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Editor's Notebook

A Smorgasbord

Adverse possession; Breach of covenant; Brexit; Frustration; Leases; Possession orders; Residential development; Restrictive covenants; Rights of way; Unjust enrichment

There seems to be a lot going on at the moment. Consequently, I thought I would present a buffet lunch of land law. Hopefully, there is nothing here that will engender indigestion: in fact, there is much that might gladden the heart of a land lawyer at the end of the long, not cold, winter months. I start with my own particular favourite.

In *Alexander Devine Children's Cancer Trust v Millgate Developments Ltd*,[1] the respondent had built affordable housing contrary to a restrictive covenant, the benefit of which was enjoyed by the Trust. The builder knew of the covenant, had taken out indemnity insurance and planned to apply for discharge under s.84 Law of Property Act 1925 after the completion of the development. When it did so, the Upper Tribunal granted discharge, relying heavily on the grant of planning permission as establishing a public interest and being mindful of Lord Sumption's obiter comment in *Coventry (t/a RDC Promotions) v Lawrence*[2] that damages should be the preferred remedy in cases of nuisance (and by extension other similar interferences with obligations concerning land). The Court of Appeal had none of this. In making it clear that there was also a public interest in upholding restrictive covenants, the Court noted waspishly, and bringing joy to these ears, that the "grant of planning permission does not generally have any impact upon private property rights".[3] And the judgment went on to make it clear that Lord Sumption's dictum which "was not endorsed by the other Justices" did "not constitute appropriate guidance"[4] because it ignored the appropriate weight to be given to private property interests. The result—the likely demolition of the affordable houses—sounds a warning to those who think that covenants, and those that enjoy their benefit, are just interfering busy bodies who are standing in the way of progress. It also makes it clear that "proprietary" obligations are exactly that and not to be disregarded when they are inconvenient.

In similar vein perhaps, is *Parker v Roberts*,[5] an unneighbourly dispute about a right of way. The respondent claimed that on construction of a conveyance, an admitted right of way was for the benefit of the obviously dominant tenement and also a second plot of immediately adjacent land which he owned and on which he intended to build a house. Without such right of way, there would be no access to the second plot. While the relevant conveyance was badly drafted, the Court of Appeal found that the dominant land comprised only the first plot. Consequently,

[1] *Alexander Devine Children's Cancer Trust v Millgate Developments Ltd* [2018] EWCA Civ 2679.
[2] *Coventry (t/a RDC Promotions) v Lawrence* [2014] UKSC 13; [2014] A.C. 822.
[3] *Devine* [2018] EWCA Civ 2679 at [43].
[4] *Devine* [2018] EWCA Civ 2679 at [51].
[5] *Parker v Roberts* [2019] EWCA Civ 121.

following *Harris v Flower*,[6] the right of way could provide access to the second plot only for ancillary purposes and not for access to the proposed new main house. Nor was there scope for the implied grant of easements by reason of either necessity or reasonably necessary use.[7] However, perhaps the most important lessons are these. First, where there is an express easement, it is very difficult to establish an implied easement of similar character (e.g. a right of way), but of greater extent.[8] Secondly, when there is a restrictive covenant, take care to register it properly. In this case, there was a covenant against building on the second plot, but a previous owner's failure to register it against the burdened land rendered it unenforceable. That would have forestalled the dispute—perhaps!

Our third neighbour dispute raises issues of adverse possession. In *Thorpe v Frank*,[9] the parties were arguing over an area of land on which the appellant parked her car, but which was within the registered title of the adjacent semi-detached bungalow.[10] Apart from the usual astonishment that disputes of this magnitude should get this far, the case itself re-affirms some fundamentals about adverse possession: that whether a claimant is in "possession" of disputed land is context driven; that fencing is not always required; and that a key question is whether the claimant is doing that which an owner could do. In this case, the Court of Appeal allowed the appeal, restoring the order of the First-tier Tribunal (which had been overturned by the Upper Tribunal) and finding for the adverse possessor. While nobody wishes to deny claimants full access to the legal process, one wonders whether there could be a better way of dealing with disputes of this type which does not involve consumption of the valuable resources of the Court of Appeal.

Our last two cases illustrate that even the most settled of principles raise challenges when applied to novel events. In the already infamous *Canary Wharf (BP4) T1 Ltd v European Medicines Agency*,[11] a tenant (an EU body that allegedly had to be headquartered in a member state) claimed that their lease would be frustrated by Brexit such as to cause it to determine without liability. The High Court rejected this, finding no frustrating event within the established scope of the doctrine, although it was accepted in principle that a lease could be frustrated in exceptional circumstances.[12] The case is heading to the Court of Appeal. It is, however, unlikely that *Hilton v Cosnier*[13] will go further. The question for the High Court, on appeal, was whether an inter vivos trust had been declared over residential property. Morgan J held not, finding that the owner's oral statements did not amount to a clear intention to create a trust—*Paul v Constance*.[14] One might also ask where the written instrument was that would have been sufficient to satisfy s.53(1) LPA 1925, to which no reference was made in the judgment.

Finally, a landlord and tenant case reminds us that failing to observe leasehold obligations can have severe consequences and two pieces of recent legislation at

[6] *Harris v Flower* [1905] 74 L.J. (Ch) 127. See also *Gore v Naheed* [2017] EWCA Civ 369; [2018] 1 P. & C.R. 1.
[7] One submission, decisively rejected, was that the easement should be implied because it concerned an activity (a new build) which was "reasonably expected to take place in the future". Had this been accepted, it would have considerably widened the scope of the law on impliedly created easements.
[8] *Waterman v Boyle* [2009] EWCA Civ 115; [2009] 21 E.G.L.R. 7.
[9] *Thorpe v Frank* [2019] EWCA Civ 150.
[10] The claim fell outside Sch.6 LRA 2002, as the material events occurred before first registration of title.
[11] *Canary Wharf (BP4) T1 Ltd v European Medicines Agency* [2019] EWHC 335 (Ch).
[12] Following *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] 1 A.C. 675.
[13] *Hilton v Cosnier* [2018] EWHC 2728 (Ch).
[14] *Paul v Constance* [1977] 1 W.L.R. 527; (1976) 7 Fam. Law 18.

last provide some additional protection for short-term residential tenants. In *Gibbs v Lakeside Developments*,[15] a 999-year lease was forfeited by the landlord for non-payment of ground rent and insurance premiums. The amount owed was all of £1410.62, but the tenant had failed at every turn to engage with the freehold owner or to protect her lease. Eventually, the freehold reversioner recovered possession and granted a new long lease to a third party who was ignorant of the former tenant's interest. The former tenant claimed the proceeds of this re-lease on the basis of unjust enrichment. The Court of Appeal decided, uncontroversially, that this claim could not proceed unless the landlord's forfeiture could be set aside. Enrichment could not be unjust if the benefit had been obtained as result of due process in the vindication of rights. In this respect, not only had the tenant failed to pursue any application for relief from forfeiture, in any event, relief for non-payment of rent was outside the six months' time limit[16] stipulated by s.138(9A) County Courts Act 1984 and, per Lewison LJ, the position in the High Court under its inherent equitable jurisdiction as explained in *Howard v Fanshawe*[17] could hardly be any different. Hence, here we have a 999-year lease forfeited largely through inattention. On a brighter note for tenants, the Tenant Fees Act 2019 has been passed and is likely to enter force on 1 June 2019. The Act, which applies to assured shortholds and residential licences and student lettings, prohibits landlords and letting agents from charging most of the "extra" fees which are nothing short of financial scams. Landlords may, of course, charge security and holding deposits, but these are capped. Enforcement is by local authorities and penalties are financial and can lead to a banning order. Hopefully, this will make letting cheaper for those who are already suffering at the hands of a lopsided property market. Finally, the Homes (Fitness for Human Habitation) Act 2018 comes into force on 20 March 2019. The Ministry of Housing, Communities and Local Government has published guidance for tenants, landlords and local authorities on the Act.[18] While, of course, the Habitation Act is not a penicillin for all ills in the short-term residential sector, it will provide some relief for those living in the slums that still persist on the "free" market.

Martin Dixon

[15] *Gibbs v Lakeside Developments Ltd* [2018] EWCA Civ 2874; [2019] 4 W.L.R. 6.
[16] Some 18 months had passed since the landlord had recovered possession.
[17] *Howard v Fanshawe* [1895] 2 Ch. 581.
[18] *www.gov.uk/government/publications/homes-fitness-for-human-habitation-act-2018* (Accessed on 12 March 2019).

Practice and Precedents

Plain Legal Language

Conveyancing; Forms; Leases; Legal language; Precedents; Sale by auction; Standard forms of contract

In 2010, I was appointed this journal's Conveyancing Editor. After more than 50 articles, now as Practice and Precedents Editor, it is time to hand over to someone less near the end of legal life. It was in 1968 that I signed my Articles of Clerkship (annual salary £312) and in 1970, I became a Solicitor, receiving my admission certificate from Lord Denning MR, no less.

After two more years in general practice, I decided to become a property lawyer and moved to Linklaters & Paines, mixing a commercial and agricultural practice, before joining DJ Freeman (sadly no more), then Cripps Harries Hall (now Cripps) of Tunbridge Wells where I remain as a consultant. My later career was dominated by property development and by the shopping centre (although since retirement from full-time practice, SDLT is my focus).

Through 50 years of change there has been one constant interest, prompted by finding in Linklaters' library *Parkers Modern Conveyancing Precedents*. After years of traditional legal education, I assumed (like many still do) that only traditional forms of words can have legal effect, especially in property law. *Parkers* provided concise conveyancing forms. I did not dare use them then and would hesitate to use them in their original form even now. The aim of plain language is clarity, not brevity. Language works best when it communicates its message without drawing attention to itself. But I owe my continuing fascination with legal communication to that happy discovery.

My first drafting attempt was a modest change to the start of an agreement. Instead of:

> "THIS DEED is made the _____ day of _____ One Thousand Nine hundred and Seventy Three BETWEEN [name and address] (hereinafter called "ABC") of the one part and [name and address] (hereinafter called "XYZ") of the other part WHEREBY IT IS AGREED as follows"

the document began:

> "AGREEMENT
> Date
> Parties
> 1. ABC [name and address]
> 2. XYZ [name and address]"

The client would not sign it. It did not look "legal". It is not only practitioners who mistrust change.

Clarity

I became an early member of "Clarity—a movement for the simplification of legal English", whose first journal was published in August 1983. Started by Solicitor John Walton it is now "an international association promoting plain legal language"[1] of which I was UK representative for many years. Its website currently hosts the archive of all 75 Clarity Journals, although for many years, most authors have not been from the UK. Australia, the US and Canada take plain legal language far more seriously than do we.

In DJ Freeman, new trainee solicitors joined the property department twice a year as their seats changed. As part of their induction, I took a lunchtime session on legal writing. While they assembled, I gave them a 300-word short story into which I had introduced around 25 language errors—confusing "affect" and "effect"; misspelling "accommodate" suggesting there could be three alternatives. These were bright trainees, all of whom had a 2.1 degree or better and had passed our selection process. They rarely found more than half the errors. Only one found more than 20. It was surprising the number who missed "would of".

Language is almost the only tool we have for defining legal principles and describing legal relationships. If we cannot use it with precision, then we are like surgeons using a blunt scalpel or engineers following a blueprint drawn in crayon. We do not have the luxury (as far too many judges seem to think) of unlimited time to pore over and refine our legal drafting, even though the sentence we agree at the end of an all-night negotiation may have to stand the test of a whole day's scrutiny in court. Legal education fails if it does not insist on the accurate use of English.

Precedents

Creating understandable and easy-to-use forms and precedents that are also legally effective has been one of the most satisfying parts of my career. I would like to mention two: forms of lease, culminating in the "leasebook"; and the Common Auction Conditions.

Leases

The first precedent I produced was Linklaters' standard form of agricultural tenancy, followed a few years later by the first forward funding agreement to find its way into the *Encyclopaedia of Forms and Precedents*. In 1989, the opportunity came to rewrite the DJ Freeman lease. The 25-year term (with five-yearly upward-only rent reviews) full repairing and insuring institutional lease was still the gold-standard, even though every institutional investor required slightly different forms of lease. I still retain a 125-page lease produced by one major firm, so convoluted that some of its clauses contradict each other.

We started afresh, and the lease took over a year to develop. We reduced its length to around 30 pages—although I recall sending it out to one firm, well-known for acting for retail tenants, and it was returned three months later with 78 pages of amendments! The success of our form was demonstrated by the number of firms

[1] See *www.clarity-international.net* [Accessed 26 February 2019].

who copied it. It is a strange experience to receive a draft lease from a landlord's solicitor that you have effectively written.

At a meeting early in 1991, one of my clients, a shopping centre developer, was bemoaning the length of time it took to complete the grant of a retail lease after agreeing heads of terms. Every lease negotiation was like re-inventing the wheel. Surely there must be a better way? We spent the summer discussing every alternative to a lease we could imagine, and concluded there was nothing better—but that we could improve the client–surveyor–solicitor relationship, something we debated for a day at the client's offices that Autumn. It was while driving home with a colleague that the idea struck. Every attempt at a standard form of lease up until then had failed. Could we not revisit that idea, not on a "one-size fits all" basis, but tailoring the form of lease to each multi-let property. The "leasebook" was born, introduced to the property world at the Institute of Directors in 1992.

Over 25 years later it is still worth quoting from the introduction to it, as many arguments could be used today:

> **"Leasebook Introduction**
>
> The second half of the 20th Century has seen the rise and fall of the institutional lease. The twenty-five-year term, security of tenure, privity of contract, upward-only rent reviews, and full repairing and insuring terms have become the standard against which other types of lease are measured.
>
> Now its validity is being questioned. Shorter terms are becoming normal. Privity of contract is to go. Upward-only rent reviews are under attack. The sheer bulk and perceived unfairness of the mature institutional lease has made the letting process unwieldy and expensive.
>
> **Time for change**
>
> There have been attempts to simplify the process. A number of standard lease conditions have been produced, but they have never taken on like standard conditions of sale.
>
> There are at least three reasons for this. First, even standard conditions of sale tend to be incorporated into differing forms of contract by the major property law firms. Second, a sale contract is transient, lasting at most a few months. Leases have to govern a relationship for years. Third, properties come in very different shapes and sizes.
>
> This explains, in part, the difficulty with the institutional lease. It has grown to a size sufficient to cover almost any eventuality. This necessarily means that the document is incomprehensible to most of those who manage the day to day relationship between landlord and tenant. Frequently terms are ignored, because they have been forgotten or are buried within one hundred pages of poorly organised text.
>
> We ourselves tried to simplify the standard lease in 1989 and achieved a measure of success with a more logical layout and the use of plainer English.
>
> But there are a number of inherent defects in the system:
>
> - It is conventional for the landlord's lawyer to produce the lease. Leases are invariably biased in the landlord's favour.

- Each firm of solicitors adopts a different form of lease, sometimes many different forms of lease. Most tenants will want to negotiate amendments. Some tenants have dozens of standard amendments. The result is that virtually every lease is different.
- It is easier for a landlord's solicitor to try to make a standard word processed precedent fit each new letting than to spend time producing leases for each property that are tailor-made.
- For multi-let properties the position can become absurd: a standard one-hundred page lease has to be used however large or small the letting. The process becomes uneconomic for all concerned. The more words there are in a document the longer it takes to produce it, read it, advise on it, amend it, negotiate it, check it and produce copies for signature.

It is time for change.

A curiosity

The behaviour of landlords and tenants in the leasing process is not rational.

Most institutional landlords will acquire a let investment where the form of lease used is markedly less favourable than the form they would require on a new letting. And those acquisitions do not just happen a few years before lease renewal. Sometimes the institution will be looking at leases with another fifteen or twenty years to run. Similarly, tenants will acquire an existing lease that may have been granted only a year or two earlier.

In both cases. the legal adviser's role is to investigate and give advice: in only the rarest instance is re-negotiation possible. and then only in respect of one or two crucial issues. There is no logical reason, therefore, why landlords and tenants should insist on the right to negotiate at the start of a lease when they are quite content not to have that right later. If the means can be found of presenting a new lease in a form that discourages negotiation and also offers other advantages, it may be possible to facilitate and cheapen the leasing process.

The Leasebook

We believe that our new leasebook does that. It is designed for multi-let buildings such as shopping centres, industrial estates and large offices. In place of the traditional lease, the landlord and its advisers produce a book setting out all the standard lease terms relevant to the property in question. They might choose to negotiate the book with two or three of the major tenants. The book could be printed.

The lease itself then becomes a very short document containing the variable terms and incorporating by reference the provisions of the leasebook. The idea is not new, just its application to the lease. Many mortgages are structured this way, as are domestic insurance policies.

Advantages

The advantages of the structure are:

- The leasing process becomes, for the tenant, not a negotiation, but a decision on whether or not to take the terms offered. Since the leasebook will be tailor-made and, ideally, agreed in advance with some of the major tenants, the document should be more acceptable than the average institutional lease.
- It should encourage landlords to offer reasonable terms, not the current approach of producing a wholly one-sided document just to give room for negotiating manoeuvre.
- If a tenant does have special requirements, they can be added to a schedule to the lease deed.
- The leasebook can be designed as a handbook—with a list of contents and an index. for example. It can be made so user friendly that it becomes an operating manual, not an obscure legal document to be locked away in a strong room.
- When the landlord comes to sell the investment, the solicitors for the purchaser do not have to compare a number of lengthy leases in order to spot the differences between them. There will be a single leasebook containing the standard terms and a number of short lease deeds, with or without schedules, showing very clearly where those lease deeds differ from the standard.
- Similarly, when the managing agents need to check on, say, insurance provisions, they do not need to read every lease. They simply read the insurance chapter of the leasebook and check whether any of the lease deeds have amended that chapter.

Greater consistency

There is another advantage. One of the problems when producing a standard legal precedent, apart from trying to make it cater for every contingency, is that it has to be easily variable. It is for this reason that legal documents contain numbered paragraphs and sub-paragraphs and frequent cross-referencing. They make extensive use of defined terms, and need those terms to be clearly identified by some convention such as an initial capital letter: They suffer from inconsistent drafting styles as other people's amendments get incorporated.

The use of a leasebook avoids all this. Since the least-book is never varied, it can he moulded into a consistent whole. There is less need for cross-referencing. The drafter can ensure that the words used accurately convey the meanings intended. It can look, and read, more like a book.

Flexibility

In its purest form, the lease deed could be two pages long - —simply the particulars of the deal—but the concept is infinitely flexible. If individual negotiation over some clauses is needed they can be added in a schedule to the lease deed—the leasebook contains the uncontroversial provisions. The process is still simplified.

What about existing properties? It is possible to change any form of lease over time, so it would be possible to introduce the leasebook when granting new leases or renewals.

Novel features

Some features are not necessary to the concept but do show what can be achieved by using a leasebook.

- Language can be more simple.
- Guidance notes can be incorporated to explain what legal terminology means.
- It is possible to incorporate application forms and standard terms for licences (to assign, sublet etc), so that the licensing process becomes more mechanical and does not need to involve lawyers: another saving of time and cost. making for more efficient management.
- Technical information can be added, so the leasebook becomes a comprehensive tenants' handbook."

Did it work?

The client used the leasebook in its shopping centre developments. At least one major outlet centre used it. But in the end it failed in its primary objective, to replace the traditional lease in multi-let property, for two reasons.

No landlord ever negotiated the form of leasebook with two or three major tenants, by which I envisaged a round-table discussion with all the tenants together contributing to the document in order to create a balanced leasebook. Nor could landlords stop themselves from adding unreasonable terms that tenants simply struck out.

No tenant lawyer was prepared to abandon the red pen. Schedules to the lease deeds became as long as the leasebook. The structure became unwieldy. Most amendments did not reflect commercial differences, incidentally, but the traditional lawyer's inability to accept new phraseology.

However, for the past 15 years the concept has proved its worth in residential lettings. Most developers choose a couple of conveyancing firms to recommend to buyers who do not have their own solicitors. One condition is that those firms agree to be involved in settling the form of leasebook. The leasebook is in plain language, with footnotes, and easy to comprehend. Tenants' solicitors do not have to prepare lengthy lease reports for their clients—they merely send them the document to read and deal with any queries.

However, there remains a problem. Finding lawyers who can write well enough to produce a document that is both legally effective and comprehensible is extraordinarily difficult. Large Australian firms actually employ non-lawyer writers to work alongside lawyers, and perhaps that needs to happen in the UK if we are to see plain legal language thrive here.

Common auction conditions

For decades conveyancers used two printed forms of sale conditions, the National Conditions and the Law Society Conditions, which were combined into the

"Standard Conditions of Sale" almost 30 years ago. The Standard Conditions (revised in 2018) are now in their fifth edition (also known as the 25th edition of the National Conditions of Sale). They are primarily designed for residential sales. The Standard Commercial Property Conditions, designed for non-residential transactions, are in their third edition (revised 2018).

The Standard Conditions are published on a form that can be completed and used as the contract. Many conveyancers, however, use their own forms of contract and incorporate the Standard Conditions by reference. For contracts with consumers (such as a plot sale contract between a builder and a home buyer) this does not meet the transparency test laid down in the Consumer Rights Act 2015 s.68, which requires the written terms of a consumer contract to be expressed in plain, intelligible and legible language. See para.2.55 of the guidelines laid down by the CMA (Competition and Markets Authority)[2]; mere reference to terms that are not included in the contract is not enough. Or para.2.57: consumers must be given an opportunity to examine all the terms. Or para.2.59: no term is likely to meet the transparency test if it requires "some legal mining to bring it to the surface".[3]

One could attach a copy of the Standard Conditions to each contract, but it would have to be an original purchased copy for copyright reasons, and some of the language used in the Standard Conditions fails the "Grey List" (a listing of unfair terms in Ch.5 of the CMA Guidance).

It was this copyright problem that led to the creation of the common auction conditions (CAC). Before 2002, when the CAC were introduced, each auction house had its own general conditions of sale, which were far more detailed than the standard conditions. They would usually refer to one of the printed sets of conditions as well, for good measure. These conditions would be supplemented by the special conditions that related to the lot being sold—or sometimes replaced (fully or partially) by the special conditions—and the special conditions followed no consistent format.

Among the aims of the CAC were:

- standardisation of both general and special conditions;
- clear language and layout;
- having all the contract terms in one document;
- making the conditions more suitable for commercial property; and
- clarifying the relationship between each bidder and the auctioneer.

Their success is shown by the fact that almost all real estate auction houses now use the CAC. The CAC may be used without charge, as long as their source is acknowledged and the text is not changed (except where permitted). The conditions were sponsored by the RICS real estate auction group and are hosted on the RICS website. They are now in their third edition but a fourth is likely soon.

[2] *Unfair contract terms guidance* published by the CMA on 31 July 2015 (CMA37).

[3] A quote from the case of *Office of Fair Trading v Foxtons* [2009] EWHC 1681 (Ch) at [74]; [2009] 7 WLUK 289.

The conduct of the auction

The standard conditions contain a few conditions that relate to auctions, but they form part of the sale contract and the only people bound by that are the seller and the buyer.

The CAC include conditions that regulate the relationship between the auctioneer and each bidder, giving auctioneers much more protection. It is not possible to disapply any of these auction conduct conditions unless the auctioneer agrees. For example, the role of the auctioneer as the seller's agent is made explicit to bidders. Behind the scenes, of course, the auctioneer needs a separate agreement with the seller as the auctioneer's client. The auctioneer is also given full authority to conduct the auction as the auctioneer sees fit.

Two controversial areas are addressed.

First, sequential bidding. The Sale of Land at Auction Act 1867 permits the seller to bid (or one person on the seller's behalf) so long as the right to bid is "declared" in the auction particulars or conditions. Then that person can bid "in such manner as he may think proper". Does that mean that the seller may, through the auctioneer, bid up to the reserve even though there is no one else actually bidding? The point is not clear, even though it has been normal auction practice for years. The CAC draws attention to the practice, making it harder for a disappointed bidder to complain.

Secondly, guide prices. Among auctioneers themselves this condition is one of the most contentious. What is the legal status of a guide price, especially if it deviates significantly from the reserve or the eventual sale price? Would a disappointed bidder, who travelled to an auction based on a guide price, have a claim against the auctioneer when he bid in excess of the guide but failed to secure the property because the reserve was greater?

The CAC stress that a guide price is only a snapshot at the date it is issued and that although the last published guide price is likely to be at or above the reserve, the seller may change the reserve just before bidding commences.

Deposits

Some "conduct" conditions (between auctioneer and bidder) stray into "sale" condition territory. Auctioneers will always take deposits, as they record the details of the contract. It was traditional for auctioneers also to hold the deposit, and to hold it as agent for the seller. The standard conditions continue that tradition, but many auctioneers today prefer to pass the deposits on to the seller's conveyancer. On sales of commercial property there is a problem where deposits are held as agent; if the sale is subject to VAT the deposit is treated as part payment, and is subject to VAT.

The default position under the CAC is that deposits are held by the seller's conveyancer as stakeholder. A special condition cannot force the auctioneer to hold the deposit unless the auctioneer agrees.

VAT

Auctioneers who do not use the CAC need to be especially vigilant. Under the standard commercial property conditions and the fourth edition of the standard

conditions the purchase price is assumed to be exclusive of any VAT. However, the fifth edition of the standard conditions states that the purchase price is *inclusive* of VAT. That may mean that bids are assumed to be inclusive of VAT as well, which is a recipe for chaos. If an investment property is being sold, the seller has opted to tax and the buyer does as well, the sale will be a transfer of a going concern, and no VAT will be payable. If the buyer is not registered for VAT, or does not opt to tax, VAT must be charged. The status of the bidder, therefore, may change the value of the bid!

If the auctioneer uses the CAC there is no problem. They state that all bids are exclusive of VAT and that is part of the "conduct of the auction" section that no special condition can change.

Extra auction conduct conditions

Auctioneers may add their own "conduct" conditions. For example, some auctioneers impose minimum deposits. Others permit payment by credit or debit card.

General conditions of sale

The general conditions of sale are those that apply between seller and buyer. They can be altered by special conditions of sale, or even entirely replaced, but the advantages of using the CAC are then lost—standardisation, simplification and ease of use. (I once saw one auction catalogue whose own general conditions were supplemented by both the Standard Conditions and the CAC, without any indication which would apply were there a difference!)

Those of us who wrote the CAC took as our model a typical private treaty contract in order to minimise the number of additional conditions that need to be added. This is not the place to describe all the conditions. However, the following are significant.

Tenancies

Some auction houses use conditions that state that a property is sold subject to stated tenancies "and any others that might exist". A private treaty sale would be agreed on that basis in only the rarest of circumstances. Although the condition might seem to be in the seller's favour, it is not: a bidder will almost always pay less than the property is worth because of the risk of finding an undisclosed tenant.

The CAC default to the position that the lot is sold subject only to disclosed tenancies.

Insurance and risk

The standard conditions differ in their approach, but effectively risk stays with the seller up to completion under the Standard Commercial Conditions and the fourth edition of the Standard Conditions, but passes at exchange under the fifth edition.

The CAC recognise that most sellers do not cancel insurance at exchange and therefore require sellers to continue insurance until completion so that, effectively, risk passes at completion.

Arrears

There is a divergence between auctions and private treaty practice. Rarely will a private buyer agree to "buy" arrears of rent, and if the buyer does agree, the amounts will need to be quantified and, usually, limited. Sellers at auction may want finality and to dispose of a property "warts and all". However, if a bidder is to offer a fair price, the extent of the arrears must be known.

Under the CAC the buyer has to pay any arrears of *current* rent (normally the current quarter) but no other arrears unless they are specified.

Commercial conditions

The CAC are more comprehensive than the Standard Conditions (and, in some areas, the Standard Commercial Conditions) by including conditions to deal with management between exchange and completion; rent deposits; TOGCs; capital allowances; maintenance agreements and warranties; the Landlord and Tenant Act 1987; sales by insolvency practitioners; environmental issues; service charges; and pending rent reviews and lease renewals.

Special conditions of sale

However comprehensive the general conditions, special conditions are always needed—to describe the property being sold and its title, details of tenancies, rights, restrictions and so on.

The CAC provide a template for the production of special conditions, cross-referring to the relevant general conditions. It is easy for auctioneers to set up an on-line form for the provision of the special conditions and much easier for conveyancers to use that form than their own sets of special conditions that might not "fit" the general conditions—causing either conflicting conditions or a gap where no condition applies.

Paul Clark

Overreaching, Trust Breaking and Underreaching

Peter Sparkes
Solicitor

Conveyancing; Easements; Equitable interests; Overreaching; Priorities

Langland and Spenser understood "overreaching" in the sense of overshooting a mark.[1] The word was drafted into conveyancing to describe clauses in 19th century settlements by which interests prior to the current settlement were removed from the land using the preserved paramountcy of a power of sale under a former settlement. Adoption of the same word in 1925 saw its meaning transformed. Statutory overreaching occurs when a legal estate is passed by trustees under a paramount power by which the beneficial interests are overridden in favour of the purchasers, causing a concurrent shift of beneficial entitlement to the proceeds of sale. *Flegg* shows that the register of title makes use of the overreaching machinery applicable to unregistered land.[2]

This harmony is now threatened by two decisions of the Court of Appeal. In *Mortgage Express v Lambert*[3] it was held that two trustees could overreach an equity in the previous holder to set aside the unconscionable bargain by which they had acquired title, thus allowing unapproved trustees to overreach prior equities. This was to overshoot the mark and would allow the 2002 register[4] to become a trust breaking machine. Conversely, in *Baker v Craggs*,[5] it was held that overreaching could not occur on a grant or reservation of an easement. That was to underreach, to fall short.

The Law of Property Act 1925 s.2(1) formed the introduction to Sir Benjamin Cherry's masterpiece, the curtain provisions of the Birkenhead legislation, which Charles Harpum believes was fully appreciated by its draftsmen.[6] In homage to them both, this article follows Charles' reliance upon Sir Benjamin's own annotations to the legislation.[7] The various components of statutory overreaching are:

- transfer of a legal estate;
- exercise of a paramount power; and
- purchaser protection.

[1] *Oxford English Dictionary* online edition at *http://www.oed.com/* [Accessed 26 February 2019].
[2] *City of London Building Society v Flegg* [1988] A.C. 54 HL at 84G per Lord Oliver; [1987] 2 W.L.R. 1266.
[3] *Mortgage Express v Lambert* [2016] EWCA Civ 555; [2017] Ch. 93.
[4] LRA 2002 s.26.
[5] *Baker v Craggs* [2018] EWCA Civ 1126; [2018] Ch. 617.
[6] C. Harpum, "Overreaching Trustees' Powers and the Reform of the 1925 Legislation" [1990] C.L.J. 277, 298.
[7] Wolstenholme & Cherry, *Conveyancing Statutes* (Stevens, 1932), Vol.1.

Transfer of a legal estate

Trustees of land

Vesting a legal estate in trustees only came to be widely adopted for family settlements from the 1850s onwards. This set the pattern for trusts for sale (1925–1997 inclusive) and now trusts of land. Two, three or four trustees have owners' powers as if they were outright owners.[8] The settlor makes a declaration of trust which confers on the proprietors another concurrent set of (legal) powers, again all the powers of an absolute owner.[9] Administrative powers conferred on the trustees are inherently paramount to the beneficial interests.[10]

Trustees can pass a legal estate to a purchaser without exercising a paramount power. Two cases decided by Lord Eldon, and noticed briefly in Harpum's footnotes, explain the process. In *Mortlock v Buller* trustees with a power of sale made a decision to sell too quickly for Eldon's liking.[11] It was said to be "void" but the decision was to refuse specific performance at the suit of the purchaser, leaving open whether legal title would have passed under a completed sale. Eldon decided that issue in *Bowes v East London Water Works Co*.[12] The legal freehold was vested in trustees who were given an express power of leasing while the beneficiary was under age. The term granted of 33 years would continue long after the beneficiary attained adulthood. This was valid at law, but *void in equity*. This enabled the beneficiary to disclaim after happily accepting rent for 29 years, but really it seems to have been *voidable*. Having notice of the terms of the power, the tenant was obliged to ensure that it had been properly exercised but *legal* title passed irrespective.

Grants of easements

Baker v Craggs effected an undesirable revolution in preventing trustees from overreaching when granting or reserving an easement. Trustees *acting as registered proprietors* have power to grant and reserve legal easements since they have power to make a disposition "of any kind permitted by the general law".[13] "Registered dispositions" are undefined, but "dispositions" include transfers, charges, leases, documentary assurances, and even gifts by will and some transfers by operation of law.[14] Most will be registrable, pertinent examples being an express grant of a legal easement or estate rentcharge.[15]

The Charltons as trustees of land divided their holding by, (1) an unregistered sale of part to Craggs reserving no easement, followed by (2) a sale of the retained

[8] LRA 2002 s.23.
[9] TLATA 1996 s.6(1).
[10] LPA 1925 s.27(1).
[11] *Mortlock v Buller* 32 E.R. 857; (1804) 10 Ves. Jr. 292 per Lord Eldon; *Ord v Noel* 56 E.R. 962; (1820) 5 Madd. 438 at 440–441 per Leach VC; *Bellringer v Blagrave* 63 E.R. 972; (1847) 1 De G. & Sm. 63 per Knight Bruce LJ.
[12] *Bowes v East London Water Works Co* 37 E.R. 873; (1820) Jac. 324; easier is (1818) 3 Madd. 375 per Giffard VC; C. Harpum, "Overreaching Trustees' Powers and the Reform of the 1925 Legislation" [1990] C.L.J. 277, 281 fn.23.
[13] LRA 2002 s.23.
[14] LPA 1925 s.205(1)(ii); *City of London Building Society v Flegg* [1988] A.C. 54 at 78D per Lord Oliver; *State Bank of India v Sood* [1997] Ch. 276 CA at 282E per Peter Gibson LJ; [1997] 2 W.L.R. 421. This is subject to LRA 2002 s.27(5).
[15] LRA 2002 s.27(2)(d), (e), Sch.2 paras 6, 7.

part to the Bakers together with the grant of an easement over Craggs' yard. Henderson LJ ruled that an easement granted by trustees cannot secure priority over the beneficiaries by overreaching. This seems odd. Easements could be granted by a tenant for life under a strict settlement,[16] and between 1925 and 1997 trustees for sale had Settled Land Act powers,[17] whereas trustees of land have much more extensive powers.[18]

Legal property rights in land were given the Chelsea chop by the Law of Property Act 1925 s.1, leaving only the freehold and the leasehold surviving as legal estates in subs.(1), whilst other property rights recognised at law were termed legal interests and listed in subs.(2). Henderson LJ read the reference to a legal estate in land in s.2(1) as a reference to one or other of the two types of legal estates in s.1(1).[19] A legal charge created a s.1(2) interest,[20] but overreaching occurs, he said, because of protection of a charge as if a mortgagee by demise (i.e. as if the chargee had been granted a long leasehold).[21] What is being purchased is a legal estate, any of:

> "the estates, interests and charges, in or over land (subsisting or created at law) which are by this Act authorised to subsist or to be created as legal estates …"[22]

Henderson LJ twisted the meaning of this definition[23] by reading only the back end whilst omitting the words "interests and charges" at the front end. He passed over the eight subsections intervening between ss.1(2) and 2(1). Newey J at first instance used s.1(4) to include as "legal estates" all "the estates, interests, and charges authorised to subsist … at law" thus including legal interests.[24] Cherry's annotations make clear that this was intended.[25] A legal charge overreaches by creating an interest (which is treated as an estate), and so do grants and reservations of easements and estate rentcharges.[26] So, the substantive 1925 overreaching provision, its defined terms, and the 2002 register all point towards a grant or reservation of an easement having overreaching potential.

Limitations

Operation of a register relies upon documentary transfers. Harpum suggested that there was a problem if trustees effected a transaction outside the scope of their powers as trustees, which would be void and so fail to overreach.[27] This was problematic under a naked power[28] where the management powers were vested in

[16] SLA 1882 s.3; *Re Brotherton* [1908] WN 56; SLA 1925 ss.38(1), 39(2), 39(6), 49(1)(a), 61(2)(c), 72, 74.
[17] LPA 1925 s.28(1) as amended in 1926.
[18] TLATA 1996 s.6(1); Transfer of Land: Trusts of Land (Law Com WP 94, 1985), [7.5].
[19] *Baker v Craggs* [2018] EWCA Civ 1126 at [27]. Emphasis on the division of these two subsections is odd when legal estates and legal interests appeared together as legal estates in LPA 1922 s.1(1).
[20] *City of London Building Society v Flegg* [1988] A.C. 54; [1987] 2 W.L.R. 1266.
[21] LPA 1925 s.87; *Baker v Craggs* [2018] EWCA Civ 1126 at [29]. Cherry's annotation referred instead to s.1(4): Wolstenholme & Cherry, *Conveyancing Statutes* (Stevens, 1932), 229.
[22] LPA 1925 s.205(1)(x).
[23] *Baker v Craggs* [2018] EWCA Civ 1126 at [25], [27].
[24] *Baker v Craggs* [2016] EWHC 3250 (Ch) at [27]; [2017] Ch. 295; this is glossed over on appeal, *Baker v Craggs* [2018] EWCA Civ 1126 at [25], [26] and [30].
[25] Wolstenholme & Cherry, *Conveyancing Statutes* (Stevens, 1932), 228, 232, 239, 584, etc.
[26] LPA 1925 s.1(2), subject to duration and formality.
[27] C. Harpum, "Overreaching Trustees' Powers and the Reform of the 1925 Legislation" [1990] C.L.J. 277, 279–283.
[28] *Edwards v Sleater* 145 E.R. 522; (1676) Hardres 410 at 416–417 per Hale CB; *Re D'Angibau* (1879) 15 Ch. D. 228 at 232–233 per Jessel MR; C. Harpum, "Overreaching Trustees' Powers and the Reform of the 1925 Legislation" [1990] C.L.J. 277, 280–281.

someone not holding a legal estate or under a (pre-1926 or post-1925) strict settlement.[29] This is not a problem, as we have seen, under the geometry of a trust of land, especially now that absolute powers are vested in both registered proprietors and trustees of land.

Limitations on the ability of registered proprietors to pass legal title to a purchaser are satisfactorily handled by the relevant curtain. Examples occur if proceeds are paid to a single trustee,[30] or the power exercised is negated by a trust deed, or sale occurs without a necessary written consent.[31] Most titles are registered[32] in which case limits of this sort should appear on the register through entry of a restriction, but otherwise a disponee may assume that exercise of owner's powers is "free of any limitation affecting the validity of a disposition".[33] Registered and unregistered land law dovetail once more, using a common concept of a "limitation",[34] and the two matching curtains handle Harpum's concerns about void transactions.

Overreachable interests

Neither the 1925 nor the 2002 register have specific machinery for overreaching which continues to occur under the Law of Property Act 1925 as explicated by Lord Oliver in *Flegg*.[35] Overreaching applies to an equitable interest under a trust of land which is "capable of being overreached by such trustees".[36]

Subordinate interests under a paramount power

A settlor transfers land to trustees he has selected, as a group of people in whom he is happy to repose confidence,[37] and the right to remove the beneficiaries from the land, Harpum's key to overreaching.

Receipt of benefit from the trust property is subject to those paramount powers. The 1925 register spoke of unprotected interests being *overridden* and in particular beneficial interests were kept off the register as minor interests that were capable of being *overridden*.[38] The title was free anyway if they had also been *overreached*, the paramountcy of the power was paramount freeing the purchaser from fear of the beneficiaries on a proper exercise of the power. Subordination applies to the beneficiaries selected by the settlor in the trust deed and also to beneficiaries selected (under an equitable power[39]) by the trustees from a discretionary class specified by the settlor.

Occupation by the holder of a property interest at the time of a disposition enables the holder of the interest to override registration of the disposition.[40] *Boland*[41]

[29] SLA 1925 ss.18, 38(i), 39(1), 72; C. Harpum, "Overreaching Trustees' Powers and the Reform of the 1925 Legislation" [1990] C.L.J. 277, 288 fn.15.
[30] LPA 1925 s.27(2).
[31] TLATA 1996 s.8.
[32] If unregistered see TLATA 1996 s.16(3).
[33] LRA 2002 s.26(1)–(3).
[34] TLATA 1996 s.8(1), (2). If a wider meaning is given to a "limitation" in LRA 2002 s.26, the two systems will diverge; see below *Full registration curtains*.
[35] *City of London Building Society v Flegg* [1988] A.C. 54 at 84E–91D per Lord Oliver.
[36] LPA 1925 s.2(1)(ii).
[37] *Re D'Angibau* (1879) 15 Ch. D. 228 CA at 243 per Brett LJ.
[38] LRA 1925 s.3(xv), 20.
[39] This phrase is omitted from subsequent quotations from statute.
[40] LRA 2002 s.29, Sch.3 para.2.
[41] *Williams & Glyn's Bank v Boland* [1981] A.C. 487; [1980] 3 W.L.R. 138 HL.

showed that a mortgage by a sole trustee for sale did not overreach a beneficiary in actual occupation before 1996, whereas *Flegg* showed that after a (proper?) mortgage by two trustees for sale, the beneficiary had no property interest under which to occupy. An occupying beneficiary can lose temporal priority to a purchaser under a proper exercise of a paramount power.

Overriding without a beneficial shift

Henderson LJ suggested in *Baker v Craggs* that it was essential to exercise a paramount power so as to shift the beneficial interests in the land to proceeds of the sale, and that no such mechanism existed on the grant of an easement.[42] This was fallacious on both counts. Full overreaching requires, it is true, concurrent operation of two mechanisms, an overriding conveyance and a beneficial shift.[43] The 1922 scheme for over-reaching had separated these mechanisms and given precedence to the overriding function,[44] but the changed curtain of 1924/1925/1926 [45] seemed to limit use of the word "overreaching" to occasions when overriding and beneficial shift occurred concurrently.[46] Repeal of the overreaching section in 1996 may, for those wishing to split hairs, have caused a reversion to older terminology.[47] Whatever, some transactions can subordinate beneficiaries to a purchaser without shifting beneficial entitlement. This class was very clear in 1922, continued after 1925 (not as "overreaching"?),[48] and is more numerous after 1996.[49] Thus in *Baker v Craggs*, the grant of an easement by the Charltons to the Bakers could potentially override Craggs without it being necessary to generate proceeds, effect a beneficial shift, and perhaps to call this "overreaching".

Paramount interests under a subordinate power

Craggs occupied Waterside Farm under a transfer which had not been registered at the time that the easement over part of the Farm's yard was granted to the Bakers. Was Craggs' interest under this transfer overreachable? The judges discussed the distinction between overreachable family interests and exempt commercial interests,[50] which was not a correct way of analysing these facts.

The 1925 scheme is structured around the difference between *over*reaching of subordinate beneficial interests and the OVERreaching of prior equities. The latter derives from the OVERreaching clauses of 19th century resettlements[51] allowing the tenant for life of the current generation to sell free of remaining interests under his parents' or grandparents' settlements, priority deriving from preservation of

[42] *Baker v Craggs* [2018] EWCA Civ 1126 at [32].
[43] Wolstenholme & Cherry, *Conveyancing Statutes* (Stevens, 1932), 232.
[44] LPA 1922 s.3(2) (note the hyphenation).
[45] LPA 1925 s.2(1) as amended in 1924 and 1926.
[46] LPA 1925 s.28 (third sentence); only then were beneficial interests shifted to the proceeds: s.27(1).
[47] *Baker v Craggs* [2018] EWCA Civ 1126 at [3]; C. Harpum, *Megarry & Wade The Law of Real Property*, 7th edn (Sweet & Maxwell, 2008), [6-054].
[48] *State Bank of India v Sood* [1997] Ch. 276 CA at 287D; [1997] 2 W.L.R. 421; M. P. Thompson, "Overreaching without Payment" [1997] (03/04) Conv. 134.
[49] C. Harpum, *Megarry & Wade The Law of Real Property*, 7th edn (Sweet & Maxwell, 2008), [6-054]; *Re Harwood* (1887) 35 Ch. D. 470 CA at 472 per Cotton LJ; (1887) 35 Ch. D. 470; *State Bank of India v Sood* [1997] Ch. 276 CA at 281 per Peter Gibson LJ.
[50] LPA 1925 s.2(2), (3).
[51] C. Walsh, *Jowitt's Dictionary of English Law*, 1st edn (Sweet & Maxwell, 1959), Vol.2, 1299 (the sense of overshooting the mark).

earlier paramountcy of the power of sale in the earlier settlements. Since 1925 strict settlements have used the simpler machinery of the compound settlement,[52] so tenants for life were given virtually no power of OVERreaching.[53]

Confusion lives on in the ad hoc trust, which shows signs of the haste with which it was crafted after the retreat in 1924 from the proposal for a complete curtain.[54] Ad hoc machinery was made available to trustees for sale[55] and now to trustees of land,[56] but only for those relatively rare trustees appointed by the court or for a trust corporation. Approved trustees can OVERreach, under s.2(2) "any equitable interest or power having priority to the trust", but this subsection does *not* affect any subordinated interest. This limitation was missed by Robert Walker LJ in *Birmingham Midshires v Sabherwal*,[57] when he quoted a passage from Megarry & Wade about OVERreaching.[58] Hence the egregious decision in *Mortgage Express v Lambert*.[59] Ms Lambert sold a flat worth £120,000 to Sinclair and Clement for £30,000, and was entitled to set this aside as an unconscionable bargain. This was an equity PRIOR to the trust,[60] so the legal charge to Mortgage Express could not *over*reach Ms Lambert, as was thought, nor OVERreach her[61] since Sinclair and Clement were never likely to be appointed by the court. So the case raised a priority issue.[62]

This phenomenal power would overshoot the mark if a Victorian restrictive covenant could be OVERreached by approved trustees in 2018. This is avoided by reining in the power in s.2(2) by excepting from OVERreaching a number of "commercial" interests set out in s.2(3)[63]—such as equitable mortgages, restrictive covenants, estate contracts and most registered land charges. This subsection has no relevance to normal *over*reaching.

Successive exercises of a paramount power

What of conflicting attempts to overreach? In *Baker v Craggs*, the Charlton as trustees of land exercised paramount powers first by selling to Craggs and then secondly to the Bakers. Waterside Farm was transferred to Craggs in January 2012 failing to reserve an easement over a yard as intended, but his solicitors were unable to make a timely answer to a requisition on title[64] and so his transfer was

[52] SLA 1925 s.31.

[53] Except under SLA 1925 s.72(3).

[54] J. M. Lightwood, "Trusts for Sale" (1927) 3 C.L.J. 59, 67–68; J. Stuart Anderson, *Lawyers and the Making of English Land Law 1832–1940* (Clarendon, 1992), 300–302; C. Harpum, "Overreaching Trustees' Powers and the Reform of the 1925 Legislation" [1990] C.L.J. 277, 396.

[55] LPA 1925 s.2(2) as amended in 1926.

[56] LPA 1925 s.2(2) as amended by TLATA 1996 Sch.4; C. Harpum, "Overreaching Trustees' Powers and the Reform of the 1925 Legislation" [1990] C.L.J. 277, 325ff.

[57] *Birmingham Midshires v Sabherwal* (2000) 80 P. & C.R. 256 CA.

[58] *Megarry & Wade The Law of Real Property*, 5th edn (Stevens, 1984), 409. The distinction between OVERreaching and *over*reaching has been clear throughout the publication history of Megarry & Wade.

[59] *Mortgage Express v Lambert* [2016] EWCA Civ 555; [2017] Ch. 93; A. Televantos, (2016) 75(3) C.L.J. 458, 458 (awarded a gold star for a point so rarely appreciated).

[60] If the conveyance to Sinclair and Clement were to have been set aside, they would never have held the land on trust.

[61] LPA 1925 s.2(3) was not in play; compare Lewison LJ at [37]; this paragraph is vitiated by his failure to appreciate the distinction in s.2 between subss.(1) and (2).

[62] *Mortgage Express v Lambert* [2016] EWCA Civ 555 at [16]–[25] and [40]–[42], rather than at [26]–[39]; M. J. Dixon, "Priority, Overreaching and Surprises under LRA 2002" (2017) 133 L.Q.R. 173, 175.

[63] It was first thought that OVERreachable interests would be equitable and those exempt would be legal, but mature reflection showed that e.g. restrictive covenants had to be saved from OVERreaching.

[64] Presumably the requisition alerted the Charlton's solicitors to the failure to reserve rights over the yard.

not registered. It had been intended to reserve access over the yard sold to Craggs in order to reach the retained land (including the Barn). This the Charltons retained for a couple of months before selling it to the Bakers reserving a right of way over the yard. Even though Craggs had seen his potential to secure registration slip away, his purchase retained priority over the unregistered transfer to the Bakers, since it was still first in time.[65] Registration of the Bakers' transfer in mid-March 2012 with the benefit of the right of way seemed to switch the Bakers to the head of the pecking order. This was reversed once more by Craggs's occupation of the servient yard, enabling his interest (his equity to rectify the plan?) to override Bakers' transfer. This was unless Craggs had been overreached.

An overreaching conveyance under a legal power shifts to the purchase money all the *equitable* interests or powers that are capable of being overreached.[66] Acts such as granting an option or conferring the benefit of a restrictive covenant operate in equity but do not create overreachable equities because the equity takes the priority of the paramount power. The distinction is similar, but not identical, to the family/commercial divide in relation to OVERreaching.[67] Craggs was recipient of the first exercise of paramount powers and had priority between two off-register interests even without occupation.[68] The court should compel a conveyance in such a situation[69] (assuming a proper exercise of the trust[70]) giving priority to Craggs as at the date of the first contract with priority irrespective of any subsequent registered transfer.

Purchaser protection

What happens if trustees sell at half the market value, or transfer to one of themselves or take out a mortgage in order to secure a personal loan? The effect as between the trustees and beneficiaries must be separated from the priority issue between purchaser and beneficiaries.[71] In *Baker v Craggs*: (1) when the Charltons granted an easement to the Bakers in breach of their trust to Craggs, did this prevent the Bakers claiming to have overreached Craggs? and (2) could the Bakers claim a right of access to the Barn which they knew had not been reserved over Craggs' yard? The effect of misusing a power is to render title voidable. So a purchaser often needs protection.

Mis-exercise of a paramount power

The effect of a breach of trust on overreaching is much misunderstood. In *Mortlock v Buller*, a case already discussed, a purchase from trustees acting under a power of sale could not be specifically enforced by the purchaser because the trustees

[65] LRA 2002 s.28. The facts show the inappropriateness of this priority principle since Craggs could have won 50 years after failing to register; temporal priority should be replaced by a race to the register.

[66] LPA 1925 s.2(1)(ii).

[67] LPA 1925 s.2(3).

[68] This is the difference between this analysis and that of the Court of Appeal.

[69] *Re Morgan's Lease* [1972] Ch. 1 at 5H–&E per Ungoed-Thomas J; [1971] 2 W.L.R. 1503; *Lord Waring v London and Manchester Assurance Co* [1935] Ch. 310 per Crossman J; LPA 1925 s.205(1)(xxi) (intending purchasers).

[70] *Ord v Noel* 56 E.R. 962; (1820) 5 Madd .438 at 440–441 per Leach VC, etc.

[71] D. Fox, "Overreaching" Ch.4 in P. Birks and A. Pretto-Sakmann, *Breach of Trust* (Hart, 2002); *City of London Building Society v Flegg* [1988] A.C. 54 at 78H–79A per Lord Oliver.

decided to sell too hastily.[72] A trust for sale was considered by Stuart VC in *Robinson v Briggs*.[73] Errors ranged from acting on the opinion of counsel and dealing with business on the day it arose, to favouring a bankrupt husband over the interests of the children, selling to the family solicitor and accepting the receipt of an infant trustee, for money not actually paid. This sixfold "original vice" (two very venial trifles and four mortal sins) prevented a beneficial shift. The children of the family got back the family estates from their solicitor.

Since he had mortgaged the estates, Stuart VC held that mis-exercise of the powers had not rendered the mortgage *void* but rather potentially *voidable*.[74] This means that a purchaser needs protection against breaches of trust.

Defining a purchaser

The intended statutory definition of a purchaser got lost as the total curtain was abandoned in painful stages through 1920, 1922,[75] 1924, 1925 and 1926.[76] Shoddy carpentry left a messy two-part definition:

> "generally [i.e. in Parts II–XII of the Law of Property Act 1925]
>
> > *purchaser* means a purchaser in good faith for valuable consideration and includes a lessee, mortgagee or other person who for valuable consideration acquires an interest in property;
>
> except that in Part I[77]
>
> > *purchaser* only means a person who acquires an interest in or charge on property for money or money's worth."

It is remarkable that the Pts II–XII good faith requirement applies to the negation of notice of an unregistered land charge,[78] contrary to all other legislation affecting unregistered land charges.[79] The Pt I definition is derived from the 19th century Conveyancing Acts[80] unhappily shoehorned into a more general definition. The accepted interpretation today is that Pt I overreaching requires the payment of money but does not require good faith. This overlooks Cherry's annotation against the sidenote "Good faith", stating that:

> "The provisions of this Act in favour of purchasers only apply in favour of purchasers in good faith. It is conceived that a purchaser is acting in good faith if he acts honestly, whether he is negligent or not."[81]

[72] *Mortlock v Buller* 32 E.R. 857; (1804) 10 Ves. 292 per Lord Eldon; *Ord v Noel* 56 E.R. 962; (1820) 5 Madd 438 at 440–441 per Leach VC; *Bellringer v Blagrave* 63 E.R. 972; (1847) 1 De G. & Sm. 63 per Knight Bruce LJ.

[73] *Robinson v Briggs* 65 E.R. 81; (1853) 1 Sm. & G. 188 per Stuart VC.

[74] *Robinson v Briggs* 65 E.R. 81; (1853) 1 Sm. & G. 188 at 223–224 per Stuart VC.

[75] LPA 1922 ss.3(1), 188(27).

[76] LPA 1925 s.205(1)(xxi); this was introduced in 1924 and left unchanged in 1926.

[77] LPA 1925 ss.1–37, which include the overreaching provision and pre-1996 trustees' powers; the same applies to trusts of land under TLATA 1996 s 23(1).

[78] LPA 1925 s.199.

[79] Land Charges Registration and Searches Act 1888 s.4; Land Charges Acts 1925 s.20(8), 1972 s.17(1); *Midland Bank Trust Co v Green* [1981] A.C. 513 HL at 529C–530E; [1981] 2 W.L.R. 28. Cherry's annotation, below, was clearly unknown to counsel arguing *Green*.

[80] Conveyancing Acts 1881 s.2(viii), 1882 s.1(4)(ii).

[81] Wolstenholme & Cherry, *Conveyancing Statutes* (Stevens, 1932), 588; Ruoff & Roper *Registered Conveyancing*, 6th edn (looseleaf, 1991), [32-08] fn.3, [32–17]. Had Cherry annotated the word *purchaser* in the opening words of LPA 1925 s.2(1) the whole history of land law would have been different.

This was "new, but declaratory". The statutory word "only" shows that the Pt I purchaser must pay money (as opposed to being issue under a future marriage) but otherwise is the same as the Pts II–XII purchaser.[82] This is the view taken in the only reported case.[83] A Pt I "purchaser" should, therefore, act in good faith for money or its equivalent.

Partial unregistered curtain

Mid-19th century cases reveal serious abuses by trustees exercising powers of sale and by trustees for sale, leading the courts to clamp down on the most trivial breaches. In *Robinson v Briggs*, it may be recalled,[84] "original vice" in the execution of the power of sale caused subsequent mortgages to become potentially voidable in equity,[85] and the mortgagee's claim to protection received short shrift,[86] having been put on enquiry by an abstract including a family solicitor as purchaser and a receipt by an infant trustee. So knowledge by a purchaser of the *existence* of the trust triggered an exhaustive investigation into the *execution* of the trusts,[87] since notice of the beneficiaries' priority was only displaced by a paramount sale.[88] Purchasers became too scared to buy from trustees.[89] That therefore is the bedrock; mis-exercise of a power of sale led to the conveyance being voidable unless the purchaser had bought in good faith without knowledge of the breach.

Cherry favoured implementing an impenetrable curtain by statute[90] for trusts for sale of unregistered land, but a Parliamentary ambush by Viscount Cave[91] destroyed the full curtain first proposed.[92] The curtain became more translucent through three rejected drafts (1922, 1924, 1925) until the final 1926 curtain which left, as Harpum showed,[93] the trust and the extent of the trustees' powers on the title. We were back in the 1850s.

The position was explained by Lord Oliver in *Flegg*,[94] relying upon the purchaser's non-notice of the "trusts affecting the proceeds".[95] His explanation became less compelling when he equated that with non-notice of the *existence of the trusts*,[96] since the trust powers were on the title and had to be checked. An equity has to be overreachable independently of s.2, a requirement replaced by three dots in Lord Oliver's speech,[97] but only satisfied by exercise of a Settled

[82] This interpretation is reinforced by the more limited parties mentioned in connection with Pt I.
[83] *HSBC Bank v Dyche* [2009] EWHC 2954 (Ch) at [39] per Judge Purle QC; [2010] 2 P. & C.R. 4.
[84] *Robinson v Briggs* 65 E.R. 81; (1853) 1 Sm. & G. 188 per Stuart VC; see above Trustees of Land.
[85] *Robinson v Briggs* 65 E.R. 81; (1853) 1 Sm. & G. 188 at 223–224 per Stuart VC.
[86] *Robinson v Briggs* 65 E.R. 81; (1853) 1 Sm. & G. 188 at 225–227 per Stuart VC.
[87] *M'Queen v Farquhar* (1805) 11 Ves. 467 per Lord Eldon (actual notice); *Boursot v Savage* (1866) L.R. 2 Eq. 134 at 141–143 per Kindersley VC (constructive notice); *Re Cooper and Allen's Contract* (1876) 4 Ch. D. 802 at 818; *Dunn v Flood* (1885) 28 Ch. D. 586 at 595.
[88] Knowledge of a breach would lead to unconscionable receipt and the continued proprietary force of the trusts until the recipient passed on the land: *Westdeutche Landesbank Girozentrale v Islington BC* [1996] A.C. 669 HL at 705F, 707C-E per Lord Browne-Wilkinson; [1996] 2 W.L.R. 802.
[89] *Re Soden & Alexander's Contract* [1918] Ch. 258 at 264 per Younger J.
[90] See below *Full Registration Curtain*.
[91] A. Offer, "The Origin of the Law of Property Act 1910–25" (1977) 40 M.L.R. 505, 516.
[92] Extensive discussion of the legislative history is available; see, e.g. C. Harpum, *Megarry & Wade The Law of Real Property*, 7th edn (Sweet & Maxwell, 2008); J. Stuart Anderson, *Lawyers and the Making of English Land Law 1832–1940* (Clarendon, 1992).
[93] C. Harpum, "Overreaching Trustees' Powers and the Reform of the 1925 Legislation" [1990] C.L.J. 277, 289–290.
[94] *City of London Building Society v Flegg* [1988] A.C. 54 at 81B–84C.
[95] LPA 1925 s.27(1).
[96] *Mortgage Express v Lambert* [2016] EWCA Civ 555 at [30] per Lewison LJ.
[97] *City of London Building Society v Flegg* [1988] A.C. 54 at 78C.

Land Act power. *When exercised,* this caused the equitable interests to "attach to the net proceeds of sale",[98] so that then (and only then) was a purchaser freed from notice of the beneficial interests.[99] Overreaching was not intended to occur come what may.[100] A purchaser had to check on exercise of the power, so Lord Oliver's obiter on unregistered land thus became a double obiter based on the sale being unimpeachable[101] (or the occurrence of a breach against which the purchaser had protection[102]). A breach of trust that was sufficiently serious to render the title voidable[103] resulted in the purchaser needing to show that he had acted in good faith without *knowledge* of the breach; there was no duty of *enquiry*.[104]

The trusts of land regime, drafted against the backcloth of Harpum's opinion that the problem was limits on the trustees' powers, conferred the powers of an absolute owner[105] subject to payment of the proceeds from trust property to two trustees.[106] No specific authority for overreaching survived, so this must now be power-based. Come what may overreaching was prevented by the rule that:

> "The powers conferred … shall not be exercised in contravention of … any rule of law or equity."[107]

Protection was needed for purchasers in good faith[108] and provided for unregistered titles by s.16(2) which applies:

> "Where (a) trustees of land who convey land … contravene section 6(6)[109] … , but (b) the purchaser[110] … has no actual notice of the contravention; the contravention does not invalidate the conveyance."

Battersby and Ferris reversed the negative to deduce that some (but not all) mis-exercises of powers by the trustees are capable of invalidating a transaction. Working from the assumptions made by Lord Oliver in *Flegg*, they wrote that overreaching had suddenly been transformed,[111] though many other academics rejected their thesis that purchasers were required to behave honestly on account of its supposed novelty.[112] In fact, s.16 restates equity that has existed continuously since Lord Eldon's tenure as Lord Chancellor. Good faith is required but there is no duty of enquiry.

[98] LPA 1925 s.28(1) third sentence (until repealed in 1996).
[99] *City of London Building Society v Flegg* [1988] A.C. 54 at 78F, 81F per Lord Oliver.
[100] Contrast *City of London Building Society v Flegg* [1988] A.C. 54 at 78A–84C.
[101] Protections in LPA 1925 s.27 do not relate to mis-exercise of the power.
[102] Trustee Act 1925 s.17 (purpose of and application of loan) is common to Lords Templeman and Lord Oliver. Lord Oliver seems to have assumed that the Fleggs were overreached as against both the Maxwell-Browns and the City of London Building Society, whereas Lord Templeman decided only that the Fleggs were overreached as against the Building Society.
[103] *Robinson v Briggs* 65 E.R. 81; (1853) 1 Sm. & G. 188 per Stuart VC.
[104] Missing from LPA 1925 s.28.
[105] TLATA 1996 s.6(1).
[106] LPA 1925 ss.2(1) as amended, 27(1).
[107] TLATA 1996 s.6(6).
[108] TLATA 1996 s.16.
[109] i.e. "sell in contravention of any … rule of … equity".
[110] TLATA 1996 s.23 uses the LPA 1925 Pt I definition discussed above.
[111] G. Battersby and G. Ferris, "The Impact of TLATA 1996 on Purchasers of Registered Land" [1998] (5/6) Conv. 168; G. Battersby and G. Ferris, "A Reply to Mr Dixon" [2001] (5/6) Conv. 221.
[112] M. J. Dixon, "Overreaching and TLATA 1996" [2000] (1/2) Conv. 1.

Full registration curtain

The issue in *Baker v Craggs* arose, as will be usual today, under the 2002 register. Any off-register priority battle is settled according to temporal priority,[113] which favoured Craggs on the facts. This was apparently trumped when the Bakers secured registration, acquiring the legal estate under a disposition for value and taking free of Craggs' off-register transfer along with any other interests unprotected on the register.[114] Craggs reversed the order of play once more by having taken occupation of the servient tenement before the Bakers' completion.[115] Attention therefore turned to how overreaching operated under a full registration curtain.

Curtains were invented by conveyancers in the 1870s, anxious to avoid the need for secret service style interrogation of trustees for sale[116] by concealing the existence of a trust for sale from the title, thus freeing purchasers from notice of the very existence of the beneficiaries[117] and worry about proper exercise of the power.[118] An occasional fraud was tolerated in the interests of conferring clean titles on the honest majority.[119]

Cherry favoured implementing that same impenetrable curtain but in the event this was done only for registered titles.

The 1925 register was drafted so as to provide a full curtain, asymmetrical with the unregistered curtain of 1925/1926.[120] The Law of Property Act 1925 ss.2 and 27 were implemented but a Nelsonian eye was turned to the limits on powers implicit in s.28[121]—precisely, perhaps, to give the register a competitive edge? Power to override minor interests[122] included both the power to destroy unprotected interests and the power to secure priority over beneficial interests using a paramount power.[123] Overreaching was irrelevant. Purchasers needed to secure a legal estate by registration and to comply with any purchase money restriction, but did not need to bother to check whether a beneficial shift had occurred as between the trustees and beneficiaries nor that (pre-*Boland*) that occupiers had been overreached. Arguably title could be passed to a purchaser acting in bad faith.[124]

This whole scheme was blown apart by the recognition in *Williams & Glyn's Bank v Boland*[125] of a resulting/constructive trust that could not be overridden on sale if the beneficiary was in occupation. A transaction by a single non-corporate trustee was not overreaching, but beneficial interests would be overreached on a

[113] LRA 2002 s.28.
[114] LRA 2002 s.29.
[115] LRA 2002 Sch.3 para.2.
[116] See above *Partial Unregistered Curtain*.
[117] *Re Harman and Uxbridge and Rickmansworth Railway Co* (1883) 24 Ch. D. 720 per Pearson J.
[118] *Carritt v Real and Personal Advance Co* (1889) 42 Ch. D. 203 at 272–273 per Chitty J.
[119] *Re Chafer & Randall's Contract* [1916] 2 Ch. 8, CA; *Re Soden & Alexander's Contract* [1918] Ch. 258 at 264 per Younger J.
[120] N. Jackson, "Overriding in Registered Land Law" (2006) 69 M.L.R. 214, 222–229.
[121] Contrast the 1875 register: N. Jackson, "Overriding in Registered Land Law" (2006) 69 M.L.R. 214, 228.
[122] LRA 1925 s.3(xv); these were interests capable of being "over*ridden*", a term embracing but not interchangeable with, "over*reached*". The enacted legislation did not permit a single trustee for sale to over*reach* beneficiaries; contrast N. Jackson, "Overriding in Registered Land Law" (2006) 69 M.L.R. 214, 215 fn.14, 230–232.
[123] LRA 1925 s.20.
[124] In *Peffer v Rigg* [1977] 1 W.L.R. 285; [1978] 3 All E.R. 745, Graham J imported a duty on a *purchaser* to act in good faith using LRA 1925 s.3(xxi). That decision, whatever its justice, was technically flawed since s.20(1) operated in favour of the *transferee* giving value, rather than a *purchaser*.
[125] *Williams & Glyn's Bank v Boland* [1981] AC 487; [1980] 3 W.L.R. 138 HL; N. Jackson, "Overriding in Registered Land Law" (2006) 69 M.L.R. 214, 214, 229.

transaction by two trustees (*Flegg*).[126] Registered titles now sometimes depended on over*reaching* (and even OVER*reaching*) occupiers rather than on over*riding* beneficiaries. Overreaching occurred under the Law of Property Act 1925 s.2 and not by dint of the (1925 or 2002) register.[127] The City of London mortgage appears to have been partly authorised and partly unauthorised,[128] but the society was protected against any breach of trust involved in the loan, which rendered any breach of trust irrelevant to the possession action.[129] Comparable protection was not provided to the many *purchasers* who needed it.

The reason is simply that the existence of a trust is concealed from a registered title, so the purchaser buys from registered proprietors as if they are absolute owners and there is an 1870s complete curtain. A purchaser knowing that the person selling to him is a trustee has a duty to ensure that a sale complies with the terms of the power, but no such duty can attach to a purchaser who does not know that the person selling to him is a trustee. The 1925 register negated *both* notice of the trusts affecting the proceeds[130] *and* notice of (the existence of) any trust—whether express, implied or constructive—which was not to affect "any person dealing with a registered estate".[131] This removed any worries about whether the trust powers had been validly exercised, though known breaches might be a different matter.[132] There was no need in 1996 to extend protection to purchasers of registered land already protected by a complete registration curtain.[133]

Failure to overreach by trustees of land under the 1925 register through a breach of trust troubled the courts only once, despite the occasional Millenarian doomsayer,[134] and that was obiter in *HSBC Bank v Dyche*.[135] A property was transferred by a bankrupt father and his wife in 1994 to their daughter and son-in-law, in order to facilitate borrowing, on the basis that the beneficial interest would revert to the father. When the younger couple divorced, the house was transferred in December 2002 (under the 1925 register which continued to operate until October 2003) from joint names into the sole name of the daughter, a "reshuffling of the legal title" which could not overreach the father. Money was borrowed from HSBC, and, in order to explain away the occupation by the father, a shorthold tenancy agreement was produced to them showing him to be a tenant; the judge held that the father's name had been forged. The interest of the case is the obiter comments (assuming that *two* trustees were transferring to a buddy complicit in their trust breaking) that overreaching requires good faith and would

[126] *City of London Building Society v Flegg* [1988] A.C. 54 at 71C–D per Lord Templeman, 78H–79A per Lord Oliver.

[127] *City of London Building Society v Flegg* [1988] A.C. 54 at 84E–91D per Lord Oliver; *Mortgage Express v Lambert* [2016] EWCA Civ 555 at [11] per Lewison LJ.

[128] It discharged an earlier mortgage (under SLA 1925 s.71(1)(i)) but that earlier mortgage was used to buy land which trustees of land could not do at that time; there was also an issue about the surplus beyond the redemption figure of the prior mortgage; see C. Harpum, "Overreaching Trustees' Powers and the Reform of the 1925 Legislation" [1990] C.L.J. 277, 307.

[129] Trustee Act 1925 s.17 (a *purchaser* does not, rather surprisingly, need to show good faith); *City of London Building Society v Flegg* [1988] A.C. 54 at 71C–D per Lord Templeman, 78H–79A per Lord Oliver.

[130] LPA 1925 s.27(1).

[131] LRA 1925 s.74; *City of London Building Society v Flegg* [1988] A.C. 54 at 85H–86A per Lord Oliver.

[132] N. Jackson, "Overreaching and Unauthorised Dispositions of Registered Land" [2007] (03/04) Conv. 120.

[133] Hence TLATA 1996 s.16 was confined to unregistered land. Compare G. Battersby and G. Ferris, "Overreaching and TLATA 1996—A Reply" [2001] Conv. 221; G. Ferris and G. Battersby, "The General Principles of Overreaching—The Modern Legislative Reforms" (2003) 119(1) L.Q.R. 94.

[134] M. J. Dixon, "Overreaching and TLATA 1996" [2000] (1/2) Conv. 1.

[135] *HSBC Bank v Dyche* [2009] EWHC 2954 (Ch); [2010] 2 P. & C.R. 4; N. P. Gravells, [2010] Conv. 169, 173.

not occur on a transfer in breach of trust.[136] As one commentator gravelled, this could be seen effectively as an adoption of the contentious views of Ferris and Battersby,[137] but it was also a quite unobjectionable application of Lord Eldon's equity to a rare case of a trustee openly breaking a trust and a (fictional) purchaser in on the act. On the actual facts, HSBC had lent in good faith and so would have been protected by the registration curtain, had the form of the transaction been potentially overreaching in geometry.

We can now jump forward to the operation of the new trust breaker register operating from October 2003. Thus far, the drafting of legislation has survived all misguided comment and judicial error, but one change to the 2002 register appears inexplicable. The 2002 register frees the *registrar* from notice of trusts[138] but not *purchasers*, as was the case under the 1925 register. Had things stood there, purchasers might have become bound by beneficiaries, in or out of occupation, and might have been infected by notice of defects in the exercise of the power to transfer, let alone actual knowledge of a breach. The need for protection was recognised and a very strong curtain was provided—but directed only to ultra vires transactions. Under the awkward (and undefined) soubriquet of "disponees", purchasers were protected by the rule that:

> "a person's right to exercise owner's powers in relation to a registered estate … is to be taken to be free from any limitation affecting the validity of a disposition."[139]

Writers think that this has filled any lacuna created in 1996[140]—even Graham Ferris has gone soft.[141] The critical word here is "limitation". The section can be read as applying only to a limitation on the power to make a legal transfer and this was certainly intended according to two paragraphs devoted to the subject in the official commentary on the draft Bill, which discuss hidden consent provisions and an exclusion of trustees' powers hidden from the register.[142] Limitations of this kind are rare when registered proprietors and trustees have such extensive powers.

Does s.26 have any impact on overreaching? Superficially a purchaser from multiple trustees acquires a good title, and the purchaser is entitled to registered as proprietor. Temporal priority of the beneficiaries remaining[143] until a disposition for value is registered when any interest unprotected on the register at the time of the disposition is postponed to the purchaser. This leaves as problem cases where a beneficiary is in occupation, a sale by two trustees acting in breach of trust and a sale by one trustee registered free of restriction.

[136] *HSBC Bank v Dyche* [2009] EWHC 2954 (Ch) at [36]–[41]; [2010] 2 P. & C.R. 4.
[137] N. P. Gravells, [2010] Conv. 169, 172–173.
[138] LRA 2002 s.78; contrast LRA 1925 s.74.
[139] LRA 2002 s.26(1); this does not affect the issue between trustees and beneficiaries (subs.(3).
[140] See the literature cited above.
[141] G. Ferris, "Making Sense of s.26 of LRA 2002" Ch.6 in E. Cooke, *Modern Studies in Property Law Vol.2* (Hart, 2003).
[142] Land Registration for the Twenty First Century (Law Com 271, 2001), [4.10], [4.11]; also other discussion at [2.15], [4.3], [7.7], [7.8]. This seems to support G. Ferris, "Making Sense of s.26 of LRA 2002" Ch.6 in E. Cooke, *Modern Studies in Property Law Vol.2* (Hart, 2003), 112 (construction 1).
[143] LRA 2002 s.28.

Although a registered disposition takes effect subject to the rights of occupiers,[144] only a *proper* disposition by two trustees should overreach beneficial interests. What if a disposition is a breach of trust? What if, for example, trustees sell at three quarters of the market price? It is possible to see the equitable duties of trustees as a "limitation affecting the validity of a disposition" and hence to see s.26 as protecting a title acquired in breach of trust. Something similar occurred in *Mortgage Express v Lambert*. Ms Lambert had transferred her house to Sinclair and Clement but had the right to set aside this transfer as an unconscionable bargain and remained in occupation throughout. A mortgage by Sinclair and Clement to Mortgage Express overreached her equity to set aside the transfer:

> "[T]he purpose of … section [26] is to prevent the disponee's title from being called into question … [I]f a right is asserted as an overriding interest, and that right is a right to impugn the title acquired by the disponee, then section 26 defeats that right. Paragraph 4.11 of the [Law Commission] report[145] …, provides strong support for [the] submission that Ms Lambert is not able to call into question the title acquired by Mortgage Express."[146]

The official examples all relate to ultra vires transactions (unfortunately called breaches of trust) and this decision muddles up the ability to transfer title and lack of priority.[147] The trustees had unlimited powers as registered proprietors but were subject to a prior equity. When the house was charged, Mortgage Express took subject to Ms Lambert's rights, as an occupier.[148] If the decision is allowed to stand it supports a very wide interpretation of s.26.[149]

In *Boland*, a possession claim by Williams & Glyn's Bank against Mrs Boland failed because she had a resulting/constructive trust interest and was in occupation when her husband mortgaged the family home to the bank.[150] Mr Boland's inability to overreach his wife's interest was a limitation on Mr Boland's powers as a trustee, which was not reflected on the register and so could be overridden by a post-2002 Williams & Glyn's under this very wide interpretation of s.26. This was not intended by the reformers, and so a more limited reading of s.26 is required, consonant with the existing fundamentals of land law.

This leaves three problems with s.26. In two respects it is too wide, enabling the register to be used as a trust breaker, by providing unwarranted protection for volunteers[151] and purchasers ignoring a known error.[152] It is too narrow in failing to reproduce the protection against the existence of trusts available to purchasers under the 1925 register.[153] The conduct of the trustees can often be criticised and honest purchasers need protection against mis-exercises of the powers of trustees.

[144] LRA 2002 ss.28, 29, Sch.3 para.2.
[145] See above.
[146] *Mortgage Express v Lambert* [2016] EWCA Civ 555 at [27]–[28] per Lewison LJ.
[147] M. J. Dixon, "Priority, Overreaching and Surprises under LRA 2002" (2017) 133 L.Q.R. 173, 175.
[148] She lost priority by failing to disclose her interest.
[149] LRA 2002 s.26(1); G. Ferris, "Making Sense of s.26 of LRA 2002" Ch.6 in E. Cooke, *Modern Studies in Property Law Vol.2* (Hart, 2003), 109-111, 112 (Ferris' rejected construction 2).
[150] *Williams & Glyn's Bank v Boland* [1981] A.C. 487; [1980] 3 W.L.R. 138 HL.
[151] G. Ferris, "Making Sense of s.26 of LRA 2002" Ch.6 in E. Cooke, *Modern Studies in Property Law Vol.2* (Hart, 2003), 117.
[152] *Mortgage Express v Lambert* [2016] EWCA Civ 555 at [27]–[28] per Lewison LJ.
[153] LRA 1925 s.74.

Conclusions

Overreaching works better than many commentators have allowed, but theoretical problems remain. Mechanistic provisions about the effect of a transfer allow misuse of the register as a trust breaker, by protecting donees and purchasers in bad faith. Overreaching the mark has been identified when trustees of land are allowed to destroy prior equities, when non-fiduciary owners could not , and when protection is afforded to outside parties buying in bad faith. Lord Oliver's come what may overreaching misunderstood the unregistered curtain. Overreaching is not an appropriate way of analysing priorities between successive exercises of the same paramount power. On the other hand, refusal to allow overreaching on a grant or reservation of a legal easement is to underreach, to fall short of the mark. The curtain provided by the 2002 register is precarious because purchaser protection was drafted against trustees acting beyond the scope of their powers, when it was really needed when they were acting in breach of their duties. The register has needed tailor-made overreaching machinery since 1925, or at least since *Boland* in 1981 and the best way forward is to equip some proprietors with specific overreaching powers.

Cherry's curtain has achieved such a mythical status that to discover holes in a badly botched job brings to mind the warning read by Dante as Virgil guided him through the gate of Hell, "Abandon hope all ye who enter here".[154]

[154] Dante's *Inferno*, Canto III.

Illegality and Trusts: Trusts-Creating Primary Transactions and Unlawful Ulterior Purposes

Remigius N Nwabueze*

Enforcement; Ex turpi causa; Illegal contracts; Illegality; Jurisprudence; Public policy; Trusts; Unjust enrichment

Introduction

Patel v Mirza provides an interesting opportunity to re-examine the role of illegality in the enforcement of trusts.[1] Though *Patel* was a case on unjust enrichment and contract, its ratio, to the effect that a restitutionary claim would not be necessarily undermined by an underlying illegality, would definitely resonate with a claim in trust that has an unlawful ulterior purpose.[2]

I argue that the role illegality plays in the law of trusts is often exaggerated. I hypothesise that a properly constituted trust, which arises from the primary feature of a transaction between the parties, should be enforced despite some credible evidence that the trust has an illegal ulterior purpose.[3] Similarly, a trust that arises by operation of law from a given primary feature of a transaction should be enforced notwithstanding an underlying illegality. I argue that pre-*Patel*, and potentially post-*Patel*, illegality obviated the enforcement of a trust only where the trust *directly* violated the law or public policy; it is only within this narrow sphere that the illegality principle is relevant in trusts law. In other words, the illegality principle or *Patel*'s trio of considerations can only be applied to trusts where a given trust is directly opposed to law or public policy, as distinct from the trust being merely impugned for having some ulterior unlawful motives. Even the cases on presumption of advancement are consistent with my hypothesis above. In advancement cases, the primary feature of the transaction delineates a trust, although this trust is opposed by the presumption of advancement. In the bid to dislodge the presumption of advancement the claimant ends up establishing a trust that directly violates the law or public policy. Since such a trust comes within the narrow sphere of the illegality principle in trusts law, the court is justified in rejecting a trust claim in such cases relating to the presumption of advancement.

* Remigius N Nwabueze, SJD (Toronto), Associate Professor of Law, University of Southampton, School of Law. This piece benefited immensely from the helpful and constructive criticism of the earlier draft by Professors Graham Virgo, John Mee, Peter Sparkes and Sarah Nield. Many thanks also to the editor of *The Conveyancer and Property Lawyer*, Prof. Martin Dixon, and the anonymous reviewers for the helpful feedback.

[1] *Patel v Mirza* [2016] UKSC 42; [2017] A.C. 467. J. Goudkamp, "The end of an era? Illegality in private law in the Supreme Court" (2017) 133 L.Q.R. 14.

[2] G. Virgo, "Patel v Mirza: one step forward and two steps back" (2016) 22 *Trusts & Trustees* 1090.

[3] Similarly, if a property right was validly created under an executed illegal contract, "the court simply ignores the illegality": Law Commission, *The Illegality Defence: A Consultative Report* (Consultation Paper No.189) paras 5.6, 5.11.

However, some advancement cases evince multiple transactions rather than a single transaction. For instance, a transfer to the transferor's wife, to evade the transferor's creditors, might be followed by a declaration of trust by the transferor's wife in favour of the transferor. In such advancement cases, the supervening and valid declaration of trust by the transferee would constitute the critical primary transaction; accordingly, the trust embodied in such a declaration would be effectuated despite the underlying illegal purpose.

I argue that the hypothesis above provides a rational and consistent explanation of the relevant case law on the topic. Properly understood, therefore, illegal ulterior purposes are hardly ever relevant to the enforcement of trusts constituted by the primary transaction in a case.

Illegal purposes and lawful primary transactions or primary features of transactions

I suggest that a critical distinction exists between the lawful and *primary feature* of a transaction that is constitutive of a valid trust and the tainted motivations or purposes of that transaction, which might be used to argue for the illegality of the trust that eventuated from the transaction.[4] What qualifies as the *primary feature* of a transaction is fact-dependent and would vary from case to case, but the answer should be obvious in most cases. For instance, if X made a voluntary transfer of his property to Y, albeit with the intention of defrauding X's creditors, the primary feature of that transaction is simply the voluntary transfer to Y; the transfer itself, without more, is constitutive of a valid resulting trust. The fact that the transfer to Y was done in order to accomplish an illegal purpose was just an incidental, but not a primary, feature of the transaction. In a situation where there are two or more transactions, the focus should turn on the *primary transaction*, and the question should be whether that primary transaction is, in itself, constitutive of a valid trust despite the presence of some ulterior unlawful motives. For instance, X makes a voluntary transfer of his property to Y, and the *transfer contains a term* which states that the objective is to defeat X's creditors.[5] Subsequently, Y declares a trust over that property in favour of X.[6] Here, there are two transactions: the voluntary transfer by X to Y and the subsequent declaration of trust by Y. Since the voluntary transfer by X is expressly and directly contrary to law and public policy, and the trust is therefore illegal and generally unenforceable (subject to my discussion on *Patel* below), the primary transaction in this latter example should be taken to be the subsequent declaration of trust by Y. Y's subsequent declaration of trust for X is ipso facto valid and enforceable.[7]

Therefore, I argue that if the primary transaction or the primary feature of a transaction in any given case were constitutive of a valid trust, in the sense that the trust is properly constituted and complies with all the essential criteria of validity, then the trust would be enforced despite the illegality of its purpose. I argue that this proposition is supported by the cases on the subject discussed below.

[4] This distinction was anticipated by Mance LJ in *Collier v Collier* [2002] EWCA Civ 1095 at [97]; [2002] B.P.I.R. 1057.
[5] An example of such a trust that is expressly illegal is *Thrupp v Collett (No.1)* 53 E.R. 844; [1858] 26 Beav. 125.
[6] Adapted from *Perpetual Executors and Trustees Assoc of Australia Ltd v Wright* [1917] 23 C.L.R. 185.
[7] Adapted from *Perpetual Executors and Trustees Assoc of Australia Ltd v Wright* [1917] 23 C.L.R. 185.

Illegality comes to the fore and potentially obviates the enforcement of a trust only when the trust, a disposition under it or an essential element for its validity *directly* violates a statute, common law or public policy,[8] as opposed to the trust just being impugned for its tainted or illegal purpose.[9] In essence, save for trusts that directly violate the law or public policy, a trust that arises from the primary transaction or from the critical and primary feature of a transaction between the parties cannot be denied judicial enforcement on the ground of its alleged illegal purpose. Properly understood, therefore, illegality operates within a narrow sphere of trusts law; and it is in this narrow sphere that *Patel*'s trio of considerations would be potentially engaged. For instance, in the two examples I gave above, the trusts arising from the primary feature of the transaction and from the primary transaction are ex facie valid and enforceable; thus, neither the illegality doctrine nor *Patel*'s trio of considerations are engaged.

Although the distinction above has not been explicitly explored in the cases and literature on the subject, it might be useful in explaining and rationalising most of the reported cases on trusts relating to illegality. Even the cases on the presumption of advancement, which complicated a principled approach to the illegality doctrine in trusts, are consistent with the hypothesis above. As argued below, the critical and primary feature of the transaction in the cases relating to advancement evinced a trust, albeit a trust that directly violates the law or public policy. The illegality of the trust in such cases becomes apparent when the claimant attempts to dislodge the presumption of gift and ends up establishing a trust that directly violates the law[10]; such a trust falls within the narrow remit of illegality in the law of trusts. Because the trust established by the claimant in advancement cases was directly illegal and unenforceable, at least before *Patel*, there was little to dislodge the presumption of advancement which had to prevail. However, in the cases of advancement where there was a subsequent transaction involving a declaration of trust by the transferee for the transferor, the valid declaration of trust (as the primary transaction) prevailed over the presumption of gift; this instantiates the driving force of a primary transaction, because the lawful and supervening declaration of trust would be enforced despite the illegality of the initial transfer.

I suggest that the proposition above provides an analytical framework for rationalising the relevant cases on the subject. In *Haigh v Kaye*,[11] for example, the claimant, worried about the possibility of an adverse decision in a suit which was then pending between him and another party, conveyed his land to the defendant during the pendency of that suit; there was no consideration for the conveyance, and transfer of property during the pendency of a suit is generally unlawful (as fraud against creditors). Although the defendant refused to re-convey the land to the claimant, he admitted that the parties entered into an oral express agreement, to the effect that he would hold the land on trust for the claimant. The claimant brought an action for a declaration of trust. The claimant appeared to have relied on two types of trust, although the judgment of James LJ did not make such a distinction—presumed resulting trust, arising from the voluntary transfer; and express trust, arising from the parol agreement between the parties.

[8] As in the first transaction of the second example above—the trust expressly contains an illegal term.
[9] As in the first example above.
[10] *Collier v Collier* [2002] EWCA Civ 1095.
[11] *Haigh v Kaye* (1871–72) L.R. 7 Ch. App. 469.

In response to the resulting trust alleged by the claimant, the defendant argued that since the purpose of the conveyance was to put the land out of the reach of the potential judgment creditor in that pending suit, the conveyance was fraudulent and unenforceable for being contrary to public policy; and that the court should refuse its assistance to the claimant on the basis that *in pari delicto melior est condition possidentis*. As to the oral express trust claim, the defendant argued that it was unenforceable for being contrary to the Statute of Frauds. Granting the claimant's claim, James LJ dismissed the illegality defence on the ground that the defendant had not clearly pleaded it:

> "If a defendant means to say that he claims to hold property given to him for an immoral purpose, in violation of all honour and honesty, he must say so in plain terms, and must clearly put forward his own scoundrelism if he means to reap the benefit of it."[12]

The Statute of Frauds argument was dismissed on the basis that the statute did not apply to trusts arising from operation of law (including resulting trusts)[13]; and that the statute was "never intended to prevent the Court of Equity from giving relief in a case of a plain, clear, and deliberate fraud".[14] Thus, James LJ appears to have enforced the invalid oral express trust as a constructive trust.[15] Although the illegality defence was dismissed on procedural grounds in *Haigh,* the outcome would not have been different had the defence been properly pleaded. The primary transaction in *Haigh* was simply the voluntary transfer to the defendant, which was constitutive of a valid and enforceable resulting trust. Alternatively, there was a supervening declaration of trust, which, albeit unenforceable for lack of writing, was enforceable as a constructive trust.[16] Whichever way you look at it, therefore, there was a valid trust constituted by the primary transaction in *Haigh*. Thus, the court was right to enforce the trust despite its underlying tainted motive.

The analysis above is supported by *Ayerst v Jenkins*.[17] There, William (a widower), by trust deed, transferred shares to trustees to hold on trust for the absolute benefit of Isabella, his deceased wife's sister. Two days after the transfer, William married Isabella, but the marriage, to their knowledge, was void for being contrary to public policy and law, because the parties were within the statutorily prohibited degrees of consanguinity or affinity. William died intestate, and Isabella married Mr Jenkins a few years later. The claimant, William's legal personal representative, brought the action and sought a declaration that the trust constituted by the trust deed was void, on the ground that the trust deed was made in contemplation, and in consideration, of the intended unlawful marriage between William and Isabella. Thus, the claimant argued that there should be a resulting trust for William's estate. Thus, in contrast to *Haigh*, illegality was properly pleaded in *Ayerst*, a point emphasised in Lord Selborne LC's observation that the relief sought by the claimant was "on the naked ground of the illegality of his own

[12] *Haigh v Kaye* (1871–72) L.R. 7 Ch. App. 469 at 473.
[13] *Haigh v Kaye* (1871–72) L.R. 7 Ch. App. 469 at 474.
[14] *Haigh v Kaye* (1871–72) L.R. 7 Ch. App. 469.
[15] *Rochefoucauld v Boustead* [1897] 1 Ch. 196; *Bannister v Bannister* [1948] 2 All E.R. 133; [1948] W.N. 261.
[16] *Bannister v Bannister* [1948] 2 All E.R. 133; [1948] W.N. 261.
[17] *Ayerst v Jenkins* [1873] L.R. 16 Eq. 275.

intention and purpose".[18] More interestingly for this piece, the defendant argued that:

> "in equity the transaction must be looked upon as complete; Mrs Jenkins (Isabella) is as much mistress of the property as if it were money in her pocket, and she cannot be deprived of it."[19]

This implies that since the completed primary transaction was constitutive of a valid express trust (transfer to trustees), the underlying illegal purpose was irrelevant. Lord Selborne LC accepted this argument, observing that the relief sought was against:

> "a completed transfer of specific chattels, by which the legal estate in those chattels was absolutely vested in trustees … for the sole benefit of the Defendant. I know no doctrine of public policy which requires, or authorizes, a Court of Equity to give assistance to such a Plaintiff under such circumstances."[20]

Furthermore, Lord Selborne LC noted that the "voluntary gift of part of his own property by one *particeps criminis* to another, is in itself neither fraudulent nor prohibited by law", implying that since the critical transaction effectuated a valid transfer to the trustees, on trust for Isabella, the court would not void that trust on the basis of its subterranean illegality. *Ayerst* is equally explicable on the basis of the public policy rule that a court would not allow a party to benefit from their own wrong, something Lord Selborne LC alluded to when he quoted from *Benyon v Nettlefold*,[21] to the effect that "on the grounds of public policy … those who violate the law must not apply to the law for protection".[22]

Furthermore, while Lord Selborne LC observed, in passing, that "It is a maxim of law not opposed to any equity, that '*in pari delicto melior est condition possidentis*'",[23] it is not clear that he based his judgment on the ground of William's illegality. I suggest that the main ground of the decision in *Ayerst* was that the primary transaction in that case clearly established an express and valid trust. This line of reasoning was captured in Lord Selborne LC's observation that:

> "I think it consistent with all sound principle, and with all authority, to recognize the importance of the distinction between a completed voluntary gift, valid and irrevocable in law (as I hold the transfer of these shares to the Defendant's trustees to be), and a bond or covenant for an illegal consideration, which has no effect whatever in law."[24]

In other words, the trust having been properly constituted by the effective transfer of the shares to the trustees (the primary transaction), the court would enforce or uphold the trust despite the alleged unlawful cohabitation between the settlor and the beneficiary.

[18] *Ayerst v Jenkins* [1873] L.R. 16 Eq. 275 at 283.
[19] *Ayerst v Jenkins* [1873] L.R. 16 Eq. 275 at 279.
[20] *Ayerst v Jenkins* [1873] L.R. 16 Eq. 275 at 283.
[21] *Benyon v Nettlefold* 42 E.R. 196; [1850] 3 Mac. & G. 94 at 102.
[22] *Ayerst v Jenkins* [1873] L.R. 16 Eq. 275 at 283.
[23] *Ayerst v Jenkins* [1873] L.R. 16 Eq. 275.
[24] *Ayerst v Jenkins* [1873] L.R. 16 Eq. 275 at 284.

Rider v Kidder makes a useful comparison to *Ayerst*.[25] In *Rider*, Rider, while lawfully married to Catherine, was involved in an adulterous and immoral cohabitation with the defendant, Anne Kidder. Rider had covenanted, in a marriage settlement, that certain sums should be paid to Catherine (his wife), 12 months after his death. Thereafter, Rider bought some stock/annuity and transferred it into the joint names of himself and the defendant; they both signed a power of attorney, which empowered an agent to receive the dividends and pay the proceeds to the defendant. Subsequently, Rider died and Catherine brought an action asking the court to declare the defendant a resulting trustee of the stock for Rider's estate, of which Catherine was the legal personal representative. The defendant alleged that the stock was an absolute gift to her from Rider. If it was a gift, Catherine countered, it was unenforceable for being in fraud of creditors under the marriage settlement (that is, Catherine and trustees of the marriage settlement). Catherine further argued, though not in terms, that the gift was unenforceable because it was made for the purpose of nurturing an immoral cohabitation between Rider and the defendant.

The Chancellor, Lord Eldon, held that the transaction, the transfer of the stock into the joint names of Rider and the defendant, did not create a gift, because the parties were not in a gift-giving relationship that could give rise to the presumption of advancement, and there was no evidence that Rider intended to part with his beneficial interest in the stock. Consequently, Lord Eldon held that the transaction gave rise to a resulting trust in favour of Rider's estate, and therefore, ordered the defendant to transfer the stock to Catherine. The point of *Rider* is that the primary transaction therein triggered a valid trust by operation of law (that is, the resulting trust, which arose from Rider's payment for the stock); thus, the enforcement of this (resulting) trust was unaffected by the illicit or illegitimate intentions that motivated its creation. Lord Eldon hinted at this when he suggested that if a complete and valid trust had emerged from the transaction in favour of the defendant, it would have been enforced despite being motivated by the unlawful and immoral cohabitation between Rider and the defendant.[26] This suggestion was made in response to the argument made on behalf of the claimant, to the effect that any trust (or gift) arising from the transaction in favour of the defendant would be practically:

> "a provision for a criminal and adulterous intercourse. The distinction between a recompence for past, and a provision for future, cohabitation, has never been made in the instance of a married man."[27]

In response to the submission above, Lord Eldon asked:

> "Has there been any case upon that distinction, where the Court finding the woman in actual possession of the property has upon that ground taken it out of her hands? The distinction upon the doctrine of *praemium pudicitae* has prevailed in the case of restraining her from enforcing a security. But I doubt,

[25] *Rider v Kidder* 33 E.R. 77; (1806) 12 Ves. Jr. 202.
[26] *Rider v Kidder* 33 E.R. 77; (1806) 12 Ves. Jr. 202 at 364.
[27] *Rider v Kidder* 33 E.R. 77; (1806) 12 Ves. Jr. 202.

> whether there is any instance of taking the property out of her hands, except as to creditors."[28]

Thus, Lord Eldon implied that if the completed primary transaction in *Rider* had given rise to a trust in favour of the defendant-paramour, the trust would have been enforced (as in *Ayerst)*, notwithstanding its immoral or unlawful purpose.

Symes v Hughes is another relevant and important case, though it is, more often, rather used to support the view that an unexecuted illegal purpose would not impair the enforcement of a trust[29]; that is, the so-called withdrawal exception to the illegality doctrine, which allows a claimant, who is a party to an illegality, to enforce a claim grounded in the illegal transaction, provided the illegality was not executed.[30] Apart from this exception, *Symes* could be used to reinforce my proposition above. In *Symes*, the claimant was in financial difficulties and, consequently, he allowed a pecuniary default judgment to be entered and executed against him. In order to secure his leasehold property against his creditors, the claimant made a voluntary conveyance of the property to his lover, Mrs Maddox; they both intended that Mrs Maddox would hold the property on trust for the claimant. A few months later, Mrs Maddox denied the claimant's request to re-assign the property to him, and instead, she conveyed the property to the defendant, her son-in-law, who had knowledge of the claimant's beneficial entitlement. The claimant sought a declaration that the defendant was a trustee of the property for the claimant, and an order for a re-transfer of the property to the claimant. The defendant argued that since the trust alleged by the claimant was illegal, its manifest purpose being to defraud the claimant's creditors, the court should not entertain the claimant's action on the basis of the maxim that *in pari delicto potior est condition possidentis*.[31] Lord Romilly MR agreed with the claimant's answer to this defence, to the effect that the illegal purpose was of no consequence because it had not been executed. More interestingly, however, Lord Romilly MR observed that:

> "the mere intention to effect an illegal object when the assignment was executed does not deprive the assignor of his right to recover the property from the assignee who has given no consideration for it."[32]

Thus, an illegal intention would not impair a trust constituted by the primary facts.

In re Great Berlin Steamboat Co provides a good challenge to my hypothesis above.[33] There, the claimant agreed to deposit £1000 into a company's bank account. The purpose of the deposit was to give the company a positive, but fictitious, credit profile, which might help to attract investors to the company. The resolution of the company authorising the transaction expressly stated that the money was to be held on trust for the claimant, and that no part of it would be spent without the claimant's consent; it further provided that the money would be paid back to the claimant at the expiration of one month from the date of receipt. However, the

[28] *Rider v Kidder* 33 E.R. 77; (1806) 12 Ves. Jr. 202.
[29] *Symes v Hughes* (1869–70) L.R. 9 Eq. 475.
[30] *Tribe v Tribe* [1996] Ch. 107; [1995] 3 W.L.R. 913.
[31] *Symes v Hughes* (1869–70) L.R. 9 Eq. 475 at 478.
[32] *Symes v Hughes* (1869–70) L.R. 9 Eq. 475 at 479.
[33] *In re Great Berlin Steamboat Co* [1884] 26 Ch. D. 616.

expected investment did not materialise and an order was made for the compulsory winding-up of the company. In the winding-up proceeding, the claimant argued that the remainder of the £1000 pounds (that is, £99.15, the rest having been spent by the company with the consent of the claimant) was held on trust for him. The defence was that the alleged trust was unenforceable, because it amounted to a fraud against potential investors and the general public. The Court of Appeal appeared to have accepted this argument, and held that it was too late for the claimant to withdraw from the transaction.

I argue, however, that the primary and critical transaction in *In re Great Berlin Steamboat Co* actually evinced a contractual or debtor-creditor relationship, rather than a trust; it is immaterial that the resolution of the company described the transaction as a trust. If *In re Great Berlin Steamboat Co* was a case of debt, as I contend here, then the court's acknowledgment of the relevance of the fraudulent purpose of the loan could not have meant that an illegal purpose would also impair the enforcement of a properly constituted trust. This rendition of *In re Great Berlin Steamboat Co* finds support in the pertinent observation of Cotton LJ, in which he cast some doubt on the claimant's cause of action grounded in trust:

> "But that declaration of trust (contained in the company's resolution) *is coupled with a statement that the advance* is made in order that the company may appear to have a creditable balance at their bankers."[34]

The emphasised part of the quotation above, particularly the use of the word "advance", clearly shows that Cotton LJ thought that the transaction was a loan, not a trust. Lindley LJ put the matter beyond peradventure when he observed: "I am not satisfied that this was not a case of loan as distinguished from trust, and if that is the true view it is fatal to the Appellant's (claimant) case".[35] Basically, therefore, *In re Great Berlin Steamboat Co* was a case of fraudulent loan, where a non-secured lender attempted to be paid in full.

Even if the primary and critical transaction in *In re Great Berlin Steamboat Co* were regarded as giving rise to a trust (instead of a loan), I would argue that the relevant trust directly infringed the law, and therefore, falls within what I consider to be the legitimate and narrow sphere of illegality in trusts law. Notice that the alleged trust in *In re Great Berlin Steamboat Co* was wholly and expressly created to give the company a misleading credit balance; thus, the trust was tantamount to fraud directly practiced on members of the public who dealt with the company. Much of this was evident in the observation of Lindley LJ, that "if it was a case of trust … He (claimant/appellant) … shews an illegal trust, since the purpose of the advance was to give a fictitious credit to the company".[36] Thus, *In re Great Berlin Steamboat Co* does really not depart from my proposition above.

Cottington v Fletcher is equally relevant.[37] There, the claimant, at a time he was a Roman Catholic, purchased an advowson,[38] which was a recognised property right. Because an advowson could only be owned by a Protestant, and was liable to forfeiture under certain statutes if acquired by a non-Protestant, the claimant

[34] *In re Great Berlin Steamboat Co* [1884] 26 Ch. D. 616 at 619—emphasis added.
[35] *In re Great Berlin Steamboat Co* [1884] 26 Ch. D. 616 at 620.
[36] *In re Great Berlin Steamboat Co* [1884] 26 Ch. D. 616.
[37] *Cottington v Fletcher* 26 E.R. 498; (1740) 2 Atk. 155.
[38] Advowson is a right to nominate a clergy to a vacant benefice.

assigned his advowson to the defendant; the claimant intended that the defendant would hold the property on trust for the claimant. The purpose of the arrangement was to conceal the claimant's beneficial interest in the property, and to protect it from forfeiture under the relevant statutes. Afterwards, the claimant became a Protestant and requested a reassignment of the property to him, but the defendant refused, hence the claimant's action for a declaration of trust. The defendant admitted that he held the property on trust, but he pleaded the Statute of Frauds. On the basis of that admission, Lord Hardwicke held that the trust was enforceable. Although Lord Hardwicke implied that the decision might have been different if the defendant had denied the trust,[39] the actual ratio of that case should not be easily dismissed, that is, the court clearly upheld or enforced a trust, which, albeit created for an illegal purpose, was validly constituted by the primary feature of the transaction in that case.

Finally, in *Davies v Otty*,[40] the claimant married a woman ten years after his wife had deserted him, in the belief that his wife, whom he had not heard from in all those years, was dead. Later, the claimant learned that his wife was still alive. Concerned that he might be charged for bigamy, the claimant transferred his property to the defendant (his stepson) on the understanding that the defendant was to hold it on trust, which was "to be done away with when the unpleasantness was over".[41] As the claimant's concern about bigamy turned out to be legally unfounded, he asked for the re-conveyance of the property to him. The defendant refused to reassign the property to the claimant and pleaded the Statute of Frauds in relation to the fact that the trust was not evidenced in writing. The court held that the defendant was a trustee of the property for the claimant. Surely, the court's decision was motivated by the honesty and consistency of the claimant's action.[42] For instance, Romilly MR emphasised that "there was no illegality in the transaction, and that the Plaintiff was quite justified, morally and legally, in marrying the second wife".[43] Nevertheless, the claimant's original intention in making the transfer was dishonest, although it turned out that he was labouring under a legal misconception. The point is that, despite that initial dishonesty, the court rightly enforced the trust arising from the primary feature of the transaction in that case.

Position of modern cases

More modern cases support the proposition above. In *Tinsley v Milligan*,[44] the claimant and defendant-counter-claimant cohabited as same sex partners, and contributed equally to the purchase of property. To achieve their purpose of defrauding the Department of Social Security, through false claims for welfare benefits, they arranged for the property to be conveyed into the name of Ms Tinsley alone. Their common intention and understanding was that they shared the beneficial interest in the property equally. When their relationship broke up, Tinsley, the legal owner, filed a claim for possession of the property. Ms Milligan

[39] Emphasised in *Muckleston v Brown* 31 E.R. 934; [1801] 6 Ves. Jr. 52 at 68.
[40] *Davies v Otty (No.2)* 55 E.R. 875; [1865] 35 Beav. 208.
[41] *Davies v Otty (No.2)* 55 E.R. 875; [1865] 35 Beav. 208 at 210.
[42] Underscored in *Tinker v Tinker (No.1)* [1970] P. 136 at 141; [1970] 2 W.L.R. 331.
[43] *Davies v Otty (No.2)* 55 E.R. 875; [1865] 35 Beav. 208 at 213.
[44] *Tinsley v Milligan* [1994] 1 A.C. 340; [1993] 3 W.L.R. 126.

counter-claimed for a declaration that Tinsley held the property on trust for the two of them in equal shares. The trust alleged by Milligan was a resulting trust, arising from her contribution to the purchase price of the property. In reply to the counter-claim, Tinsley argued that the purpose of the trust was illegal, and therefore, the court should not give its assistance to, nor enforce, Milligan's counter-claim. The majority of the House of Lords gave judgment in favour of Milligan, on the basis that she had not relied on the illegal transaction in order to prove her claim.

Obviously, the majority in *Tinsley* anchored its decision on the reliance principle, the idea that a party to an executed illegal transaction can acquire and enforce property rights arising from that transaction, provided their claim does not rely on the illegal transaction itself. In short, a claim in trust would be judicially enforced so long as the claimant does not rely on his or her own underlying illegality. Thus, since Milligan relied on her equitable proprietary interest under a resulting trust (rather than on the underlying illegality), the majority held that her claim was entitled to succeed. The majority of the Supreme Court in *Patel* has overruled *Tinsley* in relation to the reliance principle. The point, however, is that *Tinsley* could be perfectly explained on the basis of my proposition above. The primary feature of the transaction in *Tinsley* was clearly the contribution to the purchase price of the property; this effectively created a resulting trust in favour of both women. Thus, the majority of the House of Lords justifiably enforced the trust, notwithstanding that it had an unlawful ulterior purpose.[45] Put differently, the illegal purpose in *Tinsley* was not a critical or primary feature of the transaction in that case.

Furthermore, in *MacDonald v Myerson*,[46] the claimant instructed the defendant (a solicitor) to sell the claimant's two properties; after the sale, the proceeds were paid into the defendant's client (trust) account. Thus, the defendant held the money in the trust account on (express) trust for the claimant. The defendant failed to transfer the proceeds of sale to the claimant, hence the claimant's action seeking an order for account of the proceeds of sale, and payment to him of the ascertained net proceeds. The defendant argued that the claimant was not entitled to the court's assistance, because the claimant had acquired ownership of the two properties in question through fraudulent mortgage applications. Earlier, the claimant had pleaded guilty to various charges relating to obtaining mortgages by deception, including the mortgages on the two properties in question. Accordingly, the claimant was sentenced to 18 months imprisonment, but no confiscation order was made.

The Court of Appeal upheld the claimant's claim on the ground that he was the owner of the two properties (despite the illegality involved in their acquisition), and was therefore, entitled to the net proceeds of their sale. On the specific issue of illegality alleged by the defendant, the Court of Appeal, following *Tinsley*'s reliance principle, held that the claimant (being owner of the two properties) relied on his proprietary interest in the proceeds of sale, rather than on the illegal transactions underpinning the acquisition of the two properties.[47] Surely, *MacDonald* could also be explained on the simple ground that the primary features of the

[45] Also, *Silverwood v Silverwood* [1997] 74 P. & C.R. 453; (1997) 74 P. & C.R. D9.
[46] *MacDonald v Myerson* [2001] EWCA Civ 66; [2001] 6 E.G. 162 (C.S.).
[47] Also, *Mortgage Express v MacDonnell* [2001] EWCA Civ 887; [2001] 2 All E.R. (Comm) 886.

transaction therein, that is, the instruction to sell the two properties and payment of the proceeds into the client trust-account, created an express trust in favour of the claimant. Thus, the trust was rightly enforced notwithstanding the illegality involved in the original acquisition of the two properties.

Patel is the most recent case relevant to the topic. There, the claimant transferred £620,000 to the defendant. The purpose of the transfer was for the defendant to use the money to bet on the price of shares of the Royal Bank of Scotland based on some advance insider information anticipated by the defendant. The anticipated information did not materialise and the contract was not executed. The defendant, however, refused to return the claimant's money. In answer to the claimant's action for unjust enrichment (and in contract), the defendant argued that the contract amounted to a criminal offence involving a conspiracy to commit an offence under the Criminal Justice Act 1993 s.52, and was therefore, unenforceable for being illegal. There was no doubt in *Patel* that the claimant needed to rely on the illegal contract in order to prove his claim for unjust enrichment.[48] Thus, the claimant would have failed under the reliance principle. The majority, however, criticised and overruled the reliance principle for adopting "a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate".[49] Deciding for the claimant, the majority held that a claim should not fail merely because it was tainted by an illegal purpose.

The minority, which also allowed the claimant's claim on restitutionary grounds, was more faithful to the reliance doctrine, but it argued for an expansive interpretation of the withdrawal and other exceptions to the illegality principle. For the majority, Lord Toulson suggested that a flexible analytic framework should undergird the court's approach to illegality. Thus, he identified a trio of considerations that should inform a decision whether or not to enforce a claim tainted by illegality.[50] While *Patel* is obviously not a case on trust, it has some important resonances.[51] If anything, *Patel* suggests that illegality has ceased to have a determinative effect on tainted claims.[52] In that sense, *Patel* is less intense than my hypothesis above. Nonetheless, *Patel*'s cautious view of illegality reinforces my argument that a trust, validly constituted by the primary feature of a transaction, would be enforced despite being tainted by an illegal purpose.

Similarly, in *Collier*,[53] a father granted leases over two properties, with an option to purchase the freehold reversion, which was eventually exercised, to his daughter. The transaction did not raise the presumption of advancement (nor of resulting trust) because the daughter provided some consideration for the transfers.[54] However, the father alleged that the leases, and the freehold interests acquired consequent upon the exercise of the option, were held by the daughter on express trust for the father pursuant to a prior agreement between father and daughter. It was established in evidence that the father transferred the properties to the daughter

[48] That is, the claimant needed to rely on the fact that the contract was illegal and so void, thus making the way for the claim in unjust enrichment.

[49] *Patel v Mirza* [2016] UKSC 42 at [120]. This echoes the Law Commission's criticism of the reliance principle: The Law Commission, The Illegality Defence: A Consultative Report (Consultation Paper No.189) para.5.15.

[50] *Patel v Mirza* [2016] UKSC 42 at [120].

[51] G. Virgo, "Patel v Mirza: one step forward and two steps back" (2016) 22 *Trusts & Trustees* 1090; *Anzal v Ellahi* [1999] 7 WLUK 433.

[52] J. Goudkamp, "The end of an era? Illegality in private law in the Supreme Court" (2017) 133 L.Q.R. 14, 16.

[53] *Collier v Collier* [2002] EWCA Civ 1095.

[54] *Collier v Collier* [2002] EWCA Civ 1095 at [64] (Chadwick LJ).

in order to defeat the claims of his creditors; this unlawful purpose was clearly executed, in that the security of mortgages secured on the properties by the father was significantly reduced in value when the father transferred his freehold reversion to the daughter upon the exercise of the option. The daughter denied the trust alleged by the father and sought possession of one of the properties, the other having been compulsorily acquired and compensation paid to her. The father counter-claimed for a declaration that the daughter held the properties on trust for him.

The Court of Appeal rejected the father's claim. Quite apart from the justice of the outcome of *Collier*,[55] I suggest that the Court of Appeal's decision in that case is justifiable based on the analysis above. The primary features of the transaction in *Collier* (grant of the leases and exercise of the option to purchase the freehold reversion) postulated an absolute title in favour of the daughter. Thus, Mance LJ (as he then was) observed that the daughter acquired an "ostensible leasehold and freehold interests (which are) objective 'legal facts'".[56] It would have been unjustifiable to treat as nugatory the daughter's proprietary interest arising from the critical and primary features of that transaction. The trust alleged by the father does not arise, and could not have arisen, from the primary features of that transaction. Alternatively, as argued below, the trust alleged by the father directly violates the law, and thus, comes within the narrow confines of illegality delineated by this author.

In *Barrett v Barrett*,[57] after the claimant (Thomas) was declared bankrupt, his trustee in bankruptcy sold his property to the claimant's brother (John). John purchased the property with a loan from a lender (building society), which was secured upon the property. Years later, John sold the property, but Thomas claimed that John held the net proceeds of sale on trust for him. The trust alleged by Thomas was a common intention constructive trust, on the basis that, at the time the property was acquired by John, there was an express agreement, arrangement or understanding between Thomas and John that John would purchase the property and hold it on trust for Thomas absolutely. The purpose of the agreement was to enable Thomas regain ownership of the property, without it being repossessed by the trustee in bankruptcy. Thus, the intention was to conceal the property from the trustee in bankruptcy. Thomas undertook to repay John all the expenses that John incurred in connection with the house and, in reliance on the said agreement, Thomas took the sole responsibility for the payment of John's mortgage instalments out of Thomas' personal resources. John argued that the claim was not maintainable because the purpose of the trust was illegal. Richards J accepted John's argument, and affirmed the striking out of Thomas' claim by the lower court.

The decision in *Barrett* is justifiable because, as in *Collier*, the primary feature of the transaction was John's purchase of the property with his own money, which (ordinarily) did not give rise to a trust. Since the common intention constructive trust alleged by Thomas did not emanate from the primary feature of that transaction (but was incidental to it), it was unsurprising that the court refused to enforce the trust on account of its illegal purpose.

[55] The outcome in *Collier* was disapproved in *Patel v Mirza* [2016] UKSC 42.
[56] *Collier v Collier* [2002] EWCA Civ 1095 at [99].
[57] *Barrett v Barrett* [2008] EWHC 1061(Ch); [2008] B.P.I.R. 817.

Primary transactions that give rise to gifts—Presumption of advancement

Where a voluntary transfer is made to a person in a legally recognised gift-giving relationship with the transferor,[58] such as the transferor's wife, child or person in loco parentis, equity presumes that the transfer is a gift to the transferee[59]; this is known as the presumption of advancement. However, a similar transfer to a stranger would be presumed a trust in favour of the transferor, even if created for a fraudulent purpose. Why this disparity of outcome? I suggest that the reason has to do with what is identified as the critical and primary feature of the transaction in the two hypothetical transfers above. In the case of gift, the primary feature of the transaction is the voluntary transfer to a person in a gift-giving relationship; this actually gives rise to a trust, albeit countered by a presumption of advancement. To dislodge this presumption of advancement the claimant needs to prove the trust but, as highlighted above, he or she ends up proving a trust that directly violates the law or public policy; such a trust comes within the narrow confines of the illegality principle. Once you remove the parties' gift-giving relationship from that transaction, the resulting trust arising from the primary feature of that transaction prevails, because the illegality surrounding it does not directly come to the fore, something the presumption of advancement would have entailed. The same result obviating the illegality doctrine would be achieved if the transferee in a gift-giving relationship subsequently declared a trust in favour of the transferor. *Tribe v Tribe* alluded to this sort of reasoning.[60] There, the claimant-father, after being served with schedules of dilapidations, in relation to two leasehold properties, transferred his shares in a private company to his son, the defendant, without consideration. The claimant made the transfer for the fraudulent purpose of protecting the shares against his potential liability on the schedules of dilapidations. In the end, however, the schedules of dilapidations were settled without the need to consider whether or not the claimant owned any property, so no creditor was defrauded. However, the defendant refused to retransfer the shares to the claimant, arguing that the shares were a gift to him, on the basis of the presumption of advancement. Consequently, the claimant sought an order declaring the defendant a trustee for the claimant.

As no creditor was actually defrauded by the voluntary transfer in *Tribe*, the Court of Appeal granted the claimant's claim on the ground that he had withdrawn from the illegal transaction before its execution. More interestingly, Millett LJ (as he then was) hypothesised that:

> "Had the plaintiff transferred the shares to a stranger or distant relative whom he trusted, albeit for the same dishonest purpose, it cannot be doubted that he would have succeeded in his claim."[61]

[58] "Legally recognised gift-giving relationship" is used pejoratively here to indicate relationships that attract the presumption of advancement. Otherwise, gift-giving potentially takes place in every relationship.

[59] *Collier v Collier* [2002] EWCA Civ 1095; [2002] B.P.I.R. 1057; *Q v Q* [2008] EWHC 1874 (Fam); [2009] 1 F.L.R. 935; *Chettier v Chettier* [1962] A.C. 294; [1962] 2 W.L.R. 548; *Tinker v Tinker (No.1)* [1970] P. 136 at 141; *Gascoigne v Gascoigne* [1918] 1 K.B. 223.

[60] *Tribe v Tribe* [1996] Ch. 107.

[61] *Tribe v Tribe* [1996] Ch. 107 at 134.

I suggest that the reason, why that would have been the case, is that the primary feature of the transaction in that hypothetical scenario would have been constitutive of a resulting trust; that trust, as Millett LJ suggested above, would have been enforced despite being created for a dishonest purpose, a view that I have expounded all along.

However, the reliance principle established in *Tinsley* resolved the sorts of issues above purely on the basis of whether or not the claimant needed to rely on the illegality underlying the transaction in order to prove his or her claim. Thus, in the case of voluntary transfer to a person in a gift-giving relationship with the transferor, the application of the reliance principle entailed that the court would uphold a gift for the transferee, because the transferor would need to rely on the illegal purpose behind the transaction in order to rebut the presumption of advancement. On the other hand, in the case of voluntary transfer to a person outside a gift-giving relationship, application of the reliance principle meant that the court would uphold a trust for the transferor, because the transferor would rely on his proprietary right (emanating from the resulting trust) to establish his claim; he or she has no need to rely on the underlying illegality. Unfortunately, therefore, the reliance principle in *Tinsley* detracted attention from the analytic framework (above) centred on the critical and primary feature of the transaction in any given case. Thus, the application of the reliance principle made the outcome of a case to depend "on the adventitious location of the burden of proof in any given case",[62] or on the fortuitous matter of whether or not the parties are in a gift-giving relationship. Partly because of this sort of difficulty, which was perceived to be responsible for the arbitrary outcomes in advancement cases, the reliance principle was overruled in *Patel*.

I suggest that the decisions engendered by advancement cases should not be seen as some sort of quirky or arbitrary outcomes. In contrast, the outcomes of cases on the presumption of advancement are consistent with my proposition above. A voluntary transfer made to a person in a gift-giving relationship with the transferor evinces a transaction whose primary feature is constitutive of trust, albeit a trust that turns out to be directly illegal and is generally unenforceable. Put differently, in advancement cases, claimants who attempted to rebut the presumption of gift with evidence of trust ended up establishing a trust that *directly* violates the law. Since this sort of trust comes within the accepted and narrowly operative sphere of illegality in trusts law, as highlighted above and further discussed below, the courts were justified to refuse to enforce such trusts. From an analytic perspective, therefore, there is nothing untoward about the outcome of advancement cases, in comparison to the enforcement of trusts arising from voluntary transfers to persons outside the legally accepted gift-giving relationships.

Notice that even in advancement cases where the trust alleged by the transferor is directly illegal, as highlighted above, a subsequent and valid declaration of trust by the transferee would effectively constitute the primary transaction, and such a trust would be enforced despite being tainted by the initial illegality. This can happen, for instance, where a man voluntarily transfers his property to his wife, in order to defeat his creditors, and the wife, subsequently, declares a trust of that property for the husband. In such a case, the interposition of the declaration of trust would loom large as the relevant primary transaction. Ex hypothesi, the

[62] *Tribe v Tribe* [1996] Ch. 107.

declaration of trust (if valid) would be enforced notwithstanding the fraudulent purpose it was intended to achieve.

Some important cases support this line of reasoning. In *Tribe*, for example, Millett LJ pertinently observed that the claimant-father "would also have succeeded if he had given them (the shares in dispute) to the defendant (the son) and procured him to sign a declaration of trust in his favour".[63] Why is it that this outcome would have been reached, in the hypothetical scenario posited by Millett LJ, in *Tribe*? Of course, Millett LJ did not address this question because he was not concerned with this sort of inquiry. However, the answer must be that, in such a hypothetical scenario, the critical primary transaction would have been the subsequent declaration of trust by the son for the father. More interestingly, the Australian High Court decision in *Perpetual Executors and Trustees Assoc of Australia Ltd v Wright* puts the matter beyond conjecture.[64]

In *Perpetual Executors*, the husband-claimant purchased a piece of land (upon which he built a family house) in the name of his wife. According to the husband, the purchase was made in the name of his wife, and with his wife's consent, out of convenience, and not as a gift to her. The purpose was to secure the property as a family home in case the husband's business failed. About two days before she died, the wife signed a document in which she declared that she held the property on trust for the husband. In her will, which was prior to that date, she gave her husband only a life interest in the property. The husband claimed against the defendant, the executors of the wife's will, a declaration that he was absolutely beneficially entitled to the property, on the ground that his deceased wife held the property on trust for him. The court found that although the husband and wife's arrangement or agreement was intended to defeat the husband's creditors, no creditor was actually defrauded. Therefore, the court upheld the husband's claims. True, the decision mainly rested on the non-execution of the illegal agreement between the husband and wife, but Barton ACJ suggested that the subsequent written declaration of trust by the wife might be an alternative basis of the judgment; he observed that "the fact that the wife was all along the husband's trustee is evidenced by her declaration of that fact".[65] Thus, a trust analysis prevailed in *Perpetual Executors* despite the parties' gift-giving relationship. This was only possible because the subsequent declaration of trust by the wife established a primary transaction that was constitutive of a valid trust.

Trusts that directly violate the law or public policy

A trust, or a provision thereof, that directly violates the law or public policy is illegal, and might be judicially unenforceable.[66] I suggest that it is this sort of trust that clearly delineates the proper scope of the illegality principle in trusts law; in other words, the illegality principle operates within a narrow sphere of trusts law. It follows, therefore, that where the primary transaction or the primary feature of a transaction in a given case posits a trust that directly violates the law or public

[63] *Tribe v Tribe* [1996] Ch. 107.
[64] *Perpetual Executors and Trustees Assoc of Australia Ltd v Wright* [1917] 23 C.L.R. 185.
[65] *Perpetual Executors and Trustees Assoc of Australia Ltd v Wright* [1917] 23 C.L.R. 185 at 194.
[66] e.g. a provision that is subversive of all religion or all morality: *Thornton v Howe* 54 E.R. 1042; [1862] 31 Beav. 14; *Re Watson* [1973] 1 W.L.R. 1472; [1973] 3 All E.R. 678.

policy, not just a trust that has an illegal purpose, the trust would, generally, be declared illegal and unenforceable. More importantly, as mentioned in the introduction, this is the sort of trust that would most clearly engage the trio of considerations enunciated by Lord Toulson in *Patel*. Thus, if a trust were illegal because it directly violates the law or public policy, its enforceability would depend on the assessment and application of *Patel*'s trio of considerations to the facts of the case.

In *Thrupp v Collett*,[67] the trust was to procure or purchase the discharge of poachers committed to prison, under the then Game Laws, for non-payment of fines, fees or expenses. Sir John Romilly MR held that the trust was illegal and unenforceable for being contrary to public policy, in that it was "obviously calculated to encourage offences prohibited by the Legislature"[68]; and the "effect of it would be to give immunity and protect persons in the commission of acts, which are treated by the Legislature as offences, and for which penalties by fine are imposed".[69]

In *Ex p. Yallop*,[70] a ship was bought with partnership money, and managed as partnership property, but was conveyed and registered in the name of only one of the partners. On the bankruptcy of the partners, a creditor of the partnership claimed that the ship was the property of the partnership (and, therefore, ought to be available for payment of the partnership's debt) despite being registered in the name of only one of the partners. In other words, the partner who was the registered owner of the ship held it on trust for the partners. However, the alleged trust gave rise to a beneficial interest that was in direct conflict with an Act relating to the registration of ships; the statute stipulated that the registration of a ship must be taken as the conclusive evidence of its ownership. Accordingly, the court refused to uphold the trust alleged by the creditor of the partnership. Obviously, the trust in *Yallop* was rejected for being illegal, because it *directly* violated the law on ship registration, something the Lord Chancellor noted severally in his judgment. For instance, he observed that: "it is obvious, that, if, where the title arises by act of the parties, the doctrine of implied trust in this Court is to be applied, the whole policy of these Acts may be defeated",[71] and that enforcement of the trust "is *directly* inconsistent with the Act of Parliament".[72] Finally, the Lord Chancellor observed that the ship was not "partnership property (under the alleged trust) as between the partners; as that would be a *direct* infringement of the Act of parliament".[73] The emphasis above proves my point.

Similarly, in *Curtis v Perry*,[74] a ship, commercially employed in the service of the government, was bought with partnership money, but was registered in the name of only one partner, Mr Nantes. The other partner, Mr Chiswell, was a Member of Parliament at the time the ship was acquired. As the relevant statute prohibited a Member of Parliament from having commercial dealings with the government, Chiswell would have been liable to penalties if he had claimed a

[67] *Thrupp v Collett (No.1)* [1858] 26 Beav. 125.
[68] *Thrupp v Collett (No.1)* [1858] 26 Beav. 125 at 128.
[69] *Thrupp v Collett (No.1)* [1858] 26 Beav. 125 at 127–128.
[70] *Ex p. Yallop* 33 E.R. 677; (1808) 15 Ves. Jr. 60.
[71] *Ex p. Yallop* 33 E.R. 677; (1808) 15 Ves. Jr. 60 at 66.
[72] *Ex p. Yallop* 33 E.R. 677; (1808) 15 Ves. Jr. 60 at 69. Emphasis added.
[73] *Ex p. Yallop* 33 E.R. 677; (1808) 15 Ves. Jr. 60 at 72. Emphasis added.
[74] *Curtis v Perry* 31 E.R. 1285; (1802) 6 Ves. Jr. 739.

proprietary interest in the ship. After Chiswell's death, and Nantes' bankruptcy, separate creditors of Nantes claimed the ship (in payment of their debt) as the sole property of Nantes. In opposition, the joint creditors of the partners argued that Nantes held the ship on trust for the partners, and that the ship was, therefore, the beneficial property of the partnership. As in *Yallop*, Lord Eldon dismissed the claim of the joint creditors grounded in trust, because such a trust would have defeated the statute (Contract Act), which prohibited Chiswell, as a Member of Parliament, from engaging in commercial dealings with the Government.

In *Collier*, as highlighted above, the express trust alleged by the father, in opposition to the absolute ownership obtained by the daughter pursuant to the transfers, was rejected by the court, in part because, the father had already executed the illegal purpose. An alternative basis for the decision is that the trust alleged by the father contained express terms that were in direct conflict with law or public policy.[75] Much of this was captured in the pertinent observation of Aldous LJ:

> "Thus the trusts included terms which were illegal. In effect the terms of the trust were that the leases and the property were to be held in trust so as to defraud the Inland Revenue and the father's creditors. To establish that trust the father had to prove its terms. They included illegal terms."[76]

In addition to an entire trust being illegal, most of the cases concern a provision in a trust or testamentary document, which imposed a condition for entitlement to a gift, and it was argued that the relevant condition was illegal or contrary to public policy.[77] If the court accepted the argument that the impugned condition was illegal for being contrary to law or public policy, it would declare it void. But the effect of such a declaration, or the avoidance of the condition, on the relevant gift depends on whether the condition was characterised as a condition precedent or condition subsequent. The characterisation of a condition as being a precedent or subsequent is a serious and difficult matter of interpretation.[78] As there are numerous cases on the point, and their decisions are irreconcilable, it is difficult to posit a clear legal principle on the matter. At any rate, this is not the proper place for a detailed examination of such a specific, albeit relevant, issue. Fortunately, the matter has been covered in some of the leading works on the subject.[79] The point here, however, is that a provision of a trust which contains a condition that directly violates the law or public policy would come within the narrow sphere of the illegality principle in trusts law, and therefore, the impugned condition would be declared void and unenforceable.

Where a condition held to be a condition precedent is avoided for being contrary to law or public policy the relevant gift fails along with the condition. While this is certainly true of a gift of real property, there is a further distinction, in relation to chattels, between a condition precedent void for *malum in se* and *malum prohibitum*.[80] If the void condition precedent was characterised as *malum in se,*

[75] *Halley v Law Society* [2003] EWCA Civ 97; [2003] W.T.L.R. 845.
[76] *Collier v Collier* [2002] EWCA Civ 1095 at [37].
[77] The Law Commission, The Illegality Defence: A Consultative Report (Consultation Paper No.189) para.6.40.
[78] There is the further difficulty of determining whether the provision is a void condition, or just a determinable limitation, which is valid: *Re Lovell* [1920] 1 Ch. 122.
[79] L. Tucker, *Lewin on Trusts*, 19th edn (London: Sweet & Maxwell, 2015), Ch.5; D. W. M. Waters, *Waters' Law of trusts in Canada*, 4th edn (Toronto: Carswell, 2012), Ch.8.
[80] L. Tucker, *Lewin on Trusts*, 19th edn (London: Sweet & Maxwell, 2015), 167.

the gift is void, but if *malum prohibitum,* the void condition is struck out and the gift is valid, thereby taking effect as a gift without a condition. Though the meaning and distinction between *malum in se* and *malum prohibitum* are not altogether clear,[81] it can be generally said that *malum in se* refers to a wrong that is fundamentally or intrinsically immoral, in the sense that it is likely to be condemned by every civilised society. In contrast, *malum prohibitum* involves a wrong that is relatively minor on the moral scale, although it is contrary to public interest or statute. It has been suggested that the distinction between *malum in se* and *malum prohibitum* now applies to realty as well.[82] On the other hand, if a void condition were regarded as a condition subsequent, the relevant gift would survive the avoidance of the condition. In other words, the gift would run its natural course under the relevant instrument, as if it was not subject to such a condition. Examples of conditions that might be directly contrary to law or public policy include those that prohibit or restrain marriage altogether, or interfere with marital relationships; conditions that interfere with the discharge of parental duties[83]; or racially discriminatory conditions.[84]

All of the above is to say that a provision or condition in a trust instrument, which directly violates the law or public policy comes within the narrow confines of the illegality principle in trusts, and might be declared void and unenforceable depending on the result of applying *Patel*'s trio of considerations to the facts. As I argued above, these are the only sorts of trusts that come clearly within the illegality principle.

Conclusion

While the Supreme Court's recent and landmark decision in *Patel* relates to the application of the illegality principle to an action for unjust enrichment, it has created an opportunity for re-examining the relevance and scope of the illegality principle in the specific area of trusts law. In this piece, I have argued that the remit of the illegality principle in the law of trusts is very narrow, and that this becomes obvious when attention is focused, as it should be, on the critical feature of a transaction or on the primary transaction in any given case. Where the primary transaction or the primary feature of a transaction engages a validly constituted trust, whether it is an express trust or one that arises by operation of law, the illegality doctrine is not engaged, and the trust would be enforced despite some underlying illegality. I have argued that most of the reported trust cases relating to the illegality principle support my hypothesis above. Furthermore, I argued that the illegality doctrine is engaged in trusts law only where the trust, or a provision thereof, directly violates the law or public policy. Even in these sorts of cases, where the trusts directly violate the law or public policy, illegality will not in itself obviate the enforcement of the trusts, unless such an outcome is ordained by the application of *Patel*'s trio of considerations.

[81] *Re Riper* [1946] 2 All E.R. 503; *Re Moore* [1888] 39 Ch. D. 116.
[82] D. W. M. Waters, *Waters' Law of trusts in Canada*, 4th edn (Toronto: Carswell, 2012), 330.
[83] *In re Sandbrook* [1912] 2 Ch. 471; *Blathwayt v Cawley* [1976] A.C. 397; [1975] 3 W.L.R. 684; *In re Boulter (No.2)* [1922] 1 Ch. 75.
[84] *Canada Trust Co v Ontario* [1990] 69 D.L.R. (4th) 321 (Ont CA).

Old Issues, New Incentives, New Approach? Property Guardians and the Lease/Licence Distinction

Derek Whayman
Lecturer in Law, Newcastle University

Guardians; Leases; Licences; Residential tenancies; Unoccupied property

Introduction

Following the end of widespread secure tenancies and rent control[1] and the rise of the assured shorthold tenancy, the lease/licence distinction apparently lost relevance and the supply of cases diminished from the 1990s.[2] What is left is that with an assured shorthold tenancy, a landlord usually needs to give only two months' notice to recover possession, where for licensees four weeks' notice is required.[3] There are other advantages in a lease, such as standing in various torts, statutory repair obligations[4] (enlarged to include provisions for fitness for human habitation),[5] but, on the whole, the incentives for landlords to go to the trouble of creating only a licence, rather than a short lease, have diminished greatly.

The business model of property guardian companies is to take disused buildings, convert them into residential units and rent them out to "guardians"—private individuals—to prevent squatting until the owner wants the building back. The guardian companies promise to return the building vacant on very short notice.[6] We may also surmise that these companies might not want to assume repair obligations. These are then the incentives to create licences. The attraction to the guardians is, of course, that the price is relatively low.

Licence status have been challenged by occupiers in two recent cases, *Camelot Property Management Ltd v Roynon*[7] in the county court and *Camelot Guardian Management Ltd v Khoo*,[8] which reached the High Court on appeal. First, this article analyses these cases and the devices the companies used to try to avoid creating a lease. *Khoo* is much more pro-landlord than *Roynon* in the way the court interpreted the terms. Secondly, it looks at the underlying approaches to the test for a lease and how that influences the matter of interpretation. The favoured

[1] Rent Act 1977, Housing Act 1985 and predecessors.
[2] The Landlord and Tenant Act 1954 Pt 2 applies to commercial leases but can be easily contracted out of: Regulatory Reform (Business Tenancies) (England and Wales) Order 2003 (SI 2003/3096).
[3] Housing Act 1998 s.21; Protection from Eviction Act 1977 ss.3–5. The processes of possession and eviction, required for both residential leases and licences, will add to these time periods. When s.21 cannot be used is beyond the scope of this article.
[4] Landlord and Tenant Act 1985 ss.11–14 for leases of less than seven years.
[5] Homes (Fitness for Human Habitation) Act 2018, in force from 20 March 2019.
[6] Five weeks in *Camelot Guardian Management Ltd v Khoo* [2018] EWHC 2296 (QB) at [7].
[7] *Camelot Property Management Ltd v Roynon* unreported 24 February 2017, Bristol County Court.
[8] *Camelot Guardian Management Ltd v Khoo* [2018] EWHC 2296 (QB).

approach went from status to (freedom of) contract up to *Somma v Hazelhurst*[9] and back to status in what is still the leading case, *Street v Mountford*.[10] The status approach reached its zenith in *Bruton v London & Quadrant Housing Trust*,[11] where the substance of the relationship between the occupier and landlord was almost paramount. *Khoo*, alongside the almshouse case of *Stewart v Watts*,[12] shows the return of the dominance of freedom of contract, although *Roynon* did not follow this path. This lack of consistency can be traced to conflicting statements by Lord Templeman during the "status period", which did not do enough to settle the law. Thirdly, this article considers ways of resolving the issues and incentivising better practice by landlords.

The place to begin is the basic test. There is a lease, according to *Street v Mountford*, if there is exclusive possession, for a rent and a term certain.[13] The second and third conditions are rarely in issue so the cases usually turn on whether there was a grant of exclusive possession. The courts, at least during the status period, have been astute to look to the substance not the form, viewing mere labelling as a licence with suspicion and viewing pretences, terms not intended to be acted upon, as mere disguise, particularly in the domestic sphere.[14]

Camelot v Roynon

In 2014, Mr Roynon took two rooms in a guardian scheme run by a Camelot company. He also had access to shared kitchen, washing and living areas. In 2016, he was given notice to quit valid for a licence, but not a tenancy. Camelot brought possession proceedings which he resisted. He paid a monthly fee that amounted to rent for a periodic term certain, so his claim to be a tenant turned on whether he had exclusive possession.

The agreement was labelled a licence, but little turned on that. It expressly stated that no right was given for the "licensee" to use a specific room; instead it was for the guardians to agree sleeping quarters amongst themselves (cl.4). The agreement forbade the staying overnight of guests, the presence of more than two guests at once and unsupervised guests at any time. There was a right to inspect without notice. It was not disputed that Roynon took two rooms but never moved, that those rooms were labelled with his name by Camelot and that Camelot notified the other guardians of his arrival.

HH Judge Ambrose found further facts. When a new guardian moved in, Camelot offered a choice of the unoccupied rooms and this discussion was not between fellow guardians but between Camelot and the new guardian. The other guardians were merely notified. A guardian might move to a bigger room on request, and Camelot's "guardian manager" would facilitate this if possible. Occasionally this did happen. Contrary to cl.4, there was no evidence that the guardians had ever

[9] *Somma v Hazelhurst* [1978] 1 W.L.R. 1014; [1978] 2 All E.R. 1011. This was observed by R. Street, "Coach and Horses Trip Cancelled?: Rent Act Avoidance After Street v Mountford" [1985] 49 Conv. 328.
[10] *Street v Mountford* [1985] A.C. 809.
[11] *Bruton v London & Quadrant Housing Trust* [2000] 1 A.C. 406; [1999] 3 W.L.R. 150.
[12] *Stewart v Watts* [2016] EWCA Civ 1247; [2018] Ch. 423 at [50].
[13] *Street v Mountford* [1985] A.C. 809 at 816.
[14] *Street v Mountford* [1985] A.C. 809 at 819, 825. Lord Templeman called them "sham devices", but a sham is when the whole document is not too be acted on. He issued a clarification in *Antoniades v Villiers, AG Securities v Vaughan* [1990] 1 A.C. 417 at 462; [1988] 3 W.L.R. 1205.

allocated the rooms amongst themselves nor that they had informed Camelot of those arrangements.

One matter was that there was clearly no exclusive possession of the shared areas. In *AG Securities v Vaughan*, a case of a house of multiple occupancy, the issue of whether it is possible to have exclusive possession of one's room and thus a tenancy but not of the communal areas had been left open.[15] The judge decided this question in the affirmative. Of course, being decided in the County Court, this decision does not bind any court.

That left the prohibitions of guests, which were problematic. Possession is ultimately exclusionary power and immunity from supervisory control,[16] so genuine clauses that take it away, such as the provision of services and conditions of use, will mean there is no lease. However, the judge considered the restrictions to be akin to a prohibition on keeping pets. Moreover, Camelot had not reserved to itself powers that had clearly negatived exclusive possession in the past, such as requiring guardians to move on request[17] or providing services such as cleaning.[18] There was no express use of the term "pretence" in the judgment, but HH Judge Ambrose was clear that since actual practice did not reflect the arrangements of cl.4, it could not be relied on, which is one of the rules of pretences.[19] Therefore, Roynon had exclusive possession of his room, thus a lease, which then was an assured shorthold under the Housing Act 1988.

That was a generous interpretation. While pretence could be readily inferred from the fact that the parties did not actually act on the impugned clause, this really only applied to the matter of allocation. It added to the overall air of unreality, but it would be quite a leap to declaring the prohibition clauses to be pretences, and the judge did not do this. Instead, he made in effect the bold argument that romantic partners were like pets.

Camelot v Khoo

Mr Khoo entered into a property guardian agreement where he took one room in 2015. When the building's owner indicated it wanted it back in 2017, Camelot served Khoo one month's notice, which of course is only valid for a licence. While the court of first instance considered that Khoo had exclusive possession, the judge held that he nonetheless only had a licence.[20] Butcher J dismissed the appeal, but for different reasons.

The agreement stated that it was not a tenancy and was an agreement "to let you share living space", but not have exclusive occupation nor the right to use any specific room.[21] It recited that the relevant Camelot company was not entitled to grant "possession or exclusive occupation".[22] Again, the agreement provided that

[15] *Antoniades v Villiers, AG Securities v Vaughan* [1990] 1 A.C. 417 at 471. The argument that one could have a tenancy of one's room and this was enough to satisfy the test in *Street v Mountford* [1985] A.C. 809 HL had not been pleaded. cf. the inconclusive consideration of this issue in *Parkins v Westminster City Council* (1998) 30 H.L.R. 894; [1998] 1 E.G.L.R. 22 and *Uratemp Ventures Ltd v Collins* [2001] UKHL 43; [2002] 1 A.C. 301.

[16] K. Gray and S. F. Gray, *Elements of Land Law*, 5th edn (OUP, 2009), para.2.1ff.

[17] *Westminster City Council v Clarke* [1992] 2 A.C. 288; [1992] 2 W.L.R. 229.

[18] *Huwyler v Ruddy* (1996) 28 H.L.R. 550; [1996] E.G. 8 (C.S.).

[19] *Camelot Property Management Ltd v Roynon* unreported 24 February 2017, Bristol County Court at [44].

[20] *Camelot Guardian Management Ltd v Khoo* [2018] EWHC 2296 (QB) at [2]. Unfortunately the reason is not given in the High Court's judgment.

[21] *Camelot Guardian Management Ltd v Khoo* [2018] EWHC 2296 (QB) at [9], [13].

[22] *Camelot Guardian Management Ltd v Khoo* [2018] EWHC 2296 (QB) at [11].

it was for the guardians to allocate the rooms amongst themselves and that they were obliged to notify Camelot thereafter. The prohibitions on guests were substantially the same as in *Roynon*, with some additions. There was a prohibition against sleeping away for more than two nights out of seven without prior written consent, where consent would normally be given for up to four weeks per year, but Camelot was under no obligation to give it.

Butcher J said that determining if there is a right to exclusive possession is a matter of construction, and the contractual rules from cases such as *Arnold v Britton* applied.[23] He considered the possibility of there being "sham devices or pretences" and considered that it was permissible to look to how the arrangements operated in practice as well as how they were specified in the agreement.[24] He noted that a sham or pretence usually imports a degree of dishonesty, and the court will be slow (but not unrealistically so) to find dishonesty.

He was particularly impressed by the prohibition on overnight guests and the conditions for sleeping away. No pretence had been made out, and the natural meaning of the words meant that exclusive possession had not been granted. Both sides knew of the nature of the agreement, and just because the procedure had never been used did not mean it was a pretence. One passage bears quotation in full:

> "Although Mr Khoo may in fact have been permitted exclusive occupation of a room or rooms, that does not in the circumstances of this case overcome the strong presumption that parties to a transaction intend its terms, both as to rights and obligations, to be effective."[25]

The tenor of the judgment is most unlike that of *Roynon* and rather than straining to find for the guardian, Butcher J makes freedom of contract the starting point and echoes the judgment in *Somma v Hazelhurst* (later disapproved in *Street v Mountford*)[26] where the Court of Appeal said that:

> "We can see no reason why an ordinary landlord … should not be able to grant a licence … Nor can we see why [the parties'] common intentions should be categorised as bogus or unreal or as sham merely on the ground that the court disapproves of the bargain."[27]

Butcher J further noted that Camelot's business model depended on not creating tenancies and that a contextual approach to interpreting the agreement, taking this into account, accorded with its natural textual meaning to not confer exclusive possession.[28] For Butcher J, this meant the process of interpretation did not have to be strained.

There are two responses. First, if the context is important, that should be enough and drawing the occupier's attention to the landlord's business model should be sufficient. However, Butcher J's argument did not go this far and still requires terms that negative exclusive possession. This gives landlords a perverse incentive

[23] *Arnold v Britton* [2015] UKSC 36; [2015] A.C. 1619.
[24] *Camelot Guardian Management Ltd v Khoo* [2018] EWHC 2296 (QB) at [19].
[25] *Camelot Guardian Management Ltd v Khoo* [2018] EWHC 2296 (QB) at [33]–[35].
[26] *Street v Mountford* [1985] A.C. 809 at 825.
[27] *Somma v Hazelhurst* [1978] 1 W.L.R. 1014 at 1025.
[28] *Camelot Guardian Management Ltd v Khoo* [2018] EWHC 2296 (QB) at [29].

to impose onerous and artificial terms on their occupiers, which, outside of legal doctrine, benefit no one. Worse still, the incentive is now for a landlord to occasionally enforce these terms against an occupier *pour enourager les juges* to fit their claims within Butcher J's reasoning.

Secondly, if contextual interpretation is permissible, Butcher J's interpretation of the terms is somewhat one-sided, even strained. A typical guardian would likely see the prohibitions on guests as utterly unrealistic if not by physical arrangement, but in what one expects from independent accommodation under today's social norms. The guardian may well see them as technicalities neither party, in reality, really wants, even if they are valid legally. Yet in *Khoo* this context of the *occupier's* position was ignored. It cuts both ways; if the landlord's plans can colour the interpretation of the agreement, it is hard to see why the occupier's cannot, and this would go to determining what is a pretence.

The source of the tension

The difference in reasoning between *Khoo* and *Roynon* clearly shows the flexibility of the process of interpretation in the lease/licence cases. This is the continuance of a past observation,[29] and it has been further noted that there is a policy element in the test from *Street*.[30] If so, then the interpretation of the terms must be subject to that policy, even if that policy is ultimately freedom of contract. This brings us to how it was set.

In *Street v Mountford*, Lord Templeman noted that pretences were used "whose only object is to disguise the grant of a tenancy and to evade the Rent Acts"[31] but also "[t]he only intention that is relevant is the intention that is demonstrated by the agreement to grant exclusive possession for a term at a rent".[32] These are the status and contract approaches respectively.

In *Antoniades v Villiers, AG Securities v Vaughan*, he said:

> "Parties to an agreement cannot contract out of the Rent Acts; if they were able to do so the Acts would be a dead letter because in a state of housing shortage a person seeking residential accommodation may agree to anything to obtain shelter."[33]

He later qualified this statement by saying that the search is for the meaning of the language of the agreement,[34] but then noted that "[a] person seeking residential accommodation may sign a document couched in any language in order to obtain shelter".[35]

The precedence of one approach over the other was never made clear. It is therefore not surprising that different courts have taken different approaches. The approach in *Roynon* was rooted in status and the approach in *Khoo* freedom of contract.

[29] P. F. Smith, "Those who do not Remember the Past" [1989] 53 Conv. 128, 130.
[30] S. Bridge, "Street v Mountford—no hiding place?" [1986] 50 Conv. 344, 344.
[31] *Street v Mountford* [1985] A.C. 809 at 825.
[32] *Street v Mountford* [1985] A.C. 809 at 826.
[33] *Antoniades v Villiers, AG Securities v Vaughan* [1990] 1 A.C. 417 at 458.
[34] *Antoniades v Villiers, AG Securities v Vaughan* [1990] 1 A.C. 417 at 458.
[35] *Antoniades v Villiers, AG Securities v Vaughan* [1990] 1 A.C. 417 at 458.

From *Bruton* to *Stewart*

Bruton v London & Quadrant Housing Trust is significant because the House of Lords further commented on the approach to lease/licence cases. In *Bruton*, the occupier, some seven years after moving in, sought repairs pursuant to the Landlord and Tenant Act 1985 s.11, which only applies to leases.[36] The complication was that his landlord only had a licence from the head landlord and so argued they could not grant a lease, which is an interest in land they did not have to grant. *Nemo dat quod non habet*.

The House decided that Mr Bruton did have a lease after all, even if it was "non-proprietary". It should be noted that without this proposition of law, there probably could not be a lease in many property guardian arrangements. Lord Hoffmann justified this outcome on the basis that lease or tenancy describes the *relationship* between landlord and tenant and any doctrinal issues are to be resolved later.[37] Note that this statement does not go so far as to endorse a full-bloodied pro-consumer all-status approach holding all private arrangements will be tenancies. It is tolerably clear from the judgment that had the landlord made the appropriate arrangements, they could have granted a licence. Moreover, Lord Hoffmann echoed the tension in *Street* and *Antoniades* by holding that the question of lease or licence was one of law, but within that it depended on the "choice of terms".[38] Nonetheless, the message from *Bruton*, it is submitted, is that it takes genuine, not artificial or doctrinal, reasons to create licences rather than tenancies.

Furthermore, Lord Hoffmann's later comments suggest he would have disapproved of the use of context in *Khoo*. While on the facts in *Bruton* there had been no breach of the licence with the head landlord, if there had, "that would have been because it was a tenancy".[39] In other words, the intermediate landlord should be careful to arrange the terms with both other parties carefully and is not permitted to rely on his or her business arrangements to escape from any adverse consequences. Particularly given Lord Hoffmann's promotion of contextual interpretation in his wider jurisprudence, *Bruton* counsels against its overuse. It also suggests that the recital in *Khoo* that the guardian company is not allowed to grant exclusive possession should not carry much weight.

However, if one looks at the almshouses cases, the tide appears to be turning. In *Gray v Taylor*,[40] decided in 1998, the Court of Appeal declared the dweller a licensee on the basis that potentially low-cost charity-run accommodation fell into one of the exceptions (along with service occupancy and acts of friendship), where tenancies are not created even if there is exclusive possession at a rent for a term. Clearly, the exceptions are status-based. But in a materially identical case, *Stewart v Watts*, decided in 2016 by a differently constituted Court of Appeal, the same decision was reached but by construing the terms as meaning no exclusive

[36] *Antoniades v Villiers, AG Securities v Vaughan* [1990] 1 A.C. 417.
[37] *Bruton v London & Quadrant Housing Trust* [2000] 1 A.C. 406 at 415.
[38] *Bruton v London & Quadrant Housing Trust* [2000] 1 A.C. 406 at 413.
[39] *Bruton v London & Quadrant Housing Trust* [2000] 1 A.C. 406 at 414.
[40] *Gray v Taylor* [1998] 1 W.L.R. 1093 at 1098; [1998] 4 All E.R. 17.

possession was conferred, i.e. via contract.[41] That approach was of course repeated in *Khoo*, but not *Roynon*.[42]

Resolution

Bruton was not cited in either *Roynon* or *Khoo*, and while the leading cases of *Street v Mountford* and *Antoniades v Villiers* were, there was no engagement with Lord Templeman's more discursive (and contradictory) points quoted above nor the underlying approaches.[43] It is clear that a comprehensive review needs to takes place in the Court of Appeal or above, although this may be difficult to achieve practically, given the low values at stake compared to the cost of litigation.

It may be possible to radically change the test in *Street*, but such reengineering is beyond the scope of this article. Instead, consider how it could be reformed. The points made above regarding *Bruton* suggest a pragmatic, mixed approach is appropriate and that it is necessary to cut through doctrine and consider the underlying issues. Ultimately, tenants enjoy greater protection than licensees and, within that, a certain level of protection. We must consider status as well as the degree of freedom of contract. Indeed, status is still determinative in the exception cases. Moreover, in commercial cases where there is equality of bargaining power, the courts have tended to give more weight to the label "licence", which can only be because of status.[44]

In any event, it is surely necessary to take a more robust approach to the onerous and artificial conditions guardian companies impose. Requiring an "air of total unreality" to find pretence, as Butcher J appeared to do,[45] seems to require an unreality as great as sharing a bedroom with strangers, where conditions restricting staying away or guests staying are considered perfectly realistic. The interpretation of these conditions can be rebalanced away from the landlord to the occupier. This would be in line with even the most landlord-friendly interpretation of Lord Templeman's and Lord Hoffmann's comments, which temper the degree of freedom of contract even if they do not completely subordinate it. Moreover, it is not clear why dishonesty is required; disingenuity should be enough. If such terms restricting use are never relied on, the courts should be readier to find they are pretences. Leaving a strict burden of proof on the occupier renders this principle toothless.

If, as Butcher J says, the interpretation of an occupation agreement is on contractual principles, then support for these propositions can be found in the law of contract. It is said that there is still a role for *contra proferentem* where there is an imbalance of power.[46] The age-old justification remains the same: there is no true freedom of contract in such circumstances. Lord Templeman's comments

[41] *Stewart v Watts* [2016] EWCA Civ 1247; [2018] Ch. 423 at [50]. The court went to hold that *Gray v Taylor* [1998] 1 W.L.R. 1093 was correctly decided, but said nothing of the difference in reasoning.

[42] The only other recent case where this was discussed is *Gilpin v Legg* [2017] EWHC 3220 (Ch); [2018] 1 P. & C.R. DG18 at [62]ff, which is inconclusive.

[43] In *Camelot Guardian Management Ltd v Khoo* [2018] EWHC 2296 (QB) at [19] Lord Templeman's comments about attempts to evade the Rent Acts were quoted but not discussed.

[44] e.g. *National Car Parks Ltd v Trinity Development Co (Banbury) Ltd* [2001] EWCA Civ 1686; [2002] 2 P. & C.R. 18 at [28].

[45] *Camelot Guardian Management Ltd v Khoo* [2018] EWHC 2296 (QB) at [36].

[46] *Persimmon Homes Ltd v Ove Arup and Partners Ltd* [2017] EWCA Civ 373; [2017] P.N.L.R. 29 [52]; cf. E. Peel, "Whither Contra Proferentem?" in A. Burrows and E. Peel (eds), *Contract Terms* (OUP, 2007).

about accommodation-seeker behaviour where there is a shortage of (affordable) accommodation are still relevant today.

The doctrinal benefits this would bring are the elimination of the uncertainty and difficulty in interpreting the terms. The practical benefit would be the elimination of the incentive to create such onerous and artificial conditions, which in substance benefit no one. One should note that Mr Street did not attempt to employ these devices and wonder why he was treated more harshly than Camelot in *Khoo*. Landlords of his time would have been unable, in the general case, to remove their tenants at all.

This would mean most property guardians would have tenancies, a position quite justifiable for the reasons given in *Street*. It is hard to see how these minimal extra burdens would pose an existential threat to guardian companies' businesses, especially given that getting possession and eviction orders will add months to the time needed to vacate a building in any event. Moreover, these so-called temporary arrangements often go on for many years. Furthermore, the benefits are modest, and the title of the new Homes (Fitness for Human Habitation) Act 2018 is offered to illustrate the minimal decencies lessee status brings the right to enforce.

If the courts do think that reduced protection for guardians is justifiable, the better route is that of the service occupancy cases. A licence is granted irrespective of exclusive possession if the occupation is required by and is of material assistance in carrying out the occupier's employment duties.[47] Both the test and its driver look to true nature of the relationship between landlord and occupier—status—rather than the terms, which can be gamed. By this route the courts could hold that if one has exclusive possession of one's room but not of the common parts, no tenancy is created. If contract does not work, we must revert to status. At least the doctrinal and practical benefits would accrue.

[47] *Norris (t/a J Davis and Son v Checksfield)* [1991] 1 W.L.R. 1241; [1991] 4 All E.R. 327.

Casenotes

Opening Pandora's Box? Recreation Pure and Simple: Easements in the Supreme Court:

Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd[1]

Easements; Holiday accommodation; Sports and leisure facilities; Time sharing

Introduction

The recent judgment of the Supreme Court in *Regency Villas*[2] represents the latest instalment in the saga of the status of recreational rights in the law of easements. The extent to which rights of recreation can amount to effective easements is an issue that reaches back to the seminal case of *Re Ellenborough Park*[3] in which, as any good land law student will recall, the court laid down the four essential characteristics or conditions for easements. In that case, Evershed MR in the Court of Appeal, laid down four characteristics[4] for determining whether a right arising is or is not capable of being an easement. The recent *Regency Villas* litigation, culminating in the Supreme Court judgment, was concerned chiefly with the requirement that for a right to be an easement it must "accommodate the dominant tenement". This element, widely interpreted as a requirement that the right must benefit the land and not the landowner personally,[5] raises a problem for those rights which relate to recreational or sporting activity. The traditional view was that rights of such recreational flavour would rarely if ever amount to valid easements. This view was explored in *Re Ellenborough Park* itself where Evershed MR affirmed the "proposition stated in Theobald's *The Law of Law*, 2nd edn (1929) … [that] an easement must be a right of utility and benefit and not one of mere recreation and amusement".[6] Called upon to consider whether rights of "full enjoyment of a pleasure ground" by landowners of surrounding properties could amount to an easement, the Court of Appeal in *Re Ellenborough* held that use of the park included use for enjoyment of air, for exercise and other amenities which added considerable value and enjoyment to the surrounding properties and, therefore, did amount to an easement.[7] Yet, key questions remained unanswered. Beyond a pleasure ground or communal park, for example, what recreational and sporting rights could give rise to effective easements? It is on this legal question that the *Regency Villas*

[1] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57; [2018] 3 W.L.R. 1603.
[2] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57.
[3] *Re Ellenborough Park* [1956] Ch. 131; [1955] 3 W.L.R. 892.
[4] *Re Ellenborough Park* [1956] Ch. 131 at 140–141; Danckwerts J in the High Court and Evershed MR in the Court of Appeal drew extensively on Cheshire *The Law of Real Property*, 7th edn (Butterworths, 1954). The original characteristics have subsequently been glossed by a number of additional requirements or qualifications; on which see generally J. Bray, "More than just a walk in the park: a new view on recreational easements" (2017) 81 Conv. 418.
[5] See *Hill v Tupper* 159 E.R. 51; (1863) 2 Hurl. & C. 121; cf. *Moody v Steggles* (1879) 12 Ch. D. 261.
[6] *Re Ellenborough Park* [1956] Ch. 131 at 142.
[7] *Re Ellenborough Park* [1956] Ch. 131 at 150.

litigation has turned and, most recently, has received the scrutiny of the Supreme Court. As Lord Briggs explained in the Supreme Court in *Regency Villas*, the appeal offered an opportunity for the country's top court to consider, for the very first time, the extent to which rights of a pure sporting and recreational nature amounted to easements or whether such rights would fall foul of the limitations on the scope of easements in English law which the Law Commission in 2011 strongly recommended should not lightly be set aside.

Regency Villas: Factual nexus

The dispute in *Regency Villas* centred on the use of purely recreational facilities at Broome Park, a substantial country estate in Kent comprising the Mansion House, Eltham House and surrounding land. The recreational facilities were wide-ranging including an outdoor swimming pool, three squash courts, two hard-surfaced tennis courts, an 18-hole golf course, a putting green and croquet lawn. In addition, inside the Mansion House, there was a billiard room, TV room, a restaurant, bar, gym, sunbed and sauna which were later converted into an indoor swimming pool. Prior to 1981, the estate had been owned by Gulf Investments Ltd which sought to develop the land into a timeshare and leisure complex. It converted the two upper floors of the Mansion House into 18 timeshare apartments and individual purchasers of the units were granted free use of the communal and leisure facilities in the Mansion House and surrounding grounds. The development proved such a success that in 1980 the company re-acquired Eltham House (which had been sold previously in 1967) for the purposes of conversion and construction of a further 26 apartments in the grounds under a freehold structure to be named Regency Villas. In 1981, Gulf Investments transferred Eltham House to an associated company and part of the 1981 transfer included the grant of rights in the following terms:

> "… the Transferee its successors in title its lessees and the occupiers from time to time of the property to use the swimming pool, golf course, squash courts, tennis courts, the ground and basement floors of the sporting or recreational facilities … on the Transferor's adjoining estate."[8]

Over time, a number of the facilities began to deteriorate such that by 2000 the outdoor swimming pool had fallen into disuse and had been filled in; the putting green and croquet lawn closed and other facilities demolished. The freehold owner of Eltham House and individual timeshare owners claimed a declaration that the 1981 transfer had created easements in their favour; that they were entitled under the easements to free use of all the sporting and recreational facilities provided within the Park; an injunction to restrain interference with their use of the facilities and return of intermittent sums they had paid for use of the facilities since 2009 along with damages for interference with the easements. The key question to be determined by the court was whether or not the rights to enjoyment of these recreational and sporting facilities could amount, in law, to easements.

[8] See discussion of the transfer in the Supreme Court: *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57 at [8], [9].

Judgments of the lower courts

HH Judge Purle QC sitting in the High Court[9] began by revisiting the essential characteristics of easements from *Re Ellenborough Park* finding, without difficulty, that there were dominant and servient tenements each owned by different parties.[10] Perhaps somewhat surprisingly, he also found with little hesitation that the recreational and sporting facilities readily "accommodated" the land; holding that just as use of the communal "pleasure ground" in *Re Ellenborough Park* had increased the enjoyment of the land, so too did these facilities increase the claimants' enjoyment of their land.[11] Purle HHJ noted that the facilities could not be regarded as a mere right of recreation unconnected with the timeshare land; that the facilities were obviously a major attraction of occupying the land.[12] More problematic was the fourth characteristic from *Re Ellenborough Park*; namely that the right must be capable of forming the subject matter of a grant. Three concerns were identified:

- whether the language expressing the rights in question was too broadly-drawn and vague;
- whether the rights would amount to occupation and thereby deprive the owners of possession; and
- whether the rights amounted to mere rights of recreation with no quality of utility or benefit.[13]

Judge Purle dismissed each concern in holding:

- that the rights were expressed in sufficiently clear language which was nether too wide nor vague;
- that the defendant land owners retained a range of rights denied to the claimants and so could not be said to have been deprived of legal possession by the claimants; and
- although no English (nor Scottish) case had established whether an easement could exist as to use of a golf course, swimming pool or tennis court, there was no legal impediment to granting such easements.[14]

Drawing heavily on Canadian and Australian case law[15] (where rights of sporting and recreational activity have been upheld as giving rise to easements), Purle HHJ found the recreational facilities in the instant case did amount to easements.

The determination by the High Court in the claimants' favour would inevitably mean the claimants could enjoy the recreational facilities free of charge, thereby reducing their costs and increasing the amenity of the timeshare properties. Understandably perturbed at the prospect of the substantial cost implications of this position, the Park owners appealed. Three principal grounds were raised in

[9] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2015] EWHC 3564 (Ch).
[10] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2015] EWHC 3564 (Ch) at [40].
[11] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2015] EWHC 3564 (Ch) at [41]–[42].
[12] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2015] EWHC 3564 (Ch) at [41]–[42].
[13] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2015] EWHC 3564 (Ch) at [43].
[14] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2015] EWHC 3564 (Ch) at [44]–[56].
[15] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2015] EWHC 3564 (Ch) at [57]–[61]; Purle HHJ drew on cases such as *Blankstein, Fages and Fages v Walsh* [1989] 1 W.W.R. 277; *Dukart v District of Surrey* (1978) 86 D.L.R. 609; *Grant v MacDonald* [1992] 5 W.W.R. 577.

the Court of Appeal: that the rights could not amount to easements due to the considerable expense involved in maintaining the facilities; that the rights granted could not extend to facilities not even contemplated at the time of the transfer in 1982 and, finally, that the rights comprised a bundle of rights that the judge had failed to properly unpack.[16] The Park owners argued that, as they could withdraw the facilities at any time and were not under a positive duty to maintain them, the rights could not amount to easements.[17] The Court of Appeal rejected this holding that the absence of a positive maintenance obligation did not preclude the finding of an easement and neither would the easement lapse if the facilities were not maintained.[18] The court did, however, accept that Purle HHJ had construed the extent of the grant too widely in holding that it extended to all recreational facilities on the land including facilities never present nor contemplated at the time of the grant. The easement that arose was not "free-ranging … or an easement at will" and did not extend to covering future facilities not contemplated in 1981.[19] There was, said the court, "no element of futurity in the words used".[20] It would extend to new or improved facilities only if they amounted to a substitution or a facility moved from one location to another and could be construed as falling within the terms of the original grant.[21] As such, the new indoor swimming pool in the basement of Mansion House fell outside the 1981 grant. Finally, the Court of Appeal held that Purle HHJ should have considered each facility separately and "unpacked" each easement in turn as opposed to viewing the rights as giving rise to one grant particularly, as Sir Geoffrey Vos explained, that some of the grants "had never before been specifically recognised by English law …".[22] Whilst the Court of Appeal underscored that "easements in the modern world must, of course, retain their essential qualities," Vos noted that "the views of society as to what is mere recreation and amusement may change …".[23] Special emphasis was placed on the societal benefits of playing sport and that physical activity is no longer recreation or amusement but seen by many as essential. Easements, whether in 1981 or today, should not be ruled out on the basis of whether the form of physical exercise envisaged was a sport or simply walking in a garden as in *Re Ellenborough*.[24] Notwithstanding, the court repeated the orthodox position that the "essence of an easement is to give the dominant tenement a benefit or utility" but added that in today's world a right should not fail as an easement simply because the form of physical exercise envisaged was a game or sport.[25]

[16] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2017] EWCA Civ 238 at [2]; on which generally see: N. Pratt, "A proprietary right to recreate" (2017) 81 Conv. 312; see also: J. Bray, "More than just a walk in the park: a new view on recreational easements" (2017) 81 Conv. 418.
[17] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2017] EWCA Civ 238 at [25].
[18] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2017] EWCA Civ 238 at [59], [62].
[19] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2017] EWCA Civ 238 at [50]–[51].
[20] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2017] EWCA Civ 238 at [40].
[21] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2017] EWCA Civ 238 at [37].
[22] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2017] EWCA Civ 238 at [51].
[23] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2017] EWCA Civ 238 at [53].
[24] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2017] EWCA Civ 238 at [54].
[25] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2017] EWCA Civ 238 at [56].

Regency Villas in the Supreme Court

In the Supreme Court,[26] before a panel comprising five justices including the President of the Supreme Court, the appellants (the Park owners) sought dismissal of all the claims arguing that the 1981 transfer granted no enduring rights in the nature of easements in relation to any of the facilities in the Park. By way of cross-appeal, the respondents (the owners of Eltham House and several individual timeshare owners) sought restoration of the trial judge's order as to the full extent of their rights to the facilities including the new swimming pool.[27] By a majority of 4 to 1, the Supreme Court dismissed the appeal and allowed the cross-appeal. Lord Briggs, delivering the main judgment (with whom Lady Hale, Lords Kerr and Sumption agreed) began by drawing three central conclusions all of which, he argued, flowed from the "true construction"[28] of the factual matrix of the 1981 transfer:

- First, it was "abundantly plain"[29] that the parties intended to confer, through the 1981 transfer, the status of a property right in the nature of an easement rather than a purely personal right. This was apparent from the terms of the transfer which was expressed to confer rights not merely on the transferee but upon its successors in title, lessees and occupiers of what was to become a timeshare development. This, being "the manifest common intention" of the parties, should be given effect to by the court via application of the validation principle: *ut res magis valeat quam pereat*—it is better to validate a thing than to invalidate it.[30]
- Secondly, the 1981 transfer, in the view of the majority, should be construed as the grant of "a single comprehensive right to use a complex of facilities" as those facilities evolved and not as were fixed and in place in 1981.[31] The grant thus extended to cover facilities constructed and in use in 1981 but also those additional and replacement facilities later constructed and put into operation within the Park during the excepted life of the timeshare development. In this way, the majority upheld the trial judge's view that the grant was of a single, composite right to use recreational and sporting facilities within the Park "from time to time".[32] The Court of Appeal's approach of unpacking each facility and considering each separately was rejected and ought not be followed. The Court of Appeal had placed significant weight on the absence of words of futurity in the 1981 transfer as the basis for construing the rights granted as limited only to those facilities already in existence. For Lord Briggs, this absence of futurity was "amply compensated" by the inherent nature of the subject matter of the grant; namely the fact that the sporting and recreational facilities would be bound to be

[26] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57.
[27] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57 at [16]–[17].
[28] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57 at [21].
[29] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57 at [25].
[30] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57 at [25].
[31] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57 at [26]–[29].
[32] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57 at [27].

subject to significant alterations and changes during its business lifetime.[33] The Supreme Court therefore returned to "the judge's more coherent analysis".[34] The court rejected the appellants' argument that this broad construction of the grant to include future facilities would be void for perpetuity. The court held that when the grant was made in 1981, the leisure complex over which the facilities operated was in existence at the time and the fact that the precise nature and location of those facilities might change over time did not bring the grant within the perpetuity rule.[35]

- Thirdly, there was no express provision requiring the grantee or its successors or timeshare owners to make a contribution to the costs of operating, maintaining, renewing or replacing the facilities. Nor had there been any challenge made to the trial judge's conclusion that no such term should be implied on the basis of necessity.

Turning to the subject matter of the grant, the Supreme Court noted that all parties in the case recognised *Re Ellenborough Park* as constituting the "sheet anchor" as to whether the 1982 grant gave rise to an easement. Lord Briggs proceeded to engage in a close analysis of *Re Ellenborough Park* and the issue of whether recreational facilities such as those forming the subject of the 1981 grant could amount to an easement.[36] Counsel for the Park owners argued that the rights granted were incapable of amounting to an easement on three grounds:

- the rights (being purely recreational in nature) did not accommodate the dominant tenement;
- exercise of the rights by the timeshare owners would amount to an ouster of the appellant owners of the Park; and
- enjoyment of the rights depended on substantial management and maintenance expenditure by the appellants.

Briggs located as the "main controversy" the issue of whether recreational rights can be seen as accommodating the dominant tenement and noted the origins of this question in the Roman law doctrine that a *ius spatiandi* ("the privilege of wandering at will over all and every part of another's land"[37]) cannot amount to a servitude (and traditionally has not been regarded as creating an easement in English law).[38] Having identified case law on opposite sides of the debate,[39] Briggs clarified that *Re Ellenborough Park* should be taken as dispositive of the issue; namely that it is not fatal to the existence of an easement that the right granted is for recreational and sporting use and that the question of whether the right accommodates the dominant tenement must be considered separately on the facts of every case.[40] In the present case, it was, said Briggs, "plain beyond a doubt"

[33] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57 at [26].
[34] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57 at [27].
[35] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57 at [29].
[36] See generally *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57 at [44]–[60].
[37] See Eversheed MR in *Re Ellenborough Park* [1956] Ch. 131 at 136; See also Farwell J in *International Tea Stores Co v Hobbs* [1903] 2 Ch. 165 at 172.
[38] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57 at [44].
[39] *Duncan v Louch* 115 E.R. 341; (1845) 6 Q.B 904; *Mounsey v Ismay* 159 E.R. 621; (1865) 3 Hurl. & C. 486; *Keith v 20th Century Club Ltd* (1904) 73 L.J. Ch. 545; *International Tea Stores Co v Hobbs* [1903] 2 Ch. 165; *Att-Gen v Antrobus* [1905] 2 Ch. 188.
[40] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57 at [48].

that the grant of rights to use an immediately adjacent leisure complex with all its recreational and sporting facilities was "of service, utility and benefit" to the timeshare apartments just as the communal garden was of service, utility and benefit to townhouses in *Re Ellenborough Park*.[41]

Counsel for the Park attempted to argue, relying on *Hill v Tupper*,[42] that the recreational and sporting rights were so extensive that they could not be regarded as ancillary to the timeshare apartments and this distinguished these rights from those arising in *Re Ellenborough Park* such that no easement could arise. The court rejected this approach finding that *Hill v Tupper* was not authority for the proposition that only rights subordinate or accessory to the enjoyment of the dominant tenement could be easements. Provided the rights were for the benefit or utility of the dominant tenement, it did not matter if enjoyment of the recreational rights was the primary reason why the timeshare owners acquired rights in the land.[43]

Turning to the fourth condition of the *Re Ellenborough Park* test (that the right must be capable of forming the subject-matter of a grant), the 1981 grant was found to be drafted with sufficient clarity and precision and could not be said to be "precarious".[44] As to the objection to recognition of any easements on the grounds of ouster, the court noted the Law Commission's recommendation for abolition of the uncertain principle[45] and highlighted that both the trial judge and Court of Appeal had rejected this submission on the basis of concurrent factual analysis.[46] Ouster, said the court, was an essentially factual question and the findings of fact below would not be disturbed. Nothing in the terms of the 1981 grant impinged in any way on the Park owners' rights of management and control.[47] The suggestion that an easement could not arise on the facts because of the alleged positive duties the rights placed on the Park owners was therefore rejected. Whilst it was well-settled that an easement does not require anything more than "mere passivity" on the part of the servient owner,[48] there was nothing inherently incompatible with the recognition of a grant of rights as an easement that the parties share an expectation that the servient owner will undertake management, maintenance and repair of the servient tenement, any structures, fittings or even chattels located on it. All that matters is that, as on the present facts, the servient owner has undertaken no legal obligation of that kind to the dominant landowners.[49]

In overview, the majority of the Supreme Court was satisfied that the 1981 transfer exhibited all the well-settled essential characteristics of an easement as laid down in *Re Ellenborough Park*. Nevertheless, the court did acknowledge the novelty of the case and, in three key respects, by comparison with *Re Ellenborough Park*, recognised that this particular easement represented the "breaking [of] new

[41] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57 at [53].
[42] *Hill v Tupper* 159 E.R. 51; (1863) 2 Hurl. & C. 121.
[43] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57 at [54]–[57].
[44] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57 at [60].
[45] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57 at [61] referencing Law Commission, Making Land Work: Easements, Covenants and Profits à Prendre (2011) Law Com Report No.327, at [3.207]–[3.211].
[46] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57 at [63].
[47] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57 at [62]–[65].
[48] See *Gale on Easements*, 20th edn (London: Sweet & Maxwell, 2017), [1-96] and *Jones v Price* [1965] 2 Q.B. 618 at 631 per Willmer LJ: "an easement requires no more than sufferance on the part of the occupier of the servient tenement" and *Moncrieff v Jamieson* [2007] UKHL 42 at [47] per Lord Scott; [2007] 1 W.L.R. 2620.
[49] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57 at [69].

ground".[50] First, the nature and extent of the recreational and sporting facilities at Broome Park was far greater and the enjoyment of these rights called for far more intensive management than in *Re Ellenborough Park*. Secondly, *Re Ellenborough Park* concerned far fewer dominant owners than Broome Park whose facilities were ultimately available to three separate groups of timeshare owners. Thirdly, the costs of management and maintenance of Ellenborough Park were shared between the dominant owners whereas in Broome Park these were to be undertaken by the servient land owners.[51] In the present case, the right granted by the 1981 transfer was, "a recreational right pure and simple".[52] This was quite in contrast to the Court of Appeal's insistence in *Re Ellenborough Park* that the right was not "merely" recreational but rather the provision of a communal garden for townhouses. In short, "the grant of purely recreational (including sporting) rights over land which genuinely accommodate adjacent land may be the subject matter of an easement"[53] provided it satisfies the four conditions laid down in *Re Ellenborough Park*. It will, said the court, commonly be the case for timeshare developments that the "accommodation" requirement will generally be satisfied by a recreational right.[54]

In an important dissenting opinion, Lord Carnwath (who would have allowed the appeal) emphasised that the intended enjoyment of the rights granted (in particular as to the golf course and swimming pool) could not be achieved without the active participation of the Park owners in providing maintenance and management.[55] For Lord Carnwath, "the doing of something by the servient owner"[56] was therefore an intrinsic part of the right claimed and:

> "neither principle, nor any of the 70 or so authorities which [were cited in argument] ranging over 350 year … come near to supporting the submission that a right of that kind [claimed] can take effect as an easement."[57]

In effect, what was being claimed was not a simple property right at all but permanent membership of a country club. Lord Carnwath would not therefore have extended the *Re Ellenborough Park* principles to recognise what was for him a "wholly new form of property right".[58]

Assessing the significance of the Supreme Court judgment

How then are we to assess the significance of the Supreme Court's decision in *Regency Villas*? On any reading, the decision of the Supreme Court is significant for the majority's recognition that the grant of *merely* or *purely* recreational and sporting rights can amount to an easement which had long been denied in English law unlike, for example, in Australia.[59] The justices themselves (including Lord

[50] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57 at [75].
[51] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57 at [75].
[52] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57 at [75].
[53] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57 at [81].
[54] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57 at [81].
[55] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57 at [95] per Lord Carnwath.
[56] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57 at [95].
[57] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57 at [96].
[58] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57 at [96].
[59] See, e.g. *City Developments Pty Ltd v Registrar General of the Northern Territory* (2000) 135 N.T.R. 1; *Riley v Penttila* [1974] V.R. 547.

Carnwath in dissent) were well-aware of the novelty and reach of this conclusion. While Evershed MR in *Re Ellenborough Park* had sought to make clear that rights of a *mere* or *pure* recreational character were not in the nature of easements, the Supreme Court has strongly departed from this position and, in so doing, has recognised a new *species* of easement if perhaps not quite what Lord Carnwath described as a wholly new property right. The Supreme Court in recognising that purely recreational rights can amount to easements has built upon, extended and expanded the approach taken by Evershed MR in *Re Ellenborough Park*. Evershed MR in *Re Ellenborough Park* had already gone some way in extending the categories of recognised easements in accepting that the right of enjoyment of another's land by walking about in a communal garden amounted to an easement and did not conflict with or offend the *ius spatiandi*. Despite obiter comments referencing the playing of tennis and bowls, Evershed MR did not, however, extend the law of easements to broadly-drawn sporting and recreational rights. Rather, he felt bound by Baron Martin's distinction in *Mounsey v Ismay*[60] between rights of mere recreation (which could not amount to easements) and rights of utility and benefit (which could amount to easements). As Gray and Gray wrote (prior to the *Regency Villas* litigation), "there can, in short, be no easement merely to have fun"[61] for this would not, we were told, satisfy the requirement that a right must "accommodate" the dominant tenement but rather provide pleasure to the right-holder personally. In light of *Regency Villas*, we must revisit this position. We might say that the Supreme Court has indicated that rights to having fun[62] can now amount to easements. Of course, the court's judgment does not reference the language of "fun" or "pleasure" directly (it does reference 'amusement') but instead underscores the "utility and benefit" of recreational and sporting activity to society. As Lord Briggs explained:

> "[T]he advantages to be gained from recreational and sporting activities are now so universally regarded as being of real utility and benefit to human beings that the pejorative expression 'mere right of recreation and amusement, possessing no quality of utility or benefit' has become a contradiction in terms, viewed separately from the issues as to accommodation of the dominant tenement. Recreation, including sport, *and the amusement which comes with it*, does confer utility and benefit on those who undertake it."[63] (Emphasis added)

Any prospect going forward of raising an argument that a right cannot give rise to an easement because it is purely recreational or sporting in nature has been thoroughly shut down unless and until the matter is revisited in the Supreme Court. Post-*Ellenborough*, commentators, such as Baker,[64] had queried the "semantic coverage" of the easement identified in that case and, more pointedly, questioned whether the case would be limited to "parks" and "gardens" or be applied more broadly. *Regency Villas* has certainly answered these questions; heralding a vast

[60] *Mounsey v Ismay* 159 E.R. 621; (1865) 3 Hurl. & C. 486.
[61] K. Gray and S. Gray, *Elements of Land Law*, 5th edn (Oxford: OUP, 2009), p.611.
[62] Recall, the grant of rights in Broome Park extended to swimming pools, golf courses, TV room, billiards, saunas and so on—surely all sources of fun (if in varying measure and according to personal taste).
[63] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57 at [59].
[64] A. Baker, "Recreational privileges as easements: law and policy" (2012) 76 Conv. 37, 39.

expansion from easements of a "pleasure ground" to easements extending to an entire leisure complex. As such, those owning leisure sites including sporting facilities who allow others to make use of these facilities must now proceed with caution (and very careful draftsmanship!) to avoid the potentially costly implications of a finding of a single, composite recreational easement. The result is that qualifiers "mere" or "pure" prefixing the very notion of recreation no longer have any place in the law of easements.

Secondly, in locating the significance of *Regency Villas*, we should reflect upon and draw close attention to the court's ready willingness to expand the categories of accepted easements. Whilst recognition of such wide-ranging and purely recreational and sporting rights as constituting an easement is certainly novel, there is strictly nothing novel about the courts (at least notionally) embracing the idea that the categories of easements can and must adapt and expand in response to changes in society. In fact, for over 200 years, the courts have underlined the need for the law of easements to move with the times. As Lord St Leonards noted in *Dyce v Lady James Hay*[65] in 1852 in respect of the law of servitudes, "the law … no doubt, accommodates itself to the changing circumstances of society, and a new process or invention may be turned into servitude". However, as Bray has explored in this very journal,[66] there has historically been an inherent conservatism in the approach of English judges faced with calls to create new categories of easement.[67] As Bray documents, attempts to create new easements, for example, as to protection from weather[68] and interference with television reception[69] have roundly failed. Gray has argued, reflecting the fact that easements necessarily constrain and encumber the rights of landowners, "the imposition of severely limiting criteria has been rationalised as necessary to prevent the proliferation of undesirable long-term burdens which inhibit the marketability of land".[70] Indeed as Cresswell J expounded in *Ackroyd v Smith*:

> "[i]t is not in the power of a vendor to create new rights not connected with the use or enjoyment of land … nor can the owner of land render it to a new species of burthen, so as to bind it in the hands of an assignee."[71]

This echoed dicta in *Keppell v Bailey* just a few years earlier that, "incidents of a novel kind cannot be devised, and attached to property, at the fancy or caprice of any owner".[72] In this vein, the House of Lords discussed famously in *Hunter v Canary Wharf*[73] how definitional difficulties would mitigate against the creation of new categories of property rights such as easements to TV reception.

Set against the court's historical and hitherto reluctance and disinclination towards creating new species of easements, the judgment of the Supreme Court in *Regency* stands as evidence of an important shift towards a more flexible even enthusiastic approach and acceptance that, as Gray has suggested:

[65] *Dyce v Lady James Hay* (1852) 1 Macq. 305.
[66] J. Bray, "More than just a walk in the park: a new view on recreational easements" (2017) Conv. 418, 420–423.
[67] See, e.g. comments of R. Reno in R. Remo, "The Enforcement of Equitable Servitudes in land: Part I" (1942) 28 *Virginia Law Review* 951.
[68] *Phipps v Pears* [1965] 1 Q.B. 76; [1964] 2 W.L.R. 996.
[69] *Hunter v Canary Wharf Ltd* [1997] A.C. 655; [1997] 2 W.L.R. 684.
[70] K. Gray and S. Gray, *Elements of Land Law*, 5th edn (Oxford: OUP, 2009), p.616.
[71] *Ackroyd v Smith* 138 E.R. 68; (1850) 10 C.B. 164 at 188.
[72] *Keppell v Bailey* 39 E.R. 1042; (1834) 2 My. & K. 517.
[73] *Hunter v Canary Wharf* [1997] A.C. 655.

> "a relaxed categorisation of allowable servitudes may actually enhance the enjoyment of land in a crowded environment, promoting rather than inhibiting the character of a locality and its consequent attractiveness on the open market."[74]

The Supreme Court has seemingly shaken off its conservatism in recognising new species of easements. In fact, a survey of recent Supreme Court jurisprudence demonstrates a burgeoning willingness on the part of the court to accept that embracing novel forms of easements may not just be desirable but also necessary. *Regency Villas* confirms and bolsters this trajectory. By way of example, in *Coventry v Lawrence*,[75] the Supreme Court held that there can be an easement (arising by prescription) to create noise which is enforceable against owners of neighbouring land. Neuberger justified this approach on the basis of "both principle and policy",[76] despite the fact that, as Dixon has explained, an easement to create noise is at best academically "awkward"[77] particularly in terms of determining the scope of such a right. Nevertheless, the Supreme Court faced with these practical difficulties, adopted an approach founded on "pragmatism"[78] which, as Bray has argued, indicates that the old obstacles hindering the court's recognition of new easements can be overcome on a case-by-case basis.[79] This more contemporary alacrity in recognising new easements is matched by a slew of recent cases where the court has recognised existing, established easements operating in new and unique contexts for example in *Mulvaney v Gough*[80]; *Moncrieff v Jamieson*[81]; *Magrath v Parkside Hotels Ltd*.[82]*Regency Villas* continues this direction of travel and, moreover, it is suggested that it is precisely the pragmatism seen in *Coventry* that we witness also at play in *Regency Villas* in recognising that the 1981 transfer should be construed as the grant of a single and wide-ranging, composite easement. This is surely the clearest expression of the malleability and capacity of the law of easements to bend to reflect societal change.

Thirdly, in assessing the significance of the Supreme Court's judgment, we should focus on the limits and potential scope of the decision going forward. The wide-reaching nature of the majority's approach may be alarming to some who will interpret the Supreme Court as endorsing an erosion of some of the traditional constraints that existed formerly on the creation of easements. As Lord Carnwath noted in dissent, "our view of the merits should not allow us to distort the correct understanding of a well-established legal concept".[83] Baker, in exploring the arguments mounted historically against recognition of purely recreational easements, notes as a key complaint the need to "keep the floodgates shut".[84] This "floodgates" argument is likely to rear its head in light of the judgment of the

[74] K. Gray and S. Gray, *Elements of Land Law*, 5th edn (Oxford: OUP, 2009), p.616.

[75] *Coventry (t/a RDC Promotions) v Lawrence* [2014] UKSC 13; [2014] A.C. 822; on which see M. Dixon, "The Sound of Silence" (2014) 78 Conv. 79; E. Lees, "Lawrence v Fen Tigers: Where now for Nuisance?" (2014) 78 Conv. 449, 452.

[76] *Coventry (t/a RDC Promotions) v Lawrence* [2014] UKSC 13 at [34].

[77] M. Dixon, "The Sound of Silence" (2014) 78 Conv. 79, 80.

[78] J. Bray, "More than just a walk in the park: a new view on recreational easements" (2017) 81 Conv. 418, 422.

[79] J. Bray, "More than just a walk in the park: a new view on recreational easements" (2017) 81 Conv. 418, 422; see also E. Lees, "Lawrence v Fen Tigers: Where now for Nuisance?" (2014) 78 Conv. 449.

[80] *Mulvaney v Gough* [2002] EWCA Civ 1078; [2003] 1 W.L.R. 360.

[81] *Moncrieff v Jamieson* [2007] UKHL 42; [2007] 1 W.L.R. 2620.

[82] *Magrath v Parkside Hotels Ltd* [2011] EWHC 143 (Ch); [2011] 1 P. & C.R. DG23.

[83] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57 at [94].

[84] A. Baker, "Recreational privileges as easements: law and policy" (2012) 76 Conv. 37, 52–54.

Supreme Court in *Regency Villas* which, for some, will be seen as sanctioning a troublingly expansive approach to the law of easements; an opening of Pandora's box.

The context in which the case was decided is crucial here. In *Re Ellenborough Park*, the easement arose in an exclusively residential context. *Regency Villas*, by contrast, sees an easement of purely recreational rights arise vitally in a context which is mixed in nature: both residential (timeshare development) but also commercial (the wider leisure complex development). This is important for it broadens enormously the potential scope of the *Regency Villas* decision and takes it some way from the narrow, communal "pleasure ground" easement of a park garden as seen in *Re Ellenborough Park*.[85] Yet the scope of *Regency Villas* is broader still as Lord Briggs appears to establish something akin to a presumption that rights of a recreational and sporting character will "accommodate" the dominant tenement and give rise to easements (subject to satisfaction of the remaining conditions under *Re Ellenborough Park*). Indeed, at a minimum, Lord Briggs has created a firm precedent for timeshare, holiday leisure complexes specifically in holding that:

> "Where the actual or intended use of the dominant tenement is itself recreational, as will generally be the case for holiday timeshare developments, the accommodation condition will generally be satisfied."[86]

Yet the decision extends the scope of easements seemingly even further in its discussion of ouster and positive obligations owed by servient land owners. The argument advanced by the appellants that servient land owners should have no positive obligations imposed on them and that the rights claimed could not therefore amount to easements because of the onus placed on the Park owners as to maintenance of the facilities, was surely a compelling one. This traditional orthodoxy in the law of easements has been repeated often, from *Gale on Easements*,[87] to Willmer LJ in *Jones v Price*[88] that "… an easement requires no more than sufferance on the part of … the servient owner". Equally, Lord Scott in *Moncrieff v Jamieson*[89] confirmed that the grant of a right requiring some positive action to be undertaken by the owner could not amount to a servitude.[90] Lord Scott gave the example of a right to use a neighbour's swimming pool as failing as an easement for precisely this reason. Arguably, the grounds given by the Supreme Court for overcoming this traditional constraint on the law of easements (and with little effort, it must be said) are artificial and strained. The majority held there was 'nothing inherently incompatible' with the recognition of rights over land where the parties share an expectation that the servient land owner will undertake management, maintenance and repair of any structures, fittings or even chattels thereon.[91] There was no difficulty, said the court, so long as there was no legal obligation of that kind owed to the dominant owner. This is a significant judicial sleight of hand, for, as the Park owners argued, the positive obligations of

[85] A. Baker, "Recreational privileges as easements: law and policy" (2012) 76 Conv. 37, 38.
[86] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57 at [81].
[87] *Gale on Easements*, 20th edn (London: Sweet & Maxwell, 2017), [1-96].
[88] *Jones v Price* [1965] 2 Q.B. 618 at 631; [1965] 3 W.L.R. 296.
[89] *Moncrieff v Jamieson* [2007] UKHL 42; [2007] 1 W.L.R. 2620.
[90] *Moncrieff v Jamieson* [2007] UKHL 42 at [47] per Lord Scott.
[91] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57 at [69].

maintenance placed on them was potentially vast. Sir Geoffrey Vos in the Court of Appeal had reached the same conclusion albeit via a somewhat fantastical and, with respect, unconvincing, route in holding that all that was ultimately essential for a swimming pool (by analogy with a natural lake) is the water and that the further systems supporting swimming pools (filtration, heating, chlorination, circulation) were somehow not essential to the benefit and utility of using the pool.[92] Vos held that, should the servient owner cease to provide water, the dominant owners could simply provide it themselves.[93] Equally, dominant owners could mow the lawn to render a golf course playable.[94] The reasoning of the Court of Appeal here lacks credibility and betrays an air of unreality and, so too (though to a lesser degree) does the reasoning in the Supreme Court when, palpably, the Park owners will owe extensive, positive obligations to the dominant land owners in support of the rights granted. It is here that Lord Carnwath's dissent is doubtless at its most potent. An easement, as he recounts with clarity, is a right to do something or to prevent something on another's land and is not a right to have something done.[95] According to the majority's reasoning, it appears the court has abolished or at least engaged in a dramatic re-framing of the classic statement that rights imposing positive obligations cannot amount to easements.

A further issue concerning the extent of the easement recognised by the Supreme Court in *Regency Villas* warrants mention and flows from the class of interested parties. According to the Supreme Court's newly sanctioned, broad factual enquiry, in determining whether an easement exists, account is taken not only of the interests of the owners but also of occupiers and, importantly, regard is also had to the interests and expectations of those visiting or making use of the land as guests. How far this should be seen as representing an extension of the law on easements is open to question. On one view, it is no extension at all but rather a clarification that the court will be guided by the particular context of the case, the nature of the land and those using it when assessing if an easement exists. Given the particular timeshare context of *Regency Villas* and that the recreational rights by their nature related to facilities that would be enjoyed by a wide range parties including visitors or guests to the Park, it is perhaps uncontroversial that all such parties' interests would be considered as part of the court's exercise. Indeed, as the 1981 grant of rights made clear, the property right was to be conferred not just on the transferee but also its successors, lessees and occupiers of what was to become a timeshare development. Unsurprising, one might argue then, that the expectations of a broad array of potentially-interested parties should be examined. However, there is another possible and, it is argued, more persuasive view here; namely that the court is explicitly authorising a far more expansive factual and legal analysis than has hitherto been observed in the case law. In the pre-*Regency Villas* case law, account is not taken of the interests and expectations of the visiting public or guests when examining whether a right is to be recognised as an easement. This was made plain by Lord Briggs who, noting that *Regency Villas* "broke new ground" set the case apart from *Re Ellenborough Park* in the following terms:

[92] See discussion of Sir Geoffrey Vos in *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2017] EWCA Civ 238 at [72].
[93] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2017] EWCA Civ 238 at [72].
[94] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2017] EWCA Civ 238 at [77] per Sir Geoffrey Vos.
[95] Lord Carnwath at [95] citing *Gale on Easements*, 20th edn (London: Sweet & Maxwell, 2017), [1-80].

> "Ellenborough Park was made available to a limited number of dominant owners, whereas the facilities at Broome Park were available to two, later three, different groups of timeshare owners and to paying members of the public."[96]

If, going forward, in determining the existence of an easement, the court is prepared to take account of the interests not just of land owners but also those of the visiting public or short-term guests, this marks a departure from the orthodox position and an expansive new approach. Such an approach is, surely, eminently defensible in circumstances where the land over which the purported easement is said to operate is used or likely to be used for recreational purposes by visitors or the public and was always intended so to be used. To not take these interests into account in this context would be problematic. In this sense, *Regency Villas* makes explicit the uncontentious point that every case should be judged according to its own particular facts. However, there may be potential problems with delimiting this new expansive approach. Easements are powerful rights that can endure for decades through land owners and successive conveyances of land. Given this enduring nature and the potency of easements as proprietary rights, how far must the court be persuaded that visitors or guests have sufficient connection to the land before they merit having their interests taken into account? Where will and should the line be drawn between land visited by those with only a fleeting or transient connection and attachment and cases such as *Regency Villas* where it was in the inherent nature of the timeshare development and leisure complex that visitors would make use of the recreational facilities. The acceptance in *Regency Villas* that purely recreational rights can amount to easements doubtless makes this question more pressing as recreational easements have the potential to be enjoyed by a far wider group of people when compared to more traditionally-recognised easements; people who may have little or no meaningful, lasting connection to the land. We await a test case on this point but there may be legitimate concerns as to the undue burden that recreational easements will impose on the servient land and land owners. Such burdens may be only magnified when the interests and expectations of visitors and guests to the land are, additionally, to be taken into account by the court.

There are, however, grounds for resisting an overly hysterical reaction to the apparent scope of the *Regency Villas* decision. Indeed, there are three grounds on which the concern of the "floodgates" argument might be quelled; each serving as a "brake" on the potential breadth of the decision. First, whether a recreational right will, in fact, accommodate the dominant tenement still falls to be determined by a close factual analysis. As Lord Briggs demonstrated in *Regency Villas*, the court will engage in a detailed and robust examination of the "factual matrix" to locate a true construction of the grant of rights. This is not a light-touch exercise and the Supreme Court's rigorous approach can be seen as an assertion of the primacy of a thorough factual enquiry. This requires, as *Regency Villas* exemplifies, a close scrutiny of the parties' intentions, first as to whether a proprietary as opposed to a personal right was intended, secondly, as to whether the *Re Ellenborough Park* conditions are satisfied as well as examination of any potential

[96] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57 at [75].

ouster of the servient land owner. A second "brake" relates to the methods of creation of easements. It is unlikely that purely recreational easements will arise in any circumstance other than by express grant. Any argument that recreational easements arise by prescriptive user would, in most conceivable cases, fail for user by permission. It seems equally improbable that recreational rights could give rise to implied easements by necessity, inadvertently under LPA 915 s.62 or under the rule in *Wheeldon v Burrows*.[97] That said, it remains at least feasible, whether through poor drafting or an ineffective LPA 1925 s.62 exclusion clause, that recreational rights may be exercised under a licence and may go on to attract the status of an easement through the statutory magic of s.62. More commonly, however, recreational easements will arise expressly with the transparency and scrutiny this offers; the protection of formality requirements, documentary evidence and most probably after the parties have received independent legal advice. This must drastically reduce the chances of parties being bound by far-reaching recreational easements of which they have no knowledge or to which they have not expressly agreed. A final "brake" would be the provided by the ability to discharge easements under the proposed Law Commission scheme which would see the current regime for discharge of restrictive covenants under the LPA 1925 s.84 extended to the law of easements.[98] If implemented, this jurisdiction to discharge easements would be a powerful weapon in the armoury to prevent and supervise overly-burdensome easements and to ensure a balance between the rights of servient and dominant landowners.

Conclusion: Opening Pandora's box?

This article has explored the reasoning employed, the importance and potential reach of the recent Supreme Court decision in *Regency Villas*; a judgment of undoubted significance for the law of easements. The extent to which this case heralds the opening of the "floodgates" and of Pandora's box depends chiefly on the weight one attaches to the apparent erosion and dilution by the Supreme Court of the traditional constraints on the law of easements (as to positive obligations, for example) and equally the view one adopts as to court's acceptance that rights of recreation and sport "pure and simple" can amount to easements. Three possible "brakes" on the effect of *Regency Villas* case have been identified and unpacked. Whatever one's stance, *Regency Villas* is undoubtedly a controversial decision. The reasoning of the majority is driven, at its core, by a view that there is a need for the law to reflect changing social attitudes to recreation and sport something that Gray and Gray described (writing prior to *Regency Villas*) as "[perhaps] an index of a more hedonistic (or even a more health conscious) age".[99] As Lord Briggs explained in *Regency Villas* itself:

> "Whatever may have been the attitude in the past to 'mere recreation or amusement', recreational and sporting activity of the type exemplified by the

[97] *Wheeldon v Burrows* (1879) 12 Ch. D. 31; [1874–90] All E.R. Rep. 669. There is no reason to think this would not also be true under the Law Commission's proposals for reform of the law on implied easements: see Law Commission, Making Land Work: Easements, Covenants and Profits à Prendre (2011) Law Com Report No.327 at [3.52]–[3.64].

[98] Law Commission, Making Land Work: Easements, Covenants and Profits à Prendre (2011) Law Com Report No.327 at [7.27]–[7.35] and [7.53]–[7.55].

[99] K. Gray and S. Gray, *Elements of Land Law*, 5th edn (Oxford: OUP, 2009), p.612.

> facilities at Broome Park is so clearly a beneficial part of modern life that the common law should support structures which promote and encourage it, rather than treat it as devoid of practical utility or benefit."[100]

How far changing social attitudes ought to shape the recognition and operation of proprietary rights forms part of a much larger debate to be grappled with outside the pages of this article.[101] Beyond this, however, *Regency Villas* raises several crucial questions to be addressed going forward. In particular, we must wait to see how the newly-liberated landscape created for recreational easements will be picked up and applied by the lower courts. Can we expect the decision to lead to a deluge of claims testing the limits of *Regency Villas* and will the *Regency Villas* principles be recognised as applying in contexts outside timeshare developments? Will, for example, the same approach be taken to recreational rights over smaller scale, non-commercial land? Moreover, could the LPA 1925 s.62 and its statutory magic allow for the conversion of purely recreational rights under a licence into a fully-effective easement on sale of the land? Finally, how strictly will the courts scrutinise the extent of positive obligations placed on servient land owners or, alternatively, will the courts take up the Supreme Court's more relaxed approach? In short, has the Supreme Court in *Regency Villas* re-cast fundamentally the law of easements or might the courts seek to retrench back to established principles? Either way, whether or not one regards the Supreme Court as opening Pandora's box, the message from the court is plain: purely recreational and sporting rights which had hitherto been thought incapable of amounting to easements on the grounds of being "mere recreation or amusement" can now take effect as easements capable of binding servient land owners and their successors. To those granting recreational and sporting rights, the message is stark: not so much careful what you wish for but careful what you draft for as the consequences could be both wide-ranging and long-lasting.

Chris Bevan*

Register Entry Pursuant to a Court Order Subsequently Set Aside:

Antoine v Barclays Bank UK Plc[1]

Forgery; Fraud; Land registers; Mistake; Rectification; Vesting orders

Whether an entry in the land register can be upset is a question that hinges upon the availability of the powers of alteration under the Land Registration Act 2002. The scope of these alteration powers is crucial for registered land because they

[100] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57 at [81].

[101] For discussion of the relationship between property law and context see, amongst others, N. Hopkins, "The relevance of context in property law: a case for judicial restraint?" (2011) 31 *Legal Studies* 175.

* Associate Professor in Property Law, School of Law, The University of Nottingham; my sincere thanks to the anonymous reviewer for the most helpful comments on an earlier draft.

[1] *Antoine v Barclays Bank UK plc* [2018] EWCA Civ 2846; [2018] 4 W.L.R 67.

determine when security of registered title may have to give way to more important values, such as the need to give relief against the effects of fraud or error. Despite that pivotal function, their scope is not always clear and any elucidation by the court is welcome. *Antoine v Barclays Bank UK Plc* adds clarity to one aspect of the alteration powers in factual circumstances that are not so common. The Court of Appeal held that a register entry made pursuant to a court order subsequently set aside is not a "mistake" for the purpose of the correction head of the alteration powers. The decision brings coherence to the case law, and it successfully maintains the integrity of the recondite statutory provisions about alteration of the register, while highlighting the limits of the land register's reliability.

Antoine: the vesting order and the set aside order

Antoine v Barclays Bank UK Plc deals with the registration consequences of a register entry made pursuant to a vesting order that was subsequently set aside. The initial vesting order came about like this. In 1987, Mr Joseph, the registered proprietor, allegedly gave a security over the land in favour of Mr Taylor to secure a loan. Some years later, Taylor commenced proceedings claiming relief for non-payment of the underlying loan, either by repayment or an order for the transfer of the relevant registered titles into his name. He put forward three documents as the basis for claiming his title to the security. Joseph could not be found and an order was made for substituted service on him by way of advertisements in London, St Lucia and Grenada.

Joseph did not enter appearance and judgment in default was given. Joseph was ordered to pay the outstanding sum secured by a specified date, failing which Taylor would be entitled to all the interest of Joseph in the property, and to have a transfer thereof, and to become registered proprietor. After the specified date passed, Taylor lodged the court order with the land registry in support of his application to replace Joseph as registered proprietor. The land registry, having sent a notice to Joseph at the property and received no response, entered Taylor as new proprietor in 2007. Taylor then granted a registered charge to Barclays Bank in 2008.

Those entries were the source of the problem. It transpired that Joseph had in fact died in 1996. His son, Mr Antoine, represented the estate as administrator. After the entry of Taylor as proprietor and Barclays Bank as chargee, Antoine successfully applied to be joined to the proceedings commenced by Taylor which had earlier resulted in the judgment in default. The Master ordered that Taylor's claim be continued against Antoine, and he set aside the earlier judgment in default by which Taylor had become registered (without prejudice to Barclays Bank). On the basis of that order setting aside the vesting order, the land registrar altered the land register by removing Taylor as proprietor and entering Antoine in his place. Taylor died and his claim was not pursued, but two problems continued: first, a unilateral notice on the register still supported a pending land action in favour of Taylor and, secondly, the charge in favour of Barclays Bank remained. Antoine was obviously dismayed at the prospect of this charge continuing against the land he had recovered and sought its removal. Whether the court had power to do so depended on which particular head of alteration under the land registration legislation should apply.

Statutory matrix—The heads of alteration

Alteration is divided into three parts. But, unlike Caesar's Gaul, the boundaries between these three parts are not sharply demarcated by clear landmarks, and this gives rise to problems in identifying the proper scope of each part. Of the three parts, one comprises the correcting of a mistake, one brings the register up to date, and one gives effect to a right excepted from the effect of registration:

> "2. (1) The court may make an order for alteration of the register for the purpose of—
> (a) correcting a mistake,
> (b) bringing the register up to date, or
> (c) giving effect to any estate, right or interest excepted from the effect of registration."[2]

The head of alteration was crucial to Antoine's claim. If the entry of Taylor pursuant to the vesting order had not amounted to a "mistake" within the Act, then the correction head of alteration would not have been available. On that interpretation, one presumes that the basis for the alteration giving effect to the order setting aside could only have been "bringing the register up to date", a head of alteration which is probably not available against a right which is protected by the priority rules, such as Barclays Bank's charge in this case, and which is certainly not accompanied by an entitlement to indemnity for the continued existence of the charge. On the other hand, if the entry of Taylor pursuant to the vesting order upon judgment in default had been a "mistake", then the correction head of alteration would have been available to reinstate Antoine and (arguably) to remove the charge,[3] or to permit the statutory indemnity claim if correction were refused.[4] Unsurprisingly, Antoine claimed that the entry of Taylor pursuant to the vesting order was a mistake which permitted correction as against Barclays Bank.

No mistake, no correction

Antoine commenced proceedings against Barclays Bank, Taylor's widow, and the Chief Land Registrar. He argued that the security documents allegedly signed by his father were void on the basis of forgery, and that various consequences followed. First, the unilateral notice should be removed as the claim was resolved. Secondly, the entry of Taylor pursuant to the vesting order had been a mistake. Thirdly, the charge to Barclays Bank was the result of that mistake and should be deleted under the correction power. At trial in the High Court, it was found that the security documents in favour of Taylor were indeed forgeries (suspicion was directed at a rogue agent rather than Taylor himself). But the court held that the entry pursuant to the vesting order was no mistake, and consequently there was no power to delete the charge.[5] Antoine appealed on the ground that the vesting order should have

[2] LRA 2002 Sch.4 para.2(1). The registrar possesses similar powers to alter, with the additional power to remove superfluous entries: LRA 2002 Sch.4 para.5(1).
[3] See *Knights Construction (March) Ltd v Roberto Mac Ltd* [2011] 2 E.G.L.R. 123, *Proudlove v Wood* [2011] P.L.S.C.S. 206, *MacLeod v Gold Harp Properties Ltd* [2014] EWCA Civ 1084; [2015] 1 W.L.R. 1249, and others.
[4] LRA 2002 Sch.8, para.1(1)(a), (b).
[5] *Antoine v Barclays Bank Plc* [2018] EWHC 395 (Ch); [2018] 4 W.L.R. 67.

been regarded as a nullity so that the entries founded on it were correctable as mistakes.

The Court of Appeal upheld the High Court's decision. The vesting order had to be obeyed in spite of its susceptibility to being set aside and in spite of the fact that it was indeed set aside. It was a valid disposition by operation of law at the time it was made, and the registrar had been under a duty to register it (this latter point was conceded on appeal[6]). The registrar would still have to comply with it even if the registrar knew the truth about the underlying forgeries. There had been no mistake in entering Taylor pursuant to it, nor in subsequently entering Barclays Bank as chargee.

The Court of Appeal tidied up a couple of helpful points along the way. First, the court settled doubts over the decision in *Firman v Ellis*[7] by resolving that even if a party was entitled to have a court order set aside as of right, and even if such an order was "void" in the sense that the court would have no alternative but to do so, a court order (at least if from a court of unlimited jurisdiction[8]) must be obeyed until it is set aside.[9] Secondly, the Law of Property Act 1925 s.9—which declares that a vesting order operates to convey an estate in like manner as a conveyance executed by the owner—does not imply that a vesting order obtained by forged documents would be void in the same way as a forged conveyance.[10] But the central interest for property lawyers is the court's reasoning why a register entry pursuant to a court order subsequently set aside is not a mistake and what that tells us about the judicial approach towards interpreting the statutory concept of mistake.

The approach to mistake

On the question of setting aside a court order which had already been the basis for a registered entry, the Court of Appeal did not have the benefit of precedents upon which it could draw,[11] nor had the particular issue been raised in Law Commission papers preceding the Act. Instead, the judgment reveals the court approaching the interpretation of mistake by extrapolating from judicially-developed principles in the prior case law. This can only be good for the prospects of stability and coherence in the evolution of this area of law.

The court made a number of important decisions on mistake:

- It followed the distinction made in recent case law[12] that a mistake is generated by registration of a void transaction, whereas a mistake is not generated by registration of a voidable transaction, not even once it has been set aside.
- It accepted that there was a comparison to be made between voidable transactions and court orders liable to be set aside.

[6] *Antoine v Barclays Bank Plc* [2018] EWHC 395 (Ch); [2018] 4 W.L.R. 67 at [25].
[7] *Firman v Ellis* [1978] Q.B. 886; [1978] 3 W.L.R. 1.
[8] The First-tier Tribunal has limited jurisdiction, therefore the argument that a particular order of its is ultra vires and void, unlike an order of the High Court, could conceivably remain a ground for mistake in a consequential register entry, despite *Antoine*.
[9] *Antoine v Barclays Bank UK Plc* [2018] EWCA Civ 2846 at [34]–[37] and [49].
[10] *Antoine v Barclays Bank UK Plc* [2018] EWCA Civ 2846 at [46] and [52].
[11] Unlike the decision in *NRAM Ltd v Evans* [2017] EWCA Civ 1013; [2018] 1 W.L.R. 639 where the court was able to draw on *Norwich & Peterborough Building Society v Steed (No.2)* [1993] Ch. 116; [1992] 3 W.L.R. 669.
[12] *NRAM Ltd v Evans* [2017] EWCA Civ 1013; [2018] 1 W.L.R. 639.

- It confirmed that the question whether an entry is a mistake must be answered on the facts as they stood at the time of entry, disregarding the fact that the transfer or court order might have been later set aside.
- It decided that mistake does not turn upon the subjective knowledge of the registrar or the extent of the registrar's ability to make enquiries or to obtain relevant documents.

On each of these points, the court's approach cannot be faulted. The combined effect is an approach to mistake which is consistent with the statutory scheme and which is consistent with the Law Commission's limited indications as to how the provisions were expected to operate.[13]

While those individual decisions reach the right outcomes, it is worth delving into the court's reasoning. A significant part of the judgment dwells on its decision that whether an entry is mistaken must be answered as the facts stood at the time of the entry, rather than with the benefit of hindsight after the instrument supporting the entry has been set aside.[14] This rule is undoubtedly correct for reasons considered below, but two caveats need to be raised. First, this rule is not supported by the particular justification offered in the judgment. The Court of Appeal explains that the rule is necessary in order to fulfil the legislative policy that the register should be a complete and accurate statement of title at any given time.[15] But that policy is not at stake here. There is a better explanation for the rule which is developed below. Secondly, the rule is of limited value because it does not identify what a mistake is. Take the case of a voidable transfer that has been registered. We test whether it is a mistake at the time of its entry. At that time was its entry a mistake? Certainly the register seems incomplete then as it did not record the voidable transfer's susceptibility to rescission. But whether that is a mistake still depends on what you mean by mistake; specifying the time for asking the question does not tell us how to answer it. Fortunately, however, the Court of Appeal goes on to propose a test that does supply further content to the test for mistake, although it was not the focus of detailed discussion in the case itself.

The proposed test is a formula taken from two leading practice works: there is a mistake when, amongst other things, the registrar:

> "makes an entry in the register that he would not have made; … makes an entry in the register that he would not have made in the form in which it was made; or … deletes an entry which he would not have deleted; had he known the true state of affairs at the time of the entry or deletion."[16]

The test was subsequently referred to by the Law Commission when noting that a degree of consensus appeared to be emerging as to the boundaries of mistake,[17] and the Law Commission later regarded it as reflecting the tenor of recent case

[13] E.g. Law Commission, *Land Registration for the Twenty-First Century* (2001, Report No.271), paras 10.7 and 10.10.
[14] *Antoine v Barclays Bank UK Plc* [2018] EWCA Civ 2846 at [18], [27]–[30], [39], [45], [47], [50].
[15] *Antoine v Barclays Bank UK Plc* [2018] EWCA Civ 2846 at [39].
[16] *Antoine v Barclays Bank UK Plc* [2018] EWCA Civ 2846 at [29], citing C. Harpum, S. Bridge and M. Dixon, *Megarry & Wade: The Law of Real Property*, 8th edn (Sweet & Maxwell, 2012), para.7-133; D. Cavill, *Ruoff & Roper: Registered Conveyancing* (Sweet & Maxwell, Looseleaf), para.46-009.
[17] Law Commission, *Updating the Land Registration Act 2002: A Consultation Paper* (2016, Consultation Paper No.227), paras 13.79–80.

law.[18] The test provides a handy rule of thumb, but it is submitted that caveats must be raised over its use. First, it is not easy to apply to regimes where the registrar performs no scrutiny function. Were conveyancers permitted to make certain changes directly to the register, as has been mooted in registry reform suggestions, talk of what a hypothetical registrar might do is quite impractical. Secondly, while the judgment emphasises that the test does not depend on the subjective knowledge of the registrar nor impose any duty on the registrar,[19] it remains the case that the test does not explain what would be done by the hypothetical registrar who is blessed with omniscience. We are told that the hypothetical registrar would obey court orders despite knowing that they had been obtained by reliance on forgeries[20]; but there are further questions here of a very challenging nature over the hypothetical registrar's conduct, particularly in the sphere of omissions, the registrar's failure to act, and the scope of positive obligations in public law when exercising discretionary powers. In these cases, one would need to construct a whole set of hypothetical standards for action by the hypothetical registrar. This is a prime contender for avoiding the multiplication of hypothetical entities and the brisk application of Occam's razor would suggest abandoning that approach and instead directly stating the principle by which it is determined what conditions will precipitate a mistake.

Can that challenge be met? Academic efforts have been made in that direction.[21] It is suggested that the answer can be deduced from the structure of the Act. The Act liberally confers title by the act of registration, but which is offset by the correction power. The terms in which the power is expressed are not defined. All of the alteration powers contain *hapax legomena* that cannot be related to terms existing elsewhere in the legislation. Their content cannot be filled by reference to other parts of the Act and must be taken from elsewhere. But we do know that the correction power, in the subset known as rectification,[22] is capable of prejudicially affecting the title of a registered proprietor, and therefore performs the function of deciding whether an entry which shifts property rights should or should not have been made. The defining criteria for the availability of rectification should therefore be sought in rules found outside the Act which determine when a change in property rights has been effectuated. The source for the answer must be such rules of law that determine what events effectuate changes to property entitlements as were in place for unregistered land prior to the Act, except insofar as they have been amended or displaced by the Act itself. That is not to require the correction power to replicate the outcomes of those rules as to vesting of interests, but only to incorporate into the grounds of rectification the same criteria as to what events are valid to effectuate changes in property entitlements.

That proposed approach maintains the link between registered land and the relevant legal rules which have evolved in unregistered land to address all manner

[18] Law Commission, *Updating the Land Registration Act 2002* (2018, Report No.380), paras 13.15–16.
[19] *Antoine v Barclays Bank UK Plc* [2018] EWCA Civ 2846 at [42].
[20] *Antoine v Barclays Bank UK Plc* [2018] EWCA Civ 2846 at [51].
[21] e.g. A. Nair, "Morality and the Mirror" in Bright (ed), *Modern Studies in Property Law* (Hart, 2011), p.268; E. Lees, "Title by Registration" (2013) 76 M.L.R. 924; A. Goymour, "Mistaken Registrations of Land: Exploding the Myth of Title by Registration" [2013] C.L.J. 617; S. Gardner, "The Land Registration Act 2002—The Show on the Road" (2014) 77 M.L.R. 763; S. Cooper, "Regulating Fallibility in Registered Land Titles" [2013] C.L.J. 341; S. Cooper, "Correction of the Register and Mistake by Omission" [2018] Conv. 225.
[22] LRA 2002 Sch.4 para.2(1). The registrar possesses similar powers to alter, with the additional power to remove superfluous entries: LRA 2002 Sch.4 para.5(1).

of fundamental issues relating to property entitlements, such as consent and dispositive intention, capacity, formality compliance, certainty, the permitted menu of property interests, rules for acquisition by operation of law, and so on. The proposed approach also has explanatory force for much of the case law without reference to hypothetical registrars. It explains why the entry of a void transaction is a correctable mistake, but not the entry of a voidable transaction.[23] It explains why the entry of a squatter as proprietor is a correctable mistake, even though the true owner failed to object to the squatter's application, if the squatter had not actually taken the requisite possession for the requisite period.[24] The proposed approach is consistent with *Antoine* and supplies a fuller justification for its outcome.

Relation with other cases

Antoine may knit together the statutory alteration powers in the proper fashion, but its relations with other judicial decisions must be considered. Three such relationships will be addressed.

First, how does *Antoine* relate to the case of a register entry pursuant to an order that is reversed on appeal rather than set aside? We have seen that *Antoine* indicates the lower court's order should be regarded as a valid mandate for entering the winning party as proprietor, so one might have thought that its reversal on appeal would therefore be in the same category as an order setting it aside. But in *Totton and Eling Town Council v Caunter*[25] (not cited in *Antoine*), the High Court held that a register entry pursuant to the order of the Adjudicator to HM Land Registry, which was subsequently reversed on appeal, should be altered specifically under the correction head, and it did indeed order correction, implicitly admitting the presence of a mistake.[26] This appears to conflict with the decision in *Antoine* which holds that that the presence of mistake must be tested at the time of the entry of the controverted judicial order and cannot arise simply because the order is subsequently overturned. The two cases could only be reconciled by distinguishing *Totton* on an ambitious argument that the Adjudicator's order was entirely void for exceeding the Adjudicator's limited statutory jurisdiction and the register entry was a mistake on that basis; apart from that possible exception, *Totton* must be wrong on the broader point.

Secondly, how does *Antoine* relate to the case of a register entry pursuant to an order that is subsequently declared to be not binding on beneficiaries taking under the former proprietor who was removed by the order? The issue arose in *Re De Leeuw*[27] (not cited in *Antoine*), where an executor became registered proprietor and fraudulently mortgaged the property. The lender brought proceedings against the executor and obtained a foreclosure order, on the strength of which the lender was entered in the register as proprietor of the property. The beneficiaries successfully claimed that their interests had not been represented in the foreclosure (the executor having entered appearance but not having contested), and the court

[23] *NRAM Ltd v Evans* [2017] EWCA Civ 1013; [2018] 1 W.L.R. 639.
[24] *Baxter v Mannion* [2011] EWCA Civ 120; [2011] 2 All E.R. 574.
[25] *Totton and Eling Town Council v Caunter* [2008] EWHC 3630 (Ch).
[26] *Totton and Eling Town Council v Caunter* [2008] EWHC 3630 (Ch) at [43].
[27] *Re De Leeuw* [1922] 2 Ch. 540.

declared that they were therefore not bound by the foreclosure and altered the register by entering the beneficiaries' newly-appointed trustee as proprietor in place of the lender. That decision should continue to stand after *Antoine*. It concerned alteration under the former statutory provisions[28] which were in a rather primitive form and which, unlike the contemporary legislation, did not differentiate between correcting mistakes and bringing the register up to date. But the fact pattern fits perfectly within the modern concept of bringing the register up to date. After *Antoine*, therefore, any beneficiaries whose interests are not represented in litigation against their trustees should escape the doctrine of estoppel *per rem judicatam* by having the adverse order against their trustee declared not binding on them,[29] and the register should be altered, not by correcting it, but by bringing it up to date.

Thirdly, how does *Antoine*, a case of a registry entry pursuant to a court order founded on forged transfers, relate to the case of a register entry made directly pursuant to a forged transfer? There are many decisions confirming that, where a grant is forged and void, then any entry made directly in reliance on it is a mistake. A good example is *Patel v Freddy's Ltd*.[30] The original registered proprietor was the victim of a fraudster who impersonated him and sold the land to Finegold who then sold on to Freddy's Ltd. The entry of Finegold was a mistake, and rectification would in principle have been available as against him and also as against Freddy's Ltd. On the facts, rectification was refused, the new acquirer (Freddy's Ltd) kept the land, and the original owner was expected to be eligible for an indemnity claim. If that is the correct result for a forged conveyance, why, it might be asked, is it not also the result for a forged conveyance which induces a court order? The two cases, it could be argued, are similar in regard to both the nature of the wrongdoing and the effect on the victim. Yet the differences in outcome are stark. In *Antoine*, the new acquirer (Taylor, whose estate was represented by his widow) did not keep the land but rather was removed from the register without any entitlement to indemnity; while the original owner (Joseph, whose estate was represented by Antoine) recovered the land but only subject to the Barclays Bank mortgage, a loss for which no indemnity was available.

Compared to a register entry made in direct reliance on a forged conveyance, therefore, *Antoine* seems at first glance to run counter to the idea that entries in the land register are reliable. *Antoine* implies that all registered proprietors (like Joseph) need to be warned that their registration is not reliable, as their land might be extracted by a court order and damaged, mortgaged or sold on, before the court order can be undone. Equally, new acquirers who become registered proprietors under court orders (like Taylor) need to be warned that their registration is not reliable, as their land might be taken away without compensation[31] in the event of the court order being set aside, reversed on appeal, or declared not binding.

[28] Land Transfer Act 1875 ss.95, 96.

[29] See CPR 19.7A(2).

[30] *Patel v Freddy's Ltd* [2017] EWHC 73 (Ch).

[31] Furthermore, Taylor and his estate were not entitled to recover the costs of development works which had been incurred while he had been registered proprietor: *Antoine v Barclays Bank plc* [2018] EWHC 395 (Ch); [2018] 4 W.L.R. 67 at [86]—"I fail to see why Mrs Taylor should be entitled to compensation in circumstances where her husband (whether he realised it or not) had not obtained title to the Property by lawful means …". The point was not pursued on appeal.

Those consequences might spur arguments that the land registration scheme should be reformed so as to eradicate the effects of *Antoine* and to enhance the reliability of the register. In fact equivalent reform arguments have already been made in relation to entries pursuant to voidable transfers liable to be set aside,[32] if not entries pursuant to court orders liable to be reversed. There is certainly something to be said for some such reform if the policy of the reliability of the register is to be fortified—although it would come at the expense of the policy of fixing unsatisfactory court orders.[33] But reliability of the register is not the only consideration. The current limitations on reliability, as demonstrated in *Antoine*, come about because the "mistake" test used in determining susceptibility to rectification is a test which imports the common law criteria concerning what events are valid to effectuate changes in property entitlements. This importation enabled a certain economy in the drafting of the correction provisions, and it continues to mean that the definition of mistake can rely on centuries of legal thought about how the balance should be set between owners and acquirers in countless different factual circumstances. Who would be willing to dismiss all of that principled learning and attempt to draft a comprehensive new code of grounds for correction?

Simon Cooper[*]

A Partially Welcome Decision

Farakh Rashid v Teyub Nasrulla (acting as Executor of the estate of the late Mohammed Rashid)[1]

℄ Adverse possession; Constructive trusts; Equitable interests; Fraud; Mistake; Rectification; Registered land; Title to land

Introduction

The decision in *Parshall v Hackney*[2] that a registered proprietor could not be in adverse possession attracted criticism as soon as it was reported.[3] In *Farakh Rashid v Teyub Nasrulla (acting as Executor of the estate of the late Mohammed Rashid)*,[4] the Court of Appeal has now overruled that decision. However, this Note will

[32] J. T. Farrand and A. C. Clarke, *Emmet & Farrand on Title* (Sweet & Maxwell, Looseleaf), para.9.028; P. J. Clarke, "Registered Land" [1993] All E.R. Rev. 242, 246; C. Davis, "A Restrictive Approach to Rectification" [1992] Conv. 293, 297.

[33] On which see C. W. Tainter, "Restitution of Property Transferred Under Void or Later Reversed Judgments" (1936) 9 *Mississippi Law Journal* 157; D. Gordon, "Effect of Reversal of Judgment on Act done between Pronouncement and Reversal" (1958) 74 L.Q.R. 517; B. McFarlane, "The Recovery of Money Paid Under Judgments Later Reversed" [2001] *Restitution Law Review* 1; S. Christensen and B. Duncan, "Is Indefeasibility of Title a Bar to Restitution after Reversal of a Judgment on Appeal?" (2005) 11 *Australian Property Law Journal* 81.

[*] Professor, Aston Law School.

[1] *Farakh Rashid v Teyub Nasrulla (acting as Executor of the estate of the late Mohammed Rashid)* [2018] EWCA Civ 2685.

[2] *Parshall v Hackney* [2013] EWCA Civ 240; [2013] Ch. 568.

[3] K. Lees, "Parshall v Hackney: A Tale of Two Titles" [2013] 77 Conv. 222; L. Xu, "What do we protect in land registration?" (2013) 129 L.Q.R. 477.

[4] *Rashid v Nasrulla* [2018] EWCA Civ 2685.

question whether the court was right to impose a constructive trust on the registered proprietor and then rely on his adverse possession of the resulting equitable interest to determine an application for alteration under the Land Registration Act 2002 (LRA 2002) Sch.4. The Court of Appeal took a different view from the Upper Tribunal on the application of the illegality doctrine, and views will differ as to whether the decision on the point was right, but the Note is not concerned with this aspect of the case.

The facts and Tribunal decisions

The late Mohammed Rashid was the registered proprietor of the property. In 1989, whilst he was abroad, someone known to him, "the Fraudster", forged Mr Rashid's signature on a transfer and got himself registered as proprietor. When Mr Rashid returned to this country, he could not persuade any solicitors to take on his case. Later in 1989, the Fraudster transferred the property to his son ("the Son") by way of gift. The Son had been complicit in the fraud. The Son was registered as proprietor in 1990. It was only in 2011 that Mr Rashid found evidence to support his account of what had happened.[5] In 2013, he applied for alteration of the register under the LRA 2002 Sch.4 to correct a mistake, the alteration being to restore him as registered proprietor.

The First-tier Tribunal found that the registration of the Fraudster was a mistake, and that the Son had, by fraud or lack of proper care caused or substantially contributed to the mistake, allowing for alteration despite the Son being in possession: LRA 2002 Sch.4 para.6(2).[6] The tribunal took the view that the decision in *Parshall*[7] meant the law of adverse possession was of no assistance to the Son. However, the Son argued that the delay in the application for alteration being made amounted to "exceptional circumstances" for the purposes of para.6(3) justifying the registrar not making the alteration.[8] The tribunal rejected this argument and directed the registrar to give effect to the application.[9]

The Son appealed to the Upper Tribunal on the ground that *Parshall* was relevant only where the registration had been lawfully obtained. The appeal failed: Judge Elizabeth Cooke did not accept that *Parshall* was restricted to these circumstances.[10]

There was a further appeal, to the Court of Appeal.[11] (Mr Rashid died before the appeal was heard.)

The Court of Appeal's decision

The Court of Appeal allowed the Son's appeal.

[5] Up until then, according to the judge in the First-tier Tribunal, "the absence of documents stymied him" when he had "sought to pursue his rights": *Mohammed Rashid v Farakh Rashid* REF/2014/0142 at [30].

[6] *Mohammed Rashid v Farakh Rashid* REF/2014/0142 at [30].

[7] *Parshall v Hackney* [2013] EWCA Civ 240.

[8] *Mohammed Rashid v Farakh Rashid* REF/2014/0142 at [4].

[9] *Farakh Rashid v Mohammed Rashid* REF/2014/0142 at [30]–[31].

[10] *Farakh Rashid v Mohammed Rashid* [2017] UKUT 0332 (TCC) at [39] and [40].

[11] *Rashid v Nasrulla* [2018] EWCA Civ 2685. In the Court of Appeal, the LRA 2002 Sch.6 paras 2 and 3, rather than paras 5 and 6, applied, but the substance of the two sets of provisions is the same: *Farakh Rashid v Mohammed Rashid* [2017] UKUT 0322 (TCC) at [17].

Parshall v Hackney point

Lewison LJ, giving the leading judgment, referred to Lord Browne-Wilkinson's speech in *JA Pye (Oxford) Ltd v Graham*[12] in which he made clear that there are just two requirements for adverse possession, namely, legal possession (in the sense of sufficient factual possession with the necessary intention to possess) and lack of consent from the true owner.[13] In *Parshall*, Mummery LJ had found that the owners of No.31 were not in adverse possession "as their possession of the disputed land was referable to their registered title and was not unlawful",[14] effectively adding the further requirement that the squatter must not have a registered title. This made *Parshall* "irreconcilable with *Pye*" and meant that the court in *Rashid* was entitled, and bound, not to follow *Parshall*.[15]

The overruling of the *Parshall*[16] approach will generally be welcomed. Its significance, however, is probably limited.

If the same piece of land is mistakenly included within two registered titles (double registration), the registered proprietor who is in possession will almost certainly wish to apply for alteration rather than apply under the LRA 2002 Sch.6 in reliance on adverse possession. This will not only be to avoid having to establish the necessary adverse possession and, in practice, having to meet one of the three conditions in para.5 of that Schedule, but also because a successful application under para.1 of Sch.6 means that there is effectively a statutory transfer of the registered estate to the squatter. So the problem of two registered titles to the same land would remain; the only difference being that the squatter was now proprietor of both. It might be possible to alter the register (to correct a mistake) by closing one of the registered titles, but this could be difficult if third party rights affected only the title that was to be closed.[17] The position would be much the same if the double registration went back so far as to allow for the operation of the LRA 2002 Sch.12 para.18.

Where the decision might help is in cases involving a registered proprietor in possession of land within a third party's unregistered estate but also included in the proprietor's registered title. It is now clear that after 12 years the unregistered estate will be extinguished, so it will not be possible for the owner of the unregistered estate to apply for first registration or for alteration to correct a mistake in the register—the registration of the proprietor will, with the expiry of the limitation period, be correct. (Indeed, this was possibly the thinking behind the LRA 2002 s.62(4) and (5) allowing for the upgrading of a possessory freehold or leasehold estate after 12 years provided the proprietor is in possession.)

[12] *JA Pye (Oxford) Ltd v Graham* [2002] UKHL 30; [2003] 1 A.C. 419.
[13] *JA Pye (Oxford) Ltd v Graham* [2002] UKHL 30, in particular at [36] and [40].
[14] *Parshall v Hackney* [2013] EWCA Civ 240 at [101].
[15] *Rashid v Nasrulla* [2018] EWCA Civ 2685 at [50].
[16] *Parshall v Hackney* [2013] EWCA Civ 240.
[17] If the Bill in the Law Commission's Report *Updating the Land Registration Act 2002*, Law Com. No.380, is enacted, then the option of making an application under Sch.6 would no longer be available in cases of double registration. A new para.11(2A) in Sch.6 would prevent either registered proprietor from being in adverse possession for the purposes of the Schedule.

Exceptional circumstances and the son's entitlement to be registered

The Court of Appeal having decided that a registered proprietor like the Son could be in adverse possession, then accepted the argument that having been in adverse possession of Mr Rashid's equitable interest in the property for more than 12 years before the coming into force of the LRA 2002, the Son had acquired the right to be registered as proprietor under para.18 of Sch.12 to the Act. This meant, according to Lewison LJ, that:

> "there can be no point in rectifying [the register] so as to show the executor as proprietor. He would immediately be met with an unanswerable claim to have the register re-rectified so as to comply with Schedule 12 paragraph 18 of the 2002 Act."[18]

This entitlement of the Son to be registered amounted to "exceptional circumstances" for the purposes of the LRA 2002 Sch.4 para.3(3).[19]

This reasoning is problematic in two respects.

First, the reasoning requires Mr Rashid having an equitable interest in the property under a trust. In *Swift 1st Ltd v Chief Land Registrar*,[20] Patten LJ, giving the only substantive judgment in the Court of Appeal, held to be per incuriam and wrong the position taken in *Malory Enterprises Ltd v Cheshire Homes (UK) Ltd*[21] that registration of a void disposition left the original proprietor with beneficial ownership. Lewison LJ referred to this decision in *Swift* but still found that Mr Rashid had an equitable interest in the property following registration of the Fraudster as proprietor; he also found that the legal estate then vested in the Son, on the subsequent transfer to him, subject to this interest.[22] His lordship pointed out that Patten LJ had qualified what he said about the Land Registration Act 1925 (the LRA 1925) s.69, and by extension its successor the LRA 2002 s.58, not vesting only a bare legal estate by the words "absent a trust". This qualification was, Lewison LJ stated, "key"[23]:

> "If the circumstances surrounding the acquisition and registration are such as to impose a trust on the transferee, then there is no reason to read section 69 as dealing with more than the bare legal estate."

His lordship set out[24] a passage in *Snell's Equity*[25] dealing with one of the instances where a constructive trust may be imposed:

> "A distinction must be drawn between fraud consisting in the outright taking of a person's property, wholly without his consent, and a transaction induced by a fraudulent misrepresentation. In the first case, it has been said that a thief who steals the property of another holds it on constructive trust for the

[18] *Rashid v Nasrulla* [2018] EWCA Civ 2685 at [62].
[19] *Rashid v Nasrulla* [2018] EWCA Civ 2685 at [66].
[20] *Swift 1st Ltd v Chief Land Registrar* [2015] EWCA Civ 330 at [45]; [2015] Ch. 602. P. Milne, "Guarantee of title and void dispositions: work in progress" [2015] 79 Conv. 356.
[21] *Malory Enterprises Ltd v Cheshire Homes (UK) Ltd* [2002] EWCA Civ 151; [2002] Ch. 216.
[22] As a result of the Land Registration Act 1925 s.20(4): *Rashid v Nasrulla* [2018] EWCA Civ 2685 at [59]. Presumably his lordship would have taken the same view had the LRA 2002 Act applied, relying on s.28(1) of that Act.
[23] *Rashid v Nasrulla* [2018] EWCA Civ 2685 at [35].
[24] *Rashid v Nasrulla* [2018] EWCA Civ 2685 at [58].
[25] J. A. McGhee, *Snell's Equity*, 33rd edn (London: Sweet & Maxwell, 2015), para.26-012.

> claimant. The thief's possessory title is subject to the claimant's equitable entitlement to have the property specifically restored to him so that he holds it as a constructive trustee. The consequence is that the claimant need not rely on the less advantageous common law rules of tracing to recover his property."

A footnote to the sentence about the thief holding on constructive trust for the claimant cites Lord Browne-Wilkinson's well-known obiter observations in *Westdeutsche Landesbank Girozentrale v Islington LBC*,[26] but adds that these observations were questioned in *Shalson v Russo*.[27] Lewison LJ, after setting out the extract from *Snell's Equity* above, went on to consider *Shalson*. In that earlier case, Rimer J stated[28]:

> "… a thief ordinarily acquires no property in what he steals … If the thief has no title in the property, I cannot see how he can become a trustee of it for the true owner: the owner retains the legal and beneficial title."

Lewison LJ felt able to take the constructive trust approach despite Rimer J's comments as the example of the thief "cannot be directly applied to the facts of the case" because "the effect of section 69 meant that the legal estate did become vested in" the Fraudster.[29]

It seems that the Court of Appeal were adopting the same approach as Judge Cooke did in the Upper Tribunal. Judge Cooke stated that a constructive trust arose on registration "where the registered proprietor was responsible for, or colluded with, a fraudulent transfer".[30] She was careful to explain:

> "This is a very different proposition from the finding, now overruled, in *Malory Enterprises Ltd v Cheshire Homes (UK) Ltd* that where registered land is transferred by fraud, the statute retains a beneficial interest. The Court of Appeal's decision in *Swift 1st Ltd v Chief Land Registrar* makes clear that that is not the law …"

It is very questionable, however, whether a constructive trust should be treated as arising in these circumstances. The courts have recognised such trusts arising where it is inequitable for an owner to deny a claimant an interest in land, but the correctness of this has been doubted[31] other than in common intention constructive trust cases involving spouses and domestic partners,[32] or where "there are very special circumstances showing that the transferee of the property undertook a new liability to give effect to provisions for the benefit of third parties".[33] Moreover, it is difficult to see that a constructive trust is needed. *Snell's Equity* regards the constructive trust as being imposed on the thief in order to ensure that the claimant can recover his property. However, where the property is registered land, the original proprietor will have the right to apply for alteration under the LRA 2002

[26] *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] A.C. 669 at 715–716; [1996] 2 W.L.R. 802.
[27] *Shalson v Russo* [2003] EWHC 1637 (Ch); [2005] Ch. 281.
[28] *Shalson v Russo* [2003] EWHC 1637 (Ch) at [110].
[29] *Rashid v Nasrulla* [2018] EWCA Civ 2685 at [57].
[30] *Farakh Rashid v Mohammed Rashid* [2017] UKUT 0332 (TCC) at [14].
[31] C. Harpum, S. Bridge and M. Dixon, *Megarry & Wade, The Law of Real Property*, 8th edn (London, Sweet & Maxwell, 2012), para.11-022, states that "there must be a serious doubt as to the correctness" of cases where a constructive trust has been imposed on this basis, apart from in the two situations mentioned in the text.
[32] *Gissing v Gissing* [1971] A.C. 886; [1970] 3 W.L.R. 255; *Lloyds Bank Plc v Rosset* [1991] 1 A.C. 107; [1990] 2 W.L.R. 867; etc.
[33] *IDC Group Ltd v Clark* [1992] 1 E.G.L.R. 187; [1992] 08 E.G. 108 at 190 per Browne-Wilkinson VC.

Sch.4 and thus regain title to the land. The fraud will prevent the fraudster from gaining protection by virtue of possession.[34] The register can still be altered if a subsequent transfer is registered[35]; even if this does not happen, perhaps because the purchaser is in possession and was innocent and acted diligently, the former proprietor will almost certainly be entitled to indemnity.[36]

The imposition of a constructive trust means that the outcome is effectively the same as it was when the *Malory*[37] approach was still being applied, prior to that approach being overruled in *Swift*.[38] What Patten LJ in *Swift*[39] clearly meant when he said "absent a trust" was a trust *preceding* registration. If A holds on trust for B and then C forges a transfer to himself which is registered, the LRA 2002 s.58 will vest the legal estate in C; that estate remains subject to B's equitable interest because of s.28.[40] But where, as here, A did not hold on trust, there is no separate equitable interest that can be retained on the operation of s.58.[41]

The constructive trust in *Rashid* was particularly inappropriate. If one stands back and looks at who the trust benefited, the answer is the Son. Its only function seems to have been to allow for the existence of an interest which could be adversely possessed by the Son, this being treated as ultimately giving the Son the entitlement to be registered under the LRA 2002 Sch.12 para.18, with this then operating as an exceptional circumstance preventing the register from being altered.

This reliance by the Court of Appeal on para.18 of Sch.12 is a second problem with the reasoning, even if it is accepted that Mr Rashid acquired an equitable interest under a constructive trust. The Court of Appeal regarded the Son as having an entitlement to be registered under para.18 of Sch.12 as a result of the proviso to the LRA 1925 s.75(1)[42]:

> "(1) The Limitation Acts shall apply to registered land in the same manner and the same extent as those Acts apply to land not registered, except that where, if the land were not registered, the estate of the person registered as proprietor would be extinguished, such estate shall not be extinguished but shall be deemed to be held by the proprietor for the time being in trust for the person who, by virtue of the said Acts, has acquired title against any proprietor …"

However, the proviso is clearly about creating a trust of the registered legal estate where there has been adverse possession of *that estate*, not merely an equitable interest. It must follow that, as the proviso to s.75(1) did not apply, any equitable interest under the trust which Mr Rashid had must have simply been

[34] LRA 2002 Sch.4 paras 2(2)(a) and 6(2)(a).
[35] *Knights Construction (March) Ltd v Roberto Mac Ltd* [2011] 2 E.G.L.R. 123 at [132]; *Gold Harp Properties Ltd v Macleod* [2014] EWCA Civ 1084; [2015] 1 W.L.R. 1249.
[36] LRA 2002 Sch.8 para. 1(1)(b).
[37] *Malory Enterprises Ltd v Cheshire Homes (UK) Ltd* [2002] EWCA Civ 151.
[38] *Swift 1st Ltd v Chief Land Registrar* [2015] EWCA Civ 330.
[39] *Swift 1st Ltd v Chief Land Registrar* [2015] EWCA Civ 330.
[40] Under the LRA 1925 the position was the same, ss.69 and 20(4) of that Act operating in place of LRA 2002 ss.58 and s.28.
[41] As Patten LJ put it in *Swift 1st Ltd v Chief Land Registrar* [2015] EWCA Civ 330 at [41], "the legal estate carries with it all rights to the property and equity has no role to play in separating legal from beneficial ownership". See also *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] A.C. 669 at 706 per Lord Browne-Wilkinson.
[42] *Rashid v Nasrulla* [2018] EWCA Civ 2685 at [61].

extinguished at the end of the 12 years.[43] There was no scope for the operation of the LRA 2002 Sch.12 para.18. So if there were any "exceptional circumstances" for the purposes of para.3(3) of Sch.4, they could not be an entitlement to be registered under para.18 of Sch.12.

The illegality doctrine

Counsel for Mr Rashid sought to rely on the doctrine to prevent the Son being able to rely on his adverse possession. This succeeded in the Upper Tribunal.[44] Judge Cooke considered the leading authority, *Patel v Mirza*,[45] and the factors identified by the Supreme Court as being relevant to a decision whether the doctrine should operate, concluding[46]:

> "To allow [the Son] to retain the land would be to reward him for fraud and to give the message that fraud can be condoned after some years. To deny [the Son's] claim in adverse possession would be a wholly proportionate response to his conduct and his father's."

However, the Court of Appeal took the opposite view. King LJ and Peter Jackson LJ, in their joint judgment, explained[47]:

> "This careful statutory framework [in the Limitation Act], described by Sales LJ in *Best*[48] at [73] as 'a delicate and comprehensive balance of interests' will in almost every case incorporate all the considerations mentioned in *Patel v Mirza*. Like Sales LJ at [67], we would leave open whether extreme examples of illegality not encompassed within the structure of the Limitation Act might allow pleas of illegality to succeed, but we are clear that this is not such a case."

Conclusion

The overruling of the decision in *Parshall*[49] that a registered proprietor cannot be in adverse possession of the land is to be welcomed as returning the law to the clarity it had following *Pye*.[50] However, the Court of Appeal's imposition of a constructive trust on the Fraudster must be open to question. And even if Mr Rashid had an equitable interest following the registration of the Fraudster, adverse

[43] Limitation Act 1980 s.18(1). Section 21(1) was treated in both the Upper Tribunal (*Farakh Rashid v Mohammed Rashid* [2017] UKUT 0332 (TCC) at [15]) and Court of Appeal ([2018] EWCA Civ 2685 at [61]) as not applying to this type of trust: reference was made to *Paragon Finance PLC v DB Thakerar & Co* [1999] 1 All E.R. 400; (1998) 95(35) L.S.G. 36 and *Williams v Central Bank of Nigeria* [2014] UKSC 10; [2014] A.C. 1189. Judge Cooke seems to have assumed that the equitable interest was extinguished.

[44] However, this made no difference as Judge Cooke had already decided that there had not been adverse possession.

[45] *Patel v Mirza* [2016] UKSC 42; [2017] A.C. 467.

[46] *Farakh Rashid v Mohammed Rashid* [2017] UKUT 0332 (TCC) at [41].

[47] *Rashid v Nasrulla* [2018] EWCA Civ 2685 at [83]. Lewison LJ took the same approach: see, in particular, [75].

[48] *R. (on the application of Best) v Chief Land Registrar* [2015] EWCA Civ 17; [2016] Q.B. 23.

[49] *Parshall v Hackney* [2013] EWCA Civ 240.

[50] *JA Pye (Oxford) Ltd v Graham* [2002] UKHL 30.

possession should not have determined the case. The decision is, therefore, one that clarifies the law in one respect, but leaves uncertainty in others.

Patrick Milne[*]

[*] A lawyer at HM Land Registry. The views expressed in this case note are entirely personal.

Library

Barlow's Cohabitants and the Law, 4th edn, by David Josiah-Lake, (Haywards Heath: Bloomsbury Professional, 2018), 408pp., £75.00, ISBN: 9781526503046.

The "cohabiting couple family" is the fastest growing family type in England and Wales.[1] Even if Parliament provides for opposite-sex civil partnerships in the aftermath of the Supreme Court's decision in *R. (on the application of Steinfeld) v Secretary of State for the International Development*,[2] many people will surely continue to live informally as cohabitants and experience the peculiar legal consequences flowing from that decision. This, along with its inherent quality, makes *Barlow's Cohabitants and the Law* immensely useful.[3] The last edition of the work was published as far back as 2001, meaning that the new author, the solicitor David Josiah-Lake, faced a mammoth task. Professor Barlow remains an Advisory Editor of the book, which has the objective of "putting together in one place, as much as it is possible to do so, discussion of the laws affecting unmarried/cohabiting families".[4] While it is aimed at those teaching and practising *family* law, potentially suggesting that it is of only limited interest to readers of this journal, there is in fact plenty here for the property lawyer, particularly in respect of areas falling on the edge of or just outside property law as traditionally understood and taught.

Part I of the book deals with the law affecting cohabitants while living together as a unit, and Pt II deals with relationship breakdown, although inevitably there is no easy dividing line between these stages. The book opens with a chapter on "the cohabitation relationship", comprising a discussion of the definition of "cohabitation" and related concepts, the law's general approach to cohabitants and examples of the difficulties that they might encounter (specifically relating to names, wills and life assurance and pensions), the social background and impetus for reform, and cohabitation contracts. There is a helpful summary of the Cohabitation Rights Bill 2017–19, which perhaps optimistically slips into the present tense notwithstanding the understandable but painful acknowledgement that:

> "history tells us that [the Bill] is unlikely to progress further, not least because there is no appetite for reform in this area and it is not seen as a priority when the current government and Parliament are mired in the wrangling over Brexit."[5]

Chapter 2 deals fairly comprehensively with the status of children of cohabiting relationships, before Ch.3 addresses housing other than in the context of relationship

[1] Office for National Statistics, *Families and Households: 2017* (2017), p.4.
[2] *R. (on the application of Steinfeld) v Secretary of State for the International Development* [2018] UKSC 32; [2018] 3 W.L.R. 415.
[3] D. Josiah-Lake, *Barlow's Cohabitants and the Law*, 4th edn (Haywards Heath: Bloomsbury Professional, 2018).
[4] D. Josiah-Lake, *Barlow's Cohabitants and the Law*, 4th edn (Haywards Heath: Bloomsbury Professional, 2018), p.v.
[5] D. Josiah-Lake, *Barlow's Cohabitants and the Law*, 4th edn (Haywards Heath: Bloomsbury Professional, 2018), para.1.16.

breakdown (including public and private sector tenancies, owner occupation and homelessness legislation). Tax, pensions and social security (including income tax, tax credits, capital gains tax, inheritance tax, council tax, benefits and pensions) are analysed in Ch.4, where it is asserted that it is in this area that "some of the greatest anomalies in the legal treatment of cohabitants become apparent".[6] Inevitably the discussion takes the form of an outline, but enough detail is present to prompt the reader to look in more specialised texts when a particular issue arises. Chapter 5 covers inheritance and succession (including fatal accident and Criminal Injuries Compensation Scheme claims), with the discussion of the Inheritance (Provision for Family and Dependants) Act 1975 managing to incorporate recent case law such as *Ilott v Mitson*[7] and *Thompson v Ragget*.[8] Chapter 6 analyses the implications of matrimonial and civil partnership proceedings for cohabitants, in light of the fact that, inter alia "what is paid or received as financial provision from a previous relationship may limit or extend the financial resources available in the new cohabiting relationship".[9] This reviewer will forgive the problematic reference to "unreasonable behaviour" when discussing divorce,[10] particularly since the book pre-dates the Supreme Court's decision in *Owens v Owens*.[11]

Part II of *Barlow's Cohabitants and the Law* opens with a discussion of domestic abuse and the family home, including statistics and criminal proceedings and emergency accommodation as well as the civil remedies with which property lawyers are more likely to be familiar. The status of children on relationship breakdown is the concern of Ch.8. Chapter 9 then considers financial provision for children, including the apparently under-used ability to seek court-based capital provision, inter alia, for the benefit of children of cohabitants under the Children Act 1989 Sch.1, a potentially important and more palatable alternative to making arguments about constructive trusts of the family home. It is telling, however, that when discussing transfer of tenancies in Ch.10 on the rented family home following relationship breakdown, the author expressly addresses the disadvantages of using the Children Act instead. The book's last substantive chapter, covering the non-rented family home on relationship breakdown and related matters, is comparatively detailed. While a more comprehensive analysis will be within the knowledge or the reach of many property lawyers, the one in this book will be valuable to those not specialising in the precise area.

An appendix to the book contains a table providing a comparative overview of the respective rights of married and civil partnership couples and cohabitants. This may be extremely helpful to students and others seeking to appreciate quickly the (often) advantages still reserved for those in a marriage or civil partnership and the corresponding (often) disadvantages of "merely" cohabiting.

The largely descriptive nature of this book means that it is unlikely to be one for the bedside table. But that should not detract from the impressiveness of its

[6] D. Josiah-Lake, *Barlow's Cohabitants and the Law*, 4th edn (Haywards Heath: Bloomsbury Professional, 2018), para.4.01.
[7] *Ilott v Mitson* [2017] UKSC 17; [2018] A.C. 545.
[8] *Thompson v Ragget* [2018] EWHC 688 (Ch); [2018] W.T.L.R. 1027.
[9] D. Josiah-Lake, *Barlow's Cohabitants and the Law*, 4th edn (Haywards Heath: Bloomsbury Professional, 2018), para.6.01.
[10] D. Josiah-Lake, *Barlow's Cohabitants and the Law*, 4th edn (Haywards Heath: Bloomsbury Professional, 2018), para.6.03.
[11] *Owens v Owens* [2018] UKSC 41; [2018] A.C. 899.

coverage (in fewer than 350 substantive pages) and clarity of exposition, nor indeed from the sage advice it offers to practitioners tasked with advising cohabitants, often with the aim of reducing the risk of litigation. The reader is very much given the benefit of the author's considerable practical experience and awareness of the realities of life for cohabitants, and (for example) several sub-sections are devoted to legal aid. There are a number of no doubt invaluable "checklists" for practitioners advising cohabitants in particular situations, including on "cohabitants purchasing property", "disputes concerning the rented family home" and "cohabitant co-ownership disputes". It is possible that careful attention to this book will reduce the number of reported cases involving cohabitants that ultimately have to be discussed in the pages of this journal. But the book in no sense lets the Government or Parliament "off the hook" for failing comprehensively to address the difficulties faced by cohabitants in relation to their property.

Brian Sloan[*]

[*] Fellow in Law, Robinson College, Cambridge.

Conveyancer's Referencer

Housing

Milton Keynes Council v Bailey [2018] UKUT 207 (LC), PD McCrea FRICS, UT (Lands). Right to buy–Exemptions–Elderly persons–Suitability

Nottingham City Council v Parr [2018] UKSC 51, [2018] 1 W.L.R. 4985, Lady Hale PSC, SC. Houses in multiple occupation–Licence conditions–Occupiers–Students

Oduneye v Brent LBC [2018] EWCA Civ 1595, Kitchin LJ, CA (Civ Div). Homelessness–Intentional homelessness–Rent arrears–Housing benefit

R. (on the application of McDonagh) v Enfield LBC [2018] EWHC 1287 (Admin), Nigel Poole QC, QBD (Admin). Homelessness–Suitable alternative accommodation–Breach of statutory duty–Right to respect for private and family life

R. (on the application of Gaskin) v Richmond upon Thames LBC [2018] EWHC 1996 (Admin), Hickinbottom LJ, DC. Houses in multiple occupation–Service provision

Abolition of the Right to Buy and Associated Rights (Wales) Act 2018 (Consequential Amendments and Savings Provisions) Regulations 2019, SI 2019/110. In force: 26 January 2019. These Regulations make amendments to the Housing

Bhogal, Kuljit; O'Leary, Tara, "Public spaces protection orders: what have we learned?" J.H.L. 2019, 22(1).

Housing (Scotland)

Zungunde v Glasgow City Integration Joint Board [2018] CSOH 100, 2019 S.L.T. 37, Lord Woolman, OH. Homelessness–Rehousing–Respondents

Landlord and Tenant

Eales v Havering LBC [2018] EWHC 2423 (QB), Sir Alistair MacDuff, QBD. Possession–Anti-social behaviour–Personality disorders

Gateway Holdings (NWB) Ltd v McKenzie [2018] UKUT 371 (LC), Martin Rodger QC, UT (Lands). Service charges–Reasonableness–Locus standi

Goldman Sachs International v Procession House Trustee Ltd [2018] EWHC 1523 (Ch), Nugee J, Ch D. Leases–Business tenancies–Break clauses

Prezzo Ltd v High Point Estates Ltd [2018] EWHC 1851 (TCC), Adrian Williamson QC, QBD (TCC). Landlords' duties–Insurance

Robertson v Webb [2018] UKUT 235 (LC), Holgate J, UT (Lands). Rent reviews–Extensions of time

Ropemaker Properties Ltd v Bella Italia Restaurants Ltd [2018] EWHC 1002 (Ch), Fancourt J, Ch D. Agreement for lease–Termination

S Franses Ltd v Cavendish Hotel (London) Ltd [2018] UKSC 62, [2018] 3 W.L.R. 1952, Lady Hale PSC, SC. Business tenancies–New tenancy applications–Demolition

Watkins v Aged Merchant Seamen's Homes [2018] EWHC 2410 (Admin), Kerr J, QBD (Admin). Disrepair–Locus standi

Whitehall Court London Ltd v Crown Estate Commissioners [2018] EWCA Civ 1704, Underhill LJ, CA (Civ Div). New leases–Assumptions

Wild Duck Ltd v Smith [2018] EWCA Civ 1471, Longmore LJ, CA (Civ Div). Leases–Remedial works–Holiday accommodation

Zinc Cobham 1 Ltd (in administration) v Adda Hotels [2018] EWHC 1025 (Ch), Andrew Hochhauser QC, Ch D. Breach of covenant–Specific performance

Service Charges (Consultation Requirements) (Wales) (Amendment) (EU Exit) Regulations 2019, SI 2019/116. In force: In accordance with reg.1.

Tenant Fees Bill 2018 (HC Bill 203). A Bill to make provision prohibiting landlords and letting agents from requiring certain payments to be made or certain other steps to be taken; to make provision about the payment of holding deposits; to make provision about enforcement and about the lead enforcement authority; to amend the provisions of the Consumer Rights Act 2015 about information to be provided by letting agents and the provisions of the Housing and Planning Act 2016 about client money protection schemes.

Bushaway, Laura; Seitler, Miriam, "Can I recover more than 100%" E.G. 2019, 1902

Copeland, Kathryn, "A roundup of 2018" P.L.J. 2018/19, 367.

Dollar, Peta, "Practitioner page: problems with previous transactions - should lawyers be raising additional enquiries before contract to protect their purchaser clients?" L. & T. Review 2019, 23(1)

Fetherstonhaugh, Guy, "A solution to the inducement conundrum" E.G. 2018, 1844.

Fownes, James, "How landlords could reap benefits of 5G" E.G. 2018, 1844.

Muir, Nicola, "Valuation under evaluation: proposals for reform" E.G. 2018, 1842.

Muir, Nicola, "How much should a residential lease extension cost?" L. & T. Review 2019, 23(1).

Pawlowski, Mark, "What role the tenancy at will?" L. & T. Review 2019, 23(1).

Samuels, Alec, "Insurance under the service charge" Conv. 2018, 4.

Thornton, Roger; Tomlin, Jamie, "What does IFRS 16 mean for landlords?" E.G. 2018, 1844.

Landlord and Tenant (Scotland)

Gateway Assets Ltd v CV Panels Ltd [2018] CSOH 48, 2018 S.C.L.R. 736, Lord Clark, OH. Leases–Break notices–Validity

Trustees Of Gibsone Of Pentland's Trust v Telfer 2018 S.L.T. (Land Ct) 1, Lord Minginish (Chairman), T Campbell, Land Ct.

Planning

R. (on the application of Cairns) v Hertfordshire CC [2018] EWHC 2050 (Admin), Lang J, QBD (Admin). Planning conditions–Archaeological sites–Screening opinions

Eggborough Gas Fired Generating Station (Correction) Order 2018, SI 2018/1312. In force: 7 December 2018.

Environmental Assessments and Miscellaneous Planning (Amendment) (EU Exit) Regulations 2018, SI 2018/1232; made under the European Union (Withdrawal) Act 2018 s.8(1); European Communities Act 1972 s.8(1). In force: In accordance with reg.1.

Planning (Hazardous Substances and Miscellaneous Amendments) (EU Exit) Regulations 2018, SI 2018/1234; made under the European Union (Withdrawal) Act 2018 s.8(1). In force: In accordance with reg.1.

Planning (Environmental Assessments and Miscellaneous Amendments) (EU Exit) (Northern Ireland) Regulations 2018, SI 2018/1235; made under the European Communities Act 1972 s.2(2); European Union (Withdrawal) Act 2018 s.8(1). In force: In accordance with reg.1.

Planning (Appeals) Bill 2018 (HC Bill 300) A Bill to limit the grounds of appeal against decisions on planning applications consistent with a neighbourhood development plan or local plan.

Bowes, Ashley, "New commission to guarantee new-builds are beautiful" J.P.L. 2019, 2.

Bowes, Ashley, "Planners given free access to satellite images" J.P.L. 2019, 2.

Field, Duncan; McKeegan, Victoria, "Planning change: is there an alternative?" E.G. 2018, 1847.

McGeady, Bob; Lewis, Meyric, "Certificate of lawfulness" J.P.L. 2019, 3.

Vas, Michele, "Section 203 as a regeneration tool?" P.L.J. 2018, 366.

Webster, Tina, "Land value capture - uncertain times" E.G. 2018, 1845.

Real Property

CQN RTM Co Ltd v Broad Quay North Block Freehold Ltd [2018] UKUT 183 (LC), Judge Hodge QC, UT (Lands). Right to manage–Statutory interpretation

Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd [2018] UKSC 57, [2018] 3 W.L.R. 1603, Lady Hale PSC, SC. Easements–Sports and leisure facilities

TW Logistics Ltd v Essex CC [2018] EWCA Civ 2172, [2018] 3 W.L.R. 1926, Lewison LJ, CA (Civ Div). Village greens–Registration

Fire Safety (Leasehold Properties) Bill 2018 (HC Bill 298) A Bill to require freeholders of certain properties that have failed fire safety tests to carry out remedial work; to make provision for sanctions for such freeholders who fail to carry out such work; to ensure that leaseholders are not held liable for the costs of such work; to make provision for a loan scheme to assist freeholders in carrying out such work.

Ali, Naveed, "Moral authority" P.L.J. 2018, 366.

Brown, Sarah, "An exploratory initiative" E.G. 2018, 1845.

Bruce, Andrew, "Restrictive covenants: modifying the benefit" N.L.J. 2019, 169(7824).
Burton, Paul, "Up on the roof, and up in the air" E.G. 2018, 1843.
Cowap, Charles, "Time for a charm offensive" E.G. 2018, 1844.
Driscoll, James, "Is commonhold back on the agenda?" E.G. 2019, 1903.
Lang, Katherine; Vidal, Robert "Land agreements and competition law" E.G. 2018, 1848.
Mills, Matthew, "Single name family home constructive trusts: is Lloyds Bank v Rosset still good law?" Conv. 2018, 4.
Murrin, Alison, "Limiting liability on certificates of title" E.G. 2018, 1842
Packer, Steve, "Making sense of the mine of information" E.G. 2018, 1844
Pemble, Stuart, "Surveyor's negligence: what damages?" E.G. 2018, 1842.
Pilgrim, Tarnya; West, Laura, "Navigate your way to termination" E.G. 2018, 1843.
Seitler, Jonathan; Seitler, Miriam, "Reckless abandon?" E.G. 2018, 1844.
Small, Elizabeth, "Taxing changes afoot for foreign buyers" E.G. 2018, 1842.
Whittell, Mark, "Boundary disputes: the solicitor's nightmare" N.L.J. 2018, 168(7819).
Wood, Gillian; Willcox, Richard, "Termination and relocation under the Code" E.G. 2018, 1843.

Real Property (Northern Ireland)

Rodgers v Department of Agriculture and Regional Development [2018] 2 WLUK 714, Henry Spence, Lands Tr (NI). Estoppel–Limitation periods–Damage to property–Compensation–Northern Ireland

Trusts

Holmes, Allan; Hartless, Elizabeth, "'Tis the season" Tax. 2018, 182(4677).
Pawlowski, Mark, "Unconscionability in modern trust law" T. & T. 2018, 24(9).

Trusts (Scotland)

Chemcem Scotland Ltd v Beaton 2018 S.L.T. (Sh Ct) 371, Sheriff J Mundy,Sh Ct (Tayside) (Falkirk). Constitution of trusts–Writing–Personal rights