

**AN EXPLORATION OF THE IMPACT OF ELECTRONIC CONVEYANCING
(ECONVEYANCING) UPON MANAGEMENT OF RISK IN CONVEYANCING
TRANSACTIONS**

GABRIEL BRENNAN

**A THESIS SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS OF
THE NOTTINGHAM TRENT UNIVERSITY FOR THE DEGREE OF DOCTOR OF
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GLOSSARY

Term	Meaning	Related jurisdiction (if any)
ARTL	Automated Registration of Title to Land	Scotland
AVMs	Automated Valuation Mechanisms	
CFR	Compulsory First Registration	
DRA	Document Registration Agreement	Ontario
EAS (now landdirect.ie)	Electronic Access Service	Ireland
EFT	Electronic Funds Transfer	
EU	European Union	European Union
EULIS	European Land Information Service	European Union
GDP	Gross Domestic Product	
HIP	Home Information Pack	England and Wales
ICT	Information and Communication Technology	
IMC	Irish Mortgage Council	Ireland
IMF	International Monetary Fund	
IT	Information Technology	
ITRIS	Integrated Title Registration Information System	Ireland
LAS	Land Administration System	
LINZ	Land Information New Zealand	New Zealand
LRC	Law Reform Commission	Ireland
LSUC	Law Society of Upper Canada	Ontario
LT Plus	Land Titles Plus	Ontario
LTAf	Land Titles Assurance Fund	Ontario
LTCQ	Land Titles Conversion Qualified	Ontario
Ministry (or Ontario Ministry)	Ministry of Government Services	Ontario
OECD	Organisation for Economic Co-operation and Development	
OSi	Ordnance Survey Ireland	Ireland
PEXA (previously)	Property Exchange Australia (previously)	Commonwealth of

NECS)	National eConveyancing System)	Australia
POLARIS	Province of Ontario Land Registration Information System	Ontario
PRA (also PRAI)	Property Registration Authority of Ireland or Property Registration Authority	Ireland
PRTB	Private Residential Tenancies Board	Ireland
QeD	Quick electronic Discharge	Ireland
UML	Unified Modelling Language	
UN	United Nations	United Nations
UNECE	United Nations Economic Commission for Europe	United Nations
UNECE WPLA	United Nations Economic Commission for Europe's Working Party on Land Administration	United Nations
WTO	World Trade Organisation	

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All opinions expressed are my own.

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ABSTRACT

This research examined the management of risk in conveyancing transactions in the context of the move from paper based to electronic conveyancing (eConveyancing). Legal, descriptive, analytical and comparative techniques were deployed in order to determine the likely impact of technological change on the distribution of legal risk with particular reference to Ontario and Ireland. The impact is the extent to which a change in transactional process may unintentionally affect risk. Risk being the consequence of change and the likelihood of that consequence having a negative effect.

The particular focus was on risks that impact on title registration and the security, protection or lack thereof that this registration offers to land owners, third parties and property claimants. The method deployed was to use a model or abstracted process to perform a transaction analysis based on abstract participants and their standpoint in the process. The methodology was based upon doctrinal legal scholarship in the comparative law tradition. Both the method and methodology demanded that a neutral vocabulary be generated and this formed the foundation for the schematic.

The risks were identified, analysed and evaluated against the backdrop of title registration and the development of eConveyancing. As eConveyancing systems have not been extensively discussed in legal literature this research is original in the Irish context and more generally. It has the potential to influence policy development as it identifies normative possibilities for reform of conveyancing in Ireland.

The model or abstracted process is also original as these are rarely used in property law. The third original feature of this research is that it fills a gap in the field. Much of the writing on eConveyancing has focused on the role of professionals in the conveyancing process and the change in their risk profile. Writers and researchers have generally failed to explore the impact on land owners and third parties or property claimants. This research fills this gap in the field.

An exploration of the impact of electronic conveyancing (eConveyancing) upon management of risk in conveyancing transactions

“In this book is told a tale of two innocents, one who owned land (he thought) and wished to sell it (he thought) and another who had money to spend (he thought) and wished to buy that land (he thought). Nothing could be simpler (they thought). Little foresaw they the dark and dangerous depths of the ‘wide and sometimes largely uncharted sea’ to which they entrusted their ship of fortune”.¹

CHAPTER ONE – INTRODUCTION

1.1 Context

Since the 1980’s the passing of title to land by way of sale and purchase or gift, commonly known as conveyancing, has been undergoing transformation on an international and unprecedented scale. This transformation is due to the application of technological advances to what was previously a paper based process. The application of technology to this process, known as electronic conveyancing, e-conveyancing or herein referred to as eConveyancing, has thrown up many important issues for land owners and others who have an interest in the conveyancing process such as consumers, professionals, academics and policy makers². These issues include the roles of stakeholders in the process, the need for process improvements, security, costs, the removal of paper, incidences of liability and the quality of title.

One of the foremost issues concerns the management of risk. Does the application of technology to such a traditional process have any effect on the management of risk? What, if any, are the actual and potential effects of this technological transformation on the management of risk in conveyancing? Is the shift in technology risk neutral? While the management of risk has always been a compelling concern in the conveyancing process, with legal practitioners fighting a continual duel in the sale and purchase of property to protect their clients’ interests,

¹ Farrand, J.T. *Contract and conveyance* (4th edn Oyez Longman London 1983) p. 3 referring to *Lee-Parker v. Izzet* [1971] 3 All ER 1099.

² Harpum, C. ‘Property in an Electronic Age’ (2000) 1 *Modern Studies in Property Law* (Hart Publishing Oxford 2001) p. 1 notes that the business of conveyancing is a significant political issue because of the time and expense involved.

how to deal with existing and new risks becomes a vital and dominant feature once you try to adapt the process to a modern electronic environment. The development of eConveyancing provides the impetus for change to the process that can have unforeseen consequences on the incidence of risk.

eConveyancing moves the conveyancing process from being a paper based system of effecting and recording transactions to a modern electronic system via the creation and empowerment of electronic communication networks. There are a broad range of different models and systems of eConveyancing.³ The development of eConveyancing has primarily taken place in common law jurisdictions and Ontario and Ireland were chosen as two common law jurisdictions that represent opposite ends of the spectrum in terms of integration of technology into the conveyancing process. Ireland's Law Reform Commission has acknowledged that the Ontario model offers the approach that best fits the Irish environment.⁴

“Ontario is recognised as the most progressive eConveyancing solution currently in operation and is widely acknowledged as a reference source for new eConveyancing solutions in other jurisdictions....The Ontario solution is the closest “end-to-end” eConveyancing solution that is currently in existence with functional models such as: property registration, solicitor communication facilities, online searches, online mapping functions and dealings with financial institutions.”⁵

Many commentators have recognised Ontario as the oldest most developed operating system of eConveyancing in the world and it was the first jurisdiction to introduce full electronic document registration.⁶

³ Harpum, C. 'English experience: title by registration – preparation for e-conveyancing' (2004) Law Reform Commission Annual Conference (2004) <http://www.lawreform.ie/Annual%20Conference%202004.PDF> accessed 18 February 2009 p. 5.

⁴ The Law Reform Commission 'eConveyancing: Modelling of the Irish Conveyancing System' (2006) The Law Reform Commission (LRC 79 – 2006) p. 8.

⁵ *ibid.*, p. 89.

⁶ Murray, K. 'Electronic registration and other modernization initiatives in Ontario's land registration system' Law Reform Commission Annual Conference (2004) <http://www.lawreform.ie/Annual%20Conference%202004.PDF> accessed 18 February 2009 p. 21. See also Low, R. 'Maintaining the Integrity of the Torrens System in a Digital Environment: A Comparative Overview of the Safeguards used within the Electronic Land Systems in Canada, New Zealand, United Kingdom and Singapore' (2005) 11(2) *APLJ* 155-178 and Christensen, S. 'Electronic Land Dealings in Canada, New Zealand and the United Kingdom: Lessons for Australia' (December 2004) 11(4) *Murdoch University Electronic Journal of Law* http://www.murdoch.edu.au/elaw/issues/v11n4/christensen114_text.html accessed 12 October 2011.

This study explores the perception that it is by far the most developed eConveyancing system by articulating the key components of eConveyancing, comparing experiences in other jurisdictions which have undergone reform in this area and by examining the extent of the Ontario system.

By contrast Ireland is only beginning to develop the initial stages of its eConveyancing project and thus has much to learn in order to take advantage of advances already made in this arena. Ireland is entering a period of reform and it is timely that research is done to inform the debate. The fact that Ireland is distinctively behind many other states⁷ is seen as an advantage as it can try to emulate the successes of other jurisdictions while avoiding the pitfalls that they have already encountered.

There has been widespread acceptance that eConveyancing is a change for the better⁸ and certainly many benefits of electronic advances in conveyancing have been articulated.⁹ However, many of these efficiencies and benefits primarily assist the professionals or state agencies involved in the conveyancing process. Writers and researchers have to a lesser degree explored the impact on land owners and third parties or property claimants. This research aims to fill this gap in the field.

1.2 Scope and Limitations

This research describes and articulates current conveyancing systems in order to project the likely impact of technological change. It investigates the potential impact of this change on the distribution of legal risk in conveyancing transactions with particular reference to Ontario and Ireland.

⁷ Killilea, M. 'eRegistration in Ireland – An Assessment of the Transferability of the Queensland Model' Dissertation Dublin Institute of Public Administration (April 2010) p. 11

⁸ Perry, R. 'E-Conveyancing – a critical view' (2003) 8(2) *C.P.L.J.* p. 26 and Coffin, M. and Pierre, K. 'Land registration: the Nova Scotia experience' Caris 2005 Mapping a Seamless Society (2005) <http://www.caris.com/conferences/caris2005/proceedings/papers/11.pdf> accessed 29 January 2009 p. 7.

⁹ Gahan, E. 'Taking full advantage of the possibilities of eGovernment' (October 2008) 51 *Public Affairs Ireland* p. 15; Wylie, J. 'Keynote address: need for a modern legislative framework' Law Reform Commission Annual Conference (2004) <http://www.lawreform.ie/Annual%20Conference%202004.PDF> accessed 29 January 2009 p. 11; Treacy, C. and O'Sullivan, J. 'Land registration in Ireland – current position and future developments' Law Reform Commission Annual Conference (2004) <http://www.lawreform.ie/Annual%20Conference%202004.PDF> accessed 10 March 2009 p. 6 and Murray, K. 'Electronic registration and other modernization initiatives in Ontario's land registration system' Law Reform Commission Annual Conference (2004) <http://www.lawreform.ie/Annual%20Conference%202004.PDF> accessed 18 February 2009 p. 20.

Risks are inherent in the conveyancing process and any change to that process will have an effect on the risk landscape. This effect, where risks are created, re-assigned or otherwise effected by the introduction of eConveyancing, is the 'impact' that is being explored. Thus the word 'impact' in this context should not be understood as referring to an empirical study. Instead this research deployed legal, descriptive, analytical and comparative techniques in order to anticipate how, and to what extent, a change in transactional process may unintentionally affect the distribution of substantive legal risk within property law systems.

In effect this research comprises a risk assessment constituting risk identification, risk analysis and then risk evaluation. The term 'risk' in this context is the consequence of change and the likelihood of that consequence having a negative effect. This risk assessment allows for risk management¹⁰ which can minimise or eliminate the consequences and thereby the negative impact.

The research was premised on the understanding that risks are inherent in the conveyancing process¹¹ and that any change in that process, here the move towards eConveyancing, will affect or impact that risk landscape.¹²

Thus this research investigates the management of risk in the conveyancing process in Ontario and Ireland in light of moves from a paper-based conveyancing system towards eConveyancing in these and other common law jurisdictions. While the primary focus was on Ontario and Ireland the experience in other common law jurisdictions, which have undergone reform in this area, was drawn upon. In particular the move towards eConveyancing in England and Wales is referred to as both the Ontario and Irish land title systems developed from that source.

¹⁰ It is interesting to note that Susskind identified the legal risk manager as one of the five main future roles for lawyers. See Susskind, R. *The end of lawyers? Rethinking the nature of legal services* (2008 Oxford Oxford University Press) p. 272.

¹¹ No activity is without risk and action involves a judgement of the balance between risk and reward. A higher degree of risk may be accepted if there is a greater probability of reward depending on the parties appetite for or aversion to risk.

¹² In consultations with stakeholders in Australia a preference was expressed for 'no change' in risk and liability exposure. The risk assessment carried out by Sneddon and his team showed that this would be unlikely given the introduction of new processes and requirements in NECS which do not exist in paper conveyancing. Instead a preference was expressed for the objective 'no material net increase' which they considered to be the closest achievable objective to 'no change'. See Sneddon, M. 'Risk Assessment and Management in Electronic Conveyancing' Registering the World Conference Dublin (26 - 28 September 2007) http://www.landregistry.ie/eng/Dublin_Conference_2007/Conference_Papers/ accessed 9 September 2010 p. 10.

Given the broad nature of the conveyancing process it was not possible to deal with all the potential risks that might lead to loss in the course of the operation of a conveyancing system (whether electronic or not). Thus, this study focused solely on risks which impacted on title registration and the security, protection or lack thereof that this registration offers to land owners, third parties and property claimants.

Other aspects of the conveyancing process were not examined. These included:

- (a) the pre contract enquiries generally carried out by transferees relating to matters such as the size, physical condition or location of the property, outgoings and services;
- (b) the legal and procedural requirements for completing the conveyancing transaction;
- (c) the requirements to be fulfilled in order to comply with planning and environmental laws;
- (d) the mapping requirements laid down by the registering authority; and
- (e) compliance with the law on taxation.

Other aspects of the conveyancing process were dealt with but only in so far as they imposed on the main focus of the research; risks impacting on title registration.

These included:

- (a) the legal and procedural requirements for drafting contracts or deeds;
- (b) the legal right or capacity of the land owner to sell or gift title to land;
- (c) searches of the title register, deeds register, judgments¹³ and other registers to establish encumbrances on the title;
- (d) post contract enquiries.¹⁴ These relate to matters such as boundaries, rights of way, identity, bankruptcy, possession, notices and proceedings relating to the property.
- (e) other enquiries to be carried out by the transferee so that he or she is on notice of all the matters that are pertinent to the transaction;¹⁵
- (f) the entitlement of a lender holding under a charge;
- (g) the types of estate that are capable of registration in the title register; and

¹³ The term execution is used in Ontario.

¹⁴ In Ireland these are known as Requisitions on Title and are published in a standard format by the Law Society of Ireland.

¹⁵ The law will generally protect the transaction from being undermined by anything that could not be discovered by a transferee for value who carried out all reasonable enquiries.

(h) the legal and procedural requirements for registration of title to land in the title register.

Other aspects of title were not examined in detail including deeds registration and the requirements for good title (save as they apply to title registration). Also the law on adverse possession is necessarily complex and is currently the subject of enquiry by the Irish Law Reform Commission and another PhD student and thus fell outside the main focus of this research.

Space and time did not allow everything to be covered. There are numerous stakeholders with an interest in the conveyancing process. However, this study focuses exclusively on the risks posed to land owners, third parties and property claimants. It excludes those with an interest in the process alone, such as legal or other professionals.

This research also focuses on single residential conveyancing transactions. This is where a typical consumer¹⁶ is purchasing a single house for occupation. Sale of part of land from a scheme was excluded, as was the perspective of a developer or someone purchasing a buy to let property. Instead the focus is on a consumer who is a one off purchaser of a home. As Viitanen points out “it is easiest to find the basic elements of transaction processes in the normal house transaction of families.”¹⁷ Among rural families in Ireland this family home is often built on land that is gifted from the farm and thus the research also addresses this scenario.

This research is not concerned with problems common to the development of information technology systems. Thus this study excludes the specific types of problem that are common to all electronic processes e.g. authorisation, identity verification, electronic signatures and passwords. These electronic processes and their associated difficulties are referred to but only in the context of shedding light on the main focus of this study.

¹⁶ The law tends to distinguish between a consumer who is purchasing property for their own use as a family home and a business person who is only interested in the property as a financial investment. The law provides more protection to consumers as they are seen as not having the same business acumen as an investor.

¹⁷ Viitanen, K. 'Purchase of Real Property in Finland' in Stuckenschmidt, H. and others (eds) *The Ontology and Modelling of Real Estate Transactions* (England, Ashgate 2003) p. 55.

Some risks may be affected by eConveyancing but are not produced by it whereas other new risks may be produced by the development of eConveyancing. Thus this research deals with a range of risks both novel and traditional.

1.3 Specific objectives

The specific objectives of this study were both descriptive ((a) – (c)) and capable of identifying normative possibilities ((d) – (e)). They were to:

- (a) identify any relevant risks impacting on title registration;
- (b) identify which party to a conveyancing transaction (e.g. transferor, transferee, donor, donee, lender, third party or property claimant) the system of conveyancing allocates that risk to;
- (c) ascertain how the party subject to a risk is, or might be, protected in a scheme of eConveyancing;
- (d) evaluate whether such protection is desirable (whether presently given or not) and feasible (where not presently given);
- (e) if such protection is not desirable or feasible, determine which party should bear the risk, the party originally subject to it or some other party (e.g. re-allocation through insurance from individuals to the operators of the system).

1.4 Research questions

Thus the research questions were also both descriptive (1 – 8) and capable of identifying normative possibilities (9 – 10). They were as follows:

1. What is conveyancing?
2. What is eConveyancing?
3. Who are the parties to a conveyancing transaction?
4. Who bears the risk in that transaction?
5. What risks impact on title registration?
6. What party is subject to that risk?
7. How is the risk impacted by the move to eConveyancing?
8. How might that party be protected in an eConveyancing system?
9. Is such protection desirable and feasible?
10. If not, what other party should bear the risk?

The answers to these questions are arranged in terms of a clear unifying purpose; risk and its incidence in paper and electronic conveyancing.

1.5 Difficulties

The following difficulties were encountered:

- (a) the lack of an accepted definition of what constitutes eConveyancing;¹⁸
- (b) inconsistent use of terminology by researchers and commentators;
- (c) continual development of the law, systems, processes and procedures in each jurisdiction.

There is a difference in terminology between jurisdictions not just in conveyancing but also eConveyancing and thus a new vocabulary needed to be generated for this research. This new neutral vocabulary has been articulated in chapter two so as to provide commonality across jurisdictions and systems. This neutral vocabulary provided a set of clear definitions for the research and minimised the difficulties caused by inconsistent use of terminology by other writers.

As this research related to current live and developing eConveyancing projects elements are constantly being withdrawn and new initiatives launched thus requiring a continual review of the literature.

1.6 Method

In order to identify any relevant risks this study uses a model or abstracted process to perform a transaction analysis. This involves the creation of abstract or model conveyancing transactions and the allocation of risk to the parties to those transactions. The use of abstract transactions with abstracted participants generalises the problematic and allows the risks to be identified and allocated. "The goal of any model is to simplify and provide an abstraction of a complex and diverse world."¹⁹ In this way "[m]odels are useful precisely because they abstract from

¹⁸ Sneddon, M. 'Risk Assessment and Management in Electronic Conveyancing' Registering the World Conference Dublin (26 - 28 September 2007)

http://www.landregistry.ie/eng/Dublin_Conference_2007/Conference_Papers/ accessed 9 September 2010 p. 2 says that eConveyancing does not have a precise meaning but encompasses a range of activities in the process of recording, searching and transferring interests in land which may be effected using electronic (or digital) communications and/or electronic (or digital) processing.

¹⁹ Astke, H. and Ors 'Profile Definition for a Standardized Cadastral Model' FIG Conference on Standardization in the Cadastral Domain (2004)

http://www.fig.net/commission7/bamberg_2004/papers/ts_02_04_asthe_mulholland.pdf accessed 26 October 2010.

irrelevant details and thereby allow us to focus on the aspects of the domain we are interested in.”²⁰

Thus modeling is not used to give a detailed description of all possible real or theoretical conveyancing transactions. Instead the concept of modeling is used to illustrate the most general transactions and the most general relations between different parties that arise during those transactions.

Šumrada explains that:

“[m]odels help us to understand, learn and shape both a problem domain and its solution domain. A model is a simplification of the selected part of reality that helps us to master a large and complex system, which cannot be comprehended easily in its entirety. The model is intended to be easier to use for certain purposes than the complete system observed. Models therefore enable (sic) us to organize, retrieve, examine and analyse data about large systems.”²¹

Visser and Schlieder point out that modelling real property transactions “is not a trivial task. We have to model static knowledge (e.g. parcels, buildings etc.). We also have to deal with processes, and we have to deal with abstract entities such as rights.”²²

The process module in this research allows the theoretical, descriptive and analytical purposes of the research to be fulfilled. This model along with other aspects of the research is presented using visuals. This use of visualisation in law is increasingly used as a means to present complex ideas simply.²³

²⁰ Visser, P. and Bench-Capon, T. ‘A Comparison of Four Ontologies for the Design of Legal Knowledge Systems’ (1998) *A.I. & L.* 6 p. 28.

²¹ Šumrada, R. ‘Conceptual Modelling of Cadastral Information System Structures’ in Stuckenschmidt, H. and others (eds) *The Ontology and Modelling of Real Estate Transactions* (England, Ashgate 2003) p. 140.

²² Visser, U. and Schlieder, C. ‘Modelling Real Estate Transactions: The Potential Role of Ontologies’ in Stuckenschmidt, H. and others (eds) *The Ontology and Modelling of Real Estate Transactions* (England, Ashgate 2003) p. 111.

²³ See Mahler, T. *Legal Risk Management* (PhD thesis University of Oslo 2010). See also Haapio, H. ‘Visualising Contracts and Legal Rules for Greater Clarity’ (2010) *J.A.L.T.*44(3) 391 – 394 and Berger-Walliser, G. and others ‘Contracts as Roadmap for Performance: Enhancing Cross-Disciplinary Understanding Through Contract Visualization’ Institute for Supply Management, Working Paper for the 21st Annual North American Research Symposium on Purchasing and Supply Chain Management 17 March 2011.

In this research the two most common conveyancing transactions are modeled; an arms length transaction and a gift. The risks are then identified, analysed and allocated to the participants. This requires an examination of which of the participants suffers if the risk leads to a loss. This impact on land owners, third parties and property claimants is explored through the creation of abstract participants in the abstracted model of the conveyancing process. The research then looks at the conveyancing process from the standpoint of each abstract participant and examines how risk is distributed between those participants.

This use of standpoint, as articulated by Holmes,²⁴ Hart²⁵ and Twining²⁶ provides a framework for identifying the tension between different claimants, all arguing for the upholding of their property rights. Thus the laws of each jurisdiction are considered from the standpoint of a transferor, transferee, donor, donee, lender, third party and property claimant in order to identify the risks peculiar to each party. This incidence of risk between the security of the transferor and donor or transferee and donee and the security of those interested in the land (lender, third party or property claimant) is examined in the context of the continual tension in a conveyancing transaction between dynamic security and static security.

This transactional based account of property law is expressed in the under-articulated but well established practice of using an abstracted conveyancing transaction to organise the law. Function is determined by transactional context so this approach meets the needs of a comparative analysis.

Examples of the practice of this transactional type of analysis in the law of real property is provided by commentators such as Hewitt and Overton,²⁷ Williams and Lightwood²⁸ and more recently Farrand.²⁹ These classic accounts of the law of unregistered title conveyancing adopted this schematic focus for the law of real property. As Williams and Lightwood explain the text is designed to discuss the incidents of a contract for the sale of land as they are usually presented to the notice

²⁴ Holmes, O.W. 'The Path of the Law' (1896-1897) 10 *Harv. L. R.* 457-478.

²⁵ Hart, H.L.A. 'Scandinavian Realism' (1959) *C.L.J.* 233 – 240.

²⁶ Twining, W. 'The Bad Man Revisited' (1972-1973) 58 *Cornell L.Rev.* 275 – 303.

²⁷ Hewitt, E.P., and Overton, M.R.C. *Dart's treatise on the law and practice relating to vendors and purchasers of real estate* (8th edn Stevens and Sons Ltd. London 1929).

²⁸ Williams, T.C., and Lightwood, J.M. *A treatise on the law of vendor and purchaser of real estate and chattels real, intended for the use of conveyancers of either branch of the profession* (4th edn Sweet and Maxwell London 1936).

²⁹ Farrand, J.T. *Contract and conveyance* (4th edn Oyez Longman London 1983).

of conveyancers i.e. in order of time.³⁰ Thus the incidents are set out as a transaction would unfold. Cooke and O'Connor³¹ provide a contemporary example in the use of this organising technique.

Once actual and potential new risks are identified and allocated this research evaluates if the person to whom the risk was allocated (either by design or not) should be protected from the effects of the risk being realised. If such protection is not feasible or desirable then consideration is given to the allocation of the risk. A number of choices are examined in determining the allocation. The risk could be;

- (a) left with the party subject to it; or
- (b) re-allocated to another party or entity; or
- (c) it could be socialised through the use of insurance either as a feature of the system or through the establishment of a market.

This examination requires a comparison and evaluation of competing risks and a determination as to who or what entity should bear the risk. Thus mechanisms for removing, minimising or distributing the risk are examined or a view taken that the risk is worth bearing given other accrued benefits.

1.7 Originality

The research is original in the following respects.

1.7.1 eConveyancing

eConveyancing systems have not been extensively discussed in legal literature. Thus this research is a ground breaking piece of legal scholarship in the Irish context and more generally. This research is the first research done in Ireland on the incidence of risk in the conveyancing process in light of moves towards eConveyancing. Thus it will offer an insight into the possible effects of eConveyancing on risk management in the Irish conveyancing system.

³⁰ Williams, T.C., and Lightwood, J.M. *A treatise on the law of vendor and purchaser of real estate and chattels real, intended for the use of conveyancers of either branch of the profession* (4th edn Sweet and Maxwell London 1936) p. (v).

³¹ Cooke, E., and O'Connor, P. 'Purchaser liability to third parties in the English land registration system: a comparative perspective' (2004) 120 *L.Q.R.* 640 – 666.

As Ireland is entering a period of reform in this area this research has the ability to influence policy at a critical point. It will inform policy development and also further academic debate as to the degree to which Ireland should make fundamental changes to its conveyancing system in the move towards eConveyancing. It identifies normative possibilities for reform of conveyancing in Ireland.

1.7.2 Organising concepts

The design of this research involves the novel use of organising concepts through the creation and articulation of a model or abstracted process to determine risks in the conveyancing process. This abstraction provides a mechanism for ignoring those aspects that were not relevant to the research in order to focus more fully on those that were. While the use of models in property law is not new they are rarely articulated.³²

The abstracted model of the conveyancing process in this research is based on modelling the participants. It involves the creation of abstract participants in dealings with title to land. This is original within the context of the doctrinal law of Ireland and in terms of methodology within the legal discipline. This modelling allowed the separation of the descriptive aspects and the identification of normative possibilities for reform by exploring how things might happen thus revealing emergent properties.

1.7.3 Gap in the field

This research fills a gap in the field as it examines the impact on land owners, third parties and property claimants. Much of the writing on eConveyancing has focused on the role of professionals in the conveyancing process. Writers and researchers have generally failed to explore the impact on land owners and third parties or property claimants.

1.8 Data and sources

This research has been mainly conducted by library-based research. Various libraries were consulted including Nottingham Trent Library, Law Society of Ireland

³² See Miceli, T. J. and others 'Title Systems and Land Values' (October 2002) 45 *J. L. & Econ.* 565 – 582 for an example.

library and Trinity College library. Materials have also been accessed through the Internet and inter-library loan facilities have been utilised for the sources that were unavailable from the above libraries.

Where necessary material has also been sought directly from other researchers and authors who have all proved immensely helpful in sharing their own work. In addition staff in the land registry in Ireland and Ontario have proved very willing to answer queries and thanks is due for all this assistance.

Numerous conferences and seminars were attended and the researcher also drew on her own experience as the Law Society of Ireland eConveyancing Project Manager. In that capacity she has spoken at numerous Law Society and other seminars on the development of eConveyancing in Ireland. She has served on the Law Reform Commission eConveyancing Steering Group and is currently a member of the Property Registration Authority's eRegistration Project Board and the Law Society's eConveyancing Steering Group.

A review of the existing research base was undertaken and included the following sources:

Legal sources

- (a) primary; statutes, case law and statutory instruments
- (b) secondary; articles, books, practitioner works, works of relevant legal theory, legal reports and papers
- (c) policy; conference papers, government policy documents, law reform reports and papers
- (d) professional; working practices, guidance notes, recommendations and legal conventions within the professions

Non-legal sources and official sources

- (a) data; registry figures on numbers of transactions, levels of registered titles, numbers and amounts of compensation claims; statistical data on lending and property ownership in each jurisdiction, tax on property and claims and insurance data
- (b) analysis of data; national and international reports on the property sector including government reports and papers

All legislation will initially be referred to by its full title but thereafter Irish legislation will be referenced according to the year of its enactment (e.g. the 1964 Act) whereas the Ontario legislation will be referenced according to its title (e.g. the Land Titles Act).

The nature of the project requires a broad international approach to be taken to the literature. The research also adopts a multidisciplinary approach in that it draws from law, economics and social science literature as well as doctrinal property law. The research examines not just black letter property law but also the policy and procedure of conveyancing practice. Thus the approach was not restricted to an examination of formal legal rules and includes relevant contributions from practitioners and theorists from legal and non legal spheres.

1.9 Summary

This study is divided into eight chapters, the first being this chapter by way of introduction. Chapter two explains in detail the methodology of the research and sets the research in context. It also provides a neutral vocabulary for the research. In chapter three eConveyancing is defined and the relationship between its constituent parts is explored. The move towards eConveyancing in Ontario and Ireland is also examined.

Chapter four sets out the model of the conveyancing transactions, identifies the abstract participants and their standpoints. It identifies the risks borne by each participant and categorises the key risks to be examined.

Chapters five to seven then examine each of the risk categories and determine the impact of eConveyancing. Does an eConveyancing environment lead to no change in the risk profile of each participant or is there increased or decreased risk? Who, if anyone, suffers if the risk leads to a loss in an eConveyancing environment?

In chapter five the risks posed by the registration gap and the formalities for registration are explored. Chapter six looks at errors in the register. Chapter seven explores interests off the register which affect title, the destructive effects of a registered transaction and interests which are not recognised and not capable of registration.

Chapter eight is the concluding chapter. It provides an overarching view on the impact of eConveyancing on risk and examines potential mechanisms for removing, minimising or distributing the risk or takes the view that the risk is worth bearing given the other benefits accrued. Finally it seeks to draw conclusions to inform the reform process in Ireland.

CHAPTER TWO – METHODOLOGY

2.1 Introduction

This chapter explains in detail the methodology of the research. In particular it provides a neutral vocabulary thus setting the framework for the creation of the abstracted model of the conveyancing process.

2.2 Methodology

The methodology is primarily based upon doctrinal legal scholarship in the comparative law tradition. This approach advocated by Zweigert and Kötz³³ attempts to use a functional analysis of legal processes to describe the substantive and systemic aspects of different legal systems. There may be little or no convergence between the systems and their terminology but many legal systems attempt to protect similar interests. Only rules which perform the same function or address the same problem can profitably be compared. Similar concepts won't have the same label and thus researchers must move past the formal label into function. Thus an examination of the function of the rules within each system must be carried out. Rules or laws with similar functions, in this instance to protect different property rights, will yield common ground for a researcher to study.

Through this comparative study of the systems in Ontario and Ireland weaknesses and strengths are highlighted and any strengths of the Ontario system can be followed and weaknesses avoided. As Ireland is in the early stages of eConveyancing a comparative study is appropriate to assist in the development of its system. Zweigert and Kötz refer to this as modern comparative law developed in the early nineteenth century which has a practical purpose, namely reform and improvement of the law at home.³⁴

Different systems are generally striving to achieve the same ends though often by diverse means. Restricting comparison to similar systems may exclude other better ideas but for such a comparison to be feasible there must be some common ground

³³ Zweigert, K., and Kötz, H. *Introduction to Comparative Law* (3rd edn Oxford, Clarendon Press 1998).

³⁴ *ibid.*, p. 54.

between the items being compared. In this research Ontario and Ireland have many key similarities which provided the rationale for a comparison of their systems.

Ontario and Ireland are western developed societies and have long established market economies. Ireland and Canada are members of the OECD³⁵ and WTO,³⁶ UN³⁷ and IMF.³⁸ Both have a tradition of democratic governance and achieved statehood through independence from the United Kingdom. They have common rather than civil law legal systems and are English speaking. The two jurisdictions have a practice of secured lending for the purchase of property with a tradition of relatively unrestricted freedom of lifetime disposition of property. Both jurisdictions have a similar division between deeds and title registration and the model of land registration for both Ireland and Ontario developed from the English system. Thus a comparison of the systems in Ontario and Ireland is feasible.

The following chart sets out a comparison of the two jurisdictions.

	Ireland	Ontario
Population	4.58 million ³⁹	13.2 million ⁴⁰
GDP ⁴¹	178	1, 327 ⁴² (Canada) ⁴³
Total housing stock (dwellings only)	2 million ⁴⁴	4.5 million ⁴⁵
Average house prices (including apartments)	€229,531 (new) €272,638 (second hand) ⁴⁶	\$366,272 (all residential activity) ⁴⁷ (€269,415) ⁴⁸

³⁵ Organisation for Economic Co-operation and Development.

³⁶ World Trade Organisation.

³⁷ United Nations.

³⁸ International Monetary Fund.

³⁹ Census as of 10 April 2011. See preliminary results accessed 28 March 2012 at <http://www.cso.ie/en/media/csoie/census/documents/Prelim%20complete.pdf>.

⁴⁰ Preliminary figure as of 1 July 2010. Statistics Canada *Canada at a glance 2011* http://www.iut.nu/Facts%20and%20figures/Canada/CanadaAtGlance_2011.pdf accessed 29 March 2012.

⁴¹ Gross Domestic Product. 2010 statistics as billions in US dollars accessed 28 March 2012 at http://www.oecd-ilibrary.org/economics/country-statistical-profiles-key-tables-from-oecd_20752288.

⁴² Estimated figure.

⁴³ Ontario represents almost 40% of Canada's GDP. See http://www.sse.gov.on.ca/medt/investinontario/en/Pages/bcei_201.aspx accessed 28 March 2012.

⁴⁴ Census as of 10 April 2011. See preliminary results accessed 28 March 2012 at <http://www.cso.ie/en/media/csoie/census/documents/Prelim%20complete.pdf>.

⁴⁵ 2006 Census at <http://www.statcan.gc.ca/tables-tableaux/sum-som/I01/cst01/famil55b-eng.htm> accessed 25 April 2012.

Total land area	70,295 (sq. km) ⁴⁹	917,741 (sq. km) ⁵⁰
Estimated percentage of total land mass registered in the registering authority with registered title	95% ⁵¹	13% (87% of the land mass is crown land ⁵² and there are only 36,000 unregistered titles) ⁵³
Estimated percentage of legal titles registered in the registering authority	90% ⁵⁴	Almost 100% ⁵⁵
Number of registered title land parcels	1.97 million folios ⁵⁶	5.8 million parcels ⁵⁷
Percentage of home	79% total ⁵⁸	67% total

⁴⁶ As of quarter 4 2010; accessed 28 March 2012 at <http://www.environ.ie/en/Publications/StatisticsandRegularPublications/HousingStatistics/FileDownload,15295.en.XLS>.

⁴⁷ End 2011. Canada Mortgage and Housing Corporation *Housing Now Ontario Region* <https://www03.cmhc-schl.gc.ca/catalog/productDetail.cfm?lang=en&cat=100&itm=1&fr=1333032587125> accessed 29 March 2012.

⁴⁸ As at 20 February 2013.

⁴⁹ Dol, K. and Haffner, M. (eds) *Housing Statistics in the European Union 2010* 2010 The Hague: Ministry of Interior and Kingdom Relations) [http://www.iut.nu/Literature/2010/HousingStatistics InTheEU 2010.pdf](http://www.iut.nu/Literature/2010/HousingStatistics%20InTheEU%202010.pdf) accessed 29 March 2012.

⁵⁰ <http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/phys01-eng.htm> accessed 25 April 2012.

⁵¹ The Property Registration Authority 'Annual Report 2010' (2011) The Property Registration Authority http://www.landregistry.ie/eng/Publications/Annual_Reports/Annual_Report_2010.pdf accessed 17 February 2012 p. 2 and

http://www.landregistry.ie/eng/About_Us/Land_Registry/Land_Registration_in_Ireland/ accessed 28 March 2012 and updated based on Interview with Greg McDermott ICT Manager Property Registration Authority 1 March 2012.

⁵² The land registration system administered by the Ministry of Government Services only administers land that has been patented by the Crown. Jurisdiction for land that has not been patented is given to the Ministry of Natural Resources and this land falls outside the land registration system. Vicki McArthur Teranet by email 15 June 2012.

⁵³ Alex Radley Legal and Technical Officer Service Ontario by email 7 June 2012.

⁵⁴ The Property Registration Authority 'Annual Report 2010' (2011) The Property Registration Authority http://www.landregistry.ie/eng/Publications/Annual_Reports/Annual_Report_2010.pdf accessed 17 February 2012 p. 2 and

http://www.landregistry.ie/eng/About_Us/Land_Registry/Land_Registration_in_Ireland/ accessed 28 March 2012 and updated based on Interview with Greg McDermott ICT Manager Property Registration Authority 1 March 2012.

⁵⁵ Alex Radley Legal and Technical Officer Service Ontario by email 7 June 2012.

⁵⁶ See The Property Registration Authority 'Annual Report 2010' (2011) The Property Registration Authority http://www.landregistry.ie/eng/Publications/Annual_Reports/Annual_Report_2010.pdf accessed 17 February 2012 p. 10 for the growth in numbers of registered parcels since 2006.

⁵⁷ Alex Radley Legal and Technical Officer Service Ontario by email 7 June 2012.

ownership		35% with mortgage 32% without mortgage ⁵⁹
Tax on property as a % of GDP ⁶⁰	1.6	3.5 (Canada)
House prices (% change over previous period) ⁶¹	-13.1	6.8
Tax revenue on property as a % of total taxation ⁶²	5.6	11.3 (Canada)
Value of new mortgage lending for residential property in 2010	€2.46 million ⁶³	\$ 10 million (new construction) (€7.4 million) ⁶⁴ \$ 89 million (existing residential property) ⁶⁵ (€65.8 million) ⁶⁶

Table 1: Comparison of Ireland and Ontario

There is however criticism of comparative law and the view of Zweigert and Kötz that functionality is the basic methodological principle of all comparative law.⁶⁷

Teubner calls this functional equivalence but he takes issue with it and argues that attempts at unifying law⁶⁸ or convergence will result in new cleavages.⁶⁹ Legal

⁵⁸ As at 2004. Dol, K. and Haffner, M. (eds) *Housing Statistics in the European Union 2010* 2010 The Hague: Ministry of Interior and Kingdom Relations) http://www.iut.nu/Literature/2010/HousingStatistics_InTheEU_2010.pdf accessed 29 March 2012.

⁵⁹ As of 2009. Statistics Canada *Canada at a glance 2011* http://www.iut.nu/Facts%20and%20figures/Canada/CanadaAtGlance_2011.pdf accessed 29 March 2012.

⁶⁰ 2010 statistics accessed 28 March 2012 at http://www.oecd-ilibrary.org/taxation/taxes-on-property_20758510-table7.

⁶¹ 2010 statistics accessed 28 March 2012 at http://www.oecd-ilibrary.org/economics/house-prices_2074384x-table17.

⁶² 2010 statistics accessed 28 March 2012 at http://www.oecd-ilibrary.org/taxation/tax-revenue-by-sector-2008_20758510-table8.

⁶³ Irish Banking Federation/PriceWaterhouseCoopers Mortgage Market Profile Quarter 4 2011 <http://www.ibf.ie/gns/publications/research/researchmortgagemarket.aspx> accessed 29 March 2012.

⁶⁴ As at 20 February 2013.

⁶⁵ <http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/manuf03b-eng.htm> accessed 25 April 2012.

⁶⁶ As at 20 February 2013.

⁶⁷ Zweigert, K., and Kötz, H. *Introduction to Comparative Law* (3rd edn Oxford, Clarendon Press 1998) p. 34.

⁶⁸ In his commentary European contract law.

⁶⁹ Teubner, G. 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' (1998) 61 *Mod. L. Rev.* p. 12 – 13.

institutions cannot really be transplanted from a foreign to a domestic culture but instead they become a legal irritant which,

“cannot be domesticated; they are not transformed from something alien into something familiar, not adapted to a new cultural context, rather they will unleash an evolutionary dynamic in which the external rule’s meaning will be reconstructed and internal context will undergo fundamental change.”⁷⁰

He is of the view that globalising tendencies produce new divergences as their unintended consequences.⁷¹

Another critical view is offered by Legrand who is strident in his opinion that legal transplants are impossible as legal rules cannot travel.⁷² He argues that law would need to be segregated from society to travel across jurisdictions and this could only occur if law was a “somewhat autonomous entity unencumbered by historical, epistemological, or cultural baggage.”⁷³

A contrary perspective is offered by Watson who says we do legal transplant or ‘borrowing’ all the time and that “[i]n most places at most times borrowing is the most fruitful source of legal change.”⁷⁴ The reality is likely somewhere in the middle of these two divergent perspectives though the failures of ‘borrowing’ probably generate more attention than the successes.

For example Meadows and Griffin are of the view that previous title registration initiatives were “perceived to have failed to address the specific requirements of Bermuda and instead sought to impose an existing system from another jurisdiction.”⁷⁵ These attempted transplantation initiatives are blamed by them for the failure to introduce title registration into Bermuda.

⁷⁰ *ibid.*, p. 12.

⁷¹ *ibid.*, p 13. See also Kahn-Freund, O. ‘On Uses and Misuses of Comparative Law’ (January 1974) 37(1) *Mod. L. Rev.* p. 1.

⁷² Legrand, P. ‘The Impossibility of ‘Legal Transplants’’ (1997) 4(2) *Maastricht J. Eur. & Comp. L.* p. 114. At p. 111 he equates transplant to displacement. Another negative view is offered by Paasch who states that internationalisation of law, including visions of legal integration and even unification of legal systems is an old dream. See Paasch, J. M. ‘Real Property Transactions’, in Zevenbergen, J. and Ors (eds) *Real Property Transactions: Procedures, Transaction Costs and Models* (Amsterdam, IOS Press 2007) p. 167.

⁷³ *ibid.*

⁷⁴ Watson, A. ‘Aspects of Reception of Law’ (1996) 44(2) *Am.J.Comp.L.* p. 335. See also Ewald, W. ‘Comparative Jurisprudence (II): The Logic of Legal Transplants’ (1995) 43(4) *Am.J.Comp.L.* 489-510.

⁷⁵ Meadows, J. and Griffin, M. ‘Introducing Land Title Registration to Bermuda: Another World?’ Registering the World Conference Dublin (26 - 28 September 2007)

These arguments have merit however they do not impact on this research as the aim is not to unify or converge the law in Ontario and Ireland. If the aim was to 'transplant' the Ontario system in its entirety into Ireland there is no doubt it would become a major 'irritant'. While the jurisdictions share a common history their legal systems are by no means the same. Instead the aim is to learn lessons from the Ontario system so as to determine how risk is to be managed in a system of eConveyancing in Ireland.

As Lepaulle has said "[t]o see things in their true light, we must see them from a certain distance, as strangers, which is impossible when we study any phenomena of our own country."⁷⁶ Sen also refers to the need to transcend the limitations of our positional perspectives.⁷⁷ He explores the search for some kind of position-independent understanding but acknowledges that we cannot hope to succeed fully in this endeavour as this is the view from nowhere.⁷⁸

While acknowledging Sen's argument this 'view from nowhere' proves unhelpful in the context of this research as it is only by looking at the conveyancing process from the perspective of Ireland's land law system that the benefit or negative effect of any change can be evaluated. As Chodosh points out decision-makers and scholars cannot be expected to understand the foreign without comparison to the familiar.⁷⁹

Similarly Legrand states that:

"unless the comparatist can learn to think of law as a culturally-situated phenomenon and accept that the law lives in a profound way within a culture-specific – and therefore contingent – discourse, comparison rapidly becomes a pointless venture."⁸⁰

The act of interpretation of legal rules is embedded unconsciously in the language and tradition of the interpreter.⁸¹ Thus law has to be looked at in context.

http://www.landregistry.ie/eng/Dublin_Conference_2007/Conference_Papers/ accessed 9 September 2010 p. 5.

⁷⁶ Lepaulle, P. 'The Function of Comparative Law with a Critique of Sociological Jurisprudence' (1921-1922) 35 *Harv. L. Rev.* p. 858.

⁷⁷ Sen, A. *The Idea of Justice* (London, Allen Lane 2009) p. 155.

⁷⁸ *ibid.*, p. 161 and 169.

⁷⁹ Chodosh, H. 'Comparing Comparisons: In Search of Methodology' (1998-1999) 84 *Iowa L. Rev.* p. 1056.

⁸⁰ Legrand, P. 'The Impossibility of 'Legal Transplants'' (1997) 4(2) *Maastricht J. Eur. & Comp. L.* p. 124.

⁸¹ *ibid.*, p. 114 - 115.

The context in this research is the conveyancing systems in Ireland and Ontario. The functional analysis is based upon the management of risk in the conveyancing process across the two jurisdictions and in particular the identification, analysis, allocation, comparison and evaluation of risks.

Despite the similarities between the two jurisdictions there are fundamental differences in concepts and terminology. In order to overcome these differences this research generated a neutral vocabulary. This clarification of terminology and meaning sets the stage for the creation of the abstracted model to be applied across the two legal systems.

The necessity for this neutral vocabulary to overcome diversity between the two jurisdictions is explored initially before the neutral vocabulary is articulated.

2.3 Neutral Vocabulary

2.3.1 Context

“It has often been said that law and language are intimately linked, as language structures the way we think and, consequently, the way we think as lawyers...It is accepted wisdom that unification or even harmonisation of the law is neither possible without the creation of uniform legal terminology, preferably laid down in a limited number of 'authentic' language versions, nor without a superior authority (frequently a court) that is responsible for reaching uniform interpretation.”⁸²

The lack of a uniform legal terminology and uniform interpretation also arises in comparative law research.

Jurisdictions have differing systems with fundamental differences in key concepts and terminology within that system. This presents difficulties for comparative law researchers who wish to compare these concepts or terms across jurisdictions. The question of the *tertium comparationis* or the comparability of the items of comparison arises i.e. is comparison possible?

⁸² Van Erp, S. 'Linguistic Diversity and a European Legal Discourse' (September 2003) 7.3 *E.J.C.L. editorial* <http://www.ejcl.org/73/editor73.html> accessed 17 July 2009.

Ferlan and his colleagues recommend deciding at an early stage what the comparison will entail and:

“using reasonably simplified methods, to identify manageable and comparable conditions in different countries so that the person making the comparison will not need to master the whole body of each country’s property law. Comparisons have to be standardised, despite the risks that this entails.”⁸³

Hence the importance of being self-aware in modelling conveyancing transactions and the importance of identifying key concepts that perform the same role across legal systems.

Fundamental differences may arise not just in relation to the systems being compared but also the labels or terminology used. In addition even when similar or the same terminology is used across jurisdictions the meaning assigned to that term may be different. Transplantation of terminology and concepts may not prove too problematic between jurisdictions in the common law family particularly where many of the key concepts have continued to develop along similar lines. However, such transplantation would likely prove more difficult between jurisdictions without these similarities though some commentators are of the view that “even in the area of property law civil and common law share more principles and underlying policies than meets the eye at first glance.”⁸⁴

Clancy acknowledges the impetus towards convergence but he is of the view that comparison of procedures between the common law and civil law systems is like comparing apples with oranges.⁸⁵ He refers to the adversarial system in common law jurisdictions where conveyancing is based on the principle of *caveat emptor* versus the civil law system where there is an independent statutory official and the vendor has a duty of disclosure. This independent statutory official known as the notary or *notaire* acts on behalf of both vendor and purchaser and is an agent of the State.

⁸³ Ferlan, M. and Ors ‘Modelling Property Transactions’, in Zevenbergen, J. and Ors (eds) *Real Property Transactions: Procedures, Transaction Costs and Models* (Amsterdam, IOS Press 2007) p. 28.

⁸⁴ Van Erp, S. ‘Different Degrees of Convergence: A Comparison of Tort Law (Example: Fairchild v. Glenhaven Funeral Services) and Property Law’ (October 2002) 6.3 *E.J.C.L.* <http://www.ejcl.org/63/abs63-4.html> accessed 17 July 2009.

⁸⁵ Clancy, D. ‘Benchmarking Land Registration’ Registering the World Conference Dublin (26 - 28 September 2007) http://www.landregistry.ie/eng/Dublin_Conference_2007/Conference_Papers/ accessed 9 September 2010 p. 11.

Many of these countries have complete eRegistration systems but will never progress to full eConveyancing as there is little, if any, part of the conveyancing process taking place outside the role of the notary. A clear example of this is Estonia where the notary performs all the necessary inquiries and prepares all the documentation which is digitally signed and sent electronically to the land registry where it is automatically registered.⁸⁶ Commentators often refer to these systems as eConveyancing systems but this research requires that a fundamental tenet of eConveyancing is the creation of a central hub between multiple stakeholders both private and public, not just between different arms or branches of the state.

Clancy also notes that business processes can be benchmarked due to a common understanding of the terminology but “[t]his is not the case with land administration, which operates at jurisdictional level and inherits terminology that is often peculiar to the particular jurisdiction being evaluated.”⁸⁷ Lemmen *et al* also point out the lack of a shared set of concepts and terminology between cadastral⁸⁸ and land registry systems.⁸⁹

This lack of a shared set of concepts and terminology is being partly addressed in Europe by the UN⁹⁰ and the publication of a glossary of terms by The European

⁸⁶ Rätsep, H. ‘Estonian Land Registration and Experiences in Electronic Conveyancing’ CINDER XVI International Congress on Registration Law Valencia Spain (20 – 22 May 2008) http://www.cinder2008.com/ingles/detalle_ponencia.cfm?id_ponencia=297 accessed 26 August 2010 p. 3 provides a simple explanation of the conveyancing procedure in Estonia.

⁸⁷ Clancy, D. ‘Benchmarking Land Registration’ Registering the World Conference Dublin (26 - 28 September 2007) http://www.landregistry.ie/eng/Dublin_Conference_2007/Conference_Papers/ accessed 9 September 2010 p. 5.

⁸⁸ Stubkjær distinguishes between the cadastre with its spatial focus and the land register with its legal focus. See Stubkjær, E. ‘Modelling Units of Real Property Rights’ in Virrantaus, K. and Tveite, H. (eds) The 9th Scandinavian Research Conference on Geographical Information Science (GIS), 4-6 June 2003, Espoo, Finland – Proceedings 227-238 <http://www.scangis.org/scangis2003/papers/> accessed 3 February 2011. The cadastre which exists in Norway and many other west-European countries, once under the command of Napoleon, generally deals with mapping, land use and land values for taxation. Land registration often sits alongside this cadastre. Together they can be defined as the land administration system (LAS).

⁸⁹ Lemmen, C. and others ‘Further Progress in the Development of the Core Cadastral Domain Model’ International Federation of Surveyors (FIG) Working Week 2005 and 8th International Conference on the Global Spatial Data Infrastructure (GSDI – 8) Cairo, Egypt (16 – 21 April 2005) http://www.fig.net/pub/cairo/ppt/ts_11/ts11_01_lemmen_et_al_ppt.pdf accessed 9 September 2010.

⁹⁰ The Food and Agriculture Organization of the United Nations ‘Multilingual Thesaurus on Land Tenure’ edited by Gérard Ciparisse (2003)

Land Information Service (EULIS).⁹¹ Paasch sees this as an important contribution in spreading knowledge of national real property domains to interested parties but points out that it does not provide a fully standardised description of the information.⁹² The UN has also published guidelines on real property units and identifiers aimed at supporting efficient and effective national land administration and management. The guidelines include a survey of the real property rights in 18 countries in Europe which prove to illustrate a great degree of diversity.⁹³

Another publication across the world wide stage is the Inventory of Land Administration Systems in Europe and North America produced by the Land Registry of England and Wales on behalf of the UN Economic Commission for Europe Working Party on Land Administration (UNECE WPLA).⁹⁴ Though this is an inventory of systems and organisations rather than a thesaurus or glossary this also demonstrates the diversity of real property rights⁹⁵ and the disparity in systems and processes.

The difficulties as they apply to property law are already acknowledged. Zevenbergen and his colleagues note that the actors and procedures involved in transactions in real property appear to differ even between countries with comparable economies.⁹⁶ Stubkjær and his colleagues, who were working on the same research project, note that different legal traditions in different European

<http://www.fao.org/DOCREP/005/X2038E/X2038E00.HTM> accessed 4 May 2010 sets out a comprehensive thesaurus of terminology.

⁹¹ <http://www.eulis.eu/>.

⁹² Paasch, J. M. 'Real Property Transactions', in Zevenbergen, J. and Ors (eds) *Real Property Transactions: Procedures, Transaction Costs and Models* (Amsterdam, IOS Press 2007) p. 168. Paasch also refers at p. 168-169 to the standardised core cadastral model developed by Van Oosterom and his colleagues which does not focus enough on the problems with establishing a common terminology in the domain. See Van Oosterom, P. and Ors. 'The core cadastral domain model' (2006) 30 *Computers, Environment and Urban Systems* 627 – 660 http://www.eurocadastre.org/pdf/the_core_cadastral_domain.pdf accessed 16 March 2012.

⁹³ Economic Commission for Europe *Guidelines on Real Property Units and Identifiers* (United Nations, Geneva 2004)

http://www.unece.org/fileadmin/DAM/env/documents/2005/wpla/Guidelines_On_Real_Property_Identifiers.pdf accessed 16 March 2012.

⁹⁴ HM Land Registry on behalf of the United Nations Economic Commission for Europe Working Party on Land Administration 'Inventory of Land Administration Systems in Europe and North America' 4th edn (2005)

<http://www.unece.org/hlm/documents/Publications/landadminsystms.inventory.ed4.pdf> accessed 4 May 2010.

⁹⁵ Paasch, J. M. 'Real Property Transactions', in Zevenbergen, J. and Ors (eds) *Real Property Transactions: Procedures, Transaction Costs and Models* (Amsterdam, IOS Press 2007) p. 168.

⁹⁶ Zevenbergen, J. and Ors (eds) *Real Property Transactions: Procedures, Transaction Costs and Models* (Amsterdam, IOS Press 2007) preface.

countries created terminological and semantic difficulties in achieving comparable descriptions.⁹⁷ Comparison across countries is difficult because the same term may be used differently and there may be no exact correspondence between concepts.⁹⁸ Thus clarification of terminology and meaning is crucial.

In order to address these problems Zweigert and Kötz state that comparative lawyers must cut themselves loose from their own doctrinal and juridical preconceptions and liberate themselves from their own cultural context in order to discover 'neutral' concepts.⁹⁹ Thus rather than transplant and adopt the meaning or term assigned by one system or the other, a new system neutral vocabulary can be generated to incorporate the terms for each jurisdiction. Neutral vocabulary can provide a degree of commonality across the jurisdictions and systems being examined. The development of this neutral vocabulary increases the prospect of finding parallel provisions or an echo of similar type provisions in each system.

Paasch is of the view that:

“[t]he establishing of a standardised terminology for the classification of the different rights and restrictions would make it possible to ‘match’ the different real property rights and restrictions existing in one national legal system with their counterparts existing in another legal system, even if they are not created by the same legal process and have a different terminology.”¹⁰⁰

This view demonstrates the importance of developing a common terminology without distorting the systems being compared.

The lack of an accepted definition of what constitutes eConveyancing, inconsistent use of terminology by researchers and commentators and the difference in terminology between jurisdictions, not just in conveyancing but also in eConveyancing, thus required that a new vocabulary be generated for this research.

O’Sullivan refers to the fact that in some jurisdictions the terms eRegistration and eConveyancing and related concepts are ill-defined and used somewhat

⁹⁷ Stubkjær, E. and Ors ‘Modelling Real Property Transactions’, in Zevenbergen, J. and Ors (eds) *Real Property Transactions: Procedures, Transaction Costs and Models* (Amsterdam, IOS Press 2007) p. 3.

⁹⁸ *ibid.*, p. 5.

⁹⁹ Zweigert, K., and Kötz, H. *Introduction to Comparative Law* (3rd edn Oxford, Clarendon Press 1998) p. 10.

¹⁰⁰ Paasch, J. M. ‘Real Property Transactions’, in Zevenbergen, J. and Ors (eds) *Real Property Transactions: Procedures, Transaction Costs and Models* (Amsterdam, IOS Press 2007) p. 177.

interchangeably.¹⁰¹ He attributes this to differences in legal systems and sometimes to the use of language. Thus in outlining the developments in Ireland he proposed the following working definitions:

“eApplications: this covers ordering documents and services online....eLodgement: relates to the lodgement of applications resulting in *changes to the register* (‘registration’)....eRegistration: lodgement of documents occurs in electronic format only (paper documents are not lodged) and all registrations are made on an electronic register....eConveyancing: the term envisages paperless transactions through most or all of the stages of the conveyancing process from pre-sale to post completion of the transaction.”¹⁰²

These definitions were presented at the Registering the World Conference¹⁰³ in Dublin in 2007 where most, if not all, of the jurisdictions involved in eRegistration and eConveyancing advances were represented.¹⁰⁴ They have remained unchallenged since that time and have become internationally accepted.¹⁰⁵ This research draws upon these definitions, amends them and expands them substantially in order to generate a neutral vocabulary.

This neutral vocabulary as set out below provides commonality and a consistent set of terms that can be applied across jurisdictions and systems. It provides an explication of knowledge and meaning in order to overcome diversity between the two jurisdictions. It attempts to provide unambiguously defined concepts for the modeling process by setting out the meaning for terms in the model. This vocabulary also limits the boundaries of the research and sets out the parties to the conveyancing transactions to be examined.

¹⁰¹ O’Sullivan, J. ‘eRegistration and eConveyancing in Ireland – the story so far...’ Registering the World Conference Dublin (26 - 28 September 2007) http://www.landregistry.ie/eng/Dublin_Conference_2007/Conference_Papers/ accessed 9 September 2010 p. 5. See also Killilea, M. ‘eRegistration in Ireland – An Assessment of the Transferability of the Queensland Model’ Dissertation Dublin Institute of Public Administration (April 2010) p. 2.

¹⁰² *ibid.*

¹⁰³ Registering the World Conference Dublin (26 - 28 September 2007) Conference papers http://www.landregistry.ie/eng/Dublin_Conference_2007/Conference_Papers/ accessed 9 September 2010.

¹⁰⁴ Fifteen jurisdictions were represented including Canada, Ireland, England and Wales, Australia and New Zealand.

¹⁰⁵ United Nations Economic and Social Council ‘Report on the Dublin Conference “Registered the World” (2007) United Nations <http://www.unece.org/fileadmin/DAM/hlm/documents/2007/ece/hbp/wp7/ece.hbp.wp.7.2007.9.e.pdf> accessed 17 July 2012 p. 4.

While the phrase neutral vocabulary is used in this research, other commentators and researches have chosen to use different terms. For example Paasch refers to standardised terminology¹⁰⁶ while O'Sullivan refers to working definitions.¹⁰⁷ Visser and Schlieder use the term ontology to mean a language of shared concepts.¹⁰⁸ They point out that while there are already ontologies available in the law domain these have been confined to legal reasoning and spatio-temporal ontologies and, in their view, the inability of these ontologies to describe processes might be one reason why they have not been used frequently in the development of models of real property transactions.¹⁰⁹ Thus Visser and Schlieder and their colleagues turned to software engineering to build their model of real estate transactions.

Visser and Bench-Capon point out that few authors have explicitly specified their conceptualisation of the legal domains in a (semi-) formal language.¹¹⁰ Having compared four legal ontologies they also come to the conclusion that none of the ontologies seem to have adequate provisions to specify legal procedures. They point out many of the difficulties with comparing legal ontologies and suggest the creation of libraries of legal ontologies, indexed on task, legal subdomain, applicability, and abstraction level.¹¹¹

Hage and Verheij present an abstract model of the law as 'a top ontology'.¹¹² Their aim is to find heuristic guidelines for legal knowledge representation by a model based on two crucial characteristics of the law. Firstly, that the law is a dynamic

¹⁰⁶ Paasch, J. M. 'Real Property Transactions', in Zevenbergen, J. and Ors (eds) *Real Property Transactions: Procedures, Transaction Costs and Models* (Amsterdam, IOS Press 2007) p. 177.

¹⁰⁷ O'Sullivan, J. 'eRegistration and eConveyancing in Ireland – the story so far...' Registering the World Conference Dublin (26 - 28 September 2007)

http://www.landregistry.ie/eng/Dublin_Conference_2007/Conference_Papers/

accessed 9 September 2010 p. 5.

¹⁰⁸ Visser, U. and Schlieder, C. 'Modelling Real Estate Transactions: The Potential Role of Ontologies' in Stuckenschmidt, H. and others (eds) *The Ontology and Modelling of Real Estate Transactions* (England, Ashgate 2003). This book is the opening book for research conducted between 2001 and 2005. The concluding book is Zevenbergen, J. and Ors (eds) *Real Property Transactions: Procedures, Transaction Costs and Models* (Amsterdam, IOS Press 2007) available at <http://repository.tudelft.nl/view/ir/uuid%3Ace45bcf6-2cc8-46a3-9305-8526df914887/>. See also <http://costg9.plan.aau.dk/> for further details of this study and ongoing commentary and research.

¹⁰⁹ *ibid.*, p. 111. For an examination of these ontologies see p. 109 – 111.

¹¹⁰ Visser, P. and Bench-Capon, T. 'A Comparison of Four Ontologies for the Design of Legal Knowledge Systems' (1998) *A.I. & L.* 6 p. 32.

¹¹¹ *ibid.*, p. 53 - 55.

¹¹² Hage, J. and Verheij, B. 'The Law as a Dynamic Interconnected System of States of Affairs: a Legal Top Ontology' (1999) *International Journal of Human-Computer Studies* 51 1043 – 1077.

system of states of affairs and secondly that these states of affairs are interconnected.¹¹³ In this way they take account of events thus reflecting the sequential nature of the legal process.

These commentators are using the term ontology to express language as a method of organising and structuring information about law and legal systems. They are of the view that the ontologies already available in the law domain are flawed in that they do not take account of law as a process or sequence of events and this is why they have not been used frequently in models of real property transactions.

There is no doubt that many aspects of law are governed by the sequential nature of legal transactions and this is particularly evident in conveyancing where one step is often predicated on a prior step in the process.

In articulating the terms forming the framework for this research the term neutral vocabulary was chosen as providing a simple yet accurate reflection of the purpose for its inclusion. A specific attempt has been made to keep the language clear and unambiguous so as to open this research to those without any detailed knowledge of the conveyancing or registration process. Though much of the vocabulary stems from a common law legal perspective and this may confuse a reader from a civil law background.

This neutral vocabulary is as follows:

2.3.2 Neutral vocabulary

eConveyancing

eConveyancing is defined in detail in chapter three.

Lawyer

Refers to a solicitor in Ireland, a solicitor or barrister in Ontario and a similar professional in other jurisdictions. These professionals have authority to practice conveyancing in Ireland and real estate practice in Ontario.

¹¹³ *ibid.*, p. 1043. Signing a sales contract is one of the legal topics modeled. See p. 1049 - 1050 and also p. 1054.

Conveyancing

The passing of an estate or title to land by way of sale to a purchaser or by gift from one land owner to another land owner. Also the practice of property law by lawyers who facilitate the purchase and sale or gift of title to land. In Ontario this is more commonly referred to as real estate practice but the term conveyancing will be used in this research. This passing of title to land occurs by means of a process or set of procedures that must be complied with in order for one land owner to dispose legally of their title to another who thereby becomes the owner of the land. Sale and purchase are used to describe a single transaction, such usage depending upon context and standpoint.

Conveyancing transaction

This includes a purchase and sale or gift, of the whole or part of the title to land, whether freehold or leasehold, and also includes the granting of a lease or the creation of a charge in favour of a lender. In general usage it may also refer to the creation of other rights or interests such as easements, restrictive covenants or trusts in land.

Land registration

The system under which titles to land are recorded. There are two basic divisions; deeds registration and title registration. Many commentators use alternative terminology to mark this division. For example Miceli refers to the title registration system as the Torrens system and the deeds registration system as the recording title system.¹¹⁴ He, along with many other commentators, marks the division on the basis of the role of government in guaranteeing land title. The Torrens system is so called after Sir Robert Torrens, an Irishman, who introduced it first in South Australia in 1858.

O'Connor notes that the term 'Torrens system' is an ambiguous one¹¹⁵ as it has been used in the general sense and also in a genealogical sense. In the general sense it is used to mean a system that registers land titles and not deeds or instruments. In the genealogical sense it refers to the family of land title systems that derive, either directly or indirectly, from the statutes enacted in Australia at the

¹¹⁴ Miceli, T.J. and others 'Title Systems and Land Values' (October 2002) 45 *J. L. & Econ.* p. 565.

¹¹⁵ O'Connor, P. 'Registration of Title in England and Australia: A Theoretical and Comparative Analysis' in Cooke, E. (ed) *Modern Studies in Property Law Volume II* (Oxford, Hart Publishing 2003) p. 82.

instigation of Sir Robert Torrens.¹¹⁶ The two key characteristics that members of this family share are that indefeasible title¹¹⁷ guaranteed by the state is obtained by registration and the system includes a system of compensation to ameliorate the risk of an error in the register erroneously depriving a person of their interest in land.¹¹⁸ However the type of indefeasible title and also the operation of the compensation system may differ.

Indefeasible title may only arise in relation to the first registration of the title thus 'cleansing' it of all prior defects. It may be conferred on each purchaser (immediate indefeasibility) or, alternatively, if there is a defect in a transaction then that purchaser's title may not be indefeasible but a subsequent purchaser's title may be (deferred indefeasibility). There are exceptions which would make the title defeasible, if the title was obtained through fraud¹¹⁹ or there was some moral wrongdoing resulting in an *in personam* action.¹²⁰

Similarly recourse to compensation may be limited in various ways. There may be criteria that have to be met. For example the party wronged may have to claim against the wrongdoer first so that the compensation fund is only a last recourse. In other jurisdictions the party may make a claim *ab initio*. Claimants may need to show that they did not cause the loss, fraud, neglect or default or the amount of compensation may be limited.

Indefeasibility and the compensation system are examined in chapter six with particular reference to Ontario and Ireland.

¹¹⁶ *ibid.*, p. 81.

¹¹⁷ Conclusive and unimpeachable. See Ruoff, T. 'An Englishman Looks at the Torrens System: Part 1: The Mirror Principle' (1952) 26 *ALJ* p. 118.

¹¹⁸ Flaws notes that state compensation may only have been introduced to entice lawyers to accept the Torrens system and he references law reform proposals in New South Wales as identifying Malaysia, Sudan, Fiji, West Germany and Austria as jurisdictions where registration systems operate without compensation. See Flaws, J. 'Compensation for Loss under the Torrens System – Extending State Compensation with Private Insurance' in Grinlinton, D. (ed) *Torrens in the Twenty-first Century* (Wellington, LexisNexis 2003) p. 400.

¹¹⁹ There is no statutory definition in Ireland. In Ontario fraudulent instrument and fraudulent person are defined in section 1 of the Land Titles Act.

¹²⁰ A registered owner should not be allowed to refuse to perform contracts he had made and anyone who entered into such a contract should be entitled to claim such relief in law or in equity as a Court may grant. This includes specific performance or enforcement of a trust and may result in the Court ordering the registered owner to part with his title.

Deeds registration (or unregistered title)

In Ireland deeds are registered in the Registry of Deeds. The deed (document) is registered but the title is not, so the title is commonly referred to as unregistered title.

“Systems of deeds registration do not abrogate the principle that a chain of title is only as strong as its weakest link.”¹²¹ Thus under the deeds registration system the title must be investigated *de novo* every time the property is transferred.

In Ontario this system is referred to as the Registry system. In both jurisdictions this is the older system. As part of the move towards eConveyancing both jurisdictions have changed their deeds registration system to make it more similar to the title registration system so that in time the deeds system can be closed or merged into the title registration system.¹²² In this research the term deeds registration or unregistered title denotes unregistered title in Ireland and deeds registered in the Registry system in Ontario.

Title registration (or registered title)

In Ireland title is registered in the Land Registry. This is commonly referred to as registered land or title. In Ontario this system is referred to as the land titles system. In both jurisdictions the title is registered and not the deed as in a deeds register.

In this research the term title registration or registered title denotes registered title in both Ireland and Ontario. Many commentators have maintained that eConveyancing can only be successful in a title registration system and this has provided the impetus for both jurisdictions to move away from deeds registration towards title registration.

Neave sets out the triad of principles that underpin title registration; the ‘mirror principle’ (the register as a mirror of the state of the title),¹²³ the ‘curtain principle’ (behind which the purchaser need not investigate)¹²⁴ and the ‘insurance principle’ (the state guarantees the accuracy of the register and compensates any person

¹²¹ Neave, M. ‘Indefeasibility of Title in the Canadian Context’ (1976) 26 *U. Toronto L.J.* p. 173

¹²² See Donahue, D.J. and ors *Real Estate Practice in Ontario* (6th edn LexisNexis Butterworths, Canada 2003) p. 1 in relation to Ontario.

¹²³ The question arises as to whether this means the state of the legal title or should it reflect the truth on the ground.

¹²⁴ The danger is that the ‘real’ ownership could be hidden behind this curtain.

suffering loss if there is an inaccuracy).¹²⁵ Together these concepts form 'the principle of indefeasibility'.¹²⁶

Registering authority

The authority which manages and controls land registration in each jurisdiction. In Ireland the Registry of Deeds and Land Registry are managed and controlled by the Property Registration Authority (PRA). The PRA operates under the auspices of the Department of Justice and Equality. In Ontario the Registry system and the Land Titles system are governed by the Ministry of Government Services (Ontario Ministry or Ministry). Both are under the control of central government.

Title register (or land register)

The record of registered titles i.e. the title register held and maintained by the registering authority. The term title register is used in this research as the term land register is close to land registration which encompasses both the title register and the deeds register. The term land register may arise in quotations and this should be read to mean the title register.

Deeds register

The record of documents dealing with unregistered titles i.e. the register of deeds held and maintained by the registering authority.

Registrar

Generally this is an official in the registering authority who can alter the title register and who has statutory powers relating to the management and operation of land registration.

In Ireland this role is known as the Registrar of Titles however since 2006 the powers are vested in the PRA. Thus the terms Land Registry, registrar and PRA in relation to Ireland will be used interchangeably.

In Ontario there are a number of roles; the Director of Titles, the Director of Land Registration and individual land registrars who cover the 54 land registry offices.¹²⁷

¹²⁵ Neave, M. 'Indefeasibility of Title in the Canadian Context' (1976) 26 *U. Toronto L.J.* p. 174. These three fundamental principles are attributed to Ruoff. See Ruoff, T. 'An Englishman Looks at the Torrens System: Part 1: The Mirror Principle' (1952) 26 *ALJ* p. 118.
¹²⁶ *ibid.*

In simple terms the Director of Land Registration authorises access to the eRegistration system; the Director of Titles determines policy and regulates any matter relating to title and, while the individual land registrars can change the register if there is an error, only the Director of Titles can determine matters relating to fraud. References to the registrar in Ontario will refer to the Director of Titles unless otherwise stated.

Registration

The process of registration of

- (a) title (an estate, right or interest in land);
- (b) the deed, transfer or electronic transfer;
- (c) encumbrance; and
- (d) the deed of encumbrance, court order or other document which gives validity to the encumbrance.

Registrant

Person who alters the title register by means of an electronically sent message or data e.g. electronic transfer to the registering authority. This person is not employed by the registering authority and is usually a lawyer. This role does not arise outside of eRegistration or eConveyancing. As the person is not employed by the registering authority they are not under the direct management of central government. Their actions and authority are controlled by the business rules and policies laid down as part of the system design which is demonstrated via format and form.

Automatic

A change in the title register is automatic if it is triggered immediately by the registrant without any intervention by staff in the registering authority. It is automatic as no 'human' input is required from the registering authority. Arruñada refers to this as agency registration.¹²⁸

Automated

A change in the title register may be automated without being automatic.¹²⁹ The process occurs via electronic channels but the registrar or staff in the registering

¹²⁷ There are three individual land registrars. Interview with Ken Crawford Sr. Legal and Technical Analyst Service Ontario 12 July 2012.

¹²⁸ Arruñada, B. 'Leaky Title Syndrome?' (April 2010) *N.Z.L.J.* p. 115-120.

¹²⁹ The United Nations Economic and Social Council 'Report on the Dublin Conference "Registered the World"' (2007) United Nations

authority need to act upon the message or data before a change in the title register can take place. Thus it is automated but not automatic. This 'human' input by the registering authority can involve processing of the data or a substantive check. eRegistration involves the automating of applications to the registering authority.

Applicant

Person, usually a lawyer, who makes an electronic application to the registrar but who cannot alter the title register. The word applicant is generally used when referring to the eApplication phase of eConveyancing where there remains lodgement of paper.

Transferor

Is the seller (or vendor) of registered title for value. For value means that the title is sold for its value in money or an equivalent. This is referred to as the consideration. In this research the term purchase monies is used. 'A' is the transferor¹³⁰ in the schematic in chapter four.

Transferee (or *bona fide* purchaser for value)

Is the buyer (or purchaser) of registered title for value. This person is also called a *bona fide* purchaser for value. 'B' is the transferee¹³¹ in the schematic.

Donor

Is the person giving a gift of registered title not for value. 'X' is the donor in the schematic in chapter four.

Donee (or volunteer)

Is the person receiving the gift of registered title not for value. This person is also called a volunteer. 'Y' is the donee in the schematic.

Lender

This is the provider of secured finance for a conveyancing transaction. The finance is secured on the basis of a legal charge on the title to land. Also known as secured

<http://www.unece.org/fileadmin/DAM/hlm/documents/2007/ece/hbp/wp7/ece.hbp.wp.7.2007.9.e.pdf> accessed 17 July 2012 p. 4 notes that the choice between automatic or automated access will often be determined by the nature of the registry guarantee or indemnity.

¹³⁰ Used as a matter of art for vendor in Ireland and hence this term is used rather than following the more general England usage of 'vendor'.

¹³¹ Used as a matter of art for purchaser in Ireland and hence this term is used rather than following the more general England usage of 'purchaser'.

lender, chargee or mortgagee. In Ireland the lender is often treated the same as the transferee. Section 3 of the Land and Conveyancing Law Reform Act 2009¹³² (hereafter the 2009 Act) provides that the definition of purchaser includes a mortgagee.¹³³ This contrasts with the position in Ontario where the lender and transferee may be treated differently.¹³⁴

The lender's role in a conveyancing transaction can be split into two specific functions. These functions can be carried out by the same provider or by two different providers. The **prior lender** will be seeking to have its charge paid in full from the purchase monies and the **acquisition lender** will be seeking to have a first legal charge registered against the title on foot of the monies advanced to the transferee for the conveyancing transaction. The prior lender is 'T' in the schematic and the acquisition lender is 'C'.

In Ireland standard practice is to have a first legal charge for 'all sums due' and any further monies advanced later by the same lender would be secured by that charge. Where additional monies are advanced by another lender there is the possibility of a second, or other subsequent charges, on the title and these would be common in commercial lending. The creation of second charges to release equity in family homes did occur to some extent during Ireland's property boom but many homes are now in negative equity and lending rules have tightened to such an extent that such lending is now rare. Thus the role of such subsequent lenders does not form part of the schematic.

Where the land owner re-mortgages after the transaction is completed the new finance provider will step into the shoes of the acquisition lender and thus is dealt with as part of 'C's role in the schematic.

Chargor (or Mortgagor)

Holder of title to land who grants a legal charge (or mortgage) to a lender. When a mortgage is created the title is transferred to the lender who covenants to transfer the title back when the loan is repaid (redeemed). When a charge is created the title is not transferred to the lender but the charge becomes an encumbrance on the title.

¹³² No. 27 of 2009.

¹³³ See scenario 2(b) at 7.3.1 for the impact of the Irish position.

¹³⁴ In Ontario lenders are not members of the prescribed class given more favourable treatment for the recovery of compensation from the registrar. See 6.5.2 and 6.6.

The terms mortgage and charge will be used interchangeably to denote a legal charge on title to land.

Subsequent purchaser

Person who subsequently purchases the property from the transferee, B, or the donee, Y. This is a *bona fide* purchaser for value and does not include a subsequent lender. The subsequent purchaser is 'D' in the schematic.

Contract

The legally binding agreement between the transferor and transferee setting out the terms and conditions of the conveyancing transaction. This will be for value; generally no contract is completed in the case of a gift.

Deed

The formal document which passes title from a transferor to a transferee or from a donor to a donee. This is handed over at completion of the transaction and it gives effect to the contract. A deed of conveyance is the document which passes unregistered freehold title and a deed of assignment is the document which passes unregistered leasehold title. For registered title the deed is called a transfer.

Transfer (or Deed of Transfer)

The document which passes registered title (freehold and leasehold) from a transferor to a transferee or from a donor to a donee. This is handed over at completion of the transaction. It gives effect to the contract.

Electronic transfer

The electronic form, message or series thereof which passes registered title from a transferor to a transferee or from a donor to a donee. This will be transmitted to the registering authority at or immediately after completion of the transaction. It gives effect to the contract.

Assurance

Generic term to include deed, transfer and electronic transfer.¹³⁵

¹³⁵ For deeds registration this term would include a conveyance and assignment.

Completion (or closing)

The legal and procedural requirements for finalising the conveyancing transaction. Moore and Globe refer to this as closing the deal¹³⁶ and in some jurisdictions it is referred to as settlement. The deed or transfer is exchanged for the purchase monies. In eConveyancing the electronic transfer is transmitted to the registering authority and there is electronic funds transfer (EFT) of the sale proceeds. Thus completion may involve payment, transfer and registration of title. Generally physical possession or the right to physical possession of the property passes at the point of completion.

It is difficult to tie down a specific point of completion. This is due to the sequential nature of the conveyancing transaction and the fact that completion may involve a number of specific steps. In a paper environment the paper documents and keys may be exchanged physically for a cheque or bank draft. This exchange will then be referred to as the closing or completion of the deal. In an electronic environment there may be no exact point of exchange and the matter is less clear.

From a transferor's perspective, completion is likely to be when the balance of the purchase monies is released to him or her. A transferee will likely say that completion occurs when they get the keys and thus possession. From a legal perspective completion occurs at an earlier point.

In Ireland the paper deed or transfer and any other closing documents, together with the keys, are exchanged for the purchase monies. This may occur in person or by post. After completion the transferee's lawyer will pay the stamp duty and then lodge the deed or transfer for registration. Thus completion occurs prior to registration.

In Ontario documents are signed electronically by the lawyers pursuant to a signed Acknowledgement and Direction¹³⁷ from the client.¹³⁸ The transaction is then closed

¹³⁶ Moore, M.E. and Globe, J.M. *Title Searching and Conveyancing in Ontario* (5th edn Canada, LexisNexis 2003) p. 339.

¹³⁷ This must be retained in the lawyer's file as written verification of the clients' instructions and authority for electronic document registration. See The Law Society of Upper Canada 'Practice Guidelines for Electronic Registration of Title Documents' 28 June 2002 http://rc.lsuc.on.ca/pdf/eReg/july08_eregguidelines.pdf accessed 9 March 2012.

¹³⁸ The Acknowledgement and Direction confirms the client's approval of the electronic document and authorises the lawyer to sign and register electronically. It also authorises the lawyer to enter into a DRA and close in escrow on behalf of the client. See Moore, M.E. and Globe, J.M. *Title Searching and Conveyancing in Ontario* (5th edn Canada, LexisNexis 2003)

and documents are registered in accordance with a Document Registration Agreement (DRA)¹³⁹ between the lawyers. A separate Acknowledgement and Direction and DRA will be required for each registration in the e-reg system i.e. a transfer, discharge of a charge or creation of a new charge. Electronic transactions are closed online in escrow.

As in traditional escrow closings the funds, keys and documents are held in trust until each lawyer has confirmed receipt and approval of their respective requirements. The transferee's lawyer will usually register the transfer and other documents according to the list set out in Schedule A of the DRA. This lists the documents being registered and also the order or priority in which they are to be registered. The sequence is usually as follows:¹⁴⁰

1. the transferor's lawyer delivers the closing documents that are not to be registered to the transferee's lawyer
2. the transferee's lawyer delivers the closing documents that are not to be registered to the transferor's lawyer together with a certified cheque for the closing proceeds
3. all these non registration documents and the purchase monies are held in escrow
4. once each lawyer is satisfied with the closing deliveries due to them, the transferor's lawyer logs on to the Teraview system and authorises the release of the registration documents
5. the transferee's lawyer then logs onto the system and completes a final search to confirm that there has been no change to the title
6. once this is confirmed the transferee's lawyer instructs the system to proceed with registration
7. the system automatically searches for executions before registration is completed
8. once registration is completed the transferee's solicitor contacts the transferor's solicitor to confirm the registration and then all documents and monies are released from the escrow.

p. 418-419 for an example of an Acknowledgement and Direction. See also <https://www.teranetexpress.ca/content/support/pdf/ADR.pdf>.

¹³⁹ This is in a recommended form published by the Joint Law Society of Upper Canada-Canadian Bar Association Committee on Electronic Registration of Title Documents. See Moore, M.E. and Globe, J.M. *Title Searching and Conveyancing in Ontario* (5th edn Canada, LexisNexis 2003) p. 421 - 422. See also <http://rc.lsuc.on.ca/pdf/eReg/dramarch04.pdf>.

¹⁴⁰ Donahue, D.J. and others *Real Estate Practice in Ontario* (6th edn Canada, LexisNexis Butterworths 2003) p. 267 - 273.

This is the sequence where the DRA provides for the release from escrow to occur following notice that registration has been completed. The DRA also allows for this release to occur at a closing time referred to in the agreement of purchase and sale.

A registration confirmation report which lists the documents and their registration numbers will be printed immediately following closing. In addition the parcel register may be printed in order to confirm registration. Fees are transferred in the Teraview account for payment of registry fees and taxes. The final closing searches are also done online.

The standard form provides for two alternative completion options, completion to occur after registration or at an earlier closing time, but Donahue and his colleagues note that despite the risks:

“current practice is to complete purchases and mortgage advances just as one would do under the [unregistered] Registry system and not await the certification of the instrument.”¹⁴¹

Thus in both Ireland and generally in Ontario closing occurs in advance of registration. Funds and non-registration documents are exchanged in advance of electronic registration in Ontario. In Ireland funds and all documents are exchanged in advance of paper registration.

The issue of completion is explored further in chapter five as the time gap between completion and registration is one of the key risks examined.

Land owner

Generic term to include transferor, transferee, donor and donee i.e. ‘A’, ‘B’, ‘X’ and ‘Y’ in the schematic in chapter four.

Encumbrance

Encumbrance is a burden or restriction on the title to land and includes charges held by a lender, rights or interests held by third parties and judgments against the title.

¹⁴¹ *ibid.*, p. 35.

Property claimant

Someone claiming or asserting a new right or interest in the land. The potential time available for claiming or asserting such a right or interest is usually limited. The successful property claimant will become a third party or encumbrancer. 'V' is the property claimant in the schematic.

Examples might include a non owning spouse who has the right to challenge a transaction that took place without their consent, someone claiming a right of pre-emption on foot of a contract or option to purchase, a claim of proprietary estoppel or part performance or someone who contributed to the purchase price and is thus claiming the existence of a trust.

The claim may be unsuccessful or may succeed but be deemed not to create a new right or interest in the land. In these instances the property claim fails.

Third party (or encumbrancer)

Someone other than the land owner or lender who wishes to protect their existing right or interest in land. This third party has a proprietary interest in the land. A successful property claimant becomes a third party or encumbrancer. For example someone holding an easement or an equitable interest. Such third party rights do not fall within the registrable estates but instead may appear as burdens upon registered titles. The third party is 'U' in the schematic.

Pre contract

The initial negotiation and enquiries carried out in a conveyancing transaction prior to execution of the contract.¹⁴² For example there may be some negotiation about the exact purchase monies and completion date. The enquiries may relate to the size and physical condition or location of the property, planning, occupation, outgoings and services.¹⁴³

Post contract

The stage of the conveyancing transaction after execution of the contract and before completion. During this stage the transferor and transferee are legally bound to

¹⁴² In Ireland the contract is referred to as the contract or conditions of sale. In Ontario it is called an agreement of purchase and sale.

¹⁴³ See Brennan, G. and Casey, N. (eds) *Conveyancing* (5th edn Oxford, Oxford University Press 2010) p. 22 – 35 for examples relevant to Ireland.

complete the transaction and cannot back out save as provided for by the terms of the contract.

The exact point at which the contract becomes binding will differ according to the jurisdiction and the terms of the contract. It may be when the contract is signed by both parties (executed) or when it is signed and delivered (or exchanged) or it may not be binding until a deposit is paid.

Alternatively the contract may be executed subject to some conditions and will only become binding when these conditions are met. In both Ontario and Ireland the contract will usually be subject to such conditions. This contract is in a standard form. In Ireland it is a precedent document issued by the Law Society.¹⁴⁴ In Ontario it is usually in a printed form prepared by a legal stationer or by the local real estate board.¹⁴⁵

Post completion

The legal and procedural formalities to be done after completion. These will often include payment and discharge of the prior charge and registration of the transferee's title and the new charge. It will also include practical matters such as the transferee taking occupation of the property and notifying service providers of the new ownership.

Title to land

"Both 'who can be an owner' and 'what can be owned' are defined by law....Ownership can only exist if it is acknowledged and properly enforced within a society."¹⁴⁶ In legal terms what is owned is not the land or property, the physical entity, but an estate or interest in that entity which denotes the nature and extent of land ownership. The student of property law expects to study physical objects but instead encounters abstractions.¹⁴⁷ Often this is referred to as having title to land.

¹⁴⁴ *ibid.*, Appendix 6.1 and see p. 122 – 127 for examples of conditions that may be included.

¹⁴⁵ Donahue, D.J. and others *Real Estate Practice in Ontario* (6th edn Canada, LexisNexis Butterworths 2003) p. 206 and see Appendix 6 and 7 for examples of Agreements of Purchase and Sale. See also p. 221 – 227 for examples of conditions that may be included.

¹⁴⁶ Ottens, M. and Stubkjær, E. 'A Socio-Technical Analysis of Cadastral Systems' in Zevenbergen, J. and Ors (eds) *Real Property Transactions: Procedures, Transaction Costs and Models* (Amsterdam, IOS Press 2007) p. 151.

¹⁴⁷ Lawson, F.H. and Rudden, B. *The law of property* (2nd edn Clarendon Press Oxford 1982) p. 15.

Title to land can be divided into two fundamental groups; estates and interests. Interests are more minor and fall short of estates which confer major rights in respect of the land. In simple terms an estate gives the right to possession or occupation to the exclusion of others while an interests confers a limited right to land owned by another.

“The notion of dividing ownership according to different periods of time is what makes land ownership under a common law system flexible. It enshrines the fundamental principle that what is owned is not the physical entity, the land, but rather some estate (giving substantial rights in respect of the land such as the right to occupy it) or interest (giving less substantial rights such as the limited use given by an easement comprising, for example, a right of way over a road on the land, or a *profit à prendre* comprising a right to cut and take away turf) in the land....How many of the various estates and interests will exist in respect of a particular parcel of land will vary from case to case.”¹⁴⁸

Different people may own different estates and interests at the same time or in succession in respect of the same land. Engle notes that the “concept of absolute exclusivity and precisely defined right is completely alien to contemporary legal thought, which sees [property] rights as relative, divisible, and somewhat amorphous.”¹⁴⁹

For Calabresi and Melamed the law decides entitlement, so as to determine who will prevail among two conflicting parties, and having made that initial choice must then enforce it through state intervention.¹⁵⁰ In relation to conflicting property rights this will be reflected in how a property registration system operates.

Not every estate or interest can avail of the protection offered by registration in the registering authority. Those capable of registration in the title register are seen as being more advantageous than those capable of registration in the deeds register as the title register is backed by a state guarantee.

Property law seeks to classify property rather than to define it. The classifications govern the way property interests are protected in law by registration and the way

¹⁴⁸ Explanatory memorandum Land and Conveyancing Law Reform Act 2009 p. 3.

¹⁴⁹ Engle, E. ‘Taking the Right Seriously: Hohfeldian Semiotics and Rights Discourse’ (2010) 3(1) *The Crit* 84 – 107 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1424691 and <http://thecritui.com/2010/01/volume-3-issue-1-winter-edition-2010/> accessed 21 October 2011.

¹⁵⁰ Calabresi, G. and Melamed, A.D. ‘Property Rules, Liability Rules, and Inalienability: One View of the Cathedral’ (1972) 85(6) *Harv. L. R.* p. 1090.

they are transmitted which is procedural. Lawson and Rudden note that property law defines types of user as 'property' which will be protected against third parties and is alienable and is divided into those which bind regardless of notice (overriding interests) and those that depend on notice (registration).¹⁵¹

The four dimensions that determine how property is classified are length, height, breadth and time. In seeking ways to make sense of this classification commentators have used varying methods of explaining the nature of ownership. Lawson and Rudden provide some examples based on the principle of the fragmentation of ownership.¹⁵²

These principles and the concept of estates and interests flowing from them recognise the flexible division of ownership including the division between legal and equitable ownership. In addition the inchoate nature of the common law equitable system often allows for the growth of categories of estates and interests which are not limited and may be expanded to meet the needs and demands of the market place.

This is in stark contrast to the *numerus clausus* doctrine which applies in civil law countries.

“The numerus clausus – principle states that nature and content of the German real rights are regulated by law....in legal dealings rights have to be selected from a self-contained pool of real rights. This might appear to you...as being restrictive....However, it is a fact that German 19th century lawmakers were ruled by a desire for legal certainty, clarity, and uniformity.”¹⁵³

As Lawson and Rudden point out:

“[i]f property law had been codified after the Continental fashion, the codifiers would have introduced more order into it, and in particular would have asked

¹⁵¹ Lawson, F.H. and Rudden, B. *The law of property* (2nd edn Clarendon Press Oxford 1982) p. 218.

¹⁵² *ibid.*

¹⁵³ Wilsch, H. 'Legality Checks in the Attributing of Real Rights' CINDER XVI International Congress on Registration Law Valencia Spain (20 – 22 May 2008) http://www.cinder2008.com/ingles/detalle_ponencia.cfm?id_ponencia=303 accessed 26 August 2010 p. 6 in referring to the application of the principle.

whether certain generalizations accepted for one kind of property were acceptable for others.”¹⁵⁴

Instead they note a lack of co-ordination in English property law and the different ways of dealing with property in that it may be enjoyed as a physical object or as an investment “of which the money value alone is relevant....[This distinction] may be expressed summarily as one between objects and wealth, or between use-value and exchange-value.”¹⁵⁵ The different values which can be imposed on property ownership is a recurring theme in this research.

The push towards eConveyancing has given impetus to the drive for similar legal certainty, clarity and uniformity in common law jurisdictions and there is a possibility that a move towards *numerus clausus* will become the norm. It is more difficult to build an electronic system that is flexible enough to accommodate estates and interests that may not be determined for some years to come. This aspect of eConveyancing is explored in chapter seven.

Estates

In both Ontario and Ireland ownership of land is defined according to common law principles which are less absolute and more flexible than the civil law system in continental Europe referred to earlier.

“Land is ‘held’ (not ‘owned’ in the civil law sense) and the tenant is entitled to an ‘estate’. Various types of estates can be distinguished, but an essential characteristic of each estate is time. The two major types are the freehold (unlimited duration) and the leasehold (limited duration).”¹⁵⁶

Many jurisdictions, including Ontario and Ireland, limit the number of legal estates to these two. The first being a freehold (also known as the fee simple) and the second being a leasehold which is a limited estate in that it only exists for a term of years. It may be said that each estate is conferred with powers, rights, privileges and liberties.¹⁵⁷ Each estate confers rights together with obligations on the land owner

¹⁵⁴ Lawson, F.H. and Rudden, B. *The law of property* (2nd edn Clarendon Press Oxford 1982) p. 224.

¹⁵⁵ *ibid.*, p. 226.

¹⁵⁶ Van Erp, S. ‘A Numerus Quasi-Clausus of Property Rights as a Constitutive Element of a Future European Property Law?’ (June 2003) 7.2 *E.J.C.L.* <http://www.ejcl.org/72/art72-2.doc> accessed 16th April 2010.

¹⁵⁷ On the nature of rights see Hohfeld, W.N. ‘Some Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (November 1913) 23(1) *Yale L. J.* 16-59 and for a commentary see Engle, E. ‘Taking the Right Seriously: Hohfeldian Semiotics and Rights Discourse’ (2010) 3(1) *The Crit* 84 – 107 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1424691 and

and property law often attempts to balance these in the one estate and also between different land owners.

Interests (or rights in land)

These interests or rights with reference to Ireland and Ontario include:

- easements
- rights of non owning spouses, civil partners or cohabitees during the life of the land owner
- judgment mortgagor
- the proprietary interests of anyone in actual occupation
- someone holding under adverse possession
- trespassers
- lender holding under a charge
- spouses, civil partners, cohabitees or children on the death of the land owner
- those holding under a trust or settlement
- those holding the benefit of a restrictive covenant
- rights of enlargement
- remedial rights
- right of state or Crown in relation to non payment of taxes¹⁵⁸
- someone holding a construction lien¹⁵⁹
- any title or lien acquired by an adjoining owner due to improvements¹⁶⁰
- any right of expropriation, access or user, or any other right, conferred upon or reserved or vested in the state or Crown¹⁶¹
- right to payment of any periodic sum of money (except rent under a lease or tenancy)
- public rights
- any other rights or equitable interests not already listed above

<http://thecritui.com/2010/01/volume-3-issue-1-winter-edition-2010/> accessed 21 October 2011.

¹⁵⁸ Including any rights accruing to the local authorities in Ireland or the municipal authorities in Ontario.

¹⁵⁹ There is no comparable right in Irish law.

¹⁶⁰ *ibid.*

¹⁶¹ Including any rights accruing to the local authorities in Ireland or the municipal authorities in Ontario or any other public or statutory bodies in both jurisdictions. This includes the right of escheat or forfeiture to the Crown which is still a feature of the Ontario system. In Ireland the notion of escheat was abolished by section 11(3) of the Succession Act 1965.

Such rights may be legal or equitable and some are capable of being registered as an encumbrance on the title register. Some may also have status as overriding interests. This list excludes personal rights that cannot be enforced against title to land. Those holding under a lease or tenancy¹⁶² hold an estate and thus are not listed here.

In some instances it would be more accurate to use the term 'interest' rather than 'right' but this is confusing as most commentators use the words rights and interests interchangeably and may even use these terms when they actually mean estates. Also estates that are capable of being registered in the title register are commonly called registered or registrable interests.

Overriding interests

Overriding interests are those that affect title without registration in the title register.

The Ontario government guarantees the registered title vested in a land owner subject to the liabilities, rights and interests in section 44(1) of the Land Titles Act R.S.O. 1990¹⁶³ (hereafter the Land Titles Act) and these are deemed not to be encumbrances within the meaning of the Act. Section 44(1) contains a list of 13 liabilities, rights and interests to which registered land remains subject. Donahue *et al* note that it is a formidable list.¹⁶⁴

Similarly the Irish Land Registry guarantees registered title subject to some exceptions. Section 72(1) as amended¹⁶⁵ of the Registration of Title Act, 1964¹⁶⁶ (hereafter the 1964 Act) sets out the class that affects without registration though notice of any section 72 burden may be entered on the register under section 72(3).¹⁶⁷

The 19 overriding interests in Ireland are listed below and where there is commonality with the 13 in Ontario this is indicated in brackets and italics.

¹⁶² Tenancy usually refers to a short term lease of a residential property. It may be oral or in writing. Lease generally refers to a longer term interest that is set out in writing and it may be of residential or commercial property.

¹⁶³ Land Titles Act R.S.O. 1990, CHAPTER L. 5.

¹⁶⁴ Donahue, D.J. and others *Real Estate Practice in Ontario* (6th edn Canada, LexisNexis Butterworths 2003) p. 27.

¹⁶⁵ The 1964 Act has been amended on numerous occasions, most recently by the National Asset Management Agency Act 2009.

¹⁶⁶ No 16 of 1964.

¹⁶⁷ This is subject to the consent of the registered owner or an order of the Court.

1. duties and taxes (*provincial taxes and succession duties*)
2. charges re land improvement and drainage
3. annuities or rentcharges under the Land Purchase Acts
4. rights of the Land Commission or of any person under an order made or published under the Land Purchase Acts
5. rights of the Land Commission under an order for possession
6. public rights (*any public highway*)
7. customary rights arising from tenure
8. easement and profits a prendre unless created by express grant or reservation after the first registration of the land (*any right of way, watercourse, and right of water, and other easements*)
9. wayleaves
10. tenancies created for any term not exceeding 21 years or for any less estate or interest, in cases where there is an occupation under such tenancies (*short term leases with an unexpired term for less than three years where there is actual occupation*)¹⁶⁸
11. the rights of every person in actual occupation of the land or in receipt of the rents and profits thereof, save where, upon enquiry made of such person the rights are not disclosed (*possessory rights in the matrimonial home of the spouse of the registered owner under Part II of the Family Law Act*¹⁶⁹)¹⁷⁰
12. in the case of land registered with a possessory, qualified or good leasehold title, all rights excepted from the effect of registration
13. a perpetual yearly superior rent
14. covenants and conditions created in an instrument creating the superior rent
15. purchase annuity for a cottage under the Labourers Act 1936
16. restrictions on the mortgaging or charging of such cottages

¹⁶⁸ Leases for longer terms must be registered.

¹⁶⁹ Family Law Act R.S.O. 1990 c. F. 3.

¹⁷⁰ In Ontario this is confined to spouses. In Ireland it is extended to all persons which will also include spouses. The case of *Guckian v. Brennan* [1981] I.R. 478 held that the power of a spouse to refuse consent to a transfer of the family home is not a section 72 burden though such a spouse may have an overriding interest if in occupation. In the absence of evidence that the assignment had been invalidated, Gannon J. held that the plaintiffs could rely on their registration as full owners with an absolute title and on the conclusiveness of the register. See also *Murray v. Diamond* [1982] I.L.R.M. 113 which affirmed that the right of a spouse to veto a transaction in relation to the family home is not an overriding interest as section 72 relates to property rights only. The spouse must hold an estate or interest in the land. In England and Wales the matrimonial home rights of a spouse cannot be an overriding interest. See section 31(10)(b) of the Family Law Act 1996.

17. rights acquired or in the course of being acquired under the Statute of Limitations 1957 i.e. adverse possession (*any title or lien that, by possession or improvements, the owner or person interested in any adjoining land has acquired to or in respect of the land*)¹⁷¹
18. burdens to which section 59 (prohibition or restriction on alienation, assignment, subdivision or sub-letting) or 73 (mines, minerals and mining rights) applies
19. covenants which continue in force after enlargement

Those arising in Ontario with no comparable interest in Ireland are:

- a. a construction lien (in Ireland a creditor would obtain a judgment mortgage)
- b. any right of expropriation, access or user, or any other right, conferred upon or reserved or vested in the Crown (though this does have a degree of commonality with 2-5, 15 and 16 above)
- c. any liabilities, rights and interests created under section 38 of the Public Transportation and Highway Improvement Act
- d. Any by-law passed under section 34 of the Planning Act
- e. planning act violations under sections 50 and 50.1 of the Planning Act¹⁷²
- f. where the registered owner is or was previously a railway company
- g. any right of the wife of the person registered as owner to dower in case of surviving the owner

The impact of these overriding interests on risk is dealt with in chapter seven.

Registrable interests (or registered title)

Not every estate or interest is capable of being registered in the title register. Generally estates are capable of substantive registration but in the case of a lease this may depend on the length. Other rights may also be capable of registration but only as burdens on the registered title e.g. a charge. These rights need to be registered to gain priority.

There are a number of different quality or classes of title. In Ontario section 32(2) of the Land Titles Act provides that land may be registered with an absolute,

¹⁷¹ Note that in Ontario this is limited to adjoining land.

¹⁷² Donahue, D.J. and others *Real Estate Practice in Ontario* (6th edn Canada, LexisNexis Butterworths 2003) p. 28 note that this exception creates a serious flaw in the registered title system.

possessory, qualified or leasehold title. In Ireland the classes are absolute, possessory, qualified and good leasehold title.¹⁷³

In Ontario two new types of title were created in order to administratively convert titles from the unregistered system into the registered system. During this conversion titles were automatically entered into the title register as part of the implementation of eRegistration. No application was required by the owner. Teranet converted these titles into qualified titles called Land Titles Conversion Qualified (LTCQ) and such titles can be upgraded to Land Titles Plus (LT Plus). An LT Plus title “is the best of all titles.”¹⁷⁴ If these types of registered title in Ontario were graded against an absolute title according to the benefits they offered the land owner they would be listed in the following order:

1. LT Plus
2. LTCQ
3. Absolute title

This is in contrast with most other title registration systems, including Ireland’s, where the absolute title remains the highest quality title on offer. Lyall says that absolute title “suggests a title absolutely guaranteed against interests not appearing on the register, but this is far from the case and the description is in fact quite misleading. A better description would be “least qualified title”.¹⁷⁵

Purchase monies

The amount paid by the transferee to the transferor to purchase the title to land.

2.4 Conclusion

This chapter explored the methodology of the research and defined the neutral vocabulary to be used in the creation of the abstracted model of the conveyancing process. Before developing that model the next chapter explores eConveyancing in detail.

¹⁷³ See sections 33 and 40 of the 1964 Act as substituted by sections 56 and 57 of the 2006 Act.

¹⁷⁴ Moore, M.E. and Globe, J.M. *Title Searching and Conveyancing in Ontario* (5th edn Canada, LexisNexis 2003) p. 18 and 219.

¹⁷⁵ Lyall, A. *Land Law in Ireland* (3rd edn Round Hall England 2010) p. 938.

CHAPTER 3 – DEFINING ECONVEYANCING

3.1 What is conveyancing?

In order to understand eConveyancing it is first necessary to ask; what is conveyancing? To the layman it is the purchase or sale of property. For example number 15 Royal Road, Ontario. The vendor owns the property and wishes to sell and the purchaser wishes to buy the property.

As set out in chapter two, in legal terms what is owned is not the property but an estate or an interest in land. Sometimes this is also referred to as title. Thus, to the lawyer, conveyancing is the process whereby title is passed from one party to another. In our neutral vocabulary the transferor sells title to the transferee and the donor gifts title to the donee.

There is no universal conveyancing process. Many jurisdictions do have similar steps in their conveyancing process though these may not occur in the same order. Ontario and Ireland, as two common law jurisdictions whose foundations go back to a common source, the English legal system, have a large degree of commonality in their conveyancing processes. While the name of the key documentation may differ the function is often the same. Steps in the process may sometimes be carried out by different parties or in a different sequence but the main tasks in the process are the same.

These include:

- (a) obtaining initial mortgage approval from the lender¹⁷⁶
- (b) making an offer to purchase¹⁷⁷
- (c) doing a home inspection¹⁷⁸
- (d) searches of public registers¹⁷⁹

¹⁷⁶ In Ireland this is known as a loan offer while in Ontario it is referred to as pre-approval.

¹⁷⁷ In both jurisdictions this will usually be subject to conditions.

¹⁷⁸ In Ireland this is usually done prior to the formal agreement but in Ontario the formal agreement is usually signed subject to a satisfactory home inspection by a professional home inspector.

¹⁷⁹ Examples include searching of records held by the registering authority, planning and environmental bodies and court records. Additional queries may also be raised with the transferor about private information which is not available in a public register. An example would be information about any tax liability which might impact on the sale. See Appendix 6 of Moore, M.E. and Globe, J.M. *Title Searching and Conveyancing in Ontario* (5th edn

- (e) negotiation of main terms and conditions such as purchase monies and conditions of the sale
- (f) agreeing key terms and conditions
- (g) acceptance of the main terms and conditions¹⁸⁰
- (h) final approval of mortgage¹⁸¹
- (i) completion of mortgage documentation
- (j) formalities for completion including signing of the assurance
- (k) release of loan funds
- (l) purchase monies being held on trust
- (m) statement of disbursements to be delivered¹⁸²
- (n) key and possession handed over
- (o) assurance and charge delivered to registering authority
- (p) legal formalities completed including registration of the assurance

The usual steps in an Irish conveyancing transaction as set out in Brennan and Casey¹⁸³ can be compared with the steps in the Ontario system as set out by Donahue.¹⁸⁴

3.2 What is eConveyancing?

Libbis explains the move towards eConveyancing as follows:

“From the early 1980s jurisdictions have been converting their manual title records to electronic systems. Late in the 1980s some jurisdictions introduced remote electronic searches of their electronic title records. From the early 1990s there were proposals for a fully electronic process to prepare and lodge instruments affecting title records. Through the 1990s,

Canada, LexisNexis 2003) for examples of searches to be done in Ontario. See also Donahue, D.J. and others *Real Estate Practice in Ontario* (6th edn Canada, LexisNexis Butterworths 2003) p. 312-315 for an explanation of how to do electronic searching in the Teraview system.

¹⁸⁰ In Ireland this is by way of a Contract for Sale. In Ontario it is by way of an Offer to Purchase. Both are standard documents which contain the key terms and conditions of the transaction such as payment of deposit, amount of purchase monies, particulars of the property, date of completion and details of any issues that need to be addressed as part of the transaction.

¹⁸¹ This generally occurs before execution of the contract. It involves formal confirmation based on the specific transaction in question.

¹⁸² In Ireland this is called an Apportionment Account. In Ontario it is a Statement of Adjustments.

¹⁸³ Brennan, G. and Casey, N. (eds) *Conveyancing* (5th edn Oxford, Oxford University Press 2010) chapter 2.

¹⁸⁴ Donahue, D.J. and others *Real Estate Practice in Ontario* (6th edn Canada, LexisNexis Butterworths 2003) chapter 12.

deregulation of financial markets and increasing competition in the mortgage industry together with development of the internet, electronic payment systems and electronic commerce generally led to interest in a more convenient and efficient way of completing property conveyances. With the new century, it was only a matter of when electronic conveyancing would be come (sic) a reality and how it would be achieved.”¹⁸⁵

There is a broad spectrum of electronic conveyancing systems. Harpum refers to the different models of eConveyancing¹⁸⁶ and there is no doubt that there are many variations on the same theme in existence. Sneddon also ‘scopes’ this spectrum.¹⁸⁷ Some jurisdictions claim to have eConveyancing but only have an electronic registration system or an electronic lodgement system. Thus some jurisdictions have introduced a form of electronic application or electronic registration and not eConveyancing. One example is the Automated Registration of Title to Land (ARTL) system in Scotland.

eConveyancing moves the conveyancing process from being a paper-based process to an electronic process via the creation of electronic communications networks. This includes not just the system of recording transactions in the registering authority but also all the other steps in the conveyancing process. The Law Society of Ireland has described it as a secure, paperless, electronic, end to end, pre-sale to post-completion, conveyancing process.¹⁸⁸

¹⁸⁵ Libbis, S. ‘E-Conveyancing Sans Frontieres; The Development of an Electronic Conveyancing System for Australia’ Registering the World Conference Dublin (26 - 28 September 2007) http://www.landregistry.ie/eng/Dublin_Conference_2007/Conference_Papers/ accessed 9 September 2010 p. 3. Libbis doesn’t specifically identify what will be more convenient and efficient about eConveyancing.

¹⁸⁶ Harpum, C. ‘English experience: title by registration – preparation for e-conveyancing’ (2004) Law Reform Commission Annual Conference (2004) <http://www.lawreform.ie/Annual%20Conference%202004.PDF> accessed 18 February 2009 p. 5.

¹⁸⁷ Sneddon, M. ‘Risk Assessment and Management in Electronic Conveyancing’ Registering the World Conference Dublin (26 - 28 September 2007) http://www.landregistry.ie/eng/Dublin_Conference_2007/Conference_Papers/ accessed 9 September 2010 p. 2 – 3.

¹⁸⁸ Law Society of Ireland ‘eConveyancing: Back to Basic Principles. Vision of an Electronic System of Conveyancing (‘eVision’)’ (March 2008) p. 1. This is similar to the broad scope of the eConveyancing project in England and Wales. Harpum offers a brief practical guide showing how domestic conveyancing might work in this context while Butt provides additional detail for a typical transaction in that jurisdiction. See Harpum, C. ‘Property in an Electronic Age’ (2000) 1 *Modern Studies in Property Law* (Hart Publishing Oxford 2001) p. 5 – 7 and Butt, P. *Electronic Conveyancing: A Practical Guide* (2006 Thomson Sweet & Maxwell London) p. 7 – 22.

As Sneddon has demonstrated eConveyancing does not have a precise meaning but encompasses a range of activities in the process of recording, searching and transferring interests in land which may be effected using electronic (or digital) communications and/or electronic (or digital) processing.¹⁸⁹ For the purposes of this research the term means the integration of technology into most or all of the conveyancing process from pre-sale to post completion of the transaction.¹⁹⁰ This includes the contract stage, electronic transfer, completion and title registration. The term eConveyancing is used in this research though other terms may be used in quotations from commentators and other researchers.

Thus eConveyancing can be broadly defined as the placing of all conveyancing systems and processes on a secure electronic platform usually available through an online portal or hub. This platform, portal or hub is the creation of an electronic communication network which facilitates system to system exchange of data. In essence it allows one computer to “speak” to another. Information only has to be typed in once for each user to have access to it. The security of the platform is important due to the sensitive and confidential nature of the information being transmitted and different groups of users may have different levels of access. The England and Wales Law Society has recognised that there are consequences to the development of electronic initiatives. These include “the dangers of electronic attack and threats to the confidentiality, integrity and availability of electronic services and personal data...electronic privacy, online security and access to online services.”¹⁹¹

Many jurisdictions began the move towards eConveyancing without even realising it when paper registers were computerised and converted to electronic format. Making that information available electronically to users was the next inevitable step. Sometimes this involved scanning material into an electronic database¹⁹² and in other jurisdictions they converted the information into data sets that could be manipulated electronically. An electronically scanned version of a document can be

¹⁸⁹ Sneddon, M. ‘Risk Assessment and Management in Electronic Conveyancing’ Registering the World Conference Dublin (26 - 28 September 2007) http://www.landregistry.ie/eng/Dublin_Conference_2007/Conference_Papers/ accessed 9 September 2010 p. 2.

¹⁹⁰ O’Sullivan, J. ‘eRegistration and eConveyancing in Ireland – the story so far...’ Registering the World Conference Dublin (26 - 28 September 2007) http://www.landregistry.ie/eng/Dublin_Conference_2007/Conference_Papers/ accessed 9 September 2010 p. 5.

¹⁹¹ The Law Society ‘An e-strategy for the Law Society’ (2005) The Law Society p. 16.

¹⁹² This model is used in Queensland. See Killilea, M. ‘eRegistration in Ireland – An Assessment of the Transferability of the Queensland Model’ Dissertation Dublin Institute of Public Administration 17 April 2010.

accessed and viewed but it cannot be digitally manipulated and thus this is not truly eRegistration or eConveyancing.¹⁹³ A full eConveyancing system requires documents to be capable of being created, manipulated, transmitted and signed electronically.

Thus there are a number of change processes required before eConveyancing is feasible. The first is the conversion of all data into an electronic format to be held in central databases. This includes not just all information on the register but all contractual forms. The second process is the linking of the stakeholders via an online portal or hub. This second process requires co-ordination by multiple stakeholders in order to link the individual databases or systems into an electronic communication network.

Within the overall eConveyancing theme there are different levels of sophistication. These range from making title registration information available online to facilitating differing levels of interaction between stakeholders to a full conveyancing transaction done electronically. The increasing integration of information technology into the conveyancing process, leading towards eConveyancing, generally follows this sequence:

1. Conversion of paper records held by the registering authority to an electronic format. These paper records are converted to electronic data sets that are capable of being manipulated.
2. Electronic access to data held by the registering authority.
3. Electronic access to data held by the registering authority and authorised users permitted to lodge electronic applications. Initially these will be followed by the paper documents.
4. Electronic access to data held by the registering authority and authorised users permitted to lodge electronic applications with no requirement to lodge the paper documents.
5. Electronic access to data held by the registering authority, authorised users permitted to make electronic applications and manipulation of the data sets by authorised users leading to a change in the register. The information provided electronically by the authorised user will automatically fill in i.e. pre populate the register. In this sense the process is automated. This manipulation may or may not require sign off by staff in the registering

¹⁹³ See *ibid.*, for an alternate view. Killilea has no difficulty labelling the Queensland method of scanning paper documents as an eRegistration system.

authority. If it does not require confirmation by staff in the registering authority the changes are automatic.

6. Other stakeholders in the conveyancing process begin multiple electronic interaction through the online portal or hub.
7. The entire end to end conveyancing process is completed electronically. This includes not just the initial stages of drafting and execution of the contract but also the final stages of completion of the transaction and registration.

Phase 1 above can be labeled eRecords. Phases 2 and 3 come under the heading of eLodgement or eApplication. Phases 4 and 5 are part of the development of eRegistration and phases 6 and 7 come into the realm of eConveyancing. Thus there are four distinct phases in the development of eConveyancing; eRecords, eApplication, eRegistration and eConveyancing itself. These are explained in further detail later in this chapter.

Some of the key changes that occur during these phases which lead to eConveyancing are;

- (a) standardisation of documentation¹⁹⁴
- (b) standardisation of process
- (c) increased access to data online
- (d) dematerialisation¹⁹⁵
- (e) extension of title registration
- (f) digital signatures
- (g) standard format of data¹⁹⁶

¹⁹⁴ Common registration documents have been introduced in Ontario for both registered and unregistered titles. See Donahue, D.J. and ors *Real Estate Practice in Ontario* (6th edn LexisNexis Butterworths, Canada 2003) p. 1. The standard transfer deed has been reduced to three pages and the standard charge to two pages. This is in line with other advances whereby the contract between the transferor and transferee has been reduced to four pages.

¹⁹⁵ Dematerialisation is the process of replacing paper with an electronic process or no process at all. Many jurisdictions have removed the need for paper certificates of title which mirrored the ownership record details recorded in the registry. This paper was required to be produced on each sale of the land and thus would prove to be an impediment to an electronic system. Examples include Ontario which did this in 1979 (section 32, The Land Titles Amendment Act, 1979, S.O. 1979, c. 93), New Zealand which did this in 2002 (section 18, Land Transfer (Computer Registers and Electronic Lodgement) Amendment Act 2002) and Ireland which did this in 2006 (section 73, Registration of Deeds and Title Act 2006). Harpum, C. 'Property in an Electronic Age' (2000) 1 *Modern Studies in Property Law* (Hart Publishing Oxford 2001) p. 3 notes that the "mechanisms by which property is transferred are undergoing a revolution, namely, the move from paper-based to dematerialised dealings." Treacy, C. 'Doing the Deed' (March 2007) 101(2) *Law Society Gazette* p. 29 sees the removal of paper certificates as "a far-reaching and necessary milestone on the road towards implementation of a full e-conveyancing system in Ireland."

- (h) EFT
- (i) electronic instruments¹⁹⁷

Dematerialisation involves the transformation of the information or data to electronic information stored on a computer which is capable of being electronically manipulated.¹⁹⁸ It means a move from paper based processes to information based processes.¹⁹⁹ Information migrates from the physical world to the electronic world heralding the arrival of the paperless office.²⁰⁰

Electronic service delivery heralds a move towards simplification, standardisation and dematerialisation. Initially key paper documents are reviewed and fixed into a standard text and format which is adopted by all the stakeholders in the conveyancing process. Once this standardisation is completed the paper documents can then be dropped in favour of an electronic version that is completed, executed and transmitted by computers in a secure electronic system. This dematerialisation of paper documents into data sets that are capable of electronic manipulation is a core tenet of eConveyancing.

Many of these changes require legislative reform which will enable, authorise and structure the key developments above.

¹⁹⁶ Common data standards are particularly important for eConveyancing projects that straddle jurisdictions. For example the NECS (now PEXA) system in Australia will involve eight jurisdictions. See Libbis, S. 'E-Conveyancing Sans Frontieres; The Development of an Electronic Conveyancing System for Australia' Registering the World Conference Dublin (26 - 28 September 2007)

http://www.landregistry.ie/eng/Dublin_Conference_2007/Conference_Papers/ accessed 9 September 2010 p. 8.

¹⁹⁷ See Christensen, S. and ors 'The Requirements of Writing for Electronic Land Contracts – The Queensland Experience Compared with Other Jurisdictions' (September 2003) 10(3) *Murdoch University Electronic Journal of Law*

http://www.murdoch.edu.au/elaw/issues/v10n3/christensen103_text.html accessed 12 October 2011 for an examination of the move from written land contracts to electronic data.

¹⁹⁸ No jurisdiction has yet succeeded in making the process entirely paperless. In many instances the client's authority must still be given by a wet signature on a paper document. In Ontario the client must sign an Acknowledgement and Direction authorising the lawyer to enter into a Document Registration Agreement and to electronically sign and register the documents.

¹⁹⁹ Kelly, M. 'Back to the Future? A View on a Possible Future Model for Mortgage Security Perfection' Irish Banking Federation and The Institute of Bankers in Ireland Property Conveyancing Seminar Dublin (11 March 2010).

²⁰⁰ Widdison, R. 'Electronic Law Practice: An Exercise in Legal Futurology' (1997) 60 *Mod. L. Rev.* p. 144. Note however that on occasion the electronic world may instead add to the paper environment. In the Irish eStamping system Revenue replaced a physical stamp on the deed with an electronic return but lawyers must now print that return for their file.

3.2.1 Phases of eConveyancing

As noted already four distinct phases can be identified within the overall development of eConveyancing. Each phase is a precursor to the development of the next more sophisticated phase.

The first is the most basic. This requires the registering authority to convert all its paper records to an electronic format. These paper records are converted to electronic data sets that are capable of being manipulated on a computer. This phase can be called 'eRecords' as it involves the creation of electronic records. This phase becomes subsumed into the second phase and is a subset of eApplication and eRegistration.

The focus of the second phase of eConveyancing, called 'eApplication', has the objective of allowing the lawyer to lodge an application electronically with the Land Registry.

The information in the electronic application is pre-populated into the register but the transaction will only proceed once the paper documents have been received and approved by staff in the registering authority. Pre-populated means that the data entry is filled in (typed) on the register in 'draft' form as the electronic application is completed and this draft is then verified when the paper application is received. The staff in the registering authority do not need to type the information again but only need to amend the data if there is any error.

Pre-population can also occur in another way in that the electronic system can pull information already on the title register into the creation of the electronic document.²⁰¹ This avoids the need for entering information already contained in the register and may be the reason why many commentators believe that an electronic system will lead to less errors.²⁰² This, however, will only be the case if the information already in the register is correct. If the error is already on the register,

²⁰¹ In Ontario title information already stored in the POLARIS database will automatically be brought forward and entered into the electronic document. See Moore, M.E. and Globe, J.M. *Title Searching and Conveyancing in Ontario* (5th edn Canada, LexisNexis 2003) p. 425.

²⁰² Moore, M.E. and Globe, J.M. *Title Searching and Conveyancing in Ontario* (5th edn Canada, LexisNexis 2003) p. 267 state that all necessary Family Law Act statements are preprogrammed into the electronic document and this reduces clerical errors while simplifying document drafting.

staff in the registering authority may approve the new application based on that incorrect information. If the register is definitive then the information on it will be deemed to be correct.

In eApplication the process is automated but not automatic as input is required from staff in the registering authority before the information can affect the register. In one sense this phase could not really be called part of an eConveyancing system since it is dependent on the paper documents being lodged before the information can be acted upon.

Thus this phase retains the ultimate authenticative status of the paper documents. The electronic lodgment is a provisional stage contingent for its effects upon the lodgment of the effective papers. The application only has provisional status until the paper documents are lodged and these are required before the registering authority staff can amend the register. A fundamental tenet of a complete eConveyancing system is the replacement of paper with electronic information however in eApplication the transaction only gains priority upon receipt of the paper documents.

Where no input from staff in the registering authority is required before a change is effected in the title register the system may be labelled automatic. The eConveyancing process is automated because it occurs immediately via electronic channels but it may also be automatic if no 'human' input is required from the registering authority. Arruñada calls this agency registration where conveyancers alter the register after automatic controls by an "electronic registrar" but without manual intervention by the registry staff and notes that this has generally been rejected or only applied to simple transactions.²⁰³

The ARTL²⁰⁴ system in Scotland is an automatic registration system²⁰⁵ as no input from staff in the registering authority is required to effect a change in registration on

²⁰³ Arruñada, B. 'Leaky Title Syndrome?' (April 2010) *N.Z.L.J.* p. 115.

²⁰⁴ ARTL stands for Automated Registration of Title to Land but the system is both automated and automatic.

²⁰⁵ Traynor, M. 'Working with business communities to enable digital land registration for the 21st Century' (2008) United Nations Economic Commission for Europe's Working Party on Land Administration Workshop on the Influence of Land Administration on People and Business.

http://wpla.uredjenazemlja.hr/prezentacije/19_M.%20Traynor_Working%20with%20Business%20Communities%20to%20Enable%20Di.pdf accessed 16 January 2009.

the basis of the electronic application. England and Wales also propose to adopt automatic registration.²⁰⁶

The New Zealand e-dealing system is also automatic.²⁰⁷ The lawyer for the transferee submits the dealing online for registration and provided it passes the necessary business rules the transaction is registered. These business rules are built into the system as compliance checks. There is no manual intervention by registry staff before registration.²⁰⁸

Arruñada states that this provides the paradigm of agency registration.²⁰⁹ He warns of associated dangers and the implications of the transfer of risk, costs and liability between registries and conveyancers.²¹⁰ Though presumably it is the registry who set the business rules and built them into the system. The transaction is rejected if it does not meet the requirements of those rules.

It appears that Arruñada is not convinced that such rules can entirely replace intervention by the registry staff. This appears to be the prevailing view though it may be difficult to see what is added by registry staff signing off on the application except that the government accepts liability for the error or fraud of the applicant or land owner. This liability will depend on the extent to which the system provides for rectification.

If the system supports dynamic security there will be no rectification even if the registration is based on fraud, force or deceit in the electronic application. Dynamic

²⁰⁶ The proposal is to allow solicitors and licensed conveyancers to make alterations to the register by registering dispositions at the same time as they are made. See Law Commission and HM Land Registry 'Land Registration for the Twenty-First Century: A Conveyancing Revolution' (2001) Law Com No 271 <http://www.lawcom.gov.uk/docs/lc271.pdf> accessed 10 June 2010 p. 287. The report states that this is the only practicable way to have simultaneous disposition and registration. See also Butt, P. *Electronic Conveyancing: A Practical Guide* (2006 Thomson Sweet & Maxwell London) p. 10.

²⁰⁷ See Muir, R. 'Electronic Registration: The Legislative Scheme and Implications for the Torrens System in New Zealand' in Grinlinton, D. (ed) *Torrens in the Twenty-first Century* (Wellington, LexisNexis 2003) for an explanation of how this system operates.

²⁰⁸ Greenwood, J. and Jones, T. 'Automation of the Register: Issues Impacting on the Integrity of Title' in Grinlinton, D. (ed) *Torrens in the Twenty-first Century* (Wellington, LexisNexis 2003) p. 325 and 330.

²⁰⁹ Arruñada, B. 'Leaky Title Syndrome?' (April 2010) *N.Z.L.J.* p. 115. He notes at p. 116 that staff do perform some checks and audits after registration but by then it is too late to change anything as the registrar's powers of correction are limited.

²¹⁰ *ibid.*, p. 119.

security is often referred to as indefeasibility²¹¹ and the principle of indefeasibility is frequently advanced to justify the upholding of the register. If a mistake is made then compensation, and not rectification, will be the remedy for those deprived of their interest in land. By contrast if the system supports static security there will be rectification whenever it is deemed fair.

This conflict can also be expressed as a dispute between the principles of certainty and fairness. Certainty of the register will benefit purchasers and acquisition lenders but this may be at the expense of the transferor who is blameless but is now being offered a sum of money instead of title to his home as if they were “perfect substitutes”.²¹² The competing claims that may arise and how these are dealt with in Ireland and Ontario is examined in chapter six.

In a system with automatic registration it appears that there can be a reduction in land registration staffing levels. The checking function and the associated expense is transferred to the conveyancer and hence the house owner.²¹³ It could be argued that agency registration reduces the role of the registering authority as the arbitrator of ‘good title’ and redefines it as an auditor which ensures compliance²¹⁴ with the business rules. The registering authority thus develops a new role in authorising lawyers to conduct electronic conveyancing and an audit function to ensure compliance with the specified requirements.²¹⁵ The two new functions would be to license users and then to promulgate and enforce practice rules on those users. It would also have an obligation to maintain and update the system.²¹⁶

²¹¹ The particular legislative sections that provide for indefeasibility are often called “paramountcy” provisions. See the use of this term in Cooke, E. and O’Connor, P. ‘Purchaser liability to third parties in the English land registration system: a comparative perspective’ (2004) 120 *L.Q.R.* 645.

²¹² Miceli, T.J. and Sirmans, C.F. ‘The Economics of Land Transfer and Title Insurance’ (1995) 10(1) *Journal of Real Estate Finance and Economics* p. 83.

²¹³ Perry, R. ‘E-conveyancing: costs to the user’ (2003) 153 *NLJ* 1696.

²¹⁴ For further details of the New Zealand system see Muir, R. ‘E-conveyancing in New Zealand: Progress to Date and Future Developments’ Registering the World Conference Dublin (26 - 28 September 2007)

http://www.landregistry.ie/eng/Dublin_Conference_2007/Conference_Papers/ accessed 9 September 2010 p. 5.

²¹⁵ See Greenwood, J. and Jones, T. ‘Automation of the Register: Issues Impacting on the Integrity of Title’ in Grinlinton, D. (ed) *Torrens in the Twenty-first Century* (Wellington, LexisNexis 2003) for details of how the post-registration audit function operates in New Zealand.

²¹⁶ It is difficult to see how the registrar would not also have a role in registration particularly where rectification of the title or boundaries is required.

In Ontario the Director of Land Registration has the power to suspend the authorisation of an applicant if (a) there is reasonable grounds to believe that the person has submitted an electronic document that is not authorised by the registered owner or is not otherwise authorised at law or (b) considers it in the public interest to do so.²¹⁷ This would be a serious sanction as it would prevent the lawyer from practicing conveyancing. A new set of criteria were developed for the authorisation of account holders in Ontario as part of the Real Estate Fraud Action Plan. These included criteria about identity, financial resources adequate to compensate victims of fraud and good character/accountability.²¹⁸ In effect all users were required to re authenticate themselves as a fraud prevention measure.

In England and Wales it was proposed that entries on the register be made directly by the lawyer and not by the registering authority²¹⁹ however lawyers were reluctant to take on this function.²²⁰ Lawyers, as professional users of the system, are reluctant to be able to make changes to the register. They do not wish to be liable for error or fraud and to be sued by the consumers who directly suffer the system failure. Lawyers and other users do not want to become registrants. The same concerns do not appear to have arisen in relation to simpler transactions which are seen as presenting a lower risk and thus automated electronic discharge of a charge by a lender has been implemented in England without the same difficulties.

In Ireland it has been generally agreed between the stakeholders that “[i]n order to ensure that the PRA’s responsibility for maintaining the register is not diminished, PRA officials will continue to have input into applications for changes to the register before the register is updated.”²²¹ Thus the aim is to make the process automated

²¹⁷ See Murray, K. ‘Legislative Amendments Relating to Real Estate Fraud and the Ministry of Government Services Real Estate Fraud Action Plan’ Registering the World Conference Dublin (26 - 28 September 2007)

http://www.landregistry.ie/eng/Dublin_Conference_2007/Conference_Papers/ accessed 9 September 2010 p. 7. Section 23.1 Land Registration Reform Act R.S.O. 1990 CHAPTER L. 4.

²¹⁸ *ibid.*, p. 10 – 13.

²¹⁹ Harpum, C. ‘Property in an Electronic Age’ (2000) 1 *Modern Studies in Property Law* (Hart Publishing Oxford 2001) p. 6.

²²⁰ Lawyers in Victoria also rejected the possibility of agency registration because of the transfer of risk. See Arruñada, B. ‘Leaky Title Syndrome?’ (April 2010) *N.Z.L.J.* p. 118.

²²¹ O’Sullivan, J. ‘eRegistration and eConveyancing in Ireland – the story so far...’ Registering the World Conference Dublin (26 - 28 September 2007) http://www.landregistry.ie/eng/Dublin_Conference_2007/Conference_Papers/ accessed 9 September 2010 p. 7.

but not automatic.²²² The registrar or staff in the registering authority will need to act upon the electronic message or data transfer before a change in the title register can take place. Kostova is of the view that the Irish choice to keep registration automated rather than automatic should be welcomed.²²³ Automation delivers most of the benefits that the registering authority tends to seek, allowing it to keep the state guarantee intact. Automatic registration would change its role to that of an enforcement and validation authority.

This is also the position in Ontario where the registry staff manually review documents for compliance before registering or rejecting them. Section 23 of the Land Registration Reform Act²²⁴ (hereafter the LRRRA)²²⁵ stipulates that an electronic document delivered to the electronic land registration database by direct electronic transmission is not registered until the land registrar registers it in the prescribed manner.

However, many jurisdictions have built some of the simple checks, that would previously have been done by registry staff, into the electronic system in order to generate efficiencies and reduce the level of manual input.²²⁶ They have also adopted a “tell me, don’t show me” approach²²⁷ to the supporting documentation that would previously have been required. The question arises as to whether these two developments of themselves have led to the possibility of more errors appearing in the title register and thus a balance is to be achieved between efficiency and risk.

This eApplication phase becomes obsolete and subsumed into the next phase of eConveyancing. Clancy calls this phase eLodgement of Applications for Registration and identifies its key features as allowing professional customers to pay fees on-

²²² McHugh, P. ‘eRegistration; The story so far and next steps’ Presentation to Law Society 30 April 2010.

²²³ Kostova, T. *Moving Towards eConveyancing in Ireland: An Analysis* (LL.M. thesis University College Cork 2010) p. 59.

²²⁴ Land Registration Reform Act R.S.O. 1990 CHAPTER L. 4.

²²⁵ The aim of the LRRRA was to computerise, modernise and combine the unregistered and registered systems.

²²⁶ For example the system may automatically calculate the fee payable or force the applicant, or registrant, to choose options from a predetermined list. In Ontario the system will not allow the application to be lodged until certain required elements are completed. Similarly the ARTL system requires all questions relevant to the application to be completed before it allows the application to be submitted for registration.

²²⁷ This approach means that supporting documentation is not lodged in the registry. Instead the applicant, or registrant, certifies that such documentation has been executed and is held by them.

line, build and track applications.²²⁸ Also key data is validated on-line and pre-populates the register with drafts of the registration. He is of the view that this “is the precursor to full eRegistration and, other than electronic supporting documents, it contains most of the elements of full eRegistration.”²²⁹

O’Sullivan has divided this phase into two distinct parts; eApplication and eLodgement.²³⁰ eApplication being the ordering of documents and services online and eLodgement relating to the lodgement of applications resulting in changes to the register. This research takes the view that these two parts are linked and together they form the second phase of eConveyancing. The term eApplication will be used to denote this phase.

eRegistration is the third more sophisticated phase. This is truly part of an eConveyancing system as the paper is now replaced with an electronic process and this is the primary focus of eRegistration. The aim is to change the register solely on the basis of electronic information without the need for paper documents to be lodged. In the eApplication phase the electronic entry is ineffective unless it mirrors the paper. The electronic application is a shadow of the paper application and only has a provisional status.

By contrast in the eRegistration phase the electronic entry is the legal act that leads to a change in the register. The data input has independent legal effectiveness and is not dependent on a paper application. It may however be subject to a number of factors. Firstly the electronic act must conform with the data that’s already on the register. Second it must meet the business rules or other formalities laid down by the registering authority for the electronic entry and thirdly, in most instances, it must be signed off by staff in the registering authority.

²²⁸ Clancy, D. 2008. ‘From caveat emptor towards full disclosure – developments in Ireland’ United Nations Economic Commission for Europe’s Working Party on Land Administration Workshop on the Influence of Land Administration on People and Business (2008) <http://wpla.uredjenazemlja.hr/prezentacije/Presentation%20Caveat%20Emptor%20to%20Vendor%20Disclosure%208-9-08.pdf> accessed 21 January 2009 p. 5.

²²⁹ *ibid.*

²³⁰ O’Sullivan, J. ‘eRegistration and eConveyancing in Ireland – the story so far...’ Registering the World Conference Dublin (26 - 28 September 2007) http://www.landregistry.ie/eng/Dublin_Conference_2007/Conference_Papers/ accessed 9 September 2010 p. 5.

In eConveyancing the implementation of the eRegistration phase generally begins with the electronic discharge of registered charges by authorised users (may be lawyers or lenders) and then moves on to electronic charges and finally transfers.

The fourth, most extensive and most sophisticated phase is eConveyancing itself. The aim is to electrify not just the registration aspects of conveyancing but the entire end to end process from pre-sale to post completion. Some physical acts may however be excluded.²³¹

Arruñada suggests that there is no need for a physical closing act at all as digital signatures allow consent to be given without a physical presence at closing.²³² However this will only work if the client has a digital signature that meets the needs for identity verification. In most systems it is the lawyer, and not the client, who has the digital signature.²³³ This may lead to additional risk and liability for the lawyer and thus a rise in professional indemnity insurance premiums.²³⁴ Kostova warns that the impact of such an increased risk of liability on the success of any Irish system should not be underestimated.²³⁵

Perry takes the view that the central objective of eConveyancing is the elimination of the paper documents but the restriction of digital signatures to legal representatives results in his view in its failure to achieve this objective.²³⁶ The requirement to ensure that the client gives authority for the signing of the electronic document has resulted in practices whereby the client applies a wet signature²³⁷ to a paper copy of the electronic document or executes some other form of paper authority.

In both Ontario and Scotland wet signatures are required from the client in order to authorise the transaction. In Ontario this authority is kept on the lawyers file. In Scotland it is lodged with the registering authority. The lawyer then uses his or her digital signature on the basis of that paper authority. For Perry the “difficulty with this

²³¹ For example physical inspection of the property by the transferee, verification of identity in order to meet anti-money laundering legislation and authorisation for the transaction.

²³² Arruñada, B. ‘Leaky Title Syndrome?’ (April 2010) *N.Z.L.J.* p. 119.

²³³ Examples include Scotland, New Zealand, British Columbia and Ontario. For an examination of the potential for fraud and security issues arising from the use of digital signatures in eConveyancing see Kostova, T. *Moving Towards eConveyancing in Ireland: An Analysis* (LL.M. thesis University College Cork 2010) p. 21 – 32.

²³⁴ Kostova, T. *Moving Towards eConveyancing in Ireland: An Analysis* (LL.M. thesis University College Cork 2010) p. 26.

²³⁵ *ibid.*, p. 27.

²³⁶ Perry, R. ‘E-Conveyancing – a critical view’ (2003) 8(2) *C.P.L.J.* p. 29.

²³⁷ The stroke of a pen.

solution is that a major part of the rationale behind e-conveyancing is destroyed in the process.”²³⁸ He quotes an Ontario real-estate lawyer as noting that there seems to be more paper rather than less in lawyers’ files as a result of the changes in Ontario.²³⁹

In New Zealand a paper authorisation is executed and retained for 10 years. In Scotland the paper authorisation is scanned and lodged with the registry. Instead of removing paper documents from the process you now have an additional document added to the conveyancing process and this document must be preserved for a considerable length of time. This is problematic if you accept Perry’s view that dematerialisation is the major driver of eConveyancing. Even if you do not accept his view, the objective of reform is to generate efficiencies, not to add further complexity and paper to the process. These difficulties can however be overcome by developing a digital signature for clients.

The eRecords, eApplication or eRegistration phases are sometimes referred to as eConveyancing and there is no doubt that any eConveyancing system must also include these. The development of these electronic processes are stepping stones on the path towards full eConveyancing. Many jurisdictions have chosen to stop at eRecords, eApplication or eRegistration and not proceed further. By contrast other jurisdictions are planning to move forward to convert the entire conveyancing process to an electronic platform by developing complete systems of eConveyancing. This would include that part of the conveyancing process prior to registration i.e. drafting of the contract and assurance, execution of the contract and assurance together with completion involving EFT of the purchase monies.

3.2.2 Relationship between eRecords, eApplication, eRegistration and eConveyancing

The relationship between the four phases of an overall eConveyancing system can be represented by the diagram below.

²³⁸ Perry, R. ‘E-Conveyancing – a critical view’ (2003) 8(2) *C.P.L.J.* p. 27.

²³⁹ Perry, R. ‘E-conveyancing: costs to the user’ (2003) 153 *NLJ* 1696.

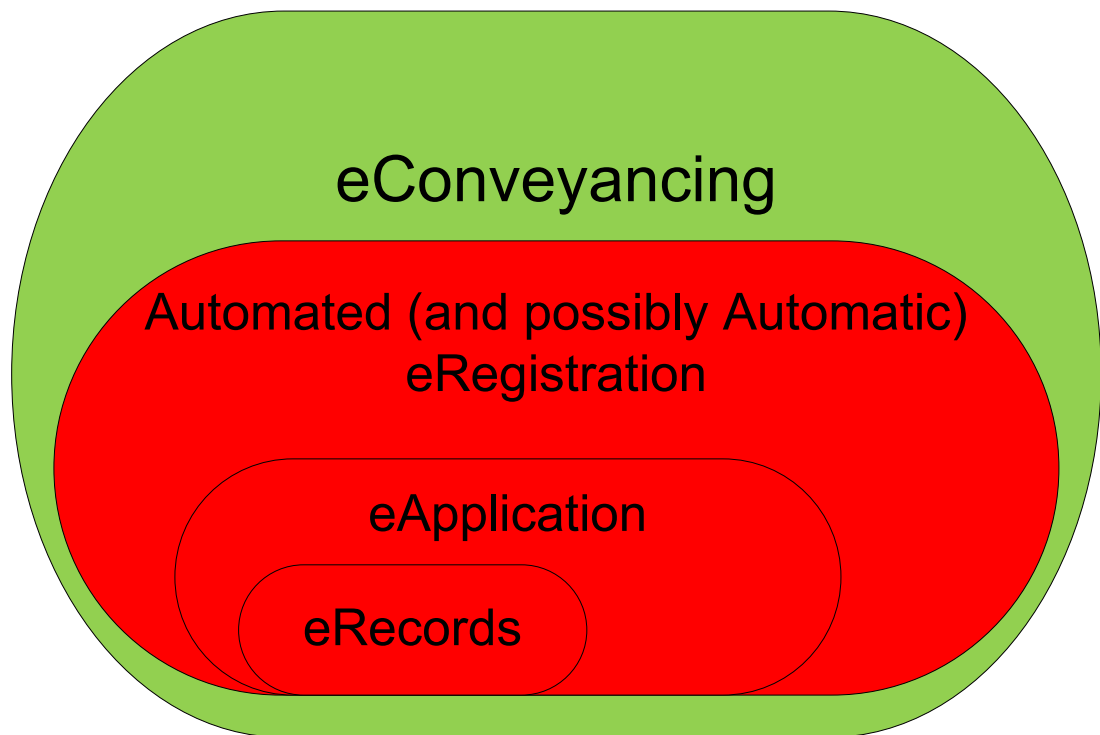


Figure 1: Four phases of an eConveyancing system

eRecords and eApplication are subsets of eRegistration and become subsumed into eRegistration once the system moves into this phase. By contrast eRegistration is retained as a distinct subset of eConveyancing as it relates solely to the registration element of the conveyancing process. The final phase is eConveyancing itself which expands the electronic interaction to stakeholders and other parts of the process separate from the registration element.

eRegistration involves electronic interaction between the registering authority and users, usually lawyers, to facilitate electronic registration. eConveyancing expands this interaction to other stakeholders such as lenders, surveyors and auctioneers and it facilitates virtually all the phases of the conveyancing process from pre sale to post completion.

eRegistration necessarily involves automated electronic communication between the users and registrar but it may not be automatic. In this research eRegistration is taken to mean an automated but not an automatic system.

The following diagram represents the same process but as a sequential timeline. Note that some of these phases may run in parallel for periods of time until the next phase is fully implemented.

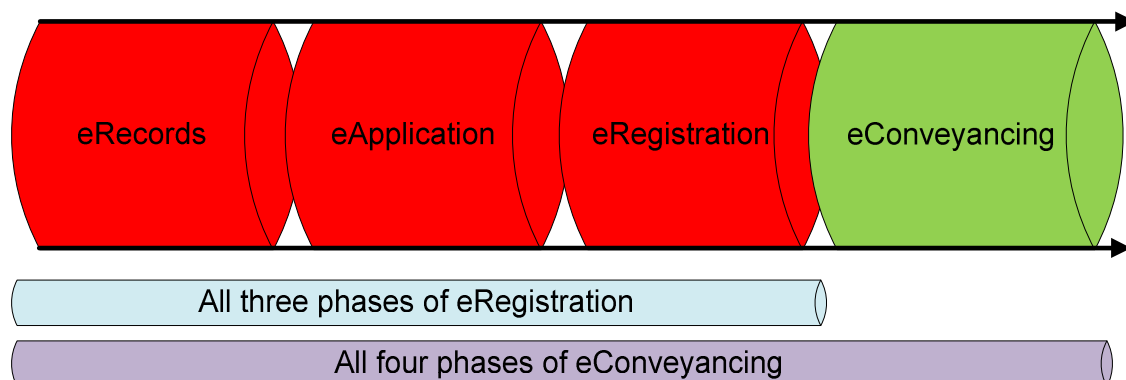


Figure 2: Sequential timeline

Traditionally the conveyancing process is seen as being very paper based, lacking transparency and with many inherent delays.²⁴⁰ This provides potential for reform, transformation and process improvements.

Globalisation demands shared and reusable knowledge in all sectors of the economy including the property market.²⁴¹ The transformation of conveyancing by the application of technological advances to a previously paper based process is part of a wider move towards the values and technologies of the information age.²⁴²

Paper based transactions are seen as outdated and traditional and often the existence of such paper is blamed for delays. Perhaps the delay is due to other

²⁴⁰ The Law Reform Commission 'eConveyancing: Modelling of the Irish Conveyancing System' (2006) The Law Reform Commission (LRC 79 – 2006) p. 5.

²⁴¹ Hess, C. and Vaskovich, M. 'Ontology Engineering for Comparing Property Transactions', in Zevenbergen, J. and Ors (eds) *Real Property Transactions: Procedures, Transaction Costs and Models* (Amsterdam, IOS Press 2007) p. 183.

²⁴² Castells refers to this as the network society; Castells, M. 'Toward a Sociology of the Network Society' (September 2000) 29(5) *Contemporary Sociology* p. 693. Brande-Lavridsen is of the view that we are leaving the network society and entering the mobile society; Brande-Lavridsen, H. 'The Spatial Information Market in Denmark' GSDI 6 Conference – From Global to Local Budapest, Hungary (16 – 19 September 2002) http://www.gsdidocs.org/gsdiconf/GSDI-6/Stream2/Wednesday_11hr/Hanne_Brande_Lavridsen/Paper-Hanne%20Brande-Lavridsen.pdf

accessed 26 August 2010 p. 10. For an outline of eGovernment initiatives in Ireland see McDonagh, M. and White, F. 'eGovernment in Ireland: An evaluation of the legal and policy framework' (2008) 56(1) *Administration* p. 38 – 45.

factors such as the formalities associated with completing a conveyancing transaction. There is a value in the formalities²⁴³ associated with executing a contract or deed so as to ensure that the client's authority cannot be questioned and the contract or deed subsequently set aside. The person cannot deny their own signature and its witnessing. It is for this reason that many jurisdictions, despite other advances towards dematerialisation, have still retained a paper authority to be signed by the client with a wet signature.²⁴⁴

When it comes to conveyancing many citizens and particularly land owners like paper deeds.²⁴⁵ They like having paper 'proof' of ownership that they can hold. It is a familiar concept and the holder may feel a sense of security that by holding the paper deed, title to the land cannot be taken away. Of course a paper deed may be burnt or destroyed just as a computer record can be deleted or infected by a virus.

The case for reform is compelling but whether this reform should embrace eConveyancing is the subject of much discussion and debate. But even if the conveyancing process requires reform does this necessarily mean that eConveyancing will solve all its ills? Does eConveyancing provide a realistic solution to difficulties in the process or is it a mirage never to be achieved?

3.3 The case for reform

²⁴³ There is much written about the legal reasons for these formalities but little has been written about their symbolic ceremonial purpose. This change of formalisation has echoes with the past with the move from memory and storytelling to written records. Such change in ritual is a field of study in its own right and was explored by Clanchy, M.T. *From Memory to Written Record, England 1066 – 1307* (2nd edn Oxford, Blackwell Publishers Ltd 1993). He explores the growth of practical literacy and the move from living memory to written records. This can be seen as a continuum whereby society is now moving from those written records to electronic data sets. For example Ruoff, writing in 1952, was encouraging title registrars to use cash registers for recording fees paid and photography for copying plans and documents. See Ruoff, T. 'An Englishman looks at the Torrens System: Part II: Simplicity and the Curtain Principle' (1952) 26 *ALJ* p. 163.

²⁴⁴ E.g. Scotland. See Christensen, S. 'Electronic Land Dealings in Canada, New Zealand and the United Kingdom: Lessons for Australia' (December 2004) 11(4) *Murdoch University Electronic Journal of Law* http://www.murdoch.edu.au/elaw/issues/v11n4/christensen114_text.html accessed 12 October 2011 for an example of the paper documents that are retained in a number of jurisdictions.

²⁴⁵ In writing about eRegistration Muir notes the symbolic value of the paper title as a tangible representation of a land owners legal title and ownership. See Muir, R. 'Electronic Registration: The Legislative Scheme and Implications for the Torrens System in New Zealand' in Grinlinton, D. (ed) *Torrens in the Twenty-first Century* (Wellington, LexisNexis 2003) p. 316.

“With the ever-increasing reliance of our society on information technology, it is perhaps not surprising that information technology has been chosen as the means by which it is hoped to modernise conveyancing – hence, *electronic* conveyancing.”²⁴⁶ Many commentators, including Wylie,²⁴⁷ have advocated eConveyancing as a means of achieving this modernisation.

The application of technology is seen as a means of standardising and simplifying the conveyancing process, improving efficiency and providing transparency. The development of eConveyancing has been advocated as a ‘cure all’ solution to the difficulties presented by a centuries old, paper based, traditional process that on the face of it appears to no longer fit the 21st Century. In moving towards eConveyancing most jurisdictions have taken the opportunity to redefine and re-engineer processes as part of the reform programme to take maximum advantage of available technologies.²⁴⁸ Kostova applauds this determination to make conveyancing easier, cheaper and more efficient, noting that “great hopes have been invested in the development of an end-to-end fully electronic system of conveyancing.”²⁴⁹

In 2005 the then Irish Taoiseach, Bertie Ahern, acknowledged that modernisation, simplification and reform of land law and conveyancing was long overdue and that eConveyancing would bring this process into the 21st century.²⁵⁰

“No one could possibly argue against that as being a highly desirable and indeed, essential goal. With all aspects of Irish life enjoying unprecedented modernisation – transport, infrastructure, communications – why should the legal profession allow itself...to, remain in the past.”²⁵¹

²⁴⁶ Kostova, T. *Moving Towards eConveyancing in Ireland: An Analysis* (LL.M. thesis University College Cork 2010) p. 1.

²⁴⁷ Wylie, J. ‘Keynote address: need for a modern legislative framework’ Law Reform Commission Annual Conference (2004) <http://www.lawreform.ie/Annual%20Conference%202004.PDF> accessed 29 January 2009.

²⁴⁸ The Law Society of Ireland ‘eConveyancing: Back to Basic Principles. Vision of an Electronic System of Conveyancing (‘eVision’)’ (March 2008) insists that it would be a fundamental mistake to digitise the current paper based system. It advocates that the whole process be re-designed and simplified to suit the online environment.

²⁴⁹ Kostova, T. *Moving Towards eConveyancing in Ireland: An Analysis* (LL.M. thesis University College Cork 2010) p. 3.

²⁵⁰ Ahern, B. ‘Speech on the occasion of the 30th Anniversary of the Law Reform Commission’ Law Reform Commission Dublin (2005) <http://www.lawreform.ie/fileupload/Speeches/30th%20Anniversary%20Taoiseach%20speech%20final%2023%20June%202005.pdf> accessed 3 September 2010.

²⁵¹ Jamieson, D. ‘Implications of eConveyancing for the Irish Conveyancer’ First Law Land Law and Conveyancing Law Reform Conference Dublin (2006) p. 75.

To a large extent the case for reform has been predicated on the need to be seen to be making advances in line with other related jurisdictions rather than a comprehensive cost benefit analysis.²⁵² The complexity of such an analysis has meant that jurisdictions have chosen to rely on other evidence to advocate eConveyancing. The Irish Law Reform Commission is of the view that the “experience in other jurisdictions has shown that a business case does exist for undertaking an eConveyancing initiative of this nature.”²⁵³ The experience drawn upon is that of Ontario, England and Wales, New Zealand, Australia and South Africa.

Many commentators have however relied upon perceived benefits rather than empirical data. This process whereby ‘perceived’ innovation is adopted is reflected in innovation-diffusion literature. Abrahamson looks at the diffusion literature and divides it into two types.

“The first claims that fads or fashions facilitate the diffusion of technically inefficient administrative technologies....A second type of account claims that fads or fashions harm organizations’ economic performances because they prompt rejections of administrative technologies that had the potential to become technically efficient for their adopters.”²⁵⁴

Do organisations imitate other organisations in order to appear legitimate by conforming to emergent norms that sanction these innovations?²⁵⁵ Is this the case with eConveyancing? Is it the new fad or fashion?

While Abrahamson has focused on the literature from an organisational point of view other commentators look at it from the perspective of social systems. Levi-Faur has defined:

“diffusion as the process by which the adoption of innovation by member(s) of a social system is communicated through certain channels and over time and triggers mechanisms that increase the probability of its adoption by other

²⁵² Kostova, T. *Moving Towards eConveyancing in Ireland: An Analysis* (LL.M. thesis University College Cork 2010) p. 33 notes that it is difficult to measure the potential savings, be it less clerical time, volume of paper or some other feature of the solution.

²⁵³ The Law Reform Commission ‘eConveyancing: Modelling of the Irish Conveyancing System’ (2006) The Law Reform Commission (LRC 79 – 2006) p. 2 Appendix.

²⁵⁴ Abrahamson, E. ‘Managerial Fads and Fashions: The Diffusion and Rejection of Innovations’ (July 1991) 16(3) *The Academy of Management Review* p. 588 – 589.

²⁵⁵ *ibid.*, p. 597.

members who have not yet adopted it....Their own particularistic order is then “exported” or “projected” globally as a “universal rationality”²⁵⁶

He points out that new sources of change have emerged since the 1980’s and these sources include technological innovations.²⁵⁷ While looking in particular at the spread of regulatory approaches across jurisdictions, his comments are of equal interest in the context of legal processes which would require the backing of new regulation.

Rogers points out that the internet has created increased interest in the study of diffusion and particularly in the role of communication networks in the diffusion process.²⁵⁸ This according to Levi-Faur is a reflection of an increasingly interdependent world.²⁵⁹ Hence when change is sought or demanded it is not surprising that decision makers look to advances made in other jurisdictions in order to benchmark their own organisation or system. What is surprising is that decision makers so readily accept the perceived benefits articulated by adopters of change in other jurisdictions, who themselves have a vested interest in their new systems being perceived to be a success.²⁶⁰ Relying on such a weak rationale for expensive systems, it is then not surprising when they often fail to be a success.

Few jurisdictions appear to have carried out a detailed risk assessment before advancing eConveyancing or if they have these results are not in the public domain. The exception to this is Australia which carried out a risk assessment of NECS (now

²⁵⁶ Levi-Faur, D. ‘The Global Diffusion of Regulatory Capitalism’ (March 2005) 598 *Annals of the American Academy of Political and Social Science* p. 23 - 24.

²⁵⁷ *ibid.* p. 23.

²⁵⁸ Rogers, E.M. *Diffusion of Innovations* (5th edn London, Free Press 2003) p. 348.

²⁵⁹ Levi-Faur, D. ‘The Global Diffusion of Regulatory Capitalism’ (March 2005) 598 *Annals of the American Academy of Political and Social Science* p. 28.

²⁶⁰ Rogers criticizes the pro-innovation bias of diffusion research and says this is a serious shortcoming caused by the research being funded by change agencies and a rejected and/or discontinued innovation is less likely to be investigated by a researcher. The implication is that either researchers are biased because they have been ‘bought’ or only successful innovations receive publicity and kudos. Of course researchers may be biased and it is possible that unsuccessful innovations are more likely to be covered up but it is cynical to taint all diffusion research with these shortcomings. See Rogers, E.M. *Diffusion of Innovations* (5th edn London, Free Press 2003) p.106 and 110.

PEXA) with the final report published on the 9 February 2007.²⁶¹ This risk assessment focused primarily on possible system failures.²⁶²

Despite this there is a considerable amount of literature advocating the advantages of eConveyancing. Gahan lists them as including:²⁶³

- (a) round the clock availability (presumably for authorised users);
- (b) clearer and quicker interaction with quicker responses (again presumably for authorised users in getting information from the electronic system);
- (c) reduced administrative burden on the customer side (presumably he is referring to the customer not having to complete and post paper documents);
- (d) higher productivity on the government side because the data can be processed more quickly compared to paper-based forms (this is likely a reference to the pre-population of data that can occur in a computer based system);
- (e) facilitating information-sharing and analysis of trends; and
- (f) improved national competitiveness.

As Connolly points out:

“Even the most superficial examination of the conveyancing process reveals the potential for the use of ICT, the retrieval of information being the most obvious, as the kernel of a conveyancing transaction is the retrieval of information about the property and those who claim an interest in it.”²⁶⁴

It will be possible to update ownership on the land register as soon as completion of the transaction has taken place and to immediately have this information available to all stakeholders. The availability of this information in real time has the potential to remove risk and cut out delay.

²⁶¹ National Electronic Conveyancing Office *Risk Assessment of the National Electronic Conveyancing System* 9 February 2007. This report is in three volumes and was carried out by the law firm Clayton Utz (contact Mark Sneddon). The entire report can be accessed by clicking on ‘The Risk Assessment of NECS Report’ at <http://www.necs.gov.au/Risk-Management-2/default.aspx> accessed 12 October 2011.

²⁶² Risks 34, 77, 78 and 81 relate to land registry errors. These are of interest but are not of direct relevance to this research. See 10.1 of volume 1 and also volume 3.

²⁶³ Gahan, E. ‘Taking full advantage of the possibilities of eGovernment’ (October 2008) 51 *Public Affairs Ireland* p. 15. Similar type benefits have been articulated by McDermott. See McDermott, G. ‘Background to the Land Registry Use of Technology to Improve Customer Service’ First Law Land Law and Conveyancing Law Reform Conference Dublin (2006) p. 68.

²⁶⁴ Connolly, F. ‘E-Conveyancing: who will benefit?’ BSc Hons Dissertation (October 2007) p. 11.

The benefits of eConveyancing and eRegistration were also discussed at the UNECE WPLA Workshop on the Influence of Land Administration on People and Business held in Croatia on the 2nd and 3rd October 2008. These benefits were identified as including the prevention of multiple registration which is time consuming and as the registration takes less time it meets the need of the market; reducing the risk of incorrect data;²⁶⁵ and increasing the possibility of transparency and the opportunity to:

“[m]ake all necessary information available to the players of the real estate market internal and external users (professionals, buyers and sellers) at one place at the Internet.”²⁶⁶

The prevention of multiple registration could mean a move from several registers to one register and the expansion of that one register to reflect all the required information.²⁶⁷ Locke explains an approach that is being explored in Australia whereby the land registry would continue to maintain the title register but would also be an online portal to information maintained by other agencies.²⁶⁸ This idea of an electronic hub for all information relating to land has been adopted in many jurisdictions. In some the land registry is taking on this role²⁶⁹ and in others it is private enterprise²⁷⁰ or a public private partnership.²⁷¹

For Perry the thrust of the electronic communications revolution²⁷² or evolution, including eConveyancing, is towards greater connectivity.²⁷³ Currently the information about property is stored by a variety of bodies. For example the lawyer

²⁶⁵ This may only be true if there is some means of the data being validated as it is entered into the system.

²⁶⁶ Conclusions of the sessions ‘Conclusions of the sessions’ United Nations Economic Commission for Europe’s Working Party on Land Administration Workshop on the Influence of Land Administration on People and Business (2008)
<http://wpla.uredjenazemlja.hr/zapisnik.pdf> accessed 16 January 2008.

²⁶⁷ In Ireland it is proposed to merge the PRA with Ordnance Survey Ireland (OSi) and the Valuation Office. See The Property Registration Authority ‘Strategic Plan 2010 – 2012’ (2010) The Property Registration Authority
http://www.landregistry.ie/eng/Publications/Strategic_Plan/Strategic_Plan_2010_2012.pdf accessed 17 February 2012 p. 22.

²⁶⁸ Locke, M. ‘Challenges facing land registries into the 21st century – an Australian perspective’ Registering the World Conference Dublin (26 - 28 September 2007)
http://www.landregistry.ie/eng/Dublin_Conference_2007/Conference_Papers/ accessed 9 September 2010 p. 5.

²⁶⁹ For example in England and Wales.

²⁷⁰ Teranet in Ontario.

²⁷¹ Teranet started as a public private enterprise.

²⁷² Widdison refers to an information revolution. See Widdison, R. ‘Electronic Law Practice: An Exercise in Legal Futurology’ (1997) 60 *Mod. L. Rev.* p. 144.

²⁷³ Perry, R. ‘E-Conveyancing – a critical view’ (2003) 8(2) *C.P.L.J.* p. 29.

currently has to retrieve information about planning from the local authority. Information about any tax liability has to be sought from Revenue. A variety of registers have to be searched for details of any encumbrances on the property. Wylie, states that it would be much easier if this information was stored in computer databases which were interlinked and easily accessible.²⁷⁴

This would benefit not just the lawyer but other stakeholders in locating the information required to complete the legal and procedural formalities to complete a conveyancing transaction. For the land owner it is likely to mean that the transaction time and cost is reduced.

An example of this is the setting up of the Land and Property Services Agency in Northern Ireland in 2008. This brought together the Rate Collection Agency, the Valuation and Lands Agency, Ordnance Survey and the Land Registers with the aim of delivering integrated mapping, registration, valuation and rating services. This is in line with the UNECE guidelines for land administration which recommend that a single agency be responsible for land administration.²⁷⁵

This may mean the expansion of the title register beyond its traditional role and possibly, by implication, the creation of new registered titles in land. This aspect and its implications are explored further in chapter seven.

The Australian States appear to have embraced the possibilities afforded by these changes. In Australia water licences which previously attached to specific land parcels are now being converted to water allocations which can be bought, sold, mortgaged and sub-divided. They do not have the benefit of a government guarantee or statutory indefeasibility but do “benefit from the same principles of priority and certainty in resource ownership that applies to interests recorded in the

²⁷⁴ Wylie, J. ‘Keynote address: need for a modern legislative framework’ Law Reform Commission Annual Conference (2004) <http://www.lawreform.ie/Annual%20Conference%202004.PDF> accessed 29 January 2009 p. 11.

²⁷⁵ Stanley, V. and Adlington, G. ‘World Bank Experience in Land Administration in the Transition Economies of Eastern Europe and Central Asia’ Registering the World Conference Dublin (26 - 28 September 2007) http://www.landregistry.ie/eng/Dublin_Conference_2007/Conference_Papers/ accessed 9 September 2010 p. 3.

freehold land register.”²⁷⁶ Queensland is also examining how it might register sub-terrain storage areas and Western Australia has created a new interest in land called a carbon right which is the right to the benefits and risks arising from carbon sequestration and release on a parcel of land.²⁷⁷ There is an argument however that these new registered interests are created to meet the demands of a changing society and have nothing intrinsically to do with eRegistration.²⁷⁸

Alternatively the reference to a prevention of multiple registration by the UNECE WPLA²⁷⁹ may mean a move from registration several times in the one register to a necessity to only register once.²⁸⁰ The UNECE WPLA noted that a balance must be achieved between transparency and data protection to maintain confidence in the system and combat new ways of fraud²⁸¹ but session 4 concluded that land administration authorities should improve by making new services based on eGovernment and electronic signatures, following the one stop-shop principle.

Sabaliauskas and Mikuta explain this principle as meaning that as:

“information [in electronic documents] is entered and examined only once, [the] probability of errors is minimised. [And with an] [i]ntegrated environment all actions are performed within the framework of one system.”²⁸²

²⁷⁶ Locke, M. ‘Challenges facing land registries into the 21st century – an Australian perspective’ Registering the World Conference Dublin (26 - 28 September 2007) http://www.landregistry.ie/eng/Dublin_Conference_2007/Conference_Papers/ accessed 9 September 2010 p. 8 – 9.

²⁷⁷ *ibid.*, p. 9 – 10

²⁷⁸ Locke does not make a direct causal link between the new interests in Australia and the development of eRegistration. Instead he examines them in the context of the challenges and opportunities faces by the land registries and the use of the land titling system to support efficient operation of markets which are of significant value to the economy. See *ibid.*, p. 3 and 8.

²⁷⁹ Conclusions of the sessions ‘Conclusions of the sessions’ United Nations Economic Commission for Europe’s Working Party on Land Administration Workshop on the Influence of Land Administration on People and Business (2008) <http://wpla.uredjenazemlja.hr/zapisnik.pdf> accessed 16 January 2008.

²⁸⁰ This could mean a move from several registers e.g. tax, planning, title, to one register and the expansion of that one register to reflect all the required information about the property.

²⁸¹ For an examination of the move from a closed to an open register in England and Wales see Timothy, J. ‘The Open Register’ Registering the World Conference Dublin (26 - 28 September 2007) http://www.landregistry.ie/eng/Dublin_Conference_2007/Conference_Papers/ accessed 9 September 2010.

²⁸² Sabaliauskas, K. and Mikuta, B. ‘Land administration in Lithuania: challenges and perspectives’ United Nations Economic Commission for Europe’s Working Party on Land Administration Workshop on the Influence of Land Administration on People and Business (2008) http://wpla.uredjenazemlja.hr/prezentacije/22_K.%20Sabaliauskas_%20B.%20Mikuta_Land%20Administration%20in%20Lithuan.pdf accessed 16 January 2009.

The potential is for the data entered into the system by authorised users to be automatically verified by the system and checked against data already validated and this presents the opportunity to minimise any errors.

Data amendment however is likely to be much more difficult than data entry. Any errors already in the system are likely to be replicated in future entries and thus verification and validation of the initial data entry is a key requirement. Limiting access to the system to authorised users and retaining a final sign off before registration to staff of the registering authority are some of the means of retaining control over the data. The design of the system is also a key factor so as to minimise input errors.

While single entry will likely decrease entry errors the likelihood of any errors already in the system being discovered is reduced. The data already in the system will only be checked once instead of multiple times. Input errors may be minimised but process errors may be maintained and increased as they may not be detected if there is no double checking. Thus the outcome might be more errors in the final product i.e. the electronic register.²⁸³

However, there is potential to limit further errors entering the system. McDermott notes that due to in-built system prompts and automatic calculation of registration fees the on-line form completion in the Irish landdirect.ie system is leading to a significantly lower incidence of errors in the documentation presented for registration.²⁸⁴ In Ontario the e-reg system automatically warns the user when a draft registration is incomplete so that signing and registration are only allowed after all mandatory information has been submitted.²⁸⁵

Treacy and O'Sullivan also list some of the major benefits to users of the Irish Land Registry's Electronic Access Service.²⁸⁶ These include improved timeliness and speed of service, improved convenience, on-line data is far more usable and

²⁸³ See Arruñada, B. 'Leaky Title Syndrome?' (April 2010) *N.Z.L.J.* p. 116 - 117 for an analysis of the incidence of errors in the New Zealand system.

²⁸⁴ McDermott, G. 'Background to the Land Registry Use of Technology to Improve Customer Service' First Law Land Law and Conveyancing Law Reform Conference Dublin (2006) p. 69.

²⁸⁵ Moore, M.E. and Globe, J.M. *Title Searching and Conveyancing in Ontario* (5th edn Canada, LexisNexis 2003) p. 425.

²⁸⁶ Treacy, C. and O'Sullivan, J. 'Land registration in Ireland – current position and future developments' Law Reform Commission Annual Conference (2004) <http://www.lawreform.ie/Annual%20Conference%202004.PDF> accessed 10 March 2009.

flexible, improved service through local offices and improved business processes in other government departments and agencies.²⁸⁷

In Ontario Moore and Globe set out the goals of land registration reform as including to simplify conveyancing law and procedure, reduce the costs of conveyancing and standardise law, terminology and procedure.²⁸⁸ While remaining concerned about digital signatures, Kostova acknowledges that eConveyancing could remove some of the risks and delays.²⁸⁹

Other benefits of eConveyancing were articulated at the CINDER XVI International Congress on Registration Law held in Valencia, Spain from the 20th to 22nd May 2008. At that forum Rätsep set out the following reasons for eConveyancing being much easier:

“activities are half-automated which means registration is more efficient and ... routine work can be done without human intervention. Texts of entries are composed automatically as they base (sic) on templates. Thanks to digital structured data exchange there are fewer mistakes and less paper. Information system is sustainable and can be easily developed further. It is easy to get statistics. You can get land register information everywhere you have internet connection, it is possible to build new online services according to clients' needs And information you get from the register has legal power electronically.”²⁹⁰

Takács, in referring to Hungary, sees a different change in land registration. He points out that the changing function of real estate from being “only a property” to being a tool of investment and a source of income increases the importance of land registration.²⁹¹ This ‘commodity-isation’ of land ownership is a recurring theme in this research. It is reflected in the conflict between use value and exchange value

²⁸⁷ *ibid.*, p. 6.

²⁸⁸ Moore, M.E. and Globe, J.M. *Title Searching and Conveyancing in Ontario* (5th edn Canada, LexisNexis 2003) p. 12.

²⁸⁹ Kostova, T. *Moving Towards eConveyancing in Ireland: An Analysis* (LL.M. thesis University College Cork 2010) p. 56.

²⁹⁰ Rätsep, H. ‘Estonian Land Registration and Experiences in Electronic Conveyancing’ CINDER XVI International Congress on Registration Law Valencia Spain (20 – 22 May 2008) http://www.cinder2008.com/ingles/detalle_ponencia.cfm?id_ponencia=297 accessed 26 August 2010 p. 3.

²⁹¹ Takács, E. ‘Land Registration in Hungary, Legal Effects of Registration, Legal Guarantees, Legality Checks’ CINDER XVI International Congress on Registration Law Valencia Spain (20 – 22 May 2008) http://www.cinder2008.com/ingles/detalle_ponencia.cfm?id_ponencia=302 accessed 26 August 2010 p. 5

which has become more evident in the development of complex commodities. Use value reflects the value an occupier will put on having possession and use of a property and this aspect is particularly important in the context of the family home. By contrast, exchange value focuses on the monetary value of the property, as a commodity or asset, the value of which can be realised by sale, lease, exchange or mortgage.

Land registration must provide prompt case management, reliability, simplicity, elasticity and legal security.²⁹² For many registries the move to eRegistration provides the opportunity to fulfill this brief. While acknowledging it is:

“axiomatic that reducing the number of procedures generates simplicity and efficiency...[Clancy is of the view that] there is a limit to the level of simplification that is effective...Obviously, if a figure lower than one [procedure] is achieved, then there is no system. As a corollary, on what basis do we then presume that a number greater than one is a weakness? Is there a risk that a disproportionate emphasis on reducing the number of procedures could lead to an erosion of the integrity and security of registration?’²⁹³

Similarly Arruñada warns that some solutions do not achieve real simplification but instead lead to a mere transfer of paperwork and that standardisation can lead to a more abstract register which forces the parties to rely on contract documents.²⁹⁴ Gaining access to these documents can then constrain the transaction as they will be held by individual stakeholders.²⁹⁵

There are, however, few dissenting voices among the overwhelming support expressed for eConveyancing. Perry says there has been widespread acceptance by lawyers that eConveyancing would be a change for the better partly due to their reluctance to be seen as backward looking and partly due to feeling that the introduction of new technology is inevitable.²⁹⁶ He is of the view that these facts tend to stifle any opposition to the introduction of eConveyancing and such unquestioning

²⁹² *ibid.*

²⁹³ Clancy, D. ‘Benchmarking Land Registration’ Registering the World Conference Dublin (26 - 28 September 2007) http://www.landregistry.ie/eng/Dublin_Conference_2007/Conference_Papers/ accessed 9 September 2010 p. 11.

²⁹⁴ Arruñada, B. ‘Leaky Title Syndrome?’ (April 2010) *N.Z.L.J.* p. 119.

²⁹⁵ *ibid.*

²⁹⁶ Perry, R. ‘E-Conveyancing – a critical view’ (2003) 8(2) *C.P.L.J.* p. 26.

acceptance often results in a lack of any real scrutiny.²⁹⁷ Given that the implementation of any new system is a challenging process and failures are not uncommon, “it is unwise to assume that the introduction of e-conveyancing is, at a practical level, in any way inevitable, as is often asserted.”²⁹⁸ His views are very much aligned with some of those expressed in the diffusion-innovation literature referred to earlier.²⁹⁹

One of the main benefits of eConveyancing is often cited as cost savings. Perry takes the view that the absence of cost savings, or even a substantial increase in costs, are not necessarily by themselves reasons not to adopt eConveyancing if the new system is more efficient than the old system.³⁰⁰ He points out that the economic benefit in the long term of IT investment is a difficult area and generates a lot of disagreement. It is rare that the effects of different systems are compared.³⁰¹ Perry cites Mähring as evidence of research that suggests the risks of large IT projects are not properly appreciated by those who end up bearing the consequences should things go wrong.³⁰²

Sneddon having carried out a detailed risk assessment over 5 months of the Australian NECS system expressed the view that eConveyancing systems “may have more concentrated points of failure than paper based systems, for the same reasons that they generate greater efficiencies.”³⁰³ Griggs argues that eConveyancing will have many advantages but also questions if it will allow those committing fraud to offend on a wider scale.³⁰⁴

Having looked at the limited information on costing available for a number of systems Perry takes the view that “the argument that the introduction of e-conveyancing will make conveyancing cheaper is almost certainly incorrect” but

²⁹⁷ Perry, R. ‘E-conveyancing: problems ahead?’ (2003) *Conv.* p. 215.

²⁹⁸ Perry, R. ‘E-Conveyancing – a critical view’ (2003) 8(2) *C.P.L.J.* p. 26.

²⁹⁹ See paragraphs five to seven of 3.3.

³⁰⁰ *ibid.*, p. 29. While an increase in costs might be justified for other benefits it would be difficult to justify any substantial increase in costs even if short term.

³⁰¹ For one example see Miceli, T.J. and others ‘Title Systems and Land Values’ (October 2002) 45 *J. L. & Econ.* 565 – 582.

³⁰² Perry, R. ‘E-Conveyancing – a critical view’ (2003) 8(2) *C.P.L.J.* p. 29.

³⁰³ Sneddon, M. ‘Risk Assessment and Management in Electronic Conveyancing’

Registering the World Conference Dublin (26 - 28 September 2007)

http://www.landregistry.ie/eng/Dublin_Conference_2007/Conference_Papers/ accessed 9 September 2010 p. 9.

³⁰⁴ Griggs, L. ‘Torrens Title in a Digital World’ (September 2001) 8(3) *Murdoch University Electronic Journal of Law* http://www.murdoch.edu.au/elaw/issues/v8n3/griggs83_text.html accessed 6 October 2011.

qualifies this to the extent that costs for land registration may be reduced as the process of updating the register is automated.³⁰⁵ His conclusion is that claims made about the cost advantages of eConveyancing do not usually withstand detailed scrutiny and the costs are usually substantially underestimated.³⁰⁶ He notes that in New Zealand and Ontario project costs were more than originally anticipated.³⁰⁷ These costs ultimately have to be paid by the consumer.³⁰⁸ Butt also notes that the many criticisms leveled at eConveyancing is how much the system will cost and the problem is we just don't know.³⁰⁹

Brown notes that inevitably there will be a fee for the operating licence and premiums on indemnity insurance may increase³¹⁰ but this will be offset by efficiency savings. However in Ontario LawPRO the insurer for lawyers "changed their requirements in order to take into consideration the changes to real estate practice from electronic registration....[and] waived certain deductibles related to electronically registered documents provided certain protocols have been followed."³¹¹ Thus it may be possible, given the increased certainty in the system, to negotiate savings with the professional insurers.

Arruñada is also critical of eConveyancing advances.³¹² He looks at some of the tradeoffs involved in substituting tasks performed by humans with computers and expresses concern about the risk of transferring costs and risks instead of reducing them.³¹³ He is also of the view that the benefit of immediacy of results may be illusory because eConveyancing makes indefeasibility unsustainable in the long

³⁰⁵ Perry, R. 'E-Conveyancing – a critical view' (2003) 8(2) *C.P.L.J.* p. 29.

³⁰⁶ For example in Australia an audit was called for after it was alleged that the Victorian government spent an estimated \$50m to build its state based eConveyancing system which had been used for only one completed property transaction; see Merritt, C. 'E-conveyancing plan thrown a \$2m lifeline' *The Australian* 19 June 2009.

³⁰⁷ Perry, R. 'E-conveyancing: costs to the user' (2003) 153 *NLJ* p. 1696.

³⁰⁸ Perry, R. 'E-Conveyancing – a critical view' (2003) 8(2) *C.P.L.J.* p. 29. One of the additional costs is software licensing fees.

³⁰⁹ Butt, P. *Electronic Conveyancing: A Practical Guide* (2006 Thomson Sweet & Maxwell London) p. 5.

³¹⁰ Brown, D. 'Electronic conveyancing – beware and prepare' (2003) 153 *NLJ* p. 626.

³¹¹ Murray, K. 'Electronic registration and other modernization initiatives in Ontario's land registration system' Law Reform Commission Annual Conference (2004) <http://www.lawreform.ie/Annual%20Conference%202004.PDF> accessed 18 February 2009 p. 20.

³¹² Arruñada, B. 'Leaky Title Syndrome?' (April 2010) *N.Z.L.J.* 115-120.

³¹³ *ibid.*, p. 118. Grinlinton, D. 'The Registrar's Powers of Correction' in Grinlinton, D. (ed) *Torrens in the Twenty-first Century* (Wellington, LexisNexis 2003) at p. 218 notes that transactions remotely registered by conveyancers may not be subject to the same scrutiny and there is a strong possibility that a substantial number of errors may infect the system and sit latent on the register possibly for many years.

term due to a greater incidence of fraud³¹⁴ and thus will debase the registry into a mere recording of rights.³¹⁵ His perspective is, however, on the basis of the New Zealand automatic system and as Kostova puts it so articulately “if solicitors are not commonly forging their clients’ signatures in the paper-based system, the introduction of digital signatures is not likely to lure them over to the dark side of fraud.”³¹⁶

Arruñada gives the example of the Victoria system which cost \$40-50 million but only registered a single pilot transaction in its first 18 months of operation because both banks and conveyancers refused to participate.³¹⁷ Under pressure from the banks a National Electronic Conveyancing System (NECS) was under consideration but in 2010 NECS was replaced by National E-Conveyancing Development Limited. This project called PEXA³¹⁸ is currently in a design and quote phase.³¹⁹

The experience in England and Wales also provides a stark warning to any jurisdiction tempted to view eConveyancing as an easy task. The chain matrix project and Home Information Pack (HIP) initiatives were both shelved after a considerable amount of money had been expended³²⁰ and more recently the move to eTransfers has been put on hold.³²¹ Kostova notes that initial plans are often ambitious, with consideration given to full end-to-end eConveyancing, but “after some deliberation and consultation, a slightly more modest solution is usually introduced instead.”³²² England and Wales provides a timely example of this.³²³

³¹⁴ Thomas is also critical of the New Zealand system on the basis that it makes the title less secure due to the removal of the paper title document and non-intervention of registry staff. Also the new system transfers more risk to conveyancers for fraudulent and incorrect transactions. See Thomas, R. ‘Fraud, Risk and the Automated Register’ in Grinlinton, D. (ed) *Torrens in the Twenty-first Century* (Wellington, LexisNexis 2003) p. 366-367.

³¹⁵ Arruñada, B. ‘Leaky Title Syndrome?’ (April 2010) *N.Z.L.J.* p. 118.

³¹⁶ Kostova, T. *Moving Towards eConveyancing in Ireland: An Analysis* (LL.M. thesis University College Cork 2010) p. 28.

³¹⁷ Arruñada, B. ‘Leaky Title Syndrome?’ (April 2010) *N.Z.L.J.* p. 118.

³¹⁸ Short for property exchange Australia.

³¹⁹ See <http://www.nationaleconveyancing.com.au/newsandupdates>.

³²⁰ Cross, M. ‘Land Registry climbdown is welcome sign of change’ *The Guardian* 19 February 2009 <http://www.guardian.co.uk/technology/2009/feb/19/land-registry-data> accessed 30 March 2012 and Department for Communities and Local Government *HIPs are history: Pickles suspends Home Information Packs with immediate effect* Press release 20 May 2010 <http://www.communities.gov.uk/news/newsroom/1591783> accessed 30 March 2012.

³²¹ HM Land Registry *Report on responses to e-conveyancing secondary legislation part 3* http://www1.landregistry.gov.uk/upload/documents/econveyancing_cons.pdf accessed 30 March 2012

³²² Kostova, T. *Moving Towards eConveyancing in Ireland: An Analysis* (LL.M. thesis University College Cork 2010) p. 39.

The critical viewpoints expressed by Perry and Arruñada have failed to find widespread support.³²⁴ Perry's opinion that there is a lack of real scrutiny and unquestioning acceptance of eConveyancing advances,³²⁵ is certainly evident in the lack of empirical data put forward by commentators advocating eConveyancing. Connolly expresses the view that Irish house purchasers could save as much as forty million euro per year in transaction costs through efficiency savings³²⁶ but she does not explain the basis for this figure.

Many commentators and politicians see eConveyancing as a panacea to solve all ills. In commenting on the reform of land law in Ireland in 2006 the then Tánaiste and Minister for Justice, Equality and Law Reform expressed the view that "eConveyancing has, I believe, the capacity to simplify the conveyancing process and reduce costs for all those involved in property transactions and it is, therefore, a prize worth striving for."³²⁷

There is certainly the potential for significant improvement in the Irish conveyancing process and many of these have been articulated in interviews with representatives from stakeholder groups.³²⁸ Whether eConveyancing can deliver these improvements has yet to be determined and much depends on the system design.

The skepticism expressed by a minority of commentators has failed to halt the ongoing advance of IT into the conveyancing process and surely a regulated, organised, communal system has to provide more security for property transactions over and above that offered by ordinary email. Even if property owners are not

³²³ HM Land Registry *Report on responses to e-conveyancing secondary legislation part 3* http://www1.landregistry.gov.uk/upload/documents/econveyancing_cons.pdf accessed 30 March 2012 acknowledging the move away from etransfers towards electronic applications with scanned transfers.

³²⁴ Browning provides another dissenting voice. He has been vocal in his prediction that England's eConveyancing project will crash and burn. See Browning, B. 'E-conveyancing- it will crash and burn' <http://www.textor.com/e-conveyancing-updated.html> accessed 9 March 2012.

³²⁵ Perry, R. 'E-Conveyancing – a critical view' (2003) 8(2) *C.P.L.J.* p. 26.

³²⁶ Connolly, F. 'E-Conveyancing: who will benefit?' BSc Hons Dissertation (October 2007) p. 20.

³²⁷ McDowell, M. 'Opening address' First Law Land Law and Conveyancing Law Reform Conference Dublin (2006) http://www.justice.ie/en/JELR/Pages/Speech_on_land_law_and_conveyancing accessed 3 September 2010.

³²⁸ Connolly, F. 'E-Conveyancing: who will benefit?' BSc Hons Dissertation (October 2007) p. 36 – 51. See also Killilea, M. 'eRegistration in Ireland – An Assessment of the Transferability of the Queensland Model' Dissertation Dublin Institute of Public Administration (April 2010).

demanding change, is it not incumbent upon key stakeholders to deliver improvements in the process whenever possible in the public interest? Obviously what is in the public interest may be a matter of debate and this research hopes to contribute to that dialogue.

It is important to note that the failures, and much of the critical commentary, relate to jurisdictions that have implemented, or attempted to implement, automatic eRegistration or attempted to deliver initiatives without stakeholder consultation and agreement. It can be seen from developments to date that Ireland is not likely to encounter these pitfalls.³²⁹ Thus provided the system design is robust and based on a sound business case there is every reason to be optimistic for the success of the Irish eConveyancing project.

3.4 Development of eConveyancing in Ireland and Ontario

The development of eConveyancing to date in Ireland and Ontario is set out under the headings of eRecords, eApplication, eRegistration and eConveyancing. The initiatives in each jurisdiction are examined based on the degree to which they meet the criteria of each phase as defined in the neutral vocabulary and as set out earlier in this chapter.

3.4.1 eConveyancing in Ireland

Background

The Irish Law Reform Commission published its report entitled eConveyancing: Modelling of the Irish Conveyancing System³³⁰ in 2006. BearingPoint were hired as consultants and their report is published as an appendix to the Law Reform Commission's Report. Together they have become known as the BearingPoint report.

The Law Reform Commission identified three workstreams as setting out a roadmap for eConveyancing; a development workstream, process improvement workstream

³²⁹ This is due to the fact that Ireland does not propose to implement automatic eRegistration and there has been considerable stakeholder consultation since publication of the Law Reform Commission report in 2006.

³³⁰ The Law Reform Commission 'eConveyancing: Modelling of the Irish Conveyancing System' (2006) The Law Reform Commission (LRC 79 – 2006).

and legislative changes workstream.³³¹ While there has been much legislative reform, to date there has been less progress on the other workstreams. However even before the BearingPoint report the Irish Land Registry was engaged in modernisation that fell within the remit of eRegistration.

eRecords

Initially the registration authority commenced a major programme of data capture of existing paper documents in tandem with the development of a new system for extensive on-line searching and retrieval of title records. This new system, introduced in 1999, was called the Electronic Access Service (EAS) and then renamed as landdirect.ie in April 2006. This service is the public interface of an internal Land Registry project entitled Integrated Title Registration Information System (ITRIS). ITRIS provides support for staff throughout the registration process including electronic storage and retrieval of ownership records, tracking and processing of applications, generation and transmission of electronic correspondence and provision of key statistics.³³² The title records are called folios³³³ and title plans. Title plans are the maps attached to the folios and they were previously known as filed plans. Folios set out details of the registration and any burdens thereon.

Part of the registration authorities' strategy to deliver its services electronically required the conversion of all paper title records into electronic records. This conversion programme commenced early in 2002 and was completed in 2004. The conversion of these paper records into electronic format involved the scanning and indexing of 6.4 million pages of official records and this data capture led to improved timeliness and speed of service with instantaneous inspections of title records, automated copying services and a reduction in time taken to process certain applications.³³⁴

³³¹ *ibid.*, p. 11.

³³² Treacy, C. and O'Sullivan, J. 'Land registration in Ireland – current position and future developments' Law Reform Commission Annual Conference (2004) <http://www.lawreform.ie/Annual%20Conference%202004.PDF> accessed 10 March 2009 p. 5.

³³³ In Ontario the title record is called the parcel register. For an example see Moore, M.E. and Globe, J.M. *Title Searching and Conveyancing in Ontario* (5th edn Canada, LexisNexis 2003) p. 166.

³³⁴ Treacy, C. 'The Property Registration Authority – Building on Progress to Date' First Law Land Law and Conveyancing Law Reform Conference Dublin (2006) p. 33 - 34.

EAS and subsequently landdirect.ie is an internet based service delivery system. It was the first eGovernment project to 'go live' in the Irish civil service.³³⁵ The main objective was to simplify access to records and improve the timeliness of information thus providing a better quality and more responsive service.³³⁶ Authorised users can do on-line searches, view and print ownership records, view and track the progress of pending applications, apply for copies of records and prepare and complete applications for registration. Initially those who are not authorised users could access some of this information but only by contacting the registering authority in person or by post. In 2011 however the registration authority started to make the searching, viewing and printing of ownership records available online to the general public.

The legislation to support these changes was introduced in 2006. Section 50 of the Registration of Deeds and Title Act 2006³³⁷ (hereafter the 2006 Act) amended the definitions in the 1964 Act by providing that record would include information in electronic or other non-legible form and register would include and be deemed to always have included any register kept in electronic or other non-legible form.

By 2008 over 95% of all searches and applications for certified copy documents were conducted on-line through landdirect.ie.³³⁸ Full access to all maps via a digital mapping project was completed in August 2010. This involved the conversion into digital format of approximately 2.5 million land parcel boundaries³³⁹ and brought to an end a ten year programme of converting the national title register into digital format.³⁴⁰ This completed the eRecords phase of eRegistration.

eApplication

³³⁵ *ibid.*, p. 34.

³³⁶ Treacy, C. and O'Sullivan, J. 'Land registration in Ireland – current position and future developments' Law Reform Commission Annual Conference (2004) <http://www.lawreform.ie/Annual%20Conference%202004.PDF> accessed 10 March 2009 p. 5.

³³⁷ No. 12 of 2006.

³³⁸ Clancy, D. 2008. 'From caveat emptor towards full disclosure – developments in Ireland' United Nations Economic Commission for Europe's Working Party on Land Administration Workshop on the Influence of Land Administration on People and Business (2008) <http://wpla.uredjenazemlja.hr/prezentacije/Presentation%20Caveat%20Emptor%20to%20Vendor%20Disclosure%208-9-08.pdf> accessed 21 January 2009 p. 6.

³³⁹ Treacy, C. 'Doing the Deed' (March 2007) 101(2) *Law Society Gazette* p. 31

³⁴⁰ Property Registration Authority 'Completion of the Digital Mapping Project' http://www.prai.ie/eng/About_Us/eZine1/Completion_of_the_Digital_Mapping_Project.html accessed 16 November 2010.

The registration authority has also moved into eApplication. It developed an electronic application form called eForm 17 that can be lodged using landdirect.ie. Upon lodging an eForm 17 users receive a dealing reference number instantaneously. As eApplication retains the paper documents any errors come to light when the paper is lodged. In the case of a conflict between the electronic application and the paper, the paper document prevails as this is the legally effective application.

This eApplication element of eRegistration was introduced in late 2002 and by 2007 this facility had grown to represent over 32% of all applications for registration and over 98% of some services were conducted online exclusively.³⁴¹

The growth of landdirect.ie has been a tremendous success for the Irish registration authority as represented by the following chart.³⁴²

Year	2000	2006	2007	2008	2009	2010
No. of registered users	1,700	10,900	12,741	13,872	14,636	15,775
No. of online transactions	0.2 million	2.2 million	2.3 million	2.5 million	2.6 million	2.5 million

Table 2: Growth of online services: landdirect.ie portal

While anyone can apply to be a registered user of the service the vast bulk are solicitors and law searchers.³⁴³ Other users include lenders, government departments, surveyors and law enforcement agencies.

As at 1 March 2012 52% of applicants use the online application form,³⁴⁴ 53% use the eDischarge facility³⁴⁵ and 95% of applications for certified copy documents are

³⁴¹ O'Sullivan, J. 'eRegistration and eConveyancing in Ireland – the story so far...' Registering the World Conference Dublin (26 - 28 September 2007) http://www.landregistry.ie/eng/Dublin_Conference_2007/Conference_Papers/ accessed 9 September 2010 p. 4.

³⁴² James O'Boyle Financial Controller Property Registration Authority by email 22 February 2012.

³⁴³ Interview with Greg McDermott ICT Manager Property Registration Authority 1 March 2012 confirmed that solicitors and law searchers account for in excess of 90% of users.

done online.³⁴⁶ Taking into account the fact that the eDischarge system does not facilitate partial discharges 53% is a high percentage of take up. The PRA confirms that there has been a 99.9% accuracy rate in these applications.³⁴⁷ This compares very favourably with overall rejection rates.³⁴⁸

Year	2007	2008	2009	2010	2011
Rejections	17.6%	12%	9%	12%	14%

Table 3: Overall rejection rates

There have been productivity gains as a result of the move towards electronic services particularly the folio data capture completed in 2009 and digital mapping project completed in 2010.³⁴⁹ In relation to eDischarges the PRA estimates that there has been about an 85% reduction in manual staff input as a result of the initiative.³⁵⁰ The growth of electronic services has meant that the PRA has delivered instantaneous access to information to its customers and also maintained ongoing services despite significant reductions in staff.³⁵¹

The 2010 Annual Report confirms that all electronic applications for eDischarge and eNursing Home charges³⁵² were completed within 2 days.³⁵³ 75% of mainstream cases for registration are completed within 10 working days and 80% of online

³⁴⁴ eForm 17.

³⁴⁵ This facility was the first phase of eRegistration and it provides for the electronic release of registered charges.

³⁴⁶ Interview with Greg McDermott ICT Manager Property Registration Authority 1 March 2012.

³⁴⁷ *ibid.*

³⁴⁸ James O'Boyle Financial Controller Property Registration Authority by email 22 February 2012.

³⁴⁹ The Property Registration Authority 'Strategic Plan 2010 – 2012' (2010) The Property Registration Authority

[http://www.landregistry.ie/eng/Publications/Strategic Plan/Strategic Plan 2010 2012.pdf](http://www.landregistry.ie/eng/Publications/Strategic%20Plan/Strategic%20Plan%202010%202012.pdf) accessed 17 February 2012 p. 24.

³⁵⁰ Interview with Greg McDermott ICT Manager Property Registration Authority 1 March 2012.

³⁵¹ The Property Registration Authority 'Strategic Plan 2010 – 2012' (2010) The Property Registration Authority

[http://www.landregistry.ie/eng/Publications/Strategic Plan/Strategic Plan 2010 2012.pdf](http://www.landregistry.ie/eng/Publications/Strategic%20Plan/Strategic%20Plan%202010%202012.pdf) accessed 17 February 2012 p. 24. See also The Property Registration Authority 'Annual Report 2010' (2011) The Property Registration Authority

[http://www.landregistry.ie/eng/Publications/Annual Reports/Annual Report 2010.pdf](http://www.landregistry.ie/eng/Publications/Annual%20Reports/Annual%20Report%202010.pdf) accessed 17 February 2012 p. 22.

³⁵² This was the second phase of eRegistration and allows the Health Services Executive to electronically register charges created under the Nursing Homes Support Scheme.

³⁵³ The Property Registration Authority 'Annual Report 2010' (2011) The Property Registration Authority

[http://www.landregistry.ie/eng/Publications/Annual Reports/Annual Report 2010.pdf](http://www.landregistry.ie/eng/Publications/Annual%20Reports/Annual%20Report%202010.pdf) accessed 17 February 2012 p. 15.

applications for folios and title plans are issued within 24 hours. In addition during 2010 there was a 32% reduction in the backlog of casework in the Land Registry.³⁵⁴ Thus eApplication has proved to be a successful initiative thus providing a framework for eRegistration.

eRegistration

The third strategic objective of the PRA is to contribute to the eConveyancing programme³⁵⁵ and this will be done by implementing core elements centered around eRegistration services. The key principles of the eRegistration project are standardised forms, no lodgment of paper documents, registrations relating to registered land only, voluntary usage incentivised by differential fees and payment of registration fees by EFT.³⁵⁶

The first element of eRegistration went live in March 2009.³⁵⁷ This was eDischarges with a new system for electronic release of registered charges.³⁵⁸ This project developed a secure system for releasing registered charges where no paper is lodged, issued or stored.³⁵⁹ The electronic discharge is lodged by the lender and in order to facilitate this there is no fee.³⁶⁰ The system is automated not automatic as the registrar continues to sign off on the cancellation of charges from the register. This system won the state body category at the Public Sector Times 2010

³⁵⁴ *ibid.*

³⁵⁵ The Property Registration Authority 'Strategic Plan 2010 – 2012' (2010) The Property Registration Authority http://www.landregistry.ie/eng/Publications/Strategic_Plan/Strategic_Plan_2010_2012.pdf accessed 17 February 2012 p. 12.

³⁵⁶ O'Sullivan, J. 'The Introduction of e-Discharges' Virtual Reality – Towards the Electronic Conveyance Law Society of Ireland Technology Committee Conference Dublin (7 November 2008). See also O'Sullivan, J. 'eRegistration and eConveyancing in Ireland – the story so far...' Registering the World Conference Dublin (26 - 28 September 2007) http://www.landregistry.ie/eng/Dublin_Conference_2007/Conference_Papers/ accessed 9 September 2010 p. 7.

³⁵⁷ See Law Society of Ireland 'New Conveyancing Initiatives – eDischarge and QED Form' (2009) 103(2) *Law Society Gazette*. See also the Land Registration Rules 2008 (SI 326/2008).

³⁵⁸ See www.edischarges.ie/login.aspx.

³⁵⁹ See Clancy, D. 2008. 'From caveat emptor towards full disclosure – developments in Ireland' United Nations Economic Commission for Europe's Working Party on Land Administration Workshop on the Influence of Land Administration on People and Business (2008) <http://wpla.uredjenazemlja.hr/prezentacije/Presentation%20Caveat%20Emptor%20to%20Vendor%20Disclosure%2008-9-08.pdf> accessed 21 January 2009 p. 5.

³⁶⁰ Land Registration (Fees Relating to Discharges Lodged by Electronic Means) Order 2009 (SI 52/2009).

eGovernment Awards³⁶¹ and usage of the eDischarge system has exceeded the land registry's expectations.³⁶² Approximately 90 per cent of the lending market is signed up to use the system.

Some of the reasons for this may include the fact that the system is subsidised in order to incentivise take up. There is no fee charged to the lender. The lender is acting directly in respect of its own charges so there is no agency problem. Also it could be said that lenders are used to the need for secure systems and thus there may have been less of a familiarisation issue. The project board also engaged in extensive consultation with the lenders to ensure that the system addressed their security concerns.

The registration authority also developed an online portal, eRegistration.ie, for the electronic registration of all transactions affecting the title register.³⁶³ The second eRegistration service was added to this portal in January 2010. This allows the Health Services Executive to electronically register charges created under the Nursing Homes Support Scheme. The signature of the chargee is not required and thus the power to create the charge rests solely with the Health Services Executive.

Other electronic registration of title services will be developed through this portal in the coming years. The project board includes *inter alia* representatives from the Revenue Commissioners, Law Society, Irish Mortgage Council and the Companies Registration Office.

The objective is to extend incrementally the range of applications which can be registered without the presentation of paper documents.³⁶⁴ To date paper documents are still required for all transactions save those falling under the eDischarge system and the Nursing Homes Support Scheme. It should be noted however that while a specific paper discharge may not be required in each transaction those lenders who sign up to the eDischarge system are required to execute formal one off documentation.

³⁶¹ See www.irishgovernmentawards.ie/winners-2010.html.

³⁶² McHugh, P. 'eRegistration; The story so far and next steps' Presentation to Law Society 30 April 2010.

³⁶³ www.eregistration.ie.

³⁶⁴ O'Sullivan, J. 'eRegistration and eConveyancing in Ireland – the story so far...' Registering the World Conference Dublin (26 - 28 September 2007) http://www.landregistry.ie/eng/Dublin_Conference_2007/Conference_Papers/ accessed 9 September 2010 p. 6.

Standard forms of charges have now been introduced as of 1 March 2012 which will facilitate the electronic registration of charges.³⁶⁵ These are one page forms specifically designed to facilitate the introduction of eRegistration and eConveyancing.

The next phase of eRegistration is due for release at the end of 2012. This will allow registered users to create and authorise full transfers and charges and to have them approved by other users. The system will allow information to be taken from the title register into the documents and also allow the transfer of data from case management systems. This will avoid multiple data entry and minimise the potential for errors. The documents will be structured based on the standard forms and thus applications are less likely to be rejected.

A dealing number will be available at an earlier stage in the transaction and while this will confer no priority, it will facilitate collaboration based on a single identifier. There is the potential for draft entries on the register to be displayed prior to finalisation of the application for registration so the applicant can be sure that the registration will accurately effect the agreed transaction. There is also the possibility for notifications to be built into the system which may increase transparency and visibility for all parties.

This phase of eRegistration is currently in development and the final detailed functionality has yet to be agreed. While it will go some way towards advancing the overall eConveyancing project it should be noted that the documents will still need to be printed, signed by a wet signature and registration will only proceed based on a paper application to the registry. Until electronic signatures are implemented full dematerialisation cannot be adopted.

McDonagh and White refer to a number of very successful Irish eGovernment initiatives including the PRA electronic access service (www.landregistry.ie/eng/landdirect_ie/).³⁶⁶ This service along with other PRA

³⁶⁵ Land Registration Rules 2011 (SI 559/2011)

³⁶⁶ McDonagh, M. and White, F. 'eGovernment in Ireland: An evaluation of the legal and policy framework' (2008) 56(1) *Administration* p. 19 – 55. Note that in the United Nations Global E-Government Survey of 2012 Ireland was ranked 34th as against Canada's 11th place. See http://www.unpan.org/egovkb/global_reports/08report.htm accessed 17 April 2012.

eRegistration initiatives have won numerous awards.³⁶⁷ Kostova points out that no award is in itself a guarantee of a successful operation but that take up of the system is impressive.³⁶⁸ The achievement to date augurs well for the success of a wider eConveyancing project.

eConveyancing

eRegistration is seen by the registration authority:

“as a distinct subset of activities but also as a critical element within the wider eConveyancing process....[thus] all plans and activities arising from the eRegistration project are carefully designed to advance, complement and integrate with the wider national eConveyancing agenda.”³⁶⁹

Thus while the PRA has not taken responsibility for the wider eConveyancing project it is working with other stakeholder groups to advance that agenda. This co-operation is vital so that eRegistration and eConveyancing do not conflict and also much of eConveyancing is based on legislative reform that impacts on title registration.

In tandem with these eRegistration developments some eConveyancing type initiatives have also been implemented. One such initiative is the introduction of a new streamlined procedure, called the QeD (Quick electronic Discharge), to provide a standardised approach for communications between lenders and solicitors.³⁷⁰ The Irish Institution of Surveyors has also established an Inter-Professional Task Force to look at property boundaries and how boundary information is reflected by the state bodies and this has provided an opportunity for stakeholder groups to collaborate on reform proposals.³⁷¹

³⁶⁷ The Property Registration Authority ‘Annual Report 2010’ (2011) The Property Registration Authority
http://www.landregistry.ie/eng/Publications/Annual_Reports/Annual_Report_2010.pdf
accessed 17 February 2012 p. 8.

³⁶⁸ Kostova, T. *Moving Towards eConveyancing in Ireland: An Analysis* (LL.M. thesis University College Cork 2010) p. 17 – 18.

³⁶⁹ O’Sullivan, J. ‘eRegistration and eConveyancing in Ireland – the story so far...’ Registering the World Conference Dublin (26 - 28 September 2007)
http://www.landregistry.ie/eng/Dublin_Conference_2007/Conference_Papers/ accessed 9 September 2010 p. 5.

³⁷⁰ This can be accessed at www.ibf.ie/qed.asp See also the Law Society of Ireland ‘New Conveyancing Initiatives – eDischarge and QED Form’ (2009) 103(2) *Law Society Gazette*.

³⁷¹ <http://www.tfpb.ie/index.html>.

While there have been no significant eConveyancing advances there has been much dialogue and debate about the path that Ireland should take and a clear vision is emerging of how eConveyancing would operate in Ireland. The proposals put forward by the Law Reform Commission and Law Society have been universally supported by stakeholder groups and have formed a benchmark for reform.³⁷²

Thus to date eRecords and eApplication have been achieved in Ireland. Only a limited eRegistration service is in operation but new initiatives are expected at the end of 2012. No specific eConveyancing advances have been launched though there is a mandate and platform for reform agreed by the main stakeholder groups.

3.4.2 eConveyancing in Ontario

Background

In 1968 the Ontario provincial government asked the Law Reform Commission to study the land registration system and make recommendations.³⁷³ This examination led to the publication of a report in 1971 that recommended sweeping reforms including the conversion of unregistered titles (Registry records) to registered titles (Land Titles), automation of records and electronic searching and registration. While the government accepted the recommendations it was not until the late 1980's that the process of reform began. Murray notes that the Ontario government decided "that the paper-based system of recording interests in land should be automated and services needed to be delivered electronically."³⁷⁴

This reform accelerated when:

"in the early 1990's the Ministry, in conjunction with a private sector consortium, established Teranet...The Ministry owns the land registration

³⁷² Law Society of Ireland 'eConveyancing: Back to Basic Principles. Vision of an Electronic System of Conveyancing ('eVision')' (March 2008) and The Law Reform Commission 'eConveyancing: Modelling of the Irish Conveyancing System' (2006) The Law Reform Commission (LRC 79 – 2006).

³⁷³ Donahue, D.J. and ors *Real Estate Practice in Ontario* (6th edn LexisNexis Butterworths, Canada 2003) p. 5.

³⁷⁴ Murray, K. 'Electronic registration and other modernization initiatives in Ontario's land registration system' Law Reform Commission Annual Conference (2004) <http://www.lawreform.ie/Annual%20Conference%202004.PDF> accessed 18 February 2009 p. 1.

data and develops the business rules. Teranet owns and operates the electronic system.”³⁷⁵

This partnership allowed the province to accelerate the computerisation of the land registration system³⁷⁶ and thus deliver the first eRegistration system in the world.³⁷⁷

Christensen refers to the Ontario system as an example of the reformist approach³⁷⁸ where all dealings are required to be undertaken electronically, information is prescribed rather than the forms and dealings are no longer in writing.

Ontario is on the cutting edge internationally³⁷⁹ in relation to eRegistration. It is widely acknowledged to be the first jurisdiction in the world to introduce full electronic document registration.³⁸⁰ This includes the eRecords, eApplication and eRegistration elements of eConveyancing.

Ontario moved quickly from eRecords directly to eRegistration and thus there was no eApplication phase.

eRecords

The reform process started in the late 1980's with the automation of records i.e. the eRecords phase of eConveyancing. Paper records were converted into electronic information to be stored on databases so that all information relating to registered titles would become electronically accessible.³⁸¹

³⁷⁵ *ibid.*

³⁷⁶ Donahue, D.J. and ors *Real Estate Practice in Ontario* (6th edn LexisNexis Butterworths, Canada 2003) p. 6.

³⁷⁷ Murray, K. 'Electronic registration and other modernization initiatives in Ontario's land registration system' Law Reform Commission Annual Conference (2004) <http://www.lawreform.ie/Annual%20Conference%202004.PDF> accessed 18 February 2009 p. 21.

³⁷⁸ Christensen, S. 'Electronic Land Dealings in Canada, New Zealand and the United Kingdom: Lessons for Australia' (December 2004) 11(4) *Murdoch University Electronic Journal of Law* http://www.murdoch.edu.au/elaw/issues/v11n4/christensen114_text.html accessed 12 October 2011. She contrasts this with the system in British Columbia which operates a dual paper and electronic system with voluntary opt in.

³⁷⁹ Moore, M.E. and Globe, J.M. *Title Searching and Conveyancing in Ontario* (5th edn Canada, LexisNexis 2003) Foreword.

³⁸⁰ Murray, K. 'Electronic registration and other modernization initiatives in Ontario's land registration system' Law Reform Commission Annual Conference (2004) <http://www.lawreform.ie/Annual%20Conference%202004.PDF> accessed 18 February 2009 p. 21.

³⁸¹ Donahue, D.J. and ors *Real Estate Practice in Ontario* (6th edn LexisNexis Butterworths, Canada 2003) p. 6.

During this automation process unregistered titles were converted to registered titles. The full automation of land registration records and the conversion process was completed on 31 March 2011.³⁸² Approximately 36,000 unregistered properties remain because it was determined that these titles could not be converted to registered parcels due to planning act issues, description issues, easement and water issues, conflicts of ownership and inability to establish owners or breaks in the chain of title.³⁸³

eRegistration

The Ontario Ministry began by building POLARIS (the Province of Ontario Land Registration Information System)³⁸⁴ with the objective of automating Ontario's land registration system. Following this automation the Ministry introduced electronic remote search facilities and then electronic registration of land title documents through software called Teraview. This eRegistration system was developed by Teranet³⁸⁵ in conjunction with the Ministry. It was launched as a pilot project in 1999 and subsequently implemented gradually across the province on a county by county basis. The first electronic land registration took place on 25 January 1999 at London in the County of Middlesex and in "less than five years, the majority of land titles searches and land registrations...moved from an archaic paper-based records system to the most sophisticated fully electronic registration system in the world."³⁸⁶

The land registration system is the responsibility of the Ministry and Teranet under contract facilitates the delivery of this service through Teraview.³⁸⁷ The system provides an automated land registration database and web based gateway for registration.³⁸⁸ Users must be registered with Teranet in order to lodge dealings electronically. The system allows for the creation and lodgement of registration documents. Pertinent information is automatically populated from the POLARIS

³⁸² Alex Radley Legal and Technical Officer Service Ontario by email 7 June 2012.

³⁸³ *ibid.*

³⁸⁴ Donahue, D.J. and ors *Real Estate Practice in Ontario* (6th edn LexisNexis Butterworths, Canada 2003) p. 6.

³⁸⁵ Teranet Enterprises Inc. See <http://www.teranet.ca/> Teranet also offers a range of property related services across Canada. One example is AVMs to lenders called Purview/Reavs.

³⁸⁶ Moore, M.E. and Globe, J.M. *Title Searching and Conveyancing in Ontario* (5th edn Canada, LexisNexis 2003) p. 455.

³⁸⁷ Alex Radley Legal and Technical Officer Service Ontario by email 7 June 2012.

³⁸⁸ Christensen, S. 'Electronic Land Dealings in Canada, New Zealand and the United Kingdom: Lessons for Australia' (December 2004) 11(4) *Murdoch University Electronic Journal of Law* http://www.murdoch.edu.au/elaw/issues/v11n4/christensen114_text.html accessed 12 October 2011.

database into the draft documents which are then shared electronically between the lawyers. Once certified by the lawyer for each party with an electronic signature the documents are lodged for registration.³⁸⁹

The documents are created in an electronic format and are also transmitted and filed electronically. “The result is an all-electronic, paperless system, where documents are created, submitted and maintained in electronic format.”³⁹⁰

Murray expresses the view that Ontario used:

“existing legislative provisions to offer a better guarantee of title to consumers and users of the land registration system. The automation of the paper records and the conversion of Registry records [unregistered titles] to Land Titles [registered titles] set the stage for the introduction of electronic registration.”³⁹¹

Thus title to land was moved from the deeds register to the title register prior to electronic processes being introduced.³⁹² However this did not apply universally with some land being automated in POLARIS but not being converted to registered title.³⁹³

Some commentators have taken issue with the benefits of reform. Moore and Globe are of the view that while the length of many searches has reduced POLARIS has not reduced the legal complexity of the title search.³⁹⁴ Because POLARIS contains titles from both registers

“lawyers and title searchers are now confronted with more title search scenarios than ever before, each with different legal requirements and administrative procedures. From a risk management point of view, it is

³⁸⁹ For the Law Society guidelines see The Law Society of Upper Canada ‘Practice Guidelines for Electronic Registration of Title Documents’ 28 June 2002 http://rc.lsuc.on.ca/pdf/eReg/july08_eregguidelines.pdf accessed 9 March 2012.

³⁹⁰ Donahue, D.J. and ors *Real Estate Practice in Ontario* (6th edn LexisNexis Butterworths, Canada 2003) p. 7.

³⁹¹ Murray, K. ‘Electronic registration and other modernization initiatives in Ontario’s land registration system’ Law Reform Commission Annual Conference (2004) <http://www.lawreform.ie/Annual%20Conference%202004.PDF> accessed 18 February 2009 p. 8.

³⁹² This refers to the creation of LTCQ and LT Plus as noted in chapter two under registrable interests.

³⁹³ There are approximately 36,000 unregistered titles.

³⁹⁴ Moore, M.E. and Globe, J.M. *Title Searching and Conveyancing in Ontario* (5th edn Canada, LexisNexis 2003) p. 16.

arguably more difficult today than in the past for lawyers to review the title search notes carefully.”³⁹⁵

The LRRRA and its Regulations and Orders set out the framework for the eRegistration initiative.³⁹⁶ The LRRRA Part 1 dealt with the modernisation of record keeping and forms. For example a common form of transfer, charge and discharge was introduced for both the unregistered and registered systems.³⁹⁷ Part II introduced automation and part III introduced electronic registration. Together they form the basis for a complete system of eRegistration.

Thus the first phase of Ontario’s eConveyancing initiative was the automation of land registration records (eRecords) and conversion of unregistered titles to registered titles. The second phase involved electronic remote search facilities and, beginning in 1999, electronic registration of registered titles, both delivered through the Teranet gateway software known as Teraview. This software provides access to POLARIS and is administered and controlled by Teranet. The eRegistration system is known as e-reg.

E-reg is described by Moore and Globe as:

“a mandatory, fully electronic or paperless registration system that will allow documents in electronic format with digital signature to be registered online from a remote location, such as a lawyer’s office, instead of actual attendance for closing and registration at a Registry office.”³⁹⁸

In order to introduce e-reg some legislative changes were required. These included the removal of the requirement that a document be in writing and signed,³⁹⁹ authority for direct electronic transmission of documents to the registered titles database,⁴⁰⁰ the fact that the electronic document will prevail over a written document⁴⁰¹ and the

³⁹⁵ *ibid.*

³⁹⁶ This Act became applicable to all land in Ontario on 1 April 1985 by O. Reg. 35/85

³⁹⁷ Donahue, D.J. and *ors Real Estate Practice in Ontario* (6th edn LexisNexis Butterworths, Canada 2003) p. 4.

³⁹⁸ Moore, M.E. and Globe, J.M. *Title Searching and Conveyancing in Ontario* (5th edn Canada, LexisNexis 2003) p. 13.

³⁹⁹ Section 21 LRRRA provides that an electronic document that deals with an interest in land is not required to be in writing or to be signed by the parties thereto and has the same effect for all purposes as a document that is in writing and is signed by the parties.

⁴⁰⁰ Section 2 Electronic Registration Act (Ministry of Consumer and Business Services Statutes) 1991 S.O. 1991 c. 44.

⁴⁰¹ Section 22 LRRRA.

introduction of law statements⁴⁰² which the registrar may rely on thus replacing the need for evidence to be provided by the lawyer.⁴⁰³ It is the information required in a document that is prescribed and not the form.⁴⁰⁴

Law statements are based on the principle of “tell me, don’t show me”. This means that lawyers are authorised to confirm certain facts without the need to provide supporting evidence.⁴⁰⁵ Only lawyers can register transfer or charges which include law statements and these account for the vast majority of such registrations.⁴⁰⁶ This principle allows certain paper documents to be removed from the process as the lawyer can confirm that perhaps a certain enquiry was made but the search result does not have to be submitted in hard copy.⁴⁰⁷ The purpose of these statements is to reduce the amount of paper filed in the registered title system.⁴⁰⁸ However while this paper may have been removed from the application to the registrar, it has not been removed from the process as all compliance with law statements must be supported by evidence retained in the file.⁴⁰⁹ This removes paper from the registry but may add to the lawyers costs.

“A Law Statement may only be made by a person who is entitled to practice law in Ontario as a solicitor.”⁴¹⁰ The system will only allow users with the proper authority and an active Law Society of Upper Canada (LSUC) number to sign a document for

⁴⁰² Section 24 LRRRA.

⁴⁰³ Murray, K. ‘Electronic registration and other modernization initiatives in Ontario’s land registration system’ Law Reform Commission Annual Conference (2004) <http://www.lawreform.ie/Annual%20Conference%202004.PDF> accessed 18 February 2009 p. 9 - 10.

⁴⁰⁴ *ibid.*, p. 10.

⁴⁰⁵ For examples of the type of statements that may be made see Donahue, D.J. and ors *Real Estate Practice in Ontario* (6th edn LexisNexis Butterworths, Canada 2003) p. 336.

⁴⁰⁶ These law statements could be seen as similar to the statement of title in Form 3 that a lawyer may give in Ireland upon first registration of a title.

⁴⁰⁷ Section 24 of the LRRRA is the statutory basis for law statements. Under section 24(2) evidence in an electronic format made in accordance with the section is deemed to comply with any requirement under a statute to provide written evidence in the form of an affidavit, declaration, statement or other written evidence despite the fact that the evidence is not in writing or signed by the parties required to provide the evidence.

⁴⁰⁸ Moore, M.E. and Globe, J.M. *Title Searching and Conveyancing in Ontario* (5th edn Canada, LexisNexis 2003) p. 424.

⁴⁰⁹ *ibid.* See also <http://rc.lsuc.on.ca/jsp/eReg/practiceIssues.jsp> and The Law Society of Upper Canada ‘Practice Guidelines for Electronic Registration of Title Documents’ 28 June 2002 http://rc.lsuc.on.ca/pdf/eReg/july08_eregguidelines.pdf accessed 9 March 2012.

⁴¹⁰ Murray, K. ‘Electronic registration and other modernization initiatives in Ontario’s land registration system’ Law Reform Commission Annual Conference (2004) <http://www.lawreform.ie/Annual%20Conference%202004.PDF> accessed 18 February 2009 p. 14. See also The Law Society of Upper Canada ‘Practice Guidelines for Electronic Registration of Title Documents’ 28 June 2002 http://rc.lsuc.on.ca/pdf/eReg/july08_eregguidelines.pdf accessed 9 March 2012.

completeness when these statements are included. The system receives a daily file from the LSUC database and verifies the lawyer is in good standing. If the user is not, the system switches the user type to “non-lawyer” and they are not able to sign a document containing law compliance statements, including transfers. Authority can only be gained by purchasing a license from Teranet and all users are authenticated. Applicants for a license must provide one piece of photographic identification or two pieces of non-photographic identification. Since 2008 users apply to Teranet for an account and if they meet the requirements Teranet will provide search access only. If the ability to register is required, users must additionally apply to the Ministry providing information about their identity, financial status and good character.⁴¹¹

Non lawyers may lodge documents but only those that do not require compliance with a law statement. They may also do searches in the system however effectively lawyers have a monopoly on conveyancing.

In practical terms authorised users of the system create and register documents from their PC using Teraview.⁴¹² The system allows users to select the appropriate document type from a list and through a series of prompts to create the document, including all necessary statements. Some information, such as property description and current owner, are pre-populated in the document from the title database. This reduces the risk of errors in this information. When a document is sent for registration the system automatically checks the information against the existing automated record. Fields and statements are programmed into the system for each document type and thus ensure that the requirements for electronic registration are met. The system will check that all mandatory fields have been completed and that inconsistent information is not provided.

There is however always the danger that unauthorised users gain access to the system. The system will have no idea who is at the keyboard and will accept anyone logged on with the required passwords. In Ontario each user is given a personalised profile, that can be stored on a diskette or USB device, that must be used to gain access to the system. This requires the user to insert their password when logging in. This identifies the user to the system and records their identity for each

⁴¹¹

http://www.ontario.ca/en/information_bundle/land_registration/content/ONT06_018594.htm

⁴¹² See Donahue, D.J. and ors *Real Estate Practice in Ontario* (6th edn LexisNexis Butterworths, Canada 2003) p. 335 - 336.

registration and each law statement. Thus Teranet can trace each registration and statement to an individual.⁴¹³

The registry report no real changes in the reporting of errors or applications to the compensation fund noting that the pre-population of data into registration documents has improved the quality of the data.⁴¹⁴

Registry staff continue to review the documentation and complete the registration through the normal certification process. This “two-step registration process existed in the legislation prior to the introduction of electronic registration”⁴¹⁵ and has been maintained in the e-reg system. Thus the electronic registration is automated but not automatic. Registration of an instrument is only complete when the entry is certified by the registrar.⁴¹⁶ The first step is the making of the application by the user of the system and the second step is the authorisation of that application by the registry staff before any change is made to the register. There is no paper lodged.

The system allows documents to be electronically shared by their creator with other users for review, amendment or approval and all communications are encrypted using Entrust technology.⁴¹⁷ All documents are digitally signed but any subsequent modification invalidates the signature and the document must then be signed again before registration.

Registration documents are prepared simply by inputting information into the system and once each document is complete it can be digitally signed by the lawyer. The system does not rely on the signatures of the parties to the transaction and instead restricts use to authorised users so as to maintain the integrity of the system. These

⁴¹³ A lawyer is prohibited from allowing any other person to use his or his diskette or password. The lawyer is also responsible for ensuring that any non-lawyers in their office who have access do not allow unauthorised persons access to the system via their diskettes. See rule 5.01 of the Rules of Professional Conduct Law Society of Upper Canada http://www.lsuc.on.ca/media/rpc_5.pdf accessed 1 August 2012.

⁴¹⁴ Alex Radley Legal and Technical Officer Service Ontario by email 7 June 2012.

⁴¹⁵ Murray, K. ‘Electronic registration and other modernization initiatives in Ontario’s land registration system’ Law Reform Commission Annual Conference (2004) <http://www.lawreform.ie/Annual%20Conference%202004.PDF> accessed 18 February 2009 p. 15.

⁴¹⁶ See Donahue, D.J. and ors *Real Estate Practice in Ontario* (6th edn LexisNexis Butterworths, Canada 2003) p. 35.

⁴¹⁷ Murray, K. ‘Electronic registration and other modernization initiatives in Ontario’s land registration system’ Law Reform Commission Annual Conference (2004) <http://www.lawreform.ie/Annual%20Conference%202004.PDF> accessed 18 February 2009 p. 15.

users must get authority from their clients before they proceed with registration. This authority to the lawyer to do the electronic registration is given by way of a direction⁴¹⁸ which is a paper document that is physically signed with a wet signature by the client.

The system was introduced in a phased manner both in terms of functionality and geographical spread. Initially e-reg was introduced on an optional basis and after a transitional period it became compulsory. It ensures that all lawyers can run their real estate practices electronically. Murray takes the view that electronic registration has:

“provided the users of the system with a more efficient method of dealing with interests in land. It has provided the Ministry with opportunities to streamline its operations. It has increased security of the records and improved the data integrity.”⁴¹⁹

As 99% of all applications for registration are now submitted electronically there has been a reduction in manual registry staff input.⁴²⁰ The following table demonstrates the growth in electronic applications and the corresponding drop in paper.⁴²¹

Yr End	2000	2003	2004	2007	2008	2011
Electronic	41,797	1,316,490	1,641,693	1,949,148	1,904,153	1,843,437
Paper	1,413,985	643,138	495,139	203,170	115,264	21,377

Table 4: Growth of electronic applications for registration

The chart below represents the same information in percentages.

Yr End	2000	2003	2004	2007	2008	2011
Electronic	2.87%	67.18 %	76.83%	90.56 %	94.29 %	99 %
Paper	97.13%	32.82 %	23.17%	9.44 %	5.71 %	1 %

Table 5: Growth in percentages

The number of system users⁴²² demonstrates the same growth pattern.⁴²³

⁴¹⁸ Donahue, D.J. and ors *Real Estate Practice in Ontario* (6th edn LexisNexis Butterworths, Canada 2003) p. 336.

⁴¹⁹ Murray, K. ‘Electronic registration and other modernization initiatives in Ontario’s land registration system’ Law Reform Commission Annual Conference (2004) <http://www.lawreform.ie/Annual%20Conference%202004.PDF> accessed 18 February 2009 p. 21.

⁴²⁰ Alex Radley Legal and Technical Officer Service Ontario by email 7 June 2012.

⁴²¹ *ibid.*

⁴²² As of January each year.

Year	2000	2004	2008	2012
Number of users	5,374	17,082	27,595	35,781

Table 6: Growth in users

On 13 June 2012 there were 36,761 users and 7,536 of these were lawyers.⁴²⁴

As of November 2010 electronic registration has been mandatory in all 54 land registry offices throughout Ontario.⁴²⁵ There is no doubt but that Ontario has implemented a full eRegistration system however there is some debate as to whether this system could be labeled eConveyancing.

eConveyancing

eConveyancing requires a number of elements as follows:⁴²⁶

- (a) the application of information technology
- (b) transmission of digital data
- (c) move from paper to electronic system
- (d) online portal or hub
- (e) electronic communication network
- (f) system to system exchange of data
- (g) information only to be typed in once
- (h) integration of technology into most or all of the conveyancing process from pre-sale to post completion of the transaction

The elements from (a) – (g) are all features of the Ontario system so the only question remains in relation to (h). Does the Ontario system electrify not just the registration aspects of conveyancing but also the entire end to end process from

⁴²³ Vicki McArthur Teranet by email 15 June 2012.

⁴²⁴ *ibid.*

⁴²⁵ Alex Radley Legal and Technical Officer Service Ontario by email 7 June 2012. There are a number of limited exceptions where a paper document may be accepted. For example where the number of properties exceeds the system limits.

⁴²⁶ See Sneddon, M. 'Risk Assessment and Management in Electronic Conveyancing' Registering the World Conference Dublin (26 - 28 September 2007) http://www.landregistry.ie/eng/Dublin_Conference_2007/Conference_Papers/ accessed 9 September 2010 p. 1 – 3, Law Society of Ireland 'eConveyancing: Back to Basic Principles. Vision of an Electronic System of Conveyancing ('eVision')' (March 2008) and The Law Reform Commission 'eConveyancing: Modelling of the Irish Conveyancing System' (2006) The Law Reform Commission (LRC 79 – 2006) p. 10 and Exhibits B and C.

pre-sale to post completion? Though as noted earlier in the chapter some elements are excluded such as the physical inspection and verification of the client's identity.

A major part of any conveyancing process is the searches that have to be done. These include searches of the title register, deeds register, judgments, known in Ontario as executions, and other registers to establish encumbrances on the title. In Ontario most of this searching is done through the Teraview system. There is a remote-access, online program for searching POLARIS and for searching writs of execution. The system offers electronic data interchange, EFT for search and registration costs and land transfer tax payments which is equivalent to the Irish stamp duty.

Moore and Globe have set out the services available.⁴²⁷ These are:

1. automated title searching
2. writ searching
3. subsearching (this is a facility to update earlier search results)
4. creation of both draft and registerable documents
5. automatic electronic calculation and payment of land transfer taxes
6. communication between lawyers throughout the document production and registration process
7. review, amendment and approval of draft documents by lawyers
8. electronic submission and registration of documents
9. transfer of funds for registration and land transfer tax fees
10. secure private communication network for authorised users
11. docket summary, Acknowledgement and Direction, document preparation, registration and land transfer tax, and deposit account and activity reports, and
12. confidentiality, security and an electronic audit trail traceable to the user.

Item 11 appears at first glance to be a repetition of the earlier services but it also includes access to standard documentation and also the printing of reports for the client file.

This is an impressive list but in considering whether the system fulfils the requirements for eConveyancing the following should be noted.

⁴²⁷ Moore, M.E. and Globe, J.M. *Title Searching and Conveyancing in Ontario* (5th edn Canada, LexisNexis 2003) p. 413.

Firstly, there are a considerable number of searches that must be done outside the system. Examples include bankruptcy, zoning, realty taxes and services.⁴²⁸

Secondly, the system does not facilitate electronic communication between all the stakeholders in the conveyancing process. The primary authorised users are lawyers and staff in the registering authority.

Thirdly, the purchase monies are not included as part of the electronic exchange.

Finally, and most importantly, the system does not include the contract stage. Part of the reason for this is likely due to the fact that it is often the real estate broker who gets this Agreement of Purchase and Sale signed by the parties. In other jurisdictions this stage in the process is done by the lawyer. Donahue and his colleagues⁴²⁹ note that these agreements are almost always prepared by real estate agents.

“Apparently, because it is printed, most people sign before consulting a lawyer and, in many cases, without even reading it. The purchase or sale of a house is the biggest transaction most people ever enter into, yet an amazing number blithely sign the agreement without ever calling on their lawyer for advice.”⁴³⁰

Thus Ontario has not made the offer to purchase electronic. This forms the binding contract between the transferor and transferee. It has however been reduced to a standard four pages. This is in line with other advances whereby the standard transfer deed has been reduced to three pages and the standard charge to two pages.

The absence of the binding contract stage and electronic fund transfer of the purchase monies means that the Ontario system is closer to eRegistration than eConveyancing.

However, this may be about to change. Currently there is a prohibition on electronic contracts for interests in land contained in the Electronic Commerce Act 2000⁴³¹ but

⁴²⁸ See *ibid.*, p. 474 - 478.

⁴²⁹ Donahue, D.J. and ors *Real Estate Practice in Ontario* (6th edn LexisNexis Butterworths, Canada 2003) p. 207.

⁴³⁰ *ibid.*, p. 206.

⁴³¹ Section 31 Electronic Commerce Act 2000 S.O. 2000, CHAPTER 17.

a new private member's bill has been introduced in the Ontario legislature to amend this Act to permit digital signatures on such agreements.⁴³² If passed this has the potential to pave the way for Ontario to move into eConveyancing.

3.5 Conclusion

Ontario was the first jurisdiction to introduce full electronic document registration⁴³³ however commentators often cite it as the most developed eConveyancing system in the world. This may be due to a misunderstanding of the terminology and a lack of research that sets out clear boundaries between eRegistration and eConveyancing.

When examined in detail it is clear that the Ontario e-reg system is one of eRegistration and is missing some vital elements that would move it into the realm of eConveyancing. This is also true of advances in other jurisdictions. "For the time being, e-conveyancing solutions in most jurisdictions are closer to e-registration than to end-to-end e-conveyancing."⁴³⁴ Though the Ontario system seems to be a major success and it is widely considered to be the most advanced.⁴³⁵ Forthcoming legislative reform may pave the way for it to move further into the electronic realm and along the spectrum towards eConveyancing.

Ireland appears to have embarked on the road to eConveyancing successfully⁴³⁶ with the modernisation of the law, extension of compulsory registration⁴³⁷ and digitisation of registry information however it has some way to go before it moves from eApplication fully into eRegistration. "The successful operation of eDischarge,

⁴³² See http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&Intranet=&BillID=2644.

⁴³³ Murray, K. 'Electronic registration and other modernization initiatives in Ontario's land registration system' Law Reform Commission Annual Conference (2004) <http://www.lawreform.ie/Annual%20Conference%202004.PDF> accessed 18 February 2009 p. 21.

⁴³⁴ Kostova, T. *Moving Towards eConveyancing in Ireland: An Analysis* (LL.M. thesis University College Cork 2010) p. 53.

⁴³⁵ *ibid.*, p. 54. See also Butt, P. *Electronic Conveyancing: A Practical Guide* (2006 Thomson Sweet & Maxwell London) p. 1.

⁴³⁶ *ibid.*, p. 56.

⁴³⁷ Since 1 June 2011 all areas are subject to compulsory first registration in the case of freehold land upon conveyance on sale and in the case of a leasehold interest on the grant or assignment on sale of such an interest. See sections 23 and 24 of 1964 Act. 'On sale' means for money or money's worth and accordingly would not apply to a voluntary transfer of title by way of gift or a title transferred on death.

the first instalment of eRegistration, and the soaring numbers of users availing of the PRA's online services should be a source of encouragement for all stakeholders".⁴³⁸

Having examined the nature of eConveyancing and developments in both Ireland and Ontario, the next chapter sets out the model, identifies the participants and risks.

⁴³⁸ Kostova, T. *Moving Towards eConveyancing in Ireland: An Analysis* (LL.M. thesis University College Cork 2010) p. 56.

CHAPTER 4 – IDENTIFICATION OF RISKS

4.1 Modelling

As already stated in chapter one, given the broad nature of the conveyancing process, it is not possible to deal with all the potential risks that might lead to loss in the course of the operation of a conveyancing system (whether electronic or not). Thus this study focuses on risk solely in the context of title registration.

In order to identify these risks this study uses a model to do a transaction unit analysis. This involves the creation of abstracted conveyancing transactions and the allocation of risk to the parties to those transaction. This type of model is an 'idealised' form of social reality.

In comparing law and economics Commons refers to the individualism of economic theory, focused solely around the selfishness of the individual rather than the interests of others.⁴³⁹ Thus some economists have borrowed from law the method of approach adopted by the courts of deciding conflict between a plaintiff and defendant "as representatives of two opposing classes of people....The court begins with a transaction....Thus the method of approach is both individualistic and socialistic."⁴⁴⁰ This balance between the rights of the individual and the common good can be explored by the use of a transactional analysis expressed through the ideal model.

Schelling looks at some of the families of models that are widely used in the social sciences.⁴⁴¹ They are less commonly used in humanities. He advocates being aware of applications outside one's own field as this can enhance appreciation of a model and often the use one can make of it.⁴⁴² In the case of his thermostat system the model can be agreed without reference to any specific house. In the same way the model in this research can be created without reference to any specific conveyancing transaction.

⁴³⁹ Commons, J.R. 'Law and Economics' (1924-1925) 34 *Yale L. J.* p. 374.

⁴⁴⁰ *ibid.*, p. 374 – 375.

⁴⁴¹ Schelling, T.C. *Micromotives and Macrobehavior* (New York, Norton and Company Inc. 2006) p. 90.

⁴⁴² *ibid.*

Calabresi and Melamed warn of two shortcomings of model building; that models can be mistaken for the total view of the phenomena and that models:

“generate boxes into which one then feels compelled to force situations which do not truly fit. There are, however, compensating advantages. Legal scholars, precisely because they have tended to eschew model building, have often proceeded in an ad hoc way....But this approach....may neglect some relationships among the problems involved in the cases which model building can perceive, precisely because it does generate boxes, or categories.”⁴⁴³

Schelling notes that “[c]yclical behavior is one of those kinds of social behavior for which it can be helpful to have a set of familiar models”⁴⁴⁴ and the conveyancing process would certainly fall into this category. Each transaction follows the same pattern. Schelling warns however of creating simple models for simple events as they are so simple that no model is needed. In reverse he also warns of complicated models as they may be too specialized to fit any events except the particular events from which the model was derived.⁴⁴⁵

Thus there is a balance to be achieved. “Models tend to be useful when they are simultaneously simple enough to fit a variety of behaviors and complex enough to fit behaviors that need the help of an explanatory model.”⁴⁴⁶

The use of theoretical models in property law is not new but has rarely been done expressly. As noted above legal scholars tend to avoid model building. One example is given by Miceli⁴⁴⁷ and his colleagues who developed a theoretical model to determine how expected title risk and transaction costs affect land values across two alternative title⁴⁴⁸ systems in Cook County, Illinois. This model identified the relevant attributes of the two systems and their individual effects on land prices. This attempt to compare the effects of two different systems is novel and it is rarely done by the use of theoretical models, particularly not in property law.

⁴⁴³ Calabresi, G. and Melamed, A.D. ‘Property Rules, Liability Rules, and Inalienability: One View of the Cathedral’ (1972) 85(6) *Harv. L. R.* p. 1127 - 1128.

⁴⁴⁴ Schelling, T.C. *Micromotives and Macrobehavior* (New York, Norton and Company Inc. 2006) p. 87.

⁴⁴⁵ *ibid.*, p. 89.

⁴⁴⁶ *ibid.*

⁴⁴⁷ Miceli, T.J. and others ‘Title Systems and Land Values’ (October 2002) 45 *J. L. & Econ.* 565 – 582.

⁴⁴⁸ He calls the two systems the Torrens (registration) system and the recording title system.

Tiainen gives an example of semantic modeling in the property law field⁴⁴⁹ while an example of an object oriented approach is given by Paasch.⁴⁵⁰ Each approach demonstrates the difficulties associated with capturing and exchanging knowledge and information about specific aspects of property law.

Stuckenschmidt and his colleagues note that the significant differences between legal systems make conventional comparison approaches difficult to apply and thus they turned to modeling techniques from computer sciences in an attempt to compare property rights in Europe.⁴⁵¹ Their research aimed firstly to provide a comprehensive and comparable description of real property transactions across European countries and secondly, to assess and compare the costs related to these transactions.⁴⁵² A modeling approach for transactions in land and other real property was elaborated and tested primarily by researchers in land surveying, real estate management, geo-information sciences and knowledge engineering. The model was developed using computer language called Unified Modelling Language (UML). This language is often used for the analysis and design of information systems.⁴⁵³ The aim was to use this language to provide transparency and allow comparison⁴⁵⁴ however “the influence of the national and social contexts, and the different perspectives that can be taken, prevent a simple ranking of the studied procedures.... the book eventually warns of simplification in this field full of complex, national institutional arrangements.”⁴⁵⁵

⁴⁴⁹ Tiainen, E. 'Directions in Modeling Land Registration and Cadastre Domain – Aspects of EULIS Glossary Approach, Semantics and Information Services' FIG Conference on Standardization in the Cadastral Domain (2004)
http://www.fig.net/commission7/bamberg_2004/papers/ts_03_01_tiaien.pdf accessed 26 October 2010.

⁴⁵⁰ Paasch, J. 'Legal Cadastral Domain Model – An Object-oriented Approach' (2005) 2 *Nordic Journal of Surveying and Real Estate Research* 117-136
<http://ojs.tsv.fi/index.php/njs/article/viewFile/1679/1526> accessed 28 October 2010.

⁴⁵¹ Stuckenschmidt, H. and others (eds) *The Ontology and Modelling of Real Estate Transactions* (England, Ashgate 2003). This book is the opening book for research conducted between 2001 and 2005. The concluding book is Zevenbergen, J. and Ors (eds) *Real Property Transactions: Procedures, Transaction Costs and Models* (Amsterdam, IOS Press 2007) available at <http://repository.tudelft.nl/view/ir/uuid%3Ace45bcf6-2cc8-46a3-9305-8526df914887/> See also <http://costg9.plan.aau.dk/> for further details of this study and ongoing commentary and research.

⁴⁵² Stubkjær, E. and Ors 'Modelling Real Property Transactions', in Zevenbergen, J. and Ors (eds) *Real Property Transactions: Procedures, Transaction Costs and Models* (Amsterdam, IOS Press 2007) p. 3.

⁴⁵³ *ibid.*, p. 9.

⁴⁵⁴ *ibid.*, p. 4.

⁴⁵⁵ Zevenbergen, J. and Ors (eds) *Real Property Transactions: Procedures, Transaction Costs and Models* (Amsterdam, IOS Press 2007) back cover. Available at <http://repository.tudelft.nl/view/ir/uuid%3Ace45bcf6-2cc8-46a3-9305-8526df914887/>.

Stubkjær and his colleagues point out that the focus was on describing a single realistic case and thus avoid getting lost in differentiations particular to a single country.⁴⁵⁶ However, “a straightforward comparison of the cost of comparable steps in property transactions in different countries is tantamount to comparing apples with oranges and reveals only half the truth.”⁴⁵⁷ After four years of research, by multiple researchers in different jurisdictions, a tried and tested modelling tool, when applied to real property transactions, only provided limited comparable data on the costs involved.

This study makes evident the differences and thus the difficulties with eliciting a common set of concepts and models across even neighbouring countries. The real value in the research was in its articulation of the process which can be used for improving efficiency, inspiring improvement and increasing transparency across jurisdictions.

Zevenbergen notes that while those working on projects to introduce or improve land registration “have gained considerable working expertise, there has been relatively little attention for describing land registration in a theoretically sound conceptual model.”⁴⁵⁸ He is of the view that such a model is needed for both academic and practical reasons. Thus he presents a static model and a dynamic model of land administration systems.⁴⁵⁹ The static model answers the questions of who, where, how much and how i.e. the owner, parcel and the right or title. These are represented diagrammatically as a mushroom. However this model on its own “falls short when trying to understand for instance the interaction between LASs [land administration systems] and land markets, the reasons for unregistered transactions, and the trustworthiness of the whole.”⁴⁶⁰ For this reason he also presents the dynamic model which addresses the functions of adjudication (first registration), transfer and subdivision.

⁴⁵⁶ Stubkjær, E. and Ors ‘Modelling Real Property Transactions’, in Zevenbergen, J. and Ors (eds) *Real Property Transactions: Procedures, Transaction Costs and Models* (Amsterdam, IOS Press 2007) p. 8.

⁴⁵⁷ *ibid.*, p. 4.

⁴⁵⁸ Zevenbergen, J. ‘The Interrelated Influence of the Technical, Legal and Organisational Aspects on the Functioning of Land Registrations (Cadastres)’ International Federation of Surveyors (FIG) Proceedings of XXI International Congress Commission 7(1998) Brighton <http://www.geom.unimelb.edu.au/fig7/Brighton98/Comm7Papers/TS22-Zevenbergen.html> accessed 8 February 2011.

⁴⁵⁹ Zevenbergen, J. ‘Trustworthiness of Land Records – The Basis of Land Administration Systems’ GIS Asia Pacific (2006) 10(6) http://www.geospatialworld.net/uploads/magazine/925d04_apJune2006.pdf accessed 5 June 2012.

⁴⁶⁰ *ibid.*

Thus while the use of models in property law is not new it has rarely been done expressly and as such it provides a novel approach for analysing risk in conveyancing transactions. The model in this study involved the creation of abstracted conveyancing transactions and the allocation of risk to the parties to that transaction. The use of abstracted transactions with abstract participants generalised the problematic and allowed the risks to be identified and allocated. This approach removed the difficulties associated with using live empirical data.⁴⁶¹

The two most common conveyancing transactions are modeled; an arms length transaction for value and a gift i.e. transaction not for value. While land owners generally purchase their homes it is common in Ireland for family members to gift each other land to build upon. Thus the schematic includes a gift.

The second reason for this inclusion is that the law provides less protection to a volunteer as set out later in this chapter. This means that the risk profile of the transferee and donee are different and these differences merit examination particularly given the move towards eConveyancing.

The abstract participants for the arms length transaction are the transferor, transferee, prior lender and acquisition lender. The abstract participants for the gift transaction are the donor and donee. The acquisition lender is removed for the gift transaction as financing would not be required. Both transactions could be impacted by third parties or property claimants. The risks in conveyancing transactions are identified, analysed and allocated to these participants. This requires an examination of which of the abstract participants suffers if the risk leads to a loss.

As the research focuses on risk solely in the context of title registration both titles are registered.

4.2 Schematic

The schematic below is based on the definitions contained in the neutral vocabulary set out in chapter two.

⁴⁶¹ Miceli, T.J. and others 'Title Systems and Land Values' (October 2002) 45 *J. L. & Econ.* n. 18 acknowledged these difficulties when admitting that they would like to include a measure of parcel-specific title risk in their model but appropriate measures of title risk were not available.

4.2.1 Transaction for value

The parties to this transaction are:

- A – transferor
- B – transferee
- T – prior lender
- C – acquisition lender

The name of the property is “Greenacre”.

A sells the freehold title to Greenacre to B. B makes this purchase with loan funds advanced by C and this loan is secured by a charge on the title. A’s title is unencumbered save for the charge in favour of T. This charge held by T will be paid in full from the purchase monies and will then be removed from the title register. This will allow C’s new charge to be registered as a first legal charge on B’s title to the property.

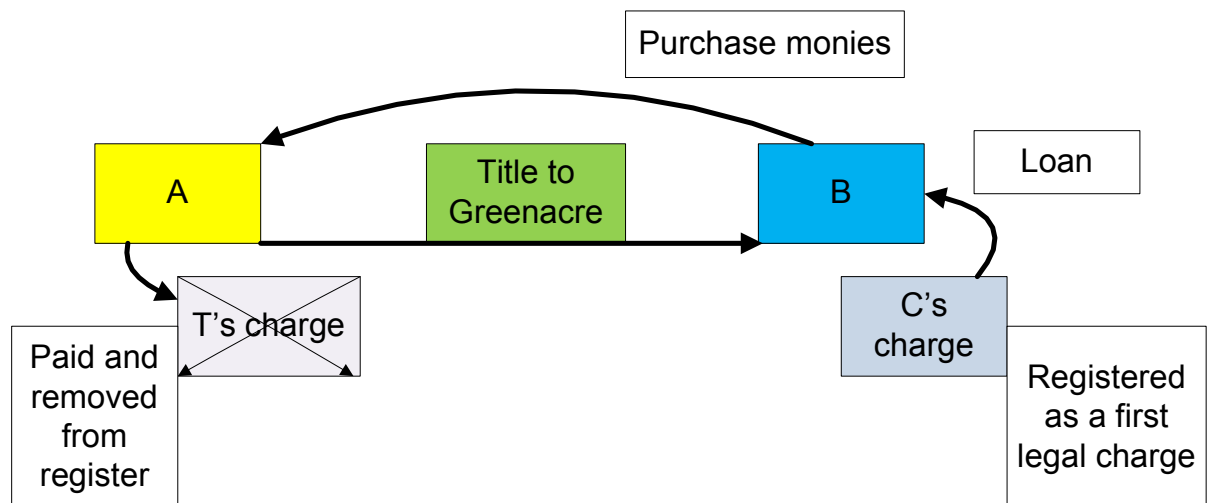


Figure 3: Transaction for value

4.2.2 Transaction not for value i.e. a gift

The parties to this transaction are:

X – donor
Y – donee
T – prior lender

The name of the property is “Whiteacre”.

X gifts the freehold title to Whiteacre to Y.

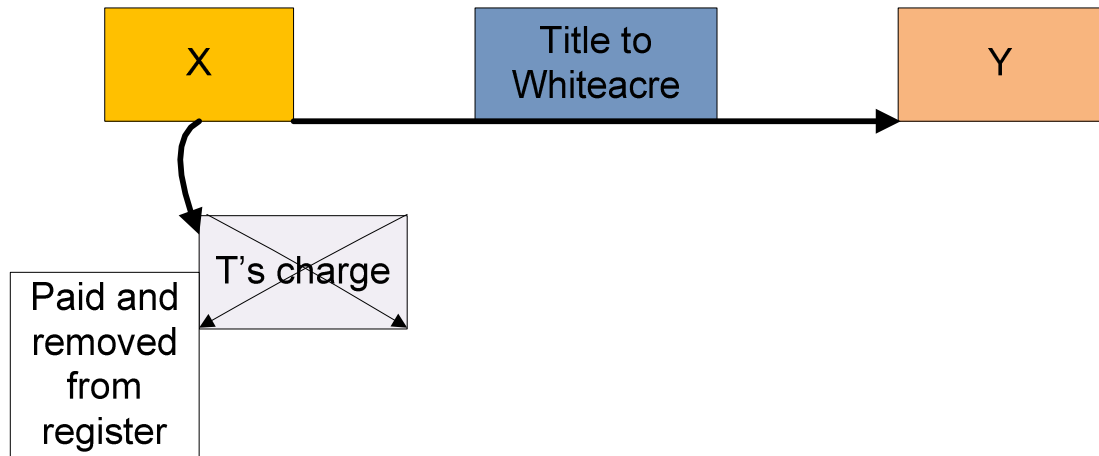


Figure 4: Transaction not for value

The additional parties that might arise in both transactions are:

U – third party
V – property claimant
D – subsequent purchaser (purchasing from B or Y)

The position of D will only be examined where it differs from that of B.

4.2.3 Distinction between U and V

When V is successful in asserting a property claim against the land, he becomes U, the third party. Thus V is only of relevance when exploring the effect of a claim that changes or matures. For example V may have an equitable remedy that matures and as a result he obtains a remedy against another party. That remedy is only of interest in this research when, and if, it becomes a proprietary interest in the land i.e. the point at which V becomes U. This may be due to a court order or some factor

such as occupation of the property or the passing of a time period e.g. twelve years adverse possession.

V is also of significance when looking at rights that are not recognised and not capable of registration. V may have a claim but it may not be sufficiently mature to affect the land or it may be a personal claim that is not capable of becoming a property claim. V may be able to register a note on the register temporarily but when his claim is defeated this note will be removed.

V is also of relevance in the context of a land owner's freedom of contractual action. If A or X grant new rights to V and those are upheld by the courts then V becomes U.

The role of V will be referred to separately to illustrate these particular aspects but otherwise U, the third party, should be taken to include V when he is successful in a claim against the land.

Having identified the participants to the model transactions the next step is to look at the perspective of each individual participant so as to determine the liability each bears for risk. Thus this research looks at the conveyancing process from the standpoint of each abstract participant and examines how risk is distributed between those participants.

4.3 Standpoints

Standpoint in this context is defined in terms of role of each participant expressed as personifications.⁴⁶² Thus a specific person is of no interest. These roles or players in the conveyancing process are transferor, transferee, donor, donee and lender. The role of the lender may be divided into the prior lender and the acquisition lender. Other participants are the third party and property claimant who may be a spouse, neighbour or other party seeking to protect an existing right or assert a new right in relation to the property. More detailed explanations of these players are set out in chapter two.

This meaning of standpoint:

⁴⁶² Twining, W. 'The Bad Man Revisited' (1972-1973) 58 *Cornell L.Rev.* p. 286.

“implies some *criteria of relevance* determined by the conception of the task or role or objective in question. Thus, “the standpoint of the judge” assumes some more or less clearly defined notion of “the judge’s role” which provides, *inter alia*, a basis for determining what the judge needs to know and to understand in order to do his job, as he or as others conceive it.”⁴⁶³

An individual player or participant is of no concern e.g. a transferor in a real life transaction. Instead we are focused on the standpoint of all similar type participants i.e. all transferors in the conveyancing process. The collective of these objectives, viewpoint or interests allows each role in the conveyancing process to be expressed over indefinite repetitions i.e. all conveyancing transactions.

Taking the viewpoint of each player or role in the conveyancing process and identifying the desires and interests of that role provide a tool for evaluating the process. This evaluation is expressly based on a restricted view of the conveyancing process as anything the abstracted participants are not concerned with or about is excluded from the analysis.

Thus standpoint allows us to take an integrated substantive law and institutional process approach as the abstract participant is trying to achieve something from the law, and is not a disinterested expositor of it. Each abstract participant or personification has some objective that they wish to achieve from the conveyancing process. This objective is shared across all real life parties fulfilling the same role.

In terms of the debate between use value and exchange value all participants will be interested in the property maintaining its exchange value but only those who wish to occupy will be interested in its use value.

The key objective for each participant is summarised as follows:

⁴⁶³ *ibid.*

Participant	Key objective	Heading
Transferor and Donor	No liability in relation to the property after completion	Security of transaction (complete)
Transferee and Donee	Immediately acquire occupation and registered title at completion and these are not subject to challenge	Use and title
Lender	Priority over and above all other interests	Security
Third party and Property claimant	Can claim and protect the right	Resilience

Table 7: Participant's key objective

The objectives are depersonalised in this model as we are dealing with abstract participants rather than real people who by their nature will exhibit personal characteristics such as greed and dishonesty or engage in fraud or sharp practice. A real life seller would likely push for the highest possible purchase price, negotiate the lowest possible professional fees and push for the purchase monies to be paid over to them immediately on completion in a spendable form. Our abstract participants display none of these personal characteristics. Thus risks arising from fraud or dishonesty are excluded except where the threat is posed by someone other than the abstract participants. Our abstract 'pure' participants are deemed to have acted correctly at all time.

The standpoint and criteria of relevance of each abstract participant in this model are set out below. This standpoint provides a basis for identifying the threats or risks to that role in the conveyancing transaction.

Each participant is open to numerous risks. This research focused on risk solely in the context of its impact on title registration and the security, protection or lack thereof that this registration offers to land owners, third parties and property claimants. Other risks that challenge the key objective of each abstract participant fall outside this study.

Each participant is examined according to their standpoint and the risks are identified. Those in *italics* fall within this research and those in normal text are excluded as they fall outside the remit.

4.3.1 Standpoint of Transferor

An objective of the transferor will be the desire to have sole and uncontested right of disposition. The transferor will wish to have an absolute right to sell the property and for this right to be uncontested so that no one else can prevent the sale.

The transferor wishes to sell his interest for the purchase monies and have no further liability in relation to the property after completion. Such liability might arise from:

- (a) A lender enforcing the terms of a secured charge that has not been discharged by the sale
- (b) The assurance does not deal with the transferors entire interest in the property
- (c) Liability arises on foot of ancillary documentation furnished to the transferee at the time of completion
- (d) The terms of the contract or assurance not being fulfilled so that the transferor is subject to a claim for
 - Breach of contract
 - Misrepresentation
 - Deceit
 - Breach of covenants of title⁴⁶⁴
- (e) *A claim of prior ownership from someone seeking*
 - *Maintenance*
 - *Occupation*
 - *Damages*
- (f) *Proceedings in relation to the property such as*
 - *A claim by a third party or property claimant*
 - *A claim in tort e.g. for an injury on the property*
 - *A claim for unpaid tax*
 - *Liability to maintain the property or to pay outgoings relating to the property such as rent or service payments*

⁴⁶⁴ Sections 5 of the LRRRA and section 80 of the 2009 Act

- (g) The consideration (purchase monies) not being received in a disposable form on completion and subsequently being withheld
- (h) *An unauthorised or illegitimate alteration of the register*

4.3.2 Standpoint of Transferee

The transferee wishes to pay the purchase monies at completion and immediately acquire occupation and registered title that is not subject to challenge. Such challenges might arise from the following:

- (a) Some other party is in occupation of the property
- (b) *An unknown or undisclosed claim by a third party or property claimant arises that binds the transferee*
- (c) The property is subject to restricted use
- (d) There has been a breach of the terms of the contract or assurance e.g. the nature and quality of the title has been misrepresented
- (e) *There is a prior encumbrance on the title that has not been cleared e.g. a secured loan*
- (f) *The transaction cannot be registered as the transferor did not have title*
- (g) *There is a delay in registration and some other intervening interest is registered during this delay*
- (h) *Some other event or formality is required for registration to take place*
- (i) There was a prior breach of legislation that impacts on the property e.g. a breach of planning which requires the buildings to be demolished
- (j) *Registration is subject to a post registration claim which leads to rectification*
- (k) *An unauthorised or illegitimate alteration of the register*

4.3.3 Standpoint of Lender

The acquisition lender wishes to advance money for the purchase so as to make a profit and immediately have a registered first legal charge on the title until the full amount of the loan is paid. The prior lender wishes to have the loan plus interest and any other fees arising on foot of the charge repaid before or at completion of the sale of the property. During the term of the loan a lender may wish to enforce the terms of the charge if there is a breach by the mortgagor. The following risks may arise:

- (a) *Delay in registration and some other intervening interest is registered*

- (b) *Prior encumbrance on the title that has not been cleared e.g. another charge takes priority*
- (c) *The charge cannot be registered as the mortgagor did not have title to grant the charge*
- (d) *Some other event or formality is required for registration to take place*
- (e) The charge is not effective and cannot be enforced due to some breach of the required formalities
- (f) The charge is not repaid before or at completion
- (g) *The charge cannot be enforced against a third party who is interested in the land and therefore has little or no value as security*
- (h) The charge is ineffective due to a substantive wrong or defect and rescission is available e.g. undue influence or unconscionable bargain
- (i) *An unauthorised or illegitimate alteration of the register*

These risks will be examined primarily from the perspective of the acquisition lender who is advancing money to the transferee to finance the conveyancing transaction. This party is the provider of secured finance for the purchase. This role includes where the transferee re-mortgages after the purchase as this lender will be stepping into the shoes of the acquisition lender and will be seeking to have a first legal charge registered against the title.

In any particular conveyancing transaction the aims of the prior lender and acquisition lender will differ but over a series of transactions, as set out in the model, the role will be the same. On a subsequent transaction the acquisition lender becomes the prior lender.

4.3.4 Standpoint of Donor

The donor wishes to gift his interest and have no further liability in relation to the property after completion. Such liability might arise from:

- (a) A lender enforcing the terms of a secured charge that has not been discharged at the time of the gift
- (b) The terms of the assurance not being fulfilled so that the donor is subject to a claim for
 - Misrepresentation
 - Deceit
 - Breach of covenants of title

As the transaction is a gift the donor will be subject to a lesser duty than a transferor.

(c) *A claim of prior ownership from someone seeking*

- *Maintenance*
- *Occupation*
- *Damages*

(d) *Proceedings in relation to the property such as*

- *A claim by a third party or property claimant*
- *A claim in tort e.g. for an injury on the property*
- *A claim for unpaid tax*
- *Liability to maintain the property or to pay outgoings relating to the property such as rent or service payments*

(e) *An unauthorised or illegitimate alteration of the register*

4.3.5 Standpoint of Donee

The donee wishes to accept the gift and immediately acquire registered title that is not subject to challenge. Such challenges might arise from the following:

- (a) Some other party is in occupation of the property
- (b) *An unknown or undisclosed claim by a third party or property claimant arises that binds the donee*
- (c) The property is subject to restricted use
- (d) There has been a breach of the terms of the assurance e.g. the nature and quality of the title has been misrepresented
- (e) *There is a prior encumbrance on the title that has not been cleared e.g. a secured loan*
- (f) *The transaction cannot be registered as the donor did not have title*
- (g) *There is a delay in registration and some other intervening interest is registered during this delay*
- (h) *Some other event or formality is required for registration to take place*
- (i) There was a prior breach of legislation that impacts on the property e.g. a breach of planning which requires the buildings to be demolished
- (j) *Registration is subject to a post registration claim which leads to rectification*
- (k) *An unauthorised or illegitimate alteration of the register*

4.3.6 Standpoint of Third Party

The third party wishes to protect their existing right in relation to land such as an easement or an equitable interest. The risk for the third party is that they will not be able to protect the right because:

- (a) some other right has priority and destroys the third party right*
- (b) some other right has priority and makes their right less valuable*
- (c) the right is not protected by the registering authority as it is not recognised as a right capable of registration by the legislation*
- (d) An unauthorised or illegitimate alteration of the register*

4.3.7 Standpoint of Property Claimant

The property claimant wishes to claim or assert a new right in relation to land. The risk for the property claimant is that they will not be able to claim or assert the right because:

- (a) some other right has priority and destroys their right*
- (b) some other right has priority and makes their right less valuable*
- (c) the right is not protected by the registering authority as it is not recognised as a right capable of registration by the legislation*
- (d) An unauthorised or illegitimate alteration of the register*

In respect of both the third party and property claimant the right that has priority and destroys their right might in fact be the right of the parties to the transaction. The transfer or charge might itself be the event that destroys or damages their right thus protecting the dynamic property rights of the transferee or chargee at the expense of the right of the third party or property claimant.

4.4 Risk matrix

These risks, which can undermine the key objective of each abstract participant, and the events that can create them are grouped into categories as indicated by the colour coding on the matrix below. This matrix provides an overview of all the risks falling within this research and also sets out a structure for allowing similar type risks to be dealt with together. It establishes six categories of risk.

The transferor and donor share the same risks as do the transferee and donee. Similarly the third party and property claimant share the same risks but the acquisition lender has to be dealt with separately. However, while some parties do share the same risk heading, each party must be examined individually as the impact of that risk will not be the same.

Thus while the matrix groups the participants, for the purposes of identifying the key risks to be examined, they will be unbundled in the following chapters which look at the specific impact on each individual participant. Some participants may be affected by risk in terms of a monetary loss in their investment whereas for other participants the loss may be a loss of use or a loss of enrichment.

Participant whose interest is at risk	Risk	Circumstance that can create this risk	Risk from
Transferor A and Donor X	Claim of prior ownership	Error in register	Prior registered owner
		Interests off the register which affect title	Prior registered owner
	Claim by a third party or property claimant	Interests off the register which affect title	U the third party or V the property claimant
	Unauthorised or illegitimate alteration of the register	Error in register	All other parties and/or the registrar
Transferee B and Donee Y	Claim by a third party or property claimant	Interests off the register which affect title	U the third party or V the property claimant

	Prior encumbrance on the title that has not been cleared	Registration gap	T the prior lender, U the third party or V the property claimant
	Transferor/Donor did not have title	Error in register	A the transferor/X the donor
		Interests off the register which affect title	A the transferor/X the donor
	Delay in registration and some other intervening interest is registered	Registration gap	U the third party or V the property claimant
	Some other event or formality is required for registration	Formalities for registration	A the transferor/X the donor and/or the registrar
	Registration is subject to a post registration claim which leads to rectification	Interests off the register which affect title	U the third party or V the property claimant
	Unauthorised or illegitimate alteration of the register	Error in register	All other parties and/or the registrar
Acquisition Lender C	Delay in registration and some other intervening interest is registered.	Registration gap	U the third party or V the property claimant

	Prior encumbrance on the title that has not been cleared e.g. another charge takes priority	Registration gap	T the prior lender, U the third party or V the property claimant
	Mortgagor did not have title to grant the charge	Error in register	B the transferee
		Interests off the register which affect title	B the transferee
	Some other event or formality is required for registration	Formalities for registration	B the transferee and/or the registrar
	The charge cannot be enforced against a third party who is interested in the land and therefore has little or no value as security	Interests off the register which affect title	U the third party or V the property claimant
	Unauthorised or illegitimate alteration of the register	Error in register	All other parties and/or the registrar
Third Party U and Property Claimant V	Some other right has priority and makes their right less valuable	Destructive effects of a registered transaction	B the transferee, C the acquisition lender or Y the donee

	The right is not protected by the registering authority as it is not recognised as a right capable of registration by the legislation	Right not recognised and not capable of registration	The state acting through the registrar
	Unauthorised or illegitimate alteration of the register	Error in register	All other parties and/or the registrar
	Some other right has priority and destroys the third party right or property claim	Destructive effects of a registered transaction	B the transferee, C the acquisition lender or Y the donee

Table 8: Risk matrix

Thus the key risks to be examined, and their associated colours in the matrix, are:

1. Registration gap: time lag between transfer and registration (blue)
2. Formalities for registration: some other event required before registration (pink)
3. Error in the register (green)
4. Interests off the register which affect title (purple)
5. Interests not recognised and not capable of registration (orange)
6. Destructive effects of a registered transaction (brown)

From the examination above it can be seen that conveyancing transactions inherently bring risks to the participants and eConveyancing is not some magic formula that can dissipate risk in its entirety. That said there is the potential for risk to be mitigated for some participants though this may result in increased risk for other participants.

The law treats some of these abstract participants more favorably than others. In particular it makes a clear distinction between the protection afforded to a *bona fide*

purchaser for value and a volunteer.⁴⁶⁵ In the schematic the transferee B, and subsequent purchaser D, are *bona fide* purchasers for value. C will be treated in a similar manner as a lender for value. By contrast as Y is obtaining a gift the law provides less protection to this participant and thus Y is subject to increased risk in the conveyancing process. Y is a volunteer.

O'Connor notes that all reform bodies in Australia and Canada who have examined voluntary transfers in recent years have concluded that volunteers should be afforded the same registration protection as purchasers for value, to facilitate the generation of new wealth, as "[i]t is not in the interests of general economic welfare to allow the titles of volunteers to remain clouded."⁴⁶⁶ However given the recent spate of voluntary dispositions to spouses occurring in Ireland as a result of the property crash, this approach is unlikely to be adopted.

As Lyall has pointed out "[t]he law assists the buyer of commodities in the market, but not those who take, even innocently, outside the market."⁴⁶⁷ Thus B and C are afforded a greater degree of protection than Y in conveyancing transactions.

4.5 Conclusion

Having examined the nature of eConveyancing and identified the risks borne by each participant, the remaining research questions are to determine how each risk is impacted by the move to eConveyancing, how might each party be protected, is such protection desirable and feasible and if not, what other party should bear the risk. Chapters five to seven examine these questions in the context of each risk category.

⁴⁶⁵ See sections 52(2) and 55(2) of the 1964 Act which provide that where the transfer is made without valuable consideration, to a volunteer, then the transferee is subject to all unregistered rights subject to which the transferor held the land transferred. Similarly in Ontario under sections 90 and 109 of the Land Titles Act a volunteer is subject to any unregistered estates, rights, interests or equities subject to which the transferor held the land. It is irrelevant that the unregistered right was unregistrable or could have been protected by a note on the register or could have been registered itself but no such registration was made.

⁴⁶⁶ O'Connor, P. 'Registration of Title in England and Australia: A Theoretical and Comparative Analysis' in Cooke, E. (ed) *Modern Studies in Property Law Volume II* (Oxford, Hart Publishing 2003) p. 91. In relation to Canada see Joint Land Titles Committee *Renovating the Foundation: Proposals for a Model Land Recording and Registration Act for the Provinces and Territories of Canada* (1990)

<http://www.law.ualberta.ca/alri/docs/Model%20Land%20Recording%20Act.pdf> accessed 1 May 2012 p. 36 - 37.

⁴⁶⁷ Lyall, A. *Land Law in Ireland* (3rd edn Round Hall England 2010) p. 960.

Chapter five looks at two risk categories i.e. the registration gap and the formalities for registration thus examining the situation before registration of the title. The risk arising from the interface of the registration system with those participants who seek registration is examined.

Chapter six examines the impact of the register itself. The participant has made a successful application for registration but due to some error in the transaction or by the registry their interest is at risk.

Chapter seven explores the remaining risk categories. These are interests off the register which affect title, the destructive effects of a registered transaction and where interests are not recognised and are not capable of registration. Each demonstrates how third party rights are impacted by the operation of the registration system and the effect of those rights on the other participants.

The concluding chapter, chapter eight, takes an over arching view of the impact of eConveyancing on risk and determines if there can be risk mitigation. It also makes some recommendations for further research and reform of the conveyancing process in Ireland.

CHAPTER 5 – BEFORE REGISTRATION

5.1 Introduction

This chapter examines two risk categories; the registration gap and the formalities for registration. Thus it explores risk arising before registration of the transfer of Greenacre and Whiteacre. The risk to those participants who seek registration on foot of the idealised transactions is considered. These participants are the transferee B, donee Y and acquisition lender C.

5.2 Registration gap

The registration gap is the time lag between transfer and registration. It is the “hiatus between the date of the making of the disposition and the date of its registration”.⁴⁶⁸ Registration could occur some considerable time after the disposition. This gap poses a risk to those who buy registered land or who wish to acquire some right or interest over the land.⁴⁶⁹

This time gap between transfer and registration is seen as a presenting a period of risk for the new owner and acquisition lender. The new owner has parted with the full purchase monies, part or all of which will comprise the monies advanced by the acquisition lender, but neither will yet have the protection of registration. Thus the interests of B and C are at risk.

Y’s interest is also at risk but since he has not paid any monies and is a volunteer, his loss is of a different nature. Y’s exposure is as great as B’s in that both are in danger of losing the entire value of the property. However, Y’s risk is not of loss, but of no gain. He may lose an enrichment but will not be impoverished in the same way that B and C might. Both B and C are at risk of suffering a monetary loss. B is further exposed in that he may have given up the right to occupy elsewhere but still may not have the use value of Greenacre. Thus the nature of each idealised participant’s exposure to risk during the registration gap is different.

⁴⁶⁸ Harpum, C. ‘English experience: title by registration – preparation for e-conveyancing’ (2004) Law Reform Commission Annual Conference (2004) <http://www.lawreform.ie/Annual%20Conference%202004.PDF> accessed 18 February 2009

p. 6.
⁴⁶⁹ *ibid.*

However there is not the same level of risk exposure during the entire period. In Ireland there is less risk after the application for registration is lodged. Provided such an application is successful registration will be backdated to the date of lodgement and priority will arise from that date. Anyone dealing with the title after the application is lodged but before the registry staff process the application will be on notice as a pending dealing will be noted on the folio. However if the application is not successful and is rejected then the registration gap is extended as priority will be lost. Any subsequently pending applications will be processed and priority will be lost until a successful application is lodged.

Presuming any application for registration is successful the exposure to risk really arises during the period between completion of the transaction and lodgement of the application for registration. C has released the loan funds, B has paid over the purchase monies but there is the danger of another interest getting registered in advance of theirs. The gap between contract and completion does not present the same exposure to risk as no funds have been released to A.⁴⁷⁰

The risk period is extended if registration is denied due to some fault or error in the transaction or the registrar mistakenly rejects the application. Presuming that the application is a successful application for registration the risk arises if some event occurs after completion and before the application for registration. The vulnerability to that risk is a product of the conveyancing process.

So the risk period may be divided into two. The gap between completion and the application for registration. This is not produced by the registration system but instead is a feature of the conveyancing process and will be compounded if there is some neglect by the lawyer and hence delay in applying for registration. The second period arises between the application for registration and actual completion of registration and this is a feature of the registration process.

A priority period mechanism could reduce the likelihood of this risk occurring but this would similarly be dependent on the subsequent application for registration being successful. If for any reason the application for registration was rejected priority would be lost.

⁴⁷⁰ The contract deposit is held pending completion.

In some jurisdictions the registration gap is a limited problem because it is standard practice to have a priority period whereby no other registration is allowed. The transfer receives priority once it is registered within the appropriate time period. This is the practice in England and Wales where there is a system of priority searches and outline applications⁴⁷¹ however Harpum has expressed the view that these measures are “contrived and imperfect...also bureaucratic and add to the costs of conveyancing”.⁴⁷²

In Ireland a priority search has a similar effect. This search has the added advantage that when the registrar issues the search he puts an inhibition on the folio. In Ireland this inhibits all dealings for a period of 21 days, save the dealing by the party on whose behalf the search was made. Nothing can be registered after the search until registration of the transaction. After the 21 days a further priority search may be applied for however, this does not continue the previous period. This search is available to someone who has contracted to buy the property or the lender who has lent money for the purchase.

In Ireland the paper application must be submitted within 21 days of completing the eForm 17 (the electronic application form) and on average the application is received within 10 days.⁴⁷³ The average time between the paper application being lodged and registration of a full transfer of title where no queries arise is 10 days.⁴⁷⁴ Thus the time between the paper application and registration is generally 10 days however it is impossible to determine the general time period between completion of the transaction and registration. The eForm 17 may not be completed until some considerable time after completion of the transaction. The longer the time lag the greater the risk that some other intervening interest will gain priority. This situation leaves B, Y and C open to risk.

As a result of the eDischarge system the registration gap has shortened somewhat but where the lender is not part of this system or the property needs to be mapped,

⁴⁷¹ Harpum, C. ‘English experience: title by registration – preparation for e-conveyancing’ (2004) Law Reform Commission Annual Conference (2004) <http://www.lawreform.ie/Annual%20Conference%202004.PDF> accessed 18 February 2009 p. 6.

⁴⁷² *ibid.*

⁴⁷³ Interview with Greg McDermott ICT Manager Property Registration Authority 1 March 2012.

⁴⁷⁴ *ibid.* Transfers of part take longer to process as these involve mapping changes and the opening of a new folio. First registrations applications where there is a full investigation of the title also take longer.

the registration gap in Ireland can extend into months or even years. There is no requirement to register within a certain time limit.⁴⁷⁵

The risks for B, Y and C are that a prior encumbrance on the title has not been cleared or due to the delay in registration some other intervening interest is registered. Loan monies have already been released by C but its interest is not yet secured by registration of a charge on the title. If another charge takes priority, the lenders charge cannot be registered as a first legal charge. Similarly if another interest is registered ahead of B and Y's title then it will take priority.

"Title registration relieves the duty of inquiry upon purchasers, in order to reduce transaction costs; the priority rules that apply during the registration gap re-impose the duty. Purchasers must either search for prior interests as if the land were unregistered, or assume the risk of losing priority to an undiscovered prior interest during the registration gap. The loss will not be compensated by the statutory indemnity scheme, unless it arises from a registry error or omission such as an error in a search certificate."⁴⁷⁶

The reason for this danger period is as a result of the nature of the right held by B, Y or C during the gap. It is not a registered right and thus must compete with other unregistered rights for priority. Wylie expresses the view that the purchaser has an equity to be registered as owner and has an unregistered right to the land valid against his vendor and all other persons except a registered transferee for value.⁴⁷⁷ This equity will survive against a volunteer but will be defeated by a registered transaction for value.

This is supported by section 68(2) of the 1964 Act which provides that nothing in the Act shall prevent a person from creating any right in or over any registered land or registered charge, but all such rights shall be subject to the provisions of the Act with respect to registered transfers of land or charges for valuable consideration. Similarly section 68(3) provides that an unregistered right in or over registered land, not being a section 72 burden, is not to affect the registered owner of a charge created for valuable consideration

⁴⁷⁵ There is a six month time period for first registration but not for subsequent dealings with registered land.

⁴⁷⁶ O'Connor, P. 'Information, Automation and the Conclusive Land Register' in Grinlinton, D. (ed) *Torrens in the Twenty-first Century* (Wellington, LexisNexis 2003) p. 263.

⁴⁷⁷ Wylie, J.C.W. *Irish Conveyancing Law* (2nd edn Dublin, Butterworths 1996) p. 369. See p. 370 for supporting case law.

Thus a purchaser's right or interest during the registration gap is vulnerable in that it will be defeated if the vendor transfers to another party for value and that second transfer is registered first. The first purchaser's unregistered right can only be protected by a note on the folio or by a priority period.

In *Coffey v. Brunel Construction Co. Ltd*⁴⁷⁸ the defendant registered a *lis pendens* as a burden pursuant to section 69 of the 1964 Act. This occurred after the plaintiffs had purchased the land but before registration of their title. The plaintiffs were registered subject to that burden and obtained an order from the High Court directing the registrar to cancel the burden but the defendant appealed to the Supreme Court. The Court held that the plaintiffs' right arising from the contract and payment of the purchase monies would not survive against the rights of a registered transferee 'but the defendants are not such' or a charge for valuable consideration 'but a *lis pendens* is not such'. O'Higgins C.J. found that section 74 only related to the priority as between registered or unregistered burdens⁴⁷⁹ and the plaintiffs' right was not a "burden". The plaintiffs held the entire beneficial estate in the lands from the time of the contract and the Court ordered that the registration of the *lis pendens* be vacated.

In the schematic B and C are at risk in the purchase of Greenacre and Y is at risk in the transfer of Whiteacre. They are at risk from:

- (a) T: the prior lender whose charge has not been discharged;
- (b) U: the third party who wishes to protect their existing right in relation to the land; and
- (c) V: the property claimant who is successful in asserting a new right in relation to the land.

5.2.1 Risk from T

Even in the most efficient of conveyancing transactions there will be a slight delay before the prior charge on the title is discharged. This delay can only be avoided if the discharge is done in advance of or at the point of completion.

⁴⁷⁸ *Coffey v. Brunel Construction Co. Ltd*. [1983] IR 36.

⁴⁷⁹ Burdens rank according to the order in which they are entered on the register.

T will not want to provide a discharge in advance of completion unless it has already been paid the redemption monies in full. This is unlikely to occur as the redemption monies will form part of the purchase monies to be paid on completion. Thus A will not be in a position to redeem the charge until the property has actually been sold.⁴⁸⁰

The other option is that the discharge is done at the point of completion. In order for this to occur three elements are required. Firstly that the redemption monies are paid to T at that point; secondly that T is in a position to immediately discharge the charge and thirdly the discharge is registered immediately.

Immediate payment of redemption monies

In a typical Irish paper conveyancing transaction a bank draft or cheque is handed over on completion and subsequently the transferor's lawyer lodges this with the prior lender in order to clear the prior charge on title. The obligation to lodge these funds and clear the prior charge arises from an undertaking given to the transferee's lawyer on completion. The terms of the contract between the parties will also have provided for an unencumbered title to be furnished on completion though, strictly speaking, this is not possible unless the discharge is done simultaneously or in advance.

Further delay may arise if the transferor is in negative equity and additional monies need to be added to the purchase monies in order to clear the prior charge. Also difficulties may arise in establishing the exact amount required to clear the prior charge and a discharge will prove impossible until the exact amount is confirmed and paid in full.

During this time period the acquisition lender C is at risk. Completion has taken place and the purchase monies have been released by the transferee's lawyer to the transferor's lawyer in order to purchase the property. Despite advancing the loan funds, and those funds passing out of C's control, C does not have a legal charge on the title and will not have a first legal charge until the prior charge is discharged in full.

⁴⁸⁰ There are some instances where a discharge may be provided in advance of completion such as in a scheme of development however these fall outside the scope of this research.

B and Y are also at risk as they will not obtain unencumbered title until any prior loan secured on the property is discharged.

In particular B has paid over the purchase monies in order to purchase Greenacre but Greenacre remains subject to T's charge. B has completed the purchase on foot of loan funds from C subject to the requirement that C's charge be registered on the title as a first legal charge. While A's (the transferor's) charge, held by T, remains on the title, B is unable to comply with this requirement.

As a volunteer Y does not have a lender's requirements to satisfy but Y would find it very difficult to sell the property or to raise finance on it while the prior charge remains on the title.

Provided the monies owed to T on foot of its charge have been paid in full, A and X will have an equity of redemption.⁴⁸¹ A and X would be in a position to call for T to release the charge. However, if there is any dispute about the amount owed or the redemption figure furnished for completion was incorrect, then it may take some time for the discharge. Meanwhile T's charge will remain registered against the title.

The delay may provide the opportunity for some event to occur which prevents the prior charge from being discharged. For example the prior charge might provide cross security for monies advanced on other properties and the lender may refuse to release the prior charge until those monies are repaid. The bank draft or cheque may be lost or stolen or the funds may be misappropriated. If there are monies outstanding which A and X refuse to pay then B and Y may be liable to dispossession and sale of the property on the basis of A and X's default.

A dispute about the amount to be repaid in order to obtain a discharge can be avoided by obtaining accurate unequivocal redemption figures from the prior lender. However, it is more difficult to avoid the risk of negligence, theft or fraud.

In Ontario the usual practice is for the transferor's lawyer to give the transferee's lawyer a statement of the amount owing on the mortgage as issued by the prior lender, together with a direction by the transferor to his lawyer to pay that amount directly to the prior lender and an undertaking by the transferor's lawyer to obtain

⁴⁸¹ Under section 121 of the Irish Consumer Credit Act 1995. This relates to housing loans which are acquisition loans or the refinancing of acquisition loans.

and register the discharge.⁴⁸² The Irish practice is also to rely on an undertaking by the transferor's lawyer.

Thus in both jurisdictions the purchase monies are paid by the transferee's lawyer to the transferor's lawyer and the transferor's lawyer then redeems the charge held by the prior lender. Both rely on the lawyer's undertaking.⁴⁸³ It would be more straightforward for the redemption monies to be paid directly by the transferee to the prior lender with the balance of the monies paid to the transferor.

This system of undertaking has dangers associated with it⁴⁸⁴ including the risk of lawyer fraud. Connolly notes that "elimination of the "registration gap" as a fraud prevention tool in today's climate has to be seriously considered."⁴⁸⁵

The use of EFT has the potential to move the money faster and thus reduce part of the gap. This means the money can transfer in hours or minutes rather than days. Also an eConveyancing system provides the potential for the prior charge to be paid off at the time of completion. In Ireland at the moment cheques and bank drafts are typically taking 3 – 5 days to clear. EFT generally takes up to 24 hours. Contrast this with Ontario where the money can be transferred in a matter of minutes.

Ensuring that the money moves quicker will however only go some way towards eliminating this risk. Paying the amount due on foot of the prior charge allows the discharge to occur however a formal discharge must also take place and then this must be registered with the registering authority.

Immediate discharge of the prior charge

Once T has received the redemption monies it must be in a position to immediately discharge the prior charge. In Ireland some moves have been made towards this

⁴⁸² Donahue, D.J. and others *Real Estate Practice in Ontario* (6th edn Canada, LexisNexis Butterworths 2003) p. 247.

⁴⁸³ According to the Irish Law Society 'Guide to Professional Conduct of Solicitors in Ireland' (2nd edn Law Society 2002) an undertaking is any unequivocal declaration of intention addressed to someone who reasonably places reliance on it which is made by a solicitor in the course of his practice, either personally or by a member of the solicitor's staff, whereby the solicitor, or in the case of a member of his staff, his employer, becomes personally bound. See paragraph 6.5.1.

⁴⁸⁴ Donahue, D.J. and others *Real Estate Practice in Ontario* (6th edn Canada, LexisNexis Butterworths 2003) p. 253.

⁴⁸⁵ Connolly, F. 'E-Conveyancing: who will benefit?' BSc Hons Dissertation (October 2007) p. 24.

position with the launch of the eDischarge facility. Prior to the launch of this facility a formal paper discharge could take 6 to 12 months to issue due to inefficiencies in the lender's process. The eDischarge facility now allows a lender to confirm the discharge of a charge directly with the Land Registry via an electronic message. Both the discharge and the registration of same are taking place within one month.

In the Ontario e-reg system registration of the discharge occurs as part of the same application for registration of the transfer and new charge.

Simultaneous registration of discharge

Once the redemption monies are paid and the discharge issued then the discharge must be registered with the registering authority. If all of these steps can occur during completion then there is no risk of a prior charge remaining on title. B and Y take unencumbered title and C can register a first legal charge.

As noted already the Land Registry eDischarge facility has considerably shortened the time period between completion and registration of the discharge of the prior charge however this time lacuna has not been eliminated entirely. Thus there remains a risk to B, Y and C.

In both Ireland and Ontario staff in the registration authority must sign off on the discharge and thus the registration is not simultaneous. However in the absence of any problem with the application, registration of the discharge will be back dated to the date of application.

Until the discharge is registered the new charge cannot be registered as a first legal charge leaving C exposed and both B and Y are exposed as they own a property encumbered with a prior charge. Unless any prior charge on title can be discharged in advance of, or simultaneously with completion of the sale, B, C and Y remain exposed to risk.

A similar risk arises in relation to other prior encumbrances on the title register. This might include a judgment mortgage that has not been paid. A wise transferee will require that any such encumbrances are cleared from the title in advance of completion so as to avoid the risk of their title being burdened.

In addition to interests on the register there may be others off the register that create a risk during the registration gap. These overriding interests are dealt with separately in chapter seven.

Apart from these overriding interests there may be other interests that are not on the title register but which make their way on to the register during the registration gap. These interests are often called minor interests and they need to be registered to be binding. This risk will arise from U the third party or V the property claimant. During the registration gap an intervening interest held by U or V may be registered and thus gain priority over the transaction.

5.2.2 Risk from U

During the registration gap there is a danger that some third party may act to protect their existing right in relation to the land. An example would be someone with an option to purchase or holding a contract for the same land.

This right will pose a risk to B and C in the purchase of Greenacre. If the right was not disclosed by A and should have been under the terms of the contract, B may have a case for breach of contract, misrepresentation, deceit or breach of covenant of title.⁴⁸⁶ B may be able to rely on a number of different remedies such as rescission, restitution or damages. If B was successful in applying to the Court for an order of rescission the parties would be restored to their original position before the contract was entered into. B would be entitled to recover not only the deposit with interest but also any legal expenses incurred in investigating title. This remedy is not available post completion.

The risk is that the interest held by U would be registered in advance of B and C's interest during the registration gap. The longer the gap the higher the likelihood that U will register its right thus increasing the level of risk for B and C. If this occurs B and C will lose priority to U. Thus B and C will be keen to have their interests registered as soon as possible.

⁴⁸⁶ Note that these risks to A are excluded from the remit of this research.

If U succeeds in having his interest registered first the title of B will be subject to such a right though, as already noted, B may have a remedy against A if the right should have been disclosed and was not.

The registration gap will also increase the level of risk for C as the quality of its security may be compromised. The value of the property may have decreased though this will only have an impact if C is required to repossess and sell the property. In Ireland the borrower B remains liable for the balance of the loan funds even if the property sells for less than the amount due and thus in the long term C may recover the shortfall anyway. Ideally C would recover all the loan funds plus interest and penalties on a sale of the property but this is subject to market conditions.

If the quality of C's security is compromised C may have a remedy against B on the basis that the right should have been discovered and disclosed by B or B's lawyer during the transaction.⁴⁸⁷ The chances of such an action being successful will be strengthened if B or B's lawyer did not carry out the appropriate enquires during the transaction and as a result of this lack of enquiry U's right remained undiscovered.

Y is also at risk in the gift of Whiteacre. As a volunteer Y will not be in a position to sue unless X gave guarantees that the property was not subject to such a right. As Y is a volunteer and takes subject to all unregistered rights to which X held the land he will not be concerned about prior unregistered rights. He takes subject to any such right held by U regardless of whether or not his title is registered. Y will, however, be concerned with new rights coming into existence during the registration gap. If this gap is reduced there is less opportunity for this new right to be registered in advance of Y.

Any rights on the register would have come to light during the transaction so, subject to any error of the registry in executing searches, the risk from U only arises in relation to rights not already on the register. The registration gap has no effect on overriding interests as they will bind both transferor and transferee regardless of when the transfer is registered.

⁴⁸⁷ In a residential conveyancing transaction B's lawyer will have certified title to the lender. Any qualifications on title need to be disclosed to the lender in advance.

5.2.3 Risk from V

During the registration gap there is the possibility of a new right being asserted in relation to the land. As this is a new right that has matured since completion B will likely have no remedy against A and C may not have a remedy against B. This is subject to the right not having been granted by A or B.

This new right may be capable of protection by registration or by occupation or some other factor and this protection may be secured during the registration gap. V then becomes U a successful property claimant who is now the third party in the schematic. For example V may have been successful in asserting a personal right which the court finds is a property right during this period. Alternatively V may have a right that becomes overriding through occupation. If the occupation is post-completion but pre-registration then the registration gap could allow a new overriding interest to come into existence. This will be examined further in chapter seven.

5.2.4 Removal of the registration gap

Is it possible to remove gap entirely? Surely one element has to occur first. The possible combinations for sequencing in a paper environment are:

	A	B	C	D	E	F
1	Money	Money	Completion	Completion	Registration	Registration
2	Completion	Registration	Money	Registration	Completion	Money
3	Registration	Completion	Registration	Money	Money	Completion

Table 9: Sequencing for completion

Completion encompasses closing of the transaction with the redemption of T's charge, discharge of that charge and registration of the discharge. This must take place prior to the registration of the transaction from A to B and X to Y. Where there is no prior charge on the title then the registration gap can automatically be reduced as there is no necessity to wait for registration of the discharge. B and Y can immediately apply to be registered as owner.

Sequences B, E and F do not occur because passing of the title by completion has to occur before registration of the fact. The registration reflects the fact that

completion has already taken place. These two steps could however be amalgamated whereby registration is completion. This is difficult to achieve where staff in the registering authority are required to sign off on the application before registration occurs.

There is also a difficulty with sequence D as the formalities for registration often require that the money will already have changed hands i.e. the transfer will acknowledge that the purchase monies have been paid. C also presents a difficulty in that completion cannot be said to have occurred without the passing of the purchase monies.

Thus most, if not all, jurisdictions including Ireland adopt sequence A. The money generally changes hands at the same time as completion. It may also be paid by B's lawyer to A's lawyer in advance on the understanding that it is held in trust until completion. Completion then takes place followed by subsequent registration of B's title and C's charge.

In Ontario the purchase monies are paid but are held in escrow pending completion and registration. In effect the money is paid, completion occurs and then registration. So sequence A has not changed in this electronic environment.

Lawyers often separate in time and space the physical and financial actions associated with completion from the legal act of completion. By the use of escrow and the holding of monies or documents on trust lawyers can co-ordinate the legal act of completion so that the intent of the transaction is fulfilled at the right time. Thus the legal act of completion is centred more on the status of the transaction than on actual physical events that need to occur.

It would be almost impossible to design an eConveyancing system whereby the money, completion and registration all occur simultaneously unless completion became the fact of registration and at the same time as registration occurs the money passes.⁴⁸⁸ Unless the final sign off by the registry staff is removed there will always remain at least a small registration gap in the conveyancing process. This is the reason why some jurisdictions have chosen to make their systems both automated and automatic.

⁴⁸⁸ See the charts in the Law Society of Ireland 'eConveyancing: Back to Basic Principles. Vision of an Electronic System of Conveyancing ('eVision')' (March 2008).

5.2.5 Effect of eConveyancing

The expectation is that eConveyancing will lead to a reduction of or perhaps even removal of the registration gap. “Completion and registration will be completed electronically, the main advantage here will be the removal of the ‘*registration gap*’ between completion and entry on the Register of the new owner, therefore minimising the risk of conflicting or illegal rights”.⁴⁸⁹

This abolition of the registration gap would involve changes to the register taking place at the same time as electronic completion of the transaction. In effect this would be “completion by registration”.⁴⁹⁰ In an electronic system “the making of a disposition and its registration, although in theory different acts, can in fact occur simultaneously.”⁴⁹¹ “The threefold process of execution, lodgement and registration of deeds would be replaced by a single act of “execution electronically by registration”.⁴⁹² This is entirely feasible in an electronic conveyancing system.

If the registration gap is removed in its entirety then completion will be simultaneous with registration.⁴⁹³ The power to transfer could be removed from the land owner and given to the registrar so that only the registrar can alter title. This is already feasible given that the physical act of execution may be separate from the legal act of completion.

This would necessitate changes in Irish conveyancing practice particularly as the discharge of the prior charge would need to be ready for registration at completion and not done subsequently.

Title to Greenacre would pass from A to B and the change of ownership would be registered at the same time. T’s prior charge would be paid and discharged and registration of the discharge would occur also at the same time allowing C’s charge to be registered on B’s title.

⁴⁸⁹ Connolly, F. ‘E-Conveyancing: who will benefit?’ BSc Hons Dissertation (October 2007) p. 52.

⁴⁹⁰ Kelway, S. ‘Electronic conveyancing – experiences in England and Wales’ Law Reform Commission Annual Conference (2004) p. 8.

⁴⁹¹ Harpum, C. ‘Property in an Electronic Age’ (2000) 1 *Modern Studies in Property Law* (Hart Publishing Oxford 2001) p. 6.

⁴⁹² Greed, J.A. ‘No, I shan’t register’ (1998) 148 *NLJ* 1670.

⁴⁹³ Harpum, C. ‘Property in an Electronic Age’ (2000) 1 *Modern Studies in Property Law* (Hart Publishing Oxford 2001) 6 – 7.

In the transfer of Whiteacre title would pass from X to Y. Any prior encumbrance would also be discharged and registration of that discharge would occur simultaneously.

In this scenario there would be no risk of a prior encumbrance on the title not being cleared and left on the title after completion. There would be no risk from T the prior lender. B and Y would obtain an unencumbered title and C's charge would be registered simultaneous with the release of the loan funds.

Removal of the registration gap also has an impact on the other risks identified. If U, the third party or V, if a successful property claimant, have their right registered before the registration of B then they gain priority as first registered prevails. This would not be possible if there is no registration gap. As a volunteer, Y is subject to U and V's right regardless of registration. If, however, V's claim is not successful then his property claim will fail and there is no risk to B, C or Y.

In *ACC Bank plc v. Johnston*⁴⁹⁴ Mr. Johnston was acting as solicitor for ACC Bank. He released monies to the borrower's solicitor on foot of an undertaking given to him to the effect that the monies would be applied in the purchase of specific properties and ACC Bank would have a first legal charge over the lands. It turned out that the borrower never owned the lands in question and thus the loan could not be secured by a first legal charge. The undertaking could not be honoured. Clark J. noted that if:

“conveyancing transactions could be executed and filed electronically (so as to have immediate effect), then there is no reason in principle why all relevant conveyancing and financial transactions could not be executed as part of a single integrated programme. By such a programme any existing mortgage could be released, the property could be transferred from the vendor to the purchaser, any appropriate mortgage in favour of a lending institution to the purchaser could be put in place, and all necessary financial transactions associated with each of those aspects of the overall transaction could be executed. The risks inherent in the existing system, which this case has brought into relief, could also be removed by such a process....then a fail safe method of conducting conveyancing transactions where all elements of the transaction

⁴⁹⁴ *ACC Bank plc v. Johnston* [2010] IEHC 236.

would take place simultaneously without, indeed, the need for any of the parties to be in same place at the same time, could be put in place.”⁴⁹⁵

A contrary view is offered by Butt who asks if it is really that important to get rid of this registration gap.

“Are house buyers really attacking the gates of the Land Registry and demanding that the registration gap be abolished? Do any of them actually know or care anything about it? Surely, the most important thing must be to speed up the part of the conveyancing process leading up to the client being able to move into his new home....What happens after that has never been of any concern to the client.”⁴⁹⁶

This is because they assume the process is secure in their lack of knowledge of it. However, if there is a problem with registration or some other intervening interest is registered then it does become a major concern for the client. Perhaps they may wish to sell on the following day or to raise additional finance using the property as collateral and this is not feasible because of some event occurring during the gap. Just because land owners are not aware of these risks does not mean they do not exist and, if the opportunity arises to eliminate them, is it not incumbent on other more knowledgeable stakeholders to assess the merits of such a reduction in risk?

5.2.6 Impact on risk

Thus removal or shortening of the registration gap does have an impact on risk. Aligning payment of the purchase monies, completion and registration has the potential to provide for:

- (a) simultaneous discharge of the prior charge – risk from T to B, Y and C is removed; and
- (b) no delay in registration and thus no other intervening interest can be registered – risk from U and V to B, Y and C is removed.

⁴⁹⁵ *ibid.*

⁴⁹⁶ Butt, P. *Electronic Conveyancing: A Practical Guide* (2006 Thomson Sweet & Maxwell London) p. 64.

However the question arises as to whether this is feasible even in an electronic environment particularly when the registering authority is required to sign off on the registration.⁴⁹⁷ Even in Ontario the registration gap remains.

In Ontario if the land registrar decides that a proposed registration is in any way deficient he or she has 21 days to notify the lawyer that the application will be rejected unless the deficiency is corrected.⁴⁹⁸ The registrar can allow a period of time between seven and 30 days for the problem to be corrected and if the request is not satisfied within that time frame then the application is rejected and priority is lost.⁴⁹⁹ If the matter is resolved within the time frame allowed then the registration will be completed. The application will be deemed to have been registered on the day that the registrar received it and in the order that the registrar entered it into the register.⁵⁰⁰

Clancy expresses the view that “[e]ssentially, if the purchaser can rely absolutely on the information contained in the register and can trust the solicitor and the registration process, then there is no concern about a registration delay.”⁵⁰¹ Unfortunately none of these absolutes apply. The reality is much different.

In both jurisdictions the register is subject to some other right getting registered in the registration gap and this right may not have been disclosed by the vendor, if indeed it was known by him. If priority has not already been secured via a priority period then there is the possibility of some other right gaining priority during the delay. Even if a priority period is secured this is dependent on the application for registration being successful. If for some reason the application is rejected then the priority is lost.

⁴⁹⁷ In England the view has been taken that the registry must share its functions in order for the registration gap to be eliminated. This argument is being used as the rationale for implementing an automated and automatic eConveyancing system. See O’Connor, P. ‘Information, Automation and the Conclusive Land Register’ in Grinlinton, D. (ed) *Torrens in the Twenty-first Century* (Wellington, LexisNexis 2003) p. 272.

⁴⁹⁸ Moore, M.E. and Globe, J.M. *Title Searching and Conveyancing in Ontario* (5th edn Canada, LexisNexis 2003) p. 142-143.

⁴⁹⁹ Section 78(2) Land Titles Act.

⁵⁰⁰ Section 78(5) Land Titles Act.

⁵⁰¹ Clancy, D. ‘Benchmarking Land Registration’ Registering the World Conference Dublin (26 - 28 September 2007)

http://www.landregistry.ie/eng/Dublin_Conference_2007/Conference_Papers/ accessed 9 September 2010 p. 12.

There is also the risk from a prior encumbrance on the title that has not been cleared. The example of the prior charge held by T is used above but this encumbrance could be a judgment mortgage or some other encumbrance on the title. The lawyer may fraudulently appropriate the funds and may not discharge the prior encumbrance in compliance with his or her undertaking.

While it may not be feasible to eliminate the registration gap entirely, particularly where the role of the registrar is to be maintained, there is considerable scope for its reduction in Ireland and this will lead to a lowering of risk for B, C and Y. The extent of this decrease in risk will depend on how much the gap can be reduced.

The impact of this lowering of risk for B, C and Y is that there may be increased risk for U and V. U and V will have less or no time to get their interest registered or protected by a note on the title register before the transaction takes effect. Thus the possibility is that the B and C will take free from their interest. B will take free of this interest as a *bona fide* purchaser for value. C who holds a charge on B's title will also hold free of this interest.

Increasing the protection offered to those with what are perceived to be more valid and valuable rights in land (in this case B and C) at the expense of U and V may be seen as desirable and feasible in an eConveyancing environment. B and C are market participants who rely on the register. Increasing the security of their rights will enhance the fluid operation of the land market and increase the potential for investment and income generation. By contrast U and V rely not on the register but on some other factor such as occupation or the status of their interest as an overriding interest.⁵⁰²

Even if the registration gap is removed or shortened an applicant for registration will still need to comply with certain formalities for registration. This is the second risk category pertaining to pre-registration. B will seek to have his title to Greenacre registered subject to C's charge and Y will seek to have his title to Whiteacre registered. All must comply with the formalities for registration.

5.3 Formalities for registration

⁵⁰² See also 8.4.

B, Y and C are at risk if some other event or formality is required before registration can take place. In a paper environment these risks might arise from a failure to properly execute the deed or charge or the wrong form being used. The defect may prevent registration taking place.

Harpum notes that in England a high degree of formality is required to create proprietary rights.⁵⁰³ The formalities required for contracts and deeds relating to land are strict and this is the position in all jurisdictions. Traditionally the purchase of a family home was seen as the most expensive purchase a consumer would make in their lifetime and thus, in order to protect this person, who was seen to have little business acumen, a high degree of formality was required. This formality also prevented a person from inadvertently parting with their interest in property or creating new rights when they might not have intended to do so.

The formalities relate not just to the type of document that must be used but also the format of that document and the execution thereof. In Ireland traditionally deeds were handwritten on indented parchment or deed paper, signed and sealed with two witnesses to each signature. With the advent of the typewriter, and then computers, they could be typed on ordinary paper and the requirement for a seal was removed. With the move to registered land the form was set by the registrar, rather than by tradition, but signing and witnessing with wet signatures is still required.

Thus the type of document and its format has changed significantly over the years. Registration of title required standard documents in a standard format and this was backed by the statutory powers of the registrar. The execution had also changed in that sealing would no longer be required. Thus there has been a continual change in the formalities for registration and eConveyancing has become part of this continuum.

Any failure to comply with the formalities may create risk in that registration may be denied. This will adversely affect B, Y and C. This failure to register may lead to a loss of priority.

5.3.1 Risk in a paper environment

⁵⁰³ Harpum, C. 'Property in an Electronic Age' (2000) 1 *Modern Studies in Property Law* (Hart Publishing Oxford 2001) p. 14.

In a paper conveyancing environment there may have been

- (a) a valid deed of transfer or charge and registration is successful
- (b) a valid deed of transfer or charge but registration was rejected
- (c) an invalid deed of transfer or charge but registration was successful
- (d) an invalid deed of transfer or charge and registration is rejected

If the registrar mistakenly rejects an application for registration of a valid deed of transfer or charge, as per (b) above, then this is a registry error. The parties could re-apply for registration or could seek rectification and compensation under the provisions outlined in chapter six. This mistake by the registry would extend the registration gap and thus B, C and Y would be at risk for a longer period of an intervening interest being registered first and gaining priority. As there was a valid deed of transfer or charge there has been no failure to comply with the formalities for registration and, provided there is no error by the registry, registration should be successful as per (a) above.

Where there is an invalid deed of transfer or charge there is a failure to comply with the required formalities. If registration is successful, as per (c), this failure might never come to light. If registration is rejected on the basis of the failure, as per (d), the parties will need to resolve the difficulty before re-lodging the application for registration. Meanwhile the registration gap is extended.

B may need to take an action against A to resolve the failure and similarly Y may need to take an action against X. C would need to take action against B who granted the charge. Such an action may be an *in personam* claim or on the basis of a breach of the covenants of title. Alternatively as the sale of Greenacre is for value B would be able to enforce the terms of the contract.

If registration had been successful and a subsequent sale to D had taken place B and Y would no longer be at risk as they would have received the purchase monies for their interest in the land and C's charge would have been redeemed.

5.3.2 Changes in formalities

In Ontario the requirement for a witness on a document was eliminated and most affidavits were replaced with law statements.⁵⁰⁴ In 1994 Part III of the LRRRA was introduced which provided for the electronic registration of electronic documents,⁵⁰⁵ known as e-reg. Section 22 provided that the electronic document will prevail over any written document. Section 21 removed the requirement that a document be in writing and signed and thus paved the way for electronic documents. Section 23 gave authority for the direct electronic transmission of electronic documents to the title register database by authorised persons.⁵⁰⁶ These parties are applicants in our neutral terminology as they do not alter the title register. In Ontario, as in Ireland, only the registrar can make a change to the title register though such a change may be ordered by the Court.

The LRRRA also introduced the concept of standardised forms known as POLARIS forms. Implied covenants for transfers and charges and standard charge terms were introduced. Lenders must file Charge Terms documents with the registry and these terms are then incorporated by reference into the standard forms. Copies of the Charge Terms are made available and a book of each year's Standard Charge Terms is published.⁵⁰⁷ This has meant a reduction in the amount of paper stored in the registry and paper in the conveyancing process. These initiatives "helped streamline the document registration process by imposing consistency and simplifying the form and content of the documents that were registered in the land registration system...[and] laid the groundwork for automation and electronic registration."⁵⁰⁸

Similar moves towards standardisation are occurring in Ireland. The 2009 Act amended section 51(2) of the 1964 Act by deleting 'or in such other form as may appear to the Authority to be sufficient to convey the land'.⁵⁰⁹ The discretion that could be exercised by Registrar was removed and now the Land Registry can only

⁵⁰⁴ Murray, K. 'Electronic registration and other modernization initiatives in Ontario's land registration system' Law Reform Commission Annual Conference (2004) <http://www.lawreform.ie/Annual%20Conference%202004.PDF> accessed 18 February 2009 p. 3.

⁵⁰⁵ The format could be an electronic copy, image or reproduction of a written document. See definitions in section 17 of the LRRRA.

⁵⁰⁶ Section 17 of the LRRRA calls these people electronic document submitters.

⁵⁰⁷ Murray, K. 'Electronic registration and other modernization initiatives in Ontario's land registration system' Law Reform Commission Annual Conference (2004) <http://www.lawreform.ie/Annual%20Conference%202004.PDF> accessed 18 February 2009 p. 3.

⁵⁰⁸ *ibid.*, p. 2.

⁵⁰⁹ Schedule 1 and section 8. A similar change was made in respect of charges on registered land.

accept transfers of registered land in the prescribed form. More recently the Land Registration Rules 2011⁵¹⁰ have set out prescribed forms of charge that must be used from the 1 March 2012.

Section 64 of the 2009 Act removed the sealing requirement and provided that execution by an individual by signing and having their signature witnessed would be sufficient. However by virtue of section 10(1) of the Electronic Commerce Act 2000⁵¹¹ deeds or transfers relating to real property cannot be in electronic form or signed electronically and this would need to be amended before the implementation of eConveyancing.⁵¹²

Generally in an eConveyancing system the required formalities are translated into business rules that need to be complied with. These business rules are reflected in the data that needs to be put into the system. There is a common view that the electronic system will reduce the possibility for errors as the electronic system will prevent certain types of mistakes. Treacy and O'Sullivan note that "because of in-built system prompts and automatic calculation of registration fees, use of the on-line form completion is leading to a significantly lower incidence of errors in the documentation presented for registration."⁵¹³ These prompts ensure compliance with pro-forma requirements however other errors would not be picked up by the system, for example if the wrong form was used.

The system may ensure that the data input meets certain criteria and there is the possibility for data fields to be checked against the title register before the application is submitted. The data may be incorrect or the user may not have authority so there is the possibility of the formalities for registration also not being complied with in an electronic system. Rigid adherence to pro-forma requirements may also generate other types of errors as the system may be too rigid to accommodate all types of variation in transactions and may not reflect the actual agreement between the land owners.

⁵¹⁰ SI 559/2011.

⁵¹¹ No 27 of 2000.

⁵¹² Oddly the section excludes contracts which can be electronic and signed electronically.

⁵¹³ Treacy, C. and O'Sullivan, J. 'Land registration in Ireland – current position and future developments' Law Reform Commission Annual Conference (2004) <http://www.lawreform.ie/Annual%20Conference%202004.PDF> accessed 10 March 2009 p. 8.

The use of an electronic platform does drive a need for conformity not just of the required documentation but also for processes. It requires that transactions occur in a prescribed way. Thus while there may be errors these may be of a limited variety.

Simplified forms may speed up registration by reducing the amount of material that registry staff need to review in an application for registration. In Ontario the forms were designed in conjunction with the automated system and in a manner to compliment the screen design and automated workflow.⁵¹⁴ This required a reduction in the amount of information abstracted on to the register and resulted in “increased productivity because of the standardized form and workflows and improved data integrity with the simplified abstract entries.”⁵¹⁵

The question arises though as to what, if anything, might be lost as a result of this standardisation and reduction in information on the registry. Is the lack of flexibility creating invisible information leading to a consequential risk that will only come to light at a later date? Harpum points out that in “an ideal world, each and every formal requirement would be subjected to a detailed analysis to determine its precise functions.”⁵¹⁶ This would likely reveal which formalities need to be retained and which can be removed from the process.

The function of such formalities is to provide certainty and create a symbolic representation of the important legal act taking place so the parties to that act will think carefully before undertaking the act. In this way the parties will subsequently find it difficult to claim that they did not understand the importance of the act and the consequence flowing from it. Youdan classifies the functions of formality provisions as ensuring intention, standardisation and evidence.⁵¹⁷ Coughlan tracks some of the

⁵¹⁴ Murray, K. ‘Electronic registration and other modernization initiatives in Ontario’s land registration system’ Law Reform Commission Annual Conference (2004) <http://www.lawreform.ie/Annual%20Conference%202004.PDF> accessed 18 February 2009 p. 3.

⁵¹⁵ *ibid.*

⁵¹⁶ Harpum, C. ‘Property in an Electronic Age’ (2000) 1 *Modern Studies in Property Law* (Hart Publishing Oxford 2001) p. 9.

⁵¹⁷ Youdan, T.G.. ‘Formalities for Trusts of Land, and the Doctrine in *Rochefoucauld v. Boustead*’ (1984) 43 *C.L.J.* p. 314 – 315. See Ipp, D.A. and Siopis, A.N., ‘Formalities relating to Contracts for the Sale of Land Revisited’ (1989) 19 *U.W. Austl. L. Rev.* 301 - 317 for an examination for conflicting formal requirements. See also Dixon, M. ‘Estoppel, Unconscionability and Formalities in Land Law’ (2000) 59 *C.L.J.* 453 - 455 for the interaction between formalities and estoppel.

changes in formalities that have occurred in Ireland while noting that there is still a tendency towards a degree of formality which seems somewhat outmoded.⁵¹⁸

eConveyancing necessitates changes to the formalities required for creation and execution of deeds. It also requires change to be made to the common law concept of 'delivery' of a deed, electronic signatures and authentication of the electronic signature through certification.⁵¹⁹ Statutory authority is given to the pressing of a computer key "setting off a digital reaction.... The pen succumbs to the statutory sword."⁵²⁰

Much of the change has centered around giving electronic documents validation over paper documents and changes to execution requirements so that a wet signature is no longer required. In eConveyancing an electronic document must be given the same as or preferential status to a paper document. Esigning without sealing must be facilitated. The format will be more tightly prescribed so there is less scope for inclusion of special clauses. Paper will be removed and this will mean the elimination of interests that depended on deposit of the title deeds.

The lawyer may need authority to sign on behalf of the client if the type of electronic signature required is beyond the reach of clients. Supporting transactional documentation and the client authority may still exist off the register. These will be required to overcome any later difficulty with providing evidential proof of what the client authorised the lawyer to do on his or her behalf. This necessity to retain paper on the lawyers file appears to defeat one of the overall tenets of eConveyancing which is dematerialisation.

The potential conflict between paper evidence and electronic evidence of title and the fear that land owners might prefer the paper document to the electronic record probably encourages the move towards abolition of paper. As Kelway states "[i]f we are to move to a fully electronic service there cannot be a paper-based end

⁵¹⁸ Coughlan, P. *Property Law* (2nd edn Dublin, Gill & Macmillan 1998) p. 80.

⁵¹⁹ Harpum, C. 'English experience: title by registration – preparation for e-conveyancing' (2004) Law Reform Commission Annual Conference (2004) <http://www.lawreform.ie/Annual%20Conference%202004.PDF> accessed 18 February 2009 p. 9.

⁵²⁰ Flaws, J. 'Compensation for Loss under the Torrens System – Extending State Compensation with Private Insurance' in Grinlinton, D. (ed) *Torrens in the Twenty-first Century* (Wellington, LexisNexis 2003) p. 397.

product.”⁵²¹ Lenders have generally welcomed this as the storage of paper records has become an expensive waste of space.⁵²² The retention of some paper may however be a necessity until all clients have an electronic signature that is robust enough to be used in the system.

While dematerialisation is an important tenet of eConveyancing it is really the knock on effect that is of interest. There may be savings in the registry due to efficiency of staff time, a reduction in data input, lowering of cost of paper storage and archiving and less investigation of title required as there is no need to review bundles of paper deeds. The same savings will occur in the lawyer’s office. There may thus be a reduction in costs that can be passed on to the land owner.

In Ontario each electronic document statement confirms that the person signing has the authority to sign on behalf of the owner. The electronic signature is attached by the lawyer and not the land owner. These new requirements have shifted authority and compliance to the lawyer. This would suggest that it is easier for a transaction to be done without a land owner’s presence, knowledge or consent. Do electronic signatures attached by the lawyer give the land owner a degree of abstraction or disassociation from the transaction and if so, what impact does this have? Is a land owner, be they transferor or transferee, more likely to repudiate the transaction as a result?

These enquiries could be seen in the context of risks that arise in all computer systems as they are not particular to eConveyancing. However, as the degree of formality associated with a paper conveyancing system is so high any perceived lowering or diluting of these formalities is generally greeted with horror. The question arises as to whether this attitude is justified.

Clearly it would be preferable for a land owner to have the electronic signature as it is their transaction. It would also be preferable for them to make all statements about the title however these requirements may need to be traded for the other benefits that can accrue from eConveyancing. Given that standardisation is a key requirement it is likely that the formalities will be streamlined and regardless of whether the system is paper or electronic there may be a breach of formalities. If

⁵²¹ Kelway, S. ‘Electronic conveyancing – experiences in England and Wales’ Law Reform Commission Annual Conference (2004) p. 3.

⁵²² *ibid.*

such formalities are more clear and streamlined a breach may be less rather than more likely to occur.

5.3.3 Risk in an eConveyancing environment

In an eConveyancing environment if the deed of transfer or charge and registration is a simultaneous act a failure, of any type, is a complete failure. In Howell's view either a disposition is registered and takes full effect, or it is not and has no effect at all.⁵²³ This means that under eConveyancing there can be no failure in formality as a transfer will either be registered or not.⁵²⁴

The schematic would need to be adjusted to indicate that the transfer or charge could not occur independently of its registration. It is the act of registration that is the key rather than the instrument. There may in fact be no instrument but instead registration will be based on the completion of data fields that comply with the information already on the register, the application of an electronic signature and the click of a computer key to indicate completion of the transaction.

Making completion and registration a simultaneous act is, however, the characteristic of an automatic system where the registrant triggers the change in the register without intervention by the registrar. This is not the system adopted in Ontario and Ireland also proposes that the registrar would retain the final approval of any application for registration.

In Ontario the documents may be returned by the registrar for corrections and the lawyer has 30 days to correct the problem and reodge the document.⁵²⁵ Thus while the instrument may have been tendered for registration and the transaction completed based on its electronic transmission to the registrar via Teraview, until the instrument is checked, certified and entered on the register it is not registered and has no effect.⁵²⁶

Donahue and his colleagues note that despite the risks

⁵²³ Howell, J. 'Land Law in an E-conveyancing World' (2006) *Conv.* 553 – 576 in referring to the likely effect of the English Land Registration Act 2002 at p. 574.

⁵²⁴ *ibid.*

⁵²⁵ Section 78(2) Land Titles Act.

⁵²⁶ Section 78(3) and 78(4) Land Titles Act.

“current practice is to complete purchases and mortgage advances just as one would do under the [unregistered] Registry system and not await the certification of the instrument. This approach is taken in spite of the provisions in s. 78(2), which allows the land registrar to decline the registration of a document within 21 days after it was received where the land registrar decides that the document contains an error, omission or deficiency.”⁵²⁷

However, even if completion and registration are not to be done simultaneously and the power of the registrar is to be retained, it should be possible in an eConveyancing environment to reduce the registration gap to such an extent that registration follows completion almost automatically. This should certainly be feasible for straightforward transfers and charges where there is no subdivision.

Retaining a time gap, though however small, means there is always the danger that the formalities may not be complied with and an application for registration might be rejected. Thus on the face of it there is no change in risk to B, Y or C through the move to eConveyancing.

If, however, the system requires a right to be registered in order for title to be conferred then a failure to register due to non-compliance with the formalities may have serious adverse consequences. If the move towards eConveyancing involves a transition from title registration to title by registration then the formalities for registration become more important. Standardised forms and workflow may make it easier to comply with the formalities and to meet the business rules but the consequence of non compliance will be more severe. Failure to register will result in the right not being enforceable.

Given that Ireland already operates a title by registration system it is possible that the changes in formality brought about by standardisation and dematerialisation will result in a more streamlined, efficient and cost effective conveyancing process. In built system prompts are likely to reduce the risk of a breach of formalities occurring though this may need to be balanced against any rigidity introduced if there is a lack of flexibility in the system.

⁵²⁷ Donahue, D.J. and others *Real Estate Practice in Ontario* (6th edn Canada, LexisNexis Butterworths 2003) p. 35.

If the system design is robust it presents the opportunity to build in less risk for B, Y and C. It may make it easier for them to comply with the registry requirements. As the formalities are translated into business rules the system may indicate if there is a problem with the data. If data is pre-populated from the register then there is less possibility of getting the name of the transferor or property identifier wrong. Errors may be identified and resolved in advance of completion so that there is less likelihood of the application for registration being rejected. The system may also show in advance what effect a successful application will have on the register so the applicant can be sure the application will effectively implement the transaction.

5.4 Conclusion

The implementation of eConveyancing is likely to impact on the risk profile of certain participants as a result of changes occurring in the pre-registration period.

eConveyancing in Ireland will not eliminate the registration gap but has the potential to reduce it. The remaining gap may be covered by a priority period. Reducing the registration gap lowers risk for B, Y and C and increases risk for U and V. This is likely to be seen as a desirable outcome and U and V are unlikely to be protected against this change.

In relation to changes to the formalities for registration there may be the opportunity to further reduce the risk for B, Y and C. This will not lead directly to a corresponding increase in risk for other parties.⁵²⁸

Thus eConveyancing will benefit those applying for registered title at the expense of third party rights. B, Y and C's title will be registered more promptly and more easily however these changes will not entirely eliminate risk for B, Y and C. Given the increased emphasis on registration the effect of an error in the register may be more severe and this risk is examined in the next chapter.

⁵²⁸ There may be indirect consequences for U and V. See chapter seven which deals with the destructive effects of a registered transaction.

CHAPTER 6 THE REGISTER

6.1 Introduction

This chapter examines the impact of the register itself. On the face of it the participant has made a successful application for registration but due to some error in the transaction or by the registry their interest is at risk.

All parties are at risk from an error in the register. Due to the error A's ownership of Greenacre and X's ownership of Whiteacre may be at risk from a claim of prior ownership. If this occurs B is at risk in the purchase of Greenacre and Y is at risk in the transfer of Whiteacre. They are at risk from the fact that A and X did not have title to sell or gift. C is also at risk in the purchase of Greenacre as B did not have title to grant the charge. D may also be at risk if a subsequent transaction has occurred.

This chapter will examine where the error occurs in the modeled transactions so that B and Y are subject to a claim of prior ownership by A and X.

The unauthorised or illegitimate alteration of the register could occur due to an action by a person who is not entitled to act at all, an action by a person who is entitled to act but not in the actual circumstances or alternatively due to an error made by the registry staff. An entry on the register might have been allowed when it should not have been or alternatively the register is not amended when it should have been. Alternatively the error might involve amending the wrong entry on the register. The registrar may fail to register the interest correctly or at all.

Cooke makes the distinction between transactional errors and register errors.⁵²⁹ Transactional errors being where the transfer is void and thus should not have been registered; its registration is an error. Alternatively there may be an administrative mistake where the transaction is fine but the process of registration produces an error. Register errors occur where the register is wrong before the transaction takes place i.e. there was an error on first registration of the title or because a prior transfer was void and should not have been registered.⁵³⁰

⁵²⁹ Cooke, E. 'Land Registration: Void and Voidable Titles' (2004) 8 *Edinburgh L. Rev.* p. 401 – 405.

⁵³⁰ *ibid.*, p. 402.

A transactional error may be capable of being corrected by the parties to the transaction, though there may be no incentive to do so if the transfer has successfully been registered. A transactional error that is not corrected may become a register error in subsequent transactions. This distinction by Cooke is primarily about which transaction has created the error i.e. the current transaction or a prior transaction.

How errors are dealt with by registration systems has, however, less to do with the transaction that created the error and more to do with the specific type of error. The exception is in the case of fraud where the person buying from the fraudster may be treated differently to a subsequent purchaser and this is examined later in the chapter.

The terms transaction errors and registry errors are used below but with a different meaning. Transaction errors are those errors that arise outside the registry. Registry errors refer to errors that originate in the registry. These errors arise purely due to some mistake by the registry and are not based on some fault in the transaction. For example the registrar amends the wrong entry or the register is not amended when it should have been.

Where there is a fault in the transaction and as a result the application for registration should have been rejected but was not, this will be referred to as a combined transaction and registry error. The entry was allowed by the registrar when it should not have been. Such errors present a danger to the participants in that the transaction may have been void or voidable for any one of a number of reasons. The transfer may have been forged or there may have been some fraudulent misrepresentation, illegality or breach of statutory duty.⁵³¹

Thus the types of errors can be divided under the following headings:

1. Transaction errors
2. Registry errors
3. Combined transaction and registry errors

⁵³¹ For some examples of breach of statutory duty see O'Connor, P. 'Registration of Invalid Dispositions: Who Gets the Property?' in Cooke, E. (ed) *Modern Studies in Property Law Volume III* (Oxford, Hart Publishing 2005) p. 45.

Transaction errors that do not result in a registry error fall outside the remit of this research.⁵³² If the error occurred prior to lodgement of the application or in the preparation of an application then the rectification is a matter for the parties affected.⁵³³ This may mean that a deed of rectification is required or the parties may need to dispute the matter in Court.

Also registry and combined errors of a minor nature are peripheral to this research. This may include where there is a mapping error or a name is spelt wrong on the register. The major risk arising from a registry error or combined error is where a party to the system loses title by being dispossessed and it is this risk that is examined in detail.

The most severe consequences for the idealised participants will be where the system allows rectification of the register, based on the error, and this adversely affects the party in question by dispossessing them. This party may be B, C, Y or D. Equally if the system does not allow rectification and upholds the register then some other idealised participant may be dispossessed instead. This would be A or X. The consequences of rectification will always be severe either for one party or another. It may be the party who would be, or have become, the owner if not for the error i.e. B, C, Y or D. Alternatively it may be the registered owner who should not have become so i.e. B, C or Y or the subsequent purchaser D who relied on the error.

As our abstracted 'pure' participants act correctly at all times the focus in this research is on when such an alteration or correction of the error is due to the fault of someone else or the registrar. The error could be corrected by rectification or the system may provide for compensation to be paid to the injured party. Ruoff and his colleagues refer to these as complementary remedies⁵³⁴ but in many instances both rectification and the lack thereof may lead to a claim for compensation though the claimants will differ.

Rectification may be the remedy for an error in the register or alternatively indefeasibility may mean that the register is immune from rectification. Where rectification is refused on the grounds of indefeasibility the registration system may

⁵³² Examples include where the wrong purchase monies are stated or the transferee transfers in the wrong capacity e.g. as personal representative and not as beneficial owner.

⁵³³ Fitzgerald, B. *Land Registry Practice* (2nd edn Round Hall Press Dublin 1995) p. 445.

⁵³⁴ Ruoff, T.B.F. and Ors *Ruoff & Roper on the Law and Practice of Registered Conveyancing* (5th edn London, Stevens and Sons 1986) p. 75.

provide for compensation to be paid. Compensation may also be payable if a person suffers loss due to a title being rectified when they have relied upon the erroneous registry entry. Such rectification arises on the grounds of defeasibility of the register.

Thus the extent to which the system of registration is defeasible will determine whose interest is to be upheld as being guaranteed by the state and whose ownership is to be displaced by the error. Such displacement may have already taken place by virtue of the error and the system may let the error stand. Alternatively the register may be rectified and this may trigger a claim for compensation.

Using the schematic the impact of combined errors and registry errors will be examined in the context of both Ireland and Ontario.

6.2 Risk from combined transaction and registry errors

The impact of a fraudulent transaction provides the clearest demonstration of how a transaction error becomes a registry error. Where the transfers to B and Y are based on fraud the schematic presents a number of different scenarios. Each scenario pits one or more participants against other participants.

Scenario 1 examines where a fraudulent transaction takes place in the transaction for value.

Scenario 1(a)

A fraudster steals A's identity in order to sell Greenacre to B and B becomes the registered owner on foot of the fraudulent transaction. In this situation A is an innocent prior registered owner. When A becomes aware of the transfer he seeks to have the register rectified to restore his title. This would only be possible where the charge held by T had already been paid and removed from the register however the transaction would have been financed by C whose interest is now at risk.

If the register is rectified in favour of A, then B and C lose title. If the register is not rectified and the interests of B and C are upheld then A loses title.

Scenario 1(b)

Before A became aware of the fraud, B sold Greenacre to D and D is now the registered owner. In this situation A is an innocent prior registered owner but D purchased in reliance on the register. A seeks to have the register rectified in his favour while D resists the rectification and requires his ownership to be upheld. D may have purchased on foot of financing provided by a lender and this acquisition lender will be called 'C2'.

The register could be rectified in favour of A so that D and C2 lose title. Alternatively the ownership of D and C2 could be upheld so that A loses title.

Scenario 2 examines where a fraudulent transaction takes place in the transaction not for value.

Scenario 2(a)

A fraudster steals X's identity in order to gift Whiteacre to Y and Y becomes the registered owner on foot of the fraudulent transaction. In this situation X is an innocent prior registered owner. When X becomes aware of the transfer he seeks to have the register rectified to restore his title.

The register could be rectified in favour of X so that Y loses title. Alternatively if the register is not rectified and the ownership of Y is upheld, X loses title.

Scenario 2(b)

Before X became aware of the fraud, Y sold Whiteacre to D and D is now the registered owner. In this situation X is an innocent prior registered owner but D purchased in reliance on the register. X seeks to have the register rectified in his favour while D resists the rectification and requires his ownership to be upheld. Again D may have purchased on foot of financing provided by a lender and this acquisition lender will be referred to as 'C2'.

The register could be rectified in favour of X so that D and C2 lose title. Alternatively

the ownership of D and C2 could be upheld so that X loses title.

6.3 Risk from registry errors

A registry error originates in the registry and as a result a party is in danger of being dispossessed. Where such errors occur the schematic presents a number of different scenarios.

In order to examine these, additional parties need to be introduced to the schematic. These will be the stranger 'S' and the stranger's lender 'SL'. D will remain the subsequent *bona fide* purchaser for value and C2 will be D's acquisition lender.

Scenario 3 examines where the error takes place in the transaction for value.

Scenario 3(a)

Instead of registering the title to Greenacre in B's name subject to the charge held by C, the registrar registers S as the owner and SL as the lender. When B and C become aware of the error they seek to have the register rectified.

Scenario 3(b)

Before B and C become aware of the error, S sold the property to D who has purchased in reliance on the error in the register. If D purchased using loan funds then C2 will also be at risk.

Scenario 4 examines where the error takes place in the transaction not for value.

Scenario 4(a)

Instead of registering the title to Whiteacre in Y's name, the registrar registers S as the owner. When Y becomes aware of the error he seeks to have the register rectified.

Scenario 4(b)

Before Y became aware of the error, S sold the property to D who has purchased in reliance on the error in the register. If D purchased using loan funds then C2 will also be at risk.

Thus in total there are four possible scenarios and each has two elements. Part (a) deals with the position where the erroneous transaction or registration has been entered on the register and part (b) examines the position of the parties after a subsequent transaction has been registered. The idealised participants have been used above to demonstrate the error in question and each scenario will be examined to determine how the error is addressed by the registration systems in Ireland and Ontario.

As already stated the extent to which each system is defeasible will determine whether the error will lead to rectification or an upholding of the register. Either may then trigger a claim for compensation from a participant who has suffered loss.

Before applying these scenarios it is necessary to explain the position in general in each jurisdiction and also the law on rectification and compensation.

6.4 The position in Ireland

Much of the Irish case law on rectification of the register arises in relation to the provisions of the Local Registration of Title (Ireland) Act 1891 (the 1891 Act) rather than under the current provisions of the 1964 Act.⁵³⁵ This is explained by two factors. Firstly it could be argued that the 1891 Act allowed rectification in a broader set of circumstances. Section 34(2) refers to errors occurring in the registration of the ownership of land whereas section 32(1) of the 1964 Act is limited to errors originating in the Land Registry.⁵³⁶ Secondly under the 1891 Act only the court had

⁵³⁵ See Dowling, A. 'Rectification of the Title Register' (1993) 44 *N.I.L.Q.*113 – 129 for an examination of these cases. See also chapter IX McAllister, D.L. *Registration of Title in Ireland* (Council of Law Reporting for Ireland Dublin 1973).

⁵³⁶ Confirmed by Carroll J. in *Geraghty v. Buckley* High Court Unreported (6 October 1986). Though the Supreme Court in *Persian Properties Ltd v. The Registrar of Titles and the Minister for Finance* [2003] IESC 12 (20 February 2003) held that the fact that the initial application to the Land Registry contained an inaccuracy did not relieve the defendants of

power to rectify and thus any act of rectification is in the public domain and is accompanied by a court decision setting out the reasons for the rectification.

This is contrasted with the position post the 1964 Act where decisions of the registrar to rectify under the provisions of section 32 remain hidden as they are not made public. There is an argument that, as this rectification is based on consent, it should remain a private agreement between the parties. The counter argument is that because the error was on the part of the registry and may form grounds for compensation public policy dictates that such decisions be publicly available.

Given however that the decisions of the registrar are not available there is in fact very little modern case law that provides guidance in this area. *In re Erris Investments Ltd.*⁵³⁷ a lease was disclaimed by a liquidator of a tenant company and the landlord sought its cancellation as a burden on his title. The registrar refused rectification and the court agreed. In *Boyle v. Connaughton*⁵³⁸ the court ordered rectification of the register on the basis that the plaintiff was aware of the defendant's actual occupation of part of his land before the transfer and thus the plaintiff's title was subject to that overriding interest. Notwithstanding the conclusiveness of the register the rights held by the Connaughtons were preserved and protected by section 72 of the 1964 Act by their actual occupation. In addition a mistake in mapping was made when the original lands were subdivided so that the intention of the transfer was not given effect to. The maps were amended to more accurately reflect the position of both properties on the ground.

The case of *Crumlish v. Registrar of Deeds and Titles*⁵³⁹ is of more interest as the same piece of land was sold twice and then the two transfers were by mistake registered in two different folios. Giving priority to the transfer that was lodged for registration first, the registrar sought to rectify the error by cancelling the second transfer to the applicant. Lynch J. in the High Court held that the registrar only had power to rectify with the consent of the parties and the applicant in this case had specifically refused consent. The court would not make an order on the basis of proceedings by way of judicial review heard only on affidavit.

their obligation to pay compensation to the plaintiff pursuant to section 120(2) since the error in registration had not been caused, or substantially contributed to, by the plaintiff.

⁵³⁷ *In re Erris Investments Ltd.* [1991] ILRM 377.

⁵³⁸ *Boyle v. Connaughton* [2000] IEHC 28 (21 March 2000).

⁵³⁹ *Crumlish v. Registrar of Deeds and Titles* [1990] 2 IR 471.

The lack of judicial guidance means that it is a matter for speculation as to exactly how the Irish courts might approach certain aspects of indefeasibility. However, the power of the registrar to rectify with consent means that often insignificant practical changes to the register can be accomplished without an application to court. Of course, significant changes could also be made provided there is consent.

If the registrar discovers an error he may enter an inhibition on the folio in order to freeze the folio and thus protect the fund in the event of a claim.⁵⁴⁰ This power must be exercised in a judicial manner and, unless the urgency of the situation requires otherwise, prior notice should be given to any person whose rights may be affected.⁵⁴¹ The registrar would not be permitted to freeze the folio indefinitely as this would make the land inalienable. The inhibition may be a prelude to a consensual change by rectification or the matter being decided in court in favour of one party or the other.

6.4.1 Rectification

Sections 31 and 32 of the 1964 Act set out the grounds for rectification of the register in Ireland.

Section 32(1)⁵⁴² provides that any errors originating in the Land Registry may be rectified by

- (a) the Authority with the consent of the registered owner and all interested parties upon such terms as may be agreed in writing by the parties; or
- (b) the Authority where it is of the opinion that the error can be rectified without loss to any person after giving such notices as may be prescribed; or
- (c) the court upon such terms as to costs or otherwise as it thinks just, if of the opinion that the error can be rectified without injustice to any person.

The error can be one of misstatement, misdescription, omission or otherwise whether in a register or registry map.

⁵⁴⁰ Section 121 of the 1964 Act.

⁵⁴¹ *The State (Christopher Philpott) v. The Registrar of Titles* [1986] ILRM 499. Gannon J. also stated that this measure should only be used to protect the fund from a real probability of a claim for compensation and should relate to an identifiable error made in the registry of a nature for which compensation could be payable in accordance with section 120.

⁵⁴² As amended by section 55 of the 2006 Act.

Thus the registrar can only rectify errors originating in the registry with the consent and written agreement of the relevant parties or, having notified the parties, if the rectification is without loss to any person. This severely limits the power of the registrar to rectify the register. Equally the court can only rectify the error under section 32 if there would be no injustice caused to any person. “Presumably this would imply that the court would not upset the registration of a registered owner who was registered on foot of a transfer for value and who purchased the lands in good faith.”⁵⁴³

The role of the registrar is in effect to mediate an agreement between the parties so as to facilitate rectification with consent. Such rectification may then give rise to a claim for compensation which will be adjudicated by the registrar. Fitzgerald points out that the hearing of compensation claims by the registrar “places him in an invidious situation and this provision in the Act has been the subject of criticism.”⁵⁴⁴

The court also has power to rectify under section 31 in the case of actual fraud or mistake and this can be on such terms as it thinks just. This does not mean that no party will suffer loss or be prejudiced by the court’s decision. Instead the availability of compensation may mean that the court’s decision is equitable.⁵⁴⁵ Section 32 contains a statutory power to rectify whereas section 31 sets out the breadth of the court’s equitable jurisdiction to rectify for reasons falling outside section 32.⁵⁴⁶

Thus the court has broad powers of rectification while the registrar can only rectify errors originating in the Land Registry. Fitzgerald notes that “no such correction or alteration [by the registrar] would of course disturb registered and legal interests”⁵⁴⁷ presumably on the basis that anyone holding such interests would not give their consent to a rectification that would deprive them of their interest. This is confirmed by the Land Registry in a practice direction which states that no correction could, of course, be made which would disturb registered legal interests.⁵⁴⁸ In *Geraghty v.*

⁵⁴³ Fitzgerald, B. *Land Registry Practice* (2nd edn Round Hall Press Dublin 1995) p. 446.

⁵⁴⁴ *ibid.*, p. 447.

⁵⁴⁵ Breen, O. ‘Registration of Title and Overriding Interests – Another Crack in the Mirror?’ (2000) 5(3) *C.P.L.J.* p. 52.

⁵⁴⁶ *ibid.*

⁵⁴⁷ Fitzgerald, B. *Land Registry Practice* (2nd edn Round Hall Press Dublin 1995) p. 445.

⁵⁴⁸ The Property Registration Authority ‘Practice Direction Rectification of Error and Claims for Compensation (published 01 December 2009)’ http://www.landregistry.ie/eng/Legal_Professional_Customers/Legal_Practices_Procedures/Practice_Directions/17_Rectification_Of_Error_And_Claims_For_Compensation/ accessed 17 April 2012.

*Buckley*⁵⁴⁹ Carroll J. noted that since the registrar did not have power to transfer land unilaterally, the only way title could be transferred, in the absence of the registration of a transfer by the registered owner, was by order of the court.

Fitzgerald notes factors that will be considered by the Court such as:

- (a) whether or not the registered owner contributed to the error⁵⁵⁰
- (b) that he could have had the error rectified previously
- (c) that he was a volunteer and his title could have been defective
- (d) that there was fraud; however where the purchaser for value then sells on the property his purchaser would get a good title and rectification would not be possible.⁵⁵¹

This implies that the fraudulent transaction would not be upheld but that a subsequent transaction to a *bona fide* purchaser for value would be guaranteed.

McAllister expresses the view that if there is a fraud the register will be rectified against the fraudster and any person claiming through or under the fraudster as volunteers but that if there is a transfer by the fraudster to a purchaser for value then the transfer cannot be set aside.⁵⁵² He relies on English case law for this stance⁵⁵³ and notes the lack of reported Irish cases dealing with rectification of the register on the grounds of actual fraud.⁵⁵⁴

Thus McAllister is of the view that the fraudulent transaction will not be set aside unless it is to a volunteer whereas Fitzgerald implies that the fraudulent transaction will be set aside unless there is a subsequent transaction. Given that both Fitzgerald⁵⁵⁵ and McAllister⁵⁵⁶ were registrars their comments are of considerable interest. If the fraudster has transferred registered title to himself then the register would obviously be rectified in favour of the innocent prior registered owner. The difficulty arises when the fraudster has transferred title to another party (B or Y in the

⁵⁴⁹ *Geraghty v. Buckley* High Court Unreported (6 October 1986).

⁵⁵⁰ Section 120(2) refers to the loss not being caused or substantially contributed to by the act, neglect or default of the person or his agent. This was argued in *Persian Properties Ltd v. The Registrar of Titles and the Minister for Finance* [2003] IESC 12 (20 February 2003) but Keane C.J. found this submission was not well founded.

⁵⁵¹ Fitzgerald, B. *Land Registry Practice* (2nd edn Round Hall Press Dublin 1995) p. 446.

⁵⁵² McAllister, D.L. *Registration of Title in Ireland* (Council of Law Reporting for Ireland Dublin 1973) p. 283 – 284.

⁵⁵³ *Assets Co Ltd v. Mere Roihi and Others* [1905] A.C. 176 and *Re Leighton's Conveyance* [1937] Ch. 149.

⁵⁵⁴ McAllister, D.L. *Registration of Title in Ireland* (Council of Law Reporting for Ireland Dublin 1973) p. 284 and 282.

⁵⁵⁵ Fitzgerald was Registrar of Deeds and Titles from 1983 until 1988.

⁵⁵⁶ McAllister was Registrar of Deeds and Titles from 1957 until 1974.

schematic) and this difficulty is compounded when B or Y have sold to D. Whose title is to be upheld?

In effect the issue has yet to be settled but on principle McAllister leans in favour of immediate indefeasibility noting that in order to overcome this “it would be necessary to show a *mala fides* on the part of the purchaser (short of actual fraud) which would tip the scales of justice against him and in favour of another claimant.”⁵⁵⁷ This contrasts with Fitzgerald’s comments which imply a policy of deferred indefeasibility.

The recent case of *Moore v. Moore*⁵⁵⁸ is of interest. The first two defendants sold the property to the third defendant on the basis that they believed the plaintiff to have predeceased their father and that he was the sole owner of the property as surviving joint tenant. The third defendant became the registered owner and took out a charge on the property. The plaintiff alleged fraud on the basis that the first two defendants relied on a death certificate of someone with the same name as the plaintiff however the court found that there was no evidence of fraud or concealment as the first two defendants did attempt to ascertain the whereabouts of the plaintiff. Murphy J. held that the register is conclusive evidence of title and if the plaintiff sustained loss as a result of fraud then she would be entitled to compensation under the provisions of section 120. She was not entitled to rectification in circumstances where the third named defendant was a *bona fide* purchaser for value without notice of the alleged fraud. Also the charge holder was a *bona fide* purchaser for value without notice.

In this case there was no originating error by the registry. It relied upon an affidavit sworn by the first and second named defendants to put the property into the sole name of their father and they then sold to the third named defendant as personal representatives. The court could have rectified under section 31 on the basis of mistake but chose not to do so. There had been a transfer and charge to *bona fide* parties without notice. The court refused the plaintiff’s claim as against the third named defendant.

This case is more consistent with a policy of deferred indefeasibility however the Irish Supreme Court has yet to issue a seminal judgment on the exact nature of Irish indefeasibility so the issue remains to be settled.

⁵⁵⁷ McAllister, D.L. *Registration of Title in Ireland* (Council of Law Reporting for Ireland Dublin 1973) p. 289.

⁵⁵⁸ *Moore v. Moore* [2010] IEHC 462 (12 October 2010).

6.4.2 Compensation

One of the defining features of the title register is the state guarantee of title underpinned by a compensation fund. If any of the parties suffer a loss as a result of an error in the register they may be entitled to compensation from the government. This compensation is intended to put them as far as possible in the position they would have been in had they not been deprived of the interest.

Compensation is payable under section 120⁵⁵⁹ of the 1964 Act to a person adversely affected by a rectification who suffers loss provided the loss was not caused or substantially contributed to by the act, neglect or default of that person or his or her agent. Section 120 provides the grounds to claim compensation for error, forgery or fraud in relation to registration. The five grounds of loss which can lead to a claim for compensation are:

- (a) loss must arise from the rectification of an error in registration under section 32(1);
- (b) any error originating in the registry which is not rectified;
- (c) any entry in or omission caused or obtained by forgery or fraud;
- (d) an error in an official search; or
- (e) the inaccuracy of any extract from the register.

The error originating in the registry may be a misstatement, misdescription, omission or otherwise.

Previously the claimant was required to show that he had exhausted all other avenues before he would be entitled to compensation. The case law that provided for this was according to McAllister “obviously absurd and largely negatives the notion of a State guaranteed title.”⁵⁶⁰ The Land Registry practice direction from 2009 however confirms that this position was overruled by the Supreme Court in 1982.⁵⁶¹ This was confirmed by the Supreme Court in *Persian Properties Ltd v. The Registrar*

⁵⁵⁹ As amended by section 69 of the 2006 Act.

⁵⁶⁰ McAllister, D.L. *Registration of Title in Ireland* (Council of Law Reporting for Ireland Dublin 1973) p. 301.

⁵⁶¹ The Property Registration Authority ‘Practice Direction Rectification of Error and Claims for Compensation (published 01 December 2009)’ http://www.landregistry.ie/eng/Legal_Professional_Customers/Legal_Practices_Procedures/Practice_Directions/17_Rectification_Of_Error_And_Claims_For_Compensation/ accessed 17 April 2012.

of Titles and the Minister for Finance.⁵⁶² Keane C.J. held that a submission by the plaintiff that it was obliged to resist the claim and engage in expensive litigation in the High Court before applying to the defendants for compensation was wholly unsustainable. Reimbursement of the costs of taking or defending legal proceedings does not depend on the consent of the Land Registry but will depend on the circumstances of each case.

It is not just the person adversely affected who is entitled to compensation but also any person deriving title from him or her.⁵⁶³ If the loss arises from rectification of an error originating in the registry then the applicants' costs and expenses in obtaining the rectification are also covered.⁵⁶⁴ The time limit for claiming under the section is six years from the time when the right to compensation accrued.⁵⁶⁵

Since the compensation is paid by the state,⁵⁶⁶ section 120(6) provides that the Minister for Finance shall then be able to recover the amount from the person who caused or derived advantage from the loss. No such compensation has ever been recovered from any person.⁵⁶⁷ This may be because there has been no significant compensation claim against the register. There has also been no rectification of the register or compensation paid arising from the use of electronic services by the registry save recovery of costs due to errors in data capture.⁵⁶⁸

6.4.3 How errors are addressed by the registration system in Ireland

The following sets out how the registration system in Ireland would deal with the scenarios above. Given that the exact nature of indefeasibility has yet to be definitively addressed the possible options are considered below along with the risk to each participant.

Scenarios 1 and 2 relate to a fraudulent transaction. The error did not originate in the registry but was a transaction error that became a registry error when the

⁵⁶² *Persian Properties Ltd v. The Registrar of Titles and the Minister for Finance* [2003] IESC 12 (20 February 2003)

⁵⁶³ Section 120(2).

⁵⁶⁴ Section 120(3).

⁵⁶⁵ Section 120(5)(c). The time is extended in the case of disability.

⁵⁶⁶ Section 120(4) provides that all compensation is paid out of moneys provided by the Oireachtas.

⁵⁶⁷ Interview with Greg McDermott ICT Manager Property Registration Authority 1 March 2012.

⁵⁶⁸ *ibid.*

application for registration of the fraudulent transaction was accepted. As this error did not originate in the registry the registrar and court have no power to correct it under section 32. Instead any application for rectification must be made to the court under section 31.

Section 32 does apply to scenarios 3 and 4 as these relate to registry errors. Section 31 may also apply to those errors as this section of the legislation relates not just to fraud but also to mistakes.

Scenario 1(a)

An application to court for rectification on the grounds of actual fraud would need to be made by A under section 31. The court has the power to order rectification on such terms as it thinks just. In this scenario an innocent prior registered owner, A, is pitted against a *bona fide* purchaser for value, B, and his lender, C.

As idealised participants neither A, B or C will have contributed to the error and thus the scales of justice could tip either way. The court may order rectification in favour of A or may uphold the fraudulent transaction, deprive A of his interest and affirm the registered title of B and C.

Section 120 will provide for compensation to be paid to the person who suffers loss as a result of the entry in a register caused or obtained by forgery or fraud provided the participant's agent did not cause or substantially contribute to the loss. If A loses title he will be entitled to compensation, or if the court deprives B or C of their title, they will be entitled to compensation.

Such compensation may be sufficient recompense for C whose only interest in the property is of a financial nature but either A or B will suffer a loss of use.

Scenario 1(b)

Again section 32 does not apply and A must apply to the court under section 31. The court has power to order rectification on such terms as it thinks just. In this scenario an innocent prior registered owner, A, is pitted against a subsequent *bona fide* purchaser for value, D, and his lender C2. B has been paid for his interest in the

property and thus is only at risk of a loss if rectification is ordered and D reclaims the purchase monies.

The court may order rectification in favour of A or may uphold the transaction to D and deprive A of his interest thus affirming the registered title of D and C2.

Section 120 will provide for compensation to be paid to the person who suffers loss as a result of the entry in a register caused or obtained by forgery or fraud provided the participant's agent did not cause or substantially contribute to the loss. If A loses title he will be entitled to compensation, or if the court deprives D or C2 of their title, they will be entitled to compensation.

Such compensation may be sufficient recompense for C2 whose only interest in the property is of a financial nature but either A or D will suffer a loss of use.

While a court may order rectification in scenario 1(a) as B took title from a fraudster it is less likely to order rectification in this scenario as there is now a *bona fide* purchaser and lender (D and C2) who relied on the register.

Scenario 2(a)

An application to court for rectification on the grounds of actual fraud would need to be made by X under section 31. The court has the power to order rectification on such terms as it thinks just. In this scenario an innocent prior registered owner, X, is pitted against a volunteer, Y.

As idealised participants neither X nor Y will have contributed to the error and thus the scales of justice could tip either way. The court may order rectification in favour of X or may uphold the fraudulent transaction, deprive X of his interest and affirm the registered title of Y. However as Y is a volunteer and did not pay for the property it is more likely that the court will order rectification in favour of X.

If Y loses title he will be entitled to compensation under section 120. Since Y did not pay for the property he will not be subject to any monetary loss but instead will suffer a loss of enrichment and loss of use value which may be difficult to quantify.

It is difficult to conceive of a fraudster gifting a property he has effectively 'stolen' to someone who is entirely innocent. It is more likely that he will sell or charge the property to make as much money from the theft as possible.

Scenario 2(b)

X must apply to the court under section 31. The court has power to order rectification on such terms as it thinks just. In this scenario an innocent prior registered owner, X, is pitted against a subsequent *bona fide* purchaser for value, D, and his lender C2. Y has been paid for his interest in the property and thus is only at risk of a loss if rectification is ordered and D reclaims the purchase monies.

The court may order rectification in favour of X or may uphold the transaction to D and deprive X of his interest thus affirming the registered title of D and C2.

Section 120 will provide for compensation to be paid to the person who suffers loss as a result of the entry in a register caused or obtained by forgery or fraud provided the participant's agent did not cause or substantially contribute to the loss. If X loses title he will be entitled to compensation, or if the court deprives D or C2 of their title, they will be entitled to compensation.

Such compensation may be sufficient recompense for C2 whose only interest in the property is of a financial nature but either X or D will suffer a loss of use. As D relied on the register the preference of the court may be not to rectify in order to uphold D's reliance on the register.

Scenario 3(a)

All parties could consent to the rectification under section 32. Alternatively the registrar could serve notice and rectify this error without loss to any person. S and SL have no grounds to object to the rectification as any enrichment they might seek would be unjust.

If S or SL do claim that they have suffered a loss, the court can rectify under section 32 or alternatively under section 31 on the basis of mistake. If a loss has been sustained compensation will be payable under section 120 and B and C would be

entitled to recover the costs and expenses incurred in obtaining the rectification. This is available under section 120(3) where the error originated in the registry.

Scenario 3(b)

In this scenario B and C are the rightful registered owner and chargee but, as a result of a mistake in the registry, a stranger was registered as owner and has now sold the property to D. The charge held by SL would have been redeemed on that sale so this party is not subject to any risk. The interests of B and C are pitted against a subsequent *bona fide* purchaser for value and subsequent acquisition lender.

B and C seek to have the register rectified in their favour. If the register is rectified to restore B and C's title then D and C2 will lose title. If the register is not rectified D will remain the registered owner, C2's charge will be protected but B and C will lose title. D and C2 will not consent to rectification as this would deprive them of their interests. Neither the registrar nor court could rectify under section 32 as such rectification would cause loss and injustice. The court can however rectify under section 31 on the basis of mistake.

If no rectification is ordered then S has been allowed take advantage of the error. B and C would have a personal action against S on the basis of unjust enrichment. B and C would also be entitled to compensation. If rectification is ordered then D and C2 would be entitled to compensation and also to recover their costs and expenses.

D and C2 are *bona fide* parties without notice who relied upon the register so the court is more likely to uphold their interests and refuse the request for rectification.

Scenario 4(a)

All parties could consent to the rectification under section 32. Alternatively the registrar could serve notice and rectify this error without loss to any person. S has no grounds to object to the rectification as any enrichment he might seek would be unjust.

If S does claim that he has suffered a loss, the court can rectify under section 32 or alternatively under section 31 on the basis of mistake. If a loss has been sustained

compensation will be payable under section 120 and Y would be entitled to recover the costs and expenses incurred in obtaining the rectification. This is available under section 120(3) where the error originated in the registry.

Scenario 4(b)

In this scenario Y is the rightful registered owner but, as a result of a mistake in the registry, a stranger was registered as owner and has now sold the property to D. The interest of Y is pitted against a subsequent *bona fide* purchaser for value and subsequent acquisition lender.

Y seeks to have the register rectified in his favour. If the register is rectified to restore Y's title then D and C2 will lose title. If the register is not rectified D will remain the registered owner, C2's charge will be protected but Y will lose title. D and C2 will not consent to rectification as this would deprive them of their interests. Neither the registrar nor court could rectify under section 32 as such rectification would cause loss and injustice. The court can however rectify under section 31 on the basis of mistake.

If no rectification is ordered then S has been allowed take advantage of the error. Y would have a personal action against S on the basis of unjust enrichment. Y would also be entitled to compensation. If rectification is ordered then D and C2 would be entitled to compensation and also to recover their costs and expenses.

Monetary compensation may be sufficient for C2 whose only interest in the property is its exchange or investment value however monetary compensation is unlikely to compensate D for its use value. Y did not pay for the property but will still be entitled to compensation for loss of the ownership and loss of use value if the gift is denied.

As D and C2 relied on the register, and Y did not, the court is more likely to uphold their interests and not rectify the register in favour of Y. Also the interests of D and C2 as *bona fide* parties for value will likely merit a greater degree of protection than the interest of Y, a volunteer. D and C2 paid value for their interests while Y did not and this may be a factor in the court dispensing justice between their respective positions.

6.5 The position in Ontario

The Ontario registration system has been subject to significant legislative change and seminal court decisions on the nature of its indefeasibility and thus the position is in many respects more clear cut.

The nature of indefeasibility in Ontario has been subject to a high level of public controversy since a decision of the Ontario Court of Appeal in 2005. In *Household Realty Corporation Ltd. v. Liu*⁵⁶⁹ a wife forged her husband's signature on a power of attorney and she then mortgaged their home three times. The court held that an instrument, once registered, was effective and the mortgagees were entitled to enforce against the husband and wife who were joint owners. This was on the basis of section 78(4) of the Land Titles Act which deemed a registered instrument to be effective according to its nature and intent and to create, transfer, charge or discharge, as the case requires, the land or estate mentioned in the register. Section 78(4) was held to override section 155 which provided that a fraudulent instrument, if unregistered, would be fraudulent and void is, despite registration, fraudulent and void in like manner. The mortgages having been given for valuable consideration and without notice of the fraud were held, once registered, to be effective and could be relied upon.

The decision was "received with widespread dismay. There was a barrage of criticism from legal commentators, the media and the provincial government."⁵⁷⁰ The government moved quickly to introduce a Real Estate Fraud Action Plan⁵⁷¹ and amending legislation. "[E]ven though the Ontario online registration system maintained registrars' review it moved in 2006 from immediate to deferred indefeasibility."⁵⁷²

⁵⁶⁹ *Household Realty Corporation Ltd. v. Liu* 2005 CanLII 43402 (ON CA). Also referenced as *CIBC Mortgages Inc. v. Chan*.

⁵⁷⁰ O'Connor, P. 'Deferred and Immediate Indefeasibility: Bijural Ambiguity in Registered Land Title Systems' (2009) 13 *Edinburgh L. Rev.* p. 211.

⁵⁷¹ See Murray, K. 'Legislative Amendments Relating to Real Estate Fraud and the Ministry of Government Services Real Estate Fraud Action Plan' Registering the World Conference Dublin (26 - 28 September 2007)

http://www.landregistry.ie/eng/Dublin_Conference_2007/Conference_Papers/ accessed 9 September 2010 for details of the stakeholders involved in agreeing this initiative.

⁵⁷² Arruñada, B. 'Leaky Title Syndrome?' (April 2010) *N.Z.L.J.* p. 117.

The Ministry of Government Services Consumer Protection and Service Modernization Act 2006⁵⁷³ (hereafter the Modernization Act) introduced amendments to the Land Titles Act to deal with registration of forged and void instruments and, in effect, introduced deferred indefeasibility.⁵⁷⁴ While *Household Realty Corporation Ltd. v. Liu* was subsequently overturned in *Lawrence v. Maple Trust Co.*⁵⁷⁵ the Modernization Act introduced two new provisions in the Land Titles Act. Section 78(4.1) provided that section 78(4) would not apply to a fraudulent instrument registered on or after 19 October 2006 and section 78(4.2) provided that section 78(4.1) does not invalidate the effect of a registered instrument that is not a fraudulent instrument including instruments registered subsequent to such a fraudulent instrument. The registrar already had power to delete a fraudulent document and rectify the register⁵⁷⁶ but definitions of fraudulent instrument and fraudulent person were added to the Land Titles Act to address concerns about levels of fraud.⁵⁷⁷ In addition the LRRRA was amended to strengthen the ability of the registrar to suspend and revoke access to the electronic title registration system.⁵⁷⁸

As a result of the changes introduced by the Modernization Act property owners are protected from fraudulent documents. “The registration does not validate the fraudulent mortgage or transfer, and it will not be enforceable against the property owner.”⁵⁷⁹ The registrar may order the fraudulent instrument be deleted from the register, thus returning title to the true owner.⁵⁸⁰ However non fraudulent instruments registered subsequently will be effective. This is in line with sections 66, 68, 86 and 93 of the Land Titles Act whereby only the registered owner can transfer or charge land. Title cannot be given through a forged transfer since such a transfer was not

⁵⁷³ S.O. 2006 Chapter 34.

⁵⁷⁴ The Act provided protection against the registration of fraudulent instruments, improved the ability to rectify titles, streamlined the LTAF process, gave the registrar additional powers to suspend or revoke an individual’s access to the electronic registration system and also increased the fines for real estate related offences.

⁵⁷⁵ *Lawrence v. Maple Trust Co.* 2007 CanLII 74 (ON CA).

⁵⁷⁶ Section 157(1) and section 57(13).

⁵⁷⁷ Section 1.

⁵⁷⁸ Murray, K. ‘Legislative Amendments Relating to Real Estate Fraud and the Ministry of Government Services Real Estate Fraud Action Plan’ Registering the World Conference Dublin (26 - 28 September 2007)

http://www.landregistry.ie/eng/Dublin_Conference_2007/Conference_Papers/ accessed 9 September 2010 p. 7. See sections 23.1 – 23.4.

⁵⁷⁹ *ibid.*, p. 6.

⁵⁸⁰ Section 57(13) of the Land Titles Act.

made by the registered owner but a subsequently registered owner can transfer or charge land.⁵⁸¹

Thus a fraudulent instrument is void despite registration and nothing in the legislation invalidates the effect of a registered instrument that is not a fraudulent instrument including instruments registered subsequently. This enshrined the principle of deferred indefeasibility in legislation.

Lawrence v. Maple Trust Co. involved a fraudster who forged Mrs. Lawrence's signature on a contract for sale to Thomas Wright. A person purporting to be Thomas Wright then applied to Maple Trust Co. for a mortgage to finance the purchase. "Mr. Wright" used false identification to obtain the mortgage and then absconded with the funds. The transfer was registered along with a new mortgage in favour of Maple Trust Co. Mrs. Lawrence was no longer the owner noted on the title register and her house was now subject to a mortgage that she was not party to. At the initial hearing the judge was bound by *Household Realty Corporation Ltd. v. Liu* and held that the transfer was void but the mortgage was valid and enforceable. The Court of Appeal found that the transfer to Wright was void and registration did not cure the defect. Thus Wright did not become the registered owner and could not transfer or charge the title.⁵⁸² Thus Maple Trust Co. could not rely on section 78(4) to gain an indefeasible title and the mortgage was invalid. Gillese J.A. found that the wording of the Land Titles Act could be consistent with both deferred and immediate indefeasibility but that deferred indefeasibility was preferable for policy reasons and that it would take clear and unequivocal language in the Act to abrogate or displace common law principles. He felt this was in line with the earlier decision of the Supreme Court of Canada in *United Trust v. Dominion Stores et al.*⁵⁸³

Deferred indefeasibility placed the risk of loss on the mortgagee as this was the party with the best opportunity to avoid the fraud, encourages lenders to be vigilant and protects a subsequent purchaser. This was based on the courts decision to treat the acquisition mortgagee as an "intermediate" rather than a "deferred"

⁵⁸¹ Arruñada considered it significant that the law empowers the registrar to notify rightholders of any attempt to register an electronic document that purports to effect a transfer or charge of land under section 23(4) of the LRRR but as of 15 February 2012 this section is not yet in force. See Arruñada, B. 'Leaky Title Syndrome?' (April 2010) *N.Z.L.J.* 115-120 p. 116.

⁵⁸² Under section 68(1) of the Land Titles Act only a registered owner is entitled to transfer or charge registered land.

⁵⁸³ *United Trust v. Dominion Stores et al* 1976 CanLII 33 (SCC).

owner.⁵⁸⁴ The indefeasibility would rest with the next *bona fide* purchaser or encumbrancer without notice. Because the fraudulent transfer and charge were registered contemporaneously Maple Trust Co. did not rely on the register and there was no opportunity for Ms. Lawrence to recover the land before the second transaction i.e. the charge. Thus the Court of Appeal in effect bundled the two transactions i.e. the fraudulent transfer and acquisition charge together ensuring that Mrs. Lawrence's right to set aside both transactions was not lost by registration of the charge. This case was decided following the introduction of the Modernization Act but before it was enacted.

A similar bundling occurred in *Home Trust Company v. Zivic*⁵⁸⁵ and *Rabi v. Rosu*⁵⁸⁶ where the transfer and the mortgages were to all intents and purposes registered simultaneously and thus were treated as one transaction.⁵⁸⁷ A significant factor in these decisions was the fact that the mortgagees did not rely on the register.

Generally deferred indefeasibility allows the original owner a window of opportunity to set aside a registered transaction before a second transaction is registered but these decisions provide an enhanced form of deferred indefeasibility and extend that window. O'Connor refers to "deferred indefeasibility-plus which denies indefeasible title to the second purchaser in a double-transaction fraud case."⁵⁸⁸ Holding the transfer and charge to be one transaction provides that indefeasibility does not pass until there is a further transaction on the title.

A similar type bundling of the transfer and charge has occurred in England and Wales but to different effect. In *Abbey National Building Society v. Cann*⁵⁸⁹ Mr. Cann purchased a leasehold flat for his mother to live in, with the benefit of a mortgage from Abbey National and with monies provided by his mother, from the sale of a

⁵⁸⁴ O'Connor, P. 'Deferred and Immediate Indefeasibility: Bijural Ambiguity in Registered Land Title Systems' (2009) 13 *Edinburgh L. Rev.* p. 214.

⁵⁸⁵ *Home Trust Company v. Zivic* 2006 CanLII 38359 (ON SC).

⁵⁸⁶ *Rabi v. Rosu* 2006 CanLII 36623 (ON SC). Echlin J. says Ontario is experiencing a serious mortgage fraud plague.

⁵⁸⁷ Contrast this with the earlier decision of *Durrani v. Augier* 2000 CanLII 22410 (ON SC) where an innocent bank's mortgage was deemed valid even though the borrower was held not to be the owner of the property. Title was restored to the original registered owner subject to a mortgage they had nothing to do with. See Troister, S. 'Can we really rely on the Land Titles Register?' *LawPRO magazine* June 2004 p. 5 <http://www.practicepro.ca/lawpromag/LawproMagArchive.asp> accessed 9 March 2012. See also *Toronto-Dominion Bank v. Jiang* 2003 CanLII 38078 (ON SC).

⁵⁸⁸ O'Connor, P. 'Deferred and Immediate Indefeasibility: Bijural Ambiguity in Registered Land Title Systems' (2009) 13 *Edinburgh L. Rev.* p. 213.

⁵⁸⁹ *Abbey National Building Society v. Cann* [1990] 1 All ER 1085

previous property. It transpired that the mother had been let into occupation some 35 minutes before completion of the mortgage. Mr. Cann subsequently defaulted in payment of the mortgage and Abbey National sought possession. The mother claimed that by reason of her contribution to the purchase price coupled with her actual occupation of the property prior to completion, she had an overriding interest which took priority to Abbey National's mortgage.

The House of Lords held that the correct date for determining the existence of an overriding interest was the date of registration, rather than the date of completion but the relevant date for determining whether an interest in registered land was protected by actual occupation and had priority over the holder of a legal estate was the date of transfer or creation of the legal estate and not the date of registration. Where a purchaser relied on a bank or building society loan to complete his purchase, the transfer and charge were one indivisible transaction and there was no *scintilla temporis*⁵⁹⁰ during which the property vested in the purchaser free of the mortgage.⁵⁹¹

By this decision acquisition lenders gained a new status and a super priority that automatically protected them from many new adverse claims. In England and Wales acquisition lender are thus treated better than subsequent lenders whereas in Ontario subsequent lenders are given enhanced priority.

In Ontario in the more recent case of *Isaacs v. Royal Bank of Canada*⁵⁹² the mortgage was however upheld as the plaintiff actively assisted the fraudsters in perpetrating the fraud. She was not herself privy to the fraud but was not a completely innocent victim. She had been paid to act as guarantor on a mortgage for a borrower with a bad credit rating. Molloy J. distinguished between the original owner who has no knowledge of the fraud, the intermediate owner who dealt with the fraudster and the deferred owner who took the property from the intermediate owner without knowing of the fraud. He noted that it is only the intermediate owner who has any opportunity to avoid the fraud and thus as a question of policy it makes more sense to place the burden on this party. Thus the intermediate owner will be subject to having his or her title defeated by a claim from the original owner.

⁵⁹⁰ Moment in time.

⁵⁹¹ See *Thompson v. Foy* [2009] EWHC 1076 (Ch) in respect of determining the date when an interest is protected by actual occupation.

⁵⁹² *Isaacs v. Royal Bank of Canada* 2010 CanLII 3527 (ON SC).

Thus Ontario operates a system of deferred indefeasibility.⁵⁹³ In moving from immediate to deferred indefeasibility Ontario moved from dynamic towards static security. It favours static security by deferring indefeasibility to subsequent purchasers though the system also attempts to balance dynamic security by favouring subsequent, non-infected by fraud, purchasers.

6.5.1 Rectification

Section 57(13) of the Land Titles Act allows the registrar or court to rectify the register if (a) a registered instrument would be absolutely void if unregistered; (b) either is satisfied, on the basis of evidence, that a fraudulent instrument has been registered; or (c) the effect of the error, if not rectified, would be to deprive a person of land of which the person is legally in possession or legally in receipt of the rents and profits. If rectification is based on these grounds members of a prescribed class are entitled to compensation under section 57(4.1) or 57(4.2) and these are dealt with below.

Under section 163(1.1) the registrar may make orders specifying what evidence is required for the purposes of clause 57(13)(b) to enable rectification of the register because a registered instrument was fraudulent.⁵⁹⁴ Fraudulent instrument and fraudulent person are defined in section 1. Fraudulent instrument means an instrument under which a fraudulent person purports to receive or transfer an estate or interest in land, that is given under a forged power of attorney, transfer of a charge where the charge is given by a fraudulent person or that perpetrates a fraud as prescribed.⁵⁹⁵ Fraudulent person is a person who executes or purports to execute an instrument if the person forged the instrument, is a fictitious person or, who holds oneself out to be, but knows that the person is not, the registered owner.

⁵⁹³ See Bucknall, B. 'Real Estate Fraud and Systems of Title Registration: The Paradox of Certainty' (2008-2009) 47 *Can. Bus. L.J.* 1 – 53 for a detailed analysis of the case law from 1999 to 2007, the legislative amendments introduced by the Modernization Act and the impact of these developments. See also Troister, S. 'Can we really rely on the Land Titles Register?' *LawPRO* magazine June 2004 p. 5

<http://www.practicepro.ca/lawpromag/LawproMagArchive.asp> accessed 9 March 2012.

⁵⁹⁴ Order of the Director of Titles ODOT-2007-01 available at http://www.ontario.ca/en/information_bundle/land_registration/content/ONT06_018790.html?openNav=orders.

⁵⁹⁵ Section 63 of O. Reg. 690/90 as amended by O. Reg. 439/11 prescribes this as the cessation of a charge or encumbrance and the person who purports to register it is a fraudulent person.

The registrar can also rectify errors and supply omissions in the register, or in an entry in it, under section 158(2) upon evidence that appears sufficient. This is not limited to the correction of minor errors.

The Court may also order rectification under section 159 where it decides that a person is entitled to an estate, right or interest in or to registered land or a charge and as a consequence rectification is required. In such circumstances the court can order the register to be rectified in such manner as is considered just.

Section 160 allows a person aggrieved by an entry, omission, default or delay to apply to the court for an order of rectification and the court can refuse, with or without costs to be paid by the applicant, or may if satisfied of the justice of the case, make an order for the rectification of the register.

Thus in Ontario the registrar and courts have wide ranging powers to rectify the register.

6.5.2 Compensation

In Ontario compensation is paid out of the Land Titles Assurance Fund (LTAF). The LTAF applies to errors in the electronic record in the same manner as it does to paper records.⁵⁹⁶ “The existence of the [LTAF] fund acknowledges that the principle of certainty of registration can lead to circumstances in which innocent parties lose legal title to the property.”⁵⁹⁷

Under section 57(1) of the Land Titles Act a person wrongfully deprived of land by reason of some other person being registered as owner through fraud or misdescription, omission or some other error in an entry on the register can recover compensation or damages from the person on whose application the erroneous registration was made or who acquired the title through the fraud or error. In addition a person wrongfully deprived of land or of some estate or interest therein by reason of the land being brought under the Act can also recover compensation or damages.

⁵⁹⁶ Moore, M.E. and Globe, J.M. *Title Searching and Conveyancing in Ontario* (5th edn Canada, LexisNexis 2003) p. 229.

⁵⁹⁷ Bucknall, B. ‘Real Estate Fraud and Systems of Title Registration: The Paradox of Certainty’ (2008-2009) 47 *Can. Bus. L.J.* p. 42.

Thus a person wrongfully deprived of land or some estate or interest therein can recover from the person on whose application the erroneous registration was made or who acquired the title through the fraud or error. However, under section 57(3), a purchaser or mortgagee in good faith for value is not liable by reason of the vendor or mortgagor having been registered as owner through fraud or error or having derived title from or through a person registered as owner through fraud or error, whether the fraud or error consisted of a wrong description of the property or otherwise. So a *bona fide* purchaser or lender for value will not be liable directly to the person wrongfully deprived of their interest.

Section 57(4) provides for compensation from the fund for a person wrongfully deprived of land or some estate or interest in land by reason of the land being brought under this Act, some other person being registered as owner through fraud, or any misdescription, omission or other error in an entry on the register. The person must be unable to recover compensation from the person who made the application or who acquired title through the fraud or error or otherwise recover just compensation for the loss. In addition under section 57(4)(b) in order to be entitled the person must have demonstrated 'requisite due diligence' if some other person was registered as owner through fraud. Under section 163(1.1) the registrar can make orders specifying what constitutes due diligence⁵⁹⁸ for the purposes of clause 57(4)(b) or 57(4.1)(b).

A mortgagee will be required to demonstrate that it took reasonable steps to verify the identity of the person mortgaging the property and to verify that the registered owner was, in fact, selling or mortgaging the property.⁵⁹⁹ Similarly a purchaser must demonstrate that they took reasonable steps to verify that the registered owner was selling the property.⁶⁰⁰ Thus both must verify the transaction and a lender must also verify identity.⁶⁰¹

⁵⁹⁸ Order of the Director of Titles OD0T-2007-02 available at http://www.ontario.ca/en/information_bundle/land_registration/content/ONT06_018790.html?openNav=orders.

⁵⁹⁹ Murray, K. 'Legislative Amendments Relating to Real Estate Fraud and the Ministry of Government Services Real Estate Fraud Action Plan' Registering the World Conference Dublin (26 - 28 September 2007) http://www.landregistry.ie/eng/Dublin_Conference_2007/Conference_Papers/ accessed 9 September 2010 p. 9. Similar type provisions exist in parts of Australia. See O'Connor, P. 'Immediate Indefeasibility for Mortgagees: a Moral Hazard?' (2009) 21(2) *Bond L.Rev.* p. 158 – 159.

⁶⁰⁰ *ibid.*

⁶⁰¹ Sections 57(4)(b) and 57(4.1)(b).

Section 57(4.1) relates only to members of a prescribed class of persons who are entitled to compensation from the fund if certain conditions are met. The person must have been wrongfully deprived of land or some estate or interest in land or have not received land or some estate or interest in land because under section 57(13)(b) the registrar or court has directed that the registration of a fraudulent instrument be deleted from the register, or, under section 57(13)(a) or (c) rectification of the register is ordered on the basis that a registered instrument would be absolutely void if unregistered or the effect of an error, if not rectified, would be to deprive a person of land of which the person is legally in possession or legally in receipt of the rents and profits.

Section 57(4.2) also provides for compensation to be paid to members of this prescribed class if the person suffers loss due to the deletion of a fraudulent instrument whereas section 57(4.1) is broader. It provides for compensation if there is rectification of the register under any of the grounds in section 57(13). However under section 57(4.1) the person must have demonstrated the requisite due diligence with respect to the instrument that is the subject of the rectification. There is no corresponding requirement in section 57(4.2).

Previously all claimants were required to seek compensation under the law before claiming against the fund. Now a person who is a member of this prescribed class can, where a fraudulent instrument is registered against their interest in land, claim against the LRAF without having to pursue the fraudster.⁶⁰² Members of the prescribed class are individuals who were registered owners of land used for residential purposes and individuals who are purchasers in good faith for valuable consideration of land used for residential purposes.⁶⁰³ Lenders are not included.

For these parties the LRAF is now a fund of first resort provided they are a victim of fraud and the loss is not covered by title insurance.⁶⁰⁴ Those within the prescribed class who are protected by title insurance will have no claim against the fund.⁶⁰⁵

⁶⁰² Thus there are two separate procedures; one for members of this prescribed class and one for others. See Service Ontario 'Information Regarding the Land Titles Assurance Fund and the Tribunal's Rules of Procedure' http://www.ontario.ca/ontprodconsume/groups/content/@onca/@bundles/@landreg/documents/document/ont06_023546.pdf accessed 17 April 2012.

⁶⁰³ Section 64 of O. Reg. 690/90 as amended by O. Reg. 439/11.

⁶⁰⁴ Murray, K. 'Legislative Amendments Relating to Real Estate Fraud and the Ministry of Government Services Real Estate Fraud Action Plan' Registering the World Conference Dublin (26 - 28 September 2007) http://www.landregistry.ie/eng/Dublin_Conference_2007/Conference_Papers/

A person who suffers damage because of an error in recording an instrument can also recover compensation from the fund under section 57(5). Under section 57(8) it is the registrar who determines the amount of compensation to be paid and the registrar can then recover from any person in respect of a loss to the fund.⁶⁰⁶

A person is not entitled to compensation from the fund in respect of an interest existing at the time the land is brought under the Act unless that interest was registered in the unregistered system or notice of it was given to the registrar before the first registration under the Act.⁶⁰⁷ The application for compensation must be made within six years from the time of having suffered the loss.⁶⁰⁸

Section 59 sets out a number of restrictions on the payment of compensation. For claims in relation to rights existing at the time of first registration, no compensation is payable out of the fund if the person first registered could have conveyed good title, as against the claimant, to a purchaser in good faith for value without notice of any defect and no caution was registered and the registrar did not have actual notice of the defect prior to first registration. No compensation is also payable if the claimant had notice of registration proceeding and failed to act. No compensation is payable for any claim where the claimant's negligence caused or contributed to the loss, the claimant knowingly participated or colluded in a fraud, if it is a subrogated claim or made on behalf of an insurer.

Thus a claimant will not be compensated from the fund if he or she has caused or substantially contributed to the loss through their own act, neglect, default and/or omission. This would include the failure to register a sufficient caution, notice or appropriate registration under the Act.⁶⁰⁹

accessed 9 September 2010 p. 8. See also LawPRO 'Minister discusses changes to Land Titles Assurance Fund' LawPRO magazine July 2009 p. 24
<http://www.practicepro.ca/lawpromag/LawproMagArchive.asp> accessed 9 March 2012.

⁶⁰⁵ See Bucknall, B. 'Real Estate Fraud and Systems of Title Registration: The Paradox of Certainty' (2008-2009) 47 *Can. Bus. L.J.* 1 – 53 for an examination of real estate fraud in Ontario.

⁶⁰⁶ Section 57(12).

⁶⁰⁷ Section 57(2).

⁶⁰⁸ The period is extended in the case of minority or incapacity.

⁶⁰⁹ Moore, M.E. and Globe, J.M. *Title Searching and Conveyancing in Ontario* (5th edn Canada, LexisNexis 2003) p. 380. See section 59.

6.5.3 How errors are addressed by the registration system in Ontario

Where there is a fraudulent transaction rectification can be made by the registrar or the court under section 57(13). This will automatically trigger an entitlement to compensation. Members of the prescribed class will be entitled to compensation under section 57(4.1) or 57(4.2). Under section 57(4.1) the person must demonstrate the requisite due diligence but there is no such requirement under section 57(4.2). Section 57(4.2) refers to a person suffering loss whereas 57(4.1) refers to a person being wrongfully deprived of land or of some estate or interest in land or has not received land or some estate or interest in land by reason of the registration of the fraudulent instrument that is now to be deleted from the register.

Those who are not members of this prescribed class must claim under section 57(4). They must show the requisite due diligence and must not have been able to recover compensation from the applicant or the new owner under section 57(1). Also the person must have been wrongfully deprived of land or some estate or interest in land.

The registrar has also a general power to rectify errors under section 158(2) and the court, under section 159, can rectify the register in such manner as is considered just where it decides that a person is entitled to an estate, right or interest in or to registered land or a charge and as a consequence rectification is required. Rectification under these two sections does not automatically trigger an entitlement to compensation.

Where there is a registry error the registrar can correct the error on foot of section 158(2) and the court can rectify under section 159. Either can rectify under section 57(13) and again this will automatically trigger an entitlement to compensation under section 57(4.1). Compensation for the error may be claimed in the following circumstances:

1. under section 57(4.1) for members of the prescribed class who have demonstrated the requisite due diligence and the effect of the error, if not rectified, would be to deprive a person of land of which the person is legally in possession or legally in receipt of the rents and profits;
2. under section 57(5) to a person who suffers damage because of an error in recording an instrument; or

3. under section 57(4) where a person is wrongfully deprived of land or of some estate or interest in land by reason of any misdescription, omission or other error in the register. The person must not have been able to recover compensation from the applicant or the new owner under section 57(1).

The idealised participants will not have caused or contributed to the loss or knowingly participated or colluded in the fraud. It is presumed that the loss is not covered by title insurance though this does form a feature of conveyancing in Ontario and as such will be examined in chapter eight. Only some of the idealised participants in the modeled transactions fall within the prescribed class of persons for the purposes of the Land Titles Act.

Both A and X are members of the prescribed class. B is also a member but Y is not a member. C and C2 are not members. Only those who are members can claim compensation under section 57(4.1) and section 57(4.2). Those who are not members must claim compensation under sections 57(4) or 57(5). The law distinguishes between registered owners and *bona fide* purchasers for value of residential property and all other parties.

Scenario 1(a)

The registrar or court will rectify the register by deleting the fraudulent instrument under section 57(13)(b). This will restore A as the registered owner. B and C will lose title. As a *bona fide* purchaser for value B will automatically be entitled to compensation as he will have suffered loss as a result of the deletion.

C is not a member of this class and thus will need to claim compensation under section 57(4). C will need to show that it was wrongfully deprived of an estate or interest in land by reason of some other person being registered as owner through fraud. In this scenario that person was B. C will also need to demonstrate the requisite due diligence i.e. that it took reasonable steps to verify the identity of B and to verify that A was, in fact, selling the property. C will also need to show that it cannot recover compensation from B or the fraudster i.e. the new owner or the applicant. If the fraudster has disappeared or was prosecuted but the proceeds of the fraud are gone then only B will be available.

It is interesting to note that if the cancellation of T's charge had been done fraudulently the legislation includes this in the definition of fraudulent instrument and the register could also be rectified under section 57(13)(b).

Scenario 1(b)

As there has been a subsequent transaction on the title the registrar and court will not order rectification of the register. A will lose title while the ownership of D and C2 will be upheld. They relied on the register. A is a member of the prescribed class but section 57(4.2) only applies when the fraudulent instrument is being deleted so it does not apply in this instance. Also section 57(4.1) only arises similarly if there is a rectification. So A is only entitled to claim under section 57(4) which requires that A must not be able to recover from B or the fraudster under section 57(1). A will not be able to claim against D or C2 as they are protected by section 57(3) as a purchaser and mortgagee in good faith for valuable consideration.

Scenario 2(a)

The registrar or court will rectify the register by deleting the fraudulent instrument under section 57(13)(b). This will restore X as the registered owner. Y will lose title. As a volunteer Y is not a member of the prescribed class and thus cannot claim compensation under section 57(4.1) or 57(4.2). Also Y cannot claim under section 57(4) since it was not some other person registered as owner through fraud; it was in fact Y who was registered through fraud. Thus Y is not entitled to compensation.

Scenario 2(b)

As there has been a subsequent transaction on the title the registrar and court will not order rectification of the register. X will lose title while the ownership of D and C2 will be upheld. They relied on the register. As soon as D purchases the register is secure regardless of the fact that the transfer to Y was a gift.

X is a member of the prescribed class but section 57(4.2) only applies when the fraudulent instrument is being deleted so it does not apply in this instance. Also section 57(4.1) only arises similarly if there is a rectification. So X is only entitled to claim under section 57(4) which requires that X must not be able to recover from Y or the fraudster under section 57(1). X will not be able to claim against D or C2 as

they are protected by section 57(3) as a purchaser and mortgagee in good faith for valuable consideration.

Scenario 3(a)

The registrar or court will rectify the register under section 57(13)(c) if the effect of the error, if not rectified, would be to deprive B of land which he is legally in possession or legally in receipt of the rents and profits.⁶¹⁰ This would appear to also cover C if C was a mortgagee in possession. If this provision does not apply the registrar can rectify the error under section 158(2) or the court can rectify under section 159.

In this case B and C will not have been deprived of land or some estate or interest and there has been no fraud so compensation can only be claimed under section 57(5) on the basis that they suffered damage because of an error in recording an instrument. S and SL would also be able to claim under this section but only if they suffered damage.

Scenario 3(b)

The registrar or court will rectify the register under section 57(13)(c) if the effect of the error, if not rectified, would be to deprive B of land which he is legally in possession or legally in receipt of the rents and profits. This is unlikely to be the case as D would have sought vacant possession. The registrar can however rectify the error under section 158(2) or the court can rectify under section 159.

D and C2 will have been deprived of their interests and thus will be able to claim compensation under section 57(5) or section 57(4). In order to claim under section 57(4) D and C2 would need to demonstrate that they cannot recover from B or S under section 57(1). It is unlikely that they would be able to recover from B since he is entirely innocent in this scenario but they should be able to recover from S. S is not a *bona fide* purchaser for value and thus would not be protected by section 57(3).

⁶¹⁰ This is presumably to cover a situation where B had let the property.

If the court does not order rectification and the interests of D and C2 are upheld on the basis that they relied on the register then B and C will have been deprived of their interests and will be entitled to compensation under section 57(5) or section 57(4). In order to claim under section 57(4) B and C will need to demonstrate that they cannot recover from S or D. D will be protected from such a claim under section 57(3) but S will not.

Scenario 4(a)

The registrar or court will rectify the register under section 57(13)(c) if the effect of the error, if not rectified, would be to deprive Y of land which he is legally in possession or legally in receipt of the rents and profits. If this provision does not apply the registrar can rectify the error under section 158(2) or the court can rectify under section 159.

In this case Y will not have been deprived of land or some estate or interest and there has been no fraud so compensation can only be claimed under section 57(5) on the basis that he suffered damage because of an error in recording an instrument. The fact that Y is a volunteer has no impact on the situation. S would also be able to claim under this section if he suffered damage.

Scenario 4(b)

The registrar or court will rectify the register under section 57(13)(c) if the effect of the error, if not rectified, would be to deprive Y of land which he is legally in possession or legally in receipt of the rents and profits. This is unlikely to be the case as D would have sought vacant possession. The registrar can however rectify the error under section 158(2) or the court can rectify under section 159.

D and C2 will have been deprived of their interests and thus will be able to claim compensation under section 57(5) or section 57(4). In order to claim under section 57(4) D and C2 would need to demonstrate that they cannot recover from Y or S under section 57(1). It is unlikely that they would be able to recover from Y since he is entirely innocent in this scenario but they should be able to recover from S. S is not a *bona fide* purchaser for value and thus would not be protected by section 57(3).

If the court does not order rectification and the interests of D and C2 are upheld then Y will have been deprived of its interest and will be entitled to compensation under section 57(5) or section 57(4). In order to claim under section 57(4) Y will need to demonstrate that it cannot recover from S or D. D will be protected from such a claim under section 57(3) but S will not.

6.6 Impact on risk

The above scenarios demonstrate the choice to be made between dynamic security and static security. In cases of conflict between two innocent parties will the Irish courts hold that the register is defeasible or indefeasible and, if indefeasibility is supported, will it be immediate or deferred? Will the interests of B and C or D and C2 be bundled together to the detriment of the lender? Or will lenders be given more preferential status?

A policy of defeasibility may be likely where there is no subsequent transaction. Under section 31 the register could be rectified in favour of A and X. B, C and Y would be entitled to compensation under section 120.

A policy of indefeasibility would mean no rectification. If immediate indefeasibility is adopted then A will be at risk from the destructive effects of a registered transaction. A would be treated the same as U and V in chapter seven as title would pass to B and C2 even if there was some fault in the transaction and it was based on error or fraud. Under section 120 A would be entitled to compensation.

X is unlikely to be at the same risk in respect of Whiteacre. A court is unlikely to treat Y the same as the other parties and rectification is likely to be ordered against him if his registered title conflicts with that of X, an innocent prior owner, as Y is a volunteer. Y would however be entitled to compensation under section 120.

If there is a subsequent transaction a policy of deferred indefeasibility would mean that the innocent prior owner of Greenacre, A, would lose title.⁶¹¹ Title would pass to the subsequent purchaser D and his lender C2. The first holders of the defective title, B and C, would not be at risk as they got repaid on the sale to the new owner who relied on the register i.e. D and C2. With deferred indefeasibility it is the original

⁶¹¹ In effect A would be treated the same as U and V in chapter seven i.e. destructive effects of a registered transaction.

owner A who loses out. Similarly in the transfer of Whiteacre X would be at risk. Y would be paid on the sale to D so he would not lose out and the title of D and C2 would be upheld.

All the parties suffering loss would be entitled to compensation under section 120. In this instance A and X would be entitled to compensation and no distinction is made between a lender, volunteer or *bona fide* purchaser for value. Each is equally entitled to claim compensation though the amount of such compensation may differ. It is interesting to compare this to the preferential treatment given to B in Ontario as a *bona fide* purchaser for value versus the restrictions on Y and C in claiming compensation as they are not members of the prescribed class.

Some data is available on the number of claims made and amount of compensation paid out by the registries in Ireland and Ontario. These claims can be placed in the context of the total amount of changes made to the title register in Ireland and total number of electronic registrations in Ontario.

6.7 Claims

6.7.1 Claims in Ireland

In Ireland over the ten year period from 2002 to 2011 a total of 257 payments were made to the value of €1.87 million.⁶¹² The following chart set out details of the changes to the title register, the number of claims and compensation paid for the period 2005 to 2011.⁶¹³

⁶¹² Greg McDermott ICT Manager Property Registration Authority by email 3 May 2012. More detailed data from other jurisdictions may be found. For example see Griggs, L. 'Torrens Title in a Digital World' (September 2001) 8(3) *Murdoch University Electronic Journal of Law* http://www.murdoch.edu.au/elaw/issues/v8n3/griggs83_text.html accessed 6 October 2011 for an examination of claims made on the Tasmania assurance fund from 1993 to 2000. 22 claims were made during this period and only one claim for fraud. Similarly see Ruoff, T.B.F. and Ors *Ruoff & Roper on the Law and Practice of Registered Conveyancing* (5th edn London, Stevens and Sons 1986) p. 904 re claims data for England.

⁶¹³ The Property Registration Authority 'Annual Report 2010' (2011) The Property Registration Authority http://www.landregistry.ie/eng/Publications/Annual_Reports/Annual_Report_2010.pdf accessed 17 February 2012 p. 37 and 42 and The Property Registration Authority 'Annual Report 2007' (2008) The Property Registration Authority http://www.landregistry.ie/eng/Publications/Annual_Report_2007.pdf accessed 4 May 2012 p. 32. Also information from Greg McDermott ICT Manager Property Registration Authority by email 3 May 2012 and James O'Boyle Financial Controller Property Registration Authority by email 6 June 2012.

Year	2005	2006	2007	2008	2009	2010	2011
Changes to the title register ⁶¹⁴	221,815	220,072	217,954	572,604	612,910	575,019	529,506
Number of claims paid	22	33	33	23	32	27	32
Amount of euros of compensation paid	227,596	101,266	397,200	344,698	281,542	167,557	208,627

Table 10: Total compensation claims and amounts in Ireland

No data is available as to the nature of these claims. It may be that most, if not all, relate to the recovery of costs for rectifications agreed between the parties under section 32 of the 1964 Act.

6.7.2 Claims in Ontario

In 2006 the Land Titles Act was amended to provide for the registration of a caution by the registrar if it appears that a registered instrument may be fraudulent in order to prevent any further transactions on the title. If such a caution has been entered the registrar may hold a hearing before ordering rectification of the register. If the hearing determines that the registered instrument is a fraudulent instrument as defined under section 1 of the Land Titles Act then an order is issued to rectify the title by deleting the instrument from the parcel register.⁶¹⁵

Since this power was granted to the registrar 38 such cautions have been registered and these have led to 29 rectifications of the register as set out in the following chart.⁶¹⁶ This chart also lists the volume of electronic registrations for each year.⁶¹⁷ This caution/hearing process only relates to allegations of fraud. The chart lists

⁶¹⁴ Pre 2008 the figures relate to dealings completed which can lead to one or more registrations so the figures from 2008 are more accurate.

⁶¹⁵ Alex Radley Legal and Technical Officer Service Ontario by email 7 June 2012.

⁶¹⁶ See

http://www.ontario.ca/en/information_bundle/land_registration/content/ONT06_018785.html?openNav=land_titles_assurance_fund_%28taf%29 accessed 17 April 2012. Updated by

Alex Radley Legal and Technical Officer Service Ontario by email 7 June 2012.

⁶¹⁷ Vicki McArthur Teranet by email 18 June 2012.

where an order for rectification is made when there is a determination that a fraudulent instrument has been registered.

Year	2005	2006	2007	2008	2009	2010	2011
Electronic registrations	1.73 million	1.80 million	1.94 million	1.89 million	1.74 million	1.86 million	1.83 million
Fraud rectifications	N/A	N/A	4	5	7	6	7

Table 11: Electronic registrations and fraud rectifications in Ontario

Only seven of the 29 caution/hearing rectifications above have resulted in claims to the LTAF paying out a total of \$88,837.⁶¹⁸ It may be that the parties affected by the other rectifications did not seek compensation or they may not have qualified on the basis of being covered by title insurance.⁶¹⁹

There is a separate process whereby each of the individual land registrars can register a caution and serve notice of intention to rectify title on all parties having an interest where an error in a record has occurred.⁶²⁰ If no objections are received the correction will be made or if there are objections then a hearing will take place. These are not tracked separately⁶²¹ and there are no statistics available on the number of such rectifications.

Information is however available on compensation claims for both types of rectification. The first chart gives the total number of LTAF claims for compensation and the total amounts paid out while the second chart provides a breakdown between the claims and amounts for fraud and non fraud cases.⁶²²

⁶¹⁸ Alex Radley Legal and Technical Officer Service Ontario by email 7 June 2012.

⁶¹⁹ Where a prior registered owner has title insurance they must claim against the insurer rather than seeking compensation from the LTAF.

⁶²⁰ For example Ministry error or an error in the conversion of records.

⁶²¹ Alex Radley Legal and Technical Officer Service Ontario by email 7 June 2012.

⁶²² *ibid.*

Year	2005	2006	2007	2008	2009	2010	2011
Number of compensation claims	6	3	28	9	8	15	7
Amount of Canadian dollars of compensation paid	585,173	394,423	1,819,958	1,494,172	524,876	821,523	1,024,914

Table 12: Total compensation claims and amounts in Ontario

2005-Fraud	2005-Non Fraud	2006-Fraud	2006-Non Fraud	2007-Fraud	2007-Non Fraud
2 - \$388,254	4 - \$196,919	2 - \$387,097	1 - \$7,326	17 - \$1,398,121	11 - \$421,837
2008-Fraud	2008-Non Fraud	2009-Fraud	2009-Non-Fraud	2010-Fraud	2010-Non Fraud
8 - \$1,336,301	1 - \$157,871	6 - \$522,172	2 - \$2,704	8 - \$593,127	7 - \$228,396
2011-Fraud	2011-Non Fraud				
6 - \$1,021,698	1 - \$3,215				

Table 13: Breakdown of compensation claims and amounts: Fraud and Non-Fraud

If a claim cannot be paid out completely the registrar, acting in the capacity of an administrative Tribunal,⁶²³ may choose to hold a hearing. The decisions of this Tribunal are made available online to the public and the decisions from 1986 to 2010 are currently available.⁶²⁴ These decisions issue when a determination has

⁶²³ Service Ontario 'Information Regarding the Land Titles Assurance Fund and the Tribunal's Rules of Procedure' http://www.ontario.ca/ontprodconsume/groups/content/@onca/@bundles/@landreg/documents/document/ont06_023546.pdf accessed 17 April 2012 p. 1, 5 and 8.

⁶²⁴ See LTAF Decisions at

been made that the loss does not meet the requirements under the Land Titles Act and is not compensable or less than the full amount claimed will be compensated and they are not included in the above statistics.⁶²⁵

The registry report that the incidence of title fraud involving unauthorised changes to the register is extremely low relative to the number of registrations each year given that over the past ten years, from 2002 to 2011, there has been on average 10.2 claims of title fraud each year to the LTAF out of an average of 1.8 million registrations.⁶²⁶

Murray is of the view that, as “there have been few claims to the Land Titles Assurance Fund resulting from...[the automation] process, it has been a successful initiative.”⁶²⁷ Moore and Globe provide a different perspective on the low level of claims. They are of the view that that

“[i]n practice, claims against the Land Titles Assurance Fund and professional practice claims against LawPRO are difficult and expensive to pursue. Case law, combined with restrictions in the statute, bar potential claimants in most cases from recovering against the fund, particularly with respect to criminal fraud.”⁶²⁸

This, in their view, explains the extent of title insurance in Ontario as it “provides a practical, non-litigious alternative for clients who wish to arrange additional protection against fraud or defects in the title or legal services related aspects of a real estate transaction.”⁶²⁹ They refer to the fact that over half of residential transactions include the purchase of title insurance⁶³⁰ however this was in 2003. The percentage is now much higher.⁶³¹ This relationship between state compensation and title insurance is examined further in chapter eight.

http://www.ontario.ca/en/information_bundle/land_registration/content/STEL02_165937.html?openNav=land_titles_assurance_fund_%28ltaf%29 accessed 17 April 2012.

⁶²⁵ Alex Radley Legal and Technical Officer Service Ontario by email 7 June 2012.

⁶²⁶ *ibid.*

⁶²⁷ Murray, K. ‘Electronic registration and other modernization initiatives in Ontario’s land registration system’ Law Reform Commission Annual Conference (2004)

<http://www.lawreform.ie/Annual%20Conference%202004.PDF>

accessed 18 February 2009 p. 5.

⁶²⁸ Moore, M.E. and Globe, J.M. *Title Searching and Conveyancing in Ontario* (5th edn Canada, LexisNexis 2003) p. 380.

⁶²⁹ *ibid.*

⁶³⁰ *ibid.*

⁶³¹ Waters, K.A. ‘There’s more to Title Insurance than meets the eye’ LawPRO magazine December 2010 p. 14 <http://www.practicepro.ca/lawpromag/LawproMagArchive.asp> accessed 9 March 2012

There is a question mark over the value of such information and its comparability between jurisdictions. Is a low level of claims, where little money is paid out, evidence of a careful and robust registration system or are the rules just too tight? Does a deficit of applications for compensation indicate an inherent fairness in the rules of registration and that few people are disadvantaged? Or does it indicate the opposite i.e. that the system is inherently unfair, there can be few valid claims and this unfairness is hidden because the detail of applications for compensation are hidden?

Certainly in Ireland there is a lack of hard data about errors in registration and many disputes only come to light when there is a court judgment. This is a challenge for research in this area and makes it difficult to explore samples of types of transactions where errors arise and also to weigh incidences of errors as against fraud. A high incidence of errors and claims against the register would make indefeasibility unsustainable however if indefeasibility was abandoned and insurance removed then the register would become a mere deeds register.⁶³²

6.8 Conclusion

Subject to there being no change in the underlying legislation the question arises as to whether eConveyancing will lead to a higher or lower incidence of errors. A high incidence of errors would lead to a backlash against the change towards eConveyancing or a demise of the protection afforded by registration by judicial decisions that erode that protection. If the register cannot be relied upon and errors are frequent then there will be a reluctance to move towards eConveyancing with its increased reliance on registration.

Muir is of the view that the registration system has always relied on the integrity and honesty of conveyancing professionals and thus there is nothing new in New Zealand's automatic system.⁶³³ eRegistration reinforces the role of lawyers as trusted professionals in the conveyancing process and questioning this "would portray a very dim view of the competence and integrity of the legal profession."⁶³⁴

⁶³² There would be no compensation available to ameliorate the risk of an error and the title conferred would not be guaranteed by the state.

⁶³³ Muir, R. 'Electronic Registration: The Legislative Scheme and Implications for the Torrens System in New Zealand' in Grinlinton, D. (ed) *Torrens in the Twenty-first Century* (Wellington, LexisNexis 2003) p. 317.

⁶³⁴ *ibid.*, p. 317 and 321.

However this disregards the transfer of increased liability to such professionals and the danger that, in time, the compensation fund would be disbanded in favour of direct liability being imposed on such users of the system or on land owners who may of necessity turn to title insurance.⁶³⁵

As Ireland is not proposing to implement an automatic system there will be no passing of the registrars function to lawyers. Changes to the register will not be opened up to a wider pool of people which would potentially increase the likelihood for error or fraud. The registrar only will continue to be responsible for making changes to the register. There will be no passing of liability for registration and no argument that the compensation fund provisions or cover should be amended or diluted.⁶³⁶ This aspect is explored further in chapter eight.

Ireland has a robust registration system which has been subject to few challenges and the likelihood is that further advances in eRegistration and eConveyancing may only serve to strengthen this. Initial evidence suggests that errors in registration applications are reduced due to the automatic compliance checks built into the electronic system. Thus the threat to all parties from an unauthorised or illegitimate alteration of the register may reduce in an eConveyancing environment.

In both Ontario and Ireland rectification is allowed by the court or the registrar. Compensation may be payable from the indemnity fund as a first resort and there is no need for the disposed homeowner to sue the wrongdoer.

Rectification in Ireland by the registrar is limited to errors originating in the registry. In those circumstances the register can be rectified and compensation will be payable to any person who suffers loss as a result of the error. In the case of errors not originating in the registry rectification can be ordered by the court if there is actual fraud or mistake. Compensation will be payable to anyone who suffered a loss.

⁶³⁵ See Flaws, J. 'Compensation for Loss under the Torrens System – Extending State Compensation with Private Insurance' in Grinlinton, D. (ed) *Torrens in the Twenty-first Century* (Wellington, LexisNexis 2003) for the impact of agency registration in New Zealand on compensation.

⁶³⁶ See O'Connor, P. 'Double Indemnity – Title Insurance and the Torrens Systems' (2003) 3(1) *QUT Law & Justice Journal* 1 – 27 <http://ljj.law.qut.edu.au/editions/v3n1/pdf/oconnor.pdf> accessed 24 April 2012 for details of jurisdictions where legislation has been introduced to exclude or restrict the right to indemnity, thus shifting risk to land owners or their representatives.

The legislation is broad enough to allow Ireland a choice between following the Torrens systems which gives an absolute guarantee of title to D (deferred indefeasibility) or the Australian and New Zealand systems which give an absolute guarantee of title to B (immediate indefeasibility).⁶³⁷

The question of fairness arises and whether immediate indefeasibility awards ownership to the 'wrong' person. When there are a number of innocent parties how does the law determine which person's interest is to be valued the most? To award title to the new owner offends against the principle *nemo dat quod non habet* and deprives A of his title without his consent. There is a conflict between the registered ownership of B, C, D or C2 and A's claim for reinstatement. The law must balance between the register giving no guarantee at all, thus becoming a deeds register, and the potential unfairness of absolute and immediate indefeasibility.

In Ontario the register will be rectified in favour of A and against B and C except when the title has been sold to D. Once the subsequent transaction to D has taken place no rectification will be ordered and A may be entitled to compensation. The sale to B and charge in favour of C will be seen as one transaction and indefeasibility will be deferred to D with a knock on benefit for C2. Ontario favours deferred indefeasibility and certainty of the register thus D, who has relied on the register, will prevail over an innocent prior registered owner, A.

This deferred indefeasibility protects those market participants that rely on the register, thus upholding dynamic security however when there is no subsequent transaction static security prevails. As Bucknall notes deferred indefeasibility means that the circumstances in which a landowner loses his or her legal title through a fraud will be extremely rare.⁶³⁸

Ireland has not had a landmark fraud case with an innocent prior owner pitted against an innocent registered transferee. Cooke notes that Irish writers are untroubled by the issue of indefeasibility as it is not clear from the legislation or comment upon it what would be the position of an innocent purchaser tracing title through a forged disposition.⁶³⁹ She notes that either it has never arisen or has been

⁶³⁷ Cooke, E. 'Land Registration: Void and Voidable Titles' (2004) 8 *Edinburgh L. Rev.* p. 402.

⁶³⁸ Bucknall, B. 'Real Estate Fraud and Systems of Title Registration: The Paradox of Certainty' (2008-2009) 47 *Can. Bus. L.J.* p. 45.

⁶³⁹ Cooke, E. *The New Law of Land Registration* (Oxford, Hart Publishing 2003) p. 169.

dealt with by the registrar and remains unreported but the likelihood is that an English approach would be taken based on section 31.⁶⁴⁰

According to Cooke the English approach expresses indefeasibility in money, not in land.⁶⁴¹ The purchaser, who took from a fraudster, will be paid compensation while an innocent prior owner will get his land back. In England however, if the purchaser is in possession, the purchaser will keep the land and the innocent prior owner gets compensation. Surely this comment by Cooke clouds two different aspects of title registration. Firstly, indefeasible title as being conclusive and unimpeachable⁶⁴² and secondly the compensation provisions which ameliorate the adverse impact of that indefeasibility. These are distinct elements which are not interchangeable. Title indefeasibility will protect ownership of the specific piece of land but compensation indefeasibility treats ownership in general as equivalent to wealth. The nature of title indefeasibility is not merely to preserve value or wealth but instead, for land owners, it will mean that their title to that specific piece of property is preserved. Compensation indefeasibility puts a financial value on ownership and this can only be equivalent to title indefeasibility when the owner is interested in the exchange value and not the use value of the land. This is generally the case with lenders.

In Ireland the registrar does not however have the power to rectify where there is a forged disposition and the Irish courts have not had opportunity to examine these issues. Thus it is not surprising that Irish researchers and writers have failed to examine the matter in any depth. There may be an examination of rectification or compensation but it is not couched in the cloak of indefeasibility. This is however unlikely to remain off the radar for much longer as the expectation is that a landmark case of fraud will appear before the Irish courts in the near future.

If deferred indefeasibility is adopted then A would be entitled to compensation and the subsequent owner D would retain title. If immediate indefeasibility is adopted then A would again be entitled to compensation and title would pass to B however if the title was held to be defeasible A would retain title and B would be entitled to compensation.

⁶⁴⁰ *ibid.*

⁶⁴¹ *ibid.*, p. 105.

⁶⁴² See Ruoff, T. 'An Englishman Looks at the Torrens System: Part 1: The Mirror Principle' (1952) 26 *ALJ* p. 118.

The key decisions are policy ones. How should Ireland decide the balance between indefeasibility (immediate or deferred) and defeasibility of the register, dynamic and static security, the right to title and the right to compensation?

The Ontario experience shows a high level of electronic integration is compatible with a policy that respects and protects static security while placing due diligence requirements on those parties most able to systematically police and keep the system honest. In order to show justice the system attempts to balance static and dynamic security and this determines which risks are indemnified by compensation and which are not.

Chapter seven now examines the remaining risk categories arising after registration.

CHAPTER 7 AFTER REGISTRATION

7.1 Introduction

The interest of a registered owner may be subject to claims, whereby U or V seek such relief as a court may grant. The claim may be legal or equitable and may arise from rights which the registered owner created whether by contract or by conduct in favour of U or V. In such circumstances the court may order the registered owner to give up the whole or part of their registered interest or to note a burden, such as a judgment mortgage, on it.

Where the registered owner is ordered to give up their interest to U or V this may be due to a number of factors. A volunteer will have taken the land subject to all prior unregistered rights held by U or V. Alternatively there may have been some defect in the transfer that makes the title void or voidable at the instigation of U or V. The court may order rectification of the register.

Section 57(13) of the Ontario Land Titles Act allows the registrar or court to rectify the register if a registered instrument would be absolutely void if unregistered. There is no similar provision in Ireland. Section 30(1) of the 1964 Act does provide that any disposition or charge which if unregistered would be fraudulent and void, shall, notwithstanding registration, be fraudulent and void in like manner. In the absence of fraud, rectification could be ordered by the court under section 31 on the basis of mistake. In this way U and V could enforce a claim or right against the registered owner.

Chapter six has already examined the position where a claim leads to rectification of the register. This chapter examines other lesser type claims. The registered owner is not dispossessed but his interest may be impacted by the claim if it is successful. Alternatively the claim may not be recognised or the registered owner may be able to transfer free of it. When this happens the interest of the claim or right holder is at risk.

This chapter deals with these remaining risk categories as identified in chapter four. These are interests off the register which affect title, the destructive effects of a registered transaction and interests not recognised and not capable of registration.

Each category demonstrates how third party rights are impacted by the registration system and the effect of those rights on the other participants.

7.1.1 Interests off the register which affect title

All parties to a conveyancing transaction are at risk with respect to interests off the register which affect title.

These risks can be divided into two categories. Firstly the risk from overriding interests. Overriding interests bind the registered owner whether shown on the register or not. Those who hold such an interest possess an invaluable benefit⁶⁴³ as their interest binds the world even a *bona fide* purchaser for value. These present a risk to all parties. The risk is from U and V.

Secondly there is the risk from other interests and claims. They may be interests already held by U or arise when V makes a successful property claim. This presents a risk to all parties and the risk is from the prior owner or from U and V. The risk from those other interests and claims arising during the registration gap has already been examined in chapter five. Chapter six has dealt with the position where a claim of prior ownership might arise after registration thus leading to rectification of the register. Thus this chapter will examine the risk from overriding interests and this is the first risk category to be examined in this chapter.

7.1.2 Destructive effects of a registered transaction

A registered transaction poses a risk to U the third party and V the property claimant.

It may be that some other right has priority and destroys the third party right or property claim. Any system of registration that requires an interest to be registered if it is to survive a disposition entails the risk of non-compliance and subsequent destruction. These failed property interests are lost. They are void against a purchaser for want of protection by registration. When this occurs it could be said that the interest is overridden by registration.

⁶⁴³ Fitzgerald, B. *Land Registry Practice* (2nd edn Round Hall Press Dublin 1995) p. 219. See section 37(3) of the 1964 Act.

This is due to the destructive effects of a registered transaction. Due to the transaction B, C or Y's right may take priority over the right held by U or asserted by V. U may hold an equitable interest by virtue of a direct or indirect financial contribution or as a result of some agreement or arrangement with A or X. If that interest is not an overriding interest and U does not register a note on the folio, or the interest itself if it is capable of registration, then a purchaser who registers subsequently will take free of the unprotected equitable interest.

The registered transaction may transfer the claim of V or the right of U to some other property, devalue the claim or destroy it entirely. In circumstances where the claim is transferred it would be more accurate to say that the right is defeated as a claim against the land but it may continue to be a claim against other property i.e. the fund.

This transfer is known as overreaching.⁶⁴⁴ This may arise in relation to property rights that are capable of affecting title but which cannot be registered directly. An example is the beneficial interest under a trust. It survives a purchase but the interest of the beneficiary may be overreached by the purchaser and the right of the beneficiary becomes a right to the trust funds. While the right is not destroyed by a disposition it does become different in nature. The beneficiary may also have a personal claim against the trustee if the trustee acted in breach of the trust. In some instances these rights are not overreached and this is the situation where the transfer is to a volunteer such as Y.

This is the second risk category to be examined in this chapter.

7.1.3 Rights not recognised

In the schematic U and V are at risk if their claim or right is not protected by the registering authority as it is not recognised as a right capable of registration by the legislation. The state acting through the registrar will refuse registration. This will apply if the right is purely personal and cannot be converted into a property right, the right is not a registrable right or the claim by V is not mature. Where rights are not

⁶⁴⁴ See Megarry, R. and Wade, W. *The Law of Real Property* (6th edn Sweet and Maxwell London 2000) p. 124 and 127 – 128 for the distinction between interests being overreached and overridden. See also *City of London Building Society v. Flegg* [1987] 3 All ER 435.

recognised by the registration system they cannot gain the protection offered by registration. This is the third and last category of risk examined in this chapter.

7.1.4 Scenarios

In order to examine these risks in detail a number of scenarios are presented to demonstrate the impact of different types of rights and claims on the participants in the schematic.⁶⁴⁵

Scenario 1(a)

A grants a short term tenancy of Greenacre to U for a period of two years. Under the terms of the tenancy U is in occupation of Greenacre.

Scenario 1(b)

X grants a short term tenancy of Whiteacre to U for a period of two years. Under the terms of the tenancy U is in occupation of Whiteacre.

Scenario 2(a)

U gave A the purchase monies for Greenacre.

Scenario 2(b)

U gave X the purchase monies for Whiteacre.

Scenario 3(a)

U claims that he has a right of way by prescription over Greenacre.

Scenario 3(b)

⁶⁴⁵ See *ibid* p. 130 – 131 for similar type examples to illustrate the position in England and Wales.

X expressly grants U a right of way over Whiteacre.

Each of these scenarios is examined in detail in the context of the conveyancing systems in Ireland and Ontario.

7.2 Overriding interests

Many overriding interests are detectable if the appropriate enquiries are made. Some are interests which are deemed to be in need of protection such as rights held by someone in occupation and others are deemed unsuitable for registration.

The existence of such overriding interests makes the register an incomplete reflection of the state of the title at any given moment. Where such interests exist the state guarantee of title is qualified. The register will warrant that the title of the land owner is as stated on the register. It will not warrant that the title cannot be affected by anything off the register. These interests make the guarantee of title less effective and are seen as being one exception to indefeasibility.

The overriding interests that apply in Ontario and Ireland are set out in chapter two under neutral vocabulary. Examples of overriding interests are short term leases, rates, taxes, easements or the rights of someone in occupation. Frequently they are apparent by an inspection of the property or identifiable from some public source of information. Purchasers are expected to check such registers, make appropriate enquiries and inspect the property. They may also seek a declaration from the transferor stating that no such interests arise.⁶⁴⁶ Overriding interests “operate outside the registered system and are treated as being like unregistered land. They have to be ascertained by the traditional methods of investigation of inquiry and inspection.”⁶⁴⁷ Consequently the existence of such interests make it difficult to implement a full eConveyancing system.

There are in effect two different types of overriding interests but they are given the same degree of protection. Some overriding interests do not require occupation

⁶⁴⁶ A section 72 declaration is automatically sought on completion in a registered conveyancing transaction in Ireland.

⁶⁴⁷ Harpum, C. 'Property in an Electronic Age' (2000) 1 Modern Studies in Property Law (Hart Publishing Oxford 2001) p. 14.

while scenario 1 relates to an overriding interest contingent upon occupation. The rights of an occupier should be distinguished from the fact of his occupation. In the English case of *Wallcote Ltd. v. Ferrishurst Ltd.*⁶⁴⁸ an option to purchase was an overriding interest whereas in the Irish case of *Honiball v. McGrath*,⁶⁴⁹ which cited the English case, rights to receive care facilities were not considered to be rights in land.

Any interest in land may be protected by actual occupation⁶⁵⁰ however, a personal right cannot be an overriding interest even if the claimant is in occupation. As per Lord Templeman in *City of London Building Society v. Flegg*⁶⁵¹ there had to be a combination of an interest which justified continuing occupation plus actual occupation to constitute an overriding interest; actual occupation was not an interest in itself. The right must be a property right in its nature and capable of binding land. This is demonstrated by the English case of *National Provincial Bank Ltd. v. Ainsworth*⁶⁵² where a wife who remained in the former family home was held to have a personal right against her husband and she had no right good against third parties. She did not have an overriding interest under section 70(1)(g) of the Land Registration Act 1925 and the bank was entitled to possession. This subsection was replicated in section 72(1)(j) of the 1964 Act.

7.2.1 Short term tenancy

Short term tenancies are capable of being overriding interests in both Ireland and Ontario provided the tenant is in occupation.⁶⁵³

In Ireland the term must be for less than 21 years and in Ontario there must be an unexpired term of less than three years. The short term tenancies granted by A and X in scenario 1 are for two years and the tenant is in occupation. The tenancies fall within the category of overriding interests in both Ireland and Ontario and have the same effect.

⁶⁴⁸ *Wallcote Ltd. v. Ferrishurst Ltd.* [1999] 1 All ER 977.

⁶⁴⁹ *Honiball v. McGrath* [2000] IEHC 33.

⁶⁵⁰ See the list of overriding interests in Ireland at 2.3.2.

⁶⁵¹ *City of London Building Society v. Flegg* [1987] 3 All ER 435.

⁶⁵² *National Provincial Bank Ltd. v. Ainsworth* [1965] 2 All ER 472.

⁶⁵³ Section 72(1)(i) of the 1964 Act and section 44(1) paragraph 4 of the Land Titles Act.

If U was not in occupation under the tenancy then his interest would not be an overriding interest. Similarly if U held an option to purchase or a beneficial interest then it would not be overriding until he goes into occupation. If U does not hold an overriding interest his tenancy will be treated the same as the expressly granted right of way is treated in Ireland in scenario 3(b).⁶⁵⁴

The interest will be an overriding interest providing there is occupation under the tenancy or lease. This contrasts with the position in Ireland for other rights where there is occupation. Those rights are overriding except where, upon enquiry the rights are not disclosed by the person holding them.⁶⁵⁵

Scenario 1(a)

If the tenancy was not disclosed by A, B will buy subject to it but will have a claim against A. If it was disclosed by A on the sale, B will still be subject to it but will have no claim against A. Such an interest will bind B despite the fact that it is not reflected on the register and even if B had no notice of its existence. C's interest will also be subject to it but C may have a claim against B if the existence of the interest was known by B but was not disclosed and it has an impact on the value of C's security.

For example if B defaults on the repayments then C may not be able to enforce its charge and sell as a mortgagee in possession while the tenancy exists as U is in occupation of Greenacre.

Scenario 1(b)

Y will take Whiteacre subject to the tenancy and Y will have no claim against X unless X gave a warranty that there was no such interest. This is unlikely given the fact that this is a gift. Again notice or the lack of notice of the interest is irrelevant.

7.2.2 Effect of overriding interest

⁶⁵⁴ It is a burden which may be registered under section 69(1)(g) of the 1964 Act.

⁶⁵⁵ In England and Wales where there is an interest protected by actual occupation consideration is given to the discoverability of that occupation. A transferee is not bound by such an interest where the occupation would not have been obvious on a reasonably careful inspection of the land at the time of the disposition. See the Land Registration Act 2002, Sch 3, para 2(c).

The effect of an overriding interest is that the interests of B, Y and C may be devalued and they will suffer a loss of investment. If the overriding interest includes the right to occupation B and Y will not have the use value of the property and C may not be able to enforce its charge so that it will have little or no value as security.

These interests bind the world and it is irrelevant that B, C or Y did not have notice of the existence of the interest. In the case of these interests there is no difference in risk between B and Y. Both are equally bound by such interests. It does not matter whether the interest could have been registered, and was not, or that the interest is unregistrable. Equally it is of no relevance whether the overriding interest existed prior to completion of the transaction or came into existence during the registration gap.

This can occur if a right capable of being overriding is granted by A or X or matures against A or X during the registration gap. This right is granted to or held by V who then becomes U. Such a right will be good against A or X and B or Y will take the land subject to it.

In practical terms both B and Y would have sought vacant possession. They are also likely to have inspected the property and discovered the occupation by U if it had not already been disclosed by A and X. In the case of Greenacre if A contracted to give vacant possession but was not able to do so, B would have a right of rescission.

Unlike Ireland, Ontario does not protect the rights of those in receipt of rents and profits.⁶⁵⁶ This can be more problematic to determine but again B and Y would likely be warned of the interest when finding a lessee in occupation. If such interests or potential interests come to light U may be required to join in the transaction to release the property or asked to postpone their claim in order to give C's charge priority.

All parties are at risk from overriding interests. This risk to A, B, X, Y, C and D on a subsequent transaction is the same regardless whether the participant is a *bona fide* purchaser for value or a volunteer. All are equally at risk though some parties may have a claim against another. In the modeled transactions B may have a claim

⁶⁵⁶ This is an alternative to actual occupation under section 72(1)(j).

against A, C may have a claim against B and D may have a claim against his vendor. Y is unlikely to have a claim against X as he is a volunteer and takes subject to all unregistered rights, whether or not they are overriding interests.

7.3 Destructive effects of a registered transaction

The transfer of a legal estate or interest may overreach any over-reachable equitable interest held by U. Overreaching will not occur if the transfer was expressly subject to the equitable interest. There may also be certain formalities that have to be adhered to.

The trust provides a clear demonstration of how a registered transaction may have this destructive effect by virtue of overreaching the beneficial interest held by U. If overreaching occurs it does not destroy the equitable interest but removes it as a claim against the land and instead the claim attaches to the trust fund. Overreaching will cleanse the title taken by the transferee of the equitable interest and protect the security of his registered interest. The title will be simplified as U will have no claim on the title. In terms of the idealised participants U will become V. In the case of a wrongful sale, V may then have a personal action against the transferor.

If the transferor uses the trust fund to buy another property then V's beneficial interest will once more be in the land. V will become U again.

7.3.1 Trust

In Ireland section 21(1) of the 2009 Act provides for the overreaching of trusts and settlements where there are two trustees or a trust corporation but in some instances only a single trustee is required.⁶⁵⁷ The overreaching is provided for the protection of transferees where there is the transfer of a legal estate or interest. This section introduced the term overreaching into Irish law for the first time.⁶⁵⁸

Thus a transferee can overreach existing equitable interests provided he or she acts in good faith and pays the purchase monies to the appropriate people i.e. in this instance the trustees.

⁶⁵⁷ See section 21(2).

⁶⁵⁸ See 7.3.2 for the reason for its introduction and the effect of overreaching.

A transferee does not gain this protection if the conveyance was made for fraudulent purposes and the transferee had actual knowledge of this at the time, or was a party to the fraud. In addition overreaching will not occur if the transfer was subject to the equitable interest, or the equitable interest is protected by the deposit of title documents,⁶⁵⁹ or in the case of a trust was protected by registration, or takes effect as a burden protected by section 72(1)(j) of the 1964 Act. Section 72(1)(j) protects the rights of persons in actual occupation of the land or in receipt of the rents and profits, save where, upon enquiry made of such persons the rights are not disclosed. The exception for a trust protected by registration or occupation only applies where there is a single trustee.⁶⁶⁰ Thus where there is a single trustee the trust will not be overreached if the beneficiary is in occupation and the interest is protected as an overriding interest.

Where there are two trustees or a trust corporation the statutory overreaching provisions will be activated. This is similar to the position in England and Wales where occupation does not prevent overreaching if the correct formalities are complied with. In *City of London Building Society v. Flegg*⁶⁶¹ the beneficiaries of a trust were found to have no right to continue in occupation when their interests were overreached by the legal charge. Their rights were transferred to the equity of redemption and they were prejudicially affected by the breach of trust, not by the overreaching provisions.

While the term overreaching is not used there are other statutory provisions with similar effect in that they free purchasers from equitable claims. These provisions apply to sale by a personal representative⁶⁶² or a mortgagee exercising a power of sale.⁶⁶³ In the former case the interests of the beneficiaries will be overreached and in the later it will be the borrower's interest that is overreached. The transferee will take free from the mortgage and the borrower's equity of redemption. These provisions are more widely drafted in that a purchaser does not have to comply with any formalities about how the purchase monies are to be paid.

When overreaching occurs the equitable interest continues to exist but it cannot be asserted against the title. Instead it is transferred to the money. In effect the right or

⁶⁵⁹ This is contradictory given the move towards dematerialisation in the 2006 Act.

⁶⁶⁰ Section 21(3)(b)(iii).

⁶⁶¹ *City of London Building Society v. Flegg* [1987] 3 All ER 435.

⁶⁶² Section 51(1) of the Succession Act 1965.

⁶⁶³ See sections 104 and 105 of the 2009 Act.

claim is not destroyed by the registered transaction but it does take a different form. The beneficiary will only get a portion or the whole of the monies and this is obviously preferable to the interest or claim being destroyed in its entirety. However, there is the possibility that such monies may have been dissipated. The transferor may have disappeared or there may be no funds left where a lender has been paid on foot of a charge. Thus V may be left with no recourse. In effect their right has been devalued.

There are no overreaching provisions in the Ontario legislation and purchasers are entitled to ignore the existence of any trust. Section 62(1) of the Land Titles Act provides that trusts are not recognised. Describing an owner as trustee is deemed not to be notice of a trust, those dealing with the owner have no duty to enquire as to his power and the owner may deal with the land as if such description had not been inserted.⁶⁶⁴ This was confirmed in *Randvest Inc. v. 741298 Ontario Ltd.*⁶⁶⁵

In the case of a sale by a mortgagee, the mortgagee can deal with the property as if they were the registered owner of the land provided they have a power of sale and provide certain evidence to the registrar.⁶⁶⁶ Section 99(1.1) of the Land Titles Act says that this evidence is conclusive evidence of compliance with the requirements and upon registration of a transfer is sufficient to give a good title to the purchaser. In the case of a personal representative he can be registered as owner under section 121 of the Land Titles Act if he has an express or implied power of sale. While the term 'overreach' is not used this is the effect of these sections.

Scenario 2(a)

Because U gave A the purchase monies for Greenacre the court found, on application by U, that A holds Greenacre on trust for U. A has now sold Greenacre to B.

In Ontario B does not need to concern himself with the existence of the trust and does not need to make any enquiries about A's entitlement to sell. A and B can deal with the property as if the trust did not exist as U's beneficial interest has no impact on the sale.

⁶⁶⁴ Section 62(2).

⁶⁶⁵ *Randvest Inc. v. 741298 Ontario Ltd.* 1996 CanLII 8207 (ON SC).

⁶⁶⁶ Section 99(1) of the Land Titles Act.

In Ireland B can only take Greenacre free of the trust provided a number of conditions are met. The transfer must not have been subject to the trust or made for fraudulent purposes. In addition the trust must not have been protected by registration and U must not be in occupation as his interest would then be protected as an overriding interest.

If B meets these conditions he will take Greenacre free of the trust. U's claim will transfer to the trust fund. While U loses any prospect of enjoying the land itself he has a corresponding interest in the trust fund. Also if A acted wrongfully, U will have a personal claim against A for breach of trust.

The trust cannot be protected by registration in its own right but if U had protected his interest by registering a note on the title before the sale of Greenacre to B then overreaching would not automatically occur. Such a note on the title will put B on notice of the existence of the trust and he will then need to be careful to comply with the correct formalities. A would need to apply for a second trustee to be appointed in order to facilitate the sale and allow overreaching.

In the interim, as there is only a single trustee, U can protect his interest against a transfer to B by occupation. In this situation if B proceeded with the purchase he would take Greenacre subject to the beneficial interest as U would hold an overriding interest.

Scenario 2(b)

Because U gave X the purchase monies for Whiteacre the court found, on application by U, that X holds Whiteacre on trust for U. X has now gifted Whiteacre to Y.

The position in Ontario is the same as above. X and Y can deal with the property as if the trust did not exist.

In Ireland the position of Y as a volunteer is different to that of B as Y will take subject to the interest of U. The definition of purchaser in the 2009 Act requires the

transaction to be for value and the definition includes a mortgagee.⁶⁶⁷ Thus B and C can overreach but Y cannot. The gift of Whiteacre from X to Y will not pose any risk to U and his beneficial interest will continue to affect the title to Whiteacre.

7.3.2 Effect of overreaching

Section 21 was introduced because the 2009 Act provided that the only legal estates capable of being created or disposed of are a freehold estate and a leasehold estate. All other estates and interests take effect as equitable interests only.⁶⁶⁸ Thus the trustees are registered as owners and the interests of the beneficiaries are by way of an equitable interest only and these are not registrable interests.⁶⁶⁹ They can, however, be protected by registration of an inhibition. The position now in Ireland is that the trust may not be evident from the register unless an inhibition has been entered.

As demonstrated above Y will take subject to the interest but there is a risk for B and C. If they are not aware of the existence of the trust then they may not comply with the correct formalities and overreaching may not occur. There is no corresponding risk in Ontario as the existence of the trust can be ignored as B and C will take free of any claim. In Ontario U automatically becomes V when a sale or transfer of the land occurs.

In Ireland the 2009 Act simplified and standardised property rights and thus trusts were moved off the register. In implementing this change section 21 tried to effect a compromise between ensuring that land held in trust is freely alienable and protecting the interests of the beneficiaries in preserving their rights. The difficulty with section 21 is that on a practical level the compromise may leave purchasers and lenders unwittingly subject to an equitable claim that was not evident from an inspection of the title register or any other register.

Where there is no inhibition on the title register a single trustee can readily hoodwink a purchaser into falling foul of section 21. Mee was critical of the original provision in

⁶⁶⁷ Section 3.

⁶⁶⁸ Section 11 of the 2009 Act.

⁶⁶⁹ The Property Registration Authority 'Practice Direction Trusts of Land (published 01 December 2009)' http://www.landregistry.ie/eng/Legal_Professional_Customers/Legal_Practices_Procedures/Practice_Directions/18_Settlements_and_Trusts_2006_/18_Settlements_and_Trusts_2006_.html accessed 17 April 2012.

the Bill and expressed the view that it downgraded beneficial interests in family homes.⁶⁷⁰ He referred to the English system which requires two or more trustees all of whom must execute the deed⁶⁷¹ and notes that while a family relationship is going well it is most unlikely that a non-owning partner will take steps to register their beneficial interest.⁶⁷²

The main thrust of the section is to protect purchasers, by transferring the interest of the beneficiary to the trust fund, but it appears to have failed somewhat in achieving this. In Ontario even if the trust is evident from the register the registered owner can deal with the property as if there were no such beneficial interest. The beneficiary is V and has no claim against the land. This policy is a more definitive stance on the issue and has much to recommend it.

B, Y and C take free of the trust and the beneficiary V must seek recourse from the transferor and trustee, A or X.

7.4 Rights not recognised

If rights are not recognised and not capable of registration then there is a risk posed to U the third party and V the property claimant. Rights may not be recognised and capable of registration for a number of reasons. The right may be a personal right that cannot be converted into a property right. For example breach of a contract of employment will result in an *in personam* claim and these type of claims fall outside this research.

Some rights fall outside the registration system in that they are not registrable rights. Other rights may be rights that are capable of being registered but the claim by V is not sufficiently mature to effect the land.

7.4.1 Easement

⁶⁷⁰ Mee, J. 'The Land and Conveyancing Law Reform Bill 2006: Observations on the Law Reform Process and a Critique of Selected Provisions – Part 1' (2006) 11(3) *C.P.L.J.* p. 71.

⁶⁷¹ This is a reference to section 2(1) and section 27 of the Law of Property Act 1925.

⁶⁷² Mee, J. 'The Land and Conveyancing Law Reform Bill 2006: Observations on the Law Reform Process and a Critique of Selected Provisions – Part 1' (2006) 11(3) *C.P.L.J.* p. 70 – 71. Mee does not deal with how this section interacts with the protection provided by the Family Home Protection Act 1976 as amended and he obviously could not address the provisions of the subsequently enacted Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010.

In Ontario easements, including rights of way, are overriding interests under section 44(1) paragraph 2 of the Land Titles Act but there is a caveat to this in section 44(3). This provides that such rights are not overriding if notice of the application for first registration of the land was served on adjoining owners and no objection to the first registration was filed. If no objection was filed at the time the adjoining owner's easement is not protected as an overriding interest. This means that subsequent purchasers will not need to concern themselves with easements existing prior to first registration provided this notice was served.

After first registration easements by prescription are prohibited by virtue of section 51(1) of the Land Titles Act. This provides that no title, right or interest can be acquired adverse to or in derogation of the title of the registered owner by any length of possession or by prescription. In effect the Act prevents the maturing of claims for adverse possession or easements and a matured prescriptive easement may be lost if the owner does not contest the registration of the servient lands. This position was confirmed in *394 Lakeshore Oakville Holdings Inc. v. Misek*.⁶⁷³ Thus after first registration easements can only be obtained by express or implied grant such as easements of necessity.

In Ireland the 2009 Act abolished the acquisition of an easement by prescription at common law and provided that acquisition at law shall only arise on registration of a court order under section 35(1). Section 40 does retain the right to an implied grant, easements of necessity and the doctrine of non-derogation from grant. Prospective purchasers require registration as section 39 provides that after twelve years continuous non-user the easement is extinguished unless protected by registration.

Until extinguished the easement is protected as an overriding interest under section 72(1)(h) of the 1964 Act unless created by express grant or reservation after first registration. Express grants or reservations can be registered as burdens under section 69 of the 1964 Act. If the easement is not an overriding interest the threat from a prospective purchaser to the easement requires it to be registered to secure the right and avoid the possibility of extinguishment.

The explanatory memorandum to the 2009 Act notes that section 35(1) was designed to facilitate conveyancing by relieving purchasers of the need to make

⁶⁷³ *394 Lakeshore Oakville Holdings Inc. v. Misek* 2010 CanLII 6007 (ON SC).

enquiries or search for possible rights not mentioned in any documents of title as all new rights acquired by prescription will have to be registered.⁶⁷⁴ However purchasers will still have to enquire if a court order has been made but not yet registered as such rights may be overriding interests and purchasers will also have to enquire if any proceedings have been initiated.

This move to bring easements on to the register caused consternation in legal circles as previously lawyers relied upon statutory declarations from prior owners as to length of user.⁶⁷⁵ Now a deed or court order seemed to be required.

The non-expressly granted easement is an important user right and the neighbour is a monopoly supplier. Forcing the claimant to contract or obtain a court order imposes cost and raised the possibility of a dispute. Servient owners could decline to execute a deed and force the dominant owner to go to the expense of a court application. This has been remedied somewhat by amending provisions in the Civil Law (Miscellaneous Provisions) Act 2011⁶⁷⁶ which allows the registrar to register the easement when there is no dispute between the parties. Notice is served on all interested parties and in the absence of the application being contested, registration may proceed.⁶⁷⁷

Thus the dominant owner can avail of this simple procedure to register subject to their being no objection by the servient owner who may be a friendly and co-operative neighbour. This extension of the registrar's power is in line with the increased emphasis on title registration in the move towards eConveyancing.

Scenario 3(a)

U is claiming a right of way by prescription over Greenacre.

⁶⁷⁴ Explanatory memorandum Land and Conveyancing Law Reform Act 2009 p. 22.

⁶⁷⁵ Brennan, G. 'Aspects of the Land and Conveyancing Law Reform Act 2009 likely to arise before a Circuit Court Judge' Circuit Court Judges Conference Adare 9 July 2010.

⁶⁷⁶ No 23 of 2011.

⁶⁷⁷ The Property Registration Authority 'Practice Direction Registration of Easements and Profits à Prendre Acquired by Prescription under Section 49A (published 9th December 2011)'

http://www.landregistry.ie/eng/Legal_Professional_Customers/Legal_Practices_Procedures/Practice_Directions/Easements_and_Profit_à_Prendre/ accessed 17 April 2012

In Ontario U cannot claim a right based on prescription after first registration of the land and thus his claim will be rejected by the courts. U becomes V. The right is not a registrable right and is not recognised.

In Ireland U will need to demonstrate 12 years user.⁶⁷⁸ If U does not have sufficient user to be successful in asserting his right his claim is not yet mature and will not be recognised by the courts. U may be able to register a note on the register temporarily, while proceedings are pending, but when the claim fails the registrar will remove the note from the register. In the interim period the title is effectively frozen as B would likely not purchase Greenacre until the matter is resolved. U becomes V as his right is not recognised and cannot be registered against the land.

If U can demonstrate 12 years user and his claim is successful the court order can be registered as a burden under section 69(1)(h) of the 1964 Act. This will protect his interest from extinguishment. This registration is required under section 35(1) of the 2009 Act for a legal easement. If U does not register the court order he would have an equitable easement. This is protected as an overriding interest under section 72(1)(h) of the 1964 Act.

The status of such a right as an overriding interest contradicts the aims of the 2009 Act in attempting to bring prescriptive easements onto the register. This demonstrates a lack of co-ordination between general conveyancing law and the law in relation to registration of title and the detrimental effect of piecemeal reform. Mee argues that more consideration should have been given to developing a conception of how eConveyancing might work before settling on the approach to reforming the substantive law.⁶⁷⁹

Scenario 3(b)

X expressly granted U a right of way over Whiteacre. This right is recognised in Ontario and Ireland. The question of the right maturing does not arise as it comes into being when the grant is executed.

⁶⁷⁸ Under sections 33 and 35(2).

⁶⁷⁹ Mee, J. 'The Land and Conveyancing Law Reform Bill 2006: Observations on the Law Reform Process and a Critique of Selected Provisions – Part 1' (2006) 11(3) *C.P.L.J.* p. 68. He notes that the Law Reform Commission report on eConveyancing came almost a year after the publication of its report setting out the substance of the Bill which was enacted as the 2009 Act.

In Ireland this right is not an overriding interest.⁶⁸⁰ Instead it is a burden which may be registered as affecting registered land under section 69(1)(j) of the 1964 Act. The easement cannot be extinguished by 12 years non-user as section 39 of the 2009 Act only applies to those acquired by prescription or implied grant or reservation.

If this was Greenacre U would be advised to register the easement in order for it to survive a sale by A to B. In the case of Whiteacre as a volunteer Y will take subject to all unregistered rights to which X held the land so it does not matter if U failed to register the easement. It will survive the gift.

The easement was created after first registration by way of express grant from X. U can register a note of it on the register in Ontario under section 39(4) of the Land Titles Act. If U fails to register it will still be protected as an overriding interest under section 44(1) paragraph 2 and on a sale or transfer both a purchaser for value and volunteer will be bound by the interest. In Ontario the easement is treated the same as the tenancy in scenario 1. B, Y and C will take their respective interests subject to the right of way.

7.4.2 Effect of rights not recognised

Lyall notes that registration of title is not merely procedural, but affects substantive law in a number of respects as it produces a new classification of interests in land.⁶⁸¹ This classification of registered interests overlaps with the legal and equitable estates and interests that can generally exist. Some legal and equitable estates and interests will be capable of registration and others will not.

The prescriptive easement is not registrable and not recognised by the title register in Ontario. In Ireland the prescriptive easement needs to be mature to affect the title. The expressly granted easement is an overriding interest in Ontario but in Ireland it is a burden which should be registered to survive a transfer from A to B.

The above scenarios demonstrate how third party rights are dealt with by the registrations systems in Ireland and Ontario and the effect of those rights on other

⁶⁸⁰ Section 72(1)(h) excludes easements created by express grant or reservation after first registration.

⁶⁸¹ Lyall, A. *Land Law in Ireland* (3rd edn Round Hall England 2010) p. 936.

participants in the land market. It is clear that registration systems do not deal with or acknowledge all third party rights.

The title register is not a complete reflection of the title at any given moment⁶⁸² and this can be viewed in a number of contexts. It may be seen as detracting from the value of the register by adding enquiries and cost to conveyancing transactions. As Stewart-Wallace puts it so articulately “[a] partial register is rather like a boat with a leak in it. You may not be drowned, but you are sure to be uncomfortable. The register must be final and conclusive in all cases and for all purposes, or its utility is diminished”.⁶⁸³

Woods is of the view that “[o]verriding interests, which operate to bind a purchaser of registered land despite not appearing on the register, were not part of Torrens’ original vision.”⁶⁸⁴ They are just one exception to indefeasibility which negate the effectiveness of registration. Mason agrees that indefeasibility does not mean, and has never meant, absolute indefeasibility and that some of the problems with the Torrens system were “unreal expectations of what the system of registered title would deliver, engendered by the notion of indefeasible registered title.”⁶⁸⁵ In support of this perspective he notes that when introduced in Australia registration under the Torrens system was voluntary and that equitable unregistered interests can be created in respect of registered land.⁶⁸⁶

For Park the ideal espoused by the originators of land title registration was that of a complete and comprehensive register.⁶⁸⁷ To investigate and ascertain legal rights or obligations a person only needed to inspect the register as “title is not affected by anything not shown on the register. It is not only unnecessary but also impossible to

⁶⁸² In England and Wales the Law Commission has endorsed making the register a complete and accurate reflection of the state of the title at any given time. See Law Commission and HM Land Registry ‘Land Registration for the Twenty-First Century: A Conveyancing Revolution’ (2001) Law Com No 271 <http://www.lawcom.gov.uk/docs/lc271.pdf> accessed 10 June 2010 p. 2.

⁶⁸³ Stewart-Wallace, J.S. ‘Land Registration under the Law of Property Act, 1922’ (1924) 9 *Conveyancer* p. 92

⁶⁸⁴ Woods, U. ‘The English Law on Adverse Possession: A Tale of Two Systems’ (2009) 38 *C.L.W.R.* p. 34.

⁶⁸⁵ Mason, A. ‘Indefeasibility – Logic or Legend?’ in Grinlinton, D. (ed) *Torrens in the Twenty-first Century* (Wellington, LexisNexis 2003) p. 3 - 4.

⁶⁸⁶ *ibid.*, p. 3.

⁶⁸⁷ Park, M.M. ‘Removing the Disharmony from Victoria’s Land Title Registration System’ (21 May 2009) Land Surveying Commission Seminar http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1537710&http://www.google.ie/search?hl=en&q=park%2B%22removing+the+disharmony%22&meta=&aq=f&aqi=&aql=&oq=&gs_rfai= accessed 28 October 2010 p. 8.

establish a right in the land by other means.”⁶⁸⁸ He notes however that this and other absolute statements regarding the integrity of the various title registers are not justified as the register is less than perfect and overriding interests exist which are not disclosed on the supposedly conclusive register.⁶⁸⁹

7.5 Effect of eConveyancing

The changes being implemented to advance eConveyancing bring a different perspective to these debates. Thus while the scenarios above demonstrate transactional risk, illuminated by the model, the imperative of eConveyancing can reveal other systemic risks.

In Ontario, Ireland and England and Wales it is widely acknowledged that eConveyancing can only be implemented in respect of registered land and this has led to an accelerated push to complete the title register. For example the Ontario e-reg system has only been introduced for registered titles. This generally means there is no further attempt to keep the registered and unregistered systems in line with each other.⁶⁹⁰

There is one exception to this widely held view. Arruñada says it is easier to fully automate a registry of deeds rather than a register of rights *stricto sensu* in which only purged, clean titles are entered.⁶⁹¹ He is of the view that agency registration, i.e. an automatic system, will debase a registry of rights into a recording of deeds given the imperative to speed up registration.⁶⁹²

Arruñada’s perspective has not found favour. This may be due to the fact that to date no jurisdiction has reduced the protection offered by its registry in order to speed up registration thus debasing the register of rights into a recording of deeds.

While Arruñada may be correct that it is easier to automate a registry of deeds, many jurisdictions embracing eConveyancing initiatives have instead chosen to

⁶⁸⁸ *ibid.*

⁶⁸⁹ *ibid.*

⁶⁹⁰ Harpum, C. ‘English experience: title by registration – preparation for e-conveyancing’ (2004) Law Reform Commission Annual Conference (2004) <http://www.lawreform.ie/Annual%20Conference%202004.PDF> accessed 18 February 2009 p. 4.

⁶⁹¹ Arruñada, B. ‘Leaky Title Syndrome?’ (April 2010) *N.Z.L.J.* p. 118.

⁶⁹² *ibid.*

advance their title register at the expense of the deeds register. This advancement has focused attention on completion of the title register and also on its efficiency. Both Ireland and Ontario have made significant movement towards extending the title register to all land parcels. This focus on completion of the title register is not just limited to its geographical spread. It also impacts on the very nature of title and how rights are categorised. The aim is not just to extend the register to the entire land mass but also to all rights and interests, or at least those deemed worthy of protection by the registry. This can be described as both a wide extension and a deep intension of registration.

7.5.1 Moving rights on to the register

This increased emphasis on registration involves an examination of all rights and interests to see if those off the register should be moved on to the title register. The aim is to make the register definitive, conclusive and all encompassing.⁶⁹³ This move towards certainty comes at the expense of some land owners. Any change in categorisation may have a positive or negative impact. An interest previously not given the protection of registration may be deemed sufficiently important to be reclassified as a right capable of registration. A right which previously affected without registration may now require registration and thus the land owner will need to comply with the required formalities. A right previously protected by registration or which affected without registration may no longer be deemed worthy of protection and may be cast out. This would be a significant policy shift and raises the issue of compensation for the loss.

Attempting to enter all interests onto this all encompassing title register would be a challenging task, possibly involving delay and expense. Those holding such interests are generally given an interim period to register their interest but if registration does not occur within the time given then the interest is deemed to be lost or may only be enforced as a personal right. Alternatively old rights could be protected independently but all new rights of the same type refused and then eventually those types of rights would fade away.

Hansmann and Kraakman express the view that the recognition of new classes of property rights generally involves a shift in wealth towards the user of those rights at

⁶⁹³ Law Society of Ireland 'eConveyancing: Back to Basic Principles. Vision of an Electronic System of Conveyancing ('eVision')' (March 2008) p. 1.

the expense of nonusers and society at large or whoever bears the system costs for the new rights.⁶⁹⁴ Thus reforms promoting or abolishing property rights are likely to be influenced strongly by different interest groups.⁶⁹⁵

Thus it is important to ask a number of questions. Is it reasonable to expect all parties to register their rights even if those rights arise informally such as by virtue of occupation, under a constructive trust or by estoppel? Or are there circumstances where it is reasonable to give protection to interests off the register? Can eConveyancing truly be effective without a complete land register that encompasses all rights, interests and estates?

A combination of interest recording and title registration was recommended in 1990 by the Canadian Joint Land Titles Committee *Renovating the Foundation: Proposals for a Model Land Recording and Registration Act for the Provinces and Territories of Canada*.⁶⁹⁶ The Committee was of the view that “the law cannot effectively guarantee ownership of all interests in land and would seriously mislead people if it were to try extend title registration to all interests.”⁶⁹⁷ It would not be appropriate to register an almost indefinite range of estates and interests.⁶⁹⁸ The Committee also expressed the view that title registration should not change substantive real property law but instead “should float upon the general law.”⁶⁹⁹ This Committee included representatives from Ontario but the recommendations have not been adopted there.⁷⁰⁰

⁶⁹⁴ Hansmann, H. and Kraakman, R. ‘Property, Contract, and Verification: The *Numerus Clausus* Problem and the Divisibility of Rights’ (2002) 31 *J. Legal Stud.* p. S402 – S403.

⁶⁹⁵ *ibid.* p. S403.

⁶⁹⁶ Joint Land Titles Committee *Renovating the Foundation: Proposals for a Model Land Recording and Registration Act for the Provinces and Territories of Canada* (1990) <http://www.law.ualberta.ca/alri/docs/Model%20Land%20Recording%20Act.pdf> accessed 1 May 2012. See McCrimmon, L.A. ‘Protection of Equitable Interests under the Torrens System: Polishing the Mirror of Title’ (1994) 20 *Monash U. L. Rev.* 300 – 316 for details of the recommendations. This Committee favoured discretionary indefeasibility in order to achieve fair results. See Mason, A. ‘Indefeasibility – Logic or Legend?’ in Grinlinton, D. (ed) *Torrens in the Twenty-first Century* (Wellington, LexisNexis 2003) p. 18. Mason is inclined to agree that it might generate fairer results but was not sure if the benefits would outweigh the detriments of change, particularly as there would be uncertainty for a significant period of time as to how the courts would exercise the discretion.

⁶⁹⁷ *ibid.*, p. 14.

⁶⁹⁸ *ibid.*, p. 20.

⁶⁹⁹ *ibid.*, p. 19.

⁷⁰⁰ Where registration is based on a forged or unauthorised transfer the Model Act leaned in favour of restoring a displaced registered owner and compensating the innocent successor of the fraudulent party as the displaced owner is statistically likely to have a closer connection with the land and to suffer loss which will be harsher as well as greater and less easy to quantify, than the loss suffered by the recent acquirer of the interest. See *ibid.*, p. 3 and 25.

Such a proposal accepts the distinction between deeds and title registration and reinforces it. The reality however is that many jurisdictions including England and Wales, Ontario and Ireland are instead extending title registration and moving towards the closure of deeds registers.

7.5.2 Reclassification of interests in land

Some interests have already been reclassified. An example arises in Ireland with the removal of the status of land certificates and certificates of charge which was driven by the dematerialisation aspect of eConveyancing.

Prior to 1 January 2007 the Land Registry would on request issue a land certificate. This was an important document of title and was required to be produced if there was any change in registration. Section 73 of the 2006 Act, which came into effect on 1 January 2007, provided that these certificates would no longer be issued. All existing certificates ceased to have effect from 1 January 2010 and in the intervening three year period a person who held a lien through deposit or possession of such a certificate could apply to the Registrar to have a lien registered as a burden on the folio. Section 73 related similarly to certificates of charge.

Thus as of 1 January 2010 it was no longer possible to create an equitable charge on registered land by lodgement of the land certificate with a lender. Any lender previously holding such a charge was given three years to protect their interest by registering it on the folio. Any lender who did not exercise this right was left holding a worthless document and an interest that could no longer be enforced. In effect a type of security that was low in cost, easy and quick to effect was abolished despite the fact that it was commercially valuable. Lenders must now take the risk of unsecured credit or put the borrower to the expense of putting a charge in place.

This demonstrates how a party may lose their claim by not registering within the time allowed and collectively a category of land owners may lose their claim if their right or interest is no longer recognised by the registration system. There is an inherent risk in registration systems and these risks are amplified in any reclassification of what the system protects.

Other interests may not be lost but may be downgraded or rendered inferior in the process or indeed there may be a perception among consumers, legal professionals and the market place that the new interest is inferior even if the reality is very different. In Ontario the protection offered by the registry has been extended in the move towards electronic services with the automation and conversion from the registry records. This is reflected in the creation of two new types of registered titles.

The new land title parcels are “commonly referred to as “Qualified Land Titles” among real estate practitioners, with the connotation that the parcel is inferior to an Absolute title” or traditional land title parcel.⁷⁰¹ The LT Plus and LTCQ are however both qualified to a lesser degree than the previously best title available i.e. the absolute title. Murray says it is unfortunate that these parcels are referred to as “Qualified”⁷⁰² as the guarantees given mean that for most conveyancing purposes they are superior to absolute title.⁷⁰³ Thus eConveyancing may improve the quality of registered titles.

eConveyancing may also require the development of a different system of principles to determine the circumstances in which it is possible to acquire title to registered land by adverse possession. This reflects “the fact that the basis of title in a registered system is the *fact of registration* and not possession as it is in an unregistered system”⁷⁰⁴ This enhances the status of registration which becomes an integral and essential part of the conveyancing process.⁷⁰⁵

Thus jurisdictions such as England and Wales have because of the conclusive nature of registration, in an eConveyancing environment, severely restricted the circumstances in which a squatter can acquire title to registered land by adverse possession.⁷⁰⁶ The Land Registration Act 2002 reduced the scope and number of

⁷⁰¹ Murray, K. ‘Electronic registration and other modernization initiatives in Ontario’s land registration system’ Law Reform Commission Annual Conference (2004)
<http://www.lawreform.ie/Annual%20Conference%202004.PDF> accessed 18 February 2009
p. 7.

⁷⁰² Their exact title is Land Titles Converted Qualified (LTCQ)

⁷⁰³ Murray, K. ‘Electronic registration and other modernization initiatives in Ontario’s land registration system’ Law Reform Commission Annual Conference (2004)
<http://www.lawreform.ie/Annual%20Conference%202004.PDF> accessed 18 February 2009
p. 7.

⁷⁰⁴ Harpum, C. ‘English experience: title by registration – preparation for e-conveyancing’ (2004) Law Reform Commission Annual Conference (2004)
<http://www.lawreform.ie/Annual%20Conference%202004.PDF> accessed 18 February 2009
p. 4.

⁷⁰⁵ *ibid.*, p. 10.

⁷⁰⁶ *ibid.*, p. 11.

overriding interests, created some new registrable interests and introduced a new regime for adverse possession based on the premise that registration and registration alone confers title.⁷⁰⁷ Dixon points to schedules 1 and 3 of this Act as having enhanced free alienability of land⁷⁰⁸ by reducing the number of overriding interests⁷⁰⁹ in the move towards an eConveyancing system with a near complete electronic register.

Ontario has gone even further and has provided that no claim for adverse possession can be made in respect of registered land unless rights were acquired before the lands were brought into the registered title system. The Law Reform Commission in Ireland has also made radical proposals⁷¹⁰ for the restriction of adverse possession but these proposals have not yet been introduced into legislation.⁷¹¹

These reforms may be looked at in the context of a drive towards a stricter *numerus clausus* and the implications this may have on the operation of the land market. As noted in chapter 2, it is more difficult to build an electronic system that is flexible enough to accommodate estates and interests that may not be determined for some years to come.⁷¹² The move towards eConveyancing may trigger further examination and reclassification of interests in land thus creating risk for all those holding, to trying to assert, such interests.

7.5.3 Impact on risk

Any reclassification of property rights poses a risk to all land owners. Some rights may be downgraded and others upgraded. The interests currently not protected by registration may, on a review, be deemed worthy of being reclassified as rights capable of registration. U and V may benefit from a change in the legislation. Until

⁷⁰⁷ See Chamberlain, L. 'The Land Registration Act 2002: a "Conveyancing Revolution" – Pt I' (2002) 152 *NLJ* p. 1093.

⁷⁰⁸ Dixon, M. 'The Reform of Property Law and the Land Registration Act 2002: A Risk Assessment' (2003) *Conv.* p. 145.

⁷⁰⁹ Though Harpum expresses the view that the Law Commission and Land Registry in England and Wales adopted a rather cautious approach to the abolition or downgrading of overriding interests. See Harpum, C. 'Property in an Electronic Age' (2000) 1 *Modern Studies in Property Law* (Hart Publishing Oxford 2001) p. 16.

⁷¹⁰ Mee, J. 'The Land and Conveyancing Law Reform Bill 2006: Observations on the Law Reform Process and a Critique of Selected Provisions – Part 1' (2006) 11(3) *C.P.L.J.* p. 67

⁷¹¹ The Law Reform Commission 'Report on Reform and Modernisation of Land Law and Conveyancing Law' (2005) The Law Reform Commission (LRC 74 – 2005) available at http://www.lawreform.ie/Reports_Published/Default.135.html

⁷¹² See title to land at 2.3.2.

this reclassification is completed the rights held by U and V are subject to increased risk. The danger is that they will be deemed as not being sufficiently important to be reflected on the new all encompassing register and thus will be deemed not to be recognised as rights.

There is also the possibility of other interests or even estates in land being examined and challenged. The likelihood of this occurring, however, is slim. It is one thing to remove third party rights but it is quite another to remove from land owners or lenders rights which were previously capable of registration. Such a major re categorisation would throw the entire conveyancing system into disarray.

A reclassification of property rights to make the register definitive and all encompassing would mean being true to one of the original principles of title registration i.e. the register being a mirror of the title. Such a reclassification could mean that any rights on the register would be protected and any rights not on the register would not. In effect equitable interests and overriding interests would no longer be enforceable and those holding such interests would have no remedies and no protection.

7.6 Conclusion

eConveyancing with its increased emphasis on registration poses a threat to the ongoing existence of the overriding interests that can be asserted. Legislative reform will likely trigger an examination of all overriding interests and their possible rationale. This could lead to such rights being devalued, undermined or completely lost. Third parties such as U may be required to bring their rights on to the register. At the moment there is no incentive for those holding overriding interests to register them. This may change in an eConveyancing environment.

Even in 1995 Fitzgerald advised that a revision of the formidable list of overriding interests might be timely.⁷¹³ There is no doubt but that some of the overriding interests in section 72 of the 1964 Act are relics of the past. Examples include those relating to the Land Purchase Acts, Land Commission and Labourers Act 1936.⁷¹⁴ Similarly there may be no necessity for those in occupation under a short term

⁷¹³ Fitzgerald, B. *Land Registry Practice* (2nd edn Round Hall Press Dublin 1995) p. 219.

⁷¹⁴ These relate to the resettlement of large estates by the Land Commission to tenant farmers. The Land Commission was dissolved in 1992 after over one hundred years in existence.

tenancy to be given the status of an overriding interest as such tenancies are now required to be registered with the Private Residential Tenancies Board (PRTB) under the Residential Tenancies Act 2004.⁷¹⁵ Given the reforms implemented by the 2009 Act it is also questionable as to whether any customary rights arising from tenure still exist⁷¹⁶ and those overriding interests relating to fee farm grants will now become obsolete as such interests can no longer be created.⁷¹⁷

These particular overriding interests could likely be removed without giving rise to injustice or practical difficulties. The position may be less clear cut in respect of others, such as the rights of those in occupation or covenants which continue in force after enlargement.

While there may not be compelling social or economic reasons to remove overriding interests entirely there is certainly merit in a reexamination of their value as part of the ongoing reform process. The move toward eConveyancing provides a landscape against which this reform can be measured.

U will be at increased risk if the greater emphasis on registration means that he has to register in order to protect his interest against a *bona fide* purchaser for value. Otherwise the interest will fall into the category of interests that are destroyed by a transaction for value.

However there is a cost to enforced registration and because the cost is not rolled into a transaction, it is highly visible and will be resented by U. If the enforced registration costs ten million a year but B and C only save five million in reduced legal and search fees then there is no overall cost saving. Given that U is likely to be a non-commercial land user any imposition of increased cost is likely to be resisted.

If eConveyancing leads to an increased emphasis on registration and further standardisation of property rights then a registered transaction may be given more impact, with an increase in its destructive effects. Additional overreaching provisions may be introduced. Alternatively if the operation of provisions, such as section 21, are found to be overly complex and detrimental in practice, then the legislature may move towards more clear cut and definitive legislation along the lines of Ontario's

⁷¹⁵ No. 27 of 2004.

⁷¹⁶ Lyall, A. *Land Law in Ireland* (3rd edn Round Hall England 2010) p. 944.

⁷¹⁷ There are two such overriding interests; a perpetual yearly superior rent and covenants and conditions created in an instrument creating the superior rent.

section 62(1). While this does not destroy the trust there is the danger of the money being more readily lost from the beneficiary's reach.

Standardisation of rights puts the focus on policies which decide how many interests and how those interests are to be protected from transactions or dealings with the title. The legislature may require the courts to limit the availability of equitable relief and this will lead to a reduction in successful *in personam* and other claims impacting on the ownership of land. The strengthening of the register with its all encompassing remit will require parties to register to have any entitlement. This will herald the reduction or even elimination of third party interests held by U and successful property claims by V.

The power of the courts to recognise novel claims would be fettered. In the choice between certainty and flexibility, eConveyancing pushes towards a stricter *numerus clausus* which facilitates ease of transaction, security of registration and the commoditisation of ownership of land. Thus certain rights may be reclassified into the category of rights that are not recognised and not capable of registration.

Such major changes can have unintended consequences on risk. Chapter eight, the concluding chapter, looks at the shift in risk and identifies suggestions for reform and research in the move towards eConveyancing. As Ireland is in the early stages of its eConveyancing programme there remains the potential to minimise any adverse consequences for participants in the land market while maximising the benefits of an electronic system.

CHAPTER 8 CONCLUSION

8.1 Introduction

This research has examined the management of risk in conveyancing transactions in the context of the move from paper based to electronic conveyancing. Legal, descriptive, analytical and comparative techniques were deployed in order to determine the likely impact of technological change on the distribution of legal risk with particular reference to Ontario and Ireland. The impact is the extent to which a change in transactional process may unintentionally affect risk. Risk being the consequence of change and the likelihood of that consequence having a negative effect.

The particular focus has been on risks that impact on title registration and the security, protection or lack thereof that this registration offers to land owners, third parties and property claimants. The methodological approach to this investigation of risk has been by use of a model which is novel in this field.

This chapter is the concluding chapter. It provides an overarching view on the impact of eConveyancing on risk and examines potential mechanisms for removing, minimising or distributing the risk or takes the view that the risk is worth bearing given the other benefits accrued. Finally it seeks to draw conclusions to inform the reform process in Ireland.

8.2 Risk versus reward

In implementing technological change there is a change in the distribution of risk in conveyancing transactions as the protection offered to different property rights is strengthened or weakened. "Any major business process re-engineering of a long established system such as conveyancing will raise the question for all participants of costs and benefits and changes to risk profile."⁷¹⁸

⁷¹⁸ Sneddon, M. 'Risk Assessment and Management in Electronic Conveyancing' Registering the World Conference Dublin (26 - 28 September 2007) http://www.landregistry.ie/eng/Dublin_Conference_2007/Conference_Papers/ accessed 9 September 2010 p. 22.

If the risk cannot be removed, minimised or distributed is it worth bearing given the other benefits of eConveyancing? Even if the risk can be mitigated, is there some factor, such as time, money or complexity that would make it undesirable? Generally when risk is allocated it should not fall on those least able to bear the consequences. This is a policy driven area where standards may be set, though this often results in the risk being borne by banks and bureaucracies with the benefit falling on consumers. Compensation may not be a feasible option, as not all risks are directly comparable when realised in monetary terms.

eConveyancing has the potential to deliver numerous benefits. There may be a reduction in the cost of title registration and greater accuracy of the register with the priority of interest more readily apparent and more transparent. There will be increased access to live register data and the possibility for quicker completion and registration. The protection of registration will be granted at an earlier stage, closer to completion, and if the register is all encompassing then there will be less searching required which will lead to lower costs.

Legal rules should minimise and balance the risks between present and would-be owners but Baird and Jackson point out that rules which increase the information about property ownership, presumably reducing the risks, bring their own costs and these must be weighted against the benefits.⁷¹⁹ Improvements in transparency however benefit all participants.

Transaction time may be reduced. Electronic messaging will be virtually instantaneous versus postal delivery which takes at least a day. If lawyers are able to deliver information and documentation more readily to each other, then they will be able to respond in a more timely manner and while the details of the transaction are fresh. Less administration will be required as documentation can be pre-populated; it will be sufficient to type data in once. This data will then be validated by the registry so that any difficulties can be addressed before completion. The improved efficiencies and improved collaboration between stakeholders will benefit all participants in the process.

There is no merit in governments, registries or citizens attempting to halt the march of technology. That argument has already been lost and technology is now an

⁷¹⁹ Baird, D. and Jackson, T. 'Information, Uncertainty, and the Transfer of Property' (1984) 13 *JLSM* p. 301

integral part of daily life. Instead it is preferable to make technological advances work to the advantage of processes that require improvement.

“There is no doubt that the move towards electronic conveyancing will continue unabated. The information technology experts have an unshakeable grip on the psyche of society and the need to reduce the human element in transactions. In conveyancing terms, this offers a promise of greater accuracy, more certainty of title, and provided the security concerns of access to central databases can be overcome, the opportunity for reduced claims on the assurance fund.”⁷²⁰

The achievement of the savings and efficiencies from eConveyancing will, if realised, accrue to all land owners however this comes with increased risk for some participants.

While this study focused on the management of risk in relation to land owners, third parties and property claimants it must not be forgotten that eConveyancing offers considerable benefits to the state through its title register. There may also be benefits to professionals involved in the conveyancing process. Those benefits may however come at the cost of increased risk for those stakeholders and this would merit further study.

8.3 Impact of eConveyancing on risk

eConveyancing will move risk from one participant to another by the substantive and procedural rules it imposes. Conveyancing itself is a risk distribution system and this does not change in an eConveyancing environment.

Chapter four set out a model in order to provide a transaction unit analysis. This involved the creation of two abstracted conveyancing transactions; an arms length transaction for value and a gift. This schematic allowed risk to be allocated to the abstract participants in order to determine how each risk is impacted by the move to eConveyancing. Some conclusions can now be drawn from the analysis of each risk category.

8.3.1 Registration gap

⁷²⁰ Griggs, L. ‘Torrens Title in a Digital World’ (September 2001) 8(3) *Murdoch University Electronic Journal of Law* http://www.murdoch.edu.au/elaw/issues/v8n3/griggs83_text.html accessed 6 October 2011.

The elimination or compression of the registration gap does have an impact on risk in conveyancing transactions. It lowers risk for B, Y and C. There is less delay in achieving the protection of registration and reduced possibility for an intervening interest to be registered.

While the risk to B, Y and C is reduced there is increased risk for U and V. They have less time to register their right or claim before it may be destroyed by a registered transaction.

Y will still be subject to all unregistered rights to which X held the land unless his status is improved. There are law reform proposals in other jurisdictions suggesting this but it has not been proposed in Ireland and would be unlikely to be adopted. From the perspective of a complete register it would make sense to treat Y the same as B. However, X would then be able to use the gift of Whiteacre to Y to destroy valuable unregistered interests and there would be no direct market interest to counter balance. Also there is no market claim for Y and there are many instances where X has attempted to use a gift to Y to circumvent his creditors so treating Y and B the same is not recommended.

Given that the registrar is to remain the gatekeeper of the register it is unlikely that the registration gap in Ireland can be eliminated entirely but there is merit in reducing it as much as possible. There is discussion in Ireland about bringing priority entries⁷²¹ into the next phase of eRegistration which may reduce some of the current risk between completion and registration but this has a cost associated with it. Also if a priority entry becomes standard practice, does it remove the incentive to reduce the registration gap? It would be preferable to reduce or eliminate the registration gap in so far as this is feasible while not implementing an automatic system. As a small gap will remain a priority entry could be used to seal this gap.

The reduced risk to B, Y and C affirms the value of title registration as a feature of the Irish land administration system and enhances the security of the market. This provides increased protection to land owners at the expense of U and V.

8.3.2 Formalities for registration

⁷²¹ This would provide a mechanism for a priority period to bridge the registration gap. See 5.2.

Initial indications are that electronic systems with more streamlined formalities result in less errors in applications for registration. In built system prompts provide the opportunity for problems to be corrected in advance of completion. If there are less registry errors all parties who participate in the registration system will benefit from the increased accuracy. The registry will also benefit from a reduction in claims.

This will decrease the risk for all participants as applications for registration are less likely to be rejected by the registrar. It will also facilitate closing of the registration gap. The benefits of standardisation and simplification must, however, be balanced against any contractual constraints that might result. If eConveyancing prevents new interests in land, that currently cannot even be conceived, then this will fetter land owners, make the market less responsive to changes in society and limit new U interests and V claims.

8.3.3 Error in register

It is difficult to establish if eConveyancing of itself will lead to increased fraud. There is no evidence that more fraud occurs in an electronic environment⁷²² though this is one of the reasons most often cited for caution in implementing eConveyancing. An increase in property fraud may be attributable to the increasing globalisation of our society, new methods of squeezing cash from land ownership and property booms rather than being in any way directly attributable to electronic systems. The disassociation of dealing with a virtual environment may be in part to blame but there is a strong argument that it is linked to predatory lending practices as much of the case law on fraud relates to mortgage fraud and particularly identity theft perpetrated on lenders.⁷²³ This is one reason why many jurisdictions including Ontario have moved to introduce more stringent controls on lending practices with specific provisions around the necessity for due diligence.

⁷²² HM Land Registry *Report on responses to e-conveyancing secondary legislation part 3* http://www1.landregistry.gov.uk/upload/documents/econveyancing_cons.pdf accessed 30 March 2012 does not accept any link between eConveyancing and fraud noting that the rise in fraud in England has occurred during a period when apart from a small number of electronic charges it was not possible to use or submit electronic documents for registration.

⁷²³ See Tuffin, J. 'Responsible Lending Laws: Essential Development or Overreaction?' (2009) 9(2) *QUT Law & Justice Journal* 280 – 310 http://ljj.law.qut.edu.au/editions/v9n2/pdf/9.Responsible_Lending_Laws_TUFFIN_Publish.pdf accessed 24 April 2012 and O'Connor, P. 'Immediate Indefeasibility for Mortgagees: a Moral Hazard?' (2009) 21(2) *Bond L.Rev.* 133 – 159. Both explore risk arising from bad lending practices and particularly the lack of due diligence by lenders.

The analysis of the system in Ontario provides grounds for determining how the Irish courts might deal with similar challenges and provides a framework for writers and academics to explore how the nature of indefeasibility might develop in Ireland. This research opens this debate in advance of any consideration by the courts. The low levels of fraud claims against the LTAF in Ontario may be due to the nature of the claim system and the proliferation of title insurance rather than proof that electronic systems can be robust enough to withstand fraud. This aspect requires further research.

Who bears the risk under this heading will be determined by whether the Irish courts find the register defeasible or indefeasible and if it is the latter whether this is immediate or deferred. In the absence of a subsequent transaction the law allows the court to rectify in favour of A but it by no means certain that this would occur if B is in occupation.

A policy of immediate indefeasibility would benefit B and C at the expense of A who would only be entitled to compensation. Y is however likely to lose out to a claim of prior ownership by X. If there is a subsequent transaction a policy of deferred indefeasibility would benefit D and C2 at the expense of A, who again would only be entitled to compensation. This is presuming that the courts will not distinguish between the title of B and C or that of D and C2. As one is a purchaser and the other a lender the courts may choose to give them differing levels of protection rather than bundling their interests together.

In relation to registry errors there is the potential to reduce these through the system design. eConveyancing may not, of itself, create more errors and increased loss but may reveal errors and losses already in the conveyancing system. Those errors and losses may previously have been hidden from the general public and policy makers and illumination provides the opportunity for them to be acknowledged and addressed. Thus the system can be designed to close off some current risks in the process. This would benefit all parties who rely on registration and also benefit the registry through reduced claims.

8.3.4 Interests off the register which affect title

eConveyancing with its increased emphasis on the title register leads to an examination of which interests should be protected by the register and which should

not. Overriding interests as a category of property rights requires a review and, if this category is to be retained, the individual interests should be examined to determine whether reform is required as some of these interests are out of date and may no longer have the same relevance. The efficiency resulting from the removal of this category of rights needs to be balanced against any injustice that might be caused to those holding such rights.

The general rationale for this category of rights is that they keep the register flexible and applicable but many of the individual rights, when examined closely, do not fulfill this. If these rights are reduced or removed as a category this will increase risk for U and V. This may not correspond to any decreased risk or cost for other participants except in future transactions when B and C don't have to enquire about such rights.

8.3.5 Destructive effects of a registered transaction

With the increased emphasis on the register the power of a registered transaction is likely to increase. This will have a negative impact on the interests of U and V. Their interests may become rights that have no impact on the ownership of land. An assessment would need to be carried out to determine if there is some other means of providing sufficient protection for those holding such rights or are there some interests which should survive a registered transaction.

A claim that was previously a property claim may become a personal claim. This would change the nature of some claims fundamentally but will have less impact on others. For example, could the claim to an easement or reliance on a restrictive covenant exist without some link to the title? In relation to trusts and equitable charges the claim will continue to exist provided there are funds to meet the claim. Other rights are temporary such as an option to purchase but if they are not recognised then there is no market as they cannot be bought and sold. This may close off areas of the land market that currently exist.

8.3.6 Rights not recognised

The re-classification of interests in land has already commenced and is likely to be driven further by the demands of standardisation and simplification to make an electronic system viable. The impact of any re-classification of rights needs to be carefully assessed and should form part of an overall reform strategy.

Such a re-classification may put the right of certain participants at risk. In particular the interests of U and V may be open to scrutiny. Third party rights are most at risk of being downgraded to personal rights or rights which can be defeated by a registered transaction. If it is the latter and the registration gap is eliminated or compressed then there is little possibility of such rights intervening between the registered interests of A and B. If overriding interests are also downgraded to rights which can be overridden by a registered transaction then U and V will have few, if any, opportunity for enforcing their right or claim against the land.

8.4 Risk to U and V

The parties who are most at risk in any move towards eConveyancing will be U and V. There is the potential for all other parties to benefit from efficiencies in the system of title registration. This is indicative of the fact that all other parties are already participants whose interests are embedded in the title register. As a general rule all the other participants (A, B, C, X and Y) will seek to have their interest protected by the registration system. Whereas U and V may seek to rely not on the register but on some other factor such as:

- (a) the status of their interest as an overriding interest;
- (b) a personal claim against the grantor of the interest;
- (c) some personal relationship with the registered owner; or
- (d) occupation of the property.

The registered owner may accept that the right or claim held by U and V has merit as often the facts speak for themselves. U is in occupation, V is married to A, U did contribute to the purchase monies or X did give V an option to purchase the land. A conflict between U and V and the other participants in the land market may not be about the existence of the claim or right but instead be a conflict about the breadth of the claim.

The existence of such a claim or right may not, in reality, have any impact on the title register but in seeking to ensure priority of registration B and C are required to carry out enquiries about potential claims or rights held by U and V. This adds to the cost of conveyancing and undermines the depth of the title register.

When examining the key objective of each participant as set out in chapter four it appears that eConveyancing may defeat the resilience sought by U the third party and V the property claimant. This will depend on how U and V are to be dealt with and there are a number of options.

U rights and V claims may be reduced or downgraded to personal rights or rights which can be defeated by a registered transaction. This would make the system cleaner and easier, reduce risk and cost for B and C but adversely affect U and V.

Alternatively U and V could be brought onto the register. This imposes cost on U and V. If these rights or claims would previously have been personal rights or defeated by a registered transaction, then bringing them onto the register will have a detrimental effect on the interest of land owners. If however they were overriding interests that affected without registration then it would benefit future land owners to have these reflected on the register.

Another option is to provide compensation for U and V if their interest or claim is downgraded or defeated or compensation for purchasers if U and V cannot be disposed of or brought onto the register.

Requiring U or V to register or downgrading their interest or claim would be an interference in the land market and this should be considered carefully. There is a general acceptance of De Soto's argument that a secure and efficient land market creates more credit and investment and thus generates economic growth.⁷²⁴ If we accept this argument we interfere with the market at our peril.

Such interference in the land market may be more acceptable where the increased risk can be mitigated. The question arises as to whether this is possible. Third parties and property claimants like U and V could be given a period of time to register their right and thereafter it would be lost. If U or V were successful in registering, then their interest is protected as a property right and if their claim is unsuccessful and fails then the interest is destroyed. After a period of time no new interests or claims of that nature would be allowed.

⁷²⁴ De Soto, H. *The mystery of capital* (Black Swan London 2001).

As Holmes points out in referring to statutes of limitation and the law of prescription “what is the justification for depriving a man of his rights, a pure evil as far as it goes, in consequence of the lapse of time?” but he also notes that “[s]ometimes it is said that, if a man neglects to enforce his rights, he cannot complain if, after a while, the law follows his example.”⁷²⁵ This may be a useful argument when depriving an individual of rights that he has failed to protect but has less merit when used to justify the removal or downgrading of an entire category of rights.

To extend a prohibition to all new interests or claims would be a drastic move by the legislature which throws up public policy and justice issues. This may, in effect, mean a definitive move to the civil law *numerous clausus*, the removal of the Courts and land owners discretion to create new interests in land thus introducing a lack of flexibility into the common law system that would overturn centuries of tradition.

The gains would be certainty, the register becoming all encompassing and the state having a more direct role in the nature and existence of title. Estates, rights and interests whether legal or beneficial would be of no relevance as the registered legal title would be all. This may have been the original aim of the Torrens registered title system but the reality of such a system would send shock waves through the common law world.

Despite this clear moves are already afoot in various jurisdictions with the limiting or removal of adverse possession claims, reduction in overriding interests, trusts being moved off the register and the attempt to move easements onto the register. Dematerialism also throws any interest dependent on the holding of paper evidence of the interest into doubt.⁷²⁶

None of the risks to the parties holding those interests have been mitigated by a general compensation scheme or through insurance but interference in the land market can be softened by indemnifying parties adversely affected by change. Thus it is important to briefly consider the merits of this as a risk avoidance mechanism.

8.4.1 Indemnity

⁷²⁵ Holmes, O.W. ‘The Path of the Law’ (1896-1897) 10 *Harv. L. R.* p. 476.

⁷²⁶ See impact of the removal of the status of land certificates and certificates of charge dealt with in chapter seven.

Title registration systems use a combination of risk management strategies to reduce the incidence of conflicts between different interests. O'Connor refers to the generation of publicity for interests to reduce the likelihood of conflict, establishment of new priority rules that provide an incentive to register, the transfer of some risks to the State and the spreading of risk through an indemnity scheme.⁷²⁷

This mitigation of risk can be done by existing insurance or compensation or new provisions may be required. However new insurance must be paid for and additional claims on existing insurance will be paid for by increased premiums. Additional claims on the registry compensation fund will come from central exchequer and will likely be passed on to land owners through higher registration fees.

Title insurance is not a standard feature of an Irish conveyancing transaction and the experience in other jurisdictions shows that there are dangers in the widespread adoption of title insurance as a means of mitigating risk in conveyancing. If title insurance is introduced:

“[t]he insurers’ strategy of risk assumption could result in increased claims upon the... indemnity fund, by reducing standards of due diligence in conveyancing. If changed conveyancing practices induced by title insurance adversely impact upon the fund, it is likely that governments will propose measures to shift the risks back to the insurers. Legislatures will bar title insurers from exercising the subrogated rights of the insured to claim...and exclude claims on the fund by privately insured persons for losses covered by their policies.”⁷²⁸

O'Connor provides examples of jurisdictions where the state indemnity provisions have been limited effectively shifting risk to claimants and their representatives particularly where there has been fraud or negligence.⁷²⁹

If private title insurance is used to mitigate risk there is a danger that this will result in the statutory scheme operated by the registry being downgraded. This will result in further increased emphasis on private title insurance with a corresponding decrease in claims against the indemnity fund. A continual shift has the potential to eliminate the indemnity fund entirely with only title insurance remaining. This private

⁷²⁷ O'Connor, P. 'Registration of Invalid Dispositions: Who Gets the Property?' in Cooke, E. (ed) *Modern Studies in Property Law Volume III* (Oxford, Hart Publishing 2005) p. 48

⁷²⁸ O'Connor, P. 'Double Indemnity – Title Insurance and the Torrens Systems' (2003) 3(1) *QUT Law & Justice Journal* p. 8 <http://ljj.law.qut.edu.au/editions/v3n1/pdf/oconnor.pdf> accessed 24 April 2012.

⁷²⁹ *ibid.*

title insurance will be optional and thus some participants may choose not to pay and assume the risk instead. This shift in risk assumption from the state to individuals can be seen in Ontario.

Title insurance prevails and dominates the conveyancing system in both the United States⁷³⁰ and Ontario.⁷³¹ In Ontario the consideration of title insurance is now a required step in both purchase and lending transactions.⁷³² Waters estimated in 2010 that 95 per cent of residential purchase transactions in Ontario were title insured.⁷³³ This may account in part for the low level of claims against the LTAF as set out in chapter six but it is also an indication of lack of public confidence in the system of title investigation and transfer. In a system where title insurance is standard it provides no encouragement for the defects to be remedied before a conveyancing transaction is concluded.

The LTAF and title insurance co-exist but the LTAF will not pay out if the claim is covered by title insurance. Thus the state indemnity has been diluted with the penetration of title insurance in the market. Though as a matter of public policy and equity, surely the state indemnity fund should pay out if the loss is due to inbuilt risk in the system regardless of fault and regardless of whether the claimant has another recourse. The state should not be encouraged to avoid liability for its errors and place the onus on individual land owners.

Title insurance as a method of socialising risk does put the onus on individuals rather than on the state. If a land owner chooses not to take out title insurance he may have recourse to the LTAF for some losses and he avoids the cost of title insurance. He must pay for registration but this is a cost that has to be incurred

⁷³⁰ For a brief explanation of the United States land title system and the role of title insurance see Thomas, D. 'Accessing US Land Title Records Through the Internet' (1997) 8(2) *JLIS* <http://www.austlii.edu.au/au/journals/JLISInfoSci/1997/11.html> accessed 12 October 2011.

⁷³¹ See Ziff, B. 'Title Insurance: The Big Print Giveth But Does the small print Taketh Away?' in Grinlinton, D. (ed) *Torrens in the Twenty-first Century* (Wellington, LexisNexis 2003) for the development and growth of the title insurance market in both jurisdictions. Title insurers are also attempting to break into other markets. See O'Connor, P. 'Double Indemnity – Title Insurance and the Torrens Systems' (2003) 3(1) *QUT Law & Justice Journal* 1 – 27 <http://lj.law.qut.edu.au/editions/v3n1/pdf/oconnor.pdf> accessed 24 April 2012. See also Donahue, D.J. and others *Real Estate Practice in Ontario* (6th edn Canada, LexisNexis Butterworths 2003) p. 262 – 263 for an argument in favour of title insurance.

⁷³² Moore, M.E. and Globe, J.M. *Title Searching and Conveyancing in Ontario* (5th edn Canada, LexisNexis 2003) p. 381.

⁷³³ Waters, K.A. 'There's more to Title Insurance than meets the eye' *LawPRO* magazine December 2010 p. 14 <http://www.practicepro.ca/lawpromag/LawproMagArchive.asp> accessed 9 March 2012

independent of any potential claim. Alternatively if he chooses to take out title insurance, he may have recourse to the title insurer for losses not covered by the LTAF, but he paid for this via a premium. Of course some losses may not be covered at all.

Currently the state compensation does not cover everything. There are exceptions in the legislation, overriding interests, *in personam* claims, interests incapable of registration and also dangers faced by volunteers who have less protection. State compensation will generally only arise if the state is responsible for the loss or the operation of the system overrides someone's interest; it is not a blanket insurance against risk but neither is title insurance.⁷³⁴

As Ziff points out title insurance is not a guarantee of title but rather a source of indemnity⁷³⁵ and coverage can be limited in several ways.⁷³⁶ *In personam* claims are not likely to be covered by title insurance and certainly not claims arising from post completion acts. It is not "a one-size-fits-all policy that eliminates the need for searches or surveys".⁷³⁷ Like all forms of insurance "coverage is subject to numerous detailed exclusions, exemptions and endorsements".⁷³⁸

Flaws suggests that private insurance and state compensation are complementary and that such insurance is not a threat to the quality of conveyancing.⁷³⁹

"Rather, it can be used as a commercial tool to cover the gaps created by many of the limitations and exceptions of state compensation and to provide economic protection against a broad range of property law risks that the state has no business or interest in covering."⁷⁴⁰

⁷³⁴ Flaws examines the differences between state and private title insurance in respect of New Zealand. See Flaws, J. 'Compensation for Loss under the Torrens System – Extending State Compensation with Private Insurance' in Grinlinton, D. (ed) *Torrens in the Twenty-first Century* (Wellington, LexisNexis 2003) p. 407 - 413. It should be remembered however that this system provides for automatic registration. See p. 414.

⁷³⁵ Ziff, B. 'Title Insurance: The Big Print Giveth But Does the small print Taketh Away?' in Grinlinton, D. (ed) *Torrens in the Twenty-first Century* (Wellington, LexisNexis 2003) p. 372.

⁷³⁶ *ibid.* p. 386 – 388.

⁷³⁷ Haynes, M. 'Title Insurance: Separating Fact from Fiction' LawPRO magazine December 2010 p. 23 <http://www.practicepro.ca/lawpromag/LawproMagArchive.asp> accessed 9 March 2012.

⁷³⁸ Moore, M.E. and Globe, J.M. *Title Searching and Conveyancing in Ontario* (5th edn Canada, LexisNexis 2003) p. 381.

⁷³⁹ Flaws, J. 'Compensation for Loss under the Torrens System – Extending State Compensation with Private Insurance' in Grinlinton, D. (ed) *Torrens in the Twenty-first Century* (Wellington, LexisNexis 2003) p. 399.

⁷⁴⁰ *ibid.*

However in a choice between state compensation and title insurance, state compensation is to be preferred for many reasons. The social insurance model operated via the state compensation fund facilitates distribution of risk by maximising the pool of insured persons and allows for cross-subsidisation. O'Connor describes this as "[t]he right to indemnity is not confined to contributors. Persons who have had no dealings with the registry may suffer loss through a registry error or omission".⁷⁴¹ By contrast only those who take out title insurance will be able to claim against the policy.

While acknowledging that private title insurance may be able to transfer to an insurer certain risks "[t]he worst scenario would see governments abandoning universal social insurance in favour of optional private insurance, many people opting to go without cover and the occasional person suffering disastrous loss without recourse to compensation."⁷⁴²

The experience in Ontario and other jurisdictions shows that the penetration of title insurance allows the government to narrow its liability and this is to be avoided. While there might be some argument for a reduction in the state liability where an automatic eConveyancing system is being implemented, and the registry is no longer responsible for changes to the title register, there is no such argument in the implementation of an automated eConveyancing system.

Regardless of whether compensation is provided via title insurance or state compensation it is not a perfect remedy. A land owner will likely not consider money to be adequate compensation for loss of title, possession or enjoyment of the property particularly in the case of a family home. Similarly monetary compensation may not be adequate for U and V if their right or claim cannot exist independently of the land. The real merit of the state compensation lies in its complimentary interaction with the rectification provisions. Any attempt to decouple these and insert title insurance between them is surely likely to allow certain claims to fall through the cracks.

8.4.2 Imposition of loss

⁷⁴¹ O'Connor, P. 'Double Indemnity – Title Insurance and the Torrens Systems' (2003) 3(1) *QUT Law & Justice Journal* p. 8 <http://ljj.law.qut.edu.au/editions/v3n1/pdf/oconnor.pdf> accessed 24 April 2012.

⁷⁴² *ibid.*

Loss allocation rules may provide assistance in examining the alternate options and these have already been considered by Sneddon in the context of eConveyancing.⁷⁴³ In looking at maintaining confidence in the move to eConveyancing in Australia, he set out three principles, from the economic efficiency approach to liability and loss allocation rules, as follows:

1. liability should be allocated to the party or parties that can reduce the incidence of losses at the lowest cost ('least cost avoider');⁷⁴⁴
2. liability should be allocated to the party or parties best able to spread the losses (liability for substantial losses may be spread over a wide class by insurance or a claim fund to which all members of the class contribute); and
3. liability allocation rules should be simple, clear and decisive so as to minimise the costs of administering them and disputes about their application.⁷⁴⁵

He refers to Cooter and Rubin who explain rules of loss imposition, loss spreading, and loss reduction.⁷⁴⁶ Cooter and Rubin note that most people are risk averse and when facing a possible loss will pay out more than the loss's average value to eliminate the risk and the widespread use of insurance is evidence of this.⁷⁴⁷

Loss imposition would mean identifying the least cost avoider and this would be B and C.⁷⁴⁸ This would in effect maintain the current position but provide compensation to B and perhaps C if U and V cannot be disposed of or brought onto

⁷⁴³ Sneddon, M. 'Risk Assessment and Management in Electronic Conveyancing' Registering the World Conference Dublin (26 - 28 September 2007) http://www.landregistry.ie/eng/Dublin_Conference_2007/Conference_Papers/ accessed 9 September 2010

⁷⁴⁴ This 'cheapest cost avoider' principle introduced by Guido Calabresi is widely used in the interdisciplinary field of law and economics. See Calabresi, G. *The Costs of Accidents; A Legal and Economic Analysis* (United States, Yale University Press 1970). See also Coleman, J. 'The Costs of *the Costs of Accidents*' (2005) 64 *Md. L. Rev.* 337 – 354 and Posner, R. A. 'Guido Calabresi's *The Costs of Accidents: A Reassessment*' (2005) 64 *Md. L. Rev.* 12 – 23.

⁷⁴⁵ Sneddon, M. 'Risk Assessment and Management in Electronic Conveyancing' Registering the World Conference Dublin (26 - 28 September 2007) http://www.landregistry.ie/eng/Dublin_Conference_2007/Conference_Papers/ accessed 9 September 2010 p. 10.

⁷⁴⁶ Cooter, R. D. and Rubin, E. L. 'A Theory of Loss Allocation for Consumer Payments' (1987-1988) 66 *Tex. L. Rev.* p. 70.

⁷⁴⁷ *ibid.* p. 70 – 71.

⁷⁴⁸ O'Connor notes that the Ontario Court of Appeal invoked the cheaper cost avoider analysis in support of deferred indefeasibility thus placing the burden of the fraud on the lender rather than the innocent homeowner. See O'Connor, P. 'Immediate Indefeasibility for Mortgagees: a Moral Hazard?' (2009) 21(2) *Bond L.Rev.* p. 141. She notes at p. 134 that very few jurisdictions extend immediate indefeasibility to mortgagees and argues that there are sound policy reasons for denying immediate indefeasibility to mortgagees even if the rule is adopted for transferees. As between the mortgagee and land owner the mortgagee can at the least cost avoid identity fraud by adjusting their behaviour in the transaction.

the register. Such compensation would likely be subject to due diligence putting the onus on B and C to enquire about U and V. This due diligence or notice requirement would maintain the status quo as it applies to overriding interests except that compensation would be payable in the event that U and V were undiscoverable as this would be a systematic risk. This makes sense as B and C should not be at risk due to undiscoverable U interests and V claims. This option however retains the cost of off register enquiries and searches and mitigates against a complete all encompassing register. In the current recessionary climate any suggestion that the state compensation scheme be extended is likely to be rejected. In addition the option of compensation for B and C provides less incentive for U or V to make and register their interest or claim.

Loss spreading would mean to either impose such loss on the state, paid for by all citizens, or on all those who avail of the protection of land registration through increased fees. A scheme to compensate U or V for any loss however it occurred would be difficult to justify. Compensation for losses caused to U and V by the registration system is more justifiable when there is a gain for other users of the system, in disregarding the interests of U and V, particularly when there is an overall public benefit. Such a scheme would avoid human rights issues by giving compensation for the de facto expropriation of the property interest.

The downgrading or destruction of U's interest may bring a net public gain and thus it seems fair to compensate U, however V is more problematic as the nature of the interest may be subject to dispute. Any compensation scheme would have to resolve the validity of the claim before its value could be assessed.

The existing or a new compensation fund could be utilised with compensation dependent on the taking of reasonable action by U and V. For example U or V may be required to bring their interest or claim to the notice of land owners or those engaged in a transaction or U and V may be required to make their claim within a set time scale to avoid the difficulty of unquantifiable liabilities to the system. A claimant with sufficient claim against the land owner may not be eligible so as to avoid the potential for land owners to be relieved of obligations they had undertaken.

U and V could be given an opportunity to assert their right so as to reduce the incidence of losses and if a new simple, efficient and cost effective scheme was put in place this would fulfil the loss reduction rule. Currently if there is a dispute

between a land owner and third party or property claimant this can only be resolved by a court case which is expensive and lengthy. A new scheme would benefit U and V if the rules were simple, clear and precise.

Alternatively private insurance could be offered but this would be an imperfect solution as it would likely not cover all claims or claimants. In addition, as noted already, there are dangers associated with the penetration of title insurance as it has the potential to unravel the state compensation scheme adversely affecting all participants in the land market.

From the standpoint of those relying on the register it would be better to bring U rights onto the register. They are likely to be interests that already exist and bind but are just not shown on the register. The advantage of having them on the register for future transactions is that they are less likely to be overlooked. This would also benefit U and V where their interest or claim is vulnerable to the effects of a transfer.

As a general principle it is reasonable to ask people to protect interests that are of value to them. Thus U and V should be asked to produce formal and verifiable documentation and to lodge those with the registry in order to bring such interests onto the register. It would be preferable not to have interests arising without such documentation.

U and V, however, are a disparate group and include some parties who would not be able to avoid the loss. For example those holding family interests or contributory rights in a family setting may, in the absence of legal advice, not know that they have a claim. If they do not know they have a claim, they cannot act to protect it. Also some claims do not produce documents. For example those based on adverse possession or prescription and informal interests generally. A problem with proofs will make registration difficult to achieve. Questions arise as to who pays for the cost of proving the claim, what mechanisms for proof are needed and what if the proof accepted by the registry is then challenged in court?

Thus a significant claimant group may suffer if U and V are disposed of or required to come onto the register. Any solution designed for a particular type of U interest or V claim is likely to throw up issues for another type of U interest or V claim. An overarching mechanism for dealing with all U interests and V claims is likely to have unintended consequences for other participants in the land market. Without

examining each potential interest or claim it is not possible to be prescriptive in making recommendations for how to deal with U and V. Instead some key principles are set out in the context of asking if the advantages of eConveyancing are sufficient to merit the injustice that might be caused to individual third parties or property claimants.

The benefits of eConveyancing to land owners are significant and may provide grounds for the increased risk to U and V. In particular it appears that many of the benefits of eConveyancing can only be realised by increased reliance and certainty in land registration. This lends itself the elimination of the exceptions to indefeasibility. Moving U and V onto the register may be a desirable and feasible solution that provides the benefits of eConveyancing and allocates the reduction in risk in the longer term among the greatest number of participants in the land market. B, C and to a lesser extent, Y would benefit.

In Mason's view the essence of the system, the Australasia Torrens system in his commentary, must be to provide a regime of registration that provides security of title, is inexpensive and enables prompt registration of interests.⁷⁴⁹ eConveyancing may provide the means to achieve all of these to a greater degree than heretofore. In eConveyancing the participants who already register their interest will continue to do so and they will be able to achieve the protection of registration in a more timely manner. Such protection will then be of increased quality. This will likely lead to a more secure and effective land market.

As eConveyancing drives towards simplification and standardisation of property rights, certainty of the register will be valued above flexibility. Security of registered title is likely to be enhanced and this will lead to a reduction in the exceptions to indefeasibility. *In personam* claims, equitable interests, adverse possession and overriding interests may be limited or eliminated. eConveyancing may achieve what has eluded the title register to date; the register and the register alone becomes the arbiter of title.

8.5 Recommendations

⁷⁴⁹ Mason, A. 'Indefeasibility – Logic or Legend?' in Grinlinton, D. (ed) *Torrens in the Twenty-first Century* (Wellington, LexisNexis 2003) p. 18.

The following recommendations are made in order to maximise the benefits of eConveyancing while also mitigating the potentially harsh effect of these changes on participants in conveyancing transactions:

- (a) An automated eConveyancing system retains the role of the title registrar and keeps the state compensation scheme intact.⁷⁵⁰
- (b) Reduce or eliminate the registration gap without implementing an automatic eConveyancing system.⁷⁵¹
- (c) Priority entry is a useful tool to seal any remaining registration gap.⁷⁵²
- (d) The lesser protection given to a volunteer should be maintained.⁷⁵³
- (e) Robust system design provides the opportunity to reduce the risk of non compliance with the formalities for registration however this must be balanced against any contractual constraints that might be imposed.⁷⁵⁴
- (f) Further research is required to establish if eConveyancing of itself will lead to increased fraud.⁷⁵⁵
- (g) The nature of indefeasibility as it applies to the title register in Ireland requires debate and discussion. Examining the results of various measures across the common law world may provide some guidance to the Courts in assessing the impact of risk to participants in the conveyancing process.⁷⁵⁶
- (h) Robust system design has the potential to reduce registry errors.⁷⁵⁷
- (i) Review overriding interests as a category of property rights to establish how this category will operate in an eConveyancing environment or to determine if these rights should be reclassified. If this category is to be retained review all overriding interests individually to update but where possible overriding interests should be abolished, subject to the policy imperatives of the law, the practicalities of the conveyancing and land administration processes and the due protection of rights of possession under the Irish Constitution and the European Convention for the Protection of Human Rights and Fundamental Principles.⁷⁵⁸
- (j) Further research is required to determine the impact of the increased emphasis on registered transactions so that valuable rights are not

⁷⁵⁰ See 6.8.

⁷⁵¹ See 5.2.6, 5.4 and 6.8.

⁷⁵² See 5.4.

⁷⁵³ See 4.4.

⁷⁵⁴ See 5.3.2 and 5.3.3.

⁷⁵⁵ See 6.8.

⁷⁵⁶ See 6.4 and 6.8.

⁷⁵⁷ See 5.3.3 and 6.8.

⁷⁵⁸ See 7.6.

inadvertently destroyed. Consideration should be given to moving vulnerable rights onto the register.⁷⁵⁹

- (k) The negative impact of any re-classification of property rights should be carefully assessed. Piecemeal reform is to be avoided as an overall strategy would provide a more cohesive approach.⁷⁶⁰
- (l) Title insurance is not recommended as an alternative to state compensation.⁷⁶¹
- (m) It must be acknowledged that eConveyancing will copper fasten registration of title and registration of title will enhance eConveyancing.⁷⁶²
- (n) Given the success of the initial eRegistration initiatives and the move towards a complete title register the timing is right for Ireland to implement eConveyancing.⁷⁶³
- (o) While the experience in other jurisdictions provides valuable insights Ireland must develop its own system.⁷⁶⁴

8.6 Conclusions

Treacy and O'Sullivan are of the view that while any model of how an electronic service should work "can draw heavily from experiences in other countries, especially other common law jurisdictions, it must also be designed to take account of practices and procedures unique to Ireland."⁷⁶⁵ Thus an eConveyancing system must accommodate local conditions and practice variations. A unique case in point is the system in Australia which has to meet the needs of all states and territories.⁷⁶⁶

Countries have a wide range of different cultures, sizes, politics, populations, traditions, philosophies, resources, development needs, stakeholders, systems, regional and geopolitical requirements and thus what is best for one may be unworkable for another. Best practice must be society specific and no one size fits

⁷⁵⁹ See 7.5.1.

⁷⁶⁰ See 7.5.1 and 7.5.2.

⁷⁶¹ See 8.4.1.

⁷⁶² See 7.5, 7.5.1 and 7.6.

⁷⁶³ See 3.4.1 and 3.5.

⁷⁶⁴ See 8.6.

⁷⁶⁵ Treacy, C. and O'Sullivan, J. 'Land registration in Ireland – current position and future developments' Law Reform Commission Annual Conference (2004) <http://www.lawreform.ie/Annual%20Conference%202004.PDF> accessed 10 March 2009 p. 12.

⁷⁶⁶ Douse, B. 'Progressing a national approach to electronic conveyancing' New South Wales Government Department of Lands. (2005) http://www.lands.nsw.gov.au/media/lands/pdf/electronic_conveyancing/publications/ProgressingANationalApproach.pdf accessed 28 January 2008.

all. While lessons can be learned from other countries only each individual jurisdiction can decide what is best for its citizens.

The Irish conveyancing process has specific practices and procedures that will need to be taken into account in designing any model of eConveyancing. Such contextual factors will make some elements of the model more vital and others less important when compared with models developed elsewhere. For example, closing the registration gap may be less of an imperative in jurisdictions where completion and registration are closely aligned. There is merit in further legislative reform to review the category of overriding interests but also to align and consolidate the registration of title statute, the 1964 Act, with the primary piece of conveyancing legislation; the 2009 Act. Also the current recessionary climate in Ireland has introduced additional delay in the conveyancing process⁷⁶⁷ and tight constraints on lending.⁷⁶⁸ The high percentage of home ownership and affinity for land means that the security of the conveyancing process and registration system is an essential part of the social fabric in Ireland and cannot lightly be tinkered with.

In many jurisdictions progress towards eConveyancing has been slower than previously anticipated. Developing the technology has been more difficult and costly than expected and the costs have proved harder to justify whilst the benefits have seemed less assured in the context of government retrenchment, a slow land market and a general economic recession. Thus empirical data must be gathered to clearly show the merits of the business case for all stakeholders. In order to do this more progress has to be made in developing methodologies and ontologies so that the definition of concepts and terminology and research can be advanced so as to develop appropriate indicators to compare conveyancing and eConveyancing systems and processes.

Any conceptualisation must take into account conceptualisations already established in other domains such as economics, political sciences and geosciences, given the relationship of land to other socio-economic fields. In referring to research on the cadastre Sliva and Stubkjær point out that the methodologies used are largely those of the social sciences as the cadastre relates

⁷⁶⁷ Among other changes, additional property taxes and charges have been introduced which add to the enquiries that need to be carried out by a transferee.

⁷⁶⁸ Loan offers are valid for shorter periods and can be withdrawn at any time. Loan to value ratios have reduced. Only those in very secure employment are in a position to obtain loan funds so generally the market is restricted to cash purchasers.

as much to people as it relates to land and that cadastral systems, which in their view includes the land register,⁷⁶⁹ are shaped by social, political and economic conditions, as by legal and technological factors.⁷⁷⁰ Thus the conveyancing system must not be viewed in isolation.

Taking into account the overall tenets of eConveyancing it is possible to design a system that introduces new controls on existing risks and provides for a net reduction in risk for land owners compared with paper based conveyancing. Any increase in a specific risk will be compensated by an overall increase in benefits however there must be a recognition that no commercial activity is completely without risk. Each jurisdiction will need to assess the risk and reward and this will be judged in light of the aversion to or appetite for risk.

The arguments for and against eConveyancing has resonance in many spheres be they cultural, political, social, judicial, economic or constitutional. Principles about the ownership of property and the protection of interests in land impact on every citizen and every activity and thus major changes should not be lightly implemented. Sufficient thought must be given to the overall strategy and impact of the goals of reform. Thought must be given to the fact that conveyancing is not just a process of transferring land but it has a wider remit as a tax and social control mechanism.

However,

“[o]nce we have it, it is a safe bet that few would want to be without it. It will become a part of life, just like electronic rail tickets or theatre bookings. Reluctance will become the province of the few because any streamlining exercise has its victims, and it will be a tremendous challenge...to find an acceptable way to safeguard those whose interests appear to be squashed by the new requirements....As electronic conveyancing is implemented, we may well be able to say that we have moved from a state of general reluctance with a few enthusiasms, to one where a few are reluctant and enthusiasm is general.”⁷⁷¹

To date such enthusiasm has manifested itself primarily in the development of eRegistration systems. These provide an easier route to reform through the control

⁷⁶⁹ Silva, M.A. and Stubkjær, E. ‘A Review of Methodologies Used in Research on Cadastral Development’ (2002) *Computers, Environment and Urban Systems* 26 p. 410.

⁷⁷⁰ *ibid.*, p. 420.

⁷⁷¹ Cooke, E. ‘E-conveyancing in England: Enthusiasms and Reluctance’ in Grinlinton, D. (ed) *Torrens in the Twenty-first Century* (Wellington, LexisNexis 2003) p. 293.

and force of central government. While this demonstrates the art of the possible, it is eConveyancing that provides the potential for re-engineering of the conveyancing process for the twenty-first century.

The experience in Ontario provides valuable insights into how Ireland might move into such uncharted territory but ultimately Ireland must decide for itself how it will balance the risks and rewards of implementing eConveyancing.

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