LAND REGISTRATION IN ENGLAND AND SLOVAKIA

– COMPARATIVE STUDY.

by

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Abstract

This thesis examines on a comparative basis the purpose, principles, functioning and effectiveness of the land registration systems in two EU member states - England and Slovakia. The comparative study aims to provide reflections “de lege ferenda” offering suggestions for statutory amendments. The thesis also examines the effect of land registration on the security and speed of conveyancing process in each state. In order to accomplish a comprehensive and up-to-date comparative study I have utilized the research conducted in the field of property law in the selected countries in order to complete an in-depth review of the national legislations on a comparative basis. The objective was to produce a comprehensive and scientifically accurate comparative study, not a mere „manual“. Therefore the thesis is based on a careful analysis of primary and secondary resources, such as national statutory provisions, journal articles, monographys, textbooks, case. The thesis challenges the argument that land registration represents an unnecessary state intervention. It also provides persuasive arguments for the superiority of the registered system of conveyancing over the unregistered conveyancing.

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Monika Vozarikova

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INTRODUCTION

The general mistrust in institutions, confusion over the pension, tax systems and falling equity markets has led popular opinion towards investing in properties. More and more people are turning to property due to failure of high expected returns in other sectors. Also, buying property abroad is more popular than ever. Although the expected profit from investment in buying property abroad is tempting potential investors need to be aware of the legal requirements under the national legislation regarding acquisition of real property. No two countries in the world have identical legal systems, nor are the rules and regulations that govern the purchase of property the same. This applies also to the EU member states, which all have their own property laws and often their own specific legal terminology. A person seeking property investment opportunities will be therefore interested to know prior to the purchase whether the property have a clear title, are there any incumbrances on the property, is there tax on rental income, is there a double tax treaty, what are the residency/immigration rules and probate law regulations. In this respect, the land registers operating in many countries serve to facilitate a secure conveyancing process. This applies also to England and Slovakia, which both operate institutionalised land registers. The functioning of the land registration systems in these countries is the subject matter of this thesis. It is one of the main objectives of this work to scrutinise the effectiveness of the registers and registration procedures in both countries.

Although the area of land law is in both states well researched, just few handbooks or journal articles have been dedicated to comparison of national legal systems in the sphere of property dispositions, while many of them are out-dated. Practical manuals offering an outline of foreign regulations applicable to property dispositions have been written mainly by non-lawyers and merely for the purpose to provide a lay purchaser with a general information of the process of purchasing properties abroad. These publications cannot be regarded as all-embracing sources of all aspects regarding acquisition of properties. At the same time the accuracy of these works is questionable. In order to accomplish a comprehensive and up-to-date comparative study I will utilize the research conducted in the field of property law in the selected countries in order to complete an in-depth review of the national legislations on a comparative basis. The objective is to produce a comprehensive and scientifically accurate comparative study, not a mere „manual“. Therefore the thesis is based on a careful analysis of primary and secondary resources, such as national statutory provisions, journal articles, monographys, textbooks, case reports, electronic sources, historical records. The interpretation of the specific legal terms with respect to property dispositions will require studying law dictionaries of the countries selected.

The thesis is divided into four chapters with its subheadings. The foundation of the thesis is laid in the first chapter which is intended to be a brief introduction into the history of land registration in England and Slovakia. This chapter is designed to find answers to the question: What were the historical, political and social determinants

which determined the current state of land registration and system of conveyance? Continually, the next chapter entitled “Towards the comprehensive land register” will examine the forces behind commencement/development of the system of land registration in both states and the different methods chosen by each state to reach a comprehensive land register. One of the main parts of the thesis can be found in Chapter 3 which is dedicated to the careful analysis of the Land Register in England and the Cadastre in Slovakia. The practical functioning of these registers will be then demonstrated on a selected disposition with land by way of sale in Chapter 4. The thesis highlights the existing deficiencies of the national systems of conveyancing and land registration, whereas the correspondent effective solutions will be searched for in the national provisions of the countries compared. The ultimate objective is to propose modern and effective amendments of the national statutory provisions.

1. HISTORY OF LAND REGISTRATION IN ENGLAND AND SLOVAKIA

This initial chapter is intended to be a brief introduction into the history of the land registration in England and in Slovakia. An outline of the earlier regulations and their amendments should enable a fuller appreciation of the recent development of the land registration laws in the countries compared. When this is linked with information in the next chapters it should be possible to identify the historical determinants which contributed to the rather late commencement and delayed completion of the land registration in England. Since the very early histories of England and Slovakia provide us with minimum information on the regulation of relationships over land I will start the historical account with Feudalism.

1.1 FEUDALISM

ENGLAND

Despite the fact that the historical basis of both English and Slovak law can be found in the Roman law, the development of the land registration systems in these countries after the fall of Roman Empire was different. In England during the Anglo-Saxon era the registration of the land for tax purposes remained. The most comprehensive land register for tax purposes in England was the Domesday Book (1086). In fact William the Conqueror who had declared himself absolute owner of

the entire country, “by his foresight.... surveyed so carefully that there was not a hide of land in England of which he did not know who held it and how much it was worth”.[1]

SLOVAKIA

At that time Slovak relationships with regard to land ownership were still regulated by the 'law of the stronger'. And it was not earlier than the 12th - 14th centuries when the demarcation of the villages, farms and parcels commenced. Rivers, streams, rocks, forests, hills, trees were used as natural boundaries. Disputes relating to the delimitation of the land were very common and the violation of someone's ownership was strictly punished particularly during the reign of the Arpad's dynasty.[2] Land ownership was of great importance particularly in the feudal era as for most people farming was the only source of their living. Due to this significantly high value of land and more frequent dispositions with it the need to prove ownership arose. This led to the creation of several ancestors of the modern Land Registry in both countries.

1.2 BETWEEN 16th AND 18th CENTURIES

ENGLAND

As first step towards the Land Registry can be regarded the system of compulsory enrolment of deeds of bargain and sale with the keeper of the rolls of the county, or

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1 A Short History of Land Registration in England and Wales. Land Registry. 2000. page 3 http://www.landreg.gov.uk/assets/library/documents/bhist-lr.pdf

2 Štaviarsky, I.: Označovanie Chotárov a pozemkov. Bratislava. Petit Press. 2005

in one of the courts at Westminster implemented by the Statute of Enrolments from 1536. The new enactment was a reaction to the difficulties[3] which arose under the Statute of Uses (1536)[4]. The latter Statute opened the way for secret bargain and sale of land without the need to convey land by feoffment with livery of seisin with its attendant notoriety.[5] Secret conveyancing helped the perpetration of frauds. To prevent this the Statute of Enrolments was passed; it provided that bargains and sales of freehold land should be void unless enrolled in public registries set up for the purpose."[6] Although lawyers were inventive enough to find ways to avoid application of this Act as it said nothing about estates less than freehold.[7]

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[3] The Statute of Enrolments was according to Bacon simply in the nature of a proviso to the Statute of Uses. Cited from Holdsworth, W.: Essays in law and history. Oxford. Clarendon press. 1946. page 109.

[4] "The basic principle embodied in this legislation was brilliantly simple in conception – it was to vest the legal estate in the *cestui que use* and take it away from the feoffees." Simpson, A. W. B.: A history of the land law. 2nd edition. Clarendon Press. Oxford. 1986. page 184.

"It proceeded on the plan of annexing the legal estate to the interest of *cestui que* use, so that landowners got the same free powers of disposition over the legal estate as they had formerly had over the use." Holdsworth, W.: Essays in law and history. Oxford. Clarendon press. 1946. page 106

[5] "The vesting of the legal estate in the *cestui que use* was described as ´executing ´the use; the seisin was taken from the feoffees and passed to the *cestui que use* by statute. Simpson, A. W. B.: A history of the land law. 2nd edition. Clarendon Press. Oxford. 1986. page 185.

[6] Simpson, A. W. B.: A history of the land law. 2nd edition. Clarendon Press. Oxford. 1986. page 188

[7] There was no need for public registration if A bargained and sold the term of years to B. Subsequently, upon the end of term granted A would simply release the fee simple by executing a deed of release was all that was required. Such transactions were devices for evasion of the public registration of deeds in contravention with the purpose of the Statute of Enrolments.

The project of establishing a general register of conveyances had been frequently discussed from the sixteenth century onwards, and repeated attempts had been made to establish a system of registration. It is interesting to note that Henry VIII at the same time when the Statute of Uses was adopted "tried to induce Parliament to pass an elaborate bill for the registration of conveyances."[8] However, his proposal to establish a register of conveyances never took shape. Whereas some authors during the Commonwealth period such as Hale[9] suggested a registration of all conveyances of land or general register for deeds, wills, and other acts affecting real property, others such as North "favoured a more extensive proposal – a register of titles."[10]

In the seventeenth and eighteenth centuries the recognition of the advantages of the registration of land or deeds had an increasing support which resulted in number of bills introduced to Parliament.[11] Nevertheless, all attempts to establish a general register failed. There were more factors behind the resistance to reform. "The cause

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[8] W. S. Holdsworth: An historical introduction to the land law. Oxford. 1927 page 153

[9] Matthew Hale presided over the law reform committee in 1652. Simpson, A. W. B.: A history of the land law. 2nd edition. Clarendon Press. Oxford. 1986. page 270.

[10] Holdsworth, W.: Essays in law and history. Oxford. Clarendon press. 1946. page 109

[11] During the reign of Charles II in 1663, 1664, 1670, and 1677; during the reig of James II in 1685; in the reign of William III in 1693, 1694, 1697, 1698, and 1699; in the reign of George II in 1734 and 1758; and the last of such bills was introduced by Mr. Serjeant Onslow in 1816, but it was not read a second time. Cited in Holdsworth, W.: Essays in law and history. Oxford. Clarendon press. 1946. page 110.

was partly, as Roger North rightly says, the hostility of the legal profession, and partly and consequently the fact that, for the most part, these Bills represented rather crude attempts to legislate upon a very complicated subject."[12] Also amongst laymen, according to Simpson, there was "a reluctance to suggest interference with so incomprehensible a mystery of the law of property, which they could not hope to understand... Even amongst the practitioners only a few possessed an extensive grasp of the law, which was essential to any intelligent proposals for reform... In the expense and delay the common run of lawyers had, of course, a vested interest: simple cheap conveyancing and certainty of titles do not increase the emoluments of attorneys."[13]

As a result of this slow development, registries of deeds were established only on a local level for the Bedford Levels in 1663, West Riding in 1703, East Riding and Kingston-upon-Hull in 1707, and Middlesex in 1708 and North Riding in 1735.[14]

SLOVAKIA

Unlike in England where the feudalism was abolished by Elizabeth I in 1574, the feudal relationships between the landowners and peasants lasted in Slovakia until

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[12] Lives of the Norths, I. 141-2 as cited in Holdsworth, W.: Essays in law and history. Oxford. Clarendon press. 1946. page 110

[13] Simpson, A. W. B.: A history of the land law. 2nd edition. Clarendon Press. Oxford. 1986. page 272.

[14] Simpson, A. W. B.: A history of the land law. 2nd edition. Clarendon Press. Oxford. 1986. page 272.

1848. The relationships over land during that era were not as diverse as in England. Therefore, there were no proposals for registration of deeds or conveyances which could be discussed in Slovakia between the 16th and 18th centuries.

Nevertheless, during the reign of Maria Therese a progressive reform of legal relationships over land was achieved, when in 1767[15] all land in the Austro -Hungarian[16] empire was precisely recorded in the Theresian register or Cadastre created for tax purposes.[17] The register did not serve as register of deeds or conveyances but rather as register of land. It also regulated the relationship between the landlord and the peasants by setting out their rights and duties in order to protect serviles from the arbitrariness of the Lord. The socage services, obligations and taxes of the peasants depended on the size and on the quality of land they held. “The objective was not to make changes in the existing legal relationships, but to legally fix them.”[18]

The regulation of land relationships from the 18th century preserved its form until the abolition of villeinage in 1848 when peasants became independent and owners of

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15 Completed in 1772.

16 Where the territory of the present-day Slovakia was until 1918 part of Hungary.

17 http://valenap.sweb.cz/pozemkove-knihy.html

18 Štaviarsky, I.: Označovanie Chotárov a pozemkov. 2005. Petit Press.

land.[19] This reallocation of land between farmers and nobles called for a new land registration, which will be discussed under the next subsection.

1.3 MODERN TIMES

ENGLAND

In the 19th century in England, the old system of conveyancing was given more consideration. “After 1832 the political influence of the country landowning classes diminished, albeit very slowly, and there was in consequence a better chance for reforming measures designed to bring the land law into line with the needs of a commercialized, industrial nation.”[20] “It was also very important that a number of able and influential lawyers allied themselves to the movement for reform, these men had the immense advantage of attacking the abuses of the system from within, and of having the technical competence to suggest and draw up concrete proposals for reform.”[21] Particularly important was the involvement of two influential lawyers, of Henry Brougham, whose celebrated six-hour speech on the state of the law, delivered as Lord Chancellor in 1828, led to the establishment of the Real Property Commissioners, and of James Humphreys, whose *Observations on the Actual State*

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19 Štaviarsky, I.: Označovanie Chotárov a pozemkov. 2005. Petit Press.

20 A. W. B. Simpson: A history of the land law. Oxford University Press. 1986. page 273

21 A. W. B. Simpson: A history of the land law. Oxford University Press. 1986. page 274

of the English Laws of Real Property, with the outlines of a Code had been published in 1826.[22]

The Real Property Commission in its first report from 1829 suggested reforms mainly in the law of conveyancing and not in substantive law. The commissioners said in the report: “We have the satisfaction to report that the Law of Real Property seems to us to require very few essential alterations.” Similarly, in their second report from 1830[23] the Commissioners only “emphasized the insecurity of titles, and the expense of the then existing system of conveyancing; and they made a careful analysis of the causes of these evils. The cure which they advocated was the establishment of a general register of conveyances.”[24] They did not give a consideration to the need for changes in the substantive land law as they were a “body of men impressed with the fundamental excellence of the land law”.[25]

The Commissioners failed to realise that alterations in the substantial land law must take place first[26] and that the defects of the substantive rules could not be cured

22 A. W. B. Simpson: A history of the land law. Oxford University Press. 1986. page 274

23 The third report of the Commissioners on the Law or Real Property issued their third report in 1832 and their fourth report in 1833.

24 Holdsworth, W: A historical introduction to the land law. Oxford 1927 page 306

25 Holdsworth, W.: Essays in law and history. Oxford. Clarendon press. 1946. page 114

26 The reported changes in substantive rules which had to take place prior to any attempts to create a general register of conveyances included: large series of estates, present and future, legal and equitable; two sets of rules for succession on intestacy, two sets of representation on

simply by establishing a register of titles or conveyances. Due to this erroneous view, the proposals in the first half of the 19th century focused on the registration schemes rather than on the complex reform of land law. The Commissioners rejected the idea of radical amendments of substantial law, including abolition of primogeniture in favour of partibility, the abolition of doctrine of tenure, or of copyhold tenure, or the introduction of a codified system of property law. They wrote in their report: "it is impossible suddenly to change the laws as the language of any country… We shall study to interfere as little as possible with established rules, and in all new enactments to preserve the spirit and analogies of existing institutions."[27]

In the latter half of the 19th century economic and political ideas were changing. During this period two major issues in respect of land registration were to be resolved. First, it had to be decided which of the two rival schemes of registration – registration of titles[28] or registration of conveyances – is to be preferred. The

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death, conveyances were needlessly lengthy, the system of strict settlement admitted of the creation of all sorts of charges upon land, estates in common were admitted, system of mortgaging land remained unreformed. In Holdsworth, W.: Essays in law and history. Oxford. Clarendon press. 1946. page 115

[27] A. W. B. Simpson: A history of the land law. Oxford University Press. 1986. page 275

[28] Robert Wilson, solicitor, presented the Law Amendment Society in 1844 with a reasoned case for the superiority of title registration over deeds registration, including an outline scheme for its achievement. He claimed to be the first who worked out a scheme for title registration, though he acknowledged that the principle had been suggested to the first Real Property Commissioners by Mr. Fonnereau (solicitor) and Mr. Hogg (barrister). See J. S. Anderson: Lawyers and the making of English land law. 1832-1940. Clarendon Press. Oxford 1992. page 63.

difference between the two schemes from the purchaser's viewpoint is apparent. While the system of registration of conveyances provides the purchaser with a record of dealings and leaves him to investigate them for himself, the system of registration of titles provides the purchaser with the net result of former dealings - information on the owner, land, burdens, etc. - which he does not have to work out for himself by perusing the deeds. Despite the evident superiority of the latter scheme the Bill introduced in 1853 suggested registration of conveyances. However, in 1857 a Committee was appointed to consider the registration of title.

The second question which was matter of discussions in the 19th century was whether to include equitable interests in the registration scheme. In this respect, the Commissioners in 1853 as well as in 1857 suggested registration of legal titles only.[29] In this respect, the Commissioners "pointed out that the great obstacle to the establishment of a system of registration of titles was the complication of estates and interests which were legally possible."[30] They acknowledged the need for the amendments in the substantial law. They wrote in their report: "the establishment of a register should only be part of a general plan for amending the law of real property"[31]

[29] In accordance with the report of the Royal Commission on Registration of Title (1957) the freehold was the only estate to be capable of registration. Mortgages and leases could be registered against the estate, but all other interests could only be protected by caution.

[30] W. S. Holdsworth: Essays in law and history. Oxford. Clarendon Press. 1946, page 117

[31] Parliamentary Papers, 1857, Sess. n, vol. xxi, 299 as cited in W. S. Holdsworth: Essays in law and history. Oxford. Clarendon Press. 1946, page 120

and added "…the sooner they are introduced the better."[32] Subsequent Acts such as the Partition Act, the Vendor and Purchaser Act, the Conveyancing Acts, the Settled Land Acts, and the Land Transfer Act (1897) introduced many partial reforms in substantial law. But they were all partial and, to a large extent, unconnected reforms. [33] Wolstenholme in this respect proposed that "legal estates should be limited to estates in fee-simple and terms of years absolute, and that mines, easements, and rentcharges should only be grantable for these two estates."[34] This scheme was eventually adopted in the 1925 reform.

Thirdly, the commissioners had to find the answer to the question, whether the register is to be open to public inspection. "The gentry certainly did not want public access to their mortgages to disclose to any busybody the extent of their indebtedness, nor did they want to expose their daughters' inheritance to fortune-seeking bachelors."[35] On the other hand, if the land register was going to be a closed register, then how would the landowner know what is going on with his land. Any

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[32] Juridical Society's Papers, ii. 607 as cited in W. S. Holdsworth: Essays in law and history. Oxford. Clarendon Press. 1946, page 120

[33] W. S. Holdsworth: Essays in law and history. Oxford. Clarendon Press. 1946, page 120

[34] Juridical Society's Papers, ii. 544 as cited in W. S. Holdsworth: Essays in law and history. Oxford. Clarendon Press. 1946, page 117

[35] J. S. Anderson: Lawyers and the making of English land law. 1832-1940. Clarendon Press. Oxford 1992. page 46.

forger could lodge a false deed at the registry, sell or mortgage the land to an innocent purchaser. It seems that the former argument outweighted the latter one as it was not earlier then in December 1990 when the land register was opened to public.

The first Land Registration Act also known as Lord Westbury's Act was eventually adopted in 1862. However the general system of registration of title introduced by the Act was not satisfactory. The Act provided for the voluntary registration of indefeasible titles after strict examination. Such titles, once accepted for registration, were to be guaranteed. The examination was however too complicated.[36] In general, the standard required of registered title was set too high. The landowners were not prepared to undergo such troubles, particularly where their documents of title deficient. "It came as rather a shock, turning out to be not at all what the Commission had recommended, so detailed and so ambitious that even the staunchest advocates

[36] In accordance with the Land Registration Act (1862) the Court of Chancery upon the receipt of the petitioon for Declaration of Title (s.1) and upon the hearing of any such petition, on being satisfied that the petitioner has proved such a a possession, and has stated such a Title as, if established, would entitle him to a Declaration under the Act, made an order for the investigation of the title (s. 6). The court must have been satisfied that the petitioner has shown such a title as it would have compelled an unwilling purchaser to accept (s. 7). When the investigation was satisfactory, the Court would make another order that on some day, not less than three months from the date of the order, a declaration shall be made establishing the Petitioner's title (s. 8). An affidavit of petitioner and his solicitor must have been filed prior to the issue of order, which would declare that the title have been fully and fairly disclosed to the court (s. 10). The order had to be advertised by the petitioner in such newspaper and at such times as the court might have ordered, so that any person could at any time before the proposed declaration of title, petition the court to be heard against the making thereof (s. 11). In addition, in accordance with the section 16, any person could within six months from the making of any such declarations appeal to the Court of Appeal in Chancery.

of title registration had doubts that it would work."[37] "The law journals and law societies saw Westbury as offering Rolls-Royce registration – a wonderfully complete thing, but so far beyond the reach of ordinary clients that it could scarcely be opposed."[38] In addition, the registration of title was optional and thus only 398[39] titles had been registered between 1862 and 1875, and there were complaints of high costs and excessive delay.

The subsequent Land Transfer Act 1875 also known as Lord Cairn's Act, which replaced the Lord Westbury's Act, went to the other extreme by allowing the registration of mere possessory titles. Although the possessory title could not provide the purchaser with a guaranteed security, once it was registered, the title would improve as time went on. However the landowners were not prepared to use the machinery for the sake of possible benefits some day in the future. The Act also provided for the registration of absolute and qualified titles, but neither this Act imposed a compulsory registration. The system introduced by the Lord Cairn's Act was unpopular and little used. By 1886 only 128 titles were registered under the Act.[40]

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[37] J. S. Anderson: Lawyers and the making of English land law. 1832-1940. Clarendon Press. Oxford 1992. page 108.

[38] J. S. Anderson: Lawyers and the making of English land law. 1832-1940. Clarendon Press. Oxford 1992. page 111.

[39] J. S. Anderson: Lawyers and the making of English land law 1832-1940. Oxford. Clarendon Press. 1992. page 335.

[40] J. S. Anderson: Lawyers and the making of English land law 1832-1940. Oxford. Clarendon Press. 1992. page 335.

Citing Holdsworth: ”Lord Westbury's Act of 1862, and Lord Cairn's Act of 1875 were both failures.”[41] As Charles Sweet pointed out: “Lord Westbury's experiment taught us that a system of registration of title, to be successful, must not be too rigid. Lord Cairn's experiment taught us that a voluntary system[42] is foredoomed to failure.”[43] Clearly, the two unsuccessful attempts proved that only a compulsory scheme could ever replace the traditional conveyancing based on investigations into the history of the property.[44]

The compulsory registration was first introduced in 1897 by the Land Transfer Act. The statute introduced the institute of a compensation fund for persons who suffered through any mistake on the register. It provided for the registration of a variety of titles – absolute, qualified and possessory. “The registration was however not imposed over the whole country. It was made compulsory at once only in the County of London and extended to the City in 1902. The system could be extended to any

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41 W. S. Holdsworth: The historical introduction to the land law. Oxford 1927. page 312

42 The first registration was voluntary, however the subsequent dealings and title would always continue on the register.

43 W. S. Holdsworth: The historical introduction to the land law. Oxford 1927 page 313

44 There were 7 subsequent Registration bills between 1873 and 1897 but these were all opposed from the legal profession.

part of the country, however upon a local request for extension. There were in fact no requests for extension before the 1925 legislation."[45]

The progress between 1897 and 1925 has been slow. Dicey in his paper from 1905 called attention to what he found as 'The Paradox of the Land Law'. He said: " To the student of legal history the development of the English land law from 1830 to 1900 presents this paradox: incessant modifications or reforms of the law, which extend over seventy years, and have certainly not come to an end, have left unchanged, in a sense almost untouched, the fundamentals of the law with regard to land...The paradox of the modern English land law may thus be summed up: the constitution of England has, whilst preserving monarchical forms, become a democracy, but the land law of England remains the land law appropriate to an aristocratic State."[46]

The number of changes which took place after the World War I made it impossible to leave the land law in the condition in which it was in 1914. The nation's capital dissipated as necessary result of the heavy death duties. It became necessary to cheapen and facilitate the transfer of land. The professionals eventually came to the opinion that the main defects in the existing system of conveyancing do not lie in the existing system of conveyancing but in the general law of real property. "The paradox, to use Dicey's phrase, had become too glaring, and public opinion was

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45 A. W. B. Simpson: A history of the land law. Oxford University Press. 1986. page 283

46 W. S. Holdsworth: Essays in law and history. Oxford. Clarendon Press. 1946, page 120

prepared for larger measures of reform. One cause, Sir Leslie Scott tells us, was his experience as chairman of the Lands Requisition Committee, which showed up 'the expenses and delays of land transfer in England as compared with newer countries'." [47] All these social and political changes made it eventually possible to incorporate many reforms which had been suggested at an earlier date. The further development of the land law therefore cannot be considered as revolution but rather evolution. The approach taken by the early 20th century reformers was to begin reforming the substantive law of real property and simplify conveyancing.

In 1919 a Committee was set up, to advise as to the action to be taken to facilitate and cheapen the transfer of land. Sir Benjamin Cherry[48] was requested to recast and put into one Bill the series of Draft Bills dealing with various parts of the land law. The Bill was introduced in the House of Lords by Lord Birkenhead in 1920. "After many amendments in a Joint Committee of both Houses, and consultations with the Law Society and many other bodies, the Bill finally passed both Houses in 1922 – a result which was, as Sir Leslie Scott has pointed out, due in great measure to the skill,

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[47] Sir Leslie Scott:The New Law of Property Explained as cited in W. S. Holdsworth: Essays in law and history. Oxford. Clarendon Press. 1946, page 121

[48] Cherry „was the dominant figure throughout. He had been the one to work out compromises with interest groups, draft special accomodations for them, set one law society against another, manipulate intermediaries, massage vanities, and even arrage for friendly MPs to help his bill on its way." – J. S. Anderson: Lawyers and the making of English land law 1832 – 1940. Clarendon Press. Oxford. 1992. Page 308

knowledge, and tact of Lord Birkenhead."[49] Subsequently, the Act was repealed with exception of some parts and its contents were split up into the series of Acts.[50]

Eventually, in 1925 the Land Registration Act supplemented by Land Registration Rules and other statutory rules introduced a revised system of registration of title. The basic doctrines of land law developed at common law under a system in which title to land was proved by the production of deeds recording the history of transactions affecting the land has been replaced by a system based on the registration of title to land and a registered title was finally guaranteed by the State.[51] An important feature of the Act was that only estates in fee simple and for a term of years absolute were capable of registration. The LRA 1925 was amended several times[52] and it was not earlier than in December 1990 when the registration of title became compulsory over the whole England and Wales.

Following the extension of area of compulsory registration over whole area of England the new legislation in 1998 widened the instances of compulsory registration

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[49] W. S. Holdsworth: Essays in law and history. Oxford. Clarendon Press. 1946, page 123

[50] The Law of Property Act 1925, the Administration of Estates Act 1925, the Land Registration Act 1925, the Universities and College Estates Act 1925. W. S. Holdsworth: Essays in law and history. Oxford. Clarendon Press. 1946, page 121

[51] The inefficiencies of the traditional unregistered system of conveyancing in comparison with the registered conveyancing will be discussed in the following Chapter II.

[52] LRA 1936, 1966, LR and LCA 1971, Parts I and III, LRA 1986, 1988 and 1997

and voluntary registration has been further encouraged. Nevertheless, the completion of the Land Register is yet to be achieved. Under the current Land Registration Act 2002[53] all sales and other changes of ownership of land in England and Wales are registered and thus the residue of unregistered land slowly diminishes. The professed and fundamental objective of the Act of 2002 is to render the register a 'complete and accurate reflection of the state of the title to land at any given time, so that it is possible to investigate title on line, with the absolute minimum of additional enquiries and inspections'.[54]

SLOVAKIA

Slovakia was a Hungarian dependent geographical area until 1918 when the independent Republic of Czechoslovakia was formed. Although the Austro-hugarian compromise took place in 1867, the area of Hungary which also covered the area of the current Slovak Republic was declared to be an inseparable part of Austrian Monarchy as a result of emperor´s decree from 31st December 1851. The law applicable to the Slovak geographical area was with some exceptions the Hungarian legal system based on customs, which remained in effect also after year 1918 by means of the Act no. 11/1918 Coll. in order to provide the continuation of the legal system in the newly formed Czechoslovakia. In accordance with the Act in the Slovak

53 The LRA 2002 will be discussed in more details in the following Chapter II.

54 Law Com No 271 (2001), paragraph 1.5

part of the republic the Hungarian law was applicable while in the Czech part the Austrian law remained in operation.[55]

In Slovakia, the institutionalised form of land registration commenced very early in 19th century. The Emperor's decree[56] , the executive order from 1865 and consequent provisions of the Ministry of Justice established a system of Land Books. The objective was to fix the rights to land in a legally perfect manner and in accordance with the actual state.[57]

This system served two main purposes: 1. protection of land ownership and 2. tax administration. The Land Books were administered by Courts. The system of Land Books was based on several principles namely: 1. principle of publicity (everybody had a right to look into the Land Book and make notes and copies from it), 2. principle of certainty of the entries in the Land Book (all the entries had to be as certain and clear as possible), 3. principle of legality (only undisputed rights were capable of the registration in the Land Book by court, each entry in Land Book had to comply with the legal requirements), 4. principle of credibility (presumption that all the entries in the Land Book are correct and reliable), 5. principle of individuality (each individual real estate had its own entry in Land Book), 6. principle of priority

55 The Hungarian law remained in operation in Slovakia until the adoption of the Civil Code 141/1950 Coll.

56 Austrian Act no. 222 from 15th December 1855

57 Peceň, Pavol a kol.: Pozemkové Právo I. Tripe, Bratislava, 1995. page 94

(application of the principle “prior tempore potior iure”, which means that in the case of two or more applications for registration of a right to the same real estate relevant was the date and time of the receipt of the applications and the main 7. principle of constitutive character of entries in Land Books (registration confers right)[58],

Each Land Book consisted of: a) Land Book entries, b) list of owners, c) register of parcels, d) list of persons entitled, e) the cadastre map and f) collection of documents.[59] Every cadastre unit had its own Land Book with Entries that were composed of 3 parts: 1. list A – material substance - identification of the real property including its area, 2. list B – information on the ownership, its restrictions and related rights, 3. list C - information on easements and mortgages.

Apart from Land books two other specialised public registers of land existed simultaneously – the Railway Books and the Mine Books. 'The registration of land in Railway Books commenced in the 19th century and their purpose was to register lots serving the railway or public transport. The Mine Books were first introduced in Slovakia in the 18th century and they cannot be regarded as registers of land in the

[58] These principles were adopted also by the later land registration legislation and are discussed in more detail in
the third chapter of this thesis

[59] J. Kolesár a Kol.: Československé Pozemkové Právo, Obzor, Bratislava, 1980. page 235

same sense as Land Books and Railway Books, as they only served the purpose of regulation of the mining rights and privileges.'[60]

The further development of land registration in Slovakia cannot be understood without providing at least an outline information on the political development after World War II. In April 1945 the independent Czechoslovak republic was declared and the first elections were held in 1946. In Slovakia, the Democratic Party won the elections (62%), but the Czechoslovak Communist Party won in the Czech part of the republic, thus winning 38% of the total vote in Czechoslovakia, and eventually seized power in February 1948, making the country effectively a satellite state of the Soviet Union. In the sphere of land law the collectivisation of farming and forest land was effected. The system of land books had been negatively affected by the World War II. Land Book registers of 376 Cadastre Areas were lost, damaged or destroyed. After the war the property transfer documents and the confiscation documents were not registered in Land Books. The fact that only the name and surname of the owner were used for identification resulted in misunderstandings and confusions regarding ownership.[61]

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[60] Exceptionally the Mining Books registered also the machinery and buildings used for mining purposes. Štefanovič, M.: Pozemkové právo. Eurounion, Bratislava, 2006. str. 255

[61] Horňanský, I.: Kataster nehnuteľností v praxi. Bratislava. Epos. 2003. page 27

The system of Land books[62] was weakened even more in the beginning of year 1951 when the Civil Code Act no. 141/1950 Coll. abolished the constitutive character[63] of the entries in the Land book. At that time of early socialism Land Books were regarded as a "means of enhancing private ownership tendencies".[64] In contrast to the previous registration system, a purchaser became owner of the land from the moment of the conclusion of the contract and not from the moment of the entry in the Land Book. The compulsory registration of some transactions in Land Books still remained but these had only a declaratory character and did not convey rights. In the vast majority of cases however the registration of the transaction (for a fee) in the Land Book was voluntary and had no relevance to the transfer of the right. This had a negative impact on the mirror effect of the entries in Land Books and the difference between the state of land rights in Land Books and in reality was wider than ever.

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[62] According to some writers the system of Land Books was not as perfect as it was proclaimed since during the years of their existence many entry errors accumulated. The entries in the Land Registration Books did not correspond with the actual state of land and relationships to it.

[63] Constitutive character of entries in Land registration book meant that the right to Land was transferred from one person to another when the entry in the Land registration book was made. Thus relevant was not the date when the constract of purchase was signed but the date and time of the entry. From that moment the purchaser became the owner of the land. The objective was to protect the ownership from fraudulent dispositions by means of a state instrument – state land register.

[64] J. Kolesár a Kol. : Československé pozemkové právo. Obzor Bratislava.1980. Page 231

Furthermore, due to the changes introduced by the Civil Code no. 141/1950 Coll., Slovakia had between years 1951 and 1990 one of the highest number of various ownerships and rights of use in the world. [65] The previous land ownership of individuals was declared to be a private ownership which as ownership of individuals could be used to the exploitation of others and therefore was declared to be adverse, harmful and undesirable. Agricultural land and forest land was permanently and without valuable consideration gradually assigned to the use of socialist organisations[66]. "Thus the actual owner of the agricultural piece of land was left with only formal ownership stripped of the right to possess, right to use the land and collect the crops from it."[67] During socialism state ownership was of primary importance and it was a privileged ownership. Co-operative ownership received recognition, but was of less importance and was less acknowledged than state ownership. The ultimate aim was to completely diminish private ownership.

Later Act no. 65/1951 on the transfer of the real property and lease of farm land and forest land made the transfer of the ownership of land dependant upon the approval

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[65] Including private ownership, state ownership, rights of personal use of land, rights of perpetual use of land, rights to administer national property, rights of use of co-operative societies, rights of use of forest land, rights of use for production purposes, temporary use of land replacing rights of use of land, individual ownership of flats, co-operative society ownership, ownership of social organizations. Horňanský, I.: Kataster nehnuteľností v praxi. Epos. 2003. page 28

[66] This way 90% of approximately 12,5 million parcels outside housing areas were registered as land in the use of socialist organisations.

[67] Štefanovič, M.: Pozemkové právo. Eurounion, Bratislava, 2006. str. 37

of National Committees.[68] In 1956 a decision of the Slovak Government of 25th January of that year announced the commencement of the so called “Unified Registration of Land”.[69] In contrast to previous registration systems, this focused on the registration of the real usage of land instead of the registration of ownership to land. The information from this technical registry was used only for central agricultural planning.

The following Act no. 22/1964 on the registration of real estates and declaration no. 23/1964 introduced a central register[70] of land and rights to land. Due to this amendment, from 1964 to 1992 Land Books were used only as archives.[71] The registration of contracts regarding land was assigned to the State Notary. To confer the right to land the party to a contract had to apply for registration of the contract with the State Notary. In a separate proceeding the State Notary then made a decision in accordance with the Notary Rules – Act no. 95/1963. After registration of the contract it was sent to the respective Local Geodesy Office, although this had no relevance to the conveyance of the right to land. 'At that time for the transfer of land and the registration with State Notary various consents and confirmations had to be

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68 Lazar, J.: Základy Občianskeho Hmotného Práva. Bratislava, Iura Edition.2004. Page 334

69 Štaviarsky, I.: Označovanie Chotárov a pozemkov. 2005. Petit Press.

70 The newly established register was run by The Department of Geodesy and Cartography.

71 Štaviarsky, I.: Označovanie Chotárov a pozemkov. 2005. Petit Press.

submitted by the parties such as: consent of the agricultural organisation using the land, statement of the organ for territorial planning, local national committees depending on the place of residency of the vendor and the purchaser and a statement of truth of the purchaser with the list of other real estates in his ownership and that the purchase price is paid from the income gained by upright/respectable/honourable work.'[72]

The price of agricultural land during that era was minimal, one time only 0.40 Coins (equivalent to £0.013). A paradoxical situation occurred when the purchaser of the agricultural land for only 100 Coins (equivalent to £3.33) had to sign a statement of truth regarding his source of income, while the purchaser of a car of value 100,000.00 Coins (equivalent to £3333.33) did not have to fulfil this obligation. This was a form of degradation and liquidation of private individual ownership of land. Entries in the new registry were made on the receipt of decisions of courts, national councils, state notaries or other office or organisation authorised to make decisions with regards legal rights to land. Very often land was transferred informally without meeting the legal requirements. By these means only the right to use the land in fact was transferred and not ownership. Between 1948 and 1989 the previous boundaries of land parcels were erased and new boundaries set, although even these were subject to many changes during those years.

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[72] Štefanovič, M.: Pozemkové právo. Eurounion, Bratislava, 2006. page 40

On 17 November 1989, a series of public protests known as the “Velvet Revolution” began and led to the downfall of Communist Party rule in Czechoslovakia. Political changes in 1989 resulted in the abolition of socialism and restoration of democracy and state in which the rule of law is incorporated into the system. One of the objectives was to restore the state's guarantee of ownership including the ownership of real estates. The transformation was not a simple task due to the serious disorganization as a result of historical, economical, social and political changes.

The system of land registration in effect in 1989 was a source of legal uncertainty and an obstacle to land dispositions and business growth. One of the problems was the socially unbearable high level of division of land. The 49 000 km^2 of land was divided into 12,5 million parcels. One piece of land was often subject to rights of a high number of co-owners with a very small shares in it. It was not unusual for a co-owner to have a share of 1 m^2 in land.[73] This was partly a consequence of the Hungarian probate law applicable until 1951 in Slovakia, which had no restrictions as to the division of inherited land.

An urgent need for improved state registration of real estates, more efficient legislation and a higher level of legal certainty was evident. An important step in this respect was the amendment of the Czechoslovak socialist constitution no. 100/1960 Coll. by the constitutional act no. 100/1990 Coll.[74] which declared in cl. 7 the equality

[73] Horňanský, I.: Kataster nehnuteľností v praxi. Epos. 2003. Page 28

[74] Came into effect on 18th April 1990.

of ownership of citizens, legal entities and state as well as equality in its protection.[75] This was also confirmed in cl. 20 of the Constitution of the Slovak Republic[76] which states: " Every person has the right to own property. Ownership of all owners has the same statutory content and protection. The inheritance is guaranteed." Furthermore, the Act no. 229/1991 Coll. guaranteed to the owners of the land the right to make dispositions of land free from the restrictions of the previous years. In accordance with s.2 of this Act "other person than the owner of the land could use/occupy the land solely on the basis of the agreement with the owner." The spectrum of owner's rights, suppressed during the socialism, was revived by the amendment of the Civil Code no. 40/1964 Coll. which in par. 123 guaranteed the owner the following basic rights: 1. right to possess the land (ius possidenti), 2. right to use the land and collect the crops (ius utendi and ius fruendi) and 3. right to make dispositions of the land (ius disponendi).

The statutory provisions mentioned in the previous paragraph constituted the necessary legal platform for re-establishment of the system of ownership that took place after 1990 and which was reached in two steps:

1. Restitution – returning the land to the original owners whose ownership had been taken away during socialism under the conditions set in the restitution acts

[75] Horňanský, I.: Kataster nehnuteľností v praxi. Epos. 2003. page 30

[76] Constitution of the Slovak Republic no. 460/1992 Coll.

2. Privatisation – the gradual transfer of land held by the state to the individual ownership of natural persons and bodies corporate

Despite the unfavourable situation of the land registration system during the socialism, the later development was encouraging. In 1996 the European Economic Commission of the Economic and Social Council of Organization of United Nations on the basis of repeated petitions from Central and Eastern European countries carried out a study in order to define a complex set of principles to be applied in the "system of registration of land and rights to land in countries with economies in transition". The result of these efforts was a document entitled "Land Administration Guidelines with Special Reference to Countries in Transition".[77] The directive provided the states with economies in transition with the benefits from the principles, methods and policy of Land Registration developed by western countries with open market economies. However, the directives emphasize that, although countries with transforming economies may learn from the experience of western countries, they need to build or improve their own systems to fit their own social, economical and cultural environments. The directives also highlight the necessity of a formal system of state administration of land and rights to land as well as the importance of protection of rights to land and of guarantees to investments.[78] The Cadastre in the

[77] White Book for the preparation of the associated countries of Central and Eastern Europe for integration into the internal market of EC did not include the law of Land Registration in the areas of law for the harmonization.

[78] Horňanský, I.: Kataster nehnuteľností v praxi. Epos. 2003. page 37

Slovak Republic as defined in the Cadastre Act[79] complies in full with the requirements set by the directives.

The importance of the Land Books as evidence of certain rights to land was revived in 1993 when the Cadastre Acts[80] came into effect. In the same year a Cadastre was established to serve as a state register of information about real estates. The objective was to provide protection to ownership and other rights in rem. The Cadastre adopted the technical register of land from the previous system. Entries[81] made under the previous legislation were deemed to be relevant proofs of title unless the opposite was proven. The important change was that from 1st January 1993 the transfer of a right in rem required the Cadastre office's formal decision of entry[82]. Subsequently, when Slovakia became independent the Cadastre Act passed in 1995 confirmed the operation of the Cadastre as a central land register, which is in operation until this date.[83]

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79 Act no. 162/1995 Coll. on the Cadastre of Real Estates and the Entry of Ownership and Other Rights to the Real Estates

80 Federal Act no. 265/1992 Coll. on the registration of ownership and other rights over real estates and the Cadastre Act no. 266/1992 Coll. passed in the Slovak parliament

81 Particularly entries in Land Books and registration by State Notary.

82 This decision is made on the basis of an application by any party to the contract and the submission of a deed with the prescribed formalities. This process is described in more detail in Chapter III of this this thesis.

83 Act no. 162/1995 Coll. on the Cadastre of Real Estates and the Entry of Ownership and Other Rights to the Real Estates is dealt with in more detail in Chapter III and IV of this thesis.

1.4 SUMMARY

In summary, the history of land registration in England and Slovakia reveals a different pattern of development, which is a natural reflection of a different social and historical development in these countries. The property ownership during the feudalism was of primary importance and trespassers were strictly punished in both countries. The regulations during the feudalism were restricted in England to land registration for tax purposes in the Domesday Book (1086), while in Slovakia it was the "law of stronger" that regulated the land law. In England the feudalism was abolished almost three hundred years earlier than in Slovakia. Therefore also the regulation of conveyancing with the objective of increasing its security has been discussed in England since the 16th century, while in Slovakia it was in the latter half of the 19th century. During the earlier centuries, land registration was limited to registers which served mainly tax purposes, such as the Theresian register regulating also the relationships between the landlord and his peasants.

The first modern land registration reforms in both countries took place in the 19th century. In England it was the complication of the substantial law which was an obstacle for the establishment of an effective land register. This was however acknowledged by commissioners only in the second half of the 19th century and the respective amendments of substantial law were passed at the end of the 19th century.

The benefits of title registration over the historically earlier registration of deeds were protracted during the second half of the 19th century. This resulted in the adoption of the Land Registration Act 1862 which introduced the title registration in England. However, this Act together with the subsequent Land Transfer Act 1875 were both failures. The Acts introduced only a voluntary registration. The compulsory registration was first adopted by the Land Transfer Act 1897, however the compulsory registration was only applied in the County of London. During the same period, for the area of Slovakia, a title registration system based on Land Books was introduced in 1855. Unlike in England, the registration of deeds was never considered as an alternative form of land registration. Another distinctive feature of the land registration system in Slovakia, compared to the English one, was that the registration unlike England, has not experienced the failure of ineffective statutory provisions for voluntary registration. In general, it can be said, that the move to an effective registration system in the 19th century was in its character evolutionary in England and revolutionary in Slovakia.

The effective registration system in Land Books was however corrupted during the era of socialism under the influence of USSR (1948-1989). The system was shaken by the abolition of the constitutive character of entries in Land Books (1951) and subsequently by replacement of the registration in Land Books by registration performed by the State Notary (1964). After the fall of socialism in 1989 the registration system had to recover from a period of complete disorganization of the

previous system of relationships to land. Progressive new Acts[84] were passed in 1992 and 1995 by parliament in order to restore a functional system with a central register of titles to land. The adoption of the new legislation in Slovakia was prompter as the Parliament did not have to face opposition from lawyers as it did in England. The land registration in England, in the 20th century was a continuation of a rather slow move towards a comprehensive land register. An important step was the adoption of the LRA 1925, based on a model of title registration developed during the 19th century. The registration was however, unlike in Slovakia, made compulsory only gradually. The registration became compulsory over the whole area of England and Wales only in 1990. The types of transactions subject to compulsory registration were similarly extended, in particular by the LRA 2002.

[84] The Federal Act no. 265/1992 on the registration of ownership and other rights over real estates, the Cadastre Act no. 266/1992 and Act no. 162/1995 on the Cadastre of Real Estates and the entry of ownership and other rights to real estates.

2. TOWARDS THE COMPREHENSIVE LAND REGISTER

The regulation of ownership of land is a matter of interest to owners, but also investors,occupants, purchasers, vendors, heirs and beneficiaries. The main advantage of the system of registration of title is that it simplifies the role of a purchaser by enabling him to obtain the title to land that is shown in the Land Register rather than the title which appears to him to be disclosed by his examination of often bulky deeds. In this chapter I am going to examine more closely the similarities and differences between the English and Slovak statutes focusing on the methods chosen by each State to bring the titles to land onto the register. The previous chapter of this thesis already indicates that a set of social, political and historical determinants specific for each state were the forces behind the legislative changes leading to the commencement/improvement of the system of land registration. These various determinants of the current legislation will be discussed in the first subsection of this chapter in more detail, while the second subsection will focus on the different paths chosen by each state in order to establish a comprehensive land register facilitating the property market.

2.1 LAND REGISTER – ESSENTIAL?

Not every state in the world operates a comprehensive land register. Such an example is USA with a functioning property market without a public land register. Therefore one could ask: What were the reasons in England and in Slovakia which

led to the adoption of the current system of land registration[85] ? If men are content with good title, why should we force them to take and pay for indefeasible ones? If they are content with parcels imperfectly described or defined, why should we compel them to take perfection at a cost of money, time and trouble? Was the introduction of title registration really inevitable? Examples of various sources below prove that the vast majority of writers acknowledge that there were and still are good reasons to believe that a comprehensive system of land registration is essential for secure conveyancing.

ENGLAND

In England it was the inefficiency of the old unregistered system that gave rise to discussions on a new system of conveyancing. Highlighting the differences between the traditional and new system of conveyancing, registration of title has been defined as “a system of conveyancing that is based upon different principles from the traditional unregistered system which it is intended to replace in its entirety. Its principal object is to substitute a single established title, guaranteed by the State, in place of the traditional title which must be separately investigated on every purchase at the purchaser's own risk”[86] The unregistered system of conveyancing made the deduction of title lengthy and costly, from which only the group of legal practitioners benefited. William Leach as early as in 1651 wrote in “there hath been many courts,

[85] In England by the Land Registration Act 2002 and in Slovakia by the Cadastre Act no. 162/1995 Coll.

[86] Megarry & Wade: The law of real property. 6th edition, London, Sweet & Maxwell limited, 2000. p. 201

and divers offices.... to search in; and very many records, books and remembrances, or rolls to turn over, view or read for every of the four terms of the year; and in some of such courts such ... incumbrances have been intermixed with others in such manner, as they have been very difficult to be found....".[87] Despite this criticism the unregistered system of conveyancing has remained in operation as a sole form of property transactions.

The distinctive feature of unregistered titles is that these exist only in the form of chains of documentary records (or 'title deeds') which detail successive transactions with reference to a particular parcel of land. These historic documents of title remain essentially private, under the control of the owner of the estate to which they relate, but must be produced on any conveyance of the land in order to enable a purchaser to verify his vendor's title. In addition, each purchaser must effect various searches, inspections and inquiries in order to ascertain that a particular piece of land is subject to no undisclosed incumbrances. [88]

On the other hand, in case of registered land the purchaser can discover from the mere inspection of the register whether the vendor has power to sell the land and thus he is saved from the wasteful re-examination of the title. "As Lord Oliver of Aylmerton indicated in Abbey National Building Society v Cann (1991), the 'governing

[87] A Short History of Land Registration in England and Wales. Land Registry. 2000. page 4

[88] The proof of title, inquiries, searches and inspections are discussed in more detail in Chapter IV of this thesis.

principle ' of land registration is that 'the title to land is to be regulated by and ascertainable from the register alone'."[89] The register also discloses incumbrances [90] with the exception of overriding interests, which still necessitate investigations on the purchaser´s part in order to discover any undisclosed incumbrances.[91] Registration of title made the conveyancing easier, faster and cheaper. It was a great improvement on the old-fashioned system of unregistered conveyancing. The hope of the Royal Commissioners on Land Transfer and Registration expressed in 1857 'to enable the owners to deal with land in as simple and easy a manner... as they can now deal with moveable chattels or stock'[92] were fulfilled.

SLOVAKIA

Although, the current Cadastre of Real Estates regulated by the Cadastre Act 162/1995, can be regarded as a modern and effective system of land/title registration as to the information which are subject to registration in accordance with the Cadastre Act, the actual information system of the Cadastre is not yet complete.

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89 Kevin Gray, Susan Francis Gray: Land Law. Oxford University Press. 6th edition, 2009. page 93.

90 The incumbrances which are subject to registration are enlisted in the 3r chapter of this thesis under the subheading: "The subject and content of the Land Register and the Cadastre."

91 The overriding interests are discussed in more detail in the chapter 3 of this thesis under the subheading: Principles of the two systems of registration - The principle of conclusiveness of registration.

92 Kevin Gray, Susan Francis Gray: Land Law. Oxford University Press. 6th edition, 2009. page 67

There are still plots of land without registered title to it. The system is complicated as the titles to land are recorded in more separate registers developed during the 19th and 20th centuries[93], such as:

a) Land Books – entries made between 1855 and 1964

b) register of the Department of Geodesy and Cartography – entries made between 1964 and 1993

c) registers administered by the Cadastre offices – entries made from 1993 until this date

Secondly, "vast areas of land were not registered in these registers in accordance with their actual legal and geometrical status and many owners do not hold the documents proving their title to lots.'[94] Even today, there are plots of land where the ownership is not documented and where the owner is unidentified/unregistered. According to one survey this applies to 20-45% of land depending on the location.[95] In most cases these are owners who do not declare their right to land or do not know about their right, for many years did not make any dispositions of the land, live on an unknown address, or have died without heirs.

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93 For more information on the 19th and 20th centuries development see Chapter I of this thesis.

94 Štefanovič, M: Pozemkové právo. Eurounion, Bratislava. 2006

95 Štefanovič, M.: Pozemkové právo. Eurounion, Bratislava, 2006. str. 256

Thirdly, even if the owner holds a document, which proves his title to land, from one of the registers above, these documents have to be adjusted to the existing system of land registration in the Cadastre and the identification of the lot have to be submitted to the Cadastre. Only then the owner may obtain the Certificate of ownership from the Cadastre and make valid dispositions with land. The completion of the Cadastre as a comprehensive system of land registration therefore requires manipulation with documents from the previous forms of land registers. However, even these land registers acquired during the years of operation severe inefficiencies. “There are some Land Books with the last entry in respect of the owner of the real estate from more than 100 years ago and even these entries are very brief containing only the name of the owner.”[96]

The completion of the Cadastre as a comprehensive land register is the objective of the Act no. 180/1995 on Some Measures Pertaining to the Settlement of Title to the Land is currently of significant importance.”[97] The Act is discussed in more detail under the next subheading of this chapter.

It is also worth to mention, that unlike the law in England, the Slovak legal system does not acknowledge unregistered conveyancing. The principle “registration confers right” has been in place since the introduction of Land Books in 1855 with interruption

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96 Štefanovič, M.: Pozemkové právo. Eurounion, Bratislava, 2006. str. 257

97 Štefanovič, M: Pozemkové právo. Eurounion, Bratislava. 2006

between years 1951 – 1964[98]. Thus, the abolition of the unregistered conveyancing, one of the objectives of the legislative amendments in England, was of not one of the reasons behind the amendments of the land registration system in Slovakia.

COMPARISON

While the development of the land registration system in Slovakia in the 20th century can be characterised as a continuation of the system of Land Books established in 1855 in the Austro-Hungarian monarchy with some amendments, in England a completely new land registration system regulated by the state was established in 1925[99]. The principal reason for the substantive changes in the English land law was the inefficiency of the unregistered system of conveyancing which proved to be repetitive, protracted and costly. The establishment of a central Land Register was considered to be crucial in order to replace the old system of conveyancing based on separate investigation of title that took place on every purchase by a new system under which the title to the land is guaranteed by the State.

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98 The Civil Code Act no. 141/1950 Coll. Abolished the constitutive character of the entries in the Land Book. Thus the moment relevant for the transfer of ownership or other right to land was the time of conclusion of the contract and not the time of registration. The constitutive character of entries in the register was renewed in 1964 when in accordance with the Act no. 22/1964 the moment relevant for the transfer of ownership or other right to land was the time of registration of the contract with the State Notary.

99 Although, there were several other Acts on land registration passed in the 19th century, ie the Land Registration Act (1862) or Land Transfer Act (1875). These failed to introduce a compulsory system of land registration, and as a result only a few hundreds of title were registered. For more information see Chapter I of this thesis.

In Slovakia, the abolition of unregistered conveyancing and its complete replacement with registered conveyancing was not the reason behind the amendments in the Slovak land law. It was the inaccuracy of the existing land registers which was a result of the enormous changes of land law and the system of land registration as consequences of political development between 1948[100] and 1989[101]. It was necessary to revise the accuracy and efficiency of the already operating land registers. Therefore, unlike in England, the purpose of the new legislation was not to move from unregistered conveyancing to the registered one, but to cleanse the land registers from mistakes which had accumulated during the socialist era.

2.2 THE WAY TOWARDS THE COMPREHENSIVE LAND REGISTER

As we have seen above, the replacement of the old cumbersome way of conveyancing by the new registered one was considered to be desirable, even necessary. Unregistered conveyancing however was not diminished instantly with the first LRA 1925. The objective of the complete abolition of unregistered conveyancing was to be achieved gradually. Similarly, in Slovakia the inaccuracies accumulated in the land register were to be removed gradually area by area in a separate administrative process within a period of time specified in the Act. This process of up-

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[100] The year 1948 marked the commencement of socialism in Slovakia which endured until the "velvet revolution" in 1989.

[101] For the historical account on these changes see the Chapter I of this thesis.

dating the land register in Slovakia together with the step-by-step move towards the exclusive registered conveyancing in England will be discussed in this subsection.

England

Although the titles of the modern Land Registration Acts from 1925 and 2002 indicate that the new system of registration is based on a complex registration of land, the land register in fact serves only as register of titles to land. The land itself was in England registered only during the 11th century for tax purposes. During the next centuries various attempts were made to simplify and add security to the conveyancing process. The first attempt was to facilitate the conveyancing process by registration of deeds. It was sought that "the system of deeds registration would reduce the costs of search and obviate the risk of suppression, accidental non-production, or non-discovery, forgery and alteration, and loss of documents."[102] The first system of deeds registration was introduced by the Statute of Enrolments (1536) use of which was avoided by legal practitioners. Later in the 17th century and the beginning of the 18th century registries of deeds were established but only on a local level[103]. Subsequently, in 1862 the Land Registration Act and in 1875 the Land Transfer Act were passed providing for a voluntary registration of title. The effect of these statutes was not significant as only a few hundreds of titles were registered under these Acts[104]. There was a need for even greater stimulation by making the

102 A. W. B. Simpson: A history of the land law. Oxford University Press. 1986. page 281

103 For more details see Chapter I subheading "Between 16th and 18th centuries".

104 For more details see Chapter I subheading "Land registration in modern times".

registration of title compulsory on dealings with land. Compulsory in the sense that dealings in land must be carried out under the new and not the old system of conveyancing. The effects of non-registration where registration is compulsory are that the transaction will be void as to the legal estate unless application for registration of it is made within a certain time. The first area of compulsory registration was the County of London, where under the Land Transfer Act 1897 a substantial number of titles were registered.[105]

“The ultimate goal, however, was to facilitate the registration of title to land, whereby a person's ownership of the land would be entered upon an official register, the third party rights affecting that land also being entered on that register. For this process to happen, however, it was necessary to simplify the substantive law relating to land.[106] To this end, a series of reforming statutes were enacted,[107] culminating in the, largely consolidating, legislation of 1925, which is sometimes referred to, after its principal architect, as the Birkenhead legislation.”[108] The policy of the new legislation was described by Lord Birkenhead in the following terms: “Its general principle is to

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[105] Megarry, R., Thompson M. P.: Megarry's manual of the law of real property. Seventh edition. 1993. p. 94

[106] Hayton: Registered Land. 3rd edition. London, Sweet & Maxwell, 1981. p. 8-14

[107] Notably, the Vendor and Purchaser Act 1874, the Conveyancing Act 1881, the Settled Land Act 1882, and the Law of Property Act 1922 and 1924

[108] Megarry, R., Thompson M. P.: Megarry's manual of the law of real property. Seventh edition. p. 94

assimilate the law of real and personal estate and to free the purchaser from the obligation to enquire into the title of him from whom he purchases, any more than he would have to do if he were buying a share of a parcel of stock."[109]

The jurisdiction of England and Wales has been moving inexorably towards the comprehensive registration of title. The requirement of compulsory registration was not imposed on the whole land and every transaction but was rather extended gradually. For many years the registration was compulsory only on the conveyance on sale of a fee simple, or on the grant or assignment of certain leases and only when the area became a compulsory area. The areas in which registration of title is compulsory were gradually extended during the years 1897 to 1990 with a marked acceleration from 1965 onwards.[110] Since 1st December 1990 compulsory registration has extended over the whole of England and Wales.

From December 1990 onwards the only limitation of the compulsory land registration was the character of the transaction in respect of land, ie the registration is only compulsory when a transaction specified in the Act takes place. These were similarly as the area of compulsory registration extended gradually. In 1997 new triggers were added for compulsory first registration to include gifts, transfers of land on death, and first mortgages on land.[111]

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109 Letter to The Times, 15 December 1920, cited in Campbell, op cit., 485

110 See the map in Land Registry Annual Report 1990-1991

Nowadays virtually all forms of disposition of an unregistered estate trigger a compulsory first registration of title at Land Registry. The steady extension[112] of the triggers for first registration has ensured that the number of currently unregistered estates is rapidly diminishing as more newly transacted titles are brought on to the Land Register. On the other hand in accordance with the Land Registry Report 2008/09 only 69.4 % of England and Wales area is currently registered with Land Registry which means that many properties across England and Wales are still unregistered.[113] To facilitate the registration of the remaining areas the LRA 2002 not only makes the process of registration very much easier, but also envisages that, in relation to the express creation or transfer of most land rights, 'the execution of the transaction in electronic form and its simultaneous registration will be inextricably linked'."[114] In effect, the previous system in which title to land was proved by the production of deeds recording the history of transactions affecting the land is being

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111 The dispositions of unregistered land requiring compulsory registration thus were: a) any qualifying conveyance of the freehold estate; b) any qualifying grant of a term of years absolute of more than 21 years from the date of the grant; c) any qualifying assignment of a term of years absolute which on the date of the assignment has more than 21 years to run; and d) any disposition effected by an assent (including a vesting assent) or by a vesting deed which is a disposition of: the freehold estate, or a term of years absolute which on the date of the disposition has more than 21 years to run.

112 Since the LRA 2002 is in effect shorter leases must be registered and voluntary registration is available for new types of interest in land.

113 Land Registry Annual Report and Accounts 2008/09, p. 2

114 Law Com No 271, para 1.9, 7.8, 12.2, 12.5

steadily overtaken by a system which is based upon the registration of title to land guaranteed by State.

SLOVAKIA

While the land registration was to be achieved in England gradually, without a specific time limit set for the completion of the registration, the comprehensive and up-to-date registration system was to be reached in Slovakia by means of a separate administration procedure[115] regulated by the Act no. 180/1995.[116] The purpose of the Act was to complete and unify all the various records of real estates and rights relating to them by forming local committees for updating the land registration records. The time limit set for this process of land registration settlement was 5 years from the date when the Act came into effect. That means by the end of 2000, which has not been met. The Act introduced a specific procedure for updating the registration of land and legal relationships to land, where the information on the land and legal relationships to land are investigated and then a register of updated information on land is prepared and passed.

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115 A similar scheme was proposed by Robert Wilson, but the Commission could not accept the statism inherent in his notion of parochial visitation to inquire into title, which they also thought had the vice of making registration compulsory in practice. Wilson's reliance on compulsory public mapping made his scheme too expensive, they thought, and since the existing public maps were inadequate there would be too long a delay before his system became operative. Besides, to require adjudication on boundaries would provoke dispute and litigation. See J. S. Anderson: Lawyers and the making of English land law. 1832-1940. Clarendon Press. Oxford 1992. page 91.

116 Act no. 180/1995 on some measures pertaining to the Settlement of Title to the Land.

The Act acknowledges the fact that the current register of real estates properly covers only a small percentage of land in Slovakia. Owners in many cases do not have their right correctly substantiated by formal deeds. Therefore the Act aims to complete the registration of land by the means of a separate procedure of collecting information on land which is not properly documented in the register of real estates. The government every year passes the Schedule for the procedures for updating the register of real estates, whereby financial resources are allocated for this purpose in accordance with the state budget. The Schedule lists the Cadastre areas where the updating procedure will take place in the particular year.

Administration of the procedure for updating the register of real estates is in the competence of the Cadastre Office and Land Office. These are responsible for the creation of committees for updating the register of real estates for each individual municipality. Committees in cooperation with state organs and with the parties of the procedure collect the relevant documents and information and prepare the draft of the updated register. Each committee consists of 7 members. The Cadastre Office, Land Office, Slovak Land Fund and the municipality itself delegate one member each. The remaining three members are appointed by the administrative organ from the owners and lessees of land nominated by the municipality. In cases of Cadastre areas with forest land the committee has one additional member, a representative of one of the state organisations for forest management. The member delegated by the municipality is the chairman. The first meeting is summoned by the administrative organ. The work of the committee is supported materially and administratively by the

municipality. The appointment of the committee terminates 3 years after the date when the information from the updated register of real estates is entered into the Cadastre. The committee is not a decision making organ, but rather an executive organ.[117]

The procedure itself is regulated by numerous rules. There is a separate procedure commenced for every municipality, or cadastre area if the municipality is formed by more than one cadastre area. The procedure commences when the announcement of commencement of the procedure for updating the register of the district office is posted for public inspection at a suitable place in the municipality and this announcement must be posted permanently until the approval of the register. In the announcement the administrative organ invites lessees and other persons entitled to provide information on the land in their possession and on the legal relationships to it within the time limit set. The announcement is also delivered to each lessee and other entitled persons, who are also advised about their right to file an application for acquisition of title by adverse possession where the requirements set out in Act no. 180/1995 are met.

Information required for preparation of the register draft is collected from information provided by lessees or other persons entitled, from the cadastre data, state archives, documentary evidence submitted by participants on the procedure, witness statements and other evidence obtained by investigation in the municipality. The

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[117] The decision making organ is the particular administrative organ.

register draft is then posted up for public inspection for 30 days at a suitable place in the municipality with information about the right to challenge the register draft. The committee also delivers to the participant of the procedure the extract from the draft register regarding the land, which is according to information obtained by investigation in his ownership or administration. They are further informed about their right to challenge the register draft within 30 days from the receipt of the extract. Unknown owners and owners whose address is not known are represented by the Slovak Land Fund or state organisation for the forest management in respect of forest land. They are also entitled to challenge the register draft within 30 days from the date when the register draft was posted up for public inspection. Any challenge must state its reasons. The committee then requests from the person whose right is affected by the challenge a statement and witness statements of persons familiar with the local state of affairs. Subsequently the administrative organ decides on the basis of the information provided by the committee and approves the register. The decision about the challenge and approval of the register may be revised by a court.

The approved register[118] is a public document, on the basis of which the cadastre office makes entries in the Cadastre. No entries in the Cadastre may be made in respect of ownership or other rights over the land[119] from the date in the announcement of the cadastre office until the approval of the register, but for the maximum of 90 days. Otherwise the constant changes could complicate to a

[118] The register itself contains geodesy data together with descriptive information on rights and legal relationships over land.

[119] With the exception of mortgages and leases.

significant degree the work of the committee. Entries in the Cadastre on the basis of contracts, public documents or other documents are made after the identification in accordance with the approved register.

Moreover, within the procedure for updating the registration of land the administrative organ may on the application of the participant confirm in form of a decision the acquisition of ownership to land by adverse possession. The application may be submitted only within the time limit set for the challenge procedure and must state facts confirming the fulfilment of statutory requirements[120] and these have to be supported by evidence. The administrative organ will reject the application if a) the statutory requirements were not met, or b) another person has claimed ownership of the same parcel, or the ownership of the parcel is subject to court proceeding. If the application is successful, the decision will show the date when the ownership was gained. The decision may be revised by a court.

The clarification of legal relationships required further amendments in respect of unknown owners. Since 1st September 2005 any land where the owner is unknown, and which is registered in the Cadastre for at least one calendar year, becomes a state owned property administered by the Slovak Land Fund or State Organisation for Forest Management.[121] The ownership of these state owned parcels of land passes after one year to the municipality in the cadastre area of which the parcel is

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120 Act no. 1801995 Coll.

121 In case of forest land.

located. [122] The municipality is prohibited from transferring the ownership or creating a land charge over land they have acquired from the state for 10 years from the day when Act no. 180/1995 came into effect, ie the transaction would be void.

On 31st December 2008 there were 1 186 completed updated registers on real estates of which 1 157 were already incorporated into the Cadastre. There are another 641 registers in the state of elaboration and 498 registers in respect of which the procedure for updating of the Cadastre has not been started.[123]

By the end of year 2008, the Slovak Republic had spent 42 540 000 € on the procedure for updating the land register. It was envisaged that there will be another 30 007 303 € allocated from the state budget for the completion of the procedures for updating the land register in years 2009 - 2015.[124] For the acceleration of works, in respect of the updating procedure, the Slovak government decided to increase the financing of the procedure by additional 3 319 392 € with the objective to accomplish the registration of ownership rights by the end of 2015.[125]

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122 With exception of land assigned by area planning documentation to objects and infrastructure serving public interest

123 Annual Report of the Office for Geodesy, Cartography and Cadastre 2008. page 11

124 Annual Report of the Office for Geodesy, Cartography and Cadastre 2008. page 11

125 Annual Report of the Office for Geodesy, Cartography and Cadastre 2008. page 11

3. LAND REGISTER VS CADASTRE

Every land register is a very difficult, costly and comprehensive piece of work that takes some decades to create and as we have seen its development is closely linked with the long-term political and economic development. The core business of both the Cadastre in Slovakia and the Land Registry in England and Wales is to register titles to land and record dealings with registered land. There is a difference between the two registers however in the scale of land and population covered. The Land Registry in England serves a population of 54 million compared to a population of 5.5 million in Slovakia. The Land Registry facilitates one of the most active property markets in the world. The computerised register, guaranteed and accessible on-line to anyone, handles in the region of 4.5 million transactions and 11 million enquiries annually. It is the largest on-line transactional database globally.[126] The number of transactions handled by the Cadastre in Slovakia is considerably lower. In 2008 the Administrations of the Cadastre rendered 338,396 decisions on applications for entry in the Cadastre.[127] When we compare the number of transactions with land and population in both countries we can see that 12 out of 100 inhabitants in England purchased a real estate in 2008 while in Slovakia in the same year it was 16 out of 100 residents.

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126 Land Registry Annual Report and Accounts 2007/8 page 13.

127 The possible reasons of the difference in the number of applications in both countries are discussed later in this chapter under the heading “administration”.

It is evident that the registers in both countries serve a similarly busy property market. Therefore the statutory regulations and practice of the Land Registry in England and the Cadastre in Slovakia should facilitate an effective, fast and reliable process of registration. It is one of the main objectives of this work to scrutinise the effectiveness of the registers and registration procedures in both countries and offer suggestions for improvement in both countries.

3.1 PURPOSE OF THE LAND REGISTER AND CADASTRE

Every Cadastre serves its own purpose expressly set by a statute or implied in it. The Slovak Cadastre as an information system as explicitly stated in §2 of the Cadastre Act serves several purposes, mainly:

- protection of rights to real estates
- tax purposes
- valuation of real estates
- protection of farm land and forest land
- protection of the environment
- protection of mineral resources
- protection of national cultural inheritance

There is no equivalent provision to the §2 of the Slovak Cadastre Act that could be found in the LRA 2002. However, the objectives of the Land Register are set out in the 2008 Land Registry report. According to this annually prepared report the Land Register's principal aims are:

- to maintain and develop a stable and effective land registration system throughout England and Wales as the cornerstone for the creation and free movement of interests in land
- on behalf of the Crown, to guarantee title to registered estates and interests in land for the whole of England and Wales
- to provide ready access to up-to-date and guaranteed land information, enabling confident dealings in property and security of title
- to provide a Land Charges and Agricultural Credits service.

In summary, both the Slovak Cadastre and the Land Registry are aimed to maintain and develop an effective land registration system protecting rights to real estates. But, while the Land Register's objective is also the stimulation of transactions regarding land, the Cadastre does not pursue a similar objective. It is understandable that a Land Registry in England, a country with a history of a market economy system, would aim to facilitate dealings in property. Similarly, the absence of the objective of stimulation of transactions regarding real estates in the Cadastre Act can be understood in the light of the historical and economic developments in the Slovak Republic. The Cadastre Act was passed in 1995 just a few years after the

commencement of the process of transformation of the directive economy into the market-oriented one. One would expect that due to the transformation process, the mention of the property market stimulation would be given a particular importance when drafting the Cadastre Act. This was not however the case. One reason could be, that vast majority of law-makers drafting the Cadastre Act were brought up in the system of centrally regulated economy with a very modest experience with open market economies. The stimulation of the property market was not of their main concern. They had fresh in mind the decades of uncertainty concerning rights to real estates[128], when at one time ownership was converted into right of use. Therefore it was completely appropriate to give the highest importance to the protection of rights to real estates.

The Cadastre in addition serves tax purposes by listing the owners of real estates required to pay the annual land tax, whereby the amount of land tax depends on the area of land which is also identified in the Land Register. There is no equivalent to land tax in the English tax regime, therefore there is no need for the Land Register to serve this purpose.[129]

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[128] For more details see previous Chapter I

[129] Stamp duty land tax is however payable on the purchase of a property where the purchase price exceeds a certain amount, currently £125,000. The stamp duty land tax is of different nature as land tax in its ordinary sense. It is not payable on each real estate annually, but only upon a transaction.

Another distinctive feature of the Cadastre the protection of forest and farm land, environment, mineral resources and national cultural inheritance. These objectives are achieved by respective provisions of the Cadastre Act. The provision of §9 requires the parcels to be identified in the Cadastre as one of the listed kind: a) arable land, b)hop gardens, c) vineyards, d) gardens, e) orchards, f) permanent grass growth, g) forest lots, h) water areas, i) built-up areas and courtyards, j) other areas. Another provision §6 lists within the subject of the Cadastre under letter e) the protected parts of nature and country and cultural monuments. The effect of these provisions is that a person investigating information about certain real estate in the Cadastre will know instantly whether it is a farm land, forest land, protected part of nature or cultural monument. Real estates of this specific nature are then protected by provisions of separate acts[130], which must be followed by the owner[131].

On the other hand, the Land Registry's distinctive feature is the provision of a Land Charges and Agricultural Credits service for which there is no equivalent in Slovakia. The Agricultural Credits department is responsible for maintaining a register of short-

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[130] Act no. 180/1995 Coll. on Some Measures Pertaining to the Settlement of Title to the Land, Act no. 49/2002 Coll. on protection of cultural monuments fund, Act no. 543/2002 Coll. on the protection of nature and country, Act no. 44/1988 Coll. on the protection and use of mineral resources

[131] The farm land and forest land is for example protected by provisions of §21 – 23 of the Act no. 180/1995 Coll. on Some Measures Pertaining to the Settlement of Title to Land, which prohibits farm land to be divided into plots smaller than 2000 m^2 and forest land to be divided into plots smaller than 5000 m^2. If the area of a plot is after the division larger than 2000 m^2 or 5000 m^2 respectively but smaller than 20 000 m^2 the person acquiring the plot of land is required to pay a fee calculated in accordance with the Act.

term loans by banks. These charges are secured on farming stock and other agricultural assets of the farmer.[132] The Land Charges Department maintains registers of land charges, pending actions, writs and orders affecting land and other encumbrances registered against the names of owners of property that is not registered under the Land Registration Acts. If the land is registered a land charge is lodged with the register in the form of a notice. The provision of a land charges register is therefore only a temporary measure, until the whole land is on the land register.

3.2 ADMINISTRATION

ENGLAND

The Land Registry was created as a separate government department in 1862 and became an executive agency on 2 July 1990 and a trading fund on 1 April 1993. The Land Registry comprises the Registration of Title Department, dealing with the Land Registry's main business, and the much smaller Land Charges and Agricultural Credits Departments. Since 1 April 2008, the Land Registry operates through 21 offices and 2 sub-offices.[133] The Chief Land Registrar[134] is the Head of the Department, full Accounting Officer and Chief Executive of the executive agency. He

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132 http://www1.landregistry.gov.uk/ar07/services/landcharges/

133 Land Registry Annual Report and Accounts 2008/2009

134 s 99 LRA 2002

is a statutory office holder and is responsible[135] for conducting the whole business of land registration in England and Wales.

The current 'mission' of the Land Registry according to the Land Registry Annual Report and Accounts 2008/2009 is “to provide the world's best service for securely registering ownership of land and facilitating property transactions. The Land Register comprises more than 22 million titles, and more than 10 million hectares – or 69.4 percent – of the land in England and Wales is now registered.”[136] The determination of various categories of dispute arising in the context of registration is now entrusted to the Adjudicator to the Land Registry, the holder of a new office independent of the Registry.[137]

SLOVAKIA

The new Cadastre in Slovakia was built in 1993 for the area of the Slovak Republic which is 49 034 sq. km divided into 8 regions, 79 districts, 2925 municipalities and 3590 cadastral districts[138]. The central state administration authority for the Cadastre

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135 The Chief Land Registrar reports to the Secretary of State for Justice and Lord Chancellor.

136 Land Registry Annual Report and Accounts 2008/2009

137 ss 107, 108 LRA 2002. Appeals against the Adjudicator's decisions are decided by the Chancery Division of the High Court in accordance with s. 111 LRA 2002.

138 State on the date of 1st January 2005. http://www.geodesy.gov.sk/english/eng/maint.html

is *Úrad geodézie, kartografie a katastra Slovenskej republiky* (The Geodesy, Cartography and Cadastre Office of the Slovak Republic).[139]

The administration itself is a three-level system formed by:

1. The Geodesy, Cartography and Cadastre Office of the Slovak Republic
2. Cadastral Offices
3. Administrations of the Cadastre

There are 8 Cadastral Offices, which execute state administration in regions and oversee 72 Administrations of the Cadastre, which execute state administration in districts. Appeals against a decision of the Administration of Cadastre are dealt by the Cadastral Office which acts as the second instance authority. The Cadastral Office is a legal entity, a state budgetary organization financially dependent on the budget of the GCCO, which within its scope of activities, arranges for personnel cost funds and material needs of Administrations of the Cadastre. The Head of Cadastral Office is appointed and can be recalled by the Chairman of the GCCO. The Administrations of the Cadastre are headed by a director, who is appointed and can be recalled by the Head of the Cadastral Office. In order to fulfil the tasks entrusted to it, the GCCO has established and directly controls these research institutes: the Geodetic and Cartographic Institute Bratislava, the Cadastral Institute in Žilina and the Research

[139] This is in accordance with the Act no. 575/2001 Coll. on the organisation of ministries and on the organisation of the central administration and also in accordance with the Act no. 162/1995 Coll.

Institute of Geodesy and Cartography in Bratislava, each of which has a specific research orientation with a nationwide area of competence. Unfortunately, in Slovakia there is no office equivalent to an independent Adjudicator in England. A provision of this kind could serve as an effective filter of disputes, arising in the context of registration, ending up in the court.

COMPARISON

What can be observed from the above mentioned is that the 21 offices and 2 sub-offices with 7500 full-time equivalent employees (as at 2007/2008)[140] in England cover a territory of 151 174 km^2 and deal with 4,5 million transactions per year[141] compared to the 8 cadastral offices and 72 cadastral registries with 2727 full-time employees (as at 2007)[142] in the Slovak Republic covering a considerably smaller territory of 49 035 km^2 and dealing with 338,396 transactions per year[143]. If we compare the proportion of number of employees with the territory covered we can see a similarity of the ratio in both countries. In England there is one Land Registry employee per 20 km^2 while in Slovakia the proportion is just slightly smaller, one Cadastre employee per 18 km^2. On the other hand if we compare the number of transactions per employee in both countries, a considerable difference in numbers

[140] http://www.eulis.eu/countries/profile/england-and-wales/

[141] As at 2008. Excluding other applications.

[142] Annual Report 2007 of Office of geodesy, cartography and cadastre SR (Úrad geodézie, kartografie a katastra SR) ref. number: P – 3322/2008

[143] As at 2008. Excluding other applications.

can be observed. While in England each employee on average deals with 600 transactions per year, his colleague in Slovakia processes only 124 transactions per year. This is a significant difference, mainly due to a more complicated, burdensome decision making and registration process in Slovakia[144]. The disproportion in productivity should move the Slovak legislative body to review the current statutory instruments in the light of the English example in order to facilitate speedy and cost-effective process of administration of the Cadastre.

3.3 THE SUBJECT AND CONTENT OF THE LAND REGISTER / CADASTRE

In introducing the system of administration of the Cadastre and the Land Register I find it appropriate to identify the subject as well as the content of both registers. Although there is a close relationship between the subject and content of the cadastre, the term subject indicates which parts of the material world and connected rights are to be registered, while the term content identifies the information held in the register about the subject. While the Slovak Cadastre Act expressly defines the subject and the content of the Cadastre, its English equivalent does not contain a similar provision. The LRA 2002 only states the dealings which are subject to compulsory registration. Nevertheless, the subject and the content of the Land Register can be extracted from the provisions of the LRA 2002 in connection with the LPA 1925.

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144 For more details on decision-making and registration process see Chapter V

A. THE SUBJECT

In accordance with §6 of the Cadastre Act the following items are recorded in the Cadastre:

a) the cadastral districts

b) the parcels

c) the buildings connected with the land by solid foundation

d) flats, unfinished flats, non-housing premises and unfinished non-housing premises

e) the protected parts of nature and country and cultural monuments,

f) rights concerning real estates and other connected information such as announcement of the bankruptcy proceedings filed against the owner of the real estate and various stages of the process of the execution by the sale of the real estate.

The Land Register is intended to be primarily a title register, therefore the subject of the Land Register is set out in the LRA 2002 under the heading “Scope of title registration”[145] according to which, the LRA makes provision about the registration of title to -

a) unregistered legal estates which take a form of an estate in land or some other interests ie a rentcharge

[145] s. 2 LRA 2002

b) interests capable of subsisting at law which are created by a disposition of an interest the title to which is registered.

The differences in the scope of subject of the Cadastre and the Land Register can be linked to the differences in the purposes of each register. The Cadastre serves various purposes[146], which require also to include within the subject of the register cadastral districts, parcels, protected parts of nature, cultural monuments. For example, if the Cadastre is to serve tax purposes, it must contain also information on each parcel of land and its owner[147]. Buildings, flats, unfinished flats, non-housing premises and unfinished non-housing premises are registered in Slovakia separately as the Roman law rule “Superficies solo cedit” has not been adopted.

In contrast, the Land Register as mentioned above serves merely the purpose of security of title and free movement of interests. Thus, the Land Register is unlike the Cadastre purely a register of title and is not intended to be a register of land and buildings connected to it. In the light of the above mentioned the title of the “Land Registration Act” seems not to be the most accurate and it should rather say “Title Registration Act”.

B. THE CONTENT

146 See above.

147 Also, if the purpose of the Cadastre is the protection of environment it must contain information on parts of nature and country which are subject to a specific protection regime.

SLOVAKIA

The Cadastre Act further in §7 identifies the data registered as the content of the Cadastre:

a) geometrical determination and location of the real estates and the cadastral districts,

b) parcel numbers, kinds and areas of lots, registration numbers of buildings, data about the prices of agricultural and forest land , as well as other selected data,

c) data about the rights to real estate, identification data about the owners and about other persons entitled,

d) the data on the basic and minor horizontal controls or the data on the controls,

e) settled or non-settled geographical names.

ENGLAND

Unlike the Cadastre Act, the LRA 2002 in England does not contain a provision explicitly defining the content of the register. The LRR 2003, however, provide us with a good guidance in this respect when identifying information held in the individual

register created for each title. Individual registers are generally sub-divided into three parts or subregisters, known respectively as the property register, the proprietorship register and the charges register[148]

1. The property register

This describes the land and the estate for which it is held, refers to a map or plan showing the land, and contains notes of interests held for the benefit of the land, such as easements or restrictive covenants of which the registered land is the dominant tenement.[149]

2. The proprietorship register

This states the nature of the title[150] (i.e. whether it is absolute, good leasehold, qualified or possessory), states the name, address and description of the registered proprietor, and sets out any cautions, inhibitions and restrictions affecting his right to deal with the land.[151]

3. The charges register.

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148 LRR 2003, Part I rr 5 - 9

149 In accordance with LRR 2003 rr 5: "The property register of a registered estate must contain – a) a description of the registered estate which in most cases must refer to a plan based on the Ordnance Survey map and known as the title plan; b) where appropriate, details of easements and other subordinate rights; c) such other matters as are required to be entered in the property register by these rules."

150 For more details see Chapter V

"Whereas the property register describes the positive side of estate ownership, its negative aspects (judged from the registered proprietor's viewpoint) are revealed in the charges register."[152] The charges register of a registered estate must contain, where appropriate [153]: details of leases, charges, any other interests which adversely affect the registered estate, dealings with these estates, identification of the proprietor of any registered charge, restrictions and notices in relation to a registered charge.

COMPARISON

In summary, although the frame of the content of both registers at a brief glance seems to be very similar in the way that they contain information on the property, proprietorship and charges, a closer look reveals many differences in the level of details required by law to be included in the register. In general, the Slovak system of registration sets higher requirements as to the amount of data to be included in the register. While the LRR 2003 only generally require the property to be described and refer to the title plan, the Cadastre Act includes the geometrical determination and location of the real estates as well as the parcel number, kind and areas of lots ... and

151 In accordance with LRR 2003, rr 8: "The proprietorship register of a registered estate must contain, where appropriate: a) the class of title, b) the identification of the proprietor of the registered estate, c) restrictions and notices in relation to the registered estate, d) where the class of title is possessory, the name of the first proprietor of the registered estate, and e) such other matters as are required to be entered in the proprietorship register by the land registration rules."

152 Gray, K., Gray S. F.: Land Law. Oxford University Press. 6th edition, 2009. page 93

153 r 9 LRR 2003

other data in accordance with the §7 of the Cadastre Act. An English lawyer would in relation to the amount of data included in the register ask “Why on earth do you need that ?!”, while his colleague in Slovakia would find the same information as absolutely normal and necessary. This is because the Slovak conveyancing is marked with extreme formalism, which has no equivalent in England. Advocates in Slovakia very precisely identify the real estates in the contract, to avoid the contract to be declared void for uncertainty. For this purpose the conveyancing advocates use the information held on the register.

On the other hand the Land Register contains some information that cannot be found in the Cadastre such as: easements and other subordinate interests benefiting the registered estate. Easements and other similar interests are only recorded in the Cadastre in the information regarding the servient real estate and not the dominant real estate.

In respect of the proprietorship data a high level of similarity can be observed, although with a number of deviations in each register. Identification of the registered proprietor, including the name and address of the owner, is common for both registers. However the Land Register contains additional information on the nature of the title – absolute, good leasehold, qualified or possessory. The Slovak system of land law does not contain a similar division of the titles to land. The title to land is always ownership – an absolute right in rem, which can vest in a single individual or legal entity or can have a form of commune ownership.

3.4 PRINCIPLES OF THE TWO SYSTEMS OF REGISTRATION

3.4.1 THE PRINCIPLE OF PUBLICITY

This principle means that the information in a Land Registry is available to the public and anyone may request an official or unofficial copy of the entries in it without any need of proof of interest.[154] The principle of publicity embraces the right to inspect the register, make extracts as well as request official copies thereof.

In England the land register was opened to public inspection, with the right to obtain copies of it on 3rd December 1990. By March 1991 about 1,000 copies a day were being issued to enquirers.[155] Previously, nobody could inspect it or obtain copies of it without the authority of the registered proprietor of the land,[156] though on a sale or other disposition (except a lease or charge) the vendor was obliged to give the purchaser an authority to inspect the register.[157] Further, an Index Map, a Parcels Index and a list of pending applications have been made open to public inspection[158],

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154 Peceň, P. a Kol: Pozemkové Právo I, Tripe Bratislava, 1995, page 95.

155 Land Registry Annual Report 1990 – 1991

156 ss. 112, 122A LRA 1925

157 s. 110 (1) LRA 1925

158 r. 8, 10, 12 LRR 1925

making it possible to discover whether or not any particular property has been or is about to be registered.[159]

Unlike in England, the idea of a Cadastre accessible to the public was not a novelty but a mere continuation of the tradition of Land Books open to public inspection. The principle of publicity is set out in § 68 subsection 1 of the Cadastre Act: “The cadastral documentation is public. Everyone has the right to access the cadastral documentation and to make extracts, copies or outlines thereof.” The main reason for publicly available cadastral data is to facilitate a public control of the administration of the cadastre and in this way minimise the occurrence of maladministration.

One might be interested in examining the reasons behind the differences between the two systems compared, particularly why the information on the register in England were made open to public inspection as late as in 1990, more than 100 years after Slovakia. The degree of transparency of personal information, in particular the transparency of the sensitive issue of property ownership, differs from state to state. What is acceptable in one country can be regarded as unthinkable in the other. As example we can point to Norway which operates a list of publicly open information on each persons income and tax levied in certain year. They are publicly accessible to that extent that anyone may search for this information on the internet. This

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159 “The access provisions of the Land Registration Act 2002 give effect to the view that the contents of the Land Register should no longer be regarded 'as a private matter relevant only to the parties to a conveyancing transaction'.” In: Gray, K., Gray S. F.: Land Law. Oxford University Press. 6th edition. 2009. page 99

approach has not been adopted by most states. In majority of countries the governments are reluctant even to introduce the duty of persons holding public offices to declare their incomes. It is a generally accepted observation that governments are reluctant to adopt a rule which would be unpopular with the majority of electors even if it would serve a good purpose. In fact, also the delayed adoption of the LRA 1925 was in part due to the lack of political will to move from unregistered conveyancing to the registered one. Similarly, in respect of amendments in December 1990 many were aware that by making the land register open to public inspection their previously well hidden property ownership would be revealed, which was not wished.

The historical development aspect should also not be omitted when examining the reasons for differences in adopting the principle of publicity. One of the reasons why the incorporation of the principle of publicity into the new Cadastre Act in 1995 was so effortless was that the principle was already in place for more than hundred years. In fact, it was such a firm principle of the Slovak system of registration that nobody would even think of having a register with information not open to public inspection. We don't know what the reaction of people would be if the principle was not already a part of the Slovak system of land registration. It might have well been that the adoption of the principle would have been postponed to the late 20th century as it was the case in England.

SCOPE OF THE RIGHT TO INSPECT

As we have seen, both the Land Register and the Cadastre are open to the public. To discover to which extent they are accessible to the public, a comparison between the two registers as to the information subject to public inspection will be made here.

In England, the information which is subject to public inspection is defined in section 66 of the LRA 2002 “Any person may inspect and make copies of, or of any part of -

a) the register of title,

b) any document kept by the registrar which is referred to in the register of title,

c) any other document kept by the registrar which relates to an application to him, or

d) the register of cautions against first registration.

Official searches can be made also in respect to the index kept under section 68 of the LRA 2002 which contains also an index map[160] In addition, under the English system, the registrar may on application provide information about the history of a registered title.

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[160] In accordance with s. 10 of the LRR 2003 the Index must be comprised of an index map from which it is possible to ascertain, in relation to a parcel of land, whether there is - (i) a pending application for first registration, (ii) a pending application for a caution against first registration, (iii) a registered estate in land, (iv) a registered rentcharge, (v) a registered profit a prendre in gross, (vi) a registered affecting franchise, or (vii) a caution against first registration.

In Slovakia, as mentioned above, the Cadastre Act[161] stretches the right to inspect over the whole cadastral documentation. The cadastral documentation is defined[162] as “a set of documentary materials comprising the cadastral data belonging to one cadastral district and is formed of the following items[163]:

a) a set of geodetic information[164]

b) a set of the descriptive information[165]

c) set of documents[166]

d) summary data of the cadastre on the land fund,

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[161] §68 of the Cadastre Act

[162] §3 s. 9 of the Cadastre Act

[163] §8 of the Cadastre Act

[164] ie cadastral maps, survey sketches, the list of coordinates and other geodetic documentation.

[165] ie data on the cadastral districts and parcels, data on rights to the real estates, identification of the owners and other entitled persons, data on settled and non-settled names.

[166] Such as written forms of contracts, agreements and declarations made in writing, written forms of decisions of the state authorities and notarial certificates as well as other deeds confirming rights to real estates.

e) land books, railway books and their documentation

In summary, the information subject to the right to inspect can be divided into: 1. set of geodetic information, 2. set of descriptive information, 3. documents, 4. historical information and 5. list of pending application.

It is only the Slovak Cadastre Act which refers expressly to the set of geodetic information as being open to the public. The Land Register is not intended to include geodetic information, but to be merely a register of title. Therefore, the title plan under the English system of land registration is a document which shows only an outline of the property and its location in relation to the surrounding properties and not the exact geodetic information. Although the Land Registry keeps a computerised map based on the Ordnance Survey map, this only provides an index of the land in every registered title and pending application for first registration. Similarly, the Index Map reveals merely the title numbers affecting the property and any Cautions against first registration.

The set of descriptive information contains information about the property, the title and the persons entitled. The major differences in descriptive information contained in the Land Register and the Cadastre, such as more precise description of the properties, can be found above in the section regarding the subject of the registers. All this information is accessible to public.

While the documents referred to in the Land Register are open to public inspection, the set of documents included in the Cadastre are excluded[167] from the general right to inspect the Cadastre. These documents referred to in the Cadastre Act include mainly written forms of contracts, agreements and declarations, public deeds, decisions of state authorities and notarial certificates as well as other deeds authenticating under the law rights to real estate. Although the documents kept by the registrar in England are open to public inspection they are not as numerous as those kept by the registrar in Slovak Republic. While the documents delivered together with the application for registration in England are handed back to the applicants after they had been inspected by a registrar, the documents submitted with an application for an entry in the Cadastre are kept by the registrar. The practice of keeping the original documents has its importance for combating frauds, as the document kept on the register would reveal whether the mistake on the register is due to an unlawful act of a party to the contract[168] or a result of an error/fraud of a land register employee.

Under the English system[169] the registrar may on application provide information about the history of a registered title. Older copies of the Title Register can be obtained from May 1993 to the date the current owner purchased the property. A

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167 §68 (5) of the Cadastre Act

168 e.g. the signature on the document is forged

169 s. 69 (1) LRA 2002

separate fee is payable for each date searched. If a person wishes to search back earlier than 1993 the only way to do this is to look through the current Title Register to see if there are any Registered Old Deeds available for purchase. Documents which are described as conveyances or transfers are the purchase documents and will contain the names and addresses of the vendors and purchasers. These documents often can date back to the 19th century. The Slovak Cadastre Act does not put a time restriction on the historical searches. A person may inspect Land Books operated under the previous system as well as obtain copies of information thereof.

The LRR 2003 make it clear that the list of pending applications can be searched by individuals. The land registration practice in Slovakia however takes a different approach. The only information open to the public in respect of pending applications are the numbers under which the application was received. Neither the parties to the transaction, nor the terms and conditions of the transaction are open to public inspection in Slovakia.

EXCEPTIONS

There are some exceptions to the principle of publicity. In accordance with the Cadastre Act[170] publishing personal identification number and data on the price of agricultural land and forest is forbidden. This information is however accessible for the owner of real estate.[171]

[170] §69 of the Cadastre Act

[171] § 68 subs. 4 of the Cadastre Act

In England, LRR 2003[172] provide for exceptions from the general right, whereby anyone can apply at any time for a document containing prejudicial information to be designated an exempt information document as long as the document falls within the definition of 'relevant document'[173]. A ‘relevant document’ is a document referred to in the register of title, or one that relates to an application or accompanying application to the registrar. It may be the original or a copy of the document which is kept by the registrar. This means that potentially sensitive information contained in leases and charges referred to in the register can be exposed to public scrutiny unless the registrar upon application designated a particular document as an 'exempt information document'. The registrar however, must be satisfied that the disclosure of a particular document would be likely to cause substantial unwarranted damage or distress to the registered proprietor or would be likely to prejudice his commercial interests.[174]

The Slovak Cadastre Act does not contain a similar right to apply for exception from the general right of publicity, but expressly excludes[175] certain documents[176] from the

[172] r 136 of the LRR 2003

[173] r 137 of the LRR 2003

[174] r 131 LRR 2003

[175] § 68 subs. 5 of the Cadastre Act

[176] set of documents, which contains namely written forms of contracts, agreements and declarations made in writing by the entering entity of the entry of real estates owned by legal entities, written forms of the

right to inspect and make copies. These documents can be searched only by owners or other entitled persons or by persons carrying out expert activities in the field of geodesy, cartography and cadastre.

PROCEDURE FOR OBTAINING A CERTIFIED COPY

A verified extract or a verified copy from the set of geodetic information, set of descriptive information, land books and railway book is provided by the Administration of the Cadastre upon request.[177] The verified extract or the verified copy are public deeds, however the Cadastre Act knows also copies which are not public deeds.[178]

The right to request copies is applied in the same extent as the right to inspect the Cadastre. The only exception is that the cadastral registry will not execute a certified extract or copy of an ownership certificate on which there is a note that the ownership to the land is affected by a change (ie transfer of rights)[179]. The Administration of the Cadastre enters this note on the register upon the receipt of any contract affecting

decisions of the state authorities and notarial certificates as well as other deeds authenticating under the law rights to real estate and the documentation of settlement and non-settlement names

177 § 69 (3) of the Cadastre Act

178 § 69 (5) of the Cadastre Act

179 § 44 subs. 1 of the Cadastre Act

rights to the property.[180] If such a note is entered in respect of a certain property, an extract or a copy of the ownership certificate concerning this property can be issued only to the owner or person authorized by him or to a person authorized under a special regulation[181]. The ownership certificate will be in such case marked with a note that the rights to the property are affected by a change.

The right to obtain copies of the documents such as contracts and public deeds is also limited[182]. The set of documents is open only to the owners or other entitled persons or to persons carrying out expert activities.[183] The reason for this exclusion is the protection of private and potentially prejudicial information contained in the documents.

The LRA 2002[184] just like the Cadastre Act does not narrow the scope of the right to request copies of the register in comparison to the right to inspect the register. From

180 The entering of such a note on the Cadastre is examined further in the following subsection referring to the "Principle of priority".

181 Such as surveyors during the procedure for updating the Cadastre. For more details on this procedure see Chapter II subheading "The way towards the comprehensive land register" section about Slovakia.

182 § 68 (5) of the Cadastre Act

183 Such as persons carrying out geodetic work concerning land consolidation under a separate regulation, persons making survey sketches or laying out lot boundaries, persons carrying out expert activities in the field of geodesy, cartography and cadastre or persons preparing price maps.

184 s.66 (1) LRA 2002

the right to make copies of the registers and documents are only exempt: a) any exempt information document, b) applications setting out the reasons for exemption in support of an application to designate a document as an exempt information document, and c) applications in connection to court proceedings, insolvency and tax liability.

DIFFERENCE BETWEEN OFFICIAL AND UNOFFICIAL COPY

The difference between an official and unofficial copy can be seen in liability for mistakes in it. In accordance with LRA 2002[185] an official copy is admissible in evidence to the same extent as the original. It is further stated[186] that a person who relies on an official copy in which there is a mistake is not liable for loss suffered by another by reason of the mistake.

The same rules regarding official copies are applied in Slovakia. In accordance with the Cadastre Act[187] the verified extract or the copy are public deeds. In the same way as official copies under the LRA 2002, these are admissible in evidence to the same extent as the original and a person who relies on an official copy in which there is a mistake is not liable for loss suffered by another by reason of the mistake and may apply for indemnity.

185 s. 67 (1) LRA 2002

186 s. 67 (2) LRA 2002

187 § 69 (1) of the Cadastre Act

PROCEDURE FOR OBTAINING COPIES

Obtaining official copies in England requires filing a particular application form depending on what document is to be copied.[188] In accordance with s. 134 (3) LRR 2003 “a separate application must be made in respect of each registered title or individual caution register”.[189]

Unlike in England, in Slovakia there are no specific forms for applications for official copies of the register. The application process is informal. Information from the Cadastre is available without the need to prove any legal or other interest in it. The applications can be made in writing, orally, by fax, electronically or by other technical means. However, some general requirement for the application must be met. It must be clear from the application by whom it is made and to which state organisation it is addressed, information requested and suggested form in which the information should be made available. If the application does not meet the prescribed requirements, the issuing authority will request the applicant to amend the application. Applicants may receive the requested information verbally, by having a

[188] The form OC1 is designed for applications for an a) official copy of an individual register, b) an official copy of any title plan referred to in an individual register, c) an official copy of an individual caution register and any caution plan referred to in it, and d) certificate of inspection of any title plan. r 134 (1)(2) LRR 2003

[189] The form OC2 serves applicants wishing to obtain an official copy of a) any document referred to in the register of title and kept by the registrar, b) any other document kept by the registrar that relates to an application to him. r 135 (1)(4) LRR 2003

document available for inspection, by obtaining a copy, over the phone, fax, by mail or e-mail.

ISSUING AUTHORITY

In Slovakia the Cadastre Act[190] sets out the powers of each Administration of the Cadastre and includes the right to verify the copies or the duplicates of the public deeds or other deeds which are to be the basis for the entry into the Cadastre. Similarly, the Land Registry in England has a number of local offices endowed with power to issue official copies of the information from the land register, each of which is responsible for a different geographical area in England and Wales and is headed by a Land Registrar.

ADMINISTRATIVE FEES

The schedule 2 part 2 of the Land Registration Fee Order 2008 in England and the Act no. 145/1995 on the administrative fees in Slovakia regulates the administrative fees in respect of land registers related applications. The analysis of both statutory instruments reveals a fairly similar regulation of the administrative fees. This can be demonstrated on some examples of most common applications for inspection and copying services. In England, inspection from a remote terminal for each individual register or for each title plan costs £4, while inspection by other means costs double - £8. Same fees apply also to copies of a registered title for each individual register. In comparison, in Slovakia the Cadastral documentation is available for inspection for a

[190] §18 (2) (j) of the Cadastre Act

small fee of 3 €, while the copy of the ownership certificate or an excerpt from the Cadastre of is executed for a fee of 8 €. In addition to the services provided also in England, the Cadastre Office can serve applicants with copy from the cadastral map for a relatively small fee of 8 €.

SPEED OF APPLICATION PROCESSING

The statutory time limit for application processing by the Slovak issuing authority is set in Act no. 211/2000 Coll. According to this Act the cadastral office is obliged to provide the applicant with the requested information without any delay, and at latest within 8 working days[191] from the day when the application was submitted or from the date when the application was amended. In exceptional cases the issuing authority may extend the time limit by a maximum 8 working days[192].The applicant however must be notified of this extension prior to the end of the statutory time limit. In practice, the cadastral offices process applications for inspection or for copies of cadastral documentation well within the statutory time limit. The cadastral office if visited in person provides a person with an official copy of ownership certificate or other information within three hours, depending on the actual waiting time.[193]

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191 The information provided to a blind person in Braille writing has to be processed within 15 working days.

192 Or 15 working days when the information is to be provided in Braille writing.

193 http://hnonline.sk/c1-26222050-list-vlastnictva-najdlhsie-sa-caka-v-ziline

The processing of applications in England is equally prompt as in Slovakia. Pursuant to the Land Registry's Annual Report 2007/2008 the “percentage of official copy and official search applications processed within 2 working days is 98%”. There is however no statutory time limit set for application processing as it is in Slovakia.

1 3.4.2 THE REGISTRATION CONFERS TITLE

The specification of the moment when the title vests in the purchaser as new proprietor is important for number of reasons. Under both English and Slovak land law, the seller will be the one liable for *vis maior* until the time when the title passes on the purchaser, save where the parties agreed otherwise. Also, from this moment the purchaser can take the real estate into possession as well as perform other rights which form the content of the ownership right.

Under English unregistered conveyancing, the vendor's estate in the land passes to the purchaser as soon as the conveyance is executed, while in registered conveyancing, the execution of the transfer by the vendor confers no estate on the purchaser. It is registration that vests the title in the purchaser in accordance with the register. Registration is treated as having effect “as of” the day when the purchaser delivers the relevant documents to the appropriate District Registry.[194]

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[194] r 74 LRR 2003

Unlike in England, the entire land in Slovakia is on the register, therefore every contractual transfer of land has to be registered by way of entry. In accordance with the Cadastre Act[195] the entry in the Cadastre takes legal effect on the date of the decision of the Administration of the Cadastre about the permission of an entry. There are however two exceptions to this rule where the registration takes effect on a different day. When transferring state property to other persons, such as municipalities, the entry in the Cadastre takes effect on the date set out in the application for an entry.[196] Also, when transferring ownership to an apartment or to non-housing premises to a tenant the entry in the Cadastre takes effect on the date of delivery of the application for an entry.[197]

In summary, the moment when the title passes from the seller to the purchaser is in principle the same for registered conveyancing in both countries. This rule corresponds with the mirror principle and principle of credibility, under which the information on the Cadastre/Land Register is considered to be a true reflection of the actual state of rights to real estates. These principles could not be fulfilled if the title passed upon conclusion of the contract or upon the execution of the deed of conveyance (England). If the title passed to the purchaser upon conclusion of the contract and not upon registration, the register would during the time between the

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195 §28 (3)

196 § 28 (4) of the Cadastre Act

197 § 28 (5) of the Cadastre Act

conclusion of contract and the registration show as proprietor the seller and not the purchaser as the new proprietor. Hence, the register would not serve as a “mirror” of the real state of legal relationships.

On the other hand, the difference between the two systems of land law in respect of the moment relevant for the title transition can be seen in unregistered conveyancing in England where the moment relevant for transition of title is the time by execution of the deed of conveyance. However, since the introduction of the compulsory registration of dealings with land, practically every dealing with land has to be registered and the title thus passes upon registration. Similarly it is under the Slovak land law, where, as already stated, all the land is on the register. Slovak legal theory considers the conclusion of the contract to be merely the *iustus titulus* (the legal title), while the subsequent registration in the Cadastre is considered to be the *modus acquirendi* (the means of acquiring the real estate).

3.4.3 THE PRINCIPLE OF CONCLUSIVENESS OF REGISTRATION

In England, the registration is conclusive of title. When a title is first registered, the registration confers a new statutory title[198] on the registered proprietor, even if his previous title was defective or he had no title at all, as where he claims under forged title deeds. The act of registration confers the statutory title on the proprietor, and he

[198] In accordance with s. 58 (1) LRA 2002: “If, on the entry of a person in the register as the proprietor of a legal estate, the legal estate would not otherwise be vested in him, it shall be deemed to be vested in him as a result of the registration.”

holds this title subject to any subsisting entries on the register, and subject to any overriding interests; but he holds free from all other interests, even if he has full notice of them.[199] Thus, subject to overriding interests, the register is conclusive in England. The one qualification to this doctrine is that there are limited powers to rectify the register in order to correct errors; but normally these are subject to the payment of compensation to any person thereby suffering loss. Subject to this, a registered title is indefeasible.

The register has a conclusive quality also in the Slovak Republic. However, the term "overriding interest" is not known under the Slovak system of land registration. Every charge and interest must be put on the register, otherwise it does not have the protection of a right in rem and the interest upon the transfer of land would not be binding upon the purchaser as the new owner. Similarly as the Land Register, the Cadastre may be rectified should any data errors appear on the register.[200]

One specific feature of the Land Register in England compared to the Cadastre in Slovakia is the existence of "overriding interests", ie interests to which a registered title is subject, even though they do not appear on the register. They are binding both on the registered proprietor and on a person who acquires an interest in the property.

[199] Megarry, R., Wade W.: The Law of Real Property. Sweet & Maxwell, 6th edition, 2000, page 98.

[200] §59 of the Cadastre Act

[201] They have always been a feature of the registration system, though the term itself was first introduced in the LRA 1925. In Land Registry Practice Guide, December 2005, page 2.

I find it appropriate to give some consideration to interests of this sort, as these have been very much criticized in the last decades. Many advocate the complete abolition of overriding interests, as in other countries. Sexton stated: “I would abolish overriding interests, making all third party rights minor interests. Then we would be at least approaching the position which already exists in some countries within the European Union, where it is actually true that, 'Everything you need to know is on the register'.[202]“ Others take the view that overriding interests should not be completely abolished, but rather an equal balance between those holders of interests and purchasers should be found.

Initially the law commission considered abolishing the category of overriding interests altogether, but later it took the view that this was not feasible. The Law Commission stated in their Consultative Document that, “it is unreasonable to expect all encumbrancers to register their rights, particularly where those rights arise informally, under (say) a constructive trust or by estoppel. The law pragmatically recognises that some rights can be created informally, and to require their registration would defeat the sound policy that underlies their recognition. Furthermore, when people occupy land they are often unlikely to appreciate the need to take the formal step of registering any rights that they have in it. They will probably regard their occupation as the only necessary protection. The retention of this category of overriding interest is justified…because this is a very clear case where protection against purchases is

[202] Sexton, R.: Cases and materials. Land Law. 2nd edition, page 138. http://www.oup.com/uk/orc/bin/9780199284436/sexton_chap10.pdf

needed but where it is not reasonable to expect or not sensible to require any entry on the register." Nevertheless the LRA 2002 reforms[203] the operation and scope of overriding interests in order to minimise their impact on land.

I find it appropriate to analyse here the necessity of overriding interests operating under the LRA 2002. Is there any justification for their existence? Are they inevitable? How are the same interests protected under the Slovak system of land registration? As mentioned above, one of the objectives of the 2002 Act is to reduce the number of overriding interests which are binding upon the purchaser of a registered title. However, in my view, the 2002 Act achieves this purpose only to a very limited degree. Of the five important categories of overriding interests in the LRA1925, only one is abolished, namely "rights acquired or in the course of being acquired under the limitation acts". Of the remaining four categories of overriding interests, one, Local Land Charges, remained unchanged, while the other three categories – a) Easements and Profits, b) Short-Term Legal Leases, and c) Property Rights of a Person in Actual Occupation – have been reduced in their scope.

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[203] The eventual objective to bring overriding interests on to the register is to be achieved by: 1) reducing the number of potential overriding interests in respect of both first registration and subsequent dispositions of a registered estate and by redefinition of the remaining ones, 2) providing for the eventual abolition of others – certain interests lose their overriding status after 10 years, 3) requiring people applying for registration to provide information about unregistered interests within their actual knowledge, so that they can be noted on the register – except specified kinds of interests, 4) general power for Land Registry to note overriding interests that come to, or are brought to its attention, 5) providing that, once an interest has been noted on the register, it loses its overriding status forever, even if the register entry is cancelled.

Now I am going to discuss separately each category of overriding interests in more detail while focusing on the justification of their existence.

1. Local Land Charges

Each District Council in England and Wales keeps a register of local land charges, and the system of local charges operates irrespective of whether title to the land is registered or unregistered. Thus, when buying land, the wise purchaser always does a local search. Local land charges cover rights such as the listing of a building as of historic interest, tree preservation orders or special charge for the making up of a road. For, they present important public law rights which are ascertainable from a separate register I do not question their binding quality on the purchaser regardless whether he has an actual knowledge about them. What I however cannot understand is the operation of local registers separately from the Land Register. The charges of this kind are in Slovakia ascertainable from the mere inspection of the Land Register. From my viewpoint it would be more practical to keep only one land register where a person interested could find also the information which is currently ascertainable from the Local Land Charges registers.

2. Easements and profits

In accordance with the LRA 2002 easements and profits already existing against a registered title continued to be governed by the old LRA 1925, s.70(1)(a) and the case law interpreting that provision.[204] Thus, all old easements and profits, however

[204] See sch. 12, para 9 LRA 2002

they were created, and whether they are legal or equitable, continued to be overriding interests after 12 October 2003. However, after 12 October 2006 these existing easements and profits became subject to the permanent rules set out in sch. 3, para 3 of the LRA 2002. “The Law Commission, in its consultations which preceded the 2002 Act, was very concerned about the plight of a purchaser who buys a piece of land and then discovers that the land is subject to easements and/or profits which have not been exercised for some years.”[205] In accordance with the permanent rules, a legal easement or profit arising by implied grant or prescription will only be overriding if any one of the following three conditions is fulfilled:

(a) the purchaser had 'actual knowledge' of the easement or profit on the date of the land transfer in his favour; or

(b) the existence of the right would have been apparent 'on a reasonably careful inspection of the land over which the easement or profit is exercisable'; or

(c) if the easement or profit has been exercised at least once in the year prior to the land transfer.

It is apparent that the new rules are extremely complicated. Furthermore, as a result of these new rules, only a very few legal easements and profits will be excluded from being overriding interests. Thirdly, in accordance with sch.3, para 3 letter c) of the

[205] Sexton 122

LRA 2002 one journey in the middle of the night would be enough to preserve the overriding status of a right of way. Also, the Act does not contain a legal definition of the term 'reasonably careful inspection' which might generate litigation.

The LRA 2002 further requires all easements and profits expressly granted after the commencement of the Act to be registered.[206] If a dominant owner of an easement or profit fails to register his right, the easement or profit will take effect only as an equitable interest, while equitable easements and equitable profits created after the commencement of the LRA 2002 are always minor interests. They will only bind a purchaser if the dominant owner has entered a notice on the register protecting his right.

The new legislation by retaining the overriding status of the old easements and profits does not contribute much to the security of the conveyancing process. The new act allows for the existence of a significant number of old easements or profits with overriding status for an unlimited period of time. The adopted rules applicable from 2006 does not reduce significantly the number of overriding easements and profits. The purchaser will therefore still have to make various searches and 'reasonable inspection' in order to find out any old easement or profit affecting the land. It is clear that the transfer of ownership would be more straight forward if the new Act required also the old easements and profits to be registered within a certain period of time. In comparison, all easements and profits in Slovakia are subject to

[206] s. 27(2)(d) LRA 2002

compulsory registration, although it must be noted that there was a longer tradition of their registration. The new legislation adopted after the fall of the socialism made the registration of easements and profits compulsory without including similar rules as can be found in the English LRA 2002.

3. Short-term leases

The sch. 3, para 1 of the LRA 2002 made overriding all legal leases of a duration not exceeding seven years. This is because all leases over seven years are substantively registrable. The short lease is overriding irrespective whether the tenant is occupying the property and irrespective of whether or not the tenant tells any enquirers that he has rights in the land. The new Act however retained the overriding status of the leases between seven and twenty-one years already in existence on the day the new Act commences. Therefore there was no real need for registration of those leases. Also, if after the commencement of the new Act, a lease is granted by deed for more than seven years and the lessee takes possession but fails to substantively register the lease, the lease will not be totally void, but will take effect in equity. Ironically, the unregistered lease might well still be an overriding interest under Sch. 3, para. 2 – property rights of a person in actual occupation.

Thus, in accordance with the English statutory provisions the purchaser will be bound by all new legal leases not exceeding seven years and by every lease which is to last between seven and twenty-one years. The new Act does not mean a significant improvement for the protection of purchasers' rights. Even after the commencement

of the new Act, the purchaser will have to conduct the same level of investigation as under the previous LRA 1925. In comparison, in Slovakia leases which last or should last at least 5 years must be registered in the Cadastre in order to gain *in rem* status. Leases of shorter duration are not registrable and are only binding *inter partes*. Therefore, the purchaser who buys a property which is subject to a lease contract for a duration of less than five years is not bound by the lease. The lessee could only enforce his rights against the lessor with whom he signed the contract. From the above mentioned we can conclude that the Slovak provisions provide better protection of a purchaser from undiscovered leases than the English provisions.

4. Property rights of a person in actual occupation

In respect of the property rights of a person in actual occupation "the Society of Legal Scholars[207] recommended to the Law Commission that the s. 70(1)(g) overriding interest[208] should be repealed without replacement. That would have meant a considerable simplification in the law. But the Commission (and Parliament) rejected this advice. Instead, they have replaced s. 70(1)(g) with a new provision, LRA 2002, Sch. 3, para 2, which is similar but more complex than s.70(1)(g)."[209] The Law Commission found the existence of overriding interest of a person in actual

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[207] The University Law Lecturer´s professional association

[208] "The rights of every person in actual occupation of the land or in receipt of the rents and profits thereof, save where enquiry is made of such person and the rights are not disclosed.

[209] Sexton 125

occupation justifiable in order to protect occupiers who cannot reasonably be expected to protect their rights through registration.[210]

In general, the effect of the new Act is that every type of property right in land can be an overriding interest provided there is 1. actual occupation at the time of disposition, 2. the person to whom the disposition is made does not have actual knowledge of the actual occupation and 3. the actual occupation would not have been obvious on a reasonably careful inspection. The terms “actual occupation” and “obvious on a reasonably careful inspection” are not defined in the LRA 2002. However, the courts have dealt with the interpretation of the term “actual occupation” in a number of cases[211]. Similarly, we may expect that the new wording “obvious on a reasonably careful inspection” will generate much litigation before its meaning is clear.

Another exception from Sch. 3 para 2 are the Matrimonial Home Rights[212]. Under the FLA 1996 if a certain house is, was or was intended to be a matrimonial home and one of the spouses is entitled to live there as the sole owner then, under the Act, the other spouse will have a right in the house which will take effect as a charge on his/her spouses interest in the house. One purpose of the FLA 1996 is to protect

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210 Lord Denning's justification was to protect occupiers from “having their rights lost in the welter of registration”

211 William & Glyn's Bank v Boland [1979] 2 All ER 697; Chhokar v Chhokar [1984] FLR 313; Kingsnorth Finance & Co. Ltd v Tizard [1986] 1 WLR; Epps v Esso Petroleum Co Ltd [1973] 1 WLR 1071; Kling v Keston Properties Ltd [1984] 49 P & CR 212

212 Sch. 11, para 34(2)(b) LRA 2002

rights of occupation of a husband or wife in respect of the matrimonial home[213] against anyone who might acquire an interest in the matrimonial home, such as a purchaser. Another purpose of the FLA 1996 is however to reassure potential purchasers that they can safely buy a house free from any possible matrimonial home rights, if no such rights have been registered. The Act therefore states that unless a person protects his/her matrimonial home right by registration, they cannot be enforced against certain people who acquire an interest in the house, such as a purchaser. The matrimonial home right has to be registered in the Land Register or as a Land Charge at the Land Charges Department in case of an unregistered property.

If the English law requires the spouses to register their matrimonial home rights which are granted by a statute, then I can't see any justification for not imposing compulsory registration on other rights of a person in actual occupation. If a spouse is expected to register his/her right at the Land Registry, than why not a person who does not have such a close relationship to the owner of the property.

In comparison, the Slovak law does not acknowledge the specific institute of matrimonial home rights, therefore there is simply nothing to register. The Slovak Family Law Act no. 36/2005 only contains a general statement that the spouses should share the same living standard. On the other hand, the Slovak law

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[213] The Civil Partnership Act 2004 gave a civil partner the same rights of occupation as a spouse.

acknowledges the existence of ownership in common between the spouses. Therefore, with some exception, everything acquired during the marriage will be owned in common by both spouses by law. This means that the spouses will own in common a property acquired during the marriage whether it is registered in the name of both spouses or just in the name of wife/husband. If however, the spouse in whose name is the property registered decides to sell the property without the consent of the other, the other spouse will be entitled to apply to the court to have the transaction declared void. This is in accordance with the Slovak statutory provision under which every disposition with a matrimonial property which cannot be regarded as a usual disposition is relatively void unless agreed by both spouses[214]. The term "relatively void" means that the spouse not involved in the transaction is entitled to apply to the court within 3 years from the transaction to have the transaction declared void. When such a transaction is declared void, the spouse who sold the property without the consent of the other will be obliged to return the purchase price. This may create problems in practice when the vendor cannot be made to repay the purchase price.

In a nutshell, it can be said that for the new registered conveyancing to work properly the mirror principle must be applied without any exception. Otherwise the law amendments will not have the desired outcome of simplification of the conveyancing process. If only one interest retains its overriding character it will mean that various searches and inspections will still be needed to be conducted by purchasers. We have seen that the Slovak statutory provisions require strictly all rights *in rem* to be

[214] §145 subs. 1 of the Civil Code no. 40/1964 Coll.

registered in the Cadastre. There are no overriding interests which would weaken the mirror principle under the Slovak provisions. On the other hand, in England a softer approach was taken. Although the number of overriding interests was reduced, there are still many interests which retained their overriding status. A somehow more radical approach would be needed in order to reach more significant simplification of the conveyancing process. The existence of overriding interests requires repeated searches and inspections to be conducted. This does not facilitate the security of the transfer of ownership.

An important role of the law is to not wait until a change occurs in the way of persons' social behaviour but also to regulate the social relationships in order to meet the objectives set by the state. However, it takes more courage to bring into the system amendments which are not in harmony with the existing system of things and requires persons to change their traditional way of thinking. In our case, the introduction of compulsory registration of all rights and interests in respect of land would require persons with unregistered interests to realize the need to register their interests. It is the government's duty to use their persuasive powers and promote the many advantages of the system of land registration without overriding interests. The land registration system which fully reflects the mirror principle is faster, cheaper and so simple that a lay person should be able to conduct it. I am convinced that if overriding interests were completely abolished it would not take long before this fact become publicly known. Consequently, people would take more care and register their interests which would lead to a creation of a comprehensive land register.

3.4.4 THE PRINCIPLE OF CREDIBILITY and THE INSURANCE PRINCIPLE

The principle of credibility is based on the presumption that all the entries in the Cadastre/Land Register are correct and reliable until the opposite is proven. Similarly, under the corresponding insurance principle the accuracy of registered titles is guaranteed and an indemnity paid from Land Registry/State funds in cases of loss. The principle of credibility and the insurance principle are closely linked with some purposes of the Land Register/Cadastre such as the protection of rights to real estates and the protection of legal certainty of real estate transactions. These principles, although not explicitly stated in the statutory instruments, have their application under both systems. The Cadastre Act as well as the LRA 2002[215] contain provisions regulating the procedure for rectification of the register.

Unlike in England, the principle of credibility is in Slovakia explicitly set out in §70 according to which the cadastral data are all trustworthy and of obligatory character unless proved otherwise.

CORRECTION OF MISTAKES

In Slovakia, the correction of mistakes in the Cadastre is regulated by § 59 of the Cadastre Act under which the Administration of the Cadastre has the authority to correct the cadastral data either upon proposal or upon its own initiative. The

[215] ss. 33 and 90(4) LRA 2002

Administration of the Cadastre may exercise its power to correct the mistakes in the Cadastre in several circumstances, such as:

a) the cadastral data are in contradiction with the public deed or other deed

b) the cadastral data are in contradiction with the results of the revision of cadastral data

c) the boundary of the lots in the cadastral map is wrongly delineated

d) the cadastral data are not accurate due to mistakes in writing and counting and by other obvious mistakes in the written forms of legal actions, public deeds and other deeds.

In England, the procedure for correction of mistakes is set out in Schedule 4, LRA 2002. In accordance with the paragraph 1(1) of this Schedule rectification is an alteration of the register which involves the correction of a mistake that prejudicially affects the title of a registered proprietor.[216] The registrar is obliged to approve the application for alteration of the register supported by some kind of evidence, unless there are exceptional circumstances that justify not doing so.[217] Along with the registrar, the courts are also endowed with power to make an order for alteration of the register. “If in any proceedings the court has power to make an order for

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[216] For example, the correction may adversely affect the value of the land or the value of a charge over the land. In Land Registry Practice Guide 39: Rectification and Indemnity. November 2008

[217] Paragraph 6(3) of the Schedule 4, LRA 2002

alteration of the register, it must do so, unless there are exceptional circumstances which justify not doing so."[218]

The LRA 2002 puts also some restrictions on the power to rectify the register. If the registered proprietor is in possession of the land in question, the register can only be rectified if they agree. This restriction, however, does not apply if either: 1) the registered proprietor has caused or substantially contributed to the mistake because they have either been fraudulent or not exercised sufficient care, or 2) it would be unjust not to correct the mistake.

In a nutshell, although both systems contain provisions for rectification of mistakes in the register, these differ in some aspects. While the LRA 2002 does not specify mistakes to be rectified, the Cadastre Act defines three groups of mistakes to be rectified – mistakes in the cadastral data, wrongly delineated boundary of the lots in the cadastral map and obvious mistakes in writing/counting. On the other hand, the LRA 2002 unlike the Cadastre Act requires the mistake to prejudicially affect the title of a registered proprietor. The underlying idea is that the alterations of the register should be reduced to minimum and should be applied only where there is a legitimate need for them. Although the Cadastre Act does not require the mistake to prejudicially affect the title of a registered proprietor, it requires from the persons

[218] Paragraph 3(3) of the Schedule 4, LRA 2002

applying for rectification to produce documents to prove their claim in the same way as it is in England[219].

Another distinctive feature of the English system is the restriction of the registrar's power to rectify the register, in cases when the registered proprietor is in possession of the land in question. The Cadastre Act does not contain a similar restriction.

While the Administration of the Cadastre in Slovakia may rectify the mistakes in the register "*ex officio"* or upon application, the registrar in England does not have the power to correct a mistake without an application . Both the administration of the Cadastre in Slovakia and the registrar in England must approve the application for rectification of the register if mistakes are identified, but pursuant to the LRA 2002 this is subject to absence of exceptional circumstances that justify the rectification not to be exercised. As we have seen, the courts in England have also the power to make an order for rectification of the register, which is effected by the registrar. Similarly, in Slovakia a person seeking the rectification of the Cadastre may also apply to the court to decide on the existence of his right, although this is not explicitly stated in the Cadastre Act but is a mere reflection of application of the principle of the prohibition of "denegatio iustitiae".

MISTAKE DUE TO FRAUD

[219] r 17 LRR 2003

A specific case of a mistake due to fraud is in England dealt with under the same procedure for correcting mistakes as with any other mistake. However, “if someone suspects that a fraud has taken place or is about to take place in relation to their property, he should contact the Land Registry immediately. In many cases, Land Registry will be able, on application, to enter a standard Form restriction LL on the register, that requires a certificate to be given by the conveyancer that they are satisfied that the person who executed a document lodged for registration as transferor is the same person as the proprietor.”[220] This form of restriction against a potential fraudulent act has no counterpart in Slovakia. If the owner or other entitled person suspects that a fraud has taken place, they are obliged to provide the Cadastre with information in this respect and submit the documents to prove their claim. On the other hand, unlike in England, the identity of the parties must be checked on every transaction subject to registration in the Cadastre.

WHO MAY APPLY FOR THE CORRECTION OF MISTAKES

In accordance with the LRA 2002 anyone may apply to the registrar to rectify the register. There is no statutory definition of persons who may apply for the rectification. If a person knows that there is a mistake on the register that he wants to be corrected, he must complete form AP1[221]. This application should be sent to the proper Land Registry Office with full details of mistake and the correction he wishes

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220 Land Registry Practice Guide: Rectification and Indemnity. November 2008.

221 r 13, LRR 2003

the registrar to make and why. A fee is payable for the application under the current Land Registration Fee Order, based on the value of the property.[222]

Unlike in England, the Slovak Cadastre Act[223] specifies who may apply for the rectification of the register as "persons, whose rights, legally protected interests or obligations are concerned with the cadastral data". The owners and other entitled persons are obliged to give true and exact information and submit the documents to prove their claim while the mistakes in the cadastral documentation are being corrected. There is no specific prescribed form for the application to rectify the register as in England, however the application must be in writing. The applicant must submit along with the application documents proving his claim, however there is no requirement to pay an administration fee as under the English system. The payment of an administration fee may seem unjust particularly when the person applying for rectification is not liable for the mistake.

PROCEDURE FOR THE CORRECTION OF MISTAKES

In England, the Land Registry Office upon receiving the application for rectification of the register may request additional information when considered to be appropriate. "The Land Registry Office will always give notice of an application to rectify the register to: 1) the registered proprietor of any land or registered charge affected by

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222 In many cases (for example if the error has been caused by Land Registry) the fee will be refunded. Land Registry Practice Guide: Rectification and Indemnity. November 2008.

223 §59

the proposed correction, 2) anyone who appears to be entitled to an interest protected by a notice, provided we have details of their name and address for service."[224] The Land Registry Office may make further enquiries as appropriate, which may reveal other parties who could be affected by the proposed correction. Anyone who receives a notice will be given at least 15 business days in which to respond[225]. The registrar cannot complete the application to rectify the register if anyone objects to the proposed correction, until the objection has been disposed of, unless the objection is groundless. The applicant is notified of the objection. If after the objection, the applicant still wishes to proceed with the application, the registrar will then ask all the parties whether they wish to negotiate and whether they consider that it may be possible to settle the matter by agreement. However, as soon as it becomes clear that they are unable to reach an agreement, the registrar must refer the matter to the adjudicator.

In Slovakia, the Administration of the Cadastre deals with the application for rectification in the first instance. Similarly as the Land Registry Office it may request additional information when considered appropriate. The decision of the Administration of the Cadastre is in general based on written evidence submitted by the applicant, but where the correction of a mistake would affect the right of the registered owner or other persons entitled, the procedure for rectification of the cadastre is conducted in accordance with the Act no. 71/1967 Coll. on the

224 Land Registry Practice Guide: Rectification and Indemnity. November 2008.

225 r 197 (2) LRR 2003

administrative procedure. Pursuant to the §14 of this Act persons whose rights, legally protected interests or obligations may be affected by the decision on the application for the rectification will be also parties to the administrative procedure for the correction of mistakes in the register.

Although the procedure for rectification of mistakes will be in most cases conducted in writing as is the case in England, the Administration of the Cadastre may conduct a hearing if it is required by the character of the case.[226] The parties to the administrative procedure must be notified about the hearing, where they may express their objections. While in England the role of the Land Registry Office is more passive with further enquiries limited to those which reveal other parties potentially affected by the proposed correction, the Administration of the Cadastre is endowed with the power to make any further enquiries and obtain evidence in order to make a decision based on sufficient information. The parties to the administrative procedure may also suggest evidence to be obtained. In general, we can conclude that the English procedure for the correction of mistakes compared to the one in Slovakia is more adversarial, with only a limited power of the Land Registry Office to act upon its own initiative.

Moreover, the Cadastre Act, unlike the LRA 2002, contains provisions regarding the time limit for the decision of the Administration of the Cadastre on the application for the rectification. According to §59(3) “the Cadastre is obliged to correct the mistakes

[226] §21 Act no. 71/1967 Coll. on the administrative procedure.

within 30 days, in especially justified cases within 90 days from the delivery of the written application for the correction of the mistakes."

PROCEDURE FOR OBTAINING INDEMNITY

Mistakes on the register may result in losses to those affected by them. In England "a right to claim indemnity will arise if: 1) there is a mistake on the register, and 2) the correction of that mistake would prejudicially affect the title of the registered proprietor of the land in question or a charge over that land, or has already done so."[227] The statutory compensation scheme covers anyone who suffers loss as a result of 1) the rectification of the register, 2) a mistake on the register that could have been rectified but was not or 3) a mistake on the register before it was rectified. None of these categories require the person concerned to establish that the Land Registry (or anyone else) was responsible for the mistake. In addition, "a person may also claim indemnity for any losses that are the result of: 1) a mistake in an official search result or an official copy issued by the Land Registry, 2) a mistake in a copy of a document referred to on the register, where the copy document is held by the Land Registry, 3) the loss or destruction of a document that has been lodged at the Land Registry for inspection or safe keeping, 4) a mistake in the cautions register, or 5) the Land Registry failing to notify a chargee under r 106, LRR 2003 when certain statutory charges are entered on the register."[228]

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227 Land Registry Practice Guide: Rectification and Indemnity. November 2008

228 Land Registry Practice Guide: Rectification and Indemnity. November 2008

In the Slovak Republic the liability of the state for losses suffered due to the rectification of the register or a mistake on the register is regulated by a separate Act No. 514/2003 Coll. on liability for damage caused by maladministration of a public authority. In accordance with this Act the state is responsible for any losses caused by a public authority while exercising public power by an unlawful decision or by maladministration.[229] The state's liability including the liability for mistakes in the Cadastre has a character of a strict liability without possibility of exculpation or limitation of the liability. A person will have a right to claim indemnity under this act if the mistake in the register is a result of an unlawful decision reached in an administrative procedure to which he was a party and the unlawful decision was consequently cancelled or changed[230] or a mistake is a consequence of maladministration[231]. A person is entitled to an indemnity due to unlawful decision only when he has appealed against it, unless there are exceptional circumstances. The act does not contain a definition of maladministration, only lists some examples of maladministration such as: breach of the duty to make an administrative act or issue a decision within the statutory time limit, passivity of the public authority, unnecessary delays in the administrative procedure or other unlawful intervention into someone's

[229] §3 of the Act no. 514/2003 Coll. on the liability for the damage caused by maladministration of public authority.

[230] §5 and 6 of the Act no. 514/2003 Coll. on the liability for the damage caused by maladministration of public authority. The requirement of cancellation or amendment of the decision does not have to be met if the loss was caused by the decision of the Administration of the Cadastre by which it exceeded its powers.

[231] §9 of the Act no. 514/2003 Coll. on the liability for the damage caused by maladministration of public authority.

right or legally protected right. Unlike under the English system, a person claiming indemnity due to mistake in the register may do so only if the mistake and the resulting loss are due to an unlawful decision or maladministration. Otherwise the Slovak statutory provisions cover in general the same cases of losses such as those resulting from rectification of the register, mistakes on the register, mistakes in official copies and loss/destruction of documents.

Another difference between the two systems can be seen in the procedure regarding applications for indemnity. Although the majority of applications for indemnity in England are settled by agreement between the claimant and Land Registry[232], a claimant has a right[233] to apply to the court to decide whether or not they are entitled to indemnity and, if so, how much. While in England an applicant may apply to the court for the decision on the indemnity, under the Slovak system a person affected by maladministration – in our case a mistake on the register – has to first submit his claim in writing to the competent central governmental body[234] – in our case the Office for Geodesy, Cartography and Cadastre - and only if he does not receive the compensation within 6 months from the date of the delivery of his claim may he apply

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232 Land Registry Practice Guide: Rectification and Indemnity. November 2008.

233 Paragraph 7 of Schedule 8, LRA 2002

234 §15 of the Act no. 514/2003 Coll. on the liability for the damage caused by maladministration of public authority.

to the court to decide on the compensation.[235] The provision of preliminary negotiation of the indemnity serves a purpose of a filter and reduces the number of claims ending at the court. In England similarly a person is required to try to resolve the dispute outside the court, otherwise if the judge rules that the case has been brought to the court unnecessarily the court can decline to grant the claimant an order for costs.

A person who suffered loss as a result of a mistake on the register has to make an application within a statutory time limit. These time limits however differ in both states. While in England a claimant has 6 years from the date they become aware of their claim, or ought to have become aware of their claim[236], in which to make an application to the court, in Slovakia a person loses his right to apply to the court to decide on the indemnity after 3 years from the date when he became aware of the claim (a subjective statutory time limit).[237] The Slovak Act no. 514/2003, unlike the English statutory provisions, further sets out an objective statutory time limit of 10 years to exercise the right to apply to the court for the indemnity, save where the loss caused was to someone's health. This objective time limit compared to the subjective time limit commences on the date when the applicant received the decision which

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[235] §16 of the Act no. 514/2003 Coll. on the liability for the damage caused by maladministration of public authority.

[236] Paragraph 8 of Schedule 8, LRA 2002

[237] An exceptional case is when an indemnity can be claimed only after the cancellation or amendment of the decision. In this case, the statutory time limit is counted from the date of delivery of the new decision. §19 of the Act no. 514/2003 Coll. on the liability for the damage caused by maladministration of public authority.

caused the loss. The subjective time limit cannot extend beyond the objective time limit, which is the maximum time allowed for a person to make an application in respect of indemnity. If we compare the statutory time limits in both states, we can conclude that the maximum time allowed to a person to make an application for indemnity is 6 years in England and 10 years in Slovakia. The time limits commence in both states on a date when the person ought to have become aware of his claim. Thus the Slovak regulation provides persons who suffered loss with more protection by allowing them more time to find out and put together a claim. I consider also the existence of a shorter subjective statutory time limit of 3 years to be a positive feature of the Slovak system as it urges a person suffering loss to exercise his rights as soon as he becomes aware of his claim.

We may conclude from the facts mentioned in the paragraphs above that the Slovak procedure for obtaining indemnity is more burdensome from the perspective of a person claiming the indemnity. In Slovakia a person is required first to have a preliminary discussion of his claim with a particular central governmental body and submit evidence proving that the mistake and the resulting loss are due to an unlawful decision[238] or maladministration. In Slovakia a person may apply to the court only after 6 months from the time of submission of his claim to the particular governmental body. In England in comparison a person claiming indemnity is only required to lodge an application with supporting evidence with the Land Registry.

[238] A decision must be declared to be unlawful by court in order for a person to be entitled to claim indemnity.

There is no requirement to prove that a mistake on the register is due to an unlawful decision or act of maladministration. Also, unlike in Slovakia, a person does not have to wait 6 months for a reply from a central governmental body before he submits his claim to the court.

In general we may conclude that the English regulation allows for a faster receipt of an indemnity. In my view, the only drawback of the English procedure for obtaining indemnity is the additional burden on the Land Registry when a mistake on the register is due to a third person's fault and when the Land Registry must act in order to recover the indemnity paid to the person who suffered loss. The state represented by the Land Registry hereby acts as an insurer or guarantor that every person who suffered loss due to mistake on the register, regardless whether it is caused by act of maladministration or due to third person's fault, will obtain an indemnity. Unlike in England, in Slovakia a person would not obtain an indemnity if a loss was caused by a third person and therefore the Administration of the Cadastre would not have to recover the indemnity paid from the third person. Clearly, the insurance principle and the state's role as insurer is weaker in Slovakia. A person who suffered loss due to a mistake on the register in Slovakia could find himself in a difficult position if the mistake was due to a third party's fault and this person could not be made to pay. Therefore, from the view of the potential 'victim' of a mistake on the register the English provisions regarding the indemnity are more advantageous.

SCOPE OF INDEMNITY

In England, any loss may be the subject of indemnity, provided it has been caused by the mistake or the rectification. A loss might be the value of an area of land removed from a title, or the reduction in the value of a property which, following rectification, is subject to a right of way that did not affect it beforehand. “In many cases, a valuation of the land will be necessary in order to quantify the loss.”[239] Also reasonable costs and expenses of the application incurred with the registrar's consent are recoverable, unless: a) they had to be incurred urgently, and b) it was not reasonably practicable to apply for consent.[240] There are limits on the amount of indemnity payable if the indemnity relates to the loss of land, an interest in land or a charge.”[241] For example, if the loss was caused by the rectification of the register, indemnity is capped at the value of that land, interest or charge immediately prior to rectification. In addition to the amount of indemnity the Land Registry is obliged to pay interest on the amount payable.

Under the Slovak statutory provisions the indemnity covers both material loss (*damnum emergens)* and profit lost *(lucrum cessans).*[242] Although the English statutory provisions do not mention separately the material loss and the profit lost as

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239 Land Registry Practice Guide: Rectification and Indemnity. November 2008.

240 Paragraph 3(2) Schedule 8, LRA 2002.

241 Land Registry Practice Guide: Rectification and Indemnity. November 2008.

242 §17(1) of the Act no. 514/2003 Coll. on the liability for the damage caused by maladministration of public authority.

subject to indemnity, the wording “any loss” can be interpreted so that it covers both groups. In Slovakia, moreover, “if the mere acknowledgement of the breach of one's right is not sufficient satisfaction, taking into the consideration the injury caused by the unlawful decision or maladministration, also an immaterial injury is indemnified in moneys, if it is not possible to satisfy it by other means.”[243] The indemnity further covers the costs incurred in the administrative procedure in which the unlawful decision was reached as well as costs incurred in the administrative procedure in which an act of maladministration has occurred, if these costs can be linked to the act of maladministration.[244] Unlike in England, there is no requirement for the registrar's consent to the costs incurred. The courts in Slovakia will however order the other side only to pay those costs which are reasonable, id est those which were incurred in accordance with the Slovak statutory provisions[245]. The caps on the value of the land putting limits on the indemnity as in England are not expressly mentioned in the statute, however, in practice the amount of indemnity is capped in the same way as in England. The value of the property will be capped at the value of the property on the date when the loss occurred.

STATISTICS

[243] §17(2) of the Act no. 514/2003 Coll. on the liability for the damage caused by maladministration of public authority.

[244] §18 of the Act no. 514/2003 Coll. on the liability for the damage caused by maladministration of public authority.

[245] The costs of legal representation are calculated on the basis of the regulation of ministry of justice no.655/2004 Coll.

It is of interest to compare the number of applications for rectification of the register in both countries. The Annual Report of the Office for Geodesy, Cartography and Cadastre 2007/2008 reported 15,926 requests for rectification of errors in the cadastral documentation - an increase of 656 requests compared to the previous year. The Land Registry's Annual Report 2008/9 does not contain information on how many applications for rectification of the register were received, but provides us with the number of indemnity claims received in 2008/9 – 1,364 claims.

In England, the overall indemnity paid for the above claims was £10,058,945.39 an increased amount compared to the amount of £9,110,218.85 for 1,072 claims in the year 2007/8. At the same time an increase in the number of claims and the amount paid as a result of fraud was observed. Land Registry paid £5,072,113.43 for 62 claims, up from £3,953,378.02 for 60 claims in 2007/8. From this amount the Land Registry recovered from persons who caused errors only a small fraction of £89,235 in year 2008/9. Data regarding the overall indemnity paid in Slovakia and the amount recovered are not available, therefore this comparison is left out.

3.4.5 THE PRINCIPLE OF LEGALITY

Pursuant to this principle the Administration of Cadastre/Land Registry Office must scrutinise the submitted documents, deeds and applications in respect of their validity to decide whether it is possible to register title to land on their basis.

In Slovakia, this principle is incorporated into § 31 subsection 1 and 2 of the Cadastre Act where we read: “The Administration of the Cadastre shall check the validity of the contract, namely the power of the party to transfer the real estate, they examine whether the transaction is done in a legal way, whether the manifestation of the will is trustworthy, whether it is certain and understandable enough and whether the contractual freedom or the power to transfer the real estate are not limited. When deciding on the permitting of the entry, the Administration of the Cadastre shall also take into account factual and legal factors that could influence the permission of the entry”.

The principle of legality is also a governing principle of the English system of land registration. According to the s. 9 (2), LRA 2002 : “A person may be registered with absolute title if the registrar is of the opinion that the person's title to the estate is such as a willing buyer could properly be advised by a competent professional adviser to accept.” A registrar in a particular case has to apply in his discretion this guiding principle when deciding on the quality of title to be registered. If a person applies for an absolute title but the registrar is unable to grant it owing to some defect in the title, where the title can be established only in respect of a limited period or only subject to certain reservations which cannot be disregarded by the registrar a qualified title is awarded instead of the absolute title.[246] A possessory title is awarded to an applicant who is in actual possession or in receipt of rents and profits but who

[246] s. 9(4) LRA 2002

cannot produce sufficient documentary evidence of title[247] The registrar has however power subsequently to upgrade title if satisfied as to its quality[248], eg if convinced that a suspected flaw in title is no longer material. In particular, a possessory title may be upgraded to an absolute title after 12 years if the registrar is satisfied that the proprietor is 'in possession of the land'.[249] The qualified or possessory title cannot be awarded under the Slovak system of land registration. The Administration of the Cadastre may only award the absolute ownership title or dismiss the application. The significance of this distinction and the conclusions drawn from it will be discussed in the following chapters.

3.4.6 THE PRINCIPLE OF PRIORITY

This principle is an application of the principle “prior tempore potior iure”, which means that in case of two or more applications for registration of right to the same real estate the date and time of the receipt of each application is relevant.

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247 eg title deeds may have been lost or destroyed or he may be relying on a period of adverse possession of the land concerned.

248 ss. 62-63 LRA 2002, rule 124 LRR 2003

249 S 62(4) LRA 2002

In Slovakia[250], rights to the same real estate are entered in an order in which the contracts, public records or other records on the origin, change or expiry of the right to the real estate were delivered to the Administration of the Cadastre. In practice every Administration of Cadastre operates a register of applications received with the date and time of their receipt. The exact time of delivery is important especially when there are concurrent applications in respect of the same land.

Similarly in England, when a paper or electronic application has been delivered to the Land Registry, the application will appear on the day list. This is the Land Registry's database of pending applications. The order in which the applications are deemed to be received is determined in accordance with rule 15 LRR 2003. This is different from the Slovak regulation for which the real time of receipt is relevant and which does not contain any presumptions/fictions of when an application has been received. In a different manner is also handled a situation when two or more applications relating to the same registered title are taken as having been made at the same time. The order of the applications is determined in accordance with rule 55 LRR 2003. Where the applications are made by the same applicant, they simply rank in such order as he may specify. If however, the applications are not made by the same applicant, their order will depend on the agreement of the applicants. If the applicants fail to agree on the order within 15 days from the date of registrar's notification, the registrar

[250] § 41 (2) of the Cadastre Act

proposes the order and notifies the applicants. The applicants then have the right to object to the registrar's proposal[251].

The comparison of the regulations relating to the determination of the order of the applications in both countries leads me to a conclusion that the Slovak regulation is plain and simple compared to the English set of presumptions in relation to the date and time of application receipt. On the other hand, the English regulation proves to be fairer towards the applicants. Under the Slovak regulation if the applications are delivered with the same daily post delivery, their order will depend on the fact of which application is marked with the date and time by the administrative employee first. In England however, the applications would be deemed to be received at the same time and the order of the applications is to be agreed by the applicants. This constitutes an additional prolongation of the registration process particularly when the applicants cannot reach an agreement. Under the English regulations if the applicants are unable to reach an agreement it is the registrar who proposes the order. The criteria for deciding on the order are not however set by the statute or rules. The registrar would need to make further enquiries, such as when the contracts were concluded, in order to propose the order. Thus, the order of the concurrent applications under the English provisions does not depend on mere chance. Nevertheless, at least one applicant will not be satisfied with the proposed order and would probably raise an objection and thereby prolong the registration process.

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[251] s. 73 LRA 2002

A prospective purchaser would therefore want to know how to avoid ending up in a situation where he finds out only upon the payment of the purchase price that another person's application was received earlier and therefore registered. One way to avoid being left with 'no money' and 'no property' is to incorporate into the contract for the sale of land a term under which the purchase price is only paid upon the successful registration of the title in the name of the purchaser proven by the ownership certificate. This would in both countries protect the purchaser from having to start a legal action against the vendor in order to recover the purchase price, if the property was registered under the name of a concurrent applicant.

Another solution available under the English registration system, is the option to apply for an official search certificate with priority “which has the effect of 'freezing' the register. This ensures that no adverse entries are made in the register during the priority period granted under the official search certificate.”[252] The priority under an official search ends at midnight marking the end of the 30th business day after the day on which the official search application was received[253]. This allows the purchaser some time for a safe submission of his application before the expiry of the priority period. Unfortunately, there is no provision of this kind in Slovakia. I find the English provisions to be inspiring and I am convinced that a similar option to apply for an official search certificate with priority would be welcomed by conveyancers in Slovakia.

[252] Land Registry Practice Guide 12, June 2004. page 6

[253] r 131 LRR 2003

3.4.7 THE PRINCIPLE OF INDIVIDUALITY

Under this principle each individual real estate has its own entry in the register and every transfer of the right is dealt with separately.

The principle is applied without exception in both countries. In England “on first registration of title to any of these forms of estate, a unique title number is allocated by the Land Registry[254] and is used thereafter to identify the estate referred to in the title (ie the physical extent of the land and the particular estate held in it).”[255] The principle of individuality has its application also in the Slovak Republic, where each parcel has its unique number as well as each land ownership certificate.

3.4.8 THE MIRROR PRINCIPLE

Under this principle the register of title reflects the totality of estates and interests affecting the registered land.

'The mirror principle' regarding the register of title has been explained by Kevin Gray: “A register of title, once created, is updated not only on subsequent registered dealings with the title, but also as further entries are made to protect freshly arising

[254] r 4 (1) LRR 2003

[255] Gray, K., Gray S. F.: Land Law. Oxford University Press. 6th edition, 2009. page 90

minor interests relating to the land. Thus, in respect of any particular registered estate, the register of title is broadly intended to operate as a mirror, reflecting to the potential disponee (and to any other interested person) the totality of the proprietary benefits and burdens which currently affects the land."[256] The practical importance of this principle is that the definitive record of the register eliminates any need for retrospective documentary investigation outside the register. The mirror principle is applied without any exceptions in the Slovak Cadastre, where every interest and dealing affecting land of 'in rem' nature must be registered.

The completeness of the mirror image which the Land Register is meant to reflect is affected by interests commonly known as 'overriding interests'. The so called 'crack in the mirror' is a distinctive feature of the English land registration and means that the LRA 2002 as earlier the LRA 1925 allows some kinds of proprietary entitlement to exist 'off the register'.[257] These unrecorded rights, which are generally detectable on a physical inspection of the land, are known as interests which 'override' registered titles and are automatically binding on any proprietor of a registered title. As already mentioned above, this is not a feature of the Slovak Cadastre. Under the Slovak registration system interests may not exist off the register with a quality of a right in rem.

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256 Gray, K., Gray S. F.: Land Law. Oxford University Press. 6th edition, 2009. page 92

257 Gray, K., Gray S. F.: Land Law. Oxford University Press. 6th edition, 2009. page 93

4. THE SALE OF LAND

The estate owner enjoys virtually plenary powers of disposition, eg by way of gift, sale, lease or mortgage charge[258]. This chapter deals with the disposition of land by sale, as it is by far the most common and significant form of disposition in practice. It is beyond the scope of this thesis to examine other ways of disposition. The creation of a lease or a mortgage charge are dispositions not involving transfer of ownership and therefore would not fit within the subject of the thesis. Although, ownership may be also transferred by way of gift, it does not require the same amount of effort and attention as transfer by way of sale. In general, with a degree of scientific inaccuracy, it can be said that a donation of land is a disposition similar to the transfer by way of sale with the difference that the ownership is transferred without the transferee receiving any valuable consideration. This is however only a very general statement and I acknowledge that it would be worthwhile to examine the differences between the transfer of ownership by way of sale and by way of donation in both countries. Unfortunately, the word limitation of the thesis does not allow for doing so. For the same reason I will not be able to analyse the acquisition of property by way of inheritance. This comparison could not be properly done without including explanation of some details of the probate law operating in England and in Slovakia, which would certainly extend the volume of the thesis.

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[258] ss 23 – 24 LRA 2002, §123 Civil Code Act no. 40/1964 Coll.

The buying or selling of a real estate, a process known as conveyancing, is widely regarded as being both one of the most important financial transactions in which an individual takes part and also one that involves a considerable amount of time, effort and stress. The process of land transfer by sale is very often in literature divided into five stages: 1.pre-contract, 2.contract, 3.between contract and completion, 4.completion, 5. post-completion.[259] Before I start to analyse each of these stages I will endeavour to sketch and compare the classification of rights on a purchase of land in both countries.

4.1 CLASSIFICATION OF RIGHTS ON A PURCHASE OF LAND

In England there are certain differences in the classification of rights in connection with a purchase of unregistered land and registered land.

A. Unregistered Land – rights in the land fall into three main categories:

- Estate that the purchaser is buying, id est 1) a fee simple absolute in possession, and 2) a term of years absolute for more than 7 years[260]

[259] Goo, S.H.: Sourcebook on land law. Third edition. Cavendish publishing, 2002. page 69; other writers, such as M. P. Thompson, refer to three-stage process: 1. The pre-contract stage, 2. Formation of the contract and 3. The transmission of the legal estate. M. P. Thompson: Modern Land Law. 4th edition. Oxford, 2009.

[260] In Slovakia a lease which lasts or should last at least 5 years is a registrable interest - article 1 (1) of Act no. 162/1995 on the Real Estates Cadastre and the Entries of Ownership and Other Rights to the Real Estates

- Rights adverse to the land which, being legal, will bind the purchaser except in the few cases where they are overreached or void for want of registration.

- Other rights adverse to the land which are equitable, and so, if not overreached or void for want of registration, will bind the purchaser unless he takes without notice of them.

B. Registered Land – rights can be similarly divided into three groups:

- Registered estates, i.e. rights in respect of which a title has been granted by the registrar.

- Overriding interests, i.e. rights which will bind a purchaser whether or not disclosed by the register or otherwise.

- Minor interests, i.e. rights which need to be protected by some entry on the register.

The classification of rights in connection with the sale of land in Slovakia is much simpler. The purchaser becomes upon the completion of the sale of land by registration the owner of the land free of any incumbrances not registered in the Cadastre. Equitable rights and Overriding interests are unknown in the Slovak land

registration system. The purchaser is therefore protected from any third party claim related to unregistered interests. This seems to be a more efficient approach than the English one, as it provides the purchaser with more certainty that his rights upon the completion of the transfer will not be disturbed by any third party right discovered later. The Slovak system motivates the person entitled by the creation of an easement or having some other interest in land to protect it by registration, otherwise upon the sale of the land he can only claim compensation from the seller with whom he has contracted his right.

This system favours legal certainty and the purchaser's interest over the interests of third persons having interests in land. The question to be asked in this respect is whether the protection of a third party having an overriding interest in land is of such value and importance as to override the importance of legal certainty as well as the interest of the purchaser. The system of land registration should ensure a secure way of acquisition of properties which would facilitate investments in this sector. Therefore, I am inclined to prefer the Slovak system which seems to be more secure in this context.

4.2 THE PRE-CONTRACTUAL STAGE

The process of arriving at a stage when a legally binding contract to buy land is created can be a prolonged affair. Upon the buyer finding property which one likes at the pre-contractual stage, the buyer and the seller are simply negotiating on various matters, particularly on the price.

A. SUBJECT TO CONTRACT AGREEMENTS

ENGLAND

In England “The normal practice, when buying a house is, after a price has been agreed, to enter into a “subject to contract agreement”. Such an agreement has no legal effect. Everybody knows... that expression when used in relation to the sale of land, means that, although the parties have reached an agreement, no legally binding contract comes into existence until exchange of formal written contracts takes place.[261] This means that either party is free to withdraw from the proposed transaction, and this will, in general, be without incurring liability to the other side.”[262]

The legal theory mentions two reasons for the parties entering into subject to contract agreement, even though they are not legally binding. One reason is, the general principle applicable to contracts for the sale of land: “caveat emptor” (“let the buyer beware”). Under this principle, the vendor, when selling land, unless he expressly agrees to do so, gives no guarantee as to either the physical condition of the property, or that it is legally fit for the purpose which the purchaser has in mind for it.

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261 Secretary of State for Transport v. Christos [2003] EWCA Civ. 1073 at para. 34 per Lindsay J. See also Spottiswoode, Ballantyne & Co Ltd v Doreen Appliances Ltd [1942] 2 KB 32 at 35.

262 M. P. Thompson: Modern Land Law. 4th edition. Oxford, 2009. page164.

263 See Thompson: Barnsley's Conveyancing Law and Practice. 4th edition. London: Butterworth, 1996. p. 178-180.

Therefore, the purchaser, prior to committing himself to the transaction, will require a good deal of information about the property.[264]

"The second, and most important reason is the existence of chains of agreements. In conveyancing it is often the case, that the person who is selling the house will be seeking to buy another, while this person may also be looking to buy a replacement property, and so on. With a number of interrelated transactions, it is important to synchronize the entry into a contract to buy with the contract to sell. A failure to do so can lead to the financially catastrophic result of having contracted to buy one house before entering into a contract to sell the existing one. To avoid this, it is necessary for all persons involved in the chain to synchronize the times when the respective contracts are entered into. To do this, they all enter into subject to contract agreements and then, when everyone is in a position to proceed, a formal process, known as exchange of contracts, is gone through."[265]

The existence of subject to contract agreements in case of chain of agreements however does not secure a successful transfer of legal estates owing to the not binding nature of the subject to contract agreements. The Law Commission in 1975 confirmed this in their report: "no legal status should be given to the "subject to contract" proviso"[266] . The existence of subject to contract agreements does not prevent a party to the chain from withdrawing from the transaction prior to its

[264] M. P. Thompson: Modern Land Law. 4th edition. Oxford, 2009. page165.

[265] M. P. Thompson: Modern Land Law. 4th edition. Oxford, 2009. page165.

completion, therefore I cannot see any practical relevance of drafting subject to contract agreement. If the seller, during the time period between the subject to contract agreement and the actual formation of the contract for sale, receives a higher offer than the one which he had accepted on a subject to contract basis and withdraw from the transaction, the purchaser will be left to pay the legal fees and costs of survey which he incurred prior to entry into the contract. This can be a frustrating experience.

The practice of "raising the price of, or accept a higher offer for, land or buildings on which a sale price has been agreed but no legally binding contract has yet been made"[267] is known as gazumping[268]. "According to DETR[269] gazumping occurs in 1-2 % of all property deals and costs £350 million a year in aborted transactions."[270] "The converse practice, in which the buyer reduces an agreed offer immediately before

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[266] Law Commission, Report on "subject to contract" agreements (Law Com 65, January 1975), para 4.

[267] E. A. Martin, J. Law: A Dictionary of Law. Sixth edition. Oxford University Press. 2006.

[268] The origins of this rather interesting word appear to lie in the early 1900s, when it was first used to mean a swindle or fraud. This word appears to be Yiddish in origin, like many other colorful words in the English language, such as "schmaltz". Cited on http://www.wisegeek.com/what-does-gazump-mean.htm.

[269] Department of the Environment, Transport and the Regions. http://www.findaproperty.com/displaystory.aspx?edid=00&salerent=0&storyid=3120

[270] M. O'Flynn: Beginner's guide: Gazumping. Find a property. 2000-2007. http://www.findaproperty.com/displaystory.aspx?edid=00&salerent=0&storyid=3120

exchange of contracts, is known as gazundering"[271] and is equally ethically questionable.

Previous research has shown that it takes around eight weeks to get from offer acceptance to exchange of contracts.[272] This allows enough time for the vendor to get a better price offer from another prospective purchaser. Conveyancing practice guides provide the potential purchasers with a number of tips how to avoid gazumping such as asking the property to be taken off the market after the purchaser made an offer, instructing solicitors straight away to begin the preparatory legal work, get a survey done as quickly as possible, make the mortgage application quickly after making an offer, making a pre-contract deposit agreement, drawing up lock-out agreement[273], taking out insurance cover to protect the purchaser if his deal falls through[274]. The aim of these suggestions is in either to speed up the conveyancing process in order to leave less opportunity to the seller to pull out or to get a coverage

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[271] E. A. Martin, J. Law: A Dictionary of Law. Sixth edition. Oxford University Press. 2006

[272] DETR – Key Research on Easier Home Buying and Selling. DETR Publications, 1999.

[273] "A contract between a potential purchaser and the vendor of a property in which the vendor agrees that for a fixed period, such as two weeks, he will take the house off the market and not accept any other offers. Meanwhile, the purchaser moves towards a quick exchange of contracts, with the aim of securing the sale within that period. If the vendor breaches the agreement by accepting another offer, he can be sued for breach of contract. Many vendors will not accept such agreements and some lawyers have argued they are unenforceable." E. A. Martin, J. Law: A Dictionary of Law. Sixth edition. Oxford University Press. 2006

[274] http://www.findaproperty.com/displaystory.aspx?edid=00&salerent=0&storyid=3120 , http://www.home.co.uk/guides/buying/gazumping.htm,

for the case that the transaction is not completed. However, none of these preventive measures can completely rule out gazumping on the vendor's part.

On a legislative level, various attempts to fight the practice of gazumping had been canvassed. In 1987, for example, the Law Commission recommended that a pre-contract deposit of 0.5 % of the purchase price should be made by both the prospective seller and buyer as soon as they agree on the sale “subject to contract”. They must then exchange the contract within four weeks and any party who withdraws otherwise than for good cause within that period will lose the deposit.[275] This solution was not accepted as optimal by all professionals. It has been said, that “anti-gazumping deposits are not a perfect solutions as they would involve preparation of additional conditions listing when there would be no forfeiture, such as when the buyer's survey was adverse.”[276] In my opinion, the time devoted to the preparation of the additional conditions could be reduced by adopting regulation of the anti-gazumping deposit conditions in a statutory instrument or alternatively by model conditions prepared by Law Society or other professional organisation.

More recently, the Government has acted in a way which is designed to mitigate the effect of the transaction failure described above on the purchaser by the provisions of

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[275] Law Commission, Pre-Contract Deposits: A Practice Recommendation by the Conveyancing Standing Committee (1987), paras 5 and 7.

[276] R. Abbey, M. Richards: A practical approach to conveyancing. 9th edition. Oxford University Press. 2007. page 40.

the Housing Act 2004 regarding compulsory preparation of Home Information Packs [277]. Of great importance are the provisions prescribing the content of the HIP and the extent to which purchasers are safe in relying on the information contained within them, thereby obviating the need to pursue their own investigations.[278] In accordance with the Act where a potential buyer makes a request to a responsible person for a copy of the home information pack, or of a document which is or ought to be included in that pack, it is the duty of the responsible person to comply with that request within the permitted period.[279] This applies only when the property is marketed. If the seller does not comply with the buyer's request, the buyer can obtain the document himself and recover the costs from the seller. The permitted period for the purposes of this section is the period of 14 days beginning with the day on which the request is made.

The aim of these provisions is to reduce the pre-contract costs incurred by purchasers, so that, if the projected contract falls through, the loss will be lower. Since in real life often the purchase of a property is financed by way of mortgage, for the scheme to work, it is essential that the HIP contains information on which both the purchaser and the mortgagee can rely upon. While the mortgagee may not be so

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[277] s 155(1) Housing Act 2004

[278] In this respect s. 163 of the Housing Act 2004 empowers the Secretary of State to make regulations as to the documents which are required to be included in the pack.

[279] s. 156 (1) Housing Act 2004

much interested in the energy performance certificate[280] he will be for sure very much interested in information about the physical state of the building which determines the assessment of its value. The relevant information about the property condition is included in the Home Condition Report as part of HIP. It has been the most controversial element in the HIP proposal. “The preliminary consultation exercise on the HIP and the draft Housing Bill that would make the HIP mandatory in England and Wales concluded that removing the HCR from the packs would risk cancelling out the likely benefits as 43% of failed transactions (12% of all transactions) arise from condition-related problems brought to light in the buyer's survey or lender's valuation inspection. The report also expressed the belief that mortgage lenders would increasingly make use of the HCR when assessing the value of properties.”[281] Nevertheless, the introduction of HCR into the HIP scheme was delayed because first, the preparation of HCR “incurs additional costs to the seller (approximately £600) and second it required a new body of certified Home Inspectors to carry out the work.”[282] However, from 2007, each home has to be inspected, and a HCR prepared, before a property is marketed for sale. The HCR includes detail on the

[280] This compulsory information in the HIP is in accordance with the EU Directive 2002/91 (the Energy
Performance of Buildings Directive)

[281] S. Darby, R. Pugh: The Home Information Pack. Background document G for the 40% House project. Environmental Change Institute. University of Oxford. 2005. page 1.

[282] S. Darby, R. Pugh: The Home Information Pack. Background document G for the 40% House project. Environmental Change Institute. University of Oxford. 2005. page 1.

condition of the exterior[283] and the interior[284] of the property and the services that are connected to it[285].

The reported positive aspects of the HIP scheme are that it 1) helps sellers to decide on a realistic purchase price, 2) speeds up the conveyancing process (from average of 62 to 48 days[286]), 3) helps saving hundreds of million pounds in wasted costs, arising from failed transactions (a reported 50 % cut in the number of house sales falling through[287]), 4) reduces the risk of gazumping. On the other hand, as negative aspects of the HIP scheme were pointed out: 1) the cost of HIP (in the region of £500) will push house prices up further and is a disproportionately expensive element in the sale of cheaper properties, 2) it is difficult to maintain accuracy and impartiality of the packs, 4) estimated 7500 inspectors were required to avoid homebuyers queuing, while in year 2000 only 2500 chartered surveyors and other professionals undertook home surveys, 5) information may become out of date if a property has been on the market for some time, 6) the preparation of HIP may cause delays in

283 eg chimney stacks, roof coverings, rainwater pipes

284 eg internal walls and partitions, floors, fireplaces and chimneys, bathroom fittings, internal decorations

285 eg electricity, gas, water, heating and drainage

286 In accordance with the evaluation of the pilot scheme to test the practical operation of the information packs in Bristol from December 1999 to July 2000 conducted by DETR in 2000. In S. Darby, R. Pugh: The Home Information Pack. Background document G for the 40% House project. Environmental Change Institute. University of Oxford. 2005. page 1.

287 Ibid

putting a property on the market.[288] Despite these concerns, the outcome of the pilot scheme to test the practical operation of the information packs in Bristol was that "over 80% of homebuyers were satisfied with the process and only 6% were dissatisfied. Buyers valued the transparency and greater certainty offered."[289]

SLOVAKIA

The Slovak land law in contrast has not adopted the caveat emptor rule. On the contrary the seller is required by law[290] to inform the buyer during the negotiations about all the defects of the land that he is aware of. In case of breach of this duty, the purchaser has a right of reasonable price discount, adequate to the nature and scope of the defect. The buyer has the right to withdraw from the contract, if the seller assured him that the real estate has certain parameters or that it has no defects and this assurance proves to be false[291]. Should the real estate have a defect then the buyer has to notify the seller about his rights without a delay, at the latest within 24 months after the purchase. Only then can the buyer enforce his right at the court. The buyer may in addition claim damages[292].

[288] Ibid

[289] In accordance with the evaluation of the pilot scheme to test the practical operation of the information packs in Bristol from December 1999 to July 2000 conducted by DETR in 2000. In S. Darby, R. Pugh: The Home Information Pack. Background document G for the 40% House project. Environmental Change Institute. University of Oxford. 2005. page 2.

[290] § 596 of Civil Code – Act no. 40/1964 Coll.

[291] 597 of Civil Code – Act no. 40/1964 Coll.

[292] § 600 of Civil Code – Act no. 40/1964 Coll.

Although the seller has the duty to disclose all the defects he is aware of, the provision of HIP could be of great benefit for purchasers in Slovakia. This would ensure, in comparison to the existing general duty to disclose defects by the seller, a decent standard of information provided by the seller. Implementing such a legal requirement could allow purchasers to make more informed decisions when buying properties.

On the other hand, it must be decided whether the potential advantages of the HIP scheme would prevail its negative aspects. Currently, an expert report on the price of property is being prepared whenever the purchase price is to be covered by a mortgage. The expert report contains the information prescribed by Announcement of the Ministry of Justice no. 440/2004 Coll. The report will contain every information relevant to the evaluation of the property such as technical value of the property, location, access from public roads. The average cost of this expert report is between €100 and €175 for flats and €330 for houses. Even if the preparation of a HIP would cost the same, in my opinion it would present an unnecessary burden on the seller's part and effectively also on the purchaser's part as the cost of HIP would be reflected in the purchase price. Unnecessary I say because in Slovakia, unlike in England, the risk of gazumping or gazundering is much lower. In fact, I first learned about this practice from English law books. Gazumping or gazundering is so rare in Slovak conveyancing, mainly due to the faster conveyancing process, that it is not given any

consideration in Slovak land law books. Moreover, the banks do not necessarily rely on the surveys submitted to them if prepared by a surveyor with whom the bank do not have good experience from previous dealings. In such case, the bank would request another survey. The same problem could arise in respect of the accuracy and impartiality of HIP. Furthermore, for it is not unusual that a property is on the market for some time particularly during this time of economic recession, information comprised in HIP would become out of date after some time and the HIP would need to be updated. In addition, the preparation of HIP would take some time which would postpone the date when a property can be put on the market. Therefore after reviewing the negative and the positive aspects of the introduction of HIP's in Slovakia I come to the conclusion that compulsory preparation of HIP would not fit the specific conditions of the Slovak property market.

The 'subject to contract agreement' in its rather institutional form as it is in England is also unknown in the Slovak system of conveyancing. The process of negotiating may be oral or in writing. Most common is that the parties agree orally on the main provisions and then a contract is drafted and sent to the other side for review. In order to avoid the document being misinterpreted as a binding offer lawyers in Slovakia must incorporate into the document body phrases such as “non-binding offer” or “preliminary offer”. The other party may suggest amendments and send the contract back. When they both reach the point when they agree to the content of the contract, the contract is signed. An English lawyer could rightly consider these negotiations as 'subject to contract' agreements. The difference is however that in

England the legal theory, the conveyancing practice and the relevant case law have given the 'subject to contract' phrase a rather institutionalised character. Conversely, the legal theory in Slovakia has dealt with the matter only marginally. Although the most appropriate wording for indication of a non-binding character of a certain document could be made subject to some theoretical discussions, in the Slovak conveyancing process this has not been a real problem.

B. SEARCHES, INQUIRIES AND INSPECTIONS

ENGLAND

In England, despite the existing provisions on the HIP and the seller's duty to disclose information prescribed, the practice of conducting searches, inquiries and inspections as already mentioned still seems to be necessary. It is therefore important and common for the buyer's solicitors to carry out searches, enquiries and inspections to find out more about the property to be transferred. The buyer has to make standard enquiries about the property and the seller must give an accurate answer to the best of his knowledge. “If the buyer exchanges the contracts as a result of a certain misrepresentation on the part of the seller, he may rescind the contract and/or sue for damages[293].”

An attempt to facilitate the conveyancing process was made by the Law Society in 1990 by introducing a “National Conveyancing Protocol” as a result of the

[293] Goo, S.H.: Sourcebook on land law. Third edition. Cavendish publishing, 2002, page 70

recommendations of the Law Commission's Conveyancing Standing Committee in 1989[294]. Under the protocol a seller is required to provide certain standard information including series of questionnaires contained in the "Property Information Form"[295] and a "Fittings and Contents Form"[296]. Although the protocol is designed to save time when acquiring information about a property, it is still the buyer's responsibility to investigate any other information not covered by the Protocol. Nevertheless, such standard forms of inquiries about the state of the property certainly facilitate a speedy and efficient conveyancing process. An introduction of similar standardised forms into the Slovak system of conveyancing would certainly increase the standard of information on the state of the property acquired by the purchaser prior to the actual transaction.

SLOVAKIA

The Slovak system of conveyancing is an example how the risk of undisclosed incumbrances may be very simply reduced. In the next few sub-paragraphs I will

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[294] "Let the buyer be well informed" (Reports of Conveyancing Standing Committee, December 1989), para 33. For an examination of the 1st edition of the National Protocol see [1990] Conv 137 (Wilkinson, HW).

[295] The Property Information Form contains series of questions regarding: boundaries, disputes and complaints in relation to the property, notices and guarantees relating to the property, utilities connected with the property, council tax band and amount, arrangements over the neighbouring property, alterations, planning and building control.

[296] The Fittings and Contents Form contains series of questions regarding: central heating and hot water, electrical points and switches, interior light fittings, television, telephone, windows, doors, external areas, curtains, blinds, carpets, other floor coverings, kitchen fitments, other non-fitted appliances, bathroom fitments, bedroom.

highlight the limited need for investigations and searches in Slovakia by comparing it with the existing significantly more complicated system in England.

A) LOCAL SEARCHES

Under the English system of conveyancing "there are two separate local searches: the local land charges search[297] and additional enquiries of the local authority. The Local Land Charges Register may be searched personally or by an application for an official search. The advantage of an official search is that the buyer can get compensation for existing charges not revealed by the official search certificate[298]. The certificate does not have any priority period and becomes out of date soon after it is issued. The search will reveal matters such as compulsory purchase order, planning matters, buildings listed as being of historical interest, tree preservation orders, financial charges etc."[299]

There is no equivalent to the Local Land Charges Register in the Slovak land registration system. The land-use planning documentation is prepared by a local authority. In practice, it is only searched when one is planning to conduct building

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297 Maintained under Local Land Charges Act 1975

298 Section 10 of the Local Land Charges Act 1975.

299 Goo, S.H.: Sourcebook on land law. Third edition. Cavendish publishing, 2002, page 70

activities on the land purchased. The land-use planning[300] involves tasks and activities such as: determination of the directions of spatial arrangement and functional land-use, determination of protected areas, protected buildings and zones, regulation of the location of buildings, creation of overall construction plans[301]. The construction administration organ issues the building permit only if it is in harmony with the land-use planning documents. The documentation is available for a public inspection in the seat of the local authority.

B) CENTRAL LAND CHARGES SEARCHES

Under the English system of conveyancing "where the title the buyer is buying is unregistered, under the Standard Conditions of Sale[302] the seller promises to sell the property free of entries made in the Land Register or Land Charges Register and if the seller does not intend to do so, he must disclose it in the contract to be approved by the buyer. Thus land charges rank as latent defects in title and should be brought

[300] In accordance with §1 of the Act no. 50/1976 Coll. on Land-use Planning and Building Order: "The land-use planning systematically and comprehensively addresses the spatial arrangement and functional use of land, lays down its principles, it proposes the material and chronological coordination of activities which influence environment, ecological stability, cultural-historical values of land, land development and landscape in accordance with the principles of permanently sustainable development.

[301] Article 2 of Act no. 50/1976 Coll. on Land-use Planning and Building Order

[302] Condition 3.1.1.

to the buyer's attention by the seller. The position is the same where the Standard Conditions of Sale[303] are not used if the seller gives full title guarantee."[304]

The dual system of parallel existence of both Land Register and Land Charges Register has not been adopted in Slovakia. The only register of incumbrances is the C register within the Cadastre. The only search that has to be conducted by a potential buyer is the official search of the Cadastre by applying for an official copy of the ownership certificate. This would disclose all the incumbrances in relation to the specific plot of land as well as information identifying the land and the owner. If the potential buyer neglects to conduct the Cadastre search and later discovers the existence of a registered easement or other incumbrance, he will be bound by it regardless whether he had actual knowledge of it at the time of purchase or not.

The Cadastre may be searched personally or by an application for an official[305] or unofficial ownership certificate. Unlike in England, the certificate does not confer any priority period and is only valid as evidence of the rights and encumbrances affecting the land on the date of its issue. The ownership certificate will reveal the following information:

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303 See s 3(1) of the Law of Property (Miscellaneous Provisions) Act 1994

304 Goo, S.H.: Sourcebook on land law. Third edition. Cavendish publishing, 2002, page 71

305 The advantage of an official search is that the buyer can get compensation for existing encumbrances not revealed by the official ownership certificate. This has been already discussed in Chapter III of this thesis.

Part A – Identification of the properties[306] subject to ownership and other rights in rem, including information on the parcel numbers, kind and areas of lots, building registration numbers, information whether the real estate belongs to the built-up municipal area.

Part B – Identification of the owners of the real estate and other persons entitled to rights in the real estate. In the case of a natural person their names, surname, surname at birth, date of birth, personal identity number and legal residence. In the case of a legal person their name, seat and identity number. This part also identifies the title by which the real estate was acquired as well as co-owners shares.

Part C – Identification of incumbrances such as easements, charges, priority rights of purchase and other rights of an *in rem* nature.

C) COMPANY REGISTER SEARCHES

It is necessary to undertake a company register search in England in cases where the seller is a company registered under the Companies Acts. “This is to discover any fixed or floating charge over the land. A fixed charge on unregistered land created before 1st January 1970 may be registered either under the Land Charges Act or at Companies House under the Companies Act 1985. Likewise, floating charges

[306] An ownership certificate may include information about more than one property.

created at any time may be, and often are, registered at Companies House. Fixed charges created after 1st January 1970 must be registered under the Land Charges Act 1972 as well as under the Companies Act 1985. Thus, although the buyer may rely on the Land Charges Register for fixed charges created after 1 January 1970, it is necessary to search at Companies House to reveal any pre-1970 charges and floating charges at any time."[307]

In Slovakia, fixed or floating charges over the land are not registered in the Commercial Register[308] but exclusively in the Cadastre[309]. The prospective purchaser is thus saved from conducting another search in order to discover this kind of third party rights with respect to the land.

4.3 FORMATION OF ENFORCEABLE CONTRACT

Once a purchaser is satisfied with the answers to his enquiries, has made any necessary arrangements to finance the transaction, and has had a surveyor's report on the property, the point will have been reached at which the parties are ready to conclude a legally binding contract. Upon this, each party is legally obliged to give

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307 Goo, S.H.: Sourcebook on land law. Third edition. Cavendish publishing, 2002, page 71

308 The content of the Commercial Register is defined in §2 of the Act no. 530/2003 Col. on the Commercial Register, which does not mention the fixed or floating charges as information subject to registration in the Commercial Register.

309 This is in accordance with the principle of conclusiveness applicable in Slovakia examined in more detail in Chapter III under the subheading "The Principle of Conclusiveness of Registration".

effect to the transaction, unless the other party is in breach of the terms of the contract.

A. FORMAL REQUIREMENTS

Transactions regarding real estates are among the most economically important transactions in most people's lives. Therefore the national laws of most countries formulate the formal and material requirements applicable to the contracts for sale of land.

ENGLAND

In general, the ordinary rules of contract law apply to a contract for the sale of land. However, due to the considerable value of land, there are additional rules relating to contracts for the sale of an estate or an interest in land. Since it is beyond the scope of this thesis to provide the reader with more detailed history of the development of the formal requirements applicable to the contracts for sale of land, I will give only a brief outline of the provisions applied prior to the current legislation. The formal requirements for the contract for the sale of land were first introduced in 1677 by the Statute of Frauds which was later replaced by section 40 of the LPA 1925[310]. The formal requirements under section 40 were:

1) adequate written evidence of the contract, and

[310] s. 40 LRA 1925: "No action may be brought upon any contract for the sale or other disposition of land or any interest in land, unless the agreement upon which such action is brought, or some note or memorandum thereof, is in writing and signed by the party to be charged or some person thereunto by him lawfully authorised."

2) signature of the party to be charged or his legal representative.

Under these provisions a contract for sale of land not complying with the formal requirements was valid but unenforceable.

The provisions of section 40, however were considered to be unsatisfactory[311]. "The idea of a valid, but unenforceable contract, was thought, with some justification, to be confusing."[312] A legislative reform was needed. This reform was enacted by section 2 of the LP(MP)A 1989 which came into effect on 27th September 1989.

Under the provision of section 2 contracts for the sale or other disposition of an interest in land must meet these formal requirements:

a) must be made in writing or there is no contract at all;

b) must contain all the terms agreed between the parties; and

c) must be signed by each of the parties, not just by the party to be charged.

The purpose of the s. 2 as pointed out by Hoffmann J, in Spiro v Glencrown Properties Ltd.[313] : "Section 2 ... was intended to prevent disputes over whether the parties had entered into a binding agreement or over what terms they had agreed".

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311 (1987) Law Com. No. 164. A fuller critique can be found in (1985) Law Com. W.P.No. 92. In M. P. Thompson: Modern Land Law. 4th edition. Oxford, 2009. page169.

312 M. P. Thompson: Modern Land Law. 4th edition. Oxford, 2009. page169.

313 [1991] Ch. 537, at 541C to D

If the contract does not satisfy the requirements of s. 2, there is simply no contract. The contract is not only unenforceable but utterly void. “Nevertheless, the courts have shown themselves able, by various routes, to enforce agreements which are not fully recorded in writing.”[314] In some cases courts have been able to declare insufficiently recorded contracts as enforceable by treating the omitted terms as a separate collateral contract[315].

However, not every omitted clause may be regarded as a separate collateral contract. “The courts have to detect a degree of separateness between the main agreement and the omitted clause before they can declare it to be a collateral contract. Even if this approach cannot be justified, the courts may order the insufficiently recorded contract to be rectified[316], on the basis of a convincing proof that the omitted term had been agreed upon by the parties and forms an integral part of the contract”[317]. This approach was envisaged also by the Law Commissioners in

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314 M. P. Thompson: Modern Land Law. 4th edition. Oxford, 2009. page 176.

315 Record v Bell [1991] 4 All E.R. 471. See also Tootal Clothing Ltd v. Guinea Properties Ltd [1992] 64 P. & C.R. 452.; Grossman v. Hooper [2001] 3 E.G.L.R. 662 at 671 per Sir Christopher Staughton where, on the facts, the part of the agreement which was not in writing was obviously separate from the land contract. M. P. Thompson: Modern Land Law. 4th edition. Oxford, 2009. page 176.

316 Wright v Robert Leonard Developments Ltd [1994] E.G.C.S. 69; Joscelyne v Nissen [1970] 2 QB 86, [1970] 1 All ER 1213

317 M. P. Thompson: Modern Land Law. 4th edition. Oxford, 2009. page177.

1987 in their working paper[318]: “If the parties reach an agreement but fail to record all the terms in writing, or record one or more of them wrongly, then either party may apply to the court for the written document to be rectified. If rectified, the document will satisfy the proposed requirement of writing and thus there will be a valid contract”.

SLOVAKIA

The formal requirements of contracts for sale were first introduced in Slovakia in 12th century. The fulfilment of the formal and material requirements were authorised by so-called *“loca credibilia”* such as judges, monasteries, chancellor, etc. Later, during the operation of Land Books the law similarly prescribed the formal and material requirements which had to be met prior to the registration of the transfer. Now, I am going to provide a brief introduction of the provisions applied prior to the current legislation. The formal requirements in respect of the contracts for sale of land prior to 1995 have been set out by the Civil Code no. 40/1964 Coll. according to which the contract for sale of land:

1. must be in writing;
2. must contain the terms specifying the parties, the property and the price;
3. must be signed by both parties.

Today, the formal requirements are set out in §42 of the Cadastre Act. Every contract in respect of real estate must meet these formal requirements in order to be valid:

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[318] Law Commission Report 164 at 5.6

1. must be in writing;

2. must be written in the Slovak language, the Czech language or another language

with attached certified translation;

3. must contain the terms specifying the parties, the property and the price;

4. must be signed by both parties while the signature of the transferor on the contract must be verified by a notary. If the transferor is represented by an agent, the signature of the transferor on the authorisation document must be verified by a notary.

COMPARISON

The analysis and comparison of the statutory provisions in both countries reveals that there are more differences to be identified than common features. An important requirement shared by both countries is the strictly prescribed written form for contracts for sale of land. This is due to the significant value of the properties and also the close link to a person's basic living conditions.

The most important distinction of the English provision is the requirement that all the terms agreed by parties are to be included in the contract. This specific requirement is not and has never been a part of the Slovak system of contract law and I fail to see the relevance of this provision. The Slovak law's position is that only the *essentialia negotii* must be included in the written form of the contract. If the parties agreed other

terms not included in the written form of contract, these would be void due to the fact that they are not in writing. The written contract would however remain valid. In my opinion it is unnecessary to insist on the completeness of the written form of contract as a condition for its validity.

I can imagine that the parties to the contract in England can be very anxious not to omit any of the agreed terms. The rigidity of the English provision was acknowledged by the courts which were able to reduce the number of contracts declared void when they invented the instrument of “separate collateral contract” enabling them to declare insufficiently recorded contracts as enforceable by treating the omitted terms as a separate collateral contract. In my view, the application of the “separate collateral contract” device could be reduced by an amendment of the statutory provisions which would require only the essential/main terms agreed between parties instead of all terms agreed by the parties. Ideally, these terms would be set out by the Act as for instance terms without which the parties would not conclude the contract. The contract would be then declared void only if the essential/main terms were omitted. This proposal is not new. It was already considered by the Law Commission in its report 164 [1987] in para 4.7 which reads: “In the working paper a preference was expressed for a scheme which required only the main terms of the contract to be in writing. It was recognised that it might be difficult to arrive at a satisfactory definition of 'main terms', but it was believed to be possible. Although, there was considerable support for this proposal, we have now decided that it would add an unnecessary complication, and that simplicity and certainty require the terms of the

contract should be in writing. We have reached this conclusion largely through a re-examination of the present law. It is not always appreciated that the written evidence required by section 40 to make a contract enforceable is not just written evidence of the existence of the contract but written evidence of all its terms. Thus to demand that all the terms of the contract be put in writing is nothing new." Although I agree with the philosophy of the latin phrase *"clara pacta boni amici"*, to insist on every term of the contract to be in writing or otherwise the contract is void creates more insecurity and complication than certainty for the parties to the contract.

The Commissioners further acknowledged: "Wherever the law requires specific formalities to do something, there is obviously a risk that on occasions these formalities will, through mistake or ignorance, be omitted. While it is important not to undermine the general rule that the formalities should be observed, it is equally important that the law should not be so inflexible as to cause unacceptable hardship in cases of non-compliance." They insisted that the remedies available are sufficient to ensure that their recommendations will not cause undue injustice. These remedies included the above discussed 1.rectification and 2. enforcement of a collateral contract. In my opinion an Act which is drafted with a view that the hardship of its provisions is to be reduced by the courts' intervention is systematically incorrect. An application to the court should only be the last resort to which the parties turn in order to set straight their relationship. The purpose of statutory provision is to prevent and reduce any potential litigation. From my viewpoint the draftsmen of s. 2 instead of

limiting any potential disputes at the source by providing the interpretation of “main terms” only pushed the problem to the courts to deal with.

Another formal requirement common for both countries is that the contract must be signed by both parties. However, the Slovak provisions endeavour to promote higher degree of protection against potential fraudulent acts by requesting the signature of the transferor to be verified by a notary. This provision has been very much criticized by conveyancers. It was considered to be insufficient for preventing fraud. In practice, the signature of a person is verified by an administrative employee of the notary office, who can be deceived by presenting him with a false ID. The recent amendment of the Cadastre Act targets also this problem. The amendment preserved the requirement of the signature to be verified by notary with the difference that if the contract is made in form of a notarial deed or the contract is authorised by an advocate the signature of the transferor does not have to be verified by a notary.[319] This is because the notary or the advocate will be responsible for the verification of the parties by making various identity checks. The undertaking of various identity checks should reduce the risk of fraud. In addition the notaries and the advocates are insured for cases when a person suffers loss due to some fraudulent act during the transaction.

Furthermore, the Slovak Cadastre Act requires the contracts to be drafted in either Slovak or the Czech language, or eventually in another language with attached

[319] §40 (3) of the Cadastre Act

certified translation. This is in harmony with another provision of the Cadastre Act which requires the Administration of the Cadastre to examine each contract submitted to determine whether the material requirements have been met. It is impossible for the Administration of the Cadastre to have employees covering every language in the world, therefore contracts drafted in another language than Slovak or Czech must be accompanied by a certified translation. A similar provision regarding the language of the contracts is not included in the English statutory provisions. Nevertheless, the general rule, that the contract must be in a language which both parties understand applies also in England.

B. TERMS OF THE CONTRACT

The rights and obligations of the parties are determined by the terms of the contract. The contract for the sale of land in both countries must include an express agreement as to the identity of the parties, the identity of the property and the price to be paid. These are *essentialia negotii* of the agreement for the sale of land. In the absence of agreement on these matters the contract will be void for uncertainty.

In England in the vast majority of cases, when drafting a contract for the sale of land one of the standard form contracts, is used. These standard forms include 'the Law Society´s form[320] or the National Conditions of Sale published by the Solicitors´ Law Stationery Society. These standard form contracts are simply ready drafted contracts

[320] Incorporating the Law Society's General Conditions of Sale.

containing a standard set of general conditions governing all those matters which need not vary from transaction to transaction. The solicitors in general only have to add those terms which will vary from the standard form, such as the parties, the description of the property, the price to be paid, the date for completion, the root of title[321] and so on.'[322]In Slovakia, similar standard forms of contract formed by the Law Society or some other professional body do not exist. Each contract for sale of land is drafted, usually by an advocate, individually. However, in the stationery shop a person may find forms of contract for the sale of land published by private editors.

a) Parties

The first of the '*essentialia negotiatii*' to be mentioned is the proper identification of the parties to the contract. While in Slovakia the requirement of identification of the parties is regulated by the Cadastre Act[323], in England this requirement was left to the case law to be ascertained.

In accordance with the Cadastre Act parties to the contract must be identified by their name, surname, surname at the birth, the date of birth, personal identity number and legal residence, and in the case of a legal entity by their name, seat and identification number if assigned. The sanction for not following these provisions is high. Any

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[321] In the case of unregistered land.

[322] Harwood, M.: Modern English Land Law. Sweet & Maxwell. 2nd edition, 1982. page 561.

[323] §42 (2)

contract which does not strictly meet these requirements will be rejected by the Administration of the Cadastre and thus the transaction will not be registered and the ownership will not pass from the transferor to the transferee. The actual position of the English case law to this matter is much more “relaxed” as it is not essential for the actual names of the parties to appear in the document, provided that the description is such as to preclude any dispute as to their identity.[324]

Consistent with the above mentioned, in England, “it is not fatal if an incorrect version of the name is inserted into the contract if the true identity is nevertheless apparent. The essential point is that extrinsic evidence is not admissible if such evidence is necessary to identify the parties to the contract.”[325] The Slovak statutory provisions also differentiate between mistakes in the contract. A minor mistake which is an obvious fault will not cause the application for an entry in the Cadastre to be rejected. If the written form of the contract includes mistakes in writing or counting or any other obvious faults which make it unintelligible or uncertain, the Administration of the Cadastre shall return the application to the applicant and shall specify the period for the correction or for the completion, respectively[326]

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[324] Fay v. Miller, Wilkins & Co. [1941] Ch. 360 at 365 per Clauson L.J.

[325] M. P. Thompson: Modern Land Law. 4th edition. Oxford, 2009. page173. Citing Rudra v. Abbey National plc (1998) 76 P. & C.R. 537.

[326] §42 (4)

Also, in accordance with the English case law “it is not sufficient simply to name the parties. One must be able to determine their respective capacities as vendor and purchaser[327], although this can be determined by inference, so that a statement of the receipt of money from a person will imply that that person is the purchaser.”[328] The identification of the capacity of each party to the contract in Slovakia is considered to be a matter of course. In fact, I would never contemplate this to be omitted from the contract. There is no record of a court case dealing with this issue in Slovakia. The reason for that is simply that if the contract failed to identify the capacity of each party, then the application for the entry in the Cadastre together with the contract would be rejected for uncertainty.

b) Property

Another of the “*essentialia negotii*“ of a contract for the sale of land is the identification of the subject matter of the contract.

Again, the statutory provisions in Slovakia very strictly set out how the property which is subject matter of the contract is identified. According to §42 (2)(c) of the Cadastre Act the property is required to be identified by its cadastral district, parcel number, kind of lot, registration number in case of a building and the shares of the joint owners. Where the property is transferred to more than one person, the contract

[327] Dewar v. Nintoft [1912] 2 K.B. 373.

[328] M. P. Thompson: Modern Land Law. 4th edition. Oxford, 2009. page173. Citing Auerbach v. Nelson [1919] 2 Ch. 373.

must also state what their shares will be. Also, if the property transferred is held in common by more than one person, the contract will state what is the share of each transferor as to the property. This means that almost all information from the ownership certificate describing the property must be copied to the contract. If a person fails to satisfy this requirement a contract may be declared to be void for uncertainty. Also, the Administration of the Cadastre would reject the application for entry to the Cadastre on the grounds of omitted/not sufficient information in the contract.

The position of the English case law seems to be less rigid and formal than the Slovak one. There are no statutory provisions which prescribe the information about the property necessary for its identification. There is a diametrically different approach between the two legal systems to be observed. While the position of the English law would be to accept any description which allows one to identify the property with a degree of certainty, the Slovak law marked with formalism would consider the identification of a property in a manner different from that prescribed as insufficient and the Administration of the Cadastre would reject such a contract.

c) Price

The third provision which cannot be omitted from the contract for it to be valid is the agreement on the price or at least a certain mechanism by which the price will be fixed. This requirement is applied in both countries without exception.

d) Specification of the legal action, its subject, place and time

Other distinctive feature of the Slovak system of conveyancing is that it includes within the *esentialia negotii* also the specification of the transaction (such as a contract for sale), its subject (such as the transfer of ownership to the land)[329], and the place and time when the transaction is concluded[330]. Should the parties fail to include these terms in the contract, the application for the entry in the register would be rejected and thus the transfer of ownership would not be effected. In England the provisions of this kind are considered to be "*naturalia negotii*" as provisions commonly included in contracts for sale of land, but the mere omission of them does not cause the contract to be void, unless these terms were agreed between parties and not included in the written form of contract.

e) Other provisions

In addition to the identification of parties and property and agreement on the price the contract of sale will contain other provisions called "*naturalia negotii*" or "*accidentalia negotii*" in order to give it a business efficacy.

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[329] The Slovak legal theory differentiates between the subject of the transaction (which is a certain action/main obligation such as the mentioned transfer of ownership) and the subject of sale (which is the property specified in the contract).

[330] §42 (2) (b) of the Cadastre Act

The terms of the contract can be either express or implied. Express terms as the title indicates are those expressly agreed by the parties. Only the terms expressly agreed between the parties need to be in writing, but not the terms implied by the law[331].

Implied terms only apply where there is no applicable express term. Since, in England, in most cases a standard form contract is used, containing a comprehensive set of express terms, there is only a little room left for the implied terms. The implied terms can be found in respective provisions of statutory instruments. In England these are for example the Statutory Conditions of Sale applicable to the contracts by correspondence, while in Slovakia the provisions of the Civil Code[332] would be applicable.

4.4 BETWEEN CONTRACT AND COMPLETION

Once all the formal and material requirements of the contract have been met and there are no defects which would cause the contract to be void, the contract is formed. The effect of such a contract is that the parties are legally bound to perform their contractual obligations and these are legally enforceable. Until the completion of the transaction the seller is still entitled to retain possession and to receive the rents and profits. Therefore the seller has to exercise a duty of care in managing and maintaining the property from the exchange of contracts till completion. If the property

[331] Such as that vacant possession is to be given upon completion.

[332] Act no. 40/1964 Coll.

is damaged during the interim period due to the seller's negligence, he will be liable to the buyer for the loss. These rules are common for both countries.

In England, it is quite normal, however, for there to be a gap of some weeks between the creation of the contract and the completion of it by the transfer of the legal estate to the purchaser. This is because the purchaser must effect searches in either the land charges registry or the register of title. During this period, if either side withdraws from the contract, or is unable to complete it[333], then he will be liable in damages to the other. If there is a considerable delay between the contract and completion, longer than the official search priority period, the buyer in order to take priority over any subsequent third party should protect it as a Class C land charge if the title to the property he is buying is unregistered. If the title is registered, the estate contract should be protected as a minor interest.

In Slovakia, unlike in England, the searches between the conclusion of contract and the completion by registration are limited to the inspection of the Cadastre or application for an official ownership certificate. Although there is no significant time gap between the conclusion of contract and completion under the Slovak system of conveyancing, the Cadastre Act allows the contract for the sale of land to be entered on the Cadastre in the form of a note. This would however not have the same effect as in England. It will not secure the purchaser's priority over other applications.

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[333] Perhaps because the vendor is not able to show good title to the land, or the purchaser is unable to raise the requisite finance.

Similarly as in England, if upon the conclusion of the contract it is discovered that the actual owner of the property is a person different from the vendor, the vendor will be liable in damages to the purchaser. This is regardless whether the purchaser becomes aware of this prior or after the submission of the application for registration.

Passing of risk

As the purchaser becomes the beneficial owner in equity from the date of the contract, the basic rule is that the risk passes to him at that point. It is, therefore, the buyer's responsibility to insure the property. On the other hand under the Standard Conditions of Sale, the seller is to transfer the property in the same physical state as it was in at the date of the contract, and he retains the risk until completion.[334] However should the house on the property burn down or be otherwise damaged after contract but before completion, the purchaser is still bound to complete the purchase and pay over the purchase price. “The Law Commission has criticised this rule as fundamentally unsatisfactory and unfair because it imposes on the buyer a responsibility to protect his property at a time when he has no physical control over it.[335] The Law Commission has recommended that the risk of physical damage should only pass to the buyer on completion and this is in line with the Standard Conditions of Sale.”[336] In practice, however, the contract may provide specifically that the risk

334 Condition 5.1.1.

335 Law Com 191, para 2.9

336 Goo, S.H.: Sourcebook on land law. Third edition. Cavendish publishing, 2002. p. 92

remains with the seller until the estate is conveyed or transferred, but if this term is not included the purchaser is at risk and should insure.

In comparison, in Slovakia the risk passes on the purchaser not upon the conclusion of contract but on the moment of completion of the ownership transfer, that is upon the registration in the Cadastre. From my viewpoint this provision is fairer to the purchaser than its English equivalent as it does make the purchaser liable for the physical damage between the conclusion of contract and completion. The *ius possidendi* does not pass on the purchaser before the transaction is completed. It is therefore truly unfair to impose on the buyer a responsibility to protect his property at a time when he has no physical control over it.

Investigating the title

Before completion takes place the vendor must prove his title to the purchaser in accordance with the contract. The essential nature of these tasks is for the purchaser to investigate the vendor's title, by which is meant establishing that the vendor can convey that which he has contracted to convey and to requisition various searches to discover to what incumbrances the land is subject. The method of proving title depends on whether the land is registered or unregistered.

With unregistered title, the contract normally specifies a particular document as the good root of title which is a document that covers the transfer of the whole of the

legal and equitable interests in the property, which describes the property adequately and which does not cast doubt on the seller's power to sell. A good root of title shall be at least 12 years old[337]. Immediately after the exchange of contracts and before the completion, the seller's solicitors must provide the buyer's solicitors with a list of documents of title starting from the good root, usually accompanied by photocopies of the documents or a document which summarises the main contents of title deeds starting from the good root (an “abstract of title”). Subsequently, the purchaser may raise queries regarding the evidence of title to which the vendor have to provide answers.

Where the title is registered, under the Standard Conditions of Sale, the evidence of title given must be office copies of the register.[338] Since the Land Register has been made open to public inspection, the buyer may also search the entries on the Land Register himself and the consent of the seller is not needed. If he gets an official search certificate, he will have a priority period of 30 working days.

In Slovakia, where only registered conveyancing is in operation, the only relevant search prior to the submission of the application for registration is the investigation of the vendor's title in the Cadastre. This way the purchaser may ensure that there were

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337 s. 15 (1) of the Limitation Act – No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person. See Chapter II subheading “Land Register – Essential?”

338 Condition 4.2.1.

no entries in the Cadastre lodged after the conclusion of the contract which would negatively affect the vendor's title or would put a burden on the land. The purchaser may also exercise his right to obtain an official copy of ownership certificate, which gives the purchaser the right to claim indemnity should it contain mistakes.

Drafting of purchase deed

The general rule of English law, with a few exceptions, is that a deed is necessary to transfer or create a legal interest in land.[339] "The historic purpose of a deed has been to indicate the highest level of formality attendant upon a solemn transaction in the law."[340] Once the buyer is satisfied that the seller can pass a good title to him, the buyer's solicitors will prepare two copies of the draft purchase deed. The purchase deeds, when drafted, are then sent to the seller's solicitors for approval. The seller's solicitors check the draft purchase deeds and, when approved, return a copy to the buyer's solicitor. The buyer's solicitors will then prepare the actual deed in its final form and obtain the buyer's signature to it. It will then be sent to the seller's solicitor for the seller's signature.

In Slovakia, compared to England, the formation of a deed is not and has never been a part of the conveyancing process. I personally consider the formation of a deed to

339 In accordance with s 52(1) of the LPA 1925 "all conveyances of land or any interest therein are void for the purpose of conveying or creating a legal estate unless made by deed."

340 Gray,K., Gray S.F.: Land Law. 6th edition, 2009. Oxford University Press, page 413.

be an unnecessary and burdensome requirement of the English system of conveyancing. It has been noted that the historic purpose of a deed has been to indicate the highest level of formality. However, the contract for sale concluded between the parties already has to meet certain formal requirements and the parties express their free will to give effect to the transaction by signing it. In addition the drafting of a purchase deed requires some time to complete and this in turn can cause further delays for the completion of the transfer of ownership. Although the drafting of a purchase deed does not have a counterpart in Slovakia I find it appropriate to examine the formalities of the deed set out by the English legislation under the next subheading.

FORMALITIES OF THE DEED

"For centuries the validity of a deed in English law rested on compliance with the requirements that the deed be signed, sealed and delivered."[341] These requirements have been modified by section 1 of the LP(MP)A 1989 in respect of all deeds executed on or after 31 July 1990. The requirement of sealing has been abolished and the due execution of a deed now requires it to be signed, attested and delivered. Furthermore, under the new legislation an instrument shall not be a deed unless it makes it clear on its face that it is intended to be a deed[342] by the person making it or

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341 Gray,K., Gray S.F.: Land Law. 6th edition, 2009. Oxford University Press, page 413.

342 Whether by describing itself as a deed or expressing itself ro be executed or signed as a deed.

by parties to it. “The intention that an instrument is a deed is often made clear by words such as “In witness whereof the vendor (or the parties hereto) have signed this document as a deed the day and year first above written”.”[343]

A) Signature

“Signature is, of course, the single fundamental and irreducible feature of a deed.”[344] Para 3 (a) of the LRA 2002 requires a deed to be signed (1) by a person who is making the deed in the presence of a witness who attests the signature; or (2) at his direction and in his presence and the presence of two witnesses who each attest the signature. The Act, itself, defines “sign” to include making one's mark.”[345] Beyond that, there is no further definition. “A company may execute a deed by affixing its common seal or by having the deed signed by a director and the company secretary, or by two company directors. It will take effect as the company's deed as long as it is made clear on its face that it is intended to be a deed.”[346]

B) Attestation

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343 Goo, S.H.: Soucebook on land law. Third edition. Cavendish publishing, 2002. p. 96.

344 See Shah v Shah [2001] EWCA Civ 527; QB 35 at [30] per Pill LJ in Gray,K., Gray S.F.: Land Law. 6th edition, 2009. Oxford University Press, page 414.

345 s. 1(4) LP(MP)A 1989

346 For the problems relating to the execution of deeds by company, see Law Commission, the Execution of Deeds and Documents by or on Behalf of Bodies Corporate (Law Com No 253, 26 August 1998) in Goo, S.H.: Soucebook on land law. Third edition. Cavendish publishing, 2002. p. 95.

In accordance with s I(3)(a)(i) LP(MP)A 1989, an instrument is validly executed as a deed only if a witness also signs to attest that the signature of the author of the deed was effected in the witness's presence.

C) Delivery

In accordance with s 3(b) of the LP(MP)A 1989 a deed must be delivered by a person making the deed or by a person authorised to do so on his behalf. “Delivery of a deed does not necessarily connote any physical transfer of the instrument. What it entails is that the person executing the deed signifies an intention to be bound by it. Delivery comprises any unilateral act or statement by the author which signifies that he adopts the deed irrevocably as his own and operates as a representation that the deed has been duly signed and attested”[347] ”Classically, the way to deliver a deed is physically to hand it over, expressing words such as “I deliver this as my deed”.[348] In practice, this is rare and the courts are willing to infer the delivery of a deed from the conduct of the grantor in signing it.”[349]

Searches, enquiries and inspections between contract and completion

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347 Gray,K., Gray S.F.: Land Law. 6th edition, 2009. Oxford University Press, page 414.

348 Xenos v. Wickham (1867) L.R. 2 H.L. 296 at 312 per Blackburn J.

349 M. P. Thompson: Modern Land Law. 4th edition, 2009. Oxford University Press. page 205.

In England, “it is important from the buyer's point of view to do the usual searches, enquiries and inspections all over again within the priority period before the completion.[350] The purpose of these searches, enquiries and inspections is to ascertain whether the seller can actually sell the property as he has contracted to do free of third parties incumbrances other than those already disclosed in the contract.” [351]

In comparison, under the Slovak system of conveyancing all the incumbrances are ascertainable from the Cadastre itself. The main reason being that the institution of overriding interests is unknown under the Slovak legislation. A simple search of the Cadastre would therefore disclose all the incumbrances in respect of a certain property. Nevertheless, it is advisable to inspect the property to ensure that the physical state of the property has not worsened since the conclusion of the contract.

A) Searches

In England, the character of searches depend on whether the title is registered or not. Where the title is unregistered, the buyer needs to search the land charges register. Although the seller would, under the National Protocol, have supplied the

[350] These include searches at the Central Land Charges Registry in the case of unregistered title, and the District Land Registry in the case of registered title, and inspecting the property itself. The process of conducting searches, inspections and inquiries has been described in more detail in this Chapter in the subsection devoted to pre-contractual stage.

[351] Goo, S.H.: Sourcebook on land law. Third edition. Cavendish publishing, 2002. page 98.

buyer with a copy of the official search certificate of the land charges register, priority is for only 30 working days and it will probably be out of date by now. Any searches the buyer did himself earlier on before the contract are, likewise, likely to be out of date. Another search is therefore necessary. This is because if the search reveals any registered land charge entered after the contract (the existence of which was not disclosed by the seller before the contract), the buyer can refuse to proceed to completion and rescind the contract immediately. Where the title is registered, an official search which reveals no registered land charges will also give the buyer a new priority period of 30 working days.

In comparison, under the Slovak system of registered conveyancing the purchaser has the option to search the register or to apply for an official copy of ownership certificate. If the search reveals the vendor's lack of title to the property or any undisclosed incumbrances, he will as in England be entitled to rescind the contract immediately. The vendor will be in addition liable in damages to the purchaser for any losses caused. The purchaser would have the same rights also if the insufficient right to transfer the ownership is revealed after the submission of the application for registration.

Inspections of property

Although, in England, the inspection of a property is normally done before the contract, this should be done again before the completion. The purpose is the same,

that is to rule out any possible third party's interests of an overriding nature created after the conclusion of the contract. At the same time the vendor would ascertain that the state of the property does not differ from the one described in the contract. The process of property inspection after the contract involves the same steps as prior to the conclusion of the contract. These have been described in previous paragraphs of this chapter.

In Slovakia, the inspection of a property in this stage almost never takes place in practice. This is first of all because normally the time gap between the conclusion of the contract and the submission of the application is minimal. Secondly, the fact that the purchaser finds out undisclosed defects on the property only after the contract does not affect his right to rescind the contract as well as claim damages.

4.5 COMPLETION

ENGLAND

Where the title is unregistered, the legal estate will pass to the purchaser upon the execution of a deed, but since all land in England and Wales is within compulsory registration areas, an application must be made for first registration of title within two months of the execution of the deed. Failure to apply for first registration of title to the freehold estate within two months of the date of any 'relevant event' renders the triggering disposition 'void' for the purpose of transferring, granting or creating a

legal estate[352]. At this point, title to the legal estate reverts to the transferor, who now holds it on a bare trust for the transferee.[353] The two-months period may be extended by order of the registrar.[354] Alternatively, the transferee may be forced to arrange for a retransfer of the intended legal estate, followed this time by somewhat swifter registration.[355] The application itself must be accompanied by prescribed documents and include: (a) sufficient details, by plan or otherwise, so that the land can be identified clearly on the Ordnance Survey map, (b) all deeds and documents relating to the title that are in the control of the applicant, (c) a list in duplicate in Form DL of all the documents delivered.[356] "On an application for first registration of title, the applicant's title deeds and other relevant claims are examined by the registrar, who determines which quality of title to award – absolute, qualified or possessory[357]. The class of title awarded to the first registered proprietor is then indicated in the proprietorship register of the newly opened register of title. The registrar in examining title on an application for first registration may also (a) make searches and enquiries

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352 ss 6(4), 7(1) LRA 2002

353 ss 7(2)(a) LRA 2002

354 s 6(5) LRA 2002

355 s 8LRA 2002

356 r 24 of the LRR 2003

357 s 9(1) LRA 2002

and give notices to other persons, (b) direct that searches and enquiries be made by the applicant, (c) advertise the application.[358]

Where the title is registered, the process of transferring land is by a deed called a transfer instead of the deed of conveyance and the legal estate does not pass until the transferee applies for registration.[359] There is thus no provision, as with dispositions which necessitate first registration, for a reversible vesting of the legal estate during the two months immediately following the disposition. But due to the limited duration of the priority period granted with an official search a buyer must apply for registration within 30 working days from the date of the search certificate which he obtained before the completion. Only within this period is the buyer protected from any other concurrent application.

The registrar may require a person to produce documents supporting his application. [360] The requirement of the registrar is enforceable as an order of the court. The seriousness of this requirement is emphasized by s. 123 LRA 2002 according to which a person commits an offence if in the course of proceedings relating to registration they suppress information with the intention of (a) concealing a person's right or claim, or (b) substantiating a false claim. Upon the submission of an

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[358] r 30 of the LRR 2003

[359] s. 27 LRA 2002

[360] s. 75 LRA 2002

application, the transfer of a registered property is made final and effective at law only by the act of registration, whereby the date of registration of the new proprietorship is deemed retrospectively to be the date on which the application was actually lodged at the Land Registry.[361]

In England the parties' contractual obligations covered directly or indirectly by the purchase deed are generally superseded upon completion. “No action can normally be brought on the contract. There are, however, matters which will not be superseded by the purchase deed. These are obligations which the parties did not intend to be extinguished by the conveyance, as well as agreements for vacant possession,[362] for compensation for misdescription,[363] and for completion of the building of a house in a proper manner.[364] Likewise, the buyer's remedies for any misrepresentation under the Misrepresentation Act 1967 survive the completion.”[365]

SLOVAKIA

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361 s. 74 LRA 2002

362 Hisset v Reading Roofing Co Ltd [1970] 1 All ER 122.

363 Palmer v Johnson (1884) 13 QBD 351, CA.

364 Lawrence v Cassel [1930] 2 KB 83, CA.

365 Goo, S.H.: Soucebook on land law. Third edition. Cavendish publishing, 2002. page 100.

It was already highlighted in the previous chapters that Slovakia, unlike England, operates registered conveyancing only. Every transaction regarding land must be therefore completed by registration in the Cadastre. The transfer of rights to land on the basis of a contract for sale are entered into the Cadastre in form of an entry. The legal effects of the entry take place on the day of the legally valid decision of the Administration of the Cadastre on the permission of an entry.[366] This is a significant difference in comparison to the English system, where the registrar's decision takes effect "*ex tunc*", from the date of application receipt. From my viewpoint, for the sake of legal certainty of the transaction, the decision on the application should take an *"ex nunc"* effect. Otherwise, if the registration takes effect "*ex tunc*", the purchaser will be liable for *vis maior* during the time between conclusion of the contract and the registrar's decision. The purchaser will be burdened with this risk at the time, when he cannot be certain whether the registrar will not reject the application for registration.

The Administration of the Cadastre decides upon an application for entry in the Cadastre which may be submitted by any party to the contract. Prior to submission of an application for entry in the Cadastre, the parties to the contract may submit a notification of an intended application for an entry in electronic form available on the website of the GCCO. The notification has the effect of reducing the administrative fee by 15€. The notification is removed if the actual application for entry is not submitted within 90 days from the date of receipt of the notification.

[366] §28 of the Cadastre Act

The application for an entry does not have a specific form as it has in England. The obligatory content of the application is prescribed by the Cadastre Act and includes: 1) the identification of the parties to the contract, 2) the specification of the Administration of the Cadastre that is the addressee of the proposal, and 3) the specification of the contract upon which the entry is made. For the future it would be certainly more convenient if the Slovak statutory provisions follow the English pattern and design a specific form for the application. It would certainly simplify and therefore speed up the administrative procedure. It would also give a lay person applying for registration a peace of mind that he has not omitted any obligatory information in the application. Similarly as in England, the application for registration must be accompanied by prescribed annexes, in particular: 1) the contract on the basis of which the right to the real estate shall be entered into the Cadastre, 2) public deed or other deed authenticating the right to the real estate (such as land book certificate), if this right to the real estate has not already been entered into the certificate of ownership, 3) identification of parcels, if the proprietorship has not been yet entered into the certificate of ownership, 4) survey sketch, 5) excerpt from the Companies Register, where the party is a legal entity, 5) power of attorney, if a party is represented by an authorized representative. At the same time the applicant is required to pay the administrative fee, which is unlike in England a fixed rate regardless of the transaction value. The basic administrative fee paid together with an application for registration is 66€ or 33€ for applications submitted electronically. The applicant may request the Administration of the Cadastre to decide within 15

days from the date of application submission and in that case he is required to pay a higher administrative fee of 265,50€ or 130€ if submitted by electronic means.

Upon the submission of an application for registration the Administration of the Cadastre first marks the application with the date, hour and minute of receipt. This determines the priority of concurrent applications. On the date of application receipt or next working day, the Administration of the Cadastre makes a notice in the Cadastre about the commencement of a process for transfer of title to a particular property. The notice is removed as soon as the Administration of the Cadastre renders a decision on the application submitted. When the notice is active, the Administration of the Cadastre will issue a certificate of ownership only upon the application of the registered proprietor and only with a note that the ownership to the property is affected by a transaction. A third person interested in the same property would therefore be aware of an on-going registration process in respect of the property. This has the effect of reducing frauds by vendors trying to sell the property to more individuals. The English system does not contain a provision to the same effect. Nevertheless, the incorporation of such provision would be advisable as it would bear the same benefits as under the Slovak system.

In the next stage of the registration process the Administration of the Cadastre examines some legal aspects of the contract, such as the validity of the contract, the transferor's title to transfer the real estate, whether the contract contains the esentialia negotii, whether the contract is in the prescribed form and not contra legem

or contra bonae morales, whether the contract was concluded in accordance with the intentions of the parties, whether the manifestation of their will was certain and understandable and whether the freedom of contract or the title to deal with the real estate were not restrained.[367] Similarly as in England, where the registrar examines only the written evidence submitted, particularly the title deeds, the decisions of the Administration of the Cadastre are based on the inspection of documents submitted. The Administration of the Cadastre in particular checks whether the contract is in the prescribed written form, whether it contains the *esentialia negotii,* whether the signature of the transferor is authorized by a notary, and whether he has the right to transfer the property. The Administration of the Cadastre does not make any further enquiries.

The provision of notarial authorisation of the transferor's signature has been subject to some criticism, when some pointed at cases of fraud where the notarial administrative person authorized the signature of a person different from the owner on the basis of a forged identification document. The Slovak law commission report on the last amendment of the Cadastre Act – Act no. 304/2009 Coll. - in effect since 1.9.2009, used the argument of frauds linked to the notarial authorisation as a reason for new provisions in the Cadastre Act. These were inspired by the Italian model according to which if the contract for sale is made in form of notarial deed or authorized by an advocate, the Administration of Cadastre examines only whether the contract is in accordance with the Cadastral data and whether the procedural

[367] §31 of the Cadastre Act

conditions for permission of entry have been met. In accordance with the amended Cadastre Act, the advocates and notaries may unlike the Administration of the Cadastre, make further enquiries in order to ensure the identity of the parties and their title to transfer the property. The advocate or notary is then liable for any damages arising from the breach of their obligations and they must be insured for this purpose. In my opinion, although the new provisions are an improvement in the safety of the transaction, they will not have the desired aim of fraud reduction if the old system still remains in effect. On the other hand, the enactment of compulsory authorisation by advocates or notaries would significantly increase the conveyancing costs, which is undesirable. In my opinion, the occurrence of frauds linked to the notarial error or misuse of authority is not so frequent[368] as to justify a major change in the system which would in fact mainly benefit only the mentioned two groups of professionals.

Unlike under the English system, with no strict time limit set for the registrar's decision, the Administration of Cadastre has to render a decision within 30 days from the day of application delivery. Also, since the last amendment of the Cadastral Act[369] effective from 1st September 2009, if the contract for sale was made in form of a notarial deed or was authorized by an advocate and is in accordance with the cadastral data and the procedural requirements are met, the time limit for a decision

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368 In 2007 for example 181, 000 application for registration were submitted and 281 offences were reported.

369 Act no. 304/2009 Coll.

is 20 days. The amendment aimed to achieve a simplification and speeding up of the process of property transfer, but this goal has been met only partially. The effect of reducing the time limit for the decision of the Administration of the Cadastre by 10 days is not a significant improvement from the viewpoint of conveyancers and contractual parties. If a person wants to achieve an even faster decision on his application, then upon a payment of an increased administrative fee the Administration of the Cadastre may decide within 15 days from the day of application receipt. The Administration of the Cadastre is however not strictly bound by the 15 days time limit. If the Administration of the Cadastre does not render a decision within this time, the applicant is only entitled to a repayment of a difference between the increased administrative fee and the standard fee.

If all the conditions of entry in the Cadastre are met, the Administration of the Cadastre permits the entry; otherwise the application is rejected. If the conditions of entry are fulfilled only with respect to a part of the application and if it is appropriate, the Administration of the Cadastre may permit an entry in the Cadastre in respect of this part only. The decision about the permission of entry in the Cadastre is marked on the contract submitted and indicates the date when the decision was made. This date is the relevant date for the transfer of ownership. The decision on the permission of entry is delivered to each party within 15 days from the date of the decision. If the application is rejected, the Administration of Cadastre delivers the decision to all the

parties to the contract. They can then appeal against the decision within 30 days from the receipt of the decision.[370]

[370] A person may however not appeal against a decision to permit entry.

CONCLUSION

The system of land registration, as we have seen on the example of England and Slovakia, can fit and benefit societies with various specific historical, economic and political conditions – Slovakia which had to recover from the era of centrally organised directive economy, disorganisation and degradation of ownership under the socialism system and England, with a different legal system, where the title to land has been traditionally not absolute, but relative and where the introduction of the land registration system was delayed due to the opposition from the lawyers.

Also, what can be learned from the example of England and Slovakia is that the objective of comprehensive land registration system can be achieved by various routes. While Slovakia has chosen a faster but more expensive way by establishing an administrative procedure for the updating of the register, in England the whole land was to be put on register gradually by making registration compulsory upon certain types of transaction. The latter concept is cheaper and presents less state intervention but the price for it is the indefinite time in which every title can be put on the register.

Although some may argue, that land registration is another form of undesired state intervention into private matters, as we have seen it contributes to a more secure, faster and eventually cheaper conveyancing compared to the unregistered one. However, for the land registration system to have the described effect it must be fully in compliance with the mirror principle. The example of England shows that any

“crack in the mirror” in a form of overriding interests existing off the register can produce unwanted uncertainty on the part of purchasers. The arguments for overriding interests such as the protection of third persons' interests do not have the weight to prevail the benefits of a secure conveyancing process without the need of conducting various searches. Therefore, the main suggestion for legislative amendments in England shall be to abolish the overriding interests completely and require all the interests to be put on the register. Another suggestions for amendments in respect of the English system of land registration and conveyancing, made on the basis of information compared are: 1) to free the conveyancing process in England from the lengthy searches in various registers, including Land Charges Register and Companies Register, by merging all information regarding interests in land into one Land Register, 2) to remove the requirement of a deed for transfers of a legal interest in land, 3) to require only the main terms of the contract for transfer of legal interest in land to be in writing.

The research highlighted also areas of Slovak land registration which require improvement. Due to the bureaucratic decision making process the work effectiveness of the Slovak administrative organs process almost 5 times less applications than the English ones. Although, the pre-contractual stage in Slovakia is faster, due to the fact that searches are limited merely to Cadastre search, the general time limit for the decision on the application for registration (currently 30 days) is considered to be unsatisfactorily long. Therefore, the objective should be to find ways how to reduce the time required for completion by registration, while

keeping the overall objective of secure conveyancing. This could be achieved, following the example of England, by introducing standard forms of contracts and application forms. The inspection of such documents would require less effort, which would have the effect of a faster registration. The research also brought up the importance of strengthening the insurance principle in Slovakia. The procedure for obtaining indemnity is burdensome and lengthy, compared to the English model, which is more efficient and should be adopted also in Slovakia.

Another question which may arise after reading the thesis is whether it would be possible to unify the land registration rules within the EU and create a central land register. The benefit of such unification would be the legal certainty of foreign investors which would eventually stimulate the property market. The Chapter III of this thesis proved that both the Land Register in England and the Cadastre in Slovakia are built, with some deviations, on the same principles. The unification of the procedure for the land registration would however require first the unification of the substantive land law rules. This can be learned from the example of the English system of land registration which failed to introduce the title registration system prior to major changes in the substantive rules such as the reduction of the number of estates. One difference between the Slovak and English substantive rules to mention is the nature of the title to land, which is absolute in Slovakia but relative in England (although moving inexorably towards an absolute title in England also).

Although, the comparative study mainly aimed to provide reflections „*de lege ferenda*“, since no monography or journal article have been written on the specific comparative topic of acquisition of property in England and Slovak Republic, it is expected that the research will fill the gap existing in this field and would be an asset particularly for advocates, solicitors, barristers and other professionals practicing within the area of property law in the countries selected. Undergraduate and postgraduate students interested in the property law or private inernational law could benefit from this research as well.

LIST OF ABREVIATIONS

Cadastre – Cadastre of Real Estates

Cadastre Act – Act No. 162/1995 on the Cadastre of Real Estates and the Entries of Ownership and Other Rights to the Real Estates

DETR – Department of the Environment, Transport and the Regions

FLA 1996 – Family Law Act 1996

GCCO – The Geodesy, Cartography and Cadastre Office of the Slovak Republic

HCR – Home Condition Report

HIP – Home Information Pack

LPA 1925 – Law of Property Act 1925

LP(MP)A 1989 – Law of Property (Miscellaneous Provisions) Act 1989

LRA 1925 – Land Registration Act 1925

LRA 2002 – Land Registration Act 2002

LRR 2003 – Land Registration Rules 2003

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