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In essence, Jackson's argument is that, in registered land, overreaching arises through the process of registration itself. It is the cumulative effect of provisions aimed at keeping trusts off the register and those protecting purchasers from matters that have not been entered on the register as a restriction on how land can be dealt with. While the statutory provisions upon which Jackson's argument is based have changed in the LRA 2002, she suggests that the same scheme of overreaching has been maintained.[18]

If Jackson is correct, a chasm has been created between the operation of overreaching in registered and unregistered land. The basis and scope of overreaching in each would need to be separated. Two significant practical consequences follow. Firstly, if overreaching is not based on the trustees' powers of disposition, then it arises regardless of whether the trustees are acting within their powers.[19] The discussion of this matter (in section 4 below) would be an issue only for unregistered land.

Secondly, a disposition by a single trustee in registered land would overreach beneficial interests. The need for any capital money to be paid to two trustees would not apply to registered land unless, again, entered as a restriction on the register. The discussion (below) of this requirement would also be confined to unregistered land.[20]

Jackson's theory, as she acknowledges, is against the current authorities and the 'universally unquestioned' view that ss 2 and 27 of the LPA 1925 apply equally to registered and unregistered land.[21] To date, courts have not differentiated the operation of overreaching in each scheme of land. To do so now (with the practical consequences that would follow) would require a fundamental reversal of current understanding. It is notable that Jackson's argument is developed around the LRA 1925. If that Act was intended to provide a self-contained scheme of overreaching, which has therefore not been properly applied by the courts, the LRA 2002 provided an opportunity to reassess the position. In the absence of any clarification provided by that Act, it seems unlikely that Jackson's argument will find acceptance by the courts. Therefore, it is suggested that the better view remains that, for both registered and unregistered land, the basis of overreaching lies in the trustees' powers of disposition.

2.2.5 Other interests capable of being overreached

In addition to the interests for which overreaching is provided in s 2 of the LPA 1925, it has been accepted that some interests claimed under proprietary estoppel must also be capable of being overreached.

Birmingham Midshires Mortgage Services Ltd v Sabherwal
(2000) 80 P & CR 256, CA

Facts: Mrs Sabherwal lived in a house with her two sons and their families. Legal title to the house was vested in the sons who had defaulted on charges granted to BMMS to raise

[18] Jackson, 'Overreaching in Registered Land Law' (2006) 69 MLR 214, 241, fn 183.

[19] A consequence confirmed by Jackson, 'Overreaching and Unauthorised Disposition of Registered Land' [2007] Conv 120. She says, at 129: '*I contend that an unauthorised disposition by trustees of registered land would always overreach*.'

[20] In this respect, it should be noted that while the Law of Property Act 1925, s 2(1)(ii), refers to a conveyance by 'trustees of land' in the plural, this is no bar to an argument for overreaching by a single trustee. The Interpretation Act 1978, s 6(c), provides '*words in the singular include the plural and words in the plural include the singular*'.

[21] Jackson (2007), p 229.

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money to support their business ventures. Mrs Sabherwal sought to establish that she had a proprietary interest in the house binding against BMMS. One argument made was that she had an interest through proprietary estoppel, which, in contrast to a beneficial interest under a trust of land, was not capable of being overreached.

Robert Walker LJ

At [24]–[32]

On the facts of this case, Mrs Sabherwal plainly made a substantial financial contribution to all the properties successively owned by the family. She could rely on a resulting trust and had no need to rely on proprietary estoppel (if and so far as the two are, in the context of the family home, distinct doctrines: see the observations of Sir Nicolas Browne-Wilkinson V-C in *Grant v Edwards* [1986] 1 Ch 638, [1986] 2 All ER 426 at 656 of the former report). If she had made no financial contribution, but had nevertheless acted to her detriment in reliance on her sons promises, she might have obtained (through the medium of estoppel rather than through the medium of a trust) equitable rights of a proprietary nature. Her actual occupation of the house would then have promoted those rights into an overriding interest. That, I think, is not conceded by counsel for the respondents but I assume that to be the case. On that basis, it would have been a remarkable result if those more precarious rights were incapable of being overreached, on a sale by trustees, under s 2(1)(ii) of the Law of Property Act 1925.

Mr Beaumont has however contended for that result, citing what Lord Wilberforce said in *Shiloh Spinners v Harding* [1973] AC 691, [1973] 1 All ER 90 at 721 of the former report:

> "All this seems to show that there may well be rights, of an equitable character, outside the provisions as to registration and which are incapable of being overreached."

Lord Wilberforce had just before referred to *ER Ives Investment Ltd v High* [1967] 2 QB 379, [1967] 1 All ER 504. In that case a boundary dispute between neighbours had been settled by an informal agreement including the grant of a right of way. The agreement about the right of way was never completed by a deed of grant, and was never registered. The Court of Appeal held that it was binding despite the lack of registration. Similarly, *Shiloh Spinners v Harding* was concerned with an equitable right of entry for enforcement of a covenant arising in what Lord Wilberforce called a dispute [...] of a commonplace character between neighbours.

Equitable interests of that character ought not to be overreached, since they are rights which an adjoining owner enjoys over the land itself, regardless of its ownership from time to time. The principle is in my view correctly stated in Megarry and Wade, *The Law of Real Property* 5th ed p 409:

> "In fact the only examples of such equities likely to occur are commercial (as opposed to family) interests, which it is absurd to speak of overreaching. Two instances are an equitable right of way which is yet not an equitable easement, and an equitable right of entry to secure performance of a covenant, and there are probably others. To overreach such interests is to destroy them [...]"

The footnotes to this passage refer to *ER Ives Investment Ltd v High* and *Shiloh Spinners v Harding* (cases which were cited to the House of Lords in *Flegg*—see especially counsels argument at p 63—but are not referred to in any of the speeches of their Lordships). The essential distinction is, as the authors of Megarry and Wade note, between commercial and family interests. An equitable easement or an equitable right of entry cannot sensibly shift from the land affected by it to the proceeds of sale. An equitable interest as a tenant in common can do so, even if accompanied by the promise of a home for life, since the proceeds of sale can be used to acquire another home.

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Mr Beaumont has also argued that, although in *Grant v Edwards* the Vice-Chancellor regarded interests in the family home created by equitable estoppel or by a constructive trust as closely similar, if not interchangeable, his remarks do not apply to a resulting trust arising from a monetary contribution. This is an area of the law in which the terminology is unfortunately far from uniform, but I do not accept that the Vice-Chancellors remarks were limited in that way. On the contrary, immediately after his reference to proprietary estoppel he said (see [1986] Ch 657, H-658A):

> "Identifiable contributions to the purchase [price] of the house will of course be an important factor in many cases."

Similarly, in *Lloyds Bank v Rosset* [1991] 1 AC 107, [1990] 1 All ER 1111 Lord Bridge (in a very well-known passage at pp 132–3 of the former report) referred to direct contributions to the purchase price by [a party] who is not the legal owner, as readily justifying the creation of a constructive trust. Such a trust, however labelled, does not then leave room for a separate interest by way of equitable estoppel: compare the remarks of Morritt LJ in *Lloyds Bank v Carrick* [1996] 4 All ER 630, [1996] 2 FLR 600 at p 639C-E of the former report. To do so would cause vast confusion in an area which is already quite difficult enough. The confusion is avoided if what Lord Wilberforce said in *Shiloh Spinners v Harding* is limited, as in my judgment it must be, to some unusual types of equitable interest arising in commercial situations. In this type of family situation, the concepts of trust and equitable estoppel are almost interchangeable, and both are affected in the same way by the statutory mechanism of overreaching, the substance of which is not affected by the 1996 Act.

In these circumstances I do not find it necessary to consider how far the judges findings in this area (which were largely limited to a general acceptance of Mrs Sabherwal's evidence) would establish the necessary conditions for proprietary estoppel. I assume in favour of Mrs Sabherwal that they would do so.

On the basis of this decision, family interests under a proprietary estoppel are capable of being overreached, while commercial interests are not. To have held otherwise would have created a significant lacuna in the operation of overreaching: the mechanism could be avoided simply by claiming an interest through proprietary estoppel rather than constructive trust. To that extent, the decision seems correct—but questions may still arise as to its scope and therefore to the extent to which interests claimed through proprietary estoppel can be overreached. It is unclear whether the category of 'family' interests to which overreaching is extended is limited to those circumstances, exemplified by the facts of *Sabherwal*, in which claims to estoppel and constructive trusts coincide, or could apply to other circumstances in which estoppel claims arise in relation to a home. Robert Walker LJ's definition of a family interest is sufficiently broad to cover such cases.

Harpum considered the scope of the judgment. Although generally adopting a restrictive approach, his comment implies that the case is not limited to situations in which trusts and estoppel coincide.

Harpum, 'Overreaching, Trusts of Land and Proprietary Estoppel'
(2000) 116 LQR 341, 344–5

Thus in determining whether an inchoate equity arising by estoppel is overreached by a disposition to two or more owners, it is necessary to consider the manner in which the court

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might have given effect to that equity. Robert Walker L.J. considered that the essential difference was between "commercial and family interests". The latter but not the former were overreachable. That may, however, be an oversimplification. If effect would be given to the equity by the creation or transfer of a legal estate in land or by the grant of a legal or equitable right over land, then the equity should be incapable of being overreached. However, if the appropriate way of giving effect to the equity was by means of an interest that could properly be converted into money on sale, such as an interest under a trust of land or a lien, the equity should be overreachable.

The scope of *Sabherwal* must be considered to remain uncertain. Overreaching of interests claimed through estoppel where a constructive trust would not also be available appears to be outside the ratio of the decision. Because the basis of overreaching is the trustees' powers of disposition, there is a difficulty in extending the operation of the mechanism to situations in which no trust could be claimed. On that view, there is simply no basis on which an equitable interest not arising under a trust can be overreached. Indeed, even if overreaching is limited in that way, it is not necessary to extend overreaching to interests under estoppel. The same result can be achieved by reliance on the suggestion in *Lloyds Bank v Carrick*[22] (referred to in the judgment extracted above and discussed in Chapter 13, section 5.8) that the existence of a constructive (or resulting) trust precludes any further claim to an interest through estoppel.

2.3 TRANSACTIONS WITH OVERREACHING EFFECT

Once it is established that an interest is capable of being overreached, overreaching will take place only if the transaction is one that has such effect. Three requirements must be met. Firstly, there is an overarching requirement, reflecting the fact that overreaching has its basis within the trustees' powers, that the transaction is one that is within the powers of the trustees. We consider below the effect of transactions that do not fulfil this requirement.

The second and third requirements are drawn from the LPA 1925. The second requirement is that the transaction must be one of those listed in s 2(1)(i)–(iv) of the Act (extracted above) as having overreaching effect. The third is that s 2(1)(i) and (ii) provides that, to overreach beneficial interests under a trust, statutory requirements as regards payment of capital money must be complied with. These requirements are contained in s 27(2) of the 1925 Act.

Law of Property Act 1925, s 27(2)

(2) Notwithstanding anything to the contrary in the instrument (if any) creating a trust of land or in any trust affecting the net proceeds of sale of the land if it is sold, the proceeds of sale or other capital money shall not be paid to or applied by the direction of fewer than two persons as [trustees], except where the trustee is a trust corporation, but this subsection does not affect the right of a sole personal representative as such to give valid receipts for, or direct the application of, proceeds of sale or other capital money, nor, except where capital money arises on the transaction, render it necessary to have more than one trustee.

[22] [1996] 4 All ER 630.

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This provision, like s 2, applies equally to registered and unregistered land. In registered land, trustees should enter a restriction on the register preventing a disposition unless s 27(2) is complied with. But (contrary to Jackson's argument, discussed above) the absence of a restriction does not remove the need for the requirement to be complied with in order for a purchaser to rely on the overreaching mechanism.

Neither ss 2 nor 27 state in their terms that there must be capital money for overreaching to take place. They impose requirements to be met when such money does arise. The fact that capital money will be paid may be thought to be inherent in overreaching as a process of 'shifting' beneficial interests from the land to money: if no money is paid, into what can the beneficial interests shift? In identifying the trustees powers of disposition as the basis of overreaching of the beneficial interests under a trust, however, Harpum indicated that this was not, in fact, the case.

Harpum, 'Overreaching, Trusteees' Powers and the Reform of the 1925 Legislation' (1990) 49 CLJ 277, 282

> [T]he interest created or the estate granted by the exercise of the power takes priority over the estates and interests under the settlement. The exercise of a power which does not give rise to any capital monies—such as an exchange of land—overreaches just as much as a transaction which does.

This statement proved prescient when the application of overreaching to a transaction in which no capital money arose came to be decided in the following case. The Court of Appeal cited Harpum's comment with approval in holding that such a transaction still has overreaching effect.

State Bank of India v Sood
[1997] Ch 276, CA

Facts: Mr and Mrs Sood were registered proprietors of their home. They granted a charge over the home for existing and future liabilities of themselves and their business. No capital money was advanced contemporaneously with this disposition, but, over a period of time, Mr and Mrs Sood accrued debts of over £1m and the State Bank of India (to which the benefit of the charge had been assigned by the Punjab National Bank) sought to enforce the charge. The five children of the couple (the third to seventh defendants) argued that they were beneficiaries under a trust of land and that their beneficial interests had not been overreached.

Peter Gibson LJ

At 279–90

> The question can be formulated in this way: where two trustees for sale hold registered land for themselves and other beneficiaries and mortgage the land as security for existing and future liabilities of themselves and other persons, are the equitable interests of the beneficiaries overreached, notwithstanding that no money was advanced by the mortgagee to or at the direction of the trustees contemporaneously with the mortgage? The judge in effect answered that question in the negative. [. . .]

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There is no dispute that the equitable interests of the third to seventh defendants were at the date of the legal charge capable of being overreached. That condition of section 2(1)(ii) was therefore satisfied. Most of the argument has turned on the final condition of that paragraph relating to compliance with the statutory requirements respecting the payment of capital money. [. . .]

I accept that a novel and important point of law is raised by this appeal. Lending institutions regularly take security from businessmen in the form of a legal charge on property (which very frequently means that the matrimonial home is charged) to secure existing and future indebtedness, and very commonly that property will be registered land held by two registered proprietors on trust for sale with no restriction registered in respect of their power to transfer or mortgage that property. It was not suggested that it had ever been the practice of mortgagees to make inquiries of occupiers of the property as to any claimed rights. Yet if the third to seventh defendants are right, that is what the mortgagees must do if they are not to take subject to the beneficial interests of the occupiers. [. . .]

The crucial issue is the true construction of the final condition of section 2(1)(ii) relating to compliance with statutory requirements respecting the payment of capital money. There is no dispute that if capital money does arise under a conveyance by trustees for sale to a purchaser it must be paid to or applied as section 27(2) dictates. But for overreaching to occur, does capital money have to arise on and contemporaneously with the conveyance?

The judge appears to have assumed that there could be no overreaching if no capital money arose.

He said:

> "we have to look to see whether capital money was paid [to] or applied by the direction of the two trustees. If it was, then the defendants have no defence; if it was not, then the bank cannot overreach and they have an arguable defence on the evidence."

Mr. Havey and Mr. Williams submitted that was indeed the position and they said that the arising of capital money on the conveyance was the assumption on which section 2(1)(ii) was drafted. Mr. Crawford's initial submission accorded with that view, but he sought to escape the consequences by contending that capital money arose whenever the Punjab National Bank advanced money, even if before the legal charge was executed. However, I cannot accept that what was done prior to the legal charge has any relevance to the condition that "the statutory requirements respecting the payment of capital money arising under a disposition upon trust for sale are complied with." Nor can I accept Mr. Crawford's further submission that the debt existing at the date of the legal charge was not materially different from the secured debt which existed at the date of the mortgage in *Flegg* and was discharged in that case out of the money raised. The circumstances are wholly different.

Mr. Crawford however had recourse to a further submission, adopting a point suggested by the court, that the relevant condition in section 2(1)(ii) should be construed as applying only to those cases where there was capital money arising under a disposition upon trust for sale, the statutory requirements of section 27(2) being simply irrelevant to a transaction under which no capital money arises. There are several types of conveyance to a purchaser (within the statutory meanings of those terms) other than a charge to secure existing and future debt which do not give rise to capital money, for example, an exchange or a lease not at a premium. Why should the legislature have intended to exclude such conveyances from having an overreaching effect? It is interesting to note that the precursor of section 2(1), viz. section 3(2)(ii) of the Law of Property Act 1922, used as one of the conditions for overreaching to occur the formula "If any capital money arises from the transaction [. . .] the requirements of this Act respecting the payment of capital money arising under a trust for sale [. . .] are complied with." However the form of section 3(2) differed in a number of respects from

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section 2(1) of the Act of 1925 and it may not be safe to infer that the later provision was intended to re-enact the substance of the earlier provision. But it points to the relevant condition of section 2(1) being worded in surprisingly oblique fashion if what was intended was that capital money must arise so that the statutory requirements can be complied with. Mr. Havey drew attention to the word "any" in connection with "capital money" in section 2(1)(iii) and (iv) and suggested that its omission from the reference to "capital money" in section 2(1)(i) and (ii) was significant. But the structure of those paragraphs is quite different from section 2(1)(iii) and (iv) and the draftsman could not have achieved the effect of section 3(2) of the Act of 1922 by adding "any" before "capital money" in section 2(1)(i) or (ii).

The relevant condition in section 2(1)(ii) is the same as that in section 2(1)(i). The overreaching powers conferred by the Settled Land Act 1925 include power to convey by an exchange or lease as well as by a mortgage or charge where capital money may not arise (see section 72 of that Act). The statutory requirements governing capital money (to be paid to or applied by the direction of not less than two individuals or a trust corporation: sections 94 and 95 of that Act) can only apply to those conveyances giving rise to capital money. The same interpretation must apply to the condition in section 2(1)(i) as it does to the conveyancing condition in section 2(1)(ii).

A more substantial argument of policy advanced on behalf of the third to seventh defendants is that if overreaching occurs where no capital money arises, the beneficiaries' interests may be reduced by the conveyance leaving nothing to which the interests can attach by way of replacement save the equity of redemption, and that may be or become valueless. I see considerable force in this point, but I am not persuaded that it suffices to defeat what I see to be the policy of the legislation, to allow valid dispositions to overreach equitable interests. In my judgment on its true construction section 2(1)(ii) only requires compliance with the statutory requirements respecting the payment of capital money if capital money arises. Accordingly I would hold that capital money did not have to arise under the conveyance.

The judge further said:

> "I consider that overreaching must take place at the time of the execution. I think that the plaintiff does not object to that in principle, but says that the defendants' right simply attaches to the equity of redemption; but I do not think one can have a condition of over-reaching on moneys which may or may not be drawn down later. For overreaching to take effect all parts of section 27(2) must be complied with; it is a two stage process which requires, first, the existence of either proceeds of sale or capital moneys and, secondly, those are either to be paid to the two trustees or applied at their discretion. The plaintiff says it does not matter-because there was a general direction for application in the charge-if it comes into existence or is applied at a subsequent time. I think that is wrong; it is necessary for the moneys to be in existence at the time of the charge so that those moneys can either be received or applied at the trustees' directions."

[. . .]

Both Mr. Harvey and Mr. Williams supported the judge's conclusion that some capital money must arise contemporaneously with the conveyance for there to be overreaching. They said that if a conveyance provided only for deferred payment, that would not suffice. They further submitted that provided some capital money arose contemporaneously with the conveyance and section 27(2) was complied with, overreaching would occur even though other money was subsequently advanced under the conveyance. Thus if a £1m facility was secured by a mortgage and in the course of time was fully drawn on but at the time of the mortgage only £100 was advanced, there would nevertheless be overreaching in respect of the whole £1m thereby secured, whereas if the £100 had not been advanced at the time of the mortgage, there would have been no overreaching. I do not believe that the statutory language supports a requirement producing such a surprising and illogical result. Mr. Havey

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drew our attention to a large number of provisions in the Settled Land Act 1925 which, he said, showed that money arising from a transaction must be received or applied at the same time as the transaction. I cannot agree, though I of course accept that to be paid or applied, capital money must be in hand. If and to the extent that capital money arises after the conveyance, section 27(2) must be complied with for the mortgagee to obtain a good receipt. If it is not, for example if an advance is made after a mortgage has been executed but under a facility provided for by the mortgage but is not paid to or at the direction of two or more trustees or a trust corporation, that would not affect the overreaching which would have occurred on the mortgage. [. . .]

The correct analysis of the position in the present case is that on the execution of the legal charge, the interests of the third to seventh defendants were overreached and attached to the equity of redemption. The legal estate in the property was by the legal charge made subject to the rights thereunder of the Punjab National Bank which were subsequently assigned to the plaintiff, including the right to sell the property. The value of the equity of redemption on the execution of the legal charge would reflect the then existing liabilities thereby secured. That value would be further reduced as further liabilities arose and were secured under the legal charge. In the light of *City of London Building Society v. Flegg* [1986] Ch. 605; [1988] A.C. 54 it follows from the overreaching that section 70(1)(g) does not avail the third to seventh defendants and that their defence on this point cannot succeed and should be struck out. On the assumption that they were not consulted about the legal charge by the first and second defendants, it may be that they have the right to obtain redress against the trustees.

Much though I value the principle of overreaching as having aided the simplification of conveyancing, I cannot pretend that I regard the resulting position in the present case as entirely satisfactory. The safeguard for beneficiaries under the existing legislation is largely limited to having two trustees or a trust corporation where capital money falls to be received. But that is no safeguard at all, as this case has shown, when no capital money is received on and contemporaneously with the conveyance. Further, even when it is received by two trustees as in *City of London Building Society v. Flegg* [1986] Ch. 605; [1988] A.C. 54, it might be thought that beneficiaries in occupation are insufficiently protected. Hence the recommendation for reform in the Law Commission's report, "Transfer of Land, Overreaching: Beneficiaries in Occupation" (1989) (Law Com. No. 188), that a conveyance should not overreach the interest of a sui juris beneficiary in occupation unless he gives his consent. Mr. Harpum in the article to which reference has been made proposed an alternative reform, limiting the power of trustees to mortgage. Whether the legislature will reform the law remains to be seen. I should add for completeness that we were assured by counsel that the recent Trusts of Land and Appointment of Trustees Act 1996 was of no assistance and we have not considered its effect.

In the absence of capital money, there may still be a shifting of the beneficial interests. In *Sood*, the interests shifted to the equity of redemption. To the extent that this may be valueless, where the debt equals or exceeds the value of the property, the result is no harsher than that in a case, exemplified by *City of London Building Society v Flegg*,[23] in which capital money is paid to the trustees, but is dissipated by them.

In *Sood*, two trustees executed the charge. If s 27(2) applies only to dispositions in which capital money is paid, however, it seems that a sole trustee (in registered and unregistered land) can overreach beneficial interests through dispositions that do not involve payment of

[23] [1988] AC 54.

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capital money.[24] There is no independent statutory requirement that the transaction must be undertaken by at least two trustees.[25] It is, however, worth noting that if the third party provides *nothing* in return for the right received from the trustees, overreaching will not occur, because the third party has not acquired a right 'for valuable consideration'.[26]

Commenting on the decision in *Sood*, Thompson suggested that the outcome prevents the need to distinguish between different types of mortgage and thus avoids the 'strange results' that Peter Gibson LJ's judgment highlights would result from drawing such distinctions.[27] But if a single trustee can overreach beneficial interests through mortgages (and other dispositions) that do not involve payment of capital money, then the effect of *Sood* is that it is, in fact, necessary to distinguish between such mortgages. The 'strange results' avoided by the decision in trusts with at least two trustees will arise in sole-trustee trusts. Hence, for example, a mortgage by a sole trustee, with £100 advanced at the outset and debts of £1m subsequently accrued, would not overreach (because the application of s 27(2) would be triggered by the initial payment of capital money), while a mortgage in which the level of borrowing reached the same amount, but with no initial advanced payment, *would* overreach, because the absence of capital money precludes the application of s 27(2). While it must be doubted that such results are intended, there is no statutory basis for limiting overreaching to transactions undertaken by at least two trustees unless s 27(2) is applied. The unfortunate result is that transactions in which beneficiaries appear most vulnerable are also those in which they are least protected.

Having outlined the general scope of overreaching, we can now consider its application in the specific context of a home occupied by the beneficiaries under a trust of land.

3 CO-OWNERSHIP, OVERREACHING, AND OCCUPYING BENEFICIARIES

We have seen that one of the interests capable of being overreached is the beneficial interest under a trust of land. Indeed, overreaching of such interests is probably the most common and practically important use of the mechanism. The shifting of beneficial interests from land to money appears neither controversial, nor problematic, where the function of the trust property is to provide an investment fund for the beneficiaries. The physical identity of the trust property itself is, then, not of central concern; what is more important is the wealth that it represents. It is of no particular significance to the beneficiaries whether their interest is in any particular piece of land or other type of property; what is important is that the value of the trust fund is maintained by the profitable sale of the land and the reinvestment of the proceeds in other lucrative investments. The trustees' equitable and statutory duties under the Trustee Act 2000 are defined with that objective in mind.

But a trust of land will also arise where co-owners hold land with the intention that they will occupy it as their home. In the common situation in which a couple purchase a home

[24] See McFarlane (2008), pp 397–400.

[25] Statutory references to 'trustees', e.g. in the Law of Property Act 1925, s 2, may considered by reference to the Interpretation Act 1978, s 6(3), to include a single trustee.

[26] Section 2(1) limits overreaching to cases in which the third party is a '*purchaser of a legal estate in land*' (this includes a mortgagee); s 205(1)(xxi) of the Law of Property Act 1925 states that, unless the context otherwise requires, a 'purchaser' means a purchaser for 'valuable consideration'.

[27] Thompson, 'Overreaching without Payment' [1997] Conv 134.

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in their joint names, they are both the legal and beneficial co-owners, and this trust creates no difficulties. Indeed, the couple is likely to be unaware that they deal with the property as trustees for the benefit of themselves as beneficial co-owners.

By contrast, a very real tension can arise where co-owners hold the legal estate on express or implied trust for themselves and others. This is a situation that can occur, for example, where a home is purchased for an extended family, where individuals within the family take the legal estate on trust for themselves and the remaining family members take as beneficial co-owners. The beneficiaries may be concerned not only with the value of their trust property, but also with its identity as their home. Yet overreaching does not recognize this concern. Their interests are assumed to be adequately protected, firstly, by the continued representation of their proprietary rights in the proceeds of sale by the process of overreaching itself, and secondly, by the requirement that at least two trustees receive those proceeds to guard against a misappropriation of the trust property or other breach of duty. If a misappropriation or other breach of duty does occur, the beneficiaries' proprietary interests are placed in jeopardy against a purchaser by overreaching, but the beneficiaries retain their personal remedies against the trustees to redress any loss in value of the trust fund.

The tension between trust property as a home for beneficiaries and the wealth that it represents came to a head in the following case. The Fleggs' main arguments focused on the need to afford protection to their occupation of the trust property as their home, by treating investment and occupation trusts differently. They argued, relying on *William & Glyn's Bank v Boland*,[28] that their beneficial interests bound the mortgagees as an overriding interest, and that an overriding beneficial interest should not be overreached. Further, they suggested that s 14 of the LPA 1925 operated to protect the interests of occupiers. If the land had been unregistered, the Fleggs would have argued that their occupation gave a purchaser constructive notice of their interest, so as to confer priority under the doctrine of notice. The House of Lords rejected these arguments. Overreaching operated, provided that the statutory conditions were satisfied. At that point, the Fleggs' beneficial interest in their home was transferred to the proceeds of sale so that there simply was no interest in the land that their occupation (or, indeed, any entry on the register) could protect.

City of London Building Society v Flegg
[1988] AC 54, HL

Facts: Mr and Mrs Flegg sold their home of 28 years and, in 1982, contributed the £18,000 proceeds to the purchase of Bleak House as a new home for themselves, and their daughter and son-in-law, Mrs and Mrs Maxwell-Brown. The balance of the £34,000 purchase price was funded by a mortgage. Despite their solicitor's advice that Bleak House should be registered in the names of all four parties, it was, in fact, registered in the joint names of Mr and Mrs Maxwell-Brown, who, given the Fleggs' contribution to the purchase price, held the house as joint tenants on resulting trust for themselves and Mr and Mrs Flegg. Bleak House was occupied and became the home of all four parties. The Maxwell-Browns ran into financial difficulties and, without the knowledge or consent of the Flegg's, remortgaged the house to the City of London Building Society to raise £37,500. The Fleggs must have been suspicious and, before the mortgage could be registered, they entered a caution against dealings at the Land Registry. Unfortunately,

[28] [1981] 1 AC 487.

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the Maxwell-Browns were unable to meet the repayments under the mortgage, and the building society sought a declaration that the mortgage bound and could be enforced against the Fleggs' interest, and an order for possession.

Lord Templeman

At 71–4

The respondents resist the claim of the appellants to possession of Bleak House and rely on section 14 of the Law of Property Act 1925. Sections 27 and 28 of that Act which overreach the interests of the respondents under the trust for sale of Bleak House are to be found in Part I of the Act. Section 14 provides:

> "This Part of this Act shall not prejudicially affect the interest of any person in possession or in actual occupation of land to which he may be entitled in right of such possession or occupation."

The respondents were in actual occupation of Bleak House at the date of the legal charge. It is argued that their beneficial interests under the trust for sale were not overreached by the legal charge or that the respondents were entitled to remain in occupation after the legal charge and against the appellants despite the overreaching of their interests. [. . .]

If the argument for the respondents is correct, a purchaser from trustees for sale must ensure that a beneficiary in actual occupation is not only consulted but consents to the sale. Section 14 of the Law of Property Act 1925 is not apt to confer on a tenant in common of land held on trust for sale, who happens to be in occupation, rights which are different from and superior to the rights of tenants in common, who are not in occupation on the date when the interests of all tenants in common are overreached by a sale or mortgage by trustees for sale. [. . .]

In my view the object of section 70 was to reproduce for registered land the same limitations as section 14 of the Law of Property Act 1925 produced for land whether registered or unregistered. The respondents claim to be entitled to overriding interests because they were in actual occupation of Bleak House on the date of the legal charge. But the interests of the respondents cannot at one and the same time be overreached and overridden and at the same time be overriding interests. The appellants cannot at one and the same time take free from all the interests of the respondents yet at the same time be subject to some of those interests. The right of the respondents to be and remain in actual occupation of Bleak House ceased when the respondents' interests were overreached by the legal charge save in so far as their rights were transferred to the equity of redemption. As persons interested under the trust for sale the respondents had no right to possession as against the appellants and the fact that the respondents were in actual occupation at the date of the legal charge did not create a new right or transfer an old right so as to make the right enforceable against the appellants.

One of the main objects of the legislation of 1925 was to effect a compromise between on the one hand the interests of the public in securing that land held in trust is freely marketable and, on the other hand, the interests of the beneficiaries in preserving their rights under the trusts. By the Settled Land Act 1925 a tenant for life may convey the settled land discharged from all the trusts powers and provisions of the settlement. By the Law of Property Act 1925 trustees for sale may convey land held on trust for sale discharged from the trusts affecting the proceeds of sale and rents and profits until sale. Under both forms of trust the protection and the only protection of the beneficiaries is that capital money must be paid to at least two trustees or a trust corporation. Section 14 of the Law of Property Act 1925 and section 70 of the Land Registration Act 1925 cannot have been intended to frustrate this compromise and

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to subject the purchaser to some beneficial interests but not others depending on the waywardness of actual occupation. The Court of Appeal took a different view, largely in reliance on the decision of this House in *Williams & Glyn's Bank Ltd. v. Boland* [1981] A.C. 487. In that case the sole proprietor of registered land held the land as sole trustee upon trust for sale and to stand possessed of the net proceeds of sale and rents and profits until sale upon trust for himself and his wife as tenants in common. This House held that the wife's beneficial interest coupled with actual possession by her constituted an overriding interest and that a mortgagee from the husband, despite the concluding words of section 20(1), took subject to the wife's overriding interest. But in that case the interest of the wife was not overreached or overridden because the mortgagee advanced capital moneys to a sole trustee. If the wife's interest had been overreached by the mortgagee advancing capital moneys to two trustees there would have been nothing to justify the wife in remaining in occupation as against the mortgagee. There must be a combination of an interest which justifies continuing occupation plus actual occupation to constitute an overriding interest. Actual occupation is not an interest in itself.

Lord Oliver

At 80–1

My Lords, the ambit of section 14 is a matter which has puzzled conveyancers ever since the Law of Property Act was enacted [. . .] For my part, I think that it is unnecessary for present purposes to seek to resolve the conundrum. What section 14 does not do, on any analysis, is to enlarge or add to whatever interest it is that the occupant has "in right of his occupation" and in my judgment the argument that places reliance upon it in the instant case founds itself upon an assumption about the nature of the occupying co-owners' interest that cannot in fact be substantiated. The section cannot of itself create an interest which survives the execution of the trust under which it arises or answer the logically anterior question of what, if any, interest in the land is conferred by the possession or occupation [. . .] the section cannot, in my judgment, have the effect of preserving, as equitable interests in the land, interests which are overreached by the exercise of the trustees' powers or of bringing onto the title which the purchaser from trustees for sale is required to investigate the equitable interest of every beneficiary who happens to be in occupation of the land. That would be to defeat the manifest purpose of the legislature in enacting the sections to which reference has already been made. [. . .]

At 90–1

Considered in the context of a transaction complying with the statutory requirements of the Law of Property Act 1925 the question of the effect of section 70(1)(g) of the Land Registration Act 1925 must, in my judgment, be approached by asking first what are the "rights" of the person in occupation and whether they are, at the material time, subsisting in reference to the land. In the instant case the exercise by the registered proprietors of the powers conferred on trustees for sale by section 28(1) of the Law of Property Act 1925 had the effect of overreaching the interests of the respondents under the statutory trusts upon which depended their right to continue in occupation of the land. The appellants took free from those trusts (section 27) and were not, in any event, concerned to see that the respondents' consent to the transaction was obtained (section 26). If, then, one asks what were the subsisting rights of the respondents referable to their occupation, the answer must, in my judgment, be that they were rights which, vis-à-vis the appellants, were, eo instante with the creation of the charge, overreached and therefore subsisted only in relation to the equity of redemption. I do not, for my part, find in *Boland's case* [1981] A.C. 487 anything which compels a contrary conclusion.

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Granted that the interest of a co-owner pending the execution of the statutory trust for sale is, despite the equitable doctrine of conversion, an interest subsisting in reference to the land the subject matter of the trust and granted also that Boland's case establishes that such an interest, although falling within the definition of minor interest and so liable to be overriden by a registered disposition, will, so long as it subsists, be elevated to the status of an overriding interest if there exists also the additional element of occupation by the co-owner, I cannot for my part accept that, once what I may call the parent interest, by which alone the occupation can be justified, has been overreached and thus subordinated to a legal estate properly created by the trustees under their statutory powers, it can, in relation to the proprietor of the legal estate so created, be any longer said to be a right "for the time being subsisting." Section 70(1)(g) protects only the rights in reference to the land of the occupier whatever they are at the material time—in the instant case the right to enjoy in specie the rents and profits of the land held in trust for him. Once the beneficiary's rights have been shifted from the land to capital moneys in the hands of the trustees, there is no longer an interest in the land to which the occupation can be referred or which it can protect. If the trustees sell in accordance with the statutory provisions and so overreach the beneficial interests in reference to the land, nothing remains to which a right of occupation can attach and the same result must, in my judgment, follow vis-à-vis a chargee by way of legal mortgage so long as the transaction is carried out in the manner prescribed by the Law of Property Act 1925, overreaching the beneficial interests by subordinating them to the estate of the chargee which is no longer "affected" by them so as to become subject to them on registration pursuant to section 20(1) of the Land Registration Act 1925. In the instant case, therefore, I would, for my part, hold that the charge created in favour of the appellants overreached the beneficial interests of the respondents and that there is nothing in section 70(1)(g) of the Land Registration Act 1925 or in Boland's case which has the effect of preserving against the appellants any rights of the respondents to occupy the land by virtue of their beneficial interests in the equity of redemption which remains vested in the trustees.

Although the decision in *Flegg* remains the leading authority on the application of overreaching against the overriding interests of occupiers, the framework of the law has moved on. The TOLATA 1996 has reformed trusts of land, including co-ownership trusts. The Fleggs would no longer hold a beneficial interest under a trust for sale, but under a trust of land, and their beneficial interests would be clearly in the land, in respect of which they would have a right of occupation.[29]

In *Sabherwal* the Court of Appeal considered that the 1996 Act does not affect the application of overreaching. We will see in section 4.1.1 that the matter is not, however, entirely beyond doubt.

Birmingham Midshires Mortgage Services Ltd v Sabherwal
(2000) 80 P & CR 256, CA

Walker LJ

At 261

The judge gave ten reasons for concluding that the decision in Flegg has not been affected by the 1996 Act. Since that conclusion is not directly challenged in this court, at any rate on

[29] Trusts of Land and Appointment of Trustees Act 1996, ss 5, 12, and 13. The beneficiaries' right to occupy is considered in Chapter 17, section 5.3.

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the grounds that the judge considered, it is sufficient to mention three of the most cogent of his reasons. First, the overreaching effect of the legal charges took place when they were executed in July 1990, and cannot be ousted by the coming into force of the 1996 Act over six years later. Second, the 1996 Act contains nothing to exclude the essential overreaching provision contained in section 2(1)(ii) of the Law of Property Act 1925. On the contrary, that provision is amended so as to meet the new terminology of the 1996 Act (see section 25(1) and Schedule 3 paragraph 4(1)) and so is in effect confirmed, with that new terminology, by the 1996 Act. Third, the abolition of the doctrine of conversion (by section 3 of the 1996 Act) is irrelevant for reasons stated by Lord Oliver in *Flegg*. However, the abolition of that doctrine does explain the amendment of s.27(1) of the Law of Property Act 1925, on which some reliance has been placed.

The 1996 Act does confer wider implied powers of disposition upon trustees[30] than were conferred by the LPA 1925 and, furthermore, provides protection to the purchasers of unregistered land from the trustees.[31] The LRA 2002 replaces the LRA 1925 and preserves the protection afforded to the interests of occupiers as an overriding interest.[32] It also defines the abilities of the registered owner, including trustees, to dispose of the registered land[33] and provides protection to purchasers dealing with the registered owner, even where the registered owner is a trustee.[34]

4 OVERREACHING AND BREACH OF TRUST

The interplay between a breach of trust and overreaching has been the subject of considerable academic debate.[35] The fact that overreaching is founded upon the trustees' powers of disposition places in question its operation where the trustees are acting in breach of their powers or the duties to which they are required to adhere when exercising those powers. Almost all of the cases on overreaching have concerned unauthorized mortgages by trustees, which have been entered into to raise finance unconnected with the purchase of the property. Unauthorized sales by trustees tend not to lead to the same problems for occupying beneficiaries, although the danger from overreaching exists. A purchaser of land will generally wish to obtain vacant possession of the land and will conduct enquiries to that end, thus invariably revealing the occupying beneficiaries. The purchaser can then take steps to ensure that the occupying beneficiaries are prepared to vacate the property before proceeding with their purchase.[36]

[30] Ibid, s 6. [31] Ibid, s 16. [32] Ibid, Sch 3, para 2. [33] Land Registration Act 2002, s 23.
[34] Ibid, s 26.
[35] The debate is led by a series of articles by Ferris and Battersby: 'The Impact of the Trusts of Land and Appointment of Trustees Act 1996 on Purchasers of Registered Land' (1998) Conv 168; 'Overreaching and the Trusts of Land and Appointment of Trustees Act 1996: A Reply to Mr Dixon' (2001) Conv 221; 'General Principles of Overreaching and the Reforms of the 1925 Legislation' (2002) 118 LQR 270; 'The General Principles of Overreaching and the Modern Legislative Reforms 1996–2002' (2003) 119 LQR 94; and Ferris, 'Making Sense of Section 26 of the Land Registration Act 2002' in *Modern Studies in Property Law: Vol 2* (ed Cooke, 2003), p 101. See also Dixon, 'Overreaching and the Trusts of Land and Appointment of Trustees Act 1996' [2000] Conv 267 and Pascoe, 'Improving Conveyancing by Redrafting Section 16' [2005] Conv 140.
[36] Harpum (1990), p 312.

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4.1 TRUSTEES' ABILITY, AUTHORITY, AND DUTIES

Ferris and Battersby[37] make the crucial point that it is important, at the outset, to understand the different ways in which we refer to trustees' powers and the different consequences that result from a misuse of these powers. A reference to the powers of trustees may be used to define the ability of the trustees to undertake a certain disposition. Trustees as holders of the legal estate are able to deal with that estate, but they do not have ability to deal with the beneficiaries' equitable interests unless given authority to do so on behalf of the beneficiaries, either by the terms of the trust instrument or by statute. Thus, when we are talking about trustees' powers, we are usually referring to their authority to affect the beneficiaries' equitable interests rather than their ability to deal with the legal estate.[38]

Harpum demonstrated that it has long been the law that a disposition beyond the trustees' authority (ultra vires) cannot overreach the beneficial interests and nor can the purchaser claim the protection of s 2 of the LPA 1925.[39] Other mechanisms are thus necessary if a purchaser is to be protected against the risk that a trustee is acting ultra vires his or her authority.

Trustees may also act within their authority, but, in so doing, misapply the trust property or otherwise breach their duties as trustees. For example, we have seen that, in *Flegg*, the Maxwell-Browns, although they had authority to mortgage Bleak House, acted in breach of trust in doing so without consulting the Fleggs and with the object of discharging their own personal debts, rather than in pursuance of their duty to act for the benefit of the trust.

Trustees may also fail to act in accordance with their statutory duty of care, as defined by s 1 of the Trustee Act 2000, or they may breach their equitable fiduciary duties. For example, the trustees may fail to exercise due care in obtaining the true market value for the property, or they may allow their personal interests to conflict with their fiduciary duty to give undivided loyalty to the beneficiaries' interests by dealing with the land for their own benefit. The TOLATA 1996 underlines both the need for the trustees to act in the interests of the beneficiaries, and in accordance with their legal and equitable duties, by reiterating these duties in s 6(5) and (6). These types of breach of duty are sometimes referred to as 'intra vires' breaches of trust, because they are within the ability and authority of the trustees, but are nevertheless proscribed. Ferris and Battersby[40] suggest that overreaching is unaffected by breaches of trust of this nature, because the purchaser can look to the protection of s 2 of the LPA 1925. Where the trust moneys are misapplied, the protections provided both by s 27(1) of that Act and of s 17 of the Trustee Act 1925 should absolve a purchaser from liability.[41]

Being clear about the ability and authority of the trustees to act, on the one hand, and their duties when acting in exercise of that ability or authority, on the other, underlines the matters upon which we need to concentrate when considering the impact of a breach of duty on overreaching. Firstly, the dispositive powers of the trustees are important in defining their authority to deal with the equitable estate and so overreach the beneficial interests. Secondly, if a purchaser cannot rely on the protection of s 2 of the LPA 1925,

[37] Ferris and Battersby (2002) 118 LQR 270, 273–80.

[38] Contrast the mortgagee's power of sale, discussed in Chapter 30. Mortgagees must be given both the ability to deal with the legal estate and the authority to deal with the borrower's equity of redemption.

[39] Harpum (1990), pp 283–5, 294–6.

[40] Ferris and Battersby (2002), pp 283–94. Smith (2005), p 198 suggests that such protection is unnecessary.

[41] Harpum (1990), p 309.

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because the trustees have acted ultra vires, then we need to look at what other protection is available to them.

4.1.1 The source of trustees' powers of disposition

The trustees' authority is defined by the trust instrument and/or implied by statute. Originally, s 28 of the LPA 1925 granted trustees for sale all of the powers that were conferred upon a tenant for life and trustees under the Settled Land Act 1925, so that the purchaser would not necessarily have to examine the trust instrument in order to determine the width of the trustees' authority.[42]

Section 28 of the LPA 1925 has now been repealed and replaced by s 6 of the TOLATA 1996. As we have seen in Chapter 17, section 5.2, s 6(1) of the 1996 Act confers on the trustees '*all the powers of an absolute owner*', though these powers must be exercised for the benefit of the trust and in a manner consistent with any other enactment of law or equity. Hence, in contrast to the previous law, rather than limiting the trustee's powers by authorizing only particular transactions, the 1996 Act authorizes all types of transaction. Consequently, at first sight, it might be thought that ultra vires transactions are less likely to result. But s 6(1) does not stand alone: s 8 enables a settlor to limit the width of the authority conferred by s 6(1).

Trusts of Land and Appointment of Trustees Act 1996, s 8

(1) Sections 6 and 7 do not apply in the case of a trust of land created by a disposition in so far as provision to the effect that they do not apply is made by the disposition.

(2) If the disposition creating such a trust makes provision requiring any consent to be obtained to the exercise of any power conferred by section 6 or 7, the power may not be exercised without that consent.

Thus, s 8 enables the settlor to limit the trustees' powers by, for example, providing that the trustees cannot act without the consent of a third party, or even by limiting or entirely excluding the implied statutory powers. Thus, where the statutory powers have been limited pursuant to s 8, a sale or mortgage that exceeds these powers will not overreach the beneficial interests and the purchaser or mortgagee will have to find protection elsewhere.

The changes made to the trustees' powers of disposition by the TOLATA 1996 may have a direct impact on the likelihood of an ultra vires disposition arising in the context of a co-owned home. Where co-ownership arises through the joint purchase of a home, the owners are unlikely to limit their own powers as trustees under s 8. As a result, an ultra vires disposition is unlikely to arise. An *intra* vires breach of duty or the misapplication of trust property, as exemplified by *Flegg*, is more likely to arise in such trusts. This is, however, subject to one further argument advanced by Ferris and Battersby.[43] They argue, although others

[42] Ibid, p 290. If the disposition contemplated was outside the s 28 (Law of Property Act 1925) powers, the purchaser could demand to see the trust instrument to check if the disposition was nevertheless within the express authority conferred by the trust deed.

[43] Ferris and Battersby (2002), pp 283–94. Smith (2005), p 198 suggests that such protection is unnecessary.

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disagree,[44] that the powers conferred by s 6(1) are also circumscribed by further statutory conditions: in particular, s 6(6), which provides that the powers of the trustees conferred by s 6(1) shall not be exercised in contravention of any rule of law or equity, and s 11, which imposes a duty of consultation upon the trustees. Thus, they suggest, the apparent wide authority conferred by s 6(1) is illusory and there is, in fact, a greater risk of transactions that are ultra vires the trustees' authority and thus unable to overreach the beneficial interests.[45] The argument is an important one beacuse if correct it means that the effect of the 1996 Act is to reverse *Flegg*.[46] This reversal would be confined to registered land since, as we will see in section 4.2.1 below, purchasers in unregistered land are protected by s 16 of the TOLATA. It has gained prescience as a result of the decision in *HSBC Bank plc v Dyche*.[47] There, Mr and Mrs Dyche held title to a house on trust for Mr Collelldevall, Mrs Dyche's father. Upon their divorce, they transferred the property into the sole name of Mrs Dyche who used the property as security for a mortgage in favour of HSBC. The question for the court was whether the transfer overreached Mr Collelldevall's beneficial interest. The transfer to Mrs Dyche and the grant of the mortgage constituted a breach of trust. Judge Purle held that '*[o]n the footing that the [. . .] transfer was unauthorised, it is difficult to see how that could as a matter of general principle overreach Mr Collelldevall's interest*'.[48] Gravells suggests that in so holding, '*the judge seems to adopt, without acknowledgement and without any serious debate, the contentious argument of Ferris and Battersby that, in the context of registered land, the Trusts of Land and Appointment of Trustees Act 1996 has expanded the scope of ultra vires dispositions by trustees that will be ineffective to overreach equitable interests under the trust, (thereby reversing, albeit inadvertently,* City of London Building Society v Flegg*)*'.[49] It is extremely doubtful, if the opportunity arises, that such a significant change will be endorsed without full discussion. On the facts, there are other grounds on which overreaching would not have taken place. In particular, as we have seen in section 2.3, overreaching requires capital money to be paid to at least two trustees. Judge Purle noted that this requirement had not been met as the capital money had been paid by one trustee (Mrs Dyche) to the other (Mr Dyche).[50]

4.2 PROTECTION OF PURCHASERS

Prior to the 1925 legislation, purchasers were in a particularly vulnerable position.[51] In order to overreach the beneficial interests, the purchaser had to be satisfied that the sale was intra vires and that the sale moneys were to be properly applied in accordance with the trust. The burden placed on purchasers was indeed onerous, particularly because they could be fixed with constructive notice of a breach of trust that the law considered they should have discovered. The LPA 1925 did not relieve a purchaser of the need to check the trustees' authority to sell, but it did try to ensure that purchasers, once they knew that they were dealing with trustees, could easily satisfy themselves of the trustee's authority by relying on the s 28 powers.

[44] Pascoe (2005); Smith (2005), p 196; Dixon (2000).

[45] 'The Impact of the Trusts of Land and Appointment of Trustees Act 1996 on Purchasers of Registered Land' [1998] Conv 168, 169–76, developed further in 'The General Principles of Overreaching and the Modern Legislative Reforms 1996–2002' (2003) LQR 94, 95–108.

[46] Ferris and Battersby [1998] Conv, pp 184–8.

[47] [2009] EWHC 2954 (Ch).

[48] Ibid, [37].

[49] Gravells, '*HSBC Bank plc v Dyche*: Getting Your Priorities Right' [2010] Conv 169, 173.

[50] [2009] EWHC 2954 (Ch), [41].

[51] Harpum (1990), pp 283–7.

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A purchaser could, however, be protected from the more difficult to discover intra vires breaches of trust by sheltering under the protection of s 2, provided that he or she followed the prescribed overreaching machinery by paying any capital moneys to two trustees.[52] The purchaser must also be acting in good faith, as the reference to purchaser in s 2 is subject to the definition contained in s 205 of the LPA 1925.[53] This sophisticated framework came under strain with the increased prevalence of implied trusts (particularly of domestic property) that emerged in the latter half of the twentieth century. Where the trust is implied, purchasers may not know they are dealing with trustees and may thus be unaware that they should satisfy themselves that the trustees are acting within their authority.[54]

Differing statutory provisions, depending upon whether the land is unregistered or registered, have addressed this need for greater purchaser protection.

4.2.1 Unregistered land

The protection of purchasers is governed by s 16 of the TOLATA 1996.

Trusts of Land and Appointment of Trustees Act 1996, s 16

(1) A purchaser of land which is or has been subject to a trust need not be concerned to see that any requirement imposed on the trustees by section 6(5), 7(3) or 11(1) has been complied with.

(2) Where—

(a) trustees of land who convey land which (immediately before it is conveyed) is subject to the trust contravene section 6(6) or (8) but

(b) the purchaser of the land from the trustees has no actual notice of the contravention,

the contravention does not invalidate the conveyance.

(3) Where the powers of trustees of land are limited by virtue of section 8—

(a) the trustees shall take all reasonable steps to bring the limitation to the notice of any purchaser of the land from them, but

(b) the limitation does not invalidate any conveyance by the trustees to a purchaser who has no actual notice of the limitation.

(4) Where trustees of land convey land which (immediately before it is conveyed) is subject to the trust to persons believed by them to be beneficiaries absolutely entitled to the land under the trust and of full age and capacity—

(a) the trustees shall execute a deed declaring that they are discharged from the trust in relation to that land, and

(b) if they fail to do so, the court may make an order requiring them to do so.

(5) A purchaser of land to which a deed under subsection (4) relates is entitled to assume that, as from the date of the deed, the land is not subject to the trust unless he has actual notice that the trustees were mistaken in their belief that the land was conveyed to beneficiaries absolutely entitled to the land under the trust and of full age and capacity.

[52] Ibid and Ferris and Battersby (2002).
[53] *HSBC Bank plc v Dyche* [2009] EWHC 2954 (Ch), [39]–[40].
[54] Ferris and Battersby (2002), pp 297–301.

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(6) Subsections (2) and (3) do not apply to land held on charitable, ecclesiastical or public trusts.

(7) This section does not apply to registered land.

Hence, purchasers of unregistered land from trustees are protected by the terms of s 16 provided that they do not have actual knowledge of the trustees' breach of trust. The terms of s 16 have, however, been subject to some criticism and are certainly not framed in the clearest terms.[55]

4.2.2 Registered land

Much of the controversy that has, in the past, surrounded the protection of purchasers of registered land[56] has been sidelined by the enactment of ss 23 and 26 of the LRA 2002.[57]

Land Registration Act 2002, s 23

(1) Owner's powers in relation to a registered estate consist of—

(a) power to make a disposition of any kind permitted by the general law in relation to an interest of that description, other than a mortgage by demise or sub-demise, and

(b) power to charge the estate at law with the payment of money.

(2) Owner's powers in relation to a registered charge consist of—

(a) power to make a disposition of any kind permitted by the general law in relation to an interest of that description, other than a legal sub-mortgage, and

(b) power to charge at law with the payment of money indebtedness secured by the registered charge.

(3) In subsection (2)(a), "legal sub-mortgage" means—

(a) a transfer by way of mortgage,

(b) a sub-mortgage by sub-demise, and

(c) a charge by way of legal mortgage.

Land Registration Act 2002, s 26

(1) Subject to subsection (2), a person's right to exercise owner's powers in relation to a registered estate or charge is to be taken to be free from any limitation affecting the validity of a disposition.

(2) Subsection (1) does not apply to a limitation—

(a) reflected by an entry in the register, or

(b) imposed by, or under, this Act.

[55] Ferris and Battersby (2003), pp 108–19; Pascoe (2005); Smith (2005), p 197.
[56] Harpum (1990), pp 304–9; Ferris and Battersby (2002), pp 283–94; Dixon (2000).
[57] Land Registration Act 2002, s 52, which deals with dispositions by a registered chargee, is considered in Chapter 30, section 3.2.6.

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(3) This section has effect only for the purpose of preventing the title of a disponee being questioned (and so does not affect the lawfulness of a disposition).

Hence, s 23 confers upon the registered owner almost unfettered ability to dispose of the registered estate. Section 26 provides that no limitation upon a person's right to exercise an owner's power of disposition, including a trustee's authority to deal with the registered estate, will affect a purchaser unless that limitation is protected by the entry of a restriction on the register. The purchaser is thus no longer concerned with any ultra vires lack of authority that is not revealed by the entry of a restriction.

The wide terms of s 26 have already been noted:[58] in particular, the section provides no saving for overriding interests, nor does it call for the purchaser or other person dealing with the trustees to be registered. The provision does not specify that the purchaser must provide value to be protected and therefore appears to provide volunteers with the same degree of protection as purchasers. But a purchaser must provide value to qualify for overreaching under s 2 of the LPA 1925.[59] Further, the defence of lack of registration (including as regards the entry of a restriction) is conferred by s 29 of the LRA 2002 only in respect of registered dispositions made for valuable consideration. Through these routes, it may, in fact, be confined in its scope to purchasers.

4.3 SUMMARY

The liability of a buyer purchasing, or a lender taking a mortgage, from trustees who are acting ultra vires is no longer dependent upon the trustees' powers of disposition, but upon the protection afforded by statute. The nature of that protection differs according to whether the land is registered or unregistered. A person purchasing, or acquiring an interest in, registered land will be protected against an ultra vires breach of trust unless the limitation of the trustees' authority is recorded on the register by the entry of a restriction. Common restrictions call for the purchase money to be paid to two trustees, thus triggering overreaching, or a requirement to obtain the consent of a third party. In the absence of a restriction on the register, overreaching will continue to operate, even though the person dealing with the trustees has knowledge of a limitation upon the trustees' authority. By contrast, a purchaser of unregistered land will only be protected if he or she has no actual notice that the trustees are acting in excess of their authority. Actual notice is unlikely where the trust is implied, because the trustees will enjoy the unlimited powers of disposition enjoyed by an absolute owner conferred by the TOLATA 1996. Even where the trust is express, the purchaser is not required to scrutinize the trust instrument to confirm the nature of the trustees' authority.

Purchasers, but not volunteers, of both registered and unregistered land continue to be protected against intra vires breaches of trust by s 2 of the LPA 1925 provided that any capital moneys are paid to two trustees. It has been suggested (but is not yet established) that s 26 of the LRA 2002 might also provide protection to both purchasers and volunteers against intra vires breaches of trust.[60] Doubt is placed on whether a volunteer would be protected under s 26 by the framework of provisions within which the provision operates.

[58] Ferris (2003), p 101. See also Smith (2005), p 194.
[59] See above, fn 26.
[60] Cooke, *The New Law of Land Registration* (2003), p 60.

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5 IS OVERREACHING JUSTIFIED?

We have noted that overreaching serves the twin objectives of implementing the trust curtain and ensuring security of transactions. Purchasers need not investigate the existence or terms of any trust affecting land. Title is taken unencumbered from such interests as long as overreaching occurs. We have further seen that where land is held on trust as an investment, the shifting of the beneficial interests from land to money is not problematic. In such cases, the effect of overreaching is entirely consistent with the purpose of the trust, because the beneficiaries' key concern is with the maintenance of the trust fund, rather than any particular item of property.

Overreaching is, however, more contentious when it is applied to land held on trust to be used as a home. Even in this context, the mechanism is problematic only in those cases, such as *Flegg*, in which the home is held on trust for the legal owners and others, and a sale or (typically) mortgage is arranged without the knowledge or consent of all of the beneficiaries. It is in these situations that the effect of overreaching, and the underlying assumption that the beneficiaries' concern lies in the maintenance of a fund, clashes with the purpose of the trust.

The spread of co-ownership of the home could not have been predicted at the time of the 1925 legislation. Both the trust for sale and the overreaching mechanism reflected the use of land as an investment. The shift from investment trusts to trusts of the home was a key impetus in the replacement of the trust for sale with the trust of land through the TOLATA 1996.[61] But in making the recommendations that led to that Act, the Law Commission envisaged the continuing operation of overreaching. That view has since been endorsed by the Court of Appeal in *Sabherwal*, although *Dyche* has cast doubt on the effect of the Act in registered land. The Law Commission did, however, identify the need to consider separately the impact of overreaching on beneficiaries in occupation and published these recommendations in a separate report.

Law Commission Report No 188, *Transfer of Land. Overreaching: Beneficiaries in Occupation* (1989, [3.1]–[3.3], [4.1]–[4.3])

PART III

NEED FOR REFORM

Change of circumstances

The 1925 legislation compromise between the need to protect beneficiaries under trusts of land and the demand for certainty and simplicity in conveyancing was satisfactory, and perhaps ideal, in the circumstances in which it was intended to operate. A purchaser from the trustees could ignore the beneficial interests so long as he was careful to observe simple precautions in paying the price. This successfully hid the terms of the settlement "behind the curtain". Buying from trustees became as simple as buying from a single beneficial legal owner which it certainly had not been previously. At the same time, the financial interest of the beneficiary was safeguarded by transferring his claim to the proceeds of sale. So long as

[61] Chapter 17, section 5.

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the trustees properly conducted the affairs of the settlement, it was not important to the beneficiary by what assets his interest was secured.

Doubts about these provisions arise now because, over the years, the patterns of land ownership and the use of settlements have changed. Although the rules with which we are concerned affect all types of real property, the changes relating to residential property are most significant. Since 1925, both the number of dwellings in England and Wales and the percentage of them which are owner-occupied have jumped dramatically. Couples have increasingly bought owner-occupied housing in their joint names, and this trend was accelerated by the decision in *Williams & Glyn's Bank Ltd v. Boland*, following which lending institutions encouraged borrowers to buy jointly so that they, the institutions, had the advantage of the statutory overreaching rules. These couples are technically trustees for sale, whether they hold on trust only for themselves, as is often the case, or whether there are others with beneficial interests.

For this reason, there is now a very large number of cases in which trust beneficiaries occupy trust property as their homes. Sometimes, also, the trust property is where they carry on business. Generally, the trust is a conveyancing technicality, imposed by the Law of Property Act 1925 as part of the scheme to confine normal conveyancing to legal estates. Most individuals in this position would be surprised to hear themselves referred to as trustees or as beneficiaries; they regard themselves simply as joint owners. The changes in circumstances have exposed the 1925 rules for the device which they are. "If the framers of the property legislation in 1925 had been able to foresee the growth in joint ownership of property which, coupled with the vast increase in the breakdown of marriage, has exposed the artificiality of the statutory trust for sale, they might have made clearer provision for the protection of beneficial interests without widening the enquiries needed to be made by a purchaser".

PART IV

REFORM PROPOSALS

Principal recommendation

We have concluded that the present protection of the interests of equitable owners in occupation of property is, in some circumstances, inadequate. The owner of an equitable interest which carries a right of occupation is entitled to two distinct benefits: a right to the value of the interest and that right to enjoy occupation. When the owner of a legal estate is in a similar position, the law protects each right separately: if the owner opts to remain in possession, he cannot be obliged to rely solely on the alternative financial right. The effect of overreaching is, however, to oblige the equitable owner to surrender his occupation right in favour of his financial one, without the chance to make a choice. We see no reason why equitable owners should be at a disadvantage in this respect

We are, however, conscious of the need to maintain arrangements which will not unduly interfere with conveyancing. This leads us to place our emphasis on protecting the rights of owners of equitable interests who are in actual occupation of the property. That very fact of occupation can be used to alert prospective purchasers and mortgagees to the claims of the equitable owners. It means that the protection of occupation rights does not extend to those who, while they are entitled to occupy, are not currently exercising the right. While that means that equitable owners will sometimes be at a disadvantage, when compared with legal owners, it seems to us to be a reasonable compromise. It offers the right to continue in occupation, to those who are already there, so it is likely to extend the new protection to those who most need it, and of course protection extends to those who enter later.

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> Our principal recommendation, to protect the occupation rights of those with an equitable interest in property, can be succinctly stated:
>
> > A conveyance of a legal estate in property should not have the effect of overreaching the interest of anyone of full age and capacity who is entitled to a beneficial interest in the property and who has a right to occupy it and is in actual occupation of it at the date of the conveyance, unless that person consents.
>
> We examine below the detailed effects of the recommendation.

The Law Commission's proposals represent a logical extension of the reasoning underlying the introduction of the TOLATA 1996. In this report, as in its report leading to the Act, the Law Commission sought to provide a scheme of regulation for land held on trust that reflects the likely use of that land as a home. The government announced however, that the recommendations on overreaching would not be implemented.[62]

It must be questioned why there is resistance to this proposal. As Smith highlights,[63] a requirement of obtaining consent is not necessarily onerous. Indeed, making enquiries of occupiers is standard procedure in other aspects of conveyancing practice. It is one of the ways in which a balance is sought between protecting the interests of beneficiaries (and other persons with subsisting property rights) and purchasers. It may be suggested that, where overreaching is concerned, there is a clear imbalance in favour of purchasers. The importance of the trust curtain and security of transactions has, it seems, superseded any concerns at the mismatch between a trust of a home and the investments ideals that underpin overreaching. This is contrary to the ethos that underlies TOLATA and leaves an inconsistency in legislative policy towards the home between TOLATA on the one hand and the overreaching mechanism on the other.[64]

6 THE FUTURE OF OVERREACHING

We conclude this discussion of overreaching by considering possible future developments of overreaching and the rules affecting the broader context in which the mechanism operates. Firstly, we consider how the scope of overreaching could be restricted or qualified; secondly, we highlight recent arguments as to whether overreaching is compliant with the HRA 1998; finally, we consider alternative causes of action that may be available to beneficiaries.

6.1 QUALIFYING AND RESTRICTING THE SCOPE OF OVERREACHING

We have seen that the Law Commission's recommendation to qualify the operation of overreaching in relation to a particular type of beneficiary (those in actual occupation), through the imposition of a requirement of consent, has been rejected. Harpum has suggested an alternative means of qualifying the mechanism. If the rationale for overreaching is found in the powers of disposition of the trustees, a more logical means of qualification might lie

[62] (1998) 587 HL Deb WA213. [63] Smith (2005), p 191.

[64] Hopkins, 'Regulating Trusts of the Home: Private Law and Social Policy' (2009) 125 LQR 310, 318–20.

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in restricting those powers. It has already been pointed out, and the cases demonstrate, that the most acute tension between overreaching and the interests of the beneficiaries occurs where the trustees utilize the land, which the beneficiaries occupy as their home, as security for a loan that is applied to discharge personal or business debts, rather than towards the acquisition or improvement of the property. Harpum advocated limiting the trustees' power to mortgage the land to first mortgages to secure the purchase, improvement, or repair of the land.[65]

Harpum, 'Overreaching, Trustees Powers and The Reform of the 1925 Legislation' (1990) 49 CLJ 277, 330–1

> [T]he Law Commission has been forced to take the path of requiring the consent of beneficiaries in actual occupation because it has failed to appreciate the basis on which overreaching rests. Overreaching is the necessary concomitant of a power of disposition. If the trustees have no power to make a disposition, that disposition will not overreach. The present writer believes that this principle could provide a more effective means of securing the objectives which the Law Commission seeks.
>
> [. . .]
>
> The powers of the trustees could be limited [. . .] these powers would draw a distinction between those transactions which should be facilitated and which are unlikely be detrimental to the interest of beneficiaries, and those dispositions which should not be encouraged and which may harm those interested in the land. There seems no reason to restrict the trustees' powers to sell and lease. If the trustees have to give vacant possession they will necessarily have to obtain the consent of persons in actual occupation who will thereby be involved in the decision-making process. [. . .] The mortgaging powers of the trustees would however be limited. The principal mortgaging powers that should be given to trustees would be to execute a first mortgage of the land to enable them to purchase the land, and a power to raise money for the improvement or repair of the property. There should be no power to execute a second mortgage.

Neither the TOLATA 1996 nor the LRA 2002 has adopted the approach advocated by Harpum. As we have seen, the 1996 Act confers upon trustees all of the powers of an absolute owner, unless expressly restricted, whilst the 2002 Act protects a purchaser against any express limitation of the trustees' powers, which is not evident by way of a restriction on the register.

6.2 HUMAN RIGHTS AND OVERREACHING

Given that the policy of overreaching with regard to occupying beneficiaries has raised concerns, it is no surprise that it has attracted attention as potentially incompatible with fundamental human rights contained in Art 8 (respect for the home) and Art 1 of the First Protocol (deprivation of property) of the European Convention on Human Rights.

[65] See also Thompson (1997). Smith (2005), p 191 suggests a hybrid approach depending both upon a limitation of the trustees' powers of disposition and the consent of occupiers.

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The issue was raised both in *Sabherwal*[66] and in *National Westminster Bank Plc v Malhan*.[67] The court rejected the submission in both cases on the simple ground that the HRA 1998 did not have retrospective effect and thus could not affect either of the mortgages, which were both entered into before the Act came into force.[68] Whilst Robert Walker LJ showed little sympathy with the substantive force of human rights in *Sabherwal,* Morritt VC in *Malhan* lent a more sympathetic ear '*finding much force in the submissions*', although his comments were obiter, because Mrs Malhan was unable to establish a beneficial interest.

As we have seen in Chapter 3, a claim based upon a breach of the 1998 Act needs to clear a number of hurdles: firstly, we need to establish the horizontal effect of that Act; secondly, we need to prove that one of the Articles of the ECHR is engaged; and finally, we need to examine whether the interference can be justified by the stated qualifications to the enshrined rights. These lie within the government's margin of appreciation, with a requirement that the interference is proportionate in both its aim and its impact upon the individual, which calls for adequate procedural safeguards..

The horizontal effect of the HRA 1998 is established by the dictates of s 3, which requires the court to interpret legislation in a manner that is compatible with the ECHR '[s]*o far as it is possible to do so*'. Further, s 4 empowers a court to declare a statutory provision incompatible with the ECHR. We have examined a number of statutory provisions upon which overreaching and its effect on purchasers is dependent. Sections 2 and 27 of the LPA 1925 define the scope of overreaching. In the TOLATA 1996, we find, in s 6, the authority of the trustees to overreach by the exercise of their powers of disposition, and in s 16, the protection of purchasers of unregistered land against the effects of an unauthorized disposition. The protection of the purchasers of registered land against an unauthorized disposition is found in s 26 of the LRA 2002. There is thus considerable scope for the courts to examine the compatibility of overreaching with the ECHR.

Article 8 and Art 1 of the First Protocol are the prime targets for engagement. But the argument in *Malhan* was based upon the discriminatory effect of overreaching where there are two trustees in comparison with the failure of overreaching where there is only one trustee. Article 8 and Art 1 of the First Protocol were thus to be read with Art 14 (prohibition of discrimination). In the past, this difference in treatment has been justified by the protection said to be afforded to beneficiaries by two trustees: firstly, as a guard against the commission of a breach of trust; and secondly, by providing two, rather than one, pockets against which to pursue any personal claim for damages. In reality, this so-called 'protection' has proved illusory. This is the case, for example, where the trust is implied and the trustees are ignorant of their responsibilities. Equally, the protection is illusory where, in the face of financial difficulties, an action for breach against the trustees (who may be family members) is worthless. But we have seen that the need for two trustees has been questioned both in the *Sood* situation, in which there are no capital moneys, and possibly (although less convincingly) where, in the absence of an appropriate restriction, a sole proprietor of a registered title deals with the land. The picture is thus rather more complex than the argument in *Malhan* suggests.

[66] (2000) 80 P & CR 256. [67] [2004] EWHC 847.
[68] *Wilson v Secretary of State for Trade & Industry* [2003] UKHL 40.

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In *Malhan*, counsel was driven to rely on Art 14 because it had conceded that a submission based upon Art 8 or Art 1 of the First Protocol alone would not succeed. In the light of more recent cases, this concession may not have been prudent.[69]

Possession proceedings against a beneficiary in occupation by a purchaser or mortgagee claiming the benefit of overreaching will engage Art 8 as the most extreme interference with the respect due to an occupier's home. The appropriate enquiry is whether there is a justification for that interference on the policy grounds either of the economic well-being of the country, in maintaining a well-balanced property and lending market, or the protection of the rights and freedoms of others—namely, purchasers and mortgagees.

The operation of overreaching by shifting the beneficial interest from the land to the capital moneys (if any) may also be capable of engaging Art 1 of the First Protocol as a deprivation of property, although the issue has not been resolved. It could be argued that the beneficiary's trust interest as a possession is inherently limited by the disposal powers of the trustees from which overreaching springs and so there is no interference with that possession.[70] If that argument did not succeed, it will be recalled from Chapter 3 that a deprivation of possession encompasses both the loss of ownership and controls over the use that interfere with the peaceful enjoyment of the possession.[71] Overreaching shifts, but does not terminate, the beneficiary's interest. This is the case even though, either because there are no proceeds (as in *Sood*) or the proceeds are dissipated (as in *Flegg*), the property to which the interest notionally shifts is of no value to the beneficiaries. Overreaching will effect the peaceful enjoyment of property by controlling the identity of the property in which the beneficial interest vests and against which attendant ownership rights can be asserted. An occupying beneficiary's occupation of his or her home is disturbed, because his or her interest is no longer in the land, but in the capital moneys (if any).

If Art 1 of the First Protocol is engaged, then both the operation of overreaching, by depriving the beneficiary of his or her property, and the process by which that deprivation is achieved must be justified as being in the public interest: for example, in securing a fair and efficient conveyancing system.

Any justification, whether required under Art 8 or Art 1 of the First Protocol, must strike a proportionate balance, within the State's margin of appreciation, between the interests of the beneficiary (particularly the beneficiary in occupation) and the purchaser or mortgagee. In addition, the proportionality of the interference upon the personal circumstances of the individual occupier against the proprietary rights of the purchaser or mortgagee will also need to be considered by an adequate process before an independent tribunal clothed with the necessary discretion to make that judgment.

Whether the courts will be inclined to question the policy of overreaching, under Art 8 and/or Art 1 of the First Protocol, is a most difficult issue. We have seen in Chapter 3 that the courts will show deference to the policy choices of Parliament in shaping property law, which has evolved over many centuries and which, in the case of statutory rules, have been considered by Parliament. Both the TOLATA 1996 and the LRA 2002 have enabled a recent appraisal of overreaching both by the Law Commission and Parliament. Thus the courts are likely to be particularly cautious in questioning the policy of overreaching.

[69] *Manchester CC C Pinnock* [2010] UKSC 35, [2010] 3 WLR 1441; *Hounslow LBC v Powell: Leeds CC v Hall, Birmingham CC v Frisby* [2011] UKSC 8, [2011] 2 WLR 287 (re Art 8); *JR Pye (Oxford) Ltd v UK* (2006) 43 EHRR 3 (re Art 1 of the First Protocol).

[70] See Goymour, 'Proprietary Claims and Human Rights: A Reservoir of Entitlement?' (2006) 65 CLJ 696, 714–5.

[71] See *Sporrong and Lonroth v Sweden* (1982) 8 EHRR 123, explored in Chapter 3.

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If a challenge were to be mounted, there are two respects in which overreaching appears vulnerable:[72] firstly, the width of the trustees' powers of disposition under s 6 of the 1996 Act, coupled with the width of the protection of purchasers conferred by s 26 of the 2002 Act (for registered land), particularly when contrasted with s 16 of the 1996 Act (for unregistered land). The variation in protection between registered and unregistered land might itself provide a possible ground for a challenge based on discrimination under Art 14.

Secondly, the automatic trigger of overreaching by the payment of any capital moneys to two trustees might also be challenged, not only on the basis raised in *Malhan*, but also as a process that provides no opportunity for the rights, or the personal circumstances, of a beneficiary occupying the trust property as his or her home to be protected, or to be balanced against those of the purchaser or mortgagee. It is this lack of procedural safeguards that represents the most serious grounds for the human rights incompatibility of overreaching, particularly with Art 8.[73]

6.3 ALTERNATIVE CAUSES OF ACTION

Overreaching does not exist in a legal vacuum. In Chapter 14, in the context of our discussion of the priority rules of registered land, we highlighted the possibility of new direct rights being imposed on a purchaser on a transfer of land. These rights, arising from a myriad of alternative causes of action, include *personal* liability being imposed on the trustees and other parties where the sale constituted a breach of trust, and *proprietary* claims over assets purchased by trustees using the proceeds of sale. Hence, one partial solution to concerns as regards the scope of overreaching is to ensure that these alternatives are developed and used. As we will see, however, each of these actions has its own limitations.

6.3.1 Breach of trust

Trustees who act in breach of trust are personally liable to the beneficiaries. In practice, however, the utility of this form of liability is dependent on the financial circumstances of the trustees. For example, we have noted that, in *Flegg*, the Maxwell-Browns acted in breach of trust towards the Fleggs in mortgaging the parties' joint home—but, as a result of the Maxwell-Brown's financial circumstances, an action against them for this breach was of no practical use.

6.3.2 Knowing receipt and dishonest assistance

A purchaser who takes trust property knowing that it is dealt with in breach of trust, or some other person who dishonestly assists in the breach of trust itself, may find him or herself called upon personally to account for the loss suffered by the trust through the equitable doctrines of knowing receipt and dishonest assistance. The beneficial interests continue to be overreached, but a distinct personal liability is imposed, which requires the purchaser or interfering third party to be held to account as if he or she were the trustee committing the breach of trust.

[72] See, however, McFarlane (2008) p 404, who is sceptical as to the likely success of human rights challenges to overreaching.

[73] See our discussion of the need for procedural safeguards in possession proceedings by a social landlord in Chapter 3, section 4.2.2.

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The interplay between statutory defences against the enforcement of *property* rights in registered land and the imposition of *personal* liability is not beyond doubt; particularly as regards recipient liability.[74] In *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* the High Court of Australia refused to impose recipient liability against a defendant who had statutory protection against the beneficiaries' equitable interests.[75] In Chapter 14 we have seen that s 29 of the LRA 2002 provides a registered proprietor who has obtained title through a registered disposition of a registered estate for valuable consideration with a defence against pre-existing property rights held by third parties (subject to statutory exceptions explored in that chapter). Conaglen and Goymour suggest that s 29 simultaneously protects the registered proprietor against personal liability for knowing receipt.[76] The basis of their argument is that this form of personal liability is not based solely on wrongdoing by the recipient proprietor, but instead 'the fundamental purpose of the claim seems to be to vindicate the pre-existing property rights that have been lost as a result of the wrongful disposition'.[77] As the personal claim is 'parasitic'[78] on the property right, they argue that it would be 'inherently inappropriate' to impose personal liability in knowing receipt on a purchaser who takes free from the property interests under s 29.[79] They acknowledge, however, that personal liability imposed on a dishonest assistant is founded entirely on wrongdoing and, therefore, its operation is not affected by s 29. Further, they note that in some instances a recipient of property transferred in breach of trust may also be a dishonest assistant in the breach and, where that is the case, s 29 will not shield the recipient from liability based on their dishonest assistance.[80]

6.3.3 Tracing

Tracing is the process by which beneficiaries can track their proprietary interest into a substitute asset that the trustees may have acquired with the proceeds of sale, following a disposition by the trustees in breach of trust.[81] Once the beneficiaries have done so, they may be able to claim proprietary interests in those substitute assets.

Tracing may be available to beneficiaries in two situations, although the process will only be of any practical assistance to a beneficiary where there are substitute assets. Furthermore, any claim that the beneficiaries may have in relation to those assets is subject to a significant limitation through the defence of bona fide purchaser.

The first situation in which tracing is available is that in which trustees make a disposition that is an ultra vires breach of trust. An unauthorized disposition will not overreach, but, in light of the protection available to purchasers, a beneficiary is unlikely to be able to assert his or her interest in the property disposed of. A beneficiary may be able to trace the proceeds of sale of an unauthorized disposition received by the trustees into any substitute asset acquired with those proceeds.[82]

[74] This basis for liability is suggested by Dixon (2000), p 270 and although initially disputed by Ferris and Battersby (see [2001] Conv 221, 224), they subsequently acknowledged its availability (see (2003) 119 LQR 94, 122).

[75] [2007] HCA 222 at [193]–[198]; McFarlane (2008), p 418.

[76] Conaglen and Goymour, 'Knowing Receipt and Registered Land' in *Resulting and Constructive Trusts* (ed Mitchell, 2009).

[77] Ibid, p 172. [78] Ibid, p 174. [79] Ibid. [80] Ibid, pp 177–81.

[81] *Foskett v McKeown* [2001] AC 102.

[82] See ibid, *Cave v Cave* (1880) 15 Ch D 639, and *Ffrench's Estate* (1887) 21 LR (Ir) 283, referred to by Fox (2002).

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Secondly, tracing may also assist the beneficiaries once overreaching has occurred and the trustees hold proceeds of sale on trust. Overreaching shifts the beneficial interests into the proceeds of sale. If the trustees then apply those proceeds in breach of trust, the beneficiaries may be able to trace their proprietary interest into assets acquired through that breach. As we have seen, s 27(1) of the LPA 1925 absolves the purchaser of any liability in this regard.

As Fox explains, the effect of tracing looks very similar to overreaching's effect in allowing a beneficiary a claim against the proceeds of sale acquired by the trustees.[83] There are, however, important differences between the mechanisms, particularly as regards their effect on the beneficiaries' title. Where overreaching takes place, the beneficiaries have the same interest in the proceeds of sale as they previously had in the land and that interest vests immediately upon overreaching. Where beneficiaries trace funds into a substitute asset, they have a right to elect between a beneficial interest in the asset (a proportionate share of an asset purchased in part with trust finds) or a lien to enforce their personal claim against the trustees for breach of trust.[84] It will not be until they have made that election that their appropriate interest will vest and, prior to that election, their interest is inchoate.

7 PRIORITY RULES WHERE OVERREACHING DOES NOT TAKE PLACE

Where overreaching does not take place, the rules determining the enforcement of a beneficial interest are dependent on whether the title is registered or unregistered. In unregistered land, enforcement of a beneficial interest is determined by the doctrine of notice (see Chapter 13, section 4). Occupation of the home by the beneficiary may be sufficient to fix the purchaser with constructive notice of the interest.[85] In registered land, the curtain principle precludes entry of a notice of a beneficial interest on the register.[86] A beneficial interest that is not overreached may bind a purchaser as an overriding interest where the beneficiary is in occupation (see Chapter 14, section 5.1).[87]

A specific issue arises where, through the process of survivorship (discussed in Chapter 17, section 2.2), legal title remains in a sole surviving joint tenant. A beneficiary may have severed his or her equitable joint tenancy prior to his or her death. A transfer by the sole trustee will not have overreaching effect, leaving a purchaser vulnerable to a claim that the severed beneficial interest is binding against him or her through notice (in unregistered land) or as overriding interests (in registered land). In unregistered land, a statutory solution is provided.

Law of Property (Joint Tenants) Act 1964, s 1

(1) For the purposes of section 36(2) of the Law of Property Act 1925, as amended by section 7 of and the Schedule to the Law of Property (Amendment) Act 1926, the survivor of two or more joint tenants shall, in favour of a purchaser of the legal estate, be deemed to be solely and beneficially interested if [...] the conveyance includes a statement that he is so interested.

[83] Fox (2002). See also McFarlane (2008), pp 400–1.
[84] Fox (2002), p 102.
[85] *Kingsnorth Finance Co v Tizard* [1986] 1 WLR 783.
[86] Land Registration Act 2002, s 33(a).
[87] Ibid, Sch 3, para 2.

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Provided that the foregoing provisions of this subsection shall not apply if, at any time before the date of the conveyance by the survivor—

(a) a memorandum of severance (that is to say a note or memorandum signed by the joint tenants or one of them and recording that the joint tenancy was severed in equity on a date therein specified) had been endorsed on or annexed to the conveyance by virtue of which the legal estate was vested in the joint tenants; or

(b) a bankruptcy order made against any of the joint tenants, or a petition for such an order, had been registered under the Land Charges Act 1925, being an order or petition of which the purchaser has notice, by virtue of the registration, on the date of the conveyance by the survivor.

(2) The foregoing provisions of this section shall apply with the necessary modifications in relation to a conveyance by the personal representatives of the survivor of joint tenants as they apply in relation to a conveyance by such a survivor.

Hence, as long as the purchaser falls outside of the provisos to s 1(1), he or she is protected against a priority claim by a beneficiary. Although not so described in the statute, Cooke notes[88] that the effect of the provision is that the beneficial interest is overreached, because the beneficiary would have a claim against the proceeds of sale.

The Law of Property (Joint Tenants) Act 1964 is confined in its application to unregistered land. No equivalent statutory protection is provided to a purchaser of registered land. This may be an oversight, explicable on the basis that the prospect of a beneficial interest binding a purchaser in registered land as an overriding interest became apparent only with the decision in *Williams & Glyn's Bank v Boland*,[89] some years after the enactment of the 1964 Act.

Cooke suggests that the problem is a small one and that the solution is simple.

Cooke, 'Beneficial Joint Tenants and the Protection of Purchasers: An Unsolved Problem' [2004] Conv 41, 48

Obviously a simple extension of the 1964 Act to registered land by repealing s.3 will not work; there is no way of making a memorandum of severance on the conveyance or transfer to the vendor and the deceased joint tenant, nor could the purchaser see that memorandum, since he has access only to the register and not to previous title deeds. All that is needed is a corresponding provision to the effect that the surviving joint tenant vendor will be deemed to be solely and beneficially entitled if:

(a) the transfer states that the vendor is solely and beneficially interested in the land;

(b) the purchaser obtains a clean bankruptcy search, exactly as in the 1964 Act;

(c) there is no restriction on the register preventing a disposition by the survivor of the two trustees.

The requirement of the absence of a memorandum of severance is thus matched by the requirement of the absence of a restriction. Neither is in fact conclusive; in unregistered land, severance could have been effected without the making of a memorandum, just as in registered land there could be a severance without the entry of a restriction. In both cases something inconclusive is deemed, for the protection of a purchaser, to be conclusive.

[88] Cooke, 'Beneficial Joint Tenants and the Protection of Purchasers: An Unsolved Problem' [2004] Conv 41, 42.

[89] [1981] AC 487.

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The application of the Act appears to have been qualified by the following case—the first in which a purchaser sought to rely on the protection provided.

Grindal v Hooper
(unreported judgment 6 December 1999, HC)

Facts: Two sisters, Vera and Sheila, were legal and beneficial joint tenants of a house occupied by Vera. She severed the beneficial joint tenancy by written notice, and, on her death, left her estate to her brother, Brian and other siblings. Sheila, as sole legal owner through survivorship, sold the house to Brian for £600, the market value being in the region of £70,000. Brian knew of the trust and of the severance, but no memorandum had been placed on the conveyance to Vera and Sheila. Following Brian's death, the question arose whether, under the 1964 Act, he was solely entitled to the house (so that it would pass under the terms of his will), or whether he held title on trust for himself and Vera's estate, each estate now entitled to a 50 per cent share.

Judge Jarvis QC

Mr Charman says that Brian in these circumstances is the purchaser of the legal estate, and in order to be a purchaser who is protected by the assumptions given by law under s.1 of the 1964 Act he must fall within the definition of a purchaser under s.205 of the Law of Property Act 1925. At definition 21 a purchaser is defined to mean:

> "a purchaser in good faith for valuable consideration [. . .] and valuable consideration includes marriage but does not include a nominal consideration in money."

In short, Mr Charman says that Brian had notice of the severance before he entered into the agreement to purchase the property. Notice of severance is in these circumstances a notice of the fact that the property was no longer jointly held and therefore that Sheila held the property on trust as to one half for herself and one half for Vera. In those circumstances, where a person has actual notice of circumstances he cannot be said to take in good faith. [. . .]

It seems to me that on the facts of this case Brian had full notice of the fact that Vera's interest was held on trust by Sheila, and that to acquire the property in these circumstances could not satisfy the definition of a purchaser for good faith under the Act. He, without doubt, purchased the property at a gross under value with actual notice of the estate's interest, and the only inference that I can draw is that that was a transaction which would be designed to deprive the estate of its interest in the property. I conclude that in any event Brian's estate could not take this property without being bound by the equitable interest of Vera's estate.

As Gravells notes, it is doubtful whether actual notice alone should deny the purchaser statutory protection.

Gravells, 'Co-ownership, Severance and Purchasers: The Law of Property (Joint Tenants) Act 1964 on Trial' [2000] Conv 461, 470

[It] might be questioned whether actual notice is or should be sufficient in itself to negative good faith. It might be argued that, in so far as the operation of section 1(1) is excluded where there is an endorsement of the notice of severance, the 1964 Act provides a means

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of protection for a beneficial tenant in common following the severance of the joint tenancy; that such endorsement may be seen as a form of "quasi-registration"; and that, if the beneficial tenant in common fails to take advantage of that protection, a purchaser should not be bound by the beneficial interest on the basis of actual notice without more. The view that a purchaser who has actual notice of a protectable but unprotected interest cannot be in good faith has been severely criticised and rejected in analogous circumstances.

As is apparent from the observation at the end of the extract from Gravells, the question of the relationship between good faith and actual notice is not unique to the Law of Property (Joint Tenants) Act 1964. We have explored the relationship between those concepts further in Chapter 13 in our discussion of *Midland Bank plc v Green*.[90]

QUESTIONS

1. Outline the rules that would be used to determine the enforcement of a beneficial interest against a purchaser where purchase money is paid to: (i) one trustee; and (ii) two trustees.
2. To what extent does the requirement that purchase money must be paid to two trustees for overreaching to take place protect the beneficiaries against dissipation of funds by trustees?
3. Does a disposition by trustees in breach of trust (ultra vires or intra vires) have overreaching effect? What is the position of the purchaser following such a disposition?
4. Assess the arguments for and against enabling overreaching of the interests of beneficiaries in occupation. What advice would you give an occupying beneficiary who is concerned that his or her trustee(s) may sell the land?
5. What are the dangers for a purchaser who buys land from a sole surviving joint tenant? To what extent have these dangers been overcome?

FURTHER READING

Cooke, *Land Law* (Oxford: OUP, 2006, ch 3)

Conaglen and Goymour, 'Knowing Receipt and Registered Land' in *Resulting and Constructive Trusts* (ed Mitchell, 2009)

Ferris, 'Making Sense of Section 26 of the Land Registration Act 2002' in *Modern Studies in Property Law: Vol 2* (ed Cooke, Oxford: Hart, 2003)

Ferris and Battersby, 'General Principles of Overreaching and the Reforms of the 1925 Legislation' (2002) 118 LQR 270

Ferris and Battersby, 'The General Principles of Overreaching and the Modern Legislative Reforms 1996–2002' (2003) 119 LQR 94

[90] [1981] AC 513. See Chapter 13, section 5.6.

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Harpum, 'Overreaching, Trusteees' Powers and the Reform of the 1925 Legislation' (1990) 49 CLJ 277

Jackson, 'Overreaching and Unauthorised Disposition of Registered Land' [2007] Conv 120

Jackson, 'Overreaching in Registered Land Law' (2006) 69 MLR 214

Pascoe, 'Improving Conveyancing by Redrafting Section 16' [2005] Conv 140

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20

SUCCESSIVE OWNERSHIP

CENTRAL ISSUES

1. Successive ownership arises under a trust in which the beneficiaries are entitled to possession in succession, rather than concurrently. While it retains practical significance, successive ownership has been superseded by co-ownership in social and economic importance.
2. Central to successive ownership is the existence of a life estate—that is, a period of ownership of land measured by the life of the beneficiary entitled in possession. The life estate is commercially unattractive and other devices can be used to confer rights of ownership or occupation for life.
3. Successive interest trusts can be created in the same way as other trusts of land. Those created after the commencement of the Trusts of Land and Appointment of Trustees Act 1996 are regulated by that Act.

1 INTRODUCTION

In Chapter 17, we examined the regulation of co-ownership, arising where two or more people are concurrently entitled to legal or beneficial title to land. We saw that the defining characteristic of co-ownership is *unity of possession*: each co-owner is concurrently entitled to possession of the whole of the land. Successive ownership arises where two or more people are entitled to possession of land in succession to each other, rather than concurrently: for example, where land is held on trust for A for life and thereafter for B. In such a case, A alone is entitled to possession of the land for his or her life (the nature of A's 'life interest' is considered in section 4 below) and, on A's death, B's interest comes into possession. Successive ownership necessarily arises under a trust of the legal estate with A and B's interests arising in equity. Therefore, this chapter is concerned with successive *beneficial* ownership.

Beyond its own practical significance, an understanding of the operation of successive ownership enhances our appreciation of the concept of ownership of an estate in land (discussed in Chapter 4). It is the recognition, through the doctrine of estates, that ownership can be divided by periods of time that makes it possible to divide ownership of land

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successively. Further, successive ownership provides a useful bridge between our current focus on the home and Part F of this book, in which we consider leases. This is because some of the arrangements for ownership of land that would previously have been achieved through successive ownership of an estate may now be achieved through leasehold arrangements, as illustrated by *Ingram v Inland Revenue Commissioners*.[1] In that case, Lady Ingram wished to make a gift of her land during her lifetime to avoid inheritance tax, whilst simultaneously securing her own occupation until her death. Lifetime occupation could be secured through a lease or through successive beneficial ownership, but the former alone protected the estate from inheritance tax.[2]

2 THE SIGNIFICANCE OF SUCCESSIVE OWNERSHIP

Historically, the regulation of successive ownership was an important feature of land law. At its core, lay the family 'strict settlement' within which the forms of successive ownership (considered in section 3 below) were used in combination to keep land within the family for generation after generation.[3]

As Simpson explains, the rules governing settlements were developed by lawyers with conflicting desires to create a market in land to buy, but then retain that land within the family.[4] Additionally, however, the family settlement provided an important means of protecting women at a time of legal subservience. While the social and legal environments in which successive ownership and co-ownership have flourished are very different, in this respect alone, there is some parallel between their legal histories.

Simpson, *A History of the Land Law* (2nd edn, 1986, p 209)

> Many settlements of property were created on the occasion of a marriage between dynastic families, and here what was needed was compromise between the interests of the families concerned. Given the legal subservience of women, the bride's family required of property law some security both for their daughter and for her children and grandchildren. This could only be achieved if the husband's rights over the family land were in some degree restricted, so that the landed endowment of the family would pass down to the next generation. Indeed the whole history of settlements can only be made intelligible if we remember that although the family as such was not treated as a legal entity by the common law, which dealt only in individual property rights, landed society did nevertheless view property as ultimately belonging to the family in some moral sense, and the legal system reflected this.

The historical significance of the strict settlement appears beyond doubt even though, as Simpson acknowledges, its precise effects remain uncertain.

[1] [1999] 1 AC 293.

[2] Ibid, at 300. The effect of the decision was subsequently reversed by statute. For discussion of this, see Lee, 'Inheritance Tax: An Equitable Tax No Longer—Time for Abolition?' [2007] LS 678, 686.

[3] A simplified example of a typical strict settlement is outlined by Simpson, *A History of the Land Law* (2nd edn, 1986), pp 236–7.

[4] Ibid, p 209.

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Simpson, *A History of the Land Law* (2nd edn, 1986, p 239)

> The strict settlement, by perpetuating and consolidating the wealth and power of the wealthy families, and by preserving their estates intact through the years, had an immense effect upon the social and political life of the country until very recent times. Precisely what effect is somewhat controversial. The settlement was the legal regime of the landed interest, powerful in both national and local political life; there is inevitably a problem in saying whether the legal institution was cause or effect of the political and social phenomenon. Death duties have in this century brought about the destruction of the social structure which the strict settlement enshrined, though the institution still lingers on.

As regards fiscal regulation, 'death duties' have been replaced by inheritance tax, which has retained disadvantageous treatment for successive interests. In particular, on the death of a lifetime beneficiary, inheritance tax is calculated on the basis that he or she was entitled to the entire estate.[5]

The decline in the significance of the strict settlement is mirrored by the growth of co-ownership. In modern law, co-ownership has superseded the strict settlement both in its social and economic importance. Despite the decline of the strict settlement, other instances of successive ownership remain of practical significance. A simple instance may arise in which, on the death of a sole owner, a home is left on trust for the deceased's spouse for life and thereafter to the couples' children.

3 FORMS OF SUCCESSIVE OWNERSHIP

Since the Trusts of Land and Appointment of Trustees Act 1996 (TOLATA 1996) came into force on 1 January 1997, trusts of successive interests take two principal forms: firstly, a legal estate in land may be held on trust for A for life, remainder to B; secondly, a legal estate may be held on trust for A for life and then revert back to the settlor of the trust (see Figure 12).

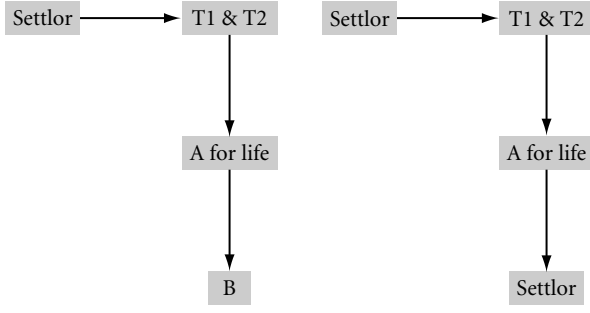

Figure 12 Successive interests in remainder and in reversion

[5] Inheritance Tax Act 1984, s 49.

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In both examples, the trustees hold legal title as legal joint tenants.[6] A and B (in the first example), or A and the settlor (in the second example), have successive interests. In both examples, A has a life estate (or life interest) in possession. In the first, on A's death, the freehold estate is held on trust for B, who is described during A's life as having an interest 'in remainder'. This form of trust may be used, for example, on the settlor's death, to provide for his or her spouse for life and thereafter for their child.

In the second example, on A's death, the trust returns the freehold estate to the settlor. During A's life, the settlor is described as having an interest 'in reversion', because the estate will revert or return back to the settlor on A's death. Such a trust may be used, for example, to provide housing for an elderly relative.

In each example, on A's death, B's interest 'in remainder', or the settlor's interest 'in reversion', becomes an interest 'in possession'.

Numerous variations on these basic examples are possible. Hence, the settlor may declare him or herself trustee of the trust and the number of trustees may vary, subject to the maximum number of four legal owners.[7] The successive interests of A and B (or of A and the settlor) may be combined with co-ownership of their respective estates. For example, adapting the first example, the freehold estate may be held on trust for A and X for their lives (ending on the death of the longest surviving), with remainder to B and Y. More than one life estate may be granted in succession before the remainder or reversion. Hence, in a different variation of our first example, a settlor may create a trust for A (his or her child) for life, then to B (A's child) before granting the remainder to C. But attempts to use successive interests in this way to keep land within generations of a family are likely to fall foul of the rule against perpetuities.

3.1 THE RULE AGAINST PERPETUITIES

The rule against perpetuities places a limit on the period of time within which a future interest in property may vest or take effect, from the time of the disposition creating the interest. The rule is borne from an ongoing battle between settlors, who wish to continue to exercise control of their property from beyond the grave, and courts keen to ensure alienation of land.

Megarry and Wade: The Law of Real Property (7th edn, eds Harpum et al, 2008, [9-012])

> It has commonly been the ambition of landowners to dictate to posterity how their land is to devolve in the future, and so to fetter the powers of alienation of those to whom they may give it; and it has always been the purpose of the courts, as a matter of public policy, to confine such settlements within narrow limits and to frustrate them when they attempt to reach too far into the future.

[6] Legal title is vested in the trustees under the scheme of regulation provided by the Trusts of Land and Appointment of Trustees Act 1996, which is examined in section 6 below. As has been seen in Chapter 17, section 2, legal co-owners are necessarily joint tenants.

[7] Trustee Act 1925, s 34(2). This provision is discussed in Chapter 17, section 2.

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A full discussion of the rule against perpetuities, which applies both to trusts of land and those of personal property, lies beyond the scope of this book and the following text is confined to providing a brief account.[8]

As a result of consecutive legislative reforms, which operate only prospectively, there are now three distinct sets of perpetuity rules. The set of rules that apply is generally dependent on the date that the instrument creating the successive interest comes into effect or, in the case of wills, the date the will is executed. The Perpetuities and Accumulations Act 2009, which came into force on 6 April 2010, provides a single perpetuity period of 125 years. This period applies irrespective of any other period being given in the instrument.[9] The rule operates on a 'wait and see' basis (adopted by previous legislation) so that if an interest 'might not become vested until too remote a time' it is treated as valid unless and until it becomes void for failing to vest within 125 years.[10] The Act is based on recommendations made by the Law Commission that were published in 1998.[11] It represents a considerable simplification of the previous two sets of rules, both of which revolved around the identity of 'lives in being'. The relevant lives in being must be living or conceived at the time that the instrument takes effect. The settlor may identify them, in the absence of which they are determined by rules. The operation of the previous perpetuities rules was outlined by the Law Commission in making its recommendations for reform.

Law Commission Report No 251, *The Rules Against Perpetuities and Excessive Accumulations* (1998)

The rule against perpetuities has to be stated in two parts. For dispositions made before the 1964 Act came into force on 16 July 1964, the rule is as follows—

1. A future interest in any type of property will be void from the date that the instrument which attempts to create it takes effect, if there is any possibility that the interest *may* vest or commence outside the perpetuity period.
2. For these purposes, the perpetuity period consists of one or more lives in being plus a period of 21 years and, where relevant, a period of gestation.

Where an instrument creates a future interest after 15 July 1964—

1. that interest will only be void where it *must* vest or take effect (if at all) outside the perpetuity period;
2. it is therefore necessary to "wait and see", if need be for the whole perpetuity period, to determine whether the interest is valid; and
3. an alternative perpetuity period of up to 80 years may be employed instead of a life in being plus 21 years. [. . .]

[8] A full account is provided in *Megarry and Wade: The Law of Real Property* (7th edn, Harpum et al, 2008), [9-012]–[9-136]; *Cheshire and Burn's Modern Law of Real Property* (17th edn, eds Burn and Cartwright, 2006), ch 16.

[9] Perpetuities and Accumulations Act 2009, s 5.

[10] Perpetuities and Accumulations Act 2009, s 7.

[11] Law Commission Report No 251, *The Rules Against Perpetuities and Excessive Accumulations* (1998).

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3.2 ENTAILED INTERESTS

A third form of successive ownership is the 'entailed interest'. The TOLATA 1996 prohibits the creation of new entailed interests, although those in existence remain unaffected by that Act.[12]

The entailed interest is an estate in land that passes successively through direct lineal descendants. It represents the clearest attempt to keep land tied up for future generations. In this respect, its chief advantage over the creation of successive life interests is that the entail lies outside the scope of the rule against perpetuities. In its most traditional form, the entailed interest follows the primogeniture principles exemplified by the passing of the British Crown: from eldest surviving son to eldest surviving son, passing to the eldest surviving daughter only where there is no male heir. Variations may limit the estate to the male or female line.

4 THE NATURE OF THE LIFE ESTATE

Central to successive ownership is the existence of a life estate. As has been seen in Chapter 4, an estate denotes the period of time for which rights of ownership are enjoyed in relation to land. A life estate therefore denotes a period of ownership measured by the life of the party entitled in possession. A life estate can exist only in equity and is given effect under a trust of the legal title.[13] Since the coming into force of the 1996 Act, the trust is a trust of land, and the rights and duties of the trustees and beneficiaries are governed by the terms of that Act. These have been discussed in Chapter 17 and their specific application to successive ownership trusts is highlighted in section 6 below.

The limited nature and uncertain duration of the life estate impact both the rights of the beneficiary and the commercial value of the estate. The nature of a life estate can be understood by analogy with a trust of money. If trustees hold £100,000 on trust for A for life, remainder to B, then A and B's rights are located respectively in the income generated from the fund (A) and the capital sum on A's death (B). In essence, the same distinction between income and capital denotes the respective rights of A and B where the trust consists of land. A alone is entitled in possession of the land (akin to the income) for his or her life. A's right to possession may be enjoyed through physical occupation, or through receipt of rents and profits generated from the land. If the land is sold, then A is entitled to the income generated from the proceeds of sale. The land (the capital) or the proceeds of sale of the land must, however, be preserved for B. A's life estate is a property right, with which A is free to deal in the same way as any other estate in land: for example, A can sell his or her life estate, transfer it as a gift, or use it as security for a loan. Practically, however, the uncertain duration of the estate imposes a limit on its commercial value. Where a life estate is sold or transferred to a third party, the purchaser or transferee is described as holding an estate *pur autre vie* (for the life of another).

[12] Trusts of Land and Appointment of Trustees Act 1996, Sch 1, para 5. Whether the provision does, in fact, prevent the creation of new entailed interests is doubted by Pascoe, 'Solicitors: Be Bold: Create Entailed Interests' [2001] Conv 396.

[13] Law of Property Act 1925, s 1(1), provides that only the freehold and leasehold estates are capable of existing at law. By virtue of s 1(3), all other estates are equitable. This provision is discussed in Chapter 4.

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McCaffery compares the rights of the holder of a life estate with those of the holder of the freehold by reference to six incidents of ownership identified by Pound. (The numbers listed in the extract below refer to the six rights of ownership listed by Pound.)

McCaffery, 'Must We Have a Right to Waste?' in *New Essays in the Legal and Political Theory of Property* (ed Munzer, 2001, p 79)

Most of the six rights readily extend to a life estate owner, or to any other present interest of limited duration. A life estate holder can possess the property (1), exclude others from it (2), dispose of her life estate (3), use the property (4), and enjoy its fruits or profits (5). One can think of these as the present-oriented rights of ownership, for they use or affect the present interest.

A fee simple absolute adds but two powers to the life estate. One is the power to direct where the property is to go on the termination of the life estate: that is, a *jus disponendi* (3) as to the remainder, or future, interest. Two is the *jus abutendi* or right of waste (6). We could add a third difference—the right to sell or alienate the entire estate in fee simple absolute. But although the ability to sell the whole property is of immense practical importance, it is entailed in the rights set out above. One can sell what one has. A life estate owner already has the *jus disponendi* as to her life estate. What she lacks is the right of disposition as to the remainder, which, when combined with what it is that she does have, would give her a right of disposing of the whole.

This all follows from the fact that the fee simple absolute owner owns the remainder interest, but the life estate holder does not. The *jus disponendi* as to the whole and the *jus abutendi* are rights that affect the remainder interest as well as the present one—one can think of them as the future-oriented rights of ownership. Under a life estate conception of ownership, the property holder cannot waste the property or direct where the remainder is to go.

One of the key differences between the estates therefore consists in what McCaffery refers to as the 'right to waste'. The purpose of McCaffery's essay is to encourage a rethinking of ownership in which a life estate is seen as an attractive form.[14] In this respect, he argues that a right to waste should not be recognized.[15] As McCaffery notes,[16] waste is usually understood in the negative, as a doctrine *against* waste. Waste generally denotes an act or omission that affects the value of the freehold (negatively or positively), or changes the nature of the land.[17] Historically, waste determined the rights of the holder of a life estate, together with the relationship between him or her and the holder of the interest in remainder or reversion. The holder of a life estate would be liable to the holder of the estate in remainder or reversion for some types of waste (for example, conduct that reduces the value of the land), but not others (including permissive waste, resulting from an omission to keep the land in good repair).[18]

In modern law, the provisions of the TOLATA 1996 govern the relationship between the parties. The broad powers of management conferred on trustees appear effectively to preclude resort to the law of waste.[19]

[14] McCaffery, 'Must We Have a Right to Waste?' in *New Essays in the Legal and Political Theory of Property* (ed Munzer, 2001), pp 78–9.
[15] Ibid, p 105. [16] Ibid, p 84. [17] McCaffery's own concept of waste is broader: ibid, p 77.
[18] A brief summary is provided by Smith, *Plural Ownership* (2004), p 20. [19] Ibid, pp 20–1.

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5 THE CREATION OF SUCCESSIVE INTERESTS

Successive interests take effect under a trust and can be created in the same way as any other trust of land. Hence, a successive ownership trust can be created expressly through compliance with s 53(1)(b) of the Law of Property Act 1925 (LPA 1925), which requires the declaration of trust to be evidenced in writing, signed by the settlor, or through a validly executed will. Successive interest trusts may also arise impliedly: for example, through a common intention constructive trust of the type that we have considered in Chapter 16 in relation to co-ownership.

As we have seen in Chapter 16, the elements of the common intention trust are a common intention to share beneficial ownership, coupled with detrimental reliance on the part of the claimant. In most cases, the agreement to share will reflect an intention to co-own the home, but, exceptionally, an agreement will be consistent with successive ownership.

Ungurian v Lesnoff
[1990] Ch 206, HC

Facts: At the time that the relevant facts took place, Poland was under Communist rule. Mrs Lesnoff, a Polish national, gave up her Polish nationality, a flat in Poland in which she could have remained in occupation for her life, and her career, to move to London to live with Mr Ungurian. The couple lived in a house, registered in Mr Ungurian's sole name, together with Mrs Lesnoff's sons and one of Mr Ungurian's sons, Paul. During the course of the parties' four-year relationship, Mrs Lesnoff carried out considerable improvements to the property. On the breakdown of the relationship, Mrs Lesnoff argued that the house was held on trust for her or, at the least, that she was entitled to remain in occupation for her life.

Vinelott J

At 223–4

In summary, therefore, I am not satisfied that the house was bought by Mr. Ungurian with the intention that it would belong to Mrs. Lesnoff, either immediately or when she gave up her flat in Poland and obtained permission to live permanently abroad; but I am satisfied that it was bought with the common intention that Mrs. Lesnoff would be entitled to live there with her children, sharing it with Mr. Ungurian when he was in England, and with any of his children who were here for the purpose of being educated. I am satisfied that Mrs. Lesnoff went through with this plan, initiated in Beirut and later elaborated, in the expectation that Mr. Ungurian would provide her with a secure home and that she burnt her boats by giving up her flat in Wraclow in the belief that he had done so. The question is whether these facts, and the work subsequently done by Mrs. Lesnoff, give rise, either to a constructive trust under which Mrs. Lesnoff became entitled to a beneficial interest in the house, or to a licence to reside, or to an estoppel preventing Mr. Ungurian from denying her right to reside in the house. [. . .]

In my judgment, the inference to be drawn from the circumstances in which the property was purchased and the subsequent conduct of the parties—the intention to be attributed

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> to them—is that Mrs. Lesnoff was to have the right to reside in the house during her life. It would be to that extent her house, and although the expectation was that Mr. Ungurian would live there with her when he was in England, and that Paul, and possibly in due course his younger son also, would be accommodated there while they were being educated, that result would flow from the continued relationship between Mrs. Lesnoff and Mr. Ungurian and would be dependent on it. It must be borne in mind that Mr. Ungurian was a man of considerable means with flats in Beirut, Amman and Switzerland. He was providing a house as a home for a woman much younger than himself who would be likely to survive him. I do not think that full effect would be given to this common intention by inferring no more than an irrevocable licence to occupy the house. I think the legal consequences which flow from the intention to be imputed to the parties was that Mr. Ungurian held the house on trust to permit Mrs. Lesnoff to reside in it during her life unless and until Mr. Ungurian, with her consent, sold the property and bought another residence for her in substitution for it.

The factual background to *Ungurian v Lesnoff* is unusual. The extreme lengths required of Mrs Lesnoff to be able to leave Poland during the time of Communist rule highlighted her particular need for security of accommodation. The case also illustrates that there are different ways in which occupation for life can be given effect. Vinelott J notes the possibility of finding a constructive trust, a licence, or a claim to estoppel. As regards estoppel, if Vinelott J were to have found that Mr Ungurian was estopped from denying Mrs Lesnoff a right to reside, he would then have had a discretion as to the appropriate remedy to award in satisfaction of the claim.[20] The remedy could take the form, for example, of a licence or a trust. Lifetime occupation may also be given effect through the grant of a lease, with provision for the lease to be terminated on an individual's death.[21]

Prior to the TOLATA 1996, the informal creation of a life estate gave rise to a trust governed by the Settled Land Act 1925. Such a trust was imposed in *Ungurian v Lesnoff*. The effect of the Settled Land Act 1925 is considered in section 6 below. It is sufficient to note that it conferred upon the holder of the life estate greater powers of management over the land than may have been appropriate.[22] The TOLATA 1996 has superseded that legislation. That Act removes the difficulties encountered under the Settled Land Act 1925 and the informal creation of a successive ownership trust is therefore less problematic. But the question still arises whether a life estate, licence, or lease is the most appropriate means of securing occupation for life. As Table 4 shows, each differs as regards the method of creation and the extent of security conferred on the occupier.

[20] The nature of the courts' discretion is considered in Chapter 10.

[21] A lease 'for life' is not itself valid, because a lease must have a fixed maximum duration. This requirement is considered in Chapter 22.

[22] A full discussion of the debate surrounding the application of the Settled Land Act 1925 to life occupancy is now largely of historical interest. Useful discussions of *Ungurian v Lesnoff* [1990] Ch 206 that highlight the issues are provided by Hill, 'The Settled Land Act 1925: Unresolved Problems' (1991) 107 LQR 596, 596–600, and Sparkes, 'Beneficial Interest or Licence for Life' [1990] Conv 223. For discussion of the earlier case law, see Hornby, 'Tenancy or Life or Licence' (1977) 93 LQR 561.

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Table 4 Legal mechanisms to provide occupation and/or ownership of land for life

	Life estate	Licence to occupy for life	Lease determinable on death
Legal status	Proprietary estate—equitable, given effect under trust	Personal	Proprietary—legal or equitable
Duration	Life	Life	Fixed term, with provision for determination by freeholder (landlord) on tenant's death
Creation	Express trust (during settlor's lifetime or by will) Implied trust, e.g. constructive trust	No specific formality requirements	Legal—dependent on duration of fixed term, but likely to require deed and registration (Law of Property Act 1925, ss 52 and 54; Land Registration Act 2002, s.4) Equitable—through existence of valid contract to create a lease, in compliance with Law of Property (Miscellaneous Provisions) Act 1989, s 2 *See discussion of lease formalities in Chapter 22*
Enforcement against third parties	Overreached on sale if requirements of overreaching are met. Possible enforcement only if not overreached: • registered land—possible protection as an overriding interest within Land Registration Act 2002, Sch 3, para 2 • unregistered land—doctrine of notice *See Chapters 13, 14, and 19*	Not enforceable against third parties, but note possible imposition of constructive trust on sale, *see Chapter 21*	Registered land—dependent on duration of fixed term, but possible entry as Land Registry notice (Land Registration Act 2002, ss 32 and 33(b)), or protection as an overriding interest within Land Registration Act 2002, Sch 3, paras 1 and 2 Unregistered land—legal lease binds all purchasers; equitable lease, an estate contract governed by Land Charges Act 1972, Class C(iv), *see Chapters 13 and 14*
Principal source of regulation	Trusts of Land and Appointment of Trustees Act 1996, *see Chapter 17 and section 6 below*	Personal agreement	Terms of lease/implied covenants, *see Chapter 24*

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6 REGULATION OF SUCCESSIVE OWNERSHIP

Prior to the TOLATA 1996, trusts involving successive ownership were generally regulated by the Settled Land Act 1925. That Act applied to all instances of successive ownership (whether created through an express trust or arising informally through, for example, a constructive trust)[23] unless the trust was expressly created as a trust for sale.[24] One of the key aims of the 1996 Act was to provide a single scheme of regulation for all trusts of land, including both co-ownership and successive ownership trusts.[25] The scheme of regulation under the Settled Land Act 1925 differed from the trust for sale as regards the *location* of the legal title and powers of management over the land.[26] In a trust for sale—and, now, under a trust of land—legal title is vested in the trustees, who exercise powers of management. Under the Settled Land Act 1925, legal title and the powers of management were vested in the 'tenant for life'—that is, the beneficiary currently entitled in possession.[27] The trustees of the settlement exercised specific functions (including executing a deed of discharge on the termination of the settlement), received and held capital moneys on sale, and played a general supervisory role.[28]

This scheme of regulation was subject to specific criticism for the position of the tenant for life.

Law Commission Report No 181, *Transfer of Land: Trusts of Land* (1989, [1.3], citing Law Commission Working Paper No 94, *Trusts of Land*, 1985, [3.16])

Conflict of interest. It has been suggested that there is an inherent conflict involved in the position of the tenant for life. The legal estate and all the powers of dealing with it are vested in him and under s.16 of the Settled Land Act 1925 he is a trustee. Yet he is, at the same time, the principal beneficiary. While it is quite usual for a trustee to be a beneficiary, given the lack of any other restraints on the tenant's powers, the conflict may become real. It seems that where there is a conflict of interests, the tenant of life is not treated like an ordinary trustee. It has been held that the court will not intervene if the tenant for life allows the estate to become derelict, but only if there is evidence that he has refused to exercise his powers. Thus the remaindermen may inherit an estate much diminished in value and have no remedy. Similarly the interests of the remaindermen may be adversely affected by a sale of the settled land at a low price. Again, they may have no effective remedy as they may not discover the sale until years after it took place and, even if they could establish a breach of trust, the tenant for life may be dead and his estate not worth suing. While it is clear that the courts, recognising the risks arising from conflicts of interest, usually make

[23] The application of the Settled Land Act 1925 to informal trusts was controversial, because it circumvented the strict formality requirements otherwise specified in s 4 of the Act. But *Ungurian v Lesnoff* [1990] Ch 206 is one of a number of cases in which the Act was applied to an informally created settlement. For further discussion of this point, see the literature listed at fn 22 above.

[24] Settled Land Act 1925, s 1(1) and (7).

[25] Law Commission Report No 181, *Transfer of Land: Trusts of Land* (1989), [1.4].

[26] The content of the powers was the same, because trustees for sale were conferred with the same powers of management as a tenant for life in relation to land held on trust: Law of Property Act 1925, s 28(1) (repealed by the Trusts of Land and Appointment of Trustees Act 1996).

[27] Settled Land Act 1925, s 19(1). Where the beneficiary was a minor, the powers of management were vested in other persons by s 26.

[28] For a full list of the functions of trustees of the settlement, see *Megarry and Wade* (2008), [A-092].

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the purchase of trust property by a trustee virtually impossible, in one case where the tenant for life purchased the settled land without the proper procedure being adopted, the sale was simply allowed to stand.

Successive ownership trusts created on or after the commencement of the TOLATA 1996 are trusts of land and are within the scheme of regulation provided by that Act.[29] Successive ownership trusts that were in existence on the date of commencement of that Act, and which were governed by the Settled Land Act 1925 at that time, remain regulated by the 1925 Act.[30] Hence the 1925 Act has not been repealed, but it is in the process of being phased out.

The scheme of regulation provided under the 1996 Act has been examined in Chapter 17 in the context of co-ownership trusts. It has been seen that the Act confers certain powers on the trustees as regards the management and sale of the land, and confers rights on the beneficiaries. A full discussion of the trustees' powers and the beneficiaries' rights is provided in Chapter 17, sections 5.2 and 5.3; in this chapter, it is necessary only to outline how these powers and rights apply in the specific context of successive ownership.

Under the 1996 Act, the legal title and powers of management are vested in the trustees of land. This removes the conflict of interest for the beneficiary entitled in possession created by the Settled Land Act 1925. As we have seen in Chapter 17, section 5.2, trustees of land are vested with '*all the powers of an absolute owner*'. These powers must be exercised with regard to the rights of the beneficiaries (s 6(5) of the 1996 Act) and in a manner that is consistent with any other enactment or rule of law or equity (s 6(6)). The settlor of an express trust may also impose limitations on the trustees' powers.[31]

The courts have not yet considered the application of these provisions in the context of successive ownership. It is suggested that difficulties may arise in applying the general limitations on trustees' powers in the context of successive owners: what 'rights' are enjoyed by beneficiaries whose interest is in remainder or reversion? We have seen, in Chapter 17, section 5.3, that the 1996 Act confers two key rights on beneficiaries: a right to be consulted by the trustees, and a right to occupy the trust land. These rights are conferred on those beneficiaries who are '*beneficially entitled to an interest in possession in the land*'.[32] Hence, these rights are limited to the holder(s) of the life estate in possession, to the exclusion of those whose interest is in reversion or remainder. The rights of beneficiaries to which the trustees must have regard in the exercise of their powers by virtue of s 6(5) are not necessarily confined to the rights conferred by the Act.[33] There is, however, no clear source of rights outside of the 1996 Act, beyond any specific rights that may be conferred by the settlor of an express trust. Beneficiaries with an interest in remainder or reversion may have to rely on the general equitable duties imposed on trustees, to which the trustees must have regard through s 6(6), in order to safeguard their interest.

[29] Trusts of Land and Appointment of Trustees Act 1996, s 1(2)(a) and (3).

[30] Successive ownership trusts expressly created as a trust for sale prior to the commencement of the 1996 Act, like all express trusts for sale, became trusts of land on 1 January 1997: Trusts of Land and Appointment of Trustees Act 1996, s 1(2)(b).

[31] Ibid, s 8.

[32] Ibid, ss 11(1)(a) and 12(1). (The right to be consulted is further limited by s 11(1)(a) to beneficiaries of full age.)

[33] See the annotation to ibid, s 6(5), by Kenny and Kenny, in *Current Law Statutes* (1997). The annotation suggests that the 'rights' referred to would include those conferred by the settlor of the trust. This implicitly accepts that the rights of the beneficiaries to which the trustees are to have regard are not confined to those conferred by the Act.

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We have seen, in Chapter 17, section 5.4, that disputes relating to the exercise of powers by trustees may be referred to the court on an application under s 14 of the 1996 Act. An application may be made (amongst others) by '*any person who* [...] *has an interest in property subject to a trust of land*'. This provision is not confined to parties with an interest in possession. Therefore, a beneficiary with an interest in remainder or reversion may bring an application to court under s 14: for example, this would enable such a beneficiary to bring an action to challenge a decision by the trustees to sell the land. But it remains open to question how much emphasis the courts will place on the wishes of a beneficiary with an interest in remainder or reversion. Although not exhaustive of the factors that may be taken into account by the court, s 15(3) directs the court to consider the wishes of beneficiaries with an interest in possession.

QUESTIONS

1. Compare and contrast successive ownership and concurrent ownership. While both take effect under a trust regulated by the Trusts of Land and Appointment of Trustees Act 1996, what differences may remain in the application of that Act to each type of trust?
2. When might it be appropriate to confer: (i) a life estate; (ii) a licence to occupy; and (iii) a lease determinable on death?

FURTHER READING

Burn and Cartwright (eds), *Cheshire and Burn's Modern Law of Real Property* (17th edn, Oxford: OUP, 2006, ch 16)

Law Commission Report No 251, *The Rules Against Perpetuities and Excessive Accumulations* (1998)

McCaffery, 'Must We Have a Right to Waste?' in *New Essays in the Legal and Political Theory of Property* (ed Munzer, Cambridge: CUP, 2001)

Simpson, *A History of the Land Law* (2nd edn, Oxford: OUP, 1986)

Smith, *Plural Ownership* (Oxford: OUP, 2004, ch 2)

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PART F

LICENCES AND LEASES

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21

LICENCES

CENTRAL ISSUES

1. In Part F, we will look first at the licence; then, in the next three chapters, we will examine the lease. Licences and leases are linked as they each provide a means by which B may occupy A's land. Indeed, in many cases, a licence or a lease may provide the basis on which B occupies his or her home. There is, however, a fundamental difference between a licence and a lease; only the latter can currently count as a property right in land.
2. A licence exists where one party (B) has a liberty to use land belonging to another (A). In considering licences, we need to examine: the rights that B has against A; the rights that B has against X, a stranger who interferes with B's use of A's land; and the rights that B has against C, a party who acquires a right from A and then interferes with B's use of the land.
3. Licences can be grouped into a number of categories. A bare licence exists where B has *only* a liberty to use A's land. The law governing such a licence is straightforward. It can be revoked by A, and B cannot assert it against X or C.
4. A contractual licence exists where B has a liberty to use A's land *and* A is under a contractual duty to B not to revoke that liberty. A's contractual duty is clearly important when considering what rights B has against A. The crucial question is whether the existence of this contract can also affect B's rights against X and C. This has been a controversial question.
5. In considering what rights B, a party with a contractual licence, may have against X or C, we need to keep in mind the two different ways in which it may be possible for B to assert a right against such a party. Firstly, B may be able to assert a new, direct right against X or C, arising as a result of X or C's conduct. Such a right may arise under a 'constructive trust'—but controversy surrounds both the source and nature of this trust.
6. Secondly, if B is unable to assert a direct right against X or C, he or she will have to argue that his or her contractual licence counts as a legal or equitable property right in land. The current position is that a contractual licence does *not* count as such a right—but this is another controversial area. A number of arguments have been made in favour of the view that at least some types of contractual licence should count as an equitable interest in land. One of these arguments involves a comparison with a third type of licence: an estoppel licence.
7. When examining licences to use land, we also need to consider statutory licences and licences coupled with an interest. The latter category, however, is of dubious value.

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1 THE NATURE OF A LICENCE

Let us say that A, a freehold owner of land, invites B to his house for dinner. When B is on A's land, he is described as having a licence. The word 'licence' simply means *permission*. Because A has a legal estate in the land, B, like the rest of the world, is under a prima facie duty not to make any use of A's land (see Chapter 4, section 1). If, however, A gives B permission to make a particular use of A's land, B's duty disappears: an act that would otherwise be wrongful (coming onto A's land) becomes permissible.

Thomas v Sorrell
(1673) Vaugh 330, Exchequer Chamber

Facts: Mr Thomas, acting on behalf of the Crown, demanded payment from Mr Sorrell on the basis that Mr Sorrell had sold wine in the parish of Stepney without a licence. Mr Sorrell claimed that he had a licence to sell wine in his capacity of a member of the '*Masters, Warden, Freemen, and Commonality of the Mystery of Vintners of the City of London*'. Vaughan CJ considered the meaning of the term 'licence'.

Vaughan CJ

At 351

A dispensation or licence properly passeth no interest, nor alters or transfers property in any thing, but only makes an action lawful which, without it, had been unlawful. As a licence to go beyond the seas, to hunt in a man's park, to come into his house, are only actions, which without licence, had been unlawful.

So, even when B is enjoying his dinner at A's home, we need to be careful in saying that B has a 'right' to be on A's land.

The great American jurist Hohfeld noted that we use the word 'right' to cover many different situations.[1] For example, if we say that B has a right that A must not poison B's food, we mean that A is under a *duty to B* not to poison B's food. In such a case, in Hohfeld's terms, B has a particular form of right: a *claim right*. In contrast, if we say that B has a right to be on A's land, we mean something different. In our example, after all, A is not under a duty to allow B to stay on his land. So, if B makes a controversial comment over dinner, A is free to ask B to leave without any dessert. So, when we say that B has a right to be on A's land, what we really mean is that, at least until A revokes his permission, B is *not under a duty to A not to be on A's land*. In such a case, in Hohfeld's terms, B has a particular form of right: a *privilege* or *liberty*.

[1] See Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1920; based on (1913) 23 Yale LJ 16 and (1917) 26 Yale LJ 710).

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Hohfeld, 'Faulty Analysis in Easement and License Cases'[2] (1917) Yale LJ 66, 94

> Suppose that A says to B, "I give you permission to walk across my land, Longacre." This language in and of itself purports merely to create in B the privilege, or more strictly, series of privileges, of walking across A's land. In correlative terms, A's right that B stay off the land is extinguished, and no-rights substituted. The important point is that the permission constitutes a *grant* to *B* of privileges alone: B is not granted any accompanying rights (or claims) that A or other persons shall not interfere with B's entering on the land, Longacre, and walking across. If, therefore, B succeeds in entering on the land, no rights (or claims) of A are violated; but if on the other hand, A closes the gate in the high stone wall, or bars the one and only path midway, no rights (or claims) of B are violated; and so also if some third party locks the gate or bars the path halfway across Longacre.

All licences thus involve a *liberty* of B to make some use of A's land.[3] There are, however, situations in which B has a liberty to use A's land and is not treated as having a licence. We can modify Hohfeld's example so that A, instead of simply giving B permission to walk across his land, grants B a legal easement that allows B to walk across A's land. If B has a legal easement, he has a liberty to make some use of A's land, *and* A is under a duty not to interfere with B's liberty, *and* the rest of the world is also under a duty not to interfere with B's liberty. These duties are imposed on A and the rest of the world because, as we saw in Chapter 4, sections 5 and 6, B's easement counts as a legal interest in land. In such a case, we would not say that B has a licence. The term 'licence' is thus reserved for cases in which B has a liberty to make some use of A's land, *and* that liberty is not part of a legal or equitable property right held by B.

So, in *Street v Mountford*,[4] a case that we will examine in Chapter 22, section 1.1.1, the House of Lords considered a situation in which, in return for payment from B, A made a contractual promise to allow B to occupy A's land for a limited period. The contract described B's right as a 'licence'—but the House of Lords held that, because B had a right to exclusive possession of the land for a limited period, A had instead given B a *lease*. This meant that B had more than permission to make some use of A's land: he had a legal property right in A's land. So, during the period fixed by the contract, A and the rest of the world had a duty not to interfere with B's occupation of the land.

Strictly speaking, then, to define a 'licence', we also need to define property rights such as an 'easement' or a 'lease'. We will consider those definitions in Chapters 25 (the easement) and 22 (the lease). In the meantime, we can define a licence as follows.

B has a licence where he has:

- a liberty to make some use of A's land; *and*
- that liberty is *not* part of a property right held by B.

[2] 'License' is the American English spelling for the noun. In British English usage, 'licence' is the noun and 'license' the verb (hence 'licensor' for a party granting a licence and 'licensee' for a party with the benefit of a licence).

[3] Hohfeld preferred the term 'privilege' to refer to the right of a party, such as B in the extract above, who has a *special* liberty not held by others. On this view, almost all licences give B a privilege. But the term 'liberty' is used in this chapter, because it can also encompass cases in which B has a licence not because of his special position, or any dealings with A, but because of a general rule permitting a particular use of A's land.

[4] [1985] AC 809.

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Within that general definition, we can then identify different forms of licence. There are five main varieties: bare licences; contractual licences; estoppel licences; statutory licences; and licences coupled with an interest.

2 BARE LICENCES

A bare licence is the simplest form of licence. It exists where B has a liberty to make some use of A's land *and* A is free to revoke that liberty—that is, A is not under a duty to B not to revoke B's permission to use A's land. When A invites B to A's house for dinner, B has a bare licence. As we have seen, A is free to revoke B's liberty and may do so either before B arrives or during B's visit. A bare licence may also be implied: for example, although not expressly invited by A, a collector for a charity, unless expressly warned otherwise,[5] has a bare licence to come onto A's land and knock on A's door to pursue his lawful business.

2.1 B'S RIGHTS AGAINST A

The key feature of a bare licence is that A is under no duty to B not to revoke the licence: as Alderson B put it in *Wood v Leadbitter*:[6] '[A] *mere licence is revocable*.' So, if A invites B around for dinner, A can change his mind and revoke the invitation. If B decides to come anyway, B commits the tort of trespass: he breaches his duty to A not to interfere with A's land.[7] If B is *already* on A's land when A revokes his invitation, there is a problem with saying that B immediately becomes a trespasser. If that were the case, A would immediately be able to use reasonable force to remove B from the land. It would, of course, be unfair on B if A could use such force before giving B a reasonable time in which to leave A's land. So, given A's initial invitation and B's reliance on that invitation by coming onto A's land, the law does not allow A's revocation of the licence to turn B immediately into a trespasser.

Winter Garden Theatre (London) Ltd v Millennium Productions Ltd
[1948] AC 173, HL

Facts: Winter Garden Theatre (London) Ltd owned the Winter Garden Theatre, Drury Lane, London. In July 1942, the company made a contractual promise to Millennium Productions Ltd to allow Millennium to use the theatre for six months, with an option to renew the licence for a further six months. The contract stated that, at the end of those two six-month periods, Millennium would have the option to continue the licence at a flat weekly price of £300. The contract stipulated that, in such a case, Millennium would have to give Winter Garden one month's notice if it wished to terminate the licence. The written agreement said nothing, however, about Winter Garden's ability, in such a case, to revoke the licence. The licence did, indeed, continue for more than a year and was still in operation by the start of September 1945. Millennium entered a contract with a production company allowing it to put on performances of a play

[5] For example, if A puts up a notice expressly denying permission to such callers to enter A's land, no licence can be implied.

[6] (1845) 13 M & W 838, 844.

[7] That is the case even if B is unaware that A has revoked the invitation and so honestly believes that he is entitled to come onto A's land.

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(*Young Mrs Barrington*)[8] from 5 September 1945 until January 1946. On 13 September, however, Winter Garden (A Ltd) decided to revoke the licence of Millennium (B Ltd). A Ltd gave B Ltd one month's notice, but demanded that it leave by 13 October. B Ltd sought a declaration that A Ltd had breached its contractual duty, because either: (i) the licence could be revoked only if B Ltd breached one or more of its terms; or (ii) even if the licence could be revoked, A Ltd had not given it a reasonable period of notice. The House of Lords rejected both of these arguments and found in favour of A Ltd.

Viscount Simon

At 188–9

The effect of a licence by A to permit B to enter upon A's land or to use his premises for some purpose is in effect an authority which prevents B from being regarded as a trespasser when he avails himself of the licence (*Thomas v Sorrell*). Such a licence may fall into one of various classes. It may be a purely gratuitous licence in return for which A gets nothing at all, e.g., a licence to B to walk across A's field. Such a gratuitous licence would plainly be revocable by notice given by A to B. Even in that case, however, notice of revocation conveyed to B when he was in the act of crossing A's field could not turn him into a trespasser until he was off the premises, but his future right of crossing would thereupon cease.

Lord Macdermott

At 204

It is, I think, safe, as well as desirable for the decision of this case, to say that one who remains on the land of another after his licence to use it has terminated will not be considered a trespasser before he has had a reasonable time in which to vacate the premises [. . .] This period of grace can, of course, be the subject of agreement, but it exists for gratuitous as well as for contractual licensees and, on that account, must, I think, be generally ascribed to a rule of law rather than to an implied stipulation.

The courts have consistently reached the conclusion that A's revocation does not immediately turn B into a trespasser. As Hill notes, this conclusion has been reached in a number of different ways.

Hill, 'The Termination of Bare Licences' [2001] Cambridge LJ 87, 89

The position with regard to bare licences should be more straightforward [. . .] As the fundamental feature of a bare gratuitous licence is that it is not based on a contract, it might be supposed that a bare licence imposes no obligations on the licensor. If this were the case, once revocation has occurred, the licensee [. . .] would, on failing to vacate the land, immediately become a trespasser. There are, however, four aspects of the law which indicate that the law relating to bare licences is not quite as simple as this.

First, through the operation of the doctrine of proprietary estoppel, the licensor may be estopped from revoking the licence. Second, a licence which has been acted upon is not

[8] A play by Warren Chetham Strode. The part of 'Arthur Barrington' was played by Peter Hammond, who went on to direct many of the well-known television adaptations of Sherlock Holmes stories (starting Jeremy Brett in the title role) from 1986–94.

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revocable. Third, on revocation of a bare licence, the licensee must be given a reasonable 'period of grace' or 'packing up period' and only at the end of this period does a licensee, who has failed to vacate the land, become a trespasser. Fourth, it is sometimes said that a bare licence may be revoked only 'on reasonable notice'.

Hill goes on to examine these four methods, each of which has been used to ensure that, when A revokes or attempts to revoke B's bare licence, B does not immediately become a trespasser. His conclusion is that only two of those methods should be used: the notion of a 'packing up' period, and the idea that the doctrine of proprietary estoppel may impose a duty on A to B. In doing so, he divides bare licences into two categories. The first is that in which the doctrine of proprietary estoppel does *not* impose a duty on A: he refers to these cases as involving a 'one-sided' licence.

Hill, 'The Termination of Bare Licences' [2001] Cambridge LJ 87, 107

Cases involving this type of 'one sided' licence present fewest problems, both doctrinally and practically. If the licensee has not acted to his detriment there is no policy reason why the licensor's freedom of action should be unduly circumscribed. In terms of fairness, the only rationale for the law's intervention is to ensure that the licensee is given a reasonable period in which to make alternative arrangements (where necessary). The packing-up period provides the mechanism whereby the law can achieve an appropriate balance between the licensor's interest in determining the licence and the licensee's interest in not suffering excessive disruption.

Hill's second category consists of cases in which the doctrine of proprietary estoppel does impose a duty on A. Hill includes those cases in his discussion of bare licences, because he defines any non-contractual licence as a bare licence. Given the duty imposed on A, however, we will treat estoppel licences as distinct from bare licences and examine them separately in section 4 below. Nonetheless, it is worth noting Hill's conclusion that the courts' handling of this second class of cases can be explained by using only two ideas: firstly, the concept of a 'packing up' period applied in the first category; secondly, the idea that the doctrine of proprietary estoppel imposes a duty on A.

Hill, 'The Termination of Bare Licences' [2001] Cambridge LJ 87, 107–8

The second category, which might be termed 'two-sided' licences, includes cases where, although there is no contractual bargain between the parties, the licensee, as a consequence of the (express or implied) licence, undertakes some activity or incurs some expenditure which otherwise he would not have undertaken or incurred. The courts have dealt with cases falling within this category in one of three ways: the largely forgotten common law doctrine of a licence acted upon, the equitable doctrine of proprietary estoppel; the licensor's obligation to give reasonable notice. In policy terms, it is far from clear that the licensor's obligation to give reasonable notice is required to ensure that a "two-sided" licensee does not suffer hardship as a consequence of the licence's summary termination; the doctrine of proprietary estoppel and the packing-up period provide the court with sufficient tools to enable the licensee's reasonable expectations to be protected.

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> All the cases in which the basis of the court's decision has been either the doctrine of a licence acted upon or the licensor's obligation to give reasonable notice could have been decided equally or more satisfactorily by the proper application of the doctrine of proprietary estoppel or the packing-up period. Furthermore, there is no argument of principle in support of the proposition that a licensor should be under an obligation to give the licensee a period of notice before revocation of a bare licence is to take effect [. . .] When bare licences are located in the broader picture of rights in relation to land, the notion that a bare licensee is entitled to a period of notice is illogical [. . .]

Whilst we can question his terminology (Hill's second class of bare licences is perhaps better seen as a class of estoppel licences), Hill's analysis is otherwise persuasive. In a simple bare licence case, in which the doctrine of proprietary estoppel does not apply, the concept of a 'packing up' period is the *only* concept that a court needs to explain why A's revocation of a bare licence whilst B is on A's land does not immediately turn B into a wrongdoer.

2.2 B's RIGHTS AGAINST X

If B has a bare licence, then, as Hohfeld noted, in the extract above, that licence does not impose any duty on X, a stranger, not to interfere with B's use of A's land. In some cases, however, B can acquire a property right *in addition* to his bare licence; that property right will then impose a duty on X. For example, let us say that A goes on holiday for a week and asks B to 'house-sit'. A and B's arrangement is that B is under no duty to do so, and that, if he does choose to house-sit, A will not pay him. If B does go onto and occupy A's land for that week, X is under a duty not to interfere with B's occupation of the land. This is confirmed by Lord Upjohn's analysis, in *National Provincial Bank v Ainsworth*,[9] of the position of Mrs Ainsworth *after* Mr Ainsworth moved out of the family home (see Chapter 1, section 5.1, and Chapter 5, section 5.4, for discussion of this case). His Lordship stated that '*in this case in truth and in fact the wife at all material times was and is in exclusive occupation of the home. Until her husband returns she has dominion over the house and she could clearly bring proceedings against trespassers*'.[10]

In such a case, however, X's duty does not arise because of B's licence; instead, it arises because B, as a result of having possession of A's land, has a legal estate in land—that is, a freehold. That right is acquired *independently* of A: B acquires the right simply by taking possession of the land (see Chapter 4, section 4, for discussion of the concept of independent acquisition). This means that B acquires such a right even if he takes possession of the land *without* A's permission and therefore has no licence. We will explore this point further in Chapter 8, when examining how B can independently acquire a legal estate in land.

2.3 B's RIGHTS AGAINST C

If B has a bare licence and A then gives C an inconsistent right—for example, by transferring his freehold of the land to C—we have an example of the priority triangle (Figure 13) (see Chapter 12).

[9] [1965] AC 1175, 1232.

[10] That view was confirmed by the Court of Appeal in *Manchester Airport plc v Dutton* [2000] QB 133.

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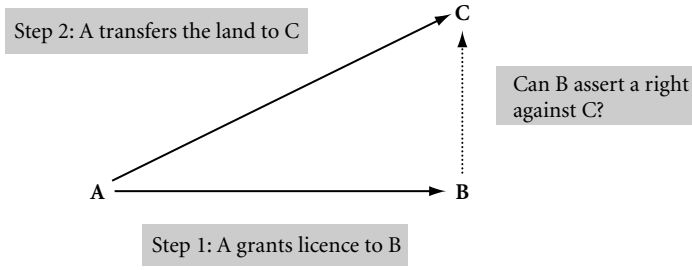

Figure 13 Bare licences and the priority triangle

As we saw in Chapters 6 and 12, there are two ways in which B *may* have a right against C: firstly, it may be that C has acted in such a way as to give B a *new, direct right* against C; secondly, it may be that B has a *pre-existing property right* that he can assert against C.

2.3.1 Direct rights

There are many different ways in which B may acquire a direct right against C. As we saw in Chapter 6, section 2, however, all of these methods depend on C's conduct: there must be something in the way that C behaves that justifies B's acquisition of a new, direct right against C. For example, if C, when acquiring his freehold from A, enters into a contract with B to allow B to continue using the land, B will acquire a direct contractual right against C. In practice, however, that situation will almost never arise. If B simply has a bare licence, there is no reason why A, when transferring the land to C, would insist on C making such a contractual promise to B. And there is no obvious reason why C would, on his or her own initiative, make such a promise to B.

2.3.2 A pre-existing property right?

If B's bare licence counts as a property right, then it will be prima facie binding on C. It is clear, however, that a bare licence does *not* count as a property right. Firstly, as we saw in Chapter 4, section 6, and Chapter 5, section 5.4, the *numerus clausus* principle, confirmed by ss 1 and 4 of the Law of Property Act 1925 (LPA 1925), means that there is a *closed* list of legal and equitable property rights in land. As confirmed by the House of Lords in *National Provincial Bank v Ainsworth*, licences do not form part of this list. Further, it is very unlikely that a bare licence will ever be admitted into the list of property rights: it cannot meet the criteria laid down by Lord Wilberforce in the following extract.

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

Lord Wilberforce

At 1247–8

Before a right or interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability.

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If B simply has a bare licence, his right clearly lacks that quality of 'permanence and stability'; after all, as we have seen, it can simply be revoked by A.

3 CONTRACTUAL LICENCES

A contractual licence exists where B has a liberty to make some use of A's land *and* A is under a contractual duty to B in relation to A's power to revoke that liberty. This means that—in some circumstances, at least—A is under a contractual duty to B not to revoke B's licence. For example, let us say A and B make an agreement that B, in return for paying A £500 up front, can share occupation of A's house for three months. As we will see in Chapter 22, section 1.1.1, such an arrangement will not give B a lease: because he can only share occupation of A's house, B does not have a right to exclusive possession of any land. B does, however, have more than a bare licence: A is also under a contractual duty not to revoke B's permission to occupy during the next three months. Of course, A's duty is not absolute: even if they have not expressly agreed it, A will have an implied power to revoke B's permission in certain circumstances—for example, if he discovers that B is stealing from him.

The distinction between a bare licence and a contractual licence thus turns on the question of whether A is under a contractual duty to B. Contractual duties can be implied as well as expressed and, in some cases, the courts have been very creative in finding such a contract.

Tanner v Tanner
[1975] 1 WLR 1346, CA

Facts: Mr Tanner (described by Lord Denning MR as a '*milkman by day and a croupier by night*') entered into an extramarital relationship with Miss Macdermott. She later gave birth to twins fathered by Mr Tanner and changed her name to 'Mrs Tanner'—but the two never married. Mr Tanner bought a house in which Mrs Tanner and the twins were to live. To move into this house, Mrs Tanner gave up her rent-controlled tenancy on the basis that she and the twins would be allowed to remain in the new house, at least until the twins left school. Mr Tanner and his first wife divorced, but Mr Tanner then married another woman and decided to remove Mrs Tanner from the house. He offered her £4,000 to leave, but she refused. Mr Tanner (A) brought proceedings to remove Mrs Tanner (B). A succeeded at first instance and B (with the children) moved into local authority accommodation. B appealed, arguing that A was under a contractual duty to allow B to remain, at least until the twins left school. B did not, however, ask the Court of Appeal for an order forcing A to let her back into occupation. The Court of Appeal found that, in removing B and the twins, A had breached his contractual duty to B and so should pay B damages of £2,000.

Lord Denning MR

At 1350

It is said that [B and the twins] were only licensees—bare licensees—under a licence revocable at will; and that [A] was entitled in law to turn her and the twins out on a moment's notice. I cannot believe that this is the law [. . .] I think he had a legal duty towards them. Not

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> only towards the babies but also towards their mother. She was looking after them and bringing them up. In order to fulfil his duty towards the babies, he was under a duty to provide for the mother too. She had given up her flat where she was protected by the Rent Acts [. . .] at his instance so as to be able the better to bring up the children. It is impossible to suppose that in that situation she and the babies were bare licensees whom he could turn out at a moment's notice. He recognised this when he offered to pay her £4,000 to get her out.
>
> What then was their legal position? She herself said in evidence: 'The house was supposed to be ours until the children left school.' It seems to me [. . .] that in all the circumstances it is to be implied that she had a licence—a contractual licence—to have accommodation in the house for herself and the children so long as they were of school age and the accommodation was reasonably required for her and the children. There was, it is true, no express contract to that effect, but the circumstances are such that the court should imply a contract by him [. . .] whereby they were entitled to have the use of the house as their home until the girls had finished school. It may be that if circumstances changed—so that the accommodation was not reasonably required—the licence might be determinable. But it was not determinable in the circumstances in which he sought to determine it, namely to turn her out with the children and to bring in his new wife with her family. It was a contractual licence of the kind which is specifically enforceable on her behalf, and which he can be restrained from breaking; and he could not sell the house over her head so as to get her out in that way.
>
> If therefore the lady had sought an injunction restraining him from determining the licence, it should have been granted [. . .]

It is important to note that a contemporary court is unlikely to adopt the very creative approach to finding a contractual licence taken by Lord Denning MR in *Tanner v Tanner*.[11] In that case, the contractual licence seems to have been imposed as a means to the end of imposing a duty on Mr Tanner to provide some form of financial assistance to Mrs Tanner and the twins (in the case itself, Mrs Tanner's only claim was for damages). Nowadays, because Parliament has recognized that particular policy need, there are statutory means by which a party such as Mr Tanner can come under a duty to make financial provision for his children.[12] As a result, there is no longer a need to bend doctrinal rules, as in *Tanner v Tanner*, in order to find a contractual licence. Indeed, under the Children Act 1989, s 15 and Sch 1, it is possible to impose a duty on a party such as Mr Tanner to allow his children (and their mother) to remain in occupation of a particular home until leaving school. As a result, there is no longer a need to stretch the concept of a contractual licence.

3.1 B's RIGHTS AGAINST A

The Court of Appeal's decision in *Tanner v Tanner* provides a good example of the protection available to B if he has a contractual licence. Lord Denning MR indicated that, *if* B had applied to court in time, a court would have prevented A from breaching his contractual duty not to revoke B's liberty to occupy A's land. In *Tanner* itself, it was too late for the court to protect B in that way. As a result, A was ordered to pay B damages; those damages had the

[11] Indeed, in *Horrocks v Forray* [1976] 1 WLR 230, a differently constituted Court of Appeal, faced with a similar case, distinguished *Tanner v Tanner*.

[12] See Children Act 1989, Sch 1.

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aim of putting B, as far as possible, in the position in which she would have been had A kept his contractual promise.[13]

In assessing B's position against A, there are two key questions: firstly, is A's actual or threatened action a breach of his contractual duty to B? Secondly, if it is, or would be, a breach, how will a court respond?

3.1.1 Is A's actual or threatened conduct a breach of contract?

Of course, this will depend on the precise terms of the contract between A and B. It is vital to note that, in most cases, it may be possible, in certain circumstances, for A to revoke B's liberty to use A's land *without* breaching his contract with B.

Winter Garden Theatre (London) Ltd v Millennium Productions Ltd
[1948] AC 173, HL

Facts: See section 2.1 above.

Viscount Simon

At 191

[W]hen the clauses of the present licence are carefully studied, the proper inference from the language used is that the licence was not perpetual but that the intention of the parties, to be inferred from the document, though not expressly stated, was that, upon [A Ltd] indicating their decision that the permission given by the licence would be withdrawn, [B Ltd] were to have a reasonable time to withdraw after which they would become trespassers.

Lord Porter

At 194

It is one thing to say that a limited and temporal licence remains in force until the particular object for which it is given is fulfilled or the definite period of time has elapsed, it is quite a different matter to allege that a licence once given in general terms can never be terminated.

Lord Macdermott

At 206

[T]he conclusion I reach is that in this contract there should be implied a stipulation to the effect that, after the expiration of the first year, the licence might be terminated by the licensors on the expiration of a reasonable notice period duly communicated to the licensees. That, to my mind, is what accords best with the express terms of the contract and the nature of the transaction.

The House of Lords further found that the one-month notice given by A Ltd was a reasonable notice period and so A Ltd, although it had revoked B Ltd's licence, had *not* breached its contract in doing so.

[13] In very rare cases, as a result of A's breach of contract, B can obtain damages based on the gain that A has made by the breach: see *A-G v Blake* [2001] 1 AC 268.

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3.1.2 If A's conduct is a breach, how will a court respond?

We have already seen that, in *Tanner v Tanner*, Lord Denning MR stated that, if approached in time, a court would have issued an injunction to prevent A's breach of B's contractual licence. Lord Uthwatt also considered this question in *Winter Garden*.

Winter Garden Theatre (London) Ltd v Millennium Productions Ltd
[1948] AC 173, HL

Lord Uthwatt

At 202

The settled practice of the courts of equity is to do what they can by an injunction to preserve the sanctity of a bargain. To my mind, as at present advised, a licensee who has refused to accept the wrongful repudiation of the bargain which is involved in an unauthorised revocation of the licence is as much entitled to the protection of an injunction as a licensee who has not received any notice of revocation.

This preference for specifically protecting B's contractual licence (rather than allowing A to breach it and leaving B to claim money from A) can also be seen in cases in which, in contrast to *Tanner* and *Winter Garden*, B has not yet started to make use of A's land.

Verrall v Great Yarmouth Borough Council
[1981] QB 202, CA

Facts: Great Yarmouth Borough Council owned a hall (the Wellington Pier Pavilion) in that seaside town. It made a contractual promise in April 1979 to allow the National Front to use the hall for its two-day national conference in October. Following a change in its political control, the council (A) attempted, in May, to revoke the National Front's licence. Mr Verrall (B), suing on his own behalf and representing all members of that organization, applied for an order forcing A to perform its contractual promise. Such an order was granted. The council appealed unsuccessfully to the Court of Appeal.

Lord Denning MR

At 216

Since the *Winter Garden* case, it is clear that once a man has entered under his contract of licence, he cannot be turned out. An injunction can be obtained against the licensor to prevent his being turned out. On principle it is the same if it happens before he enters. If he has a contractual right to enter, and the licensor refuses to let him come in, then he can come to the court and in a proper case get an order for specific performance to allow him to come in. An illustration was taken in the course of the argument. Supposing one of the great political parties—say, the Conservative Party—had booked its hall at Brighton for its conference in September of this year: it had made all its arrangements accordingly: it had all its delegates coming: it had booked its hotels, and so on. Would it be open to the local council to repudiate that agreement, and say that the Conservative Party could not go there? Would the only remedy be damages? Clearly not. The court would order the council in such a case to perform

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its contract. It would be the same in the case of the Labour Party, or whoever it may be. When arrangements are made for a licence of this kind of such importance and magnitude affecting many people, the licensors cannot be allowed to repudiate it and simply pay damages. It must be open to the court to grant specific performance in such cases.

It should not be assumed, however, that a court will *always* specifically protect B's contractual licence. After all, a court has a discretion as to whether to give B an equitable remedy such as specific performance or an injunction. And, in some circumstances, it may be inappropriate to prevent A from revoking B's contractual licence.

Thompson v Park [1944] KB 408, CA

Facts: Mr Thompson and Mr Park each owned a school. The schools were amalgamated and the new school was set up on the site of Mr Thompson's school, Broughton Hall, near Eccleshall, Staffordshire. Mr Thompson gave Mr Park, and twenty-five of Mr Park's pupils, permission to join the school. The working relationship between Mr Thompson and Mr Park broke down, and Mr Thompson attempted to revoke the licence of Mr Park and his pupils to remain at the school. Having initially left, Mr Park forced his way back onto the premises and refused to leave. Mr Thompson (A) brought proceedings for an injunction ordering Mr Park (B) to leave. A also asked for an interim injunction ordering B to leave before the court determined A's application for an injunction. The Court of Appeal granted the interim injunction.

Goddard LJ

At 409–10

If [B] thought that he had a grievance which could be lawfully asserted the courts were open to him. I am not saying what the result of any application by him would have been, for though this is not the sort of agreement which any court could specifically enforce—for the court cannot specifically enforce an agreement for two people to live peaceably under the same roof—yet, of course, if the contract is broken, [B] has got a common law remedy in damages, which, if he is right, might be heavy. [B], however did not seek the intervention of the court, but took the law into his own hands and remedied the grievances under which he felt he was suffering in a manner which seems to me to have been wholly deplorable, all the more so when one considers that he is in charge of small boys at a preparatory school and ought to be inculcating into them a respect for authority and discipline. It appears to me that on his own showing he has been guilty at least of riot, affray, wilful damage, forcible entry and, perhaps, conspiracy [. . .]

The strength of the argument which was put forward on [B]'s behalf was that, assuming that there had been a breach of contract on the part of [A], [B] had a right to be where he was. That is an entire misconception of the legal position, which was that the defendant was a licensee on the premises. That licence has been withdrawn. Whether it has been rightly withdrawn or wrongly withdrawn matters nothing for this purpose. The licensee, once his licence is withdrawn, has no right to re-enter on the land. If he does, he is a common trespasser.

It is important to separate out two questions, both discussed by Goddard LJ in *Thompson v Park*. The first is whether, if B had applied to court *after* leaving A's land, a court would order

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A to perform his contractual promise to share occupation with B. Goddard LJ's statement is surely correct: '*the court cannot specifically enforce an agreement for two people to live peaceably under the same roof.*'[14] It would be unduly onerous on A to force him to live with B, given the breakdown in their relationship. And B would not receive the full value of his promise: sharing occupation with A, after the two have fallen out, is clearly different from sharing occupation when A and B are on good terms. So, whilst A's action in revoking the licence may well be a breach of contract, B may have to settle for receiving money from A.

The second question is whether, if A revokes his licence in breach of contract, B can then insist on re-entering A's land. Goddard LJ thought not—but it is not clear that this is consistent with the decision in *Verall v Great Yarmouth BC*,[15] or with the reasoning of Viscount Simon in the following extract.

Winter Garden Theatre (London) Ltd v Millennium Productions Ltd
[1948] AC 173

Viscount Simon

At 189

[Viscount Simon referred to cases involving, for example:] the sale of a ticket to enter premises and witness a particular event, such as a ticket for a seat at a particular performance at a theatre or for entering private ground to witness a day's sport. In this last class of case, the implication of the arrangement, however it may be classified in law, plainly is that the ticket entitles the purchaser to enter and, if he behaves himself, to remain on the premises until the end of the event which he has paid his money to witness.

The point is that, even if a court would not order specific performance of A's contractual promise, once A has made such a promise, B does have a *legal right* to be on A's land for the duration of his contractual licence. In other words, even if the contract is not specifically enforced, A is under a contractual *duty* to B to allow B to use the land as promised.

This has important consequences.

Hurst v Picture Theatres Ltd
[1915] 1 KB 1, CA

Facts: On 17 March 1913, a film of Lake Garda[16] was shown at a cinema in High Street Kensington, London, owned by Picture Theatres Ltd. Mr Hurst bought a ticket. He did not misbehave, but was forced to leave by the manager of the cinema, who mistakenly believed that B had not paid for his seat. Mr Hurst (B) claimed that Picture Theatres Ltd (A), through the actions of its employee, had committed the tort of trespass to the

[14] That statement was also approved by Megarry V-C in *Hounslow LBC v Twickenham GD Ltd* [1971] Ch 233, 250. The same concern is also clear in proprietary estoppel cases: when considering how to respond to a successful estoppel claim, a court will not make an order that forces parties who have since fallen out to live together: see *Baker v Baker* (1993) 25 HLR 408.

[15] [1981] 1 QB 202, 216.

[16] It is likely to have been a Kinemacolor film produced in 1910 (entitled *Lake Garda, Italy*), currently held by the Nederlands Filmmuseum and shown at the British Film Institute's Conservation Centre in February 2008.

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person: it had breached its duty not to interfere with B's physical integrity. A argued that, once it had exercised its power to revoke B's licence, B became a trespasser and so A was permitted to use reasonable force to remove B from the land. A argued that even if its action in revoking the licence was a breach of contract, that did not change the fact that, once the licence was revoked, B was a trespasser on A's land and so reasonable force could be used to remove him. The Court of Appeal rejected that argument, affirming the decision of Channell J that B was entitled to substantial damages.

Buckley LJ

At 7

[B] in the present action paid his money to enjoy the sight of a particular spectacle. He was anxious to go into a picture theatre to see a series of views or pictures during, I suppose, an hour or a couple of hours. That which was granted to him was the right to enjoy looking at a spectacle, to attend a performance from its beginning to its end. That which was called the licence, the right to go upon the premises, was only something granted to him for the purpose of enabling him to have that which had been granted him, namely, the right to see. He could not see the performance unless he went into the building. His right to go into the building was something given to him in order to enable him to have the benefit of that which had been granted to him, namely, the right to hear the opera, or see the theatrical performance, or see the moving pictures as was the case here.

At 11

[A] had, I think, for value contracted that [B] should see a certain spectacle from its commencement to its termination. They broke that contract and it was a tort on their part to remove him. They committed an assault upon him in law. It was not of a violent kind, because, like a wise man, [B] gave way to superior force and left the theatre. They sought to justify the assault by saying that they were entitled to remove him because he had not paid. He had paid, the jury have so found. Failing on that question of fact, they say that they were entitled to remove him because his licence was revocable. In my opinion, it was not. There was, I think, no justification for the assault here committed. Under the circumstances it was for the jury to give him such a sum as was right for the assault which was committed upon him, and for the serious indignity to a gentleman of being seized and treated in this way in a place of public resort. The jury have found that he was originally in the theatre as a spectator, that the assault was committed upon him, and that it was a wrongful act.

An earlier decision, *Wood v Leadbitter*,[17] had held to the contrary on the basis that, because a contractual licence does not count as a property right in land, A remains free to revoke it. That approach is, however, impossible to defend; the decision in *Hurst* is clearly correct. A contractual licence is different from a bare licence: B has a liberty to use A's land *and* A is under a contractual duty to B not to revoke that liberty. So, even if A does attempt to revoke the licence by removing B, B's *right* (in Hohfeld's terms, a 'claim right') to be on the land remains. So A's attempt to revoke the licence does *not* turn B into a trespasser. That means that A is *not* allowed to use reasonable force to remove B from the land.

It is important to note that this analysis applies whether or not a court would grant an order of specific performance to protect B's contractual right. That point was made in the following case.

[17] (1845) 13 M & W 838.

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Hounslow London Borough Council v Twickenham GD Ltd
[1971] 1 Ch 233

Megarry V-C

At 254–5

I have said nothing about an ejected licensee's right to claim damages for assault, for such issues do not arise in this case. All that I need say, in order to avoid possible misunderstanding, is that in light of the *Winter Garden* case I find it difficult to see how a contractual licensee can be treated as a trespasser so long as his contract entitles him to be on the land; and this is so whether or not his contract is specifically enforceable. I do not think that the licence can be detached from the contract, as it were, and separately revoked; the licensee is on the land by contractual right and is not as a trespasser. I may add that I say nothing about the rights of licensees against third parties.

It therefore seems clear that even if B's contractual licence would not be protected by an order for specific performance, B nonetheless has a right against A to be on A's land for the duration of his contractual licence. This suggests that the decision in *Hurst v Picture Theatres Ltd* should be the same *whether or not* A's contractual duty to B is specifically enforceable. This means that in a case like *Thompson v Park*, in which B's contractual licence allows him to share occupation of A's land with A, the following position applies if A and B fall out during the period of the contractual licence.

- If A attempts to revoke B's licence in breach of contract and B remains on the land, B does not become a trespasser—so A cannot use reasonable force to remove B from the land. Instead, A needs to apply to court for an order that B must leave. Because A's contractual duty is not specifically enforceable, a court is likely to grant such an order (although A will, of course, have to pay B damages for revoking B's licence in breach of contract).
- If A attempts to revoke B's licence in breach of contract and B is *not* on the land, B cannot force his way back onto the land. Instead, B needs to apply to court for an order that A must allow him back onto the land—but because A's contractual duty is not specifically enforceable, a court is unlikely to grant such an order.

3.2 B's RIGHTS AGAINST X

In the passage from *Hounslow LBC v Twickenham GD Ltd* set out above, Megarry V-C concludes his survey of B's rights against A by stating that: '*I may add that I say nothing about the rights of licensees against third parties*.' It is indeed very important to draw this distinction. For example, if we say that B has a right to be on A's land for the duration of his contractual licence, this means that B has a right *against A* to be on A's land. A thus has a duty not to interfere with B's use of the land. That does *not* mean that a third party, such as X, has a duty to B: after all, A's duty arises as a result of his contractual promise to B, and X has made no such promise.

This means that there is an important difference between a licence, even a contractual licence, and a legal lease. If B has a legal lease then the rest of the world is under a duty to B: for example, we will see in Chapter 22, section 1.1.2, that if X interferes with B's reasonable enjoyment of the land, X commits the tort of nuisance against B. As the House of Lords

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confirmed in *Hunter v Canary Wharf*,[18] however, the tort of nuisance does not protect B if he or she has only a licence.

We noted in section 2.2 above that, even if B only has a bare licence, X will be under a duty to B *if* B acquires a property right by taking physical control of A's land. Clearly, the same is true if B has a contractual licence; in such a case it is not the licence itself that binds X, but rather the property right that B acquires by taking physical control of A's land. The following decision of the Court of Appeal goes further: it assumes that, if A gives B a contractual licence permitting B to take physical control of A's land, X can be under a duty to B even *before* B goes onto A's land.

Manchester Airport plc v Dutton and ors
[2000] QB 133, CA

Facts: The National Trust owned some land adjacent to Manchester Airport. Manchester Airport plc was building a new runway. It needed to ensure that trees on the National Trust's land were cut down to prevent interference with flight paths to and from the new runway. The National Trust (A) gave Manchester Airport plc (B) and its authorized subcontractors permission to go onto the National Trust land to do the necessary work. Before B or its subcontractors entered the land, Mr Dutton (one of a number of environmental protestors) occupied the land with the intention of interfering with the planned work. Manchester Airport plc (B) applied for an order against Mr Dutton (X) for possession of the land, using the special summary procedure provided by Order 113 of the Rules of the Supreme Court.

Laws LJ (with whom Kennedy LJ agreed)

At 147–50

Now, I think it is clear that if [B] had been in actual occupation under the licence and the trespassers had then entered on the site, [B] could have obtained an order for possession; at least if it was in effective control of the land. Clause 1 of the licence confers a right to occupy the whole of the area edged red on the plan. The places where the trespassers have gone lie within that area. [B's] claim for possession would not, were it in occupation, fall in my judgment to be defeated by the circumstance that it enjoys no title or estate in the land, nor any right of exclusive possession as against [A] [. . .]

But if [B], were it in actual occupation and control of the site, could obtain an order for possession against the trespassers, why may it not obtain such an order *before* it enters into occupation, so as to evict the trespassers and enjoy the licence granted to it? As I understand it, the principal objection to the grant of such relief is that it would amount to an ejectment, and ejectment is a remedy available only to a party with title to or estate in the land; which as a mere licensee [B] plainly lacks [. . .]

But I think there is a logical mistake in the notion that because ejectment was only available to estate owners, possession cannot be available to licensees who do not enjoy de facto occupation. The mistake inheres in this: if the action for ejectment was by definition concerned *only* with the rights of estate owners, it is necessarily silent upon the question, what relief might be available to a licensee. The limited and specific nature of ejectment means only that it was not available to a licensee; it does not imply the further proposition that *no*

[18] [1997] AC 665. See further Chapter 22, section 1.1.2.

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remedy by way of possession can now be granted to a licensee not in occupation. Nowadays there is no distinct remedy of ejectment; a plaintiff sues for an order of possession, whether he is himself in occupation or not. The proposition that a plaintiff not in occupation may only obtain the remedy if he is an estate owner assumes that he must bring himself within the old law of ejectment. I think it is a false assumption.

I would hold that the court today has ample power to grant a remedy to a licensee which will protect but not exceed his legal rights granted by the licence. If, as here, that requires an order for possession, the spectre of history (which, in the true tradition of the common law, ought to be a friendly ghost) does not stand in the way. The law of ejectment has no voice in the question; it cannot speak beyond its own limits.

In my judgment the true principle is that a licensee not in occupation may claim possession against a trespasser if that is a necessary remedy to vindicate and give effect to such rights of occupation as by contract with his licensor he enjoys. This is the same principle as allows a licensee who is in de facto possession to evict a trespasser. There is no respectable distinction, in law or logic, between the two situations. An estate owner may seek an order whether he is in possession or not. So, in my judgment, may a licensee, if other things are equal. In both cases, the plaintiff's remedy is strictly limited to what is required to make good his legal right. The principle applies although the licensee has no right to exclude the licensor himself. Elementarily he cannot exclude any occupier who, by contract or estate, has a claim to possession equal or superior to his own. Obviously, however, that will not avail a bare trespasser.

Chadwick LJ (dissenting)

At 146–7

There was no material, in the present case, on which the judge could reach the conclusion that [B] was in de facto possession of the relevant part of [A's land]; and, for my part, I do not think that she did reach that conclusion. She treated the question as one which turned on the construction of the licence. In my view the judge was in error when she held, in a passage in her judgment to which I have already referred, that:

> 'The licence gives the right of possession and this is, I am satisfied, a right of possession which does not give absolute title, but it does nevertheless give a power against trespassers.'

She did not make the distinction, essential in cases of this nature, between a plaintiff who is in possession and who seeks protection from those who interfere with that possession, and a plaintiff who has not gone into possession but who seeks to evict those who are already on the land. In the latter case (which is this case) the plaintiff must succeed by the strength of his title, not on the weakness (or lack) of any title in the defendant.

All three members of the Court of Appeal thus agreed that if X interfered with B's use of A's land *after* B had gone into occupation of the land, B would be able to bring a claim for possession against X. That is certainly the case: it is simply an application of the point made in section 2.2 above—that is, whenever B takes possession of land, whether with the consent of an owner or not, he acquires a legal property right in that land and so the rest of the world comes under a prima facie duty to B not to interfere with B's use of the land. We examined this point in Chapter 8.

But Chadwick LJ and the majority disagreed about the answer in a situation in which, as in *Manchester Airport* itself, X interfered with B's use of A's land *before* B had gone into occupation. There is a strong argument in favour of Chadwick LJ's analysis. The crucial point is

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that, once B takes physical control of A's land—whether under a licence or not—B acquires a legal property right in A's land. Before that point, B has only a contractual right against A: there is no reason why A's contract with B should impose a duty on X.

Swadling makes this point in the following extract.

Swadling, 'Opening the *Numerus Clausus*' (2000) 116 LQ Rev 358

> [. . .] In *Manchester Airport v Dutton* Laws LJ asserted] that no logical distinction can be drawn between a licensee in and a licensee out of possession, so that if the former can bring trespass against third parties, so can the latter. With respect, it would have been appropriate at this point to consider why a licensee in possession is able to bring trespass; the reason is in fact one which cannot apply in the case of a licensee out of possession. The reason why a licensee in possession can bring an action for possession is that he has a right of possession which is completely independent of the licence under which he occupies the land.
>
> Take the deserted wife in *Ainsworth's case* [*National Provincial Bank v Ainsworth*[19]—see the discussion in section 2.2 above]. She is, we are told, entitled to sue those who interfere with her possession of the matrimonial home, from which it follows that she has a right to the possession of that matrimonial home. But from where does her right to possession spring? Not from her licence to be on the premises, for that is a right which the House of Lords held bound the husband alone. It must therefore be some other event which creates this right of possession [. . .] and this other event is her unilateral act of taking possession of the house. In other words, her right of possession arises from the fact of her possession [. . .]
>
> The error into which, with respect, Laws L.J. falls is in failing to notice that a contractual licensee in occupation of land has rights derived from two separate sources, some from the contract, some from the fact of possession. Those derived from the contract prevent the licensor from denying him possession of the land. But those rights, because of the doctrine of privity, and notwithstanding the recent reform of that doctrine, bind the licensor alone. It is the rights derived from the second source, from the fact of possession, which bind third parties [. . .] There is, therefore, a distinction which does still need to be drawn between a plaintiff whose right to occupy the land in question arises from title and one whose right arises from the contract alone.

It is thus possible to disapprove of the decision of the Court of Appeal in *Manchester Airport plc v Dutton*. Indeed, it is interesting to compare it to the decision of in *Hill v Tupper*,[20] which we examined in Chapter 4, section 1. In that case, the Basingstoke Canal Company (A) gave Mr Hill (B) an 'exclusive' contractual licence to hire boats out on the canal. The Exchequer Chamber made clear that A's contract with B did *not* give B a legal property right and so did not impose a duty to B on Mr Tupper (X), who had also hired out boats on the canal. So, if Mr Hill wanted to stop Mr Tupper from hiring out boats, he had to ask or force the Canal Company, as owner of the canal, to assert its property right against Mr Tupper.

The same analysis should apply in *Manchester Airport plc v Dutton*: the airport should use its contract with the National Trust to ask or force the National Trust to use its property right, as owner of the land, against Mr Dutton and the other protestors. The interesting point, of course, is that at least some members of the National Trust may have refused to support such an action against the protestors.[21]

[19] [1965] AC 1175. [20] (1863) 2 H & C 122.

[21] See McFarlane, *The Structure of Property Law* (2008), p 345, fn 22.

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In *Mayor of London v Hall and others*,[22] the Mayor of London sought an order for possession of Parliament Square Gardens in London; the defendants had there set up a camp that they named 'Democracy Village'. One of the arguments made by the defendants was that, as legal title to the Gardens vested in the Crown, the Mayor had no property right on which he could base a claim for possession. In the end, the Court of Appeal upheld the possession order granted to the Mayor on the basis that ss 384 and 385 of the Greater London Authority Act 1999 gave the Mayor a statutory right to seek possession of the land. In an *obiter* part of the court's judgment, Lord Neuberger MR also considered the defendant's argument that the reasoning of the majority in *Dutton* could not be relied on by the Mayor, as authorities such as *Hill v Tupper*[23] had not been cited to the court in *Dutton*. Lord Neuberger MR noted that '*if the law governing the right to claim possession is governed by the same principles as those that governed the right to maintain a claim in ejectment, the [defendant's] argument seems very powerful.*'[24] However, his Lordship went on to say that '*there is obvious force in the point that the modern law relating to possession claims should not be shackled by arcane and archaic rules relating to ejectment, and, in particular, that it should develop and adapt to accommodate a claim by anyone entitled to use and control, effectively amounting to possession, of the land in question [. . .]*'.[25] Lord Neuberger MR thus granted his approval to the basic, but conceptually controversial, approach in *Dutton*: that if B has a right to use and occupy land, B should be able to remove a trespasser from that land, even if B's right is not a property right.[26]

The decision in *Manchester Airport plc v Dutton* could also be seen as part of a deliberate move to increase the protection given to a contractual licensee against third parties. Swadling criticizes the decision for blurring the divide between personal rights and property rights, but others see the decision as taking a welcome step towards allowing (at least some) contractual licences to count as property rights.[27] To that extent, one's view of the *Manchester Airport* decision depends on one's view as to the crucial question, to be examined in section 3.3.2 below, as to whether a contractual licence should count as a property right in land.

3.3 B'S RIGHTS AGAINST C

If B has a contractual licence and A then gives C an inconsistent right—for example, by transferring his freehold to C—we have an example of the priority triangle (Figure 14).

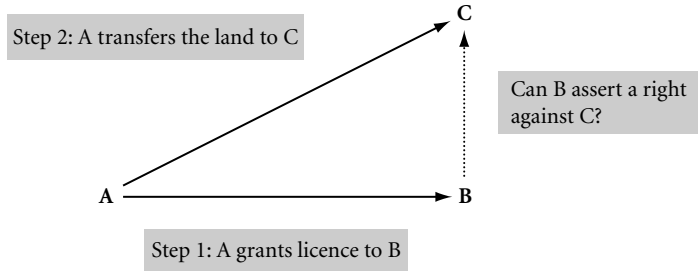

Figure 14 Contractual Licences and the Priority Triangle

[22] [2010] EWCA Civ 817. [23] (1863) 2 H & C 122. [24] [2010] EWCA Civ 817, [26].
[25] Ibid, [27].
[26] For criticism of Lord Neuberger MR's approach in *Mayor of London v Hall*, see Lochery, 'Pushing the Boundaries of *Dutton*?' [2011] Conv 74.
[27] See Gray and Gray, *Elements of Land Law* (5th edn, 2009), [10.5.13]–[10.5.15].

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As we have seen, there are two ways in which B *may* have a right against C: firstly, it may be that C has acted in such a way as to give B a *new, direct right* against C; secondly, it may be that B has a *pre-existing property right* that he can assert against C.

3.3.1 Direct rights

In Chapter 6, section 2, we considered some of the means by which B can show that he has acquired a new, direct right against C. In this section, we will look at the principles most likely to be relevant where, prior to his dealings with C, A has given B a contractual licence.

The tort of procuring a breach by A of A's contract with B

As we noted in Chapter 6, section 2.4, the existence of a contract between A and B imposes a duty on the rest of the world not to procure a breach by A of A's contractual duty to B.[28] For example, if A has a contract to perform at B's theatre, and C, knowing about that contract, persuades A to breach it and to perform at C's theatre instead, C commits a wrong against B.[29] There is a very difficult question as to whether C commits this tort if he simply knows about A's contractual licence with B, and, despite that, goes ahead and acquires a right from A with the intention of *not* allowing B to continue using A's land. Megaw LJ noted the possibility, in passing, in *Binions v Evans*.[30] But his Lordship went on to note that: '*However, it may be that there are special technical considerations in the law relating to land that would require to be reviewed before one could confidently assert that the ordinary principles as to the protection of known contractual rights would apply.*'

Certainly, as Roger Smith has pointed out,[31] there is a fear that allowing the tort to apply would make it far too easy for B to assert a direct right against C, and would thus undermine the protection due to a party acquiring a right in land. Indeed, Smith suggests that '*where real property principles accord priority to a contract or conveyance over an earlier contract, it should not be open to the earlier contracting party to rely on tort*'.[32]

On that view, the tort should *not* be able to provide any protection to B's contractual licence, because such a right does not currently count as a property right in land. There is, however, at least one case in which the tort was applied to a case involving land in relation to which B did not have a property right. In *Esso Petroleum Co Ltd v Kingswood Motors Ltd and ors*,[33] Kingswood Motors Ltd (A) operated a petrol station. Esso Petroleum Co Ltd (B) supplied petrol to A. A was under a contractual duty to B: (i) to notify B before selling the petrol station; and (ii) to ensure that any purchaser also entered into an agreement to use only fuel supplied by B. A breached this duty by selling to Impact Motor Ltd (C) without taking those steps. It was held that, because C knew about B's contract with A, C had committed the tort of procuring a breach of contract. In fact, Bridge J ordered C to transfer the petrol station back to B, so that A could continue to assert its contractual rights against B.

The decision is discussed in the following extract, which makes clear that *Esso v Kingswood* is not a standard contractual licence case.

[28] See *OBG Ltd v Allan* [2007] 2 WLR 920.
[29] See *Lumley v Gye* (1853) 2 E & B 216.
[30] [1972] Ch 359, 371.
[31] 'The Economic Torts: Their Impact on Real Property' (1977) 41 Conv 318.
[32] Ibid, 329.
[33] [1974] QB 142.

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McFarlane, *The Structure of Property Law* (2008, p 438)

> [T]he courts *are* willing to apply the wrong [of procuring a breach of contract] even where land is concerned. This is demonstrated by *Esso Petroleum Co Ltd v Kingswood Motors Ltd* [. . .] This willingness to apply the wrong even where land is concerned seems correct. The purpose of the wrong is to protect B's contractual right against A: it should therefore apply *whenever* B has a contractual right against A. It seems that the wrong is based on the need for the rest of the world to respect B's contractual relationship with A. There is no obvious reason why contractual rights relating to the use of land should attract less protection. For example, let's say that A, a cinema owner, makes a contractual promise to allow B to run a confectionary stall from part of that land for five years. That promise gives B a contractual licence: a personal right against A. However, if C, a competitor of B, pays A money to persuade A to breach the contract by removing B from the land, C commits the wrong of procuring a breach of the contract.
>
> However, this does *not* mean that C will necessarily commit the wrong if, in [a standard contractual licence case] he goes ahead and buys A's Freehold and then seeks to remove B from the land. There is an important difference between [a standard contractual licence case] and the situation in *Kingswood Motors*. In the latter case, A was under an explicit contractual duty *not to transfer his Freehold to C* unless certain conditions were met. A therefore breached his contractual duty to B *as soon as* he transferred that right to C: that is, as soon as A sold the land to C. C, by participating in a sale that he knew to breach those conditions, was actively facilitating A's breach of contract. In [a standard contractual licence case], however [. . .] A has *not* made a contractual promise not to transfer his Freehold unless certain conditions are met. As a result, the sale to C, *by itself*, does *not* breach A's contractual duty to B: that duty is breached only at a later stage: when C asserts his right and prevents B from using the land.

This analysis *may* provide a way in which to justify the courts' apparent reluctance to apply the tort of procuring a breach of contract in a standard contractual licence case. After all, as we saw in Chapter 6, section 2.6, the courts have been careful to ensure that the means by which B can acquire a direct right are not expanded to the point at which C can be bound simply as a result of his knowledge of B's pre-existing personal right against A.

The Contract (Rights of Third Parties) Act 1999

The presence of a contractual licence between A and B may have a different, more significant impact on B's chances of acquiring a direct right against C. We noted in section 2.3.2 above that, if B has a bare licence, it is very unlikely that he will acquire such a right: C simply has no incentive to act in such a way as to give B such a right. But things may be different where B has a contractual licence. For example, let us say that A makes a contractual promise to B to allow B to make a particular use of A's land for five years. Two years later, A plans to sell the land to C. A knows that if he sells the land to C and C stops B from using the land, A will be in breach of his contractual promise to B. A will therefore have to pay money to B to put B in the position in which he would have been had A kept his promise to allow B to use the land for the full five years.[34] This gives A a reason to insist that C, when buying the land, makes a promise to allow B to continue using the land until the five years are up.

[34] See *King v David Allen & Sons Billposting Ltd* [1916] 2 AC 54, HL.

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As we saw in Chapter 6, section 2.2, the Contract (Rights of Third Parties) Act 1999 allows B, in certain circumstances, to acquire a direct right against C as a result of a contractual promise made by C to A. If C makes a contractual promise to A to allow B to continue to use the land for the remainder of the five years, that promise clearly 'purports to confer a benefit' on B. Section 1(1)(b) of the 1999 Act can therefore operate to give B a direct right against C *even though*: (i) C's promise to allow B to use the land is made to A not B; and (ii) consideration for the promise is provided by A not B. Section 1(5) of the 1999 Act means that the remedies available to B as against C can then be determined by applying the principles (examined in section 3.1 above) that govern the remedies available to B against A. It is true that, under s 2 of the 1999 Act, A and C may have a power to vary C's contractual promise and hence to weaken or remove B's right against C.[35] In our example, however, there is no reason for A to wish to do so: A's aim is to give B a right against C that will absolve A from having to pay damages for breach of contract to B.

For the 1999 Act to apply, C must make a *contractual* promise to A. If, as in our example, C's promise is made as part of the contractual deal in which A promises to transfer his land to C, C's promise only counts as a contractual promise if the formality rule set out by the Law of Property (Miscellaneous Provisions) Act 1989 (LP(MP)A 1989) is satisfied. We examined that rule in detail in Chapter 7, section 3. For present purposes, it suffices to note that if, when acquiring his right from A, C makes an *oral* promise A to allow B to continue using A's land, that promise will *not* be contractually binding on C.[36] If so, B will be unable to rely on the 1999 Act to acquire a direct right against C—but B may be able to rely on a different means of enforcing C's promise.

The 'constructive trust' principle in Binions v Evans

In Chapter 6, section 2.3, we examined cases in which B acquired a direct right against C as a result of C's promise to A *without* needing to rely on the Contract (Rights of Third Parties) Act 1999. One such case was *Binions v Evans*.

Binions v Evans
[1972] Ch 359, CA

Facts: See Chapter 6, section 2.3, for the facts of the case. We saw that Lord Denning MR took the view that, even if Mrs Evans (B) had no legal or equitable property right that she could assert against Mr and Mrs Binions (C), the Binions could still be prevented from removing Mrs Evans from the cottage. That reasoning was based on the fact that, when acquiring a freehold of the cottage from the trustees of the Tredegar Estate (A), the Binions had made a promise to allow Mrs Evans to remain in the cottage for the rest of her life.

[35] There are limits to that power—e.g. it is lost if B has 'communicated his assent' to C's promise to C; if C is aware that B has relied on C's promise; or if B has relied on the promise and C could reasonably be expected to have foreseen such reliance: see s 2(1) of the 1999 Act.

[36] C's oral promise may be contractually binding if it seen as separate from the contract dealing with C's acquisition of a right from A and so counts as a 'collateral contract'. As we saw in Chapter 7, section 3.5, however, the courts are generally reluctant to view such promises as collateral to the main contract between A and C.

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Lord Denning MR

At 367

[A] stipulated with [C] that [C was] to take the house 'subject to' [B's] rights under the agreement. [A] supplied [C] with a copy of the contract: and [C] paid less because of [B's] right to stay there. In these circumstances, this court will impose on [C] a constructive trust for [B's] benefit: for the simple reason that it would be utterly inequitable for [C] to turn [B] out contrary to the stipulation subject to which [C] took the premises. That seems to me clear from the important decision of *Bannister v Bannister*,[37] which was applied by the judge and which I gladly follow.

It is worth noting that there are a number of other possible explanations for the result in *Binions v Evans*. Firstly, the majority of the Court of Appeal (Megaw and Stephenson LJJ) found that B's initial agreement with A gave B more than a contractual licence: she had an equitable life interest in the land and that equitable interest was capable of binding C. On that analysis, the case has nothing to do with contractual licences.

Secondly, Lord Denning MR also contended that B's contractual licence counted, by itself, as an equitable interest in land. We will examine that argument in the next section. As we will see, it is, to say the least, somewhat controversial: it is therefore no surprise that Lord Denning MR also considered whether B had a new, direct right against C.

It is that suggestion on which we will focus here: the idea that B acquired a direct right against C, because, given that C acquired the land on the basis of allowing B to remain in occupation, it would be 'utterly inequitable' if C were now free to go back on that promise. As we saw in Chapter 6, section 2.3, that suggestion is consistent with a number of cases in which B acquires a direct right against C where:

- C acquires a property right in land from A; *and*
- prior to that, C made a promise to A to give B a right to make some use of that land; *and*
- as a result of that promise, A allowed C to acquire the property right in the land, or allowed C to acquire that right for a lower price.

As we noted in Chapter 6, section 2.3 (and as we saw in Chapter 11, section 4), the precise basis of the principle applied in these cases has been contested. Nonetheless, the following extract, from a Court of Appeal decision, confirms that this principle may be used in a case in which B initially has a contractual licence from A.

Ashburn Anstalt v Arnold
[1989] Ch 1, CA

Facts: Mr Arnold had a headlease of business premises. Arnold & Co went into possession of the land under a sublease from Mr Arnold. Cavendish Land Co Ltd then acquired the freehold of the land subject to Mr Arnold's headlease. Mr Arnold contracted to sell his headlease to Matlodge Ltd, who also contracted to buy Arnold & Co's sublease. As part of that sale, Matlodge made a contractual promise to Arnold & Co that it could

[37] [1948] 2 All ER 133.

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remain in occupation of the land until it was needed for redevelopment. Cavendish Land Co Ltd then acquired the benefit of Matlodge's rights to both the headlease and the sublease, also taking on Matlodge's contractual duties to Arnold & Co. As a result, Cavendish now held the freehold free from the headlease and sublease, whilst Arnold & Co remained in occupation of the land. Cavendish was later taken over by Legal & General Assurance Society Ltd, which also took on the contractual duties to Arnold & Co. Legal & General (A) then sold its freehold to Ashburn Anstalt (C). Under the terms of the sale contract, C took its freehold 'subject to' the contractual rights of Arnold & Co (B) against A, arising as a result of the original agreement with Matlodge. C had no plans to redevelop the land, but sought possession from B. B's first argument was that its initial agreement with A gave B a property right (a lease) that was binding on C. As we will see in Chapter 22, section 1.1.3, the Court of Appeal accepted that argument and found in B's favour. The Court of Appeal also went on to consider B's argument that, even if its agreement with A gave it only a contractual licence, B could assert that contractual licence against C. As we will see in section 3.3.2, the Court of Appeal rejected that argument. It was pointed out, however, that, in some circumstances, a party with a contractual licence can acquire a right against C as a result of a promise made by C to A.

Fox LJ

At 25–6

It is said that when a person sells land and stipulates that the sale should be 'subject to' a contractual licence, the court will impose a constructive trust upon the purchaser to give effect to the licence [. . .]

We do not feel able to accept that as a general proposition. We agree with the observations of Dillon J. in *Lyus v. Prowsa Developments Ltd* [1982] 1 W.L.R. 1044, 1051:

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

The court will not impose a constructive trust unless it is satisfied that the conscience of the estate owner is affected. The mere fact that that land is expressed to be conveyed 'subject to' a contract does not necessarily imply that the grantee is to be under an obligation, not otherwise existing, to give effect to the provisions of the contract. The fact that the conveyance is expressed to be subject to the contract may often, for the reasons indicated by Dillon J., be at least as consistent with an intention merely to protect the grantor against claims by the grantee as an intention to impose an obligation on the grantee. The words 'subject to' will, of course, impose notice. But notice is not enough to impose on somebody an obligation to give effect to a contract into which he did not enter. Thus, mere notice of a restrictive covenant is not enough to impose upon the estate owner an obligation or equity to give effect to it [. . .]

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> [. . .] In matters relating to the title to land, certainty is of prime importance. We do not think it desirable that constructive trusts of land should be imposed in reliance on inferences from slender materials. In our opinion the available evidence in the present case is insufficient. The deputy judge, while he did not have to decide the matter, was not disposed to infer a constructive trust, and we agree with him.
>
> So far as [A and B's initial agreement] is concerned, it created either a lease or some form of licence. If it created a lease, there was no need to impose any obligation upon [C] [. . .] If, on the other hand, the agreement created some form of licence and [A] was insisting that [C] assume an obligation to give effect to [A and B's initial agreement], it seems to us highly unlikely that it would have relied upon such vague words as 'subject to' without the addition of an express obligation. Thus, if [A] was concerned about the possibility of claims against either [A's predecessor] or itself, we would have expected a clearly expressed obligation imposed on [C] [. . .] [but] we see no indication in the 1973 agreement that [A] was concerned with the protection of [B] [. . .]
>
> In general, we should emphasise that it is important not to lose sight of the question: 'Whose conscience are we considering?' It is [C's], and the issue is whether [C] has acted in such a way that, as a matter of justice, a trust must be imposed. For the reasons which we have indicated, we are not satisfied that it should be.

This discussion makes the important point that B will not acquire a direct right against C *simply* because C acquires his land 'subject to' any rights that B may have against A. The key point of C's promise must be to protect B from a claim by C, not to protect A from a claim by C.

The provisions of the 1999 Act make the same distinction: under s 1, B acquires a right against C only if C's promise to A 'purports to confer a benefit' on B. So, the crucial question is whether C, when acquiring his land, made an express or implied promise to give B a *new* right.

As we saw in Chapter 6, section 2.3, Sir Christopher Slade summed up the crucial question when giving the judgment of the Court of Appeal in the following case.

Lloyd v Dugdale
[2002] 2 P & CR 13

Sir Christopher Slade

At [52]

In deciding whether or not the conscience of the new estate owner is affected in such circumstances, the crucially important question is whether he has undertaken a new obligation, not otherwise existing, to give effect to the relevant incumbrance or prior interest. If, but only if, he has undertaken such a new obligation will a constructive trust be imposed.

There are two key questions about this principle. The first is whether it makes sense for B to acquire a direct right against C in these cases. We examined that question in Chapter 6, section 2.3, and also considered it in Chapter 11, section 4. Here, it is perhaps enough to note an argument made by Bright.

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Bright, 'The Third Party's Conscience in Land Law' [2000] Conv 398, 417

> There are situations in which [B] ought, as a minimum, to be able to prevent [C] from suing in breach of the promise made to A. To allow [C] to succeed would effectively mean that the courts are sanctioning [C] to do the very thing that he promised not to do. This does not seem proper, nor does it seem just.

The second key question is whether it makes sense for B to acquire a right against C *under a constructive trust*. It was assumed by Lord Denning MR in *Binions* itself, and by the Court of Appeal in *Ashburn Anstalt v Arnold*, that, if the principle applies, B's right arises under such a trust. We examined constructive trusts in more detail in Chapter 11, section 4. As we saw in Chapter 5, sections 1 and 3, to say that C holds 'on trust' for B means that C (the trustee) has a right (the trust property or subject matter of the trust) and is under a duty to use that right for the benefit of B (or for B and others—that is, for the beneficiaries), as well as a duty not to use that right for C's own benefit.[38] In cases such as *Binions*, it is very difficult to see how the facts fit with that basic pattern.

Swadling, 'Property' in *English Private Law* (2nd edn, ed Burrows, 2007, [4.126])

> [I]t is not clear what might have been the subject matter of this constructive trust [i.e. the constructive trust in *Binions*]. The subject matter can hardly have been the title to the cottage for, were that to be so, it would have given [B] far more than she was ever intended to have. And it cannot have been the benefit of the licence either, for that was already vested in her, and it was [C] who we are told [is] the trustee. It might be argued that the subject matter of the trust was the benefit of the covenant in the conveyance of the fee simple title under which [C] promised [A] that [it] would respect [B's] rights, and, further, that [C's] liability for breach of this covenant could be enforced by [B] by compelling [A] to sue on it. But this analysis does not work either, for the benefit of the promise was in the hands of [A], not [C].

Why, then, does Lord Denning MR describe B's right in *Binions* as arising under a constructive trust? One explanation is that, as is evident from the passage from *Binions* set out above, his Lordship relied on the decision of the Court of Appeal in *Bannister v Bannister*.[39] In that case, as we saw in Chapter 6, section 2.3, C, when buying a freehold from A, had promised to hold that freehold *on trust* for A (only two parties were involved). So, when forcing C to keep that promise, the Court of Appeal found that C held his land on constructive trust for A. As we saw in Chapter 11, section 4.3.1, it makes sense to say that a trust arose in that case: after all, the court simply enforced C's promise, and C's promise was to hold his freehold on trust. In *Binions*, however, C had *not* promised to hold any rights on trust; he had simply promised to allow B to remain in occupation of the land. So, as confirmed in the following extracts, there should be no trust in a case such as *Binions*.

[38] It is possible for there to be trusts in which C, as well as being a trustee, is also a beneficiary of the trust. In such a case, C is permitted to use the trust property for his own benefit (to the extent that he is a beneficiary).

[39] [1948] 2 All ER 133.

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Bright, 'The Third Party's Conscience in Land Law' [2000] Conv 398, 402

> [T]he *Binions* [. . .] use of the constructive trust raises conceptual difficulties which do not occur with the true *Bannister* constructive trust. With trusts, the legal and equitable titles are owned by different persons, and the trustee owes fiduciary duties. This is the model found in *Bannister* [. . .] where [C] holds the legal title subject to a (proprietary) beneficial interest for [A]. But if we look at *Binions*, [C] held the ownership interest, which was not split between legal and equitable title, and what was held on trust was [B's] 'right to remain'.

McFarlane, 'Constructive Trusts Arising on a Receipt of Property Sub Conditione' (2004) 118 LQR 667, 691

> [T]he fact that B can acquire a right against C will not always justify the imposition of a constructive trust. In cases where C's undertaking is to recognise that B has a beneficial interest in the property [. . .] then a constructive trust of the property will be appropriate. [. . .] Where C's undertaking is to confer a personal right on B, then a constructive trust of the property C has received will not be appropriate, as it will give B a property right. Rather, B's personal right should be enforced directly.

On this analysis, we have to assess the nature of C's promise. If C promises to hold his freehold on trust for B, as in *Bannister*, it is appropriate for C to hold subject to a constructive trust and B thus acquires an equitable interest in C's land. If C instead simply promises to allow B to remain on the land, as in *Binions*, C comes under a duty to honour B's licence. In such a case, there is no need for a trust. After all, when A makes a promise to B to allow B to use A's land, there is no trust; there is simply a licence.

In a case such as *Binions*, the use of the 'constructive trust' label can cause confusion. In particular, it may be very important if C, having promised to honour B's licence, then transfers his land to C2.[40] As we saw in Chapter 6, section 3, it is then very important to know if the direct right that B acquired against C is a personal right or, instead, a legal or equitable property right. *If* C held the land subject to a constructive trust in B's favour, as *Binions* suggests, then B's direct right against C is an equitable property right and is therefore prima facie binding on C2. But the answer suggested by the extracts above is that, if C promised simply to honour B's licence, there should be no constructive trust. On that view, B will only be protected against C2 if he can show that he has a *second* direct right, arising because of *C2's* conduct.[41]

3.3.2 A pre-existing property right?

The current position

We saw, in section 2.2, that a bare licence does not count as a property right—but does it make a difference if A is under a contractual duty to B not to revoke B's licence?

[40] Such a situation was inconclusively considered by the Court of Appeal in *Chattey v Farndale Holdings Inc* [1997] 1 EGLR 153.

[41] For further discussion, see McFarlane, *The Structure of Property Law* (2008), pp 434–5.

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King v David Allan & Sons, Billposting Ltd
[1916] 2 AC 54, HL

Facts: Mr King owned land in Madras Place, Dublin.[42] He planned to build a cinema on the land and made a contractual promise to the David Allan & Sons billposting company allowing it to display posters on the wall of the cinema, when built. Mr King then gave a 40-year lease of the site to the Phibsboro' Picture House company. The cinema was completed in May 1914. In June 1924, David Allan & Sons (B) attempted to display its posters on its wall, but the Phibsboro' Picture House company (C) prevented B from doing so. B brought a claim for breach of contract against Mr King (A). A claimed that its action had caused B no loss, because B could simply assert its contractual licence against C. A decision in favour of B was affirmed by the Court of Appeal in Ireland. A appealed unsuccessfully to the House of Lords.

Lord Buckmaster LC

At 61

There is a contract between [A] and [B] which creates nothing but a personal obligation. It is a licence given for good and valuable consideration and to endure for a certain time. [. . .][T]he sole right is to fix bills against a flank wall, and it is unreasonable to attempt to construct the relationship of landlord and tenant or grantor and grantee of an easement out of such a transaction, and I find it difficult to see how it can be reasonably urged that anything beyond personal rights was ever contemplated by the parties. Those rights have undoubtedly been taken away by the action on the part of [C], who has been enabled to prevent [B] from exercising [its] rights owing to the lease granted by [A], and [A] is accordingly liable in damages, although it was certainly not with his will, and indeed against his own express desire, that [C] has declined to honour his agreement.

Earl Loreburn

At 62

But we must look at the [agreement between A and B], and it seems to me that it does not create any interest in land at all; it merely amounts to a promise on the part of [A] that he would allow the other party to the contract to use the wall for advertising purposes, and there was an implied undertaking that he would not disable himself from carrying out his contract. Now [A] has altered his legal position in respect of his control of this land. Those to whom he granted the lease have disregarded his wishes and refused to allow his bargain to be carried out, and they have been practically enabled to do so by reason of the demise that he executed. In these circumstances it seems to me that there has been a breach in law of the contract of July 1, and [A] has disabled himself from giving effect to it as intended by parting with his right to present possession.

In *King*, the House of Lords thus made clear that the contractual licence is *not* on the list of property rights in land. As a result, the contractual licence given to B by A was *not* capable of binding C, a successor in title to A. Section 1 of the Law of Property Act 1925 sets out the list of legal property rights in land; the contractual licence is not included; as we saw in Chapter

[42] Madras Place was the base of Antoni Rabaiotti, whose ice-cream car is mentioned in Joyce's *Ulysses* (1922) ch 10. Joyce himself was a driving force behind *The Volta*, Dublin's first permanent cinema, which opened in 1909 and closed in 1910.

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5, section 5.4, s 4(1) of the Act appears to state that a court cannot add to the list of equitable interests in land recognized at the time of the 1925 Act. So, because the contractual licence was not recognized as an equitable property right in land before the passing of the 1925 Act, it seems clear that it cannot be recognized as such after that Act. This point is forcefully made by Briggs:[43] '*If contractual licences are to bind purchasers as proprietary interests, then they must be shown so to have existed in pre-1926 land law (and* King v David Allen *makes that impossible) or section 4 must be conjured out of existence.*'

This orthodox position continued to operate—it was, for example, confirmed by the Court of Appeal in *Clore v Theatrical Properties Ltd*[44]—until the judgment of Denning LJ in the following case.

Errington v Errington & Woods
[1952] 1 KB 290, CA

Facts: Mr Errington bought a house in Milvain Avenue, Newcastle, as a home for his son and daughter-in-law. Mr Errington paid £250 and the remaining £500 of the purchase price was financed by a mortgage loan. The mortgage instalments were paid by the son and daughter-in-law, who occupied the land. Mr Errington (A) promised the son (B1) and daughter-in-law (B2) that they could remain in occupation as long as they paid the mortgage instalments. He also promised them that, when all of the instalments were paid, the land would be theirs. A died and B1 left the home, moving in with A's widow, his mother. B2 remained in occupation. A's widow sought possession of the house from B2. The county court judge dismissed that claim for possession. A's widow unsuccessfully appealed to the Court of Appeal.

Denning LJ

At 295

Ample content is given to the whole arrangement by holding that [A] promised that the house should belong to the couple as soon as they paid off the mortgage. The parties did not discuss what was to happen if the couple failed to pay the instalments to the building society, but I should have thought it clear that, if they did fail to pay the instalments, [A] would not be bound to transfer the house to them. [A's] promise was a unilateral contract—a promise of the house in return for their act of paying the instalments. It could not be revoked by him once the couple entered on performance of the act, but it would cease to bind him if they left it incomplete and unperformed, which they have not done. If that was the position during [A's] lifetime, so it must be after his death. If [B2] continues to pay all the building society instalments, [B1 and B2] will be entitled to have the property transferred to them as soon as the mortgage is paid off; but if [B2] does not do so, then the building society will claim the instalments from [A's] estate and the estate will have to pay them. I cannot think that in those circumstances [A's] estate would be bound to transfer the house to them, any more than the [A] himself would have been.

At 298–9

[I]t seems to me that, although the couple had exclusive possession of the house, there was clearly no relationship of landlord and tenant. They were not tenants at will but licensees.

[43] 'Contractual Licences: A Reply' [1983] Conv 285, 290–1.

[44] [1936] 3 All ER 483, CA.

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They had a mere personal privilege to remain there, with no right to assign or sub-let. They were, however, not bare licensees. They were licensees with a contractual right to remain. As such they have no right at law to remain, but only in equity, and equitable rights now prevail. I confess, however, that it has taken the courts some time to reach this position. At common law a licence was always revocable at will, notwithstanding a contract to the contrary: *Wood v Leadbitter*.[45] The remedy for a breach of the contract was only in damages. That was the view generally held until a few years ago [...] The rule has, however, been altered owing to the interposition of equity.

Law and equity have been fused for nearly 80 years, and since 1948 it has been clear that, as a result of the fusion, a licensor will not be permitted to eject a licensee in breach of a contract to allow him to remain: see *Winter Garden Theatre v. Millennium Productions Ltd*,[46] *per* Lord Greene, and in the House of Lords *per* Lord Simon [...] This infusion of equity means that contractual licences now have a force and validity of their own and cannot be revoked in breach of the contract. Neither the licensor nor anyone who claims through him can disregard the contract except a purchaser for value without notice [...]

The actual decision in *Errington* can be justified on a number of different grounds.[47] For example, A had made a contractual promise to transfer his land to B1 and B2. As we noted in Chapter 5, section 5.2, such a promise is acknowledged to give rise to an equitable property right, often known as an 'estate contract' (see Chapter 9 for more details). So there was no need for B2 to rely only on her contractual licence. Nonetheless, the reasoning of Denning LJ is important, because it constitutes one attempt to turn the contractual licence into an equitable property right. His Lordship's reasoning is based on the fact that a court will often protect B's contractual licence by ordering A not to revoke that licence in breach of his contract with B. Lord Denning assumes that B therefore has a right to use A's land for the duration of his contract, and so B has a right not only against A, but also in relation to A's land.

Whilst it has found some academic[48] and judicial[49] support, there is, however, a clear flaw in Denning LJ's argument.

McFarlane, 'Identifying Property Rights: A Reply to Mr Watt' [2003] Conv 473, 475

[Denning LJ's argument] misunderstands the true effect of the availability of specific performance on the proprietary status of a right: it treats something which is at most a *necessary* condition of a right to use property's being proprietary as a *sufficient* condition of that consequence. When deciding if specific performance is available against A, a court is simply deciding on the most appropriate remedy to give in response to B's clear contractual right against A. In so doing, the court will have to balance the various interests of A and B and will consider, for example, any practical difficulties which may prevent specific performance of the contract and the adequacy of damages as a means to protect B's interests. If, in general, specific performance is not granted in cases where B has a particular type of right to use property, that right is unlikely to be viewed as proprietary—if B's enjoyment of the property itself does not merit protection as against A, the party who made a contractual promise to B, then there seems to be little reason why B's right to use the property should be capable of enduring

[45] (1845) 13 M & W 838.
[46] [1948] AC 173, 191.
[47] As noted by Fox LJ in *Ashburn Anstalt v Arnold* [1989] Ch 1, 17.
[48] See Watt, 'The Proprietary Effect of a Chattel Lease' [2003] Conv 61.
[49] See *per* Browne-Wilkinson V-C in *Bristol Airport v Powdrill* [1990] Ch 744, 759.

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against C. However, the mere fact that specific performance is available against A does not prove that B's right *must* be proprietary. The question of whether to confer proprietary status on a right involves considerations additional to those addressed when deciding that specific performance is available against A. The needs of B must be balanced not just against those of A but also against those of actual and potential third parties. Most obviously, B must show why he should be protected as against a party who, unlike A, has made no contractual promise to him. Further, B's needs must be strong enough to overcome the disadvantages inherent in allowing the contract between A and B to impose a burden on the property and hence to restrict the ease of its transfer. This is not to say that no initially contractual right can ever gain proprietary status, but rather that the concerns to be addressed before allowing such a shift are additional to, and more serious than, those to be overcome before awarding B specific performance against his contractual partner. Hence, the mere fact that B can gain specific performance against A does not demonstrate that B's right has the proprietary status it needs to be protected from interference by C.

Lord Wilberforce also pointed out this flaw in Denning LJ's argument.

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

Lord Wilberforce

At 1253

[T]he fact that a contractual right can be specifically performed, or its breach prevented by injunction, does not mean that the right is any the less of a personal character or that a purchaser with notice is bound by it: what is relevant is the nature of the right, not the remedy which exists for its enforcement.

As we saw in Chapter 9, there is a principle (it can be called the 'doctrine of anticipation') that allows B to acquire an equitable interest in land if A is under a specifically enforceable contractual duty to give B a legal estate or interest in land. But that principle cannot apply if A's contractual duty is simply not to revoke a licence: in such a case, there is no eventual grant of a legal property right for equity to anticipate.[50] It is therefore no surprise that, in the following case, the Court of Appeal rejected B's attempt to rely on *Errington* in order to show that a contractual licence could bind a third party.

Ashburn Anstalt v Arnold
[1989] Ch 1, CA

Fox LJ

At 21–2

But there must be very real doubts whether *Errington* can be reconciled with the earlier decisions of the House of Lords in *Edwardes v. Barrington*[51] and *King v. David Allen and Sons*

[50] This point is also made by Wade (1952) 68 LQR 337, 338–9, and Swadling, 'Property' in *English Private Law* (2nd edn, ed Burrows, 2007) [4.33].

[51] (1901) 85 LT 650.

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(Billposting) Ltd. It would seem that we must follow those cases or choose between the two lines of authority. It is not, however, necessary to consider those alternative courses in detail, since in our judgment the House of Lords cases, whether or not as a matter of strict precedent they conclude this question, state the correct principle which we should follow.

Our reasons for reaching this conclusion are based upon essentially the same reasons as those given by Russell L.J. in the *Hastings Car Mart* case[52] and by Professor Wade in the article, 'Licences and Third Parties'[53] to which Russell L.J. refers. Before *Errington* the law appears to have been clear and well understood. It rested on an important and intelligible distinction between contractual obligations which gave rise to no estate or interest in the land and proprietary rights which, by definition, did. The far-reaching statement of principle in *Errington* was not supported by authority, not necessary for the decision of the case and *per incuriam* in the sense that it was made without reference to authorities which, if they would not have compelled, would surely have persuaded the court to adopt a different ratio. Of course, the law must be free to develop. But as a response to problems which had arisen, the *Errington* rule (without more) was neither practically necessary nor theoretically convincing.

Denning LJ's bold reasoning in *Errington* is thus not an accurate reflection of the current law.

Lord Denning later adopted a different technique for reaching his desired conclusion that a contractual licence can count as a property right. That technique built on the idea in *Binions v Evans*[54] that a constructive trust can be used to protect a party with a contractual licence.

DHN Food Distributors Ltd v London Borough of Tower Hamlets
[1976] 3 All ER 462, CA

Facts: Bronze Ltd, a wholly owned subsidiary company of DHN Food Distributors Ltd, owned a warehouse and cash-and-carry in Malmesbury Road, Bow, London. DHN (B) ran its fruit distribution business from the premises; it occupied the land under a contractual agreement with Bronze (A). The Tower Hamlets London Borough Council made a compulsory purchase order relating to the land; it planned to demolish the warehouse and build housing. The council paid A for the land. The council argued that it had no statutory duty to pay A compensation for disturbance of its business, because A was not carrying out any business on the land. B was carrying out a business, but the relevant statute stated that B qualified for compensation for disturbance only if it had an 'interest' in the land. The council argued that B had no such right, because it simply had a contractual licence, and so had no legal or equitable interest in the land. The Lands Tribunal accepted the council's argument. B (along with a third associated company in the same position as B) successfully appealed to the Court of Appeal.

Lord Denning MR

At 466–7

The directors of [A] could not turn out themselves as directors of [B] [...] In the circumstances, I think the licence was virtually an irrevocable licence. [B was] the parent company

[52] The name given to *NPB v Ainsworth* in the Court of Appeal: [1964] Ch 665, 697.
[53] (1952) 68 LQR 337.
[54] [1972] Ch 359.

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holding all the shares in [A]. In those circumstances, [B was] in a position to carry on their business on these premises unless and until, in their own interests, B no longer wished to continue to stay there. It was equivalent to a contract between the two companies whereby A granted an irrevocable licence to B to carry on [its] business on the premises. In this situation counsel for the claimants cited to us *Binions v Evans*, to which I would add *Bannister v Bannister* and *Siew Soon Wah alias Siew Pooi Tong v Yong Tong Hong* [1973] AC 836. Those cases show that a contractual licence (under which a person has the right to occupy premises indefinitely) gives rise to a constructive trust, under which the legal owner is not allowed to turn out the licensee. So here. This irrevocable licence gave to [B] a sufficient interest in the land to qualify them for compensation for disturbance.

The decision in *DHN*, like that in *Errington*, can be justified on other grounds. For example, both Goff and Shaw LJJ found that, as a result of various transactions between A and B, A held its right to the land on trust for B. B therefore had a recognized equitable interest and could claim compensation on that basis. Further, it can be argued that the term 'interest', when used in a statute setting rules for compensation for disturbance caused by a compulsory purchase order, is not necessarily confined to legal or equitable property rights in land.[55] Moreover, it could even be argued that, when interpreting such a statute, a court can 'pierce the corporate veil' and treat constituent companies within a group, such as Bronze Ltd and DHN Ltd, as one entity.

Lord Denning's specific reasoning in *DHN*, like that in *Errington*, is, however, impossible to defend. His Lordship's argument is that, *as soon as* A comes under a duty to B not to revoke B's licence, a constructive trust arises in B's favour. This means that, if A were later to transfer his freehold to C, C would prima facie be bound by B's licence.[56] *Bannister v Bannister* and *Binions v Evans* are cited in favour of that proposition—but the constructive trusts in those cases did *not* arise as soon as A made a contractual promise to B; rather, the constructive trusts arose as a result of *C's* later promise to A, made when acquiring his right from A.

Certainly, in the following case, the Court or Appeal rejected the *DHN* analysis.

Ashburn Anstalt v Arnold
[1989] Ch 1, CA

Fox LJ

At 24

For the reasons which we have already indicated, we prefer the line of authorities which determine that a contractual licence does not create a property interest. We do not think that the argument is assisted by the bare assertion that the interest arises under a constructive trust.

[55] See *Pennine Raceways Ltd v Kirklees MBC* [1983] QB 382.

[56] Of course, *DHN v Tower Hamlets* itself did not involve a third party. In *Re Sharpe* [1980] 1 WLR 219, however, Browne-Wilkinson J (somewhat reluctantly) applied the reasoning in *DHN* to allow a licence between A and B to bind C, A's trustee in bankruptcy.

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It is clear, then, that Lord Denning MR in *DHN* used the constructive trust not as a means for B to acquire a new, direct right against C, but rather as a vehicle to turn all contractual licences into immediate equitable property rights. That approach, of course, is illegitimate as a matter of precedent: the House of Lords in *King v David Allan* and *National Provincial Bank v Ainsworth* had already made clear that a contractual licence does *not* count as an equitable interest in land. Parliament may be able to change the law and turn a contractual licence into an equitable interest, but Lord Denning MR had no power to do so.

It is, therefore, clear that a contractual licence given by A to B is not *prima facie* binding on C, a party who later acquires A's land.[57] The interesting question is, of course, whether Parliament *should* make such a change. Before looking at that question, we need briefly to consider an argument that Parliament may already (and inadvertently) have allowed a contractual licence to bind a third party.

Land Registration Act 2002, s 116

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

(a) an equity by estoppel, and

(b) a mere equity

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

If B has a contractual licence, B may try to argue that he or she has a 'mere equity' and thus that, under s 116(b), that right is capable of binding C. Certainly, B has an 'equity' in the sense that, as we saw in section 3.1.2, a court may well protect B's contract with A through the equitable remedies of specific performance or an injunction. It is clear, however, that, when proposing the clause that became s 116(b), the Law Commission did not intend to change the status of a contractual licence.[58] Instead, the term 'mere equity' is intended to refer to situations in which B has a power to obtain an equitable property right by, for example, having a document rectified or setting aside a transfer of a right to A.[59] Certainly, it would be very odd if a section of the Land Registration Act 2002 (LRA 2002)—an Act, as we saw in Chapter 15, section 1.4, primarily intended to protect a third party acquiring a right in registered land—were to *increase* the burdens on such a third party by allowing a contractual licence to function as an equitable interest.

Future reform?

It is thus clear that, as the law stands, a contractual licence does *not* count as a property right. A number of arguments have, however, been made in favour of changing the law.

[57] This point was conceded by B in *London Development Agency v Nidai* [2009] EWHC 1730 (Ch) at [11].

[58] See Law Com No 271, [5.32]–[5.37].

[59] For further discussion of mere equities, see McFarlane, *The Structure of Property Law* (2008), pp 226–7; *Snell's Equity* (32nd edn, eds McGhee et al., 2005), [2–006].

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European Convention on Human Rights, Art 8

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

In some cases, B's only right to his 'home' may come from a contractual licence with A. B may then argue that if C, a party to whom A has sold his land, is able to remove B from the land, B's right to respect for his home is interfered with.[60]

In Chapter 3, we looked in detail at how such human rights arguments can have an impact in land law. Two points are particularly worth noting here. Firstly, there is more than one way in which B's right to his home can be respected. As we have seen, if C removes B from the land before the end of the period of B's contractual licence with A, B will be able to claim damages for breach of contract from A. This right to receive money provides B with some protection for his Art 8 right.[61] Further, the law also protects B by allowing B, in certain situations, to acquire a new, direct right against C (see section 3.3.1 above). And, even if C is allowed to remove B, the Protection from Eviction Act 1977 may ensure that C has to give B four weeks' notice before insisting that B move out.[62] Indeed, that Act provides strong protection for B: s 1(2) means that C commits a criminal offence if he attempts to remove B without giving the requisite notice.[63]

Secondly, it is not clear whether, if C removes B from the land, there is any breach of Art 8. Article 8(2) allows for B's right to be compromised in order to protect the 'rights' of others. In our example, C has a right, as an owner of the land; that right must be balanced against B's right to respect for his home. It is true that, if C is a local authority or other public body, the special duty imposed by s 6 of the Human Rights Act 1998 (HRA 1998) can (in theory) mean that it is unlawful for C to exercise its prima facie right to remove B from the land.[64] In *Kay v Lambeth LBC*,[65] however, the House of Lords, when considering the position of a licensee,

[60] As we saw in Chapter 3, section 4.1.1, particular land can count as B's home even if B has no recognized legal or equitable property right in relation to that land.

[61] A contractual right, such as a contractual licence, can also count as a 'possession' for the purposes of Art 1 of the First Protocol to the ECHR: see Chapter 3, section 3. Clearly, B's right to peaceful enjoyment of that possession does not mean that B must be able to assert his contractual right against a third party such as C; instead, B must rely on his remedies against A, including a claim for damages for A's breach of contract.

[62] Section 5(1A) applies where B has a '*periodic licence to occupy premises as a dwelling*'—e.g. where B pays A £50 a week to occupy A's land. Some contractual licences are excluded from the 1977 Act: see s 3A. The Act does not apply, for example, if the licence involves B sharing accommodation with A or a member of A's family, or if, immediately before giving B the licence, A occupied the land as his only or principal home.

[63] C does not commit the offence if he deprives B of occupation whilst reasonably believing that B had, in any case, moved out: see s 1(2). Under the Criminal Law Act 1977, s 6, it is also a criminal offence to use or threaten violence in an attempt to gain possession of residential premises occupied by B.

[64] So, for example, B may be able to resist a public body's decision to exercise its power to remove B: see Chapter 3, section 4.2.2.

[65] [2006] 2 AC 465.

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held that, in all but the most exceptional cases,[66] there will be *no* breach of B's Art 8 right if C removes B in a situation in which the current land law rules allow C to do so. On that view, the introduction of the HRA 1998 does not necessitate allowing B's contractual licence of his home to count as an equitable interest in land.

In the following article, Maudsley draws a distinction between contractual licences that give B a right to exclusive possession of A's land, and other contractual licences. He argues that the former, but not the latter, should count as equitable property rights in land.

Maudsley, 'Licences to Remain on Land (Other than a Wife's Licence)'
(1956) 20 Conv 281

At 285

For, while it is consistent with principle, authority and policy to protect licensees in certain cases where they have exclusive possession of land, the protection of contractual licensees having something less than exclusive possession would cause far more problems than it would solve. For it would mean that every lodger would be entitled to remain in his room after a sale to anyone except a purchaser of the legal estate for value without notice;[67] and this would have a serious effect on land sales.

At 288–9

In most cases, of course, in which one party goes into possession of land in consideration of payment to the owner, he will be a tenant; but that is not invariably the case [. . .]

The present practice of holding certain persons who are in exclusive possession to be licensees and not tenants is of importance only in the opposite type of case, where the object is to help the landlord; the result of it is that in certain cases where the landlord, who would be unable to evict a tenant because of the tenant's statutory protection (by the Rent Acts[68] or the Limitation Acts)[69] is able to do so if the court can be persuaded that the party in occupation is not a tenant but only a licensee [. . .] It is submitted therefore that cases in which one party goes into exclusive possession in consideration of making periodic payments to the owners will be held to create tenancies unless the court, in order to deprive an undeserving tenant of the statutory protection, can do justice between the parties by construing the tenancy, according to the intentions of the parties, as a licence.

Maudsley's argument is important, because it reveals the context in which Lord Denning made his attempts (in cases such as *Errington v Errington*[70] and *DHN v Tower Hamlets*)[71] to establish a contractual licence as an equitable property right. As we will see in Chapter 22, section 2, the standard position today is that if the contract between A and B gives B a right, for a limited period, to exclusive possession of A's land, B has a lease. A lease counts as property right and B therefore has a right that is capable of binding C.

[66] A case may be exceptional if, for example, B is a member of a particularly vulnerable group: see, for example, the decision of the European Court of Human Rights in *Connors v UK* (2004) 40 EHRR 189, discussed in Chapter 3, section 2.5.3.

[67] [Note that the reference here to the 'bona fide purchaser' defence is now outdated. In registered land, a registered purchaser for value is protected against a pre-existing equitable interest unless: (i) that interest is protected by a notice on the register; or (ii) the holder of the interest is in actual occupation of the land at the relevant time—see Chapter 12, section 3.2, and Chapter 14, section 2.2.]

[68] *Marcroft Wagons v Smith* [1951] 2 KB 496; *Murray Bull & Co v Murray* [1953] 1 QB 211.

[69] *Cobb v Lane* [1952] 1 All ER 1199.

[70] [1952] 1 KB 290.

[71] [1976] 3 All ER 462.

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But from the 1950s until the mid-1980s, the Court of Appeal, again led by Lord Denning, adopted a much narrower definition of a lease. Under that definition, A could give B a right to exclusive possession of A's land for a fixed period and still deny B a lease: A simply needed to make clear that he did not intend to give B a 'stake in the land'. As Lord Denning MR put it in *Errington v Errington & Woods*:[72] '*The result of all these cases is that, although a person who is let into exclusive possession is, prima facie, to be considered to be a tenant, nevertheless he will not be held to be so if the circumstances negative any intention to create a tenancy.*'

The chief reason for this narrow definition of a lease, it seems, was to allow A to avoid the statutes that gave extra rights to a party with a lease:[73] for example, if he had a lease, B might gain a statutory right to remain in occupation of A's land even after the end of the agreed contractual period (we will consider the question of statutory protection for residential tenants in Chapter 23). But the courts' narrow definition of a lease meant that, in some cases in which B would nowadays be regarded as having a lease—that is, where B had a contractual right to exclusive possession of A's land for a limited period—B was instead regarded as having only a contractual licence. Maudsley's argument recognizes that, in such cases, B should have a property right. The law *has* now adopted that argument—but by recognizing that, in such cases, B has a lease. This means that much of the pressure for allowing contractual licences to count as property rights has now disappeared.

In the following article, Cheshire discusses and defends the reasoning of Denning LJ in *Errington v Errington*.

Cheshire, 'A New Equitable Interest in Land' (1953) 16 MLR 1, 9

[I]s the equity to specific performance enforceable against the successor in title to the licensor? Does the licensee acquire a proprietary, not a merely contractual right? [. . .] At least one learned writer in the Law Quarterly Review, Mr HWR Wade, holds it to be unjustifiable on several counts. 'It is,' he says, 'revolutionary to hold that a contract for a licence, (not being a contract for sale or lease, or a restrictive covenant) can be enforced against a person not a party to it.'[74] Perhaps, however, it may be suggested with respect that the recent decisions illustrate a peaceful penetration, not a revolution. The doctrine of privity was penetrated by the common law courts themselves in *Spencer's Case*[75] and by the Court of Chancery in *Tulk v Moxhay*,[76] and there seems no reason that what was possible and beneficial in an earlier age should become outmoded by the mere passage of time.

Another criticism made by Mr Wade is that the list of equitable proprietary interests in land should be regarded as closed and that this invention of a new type will unsettle the law of real property for many years. Similar warnings have been uttered in the past, but they have failed to impede the living growth of English law. For example, in 1834, Lord Brougham, in holding that a covenant does not run with land at law and cannot be made to run with it in equity, adorned his judgment with the following homily:

> 'Great detriment would arise and much confusion of rights if parties were allowed to invent new modes of holding and enjoying real property, and to impress upon their lands and tenements a peculiar character which should follow them into all hands, no matter how remote.'[77]

Yet, only fourteen years later, *Tulk v Moxhay* invented the restrictive covenant, a new interest of remarkable virility that nobody then or since has regretted.

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72 [1952] KB 290, 298. 73 See *Marchant v Charters* [1977] 1 WLR 1181, 1185.
74 (1952) 68 LQR 337, 338–9. 75 (1583) 5 Co Rep 16a. 76 (1848) 2 Ph 774.
77 *Keppell v Bailey* (1834) 2 My & K 517, 536.

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Although Cheshire takes issue with it, Wade's article was referred to with approval by the Court of Appeal in *Ashburn Anstalt v Arnold*.[78] And, as we saw when considering the decision in *Errington v Errington*, Wade is right to emphasize the difference between cases in which A makes a contractual promise to give B a recognized property right and those in which A simply promises to allow B to make a particular use of A's land. Cheshire's reply therefore focuses on the restrictive covenant: as we will see in Chapter 26, it is a recognized equitable property right that can arise as a result of a contractual promise by A to B, even though A's promise is *not* a promise give B, in the future, a property right.

The restrictive covenant is a very important point of comparison: it is the most recent example of the courts developing a new form of equitable property right in land. As Cheshire notes, it shows that the list of property rights *can* be added to. Two points are, however, worth noting. Firstly, the restrictive covenant was recognized as a property right *before* 1925 (see Chapter 4, section 6). In contrast, as we have seen, s 4 of the LPA 1925 now prevents the courts from developing the contractual licence as a new form of property right; any such change would have to come from Parliament.

Secondly, when the restrictive covenant was recognized as an equitable property right, the courts imposed important restrictions on precisely what type of promise by A to B could give rise to such a property right. Such restrictions would also have to be imposed by Parliament if it were to allow any contractual licences to count as property rights. Certainly, the debate is not as to whether *all* contractual licences should become property rights; rather, it is as to whether *particular sorts* of contractual licence should do so.

Thirdly, it is important to note *how* restrictive covenants came to be regarded as property rights. Cheshire cites *Tulk v Moxhay* as a key decision, but, as we noted in Chapter 6, section 2.6, that case, in fact, involved B acquiring a new, direct right against C.[79] This raises the question of whether a gradual extension of the circumstances in which B can acquire such a right could, over time, prompt Parliament to elevate some forms of contractual licence to the status of an equitable interest in land.

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

At 482

[The passage to proprietary status of restrictive covenants] depended on an initial recognition that a covenantee could be protected against a third party by means of a new, direct right. This can be seen from a consideration of *Tulk v Moxhay.* That decision did not in itself establish the proprietary status of a restrictive covenant, as is clear from Lord Cottenham L.C.'s judgment:

> 'the question is, not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased.'

B's protection in *Tulk v Moxhay* therefore seems to depend on a new right which arises as a result of C's conduct in purchasing the property with notice of the covenant. However, from this starting point, the restrictive covenant began a journey which culminated in the acquisition of proprietary status.

[78] [1989] Ch 1, 22.

[79] This point was noted by Browne-Wilkinson V-C in *Swiss Bank v Lloyds Bank* [1979] 1 Ch 548, 571.

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At 485–6

[The] history [of restrictive covenants] demonstrates that a right is generally only allowed to become proprietary on certain terms. In *Tulk v Moxhay* itself, no distinction is made between positive and negative covenants; nor does it seem necessary for the covenantee to have land for the benefit of which the covenant was taken. As the judgment in that case focuses on the culpability of C's conduct, these requirements, relating to the nature of B's original right, may well seem out of place. However, as the analysis shifts and that original right comes to be regarded as proprietary, it is inevitable that the courts will consider such restrictions. For a recognition that a particular right is proprietary must be based on a decision that the right is, by its nature, sufficiently important to warrant protection even if the property to which it relates changes hands. Therefore it is scarcely surprising that the courts will think carefully about the precise nature of the right in question before allowing it to have proprietary status. For example, given the burdens which will be placed on C's property as a result, it may well make sense to restrict proprietary status to those rights that confer a compensating benefit on another piece of property. Further, the particular disadvantage of allowing a right to be proprietary, that it can bind third parties without their consent, may be thought too great when dealing with certain types of right, such as those that impose positive obligations. Hence it may be thought unlikely that English law will ever accept that *all* [. . .] licences of land have proprietary status. As a result, it can be concluded not only that a general category consisting of all [. . .] licences of land is currently absent from the list of property rights recognised by English law, but also that it may well always remain so.

A final argument in favour of the proprietary status of contractual licences is made by Moriarty in the following extract. It rests on an unusual definition of a contractual licence.

Moriarty, 'Licences and Land Law: Legal Principles and Public Policies'
(1984) 100 LQR 376

At 376

The device of the licence, it will be argued, is no more than a mechanism by which the law sanctions the informal creation of proprietary rights in land.

At 397

The point, then is that we have to make a distinction between two different kinds of rule in land law. There are, first, the substantive rules of the subject which govern and define what kinds of right the law will accept as having the potential to bind third parties, as property rights, in the first place. And then there are the procedural rules of the subject which, important as they are, merely regulate the method by which they are created. *King* [*v David Allen Ltd*] and *Clore* [*v Theatrical Properties Ltd*], it is suggested, authoritatively rule out the possibility of the contractual licence being used to subvert the former, and more fundamental, rules of the subject. But they leave untouched the use of the contractual licence as a means of supplementing the procedural rules for creation. It is in this latter context that the contractual licence is most commonly found; and it is in this latter context that the device shares so much in common with the estoppel licence. In such a context, therefore, there can be no objection to contractual licences binding third parties, unless it is an objection to all licences binding third parties.

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The distinction made by Moriarty between the 'substantive' and 'procedural' rules of land law seems to match the distinction between the *content* question and the *acquisition* question. Moriarty's argument is thus slightly surprising. The issue that we are currently considering relates to the *content* question: should a particular type of right (a contractual licence) be regarded as an equitable interest in land? Yet Moriarty sees the issue as instead related to the *acquisition* question: given our list of equitable interests in land, by what means should B be able to acquire such a right? It is therefore important to note that Moriarty's argument does *not* involve reversing the results in cases such as *King v David Allen*[80] and *Clore v Theatrical Properties Ltd*;[81] rather, his argument is that, in a case such as *Errington v Errington*,[82] B2 had, in fact, acquired, through an informal means, a recognized equitable property right. That analysis seems to be correct: it was noted above that *Errington* could be analysed as a case in which, as a result of A's informal promise to transfer his land to them, B1 and B2 had acquired an estate contract. Crucially, then, Moriarty's analysis does *not* involve promoting the contractual licence to a property right; instead, it can be used to defend the status quo, by re-analysing some (but not all) contractual licence cases as cases in which, in fact, B acquired not only a licence, but also a recognized equitable property right.

In his article, Moriarty also draws a link between the contractual licence and the estoppel licence. He notes, firstly, that the courts have regularly held that an estoppel licence can bind a third party, and, secondly, that estoppel licences and contractual licences are very similar. We will consider estoppel licences, and their effect on third parties, in the next section.

4 ESTOPPEL LICENCES

An estoppel licence exists where B has a liberty to make some use of A's land *and* A is under a duty to B, arising as a result of the doctrine of proprietary estoppel. This means that—in some circumstances, at least—A is under a duty to B not to revoke B's licence. An estoppel licence is thus similar to a contractual licence. The key difference is the *source* of A's duty to B: in this case, the duty arises not because of a contract, but, instead, under the doctrine of proprietary estoppel. We examined that doctrine in Chapter 10. It seems to allow B to acquire a right against A where B has reasonably relied on a commitment made by A to allow B a right relating to land. As the following extract demonstrates, the doctrine can thus impose a duty on A even if A has made no contractual bargain with B.

Inwards v Baker
[1965] 2 QB 29, CA

Facts: Mr Baker owned land at Dunsmore, near Wendover, in Buckinghamshire. In 1931, Mr Baker (A) invited his son, John (B), to build a bungalow on the land. B accepted the invitation. He moved into the bungalow and lived there in the belief that he could remain, if he wished, for the rest of his life. A died in 1951 and, under his will, made in 1922, his land passed to trustees who were to hold the land for the benefit of parties other than B. The trustees attempted to remove B from the land. The judge at the Aylesbury county court found in favour of the trustees, but B successfully appealed to the Court of Appeal.

[80] [1916] 2 AC 54. [81] [1936] 3 All ER 483. [82] [1952] 1 KB 290.

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Lord Denning MR

At 36–7

The trustees say that at the most [B] had a licence to be in the bungalow but that it had been revoked and he had no right to stay. The judge has held in their favour. He was referred to *Errington v. Errington and Woods,* but the judge held that that decision only protected a contractual licensee. He thought that, in order to be protected, the licensee must have a contract or promise by which he is entitled to be there. The judge said:

> 'I can find no promise made by the father to the son that he should remain in the property at all—no contractual arrangement between them. True the father said that the son could live in the property, expressly or impliedly, but there is no evidence that this was arrived at as the result of a contract or promise—merely an arrangement made casually because of the relationship which existed and knowledge that the son wished to erect a bungalow for residence.'

Thereupon, the judge, with much reluctance, thought the case was not within *Errington's* case, and said the son must go.

The son appeals to this court. We have had the advantage of cases which were not cited to the county court judge[83] [. . .] It is quite plain from those authorities that if the owner of land requests another, or indeed allows another, to expend money on the land under an expectation created or encouraged by the landlord that he will be able to remain there, that raises an equity in the licensee such as to entitle him to stay. He has a licence coupled with an equity.

So in this case, even though there is no binding contract to grant any particular interest to the licensee, nevertheless the court can look at the circumstances and see whether there is an equity arising out of the expenditure of money. All that is necessary is that the licensee should, at the request or with the encouragement of the landlord, have spent the money in the expectation of being allowed to stay there. If so, the court will not allow that expectation to be defeated where it would be inequitable so to do. In this case it is quite plain that the father allowed an expectation to be created in the son's mind that this bungalow was to be his home. It was to be his home for his life or, at all events, his home as long as he wished it to remain his home. It seems to me, in the light of that equity, that the father could not in 1932 have turned to his son and said: 'You are to go. It is my land and my house.' Nor could he at any time thereafter so long as the son wanted it as his home.

4.1 B'S RIGHTS AGAINST A

The nature of B's rights against A depends on the nature of A's duty to B. The key point is that the doctrine of proprietary estoppel, as we saw in Chapter 10, sections 3 and 4, may have a number of different effects. For example, in *Jennings v Rice*,[84] B had been staying for a number of nights each week on A's land, in order to care for A. A had promised B that she would leave her land to B in her will; A did not do so. The Court of Appeal confirmed the finding of the trial judge: the doctrine of proprietary estoppel imposed a duty on A (and now on A's estate) to pay B £200,000. In that case, it seems, A was *not* under a duty not to revoke B's licence: A would have been able to remove B from the land. As a result of failing to honour her promise to leave her land to B, however, A was instead under a duty to pay B a sum of money.

[83] [The cases mentioned are classic proprietary estoppel cases: *Dillwyn v Llewellyn* (1862) 4 De G F & J 517; *Plimmer v Wellington Corpn* (1884) 9 App Cas 699 (PC); *Ramsden v Dyson* (1866) LR 1 HL 129.]

[84] [2003] 1 P & CR 100.

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In some cases, the doctrine of proprietary estoppel may impose a duty on A not to revoke B's licence. For example, in the passage from *Inwards v Baker* quoted above, Lord Denning MR confirms that, at least once B had built and moved into his bungalow, A was under a duty not to remove B from the land. In such a case, it seems, the discussion set out in section 2.1 above will apply: firstly, in general, a court will specifically enforce A's duty not to revoke B's licence; secondly, for as long as A's duty lasts and B remains on A's land, B will not become a trespasser, even if A attempts to revoke B's licence.

It might be thought that where A's duty not to revoke a licence arises under the equitable doctrine of proprietary estoppel, B's right to remain on the land is dependent on factors such as B's behaviour and is thus more fragile than in a case in which B has a contractual licence. As the following extract shows, however, that does not seem to be the case.

Williams v Staite
[1979] Ch 291, CA

Facts: Mrs Moore (A) owned two neighbouring cottages in Llangibby, Gwent. Her daughter married Mr Staite. A then invited the Staites to move into one of the cottages. A promised them that they could remain in that cottage for as long as they wished. Mr Staite lived in a cottage provided with his job, but, following A's promise, he gave up that accommodation to move into A's cottage. After moving in, the Staites spent money improving the cottage; they also cared for A and her husband, who lived next door. A died and her land was eventually sold to C. C then attempted to remove the Staites (B1 and B2) from the cottage. The judge found in favour of B1 and B2, holding that their licence was binding on C. C did not appeal against that finding—but C later claimed that, due to the bad behaviour of B1 and B2, he was entitled to remove them from the cottage. The judge in the Pontypool and Abergavenny county court found in C's favour. B1 and B2 then successfully appealed to the Court of Appeal.

Lord Denning MR

At 297–8

[B1 and B2] had an equitable licence under which they were entitled to live in [the cottage] for their lives or for as long as they wished it to be their home. It may in some circumstances be revoked, but I do not think it can be revoked in such circumstances as are found in the present case. I know that the judge took a poor view of the conduct of [B1 and B2]—and I am not sure he was altogether fair to them—[. . .] but to my mind their conduct, however reprehensible, was not such as to justify revocation of their licence to occupy the cottage as their home.

Goff LJ

At 300

Excessive user or bad behaviour towards the legal owner cannot bring the equity to an end or forfeit it. It may give rise to an action for damages for trespass or nuisance or to injunctions to restrain such behaviour, but I see no ground on which the equity, once established, can be forfeited. Of course, the court might have held, and might hold in any proper case, that the equity is in its nature for a limited period only or determinable upon a condition certain. In such a case the court must then see whether, in the events which have happened, it has determined or it has expired or been determined by the happening of that condition.

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It is important to note that C did not appeal against the initial holding that the estoppel licence of B1 and B2 was capable of binding C. We will consider that question in detail in section 4.3 below.

4.2 B's RIGHTS AGAINST X

If the doctrine of proprietary estoppel simply imposes a duty on A not to revoke B's licence, B's position against X should be exactly the same as if he had a contractual licence. In such a case, the discussion in section 3.2 above should apply.

4.3 B's RIGHTS AGAINST C

4.3.1 Direct rights

The discussion of direct rights in section 3.3.1 above applies equally where B has an estoppel licence. Certainly, if the doctrine of proprietary estoppel imposes a duty on A not to revoke B's licence, A will have the same incentive, when transferring his land to C, to ask C to promise to respect B's licence.

4.3.2 A pre-existing property right?

Inwards v Baker
[1965] 2 QB 29, CA

Facts: See above.

Lord Denning MR

At 37

[C's counsel] put the case of a purchaser. He suggested that the father could sell the land to a purchaser who could get the son out. But I think that any purchaser who took with notice would clearly be bound by the equity. So here, too, the present plaintiffs, the successors in title of the father, are clearly themselves bound by this equity. It is an equity well recognised in law. It arises from the expenditure of money by a person in actual occupation of land when he is led to believe that, as the result of that expenditure, he will be allowed to remain there. It is for the court to say in what way the equity can be satisfied. I am quite clear in this case it can be satisfied by holding that the defendant can remain there as long as he desires to as his home.

Lord Denning MR's view is thus that, on the facts of *Inwards v Baker*, B had a right that was capable of binding C. That conclusion seems correct. In a case such as *Inwards*, as Lord Denning noted, it would be inequitable for B's expectation of a home for life to be defeated. It can therefore be argued that the doctrine of proprietary estoppel imposes a duty on A to allow B to exclusive possession of the bungalow for B's life (at least). If that is correct, B has a recognized equitable property right: an equitable life interest arising under a trust

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(see Chapter 20, section 4). It can be argued that it is B's equitable interest, rather than any licence, that is capable of binding C.

A number of cases in which an estoppel licence is said to be capable of binding C can be explained in this way. For example, in *ER Ives Investment Ltd v High*,[85] A agreed that, in return for A being able to place foundations on part of B's land, B would have a right of way across A's land. The Court of Appeal held that B had a right that was capable of binding C, a later owner of A's land. There are a number of possible explanations for this decision.[86] One explanation is that B had a licence to use A's land *and* the doctrine of proprietary estoppel imposed a duty on A to give B the promised right of way: an easement. On that view, A was under a duty to give B a recognized property right and so B acquired an equitable easement. It is that easement, rather than B's licence, that is capable of binding C.

There are, however, some cases in which the doctrine of proprietary estoppel has simply imposed a duty on A not to revoke B's licence. *Williams v Staite*,[87] discussed above, is one example. In that case, as we have seen, it had earlier been held, by the county court judge, that a pre-existing estoppel licence was binding on C. That assumption does seem to create an inconsistency with the law relating to contractual licences. A contractual licence, like the estoppel licence in *Williams v Staite*, consists of B having a liberty to use A's land and A's being under a duty to B not to revoke that liberty. As a number of commentators have suggested,[88] B's right should not be treated differently only because A's duty arises under proprietary estoppel rather than due to a contract.

On this view, either *both* estoppel licences and contractual licences can count as equitable property rights, or neither can. We saw in section 3.3.2 above that no contractual licences are currently viewed as equitable property rights. This means that no estoppel licences should be viewed as equitable property rights. But this does not mean that the assumption made in *Williams v Staite* was a surprising one: after all, *at the time*, the Court of Appeal, led by Lord Denning MR, regarded the contractual licence as an equitable property right. It is therefore no surprise that B's estoppel licence was also viewed as such a right. Now that it is clear that a contractual licence is *not* an equitable property right, however, the same must also be true of an estoppel licence.

Land Registration Act 2002, s 116

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

(a) an equity by estoppel, and

(b) a mere equity

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

[85] [1967] 2 QB 379.

[86] See Battersby [1995] MLR 637; Swadling, 'Property' in *English Private Law* (2nd edn, ed Burrows, 2007), [4.128].

[87] [1979] Ch 291.

[88] See Thompson [1983] Conv 57; Moriarty, 'Informal Transactions in Land: Estoppel and Registration' (1984) 100 LQR 376.

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We looked at the possible effect of s 116(b) of the LRA 2002 on contractual licences in section 3.3.2 above. It seems that s 116(a) may have an important effect on estoppel licences. As we saw in Chapter 10, section 4.3, an 'equity by estoppel' is said to arise *whenever* A is under a duty to B arising as a result of the doctrine of proprietary estoppel. The 'equity' is the right that B has in the period *after* the estoppel has arisen and *before* a court makes an order in B's favour. So, even in a case in which A's only duty is a duty not to revoke B's licence, B initially has an 'equity by estoppel'—and the effect of s 116(a), on its natural reading, is to allow that 'equity by estoppel' to be capable of binding C, and thus to function as an equitable property right. That result does seem to have been intended by the Law Commission, as can be seen in the report that led to the LRA 2002.[89] As the following extract points out, however, it also seems to lead to an inconsistency in the law.

McFarlane, 'Proprietary Estoppel and Third Parties After the Land Registration Act 2002' [2003] CLJ 661, 690

> Although they view s.116(a) as solving one of the most persistent debates relating to estoppel, the Law Commission's interpretation of that section re-awakens another such debate which might have been thought settled. As a result of s.116(a), a licence arising through proprietary estoppel would operate differently to a contractual licence: the former could bind C, provided the land was transferred to him before a court order granting B the licence. It could be argued in such a case that it is not the licence itself which binds C, but rather the independent 'equity' that arose as a result of the estoppel before the licence was awarded by the court. Yet why does no such 'equity' arise in the case of a contractual licence: surely a contractual licensee also has the right to [go to court: see further Chapter 10, section 4.3]? Once again, unconvincing distinctions arise as a result of separating estoppel from other means of acquiring rights. Indeed, it seems that the position under s.116(a) could be even less satisfactory than that favoured by Lord Denning [. . .] at least his Lordship intended that contractual and estoppel licences should be treated consistently.

As we saw in Chapter 10, section 4.3, it can therefore be argued that s 116(a) should *not* be interpreted so as to mean that B acquires a right that is capable of binding C *whenever* the doctrine of proprietary estoppel imposes a duty on A to B. Under the interpretation intended by the Law Commission, however, the holder of an estoppel licence, at least in the period before a court order is made in his or her favour, has a right that is capable of binding C.[90]

5 STATUTORY LICENCES

We can use the term 'statutory licence' to refer to situations in which B has a liberty to make some use of A's land *and* A is under a statutory duty to B not to revoke B's licence. A statutory licence is thus similar to a contractual licence or an estoppel licence. The key difference again is the *source* of A's duty to B. When considering the effect of a statutory licence on A,

[89] Law Commission Report No 271, *Land Registration for the Twenty-First Century* (2001), [5.29]–[5.32].

[90] It is very unlikely that B will have protected his or her right by entering a notice on the register and so, if B is not in actual occupation of the registered land, C may well have be able to use the lack of registration defence to B's 'equity by estoppel': see Chapter 12, section 3.2, and Chapter 14, section 2.2.

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X, and C, it is difficult to set out general principles: the statute in question will generally specify the effect of B's right. In this section, we will consider, in outline only, one particularly important form of statutory licence: the licence of one spouse[91] to occupy land owned by another.

Family Law Act 1996, s 30

(1) This section applies if—

(a) one spouse is entitled to occupy a dwelling-house by virtue of

(i) a beneficial estate or interest or contract; or

(ii) any enactment giving that spouse the right to remain in occupation; and

(b) the other spouse is not so entitled.

(2) Subject to the provisions of this Part, the spouse not so entitled has the following rights ("matrimonial home rights")—

(a) if in occupation, a right not to be evicted or excluded from the dwelling-house or any part of it by the other spouse except with the leave of the court given by an order under s.33;

(b) if not in occupation, a right with the leave of the court so given to enter into and occupy the dwelling-house.

5.1 B'S RIGHTS AGAINST A

The statutory predecessors of s 30 of the Family Law Act 1996 (FLA 1996) were, in part, a reaction to the House of Lords' decision in *National Provincial Bank v Ainsworth*[92] (see Chapter 1, section 5, and Chapter 5, section 5.4). In that case, Mrs Ainsworth's right to occupy the matrimonial home was said to depend on a 'deserted wife's equity'. This right, essentially improvised by the courts, arose only after Mr Ainsworth left the home. And it was of a very uncertain nature: in particular, it would not always be clear if the home-owning spouse (A) was under a duty to allow the non-owning spouse (B) to remain in occupation of the current home. Parliament intervened, first through the Matrimonial Homes Act 1967, in the hope of making B's position clearer and more secure (see Chapter 1, section 5.7).

Whilst B's basic right to occupy A's land is set out in s 30, s 33 gives a court wide powers to exclude or restrict B's right. Section 33(6) directs a court exercising those powers to take into account a number of factors, including: (i) the housing needs and resources of A and B, and of any 'relevant child'; (ii) the financial resources of A and B; (iii) the likely effect of any order on the health, safety, or well-being of A and B, and of any relevant child; and (iv) the conduct of A and B in relation to each other and otherwise. Under s 33(7), special rules apply where there is a likelihood of one of the parties or a relevant child suffering '*significant harm attributable to conduct*' of the other party.

It is thus clear that, in order to balance the various needs of the spouses and any relevant children, the court has a wide discretion to exclude or restrict B's right against A.

[91] The statutory licence arising under the Family Law Act 1996, s 30, now also applies to parties in a registered civil partnership: see Civil Partnership Act 2004, s 82 and Sch 9, para 1, amending the 1996 Act.

[92] [1965] AC 1175.

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5.2 B'S RIGHTS AGAINST X

The provisions of the FLA 1996 are not too important in regulating B's position against X. In *National Provincial Bank v Ainsworth* itself, Lord Upjohn noted that, if B is in sole occupation of A's land, strangers such as X are under a duty not to interfere with B's possession of that land.[93] As noted in section 2.2 above, B's right, in such a case, does not arise from any licence, but rather from the fact of B's physical control of the land.

5.3 B'S RIGHTS AGAINST C

5.3.1 Direct rights

Where B has a statutory licence under the FLA 1996, it is, of course, possible for B to acquire a direct right against C. Such a right can only arise, however, if C's conduct falls into one of the means, examined in Chapter 6, section 2, by which B can acquire a direct right against C.

5.3.2 A pre-existing property right?

Family Law Act 1996, s 31

(1) Subsections (2) and (3) apply if, at any time during a marriage, one spouse is entitled to occupy a dwelling-house by virtue of a beneficial estate or interest.

(2) The other spouse's matrimonial home rights are a charge on the estate or interest.

(3) The charge created by subsection (2) has the same priority as if it were an equitable interest created at whichever is the latest of the following dates—

(a) the date on which the spouse so entitled acquires the estate or interest;

(b) the date of the marriage; and

(c) 1st January 1968 (the commencement date of the Matrimonial Homes Act 1967) [. . .]

(8) Even though a spouse's matrimonial home rights are a charge on an estate or interest in the dwelling-house, those rights are brought to an end by—

(a) the death of the other spouse, or

(b) the termination (otherwise than by death) of the marriage,

unless the court directs under s.33(5) [. . .]

(10) If the title to the legal estate by virtue of which a spouse is entitled to occupy a dwelling-house [. . .] is registered under the Land Registration Act 2002 or any enactment replaced by that Act—

(a) registration of a land charge affecting the dwelling-house by virtue of this Part is to be effected by registering a notice under the Act; and

(b) a spouse's matrimonial home rights are not to be capable of falling within paragraph 2 of Schedule 1 or 3 of that Act.

In *National Provincial Bank v Ainsworth*, the House of Lords held that B's right to occupy A's land, arising under a 'deserted wife's equity', did *not* count as a property right in land

[93] [1965] AC 1175, 1232.

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and so was not capable of binding C. Section 31(2) of the FLA 1996 clearly adopts a different position: B's statutory right to occupy is capable of binding C.

It is important to note, however, that B's statutory right does not operate in quite the same way as a standard interest in land. For example, consider the case in which B has a standard equitable interest in relation to registered land. If B fails to protect that right by entering a notice on the register, then, as we have seen, it may be possible for C to use the lack of registration defence against it (see Chapter 12, section 3.2). But if B is in *actual occupation* of the registered land at the relevant time, C cannot use that lack of registration defence against B (see further Chapter 14, section 5).

In contrast, if B does not have a standard equitable interest, and instead has only a statutory right under s 30 of the FLA 1996, B's failure to protect that right by entering a notice on the register *prevents* B from asserting that right against C. B's actual occupation makes no difference: s 31(10) ensures that B's right remains subject to the lack of registration defence. This means that, in most cases,[94] B can only assert his or her right against C if, before C registers C's right, B protects his or her statutory right by entering a notice on the register.

6 LICENCES COUPLED WITH AN INTEREST

A licence coupled with an interest arises where B has a liberty to make some use of A's land *and* that liberty protects, or arises as part of, a property right held by B. It is very doubtful, however, that 'licences coupled with an interest' are a useful concept. After all, as we saw in section 1 above, the general definition of a licence excludes situations where B's liberty to use A's land arises as part of a property right held by B: for example, if B has a lease of A's land, it is true that B has permission to be on A's land, but B's rights as against A, X, and C do not depend on this licence. Where B has a 'licence coupled with an interest' then, as against A, we would expect B's position to depend on: (i) the terms of the contract between A and B, if any; and (ii) the nature of B's property right. As against X and C, we would expect B's position simply to depend on the nature of B's property right. This does, indeed, seem to be the case; it is therefore of little use to speak of B as *also* having a licence coupled to his property right. In fact, as we will see in section 6.1, the concept of a 'licence coupled with an interest' has chiefly been used by the courts as a way in which to develop the remedies available to B when he has a contractual licence, whilst at the same time *technically* respecting past (but outdated) decisions that limited those remedies.

6.1 B'S RIGHTS AGAINST A

James Jones & Sons Ltd v Earl of Tankerville
[1909] 2 Ch 440

Facts: The Earl of Tankerville (A) owned the Chillingham estate in Northumberland.[95] He made a contractual promise to James Jones & Sons Ltd (B) allowing them to come

[94] If C does not acquire his right for value, C cannot rely on B's failure to register as a defence to B's statutory right to occupy: the protection given to C by ss 29 and 30 of the Land Registration Act 2002 applies only if C acquires his right 'for valuable consideration'.

[95] Lord Grey succeeded to the estate in 1675 and was made Earl of Tankerville in 1695, and later Lord Privy Seal. He is said to have played a pivotal role in the passage of the Habeas Corpus Act 1679, by deliberately

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onto A's land, cut down timber on that land, set up a sawmill on A's land, and then remove the timber from A's land. A breached the agreement and forcibly removed B's employees from the land. B applied for an injunction to restrain A from acting in that way. Parker J granted the injunction.

Parker J

At 442

A contract for the sale of specific timber growing on the vendor's property, on the terms that such timber is cut and carried away by the purchaser, certainly confers on the purchaser a licence to enter and cut the timber sold, and, at any rate as soon as the purchaser has severed the timber, the legal property in the severed trees vests in him. A licence to enter a man's property is prima facie revocable, but is irrevocable even at law if coupled with or granted in aid of a legal interest conferred on the purchaser, and the interest so conferred may be a purely chattel interest or an interest in realty. If A sells to B felled timber lying on A's land on the terms that B may enter and carry it away, the licence conferred is an irrevocable licence coupled with and granted in aid of the legal property in the timber which the contract for sale confers on B: *Wood v. Manley.*[96] [. . .] Even, therefore, if no interest at law passes by a contract for the sale of specific growing timber to be cut by the purchaser, it is difficult to see why on principle equity should not restrain the vendor from revoking the licence conferred by such a contract, though it might be unable to compel the purchaser to cut the timber if he refused to do so. When once the purchaser has cut any part of the timber, the legal property in the timber so cut is certainly in the purchaser, and the licence so far as that timber is concerned is irrevocable even at law, and a Court of Equity in granting an injunction would only be restraining the violation of a legal right. An injunction restraining the revocation of the licence, when it is revocable at law, may in a sense be called relief by way of specific performance, but it is not specific performance in the sense of compelling the vendor to do anything. It merely prevents him from breaking his contract [. . .]

It is important to note the date of this judgment. When it was given, there was some doubt as to whether a court could order specific performance of a standard contractual licence: *Hurst v Picture Theatres Ltd*[97] (see section 3.1.2 above) had not yet been decided. It was therefore helpful for the judge to distinguish past cases[98] in which it had been assumed that a standard contractual licence could not be protected by specific performance, by saying that B had a 'licence coupled with an interest'.[99] Nowadays, as we saw in section 3.1.2 above, there is no such difficulty in ordering A to perform a contractual duty not to revoke B's licence. It seems, then, that, in a case such as *James Jones*, B's rights against A—as far as his liberty to use A's

miscounting the number of Lords voting for the bill when acting as a teller in the House of Lords, the other teller supposedly being too drunk to notice (see WD Christie, *Life of the First Earl of Shaftesbury, vol ii* (1871) pp 335–6. I am grateful to Jamie Glister for bringing this fact to my attention. The estate, including Chillingham Castle, remained with the family until the death of the ninth Earl in 1980. The twelfth-century castle (claimed to be one of the most haunted places in Britain) is now open to the public. The estate remains home to a rare breed of white cattle, said to be the only wild cattle in the world.

96 (1839) 11 Ad & E 34.

97 [1915] 1 KB 1.

98 Such as *Wood v Leadbitter* (1845) 13 M & W 838.

99 Indeed, in *Hurst* itself, the chief argument of Mr Hurst's counsel was that Mr Hurst, on buying the cinema ticket, had a licence coupled with an interest. And both judges in the majority, do refer to that argument at points in their judgments (see Buckley LJ, [5]–[6] and Kennedy LJ, [13]–[14]).

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land is concerned—should be governed simply by A's contractual agreement with B and the principles discussed in section 3.1.2 above.

The concept of a 'licence coupled with an interest' may be more important in a case in which A is *not* under a contractual duty to B. For example, let us say that property belonging to B finds its way onto A's land. It may be that B's car is stolen and then parked on A's land. In such a case, A may refuse B permission to come onto A's land and retrieve the car.

There are two ways in which the law could respond. Firstly, it could be said that B has a 'licence coupled with an interest': B's ownership of the car imposes a duty on A *either* to deliver the car to B *or* to allow B to come onto the land to collect it. The question then would be whether a court would grant an order forcing A to comply with that duty, or would instead order A to pay damages to B.

Secondly, it could be said that, by refusing to allow B to collect the car, A is interfering with B's ownership of the car and so is committing a wrong: the tort of conversion.[100] If A commits such a tort, B can ask the court to order A to 'deliver up' the car to B,[101] but the court does not have to make such an order. In fact, the usual response of the court is to order A to pay B damages.

6.2 B's RIGHTS AGAINST X

Where B has a licence coupled with an interest, B also has a property right. If X interferes with that property right, he commits a wrong against B. For example, in *James Jones*, if X were to trespass onto A's land and take away some of B's timber, X would commit the tort of conversion against B. It is also possible for B's licence to be coupled with a property right in A's land. For example, as we will see in Chapter 25, section 1.1, there is a particular form of property right in land, akin to an easement, known as a 'profit' or 'profit *à prendre*'. It is a property right that allows B to come onto A's land and remove something that would otherwise be owned by A—for example, turf or trees growing on A's land. If B has such a right, X is under a duty not to interfere with B's right to come onto A's land and remove the thing in question. But X's duty does not arise because B has a licence; rather, it arises because B has a profit—that is, a property right in A's land. In *James Jones*, it is unclear whether B had such a property right: it seems that, because A had not used a deed to give B his right, B could not claim a legal profit *à prendre*—but B may have had an equitable profit *à prendre*.

6.3 B's RIGHTS AGAINST C

6.3.1 Direct rights

If, as in *James Jones*, A is under a contractual duty to allow B to make a particular use of A's land, the discussion of direct rights in section 3.3.1 above is applicable. Certainly, A will have the same incentive, when transferring his land to C, to ask C to promise to respect B's licence.

[100] For a discussion of the requirements of the tort, see *Kuwait Airways v Iraqi Airways (Nos 4 & 5)* [2002] 2 AC 883. *Howard E Perry v British Railway Board* [1980] 1 WLR 1375 provides an example in which the defendant committed the tort of conversion simply by refusing to return goods, currently controlled by the defendant, to the claimant.

[101] See Torts (Interference with Goods) Act 1977, s 3.

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6.3.2 A pre-existing property right?

We have seen that, in general, the fact that A is under a duty not to revoke B's licence does *not*, by itself, give B a property right in A's land. But where B has a licence coupled with an interest, the interest is, in itself, a property right. So, if the interest is a property right in A's land, such as a profit *à prendre*, it is capable of binding C. If the interest is instead a property right in a thing on A's land, that property right is also capable of binding C, just as it is capable of binding X. So, if, in *James Jones*, A were to sell his land to C, the timber already cut down by B and stored on A's land would continue to belong to B. C would therefore commit the tort of conversion if he were to refuse to allow B to collect that timber.

QUESTIONS

1. What is the key feature of a licence? Does Hohfeld's distinction between a 'privilege', or 'liberty' on the one hand and a 'claim right' on the other help in understanding the position of a licensee?
2. What are the different forms of licence? Given their variety, is it useful to think of licences as a single category?
3. In what circumstances might a court refuse to order specific performance of A's duty not to revoke B's contractual licence?
4. When can B rely on a 'constructive trust' to assert a right against C? Does such a constructive trust arise as soon as A gives B a contractual licence, or does it only arise at a later point?
5. Do you think that particular forms of contractual licence may one day be recognized as property rights?
6. Are cases in which 'estoppel licences' bind third parties cases in which B has more than a licence, and instead has a recognized equitable interest, arising as a result of proprietary estoppel?

FURTHER READING

Battersby, 'Informally Created Interests' in *Land Law: Themes and Perspectives* (eds Bright and Dewar, Oxford: OUP, 1998)

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

Hohfeld, 'Faulty Analysis in Easement and License Cases' (1917) Yale LJ 66

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

Moriarty, 'Licences and Land Law: Legal Principles and Public Policies' (1984) 100 LQR 376

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

Swadling, 'Property' in *English Private Law* (2nd edn, ed Burrows, Oxford: OUP, 2007, [4.114]–[4.128])

Wade, 'Licences and Third Parties' (1952) 68 LQR 337