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Determining "obvious" occupation under Sch.3 para. 2(c) of the Land Registration Act 2002

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Summary

Discusses the test of "obvious" occupation under Sch.3 para. 2(c) of the Land Registration Act 2002. Reviews how the background materials to the Act are relevant to the interpretation of this test. Argues that the courts should accept that a very high chance of an occupier is enough to meet it.

Introduction

This article concerns the test of "obvious" occupation in Sch.3 para. 2(c) of the Land Registration Act 2002 (LRA 2002). As readers will know, Sch.3 para. 2(c) limits when there can be an actual occupation overriding interest. It includes a requirement that the interest-holder's occupation "would not have been obvious on a reasonably careful inspection of the land" at the time of the disposition. This provision was introduced to allay concerns about undiscoverable occupation. It is "[b]y far the most important change" to Sch.3.[1] This article highlights and addresses two questions about its application. For clarity, we will refer to 'A' as the disponee of a registered disposition, such as a sale or the grant of a legal charge; 'B' as the disponor; and 'C' as the person who has an unprotected interest in the land.[2]

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[1] *A. Clarke and P. Kohler, Property Law: Commentary and Materials* (Cambridge: CUP, 2005), p.562.

[2] In each case, the singular in principle includes the plural.

There are reasons for examining Sch.3 para. 2(c). Trial judges sometimes have to apply it,[3] as do lawyers who advise on cases involving Sch.3 para. 2. The provision could be important in priority disputes between legal secured lenders and beneficiaries of family homes.[4] Clarity about the test will be useful. Yet the present guidance is open to some interpretation. A risk exists of the law being applied in subtly different ways, with potential implications for some occupiers. This article seeks to curtail any such chance. At the same time, it helps to answer the academic query about how far Sch. 3, para. 2(c) differs from the doctrine of notice.

The first question to be posed is about identity. How far must the signs of C's occupation make clear to A that there is an occupier *other than* B? If, for example, C's occupation takes the form of parking a car in a garage that is owned by B,[5] and A can see the car, does it matter if A could reasonably think that it was B's car? Alternatively, is C's occupation "obvious" simply because the car can be seen? This issue is key to the scope of Sch.3 para. 2(c). An emphasis on just what can be seen is very favourable to C. By contrast, a test that focusses on how to interpret what is visible is more helpful to A. The better view is that the matters on which C relies must make it "obvious" that there is an occupier other than B.

The second question is how clear the position must be for it to be "obvious". In practice, the matters on which C relies may suggest a chance of another occupier, but one that can vary from case to case. For example, the presence of two fully equipped home office rooms could in principle suggest a very high chance of an occupier. By contrast, a mere second en suite bedroom, with soap and towels in the bathroom, may of itself suggest a lower chance of another occupier. What degree of chance makes occupation "obvious"? It is over this matter that the scope for subtly different understandings may be greatest. Some dictionary definitions cover only what is practically certain, whereas other ones can take in what is highly likely. The Law Commission papers and the Parliamentary debates might appear to favour a test of what is practically certain, but on closer inspection they can accommodate very high chances. The courts may well prefer a 'very high chance' test. It gives them a more supportable degree of flexibility.

This article is structured as follows. The opening section gives an overview of Sch.3 para. 2(c) and its context. The next one suggests that the relevant signs must show the presence of an occupier other than B. The final section addresses the degree of chance that the signs must indicate.

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[3] For a recent example, see *Clapham* v *Narga* [2023] EWHC 3337 (Ch) at [28]–[29], setting out the relevant judgment below. There was no appeal against how the judge had applied Sch.3 para. 2(c).
[4] As was the case in *Thomas v Clydesdale Bank Plc* [2010] EWHC 2755 (QB); [2010] N.P.C. 107.
[5] As in *Kling v Keston Properties Ltd* (1985) 49 P. & C.R. 212.

The context

The basics of Sch.3 are well-known. It applies when there is a registered disposition of a registered estate for valuable consideration.[6] It sets down the 'overriding interests' that can bind a disponee, despite not being protected on the register.[7] Interests that are denied priority under another rule, such as overreaching, cannot be overriding.[8] Of present interest is Sch.3 para. 2. It applies to: "An interest belonging at the time of the disposition to a person in actual occupation, so far as relating to land of which he is in actual occupation", subject to some caveats. One of the exceptions is contained in Sch.3 para. 2(c). It stems from concern about C being in undiscoverable occupation.[9] It covers:

> (c) an interest—
>
> (i) which belongs to a person whose occupation would not have been obvious on a reasonably careful inspection of the land at the time of the disposition, and
> (ii) of which the person to whom the disposition is made does not have actual knowledge at that time

Part of the rationale for this provision is to prompt A to make inquiry of C.[10] If C could reasonably have disclosed their interest and fails to do so, their interest will come within the exception in Sch.3 para. 2(b). By contrast, if C does disclose their interest, A can then take such steps as they deem proper. This could include seeking a waiver of the right.

The test of "actual occupation" in Sch.3 para. 2 is a familiar one.[11] Readers will know that it connotes a physical presence, as opposed to a mere entitlement in law,[12] and that it need not be exclusive[13] but it must be more than fleeting.[14] We also know that "actual occupation" is applied

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[6] The dispositions that must be registered are set out in s.27. A partial definition of "valuable consideration" appears in s.132.
[7] Its role is confirmed by ss.29(2) and 30(2).
[8] *Abbey National Building Society v Cann* [1991] 1 A.C. 56.
[9] Law Commission and HM Land Registry, *Land Registration for the Twenty-First Century: A Consultative Document* (HMSO, 1998), Law Com. No.254, para.4.13.
[10] Law Commission and HM Land Registry, *Land Registration for the Twenty-First Century: A Conveyancing Revolution* (HMSO, 2001), Law Com. No.271, para.8.62.
[11] For a useful summary, see *Thompson v Foy* [2009] EWHC 1076 (Ch); [2010] 1 P.& C.R. 16 at [127].
[12] *Williams & Glyn's Bank* v *Boland* [1981] A.C. 487 at 504–505 (Lord Wilberforce).
[13] *Strand Securities Ltd v Caswell* [1965] Ch. 958 at 980 (Lord Denning MR).
[14] *Abbey National Building Society v Cann* [1991] 1 A.C. 56 at 93 (Lord Oliver).

with some flexibility. Thus, a person who lives in a house can be taken to "occupy" the airspace above it and the ground beneath it. It is hard to see what physical presence a homeowner has 100 metres above their house.

A flexible approach is also manifest in the ideas of vicarious and symbolic occupation. Vicarious occupation involves a non-visible link between the occupier(s) and the person(s) on whose behalf they occupy. Most obviously, this could be a contractual duty to occupy.[15] C might, for example, rely on occupation by builders whom they have contractually engaged to carry out work on the land.[16] Symbolic occupation covers cases where C is absent but has possessions on the land and intends to return to occupation. In determining whether in this event C is an occupier, the courts consider the reason(s) for C's absence, its length, and the personal circumstances of C.[17] A good example is *Chhokar v Chhokar*.[18] In that case, C was in hospital to give birth, but her furniture remained in the house in question. This was quite a short absence for understandable reasons.[19] C was held to be in actual occupation.

Thinking practically about all these rules, we can identify the most likely disputes to engage Sch.3 para. 2(c). Most occupiers with property rights in C's position are likely to be beneficiaries or leaseholders. If C has a lease, it will usually be recorded on the register or, in the case of shorter legal leases, overriding under Sch.3 para. 1.[20] Disputes involving beneficiaries are more probable. A likely context is that B holds the family home on trust for themselves and C, and B mortgages the property in favour of A to secure a loan,[21] without C's knowledge and without informing A about C. A cannot rely on overreaching,[22] and is unlikely to benefit from any other doctrine outside of the LRA 2002, such as estoppel.[23] C should easily be able to show actual occupation. Therefore, the question arises whether C's occupation is "obvious".

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[15] See generally *Penninstone Holdings Ltd v Rock Ferry Waterfront Trust* [2021] EWCA Civ 1029; [2022] P.& C.R.14 at [32]–[35] (Lewison LJ).
[16] *Lloyds Bank Plc v Rosset* [1989] Ch. 350.
[17] *Link Lending Ltd v Bustard* [2010] EWCA Civ 424; [2010] 2 E.G.L.R. 55 at [27] (Mummery LJ).
[18] [1984] F.L.R. 313.
[19] Cf. *Stockholm Finance Ltd v Garden Holdings Inc* [1995] N.P.C. 162.
[20] For leases that must be registered, see ss.4 and 27 LRA 2002. For leases that cannot be protected by a notice, see s.33.
[21] Contrast the position with acquisition mortgages: *Abbey National Building Society v Cann* [1991] 1 A.C. 56. In the case of a sale, the contract usually provides for vacant possession on completion: S. Bridge, E. Cooke and M. Dixon, *Megarry & Wade: The Law of Real Property*, 9th edn (London: Sweet & Maxwell, 2019), para.14-088.
[22] Overreaching cannot take place when B is the sole legal owner: Law of Property Act 1925, ss.2(1)(ii) and 27(2).
[23] For discussion of the role of estoppel, see *Ali v Dinc* [2020] EWHC 3055 (Ch); [2021] 2 P. & C.R. 19.

When it comes to applying Sch.3 para. 2(c) in such cases, some things are plain. First, the occupation (and not the interest) must be obvious.[24] This is one difference from the doctrine of notice, with its emphasis on what rights could be discovered by reasonable inquiry. Secondly, it does not matter if an inspection did take place. We ask instead what a hypothetical "reasonably careful inspection" would find.[25] This may matter in practice, if (as is suggested) secured lenders often fail to inspect at all.[26] The focus on a hypothetical inspection may also mean that A's own knowledge is irrelevant to determining its proper scope.[27] Thirdly, only visible matters are relevant to deciding what is "obvious". This is the stance adopted in a different context, to determine whether a seller has a duty to disclose a given defect in their title.[28] A seller must disclose "latent" defects but not "patent" ones, the distinction turning on what can be seen on a reasonable inspection of the land. Both the Law Commission papers[29] and the Parliamentary debates[30] propose taking this approach under Sch.3 para. 2(c). The 2002 Act case law accords with it.[31]

These points do not tell us exactly how occupation can be "obvious". This a notable unresolved issue with Sch.3 para. 2(c).[32] It cuts across the several ways in which actual occupation can be shown. As we will see, the existing case law offers limited guidance on this matter, though it does show that C will readily be treated as an "obvious" occupier when they can be seen residing on the land.[33] Academic writing has mainly queried how far Sch.3 para. 2(c) differs from the doctrine of notice. For example, *Ruoff & Roper* says that whether a distinction

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[24] Explanatory notes to the LRA 2002, para.227.
[25] *Thompson v Foy* [2009] EWHC 1076 (Ch); [2010] 1 P.& C.R. 16 at [132].
[26] For a suggestion that such inspections often do not occur, see B. Bagusz, "Defining the Scope of Actual Occupation under the LRA 2002: Some Recent Judicial Clarification" [2011] Conv. 268, 283–84.
[27] The irrelevance of such knowledge is suggested in *Thomas v Clydesdale Bank Plc* [2010] EWHC 2755 (QB); [2010] N.P.C. 107 at [40]; *Ruoff & Roper: Registered Conveyancing* (London: Sweet and Maxwell), para.17-016.
[28] *Caballero v Henty* (1873–74) L.R. 9 Ch. App. 447; *Yandle & Sons v Sutton* [1922] 2 Ch. 199. This duty is an exception to caveat emptor. A property right that will bind the buyer can be defect for this purpose: e.g., *Pagebar Properties Ltd v Derby Investment Holdings Ltd* [1972] 1 W.L.R. 1500. The duty does not apply to any rights(s) of which the buyer has actual knowledge: *Re Gloag and Miller's Contract* (1883) 23 Ch. D. 320 at 327. See generally C. Harpum, "Selling without Title: A Vendor's Duty of Disclosure?" (1992) 108 L.Q.R. 280.
[29] Law Commission and HM Land Registry, *Land Registration for the Twenty-First Century: A Consultative Document*, para.5.72; Law Commission and HM Land Registry, *Land Registration for the Twenty-First Century: A Conveyancing Revolution*, para.5.21.
[30] Hansard (HL Debates), 17 July 2001, Vol.626, col.1434–35 and 1436 (Baroness Scotland). Hansard (HL Debates), 30 October 2001, 1327–28 (Lord Bassam); House of Commons Standing Committee D, Land Registration Bill, 13 December 2001, col.69 (Michael Wills).
[31] *Thomas v Clydesdale Bank Plc* [2010] EWHC 2755 (QB); [2010] N.P.C. 107 at [40].
[32] Other issues are what A must know to have "actual knowledge" of an interest (see *Thomas v Clydesdale Bank Plc* [2010] EWHC 2755 (QB); [2010] N.P.C. 107 at [49]) and the limits of a "reasonably careful inspection", perhaps especially as regards dealings with large areas of land.
[33] Examples include *Credit and Mercantile Plc v Kaymuu Ltd* [2014] EWHC 1746 (Ch); [2014] B.P.I.R. 1127 at [79]–[82] and [189]–[195]; *Mortgage Express v Lambert* [2016] EWCA Civ 555; [2017] Ch. 93.

does emerge between the two tests "remains to be seen".[34] The authors of *Emmet and Farrand* view the distinction as "elusive".[35] In an article, Jackson discusses the test as if "obvious" means the same thing as "apparent", a word which has parallels with the doctrine of notice.[36] She does not ask whether the background materials support this view.

As we will see, the background materials are important to understanding Sch.3 para. 2(c). They and their relevance are as follows. First, there is the Law Commission consultation paper.[37] We may consider this "as part of the contextual setting for legislation, or to help identify the mischief at which it is aimed."[38] Secondly, there is the Law Commission report.[39] This is likely to be relevant for broader purposes:[40] they include adding context that helps to ascertain the purposive meaning of an ambiguous provision.[41] Thirdly, there are the legislative debates in Parliament. These are pertinent as well. As *Pepper v Hart*[42] requires, there are at least some clear statements by promoters of the Bill as to the meaning of a provision – here, about the word "obvious" – that itself admits of different interpretations.

Obviousness and the identity of occupiers

A first issue is how far the matters on which C relies to show occupation must make clear the identity of the occupier. This is an aspect of the word "obvious". Prima facie, C's occupation may not seem "obvious" when what can be seen fits with occupation only by B. We may return to a previous example to illustrate this. Consider a case involving the purchase of land on which there

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[34] *Ruoff & Roper: Registered Conveyancing* (London: Sweet and Maxwell), para.17-016.
[35] *Emmet and Farrand on Title* (London: Sweet and Maxwell), para.5-105.
[36] N. Jackson, 'Title by Registration and Concealed Overriding Interests: The Cause and Effect of Antipathy to Documentary Proof' (2003) 119 L.Q.R. 660. The test of "apparent" occupation has been linked to the doctrine of notice: *Hodgson v Marks* [1971] Ch. 892 at 931–932 (Russell LJ).
[37] Law Commission and HM Land Registry, *Land Registration for the Twenty-First Century: A Consultative Document* (HMSO, 1998), Law Com. No.254.
[38] *AB Housing Ltd v Secretary of State for Levelling Up, Housing and Communities* [2022] EWHC 208 Admin; [2022] P.T.S.R. 1027 at [70].
[39] Law Commission and HM Land Registry, *Land Registration for the Twenty-First Century: A Conveyancing Revolution* (HMSO, 2001), Law Com. No.271.
[40] See generally D. Feldman, D. Bailey and L. Norbury, *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th edn (London: Sweet & Maxwell, 2022), at [24.9].
[41] *R (O) v Secretary of State for the Home Department* [2022] UKSC 3; [2023] A.C. 255 at [30] (Lord Hodge JSC).
[42] [1993] A.C. 593.

is a garage. The car in the garage is in fact parked there by C and not B, and this is held to be actual occupation.[43] The car could be seen through a window in the garage wall. A person inspecting the land may however have thought that the car belonged to B. Had they ever thought about the contrary possibility, they may have deemed it to be a very low one.

The same issue could arise in cases of symbolic or vicarious occupation. As in *Chhokar*, a symbolic occupier may rely on the presence of their furniture. Is C's occupation obvious just because the furniture can be seen? As it was a case decided before the LRA 2002, the judge in *Chhokar* did not consider the issue.[44] In terms of vicarious occupation, we may imagine examples involving builders on the land. The builders could be treated as occupiers.[45] If they are there on behalf of C, rather than (or also for) B, is their presence alone enough to make C's occupation obvious? The alternative is that it must also be obvious that they are present on B's behalf. Some authors have noted this point of uncertainty with the test.[46]

If C's occupation is "obvious" in these examples, just because it is visible, Sch.3 para. 2(c) has a very limited scope. A could still rely on it if nothing that related to C's occupation was visible on a reasonably careful inspection. An instance would be if C is a symbolic occupier, but all their possessions are stored in cupboards and drawers.[47] The occupation of underground mines and tunnels could offer a more remote example.

Given the nature of the issue, the background materials might address it more plainly. There is a lack of discussion of how specifically one determines "obvious" occupation, as we see further in the next section. Nevertheless, a focus on mere visibility is doubtful. First, one should read Sch.3 para. 2(c) with Sch.3 para. 2(b) in mind.[48] We will recall that the latter applies when A inquires of C and C fails to disclose their right when they could reasonably have been expected to do so. This provision is intended to link to Sch.3 para. 2(c). As the report states in explaining Sch.3 para. 2(c): "Once an intending buyer becomes aware of the occupation, he or she should make inquiry of the occupier because of [Sch.3 para. (2)(b)]."[49] However, A is not prompted to

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[43] *Kling v Keston Properties Ltd* (1985) 49 P. & C.R. 212.
[44] Contrast the suggestion, in some cases under the Land Registration Act 1925, that "actual occupation" must be "apparent", such as *Hodgson v Marks* [1971] Ch. 892 at 931–932 (Russell LJ).
[45] *Lloyds Bank Plc v Rosset* [1989] Ch. 350.
[46] B. McFarlane, N. Hopkins, and S. Nield, *Land Law: Text, Cases and Materials*, 5th edn (Oxford: OUP, 2021), p.598.
[47] See by analogy *Kingsnorth Finance Co Ltd v Tizard* [1986] 1 W.L.R. 783 at 791.
[48] Statutes must be construed as a whole: *Customs and Excise Commissioners v Zielinski Baker & Partners Ltd* [2004] UKHL 7, [2004] 2 All E.R. 141 at [38] (Lord Walker).
[49] Law Commission and HM Land Registry, *Land Registration for the Twenty-First Century: A Conveyancing Revolution*, para.8.62 (footnote omitted).

make any such inquiry if B looks to be the sole occupier. A mere focus on visibility undermines the purpose behind Sch.3 para. 2(b).

This view also fits with the mischief that Sch.3 para. 2(c) seeks to address. The consultation paper objected to a right being overriding "notwithstanding that there is no person other than the vendor in apparent occupation of the property".[50] This implies as a starting point that the vendor is the "apparent" occupier. Whether someone else is one should be understood against this backdrop. By the same token, the consultation paper highlights the difficulty of discovering "that the land in question is in the actual occupation *of a third party*".[51] This is different from a problem of discovering whether the land is occupied at all. In addition, these quoted concerns derive from *Kling v Keston Properties Ltd*,[52] a case of occupation by car parking, despite C not showing that the car's owner could be ascertained. This may hint that the mischief covers issues about identity. As to the report, it states the aim of offering protection "where the fact of occupation is neither subjectively known to [A] nor readily ascertainable."[53] The "fact of occupation" is the fact of C's occupation. There will be nothing "readily ascertainable" about it if there is nothing to suggest that B is not responsible for what can be seen.

In terms of case law, *Knights Construction (March) Ltd v Roberto Mac Ltd*[54] hints that this is the correct approach. Of some items placed on the land by C in that case, the judge said that they "could as well have been put there by [B] as by anybody else".[55] The implication is that the occupation is not obvious in this event.

If this view is correct, C's occupation is "obvious" only when the signs point clearly enough to there being an occupier other than B. The words "whose occupation" – as in "a person whose occupation" – mean that C can only rely on signs that relate to their presence. In other words, if C's occupation is not obvious, it is no use them arguing that there were signs of some other occupier (whom we might call 'D'). D's signs of occupation are irrelevant to C. This approach fits with the policy of prompting A to approach C.

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[50] Law Commission and HM Land Registry, *Land Registration for the Twenty-First Century: A Consultative Document*, para.4.13, quoting from *Kling v Keston Properties Ltd* (1985) 49 P. & C.R. 212 at 222.
[51] Law Commission and HM Land Registry, *Land Registration for the Twenty-First Century: A Consultative Document*, para.4.13 (emphasis added), quoting from *Kling v Keston Properties Ltd* (1985) 49 P. & C.R. 212 at 222.
[52] *Kling v Keston Properties Ltd* (1985) 49 P. & C.R. 212.
[53] Law Commission and HM Land Registry, *Land Registration for the Twenty-First Century: A Conveyancing Revolution*, para.8.62.
[54] [2011] 2 E.G.L.R. 123. Another example of this type of reasoning may be *Cooper v Ward* [2017] UKFTT 0474 (PC) at [75].
[55] *Knights Construction (March) Ltd v Roberto Mac Ltd* [2011] 2 E.G.L.R. 123 at [50].

Obviousness and probabilities of another occupier

A second question to address about "obvious" occupation is how clear it must be to meet that description. Cases of vicarious occupation could raise this issue. An example might be based on facts like those in *Lloyds Bank Plc v Rosset*.[56] Imagine that a reasonable inspector sees construction workers renovating a house and C in attendance. They might conclude that there is a chance that the workers act on behalf of C (whether solely, or in addition to, B), and so that C is responsible for what can be seen. But there can be no certainty either way, based just on the visible evidence.

The same uncertainty could also arise with symbolic occupiers. Such occupiers must rely on the presence of their possessions. The reasonable inspector might ask how clearly these things suggest the presence of someone other than B. An example is if C alleges symbolic occupation of a house, and points to the presence of some clothes laid out on a bed, and a room furnished as their home office. Everything will turn on the precise facts, but these items could suggest varying degrees of chance of an occupier, rather than a certainty of it. For example, a home office could seem more suspicious if there are two of them in the house. B might conceivably have one such room for their own use, but it seems less likely (but not impossible) they would have a second one.

Judges in these cases are likely to view the chances impressionistically, adopting broad labels for differing levels of probability. Such labels are indeed used with the test of constructive notice. Given the decline of unregistered land, this development has come to the fore outside of the context of land law, though it has been adopted in a recent Hong Kong decision.[57] In *Credit Agricole Corp and Investment Bank v Papadimitriou*,[58] Lord Clarke said that a bank (as purchaser) would need to make inquiries "if there is a serious possibility" of a third party having a proprietary right. [59] He explained that this chance is lower than something that is probable.[60] The bank would have constructive notice if there is such a serious possibility, and its inquiries would have revealed the probable existence of the right.[61]

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[56] *Lloyds Bank Plc v Rosset* [1989] Ch. 350.
[57] *CS Credit Ltd v Marspan Ltd* [2021] HKCU 6011 at [52(5)].
[58] *Credit Agricole Corp and Investment Bank v Papadimitriou* [2015] UKPC 13; [2015] 1 W.L.R. 4265.
[59] *Credit Agricole Corp and Investment Bank v Papadimitriou* [2015] UKPC 13; [2015] 1 W.L.R. 4265 at [20].
[60] *Credit Agricole Corp and Investment Bank v Papadimitriou* [2015] UKPC 13; [2015] 1 W.L.R. 4265 at [20].
[61] *CS Credit Ltd v Marspan Ltd* [2021] HKCU 6011 at [52(5)].

We may add to the labels in *Papadimitriou* to fill out a spectrum of chances. At the lower end is a mere possibility – a low but not a fanciful one. We can then distinguish, as Lord Clarke did, between a case where the presence of another occupier is probable from one where it is not probable but still a serious possibility. At the upper end of the scale, there are high chances, very high chances and then practical certainties. A judge would need to consider the cumulative effect of the relevant visible matters, to decide how great a chance of occupation there would have appeared to be. This is inevitably quite an impressionistic task. Trial judges will eschew questions such as whether, say, an 85% chance makes something very likely, as well as expressing matters in percentages at all. They will instead reason more by intuition. Appellate courts are most unlikely to interfere with their decisions.

The question is how the Sch.3 para. 2(c) test maps onto this scale. An open discussion of this issue helps to avoid a danger of subtly different understandings. This risk should not be discounted. It fits with the various ways in which the term "obvious" is defined in dictionaries. The background materials also contain statements in outward support of different approaches. The best approach is not immediately clear.

To start with dictionary definitions, they tend to narrow the inquiry down to at least two alternatives.[62] One is that the something is "obvious" if it is practically certain. Other definitions tend to include as "obvious" that which is at least highly likely. For example, the *Oxford English Dictionary* includes (inter alia) the following definitions:

> "Plain and evident to the mind; perfectly clear or manifest; plainly distinguishable; clearly visible."[63]
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> "Lacking in subtlety, sophistication, or originality; banal, predictable."[64]
>
> "Natural, likely; such as common sense might suggest."[65]

The first of these definitions tends towards practical certainty. Other ones, like "such as common sense might suggest", are broader. That something is highly likely should be enough for this purpose. The *Cambridge* dictionary likewise refers to what is "easy to see, recognize or

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[62] Dictionary definitions are commonly considered when interpreting legislation: see generally D. Feldman, D. Bailey and L. Norbury, *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th edn (London: Sweet & Maxwell, 2022), at [24.23].
[63] *Oxford English Dictionary, https://www.oed.com*, "Obvious" (definition 1a).
[64] *Oxford English Dictionary,* "Obvious" (definition 1b).
[65] *Oxford English Dictionary,* "Obvious" (definition 1c).

understand".[66] The fact of occupation may be "easy to understand" if there is a high chance of it explaining what can be seen.

The Law Commission's stated aim for Sch.3 para. 2(c) outwardly fits with either approach, whilst probably steering us towards at least very high (rather than just high) chances. We will recall the aim of offering protection "where the fact of occupation is neither subjectively known to [A] nor readily ascertainable."[67] The word "readily" can mean "without delay", but it can also mean "easily".[68] If a very high chance exists, and C is in fact an occupier, their occupation should at least be quickly ascertainable. No extensive further inquiries should be required. Indeed, some further inquiries will often be needed even if the test requires practical certainty; for example, to establish the name and contact details of the other occupier. Thus, we are not choosing between a practical certainty test, for which no inquiries are needed, and a very high chance one, for which they are.

The Yandle test and its effect

We will call the first alternative – to require practical certainty – the *Yandle* test. It derives from words of Sargant J in *Yandle & Sons v Sutton*.[69] *Yandle* itself concerned the meaning of a "patent" defect in title, for which purpose the words "patent" and "obvious" are interchangeable.[70] It seems clear that the jurisprudence on what amounts to a "patent" defect can assist in determining what is "obvious" under Sch.3 para. 2(c). During the Parliamentary debates, the term "obvious" was defended, partly because of its familiarity to lawyers and judges from the patent defect case law.[71] It was therefore more satisfactory than the word "apparent", which lacked such a clear meaning in law.[72]

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[66] *Cambridge English Dictionary*, *https://dictionary.cambridge.org/dictionary/english*, "Obvious".
[67] Law Commission and HM Land Registry, *Land Registration for the Twenty-First Century: A Conveyancing Revolution*, para.8.62.
[68] *Oxford English Dictionary, "Readily"* (definition 2a).
[69] *Yandle & Sons v Sutton* [1922] 2 Ch. 199.
[70] See also *Ashburner v Sewell* [1891] 3 Ch. 405 at 408–9.
[71] Hansard (HL Debates), 17 July 2001, Vol.626, col.1434–35 (Baroness Scotland); Hansard (HL Debates), 30 October 2001, 1327 (Lord Bassam); House of Commons Standing Committee D, Land Registration Bill, 13 December 2001, col.69 (Michael Wills). See also Law Commission and HM Land Registry, *Land Registration for the Twenty-First Century: A Consultative Document*, para.5.73; Law Commission and HM Land Registry, *Land Registration for the Twenty-First Century: A Conveyancing Revolution*, para.5.21.
[72] Hansard (HL Debates), 17 July 2001, Vol.626, col.1434–35 (Baroness Scotland). By contrast, the Law Commission report tended to use the words "obvious" and "apparent" interchangeably: Law Commission

In *Yandle*, Sargant J decided that a public right of way was not a patent defect. It was not patent due to the nature of the visible track over which it existed. The track looked like it could have been formed by its occasional use by quite a small number of persons, or even use by the owner (until very recently) of both plots. Thus, not only was the public right of way a latent defect, but (had there been one) even a private right of way would have been one too.[73] If we were to plot the right on a scale of chances, the prospect that there was one must have seemed low at best.

Sargant J's reasoning bears scrutiny. The learned judge drew from *Ashburner v Sewell*.[74] The decision in *Ashburner*, he said, "is of great assistance in the present case; and indeed governs it, having regard to the view I take of the facts."[75] He drew from a passage in that case, stating "[t]he general rule of law in regard to rights of way", to be as follows:

> "where it is obvious that there is a right of way enjoyed by some third person, or by the public in general, the existence of such right of way cannot give rise to any objection to the title, as, for example, if the estate sold is a large one with a public highway running through it, then it is obvious that it is not intended to sell the property free from such right of way; but the purchaser would take subject to the right of way. The right is in such a case patent".[76]

As he took this view of the law, Sargant J's decision on the facts is unsurprising. He need not have gone further. However, he added a "general observation", as follows:

> "In all these cases between vendor and purchaser, the vendor knows what the property is, and what the rights with regard to it are. The purchaser is generally in the dark. I think, therefore, that, in considering what is a latent defect and what a patent defect, one ought to take the general view, that a patent defect, which can be thrust upon the purchaser, must be a defect which arises either to the eye, or by necessary implication from something which is visible to the eye. It would not be fair to hold that a purchaser is to be subjected to all the rights which he might have found out, if he had pursued an inquiry based upon that which was presented to his eye. I think he is only liable to take the

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and HM Land Registry, *Land Registration for the Twenty-First Century: A Conveyancing Revolution*, paras.2.27, 5.21, and 8.61–8.62.

[73] *Yandle & Sons v Sutton* [1922] 2 Ch 199 at 209–10.

[74] [1891] 3 Ch. 405.

[75] *Yandle & Sons v Sutton* [1922] 2 Ch 199 at 208.

[76] *Yandle & Sons v Sutton* [1922] 2 Ch 199 at 207, quoting from *Ashburner v Sewell* [1891] 3 Ch. 405 at 409–10.

> property subject to those defects which are patent to the eye, including those defects which are a necessary consequence of something which is patent to the eye."[77]

Sargant J does not use the term "practical certainty", though his remarks are to this effect. The expression is used in a later case in Northern Ireland.[78] In that case, an easement in favour of a neighbouring house had not been disclosed by the seller. It existed over a path on the land that joined a road at one end, and which led to nowhere else but the neighbouring house at the other end. It could also be seen that the neighbouring house had no other means of access to the road. The easement was held to be a patent defect, and so it did not require disclosure.

Despite the differences in context, the background materials draw on *Yandle*. Two supporters of the Bill in Parliament were Lord Bassam and Michael Wills. They both said that the test should be construed in line with the case law on patent defects.[79] They both describe *Yandle* as the "leading case", and quote Sargant J's words about "patent" defects being things that are visible or a "necessary consequence" of what is visible. The strongest support for the *Yandle* test is offered by Baroness Scotland. She stated that "the test… is to be interpreted in the same light as the case law relating to the question of a patent defect in title; that is, […] under the principles that were set out in *Yandle*".[80] She also defined "obvious" as "Plain and open to the eye or mind, clearly perceptible, perfectly evident or manifest; palpable".[81] This would fit with the *Yandle* test.

A further argument is that the *Yandle* test reflects Parliament's intention to increase the accuracy of the register. During the Parliamentary debates, Baroness Scotland sought to explain the test of what is "obvious" in the light of this context:

> "Before [explaining the proposed test], perhaps it would be convenient for me to set out yet again some of the principal aims of the Bill. The intention is that as much as possible of what is known about a property should be readily available on the register and, ultimately, online. The register should become as complete a record as possible of the matters affecting a

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[77] *Yandle & Sons v Sutton* [1922] 2 Ch 199 at 210.
[78] *Re Flanigan and McGarvey and Thompson's Contract* [1945] N.I. 32.
[79] Hansard (HL Debates), 30 October 2001, 1327–1328 (Lord Bassam); House of Commons Standing Committee D, Land Registration Bill, 13 December 2001, col.69 (Michael Wills).
[80] Hansard (HL Debates), 17 July 2001, Vol.626, col.1436 (Baroness Scotland).
[81] Hansard (HL Debates), 17 July 2001, Vol.626, col.1434 (Baroness Scotland).

property so that a buyer is not bound by something of which he had no knowledge. That is the thrust behind all the rules."[82]

Baroness Scotland relied on this reasoning to reject a suggestion that the word "obvious" set the threshold too high. In effect, she prioritised the accuracy of the register over other considerations.

If we are to favour the *Yandle* test, we must address how "occupation" can be "obvious", even though it turns on non-visible factors. For example, a house may give the appearance of being lived in, but there will be no "actual occupation" if the person who lived there has decided never to return to occupation, as happened in one case.[83] Ramsay J clearly highlights this general issue in *Thomas v Clydesdale Bank plc*:[84]

> "… in order to determine whether somebody is in actual occupation it is necessary to determine not only matters which would be obvious on inspection but matters which would require enquiry to ascertain them. That includes such things as the permanence and continuity of the presence of the person concerned, the intentions and wishes of that person and the personal circumstances of the person concerned.
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> 39. An inspection which only required something to be visible might show that somebody was staying at the property but without enquiry it would not be known whether they were there for an hour, a day, a month, or had some more permanent continuous presence to give rise to the required occupation."

Ramsay J offers an answer to the difficulty, albeit only in the context of an application to set aside a judgment, and without reference to the background materials. In his view, "it is the visible signs of occupation which have to be obvious on inspection."[85] There are at least two ways of reading this statement. One is that "occupation", as normally defined, can be "obvious" when the visible signs of it are clear enough. That would not fit with the *Yandle* test.[86] The visible signs cannot

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[82] Hansard (HL Debates), 17 July 2001, Vol.626, col.1433 (Baroness Scotland). See also Hansard (HL Debates), 30 October 2001, 1327 (Lord Bassam) ("The overall aim is to reduce interests which override registration as far as practicable and to ensure that they are restricted to interests which it would be impracticable or impossible to register").
[83] *Thompson v Foy* [2009] EWHC 1076 (Ch); [2010] 1 P. & C.R. 16.
[84] *Thomas v Clydesdale Bank Plc* [2010] EWHC 2755 (QB); [2010] N.P.C. 107 at [38]–[39].
[85] *Thomas v Clydesdale Bank Plc* [2010] EWHC 2755 (QB); [2010] N.P.C. 107 at [40]. See also at [38].
[86] It could fit with the 'very high chance' test (see the following section).

show that such "occupation" is a practical certainty. Alternatively, Ramsay J's view may support giving an atypical meaning to the word "occupation" in Sch.3 para. 2(c). For "occupation", we read "the visible signs of occupation". More fully, we might describe it as "the visible signs that will, if accompanied by the right non-visible factors, amount to actual occupation". That would at least fit with *Yandle*. Whether the signs are visible is, in turn, determined by the scope of a "reasonably careful inspection". The word "obvious" would then remind us how clearly the "visible signs" must signal the position. A sign that showed just a chance of an occupier would not be enough.[87]

Having explained the *Yandle* test, it is worth pausing to consider its impact. The effect of it on symbolic occupiers would be mixed. Those in a relatively strong position include those who live in a clearly distinct part of the land to B. *Thompson v Foy*[88] is illustrates this situation. The land in question included a cottage, along with an extension and annexe. B lived in the extension and the annexe. C lived in the main cottage, which looked to be fully furnished. Lewison J considered, obiter,[89] that C's actual occupation of the cottage was "obvious". This was so even if she was not present and had taken her personal possessions from her bedroom and her valuables.[90] This is a sensible view. It would still have looked practically certain that there were different living spaces. As to the non-visible factors, Lewison J did not explain why he put them aside. One could try to explain this, as just discussed, by reading "occupation" to refer to the visible signs of it.

Some types of symbolic occupier may struggle to meet the *Yandle* test. C may be in a difficult position if they live with B. There could be at least some possible counter-explanation for any possessions of C. For example, photographs on a wall may show C and B together, but they do not necessarily imply that C lives in the property. Merely from the sight of the photographs, a reasonable inspector cannot rule out that the person pictured with B lives elsewhere. They may be a sibling, a cousin, a close friend or such like: people who may well have a different abode. The sight of clothing is unlikely to be decisive either. If B is a man, traditionally feminine clothing in a house might suggest a very high chance of another occupier, but there are clearly other explanations, which cannot be summarily discounted. B's partner may have died, leaving all their property to B. B may have bought the items from a charity shop, intending to make a gift of them to someone. B could also be someone who chooses to wear traditionally feminine clothing. For a

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[87] The possibility that Ramsay J may have intended a lower standard of probability is discussed in the next section.
[88] *Thompson v Foy* [2009] EWHC 1076 (Ch); [2010] 1 P. & C.R. 16.
[89] C's claim to an interest that existed at the time of the relevant disposition failed.
[90] *Thompson v Foy* [2009] EWHC 1076 (Ch); [2010] 1 P. & C.R. 16 at [132].

court to say that the presence of someone other than B is a "necessary implication" of what can be seen is dubious, and potentially quite offensive.

Moving on to vicarious occupation, the risk to C is perhaps greater still. We have already given an example that is based loosely on *Rosset*. In that case, as both Smith and Sparkes have argued, the bank could not justifiably assume that that the builders worked only for Mr Rosset.[91] Yet it is hardly a practical certainty that they worked for both Mr and Mrs Rosset. There is plainly a chance, based only on what is visible, that the builders did not regard themselves (as it turns out they did) as employed by them both. That Mrs Rosset was present at times on the property as well could hardly negate this chance. Therefore, on this approach, Mrs Rosset's occupation was not "obvious" under Sch.3 para. 2(c) either. Indeed, it is hard to see that virtually anyone in C's position could show that the link between them and the workers was a practical certainty.

The case for a less strict approach

We will now set out a case for a slightly less strict approach to Sch.3 para. 2(c). The overall argument is that what is "obvious" should be determined in the context of what A is inspecting to find. A very high chance of an occupier should be enough, as that is all that can ever realistically exist in many cases. This view allows for a more natural reading of the word "occupation", is enough to address the mischief at hand, and fits with what is admissible from the Parliamentary debates. It may be the best response to the difficulty created by this provision.

To begin by thinking about Sch.3 para. 2 as a whole, there is an initial attraction to this less strict approach. It fits with the presumption that the same words in a statute bear the same meaning.[92] The word "occupation" in Sch.3 para. 2(c) can take on its normal definition: the same one as in Sch.3 para. 2. The non-visible factors should only ever leave a very small degree of doubt. If one sees evidence of an occupier other than B, in principle the chance must be very low, for example, that C has decided never to return,[93] has been absent for too long to remain an occupier,[94] or such like. The reasonable inspector could be aware of these possibilities but still

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[91] R.J. Smith, "Land Registration and a Conveyancing Absurdity" (1988) 104 L.Q.R. 507, 511; P. Sparkes, "The Discoverability of Occupiers of Registered Land" [1989] Conv. 342, 346.
[92] For this presumption, see *Webb v Webb* [2020] UKPC 22; [2021] 1 F.L.R. 448, at [119] (Lord Wilson). See generally D. Feldman, D. Bailey and L. Norbury, *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th edn (London: Sweet & Maxwell, 2022), at [23.1].
[93] As in *Thompson v Foy* [2009] EWHC 1076 (Ch); [2010] 1 P.& C.R. 16.
[94] As was the case in *Stockholm Finance Ltd v Garden Holdings Inc* [1995] N.P.C. 162.

conclude that there is a very high chance of "occupation", as normally defined. The *Yandle* test, by contrast, forces us to define "occupation" in a doubtful way. Nothing in the background materials tells us to give that term an atypical meaning. The word "actual" is missing, but this is not significant.[95] It would be quite surprising if Parliament intended the concept to have a novel and unusual definition in Sch.3 para. 2(c), despite this never being stated anywhere. Indeed, no case apart from *Thomas* lends even possible support for this approach. Other cases have found that occupation was "obvious", without suggesting that "occupation" takes on anything other than its normal meaning.[96]

Moving on, a less strict view still tackles the mischief to be addressed, on closer scrutiny. The background materials do not suggest any clear concern about symbolic or vicarious occupation. The consultation paper refers instead to remarks in *Kling v Keston Properties Ltd*.[97] The context of them may be relevant. Vinelott J expressed his concerns whilst countenancing that even intermittent parking of the car could have been actual occupation.[98] Thus, the objection was that there might be nothing to see at the relevant time, and yet still be an overriding interest. Even a "very high chance" test addresses this mischief. The courts need not invoke the stricter *Yandle* test.

The next argument is that the background materials allow the courts to adopt a very high chance test. We will recall that *Pepper v Hart*[99] requires any admissible statement to be clear. This means that the courts will look for consistency of explanation.[100] In this respect, there is accord that the test in Sch.3 para. 2(c) should parallel the one for patent defects. We saw earlier that this is why the term "obvious" was chosen to start with. Crucially, the patent defect cases do offer some leeway, and the Parliamentary debates do not stop the courts from exploiting it.

Let us consider first the ambiguity in the patent defect cases. The Law Commission[101] and Baroness Scotland[102] seem to regard *Yandle* as stating the law. There must be some doubt about

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[95] The word "actual" merely rules out an entitlement in law to occupy from being enough: *Williams & Glyn's Bank* v *Boland* [1981] A.C. 487 at 504–05 (Lord Wilberforce).
[96] For example, *Thompson v Foy* [2009] EWHC 1076 (Ch); [2010] 1 P.& C.R. 16.
[97] *Kling v Keston Properties Ltd* (1985) 49 P. & C.R. 212. See Law Commission and HM Land Registry, *Land Registration for the Twenty-First Century: A Consultative Document*, para.4.13.
[98] He countenanced (but did not decide) this point: *Kling v Keston Properties Ltd* (1985) 49 P. & C.R. 212 at 219. We saw earlier that the context also included there being actual occupation, despite a lack of evidence as to the identity of the car's owner.
[99] [1993] A.C. 593.
[100] See e.g., *R (G) v Westminster City Council* [2004] EWCA Civ 45; [2004] 1 W.L.R. 1113 at [36]; *Killoran v Belgium* [2021] EWHC 2290 (Admin) at [37].
[101] See Law Commission and HM Land Registry, *Land Registration for the Twenty-First Century: A Conveyancing Revolution*, para.5.21, fn 57, referring the reader to C. Harpum, *Megarry & Wade: The Law of Real Property*, 6th edn (London: Sweet & Maxwell, 2000), para.12-068, which adopts the *Yandle* test.
[102] Hansard (HL Debates), 17 July 2001, Vol.626, col.1436 (Baroness Scotland).

this. Several learned sources are less categoric. *Halsbury*'s volume on conveyancing, for example, describes the position as unclear in practice.[103] The Law Society's *Conveyancing Handbook* is to the same effect.[104] A well-known conveyancing textbook refers to "some doubt" about the "precise meaning" of the term.[105] Plainly, these sources do not treat the *Yandle* test as decisive.

This caution is indeed well-placed. To start with, *Yandle* is on its own terms a right of way case. Sargant J, as we have seen, said that the outcome was governed by *Ashburner*, which stated the law "in regard to rights of way".[106] His "general observation" was plainly obiter. As next to the case law more generally, it is not plainly so strict either. Reference is still sometimes made not to *Yandle* but to *Carlish v Salt*[107] – a case not mentioned in *Yandle*.[108] In this case, Joyce J referred to a latent defect as one "which the purchaser could not be expected to discover for himself with the care ordinarily used" when buying land.[109] This statement is somewhat ambiguous, and perhaps intentionally so. What a purchaser can be "expected to discover" depends on the facts and the relevant evidence. Writing shortly afterwards, the editor of *Williams on Vendor and Purchaser* opined that "no fault can be found with the learned judge's decision or judgment, so far as it relates to the non-disclosure of a latent defect of title… known only to the vendor and not discoverable by the purchaser by the exercise of ordinary care or diligence."[110] This is despite *Carlish* coming years after *Ashburner*, with its reference to what is "obvious".[111] Perhaps by "discoverable", the learned editor referred only to what is "obvious" in the same sense proposed in *Yandle*, but this is not the only reading of the words. Some writers also continue to describe the law in terms more akin to *Carlish*,[112] as indeed did some of the treatises on vendor and purchaser post-*Yandle*.[113]

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[103] *Halsbury's Laws of England*, 5th edn, Vol.23 (London: LexisNexis Butterworths, 2016), para.61.
[104] F. Silverman (ed.), *Conveyancing Handbook*, 29th edn (Law Society, 2022), para.5.2.3.
[105] M. Richards, *A Practical Approach to Conveyancing*, 23rd edn (Oxford: OUP, 2022), para.3.29.
[106] *Yandle & Sons v Sutton* [1922] 2 Ch. 199 at 208.
[107] *Carlish v Salt* [1906] 1 Ch. 335.
[108] For such references, see *Sakkas v Donford Ltd* (1983) 46 P. & C.R. 290 at 302; *Ball v Gutschenritter* [1925] S.C.R. 68 at 73–74 (Duff J).
[109] *Carlish v Salt* [1906] 1 Ch. 335 at 341.
[110] T. Cyprian Williams, "Non-disclosure, upon Sale of Land, of a Latent Defect known to the Vendor" (1906) 50 Sol. J. 611, 612.
[111] Joyce J will also have been aware that constructive notice of a right is not relevant: *Caballero v Henty* (1873–74) L.R. 9 Ch. App. 447.
[112] For example, K. Gray and S.F. Gray, *Elements of Land Law*, 5th edn (Oxford: OUP, 2009), para.8.1.10; *Halsbury's Laws of England*, 5th edn, Vol.95 (London: LexisNexis Butterworths, 2023), para.762 ("the purchaser could not have discovered its existence by exercising reasonable care").
[113] T. Cyprian Williams and J.M. Lightwood, *Treatise on the Law of Vendor and Purchaser*, 4th edn (London: Sweet & Maxwell, 1936), p.638 ("not discoverable by inspection"). G Battersby, *Williams'*

The outcomes in the cases do not compel a practical certainty test either. Arguably none of the cases turn on the distinction between practical certainties and very high chances. A few cases discuss practical certainties.[114] The earlier cases are often reported briefly or contain no substantial reasoning,[115] though they do broadly confirm that some low risk of a defect is not sufficient.[116] It is hard to draw out from them any clear distinctions. In *Yandle*, indeed, Sargant J declined to rely on one such case, noting that it was a decision on its own facts and contained no wider statement of the law.[117]

The caution of sources like *Halsbury*, and the hazy bounds of a case like *Carlish*, could reflect the role of context. What A can be "expected to discover" may be influenced by the thing to be discovered and the nature of the property. A one-size-fits-all approach is not helpful. In the context of occupiers, a reasonable inspector will know that true certainty is elusive, based just on what can be seen. This is especially so when the land does not (unlike in *Thompson*) contain clearly separate living spaces. Signs that disclose a very high chance of another occupier are as strong as one is likely to get. In the context of Sch.3 para. 2(c), therefore, they make the position "obvious".

The next question is whether the Parliamentary debates stand in the way of this approach. We may conclude that they do not. They are not as one in this matter. Baroness Scotland, it was noted earlier, is supportive of the *Yandle* test.[118] Michael Wills and Lord Bassam refer to, and quote from, *Yandle* and as the "leading case", but without dismissing the role of case law on disclosure of defects more generally.[119] Most telling, however, are comments by Michael Wills at the Standing Committee stage. He addressed concerns about how the test in issue would work.

Contract for the Sale of Land and Title to Land, 4th ed, (London: Butterworths, 1975) p.95 suggests the issue is "one of degree". W. Arnold Jolly and C.H.S. Fifoot, *Seaborne's Vendors and Purchasers*, 9th edn (London: Butterworth & Co, 1929), pp.83–84 quotes at length from *Yandle*, whilst also earlier suggesting that latent defects are ones "that may be discovered by ordinarily vigilance".

[114] *Ashburner v Sewell* [1891] 3 Ch. 405 at 409; *Re Flanigan and McGarvey and Thompson's Contract* [1945] N.I. 32.

[115] For examples, see *Stevens v Adamson* (1818) 2 Stark. 422; 171 E.R. 692; *Shackleton v Sutcliffe* (1847) 1 De G. & Sm. 609, 619; 63 E.R. 1217, 1222.

[116] In *Dyer v Hargrave* (1805) 10 Ves. Jr. 505 at 509; 32 E.R. 941 at 943, an alleged defect was not latent when there might have been "some apprehension" about its potential existence.

[117] *Yandle & Sons v Sutton* [1922] 2 Ch. 199 at 206–207, considering *Shackleton v Sutcliffe* (1847) 1 De G. & Sm. 609; 63 E.R. 1217.

[118] Hansard (HL Debates), 17 July 2001, Vol.626, col.1436 (Baroness Scotland).

[119] Hansard (HL Debates), 30 October 2001, 1327–1328 (Lord Bassam) ("The test… is to be interpreted as the case law relating to the question of a patent defect in title,"); House of Commons Standing Committee D, Land Registration Bill, 13 December 2001, col.69 (Michael Wills) ("the same as for the case law on the question of what does not have to be disclosed to a buyer"). See also Law Commission and HM Land Registry, *Land Registration for the Twenty-First Century: A Consultative Document*, para.5.73 ("The corpus of authority… would provide guidance").

He gave examples in the context of Sch.3 para. 3, as deals with when implied legal easements and profits are overriding; the grounds include when they are "obvious on a reasonably careful inspection of the land over which the right is exercisable". The patent defect cases are as relevant to Sch.3 para. 2 as they are to Sch.3 para. 3. Michael Wills's account was as follows:

> "A legal easement might occur if at the time of a registered transfer there were a private right of way, the existence of which was patent to the eye. The words "patent to the eye" and "inspection" cover a multitude of terms here. Someone could be sent to look at the land to see whether paths were clear and maintained. One might see posses of ramblers rambling over it, presumably in pursuit of some existing right of way, or people shooting… There are ways in which one might reasonably assume that a right of way existed. If that were patent to the eye, the buyer would be bound by it, even if they did not know details of the particular right under which the way was used, or who the users were."[120]

These examples are somewhat imprecise. In both cases, however, they are clear enough in one key respect. Neither of them involves a practical certainty, based on what can be seen. Something slightly less is to be treated as enough. Take first the shooting example. Shooting need not be indicative of a profit. It is "perfectly possible" to create such a right as a licence.[121] It is hardly therefore a practical certainty that there is a profit when one sees people shooting. This is implicitly acknowledged just before the quoted passage, in which it is said of seeing a shooting party, "it would be a reasonable assumption that those people were occupying the land as a result of some sort of right."[122] Yet this "right" need not be a proprietary one. Equally, however, it is hard to think of what one could see during an inspection that could suggest a higher chance of a shooting right. As next to the ramblers example, it is a somewhat confusing one: the presence of ramblers suggests if anything a public right of way (rather than a private one). Let us assume that this is what was meant. In that event, the sight of ramblers does not necessarily show a public right either. They might be trespassing, mistaking the "clear and maintained" path for one over which the public has access. But again, there may be nothing more in the context that could have evidenced a public right of way. The examples, especially the shooting one, seem like ones of

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[120] House of Commons Standing Committee D, Land Registration Bill, 13 December 2001, col.70 (Michael Wills).
[121] C. Sara and D. Dovar, *Boundaries and Easements*, 7th edn (London: Sweet & Maxwell, 2019), para.23-007.
[122] House of Commons Standing Committee D, Land Registration Bill, 13 December 2001, col.70 (Michael Wills).

very high chances rather than practical certainties. Indeed, we also see reference to activities that are "presumably in pursuit of" a right of way. "Presumably" tends to indicate something that is "likely".[123] Moreover, the words "one might reasonably assume" afford some leeway. One might reasonably assume something as a potential buyer because there is a very high chance of it.

For these reasons, the courts may eschew the strict *Yandle* test under Sch.3 para. 2(c). They can thereby give the word "occupation" its normal meaning. They can still tackle the mischief of invisible occupation. They can suggest that a limited flexibility is open to them, as is sensible in the context of occupiers. Nothing in the background materials requires this leeway to be foregone. As to Sargant J's comments, they should not be elevated into the words of the statute itself. The physical features in *Yandle* could have made the public right of way much clearer – but they did not do so. What Sargant J said was *obiter* on the wider meaning of what is "obvious", and his words chiefly have force in the context in which he advanced them.

This approach is a reasonable compromise. First, it is the best response to a difficulty created by Sch.3 para. 2(c). The problem arises as, in future, the courts will probably feel obliged to develop the tests of "patent" defects and "obvious" occupation in tandem. To permit very high chances as making occupation "obvious" allows them to do so in a way that reflects the reality of occupation, whilst maintaining a robust duty of disclosure more generally. Certainly, judges will wish to uphold the strength of this duty, as its scope turns on the justice of the position vis-à-vis A and B. The position of A naturally attracts sympathy in this context, for the reasons given in *Yandle*.

The compromise is also attractive for another reason. It still allows for Sch.3 para. 2(c) to be a meaningful change – as it was intended to be. Without this provision, the courts could have settled on lower chances of an occupier other than C as being enough. They could have done so because there was no clarity, in the pre-2002 Act cases that said that actual occupation had to be "apparent",[124] what threshold that involved. There remains similar uncertainty as regards the doctrine of notice, which requires "notice" of occupation by C to put A on inquiry.[125] Thus, in *Kingsnorth Finance Co Ltd v Tizard*,[126] the judge refers to "evidence of ... occupation reasonably sufficient to give notice" of it. A recent Hong Kong case construes *Tizard* to show "the need to have something that triggers the doubt".[127] What such expressions mean in probability terms is

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[123] *Oxford English Dictionary*, "Presumably" (definition 2).
[124] *Hodgson v Marks* [1971] Ch. 892 at 931–932 (Russell LJ); *Lloyds Bank Plc v Rosset* [1989] Ch. 350 at 394 (Mustill LJ) and 404 (Purchas LJ); *Malory Enterprises Ltd v Cheshire Homes (UK) Ltd* [2002] EWCA Civ 151; [2002] Ch. 216 at [81] (Arden LJ).
[125] *Kingsnorth Finance Co Ltd v Tizard* [1986] 1 W.L.R. 783.
[126] *Kingsnorth Finance Co Ltd v Tizard* [1986] 1 W.L.R. 783 at 794.
[127] *CS Credit Ltd v Marspan Ltd* [2021] HKCU 6011 at [60(3)].

unclear. The danger was that the courts could have clarified the law in registered land unfavourably to A. Both for the purposes of "apparent" occupation and the doctrine of notice, judges might have decided that it was enough that occupation was more likely than not, rather than very highly likely. They might even have accepted a serious possibility as being sufficient. Indeed, to do so would fit with a view that the doctrine of notice deals with "mental indifference to obvious risks".[128] The clear wording of Sch.3 para. 2(c) puts a stop to such reasoning in registered land. In principle, it places tight parameters around judicial discretion.

The idea of a sensible compromise may have influenced Ramsay J in *Thomas*. We saw earlier that he asked whether the "visible signs of occupation" were "obvious on inspection."[129] He could have meant that "occupation", as normally defined, is "obvious" when the visible signs are clear enough to show a very high chance of it. This can only be speculation. Ramsay J's words are open to interpretation. If he was suggesting that a "sign" needs only to signal a high chance of an occupier, or even just that one is probable, then this is harder to support. The test would not be the same measured compromise. It looks more like one of constructive notice, and it risks undermining the duty to disclose latent defects. Parliament is unlikely to have intended these effects.

Conclusion

It is somewhat ironic that a test of what is "obvious" might have been more clearly explained. This article has suggested that occupation is only "obvious" when it is sufficiently clear that there is an occupier other than B. As to how clear the position must be, it is helpful to consider the language of probabilities. What A can see may suggest a chance of another occupier, but the size of the chance will vary.

Framing the issue in this way helps to sharpen the issues, but it does not resolve them. There remains ambiguity around how high a chance of an occupier the visible signs must show to make the occupation – should it turn out to exist – "obvious". Looking at the background materials in the round, we should not just defer to Sargant J's words in *Yandle*. There are grounds to favour a

[128] *Flying Mortgage Ltd v Chan Kuen Kwong* [2009] HKCU 1858 at [40]. One judge has drawn a parallel with the neighbour principle in tort law: *Northern Bank Ltd v Henry* [1981] IR 1 at 9 and 11–12 (Henchy J).
[129] *Thomas v Clydesdale Bank Plc* [2010] EWHC 2755 (QB); [2010] N.P.C. 107 at [40]. See also at [38].

slightly less stringent test, under which a very high chance of an occupier, as disclosed by the visible evidence, is enough in the context of Sch.3 para. 2(c).

This somewhat looser approach may well prevail. It can be squared with the dictionary, the background materials, and the case law on latent defects. To favour it is to recognize that occupiers are most unlikely to be able to show that their occupation was a practical certainty, based on what could be seen. Parliament should not be taken to have effectively excluded many of them from the protection of Sch.3 para. 2. Instead, it has provided a limited flexibility to accommodate their claims. This understanding more appropriately fits together all the relevant considerations, including the elements of Sch.3 para. 2 as a whole and the need to keep a robust duty to disclose “latent” defects in title.

When assessing Sch.3 para. 2(c), authors will continue to be tempted to make comparisons with the doctrine of notice. The statutory test is clearly more restrictive in terms of the evidence that is relevant to deciding whether there is an occupier other than B. Whether it is also narrower in terms of the issue of probabilities is not plain. Certainly, it would be if the *Yandle* test was applied in all its strictness. Under the very high chance test, the comparison is harder to make, for the probability question has not been settled under the doctrine of notice. It is however quite arguable that the doctrine of notice would be applied more favourably to C, as would a test of “apparent” actual occupation. The demise of unregistered land means that this issue may never be settled. What Parliament has achieved with Sch.3 para. 2(c) is to stop the risk of the courts accepting lower chances as being enough in principle. In this more speculative sense too, the provision marks a break from the past.