Land Law

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Classification of property

Land is one of a number of types of property which can be owned, so it is useful to establish the meaning of the word 'property' and then to classify different types. When considering sale of goods, we saw that the word 'property' was used in the special sense of 'ownership'. The more general meaning of the word is, simply, anything capable of being owned.

The categories of property are so diverse (for example, including land, jewellery, cars, stocks and shares, patents and money) that the law needed to develop different rules for each type to cover transfers of ownership. For example, if you buy a loaf of bread, it can be handed over to you but the same cannot happen when you buy land. A transaction involving land may be far more complex, especially when several people may have different rights over the same land at the same time. To illustrate this, suppose that a couple take out a mortgage to help finance the purchase of their home. To support their ongoing overheads, they rent out part of the property to a tenant. As the house is set in large, rural grounds, the couple also grant shooting and fishing rights, and rights of way, over the land to local clubs and societies.

English law categorises property as either 'real' or 'personal'. Historically, if a person had their freehold land wrongfully taken away, the law enabled them to bring a real action to recover that land. If a person had any other type of property wrongfully taken away, the law merely enabled them to bring a personal action for damages. Therefore, property came to be classified according to the type of court action that was needed to protect it.

What is land?

Airspace

Owners of land may own the surface of the earth, the airspace above it and the ground below it. In terms of airspace, the court's decision in the case of *Bernstein v Skyviews and General Ltd* (1978) demonstrates that a landowner only owns as much airspace as is necessary for the ordinary use or enjoyment of their land. In that case, a firm specialising in aerial photography flew an aircraft over Lord Bernstein's house so that they could take a photograph and offer to sell it to him. The court held that the firm had not committed trespass, given that the pilot had flown the aeroplane over the house at a reasonable height. Most normal aircraft activity is now excused under s.76 of the Civil Aviation Act 1982, which precludes actions for nuisance or trespass if an aircraft flies over at a reasonable height and has complied with the relevant regulations.

In other situations, the threshold for determining the extent to which land encompasses the airspace above it will depend on the type of land and its potential use. For example, the court may consider that an owner of a grouse moor needs a considerably greater height of airspace for shooting purposes than the owner of a suburban bungalow who may only wish to use the airspace above their property for erecting a TV aerial.

It can be important to recognise that the airspace above land may have significant commercial worth, for example, a landowner may be able to rent out the airspace above their land to enable a marketing company to erect an advertising hoarding. Similarly, in the case of *Wollerton and Wilson Ltd v Richard Costain Ltd* (1970), a builder swung the arm of a tower crane over adjoining land without permission. When it became clear that they were trespassing, they offered to pay a weekly sum to the landowner. The landowner took the matter to court and was granted

an injunction to prevent the builder from using the crane. The court, however, ordered the injunction to be postponed for several months, by which time the builder had finished the work that they were doing and no longer needed the crane. In such situations involving trespass in the airspace above land, the landowner may be entitled to a remedy even if their use of land is not affected.

Below the surface

The case of *Bocardo v Star Energy* (2010) provides some clarification as to the extent of a landowner's rights over the subterranean space below their land. It concerned a number of oil wells which were situated at least 800 feet below the claimant's land. The court held that the defendants, who had drilled into the wells from their adjoining land, had trespassed onto the claimant's land and ordered them to pay the claimants some compensation (damages).
Section 205 of the Law of Property Act 1925 specifically includes any mines and minerals within its broad definition of land but there are exceptions. For example, anyone finding potential treasure (as defined in s.1 of the Treasure Act 1996) must report it to the Coroner within a period of 14 days, otherwise they will be committing a criminal offence. The Coroner may hold an inquest to determine whether the find is treasure and belongs to the Crown. Similarly, s.2 of the Petroleum Act 1998 entitles the Crown, rather than the landowner, to ownership of any mineral oil and natural gas found in the land, whilst any deposits of coal belong to the Coal Authority under s.7 of the Coal Industry Act 1994.

Structures

On the surface of land, there are likely to be structures such as houses, shops or offices. Such buildings form part of the land, and so do any fixtures within them. A fixture is something that is

attached to, and regarded as forming part of, the land (for example, a fitted sink, a garden gate or a rose bush). A chattel is an item of personal property which can be removed easily, and which is not regarded as forming part of land (for example, a television, fitted carpets or curtains). The same items may be classified as either fixtures or chattels in different contexts. By way of an example, a pile of stones in a builder's yard would constitute chattels, but the same stones in the form of a dry stone wall would be categorised as a fixture.

Fixtures and chattels

It can be important to determine whether an object is a fixture or a chattel. For example, when land is sold, the purchaser becomes the new owner of all of the fixtures, unless the parties have agreed otherwise. Similarly, when a tenant installs fixtures in a landlord's property, the landlord becomes the new owner of them. Additionally, where land is mortgaged, any fixtures form part of the mortgage security, whether or not they are installed before or after the mortgage is created. Further, where a testator in a will leaves all of their real property to one person and all of their personal property to another, ownership of the fixtures will pass with the real property and ownership of the chattels with the personal property.

The question of whether an item is a fixture can also be relevant where a landowner becomes insolvent. In the case of *Lyon & Co. v London City & Midland Bank* (1903), the owners of some chairs had hired them out to the owner of a hall. In order to comply with the local bye-laws on safety, the owner of the hall had fixed the rows of chairs to the floor. Following the owner's insolvency, the receiver was keen to show that the chairs formed part of the land, as fixtures, so that they could be counted as the owner's assets. The owner of the chairs was equally eager to demonstrate that the chairs still belonged to him, as chattels, because they would otherwise be

limited to making a fairly hopeless claim for their value in the insolvency proceedings. The court held that the chairs were chattels and so the owner of them was entitled to take them back.

In determining whether an item is a fixture or a chattel, the key question to be asked is whether the item is attached to the land. An item that is physically attached to land is presumed to be a fixture, for example, a statue that is cemented in place. Other items are presumed to be chattels, such as a free-standing statue that is held in place by its own weight. It is possible to rebut these presumptions by identifying the reason behind the item being attached to the land. In the case of *Leigh v Taylor* (1902), the court held that a valuable tapestry was a chattel because the purpose behind tacking it to the wall was to enable it to be enjoyed as an ornament in itself. Conversely, a dry stone wall resting on its own weight would be regarded as a fixture because its purpose is to enhance the land.

To avoid any disputes about whether items are fixtures or chattels, the parties to a sale of land will often reach an express agreement about which items are to be included in the purchase price and sold to the new owner and which items can be removed by the vendor and taken away with them. If vendors and purchasers always reached such agreements, there would be fewer disputes over items such as: greenhouses, sheds, television aerials, dishwashers, carpets and garden ornaments!

Tenant's fixtures

In relation to a tenancy (see Chapter 13) the general rule is that any items installed by a tenant will belong to the landlord at the end of the tenancy. However, subject to any contrary term in the tenancy agreement, the tenant may be entitled to remove any items that are classified as 'tenant's fixtures' either before, or within a reasonable time after, the tenancy comes to an end. Tenant's fixtures are fixtures that are installed by the tenant which are either: ornamental (such

as paintings), trade fixtures (such as petrol pumps), or agricultural fixtures (such as machinery). In removing any tenant's fixtures, the tenant must repair any damage caused.

Wildlife on land

Considering the ownership of other types of things that may be found on the land, a landowner does not own any wild animals or birds that may be living on his land. However, subject to certain statutory restrictions, the landowner does have the exclusive right to kill such wildlife and, in doing so, claim ownership of it which means that a poacher should hand over the fruits of their labours!

Water

Similarly, a landowner does not own any water on their land but may have rights in respect of it, for example, to abstract quantities of it for use in connection with their land, again subject to any statutory restrictions. If the landowner is taking water from a river, then they must be careful to observe the rule that landowners further downstream are also entitled to the flow of the river unaltered in quantity and quality. If a landowner pollutes the water, they can be sued in nuisance.

Freehold and leasehold estates

People are often surprised to learn that individuals, in England and Wales, do not own land. Instead, all land belongs to the Crown, and s.1 of the Law of Property Act 1925 provides that landholders can only own either a freehold estate or a leasehold estate in respect of it.
This may seem to be largely a theoretical matter but it provides the basis of the law of compulsory purchase, namely, that the state can acquire land for the public good for due

recompense; and also explains why land reverts to the Crown where someone dies and there is no-one to inherit under the intestacy rules.

The major difference between the two estates is the length of time for which they will be held. A freehold estate or 'fee simple absolute in possession' is the nearest equivalent to absolute ownership of land. Essentially, a freehold estate continues to exist as long as there are persons entitled to take it on the owner's death either under the terms of a will or, if the deceased has not made a will, on the application of the rules of intestacy. By contrast, an owner may grant a leasehold estate or 'term of years absolute' to a tenant which means that the tenant is entitled to exclusive possession of the land for a particular period of time or 'term'. If the term of the agreement is quite short, it is often referred to as a tenancy (for example, a monthly tenancy). If it is longer, then it is usually referred to as a lease (for example, a 99 year lease), but there is no precise or rigid rule. Both freehold and leasehold estates can be sold, inherited either under a will or on intestacy, or otherwise transferred, for example, by way of a gift.

Interests in land

Apart from the two legal estates (freehold and leasehold), other rights in land are called interests in land. Essentially, these fall into two types: legal interests and equitable interests.

Section 1 of the Law of Property Act 1925 provides that a limited number of rights in land may be legal interests if they are created by way of a deed. The most common of these are easements and profits à prendre (provided that their duration is equivalent to either a freehold or a leasehold), and charges by way of legal mortgage. The nature of each of these interests is considered below. Any interest in land which is not a legal interest must be an equitable interest. Examples of equitable interests in land are: interests under restrictive freehold covenants;

interests created without the use of a deed; interests under contracts to create legal estates or interests; and beneficial interests established under trusts of land.

Traditionally, the essential difference between a legal interest and an equitable interest is that a purchaser of land is bound by all of the legal interests in the land but may not necessarily be bound by the equitable interests. The position is regulated by the Land Charges Act 1972 (in respect of unregistered land) and the Land Registration Act 2002 (in respect of registered land). We will consider the extent to which a purchaser of land can discover, and be bound by, the major interests in land, and conversely, how an owner can ensure that their interests will bind a purchaser.

Easements

An easement is an interest in land which gives the owner of one piece of land (the 'dominant land') the right to use or restrict the use of another's land (the 'servient land'). Common examples of easements include: rights of way, storage rights, car parking rights, rights of light to land or buildings, and rights of support to buildings.

Characteristics of an easement

For a right to be classified as an easement, it must satisfy the four criteria from the case of *Re. Ellenborough* (1955).

1. First, there must be dominant land which benefits from the easement and servient land which is burdened by it. Therefore, a public right of way cannot be an easement because members of the public have the right to use it whether or not they own any dominant land.
2. Second, the right must benefit or 'accommodate' the dominant land. For a right to satisfy this criterion, the dominant and the servient land must be close to one another. In the case of *Bailey v Stephens* (1962), the court provided the example that an owner of land in

Northumberland could not grant an easement for the benefit of land in Kent as the two pieces of land were not in sufficiently close proximity. The right must also benefit the dominant land itself, rather than its owner or their business. In the case of *Hill v Tupper* (1863), the claimant was a tenant of some land which adjoined a canal. They ran a business hiring out pleasure boats and argued that their right to put boats on the canal constituted an easement. Given that the right provided them with a purely commercial advantage, the court held that it could only constitute a personal licence rather than an easement.

3. Third, a right can only be an easement if the dominant and the servient owners or occupiers are different people. This means that a landowner cannot have an easement over their own land. However, if they grant a lease of their land to a tenant, they may grant related easements to the tenant, for example, to give the tenant access over the landlord's staircase to a first floor flat.
4. Finally, the right must be capable of forming the subject matter of a grant. This requirement comprises a number of sub-criteria. The dominant and the servient owners must be legally competent, for example, of adult age. The right must also be sufficiently definite. In *William Aldred's Case* (1610), the court held that a right to a view would be too vague to constitute an easement. The courts are also more likely to hold that a right is an easement if previous courts have found in favour of easements of this type. For a right to be classed as an easement, it should not generally require the servient owner to spend money. (An exception to this general rule is the easement of fencing which only arises in respect of agricultural land (*Crow v Wood* (1970)). Finally, the exercise of the right should not unduly deprive the servient owner of the benefit of their land. In the case of *Batchelor v Marlow* (2001), the court held that the right to park six cars was too excessive to be an easement as it would unduly restrict the servient owner's use of their land.

Creation of an easement

Easements may be created in various ways.

Express creation

Legal easements may be created by express agreement between the parties, by operation of statute, or through a person's will. A servient owner may expressly 'grant' a legal easement over their land for the benefit of the dominant owner for a period equivalent to either a freehold or a leasehold estate. This type of easement must be documented by way of a deed. If a landowner sells off part of their land, they may also 'reserve' easements for the benefit of the land that they retain. This will often be documented in the same deed as is used to sell off the land. Easements may also be created by statute. For example, utility companies have rights to enter privately owned land to install supply pipes and cables. Finally, people may create easements through their will if they leave dominant land and servient land to be inherited by different people.

Implied creation

Easements may also be impliedly created in a number of ways.

1 Necessity

An easement may arise through necessity if the land cannot be used without it, for example, if there is no other means of access between the land and a publicly adopted highway.

2 Common intention

An easement may also be evidenced by the common intention of the parties. In the case of *Jones v Pritchard* (1908), the court held that there was an implied easement for the owners of semi-detached properties to make joint use of the properties' shared chimneys.

3 The rule in Wheeldon v Burrows

Following the case of *Wheeldon v Burrows* (1879), an easement may additionally be implied if the right was being used when the land was sold and is necessary for its reasonable enjoyment and/or it has been used for a substantial period of time and can be detected by a reasonably careful examination of the land.

4 Section 62 Law of Property Act

Finally, if a right is being used when land is sold or leased, the deed may automatically convert such a right into an easement under s 62 of the Law of Property Act 1925. In the case

of *Wright v Macadam* (1949), a tenant had permission under a licence to store coal in her landlord's shed. When she renewed the lease, s 62 automatically converted her right into an easement.

Long user/prescription

As well as being expressly or impliedly granted or reserved, easements may also be acquired by long user or 'prescription', for example, through the Prescription Act 1832. For example, if a landowner uses a path to cross their neighbour's land for a prescribed period of time, the landowner may become entitled to an easement. An easement can be acquired via this method by either a freeholder or a leaseholder of dominant land against either a freeholder or a leaseholder of servient land. However, a tenant is unable to acquire an easement by prescription against his own landlord.

In order to acquire such an easement by prescription, the dominant owner must have used the servient owner's land as if they had a right to do so. If the dominant owner crossed their neighbour's land in secret, so that their neighbour would not discover him, or if the dominant owner forced their way over their neighbour's land, for example, by damaging fences, they would not acquire an easement by prescription. In addition, the dominant owner must make regular use of the servient land.

There are three different methods of acquiring easements by prescription, and they each have their own requirements as to the period of time over which a right needs to be exercised before it can be classed as an easement. Whilst the technical details of these requirements fall outside the scope of this book, essentially the right needs to be exercised for a minimum of 20 years before a claim for prescription can be considered.

Protection of an easement

The question as to whether the benefit of an easement needs to be protected on the Land Charges register (for unregistered land) or the Land Register (for registered land) depends on how the easement has been created. Some easements, such as those acquired by prescription, do not need to be protected by registration. Instead, they will automatically bind a purchaser of the land.

If there is an infringement of an easement then, depending on the circumstances, the dominant owner may be able to use the self-help remedy of abatement. For example, if their right of way is blocked, they may be able to take steps to remove the blockage provided that they act promptly and reasonably, give notice to the servient owner (except in an emergency or where access to the servient owner's land is not required), and do not cause any unnecessary damage. It is, however, generally less risky for the dominant owner to consider bringing a claim in nuisance instead. They may seek damages from the servient owner and/or an injunction requiring them to remedy the problem and/or a declaration that the easement exists and defining its extent (to help avoid any issues arising in the future).

Extinction of an easement

Servient owners who seek to bring an easement to an end may do so in a number of different ways.

They may approach the dominant owner to see if they will agree to expressly release the benefit of the easement in return for payment of compensation. Such an express release would normally be documented by way of a deed.

The servient owner may be able to claim that the easement has been impliedly released because the dominant owner has not been exercising it, although long non-usage is often, of itself, not sufficient to evidence abandonment (*Benn v Hardinge* (1992)).

It might be established that the easement has come to an end due to a substantial change in the nature of the use of the land.

Finally, if the dominant and servient lands become owned and occupied by the same person, which is called 'unity of seisin', the easement will automatically come to an end. It is worth noting that, in such circumstances, the easement could be revived in the future if the two pieces of land become subsequently owned by different people.

Profits à prendre

A profit à prendre is an interest in land which enables someone to take something from another's land. Common examples include rights to fish and to graze cattle. Essentially, the legal rules on profits à prendre are identical to those which relate to easements (see above), with two major differences. First, in relation to a profit à prendre, there is no requirement for the existence of any dominant land. Second, the only form of implied grant or reservation of a profit à prendre is through evidencing the parties' common intention.

Note: The Law Commission published a report on Easements, Covenants and Profits à prendre (Law Com No 327) in June 2011 and the government noted an intention to simplify the law in this area in February 2017. These laws may well change in the forthcoming years.

Restrictive freehold covenants

A restrictive freehold covenant is a promise that is given by one landowner (the 'covenantor') to another landowner (the 'covenantee') that they will not use their land in certain ways, for example, for business purposes. The covenantor bears the burden of the covenant and the covenantee is entitled to its benefit. Such covenants are contractual obligations and are usually

documented by way of a deed. The requirements for a deed are set out in s.1 of the Law of Property (Miscellaneous Provisions) 1989 Act, namely:

- the document must be signed by both of the parties,
- each of the parties' signatures must be witnessed, and
- the witness must also sign the document to attest the parties' signatures.

If a party needs someone to sign the deed on their behalf, for example, because of illness, then two witnesses will be required.

As a consequence of the principle of privity of contract (see Chapter 6), the original covenantor who made the promise will always be liable for any breach of the covenant even after they have sold on their burdened land to someone else. New owners of the burdened land may also be obliged to comply with the restrictive covenant in equity if the following four criteria arising from the case of *Tulk v Moxhay* (1842) are satisfied.

1 First, the covenant must be negative. This means that it restricts the covenantor from taking action, for example, a covenant not to cause any nuisance from the property requires the covenantor to refrain from doing something.

2 Second, as in the case of easements (considered above), the covenant must have been made for the benefit of the covenantee's land and not merely for the covenantee's personal benefit. The covenant may, for example, benefit the covenantee's land if it increases its value by prohibiting undesirable development or activities on the covenantor's neighbouring land. (Despite this general rule, certain bodies, such as the National Trust, are not required to own benefited land in order to enforce conservation covenants.) This criterion also requires the covenantee to have owned the benefitting land at the date that the covenant was made.

3 Third, the original parties to the covenant must have intended that the burden of the covenant would be transferred to subsequent owners of the covenantor's land. There may be express evidence of their intention in the deed that created the covenant. If not, s.79 of the Law of Property Act 1925 implies such an intention (unless there is anything in the deed to suggest otherwise).

4 Finally, to be enforceable against all subsequent owners of the covenantor's land, the covenant must be protected by way of a land charge at the Land Charges Department (if the land is unregistered) or entered on the register at the Land Registry (if the land is registered).

If both the original covenantor and the original covenantee have sold their lands on to other people, it will be necessary to check whether the *benefit* of the covenant has similarly passed in equity to the new owners of the covenantee's land. If it has, they will be able to bring a claim against the current covenantors for an injunction or damages. A covenantee may transfer the benefit of a covenant to a subsequent owner of their land by expressly 'assigning' the benefit of that covenant in writing. For the benefit of a covenant to be transferred in this way, it would need to be expressly assigned each time the land is sold on to a new owner.

If there is no evidence that such an assignment has taken place, then the new owner may still be able to benefit from the covenant if they can demonstrate that it has been 'annexed' to their land. When the covenant was created, the terms of the deed may indicate that the original parties intended the benefit of the covenant to pass to subsequent owners of the covenantee's land through 'express annexation'. Even without such wording, s.78 of the Law of Property Act 1925 provides that the benefit has passed through 'statutory annexation' if the extent of the benefitting land is clear.

Particular rules apply to 'building schemes' or 'schemes of development' which are often put in place on housing estates. A building scheme exists when a developer makes each plot of land that they sell subject to the same set of covenants which will benefit all of the other plots on the development. Each time a plot is sold on, the new owners will automatically take on the burden of the covenants against their plot and simultaneously benefit from the covenants against the other plots.

It may be difficult for the current covenantee to bring a claim in equity against the current covenantor, for example, because the current covenantor is bankrupt. In such situations, the current covenantee may seek to bring a claim in common law against the *original* covenantor instead, provided that the original covenantor can be traced! To bring such a claim, the current covenantee must satisfy the four requirements from the case of *P & A Swift Investments v Combined English Store Groups* (1989). First, the covenant must 'touch and concern' or enhance the value of the covenantee's land. Second, the original parties must have intended the benefit of the covenant to pass to future owners of the covenantee's land. (Even if such an intention is not expressly contained within the deed, it will be implied by s.78 of the Law of Property Act 1925). Third, at the time when the original parties entered into the covenant, the covenantee must have held a legal estate in the benefitting land. Finally, the current covenantee must demonstrate that their ownership of a legal estate in the land can be traced back to the original covenantee.

A covenant may come to an end in a number of ways:

Similar to an easement, a covenant will automatically come to an end through unity of seisin (which we looked at above) if both the burdened and benefitting lands become owned by the same person. (If the covenant exists under a building scheme, the covenant may be resurrected at some point in the future if both the burdened and benefitting lands fall into separate ownership once more.)

The covenantor may also ask the covenantee for an express release of the covenant by deed, usually in return for payment of some compensation.

The covenantor may claim that the covenant has come to an end through 'implied discharge' if they can demonstrate that the covenantee has failed to take action for a breach for a particular

period of time. Unfortunately, it is unclear how long a period of time is required, and each case will turn on its own facts.

Finally, the covenantor may make an application to the Upper Tribunal (Lands Chamber) under s.84 Law of Property Act 1925 to discharge or modify a restrictive covenant. In order to do so, the covenantor will need to prove one of a number of grounds. These include demonstrating that the covenant has become obsolete, for example, in the case of a covenant requiring use of a private dwelling house in an area which is now dominated by business premises.

Where a covenant is discharged or modified, any entries relating to the covenant should be removed from, or amended on, the land charges register (where the land is unregistered) or the land register (where the land is registered).

Mortgages of land

The enduring quality of land makes it a valuable asset and a superior form of security for raising money. The owner of the land who borrows against it (the 'mortgagor') will naturally want to continue to use and enjoy their land, but the person lending the money (the 'mortgagee') must be given certain rights over the land in the event that the mortgagor defaults on making their repayments. These requirements are provided for in the rules governing legal mortgages.

In registered land, s.87 of the Law of Property Act 1925 provides for the creation of a mortgage by a charge by deed, expressed to be by way of legal mortgage. The rules ensure that a mortgagee has the necessary interest in the land for it to constitute effective security for the loan. This interest is reinforced by the rights granted to a mortgagee to realise this security if the mortgagor defaults on making their repayments. These include:

1 The mortgagee's 'right to take possession'. If a mortgagee has to sell the property in order to reclaim what they are owed, they will need to obtain vacant possession of it first. To do this, they will usually make an application to the court under the Civil Procedure Rules Part 55.
2 The mortgagee's 'right to appoint a receiver' under ss.101 and 109 of the Law of Property Act 1925. A mortgagee may appoint a receiver to manage or sell the mortgaged property, discharge the mortgage and pay any surplus over to the mortgagor. This is common in relation to mortgages of commercial property.
3 The mortgagee's 'right to sell' the property under s.101 of the Law of Property Act 1925. The case of *Cuckmere Brick Co v Mutual Finance Ltd* (1971) makes it clear that, when selling the property, the mortgagee is under a duty to obtain the best price reasonably obtainable. Under s.105 of the Law of Property Act 1925, the mortgagee then pays off any costs in connection with the sale and the mortgage monies owed. They will use the remainder of the sale proceeds to discharge any subsequent mortgages and pay any surplus to the mortgagor. Case law including *Rudge v Richens* (1873) and *Bristol and West v Bartlett* (2003) demonstrates how, if there is a shortfall between the sale proceeds and the monies needed to discharge the mortgage, the mortgagee may bring a claim against the mortgagor. Under s.20 of the Limitation Act 1980, the mortgagee must bring their claim within a period of 12 years in respect of any capital monies due and 6 years in respect of any arrears of interest.

A prospective purchaser must be careful to ensure that the land they are interested in will not be subject to an unredeemed mortgage. If the land is registered, any outstanding mortgages should be apparent from the land register (ss.27 and 32 of the Land Registration Act 2002). If the land is unregistered then, under s.1 of the Law of Property Act 1925, a legal mortgage will be protected by the deposit of the title deeds with the mortgagee. As we discuss below in the section on conveyancing, any prospective purchaser of unregistered land will always need to see the title deeds. If they are not available, this will suggest that they are being held by a mortgagee as security to protect a loan. Any other mortgages will be classed as *puisne* mortgages and must be protected by registration at the Land Charges Department under s.2 of the Land Charges Act

1972 and will be revealed by the prospective purchaser's land charges search. The vendor can also be asked to disclose the existence of any outstanding mortgages in their replies to pre-contract enquiries.

Licences

A licence is a permission to use land which is granted by a licensor to a licensee. It does not confer any legal estate or interest in land but is merely a personal right that prevents the licensee from being a trespasser. Licences are used in a variety of situations, for example: in property guardianship arrangements where companies permit guardians to live in their unused premises in order to deter squatters and vandals; to permit fishing or grazing; and to enable given brands to temporarily trade in shopping centres.

There are various different types of licences.

A *contractual licence* is granted by a licensor in return for payment of consideration, for example, a licence fee. Contractual licences are used in many situations, for example, when a hotel owner permits guests to stay, or a sports centre authorises people to use its facilities.

Conversely, if a landowner grants a licence without requiring the payment of any consideration from the licensee, it will be a *bare* or *gratuitous licence*. An example of such a licence would be an invite to a friend's house for coffee. Whilst no money changes hands, the landowner gives permission to their friend to be on the premises.

Whilst legal interests in land, such as rights of way, cannot unilaterally be brought to an end by the person who bears the burden of them, the general rule is that licences are only personal rights which may be revoked by the licensor at any time. Similarly, whilst legal interests may benefit/burden future owners of the land, licences will automatically come to an end on any sale of the land. There is, however, a third type of licence (already discussed) which involves profits

à prendre. As a profit à prendre comprises both a licence to enter another person's land and a property right to take something from that land, the licensor may not unilaterally revoke the right and future owners of the land will be bound by it.

Finally, if a landowner has unfairly led someone to believe that they have rights over the land and that person has acted in reliance on those rights, the court may hold that they have granted an equitable interest in the land through an *estoppel licence* and may award remedies accordingly.

When a landowner permits someone to access their premises, it is important to clarify the basis for that permission. Whether they decide to grant a lease or a licence will affect aspects such as how much control the landowner retains over the property, whether and how they can unilaterally bring the arrangement to an end, and if the occupier has a right to renew the arrangement.

Trusts

Essentially, a trust exists when a person ('the trustee'), holds property for the benefit of another person ('the beneficiary'). The trustee holds the legal estate of the property and the beneficiary has an equitable interest which entitles them to the benefits of the property. The Trusts of Land and Appointment of Trustees Act 1996 (TLATA) sets out a number of powers and duties of the trustee. Section 6 provides the trustee with the same powers as if they were the landowner which includes the rights to either sell or mortgage the property. Before doing so, s.11 requires the trustee to consult with any beneficiaries in so far as it is practicable to do so. Section 12 of the Act enables any beneficiaries to occupy the property. If there is any dispute about the trust, any person with an interest in the land (including any trustee, beneficiary or mortgagee) can make an application to the court under s.14 for it to be resolved. Section 15 sets out a non-exhaustive list

of factors which the court must take into account, including the welfare of any children who live at the property.

Trusts may be created in a number of ways and for a number of reasons. Section 53(1)(b) of the Law of Property Act 1925 enables a landowner to expressly create a trust of their legal estate in writing, either during their lifetime or through a will. For example, a widow owns a house. She has a son who is eight years' old. The terms of her will provide that, if she dies, the house is to be held on trust for her son by two trustees until her son reaches the age of 21.

If a landowner does not expressly create a trust of their legal estate, the court may imply that a trust has been created under s.53(2) of the Law of Property Act 1925. For example, suppose that the purchaser of a house agrees that their friend can move in with them and that she will become entitled to an interest in the house if she helps them with the mortgage repayments. Whilst the parties have not entered into any written agreement to create an express trust, the court may be prepared to imply a trust under which the purchaser holds the legal estate on trust for themself and their friend as beneficiaries.

There are two types of implied trust: a resulting trust and a constructive trust. The main difference between them is how the beneficiaries' respective shares are calculated when the property is sold. Under a resulting trust, the beneficiaries' shares are apportioned between them according to their respective contributions to the purchase price (see, for example, *Dyer v Dyer* (1788). If there is a constructive trust then, following the key case of *Stack v Dowden* (2007), the court will take what is known as the holistic approach to quantifying each of the beneficiary's shares. They will take into account a variety of factors, including:

- any advice or discussions at the time of the conveyance or transfer that would indicate their intentions at that time as to their respective interests in the property;
- the reasons why they purchased the property jointly;

- the reasons why the survivor of the couple was authorised to give a good receipt for capital monies;
- the purpose for which they acquired the property;
- the nature of the parties' relationship;
- whether the couple had children for whom they both had responsibility to provide a home;
- how the purchase was financed, both initially and subsequently;
- how the parties arranged their finances, for example, whether their accounts were held in separate and/or joint names and
- how the couple paid their outgoings on the property and other household expenses.

Following *Stack v Dowden*, the court is more likely to imply a constructive trust in a domestic context which involves the family home. In circumstances which involve both domestic and commercial elements then the court will consider the relationship between the parties and the purpose for which they acquired the land. By way of an example, the case of *Laskar v Laskar* (2008) involved a mother and her daughter purchasing a property as a buy to let investment. Despite their familial relationship, the court held that the parties owned the property under a resulting trust.

Co-ownership

It is quite common for two or more people to share ownership of land at the same time. Examples include a couple who buy a house together, or parties who jointly purchase business premises.

The law recognises two types of co-ownership:

- joint tenancies, and
- tenancies in common.

Sections 1(6), 34((1) and 36(2) of the Law of Property Act 1925 together provide that co-owners will always own the legal estate as joint tenants. Co-owners may hold their equitable interests as either joint tenants or tenants in common. The case of *AG Securities v Vaughan and Others* (1990) provides that for a joint tenancy to exist, the following 'four unities' must be present:

1 Unity of possession which occurs when each co-owner is equally entitled to occupy and possess the whole of the land.
2 Unity of interest which requires each co-owner's interest in the land to be the same. For example, both parties may own a freehold interest.
3 Unity of title which is satisfied when each co-owner has acquired their title in the same way, usually through the same deed.
4 Unity of time which requires each co-owner to have acquired their interest at the same time.

In a tenancy in common, the only unity that needs to be present is the first unity; namely, the unity of possession. Another difference between these two forms of co-ownership is that where there is a joint tenancy, the co-owners are regarded as owning the whole of the property together whereas in a tenancy in common, the co-owners will each own a separate, quantifiable share in the property.

Determining whether the co-owners hold their equitable interest in the property as joint tenants or tenants in common can be important if one of the co-owners dies. Upon the death of a joint tenant, the right of survivorship applies. In *Harris v Goddard* (1983), the court explained that this means that the deceased's interest in the property is automatically transferred to the surviving joint tenant(s). For example, if a property is co-owned by a husband and wife as joint tenants and the husband dies, his interest automatically passes to his wife who then becomes the absolute owner of the property. Conversely, if a tenant in common dies, their share will be transferred according to the terms of their will or, if they die without leaving a will, according to

the rules of intestacy. Their interest may therefore be inherited by someone other than the surviving co-owners.

One problem associated with co-ownership is that there could potentially be many co-owners of one property, which could complicate transfers or other related transactions in respect of it. Therefore, whether co-owners own the property as joint tenants or tenants in common, they will hold their interests under a trust of land. A maximum of four trustee(s) will hold the legal estate (under s.34(2) of the Law of Property Act 1925) and the beneficiary/beneficiaries will hold an equitable interest in the property. Essentially, s.2(1) of the Law of Property Act 1925 (as amended by TLATA, sch. 3) provides that a purchaser who pays two trustees for the property will 'overreach' the beneficiaries' interests which means that they will not be bound by them. In such a situation, the trustees will hold the proceeds of sale on trust for the beneficiaries.

It should be noted that, in practice, the co-owners are often both trustees and beneficiaries (for example, where two people have jointly purchased a house). Where only one of the parties wishes to sell the property, they may need to apply to the court under s.14 of TLATA (as discussed earlier) to do so.

Particular rules apply in the context of matrimonial proceedings. For example, upon divorce the court may rely on the Matrimonial Causes Act 1973 to adjust the relative interests of the spouses in the matrimonial home. The court has similar powers under the Civil Partnership Act 2004 where a civil partnership is being dissolved. Additionally, a spouse, civil partner or cohabitee may possess rights under s.30 of the Family Law Act 1996 whether or not they also have a beneficial interest in the property.

To determine whether co-owners own their equitable interests in the property as either joint tenants or tenants in common, the starting point is to check the terms of the conveyance or

transfer to them. The parties may have made an express declaration in that deed as to whether they will hold their equitable interest as joint tenants or tenants in common. If the co-owners have not made such an express declaration, there is a general presumption that 'equity follows the law' (following *Stack v Dowden*). As mentioned, the law requires co-owners to hold the legal estate as joint tenants. The application of this presumption means that they will also hold their equitable interests as joint tenants. However, this presumption can be rebutted by evidence to the contrary. For example, there may be other wording in the deed which indicates how the parties intend to own the property. For example, the case of *Payne v Webb* (1874) demonstrates how a reference to the property being transferred to the parties 'in equal shares' would suggest a tenancy in common. The court may also find that the co-owners hold their equitable interest as tenants in common in the interests of fairness, for example, where the co-owners have made unequal contributions to the purchase price (*Jones v Kernott* (2012)), or have bought the property for commercial purposes.

Even where the application of these tests indicate that the parties' equitable interests in the land are held under a joint tenancy, the case of *Harris v Goddard* (1983) explains how a party may 'sever' the joint tenancy in relation to their own equitable interest at any time and, in doing so, convert it into a tenancy in common. This would enable them to deal with their share in the property as they wish (for example, by way of mortgage, sale or gift), and also ensure that, on their death, it is transferred through their will to someone other than their co-owners. It is important to note that severance only converts the outgoing joint tenant's interest into a tenancy in common. The remaining joint tenant(s) interest will be unaffected. Section 36 of the Law of Property Act 1925 provides that an equitable joint tenant can sever their interest by either serving notice in writing on the other joint tenant(s) or by doing 'such other acts or things'. We will

consider each of these methods in turn. The notice in writing need not be signed (*Re. Draper's Conveyance* (1967)) but must indicate the outgoing joint tenant's immediate intention to sever (*Harris v Goddard* (1983)). Section 196 of the Law of Property Act 1925 requires the notice to be either left at, or posted through the normal post to, the last-known place of abode or business' of the other joint tenant(s), or sent to them by registered post. Whichever method is used, the cases of *Kinch v Bullard* (1999) and *Re. 88 Berkeley Road* (1971), respectively, demonstrate that the notice will still operate to sever the equitable joint tenancy even if the remaining joint tenant(s) never receive or read it.

The conveyancing process

Conveyancing is the process of transferring ownership of land, for example, by sale, gift, through the operation of a will, or on intestacy. For the purposes of this section, we will focus on the example of a sale and purchase of land. There are two systems of conveyancing in England and Wales: the unregistered conveyancing system and the registered conveyancing system. The traditional system is unregistered conveyancing but, as all land in England and Wales is now subject to compulsory registration under s. 4 of the Land Registration Act 2002, registered conveyancing has been gradually replacing it to the extent that 87% of all land in England and Wales is now registered (HM Land Registry, 2020). To determine whether either the unregistered or the registered system of conveyancing applies, a purchaser carries out an official search of the index map by sending a form to the Land Registry. In addition to confirming whether the land is unregistered or registered, the index map search result will also confirm any unique title number(s) for land which is registered.

Before the vendor puts the property on the market, they must ensure that they have a valid energy performance certificate for the property from an accredited assessor. The detailed

requirements are set out under the Energy Performance of Buildings (England and Wales) Regulations 2012. Essentially, the vendor must provide a copy of the certificate, free of charge, to the prospective purchaser. The certificate will set out information about the energy efficiency of the property. Occupiers of non-dwellings that have a total useful floor area of over 500 square metres and a valid energy performance certificate, and are frequently visited by members of the public and not exempt, are required to display their energy certificate in a prominent place. There are also obligations on those who have control of air-conditioning systems (with a maximum calorific output of more than 12 kW) to ensure that the system is inspected at least every five years by an energy assessor. The purpose behind these requirements is to enable the public to compare the energy performance of public buildings and to promote improved energy use.

The conveyancing of both unregistered and registered land involves a number of other stages which are summarised and distinguished below.

Once the parties have agreed the terms of the sale of either unregistered or registered land, the vendor drafts the contract and sends two copies to the purchaser for review. The purchaser may either agree the draft, or require amendments which are then negotiated between the parties.

Proof of title

The vendor must also prove that they own the title to the land by a process known as 'deducing title'. Traditionally, the vendor would deduce title to *unregistered* land by sending the purchaser an 'abstract of title' which summarised the title deeds. It is more common now for the vendor to provide the purchaser with an 'epitome' or chronological list of the title deeds, together with photocopies of them. The purchaser will need to review these documents to identify a 'good root of title' which is at least 15 years' old (s.44 of the Law of Property Act 1925, as amended by s.23 of the Law of Property Act 1969), and which demonstrates ownership of all of the land being

purchased. This document will usually take the form of a conveyance. For *registered* land, the vendor will deduce title by providing the purchaser with an official copy of the register that is kept by the Land Registry. The register is divided into three sections.

The Property Register contains a description of the property and will confirm whether it is either a freehold estate or a leasehold estate that has been granted for a term exceeding seven years.

The Proprietorship Register states the names of the registered proprietor(s) and, under s.9 of the Land Registration Act 2002, their class of title. The best, and most common, class of title is absolute title. Where the Registrar is not satisfied that the registered proprietor owns the freehold estate or possesses a validly granted lease, they may register one of the following inferior classes of title: good leasehold title (for leasehold estates only) and possessory or qualified title (for either freehold or leasehold estates). The Proprietorship Register will also indicate whether the vendor's ability to convey ownership of the legal estate in the property is limited by way of a restriction (under ss.40–44 of the Land Registration Act 2002), for example, because they hold the property in trust for a beneficiary or because there is an outstanding mortgage.

The Charges Register, the final section, contains details of certain third-party interests in the property which will be protected by the entry of a notice under ss.32–39 of the Land Registration Act 2002. These include, for example, mortgages, contracts to convey or create legal estates, restrictive freehold covenants, and equitable easements and profits à prendre. Following s.29 of the Land Registration Act 2002, a purchaser of registered land is only bound by interests that are entered on the register and 'overriding' interests. Overriding interests are listed in sch. 1 and 3 of the Land Registration Act 2002. They include leases that have been granted for terms not

exceeding seven years and interests of beneficiaries under a trust of land where the beneficiary is in actual occupation of the property.

Searches and enquiries

Following the vendor's deduction of title, if the land is unregistered, the purchaser will conduct a search of the Land Charges Department. In practice, these searches are normally carried out by officials of the Department on the purchaser's behalf. This search may reveal a variety of registered land charges against the property, including: mortgages where the lender or 'mortgagee' does not hold the title deeds; options granted to a third party which entitle them to purchase the property at some point in the future; and restrictive freehold covenants and equitable easements that have been created on or after 1 January 1926. Whether or not the purchaser carries out a land charges search, s.198 of the Law of Property Act 1925 means that they will be bound by any interests that have been protected by entry on the register.

In terms of other types of interest that affect unregistered land, a purchaser will automatically be bound by any legal interests, for example, legal easements and profits à prendre. They will only be bound by equitable interests if they fail to prove that they are 'equity's darling', namely a bona fide purchaser for value of a legal estate without notice (*Pilcher v Rawlins* (1872)). The reference to 'without notice' means that a purchaser will not be able to demonstrate that they have equity's darling status if they have either actual, constructive or imputed notice of the equitable interest. Section 199 of the Law of Property Act 1925 provides that a purchaser will have 'actual' notice if they know about the interest; 'constructive' notice if they would have known about it had they properly examined the title deeds and physically inspected the property; and 'imputed' interest if their agent (for example, a solicitor) knows about the equitable interest.

Whether the property is unregistered or registered, the purchaser will also carry out a number of other pre-contract searches and enquiries. These include a search of the Local Land Charges Register, which is kept by the local authority. It is usual for purchasers to send in a search form, requesting the Registrar's staff to perform the search on their behalf. There are two types of local land charges: restrictions which limit the use of land, for example, planning permissions, and financial charges, for example, in respect of the cost of making up roads that are to be adopted as public highways. If a local land charge is correctly registered, the purchaser is bound by it even if they do not carry out a search of the register. If either the local authority has failed to register a local land charge, or the search fails to reveal a local land charge that has been correctly registered, the purchaser will still be bound by it but will be entitled to claim compensation from the local authority.

Using a standard search form which can include additional enquiries, the purchaser will also make a variety of enquiries of the local authority in relation to other matters. These may include issues relating to schemes for new roads and plans for railways. If the local authority's response to any enquiries is incorrect, the purchaser may be able to bring a claim against them in either negligence or for breach of contract.

The purchaser will also carry out a separate search with the local water company to make sure that the property enjoys mains water and drainage.

The purchaser may also carry out a number of additional searches depending upon the nature of the transaction and the property's location. By way of illustration, if the vendor is a company, the purchaser should carry out a search at Companies House to make sure that the company exists, has not gone into liquidation, and has not been dissolved. Similarly, if the property is located in

an area of past, present or future coal mining, the purchaser should carry out a search with the Coal Authority, for example, to check for issues relating to subsidence.

Pre-contract enquiries

In addition to these searches and enquiries, the purchaser also raises a variety of pre-contract enquiries of the vendor in writing, usually by sending them a standard form to which they can add any specific queries. Such enquiries normally relate to matters including easements and covenants, services enjoyed, fixtures, and boundaries. The vendor is not obliged to reply to these enquiries and should be mindful that any incorrect information provided may make them liable to a claim for misrepresentation or prosecution for the criminal offence of fraud under s.1 of the Fraud Act 2006.

The purchaser will also often undertake a physical inspection of the property and have a survey of the property carried out. If the purchaser needs to fund the purchase price by way of a mortgage, the lender will usually conduct its own survey. Where this is the case, the purchaser should consider having their own survey carried out given that the lender is only concerned to know whether the property is good security for the mortgage, not whether it is worth the purchase price.

Contract for sale

If the survey and the replies to all of the searches and enquiries are satisfactory, and the purchaser is confident that they have the necessary finance to fund the purchase, the purchaser then proceeds to enter into a legally binding contract with the vendor to purchase the property. Section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 provides that such a contract for the sale (or other disposition of any interest in land) is only valid if it is made in

writing. The contract must incorporate all of the agreed terms and be signed by or on behalf of both parties. Once the terms of the contract have been agreed, the vendor produces two final copies of the document and sends them to the purchaser. The purchaser checks them and returns one to the vendor. The vendor and purchaser then each sign their own copy and exchange them. At this point of 'exchange of contracts', the contract becomes binding so that both the vendor and the purchaser become legally obliged to proceed with the sale and purchase of the property, or risk being sued by the other for breach of contract. At the same time as exchanging contracts, the purchaser will usually pay a deposit to the vendor. Following exchange of contracts, the vendor holds the property on trust for the purchaser. It is also important to note that, depending on the terms of the contract, the purchaser may bear the risk of insuring the property from this point.

Following exchange of contracts, and immediately before the vendor transfers ownership of the property to the purchaser on 'completion', the purchaser will conduct a number of further searches and enquiries, primarily to ensure that nothing has changed. These will include: another search of the registers kept by the Land Charges Department (where the land is unregistered); an official search with priority at the Land Registry (where the land is registered); a further physical inspection of the property; pre-completion requisitions of the vendor; and, if the vendor is a company, a further search at Companies House.

If the purchaser is satisfied with the results of these pre-completion searches and enquiries, the parties will proceed to completion. Section 52 of the Law of Property Act 1925 requires the transfer of ownership of the property from the vendor to the purchaser to be documented by way of a deed which is referred to as either a conveyance or transfer.

The purchaser prepares two copies of the draft deed and sends them to the vendor. The vendor returns one copy to the purchaser, either approved as drafted or with amendments. When the terms of the deed are agreed, the purchaser creates a final copy, signs it and returns it to the vendor. On the date specified by the contract for completion, the purchaser transfers the purchase money to the vendor, the vendor arranges for any outstanding mortgages to be paid off or 'discharged', the vendor hands over the deed and other relevant documentation to the purchaser, and the purchaser becomes the new owner of the property.

Following completion, the purchaser may be obliged to pay stamp duty land tax on the purchase. Also, due to the system of compulsory registration mentioned above, the purchaser must register their new ownership of the property at the Land Registry.

Rights and duties of owners of land

The rights of a landowner include the right to occupy the land without interference from others, and this right is protected by the laws of both trespass and nuisance. Another important right of every landowner is a right of support for their land from adjacent land. Any withdrawal of such support which causes their land to slip, for example, through excavation during building work, may mean that they can claim damages from the owner of that adjacent land. A landowner may also acquire a right of support for any buildings on the land through an easement, for example, a mutual right of support between terraced houses.

A landowner owes reciprocal duties not to use their land in a way which causes a nuisance and not to withdraw support for adjacent land. Their other duties include compliance with statute, including the planning laws that are principally contained in the Town and Country Planning Act 1990.

The statutory controls on a landowner range from restrictions on killing certain kinds of birds and animals (under the Wildlife and Countryside Act 1981) to positive obligations to repair dilapidated premises (under the Defective Premises Act 1972). Rights of access may be reserved over land by statute, for example, under the Countryside and Rights of Way Act 2000. Additionally, if a local authority wishes to acquire the land for redevelopment, they may be able to do so without the landowner's agreement through a compulsory purchase (in accordance with the Acquisition of Land Act 1981, as amended by the Planning and Compulsory Purchase Act 2004).

Access to Neighbouring Land Act 1992

A landowner may seek to carry out work that is reasonably necessary for the preservation of their own land. Examples of such work include repairing buildings, clearing drains and cutting hedges. If the work cannot otherwise be done, or would be substantially more difficult to do, without accessing neighbouring land, the landowner could seek their neighbour's permission and document the agreement by way of a licence (discussed further below). If their neighbour refuses to give permission, the landowner may rely on s.1 of the Access to Neighbouring Land Act 1992 to make an application for a court order to provide them with access. The court will not make such an order if the works would interfere with, or disturb, the use or enjoyment of the neighbouring land, or cause hardship to an occupier of it.

Section 2 of the Act enables the court to specify a variety of matters, including: the nature of the work that can be done, the areas of the neighbouring land that can be accessed, the date(s) of entry, the days and hours during which the work may be carried out, the persons who may enter the neighbouring land to carry out the work, the manner of the work (including controls to avoid or limit damage, loss or injury and loss of privacy), and requirements for payment to the

neighbour. If the landowner breaches the terms of a court order, the neighbour may be able to bring a claim against them for damages under s.6 of the Act.

An order binds those affected by it and may, if it is protected by registration, bind subsequent owners or tenants of the neighbouring land. Either the landowner who applied for the order or those affected by it may apply to the court for a variation.

Party Walls etc. Act 1996

The Party Walls etc. Act 1996 applies to 'party walls' and 'party structures', including walls that separate terraced or semi-detached houses and structures that divide upper and lower flats in the same building. Essentially, s.8 of the Act gives the owner of one property a conditional right to enter the other property to carry out certain works, including repairs. The owner seeking to carry out the work will need to notify their neighbour beforehand (s.8) and potentially carry out works to protect their property and/or pay them compensation (s.7).

Acquiring land other than through purchase, inheritance or gift

Land is normally acquired through purchase, inheritance or gift and, as seen in Chapter 6, contracts and transfers of land require written form (s.2 Law of Property (Miscellaneous Provisions) Act 1989). There are, however, provisions whereby land can be acquired through circumstances other than compliance with the formalities. This is not to be taken as a simple overriding of statutory requirements as very particular criteria are required to be fulfilled. The two principal mechanisms where this is seen are acquisition through adverse possession, and the operation of the equitable doctrine of proprietary estoppel.

Adverse possession

In the leading case of *J A Pye (Oxford) Ltd v Graham* (2002), a farmer was able to claim 'squatters' rights', or adverse possession, over some land by grazing cattle and managing the land for a significant period of time after a licence, which allowed lawful occupation of the land, had expired. This led to a successful claim, in adverse possession, of around 23 hectares of development land in Berkshire, which was worth around £10m! (Having failed to retain the land in the House of Lords. the original landowner then queried whether the law of adverse possession was contrary to Protocol 1, Article 1 of the European Convention on Human Rights (see Chapter 1; *J A Pye (Oxford) Ltd v UK* (2007)).

To establish a claim for adverse possession, a squatter needs to prove four elements:

1 First, they must demonstrate that they had **factual possession** of the land; namely that that they had sufficient control over the land and treated it as if they owned it. This is a context-dependent test. For example, in the case of *Red House Farms (Thorndon) Ltd v Catchpole* (1977), the court held that a squatter's use of marshland for shooting wildfowl was enough to establish factual possession of the land because the land could only be used for that purpose.

2 Second, the squatter must demonstrate that they had an **intention** to **possess** the land to the exclusion of everyone else, for example, by enclosing the land and padlocking the only gate to it (see, for example, the case of *Buckinghamshire County Council v Moran* (1990)).

3 Third, the squatter's possession of the land must be without the landowner's consent or **adverse**. As happened in *J A Pye (Oxford) Ltd v Graham* (2002), a person who has previously lawfully occupied land under a licence may be able to claim adverse possession of it if they continue to occupy the land after the licence has come to an end.

4 Finally, the squatter must prove that they have adversely possessed the property for a particular period of time.

   If the land is *unregistered* (or it is *registered* and the squatter has been in adverse possession of the land for a period of at least 12 years before 13 October 2003), the relevant rules are set out in both the Limitation Act 1980 and the Land Registration Act 1925. Essentially, the squatter must demonstrate that there has been a continuous period of adverse possession for

at least 12 years (s.15 Limitation Act 1980). In such situations, s.17 of the Act automatically extinguishes the landowner's right to reclaim ownership of their land.

If the land is *registered*, sch. 6 of the Land Registration Act 2002 provides that the squatter only needs to evidence a ten-year period of adverse possession.

Despite this shorter period, it is more difficult for squatters to bring successful claims for adverse possession of registered land for a number of reasons. Schedule 6 of the Land Registration Act 2002 requires a squatter of registered land to proactively make an application to the Land Registry, upon which the Land Registry will give the landowner, any mortgagee and any landlord the opportunity to challenge the squatter's claim. If the landowner does make a challenge, the squatter will only be able to claim ownership of the land if they can prove one of the grounds under sch. 6 para 5 of the Land Registration Act 2002. These are:

- estoppel,
- some other entitlement to the land or
- a reasonable mistake as a boundary.

We will consider each of these in turn.

First, the squatter may still be able to claim ownership of the land if they can prove estoppel; namely, that they have relied to their detriment on the landowner's assurance that the squatter owns the land, and it would be unfair to deny the squatter's claim (namely, the landowner is 'estopped' from going back on their assurance).

Second, the squatter may be able to demonstrate that they have some other right in respect of the land, for example, they have inherited the land under the terms of a will.

Finally, the squatter could argue that their claim for adverse possession is based on their reasonable mistake as to a boundary, for example, the positioning of a fence between neighbouring properties.

If the squatter fails to prove one of these three grounds, they are still entitled to bring a claim two years later, the landowner will be unable to challenge it, and the squatter will be able to apply to be registered as the new owner. To avoid this happening, the landowner could grant the squatter permission to be on the land, for example, through a licence, which would mean that their occupation of the land would no longer be adverse.

Proprietary estoppel

In Chapter 6, the concept of promissory estoppel was introduced. Proprietary estoppel is a close relation but a key distinction is that proprietary estoppel can be used as a cause of action, i.e. a claimant can sue on the basis of proprietary estoppel. Promissory estoppel can only be used as a defence, or to use the equitable maxim, can be used only as a shield and not a sword.

Broadly, where a person makes representations, promises, to another (the promisee) that the promisee will have rights to property, they should not later be allowed to deny those rights where the promisee has reasonably acted upon the promise/understanding to their detriment, i.e. it would be unconscionable to go back on the promise.

This principle was seen operating in the nineteenth century in *Ramsden v Dyson* (1866) and a somewhat stringent set of criteria (or probanda, as they were termed) was established in *Willmott v Barber* (1880). But the modern law is generally seen to have been clarified in *Taylor Fashions v Liverpool Victoria Trustees* (1982).

A key, illustrative case is *Gillett v Holt* (2001) where a partner in a farming business, Gillett, had worked for the managing partner and landowner, Holt, for nearly 40 years, since he was at school. Their relationship was far closer, for most of this period, than business partners, with Holt paying school fees for one of Gillett's sons, and attending each other's family events such as christenings, Christmas celebrations and the like. Holt had made many clear, often public,

promises that Gillett would be given a land interest and Gillett had acted on these promises, over the decades, by not taking work elsewhere, not going away to college (as he had wished), working at a lower than market salary, and not acquiring his own home. The relationship broke down and Holt cut Gillett out of his will and tried to evict him and his wife from their house. It was relatively easy to establish that Holt had made the promises, and that Gillett had acted upon them to his detriment.

Importantly, once the criteria have been satisfied, the court then has discretion as to the remedy to be awarded, which will be the 'minimum equity to do justice' (*Crabb v Arun DC* (1976)). This may, or may not, be the extent of award requested by the claimant (see *Davies v Davies* (2016) where the final award was £500,000 rather than the farm land and business which had been claimed). In the case of *Gillett*, the claimant was awarded the farmhouse, just over 100 acres of farmland and related buildings and £100,000, by way of compensation for his exclusion from all other parts of the extensive farming business.

Two cases heard within six months in the House of Lords illustrate the point that whilst in particular circumstances, somewhat oblique, verbal promises may suffice as representations or promises (*Thorner v Major* (2009)), the doctrine cannot simply be used as a means to oust the usual legislative requirements that contracts for land must be in writing (*Cobbe v Yeoman's Row* (2008)). In *Cobbe*, oral promises had been made regarding a commercial transaction in property. The House of Lords held that there were no circumstances such that the usual requirements for contracts of land could be dispensed with.

The doctrine of proprietary estoppel is particularly encountered in family and farming settings where long standing agreements and living and working arrangements are not always formalised.

It is not to be seen as a reliable way of enforcing promises and formal documentation should always be sought.