The defence afforded to C under s 29 applies '*at the time of registration*'[15] against pre-existing rights held by B '*immediately before the disposition*' (completion of the sale or mortgage).[16] That is the time at which C will accept A's title. C is not afforded protection against property rights arising in favour of B in the gap between disposition and registration. We have explored this 'registration gap' in Chapter 7. C's vulnerability in this period will be cured only by the introduction of e-conveyancing; a development which we have seen in Chapter 7, section 6 is currently on hold.

In relation to the two exceptions where s 29 does not confer C a defence against B's pre-existing property rights, provision for entry on the register accords with the mirror principle: it enables C to discover the material facts about the title. In contrast, the category of overriding interests provides 'a very significant impediment' to the accuracy of the register.[17] By definition, these are interests that do not appear on the register, but which are immune from the defence of lack of registration. In the report that led to the enactment of the LRA 2002, the Law Commission sought to advance the mirror principle further, both by simplifying the mechanisms available to B to protect his or her property rights, and by restricting the number of overriding interests.[18] The Law Commission expressed the expectation that the introduction of e-conveyancing[19] will further enhance the accuracy of the register.[20]

The cumulative effect of the provisions of the LRA 2002 governing owner's powers and the effect of a registered disposition can be summarized as follows. C has a defence against B's pre-existing legal rights where C has provided valuable consideration and:

- the disposition complies with any limitations on A's owner's powers entered on the register as a restriction; and
- B's interest is not protected on the register by entry of a notice; and
- B's interest is not within the category of overriding interests.

Hence, to understand the scheme of priorities provided for registrable dispositions, it is necessary to consider these three topics. Before embarking on that analysis, a specific point of interpretation that arises under s 29 must be discussed.

2.3 THE INTERPRETATION OF 'IMMEDIATELY BEFORE THE DISPOSITION'

Whether B has property rights 'immediately before the disposition' for the purposes of s 29 can be particularly difficult to ascertain where there is a sequence of transactions involving a disposition from A to C and the creation of property rights against A in favour of B. Priority rules do not allow for a '*dead heat*'.[21] Conveyancing logic may suggest that B's interest arises before the disposition from A to C, but courts have shown a willingness to '*have regard to the substance, rather than the form, of the transaction or transactions which give rise to the competing interests; and in particular that conveyancing technicalities must give*

[15] B will be registered as the proprietor of the estate transferred or, where B is a mortgagee, as proprietor of the charge. The creation of mortgages in registered land is discussed in Chapter 28.

[16] Law Commission Report No 271 (2001), [5.10].

[17] Law Commission Report No 271 (2001), [2.24].

[18] Ibid, [2.19] and [2.25].

[19] See Chapter 7, section 6.

[20] In particular, accuracy will be assisted by simultaneous creation and registration of interests other than the current registrable estates. See Law Commission Report No 271 (2001), [2.17] and [2.26].

[21] *Hardy v Fowle* [2007] EWHC 2423 (Ch), [102].

way to considerations of commercial and practical reality'.[22] The classic case is where A buys property using funds provided by a mortgagee C and B has equitable property rights in the property. Do B's property rights exist immediately prior to the disposition (the mortgage) from A to C? The analysis to adopt for this sequence of events was explained by the House of Lords in the following case.

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

Lord Oliver

At 89 and 92–3

It is argued, however, that because the creation of a charge on property in favour of the society necessarily posits that the chargor has acquired an interest out of which the charge can be created, there must notionally be a point of time at which the estate vested in him free from the charge and in which the estoppel affecting him could be "fed" by the acquisition of the legal estate so as to become binding on and take priority over the interest of the chargee. This is a puzzling problem upon which it is not easy to reconcile the authorities.

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. 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. [. . .] The reality is that the purchaser of land who relies upon a building society or bank loan for the completion of his purchase never in fact acquires anything but an equity of redemption, 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.

Hence, as A receives only the legal title encumbered with the mortgage, B's equitable interest does not exist immediately prior to the disposition (the grant of the mortgage) and cannot, therefore, have priority over C. As *Cann* demonstrates, the analysis adopted of events has considerable practical significance. The decision in that case prevented third-party interests having any effect against a mortgagee who provides funds used to purchase the property. It would be unrealistic to see the courts' interpretation of the timing of events independently from the commercial and practical reality that appeared to dictate a result that favoured and protected mortgage lenders. The House of Lords could have reached a decision that reflected conveyancing technicality, but chose instead the result that accorded with commercial and practical reality.

More recently, the question of whether interests exist immediately prior to disposition arose in *Re North East Property Buyers' Litigation*.[23] As with *Cann*, the determination of the question carried significant practical consequences. On this occasion, the operation of sale and lease-back arrangements fell under scrutiny. These arrangements

[22] *Whale v Viasystems* [2002] EWCA Civ 480, [72], *per* Jonathan Parker LJ.
[23] [2010] EWHC 2991 (Ch).

acquired some popularity as offering an apparent 'quick fix' for home-owners faced with the potential loss of their home as a result of financial difficulties in the wake of the global recession. The litigation involved nine test cases in which the question of priorities had arisen between mortgagees and occupiers of properties who had owned their homes before entering a sale and lease back agreement with North East Property Buyers (NEPB). The outcome of the case was likely to affect around 100 others involving NEPB alone plus a substantial number of other cases that did not involve NEPB.[24] Under the scheme in issue, the occupiers (B) sold their home to a nominee of NEPB (A) who funded the purchase through a mortgage. In return, NEPB promised to grant the occupiers a tenancy, so that they would be able to remain in their home.[25] The mortgagees (C) sought possession of the homes following default on the mortgages granted by NEPB's nominees to purchase the properties. In a preliminary hearing, the court was asked whether the occupiers had a property interest 'immediately before the disposition' under s 29. The sale of the property from the occupiers to NEPB's nominee and the mortgage taken out by the nominee with C (the disposition) all took place on the same day.[26] Judge Behrens considered the case to be analogous with *Cann*.[27] On his view, NEPB's nominees obtained legal title encumbered with the mortgage. The promise of a tenancy to the occupiers took effect against this interest held by the nominee. Therefore, the occupiers did not have a property right immediately before the disposition to C. While expressing sympathy for the occupiers, Judge Behrens was concerned that a contrary decision '*would add significantly to the obligations on the mortgagees in investigating title to have to make specific inquiries of the [occupiers]*'.[28] But he acknowledged that the point was arguable.[29] Indeed, a different conclusion had been reached in a previous case, *Redstone Mortgages plc v Welch & Jackson*,[30] which he declined to follow.[31] There, the court considered that where A buys property from B on a sale and leaseback agreement the title received by A is encumbered by the promise to grant the lease. If A funds the purchase by the grant of a mortgage to C, then the mortgage takes affect against an already encumbered title. On this analysis B has a property right prior to the disposition to C for the purposes of s 29. Hence, C will not have a defence against B's property right if B falls within one of the two exceptions provided by that provision.

3 RESTRICTIONS ON OWNER'S POWERS

A 'restriction' is the means by which limitations on A's owner's powers are recorded on the register. A restriction may be entered by or with the consent of A, as registered proprietor

[24] Ibid, [7].

[25] NEPB had subsequently purported to grant tenancies to the occupiers, but the tenancies themselves post-dated the disposition in question. Hence, the interest the occupiers claimed to have immediately before the disposition related to the promise of a tenancy.

[26] Ibid, [5]. [27] Ibid, [51]. [28] Ibid. [29] Ibid, 67. [30] [2009] EG 98.

[31] [2010] EWHC 2991 (Ch), [51].

(or a person entitled to be registered as proprietor),[32] by B, as a person with an interest or a claim to an interest in the land,[33] or by the Registrar.[34]

The nature and scope of restrictions is explained in s 40 of the LRA 2002.

Land Registration Act 2002, s 40

(1) A restriction is an entry in the register regulating the circumstances in which a disposition of a registered estate or charge may be the subject of an entry in the register.

(2) A restriction may, in particular—

(a) prohibit the making of an entry in respect of any disposition, or a disposition of a kind specified in the restriction;

(b) prohibit the making of an entry—

(i) indefinitely,

(ii) for a period specified in the restriction, or

(iii) until the occurrence of an event so specified.

(3) Without prejudice to the generality of subsection (2)(b)(iii), the events which may be specified include—

(a) the giving of notice,

(b) the obtaining of consent, and

(c) the making of an order by the court or registrar.

(4) The entry of a restriction is to be made in relation to the registered estate or charge to which it relates.

In relation to priorities, the most significant use of a restriction is in relation to beneficial interests. As we have noted, on a transfer of land, the overreaching mechanism enables C to take the land free from B's beneficial interest, but only where C pays any purchase money to a minimum of two trustees or a trust corporation. Where land is held on trust, a restriction may be entered on the register to ensure that overreaching occurs on a disposition. Where there are two or more registered proprietors, the Registrar is obliged to enter a restriction to this effect.

Land Registration Act 2002, s 44(1)

If the registrar enters two or more persons in the register as the proprietor of a registered estate in land, he must also enter in the register such restrictions as rules may provide for the purpose of securing that interests which are capable of being overreached on a disposition of the estate are overreached.

[32] Land Registration Act 2002, s 43(1)(a) and (b).

[33] Ibid, s 43(1)(c). See further Land Registrtion Rules, r. 93 and *Republic of Croatia v Republic of Serbia* [2010] Ch 200.

[34] Ibid, s 42.

The entry of this restriction ensures that overreaching takes place and therefore facilitates the operation of the curtain principle.

The effect of a restriction is explained in s 41 of the LRA 2002.

Land Registration Act 2002, s 41

(1) Where a restriction is entered in the register, no entry in respect of a disposition to which the restriction applies may be made in the register otherwise than in accordance with the terms of the restriction, subject to any order under subsection (2).

(2) The registrar may by order—

(a) disapply a restriction in relation to a disposition specified in the order or dispositions of a kind so specified, or

(b) provide that a restriction has effect, in relation to a disposition specified in the order or dispositions of a kind so specified, with modifications so specified.

(3) The power under subsection (2) is exercisable only on the application of a person who appears to the registrar to have a sufficient interest in the restriction.

It is important to note that the effect of a restriction is therefore confined to preventing registration of the disposition. On an ordinary sale or mortgage of registered land, where an application for registration proceeds from disposition (completion of the transfer), the restriction takes effect only at that final stage. Notwithstanding, as Cooke explains, failure to comply is disastrous for the purchaser or mortgagee.

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

It [a restriction] is a trip-wire to prevent the making of an *entry* of a disposition; it does not actually prevent the making of the disposition itself. Thus it does not prevent a transfer of a registered estate in contravention of the terms of the restriction; but the transfer could not then be registered, and so could not actually transfer the legal estate, would not—overreach anything, and would not confer any protection on the purchaser pursuant to section 29. Contravention of a restriction does not prevent a disposition but makes the disposition disastrous for the purchaser.

In essence, failure to comply therefore has a twofold effect: firstly, it prevents legal title passing to C; secondly, it removes C from the protection afforded by the overreaching mechanism[35] and from the distinct priority rules applied to registrable dispositions. C would be left with an equitable title and, under the general law, bound by all pre-existing property rights held by B.[36] Given these consequences, a purchaser would not proceed with completion without ensuring compliance with restrictions: for example, ensuring purchase money is paid to two trustees.

[35] The relevance of the entry of a restriction to the operation of the overreaching mechanism is considered in Chapter 19.

[36] Under the general rule for competing equitable interests that priority is determined according to the order of creation.

4 ENTRY OF A NOTICE

A notice plays a distinct role from a restriction. As we have seen, entry of a restriction tells C something about A's owner's powers: specifically, it informs C of limitations on those powers. In contrast, entry of a *notice* tells C about property rights claimed by B. It informs C of rights that—if, in fact, they exist—will be enforceable against him or her.

Entry of a notice in registered land must not be confused with the *doctrine* of notice in unregistered land. As we have seen in Chapter 13, the doctrine of notice (or the defence of bona fide purchaser) governs the enforceability of certain equitable property rights against a purchaser of unregistered land. It is concerned with the whole process of the investigation of an unregistered title. Entry of a notice in registered land is used to secure the enforcement of legal and equitable property rights against C. It relates solely to the entry of a notice on the register. Sparkes avoids terminological confusion by referring to entry of a notice in registered land as a 'Land Registry notice'.[37]

4.1 NATURE AND EFFECT

The nature and effect of a notice is provided by s 32 of the LRA 2002.

Land Registration Act 2002, s 32

(1) A notice is an entry in the register in respect of the burden of an interest affecting a registered estate or charge.

(2) The entry of a notice is to be made in relation to the registered estate or charge affected by the interest concerned.

(3) The fact that an interest is the subject of a notice does not necessarily mean that the interest is valid, but does mean that the priority of the interest, if valid, is protected for the purposes of sections 29 and 30.

Two points are notable in relation to this provision. Firstly, the description of a notice as entry of a 'burden' encapsulates the idea that the entry informs C of a third party's property right, subject to which he or she will take title to the land. This has a direct impact on the types of right in respect of which it is appropriate to enter a notice. Entry of a notice is confined to property rights that it is anticipated will bind C.[38]

Secondly, entry of a notice does not guarantee the validity of the property right claimed. This is in contrast to the effect of registration of title. Registration of A as proprietor of a legal estate operates to vest A with legal title. Entry of a notice by B to the effect (for example) that B has a restrictive covenant over A's land does not vest B with a restrictive covenant; instead, it ensures only that *if B in fact has a restrictive covenant*, that restrictive covenant will be enforceable against C.

Cooke suggests terminology to reflect this difference. She describes the entry of a notice as 'recording' an interest, in contradistinction to 'registration' of title.[39]

[37] Sparkes, *A New Land Law* (2nd edn, 2003), [20.02].
[38] Law Commission Report No 271 (2001), [6.9].
[39] Cooke, *The New Law of Land Registration* (2003), pp 4 and 72.

4.2 SCOPE

As has been noted above, the entry of a notice is confined to property rights held by B that are intended to bind C. The LRA 2002 does not attempt to provide an exhaustive list of property interests in respect of which entry of a notice is possible; instead, the Act defines interests that cannot be protected by the entry of a notice.

The most important of these are contained in s 33(a)–(c) of the 2002 Act.[40]

Land Registration Act 2002, s 33

No notice may be entered in the register in respect of any of the following—

(a) an interest under—

(i) a trust of land, or

(ii) a settlement under the Settled Land Act 1925 (c. 18),

(b) a leasehold estate in land which—

(i) is granted for a term of years of three years or less from the date of the grant, and

(ii) is not required to be registered,

(c) a restrictive covenant made between a lessor and lessee, so far as relating to the demised premises,

The rationale for each of these exclusions is different. Entry of a notice in respect of a trust is prohibited, because beneficial interests under a trust are not intended to bind C. The overreaching mechanism (supported by entry of a restriction) should ensure that C takes free from beneficial interests. Preventing entry of a notice in relation to a trust is therefore consistent with the curtain principle. Short leases, excluded from entry as a notice, are enforceable against C as overriding interests.[41] Leasehold covenants are excluded, because their enforcement is subject to a separate statutory scheme.[42]

With these exclusions in mind, the category of interests in respect of which notice may be entered is broad. It is an appropriate means of protection for any property right that is not specifically excluded. This includes, for example, equitable mortgages, restrictive covenants, legal and equitable easements, legal leases of more than three years (to a maximum of seven years),[43] estate contracts, rights to occupy conferred by the Family Law Act 1996 (FLA 1996),[44] and an inchoate equity arising from a claim to proprietary estoppel.

4.3 APPLICATION FOR ENTRY OF A NOTICE

As with a restriction, an application for entry of a notice may be made by the registered proprietor or a person claiming an interest in the land.[45] The Registrar may also enter a

[40] An explanation of all property rights excluded from entry of a notice is provided in Law Commission Report No 271 (2001), [6.8]–[6.16].

[41] Land Registration Act 2002, Sch 3, para 1.

[42] Contained in the Landlord and Tenant (Covenants) Act 1995. This Act is discussed in Chapter 24.

[43] Leases of more than seven years are registrable estates.

[44] These rights of occupation are explained in Chapter 16.

[45] Land Registration Act 2002, s 34.

notice.[46] Notices are subdivided into 'agreed' and 'unilateral'. Each type of notice serves the same function: each ensures that B's property right binds C on a registrable disposition. A unilateral notice is entered where the registered proprietor has not given consent and the Registrar is not satisfied as to the validity of B's claim.[47] The Registrar will then notify the registered proprietor of the entry.[48] The registered proprietor may apply to have a unilateral notice cancelled.[49] The person whose interest is protected by the notice is informed of the application and given a limited timeframe in which to respond.[50] If no response is received, then the notice is cancelled.[51] If notice is received and agreement cannot be reached, the matter is referred to the adjudicator.[52] If the claim to a property right is made out, then an appropriate entry will be made.[53] A unilateral notice may also be cancelled by the beneficiary.[54]

The Registrar has the power to enter a notice in respect of a number of interests that would be enforceable against the transferee as overriding interests on first registration of title.[55] This power brings those property rights (against which C has no defence) onto the register. The Registrar has a duty to enter a notice on the estate that has the burden of an interest created by various dispositions.[56] For example, on the registration of a legal lease, the Registrar enters a notice of the lease on the freehold title out of which the lease has been created;[57] on the registration of a legal easement, the Registrar will enter a notice on the estate with the burden of the easement.[58]

5 OVERRIDING INTERESTS

As we have noted, overriding interests[59] constitutes a category of property rights that do not appear on the register, but which are immune from the defence of lack of registration. They have been described as the 'crack in the mirror' of title[60] and as making the idea of a perfect register a 'myth'.[61] The Law Commission's rationale for their continued existence is simple: the category acknowledges that there are circumstances in which it is unreasonable to expect B to register his or her property right to secure its enforcement.[62] The necessary breadth of the category in light of this rationale is more contentious. The LRA 2002 has reduced the number of overriding interests from the previous legislation. The policy adopted by the Act (as explained by the Law Commission) is that '*interests should only have overriding status where protection against buyers was needed, but where it was neither reasonable to expect nor sensible to require any entry on the register*'.[63]

[46] Ibid, s 37. [47] Ibid, s 34(3). [48] Ibid, s 35. [49] Ibid, s 36. [50] Ibid, 36(2).

[51] Ibid, s 36(3). Permitted time frames are given in the Land Registration Rules 2003 (SI 2003/1417), r 86(3).

[52] Land Registration Act 2002, s 73.

[53] Law Commission Report No 271 (2001), [6.31]. This may take the form, e.g. of the entry of an agreed notice or of a restriction.

[54] Land Registration Act 2002, s 35(3).

[55] Ibid, s 37. The interests in relation to which this power is exercisable are listed ibid, Sch 1.

[56] Ibid, s 38. [57] Ibid, s 27(2)(b). [58] Ibid, s 27(2)(d).

[59] Ibid, Sch 3, refers to this category as '*interests which override registered dispositions*'. The expression 'overriding interests' is not used in the Act, but is the terminology of the Land Registration Act 1925 and remains a useful form of reference.

[60] Hayton, *Registered Land* (3rd edn, 1981), p 76. [61] Cooke (2003), p 76.

[62] Law Commission Report No 254, *Land Registration for the Twenty-First Century: A Consultative Document* (1998), [4.4]. For further discussion of this rationale, see Chapter 15.

[63] Law Commission Report No 271 (2001), [8.6].

The 2002 Act provides two distinct lists of overriding interests: those overriding at first registration (listed in Sch 1); and those overriding on a disposition of a registered estate (listed in Sch 3). First registration is treated separately, because the intention is to reflect the state of the title at that time. Whether C is bound by any overriding interests will have been determined prior to registration.[64] Our discussion focuses on interests overriding on a disposition of a registered estate—that is, those transfers that are subject to the distinct priority rules contained in ss 29 and 30 of the LRA 2002.

The full list of these overriding interests is contained in Sch 3 of the 2002 Act. Our discussion is confined to those contained in paras 1–3 of the Schedule, short leases, property rights held by those in actual occupation, and legal easements and profits *à prendre*.

We begin with the most important and notorious[65] category.

5.1 PROPERTY RIGHTS HELD BY PERSONS IN OCCUPATION

Property rights held by persons in actual occupation are given the status of overriding interests in Sch 3, para 2. This category is different in its scope from all other categories. Those categories confer the status of overriding interest on a particular property right. This paragraph, instead, confers the status of overriding interest on any property right held by a person in occupation. Its focus is therefore on the factual position of the holder of the right, not the type of property right held.[66]

Land Registration Act 2002, Sch 3, para 2

An interest belonging at the time of the disposition to a person in actual occupation, so far as relating to land of which he is in actual occupation, except for—

(a) an interest under a settlement under the Settled Land Act 1925 (c. 18);

(b) an interest of a person of whom inquiry was made before the disposition and who failed to disclose the right when he could reasonably have been expected to do so;

(c) an interest—

(i) which belongs to a person whose occupation would not have been obvious on a reasonably careful inspection of the land at the time of the disposition, and

(ii) of which the person to whom the disposition is made does not have actual knowledge at that time;

(d) a leasehold estate in land granted to take effect in possession after the end of the period of three months beginning with the date of the grant and which has not taken effect in possession at the time of the disposition.

It should be noted that occupation is the trigger for protection, but not the subject of protection. The subject of protection is B's property rights. In most cases, B's property rights will have some connection to his or her occupation, but this not necessary.[67] Further, and

[64] For further discussion, see Law Commission Report No 271 (2001), [8.3]–[8.5]; Harpum. and Bignell, *Registered Land: The New Law* (2002), [2.47].

[65] Law Commission No 254 (1998), [5.56].

[66] Cooke (2003), p 79.

[67] See *Webb v Pollmount* [1966] Ch 584, in which a tenant's option to purchase the freehold reversion was protected as an overriding interest.

importantly, if B is in occupation, but is not entitled to any property rights (for example, where B is a licensee), then B has nothing capable of binding C under Sch 3, para 2. The time of disposition (completion of the sale) is key: only those property rights held by B at the time of the disposition are protected.[68] As B's occupation is the trigger for protection it is equally clear that B must be in occupation at the time of disposition.[69] We have noted, however, that under s 29, C has a defence at the time of *registration* against interests belonging to B at the time of *disposition* that are not otherwise protected. In *Thompson v Foy*, the juxtaposition between s 29 and Sch 3, para 2 led Lewison J to suggest that B must be in occupation at the time of registration as well as the time of disposition.[70] He suggested that if B must only be in occupation at the time of registration, then the opening phrase of Sch 3, para 2 should read '*An interest belonging to a person in actual occupation at the time of the disposition*'.[71] Lewison J's comments are obiter and, he acknowledged, against the prevailing commentary.[72] The matter must be considered to remain open until either it arises for decision or is rendered otiose when, as a result of e-conveyancing, disposition and registration occur simultaneously.

Protection is confined to the geographical extent of B's occupation. This reverses the decision under the Land Registration Act 1925 (LRA 1925) in *Ferrishurst Ltd v Wallcite Ltd*,[73] in which a property right (an option to purchase) extending over offices and a garage was protected even though B was in occupation of the offices only.

This category of overriding interest (and its predecessor in the 1925 Act) has provided a key role in enforcing beneficial interests against purchasers and, particularly, mortgagees, where the beneficial interests have not been overreached because there has been one trustee of the trust. In the typical case, this has arisen where one partner is the sole registered proprietor of the family home but his or her spouse, or cohabitee, has acquired a beneficial interest through a resulting or constructive trust (the operation of which in the context of the home is considered in Chapter 16). The immunity from the defence of lack of registration afforded to the property rights of occupiers is considered to be consistent with the policy underlying the recognition of these and other informal rights.[74] A person who has obtained their rights informally is unlikely to seek to protect those rights by entry on the register. The provision also accords with the expectations of those in occupation.[75]

Strand Securities Ltd v Caswell
[1965] Ch 958, CA

Lord Denning MR

At 979–80

Fundamentally its object is to protect a person in actual occupation of land from having his rights lost in the welter of registration. He can stay there and do nothing. Yet he will be protected. No one can buy the land over his head and thereby take away or diminish his rights. It

[68] Contrast the position under the Land Registration Act 1925. In *Abbey National Building Society v Cann* [1991] 1 AC 56, the House of Lords held that C's interests at the time of registration were protected as long as C was in occupation at the time of the disposition.

[69] In this respect, the LRA 2002 is consistent with the date of occupation required under the LRA 1925 identified in *Abbey National v Cann* ibid.

[70] [2010] 1 P&CR 16, [122]–[126]. [71] Ibid, [124]. [72] Ibid, [126].

[73] [1999] Ch 353. [74] Law Commission Report No 254 (1998), [5.61]. [75] Ibid, [5.61].

is up to every purchaser before he buys to make inquiry on the premises. If he fails to do so, it is at his own risk. He must take subject to whatever rights the occupier may have.

Prior to the LRA 2002, the property rights of occupiers were protected as overriding interests in s 70(1)(g) of the LRA 1925. Decisions made under that legislation remain of interest, although caution must be exercised, because the current provision has made substantive differences to the scope of the provision.

5.1.1 Actual occupation

The requirement of actual occupation was contained in s 70(1)(g) of the 1925 Act. The general principles developed in case law under that earlier provision remain authoritative.[76]—but this is subject to the qualification (considered below) that Sch 3, para 2, has introduced a defence based on reasonable inspection.

Hayton identified two approaches to the interpretation of actual occupation.

Hayton, *Registered Land* (3rd edn, 1981, p 87)

On the absolutist view [. . .] a person is absolutely bound by the rights of every person in actual occupation of the land [. . .] It matters not that it is unreasonably difficult to ascertain the actual occupier [. . .]; it matters not that it is unreasonable to expect someone to discover certain unusual rights of the occupier [. . .] Any traditional doctrine of notice is excluded from the self-contained paragraph.

The constitutionalist view of those accustomed to traditional conveyancing is that a person is only bound by the rights of every person in actual occupation [. . .] so far as such rights are binding according to traditional conveyancing principles (concerned with legal interests, equitable interests and the doctrine of notice, express, constructive and imputed) except as expressly limited or extended by statute.

In the following case, the House of Lords signalled the adoption of the absolutist approach.

Williams & Glyn's Bank v Boland
[1981] AC 487, HL

Facts: Mr Boland was the sole registered proprietor of the home in which he lived together with his wife. He used the home as security for a loan from the bank and subsequently defaulted on the payments. Mrs Boland, in fact, had a beneficial interest in the home as a result of contributions that she had made to its purchase. She argued that, because she was in occupation of the home, her interest bound the bank as an overriding interest. The first question that arose was whether she was in actual occupation. (The case was a consolidated action arising from claims by the bank against Mrs Boland and, in the other case, a Mrs Brown.)

[76] *Link Lending Ltd v Bustard* [2010] EWCA Civ 424, [27].

Lord Wilberforce

At 504–6

Were the wives here in "actual occupation"? These words are ordinary words of plain English, and should, in my opinion, be interpreted as such. [. . .]

Then, were the wives in actual occupation? I ask: why not? There was physical presence, with all the rights that occupiers have, including the right to exclude all others except those having similar rights. The house was a matrimonial home, intended to be occupied, and in fact occupied by both spouses, both of whom have an interest in it: it would require some special doctrine of law to avoid the result that each is in occupation. Three arguments were used for a contrary conclusion. First, it was said that if the vendor (I use this word to include a mortgagor) is in occupation, that is enough to prevent the application of the paragraph. This seems to be a proposition of general application, not limited to the case of husbands, and no doubt, if correct, would be very convenient for purchasers and intending mortgagees. But the presence of the vendor, with occupation, does not exclude the possibility of occupation of others. There are observations which suggest the contrary in the unregistered land case of *Caunce v. Caunce* [1969] 1 W.L.R. 286, but I agree with the disapproval of these, and with the assertion of the proposition I have just stated by Russell L.J. in *Hodgson v. Marks* [1971] Ch. 892, 934. Then it was suggested that the wife's occupation was nothing but the shadow of the husband's—a version I suppose of the doctrine of unity of husband and wife. This expression and the argument flowing from it was used by Templeman J. in *Bird v. Syme-Thomson* [1979] 1 W.L.R. 440, 444, a decision preceding and which he followed in the present case. The argument was also inherent in the judgment in *Caunce v. Caunce* [1969] 1 W.L.R. 286 which influenced the decisions of Templeman J. It somewhat faded from the arguments in the present case and appears to me to be heavily obsolete. The appellant's main and final position became in the end this: that, to come within the paragraph, the occupation in question must be apparently inconsistent with the title of the vendor. This, it was suggested, would exclude the wife of a husband-vendor because her apparent occupation would be satisfactorily accounted for by his. But, apart from the rewriting of the paragraph which this would involve, the suggestion is unacceptable. Consistency, or inconsistency, involves the absence, or presence, of an independent right to occupy, though I must observe that "inconsistency" in this context is an inappropriate word. But how can either quality be predicated of a wife, simply qua wife? A wife may, and everyone knows this, have rights of her own, particularly, many wives have a share in a matrimonial home. How can it be said that the presence of a wife in the house, as occupier, is consistent or inconsistent with the husband's rights until one knows what rights she has? and if she has rights, why, just because she is a wife (or in the converse case, just because an occupier is the husband), should these rights be denied protection under the paragraph? If one looks beyond the case or husband and wife, the difficulty of all these arguments stands out if one considers the case of a man living with a mistress, or of a man and a woman—or for that matter two persons of the same sex—living in a house in separate or partially shared rooms. Are these cases of apparently consistent occupation, so that the rights of the other person (other than the vendor) can be disregarded? The only solution which is consistent with the Act (section 70 (1) (g)) and with common sense is to read the paragraph for what it says. Occupation, existing as a fact, may protect rights if the person in occupation has rights. On this part of the case I have no difficulty in concluding that a spouse, living in a house, has an actual occupation capable of conferring protection, as an overriding interest, upon rights of that spouse.

The House of Lords held that Mrs Boland's beneficial interest was therefore enforceable against the bank as an overriding interest. The decision was controversial at the time, because

it brought to light the previously unanticipated vulnerability of purchasers and mortgagees to beneficial interests being enforceable as overriding interests.

The adoption of the absolutist approach to defining occupation was only one step in the decision that led to the enforcement of Mrs Boland's interest. While other aspects of the case have provided the focus of much subsequent discussion,[77] the approach to occupation was significant.

Tee, 'The Rights of Every Person in Actual Occupation: An Enquiry into Section 70(1)(g) of the Land Registration Act 1925' (1998) 57 CLJ 328, 345

The *Boland* judgments were uncompromising, and suggested that it would no longer be necessary or relevant to consider concepts of notice when assessing occupation [...]. However, such a radical departure from previously held assumptions is not generally successfully achieved by one case alone, even if that case emanates from the House of Lords.

Despite the decision in *Boland*, the constitutionalist view of occupation garnered support at Court of Appeal level.

Lloyds Bank plc v Rosset
[1989] Ch 350, CA

Facts: Mr Rosset was the sole registered proprietor of a semi-derelict house that he and his wife were renovating and into which they were to move as their home. Builders were undertaking work on the house and Mrs Rosset was there almost daily, assisting in the decorating. Mr Rosset mortgaged the house and defaulted on the repayments. Mrs Rosset argued that she had a beneficial interest in the house that was enforceable against the bank as an overriding interest. In the Court of Appeal, Mrs Rosset's claim to a beneficial interest under a constructive trust was successful. The Court therefore considered whether she was in actual occupation.

Purchas LJ

At 403–4

The application of the words "in actual occupation" in section 70(1)(g) is the aspect of this appeal that has given me the most concern. The provisions of the section clearly were intended to import into the law relating to registered land the equitable concept of constructive notice. Thus, a purchaser or a chargee acquiring the title to or an interest in the land where the vendor was not in actual possession in order to protect his interest had to make appropriate inquiries if he found someone else in occupation of the property. [...]

In order for the wife's interest in the property to qualify as an overriding interest under section 70(1)(g) two things must be established: (a) was she in actual occupation? and (b) would appropriate inquiries made by the bank have elicited the fact of her interest?

[77] In particular, the relationship between overreaching and overriding interests (discussed in Chapter 19), and the treatment of a beneficial interest under a trust for sale as an interest in land, contrary to the doctrine of conversion (discussed in Chapter 17, section 5.3).

The majority of the Court of Appeal held that Mrs Rosset was in occupation and had a beneficial interest enforceable against the bank. The case went on appeal to the House of Lords, where it was held that Mrs Rosset did not, in fact, have a beneficial interest.[78] She therefore did not have any property right capable of protection as an overriding interest and the issue of occupation did not arise for decision.

The difference between the absolutist and constitutionalist approach is of practical significance in marginal cases of occupation. The danger of the *Boland* approach is that it appeared to leave purchasers and mortgagees vulnerable to beneficial interests claimed by those whose occupation was not discoverable.

Sparkes suggested that the approaches to occupation in *Boland* and *Rosset* may have separate fields of application.

Sparkes, 'The Discoverability of Occupiers of Registered Land' [1989] Conv 342, 346–7

It remains to be seen how this notice-orientated test to the finding of actual occupation [in *Rosset*] is to be reconciled with the plain English test proposed by Lord Wilberforce in Boland. Lord Wilberforce was concerned with a person who clearly was in physical occupation albeit sharing with the mortgagor, and not a person whose occupation was marginal. It is tentatively submitted that his dictum should not be viewed as having binding force in these different circumstances.

The classic illustration of marginal occupation is undiscoverable occupation. The denial by Lord Wilberforce in *Williams & Glyn's Bank Ltd. v. Boland* of a link between overriding interests and notice occurred in a case in which occupation was obvious. It was left to academics to formulate hypothetical cases in which the issue would precisely arise for decision. Situations which five years ago had seemed fanciful products of the need for academic novelty have now emerged from the examination room to become the concern of practising conveyancers and the courts. A choice between absolutism or constitutionalism is likely to form the ratio of a decision very shortly, probably in relation to undiscoverable occupiers.

No such decision was forthcoming at the time of the LRA 2002. That Act has introduced, in Sch 3, para 2(c)(i) (extracted above), a qualification to the scope of protection afforded to occupiers based on reasonable inspection.

5.1.2 The reasonable inspection qualification

Schedule 3, para 2(c)(i), of the LRA 2002 protects C against overriding interests claimed by B, by virtue of actual occupation, where two conditions are met: firstly, that B's occupation is not obvious on a reasonably careful inspection; secondly, that C did not actually know of the existence of B's property right at the time of the disposition.

This provision steers a careful course between *Boland* and *Rosset*, and between the absolutist and constitutionalist views. The absolutist view is rejected, in so far as the rights of those in occupation do not necessarily bind a purchaser or mortgagee. But in mapping the scope of the exception, the Law Commission disavows the relevance of concepts derived from the doctrine of notice.

[78] This aspect of the case is considered in Chapter 16.

Law Commission Report No 254, *Land Registration for the Twenty-First Century: A Consultative Document* (1998, [5.71]–[5.72])

> [. . .] Any requirement that [occupation should have to be apparent] it was said, would introduce into land registration the doctrine of notice. [. . .] While we entirely agree that the doctrine of notice should not be introduced into registered land, we do not agree that limiting actual occupation to cases where it is apparent would have that effect.
>
> [. . .] The test is whether the right is apparent on a reasonable inspection of the land, not whether the right would have been discovered if the purchaser had made all the enquiries which ought reasonably to have been made.

While it is no doubt anticipated that an actual inspection will take place, in *Thompson v Foy* Lewison J noted that the paragraph '*does not require an actual inspection*'.[79] Where C conducts a reasonable inspection and this does not reveal B's occupation, it may be expected that the inspection will be considered conclusive in terms of the operation of the qualification in Sch 3, para 2(c)(i) on B's ability to claim an overriding interest. Where C does not inspect, or C's inspection falls short of being reasonable, then the court may address the qualification by asking a hypothetical question, '*whether [B's] occupation would have been obvious on a reasonably careful inspection*'.[80] If not, then C's failure to inspect will not deprive C of invoking the qualification in Sch 3, para 2(c)(i). Jackson argues that the reasonable inspection qualification is misconceived.

Jackson, 'Title by Registration and Concealed Overriding Interests: The Cause and Effect of Antipathy to Documentary Proof' (2003) 119 LQR 660, 665–7

> Contrary to the reasoning of the Law Commission, it is submitted that a reasonable inspection defence will not limit the impact of occupational overriding interests upon the purchaser's registered estate. There are two arguments that support this view. First, there are other important observations that may be drawn from the differences in method of proof of title. A reasonable inspection requirement has no normative content. [. . .] the resurrection of the reasonable inspection defence provides no meaningful guidance to purchasers as to the fact or extent of the inspection required of them. In effect, such a defence will not preclude the concealed overriding interest. Although the Law Commission indicates the type of conduct that may amount to "actual occupation", in order to discover an adverse occupational right, a purchaser would require a type of knowledge that was neither based in law nor in fact. The normative guidance of the 2002 Act emphasises the conclusiveness of the register and online inspections. Thus, a purchaser may end up by being bound by an interest that was objectively apparent to the legally minded officious bystander but which was undiscoverable to the purchaser if only because he did not know what he was looking for.
>
> Secondly, there is an implied premise behind the methodology employed by the 2002 Act to reduce the circumstances in which occupational interests will take effect as overriding the estate of a registered proprietor. This premise is the connection of ideas that a purchaser, under s.70(1)(g), risked taking his title subject to a concealed overriding interest because there was no reasonable inspection defence. This is a logically flawed connection. The Law Commission assumes that the absence of an apparency requirement within

[79] *Thompson v Foy* [2010] 1 P&CR 16, [132].

[80] Ibid, *per* Lewison J.

s.70(1) (g) resulted in the extension of overriding protection to the interests of undiscoverable occupants. It is undeniable that some constructions of the paragraph impose onerous duties of inspection on purchasers. However, these duties resulted from wide interpretations of the type of occupation that could be considered to be apparent and were not the consequence of the absence of such a requirement. This mistaken orthodoxy exists in both registered and unregistered conveyancing.

The underlying issue in debate as to the correct scope of protection afforded to occupiers lies in the tension between the desire for a conclusive register and the acknowledgment that there are circumstances in which a requirement of registration would be unreasonable. As Jackson explains, the reasonable inspection qualification does not make the register any more conclusive.[81]

5.1.3 Assessing occupation

In *Link Lending v Bustard*, Mummery LJ noted, '*[t]he trend of the cases shows that the courts are reluctant to lay down, or even suggest, a single test for determining whether a person is in actual occupation*'.[82] In assessing whether B is in actual occupation, the courts have taken into account not only physical evidence of B's occupation but also—and increasingly—B's intentions; particularly where the physical evidence is equivocal. Taking into account B's intent as well as their physical acts has resonance with how 'possession' is understood—for example, in a claim to adverse possession discussed in Chapter 8. The analogy is not, however, a perfect one: occupation and possession are not synonyms. Notwithstanding, reference to B's intent is problematic in this context as it is not something that C can discover through an inspection of the land.

In *Abbey National Building Society v Cann*, Lord Oliver considered that occupation requires '*some degree of permanence and continuity which would rule out mere fleeting presence*'.[83] Hence, on the facts of that case preparatory acts of moving furniture into a home minutes before completion of the sale took place were not considered to establish occupation at the required time of disposition. In *Lloyds Bank v Rosset*,[84] the Court of Appeal acknowledged that occupation should be assessed by reference to the state of the property. Mrs Rosset's daily visits were sufficient to show occupation of a semi-derelict house. *Rosset* was applied in *Thomas v Clydesdale Bank* where, on a preliminary application, the court considered there was an arguable case that Ms Thomas' occupation was established by her almost daily presence while the property was being renovated. There, Ramsey J also noted '*the intention and wishes*' of Ms Thomas and her partner that they would both reside in the property once the renovations were complete.[85]

The need for permanence and continuity does not create difficulties where B is temporarily absent. In *Chhokar v Chhokar*,[86] a wife in hospital to have a baby was considered to remain in actual occupation of the home despite her physical absence. Her possessions evidenced her occupation. However, longer absences present a greater challenge for demonstrating that occupation has been maintained. In *Stockholm Finance Ltd v Garden Holdings Inc* the court was asked whether a Saudi princess had remained in actual occupation of her London

[81] Jackson, 'Title by Registration and Concealed Overriding Interests: The Cause and Effect of Antipathy to Documentary Proof' (2003) 119 LQR 660, 675.
[82] [2010] EWCA Civ 424, [27].
[83] [1991] 1 AC 56, 93.
[84] [1989] Ch 350, 377.
[85] [2010] EWHC 2755 QB, [32].
[86] [1984] FLR 313.

home, in which she had not 'set foot' for a year. Robert Walker J (as he then was) answered in the negative:[87]

> Whether a person's intermittent presence at a house which is fully furnished, and ready for almost immediate use, should be seen as continuous occupation marked (but not interrupted) by occasional absences, or whether it should be seen as a pattern of alternating periods of presence and absence, is a matter of perception which defies deep analysis. Not only the length of any absence, but also the reason for it, may be material (a holiday or a business trip may be easier to reconcile with continuing and unbroken occupation than a move to a second home, even though the duration is the same in each case). But there must come a point at which a person's absence from his house is so prolonged that the notion of his continuing to be in actual occupation of it becomes insupportable; and in my judgment that point must have been reached in this case, long before Mr Dawkins visited the house on 4 January 1990 (and still more so, long before 20 February 1990). By then Princess Madawi had not set foot in the property for over a year: she had for over a year been living with her mother in the Islamic household at Riyadh.

A different conclusion was reached in the following case which also involved a long absence.

Link Lending v Bustard
[2010] EWCA Civ 423

Facts: Ms Bustard had been the sole registered proprietor of her home. She suffered from severe mental illness which was compounded by alcohol abuse. She was swindled into transferring the property to Mrs Hussein who then used the property as security for a loan from Link Lending. Ms Bustard had an equity to set aside the transaction against Mrs Hussein based on her lack of capacity. The question arose whether Ms Bustard was in actual occupation of the property so that the equity was also binding against Link Lending. At the date of the disposition, Ms Bustard had been absent from the property for over a year having been sectioned under the Mental Health Act and admitted to hospital. Her furniture and personal possessions remained at the property and she made brief but regular supervised visits. She had continued to discharge the outgoings and always intended to return home. The judge at first instance had held that Ms Bustard had remained in actual occupation; a finding from which Link Lending appealed.

Mummery LJ

At [27] and [30]

Whether Ms Bustard was in "actual occupation" of the Property at the relevant date was an issue on which the trial judge had to make an evaluation based on his findings of primary fact. As for the law he considered the relevant authorities on the concept of a "person in actual occupation" of land in the earlier Land Registration legislation and now found in the 2002 Act. The construction of the earlier equivalent provisions by the House of Lords is binding on this court. The trend of the cases shows that the courts are reluctant to lay down, or even suggest, a single legal test for determining whether a person is in actual occupation.

[87] [1995] NPC 162.

The decisions on statutory construction identify the factors that have to be weighed by the judge on this issue. The degree of permanence and continuity of presence of the person concerned, the intentions and wishes of that person, the length of absence from the property and the reason for it and the nature of the property and personal circumstances of the person are among the relevant factors.

The assistance given in the authorities is in clarifying the legal principles, exploring the range of decisions available to the court and identifying the factors to which weight should be given. It is clear from the citations that Ms Bustard's is not a case of a "mere fleeting presence", or a case, like Cann, of acts preparatory to the assumption of actual occupation. It is also distinguishable from Stockholm, which involved the domestic living arrangements of a Saudi princess living with her mother in Saudi Arabia and owning a house in London, where there was furniture and clothing and caretaking arrangements in place, but where she had not lived for more than a year. In this case the new and special feature is in the psychiatric problems of the person claiming actual occupation. The judge was, in my view, justified in ruling, at the conclusion of a careful and detailed judgment, that Ms Bustard was a person in actual occupation of the Property. His conclusion was supported by evidence of a sufficient degree of continuity and permanence of occupation, of involuntary residence elsewhere, which was satisfactorily explained by objective reasons, and of a persistent intention to return home when possible, as manifested by her regular visits to the Property.

In the following extract, Bogusz considers the approach of the courts to assessing actual occupation as well as other aspects of Sch 3, para 2. She puts the approach in the context of the balancing act the courts must undertake in priority disputes between purchasers and those with pre-existing property rights.

Bogusz 'Defining the Scope of Actual Occupation under the Land Registration Act 2002: Some Recent Judicial Clarification' [2011] Conv 268, pp.274–5

Frustrating as it may seem for lawyers, the lack of a "single legal test" provides for a degree of much needed flexibility and latitude for the judicial interpretation of not only "actual occupation" but also of reasonable disclosure and a "reasonably careful inspection".

By their nature these terms provide the judiciary with the necessary tools to consider the relevant facts and circumstances to determine an outcome of a case. This leads to a number of consequences. First, the judicial use of a reflexive factual and contextual analysis serves as a potential antidote to alleviate the harshness of the rule where the actual occupier's undiscoverable rights are not protected. Secondly, this flexibility acts as a means of redressing the policy bias towards the protection of disponee from undiscoverable rights.

The policy bias which is clearly evident in the Law Commission's Reports Nos 271 and 254, is partly a symptom of what Dixon suggests is:

> "[. . .] something in the psyche of property lawyers that rebels against a purchaser being bound by rights whose existence they could not possibly discover".

This is possibly due to a perception that out of all the stakeholders the disponee is the most vulnerable and has more to lose in the transaction. That is not say the actual occupier is not vulnerable at all, there are a plethora of cases which would illustrate their vulnerability, however, their protection under LRA 2002 is based upon automatic protection unless the exceptions apply, thereby potentially losing their protected status. In this context of potential winners and losers, the judiciary are tasked with balancing the competing interests. The

policy bias embedded in the Law Commission's reports can be justified on the basis that if the aim of making electronic conveyancing is to become a reality "so that it is possible to investigate title to land online, with the absolute minimum of additional enquiries and inspections", this may only be feasible in practice if there are limitations placed on the creation of overriding interests. This is not a perfect solution, but the policy underpinning the statute indicates an attempt to strike an appropriate balance between the competing interests of multiple stakeholders in the transaction.

Thirdly, the degree of flexibility afforded to the judiciary in their interpretation of actual occupation enables the court to endeavour to find a solution which reflects more accurately the state of affairs in the case. In this regard, this is evident from the facts of *Link Lending* where the case involved a vulnerable person who had an undiscovered right. The right was undiscovered as a consequence of an imprecise form of "inspection" used by the disponee and not because the right was deliberately hidden.

5.1.4 Occupation by proxy

In *Lloyds Bank plc v Rosset*,[88] the Court of Appeal accepted that builders were in actual occupation on behalf of Mrs Rosset. Nicholls LJ suggested that whether occupation by an employee or agent sufficed depended on the '*function which the employee or agent is discharging*'. The difficulty with this test is that it shifts focus away from the nature of the occupation: B's resident housekeeper occupies on B's behalf, while B's licensee does not,[89] although the evidence of occupation in each case may be indistinguishable. In *Lloyd v Dugdale*,[90] Mr Dugdale used business premises in his capacity as managing director of a company in which he was also the majority shareholder. He was considered to be in occupation solely on behalf of the company and therefore a property right that he acquired in his personal capacity was not binding as an overriding interest when the premises were sold. But that case raises a separate issue, because courts do not generally look behind the corporate veil

It is unclear what impact the reasonable inspection qualification may have on cases involving occupation by proxy. Is it necessary to consider, in each case, whether occupation by B is reasonably obvious on an inspection of the land that reveals the physical presence of an agent or employee, or is it sufficient that the presence of the agent or employee is reasonably obvious? The former interpretation may produce a result analogous to that suggested by *Rosset*, while the latter has the advantage of focusing solely on the nature of the occupation. *Thomas v Clydesdale Bank plc* may suggest that the latter is sufficient,[91] but the case concerned a preliminary application and the specific interpretation of the reasonable inspection qualification in the context of proxies is not considered.

5.1.5 Occupation by children

In *Boland*, in the passage of his judgment extracted above, Lord Wilberforce rejected the shadow doctrine as a means of denying Mrs Boland's occupation. The doctrine has its origins in unregistered land, but had been applied in registered land to deny a claim to an overriding interest by a spouse. Its effect can be shortly stated.

[88] [1989] Ch 350, 377.

[89] Compare the examples discussed by Nicholls LJ in *Lloyds Bank plc v Rosset* [1989] Ch 350, 377, and *Strand Securities v Caswell* [1965] Ch 958.

[90] [2002] 2 P & CR 13. See esp [42]–[49].

[91] *Thomas v Clydesdale Bank plc* [2010] NPC 107, [38].

Bird v Syme-Thomson
[1979] 1 WLR 440, HC

Templeman J

At 444

In my judgment, when a mortgagor is in actual occupation of the matrimonial home, it cannot be said that his wife also is in actual occupation. I hasten to add that, equally, if the mortgagor is the wife and the house is occupied as the matrimonial home, then it is the wife who is in actual occupation and not the husband.

A spouse in occupation with a sole legal owner was therefore not considered to occupy in his or her own right, but merely as the shadow of the owner.

Despite its rejection in *Boland* in relation to a spouse, the shadow doctrine was applied in relation to minor children in *Hypo Mortgage Services Ltd v Robinson*.[92] Nourse LJ considered it 'axiomatic' that such children are not in actual occupation for the purposes of statutory provisions governing overriding interests, but are present '*as shadows of occupation of their parent*'.[93] Nourse LJ justified the application of the doctrine by difficulties of making inquiries of children. It has been argued that other means of circumventing this difficulty are available.[94] Ultimately, however, the likelihood of children having property rights is arguably too slim to justify changes in conveyancing practice.

5.1.6 The relevance of inquiry

Non-disclosure by B of his or her property rights prevents reliance on Sch 3, para 2 of the LRA 2002. The need for inquiries to be made directly of B replicates the position under the LRA 1925.[95] Hence, the provision has no application where inquiries have not in fact been made of B, regardless of whether such inquiries would have revealed the existence of B's interest.[96] But the 2002 Act introduced a new limitation to the exception: where inquiries are made, B is only denied protection if disclosure could reasonably have been expected. The practical impact of this limitation is yet to become apparent. As we have noted, protecting the rights of occupiers as overriding interests is considered consistent with the policy underlying the recognition of informal rights. These rights are particularly significant in the context of the home, and often arise on the basis of the parties' intention and conduct during the course of their relationship. B may be unaware of the existence of a claim until the relationship is subjected to legal analysis at a time of crisis—including a priority dispute with C. If B does not know that he or she has a property right, then will non-disclosure prevent reliance on Sch 3, para 2?

The answer is not apparent on the face of the provision. On the one hand, by making inquiries, C has done all that the provision requires and B should be estopped[97] from asserting an undisclosed claim; on the other hand, it is inherent in the provision that making inquiries will not necessarily protect C against B's property rights.

92 [1997] 2 FLR 71. 93 Ibid, 72.

94 See Cooke, 'Children and Real Property: Trusts, Interests and Considerations' [1998] Fam Law 349. She suggests that inquiries could be made of a person with parental responsibility.

95 *Hodgson v Marks* [1971] Ch 892. 96 *Thompson v Foy* [2010] 1 P&CR 16, [132].

97 This is the basis on which then operation of the provision is explained in Law Commission Report No 271 (2001), [8.60].

Dixon suggests that, in some circumstances, ignorance may excuse non-disclosure, but acknowledges that the criterion is a source of uncertainty.

Dixon, 'The Reform of Property Law and the Land Registration Act 2002: A Risk Assessment' [2003] Conv 136, 146–7

> Thus, the right holder loses overriding status (after failure to disclose) only if disclosure could reasonably be expected to be made. Such disclosure might not be reasonably expected where, say, the right holder did not know, and could not reasonably be expected to know, that they actually had a right (e.g. in cases of uncrystallised estoppel). While this is a welcome reform, there are uncertainties. For example, is it "reasonable" to expect disclosure when the right holder knows that the consequences of disclosure will be the loss of the family home because the purchaser will take steps to acquire the property free from the right? Presumably it is, because otherwise it will always be permitted to withhold disclosure if that would result in the loss of a property right and that would defeat the point of the provision. However, the circumstances in which a person may be asked about their rights are many and varied, and the introduction of a reasonableness criterion must introduce uncertainty that can only be settled by litigation.

There is some cause to question whether the provision was actually intended by the Law Commission. The Law Commission did not describe the effect of inquiries as limited to B's reasonable disclosure, but instead referred to limiting C's obligation to that of making reasonable inquiries.[98] The Law Commission may have intended the latter,[99] but the former has been enacted. A limitation based on reasonable disclosure by B is substantively different from one based on reasonable inquiries by C.

5.2 SHORT LEASES

With some exceptions,[100] legal leases created for seven years or less are overriding interests within Sch 3, para 1, of the LRA 2002. This provision therefore covers legal leases that fall below the duration at which a lease becomes a registered estate. The combined effect of this paragraph and s 33 of the Act (concerned with entry of a notice) is to give a dual means of protection to legal leases of more than three years, but not greater than seven years. These leases may be protected by entry of a notice and are overriding interests in the absence of such an entry. Legal leases of three years' duration or less are protected only as overriding interests. Equitable leases fall outside the scope of Sch 3, para 1 (which is confined to 'leases *granted*'). An equitable lease that is not protected by entry of notice may be an overriding interest under Sch 3, para 2, where the tenant is in actual occupation.

[98] Law Commission No 254 (1998), [5.69]; Law Commission No 271 (2001), [8.60]. The latter is equivocal. The paragraph is headed '*Rights not disclosed on reasonable inquiry*', although the text refers to a failure to disclose a right '*when* [C] *could reasonably have been expected to do so*'. The wording of the provision is unchanged to that contained in the Bill annexed to the report.

[99] The Law Commission did not intend to change the law, but to reflect an assumption underlying the requirement of inquiries in the Land Registration Act 1925: Law Commission No 254 (1998), [5.69]. A requirement of reasonable inquiries is consistent with this intent.

[100] Listed in the 2002 Act, Sch 3, para 1(a) and (b).

5.3 EASEMENTS AND PROFITS *À PRENDRE*

Legal easements and profits are overriding interests under Sch 3, para 3, of the LRA 2002.

Land Registration Act 2002, Sch 3, para 3

(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 (c. 64), 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.

The scope of this paragraph needs to be understood in light of the general treatment of easements within the 2002 Act. The express grant of a legal easement is a registered disposition and such easements necessarily appear on the register.[101] Paragraph 3 is therefore directed at legal easements that arise from an implied grant.[102] The limitation of the provision to legal easements is significant: the equivalent provision in the LRA 1925 had controversially been interpreted as including some equitable easements.[103] Equitable easements will now bind B only if protected by entry on the register.

The scope of the paragraph appears abstruse, but, unpackaged, it provides as follows: a legal easement arising from an implied grant is overriding if C has actual knowledge of its existence, or it is obvious on a reasonably careful inspection of the land, or it has been exercised in the year preceding the disposition. The latter is designed to ensure the protection of practically important, but 'invisible', easements, including drainage in an underground pipe.[104]

The provision has been tightly drawn and is intended to dovetail with inquiries made by C. The underlying goal is that C should become aware of binding easements prior to completion of the disposition.

Law Commission Report No 271, *Land Registration for the Twenty-First Century: A Conveyancing Revolution* (2001, [8.71])

What we wish to encourage is the creation of a straightforward system of standard inquiries as to easements and profits which will prompt sellers to disclose what they can reasonably be expected to know. This in turn will ensure that such rights are then registered. We

[101] Ibid, s 27(2)(e).

[102] The rules governing the implied grant of easements are considered in Chapter 25.

[103] Land Registration Act 1925, s 70(1)(a), as interpreted in *Celsteel Ltd v Alton House Holdings Ltd* [1985] 1 WLR 204.

[104] Law Commission No 271 (2001), [8.70].

anticipate that, prior to contract, a seller would be expected to disclose any unregistered easements or profits affecting his or her property of which he or she was aware, at least to the extent that they were not obvious on a reasonably careful inspection of the land. In particular, he or she would be asked to disclose any easements or profits that had been exercised in the year preceding the inquiry. The result of such inquiries is likely to be that the buyer will have actual knowledge of any unregistered legal easements and profits long before the transaction is completed.

6 INVESTIGATION OF REGISTERED TITLE AND SEARCH OF THE REGISTER

The investigation of title to registered land, like its unregistered counterpart, requires both a search of the register and a physical inspection of the land. Physical inspection is directed at discovering the existence of overriding interests. A search of the register will reveal entries both of restrictions, informing the purchaser of limitations on A's owner's powers, which must be complied with to benefit from ss 29 and 30 of the LRA 2002, and of notices, informing B of pre-existing property rights that will be enforceable against him or her.

The defence against the enforcement of B's pre-existing rights (other than those entered on the register or binding as overriding interests) provided by ss 29 and 30 of the 2002 Act applies at the time of registration against interests held by B at the time of the disposition. C will search the register between contract and the completion of the disposition. There is a risk of property rights arising after the search has been made and before the disposition is completed. To offset this risk, provision is made for C to obtain an official search with priority protection. This prevents new entries being made on the register for thirty working days.[105]

7 REGISTRATION, FRAUD, AND LIABILITY

Sections 29 and 30 of the LRA 2002 place in a privileged position, as far as priorities are concerned, registrable dispositions of a registered estate made for valuable consideration. C is provided with a defence against the enforcement of B's pre-existing property rights that are not entered on the register or protected as overriding interests. Should C be able to utilize this protection if the transaction is tainted by fraud or other wrongdoing? Where fraud affects the validity of the transaction between A and C, the issue is one of indefeasibility of title. The rules governing the circumstances in which an alteration of the register is possible have been discussed in Chapter 7. In this chapter, we are concerned with fraud or other wrongdoing that does not affect the transaction between A and C, but which, if C can invoke ss 29 or 30, would confer on him or her a defence against a pre-existing property right held by B.[106] Few would argue that C's conduct should be left unchecked in such circumstances, but the appropriate response is more contentious.

[105] Land Registration Act 2002, ss 70 and 72, and Land Registration Rules 2003 (SI 2003/1417), rr 147–54.

[106] The distinction between these two issues is highlighted by Cooke and O'Connor, 'Purchaser Liability to Third Parties in the English Land Registration System: A Comparative Perspective' (2004) 120 LQR 640, 640–3.

Torrens systems of registration of title have a two-pronged response to transactions involving fraud and wrongdoing that would enable C to invoke a defence against pre-existing property rights.[107] Where the transaction is considered to constitute fraud (a term defined specifically for this purpose), C is denied statutory protection and is bound by B's pre-existing property rights. Where wrongdoing falls short of fraud, *in personam* liability is imposed. A new direct right is created between C and B, which may either involve C being held personally liable to B, or the creation of property rights in favour of B. Hence, the label *in personam* is misleading in so far as it appears to be a synonym for personal liability: in fact, the liability may be either personal or proprietary. The difference between these solutions is illustrated in Figure 9.

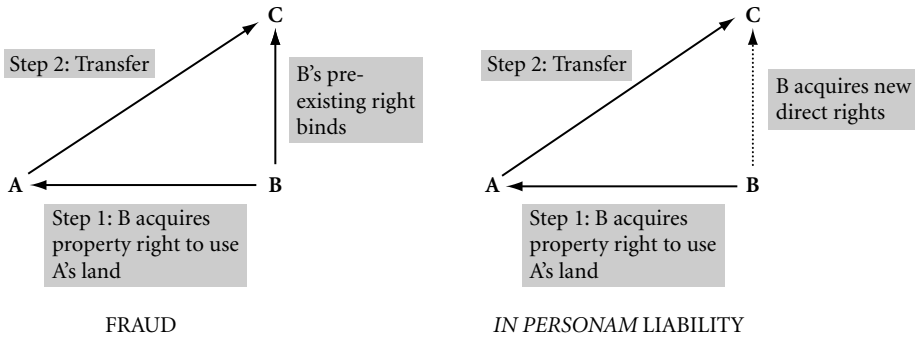

Figure 9 Torrens fraud and *in personam* liability

While English law has eschewed the explicit adoption of the same scheme of liability, the same choices arise: C can either be held bound by B's pre-existing property right, or a new direct right may be imposed. Where the latter is the case, that right may be personal or proprietary. Under the LRA 1925, a controversial decision in *Peffer v Rigg*[108] adopted the former solution. As we will see, however, the court's reasoning was erroneous and would not be possible under the LRA 2002. Instead, focus has been shifted to the imposition of new direct rights under the general law.

7.1 THE LAND REGISTRATION ACT 1925 AND THE DECISION IN *PEFFER V RIGG*

To understand the decision, it is necessary to explain briefly some of the provisions of the LRA 1925. Section 20 of the 1925 Act performed the function now found in s 29 of the LRA 2002. Section 59 of the 1925 Act, with exceptions, provided that purchasers were not concerned with matters not entered on the register, '*whether he has or has not notice thereof, express, implied or constructive*'. Section 74 of the 1925 Act provided that parties dealing with a registered estate were not '*affected with notice of a trust express, implied or*

[107] This summary of the Torrens approach is based on the account provided ibid.
[108] [1977] 1 WLR 285.

constructive'. Section 3 of the LRA 1925 defined a purchaser as '*a purchaser in good faith for valuable consideration*'.

Peffer v Rigg
[1977] 1 WLR 285, HC

Facts: Mr Peffer and Mr Rigg had married two sisters, and therefore had a common relative in their mother-in-law. Mr Peffer and Mr Rigg jointly bought a house that was a home for their mother-in-law. The house was purchased in Mr Rigg's sole name, although he held on trust for himself and Mr Peffer. Following the breakdown of the Rigg's marriage, Mr Rigg transferred the house to his wife for £1 as part of their divorce settlement. Mrs Rigg knew of Mr Peffer's beneficial interest, but argued notwithstanding that it was unenforceable against her under the terms of the Act.

Graham J

At 293–4

This argument would be convincing if it were not for my finding that the second defendant at the time knew perfectly well that the first defendant could not transfer to her more than a half share of the property. It is this knowledge which seems to me to cause great difficulty to her and prevents her argument succeeding for a number of different reasons put forward by Mr. Poulton for the plaintiff at the second hearing. [. . .]

By definition, however (see section 3 (xxi), "purchaser" means a purchaser in good faith for valuable consideration. It seems clear therefore that as a matter of construction a purchaser who is not in fact one "in good faith" will be concerned with matters not protected by a caution or other entry on the register, at any rate, as I hold, if he has notice thereof. If these sections 20 and 59 are read together in the context of the Act they can be reconciled by holding that if the "transferee" spoken of in section 20 is in fact a "purchaser" he will only be protected if he has given valuable consideration and is in good faith. He cannot in my judgment be in good faith if he has in fact notice of something which affects his title as in the present case. Of course if he and, a fortiori, if a purchaser from him has given valuable consideration and in fact has no notice he is under no obligation to go behind the register, and will in such a case be fully protected. This view of the matter seems to me to enable the two sections to be construed consistently together without producing the unreasonable result of permitting a transferee purchaser to take advantage of the Act, and divest himself of knowledge of defects in his own title, and secure to himself a flawless title which he ought not in justice to be allowed to obtain.

The principal difficulty with this judgment is that, in defining Mrs Rigg's actual knowledge as constituting bad faith, the decision apparently ignores provisions in the LRA 1925 that provided for notice to be irrelevant. Essential to the decision was the existence of a definition of purchaser as acting 'in good faith'.

In the subsequent unregistered land decision in *Midland Bank Trust Co Ltd v Green*[109] (which is discussed fully in Chapter 13), a purchaser with actual notice of an unregistered land charge was held to be able to rely on a defence provided in the Land Charges Act 1925

[109] [1981] AC 513.

(LCA 1925), now the Land Charges Act 1972 (LCA 1972) against the enforcement of unregistered land charges. In holding that the purchaser's notice was irrelevant, the House of Lords relied on the absence of a requirement of good faith purchase in the LCA 1925.

Cooke and O'Connor suggest that, while the basis of the decision in *Peffer v Rigg* is wrong, the right result was achieved.

Cooke and O'Connor, 'Purchaser Liability to Third Parties in the English Land Registration System: A Comparative Perspective' (2004) 120 LQR 640, 653–4

The reasoning was wrong, while the result was right. The ratio, revealed in the words quoted above, was: this purchaser has notice, therefore she is not in good faith. This nullifies one of the main benefits of a title registration system, taking away from a purchaser with notice all the protection of a registered disposition and moving back to the position that obtained under the early English deeds registration statutes. Yet simply to condemn the decision as incorrect is unhelpful, for clearly this is not the sort of arms' length purchaser for whom the protection of the old s.20 was intended. It is unsatisfactory for Mrs Rigg to take free of Mr Peffer's interest.

There are two alternative bases on which the same outcome could have been achieved. Firstly, Graham J held that Mrs Rigg was not a purchaser for valuable consideration.[110] This, in itself, provided a means for precluding her from relying on the statutory protection.

Secondly, as we will see, Graham J considered, obiter, that a new direct right arose on the transfer to Mrs Rigg. Hence if she had not been bound by Mr Rigg's pre-existing property right, an alternative route to liability was available.

The enforcement of C's pre-existing property rights where C has actual notice has attracted some academic support as introducing an ethical element into registration.[111] But the Law Commission considered it to run counter to the policy of registration of title and doubted the weight of ethical concerns.[112]

Law Commission Report No 254, *Land Registration for the Twenty-First Century: A Consultative Document* (1998, [3.46])

[. . .] We have concluded—as the Law Commission has done on two previous occasions—that there should in general be no place for concepts of knowledge or notice in registered land. We have reached this conclusion for the following reasons—

1. It was intended that the system of registration under the Land Registration Act 1925 should displace the doctrine of notice.
2. There is little evidence of which we are aware that the absence of the doctrine of notice in dealings with registered land has been a cause of injustice in the seventy-two years in which the present system has been operative.

110 [1977] 1 WLR 285, 293.

111 Battersby, 'Informal Transactions in Land, Estoppel and Registration' (1995) 58 MLR 637, 655–6. The issue is discussed in Law Commission No 254 (1998), [3.44]–[3.46].

112 The recommendation endorsed in the paragraph extracted here was adopted in Law Commission No 271 (2001), [5.16].

3. The ethical argument is weaker than at first sight it appears to be if the issue is considered in relation to those principles which should in our view, guide the development of land registration. Registration should be regarded as an integral part of the process of creating or transferring interests in registered land, closely akin to the formal requirement of using a deed (or in some cases, writing) in unregistered conveyancing. Just as a deed is required to convey or create a legal estate or interest in unregistered conveyancing, a disposition of registered land must be completed by registration if it is to confer a legal estate or interest. When electronic registration is introduced, it seems probable that many rights will be incapable of being created *except* by registering them.
4. In practice, if it were provided that unregistered rights in or over registered land were binding because a purchaser had *actual* knowledge of them, it would be very difficult to prevent the introduction by judicial interpretation of doctrines of *constructive* notice. If actual knowledge sufficed, the question would inevitably be asked: why not wilful blindness as well? In reality the boundary between actual knowledge and constructive notice is unclear and is, in our view, incapable of precise definition.
5. The mere fact that a purchaser *could* be bound if he or she had actual knowledge of an unregistered right or interest would inevitably weaken the security of title that registered land at present provides. Disappointed third parties, who found their rights apparently defeated by a purchaser, would threaten litigation. Because of the nuisance value of such threats, purchasers would often settle out of court.

Cooke and O'Connor argue that in focusing on notice-based liability the Law Commission lost sight of the possible role that could be played by a requirement of good faith, where a finding of bad faith requires something more than mere notice.

Cooke and O'Connor, 'Purchaser Liability to Third Parties in the English Land Registration System: A Comparative Perspective' (2004) 120 LQR 640, 657–8

Thus, a useful baby (purchaser-liability for Torrens fraud because of the absence of good faith) has been thrown out with the bathwater (purchaser-liability for notice). And all the argument is directed at the bathwater; arguments against imposing liability on the purchaser for Torrens fraud, or against requiring good faith on the purchaser's part, are simply not given. *Peffer v Rigg* has caused such a backlash that potentially good law has been rejected, because of the overwhelming need to reject the reasoning in *Peffer*.

It is clear that the reasoning adopted in *Peffer v Rigg* could not be followed under the LRA 2002. Central to that decision was the definition of purchaser in the LRA 1925 as a purchaser in good faith, and ss 29 and 30 of the 2002 Act require only that the disposition is for valuable consideration.

7.2 THE LAND REGISTRATION ACT 2002: A FOCUS ON NEW DIRECT RIGHTS

In rejecting the enforcement of B's pre-existing property rights against C on the basis that C has notice, the Law Commission emphasized the possibility of new direct rights arising on appropriate facts.

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

> Furthermore, [. . .] the law provides a wide range of *personal* remedies against those who in some way behave improperly. The operation of these personal remedies can be demonstrated by four examples.
>
> 1. If A transfers trust property to [C] in breach of trust and [C] knows or (perhaps) has notice of this, [C] is liable as constructive trustee for "knowing receipt" of trust property. Liability is personal and not proprietary and the obligation is to make restitution for the loss suffered by the trust. It has been assumed that this form of liability may apply where the trust property transferred is registered land and the rights of the beneficiaries have not been protected, so that as a matter of property law, the transferee takes the land free of the trust
> 2. If property is transferred by A to [C] expressly subject to some right of [B's] which will not in fact bind [C], a constructive trust may be imposed upon [C] if he refuses to give effect to [B's] right in circumstances in which that refusal is unconscionable. [C] can in this way be compelled to give effect to [B's] rights. [. . .]
> 3. There may be circumstances where tortious liability is imposed because A conspires with [C] to defeat [B's] proprietary rights.
> 4. If [C] induces A by misrepresentation or undue influence to charge his or her property to [B] to secure [C's] debts, A will be able to set the charge aside if [B] has notice of [C's] misconduct.
>
> In each of these cases, a purchaser may acquire the registered land free from the rights of the third party, yet find himself personally liable for the loss suffered by that third party or subject to some personal equity, which enables the transaction to be set aside. [. . .]

Although described by the Law Commission as 'personal remedies', this is a misnomer. It is apparent from the examples given that the Law Commission, in fact, is referring to new direct rights that may either be personal (1, 3, and 4) or proprietary (2).

The creation of new direct rights has been discussed in Chapter 6. Land law does not exist in a vacuum and the possibility of such rights arising on a transfer is beyond doubt—but reliance on other principles is not without controversy or difficulty. The scope of liability is no longer dependent on the land law statutes and tension may arise where liability is imposed in circumstances that run contrary to land law principles: for example, if a new direct right were to arise on the basis of notice. The objection may be acute where the new liability was proprietary, although Thompson has argued further that purchasers should also be protected against personal liability in such circumstances.[113]

Reliance on the imposition of new direct rights causes difficulty simply because the application of these principles is not generally well developed in the land law context. This is particularly the case as regards personal liability, outside of undue influence (4), which has its own developed jurisprudence in relation to mortgages. The possibility of personal liability based on knowing receipt of trust property (1) was suggested, obiter, as an alternative basis for the decision in *Peffer v Rigg*.[114] Graham J considered that Mrs Rigg's knowledge of the trust was sufficient to render her personally liable to Mr Peffer even if his pre-existing interest did not bind her through lack of good faith.

[113] Thompson, 'Registration, Fraud and Notice' (1985) 44 CLJ 280.

[114] [1977] 1 WLR 285, 294.

The creation of new direct rights on a 'subject to' transfer is considered in Chapter 21 and is drawn from the doctrine in *Rochefoucauld v Boustead*,[115] which has been discussed in Chapter 11. Under the LRA 2002, the development of these principles may become more significant.

8 CONCLUSION

The LRA 2002 provides a distinct scheme of priority rules for a category of transactions (registrable dispositions of registered estates for valuable consideration) that incorporates the most common dealings with land. C has a defence against the enforcement of B's pre-existing property rights, except those that are entered on the register by a notice (the defence of lack of registration) or binding as an overriding interest. The disposition must also comply with any limitations on A's owner's powers recorded on the register by entry of a restriction.

There is a need to find a satisfactory reconciliation between the operation of these statutory defences, and ensuring that fraud and wrongful conduct by C does not go unchecked. The policy of the 2002 Act is to rely on the creation of new direct rights arising under the general law. This may involve the imposition on C of personal liability to B, or the creation of new direct rights. But the scope of principles governing the imposition of new direct rights is largely undeveloped in the land law context.

QUESTIONS

1. What do you understand to be meant by a 'registrable disposition of a registered estate for valuable consideration'? What is the significance of this category of transaction for determining questions of priority in registered land?
2. To what extent do the priority rules in registered land implement the 'mirror' and 'curtain' principles?
3. Compare and contrast the scope and effect of entry of a restriction and entry of a notice.
4. How useful are the constitutionalist and absolutist views of the meaning of 'actual occupation' in determining the scope of Sch 3, para 2, of the Land Registration Act 2002?
5. Assess the advantages and disadvantages of responding to fraud or other wrongdoing in a disposition of land to B by: (i) preventing B from invoking statutory defences against C's property rights; and (ii) relying on the creation of new direct rights.
6. What action should the holder of the following property rights in registered land take? In what circumstances will a purchaser of the land have a defence against the enforcement of these rights?
   (a) A beneficial interest under a trust.
   (b) A legal lease created for five years.
   (c) A legal easement arising from an implied grant.
   (d) A restrictive covenant.

[115] [1897] 1 Ch 196.

FURTHER READING

Bogusz, 'Defining the Scope of Actual Occupation Under the Land Registration Act 2002: Some Recent Judicial Clarification' [2011] Conv 268

Cooke, *The New Law of Land Registration* (Oxford: Hart, 2003, chs 4–5)

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

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

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

Law Commission Report No 254, *Land Registration for the Twenty-First Century: A Consultative Document* (1998, Pts IV–VII)

Law Commission Report No 271, *Land Registration for the Twenty-First Century: A Conveyancing Revolution* (2001, Pts V, VI, and VIII)

Sparkes, 'The Discoverability of Occupiers of Registered Land' [1989] Conv 342

Thompson, 'Registration, Fraud and Notice' (1985) 44 CLJ 280

15

EVALUATING THE LAND REGISTRATION ACT 2002

CENTRAL ISSUES

1. The provisions of the Land Registration Act 2002 have a profound effect in land law. We have seen in previous chapters that those provisions affect the acquisition of legal estates and interests in land (see especially Chapters 7 and 8), as well as the defences available to a pre-existing legal or equitable property right in land (see Chapter 14).
2. This chapter gives us a chance to stand back and examine the impact of the 2002 Act. Firstly, we will consider the possible purposes of a registration system and then the specific aims of the Act itself. Secondly, we will bring together some of the material covered in previous chapters in order to summarize the effect of the Act. Thirdly, we will evaluate the Act, by asking both whether the Act has achieved its stated purpose and whether that purpose is, in any case, worthwhile. In doing so, we will consider some important recent developments concerning the circumstances in which it is possible to rectify the register.
3. In considering the effect of the 2002 Act, it is useful to look at the three questions that we considered in Chapter 1, section 3—that is, the *content*, *acquisition*, and *defences* questions. As we will see, the chief impact of the Act is on the second and third of those questions.
4. In analysing the 2002 Act, we have to be careful to separate out its current and future effects. The Act was designed to facilitate a general system of e-conveyancing. As we saw in Chapter 7, section 6, that system is not yet in place. So we need to distinguish the current effect of the 2002 Act from the effect that it may have in the future, if and when a general system of e-conveyancing has been established and consequential changes have been made to the registration rules.
5. In evaluating the 2002 Act, we need to ask if we approve of the answers that it provides to the *acquisition* and *defences* questions. This is not simply a matter of comparing the provisions of the Act to its predecessor, the Land Registration Act 1925; rather, to evaluate the 2002 Act, we have to compare the results that it produces in particular situations with what we would regard as the best results in those cases. This, of course, raises the very difficult question of how we are to decide, in the abstract, what is the 'best possible result' in any particular case.

1 INTRODUCTION: THE AIMS OF THE LAND REGISTRATION ACT 2002

1.1 THE GENERAL AIMS OF REGISTRATION

When considering the possible aims of a registration system, it is important to bear in mind that the usefulness of registration is not confined to land law. The following extract refers to two examples in which rights unrelated to land may be registered. The first concerns the registration of company shares; the second, the registration of security interests over company assets.

McFarlane, *The Structure of Property Law* (2008, pp 82–3)

The central purpose of any register is to provide *publicity*. For example, a register of births, marriages and deaths gives interested parties the opportunity to discover important information about a community. The publicity provided by a register of rights may be useful to a number of different groups: for example, it may provide the State with information it can use when making tax assessments [. . .]

Registration can thus be particularly useful to C [a party acquiring a right from A], both in disputes about the use of a thing and in disputes about the use of a right. A registration system can protect C against the two chief risks he faces when attempting to acquire a right:

1. A, the party C deals with, may in fact lack the power to give C the right. This is the risk from which a register of rights, such as a register of company share-holders, aims to protect C.
2. Even if A does have the power to give C the right, B may have a pre-existing right that he can assert against C and that will thus reduce the value of C's right. This is the risk from which a register of pre-existing powers or rights, such as a register of floating charges against a company's rights,[1] aims to protect C.

[. . .] The publicity provided by a register of rights can never provide C with full protection: in practice, no such register can ever be completely accurate. In Example 1, a register may record A as the holder of some shares, but can C be sure that the register is correct? In Example 2, a register may make no mention of a pre-existing floating charge but, again, can C be sure that the register is correct? Of course, if the register is not complete, C may have to make his own enquiries as to whether A is indeed a holder of the shares; or whether there is a floating charge against A Co's assets. The usefulness of having a register will then be reduced: C will have to spend time and money on his own investigations; as a result the possible deal between A and C will be delayed, or perhaps even called off.

Ideally, C would like to have a *guarantee*. In Example 1, he wants a guarantee that: (i) if A is recorded as the holder of the shares, then (ii) A does indeed hold those shares. In Example 2, he wants a guarantee that: (i) if there is no floating charge recorded on the register; then (ii) no-one will be able to assert such a power against him. Such a guarantee can only be provided if *legal consequences* are attached to the fact that a right is, or is not, recorded on a register. Once those legal consequences exist, registration no longer operates neutrally, as a

[1] [As we will see in Chapter 28, section 3.4, a floating charge is a particular form of security interest: e.g. it can be used by a company to give a lender security over that company's current and future assets.]

simple record. Rather, registration begins to operate as a legal concept. This introduction of legal consequences allows registration systems to affect the basic structure of property law and hence to have a greater impact on resolving the basic tension [i.e. the tension between the wishes of B, on the one hand, and of C, on the other].

1.2 THE PROMINENCE OF REGISTRATION IN LAND LAW

If a party (A) has a legal freehold of land in England or Wales, or a legal lease of such land with more than seven years to run, A can[2] register with the Land Registry[3] as the holder of that legal estate. Indeed, the overwhelming majority of such freeholds and leases are now registered. This means that the rules imposed by the Land Registration Act 2002 (LRA 2002) will apply to regulate A's dealings with his or her registered estate. For example, as we saw in Chapter 7, section 5.3, a transfer of A's registered legal estate to C will only be complete once C is registered as the new holder of that legal estate. And, if C has provided something of value in return for that registered estate (e.g. if C has bought it from A), C may then gain protection against a pre-existing property right of B that has not been noted on the register. That protection comes from the lack of registration defence provided by the LRA 2002, which we considered in Chapter 12, section 3.2 and Chapter 14, section 2.2.

In Chapter 12, section 3.2, as well as in Chapter 13,[4] we also noted that a form of registration scheme applies even if A's legal freehold or lease is *not* registered at the Land Registry. In relation to such unregistered land, the Land Charges Act 1972 (LCA 1972) may function to give C (a party acquiring a right from A) a defence against a pre-existing property right of B: the case of *Midland Bank Trust Co Ltd v Green*,[5] which we examined in Chapter 12, section 3.1, provides a memorable example.

It is therefore clear that registration is a particularly important concept in land law. As the following extract suggests, the prominence of registration can perhaps be explained by the special features of land (as examined in the extract from the same author set out in Chapter 1, section 4).

McFarlane, *The Structure of Property Law* (2008, pp 86–7)

Registration is particularly prominent in land law. We can explain this by looking at the special features of land [. . .]

1. Due to its fixed location, each piece of land is easy to identify. As a result, if a register exists, it is easy to look up a particular piece of land in that register.
2. Due to its capacity for multiple, simultaneous use, as well as its social importance, the list of [legal and equitable property rights in land] is longer than the list of such rights in things other than land. So, if C acquires a right in land from A, there is an increased risk to C of being bound by a pre-existing right of B.

[2] As we saw in Chapter 7, section 5.3, if A seeks to transfer to C an unregistered freehold or lease with more than seven years to run, then C will *have* to register in order to acquire a legal estate; it is not, however, compulsory for A, an unregistered holder of such a freehold or lease, to register that right.

[3] Formally titled Her Majesty's Land Registry, the organization now brands and refers to itself without a definite article—that is, as 'Land Registry' rather than 'the Land Registry'. In this book, however, we have used the more conventional appellation.

[4] See Chapter 13, section 5.8. [5] [1981] AC 513.

3. Due to its permanence, there is an increased risk of a pre-existing [legal or equitable property right] existing in relation to a particular piece of land. So, if C acquires a right in land from A, there is an increased risk to C of being bound by a pre-existing right of B.
4. Due to its limited availability, land is already very expensive. As a result, there is a particularly strong desire to limit the time and cost C must expend in acquiring a right in land. The more expensive the process of buying land becomes, the more difficult it becomes for those of even average wealth to acquire the land they need to set up a home or run a business.

So, the special features of land both: (i) make a registration system possible; and (ii) justify the extra protection such a system can provide to C. However, this leaves open the question of *how* a land registration system should operate. The basic tension [between B and C] will govern not only *whether* the concept of registration applies, but also *how* it applies.

From one perspective, then, we can understand how a registration system can help to protect a party attempting to acquire a right in land (C) from both: (i) the risk that the party with whom he or she deals (A) may not have the power to give C such a right; *and* (ii) the risk that, even if A does have that power, another party (B) may have a pre-existing legal or equitable interest in land that binds C.

As we saw in Chapter 7, section 5.1, these advantages are best secured by a system based on *registration of title*. Where such a system is in place, C can check the register to establish that A does indeed have 'title': in other words, C can check that A does indeed have the power to give C a right in the land. Where such a registration system exists, it is also likely to require that (at least some) pre-existing legal or equitable interests are noted on the register, thus giving C some protection against the risk of being bound by a pre-existing right of B. As the following extract notes, this 'conveyancing' perspective, focusing on the specific transaction between A and C, can be complemented, and broadened, by a consideration of the possible economic advantages of a registration of title scheme.

O'Connor, 'Registration of Title in England and Australia' in *Modern Studies in Property Law: Vol 2* (ed Cooke, 2003, pp 84–5)

While lawyers tend to view registration of title as a law reform project to overcome problems in common law conveyancing, governments and economists regard it as a market-supporting mechanism operated as a government program. The system is, as Mapp said, 'overwhelmingly administrative in operation',[6] with economic objects, namely, to improve security of title and to facilitate the transfer of interests in land. These two objects are found in the preamble to the very first English registration of title statute, the Land Registry Act 1862, which began: 'Whereas it is expedient to give certainty to the title to real estates and to facilitate the proof thereof and also to render the dealing with land more simple and economical'.

Economists have long recognised that secure property rights are a precondition for investment and economic growth. Puzzled by the difficulty of replicating the economic success of Western capitalism in the Third World, economists have in the past decade turned their attention to examining the nature of the legal institutions and property laws that underpin capitalism in developed countries. The new 'institutional economics' has rediscovered a long-overlooked connection between property laws and prosperity. Laws that ensure the

[6] Mapp, *Torrens' Elusive Title: Basic Principles of an Efficient Torrens System* (1978), p 63.

security and transferability of property establish the framework of incentives that enable the creation of new wealth from existing assets.

Secure titles have been found to contribute to economic growth in a multiplicity of ways. They provide owners with an incentive to invest in improving and developing their land, for they are assured of reaping the benefits for themselves. Owners who wish to invest are better able to obtain the development capital they need on favourable terms if they can offer a good title as collateral for a loan. If purchasers can easily satisfy themselves that the title they are acquiring is clear, the costs of transacting in land will fall. Lower transaction costs assist the market to allocate land assets to their most productive uses, by allowing them to pass to those who value them most highly.

1.3 THE AIMS OF A PARTICULAR LAND REGISTRATION SYSTEM

It is not enough simply to state that having *a* registration of title system can be useful in land law; we also have to ask what *sort* of registration of title system should apply. Certainly, it would be a mistake to think that all land registration systems are the same: even in the common law world,[7] the detail of the registration rules varies if we move from England and Wales to, for example, Australian or Canadian jurisdictions.

In particular, as the following extract explores, we need to ask how our registration of title system should balance the needs of a prior user of land (such as A or B) with those of a party later acquiring a right in relation to the land (such as C).

O'Connor, 'Registration of Title in England and Australia' in *Modern Studies in Property Law: Vol 2* (ed Cooke, 2003, pp 85–6)

A title to land is secure if it is at no risk, or no significant risk, of being found to be defective or subordinate to another interest. While economists assume that security of title is a good that property laws can bestow, it is, as Mapp said 'an elusive ideal',[8] for it incorporates contradictory elements. There are two competing aspects of security of title, that Demogue called 'static' and 'dynamic' security.[9]

Static security

The law of private conveyancing was based on the principle of static security, which protects the rights of existing owners at the expense, if necessary, of purchasers. This was achieved through rules such as *nemo dat quod non habet*,[10] the preference of both law and equity for the interest first in time when adjudicating the priority of competing interests, and the

[7] Of course, given that the special features of land are the same the world over, many civil law jurisdictions also have registration systems: for a useful survey of the position in other European jurisdictions, see Cooke, *The New Law of Land Registration* (2003), ch 9. In ch 1, Cooke notes, at p 2, that '*the ancient Egyptians, for example, kept a record of ownership in documentary form, so that land could be allocated accurately when it became accessible following the annual flooding of the Nile*'. She also notes that images of such papyrus can be seen online, via the Duke (University) Papyrus Library: see http://library.duke.edu/rubenstein/scriptorium/papyrus/records/276r.html (accessed 19 October 2011).

[8] Mapp [fn 7 above] (1978), p 63.

[9] Demogue, 'Security' in *Modern French Legal Philosophy* (eds Fouillee et al, 1916).

[10] One many not grant a better title than one has.

doctrines of notice and equitable fraud. Equity's preference for the 'bona fide purchaser for value without notice' was an attempt to balance static security against the reasonable expectations of purchasers in good faith, but the standard of inquiry required of purchasers under the extended doctrine was onerous.

Conveyancing rules based on static security suited a society emerging from feudalism, where land ownership was confined to the privileged few, and was rarely traded. By the mid nineteenth century, England and Australia were developing market economies, in which value is captured through exchange. The old conveyancing rules inhibited exchange of land by imposing high transaction costs upon purchasers, and exposing them to the risk of acquiring defective or subordinate titles.

Dynamic security

The enactment of registration of title legislation in mid-nineteenth century England and Australia decisively shifted the conveyancing law towards the opposing principle of dynamic security. Dynamic security is provided by legal rules that protect the reasonable expectations of those who purchase in good faith. It facilitates exchange by reducing or eliminating the risk that the purchaser's title will be subject to unknown prior claims and title defects. This lowers transaction costs by limiting the inquiries that purchasers need to make. By relieving against risk, it also restores value to clouded titles [. . .]

The shift to dynamic security in the law of real and personal transactions was an essential condition for the operation of market capitalism. De Soto explains that, while the law in Western countries seeks to promote both types of security, dynamic security is favoured because of its greater economic importance:

> 'Although they are established to protect both the security of ownership and that of transactions, it is obvious that Western systems emphasize the latter. Security is principally focussed on producing trust in transactions so that people can more easily make their assets lead a parallel life as capital.'[11]

It is natural to equate dynamic security with protection for purchasers, but this is too simple. While dynamic security reduces purchasers' costs and risks in transactions, it also benefits owners. Without it, owners' titles can be disturbed years after purchase if a defect in their title or a prior interest comes to light within the relevant limitation period.

The 'security of title' object of registration refers to both static and dynamic security. The dilemma for the law is that the two stand in an inverse relationship. Measures that improve dynamic security tend to diminish static security to some extent, and vice versa. The law must determine how to balance dynamic and static security in the formulation of the rules, taking into account a range of policy considerations. Different evaluation of the considerations accounts for much of the variation and instability in the rules of registration of title systems.

It is clear that we have a number of choices to make when designing a registration of title system. Consider a case in which A is registered as holding a freehold of particular land. A then goes away for six months. X takes advantage of this by forging A's signature and claiming that A has transferred his registered freehold to X. X is registered as the new holder of A's freehold and then borrows £1m from C, giving C a legal charge over the land as security. C then registers that charge. When A returns and seeks possession of the land, A will ask for the register to be changed: first, to remove X from the proprietorship register and to reinstate

[11] De Soto, *The Mystery of Capital* (2000), p 61.

A as registered proprietor; second, to remove C's charge from the charges register. This is an important example and we will refer to it a number of times in this chapter: as we will see in section 3.1.1 below, the question of whether A can remove C's charge from the register has recently been considered by both judges and commentators, and a number of different answers and approaches have been suggested. The example is important as it raises the vital question of 'indefeasibility': how secure should C's position as registered proprietor be?

As we saw in Chapter 7, section 5.6, there are a number of possible approaches that a registration of title system can take to this question. Protecting A would uphold the demands of static security; protecting C would advance the cause of dynamic security. As we will see in section 3.1.1 below, the 2002 Act itself does not give a clear answer as to whether the needs of A or C should be preferred. The impact of the Act depends, in large part, on whether C's registration can be said to be a 'mistake'; but that term is not defined in the Act, and so there is room for disagreement amongst judges and commentators as to how the crucial notion of 'mistake' should be interpreted.

1.4 THE AIMS OF THE LAND REGISTRATION ACT 2002

So far, we have seen that: (i) there are good reasons why registration is particularly important in land law; (ii) those advantages of registration are maximized if registration of title is required; but (iii) nonetheless, a question remains as to precisely how a land registration system should operate. We can now focus on the LRA 2002 and its specific aims.

The 2002 Act resulted from the Law Commission's work: in the following extract, the Law Commission sets out its aims in producing the draft Bill that led to the Act. We considered parts of the following extract in Chapter 7, section 5.1, but given its importance in setting out the chief aim of the LRA 2002, it is worth seeing again—and in full.

Law Commission Report No 271, *Land Registration for the Twenty-First Century: A Conveyancing Revolution* (2001, [1.5]–[1.10])

The fundamental objective of the Bill is that, under the system of electronic dealing with land that it seeks to create, the register should be a complete and accurate reflection of the state of the title of the land at any given time, so that it is possible to investigate title to land on line, with the absolute minimum of additional enquiries and inspections.

Although that ultimate objective may seem an obvious one, its implications are considerable, and virtually all the changes that the Bill makes to the present law flow directly from it. The Bill is necessarily limited in its scope to registered land or to dealings with unregistered land in England and Wales that will trigger first registration. Although the great majority of titles are in fact now registered, there are still substantial amounts of land (particularly in rural areas) that are unregistered. However, as we explain in Part II, unregistered land has had its day. In the comparatively near future, it will be necessary to take steps to bring what is left of it on to the register.

The process of registration of title is conducted by the State through the agency of HM Land Registry. Indeed, the State guarantees the title to registered land. If, therefore, any person suffers loss as a result of some mistake or omission in the register of title, he or she is entitled to be indemnified for that loss. At present, there is no requirement that a disposition of registered land has to be entered in the register if it is to be effective. Even without registration, dispositions are valid not only between the parties to them, but as against many

but not necessarily all third parties who subsequently acquire an interest in the same registered land. This is a necessity under the present law because there is a hiatus—called the "registration gap"[12]—between the making of any disposition and its subsequent registration. The transfer or grant has to be submitted to the Land Registry for registration, which inevitably takes some time. It would be wholly unacceptable for the transfer or grant to have no legal effect in that interim period. It should be noted that there are some interests in registered land, presently known as overriding interests, which are not protected in the register at all but which nonetheless bind *any* person who subsequently acquires an interest in the land affected. This is so whether or not that person knew of, or could readily have discovered, the existence of these interests.

If it is to be possible to achieve the fundamental objective of the Bill mentioned [above]—

1. all express dispositions of registered land will have to be appropriately protected on the register unless there are very good reasons for not doing so;
2. the categories of overriding interests will have to be very significantly reduced in scope; and
3. dispositions of registered land will have to be registered simultaneously, so that it becomes impossible to make most dispositions of registered land except by registering them.

The aim stated in (3) will be possible only if conveyancing practitioners are authorised to initiate the process of registration when dispositions of registered land are made by their clients. This is a very significant departure from present practice.

To achieve the goals stated [above] will also require a change in attitude.

There is a widely-held perception that it is unreasonable to expect people to register their rights over land. We find this puzzling given the overwhelming prevalence of registered title. Furthermore, the law has long required compliance with certain formal requirements for the transfer of interests in land and for contracts to sell or dispose of such interests. The wisdom of these requirements is not seriously questioned. We cannot see why the further step of registration should be regarded as so onerous. In any event, under the system of electronic conveyancing that we envisage (and for which the Bill makes provision), not only will the process of registration become very much easier, but the execution of the transaction in electronic form and its simultaneous registration will be inextricably linked.

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

In order to understand the LRA 2002, it is crucial to understand its basic aims, as stated by the Law Commission in the extract above. Firstly, the Act clearly aims to prioritize dynamic security: to protect a third party (C) attempting to acquire a legal property right in land from the risk of being bound by a pre-existing, but hidden, legal or equitable property right. So, in the example given in section 1.3 above (where X fraudulently registers as the new holder of A's freehold and then grants a charge to C), we might expect the Act to protect C rather than A. Indeed, if it is truly '*the fact of registration and registration alone that confers title*', we might expect C to win even if C *knew* about X's fraud.

[12] [The concept of the 'registration gap' was discussed in Chapter 7, section 5.4.]

Secondly, it is clear that the standard use of e-conveyancing (and hence electronic registration) is a fundamental part of the scheme of the LRA 2002. Certainly, it is viewed as providing an important justification for protecting C against pre-existing, but unregistered, rights: the logic is that, because e-conveyancing makes it simpler for B to register a right, it becomes harder for B to excuse a failure to register, and thus fairer to protect C against any unregistered right of B. As we noted in Chapter 7, section 6.1, e-conveyancing can also lead to the closing of the 'registration gap' referred to in the extract above: one depression of a key by A or C's solicitor or conveyancer can simultaneously finalize A's grant of a legal property right to C *and* C's registration as holder of that right.

Thirdly, and linked to the previous two points, is the fundamental idea that the registration system exists not to set out rights already acquired by parties such as A, B, and C, but, instead, to *create* those rights. In such a world, the register will *necessarily* be a '*complete and accurate reflection of the state of the title of the land at any given time*'. Indeed, there will be no external standard by which to check the accuracy of the register: anything on the register will be correct, simply because it *is* on the register.

Finally, it is important to remember that the Law Commission described its fundamental objective of a 'complete and accurate register' as an 'ultimate' objective. Certainly, the LRA 2002 did not aim to achieve its intended effects overnight. The most important outstanding step was, and remains, the standard use of e-conveyancing. This means that, when evaluating the Act, we need to be aware that its full impact cannot be determined unless and until that e-conveyancing system is fully operational. Nonetheless, the 2002 Act did make a number of very significant, immediate changes, taking effect independently of e-conveyancing. Those changes will be summarized in the next section and we will evaluate them in section 3.

Before discussing those changes, it is worth noting an important tension in the fundamental objective of the 2002 Act, as described by the Law Commission in the extract above. That tension stems from the notion that: (i) the register should be 'complete and accurate'; so that (ii) C can '*investigate title to land on line, with the absolute minimum of additional enquiries and inspections*'. Of course, if the register really were complete and accurate, there would be no need for *any* further investigation of title: such enquiries would be eliminated, rather than minimized. This tension suggests that the aim of making the register complete and accurate may not only be very difficult to achieve in practice, but may also be of dubious merit. Certainly, as we will see in the next section, it would be dangerous for C to think that he or she can rely on the register with complete confidence and will *always* be fully protected from an unregistered, but pre-existing, property right of A or B.

2 THE IMPACT OF THE LAND REGISTRATION ACT 2002: A SUMMARY

In summarizing the impact of the LRA 2002, we need to distinguish between: (i) its immediate impact; and (ii) its possible future impact once the e-conveyancing system is fully operational. At each stage, a useful way to analyse the Act is to examine its effect on the ways in which B, a prior user of land, may attempt to assert a right against C, a party later acquiring a legal estate or interest in that land. Firstly, it is important to note that, as we saw in Chapter 6, section 4, the 2002 Act has *no* impact on the question of whether B can assert a new, direct right against C, arising as a result of C's conduct. This point is made clear in the

Law Commission reports that led to the Act.[13] As a result, as we noted in Chapter 14, section 7.2, the possible means by which B can acquire a direct right against C (discussed in Chapter 6) are unaffected by the 2002 Act.

The focus of the LRA 2002 is therefore on the different question of whether B can assert a pre-existing legal or equitable property right against C. As we saw in Chapter 1, section 3, we can break that key question down into three specific questions.

1. The *content* question: does the right claimed by B count as a property right?
2. The *acquisition* question: has B, in fact, acquired the right that he or she claims?
3. The *defences* question: if B does have a property right, does C have a defence to it?

In considering the immediate impact and future effect of the 2002 Act, we can focus on those three questions.

Before doing so, it is useful to remember an important effect of the LRA 2002, discussed in Chapter 8, section 5.3. There, we saw that the rules introduced by the Act make it impossible for an adverse possessor to claim that the lapse of time, by itself, has extinguished the legal estate of a registered proprietor. As a result, a registered proprietor is given far more effective protection against an adverse possessor than an unregistered holder of a legal estate. In evaluating the 2002 Act as a whole, it is important to take a view as to whether that particular change was desirable. To a large extent, that depends on a consideration of the merits of the claim of an adverse possessor—a question that we examined in Chapter 8, section 2. It is worth noting that the extra protection given to a registered proprietor against an adverse possessor may promote the Law Commission's goal of extending the number of registered titles: an unregistered holder of a freehold or long lease, even if he or she does not plan to deal with the land in the near future, may consider registering his or her legal estate so as to reduce the (admittedly small) risk of losing that estate due to another's adverse possession.

2.1 THE IMMEDIATE IMPACT OF THE LAND REGISTRATION ACT 2002

2.1.1 The *content* question

Dixon has pointed out that, in theory, we could have a registration system that simply ignores the fundamental divide between property rights and personal rights: it could, for example, stipulate that C can be bound by registered rights that are otherwise regarded as personal rights (e.g. contractual licences).[14] The LRA 2002 does *not* set out to do this: after all, given its chief aim is to give extra protection to C, it would be very surprising if it were systematically to allow personal rights to have an effect on C. But it is worth noting that, with the aim of promoting clarity, the Law Commission took a position on whether particular types of rights, the proprietary status of which is uncertain at best, would be capable of binding C.

[13] See Law Commission Report No 254, *Land Registration for the Twenty-First Century: A Consultative Document* (1998), [3.38]–[4.9] and Law Commission Report No 271, *Land Registration for the Twenty-First Century: A Conveyancing Revolution* (2001), [4.11] and [7.7].

[14] Dixon, 'Proprietary and Non-Proprietary Rights in Modern Land Law' in *Land Law: Issues, Debates and Policy* (ed Tee, 2002), pp 26–8. Parliament's response to the House of Lords decision in *National Provincial Bank v Ainsworth* [1965] AC 1175, discussed in Chapter 1, section 5.7, provides a specific example of this type of approach: under what is now s 31(10) of the Family Law Act 1996, a partner's statutory right of occupation is allowed to bind a third party if, and only if, it is noted on the register.

And, thanks to what are now ss 115 and 116 of the 2002 Act, those rights (such as rights of pre-emption,[15] 'mere equities',[16] and 'equities by estoppel')[17] are now prima facie binding on C.

Of course, even if B has such a right, it may still be possible for C to have a defence against it. Nonetheless, it is perhaps surprising that the Act has resolved these doubts in favour of B, rather than C. The Law Commission's position was not based on a particular policy, but rather on its view as to whether such rights were already recognized as equitable interests in land. As we saw in Chapter 10, section 4.3, however, when considering 'equities by estoppel', it may be that—in some cases, at least—the Law Commission's interpretation of the pre-existing law was overly generous to B.

2.1.2 The *acquisition* question: legal estates and interests

As we saw in Chapter 7, if a party (B or C) claims that A (a party with a registered freehold or lease) has granted B or C a legal estate or interest, the provisions of the LRA 2002 may be crucial. As we saw in Chapter 7, section 5.3.3, s 27 of the 2002 Act creates a category of 'registrable dispositions'—that is, certain dealings with A's registered estate that are not complete unless and until they are registered: for example, a transfer of A's registered estate is only complete if and when the transferee registers as the new holder of A's estate. And if A attempts to grant a legal lease of more than seven years,[18] the recipient of that lease again needs to register in order to acquire that legal estate. In addition, even if A's legal estate is *not* registered, certain dealings with that estate have to be registered before the other party can acquire a legal estate from A: for example, a transfer of an unregistered freehold is not complete until the transferee has registered that freehold. In this way, progress can be made to the Law Commission's goal of reducing the number of unregistered titles to land.

In those cases, registration can be seen to operate in a *negative* sense: if B or C fails to register a claimed legal estate, he or she fails to acquire that right. In some cases, this can, of course, assist C. For example, in a case where C is registered as the new holder of A's freehold, B may claim that he or she has a pre-existing legal estate in the land, because A earlier transferred that freehold to B. But because B failed to register as the new holder of A's freehold, B's claim must fail: B's failure to register means that B failed to acquire A's freehold.

In addition, in these cases, registration can also operate in a *positive* sense: if a party does register his or her legal estate, then that right is guaranteed—the fact of registration operates positively to mean that he or she has acquired that right. This result is produced by s 58 of the LRA 2002.

[15] Such as a right of B to enter a contract with A *if* A chooses to sell his legal estate in land. For discussion of whether such a right counts as an equitable interest, see *Pritchard v Briggs* [1980] Ch 338. For the Law Commission's discussion of whether such a right should be capable of binding C, see Law Commission Report No 271 (2001), [5.26]–[5.28].

[16] Such as a power of B to rescind a transfer of a legal estate to A, where that transfer was procured by an innocent misrepresentation of A. For the Law Commission's discussion of whether such a right should be capable of binding C, see Law Commission Report No 271 (2001), [5.32]–[5.36].

[17] For discussion of the impact of s 116 of the LRA 2002 on 'equities by estoppel' see Chapter 10, section 5.3.

[18] In addition, registration is also necessary in relation to certain exceptional forms of shorter lease: see Land Registration Act 2002, s 4(1)(b), (d), and (e) (cases of first registration) and s 27(2)(b)(ii)–(v) (where a lease is granted by a registered proprietor). See further Chapter 22, section 3.1.2.

Land Registration Act 2002, s 58

Conclusiveness

(1) If, on the entry of a person in the register as the proprietor of a legal estate, the legal estate would not otherwise be vested in him, it shall be deemed to be vested in him as a result of the registration.

(2) Subsection (1) does not apply where the entry is made in pursuance of a registrable disposition in relation to which some other registration requirement remains to be met.

Section 58(1) thus has an important effect in the example discussed in section 1.3 above. If X manages to have herself registered as the new holder of A's freehold (even if that registration is fraudulent), then s 58 means that X is 'deemed' to have acquired a legal estate, simply as a result of her registration. This means that, as s 23 of the Act confirms, X does have the power, for example, to grant C a charge over the land. Conversely, of course, because A is no longer registered as the holder of that freehold, A has lost his legal estate. This result seems very harsh on A: surely he does not deserve to have his land subjected to a charge simply because X managed to trick the Land Registry by forging A's signature on the transfer documents?

As we saw in Chapter 7, section 5.6.1, the response of a given registration system to such a case depends on its approach to the question of *indefeasibility* of title. The logic of dynamic security favours protecting C, who acquired its charge from X, the party who was then the registered proprietor. The logic of static security, in contrast, favours the reinstatement of A as registered proprietor and the removal of C's charge. What solution does the Land Registration Act 2002 adopt? As we saw in Chapter 7, section 5.6.1, this is where Sch 4 of the Act comes into play. It is possible for the register to be changed: for example, a court (under Sch 4, para 2(1)(a)) or the Registrar (under Sch 4, para (5)(a)), can alter the register for the purpose of 'correcting a mistake'. It is true that Sch 4, para 6(2), sets out the basic position that a change affecting '*the title of the proprietor of a registered estate in land*' cannot be made without the consent of that proprietor (in our case, X) *if* that proprietor is in possession of the land. But Sch 4, para 6(2)(a), states that the basic position does not apply where the registered proprietor—like X in our example—'*has by fraud or lack of proper care caused or substantially contributed to the mistake*'.

It is therefore clear that if A had discovered X's fraud *before* X gave any rights to a third party, A's position would have been secure: as we saw in Chapter 7, section 5.6.2, A can apply for rectification and will be reinstated as registered proprietor[19] and X, given his own fraud, cannot complain about the loss of his registered title. But what if, as in our example, A discovers X's fraud only *after* X has granted C a legal charge? The problem for A in such a case is that, under s 24 of the LRA 2002, X, whilst proprietor of the registered freehold, is able to 'exercise owner's powers' in relation to that legal estate. Those 'owner's powers' are set out by s 23 of the 2002 Act and include, for example, the power to burden the land with a charge. In such a case, we have a classic clash between 'static' and 'dynamic' security: A will argue that C's charge should be removed; C will argue that, because it dealt with the registered

[19] Note that, either before applying for rectification or alongside such an application, A should also apply for a restriction to be entered on the register, limiting X's power to deal with X's registered estate. A can also lodge a unilateral notice on the register, to alert any potential third parties to his claim: see *per* Lloyd LJ in *Barclays Bank v Guy* [2008] EWCA Civ 452, [19].

proprietor and because the register should be regarded as conclusive, there are no grounds for the removal of the charge.

In such a case, if A's call for a change to the register succeeds, then, assuming C had no knowledge of X's forgery, C will be entitled to an *indemnity* (see Chapter 7, section 5.6.1)—that is, a payment from the Registrar to compensate C for the loss that it will suffer as a result of the rectification of the register. A's claim for rectification can only succeed, however, if it is shown that C's registration is a 'mistake'. Unfortunately, as we will see in detail in section 3.1.1 below, the meaning of that term is not clearly defined by the LRA 2002.

2.1.3 The *acquisition* question: equitable interests

As it stands, the LRA 2002 does not affect the acquisition of equitable interests. This means that registration does not operate negatively: if B claims to have acquired an equitable interest from A, it is never necessary for B to show that his or her right has been recorded on the register. It also means that registration does not operate positively: B can never claim that he or she has acquired an equitable interest simply by virtue of having entered that right on the register. It does not, however, mean that registration is irrelevant when considering equitable interests: as we will see in section 2.1.4 below, if B fails to enter a notice on the register protecting his or her equitable interest, there is a risk that C, when later acquiring a right from A, will have a defence to B's right.

2.1.4 The *defences* question: legal estates and interests

As we noted in Chapter 12, section 3.2, and Chapter 14, section 2.2, the LRA 2002 provides a very important defence: the lack of registration defence. If C acquires a legal estate or interest from A *and* if C provides something in return for that right, C may be able to use that defence against a pre-existing right of B. But it is only in the rarest cases that C can use the defence against a pre-existing *legal* estate or interest of B. Firstly, as we saw in section 2.1.2 above, B generally needs to register in order to *acquire* such a legal property right: in such cases, C clearly cannot use the lack of registration defence, because B's right, by definition, will be recorded on the register. For example, if B has acquired a legal ten-year lease from A, B must necessarily have registered that right. This means that, as far as legal property rights are concerned, the lack of registration defence is only relevant where B has managed to acquire such a right without registering it.

There are two principal situations in which this can occur: firstly, where B acquires a legal lease with a maximum period of seven years or less; secondly, where B acquires an easement that has not been expressly granted to him by A—it being possible for B to acquire a legal easement by means of an implied grant from A (see Chapter 25, section 3.2) or through the doctrine of prescription (see Chapter 25, section 3.3).

In the first case, in which B acquires a legal lease, B's right counts as an overriding interest under Sch 3, para 1, of the LRA 2002. It is therefore impossible for C to rely on the lack of registration defence against such a right.

In the second case, in which B acquires a legal easement, B's right will almost always count as such an overriding interest under Sch 3, para 3, of the 2002 Act.[20] In this way, the Act

[20] Sch 3, para 3 is set out in Chapter 25, section 4.1. The very rare case in which B's legal easement is not overriding occurs only where that legal easement fails to satisfy *any* of the three criteria set out in para 3.

essentially preserves the position applying in unregistered land:[21] if B has a pre-existing *legal* property right, it is almost impossible for C to have a defence against that right.

2.1.5 The *defences* question: equitable interests

Where B has a pre-existing equitable interest, the lack of registration defence comes to the fore: for example, whilst a legal lease will count as an overriding interest, an equitable lease, in itself, does not; whilst a legal easement will almost always count as an overriding interest, an equitable easement, in itself, does not. As we saw in Chapter 14, section 5, an equitable interest of B, in itself, can never count as an overriding interest: it will only qualify if it is accompanied by B's actual occupation of the registered land.

2.2 THE FUTURE IMPACT OF THE LAND REGISTRATION ACT 2002: THE EFFECT OF E-CONVEYANCING

In Chapter 7, section 6, we examined the reasons why the brave new world of e-conveyancing, the arrival of which the 2002 Act was supposed to herald, has not yet materialized. Nonetheless, in evaluating that Act, and in considering its broader aims, it is important to consider the planned changes that depend on the introduction of e-conveyancing.

2.2.1 The *content* question

There is no suggestion that the introduction of e-conveyancing will lead to the introduction of registration rules that affect the fundamental question of whether or not B's pre-existing right counts as a personal right, on the one hand, or as a legal or equitable property right, on the other.

2.2.2 The *acquisition* question: legal estates and interests

The introduction of e-conveyancing will make a difference to the acquisition of legal estates and interests, but not a dramatic one. As we saw in section 2.1.2 above, it is already often the case that, to acquire a legal property right from A, a party (B or C) needs to register that right. In such cases, as we saw in Chapter 7, section 6.1, e-conveyancing will have the useful effect of removing the 'registration gap' that occurs between: (i) A's granting of a right to B or C; and (ii) B or C registering, and thus acquiring, that right. As we noted in Chapter 7, section 5.4, that gap can cause particular problems for C. For example, imagine that A transfers her registered freehold to C. If A then grants B a legal lease of seven years or less *after* the transfer to C, but *before* C has registered as the new holder of the freehold, B's legal lease will bind C: it is an overriding interest in existence at the moment of C's acquisition of the freehold. Under e-conveyancing, the transfer and registration of A's freehold will occur simultaneously, and C will no longer face that risk.

In addition, the introduction of e-conveyancing is likely to see an increase in the category of 'registrable dispositions'—that is, those dealings with a registered estate that, under s 27 of the LRA 2002, need to be completed by registration. For example, we have seen that, in general, B can currently acquire a legal lease of seven years or less without needing to register.

[21] See Chapter 13, section 3.

The Law Commission, however, envisages that, when e-conveyancing makes it simpler for B to register, the registration requirement will be extended to any lease of more than three years.[22] This will assist in reaching the 'fundamental objective' of a 'complete and accurate' register. The likelihood is that leases of three years or less will remain outside the scope of compulsory registration. This is no surprise: as we noted in Chapter 7, section 4, s 54(2) of the Law of Property Act 1925 (LPA 1925) permits such leases to be created without any formality at all, if certain further conditions are met (see further Chapter 22, section 3.1.2).

2.2.3 The *acquisition* question: equitable interests

As we noted in Chapter 7, section 6.1, the introduction of e-conveyancing is likely to make a dramatic difference to the acquisition of equitable interests in land. The crucial point is that, under s 93(2) of the LRA 2002, rules can be introduced requiring the electronic registration not only of registrable dispositions, but also of *contracts* to make such dispositions. As we saw in Chapter 9, when examining cases such as *Walsh v Lonsdale*,[23] B can acquire an immediate equitable interest if A is under a contractual duty to give B a legal or equitable property right in land. This particular means by which B can acquire an equitable interest is already regulated by a formality rule: as we noted in Chapter 7, section 3, s 2 of the Law of Property (Miscellaneous Provisions) Act 1989 (LP(MP)A 1989) already requires a contract for the '*sale or other disposition of an interest in land*' to be made in writing, signed by all of the contracting parties. This means that rules passed under s 93(2) of the LRA 2002 would not be the first to apply formal requirements to contracts to transfer or create interests in land—but such rules would be the first to make the existence of such a contract depend on its *registration*.

The potential significance of rules passed under s 93(2) can be seen in a case in which B plans to buy A's freehold, and, as a result, A and B enter a contract, made in writing and signed by both parties, under which A is under a duty to transfer her freehold to B. B pays A the purchase price and takes up occupation of the land—but B neglects to have himself registered as the new holder of A's freehold. A, who remains as registered proprietor, takes advantage of her position by selling her registered estate to C, who does have himself registered as the new holder of A's freehold. Under the current law, B can assert a pre-existing equitable interest against C because: (i) as soon as A came under a contractual duty to transfer her freehold to B, B acquired an equitable interest (see Chapter 9); and (ii) because B was in actual occupation of the land at the relevant time, B has an overriding interest. C therefore cannot use the lack of registration defence against B (see Chapter 14, section 5). So, whilst B's failure to register as the new holder of A's freehold prevents him from acquiring a legal estate, it does not prevent him from asserting a right against C.

Now consider the same situation after the introduction of e-conveyancing rules. B's failure to have his contract with A electronically registered will mean that there is *no* contract between A and B. So, unless B can rely on some other means of showing that A is under a duty to transfer her freehold to him, B will have *no* equitable interest. This means that, despite B's actual occupation of the land, B will have no pre-existing right to assert against C. B will thus be in the same position as Mrs Ainsworth in *National Provincial Bank v Ainsworth*[24] (see the discussion in Chapter 1, section 5, and Chapter 4, section 5.4): in the absence of a new, direct right arising as a result of C's conduct, B will have no right to remain

[22] Law Commission Report No 271, 'Land Registration for the Twenty-First Century' (2001) [3.17].
[23] (1882) LR 21 Ch D 9. [24] [1965] AC 1175.

in occupation. In such a case, as noted in Chapter 7, sections 3.7 and 6.1, B could try to rely on the doctrine of proprietary estoppel to show that, despite the absence of a contract, A was under a duty to transfer her freehold to B.[25]

2.2.4 The *defences* question: legal estates and interests

We saw in section 2.1.4 above that the lack of registration defence provided by the LRA 2002 very rarely protects C against the risk of being bound by a pre-existing *legal* property right of B. That position will be unchanged by the introduction of e-conveyancing.

2.2.5 The *defences* question: equitable interests

The introduction of e-conveyancing rules will not directly affect the application of the lack of registration defence to pre-existing equitable interests. The importance of those rules, as we saw in section 2.2.3 above, will instead lie in their effect on the acquisition of equitable interests. As a result, there will be cases (such as in the example given in section 2.2.3 above) in which B's actual occupation of registered land will be of no use to him, as his failure to have his contract with A electronically registered will mean that he has no underlying equitable interest that can be protected by that occupation.

3 EVALUATING THE LAND REGISTRATION ACT 2002

In this section, we will evaluate the immediate impact of the LRA 2002, as summarized in section 2.1 above, as well as considering the future effect of the Act, following the possible introduction of the e-conveyancing rules summarized in section 2.2 above.

3.1 A COMPLETE AND ACCURATE REGISTER?

The first question to consider is whether the LRA 2002 has lived up to the Law Commission's 'fundamental objective' of creating a 'complete and accurate' register.[26] In considering this aim, we do need to be aware, as discussed in section 1.4 above, that the 2002 Act was not intended to achieve that aim overnight. Nonetheless, it is interesting to note that we have seen a number of situations in which the provisions of the Act diverge from this ultimate objective of a complete and accurate register.

3.1.1 Rectification

The possibility of rectification, defined by Sch 4, para 1, of the LRA 2002 as a change to the register that corrects a mistake and prejudicially affects the title of a registered proprietor, demonstrates that the register is never wholly 'complete and accurate'. This is not to suggest that rectification could ever be entirely eliminated: as we have seen, it would be very strange if, following X's fraudulent registration, it was impossible for X to be removed and for A to be

[25] See Chapter 7, section 3.7 and Chapter 10, sections 2.1.4 and 2.4 for a discussion of the possible use of proprietary estoppel in cases in which a formality rule has not been satisfied.

[26] Law Commission Report No 271,'Land Registration for the Twenty-First Century' (2001), [1.5].

reinstated as registered proprietor. The crucial question is not as to the existence of rectification, but rather as to its *scope*. In particular, if A's claim to rectification depends on showing that a 'mistake' has been made, how we are to judge what counts as a mistake?

Baxter v Mannion
[2011] EWCA Civ 120, [2011] 2 All ER 574

Facts: Mr Mannion was the registered proprietor of a field in Chatteris, a small village near Ely in Cambridgeshire. In 2005, Mr Baxter claimed that he had been in adverse possession of the field since 1985, and he applied under para 1(1) of Sch 6 of the Land Registration Act 2002 to be registered in place of Mr Mannion. The Land Registry duly sent a notice to Mr Mannion, warning him that, if he objected to Mr Baxter's application, he had to reply to the Registry within 65 working days. Mr Mannion made no such reply and so Mr Baxter was registered as the new proprietor. The scheme of adverse possession set out by the 2002 Act, discussed in Chapter 8, section 5.3.1, was thus followed. Mr Mannion then asked for an extension of time to reply to the Registry's notice. There is no provision in the 2002 Act for such an extension, and so the Registry advised Mr Mannion that his only option was to apply for rectification of the register. Mr Mannion made such an application, claiming that Mr Baxter had not in fact been in adverse possession of the land, and so a change to the register was necessary '*for the purpose of correcting a mistake*' and was thus permitted under para 5(a) of Sch 4 of the 2002 Act.

The application was first heard by a deputy adjudicator who, having considered the evidence, found that Mr Baxter had *not* been in adverse possession of the land during the relevant period, and ordered rectification of the register.[27] Mr Baxter appealed to a High Court judge, arguing that, even if he had not been in adverse possession of the land, there should be no rectification as the Land Registry had correctly followed the new scheme for adverse possession set out in the 2002 Act. The High Court judge rejected Mr Baxter's appeal, and so Mr Baxter appealed again, this time to the Court of Appeal.

Jacob LJ

At [18]–[36]

(a) The Meaning Of "Correcting A Mistake"

Ms Galley [counsel for Mr Baxter] submits that *correcting a mistake* has limited ambit. She did not put it quite as it had been put by leading counsel below, namely that the ambit was limited to procedural mistake. She submitted that the whole purpose of the new procedure was to do away with the previous law under which difficult questions of fact could arise where a squatter claimed the benefit of the Limitation Act. Whether the squatter had been in exclusive possession for 12 or more years was a notoriously difficult question to try and created uncertainty in dealings in land which might be subject to "squatter's rights". The inquiry of the deputy Adjudicator in this case was just the sort of dispute the Act was intended to do away with.

[27] For consideration of the powers of the Adjudicator to the Land Registry, an office established by s 107 of the Land Registration Act 2002, see Dixon, 'At the Sharper End: Adverse Possession before the Adjudicator' [2011] Conv 335.

She submitted that the essence of the new scheme was simplicity so as to give certainty in dealing with ownership of land. The principle is notice after an initial factual examination of the application by the Registrar. There is a limited time period to challenge. (She described it as "generous" but it should be borne in mind that the 65 day period is only provided by the rules—which cannot be used to construe the statute). Failing such challenge title would be registered and everyone would know where they were.

Ms Galley supported her contentions by reference to a number of passages in both the consultative and final reports of the Commission and HM Land Registry. I go only to her best ones, to a passage in the consultative document and the two passages in the final report:

> 10.2 (of the consultative document) If a system of registered title is to be effective, those who register their titles should be able to rely upon the fact of registration to protect their ownership except where there are compelling reasons to the contrary. All that should be required of them is to keep the Registry informed of their address for service. As we explain below, the land registration system enables registered proprietors to be protected against adverse possession in ways that would be very much harder to achieve where title is unregistered.
>
> 2.74 (of the final report) The essence of the new scheme in the Bill is that it gives a registered proprietor one chance, but only one chance, to terminate a squatter's adverse possession. In summary, a squatter will be able to apply to be registered as proprietor after ten years' adverse possession. The registered proprietor and certain other persons (such as a chargee) who are interested in the property will be notified of the application. If any of them object, the squatter's application will be rejected, unless he or she can establish one of the very limited exceptional grounds which will entitle him or her to be registered anyway.
>
> 14.34 (of the final report). Where a notice is served by the registrar (as explained in paragraph 14.32) and no counter-notice is served on him within the time prescribed, the registrar *must* approve the squatter's application to be registered as proprietor of the land in place of the existing proprietor. We explain the effect of such registration below, at paragraph 14.71.

She submitted that the intention was clear: a once and for all system by way of notice to be followed by a counternotice, failing the latter, registration. That produced the intended clarity, certainty and simplicity [. . .]

I am unable to accept these submissions for a variety of reasons which I think are compelling.

I start with the language of the Act. Sch 6(1) says that *a person may apply to the registrar to be registered [. . .] if he has been in adverse possession of an estate.* That surely indicates that a person who has not in fact been in adverse possession is simply not entitled to apply. Parliament cannot have intended that such a person could get registered title. A registration obtained by a person not entitled to apply for it would be mistaken. So, putting the register back in the condition it was prior to the application would be *correction of a mistake* within the meaning of Sch 4(1) and (5)

I can see no reason for limiting *correction of a mistake* to a mistake through some official error in the course of examination of the application, as Ms Galley in part contended for.

Secondly, like the Judge, I think the proposed construction would be an invitation to fraud. A dishonest Applicant (perhaps knowing the registered proprietor would be away or otherwise unable or unlikely to [reply to the Land Registry's notice] form in time or at all) could falsely claim he had been in adverse possession for ten years. His application would succeed because on its face it looked in order and the true owner would lose his land. The fact that there is no possibility of extending the prescribed time means that Parliament either intended

that the rectification power could cover such a case or that the true owner could lose his land for want of a form in time. The latter is wholly improbable.

Ms Galley felt the force of that. She first suggested the difficulty could be overcome because a fraudulent Applicant would be met by a counternotice. But that will not cover the case where the counternotice is not sent back in time—which could include the case where the fraudster knew the Registrar's letter would not be received or, if received, would not be dealt with in time.

Her second submission on this point involved a concession: that a registration pursuant to a fraudulent application could amount to a mistake, whereas a registration pursuant to an innocent but mistaken application could not. Thus she accepted that a registration obtained by the use of a forged conveyance could be rectified as *correcting a mistake*. And, when she was pressed by the case of an application made when the Applicant knew that the landowner would not respond in time, eg because he or she would be away or for some other reason other than mental incapacity—specifically provided for in para 8 of Sch 6—she accepted that that too would be a mistake within the meaning of Sch 4. Her concession was made by a general appeal to the old adage "fraud unravels everything."

The insuperable difficulty with this submission is that it is impossible to draw any rational distinction between a mistake induced by fraud and a mistake induced by a wrong application. The reason for the mistake—that the Registrar was given false information—is the same in both cases.

Thirdly her submission goes against the policy of the Act as regards obtaining land by adverse possession. That policy was to make it *more* difficult to do that . . . As the Judge observed, "it would be very strange if a registered proprietor could be at risk of losing his land to a squatter who had never been in adverse possession."

Fourthly her reliance on Ruoff and Roper [a major practitioner work on registered conveyancing] is misplaced. Their suggestion that there is a distinction to be drawn between a void and a voidable transaction, interesting though it is, sheds no light on an application made by someone not entitled to apply. I would add that I would reserve my position as to whether the authors are right in their proposed distinction: it is difficult to see why, for instance, a transaction induced by a fraudulent misrepresentation (which would only be voidable) could not be corrected once the victim had elected to treat it as void.

Fifthly I am not persuaded by her references to passages in the consultation and final reports. True it is that they refer to the need for certainty and simplicity. The normal operation of the provisions will indeed lead to that—a 10 or more year squatter who wants to claim title can invoke the Sch 6 procedure and the landowner will generally respond. If he objects to registration upon receipt of the notice it will be refused. But if he then does nothing about it the squatter can come back after two years and get title. The normal procedure brings things to a head one way or another.

What the passages do not do is say anything about what happens when the application is made by someone who has not been in adverse possession. Nor is there anything in either report suggesting a special, limited, meaning, should be given to *correction of a mistake*. Indeed, if anything, to the contrary. The discussion of the Bill's provisions which became Sch 4 says this:

> 10.61 [. . .] Rectification is confined to cases where a mistake is to be corrected. This will not include every case which is at present treated as rectification. It will not therefore cover cases where the register is altered to give effect to rights that have been acquired over the land since it was registered, or where the register was originally correct, but subsequent events have made it incorrect.

This is far from suggesting any special meaning of *mistake to be corrected*.

> Nor can I see any answer to the point accepted by the Judge, that if land could be lost in this way the landowner would have lost it without compensation with a consequential breach of art 1 to the first Protocol of the Convention on Human Rights [. . .]
>
> *(c) The "Unjust Point"*
>
> It is common ground that the Adjudicator overlooked the fact that Mr Baxter had, by the time of the application, assumed possession of the land. So Sch 4(6)(2) applied. Putting aside sub-para (a), the question which the Judge assessed for himself was this: would it be unjust not to put Mr Mannion back as registered title holder. He held it would be, saying that it was a matter of "simple justice." And so it was. Mr Baxter had made an unjustified attempt to get himself title. Mr Mannion would otherwise lose his property.
>
> The only factor to which Ms Galley could point to suggest that it would be unjust to alter the register now was that Mr Mannion had failed to return the form when he could have done. Mere failure to operate bureaucratic machinery is as thistledown to Mr Mannion losing his land and Mr Baxter getting it when he had never been in adverse possession. There is nothing in this point.
>
> So I would dismiss this appeal.

The decision in *Baxter* provides a useful example of the fact that the 2002 Act does not give a registered proprietor, such as Mr Baxter, a complete guarantee of title: as we saw in Chapter 7, section 5.6.2, the Act offers only *qualified* indefeasibility. The critical question, of course, is the following: just how qualified is the supposed indefeasibility of registered title? As *Baxter* demonstrates, the answer to this question depends, to a large extent, on the meaning given to the concept of a 'mistake'. For example, Mr Baxter's counsel argued that he had not been registered as proprietor by mistake: after all, the Land Registry had waited the full 65 days for a response from Mr Mannion and, when such response was not received, the scheme laid down by the 2002 Act allowed for Mr Baxter's application as the new registered proprietor. This 'procedural' argument was rejected by the Court of Appeal: it was held that Mr Baxter's entitlement to be registered depended not only on the lack of response from Mr Mannion, but also on Mr Baxter's actually having been in adverse possession of the land for the relevant period.

Baxter may, therefore, suggest that, in deciding if there is a mistake in the register which needs correction, we need to ask if the current registered party had an entitlement to be registered. As the next extracts show, however, this merely shifts the difficulty to deciding when such an entitlement exists. Before considering those cases, it is worth noting that, whilst Mr Mannion's application for rectification depended on showing that there had been a mistake, the mere presence of a mistake does not guarantee rectification.[28] Firstly, there may be 'exceptional circumstances' that justify the court or the registrar in not rectifying the register. Secondly, and more importantly, rectification cannot be ordered against a registered proprietor in possession of the land, unless: (i) that current registered proprietor has, by fraud or lack of proper care, caused or substantially contributed to the mistake; or (ii) it would for any other reason be unjust not to change the register. It is, therefore, important to remember that, whilst the debate about the meaning of 'mistake' is crucial to understanding

[28] See LRA 2002, Sch 4, paras 3, 5(3) and 6.

the nature of the indefeseability of title given by the 2002 Act, the presence of a mistake does not guarantee rectification.[29]

Baxter v Mannion is a relatively simple case as it concerned only two parties. Things are more complicated when we return to our example, first discussed in section 1.3 above, in which X forges a transfer of registered title from A and then grants a legal charge in favour of C. In such a case, it is clear that X's registration is a mistake: X had no entitlement to be registered as A did not consent to the purported transfer to X. The position in relation to C is less clear: C *did* have an entitlement to be registered, as C's charge was created with the authority of someone who was, at the time, the registered proprietor. The following extract is from a case in which the Court of Appeal considered exactly the same situation as our example.

Barclays Bank plc v Guy [2008] EWCA Civ 452

Facts: Trevor Guy was the registered proprietor of 19 hectares of land, with development potential, in Manchester. In 2004, his registered titles were transferred to Ten Acre Ltd (TAL). TAL was registered as proprietor of the land, and granted a charge over the land to Barclays Bank, to secure all moneys owed to Barclays by Lexi Holdings plc. Barclays registered its charge in March 2005. In 2006, Lexi Holdings went into administration, apparently owing Barclays over £100m. Barclays wished to sell the land and use the proceeds towards meeting this debt. Mr Guy objected, claiming that the transfer of the land to TAL had taken place without his authority, and so was void. He argued that he should be reinstated as the registered proprietor of the land, and that Barclays' charge should be removed from the register. Barclays applied for summary judgment, arguing that *even if the registration of TAL had occurred without Mr Guy's authority*, it still held a valid charge over the land and was, therefore, free to sell the land.

As the case involved an application for summary judgment, it had to be assumed that the facts alleged by Mr Guy were correct. On that basis, the case is identical to the example we discussed in section 1.3 above, where X acquires A's registered title without A's authority, and then grants a charge to C. At first instance, the judge accepted the bank's argument and granted summary judgment in its favour. Mr Guy then sought permission to appeal. This application was heard by Carnwath and Lloyd LJJ, and permission to appeal was refused. Lloyd LJ set out the reasons for denying permission to appeal.

Lloyd LJ

At [8]–[9]

[. . .] For my part, I am prepared to proceed on the footing that Mr Guy has shown a good arguable case for saying that the transfer was a forgery and may have also been procured by fraud, and if it was a forgery, it would be a void document. It would be a piece of paper of no value or dispositive effect. That would be all very well as between Mr Guy and Ten Acre Ltd, but by virtue of section 58 of the Land Registration Act 2002 (the 2002 Act) and the other provisions of that Act the register is conclusive, subject only to its rectification pursuant to the provisions of the Act. Ten Acre Ltd was the registered proprietor in March 2005 and it was therefore able to charge the property to Barclays to secure indebtedness. Accordingly, what

[29] Indeed, it can be argued that, in *Baxter v Mannion*, the Court of Appeal erred in using the fact of the mistake, by itself, as proof that it would be unjust not to rectify the register: see Dixon, 'HM Adjudicator to the Land Registry and Questions of Rectification' [2010] Conv 207.

matters for Mr Guy is not merely being able to, in effect, set aside the transfer to Ten Acre Ltd, he also has to be able to set aside the effect of the charge. In legal terms, that would require him to obtain the rectification of the register so as to remove the charge from it.

At [19]–[23]

Coming back, however, to the question of rectification, what Mr Guy would have to show is that the order for the removal of the charge from the register could be made for the purposes of correcting a mistake. He therefore has to show that the registration of the charge was a mistake. I can see that he could well arguably show that the registration of the original transfer was a mistake, especially if the transfer were the product of a forgery, because the registration of something that was not properly executed on the part of the registered proprietor must be a mistake. There is no question of that kind with regard to the charge. It was properly executed by Ten Acre Ltd. It is in proper form and there is nothing intrinsically wrong with it. What is wrong with it, according to Mr Guy, is that Ten Acre Ltd did not have a good title to the land. Its title was subject to rectification on the part of Mr Guy. Mr Guy acknowledges that, if his solicitor had acted with sufficient diligence and promptness, he could have entered or lodged at the registry a unilateral notice, the equivalent to what used to be called a caution, which would have protected him. In fact, he did instruct a solicitor to do that, but it got there only the day after the registration of the Barclays charge. So, he lost any priority in that respect. No doubt other proceedings may arise from that, but that is not the concern of these proceedings.

What Mr Guy said, in support of a contention that the registration of the chargee, the mortgagee, Barclays, is a mistake, is that it must be a mistake for a charge to be registered if the mortgagee knows that the borrower, the mortgagor, does not have a good title to the land. If, therefore, the chargee has actual notice of the defect in the mortgagor's title, he would say, the registration of the charge is a mistake [. . .]

[. . .] it seems to me that it is necessary to grasp the nettle of what is meant by 'mistake'. In that respect, while the scope of the phrase 'correcting a mistake' is no doubt something that requires to be explored and discussed and developed in the course of future litigation, which will be decided upon the facts and upon the merits of each case, I cannot see that it is arguable that the registration of the charge can be said to have been a mistake, or the result of a mistake, unless, at the least, Mr Guy can go so far as to show that the bank, the mortgagee, had either actual notice, or what amounts to the same, what is referred to as 'Nelsonian' or 'blind eye notice', of the defect in the title of the mortgagor, Ten Acre Ltd in the present case. I simply cannot see how it could be argued that if the purchaser or chargee knows nothing of the problem underlying the intermediate owner's title, that the registration of the charge or sale to the ultimate purchaser or chargee can be said to be a mistake. That seems to me inconsistent with the structure and terms of the 2002 Act. So, the question is whether Mr Guy can show an arguable case, on the evidence, for saying that Barclays had actual notice or was turning a blind eye to matters that it knew, which would if it addressed them properly, have shown it that Ten Acre Ltd did not have a good title to the property.

Lloyd LJ then found that, on the facts of the case, there was no evidence that could support a contention that the bank knew that there were doubts about the circumstances in which TAL had acquired its registered title. As a result, Mr Guy was not given permission to appeal—although, as we will see below, the case did later return to the Court of Appeal.

In *Barclays Bank v Guy*, Lloyd LJ adopted what might be called a 'narrow' approach to the interpretation of the word 'mistake' in Sch 4 of the 2002 Act. Applied to the facts of *Guy*, the strongest version of this narrow approach is as follows: even if TAL's registration was

the result of a fraud or a forgery, ss 23 and 58 of the 2002 Act nonetheless make clear that, for as long as TAL is so registered, it has owner's powers, including the power to grant a charge over the land. So whilst TAL's registration counts as a mistake, as it occurred without the consent of the then registered proprietor (Mr Guy), Barclays' registration of its charge cannot be a mistake, as the granting of the charge *did* occur with the consent of the then registered proprietor (TAL). This is essentially the view taken by Lloyd LJ, but with one twist: he did entertain the argument that, if it can be said that Barclays had sufficient knowledge of the original mistake (that is, of TAL's assumed fraud or forgery) then it can be said that Barclays' registration, like that of TAL, is also a mistake. Lloyds LJ's consideration of this notice-based point is *obiter*, as no such notice was present on the facts of the case, and it seems likely that it was only mentioned so as to show that, *even if* notice could be used as part of the definition of a mistake, there was no such notice on the facts of the case. After all, there is no indication in the 2002 Act that notice may be relevant to the definition of 'mistake' and the Law Commission was very clear, when considering other important parts of the Act, that a general notion of notice is not to be used to reduce the protection available to a party acquiring a right in registered land.[30]

Despite Lloyds LJ's intention to 'grasp the nettle' of defining mistake, *Barclays Bank v Guy* does not form the last word on the matter, as the two following cases make clear.

Odogwu v Vastguide Ltd
[2009] EWHC 3565 (Ch)

Facts: In 1986, Dr Odogwu, who lived in Nigeria, purchased a property ('Victoria Rise') in North West London as an investment, and was registered as proprietor. In 2006, a fraudster impersonated Dr Odogwu and purported to grant a charge over the land to Credit & Mercantile, to secure a loan of £750,000. Credit & Mercantile registered as proprietor of the charge. The loan was not repaid and Credit & Mercantile wished to sell the land to recoup some of its losses. In 2007, the sale went ahead and Vastguide plc was registered as proprietor in place of Dr Odogwu. Dr Odogwu then claimed that the register should be rectified, and that he should be reinstated as registered proprietor.

It is important to note that Dr Odogwu's solicitor first discovered the fraud, and alerted the police, in early 2007. The solicitor attempted to lodge a unilateral notice with the Land Registry to prevent dealings with the land, but his application was not accepted by the Land Registry. The solicitor did, however, discover that two parties (Gromore Ltd and Vastguide) were interested in purchasing the land, and so informed those companies directly of the fraud perpetrated on Dr Odogwu. As a result, Gromore Ltd decided not to buy the land. Vastguide considered its position, but received legal advice that, even if there had been such a fraud, it would not be possible for Dr Odogwu to seek rectification against Vastguide. Vastguide, therefore, went ahead with its purchase of the land. Vastguide subsequently gave a legal charge over the land to the second defendant.

Dr Odogwu then applied to the court for rectification of the register: he wanted to be reinstated as registered proprietor, with the later charge granted by Vastguide also

[30] See Law Commission Consultation Paper No 254, [3.44]; Law Commission Report No 271, [5.21]. For a different analysis, in which C's knowledge may have a role to play in deciding upon rectification, see Nair, 'Morality and the Mirror: The Normative Limits of the "Principles of Land Registration"' in *Modern Studies in Property Law: Vol 6* (ed Bright, 2011).

removed from the register. Vastguide and the second defendant opposed the application. The Chief Land Registrar wished to be joined in the proceedings, and so was added as the third defendant. Judgment was given by Sir Donald Rattee.

Sir Donald Rattee

At [14]–[16]

[. . .] It is the Claimant's case that the registration of Vastguide as proprietor of Victoria Rise is a mistake that can and should be corrected by rectification of the register under the provisions of Sch 4 to the Act. The registration of Vastguide as proprietor is, according to the Claimant, a mistake within the meaning of para 1(a) of Sch 4, because it is an entry which would not have been made on the register were it not for the forgery committed by the fraudster. The Claimant accepts, as he has to, that Victoria Rise is in the possession of Vastguide, and that therefore he cannot obtain an order for the rectification he seeks unless he can show that one of the conditions set out in para 3(2)(a) and (b) of Sch 4 is satisfied, but he submits that one or other condition is satisfied on the facts as I should find them.

Vastguide accepts that the court has jurisdiction to order the rectification sought by the Claimant, but submits that that jurisdiction can only be exercised if the court is satisfied that the condition in para 3(2)(b) is satisfied, namely that it would for some reason be unjust for rectification to be refused. This submission is based on the submission by Vastguide that the relevant mistake for the purpose of Sch 4 is not the registration of it as proprietor, but the registration (deleted on the registration of the purchase of Victoria Rise by Vastguide) of Credit & Mercantile as chargee of Victoria Rise. It is impossible, submits Vastguide, for the court to find that condition (a) in para 3(2) of Sch 4 is satisfied in relation to this latter mistake, because it cannot possibly be said that Vastguide "caused or substantially contributed" to the mistake consisting of the registration of the fraudulent charge, in which Vastguide had no involvement. Vastguide denies that there would be anything unjust about refusing rectification, leaving the Claimant to seek indemnity from the Land Registrar under s 103 of and Sch 8 to the Act.

According to Vastguide's submission, the registration of it as proprietor of Victoria Rise cannot be said to be a mistake in the register, because it correctly recognised the effect of s 58(1) of the Act that, despite the fact that the charge of Victoria Rise to Credit & Mercantile was a forgery, the registration of that company as proprietor of the charge gave it all the powers of such a proprietor, including the power to sell to Vastguide. Therefore the transfer to Vastguide is to be deemed to be valid, and its registration no mistake.

At [39]–[70]

I must now go back a little in time to explain the facts relevant to an argument on estoppel which has featured largely in submissions before me. By its Claim Form issued on 9 May 2007 the Claimant sought an order for rectification of the register by removing the name of Vastguide and restoring the name of the Claimant as proprietor [. . .]

Vastguide's solicitors indicated that they did not accept the proposition that the registration of Vastguide as proprietor could be a 'mistake' within the meaning of Sch 4 to the Act, because, by virtue of the effect of s 58 of the Act to deem the charge effective once registered, Credit & Mercantile was deemed to have power to pass title to Vastguide, and the Land Registry had accordingly been bound to register Vastguide as proprietor. This objection to the claim for rectification was in line with advice which had been received from counsel on 22 March 2007—before Vastguide's purchase. It was also in line with the view of the law that was apparently taken by the Land Registry at the time, though no longer. Before me counsel for the Chief Land Registrar said that, obviously subject to any contrary decision of the court,

he now takes the view that in the circumstances of the present case the registration of Vastguide was itself a mistake rectifiable by an order under Sch 4 to the Act [. . .]

In view of Vastguide's contention that the court had no jurisdiction to rectify the register so as to remove the registration of Vastguide as proprietor, because that registration was not a mistake within the meaning of Sch 4 to the Act, the Claimant proposed and Vastguide agreed that the court should be asked to determine as a preliminary issue the question whether the court did have jurisdiction to remove the registration of Vastguide on the assumption that the charge to Credit & Mercantile was a forgery [. . .]

On 2 November 2007 the Chief Land Registrar filed a defence to the Claimant's claim in which he conceded that, 'if the Claimant establishes the fact and matters relied on,' the court would have jurisdiction to rectify the register as against both Vastguide and the Second Defendant [. . .]

[As a result of the concession by the Chief Land Registrar, the parties agreed to a consent order, which settled the preliminary issue in the Claimant's favour, through an agreement that the court did have jurisdiction to rectify the register. As a result of signing this consent order, Vastguide was now estopped from denying that the court had jurisdiction to order rectification.]

[. . .] However, counsel [for Vastguide] submitted that [the court] has that jurisdiction, not because the entry on the register of Vastguide is a mistake, but because the entry of the Credit & Mercantile charge was a mistake (because it was a forgery), and the court's jurisdiction under para 2 of Sch 4 to the Act to make an order for alteration of the register for the purpose of correcting a mistake includes jurisdiction to make an order for such alternation for the purpose of correcting, not only a mistake on the register, but the consequences of such a mistake. This, submits Vastguide, would include jurisdiction in the present case to remove its entry as proprietor as being a consequence of the mistaken entry of the Credit & Mercantile charge, even though (according to Vastguide's argument) its own entry as proprietor was not itself a mistake.

The motive of Vastguide in now raising this argument is clearly that it prefers the relevant mistake for the purposes of Sch 4 to the Act to be the entry of the charge to Credit & Mercantile rather than its own entry as proprietor, because it can scarcely be said that Vastguide caused or substantially contributed to the entry of the Credit & Mercantile charge within para 3(2)(a) of Sch 4, whereas it is the Claimant's case that Vastguide did cause or substantially contribute to its own entry as proprietor.

Counsel for Vastguide submits that its concession recorded in the consent order that the court has jurisdiction to grant the rectification sought by the Claimant therefore did not amount to a concession that the entry of Vastguide as proprietor was a mistake. For the court's admitted jurisdiction is based not on the premise that that entry is itself a mistake, but on the premise that it is a consequence of another mistake, namely the entry of the Credit & Mercantile charge.

I find this argument unattractive and unconvincing. As I have already said, I am quite satisfied that when Vastguide made its concession recorded in the consent order, it did so, and was inevitably understood by the Claimant as doing so, on the basis that it conceded that it was abandoning the only argument it had previously put against the court's jurisdiction, namely that its entry on the register as proprietor was not a mistake for the purposes of Sch 4 to the Act [. . .]

In my judgment, Vastguide made its concession intending it to be understood as an abandonment of the only argument it had raised against jurisdiction, namely that its entry on the register was not a mistake within the meaning of Sch 4 to the Act. The Claimant entirely reasonably understood it as such. In those circumstances it is an abuse of the process of the

court for Vastguide now to seek to resurrect that argument. In my judgment it is estopped by its own concession from doing so [...]

However, in case I am wrong in this conclusion, I will proceed to consider Vastguide's new argument, namely that the court has jurisdiction to remove the entry of Vastguide on the register on the ground that such removal would constitute the correction of the consequences of the previous mistake consisting of the registration of the Credit & Mercantile charge.

The relevant jurisdiction of the court is that conferred by para 2(1)(a) of Sch 4 to the Act, namely "to make an order for alteration of the register for the purpose of correcting a mistake". In my judgment the reference in that quotation from para 2(1) to a mistake must be to a mistake on the register, so that it can be corrected by an alteration of the register. I accept the submission of counsel for the Claimant that a fundamental objection to Vastguide's argument is that the Credit & Mercantile charge, which Vastguide argues is the relevant mistake, is no longer on the register. It was deleted on completion of the sale to Vastguide when Credit & Mercantile was paid its debt.

Counsel for Vastguide sought to overcome this initial obstacle by submitting that, for this purpose, the register is not limited to the current edition of the register showing currently effective entries, which admittedly does not show the charge, but extends to the records still held by the Land Registry showing all previous entries, including those since deleted. I find this argument misconceived. In my judgment the reference in para 2 of Sch 4 to the Act to a mistake is to a mistake appearing on the current edition of the register which shows subsisting entries. Only such a conclusion makes sense in the context of the jurisdiction in para 2 to alter of register for the purpose of correcting a mistake. I cannot see what purpose would be served by making an alteration to a previous edition of the register to remove an entry such as the Credit & Mercantile charge which has already been deleted.

In my judgment Vastguide's new argument is bad for this reason alone. However, quite apart from this point it does not seem to me obvious that the reference to "correcting a mistake" in para 2(1)(a) of Sch 4 to the Act can properly be construed as including a reference to correcting the consequences of the mistake, which is the next step in Vastguide's argument. However, counsel for Vastguide relied in this context on a recent decision of a Land Registry Adjudicator in *Ajibade v Bank of Scotland plc* in the course of which the Adjudicator seems to have taken the view that the correction of a mistake by rectification of the register could extend beyond the correction of an entry on the register to include the correction of the consequences of such a mistake. As it is not necessary for me to decide this point in this case in the light of my rejection of Vastguide's argument on the ground that the Credit & Mercantile charge has already been deleted from the register (a point that did not arise in the *Ajibade* case) I do not think it appropriate that I express any conclusion on it.

Thus, even if I had not concluded that Vastguide is estopped from relying on the argument I have just been considering, I would have rejected the argument as misconceived. Counsel for Vastguide accepted that, if he failed on that argument, Vastguide would be estopped by the concession recited in the consent order from denying that the entry in the register of Vastguide as proprietor was a mistake within the meaning of Sch 4 to the Act, since that would then be the only ground on which the court would have the jurisdiction which Vastguide had accepted by its concession. It is accordingly unnecessary, and therefore inappropriate, for me to express any conclusion on the question whether, as a matter of law, the entry of Vastguide as proprietor is capable of being such a mistake. I proceed to consider the parties' cases on the footing that it is such a mistake which the court has jurisdiction in these proceedings to rectify by removing that entry from the register, subject to the provisions of para 3 of Sch 4.

Since such alteration of the register would affect the title of the proprietor of a registered estate in land who is in possession of the land, by virtue of para 3(2) of Sch 4 I may not make an order for such alteration unless I am satisfied that one or other of the conditions specified in para 3(2)(a) and (b) is satisfied. Thus I have to be satisfied either (a) that Vastguide has by fraud or lack of proper care caused or substantially contributed to the mistake, ie the registration of itself as proprietor, or (b) that it would for any other reason be unjust for the alteration not to be made.

The Claimant submits that I should find that condition (a) is satisfied, in that Vastguide clearly caused or substantially contributed to the registration of itself as proprietor by making the application for such registration without which it would not have been made, and that it did so by failing to exercise proper care to prevent the true owner of Victoria Rise being deprived of his property as a result of fraud. It failed to exercise proper such proper care in that it took a transfer of Victoria Rise from Credit & Mercantile and applied for that transfer to be registered with knowledge that Credit & Mercantile only obtained power to transfer the property as a result of a forgery.

It is, in my judgment, clear from the facts that I have recited that, when it completed its purchase from Credit & Mercantile, Vastguide did know that Credit & Mercantile had only acquired its power to sell by reason of a forgery by an unknown third party. It had been told that by the Claimant's solicitor and knew that the police had confirmed that the passport in the name of the Claimant used by the third party to impersonate the Claimant in relation to the borrowing from, and charge to, Credit & Mercantile was a forgery.

Counsel for Vastguide submitted that this did not show that Vastguide caused or substantially contributed to the mistake—ie the registration of itself as proprietor—by any lack of proper care. It had only completed the purchase from Credit & Mercantile after giving the Claimant, by his solicitor, repeated opportunities to prevent such completion by making an application to the court, which the Claimant never did. Vastguide had taken counsel's opinion and had been advised that, if it completed its purchase, there would be only a small chance of the Claimant succeeding in obtaining rectification of the register to remove the entry of Vastguide as proprietor. On the other hand, submitted counsel for Vastguide, the Claimant (at least by his solicitor) was fully aware of the facts of the forgery and the proposed sale by Credit & Mercantile to Vastguide, and must—or at least should have appreciated that his property was at risk if he took no steps to protect it by obtaining an order of the court to prevent the transfer to Vastguide. On this basis counsel for Vastguide submitted that what caused or substantially contributed to the registration of Vastguide as proprietor was not any lack of proper care by Vastguide, but the lack of proper care by the Claimant in failing to protect his property.

I entirely accept that it is extraordinary that the Claimant did not make any attempt to obtain an order of the court to prevent completion of the sale to Vastguide, and did not make any earlier application for rectification of the register once he knew of the forgery. I can find no excuse for his idleness in this respect. However this does not, in my judgment, alter the fact that Vastguide did take its transfer and apply for its registration with actual knowledge that its ability to do so depended on the perpetration of a fraud on the Claimant by use of a forged passport. In my judgment it did not take proper care to minimise the consequences of such fraud. Vastguide relied on the fact that, by the time it had confirmation from the police that the passport used by the fraudster was a forgery, it was contractually bound to complete its purchase. However it apparently did not think fit to ask Credit & Mercantile to release it from its contract, as its predecessor as a possible purchaser from Credit & Mercantile, namely Gromore Ltd, successfully did, once it had knowledge of the fraud. Moreover, even before entering into the contract to purchase Victoria Rise from Credit & Mercantile, Vastguide knew from [Dr Odoguw's solicitor's] letter of 16 February 2007 that

the police had confirmed that a forged passport had been used to enable a fraudulent person to grant the Credit & Mercantile charge.

I consider Vastguide's reliance on this point on its having taken advice from counsel is misconceived. Vastguide's only purpose in doing so was, for its own protection, to see whether its title would be liable to be upset by rectification of the register after completion. Neither do I see any merit in Vastguide's counsel's argument that Vastguide cannot be said to have caused or contributed to its registration as proprietor by lack of proper care because the provisions of the Act entitled it to apply for such registration.

In my judgment Vastguide did, by a lack of proper care within the meaning of 3(2)(a) of Sch 4 to the Act, cause or substantially contribute to the admitted mistake on the register consisting of its registration as proprietor despite the fact that its title was the consequence of fraud by a third party on the true owner. This means that I have power to order alteration of the register to substitute the Claimant for Vastguide as the proprietor of Victoria Rise.

I am also of opinion that, even if I were wrong in finding the condition in para 3(2)(a) of Sch 4 satisfied, I would have power to make the order sought by the Claimant, because condition (b) in para 3(2) is satisfied. In my judgment in all the circumstances that I have described, it would be unjust not to make such an order. Counsel for Vastguide relied in this context on the Claimant's own failure to take steps open to him to protect his own property and title to it, and the fact that, if I refuse to order rectification, the Claimant would prima facie be entitled to compensation from the Chief Land Registrar for the loss of his property, which was of no interest to him except as an investment.

I take those points into account, as I do also the facts that Victoria Rise is of interest to Vastguide only as an investment and that Vastguide has a claim against the Chief Land Registrar for compensation in the event that I do order rectification of the register. In my judgment, however, it would be unjust not to order rectification as sought by the Claimant in the present circumstances when I am satisfied that the Claimant has been deprived of his property by means of the fraud of an unknown third party and that Vastguide chose to compound the effect of that fraud by entering into and completing a purchase of the property with knowledge that it was able to do so only because of that fraud.

The remaining question is whether I should exercise that power. Paragraph 3(3) of Sch 4 to the Act requires me to exercise it unless there are exceptional circumstances which justify my not doing so. In his closing submissions counsel for Vastguide accepted (rightly in any judgment) that, if he failed in his arguments on para 3(2) of Sch 4, he could not point to any other exceptional circumstances within para 3(3). In my judgment there are none.

Accordingly I will make the order for alteration of the register sought by the Claimant.

The chief importance of *Odogwu v Vastguide Ltd* lies in the point conceded by the Chief Land Registrar and, as a result, by the other defendants in the case: if X, without A's authority, is registered as proprietor in place of A and then grants a legal charge to C, the registration of C, as well as of X, counts as a 'mistake'. As a result, A has a good chance of having the register rectified not only against X, but also against C. As noted by Sir Donald Rattee in *Odogwu*, this concession represented a change in approach by the Chief Land Registrar. The previously prevailing view, adopted, for example, in *Ruoff and Roper on Registered Conveyancing*, a leading practitioner work, was the one for which Vastguide initially argued in *Odogwu*: even if X is registered as proprietor without A's authority, the fact of X's registration gives X the legal power to grant C a valid charge. The Chief Land's Registrar change of opinion is important as it involved a rejection of such a 'narrow' approach to the interpretation of 'mistake'. Its influence can be seen in *Ruoff and Roper* itself: the editors now adopt a broader approach to the definition of mistake, as can be seen in the following extract. The extract

considers an example in which R1 is initially the registered proprietor. R2 then forges R1's signature on a transfer form and is registered in R1's place. R2 then grants a legal charge in favour of M1. The example is, thus, identical to the one set out in section 1.3 above, with R1 in place of A, R2 in place of X, and M1 in place of C.

Ruoff and Roper on Registered Conveyancing (ed Cavill et al, April 2011 release, paras 46-028–46-029)

> The Registrar will rectify the proprietorship register against R2 [. . .] In addition, it is the current view of the Registrar that it will also be possible, for the reasons explained below, to rectify the charges register against M1 even though the registration of M1's charge was not in itself a 'mistake' in the narrow sense of the term.
>
> The legal estate is deemed to be vested in R2 when he was registered as its proprietor, even though it would not otherwise have vested in him owing to the invalidity of the purported disposition from R1 to R2 [. . .] The consequence is that R2 had full owner's powers of disposition over the estate, including the power to grant the legal charge to M1, since he was at that point the registered proprietor. His powers of disposition subsisted for so long as his registration as proprietor remained effective. It cannot be said therefore that the disposition by way of legal charge to M1 was in itself invalid, nor that the registration of the charge was a mistake in the narrow sense.
>
> However, the Registrar will accept an application to rectify the register against M1 on the basis of a broader interpretation of the term "correction of a mistake" within this context. That is, on the basis that either (a) the registration of M1's charge forms part of the original mistake, in that it directly flows from it, i.e. from the registration of R2 as proprietor, and the removal of M1's charge necessarily forms part of the correction of the mistake; or (b) although not in itself a mistake, the registration of M1's charge is a consequence of the mistake, ie the registration of R2 as proprietor, and that in order to *fully* correct that mistake—pursuant to the Registrar's power to alter the register to correct a mistake—it will be necessary to remove M1's charge as well as to restore R1 as proprietor of the registered estate [. . .] R2 would not be entitled to indemnity. However, M1 would be entitled to indemnity from the Registrar in consequence of the rectification [. . .]

There is a tension here between the analysis of Ruoff and Roper and the concession of the Chief Land Registrar in *Odogwu v Vastguide Ltd*. In that case, the concession was that the relevant mistake was Vastguide's registration as proprietor. This was important: because Vastguide was in possession of the land, Dr Odogwu's application for rectification could only succeed if Vastguide had, by fraud or lack of proper care, caused or substantially contributed to the mistake; or if it was, for any other reason, unjust not to rectify the register. If the relevant mistake was Vastguide's registration, it was easy to show that it had caused or contributed to that mistake, as it had proceeded to buy the land despite warnings from Dr Odogwu's solicitor. In contrast, on the analysis set out in Ruoff and Roper, Vastguide's registration was *not* a mistake: like C in our example, or M1 in Ruoff and Roper's example, Vastguide had acquired its right with the authority of the then registered party. On this analysis, then, the only mistake is the initial registration of Credit & Mercantile, procured as it was by forgery. According to Ruoff and Roper, it can be said that correcting that mistake may necessitate removing not only Credit & Mercantile's charge, but also Vastguide's registered title. As noted by Sir Donald Rattee, there is a difficulty in applying this analysis to the facts of *Odogwu v Vastguide*: Credit & Mercantile's registered charge

no longer existed when Dr Odogwu applied for rectification, so it may seem strange to see that application as based on the need to correct Credit & Mercantile's registration. Further, if the Ruoff and Roper analysis is correct, it would be impossible for a party such as Dr Odogwu to show that Vastguide's fraud or lack of proper care contributed to the mistake, as the relevant mistake would be the registration of Credit & Mercantile, which occurred before Vastguide's involvement in the case. This means that, in a case where a third party such as Vastguide is in possession of the registered land, rectification in favour of an initial registered proprietor such as Dr Odogwu will only be possible if it is 'for any other reason unjust' not to rectify the register.

It does seem, however, that the Ruoff and Roper analysis may be the prevailing one, as can be seen by the analysis of Lord Neuberger MR in the extract below. The extract is taken from what was the next step in the *Barclays Bank v Guy* litigation. As one might expect, the Chief Land Registrar's change of approach, evidenced by his concession in *Odogwu v Vastguide Ltd*, was a matter of some interest to Mr Guy. After all, the approach of Lloyd LJ in *Barclays Bank v Guy*, set out in the extract above, was influenced by the former 'narrow' approach to the interpretation of mistake. In fact, following *Odogwu*, Mr Guy asked the Court of Appeal to reconsider its initial refusal to grant him permission to appeal against the summary judgment given in favour of Barclays. The difficulty faced by Mr Guy was that, as a matter of procedure, it is very difficult to reopen a decision not to allow permission to appeal. As a result, the Court of Appeal dismissed his further attempt to win permission to appeal. As the following brief extract shows, Lord Neuberger MR, however, did suggest that Mr Guy might have had more success in his initial application if his case had been presented differently.

Barclays Bank v Guy
[2010] EWCA Civ 1396

Lord Neuberger MR

At [35]

It also seems clear that Lloyd LJ's analysis proceeded on the basis that the alleged 'mistake' for the purposes of para 2(1) of schedule 4 to the 2002 Act was the registration of the Charge in the charges register. However, there are other ways of putting Mr Guy's case, namely (a) that the removal of his name from the proprietorship register was a mistake, and, in order to correct that mistake, the Charge would have to be removed from the charges register, or (b) that the registration of the Charge flowed from the mistake of registering the Transfer, and therefore should be treated as part and parcel of that mistake.

In a case where X is fraudulently registered in A's place, and X then grants a charge to C, the analysis suggested by Lord Neuberger MR, like that now put forward in *Ruoff and Roper*, does not depend on showing that C's registration is itself a 'mistake'. Rather, it makes use of the undoubted point that X's registration is a mistake, and then argues that the powers of the Registrar or court to correct that mistake extend to allowing the removal of C's charge, as well as the removal of X. Despite the difficulties noted above, it does seem that this analysis, when contrasted to the 'narrow' interpretation of mistake that would deny A any chance of removing C's charge, may provide a fairer balance between the demands of static security (the protection of A as previous registered proprietor) and the demands of dynamic security

(the protection of C as having newly acquired a registered right). Certainly, the possibility of rectification does show that the scheme of the 2002 Act does not provide complete protection to C: the register is not, in the Law Commission's phrase, 'complete and accurate'. As the author of the following extract suggests, it may be no bad thing that, in this way, the reality of the Act does not match up to the rhetoric that lay behind its introduction.

Nair, 'The Normative Limits of the "Principles of Land Registration"' in *Modern Studies in Property Law, vol 6* (ed Bright, 2011, p 282)

In my view [...] the [narrow] interpretation of the 'mistake' provision of the schedule [formerly] put forward in Ruoff is misguided [...] [T]he conclusiveness and accuracy of the register are competing policy goals. Although the conclusiveness of the register is an important ideal, the underlying normative principle that it represents is protection of the reliance of a purchaser who has fulfilled the obligations imposed upon him by the registration rules. This reliance is protected even where the LRA 2002 schedule 4 is engaged and it is acknowledged that a 'mistake' has been made, due to the scope of the discretion exercisable by the court or the registrar when it comes to applying the schedule, as well as the stronger protection that will be offered to a purchaser who is a registered proprietor in possession. If Vastguide Ltd had not been aware of that it was relying on a forgery to acquire rights, rectification would not have been ordered against them. Further, if the courts took the view that they had no jurisdiction to rectify or alter the register in this situation, the underlying policy objective contained in the ideal of the accuracy of the register would not be protected: the failure to rectify or alter would mean that the register did not reflect the position as it would have been if all parties had fulfilled their duties to deal honestly with the Land Registry.

3.1.2 Overriding interests

If the possibility of rectification is one dent in the idea of a 'complete and accurate' register, the concept of an overriding interest is another. The Law Commission's view of such interests is clear, as the following extract shows.

Law Commission Report No 271, *Land Registration for the Twenty-First Century: A Conveyancing Revolution* (2001, [8.6])

It is the fact that overriding interests do not appear on the register, yet bind any person who acquires any interest in registered land, that makes them such an unsatisfactory feature of the system of registered conveyancing. The existence of such rights means that inquiries as to title cannot be confined to a search of the register. We devoted a substantial part of the Consultative Document to a discussion of overriding interests and how their impact might be reduced without causing any disadvantage to those who have the benefit of them. Our conclusion was that interests should *only* have overriding status where protection against buyers was needed, but where it was neither reasonable to expect nor sensible to require any entry on the register. We suggested a number of strategies to ensure that the only overriding interests were those which met these criteria. As we have explained above, the introduction of electronic conveyancing will, of itself, substantially reduce the circumstances in which those criteria are met. As might be anticipated, our proposals attracted a good deal of

interest and the responses were lively. However, for the most part they were supported. Where this was not so, or where better solutions were proposed, those contrary or better views have been adopted.

Has the LRA 2002 achieved this aim of limiting overriding interests to situations in which B (a party with a pre-existing legal or equitable property right) cannot reasonably be expected to register that right? Clearly, it has not. For example, under Sch 3, para 2, *any* equitable interest of a party in actual occupation counts as an overriding interest (see Chapter 14, section 5.1). And, as McFarlane has pointed out,[31] '*the presence or absence of actual occupation is* irrelevant *to the question of whether B can be expected to register his right*'. So, as noted above, the 2002 Act currently allows B to have an overriding interest if: (i) he has bought land from A, and has failed to register as the new holder of A's legal estate; as long as (ii) B is in actual occupation of that land. In such a case, it is usually perfectly reasonable to expect B to register (he may well have been instructed by his solicitor or conveyancer to do so)—yet this does not prevent B from acquiring an overriding interest.

Of course, as noted in section 2.2.3 above, the result in our example may well change when e-conveyancing is operational: B's failure to register his *contract* with A may then deny him an equitable interest in the land. As we saw in Chapter 7, sections 3.7 and 6.1, however, even then, the courts will have to grapple with the question of whether B can acquire an equitable interest through the doctrines of proprietary estoppel or constructive trust. Again, this shows that the attitude of the judges will be decisive to the success, or otherwise, of the LRA 2002 in progressing towards a 'complete and accurate' register.

It is worth noting that the Law Commission attempted to limit the scope of 'actual occupation' overriding interests. For example, Sch 3, para 2(c), means that even if B is in actual occupation, his right will not be overriding if his '*occupation would not have been obvious on a reasonably careful inspection of the land at the time of the disposition*', unless C, in any case, had 'actual knowledge' of B's right. As we noted in Chapter 14, section 5.1.2, this qualification aims to give extra protection to C—but the extent of that protection again rests with the judges who will have to give meaning to the term 'reasonably careful inspection'. And, as suggested by Jackson (see the extract in Chapter 14, section 5.1.2), it may well be the case that the width of the concept of 'actual occupation' under the LRA 1925 came not from any absence of such a qualification, but rather from the judges' willingness to protect important rights of B, even if those rights had not been noted on the register.

It is important to remember that the property rights of those in actual occupation of registered land are not the only form of overriding interest. For example, as we saw in Chapter 14, sections 5.2 and 5.3, Sch 3, para 1, gives overriding status to all non-exceptional legal leases of seven years or less, and Sch 3, para 3, does the same for almost all legal easements. In contrast, as we noted in section 2.1.5 above, an equitable lease or equitable easement can only be overriding if accompanied by actual occupation of the land that it burdens. Again, it is very hard to see how this can be reconciled to the Law Commission's view that B's right should be overriding only where it is unreasonable to expect B to register that right. For example, compare: (i) a case in which A, using a deed, grants B a seven-year lease of business premises; and (ii) a case in which A orally promises B that B already has a seven-year lease of residential property. In each case, B relies on this promise by incurring expenses in modifying the

[31] *The Structure of Property Law* (2008), p 488.

land: in which case is it more reasonable to expect B to register? The answer is clear—but it is only in the first case, not the second, that B's right is necessarily overriding.

As noted in section 2.2.2 above, the position is likely to change when e-conveyancing rules are introduced: it may well be the case that *any* lease of more than three years will have to be registered in order to count as a legal lease. There will thus be a reduction in the number of overriding interests that it is reasonable to expect B to register. Yet the point remains that many interests will still fail to be overriding, even though it is *not* necessarily reasonable to expect B to register. For example, no equitable interest acquired by B under the doctrine of proprietary estoppel (see Chapter 10, section 5.3) will be overriding in its own right: it can only count as an overriding interest if B is in actual occupation of the registered land at the relevant time.

3.2 EVALUATING THE LAW COMMISSION'S AIM

One way in which to evaluate the LRA 2002 is to see how close it comes to achieving the Law Commission's aim of a 'complete and accurate' register; we have considered this in section 3.1 above. It is also important to evaluate that aim itself: for example, if the introduction of e-conveyancing rules assists in making it harder and harder for an unregistered right of B to bind C, is that necessarily a good thing? Further, even if the aim is a good one, are the means employed to achieve it proportionate? After all, it should be remembered that the registration system has to be paid for and that C, when registering as the new holder of A's registered estate, must pay a fee to the Land Registry.

It is clear from the Law Commission reports leading to the 2002 Act that the basic aim of the new system is to strengthen the protection of C, a party who acquires for value, and registers as the holder of, a legal estate in land. It is in the light of this aim, for example, that overriding interests are regarded as 'unsatisfactory'.

In the following extract, Dixon considers the possible justifications for the Law Commission's desire, given effect to in the 2002 Act, to limit the scope of overriding interests as formerly permitted by the LRA 1925.

Dixon, 'The Reform of Property Law and the Land Registration Act 2002: A Risk Assessment' [2002] Conv 136, 137–9

There is, perhaps, no other creation of the Land Registration Act 1925 that has aroused as much fierce comment as the infamous s.70(1) and its list of overriding interests. The fact that there is a category of property right that can bind a purchaser of a registered title without either that interest appearing on the register or necessarily being discoverable is thought by many to be anathema to the very idea of a registration system. To others, among which the present author can be counted, there is nothing inherently wrong with a category of non-registrable binding right, even in a system of land registration, provided that the category is well-bounded, well known and can be justified by reference to some stronger legal, social or economic need. Indeed, policy might well dictate that there should be a class of right that binds a registered title irrespective of registration. Obligations of general public utility, such as the burden of maintaining sea walls and public rights of way, are an obvious example. But, "policy" can mean more than this and it could be thought socially and economically politic to ensure that the property rights of those who do not have the protection of a formal acknowledgement of their rights, but who nevertheless occupy land as their home, should be

protected without the need to register. For, theory aside, the act of registration "against" another's land, even when it is not the land of one's emotional partner, is readily seen as an hostile act.

Of course, it is unarguable that changes to land law and land use have turned s.70(1) of the LRA 1925 into a different creature from that envisaged by the drafters of 1925 Act. The development of principles permitting (some might say encouraging) the informal acquisition of interests in land—such as resulting and constructive trusts and proprietary estoppel—have dramatically increased both the chance that an adverse right might exist and that it might be undiscoverable, being neither materially recorded nor necessarily obvious to the prudent purchaser. Likewise, the rise of a different kind of "purchaser", the institutional mortgagee, and the importance of such lending to the domestic economy has both exposed the latent power of s.70(1) and released a tidal wave of litigation. So, despite the fact that the case against overriding interests is not watertight, there are powerful arguments in favour of reform even without the imperative of e-conveyancing. When that imperative is taken into account, with its goal of making the register both the evidence and the origin of a person's title achieved on-line with the absolute minimum of additional enquiries, it is clear that reform cannot be put off. The very point of e-conveyancing where the act of electronic registration is to be the act of creation or transfer of a property right would be undone if it were possible to claim protection for rights created off-register through a substantial category of overriding interests. Thus, it is with some justification that the Law Commission saw the existence of overriding interests as the "major obstacle" to its reforms and although there was a brief flirtation with the idea of abolishing the concept altogether, in the result the 2002 Act lays the axe to the tree with some vigour by both minimising the occasions on which an "interest that overrides" can affect a registered title and by encouraging the registration of interests that might otherwise take effect as such. Conversely, if these reforms are not effective, then the dream of e-conveyancing as it is currently set out in the Act will be unattainable.

Dixon identifies the tension between: (i) the importance to the overall scheme of the 2002 Act of limiting overriding interests; and (ii) opposing policy needs that may justify the protection of pre-existing, but unregistered, property rights.

In the following extract, it is argued that the Law Commission—at least in the rhetoric used when describing overriding interests—may have underestimated those opposing policy needs.

McFarlane, *The Structure of Property Law* (2008, p 487)

The purpose of a registration system is not simply to provide security for C, but is rather to balance the interests of C with those of B. Overriding interests form a vital part of that balance [. . .] [N]o registration system would go so far as to say that B, a party with a pre-existing but unregistered property right or persistent right,[32] should *never* be able to assert that right against C. As a result, it is possible to take the opposite view to that of the Law Commission. The *very fact* that overriding interests give B the chance, in some circumstances, to assert his unregistered right against C, makes these interests a *crucial part* of the system of registered conveyancing.

32 [In this extract, 'property rights' refers to legal estates or interests in land; 'persistent rights' refers to equitable interests in land. See further Chapter 5, section 7.]

The real question, therefore, is not whether the *general* concept of overriding interests is appropriate in a registration system. Rather, the question is whether *each particular type* of overriding interest ought to be capable, even though unregistered, of binding C. One point worth noting is that if C is bound by an overriding interest, *no* indemnity is payable to C. That is because any change to the register made as a result of B's overriding interest does *not* "prejudicially affect" C's right: C was *already* bound by B's right, even before the change to the register was made. We saw when considering rectification—the second gap in C's protection—that, in many situations, C will at least receive some compensation in return for being bound by B's right. However, the same is not true of where C is bound by an overriding interest. Similarly, if C can use the lack of registration defence against a pre-existing property right or persistent right of B, no indemnity is payable to B.

The extract raises a further means of resolving the tension, identified by Dixon, between, on the one hand, making the register 'complete and accurate' and, on the other, giving effect to policy concerns in favour of protecting an unregistered property right of B. That means would be to allow B to have an overriding interest, but, at the same time—in some cases, at least—to provide C with an indemnity.

The Law Commission briefly considered this possibility.[33] Of course, no indemnity would be payable in a case in which C could reasonably have discovered B's overriding interest (e.g. where B was in actual occupation of the land at the relevant time). But an indemnity could be justified if, for example, C is bound by an oral legal lease of B: a right that counts as an overriding interest even if B is not in actual occupation. The Law Commission quickly dismissed this possibility, however, in the consultative document preceding the full report and draft Bill that, in turn, led to the LRA 2002.[34]

Nonetheless, Roger Smith has canvassed it more seriously, as shown by the following extract.

Smith, 'The Role of Registration in Modern Land Law' in *Land Law: Issues, Debates, Policy* (ed Tee, 2002, p 52)

Indemnity

The third and final aspect of guaranteeing titles concerns the financial guarantee if loss is caused to the registered proprietor. However well structured the system, it is inevitable that rectification will sometimes deny or damage a registered title [. . .] There is no financial guarantee of titles in unregistered land, so indemnity is potentially a very significant benefit for purchasers of registered land. When I reviewed the position in the mid 1980s, I concluded that just 0.18% of fee income [i.e. registration fees received by the Land Registry] went on indemnity claims, though I thought that a truer figure to take account of inflation and growth in the system would be 0.44%. How do those figures look 15 years on, when inflation is low and the system closer to a steady-state position?

Taking the last five years, the figure has increased to 0.61% of fee income [. . .] However the precise figures are viewed, it is clear that a minute part of the resources of registration is devoted to indemnity: its value to the average purchaser, in financial terms, is minimal. This may demonstrate that the Land Registry makes commendably few errors, but it also defeats

[33] Law Commission Report No 158, *Property Law: Third Report on Land Registration* (1987).
[34] See Law Commission No 254 (1998), [4.18]–[4.20].

any idea that indemnity can be seen as insurance for defects in title. A brave attempt was made by the Law Commission in the 1980s to extend indemnity to purchasers bound by overriding interests. Because of the impossibility of quantifying likely claims, that approach is now regarded as foolhardy and has been dropped by the Law Commission. It may well be that this was essential in order to advance more general reforms of land registration, but it severely limits the extent to which imaginative use is made of registration to guarantee a proprietor's title.

The point raised by Smith is a very important one. Given that such a small proportion of the income generated by land registration is currently paid out by way of indemnity, there is room to consider changes that allow such payments to be claimed more frequently. Certainly, the most recent figures published by the Land Registry show that the general financial position has not changed since Smith's survey. The Land Registry enjoyed a healthy operating surplus of £65.4m in 2010–11, with only £9.14m paid out by way of indemnity.[35] It is true that the Land Registry, like all government-funded bodies, is under financial pressure: a number of its offices have recently closed,[36] its historic headquarters in Lincoln's Inn Fields in London has been sold, and it is expected to make significant further savings in the next ten years. Nonetheless, it remains possible to dispute the Law Commission's suggestion, referred to by Smith in the extract above, that allowing indemnity payments to C in some overriding interest cases would '*undoubtedly increase registration fees*'.[37] The crucial point in favour of the reform is that the registration system would be able to take advantage—in some cases, at least—of a further way of resolving the tension between B and C. Indeed, it is even possible to argue that there could be cases (e.g. where it is unreasonable for B to register his right, but B is not in actual occupation) in which C should be able to use the lack of registration defence and *B* should receive an indemnity.[38]

This consideration of finance brings us to the question of proportionality. It is clear that, even though the register is not yet 'complete and accurate', the registration system does provide legally significant protection to C against the risk of being bound by a hidden, but pre-existing, property right. But that protection is bought at a cost: not just the loss suffered by B when he or she is unable to assert a pre-existing right against C, but also the general cost of maintaining a registration system, and the individual cost to C when he or she pays to register the legal estate acquired from A. For example, if A sells a registered freehold worth £215,000 to C, it will cost C £280 to register as the holder of that freehold.[39] So is the protection given to C worth the money: is it *practically* significant?

Smith considers this point in the following extract.

[35] Land Registry, *Annual Report and Accounts 2010–11*, pp 40 and 42. Over the past five years, the average annual sum of indemnity payments is £8.3m, and the average annual operating surplus (after indemnity payments are taken into account) is £24.4m. This average is affected by an exceptional loss of £129.9m in 2008/9 due to the costs of voluntary redundancies and early retirements of Land Registry Staff.

[36] The Harrow and York offices closed in 2010 and the Stevenage and Tunbridge Wells offices in 2011. For further discussion, see Dixon, 'The Future of the Land Registry' [2011] Conv 1.

[37] See Law Commission Report No 254 (1998), [4.18]–[4.20].

[38] See McFarlane, *The Structure of Property Law* (2008), pp 498–9.

[39] The fee is the same if A's freehold was unregistered so that C is applying for first registration. If A gives her registered freehold, worth £215,000, to C for free (e.g. by leaving it to C in her will), then C must pay a registration fee of £90. These figures were taken from the Land Registry website in October 2011.

Smith, 'The Role of Registration in Modern Land Law' in *Land Law: Issues, Debates, Policy* (ed Tee, 2002, pp 31–2)

The conveyancing dimension

This is, perhaps, the most obvious role of land registration: the principal reasons underpinning its introduction and extension have been to make conveyancing simpler, quicker and cheaper. We are not here concerned with issues of security of title or protection of interest holders, but rather the nuts and bolts of buying and selling land. Three sub-issues emerge: the ease of conveying registered land, its cost and the potential for future improvements.

Ease and cost

These issues will be dealt with together, as they are so closely linked in practice. I considered them some 15 years ago[40] and concluded that registration offered relatively minor benefits. The core point is that registration is all about the quality of the seller's title. In favour of registration, it is plainly easier to see all the relevant information from a copy of the register than to investigate complex deeds stretching over many years (and to make the necessary land charges searches). Yet two factors have combined to diminish the significance of this. First, unregistered conveyancing is much more straightforward than it used to be. Title has to be searched for a minimum period of 15 years, and this relatively short period ensures that few conveyances are likely to be involved. Indeed, the title may well consist of a single conveyance. Not only this, but the style of modern conveyances is simpler than in the past: reading the operative parts of a small number of modern conveyances is scarcely taxing [. . .] Perhaps the best conclusion is that for the average transaction the benefits of registration are decidedly minor, though on occasion they may be significant, especially where title is unusually complex or the boundaries unusually uncertain. The second factor that has to be considered in assessing the benefits of registration is that the title questions form a relatively small part of the work of a lawyer acting for the seller or purchaser of land. Questions relating to local authority searches, inquiries before contract (dealing with many non-title related issues), mortgage finance and the tying together of sales in a chain all take significant amounts of time. When one recalls that lawyers charge around 0.5% of the land value for average house values, it is easy to see that title issues account for (let us say) 0.1% of the land value. Even significant benefits in the title areas (and one may doubt whether these are achieved in practice) are going to have little impact in terms of pounds and pence. Registration has the potential for greater speed, but it is unclear that title questions contribute to the two or three months' delay often experienced between acceptance of an offer and completion. Online access to the land register may save a couple of days in obtaining vital information. This would be terribly important if other factors in the conveyancing process enabled it to be completed virtually instantaneously. As is known only too well, this is not the case. Perhaps the most obvious reasons for the present delays lie in the need to organise a chain of conveyances (as well as mortgage finance) and the obtaining of information from sources such as local authorities [. . .]

What about the cost of registration? In the mid-1980s, I concluded that registered conveyancing is more expensive because fees have to be paid to the Land Registry, whilst legal costs are virtually identical for registered and unregistered land. At that time, the Land Registry fee might be close to half the fees charged by the purchaser's legal advisers, so the extra amount was by no means trivial. Have things changed since then? [. . .] Sharp increases

[40] 'Land Registration: White Elephant or Way Forward?' [1986] CLP 111.

in housing costs bring additional revenue to the Land Registry, as the fees increase according to the value of the land [. . .]

Accordingly, we can say that the 1980s conclusion still stands: registration of title cannot be defended as a system that is more efficient, fast and inexpensive. This does not mean it does not possess advantages but rather that the inherent bureaucracy is bought at a not insignificant expense.

Smith goes on to point out that the widespread use of e-conveyancing could lead to some reduction in costs. Yet it is worth bearing in mind, as noted above, the operating surplus of over £65m made by the Land Registry in 2010/11, even after the payment of indemnities. The presence of this surplus makes clear that the registration system is not cost-neutral: fees paid by its users certainly generate a profit for the government.

Smith also makes the vital point that, whilst delays in the process of buying a house are well known and a constant source of frustration, those delays, even in an unregistered system, are not based on the need to check the seller's title; nor are they chiefly caused by the need to see whether any third parties have pre-existing legal or equitable property rights in relation to the seller's land. Rather, the most obvious causes of delay are: (i) the need for the purchaser to investigate the physical condition of the seller's land; (ii) the practice of offers to buy being accepted 'subject to contract', which gives both seller and purchaser the space to pull out of the planned transaction, or to insist on new contractual terms; (iii) the need for a purchaser to arrange mortgage finance; and (iv) in particular, the need for one sale in a chain to be completed before another can proceed.

As Smith goes on to note, the LRA 2002 does attempt to address the last of those problems. The Law Commission planned that, under the e-conveyancing system, a 'chain manager' could be appointed to monitor and manage the various links in a conveyancing chain: under Sch 5, para 9, of the 2002 Act, the Registrar (or a delegate) is given those powers to monitor and manage. But as the next extract suggests, it is not obvious how simply changing the rules of the registration system can reduce the other causes of delay.

McFarlane, *The Structure of Property Law* (2008, pp 496–7)

The basic aim of the [LRA 2002] is to simplify conveyancing; its chief tool for achieving this is the introduction of an electronic system. This means that the Act can only be fully evaluated by an empirical study, carried out once electronic conveyancing is fully operational, assessing the efficiency of the system. However, it is overwhelmingly likely that the Act will not succeed in silencing those who complain about the time and cost involved in buying a house. The chief cause of annoyance to purchasers does *not* come from the risk of being bound by a pre-existing right of B. Rather, it is the *process* of buying a house that causes problems. First, there is the problem that, before committing to a contract, a buyer needs to pay for a survey to check the condition of the vendor's land: that is the case even if another potential buyer has already paid for such a survey. The survey may be expensive and may in fact deter the buyer from proceeding with the sale. One solution to this would be to place responsibility on the vendor to carry out a survey and to include it in a "Home Information Pack"; however, that idea has now been rejected. Second, there is the practice of offers to buy being accepted "subject to contract". This means that, whilst the potential buyer may feel reasonably secure once his offered price has been accepted, no binding agreement has been concluded and the vendor is free to impose further conditions or to pull out of the sale entirely. Unless some

mechanism is introduced to deal with this uncertain period between acceptance of an offer and conclusion of a binding contract such as, perhaps, a deposit system,[41] buying a house in England and Wales[42] will continue, for those who can afford it, to be a fraught process.

This is not a direct criticism of the 2002 Act; rather, it suggests that changing the legal rules of the registration system can have only a limited practical effect. So, whilst the Law Commission heralded the reforms made by the LRA 2002 as a 'conveyancing revolution',[43] it is clear that further changes to conveyancing practice are needed in order to tackle the perennial frustration experienced by potential homebuyers.

QUESTIONS

1. What were the aims of the Land Registration Act 2002?
2. Following the enactment of the 2002 Act, is it true to say that the register is now 'complete and accurate'? If not, will it be so once e-conveyancing rules have been introduced?
3. Do you agree with the Law Commission that overriding interests are an inherently 'unsatisfactory' aspect of a registration system?
4. What different approaches can be taken to interpreting the term 'mistake' in Sch 4 of the 2002 Act?
5. Does the success or failure of the 2002 Act lie in the hands of the judges who will interpret it?
6. Is it possible or desirable for the principles of a land registration system to be wholly separate from the general principles of land law?

FURTHER READING

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

Griggs and Low, 'Identity Fraud and Land Registration Systems: An Australian Perspective' [2011] Conv 285

Harpum, 'Registered Land: A Law Unto Itself?' in *Rationalizing Property, Equity and Trusts: Essays for Edward Burn* (ed Getzler, London: Butterworths, 2002)

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

[41] In 1987, the Conveyancing Standing Committee issued a Practice Direction on pre-contract deposits. As discussed in [1988] Conv 80, the plan was that, on acceptance of an offer to purchase, both vendor and purchaser should pay a deposit equal to half of 1 per cent of the purchase price to a neutral third party. If the parties proceeded to reach a binding contract within four weeks, the deposits would be repaid; if one party withdrew for a reason not permitted by the deposit agreement, the other party would receive both deposits.

[42] The system is different in Scotland, as in most other European jurisdictions. In Scotland, sales are often conducted through a sealed bid system. Once a bid is accepted, then both vendor and purchaser are bound: see the Scottish Executive's *Guide to House Purchase*, available from its website.

[43] 'A Conveyancing Revolution' is the subtitle of Law Commission Report No 271 (2001).

McFarlane, *The Structure of Property Law* (Oxford: Hart, 2008, Pts C2 and E5)

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

O'Connor, 'Registration of Title in England and Australia' in *Modern Studies in Property Law: Vol 2* (ed Cooke, Oxford: Hart, 2003)

O'Connor, 'Ten Key Questions' in *Property and Security* (eds Moses et al, Sydney, 2010)

Smith, 'The Role of Registration' in *Modern Land Law in Land Law: Debates, Issues. Policy* (ed Tee, Devon: Willan, 2002)

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PART E

THE SHARED HOME

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16

INTERESTS IN THE HOME: THE ACQUISITION QUESTION

CENTRAL ISSUES

1. In most situations, ownership of the home falls to be determined by the application of property law principles, particularly the doctrines of resulting and constructive trusts. These trusts differ in relation to how they are created and the means by which the parties' beneficial interests are quantified.
2. Where there is sole legal ownership of the home, the initial presumption is of sole beneficial ownership. A claimant may use a resulting or constructive trust both to establish the existence of a beneficial interest (the primary question) and to quantify his or her share (the secondary question).
3. Where there is joint legal ownership of the home, but no express declaration of the parties' respective beneficial shares, the initial presumption is of joint and equal beneficial ownership. Where the property is a home purchased '*in joint names for joint occupation by a married or unmarried couple, where both are responsible for any mortgage*' this presumption will be rebutted only exceptionally and through the common intention constructive trust. In this instance the constructive trust is used only to quantify the parties' beneficial shares.
4. In other joint names cases, the presumption of joint and equal beneficial ownership is replaced with a presumption of resulting trust where the parties contributed unequally to the purchase so that the beneficiaries receive a share proportionate to their contribution. A constructive trust may, however, be claimed by a party who wishes to establish a disproportionate share.
5. Both the primary question of the creation of a common intention constructive trust and the secondary question of the quantification of shares are determined on the basis of the 'common intention' of the parties. In relation to the primary question the parties' common intention may be express or inferred. In respect of the secondary question the common intention may also, in limited circumstances, be imputed. The difference between an inferred and imputed intent is that the former is one actually held by the parties, while the latter is one attributed to the parties that they did not in fact hold.

6. Reliance on property law principles to determine rights in the home has been criticized, particularly in the context of relationship breakdown between cohabitants. Law Commission recommendations, if enacted, will replace the application of the constructive trust (and other property principles) in this narrow category of case with a more flexible regime, where certain eligibility criteria are met.

1 INTRODUCTION

This chapter is concerned with ownership of the home. We consider how a person who does not have property rights in his or her home—for example, as owner of the legal title or a beneficiary under an expressly created trust of land—may acquire rights through the doctrines of resulting and constructive trusts. While our principal concern is with ownership of the home, we also consider the statutory routes through which a person may claim a right to occupy his or her home, whether or not he or she has a property right in the home.

We have considered the general operation of resulting and constructive trusts in Chapter 11. Our discussion of these doctrines in this chapter is confined to their use in the context of the home. It is useful at the outset to state the key features of these doctrines, as are relevant for our discussion in this chapter.

- The *purchase money resulting trust* arises where the claimant to the trust pays or contributes to the purchase of property in another's name. The rationale for the trust is a presumed intent that the contributor did not intend a gift.
- *Constructive trusts* arise where, through the existence of defined elements, it is considered unconscionable for the legal owner of land to assert his or her own beneficial interest and deny the beneficial interest of the claimant. As a general doctrine, constructive trusts are considered to be imposed by operation of law, rather than through the express or presumed intention of the owner.

In addition to the doctrines of trust discussed in this chapter, interests in a home may also be obtained through a claim to proprietary estoppel, the scope and nature of which was considered in Chapter 10.

There are a number of circumstances under which it becomes necessary to determine ownership of the home. The Law Commission identified four key circumstances in which the issue may arise.

Law Commission Report No 278, *Sharing Homes: A Discussion Paper* (2002, [1.11])

[. . .]

1. The persons (two or more) who share a home cease to do so. Typically, one leaves. It may be that this follows the breakdown of a relationship between the sharers. It may be that the living arrangement is no longer convenient to the person who leaves, as they

have obtained employment elsewhere. The question arises of whether the person who leaves is entitled to receive payment of a capital sum representing their share of the property, or indeed, in the event of no satisfaction being obtained, whether that person can force a sale thereof.

2. One of the persons who has been sharing the home dies. The question arises whether that person had an interest in the property, and, if so, what therefore is now to happen to it.
3. The home is subject to a mortgage securing a loan negotiated by its owner or owners to facilitate the acquisition of the property or to provide funds for other purposes. The borrower defaults on the mortgage, and the mortgagee seeks possession in order to realise its security by sale of the property. The question arises whether any of those living in the home can assert an interest in that property against the mortgagee, and whether they can successfully defend the proceedings for repossession.
4. A creditor whose debt is not secured over the property by way of mortgage seeks to have the property sold so that the demand can be satisfied. The question arises whether any person who has been sharing with the debtor can successfully hold out against the creditor's claim.

In most circumstances in which the issue of ownership arises, it falls to be determined by the application of the property rules discussed in this chapter. The principal exception is the breakdown of a marriage by divorce, or the dissolution of a civil partnership, in which statutory schemes enable the courts to make property adjustment orders between the parties.[1] Significantly, however, no equivalent legislation applies on the breakdown of a relationship between cohabitants who live together without having married or (as regards same-sex partners) entering a civil partnership. Even in the case of marriage and civil partnerships, the statutory schemes are confined in their application to determining the parties' rights on a relationship breakdown. They do not apply, for example, where the parties' rights fall to be determined in a dispute between a mortgagor or creditor within the third or fourth situations, where property rules must be invoked.[2]

Where the issue of ownership arises as a matter of property law, the question for the court is what each party *actually* owns, not what they *ought* to own. As Dillon LJ commented:[3] '*The court does not as yet sit, as under a palm tree, to exercise a general discretion to do what the man in the street, on a general overview of the case, might regard as fair.*' Equally, English law does not have a special regime for determining rights to family property.[4] There has been increasing dissatisfaction with the operation of property rules to determine parties' rights in their home. This is particularly the case where the matter arises following the breakdown of a relationship between cohabitants, in which case the strict application of property

[1] Matrimonial Causes Act 1973, s 23; Civil Partnership Act 2004, Sch 5, para 2.

[2] In most of the case law discussed in this chapter, the issue of ownership has, in fact, arisen in the context of relationship breakdown (the first situation).The third situation is exemplified by *Williams & Glyn's Bank v Boland* [1981] AC 487, HL, and subsequent case law, which is examined in Chapter 14. The fourth situation would arise on an application for sale under s 14 of the Trusts of Land and Appointment of Trustees Act 1996, the operation of which is considered in Chapter 18.

[3] *Springette v Defoe* (1993) 65 P & CR 1, 6.

[4] Compare Law Commission Report No 278, *Sharing Homes: A Discussion Paper* (2002), [1.18], in which the Law Commission noted that English law does not have a special property regime even in relation to married couples. The major distinction between married couples (and couples with a civil partnership) and others is the applicable regime on the breakdown of the parties' relationship.

rules stands in stark contrast to the property adjustment orders available on a divorce or the dissolution of a civil partnership. The Law Commission has noted[5] that the current law is generally accepted as being '*unduly complex, arbitrary and uncertain in its application. It is ill-suited to determining the property rights of those who, because of the informal nature of their relationship, may not have considered their respective entitlements*'. In response, the Law Commission has recommended a scheme that, if enacted, will replace the determination of the parties' property rights with a more flexible scheme to provide financial relief on the breakdown of a relationship between cohabitants who fulfil certain eligibility criteria. However, as we will see in section 4 of this chapter, there are no plans to implement the proposals at this stage.

2 TRUSTS AND THE HOME

In Chapter 11, the basic rules for the acquisition of rights under a trust of land were outlined. As we saw, an express trust must be evidence by signed writing within s 53(1)(b) of the Law of Property Act 1925 (LPA 1925). But s 53(2) exempts from this requirement '*implied, resulting and constructive trusts*'.

Where an express trust exists, it is generally considered to be conclusive.[6] There is no room for the operation of resulting or constructive trusts. The preponderance of claims to these trusts thus arises through the failure of parties to determine expressly the ownership of their home, despite repeated pleas from the judiciary to legal advisers to encourage parties to do so.

Carlton v Goodman
[2002] 2 FLR 259, CA

Ward LJ

At [44]

I ask in despair how often this court has to remind conveyancers that they would save their clients a great deal of later difficulty if only they would sit the purchasers down, explain the difference between a joint tenancy and a tenancy in common, ascertain what they want and then expressly declare in the conveyance or transfer how the beneficial interest is to be held because that will be conclusive and save all argument. When are conveyancers going to do this as a matter of invariable standard practice? This court has urged that time after time. Perhaps conveyancers do not read the law reports. I will try one more time: ALWAYS TRY TO AGREE ON AND THEN RECORD HOW THE BENEFICIAL INTEREST IS TO BE HELD. It is not very difficult to do.

The application of resulting and constructive trusts in the context of the home must now be understood in light of two recent significant decisions of the highest appellate court in England and Wales: the House of Lords in *Stack v Dowden*[7] and the Supreme Court in

[5] Law Commission Report No 274, *Eighth Programme of Law Reform* (2001), p 7.
[6] *Goodman v Gallant* [1986] Fam 106. But contrast *Clarke v Meadus* [2010] EWHC 3117. The case is discussed by Pawlowski, 'Informal Variation of Express Trusts' [2011] Conv 245.
[7] [2007] 2 AC 432.

Jones v Kernott.[8] In both cases, the question in issue was the quantification of shares in a property that had been purchased in the joint names of a cohabiting couple with no express declaration of their respective beneficial interest. The issue of quantification of shares is secondary to that of the existence or creation of a trust; that primary question had already been considered by the House of Lords in three previous cases.[9] However, the significance of *Stack v Dowden* and *Jones v Kernott* extends beyond the matter of quantification. In *Stack v Dowden* the majority made a policy decision to treat the home differently to other property when determining ownership.[10] The decision of the majority, led by Baroness Hale, is underpinned with the ethos that '*in law "context is everything" and the domestic context is very different from the commercial world*'.[11] The focus on context provided the key point of departure for Lord Neuberger. He delivered a minority judgment in which he reached the same outcome as the majority on the facts but through different reasoning. Lord Neuberger was unconvinced that the domestic context requires '*a different approach in principle*'.[12] On his view: '*In the absence of statutory provisions to the contrary, the same principles should apply to assess the apportionment of the beneficial interest as between legal co-owners, whether in a sexual, platonic, familial, amicable or commercial relationship.*'[13]

In *Jones v Kernott* the Supreme Court offered clarification of key aspects of the decision in *Stack v Dowden*. The focus of the case is the meaning of 'common intention', which had been adopted in *Stack v Dowden* as the criteria for determining the quantification of the parties shares (the secondary question) and is also the basis of a claim to the existence or creation of a trust (the primary question). However, the Supreme Court also clarified the scope of *Stack v Dowden* through a clear definition of the type of home to which the decision applies.[14] The application of *Stack v Dowden* is confined to homes purchased '*in joint names for joint occupation by a married or unmarried couple, where both are responsible for any mortgage*'.[15] This is the only type of home in respect of which the Supreme Court expressly removes the operation of the presumption of resulting trust (discussed further in section 2.1.1 below). This leaves outside the scope of *Stack v Dowden* other homes, including those bought by parties who are not in an intimate relationship: for example, those bought by parents and children, siblings or friends.

In *Stack v Dowden* and *Jones v Kernott* the courts kept distinct two circumstances in which resulting and constructive trusts may be claimed. The first situation comprises cases of sole legal ownership, in which legal title is conveyed to one person alone. The second situation concerns joint legal ownership, in which legal title is conveyed to the claimant and another person (or persons), but there is no declaration as regards the parties' respective beneficial shares. These situations are kept separate by the courts as the starting point for legal analysis in each is different, as are the issues that must be addressed.

Following the maxim that equity follows the law, in the case of sole legal ownership the starting point is that the sole legal owner is also the sole beneficial owner. A claimant may use resulting or constructive trusts to establish that he or she is also beneficially entitled. If the trust is successfully established, the claimant's beneficial share must then be quantified.

8 [2011] 3 WLR 1121.

9 *Pettitt v Pettitt* [1970] AC 777; *Gissing v Gissing* [1971] AC 886; *Lloyds Bank v Rosset* [1991] 1 AC 107.

10 Hopkins, 'Regulating Trusts of the Home: Private Law and Social Policy' (2009) 125 LQR 310, p 333.

11 [2007] 2 AC 432, [69], *per* Baroness Hale. 12 Ibid, [107]. 13 Ibid.

14 Uncertainty as to the scope of *Stack v Dowden* [2007] 2 AC 432 through the dichotomy drawn between the domestic and commercial contexts had been a key source of criticism of the decision. See, Hopkins, 'The Relevance of Context in Property Law: A Case for Judicial Restraint?' (2011) 31 LS 175, 189–91.

15 *Jones v Kernott* [2011] 3 WLR 1121, [25] *per* Lord Walker and Baroness Hale.

Hence, in sole legal ownership cases, the trust is used both to determine whether the claimant has a beneficial interest, and, if so, to quantify the extent of his or her share.

In the case of joint legal ownership the starting point is joint and equal beneficial ownership, this again reflects the maxim that equity follows the law.[16] The conveyance into joint names is conclusive as to the existence of a trust, but a resulting or constructive trust may be claimed to show that the beneficial interest is held in unequal shares. Hence, in joint legal ownership cases, the application of the trust is concerned only with the matter of quantification of the parties' shares. The circumstances in which this initial presumption is displaced, and whether this is through a resulting or constructive trust, lies at the heart of the decisions in *Stack v Dowden* and *Jones v Kernott* and is addressed in section 2.2 below.

The division between sole and joint legal ownership provides the basis of the structure of this section of the chapter.

2.1 SOLE LEGAL OWNER

As has been noted, where there is sole legal ownership, the claimant may use the resulting or constructive trust to establish that he or she also has a beneficial interest. If the claim to a trust is successful, then the claimant's beneficial interest must be quantified.

2.1.1 Resulting trust

Where the claimant has made a direct financial contribution to the purchase of property in another person's sole name, a purchase money resulting trust may be imposed. The rationale for the trust is a presumption that the claimant did not intend to make a gift of his or her contribution. This rationale is reflected in the division of the beneficial interest in proportion to each party's contribution. The presumption of resulting trust is discussed further in Chapter 11, section 3.

The majority of the House of Lords in *Stack v Dowden* and the Supreme Court in *Jones v Kernott* doubted the utility of the resulting trust in the context of determining proprietary rights in the home.[17] In *Stack v Dowden* Lord Walker suggested that it should not generally be used to determine ownership of the home, even in cases of sole legal ownership.[18] Its focus on the parties' financial contributions is considered to be more apt in a commercial context, with the constructive trust preferred in relation to domestic property. As regards domestic property, Lord Walker suggested that the resulting trust '*may still have a useful function in cases where two people have lived and worked together in what has amounted to both an*

[16] This starting point is unanimously agreed by the House of Lords in *Stack v Dowden* [2007] 2 AC 432. There at [109]–[110] Lord Neuberger treats the presumption of resulting trust, when it is applied, as rebutting an initial presumption of joint and equal beneficial ownership. In *Jones v Kernott* [2011] 3 WLR 1121, [23] Lord Walker and Baroness Hale go further and treat the presumption of joint and equal benefit ownership in the context of the home as an *alternative* to the presumption of resulting trust and offer a different rationale than the maxim that equity follows the law: see further at [19]–[22]. The approach adopted in this text is preferred as being consistent with general principle and with the tenor of *Jones v Kernott*. For example, in providing a summary of the principles applicable in joint names cases, Lord Walker and Baroness Hale note, [51] '[t]he starting point is that equity follows the law and they are joint tenants both in law and in equity'.

[17] For criticism of *Stack v Dowden* [2007] 2 AC 432 in this respect see Swadling, 'The Common Intention Constructive Trust in the House of Lords: An Opportunity Missed' (2007) 123 LQR 511 and Sparkes, 'How Beneficial Interests Stack Up' [2011] Conv 156.

[18] [2007] 2 AC 432, [31].

emotional and a commercial relationship';[19] a comment echoed in *Jones v Kernott*.[20] In his minority judgment in *Stack v Dowden*, Lord Neuberger supported the application of the resulting trust in joint and sole ownership cases. On his view, the starting point for a claimant who has made a direct financial contribution to the purchase of property in another's name is that the claimant has a beneficial interest in proportion to his or her contribution through a resulting trust. The operation of the presumption of resulting trust has not been removed in the case of sole legal ownership of the home. In view of this the better view, it is suggested, is that the resulting trust will operate to rebut an initial presumption of sole legal ownership and confer on the beneficiary a share in proportion to their direct financial contribution. However, if the beneficiary wishes to claim a disproportionate share, then they will use their financial contribution as evidence of a common intention for the purposes of a claim to a constructive trust.

Where a resulting trust is imposed, two issues may arise: firstly, the scope of direct financial contributions on which the trust is based—is the trust confined to cash contributions, or does it also take into account contributions to a mortgage? Secondly, how to quantify the claimant's beneficial share where each party's contribution cannot accurately be ascertained. In *Stack v Dowden* Lord Neuberger discussed these matters.

Stack v Dowden
[2007] 2 AC 432, HL

Lord Neuberger

At 117–21

There are two other aspects of the resulting trust analysis which I should like to mention. First, there is the effect of liability under a mortgage. This will normally be a relevant, often a very important, factor, because, as Lord Walker points out, the overwhelming majority of houses and flats are acquired with the assistance of secured borrowing. There is attraction in the notion that liability under a mortgage should be equivalent to a cash contribution. On that basis, if a property is acquired for £300,000, which is made up of one party's contribution of £100,000, and both parties taking on joint liability for a £200,000 mortgage, the beneficial interest would be two-thirds owned by the party who made the contribution, and one-third by the other. If one party then repays more of the mortgage advance, equitable accounting might be invoked to adjust the beneficial ownerships at least in a suitable case. Such an adjustment would be consistent with the resulting trust analysis, as repayments of mortgage capital may be seen as retrospective contributions towards the cost of acquisition, or as payments which increase the value of the equity of redemption.

However, there is an argument that taking on liability under a mortgage should not be equivalent to a cash payment. The cash contribution is effectively equity, whereas the mortgage liability arises in relation to a secured loan. If the value of the property in the example just given had fallen by 25% when it came to be sold, the party who made the cash contribution would lose £75,000 of his £100,000, whereas the other party would lose nothing (unless he would be liable to pay £25,000 to the former, which seems intuitively improbable).

In *Ulrich v Ulrich and Felton* [1968] 1 WLR 180, an engaged couple (who subsequently married) had bought a house, she paying one-sixth of the acquisition cost in cash, and he raising

[19] [2007] 2 AC 432, [32]. [20] [2011] 3 WLR 1121, [31].

the balance by a mortgage in his name. In passages at pp 186 and 189 (approved in *Pettitt v Pettitt* [1970] AC 777, 816 A), Lord Denning MR and Diplock LJ held it was wrong to treat a mortgage contribution as equivalent to a cash contribution.

Desirable though it is to give as much guidance as possible, this is not an appropriate case in which to express a view as to whether liability under a mortgage should be treated as the equivalent of a cash contribution for the purpose of assessing the shares in which the beneficial interest is held. Certainty, simplicity and first impression suggest a positive answer, perhaps particularly where a home is bought almost exclusively by means of a mortgage. More sophisticated economic and legal analysis may suggest otherwise, especially where the cash contributions are very different and, at least in the case of one party, substantial. The point has not been fully canvassed here, because, however one treats the mortgage, the outcome of the appeal is the same.

The final aspect I wish to deal with in relation to the resulting trust analysis is where the evidence is so unsatisfactory that it is impossible to reach a clear conclusion as to the parties' respective contributions to the purchase price. In many such cases, the evidence may be so hopeless or may suggest contributions of the same sort of order, and equality would be the appropriate outcome (as in *Rimmer v Rimmer* [1953] 1 QB 63, 72, approved in *Pettitt v Pettitt* [1970] AC 777, 804 A–B, 810 H, 815 H). However, in other cases (as here, in my opinion), the court may conclude that, while it is impossible to be precise as to the relative contributions, one party cannot have contributed more (or less) than Y%. In such cases, where Y is clearly below (or above) 50, to decide that the party concerned had more (or less) than Y% of the beneficial interest would be wrong.

As we will see in section 2.1.2 below, a direct financial contribution provides evidence of an inferred common intention to share beneficial ownership for the purposes of a claim to a constructive trust. As a result, an overlap exists between the resulting trust and inferred agreement constructive trust because both may arise on the basis of a direct financial contribution to the purchase of land. These two trusts are, however, also mutually exclusive, because the basis upon which the claimant's beneficial interest is quantified is different under each: in a resulting trust, the claimant obtains an interest in proportion to his or her contribution; in the constructive trust, the claimant's interest is quantified by reference to the common intention of the parties.

This difference in the method of quantifying the claimant's share reflects a conceptual difference in how the claimant's contribution is analysed under each doctrine. A resulting trust is imposed on the *negative* basis that the claimant did not intend (or is presumed not to have intended) to make a gift of his or her contribution to the legal owner. A constructive trust is imposed on the basis that the claimant's contribution infers a *positive* agreement between the parties to share the beneficial interest. The trust arises because it would be unconscionable for the legal owner to deny the claimant a share.

There are two possible bases for distinguishing the respective scope of operation of the resulting trust and inferred agreement constructive trust. The first, reflected in Lord Neuberger's analysis in *Stack v Dowden*, is to rely on the doctrinal differences between the trusts as a means of distinguishing their scope of application. On this basis, direct financial contributions lead to a constructive trust where a common intention to share beneficial ownership can be inferred between the parties. This leaves the resulting trust to apply where a direct financial contribution has been made but no common intention to share beneficial ownership can be inferred. An alternative approach is to rely on the context of the claim so that a direct financial contribution made in respect of the home is used to infer a common

intention for a constructive trust, leaving the resulting trust to apply outside of the home. This approach reflects the view of the majority of the House of Lords in *Stack v Dowden* and the Supreme Court in *Jones v Kernott* doubting the utility of the resulting trust in relation to the home. The difficulty with this solution is a definitional one in understanding what constitutes the home for these purposes: for example, whether it is confined, reflecting the decision in *Jones v Kernott* on the scope of *Stack v Dowden* in joint legal ownership cases, to homes purchased for joint occupation by those in an intimate relationship, or whether it is afforded a broader definition. Ultimately, these two bases for distinguishing the respective scope of the trusts may not be far apart. A common intention to share beneficial ownership other than in proportion to direct financial contributions is more likely to be inferred in relation to a home, and (though more arguably) is perhaps more likely to arise between parties in an intimate relationship than in respect of other co-owned homes.

2.1.2 Constructive trust

The specific type of constructive trust used to determine ownership of the home is the common intention constructive trust. The trust has its origins in the House of Lords' decisions in *Pettitt v Pettitt*[21] and *Gissing v Gissing*,[22] although the leading case on the elements of a claim to the trust is now *Lloyds Bank plc v Rosset*.[23] In that case, Lord Bridge drew a clear distinction between two distinct forms of the common intention constructive trust.

Lloyds Bank plc v Rosset
[1991] 1 AC 107, HL

Facts: The claimant, Mrs Rosset, sought to establish a beneficial interest in the matrimonial home, which was solely owned by her husband. The house had been purchased in a semi-derelict condition with money from Mr Rosset's family trust and the trustees had insisted on his sole ownership. Mr Rosset had also funded the cost of the renovations. Mrs Rosset had made no financial contribution to the acquisition, or the cost of renovations, but she had assisted in the building works in various respects.

Lord Bridge

At 132–3

The first and fundamental question which must always be resolved is whether, independently of any inference to be drawn from the conduct of the parties in the course of sharing the house as their home and managing their joint affairs, there has at any time prior to acquisition, or exceptionally at some later date, been any agreement, arrangement or understanding reached between them that the property is to be shared beneficially. The finding of an agreement or arrangement to share in this sense can only, I think, be based on evidence of express discussions between the partners, however imperfectly remembered and however imprecise their terms may have been. Once a finding to this effect is made it will only be necessary for the partner asserting a claim to a beneficial interest against the partner entitled to the legal estate to show that he or she has acted to his or her detriment or significantly altered his or her position in reliance on the agreement in order to give rise to a constructive trust or a proprietary estoppel.

[21] [1971] AC 886. [22] [1970] AC 777. [23] [1991] 1 AC 107.

> In sharp contrast with this situation is the very different one where there is no evidence to support a finding of an agreement or arrangement to share, however reasonable it might have been for the parties to reach such an arrangement if they had applied their minds to the question, and where the court must rely entirely on the conduct of the parties both as the basis from which to infer a common intention to share the property beneficially and as the conduct relied on to give rise to a constructive trust. In this situation direct contributions to the purchase price by the partner who is not the legal owner, whether initially or by payment of mortgage instalments, will readily justify the inference necessary to the creation of a constructive trust. But, as I read the authorities, it is at least extremely doubtful whether anything less will do.

Hence, the common intention constructive trust is divided into those founded on an express agreement and those in which the agreement between the parties is inferred. Where there is an express agreement, the claimant must also show detrimental reliance on the agreement, while in inferred agreement cases, the claimant's contribution serves the dual purpose of providing evidence of the agreement and of detrimental reliance. On the facts of the case, Mrs Rosset's claim failed: there was no express agreement between the parties and Mrs Rosset had not made any direct contribution to the purchase, which Lord Bridge considered necessary for an agreement to be inferred.

Each type of common intention constructive trust will now be considered. Where a constructive trust is successfully claimed, the next question for the court is the quantification of the claimant's share. This issue also arises in joint legal ownership cases in which a constructive trust is invoked to displace the presumption of equal beneficial ownership. Therefore, the basis on which the courts quantify interests under a constructive trust is discussed in relation to both situations below. As will be seen, in *Stack v Dowden*, the House of Lords held that, in a constructive trust, the quantification of shares is determined by the common intention of the parties.

Inferred agreement constructive trust

An inferred agreement constructive trust arises where an agreement to share beneficial ownership is derived from what the parties have done, rather than what they have said. The courts' focus is on the conduct of the parties at the time of acquisition. While an agreement can be inferred from post-acquisition conduct, the courts have indicated that they will be 'slow' to do so.[24]

In *Rosset*, Lord Bridge suggested that an agreement would only be inferred on the basis of a direct cash contribution, either initially or by contributions to a mortgage. In *Stack v Dowden*, in the context of a general discussion of the development of the constructive trust, Lord Walker doubted that this aspect of Lord Bridge's judgment took full account of conflicting views in *Gissing v Gissing*[25] and noted that it had attracted 'trenchant criticism' from academic commentators. He suggested that '*the law has moved on*'[26]—a comment that appeared to be endorsed by Baroness Hale.[27]

The extent to which the courts would, or should, move beyond direct financial contributions as the basis for an inferred agreement constructive trust is unclear. Lord Walker's reference to conflicting views in *Gissing v Gissing* relates specifically to the issue of *indirect* cash contributions. These arise where, through paying household bills and other expenses,

[24] See *James v Thomas* [2007] EWCA 1212, [24]; *Morris v Morris* [2008] EWCA 257, [19].
[25] [1971] AC 886. [26] [2007] 2 AC 432, [26]. [27] Ibid, [60].

the claimant enables the legal owner to discharge the mortgage. But the academic commentary to which Lord Walker refers goes far beyond this. In particular, Lord Walker cites Gray and Gray,[28] who criticize generally the courts' 'denigration' of conduct other than direct financial contributions, which has denied beneficial entitlement to 'long-serving mothers and homemakers'.[29]

As regards indirect financial contributions, the opposing views are aptly reflected in the judgments of Lord Reid and Lord Diplock in *Gissing v Gissing*.

Gissing v Gissing
[1971] AC 886, HL

Lord Reid

At 896

As I understand it, the competing view is that, when the wife makes direct contributions to the purchase by paying something either to the vendor or to the building society which is financing the purchase, she gets a beneficial interest in the house although nothing was ever said or agreed about this at the time: but that, when her contributions are only indirect by way of paying sums which the husband would otherwise have had to pay, she gets nothing unless at the time of the acquisition there was some agreement that she should get a share. I can see no good reason for this distinction and I think that in many cases it would be unworkable. Suppose the spouses have a joint bank account. In accordance with their arrangement she pays in enough money to meet the household bills and so there is enough to pay the purchase price instalments and their bills as well as their personal expenses. They never discuss whose money is to go to pay for the house and whose is to go to pay for other things. How can anyone tell whether she has made a direct or only an indirect contribution to paying for the house? It cannot surely depend on who signs which cheques. Is she to be deprived of a share if she says 'I can pay in enough to pay for the household bills,' but given a share if she says 'I can pay in £10 per week regularly.'

Lord Diplock

At 909

Where the wife has made no initial contribution to the cash deposit and legal charges and no direct contribution to the mortgage instalments nor any adjustment to her contribution to other expenses of the household which it can be inferred was referable to the acquisition of the house, there is in the absence of evidence of an express agreement between the parties no material to justify the court in inferring that it was the common intention of the parties that she should have any beneficial interest in a matrimonial home conveyed into the sole name of the husband, merely because she continued to contribute out of her own earnings or private income to other expenses of the household. For such conduct is no less consistent with a common intention to share the day-to-day expenses of the household, while each spouse retains a separate interest in capital assets acquired with their own moneys or obtained by inheritance or gift. There is nothing here to rebut the prima facie inference that a purchaser of land who pays the purchase price and takes a conveyance and grants a mortgage in his own name intends to acquire the sole beneficial interest as well as the legal estate [. . .]

[28] Gray and Gray, *Elements of Land Law* (4th edn, 2004) [10.132]–[10.137].
[29] Ibid, [10.133] and [10.136].

It is suggested that, as regards indirect financial contributions, it is difficult to disagree with the tenor of Lord Reid's judgment that the determination of rights in the home should not be dependent on the happenstance of how a family's finances are arranged. In light of the divergence in authorities on this point prior to *Lloyds Bank plc v Rosset* (as acknowledged in *Stack v Dowden*), such an extension of the inferred agreement constructive trust would be a modest development.

The argument for inferring an agreement from conduct beyond direct or indirect cash contributions is far more contentious. Prior to *Stack v Dowden*, it had been accepted that there is a difference between contributions that may be taken into account in relation to the issue of quantification of a beneficial interest and those relevant to the creation of a trust.[30] As will be seen below, in *Stack v Dowden*, the House of Lords held that the issue of quantification is to be determined on the basis of the common intention of the parties. As a result, both the creation of a trust (in sole legal ownership cases) and the quantification of beneficial interests (in sole and joint legal ownership cases) are now based on the same criterion of common intent. It will be difficult to maintain that the same conduct (for example, the contribution of 'long-serving mothers and homemakers') can be used to infer an agreement for one purpose (quantification), but not for another (to create a trust). The consequences of inferring an agreement to create a trust from such conduct are far-reaching for the scope of constructive trust doctrine. It is certainly inconceivable that such a step could be taken on the basis of *Stack v Dowden* where the creation of a trust was not in issue. But such a step also has the potential to provide a welcome rationalization and simplification of the constructive trust. These consequences need to be explored in light of a full understanding of the current operation of the constructive trust and, therefore, we return to them below in section 2.5.

A key issue in *Stack v Dowden* and *Jones v Kernott* is when it may be appropriate for the courts to impute a common intention rather than infer one. The difference between inferring and imputing is discussed below in section 2.3.2 of this chapter. At this stage it is sufficient to note that an inferred intent is one actually held by the parties, while an imputed intent is one attributed to the parties that they did not in fact hold. In those cases the issue of imputed intent arose in respect of the secondary question of quantification of shares. In *Stack v Dowden*, Lord Walker suggested that the courts had already implicitly endorsed an imputed intent in the context of the primary question of the creation of a trust.[31] In *Jones v Kernott*, as we will see below in section 2.3.2, the Supreme Court accepted that an intention can be imputed in limited circumstances in relation to the quantification of beneficial shares. The judgment in the case is closely confined to the question of quantification.[32] At the present stage, the better view is that there is no basis for suggesting that a common intention can be imputed in relation to the primary question of the creation of a trust. Such a development would require the matter to be considered by the courts at appellate level with the benefit of the analysis of inferred and imputed intent contained in *Stack v Dowden* and *Jones v Kernott*.

[30] See, in particular, *Oxley v Hiscock* [2004] EWCA Civ 546; *Grant v Edwards* [1986] Ch 638, 646.

[31] [2007] 2 AC 432, [25]. Referring to a passage in Lord Bridge's judgment on the inferred agreement constructive trust, Lord Walker suggested that '[i]n concurring in this passage the House was unanimously, if unostentiously, agreeing that a "common intention" could be inferred even where there was no evidence of an actual agreement'. But to do so would appear to constitute imputing rather than inferring an intent.

[32] See *Jones v Kernott* [2011] 3 WLR 1121, [78]–[84] where Lord Wilson carefully limits the operation of imputed intent to quantification. See further Lord Collins at [66].

Express agreement constructive trust

An express agreement constructive trust will be imposed where there is an agreement to share the beneficial interest, in reliance on which the claimant has acted to his or her detriment. In *Rosset*, Lord Bridge held that the agreement must be based on '*evidence of express discussions between the partners, however imperfectly remembered and however imprecise their terms may have been*'. Further, he suggested that the agreement must be reached prior to acquisition, or only exceptionally at a later date. Applied strictly, this latter requirement would preclude the trust arising where the claimant moves into a home already purchased by the legal owner. In practice, post-acquisition express agreements have been accepted, without reference to a requirement that the case must be 'exceptional'.[33]

The requirement of 'express discussions' appears to be unrealistic in the domestic context. In *Pettitt v Pettitt*, Lord Hodson noted:[34] '*The conception of a normal married couple spending the long winter evenings hammering out agreements about their possessions appears grotesque.*' As the following extract illustrates, there is a sense of artificiality in the courts' detailed examination of the parties' relationship in the search for evidence of an agreement.

Hammond v Mitchell
[1991] 1 WLR 1127, HC

Waite J

At 1139

[The] tenderest exchanges of a common law courtship may assume an unforeseen significance many years later when they are brought under equity's microscope and subjected to an analysis under which many thousands of pounds of value may be liable to turn on fine questions as to whether the relevant words were spoken in earnest or in dalliance and with or without representational intent.

The artificiality of the search for an agreement is highlighted by Lord Bridge's acceptance in *Rosset* of *Eves v Eves*[35] and *Grant v Edwards*[36] as 'outstanding examples' of agreements.[37] In these cases, an agreement was found in the fact that the legal owner had given the claimant an 'excuse' for not placing the property in the parties' joint names: in *Eves v Eves*, the claimant had been told that, but for the fact she was under the age of 21 (the age of majority at the time), the house would have been placed in the parties' joint names; in *Grant v Edwards*, the claimant was told that the house was not put in joint names because this could prejudice her own divorce proceedings. Lord Bridge suggested that such excuses provide evidence of an agreement, because the claimant '*had been clearly led by the* [legal owner] *to believe, when they set up home together, that the property would belong to them jointly*'.[38]

Gardner casts doubt on this interpretation of an excuse.

[33] See *Hammond v Mitchell* [1991] 1 WLR 1127.
[34] [1971] AC 777, 810.
[35] [1975] 1 WLR 1338.
[36] [1986] Ch 638.
[37] [1991] 1 AC 107, 133.
[38] Ibid.

Gardner, 'Rethinking Family Property' (1993) 109 LQR 263, 265

> But the fact that the men's statements were excuses (i.e. neither objectively valid nor even sincerely uttered) does not mean that the men were thereby acknowledging an agreement whereby the woman should have a share. If I give an excuse for rejecting an invitation to what I expect to be a dull party, it does not mean that I thereby agree to come: on the contrary, it means that I do not agree to come, but for one reason or another find it hard to say so outright. The fallacious quality of the reasoning in *Eves v. Eves* and *Grant v. Edwards* is thus clear. It is hard to think that the judges concerned really believed in it. One can only conclude that they too were engaged in the business of inventing agreements on women's behalf [. . .]

Gardner's analysis is, however, doubted by Glover and Todd, on the one hand, and Mee, on the other.

Glover and Todd suggest that there is a fallacy in Gardner's analysis. In the following extract, they refer to the sole legal owner as 'A' and the claimant to a beneficial interest as 'B'.

Glover and Todd, 'The Myth of Common Intention' (1996) 16 LS 325, 331

> Once it is appreciated that the test for intention is objective, then we can see the fallacy of Gardner's argument that A did not really intend to declare himself a trustee in favour of B, in *Eves v Eves* and *Grant v Edwards*. It is not necessary for A to intend subjectively, merely that a reasonable person would assume that A was declaring himself trustee. In both cases the property was identified, and the statements could be taken as statements of immediate and irrevocable intention to hold the property for both of them. In both cases, B might reasonably have thought that A intended to hold the land on trust for himself and herself, but was prevented from doing so merely because of some formality. In neither case was there any reason for the declaration not to take immediate and irrevocable effect.

This criticism is made in the context of an argument that the express agreement cases should be classified as express trusts, which, as a matter of general trust law, arise on the basis of an objective declaration by the settler (the legal owner). The basis of Glover and Todd's argument is therefore removed if it is accepted (as the case law currently indicates) that the constructive trust is a discrete type of trust based on the common intention of the parties, not on a declaration of trust by one of them.

Mee suggests that, while the judges in *Eves* and *Grant* may have been generous in their view of the facts, Gardner goes too far in describing their reasoning as fallacious.

Mee, *The Property Rights of Cohabitees* (1999, p 123)

> The answer to Gardner's argument (which emerges clearly from the relevant passages in Grant and Eves) lies in the difference between legal and equitable ownership. Gardner does not appear to advert to the possibility that the woman in each case reasonably understood from her partner's representation that, while it was agreed between the parties that (beneficial) ownership was to be shared, there was some technical obstacle which prevented her being given *legal* ownership of the property. This, after all, is the nature of any "common intention" within the terms of the doctrine under discussion; it is understood between the

parties that beneficial ownership is (or will be) shared, notwithstanding the fact that this is not reflected in the legal title. To put the point in Gardner's terms: naturally, the guest's excuse will not make the dull hostess believe that he is really coming to the party; however, depending on the nature of the excuse and the manner in which it is made, she might be led to believe other things about her relationship with the guest, for example, that he finds her company delightful.

Ultimately, as Mee suggests, the appropriate interpretation of an excuse seems to be dependent on the facts of the case and the circumstances in which it is made.

Once an express agreement has been found, it is necessary to consider whether the claimant has relied on the agreement to his or her detriment.

Detriment

The requirement of detriment is concerned with what acts the claimant has done. It is assessed objectively.[39] The most authoritative judicial discussion of what acts constitute sufficient detriment is contained in *Grant v Edwards*. Nourse LJ gave the leading judgment in the case. While Mustill LJ and Browne-Wilkinson VC indicated their agreement, in fact, there are some differences in each judge's approach to detriment.

Grant v Edwards
[1986] Ch 638, CA

Facts: Mrs Grant and Mr Edwards were cohabitants. As we have noted above, Mr Edwards had given Mrs Grant an excuse for not conveying their home into their joint names and this constituted an express agreement for the purposes of a constructive trust. Mr Edwards had paid a deposit and the mortgage instalments for the house, while Mrs Grant had made substantial contributions to the general household expenses and to bringing up the parties' children. It was clear from the evidence that Mr Edwards would have been unable to maintain payments on two mortgages secured over the home without Mrs Grant's contributions. The Court of Appeal held that Mrs Grant had acted sufficiently to her detriment (and had done so in reliance on the agreement) for her claim to a constructive trust to succeed.

Nourse LJ

At 649–50

It seems therefore, on the authorities as they stand, that a distinction is to be made between conduct from which the common intention can be inferred on the one hand and conduct which amounts to an acting upon it on the other. There remains this difficult question: what is the quality of conduct required for the latter purpose? The difficulty is caused, I think because although the common intention has been made plain, everything else remains a matter of inference. Let me illustrate it in this way. It would be possible to take the view that the mere moving into the house by the woman amounted to an acting upon the common intention. But that was evidently not the view of the majority in *Eves v. Eves* [1975] 1 W.L.R.

[39] Lawson, 'The Things We Do for Love: Detrimental Reliance in the Family Home' [1996] LS 218, 219.

1338. and the reason for that may be that, in the absence of evidence, the law is not so cynical as to infer that a woman will only go to live with a man to whom she is not married if she understands that she is to have an interest in their home. So what sort of conduct is required? In my judgment it must be conduct on which the woman could not reasonably have been expected to embark unless she was to have an interest in the house. If she was not to have such an interest, she could reasonably be expected to go and live with her lover, but not, for example, to wield a 14-lb. sledge hammer in the front garden. In adopting the latter kind of conduct she is seen to act to her detriment on the faith of the common intention. [. . .]

In the circumstances, it seems that it may properly be inferred that the plaintiff did make substantial indirect contributions to the instalments payable under both mortgages. This is a point which seems to have escaped the judge, but I think that there is an explanation for that. He was concentrating, as no doubt were counsel, on the plaintiff's claim that she herself had paid all the instalments under the second mortgage. It seems very likely that the indirect consequences of her very substantial contribution to the other expenses were not fully explored.

Was the conduct of the plaintiff in making substantial indirect contributions to the instalments payable under both mortgages conduct upon which she could not reasonably have been expected to embark unless she was to have an interest in the house? I answer that question in the affirmative. I cannot see upon what other basis she could reasonably have been expected to give the defendant such substantial assistance in paying off mortgages on his house. I therefore conclude that the plaintiff did act to her detriment on the faith of the common intention between her and the defendant that she was to have some sort of proprietary interest in the house.

Mustill LJ

At 652–3

(4) For present purposes, the event happening on acquisition may take one of the following shapes. (a) An express bargain whereby the proprietor promises the claimant an interest in the property, in return for an explicit undertaking by the claimant to act in a certain way. (b) An express but incomplete bargain whereby the proprietor promises the claimant an interest in the property, on the basis that the claimant will do something in return. The parties do not themselves make explicit what the claimant is to do. The court therefore has to complete the bargain for them by means of implication, when it comes to decide whether the proprietor's promise has been matched by conduct falling within whatever undertaking the claimant must be taken to have given sub silentio. (c) An explicit promise by the proprietor that the claimant will have an interest in the property, unaccompanied by any express or tacit agreement as to a quid pro quo. (d) A common intention, not made explicit, to the effect that the claimant will have an interest in the property, if she subsequently acts in a particular way. [. . .]

The propositions do not touch two questions of general importance. [. . .] The second question is closer to the present case: namely, whether a promise by the proprietor to confer an interest, but with no element of mutuality (i.e. situation (c) above) can effectively confer an interest if the claimant relies upon it by acting to her detriment. This question was not directly addressed in *Gissing v. Gissing* [1971] A.C. 886, although the speech of Lord Diplock, at p. 905, supports an affirmative answer. The plaintiff's case was not argued on this footing in the present appeal, and since the appeal can be decided on other grounds, I prefer not to express an opinion on this important point.

Browne-Wilkinson VC

At 656–7

There is little guidance in the authorities on constructive trusts as to what is necessary to prove that the claimant so acted to her detriment. What "link" has to be shown between the common intention and the actions relied on? Does there have to be positive evidence that the claimant did the acts in conscious reliance on the common intention? Does the court have to be satisfied that she would not have done the acts relied on but for the common intention, e.g. would not the claimant have contributed to household expenses out of affection for the legal owner and as part of their joint life together even if she had no interest in the house? Do the acts relied on as a detriment have to be inherently referable to the house, e.g. contribution to the purchase or physical labour on the house?

I do not think it is necessary to express any concluded view on these questions in order to decide this case. [. . .]

As at present advised, once it has been shown that there was a common intention that the claimant should have an interest in the house, any act done by her to her detriment relating to the joint lives of the parties is, in my judgment, sufficient detriment to qualify. The acts do not have to be inherently referable to the house.

Mustill LJ's approach is notable as looking for a quid pro quo between the parties. This reflects the basis of the trust in the parties' common intention. While a clear bargain may be unusual, where one exists, it seems legitimate for the court to treat the bargained-for acts as sufficient detriment.[40]

There is a significant difference, however, between the approaches adopted by Nourse LJ and Browne-Wilkinson VC. On Nourse LJ's test, detriment requires conduct on the part of the claimant that he or she could not reasonably be expected to do unless he or she was to have an interest in the house. In contrast, Browne-Wilkinson VC's accepts as detriment all acts done by the claimant as part of the parties' joint lives. Subsequent decisions have favoured Nourse LJ's test, which has required courts to reject conduct that the court considers it 'reasonable' for the claimant to have undertaken by reason of the parties' relationship (unless explicitly done as part of a quid pro quo).

The assumption underlying this test is highlighted by Lawson.

Lawson, 'The Things We Do for Love: Detrimental Reliance in the Family Home' (1996) LS 218, 219–20

Nourse LJ's test rests on the assumption that certain types of behaviour can reasonably be expected of people who believe that they have an interest in their home, but not of people who have no such belief. If the behaviour is of a type that can reasonably be expected of people acting purely out of love and affection or the desire to live in pleasant, comfortable surroundings, it will not normally be considered detrimental. It may be so regarded, however, if it was actually requested by the legal owner as the quid pro quo for the beneficial interest. If conduct of a type judges might ordinarily expect of a claimant motivated by love and affection

[40] Compare *Jennings v Rice* [2002] EWCA Civ 159, [45], in which, in the context of exercising remedial discretion in proprietary estoppel, Robert Walker LJ indicated that where the claimant's expectations and detriment have been defined with reasonable clarity, the consensual character of the case would justify the award of expectations.

has been requested by the legal owner, judges will be prepared to assume that, had it not been for the promise of the beneficial interest, the claimant would not have performed the conduct.

Direct contributions to the purchase of property, which would be sufficient for the courts to infer an agreement to share, would necessarily be sufficient to constitute detriment where there is an express agreement between the parties. Indirect financial contributions, as illustrated in *Grant v Edwards*, are also accepted as detriment, regardless of the debate as to whether such contributions should also be a sufficient basis for the courts to infer an agreement. Substantial improvements to property will also suffice,[41] but not redecoration of a more 'ephemeral'[42] nature. Beyond such clear examples, it has been difficult for the courts to assess what conduct the claimant could not reasonably be expected to perform unless he or she was to obtain an interest in the home.

Unfortunately, in making such assessments, courts have tended to draw on outdated stereotypes of what conduct it is reasonable to expect of a man or woman. Because most claimants have been women, the most significant effect of this approach has been the rejection of domestic work and childcare as constituting acts of detriment.

A powerful feminist critique of the courts' approach is reflected in the comments of Flynn and Lawson. The examples to which they refer in the following extract draw on case law covering both constructive trusts and proprietary estoppel, which shares the requirements of reliance and detriment.[43]

Flynn and Lawson, 'Gender, Sexuality and the Doctrine of Detrimental Reliance' [1995] Fem Leg Stud 105, 106, 117–18

The status of women in Western, market-economy societies is intimately dependent on their position in the public world of the market and in the private domestic sphere, and on the relationship between those arenas as constructed in opposition to one another. Feminist lawyers now possess a coherent, (almost) canonical account of the relationship between 'separate spheres' ideology and the legitimation of inequality for women in our society. This model sees the legal system participating in the active segregation of the domestic world of the household from the public space of the market and gendering the qualities of each, notwithstanding women's on-going presence in and contributions to both. The domestic arena is anointed as fit and proper for women to occupy, and its defining qualities of care, intimacy and selflessness held out as the binary opposite of the market characterised by self-centred, arms-length bargaining. The household and the feminine qualities which are associated with it in this schema are simultaneously exalted and demeaned. In this ideological framework, the qualities of the domestic sphere are represented as a justification of appropriate female behaviour and treatment and as an explanation of its consequences. [. . .]

If a claimant's behaviour is taken by the court to consist of nothing more than normal, everyday actions, then her claim will not succeed because she will not have acted to her detriment. In their construction of normality, the decision of the courts display the tenacious

41 *Eves v Eves* [1975] 1 WLR 1338.

42 *Pettitt v Pettitt* [1970] AC 777, 796, *per* Lord Reid.

43 Although the point is not without controversy, there seems little, if any, distinction between how these requirements are met under the constructive trust and proprietary estoppel. For consideration of this point, see Ferguson, 'Constructive Trusts: A Note of Caution' (1993) 109 LQR 114, 115–20.

hold of 'separate spheres' ideology. All the behaviour which is placed in the realm of the domestic, no matter how arduous, will not amount to detriment because it can be expected of any woman in an intimate relationship with a man. Behaviour which takes the claimant outside the domestic realm is categorised as abnormal, and, in order to explain it, it must be placed in the context of a market-like transaction giving rise to a property interest. According to the authorities one cannot expect women, out of the love they have for their partners or of the desire to live in a comfortable place, to pay towards mortgage instalments. Nor is it reasonable to expect them to spend small sums on improvements, at least when those small sums represent a quarter or all their worldly wealth and their partner is a relatively rich man. A woman cannot be reasonably expected to wield 14-lb sledge-hammers or work cement mixers out of love or the desire for more pleasant surroundings. Prompted by such motives, however, it is reasonable to expect women to leave their husbands, move in with their lovers, bear their babies, refrain from seeking employment, wallpaper, paint, and generally decorate and design their lovers' houses, and to organize builders working on those same houses, even when this includes the purchase and delivery of the building materials. In order to succeed, female claimants must show that they "did much more than most women would do", or rather that they did more than the judges would expect most women to do. If a claimant's conduct [is] of a type regarded by judges as "the most natural thing in the world for a wife" to have done, she will not succeed. The use of the stereotype as a norm, from which deviation has to be established, is an almost inevitable consequence of the adoption of Nourse L.J.'s test.

The effect of the courts' approach is illustrated by comparing the claims to detriment in two cases: *Wayling v Jones*[44] and *Hammond v Mitchell*.[45] In *Wayling v Jones*, the issue of detriment was discussed in the context of proprietary estoppel. The claim arose from a homosexual relationship throughout which Mr Wayling had acted as 'companion and chauffeur' to his partner, in addition to assisting in business ventures for which he was paid 'pocket money' rather than a full wage. His acts were accepted as sufficient detriment.

Flynn and Lawson highlight the disparity between the court's treatment of Mr Wayling's conduct as detriment and the general attitude of the courts towards domestic activities undertaken by women.

Flynn and Lawson, 'Gender, Sexuality and the Doctrine of Detrimental Reliance' [1995] Fem Leg Stud 105, 118–19

[When] the normalcy-dependent test of detriment is applied to male-male relationships the unnatural qualities of these relations between men can operate in favour of the cohabiting claimant. In the separate spheres ideology which resurfaces in this field, it is not normal for a man to undertake caring, domestic duties. As a result, it is necessary for Balcombe L.J. to explain (and to elevate) Wayling's domestic behaviour in the description of him acting as companion and chauffeur in exchange for monetary support. Wayling's activities have a visibility here which no woman's would possess. However, the Court of Appeal does not dwell on this aspect of the case because it can turn to a more conventional pattern of behaviour. Wayling has also engaged in non-domestic activity with Jones, and his work in the various hotels and restaurants which they ran is deemed to constitute detrimental behaviour. Wayling, a man who lives with another gay man, who works inside and outside the domestic sphere,

[44] (1995) 69 P & CR 170, CA. [45] [1991] 1 WLR 1127.

is visible in a way in which a woman living with Jones would not have been. All of his private behaviour is unnatural and so could amount to detriment in the eyes of a court. All of his public behaviour in the market is conventional and familiar; he does the type of things which men do which are the foundation of contracts and property transactions.

In *Hammond v Mitchell*, the sole form of detriment identified by the Court of Appeal was that Miss Mitchell had participated wholeheartedly in speculative business ventures, which, had they gone badly, would have resulted in the loss of the home that she shared with Mr Mitchell, who was the sole legal owner. Her support had included subordinating any interest she may have in the property to mortgagees, to enable finance for the business ventures to be secured over the home.

As O'Hagan notes, there is an underlying difficulty in accepting as detriment Miss Mitchell's willingness to risk losing the home. (In the following extract, O'Hagan refers to Miss Mitchell as 'F' and to Mr Mitchell as 'M'.)

O'Hagan, 'Indirect Contributions to the Purchase of Property'
(1993) 56 MLR 224, 226

It seems that the court felt that F's agreement to postpone any interest in the property, followed by her agreement to subject the property to risk, constituted an act of detriment which was referable to the property. Until she had agreed to postpone any rights she may have had in the property to those of the bank, and proceeded to support M's entrepreneurial activities, she was a bare licensee. However, by agreeing to risk a bare licence, F obtained a proprietary interest. It is suggested, with respect, that the better view is that a party can only suffer detriment if he or she has something to lose. When F supported M in his business venture she had no *interest* in land to put at risk. Certainly F would have suffered had the bank sought to enforce its security, but she would not have lost any rights in the property because she had none to lose.

It may be argued that Miss Mitchell's commercial endeavours, like Mr Wayling's domestic work, had an increased visibility because each claimant was operating outside of his or her 'expected' sphere. As Flynn and Lawson highlight in the extract above, Mr Wayling's domestic activities were visible because he was a man acting in the domestic sphere. Equally, Miss Mitchell's shared enjoyment of the masculine-based commercial sphere, and her willingness to risk loss of her home for commercial success, runs counter to the ideological norm of a woman's attachment to her home.[46]

It is not suggested that *all* domestic conduct by a male claimant and *all* commercial activities by a female claimant are given an undue emphasis by the courts in assessing detriment. A male claimant who has stayed at home caring for the parties' children would not be considered to have acted to his detriment any more than would a female claimant who undertakes the role of homemaker. On the current test, the actions of the claimants would be considered no more than is reasonable in light of their relationship. *Wayling v Jones* and *Hammond v Mitchell* suggest, however, that, in marginal or atypical cases, undue emphasis may be placed on conduct that falls outside gender stereotypes.

[46] Hopkins (2000), p 113.

Reliance

While detriment focuses objectively on what acts the claimant has done, the element of reliance focuses subjectively on the claimant's motive in doing those acts.[47] For a constructive trust to arise, there must be a causative link between the common intention and the detriment. The leading authority on how this requirement is fulfilled is the proprietary estoppel case of *Wayling v Jones*, in which Balcombe LJ drew jointly on constructive trust and estoppel cases to summarize how the requirement of reliance is fulfilled.[48]

Wayling v Jones
(1995) 69 P & CR 170, CA

Balcombe LJ

At 173

1. There must be a sufficient link between the promises relied upon and the conduct which constitutes the detriment—see *Eves v. Eves*, in particular *per* Brightman J. *Grant v. Edwards*, *per* Nourse L.J. and *per* Browne-Wilkinson V.-C. and in particular the passage where he equates the principles applicable in cases of constructive trust to those of proprietary estoppel.
2. The promises relied upon do not have to be the sole inducement for the conduct: it is sufficient if they are an inducement—*Amalgamated Property Co. v. Texas Bank*.
3. Once it has been established that promises were made, and that there has been conduct by the plaintiff of such a nature that inducement may be inferred then the burden of proof shifts to the defendants to establish that he did not rely on the promises—*Greasley v. Cooke*; *Grant v. Edwards*.

The question that arises from Balcombe LJ's third point is this: once the burden of proof has shifted to the defendant, how can reliance be disproved?

As we have seen, in *Wayling v Jones*, Mr Wayling was held to have acted to his detriment by acting as 'companion and chauffeur' to his partner, and working without full remuneration within his partner's businesses. In his evidence, he acknowledged that he would have acted the same way if no promise of a property right had been made. At first instance, the judge considered this to be fatal to his claim, as demonstrating that he had not acted in reliance on the promise. This decision was overruled on appeal. The Court of Appeal held that it was not sufficient to show that Mr Wayling would have acted the same way if no promise had been made. To discharge the burden of proof, the defendant must show that Mr Wayling would have acted the same way if the promise, once made, had been revoked. Mr Wayling had stated in his evidence that, in such circumstances, he would have left Mr Jones and therefore the burden of disproving reliance had not been discharged.

The test of reliance has not been specifically discussed in the context of a constructive trust claim subsequent to the decision in *Wayling v Jones*. Some restatement is required to apply the test to a constructive trust to reflect the existence of a common intention, rather than a promise. It is suggested that, in a claim to a constructive trust, once the burden shifts

[47] Lawson (1996), p 219.

[48] For the relationship between proprietary estoppel and constructive trusts as regards the requirements of detriment and reliance, see fn 46 above.

to the defendant in order to disprove reliance, he or she would have to demonstrate that the claimant would have acted the same way even if informed that the defendant would not comply with the parties' initial common intention.

2.2 JOINT LEGAL OWNERS

Where legal title to a home is conveyed into the joint names of the parties, the conveyance is conclusive as to the existence of a trust. If the conveyance identifies the parties' respective shares, then it is generally conclusive as to those shares[49]—though with some qualification. In *Stack v Dowden* Baroness Hale explained that the declaration is '*conclusive unless varied by subsequent agreement or affected by proprietary estoppel*'.[50] This leaves the exceptional case of joint ownership in which, as in *Stack v Dowden* and *Jones v Kernott* a conveyance into joint names is silent as to the parties' respective shares.[51]

As we have seen in section 2 of this chapter, the starting point in case of joint legal ownership is joint and equal beneficial ownership. The question that arises is when and how this presumption may be displaced. The answer depends on whether the property constitutes a home in the narrow sense defined in *Jones v Kernott* as a property purchased '*in joint names for joint occupation by a married or unmarried couple, where both are responsible for any mortgage*'.[52] Where this is the case, the presumption of resulting trust no longer applies and the presumption of joint and equal beneficial ownership can be rebutted only through a constructive trust founded on the common intention of the parties. Where the constructive trust is invoked to rebut the presumption of joint and equal beneficial ownership, it is used solely to quantify the claimant's share. The existence of the trust is established by the fact of conveyance into joint names. In other instances of joint legal ownership, the presumption of resulting trust has not been removed. In these cases, therefore, the presumption of joint and equal beneficial ownership will be rebutted by a presumption of resulting trust where the parties have not contributed equally. Through a resulting trust, the parties will obtain beneficial shares in proportion to their contributions. As in the case of sole legal ownership discussed in section 2.1 of this chapter, however, a beneficiary who wishes to establish a share other than in proportion to their direct financial contribution, may do so though a constructive trust.

In *Jones v Kernott*, the majority accepted that the common intention to depart from joint and equal beneficial ownership can be imputed as well as inferred (the difference between these is discussed in section 2.3.2 below).[53] Lord Wilson disagreed on this matter. He noted that the point did not arise on the facts (where the judge had found that the parties' intentions had in fact changed)[54] and that the question 'will merit careful thought'.[55] In *Stack v*

[49] *Goodman v Gallant* [1986] Fam 106. [50] [2007] 2 AC 432, [49].

[51] In *Stack v Dowden* [2007] 2 AC 432, [52], Baroness Hale noted that the incidence of such transfers should be reduced, because the standard form completed by joint transferees of registered land (form TR1) provides them with the opportunity to specify their respective shares. Land Registry rejected a proposal to make completion mandatory: Cooke, 'In the Wake of *Stack v Dowden*: The Tale of TR1' [2011] Fam Law 1142.

[52] [2011] 3 WLR 1121, [25].

[53] *Jones v Kernott* [2011] 3 WLR 1121, [51]. Lord Wilson noted that whether it should be possible to infer the common intention did not arise on the facts and 'will merit careful thought'. See further the comments in this respect at [31] and [64].

[54] Ibid, [48]. [55] Ibid, [84].

Dowden Baroness Hale warned that the task of rebutting the initial presumption is not one that should be undertaken lightly by the claimant.

Stack v Dowden
[2007] 2 AC 432, HL

Facts: Mr Stack and Ms Dowden had cohabited for nearly 20 years and had four children. Their home was registered in their joint names but with no express declaration as to their respective beneficial shares. The purchase had been funded from the proceeds of sale of a previous home (held in Ms Dowden's sole name), money from her bank account, and a joint loan. While both parties contributed to the discharge of the loan, Ms Dowden's contributions were higher. Throughout their relationship they had kept their financial affairs separate. On the breakdown of their relationship, Ms Dowden claimed to be entitled to 65 per cent of the beneficial share.

Baroness Hale

At [68]

In family disputes, strong feelings are aroused when couples split up. These often lead the parties, honestly but mistakenly, to reinterpret the past in self-exculpatory or vengeful terms. They also lead people to spend far more on the legal battle than is warranted by the sums actually at stake. A full examination of the facts is likely to involve disproportionate costs. In joint names cases it is also unlikely to lead to a different result unless the facts are very unusual.

At present, there is little guidance on the types of factor that would make a case 'unusual' enough to justify a departure from the presumption of joint and equal beneficial ownership. In *Stack v Dowden*, Baroness Hale was satisfied that the facts of the case were sufficiently unusual to depart from the presumption and in doing so she emphasized the fact that throughout their long relationship the couple had kept their financial affairs rigidly separate.[56]

In contrast, in *Fowler v Barron*,[57] the Court of Appeal rejected Mr Barron's claim to depart from the presumption of equal beneficial ownership. In that case, the parties' home had been placed in their joint names, although Mr Barron alone provided the deposit and paid the mortgage instalments. Miss Fowler's income was used to meet day-to-day expenses, and additional expenditure towards such matters as school trips, holidays, and special occasions. Arden LJ considered that this was tantamount to the parties treating their income as '*one pool from which household expenses will be paid*'. There was nothing unusual to justify departing from the presumption.

The presumption of joint and equal beneficial ownership may be rebutted not only at the time of acquisition of the property, but also at a later stage. This feature of the constructive trust led Lord Hoffmann in argument in *Stack v Dowden* to describe the trust as 'ambulatory'.[58] *Jones v Kernott* involved a post-acquisition alteration of the parties' intention. There, the common intention of the parties was considered to have changed some-

[56] [2007] 2 AC 432, [92]. [57] [2008] EWCA 377, [46].

[58] As explained in *Stack v Dowden* [2007] 2 AC 432, [62] *per* Baroness Hale. See further *Jones v Kernott* [2011] 3 WLR 1121, [14].

time after the breakdown of their relationship when a life insurance policy was cashed in to enable Mr Kernott, who had moved out of the home the parties had shared, to buy a home for himself.[59] In *Stack v Dowden*, Baroness Hale gave as an example a situation where, '*one party has financed (or constructed himself) an extension or substantial improvement to the property, so that what they have now is significantly different from what they had [at the time of acquisition]*'.[60]

2.3 QUANTIFICATION OF BENEFICIAL INTERESTS UNDER A CONSTRUCTIVE TRUST

The issue of quantification of a beneficial interest under a constructive trust may arise in three circumstances:

- First, in cases of sole legal ownership where a constructive trust has been established.
- Second, in cases of joint legal ownership within *Stack v Dowden* and *Jones v Kernott* (those involving property purchased '*in joint names for joint occupation by a married or unmarried couple, where both are responsible for any mortgage*') where the presumption of joint and equal beneficial ownership has been rebutted by a claimant who seeks to obtain an unequal share.
- Third, in other cases of joint legal ownership where a constructive trust has been established by a claimant who seeks to obtain a share otherwise than in proportion to their direct financial contribution.

The approach to take to the quantification of shares under a constructive trust in the second situation was the central question in *Stack v Dowden* and *Jones v Kernott*. In *Abbott v Abbott* the same approach to quantification was applied by the Pricy Council in the first situation (sole legal ownership). This position was confirmed by the Supreme Court in *Jones v Kernott* whilst emphasizing the different starting point in cases of sole legal ownership.[61] It may be assumed that the same approach to quantification will be applied in the third situation as there is no basis to treat the first and third situations differently. Even though the quantification of shares is, therefore, determined by the same rules in all cases, the fact the starting point is different may still affect the outcome of the application of those rules.[62]

2.3.1 Quantification and *Stack v Dowden*: the shift to common intention

In *Stack v Dowden* the House of Lords noted a curious (and perhaps unintended) distinction that had emerged in previous case law. In sole ownership cases, a flexible approach to quantification of beneficial shares had developed through the application of the constructive trust.[63] In joint ownership cases, the courts had appeared to prefer basing decisions on the resulting trust, with its rigid approach to quantification as a proportion of each party's

[59] [2011] 3 WLR 1121, [48]. [60] [2007] 2 AC 432, [70]. [61] [2011] 3 WLR 1121, [52].

[62] This is acknowledged in *Stack v Dowden* [2007] 2 AC 432 at [69] where Baroness Hale explains '[w]*here a couple are joint owners of the home and jointly liable for the mortgage, the inferences to be drawn from who pays for what may be very different from the inferences to be drawn when only one is owner of the home*'. The paragraph is extracted in full below.

[63] See, in particular, *Stokes v Anderson* [1991] 1 FLR 391; *Midland Bank plc v Cooke* [1995] 4 All ER 562; *Drake v Whipp* [1996] 1 FLR 826; *Oxley v Hiscock* [2005] Fam 211.

contribution.[64] Baroness Hale noted:[65] '*The approach to quantification in cases where the home is conveyed into joint names should certainly be no stricter than the approach to quantification in cases where it has been conveyed into the name of one only.*' The House of Lords then proceeded to state and develop the basis on which quantification is determined.

Prior to *Stack v Dowden*, the Court of Appeal had comprehensively addressed the issue of quantification in the following case, involving a sole legal owner.

Oxley v Hiscock
[2005] Fam 211, CA

Facts: The parties were cohabitants whose home was in the sole legal ownership of Mr Hiscock. Both parties had provided a cash contribution to the purchase (approximately 28 per cent by Mrs Oxley and 48 per cent by Mr Hiscock), with the remainder raised by a mortgage. Throughout the parties' relationship, they had both contributed to the household expenditure, including the discharge of the mortgage, and to improvements and maintenance. On the breakdown of the relationship, Mrs Oxley claimed 50 per cent of the proceeds of sale. Following a review of the authorities, Chadwick LJ summarized the principles governing quantification. Chadwick LJ referred to this as the 'second question'—arising once the existence of a constructive trust (the first question) has been established.

Chadwick LJ

At [69]

In those circumstances, the second question to be answered in cases of this nature is 'what is the extent of the parties' respective beneficial interests in the property?'. Again, in many such cases, the answer will be provided by evidence of what they said and did at the time of the acquisition. But, in a case where there is no evidence of any discussion between them as to the amount of the share which each was to have—and even in a case where the evidence is that there was no discussion on that point—the question still requires an answer. It must now be accepted that (at least in this court and below) the answer is that each is entitled to that share which the court considers fair having regard to the whole course of dealing between them in relation to the property. And, in that context, 'the whole course of dealing between them in relation to the property' includes the arrangements which they make from time to time in order to meet the outgoings (for example, mortgage contributions, council tax and utilities, repairs, insurance and housekeeping) which have to be met if they are to live in the property as their home.

On the facts of the case, the Court of Appeal held that Mrs Oxley was entitled to a 40 per cent beneficial share. An equal share was considered disproportionate in light of the difference in the parties' initial cash contributions.

[64] In this respect, Baroness Hale highlighted the decisions in *Walker v Hall* [1984] 1 FLR 126, *Springette v Defoe* [1992] 2 FLR 388, and *Huntingford v Hobbs* [1993] 1 FLR 736. She held that, to the extent that these decisions hold that a stricter approach to quantification applies in joint ownership cases, they should not be followed: *Stack v Dowden* [2007] 2 AC 432, [65].

[65] Ibid.

In *Stack v Dowden*, Baroness Hale referred to Chadwick LJ's formula before shifting the emphasis away from 'fairness' towards the parties' common intention.

Stack v Dowden
[2007] 2 AC 432, HL

Baroness Hale

At [61]

[. . .] *Oxley v Hiscock* has been hailed by Gray and Gray as 'An important breakthrough' (see p 931 (para 10.138)). The passage quoted is very similar to the view of the Law Commission in *Sharing Homes: A Discussion Paper* (Law Com no 278) p 69 (para 4.27) on the quantification of beneficial entitlement:

> 'If the question really is one of the parties' "common intention", we believe that there is much to be said for adopting what has been called a "holistic approach" to quantification, undertaking a survey of the whole course of dealing between the parties and taking account of all conduct which throws light on the question what shares were intended.'

That may be the preferable way of expressing what is essentially the same thought, for two reasons. First, it emphasises that the search is still for the result which reflects what the parties must, in the light of their conduct, be taken to have intended. Second, therefore, it does not enable the court to abandon that search in favour of the result which the court itself considers fair. For the court to impose its own view of what is fair upon the situation in which the parties find themselves would be to return to the days before *Pettitt v Pettitt* [1969] 2 All ER 385, [1970] AC 777 without even the fig leaf of s 17 of the 1882 Act. [. . .]

At [69]–[70]

In law, 'context is everything' and the domestic context is very different from the commercial world. Each case will turn on its own facts. Many more factors than financial contributions may be relevant to divining the parties' true intentions. These include: any advice or discussions at the time of the transfer which cast light upon their intentions then; the reasons why the home was acquired in their joint names; the reasons why (if it be the case) the survivor was authorised to give a receipt for the capital moneys; the purpose for which the home was acquired; the nature of the parties' relationship; whether they had children for whom they both had responsibility to provide a home; how the purchase was financed, both initially and subsequently; how the parties arranged their finances, whether separately or together or a bit of both; how they discharged the outgoings on the property and their other household expenses. When a couple are joint owners of the home and jointly liable for the mortgage, the inferences to be drawn from who pays for what may be very different from the inferences to be drawn when only one is owner of the home. The arithmetical calculation of how much was paid by each is also likely to be less important. It will be easier to draw the inference that they intended that each should contribute as much to the household as they reasonably could and that they would share the eventual benefit or burden equally. The parties' individual characters and personalities may also be a factor in deciding where their true intentions lay. In the cohabitation context, mercenary considerations may be more to the fore than they would be in marriage, but it should not be assumed that they always take pride of place over natural love and affection. At the end of the day, having taken all this into account, cases in which the joint legal owners are to be taken to have intended that their beneficial interests should be different from their legal interests will be very unusual.

This is not, of course, an exhaustive list. There may also be reason to conclude that, whatever the parties' intentions at the outset, these have now changed. An example might be where one party has financed (or constructed himself) an extension or substantial improvement to the property, so that what they have now is significantly different from what they had then.

Baroness Hale's formula represents the view of the majority of the House of Lords.[66] The proposition that emerges from the case is that the issue of quantification is addressed by reference to the '*whole course of dealings between the parties*' (as stated in *Oxley v Hiscock*), but with a view to establishing the common intention of the parties, rather than determining what would constitute a 'fair' share. On the facts of the case, the House of Lords unanimously agreed that Ms Dowden was entitled to the 65 per cent share that she claimed. In *Fowler v Barron*,[67] the Court of Appeal emphasized that the parties' *common* intention alone is relevant. Mr Barron argued that the parties' home had been placed in their joint names to ensure that Miss Fowler (who was considerably younger than him) would benefit on his death, on the assumption that the couple were still together at that time. He had not appreciated that the effect of joint ownership was to confer an immediate beneficial interest on Miss Fowler. This 'secret intention',[68] which was not communicated to Miss Fowler, had no effect on the initial presumption of equal beneficial ownership.

2.3.2 Quantification and *Jones v Kernott*: common intention clarified

The crucial issue that was left unclear in *Stack v Dowden* is whether the common intention that provides the basis for the quantification of the parties' shares can be imputed as well as inferred. This in turn raised a question as to the interpretation of Baroness Hale's judgment in *Stack v Dowden*; particularly in respect of her comments in paragraph 61 (extracted above) relating to *Oxley v Hiscock* and the relevance of 'fairness'.[69]

The definition of inferred and imputed intent was considered in *Stack v Dowden* by Lord Neuberger.

Stack v Dowden
[2007] 2 AC 432, HL

Lord Neuberger

At [125]–[127]

While an intention may be inferred as well as express, it may not, at least in my opinion, be imputed. That appears to me to be consistent both with normal principles and with the majority view of this House in *Pettitt v Pettitt*, as accepted by all but Lord Reid in *Gissing v Gissing* (see [1970] 2 All ER 780 at 783, 783–784, 786, 789, [1971] AC 886 at 897, 898, 900, 901, 904), and reiterated by the Court of Appeal in *Grant v Edwards* [1986] 2 All ER 426 at

[66] While Lord Neuberger also considered quantification under the constructive trust to be based on the parties' common intention, his approach to quantification otherwise differs in key respects.

[67] [2008] EWCA 377. [68] Ibid, [36].

[69] On this issue, see Lord Wilson's analysis of Baroness Hale's judgment [2011] 3 WLR 1121, [85]–[87] with which Lord Walker and Baroness Hale express their disagreement at [13]. These paragraphs are extracted below.