



LAW ANGELS

# LAND LAW

SQE 1 PREP

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## **LAND LAW**

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## **LAW ANGELS**

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# PREFACE

Land law is the invisible architecture of our world, governing the relationships between people and the property they occupy, use, and own. It is a subject of profound conceptual depth, built on centuries of legal doctrine and fundamental principles that can seem abstract, yet have direct and powerful consequences in practice. This textbook is designed to demystify this essential subject, providing a clear and logical pathway through its complex framework.

Our approach is built on a simple belief: to master land law, you must see the underlying structure, not just the individual rules. We have therefore structured this text to build your understanding from the ground up, starting with the foundational concepts of estates and interests and progressing to the sophisticated machinery of the modern registered land system. Each chapter deconstructs a core principle such as the distinction between legal and equitable interests, the doctrine of notice, and the priority rules under the *Land Registration Act 2002*, illustrating how these abstract ideas resolve concrete disputes over property.

The SQE1 assessment requires a deep and analytical understanding of land law. This book is tailored to that challenge. We integrate pivotal statutes and case law not as isolated facts, but as the essential components of a coherent system. Clear diagrams, illustrative examples, and scenario-based analyses are woven throughout to make the conceptual tangible and to train you in the application of these principles to solve problems.

Our goal is to equip you with a formidable and structured command of land law. Whether you are grappling with co-ownership, easements, or covenants, the following pages will provide the clarity, logical rigour, and analytical depth you need to succeed.

Welcome to the study of land law. While the journey is intellectually demanding, a solid grasp of its principles is the indispensable foundation for excellence in property practice and beyond.

*Law Angels*

# ACKNOWLEDGEMENTS

The development of this textbook was a significant endeavor, and we extend our sincere gratitude to the collective efforts that made this publication possible.

At Law Angels, we are fortunate to be supported by a dedicated team whose commitment to legal education and excellence is the cornerstone of our work. The collaborative spirit, legal expertise, and tireless effort of our entire organization were instrumental in shaping this text from concept to completion.

We also extend our appreciation to the broader legal community. The insightful feedback from our academic and practitioner reviewers greatly enhanced the accuracy and clarity of the material. Their contributions, offered in a spirit of scholarly collaboration, have been invaluable in ensuring this resource meets the rigorous demands of the SQE curriculum.

We are also thankful for the unwavering support from our personal networks, whose understanding provided the foundation that allowed this project to thrive.

It is our privilege at Law Angels to contribute to the education of future solicitors, and we hope this text serves as a reliable guide for the next generation of legal professionals.

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# GLOSSARY OF KEY TERMS

## A

**Actual Occupation:** Physical presence or use of land that is more than fleeting or occasional, which can give rise to overriding interests binding on purchasers.

**Advowson:** An obsolete manorial right to present a clergyman to a church living; a type of incorporeal hereditament.

**Airspace Rights:** The right of a landowner to the airspace above their land as far as necessary for its ordinary use and enjoyment.

**Annexation:** The process by which a movable item becomes part of land through attachment, relevant in distinguishing fixtures from chattels.

**Assignment:** The transfer of an entire leasehold interest from one tenant (assignor) to another (assignee).

## B

**Beneficial Interest:** An equitable ownership right held by a person for whose benefit property is held in trust.

**Bona Fide Purchaser for Value Without Notice:** A purchaser who buys property in good faith, pays valuable consideration, and has no notice of prior equitable rights, takes free of them.

## C

**Charge:** A legal or equitable security interest over land to secure repayment of a debt (e.g., a mortgage).

**Chattel:** A movable item of personal property not affixed to land.

**Constructive Trust:** A trust imposed by equity where it would be unconscionable for the legal owner to deny another's beneficial interest.

**Corporeal Hereditament:** Tangible property such as land or buildings; physical things capable of ownership.

**Covenant:** A promise contained in a deed concerning the use of land, either positive (to do something) or restrictive (not to do something).

## D

**Deed:** A formal written instrument executed with specific formalities as per *s.1 LP(MP)A 1989*, used to create or transfer legal estates and interests.

**Doctrine of Notice:** The equitable rule that determines whether a purchaser is bound by unregistered equitable interests depending on their knowledge (actual, constructive, or imputed).

**Dominant Tenement:** The land that benefits from an easement.

## E

**Easement:** A right enjoyed by one landowner over another's land (e.g., right of way, right to light). It must satisfy the four conditions in *Re Ellenborough Park*.

**Epitome of Title:** A chronological summary of documents proving ownership of unregistered land, usually covering at least 15 years.

**Equitable Interest:** A right recognised in equity when legal formalities are incomplete or equity intervenes to protect fairness.

**Equity of Redemption:** The borrower's right to redeem mortgaged property once debt obligations are satisfied.

**Estate in Land:** A legal interest giving possession or the right to possession (fee simple absolute or term of years absolute).

## F

**Fee Simple Absolute in Possession:** The largest possible estate in land under English law; ownership that is perpetual, inheritable, and unconditional.

**Fixture:** An item that, although originally movable, has become part of the land due to its degree and purpose of annexation.

**Formalities:** Legal requirements (such as writing, signing, witnessing) necessary to create valid land transactions.

**Freehold Covenant:** A promise relating to freehold land that may run with the land, binding successors in title.

## G

**Grant:** The creation or transfer of an interest in land (e.g., an easement or lease) by deed.

**Ground Rent:** A periodic rent payable by a leaseholder to the freeholder under a long lease.

## H

**Hereditament:** Any property capable of being inherited, whether tangible (corporeal) or intangible (incorporeal).

**HM Land Registry:** The government body responsible for maintaining the register of titles for registered land in England and Wales

## I

**Implied Trust:** A trust arising by operation of law, such as resulting or constructive trusts, often used to determine beneficial interests.

**Incorporeal Hereditament:** Intangible rights over land, such as easements, profits à prendre, or rentcharges.

**Indemnity (Land Registration):** State compensation payable to anyone who suffers loss due to a mistake or omission in the land register under *s.70 LRA 2002*.

## J

**Joint Tenancy:** A form of co-ownership where co-owners hold the entire property jointly, with the right of survivorship (*jus accrescendi*).

## L

**Land Charge:** A registrable equitable interest affecting unregistered land under the Land Charges Act 1972. For example, Class D(ii) restrictive covenants.

**Lease:** A legal estate granting exclusive possession for a certain term at rent, subject to conditions.

**Legal Estate:** One of the two estates recognised at law; fee simple absolute in possession or term of years absolute under *s.1(1) LPA 1925*.

**Licence:** A personal, non-proprietary right to occupy or use land; does not confer exclusive possession.

**Limitation Period:** The statutory period after which legal action cannot be taken. For instance, 12 years for adverse possession under *Limitation Act 1980*.

## M

**Mortgage:** A transaction where land is offered as security for repayment of a loan; the borrower (mortgagor) retains the equity of redemption.

**Mutual Benefit and Burden Doctrine:** The principle that one who takes the benefit of a covenant must also bear its corresponding burden.

## O

**Overreaching** – The process by which equitable interests are detached from land and transferred to the proceeds of sale when capital money is paid to at least two trustees under *s.27 LPA 1925*.

**Overriding Interest:** An unregistered interest that binds a purchaser despite not being recorded on the register (e.g., actual occupation under *Sch 3, LRA 2002*).

## P

**Possession:** Physical control and intention to exclude others from land; the basis for ownership and adverse possession.

**Profit à Prendre:** A right to enter another's land and take natural products (e.g., timber, minerals, game).

**Privity of Contract:** The legal relationship between parties to a contract, governing the enforceability of leasehold covenants.

**Privity of Estate:** The relationship between landlords and tenants holding successive interests in the same land.

**Purchaser for Value:** Someone who acquires an interest in land by giving valuable consideration, such as money or a mortgage advance.

## R

**Real Property:** Land and anything affixed to it; contrasted with personal property.

**Rectification:** Correction of an error or omission in the land register.

**Registered Land:** Land recorded in the Land Register under the *Land Registration Act 2002*.

**Rentcharge:** A periodic sum payable by a freeholder to another person having no ownership interest in the land.

**Restrictive Covenant:** A promise restricting the use of land, enforceable in equity.

**Resulting Trust:** A trust presumed when a person contributes to purchase money but title is placed in another's name.

**Root of Title:** The starting document proving ownership of unregistered land, usually 15–30 years old.

## S

**Severance:** The process by which a joint tenancy is converted into a tenancy in common, removing the right of survivorship.

**Sublease (Underlease):** The grant of a lease by a tenant to another person for a period less than the original lease term.

**Subrogation:** The right of a lender to step into the shoes of another creditor or interest holder for repayment priority.

**Surrender:** The voluntary ending of a lease by mutual agreement between landlord and tenant.

## T

**Tenancy in Common:** A form of co-ownership where each owner has a distinct, divisible share without survivorship rights.

**Term of Years Absolute:** The legal estate created by a lease for a definite or periodic duration.

**Title Register:** The official document recording ownership, boundaries, charges, and restrictions of registered land.

**TOLATA 1996:** The *Trusts of Land and Appointment of Trustees Act 1996*, governing trustees' powers, duties, and dispute resolution for co-owned land.

**Trespass:** Unlawful interference with land in another's possession, including intrusion into airspace or subsoil.

**Trust of Land:** The statutory mechanism by which co-owned land is held by legal owners (trustees) for the benefit of equitable owners (beneficiaries).

## W

**Walsh v Lonsdale Principle:** The equitable maxim that "equity regards as done what ought to be done"; a valid land contract creates an equitable interest pending completion.

**Waste:** Damage or alteration to property by a person in possession that diminishes its value to the owner or reversioner

# 1

## FOUNDATIONS OF LAND LAW

Land law defines the rights, interests, and obligations attached to land and what is fixed to it. This chapter introduces the core principles of English land law, including the statutory meaning of land under the *Law of Property Act 1925*, the extent of ownership above and below the surface, and the distinction between real and personal property. It also outlines the rules on fixtures and fittings, the doctrine of tenure and estates, and the division between legal and equitable interests, forming the basis for later topics such as co-ownership, leases, and mortgages.

### 1.1 The Legal Concept of Land

The core principle is that land includes not just the physical soil but also everything attached to it, below it, and above it, as well as intangible rights over it. The primary statutory definition is found in s 205 (1)(ix) of the *Law of Property Act 1925* (LPA 1925).

Land can be categorised into two:

#### 1. Corporeal Hereditaments (Physical Things)

This refers to the physical, tangible land itself and what is attached to it. They include:

- **The surface:** This is the ground itself.
- **Buildings and structures:** This includes any buildings, walls, fences, etc., on the land.



- **Fixtures:** These are items that were once moveable (chattels) but have become permanently attached to the land or buildings, becoming part of the land. The tests for a fixture come from case law (see below)
- **Mines and minerals:** These are substances under the surface (e.g., coal, gold, oil). They can be owned separately from the surface.
- **Water:** Water on the surface in rivers and lakes is part of the land, though there are separate rights to use it.

## 2. Incorporeal Hereditaments (Rights over Land)

This refers to intangible rights and interests attached to the land. They include:

- **Easements:** An easement is a legal right that allows the owner or occupier of one piece of land to use another person's land for a specific purpose, such as accessing their property via a right of way or receiving natural light through a window.
- **Rentcharges:** This is a legal right entitling one party to receive a fixed annual payment from the owner of a freehold property, even though the rentcharge holder has no ownership interest in the land itself.
- **Profits à Prendre:** A profit à prendre is a legal right that allows a person to enter another's land and remove natural produce or resources, such as minerals, timber, crops, or hunt wild animals, either as an independent right or one attached to nearby land, typically created by deed or acquired through long-term use.
- **Manorial rights and advowsons:** Although they are largely obsolete today, are remnants of feudal property law, referring to rights once held by lords of the manor, such as rights over minerals, commons, or the appointment of a parish priest.

## 1.2 Land Ownership

The (Latin) ancient maxim, *cuius est solum, eius est usque ad coelum et ad inferos*, (“whoever’s is the soil, it is theirs up to the heavens and down to the depths”) underpins the notion that land ownership is three-dimensional.

### 1.2.1 Airspace Rights

#### 1. Extent of Airspace Rights

A landowner’s rights extend upward only so far as is necessary for the “ordinary use and enjoyment” of the land and any structures upon it. In ***Anchor Brewhouse Developments Ltd v Berkley House (Docklands Developments) Ltd*** [1987] EGLR 172, the court held that a crane jib which swung through the airspace above the claimant’s property constituted trespass, reaffirming that a landowner’s rights extend to the lower, usable airspace necessary for the ordinary use of the land.

Above that height, the owner has no greater rights than any other member of the public. In ***Bernstein of Leigh v Skyviews & General Ltd*** [1978] QB 479, aerial photographs taken from several hundred feet above the plaintiff’s property did not infringe his rights, because the flight occurred at a height beyond what was needed for normal enjoyment of the land.

S 76(1) of the *Civil Aviation Act 1982* provides a statutory immunity from trespass or nuisance suits “by reason only of the flight of an aircraft over any property at a height...reasonable,” subject to compliance with air-navigation regulations.

#### 2. Trespass to Airspace

A fixed structure or object that intrudes into the landowner’s usable airspace is a trespass per se, actionable without proof of damage. In ***Kelsen v Imperial Tobacco Co*** [1957] 2 QB 334, an advertising sign projecting four inches into a tobacconist’s airspace warranted an injunction for trespass, despite minimal physical interference. So also, in ***Anchor Brewhouse Developments Ltd v Berkley House Ltd*** [1987] EGLR 172,

the oversailing of a tower-crane boom into neighbouring airspace constituted trespass, even though no harm occurred.

### 1.2.2 Sub-Soil Rights

#### 1. Extent of Sub-Surface Rights

In the absence of express grant or statute, a landowner owns everything beneath the surface to a logical limit, that is, beyond extreme depths where human activity is impossible. In *Bocardo SA v Star Energy UK Onshore Ltd* [2010] UKSC 35, oil-company wells drilled up to 2,900 feet below the surface without permission were held a trespass. The landowner *prima facie* owns subterranean strata and can claim damages, subject to compulsory-purchase compensation principles under the *Mines (Working Facilities and Support) Act 1966*.

#### 2. Statutory Curtailments

The *Coal Industry Act 1994* vests ownership of most unworked coal in the Coal Authority; therefore, private landowners cannot mine coal without a licence from that body. The *Petroleum (Production) Act 1934* (now *Petroleum Act 1998*) grants the Crown rights over petroleum and natural gas. Thus, operators require licences permitting drilling beneath private land.

### Key Takeaways

Direction	Right of Landowner	Limitations
Upward	Airspace necessary for ordinary use/enjoyment (structures)	Beyond that: public right of over-flight, s 76 CAA 1982 immunity
Downward	Subterranean strata and resources	Crown or public bodies' statutory rights (coal, petroleum)

## 1.3 Distinction between Real Property and Personal Property

### 1.3.1 Real Property (Realty)

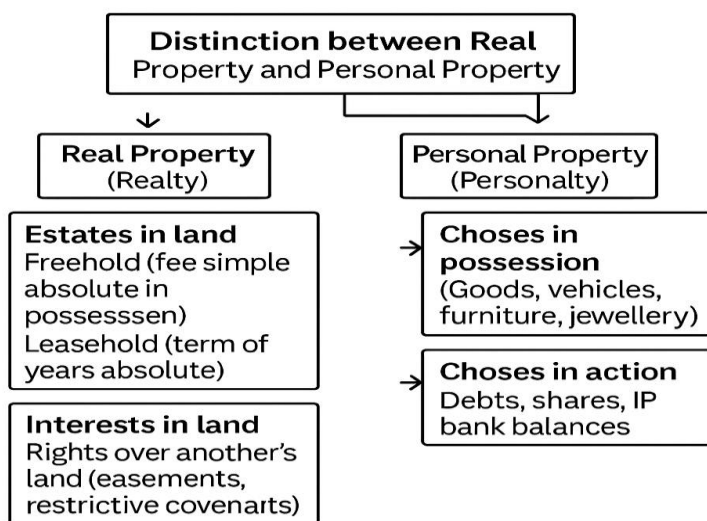
Rights and interests in land and what is permanently attached to it (fixtures).

- **Estates in land:** can be classified into freehold and leasehold. Freehold (fee simple absolute in possession) is the closest to absolute ownership and is held for an indefinite duration. Leasehold (term of years absolute), on the other hand, is exclusive possession for a fixed/periodic term.
- **Interests in land:** rights over another's land (easements, mortgages, restrictive covenants).
- **Remedy** (historical): real actions to recover the land itself (the *res*).

### 1.3.2 Personal Property (Personalty)

This includes all property not constituting land.

- **Choses in possession:** tangible movables (goods, vehicles, furniture, jewelry).
- **Choses in action:** intangible rights (debts, shares, IP, bank balances).
- **Remedy** (historical): personal actions for damages rather than recovery of the specific item.



## 1.4 Fixtures and Fittings

Ownership of land in English law does not stop at the soil: it includes buildings and things attached to those buildings. But when someone sells or leases property, it matters which items are part of the land (“fixtures”) and which remain personal property (“chattels” or “fittings”). The law resolves this by a two-stage test, with subsidiary rules for trade and tenant fixtures. The Court in ***Holland v Hodgson*** [1872] LR 7 CP 328 established the two-stage test: degree and purpose of annexation.

### 1.4.1 The Two-Stage Test

#### 1. Degree of Annexation

The degree of annexation considers how firmly or permanently the item is attached to the land or building. If the item is physically fixed or attached in a way that removing it would cause damage to the structure or to the item itself, it is generally regarded as a fixture.

In ***Holland v Hodgson*** [1872] LR 7 CP 328, *Blackburn J* held that objects resting by their own weight are presumed to be chattels, unless there is clear evidence of an intention to make them a permanent part of the land, such as when a heavy statue is fixed or built into the property’s design.

In ***Chelsea Yacht and Boat Co Ltd v Pope*** [2001] 2 All ER 409 (CA), the court confirmed the degree of annexation test; that an item’s physical attachment and intended permanence are decisive in determining whether it forms part of the real property. In the instant case, a houseboat moored to a jetty and connected to mains services could be removed without damage. The court held that it was not a fixture, as it was not sufficiently annexed to the land and was intended to remain movable.

The guiding question is how and how firmly the item is attached to the land or building.

## 2. Purpose of Annexation (The Decisive Consideration)

The guiding question is whether the item is attached to enhance the land or building (a permanent improvement can be considered as a fixture), or attached to enhance the item itself (e.g., a carpet for convenience of use can be seen as a chattel).

In *Melluish v BMI (No 3)* [1996] 1 AC 454, it was held that built-in kitchen units bolted to walls and floor are fixtures. In *Chelsea Yacht & Boat Co v Pope* [2001] 2 All ER 409, a houseboat, although a dwelling, remained a chattel because it was not affixed to the land.

### 1.4.2 Trade and Tenant Fixtures

A commercial tenant frequently installs machinery or fittings necessary for trade. English law protects those “trade fixtures” provided they can be removed without substantial damage to the premises:

The principle is that a tenant may remove trade fixtures at or before the lease end; otherwise, the landlord may claim them as abandoned. In *Leigh v Taylor* [1902] AC 157, tapestry panels affixed by small nails for decorative purposes and removable without real damage were held to be tenant’s property.

The removal must be before lease expiry or within any contractual notice period. Upon lease end, trade fixtures may vest in landlord. However, agricultural fixtures (e.g., fences, silos) may be treated differently and often become part of the land on traditional landlord-tenant terms.

### 1.4.3 Contractual Modification

Parties may agree in their lease or sale contract that certain items (even if fixtures by law) are excluded from the sale or are removable. Such express provisions take precedence over the common-law test, provided they are clearly drafted and comply with formalities for contractual variation (S.2 *Law of Property (Miscellaneous Provisions) Act 1989*).

## 1.5 Land Tenure and Estates

### 1.5.1 Legal and Equitable Interests in Land

#### 1. Legal Interests

Legal interests or charges in land do not confer exclusive possession on the owners, but it vests with a right to use the land owned by another person. They are enumerated in s 1(2) *LPA 1925*;

- **Charge by way of legal mortgage** is security interest in property granted by a borrower to a lender to secure the repayment of a debt or fulfilment of an obligation.
- **Rights of entry** refer to permission to enter property of another for particular purposes.
- **An easement** is a right attached to land that allows the landowner to use or restrict the use of another land.
- **Rentcharge** is an interest requiring the landowner to make regular payments to the right owner.

#### 2. Equitable Interests

Equity recognises additional proprietary interests when strict legal formalities are unmet or when only equitable rights can exist.

- **Equitable Fee Simple and Term of Years**

The doctrine of ***Walsh v Lonsdale*** [1882] 21 Ch D 9 is to the effect that a fully enforceable contract for the grant of a legal estate (freehold or lease) creates a corresponding equitable interest, based on the maxim, “equity treats as done what ought to be done.” Therefore, where the parties have exchanged contracts but omitted the formal deed, the purchaser holds an equitable interest.

- **Trust-Based Equitable Interests**

Express trusts are created through a deed or will, where trustees hold legal title to property for beneficiaries who in turn hold equitable estates (s 53 *LPA 1925*). A Resulting trust may arise when a person provides the purchase money for a property, but the title is registered in another's name, such a person acquires an interest in the property (***Dyer v Dyer*** [1788])

2 Cox 92). In contrast, a Constructive trust is a remedy imposed by the court to reflect a party's contribution or a common intention regarding property ownership (***Gissing v Gissing*** [1971] AC 886, ***Stack v Dowden*** [2007] UKHL 17).

- **Equitable Interests by Statute or Convention**

Restrictive covenants, though only enforceable in equity, is an obligation undertaken by a landowner to not use his property in a particular manner (***Tulk v Moxhay*** [1848] 2 Ph 774). Home rights are right of occupation granted to a non-owning spouse under ss 30–33 *Family Law Act 1996*. Contracts granting future rights of options and pre-emption to acquire land are protected by equity until exercised or expired.

### 1.5.2 Legal Estates in Land (s 1(1) *LPA 1925*)

Under section 1(1) of the *LPA 1925*, there are only two legal estates capable of subsisting at law:

#### 1. Fee Simple Absolute in Possession

This colloquially means “freehold”; indefinite duration, inheritable by any heirs. “**Fee**” is derived from the Old English *feoh* (cattle, wealth) and denotes an inheritable estate. “**Simple**” means there are no special conditions or limitations on who may inherit. It passes to the owner’s heirs generally, rather than to a narrow or specified class. A fee simple is the most extensive estate in land recognized by English law, because, subject to no conditions, it can endure in perpetuity (***Doe d Middleton v Stead*** (1860) 8 CB(NS) 197).

“**Absolute**” indicates that the estate is not subject to any strings or future events that could cut it short. There is no “determinable” or “conditional” fee (e.g., to A so long as X would be a defeasible fee). There is no built-in power for someone else to reclaim the land on the happening (or non-happening) of some event. “**In possession**” simply means that the owner has the right to occupy and enjoy the land instantly. This distinguishes it from future interests (e.g., a life estate in remainder) that take effect later.

It can be sold, gifted, mortgaged, or made subject to easements.



## 2. Term of Years Absolute

This refers to any leasehold for a fixed (e.g., 99 years) or periodic (e.g., month-to-month) provided the maximum term is certain. *Prudential Assurance v London Residuary Body* [1992] 2 AC 386) confirms that leases exceeding three years must be evidenced by deed (s 52 LPA 1925) but any “term of years” qualifies as a legal estate.

The tenant has right to possession, to the exclusion of third parties and the landlord. At lease end, the property reverts to the landlord’s freehold.

### 1.5.3 Formalities for Creation and Transfer

Effective conveyancing depends on satisfying the legal formalities that give rise to binding legal estates and interests. If these formalities are not met, a purported transfer may instead create only an equitable right or be altogether void.

#### 1. Deeds

*Section 52 LPA 1925* provides that: “All conveyances of land or of any interest therein and all powers of appointment shall be by deed.”. *Section 1 LP(MP)A 1989* specifies the six requirements for a valid deed:

- **In writing** (typed or handwritten).
- **Clear on its face** that it is intended to be a deed (e.g., “This Deed” or “executed as a deed”).
- **Signed** by the person making it (the “grantor”).
- **Attested** by at least one witness who must see the signature.
- **Delivered** as a deed; an act showing the grantor’s intention to be bound immediately.
- **Proper execution** where bodies corporate use their common seal or are signed by two authorised officers.

### Purposes and Applications of a Deed

A Deed is required for transfer of legal freehold or lease, creation or transfer of legal easements, profits a prendre, rentcharges and mortgages.

## Key Points

- **Delivery** may be explicit (“delivered as a deed”) or by conduct (e.g., handing it over to the grantee). *Shaw v Foster* [1967] 1 WLR 1197 confirms delivery can be conditional, subject to clearance of a purchase price.
- **Witness Competence:** Witness must be independent; a witness with an interest in the transaction risks invalidating the deed (*Barton v Morris* [1985] Ch 88).
- **Corporate Execution:** Companies must follow *Companies Act 2006*; s 44 for common seal or s 46 which states the authorised officers as two directors, or a director and a company secretary.

Failure to comply means the transfer is not a legal deed and cannot create a legal estate or interest, though it may found an equitable right if other conditions (e.g., contract) are met.

## 2. Contracts for Land

*Section 2 LP(MP)A 1989* provides that a contract for the sale, grant, or disposition of an interest in land is only enforceable if it is in writing, including all agreed terms in one document (or exchanged counterparts) and signed by or on behalf of each party against whom it is to be enforced. It must contain all the material terms of the agreement (e.g., price, property identification, completion date). (*Firstpost Homes Ltd v Johnson* [2015] EWCA Civ 136).

## Legal Effect

Satisfying s 2 makes the contract enforceable but does not by itself transfer legal title. Upon exchange, each party acquires an equitable estate in the land (doctrine in *Walsh v Lonsdale* [1882] 21 Ch D 9). Equity will compel completion by specific performance, treating the parties as if the deed had been executed. Signature binds a party to the contract terms, even if unread (*L’Estrange v F Graucob Ltd* [1934] 2 KB 394).

## 3. Parol (Oral) Leases

Although s 52 mandates deeds for legal leases, s 54(2) creates an exception for short leases that meet all four conditions. Where the term does not exceed three years, the tenant

commences possession, the best rent (market rent) of the property is paid, and no fine or premium other than rent is paid to the landlord, such a lease can be created orally.

In *Javad v Aqil* [1991] 1 WLR 1007, a two-year, bare tenancy at a market rent, paid periodically, gave rise to a valid legal lease despite no writing or deed.

Such “parol leases” bind third parties upon registration of the landlord’s title or actual occupation by the tenant (if registered land). If any of these four requirements are not met, the lease is not legal and can only be equitable if founded on a valid contract, and thus vulnerable to being unregistered or overreached.

## 1.6 Conclusion

This chapter establishes the foundation for every subsequent topic in Land Law. Mastery of the distinctions between estates and interests, the formal steps needed to create or transfer them, and the rules that determine whose right has priority is essential for the SQE and, more importantly, for competent practice as a solicitor. The remaining chapters build on these pillars by exploring how these principles operate in co-ownership, registered conveyancing, leases, mortgages, and beyond.

# 2

## REGISTERED VS UNREGISTERED LAND; PRINCIPLES AND PRACTICE

Land law governs the ownership, use, and transfer of land and everything attached to it. It defines the nature of proprietary rights, their extent above and below the surface, and how they are created, protected, and enforced. This chapter introduces the fundamental principles of English land law, including the statutory definition of land under the *Law of Property Act 1925*, the distinction between real and personal property, the rules on fixtures and fittings, and the doctrines of tenure, estates, and equitable interests that underpin modern conveyancing and property ownership.

### 2.1 Overview of Title Registration in England and Wales

Title registration in England and Wales transforms the old, paper-based conveyancing system into a reliable, publicly accessible, and indemnified record of land ownership. Rather than tracing chains of deeds going back centuries, a purchaser or lender relies on a concise digital register.

The *Land Registration Act of 1925* introduced the first general system of compulsory registration upon certain transactions but retained parallel unregistered title in many areas. The *Land Registration Act of 2002* overhauled and modernised the system, providing a clear statutory framework for compulsory first registration, digital registers, and enhanced protection for third-party interests.

### 2.1.1 Objectives and Benefits of Title Registration

1. **Certainty of title:** The register is conclusive evidence of the rights it records (s 58 *LRA 2002*), reducing litigation over title disputes.
2. **Transparency and simplicity:** Anyone can inspect the register online, view proprietorship details, charges, and restrictions.
3. **Indemnity:** The state-backed indemnity scheme compensates any person suffering loss due to an error or omission in the register (s 70 *LRA 2002*).
4. **Efficiency:** Electronic filing and e-signatures accelerate conveyancing, reducing reliance on voluminous paper deeds.

### 2.1.2 Compulsory vs Voluntary Registration

- **Compulsory Triggers**

*Section 4(1) LRA 2002* itemises events that can trigger the compulsory first registration of land. It includes the sale or transfer of an unregistered estate at full market value, the grant of a lease of an unregistered estate for more than seven years, the creation of a first legal mortgage (charge) on such qualifying estates.

- **Voluntary Registration**

By virtue of *Section 3 LRA 2002*, the owner of an unregistered land may opt to register as proprietor before the occurrence of a trigger event to gain certain benefits.

### 2.1.3 The Registration Process

1. Firstly, conveyancers submit an application; Form AP1 for transfers, Form FR1 for first registration), the underlying deeds, and the prescribed fee.
2. The HM Land Registry then checks identity, verifies the deeds' formalities (valid deeds, signatures), and ensures all registrable dispositions are included.
3. The interested parties (e.g., mortgagees) may then be required to consent or notified to give room for objections.

4. On acceptance, the new title is created or updated; any retained paper deeds are returned. Landscape-wide electronic registers replace bundles of deeds, and the indemnity fund protects errors.

## **2.2 The Land Register: Structure and Content**

The Land Register is a public, digitised record at HM Land Registry that provides a definitive snapshot of title to registered land. It replaces the need to hunt through historical deeds and includes everything a conveyancer needs; the boundaries, ownership, rights, and obligations is in one place.

### **2.2.1 Statutory Basis and Organisation**

The enabling legislation is the *Land Registration Act 2002*. *Part 2 LRA 2002* governs the form and effect of the register. *Section 3* defines the three distinct parts of each title entry. *Section 4* makes certain dealings (e.g., freehold transfers, leases more than 7 years, legal charges) registrable dispositions that take effect only once entered. Entries are in digital format, thus, accessible online, they include a copy of the title plan, and are updated in near real time.

### **2.2.2 Types of Register**

#### **1. Proprietorship Register**

It contains the name(s) and addresses of registered proprietors, individual or company owning the legal title. It states the class of title granted the proprietors. It may also contain the capacity of the registered proprietor (e.g., trustee). It contains the Title number which is the unique identifier (e.g., “AB123456”) used for all dealings. It shows where there is any restriction on dealings; entries under *s 40 LRA 2002* impose conditions. For example: “no transfer of the registered estate unless made by transfer signed by A and B” (protecting co-owners) or providing for a mortgagee’s certificate must accompany any disposition.

## 2. Property Register

It describes the land's boundaries, often by reference to a title plan (a red-line plan showing the parcel). It shows the quality of title, whether the land is freehold or leasehold, and, if leasehold, the term remaining. It also records subsidiary matters such as rights granted by statute (e.g., public footpaths) or any overriding interests (e.g., rights of people in actual occupation under *Sch 3, para 2 LRA 2002*).

## 3. Charges Register

It records legal charges; mortgages and other security interests, including the lender's name and charge amount. It equally records grants of Easements and rights over the land (e.g., rights of way, rights to lay services) as well as promises restricting the use of land (e.g., no building above single storey). It contains leases granted for more than seven years, where the lease itself does not appear in the property register as an overriding interest.

Under *s 32 LRA 2002*, beneficiaries of trusts or holders of estate contracts can protect their rights by entering a notice, so their interest binds future purchasers.

### 2.2.3 Rectification and Indemnity

*Section 58* provides that if an entry is wrong (e.g., an omitted restriction), it can be corrected on application. *Section 70* provides that the state guarantees the register; anyone suffering loss from a mistake is entitled to compensation under the LRA 2002 indemnity fund.

In *Swift 1st Ltd v Chief Land Registrar* [2015] EWCA Civ 330, court held that a missing notice could be rectified, but claimants must prove reliance and loss.

## 2.3 Interests Protected by Registration: Notices and Restrictions

In the registered land system, all legal interests appear automatically in the register's Property and Charges Registers. Yet many equitable interests (e.g. beneficial interests under trusts, uncompleted estate-contracts, equitable easements, and restrictive covenants) must be expressly recorded via notices, while restrictions temper the proprietor's power to deal.

### 2.3.1 Notices

#### 1. Purpose

To record equitable rights so they bind future purchasers and “ride with the land.” Without a notice, an equitable interest, even if valid, can be defeated by a buyer for value without notice.

#### 2. Statutory Basis

*Section 32(1)(g) LRA 2002* empowers the registrar to enter a notice to protect “any estate or interest in land which is an interest which, apart from this Act, would be registrable as a land charge.”

#### 3. Qualifying Interests

They include: estate contracts (uncompleted agreements for sale, options), equitable easements and profits-à-prendre, interests existing only in equity, equitable mortgages (charges by way of legal mortgage but created informally) and trusts of land (beneficial interests under an express, resulting, or constructive trust).

#### 4. Effect

A notice against the title means any grantee or purchaser is deemed to have notice of the equitable interest and cannot claim to be a bona fide purchaser without notice. Under s 29 *LRA 2002*, a protected interest takes priority over later-registered dispositions except where statute provides otherwise.

#### 5. Application

An applicant completes Form UN1 (application to enter or remove a notice), supplying evidence of the equitable right (e.g., contract, trust deed). Then the prescribed fee is paid; HM Land Registry examines and, if satisfied, enters the notice on the Charges Register.



### 2.3.2 Restrictions

#### 1. Purpose

To control the registered proprietor's power to deal with the land, ensuring that certain conditions are met before disposition.

#### 2. Statutory Basis

*Section 40 LRA 2002* allows the registrar to enter restrictions “regulating the circumstances in which a disposition of the registered estate may be registered.”

#### 3. Common Types

- **Consent restrictions:** For instance, “no disposition by the proprietor of the fee simple absolute in possession is to be registered unless authorized by a person...named in the restriction” (this is typical for co-owners or mortgagees).
- **Form restrictions:** This requires a specific form of deed or additional documentation (e.g., provision of a certified copy of board minutes for company sellers).
- **Multiple signature restrictions:** This is to protect vulnerable owners by requiring two trustees' signatures or a court order.

#### 4. Effect

A disposition in breach of a restriction is void on the register and does not override the protected interest or obligation. The Land Registry will reject applications that contravene an active restriction, alerting the conveyancer to obtain the necessary consent or satisfy the condition.

#### 5. Application

Therefore, there is need to identify existing restrictions in the proprietorship register. If a new restriction is needed (e.g., to protect a beneficiary), apply using Form RX1, providing the original document that gives rise to the restriction (e.g., trust deed, court order).

### 2.3.3 Examples and Illustrations

- **Protecting an Equitable Lease**

A purchaser holds an uncompleted contract for a 20-year lease. A notice is entered under *s 32 LRA 2002* to ensure that, on registration, the equitable lease cannot be overreached or ignored.

- **Co-ownership Safeguard**

Two unmarried co-owners want to prevent one selling without the other's consent. A restriction is placed requiring both signatures on any transfer, thereby safeguarding their joint beneficial interests.

- **Mortgagee's Protection**

A lender may impose a restriction that no disposition is registered without production of its certificate of title, ensuring it can approve any sale or lease that might affect its security.

## 2.4 Registration of Title: Initial Entry and Dispositions Requiring Registration

When title to land is first brought onto the public register or when certain transactions occur on already-registered land, those events must be formally recorded before they have legal effect. This ensures the register remains the authoritative source for who owns or may deal with the property.

### 2.4.1 Initial Entry on the Register

#### 1. What Triggers First Registration?

Under *s 4 LRA 2002*, formerly unregistered land must be registered when: a sale or transfer of the freehold takes place; a lease for more than seven years is granted; a first legal mortgage (charge) is created; or upon the happening of other statutory events, such as a compulsory purchase order or certain court orders.

## 2. Why First Register?

It is important to register to move the property from the unregistered system, which relies on historical deeds and Land Charges, into the modern, digital registry, gaining certainty, transparency, and indemnity. Once registered, all future dealings become registrable dispositions.

## 3. Procedure for First Registration

The client's solicitor assembles all title deeds and extracts; conveyances, leases, wills, court orders, and any supporting evidence of ownership. Afterwards, the Form FR1 (application for first registration) is completed and the prescribed fee paid. Then, the original deeds and any required maps or plans are submitted. Lastly, the HM Land Registry reviews the application, searches existing titles for overlaps, and, upon satisfaction, issues a new title number and publishes the register entry.

## 4. Consequences of Non-registration

A registrable disposition (e.g., sale of unregistered freehold) without first registration is ineffective at law until the new title is entered (*s 4(3) LRA 2002*). The purchaser, although equitable owner, will lack a legal estate and cannot confidently grant legal leases or mortgages until registration.

### 2.4.2 Dispositions Requiring Registration

Once land is registered, certain further deeds and transactions affecting that land must be noted on the register to take legal effect. Under *s 27 LRA 2002*, the following are registrable dispositions:

- Transfer of the registered estate; freehold or leasehold transfers—sale, gift, or vesting by court order.
- Grant or reservation of a new leases exceeding seven years, or certain short leases if so specified.
- Grant or reservation of charges by way of legal mortgage.

- Grant of a legal easement or profit-à-prendre.
- Grant of a restrictive covenant (where capable of being legal).
- Other specified dispositions such as the assignments of registered leases, variations of guaranteed agreements, and changes of name or address of the proprietor.

A registrable disposition has no legal effect until it is entered on the register. Thus, the purchaser or grantee acquires only an equitable interest until HM Land Registry completes the registration.

### **2.4.3 Process of Registering a Disposition**

#### **1. Prepare the Application**

The relevant application form should be used; Form TR1 for transfers; Form AP1 for most dispositions; Form CH1 for charges. The deed itself (transfer document, charge instrument, lease, etc.) should be attached and any required evidence (e.g., certified copy ID for parties, certified copy of corporate minutes for company execution).

#### **2. Obtain and Check Consents**

If the title is subject to restrictions (Book B), obtain any required third-party consents before applying.

#### **3. Pay the Fee**

Fees vary by transaction type and property value; an accurate fee calculation avoids rejection.

#### **4. Submit and Monitor**

Lodge the electronically when possible. HM Land Registry will issue a “notice of application” if there is any conflict (e.g., overlapping title). Upon acceptance, the register is updated, and any superseded entries (e.g., prior owner) are closed.

## 2.5 Overriding Interests and Actual Occupation

Even though most rights must be registered or protected by notice or restriction, certain interests “override” the register and bind a purchaser without being recorded. The most important of these are found in *Schedule 3 to the Land Registration Act 2002* and hinge largely on actual occupation.

### 2.5.1 Categories of Overriding Interests

1. **Leases less than seven years:** *Schedule 3, Paragraph 1* provide for leases for not more than seven years granted at market rent, whether legal or equitable. These short-term tenancies need not appear on the register but will bind a buyer.
2. **Actual Occupation:** *Schedule 3, Paragraph 2* provides for interests of persons in actual occupation of the land or premises at the time of disposition. It covers equitable interests (e.g., a beneficiary under a trust), and certain legal rights (e.g., a person’s right of occupation). It is of necessity that the person must be in actual occupation, and that occupation must be obvious on a reasonably careful inspection or otherwise brought to the purchaser’s attention before completion.
3. **Legal easements and profits-à-prendre:** *Schedule 3, Paragraph 3* provides for legal easements and profits-à-prendre that are obvious on inspection, or which the purchaser has actual knowledge of, even if not on the register.

### 2.5.2 The Principle of Actual Occupation

A person is in actual occupation when they use or reside on the land in a way that is more than fleeting or sporadic.

In *Williams & Glyn’s Bank v Boland* [1981] AC 487, Mrs Boland’s unregistered beneficial interest in the matrimonial home was binding on the bank’s mortgage because she was in actual occupation when the charge was granted.

In *Link Lending Ltd v Bustard* [2010] EWCA Civ 424, even intermittent occupation; a woman detained in hospital who regularly returned, could count as it provided a sufficient

degree of permanence and continuity in her use of the property. However, in *Stockholm Finance Ltd v Garden Holdings Inc* [1995] NPC 162, the court held that prolonged absence without physical presence or intention to return was insufficient for actual occupation, as occasional visits by servants did not show continuity or permanence.

### Characteristics of Actual Occupation

- **Physical presence:** This may be shown through tangible signs such as furniture, personal belongings, mail delivery, or regular use of the property's facilities.
- **Obviousness:** This refers to visible indications of occupation that would be apparent upon inspection, such as a fenced garden, laundry on a line, or children's toys.
- **Continuity:** This often requires evidence of sustained occupation over time, as brief or occasional visits may not be sufficient.
- **Intention to occupy:** This can also establish actual occupation where the person has stored belongings and maintains ongoing ties to the property, such as paying utility bills or intending to return.

### 2.5.3 Consequences for a Buyer

An overriding interest takes priority over the buyer's registered title. The purchaser cannot remove it by later registration.

### 2.5.4 Balancing Protecting Occupiers and Certainty

The overriding interest rules protect vulnerable or hidden equitable interests, especially in family homes without overburdening the register. The "reasonably careful inspection" test balances the buyer's need for certainty against the equitable notion that some rights should not disappear simply because they are unregistered.

## 2.6 Investigating Title in Unregistered Land

When land remains unregistered, no single public record exists of ownership or encumbrances. Instead, a conveyancer must assemble the "story" of the title from a series of historical documents, ensuring no hidden burdens or defects. This process is more laborious

than a simple Land Registry check but remains vital wherever first registration has not yet occurred.

### 2.6.1 Why Diligent Investigation Matters

There is no Central Register. Therefore, rights such as equitable easements, restrictive covenants, or beneficial interests under trusts can lurk unseen in old deeds.

- **Risk of unknown burdens:** With registration absent, a purchaser may pick up undisclosed rights or obligations unless indemnified or protected by notice.
- **Equitable protection:** A buyer may lose unregistered equitable interests if they purchase without notice, per the “purchaser without notice” rule. Under this long-standing equitable principle, a purchaser who buys the legal estate, pays valuable consideration, and has neither actual, constructive, nor imputed notice of any prior equitable right takes the property free from it. This is because equity will not intervene to defeat the title of an innocent purchaser who acted in good faith per *Pilcher v Rawlins* [1872] 7 Ch App 259.

### 2.6.2 The Epitome of Title

It is a concise, chronological summary of all title deeds back to a root of title, typically 15 or 30 years, per client instructions or lender requirements. Its contents include dates, parties, type of document (conveyance, transfer, lease, mortgage), consideration paid, and brief recital of rights granted or reserved. Its purpose is to demonstrate a clear chain of legal ownership and to identify missing or defective links requiring further enquiry or indemnity.

### 2.6.3 Examining Original Deeds

Key documents include conveyances and transfers effecting freehold sales, leases and sub-leases especially those over seven years or short tenancies that bind by estoppel, mortgages and charges to spot outstanding securities, and restrictive covenants and easements built into deeds or separate instruments.

In order to verify, there is need to confirm formalities, ensure the deeds were executed as required by s 52 *LPA 1925* and s 1 *LP(MP)A 1989*. Check for memoranda of discharge when charges are paid off and ensure no endorsements or marginal notes indicate assignments or variations.

#### **2.6.4 Root of Title and Time Limits**

Root of title is a document on which you rely to show the seller's chain; typically, at least 15 years old. Beyond that, deeds are usually too remote to trace origin.

Under the *Limitation Act 1980*, after 12 years of adverse possession, an unregistered title can be defeated, highlighting the importance of checking for unknown squatter's rights.

#### **2.6.5 Acquisition of Title by Possession**

This is a legal principle that grants ownership to a person occupying another's unregistered land for a definite period. If a landowner permits another person (squatter) to occupy their land for 12 years, the owner's right to reclaim the land is extinguished. The original holder is regarded as holding the legal estate in trust for the squatter, who then has the right to apply to be registered as the new legal owner.

An applicant claiming ownership through adverse possession must demonstrate key elements:

- Factual Physical Occupation of land
- Intention to possess the land exclusively
- Possession is without landowner's consent

#### **2.6.6 Land Charges Searches**

##### **1. *Land Charges Act 1972* Registry Categories:**

- Class C(i) puisne (second/subsequent) legal mortgage
- Class C(iii) general equitable charges



- Class C(iv) an estate contract
  - Class D(ii) a restrictive covenant
  - Class D(iii) an equitable easement
  - Class E land charge is an annuity created before 1st January 1926 and not registered in the register of annuities.
  - Class F protects the home rights of a non-owning spouse or civil partner under *Part IV of the Family Law Act 1996*.
2. **Procedure:** Local Land Charges Department search at the local authority (or, for historic purposes, the High Court index).

Consequently, unregistered charges are void against a purchaser for money; see ***City of London Building Society v Flegg*** [1987] AC 54 for overreaching but ***Pilcher v Rawlins*** [1872] 7 Ch App 259 for equitable interests.

### 2.6.7 Requisitions on Title and Enquiries

The purpose of requisition and enquiries is to resolve ambiguities or defects before exchange. Common requisitions include clarifying boundary irregularities, obtaining certified copies of missing deeds or transfers, as well as confirming extinguishment of past rights (e.g., expired easements).

Conveyancers typically allow five to ten working days for replies because unresolved issues may delay or derail the transaction.

## 2.7 Land Charges and the Doctrine of Notice

In the era before universal registration, equitable interests in unregistered land were safeguarded via the Land Charges Register. A purchaser who failed to discover and register an equitable right risked losing it under the doctrine of notice. Even today, for parcels not yet on the Land Register, these rules remain crucial.

### 2.7.1 The Land Charges Regime

The *Land Charges Act of 1972* establishes a central register for certain equitable interests affecting unregistered land.

#### Classes of Registrable Interests

- Class C(iv) – Equitable easements or profits-à-prendre.
- Class D(ii) – Restrictive covenants
- Class D(iii) – Equitable mortgages (charges by way of legal mortgage not created by deed).
- Class F – Estate contracts (agreements for sale, options, rights of pre-emption).

#### Registration Procedure

The applicant (beneficiary of the interest) completes Form A (application to register), submits the original or certified copy of the instrument, and pays the fee to the local Land Charges Department.

On successful registration, the interest appears against the proprietorship name of the relevant title.

#### Effect of Registration

A registered land charge binds all subsequent purchasers for money or money's worth, ensuring the equitable interest "rides with the land." Unregistered charges are void against a purchaser for value (*s 4, LCA 1972*). For example, if B grants A an option to buy and registers it as a Class F land charge, any purchaser of B's interest will take subject to A's option. If A fails to register, a buyer for value can ignore the option.

### 2.7.2 The Doctrine of Notice

Even where registration is not required (for purely legal rights), the doctrine of notice protects unregistered equitable interests:

1. **Actual notice:** This is a situation where the purchaser knew of the interest (e.g., the beneficiary told them).
2. **Imputed notice:** This refers to knowledge held by the purchaser's agent (e.g., their conveyancer) is treated as the purchaser's own.
3. **Constructive notice:** This encompasses knowledge that the purchaser would have acquired by making reasonable inspections or enquiries (e.g., visible occupation, obvious covenants on title deeds).

If a purchaser for money has notice (in any of these forms) of an equitable interest, they will take subject to it. Conversely, a bona fide purchaser for value without notice takes free of the interest. The leading case of *Pilcher v Rawlins* (1872) 7 Ch App 259 held that an equitable mortgage unregistered as a land charge was void against a purchaser without notice.

### 2.7.3 Interaction Between Registration and Notice

- **Registered land charges:** Registration itself provides constructive notice to all, so equitable interests entered on the Land Charges Register bind everyone.
- **Legal interests:** Legal interests such as legal easements, short leases do not require registration but remain subject to notice if they are equitable in creation.

**Illustration:** A founds an equitable lease on an oral agreement; if A does not register a Class F land charge, and B buys the freehold without notice of A's agreement, B takes free of A's lease.

## 2.8 Conclusion

The distinction between registered and unregistered land highlights the advantages of the modernised, state-backed system of title registration under the *Land Registration Act 2002*. Registration consolidates ownership, rights, and burdens into a single, authoritative public record, offering certainty, transparency, and indemnity while streamlining conveyancing. Unregistered land, by contrast, relies on historic deeds, epitomes, and the doctrine of notice, leaving greater scope for hidden defects and disputes. While some interests such as actual

occupation and short leases continue to operate outside the register, the overall framework balances protection of vulnerable rights with the need for transactional certainty.

# 3

## PRINCIPLES OF CO-OWNERSHIP

This chapter examines the principles governing co-ownership and trusts of land in England and Wales. It explains how the *Law of Property Act 1925* requires that the legal estate in co-owned land be held jointly by up to four trustees, while the beneficial interests may be held either as a joint tenancy or as a tenancy in common. It discusses the powers and duties of trustees under the *Trusts of Land and Appointment of Trustees Act 1996*, including their duty to consult beneficiaries and act in their best interests. The chapter also introduces the concept of overreaching, the methods by which joint tenancies may be severed, the operation of implied trusts such as resulting and constructive trusts, and the role of the courts in resolving disputes between co-owners.

### 3.1 Overview and Statutory Framework

Concurrent ownership, or co-ownership, arises whenever two or more persons are entitled to the simultaneous enjoyment of land. The legal framework governing co-ownership in England and Wales was fundamentally reformed by the *Law of Property Act 1925 (LPA 1925)*. The primary objective of these reforms was to simplify conveyancing by ensuring that a purchaser of co-owned land could deal with a limited number of legal owners without being concerned with the complex beneficial interests lying behind the legal title.

The cornerstone of this system is the trust of land. Whenever land is beneficially co-owned, a trust is imposed by statute. The legal estate is vested in the trustees of land, who hold the legal title, while the beneficial (or equitable) interests are held by the beneficiaries. The *Trusts of*

*Land and Appointment of Trustees Act 1996 (TOLATA 1996)* provides the modern statutory framework for these trusts.

### **3.1.1 Legal Title Held as a Mandatory Joint Tenancy**

The legal estate in land is incapable of being held in undivided shares (*s. 1(6) LPA 1925*). Consequently, the legal title must always be held by the trustees on a joint tenancy. This joint tenancy of the legal estate is incapable of severance (*s. 36(2) LPA 1925*). The maximum number of trustees of a legal estate is four (*s. 34(2) Trustee Act 1925*); if land is conveyed to more than four persons, the legal estate vests in the first four named who are of full age.

### **3.1.2 The Equitable Interests: Joint Tenancy or Tenancy in Common**

In contrast to the legal estate, the beneficial interests under the trust can be held either as a joint tenancy or a tenancy in common. The choice between these two forms determines the application of the right of survivorship and the nature of the co-owners' shares. The determination of how the equitable interests are held is a critical first step in any co-ownership problem.

### **3.1.3 Trustees' Powers and Duties**

Trustees of land have all the powers of an absolute owner in relation to the land (*s. 6 TOLATA 1996*). This includes the power to sell, lease, or mortgage the property. However, these powers are tempered by important duties. Most notably, trustees are under a duty to consult the beneficiaries of full age and beneficially entitled to an interest in possession in the land (*s. 11 TOLATA 1996*). They must, so far as practicable, give effect to the wishes of the beneficiaries, or, in case of dispute, to the majority (according to the value of their combined interests).

### **3.1.4 The Mechanism of Overreaching**

A key consequence of the trust mechanism is the doctrine of overreaching. When trustees exercise their power of sale (or mortgage) and the capital money (e.g., the purchase price) is paid to at least two trustees or a trust corporation, the beneficial interests are 'overreached'. This means the interests are detached from the land and transferred to the proceeds of sale.

The purchaser takes the legal estate free from the beneficial interests, which now bind the money held by the trustees (ss. 2(1), 27 LPA 1925).

To ensure that a purchaser can overreach the beneficial interests and take the land free from them, it is standard conveyancing practice to ensure there are at least two trustees of the legal estate. A sole surviving trustee must appoint a second trustee before a sale can proceed with the benefit of overreaching.

### 3.2 Implied Trusts and the Creation of Beneficial Interests

When the legal title to a property is held in the name of one or more persons, but the beneficial ownership is disputed or differs from the legal ownership, the courts will look to implied trusts to determine the true beneficial interests. These trusts arise by operation of law, based on the parties' conduct and intentions, rather than by an express declaration. There are two main types: resulting trusts and constructive trusts.

#### 3.2.1 Resulting Trusts

A resulting trust arises when the court presumes that a person who contributes to the purchase price of a property intends to acquire a beneficial interest in it. The beneficial interest 'results back' to the contributor. This presumption is based on the principle of equity that equity follows the law, and a person is presumed not to intend a gift when they provide purchase money.

- **Presumption of resulting trust:** If A contributes part of the purchase price but the legal title is placed solely in B's name, the law presumes that A holds a beneficial interest under a resulting trust proportionate to their contribution.
- **Rebuttal of the presumption:** This presumption can be rebutted by evidence of a contrary intention, such as an intention to make a gift or a loan.

Resulting trusts are typically concerned with the financial contribution made at the time of acquisition.

### 3.2.2 Constructive Trusts

A constructive trust is a more flexible tool imposed by the court whenever it is unconscionable for the legal owner to deny the claimant a beneficial interest. It does not depend on a common intention, but rather on the court's assessment of what is fair in all the circumstances.

The modern approach to constructive trusts in the context of the family home was authoritatively set out by the House of Lords in ***Stack v Dowden*** [2007] UKHL 17 and refined by the Supreme Court in ***Jones v Kernott*** [2011] UKSC 53. The following principles emerge:

#### 1. The Starting Point

Where a property is purchased in the joint names of a couple for their common home, there is a strong presumption that they intend to hold the property as joint tenants both legally and beneficially. This means they are presumed to own equal shares.

#### 2. Rebutting the Presumption

This presumption can be rebutted by evidence that the parties had a different common intention, either at the time of purchase or formed later. The court will undertake a holistic survey of the whole course of dealing between the parties, which includes, but is not limited to:

- Any advice or discussions at the time of transfer.
- The reasons why the home was acquired in joint names.
- The purpose for which the home was acquired.
- The nature of the relationship.
- Whether they had children for whom they both had responsibility.
- How they arranged their finances, both initially and subsequently.
- How they discharged the outgoings on the property and other household expenses.

#### 3. Inferring and Imputing Intention

The court's task is to ascertain the parties' *actual* common intention, whether express, inferred from conduct, or, where no actual intention can be ascertained, *imputed* to the parties based on what is fair having regard to the whole course of dealing between them (***Jones v Kernott*** [2011] UKSC 53).



### 3.3 Types of Beneficial Co-ownership

There are two types of co-ownership of equitable interests, each with distinct characteristics.

#### 3.3.1 Joint Tenancy (JT)

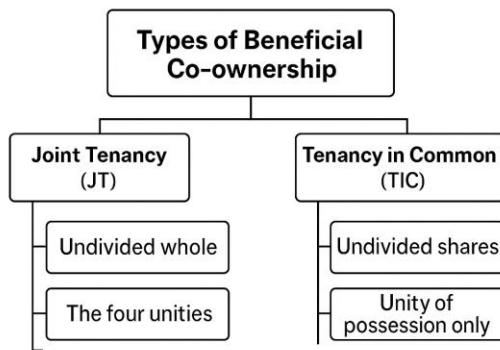
The defining feature of a joint tenancy is the right of survivorship (*jus accrescendi*). On the death of a joint tenant, their interest automatically passes to the surviving joint tenant(s). It does not form part of the deceased's estate and cannot be disposed of by will.

1. **Undivided whole:** Joint tenants are collectively seised of the whole estate. No single joint tenant can claim a specific quantifiable share; each is entitled to the entirety of the property. The language of "shares" is inappropriate for a joint tenancy.
2. **The four unities:** For a joint tenancy to exist, the law requires the presence of four unities. They are:
  - **Possession:** Each co-owner has an equal right to possess and enjoy the whole land. This unity is common to both joint tenancies and tenancies in common.
  - **Interest:** Each co-owner must hold an interest of the same nature, extent, and duration.
  - **Title:** Each co-owner must derive their title from the same act or document (e.g., the same transfer or conveyance).
  - **Time:** The interests of all co-owners must vest at the same time. Their ownership begins simultaneously under the same transaction.

#### 3.2.2 Tenancy in Common (TIC)

A tenancy in common is characterised by the absence of the right of survivorship.

1. **Undivided shares:** Each tenant in common holds a distinct, albeit undivided, share in the equitable interest (e.g., a 60% or 40% share, or equal halves). These shares can be unequal. On death, each tenant's share passes under their will or the rules of intestacy.
2. **Unity of Possession Only:** The only unity required for a tenancy in common is unity of possession. The unities of interest, title, and time may be absent.



### 3.3.3 Determining whether the Equitable Title is a Joint Tenancy or a Tenancy in Common

When analysing a scenario, a structured approach must be applied to determine the nature of the beneficial co-ownership.

#### 1. Express Declaration

The starting point is to examine the transfer deed or trust instrument. If it contains an express declaration as to how the beneficial interests are to be held (e.g., "to A and B as beneficial joint tenants" or "to A and B as tenants in common in equal shares"), this declaration is conclusive in the absence of fraud, mistake, or a claim for rectification (*Pettitt v Pettitt* [1970] AC 777).

#### 2. Words of Severance

If there is no express declaration, the document should be examined for "words of severance" that indicate an intention to create distinct shares. Examples include "in equal shares," "to be divided between," "half to A, half to B." The use of such words will create a tenancy in common.

#### 3. The Four Unities (Unity of Possession, Interest, Title and Time)

The presence of the four unities supports a finding of a joint tenancy. The absence of one or more unities, particularly the unity of interest (e.g., where contributions to the purchase price are unequal in a commercial context), points towards a tenancy in common.

#### 4. Presumptions where the Instrument is Silent

Equity follows the law. Therefore, in the absence of contrary intention, equity presumes that the beneficial interests mirror the legal estate. As the legal estate must be held as a joint tenancy, the beneficial interest is also presumed to be a joint tenancy.

This presumption can be rebutted by evidence of a contrary common intention.

In a commercial context, that is, partnerships or joint business ventures, the courts readily presume a tenancy in common to reflect the parties' separate financial contributions and commercial expectations.

Domestic context, that is for the family home, the law has evolved. Where a property is purchased in joint names for joint occupation, the starting point is that the parties are both legal and beneficial joint tenants, entitled to equal shares, regardless of their financial contributions (**Fowler v Barron** [2008] EWCA Civ 377). This presumption can be rebutted by evidence showing the parties had a different common intention at the time of acquisition, or that they later formed such an intention, which may be deduced from their conduct (**Jones v Kernott** [2011] UKSC 53). In such cases, the court may impute an intention to hold as tenants in common in unequal shares.

### 3.4 Rules on Severance and the Effect on Property Interests

Severance is the process by which a joint tenancy in equity is converted into a tenancy in common. Its principal effect is to destroy the right of survivorship (*jus accrescendi*) in relation to the equitable interests. Once severed, each co-owner holds a distinct, undivided share in the property, which forms part of their estate upon death and does not automatically pass to the surviving co-owners.

It is crucial to remember that severance applies only to the equitable interest. The legal estate must always be held as a joint tenancy by the trustees and cannot be severed (*s 36(2) LPA 1925*).

### 3.4.1 Methods of Severance

The classic judgment of *Page Wood V-C* in ***Williams v Hensman*** [1861] 1 John & H 546 established the three principal methods of severance, which remain authoritative:

#### 1. Mutual Agreement

Severance can be effected by an agreement, whether express or implied, between all the joint tenants to treat their interests as severed. The agreement itself is sufficient to effect severance; it does not need to be carried into performance. In ***Burgess v Rawnsley*** [1975] Ch 429, an oral agreement between two co-owners for one to buy the other's share was held to effect a severance, even though the sale was never completed. The agreement demonstrated a mutual intention to hold as tenants in common.

#### 2. Course of Dealing

This method applies where the conduct of the joint tenants, over a period of time, demonstrates a mutual understanding that they are to hold their interests separately, even in the absence of an express agreement. *Lord Denning MR* in ***Burgess v Rawnsley*** described this as a situation where "the parties have evinced an intention to sever, but have not expressly said so." This could include conduct such as negotiating over the sale of shares to each other, maintaining separate accounts for property expenses proportionate to claimed shares, or making wills that bequeath specific shares to different beneficiaries.

However, in ***Greenfield v Greenfield*** [1979] 38 P & CR 570, ChD, court held that dividing a shared living space into separate, self-contained areas does not, by itself, demonstrate an intention to sever the joint tenancy.

#### 3. An Act Operating on One's Own Share (Alienation)

This is a unilateral act by which a joint tenant disposes of their equitable interest. In ***Gibson v Gibbons*** [1987] 1 WLR 1242, the High Court held that when a joint tenant transfers their interest to another, the act severs the joint tenancy, converting the parties' ownership into a tenancy in common. The court confirmed that this effect arises automatically upon registration of the transfer, regardless of whether the entire or only part of the interest was conveyed.

For the act to be effective, it must comply with the formalities for the disposition of an equitable interest set out in *s 53(1)(a) LPA 1925*, (i.e., in writing and signed). Examples include:

- Selling the interest to a third party.
- Mortgaging the interest.
- Leasing the interest.
- Declaring bankruptcy, as the equitable interest vests in the trustee in bankruptcy, constituting an involuntary alienation.

A key feature of this method is that it does not require the consent or knowledge of the other joint tenants.

### 3.4.2 Statutory Severance by Written Notice

In addition to the common law methods, *s 36(2) LPA 1925* provides a statutory mechanism for severance. A joint tenant may sever the joint tenancy by giving a written notice to the other joint tenants. The notice:

- Does not need to be in any specific form.
- Must clearly indicate an immediate intention to sever (a notice expressing a future intention is insufficient. *Harris v Goddard* [1983] 1 WLR 1203).
- Must be served on all other joint tenants. The law contains deeming provisions for service, particularly if sent by recorded delivery (*s 196 LPA 1925*).

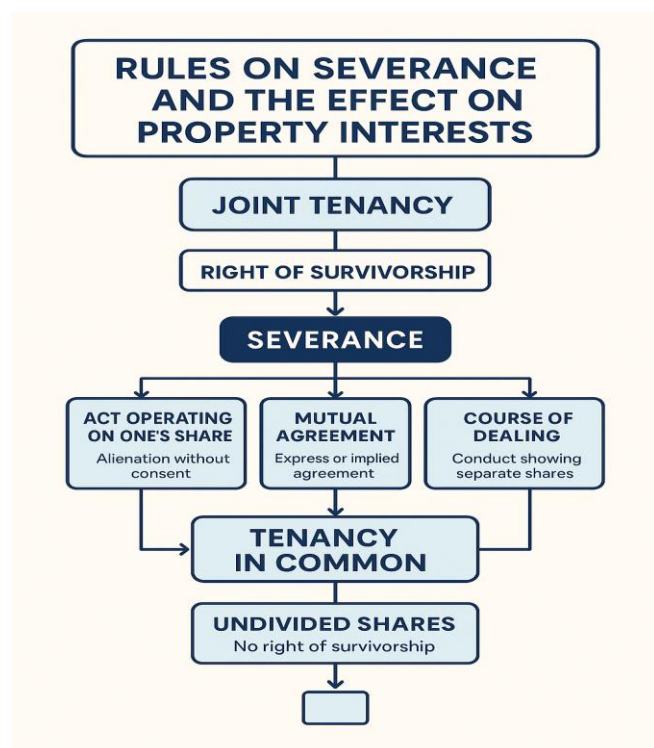
The case of *Kinch v Bullard* [1998] 4 All ER 650 illustrates the potency of this method. A wife sent a notice of severance by ordinary post to her husband. Although she retrieved and destroyed the letter after a change of heart, the court held that severance was effective the moment the letter was delivered to the husband's address, even though he never read it.

### 3.3.3 Effect of Severance

Upon severance, the joint tenancy is converted into a tenancy in common. The size of each share is determined by the number of co-owners at the time of severance. For example, if there are four joint tenants and one severs their interest, that person holds a one-quarter

share as a tenant in common, while the remaining three continue to hold the other three-quarters as joint tenants between themselves. The initial financial contributions to the purchase price are irrelevant to the size of the share upon severance; the shares are presumed equal.

In ***Bull v Bull*** [1955] 1 QB 234, the court held that where property is jointly acquired for shared occupation, equity presumes equal beneficial interests unless a contrary intention is shown. This affirms the principle established in ***Goodman v Gallant*** [1986] Fam 106 that upon severance, shares are presumed equal regardless of financial contributions.



### 3.5 Rights and Duties of Trustees and Co-Owners

Where land is held on a trust of land, whether express, resulting, or constructive, the legal owners are the trustees. Their role is not one of absolute ownership for their own benefit, but of management for the benefit of all those with an interest in the property, the beneficiaries. This fiduciary position imposes specific rights and duties, which are primarily governed by the *Trusts of Land and Appointment of Trustees Act 1996 (TOLATA 1996)*.

### 3.5.1 Duties of Trustees

The trustees' powers are extensive, but they are not unfettered. Their primary duties include:

#### 1. **Duty to Consult Beneficiaries (s 11 TOLATA 1996)**

Before exercising any of their functions relating to the land (most notably the power of sale or to mortgage), the trustees are under a statutory duty to consult the beneficiaries of full age and beneficially entitled to an interest in possession in the land. The trustees must, so far as practicable, give effect to the wishes of the beneficiaries, or, where there is a dispute, of the majority (according to the value of their combined interests). This duty ensures that the beneficiaries, who are the true equitable owners, have a voice in major decisions affecting the property.

#### 2. **Duty to Act Unanimously and in the Best Interests of the Trust**

While trustees hold the legal estate as joint tenants and the right of survivorship applies to the legal title, they must generally act unanimously in exercising their powers over the land. A decision by a majority of trustees is not sufficient for a key action such as selling the property. Furthermore, trustees must always act in the best interests of the trust as a whole, balancing the interests of all beneficiaries. They must avoid any conflict of interest and must not profit from their position as trustee.

#### 3. **Duty to Account**

Trustees are accountable to the beneficiaries for their management of the trust property. This includes a duty to keep accurate records and to account for any income received from the land (such as rent) and any capital proceeds (from a sale). Upon a sale of the property, the trustees must hold the proceeds of sale on trust for the beneficiaries according to their respective beneficial shares. The trustees' own powers over the proceeds are strictly administrative.

### 3.5.2 Rights of Co-Owners (Beneficiaries)

The beneficiaries under the trust, who may also be the trustees, have certain rights:

### **1. Right to Occupy (s 12 TOLATA 1996)**

A beneficiary entitled to an interest in possession has a right to occupy the land if the purposes of the trust include making the land available for their occupation (e.g., a family home) or if the land is held by the trustees for that purpose. However, this right is not absolute where there are multiple beneficiaries; it is subject to the trustees' power to exclude or restrict the entitlement of one or more beneficiaries (but not all), and they may impose reasonable conditions, such as paying outgoings or compensating other beneficiaries who are excluded.

### **2. Right to Income**

If the property is let out, beneficiaries are entitled to a share of the net rents and profits in proportion to their beneficial interest.

### **3. Right to Call for a Sale or to be Bought Out**

A beneficiary does not have an automatic right to force a sale. However, they can apply to the court under s 14 TOLATA 1996 for an order for sale.

## **3.6 Resolving Disputes under TOLATA 1996**

The *Trusts of Land and Appointment of Trustees Act 1996* provides a flexible statutory framework for resolving disputes between co-owners, replacing the old, rigid "trust for sale" with its presumption in favour of sale. The Act recognises that land is often held for the purpose of providing a home, and the court's powers reflect this.

### **1. Application to the Court (s 14 TOLATA 1996)**

Any trustee or any person who has an interest in the property subject to the trust (e.g., a beneficiary or a secured creditor) may apply to the court for an order concerning the exercise of the trustees' functions or declaring the nature or extent of a person's interest in the property.

### **2. Matters to which the Court Must Have Regard (s 15 TOLATA 1996)**

In determining an application under s 14, the court is directed to consider the following non-exhaustive list of factors:

- The intentions of the person or persons who created the trust: The court will consider the original purpose for which the trust was created.



- (b) The purposes for which the property subject to the trust is held: This is a crucial factor. If the primary purpose (e.g., providing a family home) is still capable of being fulfilled, the court may be reluctant to order a sale. Conversely, if the purpose has ended (e.g., the relationship between co-owners has irretrievably broken down), a sale is more likely. In ***Bedson v Bedson*** [1965] 2 QB 666, a husband and wife who jointly owned their matrimonial home had separated, and the husband continued living there alone. The court held that since the marital purpose of the trust had come to an end, the property should be sold.
- (c) The welfare of any minor who occupies or might reasonably be expected to occupy any land subject to the trust as his home: The court will give significant weight to the need to provide stability for children living in the property. In ***Re Holliday*** [1981] Ch 405, the court refused an immediate sale of the family home, holding that the children's need for stability outweighed the father's financial interest, and therefore postponed the sale.
- (d) The interests of any secured creditor of any beneficiary: The court will consider the rights of a mortgagee, but these are not automatically paramount.

Furthermore, under s 15(3), the court must also consider the circumstances and wishes of any beneficiaries of full age entitled to an interest in possession, or, in case of dispute, of the majority (by value).

### 3. Possible Orders

The court has a wide discretion and can make such order as it thinks fit, including:

- An order for the sale of the property.
- An order regulating the trustees' powers (e.g., authorising a sale without the consent of all trustees).
- An order relating to the exercise of the right to occupy.
- An order partitioning the land between the co-owners.

A leading case demonstrating the court's flexible approach is ***Mortgage Corporation Ltd v Shaire*** [2001] Ch 743. In this case, the court refused to grant an immediate sale of a family home at the request of a chargee (lender) where the charge had been created by one co-owner through forgery. *Neuberger J* held that the court was not bound to order a sale simply because a creditor demanded it. Instead, the court had to consider all the circumstances under s 15,

including the fact that the innocent co-owner and her disabled daughter lived in the property. The court made an order allowing the co-owner a chance to buy out the chargee's interest, thereby protecting her home.

### **3.7 Conclusion**

In conclusion, the principles of co-ownership provide a critical framework for understanding how property rights are shared. The fundamental distinction between joint tenancy and tenancy in common dictates the fate of an owner's interest upon death, while the separation of legal and beneficial title underpins the entire system. The rules of severance, implied trusts, and the statutory framework of *TOLATA 1996* collectively offer mechanisms to define, manage, and resolve the complex disputes that can arise when multiple individuals have an interest in a single property.

# 4

## EASEMENTS

Easements are proprietary rights that allow one landowner limited use of another's land without transferring ownership. They underpin orderly land use by defining lawful interactions between neighbouring properties. This chapter examines their nature, essential characteristics, and modes of creation; whether express, implied, or by long use, highlighting how such rights enhance the utility of the dominant land while preserving the servient owner's control.

### 4.1 Definition and Essential Elements

In land law, easements play a crucial role in regulating how neighbouring properties interact, allowing one landowner to use another's land in a limited way without transferring ownership. This section introduces the concept of easements, focusing on their definition and the key requirements for a right to qualify as one. We will explore these elements in detail, with explanations tailored to help you, as students, grasp the practical implications through real-world examples. Remember, easements are not about owning the land but about enjoying a specific benefit from it, often arising when land is divided or sold.

#### 4.1.1 Determining if a Right Qualifies as an Easement

An easement is fundamentally a non-possessory right that permits the owner of one piece of land (known as the dominant tenement) to utilize the land of another (the servient tenement) for a particular purpose, without taking ownership or exclusive control of that land. Think of

it as a "right of way" or a "right to light" it's a privilege attached to the property itself, not a personal license that vanishes when the owner changes.

The foundational case of *Re Ellenborough Park* [1956] Ch 131 established four essential characteristics that must be present for a right to be recognized as an easement. These criteria ensure that the right is tied to the land, fair, and enforceable against future owners. Without all four, the right might be classified as something else, like a license (which is personal and revocable) or a covenant (which imposes obligations rather than granting rights). Let's break down each characteristic step by step, with explanations and examples to illustrate how they apply in practice.

### 1. Presence of Dominant and Servient Tenements

For an easement to exist, there must be two distinct parcels of land: the dominant tenement (the land that benefits from the easement) and the servient tenement (the land burdened by it). The easement "runs with the land," meaning it attaches to these properties and passes to future owners.

This requirement prevents easements from being floating rights unconnected to specific land. Imagine if a right wasn't linked to properties—it could become chaotic, with people claiming uses over land without any logical basis. The dominant land gains value or utility from the servient land, creating a neighbourly relationship. Without identifiable tenements, the right can't be an easement; it might just be a personal agreement.

**Example:** Suppose Property A (dominant) has a right to cross Property B (servient) via a footpath to access a public road. Here, both tenements are clear: A benefits by avoiding a longer route, and B is burdened by allowing passage. If there's no dominant land (e.g., a general public right to wander), it fails this test and isn't an easement, it could be a public right of way instead, governed by different rules.

### 2. Separate Ownership of Dominant and Servient Tenements

The dominant and servient lands must be owned (and typically occupied) by different persons. An owner cannot have an easement over their own land, as they already have full rights to use it.

This prevents redundancy why grant an easement when you control both properties? If the same person acquires both tenements (known as "unity of ownership"), any existing easement is extinguished or suspended until the lands are separated again. This characteristic emphasizes that easements resolve conflicts or needs between distinct owners, promoting harmony in land use. Note that "separate legal estates" means the properties must be held under different titles, even if one is leased.

**Example:** If Farmer X owns Field 1 (dominant) and grants himself a "right" to drain water across Field 2 (which he also owns), this isn't an easement, it's just internal management. But if X sells Field 2 to Farmer Y, and the drainage right was properly created beforehand, it could become an easement benefiting Field 1. In *Sovmots Investments Ltd v Secretary of State for the Environment* [1979] AC 144, a right claimed over land under the same ownership failed this test, highlighting that easements require independence between the properties.

### 3. The Right Must Accommodate the Dominant Tenement

The easement must provide a genuine benefit to the dominant land itself, not merely to the current owner as a personal perk. It should enhance the use, enjoyment, or value of the property in a way that would apply to any owner. This is about ensuring the right is "land-centric" rather than "person-centric."

Courts ask: Does the easement serve the property's needs, or is it just convenient for the individual? If it's personal (e.g., tied to a hobby or business unrelated to the land), it won't qualify. This characteristic protects servient owners from indefinite burdens that don't truly relate to the neighbouring property. Proximity between the tenements often helps prove accommodation, but it's not mandatory if the benefit is clear.

In *Re Ellenborough Park* [1956] Ch 131, residents of houses surrounding a communal garden had a right to use it for recreation. This accommodated the dominant lands (the houses) by providing amenity space that increased their residential value, any future homeowner would benefit similarly. Contrast this with *Hill v Tupper* [1863] 2 H & C 121, where a boat owner claimed exclusive rights to moor boats on a canal. This was ruled not an easement because it benefited his personal business, not the land itself. If the right was

for storing farming equipment on neighbouring land to aid agriculture on the dominant plot, it would likely accommodate the land.

#### 4. Capability of Forming the Subject Matter of a Grant

The right must be capable of being granted by deed, meaning it is sufficiently definite, not overly vague or burdensome, and aligns with recognized types of easements. It can't involve exclusive possession of the servient land or require the servient owner to spend money. Courts assess if the right is "grantable" by an imaginary reasonable grantor.

This is the "quality control" test. Easements must be clear and limited to avoid overburdening the servient land or creating new, unprecedented rights. Vague rights (e.g., "a nice view") are unenforceable because they can't be precisely defined or quantified. Rights that oust the servient owner from control (like full occupation) blur into leases. Also, easements are generally "negative" in burden, they don't force the servient owner to act or spend (e.g., no right to make them repair a fence). New easements can be recognized if analogous to existing ones, like rights to parking or storage in modern contexts.

Common easements include rights of way (definite path), rights to light (through specific windows), or rights to support (e.g., a shared wall). In *Phipps v Pears* [1965] 1 QB 76, a right to protection from weather was rejected as too burdensome and not grantable. It would require positive action. However, in *Moncrieff v Jamieson* [2007] UKHL 42, a right to park cars was upheld as definite and not excluding the servient owner entirely. If a right was "to enjoy the scenic beauty" without specifics, it would fail for vagueness.

By understanding these characteristics, you can analyse whether a claimed right is a valid easement. In practice, as future solicitors, you'll advise clients on creating, enforcing, or challenging easements, often through title deeds or court applications. Remember, easements add value to properties but can limit development. Always check land registers for registered ones.

## 4.2 Express and Implied Creation of Easements

Easements can be created in a variety of ways. Understanding each method and its legal requirements is essential to advising clients on validly acquiring or protecting such rights.

### 4.2.1 Express Creation

This is creation of an easement by Deed, either a Grant or Reservation.

- **Legal Requirement**

By virtue of *s 52 LPA 1925*, any grant or reservation of an easement must be executed by deed. *Section 1 LP(MP)A 1989* sets out formalities to include that in writing; clear that it is a deed; signed; witnessed; and delivered.

- **Terminology**

**Grant of an easement:** The dominant owner obtains a new right over servient land. The owner of the servient land burdened by the right deliberately executes a legal document to confer a new right over their land to the owner of the dominant land.

**Reservation of an easement:** The servient owner retains a right over land being transferred away (e.g., before selling off a piece, reserving a right of way across it). This occurs when the owner of a land sells part of it and reserves an easement over the part being sold (the servient land) for the benefit of the part they are keeping (the dominant land).

- **Registration**

For a registered land, express easements must be entered as registrable dispositions under *s 27 LRA 2002*. A legal easement only takes effect at law once registered (*s 27(2)(b)(i) LRA 2002*).

For an unregistered land, the deed should be noted in the conveyance and, if equitable, registered as a Class C(iv) Land Charge.

### 4.2.2 Implied Creation

When parties deal with land without expressly granting easements, the law will sometimes imply them to reflect practical necessities or prior use.

#### 1. Implied by Common Intention

If, at the time of grant, both parties understood the easement to be necessary for the intended use of the dominant land, even if not strictly indispensable, equity will imply it. This test is solely based on the intended use of the land by both the grantor and the grantee at the time of the transfer. An easement will be implied if without it, the intended use of the land would be impossible or substantially frustrated.

In *Stafford v Lee* [1993] 65 P & CR 172, the purchaser bought land intended for residential development, but the transfer document did not expressly grant access. The court implied a right of way over the seller's adjoining land, holding that both parties clearly intended the plot to be used for building, and access was necessary to fulfil that purpose.

The doctrine of common intention is a more flexible than the rule requiring necessity for it can be used to imply an easement in both a grant and a reservation

#### 2. Implied by Necessity

A right is implied if absolute necessity exists for reasonable enjoyment of the dominant land (not merely convenience). In the leading case of *Pwllbach Colliery v Woodman* [1915] AC 634, *Lord Sumner* held necessity at the point of severance, judged objectively, can give rise to a right of way. The necessity for the easement must exist at the time of severance, that is, the moment the single plot of land is divided and conveyed to separate owners.

In *Adealon International Corp Pty Ltd v London Borough of Merton* [2007] EWCA Civ 362, the claimant sought to imply a right of way over the council's land to access its otherwise enclosed plot. The court refused, holding that an easement of necessity arises only where the land would be completely landlocked, and since alternative access existed, strict necessity was not established.



The courts are slightly more willing to imply an easement by necessity in a grant than in a reservation. A grantor should not be allowed to derogate from rights they granted over the land they just sold. For grants, it is presumed that the grantor had no intention to sell the property to the grantee in a condition that prevents reasonable use.

### **3. The Rule in *Wheeldon v Burrows***

The case of *Wheeldon v Burrows* [1869] LR 12 Ch 31 established that quasi-easements enjoyed by the landowner prior to severance become full easements on sale. When a landowner sells off part of their land, the purchaser automatically receives the benefit of all quasi-easements that were being enjoyed by the whole land. A quasi-easement is a right that would be an easement if the land were owned by two different people, but since it's all in one ownership, it's just a right of the owner over their own land.

To be converted into a full easement, such quasi-easement must have existed prior to the time of the sale, be continuous, necessary for reasonable enjoyment, and used at the time of sale.

This rule operates only to imply a grant of an easement in favour of the purchaser and does not imply a reservation in favour of the seller.

### **4. Implied under s 62 LPA 1925**

Upon conveyance of land, everyday rights and quasi-easements used “as of right” immediately before transfer automatically pass to the grantee unless expressly excluded. Such rights are converted into legal easements but cannot create new obligations upon servient owners.

For the transfer to be effective, the right must exist at the date of conveyance (continuous use) without interruption. This section would not apply where the conveyance expressly excludes s 62's operation.

### **5. Prescription**

The law recognizes the use of a right in use for a long period of time without interruption though in absence of an agreement. It would be presumed legal right to use. The right must

have been used for over twenty years. Also, for such uninterrupted use of land be presumed legal, the use must be as of right; *nec vi* (without force), *nec clam* (without secrecy), *nec precario* (without permission).

There are three methods of acquiring right by prescription:

- **Prescription under Common Law**

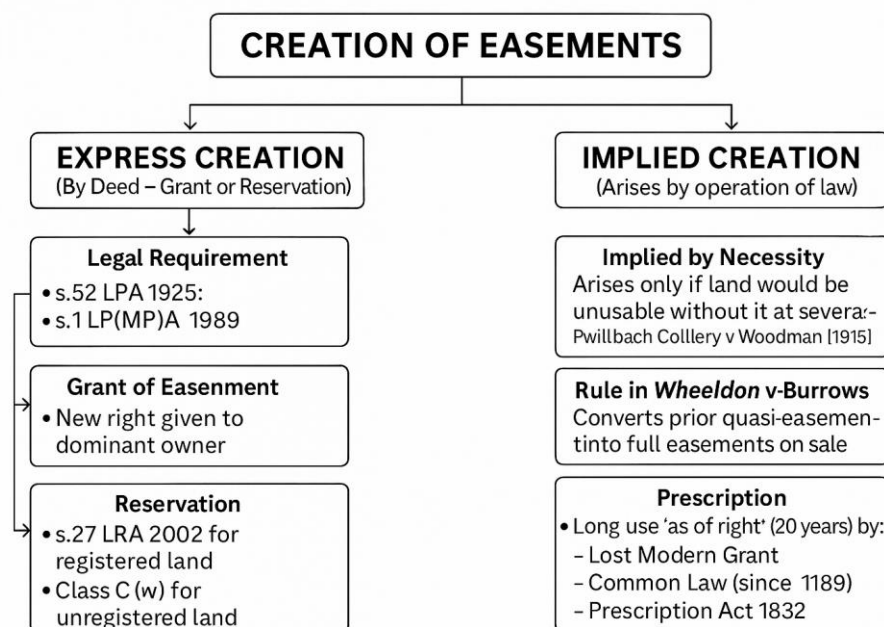
Common law presumes an easement was granted if it has been enjoyed "as of right" (without force, secrecy, or permission) continuously since time immemorial; legally fixed as the year 1189. Courts accept 20 years of continuous use as evidence of this immemorial use. However, this presumption is easily rebutted if the servient owner can prove that at any point since 1189, the right was not exercised, could not have been exercised, or both the dominant and servient lands were owned by the same person (unity of seisin). This makes the doctrine difficult to rely upon.

- **Prescription under the Doctrine of Lost Modern Grant**

This doctrine is employed to imply an easement where a right has been openly enjoyed "as of right" for at least 20 years. It presumes that a formal, valid deed of grant was executed at some point after 1189 but has since been lost. It is often used as a last resort, especially where the claimant fails to meet the strict technical requirements of the *Prescription Act 1832* or common law prescription (e.g., due to a recent break in user or a period of common ownership). Under this, the court to acknowledge long-term use and regularise the right.

- **Prescription under the *Prescription Act 1832***

The Act provides that a right is presumed legal after 20 years of uninterrupted enjoyment and a defense against such a prescriptive claim must be raised within 30 years to defeat it.



## 4.3 Legal Tests and Practical Limits of Easements

### 4.3.1 Scope and Reasonableness

An easement must not impose an excessive burden on servient land (e.g., continuous noise is not an easement). Also, minor alterations in path or route are permissible if no additional burden results (*Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57).

### 4.3.2 Extinguishment of Easement

#### 1. Release

It refers to action by the dominant owner in agreeing to surrender the right. This is usually in the form of a written deed of release by dominant owner. An informal agreement or a clear intention to release, though not by deed, may be effective in equity if the servient owner has acted on it (e.g., spent money modifying their land). In *Taylor v Needham* [1810] 2 Taunt 278, the court held that an easement was released where the dominant owner's clear intention to abandon was relied upon by the servient owner, recognising that

even without a formal deed, a clear intention to abandon supported by reliance is sufficient in equity.

## 2. Abandonment

Clear acts showing intent to relinquish the right. It requires clear, non-use, and conclusive evidence that the dominant owner intended to permanently relinquish the right. The non-use claim must be supported by a positive act by the dominant owner that demonstrates a fixed intention to abandon the right. In *Huckvale v Aegean Hotels Ltd* [1989] 58 P. & C.R. 163, the court reinforced the dominant owner's conduct must make it clear that they have a firm intention that neither they nor any successor would thereafter make use of the right. Without clear intention, the easement is merely suspended, not extinguished.

## 3. Merger

Where the dominant and servient tenements unite in one owner (unity of seisin), an easement ceases to exist. Such easement must be regranted when the ownership becomes separated subsequently. In *Sovmots Investments Ltd v Secretary of State for the Environment* [1979] AC 144, the House of Lords held that an easement is extinguished by merger when the dominant and servient lands unite under one ownership. The right cannot revive automatically and must be regranted if the titles are later separated.

## 4. Prescription

A long period of non-use can effectively extinguish an easement. 20 years' non-use may extinguish such right by statute or common law, by creating a rebuttable presumption that the right has ceased to exist or was abandoned.

### 4.4 Conclusion

Easements strike a balance between private ownership and shared utility. Their clear rules of creation, scope, and termination ensure certainty in property relations, enabling land to be used efficiently while preventing undue burden on others. Together, these principles maintain the equilibrium between private ownership and shared rights, forming a key component of modern land law and property practice.

# 5

## LEASEHOLD LAND; LEGAL FRAMEWORK AND PRACTICE

Leasehold creates an exclusive possessory interest in land for a term, distinct from freehold. This chapter covers how leases differ from licences, the formal and substantive requirements for legal leases, key terms, the rights and duties of landlords and tenants, enforcement of covenants, dealings with leases, and methods of termination.

### 5.1 Distinguishing Leases from Licences

At first glance, leases and licences both grant occupants right to live or trade on land. However, the distinction is critical: a lease creates a proprietary interest (an estate in land), whereas a licence merely confers a personal right.

#### 5.1.1 Conceptual Differences

Aspect	Lease	Licence
<b>Nature of right</b>	Proprietary, it creates a “term of years absolute” (legal estate) under s 1(1)(b) LPA 1925.	Personal, mere permission, revocable
<b>Exclusive possession</b>	Yes, a tenant can exclude all, including landlord, subject to any reserved rights	No, a licensor may enter at will

<b>Binding on successors</b>	Yes, the lease “runs with the land” and binds purchasers of the landlord’s reversion and assignees of the lease	No, a licence binds only original parties
<b>Formalities</b>	Leases more than three years by deed (s 52 <i>LPA 1925</i> ); leases less than three years may be by parol (s 54(2))	No formalities required

### 5.1.2 The *Street v Mountford* Test

In *Street v Mountford* [1985] AC 809, the court established that substance over form governs:

1. **Term certain:** A lease must grant exclusive possession for a fixed or definable periodic term.
2. **Exclusive possession:** The tenant enjoys the right to exclude all others, including the landlord.
3. **Rent:** Payment of rent or a premium reinforces the leasehold nature but is not essential if a deed grants a term certain.

If these elements exist, courts will characterize the agreement as a lease, regardless of the label used by the parties.

In *Antoniades v Villiers* [1990] 1 AC 417, two occupants signed identical “licence” agreements but shared one flat with exclusive use of all rooms. The agreement was held to be a single joint lease, not licences, because substance conferred exclusive possession for a term at rent.

In *Lace v Chantler* [1944] 1 All ER 305, an agreement granting occupation for the duration of a war (uncertain term) was held to be merely a licence because there was no ascertainable term certain.

### 5.1.3 Implications

1. **Security of tenure:** Tenants under leases enjoy statutory protection (e.g., business tenancies under *LTA 1954* or assured shortholds under *Housing Act 1988*); licensees do not.
2. **Enforceability:** Leases bind successors and can be assigned; licences cannot.
3. **Stamp Duty Land Tax (SDLT):** Leases may trigger SDLT on lease premium and rent; licences generally do not.
4. **Lender security:** Only leases create a chargeable interest the lender can take security over.

## 5.2 Requirements for a Valid Legal Lease

To create a legal lease (an estate in land) rather than merely an equitable interest or licence, the following elements must be satisfied. All four are essential; without any one of them, the occupant may hold only a licence or an equitable lease.

### 5.2.1 Capacity of the Grantor

Only a person who holds a legal estate, either a freehold or an existing leasehold, can grant a new legal lease. Under s 1(1)(b) *LPA 1925*, the only legal leasehold estate is a term of years absolute. A tenant under such an estate may grant a sublease (but only for a shorter term than their own lease).

### 5.2.2 Certainty of Term

#### 1. Fixed Tenancies (Term Certain at Outset)

The lease must have a fixed beginning and end. A term of “five years from 1 April 2025” or “year to year” (periodic lease) is acceptable because the maximum duration or the periodic interval is certain. *Section 205(1)(xxvii)* of the *LPA 1925* defines a “term of years absolute” as any fixed period or a period from year to year.

#### 2. Periodic Tenancies

A lease may be granted from period to period (weekly, monthly, yearly) provided the period is specified. The lease continues automatically until terminated by proper notice.

### 3. Uncertain or Gratuitous Occupation

Agreements without any certain term (e.g., “so long as X lives” or “for the duration of the war”) are not leases but licences (***Lace v Chantler*** [1944] 1 All ER 305).

#### 5.2.3 Exclusive Possession

The tenant must have the right to exclude all others, including the landlord, from the premises for the term, subject only to such landlord’s reserved rights (e.g., to enter for repairs). In ***Street v Mountford*** [1985] AC 809, the Court held that exclusive possession is the hallmark of a lease.

An exception to this is where the tenant shares occupation with the landlord (e.g., house share where landlord lives on premises). But it may still be a licence if landlord retains control (***Antoniades v Villiers*** [1990] 1 AC 417).

#### 5.2.4 Rent or Consideration

Rent is not strictly essential if the lease is by deed for a certain term, but payment of rent (or a premium plus rent) is strong evidence of a lease rather than a licence.

The best rent rule is to the effect that short leases under three years must be at the best rent reasonably obtainable to be legal without deed (*s 54(2) LPA 1925*).

#### 5.2.5 Formalities: Deed and Writing

##### 1. Leases over Three Years

They must be created by deed. *Section 52 LPA 1925* requires a deed for any legal lease and *s 1 LP(MP)A 1989* mandates it must be written; clear it is a deed; signed; witnessed; and delivered.

##### 2. Leases of Three Years or Less

Under *s 54(2) LPA 1925*, a lease, whether fixed or periodic, of not more than three years, at the best rent, with no fine (premium), granted in possession, is valid at law without deed or writing. A parol lease of three years or less that meets all the *s 54(2)* criteria is a legal lease, not merely an equitable one.



This allows short commercial or residential tenancies by simple oral agreement, provided the four statutory conditions are met.

### **3. Leases over Three Years by Contract**

A contract to grant a lease over three years must comply with *s 2 LP(MP)A 1989* (writing, incorporating all terms, signed) to be specifically enforceable, but it only creates an equitable lease until a deed is executed.

#### **5.2.6 Registration**

For a registered land, a legal lease for more than seven years must be registered at HM Land Registry to take effect at law (*s 27 LRA 2002*). Once entered, the leasehold estate is protected and binds successors.

For an unregistered land, a legal lease by deed automatically binds the world at law; an equitable lease (contracted but not deeded) should be registered as a Class F Land Charge to protect it against bona fide purchasers.

#### **Key Takeaways**

1. Exclusive possession for a certain term is the core substance of a lease.
2. A deed is required for a lease of more than three years; but a parol lease for a term less than or equal to three years is valid if conditions are met.
3. Rent both evidences and, for short-term leases, qualifies the right to a parol lease.
4. Proper formality ensures a lease is a legal estate, giving tenants full proprietary rights and statutory protections.

### **5.3 Essential Terms in Residential and Commercial Leases**

When you draft or review a lease, certain provisions are so fundamental that missing or ambiguous wording can lead to disputes, unintended liabilities, or loss of statutory protections.

### 5.3.1 Term and Rent

#### 1. Term (Duration)

- **Residential:** It is often for a fixed term (e.g. six months or one year for an Assured Shorthold Tenancy under the *Housing Act 1988*). After expiry, some tenancies roll into periodic tenancies unless a break clause applies.
- **Commercial:** It is frequently longer (three, five, or more years), with options to renew under the *Landlord & Tenant Act 1954*. The exact start and end dates must be clear to secure statutory renewal rights.

#### 2. Rent (Consideration)

- **Fixed rent:** A set amount per year, normally payable in quarterly or monthly installments in commercial leases, weekly or monthly for residential.
- **Rent review mechanisms (commercial):** Usually upward-only reviews at set intervals (every three–five years) tied to an index (RPI/CPI) or open market value. Drafting must specify review dates, methodology, assumptions (e.g. hypothetical lease), and fallback procedures if parties disagree.

### 5.3.2 User Clauses

These are restrictions or permissions on how the tenant may use the premises.

- **Residential:** Generally defined by statute. To be used as a private dwelling; no trade or business unless licence obtained.
- **Commercial:** Tailor “permitted use” narrowly to protect the landlord’s interests and planning compliance. For example: for office use only, class E(a) of the Use Classes Order, prohibit noxious, noisy, or offensive trades, or require compliance with planning consents. Breach of these can justify forfeiture.

### 5.3.3 Repair, Decoration, and Maintenance

Maintenance responsibilities in leases fall into two broad categories—those automatically implied into residential tenancies by law, and those expressly agreed in commercial leases. Understanding both is vital, because getting them wrong can leave either party facing unexpected bills or legal claims.

## 1. Implied Repair Duties in Residential Leases

Even though a tenancy agreement is silent about repairs, s 11 of the *Landlord and Tenant Act 1985*, steps in to protect tenants. This statute imposes non-negotiable duties on every landlord of a rented home to:

- **Keep the structure and exterior in repair:** which includes walls, roof, gutters, foundations, windows, doors; basically, any part of the building that keeps out the weather.
- **Maintain installations in working order:** which includes gas boilers, water pipes, electrical wiring, heating systems, sanitation, and lifts (if present) must be safe and functional.

These obligations are statutory; therefore, landlords cannot contract out or pass them entirely to tenants. If they do, tenants have the right to demand repairs and may even carry out urgent work themselves and deduct costs from rent if the landlord refuses.

## 2. Express Repair Covenants in Commercial Leases

Commercial tenants usually agree to much fuller and detailed maintenance obligations in their lease.

- **Full Repairing and Insuring (FRI) Covenant**

The tenant promises to put and keep the premises in “good and substantial repair,” often including decoration, boiler servicing, and external works. They also reimburse the landlord’s building insurance premiums, ensuring the landlord’s risk is neutral.

- **Upkeep of Common Areas**

In multi-tenant buildings, leases typically include a service charge mechanism. Here, the tenants pay a share of communal expenses; cleaning, landscaping, lift maintenance, security, and building repairs.

## Why Clear Repair Clauses Matter

For tenants, precise terminology prevents surprises at lease end. If you know exactly what “full repair” means, you can budget accordingly and avoid dilapidations disputes.

For landlords, enforceable repair covenants safeguard the value of your property, ensuring it remains in good condition when tenants vacate.

#### 4. Insurance

The landlord insures the building against loss or damage (fire, flood). They usually recover premium from tenant as service charge or separate insurance rent.

Tenants may insure their own contents and public liability. Commercial leases often require a “minimum cover” level, say £10 million public liability and proof of renewal.

#### 5. Service Charges and Outgoings

These are tenant contributions to communal costs (repairs, cleaning, management fees).

- **Residential blocks:** Under s 18 *Landlord and Tenant Act 1985*, service charges must be “reasonably incurred” and subject to consultation if above a threshold.
- **Commercial estates:** Negotiate clear “budget year,” capping mechanism, and audit rights as disputes over hidden costs drive most landlord–tenant friction.

#### 5.3.4 Alterations and Fit-Outs

- **Tenant’s fit-out:** The right to install partitioning or equipment, often subject to landlord’s prior written consent, must not be unreasonably withheld if the works comply with specified design standards.
- **Reinstatement obligations:** Many leases require the tenant to restore the premises to original condition at lease end. It is crucial to negotiate carefully or provide a “dilapidations” schedule at grant.

#### 5.3.5 Security of Tenure and Break Clauses

Leases normally bind both sides for the whole term, but tenants and landlords sometimes have ongoing rights to remain in, or exit from, the property even after that term. These fall into two categories: security of tenure and break clauses.

##### 1. Security of Tenure

##### • Residential Tenancies

Most modern assured shorthold tenancies (ASTs) under the *Housing Act 1988* give tenants the right to occupy until the landlord follows the correct eviction procedure.

*Section 21* provides for “no-fault” notice. The landlord serves at least two months’ notice after the fixed term (or during a periodic tenancy) using prescribed forms and complying with deposit protection, gas and energy certificates, and “How to Rent” guide requirements.

Therefore, a tenant cannot be evicted, or have possessions removed, until the court grants a possession order following service of a valid s.21 notice.

- **Commercial Tenancies**

Under *Part II of the Landlord and Tenant Act 1954*, business tenants enjoy a statutory right to renew their lease at term end. A Tenant serves a s 26 request and landlord must reply under s 25 either consenting to renewal or opposing on one of six statutory grounds. The grounds under which the landlord can oppose include:

- Where the landlord intends to occupy the premises for their own business (s 30(1)(f)).
- Where the landlord intends to redevelop or reconstruct the entire or substantial part of the building (s 30(1)(g)).
- Where the tenant is in substantial breach of covenant (s 30(1)(d)).

If landlord validly opposes, the tenant’s security ends; otherwise, the court grants a new lease on terms broadly similar to the old, with possible rent adjustment. In ***Brentford FC v Milestone*** [2007] EWCA Civ 839, the landlord’s redevelopment plans under s 30 were scrutinized to ensure they were genuine and viable.

## **2. Break Clauses**

A break clause is a contractual right, written into the lease, allowing either the tenant or landlord (or both) to terminate the lease early before the natural expiry if certain strict conditions are satisfied.

- **How Break Clauses Work**

The Tenant or landlord must serve written notice within a specified window (e.g. “not less than six months’ notice, nor more than nine months before the break date”). The conditions precedent often include: that all rent and service charges are paid up to the break date and there are no uncured material breaches of covenant.

Break dates are specific dates when the option can be exercised, e.g. “any time on or after 1 June 2028.”

- **Importance of Precise Drafting**

Courts will strictly interpret break clauses and refuse breaks for minor slip-ups. Faults relating to notice; late delivery or wrong address can invalidate the break (*Plumb v Cussens* [2002] EWCA Civ 1740). Condition slip-ups e.g. a few pounds of rent arrears or an incomplete repair can defeat the break (e.g. *London & Rochester Glass Co v Strutt & Parker* [2005] EWCA Civ 24).

## 5.4 Tenant and Landlord Obligations and Remedies

Understanding the mutual promises in a lease and the actions available when they're broken is central to effective leasehold practice. This section breaks down the main duties each party owes and the remedies they can pursue when things go wrong.

### 5.4.1 Tenant's Obligations

#### 1. Paying Rent

As the primary covenant, rent is a tenant's core obligation. The timing of rent payment is in accordance with the lease (e.g., quarterly in advance on the quarter days). Failure to pay can justify landlord action but does not extinguish the tenant's right without forfeiture.

#### 2. Repair and Decoration

This obligation could be express or implied. Commercial leases typically contain express "full repairing and insuring" covenants; residential leases rely partly on implied statutory duties (see 5.3). It is to the effect that the tenant must keep property in "good and substantial" repair, including structure, plant, fixtures, and sometimes externals like communal areas.

#### 3. Use Covenants

A tenant must not use the premises for any purpose outside the lease's "user clause." Tenant must also comply with planning law breach of which may expose tenant (and landlord) to enforcement action.

#### **4. Alienation Clauses**

Tenants generally must obtain landlord's consent before alienating the property, transferring or subletting. In commercial leases, a broken AGA can leave the outgoing tenant on the hook for the incoming tenant's breaches.

#### **5. Obeying Other Covenants**

Tenant must pay its share of insurance premiums or service charges. The tenant must also comply with health & safety, fire regulations, and any environmental obligations.

### **5.4.2 Landlord's Obligations**

#### **1. Repair (Residential)**

This is a statutory duty under *s 11 Landlord & Tenant Act 1985* to keep structure, exterior, and installations in repair. To enforce it, the tenant can serve an L&B notice; if landlord fails, tenant may arrange works and deduct cost via rent abatement or court order.

#### **2. Quiet Enjoyment**

This is an implied covenant meaning that the landlord must not interfere with the tenant's possession or use. Breach of this in form of noisy building works, unlawful entry, or changing access can give tenant a claim for injunction or damages.

#### **3. Insurance**

The Landlord insures the building; and he recovers premiums via service charge or enforce tenant's covenant to reimburse.

### **5.4.3 Tenant Remedies for Landlord Breach**

#### **1. Repairs and Rent Abatement**

After serving proper notice, tenant can undertake works for urgent disrepair and deduct reasonable costs from rent (residential context).

#### **2. Injunction or Damages**

For breaches of quiet enjoyment or failure to provide services (e.g., lifts, security), tenant can seek an injunction or claim damages for loss of amenity.

#### 5.4.4 Landlord Remedies for Tenant Breach

##### 1. Debt Action for Rent

The landlord can sue in the County Court or via Commercial Rent Arrears Recovery (“CRAR”) under *Tribunals, Courts & Enforcement Act 2007*.

##### 2. Forfeiture

In order to bring an action for forfeiture the landlord must serve a s 146 Notice (s 146(1) LPA 1925). The notice must specify the breach and the tenant must be given opportunity to remedy; if unremedied, the landlord can apply for possession.

The tenant can however apply to set aside forfeiture by paying arrears and costs (s 146(2)).

##### 3. Self-help

This entails peaceful re-entry by the landlord if the lease expressly allows. The case of **Jervis v Harris** [1996] Ch 195 established the principle that allows a landlord, after giving the tenant proper notice and a chance to rectify the breach, to enter the premises and carry out the necessary repairs themselves. The landlord is allowed to recover the expenses incurred as a contractual debt.

##### 4. Dilapidations

At lease end, the landlord can claim the cost to remedy tenant’s breaches of repair/decoration obligations, recovering via a dilapidations schedule and court action if necessary.

##### 5. Specific Performance or Injunction

For unique covenants (e.g., restrictive covenants in subletting), landlord can seek an equitable injunction to compel or prevent actions.

#### 5.4.5 Balancing Enforcement and Relationship

- **Pragmatic approach:** Heavy-handed forfeiture can risk reputational damage. As a result, many landlords negotiate rent plans or serve statutory demands rather than immediate re-entry.



- **Clear notice:** Following formal procedures (e.g., serving s 146 letters, CRAR notices) protects the landlord's remedy and avoids claims of unlawful eviction.
- **Tenant education:** Encourage tenants to understand their repair obligations and how to lawfully carry out works to avoid disputes.

## 5.5 Enforcement of Leasehold Covenants

When a lease is granted, both landlord and tenant make promises ("covenants") to one another. Enforcing those promises depends on two principles, privity of contract and privity of estate and was significantly reformed by the *Landlord and Tenant (Covenants) Act 1995*.

### 5.5.1 Privity of Contract

The original lease agreement creates a contractual relationship binding only the original parties, the landlord and the tenant. Therefore, if Tenant A breaks a covenant (e.g. fails to repair), only the original Landlord L can sue A for breach. If A assigns the lease to B, L cannot sue B under the original contract (absent a guarantee).

In *Beswick v Beswick* [1968] AC 58, the widow had a contractual right under her late husband's lease but had to enforce it in her personal capacity, illustrating the old rigidity of privity of contract.

### 5.5.2 Privity of Estate

This is a proprietary rule linking the leasehold estate itself (the right to occupy) with certain lease covenants that "touch and concern" the land. A covenant touches and concerns the land where it benefits or burdens the land itself rather than a personal obligation (e.g. repair obligations, payment of rent).

Successors in title to landlord or tenant are bound by these covenants, so a landlord's successor can enforce tenant covenants, and a tenant's assignee takes the lease subject to those covenants.

Under privity of estate, B (assignee) cannot escape repair covenants simply by virtue of assignment. But privity of estate does not bind B to the original landlord's personal covenants (e.g. a covenant to grant an option) unless those also touch the land.

### **5.5.3 Reform under the Landlord & Tenant (Covenants) Act 1995**

The Act addresses the unfairness of privity of contract by extending the reach of both landlord and tenant covenants to assignees and successors, subject to certain limits.

#### **1. Repeal of Privity of Contract for New Leases**

For any lease granted after 1 January 1996, original tenant covenants (that touch and concern the land) automatically pass to the assignee, and original landlord covenants pass to successors in title. This means assignee is bound by tenant covenants and landlord's successor can enforce them, no separate personal contract is needed. Upon a lawful assignment, the original and outgoing tenant is automatically released from all tenant covenants for the future. They are no longer liable for breaches committed by any assignee.

#### **2. Authorised Guarantee Agreements (AGAs)**

These agreements are important for landlords to hold outgoing tenants (A) responsible if the incoming tenant (B) later defaults. If A requests and obtains the landlord's consent to assign, A must enter an AGA guaranteeing B's performance of the lease covenants. AGA obligations have a time limit; they expire 12 months after the assignment date (*s 17*). AGAs only cover covenants that A would have been liable for during that first year; does not cover future breaches.

In *Arnold v Britton* [2015] UKSC 36, the Supreme Court emphasized precise drafting of both covenants and AGAs, an AGA must mirror exactly the lease obligations it guarantees, or gaps can arise.

## **5.6 Assignments, Subleases, and Consent Requirements**

A lease represents a significant asset, whether for commercial or residential purposes, and tenants often seek to transfer or sublet this interest. Landlords, however, aim to safeguard the character of their property and the financial reliability of new occupants. This balance is

achieved through carefully drafted alienation covenants within lease agreements. Alienation refers to the tenant's disposal of their leasehold estate, which can occur through assignment, subleasing, charging (creating a mortgage over the lease), or parting with possession or occupation. This section explores assignments and subleases in depth, including the formalities, legal effects, consent requirements, and the role of Authorised Guarantee Agreements (AGAs). It also examines the key differences between "old" leases (granted before 1 January 1996) and "new" leases (granted on or after that date) under the *Landlord and Tenant (Covenants) Act 1995 (LT(C)A 1995)*, and their implications for enforceability.

### 5.6.1 Assignment (Transfer of the Entire Lease Term)

An assignment involves the tenant (assignor) transferring the entirety of their remaining interest in the lease to a new tenant (assignee). No new lease is created; instead, the existing lease simply changes hands. The assignee "steps into the shoes" of the assignor, acquiring the right to occupy the property, the obligation to pay rent, and the duty to comply with all lease covenants as if they were the original tenant. This transfer must be executed by deed to be legal (*s 52(1) LPA 1925*), provided the lease term exceeds three years. For shorter terms, it may qualify as a parol lease if meeting the criteria in *s 54(2) LPA 1925*.

Assignments are common when a tenant wishes to exit the lease entirely, such as due to relocation or financial changes. The assignor relinquishes all rights and liabilities under the lease (subject to rules on ongoing liability, discussed below), and the assignee becomes directly liable to the landlord. This creates a new privity of estate between the landlord and assignee, meaning the assignee is bound by covenants that "touch and concern" the land (e.g., rent payment, repair obligations) during their tenure. However, personal covenants (e.g., a unique promise by the original tenant) do not pass.

Landlords impose restrictions on assignments to ensure the assignee's financial stability and suitability, as the assignee holds the full leasehold estate. Unlike a temporary sublease, an assignment shifts the primary relationship to the new tenant, prompting landlords to require assurances like financial statements, references, or business plans before consenting.

**Example:** Suppose Mr. Mark (T) holds a 10-year commercial lease from Ms. Ruth (L), with 7 years remaining. Mr. Mark assigns the lease to Betty. Betty now pays rent directly to Ms

Ruth and must comply with all covenants, such as maintaining the property. Mr. Mark steps out completely but may retain liability under old lease rules or an AGA (see below).

### Implications for Liability

- **Under old leases (pre-1995):** The original tenant remains liable via privity of contract for the entire term, even after assignment. The assignee is liable via privity of estate only while the lease is vested in them.
- **Under new leases (post-1995):** The assignor is automatically released from liability upon assignment (*s 5 LT(C)A 1995*), unless an AGA is in place. Covenants pass to the assignee under *s 3 LT(C)A 1995*, without needing to "touch and concern" the land, unless expressed as personal.

If the assignee breaches a covenant, the landlord can pursue recovery through indemnity chains (implied under *s 77 LPA 1925* for unregistered land *or Sch 12 LRA 2002* for registered land) or common law principles (*Moule v Garrett* [1872] LR 7 Ex 101), where one party discharging another's liability can seek reimbursement.

### 5.6.2 Sublease (Underletting)

A sublease, or underletting, occurs when the tenant (head tenant or sublessor) grants a new, shorter lease (sublease) to a subtenant for part of the original lease term. The sublease must be for a duration less than the head lease to avoid merging into an assignment. The head tenant retains their interest in the head lease and becomes the landlord to the subtenant. Thus, the subtenant owes obligations (e.g., rent, covenants) solely to the head tenant, with no direct privity of contract or estate between the subtenant and the original landlord.

Subleases allow tenants to retain control while monetizing part of their interest, such as subletting excess space in a commercial property. The head tenant remains fully liable to the original landlord for the head lease covenants, acting as a "middleman." This creates three concurrent estates: the freehold (or superior lease), the head lease, and the sublease. The sublease is carved out of the head lease, so if the head lease ends (e.g., via forfeiture), the sublease typically terminates as well.

Formalities mirror those for leases: a deed is required for terms over three years; shorter terms may be oral or written if meeting s 54(2) LPA 1925 criteria.

Landlords restrict subletting to maintain oversight, as they lack direct recourse against the subtenant. Without control, subtenants could misuse the property, leaving the head tenant responsible and the landlord indirectly affected. Leases often require the sublease to include covenants mirroring the head lease to ensure consistency.

**Example:** Samson (L) grants Scott (T) a 99-year head lease. Scott sublets to Isaac (S) for 20 years. Isaac pays rent to Scott, who pays to Samson. If Isaac breaches (e.g., damages the property), Scott must remedy it to avoid an action by Samson. If Scott's head lease is forfeited, Isaac's sublease ends.

### Implications for Liability

- **Under old leases (pre-1995):** The head tenant remains liable via privity of contract. Subtenants are not directly bound to the landlord but may be affected if the head lease fails.
- **Under new leases (post-1995):** The head tenant's liability persists as they retain the head lease. Covenants in the sublease are separate, but the *LT(C)A 1995* does not alter the head tenant's ongoing responsibility.

### 5.6.3 Distinguishing Assignment from Sublease

Assignment transfers the entire remaining term; the assignor exits; and there exists direct relationship between landlord and assignee. However, a sublease creates a new, shorter term; the head tenant remains liable; and there is no direct landlord-subtenant relationship.

If the "sublease" term equals or exceeds the head lease term, courts may reclassify it as an assignment to prevent circumvention of consent rules.

### 5.6.4 Consent Clauses

To balance tenant flexibility with landlord protection, leases typically include alienation covenants requiring the tenant to obtain the landlord's prior written consent before assigning,

subletting, charging, or parting with possession. These covenants can be absolute (total prohibition), qualified (consent required), or fully qualified (consent not to be unreasonably withheld). Legislation modifies these to prevent abuse.

### **Notice and Procedure**

Tenants must submit a formal written application, including details like the proposed assignee's financials, references, or business plan. The landlord has a reasonable time (e.g., 28 days under case law) to respond, per the *Landlord and Tenant Act 1988 (LTA 1988)*. Failure to respond promptly may be deemed unreasonable.

### **Reasonableness Test**

For qualified covenants, s 19 *LTA 1927* converts them to fully qualified, prohibiting unreasonable withholding. The *LTA 1988* requires written decisions with reasons if withheld. Reasonableness is objective. Valid grounds include the assignee's financial instability or intended use breaching covenants; invalid ones include personal grudges or extraneous demands (e.g., *Shell UK Ltd v Lostock Garage Ltd* [1976] 1 WLR 1187, where withholding to force price changes was unreasonable). For commercial leases post-1995, s 19(1A) *LTA 1927* allows pre-agreed conditions (e.g., AGA requirement) exempt from reasonableness.

For residential leases, the test is similar, but statutes like the *Housing Act 1988* for assured shorthold tenancies emphasize fairness.

### **5.6.5 Authorised Guarantee Agreements (AGAs) in Commercial Leases**

An Authorised Guarantee Agreement (AGA) is a statutory mechanism under s 16 *LT(C)A 1995* for new leases (post-1996), where the outgoing tenant guarantees the incoming assignee's performance of tenant covenants. It addresses the automatic release of assignors from liability (s 5 *LT(C)A 1995*), providing landlords a temporary "backstop" without perpetual privity of contract.

AGAs apply primarily to non-residential leases. They ensure the assignor remains liable for their immediate assignee's breaches, balancing the *LT(C)A 1995*'s tenant-friendly release. AGAs are not automatic; landlords must require them as a consent condition.

### Key Features and Terms

- **Scope:** It guarantees all tenant covenants (e.g., rent, repairs) that "touch and concern" the land, but only for the immediate assignee's tenure. Personal covenants do not apply.
- **Duration:** It is limited to the period until the next assignment (*s 16(4) LT(C)A 1995*); ceases upon further assignment. Typically, 12 months in practice, but statutorily tied to the assignee's liability.
- **Formality:** It must be a separate deed or agreement, precisely mirroring the guaranteed obligations. It is executed upon assignment with landlord consent.
- **Primary Obligation:** Landlord can sue the guarantor (assignor) directly without pursuing the assignee first.
- **Sublease Guarantee:** If the assignee sublets, the AGA may extend to ensuring subtenant compliance indirectly.
- **Bankruptcy Provision:** If the assignee's lease is disclaimed (e.g., in bankruptcy), the guarantor may be required to take a new lease on similar terms (*s 16 LT(C)A 1995*).

It is required only if the lease prohibits alienation without consent, and it's reasonable or a pre-agreed condition (*s 19(1A) LTA 1927*). Landlords cannot demand AGAs for old leases retroactively, but *s 16* applies to new ones.

### 5.6.6 Differences Between Old and New Leases and Implications

- **Old Leases (pre-1996):** Governed by common law doctrine of privity. Original tenant is liable for entire term via privity of contract, even after assignment. Assignees are liable via privity of estate only while holding the lease. There is no automatic release; thus, indemnity chains are common. The implication is that original tenants face ongoing risk, leading to "liability chains" and potential unfairness (e.g., pursuing distant former tenants for current breaches). Retrospective *LT(C)A 1995* provisions (*ss 17-19*) limit recovery. Default notices are required within 6 months for fixed charges, no overriding arrears from before assignment, and notice of increased charges.

- **New Leases (post-1996):** *LT(C)A 1995* abolishes perpetual privity; s 5 releases assignors automatically. Covenants pass fully (s 3). AGAs provide limited guarantee. These provisions are fairer for tenants. They reduce indefinite liability, but landlords use AGAs for protection. It encourages careful drafting; retrospective sections protect former tenants from surprise claims. Overall, it shifts burden to current parties, promoting market fluidity but requiring robust consent clauses.

**Example:** In a new commercial lease, Tenant (T) assigns to A with Landlord's (L) consent, providing an AGA. A breaches rent payment. L can sue A (current tenant) or T (under AGA). If A assigns to B, T's AGA ends; L may require A to provide a new AGA for B.

In practice, as solicitors, advise clients on negotiating AGA terms to limit exposure, and ensure compliance to avoid invalidity.

## 5.7 Ending a Lease: By Time, Forfeiture, Surrender, and Break

A lease is a time-bound interest in land, enduring only for its agreed term unless terminated early through specific mechanisms. This section provides a comprehensive exploration of the four primary methods by which a lease can conclude: effluxion of time, forfeiture, surrender, and break clauses. Each method carries distinct legal implications, offering flexibility or protection depending on the circumstances of the landlord and tenant.

### 5.7.1 Forfeiture (Termination for Breach)

Forfeiture allows a landlord to terminate the lease prematurely when the tenant commits a serious breach of covenant, with non-payment of rent being the most frequent trigger. This remedy restores the landlord's possession, effectively ending the leasehold interest, but it is subject to strict legal procedures to protect the tenant's rights.

#### Court Order

For a more secure termination, landlords rely on a court order following the procedure under *s 146(1) LPA 1925*. This requires serving a notice specifying the breach (e.g., £5,000 in rent arrears), detailing the remedial action needed (e.g., payment within 14 days), and warning of forfeiture if unaddressed. The notice period, typically 14–28 days, allows the tenant time to



cure the breach, though this can be shortened for persistent non-payment under s 146(3) LPA 1925 if the lease permits.

If the tenant fails to remedy the breach, the landlord can apply to the County Court or High Court for a possession order. The court assesses the breach's severity and the lease terms, ensuring compliance with statutory protections like the *Protection from Eviction Act 1977*.

### 5.7.2 Effluxion of Time

Effluxion of time represents the natural expiration of a lease when its fixed term concludes. This occurs automatically at the end of the lease period, typically at midnight on the final day, marking the cessation of the tenant's right to exclusive possession. The lease agreement, often detailed in the original deed or contract, stipulates this endpoint, which could range from months to decades depending on the lease type (e.g., a 99-year ground lease or a one-year residential tenancy).

Upon expiry, the tenant is obligated to "yield up" the premises, a legal duty requiring them to return possession to the landlord. This process involves returning keys, vacating the property, and leaving it in the condition mandated by the repair covenant—typically a state of good repair, accounting for fair wear and tear unless otherwise specified. Failure to comply transforms the tenant into a trespasser, exposing them to claims for mesne profits—damages equivalent to rent for wrongful occupation. Courts may award these profits from the expiry date until the tenant vacates, as seen in cases like ***Wharf Properties Ltd v Eric Cumine Associates*** [1991] 1 WLR 72, where holdover tenants faced liability.

### 5.7.3 Surrender

Surrender ends a lease through mutual agreement, either expressly or implicitly, offering a flexible exit strategy for both parties.

#### 1. Express Surrender

An express surrender is formalized via a deed of surrender, a concise document signed by both landlord and tenant stating the lease ends on a specified date (e.g., "we agree the lease terminates on 26 September 2025"). This legal instrument, executed under s 52 LPA

1925, clears the title, extinguishes rent liability, and enables the landlord to re-let without encumbrance. It is particularly useful when both parties wish to terminate early, such as during financial distress or redevelopment.

## 2. Implied Surrender

Implied surrender arises when the tenant permanently abandons possession, and the landlord accepts this abandonment, often by re-letting the property as if vacant. For instance, if a tenant vacates and the landlord advertises the property without objection, acceptance is inferred. However, this method is legally precarious, as courts require clear evidence of mutual intent (e.g., *Surrey CC v Bredero Homes Ltd* [1993] 1 WLR 1361). Relying solely on implied surrender risks challenges from the tenant claiming continued rights.

### 5.7.4 Break Clauses

Break clauses provide negotiated rights for either party to terminate the lease early, offering flexibility in long-term agreements. These clauses are contractually defined and must be strictly adhered to for valid exercise.

#### Drafting Essentials

- **Clear Break Date(s):** Specifies the eligible termination date(s), e.g., “any time on or after 1 June 2028,” ensuring precision to avoid disputes over timing.
- **Notice Period:** Requires the tenant to serve written notice (e.g., 6 months) within a set window, aligning with the break date. Notice must be served per the lease’s method (e.g., recorded delivery).
- **Conditions Precedent:** Commonly includes “all rent and other sums due have been paid” and “no uncured breaches.” These ensure the tenant meets obligations before exercising the break.
- **Strict Compliance:** Courts demand exact adherence. Minor breaches like late notice by one day or a small unpaid sum invalidate the break, as ruled in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749, where strict interpretation prevailed despite good faith efforts.

**Example:** A tenant with a 10-year lease and a break clause effective after 5 years serves 6 months' notice but misses a £50 service charge payment. The landlord can reject the break, requiring full compliance.

## 5.8 Remedies in Leasehold Disputes

Leasehold agreements establish a framework of mutual obligations, and breaches by either party necessitate effective remedies to restore balance. This section explores the options available to landlords for addressing non-payment of rent and other covenant breaches, as well as remedies for tenants when landlords fail to uphold their duties.

### 5.8.1 Remedies for Breach of Other Covenants

When tenants violate covenants beyond rent such as repair obligations, use restrictions, or unauthorized alterations landlords have several avenues to enforce compliance or seek redress.

#### 1. Forfeiture

Forfeiture allows landlords to terminate the lease and reclaim possession for breaches like illegal use or significant disrepair, provided the lease includes a forfeiture clause. The process involves serving a notice under *s 146(1) LPA 1925*, detailing the breach (e.g., “failure to repair within 30 days”) and offering a remedy period. If unresolved, the landlord can pursue a court order for possession. Tenants may seek relief by correcting the breach and demonstrating good faith, as upheld in similar judicial precedents.

This drastic step may not recover past losses and is often combined with other remedies.

#### 2. Self-Help Remedy

Landlords can undertake repairs or other covenant obligations themselves and recover costs from the tenant if the lease permits (e.g., “landlord may enter to remedy and charge expenses”). This requires prior notification to the tenant, detailed cost records, and either a rent deduction or separate claim. Applicable mainly to repair covenants, this approach

avoids court delays but risks trespass claims if not authorized. Note that unauthorized entry without lease support can lead to legal challenges.

### 3. **Specific Performance**

In cases where damages fall short, landlords can seek specific performance, an equitable order requiring the tenant to fulfill a covenant, such as completing overdue repairs. This remedy applies when the obligation involves unique property aspects and the covenant is clearly defined. Courts may set a compliance timeline, with non-compliance risking contempt proceedings. However, it is sparingly used, particularly for obligations resembling personal services. Note that success depends on the covenant's precision and mutual enforceability.

### 4. **Damages**

Landlords may claim damages to cover losses from a tenant's breach, such as the cost to repair damage or the reduced value of the property. For instance, if a tenant neglects to maintain a fence, the landlord could recover the repair expense or lost rental potential. The claim requires evidence of the breach's impact, and the landlord must take reasonable steps to minimize losses, such as re-letting the property promptly. Courts assess these claims based on submitted proof, like contractor estimates. This remedy suits one-off losses but may not address ongoing issues effectively.

## 5.8.2 Remedies for Non-Payment of Rent

Non-payment of rent, a frequent breach, triggers specific remedies designed to recover arrears and protect the landlord's financial interest.

### 1. **Commercial Rent Arrears Recovery (CRAR)**

Exclusive to commercial leases, CRAR under the *Tribunals, Courts and Enforcement Act 2007* enables landlords to seize and sell the tenant's goods to recover arrears. Requirements include arrears exceeding seven days' rent (or a quarter if paid quarterly), a seven-day notice of enforcement, and engagement of a certified enforcement agent.

Goods like equipment or inventory can be taken and sold, with proceeds covering rent, fees, and costs.

This remedy is inapplicable to residential or mixed-use leases, or during tenant insolvency proceedings, and requires peaceful execution.

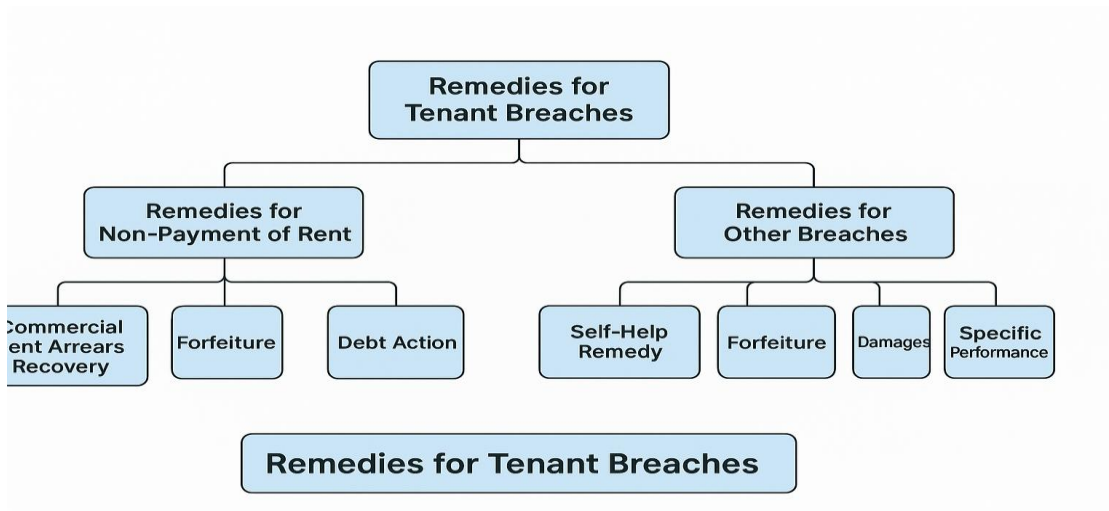
## **2. Forfeiture**

For non-payment, forfeiture permits lease termination and re-entry if the lease allows (e.g., “rent unpaid for 21 days permits re-entry”). Peaceable re-entry is possible without force, though any disturbance risks criminal liability. Alternatively, a *s 146(1) LPA 1925* notice specifies arrears and a remedy period, leading to a possession claim if unpaid. Tenants can seek relief by settling arrears and costs before court, a remedy often granted with prompt action.

## **3. Debt Action**

Landlords can pursue a debt action to recover unpaid rent as a contractual obligation. This common law remedy involves filing a claim in the County Court or High Court, supported by lease terms and payment records. A successful judgment allows recovery of arrears, interest, and legal costs, enforceable via methods like wage garnishment or bailiff action. This approach preserves the lease while addressing the debt.

The effectiveness of this remedy depends on the tenant’s ability to pay and may face delays if contested.



### 5.8.3 Tenant's Remedies for Breach of Landlord Covenants

When landlords fail to meet obligations such as repairing common areas or providing services tenants have remedies to enforce compliance or seek compensation.

#### 1. Self-Help

Tenants may perform repairs and deduct reasonable costs from rent if permitted by the lease or statute (e.g., *s 11 Landlord and Tenant Act 1985* for residential properties). This requires notifying the landlord, obtaining quotes, and retaining records. Over-deducting risks counterclaims for unpaid rent.

#### 2. Damages

Damages compensate tenants for losses from a landlord's breach, such as costs for alternative heating due to neglected repairs. The tenant must prove causation and mitigate losses, pursuing claims through court with evidence like receipts or expert testimony.

#### 3. Injunction or Specific Performance

Tenants can request an injunction to halt ongoing breaches (e.g., unauthorized access) or an order of specific performance to compel landlord action (e.g., fixing a faulty boiler). These equitable remedies apply when damages are inadequate and the covenant is clear,

requiring the tenant to be in good standing (e.g., no rent arrears). Judicial decisions support this when property-specific issues arise.

Injunctions prevent future harm; specific performance addresses existing defaults.

## **5.9 Conclusion**

Leasehold interests represent a dynamic interplay of rights and obligations, shaped by the mechanisms of assignment, subleasing, and termination. Assignments and subleases facilitate the transfer of leasehold value, balanced by consent requirements and AGAs to protect landlords, with significant differences between old and new leases under the LT(C)A 1995 influencing liability and enforcement. Termination methods effluxion of time, forfeiture, surrender, and break clauses offer varied pathways to end a lease, each with legal safeguards to ensure fairness.

# 6

## SECURED LENDING; THE LAW OF MORTGAGES

A mortgage is the most common form of security for a loan secured against real property. Though familiarly “getting a mortgage,” the borrower actually grants the lender a security interest, allowing the lender to protect its loan by enforcing against the land. This chapter explains how mortgages work, how they’re created and registered, the rights and remedies lenders have, borrowers’ protections, and how competing claims are prioritized.

### 6.1 Nature and Function of a Mortgage

A mortgage is a security device. The borrower (mortgagor) grants a charge over land to the lender (mortgagee) to secure repayment of a debt. It enables lenders to lend large sums safely; if the borrower defaults, the lender enforces the security by sale, possession, or foreclosure.

A mortgage created by deed under LPA 1925 s 52 (a charge by way of legal mortgage) creates a legal interest. The borrower’s promise to repay is enforceable being a personal covenant.

### 6.2 Creation and Registration of Legal Mortgages

#### 6.2.1 Deed Formalities

*Section 52 LPA 1925* provides that mortgages of legal estates must be created by deed. Additionally, *s.52 1 LP(MP)A 1989* provides that deeds must be in writing, stated a deed, signed, witnessed, and delivered.



An equitable mortgage is created where deed formalities fail but parties intended security (e.g., deposit of title deeds). It could also be created where the mortgagor owns only an equitable interest.

### 6.2.2 Types of Legal Mortgage

- **Mortgage by demise:** This is the conveyance of the legal estate to the lender, subject to right of redemption.
- **Charge by covenant:** This is the legal charge over the land coupled with borrower's covenant to pay.

### 6.2.3 Registration

- **Registered land:** Mortgage must be registered as a charge on the Land Register (*s 27 LRA 2002*) to bind successors.
- **Unregistered land:** Available by deposit of title deeds ("deed in escrow") or deed registration as a Land Charge (Class C (i) under Land Charges Act 1972). Unregistered equitable mortgages must be registered or risk being void against a purchaser.

### 6.2.4 Fixed Charges vs Floating Charges

When lenders take security over a borrower's assets, they may choose between a fixed charge, which attaches to specific property, or a floating charge, which hovers over a changing class of assets until a defined event causes it to "crystallise." In the context of real-estate lending, mortgages are fixed charges over land.

#### 1. Fixed Charge

A fixed charge attaches to a specific, identifiable asset, such as a parcel of land or a building. The borrower cannot deal freely with that asset without the lender's consent.

In the case of land, a mortgage operates as a fixed charge and must be created by deed in accordance with *s 52 LPA 1925*. In cases where the land is registered, it must be registered against the title pursuant to *s 27 LRA 2002*. For personal property, fixed charges over corporate assets must be registered at Companies House under *s 874* of the *Companies*

*Act 2006* in order to ensure their validity and to protect the lender's interest against subsequent *bona fide* purchasers or competing creditors.

### **Key Characteristics**

Upon creation, a fixed charge is immediately attached to the asset and the lender acquires a direct proprietary interest in that asset. As a result, the chargor (borrower) is not permitted to sell, lease, or otherwise dispose of the charged asset without the chargee's (lender's) consent. Furthermore, fixed charges enjoy a clear order of priority in insolvency or enforcement scenarios; they rank according to the date on which they were created and registered. This framework provides a high level of protection and certainty to secured creditors.

### **Enforcement**

No crystallisation event is needed. The lender takes enforcement steps (sale, possession) directly against the specific asset.

## **2. Floating Charge**

A floating charge hovers over a class of assets, for example, "all furniture and plant" or "all stock in trade", allowing the borrower to use and dispose of them in the ordinary course of business until the charge "crystallises."

The statutory framework governing floating charges is set out in key legislation. *Section 175 of the Insolvency Act 1986* provides that a floating charge crystallises automatically upon the appointment of a receiver, the commencement of administration, or the winding up of the company. *Section 874 of the Companies Act 2006* additionally requires that all floating charges be registered, with specific rules governing their creation, registration, and enforcement. Compliance with these requirements is essential to ensure the validity and enforceability of the charge against third parties.

### **Key Characteristics**

Before crystallisation, the floating charge remains in a state of "hibernation," allowing the borrower to deal freely with the assets within the charged class without breaching the

charge. However, upon the occurrence of an event of default or the borrower's insolvency, the floating charge "crystallises," transforming into a fixed charge over the assets that exist at that moment. The landmark case of *Illingworth v Houldsworth* [1904] AC 355 introduced the modern floating charge, distinguishing it from fixed charges by its mobility pre-crystallisation.

### **Priority and Ring-Fencing**

By virtue of s 176A *Insolvency Act 1986*, a portion of the company's asset pool is ring-fenced for unsecured creditors before the floating chargee can claim. Floating charges rank behind fixed charges in insolvency, reflecting their lower security.

## **6.3 Rights and Remedies of Mortgagees**

A mortgagee's security over land comes with a suite of enforcement remedies; possession, sale, receiver, and, in extremis, foreclosure, each governed by statute and tempered by equitable principles.

### **6.3.1 Appointment of Receiver**

A receiver is an agent appointed by the mortgagee to manage and realize income from mortgaged property, particularly where it is let to tenants. *Section 101(1)(iii) LPA 1925* provides that once in possession, the mortgagee may appoint a receiver to collect rents, profits, and outgoings.

#### **1. Method of Appointment**

A receiver can be appointed by power in mortgage deed. A deed will typically include a power to appoint a receiver, often exercisable on default or entry into possession. A receiver can also be appointed by court. If no power exists under the deed, the mortgagee may apply to court under its general equitable jurisdiction to appoint a receiver in appropriate cases.

## 2. Duties and Powers

The receiver acts as an agent of the mortgagee rather than as a trustee, meaning they operate in the mortgagee's name with the primary duty of securing and applying income from the property towards repayment of the debt. They also owe a duty of care to act reasonably and to avoid negligence in the management of the property, as established in ***Four Maids Ltd v Dudley Marshall (Properties) Ltd*** [1957] Ch 317. In exercising their role, a receiver has a range of powers, including the ability to let or re-let the property, collect rents, carry out necessary repairs to protect the income stream, and, if authorised, sell leasehold interests.

## 3. Interaction with Other Remedies

**Receiver vs Power of Sale:** The appointment of a receiver does not oust the mortgagee's power of sale unless the mortgage deed so provides. A receiver can coexist with a pending sale power.

**Effect on Redemption:** Receiver's appointment does not affect the mortgagor's redemption rights. Once debt is paid, receiver's agency ends.

## 4. Liability for Breach

If a receiver misapplies funds or acts negligently (e.g. letting at under-market rent), they can be personally liable for losses to both mortgagee and mortgagor.

### 6.3.2 Possession

Under *s 101(1)(i) LPA 1925*, once a legal mortgage is created, the mortgagee may take possession of the mortgaged property at any time, even before default. In practice, lenders wait until the borrower misses payments. Entry is often by peaceable re-entry (changing locks), but if met with resistance, the mortgagee must seek a court order.

Equity will restrain oppressive or premature possession (e.g. where the mortgagee has alternative remedies or where the borrower is negotiating repayment). In ***Four Maids Ltd v Dudley Marshall (Properties) Ltd*** [1957] Ch 317 the Court of Appeal held that a

mortgagee-in-possession owes the mortgagor duties akin to a trustee, including not to abuse the power.

### 6.3.3 Sale

A mortgagee's power of sale gives the ability to sell the mortgaged property and use the proceeds to repay the debt. This remedy is heavily regulated to ensure fairness to the borrower.

*Section 99 LPA 1925* provides that a mortgagee in possession always has a power of sale, even if no other condition is met. *Section 103 LPA 1925* grants a power of sale without taking possession once either the principal money secured is due and interest under the mortgage is in arrear for at least three months, or a written notice requiring payment (under s 87) has been served on the borrower, and payment remains outstanding for the period specified in the notice.

### Notice Requirements

Where power is exercised without possession, the mortgagee must first serve a notice of its intention to sell on the mortgagor (and any others with an interest) under s 103(2) or s 103(3), specifying:

- The debt amount;
- That the power of sale is about to be exercised;
- A rebate period (at least two months) for the borrower to repay and stop the sale.

### Mortgagee's Duties When Selling

- **Duty to Obtain True Market Value**

In *Cuckmere Brick Co v Mutual Finance Co* [1971] Ch 949, it was held that a mortgagee must take reasonable steps to secure the best price reasonably obtainable. Failure to do so exposes the lender to a claim for the shortfall between price achieved and true market value.

- **Duty to Account**

Under *s 105 LPA 1925*, a mortgagee must make a proper account of receipts and payments, applying sale proceeds in the correct order.

### **Risks of Improper Sale**

If the borrower can demonstrate that the mortgagee failed to fulfil their marketing duties, for example, by not taking reasonable steps to achieve the best possible price, the borrower may bring a claim for undervalue and recover the resulting shortfall. Additionally, failure to serve the correct notices before exercising the power of sale can render that power invalid, preventing the mortgagee from enforcing their security. Furthermore, selling the property without first addressing or clearing overriding interests, such as rights of occupation, may lead to priority disputes and legal challenges from third parties.

Courts enjoy equitable oversight. They are empowered to intervene if a sale is conducted in bad faith (e.g., insider purchasers, undervaluation, or improper marketing).

### **6.3.4 Foreclosure**

While foreclosure can extinguish the borrower's equity of redemption and vest absolute title in the mortgagee, it is usually treated as a last-resort remedy due to its severity.

*Section 91 LPA 1925* allows a mortgagee, upon borrower's default, to apply to the court for a foreclosure decree, ending the mortgagor's right to redeem and giving the mortgagee the legal estate outright.

The procedure can be initiated upon default, that is, where the mortgagor breaches repayment terms. Often, mortgage documentation requires notice before foreclosure proceedings. The application of the mortgagee consists of a claim and affidavit of default issue. During hearing, the court considers whether foreclosure is appropriate.

### **Equity's Reluctance**

Courts favour decree for sale over foreclosure, preserving the mortgagor's right to redeem on equitable terms (e.g., repayment plus interest), unless the borrower's conduct makes

redemption unconscionable. It was held in ***Warnborough v Garmite*** [2003] EWCA Civ 1318 that even after foreclosure proceedings start, the court can refuse foreclosure and order sale to protect student-borrower equity of redemption. The case of ***Knightsbridge Estates Trust Ltd v Byrne*** [1940] AC 613 illustrates that a voluntary long-term mortgage covenant will be enforced literally, but foreclosure remains discretionary.

### Consequences of Foreclosure

It extinguishes the borrower's right to redemption. The borrower loses all interest and has no right to reclaim the property even if debt is paid. Foreclosing mortgage moves to top of priority but extinguishes any subordinate charges. Subsequent purchasers (third parties) take subject to foreclosure; any sub-mortgages are wiped out.

### Redemption after Decree

In rare instances, courts have allowed mortgagors to redeem after decree by paying the debt and costs, especially where foreclosure was granted in error or borrower has acted promptly (an exceptional exercise of equitable jurisdiction).

## 6.4 Duties Owed by Lenders

1. **Duty to account:** A mortgagee must apply the proceeds of sale in a strict order; first to the costs of sale, then to repay the outstanding debt, and finally to any subordinate charges or the borrower, as required by *s 105 LPA 1925*. This ensures that all parties with an interest in the property are fairly compensated from the sale proceeds.
2. **Duty to obtain proper sale:** Under the principle established in ***Cuckmere Brick Co Ltd v Mutual Finance Ltd*** [1971] EWCA Civ 9, a mortgagee must take reasonable care to achieve the best price reasonably obtainable at the time of sale. Failure to market the property properly or to disclose relevant information could lead to a claim for losses by the borrower.
3. **Duty of care in possession:** Once a mortgagee takes possession, they must act with reasonable care to protect and preserve the property's value. This includes managing

the property responsibly, carrying out necessary maintenance, and avoiding negligence that could reduce its worth.

## 6.5 Protection for Borrowers and Equitable Considerations

### 6.5.1 Equity of Redemption

This refers to borrower's right to repay and reclaim the land in full, separate from contractual terms. It must not be cut down by clogs or fetters (***Samuel v Jarrah Timber*** [1904] AC 323).

### 6.5.2 Equitable Variations and Extensions

Courts can restructure onerous terms (e.g., interest penalties) and vary mortgage terms as held in ***Mortgage Corporation v Shaire*** [2001] Ch 743 in order to balance creditors and debtors' interests.

### 6.5.3 Protections in Consumer Mortgages

The *Consumer Credit Act 1974* and Financial Conduct Authority Rules require clear information, fair treatment, and rights to a repossession pre-action protocol.

## 6.6 Priority and Tacking of Mortgages

### 6.6.1 "First in Time, First in Right"

#### 1. Registered Land

Under s 28 of the *Land Registration Act 2002*, priorities among registered interests are determined by the order of entry on the register. The first mortgage registered takes precedence over later charges.

For example, Lender A's charge entered on 1 March 2024 outranks Lender B's charge entered on 15 March 2024. A must be paid in full before B receives anything.



## 2. Unregistered Land

Mortgages must be protected by registration as Land Charges under the Land Charges Act 1972 to bind purchasers. A legal mortgage is registered as a Class C(i) charge while an equitable mortgage (e.g. failed deed) is registered as Class C(iii) charge. Priority follows the chronological order of registration at the Land Charges Registry, first to register takes priority.

### 6.6.2 Overriding Interests

Even a properly registered mortgage can be trumped by certain unregistered rights known as overriding interests on registered land.

#### 1. Actual Occupation

Under *Schedule 3, paragraph 2, LRA 2002*, a person in actual occupation of the land, such as a spouse living in the home, holds an interest that overrides later registered charges, provided the occupation is obvious on a reasonably careful inspection.

#### 2. Other Overrides

Short leases, legal easements, or certain rights arising under statute (e.g. public rights of way) can also override a registered mortgage.

### 6.6.3 Tacking Further Advances

Tacking allows a mortgagee to “add on” later loans to the security of an existing earlier mortgage, so that the later advance enjoys the same priority as the original charge.

For this to be effective, the mortgage deed must expressly provide the lender with a power of further advances. Absent such a term, each new advance creates a separate charge, losing priority to intervening interests. It is also important that no other lender or purchaser must have acquired an interest in the interim. If, for example, Lender A advances a further sum after Lender B registers its charge, A cannot tack that further advance ahead of B.

In *Hopkinson v Rolt* [1862] 4 De G. & J. 566, the court held that further advances properly tacked on maintain their priority so long as the instrument permits it and no intervening mortgagee has priority.

#### **6.6.4 Subrogation and Sub-Participation**

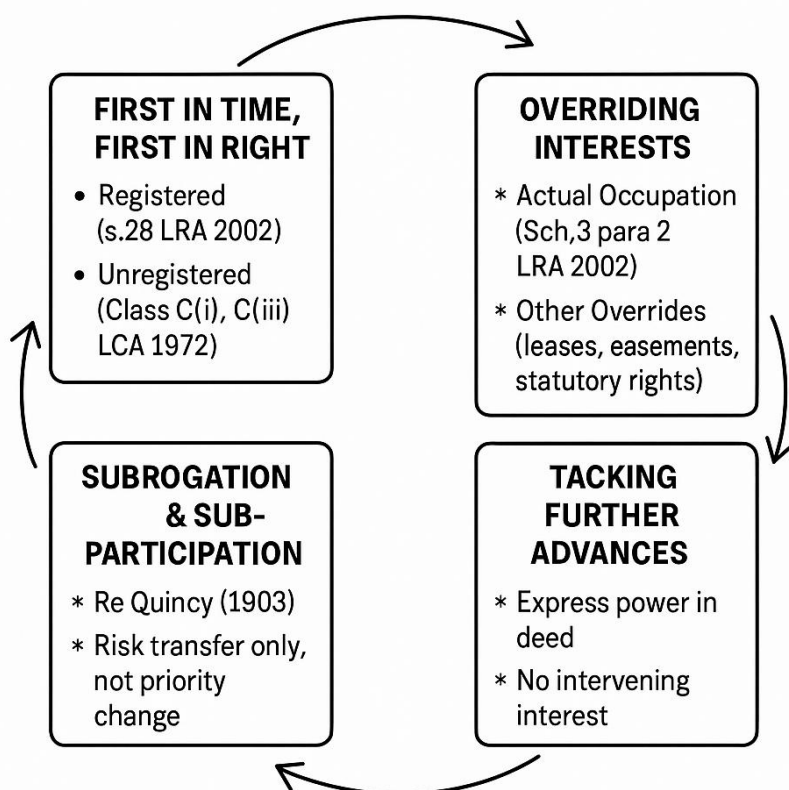
Where tacking is unavailable, equity and commercial practice provide alternative routes for preserving priority.

##### **1. Subrogation**

When a new lender pays off an existing higher-priority mortgage on the borrower's behalf, perhaps to clear title for a purchase. Equity may subrogate the new lender to the old charge's priority. The lender "steps into the shoes" of the paid-off mortgagee (*Re Quincy* [1903] 2 Ch 450).

##### **2. Commercial Sub-Participation**

Lenders sometimes enter sub-participation agreements. Lender A lends to the borrower, then sub-participates (sells) the economic risk of that loan to Lender B, without assigning the mortgage deed. Public priority remains unchanged, but the risk is transferred contractually.



## 6.7 Conclusion

A mortgage is a fundamental security device, allowing a lender to secure a debt against land. Its creation and priority are governed by the *Law of Property Act 1925* and the *Land Registration Act 2002*, with registration being key to establishing legal validity and precedence. Lenders' remedies, such as sale and possession, are balanced by equitable principles, including the duty to obtain the true market value for the property. Ultimately, while the system protects the lender's investment, it also safeguards the borrower's equity of redemption and other rights, ensuring a regulated and fair process for both parties.

# 7

## COVENANTS AFFECTING FREEHOLD LAND

A freehold covenant is a promise, created by deed or contract, between freehold landowners. Typically arising on the sale of part of a seller's land, the promise obliges one party (the covenantor) to do, or not to do, something on their own land for the benefit of the neighbouring land owned by the other party (the covenantee). The principal challenge in this area of law is ensuring that such promises can bind subsequent owners of the land, thereby moving beyond a purely personal contractual obligation.

### 7.1 The Fundamentals of Freehold Covenants

#### 7.1.1 The Nature of a Covenant as a Property Right

A covenant is not capable of being a legal interest in land, as it does not appear in the exhaustive list provided by *s 1(2) of the LPA 1925*. Consequently, a covenant is equitable in nature by virtue of *s 1(3) LPA 1925*. This classification holds true even when the covenant is created by a deed.

#### 7.1.2 Formalities for Creation

As an equitable interest, a covenant must be created in writing and signed by the covenantor to comply with *s 53(1)(a) LPA 1925*. In practice, covenants are almost always contained within the deed of transfer or conveyance when part of a landed estate is sold.

### 7.1.3 Distinguishing Positive and Restrictive Covenants

A fundamental distinction exists between positive and restrictive covenants, which dictates how (and if) their burden can pass to successors in title.

- A positive covenant requires the covenantor to expend money or effort to perform an obligation (e.g., to build a wall, to maintain a fence, to contribute to repair costs).
- A restrictive (or negative) covenant merely requires the covenantor to refrain from doing something (e.g., not to use the property for business, not to build without consent).

The substance of the obligation, not its phrasing, determines its classification. A covenant "not to allow the property to fall into disrepair" is positive in substance as it implies an obligation to spend money on repairs.

### 7.1.4 Liability of the Original Parties

The original covenantor and covenantee are bound by privity of contract. The original covenantor remains personally liable for the covenant's performance indefinitely, even after selling the land. This liability can be implied by *s 79 LPA 1925*, which states that a covenant relating to any land of the covenantor is deemed to be made on behalf of themselves and their successors in title, unless a contrary intention is expressed.

## 7.2 The Transmission of the Burden of a Covenant

When a covenant is created, it's a promise tied to land, but the question is whether that promise applies to future owners of the land. The "burden" of a covenant refers to the obligation it imposes on the owner of the servient land (the land restricted by the covenant). This section explains how the burden of a covenant passes (or doesn't pass) to new owners under common law and equity, with clear examples to illustrate the concepts.

### 7.2.1 The Common Law Position

At common law, the burden of a covenant whether positive (requiring action, like maintaining a fence) or restrictive (preventing action, like not building) does not automatically pass to a new owner of the servient land. This rule was established in ***Austerberry v Corporation of Oldham*** [1885] 29 Ch. D. 750 and confirmed in ***Rhone v Stephens*** [1994] 2 AC 310. The reasoning is that common law views covenants as personal promises between the original parties who made the agreement (the covenantor and covenantee). A new owner, who wasn't part of the original deal, can't be forced to follow a promise they didn't make.

#### Example

Imagine Sarah owns a large plot of land and sells part of it to Tom. As part of the sale, Tom promises in a deed not to build anything taller than one storey (a restrictive covenant) and to maintain a shared boundary fence (a positive covenant). Later, Tom sells his land to Emma.

Under common law, Emma isn't bound by either the restrictive covenant (no tall buildings) or the positive covenant (maintaining the fence) because she didn't personally agree to them. Sarah can only sue Tom for any breach, as he was the original covenantor. For instance, if Emma builds a two-storey house, Sarah can't sue Emma at common law, but she could sue Tom for breaching the original promise.

This rule limits the enforceability of covenants, especially for positive ones, as the original covenantor might no longer own the land, making it impractical to enforce.

### 7.2.2 The Equitable Exception: The Rule in *Tulk v Moxhay*

Equity, a branch of law focused on fairness, provides an exception to the common law rule for restrictive covenants only. The rule from ***Tulk v Moxhay*** [1848] 41 ER 1143 allows the burden of a restrictive covenant to pass to a new owner of the servient land if certain conditions are met. This ensures that restrictive covenants can protect the benefited land (the dominant land) even after the original owners are gone. The conditions are:

1. **The covenant is restrictive (not positive) in substance.** It must prevent the owner from doing something, like banning business use or limiting building height, rather than requiring action or spending money.
2. **The covenant was intended to benefit identifiable dominant land.** The promise must be meant to protect a specific piece of land still owned by the original covenantee or their successors.
3. **The covenant “touches and concerns” the dominant land.** It must affect how the dominant land is used, its value, or its enjoyment (e.g., preserving a view or preventing overcrowding).
4. **The successor in title to the servient land has notice of the covenant.** The new owner must know about the covenant, either through the land register (for registered land) or other forms of notice (actual, constructive, or imputed).

Unlike restrictive covenants, positive covenants (like maintaining a fence) cannot pass to new owners under this equitable rule.

### Example

Let’s revisit Sarah and Tom. When Sarah sold part of her land to Tom, the deed included a restrictive covenant that Tom couldn’t use his land for a business. Sarah kept the neighbouring land, which benefits from this restriction because it keeps the area quiet and residential. Tom then sells his land to Emma. Under the ***Tulk v Moxhay* rule**:

- The covenant is restrictive (no business use).
- It was intended to benefit Sarah’s remaining land (the dominant land).
- It “touches and concerns” Sarah’s land by maintaining its peaceful residential character.
- Emma, the new owner, knows about the covenant because it’s noted on the land register (or she was otherwise informed).

If Emma starts running a shop on her land, Sarah (or her successor) can ask a court to stop her, as the burden of the restrictive covenant passes to Emma in equity. However, if the

covenant was positive (e.g., to maintain a shared driveway), it wouldn't bind Emma under this rule, and Sarah could only pursue Tom, the original covenantor.

### 7.2.3 Why the Difference?

The distinction between positive and restrictive covenants in equity comes from practicality. Restrictive covenants are easier to enforce because they involve stopping an action, which a court can monitor (e.g., issuing an injunction to halt construction). Positive covenants, requiring ongoing action or money (like repairs), are harder to enforce against new owners, as courts don't want to force people into financial obligations they didn't agree to. The ***Tulk v Moxhay*** rule balances protecting the benefited land while keeping obligations fair.

For the ***Tulk v Moxhay*** rule to work, the covenant must be properly documented and registered.

For registered land, the covenant must be noted on the land register (e.g., in the Charges Register) under s 32 *LRA 2002* to ensure the new owner has notice.

For unregistered Land, the covenant must be registered as a Class D(ii) Land Charge under the *Land Charges Act 1972*. If it's not registered, it won't bind a new owner who buys the land for money.

If any condition of ***Tulk v Moxhay*** isn't met (e.g., there's no dominant land to benefit or the new owner had no notice), the covenant won't bind the new owner, even in equity.

### Example of the Failure of the ***Tulk v Moxhay*** Rule

Suppose John sells a plot of land to Lisa with a restrictive covenant not to build anything that blocks John's view. If John later sells all his remaining land, there's no dominant land left to benefit from the covenant. In this case, based on ***London County Council v Allen*** [1914] 3 K.B. 642, the covenant becomes unenforceable in equity because there's no land to receive the benefit, even if Lisa's successor knows about the covenant.



## 7.3 Circumventing the Problem of Positive Covenants

Since the burden of a positive covenant cannot run directly, alternative methods have been developed to ensure some form of enforcement against those in occupation of the servient land.

### 7.3.1 The Doctrine of Mutual Benefit and Burden

This principle, derived from *Halsall v Brizell* [1957] Ch 169, states that a person who wishes to take a benefit from a deed must also accept any associated burden. For example, a beneficiary of a right of way may be obliged to contribute to the road's upkeep. The benefit and burden must be inextricably linked.

### 7.3.2 Creation of a Leasehold Estate

If the land is let rather than sold freehold, both positive and restrictive covenants in the lease will bind successors in title to the tenant due to privity of estate. This is often an unattractive solution for a purchaser wanting freehold ownership.

### 7.3.3 Chain of Indemnity Covenants

On each sale of the servient land, the buyer is required to enter into a direct covenant with the seller to observe the positive covenants and to indemnify the seller against any breaches. This creates a chain of contractual liability. This is an indirect and potentially fragile method of enforcement.

## 7.4 The Transmission of the Benefit of a Covenant

For a successor in title to the original covenantee to enforce a covenant, they must demonstrate that the benefit of the covenant has passed to them.

### 7.4.1 Benefit Running at Common Law

The benefit of a covenant (positive or restrictive) can run at common law through:

- **Assignment:** The benefit is expressly assigned in writing to the new owner of the dominant land at the time of the transfer.
- **Annexation:** The benefit is permanently attached to the dominant land. This requires an express intention in the deed.

#### 7.4.2 Benefit Running in Equity

The benefit of a covenant can also run in equity, which is particularly relevant for restrictive covenants. Methods include:

- **Building Schemes (or Schemes of Development):** This occurs where a defined area of land is developed and sold off in plots subject to a common set of covenants intended to be mutually enforceable by all plot owners. This creates a local law for the estate, allowing any owner to enforce covenants against any other.
- **Assignment:** This is as applicable at common law.
- **Annexation:** This can be express, implied, or, significantly, statutory under s 78(1) *LPA 1925*. The case of *Federated Homes Ltd v Mill Lodge Properties Ltd* [1980] 1 WLR 494 held that section 78 has the effect of automatically annexing the benefit of a covenant to the dominant land, unless a contrary intention is shown.

### 7.5 Enforcing Covenants

For a successor in title to the original covenantee to enforce a covenant against a successor in title to the original covenantor, the method by which the benefit has passed must align with the method by which the burden has passed.

- **Restrictive Covenants:** The burden runs in equity (*Tulk v Moxhay*). Therefore, the claimant must show the benefit has passed to them in equity (e.g., via annexation under s 78 *LPA 1925*).
- **Positive Covenants:** The burden does not run. Therefore, a claimant can only sue the original covenantor (not the current owner) for breach. To do this, the claimant must show the benefit has passed to them at common law.

### 7.5.1 Remedies for Breach

The appropriate remedy depends on the nature of the covenant breached.

#### 1. Breach of a Restrictive Covenant

The primary remedy is an injunction to restrain the breach. As an equitable remedy, it is discretionary. The court may award damages in lieu of an injunction. In ***Wrotham Park Estate Co Ltd v Parkside Homes Ltd*** [1974] 1 WLR 798, the defendant built houses in breach of a restrictive covenant, and the court found that ordering demolition would be inequitable. Instead of granting an injunction, it awarded “Wrotham Park damages”, representing a reasonable share of the developer’s profit.

#### 2. Breach of a Positive Covenant

The usual remedy is damages for breach of contract, claimable from the original covenantor. Specific performance may be available against the original covenantor but is often impractical once they have sold the land. In ***Rhone v Stephens*** [1994] 2 AC 310 (HL), the court held that positive covenants do not bind successors in title, and only the original covenantor is liable, with damages as the usual remedy and specific performance rarely granted.

### 7.5.2 Registration and Protection of Covenants

The enforceability of a covenant against a successor in title also depends on its correct registration.

- **For Registered Land:** A covenant created by deed is a legal covenant and will appear in the Charges Register of the servient title. Equitable covenants require the entry of a notice under s 32 *LRA 2002* to bind successors.
- **For Unregistered Land:** Equitable covenants must be registered as a Class D(ii) Land Charge under the *Land Charges Act 1972*. Failure to register renders the covenant void against a purchaser for value of a legal estate.

## 7.6 Passing Positive Covenants to New Owner/User

Positive covenants are promises to do something on a piece of land, like maintaining a fence or paying for shared repairs. Unlike restrictive covenants, which stop certain actions and can bind future owners in equity, positive covenants are harder to enforce against new owners of freehold land.

Under common law, a positive covenant doesn't automatically apply to a new owner of the land. This was decided in *Austerberry v Corporation of Oldham* [1885] 29 Ch. D. 750. The law sees positive covenants, which require action or payment, as personal promises between the original people who made the agreement. A new owner isn't responsible unless they personally agree to follow the covenant.

The following are ways through which positive covenants can pass.

### 7.6.1 Using Leases for Positive Covenants

One way to make positive covenants enforceable is to lease the land instead of selling it as freehold. In a lease, positive covenants (like repairing the property or paying insurance) apply to new tenants through a legal rule called "privity of estate." *Section 3 of the Landlord and Tenant (Covenants) Act 1995* helps ensure these promises pass to new tenants, sometimes with the landlord's approval.

### 7.6.2 Indemnity Covenants and Chain of Covenants

To get around the common law rule, developers use a "chain of indemnity covenants." When the land is sold, each new buyer promises the seller to follow the positive covenant and cover any costs if they do not. This creates a chain of promises. For example, in a housing estate, every buyer might agree to pay for shared road repairs. If a new owner fails to pay, the estate's maintenance company can sue the original person who made the promise, who can then sue the next buyer, and so on. This keeps the responsibility alive through contracts, but it can be complicated.

### 7.6.3 Equitable Enforcement: Mutual Benefit and Burden

In equity, there's a way to enforce positive covenants if someone benefits from a related right. The rule from ***Halsall v Brizell*** [1957] Ch 169 says that if a person uses a benefit, like a shared driveway or sea wall, they must also take on the related responsibility, like paying for its upkeep. It would be unfair to enjoy the benefit without contributing.

For this to work:

- The benefit and responsibility must be connected and part of the same agreement (e.g., using a shared road and paying for its repairs).
- The person must have a choice to either accept both the benefit and responsibility or give up both (e.g., stop using the road to avoid paying).
- The benefit and responsibility must be closely linked, so one can't exist without the other.

### 7.6.4 Building Schemes

When a developer divides a large area into plots, they can set up shared covenants for all owners. These covenants, both positive and negative, can be enforced by all plot owners against each other. For this to work, the covenants must be consistent, the plots must be similar, and the sales must happen around the same time, as seen in ***Elliston v Reacher*** [1908] 2 Ch 374.

## 7.7 Altering Covenants under s 84 LPA 1925

Covenants, especially restrictive ones, can become outdated or too burdensome over time. There are ways to ensure fairness between benefits and responsibilities and to change or remove covenants when they no longer make sense.

### 7.7.1 Benefit and Burden

The “mutual benefit and burden” rule ensures fairness. If someone enjoys a benefit from a deed (like using a shared pier), they must also take on the related responsibility (like paying

for its upkeep). In *Halsall v Brizell* [1957] Ch 169, residents who used a sea wall had to help pay for it. Refusing to pay while using the benefit was seen as unfair.

For this rule to apply:

- The benefit and responsibility must come from the same legal document or plan.
- The person must have a real choice to either accept both or reject both (e.g., stop using the benefit to avoid the cost).
- The benefit and responsibility must be closely tied together, so one can't work without the other.

### 7.7.2 Altering Covenants under s 84 LPA 1925

Section 84 of the LPA 1925 lets the Upper Tribunal (Lands Chamber) change or remove restrictive covenants if they're no longer useful or cause problems.

#### Grounds for Changing or Removing a Covenant

The tribunal can act if:

- **Obsolete:** The covenant is outdated because things have changed, and it no longer benefits anyone while blocking reasonable use of the land.
- **Changed Area:** The area or land has changed so much that the covenant doesn't fit anymore.
- **More Harm Than Good:** The covenant causes more problems for the land's use than it helps the benefited land.
- **Agreement:** Everyone who can enforce the covenant agrees to change or remove it.
- **Released:** The owner of the benefited land officially agrees in writing to let go of the covenant.

#### How to Apply

1. **Notice:** The person asking for a change must notify everyone who can enforce the covenant, like the current or future owners of the benefited land.

3. **Application:** They file a request with the Upper Tribunal, including evidence of why the covenant is outdated or causes hardship.

## Hearing

The tribunal listens to any objections and decides whether to approve the request. The tribunal weighs the public's interest in using land freely against the private rights of those benefiting from the covenant. Evidence of problems, like being unable to get planning permission because of the covenant, can help convince the tribunal.

## Possible Outcomes

The tribunal can:

- Remove the covenant completely.
- Change its terms, like making it less strict, limiting its area, or setting an end date.
- Pause the covenant for a set time or until certain conditions are met.

## Key Factors

The tribunal weighs the public's interest in using land freely against the private rights of those benefiting from the covenant. Evidence of problems, like being unable to get planning permission because of the covenant, can help convince the tribunal.

## 7.8 Conclusion

Freehold covenants play a vital role in balancing private land obligations with wider community interests but their enforceability depends on strict legal rules. While positive covenants generally remain personal obligations enforceable only against the original covenantor, though workarounds like indemnity chains, leases, and mutual benefit and burden exist; restrictive covenants can bind successors in equity under the rule in ***Tulk v Moxhay***. Where covenants become outdated or unfair, s 84 LPA 1925 allows the Upper Tribunal to modify or discharge them, keeping the law responsive to modern land use.

## Master the Foundational Principles of Land Law for the SQE1

*Law Angels SQE Series: Land Law* provides a clear, structured, and conceptually rigorous guide to one of the most challenging core subjects. Meticulously designed for the SQE1 curriculum, this textbook moves beyond simple description to cultivate the analytical and problem-solving skills essential for success.

Inside, you will find:

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