1.1 LEASEHOLD COVENANT TERMINOLOGY

Where a lease or a freehold reversion is assigned, it is necessary to determine whether or not the covenants given by the original tenant (TO) to the original landlord (LO) in the lease (the tenant's covenants) may be enforced by a purchaser of the freehold reversion (the landlord's assignee, or LA) against TO and any purchaser of the lease (the tenant's assignee, or TA). Likewise, it is also necessary to establish whether TO and TA can enforce against LA the covenants granted by LO to TO in the original lease (the landlord's covenants).

This web of relationships can be depicted as shown in Figure 15.

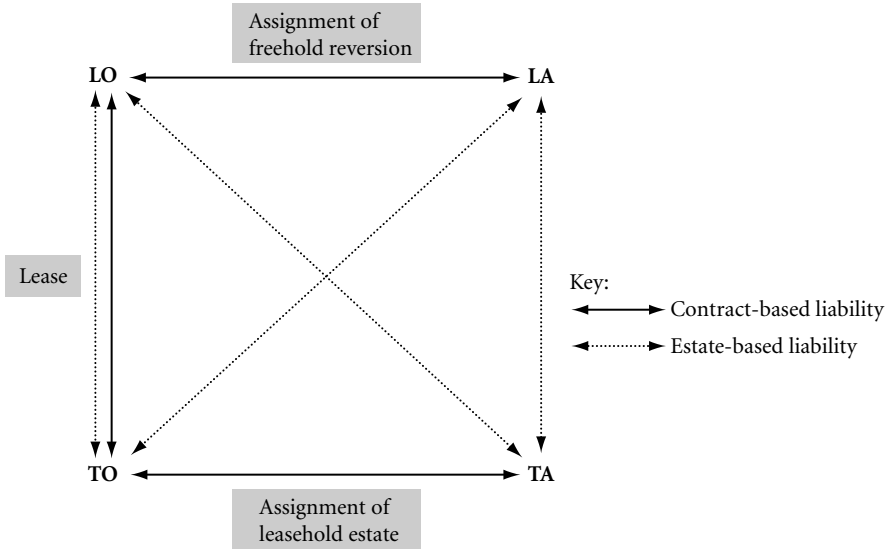

Figure 15 Leasehold covenant relationships

The answer to these central questions on the enforceability of both the landlord's and tenant's covenant depends on when the lease was granted. This is because the law was amended and codified by the Landlord and Tenant (Covenants) Act 1995, but the amendments enacted apply only to those leases granted on or after 1 January 1996. There are, of course, many leases granted before 1 January 1996 that still have many years to run and which will continue to be governed by the old law. It is thus necessary to look at the law governing leases entered into before 1 January 1996 ('pre-1996 leases') and the law regulating leases entered into on or after 1 January 1996 ('post-1995 leases').

1.2 CONTRACT AND ESTATE-BASED LIABILITY

We saw in Chapter 22 that a lease has a dual personality: firstly, as a contract between the original parties; and secondly, as a proprietary interest in the form of a leasehold estate in the land, which may be transferred or left by will. Liability on the landlord's covenants and the tenant's covenants in the lease is based either upon the contractual relationship between LO and TO, or upon the leasehold estate that will vested in TA, upon his or her purchase of the lease, or the

freehold reversion (subject to the lease), which likewise may be transferred by LO to LA. Where the parties fall within this leasehold relationship, we say that there is *privity of estate*.

Students of contract law will recognize that, between LO and TO, there is *privity of contract*, which is unaffected if and when LO and/or TO assign their interests to LA and TA, respectively. The lease contract continues between the original parties throughout the term of the lease.

Privity of estate exists between the current parties to the leasehold estate. It can thus vary during the leasehold term, depending on in whom the lease and the freehold reversion are vested. Initially, LO and TO are the parties to the leasehold estate. If LO assigns the freehold reversion, then privity of estate will exist between LA and TO: LO falls out of privity of estate because he or she no longer holds the freehold reversion. Likewise, if TO assigns his or her lease to TA, TA comes within privity of estate with the current holder of the freehold reversion, whether that is LO or LA, and TO is no longer within the privity of estate relationship.

The concept of privity of estate was developed many centuries ago, and continues to be central to the enforceability of leasehold covenants by and against the current parties to the lease. Where there is privity of estate, both the positive and negative leasehold covenants, which are so closely related to the leasehold estate that they form part of it, will be enforceable by and against the current parties to the leasehold estate.

Lord Templeman explains the interplay between the operation of privity of contract and estate in the following case.

City of London Corp v Fell
[1994] 1 AC 458, HL

Lord Templeman

At 464

The principle that the benefit and burden of covenants in a lease which touch and concern the land run with the term and with the reversion is necessary for the effective operation of the law of landlord and tenant. Common law, and statute following the common law, recognise two forms of legal estate in land, a fee simple absolute in possession and a term of years absolute: see section 1 of the Act of 1925. Common law, and statute following the common law, were faced with the problem of rendering effective the obligations under a lease which might endure for a period of 999 years or more beyond the control of any covenantor. The solution was to annex to the term and the reversion the benefit and burden of covenants which touch and concern the land. The covenants having been annexed, every legal owner of the term granted by the lease and every legal owner of the reversion from time to time holds his estate with the benefit of and subject to the covenants which touch and concern the land. The system of leasehold tenure requires that the obligations in the lease shall be enforceable throughout the term, whether those obligations are affirmative or negative. The owner of a reversion must be able to enforce the positive covenants to pay rent and keep in repair against an assignee who in turn must be able to enforce any positive covenants entered into by the original landlord. Common law retained the ancient rule that the burden of a covenant does not run with the land of the covenantor except in the case of a lease, but even that rule was radically modified by equity so far as negative covenants were concerned: see *Tulk v. Moxhay* (1848) 2 Ph. 774.

The effect of common law and statute on a lease is to create rights and obligations which are independent of the parallel rights and obligations of the original human covenantor who and

whose heirs may fail or the parallel rights and obligations of a corporate covenantor which may be dissolved. Common law and statute achieve that effect by annexing those rights and obligations so far as they touch and concern the land to the term and to the reversion. Nourse L.J. neatly summarised the position when he said in an impeccable judgment [1993] Q.B. 589, 604:

> "The contractual obligations which touch and concern the land having become imprinted on the estate, the tenancy is capable of existence as a species of property independently of the contract."

The common law did not release the original tenant from liability for breaches of covenant committed after an assignment because of the sacred character of covenant in English law [. . .] This only means that the fortunate English landlord has two remedies after an assignment, namely his remedy against the assignee and his remedy against the original tenant. It does not follow that if the liability of the original tenant is released or otherwise disappears then the term granted by the lease will disappear or that the assignee will cease to be liable on the covenants.

As between landlord and assignee the landlord cannot enforce a covenant against the assignee because the assignee does not covenant. The landlord enforces against the assignee the provisions of a covenant entered into by the original tenant, being provisions which touch and concern the land, because those provisions are annexed by the lease to the term demised by the lease. The assignee is not liable for a breach of covenant committed after the assignee has himself in turn assigned the lease because once he has assigned over he has ceased to be the owner of the term to which the covenants are annexed.

2 THE ORIGINAL PARTIES (LO AND TO) AND CONTRACTUAL ENFORCEABILITY

2.1 PRE-1996 LAW

LO and TO remain contractually liable on their leasehold covenants throughout the term of the lease, even though they may have disposed of their respective interests, unless they have expressly agreed to limit their respective liabilities in their original covenants.

This contractual liability can operate harshly particularly against TO, who, many years after he or she has assigned the lease, can find him or herself sued in respect of a breach of the tenant's covenants (usually a failure to pay the rent or service charge) committed by TA. For example, the current landlord will be tempted to rely on this contractual liability where TA is insolvent.[3] Although this liability is more often relied upon in commercial leases, where rentals reflect market levels, the principles are equally applicable to residential long leases.

Lord Nicholls explained the problems in the following case.

Hindcastle Ltd v Barbara Attenborough & Associates Ltd
[1997] AC 70, HL

Lord Nicholls

At 83

The insolvency may occur many years after the lease was granted, long after the original tenant parted with his interest in the lease. He paid the rent until he left, and then took on the

[3] The economic downturn of the late 1980s and early 1990s resulted in a number of well-publicized and criticized cases in which original leaseholders were successfully held liable.

responsibility of other premises. A person of modest means is understandably shocked when out of the blue he receives a rent demand from the landlord of the property he once leased. Unlike the landlord, he had no control over the identity of assignees down the line. He had no opportunity to reject them as financially unsound.

TO does have the benefit of an indemnity covenant for the performance of the tenant's covenant from TA, which will build up a chain of indemnity covenants following each assignment of the lease,[4] and also a restitutionary action for any damages that TO may have to pay as a result of the default of another (i.e. TA).[5] But these actions will be of little value where the defaulter is insolvent or the chain of indemnity covenants has been broken.[6]

In a series of decisions, the courts added further to TO's woes by confirming that his or her liability could be affected by a variation in the lease terms (e.g. an upward rent review), where that variation was made in pursuance of the terms of the lease.[7] A variation would not affect TO where it resulted from the separate agreement of the current parties to the lease, whether that variation resulted in a renewal or extension of the leasehold term,[8] or was to the terms upon which the lease was held.[9]

This contractual liability was the target of criticism by the Law Commission.

Law Commission Report No 174, *Landlord and Tenant Law: Privity of Contract and Estate* (1988, [3.1]–[3.3])

In Part III of the Working Paper, we identified the following criticisms of the present law:

(a) It is intrinsically unfair that anyone should bear burdens under a contract in respect of which they derive no benefit and over which they have no control: contractual obligations undertaken in a lease should only regulate relations between current owners with interests in the property.

(b) When demand is made under continuing liability of the original tenant it will often not only be unexpected, but beyond the means of the former tenant; there is no logical way in which a former tenant who does understand that there is a contingent liability can estimate the amount.

(c) A single lease can contain some covenants of which the burden automatically passes to an assignee, by privity of estate, and others of which the burden does not pass automatically. This contrast in a single document, which is not apparent from its wording is unsatisfactory [. . .]

[4] See Law of Property Act 1925, s 77(1)(c), and Land Registration Act 2002, Sch 12, para 20. The indemnity is implied into each assignment of the lease and so can build up a chain of indemnity covenants to pass liability down to the defaulting leaseholder. As to the operation of indemnity covenants, see Chapter 26, section 2.4.2.

[5] *Moule v Garrett* (1872) LR 7 EX 101.

[6] *RHP Ltd v Mirror Group Newspapers and Mirror Group Holdings* (1992) 65 P & CR 252.

[7] See *Centrovincial Estates plc v Bulk Storage Ltd* (1983) 46 P & CR 393, in which the leaseholder was liable for rent varied from £17,000 to £40,000 pursuant to a rent review clause contained in the original lease, and *Selous Street Properties Ltd v Oronel Fabrics Ltd* (1984) 270 EG 643, in which the rent review took into account unauthorized alterations that were subsequently approved by the landlord.

[8] *City of London Corp v Fell* [1994] 1 AC 458.

[9] *Friends Provident Life Office v British Railways Board* (1997) 73 P & CR 9.

(d) Many laymen do not realise that the original parties have a continuing liability and most leases do not make this clear on their face.

(e) Where a lease contains a rent review clause, the original tenant's liability, under privity of contract, normally extends to payment of the higher rents after revision. For this reason, privity of contract sometimes results in the original tenant having a greater liability then he understood he was assuming. While this may merely reflect the increase in value of the premises it can cast on a former tenant a burden resulting from an increased value from which he has derived no benefit.

(f) Landlords who are in practice the main beneficiaries of the privity of contract principle are unduly protected. They have the ability to enforce obligations undertaken by tenants by action against both the original tenant and the current tenant [. . .] This makes the principle one-sided, and unreasonably multiplies the remedies available to landlords.

(g) Original tenants against whom covenants are enforced after they have assigned the lease are not adequately protected, nor do they have adequate means of reimbursement. They are not released even if the tenant in possession agrees materially to vary the extent of liability, they are not entitled to notice of default and they have no right to take back possession of the property. Former tenants are therefore often deprived of the opportunity to limit their liability by taking prompt remedial action. Faced with demands that they must meet, they are often unable even to have recourse to the property to recoup any losses.

(h) The contingent liability which privity of contract imposes on an original tenant who has parted with his interest in the property can create difficulty in winding-up and distributing the estates of tenants who have died. The response to the Working Paper suggests that this difficulty is more theoretical than practical.

[. . .]

Against these criticisms we pointed out that continuing liability of the parties to leases is a matter of contract. They are free to vary the normal rule. This is sometimes done, but not frequently. Some feel that a heavy burden lies on those who propose any further restriction on freedom of contract, but others question whether there is any true freedom here because there is widely thought to be an inequality of bargaining power between landlords and tenants, favouring landlords.

These criticisms have, in part, been addressed by the Landlord and Tenant (Covenants) Act 1995. The reforms of the 1995 Act affecting pre-1996 leases address only the worst excesses of privity of contract. The original parties' liability under post-1995 leases is subject to more far-reaching reform, which is considered below.

Section 18 of the 1995 Act provides that TO's liability to pay an amount due under the lease will not be altered by a variation of the lease, which the landlord had an absolute right to refuse, made after the time at which he or she has disposed of his or her interest.

Section 17 of the Act provides that the current landlord, who wishes to recover a fixed sum from TO, must give notice of the amount that he or she is intending to recover within six months of the sum becoming due.[10] Where TO complies with this notice, he or she may claim an overriding lease to secure any sums that he or she has been required to pay. An overriding lease takes effect as a statutory lease interposed between the current landlord and the current defaulting leaseholder. As such, it will enable TO to enforce the tenant's

[10] Landlord and Tenant (Covenants) Act 1995, s 17. This notice must be in statutory form (see s 27) and is commonly referred to as a 'problem notice'.

covenants, for example, by claiming the rental due and seeking forfeiture if the rent is not paid.[11] Thus TO is at least given a warning of his or her potential contractual liability for fixed sums, which should not exceed six months' rental or other charges, and is provided with a mechanism to try to recover the sums that he or she has had to meet. His or her contractual liability for unliquidated sums, however, is undiminished.

2.2 POST-1995 LAW

2.2.1 Release of TO

Section 5 of the Landlord and Tenant (Covenants) Act 1995 releases TO from contractual liability once he or she has assigned his or her lease. It also confirms TA's release from liability should he or she, in turn, dispose of the leasehold estate.

Landlord and Tenant (Covenants) Act 1995, s 5

Tenant released from covenants on assignment of tenancy

(1) This section applies where a tenant assigns premises demised to him under a tenancy.

(2) If the tenant assigns the whole of the premises demised to him, he—

(a) is released from the tenant covenants of the tenancy, and

(b) ceases to be entitled to the benefit of the landlord covenants of the tenancy,

as from the assignment.

Where the tenant requires the consent of the landlord to assign the lease, however, a landlord may refuse his or her consent unless the tenant enters into an authorized guarantee agreement, under which the tenant guarantees the assignee's payment of the rent and performance of the other tenant's covenants.[12] A landlord's consent to assign is a common feature of commercial leases, but not of residential long leases.

2.2.2 Release of LO

LO can also be released from his or her contractual liability, although a release is not available from liabilities that are expressed to be personal to LO.[13] LO's release does not operate automatically upon assignment of the reversion, but must be requested by LO serving a notice on TO, within four weeks of the assignment of his or her reversion.

Landlord and Tenant (Covenants) Act 1995, s 6

Landlord may be released from covenants on assignment of reversion

(1) This section applies where a landlord assigns the reversion in premises of which he is the landlord under a tenancy.

[11] Ibid, s 19. [12] Ibid, s 16.

[13] *BHP Petroleum Great Britain Ltd v Chesterfield Properties Ltd* [2002] Ch 194: see section 3.2.2 below.

(2) If the landlord assigns the reversion in the whole of the premises of which he is the landlord—

(a) he may apply to be released from the landlord covenants of the tenancy in accordance with section 8; and

(b) if he is so released from all of those covenants, he ceases to be entitled to the benefit of the tenant covenants of the tenancy as from the assignment.

The process is governed by s 8, which provides that, where TO refuses to grant a release, the county court may grant a release where it is reasonable to do so.

Landlord and Tenant (Covenants) Act 1995, s 8

Procedure for seeking release from a covenant under section 6 or 7

(1) For the purposes of section 6 or 7 an application for the release of a covenant to any extent is made by serving on the tenant, either before or within the period of four weeks beginning with the date of the assignment in question, a notice informing him of—

(a) the proposed assignment or (as the case may be) the fact that the assignment has taken place, and

(b) the request for the covenant to be released to that extent.

(2) Where an application for the release of a covenant is made in accordance with subsection (1), the covenant is released to the extent mentioned in the notice if—

(a) the tenant does not, within the period of four weeks beginning with the day on which the notice is served, serve on the landlord or former landlord a notice in writing objecting to the release, or

(b) the tenant does so serve such a notice but the court, on the application of the landlord or former landlord, makes a declaration that it is reasonable for the covenant to be so released, or

(c) the tenant serves on the landlord or former landlord a notice in writing consenting to the release and, if he has previously served a notice objecting to it, stating that that notice is withdrawn.

The provisions of the 1995 Act cannot be excluded or varied.[14] But the House of Lords has held that a limitation of liability contained in the terms of the original covenant does not fall foul of this prohibition. In so doing, the Lords explained the purpose and effect of the Act's limitation of LO and TO's contractual liability.

London Diocesan Fund v Phithwa
[2005] 1 WLR 3956, HL

Facts: A lease provided that the original landlord (Avonridge Property Co Ltd) would not be liable for the payment of rent under the head lease after it assigned the reversion.

[14] Landlord and Tenant (Covenants) Act 1995, s 25. A contractual obligation upon the guarantor of TO to guarantee the liability of TA is void under s 25 unless they do so pursuant to an authorized guarantee agreement see *Good Harvest Partnership LLP v Centaur Services Ltd* [2010] EWHC 330 (Ch), [2010] Ch 426; *K/S Victoria St. v House of Fraser (Stores Management) Ltd* [2011] EWCA Civ 904, [2011] 2 P & CR 15.

After Avonridge assigned its leasehold reversion, the head lease was forfeited as a result of its assignee's failure to pay the rent under the head lease; the sub-lessees obtained relief from forfeiture, but had to pay the arrears of rent. They unsuccessfully claimed that the limitation of Avonridge's liability in the head lease was void under s 25 of the 1995 Act.

Lord Nicholls

At [13]–[21]

So sections 6 to 8 of the Act provide a landlord with a means which may result in his being released from the landlord covenants but will not necessarily do so. If the landlord assigns the whole of the premises of which he is landlord he may apply to be released from the landlord covenants of the tenancy. A landlord covenant is a covenant falling to be complied with by the landlord of the premises demised by a tenancy. An application for release is made by the landlord serving an appropriate notice on the tenant requesting a release of the landlord covenant wholly or in part. Where the landlord makes such an application the covenant is released to the requested extent if the tenant consents, or if he fails to object, or if he does object but the court decides it is reasonable for the covenant to be released: section 8.

These statutory provisions might readily be stultified if the parties to a lease could exclude their operation. In particular, the provision for automatic release of tenant covenants on assignment of a lease would be a weak instrument if it were open to a landlord to provide that the original tenant's contractual liability should continue for the whole term notwithstanding section 5. So the Act, in section 25, enacts a comprehensive anti-avoidance provision. Subsection (1) relevantly provides:

> "Any agreement relating to a tenancy is void to the extent that- (a) it would apart from this section have effect to exclude, modify or otherwise frustrate the operation of any provision of this Act, or (b) it provides for- (i) the termination or surrender of the tenancy, or (ii) the imposition on the tenant of any penalty, disability, or liability, in the event of the operation of any provision of this Act [. . .]"

The words in parenthesis in Avonridge's covenant in clause 6 of each sublease are an "agreement relating to a tenancy" within the meaning of this section: section 25(4). But does this agreement "frustrate the operation" of any provision of the Act? That is the key question.

The subtenants submit it does. The limited release provisions in sections 6 to 8 were intended to be the sole means whereby an original landlord could obtain a release from the landlord covenants when he assigned the reversion. The parenthetical words in clause 6 would frustrate that statutory purpose if they were allowed to have effect according to their tenor.

I am unable to agree. Where I part company with this submission is its statement of the statutory purpose. Sections 5 to 8 are relieving provisions. They are intended to benefit tenants, or landlords, as the case may be. That is their purpose. That is how they are meant to operate. These sections introduced a means, which cannot be ousted, whereby in certain circumstances, without the agreement of the other party, a tenant or landlord can be released from a liability he has assumed. The object of the legislation was that on lawful assignment of a tenancy or reversion, and irrespective of the terms of the tenancy, the tenant or the landlord should have an exit route from his future liabilities. This route should be available in accordance with the statutory provisions.

Thus the mischief at which the statute was aimed was the *absence* in practice of any such exit route. Consistently with this the legislation was not intended to close any *other* exit route already open to the parties: in particular, that by agreement their liability could be curtailed from the outset or later released or waived. The possibility that by agreement the parties may limit their liability in this way was not, it seems, perceived as having unfair consequences in practice, even though landlords normally have greater bargaining power than tenants. So there was no call for legislation to exclude the parties' capacity to make such an agreement, ending their liability in circumstances other than those provided in the Act.

Section 25 is of course to be interpreted generously, so as to ensure the operation of the Act is not frustrated, either directly or indirectly. But there is nothing in the language or scheme of the Act to suggest the statute was intended to exclude the parties' ability to limit liability under their covenants from the outset in whatever way they may agree. An agreed limitation of this nature does not impinge upon the operation of the statutory provisions.

[. . .] Whatever its form, an agreed limitation of liability does not impinge upon the operation of the statutory provisions because, as already noted, the statutory provisions are intended to operate to relieve tenants and landlords from a liability which would otherwise exist. They are not intended to impose a liability which otherwise would be absent. They are not intended to enlarge the liability either of a tenant or landlord. The Act does not compel a landlord to enter into a covenant with his tenant to pay the rent under a headlease. The Act does not compel this, even though it may be eminently reasonable that a landlord should do so. Nor do the statutory restrictions on the circumstances where a landlord can end his liability without his tenant's consent carry any implication that a tenant may not agree to end his landlord's liability in other circumstances. Such an implication would be inconsistent with the underlying scheme of these provisions.

This appraisal accords with the thrust of the Law Commission's report [. . .]

Nor do the events in this case exemplify a loophole in the Act Parliament cannot have intended. The risks involved were not obscure or concealed. They were evident on the face of the subleases. The sublessees were to pay up-front a capitalised rent for the whole term of the subleases. But clause 6 enabled Avonridge to shake off all its landlord obligations at will. Any competent conveyancer would, or should, have warned the sublessees of the risks, clearly and forcefully.

The decision does provide an escape route, particularly for landlords, who can use their bargaining power and superior knowledge of the law to limit their liability when negotiating the term of the lease.

Not all of the Law Lords were happy to accept this possibility.

London Diocesan Fund v Phithwa
[2005] 1 WLR 3956, HL

Lord Walker (dissenting)

At 35

I am driven to the conclusion that although the general legislative purpose of the Act was to effect the release from liability of landlords and tenants on their assignment of their interests, subject to and in accordance with the provisions of the Act, section 25 is expressed in terms

wide enough to interfere with the freedom of contract which was available to the parties in negotiating a tenancy before the coming into force of the Act. By restricting the parties' freedom of contract, the Act (in a case such as the present) does operate to make it more difficult for a landlord to escape liability on landlord covenants (within the meaning of the Act). I would accept the submission of Mr Wells, for the respondents, that that can be done only by the procedure laid down in section 8 of the Act. To that limited extent the Act does operate, as it seems to me, to shut off what my noble and learned friend, Lord Nicholls of Birkenhead, has described as "any other exit route" previously open to the parties.

3 ASSIGNEES (LA AND TA) AND ESTATE-BASED LIABILITY

3.1 PRE-1996 LAW

The benefit and burden of the landlord's covenants and the tenant's covenants have run with the freehold reversion and the leasehold estate since the sixteenth century. Statute has conferred upon LA the right to sue upon the tenant's covenant given to LO and has imposed upon LA the obligation to observe the landlord's covenant's given by LO in the original lease. The current statutory provisions are now found in ss 141 and 142 of the Law of Property Act 1925 (LPA 1925).[15]

3.1.1 The landlord's covenants

Law of Property Act 1925, s 142(1)

Obligation of lessor's covenants to run with reversion

(1) The obligation under a condition or of a covenant entered into by a lessor with reference to the subject-matter of the lease shall, if and as far as the lessor has power to bind the reversionary estate immediately expectant on the term granted by the lease, be annexed and incident to and shall go with that reversionary estate, or the several parts thereof, notwithstanding severance of that reversionary estate, and may be taken advantage of and enforced by the person in whom the term is from time to time vested by conveyance, devolution in law, or otherwise; and, if and as far as the lessor has power to bind the person from time to time entitled to that reversionary estate, the obligation aforesaid may be taken advantage of and enforced against any person so entitled.

Section 142 relates both to the benefit and to the burden of the landlord's covenants given by LO to TO, by imposing upon LA the obligation to perform these covenants and conferring upon TA the right to enforce these covenants. Thus TO can sue LA and TA can sue LO or LA, as appropriate (see Figure 16).

[15] They were originally contained in the Grantee of Reversions Act 1540 and amended by the Conveyancing Acts of 1881 and 1911.

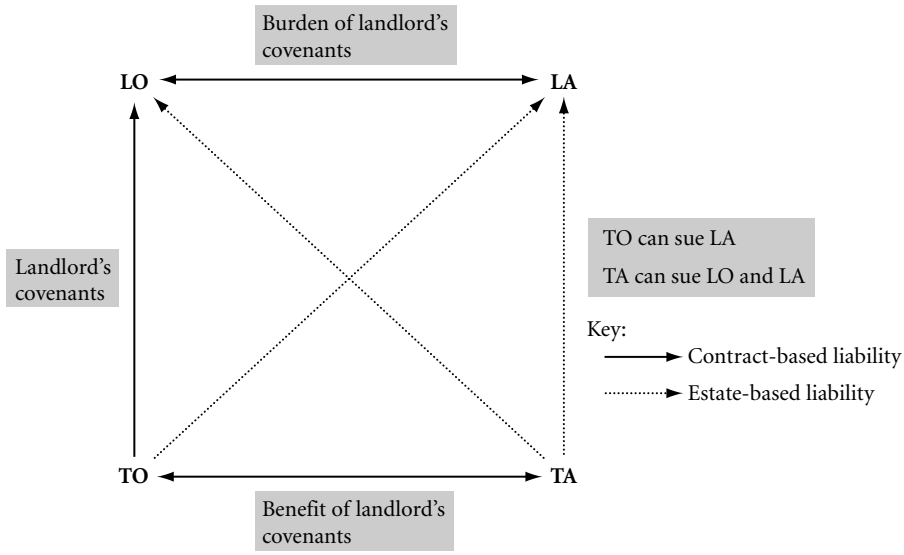

Figure 16 Law of Property Act 1925, s 142: benefit (who can sue) and burden (who can be sued) of landlord's covenants

3.1.2 The tenant's covenants

Law of Property Act 1925, s 141

Rent and benefit of lessee's covenants to run with the reversion

(1) Rent reserved by a lease, and the benefit of every covenant or provision therein contained, having reference to the subject-matter thereof, and on the lessee's part to be observed or performed, and every condition of re-entry and other condition therein contained, shall be annexed and incident to and shall go with the reversionary estate in the land, or in any part thereof, immediately expectant on the term granted by the lease, notwithstanding severance of that reversionary estate, and without prejudice to any liability affecting a covenantor or his estate.

(2) Any such rent, covenant or provision shall be capable of being recovered, received, enforced, and taken advantage of, by the person from time to time entitled, subject to the term, to the income of the whole or any part, as the case may require, of the land leased.

Section 141 relates to the benefit of the tenant's covenants, and confers upon LA the right to sue for the rent and upon the other covenants given by TO to LO in the original lease. Thus, LA can sue TO (see Figure 17).

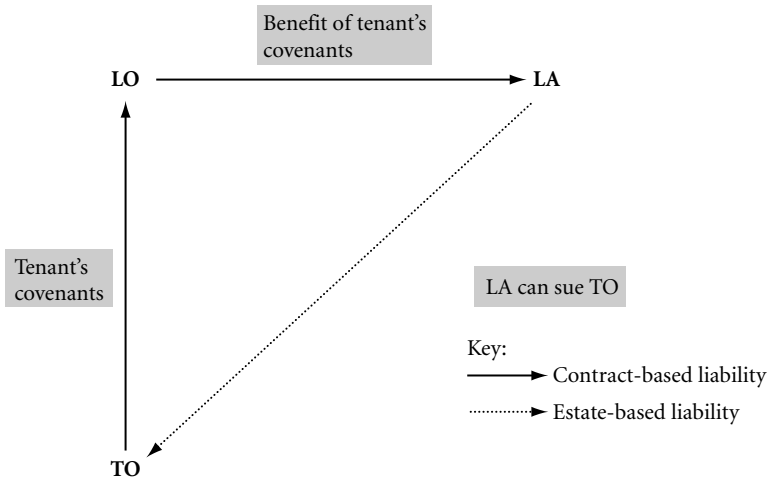

Figure 17 Law of Property Act, s 141: benefit of tenant's covenants (who can sue)

The missing link in the enforceability matrix is provided, not by statute, but by *Spencer's Case*,[16] which imposes upon TA the obligation to perform the tenant's covenants given by TO, including the covenant to pay rent.[17] Thus, LO and LA can sue TA (see Figure 18).

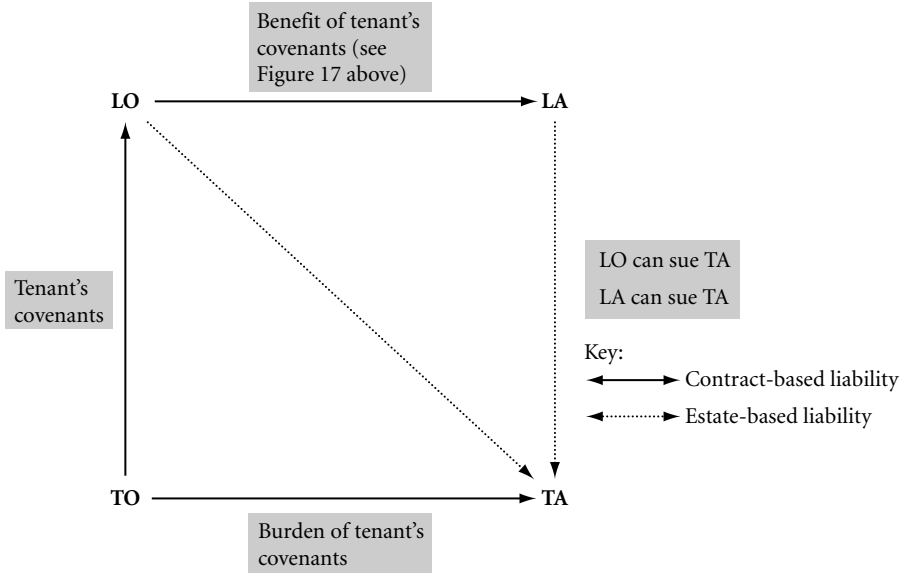

Figure 18 Spencer's Case: burden of tenant's covenants (who can be sued)

[16] (1583) 5 Co Rep 16a.

[17] The omission of this link from the statutory framework is a result of 'parliamentary fumbling': see Sparkes, *A New Landlord and Tenant* (2001) p 749–52.

Spencer's Case
(1583) 5 Co Rep 16a

If lessee for years covenants to repair the houses during the term, it shall bind all others as a thing which is appurtenant, and goeth with the land in whose hands soever the term shall come, as well those who come to it by act in law, as by the act of the party, for all is one having regard to the lessor. And if the law should not be such, great prejudice might accrue to him; and reason requires, that they, who shall take benefit of such covenant when the lessor makes it with the lessee, should on the other side be bound by the like covenant when the lessee makes it with the lessor.

3.1.3 Covenants that touch and concern, or have reference to the subject matter of, the lease

Sections 141 and 142 relate to covenants that '*have reference to the subject matter of the lease*', whilst *Spencer's Case* refers to covenants that '*touch and concern the land*'. The expressions have identical meaning,[18] but that meaning has proved somewhat elusive.

Lord Oliver provides the clearest explanation in the following case.[19]

P&A Swift Investments v Combined English Stores Group plc
[1989] AC 632, HL

Lord Oliver

At 642

In my opinion the question of whether a surety's covenant in a lease touches and concerns the land falls to be determined by the same test as that applicable to the tenant's covenant.

Formulations of definitive tests are always dangerous, but it seems to me that, without claiming to expound an exhaustive guide, the following provides a satisfactory working test for whether, in any given case, a covenant touches and concerns the land: (1) the covenant benefits only the reversioner for time being, and if separated from the reversion ceases to be of benefit to the covenantee; (2) the covenant affects the nature, quality, mode of user or value of the land of the reversioner; (3) the covenant is not expressed to be personal (that is to say neither being given only to a specific reversioner nor in respect of the obligations only of a specific tenant); (4) the fact that a covenant is to pay a sum of money will not prevent it from touching and concerning the land so long as the three foregoing conditions are satisfied and the covenant is connected with something to be done on to or in relation to the land.

There should be no difficulty in the common covenants found in the long leases of flats satisfying this test: covenants for quiet enjoyment; the payment of rent or service charge; for repair and insurance; or relating to the user of the flat or the common areas and facilities.

[18] See *Caern Motor Services Ltd v Texaco Ltd* [1994] 1 WLR 1249.

[19] And *Coronation Street Industrial Properties Ltd v Ignall Industries Ltd* [1989] 1 WLR 304. These cases concerned a surety's covenant, rather than leasehold covenants, but the test has been subsequently applied to leasehold covenants in *Caern Motor Services Ltd v Texeco Ltd* [1994] 1 WLR 1249 and *Cardwell v Walker* [2003] EWHC 3117.

More difficult questions have tended to arise with commercial leases. Here, the application of test has led to '*arbitrary and inconsistent outcome(s)*'.[20] A surety's covenant runs with the land,[21] but a covenant to repay a deposit does not;[22] an option for a tenant to purchase the reversion does not touch and concern with the land,[23] but an option to renew the lease does;[24] a covenant to sell only the landlord's products is a covenant that touches and concerns the land,[25] but a non-competition covenant by a landlord does not.[26]

3.1.4 Equitable leases and assignments

A further qualification affects the running of the burden of the tenant's covenants to TA under *Spencer's Case*, although not the passing of the benefit and burden under ss 141 and 142 of the LPA 1925. *Spencer's Case* operates where the leaseholder's covenants form part of leaseholder's legal estate in the land. Thus it has been held that the burden of the leaseholder's covenants will not pass to TA where the lease[27] or the assignment[28] to TA is equitable. This limitation has been described as '*anomalous and inconvenient*',[29] and various other approaches have been suggested.[30]

Boyer v Warbey
[1953] 1 QB 234, CA

Denning LJ

At 246

[. . .] since the fusion of law and equity [by the Judicature Act 1873], the position is different. The distinction between agreements under hand and agreements under seal has largely been obliterated. There is no valid reason nowadays why the doctrine of covenants running with the land—or with the reversion—should not apply equally to agreements under hand as to covenants under seal; and I think we should so hold.

This view, whilst attractive, rather stretches the effect of the Judicature Act 187l. A more satisfactory route to overcome the problem could be based upon finding a separate contractual nexus, or even legal periodic tenancy, between LO (or LA) and TA, from the fact of TA's possession and payment of rent, and LO (or LA's) acceptance of that rent by way of acknowledgment of TA's position as tenant.

LO or LA are not without redress: they can still exercise a right to forfeit the lease in the event of a breach of covenant (see section 6.4 below), or, where the covenant is

[20] Gray and Gray, *Elements of Land Law* (5th edn, 2009), [4.5.52].

[21] See *Kumar v Dunning* [1989] QB 193 and *P&A Swift Investments v Combined English Stores Group plc* [1989] AC 632.

[22] *Hua Chiao Commercial Bank Ltd v Chiap Hua Industries Ltd* [1987] AC 99.

[23] *Woodall v Clifton* [1905] 2 Ch 257, 279.

[24] *Phillips v Mobil Oil Co Ltd* [1989] 1 WLR 888, 891, *per* Nicholls LJ, who excuses the anomaly only on established practice.

[25] *Caern Motor Services Ltd v Texeco Ltd* [1994] 1 WLR 1249 and *Cardwell v Walker* [2003] EWHC 3117.

[26] *Thomas v Hayward* (1869) LR 4 Ex 311.

[27] *Purchase v Lichfield Brewery Co* [1915] 1 KB 184.

[28] *Cox v Bishop* (1857) 8 De GM & G 815.

[29] Gray and Gray *Elements of Land Law* (5th edn, 2009), [4.5.86].

[30] Smith, 'The Running of Covenants in Equitable Leases and Equitable Assignments of Legal Leases' [1978] CLJ 98.

negative, rely upon its enforceability as a restrictive covenant under the doctrine of *Tulk v Moxhay*.[31]

3.2 POST-1995 LEASES

3.2.1 The Landlord and Tenant (Covenants) Act 1995 framework of enforceability

The Landlord and Tenant (Covenants) Act 1995 provides a statutory framework for passing the benefit and burden of the landlord's and the tenant's covenants. TA is entitled to sue upon the landlord's covenants and is bound by the tenant's covenants by s 3(2), and LA becomes entitled to sue upon the tenant's covenants[32] and is bound by the landlord's covenants by s 3(3).

Landlord and Tenant (Covenants) Act 1995, s 3

Transmission of benefit and burden of covenants

(1) The benefit and burden of all landlord and tenant covenants of a tenancy—

(a) shall be annexed and incident to the whole, and to each and every part, of the premises demised by the tenancy and of the reversion in them, and

(b) shall in accordance with this section pass on an assignment of the whole or any part of those premises or of the reversion in them.

(2) Where the assignment is by the tenant under the tenancy, then as from the assignment the assignee—

(a) becomes bound by the tenant covenants of the tenancy except to the extent that—

(i) immediately before the assignment they did not bind the assignor, or

(ii) they fall to be complied with in relation to any demised premises not comprised in the assignment; and

(b) becomes entitled to the benefit of the landlord covenants of the tenancy except to the extent that they fall to be complied with in relation to any such premises.

(3) Where the assignment is by the landlord under the tenancy, then as from the assignment the assignee—

(a) becomes bound by the landlord covenants of the tenancy except to the extent that—

(i) immediately before the assignment they did not bind the assignor, or

(ii) they fall to be complied with in relation to any demised premises not comprised in the assignment; and

(b) becomes entitled to the benefit of the tenant covenants of the tenancy except to the extent that they fall to be complied with in relation to any such premises.

[. . .]

[31] See Chapter 26, section 2.

[32] Landlord and Tenant (Covenants) Act 1995, s 4, provides that the landlord's right of re-entry will also pass.

(6) Nothing in this section shall operate—

(a) in the case of a covenant which (in whatever terms) is expressed to be personal to any person, to make the covenant enforceable by or (as the case may be) against any other person; or

(b) to make a covenant enforceable against any person if, apart from this section, it would not be enforceable against him by reason of its not having been registered under the Land Registration Act 2002 or the Land Charges Act 1972.

3.2.2 All but personal covenants

The 1995 Act also removes any distinction between legal and equitable leases, and between covenants that touch and concern the land, and those that do not. All that is required is that the covenant is contained (either expressly or impliedly) in a legal or equitable lease and that the covenant is not expressed to be personal to any particular person.

Landlord and Tenant (Covenants) Act 1995, s 2

Covenants to which the Act applies

(1) This Act applies to a landlord covenant or a tenant covenant of a tenancy—

(a) whether or not the covenant has reference to the subject matter of the tenancy, and

(b) whether the covenant is express, implied or imposed by law

[. . .]

Landlord and Tenant (Covenants) Act 1995, s 28(1)

Interpretation

"landlord covenant", in relation to a tenancy, means a covenant falling to be complied with by the landlord of premises demised by the tenancy;

[. . .]

"tenancy" means any lease or other tenancy and includes—

(a) a sub-tenancy, and

(b) an agreement for a tenancy,

but does not include a mortgage term;

"tenant covenant", in relation to a tenancy, means a covenant falling to be complied with by the tenant of premises demised by the tenancy.

There is thus a shift in emphasis. There is no need to prove that a covenant touches and concerns the land: all covenants are transmissible, unless the parties specifically agree that they should not be so because they are expressed to be personal.[33]

[33] It seems extraordinary that a purely personal obligation can be transmissible because the parties do not expressly identify it as such: see Clarke and Kohler, *Property Law: Commentary and Material* (2005) p 647.

BHP Petroleum Great Britain Ltd v Chesterfield Properties Ltd
[2002] 2 Ch 195, CA

Facts: Chesterfield had covenanted personally to carry out certain remedial works to premises leased by BHP. It then transferred its reversion to an associated company and served a notice under s 8, seeking a release from its contractual liability on the covenant, to which BHP did not respond. Chesterfield unsuccessfully claimed that it had been released from its covenant when it was called upon to carry out repairs under the covenant.

Jonathan Parker LJ

At [59]–[62]

The crux, as we see it, is the definition of "landlord" in section 28(1) as meaning "the person *for the time being* entitled to the reversion expectant on the term of the tenancy". (My emphasis.) We find it impossible to read that definition as meaning only the original landlord. [. . .] we consider that those words clearly connote the person who may from time to time be entitled to the reversion on the tenancy. It follows that, transposing that definition into the definition of the expression "landlord covenant", what one has is an obligation "falling to be complied with by [the person who may from time to time be entitled to the reversion on the tenancy]". An obligation which (that is to say, the burden of which) is personal to the original landlord is, by definition, not such an obligation, since it does not fall to be performed by the person who may from time to time be entitled to the reversion on the tenancy.

It follows that in our judgment Chesterfield's obligations in clause 12 of the agreement, being expressed to be personal to Chesterfield, are not "landlord covenants" within the meaning of the 1995 Act, and that the notice was accordingly ineffective to release Chesterfield from such obligations.

With respect to Mr Lewison, Chesterfield's argument on the 1995 Act issue seems to us to be based on the fallacy that there is a direct antithesis between a personal covenant (that is to say a covenant which is personal in the sense that the burden of it is expressed to be personal to the covenantor) on the one hand and a covenant which "touches and concerns", or which relates to, the land on the other. As Mr Barnes correctly submits, there is no such direct antithesis. A covenant which relates to the land may nevertheless be expressed to be personal to one or other or both of the parties to it. That is a matter for the contracting parties.

Nor can we see anything in the 1995 Act to fetter the freedom of contracting parties to place a contractual limit on the transmissibility of the benefit or burden of obligations under a tenancy. On the contrary, that no such fetter was intended by Parliament is clearly demonstrated, in our judgment, by section 3(6)(a) (quoted earlier).

The decision seems, on the face of it, correct, but it could lead to unfortunate consequences. In *BHP*, it was the landlord who was denied a release from contractual liability, but the same reasoning might equally be applied to the tenant's covenants. If a tenant's covenant is expressed to be personal, then TO will be unable to obtain a release from his or her contractual liability, unless he or she can negotiate an express release from his or her current landlord.[34]

[34] Kenny [2007] Conv 1.

Slessinger, 'Precedents Editor's notes' [2007] Conv 198, 199

> If the argument stands up, the whole purpose of the 1995 Act is destroyed. The primary mischief at which it was aimed was the continuing liability of tenants despite assignment of the lease.
>
> [Slessinger goes onto to suggest that, to avoid this result, the courts might be tempted to conclude] [. . .] that there are certain covenants which are essential to the lease and cannot be made personal. Unfortunately the covenant in the *BHP* case was, essentially, a landlord's repairing covenant, so it would be difficult to distinguish the decision on that basis. In any case, such a distinction runs the risk of reintroducing the concept of covenants which "touch and concern" the lease by the back door when this too was intended to be swept away by the 1995 Act.
>
> A subtler version of the distinction would be for the courts to say that it is not for the parties to define what is a personal covenant merely by sticking a label on it (see, for example, the court's attitude to documents labelled "licences"). To be a personal obligation there must be some reason why this landlord or this tenant is peculiarly in a position to perform it.

The crux of the matter is the extent to which the 1995 Act provides a complete code or merely interferes with existing concepts of privity of contract and estate, as shaped by the parties' (or their draughtsmen's) expressed intentions.

This tension is also evident in the distinct views expressed by the majority and minority in *London Diocesan Fund v Phithwa*,[35] in respect of which Dixon makes the following observation.

Dixon, 'A Failure of Statutory Purpose or a Failure of Professional Advice?' [2006] Conv 79

> [. . .] a chance was missed, possibly deliberately, to establish the 1995 Act as a self contained scheme free from the dictates of privity of estate and privity of contract. So it seems that, after all, the 1995 Act is another example of piecemeal intervention in the landlord and tenant relationship and an intervention that can be sidestepped—in some circumstances—by careful draughtmanship.

4 THE CONTINUING LIABILITY FOR BREACHES OF COVENANT

An assignee's liability under privity of estate ends when he or she no longer holds the estate upon which enforceability depends.[36] Thus neither LA nor TA is liable for breaches of covenant that occur after they have disposed of their respective estates. They will also not be liable for breaches that occurred before they acquired their respective estates, unless those breaches are of a continuing nature.

This position is reflected by s 23 of the 1995 Act, as well as ss 5 and 6, which we have already considered.

[35] [2005] UKHL 70.

[36] *Onslow v Corriw* (1817) 2 Madd 330.

Landlord and Tenant (Covenants) Act 1995, s 23

Effects of becoming subject to liability under, or entitled to benefit of, covenant etc.

(1) Where as a result of an assignment a person becomes, by virtue of this Act, bound by or entitled to the benefit of a covenant, he shall not by virtue of this Act have any liability or rights under the covenant in relation to any time falling before the assignment.

(2) Subsection (1) does not preclude any such rights being expressly assigned to the person in question.

(3) Where as a result of an assignment a person becomes, by virtue of this Act, entitled to a right of re-entry contained in a tenancy, that right shall be exercisable in relation to any breach of a covenant of the tenancy occurring before the assignment as in relation to one occurring thereafter, unless by reason of any waiver or release it was not so exercisable immediately before the assignment.

4.1 CONTINUING RIGHTS TO ENFORCE BREACHES OF COVENANT

Where a breach of covenant occurs before the lease, or freehold reversion, is assigned, the question is who may sue for that breach: is it the assignee (e.g. LA or TA, as appropriate), or does the right to sue remain with the assignor (e.g. LO or TO, as appropriate)? The answer again differs according to whether or not the lease is governed by the Landlord and Tenant (Covenants) Act 1995.

4.1.1 Pre-1996 law

A landlord is not able to sue in respect of a breach that has occurred after he or she has sold his or her reversion, because he or she has suffered no damage, nor can he or she do so in respect of a breach of the tenant's covenants that occurred before the assignment. This result flows from the interpretation of s 141 in the following case.

Re King
[1963] Ch 459, CA

Facts: Mr King had owned a factory, the lease of which required him to repair and insure, and to lay out any insurance moneys successfully claimed in reinstating, the factory. The factory was destroyed during the Second World War, but, after the war, the land was resumed by the government and a housing estate built. Mr King's estate sought directions as to whether it remained liable for breach of the covenant to repair, insure, and reinstate the factory.

UpJohn LJ

At 487

I turn, then, to a consideration of the meaning of section 141 and construe the language used in its ordinary and natural meaning, which seems to me quite plain and clear. To illustrate this,

consider the case of a lease containing a covenant to build a house according to certain detailed specifications before a certain day. Let me suppose that after that certain day the then lessor assigns the benefit of the reversion to an assignee, and at the time of the assignment the lessee has failed to perform the covenant to build. Who can sue the lessee for breach of covenant? It seems to me clear that the assignee alone can sue. Upon the assignment the benefit of every covenant on the lessee's part to be observed and performed is annexed and incident to and goes with the reversionary estate. The benefit of that covenant to build, therefore, passed; as it had been broken, the right to sue also passed as part of the benefit of the covenant and, incidentally, also the right to re-enter, if that has not been waived. I protest against the argument that because a right to sue is itself a chose in action it, therefore, has become severed from, and independent of, the parent covenant; on the contrary it remains part of it. The right to sue on breach is merely one of the bundle of rights that are contained in the concept "benefit of every covenant." [...] Suppose the right to sue for breach of that covenant did not pass, and that right remained in the assignor, then the assignee would take the lease without the benefit of that covenant and he could never enforce it. So he has not got the benefit of every covenant contained in the lease and the words of the section are not satisfied. That cannot be right. The obligation to build being (as I have assumed) clearly defined by detailed specifications in the lease, it seems to me quite plain that the assignee could bring an action for specific performance compelling the lessee to perform his covenant to build. That is one of the rights which passed to him when the benefit of that covenant passed. The assignor has by the operation of section 141 assigned his right to the benefit of the covenant and so has lost his remedy against the lessee. Of course, the assignor and assignee can always agree that the benefit of the covenant shall not pass, in which case the assignor can still sue, if necessary, in the name of the assignee.

This view has been followed in *London & County (A&D) Ltd v Wilfred Sportsman Ltd*[37] in respect of the right to recover rent. Accordingly, under s 141 of the 1925 Act, the right to sue for arrears of rent due before the assignment will pass to the landlord's assignee and cannot be recovered by the assignor landlord.

This approach is to be contrasted with the interpretation of s 142, which preserves the rights of the tenant to continue to sue, after he or she has disposed of his or her leasehold term, in respect of a breach that occurred before the assignment.

City and Metropolitan Properties Ltd v Greycroft Ltd
[1987] 1 WLR 1085, HC

Facts: Greycroft was in serious breach of its covenant to repair premises leased by City. After abortive attempts to sell the property, City successfully took action against Greycroft to carry out the much-needed repairs. It was then able to sell its lease, but also sought damages against Greycroft for the damages that it had suffered in its earlier, but abortive, sale attempt.

Mowbray QC

At 1086

The landlord's first defence is that, when the tenant assigned the lease, all its rights passed to the assignee, including any right to damages such as are claimed under the pre-existing

[37] [1971] Ch 764 and, in so doing, has disapproved the pre-s 141 decision of *Flight v Bentley* (1835) 7 Sim 149.

specially indorsed writ, so the tenant has no cause of action left to support its claim. In my view that defence is not well founded. No authority was cited on the precise question whether a tenant who has assigned his lease can afterwards recover damages from the landlord for breaches of the landlord's covenants committed while the tenant held the lease. It is common ground, though, that a tenant (not the original lessee) who has assigned his lease again remains liable to the landlord for breaches of covenant which he committed while tenant [. . .] Both this liability and the benefit of the landlord's covenants run with the lease at common law by privity of estate under *Spencer's Case* (1583) 5 Co.Rep. 16 a: see *Smith's Leading Cases*, 13th ed. (1929), vol. 1, p. 51. There is a close analogy between the two. I take the view that, by this analogy, the landlord's liability to the tenant for existing breaches survives the assignment of the lease, in the same way as the tenant's liability to the landlord.

Mr. Moss argued for the landlord here that the tenant's rights against the landlord did not survive the assignment of the lease, because on the assignment section 142(1) of the Law of Property Act 1925 made a statutory transfer of the tenant's rights to the assignee of the lease. [. . .]

He pointed out that the Court of Appeal has held section 141(1) to make a statutory transfer of the whole benefit of a tenant's covenant to an assignee of the reversion: *In re King, decd.* [1963] Ch. 459 and *London and County (A. & D.) Ltd. v. Wilfred Sportsman Ltd.* [1971] Ch. 764. He asked me to apply that principle by analogy to an assignment of the lease.

It is not possible to apply those decisions. They turned on words corresponding to the first part of section 142(1), "shall [. . .] be annexed and incident to and shall go with that reversionary estate." The middle passage of section 142(1) is quite different. [. . .] If the intention had been to effect a statutory transfer of the right to an assignee of the term, I should have expected words to have been used similar to those in section 141(1) and the beginning of section 142(1) itself.

4.1.2 Post-1995 law

The divergence evident in *Re King* and *Greycroft* is resolved by s 23 of the 1995 Act in favour of the *Greycroft* solution. The right to sue in respect of a breach committed before an assignment of the lease or the freehold reversion remains with the assignor, although the benefit of the right to sue may be expressly assigned to the purchaser.

5 SUB-LESSEES

Where a tenant grants a lease for a shorter term than he or she enjoys, even if it is only a day shorter, he or she grants a new estate that is called a 'sublease', or 'underlease'. The sub-lessee is bound by covenants in the sublease by way of privity of contract, but he or she is not within the privity of estate of the head lease and thus is not bound by, or able to enforce, the covenants in the head lease on this basis. A sub-lessee cannot, however, ignore the covenants in the head lease.

Firstly, a well-drafted sublease will include a covenant that the sub-lessee must observe and perform the covenants contained in the head lease. The head tenant, as landlord of the sublease, can thus enforce this covenant by way of privity of contract to ensure that the sub-lessee acts in a manner that does not place the head lease in jeopardy. A carefully drafted covenant to this effect may also confer the benefit of the sub-lessee's covenant upon the head landlord, who, although not within privity of contract, may be able to rely upon s 56 of the LPA 1925, or the Contracts (Rights of Third Parties) Act 1999, to enforce the covenant

directly against the sub-lessee. An action based upon s 56 failed in *Amsprop Trading Ltd v Harris Distribution Ltd*[38] on the wording of the covenant, which was not expressed (as the section requires) as made with the head landlord. The Contracts (Rights of Third Parties) Act 1999 is less restrictive and could enable a head landlord to rely upon a covenant in the sublease where it is merely made for his or her benefit.[39]

Secondly, if the covenants in the head lease are not observed, the head landlord may forfeit the head lease. A forfeiture of the head lease will trigger the automatic extinction of the sub-lease, unless the sub-lessee successfully applies for relief from forfeiture. Relief will usually only be granted on condition that the sub-lessee remedies the breach.[40]

Thirdly, the restrictive covenants in the head lease have independent proprietary status and may be enforced in accordance with the principles that we will examine in Chapter 26. The head landlord may thus require the sub-lessee (or, indeed, any occupier of the land) to observe the restrictive covenants in the head lease under the doctrine of *Tulk v Moxhay*. The requirement of land to be benefited by the covenant has traditionally been identified as the landlord's reversionary interest,[41] although Gardner suggest an alternative rationale and, in so doing, controversially questions the whole exclusion of sub-lessees from privity of estate.

Gardner, *An Introduction to Land Law* (2009, p 226)

This special application of the restrictive covenant rule involves a radical departure from the rules original thrust [. . .] the rule in its standard form makes obligations operate in rem if, *and because*, they protect the standard of amenity prevailing between neighbouring plots of (necessarily) physical land. By not conforming to that factual pattern, the special application therefore cannot rest on the same justification. It must have a basis of its own, on the lines that the distinction between assignee and sub-tenant [. . .] is unimportant: the protection of the landlord's reversionary interest requires the lease terms be effective against both. Contrary to the assumption made by the idea of privity of estate, that seems a very reasonable position, resting on the idea that a tenant, on sub-leasing, should not be able to confer more (in the sense of an interest with fewer obligations to the landlord) then he himself has [. . .] and that idea makes as much sense for positive obligations as it does for negative ones. This lesson can best be absorbed, however, not by extending the restrictive covenant rule to positive as well as negative obligations, but by attacking the fundamental problem—privity of estate—itself.

The 1995 Act confirms the operation of *Tulk v Moxhay* to post-1995 leases in s 3(5).

Landlord and Tenant (Covenants) Act 1995, s 3(5)

Any landlord or tenant covenant of a tenancy which is restrictive of the user of land shall, as well as being capable of enforcement against an assignee, be capable of being enforced against any other person who is the owner or occupier of any demised premises to which the covenant relates, even though there is no express provision in the tenancy to that effect.

The principle was applied in the following case to enforce a covenant prohibiting assignment and underletting against a sub-lessee. The action was for a mandatory injunction requiring

[38] [1997] 1 WLR 1025.
[39] See Contracts (Rights of Third Parties) Act 1999, s 1(b), and Chapter 26, section 3.3.3.
[40] See section 6.4 below.
[41] *Hall v Ewin* (1887) 37 Ch D 74.

the sub-lessee to execute a surrender of its sublease, which afforded the sub-lessee no opportunity to seek relief from the loss of its sublease.[42]

Hemingway Securities Ltd v Dunraven Ltd
(1996) 71 P & CR 30, HC

Jacob J

At 33

I should say that the plaintiffs put their case also on the doctrine of *Tulk v. Moxhay*. They say here is a restrictive covenant; it is well settled that a restrictive covenant for the benefit of the landlords' reversion counts for the purposes for the doctrine of *Tulk v. Moxhay*; the restrictive covenant accordingly runs with the land; it accordingly binds the second defendants; they are acting in breach of it and, therefore, again, an injunction to compel them to stop acting in breach of it and in effect to gain a mandatory injunction should be granted.

Again, I do not see the answer to this way of putting the plaintiff's case. It was suggested that a covenant against alienation is not a restrictive covenant for the purposes of the *Tulk v. Moxhay* doctrine. That doctrine was limited to covenants in respect of the mode of user of property. No direct authority was cited to that effect and I do not see why, in principle, it should be so. One can have covenants subject to the doctrine not to build things without showing plans first; covenants against multiple occupation; and I do not see why this particular restrictive covenant against alienation should be treated differently.

The subsection may not, however, be employed to allow a sub-lessee to enforce a covenant in the head lease against the head landlord.[43]

In a block of flats in which the flat leases are all granted subject to the same covenants, the principles of a building scheme may also be applied to create a letting scheme,[44] with the head lease covenants creating a local law for the development, binding upon and enforceable by all leaseholders within the block.[45] This local law might also encompass sub-lessees.[46]

6 REMEDIES FOR BREACH OF LEASEHOLD COVENANTS

In addition to the usually contractual remedies of common law damages, and the equitable discretionary remedies of specific performance and injunction, the breach of a tenant's covenant may lead to the forfeiture of the lease. Where the breach is a failure to pay rent, the landlord may decide to sue the tenant in debt for the rent as it becomes due for payment. Where the tenant has effectively abandoned the premises the landlord is not obliged to repossess and re-let the premises to mitigate his or her loss.[47] There is also the possibility

[42] See Wilkie and Luxton, 'Who Needs s 146? Injunctive Relief for Landlords' [1995] Conv 416.

[43] *Oceanic Village Ltd v United Attractions Ltd* [2000] Ch 234 ('demised premises' refers to the land under the head lease and not the sublease).

[44] See Chapter 26, section 3.3.

[45] *Williams v Kiley (t/a CK Supermarkets Ltd) (No 1)* [2003] L & TR 20.

[46] See *Brunner v Greenslade* [1971] Ch 993.

[47] The landlord is suing for the rental due and not for contractual damages flowing from the breach of covenant see *Reichman v Beveridge* [2006] EWCA Civ 1659.

of recovering rent by seizing the tenant's goods, previously governed by the law of distress. In this section, we will concentrate on forfeiture, as the most common measure with which to compel performance of the tenant's covenants.

6.1 DAMAGES

Damages are recoverable, in accordance with usually contractual principles, either by a landlord or tenant, for the loss occasioned by a breach of a covenant.

A landlord's recovery of damages for breach by the tenant of a repairing obligation is, however, limited by statute. Firstly, s 18 of the Landlord and Tenant Act 1927 limits the amount recoverable to the loss in value to the landlord's reversion and provides that no damages are recoverable where the premises are demolished or the premises are so altered that the repairs are valueless.

Secondly, the landlord of a lease granted for more than seven years, and which has at least three years left to run, is precluded by the Leasehold Property (Repairs) Act 1938 from seeking damages for breach of a tenant's repairing covenant, unless notice is served under s 146 of the LPA 1925, which is extracted and considered below. This notice must include a statement that the tenant may serve a counter-notice, which will have the effect of prohibiting any further proceedings without leave of the court. This latter provision has caused difficulties where the landlord carries out the repairs and seeks to recover the cost of doing so from the tenant,[48] although where the landlord does so pursuant to a suitably drafted 'self-help' clause in the lease, it has been held that his or her recovery falls outside the Act as an action for a debt.[49]

A tenant suffering damage as a result of a landlord's breach of a repairing covenant cannot simply refuse to pay the rent.[50] He or she may resort to self-help by arranging for the necessary repairs and recovering the cost from the landlord, either by direct action or by offsetting the cost against the rent.[51] This convenient route to redress may, however, be excluded by the clear terms of the lease.[52] We will consider the more far-reaching issues of ensuring effective and efficient management of flats later in Chapter 27.

6.2 SPECIFIC PERFORMANCE

It is now clear that, where damages are an inadequate remedy, there is inherent jurisdiction, and also statutory jurisdiction limited to residential leases, for the court to award specific performance of a landlord's repairing obligations.[53] Specific performance may also be ordered of a tenant's obligations, although this jurisdiction is likely to be only rarely exercised.[54] Forfeiture is likely to remain the more appropriate remedy against a tenant.

[48] *SEDAC Investments Ltd v Tanner* [1982] 1 WLR 1342.

[49] See *Jervis v Harris* [1996] 1 ALL ER 303, overruling *Swallow Securities Ltd v Brand* (1981) 45 P & CR 328, noted at [1997] Conv 299.

[50] *Melville v Grapelodge Developments Ltd* (1978) 39 P & CR 179. It should also be noted that recovery may lie for breach of statutory duty under the Defective Premises Act 1972.

[51] *Lee Parker v Izzet* [1971] 1 WLR 1688; *British Anzani (Felixstowe) Ltd v International Marine Management (UK) Ltd* [1980] QB 137.

[52] *HSBC v Kloeckner* [1990] 2 QB 514, but see *Connaught Restaurants Ltd v Indoor Leisure Ltd* [1994] 1 WLR 501.

[53] See *Jeune v Queen's Cross Properties Ltd* [1974] Ch 97, and Landlord and Tenant Act 1985, ss 17 and 32.

[54] See *Rainbow Estates Ltd v Tokenhold Ltd* 1999] Ch 64, noted at [1998] Conv 495 and [1998] JBL 564. The Law Commission has recommended that this jurisdiction be afforded a statutory basis: see Law Commission Report No 238, *Responsibility for State and Condition of Property* (1996), [11.33]–[11.34].

6.3 DISTRESS AND TAKING CONTROL OF THE TENANT'S GOODS

The ancient law of distress permits seizure and sale of the tenant's (and other person's) goods that are at the premises in order to pay arrears of rent. Distress has long been in the firing line of reformers given not only its antiquity and resulting complexity, but also the priority that it confers upon a landlord's claims over those of other creditors and its almost certain incompatibility with the Human Rights Act 1998 (HRA 1998). It is thus in the process of abolition and replacement by an alternative process by the Tribunals, Courts and Enforcement Act 2007.

Part 3 of this new statute abolishes the previous common law and statutory provisions, and enacts a new statutory code. In particular, distress for rent is abolished[55] and a new remedy termed 'commercial rent arrears recovery' is introduced.[56] As its name suggests, the remedy is unavailable to landlords of domestic premises, who entirely lose their right to seize goods to enforce rent arrears; they must rely on their right to sue for recovery of rent or rely upon forfeiture.

6.4 FORFEITURE

6.4.1 Introduction

Forfeiture is the process by which a landlord can extinguish a lease by exercising a right to re-enter the premises. A right of re-entry must be expressly granted,[57] as it invariably is, by the lease and it exists as a separate legal interest of the landlord.[58] An agreement for a lease will, however, imply (as a usual covenant) a right of re-entry, which the landlord can insist is included in the lease itself.[59]

A right of re-entry is generally expressed to be exercisable if the tenant fails to pay the rent, or if the tenant fails to observe or perform any of the other covenants contained in the lease. Occasionally, a right of re-entry may be triggered by some other specified event: for example, the tenant's bankruptcy, in the case of an individual tenant, or entry into one of the corporate insolvency regimes, where the tenant is a company.[60]

A common form of a right of re-entry is set out below.

Encyclopaedia of Forms and Precedents, Landlord and Tenant (Residential Tenancies): Vol 23(2) (2002, Form 9)

Recovery of possession

(1) The Landlord's rights under this clause arise if and whenever during this Term:

(i) the rent, or any part of it, or any other sum reserved as rent by this lease, lawfully due from the Tenant is unpaid [14 days] after becoming due, whether formally demanded or not, or

(ii) the Tenant breaches any covenant, condition or other term of this lease.

55 Tribunals, Courts and Enforcement Act 2007, s 71.
56 See ibid, ss 72–80.
57 A right to re-enter for denying the landlord's title is implied.
58 See Law of Property Act 1925, s 1(1)(e).
59 *Chester v Buckingham Travel Ltd* [1981] 1 WLR 96.
60 A right of re-entry on bankruptcy or insolvency is unlikely to be regarded as usual covenant: see ibid.

(2) If and whenever during the Term any of the above events occurs, the Landlord may bring an action to recover possession from the Tenant and re-enter the Property subject:

(i) in the case of unpaid rent to the Tenant's right to relief on payment of the arrears and costs, and

(ii) in the case of a breach of any obligation other than to pay rent, to his obligations to serve notice on the Tenant specifying the breach complained of, requiring its remedy if it is capable of remedy, and requiring the Tenant to pay compensation in any case, and to allow the Tenant a reasonable time to remedy a breach that is capable of remedy.

On the making of a court order for possession this tenancy shall cease absolutely, but without prejudice to any rights or remedies that may have accrued to the Landlord against the Tenant, or to the Tenant against the Landlord in respect of any breach of covenant or other term of this lease, including the breach in respect of which the re-entry is made.

The law has taken a broad approach to what constitutes a right of re-entry. Thus, for example, a right of the landlord to serve notice to terminate the lease upon a breach by the tenant of his or her obligations under the lease has been interpreted as a right of re-entry.[61]

Forfeiture provides '*an essential management tool, particularly in relation to commercial and long residential leases*',[62] but it can also be a heavy-handed response. It is possible for a tenant holding for a long term to lose his or her whole interest because of a comparatively minor breach. What is more, any derivative interest granted out of that lease—for example, a sublease or mortgage—will also be lost. Forfeiture should thus only be employed as a long-stop remedy.

Clarke, 'Property Law' (1992) 45(1) CLP 81, 104

Forfeiture displays the best and worst features of a self help remedy. When exercised extra-judicially it is a fast and effective remedy for breach, and it is sufficiently drastic in effect to deter breaches. In fact it has been so successful in this jurisdiction that it has developed at the expense of the doctrines of repudiatory breach and frustration. On the other hand, its bad features are, first, that it affects the interests of third parties, who may have had no knowledge of the breach and no means of preventing it, and secondly that its effects between the parties bears no relation to the effects of the breach: it can inflict loss on the tenant quite disproportionate to the blameworthiness of the breach, and it can produce a windfall profit for the landlord.

The draconian nature of forfeiture is tempered, firstly, by the law's attitude to the ease with which a landlord is deemed to have waived a right of re-entry (see section 6.4.3 below), secondly, by the procedural steps that must be followed (see sections 6.4.4 and 6.4.5 below), and lastly, by the court's jurisdiction to grant relief from forfeiture (see section 6.4.6 below). In addition, certain short-term residential leases cannot be forfeited and the forfeiture of residential long leases is subject to additional controls, which we will examine when looking more closely at such leases.[63]

[61] *Richard Clarke & Co Ltd v Widnall* [1976] 1 WLR 845 and Law of Property Act 1925, s 146(7).
[62] Gravells [2006] JBL 830.
[63] See Chapter 23 and Chapter 27, section 2.6.

In the following case, Lord Templeman explains how the law has tempered the operation of forfeiture.

Billson v Residential Apartments Ltd
[1992] 1 AC 494, HL

Lord Templeman

At 534

By the common law, when a tenant commits a breach of covenant and the lease contains a proviso for forfeiture, the landlord at his option may either waive the breach or determine the lease. In order to exercise his option to determine the lease the landlord must either re-enter the premises in conformity with the proviso or must issue and serve a writ claiming possession. The bringing of an action to recover possession is equivalent to an entry for the forfeiture [. . .]

Before the intervention of Parliament, if a landlord forfeited by entering into possession or by issuing and serving a writ for possession, equity could relieve the tenant against forfeiture but only in cases under the general principles of equity whereby a party may be relieved from the consequences of fraud, accident or mistake or in cases where the breach of covenant entitling the landlord to forfeit was a breach of the covenant for payment of rent [. . .]

In 1881 Parliament interfered to supplement equity and to enable any tenant to be relieved from forfeiture. The need for such intervention was and is manifest because otherwise a tenant who had paid a large premium for a 999-year lease at a low rent could lose his asset by a breach of covenant which was remediable or which caused the landlord no damage. The forfeiture of any lease, however short, may unjustly enrich the landlord at the expense of the tenant. In creating a power to relieve against forfeiture for breach of covenant Parliament protected the landlord by conferring on the court a wide discretion to grant relief on terms or to refuse relief altogether. In practice this discretion is exercised with the object of ensuring that the landlord is not substantially prejudiced or damaged by the revival of the lease [. . .]

Section 146(1) prevents the landlord from enforcing a right of re-entry or forfeiture by action or otherwise so that the landlord cannot determine the lease by issuing and serving a writ or by re-entering the premises until the tenant has failed within a reasonable time to remedy the breach and make reasonable compensation. Section 146(2) enables the tenant to apply to the court for relief where the landlord "is proceeding, by action or otherwise" to enforce his right of re-entry or forfeiture. If the landlord "is proceeding" to determine the lease by issuing and serving a writ, the tenant may apply for relief after the writ has been served. If the landlord "is proceeding" to determine the lease by re-entering into possession, the tenant may apply for relief after the landlord has re-entered.

After considering the effect of forfeiture more closely, we will go on to examine each of these ways in which the law regulates its operation, before finally looking at the current proposals for reform in the light of the Law Commission's conclusion that the law governing forfeiture '*is complex, it lacks coherence, and it can lead to injustice*'.[64]

[64] Law Commission Report No 174, *Landlord and Tenant: Privity of Contract and Estate—Executive Summary* (2004).

6.4.2 The effect of forfeiture

As Lord Templeman explains, where the tenant has breached a leasehold covenant, the landlord has a choice: he or she may either elect to ignore the breach, or he or she may exercise his or her right of re-entry and so trigger forfeiture. The lease will be brought to an end, but the landlord must then recover possession either by peacefully gaining entry to the premises, or by issuing and serving on the tenant proceedings for possession. It is the landlord's decision to re-enter, either peacefully or by court process, which forfeits the lease and not the court's order for possession.[65] From the time of the landlord's re-entry, the tenant is a trespasser and no longer liable to pay rent. Instead, the landlord may claim mesne profits—being damages for the tenant's use of the land—which is calculated according the current rental value of the land.

The Law Commission explains the artificiality of this process.

Law Commission Report No 303, *Termination of Tenancies for Tenant Default* (2006, [1.9])

When a landlord commences court proceedings with a view to forfeiting the tenancy and recovering possession, a "constructive" re-entry takes place. This means, counter-intuitively, that the tenancy terminates not when the court makes an order to such effect, but on the date the proceedings are served on the tenant. This has several highly artificial consequences. First, the tenancy ends before there has been any opportunity for the parties to make representations to the court. Secondly, the tenant's obligations to pay the rent and observe the covenants are extinguished. Thirdly, the landlord's proceedings are not to terminate the tenancy (as forfeiture has technically already occurred) but are instead to recover possession of the premises. Fourthly, if the former tenant wishes the tenancy to continue, it is incumbent upon the tenant to bring a claim for "relief" in order retrospectively to revive the tenancy that has been forfeited.

We have described the lease as being extinguished by forfeiture, but until the proceedings for possession and, in particular, any claim for relief is decided, that is not quite accurate.[66]

Meadows v Clerical Medical & General Life Assurance Society
[1981] Ch 70, HC

Sir Robert Megarry VC

At 75

There are, of course, curiosities in the status of a forfeited lease which is the subject of an application for relief against forfeiture. Until the application has been decided, it will not be known whether the lease will remain forfeited or whether it will be restored as if it had never been forfeited [. . .] The tenancy has a trance-like existence pendente lite; none can assert with assurance whether it is alive or dead.

[65] *Canas Property Co Ltd v KL Television Services Ltd* [1970] 2 QB 433.

[66] See also *Driscoll v Church Commissioners* [1957] Ch 70; *Ivory Gate Ltd v Spetale* (1999) 77 P & CR 141; *Maryland Estate v Joseph* [1991] 1 WLR 83; *Twinsectra Ltd v Hynes* [(1995) 71 P & CR 145.

Bignall describes the unsatisfactory position of the parties during this 'twilight period'[67] between the service of the landlord's application for possession and the determination of the proceedings.

Bignell, 'Forfeiture: A Long Overdue Reform?' [2007] L&T Rev 140, 142

> Such historic hangovers from the early days of forfeiture by physical re-entry mean the status of the occupier is now unclear during this time. Such a period may be a lengthy one. This is disadvantageous for landlords, tenants and those with derivative interests. Until matters are resolved one way or the other, the tenant is no longer bound by the covenants in the tenancy, including the obligation to pay rent, or to repair. If the tenant remains in possession, the landlord cannot rely on the covenants in the lease so as to make a claim for an interim injunction, or claim damages for dilapidation which have accrued during the "twilight period". There is no good reason for this and the practical consequences may be very serious for the landlord. By contrast, because the tenant has not elected to treat the lease as at an end, the tenant is entitled to seek an injunction to enforce the landlord's covenants, to pursue a claim for a new tenancy [. . .] and to collect rent from a sub-tenant.
>
> Further in the event that the tenant remains in possession whilst court proceedings are conducted, the tenant becomes a trespasser whose continuing use and occupation of the premises simply entitle the landlord to recover mesne profits, or damages, from the date of actual or notional re-entry. Where the rent payable under the tenancy represents the fair market value of the property, the mesne profits will be payable at the same rate. If the fair market rental value is higher or lower than the rent, the mesne profits will be different. The quantification of this claim to damages may lead to another round of litigation, and will compound any financial hardship suffered by a landlord who has receive no income at all from the property whilst the forfeiture proceedings have run their course.

6.4.3 Waiver

Landlords cannot rely on a breach of covenant to forfeit the lease where he or she has waived his or her right of re-entry. A waiver of a right of re-entry will occur where the landlord, with knowledge of the breach of covenant, acts in some way that recognizes the continued existence of the lease.[68] The most common action is the demand or acceptance of the rent payable under the lease.[69]

The effect of waiver has been criticized as operating unfairly to landlords, bearing in mind that a tenant may avoid the harsh consequences of forfeiture by applying for relief.

Smith, *Property Law* (6th edn, 2009, p 408)

> Three criticisms may be made of this rule. First, one must feel sympathy for the position of L [the landlord] who can claim neither rent nor mesne profits until the action is heard. Secondly, rent is usually accepted because of some mistake within L's offices: it is not as if a conscious decision has been made to keep the lease alive. Thirdly, and most damning, it does not matter that T [the tenant] is well aware that L has no intention of waiving the forfeiture.

[67] This expression was used by Lightman J in *GS Fashions Ltd v B&Q plc* [1995] 1 WLR 1088, 1093.

[68] *Matthews v Smallwood* [1910] 1 Ch 777; *Central Estates (Belgravia) Ltd v Woolgar (No 2)* [1972] 1 WLR 1048; *Cornillie v Saha* (1996) 72 P & CR 147.

[69] The acceptance of rent due before the breach will not operate as a waiver.

Waiver is less of an issue where the breach is continuing in nature: the landlord can simply rely upon a subsequent breach. An example of a continuing breach is a breach of a covenant to repair,[70] or, as in the following case, a covenant that restricts the user of the premises.

Segal Securities Ltd v Thoseby
[1963] 1 QB 887, HC

Facts: Mrs Thoseby rented a maisonette under a 21-year lease for a rent of £300 a year, which was payable quarterly in advance. The lease contained a covenant that it should be used only as a residence for one household. After the death of her husband, Mrs Thoseby shared her accommodation with two other women, one of whom was a friend and the other, a paying guest. The landlord alleged that she had breached the user covenant and served the required statutory notice at the beginning of June. It demanded the rent that was payable in advance on the next quarter day at the end of June; its demand was expressed to be 'without prejudice' to any breaches. Mrs Thoseby, in the landlord's action for possession, unsuccessfully claimed that the landlord had waived the breach of the user covenant. The breach was continuing and, although the right to re-enter flowing from breaches occurring before the date of service of the notice had been waived, the demand for rent did not waive future breaches.

Sachs J

At 897

When one approaches the law relating to waiver of forfeiture, one comes upon a field—one might say a minefield—in which it is necessary to tread with diffidence and warily. That is to no small degree due to the number of points in that field that are of a highly technical nature, originating in the days before the court was able to give relief, if at all, with such freedom as it can nowadays.

[. . .] In this field of law, one point, however, is plain and was conceded by counsel for the landlord. The law as to the effect of the acceptance of rent "without prejudice" must be taken as that stated in a classic passage in the judgment of Parker J. in *Matthews v. Smallwood* [1910] 1 Ch 777 at 786 [. . .]:

> "It is also, I think, reasonably clear upon the cases that whether the act, coupled with the knowledge, constitutes a waiver is a question which the law decides, and therefore it is not open to a lessor who has knowledge of the breach to say 'I will treat the tenancy as existing, and I will receive the rent, or I will take advantage of my power as landlord to distrain; but I tell you that all I shall do will be without prejudice to my right to re-enter, which I intend to reserve.' That is a position which he is not entitled to take up. If, knowing of the breach, he does distrain, or does receive the rent, then by law he waives the breach, and nothing which he can say by way of protest against the law will avail him anything."

[. . .] It is thus a matter of law that once rent is accepted a waiver results [. . .] Where forfeiture is involved, in essence once the landlord has knowledge of a past breach, the law thus treats the rent as a piece of cake equivalent to the land out of which it derives: its nutritional qualities

[70] *Penton v Barnett* [1898] 1 QB 276.

in the landlord's hands being unaffected by attaching to it the label "without prejudice," the law treats that attachment as having no effect.

Whether a demand for rent made without prejudice similarly operates as a waiver has, apparently, not been specifically decided. [. . .] As both demand and acceptance respectively are in law merely different forms of a notification by a landlord of election not to avoid or forfeit the lease, to my mind no distinction can nowadays be drawn between them in relation to a question whether the label "without prejudice" affects their quality as an election. [. . .]

At this stage it is right to mention that there was for a long time much able argument before me, and much discussion of authorities on the question whether the continued breach of covenant in the present case was a series of continuing breaches within the meaning of those words as they apply to breaches of covenants to repair, or whether, on the other hand, once it was discovered and known to the landlord that the tenant was in breach the landlord only had a single election. It was urged by counsel for the tenant that once the landlord had thus accepted rent he could not in future play cat and mouse with the tenant and bide the time for enforcing a forfeiture. At the very last moment, however, of his concluding address, counsel for the landlord cited *Doe d. Ambler v. Woodbridge*, a judgment of a strong court presided over by Lord Tenterden in which it was held that user by a lodger was a continuing breach: thereafter counsel for the tenant felt unable to press the argument that here the tenant was not guilty of a continuing breach [. . .]

One thus has to consider the position on the basis that this is a case where, according to the rule in *Penton v. Barnett*, [1898] 1 QB 276 there were a fresh series of breaches after July 6 of which the landlord is entitled, subject to any waiver, to take advantage without serving a further notice under section 146 of the Law of Property Act, 1925.

With that rule in mind, I now turn to the important and decisive question as to the circumstances in which a demand for or acceptance of rent payable in advance constitutes a waiver of breaches during the period covered by the rent demanded. Clearly it cannot be a waiver of future breaches of which the landlord has no advance knowledge: *Ellis v. Rowbotham* [1900] 1 QB 740 which relates to a default in payment of rent in advance, seems to illustrate this point, despite being an Apportionment Act case. Equally clearly, an acceptance of rent in advance does waive a once and for all—that is to say, a non-continuing—breach in the past: such a waiver applies both to the past and to the period covered by the rent.

As regards continuing breaches, it seems to me that, in the absence of express agreement, the acceptance of rent in advance can at highest only waive those breaches that are at the time of demand known to be continuing, and to waive them for such period as it is definitely known they will continue. When it is a question of estimating the chances as to whether the tenant's breach will continue, the position is, in my view, different, irrespective of whether those chances are high or low. The object of a covenant by which rent has to be paid in advance is to obtain a certain security for that payment: *Ellis v. Rowbotham* points to the nature and effect of that covenant. A landlord cannot, to my mind, lightly be deprived of the benefit of such rights: he cannot be put in the position of having to wait until the end of the period covered by the rent before demanding or accepting it merely because there are chances that the tenant may so break or continue in breach of covenant as to render himself liable to forfeiture.

6.4.4 Notice

The reason for requiring the landlord to give notice of a breach of covenant is explained in the following case.

Horsey Estate Ltd v Steiger
[1899] 2 QB 79, CA

Lord Russell

At 91

The object seems to be to require in the defined cases (1.) that a notice shall precede any proceeding to enforce a forfeiture, (2.) that the notice shall be such as to give the tenant precise information of what is alleged against him and what is demanded from him, and (3.) that a reasonable time shall after notice be allowed the tenant to act before an action is brought. The reason is clear: he ought to have the opportunity of considering whether he can admit the breach alleged; whether it is capable of remedy; whether he ought to offer any, and, if so, what, compensation; and, finally, if the case is one for relief, whether he ought or ought not promptly to apply for such relief. In short, the notice is intended to give to the person whose interest it is sought to forfeit the opportunity of considering his position before an action is brought against him.

When considering a landlord's obligation to warn the tenant of his or her intention to exercise his or her right of re-entry, we must distinguish between a re-entry based upon a tenant's failure to pay the rent and that based on a breach of another leasehold covenant.

Breach for non-payment of rent

Rent must be formally demanded before a right of re-entry can be exercised, unless, as is invariably the case, the right excludes the need for a formal demand.[71] The right of re-entry extracted at section 6.4.1 above provides an example in clause (1)(i).

Breach of covenants other than to pay rent

Where a breach of another covenant in the lease is relied upon,[72] the landlord must serve a notice under s 146(1) of the LPA 1925. A notice that fails to comply with the subsection is void and the landlord will have to serve another notice before re-entering.

Law of Property Act 1925, s 146(1)

Restrictions on and relief against forfeiture of leases and underleases

(1) A right of re-entry or forfeiture under any proviso or stipulation in a lease for a breach of any covenant or condition in the lease shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice—

(a) specifying the particular breach complained of; and

(b) if the breach is capable of remedy, requiring the lessee to remedy the breach; and

(c) in any case, requiring the lessee to make compensation in money for the breach;

[71] Common Law Procedure Act 1852, s 210, also dispenses with the need for a formal demand where the rent is six months in arrears and there are insufficient goods at the premises to distrain for the arrears.

[72] Save for certain cases in which re-entry is based upon the tenant's bankruptcy: see Law of Property Act 1925, s 146(9) and (10).

and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach.

The purpose of the notice, as Lord Russell explains in his point (2) of the above extract, is not only to warn the tenant, but also to let them know what they must do to avoid forfeiture. The nature of the breach must thus be accurately and sufficiently stated.

Akici v LR Butlin Ltd
[2006] 1 WLR 201, CA

Facts: Mr Akici acquired a lease of commercial premises that contained a covenant '*not to charge assign* [. . .] *underlet or part with possession of a part of the demised premises* [. . .] *nor to share possession of the whole or any part of the* [. . .] *premises nor to part with possession of the whole of the* [. . .] *premises*'. Mr Akici operated a takeaway pizza business at the premises, through a company owned by another. Butlin, as landlord, served a s 146 notice, alleging '*assignment or alternatively subletting or alternatively parting with possession of the premises without the landlord's consent*'. The Court decided that Mr Akici was sharing (but had not parted with possession of) the premises with the company, although this breach of covenant had not been adequately identified in the s 146 notice.

Neuberger LJ

At [54]–[58]

I accept the submission that the approach of the majority of the House of Lords in *Mannai* [*Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749] to contractual notices would apply to section 146 notices, despite Mr Butler's submission to the contrary. However, I have none the less come to the conclusion that Mr Lloyd's defence of the notice cannot stand. Even applying the *Mannai* case the notice has to comply with the requirements of section 146(1) of the 1925 Act, and if, as appears pretty plainly to be the case, it does not specify the right breach, then nothing in the *Mannai* case can save it.

Quite apart from this, if, on its true construction, the section 146 notice did not specify sharing possession as a breach complained of, it can be said with considerable force that it neither informed the recipient of the breach complained of, nor indicated to him whether, and if so how, he must remedy any breach. On the basis that there was a sharing of possession, a reasonable recipient of the section 146 notice would have been entitled to take the view that he need do nothing, because the lessors were only complaining about the presence of the company if there was a parting with possession (or assigning or underletting) by Mr Akici to it.

Accordingly, a reasonable recipient in this case (and it is the understanding of such a hypothetical person by reference to which the validity of the notice is to be assessed according to the *Mannai* case) could, to put it at its lowest, reasonably have taken the view that the lessors were not objecting to any sharing of possession, and consequently that no steps need to be taken, either with a view to remedying the breach or with a view to improving the prospects of obtaining relief from forfeiture [. . .]

> It is [. . .] appropriate to mention the decision of the House of Lords in *Fox v Jolly* [1916] 1 AC 1, 23 where the last sentence of the speech of Lord Parmoor appears to me to encapsulate the proper approach to section 146 notices and, it may be said, to notices generally:
>
> > "I think that the notice should be construed as a whole in a common-sense way, and that no lessee could have any reasonable doubt as to the particular breaches which are specified."
>
> In this case I think it is impossible to say that no lessee would have been in any doubt but that the lessors were not contending that he was sharing possession of the premises.

It is not necessary for the landlord to specify compensation if he or she is not seeking compensation,[73] but it is the requirements of s 146(1)(b) of the 1925 Act that have proved problematic. Where the breach is capable of remedy, the notice must call for the breach to be remedied. It is only where the breach is incapable of remedy that the landlord's notice can overlook s 146(1)(b). It is relatively easy for landlords to avoid the difficulty in distinguishing between those breaches that are capable of remedy and those that are not: they merely have to call for the breach to be remedy 'if it is capable of remedy'. Where a landlord has failed to use this convenient wording, it is vital to establish whether a particular breach is capable of remedy. As we will see, the question is also of significance when the court exercises its discretion to grant relief.

It could be argued that no breach can be remedied, in the sense that it is impossible to put the clock back to before the breach, but the courts have taken a wider approach by asking whether or not the harm occasioned by the breach can be remedied.

Savva v Hussein
(1997) 73 P & CR 150, CA

Facts: The lessees holding under a twelve-year lease of commercial premises in London carried out various alterations, including changing the sign and facia to the premises, without obtaining the prior consent of the landlords as they were required to do by the terms of the lease. In holding that the landlord's s 146 notice was invalid, the Court held that the breaches were capable of remedy.

Staughton LJ

At 154

[. . .] [T]he question is: whether the remedy referred to is the process of restoring the situation to what it would have been if the covenant had never been broken, or whether it is sufficient that the mischief resulting from a breach of the covenant can be removed. When something has been done without consent, it is not possible to restore the matter wholly to the situation which it was in before the breach. The moving finger writes and cannot be recalled. That is not to my mind what is meant by a remedy, it is a remedy if the mischief caused by the breach can be removed. In the case of a covenant not to make alterations without consent or not to display signs without consent, if there is a breach of that, the mischief can be removed by removing the signs or restoring the property to the state it was in before the alterations.

[73] *Rugby School (Governors) v Tannahill* [1935] 1 KB 87.

The courts have tended to draw a distinction between positive and negative covenants. A positive covenant is generally capable of remedy, whether it relates to a once-and-for-all breach or a continuing breach: for example, a covenant to repair is generally capable of being remedied by carrying out the necessary repairs.

Expert Clothing Service & Sales Ltd v Hillgate House Ltd
[1986] Ch 340, CA

Facts: Hillgate was granted a lease of premises, which it agreed to convert either into office space, or into a gym and health club. The conversion work was to be substantially completed by 28 September 1982—but, by this date, the work had not even started. The landlord served a s 146(1) notice on Hillgate, which claimed that its breach of covenant was incapable for remedy. The Court disagreed.

Slade LJ

At 351

In a case where the breach is "capable of remedy" within the meaning of the section, the principal object of the notice procedure provided for by section 146(1), as I read it, is to afford the lessee two opportunities before the lessor actually proceeds to enforce his right of re-entry, namely (1) the opportunity to remedy the breach within a reasonable time after service of the notice, and (2) the opportunity to apply to the court for relief from forfeiture. In a case where the breach is not "capable of remedy," there is clearly no point in affording the first of these two opportunities; the object of the notice procedure is thus simply to give the lessee the opportunity to apply for relief.

At 354

[After reviewing the authorities, Slade LJ continued] Mr. Neuberger, on behalf of the defendants, did not feel able to go so far as to support the view of MacKinnon J. that the breach of a positive covenant is *always* capable of remedy. He accepted, for example, that the breach of a covenant to insure might be incapable of remedy at a time when the premises had already been burnt down. Another example might be the breach of a positive covenant which in the event would be only capable of being fully performed, if at all, after the expiration of the relevant term.

Nevertheless, I would, for my part, accept Mr. Neuberger's submission that the breach of a positive covenant (whether it be a continuing breach or a once and for all breach) will ordinarily be capable of remedy. As Bristow J. pointed out in the course of argument, the concept of capability of remedy for the purpose of section 146 must surely be directed to the question whether the harm that has been done to the landlord by the relevant breach is for practicable purposes capable of being retrieved. In the ordinary case, the breach of a promise to do something by a certain time can for practical purposes be remedied by the thing being done, even out of time. For these reasons I reject the plaintiffs' argument that the breach of the covenant to reconstruct by 28 September 1982 was not capable of remedy *merely* because it was not a continuing breach [. . .]

In contrast with breaches of negative user covenants, the breach of a positive covenant to do something (such as to decorate or build) can ordinarily, for practical purposes, be remedied by the thing being actually done if a reasonable time for its performance (running from the service of the section 146 notice) is duly allowed by the landlord following such service and the tenant duly does it within such time [. . .]

> In my judgment, on the remediability issue, the ultimate question for the court was this: if the section 146 notice had required the lessee to remedy the breach and the lessors had then allowed a reasonable time to elapse to enable the lessee fully to comply with the relevant covenant, would such compliance, coupled with the payment of any appropriate monetary compensation, have effectively remedied the harm which the lessors had suffered or were likely to suffer from the breach? If, but only if, the answer to this question was "No," would the failure of the section 146 notice to require remedy of the breach have been justifiable [. . .] In the present case, [. . .] for the reasons already stated, I think the answer to it must have been "Yes."

By contrast, it has been suggested that a negative covenant is incapable of remedy. For example, MacKinnon J, at first instance in *Rugby School (Governors) v Tannahill*,[74] raised this possibility, although the Court of Appeal refused to indorse his view.[75] The Court did accept, however, that a covenant against an immoral or illegal user could be incapable of remedy where the breach carries a continuing stigma from which the premises cannot easily be cleansed. In *Tannahill*, the premises had been used for prostitution.[76] In the later case of *Scala House & District Property Co Ltd v Forbes*,[77] the Court of Appeal also decided that a once-and-for-all breach of a negative covenant against subletting, without the prior consent of the landlord, was incapable of remedy.

The Court of Appeal has subsequently backtracked from broad statements that negative covenants are incapable of remedy. In *Expert Clothing*, the decision in *Scala* was doubted and limited to covenants against subletting. This change in approach has gone hand in hand with an appreciation of the wider meaning of remedy explained in *Savva*, in which Aldous LJ also doubted the usefulness of distinguishing between positive and negative covenants.[78]

Neuberger LJ outlined the current approach in his dicta comments in the following case, in which he went so far as he was able, in the light of authority, to explain that all breaches of positive or negative covenants should be capable of remedy unless falling within the authority of *Scala* or the stigma cases.

Akici v LR Butlin Ltd
[2006] 1 WLR 201, CA

Neuberger LJ

At [64]–[75]

> In those circumstances it seems to me that the proper approach to the question of whether or not a breach is capable of remedy should be practical rather than technical. In a sense it could be said that any breach of covenant is, strictly speaking, incapable of remedy. Thus, where a lessee has covenanted to paint the exterior of demised premises every five years,

[74] [1934] 1 KB 695, 701. [75] [1935] 1 KB 87, 90, *per* Greer LJ.

[76] See also *Egerton v Esplanade Hotel, London Ltd* [1947] 2 All ER 88; *Central Estates (Belgravia) Ltd v Woolgar (No 2)* [1972] 1 WLR 1048; *British Petroleum Pension Trust Ltd v Behrendt* (1985) 52 P & CR 117. The court takes a less robust view where the breach against immoral user is indirect because the lessee acts promptly to end the immoral user committed by a sub-lessee see *Glass v Kencakes* [1966] 1 QB 611; *Patel v K&J Restaurants Ltd* [2010] EWCA Civ 1211. Other 'stigma' cases have related to: gambling (*Hoffman v Fineberg* [1949] Ch 245); pornography (*Dunraven Securities Ltd v Hollaway* [1982] 2 EGLR 47); and spying (*Van Haarlam v Kasner* (1992) 64 P & CR 214).

[77] [1974] QB 575. [78] (1996) 73 P & CR 150, 157.

his failure to paint during the fifth year is incapable of remedy, because painting in the sixth year is not the same as painting in the fifth year, an argument rejected in *Hoffmann v Fineberg* [1949] Ch 245, 253, cited with approval by this court in *Expert Clothing Service and Sales Ltd v Hillgate House Ltd* [1986] Ch 340, 351c-d. Equally it might be said that where a covenant to use premises only for residential purpose is breached by use as a doctor's consulting room, there is an irremediable breach because even stopping the use will not, as it were, result in the premises having been unused as a doctor's consulting room during the period of breach. Such arguments, as I see it, are unrealistically technical.

In principle I would have thought that the great majority of breaches of covenant should be capable of remedy, in the same way as repairing or most user covenant breaches. Even where stopping, or putting right, the breach may leave the lessors out of pocket for some reason, it does not seem to me that there is any problem in concluding that the breach is remediable. That is because section 146(1) entitles the lessors to "compensation in money [. . .] for the breach" and, indeed, appears to distinguish between remedying the breach and paying such compensation.

On this basis I consider that it would follow, as a matter of both principle and practicality, that breaches of covenants involving parting with or sharing possession should be capable of remedy. One can see an argument, albeit that it strikes me as somewhat technical, for saying that the breach of covenant against assigning or subletting is incapable of remedy, because such a breach involves the creation or transfer of an interest in land, and a surrender or assignment back does not alter the fact that an interest in land has been created or transferred. Were the point free of authority, I would see much force in the contention that such an analysis is over-technical, and I would be attracted to the view that a surrender or assignment back could be a sufficient remedy, at least in most cases, for the purposes of section 146.

So far as the authorities are concerned it appears to me that, at least short of the House of Lords, there are two types of breach of covenant which are as a matter of principle incapable of remedy. The first is a covenant against subletting: that is the effect of the reasoning of this court in the *Scala House case* [1974] QB 575. At least part of the reasoning in the leading judgment of Russell LJ, at p 588, justifying that conclusion is defective, as was explained by O'Connor LJ in the *Expert Clothing case* [1986] Ch 340, 364e-f in a judgment with which Bristow J agreed (at p 365c). However, as O'Connor LJ also said, the *Scala House case* is a decision which is binding on this court. In terms of principle (which may not be a wholly safe touchstone in this field) this is, I think, based on the proposition that one cannot, as it were, uncreate an underlease. It therefore appears to me that it should very probably follow that the general assumption that an unlawful assignment also constitutes an irremediable breach is correct. (This would suggest that breach of a covenant against charging a lease is irremediable, which strikes me as arguably unsatisfactory; failure to comply with a covenant to give notice of a charge, a somewhat different breach, is remediable: see the *Expert Clothing case* at p 355d).

The other type of breach of covenant which is incapable of remedy is a breach involving illegal or immoral use: see *Rugby School (Governors) v Tannahill* [1935] 1 KB 87 and *British Petroleum Pension Trust Ltd v Behrendt* [1985] 2 EGLR 97. This has been justified on the basis of illegal or immoral user fixing the premises with some sort of irremovable "stigma", which results in the breach being incapable of remedy. Especially in the light of the provision for damages in section 146, it is not entirely easy to justify this, particularly as it does not appear to apply where the lessee himself does not know of the illegal or immoral user: see *Glass v Kencakes Ltd* [1966] 1 QB 611. However, in terms of policy there is force in the view that a lessee, who has used premises for an illegal or immoral purpose, should not be able to avoid the risk of forfeiture simply by ceasing that use on being given notice of it, particularly

as relief from forfeiture would still be available. Another example, mentioned in the *Expert Clothing case* [1986] Ch 340, 355a, might be a breach of covenant to insure against damage by fire, where the property burns down before insurance can be effected.

In the *Expert Clothing case* itself the Court of Appeal held that a covenant to carry out substantial building works was capable of remedy at the time of the service of the section 146 notice, even though the work should have been completed by the date of service and had not even been started. Slade LJ said, at p 357, that breach of a positive covenant could "ordinarily, for practical purposes, be remedied by the thing being actually done". However, the notion that any breach of a negative covenant will be irremediable plainly cannot be right, as is demonstrable by considering an innocuous and innocent breach of a user covenant.

There are three types of classification of covenants. They are (a) positive and negative (relevant to the transmission of the burden of freehold covenants, equitable in origin), (b) continuing and "once and for all" (relevant to waiver of forfeiture, with a common law origin), and (c) remediable and irremediable (relevant for section 146, and thus statutory in origin). These three types of classification are thus for different purposes and have different origins. Attempting to equate one class of one type with one class of a different type is therefore likely to be worse than unhelpful.

Any idea that negative covenants are by their nature irremediable has been put to rest by the decision of this court in *Savva v Hussein* (1996) 73 P & CR 150. In that case the breach of covenant consisted of carrying out alterations in breach of a covenant not to do so. After quoting the passage I have just cited from the *Expert Clothing case*, Aldous LJ said, at p 157, that he could "see no reason why similar reasoning should not apply to some negative covenants". He went on to quote with approval of a subsequent passage in Slade LJ's judgment [1986] Ch 340, 358:

> "if the section 146 notice had required the lessee to remedy the breach and the lessors had then allowed a reasonable time to elapse to enable the lessee fully to comply with the relevant covenant, would such compliance, coupled with the payment of any appropriate monetary compensation, have effectively remedied the harm which the lessors had suffered or were likely to suffer from the breach?"

As Aldous LJ, with whom Sir John May agreed, then went on to say 73 P & CR 150, 157: "It is only if the answer to that question is 'no' it can be said that the breach is not capable of being remedied."

In these circumstances it appears to me that, unless there is some binding authority, which either calls into question the conclusion or renders it impermissible, both the plain purpose of section 146(1) and the general principles laid down in two relatively recent decisions in this court, namely the *Expert Clothing* [1986] Ch 340 and *Savva* 73 P & CR 150 cases, point strongly to the conclusion that, at least in the absence of special circumstances, a breach of covenant against parting with possession or sharing possession, falling short of creating or transferring of legal interest, are breaches of covenant which are capable of remedy within the meaning of section 146.

The only authority which could be cited to call that conclusion into question is the *Scala House case* [1974] QB 575 itself, but that does not deter me from my conclusion. First, it was only concerned with underletting; secondly, the reasoning of the leading judgment in the case is, at least in part, demonstrably fallacious and inconsistent with common sense and many other authorities; thirdly, it has been overtaken and marginalised by the *Expert Clothing* and *Savva* cases; fourthly, there is no reason of logic or principle why the reasoning or conclusion in the *Scala House case* should be extended to apply to a breach which falls short of creating a legal interest.

It is true that Slade LJ said in the *Expert Clothing case* [1986] Ch 340, 354g that the principle in the *Scala House case* extends to parting with possession, as well as assigning and underletting. That was an obiter observation, which I do not regard as binding. Bristow J, at p 365c, agreed with Slade LJ's judgment but he also agreed with the judgment of O'Connor LJ who, at p 365a-b, said that the *Scala House case*, while authority for the proposition that breach of a covenant against underletting was irremediable, was not "authority for any wider proposition". As I have indicated, my present view is an intermediate one. I think that principle and precedent probably require one to go along with Slade LJ and conclude that the *Scala House case* applies to assigning but, in agreement with O'Connor LJ, I certainly do not see why it extends to parting with (let alone sharing) possession.

Once a valid notice has been served, the tenant must be given a reasonable time to remedy the breach, if it is capable of remedy, or to pay any compensation. A reasonable time will depend primarily on the nature of the breach and the time frame of the dispute, including the remaining residue of the lease.

Slade LJ explained the significance of allowing a reasonable time.

Expert Clothing Service & Sales Ltd v Hillgate House Ltd
[1986] Ch 340. CA

Slade LJ

At 358

An important purpose of the section 146 procedure is to give even tenants who have hitherto lacked the will or the means to comply with their obligations one last chance to summon up that will or find the necessary means before the landlord re-enters. In considering what "reasonable time" to allow the defendants, the plaintiffs, in serving their section 146 notice, would, in my opinion, have been entitled to take into account the fact that the defendants already had enjoyed 15 months in which to fulfil their contractual obligations to reconstruct and to subject the defendants to a correspondingly tight timetable running from the date of service of the notice, though, at the same time, always bearing in mind that the contractual obligation to reconstruct did not even arise until 29 June 1981, and that as at 8 October 1982 the defendants had been in actual breach of it for only some 10 days. However, I think they were not entitled to say, in effect: "We are not going to allow you any time at all to remedy the breach, because you have had so long to do the work already."

If the tenant does respond to the notice and remedies the breach, the landlord cannot forfeit the lease, even though the tenant's record in performing his or her leasehold obligations has been poor.[79]

Where the breach is incapable of remedy, the landlord must allow the tenant a short period before proceeding to forfeiting the lease; fourteen days is usually considered sufficient time for the tenant to prepare to accept his or her fate or plea for relief.[80]

[79] Law Commission Report No 302 *Termination of Tenancies for Tenant Default* (2006), [1.12.6].

[80] *Scala House & District Property Co Ltd v Forbes* [1974] QB 575, but see *Horsey Estates Ltd v Steiger* [1899] 2 QB 79.

6.4.5 Peaceful re-entry

The prospect of criminal liability under s 6 of the Criminal Law Act 1977, for forcible entry, or under the Protection from Eviction Act 1977, which prohibits the forfeiture of the lease of an occupied dwelling house other than by court order, discourages landlords from trying to enter peacefully, unless the premises are used for commercial purposes and they are empty. Despite these dangers, there was once an incentive for a landlord to try to re-enter peacefully, because it was believed that the tenant was then unable to apply to the court for relief from forfeiture under s 146(2) of the LPA 1925. The House of Lords held this belief to be erroneous in *Billson v Residential Apartments Ltd*,[81] a decision that we shall examine in more detail shortly. The decision also reflects a move away from self-help remedies, which have led to proposals for reform that we will examine below.

Gray and Gray, *Elements of Land Law* (5th edn, 2009, [4.4.25])

> There is nowadays a widespread apprehension that, although forfeiture by actual re-entry remains lawful at common law, it is 'undesirable to encourage landlords to self-help'. The gathering perception can only be intensified by the statutory assimilation of the European Convention guarantee of the right to a 'fair and public hearing' [. . .] The clear trend of modern human rights jurisprudence is to castigate the resort to self-help remedies as 'inimical to a society in which the rule of law prevails'. It is highly unlikely that the landlord's remedy of peaceable re-entry without court order can survive much longer as a general feature of the English law of landlord and tenant.

6.4.6 Relief from forfeiture

The draconian nature of forfeiture is tempered by the tenant's ability to apply for relief from forfeiture. Relief operates to recharacterize forfeiture from a tool of expropriation of the tenant's term to a security for the tenant's performance of the covenants contained in the lease. The rules governing relief are, however, complicated by the interplay between the courts' original equitable jurisdiction to grant relief and subsequent statutory measures. Furthermore, we again see a distinction drawn between different types of breach: namely, a failure to pay rent and breaches of other covenants. There are also differences in the treatment of the original tenant's right to relief and the rights to relief of holders of derivative interests: for example, under-lessees and sub-lessees; mortgagees and chargees.

Relief for non-payment of rent

Equity has long granted relief from forfeiture for non-payment of rent upon payment of the arrears and any costs, provided that it is equitable to grant relief.[82] This jurisdiction is overlain by various statutory measures. The result is 'an intricate maze'[83] of absolute and discretionary rights that differ according to whether the application is made

[81] [1992] 1 AC 494.

[82] *Howard v Fanshawe* [1895] 2 Ch 581, 588, *per* Stirling J; *Ladup Ltd v William & Glyns Bank plc* [1985] 1 WLR 851, 860, *per* Warner J. This jurisdiction is available for a failure to pay other charges, for example, a service charge, where those charges are expressed to be paid by way of rent: see *Escalus Properties Ltd v Robinson* [1996] QB 231.

[83] Luxton [1994] JBL 37.

before or after possession is ordered or the landlord has re-entered (whether peacefully or otherwise), and depend upon whether proceedings are brought in the High or county courts.[84]

In the High Court, relief before trial is available under s 212 of the Common Law Procedure Act 1852, which confers an absolute right to relief, and the continuance of the original lease, where the tenant pays the rent arrears and costs before trial. Under s 210 of the 1852 Act, the tenant may also claim similar relief after the hearing, provided that the claim is made within six months of execution of the order for possession. Relief under the 1852 Act is rather bizarrely only available where the rent is at least six months in arrears and there are no goods on the premises that would satisfy a landlord's claim for distress.[85] It is also unavailable where the landlord has re-entered peacefully.

Where proceedings are brought in the county court, s 138(2) of the County Court Act 1984 confers an absolute right to relief where the tenant pays the arrears and costs at least five days before the hearing. Under s 138(3), the court must allow at least four weeks before an order for possession can be executed. This period may be extended.[86] Where the possession order has been executed or where the landlord has re-entered peacefully, the tenant may apply for relief from forfeiture provided that his or her application is made within six months of the date on which the landlord regained physical possession.[87]

Where statutory relief is unavailable, the court's equitable jurisdiction may assist. The manner in which the court will exercise its discretion under its equitable jurisdiction is explained in the following case. Similar considerations apply where the court is exercising its discretion to grant relief under it statutory jurisdiction.[88]

Gill v Lewis
[1956] 2 QB 1, CA

Jenkins LJ

At 13

As to the conclusion of the whole matter, in my view, save in exceptional circumstances, the function of the court in exercising this equitable jurisdiction is to grant relief when all that is due for rent and cost has been paid up, and (in general) to disregard any other causes of complaint that the landlord may have against the tenant. The question is whether, provided all is paid up, the landlord will not have been fully compensated; and the view taken by the court is that is he gets the whole of his rent and costs, then he has got all he is entitled to so far as rent is concerned, and extraneous matters of breach of covenants, and so forth, are generally speaking irrelevant.

Exceptional circumstances may exist where the landlord has, not unreasonably, altered his or her position, or where a third party's interest would be affected.[89] The poor payment record of the tenant is irrelevant.

84 The county court has unlimited jurisdiction in forfeiture and relief proceedings.
85 *Billson v Residential Apartments Ltd* [1992] 1 AC 494, 529, *per* Nicholls LJ.
86 County Court Act 1984, s 138(4).
87 Ibid, ss 138(9A) and 139(2). See *United Dominions Trust Ltd v Shellpoint Trustees Ltd* [1993] 4 All ER 310.
88 *Howard v Fanshawe* [1895] 2 Ch 581 and *Lovelock v Margo* [1963] 2 QB 786.
89 See *Gill v Lewis* [1956] 2 QB 1, 9–10, *per* Jenkins LJ, referring to *Stanhope v Haworth* (1886) 3 TLR 34.

Where relief is granted after completion of forfeiture, whether by possession order or the landlord's peaceful re-entry, the lease will be restored and the landlord placed in the same position as if there had been no forfeiture.[90]

Relief from breach of other covenants

A tenant's right to relief, from a right of re-entry based upon a breach of the other covenants contained in the lease, is governed by s 146(2) of the LPA 1925.

Law of Property Act 1925, s 146(2)

Where a lessor is proceeding, by action or otherwise, to enforce such a right of re-entry or forfeiture, the lessee may, in the lessor's action, if any, or in any action brought by himself, apply to the court for relief; and the court may grant or refuse relief, as the court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circumstances, thinks fit; and in case of relief may grant it on such terms, if any, as to costs, expenses, damages, compensation, penalty, or otherwise, including the granting of an injunction to restrain any like breach in the future, as the court, in the circumstances of each case, thinks fit.

The right to relief is available where the landlord has entered peacefully,[91] but not where the landlord has entered into possession pursuant to a court order. In the latter case, the tenant must apply for relief during the possession proceedings.

Billson v Residential Apartments Ltd
[1992] 1 AC 494, HL

Facts: In breach of covenant, Residential Apartments had made substantial alterations to the property without the written permission of Billson as landlord. Billson served notice under s 146(1) and, fourteen days later, at 6 a.m., peaceably re-entered the premises before workmen of Residential Apartments retook possession four hours later. At the centre of the dispute was whether Residential Apartments could apply for relief under s 146(2) of the 1925 Act.

Lord Templeman

At 535

Mr. Reid submitted and referred to authority for the proposition that on the true construction of section 146(2) a tenant cannot apply for relief against forfeiture after the landlord has re-entered without obtaining a court order. Thereafter the landlord is no longer "proceeding" to enforce his rights; he has succeeded in enforcing them. The proposition is in my opinion historically unsound because the effect of issuing and serving a writ is precisely the same as

[90] *Bland v Ingrams Estates Ltd* [2001] EWCA Civ 1088, [13]–[15].

[91] In *Billson v Residential Apartments (No 2)* [1993] EGCS 155, the court warned that it may be more disposed to grant relief where landlords have entered peacefully without the sanction of a court order for possession.

the effect of re-entry; in each case the lease is determined. The landlord is entitled to remain in possession if he has re-entered and he is entitled to possession if he has issued and served a writ because the lease no longer exists. In each case the tenant seeks relief because the lease has been forfeited. The proposition is also inconsistent with the language of section 146(2). The tenant may apply for relief where the landlord is "proceeding, by action or otherwise" to enforce his rights. The tenant may apply for relief where the landlord is "proceeding" by action and also where the landlord is proceeding "otherwise" than by action. This can only mean that the tenant may apply for relief where the landlord is proceeding to forfeit by re-entry after the expiry of a section 146 notice. If re-entry bars relief, the right of the tenant to apply for relief where the landlord is proceeding otherwise than by action is substantially inoperative and the words "or otherwise" in section 146(2) have no application. In my opinion those words must have been included because Parliament intended that a tenant should be able to obtain relief against a landlord whether the landlord has asserted his rights by a writ or by re-entering. It is said that a tenant served with a section 146 notice could during and after the expiration of the notice apply for relief under section 146(2) but if he fails to do so he is at the mercy of the landlord who decides to re-enter and whose rights are therefore, it is said, quite unaffected by the provisions of section 146(2) designed to relieve tenants from the consequences of breach of covenant. In my opinion the ambiguous words "is proceeding" can mean "proceeds" and should not be construed so as to produce the result that a tenant served with a section 146 notice can only ensure that he will be able to apply for relief if he does so before he knows whether or not the landlord intends to proceed at all or whether, if the landlord decides to proceed, he will issue and serve a writ or will attempt to re-enter.

When a tenant receives a section 146 notice he will not know whether the landlord can be persuaded that there is no breach or persuaded to accept in due course that any breach has been remedied and that he has been offered adequate and satisfactory compensation or whether the landlord will seek to determine the lease by issuing and serving a writ or will seek to determine the lease by re-entering the premises. The tenant will not wish to institute proceedings seeking relief from forfeiture if those proceedings will be aggressive and hostile and may be premature and unnecessary. Parliament cannot have intended that if the landlord employs the civilised method of determining the lease by issuing and serving a writ, then the tenant will be entitled to apply for relief, but if the landlord employs the dubious and dangerous method of determining the lease by re-entering the premises, then the tenant will be debarred from applying for relief.

Mr. Reid concedes that re-entry can only avail the landlord if the entry is lawful. Re-entry is unlawful where the premises are occupied by the tenant but not unlawful where the premises are occupied by the tenant's goods. If the argument of the landlords is correct, section 146 provides a method by which a landlord can sneak up on a shop at night, break into the shop, and install new locks so that the tenant loses his lease and can only press his nose against the shop window being unable to obtain the assistance of the court because he has become a trespasser entitled to no rights and to no relief. The farce in the present case when the landlords occupied the premises for four hours should not be allowed to defeat the statutory rights of the tenants.

The right conferred by section 146(2) on a tenant to apply for relief against forfeiture may without violence to the language, be construed as a right to apply "where a lessor *proceeds*, by action or otherwise" to enforce a right of re-entry. So construed, section 146(2) enables the tenant to apply for relief whenever and however the landlord claims that the lease has been determined for breach of covenant. I have no doubt that this was the object and intention and is the effect of section 146.

[His Lordship considered past authorities, which suggested the contrary conclusion, but which he held had not decided the point in issue.]

My Lords, I accept that it is now settled law that a tenant cannot apply for relief after the landlord has recovered judgment for possession and has re-entered in reliance on that judgment. But I do not accept that any court has deprived or is entitled to deprive a tenant of any right to apply for relief if the landlord proceeds to forfeit otherwise than by an action instituted for that purpose [. . .]

The landlords or their advisers, perhaps incensed by the activities of the tenants in the present case, conceived and carried out a dawn raid which fortunately did not result in bloodshed. Since the decision of the Court of Appeal in the instant case there has been a proliferation of section 146 notices followed by pressure on tenants to surrender on terms favourable to the landlord. If this appeal were not allowed, the only safe advice for a tenant would be to issue proceedings for relief against forfeiture as soon as a section 146 notice is received at a time when the tenant cannot know whether relief will be necessary. A tenant ignorant of the development in the law pioneered by the landlords in the present case will be at the mercy of an aggressive landlord. The conclusions which I have reached will not entail these consequences and will not again involve Parliament in correcting judicial constructions of statute by further legislation.

The results of section 146 and the authorities are as follows. A tenant may apply for appropriate declarations and for relief from forfeiture under section 146(2) after the issue of a section 146 notice but he is not prejudiced if he does not do so. A tenant cannot apply for relief after a landlord has forfeited a lease by issuing and serving a writ, has recovered judgment and has entered into possession pursuant to that judgment. If the judgment is set aside or successfully appealed the tenant will be able to apply for relief in the landlord's action but the court in deciding whether to grant relief will take into account any consequences of the original order and repossession and the delay of the tenant. A tenant may apply for relief after a landlord has forfeited by re-entry without first obtaining a court order for that purpose but the court in deciding whether to grant relief will take into account all the circumstances, including delay, on the part of the tenant. Any past judicial observations which might suggest that a tenant is debarred from applying for relief after the landlord has re-entered without first obtaining a court order for that purpose are not to be so construed.

Given this interpretation of s 146(2) of the LPA 1925, it was unnecessary for the House of Lords to consider whether the subsection provided a complete statutory code or whether there was a residual equitable jurisdiction to grant relief to a tenant from a breach of covenant, other than to pay rent. The majority of the Court of Appeal in *Billson* had decided that s 146(2) was a complete statutory code. The question remains significant to the holder of a derivative interest seeking relief under s 146(4), which we will consider below.

The court's jurisdiction to grant relief is wide and unfettered.[92] All of the circumstances of the case are to be considered, but particularly significant are the gravity of the breach, the conduct of the parties, the question of whether or not the breach can be remedied, and the disparity between the loss caused to the landlord by the breach and the loss caused to the tenant should the lease be forfeited.[93] Relief will rarely be granted where the breach is intentional or cannot be remedied, unless the breach is trivial and the damage to the landlord's

[92] *Rose v Hyman* [1912] AC 623, 631.

[93] See *Ropemaker Properties Ltd v Noonhaven Ltd* [1989] 2 EGLR 50, in which relief was granted, even though the breach was serious, because the financial loss to the tenants would be out of proportion to the loss suffered by the landlords.

reversion insignificant.[94] Here, we thus see an interface with the question of whether or not a breach can be remedied for the purposes of a s 146(1) notice.

Relief and derivative interests

We have already noted that the forfeiture of a lease will also extinguish interests that are carved out of that lease: namely, underleases (of the whole of the lease premises), subleases (of part of the leased premises), mortgages, and charges. It is thus important that persons holding such interests are also able to claim relief. There is a confusing array of possibilities.

The primary jurisdiction is found in s 146(4) of the LPA 1925, which provides a right for under-lessees and sub-lessees, mortgagees and legal chargees,[95] to apply for relief against forfeiture based upon a breach of a covenant, both to pay rent and other covenants. Equitable chargees are excluded.[96]

Law of Property Act 1925, s 146(4)

> Where a lessor is proceeding by action or otherwise to enforce a right of re-entry or forfeiture under any covenant, proviso, or stipulation in a lease, or for non-payment of rent, the court may, on application by any person claiming as under-lessee any estate or interest in the property comprised in the lease or any part thereof, either in the lessor's action (if any) or in any action brought by such person for that purpose, make an order vesting, for the whole term of the lease or any less term, the property comprised in the lease or any part thereof in any person entitled as under-lessee to any estate or interest in such property upon such conditions as to execution of any deed or other document, payment of rent, costs, expenses, damages, compensation, giving security, or otherwise, as the court in the circumstances of each case may think fit, but in no case shall any such under-lessee be entitled to require a lease to be granted to him for any longer term than he had under his original sub-lease.

A successful application will result in the grant of a new lease held directly from the head landlord. Where relief is grant to a mortgagee, the expectation is that the new lease will be held on the same terms as the original lease. Where relief is grant to an under-lessee or sub-lessee, the new lease cannot exceed the length of the original term and where a sublease is in issue, the new sublease will also be limited to the relevant part of the premises.[97] If there is a difference in rental between the head and under/sublease, the higher rental will prevail.[98] The courts' discretion is exercised in a similar manner to relief granted under s 146(2), with an expectation that the breach will be remedied.[99] The court may also be circumspect in imposing upon the landlord a tenant that he or she has not chosen.

A derivative interest holder may also apply for relief from forfeiture based upon a breach of a covenant other than to pay rent under s 146(2), which we considered above.[100] The right is based upon the definition of 'lessee' found in s 146(5)(b).

94 See *Central Estates (Belgravia) Ltd v Woolgar (No 2)* [1972] 1 WLR 1048, *Van Haarlam v Kasner* (1992) 64 P & CR 214 and *Patel v K&J Restaurants Ltd* [2010] EWCA Civ 1211.

95 *Grand Junction Co Ltd v Bates* [1954] 2 QB 160.

96 *Bland v Ingram Estates Ltd (No 2)* [2002] Ch 177.

97 *Cadogan v Dimovic* [1984] 1 WLR 609.

98 *Ewart v Fryer* [1901] 1 Ch 499.

99 *Hill v Griffin* [1987] 1 EGLR 81.

100 *Escalus Properties Ltd v Robinson* [1996] QB 231.

Law of Property Act 1925, s 146(5)

(5) For the purposes of this section [. . .]

(b) "Lessee" includes an original or derivative under-lessee, and the persons deriving title under a lessee; also a grantee under any such grant as aforesaid and the persons deriving title under him;

[. . .]

The difference between relief granted under s 146(2) and the general ground in s 146(4) is that, under s 146(2), the existing lease will continue, whilst under s 146(4), a new lease is granted.

Relief from the breach of a covenant to pay rent is also available to a the holder of a derivative interest under the provisions of the Common Law Procedure Act 1852 and the County Court Act 1984, considered above.

Where the court is persuaded to exercise its jurisdiction to grant relief, the expectation is that the breaches will be made good in respect of the affected premises.[101]

Despite these various statutory routes to relief, there are still gaps. It is thought that the approach adopted in *Billson* will also apply to applications for relief by the holders of derivative interests, whether under s 146(2) or (4). Accordingly, the right will be lost where the landlord has obtained possession pursuant to a court order, although not where the landlord has entered peacefully. This possibility presents a real danger to lenders who, not being in possession, may well be unaware of the head landlord's proceedings. Equitable chargees also fall through the safety net provided by s 146(2) and (4), and the Common Law Procedure Act 1852. Equitable chargees can rely upon the county court jurisdiction, or, alternatively, may insist that the tenant asserts his or her right to relief in order to protect the security.[102]

These statutory gaps in the relief available to holders of derivative interests might be plugged if resort can be made to the courts' equitable jurisdiction. We have noted that the court has long exercised an equitable jurisdiction that provides relief from a breach of covenant to pay rent. The ability of the court to grant relief from forfeiture based upon breach of another covenant was doubted until the House of Lords decision in *Shiloh Spinners Ltd v Harding*.[103] But the House, whilst holding that such an inherent equitable jurisdiction did exist, indicated that the jurisdiction would not prevail where Parliament has made statutory provision covering the particular case. The question thus turns upon whether s 146 provides a complete statutory code. As we have already noted, the Lords in *Billson* did not provide an answer to this question.[104]

Rexhaven Ltd v Nurse[105] raises one further possibility for the derivative interest holder where the landlord has executed a possession order against the tenant—that is, to apply to have the possession order set aside on the basis that he or she has a good claim to relief, which he or she has been unable to present to the court, for example, because of his or her ignorance of the possession proceedings.

101 *Chatham Empire Theatres (1955) Ltd v Ultrans Ltd* [1961] 1 WLR 817.

102 *Bland v Ingrams Estates Ltd* [2001] Ch 767.

103 [1973] AC 691.

104 The Court of Appeal in *Billson* had reluctantly concluded that s 146 was a complete code, *per* Lord Browne Wilkinson VC [1991] 3 WLR 264, 279. See also *Official Custodian for Charities v Parway Estates Development Ltd* [1984] 3 WLR 525. There is conflicting first instance authority to the contrary in *Abbey National Building Society v Maybeech* [1985] Ch 190, which was heard at the same time, but without reference to *Parway*.

105 (1995) 28 HLR 241.

6.4.7 Reform

It should come as no surprise that there have long been calls for reform of the law governing forfeiture. The Law Commission first mooted reform in 1968,[106] although it was not until 1985 that its first report on the question was published.[107] Implementation of these proposals was delayed by other projects and developments—most notably, title registration, the HRA 1998, and changes to the civil procedure rules—but, in 2006, a further report was issued.[108]

The proposals are to replace the existing forfeiture schemes for non-payment of rent and breaches of other covenants with a single scheme for the termination of leases based upon any relevant default by the tenant. This scheme is outlined in the Executive Summary to the report.

Law Commission Report No 303, *Termination of Tenancies for Tenant Default: Executive Summary* (2006, [1.9]–[1.24])

Tenant default

The scheme introduces a new concept of "tenant default" to define the circumstances in which a landlord may seek to terminate the tenancy before the end of its term. In simple terms, tenant default is a breach by the tenant of a covenant or condition of the tenancy. There is no need for a forfeiture clause or right of re-entry to be included in a tenancy agreement entered into post implementation, although the tenant should be given an "explanatory statement" explaining what can happen in the event of tenant default.

It is open to the parties to agree that the breach of one or more covenants will not comprise tenant default and so exclude or limit the application of the scheme. It is no longer possible for the landlord to "waive" the breach (either intentionally or inadvertently).

Tenant default notice

The scheme requires the landlord wishing to proceed to warn the tenant of the impending action by giving a written notice. The tenant default notice must set out the details of the breach, any remedial action required and the date by which it should be completed. The scheme limits the period after a tenant default during which a tenant can be served with a tenant default notice.

The tenant default notice must also be served on those who hold qualifying interests deriving out of the tenancy of which the landlord has knowledge (principally mortgagees and sub-tenants).

The primary purpose of the tenant default notice is to ensure that the tenant complies with the obligations under the tenancy. It can also provide a period for negotiation by the parties. For a minimum period of seven days, or until the date for remedy set out in the notice expires, the landlord cannot take any further steps in the process that might culminate in the termination of the tenancy.

106 Law Commission Working Paper No 16 (1968).
107 Law Commission Report No 142, *Forfeiture of Tenancies* (1985).
108 Law Commission Report No 303, *Termination of Tenancies for Tenant Default* (2006), following the favourable response to its Consultation Paper No 174 (2004).

Making a termination claim

If the service of a tenant default notice fails in its primary purpose, the landlord may make a termination claim. The claim is served on the tenant and on all qualifying interest holders who have previously been served with a tenant default notice.

The orders available to the court

Once the court is satisfied that the tenant default has occurred, it may make such order that it thinks appropriate and proportionate in all the circumstances. In arriving at this decision the court is required to take into account a number of considerations. These include the conduct of the landlord and the tenant, whether any action can be or has been taken to remedy the default and whether the deadline by which it was to be remedied was reasonable.

A **termination order** ends the tenancy and any interests deriving out of it on a date specified in the order.

A **remedial order** will set out what the tenant must do to remedy the default and the date by which it must be remedied. The order does not affect the continued existence of the tenancy. It stays the landlord's claim for a termination order for a period of three months from the day by which the tenant is required to have carried out the work. During that period the landlord can apply to lift the stay and proceed with the termination claim. On lifting the stay, the court may make any order available to it, including a termination order.

An **order for sale** requires that the tenancy is sold and the proceeds distributed. This may be appropriate where the tenancy has a significant capital value and a termination order would provide a disproportionate windfall to the landlord.

There are two orders that can only be sought by qualifying interest holders. The first is the **transfer order**. This requires the tenancy to be transferred to the applicant or a third party (for example, a tenants' management company). The second is the **new tenancy order** which grants the applicant a new tenancy of all or part of the demised premises [. . .]

[. . .]

Summary termination procedure

The scheme provides an alternative procedure under which the landlord can bring a tenancy to an end without applying to the court. It is intended for use in cases where the tenant would have no realistic prospect of resisting a termination order or where premises have been abandoned. The procedure cannot be used concurrently with the court-based procedure; the landlord must elect which route to take.

The procedure cannot be used where (1) someone is lawfully residing in the premises, (2) the unexpired term exceeds 25 years, or (3) the tenancy was granted for a term in excess of seven years and there are three or more years unexpired, and the default is breach of a repairing covenant.

The procedure is commenced by service of a summary termination notice and operates to bring the tenancy and all interests deriving out of it to an end one month after the notice is served. However, the tenant or any qualifying interest holder can resist the summary termination by applying to court to discharge the notice. This application suspends the termination of the tenancy until it has been decided. The landlord must rebut the presumption that the notice should be discharged by showing that, on a termination claim being made, the tenant would have no realistic prospect of persuading the court not to make a termination order and that there is no other reason why the matter should be disposed of by way of a hearing of a termination claim.

For six months after summary termination of a tenancy, the former tenant (or a former qualifying interest holder) can apply to court for a "post-termination order". This may be any order in connection with the tenancy that the court thinks appropriate and proportionate and includes the grant of a new tenancy to the applicant or the payment of compensation. However, the court cannot in any circumstances revive the terminated tenancy.

QUESTIONS

1. Explain what we mean by 'privity of estate'? Why does a sub-lessee fall outside the privity of estate matrix of the head lease and does this matter?
2. Why is the contractual liability of the original parties to a long lease unfair? How does the Landlord and Tenant (Covenants) Act 1995 address the problem? In any event, did this contractual liability present so much of a problem for long leases of flats?
3. Is it easier for the benefit and burden of a tenant's and landlord's covenants to pass in a post-1995 lease than in a pre-1996 lease?
4. The Landlord and Tenants (Covenants) Act 1995 abandons the concepts of a covenant 'touching and concerning', and 'having reference to the subject matter' of the lease. Is it sensible for it to do so?
5. How draconian a remedy is forfeiture?
6. Why does a 'twilight period' occur during the process of forfeiture?
7. Can a negative leasehold covenant be remedied?
8. Is there any role for equity's inherent jurisdiction to provide relief from forfeiture or does the statutory right to relief provided by s 146 of the Law of Property Act 1925 provide a complete code?

FURTHER READING

Bridge, 'Former Tenants, Future Liabilities and the Privity of Contract Principle' (1996) 55 CLJ 313

Clarke, 'Property Law' (1992) 45(1) CLP 81

Davey, 'Privity of Contract and Leases: Reform at Last' (1996) 59 MLR 78

Gravells, 'Forfeiture of Leases for Breach of Covenant' [2006] JBL 830

Law Commission Report No 174, *Landlord and Tenant Law: Privity of Contract and Estate* (1988)

Law Commission Report No 303, *Termination of Tenancies for Tenant Default* (2006)

Luxton, 'Waiver of Forfeiture: Time to Shake Away the Doctrine of Election' [1991] JBL 34

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PART G

NEIGHBOURS AND NEIGHBOURHOODS

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25

EASEMENTS

CENTRAL ISSUES

1. An easement is the proprietary right to enjoy limited use of the land of another, which may exist in both positive and negative form.
2. The defining characteristics of an easement are: (i) there must be a dominant and a servient tenement; (ii) each of the tenements must be in separate occupation; (iii) the easement must accommodate the dominant tenement; and (iv) the easement must be capable of being the subject matter of a grant.
3. Easements may be created by express, implied, or presumed grant.
4. An implied grant of an easement may arise: (i) by necessity; (ii) by common intention; (iii) under the rule in *Wheeldon v Burrows*;[1] or (iv) by the operation of s 62 of the Law of Property Act 1925.
5. A grant of an easement may be presumed by prescription as a result of long user as of right either at common law, or under the doctrine of lost modern grant or the Prescription Act 1832.
6. The status of easements as overriding interests presents a challenge to a complete register, which has been addressed by the Land Registration Act 2002.
7. An easement may be extinguished by common ownership of the dominant and servient land, by release, by abandonment, or by excessive user (in extreme cases).

1 INTRODUCTION

1.1 WHAT ARE EASEMENTS?

An easement is the right of a landowner to enjoy limited use of the land of another landowner.[2] There is thus a need for two pieces of land: the *dominant* land, to which the right is attached, and the *servient* land, over which the right is exercised and which must thus suffer the burden of the right. In England and Wales, easements are very common. Land Registry

[1] (1879) 12 LR Ch D 31.

[2] See Chapter 4, sections 5 and 6.

figures reveal that 65 per cent of existing registered freehold titles and 24 per cent of existing registered leasehold titles are subject to an easement.[3]

Easements may be positive or negative in nature. A positive easement will allow the owner of the dominant land to go onto the servient land to use some facility. The most common positive easement is a right of way to use a path or road on the servient land. A negative easement is a right to receive something from the servient land: for example, a right to receive light or air flowing from the servient land. It is negative in nature both because the dominant owner is not entitled to do anything over the servient land, and because the servient owner is not permitted to interfere with the right.

Easements are proprietary rights that exist for a defined estate.[4] They are thus capable of accruing to the benefit of purchasers of the dominant land and will bind purchasers of the servient land.[5] In this respect, they differ from licences, which, as mere gratuitous or contractual permissions, allow a person to use another's land without committing a trespass, but will only bind the parties personally.[6] We saw, in Chapters 4 and 5, that the boundary between personal and proprietary rights is strictly patrolled and that only rights over the land of another that display certain characteristics are accepted as easements. Those that fail to display these characteristics may operate as licences.

We will confine our attention in this chapter to easements, but easements sit within a range of other limited rights over the land of another. There are a number of public rights that are not dependent on owning land: for example, we all have a right to use the public highways and many will gain access to their properties directly from a public road.[7] The utility companies enjoy 'way-leaves' granted by statute to run the services that they provide over land in order to supply mains gas, electricity, water, and sewage services.[8] Landowners may also claim the benefit of natural rights of support from neighbouring land and, where appropriate, the right to water flowing naturally in a river or stream. Profits *à prendre* are private rights to take the natural produce from another's land: for example, the right to fish or take game. Profits are very similar to easements, save that they do not have to be connected with the use of any dominant land, but may be held purely for the benefit of a particular individual. In our next chapter, we will be looking at restrictive covenants, which can operate negatively to regulate the user of land for the benefit of adjacent land. As such, they are similar to easements—particularly negative easements.

In this chapter, we will examine the defining characteristics of easements, before looking at how they operate as proprietary interests in terms of their mode of creation, their effect on third parties, and the manner in which they may be extinguished. Before we do so, however, we should note the underlying concerns that have shaped the law governing easements.

[3] See Law Commission Consultation Paper No 186, *Easements, Covenants and Profits à Prendre* (2008, Appendix A). This percentage is based upon statistics for the years 2003–4 and 2004–5.

[4] To exist at law, an easement must be held for a freehold or leasehold estate. An easement for life can only exist in equity.

[5] See section 4 below. [6] See Chapter 21.

[7] The public also has rights of access to certain commons: see Law of Property Act 1925, s 193; the Countryside and Rights of Way Act 2000 now confers rights of public access to some areas of private land.

[8] For example, under the Water Industry Act 1991, Electricity Act 1989, Gas Act 1986, and Telecommunications Act 1984.

1.2 THE UTILITY BALANCE

Easements have a long history. They were known to medieval lawyers, but their essential characteristics remained rudimentary until the nineteenth century, when easements became increasingly prominent as a result of the agricultural and industrial revolutions that underpin much of our modern way of life.[9] It is no coincidence that it was in 1839 that Gale wrote an influential book on easements, which remains the leading text today.[10]

Gardner explains the reason why the nineteenth century saw a growth in the importance of easements when, to maximize its economic utility, communally owned land was divided into smaller areas of individual ownership. These imperatives remain relevant today as the intensity of land use continues to grow.

Gardner, *Introduction to Land Law* (2009, p 157–8)

Division into sealed packets has a great merit: at a basic level, it gives the owner of each packet the maximum opportunity and incentive to exploit his own packet to the full. But a given packet of land may in practice not be self sufficient in the things required for its optimal exploitation. It may lack efficient access for example. Greater benefit can be extracted by running the land in question co-operatively with neighbouring packets, from which additional requirements can be sourced [. . .]

The English law of easements thus developed most during the 19th century. During the first three quarters of that century, English agricultural land was being divided into sealed packets, in a process known as 'enclosure'. Previously, the land had been operated much more communally. Enclosure was born of a realisation that the old communal approach impeded the land's maximum exploitation. But easements were developed out of a realisation, in turn, that even greater exploitation was possible if one could have it both ways. At about the same period, too, intensive building was taking place, centred on the mills, factories and so on which were perceived as the most effective tools by which to exploit downstream resources. Maximum intensity was achieved by introducing easements to allow the collaborative use of neighbouring plots of land.

Care is needed, however. Cross-exploitation does harm as well as good for it erodes the benefits to be had from dividing land into sealed packets. The less *my* land becomes simply 'mine' because there are obligations such as easements affecting its use, the further *I* shall be from having the maximum opportunity and incentive to exploit it, by growing crops myself, or building houses, or whatever. So the establishment of easements needs to be restricted to the situations in which sealed packets does more good than harm. The law does this by rules that limit the forms of benefit that can be associated with easements, favouring those that are traditional, ordinary, agricultural, and as a matter of business rather than recreation, and its rule limiting easements to rights that do not deprive me of 'any reasonable use' of my land.

As Gardner highlights, there is a need to balance the benefit of exploiting the dominant land against the burden placed upon the servient land. This balance is central in determining what characteristics a right must satisfy to qualify as an easement.

[9] See Holdsworth, *Historical Introduction to the Land Law* (1927), p 265.
[10] Now in its 18th edition: see *Gale on Easements* (eds Gaunt and Morgan, 2008).

A further balance that must be struck is between the desirability of implying an easement to promote utility and the conveyancing problems that arise where such rights are difficult to trace. This question was in minds of the architects of the Land Registration Act 2002 (LRA 2002) and we will consider their solution later in the chapter.[11]

2 THE *CONTENT* QUESTION

The leading case of *Re Ellenborough Park* summarizes the essential characteristics of an easement.

Re Ellenborough Park [1956] Ch 131, CA

Facts: Ellenborough Park is a development of houses surrounding a park. Each house was sold together with the right to full enjoyment of the park. During the Second World War, the park was requisitioned and a dispute arose as to who was entitled to the resulting compensation. It was held that the house owners' right to use the park was an easement, because it satisfied the legal characteristics of an easement, and so they were entitled to share the compensation.

Evershed MR

At 163

For the purposes of the argument before us Mr Cross and Mr Goff were content to adopt, as correct, the four characteristics formulated in *Dr Cheshire's Modern Real Property* 7th ed pp456 et seq. They are (1) there must be a dominant tenement and a servient tenement: (2) an easement must "accommodate" the dominant tenement: (3) dominant and servient owners must be different persons, and (4) a right over land cannot amount to an easement, unless it is capable of forming the subject matter of a grant.

We will use these four characteristics as our guide to explore the characteristics of easements, although we will look at them in a slightly different order.

2.1 'THERE MUST BE A DOMINANT TENEMENT AND A SERVIENT TENEMENT'

There must be two pieces of land: the servient tenement, over which the right is exercised, and the dominant tenement, which benefits from the right.

2.1.1 Should we have easements in gross?

In some jurisdictions, it is possible for there only to be a servient tenement, over which the right is exercised by a person who is not required to be the owner of any land. The easement is then said to exist *in gross*. English law accepts the possibility that profits may exist in gross

[11] See section 4 below.

and statutory way-leaves confer what are, in effect, easements in gross. For example, service suppliers, such as the gas, electricity, water, and telephone infrastructure companies, enjoy way-leaves to run their pipes and wires over and under land to maintain the national supply of these services.

Sturley has argued that easements in gross should also be permitted in English law.[12] He believes that the requirement for a dominant tenement is '*without authority or justification*',[13] and that the arguments against easements in gross, in terms of imposing a potentially excessive or unjustified burden on the servient tenement, can be overcome.

Sturley, 'Easements in Gross' (1980) 96 LQR 557

At 562

Though no justification is given against the rule against easements in gross in the cases which establish it, it may nevertheless be possible to justify it after the fact. Two possibilities, both of which are suggested by nineteenth century cases, should be considered. The first, which may be labelled the "surcharge argument," holds that an easement in gross, not being limited to the needs of the dominant tenement is likely to burden the servient tenement with excessive use. The second and somewhat more convincing, which may be labelled the "clogs on title argument," holds that an easement in gross is likely to be an unjustified incumbrance on the title of the servient tenement [. . .]

At 563

Certainly surcharge concerns are genuine, but they should not be overemphasised. Though not limited by reference to the dominant tenement, an easement in gross would still be limited by the terms of its grant [. . .] Possibilities of surcharge have long existed, both in profits and easements, but there have not been problems sufficient to justify the total prohibition of the interests. It seems the same should be true of easements in gross [. . .]

The clogs on title argument may be seen as an underlying rationale of *Keppel v Bailey* and *Hill v Tupper* where it was decided that novel rights cannot be annexed to land. The concern in both cases, however, is the type of right held rather than the means of holding it, and thus they properly relate to Cheshire's fourth characteristic of an easement, the subject matter of a grant. With respect to easements in gross the argument suggests not that anything is wrong with the right, per se, but that the owner in gross may be difficult to discover, thus making any right an unjustified clog on title when held in gross [. . .]

At 566

A solution, it seems, is to be found in the Land Charges Act [1972 or Land Registration Act 2002] scheme. If an easement in gross has to be registered, it is not very different from an appurtenant easement from the point of view of the clogs on title argument.

The Law Commission has considered whether, as a matter of policy, easements in gross should be permitted, but, whilst acknowledging the arguments made by Sturley, its view is that the requirement for a dominant tenement should not be relaxed.[14] To do so would also

[12] See also McClean, 'The Nature of an Easement' (1996) 5 West LR 32, 36–42.
[13] Sturley, 'Easements in Gross' (1980) 96 LQR 557, 568.
[14] Law Commission Consultation Paper No 186 (2008), [3.16].

require a rethink of the fundamental need for an easement to accommodate the dominant tenement.[15]

2.1.2 The need to identify the dominant tenement

The extent of the dominant land must be clearly established at the time that the easement is granted.

London & Blenheim Estates Ltd v Ladbroke Retail Parks Ltd
[1994] 1 WLR 31, CA

Facts: Leicestershire Co-op sold part of its land (the dominant land) to London & Blenheim, together with the right to park cars on land retained by the Co-op (the servient land). The agreement also included a provision that, in the event of London & Blenheim acquiring additional land, it should be entitled to give notice to the Co-op for that additional land (the alleged additional dominant land) to acquire similar parking rights. Before any notice was given, the servient land came into the ownership of Ladbrooke. London & Blenheim failed in its claim to a right to park for the benefit of the additional land that it had acquired, because, at the time that the servient land was sold by the Co-op, the alleged dominant land was not adequately identified.

Peter Gibson LJ

At 37

If one asks why the law should require that there should be a dominant tenement before there can be a grant, or a contract for the grant, of an easement sufficient to create an interest in land binding successors in title to the servient land, the answer would appear to lie in the policy against encumbering land with burdens of a uncertain extent. As was said by Fox LJ in *Ashburn Ansalt v Arnold* [1989] 1 Ch 26, "In matters relating to the title to land, certainty is of prime importance." A further related answer lies in the reluctance of the law to recognise new forms of burden on property conferring more than contractual rights. Thus in *Ackroyd v Smith* (1850) 10 CB 164, 188 Cresswell J., giving judgment of the judges of Common Pleas, after referring to the impossibility of a grant of a right of way in gross said "nor can the owner of the land render it subject to a new species of burden, so as to bind it in the hands of an assignee." "Incidents of a novel kind cannot be devised, and attached to property, at the fancy and caprice of any owner:" per Lord Brougham LC in *Keppel v Bailey* (1834) 2 Myl & K 517. A right intended as an easement and attached to a servient tenement before the dominant tenement is identified would in my view be an incident of a novel kind.

2.1.3 The rule in *Harris v Flower*[16]

A dominant owner, who acquires additional land adjacent to or close by the dominant land, may wish to use the easement that he or she enjoys for the benefit of that additional land. In general, he or she will be unable to do so without committing a trespass to the servient land.

[15] See also Lawson, 'Easements' in *Land Law: Issues, Debates, Policy* (ed Tee, 2002), p 71.
[16] (1904) 74 LJ Ch 127.

This prohibition is known as the 'rule in *Harris v Flower*', outlined by Romer LJ in the case of the same name as: '[I]*f a right of way be granted for the enjoyment of Close A, the grantee because he owns or acquires Close B cannot use the way in substance for passing over the Close A to Close B* [. . .]'[17]

Harris v Flower envisages the additional land being adjacent to the dominant land, so it is necessary to pass from the servient land to access the dominant land and then over the dominant land to access the additional land. Whilst it is perfectly acceptable for the dominant owner to use the right of way to access the dominant land, his or her use of the right of way will become unacceptable if he or she uses it to gain access to the additional land. The situation may be represented as in Figure 19.

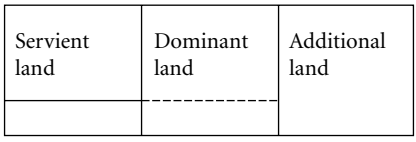

Figure 19 *Harris v Flower*: Situation 1

An alternative situation may arise where the additional land does not lie beyond the dominant land, but to the side, or close by: there is then no need for the dominant owner to pass over the dominant land to gain access to the servient land. The situation may be represented as in Figure 20.

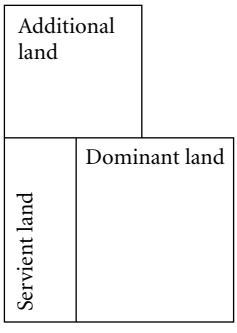

Figure 20 *Harris v Flower*: Situation 2

This is what happened in *Das v Linden Mews*,[18] in which mews houses in London enjoyed a right of way along a privately owned street. Two of the owners acquired ground at the end of the street on which to park their cars. The owners of the street (the servient land) successful argued that the rule in *Harris v Flower* prohibited the house owners from exercising the right of way attached to their house to drive along the street to the land that they had acquired for parking.

The rationale for the rule lies in keeping within the terms of the easement, rather than excessive use of the servient land.

[17] Ibid, 127. [18] [2002] EWCA Civ 590, [2003] 2 P & CR 4.

Peacock v Custins
[2002] 1 WLR 1815, CA

Facts: Peacock owned a field ('the red land', i.e. the dominant land), which was accessed by a right of way over land owned by Custins ('the yellow strip', i.e. the servient land). Peacock also owned another field adjacent to the dominant land ('the blue land'), but he failed to prove that he could use his right of way over the servient land once or twice a year to access the additional field.

Schiebsmann LJ

At [25]

Considering the position as a matter of principle, we would consider that the defendants are entitled to the declaration that they seek. In our judgment the authorities to which we have referred, and in particular *Harris v Flower* (1904) 74 LJ Ch 127, also confirm that, where a court is being asked to declare whether the right to use a way comprises a right to use it to facilitate the cultivation of land other than the dominant tenement, the court is not concerned with any comparison between the amount of use made or to be made of the servient tenement and the amount of use made or that might lawfully be made within the scope of the grant. It is concerned with declaring the scope of the grant, having regard to its purposes and the identity of the dominant tenement. The authorities indicate that the burden on the owner of the servient tenement is not to be increased without his consent. But burden in this context does not refer to the number of journeys or the weight of the vehicles. Any use of the way is, in contemplation of law, a burden and one must ask whether the grantor agreed to the grantee making use of the way for that purpose [. . .]

At [27]

It is in our judgment clear that the grantor did not authorise the use of the way for the purpose of cultivating the blue land. This cannot sensibly be described as ancillary to the cultivation of the red land. We therefore allow the appeal and declare that the claimants are not entitled to use the yellow strip for the purpose of obtaining access to the blue land in order to cultivate it.

It has to be remembered that the dominant owner is perfectly entitled to use the right in connection with his or her enjoyment of the dominant land, and it may be that he or she goes onto, or makes some use of, the additional land, which is merely ancillary to his or her use of the dominant land.

Schiebsman LJ makes reference to this possibility earlier in his judgment.

Peacock v Custins
[2002] 1 WLR 1815, CA

Schiebsmann LJ

At [22]

The law is clear at the extremes. To use the track for the sole purpose of accessing the blue land is outside the scope of the grant. However in some circumstances a person who uses

the way to access the dominant land but then goes off the dominant land, for instance to picnic on the neighbouring land, is not going outside the scope of the grant.

Such ancillary use will thus not fall foul of the rule in *Harris v Flower*. Whilst the cultivation of the 'blue land', or the use of the car park, was held not to be ancillary to the use of the dominant land in either *Peacock v Custins* or *Das v Linden Mews*, there are cases in which the use of the additional land has been considered ancillary. For example, in *Massey v Boulden*,[19] the Masseys claimed a prescriptive easement over a village green to gain access to their house. Their house had been extended by the addition of two rooms from an adjoining property. They had used the access to their original house for the required prescription period, but they had acquired the additional rooms just short of that period. It was nevertheless held that their use of the two additional rooms was ancillary to their use of their original house and thus fell within the prescriptive easement.[20]

The scope of the ancillary use exception is not easy to identify. The possible principles underlying ancillary use were explored in the following case, in which the court sought to reconcile the authorities by identifying that a use will be ancillary where the use is not 'in substance' for the benefit of non-dominant land, either because there is no benefit to the non-dominant land, or because any benefit is insubstantial.

Macepark (Whittlebury) Ltd v Sargeant (No 2)
[2003] 1 WLR 2284, HC

Facts: A hotel close to Silverstone race circuit was leased with the benefit of a right of way across adjoining land. A wood lay between the hotel and Silverstone. With the agreement of the owners of the wood, Macepark planned a short cut through the wood as a direct link to Silverstone. The hotel unsuccessfully claimed that the right of way could be used by hotel guests to drive from the hotel, and along the short cut through the wood, to Silverstone. The use of the right of way would not merely benefit the hotel as the dominant land, but would also substantially benefit the owners of the wood and Silverstone (the non-dominant land). The owners of the wood could charge for the short cut over their land and Silverstone would benefit from an additional access route.

Gabriel Moss QC (sitting as a High Court judge)

At [35]–[38]

The principle underlying the "ancillary" exception is not spelt out.

There seem to be at least two possibilities. One is that a use of the right of way to go on to non-dominant land can be ancillary where it is *insubstantial*, as in the case of going on to non-dominant land for a picnic, but cannot be ancillary if it is *substantial*, as where the access is used for going on to non-dominant land in order to cultivate another field or to store on the dominant land timber grown and felled on non-dominant land.

A second approach, which would often coincide with the first, would be that a use can be ancillary if it does not *benefit* the non-dominant land, ie does not *in effect extend the*

[19] [2003] 1 WLR 1792.

[20] See also *National Trust v White* [1987] 1 WLR 907, in which the use of a car park was held to be ancillary to the enjoyment of the ancient site of Figsbury Rings.

dominant land. The picnic for example concerned a situation where the use of the right of access involved going on to non-dominant land but not benefiting it [. . .] By contrast, non-dominant land is benefited if the access is used to enable it or to facilitate it to be cultivated or logged.

A third approach would be to say that a use was ancillary if it were *either* insubstantial *or* not a benefit [. . .]

At [47]–[52]

In accepting and applying the "ancillary" doctrine I must assume that the Court of Appeal in *Massey v Boulden* [2003] 1 WLR 1792 chose to follow the approach in *Peacock v Custins* [2002] 1 WLR 1815 rather than *Das v Linden Mews Ltd* [2002] 2 EGLR 76, since both cases are referred to in the judgment of Simon Brown LJ [2003] 1 WLR 1792, 1803, para 37. I must accept, therefore, that there is an "ancillary" doctrine.

The apparent clash with *Harris v Flower* (1904) 74 LJ Ch 127 is more difficult to resolve. The facts seem essentially similar. Moreover, there seems no doubt that in *Massey v Boulden* the access was used for the benefit of the non-dominant land as well as the dominant land. The only way, therefore, in which the Court of Appeal could have regarded the use of the access to benefit the non-dominant land as "ancillary" is if they regarded it as insubstantial: compare the use of the phrase "in substance" by Romer LJ in *Harris v Flower* at 132 and Morritt LJ in *Jobson v Record* [1998] 1 EGLR 113 at 114. The additional rooms which extended the dominant land appear to have been regarded as mere appendages to the dominant land, so that the use of the access could be seen as being *in substance* for the benefit of the dominant land and not in substance for the benefit of the non-dominant land.

If I have reconciled the apparently conflicting authorities on the question of ancillary use successfully, the result seems to be as follows. (1) There is a doctrine of "ancillary use". (2) It applies where the use of the access for the benefit of the non-dominant land in addition to the benefit of the dominant land is insubstantial, e g where it is used to reach rooms which are mere appendages to the dominant property. (3) It also applies where the use of the access to reach the dominant land and then go on to non-dominant land does not benefit the non-dominant land, e g where there is a picnic on the non-dominant land. (4) With regard to the question of what "benefits" the non-dominant land, where the access makes the use of the non-dominant land profitable, that access is being used to benefit the non-dominant land. For example, where the access, by an arrangement between the owner of the dominant land and the owner of the non-dominant land, is used to enable a profit to be made out of the use of the non-dominant land, there is a benefit to the non-dominant land.

Summary of the law

On the basis that I have accurately understood the current standing of the "ancillary" doctrine, the following propositions now seem to be correct. (1) An easement must be used for the benefit of the dominant land. (2) It must not "in substance" be used for the benefit of non-dominant land. (3) Under the "ancillary" doctrine, use is not "in substance" use for the benefit of the non-dominant land if (a) there is no benefit to the non-dominant land or if (b) the extent of the use for the benefit of the non-dominant land is insubstantial, ie it can still be said that in substance the access is used for the benefit of the dominant land and not for the benefit of both the dominant land and the non-dominant land. (d) "Benefit" in this context includes use of an access in such a way that a profit may be made out of the use of the non-dominant land, eg as a result of an arrangement with the owner of the dominant land.

The application of these principles can involve potentially difficult questions of fact and degree.

One significant factor, identified by the Court of Appeal in *Peacock v Custins* at para 24, is whether the benefit to the non-dominant land is likely to have its own "commercial value". It also seems from *Peacock v Custins* that it is not necessary to prove that separate value if it can be regarded as "self-evident".

A further feature of *Macepark* is that the court paid no regard to the fact that the hotel (as the dominant land), and the wood and race circuit (as the non-dominant land), were in separate ownership.

The rule in *Harris v Flower* has been the subject of criticism.

Paton and Seabourne, 'Can't Get There From Here? Permissible Use of Easements After *Das*' [2003] Conv 127, 132

If the rule is to be justified purely on grounds of doctrinal "neatness", then it must be recognised that its application, and the concept of "bona fide" or "colourable" use of a right of way for a particular purpose, produces some odd doctrinal consequences. It introduces something like "guilt by intention" to the law of trespass in this area. Conduct which externally is wholly consistent with the lawful exercise of right of way to land A—for example, the tractors driving along the way in *Peacock v Custins*—is made unlawful by the presence of an *intention* to carry on through A to B, land in which the servient owner has no legal or practical interest.

Yet in such cases where the right of way serving A is the only means of access to A and B, the courts have noticeably stopped short of the logical conclusion that land B is thereby landlocked and effectively sterilised. In *Peacock v Custins*, Schiemann L.J. suggested that the owner of land A could still go from A to B, perhaps for a picnic. What he could presumably not do was use the right of way serving A with that ultimate purpose (going to B) in mind. In other words, excursions from A to B, for picnics or otherwise, must be spontaneous, the idea originating once the owner is safely ensconced in A, having used the way to get there first. If, however, the servient owner one day spies the owner driving along the way with his car packed full of hampers, then sees him picnicking on B later that day, a trespass will have been committed [. . .]

The implication of this [. . .] is not a logically inevitable analysis. If lands A and B are contiguous and in common ownership, one of the most elementary incidents of such ownership must be the owner's right to *move freely between the two*. He needs no externally granted "right" to do this. There is no reason why use of the right of way to go to B via A can not be seen as a two stage process: use of the right of way to get to A, followed by access from A to B along the owner's own land as an incident of his ownership of both.

[. . .] In cases other than "passing through" ones, the above argument is not possible, but nor is it necessary. If the *only* threatened use of additional land B is by the owner/occupier of the land A which has the benefit of the right, such use of B is either ancillary or necessarily connected to the use of A, and the use of B generates no risk of increased user of the way, it is difficult to see any justification for a further, prohibitive rule.

Paton and Seabourne instead advocate that the determining principle should be based upon the concept of excessive user.[21]

[21] See section 5 below. Law Commission prefer this approach see Consultation Paper No 186 (2008), [5.64]–[5.71].

Paton and Seabourne, 'Can't Get There From Here? Permissible Use of Easements After *Das*' [2003] Conv 127, 134

A modified rule: excessive user

[. . .] As a controlling principle, excessive user is clearly related to the law of nuisance, in which the courts are more accustomed to balancing the competing activities, rights and convenience of neighbours, and giving some degree of latitude to worthwhile or productive uses of land. A court considering a claim of excessive user can have regard to the likely duration and nature of the proposed user, and the likelihood and severity of any actual or threatened damage, and can impose temporary or permanent conditions/restrictions on any relief granted.

The "rule in *Harris v Flower*", by contrast, originates in the strict construction of deeds and the conceptualisation of the law of easements around identifiable dominant and servient tenements. Ultimately, it is unnecessary. It can be qualified without collapsing the principle of appurtenance to an identified dominant tenement into "easements in gross". So long as the proposed additional activity bears *some* connection to the original dominant tenement, and does not generate excessive user or damage, the servient owner is protected. No further policy is served, or interest protected, by maintaining the strict rule for the sake of doctrinal purity.

2.1.4 Appurtenant to the dominant land or the dominant estate?

We have already noted that an easement may be granted for a freehold or leasehold term which will be co-extensive with the freeholder's or leaseholder's estate in the land. Orthodoxy has regarded easements as appurtenant to the grantee's estate in the dominant land rather than appurtenant to the land itself.[22] Thus, upon the early termination of a lease of the dominant land, for instance by notice or forfeiture, an easement enjoyed by the holder of the lease would also cease. But this orthodoxy has been challenged in the following case:

Wall v Collins
[2007] EWCA Civ 444 [2007] Ch 390

Facts: Adjoining semi detached houses were held on 999 year leases. The dominant land (House A) enjoyed the benefit of a right of way also for a term of 999 years along a passageway forming part of the servient land (House B). The freehold of House A was acquired by its leasehold owners so that their lease merged with the freehold reversion. The question arose whether their right to use the passageway which formed part of House B also merged and was extinguished.

Carnworth LJ

At [14]–[16]

As to the scope of the right granted in 1911, it is clear that Mr Hurst could neither grant the benefit, nor accept the burden, of a right in excess of his then 999-year interest in each

[22] Although see the different views expressed by Cooke, 'The Genetics of Appurtenant Interests' in *Modern Studies in Property Law: Vol 6* (ed Bright, Oxford: Hart, 2011), ch 10 and Lyall 'What are easements attached or appurtenant to' (2010) Conv 300.

property. To that extent the judge's conclusion that the right granted at that stage could not benefit or burden the freehold reversion, in which Mr Hurst had no interest, is clearly right [. . .]

That is not the same as saying that the right was "attached to" the leasehold interest. An easement must be appurtenant to a dominant tenement, but not necessarily to any particular interest for the time being [. . .] there is nothing to suggest that an easement for a term of years has to be attached to a leasehold interest of equivalent duration. All that matters is that the grantee has an interest at least co-extensive with the period of the easement [. . .]

It follows in my view that merger of the lease into a larger interest in the dominant tenement is not in itself fatal to the continued existence of the easement , for the period for which it was granted. The dominant tenement remains unchanged and there is no legal impediment to the continued enjoyment of the easement by the occupier for the time being of that tenement.

At [18]

As a matter of common sense, it seems difficult to see why a lessee should be worse off, so far as concerns an easement annexed to the land merely because he has acquired a larger interest in the dominant tenement.

The decision is not thought to extend to situations where the dominant owner's lease is forfeited or disclaimed. However, as Carnworth LJ noted, the decision has its practical advantages upon merger. To bring practicality into line with orthodoxy the Law Commission has recommended that the decision be reverse by statute but that the dominant owner should be able to elect to retain the benefit of the easement upon merger or surrender.[23]

2.2 THE DOMINANT AND SERVIENT TENEMENTS MUST BE IN SEPARATE OWNERSHIP AND OCCUPATION

It is not possible to have an easement over your own land.[24] Any rights that are exercised over two adjoining pieces of land that you own are exercised as a result of your ownership. Accordingly, where the dominant and servient land come into the same ownership and occupation, the easement is extinguished, although if the dominant land is sold off, an easement may once again be created by implied grant.[25] If the dominant and servient land come only into the same occupation—for example, because a tenant takes a lease of both pieces of land—the easement is suspended until the common occupation comes to an end.

The necessity for separate ownership of the dominant and servient land can be inconvenient when housing estates are developed, because developers will be unable to create easements between the plots whilst the plots remain in their common ownership. The Law Commission has, thus, recommended, in respect of registered titles, that it should be possible for an easement to exist where the dominant and servient land are owned by the same person but held under separate registered titles.[26]

[23] Law Commission, Law Comm 327 (2011), [3.255].

[24] *Roe v Siddons* (1889) 22 QBD 224, 236; *Metropolitan Railway Co v Fowler* [1892] 1 QB 165; *Kilgour v Gaddes* [1904] 1 KB 457, 461.

[25] See the rule in *Wheeldon v Burrows*: section 3.2 below.

[26] Law Commission, Law Com 327 (2011), [4.44].

2.3 AN EASEMENT MUST ACCOMMODATE THE DOMINANT LAND

The right must benefit the land, as opposed to an individual owner of the land, if it is to have the necessary proprietary character to qualify as an easement. The concept of the land being able to enjoy rights is somewhat strained when it is the use of the land by its occupier that derives any benefit. The import of the requirement thus relates to the benefit enjoyed by the owner for the time being of the land, rather than a personal advantage of a particular owner. The point has been explained in the following case.

Moody v Steggles
(1879) 12 Ch D 261

Fry J

At 266

It is said that the easement in question relates, not to the tenement, but to the business of the occupant of the tenement, and that therefore I cannot tie the easement to the house. It appears to me that that argument is of too refined a nature to prevail, and for this reason, that the house can only be used by an occupant, and that the occupant only uses the house for the business he pursues, therefore in some manner (direct or indirect) an easement is more or less connected with the mode in which the occupant of the house uses it.

A right that was held to confer only a personal advantage is found in the early case of *Hill v Tupper*.[27] As we saw in Chapter 4, section 1, a canal company leased land beside the canal to Mr Hill and granted him the exclusive right to put or use boats on the canal. Mr Tupper owned a pub situated beside the canal and, when he also rented out boats to be used on the canal, Mr Hill objected. The court held that his exclusive right to put boats on the canal was not an easement, but a personal advantage. In the following case, Evershed MR explained why.

Re Ellenborough Park
[1956] Ch 131, CA

Evershed MR

At 175

It is clear that what the plaintiff was trying to do was to set up, under the guise of an easement, a monopoly which had no normal connexion with the ordinary use of his land, but which was merely an independent business enterprise. So far from the right claimed subserving or accommodating the land, the land was but a convenient incident to the exercise of the right.

The question of accommodation was of central importance in *Re Ellenborough Park* when the Court decided that the right to use the communal gardens satisfied the test.

[27] (1863) 2 H & C 121.

Re Ellenborough Park
[1956] Ch 131, CA

Evershed MR

At 173

Can it be said, then, of the right of full enjoyment of the park in question, which was granted by the conveyance of December 23, 1864, and which, for reasons already given, was, in our view, intended to be annexed to the property conveyed to Mr. Porter, that it accommodated and served that property? It is clear that the right did, in some degree, enhance the value of the property, and this consideration cannot be dismissed as wholly irrelevant. It is, of course, a point to be noted; but we agree with Mr. Cross's submission that it is in no way decisive of the problem; it is not sufficient to show that the right increased the value of the property conveyed, unless it is also shown that it was connected with the normal enjoyment of that property. It appears to us that the question whether or not this connexion exists is primarily one of fact, and depends largely on the nature of the alleged dominant tenement and the nature of the right granted. As to the former, it was in the contemplation of the parties to the conveyance of 1864 that the property conveyed should be used for residential and not commercial purposes [...] We have already stated that the purchasers of all the plots, which actually abutted on the park, were granted the right to enjoy the use of it, as were also the purchasers of some of the plots which, although not fronting upon the park, were only a short distance away from it. As to the nature of the right granted, the conveyance of 1864 shows that the park was to be kept and maintained as a pleasure ground or ornamental garden, and that it was contemplated that it should at all times be kept in good order and condition and well stocked with plants and shrubs; and the vendors covenanted that they would not at any time thereafter erect or permit to be erected any dwelling-house or other building (except a grotto, bower, summer-house, flower-stand, fountain, music-stand or other ornamental erection) within or on any part of the pleasure ground. On these facts Mr. Cross submitted that the requisite connexion between the right to use the park and the normal enjoyment of the houses which were built around it or near it had not been established. He likened the position to a right granted to the purchaser of a house to use the Zoological Gardens free of charge or to attend Lord's Cricket Ground without payment. Such a right would undoubtedly, he said, increase the value of the property conveyed but could not run with it at law as an easement, because there was no sufficient nexus between the enjoyment of the right and the use of the house. It is probably true, we think, that in neither of Mr. Cross's illustrations would the supposed right constitute an easement, for it would be wholly extraneous to, and independent of, the use of a house as a house, namely, as a place in which the householder and his family live and make their home; and it is for this reason that the analogy which Mr. Cross sought to establish between his illustrations and the present case cannot, in our opinion, be supported. A much closer analogy, as it seems to us, is the case of a man selling the freehold of part of his house and granting to the purchaser, his heirs and assigns, the right, appurtenant to such part, to use the garden in common with the vendor and his assigns. In such a case, the test of connexion, or accommodation, would be amply satisfied; for just as the use of a garden undoubtedly enhances, and is connected with, the normal enjoyment of the house to which it belongs, so also would the right granted, in the case supposed, be closely connected with the use and enjoyment of the part of the premises sold. Such, we think, is in substance the position in the present case. The park became a communal garden for the benefit and enjoyment of those whose houses adjoined it or were in its close proximity. Its flower beds, lawns and walks were calculated to afford all the amenities which it is the purpose of the garden of

a house to provide; and, apart from the fact that these amenities extended to a number of householders, instead of being confined to one (which on this aspect of the case is immaterial), we can see no difference in principle between Ellenborough Park and a garden in the ordinary signification of that word. It is the collective garden of the neighbouring houses, to whose use it was dedicated by the owners of the estate and as such amply satisfied, in our judgment, the requirement of connexion with the dominant tenements to which it is appurtenant. The result is not affected by the circumstance that the right to the park is in this case enjoyed by some few houses which are not immediately fronting on the park. The test for present purposes, no doubt, is that the park should constitute in a real and intelligible sense the garden (albeit the communal garden) of the houses to which its enjoyment is annexed. But we think that the test is satisfied as regards these few neighbouring, though not adjacent, houses. We think that the extension of the right of enjoyment to these few houses does not negative the presence of the necessary "nexus" between the subject-matter enjoyed and the premises to which the enjoyment is expressed to belong.

It is evident from Evershed's judgment that there must be some physical proximity between the servient and dominant tenements for the necessary benefit to arise, although it was no objection that some of the houses did not immediately border the park, but were a short distance away.

It is also clear that an increase in economic value of the dominant land, whilst influential, is not the sole yardstick. The issue is whether or not the normal enjoyment of the land is enhanced, which is a question of fact to be determined by considering both the nature of the dominant land and the right itself.[28] Thus, a right to use a communal garden will accommodate a residence, but is most unlikely to accommodate a factory or farm. Where the land is used for commercial purposes, the right may enhance the business conducted on the land. Thus, in the case of *Moody v Steggles*,[29] a right to erect a sign to announce and promote a public house on the dominant land was held to be an easement.

Although labelled a test of fact, there are value judgments to be made, taking into account current social conditions, technical advances, and accepted modes of use of property. It has been suggested that a right of recreation and amusement cannot qualify as an easement. The Court of Appeal considered the question in *Re Ellenborough Park*, when it rejected the claim that the right to use the garden was a right of mere recreation and amusement. It did so as part of the fourth requirement that the right must be capable of being the subject matter of a grant, but, because the question relates to issues of benefit, it falls more appropriately within Cheshire's second condition.

Re Ellenborough Park
[1956] Ch 131, CA

Evershed MR

At 177–8

The third of the questions embraced in Dr. Cheshire's fourth condition rests primarily on a proposition stated in *Theobald's The Law of Land*, 2nd ed. (1929), at p. 263, where it is said

[28] Lawson (2002) p 73.

[29] (1879) 12 Ch D 261.

that an easement "must be a right of utility and benefit and not one of mere recreation and amusement." It does not appear that a proposition in similar terms is stated by Gale.

[The Court considered the authorities quoted by Theobald in support being, *Mounsey v. Ismay,*[30] *Dyce v Lady James Hay,*[31] and *Dempster v Cleghorn.*[32]].

In any case, if the proposition be well-founded, we do not think that the right to use a garden of the character with which we are concerned in this case can be called one of mere recreation and amusement [...] No doubt a garden is a pleasure—on high authority, it is the purest of pleasures—but, in our judgment, it is not a right having no quality either of utility or benefit as those words should be understood. The right here in suit is, for reasons already given, one appurtenant to the surrounding houses as such, and constitutes a beneficial attribute of residence in a house as ordinarily understood. Its use for the purposes, not only of exercise and rest but also for such domestic purposes as were suggested in argument—for example, for taking out small children in perambulators or otherwise—is not fairly to be described as one of mere recreation or amusement, and is clearly beneficial to the premises to which it is attached [...] the right in suit is, in point of utility, fairly analogous to a right of way passing over fields to, say, the railway station, which would be none the less a good right, even though it provided a longer route to the objective. We think, therefore, that the statement [...] must at least be confined to exclusion of rights to indulge in such recreations as [...] horse racing or perhaps playing games, and has no application to the facts of the present case.

It may well be that an aversion to rights of recreation and amusement are a reflection of social conditions of the time (Theobald was writing in 1929),[33] and that, where recreational rights are adequately defined, they now may be accepted as easements.

Gray and Gray, *Elements of Land Law* (5th edn, 2009, [5.1.39])

The judicial animus against recreational easements has undoubtedly receded in recent times. It may be an index of a more hedonistic (or even more health conscious) age that it no longer seems inappropriate to acknowledge the easement character of certain recreational facilities annexed to dominant land. This is particularly the case where the claim of easement refers to a defined area over which a right of recreational enjoyment has been given not to the public but to a limited number of lot holders.

2.4 THE RIGHT MUST BE CAPABLE OF BEING THE SUBJECT MATTER OF A GRANT

Cheshire's fourth condition has been described as '*both obscure and unhelpful*'.[34] At one level, the condition is deceptively simple: as a legal interest in land, an easement must be capable of being granted by deed. There must be a grantor and grantee, who have the necessary capacity and who enjoy the necessary title to create the easement in question. If the grantor does

[30] (1865) 3 H & C 486. [31] (1852) 1 Macq 305. [32] (1813) 2 Dow 40.

[33] Theobald, *The Law of Land* (2nd edn, 1929), p 263.

[34] McClean, 'The Nature of an Easement' (1966) 5 West LR 32, 61. The Court of Appeal in *Re Ellenborough Park* [1956] Ch 131, 164, described the fourth condition as 'not entirely clear'.

not hold the appropriate title, the easement can only operate to estop the grantor denying the right as against the grantee.

In fact, the condition hides '*an inept shorthand*'[35] for a number of criteria, the common features of which operate to circumscribe the effect upon the servient land of those rights that qualify as easements. We will examine these criteria under four headings:[36]

1. the requirement for certainty in the scope of the grant;
2. the requirement that the right places no positive burden on the servient owner;
3. the limitations on new easements;
4. the 'ouster' principle, which prohibits rights that amount to a claim to exclusive or joint ownership.

2.4.1 Certainty in the scope of the grant

Certainty is a constant refrain of the law when defining parties' rights and obligations. It must be clear what the dominant owner is entitled to do, and what is the nature and extent of the burden to which the servient owner must submit. The call for certainty is particularly insistent when rights are proprietary and thus capable of binding third parties. In the case of easements, certainty can be elusive when there are a wide variety of rights that can operate over another's land. There is thus a '*heightened emphasis on rigorous definitional clarity*'.[37]

There is no right to an uninterrupted right to light or air; such a right can only operate through a defined channel.[38] Nor is there a right to a view,[39] to uninterrupted television reception[40] or to make a noise.[41] In *Re Ellenborough Park*, the Court of Appeal drew a distinction between the certainty of a right to use a communal garden attached to dominant residential land, and the uncertainty of a right to wander at will over a large and ill-defined area.[42]

Re Ellenborough Park
[1956] Ch 131, CA

Lord Evershed

At 176

To the first of these questions the interpretation which we have given to the typical deed provides, in our judgment, the answer; for we have construed the right conferred as being both well defined and commonly understood. In these essential respects the right may be

[35] Gardner, *An Introduction to Land Law* (2007), p 154.

[36] In *Re Ellenborough Park* [1956] Ch 131, 164, the Court of Appeal identified three criteria—prohibitions against: (i) vague and uncertain right; (ii) rights that are claims to joint user; and (iii) rights of mere recreation and amusement. We have examined (iii) in the context of Cheshire's second requirement of accommodation. Criteria (i) and (ii) relate to our criteria (1) and (4); our criteria (2) and (3) did not arise in the context of the case.

[37] Gray and Gray, *Elements of Land Law* (5th edn, 2009), [5.1.41]. See also the discussion of what can count as a property right in Chapter 4, section 5.

[38] *Harris v De Pinna* (1886) 33 Ch D 238, 250.

[39] Ibid, 262.

[40] *Hunter v Canary Wharf* [1997] AC 655, 699.

[41] *Lawrence v Fen Tigers Ltd* [2011] EWHC 360.

[42] But see *Magrath v Parkside Hotels Ltd* [2011] EWHC 143 where an undefined right to fire escape was found sufficiently certain because it did not allow unrestricted access over the servient land and would be rarely exercised.

said to be distinct from the indefinite and unregulated privilege which, we think, would ordinarily be understood by the Latin term "jus spatiandi," a privilege of wandering at will over all and every part of another's field or park, and which, though easily intelligible as the subject-matter of a personal licence, is something substantially different from the subject-matter of the grant in question, namely, the provision for a limited number of houses in a uniform crescent of one single large but private garden [. . .]

At 179

As appears from what has been stated earlier, the right to the full enjoyment of Ellenborough Park, which was granted by the 1864 and other relevant conveyances, was, in substance, no more that a right to use the park as a garden in the way in which gardens are commonly used. In a sense, no doubt, such a right includes something of a jus spatiandi, inasmuch as it involves the principle of wandering at will round each part of the garden, except of course, such parts as comprise flower beds, or are laid out for some other purpose, which renders walking impossible or unsuitable. We doubt, nevertheless, whether the right to use and enjoy a garden in this manner can with accuracy be said to constitute a mere jus spatiandi. Wandering at large is of the essence of such a right and constitutes the main purpose for which it exists. A private garden, on the other hand, is an attribute of the ordinary enjoyment of the residence to which it is attached, and the right of wandering in it is but one method of enjoying it.

2.4.2 No positive burden on the servient owner

An easement does not require the servient owner to do anything: he or she merely has to allow the dominant owner to exercise his or her easement without interference. Furthermore, he or she is not required to keep the subject matter of the easement in repair so that the dominant owner can exercise his or her right. Thus, if the easement is a right of way or drainage, the servient owner is not required to keep the road or drains in good repair.[43] For the same reason, a right to the passage of water through pipes running through the servient land does not require a continuous supply of water; the right imposes only a negative obligation not to interrupt any supply that there is.[44]

There is one exception to this rule: namely, a prescriptive right to require a neighbour to maintain a boundary fence. The right stems from the ancient and anomalous obligation to maintain stock-proof fences to keep out a neighbour's cattle, a breach of which is a defence to cattle trespass.[45]

An obligation to repair may, however, arise as a result of some other source of liability. For example, an obligation to repair may arise by contract, whether as a result of an express or implied term.[46] Although a positive obligation to repair will not usually be enforceable against third parties, it may be enforceable in certain circumstances, which we will explore in the next chapter. Liability to repair may also arise in tort, whether under the torts of negligence or nuisance,[47] or as a result of obligations imposed upon occupiers by the Occupiers Liability Act 1984.

[43] *Duke of Westminster v Guild* [1985] QB 688.

[44] *Schwann v Cotton* [1916] 2 Ch 459; *Rance v Elvin* (1985) 50 P & CR 9 and re electricity supplies *Duffy v Lamb* (1998) 75 P & CR 364; *William Old International Ltd v Arya* [2009] EWHC 599.

[45] *Jones v Price* [1965] 2 QB 618.

[46] See *Liverpool City Council v Irwin* [1977] AC 239.

[47] See *Rees v Sherrett* [2001] EWCA Civ 760, in which a duty arose to take reasonable steps to weatherproof a wall after demolition of an adjoining wall; cf *Phipps v Pears* [1965] 1 QB 76.

2.4.3 Limitations on new easements

It is said that the class of easements is never closed,[48] because developments in lifestyle call for the recognition of new forms of easement.[49] Nevertheless, the courts are cautious in recognizing unusual new forms of easement. There is a particular reluctance to accept new negative easements, as Lord Denning MR explained in the following extract. He also pointed out that the same protection may be achieved by taking a restrictive covenant from the servient owner.[50]

Phipps v Pears
[1965] 1 QB 76, CA

Facts: There were two adjoining detached houses. The wall of the most recently constructed house was very close to the adjoining house and it had not been rendered to make it weatherproof. The other house was demolished, leaving the wall of the remaining house exposed to the weather. Because this wall was not weatherproof, cracks appeared. The owner unsuccessfully claimed a right to protection from the weather against the owner of the house that had been demolished.[51]

Lord Denning MR

At 82

But a right to protection from the weather (if it exists) is entirely negative. It is a right to stop your neighbour pulling down his own house. Seeing that it is a negative easement, it must be looked at with caution. Because the law has been very chary of creating any new negative easements.

The reason underlying these instances is that if such an easement were to be permitted, it would unduly restrict your neighbour in his enjoyment of his own land. It would hamper legitimate development, see *Dalton v. Angus* (1881) 6 App Cas 740 at 824 *per* Lord Blackburn. Likewise here, if we were to stop a man pulling down his house, we would put a brake on desirable improvement. Every man is entitled to pull down his house if he likes. If it exposes your house to the weather, that is your misfortune. It is no wrong on his part [...] There is no such easement known to the law as an easement to be protected from the weather. The only way for an owner to protect himself is by getting a covenant from his neighbour that he will not pull down his house or cut down his trees. Such a covenant would be binding on him in contract: and it would be enforceable on any successor who took with notice of it. But it would not be binding on one who took without notice.

[48] *Re Ellenborough Park* [1956] Ch 131, 140, *per* Dankwerts J.

[49] See Lord St Leonards' observations in *Dyce v Lady James Hay* (1852) 1 Macq 305, 312, that '*the category of servitudes must alter and expand with changes that take place in the circumstances of mankind*'.

[50] See Chapter 26. Dawson and Dunn advocate the formulation of a single means of creating negative property rights: see Dawson and Dunn, 'Negative Easements: A Crumb of Analysis' (1998) 18 LS 510.

[51] Following *Rees v Skerrett* [2001] 1 WLR 1541, he might have claimed a tortuous remedy requiring the owner to take reasonable steps to protect a neighbour's wall from foreseeable damage occasioned by the withdrawal of support or protection.

2.4.4 The 'ouster' principle

An easement is a right to use the land of another for some limited purpose. It thus falls short of a claim to exclusive or joint possession or occupation. The Law Commission points out that this important distinction between easements and possessory rights is not easy to define.

Law Comm No 327, *Easements, Covenants and Profits à Prendre* (2011, [3.191])

> [. . .] an easement [. . .] is an interest in land, not an estate. If what the dominant owner can do on the servient land actually amounts to an ownership right [. . .] then it cannot be an easement. That much is clear. What is more difficult is to delineate precisely the point at which the dominant owner's rights can be said to be "too much" to be merely an interest in land.

The ouster principle has been developed to try and draw that distinction.

Copeland v Greenhalf
[1952] Ch 488, HC

Facts: A repairer of vehicles unsuccessfully claimed an easement by prescription (long user) over a strip of land belonging to Greenhalf. He had been using the strip of land for fifty years, as a place on which to store his customers' vehicles whilst awaiting repair or collection.

Upjohn J

At 498

> I think that the right claimed goes wholly outside any normal idea of an easement, that is, the right of the owner or the occupier of a dominant tenement over a servient tenement. This claim (to which no closely related authority has been referred to me) really amounts to a claim to a joint user of the land by the defendant. Practically, the defendant is claiming the whole beneficial user of the strip of land on the south-east side of the track there; he can leave as many or as few lorries there as he likes for as long as he likes; he may enter on it by himself, his servants and agents to do repair work thereon. In my judgment, that is not a claim which can be established as an easement. It is virtually a claim to possession of the servient tenement, if necessary to the exclusion of the owner; or, at any rate, to a joint user, and no authority has been cited to me which would justify the conclusion that a right of this wide and undefined nature can be the proper subject-matter of an easement. It seems to me that to succeed, this claim must amount to a successful claim of possession by reason of long adverse possession. I say nothing, of course, as to the creation of such rights by deeds or by covenant; I am dealing solely with the question of a right arising by prescription.

It is to be noted that Upjohn J suggested that a claim to ownership by adverse possession might have been successful. Alternatively, if Copeland had been granted permission to use the land, he may have claimed a lease or an occupational licence. Upjohn J also suggested that the different considerations may apply if the parties had been able to demonstrate their

intentions by an express grant, rather than where an easement is claimed by prescription—but this distinction has been doubted.[52]

Difficulties arise in clearly defining the scope of the ouster principle. To some extent, all easements oust the servient owner from some use of the servient land: for example, the grant of a right of way will prevent the servient owner from building on the road so as to obstruct free passage. In *Miller v Emcer Products*,[53] the Court of Appeal saw no objection to the grant of a right to use a lavatory, although the servient owner would be excluded from the lavatory whilst the dominant owner was using it. In *Re Ellenborough Park*,[54] the Court of Appeal was also not impressed by the suggestion that use of a communal garden was effectively a claim to joint ownership because it excluded the servient owner from any use of the garden.

The uncertainty over the scope of the ouster principle has centred in recent years over rights of storage and car parking. In principle, rights of storage were accepted in *AG for Southern Nigeria v John Holt & Co (Liverpool) Ltd*[55] and in *Wright v Macadam*,[56] and the right to park cars has been accepted in principle in a number of cases—most recently, by the House of Lords in *Moncrieff v Jamieson*.[57]

The test has been said to be one of degree.[58]

London & Blenheim Estates Ltd v Ladbroke Retail Parks Ltd
[1992] 1 WLR 1278, HC

Judge Paul Baker QC

At 1288

The essential question is one of degree. If the right granted in relation to the area over which it is to be exercisable is such that it would leave the servient owner without any reasonable use of his land whether for parking or anything else, it could not be an easement, though it might be some larger or differing grant.

Thus, it is suggested that, if the area of storage or car parking is relatively small when compared with the area of the servient land, the ouster principle does not apply, because the servient owner is still able to make 'reasonable use' of the servient land. This test was applied in *Batchelor v Marlow*[59] to reject a right to park where an exclusive right to park was claimed on weekdays between the hours of 9.30 a.m. and 6.00 p.m. But the House of Lord has cast doubt on this approach in dicta in the Scottish case of *Moncrieff v Jamieson*.[60] Lord Scott

[52] Hill-Smith, 'Rights of Parking and the Ouster Principle After *Batchelor v Marlow*' [2007] Conv 223, 232. See also *Moncrieff v Jamieson* [2007] UKHL 42, 59, *per* Lord Scott.

[53] [1956] Ch 304, 316.

[54] [1958] Ch 131, 176.

[55] [1915] AC 599 (right to store materials and trade goods and produce).

[56] [1949] 2 KB 744 (right to store coal).

[57] [2007] UKHL 42, [2007] 1 WLR 2620. See also *London and Blenheim Estates Ltd v Ladbroke Retail Parks Ltd* [1992] 1 WLR 1278, HC; [1994] 1 WLR 31, CA; *Hair v Gillman* (2000) 80 P & CR 108; *Bachelor v Marlow* [2001] EWCA Civ 1051, [2003] 1 WLR 764; *Central Midlands Estates Ltd v Leicester Dyers Ltd* [2003] 2 P & CR D1; *Saeed v Plustrade Ltd* [2001] EWCA Civ 2011, [2002] 2 P & CR 19; *Montrose Court Holdings Ltd v Shamash* [2006] All ER D 272. The right to moor boats has also been accepted as an easement: see *P&S Platt Ltd v Crouch* [2003] EWCA Civ 1110, [2004] 1 P & CR 18.

[58] See also *Grigsby v Melville* [1972] 1 WLR 1355, 1364, *per* Brightman J.

[59] [2001] EWCA Civ 1051, [2003] 1 WLR 764.

[60] The case is thus not binding precedent, although the House of Lords noted that, in this respect, there was no divergence in Scottish and English law.

suggested that the test should be refocused to consider whether or not the servient owner retains possession and control over that part of the servient land over which the right to park is exercised.[61]

Moncrieff v Jamieson
[2007] 1 WLR 2620, HL

Lord Scott

At [57]

It has often been commented that *Wright v Macadam* was not cited to Upjohn J and the possible inconsistency between the two cases was addressed by Judge Paul Baker QC in *London & Blenheim Estates Ltd v Ladbroke Retail Parks Ltd* where a right of parking had been claimed. He commented, at p 1286, that the question whether the right to park that had been claimed was consistent with the nature of an easement was one of degree: "A small coal shed in a large property is one thing. The exclusive use of a large part of the alleged servient tenement is another." I think, with respect, that this attempt to reconcile the two authorities was addressing the wrong point. The servient land in relation to a servitude or easement is surely the land over which the servitude or easement is enjoyed, not the totality of the surrounding land of which the servient owner happens to be the owner. If there is an easement of way over a 100-yard roadway on a 1,000-acre estate, or an easement to use for storage a small shed on the estate access to which is gained via the 100-yard roadway, it would be fairly meaningless in relation to either easement to speak of the whole estate as the servient land. Would the right of way and the storage right fail to qualify as easements if the whole estate bar the actual land over which the roadway ran and on which the shed stood, with or without a narrow surrounding strip, were sold? How could it be open to the servient owner to destroy easements by such a stratagem? In my opinion such a stratagem would fail. It would fail because the servient land was never the whole estate but was the land over which the roadway ran and on which the shed stood. Provided the servient land was land of which the servient owner was in possession, the rights of way and of storage would continue, in my opinion, to qualify as easements [. . .]

At [59]

In my respectful opinion the test formulated in the *London & Blenheim Estates case* and applied by the Court of Appeal in *Batchelor v Marlow* [2003] 1 WLR 764, a test that would reject the claim to an easement if its exercise would leave the servient owner with no "reasonable use" to which he could put the servient land, needs some qualification. It is impossible to assert that there would be no use that could be made by an owner of land over which he had granted parking rights. He could, for example, build above or under the parking area. He could place advertising hoardings on the walls. Other possible uses can be conjured up. And by what yardstick is it to be decided whether the residual uses of the servient land available to its owner are "reasonable" or sufficient to save his ownership from being "illusory"? It is not the uncertainty of the test that, in my opinion, is the main problem. It is the test itself. I do not see why a landowner should not grant rights of a servitudal character over his land to any extent that he wishes. The claim in *Batchelor v Marlow* for an easement to park cars was a prescriptive claim based on over 20 years of that use of the strip of land. There is no difference between the characteristics of an easement that can be acquired by grant and the

[61] He was influenced by arguments made by Hill-Smith [2007] Conv 223.

characteristics of an easement that can be acquired by prescription. If an easement can be created by grant it can be acquired by prescription and I can think of no reason why, if an area of land can accommodate nine cars, the owner of the land should not grant an easement to park nine cars on the land. The servient owner would remain the owner of the land and in possession and control of it. The dominant owner would have the right to station up to nine cars there and, of course, to have access to his nine cars. How could it be said that the law would recognise an easement allowing the dominant owner to park five cars or six or seven or eight but not nine? I would, for my part, reject the test that asks whether the servient owner is left with any reasonable use of his land, and substitute for it a test which asks whether the servient owner retains possession and, subject to the reasonable exercise of the right in question, control of the servient land.

Lord Neuberger was rather more reserved in accepting this different test.

Moncrieff v Jamieson
[2007] 1 WLR 2620, HL

Lord Neuberger

At [143]–[144]

I see considerable force in the views expressed by Lord Scott in paras 57 and 59 of his opinion, to the effect that a right can be an easement notwithstanding that the dominant owner effectively enjoys exclusive occupation, on the basis that the essential requirement is that the servient owner retains possession and control. If that were the right test, then it seems likely that *Batchelor v Marlow* was wrongly decided. However, unless it is necessary to decide the point to dispose of this appeal, I consider that it would be dangerous to try and identify what degree of ouster is required to disqualify a right from constituting a servitude or easement, given the very limited argument your Lordships have received on the topic.

As I have mentioned, there are a number of cases which can be said to support the approach of the Court of Appeal in *Batchelor v Marlow*, although it may be possible to distinguish them. The point does not appear to be settled in Australia: see the difference of opinion in the recent case *White v Betalli* [2007] NSWCA 243. I am also concerned that, if we were unconditionally to suggest that exclusion of the servient owner from occupation, as opposed to possession, would not of itself be enough to prevent a right from being an easement, it might lead to unexpected consequences or difficulties which have not been explored in argument in this case. Thus, if the right to park a vehicle in a one-vehicle space can be an easement, it may be hard to justify an effectively exclusive right to store any material not being an easement, which could be said to lead to the logical conclusion that an occupational licence should constitute an interest in land.

Luther has argued that what matters is '*what the claimant could do by virtue of his easement not what the owner could not do*'.[62] He draws a distinction between two types of case: the first, in which the claimant is, in effect, claiming to be the owner, and thus the issue is the grant of a possessory right and not an easement; the second covers more limited uses, in which the defining test is one of certainty.

[62] Luther, 'Easements and Exclusive Possession' (1996) 16 LS 51, 59

Luther, 'Easements and Exclusive Possession' (1996) 16 LS 51, 61

> At this extreme level, where a claimant is in effect acting as owner, it does not matter whether the principle is expressed in terms which focus on the claimant (either by referring to the certainty of his rights, as in *Copeland v Greenhalf,* or to his state of mind when exercising them, as in the *Southern Nigeria* case) or on the person against whom the right is claimed (as in *Re Ellenborough Park* and many later cases). The result will be the same in all cases: if a grant is involved, the claimant will be the owner (*Reilley v Booth*), if prescription is involved, his claim for an easement will fail, but he may have satisfied the criteria for a claim of adverse possession, and so become the owner. This then is the first category. The second category is a residual category, covering claims which fall short of exclusive possession properly speaking—either because they are not 'exclusive', in the sense that they do not absolutely exclude the owner, or because they are not 'possession', in that they do not involve a claim to perform an unlimited range of activities. Upjohn J appears to have considered, in accordance with authority, that the appropriate criterion to apply to this second category was that of certainty: so a claim for joint user (possession, because the activities were unlimited, but not to the exclusion of the owner) would fail because it was not sufficiently certain.

Focusing either on the dominant or servient owner is rather like looking at different sides of the same coin, but Luther suggests that it is more straightforward to look at the issue from the point of the view of the claimant—that is, the potential dominant owner.

Luther, 'Easements and Exclusive Possession' (1996) 16 LS 51, 62

> Surely to ask 'What the claimant can do?' (the certainty approach) is the same as to ask 'What can the servient owner *not* do? (the exclusion/substantial interference approach)? There is some substance in this argument, and certainly it is possible to imagine cases where it would be difficult to answer one question without answering the other. A line would have to be drawn in difficult cases. But against this it must be said that to look at the positive characteristics of a claimed right must in many cases be easier than to assess its negative impact on someone else's rights. This latter enquiry must involve a large number of external factors, not least as noted above the total size of the servient tenement, the characteristics of the owner and the uses to which he might wish to put his land. It might also involve uncertainty in the definition of rights.

The Law Commission believes that the ouster principle is not useful and recommends that, if the parties so wish, a right should not be rejected as an easement merely because it prevents the servient owner from making any reasonable use of servient land.[63]

3 THE *ACQUISITION* QUESTION

We have already noted that easements lie in grant and there are three mechanisms by which that grant may arise: (i) by express grant; (ii) by implied grant; and (iii) by presumed grant as result of long user. Rights in the nature of easements may also arise by statute: for example,

[63] Law Com 327 (2011) [3.207]–[3.209].

the Access to Neighbouring Land Act 1992 and the Party Walls Act 1996 both grant an owner a right to go onto neighbouring land in order to carry out certain repairs and building work.[64]

3.1 EXPRESS GRANT

Easements may be created by the methods examined in Chapter 7. A legal easement must be created by deed and, where a legal easement is created after 13 October 2003, that deed must be registered where the land is registered,[65] with the benefit of the easement being recorded in the property register of the dominant land and the burden of the easement being noted in the charges register of the servient land.[66] A legal easement created by deed before that date may, but need not, be registered. An equitable easement may be created in writing, by agreement, or by estoppel.[67]

3.2 IMPLIED GRANT

An easement may be acquired by implied grant usually when land is subdivided into two or more parts, whether by sale or lease. There are four ways in which a grant may be implied:

- easements of necessity;
- intended easements;
- the rule in *Wheeldon v Burrows*;[68] and
- by the operation of s 62 of the Law of Property Act 1925 (LPA 1925).

The Law Commission has described these methods as providing a '*complex matrix of overlapping rules*',[69] which '*have developed in piecemeal and uncoordinated fashion*'.[70]

The underlying rationale for the first three of these rules lies in the principle that a seller or landlord should not be allowed to derogate from his or her grant: '*A grantor having given a thing with one hand, is not to take away the means of enjoying it with the other.*'[71] Thus a landowner who has disposed of part of his or her land for a particular purpose cannot use his or her retained land in such a way as to make the disposed portion unfit for its particular purpose.

The principle of non-derogation from grant is general in its application and may itself form the basis for an implied easement.[72] Hopkins explains the influence of non-derogation from grant upon the implied grant of easements.

64 See Gratton, 'Proprietarian Conceptions of Statutory Access Rights' in *Modern Studies in Property Law: Vol 2* (ed Cook, 2003), ch 18.

65 Land Registration Act 2002, s 27.

66 Where the servient land is unregistered, the dominant owner may enter a caution against first registration of the servient land to ensure that the relevant notice will be entered when the servient land is registered: see ibid, ss 15–21.

67 For an example of an easement by estoppel, see *Crabb v Arun District Council* [1976] Ch 179, discussed in Chapter 10.

68 (1878) 12 Ch D 31.

69 Law Commission Consultation Paper No 186 (2008), [4.109].

70 Ibid, at [4.99].

71 *Birmingham, Dudley and District Banking Co v Ross* (1887) 38 Ch D 295, 312, *per* Bowen LJ.

72 See *Cable v Bryant* [1908] 1 Ch 259. The Law Commission proposal for the statutory implication of easements would exclude the general principle of non-derogation from grant as an independent ground: see Law Comm 327 (2011), [3.45].

Hopkins, *The Informal Acquisition of Rights in Land* (2000, p 205)

> The rule of non-derogation from grant is seen as the basis for three specific rules enabling the acquisition of an easement [...] The general rule itself may give rise to the acquisition of easements. Therefore the question arises to what extent there is an overlap between the general and specific rules. It seems that there are three characteristics that separate the specific rules. First, each specific rule has its own requirements which are distinct, in some respects, from the general rule. Secondly, in each case the right claimed must fulfil the general characteristics of an easement. The specific rules are not the source of proprietary rights *sui generis*. In these respects the specific rules are more restrictive in their application than the general rule. However, thirdly it seems that the specific rules alone can create positive easements. The general rule may be limited to enabling the creation of negative easements. In addition to the three rules derived from non-derogation from grant, there is a fourth, related, rule enabling the acquisition of a legal easement by words implied into a conveyance by statute.

Even though the rationale for implied grant stems from the principle of non-derogation from grant, the basis for the rules is confused. They are said to be based upon the presumed intention of the parties and may indeed be excluded by a contrary intention, but in the background lurks the public policy of maximizing the effective use of land. Easements of necessity, in particular, reveal this confused interaction. The Law Commission recommends that utility should become the overt basis for implication, by replacing the four rules with a single rule based upon what is "necessary for the reasonable use of the land" at the time of the disposition.[73] This test would take into account the use of the land, the presence on the land of any relevant physical features (including any available routes for the easement), any intention for the future use of the land known to the parties and any potential interference with the servient land or inconvenience to the servient owner.

Before we examine the four methods of implying an easement, we must consider two contrasting situations. Firstly, we will consider that in which the dominant land is sold or let and the new dominant owner or tenant claims an easement over the servient land retained by the seller or landlord. If an easement is implied, it will be by means of an implied grant. This is illustrated in Figure 21.

Secondly, we will consider that in which the servient land is sold or let and the seller or landlord claims an easement over the servient land for the benefit of the dominant land that he or she retains. If an easement is implied, it will be by means of an implied reservation. This is illustrated in Figure 22.

The law is more reluctant to imply a reservation than the grant of an easement. The seller or landlord is expected to take steps to protect the use of his or her retained dominant land. The possibility of an implied reservation only arises where easements are implied on the basis of necessity or intended use. Here, the implication looks to the future use of the land. The implied grant of an easement also may arise in these circumstances and, in addition, under the rule in *Wheeldon v Burrows* or s 62 of the LPA 1925, where the implied grant looks to the past use of the land.

[73] Ibid. See also the statutory schemes for the implications of easements in Australia canvassed in Burns, 'Easements and Servitudes Created by Implied Grant, Implied Reservation or Prescription and Title-by-Registration Systems' in *Modern Studies in Property Law: Vol 5* (ed Dixon, Oxford: Hart 2009).

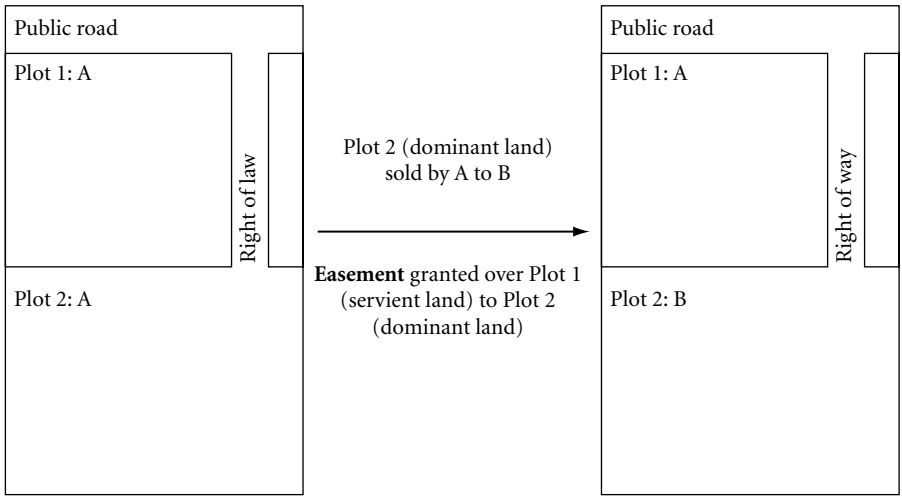

Figure 21 Easement by implied grant

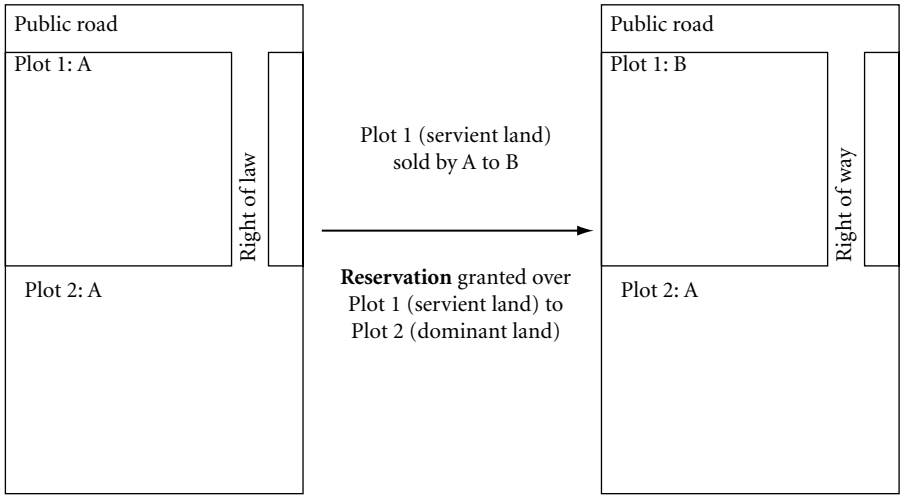

Figure 22 Easements by implied reservation

The Law Commission has recommended that the distinction between the implication of easements and reservations should be abandoned.[74]

3.2.1 Easements of necessity

The requirements for implying an easement of necessity were explained in the following case.

[74] Ibid, [3.30].

Manjang v Drammeh
(1991) 61 P & CR 194, PC

Lord Oliver

At 197

There has to be found, first, a common owner of a legal estate in two plots of land. It has, secondly, to be established that access between one of those plots and the public highway can be obtained only over the other plot. Thirdly, there has to be found a disposition of one of the plots without any specific grant or reservation of a right of access. Given these conditions, it may be possible as a matter of construction of the relevant grant [. . .] to imply the reservation of an easement of necessity.

Easements of necessity are confined to situations in which land becomes landlocked when a common owner sells (or leases) part of his or her land. In this situation, it is clear that the burden of the right of way does not fall upon some third party, whose land happens to provide the required access.[75]

An easement of necessity will only be implied where the land cannot otherwise be used at all. A high degree of necessity is thus required, which is likely only to be found where a right of way is necessary to provide access.[76] Even then, a right will not arise where an alternative access is available, however inconvenient or impractical that access might be.[77] The scope of the right is limited to what is essential to the use of the dominant land[78] at the date of its disposal.[79] It is unclear whether an easement of necessity will cease should the right subsequently become unnecessary.[80]

The basis of easements of necessity lies in intention and not public policy.[81]

Nickerson v Barraclough
[1981] Ch 426, CA

Brightman LJ

At 440

In this court we have heard a great deal of argument about ways of necessity—what is their basis, how they can be acquired and whether they can be lost. With the utmost respect to the Vice-Chancellor, I have come to the conclusion that the doctrine of way of necessity is

[75] Thus avoiding a claim that the third party's human rights had been infringed by an unjustified interference with his possessions under Art 1 of the First Protocol to the European Convention on Human Rights. See further Chapter 3.

[76] An essential right of support might be another candidate.

[77] *Union Lighterage Co v London Graving Dock Co* [1902] 2 Ch 577; *Manjang v Drammeh* (1990) 61 P & CR 194; *Titchmarsh v Royston Water Co Ltd* (1899) 81 LT 673.

[78] For example, vehicular access will not be necessary where pedestrian access is adequate: see *MRA Engineering Ltd v Trimster* (1988) 50 P & CR 1.

[79] *Corporation of London v Riggs* (1880) 13 Ch D 798.

[80] See the conflicting authority in *Holmes v Goring* (1824) 2 Bing 76; *Donaldson v Smith* [2006] All ER (D) 293; *Proctor v Hodgson* (1855) 10 Exch 824; *Barkshire v Grubb* (1881) 18 Ch D 816; *Huckvale v Aegean Hotels Ltd* (1989) 58 P & CR 163.

[81] These comments are dicta, but have been subsequently approved by the Court of Appeal in *Adealon International Corp Pty Ltd v Merton LBC* [2007] EWCA Civ 362, [2007] 1 WLR 1898.

not founded upon public policy at all but upon an implication from the circumstances. I accept that there are reported cases, and textbooks, in which public policy is suggested as a possible foundation of the doctrine, but such a suggestion is not, in my opinion, correct. It is well established that a way of necessity is never found to exist except in association with a grant of land: see *Proctor v. Hodgson* (1855) 10 Exch. 824, where it was held that land acquired by escheat got no way of necessity; and *Wilkes v. Greenway* (1890) 6 T.L.R. 449, where land acquired by prescription got no way of necessity. If a way of necessity were based upon public policy, I see no reason why land acquired by escheat or by prescription should be excluded. Furthermore, there would seem to be no particular reason to father the doctrine of way of necessity upon public policy when implication is such an obvious and convenient candidate for paternity. There is an Australian case, *North Sydney Printing Pty. Ltd. v. Sabemo Investment Corporation Pty. Ltd.* [1971] 2 N.S.W.L.R. 150, where that conclusion was reached. Furthermore, I cannot accept that public policy can play any part at all in the construction of an instrument; in construing a document the court is endeavouring to ascertain the expressed intention of the parties. Public policy may require the court to frustrate that intention where the contract is against public policy, but in my view public policy cannot help the court to ascertain what that intention was. So I reach the view that a way of necessity is not founded upon public policy; that considerations of public policy cannot influence the construction of the 1906 conveyance; and that this action is not concerned with a way of necessity strictly so called.

This view has limited the scope of easements of necessity in a number of respects. Most obviously, an easement of necessity will give way to a contrary intention, but the intention-based nature of the rule has other consequences. For example, easements of necessity will not arise where land has been acquired by adverse possession or compulsory purchase where there is no agreement from which to derive any intention. The need for common ownership of the dominant and servient land, and the static assessment of necessity at the date of severance of the land, also flow from the constraints of intention.

Several commentators have argued that public policy is a more attractive foundation for easements of necessity. They argue that any intention of the parties is purely fictional,[82] and suggest that the rational development of the doctrine has been compromised by the focus upon intention rather than utility.[83]

Bradbrook, 'Access to Landlocked Land: A Comparative Study of Legal Solutions' (1983–85) 10 Syd LR 39

At 46

[T]he development of easements of necessity has proceeded on an ad hoc basis rather than as a result of a co-ordinated response to a social problem, and the courts have shown themselves to be more interested in maintaining the conceptual purity of the law of implied grants than in devising an effective means of resolving a practical problem.

[82] Simonton, 'Ways by Necessity' (1925) 25 Col LR 571. 576 and 601; Jackson (1981) 34 CLP 133, 152; Bodkin (1973) 89 LQR 87.

[83] Bradbrook, 'Access to Landlocked Land: A Comparative Study of Legal Solutions' (1983–85) 10 Syd LR 39, 44–6; Davis, 'Informal Acquisition and Loss of Rights in Land: What Justifies the Doctrines?' (2000) 20 LS 198, 219; Lawson (2002), p 81.

At 56

[A] guaranteed access to landlocked land could most easily be achieved in common law jurisdictions if the courts were to recognise public policy as the basis of the easement of necessity. This change would remove the limitations on the scope of easements [...] for example, if it were based upon public policy rather than intention of the parties it would not be restricted to cases where the landlocking arose on a subdivision, and in appropriate cases could be granted through private land belonging to third parties. While this change would run contrary to the recent Court of Appeal decision in *Nickerson v Barraclough*, it would not be revolutionary as the earliest reported cases on the easement of necessity appear to have accepted public policy rather than intention as the basis of the easements [...] The change to the present basis of intention did not occur until the nineteenth century and appears to have been due to the jurist tendency by the courts at that time to treat all legal transactions as if they were based on contracts.

3.2.2 Intended easements

The circumstances when an easement may be implied on the basis of intention were explained in the following case.

Pwllbach Colliery Co Ltd v Woodman
[1915] AC 634

Lord Parker

At 646

[...] the cases in which an easement can be granted by implication may be classified under two heads. The first is where the implication arises because the right in question is necessary for the enjoyment of some other right expressly granted [...] Thus the right of drawing water from a spring necessarily involves the right of going to the spring for the purpose. The implication suggested in the present case does not fall under this principle; there is no express grant of any right to which the right claimed must be necessarily ancillary, [...] The second class of cases in which easements may impliedly be created depends not upon the terms of the grant itself, but upon the circumstances under which the grant was made. The law will readily imply the grant or reservation of such easements as may be necessary to give effect to the common intention of the parties to a grant of real property, with reference to the manner or purposes in and for which the land granted or some land retained by the grantor is to be used [...] But it is essential for this purpose that the parties should intend that the subject of the grant or the land retained by the grantor should be used in some definite and particular manner. It is not enough that the subject of the grant or the land retained should be intended to be used in a manner which may or may not involve this definite and particular use.

Lord Parker identifies two circumstances: the first, where the easement is necessary for the enjoyment of a right that is expressly granted; the second, where the easement is necessary to enable the dominant owner to use the land for the purpose for which it was sold or leased. An example of the first instance is given by Lord Parker in the above extract and an example of the second instance is found in *Wong v Beaumont Property Trust Ltd*.[84] Mr Wong

[84] [1965] 1 QB 173. See also *Davies v Bramwell* [2007] EWCA Civ 821.

leased the basement of a building to use as a Chinese restaurant. The lease provided that the basement should be used for this purpose, and, furthermore, that Mr Wong should control and eliminate all smells, comply with the required health regulations, and should not cause any nuisance to the landlord or adjoining occupiers. It became clear that the existing ventilation system was inadequate and a larger flue was required, but his landlords objected. An easement was implied to enable Mr Wong to comply with his obligations under the lease. In this second situation, it is clear that the implication does not arise because the parties necessarily intended that an easement be granted: it was clear in *Wong* that the parties had not anticipated the need for the larger flue, but they had made clear the intended use of the premise in the terms of the lease and it is from this intention that the right was implied.

Nourse LJ in the following case explains the process of proof being, firstly, to establish on a balance of probabilities the nature of the intended user, and secondly, to prove that the easement claimed is necessary to give effect to that use. In *Wong*, the parties had clearly expressed their intended use, but as the following case shows, the requisite intention may be established on a balance of probabilities.

Stafford v Lee
(1993) 63 P & CR 172, CA

Facts: In 1955, an area of woodland that fronted on a private drive was conveyed to Mrs Lee's predecessor in title, but no right of way was expressly granted over the drive. Mrs Lee wanted to build a house on the woodland, and claimed a pedestrian and vehicular right of way over the drive, on the basis that it was the intention of the parties to the 1955 conveyance that a house be built upon the woodland.

Nourse LJ

At 175

Intended easements, like all other implied easements, are subject to the general rule that they are implied more readily in favour of a grantee than a grantor. But even there, as Lord Parker points out, the parties must intend that the subject of the grant shall be used in some definite and particular manner. If the grantee can establish the requisite intention, the law will then imply the grant of such easements as may be necessary to give effect to it.

There are therefore two hurdles which the grantee must surmount. He must establish a common intention as to some definite and particular user. Then he must show that the easements he claims are necessary to give effect to it. Notwithstanding the submissions of Miss Baker, for the defendants, to the contrary, I think that the second hurdle is no great obstacle to the plaintiffs in this case. The real question is whether they can surmount the first.

It is axiomatic that in construing any conveyance you must take into account the facts in reference to which it was made. But here, no extrinsic evidence having been adduced on either side, we can refer only to the 1955 deed [. . .] The defendants admitted in their defence that the 1955 deed did pass to Mrs Walker a right to use Marley Drive and that that right had passed to the plaintiffs. But they have at all times contended that the right was limited to use for all purposes necessary for the reasonable enjoyment of the land as woodland, being the manner of its enjoyment in 1955. Such a right is manifestly inadequate for the plaintiffs' purposes.

The first point to be made about the defendants' contention is that, although it may sometimes come to the same thing, the material question in a case of an intended easement is not how was the land enjoyed in 1955, but did the parties to the 1955 deed intend that it should

be used in some definite and particular manner and, if so, what? [. . .] The requirement that the parties should have intended a definite and particular use for the land does not require that the intention be proved as a certainty. As always, it is enough that it is proved on the balance of probabilities. What help do we get from the 1955 deed in this regard? First, it is to be observed that Mrs. Walker's address, far from being in the neighbourhood, is stated to be in distant Sussex. Secondly, and far more significantly, there is the plan [. . .]

The significant, indeed the eye-catching, feature of the plan here is that it delineates, as the land conveyed, a plot adjoining and of comparable area to two other enclosures, each adjoining the other, which, from the legends they bear, are seen to be plots of land on which dwellings have already been constructed. In these circumstances and given, as the defendants accept, that some appurtenant right of way was intended over and along Marley Drive, what are the probabilities as to the intended use of the land? In my judgment, on the balance of probabilities, the parties can only have intended that it should be used for the construction of another dwelling to be used thereafter for residential purposes. I cannot see what other intention could reasonably be imputed to them. Having got to that point, I am satisfied that the easements claimed by the plaintiffs and declared in their favour by the judge are necessary, and are no more than are necessary, to give effect to the intention so established.

Lawson points out that there is a third situation in which an intended easement may be implied, which, although broadly based upon *Pwllbach,* is distinguishable from an easement of intended use.[85] This third category is derived from the following case, in which the Court indicated that a reservation[86] could be implied, based upon the parties' intention—although here it is the parties' intention as to creation of the right itself.

The case concerned an implied reservation, which, as Nourse LJ observed in the above extract, is less readily implied then an easement—the rationale being that the grantor should avoid the risk of derogating from his or her grant by taking care to expressly reserve any rights that he or she wishes to enjoy. Jenkins LJ explains in the case that although a reservation will not generally be implied, there are exceptions: we have already considered easements of necessity; another exception is intended easements.

Re Webb's Lease
[1951] Ch 808, CA

Facts: Webb ran a butchers shop on the ground floor of a building that he leased in south London. He sublet the upper floors, on the external walls of which advertisements were displayed. For many years, the tenant of the upper floors raised no objection to these advertisements, but he then demanded payment for them to be retained.

Jenkins LJ

At 823

As to the law applicable to the case, it is not disputed that as a general rule a grantor, whether by conveyance or lease, of part of a hereditament in his ownership, cannot claim any

[85] Lawson (2002), p 83.

[86] The case concerns a reservation, but there seems no reason why the grant of an easement should not also be implied under this third category, although there have been no such cases. Lawson (2002), p 85 explains that other grounds for the implication of the grant of an easement present more attractive options.

> easement over the part retained unless it is expressly reserved out of the grant [. . .] There are however, certain exceptions to the general rule. Two well-established exceptions relate to easements of necessity and mutual easements such as rights of support between adjacent buildings. But it is recognised in the authorities that these two specific exceptions do not exhaust the list which is indeed incapable of exhaustive statement, as the circumstances of any particular case may be such as to raise a necessary inference that the common intention of the parties must have been to reserve some easement to the grantor, or such as to preclude the grantee from denying the right consistently with good faith, and there appears to be no doubt that where circumstances such as these are clearly established the court will imply the appropriate reservation.

The question arises as to how the courts are to find this intention. In *Re Webb's Lease*, Jenkins LJ went on to state that the appropriate test was one of necessary inference, based upon proof by the landlord that the facts were not reasonably consistent with any other explanation—a test that Mr Webb failed to satisfy.[87] It was not sufficient that his tenant knew and had raised no objection to the advertisements.

Re Webb's Lease
[1951] Ch 808, CA

Jenkins LJ

At 828

The question is whether the circumstances of the case as proved in evidence are such as to raise a necessary inference that the common intention of the parties was to reserve to the landlord during the twenty-one years' term some, and if so what, rights in regard to the display of advertisements over the outer walls of the demised premises, or such as to preclude the tenant from denying the implied reservation to the landlord of some such rights consistently with good faith.

That question must be approached with the following principles in mind: (i) If the landlord intended to reserve any such rights over the demised premises it was his duty to reserve them expressly in the lease of August 11, 1949 (*Wheeldon v. Burrows*); (ii) The landlord having failed in this duty, the onus was upon him to establish the facts to prove, and prove clearly, that his case was an exception to the rule (*Aldridge v. Wright*); (iii) The mere fact that the tenant knew at the date of the lease of August 11, 1949, that the landlord was using the outer walls of the demised premises for the display of the advertisements in question did not suffice to absolve the landlord from his duty of expressly reserving any rights in respect of them he intended to claim, or to take the case out of the general rule [. . .]

Does this circumstance suffice to raise a necessary inference of an intention common to both parties at the date of the lease that the landlord should have reserved to him the right to maintain these advertisements throughout the twenty-one years' term thereby granted? I cannot see that it does. The most that can be said is that the facts are consistent with such a common intention. But that will not do. The landlord must surely show at least that the facts are not reasonably consistent with any other explanation. Here he manifestly fails.

There is considerable uncertainty as to the interface between easements of necessity and of intention. They seem to overlap, but it is clear that intended easements may be applied to a

[87] The test was also not satisfied in *Chaffe v Kingsley* (2000) 79 P & CR 404, but was met in *Peckham v Ellison* (2000) 79 P & CR 276. The decision has been criticized: see Fox [1999] Conv 353.

wider range of rights than the rights of access to which easements of necessity are largely confined.

Lawson advocates realigning the categories, with easements of intended use ('*Pwllbach* easements') encompassing and taking over from easements of necessity, and intended easements being confined to those based upon the parties' intention to create such rights ('*Re Webb's Lease* easements').

Lawson, 'Easements' in *Land Law: Issues, Debates and Policy* (ed Tee, 2002, p 85)

[. . .] there is a great deal of uncertainty about the precise relationship between easements of necessity and *Pwllbach easements*. In *Nickerson v Barrowclough* Megarry V-C seemed to regard them as 'two distinct but overlapping' ways in which easements might be implied on the basis of necessity. Both require the right to be strictly necessary for the use of the land concerned. The distinction is that for easements of necessity the right must be necessary in order for the land to be used in any manner at all, whereas for intended easements the right must be necessary in order for the land to be used in the particular manner intended by the parties.

The distinction between easements of necessity and the *Pwllbach* intended easements is frequently clouded by a judicial tendency to refer to both as easements of necessity. It may be that, in any event, it is a distinction without a difference. It is arguable that, as the courts are now prepared to imply a common intention to use the land in a specific way, they will be able to find such an intention whenever landlocked plot is conveyed—thus eclipsing the traditional easements of necessity. The precise limits of the situations in which the courts are prepared to find that there is an implied intention to use the land in a particular way have not yet been fully explored, however. It is suggested, for instance that a court will not be as inclined to find that a use was intended in the case of a reservation as it is in relation to a grant.

The view that the easement of necessity, at least in relation to implied grant, has been subsumed within the *Pwllbach* intended easement is very attractive. Both are driven by the policy that land should not become sterile but be used to its full potential. Though intention is relevant to both, neither requires proof that the parties actually intended the claimed easement. The *Pwllbach* easement could drop the misleading title of 'intended easements' and become a legitimate easement of necessity. The title 'intended easement' could, instead, be reserved for easements implied under *Re Webbs Lease*. These do not require the easement to be necessary for the land to be used and are therefore quite distinct.

3.2.3 The rule in *Wheeldon v Burrows*

The rule in *Wheeldon v Burrows* is stated by Thesiger LJ in the case of that name.

Wheeldon v Burrows
(1879) 12 LR Ch D 31

Thesiger LJ

At 49

[. . .] on the grant by the owner of a tenement or part of that tenement as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements (by which, of course, I mean quasi easements) or, in other words, all those easements which are

necessary for the reasonable enjoyment of the property granted, and which have been and are at the time of the grant used by the owner of the entirety for the benefit of the part granted.

The rule thus applies on the sale or lease of part of property when certain qualifying rights, enjoyed for the benefit of the part sold or leased (the dominant land) over the part retained (the servient land), will mature into easements. Prior to the sale or lease, such rights could not exist as easements, because of the common ownership of the dominant and servient land; they are thus referred to as 'quasi-easements'.

The rule is based upon the intention of the parties that the grantor should not derogate from his or her grant and thus gives way to a contrary intention. The rule only applies to the grant of easements, or where the sales of the dominant and servient land are simultaneous.[88] It does not operate to imply a reservation; indeed, this was the point at issue in *Wheeldon v Burrows*,[89] and is referred to as the 'second rule in *Wheeldon v Burrows*', found later in Thesiger LJ's judgment.

Wheeldon v Burrows
(1879) 12 LR Ch D 31

Thesiger LJ

At 58–9

These cases [. . .] support the propositions that in the case of a grant you may imply a grant of such continuous and apparent easements or such easements as are necessary to the reasonable enjoyment of the property conveyed, and have in fact been enjoyed during the unity of ownership, but that, with the exception which I referred to of easements of necessity, you cannot imply a similar reservation in favour of the grantor of land.

Only certain quasi-easements qualify to pass under the rule. They must be enjoyed at the time of the sale or lease, be 'continuous and apparent', and/or be reasonably necessary for the enjoyment of the property.

The first requirement is relatively straightforward. It imposes a timing constraint on the application of the rule that flows from the principle of non-derogation from grant.[90] It is the second and third requirements, and their interrelationship, that has led to the greatest uncertainty and debate.

The second requirement has its origins in the French Civil Code.[91] 'Continuous', in this context, does not mean that the right must be continuously exercised, but rather invokes the sense of permanence, so that the right might be exercised whenever necessary. 'Apparent'

[88] *Schwann v Cotton* [1916] 2 Ch 120. See also *Donaldson v Smith* [2006] All ER (D) 293, [16], *per* Donaldson QC, measuring simultaneity in context to look not solely at chronological proximity, but also at the interconnection between the two transactions.

[89] Burrows was seeking a right to light from land owned by Wheeldon, after a hoarding was erected that blocked the light to Burrows' workshop. Burrows and Wheeldon had acquired their land from a common vendor, with Burrows purchasing his land after Wheeldon.. Any rights that Burrows wished to claim over Wheeldon's land would, thus, have to be reserved by their common vendor—but there had been no express reservation and thus Burrows' claim failed.

[90] *Sovmots Investment Ltd v Secretary of State for the Environment* [1979] AC 144.

[91] Simpson, '*Wheeldon v Burrows* and the *Code Civile*' [1967] 83 LQR 240.

is the more significant part of the second requirement. Indeed, it has been suggested that '*continuousness is little more than a distraction*' and could be jettisoned.[92] For a right to be apparent, it should be discoverable from a reasonably careful physical inspection of the land. There must thus be some feature on the servient land—for example, a roadway or manhole cover—that signals the right to a purchaser.

Ward v Kirkland
[1967] Ch 194, HC

Facts: The Wards' cottage adjoined Kirkland's farm, which, at one time, had been owned by a common owner. The cottage was built so close to the farm's boundary that the only practical way for its walls to be maintained was to go onto the farm. The Wards and their predecessor in title had done so for some time before Kirkland objected.

Ungoed-Thomas J

At 225

Here, there certainly has been continuous user, in the sense that the right has in fact been used whenever the need arose. But the words "continuous and apparent" seem to be directed to there being on the servient tenement a feature which would be seen on inspection and which is neither transitory nor intermittent; for example, drains, paths, as contrasted with the bowsprits of ships overhanging a piece of land.

Here it is conceded that it was only possible or practicable for the occupiers of the cottage to maintain the boundary wall by going onto the defendant's property as claimed in this case. That would be obvious on an inspection of the properties. But there was no feature on the defendant's property designed or appropriated for such maintenance.

The third requirement calls for the right to be necessary for the reasonable enjoyment of the land and flows directly from the principle that the grantor should not derogate from his or her grant. 'Necessity', in this context, is significantly wider than the test demanded of easements of necessity, although the degree of necessity is unclear.

Thompson bemoans this uncertainty and advocates a test that merely calls for the right to be capable of being an easement by accommodating the dominant land.

Thompson, 'Paths and Pigs' [1995] Conv 239, 240–1

What appears to be necessary is that, to acquire an easement under *Wheeldon v. Burrows*, the right in question must do more than merely accommodate the dominant tenement but need not be an absolute necessity. Rather, it hovers somewhere in between, at some ill-defined point between the two. The difference between what is essential for the land to be used and what is necessary for its reasonable use is not an easy one to draw and, in consequence, it may, in the future, prove difficult to predict when a quasi-easement will be transformed into a full easement under the rule.

[. . .] [I]t would seem preferable that the second limb of *Wheeldon v. Burrows* should be interpreted to mean, in essence, that the right claimed accommodates the dominant tenement; the same requirement as exists when section 62 is in issue.

[92] Lawson (2002) p 88.

The uncertainty is illustrated by cases in which an alternative means of access is claimed to be reasonably necessary for the enjoyment of the land. An existing means of access will not be fatal to a claim under *Wheeldon v Burrows*, but it is evident that simply providing a more convenient access is unlikely to be enough:[93] the alternative access should offer some additional advantage.[94] The impact upon the servient land of the additional access should also be considered.[95]

A question that has dogged debate on *Wheeldon v Burrows* is whether the second and third requirements are synonymous, alternative, or cumulative. The authorities are not conclusive,[96] but the case for a cumulative interpretation has strong advocates.[97]

Gardner, *An Introduction to Land Law* (2009, p 166)

[. . .] [T]he rule in *Wheeldon v Burrows* [. . .] actually creates an easement, by imputing an intention to confer it. And the existence of a continuous and apparent quasi-easement alone is an inadequate basis on which to do this. The imputation is acceptable only when the additional utilitarian argument for it is sufficiently powerful. The fact that I visibly did something in the past may contribute to the making of such an argument, by giving a prima facie indication that the alleged easement would be useful. But to complete the argument, the easement must be positively needed: as the law has it, 'necessary for the reasonable enjoyment' of the land transferred. Perhaps for this reason, although the relevant case law is in disarray, the majority of commentators agree that this third requirement is essential.

3.2.4 Law of Property Act 1925, s 62

Law of Property Act 1925, s 62(1)[98]

(1) A conveyance of land shall be deemed to include and shall by virtue of this Act operate to convey, with the land, all buildings, erections, fixtures, commons, hedges, ditches, fences, ways, waters, watercourses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land or any part thereof, or, at the time of conveyance, demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to the land or any part thereof.

[93] See *Goldberg v Edwards* [1950] Ch 247 and *Wheeler v Saunders* [1996] Ch 19.

[94] See *Borman v Griffith* [1930] 1 Ch 493, in which the alternative access was more suitable for the claimant's business as a poultry dealer, the other access being impassable to heavy vehicles at certain times of the year; *Millman v Ellis* (1995) 71 P & CR 158, 163, in which the right to use a lay-by to join a busy road was held to be reasonably necessary as '*a matter concerned with safety and possible injury to life and limb*'.

[95] Ferris, 'Problems Postponed:The Rule in *Wheeldon v Burrows* and *Wheeler v Saunders*' (1996) 3 Web JCLI.

[96] See *Hansford v Jargo* [1921] 1 Ch 322, 338, *per* Russel J; *Borman v Griffith* [1930] 1 Ch 493, 499, *per* Maugham J; *Ward v Kirkland* [1967] Ch 194, 224–5, *per* Ungoed Thomas J; *Savmots v Investments Ltd v Secretary of State for the Environment* [1979] AC 145, 169, *per* Lord Wilberforce, and 175, *per* Lord Edmund-Davies; *Squarrey v Harris Smith* (1981) 42 P & CR 118, 124, *per* Oliver LJ; *Wheeler v Saunders* [1996] Ch 19, 31, *per* Peter Gibson LJ.

[97] See also Harpum, 'Easements and Centre Point: Old Problems Resolved in a Novel Setting' (1977) 41 Conv 415, 422, who points out that the two limbs of the rule have separate functions: one that facilitates discovery and the other derived from non-derogation from grant.

[98] Replacing Conveyancing Act 1881, s 6.

Section 62(4) of the LPA 1925 provides that the '*section applies only if and as far as a contrary intention is not expressed in the conveyance*'.[99]

The section was conceived as a word-saving device by implying what is known as a 'general words clause' into conveyances of land, with the object of ensuring that, on a sale or other disposal, all rights and privileges appurtenant to the land at the time of the conveyance will pass without express mention.[100] It can only operate where there has been the creation or transfer of a legal right in a deed—that is, a conveyance.[101] Judicial interpretation of the section has, however, extended its operation: not only will the section pass existing easements, but it will also operate to upgrade a mere permission into a full-fledged legal easement. In effect, the informality of the original permission is cured by the formality of the subsequent conveyance, which is '*deemed to include and shall* [. . .] *operate to convey*' the right. It is this aspect of the section that we must explore further, as a means of implied grant.[102]

Farwell J first held that this was the effect of what is now s 62 of the 1925 Act[103] in the following case.

International Tea Stores Co v Hobbs
[1903] 2 Ch 165

Facts: Hobbs was a blacksmith who let the shop adjoining his forge to the claimants and allowed them to use a private road, which formed part of the forge, to access the rear of the shop. The claimants subsequently bought the shop from Hobbs, who tried to prevent them from using the road. They successfully claimed that the privilege that they had enjoyed to use the road had become an easement by virtue of the implied general words. Farwell J rejected as immaterial the fact that the privilege was enjoyed merely by permission; it was only significant that they had used the road.

Farwell J

At 171

But, in my opinion, precariousness has nothing to do with this sort of case, where a privilege which is by its nature known to the law—namely, a right of way—has been in fact enjoyed [. . .] The real truth is that you do not consider the question of title to use, but the question of fact of user; you have to inquire whether the way has in fact been used, not under what title has it been used, although you must of course take into consideration all the circumstances of the case [. . .]

Farewell's views were indorsed by the Court of Appeal in the following case, in which the Court also set out the other characteristics of the rights that come within the section.

[99] *Selby DC v Samuel Smith Old Brewery (Tadcaster) Ltd* (2000) 80 P & CR 466; *P&S Platt Ltd v Crouch* [2003] EWCA Civ 1110.

[100] Legal easements pass automatically, without express mention, and thus the primary focus was upon equitable and quasi-easements. It was conveyancing practice to include an express general words clause.

[101] In contrast to *Wheeldon v Burrows*, which may operate at the contractual stage: see *Borman v Griffith* [1930] 1 Ch 493.

[102] Section 62 is sometimes categorized as giving rise to an express grant because the right is read into the conveyance. It is perhaps more convenient to view the grant as implied, given that it does not need to be completed by registration: see Land Registration Act 2002, s 27(7).

[103] The provision was previously comprised in s 6 of the Convenyancing Act 1881.

Wright v Macadam
[1949] 2 KB 744, CA

Facts: Wright was a weekly tenant of two rooms on the top floor of Macadam's house when Macadam gave her permission to use the coal shed at the bottom of the garden to store coal. Subsequently, Wright took a new tenancy of the two rooms, plus another room; the tenancy agreement contained no reference to the use of the coal shed, which Wright continued to use until Macadam asked her to pay for the privilege. Wright refused and successfully claimed that she had an easement to use the coal shed by virtue of s 62 of the 1925 Act.

Jenkins LJ

At 748

First, the section is not confined to rights which, as a matter of law, were so annexed or appurtenant to the property conveyed at the time of the conveyance as to make them actual legally enforceable rights. Thus, on the severance of a piece of land in common ownership, the quasi easements de facto enjoyed in respect of it by one part of the land over another will pass although, of course, as a matter of law, no man can have a right appendant or appurtenant to one part of his property exerciseable by him over the other part of his property. Secondly, the right, in order to pass, need not be one to which the owner or occupier for the time being of the land has had what may be described as a permanent title. A right enjoyed merely by permission is enough. The leading authority for that proposition is the case of *International Tea Stores Co. v. Hobbs* [. . .]

At 750

There is, therefore, ample authority for the proposition that a right in fact enjoyed with property will pass on a conveyance of the property by virtue of the grant to be read into it under s. 62, even although down to the date of the conveyance the right was exercised by permission only, and therefore was in that sense precarious.

The next proposition deducible from the cases is the one laid down in *Burrows v. Lang* [1912] 2 Ch 502, which has been referred to in some of the passages I have already read. It is that the right in question must be a right known to the law [. . .] It is necessary to keep clearly in mind the distinction between "precariousness" in the sense in which it is used in relation to quasi rights of that description, and precariousness of title as used in relation to a permissively exercised right. For the purposes of s. 62, it is only necessary that the right should be one capable of being granted at law, or, in other words, a right known to the law. If it is a right of that description it matters not, as the *International Tea Stores case* shows, that it has been in fact enjoyed by permission only. The reason for that is clear, for, on the assumption that the right is included or imported into the parcels of the conveyance by virtue of s. 62, the grant under the conveyance supplies what one may call the defect in title, and substitutes a new title based on the grant.

There is one other point to be mentioned. A further exception has been recognized in cases in which there could in the circumstances of the case have been no expectation that the enjoyment of the right could be other than temporary. That exception was recognized by Cotton L.J. in *Birmingham & Dudley District Banking Company v. Ross* (1889) 38 Ch D 295 [. . .] [A]pplying the principles [. . .] to the present case one finds, I think, this. First of all, on the evidence the coal shed was used by Mrs. Wright by the permission of Mr. Macadam, but *International Tea Stores Co. v. Hobbs* shows that that does not prevent s. 62 from applying, because permissive as the right may have been it was in fact enjoyed.

> Next, the right was, as I understand it, a right to use the coal shed in question for the purpose of storing such coal as might be required for the domestic purposes of the flat. In my judgment that is a right or easement which the law will clearly recognize, and it is a right or easement of a kind which could readily be included in a lease or conveyance by the insertion of appropriate words in the parcels. This, therefore, is not a case in which a title to a right unknown to the law is claimed by virtue of s. 62. Nor is it a case in which it can be said to have been in the contemplation of the parties that the enjoyment of the right should be purely temporary. No limit was set as to the time during which the coal shed could continue to be used. Mr. Macadam simply gave his permission; that permission was acted on; and the use of the coal shed in fact went on down to August 28, 1943, and thereafter down to 1947. Therefore, applying to the facts of the present case the principles which seem to be deducible from the authorities, the conclusion to which I have come is that the right to use the coal shed was at the date of the letting of August 28, 1943, a right enjoyed with the top floor flat within the meaning of s. 62 of the Law of Property Act, 1925, with the result that (as no contrary intention was expressed in the document) the right in question must be regarded as having passed by virtue of that letting, just as it would have passed if it had been mentioned in express terms in cl. 1, which sets out the subject-matter of the lease.

This '*metamorphosis from personal to property right*'[104] has been subject to widespread academic[105] and judicial[106] criticism, and the Law Commission has recommended that this aspect of s 62 should be abrogated.[107]

Tee explains why the Court's reasoning is faulty.

Tee, 'Metamorphoses and Section 62 of the Law of Property Act 1925'
[1998] Conv 115, 123

> [. . .] [T]he word "right" is being used in two quite different meanings, to illogical effect. A right in technical terms is enforceable—it may be enforceable only in equity, in which case it is an equitable right, or it may be enforceable at law. To start with, the only right which Mrs Wright had was the negative and precarious right not to be sued in trespass before the permission was revoked. An easement to store coal is quite a different matter; once created, it is enforceable against not only third parties, but against the original grantor as well. It is, in the technical and full sense of the word, a right [. . .] Jenkins L.J. was using the word "right" in its technical and full meaning; but [. . .] the right referred to must mean Mrs Wright's original "right", *i.e.* not to be sued.

Thus, a licence is not a proprietary right that is capable of binding third parties; it is merely a defence to an action for trespass.[108] As such, it should not be construed as a privilege appurtenant to land within the meaning of s 62.

[104] Tee, 'Metamorphoses and Section 62 of the Law of Property Act 1925' [1998] Conv 115, 115.

[105] See ibid and *Megarry and Wade: The Law of Real Property* (6th edn, ed Harpum, 2000), [18–111].

[106] See *Wright v Macadam* [1949] 2 KB 744, 755, *per* Tucker LJ; *Green v Ashco Horticulturist Ltd* [1966] 1 WLR 889, 897, *per* Cross J; *Hair v Gillman* (2000) 80 P & CR 108, 116, *per* Chadwick LJ; *Commission for the New Towns v Gallagher* [2002] EWHC 2668, (2003) 2 P & CR 24, [61], *per* Neuberger J.

[107] Reform has been advocated by the Law Commission since 1971. Its most recent recommendation is found in Law Comm 327 (2011), [3.64].

[108] See Chapter 21, sections 2 and 3.

Section 62 may thus operate to create an easement where the dominant and servient land are in common ownership, and the dominant land is sold or leased in circumstances under which an informal right has been enjoyed by the purchaser or tenant over the servient land retained by the seller or landlord. It cannot operate to create an implied reservation where the servient land is sold or leased.[109] In this respect, it looks similar to *Wheeldon v Burrows*, but there are important distinctions:

- s 62 requires a conveyance by deed to create/transfer a legal estate, but *Wheeldon v Burrows* may operate upon the creation/transfer of an equitable interest;
- s 62 operates only where there is diversity of occupation of the dominant and servient land, whereas *Wheeldon v Burrows* operates only where there has been common ownership and occupation of the dominant and servient land;
- the nature of the rights that are capable of passing as easements under s 62 are wider than those that can pass under *Wheeldon v Burrows*.

Diversity of occupation

Section 62 of the LPA 1925 calls for the right to be appurtenant to the dominant land. This requirement has been interpreted as requiring diversity of occupation between the dominant and servient land. Where the dominant and servient land are in common ownership and occupation, the rights exercised over the servient land are exercised by virtue of the occupier's ownership of servient land and not by virtue of the any right appurtenant to the dominant land.

Long v Gowlett
[1923] 2 Ch 177, HC

Facts: Long was the owner of a water mill. He claimed a right of access across fields to repair the riverbank and to cut back the weeds. The previous owners of the mill and fields had done so, and Long unsuccessfully claimed that, upon the sale of the mill, the right had passed to him under the predecessor provision to s 62.

Sargant J

At 199

It is, therefore, necessary for the purpose of dealing with the matter on this footing to consider whether, during the common ownership and occupation of Lot 1 and Lot 2 by Mr. Nichols and his widow, and therefore at the date of the conveyance, there was a "privilege, easement, right or advantage" of the kind now claimed, which can properly be said to have been "demised, occupied or enjoyed" with Lot 1 over Lot 2. It is very difficult to see how this can have been the case. No doubt the common owner and occupier did in fact repair the bank of Lot 2, and cut the weeds there; and no doubt also this repair and cutting would enure not solely for the benefit of Lot 2 (which comprised, amongst other things, a lawn tennis court), so as to prevent its being flooded, but also and very likely to a greater extent for the benefit of Lot 1. But there is nothing to indicate that the acts done on Lot 2 were done otherwise than

[109] *Kent v Kavanagh* [2006] EWCA Civ 162, [2007] Ch 1. An implied reservation may arise upon enfranchisement under Leasehold Reform Act 1967, ss 8 and 10.

in the course of the ownership and occupation of Lot 2, or that they were by way of using a "privilege, easement or advantage" over Lot 2 in connection with Lot 1. The common owner and occupier of Whiteacre and Blackacre may in fact use Blackacre as an alternative and more convenient method of communication between Whiteacre and a neighbouring village. But it has never been held, and would I think be contrary to principle to hold, that (in default of there being a made road over Blackacre forming a continuous and apparent means of communication) a sale and conveyance of Whiteacre alone would carry a right to pass over Blackacre in the same way in which the common owner had been accustomed to pass. As it seems to me, in order that there may be a "privilege, easement or advantage" enjoyed with Whiteacre over Blackacre so as to pass under the statute, there must be something done on Blackacre not due to or comprehended within the general rights of an occupying owner of Blackacre, but of such a nature that it is attributable to a privilege, easement, right or advantage, however precarious, which arises out of the ownership or occupation of Whiteacre, altogether apart from the ownership or occupation of Blackacre. And it is difficult to see how, when there is a common ownership of both Whiteacre and Blackacre, there can be any such relationship between the two closes as (apart from the case of continuous and apparent easements or that of a way of necessity) would be necessary to create a "privilege, easement, right or advantage" within the words of s. 6, sub-s. 2,of the statute. For this purpose it would seem that there must be some diversity of ownership or occupation of the two closes sufficient to refer the act or acts relied on not to mere occupying ownership, but to some advantage or privilege (however far short of a legal right) attaching to the owner or occupier of Whiteacre as such and de facto exercised over Blackacre.

Long v Gowlett was a controversial decision,[110] but has now been cited with approval by the House of Lords in *Sovmots Investment Ltd v Secretary of State for the Environment*[111] and followed by the Court of Appeal in the following case, in which the Court noted the distinction between *Wheeldon v Burrows* and s 62.[112] As Chadwick LJ explains, the situations are usually mutually exclusive: *Wheeldon v Burrows* applies where there is common ownership and occupation of the dominant and servient land, and s 62 operates where there is common ownership, but diversity of occupation.

Kent v Kavanagh
[2007] Ch 1, CA

Chadwick LJ

At [43]–[47]

The two propositions which, together, comprise the rule (or rules) in *Wheeldon v Burrows* are confined, in their application, to cases in which, by reason of the conveyance (or lease), land formerly in common ownership ceases to be owned by the same person. It is in cases of that nature that, in order to give effect to what must be taken to be the common intention of the

110 Harpum, 'Easements and Centre Point: Old Problems Resolved in a Novel Setting' (1977) 41 Conv 415; Smith, 'Centre Point: Faulty Towers with Shaky Foundations' [1978] Conv 449; Harpum, '*Long v Gowlett*: A Strong Fortress' [1979] Conv 113.

111 [1979] AC 144, 176, but see [42].

112 The Court of Appeal also endorsed diversity of occupation in *Alford v Hannaford* [2011] EWCA Civ 1099 but declined to comment in *Campbell v Banks* [2011] EWCA Civ 61 and appeared to overlook the requirement in *P&S Platt Ltd v Crouch* [2003] EWCA Civ 1110, [2004] 1 P & CR 18.

grantor and the grantee, the conveyance (or lease) will operate as a grant (for the benefit of the land conveyed) of such easements over the land retained by the grantor as are necessary to the reasonable enjoyment of the land conveyed. But, because the principle is founded on the common intention of the parties, the easements necessary to the reasonable enjoyment of the land conveyed are those which reflect (and, following separation of ownership, are needed to give effect to) the use and enjoyment of the land conveyed at the time of the conveyance and while that land and the retained land were in the common ownership of the grantor.

It is necessary to ask how far either of the two propositions which Thesiger LJ identified in *Wheeldon v Burrows* can have any application in a case where, at the time of the conveyance, the land conveyed and the land retained, although in common ownership, were not in common occupation. In particular, can either of the two propositions have any application where the land conveyed was occupied by a tenant holding under a lease from the common owner. Assuming, for the moment, that the land is not conveyed to the tenant, there are, of course, two distinct questions: (i) what easements over the retained land pass with the conveyance of the freehold and (ii) what easements are reserved out of the land conveyed for the benefit of the retained land. The rights of the tenant over the land retained; and the rights of the grantor (as owner of the land retained) over the land held under the lease are unaffected by the conveyance. Prima facie, those rights will depend on the terms of the lease—but may include rights which passed to the tenant under the first rule in *Wheeldon v Burrows* when the lease was granted.

In the absence of an express grant, the answer to the first of those questions—what easements over the retained land pass with the conveyance of the freehold turns, as it seems to me, not on any application of the first rule in *Wheeldon v Burrows* but on the operation of section 62 of the Law of Property Act 1925. Under section 62 a conveyance of land operates to convey with the land "all [. . .] ways [. . .] easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land [. . .] or, at the time of conveyance, demised [. . .] or enjoyed with [. . .] the land". I can see no reason why those words are not apt to convey, with the freehold, rights of way over the retained land which are, at the time of the conveyance, enjoyed by the tenant in occupation of the land conveyed. For my part, I find that analysis more attractive than one which relies upon the first rule in *Wheeldon v Burrows*. It seems to me an unnecessary and artificial construct to hold that the grantor, as common owner and the landlord of the land conveyed, is himself using the rights over the retained land which his tenant enjoys under the lease.

In reaching that conclusion I have had regard to the observations of Lord Wilberforce in the *Sovmots* appeal at 169, that:

> "section 62 does not fit this case. The reason is that when land is under one ownership one cannot speak in any intelligible sense of rights, or privileges, or easements being exercised over one part for the benefit of another. Whatever the owner does, he does as owner and, until a separation occurs, of ownership or at least of occupation, the condition for the existence of rights, etc, does not exist: see *Bolton v Bolton* (1879) 11 Ch D 968, 970 per Fry J and *Long v Gowlett* at 189, 198, in my opinion a correct decision."

As Lord Wilberforce pointed out, there can be no sensible concept of rights over one part of land for the benefit of another part while the two parts are in common ownership and occupation. But, once there is a separation of occupation (because part of land in common ownership is held by a tenant under a lease) there is no conceptual difficulty. There may well be rights over the untenanted part of the land for the benefit of the tenanted part. If there are, those rights are within the wide compass of section 62 of the 1925 Act.

Section 62 of the 1925 Act cannot operate to reserve rights out of the land conveyed for the benefit of the land retained. The words of the section cannot be given that effect. Nor can assistance be found in *Wheeldon v Burrows*.

Section 62, thus, largely operates in the leasehold context, in which the dominant land is leased and the tenant is granted some privilege over the servient land that is owned and occupied by his landlord.[113] That privilege may be converted to an easement under s 62 upon the renewal of the lease or upon the tenant purchasing the freehold reversion of the dominant land. In *Kent v Kavanagh*, s 62 also operated where a tenant (including adjoining tenants) exercised a right to acquire their freehold reversions by enfranchisement.[114]

Section 62 may also operate where a purchaser or lessee of the dominant land has been let into possession before the formal conveyance or lease has been executed, and the seller or landlord confers an informal privilege over the servient land. This danger arises because the operative date is the time of the formal conveyance rather than the time at which the purchaser or tenant is let into possession, or, in the case of a lease, the stipulated commencement of the term.[115]

The nature of the rights implied under s 62

A further distinction between *Wheeldon v Burrows* and s 62 flows from the nature of the rights that can pass under each rule. We have examined the need for rights under *Wheeldon v Burrows* to be continuous and apparent, and reasonably necessary for the enjoyment of the dominant land; there are no such limitations under s 62, which, accordingly, can apply to a wider range of rights.[116] In so doing, s 62 runs the danger of failing the utility test that underpins implied grant, although the discoverability of the right presents less of a problem.[117]

Gardner, *An Introduction to Land Law* (2009, p 169–170)

[. . .] the implied grant rules in fact operate to *impute* easements, rather than on the basis of a genuine implicit intention, and section 62 is certainly no exception. To justify the imputation requires a utilitarian argument for the easement in question, bolstered by the degree of consent discernable in my failure to stipulate against it. Even given the prior usage, the rule in *Wheeldon v Burrows* demands that the claimed easement be 'necessary for the reasonable enjoyment 'of the land transferred, but section 62 has no such requirement, the section demands only a lesser degree of utility to operate. Arguably, that degree is insufficient, even given the element of consent.

There is less difficulty, however, about the fact that section 62 has no requirement that the prior usage be 'continuous and apparent' [. . .] Such a requirement is in principle useful, as it enables the parties to the transfer to identify the rights the transfer will create. But as we

113 A licence to use the land may not satisfy the necessary diversity of occupation, see *Alford v Hannaford* ibid.

114 See Lewison LJ, at [70]–[76].

115 *Goldberg v Edwards* [1950] Ch 247, 256. There appears to be some latitude in determining if the right is being exercised at the time of the conveyance: see *Green v Ashco Horticulturist Ltd* [1966] 1 WLR 889, 898.

116 There are a number of cases in which claims have failed under *Wheeldon v Burrows*, but succeeded under s 62: see *Goldberg v Edwards* [1950] Ch 247 and *Ward v Kirkland* [1967] Ch 194.

117 Although others have argued that the right should be apparent: see Lawson (2002), p 93.

have seen, for section 62 to apply, the two pieces of land in question must previously have been occupied by different people, with the licence of one over the other. Under these circumstances, the right is likely to be discoverable in its very nature.

Nevertheless, to pass under s 62, the right must be capable of existing as an easement.

Phipps v Pears
[1965] 1 QB 76, CA

Lord Denning

At 84

A fine view, or an expanse open to the winds may be an advantage to a house, but it would not pass under section 62. Whereas a right to use a coal shed or to go along a passage would pass under section 62. The reason being that these last are rights known to the law, whereas the others are not. A right to protection from the weather is not a right known to the law. It does not therefore pass under section 62.

Rights that are capable of fulfilling the easement test, however, may not pass under s 62 where the particular permission given is personal to the individual, or merely temporary, or inherently precarious.[118]

Goldberg v Edwards
[1950] Ch 247, CA

Facts: Mrs Edwards owned a house and rented an annex to Goldberg, from which he ran a business. Prior to the formal entry into the lease, Mrs Edwards had let Goldberg into possession, and has allowed him and his customers to pass through the house to get to the annex, although access could be obtained via an outside passage. She also gave him permission to put up an advertising sign, bell, and a letterbox for the business. The right for Goldberg to use the access through the house became an easement by the operation of s 62, but the other rights were limited to the period of Mrs Edward's ownership of the house and thus did not pass.

Evershed MR

At 255

The various rights here claimed are these: first, a right for the plaintiffs personally to pass through the front door and along the passage of the house [. . .] Secondly, a right to maintain a signboard and an electric bell; thirdly, as a necessary corollary to that, a right for the plaintiffs' customers to use the front door and passage; and, fourthly, a right to use it for the passage of goods. As regards the signboard and the bell, it is to be observed that there is no indication of that matter in the pleadings or in the form of injunction. I need not pursue it, because the finding of the Vice-Chancellor shows quite clearly, to my mind, that everything

[118] See also *Green v Ashco Horticulturist Ltd* [1966] 1 WLR 889.

except the plaintiffs' right to come and go via this route was expressly limited to such time as the landlord should occupy the house herself. In other words, it was a privilege which she herself allowed so long as she was there, because it did not interfere with her own affairs and business. It was clear that she was not making that privilege any part of the bargain between herself and the tenants of the annex. It is plain, in my view, that these rights, other than the plaintiffs' personal right of passage, were not within the language of s. 62 so as to be covered by the demise to them.

That leaves only the personal right. As I have indicated, my main difficulty has been in deciding whether that was similarly limited or limited in some other way so as not properly to be capable of being annexed to the subject-matter of the demise. Having regard to his judgment, I think that I am bound to regard the view of the judge as having been that, in contradistinction to the other rights, it was intended to be something which the plaintiffs should enjoy qua lessees during the term of the demise, though it should not be enjoyed by their servants, workmen or any other persons with their authority.

[...] As I have held, though it is limited to the lessees themselves and does not extend to other persons, it would be capable of formulation and incorporation as a term of the lease, and it is, in my judgment, covered by s. 62. To that extent, therefore, but to that limited extent only, the plaintiffs are entitled to succeed [...]

I am anxious to guard myself from saying that rights, which were purely personal in the strict sense of that word, would necessarily in every case be covered by s. 62. I base myself on the view that the right here given, though limited to the lessees, was given to them qua lessees; and, as such, it seems to me, it is covered by the principle of *Wright v. Macadam* and by s. 62.

Gardner[119] has accused the courts of displaying '*a degree of carelessness*' in monitoring the easement-like qualities of the rights that have been held to pass as easements under s 62. For example, we have already noted that *Wright v Macadam*[120] failed to consider whether rights storage ousted the servient owner, whilst the distinctions drawn in *Goldberg*[121] between rights conferred upon the tenant as a personal favour and as a lessee are not wholly convincing.

3.3 PRESUMED GRANT: PRESCRIPTION

A grant of an easement may be presumed as a result of long user. Lord Hoffman explains the development of the law governing prescription in the following case, which concerned the registration of land as a village green by reason of the long user of the land for recreation by the inhabitants of the village.[122] The claim was for acquisition of a public right, but the same prescription principles apply to the acquisition of easements by private landowners.

119 Gardner, *An Introduction to Land Law* (2009), p 168.

120 [1949] 2 KB 744, CA.

121 See also *Green v Ashco Horticulturist Ltd* [1966] 1 WLR 889.

122 Attempts to prevent development by registering land as a town or village green has led to a surge in cases, a number of which have reached our highest court see *R v Oxfordshire CC, ex p Sunningwell Parish Council* [2000] 1 AC 335, *R (Beresford) v Sunderland CC* [2003] UKHL 60, and *R (Lewis) v Redcar & Cleveland BC* [2010] UKSC 11.

R v Oxfordshire CC, ex p Sunningwell Parish Council
[2000] 1 AC 335

Lord Hoffmann

At 349

English law [. . .] has never had a consistent theory of prescription. It did not treat long enjoyment as being a method of acquiring title. Instead, it approached the question from the other end by treating the lapse of time as either barring the remedy of the former owner or giving rise to a presumption that he had done some act which conferred a lawful title upon the person in de facto possession or enjoyment. Thus the medieval real actions for the recovery of seisin were subject to limitation by reference to various past events. In the time of Bracton the writ of right was limited by reference to the accession of Henry I (1100). The Statute of Merton 1235 (20 Hen. 3, c. 4) brought this date up to the accession of Henry II (1154) and the Statute of Westminster I 1275 (3 Edw. 1, c. 39) extended it to the accession of Richard I in 1189.

The judges used this date by analogy to fix the period of prescription for immemorial custom and the enjoyment of incorporeal hereditaments such as rights of way and other easements. In such cases, however, the period was being used for a different purpose. It was not to bar the remedy but to presume that enjoyment was pursuant to a right having a lawful origin. In the case of easements, this meant a presumption that there had been a grant before 1189 by the freehold owner.

As time went on, however, proof of lawful origin in this way became for practical purposes impossible. The evidence was not available. The judges filled the gap with another presumption. They instructed juries that if there was evidence of enjoyment for the period of living memory, they could presume that the right had existed since 1189. After the Limitation Act 1623 (21 Jac. 1, c. 16), which fixed a 20-year period of limitation for the possessory actions such as ejectment, the judges treated 20 years' enjoyment as by analogy giving rise to the presumption of enjoyment since 1189. But these presumptions arising from enjoyment for the period of living memory or for 20 years, though strong, were not conclusive. They could be rebutted by evidence that the right could not have existed in 1189; for example, because it was appurtenant to a building which had been erected since that date. In the case of easements, the resourcefulness of the judges overcame this obstacle by another presumption, this time of a lost modern grant. As Cockburn C.J. said in the course of an acerbic account of the history of the English law of prescription in *Bryant v. Foot* (1867) L.R. 2 Q.B. 161, 181:

> "Juries were first told that from user, during living memory, or even during 20 years, they might presume a lost grant or deed; next they were recommended to make such presumption; and lastly, as the final consummation of judicial legislation, it was held that a jury should be told, not only that they might, but also that they were bound to presume the existence of such a lost grant, although neither judge nor jury, nor any one else, had the shadow of a belief that any such instrument had ever really existed."

The result of these developments was that, leaving aside the cases in which (a) it was possible to show that the right could not have existed in 1189 and (b) the doctrine of lost modern grant could not be invoked, the period of 20 years' user was in practice sufficient to establish a prescriptive or customary right. It was not an answer simply to rely upon the improbability of immemorial user or lost modern grant. As Cockburn C.J. observed, the jury were instructed that if there was no evidence absolutely inconsistent with there having been immemorial user or a lost modern grant, they not merely could but should find the