2017-2018

PROPERTY LAW - I

Welcome to the Property Law I course. The materials which will form the basis of the lecture programme are attached. Please bring them along to all sessions. Also included are questions, which we shall go through in class and past papers, which you can browse at leisure.

The examination is a 90 minute, closed book exam.

It will take the following format:

The exam will comprised of two parts, Part I and Part II. There will be two questions in each part. Part I will contain essay questions and part II will contain problem questions. You must answer two questions, one from part I and one from part II. The questions in Part I are problem questions and in Part II essay type questions.

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You may wish to purchase a textbook. The one I recommend is:

Textbook on Land Law, Judith-Anne Mackenzie, published by Oxford University Press

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Topic ONE
INTRODUCTORY LECTURE

A. The Meaning of Property

Property is a relationship between people and a thing, rather than the thing itself. Property is a construct of the law. It is the rights we have against other people recognised by our legal system in relation to a thing we claim to own.

Land law is concerned with the relationship people have with land and the state of that land. People's relationship with land depends on many factors including the cultural elements. Property law tells us much about the society to which it applies.

A vast number of different rights are capable of existing simultaneously over the same piece of land – something that does not usually happen with other types of property.

The three main functions of modern land law are:
1. To control the use of land for the benefit of the present and future community as a whole - planning legislation primarily facilitates this. This is a relatively recent innovation, and we will not be studying this in this course.
2. To facilitate commercial transactions in land, for example, mortgages.
3. To enable the endowment of families, charities and other public purposes.

B. Ownership and Possession

Property may be considered to be any thing that can be **owned** (we are concerned in this course with land, and hence it is the ownership of land that is important to us). Ownership involves the right to the exclusive enjoyment of a thing.
Note that possession and ownership are not always the same thing. For example, A borrows B's book. The possession is with A, but the ownership is with B.

Possession is usually a matter of physical fact and implies power and control: it can be described as the overall control over the property.

Ownership is a right that the law recognises.

C. Definition of Land

A dictionary definition says that land is the solid portion of the earth's surface.

Coke said that "Land in the legal signification comprehendeth any grounds, soil or earth whatsoever, as meadows, pastures, woods, moors, waters, marshes, furzes (gênet) and heath (la lande)… It legally includeth also all castles, houses and other buildings."

The modern legal concept of land also embraces not only the physical surface of the earth, but also buildings, minerals etc. An artificial heap of waste could become part of the land if grass and trees grow on it.

The statutory definition of land is contained in the Law of Property Act 1925 section 205 (1) (ix). "Land includes land of any tenure, and mines and minerals whether or not held apart from the surface, buildings or parts of buildings (whether the division is horizontal, vertical or made in any other way) and other corporeal hereditaments: also a manor, an advowson, and a rent and other incorporeal hereditaments, and an easement, right, privilege or benefit in, over or derived from land; but not an undivided share in the land; and 'mines and minerals' include any strata or seam of minerals or substances in or under any land, and powers of working and getting the same, but not an undivided share thereof…".

D. The Classification of Property

Property can be classified into;

- Real property – this is anything to do with land (immeubles)
- Personal property – all other property (meubles)

'Land' includes real property and chattels real; personal property (or personalty) includes chattels real and chattels personal.

Real property itself again subdivides into 2 categories:

(i) Corporeal hereditaments;
(ii) Incorporeal hereditaments.

(i) Corporeal hereditaments

This includes land, buildings, minerals, trees and all other PHYSICAL things which are part of the land.
It is the physical matter over which ownership is exercised.

(ii) Incorporeal hereditaments
These are not things in relation to the land but rather are RIGHTS over the land. As Blackstone said, they are creatures of the mind.
Examples include :
Easements (servitudes)
Profits à prendre

Personal property
This can be divided into:

(i) Chattels personal
(ii) Chattels real

(i) Chattels real

These are connected to land but are classed as chattels because of the remedy which wa available, which was merely a personal remedy. The only chattel real which is of any import today is the leasehold . They are classed as chattels real because they have their historical basis in contract law, and the grantee had mere personal rights if his was dispossessed.

(ii) Chattels personal

Here we are dealing with personal property.

Chattels personal subdivides into two:
(i) Choses in action; and
(ii) Choses in possession.

Choses in possession
These are tangible items, for example, a book. It is a thing which the owner is in actual enjoyment of. The right to a chose in possession is capable of protection by physical control.

Choses in action
These are intangible rights, for example, a copyright. It is a thing of which a man has not the present enjoyment, but he has the right to recover it by action. The right is enforceable only by an action.

The consequences of the distinction

The classification of property was more important in the past than it is now. Historically the distinction was important for the following reasons:
1. Under feudal law the leasehold could be bequeathed, whereas the freehold could not be left by testamentary disposition.
2. The fee simple of a deceased person was not available to pay the creditors.
3. Successive interests could not be created of personalty.
4. The rules for devolution of property on the death of the deceased was different with different property. Historically if a person died intestate the realty would go to his heir and the personalty to the next of kin.

The 1925 property legislation abolished most of this. (We shall come back to this)

E. Sources of Land Law

Historically land has been an important asset in England. In agricultural societies it was the principal source of wealth. Until the beginning of the 20th century both the right to sit on a jury and the right to vote in an election was directly related to the ownership of land.

Therefore to protect such rights, to resolve the conflicts that arose out of the ownership of land and to facilitate the transfer of the ownership of land legal doctrines and institutions emerged. Many of our modern day concepts in land (for example, the fee simple absolute in possession and the mortgage) are based on the doctrines that evolved in the feudal era. This is why it is necessary to study, in noutline at least, the history of land law.

There are three main sources of land law:
(a) The common law;
(b) Equity; and
(c) Statute

(a) The Common Law

This means the law which was applied to the country as a whole by the king's courts (Curia Regis), as opposed to the local feudal and customary laws which varied from place to place and were administered in each locality free of central control until the middle of the 12th century. The centralised judicial system established in the two centuries after the Norman Conquest (particularly in the reign of Henry II of England) resulted in a body of new and uniform rules.

The new rules were laid down and developed by the decisions of judges in particular cases. Centralised records were kept and a systematic body of doctrine began to develop. Common law came to be known as the ordinary judge made law of the three central royal courts (King's Bench, Common Pleas and Exchequer). Much of the early common law was concerned with ownership and possession of land and from the common law emerges the following doctrines in relation to land law;

- That all land is held and owner by the Crown;
- That the leasehold is a species of personal (as opposed to real) property.

The superstructure of our modern law rests largely on common law principles.

(b) Equity

This came into being because of the defects of the common law. It acted as a supplement to the doctrines and procedures that the common law developed. From equity we see developed;

- The trust
- Discretionary remedies such as the injunction and specific performance.

(c) Statute

This is parliamentary legislation. The statutory reform of land law really began in the 19th century. However, the most significant changes were made in 1922 and in 1925. Six property statutes were introduced in 1925, some consolidating the 1922 legislation, and some introducing new legislation. The resulting body of law was broken down into six Acts:

The Settled Land Act 1925
The Trustee Act 1925
The Law of Property Act 1925
The Land Registration Act 1925
The Land Charges Act 1925
The Administration of Estates Act 1925

These Acts, together with the unrepealed parts of the 1922 legislation form the 'property legislation' of 1925. Some of the reforms of 1925 were made to simplify and to rationalise the substantive law. But those thay are the most important were those designed to simpyfi conveyancing, ie, the transfer of land. By and large the 1925 legislation favours the purchaser, and eliminate the need for himto make complex enquiries before purchase.

Since 1925 there has been a steady flow of legislation, the most recent Acts being the Land Registration Act 2002 and the Perpetuities and Accumulations Act 2009.

Topic TWO
ESTATES AND INTERESTS IN LAND

A. Legal Estates

The 1925 legislation drastically reduced the number of legal estates and third party rights (interests) that can subsist in relation to land. The Law of Property Act 1925 s.1(1) provides that only two legal estates may subsist in relation to land, namely:

1; the fee simple absolute in possession, and
2; the term of years absolute.

1; The fee simple has been described by Challis in the following way:

"A *fee simple* is the most extensive in *quantum*, and the most absolute in respect to the rights which it confers, of all estates known to the law. It confers, and since the beginning of legal history it always has conferred, the lawful right to exercise over, upon, and in respect to the land, every act of ownership which can enter into the imagination, including the right to commit unlimited waste; and, for all practical purposes of ownership, it differs from the absolute dominion of a chattel, in nothing except the physical indestructibility of its subject." (Challis, Law of Real Property (3rd edn, 1911), p. 281)

The fee simple absolute in possession is the largest estate known in law, and the holder of such an estate is effectively the owner of the land.

- Fee means that the estate could be inherited

- Simple means that the estate could be inherited by heirs generally. Changes made in 1925 make the idea of heirs obsolete but it is still true that the fee simple estate can be inherited by anyone entitled to it by will or on intestacy.

- Absolute means that there are no conditions attached to the grant.

- In possession means that the person is entitled to a present right to enjoyment of land. Note that X the person with the fee simple in possession, may not be entitled to physical possession, in the sense of occupation.

Eg. where there is a lease granted by X; X is still 'in possession').

The leasehold estate

A demise or lease is the grant of a right to exclusive possession of land for a determinate term less than that which the grantor himself has in the land.

(1) Origins of the lease.

The lease was originally a purely contractual arrangement. The common law eventually recognised the lease as a property right. A lease still has a dual nature – it is both a contractual and a property right. The contract between the landlord A and the tenant B regulates their relationship inter se. Many different contractual conditions - settle matters such as rent, liability to repair etc.

For such a contractual agreement to be a lease so that B has also a property right, the agreement must comply with certain essential criteria. A contractual arrangement which complies with the criteria is variously called a lease, tenancy or a term of years. Nothing turns on the name.

Street v Mountford [1985] AC 809: 'The manufacture of a five pronged implement for manual digging results in a fork even if the manufacture unfamiliar with the English language insists that he intended to make and has made a spade'.
But not all leases are proprietary**:** *Bruton v London Quadrant Housing Trust* [2000] AC 406 HL

(2) Sublease (underlease)

A, the freeholder grants a 15 year lease to B: A is B's landlord and B his tenant.
B grants a lease of 12 years to T. B is T's landlord and T is B's tenant.
Note: A is not T's landlord.

It is possible to have a sub-sub lease (T grants lease for 10 years to C) so that there are several tiers interposed between the freeholder and the tenant occupying the land.

Leases can be for a short or long term; and can be over a very small or very large area of land.

B. Legal Interests

A number of legal interests can subsist in relation to the land and they are contained in s.1(2) LPA 1925.

s.1(2)(a) an easement, right or privilege in or over land for an interest equivalent to an estate in fee simple absolute in possession or a term of years absolute;

s.1(2)(b) a rentcharge in possession issuing out of or charged on land being either perpetual or for a term of years absolute; (Rentcharges Act 1977).

s.1(2)(c) a charge by way of legal mortgage;

s.1(2)(d)... and any other similar charge on land which is not created by an instrument;

s.1(2)(e) rights of entry exercisable over or in respect of a legal term of years absolute or annexed for any purpose to a legal rentcharge.

ONLY those matters within s.1(1) and (2) LPA 1925 are capable of being legal.

Every other interest in land is equitable only: s.1(3)

Estates and interests in s1 are capable of being legal, and therefore must be created in the correct manner in order to be legal (see post).

C. Equitable interests

Apart from those matters within s1(1) and (2) everything other right which is capable of being an interest in land is equitable only. S1(3) LPA 1925: all other estates, interests or charges take effect as equitable interests.

- Restrictive covenants; estate contracts: options and rights of pre-emption
- Quasi-equitable interests: rights under the Family Law Act 1996
- Rights which can be legal but are not made by deed are treated as equitable interests, as estate contracts: *Walsh v Lonsdale* (1882) 21 Ch D 9
- Rights arising by estoppel and constructive trust
- Matters arising under various statutes: eg writs and orders.

D. The creation of new interests in land

(1) Express creation

New interests in land can be deliberately created.

(2) 'Informal' creation

(a) Adverse possession Requires 12 years uninterrupted user of land which belongs to some one else in a manner which is adverse ie against the interests of the actual owner. The original owner's fee simple estate is extinguished. An estate arising in this way is legal. In **registered land**, for the future it will only be possible to acquire title to land in this way in very limited circumstances:Land Registration Act 2002, sections 96-98.

(b) Implied easements -eg easement arises by prescription (long user.) Here a new right has arisen – no rights are extinguished. Easements arising by implication are legal.

(c) Constructive/resulting trusts and proprietary estoppel.

(d) The doctrine in *Walsh v Lonsdale* (1882) 21 ChD.

Topic THREE
Acquisition of Land - Contract and Conveyance

A. Contracts for the creation or sale of interests in land

What do we mean by 'Interest in land'
A sale includes a sale, lease, mortgage etc. Land is defined in s205(1)(ix) Law of Property Act 1925:

> "Land" includes land of any tenure, and mines and minerals... buildings or parts of buildings (whether the division is horizontal or vertical or made in any other way) and other corporeal hereditaments; also a manor, an advowson.... And other incorporeal hereditaments; and an easement, right…..over or derived from land; but not an undivided share in land...."

Remember it does not include wheat, grass (for hay) etc on the land, but it does include fixtures.

Contracts for the creation or sale of interests in land after 27 September 1989

The law relating to contracts for the sale or creation of interests in land is now governed by section 2 of the Law of Property (Miscellaneous Provisions) Act 1989, for contracts entered into after the Act came into force. It replaced section 40 LPA 1925.
Section 2 of the 1989 Act requires that a contract for sale or other disposition in land to be valid and enforceable at law by either party **must be in writing**.

The writing must incorporate **all** the agreed terms either in one document or, where contracts are to be exchanged, in each copy of the contract and the contract must be signed by or on behalf of each party. If any terms are missing from the contract they are treated as a separate contract.

Note that a contract for sale or other dealing with land which does not comply with these requirements is not a valid contract so cannot be enforced at law. In other words if A enters into an agreement to sell Blackacre to B, unless it complies with section 2 it cannot be enforced at law between A and B. There is nothing to stop A and B actually agreeing to treat it as enforceable. In Tootal Clothing Ltd v Guinea Properties Ltd [1992] 64 P & CR 452, section 2 was held to apply to exectutory contracts only (ie contracts that have not been carried out) and has no application where a contract has been completed.

The requirement of section 2 does not apply to a number of cases set out in section 2(5). The first of these is the short lease as defined in section 54(2) of the LPA 1925 (post). The second is any contract made in the course of a public auction.

B. Deeds or Conveyances

Section 52(1) LPA 1925 says "all conveyances of land or any interest therein are void for the purpose of conveying or creating a legal estate unless made by deed".

However a lease that is for a term not exceeding 3 years taking effect in possession at the best rent possible need not be created by deed, and may be oral or in writing – section 54(2) LPA 1925

Prior to the 1989 Law of Property (Miscellaneous Provisions) Act a deed had to be signed, sealed and delivered. Since 1989 this has changed.
Section 1(1)(a) provides that any rule of law which restricts the substances on which a deed is written is abolished . Section 1(3) provides that a deed will only validly be executed by an individual if it is signed by him in the presence of a witness who attests the signature or at his direction and in his presence and the presence of two witnesses who each attest his signature .

Traditionally the term signing has been given a liberal interpretation, and placing one's mark seems to have been sufficient.

The Act abolished the common law rule that a seal is an essential feature of a deed. Section 1(1)(b) provides that 'any rule of law which requires a seal for the valid execution of an instrument as a deed by an individual is abolished.'

Attestation
The provisions for signature also states that all deeds executed by individuals must not be attested. Whilst attestation was customary in practice it was not mandatory. The Act made it mandatory.
If the deed is not signed by a party because he is say incapable of so doing, then it must be signed by his direction and in his presence and there must be TWO witnesses who each attest the signature.

Delivery of the deeds
A deed must be delivered. This does not merely mean physical delivery, but a delivery accompanied by words or conduct signifying the grantor's intention to be bound by the provisions in the deed. Traditionally it used to be done by the person concerned placing a hand on the seal and saying, 'I deliver this as my act and deed.'

Form of deeds
It must now be made clear that the document is intended to be a deed. The best way to demonstrate this is for the written document to say THIS DEED…

Question

1(a) Outline the current statutory provisions necessary for the creation of a valid contract to create or sell an interest in land.
(b) Outline the current statutory provisions necessary for the conveyance of land.

TOPIC FOUR
Acquisition of land - Adverse Possession (squatting)

A. Introduction

Most legal systems have realised the necessity of fixing some definite period of time within which persons must bring an action. Since the Limitation Act 1623, the time available for litigation has been limiuted to a period of years from the commencement of the claim. In land law a person who has been unlawfully disposed of their land must pursue their claim within a definite period of time, otherwise their estate or interest in that land may be extinguished under what is known as the doctrine of adverse possession. The present law in governed by the Limitation Act 1988 and the Land Registration Act 2002.

Why do we have a doctrine of AP?

1. The doctrine is the embodiment of the policy that defendants should be protected from stale claims and that claimants should not sleep on their rights.
2. Land is a precious resource and should be kept in use and in commerce.
3. Since the basis of title in unregistered land is possession, AP reflects the 'best right to possess' which is th basis of ownership in unregistered land in English law.

The period of time in the case of unregistered land is 12 years - Limitation Act 1980 section 15. In general once time begins to run for the purposes of limitation, it will continue to do so unless the true owner brings an action to recover the disputed land. For these purposes an action refers to court proceedings.

In the case of unregistered land the period is ten years, but we shall look at this more later – Land Registration Act 2002 Sch 6 para 1(1).

B. The essential elements of adverse possession (which relate to both registered and unregistered land)

There are 2 main requirements that must be fulfilled in order to satisfy a claim for adverse possession.

1. Factual possession of the land by a person or persons;
2. Necessary intention to possess the land by that person or persons;
3. No licence.

1. FACTUAL POSSESSION

Time begins to run when the owner is **dispossessed or discontinues** his possession of the land, and adverse possession of the land is taken by some other person – Treloar v Nute [1976] 1 WLR 1295. Fry J in Rains v Buxton (1880) 14 Ch D 537 said that "the difference between the dispossession and the discontinuance of possession might be explained in this way – the one is where a person comes in and drives out the others from possession, the other case is where the person in possession goes out and is followed into possession by other persons."

What constitutes factual possession of the land?

This is a complex issue. It is a matter of fact depending on the circumstances of the case, but it was in earlier cases considered to be possession which is inconsistent with the title of the true owner – Leigh v Jack [1879] 5 Ex D 264. This approach was criticised in Powell v McFarlane [1977] 38 P & CR 452, where Slade LJ said, "Factual possession signifies an appropriate degree of physical control. It must be a single and [exclusive] possession… thus an owner of land and a person intruding on that land without his consent cannot both be in possession of the land at the same time. The question what acts constitute a sufficient degree of control must depend on the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly enjoyed."

In Seddon v Smith (1877) 36 LT 168 Cockburn CJ said that enclosure is the strongest possible evidence of adverse possession. In Buckinghamshire CC v Moran [1989] 3 WLR 152, the plaintiffs acquired a plot of land on 20 October 1955. It was not developed and was to be used at some time in the future for road development. Nothing separated this land from the defendant's house and garden, and the only approach to the disputed land was through the defendant's property. In 1967 the defendant's predecessors in title began to maintain the disputed land. They mowed the grass, trimmed the hedges and started using the property for their own purposes. On 28 July 1971 the house was conveyed to the defendants and the conveyance described the land as "together with … all such rights estate title and interests as the vendors may have in or over the plot." The defendant when he moved in locked the gates so as to prevent any access onto the land other than through the defendant's garden.

On 20 January 1976, the defendant wrote to the plaintiff pointing out the use made of the land since 1967 and adding it "has always been my firm understanding that the land should be kept by the owner of [the house] if and until the proposed" road diversion. On 25 March, however, the defendant's solicitors wrote to the council claiming that the defendant had acquired title to the plot by adverse possession.

Held, the defendant had established a good claim to title by AP.

In Barrett v Tower Hamlets LBC [2005] EWCA Civ 923 tenants of a public house used and occupied adjacent land and repaired and maintained a fence which secured it from access by third parties, whilst believing that the land was part of their tenancy. Neuberger LJ said that they had established a strong case.

Treloar v Nute – grazing cows and storing timber on the land – yes

Red House Farms v Catchpole (1977) 244 EG 295 – shooting over marshy ground – yes

Leigh v Jack – cultivation of land in the right circumstances – yes

Roberts v Swangrove Estates [2007] EWHC 513 – fishing – yes (claim over the foreshore)

Cf Tecbild v Chamberlain (1969) 20 P & CR 633 – children who played on land and tethered their ponies had not done enough

Pye v Graham [2003] 1 AC 419 – farming of land, grazing, liming and re-seeding the land, trimming the hedges and maintaining fences and ditches - yes.

Possession must be exclusive – the claimant must have been in possession against to the exclusion of the paper owner and all others.

In Leigh v Jack the person claiming AP had used the land for the storage of materials. The owner had also made occasional use of the land. Hence the claim for AP failed.

In British Waterways Board v Toor [2006] EWHC 1256, the squatter here had not excluded others from using the land and so the claim failed.

Possession must be adverse to the interests of the owner

This means that the claimant must be exercising factual possession of the land as a trespasser, rather than as someone who is entitled because he has the permission of the owner to occupy the land.
Therefore a tenant of the freeholder or a person to whom he has granted a licence, whether consensual or unilateral, cannot maintain that his possession was adverse- see Markfield Investments v Evans [2001] 2 All ER 238.
However, his possession may become adverse if it continues beyond the time when his lease or licence has come to an end – see Colchester BC v Smith [1991] Ch 448.
As Slade LJ said in the Buckinghamshire case said, "Possession is never adverse … if it is enjoyed by lawful title. If, therefore, a person occupies or uses land by licence of the owner with the paper tittle and his licence has not been duly determined, he cannot be treated as having been in adverse possession as against the owner of the paper title." This was reiterated in Pye.

Allen v Matthews [2007] EWCA Civ 216, person who had been given limited permission to use a yard for storage had successfully established his possession adverse, since he had substantially exceeded his use by permission.

Contrast Wallis's Cayton Bay Holiday Camp v Shell Mex [1975] QB 94, farmer sold land to D who intended to use it for the construction of a filling station some time in the future, once a new road was built. The road was not built, and the farmer used the land in a variety of ways, including his caravan park. Denning said that there was an implied licence so that the farmer had not defeated the intention of the D. If this case had been followed and had established a general principle then it would have made it very difficult to establish a claim based on AP.
Buckinghamshire case rejected this.
Colin Dawson Windows v King's Lynn (2005) 2 P & CR 19 said however, that a licence was implied because the paper owner (during the negotiations with the claimant squatters for sale of the land) asked the claimants to leave if the sale did not proceed, which demonstrated an implied licence to be on the land during the negotiations. Therefore it seems that such a licence can be implied where the actual facts of the case justify it.

In Barrett v Tower Hamlets, the court said that it would readily infer the grant of a licence during negotiations for the purchase or the letting of land, where the negotiating purchaser or tenant is in occupation.

Possession must be open

It must not be concealed. This means that time starts to run against the true owner where he would be able to observe that the land was being possessed.

2. INTENTION TO POSSESS

The fact that a person enjoys factual possession of the land in a manner which is adverse to the owner, is not enough for his to defeat the paper owner's title. He must also show that he has the requisite intention. This element is also known as the *animus possidendi*.

It had been thought that the intention necessary was the intention to own the land – Littledale v Liverpool College [1900] 1 Ch 19 and George Wimpey & Co v Sohn [1967] Ch 47.

However in the case of Pye (JA)(Oxford) v Graham [2003] 1 AC 419 the HL made it clear that such an intention was not necessary. All that was required was an intention to possess.
Lord Browne-Wilkinson said, "Once it is accepted that in the Limitation Acts, the word possession has its ordinary meaning (being the same as in the law of trespass or conversion) it is clear that, at any given moment, the only relevant question is whether the person in factual possession also has an intention to possess; if a stranger enters onto land occupied by a squatter, the entry is a trespass against the possession of the squatter whether or not the squatter has any long-term intention to acquire a title."

It seems to be that if the squatter believes that he enjoys possession by means of a lawful title (licence) then he cannot have the requisite intention to possess – Clowes Development v Walters [2006] 1 P & CR 1 Cf Ofulue v Bossert [2008] EWCA Civ 7 where the CA held that a person who believed that they were a tenant could be in AP. A person acting openly as owner in the incorrect beief that he has good title has the requisite animus possidendi – Armbrister v Lightbourn 2012 UKPC 40.

The intention to possess will be demonstrated by an intention on the part of the squatter to exclude the world at large, including the paper owner, so far as it is reasonably possible – Pye.

There is a very close relationship between the requirement of an intention to possess and the fact of possession.
In Powell v Macfarlane a boy started grazing his cow on the land at the age of 14. Slade J held that
this in itself did not demonstrate the necessary intention to exclude the true owner of the land.

True Owner has a future use for the property

Prior to Pye v Graham there was a view that the AP could not have the requisite intention where the true owner had an intention to put the land to some use in the future.
In Leigh v Jack, the claimant stored scrap metal on the property which he know was going to be used at a future date by the true owners for the construction of a street. It was held that he had not dispossessed the true owner.
In Buckinghamshire CC v Moran, the CA rejected the contention that Leigh v Jack meant that there could never be sufficient intention to possess where the possessor was aware of a future intended use of the land, and in Pye v Graham Lord Browne-Wilkinson considered that the "Suggestion that the sufficiency if the possession can depend upon the intention not of the squatter, but of the true owner is heretical and wrong." He said that the squatter's knowledge of an intention future purpose would only prevent AP in rare circumstances.

Intention to possess where the squatter would have been willing to pay the owner to occupy the land if asked.

This arose in Pye where the defendant would have been willing to pay the owner to occupy the land if the owner had asked for payment. Lord Browne-Wilkinson said that this did not negate the defendant's intention to possess.

Time starts running afresh by acknowledgment of title
If an AP acknowledges the original owner's title, time stops running in the AP's favour – section 29 LA 1988. A new time period starts from the date of acknowledgment. In Edginton v Clark [1963] 3 WLR 721 the AP wrote to the original owner of the land offering to buy it. The offer was accepted and a deposit paid, but the purchase was never completed. The AP was held, by making the offer, to have acknowledged title. Ofolue v Bossert [2009] 2 WLR 746 approved this decision but distinguished it on the facts from the O v B case.

C. Adverse possession and unregistered land

A squatter acquires good title in unregistered land after adversely possessing the land for 12 years or more – section 15 Limitation Act 1980. The effect of this section is to extinguish the rights of the owner in favour of the adverse possessor, who will be able to claim a new title of his own.

The adverse possessor will not be able to prove his title by means of title deeds, but rather will have to prove 12 years AP. The nature of the squatter's title was described by Lord Radcliffe in St Maryleborne Property Co Ltd v Fairweather [1963] AC 510, 513 , "He is not at any stage of his possession a successor to the title of the man he has dispossessed. He comes in and remains in always by right of possession, which in due course becomes incapable of disturbance as time exhausts the one or more periods allowed by statute for successful intervention. His title therefore is never derived through but arises always in spite of the dispossessed owner. If he can do this then he will take the land subject to any third party rights which affected it prior to the AP."

Successive Squatters
Title to land is relative rather than absolute. Thus possession by itself gives good title against the whole world with the exception of a person who has been in earlier

possession and whose right has not been barred. So, if an adverse possessor is ousted by a third party that third party cannot establish a defence that the adverse possessor is not entitled to the property. Possession will be sufficient for the adverse possessor to found an action in trespass against anyone except the true owner where title has not been barred – Asher v Whitlock.
If a squatter who is acquiring title under the Limitation Act 1980 is himself dispossessed, the second squatter can add the former period of occupation to his own – Site Developments (Ferndown) Ltd v Cuthbury 2010.

Similarly a squatter will be bound by subsisting third party rights in the land , whether they are legal or equitable, since he is not a bona fide purchaser. Nisbett and Potts' Contract (1906). It was held that a restrictive covenant was effective against a person who had acquired title to the burdened land under the Limitation Acts.

Because of the principle of relativity, successive squatters are entitled in the order in which they take possession, even if the true owner is not barred. A second squatter can as against the original owner, add to his own period of occupation periods of previous squatters and time will continue to run against the original owner from the beginning of the adverse possession so long as there are no gaps in the AP – Asher v Whitlock.

An adverse possessor who has not barred the owner of the land can sell the land to a purchaser as good a right as he has. For example, X has occupied the land for 8 years, and sells the land to Y who occupies for a further 4 years. The owner will be barred from bringing an action against Y
Where there is a gap between the respective periods of adverse possession, then the periods cannot be added together. The AP ceases and time runs afresh.

D. Adverse possession and registered land

Once the squatter has demonstrated the conditions necessary then under the old law on registered land and adverse possession, pending registration, the Land Registration Act 1925, section 75(2) provided that the original proprietor held the property on trust for the squatter who had to apply for registration as proprietor.

The Land Registration Act 2002 has introduced an entirely different approach. If the land being squatted on is registered, unless 12 years adverse possession can be proved as at 12 October 2003, then the LRA 2002 provisions apply.

Section 96 provides for a disapplication of section 15 of the Limitation Act 1980 in relation to registered land. A squatter will only be entitled to be registered as proprietor if he can prove various conditions are fulfilled, and these are found in Sch. 6 of the 2002 Act.

1. Sch 6 para 1(1) provides that "A person may apply to the registrar to be registered as the proprietor of a registered estate if he has been in AP of the estate for the period of 10 years on the date of application". Squatter will apply on a pescribed form issued by the land registry - form ADV1, which will be suppported by a statutory

declaration of truth setting out, the evidence of adverse possession, other information and the land must be identified by ordinance survey map or title plan.

2. The registrar, if he takes the view that the application discloses an arguable case for registration, must then give notice to the proprietor of the estate (amongst others) and the proprietor of any registered charge on the estate. The purpose of this is to enable any interested parties to object to the registration of the squatter as proprietor. The address to which the notice is sent is the address of the registered proprietor.

3. A person who receives such a notice has 3 options.

(i) he may consent to the application;

(ii) he may object to the application. If this is the case then the registration cannot be finalised until the objection has been dealt with. The nature of the objection is likely to be based on facts. The registered proprietor should both object (and adduce evidence to his effect) and serve a counter-notice).

(iii) He can serve a counter-notice, which requires the registrar to deal with the application under para 5 of Sch 6 of the Act. In effect this means that irrespective of the factual basis of the claim for AP the squatter cannot be entered as the new owner unless one of three grounds occurs.

(a) it would be unconscionable for the current proprietor to dispossess the AP because of an estoppel . This would be rare as the squatter is a trespasser (and this does not usually found a claim in estoppel) but may occur where the squatter mistekenly builds on the bneighbour's land, thinking it to be his own.

(b) the AP is for some other reason entitled to be registered as proprietor. This would cover situations such as the applicant having contracted to purchase the land, paid the price and moved into possession, but the title had never been transferred to him.

(c) Where there is a boundary dispute concerning adjoining land and for the last 10 years the applicant reasonably believed the disputed land to be his, provided that the disputed land had been registered land for at least 1 year prior to the application.

If the squatter's application to be registered is rejected, the effect of the Act is to require the registered proprietor to take steps within 2 years of that rejection to terminate the squatter's AP, whether by taking possession proceedings or by granting the squatter a licence or a lease to remain on the land. Where

(i) the squatter has been in AP for 10 years or more and has applied to be registered as proprietor;

(ii) the registered proprietor has objected to that application

(iii) the squatter cannot bring himself within one of the above 3 conditions

(iv) the squatter's application has therefore been rejected;

but

(v) the squatter has remained in AP for 2 years beginning on the date of the rejection of his application,

the squatter is entitled to make a further application to be registered and is he does, then he is entitled to be registered as proprietor.

E. Tenancies and Leaseholds

(a) Reversioner on a lease

Time never runs against the reversioner until the lease expires, for example, X grants Y a 60 year lease of Blackacre, and Y is dispossessed by Z. The limitation period begins to run against Y from the date of disposition, but against X from the date the lease determines. Z can therefore retain the land against Y for the rest of the term, but X can recover it from Z at the end of the term or within 12 years of that date.

Where land is subject to a lease the tenant (T) enjoys possession of the land whilst the landlord retains the freehold title. Any AP is only therefore adverse to the interests of the T and not the freeholder while the lease is in force (see above). In Fairweather v St Marylebone Property Co Ltd the freeholder of 2 adjoining properties (nos 311 and 315) built a shed in the back gardens, three-quarters of the shed being in the garden of no 315 and the remainder in no 311. In 1893 both properties were let by separate 99 year leases. In 1920 M, the sub-lessee of no 311, repaired the shed and treated it as his own. It was conceded that the occupation was adverse to the occupiers at 315, and sufficient to enable M to acquire title to it by AP against the tenants of 315.

In 1959 the respondents bought the freehold to 315 subject to the 99 year lease. Shortly afterwards this lease was surrendered to them. In 1960 P assigned the remainder of his 21 year lease of 311 to the appellant. The respondent claimed possession of the part of the shed in their garden. The appellant claimed the respondents were not entitled to possession until the expiration of the 99 year lease. Held the respondents were entitled to possession. A voluntary surrender of the lease to the landlord effectively brought the lease to an end and enabled the landlord to recover possession from the squatter because AP did not defeat the interest of the landlord as freehold owner.

(b) Tenant

A tenant cannot claim the freehold title of the land he occupies against his landlord during the term of the lease because he occupies the land with the permission and in accordance with the terms of the lease.

Encroachments by the tenant

Smith v Lyndale [1975] 1 Ch 317 – In 1955 P was granted a weekly service tenancy of a house by his landlord employers. The terms of the tenancy were set out in a rentbook. P began to cultivate adjoining land which also belonged to the employers. This was done without their permission. In 1967 the house and the land were bought by D, who issued P with a new rentbook. D, in 1973 began to develop the land and P sought a declaration that he had a good possessory title to the land, or alternatively that he held the land as an extension of the locus of his tenancy. Held, P had occupied the land by way of an addition to the tenancy to the house, and the purchase of the house and the handing over of the new rentbook were wholly ineffective to operate as a surrender and re-grant of the lease.

(c) Periodic tenancies

Hayward v Chaloner [1968] 1 QB 107. In 1939 a piece of land was let to the rector of a parish on an oral tenancy of 10s per year. The land was used as an addition to the garden

of a glebe cottage. The rent was paid by successive rectors until 1942, but not subsequently. In 1955 P purchased the disputed land and some other land.
In 1966 D, who was the incumbent rector, claimed title to the land under the Limitation Act 1939.Held, the rector had established an unassailable possessory title to the disputed land.

F. Postponement of period

This occurs where the original owner is a minor or a person of unsound mind. Where the owner is under a disability he is allowed an alternative period of 6 years from the date the disability comes to an end, with a maximum postponement of 30 years from the time the action first accrued – Limitation Act 1980 section 28.

In the case of fraud, concealment or mistake, time does not run until the owner discovers, or should have reasonably discovered the fraud etc. – section 32.

G. Legal Aid, Sentencing and Punishment of Offenders Act 2012

Section 144 – this section makes squatting in a residential building a criminal offence if:

- A person is in a residential building as a trespasser, having entered as a trespasser
- He knows or ought to have known he is a trespasser
- The person lives there or intends to live there

Building in this case means any structure or part of a strcture .
Residential means at the time of entry the building is designed or adapted as a place of residence.

Best v Chief Land Registrar 2014
Best v Curtis 2016 EWlandRA

Here B entered property as trespasser and did work on the property. He lived in the property as his dwelling. He had been in possession for the requisite period of time, and he applied to the registrar to have his title registered.

The Chief Registrar had refused to register B's title since he said it was based on criminal acts contrary to Section 144.

B appealed to the Admin Ct. for judicial review of the the refusal by the Chief Registrar. Here the court referred to the case of Bakewell Management v Brandwood in 2004, a case concerning the acquisition of an easement by means of prescription. The actual right claimed was illegal by means of a statute, but the court said that the claimant could stil have an easement.

The court also said in the Best case that Pariament would have been aware of the existing decisions in the area of rights based on illegal behaviour, and that it was not the intention of Parliament in introducing section 144 to exclude adverse possession.
The Land Registry appealed and the decision was heard by the Court of Appeal.

The CA said that s 144 is silent about the offence in the section with regard to adverse possession, and there was no consideration of this in Parliament when the legislation was enacted.

It is possible that some types of illegality might prevent an otherwise valid claim to AP, but not where the act is illegal only because the claimant does not have the right in the land that the AP is seeking to establish. But (i) it is entirely posssible for Parliament to enact expressly that the commission of the offence prevents a claim to AP; and (ii) under the LRA 2002, an applicant has no automatic entitlement to title by AP. They may be able to apply for title, which can be resisted fairly simply by the owner of the land by means of the procedure in Sch 6.

Best was successful in his claim (Best v Chief Land Registrar). The application was then handed back to the Land Registry to be dealt with accordingly.

The attention that the case had attracted caused Curtis, the son of the owner of the land, to contact the Land Registry. He was given notice of Best's applicqation pursuant to Rule 17 of the Land Registration Rules 2003, and he objected. The matter ended up in the Lands Tribunal (Best v Curtis). Curtis is the son of the registered propriator, who died in 1988, intestate. Curtis made no attempt to administer her estate until 2014. In the meantime Best's application was made in 2012. The registrar sent out 2 notices in any case. One pursuant to para 2 Sch 6, addressed to the registered proprietor of the property, and the proprietor given 65 days to respond to the notice. The other a notie under Rule 17, addressed to Curtis. Rule 17 states 'If the registrar at any time considers that the production of any further documanes or evidence or the giving of any notie is necessary or desirable, he may refuse to complete or proceed with an appliction, or to do any act or make any entry, until such documents, evidence or noties have been supplied or given.'

Because Curtis had bene in touch with the Land Registry, he was cotacted under this provision. In response he sent a form NAP, which would have been used in response to para 2 Sch 6 notice. This is the wrong form. No one other than those notified under para 2 can give counter-notice. Curtis was not omeone listed within para 2.

Questions

1; An old slate quarry in Mid-Wales is owned by Gravelpits Ltd, who ceased quarrying at the site in 1995, but hoped to re-open the quarry should the market price of slate improve.

In August 1996 the quarry was occupied without permission by a group of "flower-power" hippies. They lived there in large tents, using the land to raise chickens, and using the lakes in some of the quarry pits to breed fish. In September 2003 they were evicted by the police; they took their fish with them, though the chickens were left, and have flourished ever since.

In January 2005 Randolph, a stockbroker who had had a nervous breakdown, and who was seeking peace and quiet, without permission moved his luxury caravan onto the land, and lived there in tranquillity with his wife Jemimah and their son Quentin until February 2011, when disaster struck. Randolph and Jemimah were skating on one of the frozen lakes when the ice broke, and they were both drowned. Under the terms of their wills, Quentin was entitled to the caravan, so he continued to live there with only the chickens for company. In July 2014 he returned to the caravan after a walk to find that it had been broken into by Nasty Ned, and his belongings thrown on the ground outside. Quentin decided that enough was enough, and went off to find a new life in Surbiton. In February 2017 there was a marked upturn in the price of slate, and Gravelpits Ltd decided to rework the quarry, only to find that Nasty Ned refuses to leave.

Advise Gravelpits Ltd.

Assume the land is unregistered.

2. In 1960, Miss Riding-Hood was granted a 99-year lease of a cottage in the New Forest by the Crown Estate Commissioners. She intended to use the cottage for summer holidays, but, in 1961, she arrived to find it already occupied by Mr. Wolf, who persistently refused her requests to leave. In 1974, Miss Riding-Hood regretfully surrendered the lease to the Crown Estate Commissioners, but they made no attempt to recover possession, since the cottage stood on the site of a proposed motorway. In 1979 Mr Wolf was killed in a hunting accident, and the property remained empty until 1984, when it was illicitly occupied by Mr BEar and his family. The Bears were themselves evicted in 1994 by MissGoldilocks, who has continued in occupation ever since. However, in October 2004, the Crown Estate Commissioners discovered that the motorway scheme had been abandoned, and they sold the registered fee simple in the cottage to Miss Muffet. Hitherto,she has not sought possession, because the cottage was infested with spiders, but now she is anxious to enter into residence.

Advise Miss Muffet.

Topic FIVE
Leases and Licences

A. Introduction

It can be difficult, at times, to distinguish leases from licences. We have already seen that a lease is an interest in land and is the grant of an estate for a limited period of time.

A licence, on the other hand, is not generally an interest in land, and merely 'legalises' what would otherwise be a trespass –Thomas v Sorrell (1673) Vaugh 330. Licences are permissions to do something. There are three types of licences, namely:
1; bare licence – which may be revoked;
2; contractual licence – which may be revoked provided that the revocation is not made in breach of contract;
3; a licence by estoppel.

Significance of the distinction between lease and licence

Leases, being interests in land, means that it is bindin gon the landlord and the tenant. The tenant has a proprietary interest in the land, so that he can sell, mortgage or dispose of it, and also create lesser leases out of it.
Licences, on the other hand, do not create interests in land, and hence the licencee's right does not bind third parties.
Moreover, tenants have the added security of the Rent Acts, which do not apply to licences.

The law relating to leases is to be found in the Law of Property Act 1925 and the common law, but this has been superseded by various Rent Acts that were passed in the latter part of the 20th century, which primarily gave security of tenure to the tenant. We shall not be studying these Acts as they generally comprise of a separate area of study- that of landlord and tenant.

General principles that apply to residential leases, agricultural leases and business leases

A lease is both a contract and usually an estate in land (LPA 1925 , s 1). It constitutes one of the two legal estates (term of years) in land recognised today in English law – section 1 Law of Property Act 1925.

B. Terminology

One must be familiar with the terms used in the law of leases. A lease is sometimes referred to as a demise, and the premises in question the demised premised. The term tenancy tends to be used for interests that are to last for a short period of time, whereas the term lease is used for interests that are to last for a longer period of time. The person who grants the lease is called the lessor and the person

to whom it is granted is the lessee. In a tenancy the person who grants the tenancy is the landlord and the person to whom it is granted is the tenant.

A lessee or a tenant can grant a **sub-lease** or a **sub-tenancy** for a period less than that granted to them, for example, if Pierre grants a lease to Amelie for 25 years, from the 15th of March 2008, Amelie can grant a sublease to Marie-Claude for any period up to a maximum of 24 years 364 days, i.e., she can grant a sublease for a period of 25 years less one day on the 15th March.

S.1 LPA 1925 talks of a 'term of years absolute'. What is meant by this phrase? This is explained in section 205 Law of Property Act 1925.
See Bruton v London & Quadrant Housing Ass [2001] 1 AC 406

C. Term of years absolute in section 1

1. Term

The LPA 1925 requires that the leasehold estate should be 'a term', i.e. for a fixed period rather than for an indefinite period. Thus in *Lace* v *Chantler* [1944] KB 368 it was held that a lease 'for the duration of the war' was not a legal estate, since it was not for a fixed period.

A lease for 99 years or other specific period however is for a term.

What happens in the case of a weekly or monthly tenancy? In such an arrangement the period runs on indefinitely from one period to another. The law regards these as satisfying the requirement of a fixed term since they are regarded as being a lease for a week (fixed term), followed by another lease for a week, followed by another lease for a week and so on until the lease is correctly determined – Prudential Assurance v London Residuary Body (1992).

2. Of years

Clearly a 99 year lease is a term of years, but a periodic tenancy will be for a period of a year or less than a year. The periodic tenancy will still qualify as a legal estate, as would a lease of say 3 months, because s.205(1)(xxvii) LPA says that the expression "term of years" includes a term for less than a year, or for a year or years and a fraction of a year or from year to year". Therefore all that is necessary is a fixed period and accordingly it must be possible to grant a lease for a very short period (e.g. 2 days) even though this is not common.

Smallwood v *Sheppards* [1895] 2QB 627
Here it was held that a legal lease could be created for a period of 3 successive bank holidays, i.e. for 3 separate days.

Absolute
In this context it is not used in any intelligible sense.

D. Types of Leases or Tenancies

a) Fixed term lease

This is a grant for a fixed period of time. The period may be long or short, although the longer the term the greater the tendency to use the terminology of 'lease' rather than 'tenancy'.

b) Periodic tenancy

A 'term of years' may also take the form of a periodic tenancy which runs from week to week, or from month to month or from year to year. Such tenancies may be created either expressly or impliedly. A periodic tenancy continues indefinitely until determined by the giving of the appropriate notice.

There used to be a strong common law presumption that a periodic tenancy was impliedly created by the payment and acceptance of a periodic sum in the nature of rent. Such circumstances were apt to generate a periodic tenancy depending on the period with reference to which the period was calculated. However, the reservation of rent and its payment is not incompatible with the existence of a tenancy at will. Where there is a dispute the court must examine the 'intention of the party'.

c) Tenancy at will

These occur where a person enjoys occupation of land with the consent of the owner in circumstances where either party can terminate at will. They tend to arise where a tenant remains in the property after his formal lease has terminated, but stays there with the landlord's permission. The status of a tenancy at will in law is somewhat unclear. A tenant at will resembles a licensee in many ways in that he has no estate in land and cannot assign his tenancy to a third person. However, he is different from a mere licensee in that even though he has no 'estate' he is accorded to be 'in possession' of the land, and can thus, unlike a mere licensee, maintain an action in trespass against a stranger – Bruton v London & Quadrant Housing (2001).

d) Tenancy at sufferance

A tenancy at sufferance arises where a tenant who has enjoyed a perfectly valid term of years holds over at the end of his term **without** the consent of the landlord. It is the absence of the landlord's consent that distinguishes a tenancy at sufferance from a tenancy at will. (Adverse possession).

E. Essentials of a lease or a tenancy

No lease or tenancy can be created unless the following conditions are fulfilled:

1. The premises must be sufficiently defined;
2. The parties to the lease must be legally competent;
3. The tenant (lessee) has a right to exclusive possession of the premises during the period of the lease;
4. There must be certainty of duration; and
5. The proper formalities have been fulfilled.

Under the requirements of a tenancy there is nearly always a requirement for the tenant to pay a rent, but this is not an essential requirement of a lease – *Ashburn Anstalt* v *Arnold* [1989] Ch 1.

1. Premises sufficiently defined

A lease or tenancy can only exist if the premises are sufficiently defined. Thus a contract for the storage of goods in certain rooms, which could be changed by the owner did not create a lease.

2. The parties to a lease must be legally competent

Certain requirements of legal competence must be satisfied by the parties to a properly constituted term of year.

(a) Competent lessor

The grantor must have legal competence to create a term of years in the land. It is clear therefore that no lease is validly created unless the grantor himself has an estate in the land.

(b) Competent lessee

The lessee must be a legal person such as an individual or a corporate body.

3. A lease must confer a right of exclusive possession

It is an essential characteristic of any lease or tenancy that the grantee should be given a right to exclusive possession (as opposed to exclusive occupation which a licensee may be given- this is where the grantee may be entitled to exclusively occupy the premises, but the grantor retains control of them, for example a hotel guest in a hotel room) of the demised premises, and there can be no tenancy unless the occupier enjoys exclusive possession. Exclusive possession is an essential ingredient for a lease. Without exclusive possession there cannot be a lease, but merely a licence.

Territorial control

EP means that there is a right to exclude other persons including the landlord from the premises – *Bruton v London & Quadrant Housing Trust* [2000] 1 AC 406, 413. It is this element which confers the degree of territorial control necessary to enable the tenant to effectively carry out the purpose for which he took the letting.

Lord Templeman in *Street* v *Mountford* [1985] AC 809, 816 said

"The tenant possessing exclusive possession is able to exercise the rights of an owner of the land, which is in the real sense his land albeit temporarily

and subject to certain restrictions. A tenant armed with exclusive possession can keep out strangers and keep out the landlord."

The acid test for exclusive possession is, 'Has the grantee been given general control of the property?' A tenant who has exclusive possession can exercise the rights of the landowner (*Heslop* v *Burns* [1974] 1 WLR) except where the landlord is entitled to enter the premises and carry out repairs to it.

Wells v *Hull Corporation* (1875) LR 10 CP 402
Hull Corporation (H) owned a dry dock used by ship owners to repair their ships. H 'let' the dock to ship owners on terms that included
(1) H was responsible for opening and shutting the dock gates to allow ships in and out;
(2) The ship owner should clean out the dock at the end of each day's work under the supervision of the corporation's employees.
Held, the ship owner was not granted general control of the dock and therefore only had a licence.

Retention of keys
The mere fact that a grantor retains keys to the premises does not as such negate the existence of a lease - *Aslan* v *Murphy* [1989] 3 All ER 190

Nevertheless there are situations where exclusive possession is given, but which are only a licence.

There are situations in which the grantee will not be a tenant even though the grantee has exclusive possession of the premises.
(i) The first of these is where the landlord provides attendance and services which require the landlord to exercise unrestricted access to the premises, for example, rooms in a hotel – *Brillouet* v *Landless* (1995) 28 HLR 836.

(ii) The second situation is where the nature of the accommodation is such that the landlord must retain control over it. For example, where the landlord has the power to reallocate the occupant to some other premises, *McCarthy* v *Bence* [1990] 1 EGLR1, where there was an agricultural share-milking arrangement under which the landowner could alter the fields in which the occupier could graze his cattle. Also Westminster CC v Clarke [1992] 2 AC 288, where W, in meeting its statutory obligations to house homeless persons, provided and ran a hostel for homeless men. W had the right to move any occupant to another room, sharing with another person if need be. These arrangements did not give the occupant EP of his room.

(iii) Acts of generosity or friendship where there is no intent to create legal relations, for example *Heslop* v *Burns*, where a family were allowed to reside rent free in a cottage by their former employer; *Cobb* v *Lane* where a brother was allowed to live rent free in a property. The fact that a person is a member of the grantor's family, does not however preclude the existence of a tenancy (*Ward* v *Warnke* (1990) 22 HLR 496.) It will depend on the facts of the case. If EP is granted

and rent is paid the transaction is more likely to be regarded as a lease – Nunn v Dalrymple (1989) 21 HLR 59.

(iv) Services occupancies
Caretakers and housekeepers often have 'service occupancies'. The test to determine whether this is a licence or not depends on whether the person has to remain on the premises because the nature of his duties require it – *Norris* v *Checksfield* [1991] 1 WLR 1241.These are licences and the licensees have a licence by means of their contract of employment.

(v) Occupancy by virtue of an office e.g. clergymen who do not have a contract of employment.

(vi) There will be no tenancy where the grantor lacks the power to grant one.

Flat-sharing

Where there is single occupancy of residential premises, it is a question of fact whether or not the person has exclusive possession of the property. However, where two or more people share accommodation then the situation is more complex.

Somma v *Hazelhurst* [1978] 2 All ER 1011
H & S cohabited and each signed a separate agreement granting each the use of a bed-sitting room to be shared with a person 'to be introduced' by the fee simple owner of the property. The Court of Appeal rejected the argument that the two transactions should be read together and together regarded as granting exclusive possession and therefore a lease. The court said that the effect of this transaction was that two licences created.

AG Securities v *Vaughan*: *Antoniades* v *Villiers* [1988] 3 WLR 1025
In Antoniades a one-bedroom flat was let to a young unmarried but cohabiting couple under separate but identical licence agreements executed simultaneously. It was emphasised in the agreements that the parties were not to have exclusive possession. Clause 16 of the agreement stated that the licensor shall be entitled at any time to use the rooms together with the licensee and permit any person to use all the rooms together with the licensee.

The Court of Appeal said that this was a licence, but the House of Lords said there was a lease. The agreements were interdependent of one another and were to be read as constituting one transaction. The fact that the couple intended to inhabit the flat as man and wife – a fact known to the lessor- created a joint tenancy. The purported retention by the lessor of the right to share or to introduce others was a clear pretence and designed to deprive the couple of the lease and the subsequent Rent Act protection.

In AG Securities there was a 4 bedroom flat, which was let to 4 individual flat sharers, each of whom entered into a separate short-term licence with the licensor. There agreements were made at different times and on different terms.

All the agreements provided that each occupant had the right to use the flat in common with the others who may from time to time be granted the like right, but without having exclusive possession of the flat. The licensor and the remaining licensees decided between them on the replacement licensees when one left. The Court of Appeal had found these to be leases, but the House of Lords found them to be licences.

Where there is more than one potential tenant, then as co-owners you must prove that they are joint tenants. As a legal title to land can only be held by joint tenants, to have a legal lease the four unities must be present –
a) Possession – they must all have the right to exclusive possession against the world;
b) Interest – there is no divided interest ;
c) Time - their interest must begin and end at the same time;
d) Title – the estate must be created by one document or derive from one act.

Sometimes one of the two persons who occupy the premises as licencees may depart. That event should not affect the status of the remaining person – Mikeover v Brady [1989] 3 All ER 618. If the remaining occupier takes over the premises with the landlord's consent, that arrangement may convert the licence into a tenancy because it may give the occupier EP.

Further Pretences and Shams
The court will ignore any provisions in the agreement which are mere pretences or shams seeking to negate a tenancy - *Aslan* v *Murphy*. A sham is about saying one thing and doing another. The court tries to ascertain whether the parties' true bargain is the same as that which appears on the face of the agreement, for it is the former that the court will have regard to – Aslan v Murphy.

The provision whereby the landlord could introduce an additional occupant to share the premises with the grantees was said to be a sham, where the accommodation consisted of a one-bedroomed flat furnished with a double bed (*Antoniades*) and a small room just 51 inches wide (*Aslan*) and where the landlord did not seriously contemplate introducing another occupant (*Nicolaou* v *Pitt* (1989) 22 HLR 487).

However, the subsequent conduct of the parties may demonstrate that the terms of the agreement were genuine. Where two cohabitees entered into separate agreements with the landlord for the occupation of a flat by which each was severally liable for half the rent, and one of them left, and the landlord would only accept half the rent from the remaining occupier, the court said that these agreements were genuinely independent of one another and therefore did not confer EP of the flat to the two occupants as joint tenants – Mikeover v Brady.

Thus burden of proof that something is a sham is upon the party who is alleging it – Mikeover.

4. The lease must be of a fixed duration

A lease must **commence at a time which is certain** and which is either expressly fixed by the parties or is readily ascertainable before the start of the term. If the commencement date is not specified, it may in certain circumstances be inferred that the term begins immediately on the taking of possession – James v Lock [1978] 1 EGLR 1. A contract for a future lease is void, unless some definite time of commencement can be inferred from it – Harvey v Pratt [1965] 1 WLR 1025.

A term may be of any length of time. It may be for a fraction of a year and could be extremely short or extremely long. It is not even essential that the quantum of time in respect of which possession is granted under a lease should comprise one single continuous period. The advent of the phenomenon of 'holiday timesharing 'has confirmed the idea that a lease may comprise an aggregate of discontinuous periods of time –

Smallwood v *Sheppards* [1895] 2QB 627 – 3 successive bank holidays
Cottage Holiday Associates v *Customs & Excise Commissioner* [1983] QB 435 – timeshare lease valid.

Irrespective of the length of the term granted, it is an essential characteristic of a lease that it should confer an estate in land of certain **maximum duration**. In *Lace* v *Chantler* [1944] KB 368 no lease was held to exist where a right of occupation had been conferred for the duration of the war.

The case of *Prudential Assurance Co* v *London Residuary Body* [1992] 2 AC 386 (House of Lords) (overruling *Re Midland Railway Co Agreement* [1971] Ch 725), made it clear that what is required is the *maximum duration* of the lease, and that the lease is valid even if its actual duration is not known provided that its maximum duration is, for example, a lease for a maximum duration of 21 years or until required by the landlord at an earlier date. In the Prudential case a lease granted until the landlord required the property for road-widening purposes was not valid. A lease granted for as long as a company is trading was not valid – Birrell v Carey (1989) 58 P & CR 184. The decision in Prudential was reluctantly followed in Mexfield Housing v Berrisford [2011] UKSC 52.

Reason for the rule
The rule serves to distinguish a lease from a fee simple. The law does not recognise a lease in perpetuity – Sevenoaks, Maidstone and Tunbridge Rly Co v London, Chatham and Dover Rly Co (1879) 11 Ch D 625. If a lease were granted at a rent until a particular event were to occur, and it subsequently became impossible for that determining event to happen that lease would endure for perpetuity, but for the certainty rule. It would closely resemble a fee simple subject to a rent charge, something that can no longer be created – Rentcharges Act 1977 section 2.

Because of this 'certainty of duration' requirement there are several problems with the following types of lease, although statute has intervened.

a) Leases for Life

A person's lifespan is unpredictable and such a lease would therefore contravene the requirement of certainty of duration. A term of years as defined in the LPA 1925 cannot therefore include a lease for life. However, statute intervenes and says that a lease for life if granted at a rent or in consideration with a fine is automatically converted into a 90 year term – LPA 1925, s.149(6). Note that where neither rent nor a premium is payable under the lease the section is inapplicable.

b) Lease until Marriage or upon the formation of a civil partnership

This is likewise converted into a 90 year term – section 149(6) LPA 1925
See *Skipton Building Society* v *Clayton* (1993) 66 P & CR 223 where the court said that a fine includes a discount on the price paid by the purchaser on a sale and leaseback to the vendors for their joint lives.

Where a lease falls within s. 149(6), the lease does not automatically determine on the death or marriage or civil partnership of the original lessee. Either party may determine it by serving on the other at least one month's written notice to expire on one of the quarter days applicable to the tenancy, or one of the usual quarter days, if one is not specified in the lease. For example, leases ' to A for life', 'to B for 10 years if he so long lives' and 'to C for 99 years if he so long remains a bachelor', are all converted into terms which will continue for 90 years unless by proper notice they are determined on a quarter day after the event took place.

c) Perpetually Renewable Lease

This is a lease which gives the lessee the right to renew it for another period as often as it expires. Such leases are seldom created today, although they used to be common in Ireland. The problem is that they might be inadvertently created by unrestricted renewal clauses, such as an option giving the tenant the right to renew 'on the same terms and conditions, including this clause' – Hare v Burges (1857) 4 K and J 45. The court does lean against perpetually renewable leases. Thus where a lease contained a covenant to renew on terms which conferred a further right of renewal, that was held to give the tenant the right to renew the lease twice, but not perpetually – Marjorie Burnett v Barclay [1981] 1 EGLR 41.
In theory such a grant could endure for ever, but it is now converted into a 2,000 year lease to take effect from the date fixed for the commencement of the term– LPA 1922, Sch 15, para 10(1). Any perpetually renewable sub-lease created out of a perpetually renewable lease is likewise converted into a 2,000 lease less one day. The 2,000 year lease is subject to the same terms as the original lease, although the tenant may terminate the lease on any date upon which, but for the conversion of the lease, it would have expired had it not been renewed, provided that he gives the landlord 10 days notice. It should be noted that the landlord has no right to determine the lease at the renewal dates. (It should be noted that prior to 1926 renewal was not automatic, but the tenant had to give the landlord notice that he wished the lease to continue).

d) Periodic Tenancy

It is more difficult to sustain the argument that a periodic tenancy satisfies the requirement of certain maximum duration. It is clear that a periodic tenancy

commonly takes effect as a number of periods or units which confer on the tenant an estate in the land. It is equally clear that a periodic tenancy continues indefinitely until determined by the appropriate notice. It constitutes 'an open-ended term' with a series of possible termination dates which will only become effective if a valid notice to quit is served.

In view of its open-ended nature it is not viewed as an aggregate series of distinct terms, but as one continuous term which until determined, perpetually elongates itself by the super-addition of a fresh unit or period.

This being so, it is uncertain at the outset of a periodic tenancy what its maximum duration is to be, but nevertheless there is no serious doubt as to the leasehold quality of a periodic tenancy. It has been argued that the periodic tenancy passes the test of certain maximum duration in the sense that each occupational unit of time, as it is added to the preceding unit of time, is itself of strictly defined duration.

5. The formal requirements must be complied with

The statutory requirements for the formality for the creation of a legal leasehold interest are contained in s.52(1) LPA 1925 - "all conveyances of land or of any interest therein are void for the purpose of conveying or creating a legal estate unless made by deed (*un acte (notaire)*)."

An exception is then made in relation to "leases or tenancies ... not required by law to be made in writing" - s.52(2)(d). No writing is required for the creation of leases taking effect in possession for a term not exceeding 3 years at the best rent that can reasonably be obtained without taking a fine.
Possession – the lease must take effect in possession, as opposed to reversion. Hence a three-month reversionary lease granted today to take effect in 25 days' time cannot be created without a deed – Long v Tower Hamlets.
Three years – this includes a monthly or other periodic tenancy – Ex p Voisy (1882) 21 Ch D 442, even though it will continue indefinately unless determined by notice, for it is wholly uncertain that it will endure for more than 3 years. The phrase also includes a fixed term for 3 years or less which contains an option for the tenant to renew it beyond 3 years – Hand v Hall (1877) 2 Ex D 355.
If all the conditions are complied with then the lease may be created orally or in writing, although incorporeal rights, such as shooting or fishing, can only be leased by means of a deed – Mason v Clarke [1954] 1 QB 460.

All other interests in land if not created in writing, have the force and effect of interests at will only - s.54(1).

The net effect of these provisions is that a legal lease or tenancy for a period not exceeding 3 years can be created in writing or even orally. Otherwise the lease has to be made by deed. The Law of Property (Miscellaneous Provisions) Act 1989 section 1(1) says that a deed must

(i) make it clear on the face of the instrument that it is intended to be a deed;
(ii) be signed either by the person making the deed (or one of the parties making it) in the presence of a witness who attests the signature , or else at his direction and in his presence and the presence of 2 witnesses, who attest the signature; and
(iii) be delivered as a deed by him.

The exemption from formality applies only to the creation of a lease. An assignment of a legal lease (irrespective of its duration) must be made by deed.

Contracts to grant leases

A contract to grant a lease if made prior to 1989 must satisfy the provisions of s.40 LPA 1925. Thus for any contract to grant a lease there must either be a written memorandum of the contract satisfying s.40(1) or a sufficient act of part performance. If the requirements of s.40 were satisfied, either party to the contract could ask the court for a decree of specific performance. This was an equitable remedy and as such was subject to the usual equitable rules.

Post 1989
The position is now governed by the Law of Property (Miscellaneous Provisions) Act 1989. Now all contracts must be made in writing - section 2.

The Present Status of Walsh v Lonsdale (1882) 21 Ch D 9

It is not uncommon for a landlord and tenant to attempt to create a legal lease but fail to do so for lack of formalities. For many years both law and equity have agreed that such defective grants may be treated as contracts to grant the same lease as long as s.40(1) is satisfied or there are sufficient acts of part performance. Equity will go further and grant an order for specific performance in order to perfect the imperfect lease - 40(2).

The interaction of these various rules are illustrated in Walsh v Lonsdale. A landlord and tenant had entered into a written agreement (not under seal) under which a mill was to be let to a tenant for 7 years. Rent was to be varied according to the productivity of the mill and the tenant would pay the rent annually in advance if the landlord so demanded. The tenant went into possession and paid rent at 6 monthly intervals in arrears for 1½ years. The landlord then demanded next year's rent in advance, in accordance with the written agreement. The tenant refused and landlord distrained. The tenant then sued.
The court said that in this case there were two leases. One at law which was an implied legal lease arising from tenant's possession of the property and payment of the rent, and one in equity by entering the property and paying the rent in support of the written agreement. The legal lease was for an annual tenancy and since the rent had been paid in arrears and accepted as such this would form the terms of the legal lease. The equitable lease was for 7 years and all the terms originally agreed would form part of this.

Which lease prevailed? The equitable one did - Supreme Court Act 1981 s.49(1) says that where the rules of law and equity conflict equitable rule prevails.

In the case of unregistered land the contract for a lease will be an estate contract C(iv) land charge and will bind a purchaser only if it was registered as land charge before the date of the conveyance to him.

If title is registered the lease must be protected by entry on the register - Land Registration Act 2002, sections 28-31. If at the time of transfer the tenant of the equitable lease is in 'actual occupation' of the property his right under the agreement will be an overriding interest by means of the Land Registration Act 2002 Schedules 1 and 3.

Are equitable leases (contracts to create) lease as good as legal lease?

Since equity will uphold the rights of the parties although the legal lease had been granted it has often been said that 'a contract to create a lease is as good as a lease'.

This is not necessarily true for the following reasons:

1. Legal lease will bind everyone, equitable only if registered.

2. A legal lease comes within the definition of a 'conveyance' for the purposes of LPA 1925 s.62 and so carries with it automatically certain rights enjoyed in connection with the land. A contract for a lease does not fall within s.62 and therefore does not carry such benefits (more in easements).

Rent

Although the payment of rent is usual, it is not an essential characteristic of a lease. The Law od Property At 1925 section 205(xxvii) defines a term of years absolute as a 'term of years… whether or not at a rent.'Ashburn Anstalt (although overruled on other grounds) said rent was not a necessary ingridient of a valid lease.

F. Determination of a Lease (in outline only and not examinable)

Leases may be determined at law in a number of ways -

(a) expiry
(b) notice to quit
(c) surrender
(d) merger
(e) enlargement
(f) disclaimer
(g) forfeiture
(h) frustration

(We are not concerned with the impact of Rent Act legislation)

(a) Expiry

A fixed-term lease will automatically expire once the specified term comes to an end. Some fixed-term leases contain clauses ('break clauses') allowing one party, or both, to determine before expiry.

(b) Notice

It is always open to the parties to make an agreement about the form and period of notice required. In the absence of such an agreement the common law would apply a standard of rules and the statutory codes designed to protect tenants have created several requirements that cannot be varied by agreement.
At common law there would appear to be no need for the notice to be in writing. However the Protection from Eviction Act 1997 s.5(1) & Part I of the Housing Act 1988 has altered the position.
The correct period of notice will vary according to the type of lease or tenancy involved. But the position has been modified for certain leases by the Protection from Eviction Act 1977 s.5(1); Housing Act 1996 section 99; Housing Act 1988.

(c) Surrender

This is where the tenant relinquishes his estate to his landlord with the agreement of the landlord. A surrender releases the tenant from any future liability under the lease but does not release him from liability for past actions. If a tenant surrenders his lease to his immediate landlord, who accepts the surrender, the tenancy is absorbed by the landlord's reversion and is extinguished by operation of law – per Lord Millett, *Barrett* v *Morgan* [2000] 2 AC 264, 270. Surrender is a consensual transaction between the parties.
Abandonment of the premises is not without more surrender of a lease since the landlord may wish the tenant's liability to continue – *Bellacourt Estates* v *Adesina* [2005] EWCA Civ 208.

(d) Merger

A merger arises when tenant acquires the immediate reversion. In such a case tenant would, in theory, become his own landlord. The lease usually however merges with the reversionary estate when they come into the hands of the same owner. This only occurs, however, where it is the intention of the owner that the estates should merge.

Since a merger involves the acquisition of the superior estate, the events which give rise to it can usually only be effected by deed - s.52(1) LPA 1925.

(e) Enlargement

This is where a lease is enlarged into a fee simple absolute by means of a deed executed by the tenant. This can only be done if the provisions of s.153 LPA are complied with. The lease must be originally granted for 300 years or more, have at least 200 years left to run and no rent of any money value is payable. In such a case the tenant may execute a deed of enlargement, which has the effect of increasing tenant's interest to that of an estate in fee simple, extinguishing the title of the previous fee simple owner.
This is rare in practice.

(f) Disclaimer

A right to disclaim a lease normally arises by statute. The most common examples are the rights of a trustee in bankruptcy to disclaim contracts under the provisions of the Insolvency Act 1986, section 315. A disclaimer releases the tenant from future liabilities under the lease.

(g) Forfeiture

A landlord may sometimes forfeit a lease for a breach by the tenant of one of the terms of the agreement. This means that the landlord may re-take the premises and hence prematurely put an end to the lease. It is the most powerful of all the remedies available to the landlord.

Forfeiture is not available for every breach of covenant. It is only available in the following situations;
(i) where the tenant disclaims his title – *Clarke v Dupre* [1992] Ch 297
(ii) where an obligation in a lease is formulated as a condition – *Lockwood v Clarke* (1807) 8 East 185.
(iii)where the lease contains an express forfeiture clause.

There have been 2 alternative ways in which the landlord can forfeit a lease:

(a) Peaceable re-entry
This is a draconian measure. A right of entry is a proprietary right and it can be legal under the Law of Property Act 1925 section 1(2)(e). The right must be expressly contained in the lease (very rarely will it be implied).The re-entry

requires some unequivocal act on the landlord's part such as changing the locks or padlocking the doors to the demised premises, which shows the landlord's intention to re-enter the premises.
Peaceable re-entry is not available against the tenant of residential premises – Protection from Eviction Act 1977, section 2.

(b) Court proceedings
Need court proceedings to re-enter residential premises.
See *Billson* v *Residential Apartments* [1991] 3 All ER 265

Virtually every lease in existence today includes a widely drafted express forfeiture clause which can be utilised if the tenant breaks any of his obligations. In the case of **non-payment of rent** (*commandement de payer*), the landlord must first make a demand for the rent, although where the lease expressly excludes this need then no demand need be given, nor need a demand be made where the tenant is more than 6 months in arrears and there are insufficient goods on his premises to satisfy the arrears by means of distress – Common Law Procedure Act 1852, s.210.

Even where the landlord is entitled to forfeit the lease because of a tenant's non-payment of rent, the tenant may nevertheless obtain relief from forfeiture.

Forfeiture for **breach of other covenants** is governed by LPA section 146.

The court can grant relief from forfeiture.

(h) Frustration

This is part of the law of contract.

Questions

1. A year ago Veronique inherited a large mansion called La Belle Tour . She decided that she would convert the property into three flats in order to supplement her income in retirement. She therefore made the following arrangements:

(a) The ground floor flat conversion was completed and on 1 September. She signed a 'licence' giving David the right to occupy the flat for a payment of £200 per month. On 2 September she signed an identical 'licence' giving Marie the right to occupy the flat with Gaëlle or any other person Veronique should select for a payment of £225 per month.

(b) She completed the conversion of the small one bed-roomed attic flat and gave Christophe and Dimitri a licence to occupy it at a fee of £400 per month. They both signed identical agreements which bore the same dates. The licence agreement also reserved the right to Veronique to nominate another occupier or to occupy the flat herself. Christophe has been ill for a while and has recently vacated the flat and returned home to his parents. Since Christophe has left Veronique has only accepted a fee of £200 per month from Dimitri.

(c) The conversion of the basement flat has yet to be completed but her friend Bernadette who has recently come to work in London and has nowhere to live, moved in last week and is paying a rent of £20 per week. Veronique has kept a key to the premises in order to supervise the workmen and has entered the premises a few times for this purpose.

Veronique has now received an attractive offer for the freehold of the house from Bernard. Advise Bernard as to whether he will be able to obtain vacant possession of the flats

2. Consider the effect of the following dispositions;

(a) A grants B a lease of a flat for 1 day;

(b) The grant of a lease to B for 20 years 'if he lives that long' at a rent of £2,000 per annum;

(c) A lease of Black House to B for 20 years or until she should marry;

(d) A grants B a lease for 7 years with an option to renew on exactly the same terms as the present lease;

(e) An oral agreement to grant a lease of the Maltings to B for 2 years at a market rent of £5,000 per annum to take effect in possession.

3. Andy and Tony, who were seeking accomodation, jointly approached Joanne, the owner of N°4 Upper Street (a two-bedroomed property) and Joanne agreed to let them live there on condition that they each signed separate written agreements, described as 'licence agreements'. Each is identical, save that Andy's licences him to usse the first bedroom, and Tony's licences him to use the second (in both cases, the other rooms are to be shared 'with all other licencees').

Each agreement contains the following clauses:

(i) requiring payment of a monthly 'licence fee';
(ii) allowing Joanne to retain keys to the house and reserving to Joanne 'a right of access for all purposes' and a right to put others (including herself) into occupation;
(iii) requiring Joanne to provide cleaning and laundry services;
(iv) a recital that 'licensees are not granted exclusive occupation of the whole or any part of the premises' and that the parties to the agreement contract solely on the basis that a licence is granted.

In fact, Joanne has never provided any of the services required, has not put any other persons into occupation, or used her right of access for any reason other than to check the state of repair of the premises.

Advise Andy and Tony as to the status of their occupatin of the premises.

Topic SIX
Easements and Profits à Prendre (servitudes)

Easements

A. Definition

An easement is a right attached to a particular piece of land which allows the owner of that land (Dominant land) to use the land of another person (Servient owner) in a particular manner (for example, walk over it), but which does not allow him to take any part of its natural products or its soil.

A legal easement is a right *in rem*. It permanently binds the land over which it is exercisable and permanently avails the land for the advantage for which it exists.

If X acquires an easement either in fee simple or for a term of years absolute he becomes the owner of a legal interest in land and can enforce it against anyone who comes to the land whether by way of purchase, lease, gift, squatter (adverse possession) and whether or not they had notice of it.

B. Essentials for a valid easement

These are to be found in the case of *Re Ellenborough Park* (1956) Ch 131

1. There must be dominant and servient tenements or land

A right given to someone who does not own the land cannot be an easement.

2. The easement must accommodate the dominant **land**

An easement cannot be a valid easement unless it confers a benefit on the land itself rather than on the owner personally - *Hill v Tupper* (1863) 2 H and C 121. Here a canal company leased land adjoining the canal to H and gave him a 'sole and exclusive right' to put pleasure boats on the canal . T was an inn keeper and put his own boats on the canal. H sued T for disturbance of his easement. H claimed he had an easement to put boats on the canal. Held, the right which H had to put boats on the canal gave him a mere personal licence and not an easement. The right was not beneficial to the land itself, but the land was merely required for the exploitation of the right.

There can be no easement for purely recreational or personal amusement – M*ounsey v Ismay* (1865) 3 H & C 486. In this case the claimant argued that he could by means of an easement hold an annual horse race on land owned by D. But see the facts of *Re Ellenborough Park* itself. Evershed MR (Master of the Rolls) said that the use of a garden undoubtedly enhances and is connected with the normal enjoyment of the house to which it belongs. The garden was a communal one, and the purpose of the garden was not only to rest and exercise but also for domestic purposes such as taking out small children in perambulators. Hence it is clearly beneficial to the premises to which it is attached.

In addition the easement must not be too general - *Ackroyd v Smith* (18500 10 CB 164 *.* In this case the owner of land granted the owners and occupiers of adjacent land 'a right to pass and re-pass along a road across his land' **for all purposes**. Held, that this right was not capable of existing as an easement as it was too wide. It could be used for purposes not connected with the dominant land.

There must be a natural connection between the two tenements (pieces of land), although they do not need to be adjacent.

3. The dominant and servient owners must be different
i.e. there must be diversity of ownership.
Since an easement is a right that is exercised by virtue of the ownership of land over land belonging to another it is impossible for an easement to exist if there is no diversity of ownership and the dominant and servient tenements are owned by the same person.
You cannot have an easement over your own land, i.e., easements cannot exist *in gross.*

4. The right must be capable of forming the subject matter of a grant.

There are 4 aspects to this
(a) There must be certainty of description.
If what is granted is so vague or indeterminable as to defy precise definition then it cannot rank as an easement. There is for example, no easement to an unspoilt view (*la vue sur l'horizon A 675-680*)- *Alfred's case* . Nor is there an easement where there is a right to wander at large over someone's land - *jus spatiandi* - wandering at will over someone's field. Nor is there a right to receive a radio or telephone signal – Hunter v Canary Wharf. A right to light through a defined channel may be an easement whereas a general right to light is not - *Levet v Gas Light and Coke Co* [1919] 1 Ch 24.
(b) There must be a capable grantee
There must be a definable person or body such as a corporation. If the grantee is a fluctuating body such as the inhabitants of a village then there is no easement.
(c) There must be a capable grantor
(d) The right must be of a kind recognised as capable of being an easement.
The list of easements is not closed, and the courts may be willing to hold that other rights amount to easements provided that they fall within the requirements we have just outlined. It is inevitable as technology and science progresses that the courts have to recognise new types of easement, for example, the right to park a car is a 20th century development – *Saeed v Plustrade Ltd* [2001] EWCA Civ 2011

C. Factors that Negate an Easement

1. Positive action by the servient owner
Any rule which requires the servient owner to take positive action, and in particular involves him in the expenditure of money, will negate an easement. The right to have something done is not an easement. In *Regis Property v Redman* [1956] 2 QB 613 the CA held that the obligation of the landlord to supply the premises of his tenant with constant hot water and central heating was not

capable of existing as an easement as it involved the performance of services which was in the nature of a personal contract.

There may be one exception to this namely, an easement of fencing, where the servient owner is under a duty to take positive steps to maintain fencing - *Crow v Wood* [1971] 1 QB 77. This is an anomalous decision since it does involve the servient owner in expenditure of money. It has been described as a spurious easement. The Law Commission No 327 has recommended that this should not be an easement.

2. Negative easements

Generally English law does not like the notion of a negative easement, since they may operate in such a way as to restict what he servient owner may do on his own land.
Any negative easements that are allowed should belimited and precise as they represent an anomaly in the law since they will operate in such a way as to restrict the owner's freedom – *Hunter v Canary Wharf* 1997 AC 655.

A right of support which often exists in favour of semi-detached or terraced houses - *Bond v Nottingham Corporation* [1940] Ch 429. The owner of servient land is under no obligation to repair that part of his building which provides support for his neighbour. He may let it fall into decay. But he may not remove the support without providing the equivalent.

3. Exclusive or joint user
No right may be recognised as an easement which is in effect a claim to exclusive or joint user of the land.
Copeland v Greenhalf [1952] Ch 488. Here a wheelright (*un charron*) had no easement to store and repair unlimited number of vehicles on a strip of neighbour's land. Upjohn J. said that the claim really amounted to a joint user of the land. If he wanted the land his claim should lie in adverse possession.
However see
Miller v Emcer [1956] Ch 304, where a tenant was granted a right to use toilets on the upper floor of a building which was occupied by third parties. The CA rejected the argument that the right could not exist as an easement because it involved an excessive user. Romer L.J. said that the right had all the requisite characteristics of an easement.

Whether a right to storage is an easement or is excessive is a matter of degree. In *Wright v Macadam* [1949] 2 KB 744 the court said that a right to store coal in a shed was an easement, whereas in *London & Blenheim v Ladbroke* [1992] 1 WLR 1278 Baker J. said a small coal shed in a large property was one thing whereas the exclusive user of a large part of a servient tenement is another.
Mulvaney v Gough [2002] here the right of a cottage owner to make use of a communal garden was capable of being an easement, but the dominant owner is not entitled to plant a flower bed in a specific area as this would amount to an exclusive use of the land.

Easements of parking a car

There has been much controversy in recent years as to whether this can amount to an easement. In *Newman v Jones* [1982] Megarry VC said that the right of a tenant to park a car in a defined area is capable of amounting to an easement. Again in *Bilkus v London Borough of Redbridge* the court said that a general right to park was capable of being an easement. In *London v Blenheim*, the court said that whether the right amounted to an easement or not was a matter of degree.

In *Batchelor v Marlow* [2001] D ran a business and claimed to have acquired an easement to park and store 6 cars on land owned by the claimant, between the hours of 8.30 to 18.00 Monday to Friday. The land in this case could only accommodate 6 cars. The CA said the right was incapable of existing as an easement because it would deprive the owner of reasonable use of the land.

Lord Scott in *Moncrieff v Jamieson* [2007] rejected the reasonable use test above. If a person owns an area of land which accommodates 9 cars, why should he not grant an easement to park 9 cars. The servient owner would remain the owner and in possession and control of the land. The dominant owner would have a right to station up to 9 cars. How could it be said that the law recognise an easement to park, say, 5 cars in this situation but not 9. Lord Scott substituted a different test and one which asks whether the servient owner retains possession and subject to the reasonable exercise of the right in question, control of the servient land.

The Law Commission in 2008 rejected both tests. The Law commission proposed a 'first principles' test. An easement is a limited right only and is entirely inconsistent with the grant of a more extensive right, such as a lease. The LC said that the best approach was to consider the scope and extent of the right that is created, and to ask whether it purports to confer a right with the essential characteristics of an easement. The question should be 'what can the servient owner do?', rather than 'what can the servient owner not do?'. The right must be clearly defined and must be limited in scope.

In the case of *Virdi v Chana* 2008 CLJ 20 it was held that the ouster principle still applied in English law.

D. Acquisition/ Creation of an Easement

A legal easement may be created either by means of a statute, deed (or will) or prescription. Additionally it must be created for a period equivalent to a fee simple or a term of years - s 1(2)(a) LPA 1925. If it is created after October 2003 it requires substantive registration – Land Registration Act 2002 Section 27.

Statute

Express grant or reservation of an easement

A grant is the giving of an easement by the servient owner to the dominant owner. A reservation is the reservation of the rights by the landowner selling part of his land over the part sold.

If there is no deed then the easement may take effect in equity if the requirements of *Walsh v Lonsdale* are met - see *May v Belleville* [1905] 2 Ch 605 and *McManus v Cooke* (1887) 35 Ch D 681. If the requirements of *Walsh v Lonsdale* are not met then the 'easement' is a licence - *Wood v Leadbitter.*
An easement will only be reserved if the transferor of the servient tenement includes the appropriate words of reservation on the conveyance or transfer.
Section 62 LPA 1925 will often cause a conveyance to operate as an express grant of easements .

Implied grant or reservation
Implied grant
The basis on which easements are implied is that the owner of the land conveys part of it to another person he is under a duty not to derogate from his grant of the land. The law therefore will imply that the transfer or granted easements to the transferee which are necessary for the proper use of the transferred land or which the parties had a common intention should be granted or which were exercised by the transferor over the land before he transferred it and are necessary to the reasonable enjoyment of the land granted. Because the grant of such easements is implied into the deed they take effect as legal easements.

(i) *Easements of necessity*
A grant of land will be implied to include a grant of any easements which were necessary for the use of the land by the grantee. The most common situation for this to occur is in the case of land locked land. The requirement of necessity is strictly construed and an easement will not be implied merely because it would provide a more convenient access to the land granted.

In Sweet v Sommer [2004] an easement of necessity was implied where access to property would have required the demolition of a building.

The easement of necessity is implied into the grant of the land **at the date that the grant is made** and does not terminate if an alternative means of access later becomes available. It is unclear whether the easement ceases once the necessity ceases.
The extent of the easement is determined by what would be necessary for the use of the dominant land **at the date of the grant and its scope is not increased merely because of a change of use in the future** - *Corporation of London* v *Riggs* (1880) 12 Ch D 789.
Although easements of necessity have usually been rights of way, other rights have been held to be implied as of necessity - *Wong v Beaumont Properties* [1965] 1 QB 173. Here the CA held that the tenant of 3 cellars which he used as a Chinese restaurant was entitled to an easement of necessity to erect a ventilation duct on the outside of the landlord's building. There is an overlap between this category and the next one, since what is necessary to enjoy the land will usually be presumed to be the common intention of the parties.

(ii) *Easements based on common intention of the parties*
An easement may be enjoyed where it can be shown that it was the common intention of the grantor and grantee that a grant of the easement should be made.

See *Pwllbach Colliery v Woodman* [1915] AC 634. Here Lord Parker identified two circumstances in which such an easement will be enjoyed. The first is that the easement arises because the right in question is necessary for the enjoyment of some other right expressly granted, For example, if the grantor has expressly granted the grantee a right to draw water form a spring on his land then this means that the grantee has a right to go to the spring for that purpose. Second easements may be implied from the circumstances in which a grant of land was made.

See *Stafford v Lee* (1993) 65 P & CR 172. Here a deed of gift of woodland mentioned the fact that it fronted onto a private road which was the only practicable means of access. Some years later the owners of the land wanted to build a house and claimed that they were entitled to a right of way over the road by foot or vehicles for all purposes associated with a residential dwelling. The owners of the servient land claimed that the right of way was limited to use for all purposes necessary for the reasonable enjoyment of the land as woodland. Court held that since the original deed granting the land was accompanied by a plan which indicated that the parties intended it to be used for the construction of a dwelling, the parties enjoyed a common intention to use the eland for that definite and particular purpose and that an appropriate right of way had been impliedly granted.

Davies v Bramwell [2007] EWCA Civ 821
Here the Court of Appeal implied an easement to give effect to the common intention of the parties that the land was to be used as a garage.

(iii) *Easements implied into the grant from quasi-easements previously enjoyed by the grantor.*
Where the owner of land grants part of it and retains the rest, or divides his land by simultaneous transfers, any rights which he exercised over his land in the character of easements prior to division are termed quasi-easements.

The rule in *Wheeldon v Burrows* (1879) 12 Ch D 31 has the effect that such quasi-easements may be implied into the grant of land so that the grantee enjoys the same rights in relation to his land as were previously exercised by the owner himself.
However there are several conditions that must be fulfilled before the rule in *Wheeldon v Burrows* applies.
1. The easement must have been 'continuous and apparent'.
<u>Apparent</u>
This means one that is evidenced by some outward sign on the dominant tenament.

In *Borman v Griffiths* [1930] Ch 493 it was held that a quasi easement exercised over a plainly visible worn road track would pass under the rule. However in *Ward v Kirkland* [1967] Ch 194 it was held that a quasi easement to go onto the grantor's land for the purpose of repairing a wall was not continuous and

apparent because there was no feature on the allegedly servient land which would have been obvious on inspection as indicating the exercise of the quasi easement.
Continuous
The act must be constant in nature.

2. It must have been necessary for the reasonable enjoyment of the land. This does not require strict necessity. But it merely means that reasonable enjoyment of the property cannot be had without the easement.
In *Wheeler v Saunders* [1995] 2 All ER 697 the CA (majority) held that a means of access was not reasonably necessary for the enjoyment of the land and that there was therefore no implied easement.
P had purchased a farmhouse which had previously been in common ownership with the adjacent land owned by the D. There were 2 possible means of access to the farmhouse, one of which crossed part of D's land. Staughton and May L.JJ. held that this second means of access was not necessary for the reasonable enjoyment of the land because the other entrance would do just as well. The mere fact that the other entrance was 10 cms narrower was insufficient to prove the appropriate necessity.

A quasi easement under the rule in *Wheeldon* v *Burrows* will not be implied under the rule if there is an agreement between the parties to the contrary. The rule also applied where the grantor, instead of retaining land for himself, makes a simultaneous grant to two or more people. Each grantee obtains the same easements over the land of the other as he would have obtained if the grantor had retained it – *Swansborough* v *Coventry* (1832) 2 M & S 362.

3. The easement must have been in use at the time of the sale – *Kent v Kavanagh*. In this case at the time of the sale the land benefitting from the quasi easement was occupied by a tenant and not the owner.

Implied reservation
The law exhibits a reluctance to imply an easement by reservation for the grantor. This is because a grantor is expected to act in his own interests and deeds are construed in favour of the grantee.

Easements of necessity
Where the effect of a grant would be to completely landlocked land retained a reservation of a right of way may be implied - *MRA Engineering v Trimster* (1988) 56 P & CR 1.

Easements of common intention
In *Webb's Lease* [1951] Ch 808 it was said that a grantor who claims such a reservation must be able to prove affirmatively that such a reservation was clearly intended by him and his grantee at the time of the grant.

Section 62 LPA 1925
This in essence provides that where land is conveyed the conveyance automatically carries with it all the rights and privileges which are annexed to it, so that they do not need to be expressly put into the conveyance. All pre-existing

easements are carried with the sale – *Graham v Philcox*, but it is wider than this. The section only applies to conveyances (see section 205(1)(ii) LPA 1925 for definition of conveyance and you will find that it includes a mortgage, charge, lease) and not to contracts or agreements for the transfer of land.

In one way the section is wider than the rules for implied grant in that it is not limited to rights that are necessary for the reasonable enjoyment of the land. Furthermore, unlike implied grants it can apply to profits à prendre.

The section clearly carries with it the benefit of all pre-existing easements but it does more than this in that it converts privileges granted by the grantor into easements. For example, a landlord renews a lease, having previously allowed the tenant to enjoy certain privilege. Unless these privileges are excluded the grant of the new lease will convert them into easements.
Wright v Macadam [1949] 2 KB 744
A tenant of a top floor flat was permitted to use a shed in the garden of the property to store coal. A new tenancy was granted making no mention of the shed. The landlord subsequently demanded payment of an additional rent for its use. CA said that the licence to use the shed had been converted to a legal right by the grant of the new tenancy.

Section 62 only applies where there was a prior diversity of occupation between the land conveyed and the servient tenement. Although Sargant J. in *Long v Gowlett* [1923] 2 Ch 177 said that the section could apply even though there was no prior diversity of occupation provided that it had been exercised continuously and apparently prior to the conveyance.
But HL in *Sovmots Ltd v Secretary of State for the Environment* [1979] AC 144 (House of Lords) it was said that diversity of ownership is required. Lord Wilberforce said, "When land is under one ownership one cannot speak in any intelligible sense of rights, privileges or easements being exercised over one part for the benefit of another. Whatever the owner does, he does as owner and until separation occurs of ownership, or at least of occupation, the condition for the existence of rights etc does not exist."

However the decision of Platt v Crouch (2003) approved Long v Gowlett. In this case the court said that when using s.62 you are looking to see whether the easement is continuous and apparent, and only if you cannot find that do you need to look for diversity of ownership. If this is correct then ther is an overlap beteeh WvB and s.62

In Platt the claimant established (i) an easement of mooring; (ii) a right of way; and (iii) an easement of signage over the 'servient' land, having purchased the 'dominant' land from D, D having previously used all the rights for the benefit of the part sold.

Section 62 will not operate to convert a right into an easement unless it satisfies the characteristics of an easement.
Section 62 only operates in favour of rights being exercised at the date of the conveyance.

Nor will it apply if is expressly excluded.

Acquisition by long user - prescription

In adverse possession a person may acquire the legal ownership of land and prescription similarly in one respect in that it enables the owner of land to acquire an easement over other land merely by usage over a sufficient period of time. Unlike the doctrine of AP the acquisition of easements by prescription is not rooted in the concept that long use entitled the user to the right exercised, but operates on the basis of a fiction that the user was at some point in time granted the relevant right.

The rules on prescription in English law perform the important function of preventing the disturbance of long established de facto enjoyment.

Lord Hoffmann said in R v Oxfordshire CC Ex p Sunningwell (2000) English law "has never had a consistent theory of prescription . It did not treat long enjoyment as being a method of acquiring title. Instead, it approached the question from the other end by treating the lapse of time as either barring the remedy of the former owner or giving rise to a presumption that he had done some act which conferred a lawful title upon the person in de facto possession or enjoyment."

In this context lapse of time gives rise to a presumption that the enjoyment was pursuant to a right having a lawful origin. Thus the court may presume, on proof of the fact of long enjoyment, that there was once an actual grant of the right, even though it is impossible to produce any direct evidence of such a grant – Gardner v Hodgson's Brewery 1903. It is then the habit andd the duty of the court to clothe the fact with a right – Moody v Steggles. The court is endowed with great power if imagination for the purpose of supporting ancient user – Neaverson v Peterborough DC 1902. The policy extinguishes state claims, quiet titles and preserves established property rights, while at the same time paying lip service to the doctrine that all easements must lie in grant.

Today it is questioned whether this policy should be preserved. It has produced a complex body of law. There are no less than three methods of prescriptions, namely common law, lost modern grant and under the Prescription Act 1832. Whichever of the methods are chosen it is not enough to show long user by itself. All methods must be use as of right before the court will presume a grant. It may therefore be contended that there is little justification in acceding to claims for an easement or profit simply on the basis of long user. In 1966 the Law Commission reported that "the law of prescription is unsatisfactopry, uncertain and out of date, and that it needs extensive reform". A majority of the Commission recommended its total abolition. Nothing has been done.

There are 3 types of prescription;

1. prescription at common law;
2. prescription under the doctrine of lost modern grant;

3. prescription under the Prescription Act 1832.

General principles underlying prescription

Except where the Prescription Act 1832 provides otherwise, the following conditions must be met in order for there to be a successful claim for prescription.

1. User as of right

The user must be as of right, i.e., it must be enjoyed *nec vi, nec clam, nec precario* (without force, without secrecy, without permission). The claimant must have used the easement as though he was entitled to use it. From early times English law followed Roman law. Since the necessay conditions are negative it is usually the servient owner who will make the allegation. The whole of the law of prescription rests on acquiescence.

(i) No easement will be acquired by prescription if the user was ***forcible*** against the servient land, for example, if the allegedly servient owner continually protested against the use - *Eaton v Swansea Waterworks* (1851) 17 QB 267. Forcible entry includes not only the breaking down of barriers or other acts of violence, but also where there is a continued dispute, with the servient owner making protests – *Dalton* V *Angus* (1881) 6 App Cas 740, 786

(ii) Secret user (*clam*) is not permitted.

See *Union Lighterage v London Graving Dock Co* [1902] 2 Ch 557 - in this case Romer L.J. said that the enjoyment must have been open that is to say of such character that an ordinary owner of the land, diligent in the protection of his interests, would have, or must be taken to have, a reasonable opportunity of becoming aware of that enjoyment. For this reason the CA said that no easement had been acquired when a dock had been fixed to a wharf for more than 20 years by means of underground rods which were invisible to the owner of the servient land.

See also *Coghill case* [1918] 1 Ch 307, where there was secret discharge of harmful chemicals into a sewer.

(iii) User must have been without permission. Long user will only be effective to acquire an easement, other than a right to light, if it were exercised as of right, **without the permission** of the servient landowner, since otherwise it would derive form an implied licence or an express licence.

Gardener v Hodgson's Kingston's Brewery [1903] AC 229

Here permission was implied where the user for 60 years of a right of way had made a periodic payment to the owner of the allegedly servient land. Permission which has lapsed will not prevent the acquisition of an easement if the use continued for the appropriate period of time after the lapse. Use in excess of the permission will also acquire an easement.

(2. User must not have been unlawful- no longer the case

In Bakewell v Brandwood [2004] 2 WLR 955 owners of houses had been driving across a common to get from the public road to their homes. Section 193(4) LPA

1925 makes it an offence to drive across a common 'without lawful authority'. The claimants, the owners of the common, argued that the owners of the houses conduct was 'criminal' and could not give rise to a prescriptive easement. HL ruled in favour of the home owners.)

3. User must have been exercised in fee simple, i.e., by the freehold owner of the land.
An easement may only be acquired by prescription by the freehold owner of a dominant piece of land against the freehold owner of the servient piece of land.

4. The user must be continuous
Casual use is not enough to demonstrate prescription - *Ironside, Crabb and Crabb* v *Cook, Cook and Barefoot* (1981) 41 P & CR 326

Types of Prescription

1. Common Law
At common law an easement could be acquired if it could be shown that it had been enjoyed since time immemorial, which was taken to mean 1189 (the beginning of the reign of Richard I of England). Long user gives right to a prescription that the right claimed has been enjoyed from time immemorial, but this can be rebutted by the owner of the allegedly servient land demonstrating that this was not the case. The problem with this is that it is almost impossible to prove that the easement has existed since time immemorial. Hence the courts had to develop the fiction of the lost modern grant. As time went on, proof of lawful origin by establishing continuous user since 1189 became for practical purposes impossible. The courts filled the gap with a presumption that 20 years or more user would allow a presumption of continuous use since 1189.

Serious problems still arise in that it is a presumption and can be rebutted by showing that at some time since 1189 the right could not or did not exist. Thus an easement of light cannot be claimed by common law prescription for a building if it is shown that the building was erected post 1189 – *Bury v Pope* (1586). Again if it can be shown that the dominant and servient land was in common ownership at any time since 1189 then any easement or profit would be extinguished – *Keymer v Summers* (1769).

To remedy this the courts developed the doctrine of

2. Lost Modern Grant

This doctrine avoids the problems of common law prescription by presuming from long user that an easement or profit had acually been granted after 1189, but prior to the claim the deed or grzant had been lost. Under this doctrine evidence of 20 year's use or use during living memory generates a fiction that the right claimed has been expressly granted after 1189, but that the grant has been lost. The presumption cannot be rebutted by evidence that no grant was in fact made – *Tehidy Minerals* v *Norman* [1971] 2 QB 528, but it is a ggod defence that

during the entire period when the grant could have been made there was no person who could lawfgully have made it. For example the land was subject to a strict settlement (under which there was no power to grant a fee simple. The easement may be acquired under the lost modern grant doctrine even on the basis of a past period of 20 years which has been interrupted or discontinued - *Mills v Silver* [1991] Ch 271. However, rather strong evidence is needed to induce the court to presume a lost modern grant. The fiction can only be used if something prevents the use of the common law prescription – *Bryant* v *Lefever* (1879) 4 CPD 172, 177. Since the whole thing is a fiction the claimant will not be asked to furnish the grant, but he must argue that the grant has been made. This will only fail if it can be shown that the grant could not have been made.

3. In addition to the acquisition of easements above they may also be acquired under the Prescription Act 1832.

This Act was passed to deal with the problems of common law prescription. It has in turn, however, created its own difficulties. It is an ill-drafted piece of legislation – probably the most ill-drafted in English law. There have been repeated calls to repeal the Act. The 1832 Act makes special provision in relation to easements of light, and we shall not be studying those.

Section 2 says that no claim to an easement is to be defeasible by showing that user commenced after 1189 if 20 years' uninterrupted enjoyment as of right can be show. If 40 years' uninterrupted user is shown, the right is deemed to be absolute unless it has been enjoyed by written consent or agreement.
Section 4 says that the period is 20 or 40 years must be 'next before action' in which the claim is being brought. This means that until an action is brought there is merely an inchoate right to the easement, however long the user – *Hyman* v *Van der Bergh* [1908] 1 Ch 167. The vital period of time is that immediately before the action being brought. So if the user commenced 50 years ago, but stopped 5 years ago, the claim will fail if the action is commenced today, for there has not been a 20 or 40 year period immediately before action.
The user must be without interruption. This has a special meaning. If D has used a right of way over S's land for 20 years and a barrier is then erected barring his way, D can still succeed in establishing a successful action provided that at the time the action is brought he has not acquiesced in the obstruction for one year after he has known both of the obstruction and of the person responsible for it – *Seddon* v *Bank of Bolton* (1882) 19 Ch D 462. Interruption means a hostile obstruction and not a mere non user. A complaint against the obstruction suffices to negate acquiescence if it is communicated to the servient owner. The user must be as of right – *nec vi, nec clam, nec precario.*

However 20 years user will be ineffective to create such an easement if it can be shown that it was enjoyed by the agreement or consent of the owner of the servient land, even if the agreement is merely oral.

However user for 40 years will render the right absolute and indefeasible even if it were enjoyed with consent or agreement of the servient owner, unless that agreement was in writing.

In relation to profits section 1 of the Act applies. It replaces the 20 year period with a 30 year period and the 40 year period with a 60 year period.

The Act does not allow a claimant to establish an easement that could not be established at common law, for example, a claim by the freemen and citizens of a town to enter land and hold races on Ascension Day cannot be established under the Act – *Mounsey* v *Ismay*.
Nor has the Act abolished the other methods of prescription. You plead all three types of prescription in practice.

E. Scope of an easement

In the case of expressly created easements the scope of the entitlement to the easement is determined by the grantor's intentions. This may be done by looking at the terms in the deed granting the easement.
The nature of the land at the time of the grant may also be a determining factor - see *White v Richards* (1994) 68 P&CR 105, where part of a plot of agricultural land was conveyed with an express reservation of a right of way over a designated track to 'pass and re-pass on foot with or without motor vehicles' as far as may be necessary for the use and enjoyment of the land.' Held that the scope of this easement should be construed in the light of the physical nature of the track over which it was enjoyed, so that since it was only 8 foot 10 inches wide and mainly dirt it could be exercised by vehicles with a wheelbase of less than 8 feet and a laden weight of less than 10 tonnes. Use by 38 tonne lorries excavators etc was therefore excessive and damages for trespass awarded.

Where an easement has been expressly granted or reserved it will be held to include the right to exercise less onerous uses which are logically derived from it. See *White v Richards*

In the case of implied easements the scope of the entitlement may be limited by the use contemplated at the time of the conveyance. In *Corporation of London v Riggs* (1880) 12 Ch D 208 held that an impliedly reserved right of way to agricultural land must be limited to use for agricultural purposes and that it did not extend to use which was necessary if the land was to be used for building purposes. Use beyond that exercised at the date of the conveyance will not be excessive if it was contemplated by the parties.

F. Extinguishment of an Easement

1. Release - this means that the owner of the dominant land is entitled to release the servient land from the burden of the easement which he is entitled to exercise over it.
There may be express release which may only be done by means of a deed.
Implied release may take place. Non-user of the easement is not per se enough, but if the non user is for long enough then there is a presumption of the intention to abandon.

2. Unity of seisin

3. The easement is rendered obsolete.

G. Profits à Prendre

This is a right to go onto someone else's land and take something from the soil – *Manning* v *Wasdale* (1836) 5 A & E 758, i.e., it must either be the soil itself, the natural produce from the soil or the wild animals existing on it. The thing taken must be capable of being owned, and the thing taken must be part of the land (eg crops). A right to hawk, hunt, fish and fowl can therefore exist as a profit, for once the creatures are killed they are capable of being owned. But the right to take water from a spring or the right to water cattle at a pond may be an easement, but is not a profit.

Profits can be enjoyed by one person to the exclusion of all others, or can be enjoyed by several persons – the latter known as a profit in common.

Rights (profits) in common

The most characteristic profits were the rights of common which arose in manors and were enjoyed by the freeholders. The origin of the rights of common has been disputed. The orthodox theory is that they arose through grants by the manorial lord to his tenants (Bracton). It is more probable that such rights simply arose as customary rights associated with communal system of agriculture practised in the primitive village commuities. At the time of the conquest large parts of the country were not cultivated, and those that were were not farmed by individual farmers acting individually, but by a communal systyem of agriculture which depended for its success upon the cooperation of all the members of a small village community, forming an economic unit which was largely self-supporting. The lands occupied by such a community would be partly cultivated and partly waste. The arable land was farmed in accordance with a fixed customary system, in which one crop would be grown one year and another another year, and at regular intervals the land would lie fallow, a practice which enabled it to be ploughed at a time appropriate for weed control. In this artable system the inhabitants of the manor had individual holdings, often consisting of scattered strips, each unfenced from that of the neighbour. The great open fields which were a result of this practice were cultivated and cropped unifrmerly with local custom. Over the waste land the villagers had customary rights to graze their cattle, dig turf, gatehr wood etc. The cattle pastured by day on the waste land, and at night moved onto the arable land, thereby manuring the ground. Hence the rule that beasts in respect of which a right of common was claimed must be 'levant' and 'couchant' on the arable land to which the right was attached.

The ninteenth century saw the settlement of the modern law of profits. They were essentially incident to a system of agriculture which is no longer in use in most of the country, although in hill farming country the right to pasture sheep was still practised, and this form of right in common was important. But in general they do not have the importance they did in the medieval system, when the rights governing them were settled. The decline in the importance of profits also goes hand in hand with the enclosure movement. (**Enclosure** was the legal process in England during the 18th century of enclosing a number of small landholdings to create one larger farm. Once enclosed, use of the land became restricted to the owner, and it ceased to be common land for communal use. In England and Wales the term is also used for the process that

ended the ancient system of arable farming in open fields. Under enclosure, such land is fenced (*enclosed*) and *deeded* or *entitled* to one or more owners. The process of enclosure began to be a widespread feature of the English agricultural landscape during the 16th century. By the 19th century, unenclosed commons had become largely restricted to rough pasture in mountainous areas and to relatively small parts of the lowlands. Enclosure could be accomplished by buying the ground rights and all common rights to accomplish exclusive rights of use, which increased the value of the land. The other method was by passing laws causing or forcing enclosure, such as Parliamentary enclosure. The latter process of enclosure was sometimes accompanied by force, resistance, and bloodshed, and remains among the most controversial areas of agricultural and economic history in England.)

It was realised that the public was being deprived of public spaces and the Commons Preservation Society was founded in 1865, and the Commons Act 1876 severly limited the rights to enclose. Although this Act practically halted the enclosure movement the destruction of the manorial structure had been completed destroyed. The only parts of the country where rights of common are practised are in the hill farming regions. IN other regions these profits are no longer of great import.

Legislative regulation of rights of common have existed since the 19th century. About 4% (or 550,000 hectares) or land in England and Wales is currently common land. The Commons Reistration Act 1965 enacted a scheme for ascertaining what rights were claimed to be still in existence, registering them and extinguishing other rights.The Commons Act 2006 is the current piece of legislation, and its provisions are being incrementally introduced.

The 1965 Act made the following registrable:
(i) land in England and Wales which is common land or a town or village green;
(ii) rights of common over such land;and
(iii) persons claiming to be, or found to be, owners of such land.

Such registration was conclusive evidence as to the land being common land even where an entry was srong. The effect of the 1965 Act was that no land capable of being registered was deemed to be common land unless so registered. The provisions operated to extinguish all existing unregistered rights.
Certain land is outside the ambit of the 1965 Act eg New Forest.

Profits to individuals

Unlike an easement a profit can exist in gross or it can exist as attached to the land.

(a) A profit appurtenant

This can be given to one or several individuals, and it is annexed to some nearby tenement and runs with it.

In general there must be compliance with the 4 conditions in Ellenborough Park. Thus aprofit of piscary cannot be for commercial reasons, with the number of fish taken being limited to the number required for the needs of the dominant tenement.

(b) A profit appendant is annexed to the land by operation of law, and probably only exists in one form the right of common pasture.

(c) A profit pur cause de vicinage exists only in the form of common pasture. It is a true right of common and is a defence to an action of trespass. It covers the situation where two adjoining commons are open to each other and cattle put on one common by the commoners have been allowed to stray on the other common and vice versa. A modern example can be found in the case of Dance v Savery 2011, where D grawed his sheep on 3 adjoining commons.

(d) A profit in gross – this takes place independantly of the ownership of land, ie there is no dominbant tenament. Thus a right to take fish from a canal (Staffordshire and Worcestershire v Bradley 1912), can be a profit in gross.

A profit in gross is an interest in land which will pass with under a will or intestacy or can be sold or dealt with in any of the usual ways, being an incorporeal hereditament.

G. Remedies for interference with an easement

1. Abatement – self help, ie remove the obstruction

2. Declaration from the court to clarify the rights

3. Damages

4. Injunction

5. Claim in nuisance

Questions

1. Anne and Bert own Home Farm and a Paddock. Anne and Bert use a drive to access Home Farm and the drive leads over the Paddock. Last year they decided to retire. They sold Home Farm to Chris, who was their farm manager but kept ownership of the Paddock and the drive. The drive is in a poor state of repair and can be difficult to use in bad weather.

There is a second entrance to Home Farm which is down a narrow lane and is not suitable for vehicles making deliveries and collections to and from Home Farm. Anne and Bert did not really use this much.

There was no reference to any easements in the transfer to Chris. Anne and Bert have told Chris that they don't want the delivery vehicles using the drive any longer as they are too noisy. Also, Chris and his family who work on the farm sometimes park on the Paddock. Chris says that no one is doing anything different from when Anne and Bert owned Home Farm, and that Anne and Bert used to park on the Paddock.

Bert is adamant that Chris no longer has permission to park on the Paddock or for delivery vehicles to use the drive. Bert points out that Chris could widen the lane so that delivery vehicles could use it. However, that would involve knocking down some of the farm buildings which Chris does not want to do.

Advise Chris.

2. Kermit is the unregistered fee simple owner of "Muppet Mansion", a large house situated on a promontory, which is surrounded on three sides by the sea. Last year Kermit sold part of the grounds nearest to the mainland to Miss Piggy, but retained Muppet Mansion and its immediate gardens. Unfortunately, his solicitor failed to reserve for Kermit a right of way across the land he sold, to the main road. Kermit now intends to convert Muppet Mansion into a hotel, and although Miss Piggy does not object to allowing Kermit to drive his own car along the drive leading from Muppet Mansion to the road across her land, she is not prepared to allow construction vehicles to use the drive to get to the Mansion to do the conversion work. She is also concerned that if the Mansion is converted into a hotel large numbers of guests will be using the drive. For his part, Kermit argues that unless Miss Piggy relents, he will refuse to permit her to enjoy certain rights over the land he retained, which rights themselves were not specifically granted to Miss Piggy. These rights are (i) a right to use a television receiver on the retained land (ii) a right of way over the retained land to a yacht jetty (iii) a right to use a sewage pipe passing under the retained land to the sea.

Discuss

3. Discuss the development of profits in English law.

Topic SEVEN
Restrictive Covenants Affecting Freehold Land

A. Introduction

Alongside the law of nuisance (common law), environmenal law (statute – concerns the management of the natural resources and the environmental impact of things) and planning law (statute- concerns the use of land), the law of freehold covenants provides an important means of controlling the use of land. Like easements, restrictive covenants presuppose the existence of at least two pieces of land. They restrict what can be done on the land, but unlike easements positive covenants do not give the dominant land owner the right to enter onto the servient land. Their function is much wider than that of easements, since they serve to protect the amenity value of the dominant property or of the neighbourhood. The source of a covenant is always CONSENT. They can never be prescriptive. In practice the restrictive covenant arises from dividing land or developing it. Unlike the easement, restrictive covenants were not recognised until the mid 19th century, and the courts began to recognise the concept of amenity and thus protect covenants against successors in title. In this way negative obligation moved from being merely a matter of contract to being a servitude.

A covenant is an undertaking in a deed, by which one party (the covenantor – Cor) promises another party (the covenantee Cee) that he will or will not engage in some specific activity in relation to a given piece of land, for example, promise to paint the exterior of the property once every three years or to keep a reasonable number of domestic animals.

Covenants may be positive or negative in nature. A positive one imposes an obligation on the Cor to do something, and a negative one seeks to restrict some activity on the land.

Between the Cor and the Cee the covenant is enforceable as a form of contract. This is so whether the covenant relates to land, or is personal in nature, for example, Cor promises Cee he will not use foul language on the property. A problem arises, however, when the Cor and Cee part with the land.

Original parties

Cor----------Cee

Sale Sale

Cor2 Cee2

Are the covenants enforceable between Cor2 and Cee2?

THE RULES

The common law and equity have separate rules. Both permit the benefit of a covenant to run with the land. However, the common law does not allow the burden of a covenant to run directly while equity allows the burden of negative covenants only to run with the land.

B. Common law

History
Covenants affecting freehold land is an extension of the medieval law of contract. As early as 1369 in Pakenham's Case the court allowed the benefit of the covenant to be annexed to the estate of the covenantee. In this case D had promised to celebrate devine service in the chapel of P, who was the successor in title of the original covenantee. The court allowed this to be enforceable. It represents a breach of the ordinary rule of privity of contract.

Of the running of the burden, little is known in medieval law.

The burden at common law

The burden cannot be directly enforceable at law against the successors in title of the original Cor – Austerberry v Oldham Corp (1885) 29 Ch D 750, 781. The principle in Austerberry was motivated by a policy that land should remain unfettered for future generations. An opportunity to modify the rule arose in Rhone v Stephens [1994] 2 AC 310. Nourse LJ in the CA thought it 'hard to justify' the retention of the rule, but the HL refused to do anything about it. Lord Templeman believed the matter was one that lay in contract. Commentators and law reformers have frequently urged that the law be amended to allow positive burdens to run with the land.

There are several methods of indirect enforcement;

(i) A chain of indemnity covenants

The original Cor remains liable even after the land is sold and so he will protect himself by taking out an indemnity from the purchaser. Each successive purchaser gives an indemnity to the person above them in the chain. The original Cee should be able to secure the positive covenant by suing the original covenantor, who in turn sues the person next in line.

This has limited application, since it does not work, for example, if one of the persons in the chain of indemnity becomes insolvent.

(ii) The doctrine of mutual benefit and burden. The arument behind this is that the benefit of a contract is always assignable. Therefore it is possible to make acceptance of the buden to be made conditional on the enjoyment of the benefit, effectively making the burden pass. For example, if A conveys land to B

reserving to himself mining rights, but so that compensation in money be made for the damage done while mining, the liability to pay compensation is a condition of exercising the mining rights and will run with the land and bind A's successors in title – Chamber Colliery v Twyerould (1893). This wil give B (or his successors) the right to claim under the condition and claim an injunction to forbid future mining, unless compensation is paid – Westhoughton UDC v Wigan Coal & Iron Co (1919).

If the provision for compensation is expressed as a covenant , it may still operate as a condition if it is held that the benefit and burden have been annexed to eah other ab initio – Tito v Waddell.

Halsall v Brizell [1957] Ch 169, based on the ancientdoctrine that he who takes the benefit must also take the burden.

In this case D's predecessor in title, the purchaser of a house on a building estate, had been granted a right to use the roads and sewers on that estate, and he had covenanted to pay a proportionate share of the cost of maintenance of these facilities. Upjohn J held that D could not now exercise these rights without contributing to the costs of ensuring that they could be exercised.

This was approved in Rhone v Stephens. Here it was held to be invoked where purchases of plots on an estate were entitled to use private roads and each covenanted to pay a proportionate cost of the maintenance.

See, however, Thamesmead Town Ltd v Allotey (2000) 79 P & CR 557, where it was said that there must be a correlation between the benefit and the burden which the successor has chosen to take.

The benefit at common law

The benefit of a covenant which is not exclusively personal is a chose in action and as such may always be expressly assigned in writing as a chose in action – LPA 1925, section 136. Under this section notice must be given of the assignment to the original covenantor.

Several conditions must be met (P & A Swift v Combined English Stores Group plc [1989] AC 632).

(i) The covenant must touch and concern the land of the Cee.
This means that the covenant must affect the land as regards the mode of occupation, or be such that it affects the value of the land – Smith & Snipes Hall Farm v River Douglas Catchment Board [1949] 2 KB 500, 508.

(ii) It must be intended to run with the land. No formal words as such are necessary.
It must be shown that the covenant was intended by the parties to run with the land.

In relation to covenants undertaken post 1925, the requirement of intention is closely related to section 78(1) LPA 1925. By this provision covenants relating to the land of the Cee are deemed to have been made not merely with the Cee, but also with his successors in title.

(iii) The Cee must have a legal estate in the dominant land at the time the covenant is made – Webb v Russell (1789) 3 TR 393. In other words there must be dominant and servient land.

(iv) The successor must acquire the same legal estate or a lease derived from it, although not necessarily the same estate in the land. Thus squatters will have the benefit of a covenant. .

The Contracts (Rights of Third Parties) Act 1999 allows the benefit of a covenant to be claimed by a wide category of non-parties to the covenant provided that they are included in the covenant in some way, by means of generic descriptions, like successors in title of the Cee.

B.Equity
The Burden in Equity

Equity intervened and broke away from the common law, and will allow the burden of a restrictive covenant to be enforced against latter owners in certain circumstances. The covenant was always enforceable between the contracting parties, but it came to be thought that a subsequent purchaser of the burdened land who had notice of it , and perhgaps paid less for the land, would be acting unconscionably if they disregarded the restriction. Moreover, the person who took the benefit of the restriction would not be satisfied with money compensation for breach of the covenant, but would want an injunction. This, of course, would entail an application to the Chancery Court.

Tulk v Moxhay [1848] 2 Ph 774 (Chancery)
In the years that followed this decision the restrictive covenant was subjected to the rules in regard to servitudes.

(i) the covenant must be negative in nature or restrictive in nature, i.e., it must not require the Cor to Carry out any act or incur any expenditure. This was settled in the decision of Haywood v Brunswick 1881.
The actual covenant in Tulk was positive in wording (to maintain a garden in an open state), but negative in nature.

A covenant that has both positive and negative qualities cannot be a restrictive covennt.

(ii) the Cee must retain land capable of being benefited, i.e., there must be dominant and servient land. This is a question of fact.

LCC v Allen [1914] 3 KB 642

Wrotham Park Estates Ltd v Parkside Homes Ltd [1974] 1 WLR 798
Re Ballard's Conveyance [1937] Ch 473

Proximity of the two pieces of land is essential – Kelly v Barrett (1924).

(iii) The covenant must have been intended to run with the land of the Cor.
A covenant may be worded to bind the covenantor alone but if it is made with the covenantor, his heirs and assigns it will run with the land. Section 79 LPA 1925. Covenants relating to the Cor's land, which are made after 1925, are deemed to have been made by the Cor on behalf of himself, his successors in title and persons deriving title under him, unless excluded.

(iv) The registration or notice requirements must be met.
(v) The covenant must touch and concern the land
(vi) The covenant only runs in equity qnd therefore the remedy was traditionally an injunction, although since the Chancey Amendment Act 1858 section 2, and the Senior Courts Act 1981, section 50 damages in lieu of an injunction are also available.
(vii) The equitable maxims apply.

The Benefit in Equity

The benefit of a restrictive covenant may be transmitted in equity to a successor in title of the covenantee by one or more of the three means:

- Annexation
- Assignment
- Scheme of development or building scheme

The covenant must touch and concern the land of the Cee, and the covenant must be intended to run with the land.

Annexation

The benefit becomes attached **to the land** so that each time the land is transferred the benefit is automatically transferred. Annexation mirrors the importance attached to the element of intention by the common law rules for the passing of benefits. There are three types of annexation:

(i) Express annexation

Where the deed contains a clear expression that identifiable land should benefit or was made with the Cee in his capacity as owner of the land.

In Rogers v Hosegood [1900] 2 Ch 388, the CA held that there was annexation by the use of the following words, "with the intent that the covenant might take effect for the benefit of the vendors and their successors in title and others claiming under them to all or any of their lands adjoining or near to the land conveyed."

In Renals v Cowlishaw (1878) 9 Ch D, however, a claim of annexation failed where a covenant had been made merely with the vendors, "their heirs, executors, administrators and assigns" since there was no reference to the land that was intended to be benefited.

In Federated Homes Ltd v Mill Lodge [1980] 1 WLR 594 Brightman LJ said that if the benefit of a covenant is, on proper construction, annexed to the land, it is annexed to each and every part thereof, unless there is a contrary intention.
See Ballard's Conveyance [1937] Ch 473 and Marquess of Zetland v Driver [1939 Ch 1.
See also Small v Oliver & Saunders [2006] EWHC 1293, where the presumption that the covenant is annexed to each and every part of the land was applied, so that the covenant applies where the land is subsequently divided.

(ii) Implied annexation

This will arise if the parties so obviously intended the land to benefit that to ignore the intention would be unreasonable, and a departure from common sense.

Renals v Cowlishaw [1878] 9 Ch D 125
In MCA East Ltd [2003] 1 P 7 CR 118, it was said that the primary focus is to be placed on the language of the transfer, and the implications to be drawn therefrom, rather than on the surrounding circumstances.

(iii) Statutory annexation

Section 78 LPA 1925 says, "A covenant relating to any land of the Cee shall be deemed to be made with the Cee and his successors in title and the persons deriving titled under him or them, and shall have effect as if such successors and other persons were expressed."

At first this was regarded as a word saving provision operating only to pass the benefit of a covenant when a valid express or implied annexation had already been established. The section merely rendered it unnecessary to name the Cee's successors in title.

The case of Federated Homes, however, said that the effect of Section 78 was to annex a covenant to the land automatically provided that it was intended that it benefit the land. If this view is correct then you do not need to look at the conveyance to see whether there is an intention to annex or not.

The case has been criticized in that it is too narrow, and it allows carte blanche annexation. Furthermore, if the case is correct then a similar view can be taken of section 79, in respect of the passing of burden of covenants and Austerberry would be reversed.

A narrower view was taken in Roake v Chadha [1984] 1 WLR 40, where the court said that in order for s. 78 to operate there must be an intention that the covenant

run with the land. In that case the covenant was expressed "not to enure for the benefit of any owner or subsequent purchaser unless the benefit of the covenant has been expressly assigned". It had not been expressly assigned and therefore there was no intention for the covenant to run.

The decision of Crest Nicholson v McAllister [2004] EWCA 410 said that the land to be benefited must be identifiable from the words of the covenant or by implication.

Assignment

The difference between assignment and annexation is that the former confers the benefit of the covenant on the person, unlike annexation, which confers the benefit on the land.

The effect of annexation is to fasten the benefit of a covenant on the land for ever. Assignment is only effective to confer the benefit on an immediate assignee. The covenant will need to be assigned with ever subsequent transfer of land. Hence a person seeking to enforce the covenant will need to show a complete chain of assignments down to him.

There are several conditions that need to be fulfilled in order that a valid assignment has been made.

(i) The covenant must have been taken for the benefit of the land owner by the Cee at the date of the covenant.

If this is not then the covenant will be one in gross, and would be unenforceable except between the original Cor and Cee. In Newton Abbott Co-operative Soc v Williamson & Treadgold [1952] Ch 286, the court said that this requirement was met by a covenant which precluded the Cor from conducting trade in competition with the business carried out by the Cee in his nearby premises.

(ii) The assignment must be contemporaneous with the transfer of the dominant land.

If the benefit of the covenant becomes separated from the dominant land then it ceases to be operative.

(iii) The dominant land must be ascertainable.

Scheme of development

A problem exists at common law because of the rule in Prior's Case, which says that the benefit of covenants made with the Cee, **having an interest in the land to which they relate**, passes to his successors in title. The application of the rule can be demonstrated in the following situation:

How can the covenants be enforced between the adjacent landowners of the above plots? The developer extracts covenants from each initial purchaser, then the dominant land comprises of the area constituted by the currently unsold plots. This area shrinks with every sale. The dominant land in respect of a covenant cannot include the plots which have already been sold.

Hence I the above if plots 1-8 are sold in chronological order by developer V, then the covenants taken out by V with 1 are enforceable by 2-8, taken out by V with 2 are enforceable by 3-8, taken out by V with 3 are enforceable by 4-8 etc etc. The covenants taken out by V with 8 are not enforceable by anyone in the above situation, since V has not retained any land. This situation is untenable.

Hence the development of the scheme of development. They are easy to identify and are usually found on housing estates, and the aim of these schemes is to maintain a certain standard of amenity for all the residents.

If a scheme of development is present equity takes the view that the covenant appurtenant to each and every plot of land in the scheme can be enforced by all the current owners of the land covered by the scheme (provided that the covenants are entered into the Land Register or Register of Land Charges). If a scheme is shown to exist then it does not matter whether the party seeking to enforce the covenant is an original Cee or his successors in title. The development crystallizes on the disposition of the first plot sold within the scheme. Earlier purchasers can claim the benefit of covenants entered into by later purchasers. The chronology of the covenant and the purchase becomes irrelevant.

The origin basis for the scheme of development is the idea that 'community of interest necessarily … requires and imports reciprocity of obligation.' – Spicer v Martin (1888). The intended mutuality of the covenants created within the scheme of development attracts the protection of a jurisdiction of conscience, for it gives rise to 'an equity which is created by circumstances and is independent of

contractual obligations' – Lawrence v South County Freeholds Ltd (1939). The scheme of development simply has a special equitable character which makes it quite immune from many of the normal rules governing the enforcement of restrictive covenants.

The overriding criterion is common intention.

Parker J laid down the meaning of this intention in
Elliston v Reacher [1908] 2 Ch 374

(i) Both the plaintiff and the defendant must derive title from the same vendor.
(ii) The vendor must have laid out his estate or a defined part of it for sale in lots, subject to restrictions which were intended to be imposed on all the lots.
(iii) These restrictions must have been intended to be, and be, for the benefit of all the lots.
(iv) The lots must have been purchased on the basis that the restrictions were to be for the benefit of all the other lots.

A fifth requirement was added by the CA in Reid v Bickerstaff [1909] 2 Ch 305

(v) The area to which the scheme extends must be clearly identified.

These rules have been relaxed in recent years and it is now only necessary to show that a common intention was present that a clearly defined area should be subject to mutually enforceable covenants in the interests of all purchasers and their successor in title – 'local law'

Re Dolphin's Conveyance [1970] Ch 654
Here the scheme lacked a single common vendor, and the vendors had not, prior to the relevant sales, laid it out in predetermined lots. Stamp J nevertheless said that there was a scheme of development. He said there was a clear intention to lay down what has been referred to as local law of the estate. On the facts there arose an equity which was founded on the common interest and common intention actually expressed in the conveyances themselves.

Ultimately there are two requirements which are insisted upon. The first is that there must be an identifiable scheme – Reid. Each purchaser must know the extent of the area covered by the scheme. The second requirement is the need for reciprocity of obligations – Jamaica Mutual Life Ass v Hillsborough [1989] 1 WLR 1101.

Questions

1. Albert is the fee simple owner of Blackacre and Greenacre, two adjoining fields. He proposes to dispose of Blackacre for development by a builder and to build a house for his own occupation on Greenacre.

Advise Albert how he may most effectively ensure that the boundary fence between the two fields shall be maintained in good condition by the purchaser of Blackacre and his successors in title; that a contribution will be provided by the purchaser of Blackacre, and his successors in title towards the cost of maintenance of the roadway serving both Blackacre and Greenacre and that the houses on Blackacre will only be used as private dwelling houses.

2. . When Leroy bought an old house called Palace Court in 2015, the entry on the Land Register drew attention to the attached covenants:

(i) the building may only be used as a dwelling house for one family;
(ii) no trees on the property may be cut down;
(iii) all walls must be constructed in sandstone bricks;
(iv) the owner must contribute to the maintenance of the access drive.

The covenants were imposed in 1926 for the benefit of Nancy Spencer who then lived at Castle Court next door. Since then, Palace Court has been sold four times while Castle Court has passed down three generations of the Porter family. Lord Porter is the current owner of Castle Court.

Leroy hopes to convert Palace Court into four flats. He plans to live in one and sell the others. In order to do this, he proposes to build an extension to provide a bathroom on the ground floor. This necessitates chopping down a large oak tree which has always blocked the light to the house. Leroy intends to use sand-coloured bricks to build the extension as these are more readily available, cheaper and more durable than real sandstone bricks.

Lord Porter disapproves of the plans and has now demanded a contribution of £1000 towards resurfacing the access road to Palace Court.

Leroy seeks your advice as to whether
(i) he is liable for the road costs;
(ii) his proposed work will be affected by the covenants in the Land Register; and,
(iii) if so, whether there is any way he can carry out his plans.

3. In 2005 Spencers Developments Plc ("Spencers") developed and built Meadowfields, an estate of 20 houses on two acres of land in South Derbyshire. The plan for the development showed the individual plots on either side of a single roadway ("Meadowfield Road") on the estate, which Spencers insisted should remain a private road and not become a public highway.

The transfers to each of the 20 buyers were all in a standard form. Each buyer covenanted with Spencers for the benefit of everyone on the estate (a) not to park a caravan at the front of the houses so that it was visible from Meadowfield Road and (b) to maintain in good weather-proof condition the car port and garage attached to their house.

Amjad Hussain bought his house (2 Meadowfield Road) from Spencers and registered his title in 2007, but sold his house last year to Melanie Jones. Several

tiles are now missing from the roof of her garage, which lets in water when it rains and looks unsightly from the road.

Penny Smith bought her house (6 Meadowfield Road) from Spencers in 2008. She sold her house two years ago to Mark Giles, who has just started parking his motorhome on his driveway.

Diana Cook purchased 4 Meadowfield Road from Spencers in 2009 and has lived there ever since. She is intending to sell her house shortly but is concerned that her neighbours' behaviour might put off prospective buyers.

Spencers went into liquidation last year.

Can Diana Cook ensure that (a) Melanie Jones maintains her garage roof and (b) Mark Giles removes his motorhome from the front drive?

Please explain your answer with reference to appropriate legal principles and authorities.