

**Ketevan Kvinikadze\***

## **The Operation of the So-called “Doctrine of Notice” in the Law of Bona Fide Acquisition of Immovable Property (Comparative analysis of Georgian, German and English law)**

*The same legal problem, as a rule, is regulated differently in different jurisdictions, but nevertheless, it is still possible to find a common point of contact in a number of issues, which comparative legal analysis helps us to determine what kind of regulation may be the most suitable for national law. One of these issues is the problem of “notice” in the law of bona fide acquisition of real estate, which is discussed in the present article on the example of three countries. Although these countries differ even in terms of the understanding of the right of ownership itself (meaning the difference with respect to English law), “notice” is crucial in all three of them as part of the assessment of the bona fide acquisition of a right to immovable property. Thus, a comparative study of the “notice” component provides an opportunity to draw valuable conclusions.*

**Keywords:** *Immovable property, unauthorized alienator, purchaser in good faith, Actual knowledge, possible notice.*

### **1. Introduction**

The problem related to bona fide purchase of real estate is a subject of special regulation in all jurisdictions. The whole complexity of the issue lies in the fact that not two basic rights collide with each other, at which point the question of determining the superior one arises, but there is one basic right – the right to property – and two conflicting interests. Confidence in the authenticity of the right is based, first of all, on the good faith of the participants of the turnover, and only then on the artificial institutions created by the state.<sup>1</sup>

There are quite frequent cases when the buyer acquires the immovable thing based on the trust of the public registry from a registered unauthorized person, at which time he does not know that the alienator is not actually the owner of the thing. At such times, the question arises as to which of them should have priority protection in relation to the right of ownership – the purchaser of the thing or its real owner? For such cases, all legal systems have their own solutions – some give priority to the interests of the bona fide acquirer, which is explained by the argument of the stability of civil turnover, and others – to the real owner, which is justified by the old Latin maxim – “nemo plus iuris transferre potest quam ipse habet” (No one can give more rights than he himself has).

In terms of the circumstances excluding the bona fide acquisition of immovable property, each legal order sets different conditions, however, in any of them, the notice of the alienator's non-

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\* PhD Student, Invited Lecturer at Ivane Javakhishvili Tbilisi State University, Faculty of Law.

<sup>1</sup> Zoidze B., Reliability of the Public Register and Bona Fide Acquisition of Real Estate in Georgian law, Journal of Comparative Law, #12/2021, 128 (in Georgian).

ownership excludes the bona fides of the purchaser and, accordingly, the acquisition of the ownership right. From this point of view, the comparative-legal research of the component of “notice” is interesting to the extent that its scope is different in legal systems – for example, German law includes only actual notice in “notice”, while in Georgian law “notice” is extended by the obligation of “possible notice”. As for English law, here notice is divided into three aspects, one of which fully corresponds to the “possible notice” standard in Georgian law. Based on this, I think it should be interesting and valuable to study one of the central issues of the institution of bona fide acquisition of immovable property on the examples of countries with a continental and common law system such as Germany and England, especially when the topic under discussion allows for the possibility of drawing certain conclusions by comparing it with Georgian law.

## **2. Purchase of Real Estate from Unauthorized Alienator**

The institution of bona fide purchase of a thing, i.e. purchase from an unauthorized alienator, is characteristic of all legal systems, although the normative regulation of this institution is different. If the purchase is made from a non-owner, a conflict arises: The law considers the acquirer as the owner despite the defect in the right of the alienator, thus the real owner will be harmed by the transaction made behind his back if he refuses to the acquirer in the origination of the right to the acquired, which will already harm the acquirer.<sup>2</sup>

The approach of Georgian and German law in regulating the institution of bona fide acquisition of immovable property is similar, although it would be more correct to say that it was conceived in the same way. The approach of the general courts<sup>3</sup> and the decision of the Constitutional Court<sup>4</sup> made certain changes in the Georgian regulation of the purchase of immovable property from an unauthorized alienator, which is mainly related to the problem of “notice”.

Both Article 312 (2) of the Civil Code of Georgia (hereinafter – SC) and Paragraph 892 of the German Civil Code (hereinafter – BGB) exclude the bona fide purchase of immovable property when a complaint is filed against the entry in the public register or the buyer knows that the alienator is not the owner. A registered complaint excludes the presumption of truthfulness and completeness of the public register and in this way hinders the possibility of a bona fide purchase,<sup>5</sup> that is, by registering a

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<sup>2</sup> *Prütting H.*, Sachenrecht, 34.Aufl., C.H. Beck München 2010, 50.

<sup>3</sup> See Ruling of the Supreme Court of Georgia dated June 17, 2015 #AS-491-465-2015; Ruling of the Supreme Court of Georgia dated April 8, 2015 #AS-675-642-2014; Decision #2b/298-18 of the Tbilisi Court of Appeal of April 15, 2019; Ruling of the Supreme Court of Georgia dated December 25, 2007 #AS-524-869-07; Ruling of the Supreme Court of Georgia dated December 15, 2017 #AS-595-554-2017; Ruling of the Supreme Court of Georgia dated August 1, 2012 #AS-567-535-2012; Decision #AS-394-373-2013 of the Supreme Court of Georgia dated May 20, 2014.

<sup>4</sup> See Decision #3/4/550 of the Constitutional Court of Georgia dated October 17, 2017 on the case “Georgian citizen Nodar Dvali vs. Parliament of Georgia”, <<https://www.constcourt.ge/ka/judicial-acts?legal=1005>> [25.08.2022].

<sup>5</sup> *Chiuzi T.*, Analysis of the decision of the Constitutional Court of Georgia – “Nodar Dvali v. Parliament of Georgia” – analysis from the perspective of German law, Journal of Comparative Law, #1/2019, 3 (in Georgian).

complaint due to incorrect data in the land register, an obstacle is created for a bona fide purchase.<sup>6</sup> According to §892 of the BGB, the buyer's notice of the complaint is unimportant, because the latter, through registration in the public register, is necessarily reflected in the extract of the public register, which is why information about its existence is available to third parties.<sup>7</sup> Paragraph 892 of the BGB does not establish any additional condition to exclude the presumption, including the obligation of notice of the acquirer. A registered protest destroys the public trust in the public registry, even when the acquirer knows nothing about it.<sup>8</sup> The complaint provided for in Article 312 (2) of the Civil Code, despite its similar purpose, due to the lack of appropriate legislative regulation, is not effective in practice, which implies that it will not be included in the extract of the public register, thus it would acquire the force of universal validity. Because of this, the function of a registered complaint is taken over by the complaint and notice about it (Article 185 of the Civil Code), in which case publicity is achieved through personal information, and to protect the item from a bona fide purchase, as a rule, a claim security measure is applied, which, unlike a complaint, makes it impossible to make dispositional deals related to the item until the dispute is over.

Due to the not-so-perfect registration system and incomplete legislative regulation, the standard of “possible notice” appeared in Georgian law in relation to real estate, which calls for any potential acquirer to act within the framework of reasonable prudence. This had a direct impact on the content of the “notice” component, which is why it is now freely possible to say that Georgian law regulates the institution of bona fide acquisition of immovable property by the “possible notice” standard. This standard is also used in English law, where it is recognized as one of the aspects of notice that excludes the possibility of bona fide acquisition of an interest in unregistered land.

Despite the fact that Georgian law has created a peculiar model of the institution of bona fide acquisition of immovable property (it is possible to see similarities with all legal systems),<sup>9</sup> it remains committed to the principle of preferential protection of the interests of a bona fide participant in civil turnover, which means that, like German law, preference is given to the bona fide purchaser, and the right to claim damages from an unfair alienator is the claim of the real owner of the property. Unlike

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<sup>6</sup> *Wilhelm J.*, *Sachenrecht*, 6.Aufl., De Gruyter 2019, 2019, 364, Rn.599.

<sup>7</sup> See *Sirdadze L.*, Complaint filed against the Entry of the Public Registry, *Journal of Comparative Law*, #1/2020, 11 (in Georgian).

<sup>8</sup> *Kropholler I.*, *German Civil Code, Educational Commentary*, 13<sup>th</sup> revised edition, *Darjania T., Chechelashvili Z.*, (trans.), *Chachanidze E., Darjania T., Totladze L.* (ed.), Tbilisi, 2014, 681, field 8 (in Georgian).

<sup>9</sup> In terms of normative regulation, Article 312 (2) of the Civil Code repeats §892 of the BGB, however, in the “possible notice” part, it shows similarities with the Napoleonic Code (Italy, Spain), Scandinavia (Finland, Sweden, Norway), Eastern Europe (Poland) and common law system countries, as well as Austria, which is a country with a German legal system, however, it should be noted that the similarity with other legal system countries is not a result of reception, but a result of a correct consideration of a specific approach to the same problem. See *Pradi A.*, *Transfer of Immoveable Property in Europe, From Contract to Registration*, (ed.) *Pradi A.*, *Universita degli Studi di Trento*, 2012, 160-161, *Santisteban M.S.*, *Transfer of Immoveable Property in Europe, From Contract to Registration*, (ed.) *Pradi A.*, *Universita degli Studi di Trento*, 2012, 196-197, *Niemi M.I.*, *Transfer of Immoveable Property in Europe, From Contract to Registration*, (ed.) *Pradi A.*, *Universita degli Studi di Trento*, 2012, 86-89.

some countries, the Georgian Public Registry has been relieved of all responsibilities regarding the obligation to compensate for damages.<sup>10</sup>

### 3. “Notice” as an Exclusionary Circumstance for Bona Fide Acquisition

#### 3.1. “Actual Notice”

According to Georgian and German law, actual notice is an exclusionary condition for bona fide acquisition of immovable property. In articles 185 and 312 (2) of the Civil Code, “notice” is expressed by the words: “the buyer knew”, and in paragraph 892 of the Civil Code, “notice” is expressed by the wording – “known to the buyer”. Therefore, if the acquirer knows that the transferor, who is registered as the owner, is not the real owner of the property, he cannot acquire the right of ownership based on the contract concluded with him, because actual notice excludes the possibility of a bona fide acquisition.

German law takes a strict approach to the assessment of “notice”, in particular, “notice” includes only certain, confirmed notice about the non-ownership of the registered person and excludes the possibility of presuming any doubt or assumption in “notice”.<sup>11</sup> Even the possession of specific information, which is related to the unauthorized person registered as the owner, cannot prevent a bona fide purchase, if this information is obtained from an unreliable source or is tender.<sup>12</sup> Even ignorance due to gross negligence does not constitute bad faith.<sup>13</sup> In contrast, according to the so-called “prudence protection standard” developed by the Georgian general courts, a bona fide acquisition will always be hindered if the acquirer does not use the opportunity to verify the information received by the transferor regarding the ownership and dispel doubts.<sup>14</sup> This is considered gross negligence of the buyer, which deprives him of the opportunity to keep the acquired with reference to bona fide.

It is worth noting the assessment related to the circumstances leading to the incorrect registered data. Under German law, there is no bad faith when the buyer is aware of the facts from which the wrongful act arises.<sup>15</sup> This assessment is not shared by the Georgian judicial practice, which develops reasoning regarding the fact that “notice of the inaccuracy of the record means notice of the

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<sup>10</sup> Include Swedish Land Book, 18:1 – 18:4, according to which both the real owner and the acquirer, if the relevant prerequisites are met, are guaranteed the right to compensation against the state for the loss of the right.

<sup>11</sup> See Ring G., Griziwotz H., Keukenschrijver A., BGB Kommentar, Sachenrecht, Band 3, 3. Aufl., Baden-Baden 2013, 225, Rn.57, Wilhelm J., Sachenrecht, 6.Aufl., De Gruyter 2019, 435, Rn.725, Soergel H.T., Stürner R., BGB Sachenrecht 1, Band 14, 13. Aufl., Kohlhammer, 2002, §892, 196, Rn.4.

<sup>12</sup> See Rusiashvili G., Analysis of judicial practice in case #AS-189-182-2013, January 16, 2014, 11-2/2020, Journal of Comparative Law #2/2020, 88-89 (in Georgian).

<sup>13</sup> Kropholler I., German Civil Code, educational commentary, 13<sup>th</sup> revised ed., Darjania T., Chechelashvili Z., (trans.), Chachanidze E., Darjania T., Totladze L. (ed.), Tbilisi, 2014, 681, field 11 (in Georgian); Wilhelm J., Sachenrecht, 6.Aufl., De Gruyter 2019, 2019, 435, Rn.725; Soergel H.T., Stürner R., BGB Sachenrecht 1, Band 14, 13. Aufl., Kohlhammer, 2002, §892, 204, Rn.4.

<sup>14</sup> For judicial practice, see Decisions referred to in footnote 3.

<sup>15</sup> Soergel H.T., Stürner R., BGB Sachenrecht 1, Band 14, 13. Aufl., Kohlhammer, 2002, §892, 196, Rn. 4.

circumstances due to which the record is inaccurate”.<sup>16</sup> In this matter, it is difficult to share the opinion of the German author, because if a person knows the facts that lead to the incorrectness of the registered data, then it turns out that he knows about the incorrectness, which directly leads to dishonesty, which excludes a bona fide purchase. Thus, when the buyer knows the facts from which the irregularity derives, it should be assumed that he knows about the irregularity itself, which these facts lead to.

The presumption of legality of the public register ceases to apply when the person has actual notice of the inaccuracy of the record.<sup>17</sup> Actual notice refers to the case when the buyer knows for sure that the person registered in the public register is not the real owner of the real estate. In addition, the buyer is not obliged to know who the real owner of the property is;<sup>18</sup> it is enough to know that the legal status declared in the register is inconsistent with the real situation. Paragraphs §§892-893 of the BGB also talk about the notice of wrongdoing, and not about the notice of the actual legal situation.<sup>19</sup> Article 312 (2) of the Civil Code shares a similar assessment of “notice”, although only at the legislative level, because in practice, the assessment of “notice” in relation to real estate does not actually occur independently of the obligation of “possible notice”, the reason for this is to establish a standard of “possible notice” with respect to bona fide real estate acquisition disputes.

### **3.2. The Scope of “Notice” in Georgian Law**

#### **3.2.1. “Knew or Could Have Known” Standard**

According to the literal interpretation of Articles 185 and 312 of the Civil Code, the true owner of the real estate must prove that the purchaser knew about the alienator's non-ownership, which means that he must prove to the purchaser the notice of this fact, and not that he could have known it. Therefore, the acquirer is unfairly charged with notice, not the obligation of notice.<sup>20</sup>

According to the established judicial practice, certain corrections have been included in the scope of “notice”, in particular, it is expanded with cases of “possible notice”. The latter refers to the standard of behavior to be performed by the buyer within the framework of reasonable prudence, which reliably confirms that the buyer has insured all possible risks before purchasing the item.<sup>21</sup>

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<sup>16</sup> See Decision #AS-189-182-2013 of the Supreme Court of Georgia of January 16, 2014.

<sup>17</sup> Müller K., Gruber P. U., *Sachenrecht*, Verlag Franz Vahlen München 2016, 546, Rn.2795; Ring G., Griziwotz H., *Keukenschrijver A.*, BGB Kommentar, *Sachenrecht*, Band 3, 3.Aufl., Baden-Baden 2013, 225, Rn.57.

<sup>18</sup> Ring G., Griziwotz H., *Keukenschrijver A.*, BGB Kommentar, *Sachenrecht*, Band 3, 3.Aufl., Baden-Baden 2013, 225, Rn.57.

<sup>19</sup> Müller K., Gruber P. U., *Sachenrecht*, Verlag Franz Vahlen München 2016, 547, Rn. 2803.

<sup>20</sup> Zoidze B., *Reliability of the Public Register and Bona Fide Acquisition of Real Estate in Georgian law*, *Journal of Comparative Law*, #12/2021, 132 (in Georgian).

<sup>21</sup> For judicial practice, see #AS-1279-2019 of the Supreme Court of Georgia dated March 2, 2020; Decision #AS-1198-2019 of the Supreme Court of Georgia of June 25, 2021; Ruling of the Supreme Court of Georgia dated October 23, 2020 #AS-562-2020; Ruling of the Supreme Court of Georgia dated October 29, 2020 #AS-700-2020; Ruling of the Supreme Court of Georgia dated March 11, 2021 #AS-1387-2020; Decision #AS-394-373-2013 of the Supreme Court of Georgia dated May 20, 2014.

Acting within the framework of reasonable prudence is a given to be evaluated and it is determined taking into account the peculiarities of each specific case. For example, is it possible for a buyer to be considered in good faith when he buys a next-door apartment where family members of the real owner of the house still live?<sup>22</sup> For the buyer, inspecting the item for damage before purchasing it (even for the apartment next door), does not follow from Articles 185 or 312 (2) of the Criminal Code. Therefore, failure to carry out such an inspection according to the same articles does not cause dishonesty on the part of the acquirer, although the obligation to act within the scope of so-called reasonable prudence is established for the acquirer in accordance with the general norm-principle of bona fide, which implies the duty to perform such actions on his part, that with minimal effort and financial losses, makes it possible to investigate the legal status related to the real estate before purchasing it. Although such an obligation for the acquirer is not established by law, I think it should be justified in cases where there are certain circumstances that create reasonable doubts about the validity of the right. Although the public registry provides the buyer with information regarding the ownership right, but if there are suspicious circumstances, the verification of which requires minimal effort, they cannot be ignored and a decision cannot be made only on the basis of the public register sheet. Such a rigid approach does not correspond to a reasonable balancing of interests, when one party benefits from the presumption of legality of the registry, while the other is harmed by such a presumption. However, if the buyer has taken all measures to dispel these doubts, but later the right still becomes disputed, this cannot be the basis for recognizing him as in bad faith. At such a time he should keep the purchase. Ultimately, this approach avoids encouraging blatant indifference when the acquirer fails to take basic due diligence measures.<sup>23</sup>

Case law research has shown that in some cases the use of the standard of “possible notice” may lead to an unjustified limitation of the interests of a bona fide purchaser.<sup>24</sup> This mainly happens in disputes where the contract is concluded between close persons or relatives. The court considers such connections to be suspicious circumstances, which it sometimes associates with dishonesty of the

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<sup>22</sup> An example is taken from judicial practice, where the cassation court returned the case to the appellate court for reconsideration on the grounds that it did not fully assess the issue that the buyer could not have known about the dispute related to the right of ownership of the next-door neighbor's apartment. see Ruling #AS-1026-1219-08 of the Supreme Court of Georgia of July 3, 2009. see also, *Zarandia T.*, Bona fide purchase of immovable property from an unauthorized alienator in Georgian judicial practice, 65. *Nachkibia A.*, Definitions of civil legal norms in the practice of the Supreme Court (2000-2013), Tbilisi, 2014, 84 (in Georgian); see Also, *Zarandia T.*, Industrial Law, Tbilisi, 2016, 297-303 (in Georgian).

<sup>23</sup> See Decision #3/4/550 of the Constitutional Court of Georgia dated October 17, 2017 in the case “Citizen of Georgia Nodar Dvali vs. Parliament of Georgia”, II, 35, <<https://www.constcourt.ge/ka/judicial-acts?legal=1005>> [25.08.2022].

<sup>24</sup> See for example, the ruling of the Supreme Court of Georgia dated February 17, 2011 #Ac-888-836-2010, where the appellate court considered that due to the fact of proximity, the buyer should have been aware of the ongoing dispute over the property. The court of cassation highlighted the issue of wrong distribution of the burden of proof by the court of appeal and noted that the case file did not establish the buyer's knowledge of the dispute related to the plots of land, the court of appeal relied only on the plaintiff's position, although it is quite possible that the intermediary who was interested in the alienation of the land hid from the buyer the fact of the dispute and this opinion has the same right to exist as the opposite opinion.

buyer, although such a decision should not be valid in all cases. The presence of kinship or other close connection may only make it easier to prove the acquirer's dishonesty, therefore, based only on the fact of kinship or other close relationship, when there are no other suspicious circumstances, it will not be appropriate to make a decision against the acquirer.

### **3.2.2. The “Origin” of the Obligation of “Possible notice”**

No court decision has clarified where the “possible notice” standard for real estate came from. It is necessary to determine the above to the extent that the “origin” of the standard in relation to a real estate is clarified, so that the appropriateness of its use can be correctly assessed. Georgian judicial practice emphasizes that “notice” means only notice and not “possible notice”, which makes us think that the reasoning of Georgian courts regarding “possible notice” is not the result of a broad interpretation of “notice”, in which “possible notice” would also be presumed. Rather, it is the result of an interpretation of the general principle of bona fide, which is more related to behavior than to cognitive condition. From this point of view, it can be said that a kind of contradiction was created between the general norm-principle of bona fide (Article 8 of the Civil Code) and the obligation of bona fide established by Articles 185 and 312 (2) of the Civil Code.

### **3.3. The So-called “Doctrine of Notice” in English Law**

#### **3.3.1. In General**

In English law, not only the manner of acquiring property is different, but also the perception of the right to property itself. In England, there is no absolute ownership of land, but only rights of ownership (“estates”). In England, individuals own rights to lands, not the lands themselves.<sup>25</sup> Such rights are called “interests”, which are treated as property rights. Thus, when people say they own land, what they really mean is that they have title (interest, right) to the land.<sup>26</sup> In this sense, the English understanding of ownership is relative rather than absolute, as the only title to land can be possession.<sup>27</sup>

In England, there is a concept of “Proprietary Right”, which is not identical<sup>28</sup> to the right of ownership. Property right is one type of property right. For example, a home owned by someone can be rented out as well as encumbered to secure the bank's claim. In such a case, the owner, the tenant and the bank have ownership rights to the house.<sup>29</sup>

There are two types of land in England – registered and unregistered; therefore, the standard of protection for those who acquire them is also different. The purpose of the so-called “Doctrine of

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<sup>25</sup> *Dixon M.*, *Modern Land Law*, 6<sup>th</sup> edition, Routledge-Cavendish 2009, 6.

<sup>26</sup> *Ibid*, 7.

<sup>27</sup> *Caldwell L.K.*, *Rights of Ownership or Rights of Use? – The Need for a New Conceptual Basis for Land Use Policy*, 15 *Wm. & Mary L. Rev.*, (1974), 760.

<sup>28</sup> When we say that a person has the right of ownership to land, apartment, it means that he has the right of long-term ownership.

<sup>29</sup> *Stevens J., Pearce R.*, *Land Law*, 5<sup>th</sup> Edition, Sweet & Maxwell Ltd, 2013, 4, Rn. 1.03.

Notice” developed in English law is to determine the priority of interests in land that is not governed by the Real Estate Act 1925<sup>30</sup> (i.e. unregistered land), thus this rule applies only to unregistered land towards. Within the framework of the so-called “doctrine of notice”, three types of notice are distinguished, one of which is equivalent to the “knew or could have known” standard in Georgian law. Under the so-called “doctrine of cognizance,” a bona fide purchaser of real property who acquires the property for consideration is given priority over any owner of an interest in the land who has not registered his interest, unless the acquirer does not know and cannot know of the existence of such interest(s).

### **3.3.2. Types of Notice**

#### **3.3.2.1. Actual Notice**

“Actual notice” is one of the types of notice under English law, which implies the purchaser's certain notice of the existence of an interest in the land. This kind of notice does not include the cases of notice of hearsay, it refers only to the notice on which any rational person would act. It is immaterial from whom, when or how the purchaser acquired the “notice”, all that is decisive is that at the time of acquisition of the interest he had notice of the previously established interest in the land.<sup>31</sup> According to the opposite opinion, unclear and vague messages received from strangers or statements from persons who are not interested in a particular real estate should not be considered notice of the purchaser.<sup>32</sup>

Although at first glance it is easy to recognize cases of “Actual Notice”, in practice it is still associated with certain difficulties, due to the fact that it is often difficult to separate it from cases of “possible notice”. In one of the cases, the judge explained: “Not using the opportunity to receive “notice” equals 'notice' itself.”<sup>33</sup> It is not necessary to have direct evidence of the purchaser's knowledge of the existence of the *Deed*<sup>34</sup>, but any evidence capable of showing facts and circumstances which any person would suspect may be presented to the jury as evidence of “actual notice.”<sup>35</sup> Therefore, despite the fact that the mentioned type of notice should include only the cases of actual notice in its content, it often includes such content of notice, which is closer to another type of notice.

#### **3.3.2.2. Possible Notice**

*Constructive notice* with its content implies the obligation of “possible notice”, that is, notice that the buyer would have received within the scope of reasonable investigation. We are dealing with

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<sup>30</sup> Law of Property Act 1925, <<https://www.legislation.gov.uk/ukpga/Geo5/15-16/20/contents>> [25.08.2022].

<sup>31</sup> *Long J.R.*, Notice in Equity, Harvard Law Review, Dec., 1920, Vol. 34, № 2 (Dec., 1920), 142.

<sup>32</sup> *Ibid*, 143.

<sup>33</sup> *Ibid*, 147.

<sup>34</sup> Document confirming the title by which the right is transferred.

<sup>35</sup> *Long J.R.*, Notice in Equity, Harvard Law Review, Dec., 1920, Vol. 34, № 2 (Dec., 1920), 149.



this type of notice when there is gross negligence<sup>36</sup> or deliberate refraining<sup>37</sup> from conducting the relevant investigation. Constructive notice corresponds to the so-called standard of “observance of norms of prudence” recognized in Georgian law and implies such “notice” that any average prudent person should have, if it were not for the indifference on his part. In the case of constructive notice, there is a presumption that the person might have known a specific fact, as if he really knows it.<sup>38</sup> This type of knowledge is a manifestation of the principle – Caveat Emptor – “let the buyer beware”.

Regarding the problem of bona fide acquisition, one of the most famous cases in English law is the case of *Hodgson and Marx*.<sup>39</sup> The plot of the case was as follows: Mrs. Hodgson was an 83-year-old widow who lived in her apartment<sup>40</sup> with a tenant. She transferred this apartment to the tenant, who was registered as the owner, although the transferor wanted to continue living in the apartment, just to have it registered in the name of the tenant. In 1964, the tenant sold the house to a third party – the buyer. Before the purchase, the buyer visited the house and met Mrs. Hodgson, although he did not know who she was. Ms. Hodgson filed a lawsuit claiming that her interest in the flat should be binding on the buyer and that the buyer should not be buying the flat free of that interest. The legal basis for the claim was 70 (1) sub-section “c”<sup>41</sup> of the Land Registration Act 1925, on the basis of which the claimant argued that she was the beneficial owner of the flat and, moreover, there was nothing to show that she had abandoned or in any way renounced his interest in the flat. The Court of Appeal overturned the lower court's decision and explained that a prospective buyer should investigate all persons he encounters in the apartment being purchased and, if possible, obtain a written response for evidentiary purposes, and it is important that the buyer does this before registration. The judge's test of “present and apparent” possession<sup>42</sup> was met in this case because Mrs. Hodgson was still living in his flat. Also, the court explained that the fact of clear ownership should be evaluated from the buyer's point of view.<sup>43</sup> Criticism of the decision is based on the rationale of what significance registration can

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<sup>36</sup> In the case *Hudson v. Viney* [1921] 1 Ch98, the court explained regarding gross negligence that gross negligence does not mean mere carelessness, it means carelessness of a “gross nature” that indicates an indifference to foreseeable risks.

<sup>37</sup> Deliberate abstinence was explained by the court in *John v. Smith* ((1841) 1 Hare 60), <<https://vlex.co.uk/vid/jones-v-smith-807013737>> [25.08.2022].

<sup>38</sup> This type of knowledge is established in such cases as: *Hunt v Luke* [1902] 1 Ch 428; *Williams & Glines Bank v Boland* [1981] AC 487; *Counce v Counce*, [1969] 1 WLR 286; *Lloyds Bank v Carrick*, [1996] 1 WLR 783; *Kingsnorth Finance v Tizard* [1986] 1 WLR 783.

<sup>39</sup> *Hodgson v Marks* [1971] EWCA Civ 8 (12 March 1971) ხელმისაწვდომია: <<https://www.bailii.org/ew/cases/EWCA/Civ/1971/8.html>> [25.08.2022]. For a critical analysis, see *Maudsley R.H.*, Bona Fide Purchase of Registered Land, *The Modern Law Review*, Vol. 36, № 1, 1973, 25-41.

<sup>40</sup> He had *free simple* (the same Freehold) right to the apartment, which means that he had indefinite and unlimited ownership rights over the land.

<sup>41</sup> Land Registration Act 1925, 1925, <<https://www.legislation.gov.uk/ukpga/Geo5/15-16/21/contents>> [25.08.2022].

<sup>42</sup> Jurisprudence distinguishes between possession, which is a fact, and possession, which is based on a title right. From the terminological point of view, the first type of ownership is expressed by the term “possession”, and the second – “occupation”.

<sup>43</sup> In the case of *Hunt and Luke* (*Hunt v. Luck* [1902] 1 CH 428) the court explained that actual possession must be apparent to the purchaser.

have when the buyer is still required to carry out such an investigation. The lower court's reasoning was based on the argument that the purchaser had no so-called undisputedly presumed notice of Mrs. Hodgson's interest in the flat.

It is also worth noting the case of *Miles and Langley*,<sup>44</sup> where the court explained the following: “If I enter into a contract of sale with someone who does not own the land himself, but who owns it as a lessee, this is an unquestionable case that provides me with information that there is a lessee of the land, which according to the case of *Daniels and Davison*,<sup>45</sup> I am under an obligation to investigate the tenant's information and verify the title he holds to the land.” Also in the case of *Jones and Smith*,<sup>46</sup> the court explained: “If a person acquires real property which is not in the actual possession of the transferor but of another person, he becomes attached to all the interests vested in that land.” A similar definition is found in the case of *Hunt and Luke*,<sup>47</sup> where the court explained that if the buyer or mortgagee has notice that the seller does not own the property, he has an obligation to find out who is in actual possession of the property and find out what rights he has over the land, and if he does not fulfill this obligation, then he will become the bearer of all the burdens related to the land, which his actual owner has on this land.

### 3.3.2.3. Notice when Acting through a Representative

*Imputed notice* is used in cases where the buyer acts through a representative. At such time he is presumed to know all that his representative ought to know (section 199 of the Real Property Act 1925, (1)(ii)(b)). This is based on the Latin principle: *qui facit per alium facit per se* – “He who acts through another acts himself.”<sup>48</sup>

The question of bona fide of the buyer, when he acts through a representative, is also interesting for Georgian and German law. According to §166 paragraph I of the BGB, if the buyer acts through a representative, the notice of the representative and not of the represented is taken into account.<sup>49</sup> If the represented person knows that the alienator is not authorized, and the representative does not know this, then it would be correct that the represented (acquirer) could not obtain the right of ownership of the property. A contrary assumption would be in contradiction with the institution of bona fide acquisition of real estate, which, in case of actual notice, excludes the possibility of bona fide acquisition. Merely because the acquisition is made through another person, it should not give

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<sup>44</sup> *Miles v. Langley* (1831) 2 R. & My., 626, 628, <<https://vlex.co.uk/vid/miles-v-langley-802706321>> [25.08.2022].

<sup>45</sup> *Daniels v. Davison* (1089) 16 Ves. 249; (1811) 17 Ves. 433, <<https://vlex.co.uk/vid/daniels-v-davison-805880469>> [25.08.2022].

<sup>46</sup> *Jones v. Smith* (1841) 1 Hare 60, ხელმისაწვდომია: <<https://vlex.co.uk/vid/jones-v-smith-807013737>> [25.08.2022].

<sup>47</sup> *Hunt v. Luck* [1902] 1 Ch. 428, See *Maudsley R.H.*, Bona Fide Purchase of Registered Land, The Modern Law Review, Vol. 36, № 1, 1973, 33.

<sup>48</sup> See in detail *Long J.R.*, Notice in Equity, Harvard Law Review, Dec., 1920, Vol. 34, № 2 (Dec., 1920), 137-160.

<sup>49</sup> *Ring G., Griziwotz H., Keukenschrijver A.*, BGB Kommentar, Sachenrecht, Band 3, 3.Aufl., Baden-Baden 2013, 226, Rn. 63.

ownership to a person who could not have acquired ownership, if he purchased the item personally and not through a representative. Such a case is similar to an intermediary execution in criminal law, when an intermediary executor tries to avoid responsibility by committing a crime at the hands of a blameless person. Thus, in the case where the representative does not have notice, but the represented does, bona fide acquisition should be excluded. Assuming the opposite, the result would be that the buyer through the agent (representative) would always manage to bypass “notice”.<sup>50</sup> It should be assumed that the agent and the principal (that is, the buyer and his representative) are one and the same person; in this sense the agent is the alter ego of the principal.<sup>51</sup> The possibility of bona fide acquisition should be excluded even when the representative has notice and the represented does not. In such a case, the notice of the representative should be disclosed to the represented person and bona fide acquisition should be excluded.

#### **4. Conclusion**

As the presented research has shown, the “notice” component in the law of bona fide acquisition of real estate of the reviewed countries is interpreted with different content. Georgian law, which was created on the basis of German law, shows more similarities with English law in terms of practical action, in the part of interpretation of “notice”. According to the SC and BGB, the presumption of infallibility and completeness of the public register is excluded by actual notice, in addition, Georgian law provides for the case of “possible notice” in addition to “notice”, which is the result of the transfer of the general principle of bona fide in the law of bona fide acquisition of real estate and its interpretation. Unlike English law, notice is not divided into types in either Georgian or German law. Although Georgian law allows the possibility of using “possible notice” in relation to immovable things, however, unlike Constructive notice, it is not formed in a separate form and is used next to “notice” and together with the words: “knew or could have known”. In a number of cases, the mentioned standard provides a reasonable balancing of interests. Imputed notice is a familiar problem for Georgian and German law. Although neither the SC nor the BGB provides for a special provision for the exclusion of bona fide acquisition when acting through an unscrupulous representative, however, it would be a correct solution if the representative's knowledge is imputed to the represented person. The same rule should apply in the opposite case, when the representative is bona fide and the represented is not. In this way, the dangers of obtaining ownership rights to real estate in good faith through the artificial involvement of a representative will be avoided. In one case, when an unscrupulous acquirer tries to obtain a right through a bona fide representative, and in the second case, when an unscrupulous representative does it in order to obtain ownership rights for the buyer.

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<sup>51</sup> Ibid. In English law, there are virtually no conflicting decisions regarding a given type of notice.

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