

Gabriel Brennan

# The Impact of eConveyancing on Title Registration

A Risk Assessment

 Springer

# The Impact of eConveyancing on Title Registration



Gabriel Brennan

# The Impact of eConveyancing on Title Registration

A Risk Assessment



Springer

Gabriel Brennan  
Dublin  
Ireland

ISBN 978-3-319-10340-2                      ISBN 978-3-319-10341-9 (eBook)  
DOI 10.1007/978-3-319-10341-9  
Springer Cham Heidelberg New York Dordrecht London

Library of Congress Control Number: 2014955461

© Springer International Publishing Switzerland 2015

This work is subject to copyright. All rights are reserved by the Publisher, whether the whole or part of the material is concerned, specifically the rights of translation, reprinting, reuse of illustrations, recitation, broadcasting, reproduction on microfilms or in any other physical way, and transmission or information storage and retrieval, electronic adaptation, computer software, or by similar or dissimilar methodology now known or hereafter developed. Exempted from this legal reservation are brief excerpts in connection with reviews or scholarly analysis or material supplied specifically for the purpose of being entered and executed on a computer system, for exclusive use by the purchaser of the work. Duplication of this publication or parts thereof is permitted only under the provisions of the Copyright Law of the Publisher's location, in its current version, and permission for use must always be obtained from Springer. Permissions for use may be obtained through RightsLink at the Copyright Clearance Center. Violations are liable to prosecution under the respective Copyright Law.

The use of general descriptive names, registered names, trademarks, service marks, etc. in this publication does not imply, even in the absence of a specific statement, that such names are exempt from the relevant protective laws and regulations and therefore free for general use.

While the advice and information in this book are believed to be true and accurate at the date of publication, neither the authors nor the editors nor the publisher can accept any legal responsibility for any errors or omissions that may be made. The publisher makes no warranty, express or implied, with respect to the material contained herein.

Printed on acid-free paper

Springer is part of Springer Science+Business Media ([www.springer.com](http://www.springer.com))

# Table of Cases

## Cases

<i>394 Lakeshore Oakville Holdings Inc. v. Misek</i> 2010 CanLII 7238 (ON SC) .....	254
<i>Abbey National Building Society v. Cann</i> [1990] 1 All ER 1085 .....	220
<i>ACC Bank plc v. Johnston</i> [2010] IEHC 236 .....	188
<i>ACC Bank plc. v. Markham</i> [2007] 3 IR 533 .....	170
<i>Bertrand v. Trites</i> 2006 CanLII 37959 (ON SC)..	300
<i>Blake and Ors v. Attorney General</i> [1982] IR 117 at 127; [1981] ILRM 34 .....	269
<i>Boyle v. Connaughton</i> [2000] IEHC 28 (21 <sup>st</sup> March 2000) .....	146, 207, 272
<i>Byrnes &amp; Anor v. Meakstown Construction Ltd.</i> [2009] IEHC 123 .....	145
<i>City of London Building Society v. Flegg</i> [1987] 3 All ER 435 ...	245, 247, 251
<i>Coffey v. Brunel Construction Co. Ltd.</i> [1983] IR 36 .....	121, 180
<i>Crumlish v. Registrar of Deeds and Titles</i> [1990] 2 IR 471 .....	207
<i>Dreher v. Irish Land Commission</i> [1984] ILRM 904. ....	270
<i>Durrani v. Augier</i> 2000 CanLII 22410 (ON SC) .....	219
<i>Frazer v. Walker</i> [1967] 1 AC 569 .....	128
<i>Geraghty v. Buckley</i> High Court Unreported (6 October 1986) .....	206, 209
<i>Guckian v. Brennan</i> [1981] I.R. 478. ....	45
<i>Home Trust Company v. Zivic</i> 2006 CanLII 38359 (ON SC) .....	219
<i>Honiball v. McGrath</i> [2000] IEHC 33 .....	247
<i>Household Realty Corporation Ltd. v. Liu</i> 2005 CanLII 43402 (ON CA) .....	217
<i>In re Erris Investments Ltd.</i> [1991] ILRM 377 .....	207
<i>Isaacs v. Royal Bank of Canada</i> 2010 CanLII 3527 (ON SC) .....	220
<i>James v. United Kingdom</i> ECHR 21 February 1986, Series A No. 98; 8 EHRR 123 .....	270
<i>Lawrence v. Maple Trust Co.</i> 2007 CanLII 74 (ON CA) .....	218

<i>Lee-Parker v. Izzet</i> [1971] 3 All ER 1099 . . . . .	1
<i>Madigan v. Attorney General</i> [1982] IR 117. . . . .	269
<i>Mellacher v. Austria</i> ECHR 19 December 1986, Series A No. 169; 12 EHRR 391 . . . . .	270
<i>Moore v. Moore</i> [2010] IEHC 462 (12 October 2010) . . . . .	211
<i>National Provincial Bank Ltd. v. Ainsworth</i> [1965] 2 All ER 472 . . . . .	247
<i>O'Callaghan v. The Commissioners of Public Works in Ireland</i> [1985] ILRM 364 . . . . .	270
<i>Ontario v. Syvan Developments Ltd</i> 2006 CanLII 32430 (ONSC) . . . . .	300
<i>Rabi v. Rosu</i> 2006 CanLII 36623 (ON SC) . . . . .	219
<i>Randvest Inc. v. 741298 Ontario Ltd.</i> 1996 CanLII 8207 (ON SC) . . . . .	251
<i>Stepstone Mortgage Funding Ltd v. Tyrrell</i> [2012] IEHC 139 . . . . .	209
<i>The Right Honourable The Lord Mayor Aldermen and Burgesses of Dublin v. Burke</i> [2001] IESC 81 . . . . .	273
<i>The State (Christopher Philpott) v. The Registrar of Titles</i> [1986] ILRM 499 . . . . .	208
<i>Toronto-Dominion Bank v. Jiang</i> 2003 CanLII 38078 (ON SC) . . . . .	219
<i>United Trust v. Dominion Stores et al</i> 1976 CanLII 33 (SCC). . . . .	219
<i>Wallcite Ltd. v. Ferrishurst Ltd.</i> [1999] 1 All ER 977 . . . . .	247
<i>Walsh and Cassidy v. Sligo County Council</i> [2010] IEHC 437, [2013] IESC 48, [2014] IESC 22. . . . .	276

# Acknowledgements

Most especially I would like to thank Graham Ferris and Gary Wilson for their excellent guidance and advice. Their insight and encouragement has proved invaluable. Special thanks is also due to Professor Michael Cardwell.

I am hugely indebted to Mary Keane and T P Kennedy who supported me in this endeavour and Professor Adrian Walters for his input. I am also grateful to Dennis Barnhart, John O'Sullivan, Greg McDermott, James O'Boyle, Kate Murray, Ken Crawford, Alexandra Radley, Dr. Paddy Prendergast, Agostino Russo, Vicki McArthur and Nuala Casey who found the time to discuss ideas, provide information and make suggestions for improvement. Thank you all for your assistance.

Finally, I would like to thank my friends, family and in particular my husband for his continuing support and my children for their love and laughter.

All opinions expressed are my own.





# Contents

<b>1</b>	<b>Introduction</b> . . . . .	1
1.1	Context . . . . .	1
1.2	Focus . . . . .	3
1.3	Approach . . . . .	5
1.4	Method . . . . .	6
1.5	Scholarship . . . . .	9
1.6	Legislation . . . . .	9
1.7	Summary . . . . .	10
	References . . . . .	10
<b>2</b>	<b>Methodology</b> . . . . .	13
2.1	Introduction . . . . .	13
2.2	Methodology . . . . .	13
2.3	Neutral Vocabulary . . . . .	18
2.3.1	Context . . . . .	18
2.3.2	Neutral vocabulary . . . . .	23
	Conclusion . . . . .	47
	References . . . . .	47
<b>3</b>	<b>Defining Econveyancing</b> . . . . .	51
3.1	What Is Conveyancing? . . . . .	51
3.2	What Is eConveyancing? . . . . .	52
3.2.1	What Is Not Included? . . . . .	56
3.2.2	Phases of eConveyancing . . . . .	58
3.2.3	Relationship Between eRecords, eApplication, eRegistration and eConveyancing . . . . .	65
3.2.4	eConveyancing in the Context of eCommerce and eGovernment: Towards an Information Age . . . . .	68
3.3	The Case for Reform . . . . .	74

3.4	Development of eConveyancing in Ireland and Ontario . . . . .	87
3.4.1	eConveyancing in Ireland . . . . .	87
3.4.2	eConveyancing in Ontario . . . . .	95
	Conclusion . . . . .	105
	References . . . . .	108
<b>4</b>	<b>Defining Title Registration . . . . .</b>	<b>115</b>
4.1	What Is Land Registration? . . . . .	115
4.2	What Is Title Registration? . . . . .	119
4.3	Why Title Registration? . . . . .	123
4.4	Dynamic Versus Static Security . . . . .	126
4.5	Indefeasibility Outside Land Registration . . . . .	133
4.6	Exceptions to Indefeasibility . . . . .	134
4.7	Title Registration System in Ontario . . . . .	136
4.8	Estates and Interests Protected by the Title Register in Ontario . . . . .	137
4.9	Title Registration System in Ireland . . . . .	142
4.10	Estates and Interests Protected by the Title Register in Ireland . . . . .	144
	Conclusion . . . . .	147
	References . . . . .	147
<b>5</b>	<b>Identification of Risks . . . . .</b>	<b>153</b>
5.1	Modelling . . . . .	153
5.2	Schematic . . . . .	156
5.2.1	Transaction for Value . . . . .	157
5.2.2	Transaction Not for Value i.e. a Gift . . . . .	158
5.2.3	Distinction Between U and V . . . . .	158
5.3	Standpoints . . . . .	159
5.3.1	Standpoint of Transferor . . . . .	160
5.3.2	Standpoint of Transferee . . . . .	161
5.3.3	Standpoint of Lender . . . . .	162
5.3.4	Standpoint of Donor . . . . .	163
5.3.5	Standpoint of Donee . . . . .	163
5.3.6	Standpoint of Third Party . . . . .	164
5.3.7	Standpoint of Property Claimant . . . . .	164
5.4	Risk Matrix . . . . .	165
5.5	Distinction Between <i>Bona Fide</i> Purchaser for Value and Volunteer . . . . .	169
5.6	Categorisation of Rights . . . . .	171
5.7	Conveyancing as a Process . . . . .	173
	Conclusion . . . . .	175
	References . . . . .	175

<b>6</b>	<b>Before Registration</b> . . . . .	177
6.1	Introduction . . . . .	177
6.2	Registration Gap . . . . .	177
6.2.1	Risk from T . . . . .	181
6.2.2	Risk from U . . . . .	184
6.2.3	Risk from V . . . . .	186
6.2.4	Removal of the Registration Gap . . . . .	186
6.2.5	Effect of eConveyancing . . . . .	187
6.2.6	Impact on Risk . . . . .	189
6.3	Formalities for Registration . . . . .	191
6.3.1	Risk in a Paper Environment . . . . .	192
6.3.2	Changes in Formalities . . . . .	193
6.3.3	Risk in an eConveyancing Environment . . . . .	197
	Conclusion . . . . .	198
	References . . . . .	199
<b>7</b>	<b>The Register</b> . . . . .	201
7.1	Introduction . . . . .	201
7.2	Risk from Combined Transaction and Registry Errors . . . . .	204
7.3	Risk from Registry Errors . . . . .	205
7.4	The Position in Ireland . . . . .	206
7.4.1	Rectification . . . . .	208
7.4.2	Compensation . . . . .	212
7.4.3	How Errors Are Addressed by the Registration System in Ireland . . . . .	213
7.5	The Position in Ontario . . . . .	217
7.5.1	Rectification . . . . .	221
7.5.2	Compensation . . . . .	222
7.5.3	How Errors Are Addressed by the Registration System in Ontario . . . . .	224
7.6	Impact on Risk . . . . .	228
7.7	Claims . . . . .	230
7.7.1	Claims in Ireland . . . . .	230
7.7.2	Claims in Ontario . . . . .	230
	Conclusion . . . . .	238
	References . . . . .	241
<b>8</b>	<b>After Registration</b> . . . . .	243
8.1	Introduction . . . . .	243
8.1.1	Interests Off the Register Which Affect Title . . . . .	244
8.1.2	Destructive Effects of a Registered Transaction . . . . .	244
8.1.3	Rights Not Recognised . . . . .	245
8.1.4	Scenarios . . . . .	246

- 8.2 Overriding Interests . . . . . 246
  - 8.2.1 Short Term Tenancy . . . . . 248
  - 8.2.2 Effect of Overriding Interest . . . . . 249
- 8.3 Destructive Effects of a Registered Transaction . . . . . 250
  - 8.3.1 Trust . . . . . 250
  - 8.3.2 Effect of Overreaching . . . . . 253
- 8.4 Rights Not Recognised . . . . . 254
  - 8.4.1 Easement . . . . . 254
  - 8.4.2 Effect of Rights Not Recognised . . . . . 257
- 8.5 Effect of eConveyancing . . . . . 259
  - 8.5.1 Moving Rights on to the Register . . . . . 260
  - 8.5.2 Interest Recording . . . . . 262
  - 8.5.3 Reclassification of Interests in land . . . . . 265
  - 8.5.4 An (In)complete Title Register . . . . . 271
  - 8.5.5 Certainty Versus Flexibility . . . . . 278
  - 8.5.6 A Stricter *Numerus Clausus* . . . . . 280
- Conclusion . . . . . 283
- References . . . . . 285
- 9 Conclusion . . . . . 289**
  - 9.1 Introduction . . . . . 289
  - 9.2 Risk Versus Reward . . . . . 289
  - 9.3 Impact of eConveyancing on Risk . . . . . 291
    - 9.3.1 Registration Gap . . . . . 291
    - 9.3.2 Formalities for Registration . . . . . 292
    - 9.3.3 Error in Register . . . . . 293
    - 9.3.4 Interests Off the Register Which Affect Title . . . . . 294
    - 9.3.5 Destructive Effects of a Registered Transaction . . . . . 294
    - 9.3.6 Rights Not Recognised . . . . . 295
  - 9.4 Risk to U and V . . . . . 295
  - 9.5 Interference in the Land Market . . . . . 296
  - 9.6 Indemnity for Loss . . . . . 299
    - 9.6.1 Title Insurance Versus State Compensation . . . . . 299
    - 9.6.2 Imposition of Loss . . . . . 305
    - 9.6.3 Grounds for Increased Risk to U and V . . . . . 308
  - 9.7 Recommendations . . . . . 308
  - Conclusions . . . . . 310
  - References . . . . . 312
- Glossary . . . . . 315**

# List of Figures

Fig. 3.1	Four phases of an eConveyancing system .....	66
Fig. 3.2	Sequential timeline .....	66
Fig. 3.3	eConveyancing in the context of eCommerce and eGovernment .....	69
Fig. 4.1	Land management and land administration system .....	118
Fig. 5.1	Transaction for value .....	157
Fig. 5.2	Transaction not for value .....	157



# List of Tables

Table 2.1	Comparison of Ireland and Ontario .....	15
Table 3.1	Growth of online services Ireland: landdirect.ie portal .....	90
Table 3.2	Overall rejection rates Ireland .....	91
Table 3.3	Growth of electronic applications for registration Ontario .....	102
Table 3.4	Growth in percentages Ontario .....	103
Table 3.5	Growth in users Ontario .....	103
Table 4.1	First registration applications Ireland .....	144
Table 5.1	Participant’s key objective .....	160
Table 5.2	Risk matrix .....	165
Table 6.1	Sequencing for completion .....	187
Table 7.1	Total compensation claims and amounts in Ireland .....	231
Table 7.2	Electronic registrations and fraud rectifications in Ontario .....	232
Table 7.3	Total compensation claims and amounts in Ontario .....	233
Table 7.4	Breakdown of compensation claims and amounts: fraud and non-fraud Ontario .....	234
Table 7.5	Decisions of tribunal in Ontario .....	235



# Chapter 1

## Introduction

*In this book is told a tale of two innocents, one who owned land (he thought) and wished to sell it (he thought) and another who had money to spend (he thought) and wished to buy that land (he thought). Nothing could be simpler (they thought). Little foresaw they the dark and dangerous depths of the 'wide and sometimes largely uncharted sea' to which they entrusted their ship of fortune (Farrand (1983), p. 3 referring to Lee-Parker v. Izzet [1971] 3 All ER 1099).*

### 1.1 Context

Since the 1980s the passing of title to land by way of sale and purchase or gift, commonly known as conveyancing, has been undergoing transformation on an international and unprecedented scale. This transformation is due to the application of technological advances to what was previously a paper based process. The application of technology to this process, known as electronic conveyancing, e-conveyancing or herein referred to as eConveyancing, has thrown up many important issues for land owners and others who have an interest in the conveyancing process such as consumers, professionals, academics and policy makers.<sup>1</sup> These issues include the roles of stakeholders in the process, the need for process improvements, security, costs, removal of paper, incidences of liability and the quality of title.

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

---

<sup>1</sup> Harpum (2000), p. 1 notes that the business of conveyancing is a significant political issue because of the time and expense involved.

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

eConveyancing moves the conveyancing process from being a paper based system of effecting and recording transactions to a modern electronic system via the creation and empowerment of electronic communication networks. The potential impact of this change on the distribution of legal risk in conveyancing transactions with particular reference to Ontario and Ireland is investigated.

There are a broad range of different models and systems of eConveyancing.<sup>2</sup> The development of eConveyancing has primarily taken place in common law jurisdictions and Ontario and Ireland are two common law jurisdictions that represent opposite ends of the spectrum in terms of integration of technology into the conveyancing process. Ireland's Law Reform Commission has acknowledged that the Ontario model offers the approach that best fits the Irish environment.<sup>3</sup>

Ontario is recognised as the most progressive eConveyancing solution currently in operation and is widely acknowledged as a reference source for new eConveyancing solutions in other jurisdictions. . . . The Ontario solution is the closest "end-to-end" eConveyancing solution that is currently in existence with functional models such as: property registration, solicitor communication facilities, online searches, online mapping functions and dealings with financial institutions.<sup>4</sup>

Thus many commentators have recognised Ontario as the oldest most developed operating system of eConveyancing in the world and it was the first jurisdiction to introduce full electronic document registration.<sup>5</sup>

This analysis explores the perception that it is by far the most developed eConveyancing system by articulating the key components of eConveyancing, examining the extent of the Ontario system and comparing experiences in other jurisdictions which have undergone reform in this area. These jurisdictions include Australia, Scotland, New Zealand, British Columbia, England and Wales and Northern Ireland.

By contrast Ireland is only beginning to develop the initial stages of its eConveyancing project and thus has much to learn in order to take advantage of advances already made in this arena. Ireland is entering a period of reform and it is timely that research is done to inform the debate. The fact that Ireland is distinctively behind many other states<sup>6</sup> is seen as an advantage as it can try to emulate the successes of other jurisdictions while avoiding the pitfalls that they have already encountered.

There has been widespread acceptance that eConveyancing is a change for the better<sup>7</sup> and certainly many benefits of electronic advances in conveyancing have

---

<sup>2</sup> Harpum (2004), p. 5.

<sup>3</sup> The Law Reform Commission (2006), p. 8.

<sup>4</sup> The Law Reform Commission (2006), p. 89.

<sup>5</sup> Murray (2004), p. 21. See also Low (2005), pp. 155–178 and Christensen (2004).

<sup>6</sup> Killilea (2010), p. 11.

<sup>7</sup> Perry (2003), p. 26 and Coffin and Pierre (2005), p. 7.

been articulated.<sup>8</sup> However, many of these efficiencies and benefits primarily assist the professionals or state agencies involved in the conveyancing process. Writers and researchers have to a lesser degree explored the impact on land owners and third parties or property claimants. This analysis fills this gap by describing and articulating current conveyancing systems in order to project the likely impact of technological change on those with, or seeking to assert, rights and interests in land.

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

In effect this comprises a risk assessment constituting risk identification, risk analysis and then risk evaluation. The term ‘risk’ in this context is the consequence of change and the likelihood of that consequence having a negative effect. This risk assessment allows for risk management<sup>9</sup> which can minimise or eliminate the consequences and thereby the negative impact.

This is premised on the understanding that risks are inherent in the conveyancing process<sup>10</sup> and any change in that process, here the move towards eConveyancing, will affect or impact that risk landscape.<sup>11</sup>

## 1.2 Focus

The management of risk in the conveyancing process in Ontario and Ireland is investigated in light of moves from a paper-based conveyancing system towards eConveyancing in these and other common law jurisdictions. While the primary focus is on Ontario and Ireland the experience in other common law jurisdictions, which have undergone reform in this area, has also been drawn upon. These include

---

<sup>8</sup> Gahan (2008), p. 15; Wylie (2004), p. 11; Treacy and O’Sullivan (2004), p. 6; and Murray (2004), p. 20.

<sup>9</sup> It is interesting to note that Susskind identified the legal risk manager as one of the five main future roles for lawyers. See Susskind (2008), p. 272.

<sup>10</sup> No activity is without risk and action involves a judgement of the balance between risk and reward. A higher degree of risk may be accepted if there is a greater probability of reward depending on the parties appetite for or aversion to risk.

<sup>11</sup> In consultations with stakeholders in Australia a preference was expressed for ‘no change’ in risk and liability exposure. The risk assessment carried out by Sneddon and his team showed that this would be unlikely given the introduction of new processes and requirements in NECS (now PEXA) which do not exist in paper conveyancing. Instead a preference was expressed for the objective ‘no material net increase’ which they considered to be the closest achievable objective to ‘no change’. See Sneddon (2007), p. 10.

Australia, Scotland, New Zealand, British Columbia and Northern Ireland. In particular the move towards eConveyancing in England and Wales is referred to as both the Ontario and Irish land title systems developed from that source.

Developments in land administration, title registration and title insurance are also explored. Thus elements of property transactions in America, Europe and Eastern Europe, Asia and Scandinavia are also examined.

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

Other aspects of the conveyancing process are not examined. These include:

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

Other aspects of the conveyancing process are dealt with but only in so far as they impose on the main focus; risks impacting on title registration. These include:

- (a) the legal and procedural requirements for drafting contracts or deeds;
- (b) the legal right or capacity of the land owner to sell or gift title to land;
- (c) searches of the title register, deeds register, judgments<sup>12</sup> and other registers to establish encumbrances on the title;
- (d) post contract enquiries.<sup>13</sup> These relate to matters such as boundaries, rights of way, identity, bankruptcy, possession, notices and proceedings relating to the property.
- (e) other enquiries to be carried out by the transferee so that he or she is on notice of all the matters that are pertinent to the transaction<sup>14</sup>;
- (f) the entitlement of a lender holding under a charge; and
- (g) the legal and procedural requirements for registration of title to land in the title register.

---

<sup>12</sup> The term execution is used in Ontario.

<sup>13</sup> In Ireland these are known as Requisitions on Title and are published in a standard format by the Law Society of Ireland.

<sup>14</sup> The law will generally protect the transaction from being undermined by anything that could not be discovered by a transferee for value who carried out all reasonable enquiries.

There are numerous stakeholders with an interest in the conveyancing process. However, this analysis focuses exclusively on the risks posed to land owners, third parties and property claimants. It excludes those with an interest in the process alone, such as legal or other professionals.

This analysis also focuses on single residential conveyancing transactions. This is where a typical consumer<sup>15</sup> is purchasing a single house for occupation. Sale of part of land from a scheme is excluded, as is the perspective of a developer or someone purchasing a buy to let property. Instead the focus is on a consumer who is a one off purchaser of a home. As Viitanen points out “it is easiest to find the basic elements of transaction processes in the normal house transaction of families.”<sup>16</sup> Among rural families in Ireland this family home is often built on land that is gifted from the farm and thus this scenario is also addressed.

The analysis is not concerned with problems common to the development of information technology systems. Thus it excludes the specific types of problem that are common to all electronic processes e.g. authorisation, identity verification, electronic signatures and passwords.<sup>17</sup> These electronic processes and their associated difficulties are referred to but only in the context of shedding light on the main focus.

Some risks may be affected by eConveyancing but are not produced by it whereas other new risks may be produced by the development of eConveyancing. Thus the risks examined are both novel and traditional.

## 1.3 Approach

The risk assessment is both descriptive and capable of identifying normative possibilities for reform based on determining:

1. What is conveyancing?
2. What is eConveyancing?
3. What is title registration?
4. Who are the parties to a conveyancing transaction?
5. Who bears the risk in that transaction?
6. What risks impact on title registration?
7. What party is subject to that risk?
8. How is the risk impacted by the move to eConveyancing?
9. How might that party be protected in an eConveyancing system?

---

<sup>15</sup> The law tends to distinguish between a consumer who is purchasing property for their own use as a family home and a business person who is only interested in the property as a financial investment. The law provides more protection to consumers as they are seen as not having the same business acumen as an investor.

<sup>16</sup> Viitanen (2003), p. 55.

<sup>17</sup> For an examination of these issues in the context of eConveyancing see Keating (2012).

10. Is such protection desirable and feasible?  
 11. If not, what other party should bear the risk?

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

A broad international and multidisciplinary approach has been taken in that the analysis draws from law, economics and social science literature as well as doctrinal property law. It examines not just black letter property law but also the policy and procedure of conveyancing practice. Thus the approach is not restricted to an examination of formal legal rules and includes relevant contributions from practitioners and theorists from legal and non legal spheres.

Some difficulties were encountered as follows:

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

There is a difference in terminology between jurisdictions not just in conveyancing but also eConveyancing and thus a new vocabulary needed to be generated. This new neutral vocabulary has been articulated in Chap. 2 so as to provide commonality across jurisdictions and systems. This neutral vocabulary provides a set of clear definitions and minimises the difficulties caused by inconsistent use of terminology by other writers.

This area of research relates to current live and developing eConveyancing projects and thus elements are constantly being withdrawn and new initiatives launched. This requires a continual review of the literature.

## 1.4 Method

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

---

<sup>18</sup> Sneddon (2007), p. 2 says that eConveyancing does not have a precise meaning but encompasses a range of activities in the process of recording, searching and transferring interests in land which may be effected using electronic (or digital) communications and/or electronic (or digital) processing.

<sup>19</sup> Astke et al. (2004).

details and thereby allow us to focus on the aspects of the domain we are interested in.”<sup>20</sup>

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

Šumrada explains that:

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

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

The development of a process model allows for a theoretical, descriptive and analytical examination of risk. This model is presented using visuals. This use of visualisation<sup>23</sup> in law is increasingly used as a means to present complex ideas simply.<sup>24</sup>

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

This use of standpoint, as articulated by Holmes,<sup>25</sup> Hart<sup>26</sup> and Twining<sup>27</sup> provides a framework for identifying the tension between different claimants, all arguing for the upholding of their property rights. Thus the laws of each jurisdiction

---

<sup>20</sup> Visser and Bench-Capon (1998), p. 28.

<sup>21</sup> Šumrada (2003), p. 140.

<sup>22</sup> Visser and Schlieder (2003), p. 111.

<sup>23</sup> For example, charts and diagrams. Lawyers tend to be expert at using language and words to persuade and debate; they are less familiar with using visual techniques but these can be a powerful tool of communication.

<sup>24</sup> For examples see Mahler (2010). See also Haapio (2010), pp. 391–394 and Berger-Walliser et al. (2011).

<sup>25</sup> Holmes (1896–1897), pp. 457–478.

<sup>26</sup> Hart (1959), pp. 233–240.

<sup>27</sup> Twining (1972–1973), pp. 275–303.

are considered from the standpoint of a transferor, transferee, donor, donee, lender, third party and property claimant in order to identify the risks peculiar to each party. This incidence of risk between the security of the transferor and donor or transferee and donee and the security of those interested in the land (lender, third party or property claimant) is examined in the context of the continual tension in a conveyancing transaction between dynamic security and static security.

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

Examples of the practice of this transactional type of analysis in the law of real property is provided by commentators such as Hewitt and Overton,<sup>28</sup> Williams and Lightwood<sup>29</sup> and more recently Farrand.<sup>30</sup> These classic accounts of the law of unregistered title conveyancing adopted this schematic focus for the law of real property. As Williams and Lightwood explain the text is designed to discuss the incidents of a contract for the sale of land as they are usually presented to the notice of conveyancers i.e. in order of time.<sup>31</sup> Thus the incidents are set out as a transaction would unfold. Cooke and O'Connor<sup>32</sup> provide a contemporary example in the use of this organising technique.

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

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

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

---

<sup>28</sup> Hewitt and Overton (1929).

<sup>29</sup> Williams and Lightwood (1936).

<sup>30</sup> Farrand (1983).

<sup>31</sup> Williams and Lightwood (1936), p. (v).

<sup>32</sup> Cooke and O'Connor (2004), pp. 640–666.



## 1.5 Scholarship

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

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

The design of this research involves the novel use of organising concepts through the creation and articulation of a model or abstracted process to determine risks in the conveyancing process. This abstraction provides a mechanism for ignoring those aspects that were not relevant to the research in order to focus more fully on those that were. While the use of models in property law is not new they are rarely articulated.<sup>33</sup>

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

## 1.6 Legislation

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

---

<sup>33</sup> See Miceli et al. (2002), pp. 565–582 for an example.

## 1.7 Summary

This book is divided into nine chapters, the first being this chapter by way of introduction.

Chapter 2 explains in detail the methodology of the research and sets the research in context. It also provides a neutral vocabulary for the research.

In Chap. 3 eConveyancing is defined and the relationship between its constituent parts is explored. The move towards eConveyancing in Ontario and Ireland is also examined.

Chapter 4 looks at land administration, land registration, the nature of title registration and the systems operating currently in Ontario and Ireland.

Chapter 5 sets out the model of the conveyancing transactions, identifies the abstract participants and their standpoint. It identifies the risks borne by each participant and categorises the key risks to be examined.

Chapters 6–8 then examine each of the risk categories and determine the impact of eConveyancing. Does an eConveyancing environment lead to no change in the risk profile of each participant or is there increased or decreased risk? Who, if anyone, suffers if the risk leads to a loss in an eConveyancing environment?

In Chap. 6 the risks posed by the registration gap and the formalities for registration are explored. Chapter 7 looks at errors in the register. Chapter 8 explores interests off the register which affect title, the destructive effects of a registered transaction and interests which are not recognised and not capable of registration.

Chapter 9 is the concluding chapter. It provides an overarching view on the impact of eConveyancing on risk and examines potential mechanisms for removing, minimising or distributing the risk or takes the view that the risk is worth bearing given the other benefits accrued. Finally it seeks to draw conclusions to inform the reform process in Ireland.

All of this analysis is set within the context of moves towards eConveyancing and developments in title registration in other jurisdictions across the globe.

## References

- Astke, H., Mulholland, G., & Hyarady, R. (2004). *Profile definition for a standardized cadastral model*. In FIG Conference on Standardization in the Cadastral Domain. [http://www.fig.net/commission7/bamberg\\_2004/papers/ts\\_02\\_04\\_asthe\\_mulholland.pdf](http://www.fig.net/commission7/bamberg_2004/papers/ts_02_04_asthe_mulholland.pdf). Accessed 14 May 2014.
- Berger-Walliser, G., Haapio, H., & Rekola, K. (2011). *Contracts as roadmap for performance: Enhancing cross-disciplinary understanding through contract visualization*. In Institute for Supply Management, Working Paper for the 21st Annual North American Research Symposium on Purchasing and Supply Chain Management 17 March 2011.
- Christensen, S. (2004). Electronic land dealings in Canada, New Zealand and the United Kingdom: Lessons for Australia. *Murdoch University Electronic Journal of Law*, 11(4). [http://www.murdoch.edu.au/elaw/issues/v11n4/christensen114\\_text.html](http://www.murdoch.edu.au/elaw/issues/v11n4/christensen114_text.html). Accessed 14 May 2014.

- Coffin, M., & Pierre, K. (2005). *Land registration: The Nova Scotia experience*. Caris 2005 Mapping a Seamless Society. <http://www.caris.com/conferences/caris2005/proceedings/papers/11.pdf>. Accessed 29 Jan 2009.
- Cooke, E., & O'Connor, P. (2004). Purchaser liability to third parties in the English land registration system: A comparative perspective. *Law Quarterly Review*, 120.
- Farrand, J. T. (1983). *Contract and conveyance* (4th ed.). London: Oyez Longman.
- Gahan, E. (2008). Taking full advantage of the possibilities of eGovernment. *Public Affairs Ireland*, 51.
- Haapio, H. (2010). Visualising contracts and legal rules for greater clarity. *The Law Teacher*, 44 (3).
- Harpum, C. (2000). *Property in an electronic age. Modern studies in property law* (Vol. 1). Oxford: Hart.
- Harpum, C. (2004). *English experience: Title by registration – Preparation for e-conveyancing*. In Law Reform Commission Annual Conference. <http://www.lawreform.ie/Annual%20Conference%202004.PDF>. Accessed 18 Feb 2009.
- Hart, H. L. A. (1959). Scandinavian realism. *Cambridge Law Journal*, 1959.
- Hewitt, E. P., & Overton, M. R. C. (1929). *Dart's treatise on the law and practice relating to vendors and purchasers of real estate* (8th ed.). London: Stevens and Sons Ltd.
- Holmes, O. W. (1896–1897). The path of the law. *Harvard Law Review*, 10.
- Keating, S. (2012). *Digital signatures and electronic conveyancing* (LL.M. thesis). National University of Ireland, Galway.
- Killilea, M. (2010, April). *eRegistration in Ireland – An assessment of the transferability of the Queensland model* (Dissertation). Dublin Institute of Public Administration.
- Law Reform Commission. (2006). *eConveyancing: Modelling of the Irish conveyancing system*. The Law Reform Commission (LRC 79 – 2006). [http://www.lawreform.ie/Reports\\_Published/Default.135.html](http://www.lawreform.ie/Reports_Published/Default.135.html).
- Low, R. (2005). Maintaining the integrity of the Torrens system in a digital environment: A comparative overview of the safeguards used within the electronic land systems in Canada, New Zealand, United Kingdom and Singapore. *Australian Property Law Journal*, 11(2).
- Mahler, T. (2010). *Legal risk management* (Ph.D. thesis). University of Oslo.
- Miceli, T. J., Munneke, H. J., Sirmans, C. F., & Turnbull, G. K. (2002). Title systems and land values. *Journal of Law and Economics*, 45.
- Murray, K. (2004). *Electronic registration and other modernization initiatives in Ontario's land registration system*. In Law Reform Commission Annual Conference. <http://www.lawreform.ie/Annual%20Conference%202004.PDF>. Accessed 18 Feb 2009.
- Perry, R. (2003). E-conveyancing – A critical view. *Conveyancing & Property Law Journal*, 8(2).
- Sneddon, M. (2007). *Risk assessment and management in electronic conveyancing*. In Registering the World Conference, Dublin, 26–28 September 2007. <http://www.prai.ie/uploadedfiles/conference20071/papers/s4p1.pdf>. Accessed 14 May 2014.
- Šumrada, R. (2003). Conceptual modelling of cadastral information system structures. In H. Stuckenschmidt, E. Stubkjær, & C. Schlieder (Eds.), *The ontology and modelling of real estate transactions*. England: Ashgate.
- Susskind, R. (2008). *The end of lawyers? Rethinking the nature of legal services*. Oxford: Oxford University Press.
- Treacy, C., & O'Sullivan, J. (2004). *Land registration in Ireland – Current position and future developments*. In Law Reform Commission Annual Conference. <http://www.lawreform.ie/Annual%20Conference%202004.PDF>. Accessed 10 Mar 2009.
- Twining, W. (1972–1973). The bad man revisited. *Cornell Law Review*, 58.
- Viiitanen, K. (2003). Purchase of real property in Finland. In H. Stuckenschmidt et al. (Eds.), *The ontology and modelling of real estate transactions*. England: Ashgate.
- Visser, P., & Bench-Capon, T. (1998). A comparison of four ontologies for the design of legal knowledge systems. *Artificial Intelligence and Law*, 6.

- Visser, U., & Schlieder, C. (2003). Modelling real estate transactions: The potential role of ontologies. In H. Stuckenschmidt, E. Stubkjær, & C. Schlieder (Eds.), *The ontology and modelling of real estate transactions*. England: Ashgate.
- Williams, T. C., & Lightwood, J. M. (1936). *A treatise on the law of vendor and purchaser of real estate and chattels real, intended for the use of conveyancers of either branch of the profession* (4th ed.). London: Sweet and Maxwell.
- Wylie, J. (2004). *Keynote address: Need for a modern legislative framework*. In Law Reform Commission Annual Conference. <http://www.lawreform.ie/Annual%20Conference%202004.PDF>. Accessed 29 Jan 2009.

# Chapter 2

## Methodology

### 2.1 Introduction

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

### 2.2 Methodology

The methodology is primarily based upon doctrinal legal scholarship in the comparative law tradition. This approach advocated by Zweigert and Kötz<sup>1</sup> attempts to use a functional analysis of legal processes to describe the substantive and systemic aspects of different legal systems. There may be little or no convergence between the systems and their terminology but many legal systems attempt to protect similar interests. Only rules which perform the same function or address the same problem can profitably be compared. Similar concepts won't have the same label and thus researchers must move past the formal label into function. Thus an examination of the function of the rules within each system must be carried out. Rules or laws with similar functions, in this instance to protect different property rights, will yield common ground for research.

Through this comparative study of the systems in Ontario and Ireland weaknesses and strengths are highlighted and any strengths of the Ontario system can be followed and weaknesses avoided. As Ireland is in the early stages of eConveyancing a comparative study is appropriate to assist in the development of its system. Zweigert and Kötz refer to this as modern comparative law developed in

---

<sup>1</sup> Zweigert and Kötz (1998).

the early nineteenth century which has a practical purpose, namely reform and improvement of the law at home.<sup>2</sup>

Different systems are generally striving to achieve the same ends though often by diverse means. Restricting comparison to similar systems may exclude other better ideas but for such a comparison to be feasible there must be some common ground between the items being compared. Ontario and Ireland have many key similarities which provided the rationale for a comparison of their systems.

Ontario and Ireland are western developed societies and have long established market economies. Ireland and Canada are members of the OECD<sup>3</sup> and WTO,<sup>4</sup> UN<sup>5</sup> and IMF.<sup>6</sup> Both have a tradition of democratic governance and achieved statehood through independence from the United Kingdom. They have common rather than civil law legal systems and are English speaking. The two jurisdictions have a practice of secured lending for the purchase of property with a tradition of relatively unrestricted freedom of lifetime disposition of property. Both jurisdictions have a similar division between deeds and title registration and the model of land registration for both Ireland and Ontario developed from the English system. Thus a comparison of the systems in Ontario and Ireland is feasible.

Table 2.1 shows some key comparators between the two jurisdictions.

There is however criticism of comparative law and the view of Zweigert and Kötz that functionality is the basic methodological principle of all comparative law.<sup>7</sup>

Teubner calls this functional equivalence but he takes issue with it and argues that attempts at unifying law<sup>8</sup> or convergence will result in new cleavages.<sup>9</sup> Legal institutions cannot really be transplanted from a foreign to a domestic culture but instead they become a legal irritant which,

cannot be domesticated; they are not transformed from something alien into something familiar, not adapted to a new cultural context, rather they will unleash an evolutionary dynamic in which the external rule's meaning will be reconstructed and internal context will undergo fundamental change.<sup>10</sup>

He is of the view that globalising tendencies produce new divergences as their unintended consequences.<sup>11</sup>

Another critical view is offered by Legrand who is strident in his opinion that legal transplants are impossible as legal rules cannot travel.<sup>12</sup> He argues that law

---

<sup>2</sup> Zweigert and Kötz (1998), p. 54.

<sup>3</sup> Organisation for Economic Co-operation and Development.

<sup>4</sup> World Trade Organisation.

<sup>5</sup> United Nations.

<sup>6</sup> International Monetary Fund.

<sup>7</sup> Zweigert and Kötz (1998), p. 34.

<sup>8</sup> In his commentary European contract law.

<sup>9</sup> Teubner (1998), pp. 12–13.

<sup>10</sup> Teubner (1998), p. 12.

<sup>11</sup> Teubner (1998), p. 13. See also Kahn-Freund (1974), p. 1.

<sup>12</sup> Legrand (1997), p. 114. At p. 111 he equates transplant to displacement. Another negative view is offered by Paasch who states that internationalisation of law, including visions of legal integration and even unification of legal systems is an old dream. See Paasch (2007), p. 167.