in Chapter 3, but it is necessary to return to the decision in this chapter in order to place it in the context of the substantive laws challenged by *Pye* and how those laws have been changed by the LRA 2002.

2 IS ADVERSE POSSESSION JUSTIFIED?

We have noted that the basis on which rights are acquired by adverse possession is long use. As Howard and Hill explain, this is not an obvious basis for conferring rights on a claimant.

Howard and Hill, 'The Informal Creation of Interests in Land'
(1995) 15 LS 356, 372–3

> The fact that a claimant has enjoyed a gratuitous benefit for a period in excess [of the statutory requirements] is not in itself a justification for allowing the claimant to continue to enjoy that benefit. If, for example, a newsagent does not object when each week a stranger comes into his shop and takes a Sunday newspaper without paying for it, does the passage of time enable the stranger to assert a right to a Sunday newspaper when the newsagent's good-nature is finally exhausted?

Why, then, is long use seen as sufficient to confer a legal right in land?

Holmes[8] suggested that what lies at the heart of justifications is '*the deepest instincts of man*'. He explained: '*A thing which you have enjoyed and used as your own for a long time* [...] *takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it.*'[9] Holmes emphasized the need to look at limitation rules from the position of the person who gains a right, not that of the 'loser'. In this respect, long use has a 'curative' effect[10] through which the courts clothe fact with right.

Hopkins, *The Informal Acquisition of Rights in Land* (2000, p 219)

> The initial difficulty in justifying [adverse possession and prescription] stems from a perspective of seeing them as "taking" from the legal owner. The difficulties become less apparent if the rules are viewed in terms of "confirming" to [the claimant] that he has the rights he has been exercising. The rules ensure that formal ownership of land reflects actual occupation and use. Reality is given preference above formal legal ownership.

Dockray[11] discussed four reasons why adverse possession is needed. Adverse possession forms part of the general law of limitation of actions—that is, rules that place a long stop on the time during which a claimant may commence proceedings to assert his or her rights.

8 'The Path of the Law' (1897) 10 Harv LR 457, 477. 9 Ibid.
10 Goodman, 'Adverse Possession of Land: Morality and Motive' (1970) 33 MLR 281.
11 'Why Do We Need Adverse Possession?' [1985] Conv 272.

Therefore, Dockray took as a starting point the general justifications for the operation of limitation periods, drawn from the Law Reform Committee.

Law Reform Committee 21st Report, *Final Report on Limitation of Actions* (1977, Cmnd 6923, [1.7])

[. . .]

1. to protect defendants from stale claims
2. to encourage plaintiffs not to sleep on their rights; and
3. to ensure that a person may feel confident, after the lapse of a given period of time, that an incident which might have led to a claim against him is finally closed.

Dockray concluded that these objectives themselves, while relevant, do not fully explain the limitation of actions to recover land. The rules of adverse possession do not operate in a manner that is wholly consistent with any of the three objectives, while, in relation to the third, there is also insufficient evidence that it has influenced the development of the law. Dockray suggested that a fourth objective is at work, which he identified as facilitating the investigation of title to unregistered land.[12]

Dockray, 'Why do we Need Adverse Possession?' [1985] Conv 272, 277–8

To outline the policy, it is necessary to start by recalling that a vendor of unregistered land is obliged nowadays (subject to contrary agreement) to prove his title over a period of at least 15 years starting from a good root. However, as Professor J.T. Farrand points out in *Contract and Conveyance*, this does not require the vendor to give anything like a complete history, the account may not be of ownership at all, some third party being the true owner all the time.

But if this is possible why, it might be asked, does the legislation only require (and why are purchasers generally content only to require) a vendor to prove his title over a minimum period of 15 years. The answer, according to the theory on which the Statute of Limitations is based, is that this is because it is reasonably safe to do so, And it is reasonably safe to do so, according to the same theory, because the Statute was designed to and does provide a kind of qualified guarantee that any outstanding claims to ownership by third parties are time-barred.

The Law Commission considered this to be the 'strongest justification' for adverse possession.[13] The identification of this objective is significant, because, if the justification is rooted in the operation of unregistered land, an obvious question arises as to its applicability in registered land. As we will see, the incompatibility of adverse possession with principles of registered land resulted in significant reforms in the LRA 2002.

[12] See also Goodman (1970, 282–3).

[13] Law Commission Report No 254, *Land Registration for the Twenty-First Century: A Consultative Document* (1998), [10.9]–[10.10].

3 AN OUTLINE OF THE OPERATION OF ADVERSE POSSESSION

Adverse possession has its roots in the concept of relativity of title[14] and the operation of limitation periods. The paradigm case, on which the following explanation is based, is adverse possession by the claimant (C) in unregistered land, of which the title, traced through the title deeds, belongs to the paper owner (PO). In English law, there is no concept of absolute title: title is relative and is based on possession. In a dispute between two parties, the court determines which party has the stronger claim to possession. As soon as C enters into adverse possession, he or she obtains a freehold title to the land. As the following extract explains, the ability to acquire title by possession is a characteristic shared by land and personal property.

Swadling, 'Property' in *English Private Law* (2nd edn, ed Burrows, 2007, [4.414]–[4.417])

The mere act of taking possession—*occupatio* is the Roman term– bestows a right to exclusive possession, a title good against the whole world save a person with a better title. This is true of all things capable of being physically possessed, viz land and goods. In the leading case of *Armory v Delamirie* a chimney-sweep's boy acquired a right to exclusive possession of a brooch merely by the act of taking possession of it. Pratt CJ said:

> [T]he finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner and consequently may maintain trover.

The words 'against all but the rightful owner' are not perfectly accurate. As between the goldsmith who refused to return the brooch and the boy, the boy had the better right to possession, because he had the earlier factual possession. As between the boy and the title-holder of the house where it was found, it is likely that the latter would have had the better title, not because he was 'the rightful owner', but because his possession of his house included possession of the brooch in the chimney and antedated the possession obtained by the boy.

Asher v Whitlock teaches the same lesson in relation to land. The mere act of taking possession of a parcel of land gives the actor a right to exclusive possession of that land good against all save those with a superior right to possession. It should be stressed that the interest acquired by the possessor in a case such as *Armory v Delamirie* or *Asher v Whitlock* is legal and not equitable, for both cases involved successful actions in common law courts.

Logically, the freehold title obtained by possession should be classified as legal. As Swadling notes, both cases that he discusses arose in common law courts—but some doubt as to the classification of the right has been expressed.[15]

C's right to possession is stronger than that of any subsequent possessor, but is vulnerable to earlier claims. Hence, PO can bring an action against C to recover the land, relying on its

[14] For a general analysis of this concept in property law, see Fox, 'Relativity of Title at Law and in Equity' (2006) 65 CLJ 330.

[15] The different views are summarized by Cooke, 'Adverse Possession: Problems of Title in Registered Land' (1994) 14 LS 1, 4–5.

earlier claim to possession evidenced by the paper title. In other words, in a dispute between the parties, PO has the relatively stronger title. But s 15 of the Limitation Act 1980 provides a twelve-year limitation period for actions to recover land. If PO does not take action within that time, then its claim is time-barred. Section 17 of the Limitation Act 1980 provides that, once time-barred, PO's title is extinguished. There is no transfer of PO's title to C. Once the limitation period has expired, however, the title that C obtained by the inception of adverse possession becomes unimpeachable by PO (and anyone claiming through PO's title).

The acquisition of title by adverse possession therefore consists of two distinct stages: firstly, the inception of adverse possession; and secondly, the operation of limitation rules at the end of the requisite period of adverse possession. The principles applying to the inception of adverse possession apply uniformly to registered and unregistered land. Differences emerge, however, in the operation of limitation rules. The concept of title being acquired by possession and extinguished at the end of the limitation period makes no sense in the context of registered land. In registered land, as we have seen in Chapter 7, titles are acquired by registration. A registered title is indefeasible and could not be 'extinguished' for so long as the proprietor is registered as holder of the estate. The Land Registration Act 1925 (LRA 1925) sought to align registered land with the operation of adverse possession in unregistered land. Hence, it enabled title to be acquired automatically in registered land by adverse possession, using the device of a trust to reconcile the extinguishment of a title with registered land principles. The LRA 2002 provides a significant departure from the previous law. There is no concept of title being acquired by adverse possession, or of a limitation period at the end of which the assertion of title is automatically time-barred. Instead, adverse possession provides access to a procedure though which the claimant may acquire title by registration.

In the next section of this chapter, we consider the rules governing the inception of adverse possession; these rules remain applicable to all claims. We will then consider the effect of adverse possession: by the operation of limitation rules in unregistered land and registered land under the LRA 1925, and the new scheme provided for registered land by the LRA 2002. We then consider the human rights challenge to adverse possession and, finally, specific issues that arise where adverse possession is commenced against the holder of a leasehold title.

4 THE INCEPTION OF ADVERSE POSSESSION

The key date to identify is the date at which a cause of action accrues against the paper owner. In unregistered land (and registered land under the LRA 1925), that is the date from which the limitation period begins to run.[16] In registered land, under the LRA 2002, that is the date from which a person is treated as being in adverse possession.[17] The events that trigger the accrual of a right of action are provided by the Limitation Act 1980.

Limitation Act 1980, Sch 1, paras 1 and 8

1 Where the person bringing an action to recover land, or some person through whom he claims, has been in possession of the land, and has while entitled to the land been

[16] Limitation Act 1980, s 15(1).

[17] Land Registration Act 2002, Sch 6, para 11.

dispossessed or discontinued his possession, the right of action shall be treated as having accrued on the date of the dispossession or discontinuance.

8 (1) No right of action to recover land shall be treated as accruing unless the land is in the possession of some person in whose favour the period of limitation can run (referred to below in this paragraph as 'adverse possession'); and where under the preceding provisions of this Schedule any such right of action is treated as accruing on a certain date and no person is in adverse possession on that date, the right of action shall not be treated as accruing unless and until adverse possession is taken of the land.

Hence the inception of adverse possession is dependent on demonstrating either dispossession of the paper owner or its discontinuance in possession. In the latter case, it will be necessary to show separately that the claimant has moved into adverse possession. In relation to the former, as will be seen below, the commencement of adverse possession by the claimant is inherent in the definition of dispossession.

Discontinuance arises where '*the person in possession abandons possession and another then takes it*'.[18] Discontinuance in *possession* is not demonstrated by discontinuance in physical *occupation*; rather, it is analogous to abandonment of land. In *Powell v McFarlane*,[19] Slade J noted that '*merely very slight acts by an owner in relation to the land are sufficient to negative discontinuance*'. Dispossession arises by '*a person coming in and putting another out of possession*'.[20]

The meaning of dispossession was considered by the House of Lords in the following case, the facts of which it is useful to set out at this stage. In this case, whether the Grahams had dispossessed Pye was identified as one of two key issues that determined the outcome of the case.[21]

JA Pye (Oxford) Ltd v Graham
[2003] 1 AC 419, HL

Facts: Pye was the registered proprietor of development land that adjoined the Graham's farm. The land was enclosed by hedges, except for a gate, to which the Grahams held the only key, and a public footpath and highway. Pye had initially granted the Grahams a short grazing agreement to use the land. On the expiry of the agreement, Pye refused a request for renewal, because it was concerned that the existence of an agreement could adversely affect its application for planning permission. The Grahams continued to use the land for their farm, including uses that went beyond the original agreement. Initially, the Grahams continued to seek a renewal of the licence, but their requests went unanswered. Pye did nothing in relation to the land and the Grahams argued that they had acquired title by adverse possession. The House of Lords considered that the claim depended on whether the Grahams had dispossessed Pye (there being no suggestion that Pye had discontinued in possession) and, if so, whether the Grahams had remained in possession for the requisite limitation period.

[18] *Powell v McFarlane* (1979) 38 P&CR 452, 468, *per* Slade J. [19] Ibid. [20] Ibid.
[21] [2003] 1 AC 491, [27]–[28].

Lord Browne-Wilkinson

At 36

[. . .] The question is simply whether the defendant squatter has dispossessed the paper owner by going into ordinary possession of the land for the requisite period without the consent of the owner. [. . .]

At 38

It is sometimes said that ouster by the squatter is necessary to constitute dispossession: see for example *Rains v Buxton* (1880) 14 Ch D 537, 539 *per* Fry J. The word "ouster" is derived from the old law of adverse possession and has overtones of confrontational, knowing removal of the true owner from possession. Such an approach is quite incorrect. There will be a "dispossession" of the paper owner in any case where (there being no discontinuance of possession by the paper owner) a squatter assumes possession in the ordinary sense of the word. Except in the case of joint possessors, possession is single and exclusive. Therefore if the squatter is in possession the paper owner cannot be. If the paper owner was at one stage in possession of the land but the squatter's subsequent occupation of it in law constitutes possession the squatter must have "dispossessed" the true owner for the purposes of Schedule 1, paragraph 1 [. . .]

Hence, in a case of dispossession, the right of action accrues at the date at which the claimant commences possession. Therefore, the answer to the question of whether the Grahams had dispossessed Pye lay in determining whether the Grahams could establish that they were in possession of the land.

Before considering the meaning of 'possession', it is useful to consider the definition of 'adverse'.

4.1 'ADVERSE' POSSESSION DEFINED

A claimant's possession is not adverse if he or she is present with the licence of the paper owner. In the following case, a claim to adverse possession failed, because the paper owner had unilaterally granted a licence.

BP Properties Ltd v Buckler
(1988) 55 P & CR 337, CA

Facts: The appellant's parents had been in adverse possession of their home by remaining in occupation at the end of their lease. An order of possession was obtained within the limitation period, but was not enforced. BP Properties then purchased the freehold and wrote to Mrs Buckler, informing her that she could remain in the property rent-free for her life. Mrs Buckler neither accepted nor rejected the terms of the letter. Following her death, the appellant sought to establish that his parents had obtained title by adverse possession.

Dillon LJ

At 346–7

The claim that a unilateral licence can stop time running is a new one. It may be of some general importance in that it would enable a person who is not prepared to incur the obloquy of bringing proceedings for possession, or of enforcing a possession order, to keep his title alive for very many years until it suits him to evict. It might be thought that for title to be kept alive in this way was contrary to the policy of the statute as exemplified by section 13 of the 1939 Act which reproduced earlier statutory provision to the same effect and prevented any right of action to recover land being preserved by formal entry or continual claim.

So far as the facts are concerned, it would in my judgment be artificial to say that Mrs. Buckler "accepted" the terms set out in the two letters; B.P. Properties Ltd. neither sought nor waited for her acceptance. It would be equally artificial to say that there was any consideration in law for those terms.

It may be that the result would have been different if Mrs. Buckler had, as soon as she learned of the letters, plainly told B.P. Properties Ltd. that she did not accept the letters, and maintained her claims to be already the owner of the property; she did not however do that. She accepted her solicitors' advice that as the warrant for possession had been withdrawn, she should do nothing while the 12-year period from the date of the possession order of December 11, 1962 expired. In essence she was not asserting during the time from the receipt of the letters until after December 11, 1974—or indeed thereafter—any claim to ownership of the farmhouse and garden, or any intention to exclude the owner of the paper title.

Whether B.P. Properties Ltd. could or could not in law, in the absence of consideration have sought to determine in her lifetime the licence granted to Mrs. Buckler by the two letters, they did not in fact seek to do so. Had they sought to do so, they would in the absence of any repudiation of the letters by Mrs. Buckler have had to give Mrs. Buckler a reasonable time to quit as with any licensee.

The nature of Mrs. Buckler's possession after receipt of the letters cannot be decided just by looking at what was locked up in her own mind. It must depend even more, on this aspect of the case, on the position as seen from the standpoint of the person with the paper title. What could that person have done? The rule that possession is not adverse if it can be referred to a lawful title applies even if the person in possession did not know of the lawful title; the lawful title would still preclude the person with the paper title from evicting the person in possession. So far as Mrs. Buckler was concerned, even though she did not "accept" the terms of the letters, B.P. Properties Ltd. would, in the absence of any repudiation by her of the two letters, have been bound to treat her as in possession as licensee on the terms of the letters. They could not have evicted her (if they could have done so at all) without determining the licence.

I can see no escape therefore from the conclusion that, whether she liked it or not, from the time of her receipt of the letters, Mrs. Buckler was in possession of the farmhouse and garden by the licence of B.P. Properties Ltd., and her possession was no longer adverse within the meaning of s 10 of the 1939 Act.

The paper owner in that case therefore expressly granted the licence.

In the following case, the Court of Appeal considered that, in certain circumstances, a licence could be implied, thus defeating a claim to adverse possession on the basis that the claimant's possession is not 'adverse'.

Wallis's Cayton Bay Holiday Camp Ltd v Shell-Mex and BP Ltd
[1975] QB 94, CA

Facts: Shell-Mex had acquired land fronting the proposed site of a new road. The owners of the holiday camp had used the land as a farm and subsequently as a frontage to their camp. When the Council abandoned plans for the road, Shell-Mex wrote to the Wallises, offering to sell the land to them. The Wallises did not reply to this or a subsequent letter, but waited until their use exceeded twelve years, whereupon they argued that they had obtained title by adverse possession.

Lord Denning MR

At 103

When the true owner of land intends to use it for a particular purpose in the future, but meanwhile has no immediate use for it, and so leaves it unoccupied, he does not lose his title to it simply because some other person enters on it and uses it for some temporary purpose, like stacking materials; or for some seasonal purpose, like growing vegetables. Not even if this temporary or seasonal purpose continues year after year for 12 years, or more: see *Leigh v. Jack* (1879) 5 Ex.D. 264; *Williams Brothers Direct Supply Ltd. v. Raftery* [1958] 1 Q.B. 159; and *Tecbild Ltd. v. Chamberlain* (1969) 20 P. & C.R. 633. The reason is not because the user does not amount to actual possession. The line between acts of user and acts of possession is too fine for words. The reason behind the decisions is because it does not lie in that other person's mouth to assert that he used the land of his own wrong as a trespasser. Rather his user is to be ascribed to the licence or permission of the true owner. By using the land, knowing that it does not belong to him, he impliedly assumes that the owner will permit it: and the owner, by not turning him off, impliedly gives permission. and it has been held many times in this court that acts done under licence or permitted by the owner do not give a licensee a title under the Limitation Act 1939. They do not amount to adverse possession

In *Pye v Graham*, the decision in the *Wallis's* case was seen as stemming from a concept of 'non-adverse possession': arising where a claimant entered into possession of the paper owner's land, but did not 'oust' the paper owner by carrying out acts inconsistent with the paper title.[22] The general concept of non-adverse possession was removed from English law by the Real Property Limitation Act 1833 and the House of Lords considered that it had not been reintroduced by a 'side wind' by the specific requirement of 'adverse possession' in Sch 1, para 8, of the Limitation Act 1980 (or its predecessor in the Limitation Act 1939).[23] The specific manifestation of the concept in the *Wallis's* case was reversed by the Limitation Act 1980.

Limitation Act 1980, Sch 1, para 8(4)

(4) For the purpose of determining whether a person occupying any land is in adverse possession of the land it shall not be assumed by implication of law that his occupation is by permission of the person entitled to the land merely by virtue of the fact that his occupation is not inconsistent with the latter's present or future enjoyment of the land.

[22] [2003] 1 AC 419, [33].

[23] Ibid, [32].

This provision does not preclude the implication of a licence in a genuine case, but ensures that a licence is not implied merely by reason of the fact that the adverse possessor's actions are not inconsistent with the paper owner's intended use of the land.

4.2 'POSSESSION' DEFINED

As has been noted, in *Pye v Graham*, the House of Lords considered that the Grahams would establish that they had dispossessed Pye by demonstrating that they had entered into possession of the land. This, in turn, raised the question of the meaning of 'possession'.

Defining this term forms the bedrock of case law on adverse possession. Although the term is being defined for a particular purpose, Green argues that the courts are influenced by, and construct, a particular concept of landowner.

Green, 'Citizens and Squatters' in *Land Law: Themes and Perspectives*
(eds Bright and Dewar, 1998, p 230)

In each case of adverse possession, the judges have to decide whether what the claimant did to the land amounts to possession of it. In making these decisions, they are, little by little, fleshing out the character and activities of 'the landowner', while at the same time his pre-existing mythical figure is affecting their decisions. This is because such mythical figures as 'the landowner' 'resonate across space and over time' to anchor a philosophy of having and being 'which can influence events, behaviour and perception'. The judges are thus stabilizing and making transparent the boundaries not only on the surface of the land but also in the ideology of ownership.

In *Pye v Graham*, the House of Lords confirmed that 'possession' is to be understood in the '*ordinary sense of the word*'.[24] The House of Lords defined it in a manner closely following an analysis by Slade J in *Powell v McFarlane*.[25]

JA Pye (Oxford) Ltd v Graham
[2003] 1 AC 419, HL

Lord Browne-Wilkinson

At 40

[There] are two elements necessary for legal possession: (1) a sufficient degree of physical custody and control ("factual possession"); (2) an intention to exercise such custody and control on one's own behalf and for one's own benefit ("intention to possess"). What is crucial is to understand that, without the requisite intention, in law there can be no possession. [. . .] [There] has always, both in Roman law and in common law, been a requirement to show an intention to possess in addition to objective acts of physical possession. Such intention may be, and frequently is, deduced from the physical acts themselves. But there is no doubt

[24] [2003] 1 AC 419, [36]–[39]. [25] (1979) 38 P&CR 452, 470.

> in my judgment that there are two separate elements in legal possession. So far as English law is concerned intention as a separate element is obviously necessary. Suppose a case where A is found to be in occupation of a locked house. He may be there as a squatter, as an overnight trespasser, or as a friend looking after the house of the paper owner during his absence on holiday. The acts done by A in any given period do not tell you whether there is legal possession. If A is there as a squatter he intends to stay as long as he can for his own benefit: his intention is an intention to possess. But if he only intends to trespass for the night or has expressly agreed to look after the house for his friend he does not have possession. It is not the nature of the acts which A does but the intention with which he does them which determines whether or not he is in possession.

It is necessary to address each of these elements separately—that is the approach taken by the courts in determining claims to adverse possession—but it should be borne in mind at the outset that the two are closely interconnected.

Green, 'Citizens and Squatters' in *Land Law: Themes and Perspectives*
(eds Bright and Dewar, 1998, pp 235–6)

> In reality, the human body and mind, actions and thoughts, are fully interdependent: interpretation of the one is dependent on an understanding of the other. An ambiguous action may be given unambiguous meaning when viewed in the light of the intention with which it is done, and the interpretation of an action which appears to have an unequivocal meaning may be changed by the additions of a particular human will. On their own, neither actions nor intentions have any necessary meaning.
>
> [...] The real key to adverse possession lies not in discrete acts and intentions but in the effect of the claimant on the object of the claim (the land), and on the world beyond.

As we will see, ultimately, a claimant's acts provide the strongest evidence of his or her intent. Indeed, such is the connection between them that there is some doubt as to whether intent, in fact, exists as a free-standing element.

4.2.1 Factual Possession

In *Pye v Graham*, the House of Lords approved a definition of factual possession given by Slade J in the following case.

Powell v McFarlane
(1979) 38 P & CR 452, HC

Facts: The claimant, Mr Powell, lived on a farm with his grandparents. As a 14-year-old boy, he had started to use neighbouring land for purposes connected with the farm. In particular, he cut hay and made 'rough and ready' repairs to the boundary fence, so that the land could be used to graze the family's cow. The paper owner, Mr McFarlane, was working overseas and, on his return, Mr Powell argued that he had obtained title to the land by adverse possession.

Slade J

At 470–1

Factual possession signifies an appropriate degree of physical control. It must be a single and [exclusive] possession, though there can be a single possession exercised by or on behalf of several persons jointly. Thus an owner of land and a person intruding on that land without his consent cannot both be in possession of the land at the same time. The question what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed. In the case of open land, absolute physical control is normally impracticable, if only because it is generally impossible to secure every part of a boundary so as to prevent intrusion. [. . .] Everything must depend on the particular circumstances, but broadly, I think what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no-one else has done so.

Mr Powell's claim to adverse possession failed on the basis that he could not demonstrate an intention to possess (that aspect of the case is considered below). No specific findings were made in relation to factual possession. In *Pye v Graham*, it was held that the Grahams were in occupation of the land with exclusive physical control. Pye was physically excluded by the hedges and by the lack of a key to the only gate.[26] Therefore, factual possession was established.

The geographical scope of a claim to adverse possession is not necessarily limited to the extent of the land over which the acts that constitute factual possession have been exercised. In *Roberts v Swangrove Estates Ltd*, Lindsay J explained that the question of the scope of a claim is '*necessarily one of fact and degree*'.[27] He suggested, for example, that '*a squatter [who] has occupied a terraced house, has lived in it and has denied access through its doors other than to his visitors, he would, no doubt, be taken to have had possession of the whole house notwithstanding that he failed to prove he had occupied a back room on the top floor. Conversely a squatter who created for himself a small kitchen garden in a corner of a 40 acre field might find, on claiming title as to the whole 40 acres, that all he acquired by adverse possession was a fee simple in the kitchen garden part*'.[28] Possession of part will also constitute possession of the whole where such an inference is reasonably drawn from a '*common character of locality*'.[29]

The claimant's acts of possession must be open, but in the absence of deliberate concealment it is not necessary for the paper owner to be aware of them.[30] If the paper owner credibly denies knowledge, the test is an objective one, '*whether a reasonable owner of the plot, paying that due regard to his interests as owner of it which was to be expected of him, would have acquired notice of them and would thereby have clearly appreciated that the squatter concerned was seeking to dispossess him*'.[31]

The requirement of exclusive possession has raised a specific question whether it is possible to claim adverse possession of part of a building; for example, a room in a house

[26] [2003] 1 AC 419, [41].
[27] *Roberts v Swangrove Estates Ltd* [2007] 2 P & CR 17, [54].
[28] Ibid.
[29] *Lord Advocate v Lord Blantyre* (1878–79) LR 4 All Cas 770, 791 *per* Lord Blackburn.
[30] *Powell v McFarlane* (1979) 38 P & CR 452, 480.
[31] *Roberts v Swangrove Estates Ltd* [2007] 2 P & CR 17, [43] *per* Lindsay J.

or one flat in a block. In *Ramroop (Sampson) v Ishmael and Heerasingh*,[32] the Privy Council noted that there is '*surprisingly little authority*'[33] on the point, but accepted that such claims follow logically from the fact that land can be held horizontally. It must be shown, however, that '*part of the building was capable of being possessed by the claimant to the exclusion of others*'.[34] The Privy Council noted that this '*might be relatively easy to plead and prove if the property in question was a self-contained residential flat in a purpose-built block. It might be much more difficult in a building which had slipped into informal multiple occupation with shared facilities*'.[35] On the facts, the claim failed. The claimant argued that she was in adverse possession of the downstairs of a house, but had not provided sufficient evidence of the extent of her claim or of the layout of the house in question.

4.2.2 Intention to Possess

In *Pye v Graham*, the House of Lords approved the decision in *Buckinghamshire County Council v Moran*,[36] in which an intention to possess had been distinguished from an intention to 'own'.[37] Adopting the formulation of the judge at first instance, the Court of Appeal in *Moran* held that what is required is '*not an intention to own or even an intention to acquire ownership but an intention to possess*'.[38] The distinction had been significant on the facts of that case. The council had acquired the disputed land for future use as part of a road. The land adjoined the claimant's garden and he used the land as an extension of his garden. The only access to the land was through the claimant's garden, or by a gate, which the claimant had locked. The claimant had conceded that he would have been obliged to leave the land if it was required for the road. This may have defeated an intention to 'own' the land, but it did not preclude the claimant demonstrating that he intended to possess the land, for the time being, to the exclusion of all others.[39]

Similarly, in *Pye v Graham*, the Grahams' willingness to enter into another agreement with Pye and to pay for the use of the land may have defeated an intention to own, but did not preclude an intention to possess. Lord Browne-Wilkinson explained: '[An] *admission of title by the squatter is not inconsistent with the squatter being in possession in the meantime*.'[40]

It is necessary to show an intention to exclude the world at large, including the paper owner.[41] For the duration of the limitation period, however, the claimant remains vulnerable to the paper owner's assertion of its stronger title. With this in mind, the requirement of intention was reformulated in *Powell v McFarlane*, in a manner approved by the House of Lords in *Pye v Graham*.[42]

[32] [2010] UKPC 14. [33] Ibid, [23]. [34] Ibid, [25]. [35] Ibid. [36] [1990] Ch 623.

[37] This formulation was rejected by Tee, who argued that an intention to own should be required: 'Adverse Possession and the Intention to Possess' [2000] Conv 113. Her argument is countered by Harpum and Radley-Gardner, 'Adverse Possession and the Intention to Possess: A Reply' [2001] Conv 155.

[38] [1990] Ch 623, 643. [39] Ibid, 642–3. [40] [2003] 1 AC 419, [46].

[41] *Littledale v Liverpool College* [1990] 1 Ch 19, 23. For examples of cases that have failed on this point, see *Battersea Property Co v London Borough of Wandsworth* [2001] 19 EG 148 (no intention to exclude the world where the claimant provided access to the land to holders of allotments) and *Batt v Adams* [2001] 32 EG 90 (claimant did not intend to exclude the person that he wrongly believed to be the paper owner).

[42] [2003] 1 AC 419, [43].

Powell v McFarlane
(1979) 38 P & CR 452, HC

Slade J

At 471–2

What is really meant, in my judgment, is that, the *animus possidendi* involves the intention, in one's own name and on one's own behalf, to exclude the world at large, including the owner with the paper title [. . .] so far as is reasonably practicable and so far as the processes of the law will allow.

As has been noted, in *Powell v McFarlane*, the claim to adverse possession failed on the basis of intention. Slade J considered Mr Powell's acts to be equivocal, in the sense that they were open to interpretation as demonstrating intent merely to use the land for so long as the paper owner took no steps to prevent the use, without intending to appropriate the land.[43] The claimant's age at the time that his acts began appeared to be a significant consideration in this regard.[44] Subsequently, Mr Powell had erected signs on the land and parked lorries on it in connection with his business. Slade J acknowledged that, at that later stage, the claimant may have established an intention to possess, but these acts occurred within the limitation period.

In *Pye v Graham*, the House of Lords held that the Grahams could establish an intention to possess. In continuing to use the land at the expiry of the original grazing agreement, they had acted in a way that they knew to be contrary to the wishes of Pye. They had made such use of the land as they had wished, including for purposes beyond the scope of the original grazing agreement. In essence, the Grahams had used the land '*for all practical purposes* [. . .] *as their own and in a way normal for an owner to use it*'.[45]

How to prove intent, and the relationship between intent and factual possession, remains unclear. In *Powell*, as has been seen, the failure of intent related directly to the nature of the claimant's acts: his acts were not sufficient, in qualitative terms, to establish intent. Further, it appears that the only way in which Mr Powell could have established intent would have been to show that he had done more. Slade LJ indicated that little weight would be afforded to self-serving declarations by a claimant as to his or her intent.[46] Similarly, in *Pye v Graham*, the claimants succeeded in establishing intent because their acts were qualitatively strong: they had used the land as an owner would. This gives rise to the question of whether intent is a free-standing requirement or is simply derived from the claimant's acts.

In *Pye v Graham*,[47] Lord Browne-Wilkinson acknowledged that intent may be deduced by the claimant's physical acts. Lord Hutton suggested that where the claimant makes full use of the land as if he or she were the owner, the claimant's conduct is sufficient to establish intent. The burden then shifts to the paper owner to provide evidence that points to the contrary.[48] In *Powell v McFarlane*, Slade J suggested that 'unequivocal' acts by the claimant established intent, unless the paper owner could demonstrate otherwise. Such acts include enclosure, which has been described as the strongest evidence of intent,[49] the

[43] (1979) 38 P&CR 452, 478. [44] Ibid, 480.
[45] [2003] 1 AC 419, [61], *per* Lord Browne-Wilkinson. [46] (1979) 38 P&CR 452, 476.
[47] At [40] of his judgment extracted above. [48] [2003] 1 AC 419, [75]–[76].
[49] *Seddon v Smith* (1877) 36 LT 168. See further the discussion of enclosure in *Buckingham County Council v Moran* [1990] Ch 623 and *Powell v McFarlane* (1979) 38 P & CR 452.

cultivation of agricultural land, placing and enforcing 'keep out' notices, and locking or blocking the only means of access.[50] Where the claimant's acts are equivocal (as they were considered to be in that case), the claimant will need to adduce additional evidence to demonstrate his or her intent.[51]

On the face of it, this suggests that, in some cases, intent will be determined by reference to the claimant's acts, while in others, the claimant will be invited positively to prove his or her intent. Given the courts' (understandable) reticence to give weight to self-serving statements by claimants as to their intent, however, it is difficult to know what evidence, other than the claimant's acts, could be adduced.

Radley-Gardner questions whether intent is, in fact, a free-standing requirement. He distinguishes between 'strong' will theory (in which intent is a free-standing requirement) and 'weak' will theory (in which intent is derived from the claimant's acts).

Radley-Gardner, 'Civilized Squatting' (2005) 25 OJLS 727, 745–7

> It has to be said that the flirtations in English adverse possession cases with the 'strong' intentions theory, requiring animus as a discrete component, have not been successes. This has been a back-door method for introducing inquiries as to motive into the post-1833 law to inject some moral fibre into what has been described as 'a major inducement to steal land'. Yet such inquiries are irrelevant to the operation of possession, which is a question of fact and not morality. [. . .]
>
> A weaker form of animus can, however, produce beneficial results. The unhappy consequences of stronger will theories might make a weaker version of animus more attractive, in which it is treated not as an independent component requiring separate proof, but rather arises as a rebuttable presumption arising from conduct. This would be beneficial in those rare cases where a squatter makes a statement against his own interest, denying that he intended to be in possession. In cases of that nature, there is no practical reason why the court should not deny possession. [. . .] Except, then, in this attenuated form, where the squatter effectively waives his possession, conduct alone should be the crux of possession in English law.

In *Purbrick v London Borough of Hackney*,[52] Neuberger J emphasized the need to assess the claim on the basis of what the claimant has done. The fact that the claimant could have done more does not defeat a claim if what he or she has done is sufficient to demonstrate factual possession and an intention to possess.

Similarly, in *Topplan Estates v Townley*,[53] the claimant's acts were sufficient to establish intent even though his use of the land did not change following the expiry of a previous grazing agreement, which, on its terms, purported not to grant possession. The acts fell to be assessed on their own merits and were not 'diluted or denatured' by reference to the parties' previous dealings.[54]

50 (1979) 38 P & CR 452, 478.
51 Ibid, *Pye v Graham* [2003] 1 AC 419, [76].
52 [2003] EWHC 1871, [20]–[23].
53 [2004] EWCA 1369.
54 Ibid, [79], *per* Jonathan Parker LJ.

4.2.3 The Rule in *Leigh v Jack*

We have seen that, in the *Wallis's* case, the Court of Appeal held that a licence would be implied where a person enters into possession, but does not act in a manner inconsistent with the holder of the paper title, although that decision has since been reversed by Sch 1, para 8(4), of the Limitation Act 1980. The *Wallis's* case was based on a more specific doctrine derived from *Leigh v Jack*.[55] In that case, it was held that there is no 'dispossession' of the paper owner by a claimant whose acts are not inconsistent with the paper owner's future use of the land. On the facts, the claimant's use of land for storage connected with his business was held not to constitute a dispossession of the paper owner, because the acts were not inconsistent with the paper owner's intention to dedicate the land to the public as a road. Doubt has been expressed about whether this rule is reversed by Sch 1, para 8(4), of the Limitation Act 1980,[56] but it has been held, in any event, to be wrong as a matter of law.[57]

The underlying difficulty with the rule is that the sufficiency of the claimant's acts is made dependent upon the paper owner's intent. In this way, the rule focuses on the intention of the paper owner and not the intention of the adverse possessor. In *Pye v Graham*, Lord Browne-Wilkinson commented that '*the suggestion that the sufficiency of the possession can depend on the intention not of the squatter but of the true owner is heretical and wrong*'.[58] This is not to say, however, that the paper owner's intended use of the land is invariably irrelevant.

JA Pye (Oxford) Ltd v Graham
[2003] 1 AC 419, HL

Lord Browne-Wilkinson

At 45

The highest it can be put is that, if the squatter is aware of a special purpose for which the paper owner uses or intends to use the land and the use made by the squatter does not conflict with that use, that may provide some support for a finding as a question of fact that the squatter had no intention to possess the land in the ordinary sense but only an intention to occupy it until needed by the paper owner. For myself I think there will be few occasions in which such inference could be properly drawn in cases where the true owner has been physically excluded from the land. But it remains a possible, if improbable, inference in some cases.

In this way, Lord Browne-Wilkinson refocused *Leigh v Jack* on the intention of the claimant: the paper owner's intended use of the land may be relevant, but only to the extent that it sheds light on the intention of the claimant. The decision on the facts of *Leigh v Jack* is generally considered to have been correct. It has been suggested that either the paper owner was not dispossessed, because he had continued to carry out repairs to a fence,[59] or that the adverse possessor, who was aware of the intended use of the land, thereby fell short of demonstrating factual possession or an intention to possess.[60]

[55] (1879) 5 Ex D 264. [56] Dockray, 'Adverse Possession and Intention II' [1982] Conv 345.
[57] *Pye v Graham* [2003] 1 AC 419, [45]. [58] Ibid. [59] Ibid.
[60] *Buckingham County Council v Moran* [1990] Ch 623, 639–40.

4.2.4 Acknowledgement of Title

A right of action that has accrued to the paper owner on the inception of adverse possession is brought to an end and replaced with a fresh right of action if the adverse possessor acknowledges the paper owner's title. The date of the acknowledgement of title, therefore, replaces the date of adverse possession as the time from which the limitation period begins to run in unregistered land or the adverse possession is treated as having commenced in registered land. However, only a formal acknowledgement, made in writing and signed by the person making it, is effective. The relevant provisions are found in ss 29 and 30 of the Limitation Act 1980.

Limitation Act 1980, sections 29 and 30

29(1) Subsections (2) [. . .] below apply where any right of action (including a foreshore action) to recover land [. . .] has accrued.

(2) If the person in possession of the land [. . .] in question acknowledges the title of the person to whom the right of action has accrued –

(a) the right shall be treated as having accrued on and not before the date of the acknowledgment [. . .]

(7) [. . .] a current period of limitation may be repeatedly extended under this section by further acknowledgements [. . .], but a right of action, once barred by this Act, shall not be revived by by any subsequent acknowledgement [. . .]

30(1) To be effective for the purposes of section 29 of this Act, an acknowledgment must be in writing and signed by the person making it.

(2) For the purposes of section 29, any acknowledgment [. . .] –

(a) may be sent by the agent of the person by whom it is required to be made under that section; and

(b) shall be made to the person, or to an agent of the person, whose title or claim is being acknowledged [. . .]

The operation of these provisions was scrutinized by the House of Lords in the following case.

Ofulue v Bossert
[2009] 1 AC 990

Facts: Mr and Mrs Ofulue were registered proprietors of a property which they had let to tenants when they went to live abroad. Since 1981 or 1982 the property had been occupied by Ms Bossert who had been given possession, together with her father (who was now deceased), by the previous tenant. Possession proceedings had initially been commenced against Ms Bossert and her father in 1987, but these had been struck out in 2002. The current proceedings had then been launched in 2003. The initial proceedings had commenced well within the limitation period and so adverse possession had not been raised. When Ms Bossert claimed adverse possession in response to the current proceedings, the Ofulues argued that two events related to the initial proceedings

constituted an acknowledgment of title under s 29. One event was an offer to buy the property which the Bosserts had made in correspondence with the Ofulues in 1992. The House of Lords agreed with the Court of Appeal that an offer to buy constituted an acknowledgement of title, but the difficulty faced by the Ofulues was that the correspondence was labelled 'without prejudice'. The majority of their Lordships (Lord Scott dissenting) concluded that the correspondence fell within the scope of a general rule of evidence which prohibited 'without prejudice' correspondence from being relied upon in court. This aspect of the case, which concerns the operation of rules of evidence rather than adverse possession, is not further discussed. The second event relied upon, while subsidiary to the Ofulues' claim, raised more substantive issues on the interpretation of s 29 of the Limitation Act 1980. In their defence to the initial proceedings, the Bosserts had counter-claimed for a lease, which Ms Bossert's father argued he had been promised by the Ofulues in return for repairs and improvements to the property. This gave rise to two questions. First, whether an acknowledgement of title is sufficient if it does not admit an immediate right to possession on the part of the claimants. Secondly, if there was an acknowledgement of title, whether it was confined to the date the defence was issued in 1990, or continued to operate until the proceedings were struck out in 2002. This was significant as an acknowledgement confined to the date the defence was issued would no longer assist the Ofulues. Under the limitation rules that applied to registered land at the time of the claim (which are discussed in section 5.2 of this chapter) their title would still be defeated as the Bosserts had remained in occupation for 12 years since that date.

Lord Neuberger

74 The Court of Appeal concluded that the admission in the defence in the first proceedings did not amount to an acknowledgement within section 29 , because it was only an acknowledgement of the Ofulues' title to the freehold, and not an admission of their right to immediate possession. [. . .] But the conclusion that section 29 requires an acknowledgement of a right to immediate possession, as opposed to an acknowledgement of title, is, in my judgment, wrong for two separate reasons, which may be shortly stated.

75 First, the conclusion reached by the Court if Appeal is inconsistent with the wording of section 29(2), which refers in clear terms to acknowledging "the title" of the person whose claim is said to be time-barred. Secondly, in any event, the concept of "possession" is more subtle than the reasoning of the Court of Appeal appears to have assumed. The effect of the defence in the earlier proceedings was to acknowledge the Ofulues' right to possession, albeit subject to the Bosserts' rights as tenants (in law or equity). This analysis also accords with common sense. The current dispute is whether the Ofulues effectively lost the freehold interest in the property to Ms Bossert, so it would be strange if a plain acknowledgement by Ms Bossert of their ownership of that very interest was not a sufficient acknowledgement for the purposes of section 29 . It would also be strange if the Bosserts' contention that they held, or were entitled to the grant of, an interest in premises from the Ofulues did not operate as an acknowledgement by them of the Ofulees's title.

The admission of title in the defence as a continuing acknowledgement

78 Mr Richard Wilson QC, on behalf of Mrs Ofulue, contended that the admission in the defence constituted an effective acknowledgement which prevented time running for the period up to the time the proceedings in which it was served were dismissed. The principal

basis for this contention was that, by maintaining her case in the defence from the date it was served until the first proceedings were dismissed in 2002, Ms Bossert was affirming her acknowledgement of the Ofulues' title to the property for the purpose of section 29(2).

79 I can see no reason why a statement in a pleading or statement of case, or in any other court document, cannot amount to an acknowledgement for the purposes of section 29. Accordingly, the admission in the defence in this case, as I see it, operated as such as an acknowledgement of the Ofulues' title as at 18 July 1990, the date on which it was served. Indeed, although the point was in issue below, the contrary was not argued by Mr Peter Crampin QC, for Ms Bossert.

80 However, in my opinion, the argument that the admission continued to operate as such an acknowledgement beyond 18 July 1990 was rightly rejected by the Court of Appeal. It is inconsistent both with the language of the relevant provisions, and with the policy, of the 1980 Act. Conceptually and as a matter of language, I accept that an "acknowledgement" could cover a continuing state of affairs. However, particularly where it has to be embodied in a signed document, the more natural meaning of the word would suggest that it arises as at the date of the document—most naturally the date on which the document is provided to the person to whom the acknowledgement is made. The requirement in section 30(1) that an acknowledgement must be in writing and signed was no doubt intended to minimise the room for argument as to whether and when it was made.

81 The effect of section 15 of the 1980 Act is that a formal record, such as a conveyance or entry on the register, which appears to establish the paper title owner's title against the world, cannot be relied on after 12 years of adverse possession have passed. In those circumstances, it would seem very odd if an informal written acknowledgement could be relied on under section 29 of the same Act, where the adverse possession has thereafter continued for a longer period. If Mr Wilson's argument were correct, an offer to purchase, which remained open for acceptance, because it was not time-limited and not rejected, would presumably continue to operate as an acknowledgement for a potentially indefinite period. That appears surprising, inconvenient, and inconsistent with the purpose of the 1980 Act. Further, it seems clear that an act which could be said to refer to the future, namely a payment of rent in advance, will only stop time running up to the date it actually occurs: see paragraph 5(2) of Schedule 1 to the 1980 Act. [. . .]

Ms Bossert's claim to adverse possession therefore succeeded. Although the Bosserts had acknowledged the Ofulues' title on two occasions, on the facts neither operated to prevent their claim under s 29 of the Limitation Act 1980.

The acceptance of the Bosserts' acknowledgement of the Ofulues' freehold title as sufficient under s 29 leads to a curious juxtaposition with the requirement of intention in establishing the existence of adverse possession, which serves to highlight the significance of the formality requirement in s 30. As we have seen in section 4.2.2 of this chapter, in order to establish adverse possession a claimant must demonstrate only an intention to possess not an intention to own. Hence, we have noted that in *Pye v Graham*, the Grahams' willingness to enter into a new licence did not defeat their claim to adverse possession. Their willingness to do so was conceded in evidence, but there was no written acknowledgement within ss 29 and 30. Similarly, the Bosserts' claim to be tenants was held by the Court of Appeal not to prevent their ability to demonstrate an intention to possess for the purchase of establishing their adverse possession.[61]

[61] For further discussion when a claimant may be considered to have provided written acknowledgement of title, see Jourdan and Radley-Gardner, *Adverse Possession* (2nd edn, 2011), [16–65]–[16–80].

It is possible that s 29 does not apply to claims to adverse possession arising under the LRA 2002 and discussed in section 5.3 of this chapter. While the matter remains unresolved, such a conclusion would be a surprising and apparently unexpected consequence of the disapplication of s 15 of the Limitation Act 1980 in the new scheme of limitations provided by the LRA 2002.[62]

5 THE EFFECT OF ADVERSE POSSESSION

As has been noted, the effect of adverse possession differs between unregistered land, registered land claims governed by the LRA 1925, and registered land claims governed by the LRA 2002.

5.1 UNREGISTERED LAND

Unregistered land displays the purity and simplicity of the operation of adverse possession in a system of relative titles. The general limitation period of twelve years is provided in s 15 of the Limitation Act 1980. Once adverse possession has continued for the twelve-year limitation period, the paper owner's title is extinguished by the operation of limitation of actions.

Limitation Act 1980, s 17

[. . .] at the expiration of the period prescribed by this Act for any person to bring an action to recover land (including a redemption action) the title of that person to the land shall be extinguished.

The 12-year period may be completed by a single adverse possessor, or by two or more adverse possessors in succession: for example, where one adverse possessor is him or herself dispossessed by another before the expiry of the 12-year period. At this stage, the adverse possessor's title is relatively superior to that of the paper owner, or persons claiming title through the paper owner.[63] There is no 'statutory conveyance' of the paper owner's title to the adverse possessor.[64] The effect of the statute is entirely negative.

Fairweather v St Marylebone Property Co Ltd
[1963] AC 510, HL

Lord Radcliffe

At 535

It is necessary to start, I think, by recalling the principle that defines a squatter's rights. He is not at any stage of his possession a successor to the title of the man he has dispossessed.

[62] Jourdan and Radley-Gardner, ibid, [22–40]–[22–41].

[63] In a case of successive adverse possessors, where C1 is dispossessed by C2, C1's title remains superior to that of C2 for 12 years from the date of dispossession. This is a consequence of relativity of title, discussed at section 3 of this chapter.

[64] *Tichborne v Weir* (1892) 67 LTR 735, 737.

> He comes in and remains in always by right of possession, which in due course becomes incapable of disturbance as time exhausts the one or more periods allowed by statute for successful intervention. His title, therefore, is never derived through but arises always in spite of the dispossessed owner.

The adverse possessor acquires an independent freehold title from the time at which he or she commenced adverse possession. The effect of the limitation rules, combined with relativity of title, is that the adverse possessor's title becomes inviolable by the paper owner. But the adverse possessor is not a purchaser for value of the land and therefore will be bound by pre-existing property rights affecting the paper owner's title: for example, the adverse possessor is bound by any easements or restrictive covenants affecting use of the land.[65]

Exceptions to the operation of the twelve-year limitation period are provided in a number of special cases, including: the mental incapacity of the paper owner;[66] fraud and concealment on the part of the adverse possessor and cases of mistake;[67] acts between parties to a trust of land;[68] Crown lands and the foreshore.[69]

5.2 REGISTERED LAND: LAND REGISTRATION ACT 1925

As has been noted, the LRA 1925 sought to align registered land with the operation of adverse possession in unregistered land. Registered land was subject to the same limitation rules, except the extinguishment of title was replaced by s 75 of the Act.

Land Registration Act 1925, s 75

> (1) The Limitation Acts shall apply to registered land in the same manner and to the same extent as those Acts apply to land not registered, except that where, if the land were not registered, the estate of the person registered would be extinguished, such estate shall not be extinguished but shall be deemed to be held by the proprietor for the time being in trust for the person who, by virtue of the said Acts, has acquired title against any proprietor, but without prejudice to the estates and interests of any other person interested in the land whose estate or interest is not extinguished by those Acts.
>
> (2) Any person claiming to have acquired a title under the Limitation Acts to a registered estate in the land may apply to be registered as proprietor thereof.

[65] *Re Nisbet and Potts Contract* [1906] 1 Ch 386.

[66] Limitation Act 1980, s 28. A paper owner who is under a disability when the right of action accrues and regains capacity after the twelve-year limitation period had expired has six years from the time at which he or she regains capacity to bring an action. This is subject to a long stop of thirty years from the date at which the right of action accrued.

[67] Limitation Act 1980, s 32. The limitation period commences from the date at which the claimant discovers the fraud, concealment, or mistake, or could have done so through reasonable diligence. Beyond concealment, there is no obligation on the part of the adverse possessor to bring its acts to the attention of the paper owner. See *Topplan Estates Ltd v Townley* [2004] EWCA 1369, [85]–[86].

[68] Limitation Act 1980, Sch 1, para 9, prevents a right of action accruing in favour of one beneficiary or a trustee against another beneficiary.

[69] Limitation Act 1980, Sch 1, para 10, provides for a thirty-year limitation period for adverse possession against the Crown and para 11 provides for a sixty-year period in relation to the foreshore.

> (3) The registrar shall, on being satisfied as to the applicant's title, enter the applicant as proprietor either with absolute, good leasehold, qualified or possessory title, as the case may require, but without prejudice to any estate or interest protected by any entry on the register which may not have been extinguished under the Limitation Acts, and such registration shall, subject as aforesaid, have the same effect as the registration of a first proprietor; but the proprietor or the applicant or any other person interested may apply to the court for the determination of any question arising under this section.

At first sight, the imposition of a trust appears to be an expedient means of reconciling the idea of title being extinguished with registered land principles. As Cooke notes:[70] '[A] *trust is the English lawyer's natural response to a situation where true ownership and paper title diverge*.' In fact, however, the Law Commission noted that a trust was not necessary. All that was required was provision for the adverse possessor to apply for registration.[71]

The imposition of a trust was a source of confusion. It had the potential to confer a windfall on the adverse possessor, by providing a choice of enforcing his or her rights against the land, or enforcing personal liability against the dispossessed registered proprietor as trustee.[72] More generally, the trust raised questions as regards the relationship between the adverse possessor and the registered proprietor.

Cooke, 'Adverse Possession: Problems of Title in Registered Land'
(1994) 14 LS 1, 3–4

> Indeed, the whole concept of a trust, once its fiduciary implications are explored, begins to feel very uncomfortable. We are accustomed to trusts imposed upon a trustee against his will and even, initially, without his knowledge, in the context of resulting and constructive trusts. But in such cases the trust operates to prevent injustice to an innocent and often vulnerable beneficiary. To impose a trust, with the same implications and consequences, on the dispossessed proprietor to protect the erstwhile trespasser seems inappropriate [. . .]

A separate issue arising from the imposition of the trust is the nature of the interest acquired by the adverse possessor. In registered land, as in unregistered land, the claimant obtains a freehold title from the inception of the adverse possession. This title is independent from the title held by the registered proprietor. Once the trust is imposed by s 75(1) of the LRA 1925, however, the adverse possessor necessarily has a beneficial interest in the registered proprietor's estate. Therefore, the adverse possessor of registered land appears to have two distinct interests in the land: the independently acquired freehold title, and a beneficial interest in the registered proprietor's estate.[73]

As Cooke explains, this has consequences for understanding the nature of the right with which the adverse possessor should be registered if he or she applies under s 75(2) of the LRA 1925.

[70] *The New Law of Land Registration* (2003, p 136).
[71] Law Commission Report No 254 (1998), [10.27].
[72] Ibid, [10.30].
[73] Cooke, 'Adverse Possession: Problems of Title in Registered Land' (1994) 14 LS 1, 5.

Cooke, 'Adverse Possession: Problems of Title in Registered Land'
(1994) 14 LS 1, 5–6

> Once the limitation period has expired, the well-advised squatter will apply to be registered as proprietor. As we have seen, under s 75(2) 'any person claiming to have acquired a title under the Limitation Acts to a registered estate in the land may apply to be registered as proprietor thereof.'
>
> Does 'thereof' mean 'of the land' or 'of the registered estate to which he claims to have acquired title'? In either case, does it mean that X is to be registered as proprietor 'of the fee simple arising by adverse possession' or 'of X's already registered estate, to which he has the equitable title by virtue of the trust imposed by s 75'?
>
> In unregistered land, there is no question of the squatter's acquiring the dispossessed owner's estate by a 'parliamentary conveyance.' The fact that it is land registry practice to give [the squatter] a new title number indicates that [the squatter] is getting something new, and that he is being registered with title to his own independent fee simple so as to mirror his position in unregistered land. This is of course what the position should be.

It is debatable whether the 1925 Act provided for a parliamentary conveyance. The opening of a new title by the Land Registry suggests that this is not the case. Under the LRA 1925 (as in unregistered land cases), the adverse possessor obtained an independent freehold title, although he or she remained bound by property rights affecting the previous registered title.[74] The final closing of the registered proprietor's title produced a result analogous to the extinction of an unregistered title.

Notwithstanding, in *Fairweather v St Marylebone Property Co Ltd*,[75] a case involving unregistered land, Lord Radcliffe suggested obiter that s 75 of the LRA 1925 achieved a parliamentary conveyance. This analysis was subsequently taken in a first instance decision involving registered land.[76] But both of those cases concerned adverse possession against a leasehold estate. Specific difficulties arise in that context, which we return to consider below.

The LRA 2002 preserves the rights of adverse possessors acquired under the 1925 Act, but removes the s 75 trust. That section is repealed (without any saving) and transitional provisions are provided in Sch 12 of the 2002 Act.

Land Registration Act 2002, Sch 12, para 18

> (1) Where a registered estate in land is held in trust for a person by virtue of section 75(1) of the Land Registration Act 1925 immediately before the coming into force of section 97, he is entitled to be registered as the proprietor of the estate.
>
> (2) A person has a defence to any action for the possession of land (in addition to any other defence he may have) if he is entitled under this paragraph to be registered as the proprietor of an estate in the land.

The LRA 2002 came into force on 13 October 2003. As a result of Sch 12, para 18(1), the rights of a claimant who had completed twelve years of adverse possession (so that the s 75(1) trust

[74] Land Registration Act 1925, s 75(3), extracted above.
[75] [1963] AC 510, 542.
[76] *Central London Commercial Estates Ltd v Kato Kagaku Co Ltd* [1998] EWHC 314.

had come into existence) on or before 12 October 2003 are preserved. The trust is removed by the repeal of s 75 of the 1925 Act, but the adverse possessor retains the right (originally conferred by s 75(2)) to be registered as proprietor. The entitlement to be registered as proprietor 'of the estate' confirms that a statutory transfer takes place.

5.3 REGISTERED LAND: LAND REGISTRATION ACT 2002

The LRA 2002 provides a new scheme of adverse possession. The scheme applies to adverse possessors in registered land who had not completed twelve years of adverse possession on or before the 12 October 2003.[77] It marks a clean break from attempting to transplant the operation of adverse possession in unregistered land into registered land. Instead, it takes as its starting point the underlying principle that, in registered land, registration alone confers title, and seeks to provide a more appropriate balance between the registered proprietor and adverse possessor.[78]

The Law Commission explains the aims of the scheme.

Law Commission Report No 271, *Land Registration for the Twenty-First Century: A Conveyancing Revolution* (2001, [14.6])

The aims of the scheme are as follows.

1. Registration should of itself provide a means of protection against adverse possession, though it should not be unlimited protection. Title to registered land is not possession-based as is title to unregistered land. It is registration that vests the legal estate in the owner and that person's ownership is apparent from the register. The registered proprietor and other interested persons, such as the proprietor of a registered charge, are therefore given the opportunity to oppose an application by a squatter to be registered as proprietor.
2. If the application is not opposed, however, whether because the registered proprietor has disappeared or is unwilling to take steps to evict the squatter, the squatter will be registered as proprietor instead. This ensures that land which has (say) been abandoned by the proprietor, or which he or she does not consider to be worth the price of possession proceedings, will remain in commerce.
3. If the registered proprietor (or other interested person) opposes the registration, then it is incumbent on him or her to ensure that the squatter is either evicted or his or her position regularised within two years. If the squatter remains in adverse possession for two years after such objection has been made, he or she will be entitled to apply once again to be registered, and this time the registered proprietor will not be able to object. In other words, the scheme provides a registered proprietor with one chance, but only one chance, to prevent a squatter from acquiring title to his or her land. The proprietor

[77] It is not necessary that the title was registered throughout the period of adverse possession: Land Registration Act 2002, Sch 6, para 1(4). Hence the scheme will apply where a claimant enters into possession of unregistered land, but the title is registered before being extinguished by the expiry of the limitation period.

[78] Law Commission Report No 254 (1998), [10.43]; Law Commission Report No 271, *Land Registration for the Twenty-First Century: A Conveyancing Revolution* (2001), [14.4].

who fails to take appropriate action following his or her objection will lose the land to the squatter.

4. Consistently with the approach set out above, a registered proprietor who takes possession proceedings against a squatter will succeed, unless the squatter can bring him or herself within some very limited exceptions.

It will be apparent from this summary that one of the essential features of the scheme is that it must produce a decisive result. Either the squatter is evicted or otherwise ceases to be in *adverse* possession, or he or she is registered as proprietor of the land.

Under the 2002 Act, there is no concept of title being acquired by adverse possession or of a limitation period barring the assertion of a registered proprietor's title. Sections 15 and 17 of the Limitation Act 1980, which provide the twelve-year limitation period for an action to recover land, and 'extinguish' title at the end of that period, are disapplied in relation to registered land.[79] Instead, the completion of a minimum of ten years' adverse possession[80] enables the claimant to access a procedure that will result in one of two outcomes: either with the claimant acquiring title to the land *by registration* (not by adverse possession itself); or with the assertion of title by the registered proprietor. Where the adverse possessor acquires title, there is a 'statutory transfer' of the registered proprietor's estate.

Sch 6 of the LRA 2002 provides the scheme. We will first outline the operation of the procedure and then assess the impact of the 2002 Act on adverse possession.

5.3.1 The New Scheme of Adverse Possession

Land Registration Act 2002, Sch 6, paras 1–4

1 (1) A person may apply to the registrar to be registered as the proprietor of a registered estate in land if he has been in adverse possession of the estate for the period of ten years ending on the date of the application. [. . .]

2 (1) The registrar must give notice of an application under paragraph 1 to—

(a) the proprietor of the estate to which the application relates,

(b) the proprietor of any registered charge on the estate,

(c) where the estate is leasehold, the proprietor of any superior registered estate,

(d) any person who is registered in accordance with rules as a person to be notified under this paragraph, and

(e) such other persons as rules may provide.

(2) Notice under this paragraph shall include notice of the effect of paragraph 4.

3 (1) A person given notice under paragraph 2 may require that the application to which the notice relates be dealt with under paragraph 5.

[79] Land Registration Act 2002, s 96.

[80] Ibid, Sch 6, para 1, extracted below. The adoption of ten years as the requisite period reflects separate recommendations made by the Law Commission for reform of limitation of actions: Law Commission Report No 271 (2001), [14.19].

(2) The right under this paragraph is exercisable by notice to the registrar given before the end of such period as rules may provide.

4 If an application under paragraph 1 is not required to be dealt with under paragraph 5, the applicant is entitled to be entered in the register as the new proprietor of the estate.

By virtue of Sch 6, adverse possession has no effect unless or until an application for registration is made. Adverse possession must have been maintained for at least ten years immediately prior to the application. Further, the applicant must generally have completed the adverse possession; successive periods of adverse possession by different squatters cannot be added together.[81] This ensures that if the adverse possessor succeeds in obtaining registration, his or her title is not vulnerable to challenge by a prior possessor. Security of the adverse possessor's title is preferred over the continued recognition of relativity of title, consistent with the underlying acceptance that title is based on registration, not possession. The general period of ten years provided in para 1(1) is subject to exceptions: in particular, an application cannot be made against a registered proprietor who is incapacitated by mental disability.[82] Applications relating to Crown foreshore land can be made only after a period of sixty years' adverse possession.[83]

Once an application for registration is made, the registered proprietor (and the other persons specified in para 2) are notified of the application by the Registrar. The onus then shifts to the registered proprietor to take steps to assert his or her title by issuing a counter-notice requiring the application to be dealt with under para 5. The period that has been provided in which the registered proprietor can do so under para 3(2) is 65 business days from the date of issue of the notification.[84] If the proprietor fails to issue a counter-notice within that period, then, by para 4, a statutory transfer of the estate is affected to the adverse possessor. The adverse possessor thereby acquires title to the land by registration.

If a counter-notice is issued, then (save in three exceptional cases in para 5, discussed below) the application for registration is rejected. Under para 6, the registered proprietor has two years in which to commence proceedings for possession of the land. If no such proceedings are commenced within that period, then the adverse possessor may make a further application for registration.[85] This application does not instigate a new system of notifications. On making this application, the adverse possessor is immediately entitled to be registered as proprietor of the estate.[86]

The exceptional circumstances, in which the adverse possessor's application will be successful despite the issue of a counter-notice, are given in para 5(2)–(4).

[81] This is in contrast to the position in unregistered land explained at section 5.1 above. Successive periods of adverse possession were also possible in registered land under the 1925 Act. Limited exceptions to the bar on successive periods of adverse possession are provided by the 2002 Act, Sch 6, para 11(2). This includes where the applicant is the successor in title to a previous adverse possessor. For further discussion of these, see Law Commission Report No 271 (2001), [14.20]–[14.21].

[82] Land Registration Act 2002, Sch 6, para 8(2). Other exceptions are provided for registered proprietors who are enemies or are detained in enemy territory.

[83] Ibid, Sch 6, para 13.

[84] Land Registration Rules 2003 (SI 2003/1417), r 189.

[85] Land Registration Act 2002, Sch 6, para 6(1).

[86] Ibid, para 7.

Land Registration Act 2002, Sch 6, para 5(2)–(4)

(2) The first condition is that—

(a) it would be unconscionable because of an equity by estoppel for the registered proprietor to seek to dispossess the applicant, and

(b) the circumstances are such that the applicant ought to be registered as the proprietor.

(3) The second condition is that the applicant is for some other reason entitled to be registered as the proprietor of the estate.

(4) The third condition is that—

(a) the land to which the application relates is adjacent to land belonging to the applicant,

(b) the exact line of the boundary between the two has not been determined under rules under section 60,

(c) for at least ten years of the period of adverse possession ending on the date of the application, the applicant (or any predecessor in title) reasonably believed that the land to which the application relates belonged to him, and

(d) the estate to which the application relates was registered more than one year prior to the date of the application.

The third of these is the only true exception. In each of the other situations, the underlying assumption is that the adverse possessor, in fact, has a separate claim to the land.[87] The third exception reflects what the Law Commission acknowledged to be a legitimate conveyancing justification for adverse possession in registered land.[88] The register is not conclusive as to boundaries and therefore there is no conflict with the concept of title by registration to enable adverse possession to be used to settle genuine boundary disputes.

We have seen that, in unregistered land, and in registered land under the LRA 1925, even though the adverse possessor acquires an independent freehold title, the title is subject to burdens affecting the old title. The position is clearer in the LRA 2002 where there is a statutory transfer of the exiting title. Schedule 6, para 9, confirms that the registration of the adverse possessor does not affect the priority of interests affecting the estate. An exception is, however, made as regards registered charges. A registered chargee is notified by the Registrar of the adverse possessor's application for registration, and has the same opportunity as the registered proprietor to issue a counter-notice and bring proceedings for possession against the adverse possessor.[89] If a chargee fails to do so, then there is no justification for enabling him or her to enforce his or her charge against an adverse possessor who obtains registration.

While Sch 6 confers on a successful applicant an entitlement to be registered, that entitlement presupposes the existence of the underlying claim to adverse possession. The existence of adverse possession is a pre-condition to the right to make an application under Sch 6 and

[87] The relationship between estoppel and adverse possession is considered by Nield, 'Adverse Possession and Estoppel' [2004] Conv 123. As Cooke notes (2003, p 142), the utility of combining estoppel with adverse possession is unclear. The Law Commission Report No 271 (2001, [14.43]) suggested that the second exception could apply where the adverse possessor is entitled to the land under the will or intestacy of the registered proprietor, or where a sale of land had not been formally completed, but purchase money has been paid, so that the registered proprietor, in fact, holds the land on trust for the adverse possessor. The application of the exception to informal purchasers is considered by Woods, 'Adverse Possession and Informal Purchasers' (2009) 60 NILQ 305.

[88] Law Commission Report No 271 (2001), [14.3]).

[89] Ibid, [14.74].

of the entitlement to obtain registration if that claim is successful. In *Baxter v Mannion*,[90] Mr Baxter obtained registration of title to a field under Sch 6 when the registered proprietor, Mr Mannion, failed to issue a counter-notice on receiving notice of his application for registration. Mr Mannion successfully argued that the registration of Mr Baxter had been a 'mistake' and obtained rectification of the register under the procedure in Sch 4 of the LRA 2002 (discussed in Chapter 7, section 5.6.1). It had been established on the facts that Mr Baxter's use of the land did not in fact constitute adverse possession and, therefore, he was not entitled to have been registered under Sch 6. The Court of Appeal refused to allow the '*bureaucratic machinery*' of Sch 6 to '*[trump] reality*'.[91]

5.3.2 Assessment of the Land Registration Act 2002

As we have noted, one of the Law Commission's aims in its recommendations for adverse possession is to provide a more appropriate balance between adverse possessors and the registered proprietor. In fact, the new system is heavily weighted in favour of the registered proprietor. The LRA 2002 has been described as the 'emasculation' of adverse possession[92] and as making registered land 'virtually squatter proof'.[93] The role of adverse possession is reduced to settling boundary disputes and ensuring the marketability of abandoned land.[94] This is a deliberate policy choice to make registered land more secure and, in so doing, encourage voluntary registration.[95]

While the Act favours the registered proprietor, there is an underlying obligation of personal responsibility. To benefit from the protection afforded by Sch 6, registered proprietors must act on receipt of a notification by the Registrar and, in order to do so, must have systems in place to manage their land. This may pose few difficulties for the individual homeowner, but presents more of a challenge to large landowners, including some local authorities that have failed to protect their interests under the LRA 1925.[96]

Bogusz argues that the approach taken by the 2002 Act is to be welcomed.

Bogusz, 'Bringing Land Registration into the Twenty-First Century: The Land Registration Act 2002' (2002) 65 MLR 556, 563

> From a legal perspective, the Act reflects the true position that the basis of title to registered land is the fact of registration and is not based (as is the case in unregistered land) on the concept of possession. The Act intends to ensure an accurate register and restricting adverse possession in this way is necessary to achieve this. Adverse possession is therefore difficult to validate in the way it perhaps was in 1925. Arguments justifying adverse possession such as preventing the neglect of land or that there was a social need for wider land ownership are not so relevant today in a property owning democracy. Land ownership is not limited to a small proportion of the population, who, as was progressively becoming the case, did not have the resources to maintain the quality and value of their land. Adverse possession had

[90] [2011] 1 WLR 1594. [91] Ibid, para 1 per Jacob LJ.

[92] Dixon, 'The Reform of Property Law and the Land Registration Act 2002: A Risk Assessment' [2003] Conv 136, 150.

[93] Cooke (2003, p 139). [94] Ibid, p 133.

[95] Law Commission Report No 271 (2001), [2.10]. See further Chapter 7, section 5.3.

[96] Cobb and Fox, 'Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002' (2007) 27 LS 236, 239. The authors suggest that the Law Commission's proposals were 'heavily influenced' by media criticism of the loss of local authority housing by adverse possession.

a role to play when feudal landowners could no longer manage the estates they owned and when there was a need for some form of land redistribution.

Adverse possession with this egalitarian dimension is difficult to justify, at least in its present form, within a jurisdiction where land prices are high and the commercial market in land is particularly buoyant. The concept of alienability of land, which went to the heart of 1925 legislation, is very much a reality today. The economic reality of land being an important commercial commodity, that is freely and widely traded, makes adverse possession appear to be a very outdated concept. In this sense the LRA 2002 has very much lived up to the objectives of the Law Commission's Consultation Document of 1998 and as far as adverse possession is concerned, brought land registration into the twenty-first century.

Bogusz suggests that the reforms are equally welcome from a moral perspective.

Dixon, meanwhile, emphasizes that the approach taken by the LRA 2002 is not an inevitable one, but represents a policy choice.

Dixon, 'The Reform of Property Law and the Land Registration Act 2002: A Risk Assessment' [2003] Conv 136, 151–2

[The reform of adverse possession] is also a reflection of a political philosophy that sees adverse possession as "land theft" and as inherently inconsistent with a registration system. Of course, there is merit in both these views: modern expositions of the law on adverse possession appear to have favoured the rights of possessors over the rights of paper owners and the existence of an off-register mechanism for destroying titles seems to make a mockery of the state guarantee of title. On the other hand, the social and economic justifications for principles of adverse possession have been well documented and instead of "land theft", adverse possession can be seen as encouraging "productive land use". Again, there is nothing inherently contradictory in having principles of adverse possession operate in registered land, at least if those principles are seen positively as a method of transferring title from one person to another instead of a method of unfairly snatching it from them. It is a matter of perception, not of incontrovertible logic. Consequently, given that the Act has chosen to emasculate adverse possession—and so favours one policy perspective—we must be alive to the possibility that there will be some creative interpretation of the relevant provisions by a differently minded judiciary. [. . .]

Picking up on Dixon's acknowledgment of the importance of perception, Cobb and Fox are highly critical of the Law Commission's presentation of the morality of adverse possession. Focusing on the position of urban squatters—that is, people who deliberately move in to empty residential properties—the authors argue that the Law Commission relies on too simplistic a presentation of an undeserving adverse possessor and a blameless registered proprietor.

Cobb and Fox, 'Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002' (2007) 27 LS 236, 242–3 and 249

The first component of the Commission's argument sought to highlight the 'undeserving' nature of many claims for title through adverse possession. It accepted the importance of protecting certain categories of 'inadvertent' squatter from hardship [. . .] In contrast to this,

however, the Commission was highly critical of those squatters who deliberately take—possession of land [. . .] Significantly, by focusing upon the construction of advertent squatting as 'land theft', the Law Commission has introduced, for the first time in England and Wales, an important moral distinction between good and bad faith adverse possession. The basis of moral opprobrium, quite simply, is the squatter's own knowledge of his or her occupation, which—like mens rea under the criminal law—renders the otherwise innocent act a culpable one.

The second, and arguably more implicit, component of the Commission's moral analysis was an emphasis upon the blamelessness of the dispossessed landowner. On the one hand, the Commission identified certain landowners as blameworthy, for example a landowner who encouraged an inadvertent squatter to rely on his representations [. . .] and proposed an exception to deal with this scenario. More importantly though, [. . .] the Commission pointed out that landowners who lose title to deliberate squatters are often unaware of the presence of squatters on their property until it is too late. In these circumstances—deliberate squatting unnoticed as a result of the inadvertence of the landowner—the Commission considered it unfair to allow a squatter to gain title to the property. [. . .]

The Law Commission's proposals implicitly constructed the moral debate over the doctrine of adverse possession around a binary division between 'good faith' and 'bad faith' squatters. Yet, while the 'land theft' approach to adverse possession appears, prima facie, to provide a convincing justificatory basis for the Law Commission's agenda in relation to registered land, the Commission should not simply be accepted as having the final word on the morality of 'bad faith' squatting, particularly in light of its apparent lack of engagement with the traditional justificatory theories. The actions of the 'bad faith' squatter in an unsupervised property can be usefully conceptualised through the alternative perspectives of labour-desert theory, personhood theory and utilitarianism. Each of these frameworks allows for the possibility that, in certain contexts—specifically, in the case of an advertent squatter—the consequences of unauthorised occupation by a squatter may negate the original title holder's moral claim and provide a moral justification for the conduct of the squatter.

We have noted that the LRA 2002 seeks to provide a scheme of adverse possession that is consistent with the underlying principle of title by registration. Cooke[97] notes that, under the Act, '*proof of title has been divorced from proof of possession*' and that relativity of title, a concept central to unregistered land, is no longer important.[98] These concepts have not been removed from registered land. The adverse possessor still relies on the inception of possession as the foundation of his or her claim. It is still recognized that adverse possession confers an independent freehold title from the moment at which possession begins. Hence, Sch 6, para 9, of the 2002 Act provides that this title (in contradistinction to that of the registered proprietor) is 'extinguished' when the adverse possessor becomes registered proprietor of the estate.

But these concepts retain only a ghostly existence. Their operation is overshadowed by the overarching principle that the adverse possessor remains vulnerable to the assertion of the registered title unless and until that title is acquired by the adverse possessor by registration. The position is aptly summarized in the following extract.

97 *Land Law* (2006, p 211). 98 Ibid, p 203.

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) 263, p 280

[A]lthough it radically shifts the balance of interests between a registered proprietor and an adverse possessor, the LRA 2002 does not eliminate the concept that possession is, in principle, capable of generating a right to land that ought to be protected even against a party who originally had better title. The right of an adverse possessor to apply for registration as registered proprietor and his entitlement to succeed if certain conditions are met is, of course, a highly watered-down version of the right of an adverse possessor of unregistered land once all other titles have been extinguished by limitation. But it exists on a continuum with the rules that generate those more powerful rights and cannot be understood except in the context of a system in which possession generates rights.

5.4 HUMAN RIGHTS AND ADVERSE POSSESSION

Following the decision in *Pye v Graham*, Pye commenced proceedings in the European Court of Human Rights. It argued that the loss of its land was an infringement of its right of property under Art 1 of the First Protocol to the ECHR, for which it was entitled to compensation from the government. The Human Rights Act 1998 (HRA 1998), which incorporates the ECHR into domestic law, was not applicable to *Pye v Graham*, because the cause of action arose before that Act came into force.[99] Hence a direct action in the Strasbourg Court was the only means through which the human rights argument could be raised. The financial stakes were high, with Pye assessing its loss at £10m (a sum disputed by the government). The legal stakes were higher, with the legitimacy of rules of adverse possession called into question. The case focused on the operation of limitation periods under the LRA 1925, the scheme applied in *Pye v Graham*, although raised more generally the justification for adverse possession claims in a system of registered title.

In *Pye v UK*, the Grand Chamber of the European Court of Human Rights ultimately rejected Pye's claim by ten votes to seven.[100] This decision reversed that of the ordinary Chamber, in which Pye had succeeded by the narrowest of margins (four to three votes).[101] We have seen, in Chapter 3, the different stages of a claim under Art 1 of the First Protocol. Firstly, it must be established that the provision of the ECHR is engaged, and secondly, if it is, the possibility of justification must be considered. As we have seen in Chapter 3, the Grand Chamber agreed that Art 1 was engaged, and considered the operation of limitation rules to be concerned with the control of possessions, rather than with deprivation. The Court then turned its attention to the possibility of justification, considering, firstly, whether the limitation period serves a legitimate aim.

***JA Pye (Oxford) Ltd v UK* (App No 44302/02)**
[2008] 1 EHRLR 132, Grand Chamber

At [74]

It is a characteristic of property that different countries regulate its use and transfer in a variety of ways. The relevant rules reflect social policies against the background of the local

[99] See Chapter 3. [100] (App No 44302/02) [2008] 1 EHRLR 132.
[101] (App No 44302/02) (2006) 43 EHRR 3.

conception of the importance and role of property. Even where title to real property is registered, it must be open to the legislature to attach more weight to lengthy, unchallenged possession than to the formal fact of registration. The Court accepts that to extinguish title where the former owner is prevented, as a consequence of the application of the law, from recovering possession of land cannot be said to be manifestly without reasonable foundation. There existed therefore a general interest in both the limitation period itself and the extinguishment of title at the end of the period.

Applying its justification formula,[102] the Court held that the rules struck a fair balance between the general interest and the interest of the individuals. The absence of provision for compensation in domestic law was not considered significant in the context of limitation rules, while adequate procedural protection was available to Pye to enforce its rights. The Court was not swayed in its conclusions by the extent of Pye's loss and the corresponding gain enjoyed by the Grahams.

***JA Pye (Oxford) Ltd v UK* (App No 44302/02)**
[2008] 1 EHRLR 132, Grand Chamber

At [83]–[84]

The applicant companies contended that their loss was so great, and the windfall to the Grahams so significant, that the fair balance required by Article 1 of Protocol No. 1 was upset. The Court would first note that, in the case of *James*, the Court found that the view taken by Parliament as to the tenant's "moral entitlement" to ownership of the houses at issue fell within the State's margin of appreciation. In the present case, too, whilst it would be strained to talk of the "acquired rights" of an adverse possessor during the currency of the limitation period, it must be recalled that the registered land regime in the United Kingdom is a reflection of a long-established system in which a term of years' possession gave sufficient title to sell. Such arrangements fall within the State's margin of appreciation, unless they give rise to results which are so anomalous as to render the legislation unacceptable. The acquisition of unassailable rights by the adverse possessor must go hand in hand with a corresponding loss of property rights for the former owner. In *James and Others*, the possibility of "undeserving" tenants being able to make "windfall profits" did not affect the overall assessment of the proportionality of the legislation (*James and Others* judgment, referred to above, § 69), and any windfall for the Grahams must be regarded in the same light in the present case.

As to the loss for the applicant companies, it is not disputed that the land lost by them, especially those parts with development potential, will have been worth a substantial sum of money. However, limitation periods, if they are to fulfil their purpose (see paragraphs 67—74 above), must apply regardless of the size of the claim. The value of the land cannot therefore be of any consequence to the outcome of the present case.

It was on the issue of a fair balance that five of the seven dissenting judges disagreed with the majority.[103] In this respect, they highlighted the difference between unregistered and registered land.

[102] See Chapter 3.

[103] The other two dissenting judges considered that the application of the limitation rules in the context of registered land did not serve a legitimate function. They further considered that even if a legitimate function was served, the rules provided by the 1925 Act were disproportionate.

***JA Pye (Oxford) Ltd v UK* (App No 44302/02)**
[2008] 1 EHRLR 132, Grand Chamber

At [10]–[11] of the first dissenting judgment

In the case of unregistered land, title was made out by establishing a number of years' possession. Title deeds served only as evidence in support of possession, and could be defeated by a person who could prove actual (adverse) possession for the requisite number of years. In such a system, the extinguishment of title at the end of the limitation period could be seen as a coherent element in the rules on acquisition of title. [. . .]

In the case of registered land, however, title depends not on possession, but on registration as the proprietor. A potential purchaser of land can ascertain the owner of the land by searching the register, and there is no need for a potential vendor to establish title by proving possession. As pointed out by the Law Commission, the traditional reasons advanced to justify a law of adverse possession which resulted in the extinguishment of title on expiry of the limitation period had lost much of their cogency. This view was shared in the circumstances of the present case both by Lord Bingham and by Neuberger J., who found that the uncertainties which sometimes arose in relation to the ownership of land were very unlikely to arise in the context of a system of land ownership where the owner of the land was readily identifiable by inspecting the proprietorship register.

In the view of these dissenting judges, the absence of compensation carried a requirement of strong measures of protection for registered proprietors, which were not provided by the LRA 1925. In this respect, they contrasted the 1925 Act with the new safeguards provided by the LRA 2002 through the Sch 6 notification procedure.

Although based on the 1925 Act, it is implicit in the judgment of the Grand Chamber that the operation of adverse possession in unregistered land, and in registered land under the 2002 Act, is also human rights compliant.[104] The Grand Chamber accepted the legitimacy of limitation rules and hence the crucial issue is that of fair balance. The holder of unregistered land enjoys the same level of procedural protection as his LRA 1925 counterpart. The acceptance of the scheme under the 1925 Act necessarily means that the LRA 2002, with its additional protection for registered proprietors, would satisfy this test. This is implicit even in the joint judgment of five of the seven dissenting judges.

Jones argues further that the Grand Chamber was wrong to consider that Art 1 of the First Protocol was engaged.

Jones, 'Out with the Owners! The Eurasian Sequels to *JA Pye (Oxford) Ltd v United Kingdom*' (2008) 27 CJQ 260, 265–6

This [the conclusion that article 1, protocol 1 is engaged] is mistaken. The key term in Art.1 is "possessions". Article 1 is ultimately bound by its ordinary meaning, i.e. things which a person holds, according to the circumstances in which they were acquired. Thus, Art.1 merely confers a right to retain property in manner in which it has come to be held. The provision cannot be used to broaden the original scope of ownership. For this would have it confer a right, not to retention, but to acquisition of property, on more generous terms that did not,

[104] Jones, 'Out with the Owners! The Eurasian Sequels to *JA Pye (Oxford) Ltd v United Kingdom*' (2008) 27 Civil Justice Quarterly 260.

on the facts, emerge. As the Grand Chamber itself stated, "[i]t does not [. . .] guarantee the right to acquire property".

Paradoxically, this is precisely what the Grand Chamber's conclusion allows. As it indicated, the applicants' title to the Berkshire land was, "necessarily limited by the various rules of statute and common law applicable to real estate", including "the various rules on adverse possession". Thus, when "the applicant companies lost the beneficial ownership of [the land]", title had simply lapsed according to the terms on which it was acquired. The process was no more objectionable than the expiration of a lease by the effluxion of time. It could not attract the protection of Art.1, without suggesting that the provision guarantees the right to acquire title free from the possibility of adverse possession. As indicated, the provision does not go this far. In short, it was anything but "inescapable [. . .] that Article 1 of Protocol No 1 is applicable".

Jones' point is that once the issue goes to the matter of a fair balance, the division of opinion in the Grand Chamber (and, previously, in the ordinary Chamber judgment) shows that there is an element of subjectivity.

His argument has resonance with the approach of the House of Lords in a different context in *Aston Cantlow Parochial Church Council v Wallbank*.[105] In that case, as we have seen in Chapter 3, it was held that liability for chancel repairs did not engage Art 1, because it was an encumbrance that defined the nature of the possession. There is, however, an analytical difference between an encumbrance, as a right held by a third party affecting ownership, and the possibility of losing ownership through limitation of actions.

The Grand Chamber decision in *Pye v UK* is not technically binding on English courts, but it has since been followed by the Court of Appeal in the following case.[106] The Court rejected an argument that the justification for the operation of adverse possession is a matter that arises for reconsideration where a claim is distinguishable on the facts from *Pye v Graham*.

Ofulue v Bossert
[2008] EWCA Civ 7, CA

Facts: The facts of the case are outlined above in section 4.2.4 where the House of Lords decision is discussed. In the Court of Appeal, the Ofulues argued that the loss of their title through adverse possession was a violation of Art 1 Protocol 1. This issue was not raised again in the House of Lords.

Arden LJ

At [52]–[53]

The written submissions of the Ofulues proceed on the basis that it is open to this court to distinguish the decision in *Pye* on its facts or by reference to the applicability of the policy reasons for adverse possession identified by the Law Commission. In my judgment, this approach fundamentally misunderstands the purpose of the doctrine of the margin of appreciation. The Strasbourg Court accepted that the national authorities could in general

[105] [2003] UKHL 37, [2004] 1 AC 546.
[106] See also Dixon, 'Human Rights and Adverse Possession: The Final Nail' [2008] Conv 160.

determine the rules for the extinction of title as a result of the occupation of the land by a person who was not the true owner. That determination applies to all decisions on adverse possession and it is not open to this court not to follow that determination because the case is distinguishable on its facts. For the doctrine of the margin of appreciation to be inapplicable, the results would have to be so anomalous as to render the legislation unacceptable (see [83] of the judgment of the Strasbourg Court set out above), and in my judgment that has not been demonstrated in this case (see further [55] below).

The Ofulues' submissions additionally proceed on the basis that this court must apply the test of legitimate aim and proportionality to each different case of adverse possession which arises. Again, in my judgment this fundamentally misunderstands the function of this court. The Strasbourg Court considered the compatibility with the Convention of the limitation period in the case of adverse possession with Art.1 of Protocol No.1 and assessed its legitimate aim and proportionality as a general rule and not simply in the context of the specific facts of the *Pye* case. It would not therefore be appropriate for this court to proceed to examine the questions of legitimate aim and proportionality simply from the perspective of the facts of this case and the relationship between them and the policy considerations in the Law Commission's Consultation Paper.

6 ADVERSE POSSESSION AND LEASEHOLD TITLES

As we have seen in section 3 above, a claimant who moves into adverse possession thereby immediately obtains a freehold title. This is so even if the land is leased at the time at which the claimant commences adverse possession. In such a case, however, the adverse possession operates against the leasehold estate; the claim does not affect the title of the landlord (the holder of the freehold title). At the expiry of the term of the lease, the landlord can assert his or her freehold title against the adverse possessor. To defeat the landlord's title, a fresh claim to adverse possession is required.

The additional complexity of adverse possession in the leasehold context has given rise to a number of questions regarding the nature of the right acquired by the adverse possessor, the extent to which an estate is extinguished by the operation of limitation rules, and the relationship between the adverse possessor and the freeholder. The specific context in which these questions have arisen is the surrender of a lease by a tenant who has lost his or her title by adverse possession: is such a surrender effective to enable the landlord immediately to assert its freehold title against the adverse possessor, without the need to wait for the expiration of the term of the lease? Different answers to this question have been given in unregistered and registered land.

In unregistered land, the possibility of surrender of a lease is met with the immediate objection that the leasehold title is extinguished by adverse possession. It therefore appears illogical to suggest that the lease can be surrendered. Despite this apparent difficulty, the House of Lords has held that surrender was effective.

Fairweather v St Marylebone Property Co Ltd
[1963] AC 510, HL

Facts: The freeholder of adjoining plots of land built a shed across the boundary of the two plots. The entrance to the shed was on No 311, but 75 per cent of the shed was on No

315. Long leases were granted of both plots. It was accepted that the owner of No 311 had obtained title to the land on No 315 occupied by the shed through adverse possession. The tenant of No 315 surrendered the lease and the freeholder sought to assert its title against the adverse possessor.

Lord Radcliffe

At 538–40

On one view, which seems not an implausible one having regard to the structure of the respective sections, the right or title extinguished is coterminous with the right of action the barring of which is the occasion of the extinguishment. This would mean that, when a squatter dispossesses a lessee for the statutory period, it is the lessee's right and title as against the squatter that is finally destroyed but not his right or title as against persons who are not or do not take through the adverse possessor. On the other view, that upon which the appellant's case depends, the lessee's right and title to the premises becomes extinguished for all purposes and in all relations, so that as between himself and the lessor, for instance, he has thereafter no estate or interest in the land demised. [. . .]

I think, therefore, that it is a false approach to the provisions of the Limitation Acts to regard the "extinguishment of title" as extinguishing more than the title of the dispossessed against the dispossessor. Where the person dispossessed is a lessee, I do not think it right to try to build legal conclusions on the assumption that the nexus between him and his lessor has been destroyed; or, consequently, that, once adverse possession has been completed, he ceases to hold the term of years and estate in it granted to him by his lessor. [. . .]

I conclude, therefore, that the effect of the "extinguishment" sections of the Limitation Acts is not to destroy the lessee's estate as between himself and the lessor; and that it would be incorrect to say that if he offers a surrender to the lessor he has nothing to surrender to him in respect of the land in the possession of the squatter. *Nemo dat quod non habet*, and I daresay that he does not, but, as Pearson L.J. indicated in the Court of Appeal, the question here is not whether there are any exceptions from that general principle but whether, as a principle, it is relevant to the situation that we have here. In my opinion it is not.

Hence, the extinguishment of title operated only as regards the relationship between the tenant and the adverse possessor. Because the lease continued in existence between the tenant and landlord, the surrender of the lease was effective to enable the landlord immediately to assert the freehold title against the adverse possessor.

In registered land, under s 75 of the LRA 1925, we have seen that title was not extinguished by adverse possession, but instead was held on trust. By s 75(2), the adverse possessor was then entitled to apply to be 'registered as proprietor thereof'. A question arose as regards with what estate the adverse possessor should be registered: the freehold title acquired by the inception of adverse possession, or the leasehold estate held on trust by s 75(2)? This, in turn, appeared to affect the issue of the effectiveness of a surrender of the lease.

In the following case, Mrs David was the registered proprietor of a long lease granted by Spectrum Investment. The defendant had been in adverse possession against Mrs David and, following the expiration of the limitation period, applied for registration. The Registrar closed Mrs David's title and registered the defendant as proprietor of a new leasehold estate. In these circumstances, a surrender by Mrs David was considered to be ineffective. Browne-Wilkinson J held that, because the surrender of a lease is a registered disposition, it was clear

that, once Mrs David's title had been closed, she lacked the ability to execute a surrender. Browne-Wilkinson J was satisfied that the registration of the defendant with a lease had been correct.

Spectrum Investment Co v Holmes
[1981] 1 WLR 221, HC

Browne-Wilkinson J

At 230

To my mind the words are clear and unequivocal: the squatter claims to have acquired a title to "a registered estate in the land" (i.e. the leasehold interest) and applies to be registered as a proprietor "*thereof*" (my emphasis). Therefore under section 75 (2), references to the squatter having acquired title to a registered estate must include the rights which under the Limitation Act 1939 the squatter acquires in relation to leasehold interests. Section 75 (2) then refers to the squatter applying to be registered as proprietor "thereof." This word can, in my judgment, only refer back to the registered estate in the land against which the squatter has acquired title under the Act of 1939, i.e. the leasehold interest. The clear words of the Act therefore seem to require that, once the 12 years have run, the squatter is entitled to be registered as proprietor of the lease itself, and is bound to be so registered if he applies for registration. It follows that in my judgment the defendant (as the squatter) is correctly registered as proprietor of the lease itself in accordance with the clear requirements of section 75. If that is right, Mrs. David cannot be entitled to rectification of the register as against the defendant, and she can therefore never get into a position in which she is competent to surrender the lease to the plaintiff.

Cooke identified difficulties with this result.

Cooke, 'Adverse Possession: Problems of Title in Registered Land'
(1994) 14 LS 1, 9

The decision in Spectrum is unsatisfactory, while being correct on its facts, and has generated much academic distress. So glaring an inconsistency with unregistered land is unfortunate in itself; from a practical point of view, it imposes on the parties a relationship of landlord and tenant which neither has chosen. It raises technical queries. What has happened, for example, to [the squatter's] independent fee simple, arising from his adverse possession of the land? He becomes the registered proprietor of the estate which the dispossessed owner held on trust for him; his fee simple has disappeared without trace.

Cooke argued that while *Spectrum Investment* was the correct decision on the facts, the registration of the adverse possessor with a leasehold title should not take place. She argued that the adverse possessor should be registered with a freehold title, to reflect the title acquired by possession. This prevented the relationship of landlord and tenant being forced upon the freeholder and adverse possessor.

In *St Marylebone*, Lord Radcliffe had also expressed doubt that the adverse possessor would be registered with the leasehold title.

Fairweather v St Marylebone Property Co Ltd
[1963] AC 510, HL

Lord Radcliffe

At 543

[. . .] the trust of the dispossessed owner's title under subsection (1) must somehow be reconciled with the provision under subsection (2) for the squatter to apply to register his own title, which would presumably be his independent possessory title acquired by the adverse possession.

If the adverse possessor is registered with freehold title, then, as in unregistered land, the leasehold title continues to exist as between the landlord and dispossessed tenant, enabling the effective surrender of the lease.

But Browne-Wilkinson J's analysis of s 75 of the LRA 1925 was supported in a subsequent decision.

Central London Commercial Estates Ltd v Kato Kagaku Co Ltd
[1998] EWHC 314

Sedley J

At [36]

To split the leasehold interest after 12 years' adverse possession into an element related entirely to the freehold and another related solely to the squatter, as is now known to happen with unregistered land, does not seem to me to marry up with either the purpose or the operation of section 75(1). The squatter, unlike an underlessee, has no legal relationship at all with the leaseholder during the 12 initial years of trespass (except in the negative sense that the leaseholder may at any time evict him and claim damages); and at the end of the 12 years, by operation of law, the leaseholder's right and title to do even this are extinguished wherever the Limitation Acts apply. At law the squatter is then in a position to make a good title, independent of the lease, although always subject to the freeholder's eventual reversion. In relation to a registered leasehold, however, section 75 lifts the extinguishing effect of the Limitation Act 1980 and substitutes a trust of the leasehold interest, benefits and burdens alike, from the moment of extinction of the leasehold title. The squatter becomes entitled, without regard to merits, to be placed in the same relationship with the freeholder as had previously been enjoyed by the leaseholder. The trust preserves not the squatter's common law title but a new statutory right to be substituted by registration for the leaseholder—carrying with it, as Mr Nugee accepts, an obligation to indemnify the leaseholder against outgoings. This is to all appearances a statutory conveyance of the entire leasehold interest.

In that case, the question that arose was whether a tenant in registered land that had lost its title by adverse possession could surrender the lease prior to the adverse possessor becoming registered and, therefore, while the s 75 trust remained in existence. This possibility had not arisen on the facts of *Spectrum Investment*, although Browne-Wilkinson J had noted the possibility that the tenant may remain free to deal with the title during this period. In *Kato Kagaku*, the answer followed logically from the court's refusal to 'split' the estate. A

surrender of the lease passed the leasehold title back to the freeholder, but subject to the adverse possessor's beneficial interest.

As we have seen, the LRA 2002 preserves the rights of adverse possessors who completed 12 years of adverse possession at the time that the Act came into force, but removes the s 75 trust. The transitional provision in Sch 12, para 18, confers on the adverse possessor an entitlement to be registered as the proprietor of 'the estate'. This appears to confirm the approach adopted in *Spectrum Investment* and *Kato Kagaku* in so far as the adverse possessor is entitled to be registered with the lease. Once registered, the factual position mirrors that in *Spectrum Investment* and therefore the possibility of a surrender by the dispossessed tenant is removed. Doubt may arise, however, as regards the position prior to registration. In the absence of a trust, there may be nothing to prevent the dispossessed proprietor executing a surrender of the lease.

As regards claims to adverse possession under the 2002 Act, the position is placed beyond doubt. Title remains vested in the tenant unless and until the adverse possessor successfully applies for registration under Sch 6. A successful application will result in the claimant being registered as proprietor of the lease,[107] thus again removing the possibility of a surrender.

7 CONCLUSION

The LRA 2002 brings the modern law of adverse possession in line with principles of registration of title. In so doing, its practical impact is to reduce the role of adverse possession and reduce the significance of concepts that have long underlined English land law: title by possession and relativity of title.

At the outset of our discussion of possession, we noted Green's suggestion that, in defining this concept, the case law is influenced by, and constructs, the concept of an ideal landowner. Green identifies the characteristics of that individual.

Green, 'Citizens and Squatters' in *Land Law: Themes and Perspectives*
(eds Bright and Dewar, 1998, p 241)

> The ideal landowner constructed by the laws of adverse possession is clearly no threat to civilised society. On the contrary, he is settled and stable, and honours both man-made and natural laws. His cultivation involves hard work. The sturdy figure of the ideal English landowner as reflected and maintained in adverse possession law invests his physical, intellectual, and emotional energies in the ground: he has entirely committed himself, through his engagement with the earth, to his plot of land. He wants to be a fixture in the landscape. He fences his land and locks his gates in order to exclude those who might detract from his hard labour—addressing the world outside as well as the land within his boundaries.

Green draws comparisons between the ideal landowner and the ideal citizen. She notes that, by drawing an ideal, the law also has an exclusionary effect. Green highlights that the most successful adverse possessors are those who already own land (and, therefore, are already included) and are trying to extend their boundaries. The successful claimants in the leading

[107] Land Registration Act 2002, Sch 6, paras 4 and 7, both provide for a successful application to result in registration as proprietor of 'the estate'.

cases of *Pye v Graham* and *Moran* clearly fit within this category. The least successful (on Green's analysis) are the 'have nots' who want to join the 'haves'. The unsuccessful claimant in *Powell* may be so described: he is presented in the court's judgment as a strong-willed rebellious teenager, acting despite (rather than in pursuance of) the wishes of his elderly, landowning grandparents.

Cobb and Fox further highlight the exclusionary effect of adverse possession.[108] They argue that, by setting the odds against claims, the LRA 2002 encourages urban squatters to lie low and not draw attention to their actions by applying for registration—that is, in this way, to live 'outside the system'.

While the practical role of adverse possession may therefore have been reduced and reformed by the 2002 Act, this is an area of law that continues to have resonance with important issues for land law and law in general: issues of ownership and use of land, and of inclusion and exclusion. Current debate remains centred on—and perhaps polarized by—the spectre of those who take possession of residential buildings. In 2010 the government published new guidance for property owners affected by adverse possession.[109] In 2011, following consultation, the government announced plans to introduce a new criminal offence of squatting in residential buildings.[110]

QUESTIONS

1. What do you understand by the concepts of 'title by possession', 'relativity of title', and the 'extinguishment' of a title by limitations?
2. To what extent are the concepts in the above question compatible with registration of title? Consider how any differences that may you identify are reflected in the operation of adverse possession in registered land.
3. How is adverse possession established? To what extent is this dependent on the intention of the adverse possessor and the paper owner/registered proprietor?
4. Do you consider the maintenance of rules of adverse possession to be justified?

FURTHER READING

Cobb and Fox, 'Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002' (2007) 27 LS 236

Cooke, *The New Law of Land Registration* (Oxford: Hart, 2003, ch 7)

Dockray, 'Why do we Need Adverse Possession?' [1985] Conv 272

Green, 'Citizens and Squatters' in *Land Law: Themes and Perspectives* (eds Bright and Dewar, Oxford: OUP, 1998)

[108] Cobb and Fox, 'Living Outside the System? The (Im)morality of Urban Squatting after the Land Registration Act 2002' (2007) 27 LS 236.

[109] Ministry of Justice and Department of Communities and Local Government, 'Advice on dealing with squatters in your home' (2010) available at http://www.direct.gov.uk/en/HomeAndCommunity/WhereYouLive/Derelictbuildingsandsquatters/DG_10022452

[110] Ministry of Justice, '*Options for Dealing with Squatting*' (2011, available at http://www.justice.gov.uk/downloads/consultations/options-dealing-squatting-response.pdf

Hopkins, *The Informal Acquisition of Rights in Land* (London: Sweet & Maxwell, 2000, ch 10)

Jones, 'Out with the Owners! The Eurasian Sequels to *JA Pye (Oxford) Ltd v United Kingdom*' (2008) 27 CJQ 260

Jourdan and Radley-Gardner, Adverse Possession (2nd edn, Haywards Heath: Bloomsbury Professional, 2011)

O'Mahony and Cobb, 'Taxonomies of Squatting: Unlawful Occupation in a New Legal Order' (2008) 71 MLR 878

Radley-Gardner, 'Civilized Squatting' (2005) 25 OJLS 727

Woods, 'Adverse Possession and Informal Purchasers' (2009) 60 NILQ 305

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PART C2

THE ACQUISITION OF AN EQUITABLE INTEREST IN LAND

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9

THE DOCTRINE OF ANTICIPATION: *WALSH V LONSDALE*

CENTRAL ISSUES

1. Equitable rights arise under the doctrine of anticipation where parties enter a specifically enforceable contract for the creation or transfer of legal estates and interests in land.
2. The doctrine is based on the maxim 'equity looks on as done that which ought to be done'. The availability of specific performance is the trigger for the application of the doctrine as providing the basis upon which the contract 'ought' to be performed.
3. Where the contract is for the transfer of an existing estate (the sale of a freehold or assignment of a lease), the effect of the doctrine is to separate legal and equitable entitlement to the same estate. The vendor therefore holds the estate on constructive trust for the purchaser, although the trust has some unusual features.
4. The doctrine of anticipation is of practical significance, in particular in determining the rights and duties of parties during the course of a transaction. Its application is, however, in decline and will be further curtailed on the eventual introduction of e-conveyancing.

1 INTRODUCTION

In this chapter, we consider how equitable interests may arise through the application of the maxim 'equity looks on as done that which ought to be done'. The acquisition of equitable rights through this maxim is attributed to the decision in *Walsh v Lonsdale*,[1] although it has been afforded a much broader application than the specific context in which it was applied in that case. It is sometimes referred to as the 'doctrine of conversion', but we have adopted

[1] (1882) LR 21 Ch D 9.

the nomenclature of the 'doctrine of anticipation' as a clearer description of the basis for the acquisition of rights.

The doctrine applies where a party is under a duty to grant another a legal property right, but has not yet done so. Equity anticipates the grant of those legal rights by conferring on the intended grantee an equitable interest mirroring the legal right in question. These equitable rights are generally temporal in duration, existing only in the period between the time at which legal rights 'ought' to be granted and the time at which such rights are, in fact, granted. But the rights are practically important, both in determining the rights and obligations of the grantor and grantee during this period, and in providing the grantee with proprietary rights that may be enforceable against third parties (under the priority rules discussed in Part D) prior to the completion of the legal grant.

2 *WALSH V LONSDALE* IN CONTEXT

Walsh v Lonsdale
(1882) LR 21 Ch D 9, CA

Facts: Lonsdale agreed to grant a lease of a mill to Walsh for seven years. The rent payable depended on the number of looms operated, but this was subject to a minimum number and rent based on that number was payable yearly in advance. No lease was granted, but Walsh moved in and started paying rent quarterly in arrears. Lonsdale demanded payment in advance and levied distress for non-payment of rent. Whether Lonsdale had acted lawfully in doing so depended on whether the terms of the parties' agreement were enforceable.

Jessel MR

At 14–15

There is an agreement for a lease under which possession has been given. Now since the Judicature Act the possession is held under the agreement. There are not two estates as there were formerly, one estate at common law by reason of the payment of the rent from year to year, and an estate in equity under the agreement. There is only one Court, and the equity rules prevail in it. The tenant holds under an agreement for a lease. He holds, therefore, under the same terms in equity as if a lease had been granted, it being a case in which both parties admit that relief is capable of being given by specific performance. That being so, he cannot complain of the exercise by the landlord of the same rights as the landlord would have had if a lease had been granted. On the other hand, he is protected in the same way as if a lease had been granted; he cannot be turned out by six months' notice as a tenant from year to year.

The context of the case lies in the merger of law and equity by the Judicature Acts 1873–75. The specific issue was the effect of the Acts on the position of a tenant who moves into possession and starts to pay rent in the absence of a formally granted lease. At common law, such facts gave rise to an implied periodic tenancy. If such a tenancy was present on the facts

of the case, then Walsh was only liable for rent in arrears (as had been paid) and Lonsdale's distress for non-payment of rent in advance was illegal. In equity, it was already established that the effect of the maxim 'equity looks on as done that which ought to be done' was that the parties would be treated as though the lease had been granted,[2] with the effect that all of the terms of the parties' agreement were enforceable. Applying the Judicature Acts, the Court gave precedence to equity's analysis. The agreement for the grant of a legal lease created an equitable lease under which the parties were bound by the same terms as their intended grant. Jessel MR's judgment is generally considered to be too broad a statement of the effect of the Judicature Acts,[3] although the doctrine of anticipation attributed to the case is well established and beyond doubt.

The principle espoused in the case has significance beyond the factual context of an agreement to grant a lease. The doctrine applies in two distinct circumstances.[4] The first, exemplified by *Walsh v Lonsdale*, is a contract to create a lease (a new legal estate) or to assign an existing legal interest.

Hopkins, *The Informal Acquisition of Rights in Land* (2000, p 63)

> [In *Walsh v Lonsdale*, the] uncompleted sale of the legal lease became the source for the creation of a lease in equity. Similarly, specifically enforceable contracts to create an interest in land are treated as creating the corresponding interest in equity. Hence, for example, a specifically enforceable contract to create a legal easement creates an equitable easement; a specifically enforceable contract to create a legal mortgage creates an equitable mortgage. In the same way, effect will be given to a specifically enforceable contract to transfer an existing legal interest.

The second situation in which the doctrine in *Walsh v Lonsdale* applies is an agreement for the sale of an existing legal estate: the transfer of a freehold or assignment of an existing lease. Its application in this situation is of particular practical significance, because it means that the doctrine is invoked as part of the usual conveyancing process for the sale and purchase of land. As we have seen in Chapter 7, the typical conveyance of land is divided into three stages: the entry into a contract for sale; execution of the contract by transfer of title; the application by the purchaser for registration. Legal title does not pass until registration. The doctrine of anticipation, however, operates as soon as there is a specifically enforceable contract.[5] From that time, equity treats the parties as though the contract has been executed.

Oakley explains the effect of the doctrine in this situation.

2 *Parker v Taswell* (1858) 2 De G & J 559.

3 In upholding the use of a legal remedy (distress) for rent payable under an equitable lease, the decision is considered to go beyond mere procedural fusion generally attributed to the Judicature Acts. On this aspect of the case, see Sparkes, '*Walsh v Lonsdale*: The Non-Fusion Fallacy' (1988) 8 OJLS 350.

4 Hopkins, *The Informal Acquisition of Rights in Land* (2000), pp 62–5.

5 *Lysaght v Edwards* (1876) 2 Ch D 499. The equitable interest created by the doctrine arises when the vendor makes title according to the contract, or the purchaser agrees to accept the vendor's title, but is then backdated to the time of the contract. See further Oakley, *Constructive Trusts* (3rd edn, 1997), pp 282–5.

Oakley, *Constructive Trusts* (3rd edn, 1997, p 275)

> [The] effect of the operation of the doctrine is to separate the legal and beneficial ownership of the property and it is only to be expected that equity therefore regards the vendor as a trustee of the property for the purchaser pending performance of the contract. No corresponding trust of the purchase money will arise simply because such a trust would lack the necessary certainty of subject matter. However, the vendor acquires a lien or charge on the property for the unpaid purchase money.

The trust is generally classified as a constructive trust. The nature of the trust changes once the purchase money has been paid in full, at the second stage of the usual conveyancing process—that is, the execution of the contract. At that stage, the vendor ceases to have any charge or lien on the property, and the trust becomes a bare trust.

In principle, the doctrine of anticipation applies equally to contracts relating to equitable interests.[6] Where the contract is for the sale of an existing beneficial interest, the application of the doctrine creates a sub-trust.

The doctrine of anticipation has also been applied where the duty to grant a property right has arisen otherwise than under a contract: for example, where a court orders a transfer of property and the transfer has not yet taken place.[7]

3 THE SIGNIFICANCE OF SPECIFIC PERFORMANCE

For the doctrine of anticipation to apply, it must be established that the parties' agreement is capable of specific performance. The availability of specific performance renders the execution of a contract inevitable and is the basis upon which equity considers that the agreement 'ought' to be performed. Not all specifically enforceable agreements that *relate* to land attract the application of the doctrine. It applies only to specifically enforceable contracts to create a recognized proprietary right in land.

The distinction between a contract relating to land and a contract creating, or transferring, a proprietary right in land has been noted in Chapter 7, section 3.1. Specific performance is not capable of turning a personal right into a proprietary right. This point is explained, in relation to the doctrine of anticipation, in the following extract.

McFarlane, 'Identifying Property Rights: A Reply to Mr Watt' [2003] Conv 473, 474

> It is important to distinguish between two different senses in which the availability of specific performance is said to be relevant to the proprietary status of a right. The first is under a generally accepted equitable doctrine, which can be called the "doctrine of anticipation". Where A enters a contract with B to confer a recognised property right on B, if specific performance of that contract is available, then B can gain an equitable equivalent of that property right

[6] The leading authority is *Oughtred v IRC* [1960] AC 206, which concerned a contract for sale of the beneficial interest under a trust of personal property (shares in a private company) rather than land. The application of the doctrine to equitable interests is not without controversy and is discussed by Oakley (1997), pp 278–80 and Hopkins (2000), pp 65–8.

[7] *Mountney v Treharne* [2003] Ch 135.

which takes effect before, and continues in the absence of, the contemplated conferral of the right by A. This doctrine is irrelevant when it comes to determining the proprietary status of a particular right, as it depends for its operation on A's being under a binding obligation to confer on B a right which is independently recognised as proprietary. Indeed, the doctrine of anticipation is concerned only with the methods by which property rights can be acquired: it allows such a right to be claimed without A's completing the planned transaction. The doctrine thus extends the list of means by which property rights can be acquired, not the list of rights which have proprietary status. Hence, as Swadling has emphasised, the doctrine of anticipation cannot, by itself, be used to confer proprietary status on rights otherwise regarded as personal.

An agreement to create or transfer a legal estate or interest will be specifically enforceable if three requirements are met. Firstly, there must be a valid contract. This means that there must be a contract that meets the formality requirements of s 2 of the Law of Property (Miscellaneous Provisions) Act 1989 (LP(MP)A 1989), as discussed in Chapter 7.

Secondly, consideration must have been provided; specific performance is an equitable remedy and equity does not assist a volunteer.

Thirdly, the circumstances must not reveal a defence to an action for specific performance. Defences include mistake (by the party seeking specific performance), undue hardship caused by ordering performance, impossibility of an order being complied with, delay, and misconduct. In particular, the party claiming specific performance must not have acted inequitably, because 'he who seeks the assistance of equity must come to court with clean hands'.

The dependence of the doctrine of anticipation on the availability of specific performance means that no rights are acquired until the requirements of specific performance are met. Moreover, once acquired, the rights remain dependent on the continuing availability of specific performance. This appears to make the equitable rights precarious: in particular, they are vulnerable to challenge through the intervention of a defence. In the contemporary context, the defences of hardship and impossibility may come to the fore where, for example, job loss after a contract has been entered results in the withdrawal of mortgage finance required for a purchase.[8]

The precarious nature of such rights leads Gardner to doubt that the ongoing availability of specific performance can, in fact, be a requirement of the doctrine.[9]

Gardner, 'Equity, Estate Contracts and the Judicature Acts: *Walsh v Lonsdale* Revisited' (1987) 7 OJLS 60, 64–5 and 74

According to the orthodoxy, then, the subsistence of estate contracts [acquired under *Walsh v Lonsdale*] is circumscribed at two levels: first, by the law of contract in general; and secondly, within that, by the law on the remedy of specific performance in particular. Now it is fundamentally implausible that a property right could be constituted in this way. The law of contract, with its doctrine of privity, is obviously at variance with the *in rem* quality of a proprietary interest; and the injection of the parameters of specific performance into its definition

[8] For discussion of recent cases raising these defences see Dowling 'Vendors' Application for Specific Performance' [2011] Conv 208.

[9] A view shared by McFarlane, *The Structure of Property Law* (2008), pp 235–7 and 705.

would give it an intermittent, discretionary nature quite at odds with the stability which is needed in an institution which has to be capable of recognition and application other than *ad hoc* and *inter partes*. This was the message of Lord Wilberforce's classic *dictum* that a property right must be 'definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence and stability'.

[. . .] The applications of estate contracts are wide and varied. They involve many of considerable importance as property interests, for which a high degree of stability is of the essence. And the more applications to which they are put, the more they take on the aspect of a wholly pervasive institution, so conducing to their application in yet further contexts, in a self-propelling development. Overall, the doctrinal load which they have come to be expected—indeed, known—to bear is so large and multifarious that it appears in large measure to have been found incompatible with the maintenance of the orthodox requirement that specific performance must be available between the present parties in their present question. The proprietary nature which estate contracts are in practice evidently conceived to possess is fundamentally irreconcilable with the orthodoxy, and in reality is rather commonly upheld at the latter's expense.

Gardner suggests that rather than the interest acquired under the doctrine of anticipation being dependent on the availability of specific performance, the relationship between the two is reversed: specific performance is available to vindicate the right acquired under *Walsh v Lonsdale*, which is itself derived from another source.[10] Gardner's concern with the precarious nature of a right dependent upon the continuing availability of specific performance appears to be a legitimate one—but it begs the question: if the doctrine is not dependent on specific performance, on what basis 'ought' an agreement be performed?

Hopkins suggests that, other than specific performance, an agreement ought to be performed where the purchaser has paid the consideration in full.

Hopkins, *The Informal Acquisition of Rights in Land* (2000, pp 74–5)

For a contract to be specifically enforceable, it is necessary for the purchaser to have provided some consideration. The rights and obligations of the parties change when the purchaser has paid the consideration in full. This change can be illustrated by reference to the sale of a legal estate. On the conventional analysis, once full payment is made, the vendor becomes a bare trustee of the land for the purchaser, and the purchaser is entitled to any benefit derived from the land. [. . .] It is submitted that the effect of full payment of consideration by the purchaser is now twofold. [. . .] Secondly the purchaser's right is no longer dependent upon specific performance. This is significant because the absence of the need to rely on specific performance removes the element of precariousness that otherwise characterises the purchaser's right. Before full payment of consideration, it is the availability of specific performance that enables the application of equity's maxim "equity regards as done that which ought to be done" by demonstrating that the contract "ought" to be performed. However, once the consideration has been paid, the fact of full payment itself provides a sufficient basis to assert that the contract "ought" to be performed.

[10] Gardner, 'Equity, Estate Contracts and the Judicature Acts: *Walsh v Lonsdale* Revisited' (1987) 7 OJLS 60, 74.

The purpose of Hopkins' analysis is twofold. Firstly, he argues that a right acquired under the doctrine of anticipation that is initially dependent on the availability of specific performance of a contract may mature and cease to be so dependent once full consideration is paid. Secondly, he suggests that the doctrine of anticipation may apply where a purchaser provides full consideration in the absence of a valid contract. Payment pursuant to an oral agreement may also reveal the elements of a claim to proprietary estoppel—but an ability to claim rights under the doctrine of anticipation would be advantageous. In particular, as we have seen in Chapter 7, doubt exists as to the availability of estoppel where a contract for sale of land is invalid for non-compliance with s 2 of the LP(MP)A 1989.

Full payment of consideration undoubtedly has an effect on the nature of the rights acquired under the doctrine of anticipation: for example, in rendering the vendor a bare trustee. It has not, however, had the wider impact advocated by Hopkins.[11] In particular, in *Lloyds Bank plc v Carrick*[12] (a case that is discussed further below), the Court of Appeal rejected an argument that a right acquired by entering a specifically enforceable contract ceased to be dependent on that contract once the consideration had been paid in full. Despite Gardner's analysis of the case law demonstrating to the contrary, the orthodox view remains that rights acquired under the doctrine of anticipation are dependent on the parties' contract and, therefore, on the continuing availability of specific performance of that contract.

4 THE NATURE OF THE RIGHTS ACQUIRED

As we have seen, the type of right acquired under the doctrine of anticipation is dependent on the nature of the agreement from which they are derived. Where the agreement concerns the creation of a lease or of an interest in land, the purchaser obtains the equitable equivalent of the intended right: an agreement for a lease gives rise to an equitable lease and an agreement for a mortgage gives rise to an equitable mortgage, etc. Where the agreement is for the transfer of an existing legal estate, the effect of the doctrine is that the estate is held on trust for the purchaser. In all cases, the right acquired is distinct from the legal right intended to be granted. This is readily apparent where the effect of the doctrine is to create a trust and so the contract for sale of the legal estate creates an equitable interest. It is less apparent, although is still the case, where the doctrine confers the equitable equivalent of the intended right.

In *Walsh v Lonsdale*, in the extract from his judgment above, Jessel MR considered that the parties hold under the same terms as if a lease had been granted. In *Chan v Cresdon Proprietary Ltd*,[13] the High Court of Australia emphasized that the equitable lease acquired is a distinct proprietary right from the legal lease that the tenant has contracted to buy. In that case, in the context of an intended grant of a legal lease to a tenant, the appellants agreed to act as guarantors for the tenant's obligations 'under this lease'. No legal lease was granted, because registration provisions had not been complied with. On the assumption that an equitable lease arose under the doctrine of anticipation, the Court held that the appellants were not liable as guarantors. The equitable lease was distinct from the legal lease and therefore obligations arising under it did not arise 'under this lease'.

Two further issues arise as regards the nature of the right acquired: firstly, the basis upon which rights acquired under the doctrine are enforceable against third parties; secondly,

[11] For an analysis of the authorities, see Hopkins (2000), pp 79–83.
[12] (1997) 73 P & CR 314. See Hopkins (2000), p 78.
[13] (1989) 168 CLR 350.

where the doctrine is given effect by the creation of a trust, the rights and obligations of the parties under the trust.

4.1 ENFORCEABILITY OF RIGHTS AGAINST THIRD PARTIES

As we have seen, on an orthodox approach, rights acquired under the doctrine of anticipation are dependent upon the existence of a contract and on the availability of specific performance of that contract. Similarly—at least, in most instances—the enforcement of the rights against third parties is dependent on the enforceability of the contract. A contract to convey or create a legal estate is an estate contract—itself a property right capable of binding third parties under the priority rules discussed in Part D of this book. In registered land, estate contracts may be enforceable against third parties by entry of a Land Registry notice or as an overriding interest where the beneficiary of the contract is in actual occupation; in unregistered land, estate contracts are registrable as a Class C(iv) land charge.[14] Hence, where the doctrine of anticipation applies, there may be two proprietary rights: the estate contract and the equitable rights acquired under the doctrine. At least as regards the enforcement of the rights against third parties, however, it seems that the latter has no existence independent from the former.

Where the contract is for the creation of a lease or a legal interest (such as an easement or mortgage), this may make little practical difference, because the priority rules applicable to the equitable easement or mortgage are the same as those applicable to an estate contract.[15] The difference is more evident in a contract for sale of an existing legal estate, where the doctrine of anticipation gives rise to a trust. The priority rules applicable to beneficial interests under a trust differ from those applicable to the underlying estate contract.

Lloyds Bank plc v Carrick
(1997) 73 P & CR 314, CA

Facts: Following the death of her husband, Mrs Carrick agreed to buy the remaining term of a lease of a maisonette from Mr Carrick, her brother-in-law. The agreement was specifically enforceable and Mrs Carrick had paid the full purchase price, but no assignment of the lease had been executed. Mr Carrick subsequently used the lease as security for a loan. On his default, the bank argued that Mrs Carrick's interest constituted an estate contract, which (the land being unregistered) was void against it for non-registration as a land charge.

Morritt LJ

At 320–2

Thus the issue argued on this appeal was whether Mrs Carrick had an interest in the maisonette separate and distinct from that which arose under the unregistered estate contract

[14] Land Charges Act 1972, s 2(4)(iv); Land Registration Act 2002, ss 32–39 and Sch 3. For full discussion of these priority rules, see Part D.

[15] In unregistered land, differences may arise in relation to the category of registrable land charge in issue. An equitable easement acquired under the doctrine of anticipation may be registered under Class D(iii) and an equitable mortgage under Class C(iii). In both cases, however, registration of the contract under Class C(iv) is also possible in the alternative. See Hopkins (2000), p 72.

which was capable of binding the Bank as successor in title to Mr Carrick. For Mrs Carrick it was submitted that she did. [. . .]

The argument for Mrs Carrick relied on the relative position at law and in equity as I have described it to found the argument that such an absolute equitable interest was not itself registrable but bound the bank as they had constructive notice of it. Counsel for Mrs Carrick accepted that such interest came or started from the contract but, he contended, it matured into an interest separate and distinct from the contract as soon as the purchase price was paid in full.

For my part I am unable to accept this analysis. The payment of £19,000 by Mrs Carrick to Mr Carrick did not as such and without more give her any interest in the maisonette. Nor, prior to the conclusion of the contract, were the circumstances such that Mrs Carrick could assert that her brother-in-law held the maisonette on any trust for her benefit. The source and origin of the trust was the contract; the payment of the price by Mrs Carrick served only to make it a bare trust by removing any beneficial interest of Mr Carrick. Section 4(6) of the Land Charges Act 1972 avoids that contract as against the bank. The result, in my judgment, must be that Mrs Carrick is unable to establish the bare trust as against the bank for it has no existence except as the equitable consequence of the contract. Accordingly I reject the contention founded on the bare trust. [. . .]

In this case there was a trust of the maisonette for the benefit of Mrs Carrick precisely because there had been an agreement between her and Mr Carrick which, for her part, she had substantially if not wholly performed. As between her and Mr Carrick such trust subsisted at all times after November 1982. I agree with counsel for the bank that there is no room in those circumstances for the implication or imposition of any further trust of the maisonette for the benefit of Mrs Carrick.

The enforcement of Mrs Carrick's interest acquired under the doctrine of anticipation was therefore wholly dependent on the priority rules applicable to estate contracts, not those applicable to trusts. On the facts, Mrs Carrick's interest was void against the bank because she had not registered her estate contract as a Class C(iv) land charge. In this respect, rights acquired under the doctrine of anticipation appear parasitic in nature: they are dependent for their enforceability on the underlying contract from which they are derived. Further, the Court held that the existence of the estate contract precluded Mrs Carrick from seeking to establish property rights under other equitable doctrines, including estoppel (discussed in Chapter 10) and the common intention constructive trust (discussed in Chapter 16). Because interests arising under these doctrines would have been binding against the bank, the existence of the contract, and the consequent application of the doctrine of anticipation, left Mrs Carrick in a worse position than would otherwise have been the case.[16]

4.2 THE NATURE OF THE TRUST

As we have seen, where parties enter into a contract to convey an existing legal estate the effect of the doctrine of anticipation is to separate legal and equitable entitlement to the same estate. In such cases, the vendor has generally been regarded as becoming constructive trustee for the purchaser. The trust has been described as being '*of an extremely unusual*

[16] A point acknowledged by the court: *Lloyds Bank plc v Carrick* (1997) 73 P & CR 314, 322. For further discussion, see Ferguson, 'Estate Contracts, Constructive Trusts and the Land Charges Act' (1996) 112 LQR 549.

nature'.[17] Until full payment of the purchase money on completion, the trustee (the vendor) remains in possession, has a significant interest in the land, is entitled to income generated from the land, and is responsible for outgoings. The purchaser (the beneficiary under the trust) becomes entitled to capital benefits, such as any increase in the value of the land. In principle, risks pass to the purchaser, although these may be passed back to the vendor by the terms of the contract.[18]

The trust therefore serves a very practical role in determining the respective rights and obligations of the parties during the period of the transaction, but, as Harpum notes, it is an inelegant mechanism with which to do so.

Harpum, 'The Uses and Abuses of Constructive Trusts: The Experience of England and Wales' (1997) 1 Edin LR 437, 457

> Of course English law will not now abandon the constructive trust that arises out of a specifically enforceable contract. It is of ancient origin and is too much part of the weft and warp of our conveyancing law. In practice it is workable if inelegant. But it is not a cloth that any legal system would weave if it was starting de novo.

Viewed in the broader context of the doctrine of anticipation, the imposition of the trust creates a lack of doctrinal cohesion. The application of the same doctrine has a different effect depending on the type of contract entered. Only in those situations in which a constructive trust is imposed does the doctrine create fiduciary obligations.

It is difficult to justify why a contract to assign an existing lease places the vendor under fiduciary obligations to the purchaser as constructive trustee, while a contract to grant a new lease (such as that in *Walsh v Lonsdale*) does not. The basis for the imposition of the constructive trust (as is acknowledged by Oakley) is simply the division of legal and equitable entitlement to the same estate.[19] In *Westdeutsche Landesbank Gorozentrale v Islington LBC*,[20] the House of Lords denied that the division of entitlement necessarily requires a trust.

Hopkins suggests that the case may be used to rationalize the doctrine of anticipation.

Hopkins, *The Informal Acquisition of Rights in Land* (2000, pp 64–5)

> Following *Westdeutsche Landesbank Gorozentrale v. Islington L.B.C.*, it is no longer necessary to see the imposition of fiduciary obligations as the inevitable consequence of the division of legal and equitable entitlement. [. . .] there are circumstances in which it is appropriate to accept that legal and equitable title is divided without the imposition of fiduciary obligations. However, adopting a broad definition, such situations could still be described as involving a trust. It may be more appropriate to treat the division of title that occurs by entering a specifically enforceable contract to sell a legal estate as not imposing fiduciary obligations. This would provide conceptual coherence to the application of equity's maxim

[17] Oakley (1997), p 277.
[18] The rights and duties of the parties are explored ibid, pp 292–304.
[19] Ibid, p 275, extracted above.
[20] [1996] AC 669, 705–7.

by ensuring that the consequence of intervention is the same in all situations in which the rule is applied. In all situations, the purchaser acquires an equitable interest corresponding to the right he has contracted to buy. Where this results in the division of legal and equitable title to an estate, a form of trust may be imposed, but the vendor will not necessarily be placed under any fiduciary obligation towards the purchaser.

It may be questioned whether this solution, in fact, provides the rationalization that Hopkins suggests. It removes the initial disparity caused by the imposition of fiduciary obligations in those situations in which the doctrine of anticipation triggers the imposition of a constructive trust—but, for so long as a trust is in place, the subsequent imposition of such obligations remains possible. Indeed, Hopkins suggests that fiduciary obligations should arise at the point in time that consideration has been paid in full, where the trust becomes a bare trust.[21] Arguably, full doctrinal cohesion could only be obtained by taking the doctrine outside the scope of constructive trusts. As Harpum acknowledges (in his comment quoted above), the trust is now too embedded in English law to do so.

5 CONCLUSION

The doctrine of anticipation applies where a party is under a duty to grant another a legal property right, but has not yet done so. The effect of the doctrine, reflecting the maxim 'equity looks on as done that which ought to be done', is to create equitable proprietary rights mirroring the legal rights that 'ought' to be granted. The doctrine is of practical significance in determining the rights and obligations of parties between contract and the grant of the legal right in question. The equitable rights created are unusual in two respects: firstly, on the orthodox view, they are precarious in their nature as dependent on the continuing availability of specific performance; secondly, their ability to bind third parties is dependent upon the enforceability of the underlying estate contract.

Despite its practical significance, the application of the doctrine in the context of contractual duties is in decline. Its scope has already been curtailed by s 2 of the LP(MP)A 1989. Only contracts that comply with the formality requirements provided in that section are capable of specific performance and therefore attract the application of the doctrine. In particular, this prevents the doctrine from applying to oral agreements.[22]

Eventually the utility of the doctrine will be further curtailed by the introduction of e-conveyancing, though we have seen in Chapter 7 that this is currently on hold. When e-conveyancing is introduced, it will remove the 'registration gap' that currently exists between completion and registration—that is, the period during which the parties' rights are currently based on a bare trust subsisting under the doctrine of anticipation. The application of the doctrine will then be limited to the period between entry into a specifically enforceable contract and simultaneous completion/registration.

[21] Hopkins (2000), pp 74–5.

[22] A direct consequence of the 1989 Act was to prevent the doctrine of anticipation from being used to create an equitable mortgage by the deposit of title deeds—a previously common form of creating temporary security for a loan or overdraft: *United Bank of Kuwait plc v Sahib* [1996] 3 WLR 472.

QUESTIONS

1. Assess the relationship between the doctrine of anticipation and specific performance. Is there any other basis upon which an agreement 'ought' to be performed?
2. Compare and contrast the operation of the doctrine of anticipation to the following contracts: (i) a contract to grant a new lease; and (ii) a contract to assign an existing lease.
3. Assess the role of the constructive trust in the operation of the doctrine of anticipation.

FURTHER READING

Gardner, 'Equity, Estate Contracts and the Judicature Acts: *Walsh v Lonsdale* Revisited' (1987) 7 OJLS 60

Hopkins, *The Informal Acquisition of Rights in Land* (London: Sweet & Maxwell, 2000, ch 5)

Oakley, *Constructive Trusts* (3rd edn, London: Sweet & Maxwell, 1997, ch 6)

Sparkes, '*Walsh v Lonsdale*: The Non-Fusion Fallacy' (1988) 8 OJLS 350

10

PROPRIETARY ESTOPPEL

CENTRAL ISSUES

1. Proprietary estoppel is a means, originally developed by courts of equity, by which a party (B) can gain some protection against an owner of land (A), even if he or she has no contract with A and even if A has not formally given B a property right in relation to A's land. That protection consists of A coming under a duty to B. This means that, in some cases at least, proprietary estoppel is a means by which B can acquire a property right in land.
2. It is important to distinguish proprietary estoppel from other forms of estoppel. As we will see in the first section of this chapter, proprietary estoppel is not merely a means by which B can prevent A from asserting a right against B, or by which B can prevent A from denying that B already has a right. Rather, proprietary estoppel is an independent means by which B can acquire a right against A: it can be used not only as a 'shield' to defend B from A, but also as a 'sword' to impose a duty on A to B.
3. To make a successful proprietary estoppel clam, B must show that each of three key requirements has been satisfied. First, A assured B that B already has a right in relation to A's land, or that B will get such a right in the future. Second, B reasonably relied on A's assurance. Third, B would now suffer a detriment if A were not under a duty to B. We will examine each of these requirements in the second section. We will also consider the suggestion that there is a further, fourth requirement: that A must be shown to have acted unconscionably.
4. If B makes a successful proprietary estoppel claim, a question then arises as to the *extent of the right* acquired by B. In other words, what is the content of A's duty to B? For example, will A necessarily be under a duty to honour the assurance made to B? We will examine this question below, in section 3.
5. Having established the content of A's duty to B, we then need to work out the *effect of B's right on third parties*. For example, if B successfully claims a proprietary estoppel against A, will it ever be possible for B to rely on that same claim against C, a party who later acquires A's land? And, to answer that question, do we simply apply the content question, as outlined in Chapter 5, and ask if the content of A's duty to B is such that B has a recognised equitable interest in A's land? Or are there special rules, that apply only to cases of proprietary estoppel? We will examine these questions in section 4 of this chapter.

1 INTRODUCTION: THE NATURE OF PROPRIETARY ESTOPPEL

The term 'estoppel' can be confusing. In law, there are many different forms of estoppel but, in general, the term is used to refer to situations in which a party is *prevented*—that is, stopped or, in old French, *estopped*—from denying the truth of a particular matter of fact or law. In general, then, we would not expect an estoppel, by itself, to give B a right against A; at most, it could assist B in acquiring a right, by preventing A from denying one of the matters of fact or law that B may have to establish to acquire a right. This is certainly true of two important forms of estoppel: estoppel by representation (which prevents A, sometimes only temporarily, from denying the truth of a representation of existing fact or law made to B, where B has relied on that representation);[1] and promissory estoppel (which prevents A from enforcing an existing right against B, where A has promised not to do so and where B would suffer a detriment if A were allowed to enforce his right).[2]

There is, however, a fundamental difference between proprietary estoppel and each of estoppel by representation and promissory estoppel. The difference is that, unlike the other two forms of estoppel, proprietary estoppel *can*, by itself, give B a right against A. As Lord Denning MR once put it: '*there are estoppels and estoppels. Some do give rise to a cause of action. Some do not. In the species of estoppel called proprietary estoppel, it does give rise to a cause of action… The new rights and interests, so created by estoppel, in or over land, will be protected by the courts and in this way give rise to a cause of action*.'[3] In other words, proprietary estoppel, unlike the other two forms of estoppel, is relevant to the acquisition question.

This special feature of proprietary estoppel was recently confirmed by the House of Lords, as can be seen in the following extract.

Thorner v Major [2009] UKHL 18, [2009] 3 All ER 945

Facts: Peter Thorner owned Steart Farm, by the village of Cheddar in Somerset. David Thorner, whose father was a cousin of Peter, worked on that farm, for Peter, for 30 years. David was not paid for that work. He also worked on his parents' farm, and his parents gave him accommodation and pocket money. As a result of working for both his parents and Peter, David worked very long hours. David believed that, on Peter's death, he would inherit Steart Farm. There was no explicit promise or assurance by Peter to David, but David's belief developed over a period of 15 years and was encouraged by Peter's conduct. For example, in 1990, Peter gave David a bonus notice relating to two assurance policies on Peter's life, saying 'That's for my death duties'. As a result of his belief that he would inherit the farm, David continued to work for Peter and did not pursue other opportunities. Peter did in fact make a will leaving the farm to David. However, that will also gave specific sums of money to other individuals; when Peter later fell out with some of those individuals, he destroyed his will. Unfortunately, Peter died without making a new will and so his property, including the farm, passed not to

[1] See *Pickard v Sears* (1837) 6 Ad & El 469.
[2] See *Central London Property Trust Ltd v High Trees House* [1947] KB 130.
[3] *Crabb v Arun DC* [1976] Ch 179, 187.

David but to the closer relatives of Peter who, by statute, received his estate on the event of his intestacy.

David made a claim against Peter's estate, claiming that, when Peter died, he was under a duty, arising as a result of proprietary estoppel, to leave the farm to David. The first instance judge found in favour of David and ordered that Peter (and so now Peter's estate) was under a duty to transfer Steart Farm to David. For these purposes the farm included the land and buildings, worth around £2.4 million, as well as other farm assets (e.g. machinery and live stock), worth an additional £650,000 or so, plus whatever limited amount of working capital was credited to the farm's trading accounts at the time of Peter's death.

The Court of Appeal, however, held that David had no proprietary estoppel claim. Before the House of Lords, the argument centred on two issues. First, had Peter made an assurance that was capable of giving rise to a proprietary estoppel? Second, if such an assurance was made, was the land to which it related adequately identified? Each of these issues was decided in David's favour, and the House of Lords thus restored the order of the first instance judge that Peter's estate was under a duty to transfer Steart Farm to David.

Lord Walker

At [29]–[30]

This appeal is concerned with proprietary estoppel [. . .] most scholars agree that the doctrine is based on three main elements, although they express them in slightly different terms: a representation or assurance made to the claimant; reliance on it by the claimant; and detriment to the claimant in consequence of his (reasonable) reliance.[4]

This appeal raises two issues. The first and main issue concerns the character or quality of the representation or assurance made to the claimant. The other (which could be regarded as a subsidiary part of the main issue, but was argued before your Lordships as a separate point) is whether, if the other elements for proprietary estoppel are established, the claimant must fail if the land to which the assurance relates has been inadequately identified, or has undergone a change (in its situation or extent) during the period between the giving of the assurance and its eventual repudiation.

At [55]–[57]

The present appeal is not of course a case of acquiescence (or standing-by). David does not assert that he can rely on money which he has spent on the farm, or improvements which he has made to it. His case is based on Peter's assurances to him. But if all proprietary estoppel cases (including cases of acquiescence or standing-by) are to be analysed in terms of assurance, reliance and detriment, then the landowner's conduct in standing by in silence serves as the element of assurance [. . .]

I would prefer to say (while conscious that it is a thoroughly question-begging formulation) that to establish a proprietary estoppel the relevant assurance must be clear enough. What amounts to sufficient clarity, in a case of this sort, is hugely dependent on context. I respectfully concur in the way Hoffmann LJ put it in *Walton v Walton* (in which the mother's 'stock

[4] [The books quoted by Lord Walker were Harpum et al (eds) *Megarry & Wade's Law of Real Property* (London:Sweet & Maxwell, 7th edn, 2008), para 16–001; Gray & Gray, *Elements of Land Law* (Oxford:OUP, 5th edn, 2009), para 9.2.8; McGhee et al (eds), *Snell's Equity* (31st edn, 2005), paras 10–16 and 10–19; and Gardner, *An Introduction to Land Law* (Oxford:Hart, 2007), para 7.1.1.

phrase' to her son, who had worked for low wages on her farm since he left school at fifteen, was 'You can't have more money and a farm one day'). Hoffmann LJ stated:[5]

> 'The promise must be unambiguous and must appear to have been intended to be taken seriously. Taken in its context, it must have been a promise which one might reasonably expect to be relied upon by the person to whom it was made.'[6]

At [60]–[66]

I respectfully consider that the Court of Appeal did not give sufficient weight to the advantage that the trial judge had in seeing and hearing the witnesses. They concentrated too much, I think, on the 1990 incident of the bonus notice. That was certainly an important part of the narrative. For David it marked the transition from hope to expectation. But it did not stand alone. The evidence showed a continuing pattern of conduct by Peter for the remaining 15 years of his life and it would not be helpful to try to break down that pattern into discrete elements (and then treat each as being, on its own, insignificant). To my mind the deputy judge did find that Peter's assurances, objectively assessed, were intended to be taken seriously and to be relied on.[7] In the end it is a short point; I do not think that there was sufficient reason for the Court of Appeal to reverse the trial judge's careful findings and conclusion. I do not share the Court of Appeal's apparent apprehension that floodgates might be opened, because cases like this are fairly rare, and trial judges realise the need to subject the evidence (whether as to assurances, as to reliance or as to detriment) to careful, and sometimes sceptical, scrutiny [. . .]

The identity of the farm

In my opinion it is a necessary element of proprietary estoppel that the assurances given to the claimant (expressly or impliedly, or, in standing-by cases, tacitly) should relate to identified property owned (or, perhaps, about to be owned) by the defendant. That is one of the main distinguishing features between the two varieties of equitable estoppel, that is promissory estoppel and proprietary estoppel. The former must be based on an existing legal *relationship* (usually a contract, but not necessarily a contract relating to land). The latter need not be based on an existing legal relationship, but it must relate to *identified property* (usually land) owned (or, perhaps, about to be owned) by the defendant. It is the relation to identified land of the defendant that has enabled proprietary estoppel to develop as a sword, and not merely a shield: see Lord Denning MR in *Crabb v Arun DC*.

In this case the deputy judge made a clear finding of an assurance by Peter that David would become entitled to Steart Farm. The first, 'watershed' assurance was made in 1990 at about the time that Peter made an advantageous sale of one field for development purposes, and used part (but not the whole) of the proceeds to buy more agricultural land, so increasing the farm to the maximum at about 582 acres (some merely tenanted by Peter) which Peter farmed in 1992. Both Peter and David knew that the extent of the farm was liable to fluctuate (as development opportunities arose, and tenancies came and went). There is no reason to doubt that their common understanding was that Peter's assurance related to whatever the farm consisted of at Peter's death (as it would have done, barring any restrictive language, under s 24 of the Wills Act 1837, had Peter made a specific devise of Steart Farm). This fits in with the retrospective aspect of proprietary estoppel noted in *Walton v Walton*.[8]

[. . .]

[5] 14 April 1994 (unreported), [16].

[6] At [57], Lord Walker approved of a further quotation from Hoffmann LJ's judgment in *Walton v Walton*: this paragraph is set out in section 2.1.3 below.

[7] [2007] EWHC 2422 (Ch) at [94], [98].

[8] 14 April 1994, unreported.

In any event, for the reasons already mentioned, I do not perceive any real uncertainty in the position here. It is possible to imagine all sorts of events which might have happened between 1990 and 2005. If Peter had decided to sell another field or two, whether because of an advantageous development opportunity or because the business was pressed for cash, David would have known of it, and would no doubt have accepted it without question (just as he made no claim to the savings account which held that part of the proceeds of the 1990 sale which Peter did not roll over into land). If Peter had decided in 2000 to sell half the farm in order to build himself a retirement home elsewhere (an unlikely hypothesis) David might well have accepted that too [. . .] But it is unprofitable, in view of the retrospective nature of the assessment which the doctrine of proprietary estoppel requires, to speculate on what might have been.

Apart from his principled attack based on uncertainty, [counsel for Peter's executors], realistically, did not criticise the deputy judge's decision to award David the whole farm and the whole of the farming assets. There is no ground on which to challenge the judge's discretion in determining the remedy. I would allow the appeal and restore the judge's order.

Lord Neuberger

At [77]–[78]

In my judgment, those findings clearly indicate that the deputy judge was of the opinion, contrary to the view expressed by the Court of Appeal, that the statements he found to have been made by Peter were reasonably understood by David to indicate that Peter was committing himself to leaving the farm to David, and were reasonably relied on by David as having that effect. Such a reading is strongly supported by the deputy judge's observations that, if it was necessary to make such a finding, he would have regarded Peter's statement in 1990 as 'tantamount to an assurance to David', and that he did 'not accept' that it was 'ambiguous'.[9]

[. . .] It may be that there could be exceptional cases where, even though a person reasonably relied on a statement, it might be wrong to conclude that the statement-maker was estopped, because he could not reasonably have expected the person so to rely. However, such cases would be rare, and, in the light of the facts found by the deputy judge, it has not been, and could not be, suggested that this was such a case.

At [95]

In this case, the extent of the farm might change, but, on the deputy judge's analysis, there is, as I see it, no doubt as to what was the subject of the assurance, namely the farm as it existed from time to time. Accordingly, the nature of the interest to be received by David was clear: it was the farm as it existed on Peter's death. As in the case of a very different equitable concept, namely a floating charge, the property the subject of the equity could be conceptually identified from the moment the equity came into existence, but its precise extent fell to be determined when the equity crystallised, namely on Peter's death.

At [102]

[. . .] Of course, there may be cases where the facts justify a different conclusion either because the promise had a different meaning at the time it was made, or because intervening events justify giving it a different effect—or even no effect. However, such considerations do not apply in this case. The farm did increase in size, but this had largely happened by 1992, which was only two years after the principal statement on which the estoppel relies; and 13 years elapsed thereafter, during which that statement, together with subsequent statements

9 [2007] EWHC 2422 (Ch), [125].

by Peter, were relied on by David. Further, the increase in the farm's size was achieved largely by Peter buying more land with money obtained through the sale for development of a much smaller area of the farm. In any event, there is no suggestion that Peter had any wish or moral obligation to leave the farm or any part of it to anyone other than David.

Lord Hoffmann

At [1]–[9]

My Lords, the appellant David Thorner is a Somerset farmer who, for nearly 30 years, did substantial work without pay on the farm of his father's cousin Peter Thorner. The judge found that from 1990 until his death in 2005 Peter encouraged David to believe that he would inherit the farm and that David acted in reliance upon this assurance. In the event, however, Peter left no will. In these proceedings, David claims that by reason of the assurance and reliance, Peter's estate is estopped from denying that he has acquired the beneficial interest in the farm. [. . .]

Such a claim, under the principle known as proprietary estoppel, requires the claimant to prove a promise or assurance that he will acquire a proprietary interest in specified property. A distinctive feature of this case, as Lloyd LJ remarked in the Court of Appeal, was that the representation was never made expressly but was 'a matter of implication and inference from indirect statements and conduct'.[10] It consisted of such matters as handing over to David in 1990 an insurance policy bonus notice with the words 'that's for my death duties' and other oblique remarks on subsequent occasions which indicated that Peter intended David to inherit the farm. As Lloyd LJ observed such conduct and language might have been consistent with a current intention rather than a definite assurance.[11] But the judge found as a fact that these words and acts were reasonably understood by David as an assurance that he would inherit the farm and that Peter intended them to be so understood.

The Court of Appeal said, correctly, that the fact that Peter had actually intended David to inherit the farm was irrelevant. The question was whether his words and acts would reasonably have conveyed to David an assurance that he would do so. But Lloyd LJ accepted that the finding as to what Peter would reasonably have been understood to mean by his words and acts was a finding of fact which was not open to challenge.[12] That must be right. The fact that he spoke in oblique and allusive terms does not matter if it was reasonable for David, given his knowledge of Peter and the background circumstances, to have understood him to mean not merely that his present intention was to leave David the farm but that he definitely would do so.

However, the Court of Appeal allowed the appeal on the ground that the judge had not found that the assurance was intended to be relied upon and that there was no material upon which he could have made such a finding. The judge had found that David had relied upon the assurance by not pursuing other opportunities but not, said Lloyd LJ, that Peter had known about these opportunities or intended to discourage David from pursuing them.

At that point, it seems to me, the Court of Appeal departed from their previously objective examination of the meaning which Peter's words and acts would reasonably have conveyed and required proof of his subjective understanding of the effect which those words would have upon David. In my opinion it did not matter whether Peter knew of any specific alternatives which David might be contemplating. It was enough that the meaning he conveyed would reasonably have been understood as intended to be taken seriously as an assurance which could be relied upon. If David did then rely upon it to his detriment, the necessary

[10] [2008] EWCA Civ 732, [65]. [11] Ibid, [67]. [12] Ibid, [66].

element of the estoppel is in my opinion established. It is not necessary that Peter should have known or foreseen the particular act of reliance.

The judge found not only that it was reasonable for David to have understood Peter's words and acts to mean that 'he would be Peter's successor to [the farm]' but that it was reasonable for him to rely upon them.[13] These findings of fact were in my opinion sufficient to support the judge's decision.

The judge held that the equity in David's favour created by the proprietary estoppel required a declaration that Peter's personal representatives held the farm with its chattels, live and dead stock and cash at bank on trust for David absolutely. The personal representatives object on two grounds. First, they say although the judge placed reliance on the incident of the handing over of the insurance policy in 1990, the assurance was not unequivocal until affirmed by later words and conduct, after which the detriment suffered by David was a good deal less than if one took the whole period from 1990 until Peter's death and therefore did not justify an award of the whole farm.

I do not think that the judge was trying to pinpoint the date at which the assurance became unequivocal and I think it would be unrealistic in a case like this to try to do so. There was a close and ongoing daily relationship between the parties. Past events provide context and background for the interpretation of subsequent events and subsequent events throw retrospective light upon the meaning of past events. The owl of Minerva spreads its wings only with the falling of the dusk.[14] The finding was that David reasonably relied upon the assurance from 1990, even if it required later events to confirm that it was reasonable for him to have done so.

The second ground of objection is that the farm when Peter died in 2005 was not the same as it was in 1990. In between, he had sold some land and bought other land. I agree with my noble and learned friends Lord Walker of Gestingthorpe and Lord Neuberger of Abbotsbury that changes in the character or extent of the property in question are relevant to the relief which equity will provide but do not exclude such a remedy when there is still an identifiable property. In the present case, I see no reason to question the judge's decision that David was entitled to the beneficial interest in the farm and the farming business as they were at Peter's death.

The decision of the House of Lords in *Thorner v Major* provides a graphic demonstration of the power of proprietary estoppel. Peter did not make a testamentary gift to David, as he died without a valid will. Nor could David show that Peter was under any contractual duty to give him the farm: certainly, as we saw in Chapter 7, the Law of Property (Miscellaneous Provisions) Act 1989 ensures that any such contract would have required a formal, written agreement. Nonetheless, thanks to proprietary estoppel, Peter was, at the time of his death, under a duty to transfer the farm land and business assets, worth over £3 million, to David. As Lord Hoffmann put it, David was '*entitled to the beneficial interest in the farm and farming business as they were at Peter's death*'. This beneficial interest can be seen to arise as a result of the doctrine of anticipation, discussed in Chapter 9: as Peter was under a duty to transfer the farm land to David, David acquired an immediate equitable interest in that land.

13 [2007] EWHC 2422 (Ch), [98].

14 [This aphorism was coined by Hegel, writing in 1820, at the end of the Preface to his *Philosophy of Right* (see Knox (trs) *Hegel's Philosophy of Right*, 1967). Minerva was the Roman goddess of, amongst other things, wisdom. The idea behind the aphorism is that, in some contexts at least, the truth is known only after the event. Hegel used it to make the point that philosophy should not be expected to lay down how one ought to behave in the future. As we will see in this chapter, Lord Hoffmann uses the aphorism to capture an important difference between proprietary estoppel and contractual claims.]

It is, therefore, clear that proprietary estoppel, unlike estoppel by representation or promissory estoppel, is a means by which A can come under a duty to B, and thus a means by which B can, in some cases at least, acquire an equitable interest in A's land. As a result, the term 'proprietary estoppel' is unhelpful: the doctrine does far more than simply stop A from doing something, and so thinking of it as a form of estoppel may lead to confusion. Such confusion, it is submitted, can be seen in the following extract from Lord Scott's speech in *Thorner v Major*.

Lord Scott

At [19]–[21]

The second 'certainty' problem about a representation that David would inherit Steart Farm, a problem inherent in every case in which a representation about inheritance prospects is the basis of a proprietary estoppel claim, is that the expected fruits of the representation lie in the future, on the death of the representor, and, in the meantime, the circumstances of the representor or of his or her relationship with the representee, or both, may change and bring about a change of intentions on the part of the representor[...]If, for example, Peter had become, before his death, in need of full-time nursing care, so that he could not continue to live at Steart Farm or continue as a farmer and needed to sell Steart Farm or some part of it in order to fund the costs of necessary medical treatment and care, it seems to me questionable whether David's equity in Steart Farm, bred from the representations and conduct in evidence in this case, would have been held by a court to bar the realisation of Steart Farm, or some sufficient part of it, for those purposes. I do not, of course, imagine for a moment that, in the circumstances I am postulating, David would have raised any objection.

However, the conceptual possibility of a dispute arising in the circumstances postulated has to be borne in mind. Would it really be the case that the representations made by Peter, relied on and acted on by David as they were, would have barred the use of Steart Farm as a source of funding for the needs of Peter in a decrepit old age? For my part, I doubt it. But it is an odd sort of estoppel that is produced by representations that are, in a sense, conditional.

These reflections invite some thought about the relationship between proprietary estoppel and constructive trust and their respective roles in providing remedies where representations about future property interests have been made and relied on. There are many cases in which the representations relied on relate to the acquisition by the representee of an immediate, or more or less immediate, interest in the property in question. In these cases a proprietary estoppel is the obvious remedy. The representor is estopped from denying that the representee has the proprietary interest that was promised by the representation in question [...] In cases where the owner of land stands by and allows a neighbour to build over the mutual boundary, representing either expressly or impliedly that the building owner is entitled to do so, the owner may be estopped from subsequently asserting his title to the encroached-upon land. This, too, seems to me straightforward proprietary estoppel. There are many other examples of decided cases where representations acted on by the representee have led to the representor being estopped from denying that the representee had the proprietary interest in the representor's land that the representation had suggested. Constructive trust, in my opinion, has nothing to offer to cases of this sort. But cases where the relevant representation has related to inheritance prospects seem to me difficult, for the reasons I have given, to square with the principles of proprietary estoppel [...] and, for my part, I find them made easier to understand as constructive trust cases. The possibility of a remedial constructive trust over property, created by the common intention or understanding of the parties regarding the property on the basis of which the claimant has acted to his detriment, has been recognised at least since *Gissing v Gissing*.[15] [...] The 'inheritance' cases [...]

[15] [1971] AC 886 (see Chapter 16, section 2.1.2).

are, to my mind, more comfortably viewed as constructive trust cases [...] For my part I would prefer to keep proprietary estoppel and constructive trust as distinct and separate remedies, to confine proprietary estoppel to cases where the representation, whether express or implied, on which the claimant has acted is unconditional and to address the cases where the representations are of future benefits, and subject to qualification on account of unforeseen future events, via the principles of remedial constructive trusts.

I am satisfied, however, that this case would, on the factual findings made by the judge and accepted by the Court of Appeal have justified a remedial constructive trust under which David would have obtained the relief awarded him by the judge. I would allow the appeal.

Lord Scott thus agreed that, at the time of his death, Peter was under a duty to transfer the farm to David. However, he did not think that proprietary estoppel could explain why that duty arose; rather, his view was that the duty arose on a different basis, shared by that of the common intention constructive trust. We will examine the common intention constructive trust in Chapter 16, section 2.1.2. The important point, for present purposes, is that Lord Scott sees proprietary estoppel, like other forms of estoppel, as being limited in effect: it can only operate to prevent A from denying something. This model cannot work in a case where A, rather than representing that B *currently* has a right in A's land, instead promises B that B will acquire such a right in the future. That is why Lord Scott thinks that proprietary estoppel cannot apply in an 'inheritance case', such as *Thorner v Major*, where A promises B that B will acquire A's land on A's death.

The reasoning of all the other members of the House of Lords in *Thorner v Major* is, however, inconsistent with Lord Scott's view. The extracts set out above show that each of Lord Walker, Lord Neuberger and Lord Hoffmann held that proprietary estoppel *can* impose a duty on A to B, even in a case where A's assurance is not that B already has a right in A's land, but is rather than B will acquire such a right in the future. As a result, it is clear that proprietary estoppel is very different from other forms of estoppel; so different, in fact, that the term 'estoppel' is positively misleading.

2 THE REQUIREMENTS OF PROPRIETARY ESTOPPEL

In section 1, we considered the nature of proprietary estoppel and saw that it can be used, in some cases at least, as a means by which B can acquire an equitable interest in A's land. We also saw that, in *Thorner v Major*, Lord Walker noted that there are generally said to be three elements of the doctrine.[16] Writing extra-judicially, Lord Neuberger has also summarised proprietary estoppel as consisting of three requirements.

Lord Neuberger, 'The Stuffing of Minerva's Owl? Taxonomy and Taxidermy in Equity' [2009] CLJ 537

At 538

In very summary terms, the ingredients of proprietary estoppel are the following:

(1) a statement or action (which can include silence or inaction) by the defendant, who ought to appreciate the claimant will rely on it;

16 [2009] 3 All ER 945, [29] (set out in the extract in section 1 above).

(2) an act by the claimant in the reasonable belief that he has or will get an interest in land, induced by that statement or action;

(3) consequent detriment to the claimant if the defendant is entitled to resile from his statement or action.

We will now examine each of those three elements, basing our terminology on that used by Lord Walker in *Thorner v Major*. As we will see, there is a degree of overlap between each of the three. So, whilst it is undoubtedly useful to divide the requirements of proprietary estoppel in this way, it is also important to bear in mind the following warning, given by Lord Walker in an earlier case.

Gillett v Holt
[2001] Ch 210, CA

Walker LJ

At 225

[A]lthough the judgment is, for convenience, divided into several sections with headings which give a rough indication of the subject matter, it is important to note at the outset that the doctrine of proprietary estoppel cannot be treated as subdivided into three or four watertight compartments. Both sides are agreed on that, and in the course of the oral argument in this court it repeatedly became apparent that the quality of the relevant assurances may influence the issue of reliance, that reliance and detriment are often intertwined [. . .] Moreover the fundamental principle that equity is concerned to prevent unconscionable conduct permeates all the elements of the doctrine. In the end the court must look at the matter in the round.

This passage also raises the question of what role the concept of unconscionability plays in proprietary estoppel: we will examine that issue in section 2.4 below, after looking at each of the three elements of assurance, reliance, and detriment.

2.1 AN ASSURANCE BY A

2.1.1 The content of A's assurance

A's assurance must be that B already has, or will receive in the future, a right that relates to A's land.[17] In other common law jurisdictions, including those in the United States[18] and in Australia,[19] B's reliance on A's assurance is capable of giving B a right against A even if A's assurance does not relate to land. In England, however, this does not seem to be the case: proprietary estoppel has developed specifically to deal with situations in which B has relied on an assurance relating to land. This limitation does seem to be rather difficult to justify.

[17] For example, in *Warwick v Trustee in Bankruptcy of Yarwood* [2010] EWHC 2272 (Ch), [38], it was held that proprietary estoppel cannot apply where A's assurance is that B will be paid a sum of money, even if the parties intend that sum to be paid from the proceeds of the sale of specific land.

[18] See Restatement (Second) of Contracts, s 90.

[19] See *Waltons Stores v Maher* (1988) 164 CLR 387.

The explanation may be that, in cases not related to land, English courts have been more willing to find that, where B has relied on A's assurance, B has provided consideration for that assurance, and so A is under a contractual duty to B.[20] In contrast, where land is concerned, that contractual route has generally been blocked by the formality rules applying to contracts to dispose of an interest in land.[21]

This does not mean, however, that any duty imposed on A by proprietary estoppel is limited to A's land. As we saw in *Thorner v Major*, if A's assurance relates, at least in part, to land, then the duty imposed on A may extend beyond A's land and also encompass A's personal property (such as farm machinery and livestock) and personal rights of A (such as the farm's trading account: a personal right against a bank).[22]

2.1.2 Finding an assurance

There is an important distinction between a representation of future intention and an assurance. If A simply tells B that A's current plan is to leave his or her land to B, then this statement, by itself, does not amount to an assurance that A will, in the end, stick to that plan. An assurance can only be found if A can be seen as making some form of commitment, either that B already has a right in relation to A's land, or that B will acquire such a right. As Lord Hoffmann put it in *Thorner v Major*, the question is whether '*the meaning [A] conveyed would reasonably have been understood as intended to be taken seriously as an assurance which could be relied upon*.'[23]

There is no need, however, for A to have made an express assurance to B. As demonstrated by the House of Lords's analysis of *Thorner*, the question is whether A's conduct, taken as a whole, suffices to convey the necessary commitment to B. This point can also be seen in the following extract.

Crabb v Arun District Council [1976] Ch 179, CA

Facts: The council (A) and Mr Crabb (B) owned neighbouring plots of land. They entered negotiations concerning the potential grant to Mr Crabb of a right of way over the council's land. An agreement in principle was reached, and a particular access point ('point B') for Mr Crabb was identified, but no formal contract was concluded. When the council later put up a fence to separate its land from Mr Crabb's land, a gap was left at the planned access point for Mr Crabb, and a gate was later installed there. Confident that he had, or would get, a right of way over the council's land, Mr Crabb then sold off part of his land without reserving a right of way over that land. Unfortunately for Mr Crabb, the council then took down the gate, built a wall over the gap, and refused to grant him a right of way over its land. Mr Crabb had no other means of access to his retained land, and claimed that the council were estopped from denying him access to its land. The Court of Appeal held that proprietary estoppel imposed a duty on the council to allow Mr Crabb access to its land.

[20] See *Shadwell v Shadwell* (1860) 142 ER 62 (CCP): B's marriage, following A's promise to pay B a yearly sum during B's life, was found to constitute consideration for A's promise. Compare *Ricketts v Scothorn* 77 NW 365 (1898), in which the Supreme Court of Nebraska, in a similar case, based its enforcement of A's promise on the grounds of promissory estoppel.

[21] We examined those rules in Chapter 7, section 3.

[22] See too *re Basham* [1987] 1 All ER 405.

[23] [2009] 3 All ER 945, [5].

Lord Denning MR

At 188

The question then is: were the circumstances here such as to raise an equity in favour of the plaintiff? [. . .] The judge found that there was 'no definite assurance' by the defendants' representative, and 'no firm commitment,' but only an 'agreement in principle,' meaning I suppose that, as Mr. Alford [counsel for the council] said, there were 'some further processes' to be gone through before it would become binding. But if there were any such processes in the mind of the parties, the subsequent conduct of the defendants was such as to dispense with them. The defendants actually put up the gates at point B at considerable expense. That certainly led the plaintiff to believe that they agreed that he should have the right of access through point B without more ado.

Scarman LJ

At 193

[. . .] I can conceive of cases in which it would be absolutely appropriate for a defendant to say: 'But you should not have acted to your detriment until you had had a word with me and I could have put you right.' But there are cases in which it is far too late for a defendant to get himself out of his pickle by putting upon the plaintiff that sort of duty; and this, in my judgment, is one of those cases.

In *Crabb v Arun DC*, then, A's assurance consisted both of express communication to B (in the negotiations over the planned right of way) and other, non-verbal conduct of A (in leaving the gap in the fence and later installing a gate there).

According to the approach taken in the following extract, A may also come under an equitable duty to B in cases of pure 'acquiescence' where, for example, A allows B to do work on A's land and A knows that B is doing the work because of a mistaken belief that he has, or will get, a right in that land.[24]

Ramsden v Dyson
(1866) LR 1 HL 129

Lord Cranworth

At 140–141

If a stranger begins to build on my land supposing it to be his own, and I, perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a Court of equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own. It considers that, when I saw the mistake into which he had fallen, it was my duty to be active and to state my adverse title; and that it would be dishonest in me to remain wilfully passive on such an occasion, in order afterwards to profit by the mistake which I might have prevented.

[24] Of course, A comes under no duty to B if A warns B that B does not have, or will not get, a right in the land: see *per* Sir James Wigram V-C in *The Master or Keeper, Fellows and Scholars of Clare Hall v Harding* (1848) 6 Hare 273, 296–297; *per* Lord Scott in *Blue Haven Enterprises v Tully* [2006] UKPC 17, [14].

But it will be observed that to raise such an equity two things are required, first, that the person expending the money supposes himself to be building on his own land; and, secondly, that the real owner at the time of the expenditure knows that the land belongs to him and not to the person expending the money in the belief that he is the owner. For if a stranger builds on my land knowing it to be mine, there is no principle of equity which would prevent my claiming the land with the benefit of all the expenditure made on it. There would be nothing in my conduct, active or passive, making it inequitable in me to assert my legal rights.

Lord Wensleydale

At 168

If a stranger build on my land, supposing it to be his own, and I, knowing it to be mine, do not interfere, but leave him to go on, equity considers it to be dishonest in me to remain passive and afterwards to interfere and take the profit. But if a stranger build knowingly upon my land, there is no principle of equity which prevents me from insisting on having back my land, with all the additional value which the occupier has imprudently added to it.

There is a debate as to whether the duty arising in such 'acquiescence' or 'standing by' cases is an example of proprietary estoppel, or whether it instead depends on some other principle. Certainly, if the acquiescence cases are to be seen as part of proprietary estoppel, then A's duty should arise only if B *knows* of if A's failure to act. In such a case, as Lord Walker explains in the following extract, A's failure to act can be said to have encouraged B to start, or to continue, the work, then A can be viewed as having made the necessary assurance.

Thorner v Major
[2009] 3 All ER 945

Lord Walker

At [55]

[I]f all proprietary estoppel cases (including cases of acquiescence or standing-by) are to be analysed in terms of assurance, reliance and detriment, then the landowner's conduct in standing by in silence serves as the element of assurance. As Lord Eldon LC said over 200 years ago in *Dann v Spurrier*: '*this Court will not permit a man knowingly, though but passively, to encourage another to lay out money under an erroneous opinion of title; and the circumstance of looking on is in many cases as strong as using encouragement.*'[25]

In a case where B is *not* aware that A is standing by and failing to intervene, it is very difficult either to imply an assurance by A or to say that B has relied in any way on A. According to the formulations of Lord Cranworth and Lord Wensleydale, set out above, the 'acquiescence' principle *can* apply in such a case. To that extent, then, it seems that the principle must lie outside the core case of proprietary estoppel.

[25] (1802) 7 Ves 231, 235–36, 32 ER 94, 95.

Mee, 'Proprietary Estoppel, Promises and Mistaken Belief' in Modern Studies in Property Law: Vol 6) (ed Bright, 2011, p 182)

> The acquiescence scenario is clearly covered by the fundamental statements of principle by the majority in *Ramsden v Dyson*.[26] This category, which the older cases also refer to in terms of 'lying by', has also been recognised in cases arising outside the context of disputes over land.[27] In the view of the current author, the tendency to treat [A]'s failure to speak as a representation by silence due to the fact that he was under a duty to speak [. . .] serves only to confuse the matter. In principle, nothing which can be construed as a representation needs to be communicated from [A] to [B], so that the principle can apply in a case where [B] was unaware that [A] was observing events and [B] could not, therefore, have read anything into [A's] failure to intervene. The reason for equitable intervention is not the fact that [A] has led [B] to act to his detriment by means of a representation or promise but rather that [A] has failed to act when he was aware that [B] was acting to [B's] detriment on the basis of a mistake concerning [B's] rights (although the precise scope of the principle is in need of further analysis).

In *Ramsden v Dyson*, each of Lord Cranworth and Lord Wensleydale, when discussing acquiescence, refer to the profit that A would unjustly make if he or she were free to take advantage of B's mistaken work. As a result, it has been argued that the acquiescence principle depends on A's being unjustly enriched at B's expense.[28] Indeed, it has been argued that A can be unjustly enriched at B's expense, and so come under a duty to B, even if A has not stood by and knowingly failed to stop B's work.[29] This is because a broad unjust enrichment principle requires only that B has made a mistake and that A has benefitted from B's work (as will be the case if, for example, the work done by B is work which A was in any case planning to have done on his land). It is, however, far from clear that this broad unjust enrichment principle forms part of the law:[30] after all it is incompatible with the principle set out by Lord Cranworth and Lord Wensleydale, and its requirement that A knowingly fails to intervene.[31]

2.1.3 The certainty of A's assurance

In cases of estoppel by representation, or of promissory estoppel, it is often said that A's representation or promise must be 'clear and unequivocal': is this also the case in proprietary estoppel? As we saw in the extract set out in section 1 above, this question was considered by the House of Lords in *Thorner v Major*. Lord Walker clearly wished to avoid any over-refinement of the test, stating that: '*to establish a proprietary estoppel the relevant assurance must*

[26] [These statements of Lord Cranworth and Lord Wensleydale are set out in the extract above. Lord Cranworth noted ((1866) LR 1 HL 129, 162) that Lord Brougham, who was present at the hearing but unable to attend the House of Lords when the speeches were delivered, concurred with Lord Cranworth. Lord Kingsdown dissented.]

[27] See *Proctor v Bennis* (1887) 36 Ch D 740 (CA), 759–61 (Cotton LJ); 761–2 (Bowen LJ); 765–66 (Fry LJ).

[28] See P Birks, *An Introduction to the Law of Restitution* (Oxford: Clarendon, 1985), pp 277–82.

[29] See Tang Hang Wu, 'An Unjust Enrichment Claim for the Mistaken Improver of Land' [2011] Conv 8.

[30] See S Degeling and B Edgeworth, 'Improvements to Land Belonging to Another' in *Property and Security: Selected Essays* (eds LB Moses et al, Sydney: Lawbook Co, 2010); B McFarlane, 'Unjust Enrichment, Rights and Value' in *Rights and Private Law* (eds Nolan & Robertson, Oxford: Hart, 2012).

[31] For further examination of the relationship between unjust enrichment and proprietary estoppel, see Hopkins, 'Estoppel and Restitution: Drawing a Divide' in *Modern Studies in Property Law* (vol 2) (ed Cooke, 2002); McFarlane '*Blue Haven Enterprises Ltd v Tully*' (2006) 1 *Journal of Equity* 156.

be clear enough. What amounts to sufficient clarity, in a case of this sort, is hugely dependent on context.' Lord Walker then went on to quote with approval a passage from the judgment of Hoffmann LJ in *Walton v Walton*, part of which is now set out.

Walton v Walton
(14 Apr 1994, CA, unrep)

Hoffmann LJ

At [19]–[21]

In many cases of promises made in a family or social context, there is no intention to create an immediately binding contract. There are several reasons why the law is reluctant to assume that there was. One which is relevant in this case is that such promises are often subject to unspoken and ill-defined qualifications. Take for example the promise in this case. When it was first made, Mrs Walton did not know what the future might hold. Anything might happen which could make it inappropriate for the farm to go to the plaintiff.

But a contract, subject to the narrow doctrine of frustration, must be performed come what may. This is why [counsel for the plaintiff] has always accepted that Mrs Walton's promise could not have been intended to become a contract.

But none of this reasoning applies to equitable estoppel, because it does not look forward into the future and guess what might happen. It looks backwards from the moment when the promise falls due to be performed and asks whether, in the circumstances which have actually happened, it would be unconscionable for the promise not to be kept.

The analysis of Hoffmann LJ in *Walton v Walton* makes an important distinction between the requirements of a contract and of proprietary estoppel. It demonstrates that, even if A's assurance is not certain enough to be contractually binding, it may nonetheless form the basis of a proprietary estoppel claim. The justification given for this in *Walton v Walton* was, perhaps not surprisingly, affirmed by Lord Hoffmann in *Thorner v Major*, when stating that: '*Past events provide context and background for the interpretation of subsequent events and subsequent events throw retrospective light upon the meaning of past events. The owl of Minerva spreads its wings only with the falling of dusk.*'[32] The point seems to be that, because a contract imposes an immediate duty to perform a promise, the terms of that promise must be clear from the outset. In contrast, proprietary estoppel does not impose such an immediate duty: instead, a court can ask whether, in the light not only of A's assurance, but also of subsequent events (such as B's reliance), A came under some form of duty to B. As we will see in section 4 below, that duty need not be a duty to honour the assurance. It seems then that, when Lord Walker stated that '*[w]hat amounts to sufficient clarity, in a case of this sort, depends hugely on context*', that context can include events occurring after the moment of any initial assurance of A.

It thus seems that, in practice, it is not necessary for B to prove that A's assurance was 'clear and unequivocal'. In *Thorner v Major*, Lord Neuberger was reluctant to depart from that test; but, as we can see in the extract now set out, the qualifications he permits deprive the test of much of its practical impact.

[32] At [8]. For an explanation of the 'owl of Minerva' metaphor, see fn 14 above.

Thorner v Major
[2009] 3 All ER 945

Lord Neuberger

At [84]–[86]

It should be emphasised that I am not seeking to cast doubt on the proposition, heavily relied on by the Court of Appeal,[33] that there must be some sort of an assurance which is 'clear and unequivocal' before it can be relied on to found an estoppel. However, that proposition must be read as subject to three qualifications. First, it does not detract from the normal principle, so well articulated in this case by Lord Walker, that the effect of words or actions must be assessed in their context. Just as a sentence can have one meaning in one context and a very different meaning in another context, so can a sentence, which would be ambiguous or unclear in one context, be a clear and unambiguous assurance in another context. Indeed, as Lord Walker says, the point is underlined by the fact that perhaps the classic example of proprietary estoppel is based on silence and inaction, rather than any statement or action.[34]

Secondly, it would be quite wrong to be unrealistically rigorous when applying the 'clear and unambiguous' test. The court should not search for ambiguity or uncertainty, but should assess the question of clarity and certainty practically and sensibly, as well as contextually. Again, this point is underlined by the authorities [...] which support the proposition that, at least normally, it is sufficient for the person invoking the estoppel to establish that he reasonably understood the statement or action to be an assurance on which he could rely.

Thirdly, as pointed out in argument by my noble and learned friend Lord Rodger of Earlsferry, there may be cases where the statement relied on to found an estoppel could amount to an assurance which could reasonably be understood as having more than one possible meaning. In such a case, if the facts otherwise satisfy all the requirements of an estoppel, it seems to me that, at least normally, the ambiguity should not deprive a person who reasonably relied on the assurance of all relief: it may well be right, however, that he should be accorded relief on the basis of the interpretation least beneficial to him.

2.1.4 Pre-contractual negotiations

In *Thorner v Major*, Lord Walker emphasised that, in deciding if A has made a sufficiently certain assurance to B, much will depend on context. This context can include not only later events (such as B's reliance), but also whether the assurance is made in a commercial or domestic setting. In particular, in a case where A and B have begun contractual negotiations, but have not yet concluded a formal contract, it may be difficult for B to show that A has made the required assurance. It is true that in *Crabb v Arun DC*, discussed in section 2.1.2 above, B was able to establish a proprietary estoppel, and the parties' pre-contractual negotiations formed part of the evidence from which A's assurance was found. Yet, as the following extract shows, such a case may be the exception rather than the rule.

[33] See [2008] 2 FCR 435, [71], [74],

[34] See per Lord Eldon LC ('knowingly, though but passively') in *Dann v Spurrier* (1802) 7 Ves 231, 235–6 and per Lord Kingsdown ('with the knowledge [...] and without objection') in *Ramsden v Dyson* (1866) LR 1 HL 129, 170.

Yeoman's Row Management Ltd v Cobbe
[2008] 1 WLR 1752, HL

Facts: Yeoman's Row Management Limited (YRML) held the registered freehold of land in Knightsbridge. Mr and Mrs Lisle-Mainwaring controlled the company. A building on the land contained thirteen flats. Mrs Lisle-Mainwaring hoped to redevelop the land: if planning permission could be obtained, six houses could be built, thereby greatly increasing the value of the land. Mrs Lisle-Mainwaring, acting on behalf of YRML, entered into lengthy negotiations with Mr Cobbe, a property developer. They came to an oral agreement, with the following key points: (i) Mr Cobbe, at his own expense, would apply for planning permission to demolish the existing block of flats and to erect, in its place, a terrace of six houses; (ii) upon the grant of planning permission and the obtaining of vacant possession, YRML would sell its freehold to Mr Cobbe (or to a company nominated by him) for an up-front price of £12m; (iii) Mr Cobbe (or his nominee company) would develop the property in accordance with the planning permission; and (iv) Mr Cobbe (or his nominee company) would sell the six houses and pay to YRML 50 per cent of the amount, if any, by which the gross proceeds of sale exceeded £24m.[35]

The basics of the deal were thus clear: if Mr Cobbe were to fail to obtain planning permission, he would be paid nothing. But, if he were to succeed in getting planning permission, he and YRML would be able to share in the profits made from the redevelopment of the land. Mr Cobbe and Mrs Lisle-Mainwaring were both experienced business people: they both knew that the oral agreement was not legally binding and that a later, signed contract would have to be concluded, dealing with further issues not covered by the oral agreement. Nonetheless, Mr Cobbe, with the encouragement of Mrs Lisle-Mainwaring, spent considerable time and effort and incurred considerable expense, between late 2002 and March 2004, in applying for planning permission. By late 2003, Mrs Lisle-Mainwaring had formed an intention not to comply with the oral agreement, deciding instead to ask for more than £12m up-front before selling the freehold—but she hid her plan from Mr Cobbe, deliberately giving him the impression that, if planning permission were obtained, she would enter into a binding contract based on the oral agreement.

In March 2004, as a result of Mr Cobbe's efforts, planning permission was granted. As a result, before any redevelopment work had been started, it seems that YRML's freehold increased in value by around £4m. Mrs Lisle-Mainwaring then informed Mr Cobbe that she would only sell the land if he paid £20m up-front (as well as the agreed share of the proceeds should Mr Cobbe sell on for over £24m). Mr Cobbe objected and brought a claim against YRML. At first, he alleged a breach of contract—a claim that was doomed to fail, because no final agreement had been reached, and there was, in any case, no signed, written agreement between the parties complying with s 2 of the Law of Property (Miscellaneous Provisions) Act 1989 (LP(MP)A 1989) (see Chapter 7, section 3). Mr Cobbe then amended his pleadings to seek relief on the basis of proprietary estoppel, a constructive trust, or unjust enrichment.

At first instance, Etherton J found that Mr Cobbe did have a good proprietary estoppel claim; as a result, he ordered YRML to pay Mr Cobbe a sum equal to half of the increase in value of YRML's freehold caused by the grant of planning permission (as

[35] [2008] 1 WLR 1752, [6].

it turned out, this meant that YRML had to pay Mr Cobbe £2m). The Court of Appeal upheld that decision. The House of Lords, however, found that Mr Cobbe had *no* proprietary estoppel claim. It also found that he had not acquired a right under a constructive trust. The House of Lords did decide that he had a claim based on YRML's unjust enrichment, because YRML had received the benefit of his services without paying for them; but that claim allowed him to recover only his expenses in applying for planning permission, plus a reasonable fee to cover his professional services. As a result, Mr Cobbe was therefore limited to receiving only around £150,000—far less than the £2m awarded to him by Etherton J.

Our focus here is on the House of Lords' reasoning in rejecting Mr Cobbe's proprietary estoppel claim.

Lord Walker

At [68]–[72]

[. . .] In the commercial context, the claimant is typically a business person with access to legal advice and what he or she is expecting to get is a *contract*. In the domestic or family context, the typical claimant is not a business person and is not receiving legal advice. What he or she wants and expects to get is an *interest* in immovable property, often for long-term occupation as a home. The focus is not on intangible legal rights but on the tangible property which he or she expects to get. The typical domestic claimant does not stop to reflect (until disappointed expectations lead to litigation) whether some further legal transaction (such as a grant by deed, or the making of a will or codicil) is necessary to complete the promised title. [. . .]

So the judge found that Mr Cobbe believed that Mrs Lisle-Mainwaring was, and regarded herself as, bound in honour to enter into a formal written contract if planning permission was granted; and that Mr Cobbe regarded himself as similarly bound. It is implicit—in my view necessarily and deliberately implicit—in the judge's carefully chosen language that neither Mrs Lisle-Mainwaring nor Mr Cobbe regarded herself or himself as legally bound. They were both very experienced in property matters and they knew perfectly well that that was not the position.

Another unusual feature of this case is the judge's finding that Mr Cobbe believed that he would be reimbursed his reasonable expenditure if Mrs Lisle-Mainwaring decided to withdraw from the arrangement before planning permission was granted. This emphasis on the actual grant of planning permission as the crucial condition produces a strange result: would it be conscionable for Mrs Lisle-Mainwaring to withdraw (subject only to reimbursement) at a stage when 99% of the work necessary to obtain planning permission had been done, and success was virtually certain, but unconscionable to do so once success had actually been achieved? This feature of the arrangement emphasises the risk which Mr Cobbe was undertaking, in deciding to rely on Mrs Lisle-Mainwaring's sense of honour.

At [79]–[91]

Crabb v Arun District Council,[36] the facts of which are well known, is a difficult case, not least because of different views taken by different members of the Court [. . .] The situation was that of a commercial negotiation in which both sides expected formal legal documents to be agreed and executed. The case is best explained, I think, by recognising that the Council's erection of the two sets of gates was an act so unequivocal that it led to Mr Crabb

[36] [1976] Ch 179.

irretrievably altering his position, putting the matter beyond the stage at which it was open to negotiation [. . .]

[. . .] In my opinion none of these cases casts any doubt on the general principle laid down by this House in *Ramsden v Dyson*,[37] that conscious reliance on honour alone will not give rise to an estoppel. Nor do they cast doubt on the general principle that the court should be very slow to introduce uncertainty into commercial transactions by over-ready use of equitable concepts such as fiduciary obligations and equitable estoppel. That applies to commercial negotiations whether or not they are expressly stated to be subject to contract.

[. . .] The informal bargain made in this case was unusually complex, as both courts below acknowledged. When a claim based on equitable estoppel is made in a domestic setting the informal bargain or understanding is typically on the following lines: if you live here as my carer/companion/lover you will have a home for life. The expectation is of acquiring and keeping an interest in an identified property. In this case, by contrast, Mr Cobbe was expecting to get a contract. Under that contract he (or much more probably a company controlled by him) would have been entitled to acquire the property for a down-payment of £12m, but only as part of a deal under which the block of flats on the site was to be demolished, the site cleared, and six very expensive townhouses were to be erected instead, and sold for the best prices that they would fetch [. . .]

[. . .] Mr Cobbe's case seems to me to fail on the simple but fundamental point that, as persons experienced in the property world, both parties knew that there was no legally binding contract, and that either was therefore free to discontinue the negotiations without legal liability—that is liability in equity as well as at law [. . .] Mr Cobbe was therefore running a risk, but he stood to make a handsome profit if the deal went ahead, and the market stayed favourable. He may have thought that any attempt to get Mrs Lisle-Mainwaring to enter into a written contract before the grant of planning permission would be counter-productive. Whatever his reasons for doing so, the fact is that he ran a commercial risk, with his eyes open, and the outcome has proved unfortunate for him. It is true that he did not expressly state, at the time, that he was relying solely on Mrs Lisle-Mainwaring's sense of honour, but to draw that sort of distinction in a commercial context would be as unrealistic, in my opinion, as to draw a firm distinction depending on whether the formula "subject to contract" had or had not actually been used.

Lord Scott

At [14]–[16]

An "estoppel" bars the object of it from asserting some fact or facts, or, sometimes, something that is a mixture of fact and law, that stands in the way of some right claimed by the person entitled to the benefit of the estoppel. The estoppel becomes a "proprietary" estoppel—a sub-species of a "promissory" estoppel—if the right claimed is a proprietary right, usually a right to or over land but, in principle, equally available in relation to chattels or choses in action. So, what is the fact or facts, or the matter of mixed fact and law, that, in the present case, [YRML] is said to be barred from asserting? And what is the proprietary right claimed by Mr Cobbe that the facts and matters [YRML] is barred from asserting might otherwise defeat? [. . .]

My Lords, unconscionability of conduct may well lead to a remedy but, in my opinion, proprietary estoppel cannot be the route to it unless the ingredients for a proprietary estoppel are present. These ingredients should include, in principle, a proprietary claim made by

[37] (1866) LR 1 HL 129.

a claimant and an answer to that claim based on some fact, or some point of mixed fact and law, that the person against whom the claim is made can be estopped from asserting. To treat a "proprietary estoppel equity" as requiring neither a proprietary claim by the claimant nor an estoppel against the defendant but simply unconscionable behaviour is, in my respectful opinion, a recipe for confusion.

At [20]

[. . .] The problem (for Mr Cobbe's proprietary estoppel claim) is that when he made the planning application his expectation was, for proprietary estoppel purposes, the wrong sort of expectation. It was not an expectation that he would, if the planning application succeeded, become entitled to "a certain interest in land". His expectation was that he and Mrs Lisle-Mainwaring, or their respective legal advisers, would sit down and agree the outstanding contractual terms to be incorporated into the formal written agreement, which he justifiably believed would include the already agreed core financial terms, and that his purchase, and subsequently his development of the property, in accordance with that written agreement would follow.

At [27]–[28]

[. . .] It would be an unusually unsophisticated negotiator who was not well aware that oral agreements relating to [the transfer of estates in land] are by statute unenforceable and that no express reservation to make them so is needed. Mr Cobbe was an experienced property developer and Mrs Lisle-Mainwaring gives every impression of knowing her way around the negotiating table. Mr Cobbe did not spend his money and time on the planning application in the mistaken belief that the agreement was legally enforceable. He spent his money and time well aware that it was not. Mrs Lisle-Mainwaring did not encourage in him a belief that the second agreement was enforceable. She encouraged in him a belief that she would abide by it although it was not. Mr Cobbe's belief, or expectation, was always speculative. He knew she was not legally bound. He regarded her as bound "in honour" but that is an acknowledgement that she was not legally bound.

The reality of this case, in my opinion, is that Etherton J and the Court of Appeal regarded their finding that Mrs Lisle-Mainwaring's behaviour in repudiating, and seeking an improvement on, the core financial terms of the second agreement was unconscionable, an evaluation from which I do not in the least dissent, as sufficient to justify the creation of a "proprietary estoppel equity". As Mummery LJ said,[38] she took unconscionable advantage of Mr Cobbe. The advantage taken was the benefit of his services, his time and his money, in obtaining planning permission for the property. The advantage was unconscionable because immediately following the grant of planning permission, she repudiated the financial terms on which Mr Cobbe had been expecting to be able to purchase the property. But to leap from there to a conclusion that a proprietary estoppel case was made out was not, in my opinion, justified.

Although the House of Lords overturned the decisions of Etherton J and the Court of Appeal, the result in *Yeoman's Row* is not too surprising. Lord Scott, as in *Thorner v Major*, viewed proprietary estoppel as simply a form of estoppel by representation or promissory estoppel. As we saw in section 1 above, however, this view is difficult to support and it is impliedly rejected by all the members of the House of Lords (other than Lord Scott) in *Thorner v Major*. Yet Lord Scott's analysis, like that of Lord Walker, rests on the finding that Mr Cobbe, by undertaking work when he knew that there was no contract between him and YRML,

[38] [2006] 1 WLR 2964, [123].

was running a risk: the risk that, even if he did obtain planning permission, Mrs Lisle-Mainwaring (on behalf of YRML) might pull out of the planned contract. The House of Lords' assessment of the facts seems to be that: (i) it was perhaps dishonourable or immoral for Mrs Lisle-Mainwaring to lead on Mr Cobbe and then pull out of the planned agreement; but (ii) Mr Cobbe, an experienced property developer, should have been aware that business people do not always do the right thing.

Attorney-General of Hong Kong v Humphrey's Estate is an example of a similar case.[39] B started work on some land in the belief that A would sell that land to B. A and B had made a preliminary agreement for a sale, but that agreement was expressly 'subject to contract'. A thus made clear to B that, until a final contract was signed, A was not bound to transfer its ownership of the land to B. As a result, A could not be said to have made the necessary assurance: B acted at his own risk when undertaking the work and so proprietary estoppel did *not* impose a duty on A to B.

Equally, there are clear differences between the facts of *Thorner v Major* and those of *Yeoman's Row v Cobbe*. This can be seen in Lord Neuberger's comparison of the two cases, set out in the next extract.

Thorner v Major
[2009] 3 All ER 945

Lord Neuberger

At [93]–[98]

There are two fundamental differences between [*Yeoman's Row v Cobbe*] and this case. First, the nature of the uncertainty in the two cases is entirely different [. . .] In [*Yeoman's Row v Cobbe*], there was no doubt about the physical identity of the property. However, there was total uncertainty as to the nature or terms of any benefit (property interest, contractual right, or money), and, if a property interest, as to the nature of that interest (freehold, leasehold, or charge), to be accorded to Mr Cobbe.

In this case, the extent of the farm might change, but, on the deputy judge's analysis, there is, as I see it, no doubt as to what was the subject of the assurance, namely the farm as it existed from time to time. Accordingly, the nature of the interest to be received by David was clear: it was the farm as it existed on Peter's death. As in the case of a very different equitable concept, namely a floating charge,[40] the property the subject of the equity could be conceptually identified from the moment the equity came into existence, but its precise extent fell to be determined when the equity crystallised, namely on Peter's death.

Secondly, the analysis of the law in *Cobbe*'s case was against the background of very different facts. The relationship between the parties in that case was entirely arm's length and commercial, and the person raising the estoppel was a highly experienced businessman. The circumstances were such that the parties could well have been expected to enter into a contract, however, although they discussed contractual terms, they had consciously chosen not to do so. They had intentionally left their legal relationship to be negotiated, and each of them knew that neither of them was legally bound [. . .]

In this case, by contrast, the relationship between Peter and David was familial and personal, and neither of them, least of all David, had much commercial experience. Further, at no time had either of them even started to contemplate entering into a formal contract as to the ownership of the farm after Peter's death. Nor could such a contract have been reasonably

[39] [1987] 2 All ER 387.

[40] [We will look briefly at floating charges in Chapter 28, section 3.4].

expected even to be discussed between them. On the deputy judge's findings, it was a relatively straightforward case: Peter made what were, in the circumstances, clear and unambiguous assurances that he would leave his farm to David, and David reasonably relied on, and reasonably acted to his detriment on the basis of, those assurances, over a long period.

In these circumstances, I see nothing in the reasoning of Lord Scott in *Cobbe*'s case which assists the respondents in this case. It would represent a regrettable and substantial emasculation of the beneficial principle of proprietary estoppel if it were artificially fettered so as to require the precise extent of the property the subject of the alleged estoppel to be strictly defined in every case. Concentrating on the perceived morality of the parties' behaviour can lead to an unacceptable degree of uncertainty of outcome, and hence I welcome the decision in *Cobbe*'s case. However, it is equally true that focusing on technicalities can lead to a degree of strictness inconsistent with the fundamental aims of equity.

The distinction made by Lord Neuberger between domestic and commercial cases was also made by Lord Walker in *Cobbe* itself, as we saw in the extract set out above. The crucial distinction, however, may be between those cases, such as *Cobbe*, in which the parties have been involved in pre-contractual negotiations and other cases, such as *Thorner*, where no contract has been discussed. In the former class of cases, as Lord Walker explained in *Cobbe*, B faces the difficulty of showing that A's assurance is that B will acquire a particular right in A's land, and is not merely an assurance that A will negotiate in good faith with B, or that *some sort* of contract will be concluded, which may or may not give B a right in specific land of A. Indeed, the approach in *Cobbe* may cast doubt on previous decisions, such as *Crabb v Arun DC*,[41] in which a proprietary estoppel was said to arise against the context of pre-contractual negotiations: as one judge has put it, there is a question as to the '*Cobbe-compliance*' of such decisions.[42]

The standing of *Crabb v Arun DC* after the decision in *Cobbe*, as well as the significance of the distinction between domestic and commercial cases, has been discussed by Lord Neuberger in an extra-judicial contribution.[43]

Lord Neuberger, 'The Stuffing of Minerva's Owl? Taxonomy and Taxidermy in Equity' [2009] CLJ 537

At 541–2

Both parties [in *Cobbe*] knew there was no contractual arrangement: indeed, they intended it. They both appreciated that there was an arrangement binding in honour only. The message from the House of Lords is that it is simply not for the courts to go galumphing in,

[41] See also *Holiday Inns v Broadhead* (1974) 232 EG 951 and *Yaxley v Gotts* [2000] Ch 162.

[42] *Per* Arden LJ in *Herbert v Doyle* [2010] EWCA Civ 1095, [6]. In *Yeoman's Row v Cobbe* [2008] 4 All ER 713, [24] and [31], Lord Scott suggested that, in a case where B knows that there is no legally binding agreement with A, it may still be possible for B to show that a constructive trust has arisen under the principle in *Pallant v Morgan* [1953] 1 Ch 43 (the same suggestion was made by Morgan J in *Crossco No 4 Unlimited v Jolan Ltd* [2011] EWHC 803 (Ch), [279]). For discussion of that form of constructive trust, see Chapter 11, section 5.

[43] In the same article, Lord Neuberger also set out his view that s 2 of the Law of Property (Miscellaneous Provisions) Act 1989 has no impact on a proprietary estoppel claim (see the extract from the article in Chapter 7, section 3.7.) The same view is taken by McFarlane, 'Proprietary Estoppel and Failed Contractual Negotiations' [2005] Conv 501.

wielding some Denningesque sword of justice, to rescue a miscalculating, improvident or optimistic property developer from the commercially unattractive, or even ruthless, actions of a property owner, which are lawful at common law.

[. . .] I suggest that, before he can establish a proprietary estoppel claim, a claimant must show that he has acted in the belief that he has something which can be characterized as a legal right—at least in a commercial arm's length context.

I add that qualification, because it is perhaps in this connection that the difference between commercial and domestic cases (which Lord Walker discussed in *Cobbe* at [66]–[68], and which I also touched on in *Thorner v Major* at [96]–[97]) comes into focus. The notion that a claimant takes his chance, where he knows that he has no legally enforceable right, is easier to accept in the context of a commercial and arm's length relationship than in a domestic or familial context. In a commercial situation, the absence of a contractual relationship normally arises from the parties, with easy access to legal advice, considering themselves better off, or at least choosing to take a risk, rather than being bound. Maybe Mr Cobbe wanted to be free to walk away, rather than being committed to paying £12m and developing the property, if the market went the wrong way. Maybe he thought that he might be able to negotiate a better deal once planning permission was obtained. But, whatever his reason for not having a contract, he faced no emotional or social impediment to insisting on some form of legally binding protection before he went ahead with seeking planning permission. Why should equity assist him, when YRML decided to negotiate a better deal?

But it is much easier to see why David Thorner should have been able to invoke proprietary estoppel. His older, gruff and taciturn cousin led him to believe that, if he continued to provide work and companionship, he would inherit the farm. The notion that David could or should have asked for a commitment in writing, in the context of an informal family relationship, seems somewhat unreal. It would have risked harming the relationship with Peter, and the only solicitor he knew would no doubt have been advising Peter. Unlike in *Cobbe*, formal contractual rights and obligations were simply not the stuff of the relationship between Peter and David Thorner. [. . .]

It may very well be that proprietary estoppel will not often assist a claimant in the commercial context, but that is probably all to the good: in the business world, certainty and clarity are particularly important, and judges should be slow to encourage the introduction of uncertainties based on their views of the ethical acceptability of the behavior of one of the parties.

[. . .] If Mr Crabb believed, to the Council's knowledge, that he had been promised the grant of a right of way, and sold off his field in that belief, there is no reason to doubt that his claim in proprietary estoppel was rightly accepted by the Court of Appeal. But if his claim was simply based on a 'subject to contract' agreement (whether or not those words were used) or on moral indignation, then it may well be that it does not survive *Cobbe*.

2.2 RELIANCE BY B

To bring a proprietary estoppel claim, B must show that he has relied on A's assurance that B has, or will acquire, a right in relation to A's land. As the facts of the next two cases demonstrate, it might seem that, particularly in domestic or family cases, reliance will be difficult to prove. Nonetheless, in each case, the Court of Appeal held that reliance had occurred.

Greasley v Cooke
[1980] 1 WLR 1306, CA

Facts: Ms Cooke lived in a home owned by Kenneth and Hedley Greasley. She was Kenneth's partner and also cared for Clarice, another member of the Greasley family. Both Kenneth and Hedley had assured Ms Cooke that she would have 'a home for life', but Kenneth died without giving her any right to remain on the land and the current owners of the land wished to remove her. Ms Cooke's proprietary estoppel claim was based on the fact that, because of the assurances that she would have a 'home for life', she had remained there and cared for Clarice, rather than leaving to find paid work. It might seem difficult for her to prove such reliance: after all, because she was, in any case, 'one of the family', she may well have cared for Clarice even if she had not been given any assurances about remaining in the home. Nonetheless, the Court of Appeal held that reliance had occurred.

Lord Denning MR

At 713

The first point is on the burden of proof. [In *Brikom Investments Ltd v Carr* [1979] 2 All ER 753 at 759] I said that, when a person makes a representation intending that another should act on it—

> 'It is no answer for the maker to say: "You would have gone on with the transaction anyway." That must be mere speculation. No one can be sure what he would, or would not, have done in a hypothetical state of affairs which never took place [...] Once it is shown that a representation was calculated to influence the judgment of a reasonable man, the presumption is that he was so influenced.'

So here. These statements to [Ms Cooke] were calculated to influence her, so as to put her mind at rest, so that she should not worry about being turned out. No one can say what she would have done if Kenneth and Hedley had not made those statements. It is quite possible that she would have said to herself: 'I am not married to Kenneth. I am on my own. What will happen to me if anything happens to him? I had better look out for another job now rather than stay here where I have no security.' So, instead of looking for another job, she stayed on in the house looking after Kenneth and Clarice. There is a presumption that she did so relying on the assurances given to her by Kenneth and Hedley. The burden is not on her but on them to prove that she did not rely on their assurances. They did not prove it, neither did their representatives.

The approach taken in *Greasley v Cooke* is consistent with that taken in other areas of law, such as the law of misrepresentation:[44] if A makes a statement that is likely, objectively speaking, to cause B to act in a particular way then, if B does act in that way, it can be presumed that B did act in reliance on A's statement—in other words, the burden shifts to A to show that B would have acted in the same way even if A had not made the statement. In the next case, however, the Court of Appeal departed from that general test in order to allow B's proprietary estoppel claim.

[44] See *Smith v Chadwick* (1884) 9 App Cas 187, 196.

Wayling v Jones
(1993) 69 P & CR 170, CA

Facts: Mr Wayling first met Mr Jones in 1967. In 1971, they began a homosexual relationship and started to live together. At that time, Mr Wayling, a chef, was 21 years of age, while Mr Jones was aged 56. Over the following years, as well as living with Mr Jones, Mr Wayling worked in a number of Mr Jones' businesses. Mr Wayling received 'pocket money' and expenses, but was never given a standard salary for his work. Mr Jones made a will in which Mr Wayling was given a particular hotel (the Glen-y-Mor Hotel) owned by Mr Jones. That hotel was later sold and a different hotel bought (the Royal Hotel), but the will was never updated. So, when Mr Jones died in 1987, his will did not succeed in giving anything to Mr Wayling. Mr Wayling claimed that Mr Jones was under a duty (now binding on Mr Jones' executors), arising under the doctrine of proprietary estoppel, to give Mr Wayling ownership of the Royal Hotel.

Mr Jones had made a number of promises to Mr Wayling as to what would happen on Mr Jones's death: he promised that ownership of the Glen-y-Mor Hotel, and then the Royal Hotel, would go to Mr Wayling. The following exchange took place when Mr Wayling was cross-examined in court by counsel for Mr Jones' executors:

'Q: If he had not made that promise to you, would you still have stayed with him?
A: Yes [. . .]
Q: The promises were not the reason why you remained with the deceased?
A: No, we got on very well together. He always wanted to reward me.'

The judge at first instance took this to mean that, because Mr Wayling would have acted in the same way even if he had never been promised Mr Jones' hotel, he could not show that he had relied on Mr Jones' assurances. But the Court of Appeal upheld Mr Wayling's appeal.

Balcombe LJ

At 1030

I am satisfied that [Mr Wayling's] conduct in helping [Mr Jones] run the café in Hastings Street and the Glen-y-Mor Hotel and managing the Royal Hotel for what was at best little more than pocket money [. . .] was conduct from which his reliance on [Mr Jones's] clear promises could be inferred. The question is whether [Mr Jones' executors] have established that [Mr Wayling] did not rely on these promises.

In his affidavit evidence [Mr Wayling] stated that he relied on [Mr Jones'] promises. In his oral evidence-in-chief he said:

> 'Q: One question, Mr Wayling. Assuming you were in the Royal Hotel bar before [Mr Jones's] death and [Mr Jones] was there, if [Mr Jones] had told you that he was not going to give the Royal Hotel to you but to somebody else after his death, what would you have done?
>
> A: I would have left.'

[. . .] I am satisfied that [Mr Wayling's] answers in cross-examination do not relate to the only question that mattered: "What would you have done if [Mr Jones] had told you that he was no longer prepared to implement his promises?".

> [. . .] I am satisfied:
>
> (a) that the promises were made;
>
> (b) that [Mr Wayling's] conduct was of such a nature that inducement may be inferred;
>
> (c) that [Mr Jones' executors] have not discharged the burden upon them of establishing that the plaintiff did not rely on the promises.

Mr Wayling was a deserving claimant because: (i) only a technical mistake (Mr Jones' failure to update his will) prevented him from acquiring the hotel as expected; and (ii) he had lived with, and worked for, Mr Jones as part of a long-term relationship—he had made sacrifices as a result of that relationship and was, to an extent, dependent on Mr Jones. Nowadays, as well as bringing a proprietary estoppel claim, a party in Mr Wayling's position can also bring a claim under the Inheritance (Provision for Family and Dependants) Act 1975. That Act gives the court a power to award a share of A's estate to B, an adult dependant of A, where adequate provision for B has not been made in A's will. When *Wayling v Jones* was decided, however, the Act did not give the court a power to make an order in favour of A's homosexual partner. So, proprietary estoppel was Mr Wayling's only recourse.

It is therefore, unsurprising, that the Court of Appeal wished to allow B's claim. The difficulty is that, because Mr Wayling had *admitted* that he would have worked for low pay even if he had not been promised the hotel, it would seem that the executors had met the burden recognised in *Greasley v Cooke*: they had proved that, in fact, Mr Wayling had not relied on Mr Jones's promises. Yet the Court of Appeal nonetheless allowed Mr Wayling's proprietary estoppel claim. As explained by Cooke in the following extract, this was done by applying an unusual test: to prove that Mr Wayling had not relied, the executors had to show that Mr Wayling would have continued to work for low pay *even if* he had been told by Mr Jones that Mr Jones intended to break his promise to leave the hotel to him.

Cooke, 'Reliance and Estoppel' [1995] 111 LQR 389, 391

> That this is an unusual interpretation of reliance is best seen by comparing a case where it was held that there was no reliance. In *Coombes v. Smith* [1986] 1 W.L.R. 809 the plaintiff left her husband, moved into the defendant's house and bore his child. She claimed an interest in the property on the basis of proprietary estoppel. She failed for a number of reasons, among them the fact that she acted as she did, not in reliance upon the defendant's assurance that he would provide for her, but simply because she wanted to. Imagine her reaction if she had heard her partner say that he was not going to provide for her, in spite of his promise. Surely she would have left, because that would have undermined her relationship with him. She would thus have met the *Wayling* test. But it was held that she did not rely upon the assurance, because the giving of that assurance, and her expectation of an entitlement to the property, did not influence her actions.
>
> Reliance is an aspect of causation. When we say that someone acted in reliance upon a promise we generally mean that he would not have so acted *but for* the making of the promise. We cannot say that of Wayling. Alternatively, it seems that reliance in the context of estoppel can mean that the plaintiff would not have acted as he did *but for* a belief, which was then encouraged by the promise, (as envisaged by Robert Goff J., as he then was, in *Amalgamated Investment & Property Co. Ltd. v. Texas Commerce International Bank Ltd.* [1982] Q.B. 84 at pp. 104–105). Wayling could not meet that test either, since he did not set up home with Jones in the belief that the latter would leave his property to him. He did so,

and he stayed, because of his relationship with the defendant; because, as he put it, "he needed me". Obviously, if he had discovered that Jones was not going to change his will, the relationship would have been undermined, and he would have left. But any broken promise could have had the same effect.

The treatment of reliance in *Wayling v. Jones* is thus unusually generous. Despite the obvious justice of the result, the means of reaching it was inconsistent with earlier estoppel cases.

It may well be that the in *Wayling v Jones*, the Court of Appeal modified the general rule in order to give full effect to the nature of the relationship between A and B. As we will see in Chapter 16, a similar relaxation of the general rules is in evidence when B claims shared ownership of a family home. In section 2.1.4 above, we saw that, in applying the first requirement of proprietary estoppel (the need for an assurance by A), there seems to be an important difference between domestic and commercial cases. As a result of *Wayling v Jones*, that distinction also seems to be significant when considering the requirement of reliance by B. Certainly, it is very unlikely that the same test of reliance, with its generosity to B, would be applied in a commercial case.

2.3 THE PROSPECT OF DETRIMENT TO B

The third element of proprietary estoppel is often referred to as detriment, but it is important to note that B's reliance, in itself, does not need to be detrimental; rather, the key question is whether, given B's reliance, he *would* suffer a detriment if he had no proprietary estoppel claim against A.[45] In addition, '*the time when the prejudice to a claimant is to be judged is when the person making the representation or promise departs from his promise or indicates that he will break the promise or act otherwise than in accordance with his representation in the future*.'[46] This supports the point made by Lord Hoffmann in *Thorner v Major*, when invoking the owl of Minerva, which flies only at dusk. In a bilateral contract, for example, A's promise coincides with B's provision of consideration to create an immediate duty on A; in contrast, in proprietary estoppel, detriment is judged not at the time of A's assurance, but at a later point.

Gillett v Holt
[2001] Ch 210, CA

Facts: Geoffrey Gillett first met Mr Holt at Woodhall Spa golf club in 1952. Geoffrey was then aged 12 and Mr Holt was a gentleman farmer aged 38. Geoffrey became Mr Holt's regular caddie and a friendship developed between them. In 1956, Geoffrey left school to start working on Mr Holt's farm (The Limes). He continued working for Mr Holt, taking on extra responsibilities, for over thirty-eight years. In 1971, Mr Gillett and his wife moved into a farmhouse (The Beeches), newly acquired by a company (KAHL)

[45] This point is made most clearly in an influential passage from the judgment of Dixon J in *Grundt v Great Boulder Pty Gold Mines Ltd* (1938) 59 CLR 641, 674–5. That passage was quoted with approval by Robert Walker LJ in *Gillett v Holt* [2001] Ch 210, 232–3.

[46] *Per* Warren J in *Clarke v Meadus* [2010] EWHC 3117 (Ch), [65].

controlled by Mr Holt. In 1995, Mr Holt attempted to sack Mr Gillett and to remove him from The Beeches. Mr Holt also altered his will so that Mr Gillett was no longer the principal beneficiary.[47]

Mr Gillett claimed that Mr Holt was under a duty, arising as a result of proprietary estoppel: (i) not to remove him and his wife from The Beeches; and (ii) to transfer to him at least some of the The Limes. Mr Gillett claimed that, during the period from 1964 to 1989, Mr Holt gave seven 'specific assurances' that 'one day, he (Mr Gillett) would own the farm'. It was claimed that these assurances reflected a general understanding between Mr Gillett and Mr Holt, and were usually at significant events: for example, after Mr Gillett brought in his first harvest (1964) and at the christening of Mr Gillett's first child (1971).

Robert Walker LJ

At 225

[I]n this case Mr Holt's assurances were repeated over a long period, usually before the assembled company on special family occasions, and some of them (such as "it was all going to be ours anyway" [in 1975]) were completely unambiguous [...] Plainly the assurances given on this occasion were intended to be relied on, and were in fact relied on.

At 231

It is therefore necessary to go on to consider detriment [...] It is understandable that the judge devoted most attention to the issue of Mr Gillett being underpaid because that was the issue (affecting detriment) on which most time was spent in cross-examination [...] The judge said that he was not persuaded, on the evidence, that Mr Gillett did in fact receive less than a reasonable wage for his services as a manager, or that he did so as part of an understanding related to his expectations, and that conclusion has not been seriously challenged in this court.

Both sides agree that the element of detriment is an essential ingredient of proprietary estoppel [...] The overwhelming weight of authority shows that detriment is required. But the authorities also show that it is not a narrow or technical concept. The detriment need not consist of the expenditure of money or other quantifiable financial detriment, so long as it is something substantial. The requirement must be approached as part of a broad inquiry as to whether repudiation of an assurance is or is not unconscionable in all the circumstances.

[...] There must be sufficient causal link between the assurance relied on and the detriment asserted. The issue of detriment must be judged at the moment when the person who has given the assurance seeks to go back on it. Whether the detriment is sufficiently substantial is to be tested by whether it would be unjust or inequitable to allow the assurance to be disregarded—that is, again, the essential test of unconscionability. The detriment alleged must be pleaded and proved [...]

The matters which Mr Gillett pleaded as detriment, and on which he adduced evidence of detriment, included, apart from the level of his remuneration, (i) his continuing in Mr Holt's employment (through KAHL) and not seeking or accepting offers of employment elsewhere, or going into business on his own account; (ii) carrying out tasks and spending time beyond the normal scope of an employee's duty; (iii) taking no substantial steps to secure his future wealth, either by larger pension contributions or otherwise; and (iv) expenditure on improving

[47] The principal beneficiary instead was a Mr Wood, whom Mr Holt had met in 1992. According to the first instance judge in *Gillett v Holt*, '*Mr Holt's relationship with Mr Wood developed into something of an obsession, which was of concern to his family and other friends*': see [2001] Ch 210, 222.

The Beeches farmhouse which was, Mr Gillett said, barely habitable when it was first acquired by KAHL in 1971. That company paid for some structural work, with a local authority improvement grant, but Mr Gillett paid for new fittings and materials and carried out a good deal of the work himself [. . .]

[. . .] After listening to lengthy submissions about the judgment, and after reading much of Mr Gillett's evidence both in his witness statement and under cross-examination, I am left with the feeling that the judge, despite his very clear and careful judgment, did not stand back and look at the matter in the round. Had he done so I think he would have recognised that Mr Gillett's case on detriment (on the facts found by the judge, and on Mr Gillett's uncontradicted evidence) was an unusually compelling one.

[Having decided that the requirements of proprietary estoppel had been met, Robert Walker LJ went on to consider how to 'satisfy the equity'—that is, how to decide on the extent of Mr Gillett's right. It was held that Mr Holt and KAHL were under a duty to: (i) transfer to Mr Gillett the freehold of The Beeches (including the farmhouse and 42 hectares of attached land); and (ii) pay Mr Gillett £100,000 as compensation for not receiving any of The Limes.]

The Court of Appeal thus rejected the argument that detriment should be interpreted in a narrow, purely financial way. As Lord Denning MR had earlier put it in *Greasley v Cooke*:[48] '*It so happens that in many of these cases there has been expenditure of money. But that is not a necessary element [. . .] It is sufficient if the party, to whom the assurance is given, acts on the faith of it in such circumstances that it would be unjust and inequitable for the party making the assurance to go back on it [. . .]*'

The decision in *Gillett v Holt* also shows that B's action in reliance on A's assurance does not need to be wholly detrimental to B. For example, in *Gillett*, it could be said that Geoffrey benefitted from being allowed to live, with his wife, in The Beeches. As the Privy Council explained in the following case, however, the crucial question in relation to detriment is whether such benefits outweigh the prejudice that B would suffer if A were wholly free to go back on A's assurance to B.

Henry v Henry
[2010] 1 All ER 988

Facts: Calixtus Henry claimed to be entitled to an undivided half share in a plot of rural land on a hillside in Jalousie, St Lucia; Theresa Henry was the registered proprietor of that half-share, having purchased it in 1999 from Geraldine Pierre, just two months before Geraldine's death. During her life, Geraldine had told her relatives that they could possess the land if they remained to work the land and care for her. Calixtus was the only person to accept this offer; other relatives left St Lucia and moved to St Croix, in the US Virgin Islands, for an easier life. By the time of Geraldine's death, Calixtus had lived on the land for more than 30 years, cultivating it and caring for Geraldine, who had made further promises to Calixtus that she would then leave her share in the plot to him. The trial judge dismissed Calixtus' proprietary estoppel claim. One of his grounds for doing so was that Calixtus had not suffered a detriment: whilst he had cared for Geraldine and cultivated the land, he had also received the countervailing advantages

[48] [1980] 3 All ER 710, CA (see section 2.2 above).

of rent-free accommodation and the benefit of any produce of the land not personally needed by Geraldine. The Court of Appeal of the Eastern Caribbean Supreme Court allowed Calixtus's appeal, declaring that he was the true owner of the half share registered in Theresa's name. The Privy Council considered various points, both on appeal on cross-appeal. One of these points was as to whether the correct test had been applied on the question of detriment.

Sir Jonathan Parker (giving the advice of the Board)

In the judgment of the Board, the [trial] judge clearly misdirected himself in his approach to the issue of detriment. He said [. . .] that Calixtus Henry could not say that he had acted to his detriment and that, far from having suffered detriment because of his reliance on the deceased's promises, he positively benefited. But he did not attempt to weigh the disadvantages suffered by Calixtus Henry by reason of his reliance on Geraldine Pierre's promises against the countervailing advantages which he enjoyed as a consequence of that reliance. That is a process which, on principle, he should have undertaken. [. . .]

[. . .] Had he done so, he would have brought into account on, as it were, the debit side of the account [. . .] the fact that other members of the family had not responded to Geraldine's offer of 'an opportunity to possess land on the mountain . . . if they would work the land and cared for her in her own country as she did not want to leave St Lucia to live abroad or to live in St Croix', but instead had moved to St Croix where they were able to live more comfortably.

As well as establishing *if* a detriment would occur if A were free to renege on his or her assurance to B, a court will usually also have to take a view on the *extent* of B's detriment. This is because, as we will see in section 3 below, the nature of A's duty to B may well depend, at least in part, on the degree of detriment to which B is exposed by A's failure to honour his or her assurance.

2.4 THE ROLE OF UNCONSCIONABILITY

There is a debate as to the precise role of unconscionability within the doctrine of proprietary estoppel. It is clear that B cannot bypass the three requirements set out above and acquire a right by simply showing that A has behaved unconscionably. For example, Lord Scott in *Yeomans Row v Cobbe* stated that 'unconscionability of conduct may well lead to a remedy but, in my opinion, proprietary estoppel cannot be the route to it unless the ingredients for a proprietary estoppel are present.' And, writing extra-judicially, Lord Neuberger has opined that: '*equity is not a sort of moral US fifth cavalry riding to the rescue every time a claimant is left worse off than he anticipated as a result of the defendants behaving badly, and the common law affords him no remedy.*'[49] It is equally clear that the concept of unconscionability has played some role in the fashioning of the requirements of proprietary estoppel, and of the judges' interpretation of those requirements. As Robert Walker LJ put it in *Gillett v Holt*:

'*the fundamental principle that equity is concerned to prevent unconscionable conduct permeates all the elements of the doctrine. In the end the court must look at the matter in the round.*'[50]

[49] 'The Stuffing of Minerva's Owl? Taxonomy and Taxidermy in Equity' [2009] CLJ 537, 540.
[50] [2001] Ch 210 (CA), 225.

The difficulty of establishing the exact role of unconscionability is well demonstrated by the Court of Appeal's decision in the following case.

Taylor Fashions v Liverpool Victoria Trustees; Old & Campbell v Liverpool Victoria Friendly Society
[1982] QB 133, CA

Facts: Each of Taylor Fashions (Taylors) and Old & Campbell (Olds) made a separate claim that it had a right to renew a lease of business premises. The landlord, Liverpool Victoria, denied that either Taylors or Olds had such a right. All of the parties had acted on the basis that both Taylors and Olds *did* have a right to renew the lease: they all assumed that an earlier lease that contained such a right bound Liverpool Victoria. As a result, Taylors and Olds had, for example, spent money on improving the premises. But that general assumption was mistaken: Liverpool Victoria was not bound by the earlier lease. Taylors and Olds, because each had acted in reliance on the mistaken belief that it had a right to renew, argued that Liverpool Victoria was now estopped from denying the existence of the right to renew. Liverpool Victoria argued that proprietary estoppel could not apply, because it had not acted unconscionably, nor had it tried to deceive Taylor or Olds: it, too, had genuinely believed that it was bound by the earlier lease.

Oliver J

At 144

This is the principal point upon which the parties divide. [Counsel for Taylors and Olds] contend that what the court has to look at in relation to the party alleged to be estopped is only his conduct and its result, and not—or, at any rate, not necessarily—his state of mind. It then has to ask whether what that party is now seeking to do is unconscionable. [Counsel for Liverpool Victoria] contends that it is an essential feature of this particular equitable doctrine that the party alleged to be estopped must, before the assertion of his strict rights can be considered unconscionable, be aware both of what his strict rights were and of the fact that the other party is acting in the belief that they will not be enforced against him [That contention of counsel was supported by the decision of Fry J in *Willmott v Barber*.[51] In that case, Fry J set out five criteria or 'probanda' for proprietary estoppel, one of which is that A, when making a representation to B that B has a particular right in relation to A's land, must be aware of his true rights against B.]

Now, convenient and attractive as I find [counsel for Liverpool Victoria's] submissions as a matter of argument, I am not at all sure that so orderly and tidy a theory is really deducible from the authorities—certainly from the more recent authorities, which seem to me to support a much wider equitable jurisdiction to interfere in cases where the assertion of strict legal rights is found by the court to be unconscionable. It may well be (although I think that this must now be considered open to doubt) that the strict *Willmott v. Barber* probanda are applicable as necessary requirements in those cases where all that has happened is that the party alleged to be estopped has stood by without protest while his rights have been infringed [. . .] in a case of mere passivity, it is readily intelligible that there must be shown a duty to speak, protest or interfere which cannot normally arise in the absence of knowledge or at least a suspicion of the true position.

[51] (1880) 15 Ch D 96.

> [Oliver J then examined a number of authorities, before continuing as follows.]
>
> [. . .] the more recent cases indicate, in my judgment, that the application of the *Ramsden v Dyson*[52] principle—whether you call it proprietary estoppel, estoppel by acquiescence or estoppel by encouragement is really immaterial—requires a very much broader approach which is directed rather at ascertaining whether, in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which knowingly, or unknowingly, he has allowed or encouraged another to assume to his detriment than to inquiring whether the circumstances can be fitted within the confines of some preconceived formula serving as a universal yardstick for every form of unconscionable behaviour.
>
> So regarded, knowledge of the true position by the party alleged to be estopped becomes merely one of the relevant factors—it may even be a determining factor in certain cases—in the overall inquiry [. . .]
>
> The inquiry which I have to make therefore, as it seems to me, is simply whether, in all the circumstances of this case, it was unconscionable for the defendants to seek to take advantage of the mistake which, at the material time, everybody shared, and, in approaching that, I must consider the cases of the two plaintiffs separately because it may be that quite different considerations apply to each.

Oliver J's conclusion was that Taylors' claim failed, but Olds' claim succeeded. The difficulties for Taylors were: (i) Liverpool Victoria had not encouraged Taylors to believe that it had a right to renew the lease; but instead, both parties had *assumed* that such a right existed; and (ii) it was not clear that the improvements made to the premises by Taylors were carried out in reliance on its belief that it had a right to renew the lease, because Taylors, in any case, benefited from those improvements by continuing to use the premises up to the end of its existing lease. In contrast, Olds had been encouraged by Liverpool Victoria to spend a 'very large sum' on improving the premises precisely because of the belief that it would be able, at the end of the existing lease, to renew that lease and continue using the premises. As a result, Liverpool Victoria was ordered to allow Olds to renew its lease.

The decision in *Taylor* has been hailed as allowing an important relaxation in the requirements of proprietary estoppel: indeed, it has been called a '*watershed in the development of proprietary estoppel*'.[53] Certainly, Oliver J made clear that B can acquire a right through proprietary estoppel even if the five strict requirements laid down by *Willmott v Barber* have not all been fulfilled. And, in reaching that conclusion, Oliver J emphasized that proprietary estoppel, a doctrine developed by courts of equity, ultimately depends on the notion of unconscionability.

But we need to be careful. In fact, it was counsel for the defendants, Liverpool Victoria, who emphasised the importance of unconscionability. This is because Liverpool Victoria had *not* acted deceitfully or led anyone 'up the garden path': when leading Olds to believe that Olds had a right to renew its lease, Liverpool Victoria had honestly (but mistakenly) believed that Olds did have such a right. The actual decision in *Taylor Fashions* thus demonstrates that a proprietary estoppel claim can succeed even if A has not deceived B by leading B to believe something that A knows to be false. In other words, the decision could be said to stand for the fact that, if the three elements of proprietary estoppel are satisfied, it does not matter whether or not A's behaviour can be said, in a general sense, to be unconscionable.

[52] (1866) LR 1 HL 129 (see section 2.1.2 above).

[53] See Robert Walker LJ in *Gillett v Holt* [2001] Ch 210, 225, quoting from Gray and Gray, *Elements of Land Law* (2nd edn, 1993, p 324). See now *Elements of Land Law* (5th edn, 2009, [9.2.36]).

Taylor Fashions, then, cannot provide us with a clear answer as to the role of unconscionability. The question was also considered by Lord Walker in *Cobbe*.

Yeoman's Row Management Limited v Cobbe
[2008] 1 WLR 1752, HL

Lord Walker

At [92]

[Counsel for Mrs Lisle-Mainwaring] devoted a separate section of his printed case to arguing that even if the elements for an estoppel were in other respects present, it would not in any event be unconscionable for Mrs Lisle-Mainwaring to insist on her legal rights. That argument raises the question whether "unconscionability" is a separate element in making out a case of estoppel, or whether to regard it as a separate element would be what Professor Peter Birks once called "a fifth wheel on the coach".[54] But Birks was there criticising the use of "unconscionable" to describe a state of mind.[55] Here it is being used (as in my opinion it should always be used) as an objective value judgment on behaviour (regardless of the state of mind of the individual in question). As such it does in my opinion play a very important part in the doctrine of equitable estoppel, in unifying and confirming, as it were, the other elements. If the other elements appear to be present but the result does not shock the conscience of the court, the analysis needs to be looked at again. In this case Mrs Lisle-Mainwaring's conduct was unattractive. She chose to stand on her rights rather than respecting her non-binding assurances, while Mr Cobbe continued to spend time and effort, between Christmas 2003 and March 2004, in obtaining planning permission. But Mr Cobbe knew that she was bound in honour only, and so in the eyes of equity her conduct, although unattractive, was not unconscionable.

Lord Walker thus seems to suggest that unconscionability may have a role to play in the test for proprietary estoppel: not as a separate requirement, but rather as a concept to be borne in mind when interpreting the specific criteria of the doctrine. This point is developed in the following extract, which also notes that Lord Walker's view of the role of unconscionability may have shifted since his discussion of it in *Gillett v Holt*.[56]

Hopkins, 'Proprietary Estoppel: A Functional Analysis' (2010) 4 Journal of Equity 1

At 12–13

Robert Walker LJ [in *Gillett v Holt*] appeared to envisage two distinct roles for unconscionability. First as feeding into the assessment of whether the other elements of the claim were fulfilled: hence in *Gillett*, conduct that had been considered insufficient to constitute detriment at first instance when viewed in isolation, was considered by the Court of Appeal to be 'unusually compelling' when judged as a question of whether the claimant had so conducted himself that it would now be unconscionable for the representor to renege on

[54] [See Birks in *Breach of Trust* (eds Birks and Pretto, Oxford:Hart, 2002, p 226).]

[55] [The specific use of the term discussed by Birks comes from *Bank of Credit & Commerce International (Overseas) Ltd v Akindele* [2001] Ch 437, 455, *per* Nourse LJ. That case did not concern estoppel, but rather the question of whether a third party receiving a right held on trust can be liable, due to his 'knowing receipt' of the right, to account to the beneficiary of the trust.]

[56] [2001] Ch 210, CA: see section 2.3 above.

the assurance. Second, the concept appeared to provide a mechanism through which the court would assess claims 'in the round.' The consequence of this second role appeared to be that even where an assurance, reliance and detriment were found, a successful claim was subject to the court being satisfied, on a holistic assessment, that at the time the representor reneged it was unconscionable for him or her to do so [. . .]

[Given] Lord Walker's own previous enthusiasm for the concept, the relative lack of discussion of unconscionability in *Cobbe* and *Thorner* appears both significant and surprising. It will be suggested that while no uniform picture emerges, there is evidence of an attempt by Lord Walker to shift the focus of unconscionability further towards the other elements of an estoppel claim. In this way, unconscionability continues to play a central role in the informal acquisition of rights in land through proprietary estoppels [. . .]

At 17–18

In Lord Walker's view in *Cobbe* [. . .] the other elements [i.e. assurance, reliance, and detriment] cannot be fulfilled unless the result 'shocks the conscience'. The other elements may only *appear* to be fulfilled. Hence, having found that the other elements were not present, Lord Walker could not concur with the classification of Mrs Lisle-Mainwaring's conduct as unconscionable. In his judgment, unconscionability has no role independent from the other elements. Implicitly, this means that those other elements should be assessed in the context of determining whether it would be unconscionable for the representor to renege. Only by doing so can the courts ensure that the elements will be fulfilled only when the result 'shocks the conscience'. In effect, what seemed to be two distinct roles for unconscionability outlined by Robert Walker LJ in *Gillett* became a single role in *Cobbe*. Whether seen as part-and-parcel of the assessment of the other elements, or as the basis for an 'in the round' evaluation, only two outcomes are possible: a claim will succeed because the three elements of assurance, reliance and detriment are present and this necessarily means that it is unconscionable for the representor to renege; or a claim will fail because one or more of those requirements has not been met. It is logically impossible under Lord Walker's judgment . . . for a court to find that an assurance, reliance and detriment are actually present (as opposed to *appearing* to be present), but for a claim still to fail on the basis that it would not be unconscionable for the representor to renege.

[. . .] [T]he absence of discussion of unconscionability in *Cobbe* and *Thorner* does not necessarily make a move away from the significance of the concept in estoppel claims. Instead, what may emerge from the cases is a greater focus on the connection between unconscionability and the other elements of an estoppel claim. If maintained, the effect may be to consolidate the role of unconscionability by preventing the potential misuse of the concept that can arise when it is seen as not merely having a role independent from those elements but sufficient on its own to form the basis of a claim [. . .] However, our understanding and interpretation of the detailed rules, and therefore of the informal acquisition of rights in land through estoppel, is inseparable from the underlying concept of unconscionability.

There is, however, no academic consensus as to the precise role played by the concept of unconscionability in a proprietary estoppel claim. For example, in the next extract, the author argues that the concept must be given a meaning that is distinct from the three requirements of assurance, reliance, and detriment.[57]

[57] The extract was written before the decisions in *Cobbe* and *Thorner*, but, as noted below, the author's views on the issue remain essentially the same after those cases: see Dixon, 'Confining and Defining Proprietary Estoppel: the Role of Unconscionability' (2010) 30 LS 408.

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, 2002)

At p 175

The central role that unconscionability plays in the law of estoppel seems, at least to the present writer, to be in inverse proportion to the analysis devoted to it in the cases. All judges are agreed that unconscionability is vital, but few seem willing to share their understanding of the concept [. . .]

At p 177

[On one view of proprietary estoppel] 'unconscionability' has no independent existence for it is defined purely in terms of the three factual requirements. The corollary is, of course, that unconscionability exists *by definition* whenever there is an assurance, reliance and detriment, because non-performance of the assurance after detriment will always be unconscionable. Such a view is at odds with those who view unconscionability as at the heart of the doctrine—in the sense of providing its underlying rationale—because, quite simply it denies the concept of any discernible meaning. It is a non-definition.

If it is true that unconscionability is now to be regarded as no more than a function of assurance, reliance and detriment, this author submits that the approach is flawed and unprincipled. There are a number of reasons. First, and formally, this 'definition' of unconscionability is not supported by *Taylor Fashions* itself. A straightforward reading of Oliver J's judgment suggests that before an estoppel can be established, there must be an assurance, reliance and detriment (albeit holistically examined), but that this must occur in circumstances where the court is satisfied that it would be unconscionable to allow the party making the assurance to go back on it. Or, put shortly, *Taylor Fashions* suggests that assurance, reliance and detriment are necessary but not sufficient. Secondly, if unconscionability is simply the reflection of a withdrawn assurance after detrimental reliance, how does it justify the grant of an estoppel remedy in the formality cases, bearing in mind the point that estoppel is an exception to the normal formality rules? The whole point of the formality rules is to ensure that a representation about a property right shall be capable of enforcement only if it is in a proper form. If the proper form can be ignored simply because the representee has relied on the representation to his detriment, that is tantamount to saying that the formality rules invalidate only 'voluntary' promises, being those where there is no detriment issuing from the promisee [. . .]

At p 180

In so far as the general law requires the creation, transfer or enforcement of proprietary rights to be undertaken in certain forms, estoppel can be used to side-step these requirements only where there is a clear justification. That it would be 'unconscionable' for one of the parties to rely on the absence of the required formality is that justification. This means that unconscionability cannot be merely a function of assurance, reliance and detriment (the factual elements of estoppel) for otherwise it is devoid of meaning [. . .] 'unconscionability' *can* explain why the absence of formality may be ignored—in the sense that a right still ensues for the claimant—if the concept is tied to the formality rules. Hence, it will be unconscionable for a representor to withdraw an assurance, relied on to detriment, if the assurance of the rights carries with it (expressly or impliedly) a further assurance that the right will ensue even if the formalities necessary to convey the right are not complied with. It is the withdrawal of the promise of the right after the second assurance (assuming detrimental reliance) that constitutes the unconscionability required for a successful claim in estoppel.

At p 182

Although it is submitted that unconscionability in the narrow sense just discussed must be present before a claim *can* succeed, that does not mean that the claim *must* then succeed. The 'double assurance', withdrawn after detrimental reliance is necessary but not sufficient. There still remains the broad equitable jurisdiction either to deny the remedy or modify the remedy because of the background circumstances of the case [...] Of course, this is not [an] unfettered and unprincipled discretion...but it is in keeping with the use of estoppel as a remedy protecting those who cannot rely on formality and who instead must plead the favour of the court.

Dixon's main point is an important one and raises the question we noted in Chapter 7, section 3.7: if a failure to satisfy a formality rule means that A has not granted B a property right, nor made a contractual promise to B, is that formality rule undermined if we recognise that B has acquired a right through proprietary estoppel? In Chapter 7, section 3.7 we considered an extract from a more recent article by Dixon,[58] in which he again relates 'unconscionability' not to the three elements of assurance, reliance and detriment, but to the question of whether it is permissible for B to acquire a right in the absence of formality: in Dixon's words, '[u]nconscionability is a function of formality, not of assurance, reliance and detriment.'[59]

A sensitivity to the formality rules does not mean, however, that the role of proprietary estoppel can be justified *only* by viewing unconscionability as an independent requirement of the doctrine. It rather means that, if we take the view that A's duty arises simply because of A's commitment, B's reliance, and the prospect of B's detriment, we need to explain *why* those factors impose a duty on A to B. We then have to ask if our explanation can also justify the fact that proprietary estoppel can operate without formality; but it may be that it can do so without invoking unconscionability.

3 THE EXTENT OF A'S DUTY TO B: REMEDYING A PROPRIETARY ESTOPPEL

If B can show that proprietary estoppel imposes a duty on A, we then need to know the *extent* of A's duty. This task is often said to be one of deciding what remedy to give, or how best to 'satisfy the equity' arising,[60] where B has made a successful proprietary estoppel claim.

In any particular case, there are a number of possible ways in which the extent of A's duty might be determined. For example, it could be that:

- A is under a duty to *honour his commitment to B*—in such a case, the extent of A's duty depends on the extent of A's commitment to B; *or*
- A is under a duty to *ensure B suffers no detriment as a result of A's failure to honour his commitment*—in such a case, the extent of A's duty depends on the extent of B's potential detriment; *or*

[58] Dixon, 'Confining and Defining Proprietary Estoppel: the Role of Unconscionability' (2010) 30 LS 408.

[59] Ibid, p 418.

[60] In accordance with the terminology employed in *Crabb v Arun DC* [1976] Ch 179 by Lord Denning MR (at 190) and by Scarman LJ (at 193, 198–9).

- A is under a duty to *pay B the value of any benefit A has received as a result of B's reliance on A*—in such a case, the extent of A's duty is determined by the extent of the benefit that A has received at B's expense; *or*
- A is under a duty to do whatever is necessary to ensure that A does not act unconscionably—in such a case, the extent of A's duty depends on what a court determines that A must do to avoid behaving badly.

Of course, there may be other possibilities; equally, one of the four measures could be adopted in a certain set of cases, with other measures used in other cases.[61] Unfortunately, it is not currently possible to describe the courts' approach in a way which is both clear and consistent with the results of the cases. The most thorough judicial treatment of the question is contained in the following extract.

Jennings v Rice
[2003] 1 P & CR 100, CA

Facts: Mrs Royle, a childless widow, lived at Lawn House, Shapwick, in Somerset. She died in 1997. Mr Jennings had started to work for her in 1970 as a part-time gardener. He later began to do other work for her (e.g. running errands, taking her shopping, doing minor maintenance work). In the late 1980s, Mrs Royle stopped paying Mr Jennings for these services, but she provided him with £2,000 towards the purchase of a house. By the mid-1990s, Mr Jennings, at Mrs Royle's request, cared for her and stayed overnight at her house. In return, Mrs Royle assured him that, in her will, she would 'see him right'—but she died without leaving a will.

Mr Jennings claimed that, at her death, Mrs Royle was under a duty to Mr Jennings, arising as a result of proprietary estoppel. The first instance judge held that Mrs Royle (and so now Mr Rice, her personal representative) was under a duty to pay Mr Jennings £200,000. Mr Jennings appealed, claiming that Mr Rice was under a duty to give him the whole of Mrs Royle's estate (valued at £1.285m) or, at least, a sum equal to the value of Mrs Royle's house and its furniture (£435,000). The Court of Appeal upheld the award of the first instance judge: on her death, Mrs Royle was under a duty to pay Mr Jennings £200,000.

Aldous LJ

At [15]–[22]

The [first instance] judge then had to decide what was the appropriate relief [. . .] He concluded that he had a discretion to be exercised judicially in the light of all the relevant circumstances. He took into account, first that Mr Jennings did not know the extent of Mrs Royle's wealth and second, that the value of her actual estate and even the part known to Mr Jennings was out of all proportion to what Mr Jennings might reasonably have charged for the services he provided free. He then considered whether it would be equitable for Mr Jennings to take the house and the furniture which were the minimum he expected, and also what the judge called the problem of proportionality. The judge reminded himself that the house was valued at £420,000 and was not a suitable house for Mr Jennings to reside in on his own and he took

[61] See the discussion in Gardner, 'The Remedial Discretion in Proprietary Estoppel,' (1999) 115 LQR 438, esp at 440.

into account that Mrs Royle had no special obligations to her family. He said that to reward an employee on the scale of £420,000 was excessive. He also compared the cost of full-time nursing care, which he estimated at £200,000, with the value of the house. He reasoned that Mr Jennings would probably need £150,000 to buy a house. He concluded:

> 'I do not think that he could complain that he had been unfairly treated if he had been left £200,000 in Mrs Royle's will. Most people would say that she would, at least, then have performed her promise to see him all right. The quality of her assurance affects not only questions of belief, encouragement, reliance and detriment, but also unconscionability and the extent of the equity.'

Mr Warner, who appeared for Mr Jennings, submitted that in a case like the present, where the claimant had established his claim of proprietary estoppel, the basic rule was that the established equity should be satisfied by making good the expectation. He accepted that there were exceptions, for example where there had been misconduct, but this case did not fall within any of them [. . .]

Miss Rich, who appeared for the respondents, supported the conclusion and reasoning of the judge. She submitted that to arrive at the correct award, the starting point was the claimant's expectation as that would indicate the maximum extent of the equity. However the court's task did not end there. The ultimate aim was to achieve justice. That was achieved by making the award proportionate to the expectation and the detriment suffered [. . .]

Before coming to the authorities which establish the approach necessary to arrive at the correct award, it is instructive to consider the basic principles of proprietary estoppel [. . .]

There can be no doubt that reliance and detriment are two of the requirements of proprietary estoppel and that the basis of the estoppel is, as Lord Denning MR said in *Crabb's* case, the interposition of equity: thus the requirement of unconscionability. If the conscience of the court is involved, it would be odd that the amount of the award should be set rigidly at the sum expected by the claimant.

Against that background I turn to consider the crucial question in this case, namely how to give effect to the estoppel. Mr Warner took us back to cases decided in the last century. For my part, I believe it is appropriate to start with *Crabb's* case, decided in 1976 [. . .]

At [36]–[38]

There is a clear line of authority from at least *Crabb's* case to the present day which establishes that once the elements of proprietary estoppel are established an equity arises. The value of that equity will depend upon all the circumstances including the expectation and the detriment. The task of the court is to do justice. The most essential requirement is that there must be proportionality between the expectation and the detriment.

Mr Warner warned against the conclusion I have reached. He submitted that it led to uncertainty and that the appropriate course was to satisfy the expectation. I accept that the flexible approach adopted in the past may mean that there is room for what has been referred to as a judicial discretion, but the rigidity of the approach advocated by Mr Warner can lead to injustice which could not form the basis of an equitable result. One only has to alter the facts of this case to illustrate the unsatisfactory nature of Mr Warner's submissions. The expectation was that Mr Jennings would receive the house and furniture valued at £435,000. If he had been left £5 or £50,000 or £200,000 in Mrs Royle's will, or she had died one month, one year or 20 years after making the representation relied on, should the court award the same sum? Yes, said Mr Warner. The result could then have been that Mr Jennings would receive £635,000 made up of the expectation and the legacy of £200,000, or perhaps, £435,000 in total, even when the detriment was say £800.

The judge was right to conclude that the award must be proportionate. He took into account the relevant factors as placed before him, namely the expectation, the detriment, the position of Mr Jennings and the amount available. His conclusion was the result of a judgment to which he was entitled to come. I would not interfere with it and would dismiss the appeal.

Robert Walker LJ

At [41]–[56]

I also agree that this appeal should be dismissed for the reasons given by Aldous LJ. Because of the general interest of this appeal I add some observations of my own.

It cannot be doubted that in this as in every other area of the law, the court must take a principled approach, and cannot exercise a completely unfettered discretion according to the individual judge's notion of what is fair in any particular case [. . .]

The need to search for the right principles cannot be avoided. But it is unlikely to be a short or simple search, because (as appears from both the English and the Australian authorities) proprietary estoppel can apply in a wide variety of factual situations, and any summary formula is likely to prove to be an over-simplification. The cases show a wide range of variation in both of the main elements, that is the quality of the assurances which give rise to the claimant's expectations and the extent of the claimant's detrimental reliance on the assurances. The doctrine applies only if these elements, in combination, make it unconscionable for the person giving the assurances (whom I will call the benefactor, although that may not always be an appropriate label) to go back on them.

Sometimes the assurances, and the claimant's reliance on them, have a consensual character falling not far short of an enforceable contract (if the only bar to the formation of a contract is non-compliance with s 2 of the Law of Property (Miscellaneous Provisions) Act 1989, the proprietary estoppel may become indistinguishable from a constructive trust: *Yaxley v Gotts*).[62] In a case of that sort both the claimant's expectations and the element of detriment to the claimant will have been defined with reasonable clarity. A typical case would be an elderly benefactor who reaches a clear understanding with the claimant (who may be a relative, a friend, or a remunerated companion or carer) that if the claimant resides with and cares for the benefactor, the claimant will inherit the benefactor's house (or will have a home for life). In a case like that the consensual element of what has happened suggests that the claimant and the benefactor probably regarded the expected benefit and the accepted detriment as being (in a general, imprecise way) equivalent, or at any rate not obviously disproportionate [. . .]

However the claimant's expectations may not be focused on any specific property [. . .] Moreover (as the judge's findings in this case vividly illustrate) the claimant's expectations may have been formed on the basis of vague and inconsistent assurances. The judge said of Mrs Royle that she 'was prone to saying different things at different times and, perhaps deliberately, couched her promises in non-specific terms'. He made that observation in relation to the failure of the contract claim, but it is relevant to the estoppel claim also.

If the claimant's expectations are uncertain (as will be the case with many honest claimants) then their specific vindication cannot be the appropriate test. A similar problem arises if the court, although satisfied that the claimant has a genuine claim, is not satisfied that the high level of the claimant's expectations is fairly derived from his deceased patron's assurances, which may have justified only a lower level of expectation. In such cases the court may still take the claimant's expectations (or the upper end of any range of expectations)

62 [2000] Ch 162.

as a starting point, but unless constrained by authority I would regard it as no more than a starting point.

I do not see that approach as being inconsistent with authority. On the contrary, I think it is supported by a substantial body of English authority. Scarman LJ's well-known reference to 'the minimum equity to do justice to the plaintiff'[63] must no doubt be read in the context of the rather unusual facts of that case, but it does not stand alone [. . .] Scarman LJ's reference to the minimum does not require the court to be constitutionally parsimonious, but it does implicitly recognise that the court must also do justice to the defendant.

It is no coincidence that these statements of principle refer to satisfying the equity (rather than satisfying, or vindicating, the claimant's expectations). The equity arises not from the claimant's expectations alone, but from the combination of expectations, detrimental reliance, and the unconscionableness of allowing the benefactor (or the deceased benefactor's estate) to go back on the assurances.

To recapitulate: there is a category of case in which the benefactor and the claimant have reached a mutual understanding which is in reasonably clear terms but does not amount to a contract. I have already referred to the typical case of a carer who has the expectation of coming into the benefactor's house, either outright or for life. In such a case the court's natural response is to fulfil the claimant's expectations. But if the claimant's expectations are uncertain, or extravagant, or out of all proportion to the detriment which the claimant has suffered, the court can and should recognise that the claimant's equity should be satisfied in another (and generally more limited) way.

But that does not mean that the court should in such a case abandon expectations completely, and look to the detriment suffered by the claimant as defining the appropriate measure of relief. Indeed in many cases the detriment may be even more difficult to quantify, in financial terms, than the claimant's expectations. Detriment can be quantified with reasonable precision if it consists solely of expenditure on improvements to another person's house, and in some cases of that sort an equitable charge for the expenditure may be sufficient to satisfy the equity.[64] But the detriment of an ever increasing burden of care for an elderly person, and of having to be subservient to his or her moods and wishes, is very difficult to quantify in money terms. Moreover the claimant may not be motivated solely by reliance on the benefactor's assurances, and may receive some countervailing benefits (such as free bed and board). In such circumstances the court has to exercise a wide judgmental discretion.

It would be unwise to attempt any comprehensive enumeration of the factors relevant to the exercise of the court's discretion, or to suggest any hierarchy of factors. In my view they include, but are not limited to, the factors mentioned in Dr Gardner's third hypothesis[65] (misconduct of the claimant as in *J Willis & Sons v Willis*[66] or particularly oppressive conduct on the part of the defendant, as in *Crabb's* case or *Pascoe v Turner*).[67] To these can safely be added: the court's recognition that it cannot compel people who have fallen out to live peaceably together, so that there may be a need for a clean break; alterations in the benefactor's assets and circumstances, especially where the benefactor's assurances have been given, and the claimant's detriment has been suffered, over a long period of years; the likely effect of taxation; and (to a limited degree) the other claims (legal or moral) on the benefactor or his or her estate. No doubt there are many other factors which it may be right for the court to take into account in particular factual situations.

[63] *Crabb v Arun DC* [1976] Ch 179, 198.

[64] [Walker LJ here referred to *Snell's Equity* (30th edn, 2000), [39–21] and the authorities mentioned in that paragraph.]

[65] [The reference here is to Gardner 'The Remedial Discretion in Proprietary Estoppel' (1999) 115 LQR 438.]

[66] [1986] 1 EGLR 62.

[67] [1979] 1 WLR 431.

> [...] The essence of the doctrine of proprietary estoppel is to do what is necessary to avoid an unconscionable result, and a disproportionate remedy cannot be the right way of going about that.

On the approach adopted by the Court of Appeal in *Jennings*, proprietary estoppel does not always lead to A being under a duty to honour a commitment made to B. This point was emphasised by the Privy Council in *Henry v Henry* (the facts of the case are set out in section 2.3 above).[68] The court below had assumed that, once it had held that Calixtus had made out his proprietary estoppel claim, Geraldine must necessarily have been under a duty to honour her assurance to Calixtus. The Privy Council firmly rejected this approach: as Sir Jonathan Parker put it, the approach of the court below: '*betrays a fundamental misconception as to the nature and purpose of the doctrine of proprietary estoppels [...] Proportionality lies at the heart of the doctrine of proprietary estoppel and permeates its every application*.'[69]

Certainly, it would be difficult to defend a rule that, in all cases of proprietary estoppel, A's duty must be to honour his or her assurance to B.[70] After all, in cases such as *Jennings* and *Henry*, A is under no contractual duty to B, not least because of the absence of the signed writing required for a contract to dispose of an interest in land (see further Chapter 7, section 3). We saw in section 2.1.3 above that, in *Walton v Walton*,[71] Hoffmann LJ (as he then was) emphasised the distinction between contractual claims and proprietary estoppel. In the latter case, A's assurance does not impose an immediate duty on A; rather, B's claim arises only if, as a result of B's reliance on A's assurance, B would suffer a detriment if A were wholly free to resile on his or her assurance. This is the point that Lord Hoffmann somewhat cryptically captured by means of his mythological metaphor in *Thorner v Major*: 'the owl of Minerva spreads its wings only with the falling of the dusk'.[72] If, then, B's claim arises only because of B's reliance on A, and the prospect of B's suffering a detriment, it would be strange if the extent of A's duty were fixed solely by the content of A's assurance to B. Nonetheless, a difficulty remains after *Jennings and Henry*: once we know that proprietary estoppel does not always lead to A being under a duty to honour a commitment to B, how do we know what duty will be imposed on A? In particular, the concept of 'proportionality' is emphasised in each case; but what does it entail? It is striking that, in *Henry*, Sir Jonathan Parker simply stated that: '*The Board concludes that, in all the circumstances of the case, the appropriate relief in order to achieve the minimum equity required to do justice to Calixtus Henry is to award him one-half of Theresa Henry's undivided half-share of the plot*.' Calixtus therefore did not receive, as he had been promised, the whole of the interest formerly held by Geraldine; yet no reasoning was given by the Board as to why 50 per cent of that interest (rather than any other proportion) was the appropriate award.

One way to interpret the approach in *Jennings* is as follows. A will not always be under a duty to honour his or her assurance to B, but this should still be the starting point: in other words, B's expectation will be protected *unless* it would be disproportionate to do so. If it is disproportionate the court will then, to use Walker LJ's phrase, decide on A's duty by exercising its 'wide judgmental discretion'.[73] Such an approach may seem appealing but, as the following extract demonstrates, it leads to unprincipled results and so cannot be accepted.

[68] [2010] 1 All ER 988. [69] Ibid, 1001–2.
[70] See Mee, 'The Role of Expectation in the Determination of Proprietary Estoppel Remedies' in *Modern Studies in Property Law: Vol 5* (ed Dixon, Oxford: Hart, 2009).
[71] 14 April 1994 (unreported), CA. [72] [2009] 3 All ER 945, 950.
[73] [2003] 1 P & CR 100, [51].

Mee, 'The Role of Expectation in the Determination of Proprietary Estoppel Remedies' in *Modern Studies in Property Law: Vol 5* (ed Dixon, 2009, pp 402–40)

The Flaw in the 'Expectation as Starting Point' Approach

Consider a hypothetical case where D has promised to leave C a certain house and where, in reliance on this, C has incurred detriment which is substantial but difficult to quantify. On the approach under discussion, the court should grant an expectation remedy unless this would be disproportionate to the detriment incurred by C. A crucial variable in the hypothetical scenario is, therefore, the value of the house. The argument will proceed by examining the consequences of adjusting the example by increasing the value of the hypothetical house, while holding constant the level of C's detriment and the other features of the case. Let it first be said that the house is worth (say) £100,000 and that, on the facts, it would not be disproportionate for the court to fulfil C's expectation when it is set at this level. In these circumstances, the court would grant the house to C by way of remedy.

Consider next a case where the value of the house is adjusted upwards to the highest level whereby it would still not be disproportionate to fulfil C's expectation. Let it be said that this value of the house is £400,000. In the version of the example where the house has this value, the court will once more fulfil C's expectation and grant him the house worth £400,000 . . . Consider finally a variation on the example where all the facts are the same except that the house is now worth £1,000,000. In this situation, it would be disproportionate to order that C should receive the house, given the disparity in value between the expectation and C's detriment. Therefore the court must devise a remedy in the exercise of its 'wide judgmental discretion'. Depending on the way in which the relevant factors operate in the particular circumstances of the case, the court might award a monetary remedy valued at (say) £200,000 or £300,000 or £400,000 . . . Imagine that, in the circumstances of the case, the court exercises its discretion to choose a remedy of £300,000.

Thus, with an expectation valued at £400,000, C received a remedy valued at £400,000 (the fulfilment of the expectation); however, when the expectation was greater, being valued at £1,000,000, the award was only £300,000. That cannot be right. It is not possible to defend a position where, with all the other facts in the scenario being held constant, a *higher* expectation on the part of C can lead to a *lower* remedy . . . Yet this anomaly is the inevitable consequence of an approach which seeks to privilege the expectation remedy as 'the starting point' in the remedial inquiry, i.e. as the prima facie remedy which will be granted unless it is disproportionate to C's detriment. Either one applies the same approach to determining the remedy in all cases—in which case the expectation remedy loses its status as the prima facie remedy—or else one faces the absurdity that C may be in a stronger position if he can show that the expectation induced in him by D was sufficiently low to count as 'not disproportionate' to his detriment.

The following extract considers a different interpretation of the *Jennings* approach.

Gardner, 'The Remedial Discretion in Proprietary Estoppel—Again' (2006) 122 LQR 492, 498–500

Jennings v Rice tells us that the outcome should be "proportionate to" both expectation and detriment. The statements to this effect are not always cleanly put. For example, we read that "the task of the court is to do justice. The most essential requirement is that there must

be proportionality between the expectation and the detriment." In itself, this says nothing about the scale of relief. The idea, however, is probably that there must be proportionality between the expectation, the detriment *and the outcome* [. . .]

Still, what does it mean to say that there must be "proportionality between" the expectation, the detriment and the outcome? It is hard to find anything beyond: "When the claimant's reliance and expectation interests differ, the judge should pitch the outcome somewhere between the two."

Notice one problem. To pitch the outcome somewhere between the reliance and the expectation, each of these must be quantifiable. But a valid estoppel claim may arise even though they are not. The claimant needs to have acted in detrimental reliance on his belief, but there is no requirement that the reliance has to take any particular form, and the current position is that "it is not a narrow or technical concept," and that it "need not consist of the expenditure of money or other quantifiable financial detriment." And it is well established that the right believed in need not be conceived by the claimant with any precision. It is thus perfectly possible for a successful estoppel claim to arise in circumstances where the claimant's detriment, or expectation, or both, cannot be valued. This was in fact the case in a number of modern authorities on relief. But in none of them did it prevent the court from reaching an outcome. The solution is presumably to pitch the outcome between the innermost values that the two interests may have.

There is a more fundamental problem, however. Imagine a judge asked "I understand that I am to pitch the remedy at a point somewhere between the value of the claimant's expectation and that of her detriment. And I understand that there is no single correct place for that point: that I must make a discretionary decision about it. But still, I do have to choose my place, and I have to do so as a representative of the law, not as a private individual. How am I supposed to go about it?" The question might well be an anxious one, for the facts generating estoppel claims often involve a wide difference between expectation and detriment. The authorities do not readily disclose the answer.

The information the judge seeks is the *aim* of the jurisdiction. It is the jurisdiction's aim that gives meaning to the assertion, which we require the judge to make in arriving at a discretionary outcome, "(in my view, though others may differ) this is the *best* response". The idea of a "best response" is meaningless unless we are told "best for what?" [. . .] and the "what" is the aim of the jurisdiction. It would make sense, for example, for a judge in a criminal trial to say "(in my view, though others may differ) this sentence best captures the defendant's deserts". It makes no sense for a judge in a proprietary estoppel case to say "(in my view, though others may differ) this outcome best pitches the remedy somewhere between the value of the claimant's expectation and that of his detriment". If the objective is simply to pitch the remedy at a point somewhere between the value of the claimant's expectation and that of his detriment, that objective is achieved equally well by the choice of any point between the two poles: there is nothing to make any particular point the "best" one.

In other words, "proportionality" cannot be not the aim of the jurisdiction. Rather, the aim is to rectify unconscionability, of a particular kind. The claimant's expectation and reliance are relevant because they are the essential ingredients of the unconscionability. The linkage is explicitly put in the famous dictum of Oliver J. in *Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd,* posing the question "whether [. . .] it would be unconscionable for a party to be permitted to deny that which [. . .] he has allowed or encouraged another to assume to his detriment".[74] Likewise in the dictum of Robert Walker L.J. in *Gillett v Holt*, stating that the

[74] [1982] QB 133, 151–2.

finding of detrimental reliance "must be approached as part of a broad inquiry as to whether repudiation of an assurance is or is not unconscionable in all the circumstances".[75]

So our judge should be told to seek the outcome that (in his or her view, though others might differ) best redresses the unconscionability. The essence of unconscionability, as the concept is used in property law contexts, is that the defendant has behaved *vis-à-vis* the claimant in a way which means that it would be morally reprehensible for him to insist on the current allocation of resources between them. More specifically, in proprietary estoppel, there is unconscionability where (and because) the defendant is responsible, by his encouragement or acquiescence, for an expectation on the part of the claimant, and for the reliance that the claimant has placed on that expectation, to his detriment. The aim of the jurisdiction is to redress the resulting state of affairs.

So the outcome our judge should seek will necessarily reflect the claimant's expectation and reliance interests, since these are essential to the unconscionability; and it will therefore normally (it should perhaps be, rather than necessarily) lie between the two in value. But that is not enough. For there to be unconscionability, the claimant's expectation and reliance must be ascribable to the defendant, via the encouragement, or acquiescence, that the defendant must have given. To redress the unconscionability, the outcome must therefore reflect *both* the claimant's expectation and reliance, *and* the degree to which these can be ascribed to the defendant, given his encouragement or acquiescence.

On the model suggested by Gardner, then, B's expectation is not treated as a starting point, but it has a definite role in determining the extent of A's duty to B. This is because proportionality is interpreted as demanding that the extent of A's duty be proportionate to both B's expectation and B's detriment. There are, however, difficulties with this approach.

Mee, 'The Role of Expectation in the Determination of Proprietary Estoppel Remedies' in Modern Studies in Property Law: Vol 5 (ed Dixon, 2009, pp 402–40)

Consider the facts of *Jennings*, where the claimant acted to his detriment in the expectation of inheriting a house worth £435,000 and was awarded a remedy of £200,000. If the expectation had been to inherit a house worth £1,000,000, would this have justified an increase in the value of the remedy? In other words, in *Jennings*, the defendant 'promised Mr Jennings the moon and left him nothing';[76] would Jennings have deserved a greater remedy if he had been promised the moon *and* the stars? [. . .] it is difficult to see why, as a matter of principle, the claimant in a case like *Jennings* should receive an ever greater remedy, on the basis of the same detriment, as one increases the extent of the hypothetical expectation [. . .]

A central problem with an approach which gives a role to expectation as a factor in the determination of the remedy is that, unless it is to be an entirely arbitrary process, there must be some principled way of determining the extent to which the expectation impacts upon the remedy. However, no such principled mechanism is available. One must ask how, as a matter of logic, the remedy can be made proportional to two different values, the expectation *and* the detriment?

A further interpretation of proportionality attempts to avoid this difficulty, by suggesting that the extent of A's duty should be proportionate *solely* to the B's detriment: in other words,

[75] [2001] Ch 210, 232. [76] [2003] 1 P & CR 100, [14].

the right acquired by B should be no more and no less than the right required to prevent B from suffering a detriment as a result of his or her reliance on A's assurance. Such an interpretation is explored in each of the following extracts.

Bright and McFarlane, 'Proprietary Estoppel and Property Rights'
[2005] CLJ 449, 452–4

In order to determine the nature and extent of rights arising through proprietary estoppel it is crucial to ask why proprietary estoppel is recognized as a source of rights. Any account of the underlying purpose of the doctrine must be consistent both with the test for the availability of a proprietary estoppel claim, and with the extent of the rights awarded in response to such a claim. In particular cases proprietary estoppel may have the effect of allowing the informal grant of a property right; of enforcing a promise; or of reversing an unjust enrichment. Yet none of these three aims can constitute the basic purpose of the doctrine as, by itself, each fails to account both for the test for the availability of a claim and for the extent of the rights thereby gained by B.

On this approach, the only satisfactory theory of proprietary estoppel is one which explains proprietary estoppel as generating rights in order to protect B's reliance. Analysis of the case law shows that proprietary estoppel is concerned with reacting to and protecting B's reasonable reliance, where A can be said to be responsible for the expectation on which that reliance was based. This particular form of reliance seems to be the unifying feature which justifies the courts' view of proprietary estoppel as a single doctrine.

Moreover, this aim of protecting B's reliance explains the diverse range of responses to a proprietary estoppel claim. It does not follow that protecting reliance will limit B to recovering the direct financial cost of his reliance. This is no surprise: the reliance B needs to show in order to bring a claim is not limited to financial expenditure; hence the reliance protected by B's consequent right is not so limited. This can be seen in *Crabb v. Arun District Council*. B's reliance in that case consisted of selling part of his land without reserving a right of access to his remaining land. Were A then able to deny B his expected easement over A's land, B would be left without access to that remaining land. That particular reliance could only be protected by allowing B to have the expected easement over A's land. In some cases, protecting B's reliance will require B's receiving a property right through an informal grant; in others it will require the enforcement of a promise by A; in others the reversal of A's unjust enrichment; in others the reimbursement of money spent by B. In each case, however, each response will not be a goal in itself but will rather be a means to the end of protecting B's reliance [. . .]

The use of proportionality in recent English decisions supports the view that the purpose of proprietary estoppel is to protect B's reliance: making a proportionate award, like finding the "minimum equity to do justice to [B]", entails recognizing that B has a right which adequately protects his reliance, but goes no further. The application of this principle in practice can be seen by a consideration of *Jennings v. Rice* [. . .] It is possible to take the [result in *Jennings*] as evidence of the wide discretion a court has when responding to an estoppel claim. Certainly, there is a tendency to equate the move away from the automatic enforcement of expectations with a move towards the courts having discretion to react to a proprietary estoppel as they see fit and even to re-distribute property rights. However [. . .] it is preferable to find specific principles which can be used to regulate that task: even when departing from expectations a court must, as Robert Walker L.J. emphasized in *Jennings v. Rice*, "take a principled approach". Admittedly, protecting B's reliance is a less predictable standard than routinely enforcing B's expectation: there will always be an element of