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Property law

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Contents

Module descriptor

GENERAL INFORMATION

Module title

Property law

Module code

LA2003

Module level

5

Enquiries

The Undergraduate Laws Programme courses are run in collaboration with the University of London. Enquiries may be made via the Student Advice Centre at: https://sid.london.ac.uk

Credit value

30

Courses in which this module is offered

LLB, EMFSS

Module prerequisite

None

Notional study time

300 hours

MODULE PURPOSE AND OVERVIEW

Property law is one of the seven foundation modules required for a qualifying law degree (QLD) in England and Wales. Standard Entry and Graduate Entry students following a QLD pathway must pass an examination in this module in order to meet the requirements of their programme.

This module introduces students to the fundamental principles that underpin land ownership in England and Wales and provides them with a sound understanding of the law that governs the creation, protection and transfer of interests in land.

MODULE AIM

Students will develop a detailed knowledge of the substantive law (from both primary and secondary sources), enabling them to explain and apply key legal principles to moderately complex real-world scenarios and make a critical and reasoned assessment of them. By situating the law in its social and economic context, the module also seeks to highlight the ethical issues that frequently arise and the practical impact and importance of property law.

LEARNING OUTCOMES: KNOWLEDGE

Students completing this module should be able to explain the framework of modern land law and describe its key principles and concepts. In particular they should be able to:

1. Compare and contrast the functions of the rules of common law and statute, and common law and equity;

2. Explain how ownership rights and other interests in land are acquired, protected and transferred;
3. Appreciate how property law adapts to social and economic conditions, raises ethical issues and has practical importance.

LEARNING OUTCOMES: SKILLS

On completion of this module students should be able to:

4. Engage in research in primary and secondary materials in order to build an evidence base to support arguments;
5. Critically apply knowledge in response to moderately complex legal issues presented in both essay and problem questions about property law and reach reasoned conclusions that reference relevant legal authority appropriately;
6. Develop the ability to evaluate and critique standard legal materials and arguments relating to property law, including case law, statutes and academic writing.

BENCHMARK FOR LEARNING OUTCOMES

Quality Assurance Agency (QAA) benchmark statement for Law 2019.

MODULE SYLLABUS

a. *General principles.* The concept of land. Doctrine of tenures and estates. Freehold and leasehold estates. Legal and equitable rights. Principles of the 1925 legislation.

b. *Transfer of land, with reference to the conveyance of registered and unregistered titles in land.* Formalities and proprietary estoppel. Land Registration Acts 1925 and 2002. Concept of overreaching. An awareness (in general terms only) of unregistered land law concepts such as the doctrine of notice and Land Charges Act 1972.

c. *Ownership of land.* Co-ownership of land. Trusts of land under the Trusts of Land and Appointment of Trustees Act 1996.

d. *Landlord and tenant.* The term of years absolute. Its nature, creation, assignment and forfeiture. Enforceability of leasehold covenants. The lease/licence distinction.

e. *Licences.* Bare licences. Contractual licences, their revocability and enforceability against third parties. Estoppel licences.

f. *Easements.* Characteristics, extinguishment and extent. Creation of express and implied easements but excluding easements arising by prescription.

g. *Freehold covenants of land.* The common law and equitable rules relating to the running of the burden and benefit of covenants between neighbouring estate holders.

h. *Mortgages and charges, with particular reference to land.* Nature and creation. Protection and rights of the mortgagor. Rights and remedies of the mortgagee.

i. *Adverse possession* but only as it applies to land with freehold title.

LEARNING AND TEACHING

Module guide

Module guides are the student's primary learning resource. The module guide covers the entire syllabus and provides the student with the grounding to complete the module successfully. It sets out the learning outcomes that must be achieved as well as providing advice on how to study the module. It also includes the essential reading and a series of self-test activities together with sample examination questions, designed to enable students to test their understanding. The module guide is supplemented each year with the pre-exam update, made available on the VLE.

The Laws Virtual Learning Environment

The Laws VLE provides one centralised location where the following resources are provided:

- a module page with news and updates;
- a complete version of the module guides;
- mini lectures;
- pre-exam updates;
- past examination papers and reports;
- discussion forums where students can debate and interact with other students;
- quizzes – multiple choice questions with feedback are available for some modules.

The Online Library

The Online Library provides access to:

- the professional legal databases LexisLibrary and Westlaw;
- cases and up-to-date statutes;
- key academic law journals;
- law reports;
- links to important websites.

Core text

Students should refer to the following core text. Specific reading references are provided for this text in each chapter of the module guide:

- **Dixon, M. *Modern land law.* (Abingdon: Routledge, 2021) 12th edition [ISBN 9780367484484].**

ASSESSMENT

Learning is supported through tasks in the module guide and online activities. These formative activities will enable development of skills outcomes and help prepare students to achieve the module learning outcomes tested in the summative assessment.

Summative assessment is through a three hour and fifteen minute unseen examination. Students are required to answer four questions out of eight from a choice of essay and problem questions.

Please be aware that the format and mode of assessment may need to change in light of extraordinary events beyond our control, for example, an outbreak such as the coronavirus (COVID-19) pandemic. In the event of any change, students will be informed of any new assessment arrangements via the VLE.

Permitted materials

Students are permitted to bring into the examination room the following specified document:

- ***Hart core statutes on property law 2022–23* (Bloomsbury).**

NOTES

1 Introduction

Contents

Introduction

This module guide is designed to help you study the property law of England and Wales. Each chapter will highlight the most important aspects of the topic and give guidance as to core texts and essential and further reading. Within each chapter you will find exercises (activities) designed to test your understanding of the topic and self-assessment exercises to monitor your understanding and progress. There are also sample examination questions with advice on possible approaches to the questions.

The key to the successful study of property law is a solid knowledge and understanding of the relevant statutory and common law rules, coupled with an appreciation of how those rules fit together. Although you must study each topic separately, it is only at the end of the module that full understanding of property law is really possible, so at the end of this guide it may be helpful to stand back from the subject and think about how the topics interrelate. Note that many examination questions will require the application of principles from more than one chapter of this guide, particularly the problem questions. For example, registration of title (Chapter 3) can affect the answer to almost any question. Again, when you have finished this guide, it will be useful to go back to the questions in the earlier chapters and see whether you can now give a more detailed or different answer, in the light of subsequent chapters.

IMPORTANT NOTICE

The discussion in each chapter identifies the examinable material within the scope of this guide and aims to give some clear guidance on the suggested way of proceeding with your work and the examination.

There seems to be a tendency for some students to attempt to predict the contents of a future examination by compiling a spreadsheet of what has 'come up' in previous examinations and thus predicting what is 'likely to come up' next time around. You should know that the examiners do not operate in this fashion. They do not follow a mathematically precise allocation of questions. Instead, the guide for this academic year gives you guidance about the examinations for this academic year. It is worth bearing in mind that the examinations sat in different regions of the world on the same day are different. So, you cannot assume that a spreadsheet calculating the mathematical probability of a question 'coming up' is a reliable guide. It is not.

The structure of this module guide

Each chapter of this module guide considers a different topic, which is capable of forming the subject of a separate examination question.

At the end of each chapter there is a guide to the manner in which each chapter might be examinable, in the form of essays or problem questions.

LEARNING OUTCOMES

By the end of this chapter you should be able to:

- **approach the study of property law in a systematic way**
- **understand some of the key definitions and concepts used in property law**
- **understand what the various elements of the text are designed to do**
- **begin your study of property law with confidence.**

1.1 Studying property law

1.1.1 A coherent but complex subject

When studying property law, you will benefit, as in any other legal subject, from a disciplined approach and logical analysis; and, as usual, you also need to develop the skill of thinking and arguing conceptually. However, property law is full of categories and sub-categories: a successful answer to any problem question will depend upon accurate, comprehensive and logical analysis of how the facts of the question fit into those categories. Thus, for example, there are two categories of land known as **registered title** and **unregistered title**, and the body of rules applying to each is fundamentally different. So, when answering a problem question, determining which category is relevant, then applying the corresponding body of rules, is an important consideration. Failure to do so can sometimes lead to a totally wrong answer. Although you will need an awareness of the basic principles of unregistered land, the emphasis throughout the module, and in this guide, is predominantly on registered land because this is increasingly the more important body of rules in practice. The treatment of unregistered land is therefore limited in two ways. First, in Chapter 2 the approach that unregistered land takes to protecting land law rights is looked at in outline, principally as a way of providing a comparative perspective to the way registered land deals with the same issues covered in Chapter 3. Secondly, elsewhere in the syllabus (and this guide), unregistered land law is considered in specific instances where it continues to have particular substantive relevance (such as with adverse possession (Chapter 10). Again, we will often look at legal rights and equitable rights separately, since law and equity have very different approaches to the enforceability of rights in relation to land. Accurate labelling of rights and situations, with a calm approach, will make the application of the correct line of authorities reasonably straightforward.

Some students regard property law as a 'difficult subject'; others like the fact that so much of it is statutory. It is complex in places and remarkably straightforward in others; sometimes in need of radical reform and sometimes very modern. As a subject, hindsight adds coherence, since the answer to many questions requires an understanding of a number of interrelated issues or topics of study. This field of law uses ancient and technical language and frequently refers back to history – often at great speed and with little depth. But a calm, structured approach both to studying the key principles and to answering questions will help you a great deal. Property law can be an accessible and enjoyable subject (everyone needs and uses property and land, even the homeless), and the historical element adds both important context and colour to the principles.

Property law requires us to understand that 'property' is a relationship between people over a thing, rather than the thing itself. Property is a creation of law – it is the rights we have against other people recognised by our legal system in relation to the thing we claim to own. There are, of course, different types of property and divisions of property law rules (which are not always mutually exclusive). The focus of the module is on land, and law that concerns ownership and other rights over land. Land law is about the relationships people and the state have with land. Nobody can live without land, and most people have to share it, creating competing rights. England and Wales have a limited supply of land and (at least in towns and cities) a dense population, so disputes about rights over land are common. People's relationships to land depend on many factors and have a strong cultural element. Property law thus tells us much about the society to which it applies. Land can be a financial asset, a home, something spiritual and incapable of individual ownership, or belong to the state or to a ruler, for example. In a market-based society, land must be freely tradable, but there must also be security for those who own it and those who have lesser rights in it, such as a right to walk across it. Many land law problems will involve not just two but three sets of competing interests: those of a buyer of the land, a seller of the land and a third party who has some lesser interest in the land (e.g. a right to live there for life, or a loan secured against it).

Impact of the Human Rights Act 1998

Since the Human Rights Act 1998 (HRA 1998) came into force in October 2000, all fields of law have had to be reconsidered in light of the rights protected by the European Convention on Human Rights and Fundamental Freedoms (ECHR). Property law has not been immune to this impact: some of the cases which you will be reading will refer to human rights principles, public authorities must uphold ECHR rights, new statutes must comply with them, and courts must both interpret legislation 'so far as is possible' in accordance with ECHR rights (s.3 HRA 1998) and apply those rights where relevant in the common law. Practical considerations and long-established principles of law may raise human rights issues. For example, we shall see in Chapter 10 'Adverse possession', that there has been much debate about the extent to which a squatter's claim to the disputed land will violate the rights of the landowner: the Grand Chamber of the European Court of Human Rights overruled a first instance decision which had found such a violation.

Four key questions

There are four key questions to ask in response to any land law problem, and you must always be prepared to answer them and to explain why the answers matter:

1. Is the title to the land registered or unregistered? (Even though it is important to appreciate the significance of this distinction by asking the question, you can expect that today title is registered unless specifically advised to the contrary.)
2. What property interests may exist in the relevant land?
3. Is each of the possible property interests legal or equitable?
4. Have any necessary steps been taken to protect each of the possible property interests?

Since there has been so much statutory intervention in land law at different times, the dates on which events occur in a problem question are often crucial, and a 'before and after' answer is often necessary. Questions will usually target your knowledge of key legislative changes in this way. But case law is also important, whether in interpreting statutory rules or in creating legal rules in their own right. Please note: unless told otherwise, you should always answer a question as if you were giving advice on the date of the examination, not the date in the question.

A little history

The historical evolution of English land law is a complex but interesting story, and from the 20th century has been characterised by the increasing intervention of the state in the regulation of the use and occupation of land (e.g. housing law, planning law and regimes for the protection of tenants). However, in the **Property law** syllabus we concentrate on the private law aspects of the subject (i.e. on what land is; what interests can exist in land; how such interests may be created, transferred and extinguished; and the extent to which such interests are enforceable against third parties). An understanding of the basic principles of property law is obviously important for lawyers, but it is also relevant for lay people making arrangements for the ownership, occupation and use of land in their everyday lives.

Although you are advised to make your way through the guide topic by topic, you should bear in mind that property law, especially in relation to land, has a coherence that is lacking in some legal subjects and that there are themes that run through the subject and give it a certain unity; this is evident in the cross-referencing to be found in the guide and the textbooks. For example, the distinctions between proprietary and personal rights, between legal and equitable interests, and between registered and unregistered conveyancing are fundamental to an understanding of modern land law, and the principles of the 1925 legislation (as amended and supplemented), outlined in Chapter 2, provide a framework within which you should read the chapters that follow.

1.1.2 Outline structure of this module guide

In property law, the order of study of topics is to some extent a matter of personal choice. This module guide has been structured to enable you to begin with the basic foundations, then proceed to detailed understanding of each of the key topics. However, you must remember that many of these topics are interrelated, and the rules of some topics overlap with others.

ESSENTIAL READING

- **Cooke, 'What is land law?' Available on the VLE.**

The guide contains the following chapters:

Chapter 2 The 1925 reforms and unregistered land law

The rules of competing rights in land applying to land which has not had its title registered in the Land Registry's register of title and the reforms introduced by the Law of Property Act 1925. Persons other than the 'owner' of land may claim to have rights in the land, for example to live on it or to use it.

Chapter 3 Registration of title

The rules of competing rights in land where title has been registered in the land register, and the impact of the reforms introduced by the Land Registration Act 2002. Registration of title is compulsory, and registration of a right in land has very important effects upon its enforceability against third parties.

Chapter 4 Co-ownership and trusts of land

Co-ownership is when two or more people are entitled to simultaneous enjoyment of land. It can be created formally or informally, and we shall look at both statutory and case law rules for co-ownership and its termination.

Chapter 5 Landlord and tenant: the law of leases

The distinctions between leases and licences. Key aspects of the law of landlord and tenant, including the 'ingredients' of a lease, its defining features, its termination and the enforcement of certain promises made in leases.

Chapter 6 Proprietary estoppel

The doctrine of proprietary estoppel.

Chapter 7 Easements and profits à prendre

An easement is a right to do something on someone else's land. It is **a right in land**. Thus it can continue indefinitely, binding successive owners of the affected land.

Chapter 8 Freehold covenants

Neighbours often try to restrict each other's behaviour in order, for example, to prevent the running of a business in a residential area. A restrictive covenant is a promise made by the owner of land that he will not do a particular thing, such as run a business; it may be enforceable against subsequent buyers of that land.

Chapter 9 Mortgages

Most people finance their purchase of land via a mortgage, which is a loan secured on the land. The law has to balance the rights and duties of the mortgagor (borrower of money) against those of the mortgagee (the lender of the purchase money).

Chapter 10 Adverse possession

This is the controversial topic of **squatters' rights**, which has been radically reformed by the Land Registration Act 2002.

1.2 A suggested approach to study

You should start with this module guide. Start at the beginning and work through the chapters sequentially, reading the core textbook and doing the activities as directed.

1.2.1 Reading

Core text

- **Dixon, M. *Modern land law*. (London: Routledge, 2021) 12th edition [ISBN 9780367484484]. This is available in VLeBooks via the Online Library.**

Further reading

- **Bevan, C. *Land law* (Oxford: Oxford University Press, 2022) third edition [ISBN 9780192856760].**
- **Bogusz, B. and R. Sexton *Complete land law: text, cases and materials*. (Oxford: Oxford University Press, 2022) seventh edition [ISBN 9780198869009].**
- **Burn, E.H. and J. Cartwright *Maudsley & Burn's land law: cases and materials*. (Oxford, New York: Oxford University Press, 2009) ninth edition [ISBN 9780199226177].**
- **Clarke, A. and P. Kohler *Property law: commentary and materials*. (Cambridge: Cambridge University Press, 2005) [ISBN 9780521614894].This is available in VLeBooks via the Online Library.**
- **George, M. and A. Layard *Thompson's modern land law*. (Oxford: Oxford University Press, 2022) eighth edition [ISBN 9780198869061].**
- **Gravells, N.P. *Land law: text and materials*. (London: Sweet & Maxwell, 2010) fourth edition [ISBN 9780421963603].**
- **Gray, K. and S.F. Gray *Elements of land law*. (Oxford: Oxford University Press, 2008) fifth edition [ISBN 9780199219728].**
- **MacKenzie, J-A. and A. Nair *Textbook on land law*. (Oxford: Oxford University Press, 2020) 18th edition [ISBN 9780198839828]. A very good introduction, and useful for short explanations of difficult topics.**
- **Smith, R.J. *Property law*. (Harlow: Pearson, 2020) 10th edition [ISBN 9781292286716]. This is available in VLeBooks via the Online Library.**

From now on, we will refer to these texts in an abbreviated form using author names, chapter numbers and chapter titles, for example:

- **Dixon, Chapter 2 'Registered land' and Maudsley and Burn, Chapter 1 'Introductory topics'.**

Statute book

You should also obtain a statute book.

Information about the statute books and other materials that you are permitted to use in the examination is printed in the current Module Descriptor, which you should refer to.

Please note that you are allowed to underline or highlight text in these documents – but you are **not allowed to write notes, etc.** on them.

Legal journals

In addition to the essential texts, you should consult a range of legal journals to keep yourself up to date with academic writing on the subject:

- *Law Quarterly Review*
- *Modern Law Review*

- *New Law Journal*
- *Estates Gazette*
- *Conveyancer and Property Lawyer.*

Many other legal periodicals will contain relevant articles and it is good academic practice to consult the latest editions in libraries, if you are able to do so.

1.2.2 Structure of the guide

Each chapter follows the same basic structure:

1. Title.
2. List of contents – main section headings.
3. Introduction – telling you what the chapter deals with.
4. List of learning outcomes – the things you should be able to do when you have finished working through the chapter successfully.
5. The main text – divided into short sections.
6. Sample examination questions – these are the kind of questions you may have to answer in your examination. You are also given advice on how to answer them.

1.2.3 Working through a chapter of the module guide

This guide takes you through the entire subject of property law in a logical and systematic way, with each chapter covering a particular topic or group of topics. It is centred on the textbook *Modern land law* by Dixon. Much of your study time should be taken up reading the textbook, though you will also have to read (and think about) numerous case reports.

Introduction

Begin each chapter of the module guide by noting the contents and then reading the introduction.

Learning outcomes

Note the list of learning outcomes and keep these in mind as you work through the rest of the chapter.

When you come to the end of a chapter, check yourself against the list of learning outcomes. For example, by the end of Chapter 2 you should be able to 'decide whether third party rights are enforceable against a purchaser of unregistered title land'. Ask yourself: Can I explain what sort of third party rights might be involved here? Can I explain the rules for enforceability, both in law and in equity as appropriate?

If you can do so, then it is safe to proceed. If you cannot do so, you should go back over the work you have done until you can.

Core text

This tells you what parts of the textbook are required reading for the topic you are studying. This is where you will find the information that you will need to pass your examination. Do not skip the readings.

You should read the readings **at the point when they are referred to**. As an example, this is what should happen when you read Chapter 10 'Adverse possession'. After reading the introduction to the chapter, you will see that the Core text is Chapter 12 of Dixon. You should read this chapter before going any further into the module guide chapter. You will be told to read parts of it again later. Now work through the remainder of Chapter 10 of the guide, re-reading sections of the key chapter of the textbook when you are asked to do so – **carefully and in more detail**.

Make notes of anything you do not understand, and add any new words and phrases to vocabulary index cards, if you are keeping them.

Activities

In every chapter you will find **activities**. These are exercises that are designed to help you learn and understand important issues. They do this by getting you to think about a question and devise a response. Activities will not have simple 'yes' or 'no' answers: often you will need to write down a few sentences, so activities also give you useful practice in using legal English. Sometimes you will be asked to read a particular case in full and make notes on it before answering the questions. These cases are generally key decisions which will be helpful in understanding and applying relevant legal rules.

In most cases, feedback is provided at the end of the guide, but it is essential to do the activities before you look at the feedback. Do each activity to the best of your ability, then check the feedback. How well did you do? If your answer to the activity was incorrect or incomplete, think carefully about what went wrong. Do you need to re-read part of the textbook, or work through the module guide chapter again?

Self-assessment questions

These are factual questions designed to test your memory of the chapter you have just worked through. You may find it useful to ask a friend, fellow student or family member to test you on these questions. No feedback is given because you can always find the answer somewhere in the text of the module guide chapter.

Quick quiz

There are also quick, multiple-choice questions for you to use to check your understanding. Answers can be found on the VLE.

Sample examination questions

Most chapters contain one or two sample examination questions. These are examples of the kind of questions that have been asked on the particular topic in previous years. You should answer the examination questions fully. This will give you practice in presenting your knowledge and understanding of the topic in a thorough and integrated way. Think about each question. Ask yourself:

- What does this question relate to?
- What data do I need to answer it, in terms of relevant statutory provisions, case law and perhaps academic opinion from articles?
- Is this a topic on which there are differing academic views?
- What is an appropriate, balanced solution to the question?

Next read the Advice on answering the questions that follows. This will help you put together an effective answer. Spend 30–35 minutes writing your answer. By writing down answers you will develop the skill of expressing yourself clearly and logically on paper. It will also help you to approach the examination at the end of the year. You need as much practice as possible in writing fluently and lucidly throughout the academic year.

Reading cases

Cases are referred to in the text. These cases are not chosen at random: they are the important cases that have established or modified the law. You should read them in full whenever possible, and make notes. But you should not assume that a case is not relevant simply because it is not covered in the guide; you are expected to be familiar with the contents of all the required readings. Reading cases enriches your understanding of the law; without this step you will find any law subject drier and less comprehensible. There are no shortcuts in law other than those which we have already made on your behalf by telling you what to read and providing you with

practice materials in the module guides. Other so-called shortcuts just leave you short of marks in the examination!

Remember to make notes when you read cases.

Further reading

When you have completed your study of a section or chapter of the guide and textbook, check whether any further reading is recommended. There will usually be at least one academic article recommended, or a Law Commission report. Some articles give a useful overview of a whole topic, whereas some deal with a tricky issue or rule in detail.

1.2.4 Advice for studying property law

Learn each topic as you study it and frequently revise

You will never fully understand any topic in property law unless you gain a good working idea of how it all fits together; you cannot stop thinking about registered title simply because you have 'moved on' to another chapter.

Read each chapter in your textbook at least twice

What is unclear at first reading will often become clear on a second or subsequent reading. This is particularly true in a subject as interrelated as property law.

Read as many of the important cases as you can

Textbooks have to summarise cases succinctly, and summarising can be an obstacle to both accuracy and understanding. You are more likely to understand a decision in a particular case if you have read the case itself. Judges often give very useful summaries of related or previous cases in their judgments; some judges 'tell the story' of the case in a memorable and engaging way which deepens your appreciation of the issues in the topic.

Read as much of the further reading as you can

This will be important for essay questions in the examination, and for an appreciation of likely reforms. It will also help with tricky issues in problem questions. You should keep up to date with Law Commission reports and consultations, which contain excellent and accurate summaries of the law in addition to proposing potential reforms.

Take full notes of what is said in any lectures and tutorials

Also make notes of any relevant material that you read – chapters in textbooks, articles and cases. Keep these notes in a loose-leaf file so that you can add new material to each section as the need arises. In this subject, diagrams may be a very helpful way of supplementing your notes; you will often have to distinguish between two or more people who claim rights in the same land, or between successive 'owners' of the same land, and it is much easier to do so with reference to a clear diagram. You will find examples of such diagrams in this module guide.

Read with a book of statutes at hand for reference

You are allowed to bring a statute book into the examination hall, but you will not be able to use it effectively unless you are already familiar with its contents. You simply will not have time in the examination hall to read sections of statutes for the first time and ponder whether they affect the issues in a question! Statutes are not easy to read, and you will need to take trouble with this, reading each section that your book or article refers to several times to ensure that you have grasped all its details. Property law is highly dependent upon statutes, so you must know your way around your statute book.

Condense your own full notes into a skeleton set of notes

Your skeleton notes will be infinitely more valuable than someone else's, and are essential to ensure that you learn and revise properly. You will need an ordinary, bound notebook, with separate sections for each topic that you learn. Ask at a law stationers for some 'counsel's notebooks' if you can; they are more substantial than ordinary school exercise books and come in ruled and unruled varieties.

When you have finished studying one topic in property law, go through all your full notes and condense them into headings, subheadings and any further divisions that are convenient. Do this at first on rough paper so that you can find the best way of setting things out and summarising your full notes. Then copy your final version onto the right-hand page of your notebook, making sure that you add the names of the cases and statutory references that are involved in answering questions. On the left-hand page, summarise each case referred to on the right-hand page in no more than three or four lines, and make a note of when each statutory provision mentioned will apply. When you have done that, put your skeleton notes aside, take some more rough paper and see if you can write out from memory what you have just written. Check it with the skeleton and, if need be, repeat the exercise until you have the whole section clearly fixed in your memory.

Practise answering the sample examination questions

The difference between an average answer and a good answer in property law will often be in spotting the full range of issues for discussion, giving each an appropriate amount of discussion and applying all **relevant** statutory and case law authority. Never write a 'here is all I know' essay-style answer to a problem question; spend as much of the available time as you can **applying** the relevant law, not describing it. The difference between a good answer and a fail will often be a basic error such as incorrect labelling of the relevant issues for discussion: for example, if a question concerns adverse possession of land with registered title but you apply the rules for unregistered title, then the resulting answer will score very poorly. But what really makes a difference in effectively answering essay questions is spotting the **full** range of issues and showing a critical appreciation of them, giving appropriate weight to each issue. Make sure that you answer the question which is actually being asked, not one which you would prefer or have prepared! If you have been asked to read an academic article, you need to be able to discuss it in an essay. Many students do poorly in the examination because they are not familiar with the materials in the module guide and newsletters: there are no excuses for such negligence!

Read the *Examiners' reports*

It is extremely important to read the last few years' *Examiners' reports* as they contain much helpful information on common mistakes and misunderstandings made by students in the examinations, as well as guidance on the key elements of answering each question. Although the reports will not give specific advice concerning what is going to come up in the examination you will be sitting, they give a large amount of useful information about what the examiners are looking for, both in general terms and specifically, if a question in the same area does happen to come up. Although there can be no guarantees concerning what questions will be asked in any particular examination, a survey of recent *Examiners' reports* will give you a good feel for the type of questions and topics that have been raised in the past which, as we all know, is an important aspect of revising for a forthcoming examination.

Study time

You should probably spend **at least** eight hours a week on this subject, increasing the amount to two hours daily in the six weeks before the examination. Remember, though, that individuals vary greatly in their needs; the time to stop studying is when you know the topic thoroughly and are confident about applying its rules – and not before. It is very important to plan your time carefully. Do not forget to leave time every week and month for revision, in addition to the period before the examination. Revision must be a continuous process, not a last-minute panic.

1.3 The examination

1.3.1 General advice

At the end of the academic year there is the examination. If you have worked consistently and well throughout the year this should not be too daunting. All you are being asked to do is to demonstrate to the examiners that you have mastered the subject to the required standard; you will be able to do this if you have undertaken sufficient study throughout the year. Where too many students go wrong is to think that they only have to study and revise four, five or six topics. That is a very serious mistake. The topic you were relying on may not appear on the examination paper, or it may appear, but in a way which you did not expect. It will often be in a form which requires an appreciation of other, related, topics. You may therefore not have the confidence to attempt an answer. Or one topic might be combined with another and you will find that you have only revised half the question. If you have worked conscientiously and covered the syllabus fully, you will not encounter any of these difficulties. Every year some candidates appear to answer the wrong question by mistake, without realising the significance of key aspects of the question; this can only be because of lack of breadth of subject knowledge.

Having said that, there may be one or two topics which you just cannot get to grips with. If that is the case, then look at the topic intelligently and ask yourself whether it is sufficiently unrelated to other topics to leave safely out of consideration for the examinations. But be careful: as has been said repeatedly already, so much of property law is interrelated. You cannot hope to pass without an understanding of how it all fits together. Furthermore, if you are planning a career in law, you cannot afford to have gaps in your knowledge.

1.3.2 The format of the examination

The examination usually comprises eight questions. Some of these are essay questions, which require you to show knowledge of the law and a critical approach to the law, and sometimes an evaluation of recent or likely reform. You must be familiar with how each topic in property law might appear in a problem question: for example, if A has promised B that she can live in his house for the rest of her life, you should be able to recognise that this triggers a discussion of whether B has gained the right to do so through a contractual licence or estoppel, and the nature of the arguable right. If X often walks across land belonging to Y, you should recognise that this could be an easement, a licence or even adverse possession depending upon the other facts given in the question.

To cope with problem questions successfully, you must be able to see what issues arise from the facts and advise on them accurately and succinctly, referring always to the sources of law upon which you rely for your conclusions. The law may well be uncertain. If so, you must explain why, and then choose what you believe to be the decision most likely to be made by the court, giving reasons for your choice. There may be several potential lines of argument (as in the last example): make all of them, evaluating factors for and against the success of each. If a question asks you to advise a particular person, do so, considering the impact of your arguments upon that person.

In general, you must be aware of major proposals for reform of the law. Property law has been in a process of overhaul for some years, with further changes planned. You must also show a capacity for independent thought. It follows that during your studies you should:

- think for yourself about the persuasiveness of the arguments put forward in what you read
- 'read around' the topic – you have access to many useful sources of further reading online
- discuss problems with your tutor or lecturer if you have one
- discuss problems with fellow students, either in person or via the virtual learning environment (VLE).

Statute books: You are allowed to bring one of the permitted statute books into the examination room. Remember the rules about highlighting and not annotating statute books (see the current Regulations).

1.3.3 Advice on answering examination questions

This section gives you some advice on answering problem questions and writing essays in the **Property law** examinations. This is intended to give you advice that might help you if you are wondering how to write an answer. It is not compulsory. University education encourages you to find your own way. However, these approaches may well be useful if you are unsure.

General overview: how to answer a problem question

When answering a problem question, there are four steps towards a good answer. The key is to maintain a tight, lawyerly structure.

- **First**, you must identify the **issue** that you are considering (most problems will have four or more principal issues in them and so you must repeat this exercise for each one of those issues).
- **Second**, you must set out the **law** applicable to addressing that issue.

  Importantly, this does not mean that you should simply write out a short textbook, which merely describes the law in this field: that sort of approach can only earn you a low mark. Some candidates simply write a two- or three-page summary of the chapter of the module guide, without identifying which parts of the law are relevant to the analysis of the issues in the problem. This poor technique means that they are only awarded low marks. What you should do is set out the legal principle(s) applicable to the decision on the specific issue that you have identified at each point. You should set out the law relevant to the issue that you identified.
- **Third**, you must apply that law to the **facts** of the problem. This is the part that attracts the most marks. You need to identify the **salient** factors in the decided cases or statute, which will help you to decide the parties' respective rights and liabilities in relation to the **salient** facts of the problem in relation to that particular issue. Just repeating all of the facts of the problem is not enough: rather, you must explain how each party would use those facts in support of their arguments. The skill that is being tested is how well you can take your knowledge of the law and use it to identify the likely outcome of the case set out in the problem question if it went to court. It is likely that a problem question will place you in a grey area between cases that have taken different approaches, in which case you must argue your way towards a conclusion in the light of those cases.

  It is not enough simply to write out all of the law you know: rather, you must apply the approach of the judges in the decided cases to the problem question. If it helps, you could think of yourself as telling the examiners how you think a judge would decide this problem question in the future, given the way in which the courts have approached the cases that have already been decided; or you could think of yourself as legal counsel advising the parties as to the likely outcome if these matters went to court.
- **Fourth**, you must come to a **conclusion** as to your analysis of the problem. There is no 'right' or 'wrong' answer: rather, it is important that you argue your way towards what you consider the answer to be. It is your ability to make these arguments (in relation to the facts of the problem and in the light of the decided cases) that is being tested in the examination.

  If you think you need more facts to be sure of what the answer should be, then you must explain what further facts you need to know and how they would affect your interpretation of the law that you have set out. It is not enough to say simply 'I do not have enough facts.' Instead you must explain what more you would need to know and how it would affect your answer. However, there is usually enough in the problem question to allow you to come to a conclusion based on your knowledge of

the law and the things that you are told that the parties have said and done. So, you should ensure that you have wrung every argument from the facts that you can.

You may prefer to explain how you think each of the parties (or the claimant's and the defendant's lawyers, if you prefer) would set out their arguments but it is still good technique to conclude by explaining which of those arguments you consider to be the stronger in the circumstances. You are marked on the strength of your argument, not (as was mentioned before) on whether or not the examiners happen to agree with your conclusion.

- As a **further** element, you can introduce any academic or other **commentary** that is relevant to the law raised in your problem answer. This can be a reference to ideas in the assigned reading (which perhaps criticise the law), or dissenting opinions of judges in decided cases (which is always fertile ground for finding ideas), or even ideas that you have found in background reading in journals, in the textbook or online.

  However, you need to make your commentary refer back to your discussion of the problem. Some students just state 'Prof X argues that this is a bad rule' and say nothing further. Commentary is much more effective if you can (a) explain (in the little time available to you when answering a problem question) more precisely what the commentator's arguments actually were, and (b) explain how this insight could affect your analysis of the problem in a way that is helpful to the parties.

  If you use commentary in this way then this will increase your mark, provided that you have performed the four previous steps effectively. Your revision time could involve identifying the sort of points you could make in the short amount of time that is available to you for this purpose in the examination.

Each section of the guide suggests a structure for answering problems in each particular topic. The four-step structure above is used in relation to each individual issue that arises under each specific topic. The sample examination questions sections within the guide will help you to identify how to approach any particular problem question using this four-step approach.

Remember the four-step approach to answering problems:

issue | law | facts | conclusion

Some further advice on how to think about answering a problem question

This approach to answering problem questions might help you to think about what you are asked to do. The key point is this: do not ignore the facts of the problem. Do not simply repeat the facts of the problem as though you were writing a letter to your best friend explaining what had happened. (A surprisingly large number of students do this. Your ability to repeat the facts of the problem without any legal analysis is not a skill you are being asked to display. The skill you are being asked to demonstrate is the application of the law to the facts of the problem so as to reach a conclusion on each issue in the problem.)

Perhaps it would help you to imagine that you are the claimant's (or defendant's) lawyer preparing a memorandum that explains what the issues are and what the law is, before analysing in detail what rights your client has (and what rights your opponent will have). You should identify which facts support or disprove your client's claim to their rights. You should evaluate the strengths and weaknesses of both parties' arguments. A good lawyer always prepares their opponent's likely arguments as well as their own, just as a sports team analyses their opponents' likely tactics in advance of a game.

The spectrum technique

One way of answering problem questions, which you might find useful, is the 'spectrum technique'. In this technique you identify two cases that reach different outcomes on the same point of law. You should place one case at one end of the

spectrum and the other case at the other end. You should identify which features led to the answer 'yes' in one case and which features led to the answer 'no' in the other case. You should explain what the salient facts were in each of these cases (i.e. the facts that were crucial in the court's judgment). Then you should consider the facts of the problem in front of you and ask the following question: which features of the problem question resemble the 'yes' case and which resemble the 'no' case? You should explain why it is that you think the facts of the problem question lend themselves most clearly to a resemblance to one end of the spectrum or the other. This should help you to argue your way to a conclusion on the facts of the case in front of you.

A good example arises in Section 5.2.2 of the guide on the lease/licence distinction and the cases of *Antoniades* v *Villiers* and *AG Securities* v *Vaughan*. These cases were decided together by the House of Lords as joined appeals. Simply put, the issue was whether two or more occupants of a flat had joint rights or separate rights. In the former case, a romantic couple intended to live together, they acquired their rights at the same time in identical terms, but the landlord insisted on a number of clauses being included in their agreement that were never intended to be enforced (such as a right for the landlord to share the single attic room with the couple if he chose to do so[†]); whereas in the latter case the four occupants were unknown to one another before coming into occupation of the property, they acquired rights of different types at different times and there were no sham terms in the agreement. When examining the problem question in front of you, you should consider whether the occupants came into occupation jointly, whether their rights were acquired in the same terms at the same time and whether or not any of those terms were shams that would not be enforced as they were drafted.

[†]Try to imagine it: the landlord arrives in the middle of the night and insists on being able to spend the night with this couple. This has led some academics to refer to this case, ironically, as the 'three in a bed' case. The idea is so aberrant that the court quickly decided this clause must be a sham that was not a part of the parties' true bargain. If you read the cases in law reports you will understand far more than if you only read about them in this guide or in the textbook. And sometimes the facts are remarkable, as in this case: just like a novel based on a true story or a soap opera.

General overview: how to write an essay

In writing an essay it is important to have a point: that is, you must have a 'thesis' (or argument) which you are seeking to prove or to advance through your essay.

- A thesis can be a particular line of argument that you are following (although a good essay will usually consider the strength of the counter-arguments as it progresses): an example would be, 'The doctrine of proprietary estoppel is too uncertain to be a useful part of land law', or whatever. This thesis is therefore an argument to which you should keep returning in your essay; the points you make should be advancing that argument, albeit that you should consider any counter-arguments in the judgments, etc. as you go.
- Alternatively, your thesis might be to take an argument made by someone else (e.g. 'Lord Neuberger's dissenting judgment in *Stack* v *Dowden* is preferable to the approach of Lady Hale and Lord Walker in *Jones* v *Kernott* promoting an uncertain concept of "fairness"', or 'This essay challenges the approach taken by Prof Dixon in relation to freehold covenants') and to prosecute that argument by means of setting out the various points made in that argument and considering their strengths and weaknesses one at a time. (The less-successful candidates in examinations tend to make superficial, brief points about the arguments made by different jurists (whether academics, judges, policymakers or practitioners) in the assigned reading and therefore do not demonstrate any knowledge of the reading nor any understanding of the detailed issues. Examination success is in the detail. You must explain these arguments in detail.)
- A third approach to a thesis in an essay would be to act like a dispassionate scientist who is simply observing that there are two or three competing arguments in the literature or the case law, describing those arguments in detail and observing by way of conclusion what the principal differences between those arguments are (and whether or not any of them appears to be stronger than the others, and why). So, you would not have to decide whether to prefer Lady Hale or Lord Neuberger in *Jones* v *Kernott*, etc., but merely set out their different arguments and identify a thesis such as, 'There is an important difference in the approaches taken by Lady Hale and Lord Neuberger, as this essay shall demonstrate.'

In advancing that thesis, you must employ an analysis of the decided case law or statute (as appropriate) as well as any academic commentary to which you have been referred in the guide or textbook, or which you have found for yourself. Simply setting out a superficial description of the law will not gain you a good mark in itself. Rather, the marks are earned by demonstrating how an analysis of that law impacts on your thesis.

A good essay will present an argument in the form of a thesis and not simply rehearse your notes or the material discussed in the guide. In that sense, a good essay is 'analytical' and not merely 'descriptive'. It is, however, vital that you answer the question that you have been set: it is not enough simply to write an essay that you have prepared in your head without any reference to the question you have been asked.

1.4 Three fundamental ideas every student of property law must know

The following case illustrates an interesting point about whether property law governs the ability of people to use land which appears to be available to the public, or whether there is some general right for all human beings to use that property. You should consider this case, and what it tells us about property rights, at the end of this section.

- *R (Newhaven Port and Properties Ltd)* v *East Sussex County Council* [2015] UKSC 7

This case raises very interesting questions about the rights of people in England and Wales to wander freely on beaches. The basic question was this: for it to be possible to register the foreshore of a beach in Sussex as a town or village green under s.15 of the Commons Act 2006, it was necessary to show that people did not wander along the beach with permission to do so (i.e. 'by right') but rather that they were entitled to wander along the beach without anyone needing to give them a right at all, because they simply had that right by virtue of being a human being (i.e. 'as of right' under s.15). In essence, the thinking was that areas would only be registered as 'a village green' under statute if the public generally could wander there as of right. Otherwise, there would be landowners whose ability to exclude others from their land would be abrogated completely by that land becoming a kind of public land in the form of a village green.

This question arose in relation to an area of beach near Newhaven. Newhaven was an important harbour established in the 1880s after the previous harbour became unusable. Before then, the beach had not existed. It is now a moderately busy ferry port among other things. It was held that the beach in Newhaven had been made available to the public for the purposes of bathing after that area had been developed as a new harbour mouth: therefore, importantly, that right had been granted to the public 'by right' by the owners of the land that had been developed as the harbour.

In essence, the role of the Newhaven authority governing the use of this land meant that any right to use the beach involved permission being granted 'by right' by the authority, and consequently that the public did not have this use 'as of right'. As a result, the area could not be registered under the Commons Act 2006.

This case goes to the heart of the nature of property and of property law. Property law protects the ownership and other rights of people in property. In relation to land, there may be areas of land where it is not commonsensical to think about them as being owned because everyone uses them. For example, Oxford Street in London (its busiest shopping street) is owned by the public authority that is responsible for that street, but when hundreds of thousands of people walk along that street every day, they do not really think about it as being 'owned' by anyone. Nevertheless, there is an authority with the power to close the road (perhaps for a march or a procession) or to dig up the road or to reorganise where the buses can stop. Similarly, with a beach, we might not think about its ownership if members of the public are routinely able to go there to lie in the sunshine or swim or walk their dogs or whatever. Nevertheless, there will be notices which explain the rules that the owner of the land intends to impose on people: rules about having barbecues on the beach, or limits on the type of vehicle

that can be used on the beach, etc. As a result, the public's use of land may make some people think that there is no owner of that land, but property law will take a different view – just as the Supreme Court did here. The very fact that someone has the ability to exert a power to create rules over the use of land makes it more likely that any use of that land is only permitted because the landowner or authority grants a right to do so.

Older cases like *Blundell* v *Catterall* (1821) 5 B&Ald 268 had considered that there was no general, common law right to walk along the foreshore (between the place where high tide and low tide would reach). On the basis that there was no general common law right to wander along the foreshore, the only explanation was that the right to use the foreshore in this instance was a result of the authority's power to make regulations governing the beach. On these facts, it was important that the Newhaven authority had the power to create regulations over the harbour, including rules as to where people could and could not swim. (In relation to a busy harbour, it would be odd if there were no regulations of that sort.) Therefore, this was not land which was appropriate to register as a village green under the Commons Act 2006.

1.4.1 The two axioms of English property law

For our purposes, and because we are only studying private rights in land during this module, property can be defined (somewhat simplistically) as rights against the world, in contrast to the contractual rights you studied earlier in your degree which are rights against individuals. Thus, when a child shouts 'mine', a landowner says 'keep out' or a corporation seeks an injunction alleging trademark infringement, all three claimants are asserting that they have rights better than anyone else in the world (or at least, for reasons you will see later, better than the vast majority of the world including the individuals to whom these actions are directed). In other words, a private property right gives the rights-holder the ability to exclude anyone in the world from interfering with that right apart from someone (if there is someone) with a better claim to the right in question. That is why property is so powerful as it implicitly involves a claim that has consequences for just about everyone else in the world.

Unfortunately (for your studies if not the law), the picture is somewhat more complicated because in this jurisdiction there are in fact two types of property right, known as legal and equitable interests. The former were the traditional rights of property recognised by the common law, whereas the latter were rights known only to the Court of Chancery. The equitable jurisdiction of the Court of Chancery developed during the Middle Ages as an alternative means of providing justice and offered a more flexible form of redress to the rigidity of the writ system employed in the common law courts. In the context of property this meant that equitable interests were a form of property that was recognised by the Court of Chancery and arose either when the common law's formal rules had not been followed in the creation or transfer of an established type of interest, or when a new interest, unknown to the common law, was recognised by equity.

The jurisdiction of the common law and equity was merged by the Judicature Acts 1873–75 and thus from that point on every court was able to recognise both legal and equitable property interests. But that does not mean our interest in the source of these two forms of property is simply historic, for it was only the administration of the common law and equitable systems that were merged. From that point on any of our courts could award both common law and equitable remedies but the Acts had no bearing on the substance of the law. Consequently, common law remedies continued to be awarded as of right, while equitable ones remained discretionary; the only difference being that henceforth the same court could administer both types of remedy. From the perspective of property this meant that the reforms did not (and could not) have any bearing on a very significant substantive difference between legal and equitable property interests, which remains of major (if lessening) significance today.

It is now time to explain that difference and thereby establish the two axioms of English property law which must be understood before progressing further. Nothing that comes later in this module will make sense without an appreciation of the fundamental difference between legal and equitable property interests.

A legal property interest, as you would expect, conforms to the traditional notion of property. It is a right that binds the world and thus the first axiom of English property law encapsulates that simple truth in the unassuming (but powerful) phrase: 'Legal rights bind the world'.

The picture is, however, more complicated when we turn to equitable interests, which were a form of property recognised by the Court of Chancery but not the common law courts. A person asserting an equitable property interest was therefore claiming that someone other than the legal interest holder had a claim that took priority over the legal owner. Consider the medieval 'use', for example, the forerunner of the modern-day trust. When a departing landowner transferred his land to a trusted friend 'to the use' of his wife and children he was doing so in the expectation that the friend would manage the land on behalf of his family. However, if the trusted friend turned out to be untrustworthy, the family would not be able to seek redress from the common law because in the common law's eyes the friend, as legitimate transferee, was the legal owner. Historically, those who could not bring their claim within the narrow confines of a common law writ sought justice by petitioning the King. As an issue of justice the King would delegate such matters to his leading spiritual adviser, the Lord Chancellor, who, as an ecclesiastic, traditionally decided such matters on the basis of fairness and the conscience of the parties.

In such circumstances the family's claim could only succeed if the transferee's conscience was bound and, although the King's delegated discretion slowly became more formalised with the establishment of a Court of Chancery, the notion of conscience still underpins the concept of equity today, with very significant consequences for the ambit of equitable property interests. Clearly a court of conscience would have no problems in providing redress for the family in circumstances where the transferee of the legal title had acted in bad faith; or knew of their interest at the time of the transfer; or was a volunteer who, having paid nothing in acquiring the title, lost nothing in discovering that it was to be held 'to the use' of the family. In all these circumstances equity decreed that the transferee took subject to the rights of the family and one could consequently describe an equitable interest as a personal right against anyone in the world who acquires the legal title to property in bad faith, or with notice of any pre-existing equitable interest, or who gives no value for the legal title they acquire. However, rather than list all those bound by an equitable interest, it is simpler to define the concept as a species of property right binding everyone apart from the one character who is not bound by such an interest, represented by the cumulative opposite of the alternatives who are. For if any transferee of a legal estate who acts in bad faith or has notice or gives no value is bound by a pre-existing equitable interest, it follows that only a transferee who acts in good faith, has no notice and has given value takes free from it. This consequently represents the second axiom of English property law: 'Equitable rights bind the world with the exception of the *bona fide* purchaser of a legal estate for value without notice', often referred to as 'equity's darling'.

This is not an easy concept and it is worth re-reading the previous paragraph a number of times and then turning to your textbooks for further details. Before doing so, however, three quick points should be made.

1. You need to recognise that at the heart of English land law there are a subset of property interests, known as equitable interests, which in historic terms were always vulnerable. Thus, if the owner of a piece of land (traditionally referred to as 'Blackacre' in such pedagogic examples) granted someone else an equitable interest over Blackacre (such as a restrictive covenant, or an interest behind a trust, or an equitable easement, etc.) that equitable interest would not survive the sale of Blackacre to equity's darling. In other words, the owner of an equitable interest stood to lose that interest whenever equity's darling arose and much of the next two chapters are concerned with how the law addressed that vulnerability.

2. One cannot, as students often suggest, solve the problem simply by abolishing the distinction and classifying all property interests as legal interests. The difference between legal and equitable interests is, for example, critical to the trust. This is an extremely important creation of English property law, based on the division

of ownership into separate legal and equitable titles, with the former vested in trustees who manage the property on behalf of beneficiaries, who as equitable owners have the right to enjoy its fruits. Similarly, persuasive justifications exist for the continuance of other forms of equitable property interest. Thus, rather than abolish the distinction, it is managed via a series of statutes which you will consider in some detail over the next two chapters. For our purposes this will begin with s.1 Law of Property Act 1925 (LPA 1925) – which lists all those rights in land capable of being legal (provided the necessary formalities in their creation and/or transfer are adhered to) – and end with the Land Registration Act 2002 (LRA 2002), which has reduced the importance (but not abolished the significance) of the legal and equitable divide. As you will see in Chapters 2 and 3 we have, since 1925 (and, prior to that, in a less comprehensive way), sought to address the vulnerability of equitable property interests by means other than the abolition of the conceptual difference which, even after LRA 2002, continues to be relevant and must still be understood by every student of English property law.

3. Finally, a word of warning, although you (and others – including your examiners) might wish to dispute what comes next (remember marks are awarded not on whose side you take in any debate but on how well you frame your arguments and understand the contrary ones). Although the phrase 'equity's darling' is a useful shorthand for the '*bona fide* purchaser of legal estate for value without notice', the term has the capacity to mislead. So please feel free to employ the phrase (where appropriate), but for present purposes pause for a moment to question whether the language seduces us into assuming that equity's darling is, in some sense, equity's favourite. For, if that is so, we need to ask why a court of conscience would choose one innocent over another by preferring equity's darling to an equally *bona fide* owner of an equitable interest, who stands to lose that interest despite being no less deserving of equity's favours. The truth is that equity's darling is not favoured by equity, but simply beyond its reach, for a court of conscience has no peg on which to hang its jurisdiction when confronted by a purchaser of the legal estate in good faith for value without notice. Equity is consequently not forsaking those with an equitable interest but simply has no means to enforce such rights over someone whose conscience is not bound. As was made clear in *Pilcher* v *Rawlins* (1871–72) LR 7 Ch App 259, equity's darling signifies the limits of equity, not her largesse – but do you agree?

1.4.2 The fourth dimension of land ownership

As you will see when you embark on your introductory reading, the system of land ownership under English law dates from feudal times when, under the doctrine of tenure, the monarch granted land to feudal lords who re-granted much of what they received to those below them in the feudal hierarchy, who likewise made similar re-grants to those even lower in the chain of command and influence. A feudal pyramid, with the monarch at the apex, thereby developed which preserved the Crown's power via a system of patronage and self-interest. Details of the feudal pyramid and how and why it collapsed are included in your textbook reading but at this stage we need to introduce one concept that emerged from the doctrine of tenure and remains critical to the workings of land law today, even though the tenurial system that begat it is little more than a footnote in its history. In simple terms, the doctrine of tenure involved the conditions upon which a grant of land was made, including how long the interest was to last; and it was the doctrine of estates that was employed by our medieval predecessors to introduce, into the three dimensions of spatial existence (represented by the simple equation length x breadth x height/depth), what Einstein, many centuries later, termed the fourth dimension, namely time. The establishment of the estate meant that land could not only be parcelled up **physically** (in measured plots which always include both the two-dimensional surface area and also a suitable distance above and below ground – on claiming rights to which, see *Bernstein* v *Skyviews* [1978] 1 QB 479 (airspace); and *Bocardo SA* v *Star Energy UK* [2010] UKSC 35 (below the surface)) but also **temporally** (over years, lifetimes or for as long as there were lineal descendants or heirs), safe in the knowledge that because land is, for our

purposes, indestructible it would still be around (and in the same place!) when a future interest came into possession after the previous estate came to an end. Thus, at the heart of land ownership lies what Rudden memorably described as an 'interposed abstraction', a man-made intangible construct sitting between the all-too real and permanent land and its similarly real, but all-too transient, owner.

As it is the estate, rather than the land, which is owned it is often stated that it is only the Crown (from whom historically every estate is ultimately derived) that actually owns land under English law and, although legal historians and the occasional judge have doubted this analysis, no one can deny that the estate is the most important interest in land under this system. For the estate is an open-textured property right that gives its owner possession of the land and the ability to use it in innumerable (but not unlimited) ways, in contrast to lesser forms of property interest in land such as easements (for example, a right of way exercised by one landowner over that of their neighbour), restrictive covenants (a private right one landowner has to restrict what happens on their neighbour's land) and mortgages (whereby someone is granted an interest over land as security for a debt they are owed), which give the owner of the interest a non-possessory, and much more limited, single-use right over the land to which they are attached.

The two most important estates in land law today are the 'fee simple absolute in possession', which is a rather inelegant phrase to signify a freehold estate of potentially perpetual duration, and the 'term of years absolute' (that, as the only leasehold estate, is more commonly referred to simply as a lease, letting, tenancy or (somewhat inaccurately) demise) which is limited to last for a fixed maximum period of time. Both estates are listed in s.1(1) LPA 1925 as the only two estates capable of existing at law although they can (if the necessary formalities in their creation or transfer have not been complied with) also exist in equity. There are, in fact, two further freehold estates, namely the life estate (which lasts for the lifetime of the grantee or another) and the fee tail (an estate subject to limitations concerning who may inherit the land and often limited to male lineal descendants of the grantee). These can only exist in equity (i.e. behind a trust) and, although you should be aware of their existence, will not be covered in great detail in this module.

1.4.3 The role of formalities

Although property interests in land can be acquired by original acquisition via the taking of possession (which will be covered in Chapter 10), the vast majority of legal and equitable interests in land are acquired derivatively. This occurs either through the transfer of an existing interest (e.g. when a fee simple owner, leaseholder, mortgagee, etc. transfers the interest to another) or via the grant of a subsidiary interest carved from an existing one (as when a fee simple owner grants someone a lease, easement, restrictive covenant, etc. or a leasee (e.g. an existing leaseholder) grants a sub-lease, etc.). Derivative acquisition usually occurs deliberately by means of either a gift or a bargain (but not always, as you will see when we consider the creation of non-express easements) in which case, it is both reasonable and prudent for the law to require the completion of certain requirements, known as formalities, which provide evidence of what was intended, concentrate the minds of the parties involved and, as the jurist Lon Fuller once noted, channel people down certain legally prescribed routes. It should be noted, however, that formalities also have the capacity to cause injustice, as where one party relies to their detriment upon an oral (and thus unenforceable) agreement or declaration of trust involving land. In such situations equity will sometimes (but not always, as that would undermine the formality) intervene to enforce the arrangement via the doctrine of proprietary estoppel, which will be considered in Chapter 6.

You will consider formalities in more detail as the module progresses, but it is important to understand the basics from the outset. This requires us to first differentiate a contract from a conveyance. In the context of land transactions the contract is the agreement to transfer an interest, which usually (but not always, as in the case of a gift) precedes the actual transfer known as a conveyance. Although land transactions cover much more than just the buying and selling of land, this distinction

is most often encountered in that setting, where the first stage is referred to as 'exchange of contracts' and the second stage 'completion'. As you will see, different formalities apply to contracts and conveyances, as the former is a bilateral instrument formally confirming the agreement that has been reached, while the latter is a unilateral procedure whereby the actual transfer takes place.

All contracts in land are governed by the following simple (and sensible) requirement:

- Under s.2 Law of Property (Miscellaneous Provisions) Act 1989 (LP(MP)A 1989) a contract to transfer a legal or equitable interest in land must be in writing, containing all the terms and signed by both parties.

  Such a contract is known as an **estate contract**, which is an equitable interest capable of binding the land. In other words, once a landowner (or other interest holder in land) enters into a formal contract with someone to transfer an interest in the land, that obligation can bind a third party. For example, if A formally contracts to sell Blackacre to B but then conveys Blackacre to C, B has an equitable right capable of binding C, under the conditions considered above, enabling B to require C to convey Blackacre to B under the terms of the original estate contract by which A had been bound to B. In *Scott* v *Southern Pacific Mortgages Ltd* [2014] UKSC 52, the Supreme Court held that the specifically enforceable contract to grant an estate does not give the intended purchaser a proprietary right in the estate (from which they could carve out subsidiary interests for the benefit of third parties) but only an equitable right to require specific performance of the contract as against anyone in whom title to the estate is currently vested (a point we return to at 6.3.2).

  The requirements for conveyances are slightly more complicated as they differ depending upon whether the interest being conveyed is legal or equitable.

- Under s.52 LPA 1925 the creation or conveyance of a legal interest in land must be by deed (which is defined under s.1 LP(MP)A 1989 as a signed and witnessed document).

- Under s.53(1)(a) LPA 1925 the creation or disposal of an equitable interest in land must be by signed writing.

  As you will see in Chapter 3, further requirements apply in the context of registered title, but you first need to assimilate these basic rules before concerning yourself with those procedures.

  It must also be noted that there are a number of exceptions to these requirements, including short legal leases of no more than three years which, provided the rent is set at the market rate and no premium charged at the outset, can be created orally under s.54 LPA 1925. The operation of implied (i.e. not express) trusts of land are also excepted from these formal requirements, and similar (but not identical) formalities apply to express trusts of land.

- Under s.53(1)(b) LPA 1925 there must be signed written evidence that an express trust of land was declared (even though the declaration itself might have been oral).

- Under s.53(1)(c) LPA 1925 any subsequent conveyance of an existing equitable interest (whether in land or anything else) must, like the creation or disposal of equitable interests in land, be by signed writing.

The five formal requirements introduced above need to be learnt and understood as they are relevant to every aspect of this module.

1.5 Some basic definitions

This section builds upon the three fundamental ideas we have just considered, by requiring you to define many of the terms introduced in that section along with a few related definitions that you should also master. Please do not skip this activity as you will need to understand (rather than simply learn) all of these concepts in order to complete this module successfully.

To get started, briefly re-read section 1.4 along with Dixon, Chapter 1, and refer to a legal dictionary. You can also look these terms up on the internet and see how well, or badly, they are defined in resources such as Wikipedia. Once you have decided upon a definition, fill in the following table including explanations or statutory provisions. Do not expect all your sources to agree, for, as you will see, even some of our basic terms are ambiguous and, often, what constitutes the best definition is dependent upon context.

There are no answers provided for this activity as you should build on what has been discussed by researching further yourself. Write your answers in pencil so that you can easily amend your definitions as your knowledge increases.

Term	**Definition and explanation**
Property	
Proprietary interest	
Proprietary right	
Personal right	
Real property	
Personal property	
Land	
Cuius est solum rule	
Tenure	
Feudal pyramid	
Doctrine of estates	
Corporeal hereditament	
Incorporeal hereditament	

Term	Definition and explanation
Chattels	
Fixtures	
Ownership	
Possession	
Title	
Unregistered title	
Registered title	
Fee simple absolute in possession	
Term of years absolute	
Easement	
Mortgage	
Restrictive covenant	
Common law and equity	
Equity's darling	
Legal estate	
Legal interest	

Term	Definition and explanation
Equitable interest	
Trust	
Settlor and settlement	
Express trust	
Implied trust	
Trustee	
Beneficiary	
Legal title	
Beneficial interest	
Interest in possession	
Interest in remainder	
Reversionary interest	

Substantive examination advice

As you will have discovered from your research for the previous activity, whether something is or is not a fixture is determined by the application of two tests: namely, the degree of annexation and the purpose of annexation. On the occasions a question is set in this area students normally recite both tests and then state that the latter, being the more important, is the one to be followed if there is any divergence in their application. Very few go beyond this point even though it is a very unsatisfactory explanation. What, after all, is the point of having two tests if, whenever they produce differing results, you choose one over the other? If it is as simple as that, there really is no point in having two tests, as only the latter one determines the result.

Many textbooks go little further but if you were to read one of the central cases, namely *Holland* v *Hodgson*, you would see that Mr Justice Blackburn does. In his judgment he explains how the two tests interrelate, with the application of the degree

of annexation test raising a presumption that the thing in question is or is not a fixture. Presumptions are mechanisms by which we, as lawyers, assign the burden of proof. Thus, after applying the degree of annexation test, the burden of proving otherwise passes to whichever party is seeking to establish the opposite, by application of the purpose of annexation test. I hope you can see how, via a close reading of a single case, you can gain far greater insight into how the two tests interrelate than by reading any number of textbooks. The case provides an excellent means by which to address any fixtures problem or essay. It is also important to remember that important cases such as *Holland* may be re-evaluated by higher courts in subsequent decisions, without necessarily totally disrupting the basic approach. With fixtures, you should consider the impact of the House of Lords' ruling in *Elitestone Ltd* v *Morris* [1997] UKHL 15.

SAMPLE EXAMINATION QUESTION

'The law of fixtures is needlessly complicated by supposedly employing two tests to determine whether something is or is not a fixture, when in reality only one of those tests is ultimately important.'

Discuss.

Notes

Advice on answering the question

This question asks you to think about the two rules in more abstract terms, to work out why the law of fixtures proceeds in this way and what this says about the legal process in general.

Let us begin with the degree of annexation test and try to work out why we utilise such a simplistic test at the outset. Calling it simplistic sounds like a criticism but in fact that's the very reason why we use it. Put simply, the annexation test is definitive: something is or is not attached to the land. Although there might occasionally be a few doubts, generally we will have no problem in deciding whether or not something is deemed to be a fixture by applying that criteria.

Simple tests are extremely important for they are certain, easy/swift to apply and, as a consequence, cheap to administer, for there is little room for argument. Provided they achieve the right result, they are therefore very useful and non-lawyers often ask why the law cannot always utilise simple tests to provide clear unambiguous answers. The problem is, however, that although tests can be unambiguous, life most certainly is not; there are many complexities that cannot be addressed by a simple binary process. One could simply reject simple tests on this basis. However, in so doing, we would be forsaking all the advantages we began by listing. Provided the test usually gives the right result it would be ludicrous to reject it simply because it occasionally fails so to do.

In contrast to the degree of annexation, the purpose of annexation test is far more nuanced. Such tests are extremely important to the law as they allow us to do justice when faced with a world where we often encounter complexities. But justice in this form comes at a high price as this form of test lacks the same degree of certainty, is harder/slower to apply and expensive to administer for there is much room for argument. One could, therefore, simply reject this approach on that basis but it would again seem ludicrous to abandon a test that works, particularly when it does so in exactly those situations where the simple test fails to provide a sensible solution.

So how do we square this circle to achieve both justice and certainty? The answer of course, as we have already seen, is to employ both tests. Thus, the simple, quick and certain test is applied first. Usually that gives the right result and we stop there and stick with the presumption. If it is contended that an injustice has occurred and the wrong result achieved (e.g. an ornamental garden comprising statues resting by their own weight), the burden of proof is placed on the party seeking to remedy that injustice. In reality, it is a compromise between certainty and justice. The application of one or other test would maximise one factor to the detriment of the other; only by employing both tests in this way do we achieve a degree of certainty and justice which, in sum, achieves more than the maximum either would achieve individually.

We could stop there but you should take two further steps in this analysis, for the above is arguably an idealised account. First, the application of the second test is more problematic than discussed above. Not only is the purpose test nuanced, it is also subjective, for, despite the fact the court is seeking to find the objective purpose of the annexation (and not the subjective intent of the person who made the annexation), different judges will come to different decisions on the same facts; that is why the case law in this area is inconsistent. We consequently pay a high price for such subtlety and risk achieving justice via the injustice of inconsistent judgments.

Second, be really critical for a moment: could you argue that what has gone before is little more than deception? Try reading *TSB* v *Botham* and look at what really happens in the case: although purporting to apply the two tests, does the court simply seek to achieve what, in its view, the market expects (a point also made by Blackburn towards the end of his judgment in *Holland*)? After all, the second test presents a false dichotomy as to whether the thing was placed there to improve the thing or to improve the land, when in reality it is both (in the sense that the thing and its location are important to the enjoyment of each) and neither (in the sense that it is not the land nor the thing that is improved but the users' enjoyment of each that is enhanced). In short, one can get to the result one wants simply by changing how one phrases the question and/or answer.

2 The 1925 reforms and unregistered land law

Contents

Introduction

Although it is common to refer to 'unregistered land' or 'registered land', it is more correct and useful to label the two situations as 'unregistered title' and 'registered title'. Land itself is not registered, but the title to it can be, and usually is. The rules of unregistered title are of diminishing practical importance and are irrelevant to most land transactions these days. Even though you may not need to be able to apply both sets of rules, knowing how unregistered land law works in the general terms covered in this chapter still has value. It will help you to acquire a deeper understanding of the development of various aspects of land law, especially adverse possession (Chapter 10). Additionally, it gives context to the development of aspects of registered land law and the legal mechanisms (covered in Chapter 3) that seek to balance the protection of purchasers of land with registered title and others who hold third-party interests (such as easements and restrictive covenants) over registered land.

This chapter therefore briefly focuses on three key features of unregistered title:

- the register of land charges, which operates to protect third party interests
- the extension of overreaching of equitable interests
- the residual scope of the doctrine of notice.

LEARNING OUTCOMES

By the end of this chapter and the relevant readings, you should be able to:

- **explain the meaning and nature of 'overreaching'**
- **explain the operation of the system of land charges registration**
- **describe the ways in which the 1925 reforms have attempted to simplify conveyancing**
- **decide whether third party rights are enforceable against a purchaser of unregistered title land.**

2.1 A brief overview of the 1925 reforms

CORE TEXT

- **Dixon, Chapter 1 'An introduction to modern land law'.**

FURTHER READING

- **Gravells, Chapter 1 'Introductory topics'.**

Background

In order to understand the structure of English land law today it is useful to examine the policy of the 1925 legislation which overhauled it. Some of the reforms were made to simplify and rationalise the substantive law (e.g. the assimilation of real and personal property law and the reduction in the number of tenures to one form), but the most important, for our purposes, were those designed to simplify conveyancing. The wide variety of rights that may bind land (i.e. third party rights) makes dealings in land much more complex than dealings in other forms of property and raises the fundamental question of how the law should strike a balance between the interests of third parties and those of purchasers. (You will discover that land lawyers use a variety of different expressions to describe this tension, which is a persistent and central concern in a number of the land law cases you will study. So, you may encounter linguistic formulas that ask if a purchaser of land is bound by any pre-existing third-party rights (property rights that other people have over the land being sold). Or, put differently, the question may be framed to ask if third-party property rights are enforceable (or take priority) over the title a purchaser of land has acquired. By and large, the 1925 reforms favour the purchaser and simplify conveyancing by eliminating the need for the purchaser to make complex inquiries before purchase. In this chapter we shall consider **unregistered titles** in land, and in Chapter 3 we will look at registered titles. Remember that the position in registered land is much more important in practice today and it will therefore be given greater prominence in later chapters of this guide. However, for a richer understanding of the position in registered land, you will find it useful to have a broad grasp of the response unregistered land takes when faced with exactly the same type of priority dispute between purchasers of unregistered land and others who have third-party rights over the land that is being sold.

Although the two systems are conceptually very different, with registered land being concerned with creating a comprehensive register of land titles, they have a number of similarities. Thus, rights which are overreachable (see Section 2.4) under the one system are overreachable under the other, and rights which are registrable under the one system may be protected on the (different) register under the other. Most basically (and importantly), the rationale under both systems was to reduce the need for the purchaser to make excessive inquiries and inspections of the land, although that does not mean they are under no obligations in that regard.

2.2 Reduction in the number of legal estates

Types of estate under the 1925 law

The 1925 legislation drastically reduced the number of estates and third party rights that may subsist at law and so reduced the number of interests that automatically bind a purchaser. Section 1(1) Law of Property Act 1925 (LPA 1925) provides that the only two estates that may subsist at law are:

1. the **fee simple absolute** in possession (the holder of such an estate is effectively the owner of the land) and
2. the **term of years absolute** (i.e. the lease).

The only interests that may subsist at law are listed in s.1(2) LPA 1925 and include (among others) an **easement** (e.g. a right of way or a right to light) and a **charge by way of legal mortgage**. All other estates and interests take effect in equity (i.e. they are equitable interests) (s.1(3) LPA 1925). Thus, any freehold estate apart from the fee simple absolute in possession is necessarily equitable (although relatively rare). For example, if land is given to A for life with remainder to B in fee simple, both A's life estate and B's remainder interest are equitable as they are both estates not listed within s.1((1) as being capable of being legal. This is achieved by means of a successive interest trust with a trustee holding the legal estate on trust for A for life remainder to B.

A fee simple owner who has granted a lease is still technically 'in possession', since 'possession' includes receipt of rents and profits or the right to receive them (s.205(1)(xix) LPA 1925). Consequently, a landlord can still hold a legal estate in land despite someone else being in exclusive possession under a lease.

It is also very important to realise that s.1(1) and (2) LPA 1925 merely state what estates/interests **may** subsist at law. As we saw in section 1.4.3, to be a legal estate/interest it is necessary to ensure that the estate/interest is created or transferred by the correct formalities. For example, in most cases a deed is also necessary for the purpose of conveying or creating a legal estate (s.52 LPA 1925). Note that this is a fresh deed to effect a transfer between the vendor and purchaser and not merely the handing over of the existing deeds, which may prove the good root of title (i.e. that the person transferring the title can provide sufficient proof it was theirs to transfer).

If a deed is not used in the creation or transfer of the estate/interest, the intended recipient will not receive the intended legal estate/interest. One then has to ask what, if anything, the intended recipient will receive. Interestingly, in the context of land law, provided there is a specifically enforceable contract to transfer a legal estate (i.e. a contract that complies with s.2 LP(MP)A 1989), an equitable version of the estate/interest will vest in the intended recipient on the basis of the equitable maxim that 'Equity looks as done that which ought to be done'. From that point on, the transferor therefore holds the legal estate/interest on a constructive trust for the transferee who acquires the equitable title despite the failed legal conveyance.

2.3 The unregistered title system

CORE TEXT

- **Dixon, Chapter 3 'Unregistered land': Sections 3.1–3.4.**

ESSENTIAL READING

- **Smith, 'The central concerns of property law'. Available on the VLE.**

FURTHER READING

- **Gravells, Chapter 2 'Title deeds conveyancing'.**

The 1925 reforms and the further reforms introduced by the Land Registration Act 2002 (LRA 2002) will be covered in detail in Chapter 3 after we have considered unregistered title. But before proceeding further it might be useful to answer a question that is probably perplexing you already. Namely, why are there two systems? The policy of the Land Registration Acts 1925 and 2002 after all was to simplify conveyancing by registering all titles to land in a central register (known as the Land Registry) and LRA 2002 requires registration of title whenever land is transferred or subjected to a first legal mortgage. So why do we bother with unregistered title?

After 1925, the system we know as unregistered title was meant to be a temporary measure, to deal with some of the problems that made conveyancing so time-consuming and costly, while a comprehensive register of title was gradually introduced. The assumption at the outset was that all land in England and Wales would be registered within a decade and no one expected the unregistered title system to still be in existence almost a century later. Thus, many of its defects are not

the fault of the designers but because the design is dated. Even today, around 10 per cent of titles in England and Wales are still unregistered (amounting to around 86 per cent of the land mass), in spite of the extension of the situations which trigger compulsory registration under LRA 2002 and the introduction of incentives for voluntary registration of title. Although the government has set 2030 as the target date to achieve comprehensive registration of all land titles in England and Wales, it is difficult to judge if it will succeed. This is because some land has been held by the same owner, such as a charity or family trust, for hundreds of years and so its title remains unregistered. It is consequently still of some, albeit diminishing, relevance to know whether title to land is registered or not before the protection and priority of competing interests can be correctly evaluated. When an unregistered title is registered, it is necessary to know which third-party interests were enforceable against the holder of the title immediately prior to registration in order to judge whether such interests will:

- require entry on the register
- bind a purchaser regardless of registration
- be void for lack of previous protection (or for some other reason) under the unregistered title system.

These questions will be answered by applying the rules of unregistered title and hence there is a continuing need to appreciate in broad terms what the rules are and how they operate.

2.4 Overreaching in the unregistered title system

Core text

- **Dixon, Chapter 3 'Unregistered land': Section 3.7 'Overreachable rights'.**

The scheme of the 1925 legislation was that although a purchaser would be bound by legal interests whether they knew of them or not (remember the axiom 'legal rights bind the world'), equitable rights would be either **overreachable** or **registrable as land charges**. **Overreaching** is a process by which a purchaser of a legal estate takes it free of (i.e. will not be bound by) pre-existing equitable rights in the land, but the equitable interests do not 'vanish': they attach instead to the purchase money, converting rights in the land into a corresponding share in that money. Overreachable rights are generally those of a family nature (such as interests existing behind a trust) and registrable rights are those of a commercial nature (such as easements, covenants and options). Interests which are registrable as land charges under the Land Charges Act 1972 (LCA 1972) cannot be overreached.

Students often have difficulty understanding why some equitable interests are overreachable while others are registrable. The reason lies in the nature of the equitable interest that is thereby protected. In a trust we expect the trustees to manage the assets held on trust, and that usually includes the power to buy and sell trust property. It is therefore important, for both the beneficiary and the buyer, that when a trust asset (such as land) is sold, the beneficiary's interests move from the asset to the proceeds of sale, for otherwise a trustee could never sell any trust property. In contrast, when dealing with non-trust equitable interests, the holder of the interest needs the interest to continue binding the land over which it is exercised, even after that land is sold.

Holders of such commercial rights do not want the interest to move from the land to which it relates to the proceeds of sale but to continue in place despite the change of ownership in the land. Thus, when land is sold, overreaching ensures that beneficial interests move from the land to the proceeds while registration as a land charge enables non-trust equitable interests to continue binding the land.

As Robert Walker LJ in *Birmingham Midshires Mortgage Services Ltd* v *Sabherwal* [2000] 80 P&CR 256 noted:

> The essential distinction is…between commercial and family interests. [A commercial interest] cannot sensibly shift from the land affected to the proceeds of sale. [A family interest] can do so…since the proceeds of sale can be used to acquire another home.

Overreaching therefore clearly applies to beneficial interests and, since *Sabherwal*, also, it seems, to those family interests created via proprietary estoppel that are akin to a beneficial interest. (Perhaps a more questionable extension of overreaching is applying it to the right to have an unconscionable transaction set aside: *Mortgage Express* v *Lambert* [2016] EWCA Civ 555.)

The system of overreaching is not confined to land but extends to any property held on trust, although the mechanisms differ. We will only give detailed consideration to overreaching in land where, under s.2 LPA 1925, the purchaser will take free of any beneficial interests provided they pay the purchase money (if there is any) to at least two trustees under s.27(2) LPA 1925. Overreaching is therefore a very useful tool for purchasers of legal estates in land, freeing them from fear of hidden or undisclosed equitable interests in the land (or even the need to look for them) and thereby assisting the free alienation of property (one of land law's key objectives). Overreaching applies in both unregistered land and, as we will see in the next chapter, registered land. It is available to purchasers of an estate in land and mortgagees but not to the grantee of an easement that may be contained in a conveyance: *Baker* v *Craggs* [2018] EWCA Civ 1126. However, it should be noted that there is no overreaching unless the sale is made in good faith, even if the purchase money is paid to two or more trustees: *HSBC Bank plc* v *Dyche* [2009] EWHC 2954 (Ch).

However, students often ask why overreaching assists beneficiaries. Assuming the beneficiaries want it to take place – which is not the case with beneficiaries who prefer to stay put – the mechanism clearly does not provide any absolute guarantee that the two trustees will not run off with the beneficiaries' money (to which their rights attach via the operation of overreaching). This is indeed quite true but the two trustee rule does make that practically more difficult as any defrauding of the beneficiaries now requires a conspiracy in which at least two trustees will have to get involved. This still happens on occasion, of course, but it is generally thought that the two trustee rule limits such opportunities and is helpful to beneficiaries, although it should not be forgotten that, in the residential context, they may in practice prefer an interest in land to one in money; a house after all is first and foremost a home, rather than just an investment.

SELF-ASSESSMENT QUESTIONS

1. **Explain the concept of overreaching and how it operates.**
2. **Which interests in land will be overreached on purchase?**
3. **What are the advantages and disadvantages of overreaching?**

Summary

'Family' interests in land will be overreached, attaching instead to the proceeds of sale, if payment for the land is made to two trustees. This process is a great advantage for purchasers of land, simplifying their side of the conveyancing.

2.5 Introduction of a system of land charges registration in unregistered title

CORE TEXT

- **Dixon, Chapter 3 'Unregistered land': Sections 3.5 'The purchaser of unregistered land and the protection of legal rights' and 3.6 'The purchaser of unregistered land and the protection of equitable interests: the Land Charges Act 1972'.**

Further reading

- **Gravells, Chapter 2 'Title deeds conveyancing'.**

As stated above, it is not appropriate to apply the machinery of overreaching to equitable interests of a commercial nature (e.g. estate contracts, restrictive covenants, etc.). Prior to the 1925 reforms, such interests were governed by the doctrine of notice, that is, they were binding on the whole world except the *bona fide* purchaser of a legal estate for value without notice. This involved the purchaser making inquiries and inspections of the land. In order to obviate the necessity for such steps to be taken, the system of land charges registration was introduced in 1925. LCA 1972, which replaces the Land Charges Act 1925, provides for the registration of certain **land charges** against the name of the owner of the land in the land charges register. The different categories (or in the language used in the Act 'classes') of land charges are set out in s.2 LCA 1972 and the most important for our purposes are:

- the puisne mortgage (class C(i))
- the general equitable charge (class C(iii))
- the estate contract (class C(iv))
- the restrictive covenant (class D(ii))
- the equitable easement (class D(iii)) and
- a spouse's/civil partner's right of occupation under the Family Law Act 1996 (class F).

A land charge is registered against the name of the estate owner whose estate is intended to be affected (s.3 LCA 1972). The registration of a land charge constitutes actual notice to the whole world, hence protecting the interest even when the land is sold (s.198 LPA 1925). However, if a land charge is not registered before the completion of a purchase, the effect depends on the type of land charge and the characteristics of the purchaser (s.4 LCA 1972). Thus (and it is an important difference to note), an estate contract or a restrictive covenant or an equitable easement will be void for non-registration against a purchaser of a **legal estate** for **money or money's worth**, whereas a puisne mortgage or a general equitable charge or a spouse's right of occupation of the matrimonial home will be void for non-registration against any purchaser **for value** of the land or any interest in the land (whether legal or equitable). These specific provisions in s.4 underline that, broadly speaking, it is immaterial whether a purchaser who buys a legal estate has notice of an interest that is void against him for non-registration (on which see also s.199 LPA 1925). The purpose of the land charges registration system is to do away with the traditional doctrine of notice. The leading authority on the operation and integrity of land charge registration – the House of Lords ruling in *Midland Bank* v *Green* [1981] AC 513 – is well worth reading. Broadly speaking, the decision underlines the importance to holders of land charges of using the land charges registration scheme because failing to do so means they run the risk that their rights will become unenforceable against a purchaser of the legal title to unregistered land.

'Money's worth' includes anything which is worth money (for example, transferring shares or other land to the seller) and includes nominal consideration; 'value' is a broader term which means money, money's worth or marriage consideration. (In Chapter 3 we will see that in the law applying to registered title since the LRA 2002, by contrast, marriage consideration is no longer 'value' while nominal consideration is also excluded from the definition.) Note carefully that any unregistered land charge is valid against a person who has received the land as a mere gift.

The land charges registration system has considerable advantages from the purchaser's point of view in that it generally relieves him of the need to make inquiries and inspections of the land. Its major defect from his point of view is that registration is not against the land (as is the case with registered land) but against the name of the estate owner. One estate may have been owned by many successive people since registration of land charges began, with the potential of land charges registered against each owner under his own name. Since s.23 Law of Property Act 1969 (LPA 1969)

reduced the length of title which has to be investigated in order to find a 'good root of title' to 15 years (see below), it has become even more difficult for a purchaser to discover all the relevant names to search for entries in the land charges register, yet he is still deemed to have actual notice of the charges registered against them (e.g. a restrictive covenant registered in 1930 against the name of the estate owner at that time). However, if bound by such a hidden interest, then he may be entitled to compensation at public expense (s.25 LPA 1969).

SELF-ASSESSMENT QUESTIONS

1. **What is a land charge and how is it to be protected?**
2. **Give examples of land charges and the categories/classes in which they should be registered.**
3. **When will a purchaser be bound by a land charge relating to the land?**

Summary

The 1925 and 1972 reforms radically changed the enforceability of third party interests in land. Interests in unregistered land which have a commercial value should be registered as the appropriate class of land charge identified in s.2 of the LCA 1972. If no such registration is carried out, then such an interest is void against a purchaser for value or for money/money's worth, depending upon its nature. The doctrine of notice has no application to land charges; thus an unregistered land charge is void even if the purchaser has actual notice of it. But the system of land charge registration is difficult and has caused problems.

Registration by name of the estate owner (s.3 LCA 1972), rather than by title, is a particular deficiency but is, of course, an inevitable aspect of a system that was introduced as a stopgap measure prior to the introduction of a comprehensive system of land title registration.

2.6 The doctrine of notice in unregistered title

CORE TEXT

- **Dixon, Chapter 3 'Unregistered land': Sections 3.8 'A residual class of equitable interests in unregistered conveyancing' and 3.9 'Inherent problems in the system of unregistered land'.**

Although it was the general scheme of the 1925 legislation that equitable interests should be either overreachable or registrable, the doctrine of notice continues to govern those equitable interests that fall outside the scheme. In some instances equitable interests have been deliberately excluded from the scheme, and in others the doctrine of notice covers unintentional gaps in the statutory provisions. As most of these interests will be discussed in later chapters, it is sufficient here to note some of the more important interests which are still governed by the doctrine of notice:

- restrictive covenant made between lessor and lessee
- restrictive covenant created before 1926
- equitable interest arising under the doctrine of proprietary estoppel
- interest held on constructive trust
- equitable interest under a bare trust
- beneficial interest under a trust of land where the interest is not overreached because, for example, the capital money is paid to only one trustee: see *Caunce* v *Caunce* [1969] 1 WLR 286; and *Kingsnorth Finance Co Ltd* v *Tizard* [1986] 1 WLR 783.

Constructive trust and proprietary estoppel interests remain quite common and are, in fact, becoming increasingly prevalent, so the doctrine of notice has an unexpectedly

large role to play in unregistered land. In such cases as the above list, the doctrine of notice plays a residual role and a purchaser is bound unless he is a *bona fide* purchaser of the legal estate for value without actual, imputed or constructive notice.

The meaning of **actual notice** should be apparent. **Imputed notice** applies when the purchaser's agent has notice of the interest. **Constructive notice** is harder to spot. A person has constructive notice of all facts of which he would have acquired actual notice had he made those inquiries and inspections which he ought reasonably to have made. An outline of the process of buying and selling unregistered land (which is no longer possible) will help set the idea of notice in context. A purchaser would call for a good root of title – one which is at least 15 years old – and examine all the documents which trace later dealings with the land to reveal the names of potential interest holders. For example:

1900 by this deed I Atticus transfer to you Brutus	1997 by this deed I Brutus transfer to you Cato	2006 by this deed I Cato transfer to you Darius	2008 by this deed I Darius transfer to you Egnatius	2010 by this deed I Egnatius transfer to you Flavia	2013 by this deed I Flavia transfer to you Gaius

In these circumstances a purchaser from Gaius would need to go back to the third conveyance in the list (i.e. between Darius and Egnatius in 2008, being the first conveyance that is at least 15 years old) and inspect it and all subsequent conveyances to reveal the names of all the estate holders that held the title from the good root of title. The purchaser would then have to inspect the land charges register and look for any interests registered against the names of all the previous owners thereby revealed (Brutus, Cato, Darius, Egnatius, Flavia and, of course, Gaius). As you can see, Atticus is hidden behind a good root of title and while any interest registered against his name (or for that matter an owner previous to him) would still bind our purchaser, the purchaser would normally be entitled to compensation under s.25 LPA 1969 in respect of unknown interests hidden behind a good root of title.

A purchaser must also inspect the land and make inquiries of all persons in actual occupation of the land regarding any rights that they may claim. Under the rule in *Hunt* v *Luck* [1902] 1 Ch 428 a tenant's occupation is notice of all that tenant's rights and the presence of the vendor in occupation does not exclude the possibility of occupation by others.

It may be difficult for a purchaser to discover who, apart from the vendor, is living on the land, particularly where a dishonest vendor arranges for the purchaser to visit at a time when the other occupiers are absent. When it is clear from an inspection of the land that someone else is in occupation, a purchaser must make enquiries of that person: he is not entitled to rely on what the vendor may tell him about that person's rights. However, it is not certain what steps a purchaser is expected to take in order to discover who is in occupation. Should he question neighbours, or even check the electoral register? It certainly seems that he may not be entitled to rely simply on appointments made with the vendor; he may be expected to make surprise visits and physically inspect the land to see whether anyone other than the seller is in occupation: see *Kingsnorth Trust Ltd* v *Tizard* [1986] 1 WLR 783.

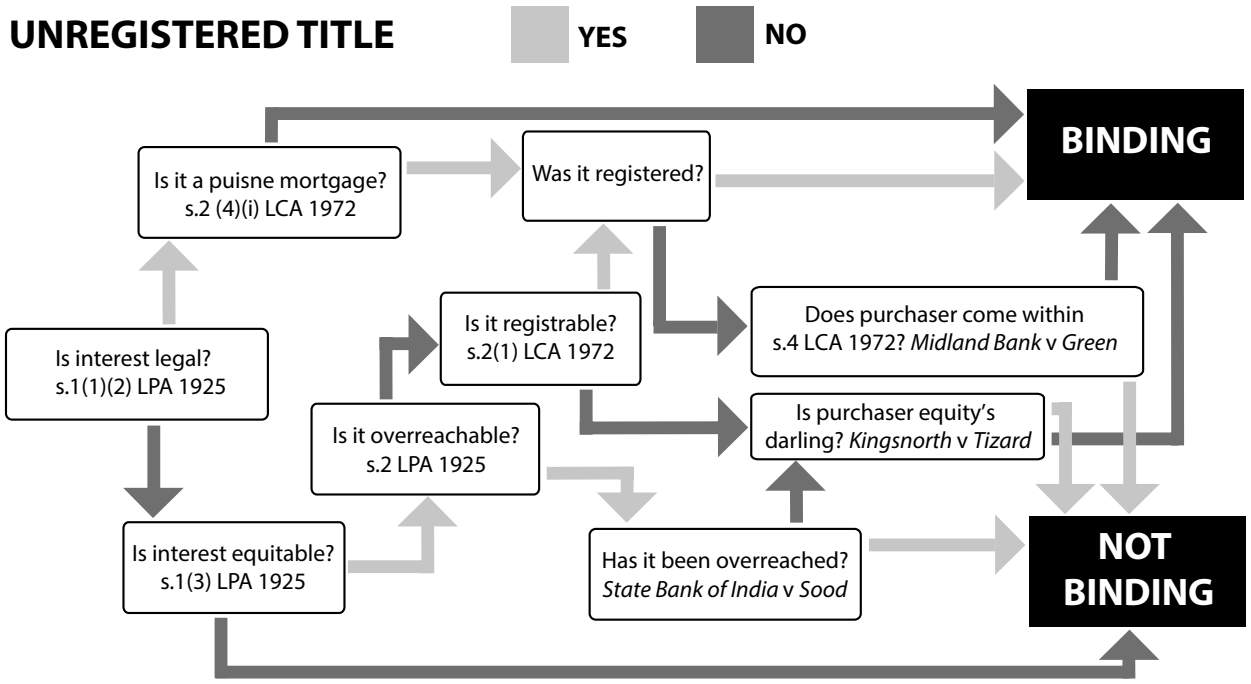
Self-assessment questions

1. **When will a purchaser be bound by a restrictive covenant entered into before 1926?**
2. **What is the consequence of a failure to register a land charge?**
3. **Which equitable interests are still subject to the doctrine of notice?**
4. **What is constructive notice and when does it apply?**

2.7 Diagrammatical summary of unregistered title

Once you have assimilated these rules you need to ensure you understand how they dovetail together. The following diagram might help you in that process as it distils this sometimes bewildering set of rules into a series of binary questions. As we hope you will see, the system is not as complex as it first appears.

The diagram will work for any interest and can be used to establish whether an interest granted by an estate owner will bind a subsequent transferee of that estate. Once you have acquainted yourself with it, please try the following activity.



Summary

Those interests in unregistered land which are neither registrable as land charges nor overreachable remain subject to the old doctrine of notice. Actual, imputed or constructive notice of such equitable rights may mean that they bind even a purchaser of a legal estate in the land. Much of the relevant law is confusing and complex. Leaving aside these finer details, what matters most for the purposes of your studies is an awareness of the ways in which equitable interests needed to be protected within the unregistered land law system if they were to bind purchasers of the legal title to land. Not only will this help you to become familiar with the nature of many of the land law rights covered in this module, it will also help you to appreciate the similarities and differences in how the same equitable rights must be protected where title to the land is registered (rather than unregistered) under LRA 2002 (Chapter 3).

You should, in particular, note that:

- Only those estates and interests mentioned in s.1(1) and (2) LPA 1925 are **capable** of being legal (whether they have been created as legal depends upon complying with the requisite formalities, otherwise they will only be equitable).
- All other interests in land can only exist in equity as specified under s.1(3) LPA 1925.
- Equitable interests are often divided into **commercial** equitable interests (such as estate contracts, restrictive covenants, equitable easements, etc.) where the interest only has meaningful value to its owner so long as it binds the land over which it is exercised, and **family** equitable interests (such as beneficial interests behind a trust of land) where the interest has value irrespective of what assets the trust currently holds.

- The aim of both registered and unregistered conveyancing is to create mechanisms to enable commercial equitable interests to continue binding the land on a subsequent purchase, while at the same time allowing family equitable interests to securely move from the land to the proceeds of sale when a subsequent purchaser arrives. Commercial equitable interests are therefore normally protectable (so that they continue to bind the land) by registration systems under both registered and unregistered title (see below).
- Family equitable interests can **always** be overreached (so that the interest moves from the land to the proceeds of sale) in **both** registered and unregistered title provided purchase monies (if they arise) are paid to two trustees under ss.2 and 27 LPA 1925.
- There are four basic categories of property interests in unregistered conveyancing.
  - Legal interests that bind the world (apart from puisne mortgages which must be registered as a land charge under LCA 1972).
  - Commercial equitable interests (such as estate contracts, restrictive covenants, equitable easements, etc.) which can be protected under LCA 1972 by registration against the name of the unregistered estate owner.
  - Overreachable interests (i.e. beneficial interests under a trust of land) that, if not overreached, are governed by the equitable doctrine of notice.
  - An anomalous category of non-overreachable, non-registrable equitable interests (e.g. pre-1925 restrictive covenants) that are only governed by the equitable doctrine of notice.

NOTES

3 Registration of title

Contents

Introduction

In the previous chapter we examined the principles underlying the 1925 legislation and in particular the reforms designed to simplify unregistered conveyancing. However, the unregistered system is becoming increasingly much less important now that registration of title has become compulsory on dispositions throughout England and Wales. This system is contained in the Land Registration Acts, supplemented by the Land Registration Rules. The mechanics of the system are fairly complex and you are not expected to master them completely. This chapter will concentrate on the general principles underlying the system and some of the flaws that have emerged in its operation. You should fully understand the implications of the House of Lords decision in *Williams & Glyn's Bank Ltd* v *Boland* [1981] AC 487, as well as the fundamental changes made by LRA 2002, which came into force on 13 October 2003. In particular, you must be aware that LRA 1925 has been repealed; any references to that statute in this module guide or in the readings are for the purposes of comparison only. One interesting outcome in comparing the 1925 and 2002 legislative schemes is to identify similarities and how far key principles have evolved and why.

Learning outcomes

By the end of this chapter and the relevant readings, you should be able to:

- **set out the principles of registered conveyancing**
- **distinguish these from the system of unregistered conveyancing**
- **explain how third party rights are to be protected in registered land**
- **explain 'overriding interests', the problems to which s.70(1)(g) LRA 1925 gave rise and the changes under LRA 2002**
- **explain the circumstances in which title must be registered compulsorily**
- **evaluate the reforms introduced by LRA 2002.**

Throughout your study of property law, you should make absolutely sure that you understand that:

- **registered title is the norm, although unregistered title does still exist**
- **separate rules apply to land of registered and unregistered title in many topics studied**
- **it is crucial to have clear and separate notes on the rules that apply to registered and unregistered title in respect of each new topic studied**
- **it is extremely important to be able to apply those principles accurately in problem questions.**

Core text

- **Dixon, Chapter 2 'Registered land'.**

3.1 Basic features of the system

Core text

- **Dixon, Chapter 2 'Registered land': Sections 2.1–2.3.**

Further reading

- **Bogusz and Sexton, Part 3 'Registered land'.**
- **Gravells, Chapter 3 'Registration of title'.**
- **Smith, Chapter 13 'Purchasers: registration of title' (excluding Sections 3 'Alteration' and 4 'Indemnity').**

As noted in Chapter 2, a comprehensive (but not immediately universal) title registration system was first introduced in England and Wales by LRA 1925, to be succeeded over three-quarters of a century later by LRA 2002.

Reference will, however, continue to be made at various points in this chapter to the former Act: first, as part of historical context; and, second, since many of its principles and rules survive in the new legislation. As new authoritative cases will only emerge over time on key aspects of LRA 2002, you will need to be familiar with cases decided on the 'old' law under LRA 1925 but you **must** treat such cases with appropriate caution and appreciate that, if the rules were different at the time when those cases were decided, this may affect their value in understanding the current law.

A registered title comprises an area of land in respect of which a person is the registered proprietor (i.e. owner). Each title is subdivided into a property register, a proprietorship register and a charges register, a copy of which used to be issued to the current registered proprietor. It was formerly known as the land certificate and provided evidence of title, but LRA 2002 makes no provision for land certificates. No copies of the register are issued, but a proprietor may be issued with a Title Information Document which provides basic information about ownership of the land. However, this is not a 'title deed', because the register is the proof of title. Prospective purchasers can, and should, inspect the land register before finalising the transaction.

As has already been indicated, the term 'registered land' is convenient and widely used. However, strictly speaking, it is an inaccurate label: it is the estates (and some interests) in land which are or can be registered (see s.1 LPA 1925; and ss.4 and 27 LRA 2002). One fundamental difference from the system of unregistered title should also be noted at the outset. Whereas in the unregistered system a purchaser will require a vendor to show a good root of title and a fresh investigation of title becomes necessary on each sale, in the registered system the legal title is investigated just once (by the Land Registrar) and then registered. The registered system is often described as being based on three principles:

1. The **mirror principle**. This means that the register is intended to reflect accurately all the facts material to a given title. Purchasers are not concerned with the past history of the title, nor are they required to carry out the sort of inquiries and inspections that may be expected of the purchaser of unregistered land; the doctrine of notice **has no application**. Overriding interests are the one important exception to the mirror principle.
2. The **curtain principle**. Trusts are kept off the title in order to simplify the transfer of the legal estate.
3. The **insurance principle**. The title is guaranteed by the state and is indefeasible without compensation.

However, you should be wary of this description as:

1. The mirror is cracked, as the existence of a category of overriding interest that binds, despite not being protected on the register, means that the registered title does not accurately reflect the totality of interests that are material to the given title.

2. It is sometimes argued that the curtain is ripped as, according to *State Bank of India* v *Sood* [1997] Ch 276, overreaching can only occur if the trustees are acting *intra vires*. This would appear to require the transferee to inspect the trust instrument to check whether the trustees have the power to transfer title.

   The criticism would appear to be unfounded, however, because even if the *dictum* is true (which seems unlikely) under s.26 LRA 2002, the purchaser's title is not affected by any limitations which have not been effected by means of a restriction recorded on the register.

3. The insurance premium is probably the most expensive in the world with only an extremely tiny proportion of the fees received being paid back out in compensation.

The system of registration of title was designed to simplify conveyancing and was not a code of land law; indeed, it is generally undesirable that the substantive law applicable to a piece of land should depend on whether the title to the land is registered or not. Whereas in unregistered conveyancing the transfer of a legal estate is completed by the deed of transfer (the conveyance), in registered conveyancing the transfer, under LRA 1925, was effectual and complete only when the transferee was recorded in the land register as the new proprietor (see Section 3.2 regarding the position under LRA 2002). The purchaser for value thereby acquired a legal estate subject to entries on the register and overriding interests but free from all other estates and interests irrespective of whether he had notice of them. Of course, if the disposition is made without valuable consideration (which, unlike in unregistered title, excludes nominal consideration: s.132(1) LRA 2002), the transferee takes subject to all pre-existing property rights, irrespective of whether they are registered or overriding (s.28 LRA 2002).

FURTHER READING

- **Dixon, M. 'The reform of property law and the Land Registration Act 2002: a risk assessment' (2003) *Conv* 136.**
- **Law Commission Report, 'Land registration for the twenty-first century: a conveyancing revolution' (2001) Law Com 271.**
- **Law Commission Report, 'Updating the Land Registration Act' (2018) Law Com 380.**
- **Sparkes, P. 'The discoverability of occupiers of registered land' (1989) *Conv* 342–54.**

3.2 Land Registration Act 2002

CORE TEXT

- **Dixon, Chapter 2 'Registered land': Sections 2.4 'An overview of the registered land system under the Land Registration Act 2002' and 2.12 'An overview of the Land Registration Act 2002'.**

FURTHER READING

- **Gray and Gray, Part 8 'Dealings and their effect': Sections 8.1 'Contract and transfer' and 8.2 'Dealings with registered estates'.**

As a first attempt to create a comprehensive title registration system, LRA 1925 was by no means unsuccessful, although it is probably fair to say that the overall concept was more impressive than the detail, where various flaws emerged over time. In order to address those weaknesses, and to take advantage of new technology to make the transfer of land more efficient, the Land Registry and the Law Commission consequently joined forces to produce an improved model. Law Com 271 was published in July 1998 and entitled 'Land registration for the twenty-first century: a conveyancing revolution'. The Act that finally emerged, however, notwithstanding the tagline, included rather more evolution than revolution; particularly given the subsequent history of one of its key proposals – the introduction of a comprehensive electronic conveyancing system.

LRA 2002 received Royal Assent on 26 February 2002 and came into force in October 2003. Most of the changes only affect land once it is subject to a new disposition under the terms of the Act (i.e. when a subsequent registered transaction occurs or, with previously unregistered titles, when any of a list of 'trigger' events occurs, such as grant of a lease for more than seven years, transfer of an existing lease with more than seven years to run, and of course sale of a fee simple).

In testament to the success of the original vision, the new system shares many of the features and principles of its predecessor. The fundamental objective of LRA 2002 is that 'the register should be a complete and accurate reflection of the state of the title of the land at any given time, so that it is possible to investigate title to land online, with the absolute minimum of additional enquiries and inspections' (Law Com 271, para.1.5). It remained true to the mirror principle, but intended to use technology to ensure that the reflection of rights was clearer and more accurate. The curtain and insurance principles, and the corresponding concepts of overreaching and indemnity, are largely unaffected by LRA 2002.

One of the most revolutionary aspects of the new regime was to have been a radical system of compulsory electronic conveyancing – for which s.93 paved the way. This envisaged collapsing three stages (creation of an interest applying for registration and entry on the register) into one, resulting in the simultaneous completion and registration of a transfer of land. A purchaser's solicitor would directly access the Land Registry's computers and a single flick of a switch would replace all the pre-2002 stages – simplifying and speeding up the traditional house buying process (and removing the problems created by the so-called 'registration gap'). Such a seismic shift would sweep away the need to follow paper formalities in most circumstances and also mean that, without registration, no interest could come into existence. However, it proved difficult to overcome various practical, legal and technical obstacles, and the Land Registry consequently abandoned their programme to develop end-to-end e-conveyancing in 2011. Since 2018, the Land Registry has, however, been devising less radical e-conveyancing plans that would be phased in over time (see further Chapter 20 of 'Updating the Land Registration Act 2002' (Law Com 380 (2018)), leaving implementation of the original conception of paper-free conveyancing for the future.

To enable electronic conveyancing, a key conceptual change introduced by LRA 2002 was to move from a system of registration of title to one of title by registration, with the actual act of registration conferring title on the transferee, rather than simply recording the transfer that has taken place. However, because this substantive conceptual change has been made in the absence of electronic conveyancing, it remains to be seen how well the new rules will work absent the system they were intended to support.

In tandem with the conceptual shift (but not as a direct result of the new Act) the Court of Appeal in *Swift 1st Ltd* v *Chief Land Registrar* [2015] Ch 602 held that *Malory Enterprises Ltd* v *Cheshire Homes (UK) Ltd* [2002] Ch 216 had been decided *per incuriam* in deciding that the fraudulent transfer of an estate only transferred the bare legal title on registration, leaving the original proprietor with a beneficial interest. Thus, under both LRA 1925 and LRA 2002, a registered transfer now gives the transferee in good faith full legal and beneficial ownership, even if preceded by a fraud.

The other main changes introduced by LRA 2002 were as follows:

- changes to the nature and scope of **overriding interests** in registered land
- substantial changes to the law of **adverse possession** for registered land (see Chapter 10)
- the expansion of the situations in which **registration of land is compulsory**, with a corresponding encouragement of voluntary land registration
- the creation of a **new Office of the Adjudicator to Her Majesty's Land Registry** to deal with disputes about registered land (from July 2013, the functions of the Adjudicator have been transferred to the Land Registration division of the Property Chamber of the First-tier Tribunal).

3.3 The categories of interest in registered title

CORE TEXT

- **Dixon, Chapter 2 'Registered land': Sections 2.6 –2.9.**

There are three basic categories of interest in registered title to which the priority rules (e.g. s.29) are relevant:

1. registered estates and interests the existence of which is guaranteed by entry on the register
2. protectable interests by which an entry can be made on the register protecting or safeguarding a claim to such an interest
3. overriding interests which bind even though they have been neither substantively registered nor protected by means of an entry on the register.

3.3.1 Estates and interests capable of registration

The registrable category comprises the only estates and interests capable of existing at law. Of these, estates are capable of being registered substantively in their own right with their own distinct title number; and their validity is then guaranteed by the Land Registry.

Originally, the only interests capable of substantive registration under the LRA 1925 were the legal fee simple and any legal term of years of which more than 21 years remained unexpired. Legal fee simples and leases remain the most important of the substantively registrable interests under s.3 of the LRA 2002; but the category is broader than it was previously in that it extends to leases with more than seven years unexpired. Two other leases must be registered, future leases (that are to take effect within three months) and discontinuous leases (e.g. for a fortnight in each of the next four years) because of the difficulty purchasers would otherwise face in discovering them. The list of other registrable interests in the LRA 2002 also includes:

- Legal mortgages
- Expressly created legal easements where the servient land is a registered title (even if the dominant land's title is not yet registered)
- Expressly created legal profits.

These registrable interests are registered as part of an existing freehold and leasehold title rather than substantively. With these interests, an entry is placed on the title of the land affected and, where such an interest also benefits land (for example, an express legal easements), an entry may also be required on the title of the benefited land. Until they are registered, registrable interests cannot take effect as legal interests. This category, therefore, is made up of legal rather than equitable interests, a distinction that continues to be recognised by the land registration provisions, but not so as to displace the priority rules the LRA 2002 has put in place.

3.3.2 Third party rights which need to be protected by entry on the register

This category (formerly known under the LRA 1925 as 'minor interests') includes all interests which are neither registrable (s.27 LRA 2002) nor overriding, but can be protected by an entry on the register. Unlike the former category of registrable interests, any entry on the register, in respect of a minor interest, does not guarantee the existence of such an interest but simply preserves its priority, insofar as it exists, against a subsequent disposition. For example, if A protects an option by an entry against the registered title of B, who then transfers her registered title to C, C takes the land subject to A's option insofar as it exists. Whether or not the option binds C, however, is ultimately not dependent upon A's entry on the register but on whether its validity can be independently established, if challenged by C. In other words, the

entry on the register is a necessary but not conclusive step in preserving A's option. Normally, then, failure to protect a valid option means that it cannot take priority through the register, even if it may still take priority as an interest that overrides by virtue of being coupled with actual occupation (considered below). Aside from that possibility, an unregistered option may exceptionally be given priority by imposing personal liability on a purchaser by imposing a constructive trust to prevent behaviour that would otherwise amount to an unconscionable attempt to deny the existence of the right: *Lyus* v *Prowsa* [1982] 1 WLR 1044; *Lloyd* v *Dugdale* [2001] EWCA Civ 1754; and *Chaudhary* v *Yavuz* [2011] EWCA Civ 1314.

There are two kinds of interest under this category, which are protected by two different types of entry on the register.

1. **A notice** is a mechanism by which commercial equitable interests are nailed to the land to ensure they survive subsequent dispositions (s.32 LRA 2002).
2. **A restriction** provides a means to apply any limitations on a registered proprietor's ability to deal with the land and is used to ensure that family equitable interests move from the land to the proceeds of sale (s.40 LRA 2002).

Thus, any commercial equitable interests that in unregistered land would be registrable under LCA 1972 will bind a purchaser if protected by entry of a notice on the register (s.32 LRA 2002). If they are not protected, they do not bind him even if he has notice (unless they comprise an overriding interest as discussed below). Note, however, that equity will not allow a statute to be used as an engine of fraud. This may be the best way of justifying the decision in *Lyus* v *Prowsa Developments Ltd* [1982] 1 WLR 1044.

In contrast, family equitable interests, under s.33 LRA 2002, cannot be protected by a notice and are therefore **not capable** of the same form of protection as commercial equitable interests. However, the beneficiary may enter a restriction (s.40 LRA 2002) requiring any purchaser to comply with the rules of overreaching. Thus, although a restriction does not protect family equitable interests by nailing the interest to the land and binding subsequent purchasers, as a notice does in respect of commercial equitable interests, it can be used to safeguard them, by giving the beneficiary the protection of overreaching (which makes it much harder to defraud a beneficiary of his interest, by requiring that the purchase monies are paid to at least two trustees). If overreaching takes place, because either a restriction was entered requiring it, or because the purchaser complied with its requirements anyway, the purchaser takes free from any overreachable interests (e.g. family equitable interests). If, on the other hand, there is no restriction and overreaching does not take place, whether or not the purchaser is bound by such an interest depends upon whether it is an overriding interest under para.2, as discussed below. The important point to note is that an overreachable interest will **never** bind a purchaser who complies with overreaching (*City of London Building Society* v *Flegg* [1988] AC 54) and will **only** bind a purchaser who does not comply with overreaching, if it is additionally an overriding interest (*Williams & Glyn's Bank* v *Boland* [1981] AC 487).

3.3.3 Interests that override

Registered dispositions take effect subject to interests that override (formerly known as 'overriding interests' and still usually referred to as such) and as these do not appear on the register, sensible purchasers need to inspect the land and make enquiries so that they know whether the land they are buying is affected by any such interests. It is thus very important to know whether a third party interest in land is one which overrides or one which requires protection on the register (see below). Overriding interests are hence a hazard for the purchaser: not visible on the register but binding upon the purchaser regardless of notice. No compensation is payable if the register is altered to give effect to an overriding interest since, strictly speaking, the purchaser has suffered no loss. Some limited information on LRA 1925 is helpful in order to appreciate the changes introduced under LRA 2002, but remember that s.70 has been repealed and replaced, and so its categories are no longer the law; they are mentioned

here for comparison purposes only. Overriding interests were listed in s.70 LRA 1925 and included, among others, the following four categories:

- s.70(1)(a) easements and profits, including some openly exercised equitable easements under *Celsteel Ltd* v *Alton House Holdings Ltd* [1986] 1 WLR 666 and *Thatcher* v *Douglas* (1995) 146 NLJ 282 (CA). This category continues under LRA 2002, but in a more limited form (see below).
- s.70(1)(f) 'rights acquired or in the process of being acquired under the Limitation Acts', that is, the rights of an adverse possessor (see Chapter 10): these will generally not override under LRA 2002 in their own right but will normally come within para.2 (see below).
- s.70(1)(g) 'rights of every person in actual occupation of the land or in receipt of the rents and profits thereof, save where enquiry is made of such person and the rights are not disclosed': this was the most litigated category of overriding interest and generated detailed case law. The person claiming an overriding interest had to prove that:
  - they had a right subsisting with reference to 'land'
  - they were 'in actual occupation' or in receipt of rents and profits
  - no inquiry had been made of them concerning their interest. Again, this category continues under LRA 2002 but in a more limited form (see below).
- s.70(1)(k) 'leases granted for a term not exceeding 21 years'. This category continues under LRA 2002, but in a more limited form (see Section 3.4).

ACTIVITY 3.1

Can you distinguish *Strand Securities Ltd* v *Caswell* [1965] Ch 958 and *Chhokar* v *Chhokar* [1984] FLR 313, bearing in mind the fact that in each case the persons claiming the overriding interest had furniture in the property though they were living elsewhere? Consider also *Kling* v *Keston Properties Ltd* [1985] 49 P&CR 212.

ACTIVITY 3.2

***Read Williams* & *Glyn's Bank* v *Boland* [1981] AC 487 and *Abbey National Building Society* v *Cann* [1991] 1 AC 56, and make notes on their relevant facts, decisions and *ratios*.**

a. **Which of Mrs Boland's interests in the land were overriding, and why?**
b. **What is actual occupation?**
c. **When must actual occupation occur in order to protect an interest?**
d. **Why was Mrs Cann not in actual occupation at the relevant time?**

Feedback provided for part (a) only.

ACTIVITY 3.3

Look up the rule in *Lyus* v *Prowsa* [1982] 1 WLR 1044. Why is this case treated as a questionable decision?

3.3.4 Complications in the system

The scheme is generally that equitable interests are either registrable or overreachable and that legal interests will bind a purchaser either because they are registered or because they are overriding. However, it is important to note that interests in registered land may sometimes fall into one class and sometimes into another; in particular, where someone with an interest is in actual occupation, they may either make an entry on the register or rely on their occupation as entitling them to an overriding interest. Thus, as noted above, an unprotected commercial equitable interest (such as an option to purchase the freehold) which can be protected by entering a notice, may constitute an overriding interest if coupled with actual occupation.

Moreover, a family equitable interest (such as a beneficial interest arising under a trust of land) which cannot be protected by a notice but could have been safeguarded (to the extent overreaching does safeguard) by the entering of a restriction (requiring overreaching) may bind a purchaser as an overriding interest if likewise coupled with actual occupation (assuming that overreaching has not otherwise occurred).

Thus, the person who has failed to use the tools available to protect (notices) or safeguard (restrictions) their interest might still be protected. However, the purchaser is required to make enquiries (not unlike those required under the doctrine of notice in the unregistered system) to discover interests that could have been protected by means of a notice or safeguarded by means of a restriction.

In the (very rare) case of strict settlements, the problems discussed above do not arise. Similarly, a spouse's right of occupation under the Matrimonial Homes Act 1983 (now the Family Law Act 1996) is declared not to be an overriding interest; it should be protected by entry on the register. Note, though, that a spouse may incidentally have another interest which is capable of overriding the disposition, such as a constructive trust interest (see Chapter 4).

Some cases also expanded the protection of overriding interests. In *Malory Enterprises Ltd* v *Cheshire Homes (UK) Ltd* [2002] EWCA Civ 151, actual occupation of derelict land did not require residence but 'some physical presence, with some degree of permanence and continuity'.

Self-assessment questions

1. **What were the main criticisms made of LRA 1925?**
2. **What are the apparent inconsistencies between the protection of third party rights in unregistered and registered title?**

Summary

The system of registered title to land was introduced in order to simplify and facilitate conveyancing of land. In order to do so, one of its fundamental principles is that the register should be a complete mirror of the interests in the land, guaranteeing those interests. It has by no means been completely successful in doing so, but the further reforms under LRA 2002 should go some way towards meeting the criticisms of its predecessor statutes. Interests in registered land can be divided into those which require registration in their own right as 'titles', those which override registration and those which can be protected or safeguarded by entry of a notice or restriction on the register.

3.4 The effect of the Land Registration Act 2002: overriding interests

Core text

- **Dixon, Chapter 2 'Registered land': Sections 2.4 'An overview of the registered land system under the Land Registration Act 2002' and 2.12 'An overview of the Land Registration Act 2002'.**

Further reading

- **Bogusz and Sexton, Chapter 6 'Interests protected by registration and overriding interests': Section 6.5 'Overriding interests or unregistered interests that override registered dispositions'.**
- **Smith, Chapter 13 'Purchasers: registration of title': Section D 'Overriding interests'.**

As mentioned above, LRA 2002 effected significant changes to the nature and scope of overriding interests. In particular, it sought to minimise the number of interests that can bind despite not being recorded on the register, which are now termed

'interests that override' rather than 'overriding interests'. Section 70(1) LRA 1925 has consequently been replaced by a smaller category of interests as detailed in Schedules 1 and 3 LRA 2002. Although superficially similar, care must be taken as there are significant differences between the two schedules. Schedule 1 applies to the first registration of title and is broader than Schedule 3, which applies to subsequent registrations and contains a more limited array of overriding interests. The reason for this difference is because first registration is an essentially administrative act, recording the title already acquired under the rules of unregistered conveyancing, and is not intended to have any substantive effect on the title registered. Thus, those unregistrable interests that bound the land, when it was acquired by the new purchaser via the unregistered conveyance immediately preceding first registration, need to survive that initial entry on to the register.

Questions on registered land are far more likely to concentrate on the rules of registered conveyancing rather than on issues of first registration. It is consequently Schedule 3, rather than Schedule 1, on which you should focus your studies.

Section 71 imposes a duty on the person applying for first or subsequent registration of a disposition to disclose information about any rights of which they are aware which might fall within the scope of Schedules 1 or 3 and are therefore overriding. The number of overriding interests should therefore diminish as more dispositions are made under the new legislation. It is also likely that some interest holders will lose rights which were overriding on first registration when there is a later disposition (see Dixon, M. 'The reform of property law and the Land Registration Act 2002: a risk assessment' (2003) *Conv* 136–56).

There are clearly some rights that were overriding interests under s.70(1) LRA 1925 which no longer override under either of the above Schedules. The rights of adverse possessors no longer override unless they are accompanied by actual occupation, while the rights of a person in receipt of rents and profits from the land are likewise no longer protected.

Most short legal leases have also been recategorised, since para.1 of both Schedules allows them to override if they run for seven years or less, a reduction from the former s.70(1)(k) requirement of 21 years. There are exceptions (s.4 LRA 2002), including reversionary leases that take effect more than three months after the date of their grant. Leases for more than seven years, or with more than that length of time to run, are now registrable in their own right. Power exists in s.118 LRA 2002 to reduce further the qualifying period from seven years. It may be used as and when e-conveyancing is up and running. When viewed against the LRA 2002's drive to achieve a conclusive register, it may be wondered how exempting short leases from the LRA 2002 provisions may be justified. As some will be leases of people's homes and others granted for short-term use of commercial properties, expecting registration may be unrealistic, burdensome and clog up the register for very little benefit.

Leases more than three years but less than seven years have acquired a dual status and can be protected by a 'notice' (and often are in commercial contexts), although there is currently no need as they qualify as overriding interests, provided they are legal. Care should be taken in respect of equitable leases, as para.1 does not apply to them as the term 'granted' refers exclusively to legal leases (see *City PBS* v *Miller* [1952] Ch 840).

The category of easements that override has also been reduced under para.3 by limiting it to legal easements and excluding all equitable easements (reversing *Celsteel* v *Alston* [1986] 1 WLR 666). As an expressly granted legal easement can only acquire that status via registration (s.27(2)(d) LRA 2002), this limits the category of unregistered easements that override to those legal easements that arise either impliedly or by prescription. Furthermore, under Schedule 3 (but not Schedule 1) the category is further limited to include only those legal easements that have been exercised within 12 months of the disposition, or were known to the transferee, or were obvious on a reasonably careful inspection of the land. These limitations in Schedule 3 aim to reduce the likelihood of a purchaser being bound by easements that are invisible (such as drainage rights) or used intermittently and it is hoped may encourage their registration by those who benefit from them.

Actual occupation

The most problematic category of overriding interest will continue to be the interests of those in actual occupation of the land, formerly governed by s.70(1)(g) and now by para.2. As before, the provision only covers those with an interest in the land (i.e. the mere fact of occupation is not itself protected if the occupier has no separate property interest in the land) but provided the occupier does have such an interest there need be no causal connection between that interest and the occupation that might thereby protect it (e.g. an unprotected option over the land owned by someone who, quite separately, say as a family member, happens to be in actual occupation of the land, is still capable of being an interest that overrides). Whether governed by Schedule 1 or Schedule 3, the rights of a person in actual occupation will override only to the extent that they coincide with that occupation. This reverses *Ferrishurst Ltd* v *Wallcite* [1998] EWCA 1874 and emphasises that 'actual occupation' is really just a warning to an intending purchaser of the existence of third party rights in the land, not in itself a guarantee of such rights. Actual occupation has a significantly different meaning under Schedule 3 (but not Schedule 1) where the rights of a person in actual occupation will not override a purchaser if either:

- enquiries have been made of the right-holder and they have failed to disclose the right in circumstances where they could reasonably be expected to disclose it, or
- the right-holder's actual occupation is not obvious on a reasonable inspection of the land, and the person potentially bound did not have actual knowledge of the interest at the time of the disposition.

Thus, s.70(1)(g) LPA 1925 has been replaced with a modified rule that appears kinder to non-disclosers in one respect: a person who does not know they have a right cannot be expected to disclose it under Schedule 3. An example of this would be where estoppel might operate but the interest holder (whose interest has proprietary status by virtue of s.116 LRA 2002) does not yet know that they have a right which they should disclose. However, the new provision has arguably gone further and (inadvertently?) reversed *Hypo-Mortgage Services* v *Robinson* [1997] 2 FLR 71. In that case it was held that, as a child cannot sensibly answer any enquiry made of them, such a person cannot be in occupation for the purposes of s.70(1)(g). In other words, the court limited the provision only to those whom the purchaser can sensibly question, on the basis that it would be unfair to the purchaser if they were bound by the occupation of someone whom they could not quiz as to whether they had an interest. In contrast, the new provision states that only those who fail to answer the question when they could reasonably be expected to do so risk losing their interest, which implicitly suggests that those who cannot answer the question can still be in occupation (for there is no need to excuse their failure to answer if they are, as in *Hypo-Mortgage*, not deemed to be in occupation for the purposes of the provision). The LRA 2002 is narrower than its statutory predecessor in another respect – the removal of overriding status from those who are in receipt of rents and profits from the land.

More importantly, the second change is significantly more restrictive, since interest holders in undiscoverable occupation will no longer be protected. Thus, a purchaser is no longer bound by an occupier's interest unless the interest holder's occupation (rather than their interest) is obvious on a reasonably careful inspection of the land or is otherwise known to the purchaser. Although the Law Commission were strongly of the view that this provision would not reintroduce the equitable doctrine of notice, critics have argued it will necessarily reintroduce a (less developed or subtle) form of constructive notice concerning what is, and is not, 'obvious' on what is, and is not, a 'reasonably careful' inspection of the land. There has been a dearth of cases from which to judge who is right and it will probably be advisable to think in a 'before and after' way for some years to come. There can be no doubt, however, that many of the cases from the 'old' law of s.70(1)(g) will remain relevant in interpreting the requirements of LRA 2002, although you must not forget that the rules have changed and you need to note that when citing pre-2003 case law.

There has been considerable judicial (and academic) exploration of actual occupation both before and since the LRA 2002. The courts have (understandably) declined to

suggest a definitive and comprehensive test, partly because much may depend on factors such as the nature and purpose of the land being occupied: see *Link Lending* v *Bustard* [2010] EWCA Civ 424 (Mummery LJ); and *Abbey National* v *Cann* [1990] UKHL 3 (Lord Oliver). Determining the existence of physical presence is essentially a question of fact (Lord Wilberforce in *Williams & Glyn's Bank* v *Boland* [1981] AC 487). Occupation should certainly be more than temporary/preparatory and involve a considerable degree of continuity and permanence even with derelict land that appears abandoned (*Rock Ferry Waterfront Trust* v *Pennistone Holdings Ltd* [2021] EWCA Civ 1029). Ordinarily, this will present little difficulty where the claimant is living in a house. Even then, the occupier's absence for a period of time may not be fatal, depending on its duration, the reason for the absence and the existence of a continuing intention to occupy – maybe supported by the presence of belongings and furniture: see *Link Lending*; *Chhokar* v *Chhokar* [1984] EWCA Civ 7; *Thompson* v *Foy* [2009] EWHC 1076 (Ch); and compare *AIB Group (UK) plc* v *Turner* [2015] EWHC 3994 (Ch). Alternatively, a claimant may be in actual occupation either via some representative – other than a licensee (such as a caretaker) (*Strand Securities* v *Caswell* [1965] Ch 958) or merely through the presence of the claimant's furniture. Exercising a right of way over the servient land is use rather than occupation (*Chaudhary* v *Yavuz* [2011] EWCA Civ 1314); and, even if an easement of parking or storage might count as occupation for the purposes of para.2 to be overriding, it will need to be obvious on a reasonably careful inspection of the land.

At what date must a claimant be in actual occupation to override a disposition? This is potentially problematic where a claimant moves into occupation during the so-called 'registration gap' – the period that customarily elapses between the date of the completion/transfer to the disponee and the later date when the title is registered. For s.70(1)(g) LRA 1925, the House of Lords in *Abbey National* v *Cann* (*obiter*) identified the date of transfer as the time to test for actual occupation and, although the LRA 2002 refers to the person being in actual occupation at the date of the disposition, this has also been taken to be the time of the transfer – and there is even a judicial suggestion by Lewison J (*Thompson* v *Foy*) that occupation must continue to the time of registration.

As mentioned previously (see also Chapter 2) a beneficiary in occupation may gain overriding status where mortgage monies are paid to only one trustee (*Boland*), signalling the dual nature of the protection the LRA 2002 affords such rights. But, where the payment is to two trustees, the beneficial rights cannot be overriding because they will have already been overreached (*City of London Building Society* v *Flegg* [1988] AC 54).

Self-assessment questions

1. **What are the key changes introduced by LRA 2002?**
2. **How has LRA 2002 changed interests that override?**
3. **What is the difference between interests that override a first registration and interests that override a subsequent transfer of the land? Why is there a difference?**
4. **Where registered land is transferred, when will a right protected by actual occupation lose its overriding status?**
5. **What would be the advantages of abolishing overriding interests altogether?**

Activity 3.4

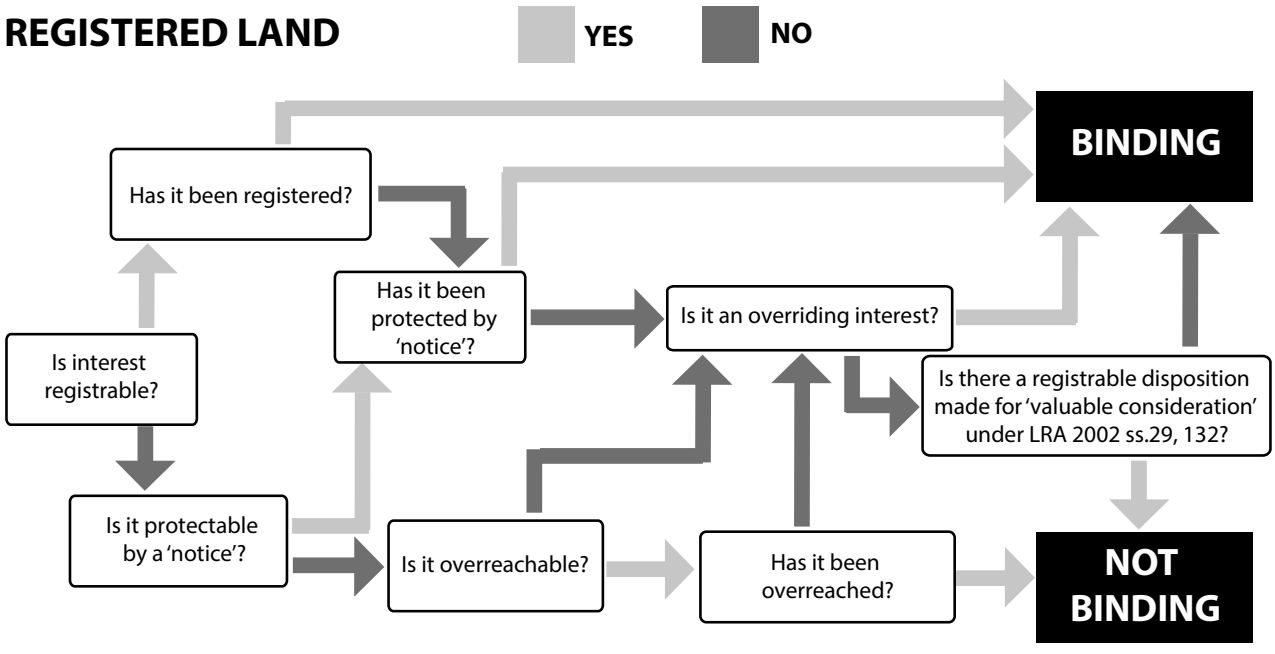
From your reading, draw up a table for the following grades of title to freehold and leasehold land that may be registered, and fill in the details of where each of them applies and which third party interests bind the registered proprietor of each.

Grade of title registrable	Where this applies	Binding third party interests
Absolute freehold		
Possessory freehold		
Qualified freehold		
Absolute leasehold		
Possessory leasehold		
Qualified leasehold		
Good leasehold		

No feedback provided.

3.5 Diagrammatical summary of registered title

Once you have assimilated these rules you need to ensure you understand how they dovetail together. The following diagram might help you in that process as it distils this sometimes bewildering set of rules into a series of binary questions. As we hope you will see, the system is not as complex as it first appears.



The diagram will work for any interest and can be used to establish whether an interest granted by an estate owner will bind a subsequent transferee of that estate. Once you have acquainted yourself with it please try the following activity.

Activity 3.5

Paul transfers the registered title of Whiteacre to Samantha for £10,000. Will Samantha be bound by the following interests, all of which arose prior to the sale of Whiteacre to Samantha?

a. **An easement granted by Paul to his neighbour Bethany.**

b. **A restrictive covenant granted by Paul to his neighbour Saskia.**

c. **Eloise's beneficial interest in Whiteacre arising from her contribution to the purchase price Paul paid when he bought the property.**

d. **Tamara's licence to occupy Whiteacre.**

e. **The option to purchase Whiteacre Paul granted Chris.**

f. **How, if at all, would your answer to each of the questions change in each of the following alternative circumstances?**

   - **Samantha paid £10 for Whiteacre.**
   - **Samantha paid a peppercorn for Whiteacre.**
   - **Samantha gave no consideration for Whiteacre.**
   - **The legal title of Whiteacre was co-owned by Paul and Gordon who jointly conveyed it to Samantha.**

Self-assessment questions

1. **What are the key changes introduced by LRA 2002?**
2. **How has LRA 2002 changed interests that override?**
3. **What is the difference between interests that override a first registration and interests that override a subsequent transfer of the land? Why is there a difference?**
4. **Where registered land is transferred, when will a right protected by actual occupation lose its overriding status?**
5. **What would be the advantages of abolishing overriding interests/interests that override altogether?**
6. **Which third party interests bind a first registered proprietor?**
7. **Why are interests that override a danger for the purchaser of a registered title?**
8. **What are 'minor interests' now called? Give examples, and explain how they appear on the register.**
9. **Which events trigger compulsory registration of title?**
10. **Why would a person choose to register title to his land voluntarily?**

Substantive examination advice

- In problem questions, always ask whether the title is registered or unregistered and be prepared for questions that ask you to apply the rules pertaining to both systems. If you are not told whether the title is registered or not, answer in the alternative where that is significant.
- If you are advising on both registered and unregistered title, initially answer the entire problem on the basis of registered title and then briefly explain how each of your conclusions would differ (either in outcome and/or detail) if title was unregistered.
- Avoid obvious errors – for example LCA 1972 applies only to unregistered title, not registered title.

- Do not go behind the facts you have been given – thus if you are told 'X has given Y an easement' you do not need to consider the *Re Ellenborough* requirements of an easement as you have already been told that Y has one. Nor do you need to consider whether it was expressly or impliedly granted as, in that example, you have already been told it is an express assignment as X gave it to Y. You therefore only need to consider whether the easement is legal or equitable (i.e. how it was given) and how that will affect its status in registered and/or unregistered title.
- Remember, in registered title there are three basic categories of property interest:
    1. Major interests – registrable legal interests (e.g. fee simples, leases over seven years, easements, charges and profits in gross) the existence of which is guaranteed by the Land Registry.
    2. Minor interests – a *prima facie* interest that can be protected by either a notice (e.g. commercial equitable interests such as estate contracts, restrictive covenants, equitable easements) or a restriction (e.g. overreachable beneficial interests behind a trust of land) entered on the register – these interests are not guaranteed by the Land Registry and thus their legitimacy has not been tested but the right (insofar as it exists) is protected (insofar as it can be) by registration.
    3. Overriding interests – interests that can bind even though not substantively registered nor protected (even if they are registrable and/or could be protected): including short- and medium-term legal leases (i.e. no longer than seven years); implied or prescriptive (but not express) legal easements (that have either been exercised in the last 12 months, or are known to, or discoverable by, the purchaser); and any property interest that is coupled with (but not necessarily causally linked to) discoverable occupation.
- Remember, in registered land, under s.27 LRA 2002, any express registrable interest capable of being legal will only be legal (even if a deed has been used to convey it) once it has been registered. Until then it is only equitable (and, as such, can be protected by means of a notice if there is some reason why it cannot be substantively registered and hence made legal).

Further reading

- **Dixon, M. 'Proprietary estoppel and formalities in land law and the Land Registration Act 2002: Theory of unconscionability' in Cooke, E. (ed.) *Modern studies in property law*. Vol. 2 (Oxford: Hart Publishing, 2003) [ISBN 9781841131733].**
- **Bevan, C. 'Overriding and over-extended? Actual occupation: a call to orthodoxy' (2016) *Conveyancer and Property Lawyer* (2) 115.**
- **Bogusz, B. 'The relevance of "intentions and wishes" to determine actual occupation: a sea change in judicial thinking?' (2014) *Conveyancer and Property Lawyer* 27–39.**
- **Cooke, E. and P. O'Connor 'Purchaser liability to third parties in the English land registration system: a cooperative perspective' (2004) 120 *LQR* 640.**

Sample of extracts from examination-type questions

Question 1

W lives in Rose Cottage, the matrimonial home, of which her husband, H, was the registered proprietor with absolute title. In 2021 H deserted W and mortgaged the cottage to B Bank. The mortgage payments are well in arrears and B Bank now seeks possession of the cottage. W, who had given H £10,000 towards the purchase price of the cottage, refuses to leave. Discuss.

Question 2

Lucy was the registered proprietor of Pinkacre. In 2018 she granted Peter a five-year lease of a cottage on Pinkacre; in 2019 she contracted to grant Quentin a four-year

lease of a field for grazing purposes; in 2020 she agreed orally to let Rick have exclusive use of a barn for three years at an annual rent of £300, and she invited Rick to pick as many apples as he liked from her orchard. In 2022 she sold Pinkacre to William, who has now written to Peter, Quentin and Rick telling them to keep off his land. Discuss.

Advice on answering the questions

Question 1

The issues to consider are:

- What is the nature of W's interest in the cottage?
- Does it bind the bank?
- Does her contribution to the purchase price give her an equitable interest behind a trust for sale (now a trust of land governed by the Trusts of Land and Appointment of Trustees Act 1996) (see Chapter 4)? If so, could she have protected her interest on the land register? Could she rely on her occupation of the cottage to give her an overriding interest?

Consider *Boland* and *Cann*, and the effect of LRA 2002. What about her right of occupation under the Family Law Act 1996?

Question 2

This is not a question on leases and licences; the key issue is whether William, the purchaser of Pinkacre, would be bound by the interests of Peter, Quentin and Rick – a question which requires an understanding of LRA 2002. Thus, Peter's five-year (legal) lease is not compulsorily registrable and would clearly bind William as an overriding interest within para.1 Schedule 3. Quentin's contract for a lease, even if not protected on the register, would bind William as an overriding interest within para.2 Schedule 3, assuming that he is in actual occupation.

Rick would appear to have a (legal) three-year tenancy of the barn (s.54(2) LPA 1925) which would bind William under para.1 Schedule 3. On the other hand, Rick's bare licence to pick apples on Pinkacre would not be a proprietary interest capable of binding a purchaser.

Focus of the assessment

Within the scope of this chapter, there are four principal areas for assessment:

1. An essay title asking you to consider the suitability and efficacy of the reforms to the land registration system in 2002. This may involve some comparison with the three mechanisms that operated in unregistered land for the protection of land law interests (land charges, overreaching and the doctrine of notice) discussed in Chapter 2.
2. A problem question asking you to consider the appropriate treatment of a variety of different property rights within the land registration system.
3. A problem question asking you to consider the rights of people in 'actual occupation' and other informal rights against the registered proprietor of the property.

Quick quiz

Question 1

Anne wants to transfer her registered title in Whiteacre to Paul. Which is the correct method?

a. She hands the bundle of deeds she has to Paul.

b. She hands Paul a deed which states that Anne transfers Whiteacre to Paul (the document complies with s.1 LP(MP)A 1989).

c. She and Paul agree a document which states that Anne is going to transfer Whiteacre to Paul (the document complies with s.2 LP(MP)A 1989).

d. She hands him a deed which states that Anne transfers Whiteacre to Paul (the document complies with s.1 LP(MP)A 1989). Paul is then registered as owner under s.27 LRA 2002.

Question 2

Anne has a trust interest in Greenacre; the legal title is held by her partner Dell. Paul has purchased Greenacre from Dell and wants Anne to move out. Which is the correct statement of Anne's position?

a. Anne's beneficial interest will be binding on Paul if Anne has entered her interest in Greenacre on the land register as a restriction (s.40 LRA 2002).

b. Anne's beneficial interest is automatically lost on transfer as her interest has been overreached when purchase money was paid to Dell.

c. Paul will only be bound by Anne's interest if she is in actual occupation.

Question 3

Anne bought Whiteacre from Paul. Her neighbour Nina claims that Anne cannot use Whiteacre as a business as Nina entered into a restrictive covenant with Paul. How should Nina have protected her interest?

a. She must enter the restrictive covenant onto the land register as a notice against Whiteacre.

b. She cannot protect it against a *bona fide* purchaser.

c. If Nina is in actual occupation of her land she can have an overriding interest.

Question 4

Anne has a trust interest in Blueacre. Legal title is held by her parents, Daniel and Dorothy. Paul has purchased Blueacre from Daniel and Dorothy and, after paying the purchase monies to them both, wants Anne to move out. What is the correct statement of Anne's position?

a. Her interest has been overreached so she has no right to stay in Blueacre.

b. Paul is bound by her interest if she is in actual occupation of Blueacre.

c. Anne's trust is binding on all but *bona fide* purchasers without notice.

Question 5

Anne has entered into a contract to buy Greenacre from Paul. He has now sold Greenacre to Claire. Anne is saying that Claire must now sell Greenacre to her. What is the correct statement of Anne's position?

a. Anne has an estate contract, this is an equitable interest and if Claire is a purchaser she takes free of the interest provided she had notice.

b. Anne should have protected the estate contract with a notice under s.32 LRA 2002 on the charges section of the land register. If she has, then Claire is bound by that interest; if she has not, then Claire takes free regardless of notice or her *bona fides*.

c. Anne has a contract with Paul and has a personal claim against him in breach of contract.

Answers to these questions can be found on the VLE.

NOTES

4 Co-ownership and trusts of land

Contents

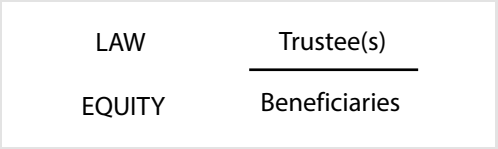
Introduction

This chapter deals with the situation that arises where two or more persons are entitled to the simultaneous enjoyment of land. Such situations occur frequently in everyday life (e.g. when a married or unmarried couple purchase a home or when a person dies leaving their house to their children). For reasons we explore in Section 4.3, whenever land is co-owned it is held via a trust, and we need to spend a few moments understanding this extremely important property holding device. The trust concept was introduced very briefly in section 1.4.1, when we considered the two axioms of land law, and you should re-read that section before proceeding further.

At its heart a trust is centrally concerned with the division of ownership and is best understood by contrasting the concept with the absolute ownership with which you are more familiar.

Where property is owned absolutely the owner's legal title includes the beneficial ownership and comprises the rights both to control the property and to enjoy it. There is simply one absolute title that gives the owner all the rights one normally identifies with ownership which, while not literally absolute (e.g. a landowner cannot normally build without planning permission or drive their car above the speed limit), do include the right to control and enjoy insofar as the law allows. In contrast, under a trust, ownership is divided between the trustee (in whom the formal legal title is vested) and the beneficiary (who holds a separate equitable interest). Under this model the formal legal title and beneficial ownership are separated with the former vested in the trustee, who controls the property but cannot enjoy it, because the legal title now no longer includes the beneficial ownership, which adheres to the equitable interest, and therefore belongs to the beneficiary (or someone claiming under the beneficiary).

It is important to understand the distinction between legal ownership and equitable ownership, which can be represented diagrammatically like this:



The scheme of the 1925 legislation was to impose a statutory trust for sale in all cases of co-ownership. Although this was intended to simplify conveyancing, it gave rise to a number of legal problems, not least because it was often inappropriate to apply to co-ownership principles (like the doctrine of conversion, now abolished) associated with express trusts for sale. However, since the Trusts of Land and Appointment of Trustees Act 1996 (TLATA 1996) came into force, trusts for sale have been converted into trusts of land. Co-ownership now takes effect behind a trust of land. While many LPA 1925 provisions governing co-ownership remain good law, TLATA 1996 has introduced important reforms in this field.

Learning outcomes

By the end of this chapter and the relevant readings, you should be able to:

- **explain the distinction between a joint tenancy and a tenancy in common**
- **describe the various modes of severance**
- **recognise the situations in which a resulting trust or constructive trust may arise**
- **explain the significance of the LPA 1925 and TLATA 1996 reforms relating to co-ownership and trusts of land**
- **apply the above rules and principles to hypothetical situations.**

Core text

- **Dixon, Chapter 4 'Co-ownership'.**

Further reading

- **Bogusz and Sexton, Chapter 8 'Co-ownership of land – the basic principles'.**

- **Smith, Chapter 15 'Joint tenancy and tenancy in common'.**

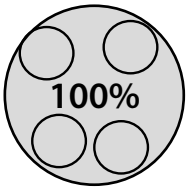
You may like to re-read Gray and Gray, 'Regulation of trusts and co-ownership'. Available on the VLE.

4.1 The two forms of co-ownership

Co-ownership arises whenever two or more people are simultaneously entitled in possession to an interest in the same land. Although there were historically other methods of shared ownership (and there arguably still are) the joint tenancy and the tenancy in common are the only forms of co-ownership that can exist in English private law today. The difference between the two is both conceptual and substantive.

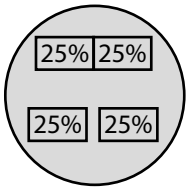
Under a joint tenancy, the joint tenants collectively own the whole and do not have individual interests. When one dies, their interest dies with them until, after the death of the penultimate joint tenant, the co-ownership comes to an end and the survivor becomes the sole owner of the property. This is known as the right of survivorship and it follows that a joint tenant has no interest that can be left to pass via a will because, by the time the will comes into effect, they have no interest to bequeath as their joint interest died with them. Thus, only the survivor has an interest at the end of the joint tenancy on the death of the penultimate joint tenant, which they can leave by will. They are then the sole beneficial owner, whose interest will not die with them but survives to pass via their will or under the rules of intestacy.

Joint tenancy



No individual interest.

Tenancy in common



Each individual has a defined interest.

In contrast, under a tenancy in common each co-owner has a separate and defined share in the co-owned property. Such a share is intangible, but real, in the sense that the property has not been physically divided (which is why such interests are often referred to as undivided shares) but represents a solely owned interest in part of the whole, which can be disposed of either during the lifetime or on the death of the tenant in common. It is important to understand what is meant when we speak of the share under a tenancy in common being undivided. Tenants in common, like joint tenants, have unity of possession (meaning that each co-owner has the right to possess the whole of the land alongside the other co-owners). Consequently, apart from under certain statutory provisions to be considered later, if any co-occupier has the right to exclude another from part of the property this is incapable of being co-ownership, under either a joint tenancy or a tenancy in common, but is simply two separate 'ownerships'.

Before proceeding we will introduce another idea which will be important to your understanding of co-ownership, namely the concept of beneficial ownership, which signifies the person(s) with the right to benefit from the property. For example, in the simplest form of ownership, where there is a single legal owner of property (e.g. a car or an estate in land, etc.), that person is said to have an absolute title, including not just the formal legal title but also the beneficial interest. Such an owner can both manage the property (via their legal title) and enjoy it (as beneficial owner). In other words, their absolute title comprises both the formal and beneficial interest, although it would be a mistake to consider these as two separate concepts as they are united within the absolute title.

In contrast to absolute ownership, consider once more the trust, an idea we introduced in Chapter 1, where it was described as a mechanism based on the division of ownership into separate legal and equitable titles, with the former vested in trustees who manage

the property on behalf of beneficiaries who as equitable owners have the right to enjoy its fruits (see diagram above). In terms of beneficial ownership, therefore, under a simple trust it is not the legal owner but the equitable owners who have the beneficial interest, which is why we refer to them as beneficiaries. The term 'beneficial ownership' is therefore often used as a synonym for the equitable interest behind a trust.

4.2 The means by which co-ownership might arise

Core text

- **Dixon, Chapter 4 'Co-ownership'.**

Further reading

- **Bogusz and Sexton, Chapter 8 'Co-ownership of land – the basic principles'.**

The majority of homes in the United Kingdom are shared by two or more adults, and very often each will contribute directly (e.g. by paying the deposit or mortgage) or indirectly (e.g. by covering ancillary costs – either financially or in kind – including running expenses, home improvements, childcare, etc.) to its value as both a home and an investment. In such situations the parties are best advised to regulate their co-ownership by means of a formal express agreement. This should set out the rights and obligations of each in relation to the land and include an express declaration of trust, which, as it comprises land, should fulfil the requirements of s.53(1)(b) LPA 1925 and be evidenced by signed writing.

Unfortunately, however, cohabitees often fail to formalise the basis on which such an important asset is to be held, often because couples rarely consider that their relationship might come to an end, nor what will happen if it does. Where no express trust has been declared in accordance with s.53(1)(b) LPA 1925, co-ownership will often arise informally (even by conduct without the parties realising the implications of their behaviour), usually under the provisions of s.53(2) LPA 1925, which exempts implied trusts from the formalities of an express trust. So, in addition to express trusts, such equitable co-ownership may occur through the application of principles of resulting trusts, constructive trusts or (rarely) proprietary estoppel. See Chapter 6 for the latter but bear in mind that the relationship between constructive trusts and proprietary estoppel is an uncertain and difficult one which you will need to consider later, once you have assimilated the basics of both these separate but interrelated doctrines.

A resulting trust arises (among other cases) when:

- a person contributes directly towards the purchase of a home but does not have their name on the legal title (known as 'purchase in the name of another'). In such a case there will be a presumption that the contributor has a beneficial interest in the land behind a resulting trust.

A constructive trust arises (again, among other cases) when:

- a person has contributed, directly or indirectly, to the purchase and/or establishment of a home but does not have their name on the legal title in circumstances where the court is willing to recognise a common intention on the basis of that contribution and/or other evidence. This is known more specifically as a common intention constructive trust to differentiate it from the other types of constructive trust.

Resulting and constructive trusts will be examined in greater detail later in this chapter, but it should be noted that there are important recent cases which indicate that the basis on which cohabitees' rights in the home are calculated is evolving. There are also relevant recent reform proposals, which would introduce radical change if they become law – although there is currently no prospect of this occurring.

When analysing a situation of co-ownership or answering a problem question, it is therefore necessary to discuss the legal and equitable positions relating to ownership

separately, and it is helpful to draw diagrams to represent the changing positions as the facts of the scenario develop. For example, if land is conveyed to A and B, in law they will take it as joint tenants. If B has paid two-thirds of the purchase price and A one-third, then in equity A and B will (at least outside the residential context) be tenants in common, as shown in Figure 5.1 (see Section 5.3.2 for why).

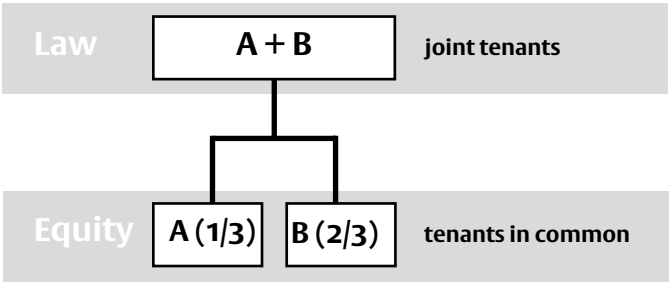


Figure 5.1: Legal and equitable positions relating to ownership

4.3 Distinction between joint tenancy and tenancy in common

Core text

- **Dixon, Chapter 4 'Co-ownership': Sections 4.1 –4.7.**

Further reading

- **Bogusz and Sexton, Chapter 8 'Co-ownership of land – the basic principles': Sections 8.1 –8.9.**
- **Hudson, Chapter 15 'Trusts of homes'. Available on the VLE.**
- **Smith, Chapter 15 'Joint tenancy and tenancy in common'.**

Although there were historically other methods of shared ownership of land, the joint tenancy and the tenancy in common are the only significant forms of co-ownership today and it is the right of survivorship that is the most significant difference (see *Dunbar* v *Plant* [1998] Ch 412). We have already discussed this but, to recap, it means that on the death of each joint tenant, their interest in the land dies with them until only one of the original co-owners remains, who then holds the land as sole owner.

By contrast, on the death of a tenant in common their 'undivided share' passes under their will or intestacy; survivorship does not apply to tenancy in common.

In equity it is possible to co-own land via either (or both) a joint tenancy or tenancy in common. At law it is only permitted to do so via a joint tenancy. The reason for what sounds, initially, like a strange rule is purely practical. Before 1925, land could be co-owned legally via either a tenancy in common or a joint tenancy (as personalty still can be co-owned today). As you will see below, under a tenancy in common there is no unity of title, which means that the tenants in common could have different documentary titles. As anyone who has ever bought a house will know, investigating title is an expensive and time-consuming business and thus, in a bid to speed up conveyancing, the 1925 legislation limited legal co-ownership to joint tenancies (meaning there was only one legal title to investigate) and also limited the maximum number of legal joint owners to four (Trustee Act 1925), to further reduce the complication of dealing with the legal title (see ss.34 and 36 LPA 1925).

Thus, if a legal title is conveyed to more than four co-owners or as a tenancy in common it will simply take effect as a legal joint tenancy limited to no more than the first four legal owners named in the conveyance (s.34 LPA 1925). Although this makes dealing with the legal title much simpler, it lacks flexibility. After all, there might be more than four people with an interest in the property or, because they do not want to be bound by the right of survivorship, the co-owners might not wish their interest to be held via a joint tenancy. To simplify conveyancing but to maintain such flexibility, the 1925 legislation (as interpreted at least) consequently played a simple but neat

little trick by imposing a trust whenever land was co-owned. This squared the circle of simplifying dealings with the legal title (by imposing limits on how it might be held) but maintaining flexibility with regard to the beneficial interest (by allowing the equitable interest to be held under a joint tenancy and/or a tenancy in common with no limit to the number of beneficial owners).

4.3.1 The four 'unities'

It is therefore particularly important to know whether co-owners hold as joint tenants or as tenants in common. To determine this, three questions need to be asked:

1. Are the four unities present? If not, there cannot be a joint tenancy. There must be unity of title, time, interest and possession:
   - Unity of title requires that all co-owners derive their interests from the same document or act.
   - Unity of time requires that the interests of all co-owners vest in them at the same time.
   - Unity of interest requires that all co-owners have the same interest in the land (e.g. freehold estate).
   - Unity of possession requires that each co-owner is as much entitled to possession of the land as any other co-owner.

   As we have already seen, unity of possession is also an essential element of tenancy in common. Therefore a co-owner who is not in occupation is generally not entitled to claim an occupation rent from a co-owner in occupation, although the matter is now governed by ss.12 and 13 TLATA 1996, which contain some exceptions to this general rule (see below).

   So, only if all four unities are present can there be a joint tenancy, but a tenancy in common requires only unity of possession to be shown.
2. Are there any words of severance in the grant indicating that the tenants were to take as tenants in common (e.g. 'X and Y in equal shares')?
3. Is the situation one where equity presumes a tenancy in common?

The principle of joint tenancy makes sense if you think about it as similar to a marriage.

In the Christian marriage ceremony, traditionally, there was an important moment in front of God when two people (husband and wife) became 'one flesh'. That is, two people are treated as being one person in front of God. A joint tenancy is similar in the sense that two or more cohabitants acquire unified rights because their rights come into existence at the same time, with the same rights, in relation to the same title and into possession at once. Their rights are indivisible unless they go through the process of severance, just as a married couple are treated as being indivisible unless they divorce or one of them dies.

In answering problem questions in this area it is important to identify (i) whether there is a joint tenancy, and, if so, (ii) whether severance has taken place.

4.3.2 The acquisition of equitable interests in the home

CORE TEXT

- **Dixon, Chapter 4 'Co-ownership': Section 4.11 'The express and implied creation of co-ownership in practice: express, resulting and constructive trusts'.**

The law relating to the acquisition of equitable interests in the home (often referred to as 'trusts of homes') – that is, situations in which there is cohabitation of property and those cohabitants are contesting whether they have rights in the property and the size and nature of their rights – is one of the most interesting areas of land law. The subject matter of the cases is easy to understand: there are relationship breakdowns, cohabitants resisting mortgage lenders who wish to take possession of property and

other situations in which claimants argue that it is 'unconscionable' for them to be denied some property rights in a home.

There are many cases in this area and they tend to disagree with one another. Therefore, the approach that is taken here is to begin with the important decision of the Supreme Court (that in *Jones* v *Kernott* [2011] UKSC 53) as the centrepiece. That judgment does not overrule any cases and therefore understanding the trends in those earlier cases will remain significant in discussing the likely future application of *Jones* v *Kernott*.

The Supreme Court in *Jones* v *Kernott* attempted to explain the earlier decision of the House of Lords in *Stack* v *Dowden* [2007] UKHL 17. The approach set out in a joint judgment of Lady Hale and Lord Walker in *Jones* v *Kernott* is the most coherent approach in this area. It is suggested that that is the approach you should use as the structure for answering problem questions in this area:

1. If the property is registered in the name of one person, presume that that person is the sole equitable owner; whereas, if the property is registered in the name of more than one person, presume that those people are equitable co-owners of the property.
2. Those presumptions can be rebutted by identifying a different common intention of the parties. This common intention should be 'inferred' from the circumstances, but done so 'objectively'. The concept of 'common intention' was debated intensely in the earlier case law, and that earlier case law remains important.
3. If the quest for the common intention produces no answer, then the court may do what is 'fair' in the circumstances.

Therefore, the important message to take from this three-part layout is the following: in answering a problem question you will have to identify the parties' common intention, which you will do by looking at all of the earlier case law on 'common intention'. If that search for a common intention is inconclusive then you can ask what is 'fair'.

4.3.3 The current law

In *Jones* v *Kernott* the Supreme Court restated and clarified the familiar principles of *Stack* v *Dowden* and confirmed the approach taken in *Oxley* v *Hiscock* [2004] EWCA Civ 546. However, there was less unanimity between the Supreme Court judges on when common intention should be inferred or imputed, or whether fairness is the key issue – for a unanimous judgment, there is a lot of disagreement, with the judges reaching their decision by completely different routes! The core principles as Lady Hale and Lord Walker see them are stated in para.51 of the judgment:

> In summary, therefore, the following are the principles applicable in a case such as this, where a family home is bought in the joint names of a cohabiting couple who are both responsible for any mortgage, but without any express declaration of their beneficial interests.
>
> (1) The starting point is that equity follows the law and they are joint tenants both in law and in equity.
>
> (2) That presumption can be displaced by showing (a) that the parties had a different common intention at the time when they acquired the home, or (b) that they later formed the common intention that their respective shares would change.
>
> (3) Their common intention is to be deduced objectively from their conduct: 'the relevant intention of each party is the intention which was reasonably understood by the other party to be manifested by that party's words and conduct notwithstanding that he did not consciously formulate that intention in his own mind or even acted with some different intention which he did not communicate to the other party' (Lord Diplock in *Gissing* v *Gissing* [1971] AC 886, 906). Examples of the sort of evidence which might be relevant to drawing such inferences are given in *Stack* v *Dowden*, at para 69.

(4) In those cases where it is clear either (a) that the parties did not intend joint tenancy at the outset, or (b) had changed their original intention, but it is not possible to ascertain by direct evidence or by inference what their actual intention was as to the shares in which they would own the property, 'the answer is that each is entitled to that share which the court considers fair having regard to the whole course of of dealing between them in relation to the property': Chadwick LJ in *Oxley* v *Hiscock* [2005] Fam 211, para 69. In our judgment, 'the whole course of dealing…in relation to the property' should be given a broad meaning, enabling a similar range of factors to be taken into account as may be relevant to ascertaining the parties' actual intentions.

(5) Each case will turn on its own facts. Financial contributions are relevant but there are many other factors which may enable the court to decide what shares were either intended (as in case (3)) or fair (as in case (4)).

Both *Stack* v *Dowden* and *Jones* v *Kernott* involved a title that was in joint legal names. The issue in each case was therefore restricted to quantifying shares in a property in which they both had an interest, via their joint legal title.

Lloyds Bank plc v *Rosset* [1991] 1 AC 107, on the other hand, was more complex as the property was not in joint legal names and thus Mrs Rosset had first to show she had acquired an interest before any quantification could take place. The House of Lords held that (in the absence of any express common intention) she could only acquire such an interest if she made direct financial contributions to the purchase price or the mortgage instalments. Following *Stack* v *Dowden* there was some academic debate as to whether or not the House of Lords' reasoning in the case was applicable to such 'acquisition' cases, with some commentators arguing that the much narrower approach in *Rosset* remained the applicable authority when the home was not in joint legal names despite Baroness Hale's comments in *Stack* that Lord Bridge's speech in *Rosset* was outdated.

Admittedly, within a few weeks of *Stack*, in *Abbott* v *Abbott* [2007] UKPC 53, the Privy Council had appeared to apply its principles to a case where the legal title was not in joint names. However, on this occasion acquisition was not in question, as the legal owner had already conceded that his wife had a beneficial interest, and thus the judgment was only concerned with quantification. The case involved an appeal from Antigua and Barbuda (where there are no provisions, as in this jurisdiction, to reassign property interests on divorce). The family home was in the sole name of the husband and the trial judge awarded a 50:50 split; this was overturned by the Court of Appeal on the basis that the wife had failed to satisfy Lord Bridge's criteria in *Rosset*. The Court of Appeal found that the wife was entitled only to the small share represented by her actual financial contributions to the mortgage. The Privy Council restored the trial judge's award, with Baroness Hale reiterating that Lord Bridge's approach in *Rosset* was outdated. Applying *Stack*, a holistic view of the facts should be taken in modern times; common intention could be inferred where there was a direct or indirect contribution to the acquisition of the land. Of course, this is going beyond the *ratio* of *Stack*, which relates to the quantification of shares, not their establishment, but it does appear clear that a more flexible approach is now taken than that found in *Rosset*.

Thus, despite *Abbott*, either because the case did not consider acquisition or because as a Privy Council decision it was only of persuasive and not binding authority, some continued to argue that *Rosset* remained the applicable authority when the legal title was in a single name, notwithstanding Baroness Hale's forthright comments. However, the Court of Appeal rejected such arguments in *Geary* v *Rankine* [2012] EWCA Civ 555. The case involved a property in the name of one trustee but the court made clear that *Stack*, rather than *Rosset*, was the relevant authority. Additionally, the decision in *O'Kelly* v *Davies* [2014] EWCA Civ 1606 accepted the broader arguments from *Stack* to establish a beneficial interest. Despite the absence of binding authority on the point, this appears to settle the argument as to whether *Rosset* should be followed in such cases. Obviously, where the legal title is in a single name the non-legal owner first has to show they have acquired an interest before it can be quantified under *Stack*. The Court of Appeal consequently held there was a two-stage test in which the claimant first had to show a common intention that they should acquire an interest and then a common intention as to what that interest should be. Although the common intention as to

acquisition could only be deduced from express words or inferences, the Court of Appeal was willing to allow the size of the share to be imputed in the absence of express words or inferences concerning quantification.

It is ironic that even the 'new' approach in the law since *Abbott* v *Abbott* [2007] UKPC 7 still means that in cases like *Oxley* v *Hiscock* [2004] EWCA Civ 546 and *Stack* and *Jones* v *Kernott* the equitable interest in the property was divided in shares that equated to the parties' respective cash contributions. What is different is that in those last two cases it was the female litigants who were the larger earners in their relationships than their male partners.

Clearly the restrictive approach in *Rosset* is now history, with *Stack* going some way to address the legitimate expectations of those who make a non-financial contribution to the family home (usually the women in terms of childcare and home making) and who could rarely, absent a direct financial contribution or an express arrangement, come within the terms of *Rosset*. However, the price paid is a high one, with Baroness Hale's holistic approach importing a large degree of uncertainty into the law. Each case is likely to turn on its own particular facts (and, dare one say it, each judge's particular view as to what is and is not significant), making it very difficult for solicitors to advise clients of their position; a point implicitly recognised in Baroness Hale's judgment where, as a former Law Commissioner, she calls for legislative intervention in this field.

It is indeed not just the courts who are pressing for change on this issue. Law Com 307 31 July 2007, 'Cohabitation: the financial consequences of relationship breakdown', found that the current law is a patchwork of principles which is 'complex, uncertain, expensive to rely on and, as it was not designed for family circumstances, often gives rise to outcomes that are unjust'. While not recommending that cohabitees should have access to the same remedies as married couples, the Law Commission proposes that where an unmarried couple have cohabited for a set number of years (precise number to be agreed later) or had a child together, and have not expressly agreed that the new scheme would not apply to them, then new principles should apply to the allocation of their property on dissolution of the relationship. It would be necessary for a claimant to show that they had suffered an economic disadvantage by making contributions to the relationship. A court would then have discretion to grant appropriate financial relief, while having regard to the needs of any dependent children.

The proposals' limitations should be noted; however, they would not apply where the cohabitants are not a couple, or where a third party is involved in the facts (as in *Rosset* itself). Thus, even if the proposed new scheme did become law, some cases would still have to be decided under whatever version of the *Stack* principles then applies.

4.3.4 Understanding the old case law on 'common intention'

Let us recap. In the wake of *Jones* v *Kernott* and *Stack*, the presumptions can be rebutted if the parties' common intention can be shown to be something different from the presumption. Significantly, the parties' common intention is to be identified objectively from the circumstances – that means, you must look at the circumstances and decide what the parties must have meant their common intention to be if they did not consciously form such a common intention. The problem that remains is this: what do we mean by 'common intention'? The answer is to be found by looking at the old case law on the meaning of that expression.

Hudson (see Further reading) suggests that there are five divisions in the case law on 'common intention' before *Stack* and *Jones* v *Kernott* in the following form:

1. The narrow form 'common intention constructive trust' identified in *Rosset* identifies that two forms of rights in the home are acquired on the basis of (i) an agreement, arrangement or understanding between the parties, involving some detriment, created before the acquisition of the property, as to the parties' rights in the property; or (ii) a contribution to the purchase price of property or to the mortgage instalments (such that it is 'at least extremely doubtful whether anything less will do'). This approach seemingly permits no other means of acquiring rights in the property than these two.

2. The 'balance sheet approach' in which resulting trust thinking is used to focus solely on cash contributions (e.g. *Springette* v *Defoe* (1992) 24 HLR 552; *Huntingford* v *Hobbs* [1993] 1 FLR 736) where the claimant acquires property rights in the home in proportion to the size of their cash contribution to the purchase price of the property. This approach takes into account no non-financial contributions to the property. The Court of Appeal in *O'Neill* v *Holland* [2020] EWCA Civ 1583 endorsed the importance of detrimental reliance in establishing a constructive trust in sole ownership cases and illustrated how detriment need not be financial (but might, as was the case for the claimant, O'Neill, involve the loss of a chance to acquire a property interest).
3. The 'family assets approach' in which the court 'undertakes a survey of the entire course of dealing between the parties' (including non-financial contributions to the home, and payments to things other than the purchase price or the mortgage), and therefore is not limited to financial contributions. In relation to long-standing marriages, this approach has held a wife's contribution to utility bills, occasional mortgage payments and to bringing up the children, keeping the home and finding occasional work when the family needed money, to be sufficient to acquire one-half of the equitable interest in the home (as in *Midland Bank* v *Cooke* [1995] 4 All ER 562). This is the antithesis of the first two approaches because it will take into account everything done between the parties.
4. The 'unconscionability approach' in which courts identify circumstances in which it would be unconscionable for the claimant to be denied some rights in the property (e.g. *Jennings* v *Rice* [2002] EWCA Civ 159; *Cox* v *Jones* [2004] EWHC 1486 (Ch)). This is, broadly speaking, the approach used in Australia. It seems to have faded away in England and Wales in recent years because it has not been mentioned in recent cases. On this basis, the claimant caring for an old woman for several years for little or no pay, in the expectation seemingly that her house would be left to the claimant, might lead to an award of £200,000 to compensate the claimant for their detriment (as in *Jennings* v *Rice*).
5. Proprietary estoppel (considered in greater detail in Chapter 6) will award rights when there has been a representation (or assurance, or understanding, or an impression that the defendant knew the claimant was forming) on which the claimant relied to their detriment. This doctrine is 'remedial' in the sense that the court can award whatever it considers appropriate, ranging from an award of the entire freehold (*Re Basham* [1986] 1 WLR 1498) through to mere compensation (*Jennings* v *Rice*) or a combination of property rights and financial compensation (*Gillett* v *Holt* [2001] Ch 210). This fifth doctrine is not based on common intention and was not referred to in *Jones* v *Kernott*, although it was affirmed by the House of Lords in *Thorner* v *Major* [2009] UKHL 18.

Answering a problem question in this area

When answering a problem concerning the issue of whether or not a person has an equitable interest in a home, the following approach is suggested. (You are welcome to take another approach if you prefer it on your reading of the cases. This suggested approach draws one line through the various cases.) It is based on the joint judgment of Lady Hale and Lord Walker (which is very similar indeed to the summary provided by Lord Kerr) in *Jones* v *Kernott*:

- First, apply the presumptions in *Jones* v *Kernott*: single ownership of the legal title presumes single ownership of the equitable interest, whereas multiple ownership of the legal title presumes multiple ownership of the equitable interest.
- Second, recognise that the presumptions can be rebutted (i.e. ignored) if the parties' common intention can be shown to be something other than the presumption. So, apply the various different approaches to common intention to the facts. Your goal is to demonstrate that you know each different approach is likely to produce a different outcome:

1. Apply the (unpopular but clear) test in *Rosset* (i.e. have the parties formed the necessary agreement, arrangement or understanding, or has the claimant contributed to the purchase price or to the mortgage instalments?) Mere contributions to supervising construction work or to utility bills will not matter on this account.
2. Apply the balance sheet approach, remembering that the majority of the House of Lords in *Stack* and the Supreme Court in *Jones* v *Kernott* refused to follow resulting trust thinking in the future.
3. Apply the family assets approach in *Midland Bank* v *Cooke* by undertaking a survey of the entire course of dealing between the parties, including the length of their relationship (where a long-term marriage would seem to justify allocation of large rights in the property), contributions to day-to-day familial expenses, bringing up children as a couple, and so forth. This would justify dividing the property 50:50 between a married couple when resisting a mortgagee's repossession claim (as in *Cooke*).
4. Apply the unconscionability approach to prevent the claimant being treated unconscionably. This may justify a wide range of outcomes.
5. Apply proprietary estoppel principles.

- Third, if the common intention analysis is inconclusive, you may rely on doing what is 'fair' between the parties.

It may be that the five-fold approach to common intention has too many cases in it for you to discuss in the time allotted in the examination. In that case, you could omit the balance sheet and unconscionability approaches (being the approaches that are least often followed in the case law). You might also be instructed in a problem question to omit proprietary estoppel: this is because proprietary estoppel is covered in a different chapter of the guide and because the examiners are aware of how much time you have to write your answers. Consequently, you need only focus on the first and third approaches in detail, bringing in comment on the others as you wish.

In terms of an essay, it would be possible to use these different categories of approach to common intention and the model set out in *Jones* v *Kernott* as the structure for an essay, together with the reading set out in this chapter of the guide. Alternatively, you could follow the different judgments in *Stack* and consider the strengths and weaknesses of the judgments of Lady Hale, Lord Hoffmann (with his ambulatory constructive trust) and Lord Neuberger (whose dissenting judgment considered the use of a resulting trust adapted for the equity of the parties' subsequent situations), and then show how *Jones* v *Kernott* tried to solve those problems. Alternatively again, you could discuss any of the academic discussions of the law in this area which are set out in the assigned reading.

Which type of trust is used

Jones v *Kernott* operates on the basis of 'constructive trust', albeit that the principles in relation to the home are different from other forms of constructive trust in the general law. An express trust over the land would trump this constructive trust, as in *Pankhania* v *Chandegra* [2012] EWCA Civ 1438. It is also to be assumed that proprietary estoppel continues to be potentially significant in relation to ownership of the home (and land generally) even though it is not mentioned in *Jones* v *Kernott*. Some commentators have taken the approach that there is a difference between whether or not rights are acquired in the home in the first place, and the size of that equitable interest in the home. It is not always so clear that the judges take the same approach.

Sample examination questions

Question 1

Ted and Sylvia were an unmarried couple who bought a disused farmhouse together in August 2018 for £250,000. In 2018, Ted was a struggling playwright aged 30, whereas Sylvia was a successful poet, aged 25, with one very successful book of

poems already published. This difference in their professional fortunes was a source of tension in their relationship.

The purchase was funded as to £25,000 by way of a gift from Sylvia's parents and the remainder by way of mortgage from Mammoth Bank, which was taken out in Ted's sole name. The legal title in the property was registered in Ted's sole name. Ted told Sylvia that putting the house in his name was 'a legal formality that will be sorted out if we get married in the future'. As the couple stood on the doorstep on the day that they moved into the house, Sylvia said: 'I don't care about the law: I think of this as being our home together, darling.'

The vendor of the house worked at the company which published Sylvia's work. Therefore, Sylvia had been able to acquire a reduction in the price of the property by £10,000 to the sale price of £250,000.

The house was a large farmhouse outside Exeter. The couple intended to have a big family together. Ted told Sylvia that she must stay at home to supervise the extensive renovation works which were being done on the property while he flew to Los Angeles for two months to try to make some money there. Ted had not earned any money in the 12 months leading up to this.

In fact, all of the mortgage repayments were made from the profits from Sylvia's first book during 2018 and 2019. Sylvia supervised the builders and did a reasonable amount of cosmetic work around the house herself. She was also very stressed about Ted's continued absence. Consequently, she missed her deadline for the delivery of her second book of poems to her publishers. In the meantime, Ted had managed to sell a screenplay to a Hollywood film studio while flying backwards and forwards between Exeter and Los Angeles. As a result of this sale of the screenplay, Sylvia and Ted were able to share the cost of the renovation, in the amount of £50,000, equally between them. The value of the property increased by £150,000 as a result of the renovations.

On the evening when the building work was finally finished in August 2019, Sylvia said: 'I have put a lot of work and money into this property, but I am slightly worried that it's all in your name'. Ted replied: 'Don't bother me with all that now. We will be rich now that I am such a big success.' The next day, Sylvia created a will which passed all of her rights in the house to her sister, Kitty.

Secretly, Ted had begun an affair with a famous Hollywood actress. When Sylvia found out about the affair she fell into a deep depression and committed suicide last month.

Advise Kitty as to Sylvia's rights in the property at the time of her death.

Question 2

'The case law relating to the ownership of the home continues to exist in a state of some confusion. Different courts have set out very different models of the parties' rights. The result is that it is impossible for litigants to know their rights before they go to court. It would be preferable for there to be legislation in this area. It would be worth having a little injustice at the edges if the main principles could be made clearer.' Discuss.

Advice on answering the questions

Question 1

Issues in relation to addressing this problem: we shall consider this problem on the basis of the decisions in *Stack* v *Dowden* [2007] UKHL 17 and *Jones* v *Kernott* [2011] UKSC 53 and the case law leading up to them. The decision of the Supreme Court in *Jones* v *Kernott* has explained *Stack* v *Dowden* and the principles to be followed in the terms set out here, in the joint judgment of Lord Walker and Lady Hale, at paragraph [51], as set out above, principally:

> ...(2) [The] presumption can be displaced by showing (a) that the parties had a different common intention at the time when they acquired the home, or (b) that they later formed the common intention that their respective shares would change.

> (3) Their common intention is to be deduced objectively from their conduct…
>
> (4) …where…it is not possible to ascertain by direct evidence or by inference what their actual intention was…'the answer is that each is entitled to that share which the court considers fair having regard to the whole course of dealing between them in relation to the property'…
>
> (5) …Financial contributions are relevant but there are many other factors which may enable the court to decide what shares were either intended (as in case (3)) or fair (as in case (4)).

Following that structure, the legal title is placed in Ted's sole name, which raises a presumption that Ted is the sole owner. However, there is evidence to suggest that Sylvia is intended to have separate rights. First, Sylvia made all of the repayments on the house and therefore it would be unconscionable to deny her any rights in the house; second, Ted bullied Sylvia and therefore placing the house in his name may have been done as a result of bullying; third, she made a will that treated her share separately from that of Ted. Therefore, there are good reasons for supposing that their intentions were different from the record on the legal title.

This section follows the order of the cases as they are discussed above:

- Following the authorities on common intention, we could start with *Lloyds Bank plc* v *Rosset* [1991] 1 AC 107. Under *Rosset*, it is not clear that there was any agreement, arrangement or understanding that was not procured by bullying. As to common intention by conduct, we must look at the fact that Sylvia contributed all of the cash and therefore she should acquire all of the equitable interest. Interestingly, it was contributions to the purchase price or the mortgage which would count, and therefore it is unclear whether on a literal reading of *Rosset* Ted's contribution to the renovation works should count years later.
- The balance sheet cases would allow Sylvia to take into account her acquisition of a discount on the purchase price on resulting trust principles (e.g. *Cox* v *Jones* [2004] EWHC 1486 (Ch); although *Evans* v *Hayward* [1995] 2 FLR 511 would not have taken into account mere haggling).
- The family assets case of *Midland Bank* v *Cooke* [1995] 4 All ER 562 asked that we look at the 'entire course of dealing between the parties', which might assist Ted here because it would consider the fact that the things said between the couple at the outset suggested that the house was to be held jointly between them. However, there was no unconscionable pressure or lying in those cases (as there had been in *Eves* v *Eves* [1975] 1 WLR 1338 when a common intention was not found as a result).
- It is unclear here when a representation could be said to have been made that would support a proprietary estoppel analysis.

If this analysis is inconclusive, then *Jones* v *Kernott* suggests that the court could look at 'fairness'. It might be said to be 'fair' here for Sylvia to have acquired the majority of the rights in the home as a result of her larger cash contribution to the purchase and also her half contribution to the renovation works, and to take into account the history of bullying between them. Consequently, it could be said that the majority of the equitable interest should be treated as having been severed from any joint tenancy as a result of being left on trust for Kitty, save for a portion represented by Ted's cash contribution to the renovations. Thus, Kitty should inherit Sylvia's share and be entitled to sell the house (accounting to Ted in cash for his contribution to the property (possibly accounting for the increase in value caused by the renovations)). More controversially, Kitty could argue to be entitled to evict Ted from the property (save for accounting to him in cash for his contribution to the renovation works) so that she could move into the property herself if she wished (an approach which would accord with the flexibility shown in the estoppel case of *Stallion* v *Albert Stallion* [2009] EWHC 1950 (Ch)).

Question 2

In writing an essay it is important to have a point: that is, you must have a thesis that you are seeking to prove or to disprove. In advancing that thesis, you must employ an analysis of the decided case law or statute (as appropriate) as well as any academic

commentary to which you have been referred in the textbook. Simply setting out a description of the law will not gain you a good mark in itself. Rather, the marks are earned by demonstrating how an analysis of that law impacts on your thesis.

Here, clearly, you must consider the decision of the Supreme Court in *Jones* v *Kernott*. That judgment is really a commentary (and slight correction) on the judgments of the House of Lords in *Stack* v *Dowden*, except for the introduction of 'fairness'. This case was considered in detail in the assigned reading. This essay gives you enormous scope to take whichever approach to the subject you wish. The assumption in the title is that there was something wrong with the approach taken in the Supreme Court: you should decide whether you want to be similarly critical, or whether you think that *Jones* v *Kernott* marks an improvement over *Stack* v *Dowden* (especially now that it has forgotten the assumption that everything will be sorted out by the TR1 Land Registry form). The judgment delivered jointly by Lord Walker and Lady Hale divides between common intention and fairness.

The idea of common intention emerged originally in the speeches of Lord Diplock in *Pettitt* v *Pettitt* [1970] AC 777 and *Gissing* v *Gissing* [1971] AC 886, and has been contested in every following decision as to its precise meaning and scope (e.g. *Lloyds Bank plc* v *Rosset, Grant* v *Edwards* [1986] Ch 638, *Midland Bank* v *Cooke, Oxley* v *Hiscock* [2004] EWCA Civ 546, etc.). You could probably consider the model established in each of those cases (as discussed in the reading in detail) and examine their strengths and weaknesses, before culminating with *Kernott* and asking whether you think the Supreme Court should have acted differently. By examining all of these cases you could adopt the 'dispassionate scientist' approach (as set out in the advice on essay writing in the Introduction to this guide) by simply explaining the differences between the various judges in the many cases, instead of choosing which one of them you prefer. This is a subject in which explaining the differences between the cases well could be sufficient to achieve a first class grade, especially if you address the precise question you are asked in the essay title.

Activity 4.1

Read *Stack* v *Dowden* [2007] UKHL 17 and note the relevant facts and decision, including how the House of Lords views the cases mentioned earlier in this chapter. Also read the Law Commission recommendations in Law Com 307 (summarised on their website at www.lawcom.gov.uk).

a. **How should Lord Bridge's judgment in *Rosset* now be viewed?**

b. **To what extent would the Law Commission recommendations be a radical reform?**

c. **How similar are the Law Commission recommendations to the approach taken by the House of Lords in *Stack* v *Dowden*?**

d. **How does Lord Neuberger's approach in *Stack* differ from that of the majority?**

No feedback provided.

Self-assessment questions

1. **Explain what is meant by joint tenancy and tenancy in common. What is the difference between them?**
2. **How can a person whose name is not on the legal title to land acquire a beneficial interest?**
3. **What is common intention and how is it significant in co-ownership?**
4. **What are the 'four unities' needed to establish joint tenancy?**
5. **When does co-ownership arise via a resulting trust?**
6. **What kinds of contributions will trigger a constructive trust?**
7. **How have the principles as to quantification of shares of cohabitees in their home changed recently?**

Summary

Co-owners at law are joint tenants. Co-ownership in equity can take the form of joint tenancy or tenancy in common, and may be created expressly or impliedly. A person may become a co-owner in equity by making contributions to the property sufficient to trigger either a resulting trust or a constructive trust. The extent of such a co-owner's interest may not be directly proportionate to their contributions, and courts have recently relaxed the criteria upon which such interests are calculated.

Further reading

- **Smith, Chapter 11 'The family home'.**
- **Bridge, S. 'The property rights of cohabitants – where do we go from here?' (2002) *Fam Law* 743.**
- **Probert, R. 'Sharing homes – a long awaited paper' (2002) *Fam Law* 834.**
- **Dixon, M. 'The never-ending story – co-ownership after *Stack* v *Dowden*' (2007) *Conv* 456.**

4.4 Severance

Core text

- **Dixon, Chapter 4 'Co-ownership': Section 4.11 'Severance'.**

Further reading

- **Bogusz and Sexton, Chapter 8 'Co-ownership of land – the basic principles': Sections 8.10–8.12.**
- **Smith, Chapter 15 'Joint tenancy and tenancy in common', Parts 2 'Severance of the joint tenancy' and 3 'Do we need both the joint tenancy and the tenancy in common?'.**

Severance is the process by which a joint tenancy in equity can be converted into a tenancy in common, to avoid the operation of survivorship. As only a joint tenancy is permissible at law, one cannot sever the legal title (s.36 LPA 1925). If there are more than two co-owners in equity, severance will operate to give a tenancy in common only to the severing party; the others will remain joint tenants. So, if A, B and C are joint tenants at law, holding for themselves as joint tenants in equity, then A severs, the result is as shown in the diagram below. Please note, when severing, the share any party acquires is calculated directly by reference to the number of joint tenants (any of whom is entitled to an equal share of the joint tenancy on severance) and not according to the parties' original contributions. So, for example, if on purchase A had contributed 40 per cent to the initial purchase, and B and C had each contributed 30 per cent, if A severed he could get 33.3 per cent (100 per cent divided by three).

At Law	A + B + C
In Equity	A + B + C

If A severs his joint tenancy then the position would be

At Law	A + B + C
In Equity	B + C as joint tenants of 2/3 A as tenant in common of 1/3

Under s.36(2) LPA 1925 a joint tenancy in equity can be severed in writing or by such other means as would sever a joint tenancy in personalty (as discussed below under *Williams* v *Hensman* (1861) 70 ER 862). The writing is a unilateral act by which one joint tenant gives notice to all the other joint tenants. The writing is not required to be signed and it does not need to take any special form. Its content must, however, show sufficient intention to sever the joint tenancy immediately; see *Burgess* v *Rawnsley*

[1975] Ch 429 and *Gore and Snell* v *Carpenter* (1990) 60 P&CR 456. There are a wealth of cases, some contradictory, on how to evince this intention. Compare, for example, *Harris* v *Goddard* [1983] 1 WLR 1203 and *Re Draper's Conveyance* [1969] 1 Ch 486.

As well as displaying the necessary intention, the writing must be served properly on all the other joint tenants (ss.36 and 196 LPA 1925). For service, s.196 requires that it is either sent (correctly addressed – see *Quigley* v *Masterson* [2011] EWCH 2529), or otherwise left at the joint tenant's last known place of abode or business. In *EON UK plc* v *Gilesports Ltd* [2012] EWHC 2172 Arnold J did not regard an email to be a valid form of notice for the purposes of s.196(3) (but there it was in the different context of a notice given to a landlord by the tenant rather than for the purpose of effecting severance under s.36). It is not necessary that the notice is actually read by the joint tenants, as it is deemed to be served the moment it arrives (not when posted, as in the postal rules). It was consequently held by Neuberger J (as he then was) in *Kinch* v *Bullard* [1999] 1 WLR 423 that the subsequent destruction of the notice to prevent the other joint tenant(s) reading it did not prevent the severance taking place, although *obiter* it was further suggested that the party who destroyed the notice (or more accurately their estate) would be estopped from relying upon the hidden severance to their advantage if they in fact predeceased the other joint tenant(s). Although it is clear that a s.36 notice cannot be withdrawn **after** it has been effectively served, can it be withdrawn before service is effected and, if so, how? These are moot points (see *Kinch* v *Bullard* [1999] 1 WLR 423). Where the notice is sent by registered post, it makes no difference to the notice being effectively delivered, and therefore constituting severance, that the sender signs for it on delivery; see s.196(4) LPA 1925 and *Re 88 Berkeley Road* [1971] (Ch) 648. A notice sent by registered post is deemed to have arrived on the day it would have done in the normal course of posting unless returned undelivered: see *Fantini* v *Scrutton* [2020] EWHC 1552 Ch.

In *Williams* v *Hensman* (1861) 70 ER 862 Page Wood VC identified three common law forms of severance in equity.

1. A further unilateral act of severance is possible via 'acting on your share'. This involves the joint tenant doing some irrevocable act of alienation and is slightly contradictory as, despite not having a share, they acquire one by acting on a share they do not yet have. This includes complete alienation, such as transferring one's beneficial interest to another, by satisfying the requirements of s.53(1)(c) LPA 1925 or agreeing to do so under a specifically enforceable contract that complies with s.2 Law of Property (Miscellaneous Provisions) Act 1989 (LP(MP)A 1989). It may also be partial alienation by mortgaging or charging one's beneficial interest. Similarly, if a person is declared bankrupt this will automatically sever their joint tenancy as all the bankrupt's assets (including any interests under a joint tenancy) automatically vest in the trustee in bankruptcy at that point.

2. Mutual agreement (see *Burgess* v *Rawnsley* [1975] Ch 429). An agreement to make mutual wills, to sever or to deal with the land in a manner which implies severance, will all form severance by mutual agreement. Note that although a valid contract concerning land requires writing under s.2 LP(MP)A 1989, *Burgess* v *Rawnsley* concerns the intention of the parties and not the issue of formalities, and so severance can occur even though the agreement which causes the severance is unenforceable in its own right due to lack of formality. Although mutual agreement sounds tautological it is not, for the agreement has to include all the joint tenants, not just some of them.

3. Course of dealing (otherwise known as mutual conduct). A course of dealing is sufficient to indicate a common intention that one or more tenants should be regarded as having an undivided share. Like mutual agreement, the course of dealing has to be mutual and involve all the joint tenants rather than just some of them (hence the alternative title). See *Gore and Snell* v *Carpenter*.

4. Homicide, though obviously this is rare. See *Re K* [1985] Ch 85. This unusual form of severance operates because a joint tenant who kills another joint tenant will not be allowed to profit from their crime, and so survivorship must not operate.

Severance cannot be by will (*Re Caines* [1978] 1 WLR 540) and must be *inter vivos* because by the time the will comes into operation any interest under a joint tenancy will already have disappeared under the doctrine of survivorship. It was stated in *Gould* v *Kemp* [1834] 2 My & K 304 that the right of survivorship takes precedence over testamentary dispositions.

Changes to the beneficial ownership will not alter the legal ownership. You cannot sever a joint tenancy at law: the only way this will change is if a legal joint tenant dies, when they then automatically disappear from the legal title under the doctrine of survivorship.

Activity 4.2

X and Y are beneficial joint tenants. X writes to Y offering to sell his interest for £5,000. Y replies that she would like to buy X's interest, but that she can only pay £4,000. Is the joint tenancy severed? Explain.

Summary

While a legal joint tenancy cannot be severed, an equitable joint tenancy may be severed in a variety of ways, and thus converted into a tenancy in common. The most important of these methods are actions that destroy one of the four 'unities' described in 5.3.1 above. Severance can also come about by notice in writing of an intention to sever immediately, provided it is communicated.

Further reading

- **Crown, B.C. 'Severance of a joint tenancy of land by partial alienation' (2001) 117 *LQR* 477.**
- **Gardner, S. 'Family property today' (2008) 124 *LQR* 422.**
- **Tee, L. 'Severance revisited' (1995) *Conv* 105.**

4.5 The 1925 and 1996 reforms

Core text

- **Dixon, Chapter 4 'Co-ownership': Sections 4.4 –4.9.**

4.5.1 Trusts for sale: a brief overview

After 1925, to simplify conveyancing (but maintain flexibility), a trust was imposed whenever land was co-owned. Between 1925 and the beginning of 1997 this was achieved by imposing 'an immediate binding trust for sale' to form the statutory framework within which co-ownership operated.

4.5.2 Difficulties with the pre-1996 position

A trust for sale essentially gave the trustees of the land a duty to sell it and a power to postpone the sale. To modern eyes, this might seem a curious land-holding mechanism. It was, however, particularly well-suited to situations where land was treated primarily as an investment to be bought and sold because it ensured that the owners could liquidate their assets unless they unanimously agreed not to do so. In 1925, when land was owned by a small minority of investors and most families lived in rented accommodation, this made absolute sense. However, it became increasingly problematic after the Second World War when an increasing number of families bought their own homes. Whereas the primary importance of land to an investor is its exchange value in the marketplace, the same is not true of an owner-occupier, who is primarily interested in its use value as somewhere to live. Thus, a land-holding device that included an implicit dynamic towards sale was ill-suited to providing the stability a family required, particularly in light of the rising divorce rates and the breakdown of family life that occurred during the post-war period, where co-owners were likely to disagree as to whether the land should be retained or sold. Increasingly, the changed context of the trust became a very

artificial way of looking at most land ownership since the equitable interests behind the trust attached to the proceeds of sale rather than to the land itself, with the help of overreaching. The consent of named persons could be required for a sale and this was sometimes used to make the exercise of the duty of sale difficult. Since the duty to sell was paramount, if one trustee wanted a sale then they could impose their decision on the other(s). Section 30 LPA 1925 gave a discretion to the courts in deciding whether a sale should be imposed in spite of contrary wishes and a great deal of case law was generated on the issue of how a court should balance competing desires of beneficiaries to sell the land or reside on it. The courts sought to deal with this issue by gradually developing the secondary or collateral purpose test where, despite the primary purpose of a trust for sale being (by definition) sale, they were prepared to postpone sale where the secondary purpose (e.g. providing a home for children) could still be attained.

There was also (until 1955) a denial that beneficiaries had any right to occupy the land held on trust for sale. Change came with Lord Denning's judgment in *Bull* v *Bull* [1955] 1 QB 234 where he held that a beneficiary did have the right to occupy the land; this has been almost universally accepted since. The main problem with the trust for sale's application to land law was that its premise was simply incompatible with the nature of family trusts of land: a duty to sell, the doctrine of conversion and the initial denial of a beneficiary's right to occupy the land are not a good fit with the reality of the situation where land provides a home and people care about more than its value as a financial asset.

4.5.3 Trusts of Land and Appointment of Trustees Act 1996

Introduction and background

According to s.1 TLATA 1996, 'trust of land' means '…any trust of property which consists of or includes land…', whether express, implied, resulting or constructive, and whether created before or after the Act itself came into force. There is an exception, worthy of only a brief mention here (no more because it is outside the syllabus), for existing strict settlements that had been created under the Settled Land Act 1925. Essentially, such settlements create a series of beneficial interests in favour of a succession of persons – successive rather than the concurrent interests we find in co-ownership. So, if S transferred his fee simple in land to A for life, then to B in fee simple, this will be a settlement. Historically, settlements were used particularly by the wealthy and the aristocracy in order to keep land in the ownership of one family for a very long time, preventing its fragmentation. In 1925 there were several key reforms introduced to deter the creation of long-lasting settlements and, in any event, they have increasingly become less relevant to land holding in England and Wales. In any event, since the 1996 Act, all trusts for sale of land (and all post-1996 settlements) are converted into 'trusts of land'. Trustees of land have broader powers than those previously enjoyed by trustees for sale under ss.28 and 29 LPA 1925 (ss.6–9 TLATA 1996), including the power to delegate any of their powers to beneficiaries of full age beneficially entitled to possession.

As far as co-owned land is concerned, TLATA 1996 replaced the statutory trust for sale with the trust of land, a land holding device that was neutral as between sale and retention. Purchasers could still choose to create a trust for sale but even those now came within the machinery of the trust of land (as did the statutory trusts for sale that had been imposed automatically prior to 1996). Strictly speaking it is thus no longer necessary to ponder the secondary or collateral purpose of a trust of land as such trusts have no primary purpose. However, as you will see in Section 4.6, the collateral purpose case law is still relevant as it played an important role in the framing of s.15 which non-exhaustively lists the issues that the court must consider when deciding whether to order the sale or retention of the land after an application by an interested party for an order under s.14.

4.5.4 Trustees' powers and duties

FURTHER READING

- **Bogusz and Sexton, Chapter 7 'Trust of land': Sections 7.5–7.13.**

The TLATA 1996 provisions are important, not least because, as previously mentioned, a trust of land is any trust whose property is, or includes, land (s.1(1)(a)). It may be created formally or informally and so may be express, resulting or constructive (s.1(2)(a)). The legal estate is vested in 'trustees of land'. The trustees are under no duty to sell the land; rather, they have a power of sale. They may sell or retain it (ss.4 and 5). As, unlike trustees of pre-1997 trusts for sale, they are not under a duty to sell the land, the doctrine of conversion (whereby the interest of a beneficiary under a trust for sale was regarded as an interest in personal property) is abolished by s.3 TLATA 1996. However, where sale occurs then the overreaching machinery originally provided for trusts for sale by ss.2 and 27(2) of the LPA 1925 (whereby, on payment of the purchase money to two trustees or a trust corporation, the interests of the beneficiaries are overreached) is retained for trusts of land imposed by the 1996 Act.

The trustees of a trust of land have all the powers of an absolute owner (s.6(1) and (2)). They may convey the land to the beneficiaries (s.6(1)) and they may delegate any of their functions to the beneficiaries (s.9), provided the beneficiaries are of full age and entitled in possession. Provisions requiring the consent of any person before dealing with the land are valid, except in charitable and ecclesiastical trusts (ss.8 and 10). As under the previous law (in s.26(3) LPA 1925), the trustees must consult the beneficiaries in the exercise of their functions and give effect to their wishes (s.11). Ostensibly, this is an important restriction upon the powers of trustees of land but it can, however, be excluded in an express trust and it is important to appreciate how it is stated in qualified terms. Trustees are only required to consult 'so far as is practicable' and should give effect to the wishes of the majority by value of the beneficiaries, but only insofar as they are consistent with the general interests of the trust.

Activity 4.3

To what extent have the powers and duties of trustees of land been changed by TLATA 1996?

No feedback provided.

4.6 Rights of beneficiaries

Core text

- **Dixon, Chapter 4 'Co-ownership': Sections 4.4–4.9.**

Further reading

- **Bogusz and Sexton, Chapter 9 'Co-ownership – the resolution of disputes'.**
- **Smith, Chapter 16 'Trusts of land', Part 3 'Management of the land': Section A 'Sale'.**

Beneficiaries of a trust of land have the right to occupy trust land, although this right may be restricted or excluded, in which case compensation may be payable (ss.12 and 13 TLATA 1996). The House of Lords had to apply these sections for the first time in *Stack* v *Dowden* [2007] UKHL 17 in the context of occupation rents, and (having read the case for Activity 4.1) you should be familiar with how the judges dealt with the TLATA 1996 issues in that case, including Lord Neuberger in his dissent. It seems TLATA may not apply to a claim by a co-owner's trustee in bankruptcy for occupation rent from another co-owner; but, equally, it is not settled when/if such a claim can or should fall within the traditional equitable accounting principles: *French* v *Barcham* [2008] EWHC 1501 and *Davis* v *Jackson* [2017] EWCH 698 [49]–[70].

The rules relating to consents and consultation are similar to those that applied to trusts for sale under s.26 LPA 1925. By contrast ss.14 and 15 of TLATA 1996, which provide for applications to the court for an order relating to the exercise of the trustees' functions and set out the matters to be considered by the court in determining such an application, go much further than s.30 LPA 1925.

4.6.1 Disputes as to whether property held under a trust of land should be sold or retained

Introduction

The case law before TLATA 1996 took a very particular view of the circumstances in which the trustees in a trust for sale could delay a sale. Ordinarily, a sale would always be ordered to protect creditors – whether creditors in an insolvency or mortgage creditors (i.e. a bank). No other category of person seemed to have this protected position. This made it very difficult for persons in occupation of a home to resist trustees who wanted to sell the property, especially if there were creditors, because the court would nearly always order that the property should be sold.

The provisions of TLATA 1996 regarding disputes as to sale

When there are disputes between the beneficiaries of a trust, or between trustees and some or all of the beneficiaries, then it is open to the parties to petition the court for an order as to how they should proceed. In many cases, one or more of the co-owner beneficiaries will want either to force or to prevent a sale of the land. Before TLATA 1996 it had already become recognised, largely through judicial creativity around s.30 LPA 1925, that, where land was bought for the purpose of providing a home to be occupied by the beneficiaries, sale could be postponed in order to allow such occupation to continue even though that was inimical to the duty to sell inherent in the trust for sale. The courts were doing what they could to remould legislation that had been drafted for a different social context of co-ownership to apply to its growing use for the family home. Section 30 has been replaced by the important provisions of ss.14 and 15 of TLATA 1996. It allows a trustee, or any person with an interest in the land (including a beneficiary or secured creditor), to apply to the court for an order relating to the exercise by the trustees of any of their functions. The scope of any order that the court is entitled to make is set out in s.14(2):

> …the court may make any such order –
>
> (a) relating to the exercise by the trustees of their functions (including an order relieving them of any obligation to obtain the consent of, or to consult, any person in connection with the exercise of any of their functions), or
>
> (b) declaring the nature or extent of a person's interest in property subject to the trust, as the court thinks fit.

Clearly, then, this creates a broadly based jurisdiction that empowers the court to make any order it sees fit. Applications made under s.14 divide into two main types: disputes where no one is bankrupt; and disputes consequent upon bankruptcy, and very different results may occur between one type of case and the other.

TLATA disputes not involving bankruptcy

Section 15 sets out the matters to be considered by the court in hearing applications where no bankruptcy has occurred.

The principal question is: what are the matters that the courts must take into account when exercising their powers under s.14? In this regard, s.15(1) sets out four factors that must be considered:

> (a) the intentions of the person or persons (if any) who created the trust,
>
> (b) the purposes for which the property subject to the trust is held,
>
> (c) the welfare of any minor who occupies or might reasonably be expected to occupy any land subject to the trust as his home, and
>
> (d) the interests of any secured creditor of any beneficiary.

Therefore, the first factor mentioned in s.15(1)(a) that the court must consider is the settlor's intention in creating the trust of land (or, if there is more than one settlor, then it is their common intention that matters, see Arden LJ *White* v *White* [2003] EWCA Civ 924 at para.22). Where the trust is not created expressly – as is likely to be the case –

establishing the intention may prove difficult. It is likely that this is where the court may turn to the second consideration listed in s.15 – the current purpose for which the trust is held. Here the court may look to the objective (or objectives) for which the property was held. These may either be set out in the trust or agreed by the parties informally. Thus, a trust that was created for the purpose of providing a home for the beneficiaries would be likely to preserve the home primarily (where possible), whereas a trust created for investment profit would be more likely to envision a sale. Clearly s.15(1)'s first two factors – intention and purpose – may overlap, although the second factor may be open to a wider application and accommodate the possibility that the original purpose may have changed over time, provided any such change has been agreed by the parties (*per* Arden LJ in *White* v *White*). So, what starts out as a matrimonial home may have become (with the arrival of children) a family home by the time of the TLATA proceedings: *First National Bank* v *Achampong* [2003] EWCA 487. The third factor s.15(1) mentions is the 'welfare' of any children (or grandchildren *Achampong*) who occupy the property as their home. Given that children ordinarily do not contribute financially to the acquisition of property, and given that children cannot own property or enter into loan contracts, the case law under s.30 LPA 1925 had tended to overlook their interests (assuming that they will go wherever their parents go). Section 15(1)(c) gives the position of children legal status for the first time. However, it is the welfare of the children that is important and not simply their presence in the property: *Edwards* v *Lloyds TSB* [2004] EWHC 1745. The court will therefore be looking for evidence of any adverse impact that ordering a sale would have on them: *National Bank* v *Achampong* [2003] EWCA 487. Fourth, s.15(1)(d) recognises the interests of any secured creditor, who could be a mortgagee (i.e. a bank lending money on a mortgage) or a business creditor who has a property right granted to them over the property. As we shall see from the following discussion, ordinarily courts will give prominence to the needs of the creditors. Finally, the list in s.15 is not exhaustive, courts can look to any other factor relevant to the circumstances in each particular case.

Most, if not all, of these factors in s.15(1) were taken into account by the courts in determining applications under the old s.30 LPA 1925 and the question arises as to the extent to which cases decided under s.30 are still relevant (such as *Jones* v *Challenger* [1961] 1 QB 176, *Re Evers' Trust* [1980] 1 WLR 1327 and *Re Citro* [1991] Ch 142). There is a balancing act to be conducted by the court between these four potentially contradictory considerations and any additional factors the court identifies as relevant. The legislation is silent about the ranking to be given to them and on how they should be weighed when the court exercises its discretion. The factors do not seem to have been listed in any particular order and they have been applied flexibly and pragmatically. Each dispute is determined on a case-by-case basis but the body of accumulated case law can be looked at to shed light on how the factors in s.15 should be understood. Recent cases have certainly expanded the interpretation of s.15. In T*he Mortgage Corporation* v *Shaire* [2001] Ch 743, it was shown that the post-1997 scheme is dramatically different in relation to the rights of beneficiaries versus those of creditors. A matrimonial home was held in joint names by Mr and Mrs Shaire. Mr Shaire was deemed to have charged his beneficial interest to secure his business debts (as a result of forging his wife's signature on a purported mortgage of their joint legal interest, which obviously had no effect on her beneficial interest). The Mortgage Corporation sought an order for sale with vacant possession when the debts were unpaid so that they could claim his beneficial interest (but not hers of course). Applying s.15, the court held that the mortgagee's interest was only one of the four factors that the court had to consider and that there was a wider discretion in favour of families under s.15 than under the prior law. Nothing in the facts indicated that the mortgagee's interest should take priority over, for example, those of resident children and Neuberger J commented that pre-TLATA 1996 cases should no longer be regarded as decisive. His decision also highlighted how the breadth of the power in s.14 means that the court is not confined to either ordering or refusing sale. Rather, it can use its jurisdiction to craft a creative resolution that responds to the particular circumstances of the parties' dispute. In *Shaire* this led to Neuberger J being willing to convert Mortgage Corporation's interest into a loan if Mrs Shaire agreed to repay the interest on the loan, otherwise he would order a sale of the house. Although Peter Gibson LJ in *Bank of Ireland Home Mortgages* v *Bell* [2001] 2 FLR recognised the increased scope offered

by s.15, he also emphasised the orthodox approach that a 'powerful consideration is whether the creditor is receiving proper recompense for being kept out of his money…'. With the Bells' house being worth less than the debt owed to the bank (a debt that was continuing to grow) and a son nearing adulthood, the Court of Appeal decided it would be unfair to refuse the Bank of Ireland's application for sale.

Therefore, although there is no presumption under s.15 to make an order in favour of the creditors of any beneficiary, it is still the case, as noted by the Court of Appeal in *Bell*, that their voice will normally prevail. (Interestingly, this priority is even evident in the nuanced order made in *Shaire*.) In effect, the prioritisation of creditors' interests may result in the demotion of family considerations such as the welfare of children. The court may sometimes be persuaded, but it seems exceptionally, to strike a different balance between the competing considerations of family and creditors by postponing sale, as in *Edwards* v *Lloyds TSB* [2004] EWHC 1745, until the youngest child has reached the age of majority. In that case, ordering an immediate sale in favour of the creditors would have left insufficient money for the mother and children to afford to buy an adequate replacement home. But the interests of the family have not always been preferred over that of the secured creditors (*Achampong*); and presumably the anxiety that creditors should not be kept waiting for money tied up in what is, in reality, their share of the property will always be difficult to counteract. Arguably, there are policy reasons why this is the case (as the credit system requires secured lenders to feel confident that they can realise their security if the debtor fails to repay their debt) but there is also a very simple practical explanation. If a creditor is unsuccessful under s.15, after making an application under s.14, he can of course proceed to make the beneficiary bankrupt at which point the court's discretion under s.14 is no longer governed by s.15 but by s.335A Insolvency Act 1986.

TLATA disputes involving bankruptcy

Where a co-owner becomes bankrupt, his interest in the house passes to his trustee in bankruptcy, whose job it is to sell the bankrupt's assets, including his interest as co-owner in the house, so that the creditors can recoup at least some of what they are owed. The other co-owners are unlikely to want a sale to occur, especially if the property is their family home. Before TLATA 1996, cases like *Re Citro* [1991] Ch 142 decided under s.30 LPA 1925 had taken the position that the interests of insolvency creditors would be given priority over the interests of other people. In *Re Citro*, it was therefore no answer to an application for sale on behalf of the bankrupt's creditors that the loss of the home that was the subject of the trust would require the family to leave the area in which they lived and to uproot their children from their schooling. It was held that a sale of the property would not be refused unless the circumstances were exceptional and that this form of hardship was, in the maudlin and yet lyrical view of the court, merely one of the melancholy features of life. As Nourse LJ put it in *Re Citro*:

> What then are exceptional circumstances? As the cases show, it is not uncommon for a wife with young children to be faced with eviction in circumstances where the realisation of her beneficial interest will not produce enough to buy a comparable house in the same neighbourhood or indeed elsewhere. And, if she has to move elsewhere, there may be problems over schooling and so forth. Such circumstances, while engendering a natural sympathy in all who hear of them, cannot be described as exceptional. They are the melancholy consequences of debt and improvidence with which every civilized society has been familiar.

The sense one might take from this passage is that this area of law is miserable and that the law is not going to do anything to relieve that misery for people faced with the prospect of losing their homes to insolvency creditors.

The first situation in which an application for an order for sale under s.30 LPA 1925 was denied was that in *Re Holliday* [1981] 2 WLR 996, a case in which the bankrupt had gone into bankruptcy on his own petition to rid himself of his creditors and one in which the debt was so small in comparison to the sale value of the house that there was thought to be no hardship to the creditors in waiting for the bankrupt's three children to reach school-leaving age before ordering a sale. However, that hardship will be caused to the children or to the family in general as a result of a sale in favour of a trustee in

bankruptcy is considered, as mentioned in the preceding paragraphs, to be merely one of the 'melancholy vicissitudes of life' (i.e. one of the sad parts of life).

Nowadays, applications by a trustee in bankruptcy for an order of sale under s.14 TLATA 1996 is governed by s.335A Insolvency Act 1986. The court's powers are as follows (s.335A(2)):

> On such an application the court shall make such order as it thinks just and reasonable having regard to—
>
> (a) the interests of the bankrupt's creditors;
>
> (b) where the application is made in respect of land which includes a dwelling house which is or has been the home of the bankrupt [or the bankrupt's spouse or civil partner or former spouse or former civil partner]–
>
> (i) the conduct of the [spouse, civil partner, former spouse or former civil partner], so far as contributing to the bankruptcy,
>
> (ii) the needs and financial resources of the [spouse, civil partner, former spouse or former civil partner], and
>
> (iii) the needs of any children; and
>
> (c) all the circumstances of the case other than the needs of the bankrupt.

Harrington v *Bennett* [2000] BPIR 630 noted five particular features of s.335A Insolvency Act 1986:

1. Where the application is made more than one year after the vesting of the bankrupt's property in the trustee, the interests of creditors are paramount.
2. The court can only ignore the creditors' interests in exceptional circumstances.
3. The categories of exceptional circumstances are not closed, with the result that it is open to the judge to decide what may constitute exceptional circumstances in future cases.
4. The term 'exceptional circumstances' indicates circumstances 'outside the usual melancholy consequences of debt or improvidence',
5. The fact that the sale proceeds may be used entirely to discharge the expenses of the trustee in bankruptcy is not an exceptional circumstance.

Therefore, by the time of *Harrington* we can see that we have returned to the position in *Citro* because the interests of the creditors are found to be 'paramount'. In regard to a sale application a trustee in bankruptcy makes in the first year following bankruptcy, the court must balance the factors listed in s.335A, a subtly but (importantly) different set of criteria than those found in s.15 of TLATA. In exercising its discretion over whether or not to order a sale, it considers such things as the needs and resources of others living in the bankrupt's house such as spouses/civil partners and children; and, perhaps controversially, any conduct by a spouse/civil partner that contributed to the bankruptcy. The court is not, however, allowed to consider the bankrupt's needs, be they financial, medical or psychological and no matter how serious: *Everitt* v *Budhram* [2009] EWHC 1219 (Ch). In sale applications, particularly where there are children, it is likely that an order of sale will rarely be made.

Then, after a year's grace, preference is given to the secured creditors, save where 'exceptional' circumstances can be found – meaning something beyond the range of distressing circumstances typically associated with bankruptcy (*Re Bremner* [1999] 1 FLR 912). The courts have set the bar high, requiring exceptional circumstances to be severe and unusual if they are to stave off an order of sale after one year has expired – such as, in *Claughton* v *Charalambous* [1999] 1 FLR 740 (Ch), the combination of serious illness, reduced mobility and a need to stay put in a specially adapted home. The cases also make it clear that a finding of exceptionality will usually delay an order of sale rather than postpone it indefinitely: *Re Raval* [1998] 1 FLR 740 (Ch) (one year to find suitable alternative accommodation for a spouse whose paranoid schizophrenia might be aggravated by an immediate move); and see *Grant* v *Baker* [2016] EWHC

1782 (Ch). The restrictive approach the courts take to 'exceptional circumstances' has been invoked several times, so far unsuccessfully, in claims that s.335A falls foul of the Human Rights Act 1998 (Article 8's right to respect for private and family life and the home): see *Bacra* v *Mears* [2004] EWHC 2170 (Ch) at para.40; and *Ford* v *Alexander* [2012] EWHC 266 (Ch) at para. 49.

4.6.2 Summary: co-ownership and TLATA 1996

TLATA 1996 created an important set of reforms. The law had previously used a concept of a 'trust for sale', which presumed that any co-owned land held on trust was intended for sale. This made it very difficult to explain how such land could be occupied as a home because the trustees were expected to sell that land. TLATA 1996 replaced the old 'trust for sale' with the new 'trust of land'. The trust of land provisions explained how the beneficiaries of a trust of land could occupy the trust property as a home without assuming that it was intended to be sold.

Importantly, TLATA 1996 (in ss.14 and 15) set out the issues that the courts are required to take into account when deciding whether a property should be sold or whether it should be kept as a home. The courts are required to take into account the needs of any insolvency or mortgage creditors, as well as the rights of any children in occupation of the property. The case law had previously prioritised the rights of creditors over all other people, except in very limited circumstances. The power of the secured creditor's voice continues to be heard loud and clear in disputes over sale dealt with under TLATA. Consequently, the provisions as to the sale of the home that comprises the trust property are important in considering the nature of the law and in analysing the circumstances that the courts will take into account when considering the sale of the property. Everything changes when sale is sought by a co-owner's trustee in bankruptcy. Thus, if the trustee in bankruptcy makes an application under s.14 it is important to realise that s.15 is no longer operative and the court is required to apply the subtly (but importantly) different criteria under s.335A Insolvency Act 1986.

ACTIVITY 4.4

a. How are the rights of co-owner beneficiaries different under a trust of land from under a trust for sale?

b. To what extent do the interests of occupying beneficiaries of a trust of land take priority over the interests of secured creditors of the beneficiary?

No feedback provided.

Summary

TLATA 1996 has radically changed the rules under which land is held on trust. It is important to understand, and be able to apply, the powers of trustees and rights of beneficiaries under the statute. Trustees no longer have a duty to sell the land, and beneficiaries' rights may have been strengthened by s.15.

FURTHER READING

- **Clements, L.M. 'The changing face of trusts: the Trusts of Land and Appointment of Trustees Act' (1998) 61 *MLR* 56.**
- **Dixon, M. 'To sell or not to sell: that is the question. The irony of the Trusts of Land and Appointment of Trustees Act 1996' (2011) 70 *CLJ* 579.**
- **Hopkins, N. 'The Trusts of Land and Appointment of Trustees Act 1996' (1996) *Conv* 411–31.**
- **Pascoe, S. 'Section 15 of the Trusts of Land and Appointment of Trustees Act 1996 – a change in the law? (2000) *Conv* 315.**
- **Pawlowski, M. 'Ordering the sale of the family home' (2007) 71 *Conv* 78.**

Sample examination questions

Question 1

Herbert and Wilma were married in 2004. They bought a house, Hersanmyne, for £200,000, of which £250,000 was contributed by Wilma's mother, Martha, who was to live with them in Hersanmyne. The house was conveyed to Herbert and Wilma on trust for themselves and Martha as joint tenants. Herbert and Wilma had a son, Sam, in 2007 and a daughter, Dawn, in 2010. In 2013 Herbert left Hersanmyne and has never returned. In 2014 Martha sent a letter to Herbert saying that she wished to have her share in the house repaid so that she could provide during her lifetime for Wilma and the grandchildren. Herbert ignored the letter. Martha died in 2015, leaving all her property to Wilma.

Herbert owned a business which failed in 2021, and he has debts of £30,000. His creditors are now pressing for payment and threatening bankruptcy proceedings. His only asset is his interest in Hersanmyne, now worth £50,000.

Wilma wishes to remain in Hersanmyne. She has no capital other than her interest in the house, but she has enough income to run the house and maintain herself and the children. Advise Wilma.

Question 2

In 2018, Mr Norton, who had three sons studying in London, decided to buy a flat for them to live in. He paid the whole of the purchase price, and the flat was registered in their names (Mark, Luke and John) as beneficial joint tenants. In 2020 Mark got married, moved out and sold his interest in the flat to John. In 2021 Luke wrote to John offering to sell his interest in the flat to John. John accepted the offer in principle but they had still not agreed a price when Luke was killed in a climbing accident. Luke left his estate to Mark and John equally.

Dispute has now arisen between Mr Norton, Mark and John as to (i) who owns the flat, (ii) who is entitled to occupy the flat, and (iii) whether the flat should be sold. Discuss.

Question 3

In 2015 Nick and his girlfriend, Ann, bought a small house for £300,000. Nick contributed £280,000 and Ann contributed £20,000, a gift from her mother, Jean. The house was registered in Nick's sole name. Nick was an unsuccessful musician, but Ann had a well-paid job and paid most of the household expenses. In 2018 Ann gave birth to a son, Charlie. In 2019 Nick and Ann invited Jean to come and live with them. Jean provided £30,000 to have an extra bedroom and bathroom added to the house for her use. In 2021, while Jean, Ann and Charlie were away on holiday, Nick mortgaged the house to the Midtown Bank. He has recently defaulted on his mortgage repayments and the bank is seeking possession of the house with a view to selling it.

Advise Jean and Ann. If the house were sold, how would the proceeds of sale be divided?

Advice on answering the questions

Question 1

Issues to consider: what was the effect of the 2014 conveyance? Note that, in spite of the unequal contributions to the purchase price, it was the intention of the parties that they should hold the house as beneficial joint tenants: see *Goodman* v *Gallant* [1986] Fam 106.

So Herbert and Wilma held the legal estate on a trust for sale (today taking effect as a trust for land under TLATA 1996) for themselves and Martha as joint tenants. Did Martha's letter operate to sever her joint tenancy? Section 36(2) LPA 1925 'notice in writing'? The effect of Martha's death will depend on whether severance occurred or not. Consider both possibilities. How is the beneficial interest in the house held now? Can Herbert force a sale of the house? Consider ss.14–15 TLATA 1996. The principles laid down in the cases on s.30 LPA 1925 continue to have some relevance and may therefore have some value in your discussion. If the house is sold, how will the proceeds of sale be divided?

QUESTION 2

Take care at the outset to consider the effect of the 2018 conveyance. Only once the scene has been set does it make sense to go chronologically through the various events that follow. The flat is conveyed to the three brothers as beneficial joint tenants. Any presumption of a resulting trust in Mr Norton's favour is rebutted by clear evidence that he intended the flat as a gift to his sons. A trust arises and the brothers hold the legal estate on trust for themselves as joint tenants in equity. The events of 2020 and 2021 require a discussion of severance. Clearly Mark has severed his joint tenancy, but what are the effects of the severance? (Mark remains a trustee and the beneficial interest is held by John and Luke jointly (two-thirds) and John as tenant-in-common (one third).) Did Luke sever his joint tenancy by mutual agreement or course of conduct? If not, the right of survivorship operates on his death and Mark and John hold the legal estate on trust for John absolutely. If Luke did sever, Mark and John hold the legal estate for themselves as tenants-in-common (one sixth/five sixths); in this case the TLATA 1996 provisions regarding occupation and sale would have to be considered.

QUESTION 3

There are several key issues to be considered; make sure not to miss any of them.

As Nick was the sole legal owner of the house, the first issue was whether either Ann or Jean could rely on equity (resulting/constructive trust or proprietary estoppel) to claim an interest in their favour. There is an immense of body of case law here. Ann would probably argue for a constructive trust (*Oxley* v *Hiscock* [2004] EWCA Civ 546 and *Stack* v *Dowden* [2007] UKHL 17 would be relevant here), while Jean would attempt to rely on estoppel. The second issue is one of priority (i.e. would the bank take subject to the interests of Ann and Jean, if any?) and requires you to consider whether their interests might override the mortgage by virtue of para.2 Schedule 3 LRA 2002.

Finally, you should consider TLATA 1996 and analyse the extent to which the court has exercised its s.14 discretion in favour of secured creditors. The division of the proceeds of sale would depend on conclusions reached on the earlier issues.

FOCUS OF THE ASSESSMENT

Within the scope of this chapter, there are three principal areas for assessment in the examination:

1. **A problem question asking you to apply case law (such as *Stack* v *Dowden* [2007] UKHL and *Jones* v *Kernott* [2011] UKSC 53) to a factual scenario where two or more people are contesting their respective rights in their home.**
2. **An essay asking you to analyse the case law leading up to *Jones* v *Kernott* by reference to the approach taken in the essay title.**
3. **An essay combining the material in the second assessment with proprietary estoppel (as discussed in Chapter 6).**

Quick quiz

QUESTION 1

Which statutory provisions can be relied on for the creation of an implied trust in land?

a. **s.53(1)(b) LPA 1925.**

b. **s.53(2) LPA 1925.**

c. **s.1 TLATA 1996.**

QUESTION 2

Which statutory provision stipulates that land can only be co-owned legally as a joint tenant?

a. **s.36 LPA 1925.**

b. It is a common law rule.

c. s.34 LPA 1925.

Question 3

When residential property is conveyed into joint names but there has been unequal contributions to the purchase price, what is the presumption made by the court?

a. That it is held on resulting trust as tenants in common.

b. That it is held as joint tenancy in equity.

c. That it is held on constructive trust.

Question 4

How can a joint tenancy be severed?

a. s.36 LPA 1925 provides for severance by notice and *Williams* v *Hensman* sets out the other methods for severing a joint tenancy in equity.

b. A joint tenancy can never be severed; see s.36(2) LPA 1925.

c. By any act which breaks the four unities.

QUESTION 5

What is the importance of s.3 TLATA 1996?

a. It removes the principle of overreaching from trusts of land.

b. It sets out what a trust of land means.

c. It removes the doctrine of conversion from a trust of land.

QUESTION 6

What is the importance of ss.14 and 15 TLATA 1996?

a. They set out who can apply for a court order for the exercise of trustees' functions.

b. They set out the beneficiaries' right to occupy.

c. They set out the duty of a trustee to sell.

Question 7

What is not a consideration under s.15 TLATA 1996?

a. The wishes of the trustee.

b. The wishes of the beneficiaries.

c. The purpose of the trust.

Answers to these questions can be found on the VLE.

Notes

5 Landlord and tenant: the law of leases

Contents

Introduction

The law of landlord and tenant is a vast subject and it is inevitable that the Property law syllabus, like most property law textbooks, concentrates on the general underlying principles, omitting any detailed treatment of more specialised topics such as the various statutory codes designed to protect certain categories of tenants. This chapter is also selective and concentrates on those areas of leasehold law that are problematic or that illustrate some of the broad themes of English property law (e.g. the distinction between legal and equitable interests, and that between rights *in rem* (leases) and rights *in personam* (licences)). You are expected to be familiar with the relevant terminology and, in particular, to understand the following:

- the distinction between a lease and a licence
- the requirements for a lease to be created validly
- when covenants (promises) in leases will be enforceable by and against successors in title of the original landlord and tenant
- the difference between the assignment of a lease and the grant of a sub-lease.

LEARNING OUTCOMES

By the end of this chapter and the relevant readings, you should be able to:

- **set out the essential characteristics of a lease as compared to a licence**
- **describe the methods of creating, forfeiting and assigning a lease, and distinguish an assignment from the grant of a sub-lease**
- **evaluate the extent to which leasehold covenants are enforceable by and against successors in title of the original parties**
- **apply all of the above to answering problem questions.**

5.1 The distinction between leases and licences

A licence is a permission to do something, for example, to occupy or to use. When a person has permission to occupy land, it can be either:

- a lease, granting statutory protection and creating an estate in land, or
- a licence, a personal right, based on contract or permission.

In many of the cases you will be studying landlords attempted to avoid the statutory protections available to tenants at that time by trying to create a licence. The courts have seen beyond this and applied the argument of substance (what was really created) over form (what people say they created). We will begin by looking at what a licence is and then move on to consider leases in more detail.

The distinction between leases and licences is significant in the study of property law because it is a straightforward illustration of the difference between having a proprietary right (such as a lease) or a personal right (such as a licence). The holder of a licence has merely personal (i.e. contractual) rights against the owner of the property they occupy. Because this right is purely contractual, it will not be enforceable against the rest of the world, unlike a proprietary right. By contrast, the holder of a lease has proprietary rights against the landlord, as well as having contractual rights against their landlord. This means that in many of the cases we consider leaseholders had rights under the Rent Acts to protect them from being arbitrarily thrown out of the property. It also means that their rights, as proprietary rights, are capable of binding anyone in the world.

5.1.1 Licence

Core text

- **Dixon, Chapter 9 'Licences to use land'.**

Further reading

- **Bogusz and Sexton, Chapter 10 'Licences and proprietary estoppel': Sections 10.1–10.5.**
- **Gray and Gray, Part 10 'Privacy, access and exclusion': Sections 10.3–10.5.**
- **Smith, Chapter 22 'Licences'.**

A licence, in its most basic form, turns a trespass into a permission to occupy or use. For the latter there is a close link with the creation of easements (see Chapter 7). In relation to occupation a person may be:

- a **bare licensee,** whose licence may be revoked
- a **contractual licensee,** whose licence may not be revoked in breach of contract, or
- a **licensee by estoppel** (see Chapter 6).

It is not always possible to predict which solution will commend itself to the court in any particular case, and students tackling problems in this field would generally be advised to consider all the various possibilities.

Activity 5.1

Does each of the following have a licence, and if so, of which type? What does it permit them to do? What does it not permit them to do?

a. **A postal worker delivering mail to a house.**

b. **A landlord entering premises to read an electricity meter.**

c. **A student who shares a house with four others, without any written agreement.**

d. **A 20-year-old student who lives at home with his parents.**

e. **A woman attending a dinner party at a friend's house.**

f. A police officer investigating a reported burglary, the owner not being present at the house in question.

g. A woman who has lived with her partner for 10 years; he promised her that she would never be evicted.

5.1.2 Definitions and creation of licences

Bare licence

A bare licence is simply a permission to enter or use land where consideration has not been given in return. The licence prevents a claim of trespass being brought against the licensee unless they exceed the bounds of the licence. As was famously said by Scrutton LJ in *The Calgarth* [1927] P 93, 'When you invite a person into your house to use the staircase you do not invite him to slide down the banisters.'

A bare licence may be created expressly or impliedly; for example, there is an **implied licence** for all persons who believe that they have legitimate business to walk up the path to someone else's house and knock on the door (or deliver a letter).

A bare licence may be revoked without notice at any time, and is automatically revoked by the death of the licensor or by disposition of the land in question, except where a licence is granted expressly or impliedly to a class of people by definition rather than to an individual (e.g. the postal worker will not have to ask each new owner or tenant of a house for permission before walking up the path, and a new postal worker will be covered by the licence given to their predecessor).

Contractual licence

A contractual licence is, unsurprisingly, a licence granted in exchange for consideration. As a result, general principles of contract law are relevant to their creation. So a contractual relationship entered into by family members will be presumed to have no legal effect. This will also be a factor in deciding if a proprietary right has been created via a lease (see below). Very often a contractual licence has been used in an attempt by a landowner to evade the statutory protection afforded to leaseholders, but remember that courts do not like 'sham' devices.

Other examples of contractual licences include paying to use a commercial car park or a ticket for a performance of a play. It can thus be seen that the contractual licence is very flexible and capable of covering a wide range of dealings and relationships. The key issues concerning contractual licences have been: (1) revocability, and (2) whether they bind third parties.

1. Revocability

As the agreement is contractual there is assumed to be the normal remedy for breach of contract: damages. However, as an agreement over land would be unique (as all land is unique) then it may be subject to the equitable remedies. Specific performance of the agreed contract will make the contract enforceable (*Verrall* v *Great Yarmouth Borough Council* [1981] QB 202), as will an injunction preventing breach.

ACTIVITY 5.2

Read *London Borough of Hounslow* v *Twickenham Garden Developments Ltd* [1971] Ch 233 and *Verrall* v *Great Yarmouth Borough Council* [1981] QB 202 and make brief notes of the facts and decisions of these cases.

No feedback provided.

Although the equitable remedies may give the agreement an appearance of being akin to a property interest, *Ashburn Anstalt* (discussed below) has made the differences clear and confirmed that contractual licences are not proprietary interests.

This means the issue is more problematic when there has been a sale of the land by the licensor. Is the agreement enforceable against third parties?

2. Enforcement against third parties

In line with general contractual principles, to be able to claim on a contract you must be privy to that contract. The privity requirement was modified by the Contract (Rights of Third Parties) Act 1999 but the attack on privity came much earlier in relation to land. Not surprisingly, Lord Denning, who was not a fan of privity in contract, generally, led the attack. See Lord Denning's judgments in *Errington* v *Errington and Woods* [1952] 1 KB 290, *Binions* v *Evans* [1972] Ch 359 and *DHN Food Distributors Ltd* v *Tower Hamlets London Borough Council* [1976] 1 WLR 852.

In *Binions* v *Evans*, Lord Denning built his arguments in favour of enforceability of the licence against third parties by relying upon the existence of a constructive trust triggered by the knowledge of the plaintiffs of the rights of the licensee, since 'it would be utterly inequitable for the plaintiffs to turn the defendant out contrary to the stipulation subject to which they took the premises'. This is not in itself creating a property right in the licence but a constructive trust as a remedy for a breach based on the third parties' knowledge of the licence.

In *Ashburn Anstalt* v *Arnold* [1989] Ch 1 the Court of Appeal restated the traditional view that contractual licences are not generally binding on third parties. However, the court also recognised that, in exceptional circumstances, a constructive trust may be imposed to compel a purchaser to give effect to a contractual licence.

According to Fox LJ (p.22 of *Ashburn Anstalt*):

> Before *Errington* the law appears to have been clear and well understood. It rested on an important and intelligible distinction between contractual obligations which gave rise to no estate or interest in the land and proprietary rights which, by definition, did. The far-reaching statement of principle in *Errington* was not supported by authority, not necessary for the decision of the case and *per incuriam* in the sense that it was made without reference to authorities which, if they would not have compelled, would surely have persuaded the court to adopt a different ratio. Of course, the law must be free to develop. But as a response to problems which had arisen, the *Errington* rule (without more) was neither practically necessary nor theoretically convincing. By contrast, the finding on appropriate facts of a constructive trust may well be regarded as a beneficial adaptation of old rules to new situations.†

† Do you agree with Fox LJ's approach to *Errington*? The Court of Appeal has since referred to *Ashburn Anstalt* as being the authority on this aspect of contractual licences in *Habermann* v *Koehler* (1996) 73 P&CR 515 at p.523.

Thus, in general a contractual licence will not be capable of binding a third party.

Previously it was also thought that the holder of any type of licence could not sue in trespass or nuisance. This view accords with the orthodoxy that licences are personal and not proprietary rights. But this was challenged in *Manchester Airport plc* v *Dutton* [2000] QB 133 where a contractual licensee with an occupation licence was allowed to bring an action to recover land from a trespasser. However, it is worth noting that *Dutton* was a 2:1 majority decision and that the dissenting member of the Court of Appeal (Chadwick LJ) was the property lawyer! That said, the majority's controversial view has since received support (*obiter*) from Lord Neuberger MR in *Mayor of London* v *Hall* [2010] EWCA Civ 817 at para.27; and by the Supreme Court 's determination that relief from forfeiture is available not only to proprietary rights (leases) but may also be available to a licence over land that grants possessory rights: *Manchester Ship Canal Company Ltd* v *Vauxhall Motors Ltd* [2019] UKSC 46.

Activity 5.3

Read the extracts from *Manchester Airport plc* v *Dutton* [2000] QB 133 in your casebook or read the case online, and answer the following questions.

a. **What reasoning did Laws J use to support his finding that a contractual licensee could bring a claim against a trespasser?**

b. **Does it matter that the licence holder is not in occupation of the land? If not, why not?**

Licence coupled with an interest

Sometimes a licence is granted in connection with an interest, such as a profit à prendre (see Chapter 7). When a person is given the right to shoot animals on land, they may be granted a licence to enter the land in order to remove the dead animals. The licence exists to facilitate the enjoyment of the interest. Such a licence cannot be revoked before the interest concerned has ended. If the interest in land is binding on successors in title, the licence attached to it is also binding and may be validly assigned to third parties.

Licence by estoppel

These licences arise by way of the doctrine of proprietary estoppel. If the estoppel is proved then the remedy awarded may be a licence to use or occupy the land. In *Ottey* v *Grundy* [2003] EWCA Civ 1176 the Court of Appeal had to decide whether there had been detrimental reliance on the part of the claimant and how to give effect to the equity that arose in her favour. Look at the case: do you think the court reached a fair result? See Chapter 6 for more detail.

SELF-ASSESSMENT QUESTIONS

1. **Define 'bare licence'.**
2. **Can dealings within a family give rise to an intention to create legal relations?**
3. **When a licence is revoked in breach of contract, what is the court's likely response?**
4. **What was the argument adopted by Denning LJ in *Errington* v *Errington and Woods* [1952] 1 KB 290?**
5. **What impact has *Manchester Airport plc* v *Dutton* [2000] QB 133 had on the rights of licencees?**

Summary

We have seen that contractual licences have evolved from personal contracts to entities which closely resemble leases. They may even become enforceable against third parties in some circumstances (e.g. where the conscience of the successor in title to the licensor has been affected to such an extent that a court is willing to impose a constructive trust). The extent to which third party enforceability exists is unclear, and the issue needs clarification by a Supreme Court decision.

FURTHER READING

- **Battersby, G. 'Contractual and estoppel licences as proprietary interests in land' (1991) *Conv* 36.**

5.2 General characteristics of a lease

CORE TEXT

- **Dixon, Chapter 6 'Leases'.**

FURTHER READING

- **Bogusz and Sexton, Chapter 11 'Leases – the basic requirements'.**
- **Smith, Chapter 18 'Leases: types and requirements'.**

5.2.1 Introduction to leases

An estate in land gives the owner of that estate exclusive possession of the land. There are two estates in land which are capable of existing at law, the fee simple and the term of years absolute. The term of years is a lease. It is 'carved out' of the greater estate. Land will be owned by a fee simple owner (the landlord/lessor) who may grant a lease to

the tenant (lessee). A lease of land involves both proprietary and contractual rights for both the landlord and the tenant, and so is subject to contradictory pressures. This is heightened by the lease's commercial importance and the wide range of transactions which it encompasses. A tenant is an 'owner' of an estate in land, albeit temporarily and subject to restrictions, but equally they are a consumer contracting for the provision of 'services'. To further complicate the situation and as evidence of this tension between the contractual nature of a lease and its proprietary nature, recent cases (see *Bruton* v *London & Quadrant Housing Trust* [2000] 1 AC 406) have upheld the existence of contractual, non-proprietary leases. The reasoning behind the decision in *Bruton* may be that the tenant needed to be defined as a tenant to come within the statutory protections for tenants, rather than an attempt by the judiciary to undermine the long-standing nature of leases. It also shows the limited rights enjoyed by a person who has a licence. However, to keep things simple at this stage, a lease or term of years is exclusive possession of land for a certain period of time.

Lord Templeman set out the requirements of a valid lease in *Street* v *Mountford* [1985] AC 809:

- exclusive possession
- fixed term
- rent (either a one off payment (a premium) or paid periodically).

So this is a good place to begin our discussion.

A lease is one of the legal estates in land (s.1(1)(b) LPA 1925), as a term of years absolute in possession. Although it refers to a term of years, a lease can be much shorter.

Exclusive possession

As stated by Lord Templeman in *Street* v *Mountford*, this is the right to exclude others from the land: a tenant is entitled to keep out 'the world', which includes the landlord, unless the landlord is exercising limited rights reserved to them by the tenancy agreement to enter and 'view and repair'. So your lease may provide for the landlord to enter on certain conditions, but it is your permission which provides for this, not the landlord's property right. This is one of the major factors considered by the courts in making the distinction between a lease and a licence.

Fixed term

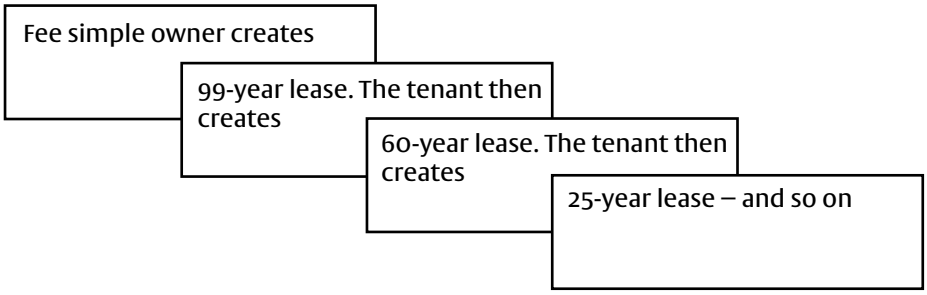
A lease must have a maximum duration, ascertainable from its outset. This requirement is subject to exceptions and statutory modifications. This term can be set at the outset or be ascertained as a periodic tenancy. So you may have a lease which is for a month; should neither party end the agreement this may be renewed for another month. Although the maximum term of the lease is not clear at the outset, the successive terms of the right to exclude are clear.

Rent

In *Street* Lord Templeman included rent in his description of the usual characteristics of a tenancy. Rent is not, however, an essential legal requirement of a lease (see s.205(x) and (xxvii) LPA 1925; *Ashburn Anstalt* v *Arnold* [1989] Ch 1). In practice, almost every lease will involve rent paid by the tenant either in the form of a periodic payment or a lump sum at the outset. The payment of rent may also be required for the application of some statutory provisions relating to leases (for example ss.54(2) and 149(6) LPA 1925). Absence of an obligation to pay rent may even be taken to suggest that the parties did not intend to create a lease. Usually, the rent will be monetary but it may take other forms (even a peppercorn). What matters is that the amount of rent to be paid must be certain or at least capable of being rendered certain: *Bostock* v *Bryant* (1991) 61 P&CR 23. A periodic tenancy's duration is aligned with the period over which the rent is quantified rather than the period the payments are made. So, if rent is quantified on a monthly basis, it is a monthly periodic tenancy and it does not matter that its payment is made weekly. A monthly tenancy can be brought

to an end by a month's notice to quit from either party. What are the periods of notice required for a weekly and a yearly periodic tenancy?

There must be a capable grantor and grantee. This means that the person who creates the lease has a greater estate in the land.



Each lease is 'carved out' of the greater estate (s.1(5) LPA 1925). So the person with a 60-year lease cannot grant a 90-year lease because their estate in land would end before that time.

There must also be a person capable of granting a lease and one able to accept the grant (a capable grantor and grantee). So if a person does not have an estate in land they cannot create a lesser estate (see above). This was considered in *Bruton* v L*ondon* & *Quadrant Housing Trust* [2000] 1 AC 406. A housing association was the licensee of property. As a licensee, the housing association did not have an estate out of which it could grant a lease (i.e. a proprietary estate in land). The housing association gave Bruton the exclusive right to occupy the property. He subsequently sought the protection of a statutory provision that applies only to tenants. The House of Lords held that Bruton had a non-proprietary lease and was a tenant of the property. The House of Lords does not clearly explain the basis of its decision, which ostensibly flies in the face of long-established property law ideas. Academics have explored different justifications for the controversial and enigmatic decision. In *Kay* v *Lambeth BC* [2006] UKHL 10 it was recognised that a *Bruton* tenancy could not bind the freeholder.

5.2.2 Exclusive possession

This topic is capable of forming the subject matter of a problem question or of an essay question in itself, distinct from the rest of the law on leases.

The test in the leading case

The decision of the House of Lords in *Street* v *Mountford* identified that the court will look for 'the true bargain' between the parties and so will ignore shams. Therefore, just because a document claims on its face to be 'a licence' that does not mean that the courts will treat it as such unless they genuinely believe that that is the true bargain between the parties. It is common for landlords to claim that their arrangement is merely a licence (and therefore that it does not create proprietary rights for the tenant). The courts will ignore such provisions if they consider that that is not the true position between the parties in the remainder of the circumstances.

The key identifying factors of a lease are that:

- there must be exclusive possession
- it is for a term (i.e. a period of time)
- it is at a rent.

Often the central purpose of problem questions in this area is to ask you to analyse closely the terms of the agreement between the parties in the light of the precise circumstances (including such matters as the parties' prior negotiations, the type of property and its layout and mode of their occupation) and then to present an analysis of whether the occupier has a lease or a licence by drawing on decided cases. The skill that is being tested is your ability to apply these tests, analyses and *dicta* to the facts of the problem.

Two House of Lords judgments essential to answering a problem question in this area

The joined appeals in the House of Lords in *AG Securities* v *Vaughan* and *Antoniades* v *Villiers* (both at [1990] 1 AC 417) are particularly important in analysing problem questions where the claim is brought by more than one occupier. These joined appeals had very different scenarios and came to different outcomes. You must read the joined judgment in these cases in the law reports to understand the detail of those circumstances so that you can use them to answer problem questions. As discussed in the Introduction to this guide, this lends itself to the 'spectrum technique' of problem-answering: put each case at the end of a spectrum with its various determining factors and then argue whether the case in front of you is closer to one end of the spectrum or the other.

- On the one hand, *Antoniades* v *Villiers* involved a romantic couple who rented a small flat (in the form of a room in an attic) from a landlord with an agreement which purported (on its own terms) to be a licence. The arrangement was held to be a lease. The House of Lords was particularly influenced by the fact that a number of terms in the agreement were shams. Indeed, the landlord went so far as to reserve a right to spend the night with the couple (which cannot have been intended in reality!). The occupants had exclusive possession of the property in practice.
- On other hand, *AG Securities* v *Vaughan* involved a group of unconnected individuals who responded at separate times to adverts to rent a room in a four-bedroom flat, which was rented out by a company. Each occupant had exclusive possession over their own bedroom at most, but not the communal bathroom, kitchen, living-room and so forth. Moreover, they had none of the four unities (of time, title, interest or possession) because they came into occupation at different times and moved rooms when someone moved out depending on seniority and the desirability of the vacant room. Consequently, it was held that the occupants in *Vaughan* only had licences.
- In answering a problem question in this area, one way of proceeding is to compare the facts of the problem with each of these cases (identifying similarities and differences), and so argue your way to a conclusion as to whether the problem question resembles one case more closely than the other.
- NB: applying these two cases is not all that you should do. The leading case setting out the test is *Street* v *Mountford* (which you should lay out first). There have been several cases in this area after *Antoniades* and *Vaughan* and you should discuss relevant cases from that body of law in your answer, too.

Other useful cases

In *Aslan* v *Murphy* [1990] 1 WLR 766 it was held that the landowner had not retained exclusive possession by including in a residential occupation agreement a term that required the occupant to vacate the premises for 90 minutes every day. The Court of Appeal concluded that the term was 'wholly unrealistic' and a clear pretence, and that it should be ignored in ascertaining the true relationship between the parties.

In *Mikeover* v *Brady* [1989] 3 All ER 618 two friends (not a romantic couple) were required to sign a separate agreement, with the result that each was responsible for half of the total rent payable. The same provision appeared in *Antoniades* v *Villiers* whereby each occupant (being part of a romantic couple) was supposedly responsible for half of the rent. In *Antoniades* v *Villiers* the provision was treated as a sham and disregarded. Yet, in *Mikeover* v *Brady* the provision was found to be effective (so that if one party had not paid their part of the rent then the other party would not have been required to make up the other half) and therefore they were found not to have a lease together but rather to have separate licences. Again, this is an example of two subtly differing cases that reach different outcomes.

An occupier who does not have exclusive possession cannot be a tenant; they will usually be a licensee. Moreover, the fact that an occupier does have exclusive possession does not necessarily mean that he is a tenant; he may still be a licensee.

The easiest way to illustrate this is a hotel room. You would expect that if you book your room you will be there alone for the duration of your stay. It would be a surprise to have booked a room and to arrive to find the hotel had put another guest in the room to share with you. You do not have a lease but a licence to occupy. The terms of the agreement grant you sole use – not because you have a right to exclude but because the room is your property. The courts have taken great pains to establish whether the occupation is a property right or merely personal. They are aware of the use of sham documents. The fact that a person has called the agreement a licence is merely an indicator of its status: the courts look to the substance of the agreement and not the form.

Following the House of Lords' judgment in *Street* v *Mountford*, whenever an occupier is granted exclusive possession of residential accommodation for a fixed or periodic term at a stated rent, there is a presumption of a tenancy. Special circumstances might rebut that presumption. Based on Denning LJ's explanation in *Facchini* v *Bryson* [1952] EWCA Civ 3, Lord Templeman recognised in *Street* that the occupier's exclusive possession in these exceptional situations was either attributable to some other legal source or to the absence of an intention to create a legal relationship. For example:

- friendship – *Marcroft Wagons* v *Smith* [1951] 2 KB 496
- family – *David* v *Lewisham* (1977) 34 P&CR 112
- employee ('service occupier') – and the occupation is for the better performance of their duties: *Norris* v *Checksfield* [1991] 1 WLR 1241
- lodgings, where services are provided such as cleaning – *Marchant* v *Charters* [1977] 1 WLR 1181
- each responsible for own rent – *Mikeover* v *Brady* [1989] 3 All ER 618.

Activity 5.4

Think about the following questions as you do your reading:

Does *Street* v *Mountford* mean that the parties' intentions will seldom be relevant? Would *Marchant* v *Charters* be decided the same way today? Why should not parties be free to enter into a residential licence agreement?

No feedback provided.

A number of cases have explored the exact limits of *Street* v *Mountford* [1985] AC 809. Although the courts will be astute to strike down sham devices purporting to deny the occupier exclusive possession (for example: *Antoniades* v *Villiers*; *Aslan* v *Murphy*; *Skipton Building Society* v *Clayton* [1993] 25 HLR 596) it is still possible to enter into a genuine non-exclusive occupation agreement, for example: *AG Securities* v *Vaughan* [1990] 1 AC 417 and *Mikeover Ltd* v *Brady*.

Conversely, exclusive possession at a rent for a term does not necessarily connote a tenancy if there are other factors of greater significance to be considered: see *Mehta* v *Royal Bank of Scotland* [1999] L&TR 340. In *Gray* v *Taylor* [1998] 1 WLR 1093 exclusive possession by an almsperson† at a rent did not create a lease since the charitable trustees who were 'landlord' did not have the power to create a tenancy.

Where there is more than one potential tenant then you must prove that as co-owners they are joint tenants. As a legal title to land can only be co-owned by joint tenants (s.1(6) LPA 1925), to have a legal lease they must satisfy the four unities (see *AG Securities* v *Vaughan*):

1. Possession – they all have the right to exclusive possession against the world.
2. Interest – they all have the same interest in the property and their rights and obligations are joint rather than separate.
3. Time – the interest begins and ends at the same time.
4. Title – the estate is created by a single transaction.

† **Almsperson**: a person receiving charity (alms). The charity may consist of gifts of money, but in earlier centuries money was often given for the building of 'almshouses' where elderly poor people could be housed. Many of these small but elegant dwellings still exist.
The photograph below shows almshouses in Stoke Newington, London.

Self-assessment questions

1. **What is the difference between exclusive possession and sole occupation?**
2. **What is the significance of the lease/licence distinction?**

5.2.3 Certainty of term

The term must commence at a time certain and exist for a definite period (see *Lace* v *Chantler* [1944] KB 368 where a lease expressed to last for the duration of the Second World War was deemed to be too uncertain).

As long as the maximum duration of the term is known in advance, it is immaterial that it may come to an end at an earlier date (e.g. by the service of a notice to quit or on the occurrence of some other event). A periodic tenancy satisfies the rule because each party has power to determine it by notice. If either party lacks such power, the *Lace* v *Chantler* rule is not satisfied. In *Prudential Assurance Co Ltd* v *London Residuary Body* [1992] 2 AC 386 the House of Lords reasserted a strict interpretation of the certainty of term rule after a number of cases (most notably *Re Midland Railway Co's Agreement* [1971] Ch 725 and *Ashburn Anstalt* v *Arnold* [1989] Ch 1) had sought to relax its requirements. The judgment is notable for the forthright assertion of orthodoxy by Lord Templeman (who, incidentally, was the losing senior counsel in *Re Midland Railway Co's Agreement*) in the face of an otherwise hesitant and ambivalent House of Lords who queried, but ultimately did not challenge, why any such requirement exists. In light of the House of Lords' unenthusiastic application of the rule in *Prudential* it is perhaps not surprising that the Supreme Court took the opportunity afforded them by counsel's clever argument in *Mexfield Housing Co-operative Ltd* v *Berrisford* [2011] UKSC 52 to sidestep the requirement by resort to old case law and a rarely invoked statutory provision. The case involved a clause in an occupancy agreement that stated that it could only be terminated if the occupier was in arrears or had otherwise breached its terms. In the Court of Appeal it was held that the agreement was void as a lease for uncertainty of term as its maximum duration was uncertain under *Prudential Assurance Co Ltd* v *London Residuary Body*. On appeal to the Supreme Court the agreement was seen differently: it was accepted that a lease of uncertain duration was void for lack of certainty of term. However, before the 1925 legislation, such a lease would have been deemed to be a tenancy for life determinable on the happening of the uncertain event, which under s.149(6) LPA 1925 was converted into a tenancy for 90 years, determinable either on the death of Ms Berrisford or in accordance with the terms of the original agreement. Although it was not necessary to determine the point, Lord Neuberger also expressed the view that Ms Berrisford would also have won on her alternative ground that the terms of a licence should continue to bind the original parties to the licence. The Supreme Court, like the majority in *Prudential* v *LRB*, showed no great enthusiasm for the certainty of term requirement and consequently embraced an imaginative means of avoiding its implications on these facts. However, you should be aware of the limits of the decision. For example, the device whereby a lease of uncertain duration is deemed to be a determinable life tenancy will not work where the lessee is a corporate entity as they cannot hold a lease for life. In addition, the device will only be available where rent is payable – that being required by s.149(6). All that aside, even where the statutory provision can operate to save an otherwise uncertain term, this does not dispense with the need to satisfy relevant formality requirements (such as s.53 LPA 1925 or s.2(1) LP(MP)A 1989) for the creation of a valid lease: *Hardy* v *Haselden* [2011] EWCA Civ 1387.

In *Mexfield*, the application of the rule that converts an uncertain term to a 90-year lease determinable on the tenant's death ('the Rule') was consistent with the intention of the transacting parties. However, Baroness Hale contemplated situations in which the application of the Rule would frustrate their intention. Hildyard J was confronted with just this situation in *Southward Housing Co-operative Ltd* v *Walker* [2015] EWHC 1615 (Ch). The landlord granted to the tenants a weekly tenancy but agreed not to terminate the tenancy as long as the tenants observed their obligations under the lease. As the fetter on the landlord's ability to terminate the tenancy created an uncertain term, Hildyard J had to decide whether the Rule applied. As a matter of

construction, Hildyard J concluded that the parties envisaged that the tenancy would be long term, but that they did not intend to create a lease for the tenants' lives: the provision permitting the landlord to terminate in the event of breach was inconsistent with any such intention. Accordingly, Hildyard J considered that the application of the Rule to the case before him 'would confound the accepted approach to the construction of any agreement, including a tenancy agreement, substitute for the meaning of the contract on its true interpretation an entirely different contract, and thereby contradict the intention of the parties'. Hildyard J was able to avoid this 'bizarre' result. After a careful analysis of the judgments in *Mexfield* he concluded 'with diffidence and anxiety' that the Rule can be displaced where its application would be inconsistent with the intention of the transacting parties or would frustrate fundamental aspects of their agreement. One question remained for consideration: if the lease was void for uncertainty and was not saved by the application of the Rule, what was the effect of the parties' agreement? Hildyard J adopted the *obiter* comments in *Mexfield* and held that the agreement took effect as a contractual licence – a licence which could only be determined in accordance with its terms. *Southward*, then, both distinguishes *Mexfield* on the facts and also addresses the role of intention, a point that the Supreme Court had left open. More controversially, in *Gilpin* v *Legg* [2017] EWHC 3220 (Ch), Judge Paul Mathews went further (at [84] and [85]) expressing (*obiter*) 'respectful doubt' on whether the authorities considered by the Supreme Court did in fact support the Rule.

A term is usually limited to take effect from the date of the grant (i.e. in possession) but it is possible to create a term limited to commence at some future date (a reversionary lease), but not more than 21 years from the date of the grant: see s.149(3) LPA 1925. A lease for life or until marriage (which would otherwise fall foul of the rule in *Prudential Assurance Co Ltd* v *London Residuary Body*) is, if granted at a rent or in consideration of a fine, to take effect as a lease for 90 years: s.149(6) LPA 1925. Lack of a commencement date does not necessarily render a lease void, particularly if it is a commercial lease and the parties intended it to be enforceable: *Liverpool CC* v *Walton Group plc* [2002] 1 EGLR 149. Finally, note that perpetually renewable leases are converted into terms of 2,000 years: s.145 and Schedule 15 LPA 1922. The danger here is that a lease containing a covenant for renewal on the same terms may be construed as a perpetually renewable lease and converted to a 2,000-year term. Compare *Caerphilly Concrete Products Ltd* v *Owen* [1972] 1 WLR 372 and *Marjorie Burnett Ltd* v *Barclay* [1981] 1 EGLR 41 where it was stated that '...the leaning of the courts has been against perpetual renewals'.

SELF-ASSESSMENT QUESTIONS

1. **What are the four unities?**
2. **Why are they important in relation to leases?**

Summary

A lease grants exclusive possession of the land for a certain fixed or periodic term, usually in consideration of a rent or premium. The lease/licence distinction centres upon whether the claimant has exclusive possession of the land. A valid lease depends on the maximum duration of the term being prospectively known (i.e. known at the outset) unless it qualifies for conversion into a 90-year lease determinable on the tenant's death.

FURTHER READING

- **Davey, M. 'Privity of contract and leases – reform at last' (1996) 59 *MLR* 78.**
- **Low, K. 'Certainty of terms and leases: curiouser and curiouser' (2012) 75 *MLR* 401.**
- **Lower, M. 'The *Bruton* tenancy' [2010] *Conv* 38.**
- **Sparkes, P. 'Certainty of leasehold terms' (1993) 109 *LQR* 93.**

5.3 Creation of a lease

CORE TEXT

- **Dixon, Chapter 6 'Leases'.**

FURTHER READING

- **Bogusz and Sexton, Chapter 11 'Leases – the basic requirements': Section 11.5 'Formalities for leases'.**

5.3.1 Legal leases

A lease is capable of subsisting at law (s.1(1)(b) LPA 1925). To be legal it must meet certain formal requirements. Here the length of the lease is crucial, but remember that despite the length of the lease it must satisfy the basic requirements of a lease.

Some leases are exempted from formality requirements by ss.52(d) and 54(2) LPA 1925. The exemption only applies where three requirements are satisfied. First, the lease must be granted for a term of three years or less. (This will include a periodic lease based on the payment of rent.) Second, the lease must take effect in possession (i.e. the term must commence on the same day that the lease is granted). Third, the lease must be granted at the prevailing market rent: *Fitzkriston LLP* v *Panayi* [2008] EWCA Civ 283.

Leases over three years but up to (and including) seven years must be created by deed (s.52 LPA 1925 – see s.1 LP(MP)A 1989 for what constitutes a deed).

A lease over seven years is now a trigger for registration under s.27 LRA 2002 and in addition to creation by deed it must be registered to take effect at law.

Leases requiring substantive registration

Any legal leasehold estate for a term of more than seven years requires registration (ss.3(3), 4(2) and 27(2) LRA 2002). Thus, the length of a lease requiring registration has been shortened considerably from 21 years under LRA 2002. This means that the lease over seven years will have its own substantive entry on the Land Registry.

Leases protected by notice and leases that override

A lease exceeding three years but not exceeding seven years can be protected by the entry of a notice on the charges register of a registered title (ss.32/33 LRA 2002). A lease of three years or under cannot be entered on the register (s.33 LRA 2002).

Although leases exceeding three years but not exceeding seven years can be protected by the entry of a notice, there is little incentive to protect them in this way because they are automatically overriding under para.1 of Schedule 3 LRA 2002. The reason why it is not possible to protect a lease of three years or less by a notice is to maintain the efficiency of the register and not clog it with minor short interests.

Leases created before October 2003, which would have been overriding under LRA 1925, will remain overriding (para.12 Schedule 12 LRA 2002).

5.3.2 Equitable leases

When a person has tried to create a legal lease but failed to fulfil the requirements (set out above) there may still be an equitable lease. For this to operate, the agreement must satisfy the requirements for an estate contract set out in s.2 LP(MP)A 1989, which replaces s.40 LPA 1925. If these requirements are satisfied, the principle in *Walsh* v *Lonsdale* (1882) 21 Ch D 9 may apply.

A question that is commonly raised is the extent to which an agreement for a lease is as good as a lease. As between the parties it may be, but in a number of other respects it is not.

The doctrine depends on the discretionary remedy of specific performance. Consider the circumstances in which the remedy would not be available: see, for example, *Coatsworth* v *Johnson* [1886–90] All ER 547.

Before 1926 an equitable lease, which is a form of estate contract, was liable to be destroyed by a *bona fide* purchaser of a legal estate for value without notice.

However, the position in respect of post-1925 agreements has been changed, as regards unregistered land, by the Land Charges Act 1972 (i.e. they are registrable as class C(iv) land charges). If the land is registered, equitable leases may, and now often must, be protected by entry on the land register and they may also rank as overriding interests if they fall within the terms of protection provided by para.2 of Schedule 3 of the LRA 2002.

ACTIVITY 5.5

In 2019 Anne enters into an agreement to give exclusive possession for 10 years of Greenacre (a registered title) to Paul for a quarterly rent of £300. All the terms are in a written document and they both sign this. Paul moves in and regularly pays the rent. Anne has now sold the freehold of Greenacre to Simon. Simon wants Paul to move out. Advise Paul.

ACTIVITY 5.6

Does it matter to a tenant whether his lease is legal or equitable?

ACTIVITY 5.7

How does (a) an equitable lease and (b) a periodic tenancy come into existence?

No feedback provided.

A lease may also be created by estoppel: *Tower Hamlets LBC* v *Sherwood* [2002] EWCA Civ 229, but of course it is inchoate until recognised as existing by a court.

Summary

Where an 'ordinary' legal lease fails, either a periodic tenancy or an equitable lease may exist instead and allow the enforcement of an agreement between the parties.

5.4 Determination of leases

CORE TEXT

- **Dixon, Chapter 6 'Leases': Sections 6.7 –6.9.**

FURTHER READING

- **Bogusz and Sexton, Chapter 14 'Termination of leases': Sections 14.1 –14.4.**
- **Smith, Chapter 19 'Leases: obligations and remedies', Part 4 'Forfeiture'.**
- **Law Commission Report, 'Termination of tenancies after tenant default' (October 2006) Law Com 303.**
- **Law Commission Report, 'Renting homes' (November 2003) Law Com 284.**

5.4.1 Forfeiture

A lease or tenancy may be terminated in a number of ways. Most of these give rise to no particular difficulty, though some points regarding forfeiture and notice need to be noted. The Law Commission has made repeated far-reaching proposals for the reform of the law, which will be noted below.

Forfeiture is the landlord's right to re-enter premises because of a tenant's breach of covenant. It should be noted that there are special controls on the forfeiture of residential tenancies. A lease cannot be forfeited for breach of covenant unless it contains a forfeiture clause, and a landlord may in any case be prevented from proceeding with the forfeiture if he waives the breach (i.e. if with knowledge of the breach he does some unequivocal act recognising the continued existence of the lease): see *Matthews* v *Smallwood* [1910] 1 Ch 777.

Activity 5.8

Consider the sort of acts from which waiver may be implied: read *Central Estates (Belgravia) Ltd* v *Woolgar (No 2)* [1972] 1 WLR 1048, then answer the following questions:

a. **How had Woolgar breached the lease?**

b. **Why were the landlords so keen to forfeit the lease?**

c. **How important are the intentions of the parties? Here the landlord did not intend to waive the breach and the tenant was aware that he did not.**

No feedback provided for parts (a) and (b).

Moreover, before a right of forfeiture can be enforced (e.g. by issuing and serving a writ for possession), certain conditions must be satisfied, though the breach of a covenant to pay rent is treated differently from the breach of any other covenant.

Non-payment of rent – there must be a formal demand (unless this is excluded by the lease or dispensed with by the Common Law Procedure Act 1852) and the tenant may apply for relief both in equity and, usually, under the 1852 Act.

Other breaches – the landlord must serve on the tenant a statutory notice in writing under s.146 LPA 1925 which must specify the breach complained of, require it to be remedied if possible and require the tenant to pay compensation (if required). If the breach is capable of remedy, the landlord must allow a reasonable time to elapse to enable the tenant to comply with the notice; they may then proceed to enforce the forfeiture. If successful, forfeiture will also affect any subtenant since their sublease will be destroyed. The question whether a particular breach is capable of remedy is important both in determining whether a s.146 notice which does not require the breach to be remedied is good or not, and in considering whether the tenant has had sufficient time to comply with the notice.

Activity 5.9

Read about the following cases in your textbook and casebook and make notes on how the court in each case classified breaches of covenant as remediable or irremediable:

- ***Rugby School (Governors)* v *Tannahill* [1935] 1 KB 87**
- ***Glass* v *Kencakes Ltd* [1966] 1 QB 611**
- ***Expert Clothing Service and Sales Ltd* v *Hillgate* [1986] Ch 340**
- ***Akici* v *LR Butlin Ltd* [2005] EWCA Civ 1296.**

Would it be possible to argue that breaches of negative covenants (i.e. promises 'not to do' something, such as build on land or run a business on premises) are in their nature not capable of remedy whereas breaches of positive covenants are? Or may the breach of a negative covenant sometimes be capable of remedy?

Relief against forfeiture

Finally, at any time before the landlord has re-entered, the tenant may apply for relief against forfeiture, which may be granted on such terms as the court thinks fit (s.146(2) LPA 1925); a subtenant may also apply for relief (s.146(4) LPA 1925), as can the holder of a charge on the land in question (*Bland* v *Ingrams Estates Ltd* [2001] 2 WLR 1638). A tenant may apply for relief even when the landlord has forfeited the lease by physical re-entry on the land: see *Billson* v *Residential Appointments Ltd* [1992] 1 AC 494. A key issue is whether forfeiture is a disproportionate penalty for the specific breach. If it is, then relief is likely to be granted.

The court may grant relief even for a breach which is irremediable. Consider the kind of factors that the court will take into account in deciding whether to grant relief or not (see *Shiloh Spinners Ltd* v *Harding* [1973] AC 691; *Bathurst (Earl)* v *Fine* [1974] 1 WLR 905; *Central Estates (Belgravia) Ltd* v *Woolgar (No 2)* [1972] 1 WLR 1048; *GMS Syndicate Ltd* v *Gary Elliott Ltd* [1982] Ch 1; *Bland* v *Ingrams Estates* [2001] Ch 767; *Freifeld* v *West Kensington Court Ltd* [2015] EWCA Civ 806).

In relation to most leases of more than 21 years, ss.168 and 169 Commonhold and Leasehold Reform Act 2002 prevent a landlord from issuing a s.146 notice unless the tenant has either admitted the breach or a leasehold valuation tribunal has accepted the evidence of breach. These sections came into force on 28 February 2005 and do not affect s.146 notices served before that date.

5.4.2 Notice

A fixed term lease cannot be determined by notice unless this is expressly agreed; a periodic tenancy is determined by notice and any term that seeks to prevent the landlord from ever determining the tenancy is void at law as being repugnant to the nature of the tenancy: see *Centaploy Ltd* v *Matlodge Ltd* [1974] Ch 1.

Subject to contrary agreement the notice of termination is a full period expiring at the end of a completed period, though it is half a year in the case of a yearly tenancy. For example, a weekly tenancy commencing on a Monday can be determined by notice given on or before one Monday to expire at midnight on the following Sunday.

Subject to the limitations in the first paragraph above, a lease may be terminated by either party by the giving of notice. The notice must be an unambiguous exercise of the relevant term in the lease (*Aylward* v *Fawaz* (1997) 2 HLR 408). The requirements of a lease regarding notice and how it is to be given must be complied with strictly, although the bare majority of the House of Lords in *Mannai Investment Co* v *Eagle Star Life Assurance Co* [1997] AC 749 held that minor errors do not invalidate notice as long as the decision to terminate the lease has been conveyed with sufficient clarity. See also *Ravenseft Properties* v *Hall* [2001] EWCA Civ 2034.

ACTIVITY 5.10

a. Two parties agreed a tenancy to commence on 1 January 2021, at a rent of £12,000 per annum payable monthly. In February 2021 the landlord decided that he wanted to determine the tenancy. How should he do this?

b. What if the tenancy had been for eight years?

5.4.3 Other methods of termination

A lease will in general be terminated by any transaction which results in the leasehold estate and its reversion being owned by the same person (including merger and surrender). Lord Millett in *Barrett* v *Morgan* [2000] 2 AC 264 said that 'a surrender is simply an assurance by which a lesser estate is yielded up to the greater, and the term is usually applied to the giving up of a lease or tenancy before its expiration'. (The House of Lords appears to have affirmed Lord Millett's dissent on the property issues, but mainly concentrated on the (now irrelevant) tax problem.)

Surrender requires a deed at law, but a contract for surrender is effective in equity. Informal surrender is implied when the landlord and tenant conduct themselves in a manner which is inconsistent with the continuation of the lease.

5.4.4 Reform proposals

The Law Commission has repeatedly made reform proposals in this field of law. It stated in its 2006 report (Law Com 303, 'Termination of tenancies for tenant default'):

> It has long been recognised that this area of the law is in need of reform. It has been the subject of frequent criticisms for many years. It is complex, it lacks coherence, and it can lead to injustice.

Consequently, the Law Commission proposed in the 2004 consultation paper that the current law should be abolished and replaced by a statutory scheme under which almost all termination proceedings would be heard in court, with greater fairness to the tenant. The scheme is designed to be complementary to that proposed under the Law Commission report on 'Renting homes' (Law Com 284, November 2003). Their 2006 Report proposed more specific reforms in its suggested Landlord and Tenant (Termination of Tenancies) Bill. The aims of the proposed new scheme for forfeiture

would be simplification, transparency and rebalancing of rights. The circumstances which justify forfeiture would be labelled 'tenant default' and would allow forfeiture regardless of whether the landlord had a right of re-entry or forfeiture clause in the lease. Waiver of breach would be abolished. A tenant default notice (rather similar to the current s.146 notice) would be required to be served by the landlord and if the breach were not remedied, then a court could give whatever remedy was thought appropriate and proportionate in the circumstances from six suggested orders. The government has not yet responded to the 2006 Report.

Summary

The main methods of termination of leases are the giving of notice and forfeiture.

In both cases, extra protection may be given to residential tenants. The courts have discretion to grant relief from forfeiture even where a tenant's breach is irremediable.

5.5 Covenants running with the land and the reversion

Core text

- **Dixon, Chapter 6 'Leases': Sections 6.4 –6.6.**

Further reading

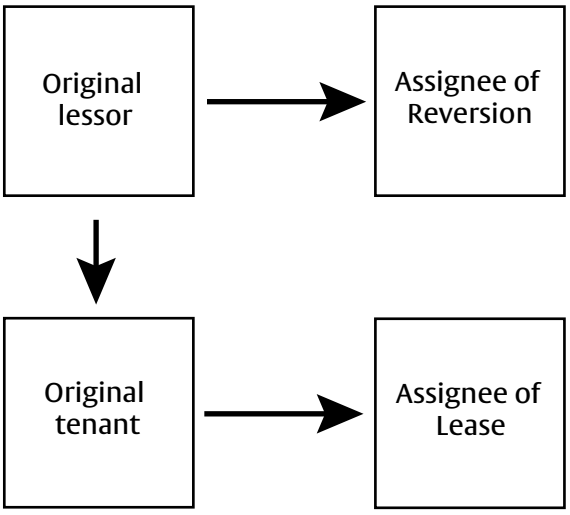
- **Bogusz and Sexton, Chapter 13 'The running of covenants in leases'.**
- **Smith, Chapter 20 'Leases: parties and the running of covenants'.**

The lessor may assign their reversion and the lessee may assign the lease. A deed is necessary for the legal assignment of a reversion and of a lease no matter how short the term. Many leases contain a covenant against assignment, subletting or parting with possession of the land without the landlord's consent and in such cases s.19(1) Landlord and Tenant Act 1927 provides that this consent is not to be unreasonably withheld. If the tenant seeks the consent but it is unreasonably withheld, they may go ahead and assign, etc. without the consent. The Landlord and Tenant Act 1988 imposes on the landlord certain obligations relating to the giving and withholding of consent.

5.5.1 Enforceability of covenants

The Landlord and Tenant (Covenants) Act 1995 (LTCA 1995), which came into force on 1 January 1996, has radically altered the law in this field. However, most of its provisions apply only to post-1995 leases and, therefore, the previous law will remain important for a long time to come. You will need to understand both regimes. In the discussion that follows the old regime (old leases) will be set out first and then the LTCA 1995 reforms (new leases).

It may help to keep this image in mind when working out the rules below.



Leases created before 1 January 1996: Original parties

Under the doctrine of privity of contract the original parties remain liable on the covenants of the lease for the duration of the term. As stated by Lord Templeman in *City of London Corporation* v *Fell* [1994] 1 AC 458:

> The common law did not release the original tenant from liability for breaches of covenant committed after an assignment…the fortunate English landlord has two remedies after an assignment, namely his remedy against an assignee and his remedy against the original tenant.

This can prove very onerous – particularly for the original tenant. A good example is *Centrovincial Estates* v *Bulk Storage* [1983] 46 P&CR 393, where the original tenant was liable for the two quarterly instalments of increased rent unpaid by a later assignee of the lease; the original rent was £17,000 per annum and the revised rent was £40,000 per annum. Due to the perceived unfairness to original tenants who have not themselves defaulted, the courts (for example in *City of London Corporation* v *Fell* and in *Friends' Provident Life Office* v *British Railways Board* [1996] 1 All ER 336) have sought to limit the operation of this principle. In *Fell* the House of Lords gave a limited concession to original tenants by holding that they were not liable for rent left unpaid by a later assignee of the lease, where the term of the lease had been extended beyond its original 10-year term by a later assignee. In *Friends' Provident* the Court of Appeal found that an original tenant was not bound by later variations of the lease between landlord and assignee, unless the variation had been foreseen in the terms of the original lease (e.g. by having a rent review clause). In relation to pre-1996 leases LTCA 1995 now restricts the right of a landlord to recover rent from the original tenant after assignment via s.17, so that now the landlord must serve the original tenant with warning of their potential liability for an assignee's breach – a 'problem notice' – within six months of the rent becoming due. This limits the tenant's potential liability to six months' worth of rent in effect, but note that the provision does not apply to damages owed for breaches of non-rent covenants. However, s.19(1) entitles the original tenant made liable for an assignee's breach to recover a leasehold interest in the land, once they have paid the full amount owed, so in effect they can get very valuable compensation.

Assignee of lease

It is also important to determine the circumstances in which persons other than the original parties to a lease can sue or be sued on covenants in that lease. In the case of the assignment of a lease the rule is that both the benefits and burdens pass if two conditions are fulfilled. In the first place, the covenants must 'touch and concern the land' or 'have reference to the subject matter of the lease'. Most textbooks contain lists of covenants that have been held to touch and concern the land or not to do so. Examples include *Hua Chiao Commercial Bank Ltd* v *Chiaphua Industries Ltd* [1987] AC 99, where the Privy Council held that the landlord's obligation to return the tenant's deposit at the expiration of the lease did not touch and concern the land, and *Kumar* v *Dunning* [1989] QB 193 where the Court of Appeal held that a covenant by a surety guaranteeing the payment of rent did touch and concern the land.

In *Swift Investments* v *Combined English Stores* [1989] AC 632, the House of Lords approved *Kumar* v *Dunning* and held that the test to be applied was whether:

- the covenant benefited only the reversioner for the time being
- it affected the nature, quality, mode of user or value of the reversioner's land, and
- it was not expressed to be personal.

The second general requirement is that there must be privity of estate between the lessor and the assignee of the lease (i.e. there must be a legal lease – see *Purchase* v *Lichfield Brewery* [1915] 1 KB 184) and there must be a legal assignment of the whole term. If these conditions are satisfied, the common law rule in *Spencer's Case* (1582) 77 ER 72 lays down that the benefits and burdens of covenants that touch and concern the land will pass to the assignee of the lease.

Activity 5.11

What is the position if the original lease is equitable (or the assignment is equitable) and there is therefore no privity of estate?

Assignees of the reversion

By virtue of ss.141 and 142 LPA 1925, the benefits and burdens of covenants having reference to the subject-matter of the lease will pass on the assignment of the reversion, whether the lease is by deed or not: see *Rickett* v *Green* [1910] 1 KB 253.

The assignee becomes the only person entitled to sue, even in respect of breaches of covenant that occur before the assignment: *Re King* [1963] Ch 459; *London and County (A and D) Ltd* v *Wilfred Sportsman Ltd* [1971] Ch 764.

Sublessees

There is neither privity of contract nor privity of estate between a lessor and a sublessee, so covenants in the lease will not be directly enforceable against the sublessee under the rule in *Spencer's Case*. However, restrictive covenants may be enforceable under the doctrine in *Tulk* v *Moxhay* (1848) 47 ER 1345 (see Chapter 8).

Moreover, if the head-lease contains a forfeiture clause, the lessor can re-enter and determine that lease for breach of covenant, even (it seems) for breach of a covenant that does not touch and concern the land. Then the sub-lease will come to an end, unless the sublessee can obtain relief. The principles in this paragraph also apply where an equitable lease has been assigned or where there has been an equitable assignment of a lease.

5.5.2 Post-1995 leases (new leases)

Throughout LTCA 1995, no distinction is made between legal and equitable leases and legal or equitable assignments (s.28). The benefit and burden of all covenants will pass on an assignment of a lease or reversion, except those expressed to be personal. It no longer matters whether the covenant touches and concerns the land.

See *First Penthouse* v *Channel Hotels and Properties* [2004] EWCA Civ 1072 on the meaning of 'expressed to be personal' under LTCA 1995.

Original parties

In relation to post-1995 leases, LTCA 1995 releases a tenant from the covenants after they have assigned (s.5) unless the assignment was in breach of covenant or by operation of law (s.11). The Act provides a procedure for the release of a landlord from their covenants after they have assigned (s.8), subject to their giving notice of the assignment to the tenant and the tenant not objecting. The Act thus goes a long way towards abolishing privity of contract in this context. The general scheme is that when a tenant assigns their lease, they are released from the covenants (subject to the possibility of the landlord extracting an 'authorised guarantee agreement'). In cases where a landlord's consent is required to an assignment, a landlord will try to make the tenant sign an authorised guarantee agreement, by which the tenant acts as a guarantor for the person to whom the tenant assigns (s.16).

Assignees of lease, and assignees of the reversion

There are very few covenants which do not 'run' under LTCA 1995. The requirement of 'touching and concerning' is abolished, so all landlord covenants and tenant covenants automatically pass with an assignment of either the reversion or the lease. Section 3 LTCA 1995 covers the transmission of such covenants, but personal covenants are specifically excluded (s.3(6) LTCA). In *BHP Petroleum* v *Chesterfield Properties* [2001] EWCA Civ 1797 it was held that all terms agreed between the original landlord and tenant pass automatically unless a covenant is qualified so as to make it personal, with liability between the original parties. On the facts the covenant was purely personal and so was not covered by LTCA 1995. Thus, equally, liability for purely personal covenants does not pass to an assignee, so the original landlord remains liable for

the duration of the lease in respect of a personal obligation upon them to repair the premises. The s.8 procedure for releasing a landlord from their obligations cannot apply to a personal covenant. Moreover, an assignee has no rights or liability in relation to pre-assignment breaches.

Sublessees

The rules relating to the enforceability of covenants against sublessees are unaffected by LTCA 1995.

In *London Diocesan Fund* v *Avonridge Property Company Ltd* [2005] UKHL 70 the lease included an express term releasing the landlord from the landlord covenants immediately he assigned his interest in the property to a third party. The tenant argued that this term was void under s.25(1) LTCA 1995, since it attempted to avoid the requirements of ss.6–8 of that Act. The House of Lords rejected this argument and held that the term was valid. Thus the *Avonridge* clause allows an original landlord to escape liability under a lease without having to serve a notice on the tenant. It both destroys an essential element of the Act and indicates that the House of Lords still regards leases as contractual creations.

SELF-ASSESSMENT QUESTIONS

1. **How has LTCA 1995 affected the enforceability of leasehold covenants?**
2. **When are covenants enforceable against sublessees?**

Summary

LTCA 1995 has greatly changed the law relating to the enforceability of leasehold covenants, and improved the position of the original parties after assignment. Almost all covenants will 'run' under LTCA 1995. However, the 'old' law still applies to leases created before 1996, for which it remains necessary to check whether covenants 'touch and concern' the land.

Sample examination questions

Question 1

In 1980, Lionel, by deed, granted to Thomas a lease of Blackacre (a house with a tennis court), for 30 years. In the lease Thomas covenanted (*inter alia*) to pay the rent, to keep the house in repair, not to do anything that might be a nuisance or an annoyance to neighbours, and to allow Lionel to use the tennis court on one day each week; the lease also reserved to the lessor a right of re-entry on breach of covenant. In December 1984, Thomas by deed sublet Blackacre to Victor for the residue of the term less three days, and shortly afterwards assigned his lease to William. Lionel consults you, saying that the house is in disrepair, that Victor has been convicted of possessing cannabis found on Blackacre and that he (Lionel) has not been allowed to play tennis this year. Advise Lionel. Would your advice be the same if all these events had occurred after 1 January 1996?

Question 2

On 1 January 1994, Lena granted Tricia a 30-year lease of Stapleton House (registered land) at an annual rent of £15,000, payable in advance. Stephen covenanted, as surety, to guarantee payment of the rent by Tricia. Under the lease the tenant covenanted not to use the house for business purposes, and the tenant was given the option to purchase the reversion. In 2000, Tricia assigned the lease to Arthur, who had granted a five-year sub-lease to Stan, and Lena assigned her reversion to Richard. No rent has been paid for two years. Stan has opened a hairdressing salon in the house.

Richard wants to know (i) whether he can recover the rent arrears and from whom, (ii) whether he can enforce the user covenant and against whom, and (iii) whether he is bound by the option.

Advise Richard. How, if at all, would your advice differ if the original lease had been granted in 1996?

Question 3

In 2010 Len granted Tim a lease of Commercial House for 30 years. Len covenanted, *inter alia*, to maintain the exterior of the building in a good state of repair. In 2013 Tim assigned his lease to Alf and in 2015 Len assigned his reversion to Rob. The exterior of the building is now in serious need of repair and Alf wishes to know whether he can enforce the repairing covenant and, if so, against whom.

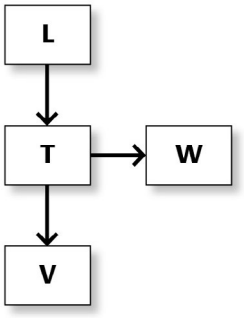
Advise Alf.

How would your advice differ, if (a) Len and Tim had agreed that the covenant was to be personal, or, alternatively, if (b) Len and Tim had agreed that Len was to be released from liability when he assigned the reversion?

ADVICE ON ANSWERING THE QUESTIONS

QUESTION 1

This question concerns leasehold covenants and their enforceability after assignment. The position of subtenants is also covered. You need to work out whether each covenant is legal or equitable and positive or negative, and whether it touches and concerns the land or is personal. Then you will be able to tell which pass on assignment of the lease, and can work out whether forfeiture is available for any breach committed. Lionel is the original landlord and so you do not need to worry about assignment of the reversion. You also have to answer the question twice: once on the 'old' law pre-LTCA 1995, and then again under the 'new' law of that Act. It is extremely helpful in questions on enforceability of covenants to draw a diagram which shows all the parties, using vertical lines to represent the relationship between landlord and tenant and horizontal lines to show an assignment. L = landlord (Lionel), T= tenant (Thomas). So, what we have is this:



L wants to sue T for the breach of each covenant and also presumably to forfeit the lease.

QUESTION 2

Read and follow the three sub-questions to make sure that you do not miss any important issues. The first part of the question largely concerns the operation of the pre-LTCA 1995 law, though ss.17–19 apply to old tenancies. On (i) you should consider whether the benefit of the rent covenant has passed to Richard (s.141 LPA 1925) and whether he can enforce it against Tricia (original tenant), Stephen (surety), Arthur (assignee) and Stan (sublessee). Different considerations apply in each case. You should take the same approach to (ii), the important point here being the possibility of enforcing the covenant directly against Stan under the doctrine of restrictive covenants. On (iii) Richard will be bound only if the option has been registered or if it is supported by 'actual occupation'. The second part of the question concerns LTCA 1995, but the same orderly approach is called for. On (i) Richard's position is governed by s.3, Tricia and Stephen are released when Tricia assigns (s.5, in absence of authorised guarantee agreement), so Richard can sue Arthur alone (s.3) for post-assignment arrears. Richard can bring an action against Stan under s.3(5) LTCA 1995. The law relating to the enforceability of the option is unchanged (s.3(6)(b)). You are not asked to discuss remedies.

QUESTION 3

This question requires a consideration of LTCA 1995. By virtue of s.3 Alf would be able to enforce the repairing covenant against Rob, but not against Len (assuming that Len had complied with the ss.6–8 release provisions). If, however, the covenant was expressed to be personal, s.3(6)(a) would apply and neither the benefit nor the burden of the covenant would pass on assignment, nor could Len be released (*BHP Petroleum Great Britain Ltd* v *Chesterfield Properties Ltd* [2001] EWCA Civ 1797). Finally, the question arises whether an agreement that Len should be released on assignment of the reversion falls foul of s.25 on the grounds that it frustrates the operation of the Act. This involves a discussion of *London Diocesan Fund* v *Avonridge Property* [2005] UKHL 70, an important case with which you should be familiar.

Focus of the assessment

Within the scope of this chapter, there are four principal areas for assessment:

1. A problem question asking you to consider whether or not the litigants have created a lease or a mere licence.
2. An essay asking you to consider the law governing the distinction between leases and licences.
3. A problem question on the law on leasehold covenants.
4. An essay on the changes to the law on leasehold covenants effected by the legislation.

Quick quiz

Question 1

Which of the following is not essential for a valid lease?

a. Exclusive possession.

b. Fixed term.

c. Rent.

Question 2

If a lease has an uncertain term but rent is paid regularly will this be a valid lease?

a. No, this will fail.

b. It may be valid as a periodic lease.

c. It may be saved under the principles of *Mexfield Housing Co-operative Ltd* v *Berrisford* [2011] UKSC 52.

Question 3

Considering your answer to Question 2, is this a legal lease?

a. Yes.

b. No.

c. Possibly.

Question 4

Which of these leases needs to be substantively registered to be legal on creation?

a. A lease of exactly seven years.

b. A lease of over seven years.

c. A lease of over three years.

Question 5

What are the requirements of a valid equitable lease?

a. It must satisfy the formalities of s.2 LP(MP)A 1989.

b. It must be a specifically enforceable contract.

c. It must satisfy the requirements of *Walsh* v *Lonsdale*.

Answers to these questions can be found on the VLE.

NOTES

6 Proprietary estoppel

Contents

Introduction

The doctrine of proprietary estoppel has developed in a striking manner over the last 30 years. The scope of the doctrine has been continuously extended by the courts, but with little heed for the conveyancing problems that may be caused.

The doctrine is increasingly used to give effect to grants that fall foul of the rules for the creation of property rights, as in *Cobbe* v *Yeoman's Row* [2008] UKHL 55 (discussed below). It also provides an increasingly important exception to the principle that equity will not assist a volunteer. In some cases, for example, *Lim Teng Huan* v *Ang Swee Chuan* [1992] 1 WLR 113, the doctrine may fill the role of the old law of part performance.

LEARNING OUTCOMES

By the end of this chapter and the relevant readings, you should be able to:

- **describe the essential characteristics of proprietary estoppel**
- **explain the relationship between proprietary estoppel and constructive trusts**
- **apply the above in answering problem questions.**

6.1 Proprietary estoppel

Core text

- **Dixon, Chapter 10 'Proprietary estoppel'.**

Further reading

- **Bogusz and Sexton, Chapter 10 'Licences and proprietary estoppel': Sections 10.5–10.8.**
- **Smith, Chapter 22 'Licences': Section 1.E 'Estoppel licences'.**

The doctrine of proprietary estoppel operates in two stages. First, the claimant must prove that the estoppel is present. This requires the claimant to demonstrate that (i) the defendant made them a representation (ii) on which the claimant relied (iii) to their detriment. The claimant must also show that the defendant's conduct is unconscionable. A representation can involve a single, clear statement that the claimant would acquire rights in property or an impression formed over time, which the defendant knows that the claimant has formed (*Gillett* v *Holt* [2001] Ch 210). Detriment may involve the payment of money (like consideration in a contract) or it may involve something personal to the claimant like moving their children to a new school in reliance on a promise that they would consequently have a new home (*Grant* v *Edwards* [1986] Ch 638, although the opposite was found in *Coombes* v *Smith* [1986] 1 WLR 808).

At the second stage, the court must identify the remedy. The claimant does not simply acquire property rights. Instead, the court can seemingly award anything on a spectrum ranging from property rights through to mere compensation. The basis on which the courts make their decision is unclear: it could be an urge to enforce the promise, to compensate the claimant's detriment or to prevent the claimant being treated unconscionably. In the cases, the claimant has been awarded the freehold (in fulfilment of the promise, *Pascoe* v *Turner* [1979] 1 WLR 431), an amount of money (*Campbell* v *Griffin* [2001] EWCA Civ 990) or a combination of those two things (*Gillett* v *Holt*).

Proprietary estoppel is an equitable doctrine. It has been explained by Cooke, E. in *The modern law of estoppel* ((Oxford: Oxford University Press, 2000) [ISBN 9780198262220]) as forming part of a general doctrine called 'equitable estoppel'.

As such, proprietary estoppel is discretionary (especially in relation to the remedy that is available) and is based on the idea of seeking to reach a conscionable result in individual cases.

6.1.1 The doctrine: establishing an equity (an equitable right)

The classic statement of the doctrine was made in Lord Kingsdown's dissenting speech in *Ramsden* v *Dyson* [1866] LR 1 HL 129 at 170:

> If a man, under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of the land, with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, a court of equity will compel the landlord to give effect to such promise or expectation.

Lord Kingsdown's *dictum* is frequently quoted with approval, but the scope of the doctrine has been considerably extended in recent times. Where the owner of land knowingly encourages another to act, or acquiesces in another's acting to their own detriment on the understanding that they are to have an interest in that land, the owner will subsequently be estopped from asserting their strict legal rights (and may indeed be compelled to give effect to the equity that has arisen in favour of that other). The elements, therefore, are:

- a representation
- reliance/change of position
- detriment/disadvantage (e.g. an expenditure or loss to the promisee)

- unconscionability (i.e. in all the circumstances it is unconscionable that the promisor should be able to rely upon their strict legal rights by breaking their promise).

Note the following points:

- The doctrine may still apply where the owner was ignorant of the true legal position at the time she encouraged the other person to act. The question is simply whether it would be conscionable to allow her to insist on her strict legal rights (see *Taylor Fashions Ltd* v *Liverpool Victoria Trustees Co Ltd* [1982] QB 133). More recently, in *Matharu* v *Matharu* [1994] 2 FLR 597 (CA) the claimant was successful, even though the owner does not seem to have made any promise or representation encouraging her to believe what she believed.
- Although, in many of the earlier cases, the claimant had actually spent money on the land, it is sufficient today if she has suffered some detriment as a result of her doing or omitting to do something. Not only do the courts take a broad view of what constitutes 'detriment', but the Court of Appeal has held that, where a representation has been made, there is a rebuttable presumption that the claimant has acted in reliance on it. The onus is on the defendant to prove otherwise: see *Greasley* v *Cooke* [1980] 1 WLR 1306.
- In most cases, the representation has related to a particular property in which the claimant has an existing interest. However, the court in *Re Basham* [1986] 1 WLR 1498 (where the claimant lived in her own house at some distance from the deceased's house) refused to restrict the operation of the doctrine in this way.
- It was also held in *Re Basham* and again in *Wayling* v *Jones* (1993) 69 P&CR 170 (CA) that the doctrine applied to the situation where a person encourages another to act to her own detriment on the understanding that she will inherit certain property on that person's death. This approach has been endorsed by the House of Lords in *Thorner* v *Major* [2009] UKHL 18.
- *Gillett* v *Holt* [2001] Ch 210 and *Jennings* v *Rice* [2002] EWCA Civ 159 (discussed below) make it clear that courts are now applying a more 'holistic approach' to proprietary estoppel cases and judging the facts 'in the round' to determine whether the claimant has an estoppel equity and how it should be satisfied. The need for the claimant to prove unconscionability has become the central factor in proprietary estoppel claims.

6.1.2 The remedy

Once an equity has been established, how will the court give effect to it? An examination of the cases will show that the range of remedies awarded by courts to satisfy an estoppel equity is great, ranging from compensation to licences to leases to freeholds. In *Dodsworth* v *Dodsworth* (1973) 228 EG 1115 and *Burrows and Burrows* v *Sharpe* (1991) 23 HLR 82, compensation for expenditure incurred was considered the appropriate remedy (particularly as it would have been impracticable to have required the parties to continue living together). In *Crabb* v *Arun District Council* [1976] Ch 179 and *Chaudhary* v *Yavuz* [2011] EWCA Civ 1314 rights of access and way were awarded. In *Griffiths* v *Williams* (1977) 248 EG 947 a non-assignable lease for life was awarded. There have also been cases where the courts have held that the equity that has arisen in the claimant's favour can only be satisfied by the transfer of the fee simple to them (see *Dillwyn* v *Llewelyn* (1862) 45 ER 1285; *Pascoe* v *Turner* [1979] 1 WLR 431; and *Thorner* v *Major* [2009] UKHL 18). At the other extremity of this spectrum of possible outcomes, a remedy may be denied if the claimant has enjoyed benefits that are found to have 'exhausted' the detriment so that they have not suffered any injustice: *Sledmore* v *Dalby* [1996] EWCA Civ 1305.

There appear to be two methods by which courts have calculated the appropriate remedy; sometimes courts appear to be giving effect to the claimant's reasonable expectations, and in other cases courts appear to have complete discretion as to

the choice of remedy. However, it now appears that courts are combining both approaches by considering the claimant's expectations and then ensuring that there is proportionality between the detriment and the remedy awarded. In *Jennings* v *Rice* the court considered both approaches and held that it was not appropriate to grant a remedy merely on the basis of the claimant's expectations, nor could the court have absolute discretion. According to Lord Justice Walker ([2002] EWCA Civ 159 at [43]), 'It cannot be doubted that in this as in every other area of law, the court must take a principled approach and cannot exercise a completely unfettered discretion according to the individual judge's notion of what is fair in any particular case.' Hence, although the interest expected by the claimant was a relevant consideration, the court must do justice by ensuring that there is proportionality between the remedy and the detriment. Once an estoppel equity has been generated:

> (T)he value of that equity will depend upon all the circumstances including the expectations and the detriment. The most essential requirement is that there must be proportionality between the expectations and the detriment…
>
> (at [36])

The modern approach is to award the 'minimum equity to do justice' on the facts of the individual case. This might be nothing at all, as in *Sledmore* v *Dalby* (1996) 72 P&CR 196 (see below), or a combination remedy as in *Gillett* v *Holt*. A nuanced use of what is a broad remedial discretion allows for an award of monetary and property rights according to what is judicially regarded as best in satisfying the equity. This may even involve affecting a clean break between acrimonious parties: *Guest* v *Guest* [2020] EWCA Civ 387. Following *Davies* v *Davies* [2016] EWCA Civ 463, if the expectation is very clear and the detriment incurred for a long time, then a claimant may be more likely to have an expectation based remedy but the opposite if the representation is not as clear, or the detriment incurred not as great (see also *Habberfield* v *Habberfield* [2019] EWCA Civ 890).

What is the impact of a successful claim to proprietary estoppel on third parties, third parties such as transferees of the land in respect of which the claim was made? Section 116 LRA 2002 provides that an equity by estoppel 'has effect from the time the equity arises as an interest capable of binding successors in title'. Thus, it confirms that an uncrystallised estoppel 'equity' can bind a transferee if protected as required by the normal rules of registered or unregistered land. In land with registered title it can be protected by entry of a notice on the land register or, coupled with actual occupation, is capable of overriding a disposition (see Chapter 3). But, once the court has granted a remedy, then whether a transferee is bound will depend on the nature of the remedy granted. For example, if the remedy is a freehold or an easement then it will bind a transferee but, if it is a licence or financial compensation, then it will not.

Activity 6.1

a. What were the relevant facts of *Ives Investment Ltd* v *High* [1967] 2 QB 379?

b. Could the decision in this case have been made on other grounds?

c. Would the result have been different in registered land?

It remains uncertain whether a contractual licensee could additionally rely on estoppel. Thompson (1983) *Conv* 50 thinks so, but Briggs (1981) *Conv* 212 and (1983) *Conv* 285 disagrees.

This is currently a fast moving part of property law that is rich in case law. The following cases are just some of those that either illustrate settled principles or can be said to have changed/developed a number of issues in relation to interests created by estoppel. You should make notes on the relevant facts, decision and reasoning in each, and note what was given to the successful claimants in order to give effect to the equity:

- In *Sledmore* v *Dalby* [1996] 72 P&CR 196, the Court of Appeal held that, although an equity had arisen in favour of the respondent, it was no longer inequitable to defeat it, due to the benefits which he had enjoyed over the years and the parties' situations at the time of the action. Thus, although Dalby could have had an estoppel interest, he was given nothing.

- In *Gillett* v *Holt* [2001] Ch 210, the defendant had promised to leave the bulk of his estate to Mr Gillett and had made a will doing so. Subsequently he changed his will, excluding Mr Gillett, whose claim in proprietary estoppel succeeded. The Court of Appeal rejected the idea that there had to be a 'double assurance' (a second promise, that the defendant would in no circumstances change his will). It was enough that the defendant had behaved unconscionably by withdrawing his promise after the claimant had, to his knowledge, relied on it to his detriment.
- In *Yaxley* v *Gotts* [2000] Ch 162, the Court of Appeal held that, even when an agreement relating to land was void for want of formality, the doctrine of proprietary estoppel could still operate to compel one of the parties to give effect to a promise made under the agreement. *Banner Group* v *Luff Developments* [2000] Ch 372 is another example.
- In *Hunt* v *Soady* [2007] EWCA Civ 366, where there had been a provisional agreement that one beneficial tenant in common (H) would transfer her beneficial interest to the other (S), proprietary estoppel could not operate since that agreement had not been acted on by the other party either in good time or to his detriment; it was not unconscionable for H to go back on her representation, particularly given the substantial change in circumstances since the time of the provisional agreement.
- In *Holman* v *Howes* [2007] EWCA Civ 877, a divorced couple bought a property together, being optimistic about reconciliation and joint occupation. They both contributed to the purchase price but the legal title was put into the sole name of the ex-husband. He then left the house but the ex-wife continued to live there. On application for an order to determine their beneficial shares, with the ex-husband also seeking an order for sale, the court held that assurances had been made that the ex-wife could occupy the property for as long as she wanted. Since there was detrimental reliance by the ex-wife, the requirements of proprietary estoppel were satisfied and thus in order to satisfy this equity there should be no order for sale without the ex-wife's consent.
- In *James* v *Thomas* [2007] EWCA Civ 1212, where there was insufficient evidence of a common intention that J should have a beneficial interest in the property and assurances made by T to J were vague as to the extent of any beneficial interest which J might expect, neither a constructive trust interest nor one via proprietary estoppel could arise. The parties had lived together for 15 years in a property held in T's sole name; J had helped T with his business and together they had conducted extensive renovations of the property. The assurances which were found to be too vague were that the renovations would be for the benefit of both parties and that J would be provided for on T's death.
- In *Powell* v *Benney* [2007] EWCA Civ 1283, the appellants (P) had looked after B's cousin (H) and improved his properties for their own use after H became unable to look after himself properly and gave them the keys to the premises. H had promised the properties to P upon his death but he died intestate due to his 'will' being invalid. The court held that there was not a strong enough causal link between the promise and the work carried out for P to receive the entire properties as satisfaction for the equity; although P had incurred some expense in improving the premises, they had not been required to do so by H. Thus the case was a 'non-bargain' proprietary estoppel claim; *Jennings* v *Rice* applied. To transfer the properties to P would be out of all proportion to the detriment P had suffered, and so the trial judge's award of £20,000 was upheld.
- In *Cobbe* v *Yeoman's Row Management Ltd* [2008] UKHL 55, the House of Lords showed that the exceptions to s.2 LP(MP)A 1989 are narrower than previously thought. A property developer reached an oral agreement in principle with an owner to buy their property and then spent considerable sums in obtaining planning permission. The owner then refused to proceed on the agreed terms and enter into a binding contract. The House of Lords reversed the decision of the Court of Appeal and held that the developer was not entitled to a remedy based on proprietary estoppel or a constructive trust, but only to a *quantum meruit* payment

for his services in pursuing and obtaining planning permission. Since neither party had thought that the agreement between them was enforceable, the owner could not be estopped from relying upon s.2 to show that the agreement was unenforceable. The agreement between the parties was a 'gentlemen's agreement' and was too uncertain as to its terms to constitute a contract. The lower courts had pushed proprietary estoppel too far.

- In *Thorner* v *Major* [2009] UKHL 18, a rather taciturn farmer, called Peter, died intestate after revoking a previous will which had left the residue of his estate to David, the son of his cousin. This would have given Peter's farm to David. The will had been revoked apparently because Peter had fallen out with one of the legatees to whom he had given a sum of money and wished to exclude him. The only way in which David could now succeed in establishing title to the farm was claiming proprietary estoppel because on intestacy the farm would now go to Peter's closer relatives. David had assisted Peter on the farm for almost a 30-year period without being paid an income. At no point did Peter state to David that he would leave any property to him after his death. Instead, David had to make out his case from inferences, the most important piece of evidence from his point of view being an occasion when Peter handed a bonus notice relating to two life policies with the Prudential on Peter's life saying, 'that's for my death duties'. For the judge at first instance, this was a watershed moment, turning David's hope of inheriting the farm into an expectation. Following this there were a number of other comments made by Peter which David alleged would only have been made to a person who was expected to inherit the farm. With Lloyd LJ giving the leading judgment, the Court of Appeal reversed the decision of the court below on the basis that for estoppel to succeed in these cases the representation had to be clear and unequivocal and not drawn from inferences. However, the case was then appealed to the House of Lords, who reversed the decision of the Court of Appeal, finding that it had been wrong to overturn the first instance judge's decision; the trial judge was best placed to assess all the parties' dealings and all the evidence before him. For proprietary estoppel to succeed, it is indeed the case that an assurance must be 'clear enough' and must relate to identified property. Both the deceased and the claimant understood that the property was to be a farm in the state as it existed at the deceased's death, whatever that might be: the precise scope of the property did not need to be agreed in advance. The House of Lords distinguished *Cobbe* v *Yeoman's Row* on the ground that in *Cobbe* there had been no doubt as to the physical identity of the property, but there had been complete uncertainty as to the nature of the benefit to be given to *Cobbe*. Further, in *Cobbe*, the relationship between the parties was a commercial one at arm's length, where the parties had chosen not to enter into a contract and knew that they were not legally bound to each other. Taken broadly, the decision seems to highlight that it may be harder (but not impossible) to establish an estoppel case in the commercial (as distinct from a family) context where the parties are aware that there is no contract – perhaps because reliance is less justifiable in such cases. This does, however, beg questions about the nature and credibility of the distinction. You would be well advised to read this case as each judge considered the elements of proprietary estoppel in useful detail and Lord Scott made some interesting arguments about remedial constructive trusts.

- In *Henry* v *Henry* [2010] UKPC 3, the Privy Council considered an appeal from St Lucia in a proprietary estoppel case. T bought the land from an elderly relative (G) just before the latter's death. G had promised to leave the land in her will to C, who had lived on it and cultivated it for over 30 years. The trial judge had dismissed C's claim on the basis that he had not suffered a detriment, he had received a benefit from the land for over 30 years and T was a registered proprietor who had given value for the land and so took free of C's claim. The Court of Appeal, however, did find that C had suffered detriment and hence had an equity which bound T as an overriding interest (St Lucia has a similar land registration system to England and Wales). On appeal, T argued that since her purchase of the land had not been unconscionable, she should not be bound by any equity which had arisen in favour of C. The Privy

Council held that the trial judge had misdirected himself as to detriment by failing to weigh up C's disadvantages and advantages resulting from the promise (*Jennings* v *Rice* applied). The Court of Appeal had also been mistaken in its approach to detriment. Hence the Privy Council had to consider that issue afresh, and found that C had deprived himself of a better life elsewhere by remaining on the land; that detriment had not been outweighed by the advantages he took from his 'hard life in which he has to struggle to make ends meet' occupying the land. The resulting estoppel equity was satisfied by awarding C half of T's share of the plot of land (i.e. a quarter of the total); proportionality is at the heart of proprietary estoppel. The Privy Council looked at the effect of an estoppel equity on third parties, and noted *obiter* that there may be cases in which the circumstances of a third party purchase might require a claimant's equity to be reassessed, even though the claimant has an overriding interest.

- In *Suggitt* v *Suggitt* [2012] EWCA Civ 1140, CA Frank promised his son, John, the family farm, including the farmhouse. However, by his will, Frank left this entire estate to his daughter, Caroline, subject to a power (not an obligation) that she might transfer the farm to John if she decided that he was capable of running and managing it. When Frank died, John sought to enforce the lifetime promise, relying on proprietary estoppel. The first instance court found that Frank had repeatedly made John unconditional assurances that had created a reasonable expectation that he would inherit the farm. This raised the key issue of detrimental reliance. At different times during Frank's life, John had helped his father on the farm, for which he received no wages but was provided with a home, living and other expenses, and business opportunities. As the terms of Frank's will indicated, Frank did not see John as fit to run the farm and during his lifetime had made other arrangements with local farmers. However, the first instance judge found that John had relied on the assurances and, to some extent, suffered detriment through the work he had contributed. John was therefore awarded the freehold of the farm and house worth over £3 million. Caroline appealed, arguing that, given the limited work John had done, the remedy was disproportionate to the level of John's detriment and exceeded the minimum necessary to do justice. Arden LJ in the Court of Appeal considered Walker LJ's approach to proportionality in *Jennings* v *Rice* as not requiring a relationship between the relief and the level of detriment suffered. What was required was a determination of whether the award was 'out of all proportion' and 'clearly wrong'. So, in cases where the claimant's expectations were 'extravagant' or 'out of proportion' with the detriment, the equity should be satisfied in a more limited way. However, in *Suggitt*, although the farmland and house were valuable assets, their value was reflected in the unconditional assurances the first instance judge had found Frank had given John. The Court of Appeal therefore upheld the first instance decision.

- In *Southwell* v *Blackburn* [2014] EWCA Civ 1347, Blackburn and Southwell met in 2000. Two years later they found a house for them to share with Blackburn's two young daughters. Blackburn had limited financial means and Southwell took the title to the house in his sole name, funding the purchase with the equity from his previous home and a mortgage for which he assumed sole responsibility. Blackburn had given up her job and a rent-controlled secure tenancy of a house on which she had spent around £15,000. She also invested about £5,000 in her new home. When their relationship broke down in 2012, Blackburn applied to the court for an equal share of the property. At first instance, her claim to a constructive trust failed but the court found in her favour in terms of proprietary estoppel and valued her equity at £28,500 as that would restore her financially to the position she had been in before she gave up her house to live with Southwell. On appeal, Tomlinson LJ supported the first instance judge's findings that there was in fact an assurance. Although they had not specifically discussed ownership of the house, it was enough that, when they discussed the move, Southwell had assured Blackburn that she would always have a secure home with him there and that it was intended as a long-term commitment. The Court of Appeal also accepted the first instance determination that Blackwell's promises were made with the intention they would

be relied on and that Blackburn had done so to her detriment. Here Tomlinson LJ referred to the approaches of that detriment as not to be treated as a 'narrow and technical concept' (Robert Walker LJ In *Gillett* v *Holt*) and should be 'assessed and evaluated over the course of the relationship' (Lord Walker in *Thorner* v *Major*). As such, and agreeing with the first instance decision, it was clear that detriment was established by Blackburn giving up a secure rented home, leaving her job and moving into the house.

- In *Davies* v *Davies* [2016] EWCA Civ 463, Eirian Davies spent many years, on and off, living and working on her parents' dairy farm in Wales. Her parents wanted the farm to stay in the family when they died. Eirian was the only one of their children who was interested in the business. In 1985 Mr Davies first told Eirian that she would inherit the farm. Over the years the volatile relationship with her parents meant that Eirian left the farm a number of times but returned at her parents' request. When she was working on the farm, she received accommodation and benefits but earned less than she would have done elsewhere. Eirian also gave up a more lucrative and less stressful job. Following her return in 1990, her parents assured her that she would join their business partnership but they never signed the 1997 partnership agreement that was drawn up. In 2009 Eirian was shown a draft will under which she was to inherit the farm. A year later Mr and Mrs Davies drafted a fresh will that omitted this provision. By 2012 the family relationship had broken down so badly that it resulted in Eirian leaving the farm for good. In 2013 she brought a claim in proprietary estoppel for an interest in the land and dairy business. At first instance, it was decided that Eirian was entitled to equitable relief. The main issue was how the equity should be satisfied. It was thought that in the circumstances, and with the Davieses still being alive, it was not appropriate for there to be a transfer of the farming assets and that a monetary award of £1.3 million (amounting to a third of the value of the business) was a fair reflection of the expectation and detriment Eirian had experienced. The Court of Appeal reduced the award to £500,000, finding the first instance approach to be too broad brush in respect of the facts establishing detriment and precisely what the claimant's expectation was. As to the latter, it was held that over the years there had been a series of shifting expectations, some of which were either repudiated or superseded, and the evidence on detriment fell short of showing that Eirian had positioned her entire life on the basis of the assurances.

- In *Moore* v *Moore* [2018] EWCA Civ 2669, Roger and his son carried on a farming business in partnership. Stephen claimed that Roger had assured him that he would inherit Roger's share in the business. However, when the father and son fell out, Roger, who by this point lacked mental capacity, sought to dissolve the partnership. Stephen's counterclaim relied on proprietary estoppel. He was able to establish the elements of the claim. The principal question that arose was the right approach to be taken to the relief to be granted. The first instance judge satisfied the equity by ordering an immediate transfer to Stephen of Roger's half share in the business and its assets. This would give effect to Roger's clear intention to keep the farm in family ownership. The judge took the view that Roger and his wife (and Stephen's mother), Pamela, should continue to receive what they had expected to receive from the farm during their lifetimes. This involved ordering Stephen to provide Roger and Pamela with the farmhouse to live in and to cover all its running costs, together with paying for their care and living expenses. The finding of estoppel was upheld on appeal. The Court of Appeal agreed that the order of an immediate transfer of Roger's share to Stephen should stand. However, Henderson LJ decided that the remedy awarded at first instance failed to recognise that the assurances had been given in a context that assumed the relationship between the partners would remain harmonious, when it had in fact later broken down. This made it impracticable for an order to make the parties financially interdependent on an ongoing basis. The better approach to satisfying the equity in the circumstances would therefore be to provide the parties with 'a clean break'. This would require Stephen to make generous financial provision for Roger and Pamela. Remitting determination of the detail of the order to the High Court, the Court

of Appeal offered guidance on the nature of the relief that might be considered appropriate. In return for Stephen getting Roger's share, it was suggested the order should require Stephen to: (a) pay a sizeable lump sum to his parents, allowing his mother to be rehoused, and take care of any future health needs she might have; (b) assume responsibility for his father's health costs and pay his mother a weekly sum; and (c) shoulder any tax liability arising from the order.

- In *James* v *James* [2018] EWHC 43 (Ch), the claimant, Sam, had worked for around 35 years with his father, Charles, in a farming and haulage business in Dorset. In 1990 he became a partner in the business along with his father and his mother, Sandra. The partnership was dissolved in 2009 in the aftermath of family disharmony created when Charles gave some land to Karen, one of Sam's siblings. Charles died in 2012 having previously transferred assets into his and his wife's joint names and making a 2010 will, leaving his estate to wife and two daughters. Sam unsuccessfully challenged the will; and he also unsuccessfully mounted a proprietary estoppel claim in respect of the farm against his mother and two sisters. Judge Paul Matthews dismissed Sam's proprietary estoppel claim. He could not establish a clear assurance by Charles that he would leave the farm to Sam. Charles had on occasion told Sam what his testamentary intentions were. But the judge pointed out that such a statement of current intentions as to future conduct was neither a promise of that conduct, nor intended to be acted upon. (For claims that similarly proved unsuccessful for lack of a clear or uncontroverted assurance, see *Shaw* v *Shaw* [2018] EWCH 3196; and *McDonald* v *Rose* [2019] EWCA Civ 4.) Context and the parties' personalities played a part in the judge's finding that statements Charles made that Sam would one day be farming the land were not assurances. Charles was by character reluctant to make such commitments and Sam was known to be keen to inherit the property. The judge also held that in any event Sam had not suffered detriment, nor could he show reliance. He had been paid properly for his work, received benefits and had been made a partner. Nor, in Judge Matthews' view, could Sam show reliance. Sam would not have acted any differently. He had never seriously considered going elsewhere to take up some other occupation. Judge Matthews found that, although Sam had worked hard in the haulage business, the same could not have been said of the farm in which he was less interested. Finally, the case contains some interesting *obiter* remarks ([51] and [52]) on the relationship of proportionality between the level of detriment and the relief awarded, comparing views expressed in *Davies* v *Davies* with those expressed in *Suggitt* v *Suggitt* – essentially favouring expectation fulfilment.

- *Wills* v *Sowray* [2020] EWHC 939 (Ch) is factually unusual as an estoppel-based claim to a farm in that the claimants were not members of the deceased's family. Two brothers, James and Matthew, made separate claims based on their dealings with Tony, their long-standing friend. Tony owned Gilmoor Farm, which comprised 50 acres of grazing land, a farmhouse, various barns and outbuildings, with a value of around £600,000. Tony, a divorcee, had a daughter, Claire, from whom he became estranged for a period until she was 22. In 2017, Tony died intestate and Claire inherited the entire estate. Matthew made a proprietary estoppel claim in relation to 50 acres of farmland and the outbuildings (but not the house). The High Court accepted his evidence that, on more than one occasion, Tony had made promises to the effect that the farm was Matthew's or it would become his. In 2005, after Tony had been reunited with his daughter, Claire, Matthew appreciated that Tony would leave the farmhouse to her. It was accepted that the two men were very good friends, akin to father and son, and that Matthew trusted that Tony would keep his word. Matthew worked on the farm for more than 20 years and the first instance judge found that his agricultural labour (digging, repairing, rotavating and hay-making) amounted to substantial detriment. Finding that an equity had arisen in Matthew's favour, the Court decided that a proportionate and appropriate remedy to meet Matthew's expectations was for Claire to transfer all the land (except for the plot that James was claiming) together with the outbuildings to

Matthew. James's separate claim related to a small piece of Tony's farmland (valued at around £30,000) on which he had built a log cabin as a family home. It was based on an oral transaction in 2012 by which Tony promised to leave James the land in his will if James gave him his Jeep. The judge found that James had satisfied all the elements of estoppel and that the lack of a written contract in compliance with s.2 of the LP(MP)A 1989 was not a bar to James succeeding in an estoppel claim to the land. This keeps alive the debate about the interrelationship between formalities and proprietary estoppel. The judge held that it could, notwithstanding Lord Scott's *obiter dicta* to the contrary in *Cobbe* v *Yeomans Row* [2008] 1 WLR 1752. The point receives only limited treatment (at [259]–[264]). It recognises that s.2 may prevent the agreement from being a valid contract but does not stop it from being an ingredient in another cause of action. In other words, a freestanding action based upon proprietary estoppel need not be seen as frustrating s.2's policy – on which point see, too, Kitchin LJ's observations in *Farrar* v *Miller* [2018] EWCA Civ 172 (at [59]–[68]).

- In *Howe* v *Gossop* [2021] EWHC 637 (Ch) Mr and Mrs Howe (the Howes) owed Mr and Mrs Gossop (the Gossops) £7,000 for some road surfacing work. The parties reached a verbal agreement (on which they shook hands) that the Howes would transfer land to the Gossops in return for them waiving the Howes' obligation to pay the £7,000 debt. The Gossops then carried out fencing work on the land and cleared it of rubble before adding topsoil and sowing grass seed. After the two couples fell out, the Howes brought proceedings to recover the land. The trial judge held that a proprietary estoppel right had arisen that entitled the Gossops to an irrevocable licence to use the land as part of their garden for as long as one of them was alive and living in the adjacent house. On appeal, Snowden J upheld the decision. The Gossops were not asserting proprietary estoppel in an attempt to enforce the verbal agreement. They were merely raising proprietary estoppel to defeat the Howes' claim for possession of the land. Therefore (relying on Lord Neuberger's approach in *Thorner* v *Major* [2009] UKHL 18, [99]) Snowden found that there was no clash with s.2's requirement of a land contract needing to be in writing.

  The case is worth looking at more generally for its useful (*obiter*) discussion of the contested and unsettled position on the relationship between s.2's formality requirements and the operation of estoppel. Snowden J left open (at [66]) the possibility that, notwithstanding s.2 of the 1989 Act, proprietary estoppel might be used to enforce an oral agreement if a claimant could 'point to something else as the basis for an estoppel based on unconscionability'. The judge took the view (at [70]) that might be possible where, as in cases such as *Kinane* v *Mackie-Conteh* Civ [2005] EWCA 45, a claimant is able to rely on some additional representation or conduct by the defendant.

- Section 116 LRA 2002 provides that an equity by estoppel 'has effect from the time the equity arises as an interest capable of binding successors in title'. Thus, it is confirmed that an uncrystallised estoppel 'equity' can bind a transferee if protected as required by the normal rules of registered or unregistered land. In registered title land it can be protected by entry of a notice on the land register or, coupled with actual occupation, is capable of overriding a disposition (see Chapter 3). But, once the court has granted a remedy, then whether a transferee is bound will depend on the nature of the remedy granted. For example, if the remedy is a freehold or an easement then it will bind a transferee, but if it is a licence or financial compensation, then it will not.

Self-assessment questions

1. **When will an interest arise through proprietary estoppel?**
2. **Which factors are relevant in determining how to give effect to an estoppel interest?**

Activity 6.2

Could *Errington* v *Errington and Woods* [1952] 1 KB 290 or *Tanner* v *Tanner* [1975] 1 WLR 1346 have been argued on the basis of proprietary estoppel?

No feedback provided.

Activity 6.3

What would have been the position if Basham in *Re Basham* [1986] 1 WLR 1498 had:

a. sold the cottage to X?

b. died having made a will leaving the cottage to X?

No feedback provided.

Further reading

- Dixon, M. 'Confining and defining proprietary estoppel: the role of unconscionability' (2010) *LS* 408.
- Gardner, S. 'Fin de siècle chez *Gissing* v *Gissing*' (1996) 112 *LQR* 378.
- Gardner, S.'The remedial discretion in proprietary estoppel – again' (2016) 122 *LQR* 492.
- Thompson, M.P. 'The flexibility of estoppel' (2003) *Conv* 225.

Sample examination questions

Question 1

David, owner in fee simple of a property called Le Nid (unregistered land), persuaded Clarissa, his partner, to come to live with him. He promised that she could stay there as long as she wished, provided she gave up her flat, decorated the kitchen and paid for a second garage to be built for her car. Clarissa agreed, moved in, decorated the kitchen and had the garage built. After three years, their relationship broke down and David agreed to sell Le Nid to Eric. Eric visited the house when Clarissa was shopping, saw her clothes, and was told by David that they belonged to a friend who would not be staying long. Clarissa wishes to remain in the house.

Will she be able to succeed:

a. while David is the owner?

b. if David sells to Eric?

Question 2

In 2018 Dave and Pam met and decided to get married after Pam had finished her course of study, which they expected to happen in 2022. Dave suggested to Pam that she should move into his house (registered land). At that time Dave said 'We will get a bigger place when we are married, but in the meantime, why don't you sell your flat and move your furniture in here? You could also convert the garden shed into a nice study for yourself.'

Pam agreed. She sold her flat, moved into Dave's house and converted the shed into a study. For the next three years Dave paid all the household bills and gave Pam a small allowance while she completed her course. Pam looked after the house and garden. In 2022 the relationship broke down and Dave gave Pam notice to quit.

Advise Pam.

What would your advice be if Dave had sold the house in 2022 to Robert during Pam's absence on a training course and Robert had given Pam notice to quit?

Question 3

Romeo was the sole owner of the freehold title to a house on registered land. After meeting on holiday, Romeo and Juliet began a relationship in August 2017. In March 2018, Romeo asked Juliet to move into his house with him. This required Juliet to sell her home for £125,000.

Juliet was concerned about her rights after she moved into Romeo's house. In April 2018, after an evening drinking wine at Juliet's birthday dinner, Romeo said to her: 'You can think of this as being your home too. I want us to have a meaningful relationship.'

Juliet had a son, Billy, from a previous relationship. Billy was aged five. He had to move school as a result of this move.

Juliet wanted to pay for the house to be redecorated so that it was more to her taste. In March 2019, she asked Romeo to give her permission to do this because, as she put it: 'That would make me feel more like this is my home too.' Romeo allowed her to refit the kitchen, the master bedroom and its en suite bathroom at a total cost of £40,000. Juliet paid for the entire £40,000. The house had five bedrooms and eight other rooms.

In March 2021, Romeo decided to construct a guest house on the land attached to his house. Juliet was a qualified architect. She designed the bungalow. It was a single bedroom bungalow in the modernist style, with a kitchen and a living-room looking over the large gardens. The bungalow was special in that it required no heating and received all of its power from solar panels on the roof. These features were the result of Juliet's special knowledge and skills as an architect.

The construction work cost £100,000, which was funded half by Romeo and half by Juliet. Juliet supervised every stage of the construction process and fitted the solar panels herself. The construction work was completed four months ago. On regular occasions during the construction work, Romeo said to Juliet: 'You are amazing. No one else could do what you do. This really is your guesthouse'.

Recently, Romeo has begun a new romantic relationship and wants Juliet and Billy to leave the property.

Advise Juliet on her rights under proprietary estoppel principles.

Advice on answering the questions

Question 1

The issues to consider relate to the nature of Clarissa's interest in the house:

1. Does she have a beneficial interest under a constructive trust?
2. Does she have a contractual licence? Is there consideration and an intent to create legal relations? Would it be a breach of contract for David to revoke the licence? Would the licence bind Eric, a purchaser (consider *Ashburn Anstalt* v *Arnold* [1989] Ch 1)?
3. Could she rely on the doctrine of proprietary estoppel? What conditions would have to be satisfied? How would the equity be satisfied as against David? Would Eric be bound? Does he have constructive notice of her equity?

Question 2

The major issue here is the nature of Pam's rights in the house. As Dave was the sole legal owner, could she claim an equitable interest by way of a resulting or constructive trust? An examination of the case law (particularly *Lloyds Bank* v *Rosset* [1991] 1 AC 107) makes this seem unlikely, although you should note the criticism of *Rosset* by the House of Lords in *Stack* v *Dowden* [2007] UKHL 17 (see Chapter 4), and consider the effect of the latter case. If she occupied the house as a licensee, was it a bare licence or is the licence supported by a contract or an estoppel? There are problems in finding a contract in this kind of situation – consideration? Intent to create legal relations? Certainty of terms? – and it seems that Pam would be best advised to argue that an estoppel had arisen in her favour.

You are expected to focus on proprietary estoppel and the ways in which the courts have in recent years defined the scope of the doctrine. Was there an 'assurance' on Dave's part? Was there 'detrimental reliance' on Pam's part? Would it be unconscionable for Dave to assert his strict legal rights? If so, how would the courts give effect to the equity that had arisen in Pam's favour? These are difficult questions

that require careful analysis in the light of the case law (e.g. *Coombes* v *Smith* [1986] 1 WLR 808, *Sledmore* v *Dalby* (1996) 72 P&CR 196, *Gillett* v *Holt* [2001] Ch 210). The other issue in the question relates to Robert's position. Assuming that Pam has an interest in the house, it would bind Robert if it had been protected on the land register or if it was supported by 'actual occupation' (para.2 Schedule 3 LRA 2002). You need to consider both whether she was in actual occupation and whether an estoppel equity amounted to a 'right' within the registration legislation; it does, under s.116 LRA 2002.

Question 3

This problem raises issues of proprietary estoppel. The principal issue is whether Juliet acquires rights under proprietary estoppel and, if so, what the nature of her remedy would be.

The problem falls into three phases: 2018 on moving into the property with Billy, 2019 with the redecoration and 2021 with the bungalow.

Juliet needs to demonstrate representation, reliance and detriment (and the module guide identifies 'unconscionability' as a separate factor). The nature of any remedy is a separate question.

2018: The first question is whether Romeo makes a representation or assurance. The statement made to Juliet is about having a home, not acquiring rights in the property and therefore may appear too slight. A succession of assurances would be sufficient, as in *Gillett* v *Holt*; or even silence with an appropriate background of circumstances, as in *Thorner* v *Major* [2009] UKHL 18. There is a question as to whether or not there is sufficient detriment: factors affecting the claimant's children (as suggested in *Grant* v *Edwards* [1986] Ch 638) would be sufficient, although other cases like *Coombes* v *Smith* take the opposite view and would require something such as spending money (but not merely personal detriment, such as moving one's children).

As to the concept of unconscionability, much depends on one's view of encouraging a mother and her young son to move into your home, and whether you thought reliance was being placed on your representation about having the house as their 'home'. The idea of the home could be a mere licence to occupy. It would be a strained interpretation to think that this is a promise of property rights.

2019: Redecorating the property would not, in itself, acquire rights in the property in the wake of *Lloyds Bank* v *Rosset*. There a wife supervised the redecoration of a property (showing some skill in so doing – see Sparkes' 1989 article) but acquired no rights. In that case, there was a suggestion that this was the sort of work that might be expected from a wife. The words spoken by Juliet could be said to relate only to a 'home' and not to 'property rights in a building'. The issue might turn on Romeo's response: in letting Juliet undertake this work, is he merely indulging his partner and restricting her ability to remodel their home to only three rooms in a large house, or is he allowing her to form the impression that she is acquiring rights in the home? The 2019 arrangements seem to acquire her nothing but for the fact that Juliet pays for that work. Some students may want to make a stronger argument, especially considering this expenditure to be large enough to raise the assumption that Juliet would acquire some rights as a result.

This case appears similar to *Lissimore* v *Downing* [2003] 2 FLR 308 in that a homeowner (in that case a wealthy homeowner) allowed a girlfriend to move into his home and she unsuccessfully claimed property rights with specious suggestions that his saying 'Wouldn't you like to be lady of this manor?' was intended to grant her rights in his enormous Warwickshire estate. Even forming a long-term relationship latterly did not acquire her rights in his capacious home.

2021: The construction of a separate building is something more than *Rosset* and the redecoration. Juliet uses her architectural knowledge and skills to design and supervise the construction of that bungalow. Moreover, Juliet meets half of the construction cost. We are not told of any specific representation being made here. Could Juliet acquire rights like *Thorner* v *Major* for this extra work? The words which Romeo speaks could be considered to be similar to the words spoken in *Gillett* v *Holt*

(which were held to be a representation), although they are very ambiguous and might not be thought to amount to a representation that Juliet is to acquire property rights in the guesthouse.

If the estoppel had been made out in 2021, then the question arises as to remedy. Awarding the freehold, as in *Re Basham*, would be inappropriate because she has not been promised anything of that order. A bold approach could divide the property in half if the words spoken in 2018 were taken to be a representation that the home would be owned half each. Alternatively, the approach in *Gillett* v *Holt* would permit some compensation and the acquisition of some property rights (perhaps the freehold over the bungalow if it were separated from the rest of the land, as with the cottage in *Gillett* v *Holt* which the claimant renovated). Cases such as *Jennings* v *Rice* [2002] EWCA Civ 159 and *Campbell* v *Griffin* [2001] EWCA Civ 990 granted a right to mere compensation – perhaps the £40,000 spent on decoration and the £50,000 spent on the construction of the bungalow.

There would be a debate here as to whether or not (like *Jennings* v *Rice*) there would be held to be 'unconscionability' even though the time period is less than in other cases. The presence of the child may make it appear more unconscionable to throw them out of the house.

Focus of the assessment

Within the scope of this chapter, there are three principal areas for assessment:

1. **A problem question focusing solely on the material in this proprietary estoppel chapter.**
2. **An essay question asking you to consider the nature of proprietary estoppel (with the many possible explanations of how the estoppel is made available and the remedies that are available).**
3. **An essay question asking you to consider the nature of proprietary estoppel and the law on constructive trusts under *Jones* v *Kernott* in Chapter 4 'Co-ownership and trusts of land'.**

Quick quiz

Question 1

What are the essential elements of an estoppel arising?

a. **A promise followed by reliance.**

b. **A promise, reliance and unconscionability.**

c. **A representation, reliance which is detrimental and unconscionability.**

Question 2

Which of the following statements is true in relation to proprietary estoppel?

a. **It can only be used as a shield and not as a sword.**

b. **The detrimental reliance requires some expenditure by the promisee and the burden is on the promisee to prove there was detrimental reliance.**

c. **The reliance does not require expenditure. It is sufficient that there has been some reliance. The burden is on the promisor to prove there was no reliance.**

Question 3

Which statement is true?

a. **The remedy is limited to monetary compensation, as the estoppel only creates personal rights to avoid any problems related to the formalities and rules of conveyancing.**

b. **There is no limit to the remedy that is available; it seeks to give effect to the reasonable expectations of the promise.**

c. **The courts seek to protect the expectations of the promise, but this is only a factor. The courts seek to ensure proportionality between the remedy and the detriment.**

QUESTION 4

Which statement is true?

a. **An estoppel promise must satisfy the requirements of s.2 Law of Property (Miscellaneous Provisions) Act 1989.**

b. **An estoppel promise can be by words, even if inferred from conduct or imprecise statements.**

c. **An estoppel promise must be an active promise and inaction will not be sufficient.**

QUESTION 5

Which statement is NOT true?

a. **Estoppel interests cannot be overriding.**

b. **Estoppel interests, although uncrystallised, can be overriding if protected by actual occupation.**

c. **Estoppel interests, although uncrystallised, can be overriding if protected by registration.**

Answers to these questions can be found on the VLE.

7 Easements and profits à prendre

Contents

Introduction

This chapter is concerned with some of the most important rights that a person may exercise over the land of another. They are proprietary rights and they may exist both at law (s.1(2)(a) LPA 1925) and in equity. It is obviously important for the purchaser of land to discover whether a third party possesses a right that is enforceable against the land and, if so, what is its nature and extent. Therefore, the law has laid down fairly strict rules governing the definition of easements and profits, and the ways in which they can be created or acquired. When it comes to methods for the creation of easements, this chapter focuses on grant and reservation, predominantly by implication rather than expressly. It does not consider the more obscure and complex methods by which long use may generate an easement by prescription – which lies outside the syllabus. In practice, easements (e.g. rights of way, right to light and right to water) are much more important than profits (the right to enter another's land and to remove the soil or the produce of the soil, such as crops) and this chapter will therefore concentrate on easements, though reference will be made to the more important differences between the two types of right.

LEARNING OUTCOMES

By the end of this chapter and the relevant readings, you should be able to:

- **set out the essential characteristics of an easement and of a profit à prendre**
- **explain the circumstances in which an easement may be implied in favour of the grantor or grantee of land**
- **explain the circumstances in which an easement will bind a purchaser of the land affected**
- **apply your knowledge to hypothetical factual situations in problem questions.**

7.1 Nature and characteristics of an easement

Core text

- **Dixon, Chapter 7 'The law of easements and profits': Section 7.1 'The nature of easements as interests in land' and Section 7.2 'The essential characteristics of an easement'.**

Essential reading

- **George and Layard, Chapter 11 'Easements' (excluding Section 12.6 'Prescription'). Available on the VLE.**

Further reading

- **Bogusz and Sexton, Chapter 17 'The essential characteristics of easements'.**
- **Smith, Chapter 23 'Easements and profits': Section 1 'Similar rights' and Section 2 'What can be an easement and profit?'.**
- **Bevan, C. 'Opening Pandora's box? Recreation pure and simple: easements in the Supreme Court' (2019) *Conv* 55.**

Put simply, easements are rights which one landowner enjoys over the land of a neighbour: a right of way is a common example. As with many things in law, easements are easier to explain by example. Suppose two neighbours come to an agreement that, since House A has no garden, its owner can use the garden of House B for sunbathing. If the 'right' to use the garden satisfies the test from *Re Ellenborough Park* (below) and is created by one of the recognised methods, then it may be an easement.

Activity 7.1

What if the owner of House A wants to use B's garden every day, so that B is unable to enjoy his own land?

Some basic working definitions

These definitions do not cover negative easements; see below for further discussion of this topic.

- Dominant tenement: a piece of land which benefits from a right to do something on, or over, neighbouring land (i.e. which has the benefit of an easement)
- Servient tenement: a piece of land over which another, neighbouring landowner has rights to do something (i.e. which has the burden of an easement)
- Profit à prendre: a right to take something from land belonging to another person, for example, a right to take fish from a lake on land belonging to another, or to shoot game on it (à prendre (French) = 'to take' (to be taken))
- Legal easement: an easement which was created in a manner recognised at law, for a duration equivalent to a fee simple absolute in possession or a term of years absolute (s.1(2)(a) LPA 1925)
- Equitable easement: any other valid easement, including all those created informally; this includes any easement held for a period other than either a fee simple absolute in possession or a term of years.

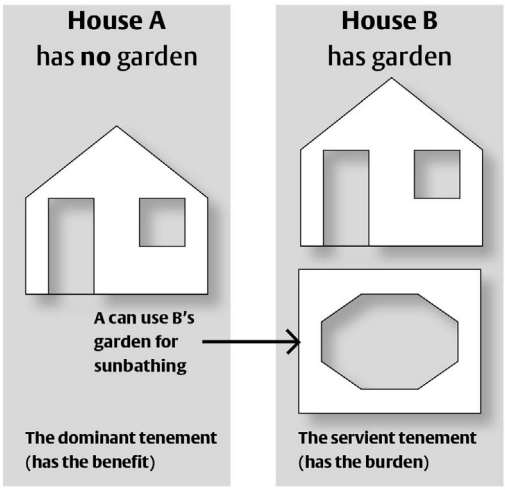


Fig. 1 Diagram to represent an easement

An easement confers a benefit upon one piece of land (called the dominant tenement) and a corresponding burden upon another piece of land (called the servient tenement). The benefit and burden apply to the **land itself**, and so are not merely personal to those who created them. An easement is a **proprietary interest** in land and can pass with the land to new owners (subject to conveyancing and registration requirements). This means that purchasers of land may find that they are bound by

such pre-existing third party rights. There is a difficult balance of rights involved in the recognition of easements. Because they are proprietary rights capable of passing with the land which they affect and disrupt the servient landowner's use and enjoyment of their land, the law is careful not to expand the category of easements too readily. The definition of easements must not become too vague or uncertain. But on the other hand, easements may be necessary for the use and enjoyment of the dominant land, or may be commercially valuable, and so the law must develop with the passing of time, therefore the category of easements must not be closed. For a recent decision on how the category of easements has been developed, see *Regency Villas Title Ltd* v *Diamond Resorts (Europe) Ltd* [2018] UKSC 57.

It is difficult to define an easement in a really helpful way due to the wide-ranging and flexible nature of the category, and it is therefore more usual to explain the nature of an easement by reference to its essential characteristics and by comparison with other similar rights. The essential characteristics were set out by the Court of Appeal in *Re Ellenborough Park* [1956] Ch 131. The Supreme Court endorsed and offered further guidance on them in their important ruling in *Regency Villas Title Ltd* v *Diamond Resorts (Europe) Ltd* [2018] UKSC 57 – a decision that is well worth considering in detail.

In *Re Ellenborough Park*, people who owned houses around a park were granted the right to use it as a 'leisure garden', but during the Second World War it was taken over by the government. If the house owners had been deprived of a legal right, then they were entitled to compensation under a statute. On the facts, the only possible legal right was an easement. Eventually, the house owners succeeded in convincing the Court of Appeal that the right to use the park was an easement. Four factors were held to be relevant in determining whether an easement exists.

The *Re Ellenborough* criteria currently maintain the balance of rights mentioned above and are generally applied, but they are flexible and must not be treated as if they were statutory law. Most textbooks contain lists of examples of rights which have been held to be easements, and you should make yourself familiar with a range of examples.

7.1.1 The *Re Ellenborough* criteria

1. **There must be a dominant and a servient tenement**

   Unlike a profit, which may exist in gross (i.e. detached from the ownership of land), an easement cannot exist independently of the ownership of land. An easement must be attached ('appurtenant') to a dominant tenement and it passes on any transfer of the land (s.187(1) LPA 1925). For an interesting application of this principle, see *London and Blenheim Estates Ltd* v *Ladbroke Retail Parks Ltd* [1994] 1 WLR 31, which also holds that the creation of easements for land not yet identified is not possible – they cannot exist independently of land. The requirement, which does not apply to profits, is firmly entrenched, being well supported by authority (see Peter Gibson LJ in *London and Blenheim Estates Ltd* v *Ladbroke Retail Parks Ltd* [1994] 1 WLR 31 at p.36). In the Law Commission's most recent review of the law of easements it concluded that dispensing with the restriction and allowing easements to exist in gross (i.e without a dominant tenement) would lead to the undesirable prospect of allowing 'a proliferation of adverse interests in land, unlimited by the needs of the dominant land' (*Making land work: easements, covenants and profits à prendre* Law Com 327, 2011 at [2.24]). The understandable anxiety here is ensuring that land is not overburdened. But is that justification entirely convincing and might the requirement stifle the creation of easements that are convenient and economically beneficial for the dominant land? See Sturley, M.F. 'Easements in gross' (1980) 96 *LQR* 557.

   There must be land which is burdened with the easement (the 'servient tenement'). An easement is a proprietary right affecting the servient tenement and is potentially enforceable against subsequent owners of the servient tenement.

2. **The easement must accommodate the dominant tenement**

   The right granted must not simply confer a personal advantage unconnected with the land; it must increase the normal enjoyment of the land: see *Hill* v *Tupper*

(1863) 159 ER 51. Here, the right to put pleasure boats on a canal for profit was not an easement, since it was held to be a personal advantage. This can be contrasted with *Moody* v *Steggles* (1879) 12 Ch D 261 where the right to place an advertisement on neighbouring land was held to be an easement. Here the land was used as a public house and it was seen as not just benefiting the current owner of the land but the intrinsic nature of the land itself. See also *P & S Platt Ltd* v *Crouch* [2003] EWCA Civ 1110 (moorings on the servient land benefiting the hotel on the dominant); and *Regency* where the recreational facilities on the burdened land benefited the timeshare enterprise operating on the dominant land.

Be prepared to discuss this aspect of the need for accommodation and apply it to the facts given to show that this is not a clear-cut test.

In *Re Ellenborough* a claim in respect of a house (without its own garden) to be able to enjoy the recreational benefits provided from using a communal garden itself sparked considerable discussion, not least because it seemed to be tantamount to recognising personal/recreational rights for those occupying the land. Ultimately, the Court of Appeal accepted the accommodation requirement was satisfied through the use value the house gained from having the benefit of a recreational right rather than through any incidental increase in its value. By extension, the Supreme Court in *Regency* recognised that recreational activities (including swimming and playing golf and tennis) are a beneficial part of modern life and it confirmed that there is no blanket prohibition on the existence of recreational and sporting easements. What matters is being able to show how, in the fact-specific context of each case, the particular rights claimed over the servient land do in fact accommodate the dominant land. In *Regency* the owners specifically acquired the dominant land because of the recreational facilities available on the servient land. That in turn raises interesting questions about what limits there may be on the way *Regency* is applied to future claims to recreational rights.

A second aspect of the requirement is that the dominant tenement and the servient tenement must be sufficiently proximate: *Pugh* v *Savage* [1970] 2 QB 373.

3. **The dominant and servient tenements must be owned or occupied by different persons**

A person cannot have an easement over his own land. The nature of the right is that it exists over somebody else's land (note, however, the concept of a 'quasi-easement' under the rule in *Wheeldon* v *Burrows* (below)). However, a tenant can enjoy an easement over land retained by the landlord (and vice versa) because it is enough that the dominant and servient tenements are not owned **and** occupied by the same person. However, the same does not apply where the occupier has only a licence because the licensee lacks an estate in the land to which the easement can attach. What is important then is that there is a need for two separate estates in land even if the freeholder of both pieces of land is the same person. An easy way to consider this is by asking whether there was diversity of ownership or occupation at the time the application for an easement was made.

4. **The easement must be capable of forming the subject matter of a grant**

Since, as we shall see, an easement must originate in a grant, whether express, implied or presumed, certain conditions must be fulfilled:

a. There must be both a capable grantor and a capable grantee.

b. The right must be sufficiently definite. If the nature and extent of a claimed right are uncertain, it is difficult to determine what could constitute an interruption of such a right. Cases involving claims to the free access of air illustrate this point (see *Bryant* v *Lefever* (1879) 4 CPD 172 and *Cable* v *Bryant* [1908] 1 Ch 259).

An easy way to remember the *Re Ellenborough* criteria is by the acronym 'DADS':

Dominant and servient tenement

Accommodate the land

Diversity of ownership

Subject matter of a grant

ACTIVITY 7.2

Since there is no such easement as a right to privacy or a right to a view, how would a landowner who intends to sell part of his land prevent the purchaser from interfering with his privacy or spoiling his view? (Hint: see Chapter 8.)

7.1.2 Additional points

In addition to the *Re Ellenborough* criteria, an easement must conform to the following requirements.

The right must be within the general nature of rights capable of existing as easements. Although it is often said that the list of easements is not closed, it seems that while the category of positive easements is likely to expand with changing social and economic conditions, the courts will be reluctant to recognise any new negative easements. Positive easements are those which allow the dominant owner to do something on the servient land. Negative easements operate primarily as restrictions on use of the servient land. A well-known example is the right for the dominant landowner's building to get support from a building or structure on servient land. Here, exceptionally, an easement can restrict the use of the servient land. Another example is an easement of light through a window. An easement of this type prevents any use of the servient tenement that obstructs the passage of light to the window. In *Hunter* v *Canary Wharf* [1997] AC 665 the House of Lords (rejecting a claim to an easement to receive a radio/TV signal across a neighbour's land) characterised negative easements as 'anomalous' and indicated that the category of negative easements is closed and is not to be expanded. Evidence of this can be seen in the unwillingness of the Court of Appeal in the earlier case of *Phipps* v *Pears* [1965] 1 QB 76 to extend the right of support to recognise a new easement for a building on the dominant land to have a right to protection from the weather.

The exercise of the right must not require any action on the part of the servient owner. A right which requires positive action by the owner of the servient tenement in order for the right to be enjoyed cannot usually be an easement. As Judge Pelling QC explained in *William Old International Ltd* v *Arya* [2009] EWHC 599 (Ch): 'An easement cannot impose a positive obligation on a servient owner…The servient owner's only obligation is to refrain from doing anything that impedes enjoyment of the easement by the dominant owner.' So, with positive rights such as a right of way, the servient owner is under no obligation to keep the servient land in good repair nor, in the absence of a specific agreement, do they have the right to recover a financial contribution towards its repair from the owner of the dominant tenement. Lord Scott (*obiter*) in *Moncrieff* v *Jamieson* [2007] UKHL 42 saw attaching an obligation to maintain a swimming pool as an obstacle to the right to its use being an easement. (After *Regency Villas* this might be otherwise where the right is merely for the use of such a recreational facility, or even perhaps in cases where the servient owner is willing to spend money on the upkeep of the servient land.) There is also said to be a long-standing exception to the prohibition on positive easements that allows an easement for the servient owner to maintain/repair a fence with a neighbour so as to prevent animals escaping from the dominant land: *Crow* v *Wood* [1970] EWCA Civ 5. The basis and the scope of this exception are, however, moot; and an attempt to grant such a right expressly as an easement may be interpreted as taking effect as a positive freehold covenant: *Churston Gold Club* v *Haddock* [2019] EWCA Civ 544.

The easement must be exercisable as of right. A right which is exercisable by permission only cannot qualify as an easement. If the exercise of the 'right' is dependent on the permission of the servient landowner, the right cannot qualify as an easement: 'a purported grant of a right of way for such periods as the servient owner may permit one to use it would not confer any legal right at all' (*Green* v *Ashco Horticulturist Ltd* [1966] 1 WLR 889).

The easement must not confer a right to exclusive possession of the servient tenement. When deciding if a right is an easement it must not amount to exclusive possession. If this is the case then it is not a right over a person's land but is equivalent to an estate in land. It is important to appreciate that an easement is a right over the servient land for a **defined, limited purpose**: it must not be equivalent to exclusive possession of the servient land.

An example of the difficulty which courts have had in applying this requirement can be seen in relation to the simple issue of parking of cars. There have been many cases concerning parking 'rights', or at least permission to park on the land of another.

The 'right' to park has caused particular problems, since in some cases it has been considered to be too extensive and causes too much interference with the servient owner's use of their own land. To see different judicial approaches to balancing competing land use, you can compare the reasoning and framing of the so-called 'ouster' principle by the Court of Appeal in *Batchelor* v *Marlow* [2001] EWCA Civ 1051 with the views expressed by Lord Scott *obiter* in the Scottish House of Lords decision in *Moncrieff* v *Jamieson* [2007] UKHL 42. *Batchelor*'s 'no reasonable use' test has understandably been regarded as binding in more recent English decisions (see *Virdi* v *Chana* [2008] EWHC 2901 (Ch); *Kettel* v *Bloomfold Ltd* [2012] EWHC 1422 (Ch); and *De Le Cuona* v *Big Apple Marketing Ltd* [2017] EWHC 3783 (Ch)). However, the broad interpretation and application it has been given appears to be consistent with Lord Scott's approach to ouster (which focuses on whether or not servient owners retain possession and control of their land). Note that there is no special importance to the parking cases; we are simply looking at them as a common modern illustration of the problems involved in the recognition of easements (a similar problem occurs for storage – see *Wright* v *Macadam* [1949] 2 KB 744). An interesting case is *Miller* v *Emcer Products* [1956] Ch 304 when a neighbour was given the right to use a toilet. Obviously while in use they had exclusive possession but this was not unreasonable as the use was for short periods.

Activity 7.3

Read *Moncrieff* v *Jamieson* [2007] UKHL 42. From this and your reading so far, answer the following question. If a person who owns a garage but no car grants his neighbour the right to park his car in the garage, can such a right exist as an easement?

Summary

Whether a dominant landowner may have the benefit of an easement over the servient land of his neighbour depends to a large extent upon whether the four criteria from *Re Ellenborough Park* can be satisfied. *Regency Villas* is a useful reminder that the category of easements is not closed. But, at the same time, it is important to keep in mind that new easements are not easily recognised by analogy, especially when they require the servient landowner to spend money, or appear to be too close to a claim to exclusive possession of the land affected.

7.1.3 Examples of easements

Essential reading

- ***Re Ellenborough Park* [1956] Ch 131, Court of Appeal.**
- ***Regency Villas Title Ltd* v *Diamond Resorts (Europe) Ltd* [2018] UKSC 57, Supreme Court.**

Activity 7.4

Which of the following could be easements, and why?

a. **A right to park on neighbouring land whenever it is convenient for both parties.**

b. **A right to park on neighbouring land every day from 9.00 a.m until 10.00 p.m.**

c. **Permission to use a garden shared with 10 other houses.**

d. **Permission to use a garden as the only user.**

e. **Access to the public highway across a strip of land owned privately; the previous owner of the land has always done so.**

f. **Ventilation for a basement flat; it could be provided in another way, but that would be much more expensive.**

Look back at all these examples once you have finished this chapter and see if you can expand your answers.

7.2 Creation of easements

CORE TEXT

- **Dixon, Chapter 7 'The law of easements and profits': Section 7.3 'Legal and equitable easements: formalities' to Section 7.10 'Easements resulting from prescription'.**

FURTHER READING

- **Bogusz and Sexton, Chapter 18 'Creation of express and implied grants of easements'.**
- **Smith, Chapter 23 'Easements and profits': Section 3 'The creation and transfer of easements and profits', Part A 'Implied easements'.**
- **Douglas, S.J. 'How to reform section 62 of the Law of Property Act 1925 (2015) 79 *Conv* 13.**
- **Douglas, S.J. 'Reforming implied easements' (2015) 115 *LQR* 251.**
- **Paton, E. and G. Seabourne 'Can't get there from here? Permissible use of easements after Das' (2003) *Conv* 127–35.**

An easement may exist both at law and in equity. The distinction between legal and equitable easements is important, since different methods of creation apply to each category. The distinction is also crucial in determining whether an easement runs with the land (i.e. passes on transfer of either the dominant tenement or servient tenement, to be enforceable by or against the new owner(s)).

Legal easements

To exist at law an easement must be held for an interest equivalent to an estate in fee simple absolute in possession or a term of years absolute (s.1(2)(a) LPA 1925) and can be created expressly or impliedly.

Equitable easements

Easements held for a period other than either a fee simple absolute in possession or a term of years must be equitable (s.1(2)(a), (3) LPA 1925). An easement will also be equitable if it has not been created by one of the methods for creating legal easements. Thus an easement for life or an easement that has been created informally cannot exist at law, though it may take effect in equity. Equitable easements may be created in a written contract which equity regards as specifically enforceable (s.2 LP(MP)A 1989, *Walsh* v *Lonsdale* (1882) 21 Ch D 9), or by proprietary estoppel. If the land is registered then it is capable of protection by a notice on the land register (s.32 LRA 2002). In unregistered land, an equitable easement is registrable as a class D(iii) land charge under LCA 1972 (see Chapters 2 and 3).

Easements normally come into existence either by means of a reservation (where, for example, the vendor of land reserves a right of way over the land sold) or by means of a grant (where, for example, the vendor of land grants the purchaser a right of way over the retained land). Both reservation and grant may be either express (deliberate) or implied.

7.2.1 Express creation

An expressly created easement will be legal or equitable depending upon the character of the document which creates it.

An express legal easement must satisfy these conditions:

- duration (s.1(2)(a) LPA 1925) and
- created by deed (s.52 LPA 1925 (which satisfies s.1 LP(MP)A 1989)) and
- created after October 2003 – it requires substantive registration (s.27 LRA 2002).

An express equitable easement must satisfy these conditions:

- created by compliance with s.53(1)(a) LPA 1925 or
- created by a person with an equitable estate only or
- the legal formalities (above) have failed, as long as this failure is still a specifically enforceable contract which satisfies s.2 LP(MP)A 1989.

Express reservation

An express reservation is where the owner of the dominant tenement deliberately and expressly keeps the right for themselves when they sell or lease part of their land to another. A reservation operates by way of re-grant (i.e. the purchaser is deemed to have granted the easement to the vendor). This means that if there is any ambiguity in the definition of the easement which cannot be dispelled by a consideration of the surrounding circumstances, the grant will be construed against the grantor (i.e. in this case the purchaser). See *St Edmundsbury and Ipswich Diocesan Board of Finance* v *Clarke (No 2)* [1975] 1 WLR 468.

Express grant

Express grant is fairly self-explanatory: the owner of the servient tenement deliberately grants the right over their land to the owner of the dominant tenement.

7.2.2 Implied creation

Implied creation will result in a legal or equitable easement depending upon the character of the document into which it is implied. For example, an easement implied into a legal lease will be legal, and an easement implied into an equitable lease will be equitable.

Implied reservation

Only in the following two instances will easements be reserved, i.e. implied in favour of a grantor.

1. **Easements of necessity** These occur where the land retained would be useless without the existence of an easement in its favour. The typical case is one where the dominant tenement is 'landlocked' (i.e. where a transaction has effectively deprived the dominant tenement of a means of access). It is wrong to assume that 'necessity' would imply, for example, a right to drainage, as land can be used without drains. Although it used to be thought that the implication of easements of necessity was based on public policy, it is clear since *Nickerson* v *Barraclough* [1981] Ch 426 that ways of necessity are implied from the common intention of the parties. An easement of necessity is strictly limited to the kind of enjoyment existing at the time of the grant. This category can overlap with the second category, since what is necessary to enjoy the land will usually be presumed to be the common intention of the parties transferring the land.

   In *Adealon International Proprietary Ltd* v *Merton London BC* [2007] EWCA Civ 362 it was held that where there had been no express reservation of a right of way and there remained a realistic possibility of alternative access over land belonging to

third parties, no such right of way could be impliedly reserved. The claimant (A) owned land bordering the A24 road, and the defendant (M) owned neighbouring land which had another road, High Path, at its northern boundary. A could not lawfully access either the A24 or High Path without planning permission, which had been refused. Until 1989 the two plots had been in common ownership. A claimed an easement by necessity over M's land in order to have access to High Path.

Applying *Manjang* v *Drammeh* (1991) 61 P&CR 194 and *Nickerson* v *Barraclough* [1981] Ch 426, no easement of necessity could exist on the facts.

2. **Common intention** These are easements necessary to give effect to the common intention of the parties at the time of the grant. The scope of this category (which would seem to include easements of necessity) has been strictly limited by the courts: see *Pwllbach Colliery Co Ltd* v *Woodman* [1915] AC 634*; Re Webb's Lease* [1951] Ch 808.

   Implied creation of easements by common intention is not lightly presumed, particularly where implied reservation is argued: see *Chaffe* v *Kingsley* (1999) 77 P&CR 281. As a general principle, if an alleged easement is vital to the parties' common intention, then they should have expressly created it in the conveyance between them. Thus, in the context of implied reservations it is likely that little less than a common intention that a specific easement has been reserved will suffice to imply a reservation in the absence of the express reservation that both parties thought existed (see *Peckham* v *Ellison* (1999) 31 HLR 1030).

ACTIVITY 7.5

Read *Wong* v *Beaumont Property Trust Ltd* [1965] 1 QB 173 and make a note of the relevant facts, *ratio*, decision and reasons for the decision.

Would the decision have been the same if an adequate but more expensive ventilation system could have been installed which did not pass through the defendant's premises?

Implied grant

The law is more prepared to imply easements by way of grant than reservation on the basis that the seller of land should not derogate from their grant. That means the law will not lightly allow the seller to imply reservations over land that was supposedly transferred without such reservations (on the basis that the seller should have made an express reservation if they wanted to retain rights over that land and to allow them to do otherwise derogates from the unreserved grant that they made). That is why implied reservations can only occur via necessity and (rarely) common intention as considered above. Conversely, the law is more willing to imply grants over the land the seller retains where such easements are deemed appropriate to enable the buyer to use the land bought in the way that was envisaged (for to do otherwise would derogate from the grant the seller supposedly made in selling the land to the buyer).

Thus, while grants can, like reservations, impliedly arise by necessity and common intention, the latter is more flexibly interpreted and includes a generalised common intention as to how the purchased land would be used rather than specific common intention as to the specific easement that was intended to be reserved. In *Stafford* v *Lee* (1993) 65 P&CR 172 Nourse LJ stated that an easement by common intention can exist if there was a common intention between the purchaser and vendor of the land as to some particular use of the land, and the easement is necessary in order to give effect to that intention. On the facts, the purchaser wanted to build a house on the land and the vendor had sold it to him for that purpose; since the only practical access for the construction process was over the vendor's land, it was held that an easement for the purpose of construction had been created.

In addition to necessity and a more flexibly interpreted common intention, implied grants can also arise under two further mechanisms. It is important to note that both the rule in *Wheeldon* v *Burrows* (1879) 12 Ch D 31 and s.62 LPA 1925 (considered below)

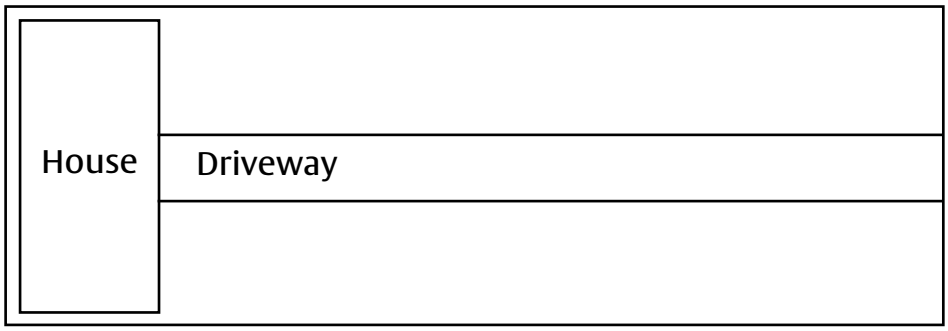
are additional means by which an easement might be impliedly granted but can never be used to impliedly reserve an easement.

Rule in *Wheeldon* v *Burrows*

The rule in this case holds that where a person transfers part of his land to another person, the transfer impliedly carries with it all easement-like rights (known as 'quasi-easements') which were enjoyed and used by the transferor before the transfer, for the benefit of the part of the land which has been transferred. The 'rights' are 'quasi-easements' rather than an actual easements because there is neither diversity of ownership nor separate tenements.

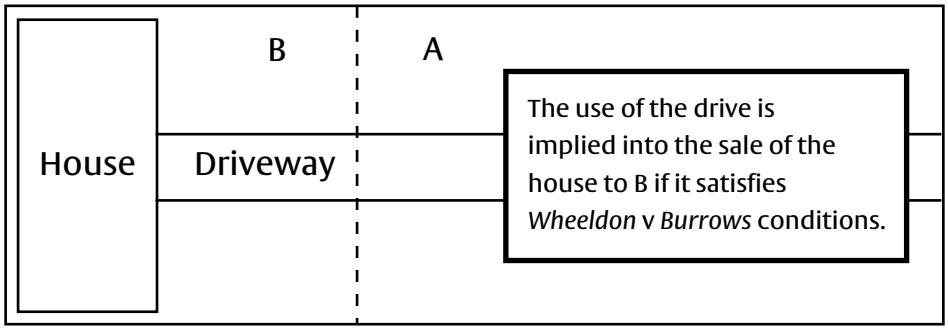
This rule in *Wheeldon* v *Burrows* is based on the principle that a grantor may not derogate from his grant, and has the effect of creating easements in situations that fall far outside the narrow scope of the other two categories of implied easements.

The land is owned by A and he uses the drive when he lives in the house.



Then A sells the house to B and retains the rest of the land.

The use of the drive is implied into the sale of the house to B if the *Wheeldon* v *Burrows* conditions are satisfied.



For the rule to operate three conditions must be fulfilled.

1. The use of the quasi-easement before the sale by the common owner-occupier (A) must be continuous and apparent. The use of the word 'continuous' in this formulation has been judicially characterised as 'all but superfluous'. Accordingly, the question is whether the use by the common owner-occupier was 'apparent'. This requirement will be satisfied if there are visible signs of the use on the ground.
2. The easement must be necessary for the reasonable enjoyment of the dominant land. Note this is not the strict necessity required to create an easement by necessity but for the reasonable enjoyment of the land, so includes drains, power, etc. Even if the property is not landlocked and the grantee is therefore not entitled to a way of necessity, the grantee may still be entitled to claim a right of way under this rule. In determining whether the right claimed is necessary to the reasonable enjoyment of the property granted, the courts will take into account the inconvenience likely to be caused to the servient owner: see *Goldberg* v *Edwards* [1950] Ch 247.
3. Finally, the 'easement' must have been used by the common owner-occupier (A) at the time of the grant for the benefit of the part granted.

There is some debate as to whether (1) and (2) are cumulative or alternative requirements, with the case law inconsistent on this point. You are advised to research this issue yourself and come to a reasoned opinion of what the law should be on this point.

The principle in *Wheeldon* v *Burrows* can generate a legal or equitable easement depending on the nature of the transaction into which the easement is implied. If the transaction is legal the implied easement will be legal; if the transaction is equitable the implied easement will be equitable.

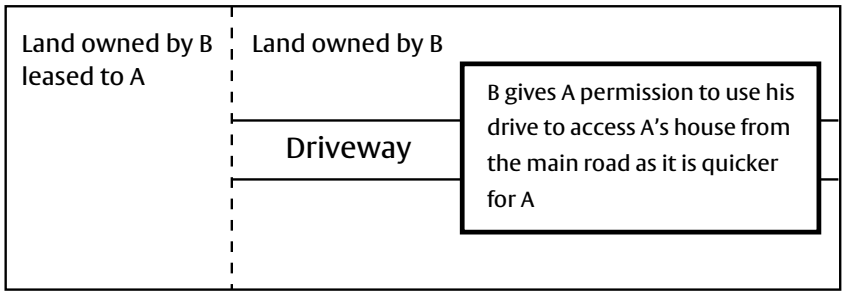
The principle in *Wheeldon* v *Burrows* can only be used to imply the grant of an easement; it cannot be used to impliedly reserve an easement: *Chaffe* v *Kingsley* [2000] 1 EGLR 104.

Implication under s.62 LPA 1925

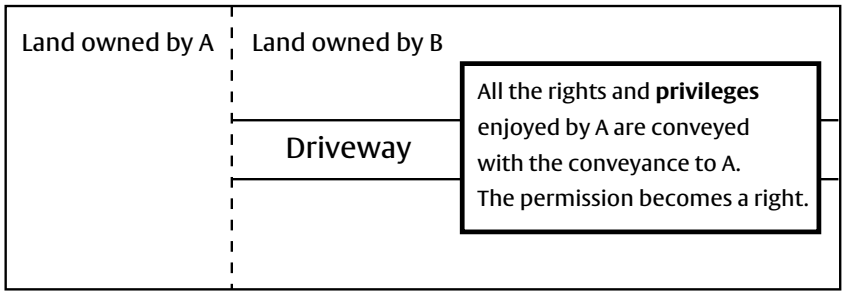
Section 62 is another mechanism by which easements can be impliedly acquired. It operates in two distinct types of situation.

The first (and well-established) situation to which s.62 applies is one where the dominant tenement and servient tenement have a common owner but are occupied by different persons. The common situation is one in which the common owner has granted a lease of part of his land to a tenant. If the common owner subsequently conveys that leased land to a purchaser or grants a new lease to a tenant, the purchaser or tenant will acquire as easements all rights which were previously enjoyed with the land, even if those 'rights' were previously mere licences.

The process may look like this.



A then buys the freehold (or renews his lease).



Section 62 was essentially intended as a word-saving device on conveyance. However, subject to any contrary intention, it operates to 'convert' consensual privileges into easements. It is very unlikely that Parliament intended it to have any such effect. But s.62 has become an important way in which easements can be created.

The requirements for the application of s.62 in this first type of situation are as follows:

a. There must be a conveyance (s.205 LPA 1925) by deed or by registered disposition. Section 62 only applies where land is sold or leased by deed or registered disposition, and can only create a legal easement.

b. There must be diversity of occupation of the two tenements at the time of the conveyance. The person occupying the dominant tenement is usually a lessee.

c. The right (permission) must relate to the land: s.62 cannot convert into easements rights that are in their nature incapable of being easements, such as the intermittent consensual privilege enjoyed by the plaintiffs in *Green* v *Ashco Horticulturalist Ltd* [1966] 1 WLR 889.

d. There is no contrary intention, such as the right being expressed to be personal or merely temporary.

Wright v *Macadam* [1949] 2 KB 744 is a good example of the operation of s.62. The defendant leased a top-storey flat to Mrs Wright and gave her permission to store coal in a coal-shed in the garden of the building. The lease was renewed, without anything further being said about the coal-shed at the time of renewal, but later the defendant demanded a weekly rent for the use of the coal-shed. The Court of Appeal held that when the lease to Mrs Wright was renewed, the 'right' (it is really a privilege) to use the coal-shed was converted by s.62 into an easement, since it was a right already existing, and the lease was a conveyance. Note that if the second lease had been to a third party rather than to Mrs Wright, or if the defendant had sold the flat to a third party, then s.62 would have given the benefit of the easement to that third party.

In *Hair* v *Gillman* & *Inskip* (2000) 80 P&CR 108, the Court of Appeal held that permission given to the tenant of a building by the landowner to park on a forecourt was converted into an easement by s.62 when the landlord conveyed the freehold of the building to the tenant. In applying *Wright* v *Macadam* the Court of Appeal stressed that the section would not have this effect where there was no expectation that the permission could be other than temporary. The judge also expressed the concern that a kindness could create an obligation for the landlord, perhaps unintentionally.

Activity 7.6

Read *Goldberg* v *Edwards* [1950] Ch 247, make notes on the relevant facts, decision and reasoning, then answer the following questions:

a. Why did Mr Goldberg's claim for an easement under the rule in *Wheeldon* v *Burrows* fail?

b. How did Mr Goldberg win the case?

c. What should the landlord have done in both *Wright* v *Macadam* and *Goldberg* v *Edwards* to prevent an easement arising on the grant of a second lease?

The second situation to which s.62 applies is one where the dominant tenement and servient tenement have a common owner **and occupier** prior to the relevant grant. This is illustrated by *P&S Platt Ltd* v *Crouch* [2003] EWCA Civ 1110, the first (modern) case in which s.62 was applied to this type of situation. The owner of a riverside hotel also owned an island in the river which had moorings which could be used by hotel guests. When the hotel was sold, the sale did not include the moorings, but the purchasers argued that they had an easement to use them under s.62. Peter Gibson LJ held that since the right to use the moorings was enjoyed with the hotel and by its guests as part of its business, and the rights were continuous and apparent, there was an easement even though there had been no prior diversity of occupation of the dominant and servient tenements.

Two particular conditions have been identified for the application of s.62 to this type of situation.

1. The use of the quasi-easement by the common owner-occupier prior to the relevant grant must have been continuous and apparent. As explained above in connection with *Wheeldon* v *Burrows*, use by a common owner-occupier is 'continuous and apparent' when there are visible signs of the use on the ground.

2. The quasi-easement must be enjoyed with the quasi-dominant land at the time of the relevant grant, including a reasonable period before the grant.

P&S Platt Ltd v *Crouch* was endorsed and applied in *Wood* v *Waddington* [2015] EWCA Civ 538. However, this application of s.62 is not without its critics. It involves a

considerable overlap with the rule in *Wheeldon* v *Burrows* and it means that in respect of continuous and apparent easements an implied grant arises on a legal conveyance without any question of the easement being reasonable or necessary.

ACTIVITY 7.7

List the differences between the rule in *Wheeldon* v *Burrows* and s.62, explaining when each will apply.

No feedback provided.

Reform

The Law Commission published a report, 'Making land work: easements, covenants and profits à prendre' (Law Com 237), recommending reform of easements, covenants and profits à prendre on 8 June 2011. Among the main problems identified in the current law are, in respect of easements, the fact that some are acquired too easily, some may be difficult to detect and generally there is no means to modify them unlike the provision in relation to covenants. The law relating to implied creation is described as being 'neither straightforward nor clear'. The report includes recommendations that s.62 should no longer operate to transform precarious benefits into legal easements. Although the Government has announced its intention to introduce a draft Law of Property Bill implementing the Law Commission's recommendations, this has not yet happened.

Summary

You should now understand that whether an easement is legal or equitable depends upon its form and the method of its creation. Easements may be created expressly or impliedly, by grant or reservation. The rule in *Wheeldon* v *Burrows* and s.62 LPA 1925 may also create easements from lesser rights, interests or behaviour when land is transferred. In many cases there will be more than one method of justifying the existence of an easement on the facts.

7.3 Extent and extinguishment of easements

CORE TEXT

- **Dixon, Chapter 7 'The law of easements and profits': Sections 7.12 'Improper or excessive use of easements' and 7.13 'The extinguishment of easements'.**

FURTHER READING

- **Bogusz and Sexton, Chapter 19 'Prescription for easements and profits': Section 19.6 'Extinguishment of easements'.**
- **Conway, H. 'Out with the old: easements and obsolescence' (2007) 71 *Conv* 87.**

The extent of an easement depends on its mode of creation. If it is created by express grant, its extent is dependent upon the proper construction of the grant in the light of the surrounding circumstances: if by implied grant, it is dependent upon the original parties' intentions.

Apart from by statute, easements may be extinguished either by (i) unity of possession and ownership or by (ii) release. The former method derives from the principle that the dominant and servient owners should be different persons and happens automatically. The latter may be expressed or implied: for an express release, a deed is required at law whereas release will be implied where the dominant owner has abandoned the exercise of the right with the clear intention to release it. Courts were traditionally eager to presume an intention to abandon where an easement had been unused for 20 years without explanation, but it is now clear that only a very simple explanation is needed for non-use. Courts are reluctant to presume abandonment, and now recognise that a dominant owner is not likely to abandon such a valuable property right, which might be most useful in the future. In *Benn* v *Hardinge* [1993] 66

P&CR 246 the Court of Appeal refused to presume an intention to abandon a right of way which had gone unused for 175 years after the dominant owner explained that throughout that period there had been an alternative means of access to the land. It appears that, as a matter of common sense, an easement will cease to exist when it no longer benefits the dominant land, but the test to be satisfied is a strict one: see *Huckvale* v *Aegean Hotels* [1989] 58 P&CR 163, where Slade LJ stated at 173 that:

> In the absence of proof of abandonment, the court should be slow to hold that an easement has been extinguished by frustration, unless the evidence shows clearly that because of a change of circumstances since the date of the original grant there is no practical possibility of its ever again benefiting the dominant tenement in the manner contemplated by that grant.

In *Wall* v *Collins* [2007] EWCA Civ 444 it was held (somewhat surprisingly) that when a leasehold and freehold estate were merged it did not have the effect of extinguishing a right of way that had been attached to the leasehold interest. An easement had to be appurtenant to a dominant tenement, but not necessarily to any particular interest for the time being. After merger of the leasehold and freehold, the dominant tenement remained unchanged and there was no legal impediment to the continued enjoyment of the easement by the occupier for the time being of that tenement. The decision also deals with the creation of easements via s.62 LPA 1925, and the extent to which a right of way may be exercised over land which was not originally part of the dominant tenement. *Kent* v *Kavanaugh* was also applied. There is a useful case comment by Ward, T. '*Wall* v *Collins* – the effect of mergers of a lease on appurtenant easements' [2007] 71 *Conv* 464.

7.4 Running with the land

The **benefit** of an easement will **pass to a transferee of the dominant tenement**, since the easement is appurtenant to the dominant tenement. The **burden** of an easement can only be enforced against a transferee of the servient tenement if the criteria discussed below are followed. It is thus not enough to consider whether an easement has been validly created, since its burden will only bind future owners of the land to which it relates if it has the characteristic of 'running with the land'. It is important to know whether an easement is legal or equitable, since there are separate rules for each. It is convenient to consider the categories separately.

7.4.1 Registered land before LRA 2002

This section is for comparison purposes only – remember LRA 1925 has been repealed.

Legal easements

The benefit of any easement automatically passed to a purchaser or transferee of the dominant tenement. But the **burden** did not automatically pass with the land. Most legal easements were registered against the title of the servient tenement, and must be so registered if they are created after the first registration of title of the land. Legal easements created before first registration of the land were overriding interests under s.70(1)(a) LRA 1925. So, legal easements bound purchasers of servient tenements in registered land.

Equitable easements

It was intended under LRA 1925 that almost all equitable easements would bind a purchaser of the servient tenement only if registered as minor interests. But the decision in *Celsteel* v *Alton* [1986] 1 WLR 512 meant that equitable easements which were 'openly exercised and enjoyed' could also be overriding interests under s.70(1)(a) LRA 1925. It remained uncertain whether all equitable easements would be saved from registration requirements by *Celsteel*.

7.4.2 Under LRA 2002

Note the transitional provisions which applied until 13 October 2006 and protected as overriding interests all existing easements and profits where they affected a registered title, whether the easement was legal or equitable. It is likely that, after the transitional provisions came to an end in 2006, some easements ceased to exist since they were no longer overriding and had not been protected on the register.

The position is now that, on first registration, para.3 Schedule 1 of LRA 2002 provides that all legal easements are interests that override a first registration of the servient tenement. Thus, legal easements will bind the first registered proprietor and all subsequent transferees of the servient tenement. Where legal easements are **expressly** created after first registration, they must have been entered on the register in order to exist, and once registered will bind all transferees of the servient tenement.

Impliedly created legal easements may override under para.3 Schedule 3 of the 2002 Act if they are either known to or reasonably discoverable by the purchaser, or have been used within a year before the purchase of the land. Paragraph 3 Schedule 3 applies only to legal easements and profits. Express easements created after 2003 will need to be substantively registered under s.27 LRA 2002 to be legal so eventually only implied legal easements will be overriding.

An equitable easement can be protected by the entry of a notice on the charges register. It is unclear whether there are any circumstances in which an equitable easement can override a registered disposition under para.2 Schedule 3. It is reasonably clear that the use of a right of way is too fleeting and intermittent to constitute actual occupation of the servient tenement. However, the Court of Appeal has left open the question of whether more intensive use of the servient tenement in connection with an easement of storage or parking could amount to actual occupation: *Chaudhary* v *Yavuz* [2011] EWCA Civ 1314.

7.4.3 Unregistered land

The benefited and burdened land will now most commonly be subject the provisions found in LRA 2002. It is still, however, useful to be aware of the comparable position under the unregistered land law rules. The **benefit** of both legal and equitable easements will automatically pass to a purchaser of the dominant tenement, in the same way as in registered land. Again, in relation to the burden, different rules apply to legal and equitable easements:

- Legal easements 'bind the whole world' because they are legal rights and so are binding upon a purchaser of the servient tenement.
- Post-1925 equitable easements (other than those created by proprietary estoppel) needed to be registered as class D(iii) land charges under LCA 1972 if they were to bind a subsequent purchaser for money or money's worth of the servient tenement.

7.5 Effect of the Land Registration Act 2002

FURTHER READING

- **Battersby, G. 'More thoughts on easements under the Land Registration Act 2002' (2005) *Conv* 195.**
- **Kenny, P.H. 'Vanishing easements in registered land' (2003) *Conv* 304–13.**

Although the enforceability of easements in registered land has been explained above, some further points are worth making and the importance of a few should be reinforced. Under LRA 2002, easements created by electronic deed will be legal easements, and those created by electronic written contracts will be equitable. Further, once electronic conveyancing is fully operational, expressly created easements will not exist until entered electronically on the register of the servient land (s.93). Thus, it will eventually not be possible to create easements in registered land at all except electronically.

First registration takes effect subject to any legal easement or profit à prendre (para.3 Schedule 1 LRA 2002). It does not matter whether the easement was created formally, by informal grant or by prescription. But unregistered rights should be disclosed on first registration and protected by a notice. Note also the following points:

- Overriding status can no longer be claimed for any easement or profit expressly created out of a registered title after 13 October 2003 since only legal rights override; and legal status is itself dependent upon registration (s.27(1) and para.7 Schedule 2 LRA 2002).
- But implied easements will override even though they can only be detected via their use.
- Undiscoverable easements will no longer override a transfer.
- Legal and equitable easements that were overriding interests under the old law, prior to the LRA 2002, will remain as such, despite the new provisions in the Act.

7.6 Profits à prendre

A profit is a proprietary right to enter the land of another and to take produce of that land, such as crops, timber, fish or turf. It can be legal or equitable. In registered land, all profits are overriding interests and, under LRA 2002, legal profits can be registered with their own title. A distinction between profits and easements, as stated above, is that profits can exist in gross (i.e. they may bind servient land even if the person with the benefit does not own any land himself). Profits can be created in much the same ways as easements. Detailed consideration of profits is outside the scope of this module.

Self-assessment questions

1. **Which benefits from an easement: the servient tenement or the dominant tenement?**
2. **Can an easement exist independently of the ownership of the land in question?**
3. **Can the right to play tennis or to sunbathe in one's neighbour's garden exist as an easement? (Hint: see *Re Ellenborough Park* [1956] Ch 131 and *Regency Villas Title Ltd* v *Diamond Resorts (Europe) Ltd* [2017] EWCA Civ 238.)**
4. **What are the principal rules arising from *Re Ellenborough Park*?**
5. **What are the three methods for creating legal easements?**
6. **How can an equitable easement be registered?**
7. **What is an 'easement of necessity'?**
8. **Give an example of profit à prendre.**

Sample examination questions

Question 1

'The vendor and purchaser of land should make express provision for any easements that they want. The law should rarely imply easements in their favour.' Discuss.

Question 2

Oliver was the registered owner of a property which consisted of a house, a garden behind the house and a cottage at the further end of the garden. There was a path leading from the house to the cottage through the garden. The house fronted on to a major road and the cottage fronted on to a narrow lane. Oliver lived in the house and used the cottage as an office. In November 2019 he contracted to lease the cottage to his friend, Fred, for five years from 1 January 2020. Oliver allowed Fred to occupy the cottage in November 2019 and told him that he could use the garden shed to store some of his things and that he could access the cottage through the house and garden except when Oliver had guests staying at the house. In January

2020 a formal lease was executed. In 2021 Oliver sold the whole property to Paul. Paul has now told Fred to keep out of the house and garden and to remove his things from the shed.

Advise Fred.

ADVICE ON ANSWERING THE QUESTIONS

QUESTION 1

A well-focused answer would examine in detail the situations in which the law will imply an easement in favour of (i) the grantee of land and (ii) the grantor of land. A grant may be implied in the case of easements of necessity, intended easements, easements under the rule in *Wheeldon* v *Burrows* and by the operation of s.62 LPA 1925. The implied reservation of easements is limited to the first two categories. Why does the law make this distinction? What is the justification for implying easements? Have the courts defined the various categories of implied easements in a restrictive or in a broad manner? There is a wealth of case law to be considered in this context.

QUESTION 2

The main issue was whether Fred could claim easements of way and storage over Oliver's land and, if so, whether they would be binding on Paul. Could these 'rights' exist as easements? Start by applying the *Re Ellenborough* criteria and point out that there could not be an easement of storage if the effect would be to leave the servient owner without any reasonable use for his land. But it is also important to consider whether a right of way 'except when there were guests staying' could exist as an easement (see *Green* v *Ashco Horticulturalist*). Assuming they can exist as easements, have they been effectively acquired? In the absence of any express grant, Fred would rely on the rule in *Wheeldon* v *Burrows* or on s.62 LPA 1925, as in *Goldberg* v *Edwards*, where the facts were similar. Easements acquired in one of these ways would bind Paul, a purchaser, under para.3 Schedule 3 LRA 2002, a point often missed by candidates in examinations.

Quick quiz

Question 1

Which of the following is not an essential element of *Re Ellenborough Park* [1956] Ch 131?

a. **That there must be two freehold estates.**

b. **That there must be diversity of ownership.**

c. **That there must be a dominant and servient tenement.**

Question 2

Which of the following is not a way to create an easement?

a. **Expressly granting a right by deed and registering the easement under s.27 LRA 2002.**

b. **Between two freehold estates, when one gives the other permission to use a right and then the estate with the permission is sold.**

c. **When there is one owner of land using a 'quasi-easement' who then sells the land which forms the dominant tenement.**

Question 3

Which statement is correct in relation to the main difference between a profit and an easement?

a. **A profit can exist in gross.**

b. **A profit can be owned by more than one person.**

c. **There is no difference.**

Question 4

In registered land, which of the following does not identify when an easement can be overriding?

a. **Para.2 Schedule 3.**

b. **Para.3 Schedule 3.**

c. **Para.3 Schedule 1.**

Answers to these questions can be found on the VLE.

NOTES

8 Freehold covenants

Contents

Introduction

Neighbours often agree that each will use their land in a particular way, or will not use their land in a particular way. These agreements are **covenants** – personal obligations made by deed and enforced by the rules of contract law – and the original parties to the covenants can enforce them. But, in order for the covenants to bind successors in title of the original parties, a complex set of rules must be applied. The rules which relate to the passing of the covenants must be considered in relation to both the common law rules and equitable rules. Although many of the rules of freehold covenants are a creation of equity, they are in some ways similar to easements.

Like easements, they create a relationship between two pieces of land, one becoming benefited by the covenant (the dominant tenement) and the other one burdened by it (the servient tenement). In this context, a covenant is an undertaking by which one party promises another that they will or will not engage in some activity in relation to their land. The person receiving the benefit of the covenant is called the covenantee and the person with the burden of the covenant is called the covenantor. Before the introduction of strict planning law requirements, this was an important method of regulating land use and maintaining the value of land. It is an important method of ensuring good relations between neighbours and upholding or enhancing the value of land. Positive covenants require the promisor to carry out an activity (e.g. maintain a fence); negative (or restrictive)[†] covenants forbid the promisor from doing something (e.g. conducting a business on their land). Covenants are relatively easy to enforce between the original parties as the obligations are contractual in nature; it is when either party sells their land to a third party that the enforceability of any relevant covenants becomes more complex.

[†] For a discussion of the Law Commission's proposals for the reform of this area of the law, see Law Com 127, 1984, 'Restrictive covenants'.

A freehold covenant is a contractual agreement between two parties in relation to the use of their land. Covenants can be 'negative', meaning that the burdened party is required to refrain from acting. An example would be a covenant not to build a wall above a stipulated height. Covenants can also be 'positive', meaning that the burdened party is required to act. An example would be a covenant that a wall must be built, thus involving the expense and effort of constructing a wall.

Being a contractual provision in the first place, the contract binds the original contracting parties. The question for land law purposes is when the contractual covenant will bind people who buy the land from the original contracting parties. The first requirement is whether or not the covenant 'runs with the land' or 'touches and concerns the land' – that means that the covenant must relate to the land specifically, so that it can continue to be enforceable by whoever owns the land in the future. So, a covenant to polish your neighbour's shoes would be purely personal between you and your neighbour and would not relate to the land, whereas a covenant to maintain the sewerage system on your neighbour's land would be something which related to the land itself.

The benefit of a covenant will pass with the land at common law as a result of s.78 LPA 1925, as made clear in *Federated Homes Ltd* v *Mill Lodge Properties Ltd* [1980] 1 WLR 594. The burden of a covenant will not pass at common law, despite the provisions of s.79 LPA 1925, as made clear in *Rhone* v *Stephens* [1994] 2 AC 310. The benefit of a covenant will also pass in equity as a result of annexation, assignment or a building scheme. The only way of passing the burden of a negative covenant is in equity under *Tulk* v *Moxhay* (1847) 47 ER 1345. There is no way of passing the burden of a positive covenant, even in equity, as made clear in *Rhone* v *Stephens*. These cases are considered in detail below.

Learning outcomes

By the end of this chapter and the relevant readings, you should be able to:

- **explain and apply the ways in which the benefits of covenants may run with freehold land both at common law and in equity**
- **explain and apply the legal and equitable rules relating to the running of the burdens of covenants with freehold land**
- **suggest ways in which this area of law could be reformed.**

8.1 Passing of the benefit and burden

CORE TEXT

- **Dixon, Chapter 8 'Freehold covenants'.**

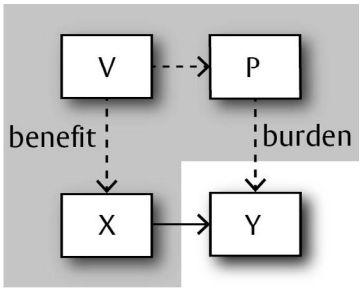
ESSENTIAL READING

- **Chappelle, 'Restrictive covenants'. Available on the VLE.**

FURTHER READING

- **Bogusz and Sexton, Chapter 20 'Freehold covenants'.**
- **Smith, Chapter 24 'Covenants'.**

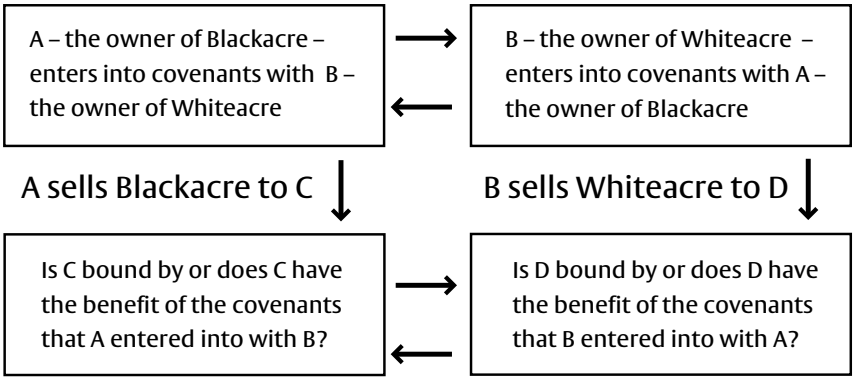
Covenants (both freehold and leasehold) provided an important method of controlling land use in the days before government agencies played the central role in the use and development of resources that they play today. Covenants continue to be widely used in order to enhance the attractiveness to purchasers of a particular development area by ensuring that the local amenities will be preserved and property values protected. Although it is generally desirable that covenants should be enforceable both by and against successors in title of the original parties, the enforcement of all covenants, no matter how trivial or how loosely defined, could impose an intolerable burden on purchasers of the 'servient' land and could make that land unmarketable. Remember that an underlying theme of land law is to maintain the value of land and to make it freely marketable. A balance clearly must be struck between competing interests, and the development of the law of freehold covenants should be seen in this context. They are generally referred to as freehold covenants to distinguish them from the covenants that landlords can place in a lease (see Chapter 5).



In this chapter we are largely concerned with covenants running with freehold land and with the situation where there is neither privity of contract nor privity of estate. (The issue of leasehold covenants is covered in Chapter 5; review your notes if these terms do not seem familiar.) A typical case would be where V conveys part of his land to P, P entering into various covenants (promises contained in a deed). The covenants will of course be enforceable between the original parties but if V subsequently conveys his remaining land to X and P conveys his land to Y, to what extent can X enforce the covenants against Y? Where a covenant is enforceable, it amounts to an encumbrance over Y's land, but to be enforceable it would have to be shown both that the benefit of the covenant has passed to X and the burden has passed to Y.

There are separate rules for the passing of the benefit and the burden in each of law and equity, so it is important to organise your notes into those four categories to avoid confusion.

It may be useful when planning the answer to identify the parties in a diagram.



It is useful then to identify the covenants that you are dealing with.

Here are some typical covenants to keep in mind when reading the rest of the module guide.

1. A promises B that she will not build in the garden of A's land.
2. B promises A that he will contribute to the upkeep of their shared drive.
3. A promises B that she will keep his garden tidy as B is not a keen gardener.

You need to identify who would have the benefit and who the burden of each covenant. In covenants 1 and 3, A has the burden and B the benefit. In covenant 2, B has the burden and A the benefit. The original party who benefits from the covenant is the covenantee, and the covenantor is the party who is subject to its burden. C and D, who acquire the land from one of the two original parties to the covenant, are known respectively as successor in title to the covenantee's land and successor in title to the covenantor's land.

8.1.1 Passing the benefit at law

An original covenantee can always enforce a covenant against the original covenantor, as this is a contract between the parties. The effect of s.56 LPA 1925 is to treat those who are not party to the covenant (i.e. not a signatory but persons in existence at the time of the deed and mentioned in the deed as within the covenant) as though they are original covenantees. In this way, the courts have limited (although arguably in a less than definitive way) the potentially broad wording of the statute, so that it is only available to claimants where the covenant can be interpreted as having been made **with**, rather than simply **for,** them. The courts have therefore ensured that s.56 does not undermine the contractual doctrine of privity. See *Re Ecclesiastical Commissioners for England's Conveyance* [1936] Ch 430; *White* v *Bijou Mansions Ltd* [1938] Ch 351; and *Amsprop Trading Ltd* v *Harris Distribution* [1997] 1 WLR 1025. It follows that s.56 cannot be used to make a future owner of the benefited land an 'original covenantee'

Where a covenant is made after 11 May 2000, the Contracts (Rights of Third Parties) Act 1999 may also assist. Section 1 provides that a person who is not a party to a contract may enforce it if either it expressly provides they may, or it purports to confer a benefit upon them, as long as the contract identifies them by name, by description or as a member of a class. It does not matter if they did not exist at the time the contract was made; hence it appears that the Contracts (Rights of Third Parties) Act 1999 is wider in application than s.56 LPA 1925 (not least in being potentially available to future owners of the benefited land).

Successors in title

The benefit of the covenant may pass to a successor in title (C and D in the diagram above are the successors in title). There are two methods of transmitting the benefit of a covenant to the covenantee's successor at law.

Before considering how the benefit can run, in either case, the covenants must first run with the land. At common law a covenant can 'run' with the dominant land if all of the following requirements in (a)–(c) are satisfied:

a. The covenant 'touches and concerns' the land (*Smith and Snipes Hall Farm Ltd* v *River Douglas Catchment Board* [1949] 2 KB 500). See the full 'touch and concern' test from *Swift Investments* v *Combined English Stores* [1989] AC 632.

b. Both the covenantee and the covenantee's successor in title have a legal estate in the land (although they need not be the same legal estate) (s.78 LPA 1925).

c. It was intended by the original parties to run with the land (although whether this is essential is cast into doubt by cases such as *Smith and Snipes* and *Swift Investments*).

The covenant can then either run by assignment or annexation.

1. **Express assignment**. The covenantee can expressly assign the benefit of the covenant to his successor in title. This would say something like 'I, A, give to you,

C, my benefit under covenant 2.' The covenant must not be purely personal, and the assignment must comply with the formalities prescribed by s.136 LPA 1925 (requiring both that the assignment is in writing and that the covenantor is given express written notice of it). This method is of less significance now but would be useful where the methods identified below have been excluded.

2. **Annexation.** The benefit of a covenant can be annexed to the dominant land, either expressly by the covenanting parties or statutorily by s.78 LPA 1925. Under LPA 1925 there is no requirement that the covenantee's successor in title should own the same legal estate as the covenantee. This means that the statute applies where the covenantee grants a legal lease of the dominant land. The statute also applies where the covenantee transfers part (rather than the whole) of the dominant land.

8.1.2 Passing the benefit in equity

In practice it is the equitable rules governing the passing of the benefit which are of paramount significance, because there are a number of situations where the common law rules are inapplicable, in particular where the claimant relies upon their land being part of a scheme of development and, most important of all, where the servient tenement has been assigned and enforcement depends on the equitable doctrine of restrictive covenants. In that situation it is usually argued (but see *Gray*) that for the burden to run in equity the benefit must likewise do so. This should not matter as the equitable rules for the running of the benefit are more flexible than the common law rules. However, because equitable rules are necessarily discretionary, this might still be significant in a situation where, due to unnecessary delay (laches) or *mala fides* (bad faith), a court was unwilling to apply the equitable rules for the running of the benefit even though the common law rules for the benefit passing, and likewise the equitable rules for the burden similarly doing so, were both satisfied. In recent years the courts have taken a flexible approach to rules which in their original formulation were sometimes excessively rigid and technical. Not only must the covenant touch and concern the land of the covenantee, but the claimant must show that they have acquired the benefit of the covenant in one of the three ways prescribed by equity: assignment, annexation or scheme of development.

1. **Express assignment**. See the discussion of express assignment in Section 8.1.1. The benefit of a covenant can be expressly assigned to the covenantee's successor in title. This mode of transmitting the benefit remains important where the operation of s.78 LPA 1925 has been excluded. Three points should be noted. (1) The covenant must have been taken to protect ascertainable land of the covenantee, and the assignment must be contemporaneous with the transfer of the dominant land. Should there be something in the conveyance itself identifying the land to be benefited? Consider *Newton Abbot Co-operative Society Ltd* v *Williamson and Treadgold Ltd* [1952] Ch 286, where it did not take incredible detective work to identify the dominant land. But would the decision in that case have been different if the nearest ironmonger's shop had been a mile away from the servient land? (2) An assignment does not operate to annex the benefit of the covenant to the dominant land. A chain of assignments from one owner to another, on the same terms, is necessary: *Re Pinewood Estate, Farnborough* [1958] Ch 280. (3) Equity allows the benefit to be assigned with any part of the benefited land. Thus a covenant made with the intention of benefiting the whole of the dominant land can be assigned on the sale of part of that land: *Stilwell* v *Blackman* [1968] Ch 508.

2. **Annexation.** As mentioned above, it is possible for the covenanting parties to expressly annex the benefit of a covenant to the dominant land. The words of the covenant must manifest an intention to benefit **the land**, so some reference to the land must be made. A covenant that is made with the 'heirs and assigns' of the covenantee is not sufficient to annex the benefit of the covenant to the dominant land because no mention is made of the land: *Renals* v *Cowlishaw* (1879) 9 Ch D 125. Where the covenanting parties have not expressly manifested an intention to annex the benefit of a covenant to the dominant land, it may be possible to

infer that intention from the terms of the instrument containing the covenant. If it can be inferred from those terms that the covenanting parties' intention was to benefit the dominant land, this will be sufficient to annex the covenant to the land. In the absence of express or implied annexation, a covenant can be annexed to the dominant land by s.78 LPA 1925: *Federated Homes Ltd* v *Mill Lodge Properties Ltd* [1980] 1 WLR 594. In that case, the Court of Appeal emphasised that s.78 only applies to covenants that touch and concern the dominant land. The court also explained that a covenant annexed to the dominant land by s.78 was annexed to each part of the land and not just the whole. Accordingly, a transferee of part of the dominant land will acquire the benefit of any covenants in relation to that part of the land. *Crest Nicholson Residential (South) Ltd* v *McAllister* [2004] EWCA Civ 410 endorsed the decision in *Federated Homes* but held that in order for s.78 to apply the instrument containing the covenant must identify the benefited land so that it is readily ascertainable. The court in *Crest Nicholson* also affirmed the decision in *Roake* v *Chadha* [1984] 1 WLR 40 that covenanting parties are free expressly or impliedly to exclude the operation of s.78. In *Roake* v *Chadha* [1984] 1 WLR 40, there was a covenant not to build more than one house per plot on a piece of land, and another clause in the conveyance provided that the benefit of the covenant would not pass unless it was expressly assigned. The court held that, despite the decision in *Federated Homes*, s.78 could not operate to pass the benefit of the covenant to a buyer, since the original parties had expressed a contrary intention. *Roake*'s approach to the effect of contrary intention was confirmed in *Crest Nicholson*, where Chadwick LJ explained that the way s.78 defines successors in title by reference to the land 'intended to be benefited' implicitly introduces the qualification without the need for s.78 to mention contrary intention explicitly (in the way s.79, the corresponding provision on burden, does).

Covenants created after 1925 will be automatically annexed to the land under s.78 LPA 1925. So both express and (the more dubious) implied annexation, along with assignment, are of less importance since s.78 was enacted and is only relevant to covenants created before 1926 (of which there are many). *Sainsbury* v *Enfield Borough Council* [1989] 1 WLR 590 illustrates the obvious point that there can be no statutory annexation in respect of pre-1926 covenants; appropriate words of annexation will still be necessary.

3. **Scheme of development**. A scheme of development, or building scheme, is a useful modern tool for the enforcement of covenants in a clearly defined area, with one seller of all the plots of land involved, and where all the original purchasers of plots knew that the covenants imposed on each and all of them were intended to be mutually enforceable. Where such a scheme exists, a kind of 'local law' is created whereby restrictive covenants are enforceable by and against the owners of plots within the scheme (i.e. a covenant entered into by the purchaser of a plot is enforceable both by those who have previously bought plots and by those who subsequently buy the unsold plots and by their successors in title). Registration is still necessary, however.

The conditions of a scheme of development were laid down in *Elliston* v *Reacher* [1908] 2 Ch 665 as follows:

- There was originally a single seller of all the land within the scheme.
- The plots of land were laid out in advance.
- Mutual restrictions were established by the original seller, for mutual benefit of all the buyers of plots.
- The purchaser of each and every plot knew of the mutually binding nature of the covenants.

A further condition was added in *Reid* v *Bickerstaff* [1909] 2 Ch 305 to the effect that the area of the scheme must be clearly defined. These requirements seem to have been onerous, since only two reported cases enforce schemes of development between 1908 and the 1960s. In recent years, however, the courts have taken a much more

relaxed approach to these conditions (e.g. those requiring a common vendor and pre-sale lotting) and have tended merely to insist on the clear definition of the scheme and on evidence that the original vendor and the original purchasers intended that all purchasers should be mutually bound by, and mutually entitled to enforce, a defined set of restrictions:

- In *Baxter* v *Four Oaks Properties Ltd* [1965] Ch 816, although a common vendor had decided the boundaries of the scheme, he had not fixed the size of the plots before sale, instead selling each purchaser as much land as the purchaser wanted to buy. Cross J held that there was a valid building scheme in spite of this 'special feature'.
- In *Re Dolphin's Conveyance* [1970] Ch 654 there was no common vendor, the plots had not been laid out in advance and the land had been sold over a period of 20 years, but a building scheme was held to be in existence.
- In *Emile Elias and Co Ltd* v *Pine Groves Ltd* [1993] 1 WLR 305 (PC) it was restated that the area of the scheme must be fixed before the sale of plots commences; note that this appears to throw doubt on some aspects of *Re Dolphin's Conveyance*.
- In *Birdlip* v *Hunter* [2016] EWCA Civ 603 Lewison LJ (who, at para.20, provides a useful summary of the usual features of a scheme) restated that the conveyancing documents should also make the existence of the scheme clear.

But it is important not to stray too far from the key *Elliston* v *Reacher* requirements. In *Whitgift Homes* v *Stocks* [2001] EWCA Civ 1732, there was a great deal of uncertainty as to how much of an estate was intended to be within a building scheme. The Court of Appeal found that no building scheme existed even between owners of houses which were clearly intended to have been within such a scheme, on the basis that:

> the authorities show that [a] number of characteristics must be established. Among them is certainty; otherwise, in relation to each plot of land said to fall within the scheme, the question will continually arise: does it or does it not so fall? More precisely, is it, or is it not subject to mutually enforceable benefits and obligations, and, if enforceable, by and against the owners of which plots? This essential requirement of certainty makes obvious practical sense.
>
> (Judge LJ, para.110)

Activity 8.1

Read *Federated Homes Ltd* v *Mill Lodge Properties Ltd* [1980] 1 WLR 594 carefully and make notes on the relevant facts, decision and reasoning. Note also the critique of this case in your textbook, and reflect on how far subsequent case law has shed further light on how and when it applies.

a. **Must there be a reference to the benefited land in the deed for annexation to occur?**
b. **What would be the effect today of a covenant which used the *Renals* v *Cowlishaw* (1879) 9 Ch D 125 formula?**
c. **Can the benefit of a covenant pass by virtue of s.62 LPA 1925?**

Summary

The benefit of a restrictive covenant may pass in law, by statute or in equity (via assignment, annexation or under a scheme of development).

8.2 Passing of the burden at law

Core text

- **Dixon, Chapter 8 'Freehold covenants': Sections 8.5 'Principle 2: Enforcing the covenant against successors in title to the original covenantor – passing the burden' and 8.7 'Escaping the confines of the rules: can the burden of positive covenants be enforced by other means?'.**

The burden of a covenant cannot pass at law so as to become directly enforceable against the covenantor's successors in title. In *Austerberry* v *Oldham Corporation* (1885) 29 Ch D 750, the Court of Appeal applied the contractual rule that only a party to an agreement can be burdened by it. This was confirmed by the House of Lords in *Rhone* v *Stephens* [1994] 2 AC 310.

This rule, which is based on the need to prevent land being fettered indefinitely, has proved highly inconvenient and has been widely criticised. Ways have been devised to circumvent it, including: by transferring land on long lease (which can be converted to a freehold) and hence using the law of leasehold covenants; commonhold arrangements (see below); creating a conditional fee simple subject to a right of re-entry; using a chain of indemnity clauses; or by the doctrine of mutual benefit and burden.

Of these ways for indirect enforcement of a covenant, perhaps the most interesting is the doctrine of mutual benefit and burden or, as it is sometimes called, the doctrine of *Halsall* v *Brizell* [1957] Ch 169, according to which a person who claims the benefit of a conveyance (e.g. the right to use a road or drains) must submit to its burden (e.g. the corresponding obligation to contribute to the cost of maintenance). Rejecting the application of the doctrine to the facts in *Rhone* v *Stephens* [1994] 2 AC 310, Lord Templeman (at 322) affirmed the principle but he identified limitations on its operation. These have been explored in a number of subsequent cases, including *Thamesmead Town Ltd* v *Allotey* (1998) 30 HLR 1052; *Davies* v *Jones* [2009] EWCA Civ 1164, [20]–[27]; and *Wilkinson* v *Kerdene Ltd* [2013] EWCA Civ 44. In essence, three requirements need to satisfied for the principle to be invoked:

1. the benefit and burden need to be conferred by the same transaction – usually a conveyance or other deed
2. the substance of the benefit and burden must be related/linked in the sense of the former being conditional on, or reciprocal to, the latter, and
3. the person who is subject to the burden must have the right to reject or disclaim it.

While the principle cannot apply where the burdened owner enjoys no benefits, it does mean that a vendor, by reserving control of some essential facility, will be able to enforce positive covenants connected with that facility against the purchaser's successors in title. However, unlike a restrictive covenant, which creates an interest in the burdened land, the doctrine only generates a personal right to enforce the positive covenant: *Goodman* v *Elwood* [2013] EWCA Civ 1103.

It was anticipated that the introduction of commonhold, a new form of landholding, might have the advantage of getting around the obstacles created by the ruling in *Rhone*. With effect from 2004, the Commonhold and Leasehold Reform Act 2002 introduced commonhold, an innovative scheme whereby individual units within a property may be owned as freehold rather than leasehold, yet the management of the land subject to the scheme can be conducted as a whole. So, a new block of flats might be managed by a commonhold association collectively, with each flat owned individually, and reciprocal positive covenants will help to enforce the rules of the collective and to manage the common parts of the building. The details of the scheme are complex. Commonhold has not so far been popular, with only something like 20 schemes created since the legislation was enacted. Thus far then it has not had the anticipated effect of alleviating the impact of the *Rhone* prohibition on being able to enforce positive covenants against successors of the burdened land. All this might change following the Law Commission's work on making commonhold a preferred alternative to leasehold ownership (see 'Reinvigorating commonhold: the alternative to leasehold ownership' (Law Com 394, July 2020). In January 2021, the government announced the creation of a Commonhold Council – a partnership of leasehold groups, industry and government – that will prepare homeowners and the market for the widespread take-up of commonhold (see www.gov.uk/government/news/government-reforms-make-it-easier-and-cheaper-for-leaseholders-to-buy-their-homes). It remains to be seen how successful this initiative will be in reinvigorating the popularity of

commonhold and overcoming the obstacle *Rhone* places on passing the burden of positive covenants directly.

Finally, it should be noted that the original covenantor remains liable for performance of the covenant after transferring the servient land to a third party. However, the remedies available against the original covenantor in such a situation are limited. For example, although the covenantee may be able to claim damages from the covenantor for breach of the covenant, he cannot prevent the covenantor's successor in title from using the servient land in a manner inconsistent with the covenant.

Activity 8.2

If a purchaser covenants to bear half the cost of maintaining the boundary wall situated between his and his vendor's retained land and the vendor covenants to bear the other half, can the vendor enforce the covenant against the purchaser's successor in title?

What if the purchaser had covenanted to bear the whole cost? Would he obtain a 'benefit' under the conveyance?

8.2.1 Passing of the burden in equity

The strictness of the common law rule that burdens will not run with the land has been mitigated by equity. It is thus due to equity that restrictive covenants are a worthwhile measure for the owner of the dominant land. According to Lord Cottenham in *Tulk* v *Moxhay* (1848) 47 ER 1345, if equity did not enforce the covenantor's promise, then it would be 'impossible for the owner of land to sell part of it without incurring the risk of rendering what he retains worthless'. Since *Tulk* v *Moxhay* it has been clear that the burden will run in equity, provided the following requirements are satisfied:

- the covenant is negative in nature
- the covenant touches and concerns the burdened land (the *Swift* test)
- it protects land retained by the covenantee
- it was intended to run with the land, and
- the successor has notice of the covenant.

See *Haywood* v *Brunswick Permanent Benefit Building Society* (1881) 8 QBD 403.

There is little chance of enforcing the burden of a positive covenant against the covenantor's successors in title. According to Lord Templeman in *Rhone* v *Stephens* [1994] 2 AC 310 it is a basic truth of land law 'that positive covenants affecting freehold land are not directly enforceable except against the original covenantor'. This is so because:

> Equity cannot compel an owner to comply with a positive covenant entered into by his predecessors in title without flatly contradicting the common law rule that a person cannot be made liable upon a contract unless he was a party to it. Enforcement of a positive covenant lies in contract; a positive covenant compels an owner to exercise his rights. Enforcement of a negative covenant lies in property; a negative covenant deprives the owner of a right over property.

There is no sense in showing that the benefit of a positive covenant has passed unless there is someone who is burdened by it. But whether a covenant is positive or negative is a question of substance, not of form. A covenant to keep land as a wilderness is really a covenant not to build upon the land, and so is negative in substance.[†] Generally, if a covenant requires the covenantor to spend money in order to perform it, then it is a positive covenant and its burden will not run with the land. In *Rhone* v *Stephens*, the covenant was to maintain a roof in good condition, which is positive in nature, and so the burden did not pass to a buyer of the house, rendering the covenant unenforceable after sale. This was unfortunate since the roof protected an adjoining cottage, whose owners thereby lost a method of ensuring the continuance of that protection.

[†] Consider whether a covenant to maintain land as an ornamental garden is negative in substance (see *Tulk* v *Moxhay*).

ACTIVITY 8.3

What objections might there be to the enforcement of positive covenants against subsequent buyers of the burdened land?

The covenant must protect land owned by the covenantee

London County Council v *Allen* [1914] 3 KB 642 demonstrates that, as with easements, there must be two tenements and the covenant must benefit the dominant tenement. Although both parties to the covenant are free to sell their land as usual, the covenant will only remain enforceable so long as it benefits a piece of land which can be identified as the dominant tenement: *Newton Abbott Co-operative Society Ltd* v *Williamson & Treadgold Ltd* [1952] Ch 286. Only the holder of the dominant land can sue to enforce the covenant. Note, however, that a landlord's reversion on a lease is a sufficient interest for the purpose of this rule and may entitle the landlord to enforce a restrictive covenant against, for example, a sub-lessee if the other requirements are satisfied: *Hall* v *Ewin* (1887) 37 Ch D 74.

The covenant must have been intended to run with the covenantor's land

In the case of post-1925 covenants relating to the covenantor's land it is presumed that this is the case, in the absence of any contrary intention (s.79 LPA 1925).

In *Morrells of Oxford Ltd* v *Oxford United Football Club* [2001] Ch 459 this requirement was not satisfied. A person sold part of his land as a public house and covenanted not to permit any competing business on his retained land. The Court of Appeal held that this covenant was personal in nature and was not intended to bind the covenantor's successors in title.

The covenantor's successors in title must have notice of the covenant

It is important to remember that freehold restrictive covenants entered into since 1925 must be protected in order to bind the covenantor's successors in title. This means that, in registered land since the enactment of the LRA 2002, it needs to be protected by entry of a notice (in unregistered land such covenants were registrable as class D(ii) land charges in the land charges register). As an equitable interest in the land, a restrictive covenant entered into before 1926 was, and remains, subject to the doctrine of notice.

ACTIVITY 8.4

Read *Tulk* v *Moxhay*.

a. Summarise the relevant facts and decision.

b. Why was the injunction granted, and what were its terms?

c. Did the court follow existing precedent?

d. Why was only the covenant against building enforceable?

e. What is the justification of enforcing restrictive covenants in equity?

No feedback provided for parts (a) and (b).

Summary

The burden of a covenant can only pass in equity, and only when the requirements of *Tulk* v *Moxhay* are satisfied (i.e. the covenant must be restrictive, created for the benefit of land owned by the covenantee, intended to run with the covenantor's land and enforceable in accordance with the applicable enforcement rules).

8.3 Discharge and modification of restrictive covenants

CORE TEXT

- **Dixon, Chapter 8 'Freehold covenants': Section 8.8 'Discharge and modification of restrictive covenants'.**

Further reading

- **Bogusz and Sexton, Chapter 21 'Escaping from restrictive covenants': Section 21.5 'Modification or discharge of a covenant under s.84(1)'; see also reform proposals discussed in Chapter 20 'Freehold covenants': Section 20.13 'The chaotic state of the law on the running of benefits of covenants '.**
- **Smith, Chapter 24 'Covenants': Section 2.D 'Modification'; see also reform proposals discussed in Section 4 'Reform'.**
- **Cash, A. 'Freehold covenants and the potential flaws in the Law Commission's 2011 reform proposals'(2017) *Conv* 212.**

8.3.1 General powers

In certain circumstances the courts may refuse to enforce a restrictive covenant (e.g. where the person entitled to enforce it has remained inactive in the face of open breaches or where the character of the neighbourhood has changed significantly). In *Chatsworth Estates Co* v *Fewell* [1931] 1 Ch 224, for example, it was argued that the benefit of a covenant had been 'abandoned' when the covenantees had done nothing about breaches by others in the neighbourhood, proceeding only against the defendant (on the facts the court found that there had been no abandonment). But in *Shaw* v *Applegate* [1977] 1 WLR 970 it was held that a covenantor in breach of covenant had been 'lulled into a false sense of security' by the covenantee's delay in enforcing the covenant, and so an injunction was refused and damages awarded instead for the breach.

Moreover, s.84(1) LPA 1925 confers on the Lands Tribunal a discretionary power to modify or discharge a restrictive covenant with or without compensation and sets out in detail the criteria to be used.† A covenant may be discharged or modified if:

- it should be deemed obsolete due to changes in the neighbourhood
- it impedes a reasonable use of the land, provided that money compensation is adequate and either the covenant 'provides no practical benefits of substantial benefit or advantage' or is against the public interest
- the parties agree expressly or impliedly
- it will not injure anyone entitled to the benefit.

† For a discussion of the Law Commission's recent proposals for the reform of this area of the law, see Maudsley and Burn, Chapter 12, Part VI.

On the whole the Tribunal has taken a restrictive approach in the exercise of its powers and, in particular, has refused to order the modification or discharge of a restrictive covenant merely on the ground that planning permission has been obtained for the proposed user. Although the extension of planning control under the main planning statute, the Town and Country Planning Act 1971 (now 1990), has reduced the importance of private planning (where freehold and leasehold covenants play a central role), the two systems continue to operate side by side.

Reform

On 8 June 2011 the Law Commission published a report (Law Com 327) entitled 'Making land work: easements, covenants and profits à prendre'. The report includes radical and far-reaching recommendations relating to the law of non-leasehold covenants. In particular, the Commission recommended replacing the current law with a new Land Obligation which would allow the enforcement of both positive and negative obligations, by and against successors in title to land. The Commission anticipated that such Land Obligations could only be created expressly by deed and would be entered on both affected registered titles. It was also proposed that, once the original parties had parted with the land, they would cease to be liable for breaches that occurred subsequently. The proposals received widespread approval (for a notable contrary voice, see O'Connor, 'Careful what you wish for: positive freehold covenants' (2011) 75 *Conv* 191). On 18 May 2016, the government announced its intention of implementing certain aspects of the Law Commission's recommendations, but as yet no such legislation has been introduced.

SELF-ASSESSMENT QUESTIONS

1. When does the burden of a freehold covenant pass to a new owner of the servient land?
2. What are the four requirements for the burden of a covenant to pass in equity (*Tulk* v *Moxhay*)?
3. When do each of assignment, annexation and scheme of development operate to allow enforcement of the benefit of a covenant?
4. How does the enforcement of covenants differ in law and in equity?

SAMPLE EXAMINATION QUESTIONS

QUESTION 1

Bob was the registered owner of Pinkwall Farm, and in 2014 he sold one of the fields (Bluefield) to Calum, a neighbouring sheep-farmer. Calum covenanted with Bob (i) to maintain the fences surrounding Bluefield in good repair, (ii) not to erect any structure on Bluefield, and (iii) not to use and not to permit the use of Bluefield for any purpose other than the grazing of sheep.

In 2021 Bob granted Dan a 10-year lease of the farm and Calum sold Bluefield to Eric. Eric has neglected to maintain the fences. He is building a shed on Bluefield, and has allowed a friend's daughter to keep her pony there. Discuss.

QUESTION 2

Consider the extent to which the Court of Appeal decision in *Federated Homes* v *Mill Lodge Properties* (1980) has simplified the law relating to the passing of the benefit of restrictive covenants with freehold land.

Advice on answering the questions

Question 1

This is a fairly straightforward question on the enforceability of freehold covenants: the answer falls into two main parts. First, had the burden of Calum's covenants passed to Eric? The equitable rules (*Tulk* v *Moxhay*) on the passing of the burden need to be considered. Covenant (i) was a positive covenant; could it be enforced under the rule in *Halsall* v *Brizell* [1957] Ch 169 or as an easement (*Crow* v *Wood* [1971] 1 QB 77)? *Morrells* v *Oxford United Football Club* [2001] Ch 459 is relevant in determining whether covenant (iii) was personal or intended to run with the land.

The need to register restrictive covenants is often overlooked by candidates. There is little point in memorising the rules for running of the benefit and burden unless you remember that they also require protection on the register. Second, had the benefit of Calum's covenants passed to Dan? You need to consider the equitable rules on the passing of the benefit of restrictive covenants. Had the benefit been annexed to the land or had it passed by assignment?

Question 2

You should start by setting out the pre-*Federated Homes Ltd* v *Mill Lodge Properties Ltd* [1980] 1 WLR 594 law on annexation and then critically analyse the effect of the Court of Appeal decision and its interpretation of s.78 LPA 1925. Although regarded at the time as a highly important, if controversial, decision, subsequent cases (e.g. *J Sainsbury plc* v *Enfield London Borough Council* [1989] 1 WLR 590, *Roake* v *Chadha* [1984] 1 WLR 40 and *Crest Nicholson Residential (South) Ltd* v *McAllister* [2004] EWCA Civ 410) have shown that its scope is somewhat limited. The insistence in *Crest Nicholson*, in particular, that the benefited land be clearly identified, operates as a major restriction on the scope of statutory annexation.

Focus of the assessment

Within the scope of this chapter, there are two principal areas for assessment:

1. **A problem question dealing with the transmission of the benefits and burdens of different types of freehold covenants (positive and negative) to successors in title.**
2. **An essay question dealing with the nature of freehold covenants.**

Quick quiz

QUESTION 1

Which statement is NOT true?

a. **A third party can never enforce the benefit of a covenant.**

b. **A third party may be able to enforce the benefit of a covenant under s.56 LPA 1925.**

c. **A third party may be able to enforce the benefit of a covenant under the Contract (Rights of Third Parties) Act 1999.**

QUESTION 2

Which statement is true?

a. **At common law the only way that the benefit of a covenant can pass is by express assignment.**

b. **At common law the benefit and burden of a covenant can pass.**

c. **At common law the benefit of a covenant can pass by express assignment, express and implied annexation.**

QUESTION 3

Which statement is true?

a. **In equity the benefit of a covenant can only pass if expressly annexed.**

b. **In equity the benefit of a covenant can pass by express assignment, annexation and scheme of development.**

c. **In equity the benefit of a covenant has no need to touch and concern the land.**

QUESTION 4

Which statement is correct?

a. **The burden of a covenant can never directly pass at common law.**

b. **The burden of a covenant can pass at common law if it is expressly assigned.**

c. **The burden of a covenant can pass at common law if it is negative in nature.**

QUESTION 5

Which statement is correct?

a. **The burden of a covenant can pass in equity if it satisfies the requirements of *Tulk* v *Moxhay* (1848) 47 ER 1345.**

b. **The burden of a covenant can pass in equity if it is negative in nature.**

c. **The burden of a covenant can pass in equity if there is a corresponding benefit obtained.**

Answers to these questions can be found on the VLE.

9 Mortgages

Contents

Introduction

Most of the rules related to mortgages are quite straightforward, but the concepts and language can be confusing or misleading. A mortgage is the conveyance of an interest in property as security for the payment of a debt or the discharge of some other obligation. In most situations, a mortgage is taken out by the buyer of land as a method of financing the purchase of that land. The mortgagor is the person who takes out the loan (the borrower, easy to remember as borrower has two o's and so does mortgagor); the mortgagee is the financier to whom the debt is owed (the lender, easy to remember as lender has two e's and so does mortgagee). The mortgagor's interest in the land (i.e. the value of the land after the debt attached to it has been paid) is called the **equity of redemption**, and is very important for the mortgagor since it gives them the right to redeem the mortgage, unencumbering the land. It also allows them some protection from oppressive terms.

The equity of redemption can be disposed of in all the ways available for an interest in land: sold, leased or itself subjected to a further mortgage called a second mortgage. When a debtor is insolvent, a secured creditor has priority over an unsecured creditor and the most important kind of security is the mortgage, particularly the mortgage of land. The law of mortgages is complex, technical and in urgent need of reform. Some knowledge of the history of mortgages is useful for an understanding of the present position; the harsh common law rules have been supplemented by equity's kinder approach, and statutory measures have been introduced to protect borrowers. However, this chapter will concentrate on the modern law and on three key areas in particular:

- the creation of mortgages
- the protection of the mortgagor's equity of redemption
- the mortgagee's remedies (especially their power of sale)

Some of the Law Commission's proposals for the reform of the law of mortgages are set out in Maudsley and Burn, Chapter 10 'Mortgages', Part X 'Law reform'.

LEARNING OUTCOMES

By the end of this chapter and the relevant readings, you should be able to:

- **define 'mortgage'**
- **explain how mortgages may be created today (both at law and in equity)**
- **describe the ways in which the mortgagor's equity of redemption is protected today**
- **set out the principal powers of the mortgagee**
- **evaluate the effect of the Land Registration Act 2002 on mortgages.**

9.1 Creation of mortgages

Core text

- **Dixon, Chapter 11 'The law of mortgages': Sections 11.1–11.8.**

Essential reading

- **MacKenzie and Nair, 'Mortgages and charges'. Available on the VLE.**

Further reading

- **Bogusz and Sexton, Chapter 22 'The creation of mortgages'.**
- **Smith, Chapter 25 'Mortgages': 'Introduction' and Sections 1 'Forms of mortgages' and 2 'Creation of mortgages'.**

9.1.1 Forms of mortgage

Legal mortgages under the 1925 legislation: for comparison purposes only

Registered and unregistered land

A legal mortgage of an estate in fee simple was effected either:

1. by a demise for a term of years absolute subject to a provision for cesser on redemption (cesser: the early termination of some right or interest; for example, one which stands until some condition is fulfilled, such as getting married or having children), or
2. by a charge by deed expressed to be by way of legal mortgage (s.85(1) LPA 1925). Similarly, a legal mortgage of a term of years absolute was effected either by a subdemise for a term of years absolute (lease) subject to a provision for cesser on redemption, or by a charge by deed expressed to be by way of legal mortgage (s.86(1) LPA 1925).

Both the mortgagor/chargor and the mortgagee have legal estates, while the chargee has a legal interest (s.1(2)(c) LPA 1925) and enjoys the same protection, powers and remedies as if he had taken a legal term of years (s.87 LPA 1925). As the mortgagor **retains the legal estate**, they may create subsequent legal mortgages.

Legal mortgages under the Land Registration Act 2002: the current law

Registered land

A legal mortgage of registered land is made by **charge** by way of a legal mortgage, which must be done by deed (s.52 LPA 1925), and s.1 LP(MP)A), and is followed by registration in the charges register of the land affected (s.27 LRA 2002), at which point it is a **registered charge**. Legal rights under the mortgage only pass once registration is effected; eventually this will be done electronically. Section 24 LRA 2002 provides that only the registered proprietor, a person entitled to be registered under a transfer, or the owner before first registration, may create a legal mortgage. The only method by which registered land may now be mortgaged is the **charge by deed by way of legal mortgage, the demise of a leasehold estate** (s.23(1)).

Equitable mortgages: this includes all mortgages of registered title land which are not on the register

The mortgage of an equitable interest (e.g. a life interest arising under a settlement or a tenancy in common) is necessarily equitable and is effected by a conveyance of the equitable interest with a proviso for reconveyance. If not made by will, the assignment must be in writing signed by the mortgagor or the mortgagor's agent authorised in writing (s.53(1) LPA 1925).

The informal mortgage of a legal interest is treated as a contract for a mortgage provided the requirements of s.2 LP(MP)A 1989 are satisfied (i.e. it is made in signed writing); if the contract is specifically enforceable, it is regarded in equity as a mortgage.

In the case of equitable mortgage by deposit of title deeds, the deposit must be intended to be by way of security and in practice is usually accompanied by a memorandum under seal. Since s.2 LP(MP)A 1989 came into force, the mere deposit of title deeds is ineffective to create a mortgage in the absence of a written contract which satisfies that section: see *United Bank of Kuwait* v *Sahib* [1997] Ch 107.

An equitable charge arises where property is appropriated to the discharge of a debt or some other obligation.

Under LRA 2002, any mortgage which is not entered on the charges register is equitable (ss.25–27). In order to be enforced it must be registered substantively; at which point, whatever form it previously took, it becomes a legal charge (s.51).

Unregistered land

The process for creation is under the 1925 rules but since 1997, creation of a first legal mortgage attracts **compulsory first registration**. Now, under s.4(1) LRA 2002 the mortgage of unregistered land will trigger the registration of the mortgaged estate and the mortgage itself.

9.1.2 Registration of mortgages

If the land is **unregistered**, the following types of mortgage are registrable as land charges under LCA 1972:

- a puisne mortgage (i.e. a legal mortgage not protected by deposit of deeds – the first legal mortgagee will normally hold the title deeds, as they are entitled to do so) as a class C(i) land charge
- a contract for a legal mortgage (an estate contract) as a class C(iv) land charge, and
- a general equitable charge as a class C(iii) land charge (s.2(4) LCA 1972).

Where an equitable mortgage is protected by deposit of deeds, it is not registrable as a general equitable charge nor, though this is less certain, as an estate contract.

These provisions are particularly important when the priority of mortgages falls to be considered. The mortgagee of an equitable interest should give notice to the trustees in order to secure priority under the rule in *Dearle* v *Hall* (1828) 38 ER 475.

Since 1997, first legal mortgages attract **compulsory first registration**.

Before LRA 2002, if the land was registered, legal mortgages or charges were required to be perfected by entry of a notice of the registered charge against the charged title and by the issue of a charge certificate to the chargee. Until a mortgage became a registered charge, it took effect in equity and could be overridden as a minor interest unless protected by an entry on the land register. Interests which would have been registrable under LCA 1972 if the land was unregistered, also took effect as minor interests and priority was governed by date of entry. Mortgage (lien) by deposit was possible under s.66 LRA 1925.

But now there has been an important change: under LRA 2002, substantive registration is required when a registered proprietor grants a mortgage, or when a registered charge is transferred or subjected to a further mortgage. Registration against the affected estate is vital (s.27(2)) for the mortgage to take effect as a legal charge; without such registration, full legal remedies do not attach.

A first registration with title absolute is made subject to all mortgages and charges existing at the time of first registration (s.11). Under s.4(1)(g) LRA 2002, grant of a mortgage may itself trigger registration.

If the land is registered then the mortgage will be entered on the register and will be bound by all prior interests in the land (see Chapter 3).

Summary

Legal mortgages can now only be made by legal charge under LRA 2002. Once registered, a legal charge becomes a registered charge and achieves full legal status. Any other mortgage will now be equitable. In unregistered land, most mortgages require protection as a land charge.

Self-assessment questions

1. **What are the requirements for a legal mortgage?**
2. **In which circumstances does a mortgage require protection on the register in (a) unregistered land and (b) registered land?**
3. **How has LRA 2002 changed the registration requirements for mortgages?**

9.2 Position of the mortgagor

Core text

- **Dixon, Chapter 11 'The law of mortgages': Section 11.9 'The rights of the mortgagor: the equity of redemption'.**

Further reading

- **Bogusz and Sexton, Chapter 24 'The operation of mortgages': Section 24.1 'Rights of the mortgagor'.**
- **Smith, Chapter 25 'Mortgages': Section 4.A 'Rules protecting the mortgagor'.**

9.2.1 General

The tension in the relationship between mortgagor and mortgagee is that a mortgage is a contract, and freedom to contract is an important commercial principle. Increasingly, and to some extent historically, the courts aim to protect those who have entered into a contract on harsh or unconscionable terms. With the increase in non-commercial mortgages there has also been legislative protection for mortgagors.

A key feature of a mortgage is the right to redeem the debt (to kill (*mort*) the pledge (*gage*)) and reclaim the land free from debt. The courts have established principles for striking out attempts to remove or delay the right to redeem. These 'clogs and fetters' on the right to redeem will be struck out by the court while the mortgage remains intact.

Historically, the law of mortgages has particularly concerned itself with the need to protect the mortgagor from harsh and unconscionable transactions. The key principles were established at a time when mortgagors were more likely to find themselves in a disadvantageous bargaining position as against mortgagees. However, the problem today is to determine the extent to which such principles should continue to be followed. Particularly in commercial mortgages, the protection for the mortgagor is minimal, but there may be concerns in relation to inequality of bargaining power in domestic mortgages. Equity has always stressed the security aspect of the transaction and has developed rules to protect the mortgagor's equity of redemption. Further protection may be provided by the common law doctrine of restraint of trade and by the Consumer Credit Act 1974 (as amended by the Consumer Credit Act 2006). The Law Commission has proposed reform in this area: 'Land mortgages' Law Com 204, 1991.

Removing the right to redeem

At common law the right to redeem the mortgage is set within six months of the date the mortgage is granted. However, equity provides for the date to be set at a much later date (commonly 20–25 years for domestic mortgages). If there is an attempt to place a restriction on the ability of the mortgagor to redeem the mortgaged property free from the mortgage, such as an option to purchase, then the court may see this as

an attempt to alter the fundamental nature of the mortgage. Thus, a provision giving the mortgagee an option to purchase the mortgaged property is generally void.

However, as a mortgage is a contract at heart, and the freedom of contract principle is a strong consideration, if the courts feel that the option to purchase was freely entered into as a separate agreement and not conditional on the mortgage contract then it may be upheld. See *Samuel* v *Jarrah Timber & Wood Paving Corp Ltd* [1904] AC 323 and *Reeve* v *Lisle* [1902] AC 461 to compare the courts' approach.

In *Jones* v *Morgan* [2001] EWCA Civ 995, a nursing home was threatened with repossession but an agreement was reached to prevent this. The mortgage agreement purported to give the lender the right to buy a half share in the mortgaged land. The minority judge (Court of Appeal) thought that since the agreement was reached independently of the mortgage and after completion of the mortgage, it was not a 'clog' and was valid. However, the majority disagreed and struck out the offending term as a 'clog', in the process making it clear that they disapproved of the precedent which they were being forced to apply. Lord Phillips MR stated at [86]:

> the doctrine of a clog on the equity of redemption is, so it seems to me, an appendix to our law which no longer serves a useful purpose and would be better excised.

A similar approach can be seen by the Court of Appeal in *Warnborough* v *Garmite* [2003] EWCA Civ 1544, where the court made it clear that the mere fact that an option to purchase the property is granted by the mortgagor to the mortgagee at the same time as the mortgage is granted, does not mean that it is a 'clog'; it is necessary for the court to look at the true nature of the bargain made by the parties.

Activity 9.1

Read *Samuel* v *Jarrah Timber* [1904] AC 323 and *Reeve* v *Lisle* [1902] AC 461, and make notes on the relevant facts, decisions and reasoning.

a. **Why was the option invalid in *Samuel* v *Jarrah*?**

b. **Why was the option valid in *Reeve* v *Lisle*?**

c. **What would be the position if the mortgagee was given the option to purchase other property of the mortgagor?**

No feedback provided for part (c).

Postponing the right to redeem

As the mortgagee must be allowed to earn interest on the loan to make the business of lending viable, then it may be possible to postpone the date of redemption. However, attempts to postpone the date which make the equity of redemption an illusion will not be upheld.

This is a question of degree. In *Fairclough* v *Swan Brewery Co Ltd* [1912] AC 565, F held a 17-year lease on a hotel and borrowed, using the lease as security. The contractual date for redemption was set to be just weeks before the lease was due to expire. The right to redeem would not arise until the contractual date had passed, leaving only a few weeks of the estate being free from the debt. Thus, the mortgage was effectively irredeemable and the postponement was void. But in *Knightsbridge Estates Trust* v *Byrne* [1939] Ch 441, even though the contractual date for redemption was set 40 years in the future, the postponement term was enforceable since the parties were commercial, of equal bargaining power and the mortgaged estate was freehold.

Activity 9.2

To what extent do you think that *Fairclough* v *Swan Brewery* [1912] AC 565 is consistent with the Court of Appeal decision in *Santley* v *Wilde* [1899] 2 Ch 474 or with the new approach of the courts demonstrated in *G&C Kreglinger* v *New Patagonia Meat & Cold Storage Co Ltd* [1914] AC 25 (below)?

The doctrine of clogs on the equity of redemption has come under a great deal of criticism in recent years: Lord Phillips MR described it as serving no useful purpose in

Jones v *Morgan* [2001] EWCA Civ 779. In relation to commercial mortgages it is rare for terms to be invalidated by equity; generally all terms of such mortgages will be held to be valid and enforceable.

Statutory protection

Mortgages are also the subject of complex statutory regimes, the detail of which is beyond the scope of this module. Until recently there were two regulatory regimes but the Financial Conduct Authority (FCA) has been responsible for regulating all mortgages.

Before the changes, first legal mortgages of residential properties to be occupied by the borrower were already regulated by the FCA under the Financial Services and Markets Act 2000 (FSMA 2000). The FCA Handbook (Mortgages and Home Finance: Conduct of Business), issued under FSMA 2000, sets out detailed requirements for mortgage lenders dealing with mortgages regulated under FSMA 2000. These detailed requirements are beyond the scope of this module.

Mortgages which previously fell outside FCA regulation, such as second mortgages and mortgages for other purposes (i.e. those on a 'buy-to-let' basis), were covered by the consumer credit legislation instead (the Consumer Credit Act 1974 (CCA 1974), as amended by the Consumer Credit Act 2006 (CCA 2006)).

The two regulatory regimes were mutually exclusive, so that an FCA-regulated mortgage fell outside the consumer credit legislation and vice versa. However, the government decided that responsibility for regulating second mortgages would transfer to the FCA on 21 March 2016. Prior to this on, 1 April 2014, the regulation of the consumer credit legislation passed to the FCA. This fulfilled the Treasury's aim to provide a single consistent regulatory framework for the mortgage market.

The consumer credit legislation was historically aimed at protecting borrowers with low credit ratings, who find it difficult to obtain finance. A typical example is the county court case of *Falco Finance* v *Gough* (1998) (unreported). Mr Gough borrowed money secured by a mortgage whose terms imposed a standard flat annual interest rate of 13.99 per cent, discounted to 8.99 per cent. Under the mortgage terms, this 5 per cent discount was permanently lost if, at any time, the mortgage went into arrears (which it inevitably did). This dual interest rate was held to be an extortionate credit bargain under CCA 1974. It was almost impossible for any borrower to make all payments exactly on time, and the differential between the two rates had no relation to the loss that the finance company would incur as a result of a missed payment.

In *Paragon Finance* v *Nash* [2002] WLR 685, the court held that a lender's discretion to vary interest rates was subject to an implied term not to exercise that discretion for an improper purpose, arbitrarily or capriciously. However, maintaining interest rates at 2–4 per cent above those on the high street was not a breach of this implied term or 'grossly exorbitant' under CCA 1974. The lender was having financial difficulties and, in taking its own commercial needs into account, had not acted in an improper way.

In *Davies* v *Directloans Ltd* [1986] 1 WLR 823, the lender had not acted improperly by imposing a 21.6 per cent rate of interest (at a time when market rates were 17 per cent). In reaching this decision, the court took into account the poor credit history of the borrower and the subsequent risk being taken by the lender.

The extortionate credit provisions of CCA 1974 were replaced by the concept of an 'unfair relationship' under CCA 2006. This allows the court to examine not only the terms of the agreement, but also whether the creditor's behaviour towards the borrower has been unfair in any way. The legislation does not clearly define an 'unfair relationship', preferring instead to leave it to the court to decide how this should be applied on the particular facts. As with the case law on unconscionable terms, a lack of good faith and an inequality of bargaining power seem likely to be important factors.

CCA 2006 gives the court a wide range of remedies to deal with an unfair credit relationship, including ordering any part of the agreement to be set aside, varying any terms, or ordering a creditor to take or refrain from taking a particular course of action.

Although the case law on the consumer credit legislation is based on statute rather than broader equitable principles, it seems that the principles arising out of this case law may be applicable by analogy to the court's equitable jurisdiction to strike down unconscionable terms.

However, it remains to be seen how the new statutory regime will develop.

Onerous mortgage terms may also be vulnerable to challenge under the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCR 1999). The FCA is responsible for considering the fairness of terms in mortgages as well as in other types of financial services contracts issued by FCA-authorised firms.

A term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights to the borrower's detriment (R5 UTCCR 1999). Such a term will not be binding on the borrower, but the remainder of the agreement will remain in force.

In *Falco Finance* v *Gough*, the court held that the dual interest rate was contrary to the requirement of good faith under the Regulations, taking into account the borrower's weak bargaining position, the powerful inducement of no legal or surveyor's fees being payable and the apparent attractiveness of a discounted interest rate. The interest rate was also calculated on a flat-rate basis. This meant that interest was payable on the full loan amount for the whole mortgage term, regardless of how much capital had been repaid. The judge called this a harsh, unremitting and evil term. Unsurprisingly, this term was also held to be unfair under the Regulations.

Note that unlike UTCCR 1999, the Unfair Contract Terms Act 1977 has no application to mortgages of land.

9.2.2 Redemption free from conditions/collateral advantage

A mortgage may contain terms which give the mortgagee some advantages in addition to their security. A common example is 'tied' public houses, which may only sell the products of a particular brewery. As long as such collateral advantages are neither unconscionable nor in restraint of trade, they are enforceable if designed to cease with redemption. Where they are designed to persist beyond redemption, the position is less clear, but the courts have shown an increasing willingness to uphold such advantages as independent of or collateral to the mortgage agreement (*Kreglinger*), as long as they do not render the right of redemption illusory. This again reflects the freedom of contract approach to commercial mortgages. **Permanent** fetters remain invalid: *Noakes* v *Rice* [1902] AC 24. If the court, however, finds that the mortgage and the advantage form part of the same transaction, it may construe the agreement as in substance more than a mere mortgage and therefore not affected by the equitable rule that redemption should be free from conditions.

Restraint of trade

Any interference with a person's freedom to trade can be struck down by English courts as against public policy (*Nordenfelt* v *Maxim Nordenfelt Guns* [1894] AC 535), or by competition law. The doctrine of restraint of trade applies to mortgages. It is based on the public interest and it has principally been used in this context to attack tie clauses (i.e. terms in the mortgage of a petrol station, for example, or a public house, requiring the mortgagor to purchase part or all of their stock from the mortgagee): *Esso Petroleum Co Ltd* v *Harper's Garage (Stourport) Ltd* [1968] AC 269 and *Alec Lobb (Garages) Ltd* v *Total Oil Great Britain Ltd* [1985] 1 WLR 173. You should make notes on these cases, listing the considerations which the courts have taken into account in determining whether a particular 'tie' is reasonable and in the public interest.

9.2.3 Oppressive and unconscionable terms

Historically, equity could intervene in oppressive contractual bargains. The courts have a general equitable jurisdiction to strike down terms in a mortgage that tend to operate in an oppressive or unconscionable manner. The courts have rarely exercised

this jurisdiction in recent years and would, it seems, only be prepared to exercise it where one of the parties had imposed objectionable terms on the other in a morally reprehensible manner (for example, by exploiting their dominant bargaining position). The courts appear reluctant to intervene in commercial agreements where the parties have equal bargaining power. Certainly it is not sufficient that the term is unreasonable or that one of the parties has struck a hard bargain: see *Cityland and Property (Holdings) Ltd* v *Dabrah* [1968] Ch 166, *Multiservice Bookbinding Ltd* v *Marden* [1979] Ch 84 and *Alex Lobb (Garages) Ltd* v *Total Oil Great Britain Ltd*. You should make notes on each of these cases.

In *Multiservice Bookbinding Ltd* v *Marden*, for example, it was held that the term might have been unreasonable but it was not oppressive or unconscionable. An objectionable term will only be struck out if it is 'imposed in a morally reprehensible manner…which affects [the mortgagee's] conscience'.

In *Paragon Finance PLC* v *Pender* [2005] EWCA Civ 760 the Court of Appeal held that, although C's power to vary interest rates for the mortgage was subject to an implied term that it would not be exercised improperly or capriciously, this did not prevent the lender from raising interest rates above those of competitors for genuine commercial reasons. The rates actually charged were not grossly exorbitant.

Statutory provisions

The area of unfair or unconscionable terms has been increasingly subject to statutory control. For second mortgages or buy-to-let mortgages by CCA 1974 (as amended by CCA 2006), the courts have a power to re-open unfair credit relationships so as to do justice between the parties. In determining whether a particular credit relationship is unfair, the courts are required to have regard to certain factors set out in the Act. A credit relationship is unfair if it is unfair to the debtor because of one or more of the following:

- any terms of the agreement or of any related agreement
- the way in which the creditor has exercised or enforced any of their rights under the agreement or any related agreement
- any other thing done (or not done) by or on behalf of the creditor (either before or after the making of the agreement or any related agreement).

CCA 1974 (as amended) applies to mortgages where one party is an individual. CCA 2006 has given courts far broader scope in finding agreements to be unfair than was the case under CCA 1974. No detailed knowledge of the Act is required for this module.

For first mortgages of residential properties, created after 31 October 2004, which are owner occupied, the Financial Services and Markets Act 2000 will prevent excessive charges, considering the prevailing market when the mortgage was created.

Activity 9.3

Make notes on and compare these cases: *Re Petrol Filling Station, Vauxhall Bridge Road* (1969) 20 P&CR 1, *Biggs* v *Hoddinott* [1898] 2 Ch 307, *Noakes* v *Rice* [1902] AC 24, *Bradley* v *Carritt* [1903] AC 253, *G&C Kreglinger* v *New Patagonia Meat & Cold Storage Co Ltd* [1914] AC 25.

Do you think that *Bradley* v *Carritt* and *Kreglinger* are distinguishable?

No feedback provided.

Activity 9.4

What sort of considerations would the courts take into account in determining whether a particular tie was reasonable and in the public interest?

No feedback provided.

ACTIVITY 9.5

Compare *Cityland & Property Holdings Ltd* v *Dabrah* [1968] Ch 166 and *Multiservice Bookbinding Ltd* v *Marden* [1979] Ch 84.

a. **What are the reasons for the opposite results in the two cases?**

b. **If there is no disparity of bargaining power as between mortgagor and mortgagee, would the courts strike down a term imposing an unusually high rate of interest?**

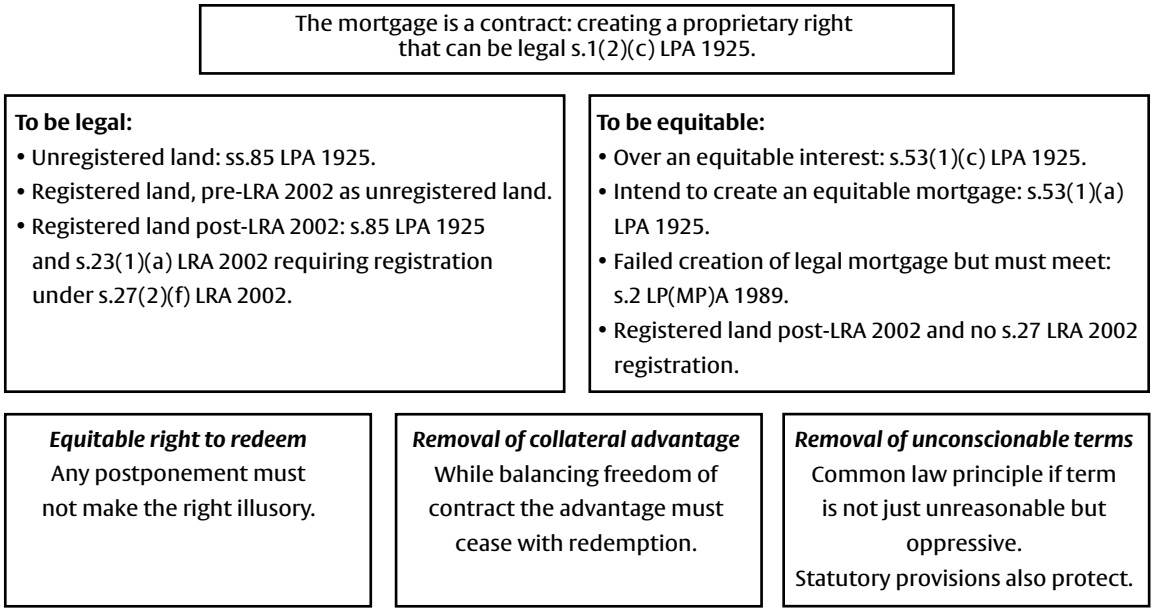
SELF-ASSESSMENT QUESTIONS

1. **What is the equity of redemption and what is its significance?**
2. **Give an example of a case where there has been a clog on the equity of redemption.**
3. **In what circumstances will a collateral advantage be unenforceable?**

Summary

Where the terms of a mortgage are unduly oppressive and the mortgage is not a commercial one, courts may intervene and prevent the enforcement of an objectionable term, though they rarely do so.

Rights of the mortgagor



9.3 Rights of the mortgagee

CORE TEXT

- **Dixon, Chapter 11 'The law of mortgages': Section 11.10 'The rights of the mortgagee under a legal mortgage'.**

FURTHER READING

- **Bogusz and Sexton, Chapter 23 'The remedies of mortgages'.**
- **Smith, Chapter 25 'Mortgages': Section 4.B 'Rights and remedies of the mortgagee'.**

The mortgagee may, of course, sue for any money due, but it is more important to consider the ways in which they can enforce their security. If they wish to recover their capital and put an end to the whole mortgage transaction, they may either sell the land or foreclose. On the other hand, if they wish to preserve the mortgage

but to intercept the rents and profits from the mortgaged land, they may enter into possession or appoint a receiver. You are not expected to know details of possession and foreclosure procedures. In practice the mortgagee's power of sale provides their most important and usual remedy.

9.3.1 Debt action

Remember that a mortgage is a contract at heart. If a debt is not repaid then the money can be recovered. The right survives a sale by the mortgagee and provides a basis to recover any shortfall between the sale price and the debt. However, there are certain procedures to balance the rights of the lender to recover what they are owed and the rights of the mortgagor to have their property rights protected.

Before a debt action can begin the mortgagee must ensure that the legal date of redemption (the date when the contract said the mortgagor could repay their debt) has passed. Historically it could be neither before nor after this date. Now this date is usually set at between one and six months from entering into the mortgage. Equity has made this legal date less important for the repayment of debt but it is still important for triggering certain rights of the mortgagee.

This remedy may be of limited practical use since a mortgagor who has failed to make payments is unlikely to be in a financial position to pay on this action, which is also subject to limitation of actions rules (normally 12 years from the date of default): s.20 LA 1980 (see *West Bromwich Building Society* v *Wilkinson* [2005] UKHL 44). Yet, the mortgagee may decide to rely on the mortgagor's potential contractual liability to precipitate the mortgagor's bankruptcy, which may indirectly assist the mortgagee in recouping at least some of what it is owed: *Alliance & Leicester* v *Slayford* [2000] EWCA Civ 257. That said, there are other, less drastic, remedies available for the mortgagee that are likely to be of greater relevance and value in most cases.

Power of sale

Where a mortgage is made by deed, the mortgagee has a statutory power of sale which is exercisable out of court. While the power arises when the mortgage money becomes due (s.101 LPA 1925), it is not exercisable until at least one of three conditions has been fulfilled (s.103 LPA 1925), which concern default by the mortgagor. These are:

- default in complying with a notice to repay any of the mortgage money for three months
- interest remaining unpaid for two months after it becomes due (the usual ground)
- breach of some other condition of the mortgage (see *Ladsky* v *TSB Bank* (1997) 74 P&CR 372, disrepair).

Selling before the power has arisen under s.101 leads to the purchaser taking a transfer of the mortgagee's interest rather than the title to the land. If the mortgagee sells after the power has arisen but before it has become exercisable under s.103, the purchaser takes the title free from the mortgage, although the mortgagor may have the sale set aside where the purchaser has notice of the mortgagee's breach. It is often said that the mortgagee can choose their own time for a sale and that they need not attempt first to sell by public auction before selling by private contract. The power is exercised validly by the mortgagee entering into a contract to sell as in *Lord Waring* v *London and Manchester Assurance Co Ltd* [1935] Ch 10. The mortgagee is not a trustee of their power of sale and has a wide discretion regarding the organisation of the sale but they are under a duty to act in good faith and to take reasonable care to obtain the true market value. Consider *Cuckmere Brick Co Ltd* v *Mutual Finance Ltd* [1971] Ch 949 where the mortgagee was held to have been negligent by failing to publicise the terms of planning permission granted over the land fully, accurately and in good time. Where the mortgagee sells, their duty is to achieve the best price reasonably obtainable at that time. The mortgagee is, however, entitled to choose the most convenient time for sale, even though by waiting the mortgagee may have achieved a better price: *Meftah* v *Lloyds TSB Bank plc* [2001] 2 All ER (Comm) 741.

The mortgagee is not, however, obliged to spend money or take other positive steps (by, for instance, applying for planning permission) to increase the value of the land or to achieve a higher sale price: *Silven Properties Ltd* v *Royal Bank of Scotland* [2003] EWCA Civ 1409.

The sale must be a true sale, not a 'sale' by the mortgagee to themselves, and even if there is no rule that a mortgagee cannot sell to a connected entity, such as a company in which they have an interest, a court will need to satisfy itself that such a sale is *bona fide* and that the mortgagee has taken reasonable steps to obtain the best price reasonably obtainable at the time: see *Tse Kwong Lam* v *Wong Chit Sen* [1983] 1 WLR 1349. The burden of proof, normally with the mortgagor, shifts to the mortgagee in such cases; and this may present the mortgagee with difficulty in showing that the price was the best reasonably obtainable: *Kevin Philbin* v *Stewart Davies* [2018] EWHC 3472 (Ch). Where the sale is made to a connected entity a breach of duty may lead to the sale being set aside. Otherwise, a mortgagee's breach will normally result in the mortgagor receiving compensation – being the difference between the price paid and the true market value reasonably achievable at the time. However, if the purchaser had actual notice of the breach then the mortgagor may succeed in having the sale set aside: *Corbett* v *Halifax Building Society* [2002] EWCA Civ 1849.

A mortgagor may apply for an order to be allowed to control the sale under s.91(2) LPA 1925; and a mortgagee's objection to sale can be overridden by a court in circumstances such as those in *Palk* v *Mortgages Service Funding plc* [1993] Ch 330 (CA). This statutory provision, which gives the court an unfettered discretion to prevent 'manifest unfairness' to either party, allows the mortgagor's needs both financial (*Palk*) and social (*Polonski* v *Lloyds Bank Mortgages Ltd* [1998] 1 FCR 282) to be taken into account. It may also be possible for there to be a postponement of possession under s.36 to allow the mortgagor to stay put to control a sale where they are best placed to get the highest price: *Target Home Loans* v *Clothier* [1994] 1 All ER 439. However, there is no general principle that the mortgagor can control a sale simply because they are in negative equity: *Cheltenham & Gloucester* v *Krausz* [1997] 1 WLR 1558.

On a sale the mortgagee sells free from all interests except mortgages prior to their own. In particular, they sell the mortgagor's legal title. They have no need to overreach interests to which they already have priority – because they already have priority.

Thus, the purchaser takes the whole interest vested in the mortgagor subject to prior mortgages but free from all interests to which the mortgage has priority (such as equitable interests behind a trust) which are overreached. The mortgagee is a trustee of the proceeds of sale which they are required to apply in a certain order (s.105 LPA 1925).

Right of foreclosure

As a remedy, foreclosure epitomises the proprietary nature of the mortgage, rooted as it is in the mortgage's original (and now defunct) form of a conveyance of the mortgagor's legal title. It is a judicial procedure and a foreclosure order operates to vest the mortgagor's fee simple or leasehold reversion in the mortgagee subject to prior mortgages (ss.88(2) and 89(2) LPA 1925). Not only does this destroy the mortgagor's right to redeem, it also leads to an unfair windfall for the mortgagee where the value of the property is greater than the mortgagor's debt. However, the court may, and nowadays will almost invariably, refuse a foreclosure order and instead order a sale under s.91(2) LPA 1925. As a provision that serves to protect the interests of the mortgagor (and subsequent mortgagees) s.91 accounts, in part, for the relative infrequency of foreclosure orders today. Foreclosure is so rare that it is practically non-existent as a remedy in this jurisdiction and the Law Commission (Law Com 204) has recommended its abolition and replacement with a more broadly based mortgagee's power of sale.

Right to possession

As a legal mortgagee has a term of years vested in them, they may go into possession as soon as the mortgage is made or 'before the ink is dry on the mortgage', as it was

vividly expressed in *Four-Maids Ltd* v *Dudley Marshall (Properties) Ltd* [1957] Ch 317 unless they have contracted out of the right, either expressly or by implication. The courts are slow to imply a term excluding the common law right, since even though the mortgagor has been guilty of no default it is only in this way that the mortgagee can ensure that the mortgaged property is being properly managed and the value of the security preserved (*Western Bank Ltd* v *Schindler* [1977] Ch 1).

In practice, it is uncommon for a mortgagee to seek possession except as a preliminary to the exercise of its power of sale and in part this is due to its duty to account strictly to the mortgagor for any rents and profits that it receives and 'on the footing of wilful default' for all that it ought to have received. See *White* v *City of London Brewery Co* (1889) 42 Ch D 137.

Of course, there is less risk in taking possession where the property is already let to a tenant; in such a case a mortgagee takes possession by directing the tenant to pay their rent to the mortgagee instead of to the mortgagor. While the court has an inherent jurisdiction to stay possession proceedings, it will only exercise it when there is a reasonable prospect of the mortgagor paying off the mortgage or otherwise satisfying the mortgagee within a short time: see *Birmingham Citizens Permanent Building Society* v *Caunt* [1962] Ch 883 and *Mobil Oil Co Ltd* v *Rawlinson* (1982) 43 P&CR 221.

Mortgagees have been said to be subject to a duty to use their right to possession *bona fide* and reasonably to enforce their security for payment of what they are owed (see *Quennell* v *Maltby* [1979] 1 WLR 318, at 322H (Lord Denning) and 324 (Lord Templeman); *The Co-operative Bank plc* v *Phillips* [2014] EWHC 2862 (Ch); and *Cukurova Finance International Ltd* v *Alfa Telecom Turkey Ltd* [2013] UKPC 2, at [73]. However, the contours and justification for such a duty, which has received scant judicial treatment, are open to question.

The courts' power to stay possession proceedings is the only protection for commercial mortgagors. However, statute (s.36 Administration of Justice Act 1970 and s.8 Administration of Justice Act 1973) has intervened to protect the mortgagor where the property includes a dwelling-house by giving the court powers to adjourn possession proceedings or to postpone the giving up of possession for such period as the court thinks reasonable.

The court must be satisfied that the mortgagor is likely to be able within a reasonable time to pay any sums due under the mortgage or to remedy some other default. Moreover, the court's powers are exercisable even in the absence of arrears or default: *Western Bank Ltd* v *Schindler*.

Some cases show great sympathy towards domestic borrowers. In *Cheltenham & Gloucester BS* v *Norgan* [1996] 1 WLR 343, the Court of Appeal allowed the whole remaining term of the mortgage, 13 years, for the mortgagor to clear the arrears, stating that although cases had treated two years as a 'normal' period to clear arrears, there is no particular length of time which is a 'reasonable period' within which arrears must be paid under the wording of s.36. Taking the whole of the remaining mortgage term as a starting point for calculating a reasonable period is contingent upon the mortgagor successfully persuading the court that repayment can realistically be made during that time. *Norgan* makes it clear that courts will therefore need to be forensic and rigorous in testing the mortgagor's financial position and will expect to receive a detailed budget. The court will also look at other factors, including the reasonableness, from the mortgagee's perspective, of adding unpaid interest to the capital for the whole of the remaining mortgage term and what risk there might be to the mortgagee's security interest over that same period. The approach in *Norgan*, which most obviously benefits the mortgagor, can also work to both parties' advantage. It saves the mortgagee from the extra cost of repeat possession proceedings where a mortgagor defaults having already been granted a short period under s.36 – as happened twice in *Norgan*. It also relieves the mortgagor who finds themself in such circumstances from stress and uncertainty. *Norgan* makes it clear, however, that where the remaining period of the mortgage is used as a reasonable period, the mortgagor will not normally be allowed a second chance to rely on s.36.

Activity 9.6

Is it possible to support Lord Denning's statement in *Quennell* v *Maltby* [1979] 1 WLR 318 that '...in modern times equity can step in so as to prevent a mortgagee, or a transferee from him, from getting possession of a house contrary to the justice of the case'? Explain.

The common law right to possession was examined in great detail by the Court of Appeal in *Ropaigealach* v *Barclays Bank plc* [2000] QB 263. Note that where the mortgagee does not apply for a court order, choosing to use the common law possession rules instead, the court has no power to suspend proceedings since s.36 does not apply. Of course, where the mortgage relates to domestic premises and the mortgagor is in occupation and objects to possession, in effect, criminal law requires court proceedings to be taken by the mortgagee in order to get possession: s.6(1) Criminal Law Act 1977. Likewise, and controversially, s.36 is unavailable where the mortgagee validly exercises their power of sale so as to overreach the mortgagor's equity of redemption without taking possession: *Horsham Properties Group Ltd* v *Clark* [2008] EWHC 2327 (Ch). Fortunately, it seems sidestepping the statutory jurisdiction in this way, although not incompatible with human rights' provisions, is unlikely to happen often in practice.

Power to appoint a receiver

The mortgagee has a statutory power to appoint a receiver. This power arises and becomes exercisable in the same circumstances as his power of sale, and is useful if the mortgagee wishes neither to realise his security nor to enter into possession of the mortgaged property. The receiver, who is deemed to be the agent of the mortgagor, is under a duty to manage the property and to receive all income derived from the property.

Summary

A mortgagee has powers to sell, foreclose or take possession of the land mortgaged. Rules and general fairness principles govern the circumstances in which each of these rights may legitimately be exercised, and protection of domestic borrowers is much stronger than that for commercial mortgagors. Registration requirements must be followed in order to ensure priority for a mortgage over other secured debts.

Rights of the mortgagee

Mortgagee bound by interests which would bind a purchaser:
- Unregistered land: legal with title deeds first priority.
- Puisne mortgage – entry as C(i) land charge.
- Equitable – entry as C(iii) land charge.
- Prior to the registration of later mortgages registered land must now be entered under s.27 LRA 2002.
- Priority by date of entry not date of creation s.48 LRA 2002.
- Non-registration under s.27 LRA 2002 means only equitable and priority by date of creation.

Sue on a debt
- Mortgage is a debt and this is always available.

Appoint receiver
- Arises under s.101 LPA 1925.
- Exercisable under s.103 LPA 1925.
- Proceeds distributed under s.109 LPA 1925.

Possession
- Legal right as soon as created.
- Equity can prevent exercise of the right. Dwellings s.36 AJA 1970.
- Statutory power to postpone possession proceedings/orders: dwellings only.
- Possession attracts duties for upkeep and account.

Foreclosure
- Rarely used.
- Vests property in mortgagee free from mortgagor.

Sale
- Arises under s.101 LPA 1925.
- Exercisable under s.103 LPA 1925.
- Proceeds distributed under s.105 LPA 1925.
- Cannot purchase themselves or via agent.
- Must obtain 'fair and true' market value.
- Section 91 LPA 1925: court can order sale; available where there is no deed attracting s.101 LPA 1925.

SELF-ASSESSMENT QUESTIONS

1. **When and how does a mortgagee have the power to sell the mortgaged property?**
2. **How are domestic mortgagors protected when they fall into arrears?**

SAMPLE EXAMINATION QUESTIONS

QUESTION 1

Croesus, a businessman, wishes to borrow £50,000 to improve the cash-flow in his business and to pay off his gambling debts. He can offer, by way of security, land on which he has a 12-year lease, which is non-renewable. His bank refuses to lend him the money, but Midas, an entrepreneur, lends him £50,000 on a mortgage of the lease. The mortgage contains the following terms:

a. **Interest to be payable quarterly at a rate 5 per cent above that charged by the Building Societies Association.**

b. **The loan to be repaid over a period of six years, in equal quarterly instalments. Each payment is to be adjusted by reference to the value of the pound against the American dollar.**

c. **Croesus to obtain all the supplies of paper that he needs for his business from Paperco Ltd, a company wholly owned by Midas.**

Croesus wishes to know whether all the above terms are enforceable. Advise him.

QUESTION 2

Mr and Mrs Jay purchased a cottage for £180,000. Mrs Jay paid the deposit of £20,000 from her savings and the remaining £160,000 was raised on the security of a mortgage with the Barset Bank. The cottage was registered in the sole name of Mr Jay and he was solely responsible for the mortgage repayments. Recently Mr Jay lost his job and has started to default on the mortgage payments. However, he hopes to find another job soon.

The Jays would like to know (i) whether the bank will be able to obtain possession of the cottage, (ii) whether they will be able to prevent the bank from selling until the housing market recovers, (iii) whether they can compel the bank to sell by auction, and (iv) how, if the cottage were sold, the proceeds of the sale would be distributed. Advise the Jays.

QUESTION 3

'The law relating to the creation of legal and equitable mortgages of land is complex, confusing and in urgent need of reform.'

Discuss with reference to both registered and unregistered land.

ADVICE ON ANSWERING THE QUESTIONS

QUESTION 1

The first three words are very important, since Croesus is an individual but there is also a commercial character to the bargain. You should consider whether each of the terms is void or enforceable. Will Croesus be protected by the Consumer Credit Act 1974? Has the right to redeem been validly postponed? Is there a collateral advantage or restraint of trade? Is the interest rate oppressive or extortionate?

QUESTION 2

Note that this is not simply a question on the court's exercise of discretion under TLATA 1996; you need to focus on the priority issue and consider the rights and duties of mortgagees in appropriate detail. Assuming that Mrs Jay's contribution to the purchase price of the cottage gives rise to a resulting trust in her favour, the question arises whether the bank takes free from or subject to her beneficial interest. On the basis of *Abbey National Building Society* v *Cann* [1991] 1 AC 56 it is likely that the bank takes free (even if Mrs Jay happened to be in actual occupation at the time of the completion of the mortgage), either because she has impliedly authorised the bank to take priority or because there is no *scintilla temporis* (Latin = a tiny bit of time) between the conveyance and the mortgage. On point (i) a good answer would discuss the provisions of the Administration of Justice Acts protecting the mortgagors of dwelling-houses. On (ii) and (iii) you should consider, in the light of the case law, the extent to which a mortgagee is free to sell the mortgaged property when and how they like. Assuming that the power of sale has become exercisable, what are the duties of the mortgagee? The answer to (iv) depends on the question of priority. If the bank takes free from Mrs Jay's interest, the proceeds will go first towards paying the sums due under the mortgage and the residue will be divided between the Jays in proportion to their shares.

QUESTION 3

The key issue in this question is the creation of mortgages and it is important that you do not write a 'here is all I know' answer. You should examine critically the LPA 1925 provisions (ss.85–87) regarding the creation of legal mortgages of freehold and leasehold land. (What is the difference between the two methods of creating a legal mortgage? What is the difference between a mortgage and a charge? Is there a case for abolishing the mortgage by demise, as has been done by s.23 LRA 2002?) You should also examine the variety of ways in which an equitable mortgage/charge may arise and be protected today and you should consider whether there is any justification for retaining these various forms. Reference could be made to Law Commission proposals for reform of this area of law.

FOCUS OF THE ASSESSMENT

Within the scope of this chapter, there are four principal areas for assessment:

1. **A problem question examining whether there are clogs and fetters on the mortgage contract.**
2. **A problem question relating to repossession or sale under a mortgage contract.**
3. **Any combination of the above.**

4. **An essay enquiring into the suitability of the law on mortgages in the modern property market, protecting the rights of occupants, allowing you to cover any or all of the first three categories.**

Quick quiz

Question 1

What are the statutory provisions which regulate the creation of a legal mortgage in freehold registered land?

a. **Section 27 LRA 2002.**

b. **Section 23 LRA 2002 with entry under s.27 LRA 2002 and a notice under s.32 LRA 2002.**

c. **Section 1 LP(MP)A 1989.**

Question 2

Paul buys Greenacre and then takes a mortgage with CBS Bank, which is registered. He later takes a mortgage with ABC Bank, which is registered and then later a further mortgage with TBS Bank. Paul has not paid the mortgages and ABC Bank seeks to sell Greenacre. Which statement is correct?

a. **On sale ABC would need to repay CBS Bank first, then cost of sales before repaying their own money. They do not have to repay TBS Bank as this was registered after their mortgage.**

b. **On sale ABC would take their money first under s.105 LPA 1925 then pay the rest of the money (if any) to Paul.**

c. **On sale ABC would need to repay both CBS and TBS Bank before taking their money.**

Question 3

ABC Bank entered into an agreement to mortgage Whiteacre. The mortgage has not been paid and they want to sell Whiteacre to regain their money. Which is correct?

a. **They can apply for an order for sale under s.101 LPA 1925.**

b. **They can apply for an order for sale under ss.101/103 LPA 1925.**

c. **They can apply for an order for sale under s.14 TLATA 1996.**

Question 4

The court may strike out a clause of a mortgage for being oppressive or unconscionable. Which of the following are considerations that a court will take into account?

a. **The bargaining power of the parties.**

b. **The reasonableness of the clause.**

c. **The experience of the mortgagor.**

Question 5

Which of the following statements are correct in relation to the obligations of the mortgagee in selling mortgaged property?

a. **Once ss.101 and 103 LPA 1925 are satisfied the mortgagee can sell the property whenever they wish.**

b. **The mortgagee must wait until there is a good market to get the best price for the mortgaged property.**

c. **The mortgagee can buy the property themselves if they give the best price.**

Answers to these questions can be found on the VLE.

Notes

10 Adverse possession and freehold title

Contents

Introduction

Often referred to as 'squatter's rights' (a squatter is a person unlawfully occupying land (which may include buildings)), adverse possession of land is a much misunderstood, though highly topical, subject. At its most basic, the principle is that long use of land without the permission of the 'paper owner' can result in rights over that land for the squatter. The basis of title to land is possession and this principle has long been reflected in the Limitation Acts, whose broad policy has been that those who 'sleep upon' their claims should not be assisted to recover their property. Limitation operates negatively so as to bar a claim to the land and it may bar one person but not another; titles are relative. It does not create a title in somebody; it prevents somebody from enforcing his title. A person can lose their rights in land by failing to evict a trespasser. An adverse possessor may, by virtue of their long possession, be entitled to claim a legal estate in fee simple absolute, becoming the 'owner' of the land, simply because nobody else can claim a better right than the paper owner whose title is now extinguished. (For registered land see below.) The governing statute used to be the Limitation Act 1980 (LA 1980). The Land Registration Act 2002 (LRA 2002) radically changed the rules for adverse possession so that it is no longer a real threat to landowners in registered land. It is thus currently necessary to distinguish three separate sets of legal rules of adverse possession, that is, those applying in:

- unregistered land
- registered land where the cumulative period of continuous adverse possession amounted to at least 12 years on 13 October 2003
- registered land where the cumulative period of continuous adverse possession did not exceed 12 years on 13 October 2003.

It is **very important** to be able to compare and contrast the rules applicable to each of the three situations above. There are also differences in the effect of adverse possession depending on whether the title is freehold or leasehold. In this chapter, the focus is on the former. You are only expected to study how adverse possession affects title to land with freehold title – so you can omit those parts of the textbook chapters and other reading concerning adverse possession of leasehold title as it applies in both unregistered and registered land.

LEARNING OUTCOMES

By the end of this chapter and the relevant readings, you should be able to:

- **explain the nature of adverse possession**
- **describe how the limitation period is computed**
- **distinguish the effect of lapse of time in the case of unregistered land from its effect under LRA 1925 and LRA 2002**
- **apply the rules of adverse possession to situations where the relevant facts occur under each of the three legal regimes**
- **evaluate the effects of LRA 2002 on both unregistered and registered land in relation to adverse possession.**

10.1 Unregistered land

Core text

- **Dixon, Chapter 12 'Adverse possession': Introduction, Section 12.1 'How is adverse possession and the Limitation Acts established? The rules common to unregistered and registered land' and Section 12.2 'Adverse possession and unregistered land' (excluding 12.2.3.3 'Effect on the adverse possessor: leaseholds').**

Further reading

- **Bogusz and Sexton, Chapter 15 'Adverse possession and the Limitation Acts': Section 15.1 'Rationale of adverse possession' up to Section 15.8.1 'What if an adverse possessor displaces a tenant?'.**
- **Smith, Chapter 7 'Original acquisition of property interests': Section 2 'Adverse possession' (excluding D(iv)–(vi)).**
- **Dockray, M. 'Why do we need adverse possession?' [1985] *Conv* 272.**

10.1.1 Limitation period

Section 15(1) LA 1980 provided that no action shall be brought by any person to recover any land after the expiration of 12 years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims (e.g. the person who sold him the land), to that person. So the period is generally 12 years and it may be established by a continuous series of adverse possessors of land (see Section 10.1.2). Special periods apply to the Crown (usually 30 years) and in relation to claims to the foreshore (60 years). The limitation period may be extended in case of disability (e.g. where the paper owner is a child or lacks mental capacity) and the commencement of the period may be postponed in the case of fraud, concealment or mistake by the person trying to establish adverse rights in the land. These rules are fairly straightforward; note, in particular, the effects of **supervening** and **successive disabilities**. Moreover, time which has begun to run is stopped, either when the owner asserts his right or when his right is admitted by the adverse possessor (e.g. by a signed acknowledgement in writing). After the period of 12 years, the paper owner's title will be extinguished (s.17 LA 1980).

10.1.2 Accrual of right of action

No right of action can accrue unless the land is in adverse possession, though the date at which this accrual occurs varies according to the nature of the interest which the stranger seeks to bar. In other words, the date on which an adverse possessor can begin building up towards 12 years' possession in order to claim a right to the land depends upon whether the person they have dispossessed is a freehold owner or a tenant, and whether the land was held on trust.

Two elements are needed to establish adverse possession:

1. factual possession
2. the intention to possess.

Time runs against a person in present possession of land from the moment adverse possession is taken by another (i.e. from the moment that they have been dispossessed by another or from the moment that they have discontinued their possession, such discontinuance being followed by the taking of possession by another – but there must not be a gap between the periods of adverse possession). Possession of land is 'adverse' if the land is possessed without the permission or licence of the paper owner. The owner can therefore stop possession from being adverse by unilaterally giving the squatter an occupational licence that the squatter neither accepts nor rejects: see *BP Properties* v *Buckler* [1987] EWCA Civ 2 , a decision that, although questioned at the time, has since been applied by the Privy Council in *Smith* v *Molyneaux* [2016] UKPC 35 at [28]).

The outcome may seem strange; but this is not a revival of the 'heresy' (associated with *Leigh* v *Jack* (1879) 5 Ex D 264 and discussed further below) that an implied licence can be imposed automatically: *Smith* v *Molyneaux* [2016] UKPC 35 at [32]–[36]. Rather, the unilateral licence is seen from the owner's standpoint as giving rise to the inference that it deprives the squatter of the intention to possess. (For an assessment see: Radley-Gardner, O. 'Foisted permission and adverse possession' (2017) 133 *LQR* 214.)

What is clear is that neither a licensee nor a tenant at will can be in adverse possession since they are in possession with the owner's consent, and time will only begin to run in their favour after the licence or tenancy has been determined: *JA Pye (Oxford)* v *Graham* [2002] UKHL 30. However, in *Rashid* v *Nasrullah* [2018] EWCA Civ 2685, the Court of Appeal (overruling a contrary approach in the earlier decision in *Parshall* v *Hackney* [2013] EWCA Civ 240) decided there is nothing in *Pye* to prevent the possibility of a registered proprietor being in adverse possession of land falling within their registered title but which is also within another registered or unregistered title.

Where a paper owner has been dispossessed by a chain of adverse possessors, the paper owner's title will still be barred once a cumulative period of 12 years has elapsed, provided the adverse possession was continuous and irrespective of whether the subsequent squatters dispossessed the former adverse possessor or took possession consensually. Each adverse possessor has a legal possessory title which can be defended against subsequent squatters, sold, gifted or passed on death in the same way as a paper title. So it is important to note that the possession may begin with one squatter and this time in possession can, against the owner, be added to the time in possession of a successor (*Mount Carmel Investments Ltd* v *Peter Thurlow Ltd* [1988] 1 WLR 1078). After a total of 12 years' continuous adverse possession, the paper owner's title will be time barred. An adverse possessor who has consensually passed his interest to a subsequent squatter has no claim against his successor but an adverse possessor who has been dispossessed by a subsequent squatter has, like the paper owner, 12 years from the dispossession to assert his claim against anyone subsequently in possession of the land.

What is possession?

Consider whether there has been a discontinuance of possession where the owner of a piece of land for which they have no immediate use leaves it unoccupied, and a stranger enters into possession of it. Does the position depend on whether the paper owner intends to use the land for a specific purpose in the future? How specific should the purpose be? How firm is the intention? Is the stranger's knowledge or ignorance of the intention relevant?

Activity 10.1

Consider the differing findings of the courts in: *Leigh* v *Jack* (1879) 5 Ex D 264, *Wallis's Cayton Bay Holiday Camp Ltd* v *Shell-Mex and BP Ltd* [1975] QB 94 and *Treloar* v *Nute* [1976] 1 WLR 1295.

Which facts or behaviour of the adverse possessor were material in each of these three cases?

No feedback provided.

Buckinghamshire County Council v *Moran* [1990] Ch 623 makes it clear that where land has been acquired or retained by the paper owner for a specific future purpose, there is no rule of law that they cannot be dispossessed by acts of trespass that are not inconsistent with that purpose.

In addition to discontinuance of possession on the part of the paper owner, it must be shown that the stranger has entered into possession (i.e. that they are in possession in fact and that they have the necessary intention to possess. The terms 'actual possession' and 'factual possession' in practice mean the same thing, though the courts tend to use them in slightly different contexts). Factual possession implies some degree of physical control over the land. While trivial or occasional or equivocal acts will not amount to proof of possession, much depends on the circumstances

of each case, including the nature of the land and the manner in which land of that nature is commonly used. It involves a holistic assessment, objectively evaluating all the circumstances as a whole: *Heaney* v *Kirkby* [2015] UKUT 178.

The fact of possession must be accompanied by an intention to possess on the part of the stranger, and the courts have tended to insist on unequivocal evidence of such an intention as well as on the need for the stranger to show that they made their intention sufficiently clear 'so that the owner, if present at the land, would clearly appreciate that the claimant is not merely a persistent trespasser, but is actually seeking to dispossess him'. See *Powell* v *McFarlane* (1979) 38 P&CR 452.

Commonly, the presence of intention will be derived by implication from the evidence of the very acts relied upon to establish the control needed for a successful finding of factual possession, especially where that evidence is unequivocal, and there is no evidence that the owner had a contrary intention: *Pye* (Lord Hutton [76]). In this way, the squatter's intention is assessed objectively. It will normally not depend upon them giving direct evidence of their subjective intention – which may either be seen to be self-serving or prove damaging (*Bolton MBC* v *Musa Ali Qasmi* (1998) 77 P&CR 36). Such evidence may, however, be relevant where the acts of users are not sufficiently unequivocal to give rise to proof of intention (*Malik* v *Malik* 2019] EWHC 1843 (Ch)).

In *Pye*, the House of Lords conducted a useful and detailed review of the relevant cases on what constitutes intention to possess (*animus possidendi*) and stated that the squatter must show intention to exclude the paper owner and the rest of the world from the land to the extent that is reasonably practicable and so far as the law allows. The intentions of the paper owner are irrelevant. Indeed, in *Pye*, it made no difference that the adverse possessor admitted that he would have paid for the land had he been asked, since possession can be adverse until a request for payment is actually made (*per* Lord Browne-Wilkinson). It is not the intention to own but the intention to possess that the courts seek to identify. It must be remembered that the facts of each case are crucial to assessing whether the required intention to possess is present. For example, in *Batt* v *Adams* [2001] 2 EGLR 92, fencing to keep in animals did not show intention to exclude others and so could not found adverse possession. The facts fell on the wrong side of the borderline established in *Treloar* v *Nute* [1976] 1 WLR 1295. But the motive for fencing is not necessarily conclusive: see, for example, *Hounslow LBC* v *Minchinton* (1997) 74 P&CR 221; and *Chambers* v *London Borough of Havering* [2011] EWCA Civ 1576 at [37]–[40] (Etherton LJ) and [65] (Lewison LJ).

Activity 10.2

How difficult do these requirements make it for a person to extinguish an owner's title by virtue of adverse possession? How would a person demonstrate both factual possession and intention to possess?

Activity 10.3

Summarise the relevant facts of *JA Pye (Oxford) Ltd* v *Graham* [2002] UKHL 30 and answer the following questions about the case:

a. **What was the cause of the disagreement between the Court of Appeal and the House of Lords?**

b. **What reservations did the judges in the House of Lords express about their decision in favour of the squatters? (Hint: see Lord Bingham's speech.)**

c. **How did the House of Lords deal with the human rights issue of 'interference with the right to enjoyment of property'?**

d. **This case concerned the adverse possession of a piece of open land. To what extent do the rules differ when the land concerned is a building?**

No feedback provided.

A considerable body of case law sheds light on what is meant by factual possession and/or intention in a variety of factual situations. A non-exhaustive selection is set out below. Although judicial determinations are fact-sensitive, the reasoning they use can

often be valuable in building effective advice about how the requirements apply to the facts and issues in problem scenarios. It is therefore a good idea to keep abreast of case law developments.

Other cases have shed further light on what is meant by factual possession and/or intention:

- In *Lambeth London Borough Council* v *Archangel* [2002] 1 P&CR 18, the Court of Appeal found in favour of a performance poet who had acknowledged the local authority's title to the land. It was stated that padlocking a front door is a clear demonstration of possession.
- In *Battersea Freehold & Leasehold Co Ltd* v *Wandsworth London Borough Council* [2002] 2 EGLR 75, the occupier of a bombed-out pub site allowed neighbouring tenants to have keys to the site. It was held that allowing access for others showed that he lacked the intention to hold exclusive possession for himself.
- *Simpson* v *Fergus* (2000) 79 P&CR 398 clarifies that acts of exclusion of the paper owner are required; a declaration of intention, however clear, will not alone amount to possession.
- In *Purbrick* v *Hackney London Borough Council* [2003] EWHC 1871 (Ch), Neuberger J upheld the claimant's contention that he had been in adverse possession of a burnt-out shell of a building by using it to keep his ladders and other building equipment, protecting the tools from the rain by a tarpaulin and sealing the doorway with a sheet of corrugated iron secured with a chain and two padlocks. Although the Council argued he could have done more with the building, it was found Purbrick had done enough to possess the land and exclude the owner; and his willingness to pay rent had the Council tried to reclaim the land did not stop him from having the necessary intention to possess for the time being.
- In *Palfrey* v *Wilson* [2007] EWCA Civ 94 combined acts over time amounted to unequivocal possession with intent to possess, including partially rebuilding a damaged 9 inch thick wall dividing neighbouring properties, inserting a damp proof course in it to protect a building and raising the wall's height (with planning permission) to connect the wall to a new car port.
- In *Heaney* v *Kirkby* [2015] UKUT 178 (TCC), creating hardstanding for parking on a roadside verge, along with various gardening activities such as laying topsoil and planting a flower border, constituted sufficient possession. Occasional vehicular use by others did not matter, nor was it necessary or reasonable for the land to be enclosed.
- In *Port of London Authority* v *Paul Mendoza* [2017] UKUT 146 (TCC) the act of simply mooring a houseboat on London's River Thames was held to be insufficient in itself to be evidence both of factual possession and the owner's intention to take adverse possession because the mooring was ambiguous and open to several interpretations (such as permission by licence or easement or trespass without intending to take adverse possession.)
- In *Thorpe* v *Frank* [2019] EWCA Civ 150, the Court of Appeal found that, by permanently repaving and altering the level of a small triangular piece of the forecourt to a semi-detached bungalow, the claimant had shown a sufficient degree of control that amounted to adverse possession even without enclosing the land. The land formed part of an open-plan estate and was subject to covenants restricting fencing.
- In *King* v *The Incumbent of the Benefice of Newburn in the Diocese of Newcastle* [2019] UKUT 176 (LC), the Upper Tribunal held that title to the burial vault had not been acquired by adverse possession, the claimant having never entered it nor sought to exclude its owners. Locking the church doors (the only means of access to the vault) was not enough.
- In *Amirtharaja* v *White* [2021] EWHC 330 (Ch) the court found the claimant's actions of gating and enclosing a passageway was insufficient and too equivocal to be

evidence of their intention to possess the land by excluding the owners. What they had done was equally consistent with them having a right of way on the land, access to which they wanted to protect.

Effect of lapse of time

The expiration of the limitation period does not operate as a 'Parliamentary Conveyance' (i.e. it does not transfer the paper owner's title to the adverse possessor, at least in the case of unregistered land). It merely extinguishes the paper owner's claim (s.17 Limitation Act 1980); the adverse possessor gains a legal estate in their own right (essentially a freehold title) that is rooted in their possession: *Asher* v *Whitlock* [1865] LR 1 QB 1. The adverse possessor is bound by pre-existing burdens that bind the land (e.g. restrictive covenants) because the adverse possessor is neither a transferee nor a purchaser from the paper owner. They will be bound irrespective of whether the burdens were duly protected in unregistered land as they should have been under the LCA 1972. After all, the adverse possessor cannot qualify as equity's darling. This does not stop the adverse possessor from: creating rights over the land in favour of others (such as easements); selling the land; or applying for first registration of title under the LRA 2002 – which would be a sensible thing for the adverse possessor to do. In cases of sale or registration applications, it will be for the adverse possessor to satisfy either the purchaser as part of the conveyancing process or the Land Registry that 12 years of adverse possession have been completed so as to evidence an entitlement to become the registered proprietor of the land.

Stopping the limitation clock from running: permissive occupation, payment and acknowledgement

- Acts done by permission of the paper owner do not exclude them from the land and so cannot contribute to an adverse possession claim, even where that permission is an informal licence or implied licence. The owner's offer of a non-gratuitous licence can be effective in stopping time running where, rather than actively rejecting it, the adverse possessor simply stays silent: *BP Properties* v *Buckler* [1987] EWCA Civ 2. However, it must be remembered that a licence will not be implied automatically where the owner contemplates a future use that is compatible with that of the squatter. Although that 'heresy' (based on *Leigh* v *Jack*) is clearly abolished by para.8(4) Schedule 1 LA 1980 (see *Pye*), that does not rule out the potential for the implication of a licence if the specific facts justify it (see *Colin Dawson Windows Ltd* v *King's Lynn & West Norfolk BC* [2005] EWCA Civ 9 – allowing the claimant to go into possession during negotiations to buy land). Likewise, the Privy Council in *Smith* v *Molyneaux* [2016] UKPC 35 upheld the lower court's inference of a licence where the claimant knew he would have to leave the property when the owner wanted to develop it. But there are few cases of successful defences by paper owners based on an implied licence. However, Lord Browne-Wilkinson (*Pye* ([2002] UKHL 30 at [45]) recognised that, where a squatter uses land in a way that he knows to be compatible with the owner's current or future use, that may, factually, be a sufficient basis for a finding that the squatter lacks the requisite intention to possess.
- Payment for land is an admission that the recipient has rights over the land concerned. But ceasing to make payments can start adverse possession.
- Acknowledgement of the paper owner's title by other means will prevent adverse possession, not only by the acknowledger but also by their successors, but only when made in writing.
- In *Markfield Investments* v *Evans* [2001] 1 WLR 1321 the court considered what sort of action stops time running (i.e. prevents a squatter from gaining any more time towards their 12-year target for adverse possession for unregistered land). It was held that bringing an action for possession will not by itself stop time running; the action must be carried through to completion before it has any such effect.
- Ordinarily, an acknowledgement that takes place after the limitation period has run its course is ineffective because the owner's unregistered title has already been

extinguished: *Nickerson* v *England* [1926] 2 KB 93. Exceptionally, in *Colchester BC* v *Smith* [1992] Ch 421 the Court of Appeal recognised that where, after the end of the 12-year limitation period, the parties enter into a freely negotiated and genuine compromise agreement that the owner acts upon (such as by the grant of a lease) this may be sufficient to estop the adverse possessor from claiming rights. Do you think there may be a policy justification for the parties being able in effect to contract out of the limitation legislation?

ACTIVITY 10.4

How might acknowledgement of the paper owner's title be made?

Summary

In unregistered land, the key issue for adverse possession is whether the claimant has completed an uninterrupted period of 12 years' use of the land, in a manner which demonstrates both factual possession and the intention to possess, excluding all others. The adverse possessor must not acknowledge the title of the paper owner, and will be bound by pre-existing rights in the land. The adverse possessor's title is a new one, not that of the previous owner; and even before it has been acquired by completion of possession for the limitation period the adverse possessor has a legal estate/fee simple absolute in possession – demonstrating how holding an estate is distinct from having title to the land: see *Turner* v *Chief Land Registrar* [2013] EWHC 1382 (Ch) at [15]–[16]. A period of squatting for less than 12 years can be transferred, say, by will (*Asher* v *Whitlock* [1865] LR 1 QB 1) and added to the legatee's period of possession to complete the limitation period. Voluntary registration of the land under LRA 2002 will almost always defeat the squatter's claim (see Section 10.3).

10.2 Registered land with 12 years' adverse possession before 13 October 2003

CORE TEXT

- **Dixon, Chapter 12 'Adverse possession': Section 12.3 'Adverse possession under the Land Registration Act 1925'.**

Mechanics of the old (pre-LRA 2002) scheme

In the case of registered land before LRA 2002 came into force (13 October 2003), lapse of time did not extinguish the owner's title. After 12 years' adverse possession, the registered proprietor remained on the register but the squatter had an overriding interest, which they could protect on the land register. Moreover, under LRA 1925, the registered title was held on statutory trust for the squatter (s.75(1)). A squatter could apply for registration of their title after the 12-year period (s.75 LRA 1925), making a statutory declaration and producing supporting evidence. The Land Registry gave the squatter a new possessory title, treating their application as a first registration, although subject to any interests in the land that had not been extinguished by the adverse possession (e.g. restrictive covenants). Following criticisms by the Law Commission (Law Com 254) that imposing a statutory trust introduced confusion and unnecessary complexity, it was abolished and replaced by the mechanics of the new scheme (see below). However, the LRA 1925 still applies where a squatter can show completion of the 12-year period of adverse possession before the new scheme entered into force (13 October 2003); but now, rather than imposing a statutory trust, the squatter is 'entitled to be registered as proprietor of the estate' (LRA 2002, Sch.12, para.18). If the registered title is sold, the adverse possessor's entitlement to be registered is enforceable against the purchaser as an overriding interest, provided the adverse possessor's actual occupation is discoverable within the terms of Sch.3, para.2 of the LRA 2002 (see Chapter 3).

10.2.1 Adverse possession and human rights

In *JA Pye (Oxford Ltd)* v *Graham* [2001] EWCA Civ 117, the Court of Appeal considered Pye's contentions about whether the gaining of land by adverse possession, particularly by virtue of the combined provisions of the LA 1980 and the LRA 1925, violated the human property rights of the dispossessed owner of the land under the Human Rights Act 1998. It was decided that removal of title by limitation defines the terms on which ownership is allowed by the English legal system and so is neither an interference with, nor a deprivation of, the owner's possession of the land. The court conceded an interference with the paper owner's right of access to a court under Article 6 of the European Convention on Human Rights but considered the interference justifiable in view of the time limits involved. On appeal, the House of Lords did not deal with the issue because (as Pye conceded) the disputed facts arose before the Human Rights Act had entered into force.

This issue was subsequently considered by the European Court of Human Rights when Pye sued the UK government for damages. In *JA Pye (Oxford) Ltd* v *United Kingdom* (2006) 43 EHRR 3, the court of first instance found that the deprivation of registered title to land under LA 1980 and LRA 1925 was a breach of Article 1 of the First Protocol of the European Convention on Human Rights.

The court based its decision on the lack of compensation and the lack of procedural safeguards for the registered title holder. The United Kingdom government appealed successfully to the Grand Chamber of the European Court of Human Rights. The Grand Chamber (by a 10:7 majority) held that there was no violation of the Convention and the law on adverse possession as it applied to registered title under the LRA 1925 was within the margin of appreciation allowed to national legislatures: *JA Pye (Oxford) Ltd* v *United Kingdom* (2008) 46 EHRR 45.

In *Ofulue* v *Bossert* [2008] EWCA Civ 7, the Court of Appeal confirmed that the law of adverse possession does not violate human rights and that the decision of the Grand Chamber in *Pye* should be followed unless there were 'very good reasons' for departing from it.

It must be remembered that the human rights challenge in *Pye* was concerned with assessing the compatibility of the now largely obsolete registered land law provisions in the LRA 1925 about the effect of adverse possession. Here, it was arguable – albeit unsuccessfully as it turned out – that the law in the LRA 1925 failed to find an appropriate balance between the rights of the registered owner and the adverse possessor. By contrast, in unregistered land, the role of adverse possession was (and still is) widely accepted as being justifiable. Similarly, as we shall see (below), the reforms in the 2002 Act significantly curtail the impact of adverse possession and prevent a registered owner from unknowingly losing out to the squatter. Thus, it appears settled that the operation of the doctrine of adverse possession in both unregistered and registered land does not violate human rights.

See further the comments by Oliver Radley-Gardner in (2007) 5 *Web JCLI* and Kerridge and Brierley in (2007) *Conv* 552–58.

Summary

In registered land under the LRA 1925 scheme, adverse possession for 12 years caused a transfer of the title from the registered proprietor to the claimant. A squatter who had not yet been registered as proprietor had an overriding interest even if they did not protect their rights on the register. Since LRA 2002's transitional provisions have now expired, a squatter who had accrued 12 years' adverse possession before 13 October 2003 will **only** be able to enforce their rights if they are in actual occupation. They can of course apply for registration as proprietor under LRA 2002 (see below).

Further reading

- **Dray, S. 'Whose land is it anyway? Title by adverse possession' (2002) 7(3) *L&T Review* 42–44.**

10.3 Registered land under the Land Registration Act 2002

CORE TEXT

- **Dixon, Chapter 12 'Adverse possession': Section 12.4 'Adverse possession under the Land Registration Act 2002'.**

FURTHER READING

- **Cobb, N. and L. Fox 'Living outside the system? The im(morality) of urban squatting after the Land Registration Act 2002' (2007) 27 *LS* 236.**
- **Dixon, M. 'The reform of property law and the Land Registration Act 2002: a risk assessment' (2003) *Conv* 136–56.**

10.3.1 The nature of adverse possession under LRA 2002

How adverse possession operates under LRA 2002

The LRA 2002 does not change how the law (discussed in Section 10.1.2) defines adverse possession but it does fundamentally alter the effect adverse possession has on the registered proprietor's title. In short, the registered owner cannot lose their title except in the limited circumstances provided for by the 2002 Act. Part 9 LRA 2002 therefore achieves the Law Commission's aim that 'adverse possession of an estate in land will never of itself bar the registered proprietor's title' (Law Com 271, 2001). Sections 95 and 96 of the LRA 2002 contribute to realising this goal by disapplication of the Limitation Act 1980 to registered title.

Possession, for whatever length of time, will therefore never automatically extinguish a registered title (s.96(3) LRA 2002). A person who has been in adverse possession for at least the last 10 years can apply to be registered as proprietor (para.1(1)–(3) Schedule 6). He will normally be in possession at the time of his application. On receipt the registrar will notify the registered proprietor, who is likely to object within the three-month period allowed for this (para.3(2) Schedule 6). The proprietor of any registered charge or any superior title, and any person who has registered a right to receive notice, will also be notified and be able to object (para.2 Schedule 6). If no objections are lodged, the adverse possessor is entitled to be registered as the new proprietor of the relevant title (para.4 Schedule 6). If objections are lodged and the adverse possessor's application is rejected (because none of the exceptional grounds in para.5(2)–(4) set out below applies) but the applicant remains in adverse possession for a further two years, the applicant can make a further application to be registered. On receipt of this second application under para.6, the Registrar must register the adverse possessor as the new proprietor of the relevant title (para.7). It is an automatic entitlement that is neither dependent on notifications nor capable of being defeated by the owner's objection. The adverse possessor will not get a new title (as in unregistered land) but in effect obtains a statutory assignment of the existing registered title that is subject to all existing priorities other than any registered charge.

In this way, the new LRA procedures operate to alert registered proprietors that their land has been occupied for at least 10 years by somebody who claims to have rights to it. If they then fail to object and remove the claimant within the further two-year grace period allowed by the 2002 Act (which incidentally makes the total duration of possession match the 12-year limitation period required in unregistered land), ownership of the land will be changed in favour of the adverse possessor. As a result, the identity of the owner on the land register will become a mirror of the reality on the ground. Conversely, if adverse possessors decide against making an application then, unlike with unregistered land, they cannot have any impact on the registered title no matter how long they stay on the land.

When will the objections will not defeat the application?

There are three exceptional circumstances where applicants to the Land Registry with at least 10 years' adverse possession will succeed even against the registered proprietor's objection. Broadly speaking, they are: estoppel, independent entitlement to estate and boundary disputes. In each case, the squatter acquires an independent fee simple estate and is entitled to become registered as proprietor of the land.

Estoppel

Under para.5(2) Schedule 6 LRA 2002 an adverse possessor can insist on registration where it would be unconscionable for the registered proprietor to dispossess them (this is a relatively straightforward restatement of the principle of proprietary estoppel – see Chapter 6).

Independent right to estate

If the squatter separately has a proprietary claim to the land (e.g. where they have paid to buy the land, taken occupation but no transfer has occurred) they will be entitled to seek registration (para.5(3) Schedule 6 LRA 2002).

It should be noted that, where either this or the previous condition (estoppel) exists, the squatter's claim rests on some separate, independent legal basis rather than on adverse possession. The 2002 Act provides a simple procedure to settle such claims. In 'Updating the Land Registration Act 2002' (Law Com 308, 2018) the Law Commission took the preliminary view ([17.33]–[17.44]) that using these adverse possession provisions in LRA 2002 to determine the merits of other claims to land might be 'practically useful' but it was 'conceptually unsatisfactory'. However, after conducting its consultation exercise, the Law Commission decided against recommending reform of these two exceptional categories.

Boundary disputes

The 'boundary exception' differs from the previous two conditions in being related to traditional ideas of adverse possession and in being of far greater significance in practice. It is surprisingly common for houses and fences to be built slightly outside their theoretical boundaries. Land Registry plans only give a general boundary line; the details are fixed by the buildings and enclosures on the land itself. An adverse possessor will be registered as proprietor of any such strip of land (para.5(4) Schedule 6) if:

- They own land adjacent to that for which their own application is made
- The exact line of the boundary has not been determined
- The applicant has held adverse possession for a period of at least 10 years, ending at the date of the application
- Throughout that period the applicant or their predecessor in title reasonably believed that the land belonged to them (or was at least unsure who the owner was), and
- The estate to which the application relates was registered more than a year before the application.

The exception is designed to deal with cases where the boundary as shown on the register is at odds with the position on the ground and it does not apply where the boundary has been fixed. There are other limits on the scope of the exception. It only applies to true boundary disputes where the whole of the land, or a substantial part of it, is adjacent to the squatter's land: *Dowse* v *Bradford Metropolitan District Council* [2020] UKUT 202 (LC). What is substantial for these purposes? Para.5(4) also requires that claimants reasonably believe the disputed land belongs to them. Thus far it is this requirement that has generated interesting and difficult questions. Here, it is the claimant's own belief and knowledge that matters, not the actual or constructive knowledge or belief of their agent (such as solicitors or surveyors) that might be imputed to claimants: *IAM Group* v *Chowdrey* [2012] EWCA Civ 505. According

to the Court of Appeal in *Zarb* v *Parry* [2011] EWCA 1306, the fact that the registered owner has challenged the squatter's entitlement may not be enough to disturb the reasonableness of the squatter's belief. The requirement that the period of reasonable belief is to last for 10 years and end on the date of the application has also given rise to controversy and differing judicial and academic interpretations. Currently, the prevailing view (Arden LJ) is that reasonable belief of ownership need not continue right up to the time of the squatter's application for registration, provided it existed until a short time before the application was made: Zarb v *Parry* [2011] EWCA 1306. But what is a short time? If the application succeeds the boundary can then be fixed on the register: s.60(3) LRA 2002.

Other changes: successive squatters and acknowledgement

As we have seen, LRA 2002 makes it much more difficult for an adverse possession claim to succeed in registered land. There are a number of detailed changes worth mentioning:

- The period of adverse possession before registration can be sought is reduced to 10 years. There was no transitional provision for existing squatters unless they had acquired full rights through their 12 years' possession before 13 October 2003. So, a squatter with 11 years and 364 days' possession by that date is governed entirely by the new scheme and is unlikely to secure registration. However, they will have an overriding interest if they are in actual occupation.
- It is usually the applicant who is expected to have been in adverse possession for the 10 years. Adverse possession cannot be taken over from an earlier squatter, except where one is the successor of the other, having bought or inherited the land (para.11(2)(a) Schedule 6. This provision also allows a squatter who leaves the land to count a period of possession by the next squatter provided they return immediately after the second squatter leaves: para 11(2(b)). Curtailing when an applicant can add periods of possession by others to reach the required 10 years highlights a shift from adverse possession being a means of extinguishing (unregistered) title to enabling the eligible possessor to apply for registration.
- As possession can no longer extinguish registered title under the 2002 Act there is no need for ways of stopping the clock provided by acknowledgement. Although the Law Commission (Law Com 271, para.14.11) was clear that ss.29 and 30 of the Limitation Act 1980 would not apply under the new law, it is not obvious if/how the 2002 Act puts that view into effect. In any event, acts that constitute acknowledgment are likely to block an application because the possession will be permissive rather than adverse.

Adverse possession and criminal law

With the enactment of s.144 Legal Aid, Sentencing and Punishment of Offenders Act 2012, it has become a crime to enter residential premises as a trespasser, knowing you are a trespasser and with the intention of living there. Even though s.144 is not the only potential offence that a squatter may commit when taking adverse possession of land (notable examples can be found in ss.6 and 7 of the Criminal Law Act 1977) it is the most important and controversial criminal offence to date. It is distinctive because it is the first criminal provision in England and Wales that criminalises the act of squatting itself. Section 144 is meant to provide residential owners with police assistance to remove squatters, although whether they will take on such a role with any great enthusiasm, particularly when confronted by an occupier purporting to be in legal possession and providing documentary evidence that may or may not be legitimate, is open to doubt. Without a specific crime and assistance of the criminal process, it was thought that residential owners would be left to the slower and expensive civil process for ending the squatter's trespass. What the framers of the 2012 Act do not seem to have considered is how the new offence would interact with the civil law rules on claiming adverse possession. This raises a difficult question. Should a squatter's criminal act prevent them from relying on the land law principles – not least because it might let them profit from their own wrongdoing? The Court of Appeal has determined that the criminal character

of the possession does not disable the possessor from relying on the adverse possession rules discussed in the sections above: *R (on the application of Best)* v *Chief Land Registrar* [2015] EWCA Civ 17. As Amy Goymour has highlighted (see 'Squatters and the criminal law: can two wrongs make a right?' (2014) 73 *CLJ* 484) a squatter who succeeds in gaining registered title (under Schedule 6 of the LRA 2002) may still be required to give up the title as a profit of their crime under the Proceeds of Crime Act 2002.

Self-assessment questions

1. **What were the main differences introduced to adverse possession by LRA 2002?**
2. **Why must you be very careful with dates when answering problem questions on this topic?**
3. **How can an adverse possessor's claim be defeated in (a) unregistered title land and (b) registered title land?**
4. **What has the impact of human rights law been on adverse possession claims?**

Summary

The changes introduced to registered land by Part 9 LRA 2002 have had a major effect on adverse possession. Adverse possession plays a residual role as a perfector of title: in the three exceptional situations in Sch.6, para.5; where registered proprietors disappear; or, in presumably even rarer instances, they do not wish to keep title to the land. Outside the three exceptional sets of circumstances (estoppel, independent entitlement and boundary disputes) it is only where the paper owner and all others with rights in the land do not object in time after notification that adverse possession claims succeed. The register is thus becoming a more perfect mirror of the interests in the land. Adverse possession weakens the 'mirror' quality of the register and the changes put in place by LRA 2002 thus support the conclusiveness of registration. Voluntary registration of title defeats a squatter in a cost-effective manner since it is not necessary for the land to have been registered throughout the 10-year period for the mechanisms of the new scheme to apply.

However, a counter-argument may be that there is no longer any incentive for an adverse possessor to notify the registrar of their occupation. So the register may not reflect the *de facto* occupation and control of land.

10.4 Unregistered land after the LRA 2002

Finally, it must be kept in mind that unregistered land is unaffected by the changes to registered title introduced by the 2002 Act. As outlined above, once 12 years' adverse possession is established (s.15 LA 1980), the paper owner's title is extinguished (s.17 LA 1980). The adverse possessor can then apply to be registered as owner under the 2002 Act, possessory title will be given and then absolute title can be applied for once the possessory title has been registered for 12 years (s.62(4) and (5) LRA 2002).

Further reading

- **'The Land Registry changes' (2003) 24(4) *Property Law Bulletin* Supplement, i–iv.**
- **Law Commission Report, 'Land registration for the twenty-first century' (2001) Law Com 271.**

Sample examination questions

Question 1

'The law of adverse possession had been in desperate need of reform for many decades. The changes effected by the Land Registration Act 2002 were a timely response to this need.'

Critically analyse the current law of adverse possession with reference to the above statement.

QUESTION 2

In 1990, when Tim, a homeless person, noticed that a large shed on Blackacre had been empty for some time, he decided to occupy it and make it his home. He mended the windows and the roof and brought in a few pieces of furniture. In 1991 he started growing vegetables on a patch of land outside the shed and fenced in the patch to keep out rabbits. In 1993 Lisa, Tim's girlfriend, joined him in the shed. Adam, the registered owner of Blackacre, was hoping to get planning permission to pull down the shed and build a bungalow in its place, but for the moment he had no objection to Tim staying there. Tim continued to live in the shed until his death in 2000. In 2002 Adam sold Blackacre to Saul. In 2022 Saul decided to develop the site and wrote to Lisa asking her to leave. She ignored the letter and now Saul has brought an action for possession.

Advise Lisa.

Advice on answering the questions

Question 1

In order to answer this question you need to demonstrate an understanding of the current legal position regarding adverse possession, including its complexities while there are still three sets of rules in operation. Intention to possess, factual possession and the applicable limitation periods for each set of rules should be examined. Key cases should be discussed including *Pye* v *Graham*, *Central London Commercial Estates*, *Markfield Investments*, *BP Properties*, *Moran*. The changes introduced by LRA 2002 should be explained. A good answer would also look at the human rights aspects of adverse possession, where there have been many relevant cases, including two visits for *Pye* to the European Court of Human Rights, with opposite results.

Question 2

The first issue is: when did time start running in favour of Tim? When was Tim in factual possession of the land claimed with the necessary intention to possess? What was the relevance of Adam's plans for the land? *Powell* v *McFarlane*, *Bucks CC* v *Moran* and *Pye* v *Graham* are among the more important cases to be considered in this context. Other issues to be covered are the effect of Tim's death, the effect of the sale of Blackacre and the effect of Saul's letter. If Lisa could show 12 years' adverse possession before LRA 2002 came into operation, Saul's action would fail. If not, she would have to rely on the provisions set out in Schedule 6 LRA 2002. Both possibilities are worth discussing.

Focus of the assessment

Within the scope of this chapter, there are three principal areas for assessment:

1. **An essay asking you to discuss the desirability of adverse possession and the shift in the law since the enactment of the LRA 2002.**
2. **The effect of the decision in *Pye* v *Graham* on the law on adverse possession (as discussed in Dixon's textbook).**
3. **A problem question asking you to consider the availability of adverse possession on a set of facts under the law on unregistered land, the law before LRA 2002 came into effect, and the law at present (post-2002).**

Quick quiz

QUESTION 1

What is the relevant statute for acquiring title by possession before October 2003?

a. **Limitation Act 1980.**

b. **Law of Property Act 1925.**

c. **Land Registration Act 2002.**

QUESTION 2

What are the two elements of adverse possession?

a. **Use contrary to the paper owner and actual possession.**

b. **Factual possession and the intention to possess.**

c. **Factual possession and the intention to own.**

QUESTION 3

What is the relevant time period for adverse possession before 2003?

a. **10 years.**

b. **12 years.**

c. **15 years.**

QUESTION 4

What happens to the paper owner's title in unregistered land when 12 years of adverse possession is complete?

a. **The paper owner's title is extinguished.**

b. **The paper owner holds the land on trust for the adverse possessor.**

c. **The paper owner retains title until the adverse possessor registers their interest.**

QUESTION 5

What happens to the paper owner's title in registered land when 12 years of adverse possession is complete?

a. **If the relevant period ends before October 2003, the adverse possessor is entitled to be registered as proprietor of the owner's estate; if the period ends after October 2003, there is no change to legal title.**

b. **The registered owner's title is extinguished.**

c. **The registered owner retains title until the adverse possessor registers their interest.**

Answers to these questions can be found on the VLE.

Feedback to activities

Contents

Using feedback

Feedback is designed to help you judge how well you have answered the activities in the text. It will show you whether you have understood the question and chosen the correct solutions.

Do not look at the feedback until you have answered the questions. To do so beforehand would be pointless, and even counter-productive. Doing the activities helps you to learn. Checking the feedback helps you learn more. Remember that 'doing' activities teaches you more than reading does.

You should reflect on what the feedback tells you, and note down your thoughts.

Chapter 3

Activity 3.1

It may be relevant that in *Strand Securities* the person claiming overriding status was not in actual occupation and his daughter (who was living in the house) was not acting as his agent, whereas *Chhokar* concerned the interest of a wife who was only away from the house because she was in hospital giving birth at that time.

Activity 3.2

a. Those under a constructive trust, not her matrimonial rights, since the latter were excluded by statute from s.70(1)(g) protection.

No feedback provided for parts (b)–(d).

Activity 3.3

A land transfer was made expressly subject to an interest which should have been, but was not, entered as a minor interest on the register. Held: the purchaser was bound by the interest because of his express undertaking to uphold it. This appears contrary to the entire logic of the LRAs. See the discussion of this issue by the Court of Appeal in *Chaudhary* v *Yavuz* [2011] EWCA Civ 1314.

Activity 3.4

No feedback provided.

Activity 3.5

a. Although use of the term 'granted' signifies that a deed has been used, the easement will only be legal once it has been substantively registered under s.27(2)(d) LRA 2002. If that had occurred, Samantha would obviously be bound but if it had not been substantively registered it is equitable and will only bind Samantha if protected by means of a notice under ss.32–39 LRA 2002.

b. A restrictive covenant is not substantively registrable but can be protected by means of a notice under ss.32–39 LRA 2002.

c. Eloise's interest is not substantively registrable, nor is it protectable by means of a notice (see s.33(a) LRA 2002). However, she could have entered a restriction under ss.40–47 LRA 2002 ensuring no dealings with the legal title occur unless overreaching takes place. As a purchaser will always take free of an overreachable interest by complying with overreaching, this is the limit of what Eloise could have done to protect her interest. On the facts, no such restriction has been imposed as Samantha was able to purchase the property from Paul even though he was a single trustee (and thus the purchase monies could not have been paid to at least two trustees). In these circumstances Eloise's interest will not bind Samantha unless she has an overriding interest by means of her discoverable occupation under para.2 Schedule 3 LRA 2002.

d. Tamara's licence is not a property interest but if you use the diagram correctly you will still get the right answer as the interest is not substantively registrable, not protectable, not overreachable and not overriding.

e. An option is a form of estate contract and can be protected by means of a notice.

f. As for the changed facts:

- This is (on our reading of *Midland Bank* v *Green*) still valuable consideration so it should make no difference.
- The peppercorn, unlike the £10, is nominal consideration which is excluded from the definition of valuable consideration under s.132 LRA 2002 so Samantha would be bound.
- Samantha has provided no consideration and so she is bound.

- Provided the purchase monies were paid to both Paul and Gordon, Eloise's beneficial interest will have been overreached whether or not she is in discoverable occupation under para.2 Schedule 3 LRA 2002. However, overreaching would have no effect on Bethany's easement or Saskia's restrictive covenant as these equitable interests are specifically excluded from the effect of overreaching under s.2(3) LPA 1925. Thus, whether or not these interests bind Samantha will continue to be determined, as detailed above.

Chapter 4

ACTIVITY 4.1

No feedback provided.

ACTIVITY 4.2

See *Harris* v *Goddard* [1983] 1 WLR 1203 and *Burgess* v *Rawnsley* [1975] Ch 429. A written notice indicating that a joint tenant wishes to end the joint tenancy immediately will sever; is this requirement satisfied by either of the letters? Or, informal negotiations indicating a common intention that the joint tenancy should be regarded as severed would be effective; can such an agreement be inferred on the present facts? A sale would of course have severed the joint tenancy.

ACTIVITY 4.3

No feedback provided.

ACTIVITY 4.4

No feedback provided.

Chapter 5

ACTIVITY 5.1

(a) is a licence by implication

(b) may have a contractual, statutory or implied licence depending on the form of agreement between the landlord and the inhabitants of the premises

(c) may have a contractual licence or a tenancy depending upon whether he has exclusive possession

(d), (e) and (f) probably have bare licences by implication or expressly

(g) can argue either an equity in her favour under the doctrine of proprietary estoppel, or an interest behind a resulting or constructive trust

(a), (b), (d), (e) and (f) will not grant any right to occupy the premises or to use them as one's own.

ACTIVITY 5.2

No feedback provided.

ACTIVITY 5.3

a. A combination of: rejecting tired historical principles, vindication of the contractual rights of the licensee; and the maxim that a right must have a corresponding remedy.

b. Laws J stressed that the respondents, had they already been in possession of the land, could have obtained an order to evict the trespassers, and so he thought it illogical to deny them such a remedy.

Activity 5.4

No feedback provided.

Activity 5.5

As freeholder Anne is able to grant Paul a lease; it is for a fixed term and with exclusive possession and rent. This satisfies the elements set out in *Street* v *Mountford* [1985] AC 809. As the lease is over seven years it requires a deed (s.52 LPA 1925) which satisfies the requirements of s.1 LP(MP)A 1989. It would also need to be substantively registered (s.27 LRA 2002). It is unclear if there is a deed; if there is, it has not been registered on the facts given, so cannot take effect in law. As Paul is paying rent it may be a periodic lease, based on the payment of rent, for each quarter. If so this would be a valid legal lease under s.54 LPA 1925 and would be binding on a purchaser as an overriding interest (para.1 Schedule 3). However, the periodic tenancy can be ended by notice by either party and would not protect Paul.

If the writing satisfies s.2 LP(MP)A 1989 then this may be an equitable lease. An equitable lease is an interest in the land, which (when coupled with actual occupation) will be overriding under para.2 Schedule 3 LRA 2002.

Activity 5.6

A few statutory rights only apply to tenants of legal leases and sometimes there are different registration requirements.

Activity 5.7

No feedback provided.

Activity 5.8

No feedback provided for parts (a) and (b).

(c) In spite of the reasons why the landlord was adamant that he wanted to forfeit the lease, the fact that he had sent a rent demand for a future rent instalment was held by the Court of Appeal to be a waiver. It made no difference that Woolgar still believed that forfeiture was going ahead; the test is one of the 'reasonable onlooker', who always thinks that rent demands are waivers of breach.

Activity 5.9

The distinction is not always easy to make in practice, since it is possible to phrase the same covenant both positively and negatively – 'I promise not to alter the building' is in essence the same as 'I promise to keep the building in the same condition'. But it is generally accepted that breaches of positive covenants are remediable; the tenant can simply do what he or she was supposed to do. With negative covenants, what has been done cannot usually be undone (e.g. with a covenant not to sub-let the premises, or not to run an immoral business on the premises, the damage had already been done by breach). There are, however, inconsistent cases on this point: see the controversial decision in *Savva* v *Houssein* (1996) 73 C&PR 150, where all breaches of negative covenant outside the *Scala House* principle were thought to be capable of remedy. The most recent Court of Appeal case addressing this issue – *Akici* v *LR Butlin Ltd* [2005] EWCA Civ 1296 – endorsed the general approach in *Savva* v *Houssein*.

Activity 5.10

a. He needs to look closely at the terms of the lease first to check for an express notice provision. Is it a periodic tenancy or a fixed term lease? If a periodic tenancy (probably monthly since that is the frequency of payment), then he needs to give one month's notice; if a fixed term tenancy, then the notice period in the contract will apply. If it had been a yearly periodic tenancy then he would have had to give six months' notice.

b. If the tenancy had been for eight years, then he had better hope that there is an express notice provision or a breach by the tenant!

ACTIVITY 5.11

Equitable leases are within ss.141 and 142 and so benefits and burdens pass with the reversion. But until LTCA 1995, burdens did not pass from one equitable tenant to another. This means that the assignee from a tenant could sue the lessor but cannot be sued by him. Or could it be argued that the fusion of law and equity in the Judicature Acts has eliminated the distinction between legal and equitable leases? See *Boyer* v *Warbey* [1953] 1 QB 234. Note that for post-1995 leases, LTCA 1995 applies to all leases, legal or equitable.

Chapter 6

ACTIVITY 6.1

You should not need feedback for part (a).

b. Lord Denning also used the doctrine of mutual benefit and burden in easements as a justification for the decision.

c. Hint: see *Habermann* v *Koehler* (1997) 73 P&CR 515. Note that although this case was heard by the Court of Appeal, they remitted it for a new trial, where the judge then held that the licensee's right to remain in the property did bind the purchaser for value.

ACTIVITY 6.2

No feedback provided.

ACTIVITY 6.3

No feedback provided.

Chapter 7

ACTIVITY 7.1

Consider: would this be an easement, or would it be an assertion of a greater right over the land? An easement must not be equivalent to exclusive use of the land.

ACTIVITY 7.2

The landowner could draft a restrictive covenant preventing the purchaser from building on the land, or restricting the manner in which he could do so. It would benefit his retained land and burden the land sold. He would have to make sure that the restrictive covenant would bind later purchasers of the land, and so would need to comply with the rules of *Tulk* v *Moxhay*.

ACTIVITY 7.3

It appears that the parking right is capable of being an easement, satisfying (i), (ii) and (iii) of the *Re Ellenborough* criteria, but limitations have been imposed on such easements by cases including *Copeland* v *Greenhalf* [1952] Ch 488 and *London and Blenheim Estates Ltd* v *Ladbroke Retail Parks Ltd* [1994] 1 WLR 31. In the latter case it was held that the right to park on land and to cross it with shopping trolleys can be an easement, but successful cases are rare because of problems with the *Re Ellenborough* requirement (iv). *Batchelor* v *Marlow* [2001] EWCA Civ 1051 parking easements: no easement can exist if the true owner is excluded from his land or his ownership has become illusory. More recently, in *Central Midlands Estates Ltd* v *Leicester Dyers* (Unreported) (Ch D), although it was left open by the court whether an easement of parking was capable of existing, it was pointed out that since parking on land prevents the owner from using it, an easement of parking can only potentially arise where the land affected is big enough to accommodate other cars or uses of the owner. The House of Lords in *Moncrieff*, although deciding on a Scottish case, did state that

it was making points which also applied to English law and upheld an easement of parking, but you should note that the facts of that case are extremely unusual: there was nowhere else where anybody could park. Lord Scott noted, particularly in relation to English law, that there would be a limit to the extent that a servitude or easement could oust or exclude an owner from his land but that the limit was not crossed in this case. The right of parking was not such as would oust an owner from his land as he could still park anywhere on the land, subject merely to the right of the dominant owner to park there also.

Activity 7.4

a. See *Saeed* v *Plustrade*; is it definite enough, or at the whim of the servient owner?

b. Is this too close to exclusive possession to be an easement?

c. See *Re Ellenborough Park*.

d. Exclusive possession would appear to be a problem here.

e. This looks like an easement, as long as the amount of use does not amount to a claim for possession; if it is the latter, then the rules of adverse possession will apply – see Chapter 11.

f. See *Wong* v *Beaumont*.

Activity 7.5

In *Wong* the ventilation was necessary even if that had not been vital to the common intention of the parties. It seems to have been important to the decision that there was no other way of giving effect to the common intention. Note that the *Wong* decision is argued partly on necessity and partly on common intention.

Activity 7.6

a. Because, according to the Court of Appeal, the right to use a hallway was not 'necessary for the reasonable or convenient enjoyment' of the annexe building.

b. The Court held that he had an implied easement to use the hallway on the basis of s.62.

c. He should have revoked the permission he had given to the tenant to use his other land.

Activity 7.7

No feedback provided.

Chapter 8

Activity 8.1

a. In *Crest Nicholson Residential (South) Ltd* v *McAllister* [2004] EWCA Civ 410, the Court of Appeal held that annexation was only possible where the instrument containing the covenant defines the dominant land in such a way that that land is easily ascertainable. The question in each case is whether 'the land intended to be benefited can be identified (from a description, plan or other reference in the [instrument] itself, but aided, if necessary, by external evidence to identify the land so described, depicted or otherwise referred to)'.

b. It would annex the benefit to the dominant land if the court followed *Federated Homes* and found that the dominant land could be identified by looking at all the circumstances.

c. The trial judge in *Federated Homes* thought so, but the Court of Appeal chose to use s.78 instead: note why. However, in *Kumar* v *Dunning* [1989] QB 193, Browne-Wilkinson V-C expressed the view that the benefit of a covenant could not pass under s.62 LPA 1925 unless the covenant was annexed to the dominant tenement.

ACTIVITY 8.2

The covenant is enforceable between the original parties, but since it is a positive covenant its burden will not bind third parties unless it fits one of the exceptions. The benefit can pass to third parties. Under the doctrine of mutual benefit and burden, the purchaser may be bound by the covenant to maintain the wall, since they derive a benefit from it: see *Halsall* v *Brizell*. If the purchaser was expected to pay the entire cost then the covenant would not be enforceable: consider *Tito* v *Waddell (No 2)*.

ACTIVITY 8.3

The objections are (a) that the buyers did not contract for the covenant and so should not be bound by it, and (b) that it is a personal obligation rather than a proprietary one.

ACTIVITY 8.4

No feedback is provided for parts (a) and (b).

c. It appears that the case created a new principle and that Lord Cottenham invented a new equitable interest. There are a few prior cases but *Tulk* is the first to extend principles of leasehold covenants to those between freeholders, and to use an analogy with the easement to light.

d. Because the others were positive in nature, and the injunction granted was a negative injunction.

e. There are several reasons: conscience, since a buyer with notice has his conscience affected; unjust enrichment, since breaking covenants would allow unfair profits to covenantors; proprietary rights, since the buyer of land subject to a covenant is simply being prevented from exercising a 'right' he has never acquired (see Lord Templeman in *Rhone* v *Stephens*).

Chapter 9

ACTIVITY 9.1

a. Many academics consider that the real reason for invalidity of the option in *Jarrah* must be its technical inconsistency with the right to redeem, since it was a commercial transaction with free negotiations and the payment of a fair price for the option. Lord Macnaghten stated at p.327:

> The directors of a trading company in search of financial assistance are certainly in a very different position from that of an impecunious landowner in the toils of a crafty money-lender.

Thus, if such inconsistency had not occurred, there might not have been a problem with the option.

b. In *Reeve*, the option was seen as a separate agreement from the mortgage agreement.

c. No feedback provided.

ACTIVITY 9.2

The cases do appear to conflict, but in *Santley*, the postponement was designed to secure the future obligation of tenant to pay a share of profits to the lender; a legitimate commercial interest for the lender was thus being protected. In general, the important factors to think about are the comparative status of the parties in each case and the title involved (leasehold or freehold).

ACTIVITY 9.3

No feedback provided.

Activity 9.4

No feedback provided.

Activity 9.5

a. Although the bargains favour the lender hugely in both cases, the borrowers were very different. In *Cityland* the mortgagor was a domestic borrower and the mortgage had terms which were harsh in themselves, plus the mortgagor was young and inexperienced, threatened with losing his home and acted in a hurry. In *Multiservice*, it was clearly a commercial agreement without inequality of bargaining power.

b. Where the parties are equal, the imposition of a very high rate of interest is probably enforceable; even when one party is an individual a very high interest rate may not be extortionate – see *Davies* v *Directloans Ltd* (*Davies and Hedley-Cheney* v *Directloans Ltd*) [1986] 1 WLR 823.

Activity 9.6

Lord Denning MR was asserting a general right in equity to ensure that possession was only being obtained by the mortgagee as a prelude to a genuine enforcement of the mortgage, and that 'A mortgagee will be restrained from getting possession except when it is sought *bona fide* and reasonably for the purpose of enforcing the security and then only subject to such conditions as the court thinks fit to impose' (at 571). But in fact equity did not interfere with common law possession proceedings before the Judicature Act 1873 and so there is no equity to prevent a lender taking possession. Notwithstanding this criticism, Lord Denning MR's approach has been endorsed and applied in subsequent cases: *Albany Home Loans Ltd* v *Massey* [1997] 2 All ER 609; *Cukurova Finance International Ltd* v *Alfa Telecom Turkey Ltd (Nos 3 to 5)* [2013] UKPC 2, 20, 25.

Chapter 10

Activity 10.1

No feedback provided.

Activity 10.2

As you will see from the cases, this depends very much on the precise facts and what the court infers from those facts. In *JA Pye (Oxford) Ltd* v *Graham* [2002] UKHL 30 there was a great deal of disagreement among the judges as to the meaning of 'intention to possess', and the effect of future plans of the paper owner for the land. Twenty-five hectares of prime building land in Berkshire were granted via adverse possession to a farmer making hay on it while the development company owner struggled to obtain planning permission. This case is arguably the highpoint of adverse possession and came ironically just before the latter was curtailed severely by LRA 2002.

Activity 10.3

No feedback provided.

Activity 10.4

An acknowledgement of the paper owner's title might be made by: payment of rent; an offer to buy the property (*Ofulue* v *Bossert* [2009] UKHL 16); signing a petition opposing a sale by a local authority landlord (*Lambeth LBC* v *Bigden* [2001] 33 HLR 43, Court of Appeal).