One consequence of the 'regularisation' of Equity was the creation of a law of property. The Chancellor had originally intervened by imposing personal obligations on particular defendants. So the early trustee of land would be under a personal obligation to administer the property for his beneficiary, but the trustee might still be seen as the owner of the land. The particular novelty of the trust is that the beneficiary need not have been a party to a transaction establishing the trust, yet he is still able to enforce it, and what is more, the person who does set up the transaction finds he has no standing to intervene to see that it is honoured. By the end of this period the beneficiary of the trust is perceived as having an equitable proprietary interest in the asset, not just rights enforceable only against the trustee. He can enforce his rights against total strangers, from whom he can demand the asset. This 'exigibility'—demandability—is one of the characteristics of property. He can also alienate and pass a good equitable title. For some of the beneficiary's protection his trustee will have to use the mechanism of the common law courts, and the beneficiary of the trust may have to invoke the assistance of the Chancellor to drive a reluctant trustee to take the necessary steps. But it is important to see that the trustee is no longer exercising rights. His common law ownership was made up of a set of rights, powers and duties. The Chancellor's intervention has overridden or destroyed the rights, which the trustee can no longer exercise at his own election and for his own benefit, and has converted them into equitable duties, to be performed for the sole benefit of the beneficiary. No principle seems more central to the law of trusts than that the trustee may not derive a profit from the trust. There is today no sensible usage of 'owner' which can apply to the trustee, and every sensible usage which can apply to the beneficiary. The trustee has a legal title and access to common law courts and remedies, but he is a driven vehicle for the superior rights of his beneficiary. He litigates at common law in response to his equitable duties, and not to his common law rights, which have been subordinated. The trustee is now a manager in an institution which is a hybrid between the creation of an agency and the disposition of property.

2 THE CONCEPT OF AN EQUITABLE INTEREST IN LAND

In Chapter 1, we considered the decision of the House of Lords in *National Provincial Bank v Ainsworth*.[4] It was held that Mrs Ainsworth's right, her 'deserted wife's equity', whilst clearly a product of equitable rules, did not count as an equitable interest in land. Instead, it was simply an equitable personal right against her husband. As a result, Mrs Ainsworth could not assert that right against the bank, who had acquired a right in the land from her husband. That decision can be contrasted with the decision of the House of Lords in *Williams & Glyn's Bank v Boland*.[5] Mr Boland was registered as holding a freehold of a home in Ridge Park, Beddington, Surrey. Mr Boland and his brother were directors of a building company. To support the business, Mr Boland borrowed money from the Williams & Glyn's Bank. The money was borrowed as part of a mortgage deal: to secure his duty to repay that sum, plus interest, Mr Boland gave the bank a legal charge over his home. When Mr Boland failed to repay the loan, the bank wished to sell the land. To get a good price, the bank knew that it had to sell the home with vacant possession. Because Mrs Boland refused to leave, the bank applied for an order for possession of the home.

The facts of *Boland* thus have much in common with those of *Ainsworth*. The crucial difference between the two cases was as to the *content* of the wife's right. Mrs Boland did

[4] [1965] AC 1175. [5] [1981] AC 813.

not attempt to assert a 'deserted wife's equity' against the bank. Rather, because Mr Boland had acquired his freehold of the land with her financial assistance, he was under a duty to use that freehold not for his own sole benefit, but for the benefit of both himself and his wife.[6] Mr Boland thus held his freehold on trust, and both he and his wife were beneficiaries of that trust. A beneficiary of a trust has an equitable interest, and so Mrs Boland, unlike Mrs Ainsworth, had more than a mere personal right against her husband. As confirmed by the House of Lords, Mrs Boland had an equitable interest in the land: a right capable of binding a third party, such as the bank, later acquiring a right from Mr Boland.

It is important to note that, as we will see in Chapter 14, section 5.1.1, the House of Lords considered whether the bank had a defence to Mrs Boland's pre-existing equitable property right. The fact that an equitable interest in land is *capable* of binding a party other than A does not mean that such a right will *always* bind such parties. We noted in Chapter 4, section 1, that it is possible for a third party to have a defence to a pre-existing legal estate or legal interest; it is also possible for a third party to have a defence to a pre-existing *equitable* interest. We will consider such defences in detail in Part D of this book.

3 RIGHTS UNDER TRUSTS: THE *CONTENT* QUESTION

Let us say that S, who has a freehold, wants to divide up his ownership of land by making B1 owner of the land for B1's life, with B2 becoming owner on the death of B1. We know that S cannot achieve his aims by giving either of B1 or B2 a *legal* estate in land: as we saw in Chapter 4, section 3, section 1 of the Law of Property Act 1925 allows for only two forms of legal estate in land: the freehold and the lease. S can, however, set up a trust, by transferring his freehold to A1 and A2 subject to a duty to use that freehold: (i) for the benefit of B1 during B1's life; then (ii) for the benefit of B2 forever. In such a case, A1 and A2 clearly have a legal estate: a freehold. But, as noted in the Hackney extract set out in section 1 above, the trust imposed on A1 and A2 means that they cannot use their ownership rights for their own benefit: instead, they must use their freehold for the benefit of B1, then for the benefit of B2. So, whilst A1 and A2 have ownership, they are under equitable duties to B1 and B2; and those duties ensure that it is B1 and B2 who take the benefit of A1 and A2's ownership.

This structure is made clear in the Trusts of Land and Appointment of Trustees Act 1996 (TOLATA 1996).

Trusts of Land and Appointment of Trustees Act 1996, s 6(1) and (6)

(1) For the purpose of exercising their functions as trustee, the trustees of land have in relation to the land subject to the trust all the powers of an absolute owner.

[...]

(6) The powers conferred by this section shall not be exercised in contravention of, or of any order made in pursuance of, any other enactment or any rule of law or equity.

In our example, each of B1 and B2 has an equitable property right that allows him or her to take the benefits, for a slice of time, of ownership of land. Nonetheless, it would be

[6] We will consider the circumstances in which such trusts can arise in Chapter 16.

inaccurate to say that either of B1 or B2 has an 'equitable estate'. Firstly, the Law of Property Act 1925 (LPA 1925) does not use that term. As we saw in Chapter 4, s 1(1) of the Act sets out permissible legal estates and s 1(2) sets out permissible legal interests. Section 1(3) then states that: '*All other estates, interests, and charges in or over land take effect as equitable interests*.' So, if we are to follow that terminology, we should treat all equitable property rights as equitable interests.

Secondly, and more importantly, in Chapter 4, section 2, we defined an estate as a property right giving its holder ownership rights. In our example in which A1 and A2 hold a freehold on trust for B1 and B2, it is not accurate to say that B1 and B2 have ownership rights; rather, A1 and A2 have ownership, and A1 and A2 are under a duty to use that ownership for the benefit of each of B1 and B2. As a result, each of B1 and B2 can, in practice, enjoy the *benefit* of A1 and A2's ownership. For example, if the land consists of commercial premises rented out to a business, the rent will be paid to A1 and A2, but A1 and A2 will be under a duty (depending on the exact terms of the trust) to pay that rental income to B1 during B1's life.

It is therefore important to distinguish two cases. In the first case, A, a freehold owner of land, grants B a lease of that land. In the second case, A, a freehold owner of land, transfers that freehold to A1 and A2 to hold on trust for B1 and B2. In the first case, A can be seen as splitting, or carving up, A's right to exclusive possession of the land: that right goes to B for the duration of the lease, before returning to A. In the second case, there is no such splitting or carving up. Rather, A's freehold is transferred intact to A1 and A2, who acquire A's right to exclusive possession of the land forever. In the second case, the rights of B1 and B2 therefore derive not from any splitting or carving up of A's freehold, but rather from A's imposition of a *duty* on A1 and A2. As an Australian judge once put it: '*An equitable interest is not carved out of a legal estate but impressed upon it*.'[7] In the second case, the equitable interest is impressed upon the freehold of A1 and A2 because of the duty imposed on A1 and A2. That duty, owed to each of B1 and B2, relates to the freehold held by A1 and A2, as it limits the uses that A1 and A2 can make of the freehold. It ensures, in particular, that A1 and A1 must use the freehold not for their own benefit, but rather for the benefit of each of B1 and B2.

As far as the content question is concerned, that is the key feature of the trust: A must hold a right, and also be under a duty to B not to use that right for A's own benefit, unless and to the extent that A is also a beneficiary of the trust. We saw that, in *Williams & Glyn's Bank v Boland*,[8] for example, Mr Boland held his freehold on trust for each of himself and his wife. As a result, Mr Boland was permitted, to a certain extent, to use his freehold to his own benefit: if the freehold was sold, for example, Mr Boland would be entitled to retain a proportion of the proceeds of sale for his own benefit. The presence of the trust, however, means that, in such a case, he would be under a duty to pay a proportion of those proceeds to Mrs Boland; and also that, when deciding whether to sell his freehold, he would be under a duty to take into account the wishes of his wife.

In analysing equitable interests in land, it is important to distinguish rights under trusts from other forms of equitable interest in land. Firstly, as we will see in Chapters 17 and 20, a

[7] *Per* Brennan J in *DKLR Holding Co (No 2) Ltd v Commissioner of Stamp Duties* (1982) 149 CLR 431 (High Court of Australia). See Swadling, 'Property' in Burrows (ed) *English Private Law* (Oxford: OUP, 2nd edn, 2007) 4.145–4.150. This view also fits with the historical development of the trust: see N Jones 'Trusts in England after the Statute of Uses: A View from the Sixteenth Century' in R Helmholz and R Zimmerman (eds) *Itinera Fiduciae: Trust and Treuhand in Historical Perspective* (Berlin: Duncker & Humblot, 1998), p 190: '*The interest of* [a beneficiary of a trust] *depends upon the interest of the trustee: the creation of a trust is a process of cumulation, and not division*'.

[8] [1981] AC 813, HL (the facts of the case are discussed in section 2 of this chapter).

special statutory regime regulates trusts of land, but does not apply to other equitable interests in land; secondly, as we will see in Chapter 11, section 2, a special formality rule applies to the acquisition of rights under trusts of land.[9]

To make this distinction between rights under trusts and other forms of equitable interest in land, we need to focus on the content of A's duty. In a trust, A is under a duty in relation to the whole of a particular right held by A, such as A's freehold or A's lease. In contrast, if B has a different form of equitable interest, it seems that A is under a narrower, more specific duty: for example, if B has an equitable easement, A's duty is simply to grant B an easement and A is otherwise free to use A's freehold or lease for A's own benefit.

It is important to remember that a trust will often have more than one beneficiary. We have already discussed the example where A1 and A2 hold a freehold on trust for B1 and B2, with a duty to use the freehold for B1's benefit during B1's life, and then for the benefit of B2. This example demonstrates one of the great advantages of the trust: it can be used to divide up the benefits of a right in almost any way.[10] The next extract considers examples that do not involve land, but, as shown by our examples above, the flexibility of the trust also applies where the right held on trust is a freehold or lease of land.

Worthington, *Equity* (2nd edn, 2006, pp 73–7)

> Now that the idea of a trust is clearer, with its ingenious splitting of the ownership 'bundle of rights' into legal and Equitable ownership, it is possible to explore some of the enormous practical advantages of the trust [. . .]
>
> [. . .T]rusts enable proprietary interests to be divided along a time line. A trustee can hold a Rembrandt painting on trust 'for A for life, then B for life, remainder to C' (and death need not be the only marker along the time line). This arrangement gives each party (the trustee, A, B and C) some immediate proprietary interest in the painting, with all the protection this entails, even though B and C have to wait some time before they are entitled to possession of the painting. A contract could achieve a similar result, but again without the important protections that proprietary interests afford [. . .]
>
> [. . .T]rusts are enormously flexible in slicing up property rights in ways that would be inconceivable without the trust. Consider company shares. A shareholder who wishes to deal with his shares can only transfer full ownership or a security interest in the entire bundle of rights associated with the share. He cannot sell part of a share; he certainly cannot parcel out the different benefits inherent in shareholding to different transferees, giving one the right to dividends, another the right to vote and yet another the right to capital gains. Under the umbrella of a trust, however, all of this is possible. The owner (as settlor) simply has to specify the beneficiaries' rights under the trust in the appropriate way.

In Chapter 20 we will look more closely at the ways in which a trust can be used to divide up the benefits of ownership over time (as in our first example). One question is, however, worth asking here: does the possibility of creating diverse equitable interests in land undermine the aim of s 1 of the LPA 1925? After all, as we saw in Chapter 4, section 3.3, part of the purpose of that provision is to protect third parties against the risk of being bound by complicated and unusual property rights. So, for example, it is impossible for B1 to have

[9] That rule is set out in s 53(1)(b) of the Law of Property Act 1925; it differs from the general formality rule applying to the acquisition of equitable interests in land, set out in s 53(1)(a) of the same Act.

[10] One of the limits is imposed by the rule against perpetuities: see Chapter 20, section 3.1.

a legal life estate, or for B2 to have a legal estate giving B2 ownership of the land after B1's death. Yet in our example above, in which A1 and A2 hold a freehold on trust for B1 for B1's life, and then for B2, each of B1 and B2 has an *equitable* property right, capable of binding a third party who, for example, acquires the freehold of A1 and A2. So there may seem to be little point limiting the content of legal estates and interests in land if those limits can be evaded by simply setting up a trust.

The key point, however, is that where a party has an equitable interest, it is far easier for C (a third party later acquiring a right from A1 and A2) to have a *defence* to that pre-existing right. Indeed, in our example, if C acquires the freehold of A1 and A2, he may well be able to take free from the equitable interests of B1 and B2, even if C knows about those rights, and even if B1 or B2 is in actual occupation of the land when C acquires his right. This is because C may well be able to rely on a special application of the overreaching defence. We will explore this defence, which is regulated by s 2 of the LPA 1925, in Chapter 12, section 3.3, and in Chapter 19: it gives C valuable protection against the risk of being bound by a pre-existing equitable interest arising under a trust. It thus seems that, as far as the protection of third parties is concerned, the LPA 1925 has a clear, logical structure:

- in order to protect third parties such as C, s 1 limits the list of legal estates and interests in land;
- this means that particular arrangements (such as giving B1 a right to benefit from the land for B1's life, with the right to benefit thereafter going to B2) have to take effect behind a trust, with each of B1 and B2 having only an equitable interest;
- s 2 then recognizes that C can use a special overreaching defence against a pre-existing *equitable* property right arising under a trust.

4 RIGHTS UNDER TRUSTS: THE *ACQUISITION* QUESTION

As we noted in section 1 above, any equitable property right depends on A being under an initial duty to B. So, the first step for B in showing that he has a right under a trust is to show that A is under a duty to him. In Chapter 4, section 4, we saw that it may be possible for B to acquire a legal estate in land by an *independent acquisition*—that is, through relying simply on his own, unilateral conduct. In contrast, it is *impossible* for B to acquire a right under a trust by relying on an independent acquisition. This is because B can acquire an equitable property right only when A is under a duty to B; and A cannot come under a duty to B simply as a result of B's own, unilateral conduct.

In practice, however, the need to show that A is under a duty to B *increases* B's chances of showing that he has acquired a right under a trust. This is because there are many different means by which A can come under a duty to B.[11] We will discuss these means in Chapters 9–11. For example, if A makes a contractual promise to transfer his freehold to B, that contract, by itself, does not transfer A's freehold: as we will see in Chapter 7, section 3, further formalities must be completed before B acquires A's freehold. The contract between A and B, however, imposes a duty on A: a duty in relation to A's freehold. As a result, as

[11] This point is noted by Smith, 'Fusion and Tradition' in *Equity and Commercial Law* (eds Degeling and Edelman, 2005), p 34. See, also, Chambers, 'Constructive Trusts in Canada' (1999) 37 Alberta Law Rev 173.

we will see in Chapter 9, the contract itself may suffice to give B a right under a trust of A's freehold.

5 OTHER EQUITABLE INTERESTS: THE *CONTENT* QUESTION

5.1 A LONGER LIST OF PROPERTY RIGHTS

In the following extract, Swadling considers one of the contributions of equity to property law: the recognition of a longer list of property rights.

Swadling, 'The Law of Property' in *English Private Law* (ed Burrows, 2nd edn, 2007, [4.26])

A longer list

All rights recognized as property rights at common law are also recognized as such by equity. So, for example, it is possible to have an easement, for example a right of way over land, both at common law and in equity. But there are also some rights recognized in equity as proprietary which at common law either do not exist at all or, if they do, are only recognized as personal rights. An example of the latter is the restrictive covenant over land. Others are contracts and options to purchase certain types of legal property rights. The mortgagor's equity of redemption is an example of equity creating a property right where not even a corresponding personal right exists at law.

5.2 THE LIST OF EQUITABLE INTERESTS

It is possible to come up with a list of rights that, in addition to rights under a trust, count as equitable interests in land. Building on Swadling's approach in the extract above, that list can be usefully split into two categories. In the first category are those rights that do not correspond to any legal estate or legal interest in land. Examples of such rights are: (i) the restrictive covenant (which we will examine in Chapter 26); and (ii) the mortgagor's equity of redemption (see Chapter 28, section 5). Where registered land is concerned, we can also include: (i) an 'equity by estoppel' (see Chapter 10, section 4.3); and (ii) a 'mere equity'.[12] Under s 116 of the Land Registration Act 2002 (LRA 2002), those rights are expressly said to be capable of binding a third party acquiring a right in relation to registered land.

In the second category are equitable interests that do correspond to a legal estate or legal interest in land. Clear examples of such rights are: (i) equitable leases (see Chapter 22, section 3.2); (ii) equitable easements (as noted by Swadling in the extract

[12] One example of a 'mere equity' is an equitable power to rescind a transfer of a right, arising because that transfer was the result of an innocent misrepresentation made by the transferee: see *Bristol & West Building Society v Mothew* [1998] Ch 1, 22–3, *per* Millett LJ. In such a case, when the transferor exercises his power to rescind, he or she acquires a full equitable interest; but, before then, he or she has only a 'mere equity': a power to acquire an equitable interest. For further discussion see McFarlane, *The Structure of Property Law* (2008) pp 224–7; O'Sullivan, 'The Rule in *Phillips v Phillips*' (2002) 118 LQR 296.

above, and see further Chapter 25); and (iii) equitable charges (see Chapter 28, section 4.3). In each of those cases, B's equitable interest arises because A is under a duty to grant B a recognized legal property right in land. The content of the equitable property right thus reflects the content of the legal estate or interest in question.[13] The crucial difference is that A has not yet granted B the relevant legal estate or legal interest; rather, A is under a duty to do so.

In this category, we can also include what Swadling refers to as '*contracts and options to purchase certain types of legal property rights*'. Such equitable property rights can be broken down into: (i) estate contracts (see Chapter 9); and (ii) options to purchase. Where registered land is concerned, we can add a further right: (iii) the right of pre-emption. Under s 115(b) of the LRA 2002, that right is expressly said to be capable of binding a third party acquiring a right in relation to registered land. As we will see in section 6 below, equity's contribution here again relates to the *acquisition* question, not the *content* question. To show that he has an estate contract, option to purchase, or right of pre-emption, B always needs to show that A has a legal estate. To show that he has an estate contract, B also needs to show that A is under an existing contractual duty to transfer that estate to B. To show that he has an option to purchase, B need only show that B has the option to impose a contractual duty on A to transfer A's estate to B. And to show that he has a right of pre-emption, B only needs to show that, if A chooses to sell A's estate, B has the option to impose a contractual duty on A to transfer that estate to B.

It is, therefore, possible to come up with the set of equitable interests in land illustrated in Table 2.

5.3 LIMITING THE CONTENT OF EQUITABLE INTERESTS

Whilst all equitable interests depend on A being under a duty to B, it is clear that B does not have an equitable interest in all cases where A is under a duty to B. For example, as we noted in section 2 above, the House of Lords held in *National Provincial Bank v Ainsworth* that, whilst Mr Ainsworth was under an equitable duty to Mrs Ainsworth, his 'deserted wife', that duty did not give Mrs Ainsworth an equitable interest.[14]

Equally, the content of those rights that do count as equitable interests is carefully controlled by the courts. This can be shown by the following extract, in which Lord Templeman considers the content of the restrictive covenant. As we will see in Chapter 26, it is possible to take issue with Lord Templeman's reasoning, but, for our present purposes, it is important to note one key point. We saw in section 1 above that equitable property rights arose because of equity's willingness to allow an obligation owed by A to B to affect a third party, C; as the following extract demonstrates, it is clear that equity does not allow *all* obligations to have that effect.

[13] There can, however, be a slight difference. To count as a legal interest in land, an easement or charge must last forever (like a freehold) or for a certain, limited period (like a lease). As a result, if A gives B a right of way that is due to last only for B's life, that right, even if passes the content test for an easement (see Chapter 25, section 2), cannot count as a legal easement. Nonetheless, it can count as an equitable easement: see *ER Ives Investments Ltd v High* [1967] 2 QB 379, 395, *per* Lord Denning MR.

[14] [1965] AC 1175. See the discussion of the case in Chapter 1.

Table 2 Equitable Interests in Land

Group A	**Rights under trusts**
Group B	**Rights with a content not corresponding to a legal estate or legal interest** *General*: (i) restrictive covenants; (ii) mortgagor's equity of redemption *In relation to registered land*: (i) equity by estoppel; (ii) mere equity
Group C	**Rights with a content corresponding to a legal estate or legal interest** *General*: (i) equitable lease; (ii) equitable easement; (iii) equitable charge; (iv) estate contract; (v) option to purchase *In relation to registered land*: (i) right of pre-emption

Rhone v Stephens
[1994] 2 AC 310, HL

Facts: Walford House in Combwich, Somerset, was divided by its owner into a house and a cottage. The roof of the house overhung the cottage. In 1960, the former owner then sold a freehold of the cottage. When doing so, he promised the purchasers of the cottage '*for himself and his successors in title* [. . .] *to maintain* [. . .] *such part of the roof of Walford House* [. . .] *as lies above the property conveyed in wind and watertight condition*'. After that, both the house and the cottage were sold on. By 1991, the freehold of the house was held by Ms Stephens, and the freehold of the cottage was held by Mr and Mrs Rhone. Mr and Mrs Rhone claimed that Ms Stephens was under a duty to repair the roof of the house, as a result of the covenant entered into by the former owner of the house in 1960. On that basis, they claimed compensation from Ms Stephens for damage that they had suffered as a result of the state of the roof and also asked for an order forcing Ms Stephens to ensure that the necessary repairs were done. The first instance judge found in favour of Mr and Mrs Rhone; but the Court of Appeal reversed that finding, holding that the promise made in 1960 did not give rise to an equitable property right, because it imposed a *positive* burden (a duty to do repairs) and so did not count as a *restrictive* covenant. The House of Lords upheld that finding.

Lord Templeman

At 317–18

My Lords, equity supplements but does not contradict the common law. When freehold land is conveyed without restriction, the conveyance confers on the purchaser the right to do with the land as he pleases provided that he does not interfere with the rights of others or infringe statutory restrictions. The conveyance may however impose restrictions which, in favour of the covenantee, deprive the purchaser of some of the rights inherent in the ownership of unrestricted land. In *Tulk v. Moxhay* (1848) 2 Ph. 774 [see Chapter 6, section 2.6] a purchaser of land covenanted that no buildings would be erected on Leicester Square. A subsequent purchaser of Leicester Square was restrained from building. The conveyance to the original purchaser deprived him and every subsequent purchaser taking with notice of the covenant of the right, otherwise part and parcel of the freehold, to develop the square by the construction of buildings. Equity does not contradict the common law by enforcing a

restrictive covenant against a successor in title of the covenantor but prevents the successor from exercising a right which he never acquired [. . .]

Equity can thus prevent or punish the breach of a negative covenant which restricts the user of land or the exercise of other rights in connection with land. Restrictive covenants deprive an owner of a right which he could otherwise exercise. Equity cannot compel an owner to comply with a positive covenant entered into by his predecessors in title without flatly contradicting the common law rule that a person cannot be made liable upon a contract unless he was a party to it. Enforcement of a positive covenant lies in contract; a positive covenant compels an owner to exercise his rights. Enforcement of a negative covenant lies in property; a negative covenant deprives the owner of a right over property.

5.4 EQUITABLE INTERESTS AND THE *NUMERUS CLAUSUS* PRINCIPLE

In the extract above, Lord Templeman could have supported his analysis by referring to the following statutory provision (emphasis added), which makes clear that there is a limit to the content of equitable interests.

Law of Property Act 1925, s 4(1)

Creation and disposition of equitable interests

(1) Interests in land validly created or arising after the commencement of this Act, which are not capable of subsisting as legal estates, shall take effect as equitable interests, and, save as otherwise expressly provided by statute, interests in land which under the Statute of Uses or otherwise could before the commencement of this Act have been created as legal interests, shall be capable of being created as equitable interests:

Provided that, after the commencement of this Act (and save as hereinafter expressly enacted) an equitable interest in land shall only be capable of being validly created in any case in which an equivalent equitable interest in property real or personal could have been validly created before such commencement.

It thus seems that, whilst s 1(2) of the Act limits the content of legal interests, s 4(1) does the same job for the content of equitable interests. Rather than setting out the permissible equitable interests, s 4(1) instead imposes a freeze on the development of new equitable interests. As noted by Briggs:[15] '[Section 4(1)] *seems clear enough* [. . .] *If* [particular rights] *are to bind purchasers of land as proprietary interests, then they must be shown to have existed in pre-1926 land law* [. . .]'

It is certainly the case that the courts have developed no new equitable interests since 1926. Perhaps surprisingly, however, the courts have not supported that approach by relying on s 4(1). For example, we saw in Chapter 1 that, when finding in *National Provincial Bank v Ainsworth*[16] that a 'deserted wife's equity' did not count as an equitable interest, Lord Wilberforce did not refer to s 4(1), but instead explained that the content of the 'deserted wife's equity' meant that it was unsuited to binding anyone other than the husband. In an important passage, Lord Wilbeforce stated that: '*Before a right or an interest can be admitted*

[15] 'Contractual Licences: A Reply' [1983] Conv 285, 290.

[16] [1965] AC 1175.

into the category of property, or of a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability. The wife's right has none of these qualities, it is characterised by the reverse of them.'[17]

Once it had been decided that Mr Ainsworth was not under a duty to allow Mrs Ainsworth to live in *her current house*, but instead simply had a duty to provide her with *some* accommodation, Mrs Ainsworth's claim to an equitable property right was doomed to fail: she could not show that her husband's duty to her related to his freehold. But Lord Wilberforce went further and set out criteria that can be used to analyse a claim that B has an equitable property right. To count as such a right, B's right must be:

- definable;
- identifiable by third parties;
- capable in its nature of assumption by third parties; and
- (to some degree) permanent and stable.

It is important to realize, however, that a right will not count as an equitable property right *simply* because it meets Lord Wilberforce's criteria. For example, a positive covenant, such as that considered by Lord Templeman in *Rhone v Stephens*[18] (see section 5.3 above), gives its holder a right that has all of the characteristics specified by Lord Wilberforce. So whilst these characteristics may be *necessary* if B's right is to count as an equitable property right, they are clearly not *sufficient*.

6 OTHER EQUITABLE INTERESTS: THE *ACQUISITION* QUESTION

In section 4 above, we noted that, to acquire a right under a trust, B must show that A is under a duty to B. The same is true when B claims any form of equitable interest. For example, in *Walsh v Lonsdale*,[19] which we will examine in detail in Chapter 9, Lonsdale had made a contractual agreement to grant Walsh a seven-year lease. Walsh did not acquire a legal lease because no grant was made. Nonetheless, the Court of Appeal held that Walsh had an *equitable* lease, arising as a result of Lonsdale's contractual duty to grant Walsh the promised legal lease.

In Chapters 9 and 10, we will examine a general means by which B may acquire an equitable interest. In other chapters, we will consider the acquisition of specific equitable interests: for example, in Chapter 22, section 3.2, we will consider the acquisition of an equitable lease; in Chapter 26, sections 2.5 and 3, we will consider the acquisition of a restrictive covenant. It is important to bear in mind that formality rules may regulate the acquisition of an equitable interest: for example, we will see in Chapter 7, section 3 that a contract for the grant of a seven-year lease (such as was relied on in *Walsh v Lonsdale*) is only valid if it complies with the formality rule imposed by s 2 of the Law of Property (Miscellaneous Provisions) Act 1989. The general formality rule applying to the acquisition of an equitable interest in land is set out by section 53(1)(a) of the Law of Property Act 1925:

[17] Ibid, 1248. [18] [1994] 2 AC 310, HL. [19] (1882) LR 21 Ch D 9, CA.

Law of Property Act 1925, s 53

Instruments required to be in writing

(1) Subject to the provision hereinafter contained with respect to the creation of interests in land by parol—

(a) no interest in land can be created or disposed of except by writing signed by the person creating or conveying the same, or by his agent thereunto lawfully authorised in writing, or by will, or by operation of law.

(b) [. . .]

(c) [. . .]

(2) This section does not affect the creation or operation of resulting, implied or constructive trusts.

In Chapters 10 and 11, we will examine a number of means by which B can acquire an equitable interest even in the absence of any writing. Chapter 10 is concerned with proprietary estoppel: we will consider the reasons why that doctrine does not require formality in Chapter 7, section 3.7, and in Chapter 10, section 2.4. In Chapter 11, sections 3 and 4, we will consider resulting and constructive trusts, which fall within the exception permitted by s 53(2).

7 THE RELATIONSHIP BETWEEN COMMON LAW AND EQUITY

Many land law cases share a basic form: A, an owner of land, has some dealings with B; as a result, B acquires a right to make a particular use of A's land. A then gives C a right in relation to the land: for example, by selling his freehold or lease to C, or by granting C a legal charge over the land. B wishes to carry on using the land, but C wants to prevent B from using the land in that way. For example, in *National Provincial Bank v Ainsworth*[20] (see Chapter 1 as well as section 5.4 above), the bank (C) wanted to prevent Mrs Ainsworth (B) from continuing to occupy the home owned by Mr Ainsworth (A).

In such cases, it is important to ask if B's right, acquired from A, counts as a property right. If it does, it is capable of binding C. If it does not, and is simply a personal right against A, B cannot assert that right against C (although, as we will see in Chapter 6, it may still be possible for B to assert a *new*, direct right against C, arising as a result of C's conduct). To see if B's right counts as a property right, we need to look at both the *content* question and the *acquisition* question. But in the past two chapters, we have seen that, as far as the content question is concerned, there are two sets of answers: one set is provided by the common law rules; another set, by the equitable rules. For example, a restrictive covenant does not count as a legal estate or interest in land, but it can count as an equitable interest (see section 5.3 above). As pointed out in the following extract, these differences raise an awkward question: does it make sense for common law and equity to give different answers to the same question?

[20] [1965] AC 1175.

Burrows, 'We Do This at Common Law But That in Equity' (2002) 22 OJLS 1

[T]he fusion of law and equity is a topic that provokes strong reactions. But the question remains of what, exactly, is meant by fusion. One way of answering this is to give a short description of the essence of first, the anti-fusion school of thought; and second, the fusion school of thought.

According to the anti-fusion school of thought, the Supreme Court of Judicature Acts 1873–5 fused the administration of the courts but did not fuse the substantive law. Common law and equity sit alongside one another. Moreover, they can happily sit alongside one another. Clashes or conflicts or inconsistencies between them are very rare. Where they exist, and in so far as they are not resolved by the more specific provisions of the 1873–5 Acts, they are resolved by the general provision in section 11 of the 1873 Act which lays down that 'equity shall prevail'. This is not to say that common law or equity is frozen in the position it was in before 1873. Rather common law and equity can independently develop incrementally. But one should not develop the law by reasoning from common law to equity or vice versa. To do so would cut across the historical underpinnings of the two areas; and a harmonized rule or principle that has features of both common law and equity but cannot be said clearly to be one or the other, would be unacceptable.

In contrast, the fusion school of thought argues that the fusion of the administration of the courts brought about by the 1873–5 Acts, whilst not dictating the fusion of the substantive law, rendered this, for the first time, a realistic possibility. While there are areas where common law and equity can happily sit alongside one another, there are many examples of inconsistencies between them. It is important to remove the inconsistencies thereby producing a coherent or harmonized law. In developing the law it is legitimate for the courts to reason from common law to equity and vice versa. A harmonized rule or principle that has features of both common law and equity is at the very least acceptable and, depending on the rule or principle in question, may represent the best way for the law to develop.

It is submitted that the latter view is to be strongly preferred. There are numerous instances of inconsistencies between common law and equity; and to support fusion seems self-evident, resting, as it does, on not being slaves to history and on recognizing the importance of coherence in the law and of 'like cases being treated alike' [. . .]

[Burrows goes on to suggest that cases in which common law and equitable rules do differ can be placed into one of three categories:]

The first category is where common law and equity co-exist coherently and where the historical labels of common law and equity remain the best or, at least, useful terminology [. . .]

The second category is where common law and equity co-exist coherently but, in contrast to the first category, there is nothing to be gained by adherence to those historical labels. If we are to take fusion seriously, the labels common law and equity in the areas of the law covered by this category should be abandoned at a stroke [. . .]

The third category is more complex. It comprises probably most of our civil law. In this category, in contrast to both of the first two categories, common law and equity do not exist co-exist coherently. If we are to take fusion seriously, what is needed is a change in the law, albeit often only a small change, so as to produce a principled product which may combine elements of law and equity.

As Burrows notes, the 'fusion' debate provokes strong reactions. Certainly, his preference for what he calls the 'fusion approach' is not universally shared: for a robustly-expressed alternative view, see, for example, *Meagher, Gummow and Lehane's Equity: Doctrines and*

Remedies.[21] Nonetheless, the central point raised by Burrows seems to be a valid one: where there is a difference between common law rules and equitable rules, we need to ask whether that difference can be justified. After all, history can explain why we *have* two different sets of rules, but, by itself, history cannot justify why we should *keep* them. If we apply that same approach to the law of property rights, we need to be able to justify the special rules, noted in this chapter, that apply to equitable property rights but not to their legal counterparts.

It seems that these differences can be justified if we focus on the different *effects* of legal and equitable property rights. The list of legal property rights is shorter, and such rights are, in general, harder to acquire—but, if B has a legal property right, then he receives better protection. Firstly, as we will see in Chapter 12, section 3.6, it is far harder for C to have a defence to a pre-existing *legal* property right in land; where B has a pre-existing *equitable* interest, a number of additional defences may be available to C.

Secondly, as we saw in Chapter 4, section 1, a key feature of a legal property right is that it imposes a prima facie duty on the rest of the world. As noted in the following extracts, however, that does not seem to be the case with all equitable interests.

Swadling, 'The Law of Property' in *English Private Law* (ed Burrows, 2nd edn, 2007, [4.23])

[E]quitable rights which might be seen as 'proprietary' behave in a slightly different fashion to those at common law. At common law, as we have seen, the right is exigible directly against anyone interfering with it. Thus, the holder of a common law easement can sue for damages and an injunction against any third party, be it a successor in title of the original grantor or even a complete stranger, who interferes with his right. This is not generally true for equitable property rights. Take, for example, the case of an option to purchase a fee simple estate in land [. . .] such a right will generally bind transferees of the fee simple in question from its grantor, and so is classed as a property right. But it will not bind other third parties, such as squatters. Although a squatter will be bound by easements granted by the person he has dispossessed, he will not be bound by an option to purchase. Indeed, he could not be bound by any such right, for the burden of such a right entails a duty to convey the right contracted to be sold, and the squatter does not have that right. The only exception would seem to be the restrictive covenant, which has been held to bind persons other than a successor in title of the grantor.

Penner, 'Duty and Liability in Respect of Funds' in *Commercial Law: Perspectives and Practice* (eds Lowry and Mistelis, 2006, pp 214–16)

[I]t is necessary to make a distinction between two version of the notion of rights *in rem*, both of which operate in law but which are often not clearly distinguished. The best way to see the distinction is not to focus on the right, but on the corresponding duties or liabilities. Under the first, 'trespassory' version of rights *in rem*, a right is protected by duties *in rem* that everyone owes to the right holder, which bind everyone unconditionally all the time. The best example is the case of the ownership of a chattel: all persons presently have a right not to interfere with your chattels. Of course there may be factual contingency here—I may be

[21] *Meagher Gummow and Lehane's Equity: Doctrine and Remedies* (4th edn, eds Meagher, Heydon, and Leeming, 2002), ch 2.

in no position to interfere with your Rolls-Royce at the minute because it is in the shop in Guildford, but that doesn't mean I have no duty not to interfere with it in law. This notion of rights/duties *in rem* is the one normally spoken of by philosophers when they speak of rights of property binding all the world.

The second, 'successor' version is distinct but equally often encountered in the law. Such a right *in rem* is one which *in principle*, *may* bind all others, not because of the fact that each of us all presently owe a duty to the rightholder, but because of the fact that in principle all persons may become a successor in title or possession to property which is bound by the right-holder's right. Here, the right-holder's right is *in rem*, binds all the world, because it binds successors in title or possession to another distinct property, and the right holder's interest runs with that property, and anyone, in principle, might be a successor in title or—possession to it [. . .]

I will now look at the liability of third party recipients of trust property [. . .i]n doing so I will rely upon the distinction just drawn. It is one of the features of the particular property interest that exists in a trust fund that the trust reveals the distinction between the trespassory and successor versions of the right *in rem* in the following way: in so far as their proprietary rights are concerned, the trust divides the rights of the trustee and the rights of the beneficiary such that the trustee has all the trespassory rights *in rem* to the trust property, while the beneficiaries' rights are purely successor rights *in rem*—rights to enforce the trust against successors in title to the trustee of any property which can be seen to constitute an asset of the [trust] fund.

It may, therefore, be the case that legal property rights and equitable property rights are conceptually, as well as historically, different. Each type of right differs from a personal right, as each is capable of binding a third party. Legal property rights are capable of binding *any* third party, so if B has a legal property right in land, the rest of the world is under a prima facie duty to B not to interfere with the land. In contrast, if B has an equitable interest in A's land, B's right is capable of binding only A and parties later acquiring a right from A.

This possible difference in the effect of legal and equitable property rights can be related to the different content of each type of right. In particular, we have seen in this Chapter that an equitable interest in land depends on A's coming under a duty to B. In the following extract, it is suggested that the difference between equitable property rights on the one hand, and personal rights on the other, is that in the former case, A's duty to B relates to a specific right held by A. As a result, B is permitted to assert a right not only against A, but also against third parties who later acquire A's right, or a right that depends on A's right. B, however, is not permitted to assert a right against X, a third party who does not acquire any right from A, as, in such a case, it is not possible for B to trace A's right into X's hands.

McFarlane and Stevens, 'The Nature of Equitable Property'
(2010, 4 Journal of Equity 1, pp 1–2)

This article proposes three principal theses about the nature of equitable property rights. The first is that such rights are fundamentally different not only from personal rights but also from the property rights recognised by common law. An equitable property right is neither a right against a person nor a right against a thing. Rather, it is a right against a right. [. . .]

> The second thesis is that, whenever a party (B) has a right against a right of another (A), B's right is *prima facie* binding on anyone who acquires a right that derives from A's right. [. . .] Nonetheless, there remains a difference between a right against a thing and a right against a right. The key attribute of a right against a thing is its universal exigibility: if B has a right against a thing, B's right is *prima facie* binding on the rest of the world. The key attribute of a right against a right can be labelled persistence: if B has a right against A's right, B's right is *prima facie* binding on anyone who acquires a right that derives from A's right.
>
> The third thesis is that B will acquire such a persistent right *whenever* A is under a duty to hold a specific claim-right or power, in a particular way, for B. [. . .]
>
> [The approach taken in this article] it rejects a very common, not to say orthodox, view of the nature of equitable property rights. On that view, such rights are, in effect, a weaker, more vulnerable version of the property rights recognised at common law. Both types of right give their holder the power to exclude others from making use of a thing, but the equitable variety is weaker than its common law counterpart as it is generally vulnerable to the bona fide purchaser defence. That view, however, overlooks the genius of equity. That genius consists in its willingness to transcend, not to duplicate, the classic division between rights against things and rights against people. This has resulted in the concept of a right against a right. By recognising the distinctiveness of that concept, it is possible to avoid the orthodox, but unattractive, view that English law contains two competing laws of property.

In land law, this possible difference between the effect of legal and equitable property rights is often hidden. In most cases, B's reason for claiming a property right is to assert that right against C, a party who later acquired a right from A. So, in *National Provincial Bank v Ainsworth*,[22] for example, Mrs Ainsworth wished to show that a right she held against Mr Ainsworth could also bind the bank: a party later acquiring a right from Mr Ainsworth. In such a case, Mrs Ainsworth would be happy either with a right in the land itself (a right against a thing) or a right against Mr Ainsworth's right: each type of right would be prima facie binding on the bank.

McFarlane and Stevens do acknowledge in their article that one particular equitable property right, the restrictive covenant, has departed from the 'right against a right' model as it has been allowed to bind C, even if C has not acquired a right from A.[23] This occurred in a case where B was allowed to assert a restrictive covenant against a squatter:[24] a third party who had not acquired his title to the land from A, but who had rather acquired that right independently,[25] through his action in taking possession of the land. They argue, however, that the restrictive covenant has been allowed to operate in this anomalous way for particular policy reasons: to use the terms we discussed in Chapter 1, section 5.2, this is an example of courts giving more weight to the 'utility model' rather than the 'doctrinal model'.

In the following case, B's right was not a restrictive covenant; it was rather an equitable interest arising under a trust. On the facts of the case, it was important to know if B's right was a right in a thing (prima facie binding on anyone interfering with the thing) or a right against A's right (prima facie binding only on those later acquiring a right that derives from A's right).

[22] [1965] AC 1175. [23] (2010) 4 Journal of Equity 1, 13–14.

[24] *Re Nisbet & Potts Contract* [1906] 1 Ch 386 (see Chapter 26, section 2.5.2).

[25] The distinction between dependent and independent acquisition is discussed in Chapter 4, section 4. See Chapter 8 for further discussion of adverse possession.

Shell UK Ltd & ors v Total UK Ltd & ors
[2010] EWCA Civ 180, [2011] QB 86

Facts: The largest peace-time explosion in Britain occurred in the early morning of 11 December 2005 at the Buncefield oil storage terminal in Hertfordshire. The explosion was caused by the careless overfilling of a fuel storage tank, for which the defendants were responsible. The destruction and damage extended to fuel storage and pipeline facilities used by Shell. As a result, Shell suffered serious loss through its temporary inability to supply fuel to customers in the South East of England. Shell sought to recover compensation from the defendants. The defendants conceded that their negligence had caused Shell to suffer economic loss, but argued that they owed no duty of care to Shell. This argument was based on the fact that Shell did not hold legal title to the damaged facilities, nor to the land on which those facilities stood. The legal title to the land and facilities was held by two service companies on trust for four beneficiaries, including Shell. The defendants' argument succeeded at first instance, where David Steel J held that the general rule that there is no duty to avoid carelessly causing economic loss applied: Shell's equitable interest in the damaged property did not prevent the application of that rule. Particular reliance was placed on the decision of the House of Lords in *Leigh & Sillivan Ltd v Aliakmon Shipping Co Ltd (The Aliakmon)*,[26] in which Lord Brandon found that a beneficiary of a trust of goods could not bring a claim against a party who had carelessly damaged those goods, stating that: '*in order to enable a person to claim in negligence for loss caused to him by reason of loss or damage to property, he must have had either the legal ownership of or a possessory title to the property concerned at the time when the loss or damage occurred*'.[27] The Court of Appeal, however, upheld Shell's appeal. Waller LJ delivered a judgment of the court, to which its other members (Longmore and Richards LJJ) also contributed.

At 128–36

[Counsel for Shell] accepted that Lord Brandon in *The Aliakmon*[28] had confined the right to sue for negligent loss of or damage to property to a person who had "the legal ownership of or a possessory title to" the relevant property but he submitted that Lord Brandon was not intending to rule out the owner in equity at any rate if that equitable owner had (as Shell had) joined the legal owner to the proceedings [. . .]

The first proposition [of counsel for the claimants in *The Aliakmon*] in relation to equitable ownership in *The Aliakmon* was that the owner in equity was entitled to sue in tort for negligence anyone who by want of care caused his property to be lost or damaged, without joining the legal owner as a party to the action. Lord Brandon responded that that proposition could not be supported. He explained this response by saying:[29]

> "There may be cases where a person who is the equitable owner of certain goods has also a possessory title to them. In such a case he is entitled, by virtue of his possessory title rather than his equitable ownership, to sue in tort for negligence anyone whose want of care has caused loss of or damage to the goods without joining the legal owner as a party to the action: see for instance *Healey v Healey*.[30] If, however, the person is the equitable owner of the goods and no more, then he must join the legal owner as a party to the action, either as co-plaintiff if he is willing or as co-defendant if he is not. This has always been the law in the field of equitable

[26] [1986] AC 785. [27] Ibid, 809. [28] [1986] AC 785. [29] Ibid, 812.
[30] [1915] 1 KB 938.

ownership of land and I see no reason why it should not also be so in the field of equitable ownership of goods."

In this passage Lord Brandon appears to contemplate that joining the legal owner will suffice to enable the beneficial owner to sue for his loss or, perhaps more accurately, that once both the legal owner and the beneficial owner are parties to the action they can recover, subject to the rules of remoteness of damage, for all the loss which they have suffered.

[Counsel] for Total submitted that that was too simplistic a view of what Lord Brandon was saying. First, Lord Brandon would not have used the words "legal ownership" [in the quotation set out in the facts of the case, above] if beneficial ownership (albeit together with the legal ownership) was enough. Secondly the point of requiring the legal owner to be a party to the action was (as was the case in *The Aliakmon* itself) to enable recovery to be made for physical loss or damage to the goods not to enable a claim for the negligent infliction of economic loss suffered by the beneficial owner which he would never be able to mount in his own name and on his own behalf.

It is fair to say that Lord Brandon's speech in *The Aliakmon* does not resolve the question which divides the parties in this case [. . .]

In the absence of any directly applicable authority, it is necessary to look in a little more detail at the exclusionary rule and the rationale for it. The rule is set out in *Clerk & Lindsell on Torts*[31]

"no duty is owed by a defendant who negligently damages property belonging to a third party, to a claimant who suffers loss because of a dependence upon that property or its owner."

So on the facts of this case Total, who has admittedly damaged the pipelines owned by [the service companies], submits that it owes no duty to Shell who has a contractual right to have its fuel loaded into, carried and discharged from the pipelines. If Shell were a complete stranger to the transaction that would be understandable but Shell is not a complete stranger. It is the (co-) beneficial owner of the pipelines and the contract to use the pipeline is only an incident of its beneficial ownership (albeit a necessary incident, since it is a co-owner of the pipelines with others who also wish to use it). On the face of things, it is legalistic to deny Shell a right to recovery by reference to the exclusionary rule. It is, after all, Shell who is (along with BP, Total and Chevron) the "real" owner, the "legal" owner being little more than a bare trustee of the pipelines. [. . .]

The editors of *Clerk & Lindsell on Torts*, summarise the position by saying:[32]

"To allow all claims for such economic loss would lead to unacceptable indeterminacy because of the ripple effects caused by contracts and expectations. Proximity requires some special relationship between the defendant and the person suffering relational economic loss, one which goes beyond mere contractual or non-contractual dependence on the damaged property."

Beneficial ownership of the damaged property goes well beyond contractual or non-contractual dependence on the damaged property and does indeed constitute a special relationship of the kind required by the editors. It is, in fact, a closer relationship in many ways than that of a bare trustee having no more than the legal title.

At 143–44

We must confess to being somewhat influenced . . . by what Lord Goff of Chieveley in *White v Jones* called "the impulse to do practical justice".[33] It should not be legally relevant that the

[31] (London: Sweet & Maxwell, 19th edn, 2006) [8.115].
[32] Ibid, [8.116].
[33] [1995] 2 AC 207, 259–60.

> co-owners of the relevant pipelines, for reasons that seemed good to them, decided to vest the legal title to the pipelines in their service companies and enjoy the beneficial ownership rather than the formal legal title. Differing views about the wisdom of the exclusionary rule are widely held but however much one may think that, in general, there should be no duty to mere contracting parties who suffer economic loss as a result of damage to a third party's property, it would be a triumph of form over substance to deny a remedy to the beneficial owner of that property when the legal owner is a bare trustee for that beneficial owner.
>
> The judge understandably relied on *The Aliakmon* to dismiss Shell's claim but, for the reasons given, *The Aliakmon* does not conclude the argument about equitable ownership once the legal owner has been joined… It leaves the question open for this court to determine and we would reverse the judge on this aspect of this case and hold that Shell can recover for its provable loss or, if formality is necessary, that [the service companies holding the land on trust] can recover the amount which Shell has lost but will hold the sums so recovered as trustees for Shell.

The reasoning of the Court of Appeal in *Shell UK v Total UK* is, perhaps, rather surprising. A number of previous decisions, not only *The Aliakmon*, seemed to establish that if A holds a property right on trust for B, and the property is taken or damaged by X, then, assuming B did not have possession of the property, only A can bring a claim against X.[34] On this model, any damages recovered by A will then be held on trust for B, but A's claim against X is based on X's breach of a duty owed to A. This means that if, as in *Shell UK v Total UK*, B suffers consequential loss as a result of X's breach of duty, that loss is *not* recoverable from X. After all, if A has a property right, A can in theory declare that he holds that right on trust for an unlimited number of people; can all of those people then recover their consequential loss from X if X has the misfortune carelessly to damage A's property?

The defendants were given permission to appeal to the Supreme Court, but the case was settled before any such appeal was heard. There may have been a number of alternative bases on which Shell's claim could have been allowed. First, it was accepted by the first instance judge that, if Shell could show that it had suffered loss which was 'particular, substantial and direct' as a result of the explosion, a claim in public nuisance would be available.[35] Such a claim can be made in respect of purely economic loss and does not depend on the claimant having any legal, or even equitable, property right. Second, it may have been possible for Shell to argue that it had a legal property right by virtue of its possession of the land and facilities, such possession arising because the service companies were acting as agents for Shell and the other beneficiaries, and their possession was thus attributable to Shell and the other beneficiaries.

The *result* reached by the Court of Appeal may therefore not be too surprising; but its reasoning has attracted a great deal of criticism.[36] It is the first and thus far only decision in which, in effect, B's interest under a trust has been held binding against a stranger, rather than against a third party later acquiring a right from A. The difficulty is that the court equated the position of a beneficiary of a trust of land with that of an owner of land, stating that it would be 'legalistic' to deny Shell's claim simply because it had an equitable interest

[34] See *Lord Compton's Case* (1586) 3 Leo 196; *Earl of Worcester v Finch* (1600) 4 Co Inst 85; *MCC Proceeds Inc v Lehman Bros* [1998] 4 All ER 675.

[35] [2009] EWHC 540 (Comm) at [434].

[36] See Turner, 'Consequential Loss and the Trust Beneficiary' [2010] CLJ 445; Low, 'Equitable Title and Economic Loss' (2010) 126 LQR 507.

in the land rather than a legal estate or legal interest. To use the language of McFarlane & Stevens in the extract set out above, that analysis seems to adopt the 'very common, not to say orthodox, view' that the only difference in the effect of legal and equitable property rights is that the latter are subject to a greater range of defences. It overlooks the argument, developed in the extracts set out in this section, that equitable property rights are conceptually different from legal property rights, as B's equitable property right can bind only A and A's successors, whereas legal property rights can bind the whole world. It is true that the Court of Appeal did impose a condition on Shell's claim: the service companies, as trustees, had to be joined to the claim against Total. This requirement preserves a formal difference between legal and equitable property rights. The surprise in *Shell UK v Total UK*, however, is that Total could be made to pay not only for the value of the destroyed or damaged property but also for the consequential loss suffered by Shell.

QUESTIONS

1. How did equitable property rights develop?
2. Why might the term 'equitable estate in land' be misleading?
3. Why might a party with a freehold or lease decide to set up a trust of that right?
4. Is the limit on the number of permissible legal estates in land, imposed by s 1 of the Law of Property Act 1925, undermined by the variety of different rights which may be enjoyed by a beneficiary of a trust of land?
5. The criteria for proprietary status set out by Lord Wilberforce in *National Provincial Bank v Ainsworth*[37] have been described as 'riddled with circularity'.[38] Do you agree?
6. In what ways do equitable property rights have a different effect from that of legal property rights?

FURTHER READING

Bright, 'Of Estates and Interests: A Tale of Ownership and Property Rights' in *Land Law: Themes and Perspectives* (eds Bright and Dewar, Oxford: OUP, 1998)

Hackney, *Understanding Equity and Trusts* (London: Fontana, 1987, ch 1)

Harris, 'Legal Doctrine and Interests in Land' in *Oxford Essays in Jurisprudence* (3rd series, eds Eekelaar and Bell, Oxford: OUP, 1987)

McFarlane, *The Structure of Property Law* (Oxford: Hart, 2008, Pts B & C1)

McFarlane and Stevens, 'The Nature of Equitable Property' (2010) 4 Journal of Equity 1

Smith, 'Fusion and Tradition' in *Equity in Commercial Law* (eds Degeling and Edelman, Sydney: Lawbook Co, 2005)

Worthington, *Equity* (2nd edn, Oxford: OUP, 2006, ch 3)

[37] [1965] AC 1175.

[38] See Gray and Gray, *Elements of Land Law* (5th edn, 2009) p 97.

6

DIRECT RIGHTS

CENTRAL ISSUES

1. Many land law cases share a basic form: a dispute arises between B and C, each of whom wants to make an inconsistent use of the land. We saw in Chapters 4 and 5 that the courts will find in favour of B if B has a pre-existing legal or equitable property right, and C has no defence to that right.
2. It is possible, however, for B to prevail even if he or she has no pre-existing property right; and even if he or she has a property right to which C has a defence. B can do so if he or she can assert a direct right against C.
3. A direct right, unlike a pre-existing property right, arises as a result of C's conduct. In this chapter, we will consider some examples of situations in which C's conduct allows a court to recognise that B has a direct right against C.
4. In most cases, it will be very difficult for B to show that he or she has a direct right against C. For example, if C buys some land by acquiring A's freehold or lease, it is very unlikely that C will act in such a way as to give B a direct right. Nonetheless, in some cases, direct rights may provide a court with a useful means to protect B. For example, a direct right can protect B even if he or she has failed to ensure that his or her pre-existing property right is recorded on the register.
5. It is not always clear whether the result of a particular case depends on B asserting a direct right against C or, instead, on B having a pre-existing property right to which C has no defence. When analysing the cases, however, it is very important to distinguish between those two possibilities. We will see the importance of this distinction in Chapter 21, section 3.3, when analysing the contractual licence.

1 INTRODUCTION: THE CONCEPT OF A DIRECT RIGHT

We saw in Chapters 4 and 5 that if B and C each wish to make an inconsistent use of the same piece of land, it is important to ask: (i) whether B has a pre-existing legal or equitable property right; and (ii) if so, whether C has a defence to that right. But it is also important to bear in mind the possibility of B having a direct right against C. For example, in

National Provincial Bank v Ainsworth,[1] a case that we examined in Chapter 1, section 5, and Chapter 5, sections 2 and 5.4, we saw that, when the bank acquired its charge, Mrs Ainsworth had no pre-existing property right. Imagine, however, that the bank had nonetheless made a contractual promise to Mrs Ainsworth to allow her to remain in occupation of the land. In such a case, the fact that Mrs Ainsworth had no pre-existing property right would be irrelevant: she would simply be able to rely on her direct, contractual right against the bank.

The important point about a direct right, as opposed to a pre-existing property right, is that it arises as a result of C's own conduct. Of course, in *Ainsworth*, the bank did *not* make a contractual promise to Mrs Ainsworth; nor did it do anything else to give her a direct right (as we will see in section 2.6). After all, the bank wanted to ensure that, if Mr Ainsworth failed to repay the mortgage loan, it would be able to sell the land with vacant possession: it therefore had no reason to act in such a way as to give Mrs Ainsworth a direct right. In some cases, however, there may be an incentive for A, when giving C a right, to ensure that C does, indeed, act in such a way as to give B a direct right.

For example, consider the situation in *Rhone v Stephens*,[2] a case that we examined in Chapter 5, section 5.3. There, A's roof overhung B's land, and A had made a promise to B that he and future owners of his land would keep that roof in good repair. The question then arose of whether A's promise could give B, and later owners of B's land, an equitable interest in A's land: a right that was capable of binding C, who later acquired A's freehold. As we saw, the House of Lords found that A's promise did *not* give B an equitable interest: in general,[3] a promise to act in a certain way, unlike a promise *not* to act in a certain way, cannot currently give B a legal or equitable interest in land (see Chapter 26, section 2.3, for more detail). The rule applied in *Rhone v Stephens* thus causes B a problem if he or she wants to ensure that later owners of A's land, as well as A, will be under a duty to perform a positive act, such as repairing a roof. As we will see in Chapter 26, section 2.4.2, one possible response to this problem is for B to give A an incentive, when transferring his or her freehold to C, to make C agree to repair the roof. This can be done by a chain of 'indemnity covenants': the initial agreement between A and B makes clear that A not only has a duty to repair the roof, but also to ensure that, if he or she later transfers his or her freehold to C, C will also agree to repair the roof. Of course, B still faces the risk that A, when transferring the land to C, will not extract that promise from C—but the terms of A's initial promise to B do at least give A an incentive to ensure that C makes that promise. The question then arises of whether C's promise, if made to A, can give B a direct right against C.

2 WHEN WILL B HAVE A DIRECT RIGHT AGAINST C?

There are many different means by which B can acquire a direct right against C. We will concentrate here on those that are most likely to be relevant in a dispute relating to the use of land.

[1] [1965] AC 1175. [2] [1994] 2 AC 310.

[3] As we saw when examining *Walsh v Lonsdale* in Chapter 5, section 6, there is an exception where A's promise is to give B a property right in relation to A's land: this point will be explored further in Chapter 9. In such a case, A is not simply promising to act in a particular way; he or she is instead promising to exercise a power to grant a property right in favour of B.

2.1 WHERE C GIVES B A DIRECT RIGHT BY MEANS OF A DEED

If C chooses to give B a direct right, C can use a deed to do so. As the following extract shows, it is important to distinguish between cases in which the deed is executed by C alone; and those in which the deed is entered into by both C and another party. In the latter case, it may well be that C makes the deed with A, not with B. After all, C, when acquiring his or her right, must deal with A, and, if C is acquiring a legal estate in the land from A, it will usually be necessary for a deed to be used. The fact that C deals with A, not B, may seem to make it more difficult for B to acquire a direct right against C. As discussed in the following extract, however, that problem is alleviated by s 56 of the Law of Property Act 1925 (LPA 1925) (set out after the extract). We will return to s 56 in Chapter 26, section 3.3.3, when examining promises made between owners of neighbouring land.

McFarlane, *The Structure of Property Law* (2008, pp 268–9)[4]

C can use a deed to give B a direct right [. . .] If the deed is executed by C alone, it is known as a *deed poll*. C can use such a deed to give B a direct right even if there is no agreement between B and C and even if B is not aware of the deed.[5]

An additional requirement applies to a deed executed not just by C, but by C and another party, such as A. Such a deed is known as an *inter partes* (between parties) deed: the deed itself will record that it is made *between* C and A. Again, C can use such a deed to give B a right. However, the traditional rule is that B can only acquire a right by means of an *inter partes* deed if B is *named* as one of the parties to the deed.[6] So, the deed itself must record that it is made *between* all three parties: A, B and C.

However, where C attempts to give B a right relating to a thing,[7] section 56 of the Law of Property Act 1925 provides an exception. Even if C uses an *inter partes* deed, and fails to name B as a party to the deed, B *can* acquire a right. The section thus means that where C attempts to deal directly with B by means of an *inter partes* deed, C's failure to include B as a party to the deed will *not* prevent B acquiring a direct right against C.

It is important to note the limits of the section 56 exception: it cannot be used *whenever* C makes a promise in a deed that happens to, or is even intended to, benefit B.[8] Instead, C must *purport to deal directly with B*: C must make a promise to B or otherwise attempt to give B a right.[9] As a result, B must be identifiable at the time the deed is executed.[10]

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[4] The footnotes in the original are included here.

[5] See *Macedo v Stroud* [1922] 2 AC 330.

[6] See *Lord Southampton v Brown* (1827) 6 B & C 718; *Chesterfield and Midland Silkstone Colliery Co Ltd v Hawkins* (1865) 3 H & C 677, 692; *White v Bijou Mansions Ltd* [1938] Ch 351.

[7] Section 56 allows B to acquire a right relating to '*land or other property*'. The majority of the House of Lords in *Beswick v Beswick* [1968] AC 58 take the strange view that the section can only apply to give B a right relating to land, or to a property right in land. The natural reading of the section, however, is that it can apply whenever C attempts to give B a right relating to the use of a thing.

[8] As was made clear by Neuberger J in *Amsprop Trading Ltd v Harris Distribution Ltd* [1997] 1 WLR 1025.

[9] See also Simonds J in *White v Bijou Mansions Ltd* [1937] Ch 610, 625: B can only rely on s 56 if '*although not named as a party to the instrument,* [B] *is yet a person to whom that conveyance or other instrument purports to grant some thing or with whom some agreement or covenant is purported to be made*'. That view was cited with approval by Lords Upjohn and Pearce in *Beswick v Beswick* [1968] AC 58, 106 (Lord Upjohn) and 92–4 (Lord Pearce), and was also accepted by Neuberger J in *Amsprop Trading Ltd v Harris Distribution Ltd* [1997] 1 WLR 1025.

[10] For example, if C has promised to give a right to 'future owners of A's property', then B, a future owner of that thing, cannot use s 56, because he could not have been specifically identified when C made the promise in the deed.

Law of Property Act 1925, s 56(1)

(1) A person may take an immediate or other interest in land or other property, or the benefit of any condition, right of entry, covenant, or agreement over or respecting land or other property, although he may not be named as a party to the conveyance or other instrument.

2.2 WHERE C GIVES B A DIRECT RIGHT BY MEANS OF A CONTRACTUAL PROMISE

If C chooses to give B a direct right, C may also do so by means of a contractual promise. Again, the fact that C is likely to deal only with A may seem to cause B a problem: if C's promise is made to A, and if only A provides consideration for it, then it seems that B cannot acquire a contractual right against C. The Contract (Rights of Third Parties) Act 1999, however, now allows B, in certain situations, to acquire a statutory right as a result of C's contractual promise to A.

Contract (Rights of Third Parties) Act 1999, s 1

(1) Subject to the provisions of this Act, a person who is not a party to a contract (a "third party") may in his own right enforce a term of the contract if—

(a) the contract expressly provides that he may, or

(b) subject to subsection (2), the term purports to confer a benefit on him.

(2) Subsection (1)(b) does not apply if on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party.

(3) The third party must be expressly identified in the contract by name, as a member of a class or as answering a particular description but need not be in existence when the contract is entered into.

(4) This section does not confer a right on a third party to enforce a term of a contract otherwise than subject to and in accordance with any other relevant terms of the contract.

(5) For the purpose of exercising his right to enforce a term of the contract, there shall be available to the third party any remedy that would have been available to him in an action for breach of contract if he had been a party to the contract (and the rules relating to damages, injunctions, specific performance and other relief shall apply accordingly).

[. . .]

Section 1(5) is particularly worth noting: where land is concerned, it is often the case that a court will protect a contractual right by means of specific performance or an injunction: for example, as we will see in Chapter 21, section 3.1.2, if A makes a contractual promise to B to allow B to occupy land for a period, a court will usually intervene, at B's request, to grant an injunction preventing A from breaching that promise. Similarly, then, if C makes a contractual promise to A to allow B to occupy land for a period, it will generally be the case that if B has a right against C, arising under s 1 of the 1999 Act, that right will be protected by means of an injunction.

The effect of the 1999 Act can be compared to that of s 56 of the LPA 1925. It is clear that the 1999 Act has a wider scope: for example, there is no need for C's promise to be made in

a deed. Further, B does not need to be in existence and identifiable when C makes his or her promise: a promise by C for the benefit of '*A's current and future neighbours*' can give B a right under the 1999 Act even if B becomes A's neighbour *after* C has made his or her promise. As a result, the 1999 Act can be important in practice: we will therefore return to it in Chapter 21, section 3.3.1 and Chapter 26, section 3.3.3. It is worth noting here, however, that it is possible for B to rely on s 56 of the LPA 1925 in order to acquire a *legal* estate or interest in C's land.[11] In contrast, if B relies instead on the 1999 Act, C's promise can, at most, give B an *equitable* interest in C's land (see section 3 below).

2.3 WHERE C GIVES B A DIRECT RIGHT BY MEANS OF A NON-CONTRACTUAL PROMISE

The Contract (Rights of Third Parties) Act 1999 can only assist B where C has made a *contractual* promise to A. If C makes any promise to benefit B, it is likely to be made as part of the contract under which C acquires an estate or interest in land from A. This means that, as we noted in Chapter 5, section 6, the *formality rule* imposed by s 2 of the Law of Property (Miscellaneous Provisions) Act 1989 (LP(MP)A 1989) will apply. We will examine that rule in more detail in Chapter 7, section 3. Its basic effect is that C's promise will be contractually binding on C *only* if it is recorded in writing signed by both A and C. So, if A transfers his or her estate to C and C simply makes an *oral* promise for B's benefit, it seems that: (i) C's promise will not be contractually binding; and so (ii) B will not be able to rely on the 1999 Act to acquire a direct right against C.

In such a case, B may, however, be able to rely on a *different* principle to acquire a direct right against C. Even before the passing of the 1999 Act, the courts recognized that, in certain situations, a promise made by C to A could give B a direct right against C. It has been suggested that the principle is that if: (i) C makes a promise to A to give B a right in relation to the land; and (ii) as a result of that promise, C acquires some sort of advantage in relation to his or her acquisition of the land; then (iii) C will be under a duty to B to perform their promise.[12] The suggested principle is an equitable one and does not depend on C's promise being contractually binding. It has been called the 'receipt after a promise' principle as it seems to depend on the argument that it would be unjust for C, having acquired a right from A, both to retain the advantage stemming from his or her promise and to be free to renege on that promise.[13] Whilst there is much controversy as to the exact basis[14] and scope[15] of the principle, some evidence for its existence can be derived from the following three extracts.

[11] In some cases (e.g. where C grants B a non-exceptional lease of seven years or less) B can acquire a legal property right simply through the use of a deed; in most cases, however, B will also need to register in order to acquire a legal property right: see Chapter 22, section 3.1.

[12] See McFarlane, 'Constructive Trusts Arising on Receipt of Property *Sub Conditione*' (2004) 120 LQR 667.

[13] See McFarlane, *The Structure of Property Law* (2008), pp 270–1.

[14] For two different views, see McFarlane, 'Constructive Trusts Arising on Receipt of Property *Sub Conditione*' (2004) 120 LQR 667 and Gardner, 'Reliance-Based Constructive Trusts' in *Constructive and Resulting Trusts* (ed Mitchell, 2010), pp 63–95.

[15] For example, there is a debate as to whether the principle can be used to understand the decision of the Court of Appeal in *Rochefoucauld v Boustead* [1897] 1 Ch 196: see further Chapter 11, section 6.

Bannister v Bannister
[1948] 2 All ER 133, CA

Facts: Mrs Bannister had a freehold of two cottages: 30 and 31 Maryland Cottages, Mountnessing, Essex. She planned to sell her freehold to Mr Bannister, her brother-in-law. She told him that she was only willing to sell if she could continue to live in No 30. He orally agreed to this, telling her: '*I will let you stay as long as you like, rent free.*' The freehold of the two cottages was then transferred to Mr Bannister by means of a standard conveyance, which made no mention of Mrs Bannister's right to remain in No 30. But Mr Bannister paid only £250 for the land, which was, in fact, worth around £400. Following a dispute between Mrs Bannister and her brother-in-law, Mr Bannister sought an order for possession of No 30. He argued that his oral promise, at most, gave Mrs Bannister a 'tenancy at will'—that is, a permission to occupy that could be revoked by Mr Bannister at any time. The Court of Appeal rejected that argument and found that Mr Bannister, as a result of his promise, held his freehold of No 30 on trust for Mrs Bannister: under that trust, he had a duty to use the freehold for her benefit for the rest of her life, provided that she continued to occupy No 30.

Scott LJ

At 135–6

In view of the learned county court judge's acceptance of [Mrs Bannister's] evidence he necessarily found as a fact that the oral agreement as a result of which [Mrs Bannister] conveyed Nos 30 and 31 to [Mr Bannister] for £250 included an undertaking by [Mr Bannister] to permit [Mrs Bannister] to stay in No 30 for as long as she liked rent free, and that, but for this undertaking, [Mrs Bannister] would not have sold the two cottages to [Mr Bannister] at what, on the uncontradicted evidence of value, he rightly described as "a bargain price." He further found as a fact that there was no fraud in the case. On these findings of fact he held that on well-known equitable principles there was (as he put it) an implied or inferential trust, or, in other words, a constructive trust, of No 30 under which [Mr Bannister] held that property in trust for [Mrs Bannister] for life.

The conclusion thus reached by the learned county court judge was attacked in this court on substantially the following three grounds:—First, it was said that the oral undertaking found by the learned county court judge to have formed part of the agreement—namely, that [Mr Bannister] would let [Mrs Bannister] stay in No 30 as long as she liked rent free—did not, as a matter of construction of the language used, amount to a promise that [Mrs Bannister] should retain a life interest in No 30, but amounted merely to a promise that [Mr Bannister] would allow [Mrs Bannister] to remain in No 30 rent free as his tenant at will. Secondly, it was said that, even if the terms of the oral undertaking were such as to amount to a promise that [Mrs Bannister] should retain a life interest in No 30, a tenancy at will free of rent was, nevertheless, the greatest interest she could claim in view of the absence of writing and the provisions of ss 53 and 54 of the Law of Property Act, 1925. Thirdly, it was said that a constructive trust in favour of [Mrs Bannister] (which the absence of writing admittedly would not defeat) could only be raised by findings to the effect that there was actual fraud on the part of [Mr Bannister] and that the property was sold and conveyed to him on the faith of an express oral declaration of trust which it would be fraudulent in him to deny. It was, accordingly, submitted that the learned county court judge's conclusion that there was a constructive trust could not stand since it was negatived by his finding that there was no

fraud in the case and by the absence of any evidence of anything amounting to an express oral declaration of trust.

In support of the first of these three objections reliance was placed on *Buck v Howarth*,[16] in which a King's Bench Divisional Court held that the occupant of a house who had been told by a predecessor in title of the freeholder "that he could live in the house until he died" (an oral and, it would seem, a purely voluntary promise) was given an uncertain interest in the premises and that the law would presume a tenancy at will [. . .] That was, obviously, a very different case from the present one and we find ourselves unable to derive any assistance from it. The promise was a purely voluntary one, and any court would naturally have been slow to construe it as intended to confer a life interest, even if it was literally capable of that construction. Moreover, whatever the words may have meant, the case clearly fell within s 54 of the Law of Property Act, 1925, under which interests in land created by parol have the force and effect of interests at will only. There was, of course, no question of a resulting trust as there might have been if the occupant of the house had been a former owner who had sold the freehold on the faith of a similar promise. In the present case [Mrs Bannister] did, on the facts found, sell and convey the property on the faith of the oral undertaking and would not otherwise have done so, and the undertaking must be assumed to have been regarded as reserving to her a benefit worth at least £150, or three-eights of the contemporary market value of the property without vacant possession. We, therefore, see no reason why the words of the undertaking should not be given the most favourable construction, from [Mrs Bannister's] point of view, of which they are properly capable. Similar words in deeds and wills have frequently been held to create a life interest determinable (apart from the special considerations introduced by the Settled Land Act, 1925) on the beneficiary ceasing to occupy the premises [. . .] In our view, that is the meaning which should, in the circumstances of the present case, be placed on the words of the oral undertaking found by the learned county court judge to have been given by [Mr Bannister]. We are, accordingly, of opinion that the first objection fails, though the interest promised to [Mrs Bannister] by [Mr Bannister] must, we think, be taken to have been a life interest determinable on her ceasing to occupy No 30 and not a life interest *simpliciter* as held by the learned county court judge.

As will be seen from what is said below, the second objection (based on want of writing) in effect stands or falls with the third, and it will, therefore, be convenient to deal with that next. It is, we think, clearly a mistake to suppose that the equitable principle on which a constructive trust is raised against a person who insists on the absolute character of a conveyance to himself for the purpose of defeating a beneficial interest, which, according to the true bargain, was to belong to another, is confined to cases in which the conveyance itself was fraudulently obtained. The fraud which brings the principle into play arises as soon as the absolute character of the conveyance is set up for the purpose of defeating the beneficial interest, and that is the fraud to cover which the Statute of Frauds or the corresponding provisions of the Law of Property Act, 1925, cannot be called in aid in cases in which no written evidence of the real bargain is available. Nor is it, in our opinion, necessary that the bargain on which the absolute conveyance is made should include any express stipulation that the grantee is in so many words to hold as trustee. It is enough that the bargain should have included a stipulation under which some sufficiently defined beneficial interest in the property was to be taken by another [. . .] We see no distinction in principle between a case in which property is conveyed to a purchaser on terms that the entire beneficial interest in some part of it is to be retained by the vendor [. . .] and a case, like the present, in which property is conveyed to a purchaser on terms that a limited beneficial interest in some part of it is to be retained by the vendor. We are, accordingly, of the opinion that the third ground of objection

[16] [1947] 1 All ER 342.

to the learned county court judge's conclusion also fails. His finding that there was no fraud in the case cannot be taken as meaning that it was not fraudulent in [Mr Bannister] to insist on the absolute character of the conveyance for the purpose of defeating the beneficial interest which he had agreed [Mrs Bannister] should retain. The conclusion that [Mr Bannister] was fraudulent, in this sense, necessarily follows from the facts found, and, as indicated above, the fact that he may have been innocent of any fraudulent intent in taking the conveyance in absolute form is for this purpose immaterial. The failure of the third ground of objection necessarily also destroys the second objection based on want of writing and the provisions of ss 53 and 54 of the Law of Property Act, 1925.

One important point in *Bannister* is that Mrs Bannister's right arose under a *trust*: there is a slight puzzle as to the nature of this trust, and so we will examine it further in Chapter 11, section 4.3.1. For our present purposes, however, the importance of the decision in *Bannister* lies in the recognition that a party acquiring an estate or interest in land can come under a duty as a result of an oral, non-contractual promise made when acquiring that estate or interest. Certainly, Mrs Bannister did not assert her pre-existing freehold against Mr Bannister: after all, she transferred that very right to him. Instead, she relied on a new, direct right, arising as a result of Mr Bannister's promise to her.

Of course, there is a difference between the facts of *Bannister* and the three-party situation in which C, on acquiring an estate or interest from *A*, makes a promise to give B a direct right. But it seems that the principle set out in *Bannister* can also apply in a three-party case. Certainly, Lord Denning MR took that view in the following extract.

Binions v Evans
[1972] Ch 359, CA

Facts: Mrs Evans lived with her husband in a cottage in Cardiff Road, Newport. The cottage was owned by the husband's employers, the trustees of the Tredegar Estate. After her husband died, Mrs Evans entered into an agreement with the trustees, under which she was allowed to remain in the cottage for the rest of her life. The trustees then sold some land, including the cottage, to Mr and Mrs Binions. The trustees warned them that Mrs Evans was entitled to remain in the cottage for the rest of her life and sold the land 'subject to' her right; as a result, Mr and Mrs Binions bought the land for a reduced price. They then brought proceedings to remove Mrs Evans from the cottage. Mrs Evans claimed that: (i) her agreement with the trustees gave her a pre-existing property right that was binding on Mr and Mrs Binions; and, in any case, (ii) the term included in the sale to Mr and Mrs Binions gave her a direct right against them.

Lord Denning MR

At 367

[Lord Denning MR first examined the argument that the agreement between Mrs Evans and the trustees gave her a pre-existing property right. His Lordship then considered the position if the agreement gave her no such right.]

Suppose, however, that [Mrs Evans] did not have an equitable interest at the outset, nevertheless it is quite plain that she obtained one afterwards when the Tredegar Estate sold

> the cottage. They stipulated with [Mr and Mrs Binions] that they were to take the house 'subject to' [Mrs Evans'] rights under the agreement. They supplied [Mr and Mrs Binions] with a copy of the contract: and [Mr and Mrs Binions] paid less because of her right to stay there. In these circumstances, this court will impose on [Mr and Mrs Binions] a constructive trust for [Mrs Evans'] benefit: for the simple reason that it would be utterly inequitable for Mr and Mrs Binions to turn Mrs Evans out contrary to the stipulation subject to which they took the premises. That seems to me clear from the important decision of *Bannister v Bannister*,[17] which was applied by the judge and which I gladly follow.

Lord Denning MR thus adopted the view that C's oral promise to A could give B a direct right against C, arising under a constructive trust. In Chapter 21, section 3.3.1, we will see that there are a number of significant problems with the view that B's right arose under a trust. For present purposes, however, the important point is the recognition that B can acquire a direct right against C as a result of C's oral promise to A.

This particular means by which B can acquire a direct right against C is considered further in the following extract. The court's analysis also provides a very good example of the fact that, even if C has a defence to a pre-existing property right of B, it may nonetheless be possible for B to have a direct right against C.

Lloyd v Dugdale
[2001] EWCA Civ 1754, CA

Facts: Mr Ingham had a long lease (999 years) of Moorcroft Mill in Haywood, Greater Manchester. Mr Dugdale was the major shareholder and managing director of JAD Flooring Ltd. He was looking for new business premises and entered into negotiations with Mr Ingham about acquiring Mr Ingham's rights in a part of the Mill, including an office and warehouse. This part of the Mill was referred to as the 'Unit'. Mr Dugdale reached a preliminary agreement with Mr Ingham, but no formal contract was signed. Because Mr Dugdale had urgent need of the premises, however, Mr Ingham allowed JAD to begin operating from the Unit. Mr Dugdale wanted to spend money on improving the Unit, but was worried that Mr Ingham might pull out of the planned sale. Mr Ingham assured Mr Dugdale that he was a 'man of his word'. After Mr Dugdale had improved the Unit and before any formal contract of sale was signed, Mr Ingham decided to pull out of the proposed sale, and sought to remove Mr Dugdale and JAD from the Unit. Mr Dugdale refused and legal proceedings were commenced. Mr Ingham then died. His executors purchased a freehold of the Mill and then sold the Mill to the trustees of a pension scheme. By virtue of clause 14, the sale agreement was made 'subject to' the legal proceedings between Mr Ingham and Mr Dugdale. Those trustees then sought to remove Mr Dugdale and JAD from the Unit.

Mr Dugdale's first argument was that he had a pre-existing equitable property right that was binding on the pension scheme trustees. The Court of Appeal found that Mr Dugdale did, indeed, have a right, arising as a result of proprietary estoppel, that was capable of binding a third party (see further Chapter 10, section 4). But it also held that the pension scheme trustees could use the lack of registration defence provided by

[17] [1948] 2 All ER 133.

the Land Registration Act 1925 (LRA 1925) against Mr Dugdale's right. Mr Dugdale argued that he had an overriding interest, because he was in actual occupation of the Unit (see Chapter 12, section 3.2.2). The Court of Appeal found, however, that it was JAD, and not Mr Dugdale, who occupied the Unit. Nonetheless, the Court of Appeal, as can be seen in the following extract, did consider whether Mr Dugdale had a direct right against the pension scheme trustees, arising under a constructive trust and based on the trustees' purchase 'subject to' the legal proceedings between Mr Dugdale and Mr Ingham.

Sir Christopher Slade LJ

At [50]–[56]

Issue (D): Constructive trust

Even if Mr Dugdale did not enjoy an overriding interest in the Unit, the claimants acquired the Unit with notice of his claim and, by virtue of clause 14 of the 1994 Agreement, expressly subject thereto. There is no general principle which renders it unconscionable for a purchaser of land to rely on a want of registration of a claim against registered land, even though he took with express notice of it. A decision to the contrary would defeat the purpose of the legislature in introducing the system of registration embodied in the 1925 Act. Nevertheless, the authorities show that, in certain special circumstances the court will impose on a purchaser, who has taken a disposition expressed to be subject to specified incumbrances or prior interests, a constructive trust obliging him to give effect to them, if it considers it unconscionable for him to do otherwise, in the particular circumstances of the case.

Counsel have helpfully taken us through a number of authorities in which the court has been invited to find a constructive trust on this basis [. . .] I do not find it necessary to traverse the authorities at any length in this judgment, because I consider the relevant principles and their application to the particular facts of this case fairly clear. The relevant principles to be extracted from the authorities may for present purposes be summarised as follows:

(1) Even in a case where, on a sale of land, the vendor has stipulated that the sale shall be subject to stated possible incumbrances or prior interests, there is no general rule that the court will impose a constructive trust on the purchaser to give effect to them. In *Ashburn and Anstalt v Arnold* Fox LJ,[18] delivering the judgment of the court, expressed agreement with the following observations of Dillon J in *Lyus v Prowsa Development Ltd*:[19]

> "By contrast, there are many cases in which land is expressly conveyed subject to possible incumbrances when there is no thought at all of conferring any fresh rights on third parties who may be entitled to the benefit of the incumbrances. The land is expressed to be sold subject to incumbrances to satisfy the vendor's duty to disclose all possible incumbrances known to him, and to protect the vendor against any possible claim by the purchaser. [. . .] So, for instance, land may be contracted to be sold and may be expressed to be conveyed subject to the restrictive covenants contained in a conveyance some 60 or 90 years old. No one would suggest that by accepting such a form of contract or conveyance a purchaser is assuming a new liability in favour of third parties to observe the covenants if there was for any reason before the contract or conveyance no one who could make out a title as against the purchaser to the benefit of the covenants."

[18] [1989] Ch 1, 25E.

[19] [1982] 1 WLR 1044, 1051.

(2) The court will not impose a constructive trust in such circumstances unless it is satisfied that the conscience of the estate owner is affected so that it would be inequitable to allow him to deny the claimant an interest in the property.[20]

(3) In deciding whether or not the conscience of the new estate owner is affected in such circumstances, the crucially important question is whether he has undertaken a new obligation, not otherwise existing, to give effect to the relevant incumbrance or prior interest. If, but only if, he has undertaken such a new obligation will a constructive trust be imposed. The importance of this point was repeatedly stressed in *Ashburn Anstalt v Arnold*:[21] [. . .]

(5) Proof that the purchase price by a transferee has been reduced upon the footing that he would give effect to the relevant incumbrance or prior interest may provide some indication that the transferee has undertaken a new obligation to give effect to it: see *Ashburn Anstalt v Arnold*.[22] However, since in matters relating to the title to land certainty is of prime importance, it is not desirable that constructive trusts of land should be imposed in reliance on inferences from "slender materials".[23] [. . .]

The Judge also inferred that the purchase price paid by the claimants for the Unit had been reduced by reason of the potential claims of Mr Dugdale, but there was no evidence whatever to support this inference, which was not in my opinion justified [. . .] In my judgment, however, [the arguments made by counsel for Mr Dugdale] do not suffice to support the Judge's decision that the provisions of the 1994 Agreement gave rise to very special circumstances showing that, when the [pension fund trustees] acquired the Unit, they undertook a new liability to give effect to any rights which Mr Dugdale might have enjoyed in equity immediately prior to that acquisition. That Agreement certainly demonstrated an intention to protect the claimants against any future claims which might be made by Mr Dugdale. But, as [counsel for the pension fund trustees] pointed out, so far from imposing on the [trustees] an obligation to give effect to Mr Dugdale's asserted rights, it plainly contemplated that the [trustees] would be proceeding with the claim for possession of the Unit against him and JAD on the basis that neither he nor JAD had any rights in equity in relation to the Unit. Mr Dugdale's rights, if they existed at all, were at best uncertain and ill defined. To impose a constructive trust on the claimants would be to do so on the basis of very slender materials. There was in my judgment no thought of conferring any fresh rights on Mr Dugdale himself by the 1994 Agreement. In all the circumstances Mr Dugdale's defence based on constructive trust must in my judgment also fail.

The analysis of Sir Christopher Slade LJ is helpful in clarifying the principle applied in *Binions v Evans*. Firstly, B cannot acquire a direct right against C simply because C *knows* that B has some form of pre-existing right in relation to the land. Secondly, even if the contract between A and C states that C acquires his right 'subject to' a right of B, this may not be enough to give B a direct right against C. The question in all cases is whether C has '*undertaken a new obligation*' to B. These two points, which together limit the situations in which B will be able to rely on the principle to acquire a direct right against C, were also emphasised by the Court of Appeal in *Chaudhary v Yavuz*.[24] In that case, B had an equitable easement to access his property by means of a metal staircase installed on A's land. A then sold his land to C. B could not argue that his pre-existing equitable interest bound C as C had a defence to

[20] See *Ashburn Anstalt v Arnold* [1989] Ch 1, 22E–F and 25H.

[21] See, for example, 23G, 25A–26A, and 27B. See also *Lyus v Prowsa Development Ltd* at [1982] 1 WLR 1044, 1051; *IDC Group Ltd v Clark* (1992) 1 EGLR, 190B–C; *Melbury Road Properties 1995 Ltd v Kreidi* [1999] 3 EGLR, 110G.

[22] [1989] Ch 1, 23F–G [23] Ibid, 26E. [24] [2011] EWCA Civ 1314.

it: the lack of registration defence (see Chapter 12, section 3.2 and Chapter 14, section 2.2). This defence arose as B had not entered a notice on the register to protect his equitable easement, nor could it be said that B was in actual occupation of the staircase (see Chapter 14, section 5.1). B therefore tried to argue that he had a direct right against C, using the principle developed in cases such as *Bannister v Bannister*.[25]

The problem for B was that the contract of sale between A and C contained no express reference to any right of B to use the staircase; nor had C made any promise outside the contract of sale. B's claim was therefore founded on no more than a term in the standard conditions of sale used by A and C: that C buys the land free from any incumbrances, other than (inter alia) 'those discoverable by inspection of the property before the contract'.[26] B argued that the presence, on A's land, of the metal staircase adjoining B's land meant that it should have been obvious to C that B might have some right over A's land. The Court of Appeal, however, rightly gave short shrift to B's somewhat fanciful claim. Firstly, B cannot acquire a direct right simply because C knows, or ought to know, that B has some form of pre-existing right in relation to the land. Secondly, the purpose of the terms in the standard conditions of sale are to protect *A* against possible claims from C, not to protect B by giving B a new direct right against C. It was therefore clear that, simply by entering into the standard contract with A, C had *not* undertaken a new obligation to B.

Chaudhary v Yavuz thus provides a useful reminder that the principle discussed here is a limited one, and will apply only in rare cases. Indeed, even if C has made a promise to A to give B a right in relation to the land, we are left with the question of precisely *why* B should acquire a direct right against C. Certainly, the question is a difficult one,[27] and has been complicated by the courts' insistence that B's right arises under a constructive trust. We will return to it in Chapter 11, section 4, when examining such trusts.

2.4 WHERE C COMMITS A TORT AGAINST B

The situations we have examined so far all involve C *choosing* to give B a direct right, whether by means of a deed (section 2.1), a contractual promise (section 2.2), or a non-contractual promise (section 2.3). But it is also possible for B to acquire a direct right against C even if C has *not* chosen to give B such a right. For example, it may be that C's conduct gives B a direct right because it counts as a tort against B. This was the case in *Midland Bank Trust Co Ltd v Green (No 3)*.[28] We will examine the background to that case in detail in Chapter 12, section 3.1. Walter Green (A) owned a farm, title to which was unregistered. Walter had given his son, Geoffrey (B) an equitable interest in that land. Walter and his wife, Evelyne, then fell out with Geoffrey, and wanted to deny him the benefit of that equitable interest. Walter, therefore, sold his land to his wife (C). Geoffrey's pre-existing equitable interest was, of course, *prima facie* binding on Evelyne, but as Geoffrey had failed to enter his option on the Land Charges Register, the House of Lords held that Evelyne had a defence to Geoffrey's equitable interest:[29] in the words of s 13(2) of the Land Charges Act 1925, Geoffrey's equitable interest was 'void as against' Evelyne. So far, so good then, for Walter and Evelyne's plan: they succeeded in denying Geoffrey the benefit of his equitable interest in the land. In further litigation, however, Geoffrey argued that his parents had committed a tort against him, precisely

[25] [1948] 2 All ER 133, CA.

[26] See Standard Conditions of Sale, 4th edn, Condition 3.1.2(b).

[27] For a survey of possible answers, see McFarlane, 'Constructive Trusts Arising on a Receipt of Property "Sub Conditione"' (2004) 120 LQR 667, 683–90.

[28] [1981] AC 413.

[29] *Midland Bank Trust Co Ltd v Green* [1981] AC 513: see Chapter 12, section 3.1.

because their plan was successful. His argument, accepted by Oliver J[30] and then the Court of Appeal, was that, by working together with the predominant motive of causing him loss, Walter and Evelyne had committed the tort of 'lawful act conspiracy'. As a result, *each of* Walter and Evelyne was liable to pay damages to Geoffrey to compensate him for the loss that he suffered as a result of losing his right to purchase the farm from Walter.[31]

The tort of 'lawful act conspiracy' is a controversial and difficult one,[32] and we cannot examine it in detail here. One important point is that it requires B to show that A and C have acted with the 'predominant purpose' of harming B.[33] That may be possible in a case such as *Green*, in which the *only* point of the transfer of A's estate to C was to prevent B from exercising his option to purchase that estate. In most situations, however, C's principal purpose will simply be to acquire a right to use the land for his own benefit. Nonetheless, *Green* shows us that, if B can complete the difficult task of showing that A and C acted with the predominant purpose of harming B, B will acquire a direct right against C *even if* C has a defence (such as the lack of registration defence) to B's pre-existing property right. We will explore this point further in section 3 below.

There is a further tort that may provide some assistance to B in a case in which his initial right to use A's land comes from a contract with A. In such a case, B may try to argue that C, by acquiring a right from A and then attempting to stop B's use of the land, commits the tort of *procuring a breach by A of A's contract with B*.[34] This argument is of most relevance when B has a contractual licence with A: in such a case, B has a contract with A, but that contract does not give B a legal or equitable interest in the land. We will, therefore, examine the possible application of this tort in more detail in Chapter 21, section 3.3.1. As with 'lawful act conspiracy', the exact boundaries of the tort are unclear. Moreover, there is also a problem that, if the tort is applied too readily, it will undermine the basic position that C, when acquiring a right in relation to A's land, cannot be bound by his mere knowledge of a pre-existing *personal* right of B (see section 2.6).

2.5 THE 'BENEFIT AND BURDEN' PRINCIPLE

The 'benefit and burden' principle provides another means by which B can acquire a direct right against C even if C has not made a promise to give B a right. It can be particularly important when considering disputes between neighbours and we will examine it in more detail in Chapter 26, section 2.4.1, when looking at freehold covenants.

As noted in the extract below, the basis of the principle is that: (i) if an arrangement between A and B links the enjoyment of a particular right by A (and later owners of A's land, such as C) to the bearing of a particular burden (e.g. if A is permitted to use roads on B's land only if he pays an annual charge to B); and (ii) C, a later owner of A's land, chooses to enjoy the benefit (e.g. if C chooses to use the roads on B's land); then (iii) C will be under a duty to B (or a later owner of B's land) to bear that burden.

[30] See [1980] Ch 590 for Oliver J's decision.

[31] Of course, Walter was, in any case, liable to pay damages to Geoffrey, because he had breached his contractual promise to allow Geoffrey to buy the farm.

[32] In *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)* [1982] AC 173, 188 and 189, Lord Diplock described the tort as 'highly anomalous' but 'too well-established to be discarded'.

[33] See *per* Viscount Simon LC in *Crofter Hand Woven Harris Tweed Co Ltd v Veitch* [1942] AC 435, 445.

[34] This tort is often associated with the reasoning of the majority of the Court of Queen's Bench in *Lumley v Gye* (1853) 2 E and B 215 (although it was held that, on the facts of the case, the tort had not been committed). For a more recent consideration of the tort at the highest judicial level, see *OBG Ltd v Allan* [2008] 1 AC 1.

Davis, 'The Principle of Benefit and Burden' [1998] CLJ 522

At 544–7

The cases have all involved what may loosely be termed as an 'arrangement'. The arrangement may take various forms: a gift, whether inter vivos or by will; an agreement, whether by deed, writing or oral; or a grant. What is common to the arrangements is that they confer a benefit and also impose a burden. The burden only binds persons who accept or exercise the benefit, have no other right to do so other than by relying on the arrangement, and have a choice whether or not they accept it. Although in a large number of the cases the benefit was a right relating to land, there has been no indication in any of the cases that the principle is limited to real property and there are a number of cases where the benefit was personal property, money or a contractual right [. . .]

The burden must be linked to the benefit, or made a condition of it, by the original arrangement. This link may be express, implied or even presumed. If it is clear that the burden is personal to the original party or separate from the benefit then the principle will be inapplicable [. . .]

It is impossible to find adequate discussion of the issue whether a person needs to have knowledge of the burden and the fact that it is linked to the benefit before being bound [. . .]

The principle seems to operate both at law and in equity and imposes a personal obligation on the person who seeks to use the benefit without affecting the liability of the original party. It can be used as a cause of action, not only by the original party, but also by his successors.

At 552

It is arguable that 'benefit and burden' is a principle, reasonably clear in its application, that promotes fairness and, consequently, far greater use should be made of it. It seems only fair that a right or benefit originally granted subject to a condition or linked with a reciprocal right or obligation should remain conditional or linked.

2.6 WHERE C KNOWS ABOUT A PRE-EXISTING RIGHT OF B

As the following extract shows, it has occasionally been suggested that B will acquire a direct right against C if: (i) B has a pre-existing *personal* right against A; and (ii) C then acquires a right from A with *knowledge* of B's personal right.

Tulk v Moxhay
(1848) 2 Ph 774, High Court of Chancery

Facts: Mr Tulk owned land in Leicester Square, London. He sold part of that land to Mr Elms, and demanded that Elms promise that he would '*at all times thereafter at his own cost keep and maintain the piece of ground in sufficient and proper repair, and in an open state, uncovered with any buildings, in neat and ornamental order*'. Elms' land then passed to Mr Moxhay. When acquiring the land, Moxhay did not make a promise to maintain the garden. Moxhay did, however, know about Elms' promise and paid a lower price for the land as a result. When Moxhay decided to develop the land by building on the garden, Tulk applied for an injunction to prevent Moxhay from acting inconsistently with Elms' promise.

Lord Cottenham LC

At 777

It is said that, the covenant being one which does not run with the land, this Court cannot enforce it; but the question is, not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased. Of course, the price would be affected by the covenant, and nothing could be more inequitable than that the original purchaser should be able to sell the property the next day for a greater price, in consideration of the assignee being allowed to escape from the liability which he had himself undertaken.

That the question does not depend upon whether the covenant runs with the land is evident from this, that if there was a mere agreement and no covenant, this Court would enforce it against a party purchasing with notice of it; for if an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased.

Today, as we will see in Chapter 26, section 2, *Tulk v Moxhay* is generally regarded as a case in which B was able to assert a pre-existing equitable interest against C. Certainly, Elms' promise not to build on the garden can nowadays be seen as giving B a restrictive covenant and, as we saw in Chapter 5, section 5.2, such a right counts as an equitable interest in land. But Lord Cottenham LC's reasoning in the extract above does *not* depend on B having a pre-existing property right; indeed, his Lordship expressly says that the question is *not* '*whether the covenant runs with the land*'. Instead, Lord Cottenham's reasoning seems to be that because: (i) Moxhay knew about Elms' promise; and (ii) Moxhay paid a lower price for his estate as a result; then (iii) Tulk acquired a direct right against Moxhay. It therefore seems that, as a matter of history, the recognition of such a direct right played an important part in the journey by which the restrictive covenant came to be an equitable property right: this is a point to which we will return in Chapter 21, section 3.3.2.

It is, however, now generally accepted that C's knowledge of B's pre-existing personal right, by itself, *cannot* give B a direct right against C. The basic point is a simple one: in Chapters 4 and 5, we saw that the *content* test is used to ensure that only a limited class of rights can count as property rights in relation to land. This provides important protection for third parties later acquiring a right in land: if C knows that B's pre-existing right does *not* count as a property right, and is only a personal right against A, C knows that he or she cannot be bound by B's right. That protection would be fatally undermined if B were able to acquire a direct right against C whenever C knows of B's pre-existing personal right.[35]

Keppell v Bailey
(1834) 2 My & K 517

Facts: We examined this case in Chapter 4, section 6, and the facts are set out there. We saw that Mr Keppell, on behalf of the shareholders in a joint stock company, wished

[35] As stated by Swadling, 'The Law of Property' in *English Private Law* (2nd edn, ed Burrows, 2007, [4.11]): '*if knowledge of a personal right did transform it into a property right, the* numerus clausus *would be destroyed*.' To support this point, Swadling also quotes part of the extract from *Keppell v Bailey* set out above.

to assert a right to stop the Baileys from buying limestone from anywhere other than the Trevill quarry. Mr Keppell made two arguments: (i) that the promise made by the Kendalls bound not only them, but also any later owners of the ironworks, such as the Baileys; and, alternatively, that (ii) even if the promise made by the Kendalls did not create a property right, it should bind the Baileys, because they acquired the ironworks knowing of that earlier promise. As we saw in Chapter 4, section 6, the High Court of Chancery rejected that first argument. The extract set out below shows that the second argument was also rejected.

Lord Brougham LC

At 546–8

[Given that the Kendalls' promise does not give rise to a pre-existing right capable of binding the Baileys], does the notice which the [Baileys] had of its existence alter the case in this Court, upon an application for an injunction; or would it, upon the application of a co-relative and co-extensive nature, for a specific performance? Certainly not [. . .] The knowledge by an assignee of an estate, that his assignor had assumed to bind other than the law authorises him to affect by his contracts—that he had attempted to create a real burden upon property which is inconsistent with the nature of that property, and unknown to the principles of the law—cannot bind such assignee by affecting his conscience. If it did, then the illegality would be of no consequence; and however wild the attempt might be to create new kinds of holding and new species of estate, and however repugnant such devices might be to the rules of law, they would prove perfectly successful in the result, because equity would enable their authors to prevail; nay, not only to compass their object, but to obtain a great deal more than they could at law, were their contrivances ever so accordant with strict legal principle [. . .]

So a person who had conveyed land, and subjected it to covenants in the hands of his [purchaser], could at once make sure of those burdens following it into the hands of all holders to whom it might pass, by taking the precaution of notifying the covenants in some effectual though easy manner, as by publication in some place near the premises, where the purchaser needs must observe the announcement. It is clear then that this Court will never interefere, by way of injunction, or in any other more direct manner to enforce such covenants, when satisfied that they could receive no support or countenance at law.

National Provincial Bank v Ainsworth
[1965] AC 1175, HL

Facts: We examined this case in detail in Chapter 1 and its facts can be found in Chapter 1, section 5.1. We saw that the House of Lords viewed Mrs Ainsworth's 'deserted wife's equity' as a purely personal right against her husband. The following extract makes clear that the bank's notice of that pre-existing personal right, by itself, could not give Mrs Ainsworth a direct right against the bank.

Lord Wilberforce

At 1253

It was said that the wife's right was an equitable claim, binding on the husband's conscience, and that consistently with what has been decided in relation to such matters as restrictive

covenants, it should be held to be binding on the conscience of a "purchaser" with notice [. . .] In my opinion, this line of argument is but a revival of a fallacy that, because an obligation binds a man's conscience, it therefore becomes binding on the consciences of those who take from him with notice of the obligation. But this has been decisively rejected, not only in relation to covenants (enforceable by specific performance) entered into by the predecessor of the purchaser whom it is sought to bind[36] but in the law of restrictive covenants to which an appeal by way of analogy was made.

Equally, if B has a pre-existing property right to which C has a defence (e.g. as in *Midland Bank v Green*, a lack of registration defence), then C's knowledge of B's right will not, by itself, give B a direct right against C. After all, the possibility of having a defence to B's pre-existing property right also gives C important protection. That protection would also be significantly undermined if B were able to acquire a direct right against C whenever C knows of B's pre-existing property right. As Bright argues in the following extract, it therefore seems that C's notice of B's pre-existing right, *by itself*, will not give B a direct right against C.

Bright, 'The Third Party's Conscience in Land Law' [2000] Conv 398, 407–8[37]

Part 3 What good reasons are there for holding C liable?

There are various reasons why we might want to argue that C is liable. One is that C bought with notice of B's rights and it would, therefore, be "unconscionable" to deny these rights. Although it has been suggested at various times that notice is enough, there are many judicial utterances showing that notice alone will not suffice to impose liability.[38] To hold otherwise would undermine land law. If a property statute clearly states that a purchaser shall not be affected with notice, then it cannot be unconscionable to rely on this statute. *Midland Bank v. Green* provides the highest judicial authority for this. The mother bought the farm at considerable undervalue in order to defeat her son's option, which she knew he had not protected by registration. There was seemingly no other reason for the purchase, Lord Denning described her behaviour as fraudulent. The House of Lords held, however, that she took free of the option. C is not liable if that is what the statutes clearly state; old equitable doctrines of notice and so on should not be read into modern Acts of Parliament.[39]

In each case something more than notice is required. What that "something more" is will depend upon the circumstances. In some cases the "something more" stems from wrongful

[36] Lord Wilberforce here referred to the judgment of Lindley LJ in *London & SW Railway Co v Gomm* (1882) 20 Ch D 562, 587.

[37] In the original, the party potentially subject to a direct right is referred to as 'B' and the party potentially acquiring a direct right is referred to as 'X'. These letters have been changed so as to be consistent with the usage in this chapter: i.e. B becomes 'C' and X becomes 'B'.

[38] [The original here refers to Fox LJ in *Ashburn Anstalt v Arnold* [1989] Ch 1, 25; Sir Browne-Wilkinson V-C in *IDC Group Ltd v Clark* [1992] 1 EGLR 187; Cowell J in *Melbury Road Properties 1995 Ltd v Kreidi* [1999] 44 EG 157. Further support, arising in relation to dealing with property other than land, comes from Diplock J in *Port Line Ltd v Ben Line Steamers Ltd* [1958] 2 QB 146 and Browne-Wilkinson V-C in *Swiss Bank Corp v Lloyds Bank Ltd* [1979] 1 Ch 548.]

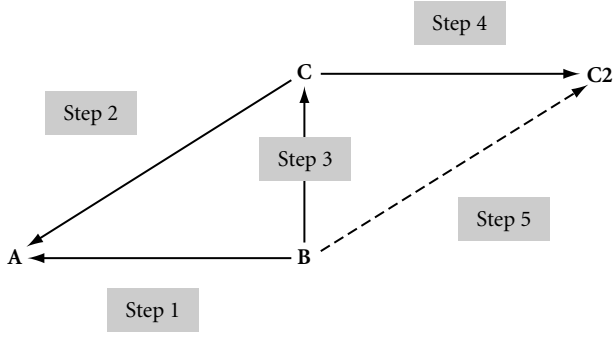
[39] [The original here refers to *Midland Bank Trust Co Ltd v Green* [1981] AC 513, 528B, *per* Lord Wilberforce: '*Any temptation to remould the Act to meet the facts of the present case, on the supposition that it is a hard one and that justice requires it, is, for me at least, removed by the consideration that the Act itself provides a simple and effective protection for persons in Geoffrey's position-viz-by registration.*']

conduct by C in relation to the transfer itself, the fact that C is knowingly interfering with B's rights. In *Midland Bank v. Green* (not a constructive trust case), the mother should be held liable, not as a matter of property law, but in tort because she bought the property for the sole purpose of defeating the son's unprotected interest [...] In other cases, C should be held liable not because he behaved badly at the time of the transfer, but because he assumes some responsibility towards B at the time of the transfer and it would be wrong later to turn his back on this responsibility. In *Binions* [...] the inequity stems from the fact that having clearly promised to honour the agreement with B (and in *Binions* even paid less in recognition of this) C later tries to deny this promise.

3 IS B'S DIRECT RIGHT A PROPERTY RIGHT OR A PERSONAL RIGHT?

A direct right is simply a right that arises as a result of C's conduct. It can be a property right (as, for example, if C chooses to give B a lease), or simply a personal right against C (as, for example, in *Midland Bank Trust Co Ltd v Green*, in which, as a result of C's commission of the tort of conspiracy, B acquired a right to claim damages from C). Where B simply wants to assert his right against C, it makes very little difference whether B's direct right counts as a property right or as a personal right. Things are different, however, if C later transfers his estate to C2, as Figure 1 illustrates.

In such a case, B may wish to argue that: (i) as a result of C's conduct, B acquired a direct right against C; and (ii) that right counts as a legal or equitable property right in relation to the land; and so (iii) B can assert that right against C2, provided that C2 has no defence to it. This shows us that the *content* and *acquisition* questions, which we examined in Chapters 4 and 5, may also be important where direct rights are concerned.



Key:

Step 1 B acquires a right to use A's land
Step 2 C later acquires a right to use A's land
Step 3 B acquires a direct right due to C's conduct
Step 4 C2 acquires a right to use the land
Step 5 Does B have a right against C2?

Figure 1 Direct Rights and Later Parties: A Priority Parallelogram

Where B's direct right against C arises because of C's commission of a tort, B will simply have a right to claim damages from C and so the *content* question is easy to answer: B has only a personal right against C. In other cases, as when B's direct right arises because of C's use of a deed, or a contractual or non-contractual promise of C, we simply need to look at the right C has given B and see if it matches the content of any of the legal or equitable property rights examined in Chapters 4 and 5. It is important to note that, in cases such as *Bannister v Bannister* and *Binions v Evans*, B's direct right against C is said to arise under a constructive trust. As we saw in Chapter 5, if B has a right under a trust, he has an equitable property right. But it is not clear that, in all of those cases, B's direct right should necessarily be an equitable property right. We will consider this point in detail in Chapter 21, section 3.3.1.

As for the *acquisition* question, any relevant formality rules will, of course, apply if B claims that the direct right that he has acquired against C is a legal or equitable property right. For example, if B claims that C has given B a legal lease of five years' duration, B will need to show that C used a deed to give B that right (see Chapter 7, section 4, and Chapter 22, section 3.1.1).

4 DIRECT RIGHTS AND REGISTERED LAND

If B claims that the direct right that he has acquired against C counts as a legal property right, then B may have to satisfy a formality rule laid down by the Land Registration Act 2002 (LRA 2002) to show that he has acquired that right. For example, if B claims that C, when acquiring registered title, also gave B a lease of more than seven years' duration, B will need to show that he is registered as holding that lease. There is, however, no general rule, even in relation to registered land, that says that B must be on the register in order to acquire a direct right against C. For example, when examining *Lloyd v Dugdale* in section 2.3 above, we saw that, although B was not on the register, the Court of Appeal was still prepared to *consider* whether C's conduct gave B a direct right. Indeed, as the following extract argues, even Australian jurisdictions using the strict 'Torrens' forms of registration system (under which C, by registering his right, is said to have 'indefeasible title') have accepted that it may still be possible for an unregistered B to acquire a direct right against C.

Chambers, *An Introduction to Property Law in Australia* (2nd edn, 2008, pp 464–5)

Indefeasibility of title provides a registered proprietor with powerful protection from older unregistered rights. However, with one important exception[40] [. . .] it does not affect the creation of new property rights to land. Registered proprietors are free to create property rights to their land. Property rights can also arise without their consent, in response to events such as detrimental reliance, unjust enrichment and wrongdoing [. . .]

This principle, that the indefeasibility of title does not prevent the creation of rights, is sometimes called the "*in personam* exception" to indefeasibility. This phrase was coined

[40] [The exception given occurs where C acquires a registered right with notice that the registered document was a forgery or obtained by fraud. In that case, provided that C has not been dishonest, a Torrens system will ensure that B does not acquire a direct right against C; B's protection will instead come from making a claim on the assurance fund—i.e. through the Australian equivalent of an English claim for indemnity (see Chapter 7, section 5.6.1 and Chapter 15).]

following a comment made by Lord Wilberforce in *Frazer v Walker*.[41] After setting out the principle of immediate indefeasibility, he said that "this principle in no way denies the right of a plaintiff to bring against a registered proprietor a claim *in personam*, founded in law or in equity, for such relief as a court acting *in personam* may grant."[42]

The phrase "*in personam* exception" is unfortunate for two reasons. First, it is not really an exception to indefeasibility of title. It refers not to the survival of older unregistered rights, but to the creation of newer unregistered rights. Indefeasibility of title is about the priority of rights and has (almost) nothing to do with their creation. The *in personam* exception is an "exception" to indefeasibility only because a registered right can be affected by the creation of a new right [. . .]

Secondly, this "exception" is not limited to the creation of personal rights. Registered proprietors often create personal rights to use their land (such as a licence to stay in a guest room for the weekend), but they also create unregistered property rights, through tenancy agreements, contracts of sale, equitable mortgages and the like. Both fall within the *in personam* exception.

In this extract, Chambers draws on the key distinction between: (i) cases in which B attempts to assert a pre-existing property right against C; and (ii) cases in which B claims that he or she has acquired a direct right against C. Whilst a registration system may protect C in the first set of cases, by giving C a defence against a pre-existing property right of B that is not recorded on the register, it does not assist C in the second set of cases. As we will see in Chapter 14, section 7, this is true not only of the Australian registration systems discussed by Chambers, but also of the system applying in England and Wales under the LRA 2002. Indeed, the provisions of the 2002 Act, by making it more difficult for B to assert an unregistered right against C, have increased the importance of direct rights.

5 CONCLUSION

We have seen that many land law cases share a basic form: B has some sort of right to use A's land; A then gives C a right in relation to that land; and B and C each want to use the land in incompatible ways. The first question to ask in such a case is whether B has a pre-existing legal or equitable property right (see Chapters 4 and 5). If B *does* have such a right, we then need to consider whether C has a defence to that right. But if B has no such property right, or even if C has a defence to B's property right, it may still be possible for B to prevail. To do so, B needs to show that he or she has acquired a direct right, arising as a result of C's conduct.

In most cases, it will be impossible for B to show he or she has a direct right against C. For example, we have seen that C's knowledge of a pre-existing right of B, by itself, will not give B a direct right against C (see section 2.6 above). It is always important, however, to keep in mind the possibility that B may have such a right. A direct right against C can give B crucial protection even where B has failed to register his or her pre-existing property right, and, as we will see in Chapter 21, it may also protect B where his or her initial right to use the land is simply a personal right against A.

[41] [1967] 1 AC 569. [42] [1967] 1 AC 569, 585.

QUESTIONS

1. What is the difference between a direct right and a pre-existing property right?
2. When can a promise made by C to A give B a direct right against C?
3. Is the Court of Appeal's decision in *Midland Bank Trust Co Ltd v Green (No 3)* that Evelyne Green was liable to pay damages to Geoffrey Green compatible with the House of Lords' earlier decision that Geoffrey's unregistered equitable property right did not bind Evelyne?
4. When might it be important to know if a direct right acquired by B as a result of C's conduct is a property right as opposed to a personal right against C?

FURTHER READING

Bright, 'The Third Party's Conscience in Land Law' [2000] Conv 398

Cooke and O'Connor, 'Purchaser Liability to Third Parties in the English Land Registration System: A Comparative Perspective' (2004) 120 LQR 640

Law Commission Report No 254, *Land Registration for the 21st Century: A Consultative Document* (1998, [3.48]–[3.49])

McFarlane, 'Identifying Property Rights: A Reply to Mr Watt' [2003] Conv 473

McFarlane, *The Structure of Property Law* (Oxford: Hart, 2008, Part E3)

Smith, 'The Economic Torts: their Impact on Real Property' (1977) 41 Conv 318

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PART C1

THE ACQUISITION QUESTION

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7

FORMAL METHODS OF ACQUISITION: CONTRACTS, DEEDS, AND REGISTRATION

CENTRAL ISSUES

1. The creation and transfer of legal rights is heavily regulated by statutory formality requirements. Land is more complex to deal with than other property—a position that is considered desirable because of the uniqueness of land.
2. Specific formality requirements must be met to enter a contract for sale or other disposition of an interest in land and to create or transfer legal rights. The creation and transfer of legal estates is generally subject to a further requirement of registration.
3. The requirements for a contract for sale or other disposition of land are provided in the Law of Property (Miscellaneous Provisions) Act 1989. The effect of non-compliance is that no contract exists, although devices of rectification and collateral contracts may be used to save invalid agreements.
4. In the absence of a contract, rights may also arise through the doctrine of proprietary estoppel. This is just one possible application of a much broader doctrine (which is discussed fully in Chapter 10) and its application in the context of a failed contract remains highly controversial.
5. The creation or transfer of legal rights generally requires a deed. In the absence of a deed, legal rights will not be created. Equitable rights may, however, be obtained through the doctrine of anticipation if the parties have entered a valid contract.
6. A system of registration of title has been spreading gradually since its introduction in the nineteenth century. With the exception of short leases, all legal estates are now either registered, or will become subject to compulsory first registration the next time that a specified transaction occurs. Additionally, it is possible to register a title voluntarily.
7. In registered land, title to legal estates does not pass until registration. Registered land is now governed by the Land Registration Act 2002, which repealed and replaced the Land Registration Act 1925. The 2002 Act purports to provide 'a conveyancing revolution'. It introduced significant amendments, with the underlying objective of facilitating the introduction of e-conveyancing; but work towards this has now been placed on hold. The 2002 Act marks a shift in English law from a system of 'registration of title' to one of 'title by registration'.

1 INTRODUCTION

In Chapter 4, we saw that legal estates and interests in land can be acquired *dependently*, where they are granted by a person with property rights in land, and *independently*, by the unilateral conduct of the person acquiring the right. In most cases, dependent acquisition of a legal right requires compliance with statutory formality requirements.

In this chapter, we consider the formality requirements that must be complied with for the creation or transfer of legal estates and interests in land. These statutory requirements are generally based on the need for the transaction to be in signed writing, usually witnessed, and sometimes require the written document to take the specific form of a deed. For the creation and transfer of legal estates (except for short leases), there is an overarching requirement of registration. In the introduction to this chapter, we will explore two issues: what are formality requirements and why do we have them in relation to land?

Critchley considers a legal definition of 'formality'.[1]

Critchley, 'Taking Formalities Seriously' in *Land Law: Themes and Perspectives* (eds Bright and Dewar, 1998, p 508)

> One good starting point might be the common legal distinction between matters of 'substance' and 'form'. This suggests a definition of formality as something which is external or *added* to the transaction, rather than a constituent, substantive part of it. In legal usage, formality is generally also seen as a *requirement*, rather than a mere habit or convention, so it would be helpful for our definition to express the notion that formality is something mandatory. Further, it is typical (though not essential), where a legal formality is imposed, to have some sort of *sanction* for breach of the rule: some legal disbenefit, or some failure to obtain a legal benefit. The sanction is frequently the invalidation of a non-complying transaction, but there are other possibilities: for example, there might be procedural disadvantages (limiting the type of evidence which may be used to prove the transaction in legal proceedings); or the transaction might be valid as regards the original parties to it, but invalid against third parties. Whatever the sanction is, it would clearly also be useful to have a definition which would cover a formality rule with a sanction attached. Putting all of this together, then, we reach the following definition: 'in law, a formality is a requirement that matters of substance must be put into a particular form (in order to have a specified legal effect).'

The effect of formality requirements is undoubtedly that land is more complex to deal with than other forms of property. Why, then, are they considered desirable? Ultimately, it is for all of the reasons relating to the uniqueness of land that we have outlined in Chapter 1. This is reflected, too, in the following extract, in which Birks highlights the particular need for formality requirements in light of the nature of rights in land.

Birks, 'Before We Begin: Five Keys to Land Law' in *Land Law: Themes and Perspectives* (eds Bright and Dewar, 1998, p 483)

> There is an extra reason [for formality requirements] too. It derives from the invisibility of real rights. Just as one cannot see a fee simple, so one cannot see an easement or a restrictive

[1] See further Fuller, 'Consideration and Form' (1941) 41 CL Rev 799.

covenant. A neighbour's right to pass over a field does not reveal itself in a pink line, nor will even an infra-red camera disclose his right to restrict or forbid building. If one is buying a fee simple from a company, and a firm of solicitors is in daily occupation of the premises doing the business of soliciting, one might reasonably infer that the firm holds a lease. But still a lease is not visible, nor a pyramid of sub-leases. Real rights have to be made apparent through documents. Acquiring land would otherwise be a nightmare unless the law made really massive erosions of the principle of *nemo dat*.

In addition, however, formality requirements serve functional roles. Immediately prior to the comment extracted above, Birks acknowledges, for example, their role in encouraging people to think about the job in hand, and in preventing doubt and argument.

In making recommendations relating to one aspect of formality requirements (those concerning contracts for sale of land), the Law Commission highlighted the practical functions served by the requirements in issue. These can fairly be carried over to all formality requirements.

Law Commission Report No 164, *Transfer of Land Formalities for Contracts for Sale etc of Land* (1987, [2.7]–[2.13])

One principal justification for perpetuating formalities for contracts dealing with land is the need for certainty. The existence and terms of oral contracts are always difficult to establish and the resulting confusion [. . .] would, we anticipate, lead to increased litigation. To minimise disputes, reliable uncontrovertible evidence of the existence and terms of a transaction needs to be available for later reference. In the light of this, the value of the evidential function of writing cannot be doubted.

The evidential function of writing is also valuable in assisting the prevention of fraud. The requirement goes some way to ensuring that parties are not bound in the absence of actual agreement. In fact, the prevention of fraud was the rationale of the original Act, the Statute of Frauds 1677 [. . .]

A related argument in favour of formalities for contracts for the sale of land is based upon consumer protection. Whilst it has been suggested that laymen appreciate the significance of entering into a contract for the sale of land, we still consider that some form of protection imposed from outside is necessary. The consumer should be warned about the gravity of the transaction into which he is about to enter. He needs time to reflect and, if necessary, to seek legal advice. This is especially important in the case of contracts dealing with land because they often involve acceptance of a complexity of rights and duties. A formal requirement of writing is, in our view, suited to this cautionary role. At least, it prevents a person from becoming bound without realizing it, since most people nowadays are aware that signature of a written document imports some binding effect. The need for consumer protection is particularly strong in the case of the sale or purchase of a dwelling, house or flat. The majority of people, at some time in their life, will enter into such a transaction, and it will involve them in major financial commitments and general upheaval. In such circumstances, it appears vital that a consumer takes all reasonable precautions and is fully protected. [. . .]

The cautionary role of formalities is not confined to the consumer protection context. It is equally important for all types of contract dealing with land, whether in domestic or commercial conveyancing, because it prevents the parties from being bound inadvertently or prematurely. Without formalities, it may be difficult to ascertain the exact time when a contract

is created, and this would lead to confusion. As a result, pre-contract negotiations would be unnecessarily uncertain and hazardous.

Another recognised function performed by formalities is the "channelling" function. This describes the way in which formalities mark off transactions from one another and create a standardised form of transaction. As a result, the identification and classification of certain types of transaction are facilitated, enabling them to be dealt with routinely. Such a function contributes to certainty by making clear the effect of non-compliance with formalities. [. . .]

The general uniqueness of land constitutes another argument for requiring formalities for contracts relating to it: each particular piece of land is regarded as unique from which it follows that interests in or rights over it should not be created or disposed of casually. [. . .] It has also been argued that land is different from other property because there can exist simultaneously several interests, whether corporeal or incorporeal, in or over the same piece of land. Therefore, so the argument goes, writing is desirable to avoid so far as possible confusion about who owns what. As was said in the working paper, this argument may be found persuasive but not totally compelling, because third party interests can also be created in other forms of property.

Finally [. . .] most other legal jurisdictions require more formality for contracts relating to land.

2 FORMALITY REQUIREMENTS FOR THE CREATION OR TRANSFER OF LEGAL RIGHTS

The process of creating and transferring legal rights can be divided into three stages: contract; creation, or transfer; and registration. These stages are most apparent in a typical conveyance, or sale, of a home.

1. *Contract* The vendor and purchaser enter a contract for sale of the legal estate (whether freehold or leasehold). The purchaser usually pays a deposit.
2. *Creation or transfer* The contract is executed by the vendor transferring title. This stage is commonly referred to as 'completion', and is the stage at which the purchase money is paid (less the deposit) and the purchaser takes possession of the land.
3. *Registration* The purchaser applies to be registered as proprietor of the estate. Legal title does not vest in the purchaser until registration.

Although legal title does not vest in the purchaser until registration, equitable rights arise under the doctrine of anticipation from the moment at which the parties have entered a specifically enforceable contract. Under that doctrine, in the period between contract and registration, the vendor holds the legal estate on trust for the purchaser. The nature of these rights is discussed fully in Chapter 9. In *McLaughlin v Duffill*[2] the Court of Appeal noted that even allowing for the operation of the doctrine of anticipation a sharp distinction exists between a contract for disposition and a disposition. There, Ms Duffill argued (*inter alia*) that by virtue of the doctrine of anticipation a contract for sale of a legal estate was simultaneously a disposition of an equitable interest and, as such, had to comply with s 51(1)(a) of the LPA 1925. This affected the manner in which an agent could be authorised to sign on behalf of the vendor as s 53(1)(a) requires written authorization. The court rejected the argument,

[2] [2010] Ch 1.

noting that the disposition under the doctrine of anticipation does not arise merely by virtue of the contract but is dependent on the availability of specific performance.[3]

The same three-stage process may be followed whether the conveyance of land involves the transfer of an existing legal estate (for example, the transfer of a freehold or assignment of the existing term of a lease) or the creation of a new one (such as the grant of a new lease). Not every transaction in which a legal right is created or transferred will follow each stage of this process. For example, a contract is a convenient stage in the sale of land, but is not an essential requirement. A gift of land necessarily does not involve a contract. The requirement of registration only arises in relation to specified legal rights. Further, as we will see in section 4 (and discuss further in Chapter 22), it remains possible to create certain short leases without the need to comply with any formality requirements. Where any stage in the process is applicable, however, compliance with the formality requirements is mandatory.

3 CONTRACT

The requirements for a valid contract for the sale or other disposition of an interest in land are provided by s 2 of the Law of Property (Miscellaneous Provisions) Act 1989 (LP(MP)A 1989). That Act is the product of work of the Law Commission[4] and replaced the previous formality requirement contained in s 40 of the Law of Property Act 1925 (LPA 1925). The 1989 Act has been considered to mark a change in philosophy from previous legislation, focusing attention on the written contract. As a result, case law under the previous legislation may no longer be authoritative.[5]

As will be apparent from the following analysis, the 1989 Act has proved controversial in a number of respects. It increased the formality requirements for contracts and made more severe the consequences of non-compliance. Recurring concerns have been that the report and the legislation (which differs from the draft Bill annexed to the Law Commission's report) have failed to consider the consequences of the changes, and to enable parties to escape from what appears to be a clear bargain.

Law of Property (Miscellaneous Provisions) Act 1989, s 2

(1) A contract for the sale or other disposition of an interest in land can only be made in writing and only by incorporating all the terms which the parties have expressly agreed in one document or, where contracts are exchanged, in each.

(2) The terms may be incorporated in a document either by being set out in it or by reference to some other document.

(3) The document incorporating the terms or, where contracts are exchanged, one of the documents incorporating them (but not necessarily the same one) must be signed by or on behalf of each party to the contract.

(4) Where a contract for the sale or other disposition of an interest in land satisfies the conditions of this section by reason only of the rectification of one or more documents in

[3] Ibid, [25]–[26].

[4] Law Commission Report No 164, *Transfer of Land: Formalities for Contracts for Sale etc of Land* (1987).

[5] These comments were made in *Firstpost Homes Ltd v Johnson* [1995] 1 WLR 1567 in relation to the requirement of a signature under the 1989 Act, but are clearly of more general application.

pursuance of an order of a court, the contract shall come into being, or be deemed to have come into being, at such time as may be specified in the order.

(5) This section does not apply in relation to—

(a) a contract to grant such a lease as is mentioned in section 54(2) of the Law of Property Act 1925 (short leases);

(b) a contract made in the course of a public auction; or

(c) a contract regulated under the Financial Services and Markets Act 2000, other than a regulated mortgage contract, a regulated home reversion plan, a regulated home purchase plan or a regulated sale and rent back agreement;

and nothing in this section affects the creation or operation of resulting, implied or constructive trusts.

(6) In this section—

"disposition" has the same meaning as in the Law of Property Act 1925;

"interest in land" means any estate, interest or charge in or over land;

"regulated mortgage contract"[,"regulated home reversion plan","regulated home purchase plan" and "regulated sale and rent back agreement"] must be read with—

(a) section 22 of the Financial Services and Markets Act 2000,

(b) any relevant order under that section, and

(c) Schedule 2 to that Act.

(7) Nothing in this section shall apply in relation to contracts made before this section comes into force.

(8) Section 40 of the Law of Property Act 1925 (which is superseded by this section) shall cease to have effect.

Section 2 governs all contracts entered into on or after the 27 September 1989. It differs from s 40 of the LPA 1925 both as regards the formality requirements specified and the consequences of non-compliance.[6] As regards the formality requirements, under s 40, there was no requirement for a contract to be in writing; it was necessary only for it to be *evidenced* in writing. In contrast, s 2 of the LP(MP)A 1989 requires the contract to be in writing. This difference has a direct effect on the consequence of non-compliance. Under s 40 of the 1925 Act, a contract that was not evidenced in writing remained valid, but was not enforceable by action. Under s 2 of the 1989 Act, no contract exists unless and until formality requirements are fulfilled. There is no concept of a contract being valid, but unenforceable.

The principal significance of this difference is the abolition by s 2 of the doctrine of part performance.[7] That doctrine enabled the court to order specific performance of an oral contract if there was a sufficient act of part performance by the claimant.[8] Essential to the application of the doctrine was the fact that, under s 40 of the LPA 1925, an oral contract was valid. Without a valid contract, there is nothing in relation to which specific

[6] Law of Property Act 1925, s 40(1), provided as follows: '*No action may be brought upon any contract for the sale or other disposition of land or any interest in land, unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing, and signed by the party to be charged or by some other person thereunto by him lawfully authorised.*'

[7] The application of part performance was expressly provided for by the Law of Property Act 1925, s 40(2).

[8] For an example of the operation of part performance, see *Steadman v Steadman* [1976] AC 536.

performance can be ordered. The uncertainty created by the doctrine was identified by the Law Commission as one of the key defects in the operation of s 40.[9] Its effect was that '*an oral contract for sale can readily and unilaterally be rendered enforceable and the provisions of section 40 left to beat the air*'.[10] It was considered a '*blunt instrument for doing justice*'[11] where formality requirements have not been complied with. Its abolition was therefore a key recommendation in the Law Commission's report. Although nothing in the terms of s 2 of the LP(MP)A 1989 expressly abolishes the doctrine, no such provision is necessary. Its abolition was recognized by the Law Commission as inherent in the requirement for a contract to be in writing.[12] The abolition of the doctrine has generally been given effect by the courts,[13] although it was doubted in *Singh v Beggs*[14] and the doctrine has continued to attract limited academic support.[15]

Under s 2, the written contract may take one of two forms: a single document signed by both parties; or separate documents signed by each party and exchanged. The document—or each document, in the case of an exchange—must contain all of the terms expressly agreed by the parties. The terms may be contained in the signed document—or documents, in the case of exchange—or be contained in a separate document that is incorporated by reference. Three main issues arise for discussion: the circumstances in which s 2 applies; the concept of an exchange; and the requirement of a signature.

3.1 WHEN DOES SECTION 2 APPLY?

Section 2 of the LP(MP)A 1989 applies to all contracts for the creation or transfer of an interest in land.[16] Although, in this chapter, we are concerned specifically with the acquisition of legal rights, it should be noted that s 2 applies equally to equitable interests.[17] In *McCausland v Duncan Lawrie Ltd*,[18] it was held that s 2 also applies to the variation of an existing contract. As a result, unless the variation complies with s 2, the terms of the contract as originally agreed remain enforceable. In that case, an attempt to vary the completion date in a contract failed for non-compliance with s 2, with the effect that the vendor's attempt to rescind the contract was premature.[19]

Section 2 does not apply to a contract that relates to land without involving the sale or disposition of an interest in land. In *Pitt v PHH Asset Management Ltd*,[20] it was held that a 'lock-out' agreement, through which a vendor agreed not to negotiate with anyone other than the purchaser for a fixed period of time, was not a contract for sale of land and therefore s 2 did not need to be complied with. The contract locked the parties into negotiations, but with no obligation that a contract for sale would be entered.

[9] Law Commission Report No 164 (1987, [1.9]). [10] Ibid. [11] Ibid.

[12] Law Commission Report No 164 (1987, [4.13]).

[13] See *United Bank of Kuwait v Sahib* [1997] Ch 107. In that case, it was acknowledged that the abolition of part performance prevented the practice of creating a mortgage by the deposit of title deeds.

[14] (1996) 71 P & CR 120. See Swann, 'Part Performance: Back from the Dead' [1997] Conv 293.

[15] Griffiths, 'Part Performance: Still Trying to Replace the Irreplaceable' [2002] Conv 216.

[16] Law Commission Report No 164 (1987, [4.3]).

[17] While the creation of equitable interests generally arises informally and is exempt from formality requirements, s 2 will apply to the transfer of an equitable interest: e.g., a contract to transfer a beneficial interest. See Law Commission Report No 164 (1987, [4.4]).

[18] [1997] 1 WLR 38.

[19] The case is further discussed by Thompson, 'Mere Formalities' [1996] Conv 366.

[20] [1994] 1 WLR 327.

A specific issue has arisen as regards the application of s 2 to an option to purchase. An option to purchase land consists of two stages: in the first stage, the option is granted; in the second, the option is exercised by the grantee. Following the enactment of the LP(MP)A 1989, Adams suggested that the exercise of the option by the grantee would need to comply with s 2:[21] an outcome that would run counter to commercial practice[22] and that, Stark suggested, would give the provision 'seismic effect', by leaving the exercise of options to 'the whim of the vendor'.[23] The issue soon arose for decision in the following case, which arose from an option granted a matter of weeks after s 2 came into force.

Spiro v Glencrown Properties Ltd
[1991] Ch 537, HC

Facts: The vendor granted the purchaser an option to purchase land, exercisable the same day by notice in writing. The grant of the option complied with s 2(1), but was exercisable by unilateral notice by the purchaser. The purchaser exercised the option, but failed to complete and the vendor had been awarded damages for breach of contract. In an action for judgment against the purchaser's guarantor, the question arose whether the exercise of the option was required to comply with s 2(1).

Hoffmann J

At 541

Apart from authority, it seems to me plain enough that section 2 was intended to apply to the agreement which created the option and not to the notice by which it was exercised. Section 2, which replaced section 40 of the Law of Property Act 1925, was intended to prevent disputes over whether the parties had entered into a binding agreement or over what terms they had agreed. It prescribes the formalities for recording their mutual consent. But only the grant of the option depends upon consent. The exercise of the option is a unilateral act. It would destroy the very purpose of the option if the purchaser had to obtain the vendor's countersignature to the notice by which it was exercised. The only way in which the concept of an option to buy land could survive section 2 would be if the purchaser ensured that the vendor not only signed the agreement by which the option was granted but also at the same time provided him with a countersigned form to use if he decided to exercise it. There seems no conceivable reason why the legislature should have required this additional formality.

The language of section 2 places no obstacle in the way of construing the grant of the option as the relevant contract. An option to buy land can properly be described as a contract for the sale of that land conditional on the exercise of the option. A number of eminent judges have so described it.

Following a review of authorities, Hoffmann J concluded that nothing prevented him from interpreting s 2 in that way. Hence, while the grant of an option must comply with s 2, the exercise of the option is a unilateral act by the purchaser.

[21] Adams, 'You've No Option: More Consequences of Section 2 of the Law of Property (Miscellaneous Provisions) Act 1989' [1990] Conv 9.
[22] Ibid. [23] Stark, 'The Option to Purchase: A Legal Chameleon' [1992] JBL 296, 296.

The decision has been welcomed as regards the practical operation of options under s 2, although the 'conditional contract' analysis of options taken by Hoffmann J to achieve this may be more problematic in other contexts.[24]

3.2 THE CONCEPT OF AN EXCHANGE

As has been noted, under s 2 of the 1989 Act, a contract may take the form of an exchange of documents. Prior to that Act, it was possible for a contract for sale of land to come into existence though correspondence between the parties—the correspondence providing the written evidence of the contract required by s 40 of the LPA 1925. Parties could prevent their correspondence from being interpreted this way by indorsing it 'subject to contract'. In its report, the Law Commission anticipated that contracts by correspondence would remain possible[25]—but in the following case, the Court of Appeal held that s 2 of the LP(MP)A 1989 goes further than the Law Commission anticipated in this regard.

Commission for the New Towns v Cooper
[1995] Ch 259, CA

Stuart-Smith LJ

At 287

But there were in fact three problems under the old law [...] and endless difficulties in determining when, and if so on what terms, a contract was entered into in correspondence. I can see no reason why Parliament should not have gone further than the Law Commission recommendation and required a greater degree of formality in this very important area of the law where it is crucial that the parties know for certain when they are bound and on what terms.

The decision in *Commission for the New Towns v Cooper* runs counter to a previous Court of Appeal case, *Hooper v Sherman*,[26] but its authority has not been doubted. As Oakley notes, a contract may still arise by correspondence, but only in the unlikely event that the parties' correspondence results in a document (or documents) that comply with the requirements of s 2: for example, if each party signs the same document, thus removing the need for an exchange.[27]

Hence, while the LP(MP)A 1989 enables contracts by exchange, the process of exchange must be distinguished from mere correspondence. The nature of an exchange was also considered in *Commission for the New Towns v Cooper.*

24 *Ibid*; Smith, 'Options to Purchase: A Nasty Twist' [1991] Conv 140, 144.
25 Law Commission Report No 164 (1987, [4.15]).
26 [1994] NPC 153. See Thomson, 'Contracts by Correspondence' [1995] Conv 319.
27 Oakley, 'Conveyancing Contracts by Exchange of Letters' [1995] CLJ 502, 504.

Commission for the New Towns v Cooper
[1995] Ch 259, CA

Stuart-Smith LJ

At 285

In my opinion, the authorities show that, even if the expression "exchange of contracts" is not a term of art, it is a well-recognised concept understood both by lawyers and laymen which has the following features.

1. Each party draws up or is given a document which incorporates all the terms which they have agreed, and which is intended to record their proposed contract. The terms that have been agreed may have been agreed either orally or in writing or partly orally or partly in writing.
2. The documents are referred to as "contracts" or "parts of contract," although they need not be so entitled. They are intended to take effect as formal documents of title and must be capable on their face of being fairly described as contracts having that effect.
3. Each party signs his part in the expectation that the other party has also executed or will execute a corresponding part incorporating the same terms.
4. At the time of execution neither party is bound by the terms of the document which he has executed, it being their mutual intention that neither will be bound until the executed parts are exchanged.
5. The act of exchange is a formal delivery by each party of its part into the actual or constructive possession of the other with the intention that the parties will become actually bound when exchange occurs, but not before.
6. The manner of exchange may be agreed and determined by the parties. The traditional method was by mutual exchange across the table, both parties or their solicitors being present. It also commonly takes place by post, especially where the parties or their solicitors are at a distance. In such a case exchange is sequential and does not take place until the second document to be dispatched has been received or posted: *Eccles v. Bryant and Pollock* [1948] Ch. 93, 97–98, *per* Lord Greene M.R. Exchange can also take place by telephone, in which case it will be simultaneous: *Domb v. Isoz* [1980] Ch. 548, 558, *per* Buckley L.J.

Therefore, an exchange is qualitatively different from correspondence; the difference is marked most clearly by the parties' mutual intentions as regards the documents and the 'formal delivery' by way of exchange.

3.3 THE REQUIREMENT OF A SIGNATURE

To constitute a contract within s 2 of the LP(MP)A 1989, the 'document' itself must be signed. Problems may arise in identifying what constitutes the document. In the following case, an Ordnance Survey plan was attached to a letter that purported to record an agreement for sale of land.[28] The vendor signed the letter and the plan, but the purchaser signed only the plan. It was held that the 'document' requiring signature for s 2 was the letter alone, the plan being a

[28] In fact, it was held that the letter did not constitute a contract, because it failed to contain an obligation to buy: [1995] 1 WLR 1567.

separate document incorporated into the letter by reference. Peter Gibson LJ acknowledged that the identification of the document was '*largely one of first impression*', but, on the facts, the 'natural' interpretation was to treat the letter alone as the document.[29] In the absence of the purchaser's handwritten signature on the letter, the question arose whether the requirement of a signature was met by the appearance of his printed or typed name. This had been considered sufficient to constitute a signature under s 40 of the LPA 1925 and its predecessor, the Statute of Frauds 1677.

Firstpost Homes Ltd v Johnson
[1995] 1 WLR 1567, CA

Peter Gibson LJ

At 1575–6

In my judgment, it is an artificial use of language to describe the printing or the typing of the name of an addressee in the letter as the signature by the addressee when he has printed or typed that document. Ordinary language does not, it seems to me, extend so far; and for this there appears to be the powerful support of Sir Raymond Evershed M.R. in *Goodman v. J. Eban Ltd.* [1954] 1 Q.B. 550, 555 and of Denning L.J., who said, at p. 561:

> "In modern English usage, when a document is required to be 'signed by' someone, that means that he must write his name with his own hand upon it."

In any event, I do not accept that authorities on what was a sufficient signature for the purposes of the Statute of Frauds 1677 and section 40 of the Act of 1925 should continue to govern the interpretation of the word "signed" in section 2 of the Act of 1989. Prior to the Act of 1989 the courts viewed with some disfavour those who made oral contracts but did not abide by them. The courts were prepared to interpret the statutory requirements generously to enable contracts to be enforced and in relation to the question whether there was a sufficient memorandum evidencing an agreement extrinsic evidence was admissible.

There are statements by judges who were called upon to consider what was a signature for the purpose of those statutory provisions which suggest that they regarded the interpretation by earlier courts, in the generous manner that I have indicated, as not being what they themselves would have decided if not constrained by authority. In particular, in *Durrell v. Evans* (1862) 1 H. & C. 174 both Crompton and Blackburn JJ. expressed their doubts as to the way the matter had been interpreted by earlier courts. I have already referred to the remark of Cave J. in *Evans v. Hoare* [1892] 1 Q.B. 593 in the first sentence of the passage which I cited from his judgment and that supports the view that a liberal interpretation had been placed by the courts on the statutory requirements. The Act of 1989 seems to me to have a new and different philosophy from that which the Statute of Frauds 1677 and section 40 of the Act of 1925 had. Oral contracts are no longer permitted. To my mind it is clear that Parliament intended that questions as to whether there was a contract, and what were the terms of the contract, should be readily ascertained by looking at the single document said to constitute the contract.

To accept Mr. Seymour's contentions would be to allow the courts to consider matters outside the claimed contractual document such as what the parties subjectively intended by the document or by the name to be found on it or who prepared the document. For my

[29] [1995] 1 WLR 1567, 1573.

> part, I do not see why it is right to encumber the new Act with so much ancient baggage, particularly when it does not leave the "signed" with a meaning which the ordinary man would understand it to have. This decision is of course limited to a case where the party whose signature is said to appear on a contract is only named as the addressee of a letter prepared by him. No doubt other considerations will apply in other circumstances. I therefore do not accept Mr. Seymour's contention that a signature of the purchaser appears on the letter.

Peter Gibson LJ's clear limitation of his judgment leaves the matter open to discussion in other circumstances, although with the clear message that the requirement of a signature will be interpreted differently now from how it was under s 40 of the LPA 1925.

3.4 THE EFFECT OF NON-COMPLIANCE

As has been noted, the effect of non-compliance with s 2 of the LP(MP)A 1989 is that there is no contract. The Law Commission acknowledged that: '*While it is important not to undermine the general rule that the formalities should be observed, it is equally important that the law should not be so inflexible as to cause unacceptable hardship in cases of non-compliance.*'[30]

There are two possible responses to non-compliance. Where the parties have written and signed a document—or documents, in the case of exchange—but the terms are absent or wrong, rectification or the finding of a collateral contract may be invoked to create a contract that complies with s 2.[31] Alternatively, rather than seeking to establish a valid contract (or where there is no prospect of one being established, for example, through an absence of writing) a non-contractual remedy may be sought. The Law Commission specifically anticipated the doctrine of proprietary estoppel playing a role in this regard,[32] although, as will be seen, this has proved problematic.

Arguments relating to the validity of a contract cannot be raised once the contract has been executed by the creation or transfer of the legal right.

Tootal Clothing Ltd v Guinea Property Management Ltd
(1992) 64 P & CR 452, CA

Facts: The parties had entered two agreements on the same day: firstly, a lease agreement, for the grant to the tenant, Tootal, of a 25-year lease of commercial premises; secondly, a 'supplemental agreement' that the landlord, Guinea, would pay Tootal £30,000 on completion of work by Tootal to fit the premises for use as a shop. The lease was granted, but Guinea refused to pay Tootal for its work. Guinea argued, unsuccessfully, that the term was part of the bargain for the grant of the lease and was therefore not enforceable for its exclusion from the lease agreement.

[30] Law Commission Report No 164 (1987), [5.1].

[31] The possibility of each claim was recognized by the Law Commission: Law Commission Report No 164 (1987, [5.6]–[5.8]).

[32] Law Commission Report No 164 (1987), [5.4]–[5.5].

Scott LJ

However, section 2 is of relevance only to executory contracts. It has no relevance to contracts which have been completed. If parties choose to complete an oral land contract or a land contract that does not in some respect or other comply with section 2, they are at liberty to do so. Once they have done so, it becomes irrelevant that the contract they have completed may not have been in accordance with section 2.

In the present case, the parties having agreed all the terms under which the new 25 year lease would be granted, including those relating to the shop-fitting works and the contribution by Guinea Properties of £30,000 towards the cost incurred by Tootal in carrying out the shop-fitting works, chose to incorporate the terms in two documents instead of one, namely the lease agreement and the supplemental agreement. They then completed the lease agreement. The lease agreement thereupon ceased to be an executory contract. The question whether section 2 of the 1989 Act would, because not all the terms of the contractual bargain had been incorporated into the lease agreement, have rendered the lease agreement unenforceable became irrelevant. All that was left was the supplemental agreement. The supplemental agreement was not and is not by itself a land contract, or, at least, if it is, by incorporation therein of the terms of the lease agreement, a land contract, then there is no issue in the case that need detain the court. But on the footing that the supplemental agreement by itself is not a land contract, which is the contention of Mr. Ritchie for Guinea Properties, there was no longer, after the completion of the lease agreement, any executory land contract in existence to which section 2 of the 1989 Act could apply. There was simply a contract recorded in writing, signed by each party, for the payment of £30,000 in a certain event by one party to the other.

Hence, following execution of the contract, Guinea could not raise compliance with s 2 to question the enforceability of its agreement to pay Tootal for its works.

As Wilde notes,[33] the decision is of limited practical significance. It is relevant only in cases in which contractual obligations remain following the creation or transfer of the legal right in issue. This does not affect the possibility of an action for damages for breach of contract where a term of the contract is not complied with in its execution.[34]

3.5 COLLATERAL CONTRACTS

Section 2 of the LP(MP)A 1989 requires a contract for sale of land to contain all of the terms agreed by the parties. Hence, if a term is omitted, there is no contract, even where there is a written and signed document (or documents, in the case of exchange). If the absent term can be construed as a separate or collateral contract, then this difficulty is overcome. The parties' agreement constitutes a valid contract within s 2, minus the absent term, which is enforceable (if at all) as a separate contract. If the collateral contract does not itself constitute a contract for the sale of land, then it does not need to comply with s 2. A collateral contract must, however, have all of the elements of an ordinary contract—that is, offer, acceptance, and consideration.

The possibility of a collateral contract was an alternative ground for the decision in *Tootal Clothing*. In that case, as we have seen, the Court held that no question of compliance with s 2

[33] Wilde, 'Contracts for the Sale or Disposition of Land' (1993) 109 LQR 191.
[34] See *Robert Leonard Developments v Wright* [1994] NPC 49.

could be raised, because the contract for the grant of a lease had been executed. Alternatively, the Court suggested that the landlord's supplemental agreement to pay the tenant £30,000 on completion by the tenant of works could be constructed as collateral to the main agreement for the grant of a lease.

Tootal Clothing Ltd v Guinea Property Management Ltd
(1992) 64 P & CR 452, CA

Scott LJ

At 456

I am of the opinion, speaking for myself, that even before completion of the lease agreement on August 31, 1990, section 2 would not have prevented the enforcement of the lease agreement. If parties choose to hive off part of the terms of their composite bargain into a separate contract distinct from the written land contract that incorporates the rest of the terms, I can see nothing in section 2 that provides an answer to an action for enforcement of the land contract, on the one hand, or of the separate contract on the other hand. Each has become, by the contractual choice of the parties, a separate contract.

The device of a collateral contract was used in *Record v Bell*.[35] In that case, a vendor had been unable to provide the purchaser with an office copy of the registered title at the time of exchange. To enable exchange to proceed, the vendor provided a warranty of title. The purchaser subsequently failed to complete and argued that the parties' agreement did not comply with s 2, because it did not contain the warranty of title. Judge Paul Baker QC held that the warranty was a collateral contract. The warranty had been offered to 'induce' exchange and was accepted by exchange taking place.[36] He noted the utility of the device in ensuring that common transactions do not fail for non-compliance with s 2.[37]

The notion of 'hiving off' part of the parties' agreement to save an agreement from non-compliance with s 2(1) was, however, criticized by the Court of Appeal in the following case.

Grossman v Hooper
[2001] EWCA Civ 615, CA

Facts: Mr Hooper and Miss Grossman had separated after a period of cohabitation. The parties had both signed an agreement, whereby Mr Hooper undertook to transfer legal title to the parties' home to Miss Grossman. The agreement was contained in a single document, signed by both parties. Mr Hooper subsequently argued that the agreement did not constitute a contract under s 2(1), because it omitted a term whereby Miss Grossman agreed to repay a loan for £10,000 to a Mr Modi.

Chadwick LJ

At [19]–[23]

I do not, myself, find it helpful to ask whether the arrangement between the appellant and the respondent in relation to the discharge of the Modi loan was to be described as a collateral

[35] [1991] 1 WLR 853. [36] [1991] 1 WLR 853, 862. [37] Ibid.

agreement. The correct starting point, as it seems to me, is to examine the words used in section 2 of the 1989 Act. Subsection (1) requires that "all the terms which the parties have expressly agreed" must be incorporated in one document—or, where contracts are exchanged, in each of the documents exchanged. In that context, "the terms which the parties have expressly agreed" means the terms (so far as they are not to be implied) upon which the parties to the sale or other disposition have agreed that the relevant interest in land shall be sold or otherwise disposed of. The words do not refer to terms upon which the parties have agreed (albeit contemporaneously) that some other transaction should be entered. [. . .]

The relevant inquiry, therefore, is (i) upon what terms did the parties agree that the land (or interest in land) was to be sold, and (ii) are all those terms incorporated in the document which the parties have signed. Or, to elide the two stages of the enquiry: did the terms upon which the parties agreed that the land was to be sold include a term (or terms) which have not been incorporated in the document which they have signed?

The point can be illustrated by an example. Suppose that A wishes to purchase a house from B; and wishes, also, to purchase the carpets and curtains that are in the house. Before anything is put in writing A and B negotiate a price for the house, say £500,000, and a separate price for the carpets and curtains, say £50,000. But the negotiation for the sale of the house is made subject to contract; and it is implicit neither A nor B intends to become bound to a purchase and sale of the carpets and curtains (if at all) until after the terms for the sale of the house have been put in writing and signed. A contract for the sale of the house at a price of £500,000 is drawn up and is signed by both A and B. The document contains no reference to the sale of carpets or curtains. The question, in such a case, in the context of section 2(1) of the 1989 Act, is whether it was a term of the contract for the sale of the house that A would purchase and B would sell the carpets and curtains. That is a question of fact in each case. It would have been open to A and B to agree that the sale of the house was independent of any sale of the carpets and curtains; so that A was to buy the house whether or not he bought the carpets and curtains as well. It would, equally, have been open to A and B to agree that the sale of the house was conditional upon a sale of the carpets and curtains; so that A would not be obliged to buy the house, nor B to sell it, unless the carpets and curtains were sold also. In the first case, the requirements of section 2(1) of the 1989 Act would be satisfied; in the second case those requirements would not be satisfied. The requirements would not be satisfied in the second case because, upon a true understanding of the bargain between the parties, it was a term of the contract for the sale of the house that A would purchase and B would sell the carpets and curtains; and that term was not incorporated in the document signed by the parties.

The question of fact, in such a case, is not answered by asking whether the agreement to sell the carpets and curtains was "a collateral contract"; unless, by that term, it is intended to refer only to a contract the existence, or nonexistence of which has no effect upon the efficacy of the principal contract. Nor, it may be noted, is that question answered by asking whether or not the contract for the sale of the carpets and curtains is conditional upon the sale of the house. It is obvious that (save in the most exceptional circumstances) if a contract for the sale of the carpets and curtains has been made in advance of the contract for the sale of the house, it will be conditional upon the sale of the house. The question is whether the contract for the sale of the house is conditional upon the sale of the carpets and curtains.

In the present case, therefore, the relevant question is whether the respondent's undertaking to discharge the Modi loan was a term of the sale by the appellant to the respondent of his interest in 77d Nightingale Lane. The judge held that it was not. In my view he was entitled to reach that conclusion. [. . .]

Sir Christoper Staughton

At [35]–[37]

[. . .] If the parties are allowed by a simple device to avoid the effects of section 2 of the Law of Property (Miscellaneous Provisions) Act 1989, what was the point of Parliament enacting it? [. . .]

So if there was a term in the contractual agreement that Miss Grossman would pay off Mr Modi, and if that was part and parcel of an agreement for the transfer of property, I am by no means sure that it can be hived off, as Scott LJ put it, into a separate contract.

But in the event it is unnecessary in this case for Miss Grossman to establish a collateral contract. There was in my judgment no term of any contract whether integral or collateral, that she should pay off Mr Modi. That was simply a matter of concurrence common to them both. They were in agreement that it would happen, as appears from the passage in the judgment which I first cited. There was no need for any contractual term about it and no such term was created.

In the view of the Court of Appeal, an agreement is either part of the contract for the sale of land, or it is not. If it is, then it must be contained in the parties' written document to ensure compliance with s 2; it cannot be 'hived off' as a collateral contract. If it is not part of the agreement for the sale of land, then it is not a collateral contract, but simply a wholly separate transaction, the existence of which has no bearing on whether s 2 is complied with. The classification of the agreement is dependent on the terms of Chadwick LJ's judgment. The essential question appears to be this: did the parties intend that the sale of the land would go ahead even in the absence of the agreement in question? If so, then the agreement is not part of the contract for sale of land.

This is a strict approach that casts doubt on the future use of collateral contracts and, implicitly, on the correctness of the decision in *Record v Bell*. Notably, that case is not referred to in the judgments. By reference to [21], however, it is difficult to avoid the conclusion that the warranty of title in that case *was* part of the contract for sale of land: in the absence of the warranty, the sale of the land would not have proceeded. If this is so, then, contrary to the decision in the case, the contract should have been void for non-compliance with s 2.

The cases may be distinguished by reference to the subject matter of the agreements in question. In *Grossman v Hooper*, the subject matter of the agreement was distinct from the land to be transferred: it concerned the discharge of an unsecured debt. Similarly, the example discussed by Chadwick LJ in his judgment involves distinct subject matter: carpets and curtains. It is difficult to apply the Court's reasoning to *Record v Bell* when the agreement related to the title of the land being transferred.

One consequence of the strict approach to collateral contracts signposted by *Grossman v Hooper* is that the ability of parties to establish a valid contract within s 2 through rectification becomes more significant.

3.6 RECTIFICATION

Where the parties have reached an agreement, but the terms are not all recorded in the document (or documents, in the case of exchange), or are recorded wrongly, the court may order rectification, with the result that the document then satisfies s 2 of the LP(MP)A 1989. The possibility of rectification is specifically referred to in s 2(4), which confers on the court

discretion to determine the time at which the contract comes into being. This is to enable the court to take into account the possible effect of rectification on third parties who enter a transaction between the date of the original 'contract' (void at the time for non-compliance with s 2) and the court's decision to rectify the agreement.[38]

It is established as a matter of contract law that rectification may be awarded where there is a prior agreement or common intention to contract on specified terms, and convincing proof[39] that the written agreement does not reflect those terms.[40] More controversially, rectification may also be available in cases of unilateral mistake, but only where the party not mistaken has acted unconscionably.[41] To date, there is little authority on the use of rectification in relation to contracts for sale of land. But the courts' reticence towards the use of collateral contracts expressed in *Grossman v Hooper* implicitly increases the likelihood of claims to rectification.

The remedy was adopted in *Robert Leonard Developments Ltd v Wright*.[42] In that case, a purchaser had agreed to buy a show flat, the price of which was to include carpets and furnishings. This term was not included in both written contracts on exchange and the vendor removed the furniture. The contract was executed by the transfer of the lease of the flat and therefore the validity of the contract could no longer be questioned—but the purchaser sought damages for breach of contract. The Court of Appeal considered that there was no separate or collateral contract for the sale of the furnishings; it was part of one package for the sale of the flat. Instead, the Court held that the contract should be rectified to include the omitted term.

Rectification is not available in all cases in which a written document does not include all of the terms agreed by the parties. Interpreted in such a broad manner, it would have the potential to undermine the operation of s 2 of the 1989 Act.

Oun v Ahmad
[2008] EWHC 545

Facts: Mr Ahmad and Mr Oun signed an agreement (referred to in the judgment as the 'first document') for the sale of premises comprising of a residential flat and an off-licence. The sale was never completed and the question arose as to whether a valid contract for sale had been entered. The agreement signed by the parties did not refer to an apportionment of the purchase price between the building, fixtures, and fittings, and the business goodwill. This matter was instead recorded by the parties in a second document. Mr Oun, the proposed purchaser, argued that the parties' agreement should be rectified to include this term.

38 Law Commission Report No 164 (1987, [5.6]).

39 See Thompson, 'Blowing Hot and Cold' [1995] Conv 484. He suggests that this may be diluted to a test based on the balance of probabilities.

40 *Josceleyne v Nissen* [1970] 2 QB 86.

41 For example, through estoppel, fraud, undue influence, breach of fiduciary duty, or though actual knowledge of the mistake. In *Commission for the New Towns v Cooper* [1995] Ch 259, 277–82, it was suggested, obiter, that it would also be sufficient if one party merely suspects the other to be mistaken and intends them to be so, without proof of inducement. See further on unilateral mistakes *George Wimpey UK Ltd v VI Construction Ltd* [2005] EWCA Civ 77.

42 [1994] NPC 49.

Morgan J

At [35]

Section 2(4) of the 1989 Act expressly contemplates that a court can order rectification in some cases where the written document does not incorporate all of the terms expressly agreed. However, there is an important issue in the present appeal as to the cases in which rectification is available. Is it every case where the written document does not incorporate all of the terms expressly agreed (whatever the reason for that might be) or is it only those cases where, applying conventional principles, the equity of rectification is available? [. . .]

At [39]

Although the process of rectification in this context is an unusual form of rectification, it seems to be the case that one applies the usual rules as to the availability of rectification. In the *Robert Leonard* case, Henry LJ adopted a passage in the Law Commission Report (Law Com No. 164) at paragraph 5.6 which dealt with the possibility of rectification. Reference to the Law Commission Report itself shows that the footnotes to paragraph 5.6 refer to the general law as to rectification as set out in *Snell's Equity* and in well known cases dealing with rectification. [. . .]

At [41]–[43]

Rectification: further discussion

Because of the arguments addressed to me, it is necessary to consider the possibility of rectification in more detail. I will distinguish between two types of case.

In the first type of case, the written document does not incorporate all the terms expressly agreed, by reason of a mistake in the recording of the agreement. In such a case, the court can rectify the written document so as to incorporate all the terms expressly agreed and then the document as rectified complies with section 2.

The second (rather more unusual) type of case is as follows. Say the parties expressly agree upon five terms of their agreement. They agree to record four of them in a written document and they do so. They agree that the fifth term shall remain unrecorded in writing. The result is that the written document does not comply with section 2 and is of no effect. Can one party seek an order for rectification to the effect that the fifth term should be incorporated into the written document so that the written document will then comply with section 2? Will the position be different if the court finds that the parties believed that they had made a binding contract and that it was unnecessary for them to record the fifth term in writing? [. . .]

At [48]

It appears from the above formulation that the court can order rectification where the relevant mistake is as to the meaning or effect of the words used in the instrument and, indeed, as to the legal effect of the instrument as a whole. [. . .]

At [51]

But rectification is not available where the parties have executed the document they intended to execute and the mistake is as to the legal consequences of that document. In *Allnutt v Wilding*, the parties had created a discretionary trust. They believed that the creation of a discretionary trust would be a potentially exempt transfer for the purposes of inheritance tax. It was not. If they had appreciated that legal consequence, their claim was that they would have created an interest in possession trust. It was held that a change in the document from

one which created a discretionary trust into one which created an interest in possession trust was outside the ambit of rectification. [. . .]

At [55]

In my judgment, this express agreement to omit the term means that there is no defect or mistake in the recording of, or the expression of, the arrangement and it is beyond the ambit of rectification to write into the written agreement a term which the parties expressly agreed should not be so recorded. I reach this conclusion applying what I understand to be conventional principles as to the availability of rectification and not some special set of rules as to rectification for the purposes of section 2(4) of the 1989 Act. In my judgment, this approach serves the legislative objective of section 2 of the 1989 Act. [. . .]

On the facts, Morgan J considered that the parties had agreed on the apportionment of the purchase price at the time that the first document was signed and had further agreed that this should not be included in the document. Both parties had mistakenly considered that, notwithstanding the absence of the term, the document would still be a valid contract. This mistake was beyond the scope of rectification and therefore there was no contract for sale of the premises.

3.7 ESTOPPEL

The doctrine of proprietary estoppel has application in a wide range of circumstances, in many of which (for example, promises of a gift or an inheritance) there is no question of the existence of a contract. The doctrine is discussed in Chapter 10. In this chapter, we are concerned with a specific point regarding the operation of proprietary estoppel: can the doctrine be invoked by a claimant where a contract has failed for non-compliance with s 2(1) of the LP(MP)A 1989?

The Law Commission specifically envisaged the use of estoppel in appropriate cases in which formality requirements for a contract for sale were not complied with. Indeed, this prospect played a central role in the Law Commission's acknowledgment that the effect of its recommendations was that the doctrine of part performance would cease to have effect.[43]

Law Commission Report No 164, *Transfer of Land Formalities for Contracts for Sale etc of Land* (1987, [5.4]–[5.5])

We have already pointed out that it is implicit in our recommendation that a contract will no longer be enforceable simply because one party has performed some or all of his obligations under it. We believe this not to be a consequence to be regretted. [. . .] Nevertheless there are clearly circumstances in which injustice could be caused through the inability to plead part performance. [. . .] Are there other solutions than that which might have been provided by part performance? We believe that there are, and that the courts would use doctrines of estoppel to achieve very similar results where appropriate to those of part performance.

We see no cause to fear that the recommended repeal and replacement of the present section as to the formalities for contracts for sale or other disposition of land will inhibit the

[43] Law Commission Report No 164 (1987), [5.4]–[5.5]. See further, Bently and Coughlan, 'Informal Dealings with Land after Section 2' (1990) 10 LS 325.

courts in the exercise of the equitable discretion to do justice between parties in individual otherwise hard cases.

The ability to invoke estoppel was, however, subsequently called into question in the following case. Two key issues were central to the Court of Appeal's discussion: firstly, a 'public policy principle' that estoppel could not be used to render valid a transaction that legislation has enacted is to be invalid;[44] secondly, the scope of s 2(5) of the 1989 Act. That provision (extracted above) provides a saving for the operation of resulting and constructive trusts, but makes no reference to proprietary estoppel. This second issue, in turn, raised the question of the relationship between estoppel and constructive trusts.[45]

Yaxley v Gotts
[2000] 1 Ch 162, CA

Facts: Mr Yaxley, a builder, found a property ripe for redevelopment. He entered an oral agreement, described as a 'gentleman's agreement', with his friend, Mr Brownie Gotts. The terms of the agreement were that Brownie would purchase the property, and that Mr Yaxley would undertake the redevelopment and manage the building, in return for which he would be given the two ground-floor flats. The property was, in fact, purchased in the name of Brownie's son, Mr Alan Gotts. Mr Yaxley carried out the works, but, following a falling out between the friends, Alan refused to transfer the flats to Mr Yaxley. At first instance, the judge had found that Mr Yaxley could invoke proprietary estoppel and ordered a long lease of the flats to be granted to him. On appeal, the Gotts argued that the agreement with Mr Yaxley was void for non-compliance with s 2(1) of the LP(MP)A 1989 and estoppel could not be invoked to give effect to the void agreement.

Robert Walker LJ

At 174–80

Recent cases on section 2 and estoppel

[. . .] I have no hesitation in agreeing with what I take to be the views of Peter Gibson L.J., Neill L.J., and Morritt L.J., that the doctrine of estoppel may operate to modify (and sometimes perhaps even counteract) the effect of section 2 of the Act of 1989. The circumstances in which section 2 has to be complied with are so various, and the scope of the doctrine of estoppel is so flexible, that any general assertion of section 2 as a "no-go area" for estoppel would be unsustainable. Nevertheless the impact of the public policy principle to which Sir John Balcombe drew attention in *Godden v. Merthyr Tydfil Housing Association* does call for serious consideration. It is not concerned with illegality (some confusion may have arisen from the inadequate report or note shown to this court in *Bankers Trust Co. v. Namdar*) but with what Viscount Radcliffe in *Kok Hoong v. Leong Cheong Kweng Mines Ltd.* [1964] A.C. 993, 1016, called a principle of general social policy,

[44] The principle is cited by Robert Walker LJ [2000] Ch 162, 172–3, from *Halsbury's Laws of England: Vol 16* (4th edn, reissue, 1992): '*The doctrine of estoppel may not be invoked to render valid a transaction which the legislature has, on grounds of general public policy, enacted is to be invalid.*'

[45] The nature of constructive trusts is discussed in Chapter 11. The specific type of constructive trust discussed in this section is the common intention constructive trust, which is considered in Chapter 16.

> "to ask whether the law that confronts the estoppel can be seen to represent a social policy to which the court must give effect in the interests of the public generally or some section of the public, despite any rules of evidence as between themselves that the parties may have created by their conduct or otherwise."

In this case that principle must of course be applied consistently with the terms in which section 2 of the Act of 1989 has been enacted, including the saving at the end of section 2(5).

Parliament's requirement that any contract for the disposition of an interest in land must be made in a particular documentary form, and will otherwise be void, does not have such an obviously social aim as statutory provisions relating to contracts by or with moneylenders, infants, or protected tenants. Nevertheless it can be seen as embodying Parliament's conclusion, in the general public interest, that the need for certainty as to the formation of contracts of this type must in general outweigh the disappointment of those who make informal bargains in ignorance of the statutory requirement. If an estoppel would have the effect of enforcing a void contract and subverting Parliament's purpose it may have to yield to the statutory law which confronts it, except so far as the statute's saving for a constructive trust provides a means of reconciliation of the apparent conflict.

None of the recent authorities referred to by counsel is determinative of this appeal [. . .] Nor can anything in the Law Commission's report (or its earlier working paper) be decisive. The report and the working paper are invaluable guides to the old law and to the problems which constituted the "mischief" at which section 2 of the Act of 1989 is directed, but they cannot be conclusive as to how section 2, as enacted, is to be construed and applied.

Proprietary estoppel and constructive trusts

At a high level of generality, there is much common ground between the doctrines of proprietary estoppel and the constructive trust, just as there is between proprietary estoppel and part performance. All are concerned with equity's intervention to provide relief against unconscionable conduct, whether as between neighbouring landowners, or vendor and purchaser, or relatives who make informal arrangements for sharing a home, or a fiduciary and the beneficiary or client to whom he owes a fiduciary obligation. The overlap between estoppel and part performance has been thoroughly examined in the defendants' written submissions, with a survey of authorities from *Gregory v. Mighell* (1811) 18 Ves. 328 to *Take Harvest Ltd. v. Liu* [1993] A.C. 552.

The overlap between estoppel and the constructive trust was less fully covered in counsel's submissions but seems to me to be of central importance to the determination of this appeal. Plainly there are large areas where the two concepts do not overlap: when a landowner stands by while his neighbour mistakenly builds on the former's land the situation is far removed (except for the element of unconscionable conduct) from that of a fiduciary who derives an improper advantage from his client. But in the area of a joint enterprise for the acquisition of land (which may be, but is not necessarily, the matrimonial home) the two concepts coincide [. . .]

In this case the judge did not make any finding as to the existence of a constructive trust. He was not asked to do so, because it was not then seen as an issue in the case. But on the findings of fact which the judge did make it was not disputed that a proprietary estoppel arose, and that the appropriate remedy was the grant to Mr. Yaxley, in satisfaction of his equitable entitlement, of a long leasehold interest, rent free, of the ground floor of the property. Those findings do in my judgment equally provide the basis for the conclusion that Mr. Yaxley was entitled to such an interest under a constructive trust. The oral bargain which the judge found to have been made between Mr. Yaxley and Mr. Brownie Gotts, and to have

been adopted by Mr. Alan Gotts, was definite enough to meet the test stated by Lord Bridge in *Lloyds Bank Plc. v. Rosset* [1991] 1 A.C. 107, 132.

The saving in section 2(5)

To recapitulate briefly: the species of constructive trust based on "common intention" is established by what Lord Bridge in *Lloyds Bank Plc. v. Rosset* [1991] 1 A.C. 107, 132, called an "agreement, arrangement or understanding" actually reached between the parties, and relied on and acted on by the claimant. A constructive trust of that sort is closely akin to, if not indistinguishable from, proprietary estoppel. Equity enforces it because it would be unconscionable for the other party to disregard the claimant's rights. Section 2(5) expressly saves the creation and operation of a constructive trust.

[. . .] To give [section 2(5)] what I take to be its natural meaning, comparable to that of section 53(2) of the Law of Property Act 1925 in relation to section 53(1), would not create a huge and unexpected gap in section 2. It would allow a limited exception, expressly contemplated by Parliament, for those cases in which a supposed bargain has been so fully performed by one side, and the general circumstances of the matter are such, that it would be inequitable to disregard the claimant's expectations, and insufficient to grant him no more than a restitutionary remedy.

Clarke LJ

At 181–2

Proprietary estoppel and the Law Commission

The Act of 1989 expressly refers to resulting, implied or constructive trusts but it does not expressly refer to proprietary estoppel, in so far as its principles are different from those relating to constructive trusts. The Act neither expressly saves the operation of the doctrine of proprietary estoppel nor expressly provides that it should have no application. Whether the principles of proprietary (or indeed other classes of estoppel) can be invoked will no doubt depend upon the principle which Robert Walker L.J. has quoted from *Halsbury's Laws of England*, 4th ed. reissue, vol. 16, pp. 849–850, para. 962, namely that the doctrine of estoppel may not be invoked to render valid a transaction which the legislature, on grounds of general public policy, has enacted is to be invalid or void.

It seems to me that in considering whether a particular estoppel relied upon would offend the public policy behind a statute it is necessary to consider the mischief at which the statute is directed. Where a statute has been enacted as a result of the recommendations of the Law Commission, it is, as I see it, both appropriate and permissible for the court to consider those recommendations in order to help to identify both the mischief which the Act is designed to cure and the public policy underlying it. Indeed, although I agree with Robert Walker L.J. that they cannot be conclusive as to how a particular provision should be construed, I entirely agree with Beldam L.J. that the policy behind section 2 of the Act of 1989 can clearly be seen from the Law Commission Report to which he refers. In my opinion the contents of that report will be of the greatest assistance in deciding whether or not the principles of particular types of estoppel should be held to be contrary to the public policy underlying the Act. In this regard it seems to me that the answer is likely to depend upon the facts of the particular case. So, for example, an attempt to apply the principles of estoppel by convention is likely to fail, as in *Godden v. Merthyr Tydfil Housing Association* [1997] N.P.C. 1; Court of Appeal (Civil Division) Transcript No. 370 of 1997, whereas an attempt to apply the principles of proprietary estoppel might well succeed, depending upon the facts of the particular case.

Beldam LJ

At 190

In the present case the policy behind the Commission's proposals was as clearly stated as its intention that the proposal should not affect the power of the court to give effect in equity to the principles of proprietary estoppel and constructive trusts. Even if the use to be made of the Commission's report is to be confined to identifying the defect in the law which the proposals were intended to correct, in a case such as the present it is unrealistic to divorce the defect in the law from the policy adopted to correct it. The Commission's report makes it clear that in proposing legislation to exclude the uncertainty and complexities introduced into unregistered conveyancing by the doctrine of part performance, it did not intend to affect the availability of the equitable remedies to which it referred.

The general principle that a party cannot rely on an estoppel in the face of a statute depends upon the nature of the enactment, the purpose of the provision and the social policy behind it. This was not a provision aimed at prohibiting or outlawing agreements of a specific kind, though it had the effect of making agreements which did not comply with the required formalities void. This by itself is insufficient to raise such a significant public interest that an estoppel would be excluded. The closing words of section 2(5)—"nothing in this section affects the creation or operation of resulting, implied or constructive trusts"—are not to be read as if they merely qualified the terms of section 2(1). The effect of section 2(1) is that no contract for the sale or other disposition of land can come into existence if the parties fail to put it into writing; but the provision is not to prevent the creation or operation of equitable interests under resulting implied or constructive trusts, if the circumstances would give rise to them [. . .]

There are circumstances in which it is not possible to infer any agreement, arrangement or understanding that the property is to be shared beneficially but in which nevertheless equity has been prepared to hold that the conduct of an owner in allowing a claimant to expend money or act otherwise to his detriment will be precluded from denying that the claimant has a proprietary interest in the property. In such a case it could not be said that to give effect to a proprietary estoppel was contrary to the policy of section 2(1) of the Act of 1989. Yet it would be a strange policy which denied similar relief to a claimant who had acted on a clear promise or representation that he should have an interest in the property. Moreover claims based on proprietary estoppel are more likely to arise where the claimant has acted after an informal promise has been made to him [. . .]

For my part I cannot see that there is any reason to qualify the plain words of section 2(5). They were included to preserve the equitable remedies to which the Commission had referred. I do not think it inherent in a social policy of simplifying conveyancing by requiring the certainty of a written document that unconscionable conduct or equitable fraud should be allowed to prevail.

In my view the provision that nothing in section 2 of the Act of 1989 is to affect the creation or operation of resulting, implied or constructive trusts effectively excludes from the operation of the section cases in which an interest in land might equally well be claimed by relying on constructive trust or proprietary estoppel.

That, to my mind, is the case here. There was on the judge's findings, as I interpret them, a clear promise made by Brownie Gotts to the plaintiff that he would have a beneficial interest in the ground floor of the premises. That promise was known to Alan Gotts when he acquired the property and he permitted the plaintiff to carry out the whole of the work needed to the property and to convert the ground floor in the belief that he had such an interest. It would be unconscionable to allow either Alan or Brownie Gotts to resile from the representations

made by Brownie Gotts and adopted by Alan Gotts. For my part I would hold that the plaintiff established facts on which a court of equity would find that Alan Gotts held the property subject to a constructive trust in favour of the plaintiff for an interest in the ground floor and that that interest should be satisfied by the grant of a 99-year lease. I consider the judge was entitled to reach the same conclusion by finding a proprietary estoppel in favour of the plaintiff [. . .]

The outcome of the case for Mr Yaxley is beyond doubt. The first instance judge had ordered a grant to him of a 99-year lease of the ground-floor flats and the Gotts' appeal against that ruling failed.

It is, however, much harder to identify a clear ratio for the decision. The differences between the judgments of Robert Walker and Beldam LJJ, and the issues to which these differences give rise, are highlighted by Moore.

Moore, 'Proprietary Estoppel, Constructive Trusts and Section 2 of the Law of Property (Miscellaneous Provisions) Act 1989' (2000) 63 MLR 912, 914

It appears that, according to Robert Walker LJ, proprietary estoppel does not survive as a separate and distinct remedy in a case where a claimant relies on an oral agreement. Proprietary estoppel survives only in so far as it overlaps with (and is subsumed within) the common intention constructive trust. By implication, an estoppel claim that cannot be framed alternatively as a constructive or resulting trust can not override section 2.

At first sight the approach of Beldam LJ appears to be more generous than that of Robert Walker LJ. Unlike Robert Walker LJ, Beldam LJ did not hesitate to rely upon the Law Commission papers to identify parliamentary policy and intent. His Lordship observed that the general principle raised by the appellants depended upon the nature and purpose of the statutory provision and the social policy behind it. The policy here was to exclude uncertainty and complexities introduced by the doctrine of part performance, and not to prohibit specific agreements. The mere fact that informal agreements were rendered void rather than unenforceable was not enough in itself to raise a public interest sufficient to exclude proprietary estoppel. Furthermore his Lordship commented that if the appellants' contention succeeded, a claimant raising a proprietary estoppel through mere standing-by and encouragement would be in a stronger position than a claimant relying on a clear oral agreement.

Following this reasoning, proprietary estoppel (and presumably other equitable remedies) could continue to operate notwithstanding a failure to comply with section 2. Since the intention of the reforms was not to abolish these remedies there would be no conflict between equitable remedies and statutory policy. There is thus no logical need to restrict estoppel remedies to cases already falling within the saving of section 2(5). Despite this, Beldam LJ's later comments appear to restrict the scope of his judgment. Firstly, Beldam LJ considered that section 2(5) was 'included to preserve the equitable remedies to which the Law Commission had referred', so apparently allying proprietary estoppel and constructive trusts. Secondly, the learned judge concluded 'the saving in section 2 effectively excludes cases where an interest might equally well be claimed by relying on a constructive trust or proprietary estoppel. That, to my mind, is the case here.' This appears to echo the approach of Robert Walker LJ. There is therefore some doubt whether, despite his reasoning, Beldam LJ intended to give a wider judgment than Robert Walker LJ.

As Moore subsequently identities, the issue that remains unanswered in *Yaxley v Gotts* is whether a claimant in Mr Yaxley's position succeeds on the basis of constructive trusts or estoppel. The issue may be crucial, given the existence of remedial discretion in estoppel. Even on the facts of *Yaxley v Gotts*, as Smith noted, it is far from clear that the grant of a lease can be explained on the basis of a constructive trust.[46]

The relationship between estoppel and s 2 was further considered in the following case. While the decision offers some clarification of the application of estoppel, the Court of Appeal followed the approach in *Yaxley v Gotts* without offering further elucidation as to whether the claimant succeeds under estoppel or constructive trust.

Kinane v Mackie-Conteh
[2005] EWCA Civ 45, CA

Facts: Mr Mackie-Conteh agreed to grant a charge over his home as security for a loan from Mr Kinane, but the charge was not formally executed. Mr Kinane provided the loan money, but Mr Mackie-Conteh argued that the charge was void for non-compliance with s 2. Mr Kinane therefore argued for an estoppel.

Arden LJ

At [28]–[29]

In my judgment, therefore, a party seeking to rely on proprietary estoppel as a basis for disapplying section 2(1) of the 1989 Act is not prevented from relying in support of his case on the agreement which section 2(1) would otherwise render invalid. Thus, the requirement that the defendant encouraged (or allowed) the claimant to believe that he would acquire an interest in land may (depending on the facts) consist in the defendant encouraging the claimant (by words or conduct) to believe that the agreement for the disposition of an interest in land (here a security interest) was valid and binding. Here, Mr Mackie-Conteh gave Mr Kinane that encouragement. Mr Kinane made it clear that he required security for his loan. Mr Mackie-Conteh responded by providing the security agreement and persuading him that, once he had got that letter (and the cheque for £15,000 had been banked), he should make the loan to Almack. By his conduct, Mr Mackie-Conteh thereby encouraged Mr Kinane to believe that the security agreement was valid and binding. He must stand by that conduct even if he himself misunderstood the effect of section 2(1) on the security agreement. Accordingly, the requirement for encouragement by Mr Mackie-Conteh of Mr Kinane in the erroneous belief that he would obtain a security interest over the property is satisfied.

It is to be noted that, even on this scenario, reliance on the unenforceable agreement only takes the claimant part of the way: he must still prove all the other components of proprietary estoppel. In particular, the requirement that the defendant encouraged or permitted the claimant in his erroneous belief is not satisfied simply by the admission of the invalid agreement in evidence. In this sort of case, the claimant has to show that the defendant represented to the claimant, by his words or conduct, including conduct in the provision or delivery of the agreement, that the agreement created an enforceable obligation. The cause of action in proprietary estoppel is thus not founded on the unenforceable agreement but upon the defendant's conduct which, when viewed in all relevant respects, is unconscionable. [. . .]

[46] Smith, 'Oral Contracts for the Sale of Land: Estoppels and Constructive Trusts' (2000) 116 LQR 11, 12–13.

At [31]–[33]

Accordingly the issue here is whether the circumstances justify a finding of proprietary estoppel overlapping with constructive trust in the manner explained above. I have dealt with the question of encouragement above. Did Mr Kinane act in the belief that he had or would obtain a valid security? Did he act thereon to his detriment? The security agreement demonstrates an intention to create a security interest. Mr Kinane made it clear in his witness statement and when giving evidence that he was not prepared to make a loan without security. Having obtained the security agreement, he made a loan which, to his detriment, is now irrecoverable. In my judgment, the fact that he knew that the formal documentation had not been executed does not mean that proprietary estoppel cannot be established. The fact is that he drew no distinction between the security agreement and the formal document. He assumed that the security agreement was enforceable and thus he acted in the belief that he would be given a formal security. Thus I would reject Mr Jack's argument that it is fatal to Mr Kinane's case that the security agreement had not been executed. Likewise, in my judgment, it is immaterial that the reliance consisted in the single act of making the loan. That act had significant consequences on its own, and is thus of itself sufficient to give rise to proprietary estoppel.

As I see it, the policy of section 2(1) of the 1989 Act is to protect the public by preventing parties from being bound by a contract for the disposition of an interest in land unless it has not been fully documented in writing. However, in section 2(5) Parliament has acknowledged that under section 2(1) there is a risk that one party will seek to take advantage of the sanction provided by that subsection when it is unconscionable for him so to do. To that extent, section 2(5) plays a role similar to that of part performance, although it operates more flexibly than that doctrine. Unconscionability on the part of the party seeking to rely on subsection (1) is the touchstone giving rise to a constructive trust. It will arise where a party led another party to believe that he would obtain an interest in property to another and then stands by while that other party acts to his detriment in reliance on that promise. The knowledge of the disadvantaged party is of less significance. Here Mr Mackie-Conteh induced Mr Kinane to make the loan before the formal documentation was executed. Even though the venture was abortive, Mr Mackie-Conteh benefited therefrom to the extent that he did not have to find another lender to get to the stage where FMBC could produce a letter of credit. The risk of the letter of credit at that stage not meeting the seller's requirements was one which, under the parties' agreement, Mr Mackie-Conteh and not Mr Kinane, had implicitly agreed to bear.

In proprietary estoppel, the court awards a remedy appropriate to satisfy the expectations that the defendant has induced. This need not be an interest in land. However, in my judgment, that is the appropriate remedy in this case and neither counsel has suggested otherwise.

Neuberger LJ

At [46]–[49]

There are observations in the speeches of Robert Walker and Beldam LJJ (with both of whom Clarke LJ agreed) in *Yaxley v Gotts* [2000] Ch. 174, to the effect that facts giving rise to an estoppel, could be sufficient (even if they do not give rise to a trust) to enable a claimant to avoid the rigours of Section 2(1) of the 1989 Act: see at 174F-G and 188F-9G. It is unnecessary to decide in this case whether those observations can survive in light of the reasoning of the House of Lords in *Actionstrength*. For the purposes of this appeal, I am content to assume, in favour of Mr Mackie-Conteh, that it would not be open to Mr Kinane to

avoid the consequences of Section 2(1) of the 1989 Act if he could only establish a proprietary estoppel, and not a trust.

There are clearly circumstances which can give rise to an estoppel, but not a trust. This point was made clear by Robert Walker LJ in *Yaxley* at 176D where he said this of "estoppel and the constructive trust":

> "Plainly there are large areas where the two concepts do not overlap: when a landowner stands by while his neighbour mistakenly builds on the former's land the situation is far removed (except for the element of unconscionable conduct) from that of a fiduciary who derives an improper advantage from his client."

He then went on to explain at 176E that, in light of cases such as *Gissing v Gissing* [1971] AC 886, it was well established that "the two concepts coincide" "in the area of a joint enterprise for the acquisition of land".

It initially appeared to me well arguable that the nature of the estoppel which could be established by Mr Kinane may not be such as to amount to a constructive trust. There is obviously a conceptual similarity between a person building on another's land in the false belief that he owns it, thereby conferring a benefit on the true owner, and a person who lends money to the owner of land, in the false belief that he has a mortgage over the land. In each case, the true owner of the land receives a benefit at the expense of a person who has spent money in the mistaken belief that he has an interest in the land.

However, I am persuaded that the reasoning, and the authorities cited, in *Yaxley* do lead to the conclusion that a constructive trust was created in the present case.

The case is notable as confirming that while the parties' agreement is void as a contract for non-compliance with s 2, it can, notwithstanding, form the basis of the agreement or assurance of rights for an estoppel claim. As Arden LJ explains, the other elements of estoppel must still be made out. It remains unclear, however, whether the claimant therefore succeeds on the basis of estoppel or constructive trust. Both Arden and Neuberger LJJ appear to adopt a narrow approach to estoppel that echoes Robert Walker LJ's judgment in *Yaxley v Gotts*. Hence, Arden LJ identifies the question as whether Mr Kinane can demonstrate an estoppel 'overlapping' with a constructive trust. Neuberger LJ proceeds on the basis that Mr Kinane's claim would fail under s 2 if he could only establish an estoppel, but not a constructive trust.[47]

Writing extra-judicially, Lord Neuberger has subsequently indicated a broader approach than that given in his judgment in *Kinane*. He has moved towards the view that an estoppel claim is not precluded by section 2 even where there is no overlapping constructive trust. Notably, this change appears to have been prompted by a narrow approach to estoppel both generally and in relation to section 2 that was advocated by Lord Scott in *Yeoman's Row Management Ltd v Cobbe*.[48] Giving judgment in that case, Lord Scott commented, obiter "*My present view, however, is that proprietary estoppel cannot be prayed in aid in order to render enforceable an agreement that statute has declared to be void. The proposition that an owner of land can be estopped from asserting that an agreement is void for want of compliance with the requirements of section 2 is, in my opinion, unacceptable. The assertion is no more than the statute provides. Equity can surely not contradict the statute*".[49] In a discussion of that decision Lord Neuberger said the following.

[47] See further *Brightlingsea Haven Ltd v Morris* [2009] 2 P&CR 11.

[48] [2008] 1 WLR 1752. The case is discussed in Chapter 10.

[49] Ibid, [29].

Lord Neuberger of Abbotsbury 'The Stuffing of Minerva's Owl: Taxonomy and Taxidermy in Equity' (2009) 68 CLJ 537, 545–46

There is another aspect of the relationship between proprietary estoppel and contract, which arises out of that misconceived piece of legislation, section 2 of the Law of Property (Miscellaneous Provisions) Act 1989. Section 2(1) of that Act declares void any agreement purporting to create or dispose of an interest in land which does not comply with the requisite formalities. Section 2(5) sets out certain exceptions, including implied, resulting, and constructive trusts, but not proprietary estoppel. Section 40 of the Law of Property Act 1925, which section 2 was designed to replace, had its quirks, but it worked perfectly well. Now that the Law Commission, by needlessly meddling, Parliament, with misconceived drafting, and the courts, through inconsistent decisions, have had their wicked ways with section 2, we are worse off than we ever were with section 40.

However, the point about section 2 for present purposes is that, at least on one view of Lord Scott's speech in *Cobbe,* it seemed to have put paid to proprietary estoppel. He said that his "present view [was] that proprietary estoppel cannot be prayed in aid to in order to render enforceable an agreement that statute has declared to be void". If the proprietary estoppel also gives rise to a constructive trust, it is different because constructive trusts are excluded from the ambit of section 2 by subsection (5). So, save to the extent that proprietary estoppel claims can be said to be grounded in constructive trust, or are based on a mistake as to present ownership, it seems to me that Lord Scott's approach may either serve to defeat any proprietary estoppel claim, or else it means that the weaker the claim the less the section 2 problem.

Consider the facts in *Crabb* v. *Arun* or in *Thorner* v. *Major.* As in the great majority of proprietary estoppel cases, the defendant made a statement or gave an indication, which was relied on by the claimant as meaning that he would be granted an interest in land. If Lord Scott's approach is right, there are two possibilities. First, as section 2 would prevent the claimant from mounting a claim in contract, every proprietary estoppel claim must fail, as the statutory formalities were not complied with. Alternatively, section 2 presents no problem where the statement or indication is so imprecise that we are not near contractual territory. Either alternative is unpalatable. The first would mean that any proprietary estoppel claim based on an indication or promise that the claimant will get an interest in land will fall foul of section 2, unless the claimant happens to be able to erect a constructive trust out of the arrangement. On that view, it would seem that Lord Hoffmann's owl is stuffed, as it could never fly. The second would mean that the clearer and more precise the defendant's indication or promise, and therefore the stronger the claimant's case in principle, the more likely it is that section 2 will scotch any proprietary estoppel claim. On that view, Lord Hoffmann's owl would be rather perverse—scarcely a wise old owl.

However, it is only fair to acknowledge that Lord Scott's approach was consistent with a number of previous Court of Appeal decisions, including two to which Lord Walker and I were parties—*Yaxley* v. *Gotts* and *Kinane* v. *Mackie-Conteh.* However, in agreement with the Court of Appeal and Etherton J. in *Cobbe,* I suggest that section 2 has nothing to do with the matter. In cases such as those in *Crabb* v. *Arun* and *Thorner* v. *Major,* the estoppel rests on the finding that it would be inequitable for the defendant to insist on his strict legal rights. So the fact that, if there was a contract, it would be void is irrelevant: indeed the very reason for mounting the proprietary estoppel claim is that there is no enforceable contract. I accept of course that it is not open to a claimant to take the unvarnished point that it is inequitable for a defendant to rely on the argument that an apparent contract is void for not complying with the requirements of section 2. But where there is the superadded fact that the claimant, with

the conscious encouragement of the defendant, has acted in the belief that there is a valid contract, I suggest that section 2 offers no bar to a claim based in equity.

There is strong logical force in favour of the view that s 2 should not bar claims to estoppel even where the claim does not coincide with a constructive trust. It is beyond doubt that estoppel cannot be used to enforce an otherwise invalid contract.[50] But the purpose of an estoppel claim is not to enforce the parties' agreement. As Arden LJ acknowledges in *Kinane v Mackie-Conteh*, the claim is founded on the prevention of unconscionability, not on the unenforceable agreement.[51] In the following extract, Dixon suggests that the key to understanding the relationship between estoppel and s 2 lies in the precise meaning of unconscionability within the doctrine. He considers that once the meaning of unconscionability is properly understood, the reasoning in cases that rely on the existence of an overlapping constructive trust can be rejected.

Dixon 'Confining and defining proprietary estoppel: the role of unconscionability' (2010) 30 LS 408, pp 416–18

[A]lthough the use of the constructive trust is readily understandable (especially as there is great attraction in having a statutory justification), it is respectfully submitted that it does not stand up to close scrutiny. Few cases explain *why* a constructive trust is imposed, save that the existence of the estoppel means that someone has been unconscionable and constructive trusts can protect against unconscionability. This seems to be entirely circular and implies that *whenever* there is an estoppel, there is also a constructive trust. In reality, it amounts to the imposition of a remedial and artificial constructive trust simply because we want to avoid a conflict with s 2. It is not a justification or an explanation of why s 2 is not engaged, it is an assertion that avoids us having to dive deeper into the dark waters of estoppel to look for such a justification.

It is suggested below that it is not necessary to resort to the constructive trust to explain the relationship between formality requirements in land law, be they found in s 2 or elsewhere. [. . .]The argument is that estoppel can be explained and confined on a principled basis through the use of unconscionability.

The essence of the argument here is that estoppel can be the antidote to the imperfect and otherwise flawed creation of property rights if, but only if, there is clear justification for ignoring the formality rules that otherwise normally apply. If the formality rules apply (ie their inapplicability cannot be justified), then there can be no estoppel. Unconscionability provides this justification and the legislature's insistence that property rights must be created in certain ways, means that our understanding of unconscionability should be tied inexorably to the concept of formality, rather than being simply a function of assurance, reliance and detriment. Thus, unconscionability will exist if (but only if) the landowner's assurance amounts both to an assurance of a 'certain enough' right in relation to land *and* this carries with it a further assurance that the right will be granted despite the absence of the formality that is normally required to create, transfer or enforce that right. Assuming detrimental reliance, an estoppel is made out when a landowner makes a 'double assurance'—an assurance that the claimant will have some right over the representor's land (the 'rights assurance') combined with an assurance that the right will ensue even if the formalities necessary to convey that right

[50] Dixon, 'Invalid Contracts, Estoppel and Constructive Trusts' [2005] Conv 247, 250.
[51] *Kinane v Mackie-Conteh* [2005] EWCA Civ 45, [29] (extracted above).

are not complied with (the 'formality assurance'). This second assurance may be express or implied, but it is submitted that it exists in all successful cases of estoppel. Unconscionability is a function of formality, not of assurance reliance and detriment. Unconscionability exists when a 'formality assurance' is withdrawn after detrimental reliance. In the absence of such an assurance and its withdrawal, there is no unconscionability and no estoppel:

[. . .] In failed contract cases, such as *Cobbe*, *Kinane v Mackie-Conteh* and *Yaxley v Gotts*, the fact that the parties attempted to enter into a formality compliant transaction means that it is much more difficult to establish estoppel. This is not because the formality rules triumph over estoppel as a matter of public policy (the s 2 et al argument), but because the landowner cannot easily be said to have promised that formality would *not* apply when the parties intended but failed to comply with the required formality. It is more difficult to establish unconscionability because the attempted use of formality usually will mean that no assurance was given that formality would not apply—no 'formality assurance'. In both *Yaxley* and *Kinane*, the estoppel was successful because in both cases the landowner in essence assured the claimant that the required formality was not needed—in *Yaxley* when the defendant encouraged the claimant to assume that the gentleman's agreement was binding and in *Kinane* when the defendant encouraged the claimant to believe that the oral agreement was binding. In *Cobbe*, not only did Mr Cobbe know and understand that formality was needed, more crucially the defendant did not assure Mr Cobbe that he would acquire property rights without that formality—there was no formality assurance. Thus, it is not the fact that *Cobbe* was a commercial case that is critical, nor that the 'rights assurance' was not 'certain enough' on the facts, but rather that there was no unconscionability in the sense here explained. Had the defendant made a 'formality assurance', the estoppel could have existed. It is simply that in commercial contexts, the 'formality assurance' is more difficult to establish and so unconscionability is less likely to exist.

4 CREATION AND TRANSFER

Once a contract for the sale or other disposition of an interest in land is created, it is executed by the creation or transfer of the interest concerned. As we have noted, once the contract is executed, no question of compliance with s 2 of the LP(MP)A 1989 can be raised. The formality requirements necessary for the creation or transfer of the legal right, and their exceptions, are provided by ss 52 and 54 of the LPA 1925.

Law of Property Act 1925, ss 52 and 54

52 (1) All conveyances of land or of any interest therein are void for the purpose of conveying or creating a legal estate unless made by deed.

(2) This section does not apply to— [. . .]

(d) leases or tenancies or other assurances not required by law to be made in writing; [. . .]

(g) conveyances taking effect by operation of law.

54 (1) All interests in land created by parol and not put in writing and signed by the persons so creating the same, or by their agents thereunto lawfully authorised in writing, have, notwithstanding any consideration having been given for the same, the force and effect of interests at will only.

(2) Nothing in the foregoing provisions of this Part of this Act shall affect the creation by parol of leases taking effect in possession for a term not exceeding three years (whether or not the lessee is given power to extend the term) at the best rent which can be reasonably obtained without taking a fine.

Hence, save in exceptional cases, the creation or transfer of a legal right requires the execution of a deed. The effect of non-compliance is that legal title does not pass. The intended recipient of the rights may have a claim in equity. For example, where there is a contract for sale, but s 52 is not complied with, an equitable interest may arise under the doctrine of anticipation (discussed further in Chapter 9).

The most notable exception to the need for a deed is that contained in s 54(2) for short leases. This is limited by the terms of the provision to leases at market rent, without a premium, and taking effect in possession. It has been held that possession must be immediate.[52]

The requirements of a deed are provided in s 1 of the LP(MP)A 1989.

Law of Property (Miscellaneous Provisions) Act 1989, s 1

Deeds and their execution

(1) Any rule of law which—

(a) restricts the substances on which a deed may be written;

(b) requires a seal for the valid execution of an instrument as a deed by an individual; or

(c) requires authority by one person to another to deliver an instrument as a deed on his behalf to be given by deed,

is abolished.

(2) An instrument shall not be a deed unless—

(a) it makes it clear on its face that it is intended to be a deed by the person making it or, as the case may be, by the parties to it (whether by describing itself as a deed or expressing itself to be executed or signed as a deed or otherwise); and

(b) it is validly executed as a deed—

(i) by that person or a person authorised to execute it in the name or on behalf of that person, or

(ii) by one or more of those parties or a person authorised to execute it in the name or on behalf of one or more of those parties.

(2A) For the purposes of subsection (2)(a) above, an instrument shall not be taken to make it clear on its face that it is intended to be a deed merely because it is executed under seal.

(3) An instrument is validly executed as a deed by an individual if, and only if—

(a) it is signed—

(i) by him in the presence of a witness who attests the signature; or

(ii) at his direction and in his presence and the presence of two witnesses who each attest the signature; and

(b) it is delivered as a deed.

[52] *Long v Tower Hamlets LBC* [1998] Ch 197. The implications of the decision are considered by Bright, 'Beware the Informal Lease: The (Very) Narrow Scope of S.54(2) Law of Property Act 1925' [1998] Conv 229.

(4) In subsections (2) and (3) above "sign", in relation to an instrument, includes

(a) an individual signing the name of the person or party on whose behalf he executes the instrument; and

(b) making one's mark on the instrument,

and "signature" is to be construed accordingly.

(4A) Subsection (3) above applies in the case of an instrument executed by an individual in the name or on behalf of another person whether or not that person is also an individual.

This section, like s 2 of the 1989 Act concerning contracts, implements recommendations by the Law Commission.[53] It represents a modernization of the requirements for a deed. Under the provision, the key requirements for a document to be a deed are that it is signed and attested, and that it specifies on its face that it is a deed. The specific need for attestation, explained in s 1(3)(a)(i), is that the document is signed '*in the presence of a witness*', who then signs the deed him or herself. This requirement is not met, for example, if a witness who was not present when the party executing the deed signed it signs the document. Non-compliance with this requirement is most likely to be known by the party executing the deed, who may, in any event, be estopped from seeking to invalidate it on this basis.[54]

A deed takes effect when it is 'delivered as a deed'.[55] This will be immediate if the document specifies that it is 'signed and delivered' as a deed; in other cases, there will need to be a subsequent delivery. Delivery originally denoted a physical act, but the requirement has evolved to relate to an intention to be bound.

Vincent v Premo Enterprises (Voucher Sales) Ltd
[1969] 2 QB 609, CA

Lord Denning MR

At 619

The law as to "delivery" of a deed is of ancient date. But it is reasonably clear. A deed is very different from a contract. On a contract for the sale of land, the contract is not binding on the parties until they have exchanged their parts. But with a deed it is different. A deed is binding on the maker of it, even though the parts have not been exchanged, as long as it has been signed, [. . .] and delivered. "Delivery" in this connection does not mean "handed over" to the other side. It means delivered in the old legal sense, namely, an act done so as to evince an intention to be bound. Even though the deed remains in the possession of the maker, or of his solicitor, he is bound by it if he has done some act evincing an intention to be bound, as by saying: "I deliver this my act and deed." He may, however, make the "delivery" conditional: in which case the deed is called an "escrow" which becomes binding when the condition is fulfilled.

Yale doubts the antiquity of this rule, highlighting the artificiality of continued reference to delivery.

[53] Law Commission Report No 163, *Deeds and Escrows* (1987).
[54] *Shah v Shah* [2002] QB 35.
[55] Section 1(3)(b) of the 1989 Act.

Yale, 'The Delivery of a Deed' [1970] CLJ 52, 73–4

> It is perhaps too harsh to say that fact has been replaced by fiction, for a man's state of mind is as much a fact as the state of his paper [...] But the element of fiction is truly present in the use of the word "delivery" in the mouths of modern judges. It is not the case that a word of lay usage has been appropriated to an artificial sense for purposes of legal definition and application; it is the case that one legal content has been emptied out of "delivery" and replaced by another. The wine has been changed (for better or for worse) but the bottle bears the same label.

Intention becomes significant where, in the ordinary course of transactions, deeds are prepared and signed in advance of an anticipated completion of creation or transfer. Following *Longman v Viscount Chelsea*,[56] a deed that has been signed, but not delivered, may be classified in one of two ways: as an escrow, or as a 'non-deed'.[57]

The different legal consequence of these possibilities was considered in that case.

Longman v Viscount Chelsea
(1989) 58 P & CR 189, CA

Nourse LJ

At 195

> A writing cannot become a deed unless it is signed, [...] and delivered as a deed. Having reached that stage, it is correctly described as having been "executed" as a deed. Having been signed [...], it may be delivered in one of three ways. First, it may be delivered as an unconditional deed, being irrevocable and taking immediate effect. Secondly, it may be delivered as an escrow, being irrevocable but not taking effect unless and until the condition or conditions of the escrow are fulfilled. Thirdly, it may be handed to an agent of the maker with instructions to deal with it in a certain way in a certain event, being revocable and of no effect unless and until it is so dealt with, whereupon it is delivered and takes effect [...]

Whether a deed is within the second or third category is dependent on the intention of the party executing the deed. In that case, Mrs Longman, who held a long lease of a residential property, had negotiated with her landlord, the Cadogan Estate, for the surrender of her existing lease and the grant of a new one with an extended term. Each part of the transaction required a deed and both parties had signed deeds in preparation for completion. Following delays by the landlord, they then withdrew and made a fresh offer for a new lease at a vastly increased cost. Mrs Longman argued that the deed granting the new lease had been delivered as an escrow and that the remaining conditions had been, or could be, fulfilled. Her claim failed, because there was no intent on the part of the landlord to deliver the deed. This was evident by the fact that the parties' negotiations had been expressly conducted subject to the formal execution of the deeds. The Court was critical

[56] (1989) 58 P & CR 189. The case is discussed further by Clarke, 'Delivery of a Deed: Recent Cases, New Statutes and Altered Practice' [1990] Conv 85.

[57] A term used by Sparkes, *A New Land Law* (2nd edn, 2003), [7–08].

of the conduct of the landlord, which was considered 'deplorable',[58] but conscious that, in everyday conveyancing, it is usual for deeds to be signed in advance of completion with no intention of being irrevocable.

Longman v Viscount Chelsea
(1989) 58 P & CR 189, CA

Nourse LJ

At 193

[T]he negotiations did not differ in substance from those which are conducted between solicitors all round the country every day of the week. In an area where there has already been some tendency to allow hard cases to make bad law we must recognise that our decision will have equal effect on everyday transactions of varying and unpredictable merits, in respect of which settled and expedient practices ought to be more highly regarded than the merits of individual cases.

5 REGISTRATION OF TITLE

In most cases, the formal transfer of a legal estate is not complete until title is registered.[59] Either the legal title being transferred will already be subject to registration, or the transfer in question will trigger compulsory first registration. Where registration is required, failure to do so carries the consequence that legal title will not be transferred. Title remains with the transferor, although, in the case of a sale, it will be held in trust for the transferee under the doctrine of anticipation discussed in Chapter 9.[60]

Registration of title is now governed by the Land Registration Act 2002 (LRA 2002), which repealed and replaced the Land Registration Act 1925 (LRA 1925). The 2002 Act is based on recommendations by the Law Commission.[61] While the Act is a revolution in its own terms, it also marks the latest stage in the *evolution* of registered land, the origins of which can be traced back to the eighteenth century.[62] Over the course of time, the system has developed from a mechanical means of registration of title, based on the substantive principles of unregistered land law, to an independent system of 'title by registration'.[63]

[58] (1989) 58 P & CR 189, 199, *per* Taylor LJ.

[59] The scope of registration is discussed below. The principle exception relates to leases of seven years' duration or less.

[60] No trust will be imposed in the case of a transfer by gift as a result of the maxim that 'equity does not complete an incomplete gift'.

[61] Law Commission Report No 271, *Land Registration for the Twenty-First Century: A Conveyancing Revolution* (2001).

[62] The history is traced by Ruoff et al, *Registered Conveyancing* (1986, ch 1).

[63] The Law Commission's Consultation Paper, which preceded the final Report, noted the aim to bring about '*not a system of registration of title but a system of title by registration*': Law Commission Report No 254, *Land Registration for the Twenty-First Century: A Consultative Document* (1998), [10.43]. The clearest illustration of the shift to title by registration is found in how the 2002 Act governs claims to adverse possession of registered land. This is considered in Chapter 8.

Cooke, *The New Law of Land Registration* (2003, p 31)

> [In] the Land Registration Act 2002 and the Law Commission documents that preceded it we find the divergence of registered from unregistered title affirmed with confidence and reinforced. It has finally been appreciated that title registration can be used to manipulate the nature of title; for the first time we see real legislative enthusiasm for title registration not merely because of its accuracy or its potential benefit to conveyancers, but also because of its ability to change the law relating to land ownership.

Despite the development noted by Cooke, registration of title in English law operates alongside, rather than wholly separately from, general rules of property law. Such a system of registration of title has been described by the Scottish Law Commission as 'bijural': it is a scheme 'which operates with two different laws of property'.[64] This characteristic is important to bear in mind in understanding registration of title. As Nair explains, it means 'that the title registration rules cannot be fully understood except by reference to their interaction with the principles of English property law as a whole'.[65] The difficulty in such a system is that the general law and the rules of registration of title may conflict and each allocate property to different parties. This phenomenon is described by O'Connor as 'bijural ambiguity'.[66] Resolving such conflicts is a key challenge for bijural schemes of registration of title.

5.1 WHY REGISTRATION OF TITLE?

It is common to refer to 'registered land' in contra-distinction to unregistered land, although 'registration of title' is more accurate, because it is titles that are registered. More than one title may subsist in relation to the same piece of land and be registered as separate titles: in particular, a freehold and leasehold. Registration of title is considered desirable, both because of the positive attributes of registration and the defects of alternative systems. Unregistered conveyancing is cumbersome and repetitive: title must be investigated fresh on every transfer through an examination of the title deeds. Registration of title obviates this process by providing a single, updated record of title. An alternative system of deeds registration has successfully been adopted in some jurisdictions, and operated in Yorkshire and Middlesex before being replaced by registration of title.[67] It ensures that an accurate record of deeds is available to investigate title, but maintains the mechanism, and therefore the disadvantages, of unregistered conveyancing.

The 1857 Royal Commission considered registration of title to be the only answer to the following problem:

[64] Scottish Law Commission, *Land Registration: Void and Voidable Titles, Discussion Paper No 125* (2004), at [1.11].

[65] Nair, 'Morality and the Mirror: The Normative Limits of the "Principles of Land Registration"' in *Modern Studies in Property Law: Vol 6* (ed Bright, Oxford: Hart (2011), p 282.

[66] O'Connor, 'Deferred and Immediate Indefeasibility: Bijural Ambiguity in Registered Land Title Systems' (2009) Edin Law Rev 194.

[67] For further explanation, see Cooke, *The New Law of Land Registration* (2003), pp 5–7. She notes that the system is successfully used within the USA, South Africa, and Scotland.

Royal Commission, *Registration of Title* (1857, 23–4)

> By what means, consistently with the preservation of existing rights, can we now obtain such a system of registration as will enable owners to deal with land in as simple and easy a manner, as far as the title is concerned, and the difference in the nature and the subject matter may allow, as they now can deal with movable chattels or stock? No-one doubts that it would be a great benefit to the proprietors of land if they were able to convey it with the same facility as the owners of ships or of stocks or railway shares can now assign their property in any of them. The questions is, can this be accomplished?—and if so how?

The provision of a system of registration of title based on the 1857 Royal Commission report was first provided by the Land Transfer Act 1875.[68] Despite this, even at the time of the 1925 legislation, registered land was still seen as experimental. The intention was to operate both registered and unregistered systems for a ten-year period, before adopting '*whichever system should be found more safe, simple, speedy and economic*'.[69] Although no formal decision on the matter was ever taken, the system of registration was gradually extended.

In replacing the LRA 1925, the primary focus of the LRA 2002 is to lay the foundations for the implementation of e-conveyancing.

Law Commission Report No 271, *Land Registration for the Twenty-First Century: A Conveyancing Revolution* (2001, [1.5]–[1.6])

> The fundamental objective of the Bill is that, under the system of electronic dealing with land that it seeks to create, the register should be a complete and accurate reflection of the state of the title of the land at any given time, so that it is possible to investigate title to land on line, with the absolute minimum of additional enquiries and inspections.
>
> Although that ultimate objective may seem an obvious one, its implications are considerable, and virtually all the changes that the Bill makes to the present law flow directly from it. [. . .]

E-conveyancing itself has not yet been achieved (and is discussed in section 6 below), but the changes made to facilitate its introduction are far reaching in their own right.

The Law Commission noted that the legislation called for a shift in attitude and perception.

Law Commission Report No 271, *Land Registration for the Twenty-First Century: A Conveyancing Revolution* (2001, [1.09]–[1.10])

> To achieve the goals [of the report] will also require a change in attitude. There is a widely held perception that it is unreasonable to expect people to register their rights over land. We find this puzzling given the overwhelming prevalence of registered title. Furthermore, the law has long required compliance with certain formal requirements for the transfer of interests in

[68] A previous system under the Land Registry Act 1862 had departed from those recommendations and was superseded by the 1875 Act: see Ruoff et al (1986), [1–03].

[69] Ruoff et al (1986), [1–05].

land and for contracts to sell or dispose of such interests. The wisdom of these requirements is not seriously questioned. We cannot see why the further step of registration should be regarded as so onerous. In any event, under the system of electronic conveyancing that we envisage (and for which the Bill makes provision), not only will the process of registration become very much easier, but the execution of the transaction in electronic form and its simultaneous registration will be inextricably linked.

These changes will necessarily alter the perception of title to land. It will be the fact of registration and registration alone that confers title. This is entirely in accordance with the fundamental principle of a conclusive register which underpins the Bill.

The changes introduced by the LRA 2002 impact, in particular, on the operation of priority rules in registered land, discussed in Chapter 14, and on adverse possession of registered land, discussed in Chapter 8. We return to evaluate the operation of the 2002 Act in Chapter 15.

5.2 THE PRINCIPLES OF REGISTRATION OF TITLE

Registration of title is not unique to English law. Its introduction matched a parallel development in Australia, in the introduction to New South Wales of the Torrens system of registration, pioneered by Sir Robert Torrens. The principles underlying systems of registered title are identified in the following seminal work.

Ruoff, *An Englishman Looks at the Torrens System* (1957, pp 7–14)

The essential features of every system of registered title are that the State authoritatively establishes title by declaring, under a guarantee of indemnity, that it is vested in a named person or persons, subject to specified incumbrances and qualifications. Anterior defects of title are cured, and thenceforth all investigation of the history of how the named owner came to be entitled is ruled out for ever and all future transactions are carried out by simple forms and simple machinery. No transaction is effective until it has been entered on the official record kept by the State, but once this has happened it cannot (apart from fraud) be upset—that is the broad theory.

It remains for me to indicate what I believe to be the merits or faults of this system. I suggest that in each particular country or state it succeeds or fails according to the degree with which the local law and the local administration accord, or do not accord, with certain fundamental principles. I will call these:

1. The mirror principle.
2. The curtain principle.
3. The insurance principle.

The mirror principle involves the proposition that the register of title is a mirror which reflects accurately and completely and beyond all argument the current facts that are material to a man's title. [. . .]

The curtain principle is one which provides that the register is the sole source of information for proposing purchasers, who need not and, indeed, must not concern themselves with trusts and equities which lie behind the curtain. [. . .]

> The true [insurance] principle is this, that the mirror that is the register is deemed to give an absolutely correct reflection of title but if, through human frailty, a flaw appears, anyone who thereby suffers loss must be put in the same position, so far as money can do it, as if the reflection were a true one. A lost right is converted into hard cash.

Achieving the 'mirror principle' has been a continuous goal of registration of title. It is reflected in the 'fundamental objective' of the LRA 2002 extracted above. Ruoff acknowledged that '*in this imperfect world the mirror does not invariably give a completely reliable reflection*'.[70] Tension remains, in particular, as regards the balance between the mirror principle and the category of 'overriding interests'—that is, those not entered on the register, but necessarily binding against purchasers. This category of interest is discussed in Chapter 14.

The 'curtain principle' is ensured through the process of overreaching, whereby (as long as certain conditions are met) purchasers take land free from beneficial interests under a trust. The mechanism is discussed in Chapter 19.

The 'insurance principle' is reflected in the provision for payment of an indemnity, now governed by Sch 8 of the 2002 Act, for those suffering loss as a result of a rectification of the register (or a mistake, the correction of which would involve rectification), or through mistakes made by the Land Registry. It is closely connected to the issue of indefeasibility of title,[71] which is discussed below.

5.3 THE SCOPE OF REGISTRATION

When registration of title was first introduced, it operated on a voluntary basis. The Land Transfer Act 1897 was the first to make provision for compulsory registration.

Compulsory registration is a two-stage process: firstly, an area is declared (by Order in Council) to be subject to compulsory registration of title; secondly, title is registered for the first time on the occurrence of an event that triggers registration. Compulsory registration began in London and spread piecemeal. The last remaining districts were made subject to compulsory registration on 1 December 1990.[72] Hence, title to all land in England and Wales is now either registered, or will be registered for the first time on the next triggering event.

Voluntary registration is possible under s 3 of the LRA 2002. To assist in the completion of the register, financial incentives have been provided by the reduction of fees for voluntary registration.[73] The Act further encourages voluntary registration through making a registered title qualitatively superior to its unregistered counterpart[74]—in particular, through its limited vulnerability to claims to adverse possession (discussed in Chapter 8).

It is estimated that as much as 25 per cent of land in England and Wales remains unregistered.[75] Because much of this is likely to be rural land, the percentage of titles that remain

[70] Ruoff, *An Englishman Looks at the Torrens System* (1957, Sydney: The Lawbook Co), p 9.

[71] Whilst acknowledging the importance of the link between rectification and indefeasibility, Cooper has argued that indemnity in systems of title registration 'is also to be justified on account of its function as a policy tool to manipulate the attitudes and behaviour of those involved in land dealing': Cooper, 'The Versatality of State Indemnity Provisions' in *Modern Studies in Property Law: Vol 5* (ed Dixon, Oxford: Hart, 2009), p 35.

[72] Registration of Title Order 1989, SI 1989/1347.

[73] Land Registration Fee Order 2006 (SI No 1332, art 2(6)) provides for a 25 per cent discount.

[74] Law Commission Report No 271 (2001), [2.10].

[75] http://www1.landregistry.gov.uk/register-land

unregistered is considerably lower. The Law Commission identified 'total registration' as a goal:[76] '[U]*nregistered land has had its day. In the comparatively near future, it will be necessary to take steps to bring what is left of it on to the register.*'[77] But the recommendations for the 2002 Act did not include provisions to achieve this goal, for which three reasons were given.[78] Firstly, the Law Commission noted that it would be premature to do so before existing provisions were given the opportunity to work (including an anticipated rise in voluntary registration under the LRA 2002).

Secondly, it was felt that the triggers for compulsory registration catch the principal dispositions of land and extension of compulsion beyond this may be heavy handed.

Thirdly, concerns were expressed at further stretching the Land Registry's resources following the changes introduced by the 2002 Act.

The Law Commission suggested that the matter should be subject to a future review.

5.3.1 Registrable Titles and First Registration

The scope of registration of title is outlined in s 2 of the LRA 2002.

Land Registration Act 2002, s 2

This Act makes provision about the registration of title to—

(a) unregistered legal estates which are interests of any of the following kinds—

(i) an estate in land,

(ii) a rentcharge,

(iii) a franchise,

(iv) a profit à prendre in gross, and

(v) any other interest or charge which subsists for the benefit of, or is a charge on, an interest the title to which is registered; and

(b) interests capable of subsisting at law which are created by a disposition of an interest the title to which is registered.

Of most significance is s 2(1)(a), through which registration applies to the two legal estates in land: the freehold and leasehold. As regards leases, ss 2 and 3 (which make provision for first registration of title) limit the application of registration to those of more than seven years' duration. The true scope of registration of title is therefore freeholds and leaseholds of more than seven years' duration. These are the only rights that are subject to compulsory registration. Rentcharges, franchises,[79] and profits *à prendre* in gross[80] may be registered voluntarily, but there is never an obligation to do so. Although economically valuable, these rights are of limited significance in understanding the operation of registered titles and they are not further discussed in this chapter.

Sections 3 and 4 of the LRA 2002 make provision for first registration of title. Section 3 concerns voluntary registration, enabling the proprietor of a freehold and of a lease with

[76] Law Commission Report No 271 (2001), [2.13]. [77] Ibid, [1.6]. [78] Ibid, [2.10]–[2.12].

[79] This category covers certain privileges, such as the grant of a right to hold a market.

[80] A profit is a right to take something from land. It exists in gross where it is not attached to a dominant estate. The category includes, e.g. a right to hunt and shoot game.

more than seven years left to run to apply to have the title registered. Section 4 then identifies the events that trigger compulsory registration.

Land Registration Act 2002, s 4

(1) The requirement of registration applies on the occurrence of any of the following events—

(a) the transfer of a qualifying estate—

(i) for valuable or other consideration, by way of gift or in pursuance of an order of any court, or

(ii) by means of an assent (including a vesting assent); [. . .]

(c) the grant out of a qualifying estate of an estate in land—

(i) for a term of years absolute of more than seven years from the date of the grant, and

(ii) for valuable or other consideration, by way of gift or in pursuance of an order of any court;

(d) the grant out of a qualifying estate of an estate in land for a term of years absolute to take effect in possession after the end of the period of three months beginning with the date of the grant; [. . .]

(f) the grant of a lease out of an unregistered legal estate in land in such circumstances as are mentioned in paragraph (b);

(g) the creation of a protected first legal mortgage of a qualifying estate.

(2) For the purposes of subsection (1), a qualifying estate is an unregistered legal estate which is—

(a) a freehold estate in land, or

(b) a leasehold estate in land for a term which, at the time of the transfer, grant or creation, has more than seven years to run.

Hence, registration is compulsory for freehold titles and for leases of more than seven years' duration. The events triggering first registration relate to the transfer of a freehold and the creation or transfer of a lease or mortgage.

5.3.2 Grades of Title

On first registration, a freehold estate is registered with absolute, qualified, or possessory title. 'Absolute' title is the usual expectation, and vests the estate in the proprietor subject principally to burdens on the register and overriding interests.[81] 'Qualified' or 'possessory' title may be awarded (respectively) where there is a possible defect in the applicant's title or insufficient documentary proof. Registration is additionally subject to estates, rights, or interests that are excepted from registration (in the case of qualified title), or are subsisting or capable of arising at the date of registration (possessory title).[82]

[81] Land Registration Act 2002, s 11(3)–(5).

[82] Ibid, s 11(6)–(7).

A fourfold scheme applies to leasehold title.[83] Absolute, qualified, and possessory leasehold titles have analogous effect to those grades of freehold title, with additional provision that they are subject to covenants, obligations, and liabilities in the lease.[84] Absolute leasehold is only available, however, where the freehold is also registered or proved to the satisfaction of the Registrar. Where this is not the case, good leasehold title is granted, leaving open a possible challenge against the estate out of which the lease was granted.[85]

5.3.3 Subsequent Dispositions

It is essential that the register is kept up to date. Hence, once a title has been brought onto the register through voluntary or compulsory first registration, subsequent dealings must be completed by registration.

Land Registration Act 2002, s 27

(1) If a disposition of a registered estate or registered charge is required to be completed by registration, it does not operate at law until the relevant registration requirements are met.

(2) In the case of a registered estate, the following are the dispositions which are required to be completed by registration—

(a) a transfer,

(b) where the registered estate is an estate in land, the grant of a term of years absolute—

(i) for a term of more than seven years from the date of the grant,

(ii) to take effect in possession after the end of the period of three months beginning with the date of the grant,

(iii) under which the right to possession is discontinuous,

(iv) in pursuance of Part 5 of the Housing Act 1985 (c. 68) (the right to buy), or

(v) in circumstances where section 171A of that Act applies (disposal by landlord which leads to a person no longer being a secure tenant),

(c) where the registered estate is a franchise or manor, the grant of a lease,

(d) the express grant or reservation of an interest of a kind falling within section 1(2)(a) of the Law of Property Act 1925 (c. 20), other than one which is capable of being registered under the Commons Registration Act 1965 (c. 64),

(e) the express grant or reservation of an interest of a kind falling within section 1(2)(b) or (e) of the Law of Property Act 1925, and

(f) the grant of a legal charge.

There is a logical symmetry between the scope of registered dispositions and events triggering compulsory first registration. Hence, the transfer of a registered freehold or leasehold title, and the creation of a lease or more than seven years' duration, are all included in the list of registrable dispositions.

[83] Ibid, s 12. [84] Ibid, s 12(4). [85] Ibid, s 12(7).

It should be noted that the transfer of a registered lease requires registration even if there is less than seven years of the term left to run. The effect of non-compliance is specified in s 27(1): legal title does not pass unless and until completed by registration.[86]

5.4 THE REGISTRATION GAP

Inherent within s 27(1) of the LRA 2002 is the existence of a 'registration gap'—that is, a period between completion of a transfer by execution of a deed and the vesting of legal title by registration. During this period, legal title is held on trust for the purchaser through the doctrine of anticipation discussed in Chapter 9. But the purchaser remains vulnerable to third-party rights arising during this period, or further dealings affecting the title being carried out by the vendor.

Brown & Root Technology Ltd v Sun Alliance and London Assurance Co Ltd
[2001] Ch 733, CA

Facts: Brown & Root Technology Ltd (Technology) was registered proprietor of a lease. Clause 8.1 conferred on it a personal break clause, enabling it to bring the lease to an end by notice. Technology assigned the lease to its parent company, B & R, but the assignment was not registered. Under the predecessor to s 27(1) of the 2002 Act in the Land Registration Act 1925, this meant that legal title had not vested in the assignee. Technology sought to exercise the break clause.

Mummery LJ

In my judgment, Technology were entitled, on the correct construction of clause 8.4 of the lease, to serve the notice terminating the lease. [. . .] My reasons are:

1. Clause 8.4 had two purposes: first, that the right to terminate should be unassignable; secondly, that, if there was an assignment of the lease, the personal right to terminate conferred on Technology should cease to have effect. The second purpose is relevant to the resolution of this appeal, which turns on the identification of the precise event occasioning Technology's cesser of the right to invoke the break clause. The critical question is: has there been an assignment of the lease by the lessee and, if so, when did that event occur?
2. It is common ground that there has been no transfer (and therefore no assignment) of the legal title to the lease; that, as between Technology and B & R, the equitable title to the lease was capable of passing by virtue of a specifically enforceable contract to assign the lease; that, if this were unregistered land, the assignment would occur on the execution of the deed of assignment and the conveyance of the legal estate thereby, and not on the conclusion of the contract to assign; and that, depending on the context, the passing of the equitable or beneficial interest may amount to a transfer or assignment of the property in question, even though there has been no registration of the

[86] Under the Land Registration Act 2002, s 74, the entry has effect from the date of the application for registration.

transfer, as required by statute, to perfect the legal title. The judge referred to the cases of *In re Rose* [1949] Ch 78 and *In re Rose* [1952] Ch 499 as instances of a bequest of shares and an inter vivos gift of shares which took effect as between donor and donee and in accordance with donative intent before the registration of the transfers of the shares pursuant to the provisions of the Companies Act. Until registration there was no transfer so far as the company was concerned, but that did not prevent the gift from being effective as between others.

3. This case is not a matter of beneficial ownership between parties to the transfer of the lease: the issue of assignment or no assignment affects the legal position of a third party, the lessors, who have given their licence to assign but are not a party to the transfer. As was observed by Jenkins LJ in *In re Rose* [1952] Ch 499, 518 it is necessary to keep clear and distinct the position between the transferor and the transferee and the position of a third party. Transfer of the beneficial title is not, in this context, relevant to the legal relationship between the lessees and the lessors. The issue is not what rights Technology and B & R have against each other, but what rights Technology and Sun Alliance have against each other. That is a question of legal, not equitable, rights.
4. As between lessors and lessees, there is binding Court of Appeal authority in *Gentle v Faulkner* [1990] 2 QB 267 for the proposition that assignment means, in the absence of a context showing an extended meaning, an assignment of the legal estate, and not of the beneficial interest, e g by declaration of trust of the lease. It is not a matter of intention to assign, a point highly relevant to the passing of beneficial title, but of whether a defined event has occurred. That event is not completion, as Mr Dowding contended; it is the transfer of the legal title to the lease, so as to create the legal relationship of lessor and lessee between B & R and Sun Alliance.

The facts of the case are unusual. The companies were the claimants in the action and had brought proceedings against the landlord, who had refused to accept the exercise of the break clause. Technology was owned by B & R and, following the assignment of the lease, falling rental values meant that the lease was commercially unattractive. B & R's non-registration therefore operated to its advantage. Technology's exercise of the break clause effectively enabled B & R to escape an unwanted lease.

The case illustrates, however, the vulnerability of a purchaser or assignee pending registration. The loss of a property right may, more usually, be the last thing wanted by a purchaser: for example, if the companies were not related and the exercise of the break clause was motivated by spite against the assignee. In such a case, personal remedies may lie against the vendor (or assignor),[87] although the utility of these is dependent on the vendor's whereabouts and ability to pay.

The registration gap will be removed by e-conveyancing, because completion and registration will occur simultaneously.[88] The Law Commission flagged possible solutions to apply in the meantime,[89] but considered that personal liability sufficed.[90]

[87] For example, because the legal title is held on trust, an action may lie for breach of trust.
[88] Law Commission Report No 271 (2001), [1.20].
[89] Law Commission Report No 254 (1998), [11.26]–[11.29].
[90] Law Commission Report No 271 (2001), [1.20].

TITLE NUMBER: CS72510 PROPERTY REGISTER

CORNSHIRE: MARADON

1. (29 August 1974) The Freehold land shown edged with red on the plan of the above Title filed at the Registry and being 23 Cottage Lane, Kerwick, (PL14 3JP).
2. (29 August 1974) The land tinted yellow on the title plan has the benefit of the following rights granted by the Conveyance dated 27 July 1968 referred to in the charges register:—
   "TOGETHER WITH the benefit of a right of way on foot only over that part of the shared accessway belonging to 25 Cottage Lane."
3. (29 August 1974) The land has the benefit of the rights granted by the Transfer dated 21 August 1974 referred to in the Charges Register.

END OF PROPERTY REGISTER

TITLE NUMBER: CS72510 PROPRIETORSHIP REGISTER—ABSOLUTE FREEHOLD

1. (18 December 2001): PROPRIETOR: PETER ANDREW BARTRAM and SUSAN HELEN BARTRAM of 23 Cottage Lane, Kerwick, (PL14 3JP).
2. (18 December 2001) The price stated to have been paid on 3 December 2001 was £128,000.
3. (18 December 2001) Except under an order of the registrar no disposition by the proprietor of the land is to be registered without the consent of the proprietor of the charge dated 3 December 2001 in favour of the Ilkingham Building Society referred to in the Charges Register.

END OF PROPRIETORSHIP REGISTER

TITLE NUMBER: CS72510 CHARGES REGISTER- ABSOLUTE FREEHOLD

1. (29 August 1974) A Conveyance of the land tinted pink on the title plan dated 14 February 1965 made between (1) Archibald Henry Dawson (Vendor) and (2) Thomas Yorke (Purchaser) contains the following covenants:—
   "THE Purchaser hereby covenants with the Vendor so as to bind the land hereby conveyed into whosoever hands the same may come that the Purchaser and his successors in title will not use the premises hereby conveyed for the retail sale of grocery or as a butchers shop."
2. (29 August 1974) The land in this title is subject to the following rights reserved by a Conveyance dated 27 July 1968 made between (1) Maradon Borough Council (Vendor) and (2) John Robertson (Purchaser):—
   "subject to
   (i) An exception and reservation in favour of the Vendor of the right to enter upon the land hereby conveyed for the purpose of constructing a public sewer the approximate line of which is shown coloured red on the plan annexed hereto and at all times hereafter for the purpose of inspecting cleaning repairing or renewing the said sewer."
   NOTE:—The red line referred to is shown by a blue broken line on the title plan.
3. (29 August 1974) A Transfer of the land in this title dated 21 August 1974 made between (1) Henry Smith and (2) David Stanley Charles and Susan Charles contains restrictive covenants.
   NOTE: Copy in Certificate.
4. REGISTERED CHARGE dated 3 December 2001 to secure the moneys including the further advances therein mentioned.
   PROPRIETOR Ilkingham Building Society of 101 Cambridge Street, Ilkingham IL1 3FC.

Figure 2 Sample register
(Source: http://www.landregistry.gov.uk, accessed 30 October 2008)

5.5 OUTLINE OF A REGISTERED TITLE

A sample registered title is provided in Figure 2. Each registered title is given a unique title number. The information recorded is divided into three parts.

- The *property register* identifies the title as freehold or leasehold, and, in the case of a lease, provides brief details of its terms. It identifies the land by a description, usually the address, and by reference to the official plan. It also lists rights that benefit the title, such as the benefit of an easement.
- The *proprietorship register* gives the name and address of the registered proprietor(s) and any restrictions on their ability to deal with the land.[91] It may also state the price paid for the title.
- The *charges register* contains information on registered mortgages and other secured interests, and any other burdens affecting the title: for example, leases, easements, and covenants to which the land is subject.

5.6 INDEFEASIBILITY

Ruoff, in the extract at section 5.2 above, identifies as an essential requirement of title registration the idea that, once title is entered on the register, '*it cannot (apart from fraud) be upset*'. This encapsulates both the suggestion that a registered title is indefeasible and that indefeasibility is not absolute, because it is subject to an exception for fraud.

Cooke describes 'indefeasibility' as the affirmative warranty of title provided by registration.[92] The warranty is backed by an indemnity through the insurance principle. The approach adopted to indefeasibility is significant, because it determines how secure a registered title is.

Cooke, *The New Law of Land Registration* (2003, pp 99–100)

The question behind a discussion of indefeasibility, or security, or the affirmative warranty, is: can I be sure that, if I purchase a registered estate, I will be able to keep it without fear that I will lose it because of something already existing that I do not know about? Indefeasibility is a policy issue. The shape of the law, and the answer to any ambiguities in it, must depend upon whether preference is to be given to a proprietor of land or to a purchaser; that is, to static or dynamic security. Dynamic security means that the purchaser can be confident that he will get a good title, and this generates a confident market; static security means that someone who owns or has an interest in land can be sure he will not be deprived of it against his will. The two are in tension. If we say that an innocent purchaser P, who has obtained registration of a forged transfer, must be able to keep his land (while compensating O who has lost it due to fraud or forgery by a third party, who of course is not worth suing), P may be happy now, but he will be less happy if another rogue forges P's signature and transfers the land to P2, to whom the same principle will also give a good title, while compensating P. The system must therefore find an acceptable compromise between dynamic and static security; but different systems find the balance at different points.

[91] The entry and removal of restrictions is governed by the 2002 Act, ss 40–47. They are considered in Chapter 14.

[92] Cooke (2003), p 99.

Cooke argues that determining the approach to indefeasibility is now the 'biggest challenge' for the English system, because the provisions of the 2002 Act leave the matter open to interpretation.[93]

In Torrens systems, two approaches to indefeasibility have been identified: immediate indefeasibility supports dynamic security, by favouring the purchaser's title;[94] deferred indefeasibility supports static security, by giving preference to the former proprietor. Immediate indefeasibility has now been adopted in Australia and New Zealand. Cooke argues that the policy of the LRA 2002 requires a move towards the Torrens system and therefore to immediate indefeasibility[95]—but this is subject to special protection that is provided to a proprietor in possession.[96] The Law Commission termed its approach 'qualified indefeasibility'.[97] In this chapter we explain the operation of the provisions of the LRA 2002 connected with indefeasibility. We return to the issue in our evaluation of the LRA 2002 in chapter 15.

5.6.1 Alteration, Rectification, and Indemnity

The scheme of the LRA 2002 is to permit, in circumstances specified in Sch 4 to the Act, an 'alteration' of the register. An alteration may be made by order of a court or by the Registrar. The circumstances in which a court or the Registrar may alter the register are the same, except for an additional power on the part of the Registrar to remove superfluous entries.[98] The other circumstances are given in Sch 4, para 2, in relation to a court and in para 3 in relation to the Registrar.

Land Registration Act 2002, Sch 4, para 2

(1) The court may make an order for alteration of the register for the purpose of—

(a) correcting a mistake,

(b) bringing the register up to date, or

(c) giving effect to any estate, right or interest excepted from the effect of registration.

(2) An order under this paragraph has effect when served on the registrar to impose a duty on him to give effect to it.

The same provision is made for alterations by the Registrar in Sch 4, para 5(a)–(c). A mistake may be procedural or be substantive, the latter arising for example where a person becomes registered proprietor of a title which they are not entitled to as a matter of

[93] Ibid, p 11.

[94] See, however, O'Connor, 'Registration of Title in England and Australia: A Theoretical and Comparative Analysis' in *Modern Studies in Property Law: Vol 2* (ed Cooke, 2003), p 86. She notes that equating dynamic security with protection of purchasers is too simplistic. It also benefits owners because '*Without it, owner's titles can be disturbed years after purchase if a defect in their title or a prior interest comes to light within the relevant limitation period*'.

[95] Cooke (2003), p 101.

[96] Ibid. The term 'proprietor in possession' is defined in s 131 of the 2002 Act. It covers proprietors who are physically in occupation themselves, or where the land is occupied by a party in a specified relationship to the proprietor: e.g., trustees and landlords are treated as proprietors in possession where the land is physically occupied by (respectively) their beneficiaries or tenants.

[97] Law Commission Report No 271 (2001), [10.13].

[98] Schedule 4, para 5(d), of the 2002 Act.

law.[99] We discuss the meaning of mistake further in our evaluation of the LRA 2002 in chapter 15, part 3.1.

'Rectification' is the term given to one specific type of alteration.

Land Registration Act 2002, Sch 4, para 1

In this Schedule, references to rectification, in relation to alteration of the register, are to alteration which—

(a) involves the correction of a mistake, and

(b) prejudicially affects the title of a registered proprietor.

Rectification is significant in understanding the extent to which a title is indefeasible, because it is an alteration that 'prejudicially affects' the registered title. It is directly linked to the availability of an indemnity under Sch 8 of the 2002 Act.

Land Registration Act 2002, Sch 8, para 1

(1) A person is entitled to be indemnified by the registrar if he suffers loss by reason of—

(a) rectification of the register,

(b) a mistake whose correction would involve rectification of the register, [. . .]

(2) For the purposes of sub-paragraph (1)(a)— [. . .]

(b) the proprietor of a registered estate or charge claiming in good faith under a forged disposition is, where the register is rectified, to be regarded as having suffered loss by reason of such rectification as if the disposition had not been forged.

These provisions therefore ensure that where a decision is made as regards the rectification of the register, the party who loses as a result of that decision receives an indemnity. Subparagraph 2(b) precludes an argument that no 'loss' is suffered where rectification is made pursuant to a forged disposition, because such a transaction has no effect.[100]

Paragraph 5 of Sch 8 limits the availability of an indemnity to 'innocent' parties.[101]

Land Registration Act 2002, Sch 8, para 5

(1) No indemnity is payable under this Schedule on account of any loss suffered by a claimant—

(a) wholly or partly as a result of his own fraud, or

(b) wholly as a result of his own lack of proper care.

(2) Where any loss is suffered by a claimant partly as a result of his own lack of proper care, any indemnity payable to him is to be reduced to such extent as is fair having regard to his share in the responsibility for the loss.

[99] *Baxter v Mannion* [2011] 1 WLR 1594. The case is discussed below and in Chapter 15, section 3.1.

[100] The provision maintains the reversal of *Re Odell* [1906] 2 Ch 47, enacted in the 1925 Act.

[101] Apart from instances of rectification, Land Registration Act 2002, Sch 8, provides for an indemnity to be payable as a consequence of various mistakes, errors, and omissions connected with the register that are not connected to an alteration of the register.

The special protection afforded to a proprietor in possession is provided in Sch 4, paras 3 (as regards alterations by a court) and 6 (as regards alterations by the Registrar).

Land Registration Act 2002, Sch 4, para 3

(1) This paragraph applies to the power under paragraph 2, so far as relating to rectification.

(2) If alteration affects the title of the proprietor of a registered estate in land, no order may be made under paragraph 2 without the proprietor's consent in relation to land in his possession unless—

(a) he has by fraud or lack of proper care caused or substantially contributed to the mistake, or

(b) it would for any other reason be unjust for the alteration not to be made.

(3) If in any proceedings the court has power to make an order under paragraph 2, it must do so, unless there are exceptional circumstances which justify its not doing so.

(4) In sub-paragraph (2), the reference to the title of the proprietor of a registered estate in land includes his title to any registered estate which subsists for the benefit of the estate in land.

The same provision is repeated in para 6 as regards alterations by the Registrar. As we have seen, in Sch 4 para 1 rectification is defined as the correction of a "mistake" in a manner that "prejudicially affects the title of the registered proprietor". Hence, the effect of Sch 4 para 3 is that rectification against a proprietor in possession is only possible where, in addition to establishing a mistake, the proprietor consents, substantially contributed to the mistake by fraud or lack of proper care, or for any other reason it would be unjust not to rectify. In *Baxter v Mannion*,[102] Mr Baxter became registered proprietor of a field through claiming to have been in adverse possession of the land against the title of the previous registered proprietor, Mr Mannion.[103] In fact, Mr Baxter had not been in adverse possession and so his registration was held to constitute a mistake within Sch 4 para 1. However, he was now a registered proprietor in possession entitled to the protection afforded (in this instance) by paras 3 and 6. The Court of Appeal accepted the judge's conclusion that "simple justice" required Mr Mannion to be reinstated as proprietor.[104] Mr Baxter had obtained registration when he was not entitled to do so and therefore it would be unjust not to rectify. Commenting on the first instance decision that was endorsed by the Court of Appeal, Dixon suggests that the judge's approach elides two separate issues; the existence of the mistake on the one hand and the reason why it would be unjust not to rectify on the other.[105] The judgment amounts to saying that it would be unjust not to rectify *because* registration had been made by mistake.

The special protection afforded to the proprietor in possession is limited to rectification and does not apply to other alterations of the Registrar. Such an alteration may include amending the register to reflect an easement acquired through prescription, or a right binding against the proprietor as an overriding interest.[106]

[102] [2011] 1 WLR 1594.
[103] For discussion of the operation of adverse possession in the case see Chapter 8, section 5.3.1.
[104] [2011] 1 WLR 1594, [41].
[105] Dixon [2010] Conv 207.
[106] Law Commission Report No 271 (2001), [10.7] and [10.16].

5.6.2 Indefeasibility in Action

To understand the scope of these provisions and, in particular, the 'qualified indefeasibility' conferred on a proprietor in possession, it is helpful to consider their application to a number of examples. The examples are based on the transfer of a registered title from A to B, or the grant of a registered charge to B. It transpires that the transfer is the result of forgery of A's signature, or fraud conducted against A, which includes the situation in which A signs a transfer as a result of undue influence. B may be the perpetrator of the forgery or fraud, or may be innocent—the wrong being committed by a third party (typically, a person who was jointly registered proprietor of the title with A).

The distinction between 'forgery' and 'fraud' is a significant one. The special protection afforded to a proprietor in possession applies only in relation to a rectification (Sch 4, para 3) and the register is only rectified if it is altered to correct a mistake (Sch 4, para 1). The availability of an indemnity (in Sch 8) is, in turn, linked to rectification. 'Mistake' is not defined in the LRA 2002. To determine whether a mistake has been made, it is necessary to consider the effect of a transaction as a matter of the general law. A forged transaction is void and does not, under the general law, pass title to B. Hence, if B is entered on the register pursuant to a forged transaction, then there is a mistake, because B did not, in fact, hold title. Removing B from the register constitutes rectification.

But fraud (such as undue influence) renders a transaction voidable by A. Title passes to B under the general law and therefore no mistake is made in registering B as proprietor: B holds the title at the time of registration. If the voidable transfer is rescinded by A, then removing B from the register does not involve rectification. It is an alteration of the register to bring it up to date (within Sch 4, para 2(1)(b)), with the setting aside of the transaction.[107]

With this distinction in mind, the examples can now be discussed. In each case, it is assumed that following B's entry on the register as proprietor, A seeks to be reinstated.

B forges A's signature

The register is rectified to correct the mistake made by B's registration following a void transaction. B's fraud precludes him or her from benefiting from indefeasibility, even if B is now a proprietor in possession (Sch 4, para 3(2)(a)), or from claiming an indemnity (Sch 8, para 5).

B procures A's signature through fraud (such as undue influence)

The effect of the fraud under the general law is that the transaction is voidable and A has an equity to rescind the transaction against B. When the transaction is set aside, the register is altered to bring it up to date. Because there is no rectification here, no issue arises of B being protected as a proprietor in possession or of an indemnity being payable.

A's signature is forged by a third party

The registration of B is a mistake, because it has been made pursuant to a void transaction. Alteration of the register therefore constitutes rectification. If the register is rectified, then B is indemnified under Sch 8, para 1(1)(a); if not, then A is indemnified under Sch 8, para 1(1)(b). Nothing in the terms of Sch 4 dictates the approach to be taken, although immediate

[107] Law Commission Report No 271 (2001), [10.7], fn 23.

indefeasibility (leaving B as registered proprietor) is consistent with the policy identified by Cooke of moving closer to the Torrens system.[108]

The position changes, however, if B is a proprietor in possession. B then benefits from the special protection afforded to proprietors in possession under Sch 4, para 3(2). The register is unlikely to be rectified against B, leaving A to a financial indemnity. This exemplifies the Law Commission's concept of 'qualified indefeasibility'.

A's signature is procured by fraud (such as undue influence) perpetrated by a third party

As in the previous example of forgery, there is no mistake in B's registration pursuant to a voidable transaction. There is therefore no rectification of the register and no issue of payment of an indemnity. The register may be altered to bring it up to date within Sch 4, para 2(1) (b), if the transaction is rescinded as against B.

The difference between this situation and that in which the fraud is perpetrated by B relates to the likelihood of rescission being available against B, and therefore to the likelihood of any alteration being made to the register. This, in turn, relates to the operation of the general law on undue influence rather than the statutory provisions on alteration of the register. Rescission will be available against B only if B is 'infected' by the undue influence exerted against A by the third party:[109] for example, if B, a bank, were to fail to take the steps necessary under *Royal Bank of Scotland v Etridge (No 2)*[110] to avoid being infected by undue influence exerted against A by her husband, the third party, in procuring A's signature on a mortgage application.

6 THE FUTURE: E-CONVEYANCING

The fundamental objective of the LRA 2002 (contained in [1.5] of the Law Commission report, extracted in section 5.1 above) is directly connected to the introduction of e-conveyancing. The Law Commission further described providing the framework for its introduction as '*the most important single function*' of the Act.[111]

Harpum, who, as Law Commissioner, was one of the architects of the 2002 Act, notes the close connection between the procedural and substantive changes introduced by the Act, and the political significance of e-conveyancing.

Harpum, 'Property in an Electronic Age' in *Modern Studies in Property Law: Vol 1* (ed Cooke, 2001, p 3)

> The mechanisms by which property is transferred are undergoing a revolution, namely, the move from paper-based to dematerialised dealings. [. . .] Because of the time that the business of conveyancing takes and its expense, it has become a significant political issue. These fundamental changes in the ways in which conveyancing is conducted, remarkable though they are in themselves, will necessarily bring equally significant changes in substantive land law in their wake. The substantive law must be harmonised to fit the new conveyancing order.

[108] Cooke (2003), p 101.
[109] The operation of undue influence is discussed in Chapter 29.
[110] [2002] 2 AC 773.
[111] Law Commission Report No 271 (2001), [13.1].

None of this should come as any great surprise. Changes in the manner in which conveyancing is conducted have in the past acted as a catalyst for much wider changes, both legal and otherwise.

Cooke further describes e-conveyancing as the 'magic carpet' that transported the Bill through Parliament by making it politically attractive.[112]

The goal of e-conveyancing is to enable transfers or dispositions of land to become electronic transactions. This will be achieved gradually by the incremental development and introduction of an e-conveyancing system which will, at least initially, operate on a voluntary basis alongside paper-based transactions. E-conveyancing requires a change in formalities, with the deed, discussed in section 4 of this chapter, superseded by an electronic document provided for by section 91 of the LRA 2002. Central to the validity of this document is an electronic signature. For conveyancers this is likely to consist of a signature key held on a cryptographic token and connected to their computer each time a document needs to be signed. Parties to a transaction may delegate authority to sign to their conveyancer or sign using their own electronic signature. In their case, a personal signature takes the form of an Identity Guard Authentication Grid; a card containing a grid of numbers which is valid for the life of a single transaction.[113]

Despite its centrality to the 'conveyancing revolution' promised by the LRA 2002, e-conveyancing has remained elusive. In 2010, the Land Registry launched a consultation on secondary legislation designed to introduce the first e-transfers in 2011. The result of that consultation was a decision to put work "'on hold' for the immediate future".[114] A number of important steps towards e-conveyancing have been taken. Previous consultations by the Land Registry have resulted in secondary legislation providing for Network Access Agreements to be entered into by those participating in e-conveyancing,[115] and for the e-charge;[116] making remortgages the first electronic disposition of land. In addition, there is already electronic access to the register and provision for electronic searches. An electronic application can be made to make non-dispositionary changes to the register (for example, a change of the name of a current registered proprietor), and by a lender to discharge a registered charge. Why then has progress now stalled? There are three key reasons.[117] First is the downturn in the property market that followed the global economic crisis. The Land Registry concluded that this was not the time to launch a new system of conveyancing and that take-up was likely to be small.[118] The experience of e-charges has been telling in this respect. There has been very little take-up of e-charges, with only around 20 created by 2011. The downturn in the market for remortgages following the global economic crises is seen as a significant factor in this respect.[119] Secondly, there remain concerns—albeit doubted by the Land Registry—that e-conveyancing will exacerbate the risk of conveyancing fraud.[120] While paper-based conveyancing is also susceptible to fraud, e-conveyancing appears more vulnerable. As Cooke notes, electronic forgery removes the need for the manual skill involved in copying a handwritten signature: '*I cannot forge a*

112 Cooke (2003, p 158).
113 Land Registry E-conveyancing: Consultation, Secondary Legislation Part 2, [5.4].
114 Land Registry E-conveyancing: Consultation, Secondary Legislation Part 3, [5.2].
115 Land Registration (Network Access) Rules 2008.
116 Land Registration (Electronic Conveyancing) Rules 2008.
117 Land Registry Report on Responses to E-Conveyancing Secondary Legislation Part 3, [5.1].
118 Ibid, [5.1.2]. 119 Ibid, [2.3]. 120 Ibid, [5.1.1].

signature on a paper transfer; I can swipe my card [containing the signature key] *and press the button.*'[121] A signature key is only as secure as the computer system on which it is used. It is vulnerable to lapses in security by the holder of the key (for example, in leaving a computer unattended) and to more sophisticated attacks, such as malicious software enabling the signature to be hijacked by a third party.[122] Thirdly there are unresolved legal issues surrounding the possibility of parties to the transaction delegating their authority to sign to a conveyancer.[123] In particular, there is a concern whether a transaction signed by a single conveyancer on behalf of joint owners will trigger the overreaching mechanism. Overreaching, which is discussed in Chapter 19, plays an essential role in transactions involving co-owned land, but is triggered only where the transaction is undertaken by at least two trustees. It is uncertain whether it will apply to a transaction signed by a single conveyancer on the authority of two trustees.

Underlying these causes for delay in progress towards e-conveyancing is a question of confidence in the system on the part of all of its intended users; from the Land Registry and professionals involved in conveyancing to institutional lenders and ultimately individual consumers undertaking transactions involving land. To instil confidence, e-conveyancing must be legally robust and at the least not increase risks associated with transactions. In relation to risk, with such a significant change perception may be as important as reality. The goal of achieving e-conveyancing has not been abandoned, but its introduction seems almost as far away now as it did when the LRA 2002 passed into law.

6.1 ELECTRONIC DISPOSITIONS: THE LEGAL IMPACT

The introduction of electronic conveyancing does not signal only a procedural change in dealings with land. Its eventual introduction will mark a change in the relationship between the process of registration and substantive property law. This is because of the legal effect of e-conveyancing provided in s 93 of the LRA 2002.

Land Registration Act 2002, s 93

(1) This section applies to a disposition of—

(a) a registered estate or charge, or

(b) an interest which is the subject of a notice in the register,

where the disposition is of a description specified by rules.

(2) A disposition to which this section applies, or a contract to make such a disposition, only has effect if it is made by means of a document in electronic form and if, when the document purports to take effect—

(a) it is electronically communicated to the registrar, and

(b) the relevant registration requirements are met.

[121] Cooke (2003, p 164).

[122] Mason and Bohm, 'The Signature in Electronic Conveyancing: An Unresolved Issue' [2003] Conv 460. The authors provide these and other examples of the vulnerability of the electronic signature.

[123] Land Registry Report on Responses to E-Conveyancing Secondary Legislation Part 3, [5.1.3].

As a result of this section, a contract for the disposition of a registered estate and the disposition (for example, a contract to transfer the freehold of a house or to create a lease of more than seven years) has no effect unless made in electronic form.

As Howell notes,[124] up to now registration has been seen as an 'add-on' to pre-existing interests. Rights are transferred under the general law and then registered (with the acquisition of legal title alone dependent on the final step). Hence, in this chapter, it has been possible to discuss separately creation and transfer, on the one hand, and registration, on the other. Under e-conveyancing, such separation of the substantive law and the process of creation or transfer will cease to be possible.

The wording of s 93(2) is to be contrasted with s 27(1), which currently governs paper-based registered dispositions (and the application of which will be superseded by s 93).[125] Under s 27, a disposition '*does not operate* at law' until registration requirements are met. This enables *equitable* title to pass (through the doctrine of anticipation) as soon as a specifically enforceable contract is in existence. Under s 93(2), a disposition 'only has effect' on registration; there is no qualification to its effect at law.

The consequence of s 93(2) is that the registration gap that currently exists between creation or transfer and registration is removed: creation or transfer and registration will occur simultaneously. The entry into a contract remains a separate stage, although the contract also becomes an electronic document.

At this stage, the likely response of the courts to the attempt to crush equitable intervention is a matter of speculation. Dixon has suggested that the application of s 91 will result in an 'estoppel boom'.[126]

Dixon, 'Proprietary Estoppel and Formalities in Land Law and the Land Registration Act 2002: A Theory of Unconscionability' in *Modern Studies in Property Law: Vol 2* (ed Cooke, 2003, pp 170–1)

First, it is anticipated that the great majority of proprietary rights will be subject to section 93 LRA 2002 in due course [...] Of course, the point is precisely to ensure that virtually all expressly created rights appear on the register. Thus, if they do not appear, they do not exist and resort to estoppel may be the only hope for a disappointed claimant. Secondly, we cannot assume that all property professionals immediately will understand that material deeds and contracts are to be completely ineffective, and a remedy in negligence will not secure the proprietary right denied by section 93 LRA 2002. Thirdly, registration (ie the act of creation or transfer) will be electronic, and only authorised persons will be able to transact. Thus, not only is it likely that individuals will continue to deal with each other without the benefit of legal advice and hence without understanding the relevant formality rules (as in *Yaxley v Gotts*), even if they did comprehend section 93 LRA 2002, how would they ensure the registration of their right? [...] Fourthly, and perhaps most importantly, it is now clear [...] that an 'estoppel' is a proprietary right capable of binding a third party as an overriding interest [...] Thus, whereas the failed creation or transfer of a proprietary right under the rubric of electronic conveyancing will be of no effect at all (s 93 LRA 2002), and so cannot trigger an 'interest that overrides' [...] a successful estoppel can do just this [...] How tempting then

124 'Land Law in an E-Conveyancing World' [2006] Conv 553, 563.

125 Land Registration Act 2002, s 93(4).

126 Dixon, 'Proprietary Estoppel and Formalities in Land Law and the Land Registration Act 2002: A Theory of Unconscionability' in *Modern Studies in Property Law: Vol 2* (ed Cooke, 2003), p 170.

> to use estoppel both to acquire the right despite the absence of compliance with sections 91 or 93 LRA 2002 [. . .] and then when the estoppel is established to ally it with actual occupation to make it binding against a third party. In other words, estoppel may well come to be the single most effective way of creating, transferring and enforcing property rights outside of electronic formalities. The greater the injunction to use electronic measures, the greater the scope for claims in estoppel.

But while acknowledging the possible reticence of the courts to allow perceived injustices to go unchecked, Cooke urges a restrictive approach to estoppel.

Cooke, *The New Law of Land Registration* (2003, pp 163–4)

> Law and Equity have fused, but both traditions remain very much alive; the courts' will to intervene when the law works injustice will hardly vanish overnight. What the courts have found very difficult, of course, is the interaction of their equity jurisdiction with statute. It is one thing to counter a common law injustice with an equitable maxim and its out-workings; it is quite another to override the expressed will of the legislature in a statute. Yet equity has ancient roots as the response to circumstances that the legislator had not thought of, so that modification of a statute by the courts is not inherently impossible, although the courts have become increasingly reluctant to do it. [. . .] Will the courts use their equitable jurisdiction, including the law of estoppel, to combat electronic conveyancing and conveyancing provisions? There is a very difficult line to be drawn here. The courts have the power to sabotage the new system, and it is to be hoped that they will find ways to balance the wish to remedy injustice in the individual case with the need to uphold the policy of the statute, reserving estoppel as a means of reversing injustice in cases involving unusual hardship or fraudulent behaviour, and interpreting fraud quite strictly.

QUESTIONS

1. Are formality requirements necessary?
2. Assess the role of rectification, collateral contracts, and proprietary estoppel under s 2 of the Law of Property (Miscellaneous Provisions) Act 1989.
3. Compare and contrast a deed, a 'non-deed', and an escrow.
4. What are the key advantages of registration of title?
5. What is the 'registration gap' and how will it be closed by e-conveyancing?
6. What do you understand by 'indefeasibility' of title? To what extent is a title registered under the Land Registration Act 2002 indefeasible?
7. What impact will the introduction of e-conveyancing have on existing formality requirements?

FURTHER READING

Bently and Coughlan, 'Informal Dealings with Land after Section 2' (1990) 10 LS 325

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8

INFORMAL METHODS OF ACQUISITION: ADVERSE POSSESSION

CENTRAL ISSUES

1. The principal means of the informal acquisition of legal rights are adverse possession, which enables the acquisition of a legal estate, and rules providing for the informal grant of legal easements.
2. An adverse possession claim has two stages. The first stage—establishing 'adverse possession'—has rules that are common to registered and unregistered land. The second—the consequences of adverse possession—operates differently in relation to registered and unregistered land.
3. Adverse possession has its roots in the concepts of title by possession and relativity of title, combined with the operation of rules on limitation of actions. Its operation reflects ideas underlying unregistered titles.
4. Adverse possession is incompatible with registration of title. The Land Registration Act 1925 sought to align registered land with unregistered land, but the Land Registration Act 2002 has departed from this approach.
5. Under the 2002 Act, it is not possible to acquire title automatically by adverse possession; instead, a claimant has access to a procedure, the outcome of which may be the award of title by registration. The scheme is, however, heavily weighted against claims, except in limited circumstances in which adverse possession is considered still to play a legitimate role.
6. Adverse possession rules have been held to be human rights compliant.
7. Specific issues arise where adverse possession takes place against a leasehold title.

1 INTRODUCTION

In Chapter 4, we saw that legal estates and interests in land can be acquired *dependently*, where they are granted by a person with property rights in land, and *independently*, by

the unilateral conduct of the person acquiring the right. In Chapter 7, we considered the formality requirements that govern the dependent acquisition of legal estates and interests. We have seen that the creation of some legal rights is exempt from the statutory formality requirements: in particular, the grant of a lease for a term of three years or less is exempt from the requirement of a deed.[1] Apart from these specific exemptions, however, legal estates and interests cannot be created though informal *dependent* acquisition. Generally, informal dependent acquisition is the provenance of equitable intervention. We consider the acquisition of equitable interests in land in Chapters 9–11 and 16.

Legal rights may, however, be acquired informally through *independent* acquisition. There are two means through which such rights may arise: firstly, the rules of adverse possession, which provide a means of acquiring a legal estate; secondly, a number of doctrines enable the informal acquisition of a legal easement. The basis for the acquisition of a legal estate by adverse possession is *long use*. This basis is shared by *prescription*, which is one of the sources of an informally acquired easement. If a claimant uses land, or exercises a right with the characteristics of an easement over land, for a period of time, then he or she may obtain legal title, or a legal easement, by virtue of that use.

The similarity between adverse possession and prescription begins and ends with their common foundation in long use.[2] The doctrines differ in how long use is analysed as conferring rights. On the one hand, adverse possession has historically viewed long use as having a *negative* effect—of extinguishing previous titles. This remains the case in relation to unregistered land, although, as we will see, the Land Registration Act 2002 (LRA 2002) adopts a different approach to the effect of adverse possession. Prescription, on the other hand, views long use as having a *positive* effect—of implying the grant of a legal easement.

In *Buckingham County Council v Moran*,[3] Nourse LJ explained the essential difference between the claims as being that prescription requires possession 'as of right', while adverse possession concerns possession 'as of wrong'. This, in turn, means that, in prescription, the intention of the grantor may be significant, while, as will be seen, in adverse possession, the focus is on the intention of the claimant.[4] For the remainder of this chapter, our discussion is confined to adverse possession. Prescription and the other doctrines enabling the informal acquisition of legal easements are considered in Chapter 25.[5]

The English law of adverse possession came under close scrutiny in the *Pye* litigation, which plays a central role in this chapter. The first case, the House of Lords' decision in *JA Pye (Oxford) Ltd v Graham*,[6] concerned a successful claim to adverse possession by Mr and Mrs Graham to valuable development land of which Pye was the registered proprietor. Following the loss of its land, Pye brought an action against the UK before the European Court of Human Rights. It argued that the English law on adverse possession was contrary to the European Convention on Human Rights (ECHR) and that, as a result, it should receive financial compensation for the loss of its land. The Grand Chamber of the European Court of Human Rights rejected Pye's claim.[7] The decision of that Court has been discussed

[1] Law of Property Act 1925, s 52(2).

[2] A point made judicially in *Lovett v Fairclough* (1991) 61 P&CR 385, 398, *per* Mummery J.

[3] [1990] Ch 623, 644. [4] Ibid.

[5] A conjoined discussion of the doctrines is provided by Hopkins, *The Informal Acquisition of Rights in Land* (2000, ch 10). For a general discussion of long use and proprietary rights, see Goymour, 'The Acquisition of Rights in Property by the Effluxion of Time' in *Modern Studies in Property Law: Vol 4* (ed Cooke, 2007).

[6] [2003] 1 AC 419. [7] *JA Pye (Oxford) Ltd v UK* (App No 44302/02) [2008] 1 EHRLR 132.