judgement in gauging what is proportionate. The matter will not, however, be left to the unbridled discretion of the court: the crucial point is that the response to the estoppel will be guided by the goal of protecting B's reliance.

Robertson, 'The Reliance Basis of Proprietary Estoppel Remedies' [2008] Conv 295, 300–3

The outcomes of the English and Australian cases fall into a clear and consistent pattern. In most cases it is found that the claimant's equity can be satisfied only by granting expectation relief, either *in specie* or in monetary form. In a small but significant number of cases it is necessary to grant more limited relief in order to give effect to the minimum equity principle. In a few cases the courts seek to quantify the claimant's reliance loss by reference to a mathematical formula. In a similar number of cases the courts prefer to adopt a broad-brush approach to relief, framing the remedy by reference neither to the value of claimant's expectations nor the extent of his or her reliance loss. Together those two categories of case, the mathematical and the broad-brush, show that the proportionality principle is playing an important role in the determination of relief in proprietary estoppel cases [. . .]

The minimum equity principle requires that, in fashioning a remedy to give effect to proprietary estoppel, the court must go no further than is necessary to prevent detriment. This principle recognises reliance-based harm as the core of the estoppel equity: the touchstone in the determination of relief is the overriding goal of protecting against harm resulting from reliance on inconsistent conduct. The decision in *Jennings v Rice* was based on a rejection of the idea that the purpose of proprietary estoppel is to protect expectations or to enforce promises [. . .] In *Commonwealth v Verwayen*, Mason C.J. said that, in giving effect to an estoppel, "[i]t would be wholly inequitable and unjust to insist upon a disproportionate making good of the relevant assumption".[77] Mason C.J. did not, however, explain why it would be unjust or inequitable to do so. If the expectation of a benefit and harm or potential harm, resulting from reliance, are both essential elements in the establishment of an estoppel, why should the claimant be limited to a remedy which protects his or her reliance interest? Why is it not necessary to protect the expectation interest? The answer is that both expectation loss and reliance loss are essential elements of the equity, and, once either the expectation is fulfilled or reliance loss is prevented, the relying party has no claim in estoppel. This is why it is said in estoppel cases that the relying party has nothing to complain about while the assumption is adhered to. It is also why even proprietary estoppel can, in some situations, have a suspensory effect: if the representor is able to and does give the relying party the opportunity to resume his or her original position, there is no longer an equity arising by way of estoppel. If either the expectation loss or the reliance loss is in one way or another avoided or taken away, the reason for the court's intervention comes to an end.

The reason reliance loss rather than expectation loss provides a loose cap on the remedy is simply that, where there is a discernable difference in value between the reliance interest and the expectation interest, the reliance interest is almost always the smaller. It usually makes no sense to expend £100 in the expectation of a benefit worth £50. Since both expectation loss and reliance loss are essential elements of an estoppel claim, the remedy must necessarily be limited by the smaller of the two measures. Once the lesser interest has been satisfied, an essential element of the claim has been removed. When the reliance-based harm has been prevented or compensated, there is no longer any need for the court to intervene. But just as we can say that, where there is no reliance loss, there is no claim, we

[77] (1990) 117 CLR 394, 413 (High Court of Australia).

can equally say that, where there is no expectation loss, there is no claim. For this reason, in the rare situation in which the claimant's reliance interest exceeds the value of the expectation, the expectation interest provides the upper limit of the remedy. *Baker v Baker* stands as authority for this proposition.[78] There, the claimant contributed £33,950 to the purchase of a house by his son's family in the expectation of having the right to occupy a room in the house for the rest of his life. The arrangement came to an end when the relationship between the parties broke down. The trial judge's award of (reliance-based) compensation in the amount of £33,950 was held on appeal to be unjustifiable because it exceeded the value of the expectation. The starting point should have been the value of the expectancy (the right to occupy), since that was less valuable than the reliance loss (the claimant's contribution to the purchase price).

In summary, then, the proportionality principle can be justified on the basis that both reliance loss and expectation loss are necessary to an estoppel claim. Where the lesser interest has been met, the equity is satisfied because an essential element of the claim has been removed. In those rare instances in which the expectation interest is less valuable, it will provide a cap on the claim. Almost invariably, however, the reliance interest is the smaller. That is why the minimum equity principle requires the courts to go no further in granting relief than is necessary to prevent reliance loss.

An approach in which the extent of A's duty to B is determined by the need to prevent B suffering a detriment as a result of his or her reliance on A's assurance is, at least, capable of being stated clearly. Such an approach, however, is yet to be explicitly adopted by the courts: other factors, such as the need to avoid unconscionable conduct by A, continue to feature prominently in the courts' reasoning. For example, in *Ottey v Grundy*,[79] Arden LJ stated that: 'the purpose of proprietary estoppel is not to enforce an obligation that does not amount to a contract nor yet to reverse the detriment which the claimant has suffered but to grant an appropriate remedy in respect of the unconscionable conduct.'

Perhaps the most that can be said in conclusion is that, whenever A comes under a duty to B, whether that duty arises because of proprietary estoppel or some other means, the extent of A's duty must depend on the reason, or reasons, for which that duty has arisen. Where proprietary estoppel is concerned, the difficulties in determining the extent of A's duty stem from a lack of clarity as to the reason, or reasons, for which A's duty has arisen. In other words, until we have a clear sense of the justification for the doctrine of proprietary estoppel, we cannot hope to have a clear test for determining the extent of A's duty to B.

4 THE EFFECT OF PROPRIETARY ESTOPPEL ON A THIRD PARTY: PRIORITY AND THE DEFENCES QUESTION

4.1 INTRODUCTION

In land law, as we saw in Part A of this book, one of the most fundamental questions is as follows: if B acquires a right from A, when will it be possible for B to assert that right against C, a party later acquiring a right in relation to A's land? For example, we can go back to *Thorner*

[78] (1993) 25 HLR 408. [79] [2003] EWCA Civ 1176, [61].

v Major. In that case, the only question was as to the rights of David Thorner against Peter Thorner: any duties that Peter was under at the time of his death were also binding on Peter's administrators. But what if, before his death, Peter had fallen out with David, and sold the farm to a third party: would David then have had any claim against that third party?

As we have seen, for example in Chapter 1, as well as Chapters 4 and 5, land law provides a clear structure for determining this fundamental question of whether B can assert his or her initial right against C.[80] That structure depends on asking whether B, at the time of the sale to C, had a property right in relation to A's land. This in turn depends on the content and acquisition questions. First, is the right claimed by B capable of counting as legal estate or legal interest, or as an equitable interest? Second, has B in fact acquired that right? If B can show that he or she did have such a right then, as we will see in Chapter 12, there is an issue as to the *priority* of B and C's competing rights. As B acquired his or her right before C, the question will be whether C has a defence to B's pre-existing property right.

Where does proprietary estoppel fit into this structure? The obvious answer would be that proprietary estoppel is concerned solely with the acquisition question: it is simply a means by which A can come under a duty to B. The mere fact that B's right has arisen through proprietary estoppel should tell us nothing about the content of B's right: that will depend on the content of A's duty to B. It seems, however, that, where proprietary estoppel is concerned, things are more complicated than the obvious answer would suggest. In answering the question as to whether B's right can bind C, the usual approach is to distinguish between two situations: (i) where the sale to C occurs *after* a court has made an order in B's favour; and (ii) where the sale to C occurs *before* such an order.

4.2 B's POSITION *AFTER* A COURT ORDER IN HIS OR HER FAVOUR

The position here seems to be clear, and it is consistent with the obvious answer set out above. We simply need to examine the content of A's duty to B, as determined by the court order made in B's favour. So if, as *Thorner v Major*, that duty is to transfer A's legal estate to B, then, at the date of the court order, B has an immediate equitable interest in A's land. In *Crabb v Arun DC*, the Court of Appeal ordered that A's duty, arising as a result of proprietary estoppel, was to allow B a right of access over A's land. That right of access, in theory, could have taken the form of either a personal right against A (a licence) or a property right in relation to A's land (an easement). In the former case, B's right would not have been capable of binding C: as we will see in Chapter 21, a licence does not count as an equitable interest in land.[81] In the latter case, A's duty to grant B a legal easement would give B an immediate equitable easement and such a right would be capable of binding any third party acquiring A's land after the court order in B's favour. It seems that, in *Crabb*, A was under a duty to grant B an easement: the detriment B faced consisted of having no means of access to his land and, to secure such access in the future, B required a right that was capable of binding not only A, but also any party later acquiring A's land.

In some cases, however, the court's order does not recognize that B has a property right. For example, in *Jennings v Rice* (see section 3 above) Mrs Royal (and then her estate) was

[80] There is, of course, a separate question as to whether B can assert a new, direct right against C: see Chapter 6. In such a case, B relies on the new, direct right, rather than the right initially acquired from A.

[81] Although it is true that there have been some complications surrounding the status of an 'estoppel licence': these are discussed in Chapter 21, section 4.

simply under a duty to pay Mr Jennings a sum of money: £200,000. Because that duty to pay money was not in any way secured on the land,[82] it could only give Mr Jennings a personal right. So it seems that if the land had been sold to C *after* the court order in favour of Mr Jennings, he would have had no legal or equitable property right to assert against C.

4.3 B's POSITION *BEFORE* A COURT ORDER IN HIS OR HER FAVOUR

The general view is that, before any court order is made in his or her favour, B has only an 'estoppel equity', or 'inchoate equity'—that is, a right to go to court. This is the case even if the test for proprietary estoppel has been clearly satisfied, so that we know that A is under *some* form of duty to B. This means that, if A sells the land to C *after* B has relied to his or her detriment on a commitment made by A, but *before* a court has made any order in B's favour, the crucial question is whether B's 'estoppel equity' counts as a property right.

In relation to registered land, the position has now been clarified by s 116(a) of the Land Registration Act 2002 (LRA 2002).

Land Registration Act 2002, s 116

It is hereby declared for the avoidance of doubt that, in relation to registered land, each of the following:

(a) an equity by estoppel, and

(b) a mere equity

has effect from the time the equity arises as an interest capable of binding successors in title (subject to the rules about the effect of dispositions on priority).

The thinking behind this provision is explained in the following extract from the Law Commission Report that led to the 2002 Act.

Law Commission Report No 271, *Land Registration for the Twenty-First Century: A Conveyancing Revolution* (2001, [5.30])

Our concern was with the status of B's 'inchoate equity' that arises after he or she has acted to his or her detriment but before the court can make an order giving effect to it. Although the point is not finally settled, the weight of authority firmly favours the view that such an equity is a proprietary and not merely a personal right.[83] HM Land Registry treats it as such, permitting the entry of a caution or notice in relation to such equities. It has also been assumed that a person in actual occupation can protect such an equity in relation to land as an overriding

[82] The possible forms of security right in relation to land are discussed in Chapter 28.

[83] [The report here refers to *Megarry & Wade's Law of Real Property* (eds Harpum et al, 6th edn, 2000, [13–028]–[13–032]). Law Commission Consultation Paper No 254, which first suggested the provision to become s 116(a) of the Land Registration Act 2002, listed the following authorities at [3.35]: *Duke of Beaufort v Patrick* (1853) 17 Beav 60, 78; *Inwards v Baker* [1965] 2 QB 29, 37; *E R Ives Investment Ltd v High* [1967] 2 QB 379; *Voyce v Voyce* (1991) 62 P & CR 290, 294 and 296.]

> interest. We pointed out in the Consultative Document that proprietary estoppel is increasingly important as a mechanism for the informal creation of property rights. To put the matter beyond doubt, we recommended that the proprietary status of an equity arising by estoppel should be confirmed in relation to registered land. It could therefore be protected by the entry of a notice in the register or, where the claimant was in actual occupation of the land in relation to which he or she claimed an equity, as an overriding interest. This recommendation was more contentious than our proposal in relation to rights of pre-emption. It was supported by 55 per cent of those who responded to the point (of whom there were not many). Those who opposed it were mainly academics, several of whom were defending their published views. On the other hand members of the legal profession generally supported the proposal. We have therefore decided to take the proposal forward, particularly as we consider that we are merely confirming what is probably the present law.

It is important to note that s 116(a) does not mean that B's 'equity by estoppel' will *always* bind C. After all, any property right may be subject to defences. In particular, as we will see in Chapter 14, section 2.2, if C pays for and registers his or her right, C will have a defence against B's 'equity by estoppel' *unless*: (i) B has protected his or her equity by entering a notice on the register; (ii) *or* B can show that he or she was in actual occupation of the land at the relevant time. For example, in *Henry v Henry*,[84] Calixtus Henry wished to assert a right not against Geraldine Pierre, who had promised to leave her land to him, but rather against Theresa Henry, to whom Geraldine had sold her land shortly before Geraldine's death (the facts of the case are set out in section 2.3 above). The case was governed by the law of St Lucia, and s 28 of the Land Registration Act (St Lucia) sets out the list of overriding interests: that list, includes, in paragraph (g), 'the rights of a person in actual occupation of land [. . .] save where inquiry is made of such person and the rights are not disclosed'. As a result, the Court of Appeal of the Eastern Caribbean Supreme Court concluded (and this point was not challenged on appeal to the Privy Council) that Calixtus' estoppel equity bound Theresa: she could not rely on the lack of registration defence, as his estoppel equity counted as an overriding interest.

In *Henry v Henry*, the Privy Council advised that Calixtus was entitled to one half of Theresa's interest in the land. The result in *Henry*, therefore, can be explained without taking the view that *every* 'equity by estoppel' is capable of binding a third party.[85] The result in *Henry* is equally consistent with the view that a proprietary estoppel claim can only bind a third party if the right arising is a recognised equitable interest, such as a beneficial interest under a trust.

Indeed, in the following extract, Smith notes there are some doubts as to whether an 'equity by estoppel' should be capable of binding a third party. His first point relates to the discretion possessed by a court in deciding what right B has acquired through proprietary estoppel.

[84] [2010] 1 All ER 988.

[85] For the application of this argument to earlier cases in which rights acquired through proprietary estoppel were allowed to bind a third party, see McFarlane, 'Proprietary Estoppel and Third Parties After the Land Registration Act 2002' [2003] CLJ 661.

Smith, 'How Proprietary is Proprietary Estoppel', in *Consensus ad Idem: Essays on the Law of Contract in Honour of Guenther Treitel* (ed Rose, 1996, p 244)

Although most equities are claims to conventional property interests, the nature of the discretion is such that it cannot be argued that there is a right to this interest. It must, therefore, be recognised that, in saying that the equity binds a purchaser, the law is in substance accepting the principle that estoppels bind purchasers. It may well be argued that this is odd. Estoppels and contracts are rather similar, in that they are routes to providing remedies. Nobody seriously suggests that contracts bind purchasers, unless of course there is a contractual right to a legal estate (an estate contract). This seems correct: contracts as such do not represent rights to the land. The same can be argued of estoppels. Yet it has been seen that there is a large body of cases holding that proprietary estoppels bind successors in title. So it seems that the equity involved in an estoppel is a special and discrete property right, albeit one having respectably old origins [. . .]

The second and perhaps more forceful articulation of doubts is to argue that the position of purchasers is intolerable if it is impossible to discover what remedy B will be given. It is not enough to be informed that one is bound by an equity, when the practical effect of this cannot be foretold [. . .] Purchasers know what sort of rights to expect if there is, for example, an easement or a lease, but estoppels have no common content in terms of rights over the land. Next, it will be rare for an estoppel to be evidenced in writing, which necessarily makes it more difficult to ascertain the nature of the right claimed, quite apart from the strength of the claim. Similarly, the facts required to be prove an estoppel will often be in doubt: the average purchaser cannot be expected to investigate allegations of detriment. These points have little to do with discretion; they are features of any estoppel. Even once a purchaser knows about the expectation and the detriment, it will often be essential to know what remedy will be given in order to decide whether to proceed with a purchase. Many purchasers would withdraw from the purchase if B could reside in the property for life. On the other hand, monetary compensation for B could be reflected in an adjustment of the purchase price paid to A.

Yet these arguments have an air of unreality about them. In practice, most purchasers will run a mile on becoming aware of any form of estoppel claim. The typical response will be that the sale is off, unless A (the vendor) can persuade B to drop the claim. It would be very rare for the purchaser to want to investigate the claim and then proceed with the sale. It follows that uncertainty as to whether the claim can be made out and as to its exact scope is unlikely to be significant.

More fundamentally, it is also possible to challenge the very notion of the 'equity by estoppel'. The extract, which adopts an admittedly unorthodox view, argues that there is simply no need for the 'equity by estoppel': B's position should be the same both before and after any court order made in his or her favour.

McFarlane, *The Structure of Property Law* (2008, pp 468–70)

[The orthodox view] takes a *two-stage* approach to the acquisition of a right through proprietary estoppel. The first stage is complete once all the requirements of the doctrine have been met: B has relied on A's commitment, and has suffered, or would suffer, a detriment if A fails to honour that commitment. At that stage, we would expect B already to have a right against A: after all, the requirements of the doctrine have been met. However, on the

orthodox view, B does not yet have a right against A. B has only an "equity by estoppel": a right to go to court [. . .]

So, in a case such as *Crabb v Arun DC*, if C acquires a right in relation to A's land *after* Stage 2 has begun [i.e. after the court order in B's favour] things are fairly clear. Due to the court order, A is under a duty to give B an Easement: A is thus under a duty in relation to a specific right and so C is *prima facie* bound by B's pre-existing Equitable Easement.

However, if C instead acquires his right during Stage 1 (i.e. *before* the court has made its order, but after B has relied on A's commitment) everything depends on the status of B's mysterious "equity by estoppel". C can be bound by B's proprietary estoppel claim if, and only if, the "equity by estoppel" counts as a persistent right.[86]

So, on the orthodox view, a choice has to be made: is an "equity by estoppel" capable of binding a third party or not? The consensus answer is Yes: and so the Law Commission, when preparing the draft provision that became s.116(a) of the LRA 2002, adopted that position [. . .]

The orthodox view treats proprietary estoppel in an odd way and therefore leads to odd results. First, as a matter of principle, it is strange to say that the doctrine works in two separate stages, and that B has no actual right until a court makes an order. Certainly, we do not talk of "inchoate" contracts, wrongs or unjust enrichments: the rule is that B's right arises as soon as all the relevant requirements for acquiring the right have been met. So, if A commits a wrong by carelessly running B over, B acquires a right against A immediately: there is no need to wait for a court order. Indeed, we do not usually think of courts as awarding rights to the parties: unless they have a special statutory jurisdiction, the job of the courts is not to confer new rights but to *recognise* rights the parties have already acquired. To say that, even after the requirements of proprietary estoppel have been met, B only has an "equity by estoppel" (a right to go to court) gives insufficient weight to the fact that B has relied on A's commitment and would suffer a detriment if that commitment were not honoured: after all, vexatious litigants aside, *everyone* has the right to go to court. In fact, there are a number of cases in which the courts have recognised that B has a definite right *before* any court order has made in his favour.[87]

The special, two-stage view of proprietary estoppel *would* be defensible if the doctrine gave the courts an unfettered discretion to vary the rights of A and B. In such a world, it would be very difficult to say that B has a right before the court had exercised its discretion and awarded B a right. However [. . .] proprietary estoppel does *not* operate in that way: like contract, wrongs and unjust enrichment, it is a means of acquiring a right that has its own specific requirements. Indeed, the two-stage model seems to be based on an out-dated, seemingly medieval model of the law, where parties go cap in hand to an all-powerful representative of the monarch and hope that he will exercise his unregulated largesse in their favour.

The two-stage model, and the special treatment it accords proprietary estoppel, is thus over-complicated and unnecessary. There is simply no need for the "equity by estoppel": if B acquires a right through proprietary estoppel that right should arise immediately.

McFarlane's view is inconsistent with the view of the Law Commission, seemingly now enshrined by statute in relation to registered land.[88] For example, in *Halifax plc v Curry*

[86] ['Persistent right' here is used by the author to refer to rights usually called 'equitable property rights': see the discussion of this point in Chapter 5, section 7.]

[87] [The example given in the text is *Voyce v Voyce* (1991) 62 P & CR 290, esp *per* Dillon LJ at 294.]

[88] The word 'seemingly' is used as there is an argument that the term 'equity by estoppel', in s 116(a) of the LRA 2002, could be limited in its meaning to 'recognised equitable interests arising through estoppel': see McFarlane 'Proprietary Estoppel and Third Parties After the Land Registration Act 2002' [2003] CLJ 661. The author does there admit that this argument depends on a somewhat strained interpretation of s 116(a).

Popeck,[89] the parties accepted that, in the words of Norris J, 'a proprietary estoppel, including an inchoate one, is a property interest.' In that case, however, it seems clear that A's duty, arising under proprietary estoppel, was to grant B a legal charge; on McFarlane's view, then, the content of A's duty was such that B would in any case have acquired an equitable interest in A's land: as A was under a duty to grant B a legal charge, B had an immediate equitable charge over A's land. The decision in *Halifax plc v Curry Popeck*, like that in *Henry v Henry*, is thus consistent with the view that a right arising through proprietary estoppel should be capable of binding a third party only if it gives rise to a recognised equitable interest.

The difference between that view and the Law Commission's view, seemingly now enshrined in s 116(a) of the LRA 2002, is only apparent in a case where the content of A's duty is *not* such as would usually give B an equitable interest. This will be the case, for example, where A's duty is simply to pay B a sum of money (that duty not being secured on any land of A), or to allow B a licence to make some use of A's land. In such a case, it is clear that, *after* a court order is made in B's favour, B will have only a personal right against A. Yet, *before* such a court order, B will, according to the intended effect of s 116(a) of the LRA 2002, have a property right. It is not immediately clear what the justification is for this position.

In conclusion, s 116(a) was enacted 'for the avoidance of doubt', but it may not have achieved that aim. Indeed, a possible further complication was considered by the Privy Council in *Henry v Henry*.[90] Counsel for Theresa Henry, who had bought Geraldine's share in the land, argued that 'the test of unconscionability must be considered afresh in relation to the position of Theresa Henry as purchaser.'[91] That argument was rejected on the technical grounds that it had not been pleaded or pursued at the initial trial of the case, but Sir Jonathan Parker stated that the Privy Council '*does not rule out the possibility that cases may arise in which the particular circumstances surrounding a third party purchase may, notwithstanding the claimant's overriding interest, require the court to reassess the extent of the claimant's equity in the property.*'[92] There is some academic support for that position:[93] its logic is that, where C acquires his or her right before any court order in B's favour, C is bound by B's inchoate estoppel equity. In satisfying that equity, the court then has to consider whether *C's* action in attempting to deny B a right relating to the land is unconscionable. Of course, B will have no independent proprietary estoppel claim against C, as C has made no assurance on which B has relied. So, in determining whether or not C has acted unconscionably, a court will not be able to rely on the three elements of proprietary estoppel but, presumably, must adopt a wider notion of what conscience demands of C. In contrast, if the general land law position were to be adopted, there would be no room for an independent assessment of C's behaviour: if B had an equitable interest before C acquired C's right in the land, and if C has no defence to B's right, B can assert that interest against C. It is difficult to see what, if anything, is to be gained by departing from this general position and making special rules for proprietary estoppel. In particular, it is surprising that s 116(a) of the LRA 2002, part of an Act that was introduced to protect the position of a third party purchaser for value of registered land,[94] seems to have rendered C's position so uncertain.

[89] [2008] EWHC 1692 (Ch). [90] [2010] 1 All ER 988.
[91] This is how the argument was summarized by Sir Jonathan Parker at [46].
[92] [2010] 1 All ER 988, [56].
[93] See Gray & Gray, *Elements of Land Law* (5th edn, 2009), para 9.2.93.
[94] See further Chapter 15, section 1.4.

QUESTIONS

1. In *Thorner v Major*, why was Peter Thorner under a duty to transfer Steart Farm to David Thorner?
2. Is our understanding of how a proprietary estoppel claim differs from a contractual claim aided by Lord Hoffmann's metaphor, in his discussion of proprietary estoppel in *Thorner v Major*, that 'the owl of Minerva spreads its wings only with the falling of the dusk'?
3. In *Yeoman's Row Management Ltd v Cobbe*, should Mr Cobbe have been entitled to at least some of the increase in value of YRML's land, given that his work was crucial in obtaining the planning permission that led to that increase?
4. Can proprietary estoppel apply even if A (the party against whom proprietary estoppel is used) has acted perfectly innocently? How does the decision in *Taylor Fashions v Liverpool Victoria Trustees* affect your answer?
5. Do you agree with the result reached by the Court of Appeal in *Jennings v Rice*?
6. Does s 116(a) of the Land Registration Act 2002 impose a potentially unfair burden on a third party acquiring land subject to a proprietary estoppel claim?

FURTHER READING

Bright and McFarlane, 'Proprietary Estoppel and Proprietary Rights' [2005] CLJ 449

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

Gardner, 'The Remedial Discretion in Proprietary Estoppel—Again' (2006) 122 LQR 462

McFarlane, 'Proprietary Estoppel and Third Parties After the Land Registration Act 2002' [2003] CLJ 661

Mee, 'Proprietary Estoppel, Promises and Mistaken Belief' in *Modern Studies in Property Law (vol 6)* (ed Bright, Oxford: Hart, 2011)

Robertson, 'The Reliance Basis of Proprietary Estoppel Remedies' [2008] Conv 295

11

TRUSTS: THE ACQUISITION QUESTION

CENTRAL ISSUES

1. Beneficial interests under a trust of land may be acquired through an express, resulting, or constructive trust.
2. An express trust of land must be evidenced by signed writing to fulfil statutory formality requirements. Resulting and constructive trusts of land are exempt from this requirement.
3. A purchase money resulting trust arises where A purchases or contributes to the purchase of land in the name of B, or where land is purchased in the joint names of A and B, but with no express declaration as to their beneficial shares. The trust confers on the parties beneficial interests in proportion to their contribution. The presumption is not applied in specific circumstances where property is bought as a home.
4. The basis of the resulting trust remains subject to debate. The trust arises either through a reluctance to assume that A intended a gift, or to prevent B's unjust enrichment at A's expense.
5. Constructive trusts arise in a number of circumstances in which, through the existence of specific factors, it is considered unconscionable for the legal owner to assert his or her own beneficial ownership, and to deny the beneficial interest of another.
6. There is no exhaustive definition of the circumstances giving rise to a constructive trust. Two types of constructive trust are considered in this chapter: those arising under the doctrine in *Rochefoucauld v Boustead*;[1] and those arising under the *Pallant v Morgan*[2] equity.
7. Constructive trusts arise under the doctrine in *Rochefoucauld v Boustead* where A transfers land to B on an oral trust in favour of A or transfers land to C on trust for B, a third party. The trust prevents B or C from fraudulently relying on the absence of compliance with formalities for an express trust to claim the land for him or herself.
8. Constructive trusts arise under the *Pallant v Morgan* equity where one party acquires land pursuant to an informal commercial joint venture and reneges on an agreement that another party will have an interest in the land. The non-acquiring party must have relied on the agreement, but it is not necessary that he or she acted to his or her detriment in so doing. The trust has been analysed as a specific example of the 'common intention constructive trust' (discussed in Chapter 16) but this classification is problematic.

[1] [1897] 1 Ch 196, CA. [2] [1953] 1 Ch 43.

1 INTRODUCTION

In this chapter, we consider how equitable interests in land are acquired by the creation of a trust. Not all equitable interests take effect under a trust. The difference between equitable interests under a trust and other forms of equitable interests is explained in Chapter 5. There are three principal categories of trust that need to be considered: express, resulting, and constructive. These categories of trust are differentiated by their method of creation and, specifically, by the different role afforded to the settlor's intention in the creation of the trust.

Snell's Equity (32nd edn, ed McGhee, 2010, [21-018]–[21-021])

A classification of trusts in these terms [express, resulting, and constructive] refers to the degree that the trust arises though the expression of the settlor's actual intention to create it, or by operation of law and irrespective of his intentions. The distinction is often a fine one, and depends on a close analysis of the relevant transaction.

(a) *Express trust*. An express trust is created by the actual intention of the person in whom the property is vested, as where A declares himself a trustee of Whiteacre for B, or conveys it to C on trust for B. [. . .]

(b) *Resulting trust*. A resulting trust arises by operation of law, though in response to a legal presumption about the intentions of the person who transfers the property which becomes subject to the trust. If A transfers property to B when it is unclear whether A intends B to have the beneficial interest in it, then B may hold the property on resulting trust for A. The trust arises by operation of law to give effect to a presumption that A did not intend B to take the property beneficially.

(c) *Constructive trust*. A constructive trust is imposed by operation of law, rather than through the express or presumed intention of the owner of the property to create a trust or to retain any beneficial interest for himself. The trust may even arise contrary to the actual intentions of the owner [. . .] In other cases the distinction between constructive and express trusts is less clear. So a constructive trust may be imposed on property to give effect a person's intention to make a gift to another or to act as an express trustee, but where the formalities necessary to give effect to the gift or the express trust have not been fully complied with.

A fourth and fifth category of trust are also commonly referred to. We note these categories here but they are not further discussed. The fourth category—the 'implied trust'—lacks a clear and consistent usage. It is sometimes used to refer to a trust created by a settlor, but where the settlor's intention is inferred, rather than express. This use of the implied trust has no application in relation to land,[3] where, as we will see, written evidence of intent is required. At other times, the expression 'implied trust' is used simply as an umbrella term for resulting and constructive trusts, in contradistinction to express trusts. The final category is the statutory trust. Trusts are imposed by statute in a disparate range of circumstances. The consequence can be significant for the unwary statutory trustee. One example is a purported conveyance of a legal estate in land to a minor. A minor cannot hold legal title to land[4] and the effect of such a transfer is a statutory trust under which the legal title is held on trust for

[3] *Lewin on Trusts* (18th edn, ed Mobray, 2008), [7–04].

[4] LPA 1924, s 1(6).

the minor by the transferor.[5] In *Hammersmith and Fulham LBC v Alexander-David*[6] a local authority purported to grant a legal lease to a 16 year-old homeless girl. The result was that the local authority held the lease on trust for her. This had the practical consequence that the local authority could not terminate the lease using their usual powers as landlord as this would destroy the trust property. As such, it would be a breach of trust.

An alternative means of classifying trusts has been suggested based on the causative event that triggers the imposition of the trust.[7] This development should be seen in the broader context of the taxonomy of private law pioneered by Professor Peter Birks.[8] He demonstrated that obligations arise on the basis of consent, wrongs, unjust enrichment, and through a category of miscellaneous other events. This scheme appeals to a sense of logic and rationalization by aligning the creation of trusts with the creation of obligations in private law—but as the language of the traditional scheme is embedded in statute a wholesale change appears unlikely.

Once a trust comes into existence, the method of creation and the consequent classification of the trust are of limited significance. Hence, the priority rules determining the enforcement of trusts against third parties (the defences question) operate in the same way, regardless of how the trust came into existence. Equally, express, resulting, and constructive trusts of land are all 'trusts of land' within s 1(2)(a) of the Trusts of Land and Appointment of Trustees Act 1996 (TOLATA 1996). That Act, which is discussed in Chapter 17, deals with the content question: it sets out the general rights of beneficiaries and duties of the trustees for all trusts of land. The Act draws no distinction between different categories of trust, except that, where a trust is created expressly, the settlor may make specific provision as regards those rights and duties. In some instances, however, differences emerge through specific rules applicable to trusts arising in particular circumstances. For example, as we have seen in Chapter 9, the constructive trust arising under the doctrine of anticipation has unusual features stemming from its origin in a contract for sale of land.

The classification of a trust therefore seems to be of secondary importance. In the beginning, it is more important to understand when a beneficial interest will arise than whether it is called an 'express', 'resulting', or 'constructive' trust.

Once these rules are understood, however, the issue of classification becomes more significant. The scope of resulting and constructive trusts ultimately lies in the development of doctrine by the courts. Rationalizing the basis on which these trusts come into existence can provide an important benchmark for distinguishing the uses and abuses of these doctrines. With this in mind, this chapter considers the application of express, resulting, and constructive trusts to land, and places this discussion in the broader context of current debate concerning those doctrines of trust.

2 EXPRESS TRUSTS

As we have seen, an express trust is one created by the actual intention of the settlor. The creation of express trusts of land is subject to compliance with formality requirements. These are contained in s 53(1)(b) of the Law of Property Act 1925 (LPA 1925).

[5] Trusts of Land and Appointment of Trustees Act 1996, Sch 1, para 1(1).

[6] [2010] Ch 272.

[7] See *Snell's Equity* (32nd edn, ed McGhee, 2010), [21-023]–[21-026] and Swadling, 'Property' in *English Private Law* (2nd edn, ed Burrows, 2007).

[8] Birks, *An Introduction to the Law of Restitution* (1985).

Law of Property Act 1925, s 53(1)(b) and (2)

(1) [. . .]

(b) a declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare such trust or by his will;

[. . .]

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

An express declaration of trust is conclusive as to the existence of the trust. If the declaration specifies the parties' respective beneficial shares, it is also conclusive in that respect;[9] otherwise, the parties' shares will be determined by the application of resulting and constructive trust principles.[10]

Debate arises as to whether a trust that the settlor intends to create, but which does not comply with s 53(1)(b) of the LPA 1925, should still be classified as 'express'. One instance of this debate is considered below, as regards the classification of the trust arising under the doctrine in *Rochefoucauld v Boustead*. The better view, it is suggested, is that a trust of land should be classified as an express trust only where s 53(1)(b) is complied with. In the absence of compliance, the trust should be classified as resulting or constructive to invoke the exception in s 53(2).

3 RESULTING TRUSTS

There are two main views on the scope of resulting trusts, each of which affords a different role to intent. The first, and traditional, view is that resulting trusts arise in two distinct categories: where A pays or contributes to the purchase of property in B's name (the 'presumed intention', or 'purchase money', resulting trust); and where A creates an express trust that does not exhaust the beneficial interest (an 'automatic' resulting trust).[11] The presumed trust arises through an assumption that A does not intend a gift. The role of intent in the automatic resulting trust is more contentious: it may play no role,[12] or the trust may arise because A does not intend the property to vest in the Crown as *bona vacantia*.[13]

The second view on the scope of resulting trusts is that they arise whenever B receives property in relation to which he or she was not intended to benefit. On this view, the trust arises through A's (the transferor or purchaser) lack of intent to benefit B and the effect of the trust is to provide restitution for unjust enrichment.

9 *Goodman v Gallant* [1986] 2 WLR 236.

10 The quantification of shares in such cases is considered in Chapter 16.

11 The description of these as presumed and automatic is provided by Megarry J in *Re Vandervell's Trusts (No 2)* [1974] Ch 269, 294.

12 The approach suggested ibid.

13 Compare the discussion by Lord Browne-Wilkinson in *Westdeutsche v Landesbank Girozentrale v Islington LBC* [1996] AC 669, 708.

Chambers, *Resulting Trusts* (1997, p 220)

> There are two requirements for every resulting trust: (i) a transfer of property (ii) in circumstances in which the provider of that property did not intend to benefit the recipient. The property may be any interest in any type of property or asset, so long as it is capable of being the subject of the trust. The provider may be the previous owner of the property in question or someone who has contributed to the recipient's acquisition of that property. [. . .]
>
> All resulting trusts effect restitution of what would otherwise be the unjust enrichment of the recipient. They are created neither by the consent of the recipient nor by the intention of the provider to create a trust. The resulting trust is not merely the passive preservation of the provider's pre-existing property interest, but is one of equity's active responses to non-voluntary transfer.

The broader view of the resulting trust was rejected by the House of Lords in *Westdeutsche v Landesbank Girozentrale v Islington LBC*.[14] The House of Lords preferred the traditional view, confining the trust to its two categories. Placing the resulting trust in the context of general principles of trust law, however, Lord Browne-Wilkinson considered that the trust could not arise until the trustees' conscience is affected by knowledge of the factors giving rise to the trust.[15]

That decision has not put an end to the debate. The restitutionary approach was advocated by Birks,[16] while Chambers has remained its chief proponent.[17] In contrast, Penner has noted that the recognition of the trust as restitutionary is "a prospect which some of us find appalling".[18] McFarlane suggests that the limitation of the resulting trust in *Westdeutsche* to the two traditional situations is arbitrary. Combining the analysis of Lord Browne-Wilkinson, on one hand, and Birks and Chambers, on the other, McFarlane argues that the resulting trust should arise to prevent unjust enrichment in cases outside the two traditional situations, but only where the trustee is aware, or ought to be aware, of the relevant facts.[19]

The practical differences between Lord Browne-Wilkinson's view of the resulting trust, on the one hand, and Birks' and Chambers' view, on the other, are twofold. Firstly, Lord Browne-Wilkinson confines the operation of the trust to its two traditional applications. The second difference relates to the timing of the trust: if an unjust enrichment analysis is applied, the trust dates from the time of receipt of the property (the time of the enrichment); on Lord Browne-Wilkinson's view, the trust does not arise until the trustee has knowledge of the factors that give rise to the trust. This difference in timing can be particularly significant where the recipient becomes bankrupt between the date of receipt and the date on which the trustee becomes aware of the relevant facts.[20]

In relation to land, the most significant application of the resulting trust is the purchase money resulting trust, arising where A purchases or contributes to the purchase of land in the name of B. In such a case, the analysis adopted may have no practical impact

[14] [1996] AC 669. [15] [1996] AC 669, 709.

[16] See Birks, 'Restitution and Resulting Trusts' in *Equity and Contemporary Legal Developments* (ed Goldstein, 1992).

[17] Chambers, *Resulting Trusts* (1997, p 220).

[18] Penner, 'Resulting Trusts and Unjust Enrichment: Three Controversies' in *Resulting and Constructive Trusts* (ed, Mitchell, Oxford: Hart 2009), 237 fn 4.

[19] McFarlane, *The Structure of Property Law* (2008, pp 314–22).

[20] See the discussion of *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd* [1981] Ch 105 in *Westdeutsche v Landesbank Girozentrale v Islington LBC* [1996] AC 669, 714–15.

on the timing of the trust. The trust is within the two traditional categories and, because B will necessarily have knowledge of A's contribution, whichever analysis is taken, the trust will arise at the time of receipt. In view of this, and in line with prevailing judicial preference, the traditional analysis of the resulting trust is followed in the remainder of this chapter.

3.1 THE PURCHASE MONEY RESULTING TRUST

Where A purchases or contributes to the purchase of land in the name of B, a resulting trust arises, because it is presumed that A did not intend a gift. A classic exposition of the trust is contained in the following case.

Dyer v Dyer
(1788) 2 Cox 92

Eyre CB

At 93

The clear result of all the cases, without a single exception, is that the trust of a legal estate whether freehold, copyhold, or leasehold, whether taken in the names of the purchaser and others jointly, or in the names of others without that of the purchaser, whether in one name or several, whether jointly or successive, results to the man who advances the purchase money.

The link between the trust and payment of purchase money is reflected in the quantification of shares under the resulting trust. Each party receives a share in proportion to their contribution.

The nature of the presumption is analysed by Swadling.

Swadling, 'Explaining Resulting Trusts' (2008) 124 LQR 72, 74

Presumptions properly so-called form part of the law of proof. Generally speaking, facts can be proved by admission, judicial notice, or evidence. In the absence of admission and judicial notice, the general rule is that facts must be proved by evidence, the burden of proving those facts lying on the party alleging them to have occurred. Very occasionally, however, proof by evidence of one fact, the "basic" or "primary" fact, gives that party to the litigation the benefit of another fact, the "secondary" fact, without any need to adduce evidence in proof. In such cases, the fact is proved by presumption. The burden then lies on the other party to adduce evidence to rebut the presumption. If they do not, the tribunal of fact must find the secondary fact proved.

In the resulting trust, the primary fact is A's contribution to the purchase. Swadling argues that the secondary fact (the fact presumed) is that A intended a declaration of trust.[21] On Birks' and Chambers' unjust enrichment analysis, the fact presumed is the lack of intent to benefit the recipient.[22]

[21] Swadling, 'Explaining Resulting Trusts' (2008) 124 LQR 72, 79.

[22] See Chambers (1997, p 21). Chambers directly refutes Swadling's views in Chambers, 'Is There a Presumption of Resulting Trust?' in *Resulting and Constructive Trusts* (ed Mitchell, Oxford: Hart 2009).

3.1.1 Presumption of advancement

In a limited number of circumstances, due to the relationship between A and B, no presumption of resulting trust is currently drawn; instead, it is presumed that A did, in fact, intend to make a gift of the land to B. These cases are described as involving a 'presumption of advancement', or a 'presumption of gift'. The relationships to which the presumption of advancement applies were established by the early twentieth century and reflect the prevailing views of relationships in which there is a moral obligation for A to provide for B. Hence, the presumption applies to transfers from a husband to his wife (but not from a wife to her husband, or between cohabiting partners), and from a father to his child. In *Laskar v Laskar*,[23] the Court of Appeal assumed that it would also apply to a transfer from a mother to her child although counsel did not argue for its application on the facts.[24]

The values on which the presumption of advancement is based now appear outdated. Its continuing application on a transfer from husband to wife has met with particular criticism. As we have seen in the context of the presumption of resulting trust, a presumption is no more than a means of proving the existence of a fact. As Lord Diplock explains, this means that a presumption is only as valid as the underlying assumptions upon which it is drawn.

Pettitt v Pettitt
[1970] AC 777, HL

Lord Diplock

At 824

But the most likely inference as to a person's intention in the transactions of his everyday life depends upon the social environment in which he lives and the common habits of thought of those who live in it. The consensus of judicial opinion which gave rise to the presumptions of "advancement" and "resulting trust" in transactions between husband and wife is to be found in cases relating to the propertied classes of the nineteenth century and the first quarter of the twentieth century among whom marriage settlements were common, and it was unusual for the wife to contribute by her earnings to the family income. It was not until after World War II that the courts were required to consider the proprietary rights in family assets of a different social class. The advent of legal aid, the wider employment of married women in industry, commerce and the professions and the emergence of a property-owning, particularly a real-property-mortgaged-to-a-building-society-owning, democracy has compelled the courts to direct their attention to this during the last 20 years. It would, in my view, be an abuse of the legal technique for ascertaining or imputing intention to apply to transactions between the post-war generation of married couples "presumptions" which are based upon inferences of fact which an earlier generation of judges drew as to the most likely intentions of earlier generations of spouses belonging to the propertied classes of a different social era.

Although the presumption of advancement still exists in a transfer from husband and wife, it will readily be rebutted. In *Stack v Dowden*,[25] Lord Neuberger noted: '[T]*he pre-*

[23] [2008] EWCA 347, [20].

[24] The application of thre presumption in relation to parents is considered by Glister, 'The Presumption of Advancement' in *Resulting and Constructive Trusts* (ed Mitchell, Oxford: Hart, 2009).

[25] [2007] 2 AC 432, [101]. See further *Gissing v Gissing* [1971] AC 886, 907, in which Lord Diplock suggested that the presumption would seldom be decisive.

sumption of advancement, as between man and wife, which was so important in the 18th and 19th centuries has now become much weakened, although not quite to the point of disappearance.'

While the courts have therefore made some attempt at modernizing the operation of the presumption, the underlying discriminatory treatment of transfers by husbands and fathers on the one hand and wives and mothers (subject to the assumption in *Lasker v Lasker*) on the other is impossible to rationalize in a modern context. The Equality Act 2010 contains a provision in section 199 for the abolition of the presumption of advancement. The section is not yet in force and will apply only to transfers undertaken after it comes into effect. Following abolition of the presumption of advancement, the presumption of resulting trust will apply to transfers in its place.

3.1.2 Rebutting the presumptions: general principles

The presumptions of resulting trust and of advancement can be displaced by evidence of the actual intention of A.[26] Where the presumption of resulting trust is rebutted, A does not obtain a beneficial interest in the land despite his or her financial contribution to its purchase. Where the presumption of advancement is rebutted, the land is held on resulting trust for A, who provided the purchase money, despite A's relationship to B.

Debate has centred on the nature of the evidence required to rebut the presumption of resulting trust. As we have noted, the presumption that A intended a declaration of trust is drawn because of a reluctance to presume that A intended to make a gift of the land to B. Hence, evidence that a gift was, in fact, intended would clearly rebut the presumption of trust. But the presumption may be rebutted by a wider range of evidence, consistent with the view that the presumption drawn is that of a declaration of trust.

Swadling, 'A New Role for Resulting Trusts?' (1996) 16 LS 110, 116–17

> The presumption of resulting trust which arises in the case of a transfer of property without consideration is not one of non-beneficial transfer. It is instead a presumption of transfer on trust for the transferor. And for that reason, evidence of a positive donative intent is not the only thing capable of rebutting the presumption. Any evidence which is inconsistent with the implication of an intended trust will do [. . .]

In *Westdeutsche v Landesbank Girozentrale v Islington LBC*,[27] Lord Browne-Wilkinson approved the statement that the presumption of trust is rebutted by evidence of any intention inconsistent with the trust. In doing so, he rejected the view (consistent with an unjust enrichment analysis) that the presumption is rebutted only by evidence of an intention to make a gift.[28]

3.1.3 Rebutting the presumptions: transfers for an illegal purpose

Where A transfers land to B, or contributes to the purchase of property in B's name, in order to facilitate an illegal activity, the illegal purpose cannot be invoked to rebut a presumption of advancement or trust. In the following case, a three–two majority of the House of Lords

[26] *Snell's Equity* (2010), [25–001]. [27] [1996] AC 669, 708. [28] Ibid.

held that this does not prevent A from relying on the initial presumption, because A does not need to plead the illegality in order to do so.

Tinsley v Milligan
[1994] 1 AC 340, HL

Facts: Tinsley and Milligan, a lesbian couple, both contributed to the purchase of the house that they shared, but the house was transferred into Tinsley's sole name in order to facilitate fraudulent social security claims. Milligan subsequently repented and confessed to the frauds, following which, Tinsley moved out of the house. Tinsley then sought possession of the house and argued that she was solely entitled.

Lord Browne-Wilkinson

At 371–2

The presumption of a resulting trust is, in my view, crucial in considering the authorities. On that presumption (and on the contrary presumption of advancement) hinges the answer to the crucial question 'does a plaintiff claiming under a resulting trust have to rely on the underlying illegality?' Where the presumption of resulting trust applies, the plaintiff does not have to rely on the illegality. If he proves that the property is vested in the defendant alone but that the plaintiff provided part of the purchase money, or voluntarily transferred the property to the defendant, the plaintiff establishes his claim under a resulting trust unless either the contrary presumption of advancement displaces the presumption of resulting trust or the defendant leads evidence to rebut the presumption of resulting trust. Therefore, in cases where the presumption of advancement does not apply, a plaintiff can establish his equitable interest in the property without relying in any way on the underlying illegal transaction. In this case Miss Milligan as defendant simply pleaded the common intention that the property should belong to both of them and that she contributed to the purchase price: she claimed that in consequence the property belonged to them equally. To the same effect was her evidence in chief. Therefore Miss Milligan was not forced to rely on the illegality to prove her equitable interest. Only in the reply and the course of Miss Milligan's cross-examination did such illegality emerge: it was Miss Tinsley who had to rely on that illegality.

Although the presumption of advancement does not directly arise for consideration in this case, it is important when considering the decided cases to understand its operation. On a transfer from a man to his wife, children or others to whom he stands in loco parentis, equity presumes an intention to make a gift. Therefore in such a case, unlike the case where the presumption of resulting trust applies, in order to establish any claim the plaintiff has himself to lead evidence sufficient to rebut the presumption of gift and in so doing will normally have to plead, and give evidence of, the underlying illegal purpose.

Hence, Milligan could still invoke the presumption of resulting trust, because she did not need to rely on the illegal purpose of the purchase in Tinsley's sole name in order to do so. The principle espoused by the case is therefore sometimes described as the 'reliance principle'. The outcome in *Tinsley v Milligan* would have been different, however, if the case had involved a husband and wife, and the house had been purchased in the wife's name in order to facilitate social security fraud. In such a case, the initial presumption would be of a gift and therefore the husband would have to plead the illegal purpose in order to establish a resulting trust.

An exception to the principle that an illegal purpose cannot be raised to rebut a presumption was recognized in *Tribe v Tribe*.[29] In that case, a father transferred shares in a company to his son to preserve them for the benefit of the family in light of the father's possible liability for dilapidations under commercial leases. The liability did not materialize, but the son refused to re-transfer the shares. The relationship of father and son is one to which the presumption of advancement applies. The Court of Appeal noted the comments in *Tinsley v Milligan* that an illegal purpose could not be raised to rebut the presumption of advancement, but it was held that, because the illegal purpose had not been carried out, the father was not precluded from pleading the purpose of the transfer to claim a resulting trust of the shares. *Q v Q* signals that in applying *Tribe v Tribe* the court will resist attempts to rely on an unduly narrow (and self-serving) explanation of the purpose of a transfer.[30] There, a father argued that the illegal purpose of a transfer of a house to his sons was to avoid inheritance tax which therefore would not be carried out until his death. The court considered that the purpose should be interpreted more broadly as being 'to deceive the Revenue'. Such deception had already occurred by, for example, the father falsely representing to the Revenue that he was no longer the owner of the house. Hence, his attempt to invoke *Tribe v Tribe* failed.

The fact that the outcome in cases of illegality is dependent on whether the initial presumption applied is one of trust or advancement is unsatisfactory as the nature of the illegality in each case is identical.[31] We have seen in section 3.1.1 that provision has been made for the abolition of the presumption of advancement in the Equality Act 2010, but this is not yet in force. When the presumption is abolished, *Tinsley v Milligan* will apply to all cases of illegality: the initial presumption will be one of resulting trust and the claimant will not need to rely on the illegality to prove the existence of the trust. However, the Law Commission has recommended replacing the reliance principle with a statutory discretion.[32] If enacted, the proposals will apply where a trust is created, or an existing trust is used,[33] to conceal beneficial ownership in connection with a criminal purpose.[34] The starting point under the proposals is that a beneficiary should be able to retain their interest and enforce a trust despite the illegality (the same starting point that will arise in all cases when the presumption of advancement is abolished). However, in 'exceptional circumstances' the court may exercise a discretion to deprive the beneficiary of their interest.[35] Where the discretion is exercised, the court must then decide in whom the property should vest; the settlor, trustee or another beneficiary.[36] The approach adopted is (like under the current law) one of 'all

[29] [1996] Ch 107.

[30] *Q v Q* [2009] 1 FLR 935. See further Pawlowski, 'Constructive Trusts, Illegal Purpose and the Locus Poenitentiae' [2009] Conv 145.

[31] Halliwell, 'Equitable Proprietary Claims and Dishonest Claimants: A Resolution' [1994] Conv 62.

[32] Law Commission Report No 320, *The Illegality Defence* (2010). The report contains a draft Trusts (Concealment of Interests) Bill to enact the proposals. For discussion, see Davies, 'The Illegality Defence: Turning Back the Clock' [2010] Conv 282 and Sheehan, 'The Law Commission on Illegality: the end (at last) of the saga' [2010] LMCLQ 543.

[33] But only where the beneficiary has taken steps to ensure that the trust remains in place to facilitate the concealment, or the criminal purpose is carried by the beneficiary or with his or her consent: Law Commission Report No 320, [2.42].

[34] This will cover, in particular, concealment for the purposes of conduct which is criminal under the Fraud Act 1996: Law Commission Report No 320, [2.25].

[35] Law Commission Report No 320, [2.58]–[2.60].

[36] Law Commission Report No 320, [2.87]–[2.99].

or nothing'.[37] Either the beneficiary obtains their full share unconditionally,[38] or they are deprived of their entire interest.

3.2 THE SCOPE OF THE PURCHASE MONEY RESULTING TRUST

As we have seen, the presumption of resulting trust applies where A purchases or contributes to the purchase of land in B's name. The presumption also applies where land is purchased in the joint names of A and B, but there is no express declaration of trust regarding the parties' respective beneficial shares. In all cases, the presumption of resulting trust confers on the parties beneficial shares in proportion to their financial contribution to the purchase.

The scope of the purchase money resulting trust is curtailed by its relationship with the common intention constructive trust. Where A purchases or contributes to the purchase of land in B's name, or land is purchased in the joint names of A and B, but there is no express declaration of trust, a constructive trust may be imposed to give effect to the common intention of the parties. The practical difference between the constructive and resulting trusts relates to the quantification of the parties' respective beneficial shares. In the common intention constructive trust, beneficial shares are determined in accordance with the common intention of the parties. This may result in the acquisition of shares that are disproportionate to the parties' contributions.

There is no doubt that the resulting trust is the appropriate device to use where A and B are commercial parties.[39] The relationship between the resulting trust and common intention constructive trust has arisen principally in the context of determining ownership of a home. It is discussed fully in this context in Chapter 16. For the purposes of this chapter, it is sufficient to note that in two significant decisions the House of Lords in *Stack v Dowden*[40] and the Supreme Court in *Jones v Kernott*[41] have removed the application of the resulting trust in some cases where the property in question is a home. The reason underlying this development, and the type of home to which the presumption of resulting trust no longer applies, are explained in the following extract.

Jones v Kernott
[2011] 3 WLR 1121

Lord Walker and Baroness Hale

At [24]–[25]

In the context of the acquisition of a family home, the presumption of a resulting trust made a great deal more sense when social and economic conditions were different and when it was tempered by the presumption of advancement. The breadwinner husband who provided the money to buy a house in his wife's name, or in their joint names, was presumed to be making her a gift of it, or of a joint interest in it. That simple assumption—which was itself an exercise in imputing an intention which the parties may never have had—was thought unrealistic in the modern world by three of their Lordships in *Pettitt v Pettitt* [1970] AC 777. It was also discriminatory as between men and women and married and unmarried couples. That

[37] Davies, 'The Illegality Defence: Turning Back the Clock' [2010] Conv 282, 291.
[38] The Law Commission considered but rejected the possibility that the court could impose terms on the beneficiary's retention of the property: Law Commission Report No 320, [2.81]–[2.86].
[39] *Malayan Credit v Chia-Mph* [1986] AC 549 (PC). [40] [2007] 2 AC 432.
[41] [2011] 3 WLR 1121.

problem might have been solved had equity been able to extend the presumption of advancement to unmarried couples and remove the sex discrimination. Instead, the tool which equity has chosen to develop law is the "common intention" constructive trust. Abandoning the presumption of advancement while retaining the presumption of resulting trust would place an even greater emphasis upon who paid for what, an emphasis which most commentators now agree to have been too narrow: hence the general welcome given to the "more promising vehicle" of the constructive trust: see Gardner and Davidson at (2011) 127 LQR 13, 16. The presumption of advancement is to receive its quietus when section 199 of the Equality Act 2010 is brought into force.

The time has come to make it clear, in line with *Stack v Dowden* (see also *Abbott v Abbott* [2007] UKPC 53, [2007] 2 All ER 432), that in the case of the purchase of a house or flat in joint names for joint occupation by a married or unmarried couple, where both are responsible for any mortgage, there is no presumption of a resulting trust arising from their having contributed to the deposit (or indeed the rest of the purchase) in unequal shares. The presumption is that the parties intended a joint tenancy both in law and in equity. But that presumption can of course be rebutted by evidence of a contrary intention, which may more readily be shown where the parties did not share their financial resources.

It should be noted that the types of home to which the presumption of resulting trust no longer applies is narrower than had been understood in the immediate aftermath of *Stack v Dowden*. In that case Baroness Hale explained that '[i]n law, "context is everything" and the domestic context is very different from the commercial world'.[42] Subsequently, the courts had distinguished the domestic and commercial contexts according to the purpose for which property was acquired. Hence, the presumption of resulting trust was not applied in *Adekunle v Ritchie*[43] to a home bought jointly by a mother and her son, but was applied in *Laskar v Laskar*[44] where a mother and daughter jointly purchased a house as a buy-to-let investment. Following *Jones v Kernott* the resulting trust is the correct starting point outside the context of homes purchased by couples in an intimate relationship. In such cases the presumption of resulting trust may still be displaced by a claim to a constructive trust.

4 CONSTRUCTIVE TRUSTS

Constructive trusts represent the broadest and least clearly defined of the three categories of trust.

Yeoman's Row Management Ltd v Cobbe
[2008] UKHL 55

Lord Scott

At [30]

It is impossible to prescribe exhaustively the circumstances sufficient to create a constructive trust but it is possible to recognise particular factual circumstances that will do so and also to recognise other factual circumstances that will not.

[42] [2007] 2 AC 432, [69]. [43] [2007] BPIR 1177 (Leeds CC). [44] [2008] 1 WLR 2695.

Judicial attempts at definition have tended to be made at a high level of generality, as in the following case.

Paragon Finance plc v DB Thakerar & Co
[1999] 1 All ER 400

Millett LJ

At 409

A constructive trust arises by operation of law whenever the circumstances are such that it would be unconscionable for the owner of property [. . .] to assert his own beneficial interest in the property and deny the beneficial interest of another.

The reference in this definition to unconscionability is significant, but of limited utility. In *Westdeutsche*, Lord Browne-Wilkinson considered unconscionability to be the foundation for the whole of the law of trusts. Notwithstanding, the constructive trust is the only category explicitly defined on this basis. The concept of unconscionability provides a common thread that ties together all trusts classified as constructive. The concept is of limited utility, however, because it does not operate at large. Indeed, in so far as it is indicative of a general discretionary jurisdiction to impose constructive trusts, it is entirely misleading. At best, it may be said that the combination of elements required for the imposition of a constructive trust in each particular application of the doctrine collectively establish conduct considered by the courts to be unconscionable.

4.1 INSTITUTIONAL AND REMEDIAL CONSTRUCTIVE TRUSTS

The key division in constructive trust doctrine is that between institutional and remedial versions of the trust. Lord Browne-Wilkinson explained the difference between these in *Westdeutsche*.

Westdeutsche Landesbank Girozentrale v Islington LBC
[1996] AC 669, HL

Lord Browne-Wilkinson

At 714–15

Under an institutional constructive trust, the trust arises by operation of law as from the date of the circumstances which give rise to it: the function of the court is merely to declare that such trust has arisen in the past. The consequences that flow from such trust having arisen (including the possibly unfair consequences to third parties who in the interim have received the trust property) are also determined by rules of law, not under a discretion. A remedial constructive trust, as I understand it, is different. It is a judicial remedy giving rise to an enforceable equitable obligation: the extent to which it operates retrospectively to the prejudice of third parties lies in the discretion of the court.

This difference can be illustrated as follows. Assume that a claimant has fulfilled the elements of a claim to a constructive trust of land on 1 December 2006, but that a court does

not decide the claim until 1 December 2009. If the trust is institutional, then the role of the court, having found the constituent elements of the claim to be established since 1 December 2006, is to declare that the trust arose on that date. Since that date, the claimant has had a proprietary interest in the land. If the defendant has sold the land since that date, or has become bankrupt, then the claimant's interest may bind the purchaser and the claimant will have priority in the bankruptcy against unsecured creditors. If, however, the trust is remedial, then the court has discretion to decide what effect, if any, it should have prior to its decision on 1 December 2009. The court, therefore, has a discretion to determine the claimant's ability to enforce his or her interest against a purchaser who has bought the land since 1 December 2006, and to determine whether the claimant should be treated as a secured creditor in a bankruptcy.

The remedial version of the trust has been embraced in North American jurisdictions, but its place in English law is uncertain. Undoubtedly, there are instances in which English courts impose a constructive trust as a remedy. Nield[45] highlights that a constructive trust imposed as the remedy for proprietary estoppel would be classified in this way. Outside such isolated incidences, however, attempts to develop the remedial constructive trust have faltered.

In the 1970s, Lord Denning advocated the development of a '*constructive trust of a new model*',[46] which he described as 'an equitable remedy by which the court can enable an aggrieved party to obtain restitution'.[47] This new model trust was developed by Lord Denning in the context of determining ownership of the home: a matter that has subsequently been established as based on a much narrower form of institutional constructive trust.[48] In *Westdeutsche*, Lord Browne-Wilkinson suggested that the remedial constructive trust could be used as a proprietary response to unjust enrichment. His comment was made in the context of his rejection of the unjust enrichment analysis of the resulting trust—but this suggestion has since been rejected by the Court of Appeal in *Re Polly Peck International (No 2)*.[49] Although the case was only a preliminary ruling, the court's objection strikes at the very heart of what a remedial trust involves. Nourse LJ explained, 'we must recognise that the remedial constructive trust gives the court a discretion to vary proprietary rights. You cannot grant a property right to A, who has not had one beforehand, without taking some proprietary right away from B. No English court has ever had the power to do that, except with the authority of Parliament'.[50]

The most recent judicial attempt to identify a role for the remedial constructive trust came in *Thorner v Major*.[51] That case, which is discussed fully in Chapter 10, involved a claim to proprietary estoppel in the context of a promise of an inheritance. Lord Scott suggested that the remedial trust may be better equipped than estoppel to accommodate the uncertainty inherent in promises as to the future.[52] However, Lord Scott's concerns were not shared by the other members of the House of Lords and Lord Scott made it clear that he did not disagree with the claim succeeding under proprietary estoppel. Indeed, the promise of an inheritance has become a common situation in which proprietary estoppel is invoked and

[45] Nield, 'Constructive Trusts and Estoppel' (2003) 23 LS 311, 312.
[46] *Eves v Eves* [1975] 1 WLR 1338, 1341. [47] [1972] 1 WLR 1286, 1290.
[48] The common intention constructive trust, discussed in Chapter 16. [49] [1998] 3 All ER 812.
[50] [1998] 3 All ER 812, 830–1. [51] [2009] 1 WLR 776.
[52] Ibid, paras [19]–[21]. See, however, *Crossco No 4 Unlimited v Jolan Limited* [2011] EWCA Civ 1619, [84]. There, Etherton LJ doubts whether Lord Scott was using the expression 'remedial constructive trust' in the manner in which it had been used by Lord Browne-Wilkinson.

there seems little prospect that Lord Scott's preference for a remedial constructive trust will be adopted.

Currently, therefore, beyond isolated incidents of remedial trusts, the constructive trust recognized by English law is the institutional trust. There are four types of institutional constructive trust that are specifically concerned with the acquisition of beneficial interests in land:

- the common intention constructive trust that is used to determine ownership of the home;
- constructive trusts imposed on a vendor under a specifically enforceable contract for sale of land;
- constructive trusts imposed under the doctrine in *Rochefoucauld v Boustead*;[53]
- constructive trusts arising under the *Pallant v Morgan*[54] equity.

The common intention constructive trust is considered in Chapter 16, while the trust imposed on a vendor has been considered in Chapter 9. In this chapter, we will consider constructive trusts arising under the doctrine in *Rochefoucauld v Boustead* and the *Pallant v Morgan* equity.

4.2 THE DOCTRINE IN *ROCHEFOUCAULD V BOUSTEAD*

The doctrine in *Rochefoucauld v Boustead* stems from the maxim that 'equity will not allow a statute to be used as an instrument of fraud'. Where land is transferred on trust, but the statutory requirements for an express trust are not complied with, a constructive trust is imposed to prevent the transferee from reneging on the trust and seeking to retain the property for him or herself. The paradigm case within the doctrine is a two-party case, in which land is transferred from A to B, to hold on trust for A. An extension to this paradigm is a three-party case, in which land is transferred from A to C, to hold on trust for a third party, B. These are illustrated in Figure 3.

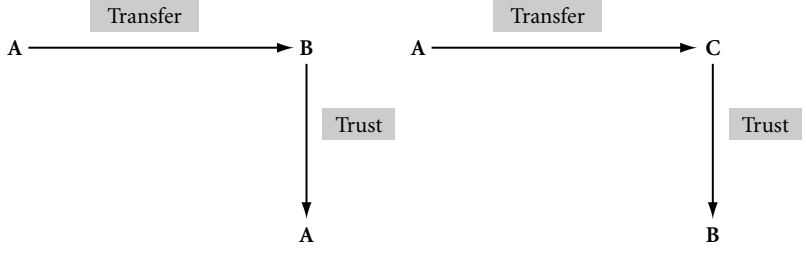

Figure 3 *Rochefoucauld v Boustead* in two and three-party cases

The doctrine has been further extended to situations in which A transfers land to C expressly 'subject to' rights in favour of B, where the rights intended to be enjoyed by B have either been proprietary rights that do not generally take effect under a trust,[55] or personal

[53] [1897] 1 Ch 196. [54] [1953] Ch 43.

[55] See *Lyus v Prowsa Developments Ltd* [1982] 1 WLR 1044, in which the transfer was made 'subject to' an option to purchase (an estate contract).

rights.[56] In such cases, the courts have, notwithstanding, held that a constructive trust may be imposed to prevent C reneging on the 'subject to' agreement. This extension of the doctrine has been particularly significant in cases in which A has conferred a contractual licence on B (a personal right) and wants to protect B's occupation on a transfer of the land to C. The imposition of a constructive trust pursuant to a 'subject to' transfer is considered in Chapter 21 in the context of licences. In this chapter, we consider the imposition of a constructive trust on a transfer of land from A to B on trust for A, or a transfer from A to C on trust for a third party, B.

4.3 THE TWO-PARTY CASE

The two-party case provides the factual context of the decision from which this doctrine takes its name.

Rochefoucauld v Boustead
[1897] 1 Ch 196, CA

Facts: Rochefoucauld owned coffee estates in Ceylon, but had been unable to pay mortgages on the estates. She transferred the estates to Boustead, who had subsequently sold them. Rochefoucauld argued that the estates had been transferred to Boustead on trust for her and that the surplus proceeds of sale (after discharge of sums owed to Boustead) should therefore be paid to her. The Court doubted that there was written evidence of the trust, as was required under the Statute of Frauds 1677—the precursor to s 53 of the LPA 1925.

Lindley LJ

At 206

It is further established by a series of cases, the propriety of which cannot now be questioned, that the Statute of Frauds does not prevent the proof of a fraud; and that it is a fraud on the part of a person to whom land is conveyed as a trustee, and who knows it was so conveyed, to deny the trust and claim the land himself. Consequently, notwithstanding the statute, it is competent for a person claiming land conveyed to another to prove by parol evidence that it was so conveyed upon trust for the claimant, and that the grantee, knowing the facts, is denying the trust and relying upon the form of conveyance and the statute, in order to keep the land himself.

The effect of the fraud was to enable oral evidence to be admitted as to the existence of the trust. On the facts, the Court was satisfied that the evidence established that the land had been transferred on trust in favour of Rochefouaculd.

4.3.1 Elements of the *Rochefoucauld v Boustead* constructive trust

The court's intervention is triggered by B's (the transferee's) denial of the trust pursuant to which the land was transferred. It is necessary only to establish that the land was

[56] See *Binions v Evans* [1972] Ch 359, in which the transfer was 'subject to' a contractual licence.

transferred on trust and that the transferee has reneged on this agreement. In *Rochefoucauld v Boustead*, as we have seen in the extract above, Lindley LJ described Boustead's conduct as fraudulent. It is important to note that Lindley LJ's reference is to the concept of equitable fraud. In equity, fraud is a broad concept and has no inherent connection to an intention to cheat. Equitable fraud and unconscionability have been defined by reference to each other, and nothing turns on the classification of the conduct as 'fraudulent' as opposed to 'unconscionable'.[57] Discussing the terminology of fraud and unconscionability in another context (that of proprietary estoppel), Scarman LJ commented: '"[F]*raud" was a word often in the mouths of those robust judges who adorned the bench in the 19th century. It is less often in mouths of the more wary judicial spirits today who sit upon the bench*.'[58]

The key difficulty with the concept of fraud in *Rochefoucauld v Boustead* is that the fraud consists in denying the trust, which is the very thing that s 53(1)(b) of the LPA 1925 requires to be evidenced in writing.

Hopkins, *The Informal Acquisition of Rights in Land* (2000, pp 31–2)

> Applied broadly, *Rochefoucauld v. Boustead* has the effect that when land is transferred on trust, the trust is enforced as long as it is evidenced: in writing (within section 53(1)(b)); or orally. The effect of such a rule would be to reduce section 53(1)(b) to trusts declared by (current) holders of land. This would be a startling result for a rule purportedly based on the prevention of fraud. The underlying difficulty is in determining why the denial of an informal trust should, in some circumstances, be considered fraudulent [...] it may be argued that the fraud lies in the combination of the trustee's wrongdoing and the harm to the transferor. [...] However, it seems that such a definition does no more than beg the question as to the nature of the underlying wrongdoing and harm, in light of non-compliance with statutory formalities.

A comparison can be drawn with the use of proprietary estoppel in the context of s 2 of the Law of Property (Miscellaneous Provisions) Act 1989 (LP(MP)A 1989). As we have seen in Chapter 7, in *Yaxley v Gotts*,[59] the Court of Appeal held that estoppel could not be used to render valid a transaction that legislation has enacted is to be invalid—but this is exactly what the doctrine of *Rochefoucauld v Boustead* appears to allow. The difference between this doctrine, operating in relation to s 53(1)(b) of the LPA 1925, and proprietary estoppel, operating in relation to s 2 of the LP(MP)A 1989, is that s 53(2) contains an explicit exception for constructive trusts. This difference is undoubtedly crucial. Notwithstanding, it is difficult to avoid the conclusion that *Rochefoucauld v Boustead* '*amounts to a drastic judicial modification*' of the statutory formalities.[60]

Three important points about the operation of the doctrine in *Rochefoucauld v Boustead* are derived from its application in the following case.

[57] See *Nocton v Lord Ashburton* [1914] AC 932, 954; *Semiahmoo Indian Band v Canada* (1997) 148 DLR (4th) 523, 551–2. Further discussion of the relationship between these terms is provided by Hopkins, 'Understanding Unconscionability in Proprietary Estoppel' (2004) 20 JCL 210, 212–14.

[58] *Crabb v Arun DC* [1976] 1 Ch 179, 195.

[59] [2000] 1 Ch 162, CA.

[60] Youdan, 'Formalities for Trusts of Land, and the Doctrine in *Rochefoucauld v. Boustead*' (1984) 43 CLJ 306, 325, referring to the Statute of Frauds 1677, the precursor to the Law of Property Act 1925, s 53.

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

Facts: The defendant had inherited two cottages, one of which was her home, on the death of her husband. She transferred the cottages to the plaintiff, her brother-in-law, for less than the market value, pursuant to an oral agreement that she would remain living in her home, rent-free, for life. The plaintiff reneged on the agreement and sought possession of the defendant's home.

Scott LJ

At 136

It is, we think, clearly a mistake to suppose that the equitable principle on which a constructive trust is raised against a person who insists on the absolute character of a conveyance to himself for the purpose of defeating a beneficial interest, which, according to the true bargain, was to belong to another, is confined to cases in which the conveyance itself was fraudulently obtained. The fraud which brings the principle into play arises as soon as the absolute character of the conveyance is set up for the purpose of defeating the beneficial interest, and that is the fraud to cover which the Statute of Frauds or the corresponding provisions of the Law of Property Act, 1925 cannot be called in aid in cases in which no written evidence of the real bargain is available. Nor is it, in our opinion, necessary that the bargain on which the absolute conveyance is made should include any express stipulation that the grantee is in so many words to hold as trustee. It is enough that the bargain should have included a stipulation under which some sufficiently defined beneficial interest in the property was to be taken by another.

It is clear therefore that: firstly, the conveyance need not be obtained by fraud; secondly, the transfer need not use the technical language of trust; and thirdly, that no weight was given to the fact that the conveyance was at an undervalue. Intervention was triggered solely by the fraud consisting in the denial of the trust. As we will see below, this is significant in understanding the basis of intervention.

4.3.2 The classification of the trust: express or constructive?

In *Rochefoucauld v Boustead*, the Court classified the trust as an express trust. Without doubt, the trust was one that the parties intended to create. On that basis, Swadling considers that the trust is correctly considered to be express.[61] But the classification of the trust was discussed in the context of the prevailing Statute of Limitations.[62] As McFarlane explains, the classification of a trust for that purpose is not conclusive. (In this extract C is the transferee.)

McFarlane, 'Constructive Trusts Arising on Receipt of Property Sub Conditione'
(2004) 120 LQR 667, 675

[The] characterisation of trusts adopted when applying limitation statutes cannot be taken as definitive: to say that a trust is to be treated as an express trust "within the meaning" of

[61] Swadling (2007), [4.207]; Swadling, 'The Nature of the Trust in *Rochefoucauld v Boustead*' in *Constructive and Resulting Trusts* (ed Mitchell, Oxford: Hart, 2009).

[62] A point refuted, however, by Swadling, 'The Nature of the Trust in *Rochefoucauld v Boustead*' ibid.

a limitation statute is not the same as saying that trust is an express trust for all purposes. As far as the current inquiry is concerned, the critical question is: "what is the event which leads the court to recognise the new right arising on the transfer to C in *Rochefoucauld*?" On this point, there seems to be little controversy. On the constructive trust analysis, the trust does not arise simply because the former owner of the property so intended; rather, the trust arises to prevent C's reneging on the understanding subject to which he received the property. The trust is therefore constructive, and can arise without being manifested and proved by writing. It is thus possible to accept the view in *Rochefoucauld* that the trust is an express one for limitation purposes, as it was one that B (and C) intended to create, without admitting that the trust is an express one in the sense that this intention is by itself sufficient to create the trust.

While the parties in *Rochefoucauld v Boustead* intended a trust, this was not the basis upon which a trust was imposed: the trust was imposed to prevent Boustead's fraudulent denial of the agreement pursuant to which the land was transferred. As we have noted, nothing turns on the description of the conduct as fraudulent rather than unconscionable. The trust was therefore imposed to prevent unconscionable conduct and contrary to the view maintained by Swadling is correctly classified as a constructive trust.[63] This classification of the trust was adopted by the Court of Appeal (without discussion) in *Bannister v Bannister*.[64]

4.3.3 An alternative analysis: unjust enrichment

There is a tendency in the literature to subject the operation of the doctrine in *Rochefoucauld v Boustead* to an unjust enrichment analysis.[65] Sometimes, the analysis appears to relate to a broad sense of unjust enrichment, denoting no more than '*a state of affairs where the defendant can be said to have been enriched in circumstances of injustice*'.[66] This is in contradistinction to the narrow sense of the term (the sense in which it is used in other references to the concept in this chapter) as denoting the existence of limited and specific factors on which a claimant can obtain restitution, because the defendant has been unjustly enriched at his or her expense.[67]

There are, however, difficulties in using either sense of unjust enrichment in relation to the doctrine in *Rochefoucauld v Boustead*. Used in a narrow sense, unjust enrichment requires a structured analysis of whether the transferee has been enriched at the transferor's expense and whether the enrichment is unjust by reference to specific unjust factors. There is no evidence of such an analysis being taken by the courts. It is doubtful, in particular, whether the facts of a claim within *Rochefoucauld v Boustead* fit within the scope of existing unjust factors.[68]

Used in a broad sense, the concept does not add to our understanding of the operation of the doctrine.

[63] Hopkins, 'Conscience, Discretion and the Creation of Property Rights' (2006) 26 LS 475, 480.
[64] [1948] 2 All ER 133.
[65] See Ames, 'Constructive Trusts Based on the Breach of an Express Oral Trust of Land' (1906–7) 29 Harv LR 549; Youdan (1984), p 328; Worthington, *Equity* (2006), pp 202–4.
[66] Virgo, *The Principles of the Law of Restitution* (2nd edn, 2006, p 8).
[67] Ibid, pp 9–10.
[68] Hopkins (2006, pp 481–3).

Hopkins, 'Conscience, Discretion and the Creation of Property Rights' (2006) 26 LS 475, 481

> In the broad sense of the term it may be accurate to say that a defendant who reneges on an agreement to hold on trust pursuant to which land is transferred would be unjustly enriched. However, at best this takes our understanding of intervention no further than the statement that it is unconscionable or fraudulent of the transferee to renege on the agreement.

Indeed, used in a broad sense, unjust enrichment can be detrimental to our understanding of the doctrine.

This is the sense in which Youdan appears to refer to unjust enrichment in a discussion of *Bannister v Bannister*. As we have seen, in that case, the transferee received a discount on the market value of the cottages in return for agreeing to allow the transferor to live in one cottage for the rest of her life.

Youdan, 'Formalities for Trusts of Land, and the Doctrine in *Rochefoucauld v. Boustead*' (1984) 43 CLJ 306, 328

> Consider the position in *Bannister* if the making of the undertaking had been seriously disputed and the property had been sold for its full market value on a vacant possession basis. The enforcement of a mistaken or false allegation of an undertaking would have resulted in the woman being unjustly enriched by receiving both the full market value and the right to live in the property for the rest of her life. On the other hand, the non-enforcement of an undertaking that in fact was made would only have the result that the woman would not retain an expected gift—free living accommodation.

As Youdan acknowledges (and as has been noted above), the provision of the discount was not, in fact, considered significant. By focusing on the financial position of the parties, an unjust enrichment analysis loses sight of the essential element of the doctrine in *Rochefoucauld v Boustead*: the objection in the doctrine lies in the transferee reneging on the agreement pursuant to which the land was transferred.[69]

4.4 THE THREE-PARTY CASE

As we have noted, the three-party case involves a transfer of land from A to C on trust for B. This is only a slight extension from the paradigm two-party case and there is no doubt that the doctrine in *Rochefoucauld v Boustead* applies in this context.[70] The doctrine has been further applied beyond this factual matrix, where the agreement for the trust in favour of B is entered into between C (the transferee) and a party (X) providing finance for the purchase of land (Figure 4).

[69] Ibid, p 481. [70] See Youdan (1984), p 326.

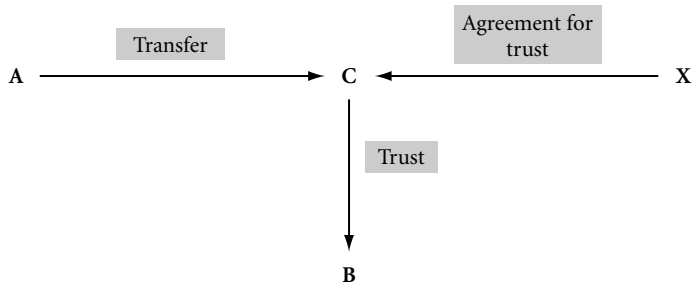

Figure 4 *Neale v Willis*

Neale v Willis
(1968) 19 P & CR 836, CA

Facts: A husband obtained a loan from his mother-in-law in connection with the purchase of the house. The loan was made pursuant to an agreement that the house would be bought in the joint names of the husband and wife. The husband reneged on this agreement and bought the house in his sole name. Following the couple's divorce, the question arose as to the beneficial ownership of the house.

Lord Denning MR

At 839

This was a binding contract and a court of equity will not allow the husband to go back on it. It will enforce it by holding that the husband holds the property on a constructive trust for himself and his wife. This follows from *Bannister v Bannister*. That case shows that if a person who takes a conveyance to himself, which is absolute in form, nevertheless has made a bargain that he will give a beneficial interest to another, he will be held to be a constructive trustee for it for the other. He cannot insist on the absolute character of a conveyance to himself for the purpose of defeating a beneficial interest which according to the true bargain is to belong to another. So here we have a husband who is seeking to insist on the absolute character of the conveyance to himself and to him alone. He does it for the purpose of defeating a beneficial interest which according to the true bargain was to belong to his wife. He holds it on a constructive trust to carry out the bargain.

4.4.1 In whose favour does the constructive trust operate?

The key question that has arisen in three-party cases is whether the trust should operate in favour of B, the intended beneficiary, or A, the transferor. The debate has been complicated by the absence of clear authority, and the consequential impact on this issue of competing views as to the nature of the trust in issue and the basis of intervention. Hence, if *Rochefoucauld v Boustead* enforces the parties' express trust, then, in the three-party case, the trust necessarily operates in favour of B. If the doctrine is founded on unjust enrichment, then this necessarily dictates intervention in favour of A, as the party at whose expense C is otherwise unjustly enriched.[71]

[71] See the example discussed by Worthington (2006), pp 203–4.

But it has been suggested above that both of these views are incorrect: the doctrine imposes a constructive trust in response to C's fraudulent or unconscionable conduct. In a series of articles, Youdan and Feltham expressed opposing views: Youdan supporting the claim of B, and Feltham, that of A.

Youdan, 'Formalities for Trusts of Land, and the Doctrine in *Rochefoucauld v. Boustead*' (1984) 43 CLJ 306, 335–6

The claim of [B] is, I suggest, stronger for three main, related reasons. First, it seems inappropriate that [C], the trustee, should have the power to determine whether [B] or A should get the benefit of the property. Secondly, A has effectively divested himself of the property. It is he who is seeking equity to obtain the return of property he has given away on a valid trust. Thirdly, the allowance of [B's] claim is not contrary to the purpose of the formality requirement. If A had simply conveyed the land to [C] as a gift for [C] he obviously could not recover it since he effectively divested himself [. . .] There is no reason why A should be in a stronger position merely because the beneficial gift was to [B] with the interposition of [C's] trusteeship.

Feltham, 'Informal Trusts and Third Parties' [1987] Conv 246, 249

T. G. Youdan suggests three reasons why [B's] claim should be preferred to that of A. First, that it is inappropriate that [C], the trustee, should have the power to determine whether [B] or A should get the benefit of the property. But this goes rather to the proposition that lack of writing renders the transaction unenforceable rather than void. Secondly, that A has effectively divested himself of the property and is seeking the assistance of equity to obtain its return. But the only property of which A has effectively divested himself is the legal estate; the location of the equitable interest is what is at issue. Thirdly, that the allowance of [B's] claim is not contrary to the purpose of the formality requirement. But it has been argued in the previous paragraph that the allowing of such claims does defeat the purpose of the formality requirement. Youdan's comparison with a direct conveyance by way of gift does not hold because he is assuming in the case of a direct conveyance that the relevant formal requirement (and the purpose behind it) has been satisfied.

Youdan, 'Informal Trusts and Third Parties: A Response' [1988] Conv 267, 272–3

My three points were explicitly based on the assumption that it is "established that an oral trust of land is valid despite non-compliance with [the statutory formality requirement]; it is merely unenforceable. Consequently, where A conveys land to [C] on an oral trust for [B], A has ordinarily no right to restitution since [C] is holding the property on a valid trust for [B], and he may carry out that trust if he chooses to do so." I discuss, and indeed criticise, this principle in an earlier section of my article. Nevertheless, despite possible criticism of it, this principle does appear to be well established, as Feltham also seems to recognise at the beginning of his article.

My first point seems, therefore, to be accepted by Feltham if one accepts the assumption that lack of writing makes the transaction unenforceable rather than void. My second point

is grounded on the same assumption and, on this basis, Feltham is wrong in saying "the only property of which A has effectively divested himself is the legal estate; the location of the equitable interest is what is at issue," since [C] is holding title to the property on a valid trust for [B]. Feltham is, however, justified in criticising the way I put my third point. I did overstate it when I said that the allowance of [B's] claim is not contrary to the purpose of the formality requirement. The *Rochefoucauld* doctrine as a whole substantially diminishes the policies of the formality requirement, and, as it was the main purpose of my article to show, the question becomes one of balancing the value of those policies against the injustice that may be caused by reliance on the formality requirement. Moreover, there is, as I recognised in my article, considerable merit in the view that restitution back to the transferor entails a less serious interference with the statute than enforcement in favour of the third party beneficiary.

However, I do maintain that my comparison with a direct gift to [C] is tenable, although perhaps too strongly stated.

On balance, the arguments appear weighted against B. The purpose of the doctrine is to prevent C's fraudulent or unconscionable conduct, and intervention should go no further than is necessary to achieve this purpose. B is a volunteer and 'equity does not assist a volunteer'. The imposition of a trust in favour of A provides A with a further opportunity to benefit B. Finally, intervention in favour of A does less violence to the formality requirement in s 53(1)(b) of the LPA 1925.[72]

In limited circumstances, however, intervention in favour of B may be justified.

Hopkins, *The Informal Acquisition of Rights in Land* (2000, pp 37–8)

First, there may be exceptional circumstances where intervention in [B's] favour is the only means of preventing fraud. This possibility is illustrated by *Neale v. Willis*. [. . .] it would not have been appropriate for the land to be held in favour of the mother-in-law with whom the agreement had been entered. The agreement did not envisage that she, as a lender, should acquire rights in the house.

Secondly, an assumption underlying the reasoning against [B] is that A will have another opportunity to grant rights to [B]. There are circumstances in which no such opportunity in practice arises. The clearest example is where A has died. On a strict view this (unlike the first situation) does not alter the reasoning against [B]. The purpose of the rule, of preventing fraud, is still achieved by vesting the beneficial interest in A's estate. However, a concession in favour of [B] may be justified in terms of giving effect to A's intentions as he has died in the belief the gift was effective.

5 THE *PALLANT V MORGAN* CONSTRUCTIVE TRUST

Although taking its name from the decision in *Pallant v Morgan*,[73] the operation of this constructive trust received its most comprehensive judicial analysis and rationalization in *Banner Homes Group plc v Luff Developments Ltd*.[74] As Nield has demonstrated, the origins

[72] Youdan (1984, p 335); Worthington (2006), p 204. [73] [1953] 1 Ch 43. [74] [2000] Ch 372.

of the trust ultimately lie in the doctrine of *Rochefoucauld v Boustead*.[75] As with the doctrine in *Rochefoucauld v Boustead*, the trigger for the imposition of the constructive trust lies in the transferee of land reneging on an agreement pursuant to which land is acquired—but the agreement arises in a different factual matrix and the finding of unconscionability is not based solely on the transferee reneging on the agreement.

5.1 THE ELEMENTS OF THE *PALLANT V MORGAN* CONSTRUCTIVE TRUST

The requirements of the claim were enumerated in *Banner Homes*.

Banner Homes Group plc v Luff Developments Ltd
[2000] Ch 372, CA

Facts: Banner Homes (the claimant) and Luff Developments (the defendant) had commenced negotiations for a joint venture for the acquisition of development land. The parties had reached an agreement in principle for the joint venture, but no contract had been concluded, when the land was acquired by S Ltd, a wholly owned subsidiary of Luff. Unknown to Banner Homes, Luff had had second thoughts about the suitability of Banner Homes as a joint venture partner. Luff had not informed Banner Homes of this, out of concern that Banner Homes would mount a rival bid for the land. Banner Homes sought to establish entitlement to the land through a constructive trust.

Chadwick LJ

At 397–400

It is important, however, to identify the features which will give rise to a *Pallant v. Morgan* equity and to define its scope; while keeping in mind that it is undesirable to attempt anything in the nature of an exhaustive classification. [. . .]

1. A *Pallant v. Morgan* equity may arise where the arrangement or understanding on which it is based precedes the acquisition of the relevant property by one party to that arrangement. It is the pre-acquisition arrangement which colours the subsequent acquisition by the defendant and leads to his being treated as a trustee if he seeks to act inconsistently with it. [. . .]
2. It is unnecessary that the arrangement or understanding should be contractually enforceable. Indeed, if there is an agreement which is enforceable as a contract, there is unlikely to be any need to invoke the *Pallant v. Morgan* equity; equity can act through the remedy of specific performance and will recognise the existence of a corresponding trust. [. . .]
3. It is necessary that the pre-acquisition arrangement or understanding should contemplate that one party ("the acquiring party") will take steps to acquire the relevant property; and that, if he does so, the other party ("the non-acquiring party") will obtain some interest in that property. Further, it is necessary that (whatever private reservations the acquiring party may have) he has not informed the non-acquiring party before

[75] Nield, 'Constructive Trusts and Estoppel' (2003) 23 LS 311, 315.

the acquisition (or, perhaps more accurately, before it is too late for the parties to be restored to a position of no advantage/no detriment) that he no longer intends to honour the arrangement or understanding.

4. It is necessary that, in reliance on the arrangement or understanding, the non-acquiring party should do (or omit to do) something which confers an advantage on the acquiring party in relation to the acquisition of the property; or is detrimental to the ability of the non-acquiring party to acquire the property on equal terms. It is the existence of the advantage to the one, or detriment to the other, gained or suffered as a consequence of the arrangement or understanding, which leads to the conclusion that it would be inequitable or unconscionable to allow the acquiring party to retain the property for himself, in a manner inconsistent with the arrangement or understanding which enabled him to acquire it. *Pallant v. Morgan* [1953] Ch. 43 itself provides an illustration of this principle. There was nothing inequitable in allowing the defendant to retain for himself the lot (lot15) in respect to which the plaintiff's agent had no instructions to bid. In many cases the advantage/detriment will be found in the agreement of the non-acquiring party to keep out of the market. That will usually be both to the advantage of the acquiring party—in that he can bid without competition from the non-acquiring party—and to the detriment of the non-acquiring party—in that he loses the opportunity to acquire the property for himself. But there may be advantage to the one without corresponding detriment to the other. Again, *Pallant v. Morgan* provides an illustration. The plaintiff's agreement (through his agent) to keep out of the bidding gave an advantage to the defendant—in that he was able to obtain the property for a lower price than would otherwise have been possible; but the failure of the plaintiff's agent to bid did not, in fact, cause detriment to the plaintiff—because, on the facts, the agent's instructions would not have permitted him to outbid the defendant. Nevertheless, the equity was invoked.
5. That leads, I think, to the further conclusions: (i) that although, in many cases, the advantage/detriment will be found in the agreement of the non-acquiring party to keep out of the market, that is not a necessary feature; and (ii) that although there will usually be advantage to the one and correlative disadvantage to the other, the existence of both advantage and detriment is not essential—either will do. What is essential is that the circumstances make it inequitable for the acquiring party to retain the property for himself in a manner inconsistent with the arrangement or understanding on which the non-acquiring party has acted. Those circumstances may arise where the non-acquiring party was never "in the market" for the whole of the property to be acquired; but (on the faith of an arrangement or understanding that he shall have a part of that property) provides support in relation to the acquisition of the whole which is of advantage to the acquiring party. They may arise where the assistance provided to the acquiring party (in pursuance of the arrangement or understanding) involves no detriment to the non-acquiring party; or where the non-acquiring party acts to his detriment (in pursuance of the arrangement or understanding) without the acquiring party obtaining any advantage therefrom.

On the facts of the case, the requirements for the constructive trust were fulfilled. There was a pre-acquisition agreement (falling short of a specifically enforceable contract) that a jointly owned company would acquire the land. Banner Homes had relied on this agreement by treating the site as 'out of play', as a potential acquisition in its own right.[76] This conferred an

[76] [2000] Ch 372, 400, *per* Chadwick LJ.

advantage on Luff of keeping Banner Homes out of the market as a potential competitor. The shares in S Ltd were, therefore, to be held on constructive trust for Banner Homes and Luff equally, charged with the payment by Banner Homes of half the purchase price.

Subsequent case law has cast some light on the scope of the doctrine and on how the individual elements will be interpreted. In *Baynes-Clarke v Corless* the Court of Appeal held that the agreement need only be 'sufficiently clear' that the parties understood that they would acquire an interest in the land, even if the mechanics through which this was to be achieved were left undecided.[77] It has become apparent that there is little room for manoeuvre around the elements stated by Chadwick LJ. Hence, in *Yeoman's Row Management Ltd v Cobbe*,[78] the House of Lords held that *Pallant v Morgan* was not applicable, because the land in question was already owned by one of the parties to the joint venture agreement.

The Court of Appeal also noted this factor in rejecting a claim in *London & Regional Investments Ltd v TBI plc*.[79] In that case, in any event, the claim failed, because the negotiations between the parties had been conducted expressly 'subject to contract'. In these circumstances, it was not unconscionable for the party to withdraw from discussions following the acquisition of the land.[80]

In *Kilcarne Holdings Ltd v Targetfellow (Birmingham) Ltd*,[81] it was suggested that it was not essential for the non-acquiring party to have intended to obtain the land on their own account. The claim failed on the facts, however, because there was no agreement that the property would be acquired for the parties' joint benefit.

5.2 THE NATURE OF THE UNCONSCIONABILITY

As we have noted, the unconscionability on which the constructive trust is based does not lie solely in the trustee reneging on the agreement. It must also be demonstrated that the party in whose favour the trust is imposed had relied on the agreement. This is the fourth of the five elements of the trust in Chadwick LJ's judgment (extracted above). Whether it is unconscionable for the trustee to renege requires an objective assessment of the agreement and the effect that it has had, rather than being concerned with the trustee's subjective state of mind.[82] A requirement of reliance is found in other doctrines through which equitable interests may be acquired: for example, the common intention constructive trust and proprietary estoppel. In those doctrines, however, the requirement is explicitly one of detrimental reliance. The distinctive feature of the *Pallant v Morgan* constructive trust is that it suffices for the reliance to confer an advantage on the acquiring party, with no requirement of a corresponding detriment on the part of the non-acquiring party.

Nield highlights that the focus on the detriment or advantage in *Banner Homes* marks a development from the earlier cases.

Nield, 'Constructive Trusts and Estoppel' (2003) 23 LS 311, 324–5

> [. . .] Earlier cases do not focus on this possible detriment or advantage, but upon the unconscionability inherent in the breach of trust and confidence that the non-acquiring party placed in the acquiring party to carry out their arrangements for the acquisition of certain property.

---

77 [2010] EWCA Civ 338, [41], *per* Patten LJ.
78 [2008] UKHL 55, [33].
79 [2002] EWCA 355, [48].
80 Ibid, [42].
81 [2005] EWCA 1355, [21].
82 *Baynes Clarke v Corless* [2010] EWCA 338, [40] and [51].

This duty may be articulated as an agency, but it does not have to fit neatly within defined categories of fiduciary relationship, provided the central characteristics of a fiduciary relationship can be identified. For instance, commercial enterprises, husband and wife, relatives and neighbours have all been required by equity to adhere to their informal arrangements for the joint acquisition of property because of the trust and confidence placed in them to act not only in their own interests, but also the interests of the non-acquiring party. In this context equity seems to demand remarkably high standards of conduct and perhaps what is surprising about the *Banner Homes* decision is the line drawn between acceptable commercial tactics and a breach of duty justifying the imposition of one of equity's most potent weapons, the constructive trust.

In many cases that fulfil the requirements of the *Pallant v Morgan* trust, there will, in any event, be detrimental reliance. In *Banner Homes*, the Court left open the issue of whether Banner Homes had suffered a detriment on the facts.

Banner Homes Group plc v Luff Developments Ltd
[2000] Ch 372, CA

Chadwick LJ

At 400–1

I am satisfied, also, that the judge was wrong to reject the constructive trust claim on the grounds that Banner had failed to show that it had acted to its detriment in reliance on the arrangement agreed on 14 July 1995. [. . .] In other words, Luff saw it as an advantage that Banner's belief that the site was out of play should be maintained. Luff wanted to keep Banner out of the market. In those circumstances, it does not lie easily in Luff's mouth to say that Banner suffered no detriment. But whether or not Banner suffered detriment from the fact that it never regarded itself as free to consider the site as a potential acquisition of its own does not seem to me conclusive. Luff obtained the advantage which it sought.

In the context of proprietary estoppel, the requirement of detrimental reliance has been met where a claimant has linked his or her life and career to the defendant in reliance on an assurance of rights (typically, of an inheritance).[83] It may be suggested, by analogy, that detriment lies in the non-acquiring party resting his or her chance of obtaining an interest in the land on the proposed joint venture.[84]

The analogy has, however, been doubted by Nield.[85] Further, it is clear that *Pallant v Morgan* can operate where no detriment arises—a point illustrated by the facts of that case. In *Pallant v Morgan*, immediately before the start of an auction, agents acting for the parties agreed that the claimant would refrain from bidding and, if the defendant succeeded in acquiring the land, part would be sold on to the claimant. The defendant's agent obtained the land with a bid of £1,000, but the defendant then reneged on the agreement. The defendant's agent was authorized to bid up to £3,000, while the claimant's agent was authorized to bid to £2,000. On these facts, it is clear that the claimant suffered no detriment, because the land would not have been acquired even in the absence of the agreement—but the defendant

[83] See *Gillett v Holt* [2001] Ch 210.
[84] Hopkins '*The Pallant v Morgan* "Equity"?' [2002] Conv 35, 45.
[85] Nield, 'Constructive Trusts and Estoppel' (2003) 23 LS 311, 322–3.

obtained an advantage, because the land was acquired for half of the sum that would have been necessary to outbid the claimant. Judgment in the case is not given explicitly in terms of a constructive trust. The Court considered that the defendant's agent had acted for both parties at the auction. The defendant therefore held the land for himself and the claimant jointly, subject to agreement by the parties as to its division (with provision for a resale if no such agreement was reached).

5.3 THE BASIS OF THE *PALLANT V MORGAN* CONSTRUCTIVE TRUST

Following the decision in *Banner Homes*, the basis of the *Pallant v Morgan* constructive trust appeared unclear. Thompson suggested that it was an application of the common intention constructive trust that is more commonly applied in relation to ownership of the home (the trust is discussed in Chapter 16).[86] However, the existence of a distinction between the *Pallant v Morgan* constructive trust and the common intention constructive trust appeared to be acknowledged in *Cox v Jones*.[87] There, following the breakdown of a relationship between the parties, the *Pallant v Morgan* trust was applied to determine ownership of a flat purchased as an investment, while the common intention constructive trust was used to ascertain ownership of a property bought as a home. The two doctrines were described by Mann J as being '*slightly different, though probably conceptually related*'.[88] An analysis of the *Pallant v Morgan* trust as an example of the common intention trust was doubted by Hopkins. He highlighted the conceptual difference between the *Pallant v Morgan* trust as 'gain-based' in contra-distinction to the common intention constructive trust which is 'loss-based'.[89] In the following extract, Hopkins criticized the exposition of the trust provided by *Banner Homes*.

Hopkins, 'The *Pallant v Morgan* "Equity?"' [2002] Conv 35, 46–7

Constructive trusts are not usually imposed solely as a response to an unconscionable gain. Constructive trusts are usually imposed only where the gain is the result of a particular breach of duty; for example, in relation to gains made by a breach of fiduciary duty. On one level it may seem attractive to suggest that the *Pallant v Morgan* equity could be rationalized as involving the breach of a fiduciary relationship and, therefore, as within an accepted category of gain-based constructive trust. The finding of agency in some of the earlier cases may have provided an avenue for such an analysis. Such an approach would also be consistent with Canadian law. In that jurisdiction, a constructive trust has been imposed following the breakdown of a commercial joint venture based on breach of fiduciary duty or breach of confidence. The finding of fiduciary duties in a commercial context is contentious because of the consequence such duties carry; i.e. the imposition of equitable doctrines, such as the constructive trust. In this respect, the decision in *Banner Homes* perhaps represents the worst of both worlds. By providing for a gain based constructive trust, without an indication of a breach of duty, the court circumvented difficult questions arising from the nature of fiduciary relationships and the circumstances in which one commercial undertaking may owe fiduciary duties to another.

---

86 'Constructive Trusts and Non-Binding Agreements' [2001] Conv 265, 265–6.
87 [2004] EWHC 1486. 88 Ibid, [45].
89 'The *Pallant v Morgan* "Equity?"' [2002] Conv 35, 36.

The jurisprudential basis of the *Pallant v Morgan* trust was addressed by the Court of Appeal in *Crossco No 4 Unlimited v Jalan Limited*.[90] There, the court was presented with competing arguments by Counsel that the trust was either a common intention constructive trust or was founded on a breach of fiduciary duty. Etherton LJ considered that the link between *Pallant v Morgan* and the common intention constructive trust had become '*untenable*'.[91] He explained that the common intention constructive trust was now '*driven by policy considerations and the special facts that normally apply in the dealings between those living in an intimate relationship*', which made it inappropriate to apply in a commercial context.[92] Etherton LJ considered that cases in which *Pallant v Morgan* has been applied '*can all be explained, and, in my judgment, ought to be explained in wholly conventional terms by the existence and breach of fiduciary duty*'.[93] However, the majority of the court, McFarlane and Arden LLJ, felt constrained by authority to hold that *Pallant v Morgan* is an example of the common intention constructive trust. In so-doing, McFarlane LJ expressed some sympathy with Etherton LJ's alternative rationale.[94] At the present stage, the majority's view must be accepted as binding and the *Pallant v Morgan* trust analysed as a common intention constructive trust. Notwithstanding, there are difficulties with this approach, not least of which is reconciling the gain-based nature of the *Pallant v Morgan* trust with a requirement of detrimental reliance.

6 TOWARDS A RATIONALIZATION OF CONSTRUCTIVE TRUSTS

In this chapter, we have considered two situations in which constructive trusts are imposed in relation to land: those arising under the doctrine in *Rochefoucauld v Boustead*; and those arising through the *Pallant v Morgan* equity. We have noted other constructive trusts that are discussed elsewhere in this book: a transfer of land from A to C 'subject to' rights in favour of B; the common intention constructive trust used to determine ownership of the home; and the constructive trust imposed on a vendor under the doctrine of anticipation. We have noted that constructive trusts share a common thread, because the trust is imposed in response to unconscionability, but that this concept is of limited utility in understanding the scope of constructive trust doctrine. Is there a further thread linking these trusts together, or must each simply been seen as a discrete operation of the constructive trust?

There are undoubtedly advantages in identifying common links. This rationalizes our understanding of the constructive trust and can assist us in understanding developments of the doctrine. An awareness of differences, as well as similarities, can, however, aid our understanding of individual applications of the trust. It must also be acknowledged that no single element ties together all constructive trusts.

McFarlane and Gardner have both suggested that the trusts in *Rochefoucauld v Boustead* and *Pallant v Morgan* are illustrations of a broader principle. McFarlane sees both trusts as examples of what he terms a 'receipt after promise' principle. The scope

[90] [2011] EWCA Civ 1619. [91] Ibid, [87]. [92] Ibid, [85]–[86]. [93] Ibid, [88].
[94] Ibid, [122].

of McFarlane's idea, which has attracted considerable criticism,[95] is outlined in the following extract.

McFarlane, *The Structure of Property Law* (2008, pp 270–1)

[T]he courts seem to apply a clear principle, which can be called the "receipt after a promise" principle [. . .] The principle means that if:

1. C makes a promise to come under a duty to B; *and*
2. C's promise relates to the use of a particular right; *and*
3. C acquires, as a result of that promise, an advantage in relation to the acquisition of that right; *then*
4. C is under a duty to B to keep that promise, as far as it relates to the right advantageously acquired by C.

[. . .] The principle thus allows C's promise, even though it was made to A, to be enforced by B, the party who benefits from the promise. It is important to note that B's right does *not* arise as a result of a contract between B and C. Rather, it is based on the principle that, having received a right on a particular basis (that he will allow B to make some use of that right), C is not then allowed to enjoy that right on a different basis."

Gardner offers an alternative means of unifying the trusts. He suggests that the trusts are imposed, 'to correct a reliance loss—specifically the loss that someone suffers when, acting in reasonable reliance on another's undertaking, he foregoes his opportunity to achieve the content of the undertaking in some other way'.[96]

There are undoubtedly advantages in the recognition of a general principle linking together these doctrines of constructive trust: for example, both McFarlane and Gardner's theses can provide an explanation of the decision in *Neale v Willis*[97] (extracted above), which may otherwise appear an awkward deviation from the factual matrix of a claim within *Rochefoucauld v Boustead*. In *Crossco No 4 Unlimited v Jalan Limited*, Etherton LJ noted the merit in McFarlane and Gardner's arguments insofar as they are '*put forward as principled explanations for a range of constructive trusts*'.[98] But the sense of unity provided is illusory if it in fact masks genuine differences in the operation of each trust. Neither approach was endorsed by Etherton LJ, who noted that it was '*not possible to do full justice in the context of this judgment to the alternative explanations*' whilst reiterating the specific basis on which he considered the *Pallant v Morga*n trust could be rationalized.[99] Commenting on McFarlane's analysis, Hopkins has highlighted the danger of losing sight of the fact that *Rochefoucauld v Boustead* enables the court to intervene solely on the basis of preventing

[95] Hopkins, 'Conscience, Discretion and the Creation of Property Rights' (2006) 26 LS 475; Gardner, 'Reliance-Based Constructive Trusts' and Swadling, 'The Nature of the Trust in *Rochefoucauld v Boustead*' in *Resulting and Constructive Trusts* (ed Mitchell, Oxford: Hart, 2009). Swadling rejects any attempt to unify *Rochefoucauld v Boustead* with other types of constructive trust as he considers that the trust is an express trust (a view rejected above), but he also outlines, at pp. 106–7 a number of reasons for resisting McFarlane's analysis.

[96] Gardner, Reliance-Based Constructive Trusts' in *Resulting and Constructive Trusts* (ed Mitchell, Oxford: Hart, 2009), p 63.

[97] (1968) 19 P&CR 836, 839. [98] [2011] EWCA Civ 1619, [94]. [99] Ibid.

the transferee's fraudulent or unconscionable attempt to renege from the trust and claim the land for him or herself.[100] He suggests that this feature of the trust 'links together the application of *Rochefoucauld v Boustead* in both two- and three-party cases, and distinguishes this instance of unconscionability'.[101] In the present state of the authorities recognition of a unifying principle appears unlikely.

QUESTIONS

1. Assess the different role afforded to the settlor's intention in the creation of express, resulting, and constructive trusts.
2. Would the following situations, each concerning the purchase of an investment property, give rise to a presumption of resulting trust or a presumption of advancement? Do your answers yield a logical result?
   (a) The property is purchased in the joint names of Mr and Mrs X, with the purchase money provided by Mr X.
   (b) The property is purchased in the joint names of Mr and Mrs X, with the purchase money provided by Mrs X.
   (c) The property is purchased in the joint names of Mr Y and his son, with the purchase money provided by Mr Y.
   (d) The property is purchased in the joint names of Mr Y and his son, with the purchase money provided by the son.
3. What is the nature of the unconscionable of fraudulent conduct that triggers the imposition of the constructive trust under the doctrine in *Rochefoucauld v Boustead*? Compare and contrast this with the conduct required for a trust under the *Pallant v Morgan* equity.
4. In a three-party case within the doctrine in *Rochefoucauld v Boustead*, should the constructive trust arise in favour of A (the transferor) or B (the intended beneficiary)?

FURTHER READING

Chambers, *Resulting Trusts* (Oxford: Clarendon Press, 1997)

Hopkins, 'Conscience, Discretion and the Creation of Property Rights' (2006) 26 LS 475

Hopkins, *The Informal Acquisition of Rights in Land* (London: Sweet & Maxwell, 2000, ch 3)

Hopkins, 'The *Pallant v Morgan* "Equity?" ' [2002] Conv 35

McFarlane, 'Constructive Trusts Arising on Receipt of Property Sub Conditione' (2004) 120 LQR 667

Mitchell (ed), *Resulting and Constructive Trusts* (Oxford: Hart, 2009)

[100] Hopkins, 'Conscience, Discretion and the Creation of Property Rights (2006) 26 LS 475, 487.
[101] Ibid.

Oakley, *Constructive Trusts* (3rd edn, London: Sweet & Maxwell, 1996)

Swadling, 'A New Role for Resulting Trusts?' (1996) 16 LS 110

Swadling, 'Explaining Resulting Trusts' (2008) 124 LQR 72

Youdan, 'Formalities for Trusts of Land, and the Doctrine in *Rochefoucauld v. Boustead*' (1984) 43 CLJ 306

PART D

PRIORITY AND THE DEFENCES QUESTION

This page intentionally left blank

12

THE PRIORITY TRIANGLE

CENTRAL ISSUES

1. Many land law cases share a basic form: a dispute arises between B and C, each of whom wants to make an inconsistent use of the land.
2. The law has adopted a very clear structure to deal with these difficult disputes. Firstly, does B have a pre-existing (legal or equitable) property right that he or she can assert against C? Secondly, if B does have such a property right, does C have a defence to it? Thirdly, does B have a direct right against C?
3. In Chapters 4 and 5, we examined an aspect of the first question—whether the right claimed by B counts as a (legal or equitable) property right. In Chapter 6, we looked in detail at the question of when B can acquire a direct right against C. In Chapters 7–11, we looked at another aspect of the first question—whether B can show that he or she has, in fact, acquired a claimed legal or equitable property right. In this chapter, our focus is on the question of when C can have a *defence* to B's pre-existing property right. This question can be thought of as the *priority* question: does B's property right have priority over C's right?
4. The question of priority is one of the most important, and most difficult, in land law. In a case where each of B and C has a (legal or equitable) property right in relation to land, it may be very difficult, in the abstract, to decide which of B or C should be free to use the land as he or she wishes. After all, it may well be that each of B and C has paid for his or her right; and that each of B and C is entirely innocent. In such cases, however, the law must try to provide a relatively simple set of rules to establish which right will take priority: B's right or C's right.
5. We will examine the priority question throughout Part D. In Chapters 13 and 14, our focus will be on the *detail* of the *specific* statutory rules imposed by the Land Charges Act 1972 (in relation to unregistered land) and the Land Registration Act 2002. In Chapter 15, we will evaluate the impact of the 2002 Act. The aim of this introductory chapter is to set out the *basic principles* that apply when answering the priority question.

1 INTRODUCTION: THE PRIORITY TRIANGLE IN PRACTICE

The cases that we will examine in this chapter share a basic set of facts:

1. A is an owner of some land (i.e. A has a freehold or lease of some land); *and*
2. B then acquires a right to make some use of that land; *and*
3. C then acquires a right in relation to A's land (e.g. C buys A's freehold or lease, or A gives C a charge over A's land).

If C is content for B to continue using the land, there will be no problem for B. In practice, however, C may want to prevent B from continuing to use the land. For example, it may be that A, who has a freehold or lease, has allowed B to occupy all or part of A's land. If C then buys A's freehold or lease, it is likely that C will want to remove B. In such a case, we need to ask if B has a right that he or she can assert against C. This question is sometimes put in the following terms: does B's right to use the land *take priority* over C's right? Or, instead, does C's right *take priority* over B's right? As Figure 5 shows, we can consequently think of a *priority triangle* involving A, B, and C.

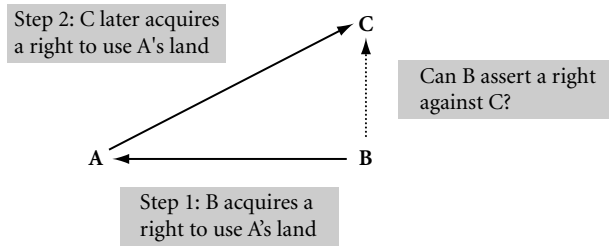

Figure 5 The Priority Triangle

For example, in Chapter 1, section 5, and Chapter 5, section 5.4, we examined the decision of the House of Lords in *National Provincial Bank v Ainsworth*.[1] The facts of the case provide a good example of the priority triangle in practice. A (Mr Ainsworth) held a freehold. B (Mrs Ainsworth) had a right to use A's land ('a deserted wife's equity').[2] C (National Provincial Bank) then acquired a charge over A's land. That charge gave it the power, if A failed to repay a loan as agreed, to sell A's freehold and use the proceeds towards meeting the debt owed to C. As long as A (or someone acting on A's behalf) continued to repay the debt, there was no problem for B. But when A defaulted on the debt, C wanted to recover the sums due to it by selling A's freehold. And, of course, to get a reasonable price for A's freehold, C needed to sell the land with vacant possession (i.e. without B remaining in occupation). So the question was whether B had a right that she could assert against C—or, in other words, who had priority: B or C?

[1] [1965] AC 1175.

[2] As we saw in Chapter 1, section 5, a 'deserted wife's equity' was the name given to the right held by a wife as a result of a duty imposed on a husband, having moved out of the matrimonial home, to provide her with financial support and, perhaps, accommodation.

To determine the *priority* question, we have to do more than simply ask whose right came first in time. For example, in *National Provincial Bank v Ainsworth*, Mrs Ainsworth's 'deserted wife's equity' arose *before* the bank received its charge, and yet, as we saw in Chapter 5, section 5.4, Mrs Ainsworth had *no* right that she could assert against the bank: the bank was free to remove Mrs Ainsworth from the land. The crucial point was that the House of Lords saw the 'deserted wife's equity' as giving Mrs Ainsworth only a *personal right* against Mr Ainsworth. As we saw in Chapter 4, section 1, a personal right, by itself, cannot be asserted against a third party. So, in answering the priority question, we firstly need to ask whether, when C acquired C's right, B already had a (legal or equitable) property right in relation to the land. As demonstrated by Chapters 4 and 5, the question of whether B had a pre-existing property right can, in turn, be split into two questions. Firstly, we need to ask the *content* question: does the type of right claimed by B count as a property right in relation to land? Secondly, if B's claimed right *does* count as a property right, we then need to ask the *acquisition* question: on the facts of the case, had B, in fact, acquired that right before C acquired C's right?

National Provincial Bank v Ainsworth provides a good example of the *content* question in practice. There was no doubt that, when Mr Ainsworth moved out of the matrimonial home, Mrs Ainsworth acquired a right: a 'deserted wife's equity'. And there was no doubt that Mrs Ainsworth had that right *before* the bank acquired its right in the land. But Mrs Ainsworth's right could not bind the bank, because, according to the House of Lords, it did not count as a property right in land: it thus failed the content test. In one sense, then, *National Provincial Bank v Ainsworth* was a relatively straightforward case: the priority question was decided in C's favour as, whilst B had acquired a right before C, B's right was only a personal right. As we will see in this chapter, the priority question can be trickier to solve if *each of* B and C has a (legal or equitable) property right in relation to the land. In section 2.1, we will consider the basic rule that applies in such a case.

2 THE BASIC RULE AND THE *TIMING* QUESTION

2.1 THE BASIC RULE

When considering the priority triangle, the most difficult cases are those in which *each of* B and C has a property right in relation to the same piece of land. In such a case, the starting point is that *the first in time prevails*. So, if (i) A has a freehold or lease, and (ii) B then acquires a property right in relation to A's land, and (iii) A then transfers his freehold or lease to C, the starting point, in relation to both registered and unregistered land, is that (iv) *B's pre-existing (legal or equitable) property right will take priority over C's later property right*. As far as registered land is concerned, that basic rule is now enshrined by statute:

Land Registration Act 2002, s 28

(1) Except as provided by sections 29 and 30, the priority of an interest affecting a registered estate or charge is not affected by a disposition of the estate or charge.

(2) It makes no difference for the purposes of this section whether the interest or disposition is registered.

Of course, in relation to registered land, the exceptions provided by ss 29 and 30 are often more important than the basic rule, as we will see in section 3 of this chapter. Nonetheless, it is important to bear the basic rule in mind: if C does not have a defence to B's pre-existing legal or equitable property right, then B's right will bind C, even if B's right has not been entered on the register.[3]

2.2 THE *TIMING* QUESTION

To apply the basic rule, we must, of course, know whether or not B's property right arose before C's property right. In most cases, it will be very easy to work out the order of the parties' rights. For example, in *Williams & Glyn's Bank v Boland*[4] (a case we discussed in Chapter 5, section 2), Mr and Mrs Boland bought a home together. The registered title to the land was in Mr Boland's sole name, but he held his right to the land on trust for both himself and his wife, as Mrs Boland had contributed to the purchase price of the home. Some years later, Mr Boland borrowed money from the bank to support his business, and this loan, unbeknownst to Mrs Boland, was secured by a charge over the home. So, each of Mrs Boland and the bank had a property right in relation to the home: Mrs Boland had an equitable interest under a trust; the bank had a legal charge. It is, therefore, clear that the basic 'first in time' rule favoured Mrs Boland, and so the onus was on the bank to displace that rule, by showing that it had a defence to Mrs Boland's right.

In other cases, however, it can be slightly more difficult to establish which of two property rights is the first in time.

2.2.1 Whose right is first in time? Charges

In *Boland*, the loan secured by the bank's charge was used to support Mr Boland's business: it was not used to acquire the land itself. It was, therefore, clear that Mrs Boland's equitable interest in the land had arisen before the bank's legal charge. A particular problem can arise, however, in the very common case of an 'acquisition mortgage'. This is where: (i) A borrows money from C *in order to buy* a freehold or lease; and (ii) in return, C acquires a charge over the land to secure A's duty to repay the loan. In such a case, when does C acquire its right? The traditional view was a technical one: C acquires its charge from A, and A can only give C a right in relation to the land if A *already* has a freehold or lease. On that view, A must acquire a property right *before* C: logically, there must be a *scintilla temporis*—that is, a tiny spark of time during which A holds his or her right free from C's charge.

But that view may seem unrealistic: after all, if A needs to borrow money from C in order to acquire his or her freehold or lease, why should A's property right take priority to C's charge? In the following case, the House of Lords considered the problem and decided to depart from the traditional view.

Abbey National v Cann
[1991] 1 AC 56, HL

Facts: George Cann lived with his mother, Daisy, in Island Road, Mitcham, South West London, in a home that was registered in George's sole name. Because Daisy had

[3] For an example of the application of the general 'first in time' rule in registered land, see *Halifax plc v Curry Popeck* [2008] EWHC 1692 (Ch).

[4] [1981] 1 AC 487.

contributed to the purchase price of that home, George held his estate on trust for both himself and Daisy. George and Daisy decided to move to a smaller home in South Lodge Avenue, also in Mitcham. They paid for that home by means of: (i) the proceeds of sale of their previous home in Island Road; and (ii) a loan from the Abbey National Building Society, secured by a charge over their new South Lodge Avenue home. The new home was registered in George's sole name and Daisy was not a party to the loan from the Abbey National. Daisy had known that a mortgage loan was necessary, because the new South Lodge Avenue home cost £4,000 more than the proceeds of sale of the Island Road home. Acting without Daisy's knowledge, however, George had taken out a loan of £25,000 from the Abbey National. When George failed to repay that loan as agreed, the building society attempted to remove Daisy (along with her new husband) from the home so that it could sell the home with vacant possession and use the proceeds to meet George's outstanding debt.

It was accepted that Daisy had an equitable property right: George held his estate in the South Lodge Avenue home on trust for himself and Daisy, because she had contributed to the purchase price by allowing all of the proceeds of sale of Island Road to be used in buying the new home. It was also clear that the Abbey National had a legal property right: the charge that it had acquired from George and then registered. The Abbey National argued that its property right arose *before* Daisy's property right. The Court of Appeal had rejected that argument, but found in favour of the Abbey National on other grounds. The House of Lords, whilst also supporting those other grounds (see below), also accepted Abbey National's argument that its charge arose before Daisy's equitable property right.

Lord Oliver

At 92–3

Of course, as a matter of legal theory, a person cannot charge a legal estate that he does not have, so that there is an attractive legal logic in the ratio in *Piskor's Case* [a decision of the Court of Appeal applying the traditional *scintilla tempors* view].[5] Nevertheless, I cannot help feeling that it flies in the face of reality. The reality is that, in the vast majority of cases, the acquisition of the legal estate and the charge are not only precisely simultaneous but indissolubly bound together. The acquisition of the legal estate is entirely dependent upon the provision of funds which will have been provided before the conveyance can take effect and which are provided only against an agreement that the estate will be charged to secure them. Indeed, in many, if not most, cases of building society mortgages, there will have been, as there was in this case, a formal offer and acceptance of an advance which will ripen into a specifically enforceable agreement immediately the funds are advanced which will normally be a day or more before completion. In many, if not most, cases, the charge itself will have been executed before the execution, let alone the exchange, of the conveyance or transfer of the property. This is given particular point in the case of registered land where the vesting of the estate is made to depend upon registration, for it may well be that the transfer and the charge will be lodged for registration on different days so that the charge, when registered, may actually take effect from a date prior in time to the date from which the registration of the transfer takes effect [. . .] The reality is that the purchaser of land who relies upon a building

5 [1954] Ch 553.

society or bank loan for the completion of his purchase never in fact acquires anything but an equity of redemption [a concept we will examine in Chapter 28, section 5], for the land is, from the very inception, charged with the amount of the loan without which it could never have been transferred at all and it was never intended that it should be otherwise. The "scintilla temporis" is no more than a legal artifice and, for my part, I would adopt the reasoning of the Court of Appeal in *In re Connolly Brothers Ltd. (No. 2)*[6] and of Harman J. in *Coventry Permanent Economic Building Society v. Jones*[7] and hold that *Piskor's Case* was wrongly decided.

Lord Jauncey

At 101–2

It is of course correct as a matter of strict legal analysis that a purchaser of property cannot grant a mortgage over it until the legal estate has vested in him. The question however is whether having borrowed money in order to complete the purchase against an undertaking to grant security for the loan over the property the purchaser is, for a moment of time, in a position to deal with the legal estate as though the mortgagee had no interest therein [. . .] In my view a purchaser who can only complete the transaction by borrowing money for the security of which he is contractually bound to grant a mortgage to the lender [simultaneously] with the execution of the conveyance in his favour cannot in reality ever be said to have acquired even for a scintilla temporis the unencumbered fee simple or leasehold interest in land whereby he could grant interests having priority over the mortgage [. . .]. Since no one can grant what he does not have it follows that such a purchaser could never grant an interest which was not subject to the limitations on his own interest. In so far as *Piskor* decided that such a purchaser could be vested for a moment of time in the unencumbered freehold or leasehold estate with the consequences to which I have just referred, I consider that it was wrongly decided.

The decision in *Cann* certainly has an important effect: it means that, if A takes out a mortgage to assist in acquiring a freehold or lease, then C (the mortgagee: i.e. bank or building society providing the loan) will take priority over B (a party also providing money towards the purchase of the freehold or lease).

The approach adopted in *Cann* has since received further support: for example, in *Ingram v IRC*,[8] Lord Hoffmann stated that: '*For my part, I do not think that a theory based upon the notion of the scintilla temporis can have a very powerful grasp on reality.*' But its operation in a case such as *Cann* itself seems somewhat harsh.[9] Firstly, whilst it may be true to say that George could not have acquired his estate in the South Lodge Avenue home without the mortgage loan, it is equally true to say that George could not have acquired that right without Daisy's financial contribution. Secondly, whilst Daisy knew that a mortgage of around £4,000 was necessary to complete the purchase, George went well beyond that in borrowing £25,000. It may therefore be that the courts should take a more nuanced approach, as explored by the following extract.[10]

[6] [1912] 2 Ch 25. [7] [1951] 1 All ER 901. [8] [2001] 1 AC 293, 303.

[9] For criticism, see Beaumont [1990] Law Society Gazette, 23 May, p 25, and 25 July, p 27.

[10] For further disapproval of this aspect of the decision in *Cann*, see Thompson [1992] Conv 206; Dixon [1992] CLJ 223.

Smith, 'Mortgagees and Trust Beneficiaries' (1990) 109 LQR 545, 548–9

Let us turn to the economic reality behind these cases. What is objectionable about the old *scintilla temporis* cases is that the mortgagee's finance [i.e., the money provided by the bank or building society] enables the interest of the claimant to arise. How does this apply to the facts of *Cann*? The proceeds of the previous house (after repayment of a mortgage) amounted to £30,000, owned equally by George Cann (the legal owner) and Mrs Cann. The new house (costing £34,000) required extra finance of £4,000. In fact George Cann, without authority from his mother, raised £25,000 on mortgage. It can be appreciated that the house could not have been purchased without mortgage finance of £4,000 and that to this extent the mortgagee should have priority. This may be explained either on the basis of Mrs Cann's authorising the mortgage [see section 3.4.2 below] or on the rejection of *scintilla temporis*. Beyond £4,000, however, George Cann had two overlapping sources of finance: the proceeds from the previous house and the mortgage. What logic or sense is there in saying that the mortgagee must have priority?

If we suppose that the second house had been purchased for £30,000, it is easy to see that no mortgage would have been necessary. In such a case, Lord Jauncey's analysis fails to operate: no longer is there "a purchaser who can only complete the transaction by borrowing money." Yet to the mortgagee the situation looks exactly the same, whatever the financial position of the purchaser is. The problem is most obviously acute if [. . .] the purchaser obtains loan finance sufficient to purchase the property from each of two sources, promising each of them a legal mortgage.

How can these problems be resolved? We may start by saying that where finance is required to complete a purchase, then the mortgagee should to that extent have priority. Such a proposition represents the very minimum that *Cann* is authority for. If there are overlapping sources of finance then three solutions offer themselves (all subject to the operation of land registration or other priority rules). First, we could simply favour the mortgagee. As has been argued, it is difficult to support this conclusion in terms of legal logic or economic reality. A second solution is to favour the source of finance that is first in time. The difficulty here is partly that establishing a time order may be difficult and partly that it is difficult to reconcile with the *Cann* decision favouring the mortgagee when finance is required. The final solution is to accord the sources of finance equal priority (proportionate to their quantum). A variation on this is to deny that either of the sources has priority over the other (see A. M. Prichard (1964) 80 L.Q.R. 370 at pp. 381–382): this may be appropriate when it is not possible to quantify a contribution in financial terms or the dispute concerns possession. It is worth noting that if a mortgagee fails to obtain possession then he is likely to bankrupt the mortgagor. Almost inevitably, the house will be sold and an equal priority analysis can be applied to the proceeds of sale. The third solution seems most likely to do justice, although it would require considerable elucidation. It has to be recognised, however, that it is at odds with other real property priority rules, which invariably strive to prefer one proprietary claim to another. On the other hand, once the *scintilla temporis* doctrine (designed to provide us with a preference) is dismissed, the law appears to be at a loss as to what to put in its place.

2.2.2 Whose right is first in time? Independently acquired rights

We saw in Chapter 4, section 4 that, where A has an estate in land, it is possible for B *independently* to acquire a property right in that land. For example, if B takes physical control of A's land, even without A's consent, B acquires a freehold of that land. But because A's

property right arose before B's freehold, the basic rule tells us that A's pre-existing property right takes priority to that of B. So, A is free to remove B from the land, either by using reasonable force or by seeking a possession order from a court. Initially then, B's freehold may give him or her useful protection against X (a party who later tries to move into the home), but it does not protect him or her against A.

Similarly, if A then gives C a property right in the land (for example, by transferring his or her estate to C), C is also free to remove B from the land. From a technical point of view, it may seem that B's pre-existing property right should take priority: after all, B had that right before C acquired his or her right. But the point is that C, by acquiring a property right *from* A, is essentially basing his or her claim on A's property right, which arose before B's property right. In a case in which A gives a property right to B, and then to C, this 'backdating' process cannot assist C because *each of* B and C can backdate his or her right to A's right. Where B acquires his or her right independently, however, he or she does not base the claim on A's right: in such a case, C alone can rely on backdating to take priority to B's right.

It is important to note that if either A or C delays in exercising his or her right to remove B from the land, it may then be possible for B to take priority: the lapse of time, either by itself or coupled with other factors, may give B a defence to the pre-existing property right of A, or to C's backdated property right. We will examine this point in section 3.5 below.

3 EXCEPTIONS TO THE BASIC RULE: THE *DEFENCES* QUESTION

3.1 THE POSSIBILITY OF A DEFENCE

There are exceptions to the basic rule that B's property right, where it arises before C's property right, will take priority. As we noted in Chapters 4 and 5, we have to bear in mind that, even if B has a pre-existing property right relating to land, it may be possible for C to have a *defence* to that right. In such a case, C can use that defence to take priority to B's property right. The following case, concerning unregistered land, provides a particularly memorable example of this point.

Midland Bank Trust Co Ltd v Green
[1981] AC 513, HL

Facts: Walter Green owned Gravel Hill Farm, a 300-acre farm in Lincolnshire. Walter made a contractual promise to his son, Geoffrey, that Geoffrey could, if he wished, purchase the farm at a price of £75 per acre at any time in the next ten years. As a result of this contractual promise, Geoffrey acquired an 'option to purchase': a recognized equitable property right—but Walter and Geoffrey then fell out. Walter was determined to prevent Geoffrey from buying the farm. Walter therefore transferred ownership of the farm to his wife, Evelyne. At the time, the farm was worth about £40,000, but Evelyne paid only £500. Evelyne, of course, was fully aware of Geoffrey's pre-existing option to purchase, but she argued that, because Geoffrey had failed to enter that option to purchase on the Land Charges Register, the Land Charges Act 1925 (LCA 1925) enabled her to take priority over his right. The Court of Appeal found in favour of Geoffrey, but the House of Lords upheld Evelyne's appeal.

Lord Wilberforce

At 526–8

[Geoffrey's] option was, in legal terms, an estate contract and so a legal charge, class C, within the meaning of the Land Charges Act 1925. The correct and statutory method for protection of such an option is by means of entering it in the Register of Land Charges maintained under the Act. If so registered, the option would have been enforceable, not only (contractually) against Walter, but against any purchaser of the farm [. . .]

My Lords, section 13 (2) of the Land Charges Act 1925 reads as follows:

> "A land charge of class B, class C or class D, created or arising after the commencement of this Act, shall (except as hereinafter provided) be void as against a purchaser of the land charged therewith [. . .] unless the land charge is registered in the appropriate register before the completion of the purchase: Provided that, as respects a land charge of class D and an estate contract created or entered into after the commencement of this Act, this subsection only applies in favour of a purchaser of a legal estate for money or money's worth."

As regards the word "purchaser" section 20 (8) of the same Act reads: " 'Purchaser' means any person [. . .] who, for valuable consideration, takes any interest in land [. . .]"

Thus the case appears to be a plain one. The "estate contract," which by definition (section 11) includes an option of purchase, was entered into after January 1, 1926; Evelyne took an interest (in fee simple) in the land "for valuable consideration"—so was a "purchaser"; she was a purchaser for money—namely £500; the option was not registered before the completion of the purchase. It is therefore void as against her.

In my opinion this appearance is also the reality. The case is plain: the Act is clear and definite. Intended as it was to provide a simple and understandable system for the protection of title to land, it should not be read down or glossed: to do so would destroy the usefulness of the Act. Any temptation to remould the Act to meet the facts of the present case, on the supposition that it is a hard one and that justice requires it, is, for me at least, removed by the consideration that the Act itself provides a simple and effective protection for persons in Geoffrey's position—viz.—by registration.

Midland Bank Trust Co Ltd v Green provides a very good example of the priority triangle in practice: Geoffrey (B) acquired a property right in relation to the farm *before* Evelyne (C) acquired her right. So the basic rule is that Geoffrey's property right will take priority. But that basic rule was changed by s 13(2) of the LCA 1925, which can be seen as giving Evelyne a *defence* against Geoffrey's pre-existing equitable property right: in the language of the statute, Geoffrey's pre-existing equitable property right was void *as against Evelyne*. To use that defence, Evelyne had to show three things: (i) that Geoffrey's right was one of those property rights that was covered by the registration rules of the Act; (ii) that Geoffrey had not registered that right as a land charge; and (iii) that Evelyne had acquired her property right in land 'for valuable consideration' and so counted as a 'purchaser' for the purposes of the Act. Because Evelyne was able to show all of these three things, she had priority to Geoffrey's right *even though* she knew all about it.

Since the decision in *Green*, the LCA 1925 has been replaced by the Land Charges Act 1972 (LCA 1972). But the relevant provisions of that new Act operate in exactly the same way as the previous Act: so, if the facts of *Green* were to occur again today in relation to unregistered land, the result would be exactly the same. Of course, it is possible to disapprove of that result: for example, Battersby[11] has argued that '*the decision in* Midland Bank v Green,

[11] 'Informal Transactions in Land, Estoppel and Registration' [1995] MLR 637, 655.

though correct on the present statutory provisions, is unacceptable and the Land Charges Act needs amendment'. We will examine that argument, and the wider issues that it raises, when looking in detail at the priority question in Chapters 13–15. The crucial point to note here is that, whether or not we agree with the current provisions of the LCA 1972, the decision in *Green* makes very clear that it may be possible for C, by relying on a defence, to take priority over B's *pre-existing* property right in land. It is also important to bear in mind that, whilst the House of Lords in *Green* decided that C's property right took priority over B's property right, this was not the end of the story. As we saw in Chapter 6, section 2.4, it was later held that, by acting with the predominant purpose of harming Geoffrey, his parents (Walter and Evelyne) had committed the tort of lawful act conspiracy against Geoffrey and were, therefore, liable to pay him damages. This shows that, even if C has priority over B, it may still be possible for B to assert a direct right against C.[12]

3.2 REGISTERED LAND AND THE LACK OF REGISTRATION DEFENCE

3.2.1 The basic defence

In *Green*, the specific defence relied on by Evelyne is now provided by the Land Charges Act 1972 (LCA 1972), which applies only to dealings with unregistered land. That defence can, however, be seen as an example of a more general type of defence: the lack of registration defence. A lack of registration defence forms a very important part of the registered land system. As we saw in section 2.1 above, s 28 of the Land Registration Act 2002 (LRA 2002) ensures that, where dealings with registered land are concerned, the basic rule applies: B's pre-existing property right will take priority over a later property right of C. But as s 28(1) makes clear, that basic rule is subject to the exceptions provided by ss 29 and 30 of the same Act. Those sections ensure that, in relation to registered land, it may be possible for C to take priority over a pre-existing property right of B that is not recorded on the register. Section 29 is set out below: it governs the position in which A has a registered freehold or lease (a 'registered estate'), and then gives C a property right in the land by means of a 'registrable disposition' (e.g. by transferring his freehold or lease to C, by granting C a new lease of more than seven years' duration, or by giving C a charge). Section 30 is not set out below: it is very similar in effect, and applies only where A has a registered charge.

Land Registration Act 2002, s 29

(1) If a registrable disposition of a registered estate is made for valuable consideration, completion of the disposition by registration has the effect of postponing to the interest under the disposition any interest affecting the estate immediately before the disposition whose priority is not protected at the time of registration.

(2) For the purposes of subsection (1), the priority of an interest is protected—

(a) in any case, if the interest—

(i) is a registered charge or the subject of a notice in the register;

[12] A further example of this point is provided by *Lyus v Prowsa Developments Ltd* [1982] 1 WLR 1044, a case considered in the extract from *Lloyd v Dugdale* [2001] EWCA Civ 1754 set out in Chapter 6, section 2.3.

(ii) falls within any of the paragraphs of Schedule 3, or

(iii) appears from the register to be excepted from the effect of registration, and

(b) in the case of a disposition of a leasehold estate, if the burden of the interest is incident to the estate.

(3) Subsection 2(a)(ii) does not apply to an interest which has been the subject of a notice in the register at any time since the coming into force of this section

(4) Where the grant of a leasehold estate in land out of a registered estate does not involve a registered disposition, this section has effect as if—

(a) the grant involved such a disposition; and

(b) the disposition was registered at the time of the grant.

In Chapter 14, we will examine the lack of registration defence provided by the LRA 2002 in more detail. Some general points are, however, worth noting here. When analysing any lack of registration defence, it is useful to ask two questions: firstly, what does C have to do to take advantage of the defence? Secondly, when will B's pre-existing property right be vulnerable to that defence? For example, in *Green*, C was able to take advantage of the lack of registration defence provided by the LCA 1925, because she was a 'purchaser of a legal estate for money or money's worth', and B's right was vulnerable to that defence, because it counted as an estate contract and, thus, as a Class C land charge.

When applying the first question to s 29 of the LRA 2002, we can see that C must meet certain requirements in order to rely on the lack of registration defence. Firstly, there must be a '*registrable disposition of a registered estate*' in favour of C. In Chapters 7 and 14, the meaning of 'registrable disposition' is discussed in more detail. As noted in Chapter 4, it includes almost all situations in which A, a holder of a registered freehold or lease, might attempt to give C a *legal* property right. An important exception occurs if A gives C a lease of seven years or less: in general, that does not count as a 'registrable disposition'. But in such a case, s 29(4) comes to C's rescue: it means that C may nonetheless qualify for the lack of registration defence because, for the purposes of s 29, he will be regarded as having acquired his property right by means of a 'registrable disposition'.

Secondly, the disposition in C's favour must be made for 'valuable consideration'. This is an important qualification. It means, for example, that if C acquires his property right by means of a gift from A, or on A's death, then C *cannot* use the lack of registration defence against a pre-existing property right of B.

Thirdly, to qualify for the defence, the '*completion of the disposition by registration*' is necessary: so C must register his newly acquired property right. Again, s 29(4) means that C is viewed as having met that requirement if he acquires a lease that, due to its length, cannot be registered.

3.2.2 Exceptions to the basic defence

If C does qualify for the lack of registration defence, we need to ask if B's pre-existing property right is vulnerable to that defence. The starting point, under both ss 29 and 30 of the LRA 2002, is that B's pre-existing property right *will* be vulnerable to the lack of registration defence. The 2002 Act thus works in the opposite way to the LCA 1972. The 1972 Act sets out a list of property rights that need to be registered, the 2002 Act: (i) sets out a general rule, in s 29(1), that *any* '*interest affecting* [A's estate] *immediately before the disposition* [to C]' is

vulnerable to the lack of registration defence; and (ii) in s 29(2), sets out exceptions to that rule. Section 29(2)(a)(i) and (iii) simply protect a pre-existing property right of B that C can see by examining the register. Section 29(2)(b) applies a special rule ensuring that if B's right arises because A is a tenant of B, C will also be subject to those duties: again, it will be easy for C to discover any such right of B, because he simply needs to examine the terms of A's lease with B. So the really important provision is s 29(2)(a)(ii): it means that, if B's property right is on the list of rights set out by Sch 3 of the Act, it will *not* be vulnerable to the lack of registration defence.

Those pre-existing property rights of B that are not vulnerable to the lack of registration defence are known as *overriding interests*. We will examine the list in detail in Chapter 14, section 5, but it is worth noting here one important example of an overriding interest. The Land Registration Act 1925 (LRA 1925), by means of s 70(1)(g), allowed a property right of B to count as an overriding interest if B was in '*actual occupation of the land or in receipt of the rents and profits thereof, save where enquiry is made of such person and the rights are not disclosed*'. The LRA 2002 contains a very similar provision (Sch 3, para 2), which can again be used by B if he is in actual occupation of the registered land. That provision does vary from its predecessor, but not in such a way as to change the result of the following case, which provides a good example of the role of actual occupation.

Hodgson v Marks
[1971] Ch 892, CA

Facts: In 1939, Mrs Hodgson bought a freehold of 31 Gibbs Green, Edgware, Middlesex. By 1959, she was a widow and took in lodgers. Mr Evans moved in as a lodger in April 1959. In June 1960, Mrs Hodgson, at Mr Evans' urging, transferred her freehold to him, for free. Mr Evans was then registered as holding that freehold, which he then sold to Mr Marks, who gave a charge over the land to the Cheltenham & Gloucester Building Society. Mrs Hodgson had continued to live in the home throughout. When she learned that Mr Marks now claimed to be an owner of the home, Mrs Hodgson applied to court for a declaration that Mr Marks should transfer his freehold to her, free from the charge in favour of the building society. Her argument was that: (i) although Mr Evans acquired her legal property right (her freehold), he held that right on trust for her; and (ii) her equitable interest, arising under the trust, was capable of binding both Mr Marks and the building society. Ungoed-Thomas J, at first instance, found in favour of Mrs Hodgson. The Court of Appeal upheld that decision.

There is some debate as to the precise basis on which Mrs Hodgson acquired her equitable interest under the trust.[13] Our focus here, however, is on the defences question: given that Mrs Hodgson had acquired an equitable interest before Mr Marks and the building society acquired their property rights, could either Mr Marks or the building society establish a defence to that pre-existing equitable interest?

Mr Marks and the building society tried to rely on the lack of registration defence provided by the LRA 1925. Their argument was that: (i) each had paid for, and registered, a property right in the land; and that (ii) Mrs Hodgson's pre-existing equitable

[13] See the contrasting views of Chambers, *Resulting Trusts* (1997), pp 139–140 and Swadling, 'A Hard Look at *Hodgson v Marks*' in *Resulting Trusts and Equitable Compensation* (eds Birks and Rose, 2000). For discussion of Chambers' analysis of resulting trusts, see Chapter 11, section 3.

property right had not been noted on the register. Mrs Hodgson argued that she had an *overriding interest*: her property right was *not* vulnerable to the lack of registration defence, because she had been in actual occupation of the land when Mr Marks and the building society acquired their later property rights.

At first instance, Ungoed-Thomas J held that Mrs Hodgson had *not* been in actual occupation of the land at the relevant time: although she had been living there, her presence was not such as to alert Mr Marks or the building society to the risk that she had a pre-existing property right. This reasoning seems to be based on the idea that Mr Marks and the building society could reasonably believe that Mrs Hodgson's presence showed only that Mr Evans permitted her to share occupation of the land with him. The Court of Appeal disagreed with that analysis and held that Mrs Hodgson *was* in actual occupation of the land at the relevant time.

Russell LJ

At 93–3

[Ungoed-Thomas J, having decided that Mrs Hodgson was in physical occupation of the premises at the relevant time,] then proceeded to attach a different and special meaning to the words "in actual occupation" in section 70(1)(g). He took as a starting point to justify departure from the ordinary meaning of the words first the fact that every person in actual occupation could not include the vendor himself; but that only puts a gloss on the words "every person" and, indeed, assumes the ordinary meaning of "actual occupation"; moreover, it is not in the context a special construction of "every person" to exclude the vendor who ex hypothesi has transferred his rights to the purchaser. Secondly, the judge relied upon the correct conclusion that "the land" included part of the land. I cannot see that this can properly be used as a justification for departure from the ordinary meaning of the words "in actual occupation." Having by this means freed himself from the fetters of the golden rule, he then, after considering the circumstances in which in the case of unregistered land a purchaser would be fixed with constructive notice of the rights of persons in occupation of the land sold, concluded that "actual" should be construed in the sense of "actual and apparent." [. . .] But, nevertheless, how can it be said that the plaintiff was not in actual occupation of the house? The judge said that in all fairness a purchaser of this house (if unregistered) should not be fixed with notice of the plaintiff's rights. But why not? It is a principle of law (and of the Land Registration Act 1925) that a person in occupation is protected in his rights by that occupation, unless, of course, the rights are such that they require registration if they are to be protected. A purchaser must pay heed to anyone in occupation if he is to be sure of getting a good title. It was argued, on the basis of a quotation from the judgment of Vaughan Williams L.J. in *Hunt v. Luck*[14] that this does not apply when the vendor is in occupation, and that (as is the fact) there is no reported case of unregistered land where a purchaser was fixed with constructive notice of the rights of any other occupier when the vendor was in occupation, and that any other view would lead to an impossible burden of inquiry on a purchaser and more particularly on a lender of money on mortgage such as the building society. (As to the defendant building society it is plain that it made no inquiries on the spot save as to repairs; it relied on Mr. Marks, who lied to it; and I waste no tears on it.) I do not think this is a real problem. Conveyancing is conducted generally upon a basis of good faith, with something of a long stop in the shape of covenants for title. Moreover, I do not consider that it is correct in

[14] [1902] 1 Ch 428, 432.

law to say that any rights of a person who is in occupation will be overridden whenever the vendor is, or appears to be, also in occupation.

I do not think it desirable to attempt to lay down a code or catalogue of situations in which a person other than the vendor should be held to be in occupation of unregistered land for the purpose of constructive notice of his rights, or in actual occupation of registered land for the purposes of section 70(1)(g). It must depend on the circumstances, and a wise purchaser or lender will take no risks. Indeed, however wise he may be he may have no ready opportunity of finding out; but, nevertheless, the law will protect the occupier. Reliance upon the untrue [statement] of the vendor will not suffice. Take the present case—though the test of occupation must be objective. Mr. Evans was only a lodger, and whether in law he was in occupation at all is at least doubtful. But the plaintiff was there for Mr. Marks to see and he saw her on two occasions. He did not introduce himself to her as an intending purchaser. He made no inquiry of her. He assumed her to be Mr. Evans' wife who knew all about the proposed purchase. This assumption may well have stemmed from a lie told by Mr. Evans, though neither Mr. Marks nor Mrs. Marks actually said so. Nonetheless, there was the plaintiff de facto living in the house as her house, and, if the judge's gloss were to be accepted, I should say just as much in apparent actual occupation of it as before the transfer to Mr. Evans; and, indeed, if Mr. Evans had stopped lodging there before the registration in Mr. Marks' name she would unquestionably have been in actual occupation. In short, unless it can be established in law that a person is not to be regarded as in actual occupation for the purposes of section 70(1)(g) merely because the vendor appears also to be occupying the property, it seems to me that the judge's decision on this point cannot be supported.

Accordingly, I would hold that the plaintiff was at all material times a person in actual occupation of the property.

As we will see in Chapter 14, section 5.1.1, there is an important debate about how the term 'actual occupation' should be interpreted. For our present purposes, however, the crucial point is to understand how the priority triangle was resolved in *Hodgson*.

1. The basic rule is that Mrs Hodgson's pre-existing property right takes priority over the later property rights of Mr Marks and the building society.
2. Mr Marks and the building society then attempted to displace that basic rule by using the lack of registration defence.
3. That attempt failed: because Mrs Hodgson was in actual occupation of the registered land at the relevant time, her pre-existing property right counted as an overriding interest. As a result, it was immune from the lack of registration defence.

In fact, exactly the same analysis applied in *Williams & Glyn's Bank v Boland*,[15] the case we discussed at the start of section 2 of this chapter. The bank in that case was unable to use the lack of registration defence against Mrs Boland's pre-existing equitable interest, as Mrs Boland was in actual occupation of the land when the bank acquired its charge. It is important to remember, however, that the actual occupation of Mrs Hodgson and Mrs Boland was important only because each had a pre-existing property right. For example, in *National Provincial Bank v Ainsworth* (see Chapter 1, section 5 and Chapter 5, section 5.4), Mrs Ainsworth lived in the home throughout—but her actual occupation was irrelevant, because she had no pre-existing property right that she could assert against the bank. So, without the support of a pre-existing property right, actual occupation is irrelevant.

[15] [1981] 1 AC 487.

Similarly, as we will see in the next extract, there may also be cases in which C takes priority even though B: (i) has a pre-existing property right; *and* (ii) is in actual occupation of the land at the relevant time. This is because B's actual occupation simply means that his or her pre-existing property right is not vulnerable to the lack of registration defence; B's actual occupation does not prevent C from taking priority by using a *different* defence to B's property right. We will consider such different defences in the remainder of section 3 of this chapter.

3.3 OVERREACHING UNDER S 2 OF THE LAW OF PROPERTY ACT 1925

Midland Bank v Green concerns the application of the lack of registration defence in unregistered land; *Hodgson v Marks* deals with its application to registered land. The following extract considers a wholly different defence, which does not depend on B's failure to protect a pre-existing property right through registration. The defence is known as *overreaching* and we will examine it in detail in Chapter 19.

A few points need, however, to be made here to put the following extract in context. Overreaching is a general defence that can be used by C whenever A has a *power* to give C a right free from B's pre-existing property right.[16] It is important where trusts are concerned: it may be that, if A holds on trust for B, the terms of the trust give A a power to give C a right free from B's pre-existing equitable interest. And it is particularly important where trusts of land are concerned, because the trustee or trustees will then have a default *statutory* power to give C a right free from B's pre-existing equitable interest.

For example, in *City of London Building Society v Flegg*,[17] Mr and Mrs Flegg had contributed to the purchase price of a house, legal title to which was in the names of their daughter and her husband (Mr and Mrs Maxwell Brown). The Maxwell-Browns, therefore, held their legal freehold on trust for themselves and for Mr and Mrs Flegg, and all four lived in the home together. The Maxwell-Browns later granted a legal charge over the land to the building society, who wished to enforce that charge by removing Mr and Mrs Flegg and selling the land. As in *Williams & Glyn's Bank v Boland*,[18] Mr and Mrs Flegg's right arose before that of the lender; and, as in *Boland*, their pre-existing equitable interests counted as overriding interests, as they were coupled with actual occupation of the land. Nonetheless, the building society in *Flegg* was able to take priority, as it had a defence to Mr and Mrs Flegg's right: the overreaching defence.

We will examine the overreaching defence in detail in Chapter 19, as it is particularly relevant to the context of the shared home, the subject matter of Part E of this book. We will see there that the decision in *Flegg* provoked a good deal of controversy. Here, our concern is with what *Flegg* can tell us about how the courts deal with the priority triangle. The first point concerns the role of actual occupation. It is wrong to think that if B has a pre-existing property right and is in actual occupation of registered land, B will *always* take priority over C. B's actual occupation may prevent C from using the lack of registration defence against B, but it does *not* prevent C from relying on a different defence, such as overreaching.

The second point demonstrated by *Flegg* is that the defences available to C may depend on the nature of B's pre-existing property right. In *Flegg*, B's right arose under a 'trust for

[16] See Harpum, 'Overreaching, Trustees' Powers and the Reform of the 1925 Legislation' [1990] CLJ 277.
[17] [1988] AC 54, HL. [18] [1981] AC 487, HL: see section 2 above.

sale'; as a result, that right was vulnerable to the overreaching defence regulated by s 2 of the LPA 1925. As we will see in Chapter 19, B is now vulnerable to that defence whenever his equitable property right arises under a trust of land. Similarly, C's ability to rely on a defence may depend on C satisfying certain requirements: for example, as we will see in Chapter 19, s 2 of the LPA 1925 meant that, in *Flegg*, it was crucial that the building society had paid the loan money to *two* trustees.[19] This is why, in *Williams & Glyn's Bank v Boland*, the bank was *not* able to rely on the statutory overreaching defence: in that case, there was only one trustee (Mr Boland) and so the bank did not meet the requirement, imposed by the LPA 1925, that the loan money be paid to at least two trustees.

3.4 DEFENCES BASED ON B'S CONSENT

3.4.1 Where B expressly consents to C taking priority

Imagine a case in which A holds a freehold on trust for both A and B, who share occupation of the home. That freehold was acquired without a mortgage loan. A and B then decide to raise some money by taking out a mortgage loan. A approaches C Bank and informs C Bank that B has a pre-existing equitable property right. If C Bank deals with A alone, it can acquire a charge over the land, because A is a sole registered proprietor. But C Bank is aware that, B's beneficial interest, coupled with B's actual occupation of the land, gives B an overriding interest. As a result, C Bank requires B to give his consent to C Bank's later charge taking priority over B's right. Clearly, if B gives that consent, C Bank's later charge will take priority: B's consent gives C Bank a defence to B's pre-existing equitable property right.

Problems can, however, arise if B later claims that his consent was not freely given: for example, it may be that A pressured B into giving the consent, or that A lied to B about the terms of the loan. In that case, two questions arise: firstly, was there really any flaw in B's consent—for example, did A use undue influence or make a misrepresentation in order to convince B to give that consent? Secondly, if so, should that flaw in B's consent affect C Bank: after all, if it was A who used the undue influence or made the misrepresentation, why should C Bank lose out?

We will examine the special principles developed to deal with this difficult question in Chapter 29, section 3.3. For the moment, we simply need to note that, *in some circumstances*, a flaw in B's consent, even if procured by A, *can* prevent C Bank from taking priority.

3.4.2 Where B impliedly consents to C taking priority

We saw above that, in *Abbey National v Cann*, Daisy Cann did not give her express consent to the Abbey National taking priority. The Abbey National did not have the chance to ask for such consent, because it was unaware that Daisy had any pre-existing property right: when George Cann applied for the mortgage loan, he lied to the building society and said that he did not plan to share occupation of the home. Daisy did, however, know that a loan would be necessary to provide the extra £4,000 that she and George needed to buy that land. The Court of Appeal therefore decided that Daisy had *impliedly* consented to

[19] Section 2(1)(ii) limits overreaching in a case such as *Flegg* to situations in which '*the statutory requirements respecting the payment of capital money arising under the settlement are complied with*'. Section 27 of the Law of Property Act 1925 then imposes such a requirement: *if* C pays money in return for its property right, that money must be paid to at least two trustees or to a trust corporation (see Chapter 19, section 2.3).

a mortgage lender (the Abbey National) taking priority. We have seen that the House of Lords held that, in any case, there was no need for such consent: the Abbey National did not need a defence to Daisy's equitable property right, because its charge arose *before* Daisy acquired that right.

Nonetheless, in the following extracts from the House of Lords' decision, Lord Oliver (with whom Lords Bridge, Ackner, and Griffiths agreed)[20] supported the Court of Appeal's reasoning.

Abbey National Building Society v Cann
[1991] 1 AC 56, HL

Facts: See section 2.2.1 above.

Lord Oliver

At 94

The view that I have formed renders it strictly unnecessary to consider the ground upon which Mrs. Cann's claim failed in the Court of Appeal. What was said was that, despite her initial evidence (in her affidavit) that she did not know of her son's intention to raise any of the money required for the purchase on mortgage, nevertheless her oral evidence before the judge disclosed that she was well aware that there was a shortfall which would have to be met from somewhere. Her own account of the matter was that his reason for selling was that he was in financial difficulties, so that she must have known that he was not going to be able to meet it out of his own resources. Dillon L.J. (with whom, on this point, the other two members of the court agreed) inferred that "she left it to George Cann to raise the balance"[21] from which he further inferred that George Cann had authority to raise that sum from the society. There was no finding to this effect by the judge, but I think, for my part, that it is a necessary conclusion once it is accepted, as it has to be, that she knew that there was a shortfall of some £4,000 apart from conveyancing costs, that George Cann was going to raise it, and that he was in financial difficulties. It is said that there was no evidence that he was going to raise it on the security of this property. There might, for instance, be other property available to him. He might obtain an unsecured loan. In the circumstances of his known lack of resources, however, this is fanciful and in my judgment the court was entitled to draw the inference that it did draw. If that is right, it follows that George Cann was permitted by her to raise money on the security of the property without any limitation on his authority being communicated to the society. She is not, therefore, in a position to complain, as against the lender, that too much was raised and even if, contrary to the view which I have formed, she had been able to establish an interest in the property which would otherwise prevail against the society, the circumstances to which I have alluded would preclude her from relying upon it as prevailing over the society's interest for the reasons given in the judgment of Dillon L.J. in the Court of Appeal. For all these reasons, I would accordingly dismiss the appeal.

[20] Lord Jauncey's reasoning is also consistent with that of Lord Oliver, but at 102–3, Lord Jauncey noted that, in finding that the Abbey National's charge arose before Daisy Cann's equitable property right, '*it is unnecessary to consider whether or not Mrs Cann was aware that George Cann would require to borrow money in order to finance the purchase of* [the new home]'.

[21] [1989] 2 FLR 265, 276.

The idea that B can be taken to have *impliedly* consented to giving priority to C did not originate in *Cann*,[22] and it has been applied since the House of Lords' decision in that case.[23] Nonetheless, it is somewhat controversial.[24] Firstly, there is a practical question: in *Cann* itself, was it really true to say that Daisy 'must have known' that George would take out a mortgage? After all, it may have been possible to raise the £4,000 by other means.[25]

Secondly, even if Daisy did know that a mortgage would be necessary, there is a conceptual problem. There is a general doctrine, often referred to as 'promissory estoppel', which can be used to give C a defence against a right of B.[26] For that defence to operate, however, it is usually necessary: (i) for B to make some form of promise to C (e.g. a promise not to enforce his right against C); and (ii) for C to rely on that promise. The difficulty in a case such as *Cann* is that Daisy Cann did not make any promise to the Abbey National; indeed, the cause of the problem was that the Abbey National was entirely unaware of her.

The following extract makes this point, as well as suggesting a way of understanding other cases that adopt the implied consent reasoning. In the extract: (i) 'promissory estoppel' is referred to as 'defensive estoppel'; (ii) 'A' represents George Cann, 'B' represents Daisy Cann, and 'C Bank' represents the Abbey National; and (iii) the term 'persistent right' is used to refer to an equitable property right (see Chapter 5, section 7).

McFarlane, *The Structure of Property Law* (2008, p 823)

As there have been no direct dealings between B and C Bank, the defensive estoppel defence can apply only if we can say that: (i) A, acting as an agent for B, made an implied commitment to C Bank on behalf of B; *or* (ii) B was under a *duty* to inform C Bank of her right. Yet neither (i) nor (ii) is persuasive. As to (i), in [a case such as *Cann*], it is *at most* tenable to say that B allowed A to give C Bank a Charge in order to raise [£4,000: the extra money necessary to purchase the home]. B certainly did not give A any authority to borrow [£25,000]. And yet, in *Cann*, the House of Lords stated that C Bank has a defence *irrespective* of the fact that A borrowed more than was necessary to achieve A and B's plan. As to (ii), it is very odd to say that B, with a pre-existing persistent right, is under any duty to inform others of that right: such an idea is entirely absent from the property law system. Rather, if anything, the opposite approach is adopted: C's failure to check for a pre-existing persistent right of B may be important in denying C a defence to that right.

So, as a matter of doctrine, the position adopted in *Cann* cannot be defended [. . .] The *Cann* position thus gives *special* protection to a secured lender. Can that special treatment be justified by the needs of practical convenience? Probably not. The *Cann* position is *not* a simple rule that C Bank always wins; rather, it is based on B's knowledge of the shortfall in A and B's funds. So to defend the *Cann* position we need to show why that knowledge should affect C Bank's position. And it is hard to find a convincing practical reason why that knowledge should make any difference.

[22] It was also applied in *Bristol & West BS v Henning* [1985] 1 WLR 778 and *Paddington BC v Mendelsohn* (1985) 50 P & CR 244.

[23] See *Equity & Law Home Loans Ltd v Prestidge* [1992] 1 WLR 137.

[24] See Smith (1990) 109 LQR 545.

[25] This point is noted by Sawyer, 'A World Safe for Mortgagees? Registering a Scintilla of Doubt' in *Modern Studies in Propety Law: Vol 1* (ed Cooke, 2001, p 209).

[26] See *Central London Property Trust Ltd v High Trees House* [1947] KB 130.

In practice, this particular aspect of the *Cann* decision is not too important: the real impact of that decision is in protecting C Bank whenever it makes a secured loan used by A to *acquire* a Freehold or Lease. In fact, cases before *Cann* adopting the modified "defensive estoppel" defence may well have done so precisely because, at that time, it was *not* possible for C Bank to argue that its Charge arose before B's persistent right.[27] So, when changing the approach to the timing question in *Cann* [see section 2.2.1 above], the House of Lords should also have taken the opportunity to change the approach to "defensive estoppel" by stating that C Bank cannot use that defence if, as in [*Cann*], B has made no commitment to C Bank.

3.5 DEFENCES BASED ON THE LAPSE OF TIME

3.5.1 Unregistered land

As we saw in Chapter 4, section 4, and Chapter 8, section 3, B can acquire a legal property right (a freehold) simply by taking physical control of a piece of land. That is the case even if B acts with full knowledge that A has a pre-existing property right in the same land. For example, if A has a freehold of a holiday home, and B moves into that home whilst A is away and starts to use the house as his own, B acquires his own freehold. But because A's freehold arose before B's freehold, the basic rule tells us that A's pre-existing property right takes priority to that of B. So, A is free to remove B from the land, either by using reasonable force or by seeking a possession order from a court. Initially, then, B's freehold may give him useful protection against X (a party who later tries to move into the home), but it does not protect him against A.

If B continues to act as an owner of the home over a long period, however, the lapse of time can give B a defence to A's pre-existing property right. Where unregistered land is concerned, the basic rules are set out by ss 15(1) and 17 of the Limitation Act 1980.

Limitation Act 1980, ss 15(1) and 17

15 Time limit for actions to recover land

(1) No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person [. . .]

17 Extinction of title to land after expiration of time limit

Subject to section 18 of this Act, at the expiration of the period prescribed by this Act for any person to recover land (including a redemption action) the title of that person to the land shall be extinguished.

[27] [The footnote in the original refers to *Bristol & West BS v Henning* [1985] 1 WLR 778 and *Paddington BC v Mendelsohn* (1985) 50 P & CR 244, noting that the result in those cases need not depend on the 'implied consent' of B: following the decision in *Cann* on the *scintilla temporis* point (see section 2.2.1 above), the result can instead be seen as depending on the fact that C Bank's charge arises before B's equitable property right. The decision in *Equity & Law Home Loans Ltd v Prestidge* [1992] 1 WLR 137 is explained on the basis that: (i) following the *Cann* decision on the *scintilla temporis* point, the holder of the first charge took priority over B; and (ii) the holder of the second charge, when providing the money used to pay off that first loan, then stepped into the shoes of the holder of the first charge. See further Dixon, 'Consenting Away Proprietary Rights' in *Modern Studies in Property Law: Vol I* (ed Cooke, 2001), pp 193–8.]

Section 15(1) allows the lapse of time (twelve years) to give B a defence against A's pre-existing property right. Section 17 goes further: it means that, once twelve years has elapsed, A loses that pre-existing right. This means that not only is B protected from A's previous right, but also that any later users of the land are safe from a claim by A. As a result, B's acquisition of a freehold (which occurs as soon as B takes physical control of the land), coupled with the lapse of time, means that B may be able to acquire, in practice, the best right to the land. In such a case, B's protection is said to depend on the doctrine of *adverse possession*.

We examined the detail of that doctrine in Chapter 8; as far as the priority triangle is concerned, two points are worth noting here. Firstly—in relation to unregistered land, at least—the lapse of time can operate to give a later property right priority to an earlier property right, even if the holder of the later property right has deliberately acted inconsistently with that earlier right.

Secondly, the defence provided by s 15(1) of the Limitation Act 1980 has an unusual effect: it not only protects an adverse possessor from a pre-existing property right; it also *extinguishes* that pre-existing right.[28]

3.5.2 Registered land

Land Registration Act 2002, s 96

(1) No period of limitation under section 15 of the Limitation Act 1980 (time limits in relation to recovery of land) shall run against any person, other than a chargee, in relation to an estate in land or rentcharge the title to which is registered.

(2) [. . .]

(3) Accordingly, section 17 of that Act (extinction of title on expiry of time limit) does not operate to extinguish the title of any person where, by virtue of this section, a period of limitation does not run against him.

Section 96 of the LRA 2002 thus makes clear that, if A has a registered freehold or lease, the lapse of time, by itself, can *never* give B a defence against A's pre-existing property right. Instead, the 2002 Act provides a new set of rules to deal with cases in which B takes physical control of land covered by a freehold or lease registered in A's name.

We examined the detail of those rules in Chapter 8. One important point to note here is that the 2002 Act enacted a deliberate policy of giving greater protection to A where he or she has a registered freehold or lease. Indeed, if A has a freehold or lease of unregistered land and has no current plans to sell that land, the extra protection given against an adverse possessor provides perhaps the best incentive for A to register his or her property right.

[28] The limitation defence has the same effect in relation to goods: if B tortiously interferes with A's goods, and A fails to act before the limitation period expires, then s 3(2) of the Limitation Act 1980 operates to extinguish A's pre-existing property right in the goods. In contrast to the position in relation to land, however, the limitation period does not begin to run in favour of B if B dishonestly takes possession: see s 4 of the 1980 Act.

3.6 DEFENCES AND THE DISTINCTION BETWEEN LEGAL AND EQUITABLE PROPERTY RIGHTS

If B has a pre-existing *legal* property right, it is possible for C's later property right to take priority: C may have a defence to B's legal property right. For example, B's express consent can clearly give C such a defence, and we have seen that—in unregistered land, at least—the lapse of time can also give a party a defence against a legal freehold or lease. It is, however, far easier for C to have a defence against a pre-existing *equitable* property right. It is therefore crucial, when considering the defences question, to ask if B's pre-existing property right is legal or equitable: as noted in Chapter 5, section 7, this is one of the main reasons why it is so important to distinguish between legal and equitable property rights.

Similarly, when considering the defences question, it is also very important to know if *C's* property right is legal or equitable. For example, in relation to registered land, if C has only an equitable property right, then it is not possible for C to take advantage of the lack of registration defence set out in ss 29 and 30 of the LRA 2002; instead, the basic rule in s 28 of that Act will apply.[29] Equally, if C acquires only an equitable property right, C will not be able to rely on the statutory overreaching defence discussed in section 3.3 above.[30]

The differences between legal and equitable property rights are particularly clear when we look at the lack of registration defence. For example, we saw in *Midland Bank Trust Co Ltd v Green,*[31] at the start of section 3 of this chapter, that Geoffrey's failure to register his equitable property right as a land charge allowed Evelyne to have a defence against that right. As we will see in Chapter 13, section 5.1, however, it is only in very rare cases that the lack of registration defence operating in unregistered land can be used against a pre-existing *legal* property right.

Similarly, under the LRA 2002, it is almost impossible for C to use the lack of registration defence against a pre-existing *legal* property right. This is for two reasons: firstly, in order to acquire such a legal property right in the first place, B will often need to register it, as we saw in Chapter 7; in such a case, the lack of registration defence is irrelevant. Secondly, if the LRA 2002 does allow B to acquire a legal property right without registering it, that right will almost always count as an overriding interest; as a result, it will be immune to the lack of registration defence (see section 3.2.2 above). We will examine the detail of overriding interests in Chapter 14, section 5, but we can see the crucial difference between legal and equitable property rights in the following provisions.

Land Registration Act 2002, Sch 3, para 1

Unregistered interests which override registered dispositions

Leasehold estates in land

A leasehold estate in land granted for a term not exceeding seven years from the date of the grant, except for—

(a) a lease the grant of which falls within section 4(1)(d)(e) or (f);

(b) a lease the grant of which constitutes a registrable disposition.

[29] See *Halifax plc v Curry Popeck (a firm)* [2008] EWHC 1692 (Ch), [25], *per* Norris J.

[30] Under s 2(1) of the Law of Property Act 1925, overreaching can occur only if there is a 'conveyance to a purchaser of a legal estate in land'.

[31] [1981] AC 513.

The exceptions in (a) and (b) simply ensure that, in those exceptional cases in which a lease of seven years or less must be registered, it cannot count as an overriding interest. The crucial word in setting the scope of the main rule is 'granted'. That word is used because, following the decision in the case set out below, it means that only a *legal* lease is covered by the LRA 2002, Sch 3, para 1. In that case, the court considered s 70(1)(k) of the LRA 1925, which allowed '*Leases granted for a term not exceeding twenty-one years*' to count as an overriding interest.

City Permanent Building Society v Miller
[1952] Ch 840, CA

Facts: Louie Cumberland had seven children and was in desperate need of somewhere to live. Henry Miller agreed to give Ms Cumberland a lease of the first and second floors of a house in Earl's Court, London. The lease was stated to run for three years, initially, and then to run from week to week. In return, she paid three years' rent in advance. At that point, however, Mr Miller had no rights in relation to the house and Ms Cumberland was not able to move in until three months later, when Mr Miller acquired a long lease of the house. To acquire that lease, Mr Miller borrowed £650 from the City Permanent Building Society: that sum was secured by a charge over the house. When Mr Miller failed to repay the loan as agreed, the building society attempted to remove Ms Cumberland so that it could sell the house with vacant possession and use the proceeds to meet Mr Miller's debt. Ms Cumberland argued that she had an overriding interest under s 70(1)(k) of the LRA 1925, which protected '*Leases granted for a term not exceeding twenty-one years*'.

Lord Evershed MR

At 848

[T]he effect of the contract was that [Mr Miller] obliged himself to grant to the tenant a term in these premises of three years plus one week at the least [. . .] such an agreement is not capable of conferring upon the tenant any estate in the property; in order that a tenant may acquire an estate of over three years, a deed is necessary [see Chapter 7, section 4 and Chapter 22, section 3.1.2].

I therefore proceed to a consideration of the main problem, bearing in mind that all the tenant took at the most was, as I have said, a specifically enforceable contract to grant a lease of at least three years and a week. [Counsel for Ms Cumberland], in his reply, has said that she took an equitable term and that during the moment of time when the mortgagor was registered proprietor unencumbered by the charge that equitable term ripened into a legal interest. I am unable to accept any stage of that argument. I do not think she had an equitable term. Indeed, I do not think that that phrase really can mean anything except that she had the right to get specific performance of this contract; and, assuming in [Ms Cumberland's] favour that there was a [point in time] when the mortgagor was the unencumbered proprietor of the property, I am clear that the effect of it was not to create any legal estate in the tenant, more particularly since she was not, as I have explained, at that time in occupation.

Now having dealt with all those points, I return to give my reasons for the conclusion which I have already anticipated. It seems to me that as a matter of English the use of the word "granted" in paragraph (*k*), whether it he applied to the word "lease" or the word "term," indicates, on the face of it, that the lease or agreement for lease which is to be an overriding

> interest must be a lease or agreement which is effective to create a term. An agreement for a tenancy or to grant a tenancy for a year would be so effective if the tenant were in possession, but I have felt compelled, upon a review of the whole of the relevant legislation, to conclude that such a limitation of the expanded word "lease" is inevitably imposed by the use of the word "granted"; and since, as I have already stated, the definitions must be read subject to the requirement of the context, that is my conclusion.

So, in *City Permanent Building Society v Miller*, the crucial point was that Ms Cumberland's agreement with Mr Miller could not give her a legal lease: because the lease was due to last for more than three years, s 52 of the LPA 1925 meant that it could only be legal if created by means of a deed. The agreement did give Ms Cumberland an equitable lease (under the doctrine of anticipation)[32] and that equitable lease arose *before* the building society acquired its charge. But the building society was able to use the lack of registration defence: Ms Cumberland had not protected her lease by entering a notice on the register, and that lease, because it was only equitable, could not count, by itself, as an overriding interest.

Of course, in *Miller*, things would have been different if Ms Cumberland had been in actual occupation of the land when the building society acquired its charge. In fact, where B has a pre-existing equitable property right, actual occupation is the *only* means by which that right can count as an overriding interest. This is why actual occupation is so important in practice and why we will consider the concept in detail in Chapter 14, section 5.1.

Land Registration Act 2002, Sch 3, para 3

Unregistered interests which override registered dispositions

Easements and profits a prendre

(1) A legal easement or profit a prendre, except for an easement, or a profit a prendre which is not registered under the Commons Registration Act 1965, which at the time of the disposition—

(a) is not within the actual knowledge of the person to whom the disposition is made, and

(b) would not have been obvious on a reasonably careful inspection of the land over which the easement or profit is exercisable.

(2) The exception in sub-paragraph (1) does not apply if the person entitled to the easement or profit proves that it has been exercised in the period of one year ending with the day of the disposition.

This paragraph is badly drafted (we will unpick its detailed meaning in Chapter 14, section 5.3), but one point is made very clear: the paragraph protects only *legal* easements and profits. Under the LRA 1925, the comparable provision (s 70(1)(a)) had, rather controversially, been interpreted as including at least some equitable easements.[33] Following the recommendation of the Law Commission, however, the new Act makes clear that equitable easements and profits cannot count, by themselves, as overriding interests. So, such a right

[32] See the discussion of *Walsh v Lonsdale* in Chapter 5, section 6 and also in Chapter 9.

[33] See *Celsteel Ltd v Alton House Holdings Ltd* [1985] 1 WLR 204.

can only be immune from the lack of registration defence in the unlikely case that B is in actual occupation of the land to which his or her equitable easement or profit relates.

4 CONCLUSION

Many disputes about the use of land have the same basic form: (i) B acquires a right to make some use of land from A, who has an estate in that land; (ii) C then acquires a similar right from A; and (iii) B and C want to use that land in mutually inconsistent ways. In such a case, the first question to ask is whether B acquired a legal or equitable property right: as we saw in Chapters 4 and 5, we can break that question down into the *content* and *acquisition* questions. It may be the case that C also acquired a legal or equitable property right from A. If so, there is a *priority triangle*: we need to ask whether B or C's property right is to take priority.

The basic rule is clear: B's property right will take priority because it is *first in time*—that is, it arose before C's property right. As we saw in section 2.2 above, however, there are some cases in which we need to take care in working out the order in which the property rights arose. And, even if it is clear that B's property right arose before C's property right, it may still be possible for C to take priority: to do so, C needs to show he has a *defence* to B's pre-existing right. In section 3 above, we saw a number of examples of such a defence. In later chapters, we will return to examine some of those defences in more detail: for example, Chapter 13 will look at the lack of registration defence in unregistered land, Chapter 14 will focus on that defence in registered land, and Chapter 19 will explore overreaching.

We have, however, already seen a number of important points. Firstly, it is always vital to keep in mind the possibility of C having a defence to B's pre-existing property right. Secondly, the availability of a defence can depend on both: (i) the nature of B's property right; and (ii) the circumstances in which C acquired his property right. In particular, C's chances of having a defence are much greater where both: (i) B's property right is an equitable, rather than a legal, right; and (ii) C's property right is a legal, rather than an equitable, right.

So, even if B can clear the hurdles discussed in Chapters 4 and 5, and show that he has a legal or equitable property right in relation to land, there is no guarantee that his right will *always* bind a third party. Equally, however, it is important to remember that, even if he cannot assert a pre-existing property right against C, there is another means by which B's claim can prevail. As we saw in Chapter 6, if B can show that he has a *direct right* against C, arising as a result of C's conduct, B can simply rely on that right.

QUESTIONS

1. In *National Provincial Bank v Ainsworth*, Mrs Ainsworth acquired her 'deserted wife's equity' before National Provincial Bank acquired its charge. So why was her claim to remain in occupation of the land unsuccessful?
2. Do you agree with the approach to the *scintilla temporis* question adopted by the House of Lords in *Abbey National v Cann*? Should that approach be limited to cases in which a mortgage loan is necessary in order to enable the borrower to buy the land in question?

3. In *Midland Bank Trust Co Ltd v Green*, Geoffrey Green acquired his equitable property right before Evelyne Green acquired her freehold. So why was Evelyne free to ignore Geoffrey's right? Should the fact that Evelyne was fully aware of Geoffrey's right make any difference to the result?
4. What is an 'overriding interest'? Can you explain why Mrs Hodgson had such a right in *Hodgson v Marks*, but Mrs Ainsworth did not in *National Provincial Bank v Ainsworth*?
5. In a case such as *Abbey National Building Society v Cann*, does it make sense to say that Mrs Cann impliedly consented to the building society taking priority?

FURTHER READING

Battersby, 'Informal Transactions in Land, Estoppel and Registration' [1995] MLR 637

Dixon, 'Consenting Away Proprietary Rights' in *Modern Studies in Property Law: Vol 1* (ed Cooke, Oxford: Hart, 2001)

Harpum, 'Overreaching, Trustees' Powers and the Reform of the 1925 Legislation' [1990] CLJ 277

Law Commission Report No 188, *Overreaching: Beneficiaries in Occupation* (1989)

Law Commission Report No 271, *Land Registration for the 21st Century* (2001, Pts I, II, and V)

McFarlane, *The Structure of Property Law* (Oxford: Hart, 2008, Pts B5, E1.3, E2.3, and G4.4)

Sawyer, 'A World Safe for Mortgagees? Registering a Scintilla of Doubt' in *Modern Studies in Property Law: Vol 1* (ed Cooke, Oxford: Hart, 2001, ch 12)

Smith, 'Mortgagees and Trust Beneficiaries' (1990) 109 LQR 545

13

UNREGISTERED LAND AND PRIORITIES

CENTRAL ISSUES

1. Where A transfers land to C, priority questions arise as to whether B, who has pre-existing property rights, can enforce those rights against C. Property rights are capable of binding any third party later acquiring a right from A; therefore this issue is conceptualized as the *defences* question: does C have a defence against the enforcement of B's pre-existing property rights?
2. Priority rules differ between unregistered and registered land. The overreaching mechanism (discussed in Chapter 19) is the only rule that is common to both systems. This chapter considers the priority rules of unregistered land.
3. In unregistered land, the key distinction is between legal and equitable rights.
4. C generally has no defence against the enforcement of legal rights held by B.
5. The enforcement of equitable rights in unregistered land used to be governed by the doctrine of notice. C would have a defence only if he or she were a bona fide purchaser for value without notice of B's equitable rights. The doctrine is perceived as being a fundamentally ethical means of resolving priority issues, but had fallen out of favour by the time of the 1925 legislation and has largely been replaced with more mechanical means of determining priorities.
6. A number of equitable interests, and one legal interest, are registrable as land charges under the Land Charges Act 1972. This is a limited register of interests in unregistered land. Land charges are registered against the name of the holder of the legal estate at the time of registration.
7. Where B's interest is registrable as a land charge, its enforcement against C is entirely dependent on the provisions of the 1972 Act; the defence of bona fide purchaser is irrelevant. Controversially, this has been held to mean that C has a defence against B's unregistered land charge even where C knows about B's interest.

1 INTRODUCTION

Where A transfers an estate in land to C, or creates a mortgage in C's favour, the question arises whether third parties, B, have property rights that are enforceable against C. This fundamental question gives rise to the priority triangle that was introduced in Chapter 12.

There are two distinct ways in which B may have rights that are binding on C. Firstly, the transfer from A to C may have created a new direct right in favour of B. The importance of new direct rights has been discussed in Chapter 6.

Secondly, B may have pre-existing property rights at the time of the transfer. Property rights are prima facie enforceable against third parties later acquiring a right from A; therefore property rights owned by B at the time of the transfer are prima facie enforceable against C.

The difference between these two scenarios is illustrated in Figure 6.

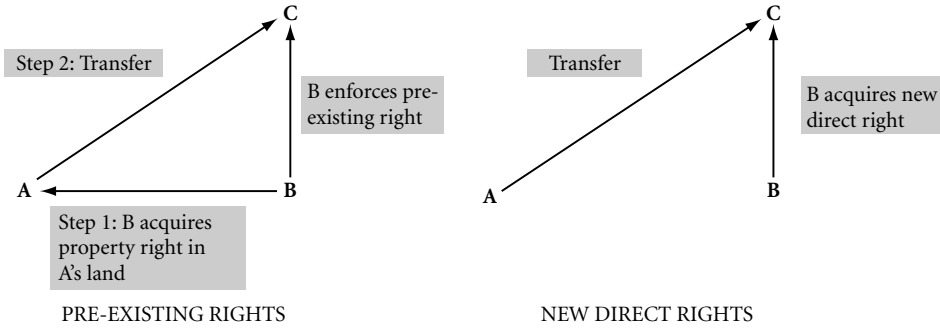

Figure 6 The priority triangle and the creation of new direct rights

In this chapter, and in Chapter 14, we are concerned with the enforcement of B's pre-existing property rights. These are sometimes referred to in this context as 'incumbrances'. We examine the rules that determine whether B's pre-existing property rights are binding against C on a transfer of an estate in land. Because B's rights are prima facie binding, this is conceptualized as the *defences* question: does C have a defence to the enforcement of B's property rights? This question is answered through land law's priority rules. These rules determine whether C has priority over B's property rights, or is bound by them.

It is important to emphasize that we are concerned only with the enforcement of pre-existing *property* rights held by B—that is, legal and equitable estates and interests in land. These are the only rights that are prima facie enforceable against a third party. We are not concerned with any personal rights that B has against A at the time of the transfer: B's pre-existing personal rights are not enforceable against C. To obtain property rights enforceable against C, B would need to demonstrate that new direct rights were created on the transfer.

Different priority rules apply to unregistered and registered land. The unregistered land rules are considered in this chapter and those of registered land in Chapter 14. The practical significance of the unregistered land rules is diminishing, but they retain some importance. As we have seen in Chapter 7, all unregistered land is now subject to compulsory first registration on the occurrence of a triggering event. This includes the transfer (by sale or gift) of

a legal estate, except the grant of a new legal lease of no more than seven years' duration, or the transfer of an existing legal lease with seven years or less remaining.[1]

The priority rules of unregistered land apply in two situations. Firstly, on a transfer of unregistered land that triggers compulsory first registration, title to the estate in question will be investigated through the unregistered land rules for the last time. Secondly, the rules will continue to apply to unregistered land as regards transfers of an estate that do not trigger compulsory first registration: for example, the creation of a legal lease for seven years or less, or the transfer of an existing legal lease with seven years or less remaining, or the transfer of an equitable interest (such as an assignment of an existing beneficial interest under a trust).

2 INVESTIGATION OF TITLE

To ascertain the existence of pre-existing property rights, C will investigate A's title to the land. The means of investigation is twofold. Firstly, C will investigate the documentary proof of A's title. In Chapter 7, we saw the written formality requirements that apply to the creation and transfer of rights in land. In unregistered land, there is no central record of title. A's documentary proof therefore consists of the bundle of deeds recording transactions carried out in relation to the land that have been executed to fulfil those formality requirements. C does not need to investigate the full history of the title, but must establish a good root of title. The period of time that must be investigated to establish good root of title has gradually been decreased. At the time of the 1925 legislation, it was necessary to investigate from the first conveyance that had taken place at least thirty years ago. Section 23 of the Law of Property Act 1969 (LPA 1969) reduced this period to fifteen years.

Secondly, C should undertake a physical inspection of the land. As we will see, each of these means of investigation has a particular role in the application of priority rules.

3 THE TWO BASIC PRIORITY RULES

In unregistered land, two basic priority rules are applied. The key distinction is that between legal and equitable rights. Firstly, legal rights bind all third parties who later acquire a right from A and therefore legal rights held by B are necessarily binding. C has no defence against the enforcement of these rights. The existence of legal rights will generally be apparent from the title deeds, although this is not invariably the case.[2]

Secondly, equitable rights bind any third party acquiring a right from A except a bona fide purchaser of legal estate without notice of the rights. Hence, equitable rights held by B are enforceable against C unless C can invoke the defence of bona fide purchaser. The 'doctrine of notice' is an important part of this defence. A person who successfully invokes this defence is sometimes described as 'equity's darling'—that is, as beyond the reproach of courts of equity.

The first rule is subject only to one limited exception. As we will see, the enforcement of a puisne mortgage, a specific type of legal mortgage, is now subject to registration under the

[1] Land Registration Act 2002, s 4.

[2] For example, there may be no record of short leases that are exempt from statutory formalities for their creation (Law of Property Act 1925, s 54(2)) or of legal easements created by implied grant.

Land Charges Act 1972 (LCA 1972). C may have a defence against this type of mortgage if it has not been registered under that Act. Apart from this exception, pre-existing legal property rights held by B do not require further discussion.

The second rule is subject to two significant exceptions. Firstly, the enforcement of a number of equitable property rights is subject to registration under the 1972 Act. The defence of bona fide purchaser has no application in relation to these rights, the enforcement of which is determined by the rules provided by that Act. Secondly, the enforcement against C of beneficial interests under a trust is subject to the operation of the overreaching mechanism. That mechanism, which applies equally to unregistered and registered land, is discussed in Chapter 19. Overreaching enables C to take the land free from beneficial interests as long as certain conditions are fulfilled: in particular, C must pay the purchase money to a minimum of two trustees or a trust corporation. If the conditions for overreaching are met, then C has a defence against the enforcement of beneficial interests held by B. As we will see in Chapter 19, B's interests are removed from the land and attach to the proceeds of sale held by the trustees (A). If the conditions for overreaching are not fulfilled (for example, because there is only one trustee of the trust), then the enforcement of beneficial interests is determined by the doctrine of notice. Hence, C will be bound by B's beneficial interest unless C can invoke the defence of bona fide purchaser.

As a result of these exceptions, the defence of bona fide purchaser plays a residual, but significant, role. In *Shiloh Spinners Ltd v Harding*,[3] Lord Wilberforce noted: '[T]*here may well be rights, of an equitable character, outside the provisions as to registration and which are incapable of being overreached*.' Such rights remain enforceable against C unless C can invoke the defence of bona fide purchaser.

4 THE DEFENCE OF BONA FIDE PURCHASER

The defence of bona fide purchaser is founded on equity's ideas of acting in good conscience. Equity would enforce its property rights against all those who could not, in good conscience, seek to take free from them. In this respect, the defence represents an essentially ethical rule.[4] But by the time of the 1925 legislation, the defence appeared too narrow. As is illustrated below in the debate arising from *Kingsnorth Finance v Tizard*,[5] its effect is to enforce rights against persons whose conduct it is difficult to call into question. As we will see, this is due, in particular, to the broad reach of constructive notice.

The effect of the defence, when successfully applied, is to provide the purchaser of a legal estate with an '*absolute, unqualified, unanswerable defence*' against the enforcement of B's equitable interest.[6] B's interest is not resurrected on a subsequent sale to a purchaser with notice.[7] The defence therefore seems to reflect a value judgment about the relative worth of legal and equitable rights; security of legal transfers is assisted at the cost of equitable proprietary rights.

The legitimacy of this value judgment is assessed by Worthington. She considers the defence in the context of its impact on a beneficiary, B, following the transfer of legal title from A to C.

[3] [1973] AC 691, 721.
[4] Compare Battersby, 'Informal Transactions in Land, Estoppel and Registration' (1995) 58 MLR 637.
[5] [1986] 1 WLR 783.
[6] *Pitcher v Rawlins* (1871–72) LR 7 Ch App 259, 269, *per* James LJ.
[7] *Wilkes v Spooner* [1911] 2 KB 473.

Worthington, *Equity* (2nd edn, 2006, p 96)

Although the bona fide purchaser rule is commonly justified by the need to make (legal) transfers of property secure, this rationalization presupposes that legal ownership is the—pre-eminent property right. [. . .] In the face of this, it is sometimes suggested that the rule is not grounded in logic, but in the competitive jurisdictional politics that once existed between the Common Law and Chancery courts, and that Chancery was simple (but perhaps illogically) ceding jurisdiction to the Common Law courts. There is scope for logical justification, however. A trust presupposes that the beneficiary has left the trustee with all the incidents of title and the power (even if not the authority) to deal with the trust property. Given this, it may make sense to reassess the appropriate balance of risk between the beneficiary and an innocent third party, and sometimes (perhaps not always) favour the third party's security of transaction over the beneficiary's security of property. This forces the beneficiary, not the third party, to bear the risk of the defaulting trustee being unable to make the claims against him.

To invoke the defence, C must meet each of the composite elements.

4.1 'BONA FIDE'

C must act in good faith in the purchase. The requirement of good faith is closely related to an absence of notice, but it has been held to remain a distinct element.

Midland Bank Trust Co Ltd v Green
[1981] AC 513, HL

Lord Wilberforce

At 528

My Lords, the character in the law known as the bona fide (good faith) purchaser for value without notice was the creation of equity. In order to affect a purchaser for value of a legal estate with some equity or equitable interest, equity fastened upon his conscience and the composite expression was used to epitomise the circumstances in which equity would or rather would not do so. I think that it would generally be true to say that the words "in good faith" related to the existence of notice. Equity, in other words, required not only absence of notice, but genuine and honest absence of notice. As the law developed, this requirement became crystallised in the doctrine of constructive notice which assumed a statutory form in the Conveyancing Act 1882, section 3. But, and so far I would be willing to accompany the respondents, it would be a mistake to suppose that the requirement of good faith extended only to the matter of notice, or that when notice came to be regulated by statute, the requirement of good faith became obsolete. Equity still retained its interest in and power over the purchaser's conscience. The classic judgment of James L.J. in *Pilcher v. Rawlins* (1872) L.R. 7 Ch.App. 259, 269 is clear authority that it did: good faith there is stated as a separate test which may have to be passed even though absence of notice is proved. and there are references in cases subsequent to 1882 which confirm the proposition that honesty or bona fides remained something which might be inquired into (see *Berwick & Co. v. Price* [1905] 1 Ch. 632, 639; *Taylor v. London and County Banking Co.* [1901] 2 Ch. 231, 256; *Oliver v. Hinton* [1899] 2 Ch. 264, 273).

While it is clear from this statement that bona fides is a separate requirement from notice, it is difficult to pinpoint what it adds to the defence.

In *Grindal v Hooper*,[8] the definition of a good faith purchaser arose for consideration in the context of a statute, rather than the defence of bona fide purchaser. Lord Wilberforce's statement was interpreted to mean that '*notice is an essential but not an exclusive aspect of good faith*'. Hence, a purchaser with notice would necessarily act in bad faith in denying the enforceability of B's rights, but an absence of notice does not guarantee that C acts in good faith in so doing.

4.2 'PURCHASER FOR VALUE'

To be a purchaser, C must acquire the estate by an act of the parties, rather than by operation of law. Hence, for example, a person who acquires a legal estate through adverse possession (as discussed in Chapter 8) is not a 'purchaser'.

The requirement of value precludes the defence being invoked where A transfers the land to C as a gift, whether during A's lifetime or on A's death. 'Equity will not assist a volunteer' and therefore the recipient of a gift is not placed in a better position than the donor. In *Midland Bank v Green*, in the context of discussing statutory definitions of purchaser, Lord Wilberforce considered that valuable consideration '*requires no definition: it is an expression denoting an advantage conferred or detriment suffered*'.[9] It is a general expression that, unless curtailed by statute, includes inadequate consideration[10] and even nominal consideration.[11] In that case, it was held that a purchaser who paid £500 for land valued at £40,000 had provided valuable consideration.[12]

4.3 'OF A LEGAL ESTATE'

The defence of bona fide purchaser is available only to purchasers of a legal estate—that is, a legal freehold or leasehold. If C purchases an equitable interest, such as an equitable lease or an existing beneficial interest, then C remains bound by all equitable interests affecting that interest.

4.4 'WITHOUT NOTICE'

The most significant aspect of the defence is the requirement that C does not have notice of B's equitable proprietary right. Notice can take three forms: actual, constructive, and imputed.

[8] Unreported, judgment 6 December 1999.

[9] [1981] AC 513, 531.

[10] *Basset v Nosworthy* (1673) 23 ER 55, 56, '*in Purchases the Question is not, whether the Consideration be adequate, but whether 'tis valuable*' (sic).

[11] Compare Lord Wilberforce's discussion in *Midland Bank Trust Co Ltd v Green* [1981] AC 513, 531–2. Lord Wilberforce defined nominal consideration and a nominal sum as '*terms of art,* [referring] *to a sum or consideration which can be mentioned as consideration but is not necessarily paid*'.

[12] Ibid. While the matter did not arise for consideration, Lord Wilberforce doubted that £500 would be classed as nominal consideration on the definition of that term which he provided.

4.4.1 Actual notice

Actual notice refers to those matters of which C is actually aware. If C knows of B's property rights, then C has no defence against their enforceability. The means by which C obtained notice are generally irrelevant: in particular, it is not necessary that notice is obtained from A or B.

The contrary was suggested to be the case in *Barnhart v Greenshields*.[13] In that case, it was held that '*a purchaser is not bound to attend to vague rumours to statements by mere strangers, but that a notice in order to be binding, must proceed from some person interested in the property*'.[14] While the irrelevance of rumours has not been doubted, a broader approach to the defence has been indicated.

Lloyd v Banks
(1868) LR 3 Ch App 488

Lord Cairns LC

At 490–1

I do not think it would be consistent with the principles upon which this Court has always proceeded, or with the authorities which have been referred to, if I were to hold that under no circumstances could a trustee, without express notice from the incumbrancer, be fixed with knowledge of an incumbrance upon the fund of which he is the trustee so as to give the incumbrancer the same benefit which he would have had if he had himself given notice to the trustee. It must depend upon the facts of the case; but I am quite prepared to say that I think the Court would expect to find that those who alleged that the trustee had knowledge of the incumbrance had made it out, not by any evidence of casual conversations, much less by any proof of what would only be constructive notice—but by proof that the mind of the trustee has in some way been brought to an intelligent apprehension of the nature of the incumbrance which has come upon the property, so that a reasonable man, or an ordinary man of business, would act upon the information and would regulate his conduct by it in the execution of the trust.

4.4.2 Constructive notice

If C does not have actual notice of B's rights because of a failure to make reasonable inquiries, then C will be fixed with constructive notice and be precluded from invoking the defence. The Law of Property Act 1925 (LPA 1925) provides a statutory explanation of the scope of constructive notice.

Law of Property Act 1925, s 199

(1) A purchaser shall not be prejudicially affected by notice of—
[. . .]
(ii) any other instrument or matter or any fact or thing unless—

[13] (1853) 9 Moo PCC 18.

[14] Ibid, 36, *per* The Rt Hon T Pemberton Leigh.

> (a) it is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him;
>
> [. . .]

Howell explains the rationale for this form of notice.

Howell, 'The Doctrine of Notice: An Historical Perspective' [1997] Conv 431, 432

> It is constructive notice which has caused and continues to cause the most difficulty. The principle upon which it is based is eminently reasonable. If a purchaser is affected only by matters of which he actually knows, he will take care to ensure that he is without that knowledge. Since this could clearly lead to injustice, equity was prepared in certain circumstances to treat the purchaser as having knowledge which he did not in fact have. In order to satisfy the courts of equity, the purchaser was expected to inspect both the land itself and the documents of title to a standard of enquiry set by the courts, and that standard could be very high. [. . .] In general, however, the courts were concerned to confine constructive notice within the scope of those inspections and enquiries which it was reasonable to make, and not to put an over-stringent burden of enquiry on the purchaser.

Inevitably, what constitutes 'reasonable' inquiries has provided a fertile ground for litigation. In particular, this has centred on the protection afforded to those in occupation.

It is well established that B's occupation is sufficient to fix C with constructive notice of B's rights.[15] To have this effect, however, the fact of B's occupation must be ascertainable on reasonable enquiries. This gives rise to two issues: what constitutes occupation and what constitutes reasonable enquiries.

As we will see in Chapter 14, occupation is relevant to determining priorities in registered, as well as unregistered, land. In registered land, in *William & Glyn's Bank v Boland*,[16] the House of Lords interpreted 'occupation' broadly. In particular, it was held that there is no requirement that occupation must be inconsistent with the title offered by A. In taking this approach, the House of Lords declined to follow case law from unregistered land, including the following case, which signals a narrower definition of 'occupation'.

Caunce v Caunce
[1969] 1 WLR 286, HC

Facts: Mr Caunce was the sole legal owner of a matrimonial home, which he held on trust for himself and his wife, who had paid towards the cost of the purchase. Mr Caunce used the home as security for loans and became bankrupt. Mrs Caunce argued that the banks had constructive notice of her beneficial interest, because she was in occupation.

15 See *Barnhart v Greenshields* (1853) 9 Moo PCC 18; *Hunt v Luck* [1902] 1 Ch 428.
16 [1981] AC 487.

Stamp J

At 393–4

In my judgment, where the vendor or mortgagor is himself in possession and occupation of the property, the purchaser or the mortgagee is not affected with notice of the equitable interests of any other person who may be resident there, and whose presence is wholly consistent with the title offered. If you buy with vacant possession on completion and you know, or find out, that the vendor is himself in possession and occupation of the property, you are, in my judgment, by reason of your failure to make further inquiries on the premises, no more fixed with notice of the equitable interest of the vendor's wife who is living there with him than you would be affected with notice of the equitable interest of any other person who might also be resident on the premises, e.g., the vendor's father, his "Uncle Harry" or his "Aunt Matilda," any of whom, be it observed, might have contributed towards the purchase of the property. The reason is that the vendor being in possession, the presence of his wife or guest or lodger implies nothing to negative the title offered. It is otherwise if the vendor is not in occupation and you find another party whose presence demands an explanation and whose presence you ignore at your peril.

Caunce v Caunce has never been overruled. Its effect, if applied, is that where A is in occupation of the land, C is not fixed with constructive notice of property rights held by other persons in occupation whose presence is not inconsistent with A's title. In particular, this includes A's spouse.

As a matter of policy, the decision is unsatisfactory. It means that the level of protection afforded to a person's property rights is dependent on his or her relationship to A. At a broad level, it runs counter to the increasing recognition of the likelihood of co-ownership of the home. The practical effect of developing the doctrines of trust through which co-ownership may be established (discussed in Chapter 16) is weakened if due protection of those rights is denied simply on the basis of the parties' relationship. Therefore, it may be expected that, should the scope of occupation arise again in unregistered land, the court would prefer the wide approach taken in *Boland* and further discussed in Chapter 14.

The court considered the need for C's occupation to be ascertainable on reasonable inquiries in the following case.

Kingsnorth Finance Co Ltd v Tizard
[1986] 1 WLR 783, HC

Facts: Mr Tizard held legal title to his house on trust for himself and his wife. Following the breakdown of their marriage, Mrs Tizard had stopped living in the home, while Mr Tizard had remained there with the couple's son and daughter. Most of Mrs Tizard's clothes remained in the house, which she visited every day to care for the children. Mrs Tizard slept at the house on the frequent occasions when her husband was away. Unknown to her, Mr Tizard used the house as security for a loan, the proceeds of which he used to emigrate with their son. The facts came to light when the loan was not repaid. The court held that Mrs Tizard was in occupation. Prior to the grant of the loan, an agent (Mr Marshall) had visited the house to undertake a valuation. The inspection had taken place on a Sunday afternoon, at a time arranged by Mr Tizard, who ensured that his wife took the children out for the day. Mr Marshall saw evidence of occupation

by the children, but not of Mrs Tizard. Mr Tizard told Mr Marshall that he was separated from his wife, although he had described himself as single on his application form. The issue arose of whether Kingsnorth Finance had constructive notice of Mrs Tizard's beneficial interest.

Judge John Finlay QC

At 794–5

I return to the submissions made by Mr. Romer and Mr. Wigmore. Mr. Romer's submission is that as Mrs. Tizard was in fact in occupation, that circumstance itself fixed the plaintiffs with notice of such rights as she had; to the contrary is the submission made by Mr. Wigmore that, in the case of unregistered land, it is only where the purchaser or mortgagee finds the claimant to an equitable interest in occupation that he has notice.

I accept Mr. Wigmore's submission but subject to a significant qualification: if the purchaser or mortgagee carries out such inspections "as ought reasonably to be made" and does not either find the claimant in occupation or find evidence of that occupation reasonably sufficient to give notice of the occupation, then I am not persuaded that the purchaser or mortgagee is in such circumstances (and in the absence, which is not the case here, of other circumstances) fixed with notice of the claimant's rights. One of the circumstances, however, is that such inspection is made "as ought reasonably to be made."

Here Mr. Marshall carried out his inspection on a Sunday afternoon at a time arranged with Mr. Tizard. If the only purpose of such an inspection were to ascertain the physical state of the property, the time at which the inspection is made and whether or not that time is one agreed in advance with the vendor or mortgagor appears to me to be immaterial. Where, however, the object of the inspection (or one of the objects) is to ascertain who is in occupation, I cannot see that an inspection at a time pre-arranged with the vendor will necessarily attain that object. Such a pre-arranged inspection may achieve no more than an inquiry of the vendor or mortgagor and his answer to it. In the case of residential property an appointment for inspection will, in most cases, be essential so far as inspection of the interior is concerned. How then is a purchaser or mortgagee to carry out such inspection "as ought reasonably to have been made" for the purpose of determining whether the possession and occupation of the property accords with the title offered? What is such an inspection "as ought reasonably to be made" must, I think, depend on all the circumstances. In the circumstances of the present case I am not satisfied that the pre-arranged inspection on a Sunday afternoon fell within the category of "such inspections which ought reasonably to have been made," the words in section 199 of the Law of Property Act 1925 which I have already read. The plaintiffs not having established that they made such an inspection, the conclusion that I have reached by another route is, in my view, fortified. It follows that the plaintiffs' claim for possession fails.

Jackson notes that *Tizard* takes a broad approach to determining when occupation is apparent. On her analysis, there were two routes to the finding of constructive notice: in the following extract, she refers to 'latent' and 'patent' defects in A's title. Latent defects are those ascertainable on inquiry; patent defects are those that would be disclosed on a reasonable inspection of the land.[17]

[17] Jackson, 'Title by Registration and Concealed Overriding Interests: The Cause and Effect of Antipathy to Documentary Proof' (2003) 119 LQR 660, 672–3.

Jackson, 'Title by Registration and Concealed Overriding Interests: The Cause and Effect of Antipathy to Documentary Proof' (2003) 119 LQR 660, 673–4

> There were two grounds for the decision. First, under the "latent" aspect of constructive notice he [Judge Finlay] held that inquiries would have revealed the presence of an interest that encumbered Kingsnorth's title. Secondly, under the "patent" aspect of the doctrine, it was held that Kingsnorth had not made a reasonable inspection of the land. In relation to the latter, Judge Finlay observed that sufficient evidence of occupation was required before a purchaser would be bound by an equitable co-ownership right. Under s.199, occupiers' rights are protected to the extent that their occupation is patent, i.e. apparent on a reasonable inspection. That occupation then puts a purchaser on inquiry as to the possible existence of an adverse claim. A purchaser will take free from the interest of the occupier only if the purchaser could not establish that there was insufficient evidence of occupation. [. . .] By definition therefore, if Mrs Tizard's minimal constructive occupation would be considered to be apparent, the apparency requirement itself imposes a high standard of inspection on purchasers.

Thompson criticizes Judge Finlay's focus on whether Kingsnorth Finance had notice of Mrs Tizard's occupation. He notes that the issue under the bona fide purchaser defence is whether the company had notice of Mrs Tizard's beneficial interest, not of her occupation. This is in contrast to the position in registered land. There, as we will see in Chapter 14, the rights of persons in occupation are protected as 'overriding interests'. Statutory regulation of this category of interest is centred on the issue of occupation as the trigger for protecting B's rights.[18]

Once it is accepted that occupation confers constructive notice, however, some focus on determining when B is in occupation appears logical and necessary. The key question for the scope of constructive notice is whether the court has struck the right balance in its interpretation of what constitutes reasonable inquiries. This is the case whether those inquiries are focused towards discovering B's rights, or B's occupation. On this crucial issue, Thompson questions Judge Finlay's suggestion (in the extract from his judgment above) that a single inspection at a prearranged time is insufficient when the object is to ascertain who is in occupation.

Thompson, 'The Purchaser as Private Detective' [1986] Conv 283, 286

> With respect, this seems to go too far. Suppose Mr. Marshall had asked where the mother of the children was and had been told either that she was dead or that she had left years ago and her present whereabouts, or even whether she was still alive, was unknown. What then is he supposed to do? Clearly, an inspection of the property should take place. If the mortgagor says this can take place at the weekend, can it really be supposed that the mortgagee's agent must insist on calling at an alternative, unannounced time to check whether the mortgagor is lying? Similarly must he insist upon rifling through drawers and cupboards, inevitably causing offence? It is submitted that such behaviour goes far beyond what are reasonable inquiries.

[18] Thompson, 'The Purchaser as Private Detective' [1986] Conv 283. Overriding interests are discussed in Chapter 14.

It is suggested that the onus on a purchaser of unregistered land is not this heavy. It is necessary that the vendor should be asked whether he shares the house with anyone else. Additionally he should be asked if he either is or was married. If the answers reveal the existence of anybody, then inquiries where possible should be made of that person. Further, an inspection of the property should be carried out. If such an inspection gives no cause to suspect adverse rights then, pace Judge Finlay, even if this inspection was performed at a time arranged with the vendor, the purchaser should be held to have done all that is required of him by section 199 of the Law of Property Act 1925. For the purchaser to insist on doing more carries the inevitable implication that he suspects the vendor of deceit. Such demands should not be considered to be within the scope of reasonable inquiries.

Ultimately, it must be recalled that the requirement is to make *reasonable* inquiries. What this entails must be dependent on the facts. In a case such as *Tizard*, in which a prearranged inspection brings to light irregularities, it may be reasonable to expect that these are followed up.

Where B is in occupation as a tenant, his or her occupation does not give C constructive notice of the rights of the landlord. Farwell J explained the position at first instance in the following case—a judgment that was upheld by the Court of Appeal[19] and remains authoritative.

Hunt v Luck
[1901] 1 Ch 45

Facts: A solicitor transferred property to the defendant as security for a mortgage. The property consisted of a number of homes let out to tenants. Prior to the transfer, the defendant had been informed by the tenants that their rent was paid to a local estate agent, but did not make further inquiries to ascertain on whose behalf the rent was collected. The plaintiff argued that the defendant had constructive notice that the property was held on her behalf.

Farwell J

At 48–9

The plaintiff's contention, therefore, is that it was the duty of the mortgagees to direct their agent (1.) to inquire of the tenants, not merely whether they claimed any and what interest in their holdings, but also who was the person to whom their rents were paid; and (2.) having ascertained to whom the rents were paid, to inquire of the recipient on whose behalf those rents were received.

Now, in my opinion on the authorities as they stand, it is not the duty of a purchaser to ask the tenants to whom they pay their rents. The fact that a tenant is in occupation is notice of his own rights, but is not notice of the rights of the persons through whom he claims.

The matter is different if the purchaser has actual notice that rent is being paid to a person whose receipt is inconsistent with the vendor's title. In such circumstances, the purchaser has constructive notice of the recipient's property rights.[20]

[19] [1902] 1 Ch 428. [20] [1901] 1 Ch 45, 51.

4.4.3 Imputed notice

This category concerns notice obtained by agents acting on C's behalf.[21] If C's agent—for example, C's solicitor—has notice of B's rights, whether actual or constructive, then the agent's notice is imputed to C.

Like constructive notice, a statutory explanation of the scope of imputed notice is provided by s 199 of the LPA 1925.

Law of Property Act 1925, s 199

(1) A purchaser shall not be prejudicially affected by notice of—

[. . .]

(ii) any other instrument or matter or any fact or thing unless—

[. . .]

(b) in the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel, as such, or of his solicitor or other agent, as such, or would have come to the knowledge of his solicitor or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent.

Tizard illustrates the operation of imputed notice. In that case, as we have seen, Mr Marshall undertook an inspection of the property. He was considered to have been acting as an agent for Kingsnorth Finance and therefore information that he obtained, that Mr Tizard was separated from his wife, was imputed to Kingsnorth Finance. It was on the basis of this imputed knowledge that Judge Finlay considered that Kingsnorth Finance should have made further inquiries.[22]

5 THE LAND CHARGES ACT 1972

A system for the registration of a limited number of interests in unregistered land was provided by the Land Charges Act 1925 (LCA 1925). The idea of registering land charges was not new, but had previously been confined to '*somewhat unusual charges which a purchaser might fail to discover in an ordinary investigation of title*'.[23] The 1925 Act extended the operation of registration to '*numerous everyday transactions*'.[24] That Act was replaced by the LCA 1972.

At first sight, it seems paradoxical to speak of *registration* in relation to *unregistered* land. It is important, therefore, to understand the limited scope of land charges registration and how this scheme differs from the system of registered land.

[21] For further consideration of the nature of imputed notice, see Nield, 'Imputed Notice' [2000] Conv 196.

[22] [1986] 1 WLR 783, 794.

[23] *Megarry and Wade's The Law of Real Property* (6th edn, ed Harpum, 2000), [5–086]. This paragraph is referred to in [8–062] of the seventh edition, but is not repeated in the text.

[24] Ibid.

The 1972 Act provides for a number of equitable interests, and one legal interest, to be recorded on a register against the name of the holder of the legal estate. Registered land, as we have seen in Chapter 7, requires the registration of legal estates in land. Each estate is given a title number, with the name of the holder of the legal estate, and the holders of certain other legal and equitable interests in the land, recorded against that title number. Hence land charges registration is a system for the registration of *interests* in unregistered land against the *name* of the holder of the legal title; registered land provides for the registration of *legal estates* against a unique *title number*.

5.1 THE SCOPE OF THE LAND CHARGES ACT 1972

The interests registrable as land charges are listed in s 2 of the LCA 1972 in six classes: Classes A–F, with Classes C and D further subdivided. The most important land charges are those contained in Classes C(i) and C(iv), D(ii) and D(iii), and F. These are discussed below. Other classes cover various statutory and equitable financial obligations connected to land, including equitable mortgages (Class C(iii)) and statutory charges securing payment of tax (Class D(i)).

Land Charges Act 1972, s 2

(1) If a charge on or obligation affecting land falls into one of the classes described in this section, it may be registered in the register of land charges as a land charge of that class.

[. . .]

(4) A Class C land charge is any of the following (not being a local land charge), namely—

(i) a puisne mortgage;

[. . .]

(iv) an estate contract;

and for this purpose—

(i) a puisne mortgage is a legal mortgage which is not protected by a deposit of documents relating to the legal estate affected;

[. . .]

(iv) an estate contract is a contract by an estate owner or by a person entitled at the date of the contract to have a legal estate conveyed to him to convey or create a legal estate, including a contract conferring either expressly or by statutory implication a valid option to purchase, a right of pre-emption or any other like right.

(5) A Class D land charge is any of the following (not being a local land charge), namely—

[. . .]

(ii) a restrictive covenant;

(iii) an equitable easement;

and for this purpose—

[. . .]

(ii) a restrictive covenant is a covenant or agreement (other than a covenant or agreement between a lessor and a lessee) restrictive of the user of land and entered into on or after 1st January 1926;

(iii) an equitable easement is an easement, right or privilege over or affecting land created or arising on or after 1st January 1926, and being merely an equitable interest.

[. . .]

(7) A Class F land charge is a charge affecting any land by virtue of the Part IV of the Family Law Act 1996

The Class C(i) land charge, the puisne mortgage, is notable as the only legal interest registrable as a land charge and (as has been noted above) the only exception to the general priority rule that a purchaser of unregistered land is necessarily bound by legal interests. In unregistered land, the first legal mortgagee generally holds title deeds—hence registration is aimed at second and subsequent legal mortgages.

The estate contract in Class C(iv) has a broad application. Its scope may be sufficiently broad to cover all cases in which there is a specifically enforceable contact for the creation or transfer of legal estates and interests[25] in land that would attract the application of the doctrine of anticipation discussed in Chapter 9. It includes contracts for sale of a freehold, for the creation and assignment of a lease, and contracts to create a mortgage. It also includes a contract to create an easement,[26] although an equitable easement arising from the contract could be registered as a Class D(iii) land charge.

An estate contract arises in the ordinary course of a conveyance of a legal estate in unregistered land as soon as there is a specifically enforceable contract (the requirements of which are discussed in Chapter 7). Registration may not be usual where the period of time between contract and conveyance is short. This leaves the purchaser vulnerable to loss of his or her property right, although it does not affect contractual remedies. For example, if A contracts to sell land to B and, in breach of contract, sells to C (who has offered a higher price), B's estate contract is not enforceable against C unless registered, but A remains liable for damages for breach of contract.

Class D(iii) covers only equitable easements; legal easements are governed by the general priority rule that legal rights bind all third parties who acquire rights from A. The existence of legal easements should be apparent from the title deeds if expressly created, but, as we will see in Chapter 25, legal easements may also arise through an implied grant. The existence of such easements may be no more or less apparent on an inspection of the land than equitable easements. Hence the different treatment of these is not necessarily logical. The scope of Class D(iii) has been subject to debate. In *ER Ives Investment Ltd v High*,[27] Lord Denning MR suggested that it included only those easements that would have been categorized as legal before the 1925 legislation and became equitable as a result of the changes introduced by those Acts. This is an artificially narrow interpretation.[28] In *Shiloh Spinners Ltd v Harding*,[29] Lord Wilberforce said that it '*should be given its plain prima facie meaning*'.

[25] Although defined in the Land Charges Act 1972, s 2(4)(iv), as concerned with 'legal estates', s 17 provides for that expression to be given the same meaning as in the Law of Property Act 1925. 'Legal estates' is defined broadly in the 1925 Act, s 1(4), as '*estates, interests, and charges which under this section are authorised to subsist or to be conveyed or created at law*'. See Battersby (1995), p 646.

[26] Ibid. [27] [1967] 2 QB 379. [28] Battersby (1995). [29] [1973] AC 691, 721.

Equitable easements and restrictive covenants (in Class D(ii)) are registrable only if created after the LCA 1925 came into force. The enforceability of those that pre-date the introduction of registration of land charges remains determined by the doctrine of notice. This limitation on the scope of Class D(ii) is significant, because easements and restrictive covenants constitute some of the most important and enduring third-party rights, the creation of which was already common prior to 1925.

Class F concerns statutory rights of occupation conferred on certain spouses and civil partners who do not own legal title to their home. The scope of these occupation rights is considered in Chapter 16. The need to register has been described as a 'severe restriction' on the protection afforded by these statutory rights.[30] Registration is unlikely to be undertaken through lack of knowledge or advice, or where the claimant is '*still living at home in peace with her husband*'.[31] Notwithstanding, registration can be used as a potent weapon. In *Wroth v Tyler*,[32] the vendor's wife objected to her husband's plan to sell their house and relocate the family. She registered a Class F land charge between contract and conveyance, thus preventing her husband from completing the sale with vacant possession and leaving him liable for damages for breach of contract. On the facts, it was apparent that the consequence of such liability would be the bankruptcy of the husband and, through that, the loss of the home. Despite this, the wife refused the opportunity to cancel the land charge to enable the sale to go ahead.

5.2 THE EFFECT OF REGISTRATION AND NON-REGISTRATION

The effect of registration is given in clear and unequivocal terms in s 198 of the LPA 1925.

Law of Property Act 1925, s 198

(1) The registration of any instrument or matter [in any register kept under the Land Charges Act 1972 or any local land charges register], shall be deemed to constitute actual notice of such instrument or matter, and of the fact of such registration, to all persons and for all purposes connected with the land affected, as from the date of registration or other prescribed date and so long as the registration continues in force.

[. . .]

The effect of a failure to register is provided in s 4 of the LCA 1972. The general effect of non-registration is to provide a purchaser with a defence of lack of registration—the defence that we introduced in Chapter 12. Minor differences arise as regards when a purchaser can invoke the defence, depending on the class of registrable land charge.

Land Charges Act 1972, s 4

[. . .]

(5) A land charge of Class B and a land charge of Class C (other than an estate contract) created or arising on or after 1st January 1926 shall be void as against a purchaser of the land

[30] *Williams & Glyn's Bank v Boland* [1979] Ch 312, 328, *per* Lord Denning MR.
[31] Ibid.
[32] [1974] Ch 30.

charged with it, or of any interest in such land, unless the land charge is registered in the appropriate register before the completion of the purchase.

(6) An estate contract and a land charge of Class D created or entered into on or after 1st January 1926 shall be void as against a purchaser for money or money's worth [or, in the case of a HM Revenue and Customs charge, a purchaser within the meaning of the Capital Transfer Tax Act 1984] of a legal estate in the land charged with it, unless the land charge is registered in the appropriate register before the completion of the purchase.

The effect of non-registration of land charges in Classes C(iv) and D therefore differs in two respects from non-registration of all other classes. Firstly, unregistered land charges in Classes C(iv) and D are void only against purchasers for money or money's worth. In the absence of a specific requirement, land charges in other classes are void for non-registration against purchasers for 'valuable consideration', within the general definition of 'purchaser' in s 17 of the 1972 Act. The practical difference between these is that marriage consideration constitutes value, but is not money or money's worth.

Secondly, unregistered land charges in Classes C(iv) and D are void only against purchasers of a legal estate. Unregistered land charges in other classes are void against purchasers of any interest in the land, which would include equitable interests.

As we will see below, there is no scope in these provisions to superimpose the doctrine of notice. Where B holds a property right that is registrable as a land charge and has not been registered, the statutory protection conferred by s 4 of the LCA 1972 provides the purchaser with a complete defence against the enforcement of B's property right.

5.3 THE MECHANICS OF REGISTRATION

The register maintained under the LCA 1972 is names-based.

Land Charges Act 1972, s 3

(1) A land charge shall be registered in the name of the estate owner whose estate in intended to be affected.
[. . .]

B registers his or her land charge against the name of the holder of the legal estate at the time of registration. The purchaser, C, searches the register against the names of all holders of the legal estate within the period of inspection necessary to establish a good root of title. The successful operation of the register is therefore dependent on B registering and C searching against the correct name. The correct name is the name of the estate owner, as disclosed by the conveyancing documents;[33] this is the name available to the purchaser when investigating title.

The need to register against the name of the holder of the legal estate gives rise to a particular difficulty on a sub-sale. In *Barrett v Hilton Developments*,[34] A contracted to buy land

[33] *Standard Property Investment plc v British Plastics Federation* (1987) 53 P & CR 25.
[34] (1975) 29 P & CR 300.

from X. Before the purchase was completed, A subcontracted to sell the land to B, who registered a Class C(iv) land charge against A's name. A subsequently acquired legal title, but sold the land to C (Figure 7).

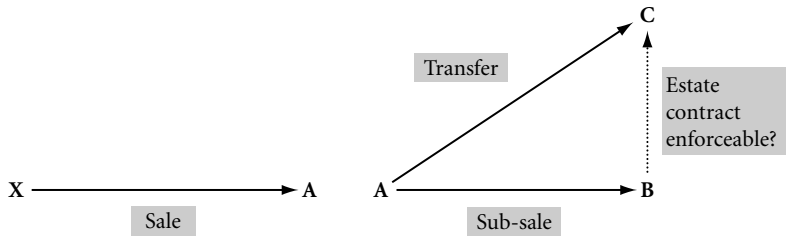

Figure 7 *Barrett v Hilton Developments*

B's registration against A's name was ineffective, because A was not the holder of the legal estate at the time of the registration. The Court of Appeal acknowledged the practical difficulties for B, who may have no means of knowing that A did not hold legal title—but the Court considered that that s 3(1) of the 1972 Act was not susceptible to a construction that would validate registration against anyone other than the current holder of legal title.

The purchaser is entitled to see the title deeds only once the contract for sale has been entered, although, in practice, they may be produced beforehand. The title deeds enable the purchaser to ascertain the names against which a search of the land charges register should be carried out, and it is usual conveyancing practice to search the register in the period between contract and completion. This means that C generally investigates title only after he or she has become contractually bound to purchase the land. The vendor will, however, have contracted to give good title free from undisclosed third party interests; hence, if good title is not shown, or undisclosed interests are discovered, then contractual remedies, including rescission, would be available to the purchaser. Provisions in the contract to the contrary are void.[35]

5.4 SEARCHING THE LAND CHARGES REGISTER

A purchaser may search the land charges register personally or requisition an official search.[36] An official search carries two significant advantages. Firstly, the certificate of search is deemed conclusive.

Land Charges Act 1972, s 10

[. . .]

(4) In favour of a purchaser or an intending purchaser, as against persons interested under or in respect of matters or documents entries of which are required or allowed as aforesaid, the certificate, according to its tenor, shall be conclusive, affirmatively or negatively, as the case may be.

[35] Law of Property Act 1969, s 24.

[36] Land Charges Act 1972, ss 9 and 10.

Hence, a correctly registered charge that is not revealed on the certificate of an official search is unenforceable against the purchaser. In such a case, the Registrar would be liable in negligence to the holder of the land charge.[37]

The second advantage of an official search is that it confers on the purchaser, for a limited 'priority period', protection against new charges registered between the time of search and completion of the conveyance.

Land Charges Act 1972, s 11

[. . .]

(5) Where a purchaser has obtained a certificate under section 10 above, any entry which is made in the register after the date of the certificate and before the completion of the purchase, and is not made pursuant to a priority notice entered on the register on or before the date of the certificate, shall not affect the purchaser if the purchase is completed before the expiration of the relevant number of days after the date of the certificate.

(6) The relevant number of days is—

(a) for the purposes of subsections [. . .] (5) above, fifteen;

[. . .]

or such other number as may be prescribed; but in reckoning the relevant number of days for any of the purposes of this section any days when the registry is not open to the public shall be excluded.

Land charges registered pursuant to a 'priority notice' are excluded from the protection afforded to purchasers during the priority period. Such land charges arise where notice of intent to register has been given to the Registrar prior to the creation of the land charge.

5.5 PROBLEMS WITH A NAMES-BASED REGISTER

The system of land charges registration is undermined by two flaws: firstly, it is susceptible to human error in registration and search; secondly, there is an inherent and unavoidable risk of registered charges being hidden behind a good root of title.

5.5.1 Errors in search and registration

As we have noted, land charges should be registered and searches made under the name of the holder of the legal estate as provided on the title deeds. Like any database, variations and misspellings of names will not be recognized. An official search against the correct name provides a purchaser with a defence against interests registered under an incorrect

[37] By analogy with *Ministry of Housing and Local Government v Sharp* [1970] 2 QB 223. In that case, a local authority was held vicariously liable for the negligence of its clerk in issuing an incorrect local land charges search certificate.

name. In *Diligent Finance Co Ltd v Alleyne*,[38] Mrs Alleyne registered her statutory rights of occupation as a Class F land charge against her husband as 'Erskine Allyene'. This was not revealed when Diligent Finance, prior to the grant of a mortgage, requisitioned an official search against 'Erskine *Owen* Alleyne', the name used on the conveyancing documents. The official search protected Diligent Finance against Mrs Alleyne's Class F land charge. Conversely, an official search against an incorrect name would offer no protection against a properly registered land charge: the certificate of an official search is only conclusive in relation to the names searched. In rare cases, errors occur at both stages of registration and search.

Oak Co-operative Building Society v Blackburn
[1968] Ch 730, CA

Facts: Mr Blackburn granted an estate contract over his house to B. The estate contract was registered as a Class C(iv) land charge under the name 'Frank David Blackburn', Frank being the name by which Mr Blackburn was known. In fact, however, his correct name (used on the title deeds) was 'Francis David Blackburn'. Subsequently, Mr Blackburn used his house as security for a mortgage from the building society. An official search was requisitioned against the name 'Francis Davis Blackburn'; the building society's solicitor, a 'Mr Davis', apparently transposing his own name onto the search request. The certificate of official search showed a nil return and the mortgage was granted.

Russell LJ

At 743

We have come to the conclusion that the registration on this occasion ought not to be regarded as a nullity simply because the formal name of Blackburn was Francis and not Frank, and notwithstanding that Frank as a name is not merely an abbreviation or version of Francis but also a name in its own right, as are also for example Harry and Willie. We are not led to this conclusion by the fact that initials would seem to suffice for registration of a lis pendens: see *Dunn v. Chapman*—at least under the then legislation and rules: for presumably a request for search under a full name having the same initials should throw up all entries under those initials. We take a broader view that so far as possible the system should be made to work in favour of those who seek to make use of it in a sensible and practical way. If a proposing purchaser here had requested a search in the correct full names he would have got a clean certificate and a clear title under section 17 (3) of the Land Charges Act, 1925, and would have suffered no harm from the fact that the registration was not in such names: and a person registering who is not in a position to satisfy himself what are the correct full names runs that risk. But if there be registration in what may be fairly described as a version of the full names of the vendor, albeit not a version which is bound to be discovered on a search in the correct full names, we would not hold it a nullity against someone who does not search at all, or who (as here) searches in the wrong name.

[38] (1972) 23 P & CR 346.

Section 17 of the LCA 1925 is now replaced by the provisions for official searches in s 10 of the LCA 1972. The outcome of the case would have been the same if the building society had undertaken a personal search against the correct name. Russell LJ commented, obiter, that the courts would not protect a personal searcher 'from his folly'.[39]

It is apparent from the decisions in *Oak Co-Operative Building Society v Blackburn* and *Diligent Finance Co Ltd v Alleyne* that registration of a land charge against an incorrect version of a name is not wholly ineffective. The land charge will still be enforceable against a purchaser who does not search, who searches personally, or who requisitions an official search against an incorrect name. A defence against the enforcement of an incorrectly registered land charge is available only to a purchaser who requisitions an official search against the correct name.

5.5.2 Registered charges hidden behind good root of title

As we have noted, good root of title is established by investigating title back to the first conveyance that is at least fifteen years old. The purchaser therefore receives title deeds relating to that period, from which he or she should requisition an official search against the names of the holders of legal estates. This will not reveal land charges registered against the names of those who held legal title at an earlier time: such land charges are hidden behind the good root of title. Notwithstanding, by the force of s 198 of the LPA 1925, a purchaser has no defence against the enforcement of the land charge.

This problem was inherent in the provision for land charges to be registered against the name of the holder of the legal estate. It was bound to arise as soon as the register had subsisted for a period longer than that constituted by good root of title. The matter was investigated by the Roxburgh Committee, which conceded that the problem was insoluble.

Report of the Committee on Land Charges (Cmd 9825, 1956, [22])

> We are the inheritors of a transitory system which was bound to disclose this defect after 30 years of transition [the period of good root of title at the time of the LCA 1925] and it seems too late to disclaim our inheritance. [. . .] The only policy which we can recommend is to press on as quickly as may be with the extension of the system of compulsory registration of title.

The creation of such an inherently flawed system undoubtedly gives cause for concern.

Wade, 'Land Charges Registration Reviewed' [1956] CLJ 216, 216

> If the inventions of one generation of legislators fail to justify themselves, the next generation should be able to amend them, at any rate where the difficulties are purely technical and there are no questions of policy. But Lord Birkenhead and Sir Benjamin Cherry appear to have succeeded in creating the conveyancing equivalent of a Frankenstein's monster, which with the passing years would become not only more dangerous but also more difficult to kill.

A pragmatic solution is provided by s 25 of the LPA 1969, which provides for financial compensation for the purchaser.

[39] [1968] Ch 730, 744.

5.6 LAND CHARGES REGISTRATION AND THE DOCTRINE OF NOTICE

The statutory protection against unregistered land charges afforded to a purchaser leaves no room for the operation of the doctrine of notice. If A sells land to C, who has actual notice of B's registrable, but unregistered land charge, then B's property right is void against C as long as C meets the criteria of purchaser within s 4 of the LCA 1972. C's statutory protection confers an absolute defence against B.

This prompted the following criticism.

Wade, 'Land Charge Registration Reviewed' [1956] CLJ 216, 227

The policy of 1925 was to abandon the equitable principle of notice in favour of a mechanical principle of registration. This was a shift from a moral to an a-moral basis. Its justification was that the doctrines of constructive and imputed notice had been over-refined "to such an extent that it had become dangerous to employ in a purchase a solicitor of good practice and reputation." But those difficulties could be avoided without the defiance of ethics which occurs when a purchaser with *actual* notice is allowed to disregard a third party's rights.

The matter was put to the test in *Midland Bank Trust Co Ltd v Green*,[40] a case that we discussed in Chapter 12, which concerned an option to purchase (a Class C(iv) land charge) granted to Geoffrey Green by his father, Walter. Geoffrey did not register his option as a land charge and, aware of this fact, Walter colluded with his wife, Evelyne, to defeat Geoffrey's option. In order to do so, Walter conveyed the land, which had a market value of £40,000, to Evelyne for £500. Despite Evelyne's actual notice of Geoffrey's option, the House of Lords held that she had a defence against its enforcement because of Geoffrey's non-registration. Against this conclusion, it was argued that Evelyne could not benefit from the statutory protection against unregistered land charges, because she was not a purchaser in good faith.

As we have noted above, the House of Lords acknowledged notice of a right precluded a purchaser from acting in good faith. But the definition of purchaser provided in the LCA 1925 (and the LCA 1972) excludes a requirement of good faith. This is in contrast to the definitions given in the other statutes in the 1925 property legislation.

Was this omission deliberate?

Midland Bank Trust Co Ltd v Green
[1981] AC 513, HL

Lord Wilberforce

At 530

My Lords, I recognise that the inquiring mind may put the question: why should there be an omission of the requirement of good faith in this particular context? I do not think there should be much doubt about the answer. Addition of a requirement that the purchaser should be in good faith would bring with it the necessity of inquiring into the purchaser's motives and state of mind. The present case is a good example of the difficulties which would exist. If the

[40] [1981] AC 513.

> position was simply that the purchaser had notice of the option, and decided nevertheless to buy the land, relying on the absence of notification, nobody could contend that she would be lacking in good faith. She would merely be taking advantage of a situation, which the law has provided, and the addition of a profit motive could not create an absence of good faith. But suppose, and this is the respondents' argument, the purchaser's motive is to defeat the option, does this make any difference? Any advantage to oneself seems necessarily to involve a disadvantage for another: to make the validity of the purchase depend upon which aspect of the transaction was prevalent in the purchaser's mind seems to create distinctions equally difficult to analyse in law as to establish in fact: avarice and malice may be distinct sins, but in human conduct they are liable to be intertwined. The problem becomes even more acute if one supposes a mixture of motives. Suppose—and this may not be far from the truth—that the purchaser's motives were in part to take the farm from Geoffrey, and in part to distribute it between Geoffrey and his brothers and sisters, but not at all to obtain any benefit for herself, is this acting in "good faith" or not? Should family feeling be denied a protection afforded to simple greed? To eliminate the necessity for inquiries of this kind may well have been part of the legislative intention. Certainly there is here no argument for departing—violently—from the wording of the Act.

In the judgment of the House of Lords, therefore, the omission of a requirement of good faith purchase was deliberate. The underlying fault lay in the failure to register Geoffrey's estate contract as a land charge. As may often be the case, the fault was that of the solicitor: Geoffrey's solicitor had already accepted liability pending the outcome of the case.[41] A separate action, for the tort of conspiracy, lay against Geoffrey's parents.[42] That action is discussed in Chapter 6, section 2.4.

Commenting on *Green* and, more generally, on the move away from the doctrine of notice, Megarry and Wade echo Wade's earlier criticism.[43]

Megarry and Wade's The Law of Real Property (6th edn, ed Harpum, 2000, [5–120])

> For centuries the courts had developed a policy based upon good faith and fair dealing under the doctrine of notice, the reasons for which were primarily ethical. Its refinements having grown too great for practical convenience, they were largely swept away [by the legislation in 1925 and since then] in favour of a mechanical system from which the ethical element was eliminated. Convenience was bought at the price of injustice in cases where the owners of registrable interests did not realise that they should register them (their solicitors usually making the omission) and so suffered loss. To allow the defeat of a prior interest by a later transaction is a failure on the part of the law, and a natural reluctance to enforce it has sometimes tempted judges to resist the policy of the legislation, clear-cut though it is. [. . .] The House of Lords [in *Green*] has now reasserted the stark policy of 1925, unethical and uncompromising but clear and simple, at least for those who are aware of it.

It seems open to question whether the disparity between the doctrine of notice and land charges registration is as clear-cut as these authors suggest. Lord Wilberforce's discussion of

[41] Noted by Lord Wilberforce [1981] AC 513, 526. The existence of a cause of action in negligence was established in *Midland Bank Trust Co Ltd v Hett, Stubbs and Kemp* [1978] Ch 384.

[42] *Midland Bank Trust Co Ltd v Green (No 3)* [1982] 2 WLR 1.

[43] The paragraph extracted is omitted from the seventh edition.

the possible mixed motives at play in *Green* give at least some cause for caution in classifying the outcome dictated by the land charges mechanism as amoral or unethical. It is far from apparent that Lord Wilberforce viewed the outcome to which he was led in this way.

Gray and Gray suggest that the House of Lords' decision reflects a particular view of the function of property law.[44]

Gray and Gray, *Elements of Land Law* (4th edn, 2004)

At [12.116]

[. . .] The dominant ideology of modern property law places a clear emphasis upon the simple mechanics of contract and transfer, leaving the morality of exchange largely unquestioned. On this view, the principal purpose of the law of property is to provide clarity and procedural efficiency in the combined operation of bargain and disposition. In many ways the law of property implicitly assumes a world of assertive individualism in which all are presumed to be equal, self-determining and competent to protect their own self-interest. Land transactions therefore have no particularly significant moral dimension. There is, however, another perspective according to which the ultimate business of the law of property is, quite inescapably, the administration of distributive justice. In this context there is no such thing as moral neutrality. The priorities which we allow to govern the law of property simply reflect the moral sensitivity of an entire legal culture [. . .]

At [12.296]

The decision of the House of Lords in *Midland Bank Trust Co Ltd v Green* is entirely consistent with the amoral approach to economic relations which infuses the market concept of property. The ruling confirmed the traditional inclination of the property lawyer to trade off justice in return for enhanced security and stability in commercial transactions. [. . .]

The simple mechanisms favoured by property law extend beyond the LCA 1972 to the operation of overreaching as a means of protecting purchasers against the enforcement of beneficial interests under a trust. However desirable the ethical underpinnings of the bona fide purchaser defence are, it is too uncertain a means of resolving the question of priorities. The common theme underlying criticisms of the decision in *Green* by Megarry and Wade, and Gray and Gray, is their perception of the relationship between certainty and justice. The authors do not see these as diametrically opposed, but certainty is seen as necessarily detracting from justice. The relationship between these concepts is undoubtedly complex and the extent to which the case law reflects those authors' views remains open to debate.

5.7 FRAUDULENT TRANSACTIONS

In *Green*, the House of Lords considered that Evelyn Green did not act fraudulently by seeking to rely on her statutory rights.[45] The decision leaves open the position where there is, in fact, fraud in the transaction.[46] Where a purchaser seeks to invoke a statutory defence against the enforcement of a pre-existing property right in circumstances amounting to

[44] The paragraphs extracted are omitted from the 5th edition (2009).

[45] [1981] AC 513, 531.

[46] Gray and Gray, *Elements of Land Law* (4th edn, 2004), [12.296].

fraud or other wrongdoing, two courses of action may be taken: firstly, the purchaser may be denied the statutory defence; or secondly, fresh obligations may arise under the general law. These fresh obligations may involve the imposition of personal liability on C towards B, or the creation of new direct rights in B's favour.

The appropriate response to fraud and other wrongdoing is of equal significance where the statutory defence concerns an unregistered land charge under the LCA 1972, or one of the defences provided in registered land by the Land Registration Act 2002 (LRA 2002). The issue is therefore discussed in Chapter 14.

5.8 CLAIMS TO ALTERNATIVE PROPERTY RIGHTS

In two notable cases, claimants whose land charges have been void against a purchaser for non-registration have sought to establish the existence of other property rights that, not being registrable, bind the purchaser as a purchaser with notice. The defence of lack of registration provides the purchaser with protection only against B's unregistered land charges; it does not protect a purchaser against two categories of rights: firstly, B's pre-existing rights that are not registrable as land charges and therefore remain governed by the doctrine of notice; secondly, new direct rights claimed by B.

As a matter of general law, where alternative claims are available, the claimant is entitled to choose the cause of action that is most favourable to him or herself. Complex questions may, however, arise as regards the relationship between the different property rights concerned.

In *Lloyds Bank v Carrick*,[47] B entered a specifically enforceable contract to buy a home from her brother-in-law (A). B moved into the home, but, unknown to her, A subsequently used the property as security for a loan obtained from C. B had not registered her contract as a Class C(iv) land charge and therefore it was void against C. The Court of Appeal held that the existence of the estate contract precluded B from claiming other property interests under a trust or estoppel, which may have been binding on C, as purchasers with notice, because B was in occupation. The objection to these alternative claims lay in the fact that their source and origin was the contract that was void for non-registration.

In *ER Ives Investment Ltd v High*,[48] A assured B of a right of way across A's land, in return for which B did not object to a trespass caused by the foundations of flats constructed by A. B did not register a land charge and A subsequently sold the land to C. Danckwerts and Winn LLJ accepted that B had an equitable easement that was registrable as a land charge and which was void for non-registration. But they held that B had also acquired rights through estoppel that were not registrable and bound C as purchasers with notice.[49]

In light of *Carrick*, the decision is open to the criticism that the source and origin of B's claim lay in the same facts that had generated the equitable easement. Lord Denning MR considered that B's equitable easement fell outside the classes of registrable land charge and itself bound C as purchasers with notice—but to reach this conclusion requires an

[47] [1996] 4 All ER 630. [48] [1967] 2 QB 379.

[49] See further, Battersby, 'Informal Transactions in Land, Estoppel and Registration' (1995) 58 MLR 637 for an analysis based on the principle of mutual benefit and burden. See Chapter 6.

artificially restrictive interpretation of the scope of registrable land charges.[50] It is difficult to avoid the conclusion that the Court of Appeal in *Ives v High* (unlike the Court of Appeal in *Carrick* and the House of Lords in *Green*) was not prepared to accept the outcome in a hard case to uphold the policy of land charges registration. Lord Denning noted that a decision against B would perpetrate the 'grossest injustice'.[51]

6 CONCLUSION

Where A transfers unregistered land to C, or creates a mortgage in C's favour, pre-existing property rights held by B will bind C unless C has a defence against the enforcement of those rights. The key distinction is between legal and equitable rights held by B: C generally has no defence against the enforcement of legal rights held by B.

One exception to this rule arises in relation to the puisne mortgage, which is registrable as a Class C(i) land charge. C has the defence of lack of registration against the enforcement of a puisne mortgage in the following circumstances:[52]

- the mortgage has not been registered as a land charge;
- the mortgage has been registered against an incorrect name and C has requisitioned an official search against the correct name.

C has a defence against the enforcement of equitable rights held by B in the following circumstances.

- B's equitable right is registrable as a land charge and either:
  - has not been registered; or
  - has been registered against an incorrect name and C has requisitioned an official search against the correct name;[53]
- B's equitable right remains governed by the doctrine of notice and C is a bona fide purchaser for value without notice. Equitable rights within this category include, in particular:
  - beneficial interests under a trust—the defence of bona fide purchaser need be invoked only in relation to trusts with one trustee; where there are two or more trustees, the beneficial interests will be overreached on a sale under the mechanism discussed in Chapter 19;
  - an inchoate equity arising under a claim to proprietary estoppel;[54]
  - equitable easements and restrictive covenants created prior to 1 January 1926 and therefore falling outside the application of the LCA 1972.

[50] Compare the discussion of the scope of Class C(iv) and D(iii) at section 5.1 above. The equitable easement in the case in fact appears to be registrable as a Class C(iv) or D(iii) land charge. See further Battersby (1995).

[51] [1967] 2 QB 379, 396.

[52] B must be a purchaser for value within the Land Charges Act 1972, s 4(5).

[53] In both cases, subject to B meeting the requirements of the Land Charges Act1972, s 4(5) or (6), depending on the class of land charge concerned.

[54] *ER Ives Investment Ltd v High* [1967] 2 QB 379. Proprietary estoppel is discussed in Chapter 10.

QUESTIONS

1. What do you understand by the defence of 'bona fide purchaser'? In what circumstances is this defence relevant to determining priority questions in unregistered land?
2. What difficulties arise from the use of a names-based register for the registration of land charges under the Land Charges Act 1972?
3. What do you consider to be the advantages and disadvantages of the 1972 Act as a means of determining priority questions compared with the defence of bona fide purchaser?
4. In what circumstances will the following pre-existing property rights held by C bind B, a purchaser of unregistered land?
   (a) A beneficial interest, assuming that B purchased the land from a single trustee.
   (b) A beneficial interest, assuming that B purchased the land from two trustees.
   (c) A legal mortgage.
   (d) An equitable easement created in 1930.
   (e) A restrictive covenant created in 1900.

FURTHER READING

Battersby, 'Informal Transactions in Land, Estoppel and Registration' (1995) 58 MLR 637

Howell, 'The Doctrine of Notice: An Historical Perspective' [1997] Conv 431

Wade, 'Land Charges Registration Reviewed' [1956] CLJ 216

14

REGISTERED LAND AND PRIORITIES

CENTRAL ISSUES

1. Where A transfers land to C, priority questions arise as to whether B, who has pre-existing property rights, can enforce those rights against C. Property rights are capable of binding all third parties who acquire a right from A, therefore this issue is conceptualized as the *defences* question: does C have a defence against the enforcement of B's pre-existing property rights?
2. Priority rules differ between unregistered and registered land. The overreaching mechanism (discussed in Chapter 19) is the only rule that is common to both systems. This chapter considers the priority rules of registered land.
3. The Land Registration Act 2002 provides a distinct set of priority rules for one category of transaction: a registrable disposition of a registered estate for valuable consideration. This category incorporates the most common dealings with land, including an ordinary sale or mortgage.
4. In this category of transactions, C is provided with a defence against B's rights where: the disposition complies with limitations on A's owner's powers, which are entered on the register; and B's interest is not entered on the register; and B's interest is not within a category of overriding interests. These are interests that do not appear on the register, but which are, notwithstanding, enforceable against C.
5. The category of overriding interests includes property rights held by persons in actual occupation of the land at the time of the disposition. The meaning of 'occupation' for this purpose has been the subject of debate and the 2002 Act introduced a reasonable inspection qualification to the operation of this category.
6. Where the disposition to C involves fraud or other wrongdoing (but not such as to invalidate the transaction), the policy of the 2002 Act is to enable C still to invoke defences against B's property rights, but to rely on the general law to create new direct rights that are enforceable against C. This may involve C being held personally liable to B or the creation of new property rights in B's favour.

1 INTRODUCTION

In this chapter, we are concerned with how questions of priorities are answered in registered land. The priority triangle was introduced in Chapter 12 and, in Chapter 13, we considered the priority rules applied in unregistered land. It is useful, however, to recap the basic issue with which we are concerned.

Where A transfers land to C, or creates a mortgage in favour of C, the priority question asks whether C is bound by property rights held by a third party, B. This is illustrated in Figure 8.

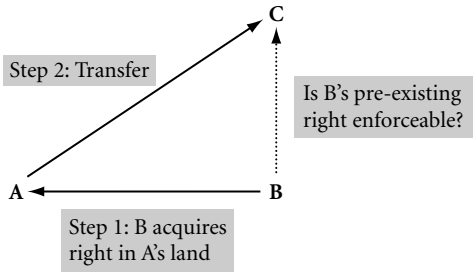

Figure 8 The priority triangle

It is important to emphasize that we are concerned with pre-existing rights held by B at the time of the transfer, and only with B's property rights. Because property rights are prima facie enforceable against all third parties who later acquire a right from A, we have conceptualized this as the *defences* question: on a transfer of land from A to C, does C have a defence against the enforcement of pre-existing property rights held by B?

The rules by which this question is answered differ between unregistered and registered land. The only priority rule common to both systems is overreaching. That mechanism, which is discussed in Chapter 19, enables C to take the land free from beneficial interests under a trust as long as certain conditions are fulfilled: in particular, C must pay any purchase money to two trustees or a trust corporation. If the conditions for overreaching are met, then C has a defence against the enforcement of beneficial interests held by B. As we will see in Chapter 19, B's interests are removed from the land and attach to the proceeds of sale held by the trustees (A).

2 AN OVERVIEW: PRIORITIES AND PRINCIPLES OF REGISTRATION OF TITLE

The starting point in understanding the approach of registered land to priorities is s 28 of the Land Registration Act 2002 (LRA 2002).

Land Registration Act 2002, s 28

(1) Except as provided by sections 29 and 30, the priority of an interest affecting a registered estate or charge is not affected by a disposition of the estate or charge.

(2) It makes no difference for the purposes of this section whether the interest or disposition is registered.

The starting point therefore is that the 2002 Act does not alter how questions of priority are determined under the general law. The exception contained in ss 29 and 30 is, however, highly significant. Those sections (s 29 is extracted at section 2.2 below) refer to a category of transactions that are elevated out of the general law and provided with distinct priority rules.

It is important to note at the outset that the category of transactions concerned is an important one, including within its scope the most common transactions undertaken in relation to land. Sections 29 and 30 of the LRA 2002 apply to 'registrable dispositions' of registered estates (and registered charges)[1] made for 'valuable consideration'. Registered estates are legal freehold estates and legal leases created[2] for a term of more than seven years. These are the estates that, as we have seen in Chapter 7, are registered with a unique title number. A 'registrable disposition' of a registered estate includes the transfer of a registered estate, the creation out of a registered estate of a new lease of more than seven years' duration, and the creation of a legal mortgage. The creation of a lease of seven years or less is *not* a registrable disposition, but it is placed in the same position as a registrable disposition for the purposes of the application of priority rules.[3]

The requirement of 'valuable consideration' excludes from this scheme of priorities transfers by gift, for nominal consideration,[4] or through adverse possession.[5] The type of transactions to which the distinct scheme of priorities contained in ss 29 and 30 of the LRA 2002 applies therefore includes the ordinary sale or mortgage of registered land.[6]

To understand how questions of priority are answered in relation to registrable dispositions, it is necessary to understand two particular aspects of the operation of the 2002 Act: firstly, the powers of disposition conferred on A; secondly, the effect of a registered disposition to C. These aspects of the operation of registered land should be understood in light of two underlying principles: the *mirror principle* and the *curtain principle*.[7] The mirror principle is the proposition that the register constitutes an accurate reflection of facts material to the title; the curtain principle provides that a curtain is drawn across the register against any trusts.[8]

1 Land Registration Act 2002, s 30.

2 Or with more than seven years remaining at the time of the transfer of an existing lease that triggers compulsory first registration.

3 Land Registration Act 2002, s 29(4), extracted below.

4 Valuable consideration is defined in s 132(1) of the 2002 Act.

5 The scheme of priorities for registration following a successful application based on adverse possession is provided in the 2002 Act, Sch 6, para 9.

6 The approach adopted by the 2002 Act to priorities is not intended to make major changes to the position under the Land Registration Act 1925, but to place prevailing rules on a statutory footing. A full explanation is provided in Law Commission Report No 271, *Land Registration for the Twenty-First Century: A Conveyancing Revolution* (2001), Pt V.

7 These principles are explained in Chapter 7, section 5.2.

8 Ruoff, *An Englishman Looks at the Torrens System* (1957) pp 7–14, extracted in Chapter 7, section 5.2.

Cooke explains the combined effect of these principles.

Cooke, *The New Law of Land Registration* (2003, p 53)

> [. . .] the mirror reveals, the curtain hides. The strange thing about this mirror is that it is an active one; what it reveals has been made true, at least to some extent, by the register itself. And just as domestic mirrors are designed to assist a specific type of viewer (humanoids with heads about 1.8 metres from the floor), so is the land register: it is designed to assist purchasers. It is designed so as to fashion and display that particular facet of truth which most tends to make a purchaser secure, although what it shows is also informative and useful to others. What the register hides are things that the purchaser does not need to know, because the law of registration has ensured that they cannot affect him, although they may be of first importance to others. [. . .]

These principles continue to influence the development of registered land. In particular, the desire for the register to provide '*a complete and accurate reflection of the state of the title at any given time*' was fundamental to the Law Commission's work[9] that led to the LRA 2002.

2.1 OWNER'S POWERS

Section 23 of the LRA 2002 confers on A, as a registered proprietor (or a person entitled to be registered as the proprietor),[10] 'owner's powers'.

Land Registration Act 2002, s 23(1) and (2)

> (1) Owner's powers in relation to a registered estate consist of—
>
> (a) power to make a disposition of any kind permitted by the general law in relation to an interest of that description, other than a mortgage by demise or sub-demise, and
>
> (b) power to charge the estate at law with the payment of money.
>
> (2) Owner's powers in relation to a registered charge consist of—
>
> (a) power to make a disposition of any kind permitted by the general law in relation to an interest of that description, other than a legal sub-mortgage, and
>
> (b) power to charge at law with the payment of money indebtedness secured by the registered charge.

Section 26 of the 2002 Act enables C to assume that A's owner's powers are free from any limitations, except those reflected by an entry on the register. It ensures that C's title is unaffected by any limitation on A's powers that do not appear on the register. The means of registering a limitation is through entry of a restriction.[11] As we will see, entry of a restriction is of particular relevance to priorities where B holds a beneficial interest under a trust.

[9] Law Commission Report No 271 (2001), [1.5].
[10] Land Registration Act 2002, s 24.
[11] Ibid, ss 40–7.

2.2 THE EFFECT OF A REGISTERED DISPOSITION

The effect of a registered disposition is explained in s 29 of the LRA 2002.

Land Registration Act 2002, s 29

(1) If a registrable disposition of a registered estate is made for valuable consideration, completion of the disposition by registration has the effect of postponing to the interest under the disposition any interest affecting the estate immediately before the disposition whose priority is not protected at the time of registration.

(2) For the purposes of subsection (1), the priority of an interest is protected—

(a) in any case, if the interest—

(i) is a registered charge or the subject of a notice in the register,

(ii) falls within any of the paragraphs of Schedule 3, or

(iii) appears from the register to be excepted from the effect of registration, and

(b) in the case of a disposition of a leasehold estate, if the burden of the interest is incident to the estate.

(3) Subsection (2)(a)(ii) does not apply to an interest which has been the subject of a notice in the register at any time since the coming into force of this section.

(4) Where the grant of a leasehold estate in land out of a registered estate does not involve a registrable disposition, this section has effect as if—

(a) the grant involved such a disposition, and

(b) the disposition were registered at the time of the grant.

Section 30 makes equivalent provision to s 29 in relation to the disposition of a registered charge. Section 29(4) is notable, because it means that where C is granted a lease of seven years or less in duration (a grant that does not constitute a registrable disposition), C is, notwithstanding, able to invoke the protection afforded by s 29.

The effect of s 29 is that, on a registrable disposition, C has a defence against the enforcement of pre-existing property rights held by B except in two situations: firstly, where B's right is protected by entry on the register; secondly, where B's interest is an overriding interest within Sch 3 of the LRA 2002. The means by which B protects his or her right by entry on the register is the entry of a 'notice'.[12] The effect the operation of the defence provided by s 29 has on B's property right is not without doubt. In *Halifax plc v Curry Popeck (a firm)*, Norris J endorsed the view advanced in argument that s 29 operates to '*destroy the subsistence of those interests as interests in land, leaving them capable of enforcement as personal rights*'.[13] As such, B is confined to personal remedies that may be available against A. Whilst advocating this approach, Dixon has highlighted that s 29 is open to an alternative analysis.[14] As the section explicitly merely 'postpones' B's interest, it may remain as an interest in land and able to take priority against any rights that are not derived under the disposition to C.

[12] Ibid, ss 32–9.

[13] [2008] EWHC 1692 (Ch), [49]. See generally the discussion at [48]–[53].

[14] Dixon, 'Priorities Under the Land Registration Act 2002' (2009) 125 LQR 401.