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 unchartered 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.1 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

1 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. 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.

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.

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.

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 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 and certainly many benefits of electronic advances in conveyancing have

---

6 Killilea (2010), p. 11.
been articulated. 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 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 and any change in that process, here the move towards eConveyancing, will affect or impact that risk landscape.

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

---

9 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.
10 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.
11 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\[12\] and other registers to establish encumbrances on the title;
(d) post contract enquiries.\[13\] 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\[14\];
(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.

---

12 The term execution is used in Ontario.
13 In Ireland these are known as Requisitions on Title and are published in a standard format by the Law Society of Ireland.
14 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\(^{15}\) 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.”\(^{16}\) 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.\(^{17}\) 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?

---

\(^{15}\) 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.

\(^{16}\) Viitanen (2003), p. 55.

\(^{17}\) 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\(^{18}\);
(b) inconsistent use of terminology by researchers and commentators;
(c) continual development of the law, systems, processes and procedures in each jurisdiction.

There is a difference in terminology between jurisdictions not just in conveyancing but also eConveyancing and thus a new vocabulary needed to be generated. 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.”\(^{19}\)

In this way “[m]odels are useful precisely because they abstract from irrelevant

---

\(^{18}\) 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.

\(^{19}\) Astke et al. (2004).
details and thereby allow us to focus on the aspects of the domain we are interested in.\textsuperscript{20}

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

Šumrada explains that:

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

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

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\textsuperscript{23} in law is increasingly used as a means to present complex ideas simply.\textsuperscript{24}

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,\textsuperscript{25} Hart\textsuperscript{26} and Twining\textsuperscript{27} 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

\textsuperscript{20}Visser and Bench-Capon (1998), p. 28.
\textsuperscript{21}Šumrada (2003), p. 140.
\textsuperscript{22}Visser and Schlieder (2003), p. 111.
\textsuperscript{23}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.
\textsuperscript{24}For examples see Mahler (2010). See also Haapio (2010), pp. 391–394 and Berger-Walliser et al. (2011).
\textsuperscript{25}Holmes (1896–1897), pp. 457–478.
\textsuperscript{26}Hart (1959), pp. 233–240.
\textsuperscript{27}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,28 Williams and Lightwood29 and more recently Farrand.30 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.31 Thus the incidents are set out as a transaction would unfold. Cooke and O’Connor32 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 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.

28 Hewitt and Overton (1929).
29 Williams and Lightwood (1936).
1.5 Scholarship

eConveyancing systems have not been extensively discussed in legal literature. Thus this research is a groundbreaking 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.\(^\text{33}\)

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.

\(^{33}\) See Miceli et al. (2002), pp. 565–582 for an example.

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).
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


References 11


The Impact of eConveyancing on Title Registration
A Risk Assessment
Brennan, G.
2015, XV, 316 p. 7 illus. in color., Hardcover
ISBN: 978-3-319-10340-2