Contents

Chapter 1

The essence of land law

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Introduction

This chapter looks at what is meant by the ownership of land, the difference between law and equity, and the nature of legal and equitable rights. The chart on page 2 shows the way the chapter is structured, and will introduce the way boxes are used in the text throughout this book. In later chapters we will use this box structure to understand the nature of land law and the different interests in land.

Let's examine each box in the chart on page 2 in turn.

The ownership of land

Box A

THE OWNERSHIP OF LAND

1. Title to land

2. Interests in and over land

The first part of this section gives you a very brief history of the ownership of land. While it may be the part of a book you might initially miss out, may I suggest that you don't do so here? The history explains how people own land and gives you an insight into some of the rather archaic but important terms that are still used today.

From the early Middle Ages all land was owned by the Crown. However, the King used to give out parcels of land to his lords in return for services to the Crown. Of course, in those far-off days, owning land did not just mean enjoying lots of space. The landowner would also own the crops, woodland, fish and wildlife, all of which could be exploited for his benefit. Land meant wealth. The King would give Lord Toff a parcel of 1,500 acres of land in Derbyshire, for example, and in return Lord Toff would supply the King with 30 fully equipped mounted soldiers when necessary. The name of the interest the King gave to Lord Toff was 'estate'. Lord Toff held an estate in land. The conditions on which Lord Toff held the land were known as tenure, a word which comes from Latin, meaning 'to hold'. Lord Toff would then give his servant, Joleyn, the use of 250 acres of the land in return for Joleyn working on the land for him and also for saying prayers at least three times a week to absolve Lord Toff of his sins. Joleyn would also hold an estate in the land

THE ESSENCE OF LAND LAW

Box A

THE OWNERSHIP OF LAND

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granted to him, again subject to the conditions of tenure that were determined by Lord Toff.

Q: ***When did these feudal services end?***

A: Over the years many of the services performed for the Crown were replaced by monetary payments. However, the whole system started to become extremely unwieldy, a situation compounded by social change following the English Civil War. The monetary payments ceased to become worth collecting and the difficulty in obtaining remedies against people who didn't provide services, or the cash equivalent, meant that the system collapsed. One aspect remains, though. All land is still owned by the Crown. If there really is no one to inherit land when a person dies, the land will return to the Crown and be sold in the normal way on the Crown's behalf. Although you think you own the property called Yourland, it is actually still owned by the Crown, and the interest that you own in the land is still called an estate.

Q: ***Were there different types of estate that the King could give you?***

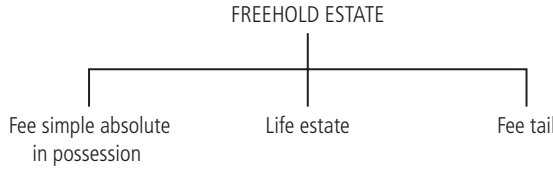
A: Yes. The name of the estate you held was determined by how long you had been granted the land for. There were two main estates: the freehold estate, which can be split into three further estates, and the leasehold estate.

A freehold estate is one whose duration is unknown when it is first acquired.

Compare this to a leasehold estate. A leasehold estate is one that goes on for a period of time that is set when you acquire the estate. A more familiar way of putting this is to say that land is leased. A lease for 10 years gives you a leasehold estate for 10 years.

The freehold estate can be split into three further parts.

Look at each of these in turn. First, the *fee simple absolute in possession*.



Fee means an estate capable of being inherited. As long as there is someone to inherit, the estate can go on forever.

Simple means there are no restrictions on who can inherit the estate.

Absolute means there are no conditions attached to the holding of the estate. For example, if you own the fee simple in Yourland until you marry, your estate is not absolute because there is a condition attached to it.

In possession means the estate is being enjoyed at the present. The enjoyment of it is not postponed to a future date. You are in possession of this book right now. Your use of it is in the present, not postponed to sometime in the future. You must note, though, that *in possession* does not mean in occupation of the land.

Q: ***So when people say that they own their houses, do they actually hold a freehold estate in fee simple absolute in possession?***

A: They hold an estate that doesn't have a predetermined ending (freehold); it is capable of being inherited (fee); it can be inherited by anyone (simple); there are

no conditions attached to the holding of the estate (absolute); and they are actually in possession of their interest in the land (in possession), so yes. This is what the lay term *ownership* means, as in 'Fred owns Greenacres'. Although it can never be absolute ownership, an estate in fee simple absolute in possession is the closest you can have to it. While we will talk about ownership in this book, you must always remember that people don't actually own land, but hold an estate in it.

Q: ***Is a* life estate *as obvious as it sounds?***

A: Yes. Imagine you have been left Yourland in a will for you to use during your lifetime, after which Yourland is to pass to Fred. You have a life estate. It is classified in the freehold category because, at the start of your life, no one can tell how long you are going to live.

Q: ***And the* fee tail*?***

A: *Fee* means it is an estate capable of being inherited. *Tail* means there are restrictions on who can inherit the estate, for example only male heirs. A fee tail falls under the freehold estate because the estate has no predetermined end.

Now look at the leasehold estate.

A leasehold estate is where you hold an estate in the land for a certain period of time. If you lease Greenacres from Fred for 10 years, you own a leasehold estate in Greenacres for 10 years, after which Greenacres returns to Fred. Fred continues to hold the freehold estate in fee simple absolute in possession of Greenacres during the lease. Technically speaking, Fred owns the *freehold reversion* of Greenacres, which comes from the fact that, after 10 years have passed, Greenacres reverts to him, as the leasehold estate has then ended.

Q: ***How can Fred still own a fee simple absolute in possession when I am in possession of Greenacres under the lease?***

A: 'In possession' does not mean in occupation. It means that Fred is enjoying his interest in Greenacres at the present time and his interest is not postponed to a future date. Being *in possession* also includes receiving rents and profits. Fred will be receiving rent from you so he still has an estate in possession.

Q: ***Why do I need to know about estates in land?***

A: The point is that people who think they own their houses actually own an estate in fee simple absolute in possession. People who lease property actually own a leasehold estate. Furthermore, section 1 of the Law of Property Act 1925 is a very important statutory provision in land law and it uses the terms described above.

Box A1 Title to land

Although we often talk about ownership of land, the correct way of putting it is to say that a person has title to land, for example Fred holds the title to Greenacres. Title here means a claim to ownership of an estate in land.

Q: ***How do you show a claim to ownership of an estate in land?***

A: This used to be determined by possession. If you had possession of the land, you were deemed to have title to the land. This is where the phrase 'possession is nine-tenths of the law' comes from. Your possession could be defeated only by someone who could claim a better right to possession of the land. A better right meant a prior right.

Q: ***So if someone could prove that he had possessed the land before you, he had a better right to it and you had to leave?***

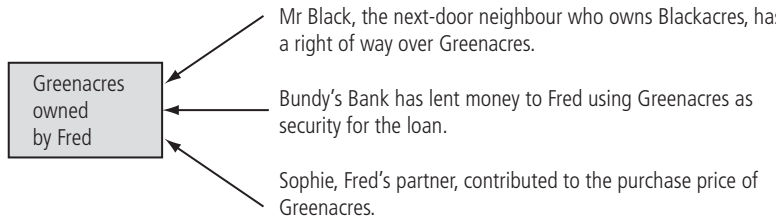
A: Yes. This was less than helpful when it came to buying land. To remedy this situation a number of Limitation Acts were passed. The current one is the Limitation Act 1980. These Limitation Acts barred any person with prior possession from claiming the land after a certain period of time had passed. This meant that if you were in possession of the land, nobody could challenge your possession after this set period of time. However, if you yourself stopped possessing the land and a stranger started to possess it, you would also be time-barred from reclaiming the land after the set period of time. This area of law is known as adverse possession, with the more familiar term of 'squatter's rights'.

Q: ***Is possession of land still relevant today?***

A: Not nearly as much as it used to be. In the United Kingdom land is classified as unregistered land or registered land. The difference between the two is that in unregistered land title to an estate in land is proved by documentation and possession, although it is still possible to acquire land by possession alone. In registered land, a person's title to an estate in land is entered on a register and this title is guaranteed by the state. It is still possible, although difficult, to acquire registered land by possession. Where title to an estate in land is entered on a register that is guaranteed by the state, the owner will have title because of the fact of registration. In unregistered land, where there is no register, title to an estate in land must be proved by documentation, and the owner is said to have documentary title to the land. Acquiring land by possession alone gives a possessory title.

Box A2 Interests in and over land

Even though Fred may hold the estate in fee simple absolute in possession in Greenacres, other people can have lesser interests in and over Greenacres at the same time. Look at some examples of possible interests that other people could have in and over Greenacres.



These are just some of the interests in and over land that are discussed in this book.

Law and equity

Box B

LAW AND EQUITY

1. Legal and equitable estates and interests

2. The creation of legal and equitable estates and interests

Throughout the whole of land law you will continually refer to law and equity, and legal and equitable rights. Strict legal rights that came from the common law were often seen as unfair. Over time, rules of equity or fairness were developed to balance the common law, giving people an equitable right as distinct from a legal right. The acquisition and administration of legal and equitable rights differ, as do the remedies, and these differences pervade much of land law. A historical perspective will explain how these jurisdictions have developed and the distinctions between them.

The Norman Kings were responsible for the development of a centralised court system. If your right was recognised at law by the common law courts, you had a legal right which was enforceable against everybody. A legal right was an important right, just as it is these days. However, actions in the common law courts were very difficult to pursue because you had to obtain a writ which matched the type of action you wanted to bring, and that cost money. If there wasn't a writ already in existence for a situation similar to your claim, you then had to persuade the Chancellor to come up with a new one, which was not an easy matter. So instead people petitioned the King for 'justice'. The King was chosen because he was the most powerful person in the kingdom. The King passed the petition to the Chancellor, who took a look and decided whether to intervene. If the Chancellor approved of your petition he would award you a right – a right recognised in the interests of justice and fairness in any given situation. The result was a system of rules and precedents that became known as equity, and the right you were awarded was known as an equitable right, rather than a legal right.

Q: ***Is this where the Court of Chancery and the Chancery Division originate from?***

A: Yes. The Chancellor was so inundated with enquiries during the fourteenth and fifteenth centuries that a separate court was established. This was the Court of Chancery, in which the equitable principles and rules were administered. These principles were based on fairness and justice, and, over time, became an established set of rules. It was not until the Judicature Acts (Supreme Court of Judicature Acts of 1873 and 1875) that common law and equity were administered in the same court.

Q: ***So did the Court of Chancery just say that the common law decision was wrong and then impose its own solution?***

A: The Court of Chancery didn't just dismiss the common law decision. Instead, in situations where it was unjust or unfair for one party to rely on his strict legal rights, the Court of Chancery would tell that party either to do or refrain from doing something, which would then lead to a just result. The courts administering the principles of equity imposed equitable remedies, such as specific performance

and the injunction, which are remedies directed against a particular person. Specific performance requires a party to carry out an act, for example to transfer land to someone else. An injunction requires a party to stop doing something, for example, to stop building a house. If you didn't do what the court told you to do or stop doing what you weren't supposed to do, you were in contempt of court and liable to find yourself in prison.

Q: ***What happens if there is a conflict between law and equity?***

A: Equity will prevail: see section 25(11) of the Supreme Court of Judicature Act 1873, now incorporated into section 49(1) of the Supreme Court Act 1981, and *Walsh v Lonsdale* (1882). If there is a conflict between common law, equity and statute, statute will prevail over both common law and equity.

Q: ***Are equitable remedies granted automatically?***

A: No. Equitable remedies are discretionary. Furthermore, given that the rules of equity are based on fairness, rather than on strict legal rights, if you want to claim an equitable remedy then you must have behaved equitably yourself. These rules of etiquette are encapsulated in a series of moral proverbs. Examples include:

- *Delay defeats equity*. If you wait too long before seeking an equitable remedy, you will not be awarded one as it will be seen to be unfair to the other party who has relied on his legal rights for a long time.
- *Equity will not assist a volunteer*. If you haven't given some form of consideration, payment or service for the act of the other party, you will not obtain an equitable remedy.
- *He who comes to equity must come with clean hands*. If you have behaved with bad faith, for example by lying or causing a nuisance to the other party, then again you will not be awarded an equitable remedy.
- *Equality is equity*. Generally, equity will divide property equally in the absence of any other evidence to the contrary.

There are many more examples but these give the general picture.

Box B1 Legal and equitable estates and interests

Before 1926, there were a large number of estates and interests in and over land that could be legal. There were problems with allowing such a large number of legal estates and interests. The problem with legal estates was as follows. When land was sold, everyone with a legal estate in the land had to sign the documents of sale, which made selling land difficult or impossible if you couldn't find them. As far as legal interests were concerned, a purchaser of land was bound by any legal interests that existed over the land, whether or not he knew about them. This meant that buying land was difficult for a purchaser, because he could never be sure who had a legal interest over the land he had purchased.

Q: ***So if Lord Toff bought Greenacres centuries ago, he would have been bound by the rights of other people over the land provided that their rights were legal?***

A: Yes, and it wouldn't have mattered whether Lord Toff knew about, or could have found out about, such legal rights. Legal rights were important then, and

are still so today. If you have a legal right to drive on the road, you expect to be able to exercise that right. You don't expect Mr Brown, the next-door neighbour, to tell you that you can't drive when you have a legal right to do so. The number of legal estates and interests that existed in land before 1926 made the selling of land difficult because of the number of legal owners there could be, and it made the buying of land precarious because you couldn't be totally sure who would appear to claim a legal right over the land after you'd bought it. The result was the enactment of section 1 of the Law of Property Act 1925, which reduced the number of estates and interests in land that were capable of being legal. Section 1(1) states:

> The only estates in land which are capable of subsisting or of being conveyed or created at law are –
>
> (a) An estate in fee simple absolute in possession
> (b) A term of years absolute.

Section 1(1) talks about estates. The fee simple absolute in possession is ownership as we know it today. A term of years absolute refers to the leasehold estate. Section 1(1) states that these two estates alone are capable of subsisting or of being conveyed or created at law. The section doesn't state that these estates are legal, only that they are capable of being so. Whether the estate is actually legal or not is then determined by how it has been created or transferred. The distinction here is that estates in section 1(1) can be legal, but only if they are created or transferred in an approved manner. If you create or transfer them in the wrong way, they will not be legal.

Q: ***What was the effect of this section?***

A: As there were fewer legal estates in land, fewer people were required to sign if the land was sold. The situation was further improved here, because the Trustee Act 1925 also limited the number of people who could appear on the documentation to a legal estate to four.

Q: ***What happened to estates that were legal before 1926 and were prevented from continuing as legal estates because they were not in section 1(1) of the Law of Property Act 1925?***

A: Section 1(3) of the Law of Property Act 1925 says that all other estates, interests and charges in or over land take effect as equitable interests. This meant that the estate was recognised in equity, but not at law.

Q: ***Did this matter?***

A: A legal estate was enforceable against everyone in the world. An equitable estate was not enforceable against everyone in the world, so in this respect it did matter.

Section 1(2) of the Law of Property Act 1925 is concerned with interests in or over land. Before 1926, a large number of interests in or over land could be legal, and would therefore bind a person who bought the land they were exercised over. Section 1(2) of the Law of Property Act 1925 reduced the number of legal interests that could exist at law. The main ones that will concern you are detailed in sections 1(2)(a) and (c) of the Law of Property Act 1925. Section 1(2)(a) relates to an easement. An easement is a right over someone else's land. An example could be a right of

way or a right to lay drains. Section 1(2)(c) relates to a mortgage. When Fred, for example, grants a mortgage over Greenacres to Bundy's Bank, Bundy's Bank lends a capital sum of money to Fred to be repaid with interest. Bundy's Bank will use Greenacres as security for this loan. If Fred defaults on the mortgage repayments, Bundy's Bank has the power to sell Greenacres to recoup any outstanding mortgage money. After 1925 an easement and a mortgage have been the two main interests over the land of another capable of being legal, and therefore binding a person who buys that land. Section 1(2) doesn't state that these interests are legal, only that they are capable of being so. Again, the distinction here is that these interests can be legal, but only if they are created in an approved manner. If you create them in the wrong way, they will not be legal. The exact detail of each of these clauses is discussed in Chapter 17 on easements and Chapter 18 on mortgages.

Q: ***What happened to interests that were legal before 1926 and were prevented from continuing as legal interests because they were not in section 1(2) of the Law of Property Act 1925?***

A: Section 1(3) of the Law of Property Act 1925 says that all other estates, interests and charges in or over land take effect as equitable interests. This meant that the interest is recognised in equity, but not at law.

Q: ***Did this matter?***

A: A legal interest was enforceable against everyone in the world. An equitable interest was not enforceable against everyone in the world, so in this respect it did matter.

Summary of section 1 of the Law of Property Act 1925

Section 1 of the Law of Property Act 1925 reduced the number of estates and interests in land that were capable of being legal. This section did not state that these estates and interests were legal, only that they were capable of being legal. The effect of this reduction in the number of legal estates and interests in land was to make the selling and buying of land easier and safer.

Box B2 The creation of legal and equitable estates and interests

Q: ***If only certain estates and interests are capable of being legal, how do you know whether they are actually legal?***

A: Section 52(1) of the Law of Property Act 1925 states:

> 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.

A conveyance is any instrument, excluding a will, that transfers property from one person to another. This section means that if you want to create or transfer a legal estate or interest in land you must use a deed.

Q: ***What is a deed?***

A: A deed is a document that has legal bearing. A deed is defined in section 1 of the Law of Property (Miscellaneous Provisions) Act 1989.

A deed

- must make clear on the face of it that it is a deed, either by describing itself as a deed or by stating that it has been executed or signed as a deed or otherwise

  and

- it must be signed by the person granting the interest in the deed in the presence of a witness who attests his signature

  and

- it must be delivered as a deed.

By definition, then, a deed must be in writing. The witnessing of a deed is called attestation and the witness must sign and date the deed.

Q: ***How do you make clear on the face of it that it is a deed if you don't actually use the word 'deed'?***

A: Not easily. In *HSBC Trust Company (UK) Ltd v Quinn* (2007) it was held that if the word 'deed' wasn't used, the fact that a document was a deed had to be clear from the face of the document, i.e. from the wording in the document. In the case, the parties hadn't used the word 'deed'. Although they had used formal language and formal signatures and had ensured that the signatures were witnessed, this only showed that they intended the document to be legally binding. It wasn't clear on the face of the document that it was a deed. Something showing that the parties intended it to have the extra status of a deed was needed.

Q: ***How do you deliver a deed?***

A: You do not have to deliver a deed physically. It's sufficient that the person granting the interest in the deed makes it clear that he intends to be bound by the deed. This is usually inferred from the fact that he signs it.

Q: ***Overall, then, are there two conditions for an estate or interest in land to be legal?***

A: Yes. The estate or interest must be capable of being legal, which means it must be mentioned in section 1(1) or (2) of the Law of Property Act 1925, and the estate or interest must have been created by means of a deed. As always, there are exceptions to every rule, and so there are exceptions to the requirement that you have to use a deed to create a legal right.

Q: ***Why are there exceptions?***

A: A deed is rather bureaucratic and, by the time you've consulted a solicitor, expensive. It would be unfair to impose the requirements of a deed on some of the most common short-term transactions in land, and so exceptions are created. One example is where a flat is let out on a short-term lease. It would be impractical to expect people to use a deed every time this happens. Thus, a short-term lease can be created under section 54(2) of the Law of Property Act 1925 either orally, or else in writing which doesn't have to comply with any formality.

Q: ***So how do you create an equitable interest in land?***

A: As the system of rules and precedents in equity became established, the conditions in which equitable interests were recognised also became established. Equitable interests can be created both formally and informally, and both intentionally and unintentionally.

One of the most common instances where an equitable interest arises is when there is an agreement, a contract, to create an interest in land or to sell land. Before we look at why this happens, we'll go through the requirements for the contract.

Before 1989 a contract for the creation or sale of an interest in land could be:

either

- in writing

or

- by an oral agreement if the oral agreement was evidenced in writing

or

- by an oral agreement where the party relying on the oral agreement had started to carry out his side of the bargain. If A promised B a right in A's land, and B acted in reliance on that promise, the courts of equity would recognise that B did have a right in A's land. It couldn't be a legal right as it hadn't been created by deed, but, in the interests of justice, equity would grant B an equitable right in A's land. This was called the equitable doctrine of part performance.

After 26 September 1989, all contracts for the creation or sale of an interest in land became governed by section 2 of the Law of Property (Miscellaneous Provisions) Act 1989. Under section 2, the contract must be:

- in writing

  and

- signed by or on behalf of both parties to the contract

  and

- it must contain all the express terms of the agreement.

Q: ***What kind of transaction does section 2 apply to?***

A: It applies to a contract for the creation of a new interest in land and to a contract for the sale, transfer, lease or mortgage of other interests in land. Just about everything you are likely to come across, really.

Q: ***So if Fred agrees in a contract to sell Lilac Cottage to me, does that contract have to be in writing, signed by or on behalf of me and Fred, and contain all the express terms of the agreement?***

A: Yes. It is a contract for the sale of Fred's legal fee simple estate in the land, and so it must meet the requirements of section 2. It is known as an estate contract, as it is a contract for the sale of a legal estate in the land.

Q: ***What happens if the contract doesn't meet the requirements of section 2?***

A: It is void. It is as though it never existed. This means that the equitable doctrine of part performance can no longer exist. You cannot have part performance of a void contract as you do not have a contract at all to perform.

Q: ***Do you have to sign the contract yourself?***

A: No. It can be signed by an authorised agent. In *Re Stealth Construction Ltd* (2011), also known as *Green v Ireland*, there were indications that a contract satisfying section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 could be created in an email together with the reply to that email if the emails formed a string of communication. The names inserted at the end of the emails constituted signatures. In the case, though, the contract did not include all the express terms and so didn't satisfy section 2. If you want to ensure that you don't inadvertently create a contract by email exchange, you should say in the email that the contract will be made only by means of a separate signed and exchanged document.

Q: ***Do all the terms have to be in the document?***

A: No. You can incorporate them into the main document by referring to them. It is possible for both parties to sign one document which contains all the expressly agreed terms. Alternatively, and more commonly under section 2, two identical copies of the document containing all the express terms of the contract are made, and the purchaser signs one, while the vendor signs the other. Until the exchange of contracts actually takes place, either party can withdraw from the transaction because there is no valid contract that meets section 2 of the Law of Property (Miscellaneous Provisions) Act 1989. If there is a variation of the contract, the variation must also meet section 2: see *McCausland v Duncan Lawrie Ltd* (1997).

Q: ***What happens if you forget to put an expressly agreed term into the contract?***

A: The court has been able to view the term missed out of the written agreement as a collateral contract – a separate contract – provided the missing term is not for the sale or disposition of an interest in land. In *Record v Bell* (1991) the missing term was to do with providing evidence that the seller was the owner of the land. The purchaser, who wanted to get out of buying the property, argued that the contract for sale was void because it did not contain all the express terms of the contract. It was held that the missing term was a second contract. This second contract was collateral to and separate from the first contract which was for the sale of the land. The second contract was not for the sale of land, so did not have to meet the requirements of section 2 and was enforceable. Given that this second contract was separate from the main contract for sale of the land, the main contract therefore contained all the express terms and was held to be enforceable. *Tootal Clothing Ltd v Guinea Properties Management Ltd* (1992) is another case that illustrates this point. In *Grossman v Hooper* (2001) there was criticism of the use of collateral contracts and emphasis was placed on looking at whether the term missed out of the written agreement was vital to the contract going ahead.

The court is able to order rectification and performance of the contract under section 2(4) of the Law of Property (Miscellaneous Provisions) Act 1989 if it is convinced that the term should have been included. In *Wright v Robert Leonard*

(Developments) Ltd (1994) the term missing in the written agreement was held to be an integral part of the contract, so it could not be seen as a separate collateral contract. Even so, because there was evidence that the parties had intended to include the term, the contract was rectified and enforced.

All these ruses rather make nonsense of the fact that a written contract which does not include an express term is void because it does not satisfy the requirements of section 2 and they don't always work. In *Oun v Ahmad* (2008) the claimant asked for rectification of a contract for sale because not all the express terms had been included. However, the parties had specifically agreed not to include these express terms in the contract. As such, there was no mistake in recording the agreement and therefore no place for rectification. The parties had recorded what they intended to record but their mistake (rather a major one) was to fail to appreciate the legal consequences of not including all the express terms. The contract was therefore void. In *Francis v F Berndes Ltd* (2011) there was an oral agreement to buy a property. This was followed by a letter signed by both parties. Whilst confirming the offer of sale, the letter did not contain an obligation on the buyer to purchase the property. This term would not be implied and rectification would not be ordered because there was 'no mistake about the factual or legal nature of the bargain which the parties intended to record'. It was said that whilst this might be a highly technical distinction and could cause injustice where the missing term was obvious, one of the main aims of the 1989 Act was to ensure certainty as regards contracts for the sale of land and avoid the need for extrinsic evidence. An application to raise a claim in restitution was allowed though.

People have arguably tried to avoid the formal requirements of section 2 also in other ways which will be discussed in Chapter 12.

Contracts are important because we use them constantly in buying and selling land. They are also important because they are capable of specific performance. This means that the court can order specific performance of the contract in the event of a breach.

Q: ***Why wouldn't you just award damages, for example, if a vendor refused to sell the land after he'd entered into a contract to do so?***

A: Land is considered to be unique. Damages are inadequate if there is a breach of a contract to sell land to you, because you could never find an identical piece of land again, even if you were awarded damages. This means that where there is a breach of a contract for the sale of land, you can claim the remedy of specific performance, and ask the court to order that the contract is carried out according to its terms and that the land is sold to you.

And now we will return to the question of how an equitable interest arises here. Because the contract is capable of specific performance, it will immediately create an equitable interest in favour of the purchaser.

Q: ***Why does the contract immediately create an equitable interest in favour of the purchaser?***

A: This is because of two factors. First, a contract relating to land is capable of specific performance. Secondly, there is an equitable maxim that states 'equity looks on that as done which ought to be done'. As the court will enforce the contract,

equity views the purchaser as having a right in the land immediately. It can be only an equitable right, as the land has not yet been conveyed by deed to the purchaser.

Take an example and look at a situation that everyone will recognise. Fred owns Lilac Cottage. It is a delightful, charming, thatched cottage with a brook running through the garden, apple trees laden with fruit and birds chirping merrily in the trees. You have fallen in love with it and, in return for a large sum of money, you enter into a written contract with Fred which satisfies section 2 of the Law of Property (Miscellaneous Provisions) Act 1989, in which Fred agrees to sell Lilac Cottage to you. Several days later, Fred changes his mind about selling. You are distraught. You are never going to find another cottage like it, so the common law remedy of damages would never compensate you adequately. Lilac Cottage is unique and the contract for the sale of it is capable of specific performance. This means that you could go to court and demand that Fred sell the legal estate of Lilac Cottage to you. As 'equity looks on that as done which ought to be done', this will immediately give you an equitable right, an equitable estate in Lilac Cottage, because specific performance is available.

Q: ***Can you argue that no two houses are the same, even ones on a housing estate?***

A: Yes. Each plot of land is unique because, for example, it doesn't have the same view.

We can now widen this argument to say that all contracts for the creation or sale of interests in or over land are also contracts capable of specific performance. Because land is unique, the rights in and over land are also unique, and so specific performance is the only acceptable remedy.

Q: ***So if a contract to create or sell an interest in or over land is breached, equity can order specific performance of it?***

A: That's right. And because these sorts of contracts are capable of specific performance and equity looked on that as done which ought to be done, equity recognised that you had a right in or over the land, an equitable right, before the case ever went to court. You could never have a legal right because you hadn't used a deed.

This means that, within the framework of the law, you can have either legal or equitable interests in land depending on how they have been created.

Q: ***If, for example, Fred grants Peter a lease of Lilac Cottage for 10 years by deed, will this be a legal lease or an equitable lease?***

A: Putting Boxes B1 and B2 together, it is capable of being a legal estate in land in accordance with section 1 of the Law of Property Act 1925. It has been created by deed, therefore satisfying section 52(1) of the Law of Property Act 1925, and so it will be a legal lease.

Q: ***And if Fred had agreed in a written contract satisfying section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 that he would grant Peter a lease of Lilac Cottage for 10 years, Peter would have an equitable lease?***

A: Yes. The lease in this case could never be legal as it hadn't been created by deed. Provided the agreement satisfied section 2 of the Law of Property (Miscellaneous

Provisions) Act 1989, Peter could go to court and ask for the remedy of specific performance. Lilac Cottage is unique, and a lease of Lilac Cottage is unique, so damages are an inadequate remedy. As 'equity looks on that as done which ought to be done', the agreement or contract would immediately create an equitable interest in favour of Peter, here an equitable lease.

The process of buying and selling land

Box C

THE PROCESS OF BUYING AND SELLING LAND

It is important to know the mechanics involved in buying and selling land, and conveyancing is the process by which this is done. To illustrate the conveyancing process, imagine that Fred owns Greenacres.

Q: ***Is that the shorthand way of saying that Fred owns the legal estate in fee simple absolute in possession in Greenacres?***

A: Yes. He owns a freehold estate that has no determinable end. There are no restrictions on who can inherit Greenacres. There are no conditions attached to the holding of Greenacres, and Fred is in possession of his interest in Greenacres right now. Fred decides to sell Greenacres and puts the house on the market. Peter looks round Greenacres and decides he wants to buy it. A 'deal' is negotiated. The first thing Peter will want to check, usually via his solicitor, is whether Fred actually owns Greenacres. How he does this depends on whether or not Greenacres is registered. Two systems exist in parallel in the United Kingdom – unregistered land and registered land – and they are discussed in detail in Chapters 3 and 4. If Greenacres is unregistered land, Fred will have to rely on documentation to prove that he holds the title to Greenacres. These documents are called 'title deeds'. Registered land is what it says it is. The estate of Greenacres will appear on a register, and the name of the owner, Fred in this instance, will also appear on the register.

Q: ***Doesn't the purchaser, Peter, have to carry out searches as well?***

A: Yes. In addition to checking the title to Greenacres, Peter's solicitor will also make searches to check that there are no adverse matters affecting the property. Some examples of these searches are:

a. A search of the Local Land Charges Register together with enquiries of the Local Authority. The Local Land Charges Register is held by the Local Authority and shows restrictions or burdens on the land which are binding on any owner. The enquiries reveal information about the property such as its planning history and whether any new roads or traffic calming measures are proposed.
b. An environmental search to check the past use of the land. Is Greenacres built on a landfill site? Is it on contaminated land which will cause risk to the occupiers? Is it in an area prone to flooding?

c. A drainage search to check that the property is connected to the mains drainage and mains water supply. The alternative would be septic tanks or a private water supply from the ground, and this can put a buyer off.
d. A search to check whether other people have an interest in the land. The owner of adjoining Blackacres may have a right of way, for example, over Greenacres. How this information is obtained depends on whether the land is registered or not, and this is discussed in detail in Chapters 3 and 4.

Q: ***Does Fred still have to provide a Home Information Pack for Peter?***

A: No. Home Information Packs (HIPs) were suspended from 21 May 2010 following a general election. A Home Information Pack used to give information on, for example, electricity and gas safety, any previous structural damage, flood risk information and it also included an Energy Performance Certificate showing how energy-efficient the house was. Even though HIPs have been suspended, before marketing a residential or commercial property today for sale or rent, an Energy Performance Certificate must still have been commissioned, or be available. There is a financial penalty for not doing so.

Q: ***Does the seller have to provide any other information?***

A: The seller also has to fill in a Seller's Property Information Form, also known as 'pre-contract enquiries', which asks general questions about the house, such as about the supply of gas and electricity and disputes with the neighbours. The form used to have the following question 13: 'Is there any other information which you think the buyer might have a right to know?' In *Sykes v Taylor-Rose* (2004), Mr and Mrs Sykes had purchased a house from Mr and Mrs Taylor-Rose and had subsequently discovered, by courtesy of a television documentary and a note pushed under their door, that the house had been the scene of a gruesome murder and dismembered body parts had been hidden around the property. They moved out and had to sell the house at a loss of £25,000 because of its history. They therefore claimed damages from Mr and Mrs Taylor-Rose because the latter had answered 'No' to question 13 on the form, although they had known about the murder. It was held that the words in the question were to be given their normal meaning and an honest, personal and subjective answer did not amount to misrepresentation. There was no legal obligation to give the history of the house, and the words 'right to know' did not include anything which might affect the enjoyment or value of the property. Although Mr and Mrs Taylor-Rose knew about the murder, their answer was honestly given and they were not liable. Question 13 has now been omitted from the form, but if you'd been in the same situation, what answer would you have given?

When everyone is happy with the title and the search results a contract is signed.

Q: ***Does this contract have to satisfy section 2 of the Law of Property (Miscellaneous Provisions) Act 1989?***

A: Yes. As discussed in Box B2, the contract must be in writing, it must be signed by or on behalf of both Fred and Peter, and it must contain all the express terms of the agreement. It is known as an estate contract because it is a contract to convey

the legal estate in Greenacres to Peter. Normally the seller and the buyer each have an identical contract which they each sign. Their solicitors telephone each other to agree that the contracts are identical, to confirm the amount of the deposit to be paid by the buyer and to agree that they are to enter into an exchange of contracts by telephone. If the contract doesn't satisfy section 2, it will be void, which means it is as though it never existed. This doesn't mean to say that Peter cannot buy Greenacres, only that the contract to sell Greenacres to Peter does not exist.

Q: ***Assuming the contract satisfies section 2, is it a specifically enforceable contract?***

A: Yes. Greenacres is land. Land is unique. If Fred backed out of the agreement, damages would be an inadequate remedy for breach of the contract, because Peter would never be able to find a property identical to Greenacres. This means that Peter could ask the court to order specific performance of the contract, and Fred would have to sell Greenacres to him. It also means that equity views Peter as having an equitable interest in Greenacres already because of the maxim 'equity looks on that as done which ought to be done'. After all, he has complied with the statutory requirements for the contract, he has given consideration in the form of a deposit, and he would never be able to find another house like Greenacres. As equity regards that as done which ought to be done, Peter will have an equitable interest in Greenacres. This will be an equitable estate in Greenacres. He cannot own the legal estate in Greenacres yet, as it has not been transferred to him by deed. Remember that section 52(1) of the Law of Property Act 1925 states that a legal estate or interest in land must be created by a deed. Peter must then enter his estate contract on a register. This ensures that his estate contract takes priority over that of anyone else Fred might be tempted to sell Greenacres to if a higher offer were made.

Q: ***Why doesn't Fred just transfer Greenacres to Peter by deed immediately Peter tells him that he wants to buy Greenacres?***

A: There is nothing to stop this happening. However, there is no proof at this point that Fred actually owns Greenacres! If Fred conveyed Greenacres to Peter immediately by deed, Peter could be in for an unpleasant surprise. Also, Fred needs to make sure that he has somewhere to move to, so all the people in a chain of transactions agree to the same completion date, which is when the legal estate is transferred to the purchaser by deed.

Q: ***What happens if Fred hasn't told the whole truth and the terms of the contract don't reflect the actual situation?***

A: In this case, Peter is allowed to withdraw from the contract and the court will not order specific performance. Assuming everything is in order, a completion date will be written into the contract on exchange. The completion date for a house could be 10 working days from the date of exchange. For a development site, it could be 10 working days from the date the buyer received his planning permission, which could be some six months after the date of exchange. On the completion date the purchase price minus the deposit is paid. Fred then transfers the legal estate in Greenacres to Peter by deed and Peter can take physical possession of the land. Even so, Peter is not recognised as having the legal title until the transaction has

been registered at the Land Registry. This is discussed in Chapter 4. When this has happened, in lay terms, Peter will own Greenacres. Tax is payable on residential property as a percentage based on its market value. The scale is 1% of the market value for properties valued at between £125,000 and £250,000. Properties over £250,000 are charged from 3% upwards.

Q: ***What happens if I'm buying a house with someone else, like my spouse or partner?***

A: In this case, your solicitor will ask you how you intend the property to be owned. For example, do you want to own it in equal or unequal shares? The deed which transfers the land to you has an option which your solicitor fills in to confirm how the property is to be held. The ways in which you can hold land together are covered in Chapter 8.

Q: ***Is the conveyancing process the same for the purchase of a house such as Greenacres as for the purchase of several acres of land for redevelopment?***

A: Yes, except that some terms of the contract may be different. In a development situation, the trigger for completion may be the grant of planning permission, and, of course, value added tax (VAT) will come into it.

Q: ***What will Peter actually own when he buys Greenacres?***

A: Section 205(1)(ix) of the Law of Property Act 1925 gives a definition of land.

> '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.

So land includes mines and minerals. In *Coleman v Ibstock Brick Ltd* (2007) the court had to decide whether brick shale, clay and fireclay were minerals because 'minerals' had been excluded from the sale. Only the fireclay was classified as a mineral and the seller was able to claim damages for the fireclay that had already been mined by the purchaser. Coal belongs to the Coal Authority under the Coal Industry Act 1994 and oil, gas and petroleum belong to the Crown under the Petroleum Act 1988. In *Bocardo SA v Star Energy UK Onshore Ltd* (2010) an oil company had drilled from other land some 2800 feet down under Bocardo's land, without Bocardo's permission, to recover petroleum. It was held that the owner of the surface of the land would also own the strata (layers) beneath the surface of his land, including minerals. Although the oil company had a licence to obtain the petroleum, in the absence of permission or statutory authority to actually enter Bocardo's land, the oil company had trespassed and was liable for damages.

As Lord Hope said

> There must obviously be some stopping point, as one reaches the point at which physical features such as pressure and temperature render the concept of the strata belonging to anybody so absurd as to be not worth arguing about. But the wells that are at issue in this case, extending from about 800 feet to 2,800 feet below the surface, are far from being so deep as to reach the point of absurdity. Indeed the fact that the strata can be worked upon at those depths points to the opposite conclusion.

Q: ***How can land be divided horizontally?***

A: You could sell the rights to a mine under your land, for example. If you owned a block of flats and sold the top one to Peter, this also would be a horizontal division of land. In this case Peter will own what is called a flying freehold. If Peter allowed the roof to collapse, you wouldn't have any redress against him if the rest of the flats were damaged. Any obligation on him to keep his property in repair is almost impossible to enforce because it is a positive obligation rather than a negative obligation. This is why flats are leased rather than owned outright because in a lease you can impose positive obligations on Peter to keep his roof in repair and these obligations are enforceable. The system of commonhold discussed in Chapter 16 seeks to resolve some of these problems but there are significant difficulties in practice with the system of commonhold to the extent that people try to avoid it.

Q: ***How much of the airspace above a house do you own?***

A: There is a Latin phrase, 'cuius est solum eius est usque ad coelum et ad inferos', which means that whoever owns the land owns up to the heavens and down to the bowels of the earth. The claim that you own up to the heavens and down is far from true, not least because if a plane flew over your garden you could not sue for trespass. The Civil Aviation Act 1982 allows an aircraft to fly at a reasonable height given its circumstances over your land and you have the right to the height necessary for the use and enjoyment of your land. You can also sell airspace – think of a walkway suspended over land.

Q: ***Can you buy bits of the moon?***

A: Sheer lunarcy! There is no shortage of opportunities on the internet to buy bits of the moon but I suggest that you work out who owns the moon because you cannot buy what someone doesn't own and you cannot sell on something that you don't own.

Q: ***In the definition of land, what is meant by a corporeal hereditament?***

A: A corporeal hereditament is a physical attribute of the land, for example, a building. This is in comparison to an incorporeal hereditament, which is an intangible right such as a right of way over the land.

Q: ***What happens if I find something on my land? Whom does it belong to?***

A: If something is buried, it is seen as part of the land. Unless the rightful owner claims it, it belongs to you, even if you didn't find it. If something is found lying on the ground, it belongs to the owner of the land provided the owner has made it clear that he has control over the land. The more the public is allowed access, the less likely that is. In *Parker v British Airways Board* (1982) a bracelet found by a passenger on the floor of the airport lounge was held to belong to the finder and not to British Airways because it didn't have sufficient control of the premises. So if you find an envelope with £1 million in it in a bank vault, it belongs to the bank. If you find it in a park, it belongs to you.

Q: ***Whom does treasure found on land belong to?***

A: Treasure used to have a limited meaning and belonged to the Crown under the doctrine of treasure trove. This meant that too many items were kept by finders and

were lost from the public view so the Treasure Act 1996 has extended the definition of treasure. Under this Act ownership of the treasure rests with the Crown. You must report your find to the local coroner and you may be given a reward from the Crown.

Q: ***We've talked about what Peter owns when he buys Greenacres, but what can Fred take with him when he moves out of Greenacres? There are all sorts of stories about people taking the light bulbs and the door knobs.***

A: Under section 62(1) of the Law of Property Act 1925 a conveyance of land includes the following:

> A conveyance of land shall be deemed to include and shall by virtue of this Act operate to convey, with the land, all buildings, erections, fixtures, commons, hedges, ditches, fences, ways, waters, watercourses, liberties, privileges, easements, rights, and advantages whatsoever …

This means that when land is sold everything described in section 62 will pass to the buyer, so that will include sheds, outhouses and conservatories which come into the definition of a building.

Q: ***What's a fixture in section 62?***

A: A fixture is seen as something that is attached to the land and has become part of the land. There is a Latin phrase – 'quicquid plantur solo, solo cedit' – which means that whatever is fixed to the land becomes part of the land. Something that is not attached to the land and does not become part of it is known as a chattel or a fitting.

Q: ***Is it important to know the difference between a fixture and a chattel?***

A: Yes, it is, because under section 62 a conveyance of land will include all fixtures with the land. If you are selling a house, after contracts have been exchanged you are not allowed to remove any fixtures from the house because you have then contracted to sell the land which includes the fixtures. You can take any chattels with you as they are not part of the definition of land.

Q: ***Can I never remove a fixture from my house?***

A: In your capacity as owner of the freehold you can remove a fixture up to the time you exchange contracts for the sale of the property. You cannot remove fixtures between the time a potential buyer inspects the property and exchange of contracts. In *Taylor v Hamer* (2002), the seller had removed flagstones after the buyer inspected the property but before the exchange of contracts. It wasn't a case of 'buyer beware' because the seller had invited an offer for the property as shown, which would have included the flagstones, and hadn't said anything to the contrary. It was held under simple morality the seller had to tell the buyer if he intended to take something like flagstones that would be classified as fixtures. The seller wasn't stealing the flagstones because they were his, but he did not sell what the buyer was entitled to have conveyed to him. The seller had to replace the flagstones or pay for substitutes.

Q: ***Is there an easier way of making sure there is no confusion over what you are going to take with you?***

A: If you sell a house you will be asked to fill in a Fixtures, Fittings & Contents Form. This is a list of just about every item imaginable, asking whether you are taking it or leaving it. This list then becomes part of the contract, and so there is no dispute.

Q: ***How do you tell the difference between a fixture and a chattel if you haven't filled in the form or an object doesn't appear on the Fixtures, Fittings & Contents Form?***

A: There are two tests to apply. The first is the degree of annexation. If an object is attached to the land then it is deemed to be a fixture. If it is not attached to the land, it is deemed to be a chattel. So, in *Holland v Hodgson* (1872) spinning looms bolted to the floor of a mill were seen as fixtures, and in *Aircool Installations v British Telecommunications* (1995) an air-conditioning unit fitted onto a building was a fixture. Conversely, printing machines resting on their own weight on the floor were seen as chattels in *Hulme v Brigham* (1943). In *Dean v Andrews* (1985) a large prefabricated greenhouse was bolted to a concrete plinth which stood on the ground but was not fixed to the ground. The greenhouse was a chattel.

Q: ***Does it matter how an object is fixed?***

A: No, although the more securely an object is fixed, the more it will be seen as a fixture. The degree of annexation is the first test, but it does not necessarily determine whether the item is a fixture or a chattel because of the second test. This second test looks at the purpose of annexation. It has long since been held that this is the more important test. In *Hamp v Bygrave* (1982) it was stated that the purpose of annexation is now of first importance. The purpose of annexation test looks at why the object was fixed. Was it to improve the land or was it simply fixed so that the owner could enjoy or use the item? If the object was attached to make a permanent improvement to the land or the object was an integral part of the property, it would be a fixture. If the object was attached to the land simply so that it could be enjoyed or because that was the only way it could be used, it could still be a chattel even though it was firmly attached to the land. One of the best illustrations concerns the tapestry cases. In *Re Whaley* (1908) the house was a 'complete specimen of an Elizabethan dwelling house' and the tapestries that had been attached to the walls were held to be an integral part of the property, and therefore fixtures. In *Leigh v Taylor* (1902), though, tapestries had been tacked on to canvas which was nailed to strips of wood which were nailed to the wall. They were held to be chattels because you couldn't enjoy the tapestries other than by hanging them up and they were never intended to become an integral part of the house. It was also said in *Leigh v Taylor* that just because it's far easier to attach things these days (think of Blu-Tack) it doesn't mean to say they become fixtures.

Q: ***Does the amount of damage caused by removing an item make a difference?***

A: The view is that the more damage done on removal, the more likely it is to be a fixture. In *Leigh v Taylor* the tapestries had been removed without causing any damage and the very nature of their slight attachment also meant they were chattels.

In *Berkley v Poulett* (1977) there was a dispute over whether pictures which had been fixed into the recesses of a panelled wall in the Queen's Dining Room and

the Queen's Ante-Room were fixtures or chattels. Lord Scarman asked whether the design of the room was either panelled walls with recesses for pictures which could be enjoyed as pictures, or a room with walls comprising both panelling and pictures where the pictures were part of the 'composite mural' i.e. were part of the whole effect. He decided that the former had been intended because, although the panelling was Victorian, the pictures were a mixed collection. The rooms were not along the same lines as the Elizabethan rooms in *Re Whaley*. Despite the 'painstaking and attractive arguments of Mr Millett for the plaintiff', which had lasted for five and a half days, Lord Scarman found that the pictures were chattels put on the wall to be enjoyed as pictures.

Q: ***Does this second test mean that each case is decided on its facts depending on the circumstances?***

A: Yes. There are examples of cases where the item has been held to be a chattel in one case and a fixture in another, such as the tapestry cases. In *D'Eyncourt v Gregory* (1866) carved figures and marble vases in the hall which rested on their own weight were part of the architectural design of the hall and staircase rather than ornaments which had been added afterwards. They were therefore fixtures. Stone lions at the top of the steps in the garden and stone garden seats were also fixtures on the same basis. *Berkley v Poulett* also concerned a white marble statue weighing half a ton standing on a plinth which itself was fixed in position. The plinth that the statue was on was a fixture because it was an integral part of the architectural design of the west side of the house. The statue was a chattel because the object on top of the plinth could be changed depending on the owner's taste and was not part of the architectural design. A sundial resting on a pedestal was held to be a chattel as it was detachable.

Q: ***Does the seller's intention matter?***

A: The court will not take into account the subjective intention of the seller because the answer will inevitably be 'it's a fitting and I can take it with me', but it can look at the objective factors if they throw light on the situation: see *Elitestone Ltd v Morris* (1997). In *Hamp v Bygrave* the garden urns, statues and ornaments could have been chattels because they rested only on their own weight, or they could have been fixtures because they were intended to be part of the garden. Mr Justice Boreham looked at the objective intention of the parties. The fact that the particulars of sale mentioned the items as being included in the sale indicated they were fixtures. The sellers had talked about reducing the price of the property by excluding the items from the sale, again leading to the inference that they were fixtures. The sellers' solicitor had said that the items were included in the sale. On this basis they were fixtures.

Q: ***How do you classify the house itself?***

A: The definition of land includes buildings, and a conveyance of land includes buildings. This did not stop the court being asked to adjudicate on this in *Elitestone Ltd v Morris*, where the parties had disagreed about the status of a chalet bungalow which rested on concrete foundation blocks in the ground. It was argued that it was a chattel on the basis that it wasn't attached to the land. The House of Lords

held that when considering a house the answer 'was as much a matter of common sense as precise analysis'. Whereas a house that could be moved in sections could arguably be a chattel, the bungalow couldn't be removed without destroying it. Lord Lloyd of Berwick drew an analogy with an example given in *Holland v Hodgson*, where stones placed on top of one another to form a drystone wall would become part of the land, but the same stones piled up in a builder's yard for convenience in the form of a wall would remain a chattel. When the timber was assembled into wall frames for the bungalow, it became part of the structure which was part and parcel of the land. The reason the timber was brought onto the land was so obvious that the fact the bungalow wasn't attached was irrelevant. Lord Lloyd went to cite, per curiam, a threefold classification from Woodfall on Landlord and Tenant, release 36 (1994):

> … an object brought on to land is either (i) a chattel, (ii) a fixture, or (iii) part and parcel of the land itself, with objects in categories (ii) and (iii) being treated as being part of the land.

This classification seems eminently sensible and deals with cases like *Elitestone Ltd v Morris*, where the chalet bungalow was seen as part and parcel of the land.

Q: ***What about a houseboat then?***

A: In *Chelsea Yacht and Boat Co Ltd v Pope* (2000) it was held that it was a chattel because the mooring ropes could be undone, the boat could be moved without damaging it or the land and it had not become part of the land, not least because it was unclear what land it might have become part of. As Lord Justice Tuckey said:

> I support this conclusion on the grounds of common sense. It is common sense that a house built on land is part of the land. (See Lord Lloyd in *Elitestone Ltd v Morris* at page 692 H.) So too it is common sense that a boat on a river is not part of the land. A boat, albeit one used as a home, is not of the same genus as real property.

Hurrah for common sense.

Cinderella Rockerfellas Ltd v Rudd (2003) also confirmed the status of a boat as a chattel, although the case was to do with rateable values.

The latest boat case is *Mew v Tristmire* (2011) which concerned two residential houseboats that rested on a platform supported on wooden piles set into the sea bed. The case was to do with whether there was a tenancy but the court had to decide whether the houseboats were fixtures or chattels. Unlike the bungalow in *Elitestone Ltd v Morris* which was a permanent feature and could be moved only by demolishing it, the houseboats were designed to be moveable like caravans. Notwithstanding their condition today (they had deteriorated and moving them would result in damage or destruction), when they were first put on the platform they could have been moved off it in one piece and floated elsewhere without dismantling or destroying them. The Court of Appeal came to the conclusion that they were chattels.

Q: ***Apart from boats, most of the cases relate to grand houses with grand schemes. What happens in a mock Elizabethan, Tudor style, Renaissance inspired suburban house today with all mod cons?***

A: *Botham v TSB Bank plc* (1996) is a good example here. Mr Botham's house had been repossessed by the Bank. The Bank wanted to sell the house to recover the

money that Mr Botham still owed on the mortgage. When there is a mortgage, any fixtures belong to the lender whether the objects became fixtures before or after the creation of the mortgage.

Q: ***Presumably it was in the Bank's interests to argue that everything was a fixture?***

A: Yes, because if items were classified as fixtures, they would be included in the sale. The price the Bank could ask for the house would be higher, and so the Bank would stand more chance of getting back the money it had lent to Mr Botham. Conversely, it was in Mr Botham's interest to argue that everything was a chattel so that he could take it with him. Starting off in the soft furnishings department, it was held that carpets could be easily removed from gripper rods and could be used elsewhere. They were not intended to make a permanent improvement to the building. The curtains were only attached to enable them to be used as curtains. Removal of either the carpets or the curtains would not cause damage. Both were chattels.

Q: ***What would happen if there were carpet squares stuck down with glue?***

A: According to *Botham v TSB Bank plc*, they would be fixtures.

Q: ***And in the lighting department?***

A: The light fittings were chattels, as would be lampshades and chandeliers. The judge adopted the test in *British Economical Lamp Co Ltd v Empire, Mile End, Ltd* (1913), where the light fittings were not shown to be part of the electrical installation in the flat and so were not fixtures. And, once and for all, in any exam question, under the same authority the light bulbs are chattels. In *Botham v TSB Bank plc*, the gas fires, which were attached by a gas pipe with a gas tap to turn the gas on and off at the mains, were the same as electric fires plugged in. They rested on their own weight and were attached to the gas pipe only so as to be usable, and so were also chattels.

Q: ***And in the kitchen area?***

A: As far as the gas hob, the extractor fan unit, the integrated dishwasher and the fitted oven were concerned, the degree of annexation was slight and simply enabled the item to be used. They could be disconnected without damage and were not a permanent improvement to the building. They were also items that would need replacing after a relatively short period of time. The kitchen units, including the sink, would cause damage if removed and were surrounded by wall tiling, which meant that they would be seen as a permanent improvement and therefore a fixture.

Q: ***And I don't suppose the facilities for ablution were left out of the discussion?***

A: No. The taps, plugs, soap dish, towel rail and lavatory roll holders were fixtures because they were items necessary for a room used as a bathroom and were intended to be a lasting improvement to the property. Had there been a freestanding Victorian bath, this could have been a chattel and, if so, any Victorian taps would also have been chattels.

Q: ***What happens if the land is leased to a tenant and the tenant installs fixtures? Who is entitled to these fixtures when the lease comes to an end?***

A: All fixtures become part of the land, but the tenant is entitled to remove fixtures that have been attached for trade, ornamental or domestic purposes at the end of the lease or within a reasonable time afterwards. In *Spyer v Phillipson* (1929) the tenant was allowed to remove antique panelling that he had put up because it was an ornamental fixture. An agricultural tenant has the right to remove any fixtures under the Agricultural Holdings Act 1986. This must be done either before the end of the lease or within two months thereafter, provided the tenant has given one month's notice to the landlord and has paid all the rent. Any tenant must repair damage caused by the removal of fixtures. In *Mancetter Developments Ltd v Garmanson* (1986) the tenant was liable for the repair of holes in the walls left by the removal of extractor fans.

Q: ***Fred is clearly going to be concerned about things like fixtures and chattels when he sells Greenacres. What sorts of issues can arise when there is more of a business element in the sale?***

A: Consider the following examples. You want to buy a small area of land from the Local Authority to extend your garden and have agreed a purchase price of £5,000. This price reflects the land value as garden land. If the land was large enough to construct a house on though, you could make a profit by developing the land, and so the £5,000 paid would not reflect the true value of the land. A Local Authority is under an obligation to achieve the best possible price for land and so wouldn't want to miss out on the profit it could have made had it sold the land for redevelopment instead. The Local Authority could therefore extract a negative promise from you restricting the use of the land to a garden only. This is known as a negative or restrictive covenant and is discussed in Chapter 14. Alternatively, it could impose a positive promise, a positive covenant, on you, where you would have to pay a percentage of any profit you made from any later development of the land. The Local Authority will need to know whether and how these promises can be enforced against anyone you sell the house to.

Now consider a different example. A developer is negotiating to buy a plot of land for several million pounds which he intends to develop as a housing estate. The land is accessed by crossing over adjoining land that the seller wants to keep. The developer needs to secure a right of way over that adjoining land and he needs to ensure that the right of way can be used forever by the individual owners of the houses that are going to be built on the housing estate. This right of way is known as an easement and is discussed in Chapter 17. Other property issues will need to be resolved here as well. The seller might make it a condition that the developer constructs a road (a positive covenant) and also maintains it (a positive covenant). The developer will want to pass on this liability to individual house buyers (again a positive covenant) until the road is adopted by the local authority.

Q: ***Does the law in this book apply to both residential and commercial situations?***

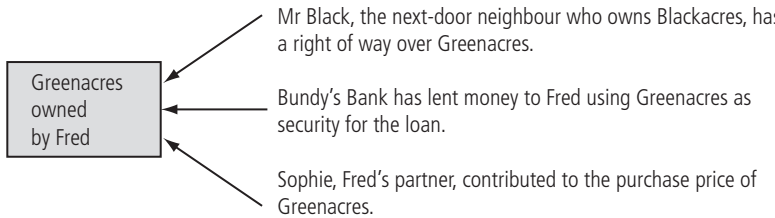
A: Yes.

Personal and proprietary rights in land

Box D

PERSONAL AND PROPRIETARY RIGHTS IN LAND

You must now distinguish between rights that are personal in nature and rights that are proprietary in nature. A personal right can be enforced only against a specific individual. For example, if you enter into a contract with Fred to buy a book and Fred sells the book to Jemima instead, your right to the book is enforceable only against Fred. You have only a right to claim damages for breach of contract. However, if you had paid for the book and ownership had passed to you, but Fred had given it to Jemima, you would have a right to claim the book itself. This is a proprietary right, a right in the property itself. Interests in land are either personal or proprietary. If a right is personal, it can be enforced only against the person who granted it, not against anyone else. If a right is proprietary in nature, it can be enforced against other people. Personal rights are called rights *in personam*, rights against the person. Proprietary rights are called rights *in rem*. 'Rem' means 'object' in Latin so you have a right in the object itself, here in the land. Look at the example of Fred and the range of possible interests over Greenacres.



Now imagine that Fred has decided to move house. He has put Greenacres on the market and Peter is interested in buying it. If the rights of Mr Black, Bundy's Bank and Sophie are personal rights, they will be enforceable only against Fred. If their rights are proprietary in nature, they could be binding on Peter.

Q: ***How do you know which rights in land are personal and which are proprietary?***

A: There is a recognised category of proprietary rights in land. The main ones are discussed in this book and include leases, easements, restrictive covenants, equities acquired by estoppel, mortgages and interests acquired under a trust.

Q: ***Who decides whether rights are proprietary or not?***

A: The courts or Parliament.

Q: ***Does the list of proprietary rights in land increase all the time?***

A: No. An increase in the list would make the buying and selling of land more uncertain. Peter would have no wish to buy Greenacres if more and more people could claim a proprietary right over Greenacres which could be binding on him. Even if he did buy Greenacres, his own use of the land might be hampered by other people's rights over Greenacres, and so owning Greenacres would become less and less attractive.

Q: ***Is there a unifying link between all the proprietary rights you can have in and over land?***

A: There is no clear unifying link. However, a proprietary right in land must be capable of clear definition, not least so that the parties are fully aware of the individual rights and duties of each of them: see *National Provincial Bank Ltd v Ainsworth* (1965).

Q: ***Can both legal and equitable rights be proprietary in nature?***

A: Yes.

Q: ***So if Mr Black, Bundy's Bank and Sophie had either legal or equitable proprietary rights over Greenacres, their rights could bind Peter?***

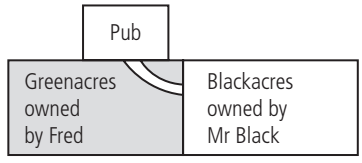
A: Yes.

The whole picture

Box E

THE WHOLE PICTURE

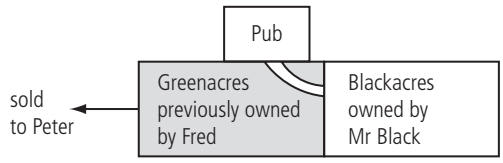
You can now start to bring strands of this chapter together. Imagine the following situation. Fred owns Greenacres. This means he owns the legal estate in fee simple absolute in possession in Greenacres. He has given Mr Black, the next-door neighbour who owns Blackacres, the right to walk over his land as a short cut. The right could have been given in either a deed or a contract.



Mr Black has an interest over Greenacres.

If Fred refuses to let Mr Black walk over Greenacres, Mr Black can sue for breach of Fred's promise in the deed or contract and ask for specific performance. This is not a problem.

Imagine that Fred then sells Greenacres to Peter.



The question is whether Peter has to let Mr Black continue to use the right of way he was granted by Fred over Greenacres. You now have several questions to answer.

What sort of right does Mr Black have over Greenacres? How has it been created? Is it legal or equitable, or is it not recognised in either jurisdiction? Is it proprietary in nature and therefore capable of binding Peter when he buys Greenacres? Under what circumstances should it be binding on Peter?

If it is binding on Peter, it means that he must let Mr Black continue to use the right of way over Greenacres even though he, Peter, is now the new owner of Greenacres.

The answers to these questions are the essence of land law. The next three chapters look at the circumstances in which Peter will be bound by any interest that Mr Black has over Greenacres, the answer to which will be of paramount importance to both Peter and Mr Black.

Chapter 2 looks at what their position would have been before 1926, some aspects of which are still relevant today. Chapters 3 and 4 look at their position following the major reform that took place in land law in 1925. The remaining chapters in this book look at the nature and the creation of the individual estates and interests in land.

Reform

The Law Commission proposed a project to reform feudal land law because the several remaining but significant elements of feudal law dating from 1066 cause uncertainty for the public, practitioners and the courts, and there is conflict with modern case law and statute. After nearly 950 years, clearly there is no urgency to complete this project not least because the review was proposed in the ninth Programme, deferred to the tenth and then the eleventh Programme and now the Commissioners have again taken the view that other proposed law reform projects offer the potential for greater public benefit than work on feudal land law.

The situation will be reviewed in the future.

Further reading

S. Bridge, 'Part and Parcel: Fixtures in the House of Lords', 56 *CLJ* (1997) 498

M. Haley, 'The Law of Fixtures: An Unprincipled Metamorphosis?' *Conv and Prop Law*, Mar/Apr (1998) 137

Law Commission (1987), Formalities for Contracts for Sale etc. of Land (Law Com No 164)

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