

2/10/20

U1 / Intro to Land Law

1. 'Property' and 'Land Law'

Land is just one type of 'property'. 'Property' can be physical things, rights in those things ('property rights'/'proprietary rights') and intangible assets ('choses in action'), such as shares in companies.

In terms of physical things, these divide into land and chattels. Chattels are any physical thing that is not land, such as tables and chairs. 'Land' as a physical thing includes:

1. The ground below the surface, as far as modern technology allows us to exploit it (*Bocardo SA v Star Energy UK Onshore Ltd* [2011] 1 A.C. 380).
2. The surface, including trees and plants growing from it.
3. Any structures or items on the land that are objectively intended to form part of it (*Elitestone Ltd v Morris* [1997] 1 W.L.R. 687).
 - E.g. building a brick wall or a garden shed.
 - When you bring something onto the land, it can become part of the land if you intend for it to be so. You can always remove or demolish it.
 - Kitchen sink example: when you buy a kitchen sink in a store, it is not part of any land (it is a chattel). However, it does become part of the land once you install it.
 - If you put a clock on a wall, it is not intended to become part of the land.
 - Courts focus on the degree to which something is attached to the land, and how much damage it would do to remove it.
4. The airspace above the surface to a reasonable height (*Bernstein v Skyways & General Ltd* [1978] Q.B 479).
 - Probably only a couple of hundred metres to allow planes to fly without trespassing.
 - As some airspace above the surface is treated as 'land', a sale of a portion of this airspace is technically a sale of land.
 - A recent issue regarding this is the increase in the use of drones above people's land.

All common law systems provide special rules for property rights in land and contracts to use land. 'Land law' is the study of these rules.

Property also includes rights we have in physical things. We often call these 'property rights' or 'proprietary rights'. An 'ownership' right is an example. If for instance one 'owns' a book, what one has is a right over that book. The same goes if one 'owns' land: one has a right over that land. As will become clear, however, one does not have to be an owner of a physical thing to have a property right in it. In other words, we can have property rights to use other people's land.

securing a mortgage if Y has a poor credit history). Historically, as we will see from the case law, male partners often held the sole legal title to property, and we will explore the role that gender plays in these cohabitation disputes.

Where only one partner holds the legal title, the starting point is always that this party is the 'absolute owner' of the estate; that is, that they do not hold it on trust.

This, however, is only a starting point. It is open to any other person to show that they are entitled to a beneficial interest in the land. In so doing, the other party will have proven that the legal estate is, in fact, held on trust, and not absolutely. If a claimant succeeds in this respect, the next question to be asked is how the equitable interest is held (for example, it may be decided that the legal owner and the claimant are each 50:50 tenants in common of the beneficial interest). We often call these two stages the 'acquisition' and 'quantification' stages.

For present purposes, it would seem that the ways in which the non-legal owner could succeed in establishing a beneficial interest in the property are as follows:

- i. They could rely on a valid express trust (section 3.2).
- ii. They could (very likely only in non-family home cases) seek to show a purchase money resulting trust (section 3.3).
- iii. They could show a common intention constructive trust (section 3.4).
- iv. They could rely on proprietary estoppel (see section 4).

3.2 Express trust

The formalities for an express trust, it has been seen (section 2.2, above), are contained in s 53(1)(b) LPA: the trust must be evidenced in writing and signed. This can be done at any time. Such trusts will be interpreted in the same way as trusts executed by joint legal owners (on which, see section 2.2.1 above). Such a trust will likewise be conclusive *Goodman v Gallant* [1986] Fam.106; and *Pankhania v Chandegra* [2012] EWCA Civ 1438 unless it is overridden by a subsequent proprietary estoppel trust (e.g. *Stack v Dowden* [2007] UKHL 17, at [49] per Baroness Hale; and *Clarke v Meadus* [2010] EWHC 3117 (Ch) (on proprietary estoppel, see section 4, below).

There is often frustration from judges that more people don't do this when they move in (it would make life easier). You can see why couples don't want to do this when they first move in as it kind of crushes the romance :/

3.3 Purchase money resulting trust

Not included in slides.

A purchase money resulting trust, as we have noted already, is one under which the beneficial interest is shared according to the extent of each party's contribution to the purchase price of the asset.

- *Like in halls of residence - no exclusive possession over the rooms as landowners will need to enter during the term.*
- c. the occupant is required to vacate the property during particular times (*Aslan v Murphy* [1990]); or
- d. the landowner can enter the premises at any time to ensure compliance with the agreed terms (see *Westminster CC v Clarke* [1992])
 - *Like in a hostel.*

On the other side of the line are two types of terms. Firstly, one can have exclusive possession even if there are terms that limit how one can use the land (e.g. not to keep pets). Secondly, *Street* (at 816) confirms that 'limited rights' to 'enter and view and repair' are compatible with exclusive possession as well.

- *Landowners should get prior consent to come round.*

If a term is at odds with exclusive possession, but there is no genuine intention to implement it, it is overlooked. A non-genuine term is called a 'pretence': *Antoniades v Villiers* [1990]. To decide whether a term is a pretence: (*emphasis on non-genuine*)

'... the court must consider the surrounding circumstances, including any relationship between the respective occupiers, the course of negotiations and the nature and extent of the accommodation and the intended and actual mode of occupation of the accommodation': *ibid*, at 458, per Lord Templeman)

'[Subsequent conduct] is certainly admissible as evidence on the question of whether the documents were or were not genuine documents giving effect to the parties' true intentions' (at 469, per Lord Oliver)

Antoniades v Villiers [1990] 1 A.C. 417

- Cohabiting couple agreed to take a one-bedroom flat.
- A right reserved to the landowner to allow others to share the flat was a pretence.
- Couple had exclusive possession, and with it, a lease.

Huwylar v Ruddy (1996) 72 P. & C.R. D3

- Term to clean a room for 20 minutes per week.
- The occupant later indicated that he would clean the room himself.
- No pretence: the occupant could have insisted on the resumption of cleaning.
- If a term hasn't been exercised, or it stops being exercised, that is not proof that it is a pretence.

For another recent case applying the same principles, see *Camelot Garden Management Ltd v Khoo* [2018] EWHC 2296 (QB).

you can be evicted on a no fault basis after six months (provided 2 months notice is given in writing).

Provided these conditions are met, the landlord does not have to give any reason for eviction. These 'no fault' evictions can be difficult to challenge as provided the landlord has followed the correct procedure they are entitled to possession.

'There is no concept that is more fundamental than a right of property. Where it exists, it is for the owner to exercise it as he pleases. He does not need the permission of the court, nor is it subject to the courts discretion...these are the rights which the court must respect and which it will enforce if asked to do so.' Lord Hope *Fisher v Brooker* [2009] 1 W.L.R 1764 at [8]

It has been argued that Section 39 Deregulation Act 2015 has increased tenants' protections from s21 eviction due to additional requirements imposed on landlords. A s21 notice is invalid if the tenant has not been supplied at the start of the tenancy with a gas safety certificate, an Energy Performance Certificate, evidence that a deposit has been lodged with one of the tenancy deposit schemes, and a copy of the Government's 'How to Rent' guide.

Despite this, there have been calls for further reform. Scotland has recently done just this, introducing The Private Housing (Tenancies) (Scotland) Act 2016 and a system that allows landlords to evict tenants on the basis of 18 grounds. For instance, if the owners want to live in the property, or if the tenant has been engaging in antisocial behaviour.

In support of further reform, The Joseph Rowntree Foundation has highlighted that there has recently been a sharp rise in Section 21 evictions in London, which is not fully explained by the growth of the private rented sector. Their report highlights that s21 evictions have significant consequences beyond the obvious issue of being evicted. They suggest that forced moves can have serious impacts for people's health and employment and, for children's wellbeing.

In 2019 the Government launched a consultation on how section 21 of the Housing Act 1988 has been used in the past, and the circumstances in which landlords should be able to regain possession once it has been abolished, including what changes may be necessary to the existing grounds for possession in Schedule 2 of the Housing Act 1988. However, the anticipated Renters' Reform Bill is unlikely to be published any time soon, and the COVID-19 crisis has only shone a light on the desperately vulnerable situation that so many renters find themselves in (see further discussion in section 4.2)

The Lettings Industry Council (TLIC) 'Beyond section 21' Report claims that the abolition of s21 will result in:

- A tougher screening process for tenants, impacting those on housing benefits, lower-income families and insecure employment the most.
- A fall in the private rented dwelling stock in England by 20%, with the impact falling heaviest on vulnerable tenants claiming benefits, as landlords seek to either leave the PRS or move towards other market segments such as short-term lets.

(c) Two defences

Schedule 3(2) provides two defences for buyers. The right will not bind if either defence applies. They are as follows:

i. inquiry was made of the right-holder before the disposition, they failed to disclose the right and they could reasonably have been expected to do so (Sch 3(2)(b));

Begum v Issa (County Court (Leeds) 5 November 2014)

Mortgage Express v Lambert [2017] Ch. 93

- Obiter discussion of this defence.
- If the defence applies, it is irrelevant if the buyer ought to have realised that the person had a right in the land.

ii. the occupation of the right-holder would not have been obvious on a reasonably careful inspection of the land at the time of the disposition, and the buyer does not have actual knowledge of the right at that time (Sch 3(2)(c)).

- *We await further case law on how this defence works.*

2.4 Other claims

Other claims may arise out of the circumstances surrounding a sale. Let us first consider a property-right holder whose interest does not bind the buyer:

a) Claims against the seller: a beneficiary can sue a trustee who breaches their duty to them in selling the land (e.g. if the trustee does not believe they are acting in the beneficiary's best interests). When a property right also involves a contractual relationship (e.g. a lease), there may also be a claim for breach of contract.

b) Claim to 're-impose' the right: a non-binding right will be re-imposed (*because the right has been defeated*) on the buyer when their conduct is 'unconscionable': *Lloyd v Dugdale* [2001] EWCA Civ 1754, at [52]. This happens if they accepted 'a new obligation' to respect the right before the sale and then afterwards they deny that it binds them: *ibid.* See *Chaudhary v Yavuz* [2011] EWCA Civ 1314 (not merely a sale 'subject to' rights); *Binion v Evans* [1972] Ch. 359 (materially reduced price); and *Lysus v Prowsa Developments Ltd* [1982] 1 W.L.R. 1044 (explicit references to the right and other factors). This form of liability can also apply to licences: *Binion v Evans*.

c) Contracts (Rights of Third Parties) Act 1999: if the buyer promises in the sale contract to respect a right, any refusal to do so could give rise to a claim under the 1999 Act.

Task 4: Read N. Cobb and L. Fox 'Taxonomies of Squatting: Unlawful Occupation in a New Legal Order' (2008) 71(6) MLR 878 What does the paper argue about the legal responses to adverse possession? What points does it make about the difference between good faith and bad faith squatting, the landowner's duty of stewardship, and the question of compensation?

3.2.3 The blameless landowner and the blameworthy squatter...

Factual possession of the property: the courts are generally reluctant to deprive the true owner of possession if there is any kind of evidence that they still had control of the land.

Similarly, the possession must be adverse meaning the landowner can easily stop the 'adverse' nature of the possessions by providing a licence.

In a 2008 piece for the Modern Law Review Cobb and Fox (Taxonomies of Squatting: Unlawful Occupation in a New Legal Order') highlighted that:

- 78,000 families are in temporary accommodation in England and Wales
- 3.8 million new households are estimated to be in need of accommodation by 2016
- Properties currently lying empty could potentially provide around 600,000 new homes. Almost 100,000 of these in London alone where the housing market is most saturated.

Further the impact of empty homes on local communities has been flagged in a 2018 House of Commons Briefing paper:

- High levels of empty properties are recognised as having a serious impact on the viability of communities. Consequently, it has been identified that dealing with empty properties can have social, regenerative, financial and strategic benefits. HC Research Briefing paper, Empty Homes (England) Number 3012, 13 June 2018

The number of empty homes in England in October 2019 at 634,453. Of these, 216,186 were classed as long-term empty properties (empty for longer than 6 months).

Action on Empty Homes Report 2018: Mapping of the data at local authority level shows that many of the areas with higher levels of long-term empty homes are found in the North of England in local authorities which tend to have:

- *Lower house prices and more households on lower level incomes than the rest of England - more pre-1919 terraces.*
- *More antisocial behaviour.*
- *More changes in population/higher population turnover.*
- *More crime.*
- *More private rented accommodation.*
- *More private rented accommodation that does not meet the decent homes standard.*
- *Thirty-seven of the 53 local authorities with 1.2% or more of their homes long-term empty are in the North, nine are in the Midlands, and seven are in the South.*

Are these numbers right?

the legal mechanisms/cases and broader policy/social issues in constructing your argument.

- Where only one partner holds the legal title, the starting point is always that this party is the 'absolute owner' of the estate; that is, that they do not hold it on trust.
 - Legal mechanisms include: relying on a valid express trust; show a common intention constructive trust; or rely on proprietary estoppel.
 - i. Express trust: must be evidenced in writing and will be conclusive unless it is overridden by a proprietary estoppel trust.
 - ii. Common intention constructive trust: *Rosset* identified two ways in which this trust can arise: a) the actual/express constructive trust and b) the inferred common intention constructive trust. a) requires an actual intention to share beneficial ownership (demonstrated by express discussion between the parties) and detrimental conduct by the claimant. b) considers either a direct contribution to the purchase of the property; significant improvements to the property; and also occasionally accepts some indirect payments when the SLO could not make direct payments without these from the claimant.
 - iii. Proprietary estoppel: a doctrine which seeks to stop unfair conduct. There are three matters which the claimant must show in order to establish a proprietary estoppel: inducement, detriment, and unconscionability. A remedy is then granted but this may not always be a share of the land; it could be a financial remedy.
 - *Why might reform be problematic?*
 - i. Religious reasons: undermines the religious purpose of marriage and reduces it down to mere financial safety. Questionable to treat marriage and cohabiting on the same level.
 - ii. Introducing a new scheme with new definitions will mean that we need cases to see it in practice (means much more litigation). When these are actually implemented it could lead to repetition of the same issues as before.
 - iii. Potentially unethical to make it an opt-out scheme (like the Law Commission's was) - to what extent can you implement a statutory scheme on those that didn't ask for it. At least marriage and civil partnerships are voluntary and leave people with choice.
2. What is the current law on SLO? What impact has *Kernott* had/how does the approach to relevant factors in JLO cases differ? How have the courts dealt with SLO cases post *Kernott*? What issues are visible in the current law on SLO and how do cases illustrate these? What is the impact of the current issues (e.g. what kind of inequalities are visible)? Why is there a need for reform? How do other jurisdictions deal with cohabitation disputes/what other options could be used? Remember to consider both the legal mechanisms/cases and broader policy/social issues in constructing your argument.
- Where only one partner holds the legal title, the starting point is always that this party is the 'absolute owner' of the estate; that is, that they do not hold it on trust.
 - Impact of *Kernott*:

As with all essays, some legal context is useful early on. One cannot go straight to Sch 3(2). Explain instead the overall legal framework in which it operates. Please think about what matters ought to be mentioned as part of this. After this, one could set out Sch 3(2) itself. Think about how you would explain its effect, and what case law to use to clarify how it applies.

In terms of analysis, the background here is that it is unreasonable to expect rights always to be recorded on the register to bind a buyer (handout, p 9). In these cases, there must be some other rule(s) (handout, bottom of p 9 onto p 10). What should they be? We can only answer this by asking what the 'interests' of purchasers are, and weighing them against the 'interests of occupiers' (i.e. persons with property rights in the land who can be described as 'occupying' it). In other words, what rules would these persons favour? Do purchasers and occupiers want different things? Please take time to think about this. Once you have thought about this, you are in a better position to assess whether Sch 3(2) gets the balance right. It is necessary to view Sch 3(2) in the round to make this assessment, but just some of the individual aspects we might discuss are (i) whether more/less rights should have 'capacity to override'; (ii) whether 'actual occupation' is being defined too narrowly/widely; and (iii) whether the two defences are appropriate. Please think about these and any other issues that occur to you.

You may find it helpful to think about beneficiaries separately from those with other types of property right. Cases involving beneficiaries raise especially stark choices (handout, pp 10–12). There are also cases (and statutory rules) that only stop beneficial interests (but not other rights) from binding purchasers. Please identify what these are from your reading, the handout and the recordings. Do you think these rules are clear and appropriate? Should any of them be overruled/abolished or reformed?

- *Land registry should 'mirror' everything about the property - mirror effect.*
- *Rights not on the reg are in Sch3(2) - relates to overriding interest. Sometimes will bind a buyer even if they're not on the register - hence why it's called a 'crack in the mirror'.*
- *Is the law necessary because we need to find the ideal balance between buyer and the occupier or should it be reformed?*
- *Sch3(2):*
 - *Relates to people in actual occupation.*
 - *4 ways to show actual occupation:*
 - *Personal presence; vicarious occupation; symbolic occupation; and placing personal belongings on the land.*
 - *Para 2 talks about 2 defences for the buyer:*
 - *inquiry was made of the right-holder before the disposition, they failed to disclose the right and they could reasonably have been expected to do so (Sch 3(2)(b));*
 - *the occupation of the right-holder would not have been obvious on a reasonably careful inspection of the land at the time of the disposition, and the buyer does not have actual knowledge of the right at that time (Sch 3(2)(c)).*
 - *Binds unless they show one of these two defences.*

- *By the time Elliott removes the fence in Nov 2020, Kinmont has possessed it for over 10 years so he could apply to be the registered proprietor. Bring up Zarb v Parry.*
- *Elliott would then file a counter notice unless Kinmont fell under one of the three exceptions in Sch 6(5):*
 - *Estoppel - not induced by Walter to believe the land was his. Or was he? Difficult claim to establish but mention the ambiguous text. Relied on to his detriment when building the sheds as a way to keep the animals under control?*
 - *Some other reason - nope.*
 - *Boundaries - Kinmont reasonably believed that the land was his for a continuous period of over 10 years - his solicitor said that his land led up to the wall where he erected the fence and he was not informed that this was incorrect until Nov 2020. Relying on legal advice case - IAM Group v Chowdrey - reasonable to rely on legal advice even if wrong. Reasonable until Nov 2020 when the barrister concludes that the strip was definitely part of North Reiver.*
 - *Belief must be reasonable (Dowes v Bradford MBC (2020)).*
- *Has Elliott retaken possession? He only took down the fence and put up signs so is this just the preparatory steps to exclude Kinmont and retake possession? (Zarb v Parry (2012)).*
- *Mention not a criminal offence with LASPO. residential squatting only. Include the odd sentence about how it could be if the facts were different.*