§ Law in Context

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Property Law

Commentary and Materials

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Registration

15.1. What are registration systems for?

In this chapter, as in the previous one, we are looking at registration primarily as a means of protecting private property rights. A property registration system can provide more effective ways of dealing with, or averting, the kind of difficulties over the enforceability and priority of property interests that we considered in the previous chapter, and can also facilitate proof of title, as we noted in Chapter 10. This not only makes the assets the subject of the registration system more freely marketable – assets are more easily traded if title can be proved quickly, cheaply and with certainty – but also helps promote security of title. Infringements of an interest holder's rights are easier to combat (and therefore less likely to occur) when the interest holder's title is beyond dispute.

However, it is important to appreciate that a state might decide to set up a property registration system for purposes other than the protection of private rights. One of our oldest property registers, the Shipping Registry, was set up by the Navigation Act 1660 primarily for the protection of British trade. British-owned ships were required to be registered in their local British port to enable the port authorities to ensure that foreign-owned ships did not trade from British ports, and that various privileges were accorded only to British-owned ships. Protectionism re-emerged as the publicly articulated objective of changes made to the ship registration regime by the Merchant Shipping Act 1988, which required all previously registered fishing vessels to reapply for registration, and introduced a requirement that eligibility for registration was limited to fishing vessels whose owners (and at least 75 per cent of shareholders) were British citizens resident and domiciled in the United Kingdom. In making these changes, the stated intention of the British government was to protect British fishing communities by preventing Spanish nationals buying up British ships in order to take advantage of the United Kingdom's fishing quota under the European Community's common fisheries policy. The common fisheries policy had been adopted by the EC out of concern for overfishing of stocks in the North Sea and Atlantic Ocean, and was intended to ensure equality of access to fishing grounds for Member States (and exclusion of everyone else), having regard to the needs of regions where the local population is

dependent on fishing. As it happened, this attempt to use registration to defend the British quota failed. The European Court of Justice held that the registration conditions were contrary to EC law, and the House of Lords ordered the British government to pay compensation to the shipowners who had been unable to re-register (see further *R.* v. *Secretary of State for Transport, ex parte Factortame Ltd (No. 5)* [2001] 1 AC 524). Nevertheless, ship registration (both in this country and abroad) continues to serve as a mechanism for the international regulation of safety standards and the welfare of crew. International conventions oblige all countries bound by them to impose regulatory regimes on all ships registered in that country, and entry to a port in any particular country may depend on the ship being registered in a country which imposes such regimes and enforces them to an acceptable degree.

Ship registration is also of course intended to facilitate the buying, selling and mortgaging of ships, but unlike land registration (and for obvious reasons) it operates on an international as well as a national level in this respect. In particular, the main function internationally of registration in national shipping registers is to act as an internationally recognised 'badge' of entitlement, which enables foreign courts to assume that the person registered as owner or mortgagee of a ship in the national register on which the ship is registered is indeed entitled under domestic law, without having to enquire into the property rules applicable in that particular jurisdiction. One consequence of this is that unregistered interests are not internationally recognised, a severe disadvantage given that ships tend to sail between jurisdictions. So, for example, English law recognises equitable property interests in British ships and they are fully enforceable in English courts but they are not enforceable in any other jurisdiction because they are not registrable under the British Merchant Shipping Act 1995, the current ship registration statute.

As far as land registration is concerned, our registration of title system differs from most European systems in that the first attempts at a national system were not made until the mid-nineteenth century, when the idea of land as a tradable commodity first started to emerge. The overriding consideration then was (as it was when the present system was introduced by the Land Registration Act in 1925, and as it still was when the 1925 Act was amended and replaced by the Land Registration Act 2002) to make conveyancing simpler and cheaper – in other words, to increase the marketability of land.

This is in marked contrast to the way in which most other European land registration systems evolved. In many European jurisdictions the impetus for cataloguing land came from the state, and the motive was to protect the interests of the state by gathering information to enable the state to levy tax. This was the origin of the cadastre, a systematic record of land-holdings sometimes said to have been devised in the Austrian Empire in the eighteenth century (see, for example, the short history given in *Ruoff and Roper on the Law and Practice of Registered Conveyancing*, Extract 15.1 below) but probably dating back much earlier than that (the Domesday book is an early English example). The cadastre forms the basis of

most continental European land registration systems, which consequently are regarded as operating primarily for public purposes (now for land regulation and environmental protection as well as for taxation), whereas our system's primary objective is purely private – to increase the marketability of land.

As Ruoff and Roper point out in Extract 15.1 below, these fundamental differences in purpose between cadastral-based systems and ours have led to significant structural differences between their systems and ours, which we must now look at in more detail.

15.2. Characteristics of the English land registration system

15.2.1. Privacy

A cadastral system necessarily involves revealing details of private ownership to the state, and in modern times, where the cadastre plays a central role in land regulation and environmental protection, to other members of the public as well. In our system, until very recently, privacy was regarded as paramount. The land register was not opened for public inspection until December 1990 when the Land Registration Act 1988 came into force (and then only after a protracted parliamentary struggle) and the Land Registration Rules 2003 (SI 2003 No. 1417) made under the Land Registration Act 2002 still make elaborate provision for applicants to delete 'prejudicial information' in leases and mortgages before they have to be made available for public inspection (rules 136–138). 'Prejudicial information' is defined in rule 131 as any information which, if disclosed to the public generally or to specific persons, would or would be likely to cause 'substantial unwarranted' damage or distress, or 'prejudice the commercial interests' of the applicant. The Registrar must accept an application to treat information as coming within this category if 'satisfied that [it] is not groundless' (rule 136(3)).

Similarly, the Land Registry has been slow to share its information with other government departments, and it is only now that arrangements are being made to do so systematically (see Land Registry, *Annual Report and Accounts 2002–2003*, item 6 of their business objectives for 2002/3, which they report they have achieved).

15.2.2. Comprehensiveness

A fundamental difference between cadastral-based systems and ours is that a cadastre is geographically comprehensive (at least in relation to populated areas of the country surveyed) and is compiled systematically and usually all in one go, whereas in our system individual plots of land are added to the register sporadically, by a process which has not yet been completed and probably never will be.

Under our system, voluntary registration of individual plots of land has been at least theoretically possible ever since the system was brought into operation by the Land Registration Act 1925, but registration does not become compulsory unless

and until a triggering event occurs. Because the system has always been geared towards marketability of land, the only triggering event is a dealing with the land – either a transfer on sale, or, since 1997, the grant of a lease for more than twenty-one years (reduced from forty years by the Land Registration Act 1997, and now reduced again down to seven years by section 4 of the Land Registration Act 2002) or a legal mortgage over a fee simple or such a lease (section 4 of the 2002 Act).

This means that land which is not traded simply never gets on the register unless the title holder chooses to put it there. In addition, the process has been prolonged still further because it was decided in 1925 to limit compulsory registration to specified areas of England and Wales, and to progressively add additional areas of compulsory registration only as and when resources permitted. It was only if land was in area of compulsory registration that a plot of land had to be put on the register following a dealing with it: in other areas registration was merely voluntary, and indeed for many years a shortage of resources led to prolonged suspensions or restrictions of voluntary registration. This process of gradually extending compulsory registration to cover the whole of England and Wales was not completed until 1 December 1990: the last areas to be brought in comprised the districts of Babergh, Castle Point, Forest Heath, Leominster, Maldon, Malvern Hills, Mid Suffolk, Rochford, St Edmundsbury, South Herefordshire, Suffolk Coastal, Tendring, Wychavon and Wyre Forest, all under the Registration of Title Order 1989 (SI 1989 No. 1347).

As a consequence of all this, although there are 18.87 million registered titles in England and Wales (as at the end of 2003), the Land Registry estimates that there are about 3–4 million still to go (Land Registry, *Annual Report and Accounts 2002–2003*). The Land Registry reports that it is now taking active steps to encourage voluntary registration. In its *Annual Report and Accounts 2002–2003*, for example, it says that it is working with, among others, the National Playing Fields Association to register playing fields and the Court Service to register 180 court buildings, and also reports that it has managed to complete registration of all its own land (*ibid.*, p. 41). However, the option of completing the process by compulsion was rejected in the joint Law Commission and Land Registry report whose recommendations were implemented by the Land Registration Act 2002 (Law Commission and HM Land Registry, *Land Registration for the Twenty-First Century: A Conveyancing Revolution* (Law Commission Report No. 271, 2001)) – for no very good reason, as we see in Extract 15.2 below. Consequently, despite the report's recommendation that the matter be re-examined in five years' time, it remains a real prospect that we will never have a comprehensive land registration system.

This sporadic, transaction-based approach to putting land on the register has had a profound effect on two aspects of our registration system. The first is the way in which boundaries are treated, and the second is the limited range of interests in land that are eligible for registration. We look at these in the next two sections.

15.2.3. Boundaries

One of the points of a cadastre is to draw up a map or catalogue of the area settling the boundaries between differently owned lots. However, this is not easy to do in a registration system like ours where individual lots are haphazardly and sporadically put onto the register. In any event, it was decided in 1925 not to do it: boundaries have never been guaranteed under the Land Registration Acts (see now sections 60 and 61 of the 2002 Act; the procedure referred to in section 60(3) for allowing the Land Registry to determine the exact line of the boundary in specified cases dates back to 1925, but is very rarely used). The land register does indeed include a definitive map, and the Land Registry works closely with the Ordnance Survey and has pioneered the development of digital mapping techniques, but nevertheless it takes no responsibility for the accuracy of the boundaries between registered properties. This is perhaps inevitable. When an application is made for the first registration of title to a plot of land which has never before been put on the register, the registry hears only the applicant's side of the story as to where the boundaries lie between her plot and those of her neighbours. Conflicting views are unlikely to come to light until the neighbours make their own applications for registration, if then. Consequently, boundary disputes are as common in registered land as in unregistered land, and the position of the boundaries on the register is of no significance when it comes to resolving such disputes. Also, it seems clear from reported cases on rectification of the register that areas of land do sometimes end up registered under two different titles held by different people, and conversely that landlocked areas between titles can be overlooked and never be registered at all.

15.2.4. Restricted class of registrable interests

15.2.4.1. Distinguishing 'substantive' registration and 'protection' on the register

The most striking feature of our land registration system is that only some types of property interest can actually be registered. This is a direct consequence of our system's focus on marketability.

Property interests which cannot be registered are not wholly excluded from the system. There are two other methods (i.e. not involving actual registration of the interest) by which their existence can be made known on the register. These are sometimes referred to as ways of 'protecting' the interest on the register, although as we see below the protection actually offered is not extensive. The term 'substantive registration' is often used (although not in the legislation) to distinguish genuine registration of an interest from this somewhat ambiguous protection provided by 'protection' of it.

15.2.4.2. Registration

The only interests that can be actually registered are:

1 a legal estate in fee simple absolute in possession;

2 a legal lease for a term of more than seven years (with some exceptions);
3 a legal charge by way of legal mortgage;
4 a profit in gross (with a perpetual duration or for a term of more than seven years);
5 a legal easement or profit which is appurtenant to a registered fee simple or lease;
6 a rentcharge; and
7 a franchise and a manor.

See sections 2–4 of the 2002 Act, and also section 1 of the Law of Property Act 1925 which supplies the definition of the term 'legal estate' as it appears in the 2002 Act.

Only the first five of these are of any significance. Rentcharges were prospectively abolished by the Rentcharges Act 1977: no new ones can be created after 21 August 1977 and most will have ceased to exist by 2037. Franchises and manors are relics of Crown prerogative and the feudal system – interesting, but rarely encountered.

Leaving these aside, the content of the list is dictated by the fact that the primary objective of the system is to facilitate dealings with land. Fee simples, leases and profits in gross are on the list because they can be, and in practice regularly are, separately traded (profits particularly so as a consequence of the decision in *Bettison* v. *Langton* [2001] UKHL 24, as we saw in Chapter 5). For this reason, each of them is given a separate title number and what amounts to (but is not described in the Act as) a separate file. Legal charges by way of legal mortgage (now the only type of legal mortgage or charge that can be granted over a registered fee simple or lease) are on the list of registrable interests because the most important remedy of the mortgagee is to sell the mortgagor's interest (free from the mortgage) if there is a default, and registration of the title to the mortgage facilitates a sale as mortgagee. Registered mortgages are not given a separate title number or a separate file: they are registered against, and in the file of, the fee simple, lease or profit they are charged on.

The appearance on the list of appurtenant easements and profits is anomalous in that, by definition, they cannot be separately traded. If expressly granted they are usually granted in a transfer of either the benefited or the burdened land, in which case they will be registered automatically. If granted by a separate deed, the grantee has to take steps to register the easement as appurtenant to the benefited land (i.e. appearing under the benefited title's title number and in its file) and to have an appropriate entry made in the file of the burdened title. Legal easements arising by prescription, or otherwise arising informally, are registrable in theory, but in practice this is rarely a practical proposition.

We consider the effect of registration below, but as already noted for present purposes the important point is that *no other type of interest in land* can be registered.

15.2.4.3. 'Protection' by notice or restriction

The 2002 Act, like its predecessors, provides two protection mechanisms which can be used either for interests which cannot be registered, or for those which can be registered but are not.

The first is by entry of a 'notice' in the file of the registered title affected by the interest (sections 32–39 of the 2002 Act). This ensures that the interest will be enforceable against subsequent purchasers of that title, as we see below, but it has no other effect. In particular, it provides no guarantee of the validity of the interest. If the interest is ineffective as against that particular purchaser for some other reason, for example because not created using the correct formalities, the entry of a notice will not make it enforceable: section 32(3). Also, it does not have any priority effect: as we see below, interests protected by notice take priority from the date they are created, not the date on which they appear on the register. Finally, only some, but not all, non-registrable interests can be protected by entry of a notice. Important categories of interest are excluded, most notably interests under a trust of land, leases granted for a term of less than three years and interests registrable under the Commons Registration Act 1965 (section 33).

The other – and very different – method of protection is to enter a 'restriction' in the file of the registered title affected by the interest (sections 40–47). A restriction does not make the interest enforceable against anyone, nor does it necessarily even identify the interest. It certainly does not validate the interest, nor give it priority over any other interest. All it does is to alert prospective purchasers of the registered title of any limitations there may be on the registered title holder's powers. If, for example, the title holders are trustees and so unable to overreach interests under the trust except in the circumstances noted in the previous chapter, this limitation on their powers will be stated in a restriction entered in the title holder's file. Similarly, if the registered title holder is unable to sell or grant leases without first notifying or obtaining the consent of a specified person, this too will be stated in a restriction in his file.

It will be apparent from the above that the principle of overreaching applies in registered land. Beneficiaries under a trust of land certainly cannot register their interests, nor are they given any means of protecting them against an unwanted overreaching disposition. All they can do is enter a restriction against the trustees' title pointing out to purchasers what a purchaser has to do to overreach their interests.

15.2.4.4. The overriding interest class

To complete the picture, it has to be noted here that the fact that a property interest in land in neither registered nor protected on the register does not necessarily mean that it is unenforceable against registered title holders. The Land Registration Acts have always recognised the concept of overriding interests – i.e. interests which are fully enforceable even though not appearing on or apparent from the register. The 2002 Act has restricted the categories of overriding interests, but they still remain highly significant. In particular, they include short leases (which can be neither registered nor protected by notice) and *any* interest in land where the interest holder is in actual occupation of the land, as we see below. One effect of this is that overreachable interests of beneficiaries under a trust who are in occupation of the

land will usually nevertheless be fully enforceable, *provided they are not overreached*. In other words, overreaching not only applies to registered land, it operates in registered land in precisely the same way as it operates in unregistered land.

15.2.5. The mirror, curtain and guarantee principles

Commentators on land registration frequently quote the comment made by T. B. F. Ruoff (Chief Land Registrar for many years) in *An Englishman Looks at the Torrens System* (published in Sydney, Melbourne and Brisbane in 1957), that the fundamental features of common law registration systems in general and the Torrens and English land registration systems in particular are the 'mirror principle', the 'curtain principle' and the 'guarantee principle'. Gray and Gray usefully summarise Ruoff's principles in the following way:

> THE 'MIRROR PRINCIPLE'
>
> 6.11. The register of title is intended to operate as a 'mirror', reflecting accurately and incontrovertibly the totality of estate and interests which may at any time affect the registered land. In this sense, 'the register is everything' [quoting Lord Buckmaster in *Creelman* v. *Hudson Bay Insurance Co.* [1920] AC 194 at 197].
>
> THE 'CURTAIN PRINCIPLE'
>
> 6.12. Trusts relating to the registered land are kept off the title, with the result that third parties may transact with registered proprietors safe in the assurance that the interests behind any trust will be overreached.
>
> THE 'INSURANCE PRINCIPLE'
>
> 6.13. The state itself guarantees the accuracy of the registered title, in that an indemnity is payable from public funds if a registered proprietor is deprived of his title or is otherwise prejudiced by the correction of any mistake in the register. (Gray and Gray, *Elements of Land Law* (4th edn), paras. 6.11–6.13)

We see below that, despite what Ruoff says, the insurance principle he articulates differs in important respects from the indemnity principle which actually underlies the Land Registration Acts, and that in any event the system we actually have falls far short of the ideal contemplated by either of those principles. As far as Ruoff's other two principles are concerned, the second contradicts the first. How can a system both aspire to provide an accurate mirror of property interests affecting land and at the same time construct a curtain behind which a significant class of interests is required to hide? This is not the only reason for scepticism about the mirror principle. A system that offers genuine registration only to a limited class of property interests can hardly be said to be taking its mirror aspirations seriously, while the existence and content of the overriding interest class raises the whole question of whether a mirror is really what we want in

any event. We return to this point when we look at overriding interests in more detail below.

15.2.6. Consequences of non-registration

Looking at registration systems in general, there are various ways of dealing with a failure to utilise the registration machinery provided. One way is to make registration entirely optional, a privilege that can be acquired by any eligible person who chooses to take advantage of it. This involves providing benefits for those who register which are not available to those who do not. At the other end of the spectrum, registration can be made compulsory and the system can not only withhold benefits from those who default but also impose penalties on them.

Ship registration moved from one extreme to the other within a relatively short period. Under the Merchant Shipping Act 1894, which was the principal registration Act for nearly a century, it was compulsory for a British ship to be registered in the British Shipping Registry, and failure to comply was a criminal offence. However, the Merchant Shipping Act 1988 made registration voluntary, and then, under the Merchant Shipping Act 1995, the effect of registration was limited to five years, so that anyone who wants to enjoy the benefits of registration must reapply every five years. Registration is therefore now a privilege. This works because it is virtually impossible for a ship to operate unless it is registered in some jurisdiction or other, so the only real option facing a ship owner is where, not whether, to register.

As far as land registration is concerned, we have already seen that from the outset the system has relied on both compulsory and voluntary routes for entry into the system, and seems likely to continue to do so. However, once titles are in the system, it has always been compulsory to use the registration machinery whenever the registered title holder makes a 'registrable disposition' (defined in section 27 of the 2002 Act to cover, essentially, any transfer of the interest itself, any grant of a lease for more than seven years, any grant of a legal mortgage, and any grant of a legal easement or profit). Any such disposition must be 'completed by registration', i.e. the person taking the benefit of the disposition must apply to the Land Registry to be registered as title holder. At present, there are two sanctions provided for failure to do so. The first is that the disposition does not have *legal* effect until the person taking the benefit of the disposition has become registered – i.e. until registration, her interest remains equitable only (section 27(1)). The second is that her interest may not be enforceable against anyone else who acquires a registrable interest in the land for valuable consideration and becomes registered title holder of his interest. This is because of section 29 of the 2002 Act, which provides in effect that any purchaser (meaning anyone who acquires his interest for valuable consideration) who becomes a registered title holder takes free from any interest that is neither registered, nor protected on the register by a notice, nor categorised as an overriding interest. A person who acquires an interest under a registrable disposition but does not

register, is therefore vulnerable under section 29: her interest will not be enforceable against subsequent registered proprietors who gave valuable consideration unless she decided to protect her interest by notice instead of by registering it (allowable, but not usually advisable) or unless her interest is overriding (because, for example, she happened to be in actual occupation of the land, as we see below). However, this is the only other sanction provided for non-registration. Her interest will not be affected in any other way. It will remain valid as between herself and the person who granted her the interest, and enforceable against anyone other than a registered purchaser (to the same limited extent as any other unregistered equitable interest is).

This sanction of non-enforceability against subsequent purchasers makes sense in a registration system aimed primarily at facilitating marketability. Marketability requires no more than that purchasers will not be affected by interests not on the register: it has no interest in seeing that interests off the register cannot exist at all for any purpose. A sanction of invalidity for all purposes would only be appropriate if there were other reasons why the state wanted the register to provide a complete record of all interests in land (as for example it might if our register also functioned as a cadastre). However, under section 93 of the 2002 Act, the government is given power to make rules (intended to be made when electronic conveyancing is sufficiently advanced) which will change the sanction for non-registration from unenforceability to invalidity. Surprisingly little justification has been provided for this dramatic swing to the far extreme of compulsion. In fact, it appears from paragraphs 2.59–2.68 and 13.74–13.82 of the Law Commission's report (see Extract 15.2 below) that, as far as the Law Commission and Land Registry are concerned, a sufficient justification for moving to an invalidity sanction is that technological developments enable us to do so.

Extract 15.1 R. B. Roper *et al.*, *Ruoff and Roper on the Law and Practice of Registered Conveyancing* (2nd looseleaf edn, London: Sweet & Maxwell, 2003)

REGISTRATION SYSTEMS: CONTINENTAL EUROPE

The prevalence of the cadastre in continental Europe has led to a fundamental difference between, on the one hand, the land registration systems in many European countries which are based on the cadastre and, on the other hand, those focused on the registration of title or registration of deeds as is the case in the British Isles, Germany and countries which have the Torrens system. The cadastre was devised during the eighteenth century, principally in the Austrian Empire. It was then fully developed by Napoleon whose Commission, set up in 1807, contained terms of reference as follows:

> To survey more than 100 million parcels; to classify these parcels by fertility of the soil and to evaluate the productive capacity of each one; to bring together under the name of each owner a list of the separate parcels he owns; to determine, on the basis

of their total productive capacity, their total revenue and to make of this assessment a record which should thereafter serve as the basis of future assessments.

This was clearly instituted to serve the needs of the state for the purpose of the assessment and collection of revenue, whereas the purpose of deeds or title registration is to protect the interests of landowners. A cadastral system has three main points of difference from a system of title registration.

(i) A cadastre is a systematic record designed to prevent a landowner evading the payment of tax. The compilation of a register of title, in contrast, is usually sporadic when and where transactions occur.
(ii) A cadastre necessitates classification and valuation so that the tax can be assessed, whereas registration of title is not directly concerned with value. Cadastre plans do not admit to any flexibility in the interpretation of boundaries as is found where registration is with general boundaries only.
(iii) A cadastre is primarily concerned with the payment of taxes and not with proof of ownership as is the case with the registration of title nor with the aim of giving publicity to conveyancing transactions as is the case with deeds registers.

Where there has been a marriage between title registration and the cadastre, the cadastre incorporates registration of title and the resulting system consists of the following two basic parts:

(i) a cartographic part consisting of large-scale maps which are based on surveys including aerial photographs and which indicate the division into parcels of an area together with appropriate parcel identifiers;
(ii) a descriptive part containing registers or files which record 'legal facts' (deeds) or 'legal consequences' (titles) and other physical or abstract attributes concerning the parcels depicted on the map.

From the registration of title point of view there is a potential weakness in a cadastre-based system in that priority may be given to the maintenance and expansion of fiscal information and to items of unchanging character, such as the type of soil, to the prejudice of the effective recording of matters vitally important for property owners for the creation and disposition of interests in land. This was the case in parts of Eastern Europe where the requirements of the state were taking precedence over the needs of landowners, as indeed they had in the original Napoleon concept. Nevertheless, there is great potential for development here as can be seen in the system developed in Sweden where the land records are held on two registers, each operated by a separate government organisation. The first is the 'Property Register' or cadastre which is maintained in cadastral offices spread throughout the country. The second is the 'Land Register', which is maintained in land registries that are adjuncts of the Lower Courts. From the comprehensive information obtained from these registers and from other national and local authorities a Land Data Bank has been developed on a central basis which contains not only data essential to land titles but also information on many other matters relating to the land including values for taxation purposes and planning matters.

Notes and Questions 15.1

1 See also paragraph 3.004 in Ruoff and Roper for a comparison of the English system with Torrens-based systems, which originated in Australia and now apply throughout most of Australasia. Most developing countries and former communist states introducing land registration for the first time have opted to base their systems on the Torrens system rather than on the English Land Registration Act model.

2 The concentration on the interests of the state that Ruoff and Roper see as a potential weakness of cadastral systems is seen by others as a strength. In 1995, the International Federation of Surveyors published a *Statement on the Cadastre*, 'highlight[ing], from an international perspective, the importance of the cadastre as a land information system for social and economic development', and made these claims for the modern role of a cadastre:

> It may be established for fiscal purposes (e.g. valuation and equitable taxation), legal purposes (conveyancing), to assist in the management of land and land use (e.g. for planning and other administrative purposes), and enables sustainable development and environmental protection ... It provides governments at all levels with complete inventories of land-holdings for taxation and regulation. But today, the information is also increasingly used by both private and public sectors in land development, urban and rural planning, land management, and environmental monitoring ... The cadastre plays an important role in the regulation of land use. Land use regulations [permitting development] stipulate [for example] ... the necessary access to water and sewerage, roads etc. [and] the cadastre forms an essential part of the information required by the private developer, landowners, and the public authorities to ensure that benefits are maximised and costs (economic, social, and environmental) are minimised. (www.fig7.org.uk/publications/cadastre/statement_on_cadastre.html)

They also stressed the importance of encouraging developing countries to develop cadastral systems to meet 'the needs and demands in societies with customary and informal land tenure systems' and concluded that the cadastre although 'important in early societies, [is] even more important today from a global perspective due to its role in economic development and environmental management'.

Extract 15.2 Law Commission and HM Land Registry, *Land Registration for the Twenty-First Century: A Conveyancing Revolution* (Law Commission Report No. 271, 2001)

FIRST REGISTRATION

2.9. We consider that, in principle, the remaining unregistered land should be phased out as quickly as possible and that all land in England and Wales should be

registered. As we have indicated above (paragraph 2.6) the continuation of two parallel systems of conveyancing, registered and unregistered, has absolutely nothing to commend it. Furthermore, as the result of a change to an open register in 1990, the contents of the register are now public. The register is no longer something of concern only to conveyancers but provides an important source of publicly available information about land, a resource in which there is an increasing interest. However, the Bill [now the Land Registration Act 2002] does not introduce any system to compel the registration of all land that is presently unregistered. This may at first sight appear paradoxical, but there are three particularly compelling reasons for not doing so at this juncture.

2.10. First, we consider that it would be premature to do so. Not only have the changes made by the 1997 Act only recently started to have effect, but the present Bill will offer considerable additional benefits to those whose titles are registered, quite apart from the conveyancing advantages should they wish to sell or deal with their land. We therefore anticipate a very significant rise in voluntary first registration as a result. Compulsion should not be employed in our view until it is clear that existing provisions have been given an opportunity to work.

2.11. Second, compulsory registration is at present triggered by the making of many of the commonest dispositions of unregistered land. It is not at all easy to devise a system of compelling compulsory registration of title other than one that operates on a disposition of the land in question. The mechanisms of compulsion in such situations are not self-evident and there are dangers of devising a system that could be heavy handed. Any such system would obviously have to comply with the European Convention on Human Rights. The means employed would therefore have to be proportionate to the desired ends.

2.12. Third, the implementation of the present Bill, which makes such striking and fundamental changes to the law governing registered land and the methods of conveyancing that apply to it, is likely to stretch the resources of both the conveyancing profession and HM Land Registry for some years after its introduction. We doubt that it would be possible to accommodate a programme for the compulsory registration of all the remaining unregistered land at the same time.

2.13. Nevertheless, we recognise that total registration is a goal that should be sought within the comparatively near future. We therefore recommend that ways in which all remaining land with unregistered title in England and Wales might be brought on to the register should be re-examined five years after the present Bill is brought into force.

Compulsory use of electronic conveyancing

2.59. There is power in the Bill [now section 93 of the Act] to make the use of electronic conveyancing compulsory. The way that the power will operate, if exercised, is that a disposition (or a contract to make a disposition) will only have effect if it is:

1 made by means of an electronic document;
2 communicated in electronic form to the Registry; and
3 simultaneously registered.

2.60. This is a power that will not be exercised lightly. When solicitors and licensed conveyancers enter into network access agreements with the Registry, they will be required to conduct electronic conveyancing in accordance with network transaction rules. Those transaction rules are likely to provide that the dispositions and contracts to make dispositions are made in the manner explained in the previous paragraph. In other words, those rules will ensure that electronic dispositions are simultaneously registered, which is the single most important technical objective of the Bill. However, as we explain in Part XIII of this Report [paragraphs 13.74 *et seq*. below], it may be necessary to exercise the statutory power to secure that technical objective notwithstanding what can be done under the network transaction rules.

2.61. There are, in any event, other reasons why the Bill has to contain a power to make electronic conveyancing compulsory. It is inevitable that the move from a paper-based to an all-electronic system of conveyancing will take some years and that the two systems will necessarily co-exist during this period of transition. However, that period of transition needs to be kept to a minimum for two principal reasons. The first is that it will be very difficult both for practitioners and for the Land Registry to have to operate two distinct systems side by side. Secondly, if electronic conveyancing is to achieve its true potential and deliver the savings and benefits that it promises, it must be the only system. This can be illustrated by the example of a typical chain of domestic sales. As we have indicated above, it will be possible to manage chains in an all-electronic system. However, if just one link in that chain is conducted in the conventional paper-based manner, the advantages of electronic chain management are likely to be lost. A chain moves at the speed of the slowest link. A paper-based link is in its nature likely to be slower than an electronic one and will not be subject to the scrutiny and controls of those links in the chain that are electronic and therefore managed. There must, therefore, be a residual power to require transactions to be conducted in electronic form. It is hoped that the eventual exercise of the power will be merely a formality because solicitors and licensed conveyancers will have chosen to conduct conveyancing electronically in view of the advantages that it offers to them and to their clients. Not only will it make the conduct of conveyancing easier and faster for them, but they will also have to compete with other practitioners who have elected to adopt the electronic system . . .

Do-it-yourself conveyancing

13.72. Although the number of persons who conduct their own registered conveyancing is very small – it is understood to be less than 1 per cent of transactions – it is plainly important that they should still be able to do so, even when all registered conveyancing has become paperless. We mentioned the issue of 'do-it-yourself conveyancers' in the Consultative Document. Our provisional view was that such persons would have to lodge the relevant documents with a district land registry, which would, as now, register the transaction. This approach would deny do-it-yourself conveyancers the opportunity to take advantage of electronic conveyancing. It could also have deleterious effects if, say, such a person was involved in a chain of other transactions. We have therefore reconsidered the matter and the Bill adopts a different approach.

13.73. Once there is a land registry network, the registrar is to be under a duty to provide such assistance as he thinks appropriate for the purpose of enabling persons engaged in qualifying transactions who wish to do their own conveyancing by means of the land registry network. The duty does not, however, extend to the provision of legal advice. (It would be wholly inappropriate for the Registry, in effect, to be in competition with conveyancing practitioners. The Registry has neither the wish nor the resources to do so.) It is envisaged that the way in which this will operate is that a person who is undertaking his or her own conveyancing, will be able to go to a district land registry for this service. The registrar will carry out the necessary transactions in electronic form on his or her instructions. Obviously, that person will be required to pay an appropriate fee for the service that will reflect the costs involved to the Registry.

THE POWER TO MAKE ELECTRONIC CONVEYANCING COMPULSORY AND TO REQUIRE THAT ELECTRONIC DISPOSITIONS SHOULD BE SIMULTANEOUSLY REGISTERED

The objective of the power

13.74. We have briefly explained in Part II of this Report why the Bill contains and needs to contain a power by which, in due course, the use of electronic conveyancing could be made compulsory (paragraphs 2.59–2.61). In particular, we explained that it might be necessary to require at least some transactions to be effected electronically because otherwise the benefits of electronic conveyancing could be lost. We also explained that the power of compulsion was linked to the single most important technical aim of the Bill. That is to bring about the situation in which many transactions involving registered land will have no effect unless registered. Much of the thinking underlying this Bill rests on that principle. However, it can only happen if the making of the transaction and its registration are simultaneous and that in turn is possible only if both can be effected electronically.

13.75. The power to make electronic conveyancing compulsory is found in Clause 93 [now section 93 of the Act] and, as the comments in the last paragraph suggest, it has twin objectives. If the power is exercised, it will require, in relation to any disposition or contract to make such a disposition that is specified in rules, that:

(1) the transaction shall only take effect if it is electronically communicated to the registrar; and
(2) the relevant registration requirements are met.

13.76. In other words, it will be possible to require not only that a particular disposition (or contract to make a disposition) should be effected in electronic form, but that it should only have effect when it is entered on the register in the appropriate way. Those two elements will occur simultaneously. This double effect of the power is essential to an understanding of its purpose. The objective is to link inextricably the elements of making a contract or disposition electronically and the registration of that contract or disposition. Although there will be no contract or no disposition at all unless and until registration occurs, an electronic system means that these two steps can be made to coincide. There will no longer be any registration gap because it will no longer be possible to create or dispose of rights and interests off the

register (as it is at present). This is the goal that all registration systems have so long sought to attain. Its benefits are considerable.

13.77. The absence of any period of time between the transaction and its registration eliminates any risk of the creation of third party interests in the interim. It also means that there is no risk that the transferor may destroy the interest after its transfer but before its registration, as where X plc assigns its lease to Y Ltd and X plc surrenders the lease to its landlord after assigning it but before the assignment is registered (*Brown & Root Technology Ltd* v. *Sun Alliance and London Assurance Co.* [2000] 2 WLR 566).

13.78. At present, the priority of an interest in registered land, other than a registrable disposition that has been registered, depends upon the date of its creation, not the date on which it is entered on the register. That will remain so under the Bill [see now section 28 of the Act]. However, the exercise of the power under Clause 93 will mean that a transaction and its registration must coincide. In this way, the register will become conclusive as to the priority of many interests in registered land, because the date of registration and the date of disposition or contract will be one and the same.

13.79. Quite apart from the reasons already given why electronic conveyancing might be made compulsory in relation to at least some transactions there is, therefore, also an important legal goal to be achieved by doing so. It is to make an inextricable link as a matter of law between the making of a transaction and its registration. It is true that network transaction rules can achieve the effect that a transaction and its registration coincide. But if by some mischance in a particular case that did not happen, a transaction might still have some effect between the parties (as it would now) if it were not registered. There is a risk that the mere fact that this could happen might undermine one of the goals of ensuring simultaneity of transaction and registration, namely, that a person could rely on the register as being conclusive as to priority. It is therefore necessary to have statutory provision to ensure the linkage between a transaction and its registration.

The application of the power

13.80. The power in Clause 93 will apply to a disposition of:

(1) a registered estate or charge; or
(2) an interest which is the subject of a notice in the register;

where the disposition is one specified by rules. The scope of the power will, therefore, be determined by rules. This means that the power can (and doubtless will) be exercised progressively. As the use of electronic conveyancing becomes the norm in relation to particular transactions, the power to require them to be made electronically and simultaneously registered could then be exercised. Given the considerable importance of this power, the Lord Chancellor is required to consult before he makes any rules under it. There are two points that should be noted about the power.

13.81. The first is of some general importance. The power conferred by the Bill would mean that it was possible to require a disposition of an interest protected by a notice to be made electronically and registered. This is something new under the Bill. It

is not at present possible to register transfers of such interests. The types of interest to which this power is likely to be applied include:

(1) a profit à prendre in gross that has not been registered with its own title;
(2) a franchise that has not been registered with its own title;
(3) an equitable charge;
(4) the benefit of an option or right of pre-emption.

13.82. The extension of the system of title registration to interests that were protected by notice and not registered with their own titles was canvassed in the Consultative Document [but not recommended in the Report, and therefore not achieved in the Act].

Notes and Questions 15.2

1 Compare the justifications given here for invalidating an interest for non-registration with the arguments put in Extract 12.1 about the principles to be applied in applying sanctions for failure to comply with formalities rules. Does this sanction satisfy Peter Birks' principle that 'pain should not be inflicted except in case of pressing necessity' (Extract 12.1 above)?

2 To what extent could equitable doctrines such as estoppel come to the aid of a person whose interest is invalidated through non-registration? See Dixon, 'The Reform of Property Law and the Land Registration Act 2002: A Risk Assessment'.

3 If the invalidity sanction is to be extended to interests protected by notice, the intention appears to be that the *initial* protection by notice would still not guarantee the validity of the interest protected, nor have any priority effect, but that any subsequent dealing with the interest would be wholly ineffective (even as between the parties) if it was not recorded on the register that the dealing had taken place. Is this a satisfactory substitute for registration, as far as the interest holder is concerned?

15.3. Enforceability and priority of interests under the Land Registration Act 2002

It follows from what we said in the previous section that the basic enforceability and priority rules in registered land are as follows.

15.3.1. Registrable interests

Registrable interests do not become legal interests until the holder's title is registered (section 27(1) of the 2002 Act). Once registered, the interest is enforceable against the whole world and takes priority from the date of registration.

15.3.2. All other interests

As far as all other interests are concerned – i.e. interests that are registrable but not registered, and interests that are not registrable at all – the position is as follows.

15.3.2.1. Enforceability

One of the two following rules applies:

1 section 29 of the 2002 Act applies, and the interest is not enforceable against someone who takes under a disposition for valuable consideration and becomes a registered title holder, unless the interest is either protected by notice (section 29(2)(a)(i)) or is an overriding interest within Schedule 3 to the Act (section 29(2)(a)(ii)); but
2 an overreachable interest *which is overreached* cannot affect the purchaser/mortgagee whose purchase/mortgage overreached the interest, even if the overreachable interest had been protected by notice (not possible for interests under a trust, but possible for other overreachable interests) or by restriction, and even if the interest would otherwise have been an overriding interest because the interest holder was in actual occupation. This was confirmed by the House of Lords in *City of London Building Society* v. *Flegg* [1988] AC 54 (considered in Notes and Questions 14.3 above).

15.3.2.2. Priority

The date of any protection on the register (i.e. entry of notice or restriction) is irrelevant for priority purposes. Priority is governed by the unregistered land priority rules considered in Chapter 14, i.e. all interests rank for priority purposes by date of creation (confirmed by section 28 of the 2002 Act) but a prior equitable interest holder can lose priority to a later interest holder by unconscionable conduct of the kind discussed in *Freeguard* v. *Royal Bank of Scotland plc* (1998) 79 P&CR 81 (discussed in Notes and Questions 14.1 above).

15.4. Overriding interests

15.4.1. Justifications for overriding interests

The existence of a class of interests that are enforceable against registered title holders even though not appearing anywhere on the register is contentious. Three arguments have been put forward for having such a class, only the last of which is now tenable.

The first is that those interests that are easily discoverable by a purchaser, because they would be obvious on an inspection of the property, should be enforceable against her regardless of whether they are discoverable from the register. This argument, if accepted, would undermine the fundamental principle of registration: purchasers are entitled to assume that they will not be affected by any interest not appearing on the register, whatever their conduct and whatever their knowledge. They should not be expected to look elsewhere. The only inroads that should be allowed into this fundamental principle are those that relate to the

nature of a prior-interest holder's interest, or the circumstances in which it arose, or the conduct of the prior-interest holder. In other words, whatever justifies treating an interest as overriding, it ought to be something relating to the interest holder, not something relating to the conduct of the purchaser.

The second argument is that there are some transient interests, too trivial or fleeting or too numerous, that should not be put on the register, either because it would be a waste of resources or because it would impose too heavy an administrative burden on the Land Registry. This made some sense when we had a paper-based registration system, where each registration involved physical processes of entry, filing, storage and eventual deletion. However, it is a strange argument to hear in the context of a wholly computerised system for registering interests in land. Few interests in land are either trivial or transient – the most short-lived are probably short-term residential tenancies, and even these are unlikely to last for less than three or six months, and anyway make up in importance to the interest holder what they lack in length. Recording events of this duration should not be beyond the demands of a modern computerised system, nor should sheer weight of numbers be the obstacle it was in a paper-based system.

The third argument is, however, compelling. Peter Birks, in Extract 12.1, describes the provision of an overriding interest category in the Land Registration Act as 'the attempt of the legislator to anticipate the most obvious instance of the problem endemic in formality'. In other words, there is an inevitable tension between the need to protect prior-interest holders who for one reason or another could not have been expected to use the machinery provided for this purpose, and the need to guarantee to prospective purchasers that the register tells them all they need to know about the property.

15.4.2. Principles to be applied

In its *Third Report on Land Registration* (Law Commission Report No. 158, 1987, an earlier attempt at reform of land registration), the Law Commission put it in this way:

> We have mentioned the theoretical ideal of the mirror principle. However, it should be appreciated that this is a conveyancer's ideal which can only prevail at the price of restricting someone else's rights. The conflict was plainly put by our predecessors fifteen years ago [in Law Commission Working Paper No. 37 (1971), paragraph 7]:
>
> From the point of view of purchasers of registered land, it is clearly desirable that as many as possible of the matters which may burden the land should be recorded on the register of the title to the land. We aim at simplifying conveyancing, and a reduction in the number of overriding interests would contribute to that end. A balance must, however, be maintained between, on the one hand, the interests of purchasers of land and, on the other, the legitimate interests of those who have rights in the land which might be prejudiced by a requirement that such rights must be recorded on the register to be binding on a purchaser. Those who advocate eliminating or drastically reducing

the number of overriding interests sometimes, we think, tend to look at the matter solely from the point of view of purchasers of land without paying sufficient regard to the interests of others.

The ideal of a complete register of title is certainly compatible with the policy of the law for over one hundred and fifty years of both simplifying conveyancing and maintaining the security of property interests on the one hand and the marketability of land on the other. But the longevity of a policy hardly guarantees its acceptability today in the light of modern developments affecting land ownership. Plainly, no policy should be followed blindly which works against rather than for 'rights conferred by Parliament, or recognised by judicial decision, as being necessary for the achievement of social justice' (Lord Scarman in *Williams & Glyn's Bank Ltd* v. *Boland* [1981] AC 487 at 510). Put simply, it may be unjust to require that a particular interest be protected by registration on pain of deprivation. Apart from this basic aspect, also militating against the ideal of a complete register are the various matters the nature of which is such that recording them on the register would be 'unnecessary, impracticable or undesirable'. Thus there are self-evident difficulties in reproducing in verbal form on the register rights which are acquired or arise without any express grant or other provision in writing ... These considerations persuade us to adopt two principles, with the first being subject to the second:

(1) in the interests of certainty and of simplifying conveyancing, the class of right which may bind a purchaser otherwise than as the result of an entry in the register should be as narrow as possible, *but*
(2) interests should be overriding where protection against purchasers is needed, yet it is either not reasonable to expect or not sensible to require any entry on the register.

... The considerations and principles just outlined emerged fairly clearly as essentially supported following various consultations.

They went on to recommend, however, that overriding interests should be linked to the payment of indemnity, so that anyone who suffered loss as a result of taking an interest in land subject to an overriding interest should be fully compensated. This has never been implemented, and this means that the question of whether a purchaser or mortgagee must take subject to an overriding interest assumes an importance it does not necessarily have to have. We return to this point later.

In accordance with the principles articulated by the Law Commission, obvious candidates for inclusion in a list of overriding interests would seem to be informally created interests, such as those arising under resulting or constructive trusts or estoppel and those arising out of possession or long use, such as the interests of those with possessory titles or whose interests arise by prescription, and also interests arising by operation of law.

15.4.3. Overriding interests under the 2002 Act

The interests that actually fall within the overriding interest category now are set out in Schedule 3 to the 2002 Act (with different transitional arrangements arising

on first registration set out in Schedule 1). They do not marry particularly well with the description just given. The 2002 Act cut down the 1925 Act's list of overriding interests, implementing the recommendations of the joint Law Commission and Land Registry report (*Land Registration for the Twenty-First Century: A Conveyancing Revolution* (Law Commission Report No. 271, 2001)). This report adopted much the same principles as those advocated by the Law Commission in its *Third Report on Land Registration* (Law Commission Report No. 158, 1987), although with considerably less sympathy for the interest holder who neglects to use the machinery provided (see Part VIII of the 2001 report) and without supporting the recommended linkage of overriding interests with the payment of indemnity.

One of the ways is which the 2002 Act has attempted to reduce the category of overriding interests marks a radical change from the 1925 Act. The 1925 Act kept scrupulously away from the idea of notice as a factor governing the enforceability of interests, for the reasons given by the House of Lords in *Williams & Glyn's Bank Ltd* v. *Boland* [1981] AC 487. The 2002 Act has broken away from this, and in two categories has made discoverability of the interest a criterion for overriding status, as we see below.

The most important of the Schedule 3 interests are leases for a term not exceeding seven years (Schedule 3, paragraph 1: see paragraph 1(a) and (b) for the relatively insignificant exceptions), the interests of persons in actual occupation (paragraph 2), legal (but not equitable) easements and profits (paragraph 3, with highly significant exceptions in paragraph 3(1) and (2)), and customary and public rights. The second and the third require further examination.

15.4.4. Easements and profits

As we saw in Chapter 13, easements frequently arise by implication and/or long use. Sometimes they take effect as legal interests, but not always. Following the principles stated by the Law Commission in its *Third Report on Land Registration* (Law Commission Report No. 158, 1987), one would expect them all to qualify for overriding status – there seems no logical reason why equitable easements which are informally created should be treated differently from legal easements. Nevertheless, this is what the Act achieves. More importantly, the Act has tried to cut down the class by limiting it, in effect, to those easements and profits that the purchaser in question either knew about or should have known about. It does this by introducing a kind of 'discoverability' test. Paragraph 3 of Schedule 3 provides that even a legal easement or profit will not be overriding if it 'would not have been obvious on a reasonably careful inspection of the land over which the easement or profit is exercisable' (paragraph 3(1)(a)). There are two exceptions provided to this. The first is that an easement or profit which does not pass the discoverability test will nevertheless be overriding if it is 'within the actual knowledge of the person to whom the disposition is made' (paragraph 3(1)(a)). Secondly, it will not

be required to pass the discoverability test if the person entitled to it 'proves that it has been exercised in the period of one year ending with the day of the disposition' (paragraph 3(2)).

There are several difficulties with all this. It not only reintroduces the idea of notice into land registration (so reintroducing the very problems that registration is designed to overcome, as we saw in Chapter 14), it produces it in a form that is quite different from (and not apparently superior to) the traditional concept of actual/constructive/imputed notice we considered in Chapter 14. What, for example, is to be the role of imputed notice here? Can it really be intended that an 'undiscoverable' easement or profit will be enforceable against a purchaser if she actually knows about it, but not if her solicitor and surveyor know about it but omit to tell her? And what is the justification for protecting discoverable but not undiscoverable easements? The latter could include rights over drainage, water and power conduits that are essential for the reasonable use of the benefited land but that even the holder of the easement does not realise she has. It is difficult to see why the burden of such rights should not pass automatically with the burdened land regardless of registration, and it is surely an unnecessary complication to require the easement holder to prove use within the year before the disposition.

But the most important objection to the introduction of this discoverability test is that it is based on the doubtful premise that the two conflicting principles adopted by the Law Commission in its *Third Report on Land Registration* (that purchasers should take free from interests not on the register, but vulnerable interest holders should be protected) can best be resolved by limiting both the immunity of the purchaser and the protection of the prior-interest holder by factors relating to the purchaser rather than factors relating to the prior-interest holder. This seems hard on both. As far as prior-interest holders are concerned, a person who cannot reasonably be expected to protect her interest on the register is no less in that position simply because her interest is undiscoverable. As to purchasers, their claim to take free from interests not appearing on the register is not based on justice but on practicalities – this is the best way of ensuring that trading in interests in land is fast, inexpensive and straightforward. If a purchaser's protection depends in every case on a minute enquiry into what he knew or should have discovered, the object is defeated.

15.4.5. Interests of persons in actual occupation: the 1925 Act

All these arguments apply, and with even greater force, to this category of overriding interest. The 2002 Act formulation of the category is considerably more complex than its 1925 Act equivalent, but it retains two crucial elements from the 1925 Act formulation, so making it necessary to understand both.

In the Land Registration Act 1925, the equivalent category was set out in section 70(1)(g):

> (1) All registered land shall . . . be deemed to be subject to such of the following overriding interests as may be for the time being subsisting in reference thereto . . . (that is to say) –
>
> . . .
>
> (g) The rights of every person in actual occupation of the land or in receipt of the rents and profits thereof, save where enquiry is made of such person and the rights are not disclosed.

The House of Lords decision in *Williams and Glyn's Bank* v. *Boland* [1981] AC 487 (see Notes and Questions 15.3 below) established two important points about this, both of which continue to be relevant in the 2002 Act formulation. The first concerns the scope of the rights which will be overriding if the right holder is in occupation. The second is the meaning of 'actual occupation'.

15.4.5.1. What rights are covered?

It was accepted in *Webb* v. *Pollmount Ltd* [1966] Ch 584 (and never subsequently doubted) that *all* proprietary interests in land are overriding if the right holder is in occupation of the land, not just those where there is some causal connection between the interest and the occupation. A causal connection between the two would exist where it is the interest that entitles the occupier to be in occupation: this would cover for example tenants, or those with interests under a trust, or contractual purchasers allowed into possession even though the purchase was never completed, like Mrs Carrick in *Lloyds Bank* v. *Carrick* [1996] 2 All ER 630 (see Notes and Questions 12.2 above). Equally, a causal connection would exist where it is the occupation – in the form of possession – that gave rise to the right, which would cover those who have acquired title by taking possession. It is consistent with the second principle stated in the Law Commission's *Third Report on Land Registration* that all these people should be protected, because significant numbers of them fall within the category of persons who could not reasonably be expected to register their interest. Their case is made stronger by the fact that they will tend to value their interest as thing rather than wealth (adopting Rudden's terminology, as discussed in Extract 2.3 above). Because the right to occupy the land is associated with their interest in the land, they almost certainly put the value of their interest higher than its monetary value.

None of this applies when there is no causal connection between the occupation and the right. Why should, for example, a mortgage or an easement over land, or an option to purchase it, be enforceable simply because the holder of the interest happens also to occupy the land? These are not interests that usually arise informally, and there seems no reason why they should be put in the overriding interest category.

However, the House of Lords has confirmed that no causal connection is necessary, and there is nothing in the 2002 Act formulation to justify a different conclusion under the 2002 Act.

5.4.5.2. Actual occupation

It was also confirmed by the House of Lords in *Boland* that 'actual occupation' is not a term of art. It is a question of fact whether or not someone actually occupies somewhere: all that is required is physical presence. In particular, the House of Lords emphasised that it is not appropriate, when considering whether a person is in actual occupation, to look at whether a purchaser could reasonably have been expected to discover, or appreciate the significance of, their occupation. To do that would be to import into the section notions of notice that Parliament intended to exclude. Thus, the argument that a wife could not be in 'actual occupation' of the house she lived in with her husband (the registered title holder) because her occupation was a 'shadow' of his was firmly rejected.

However, subsequent cases have revealed that it is not always so easy to see what amounts to actual occupation.

Physical presence

First, it is clear that it cannot require *constant* physical presence. No one would suggest that you cease to be in occupation of your house when you go off to work every day, or go out shopping. But what if the absences are more prolonged? What if you go into hospital to have a baby, like Mrs Chhokar in *Chhokar* v. *Chhokar* [1984] FLR 313, or occupy your holiday cottage only occasionally because you spend most of your time in your other house, or are absent from your home because you are working abroad, or in prison, or away at university? In all these cases, it must be a question of degree, and the crucial question is what test we should apply in deciding the borderline cases. We could look at how it appears to outsiders, and say that you are in actual occupation if there are outward manifestations of your occupation, such as presence of belongings, publishing that place as your address in a telephone directory or using it as a billing address for credit cards, or perhaps having supermarket shopping delivered there. But this would be quite inconsistent with what the House of Lords said in *Boland*. It would, in effect, import an element of notice.

The alternative approach is to focus on the intentions of the occupier, and ask whether the occupier considered herself to be still in occupation (or, to introduce an objective element, whether a reasonable person in her position would regard herself as still in occupation). This would involve enquiries into, for example, intention to return, or whether the interest holder has left the place in a state such that she can come back whenever she wants, perhaps by leaving her belongings there and not packed away, and by not meanwhile putting the place to some other use or letting someone else occupy it. This is not simple, but it is consistent with the *Boland* principle that the focus should be on the interest holder, and not on whether the purchaser could have discovered the occupation or the interest.

Personal occupation

Difficulties become more acute where the premises are of a type that is usually occupied by things and not by people. In *Kling* v. *Keston Properties Ltd* (1983) 49 P&CR 212, the holder of a right of pre-emption over a garage was held to be in actual occupation of it by parking his car there, and presumably the same would be true of a person who had a property right over, for example, warehouse premises where he stored goods. Taking the matter even further, in *Malory Enterprises Ltd* v. *Cheshire Homes (UK) Ltd* [2002] EWCA Civ 151, the Court of Appeal accepted that a property development company was in actual occupation of derelict land when all it did was to maintain a fence to keep out vandals, board up ground floor windows of a derelict building on the land, and occasionally dump rubbish by the fence.

In cases such as these, the courts appear to be equating use with occupation. Do they mean that if you make *any* physical use of premises you occupy them, even if you use them only for the vestigial purposes permitted by the nature of the premises, as in *Malory*, and even if one might in other circumstances more accurately describe the premises as 'unoccupied' (*Malory* again)? What if your physical use is shared by others? We know that you can be in occupation of premises even if you share personal occupation with others: is the same true where you are merely one of several people making use of premises by putting goods there?

The questions are difficult to answer because it is not clear why those who are not in personal occupation should have the protection afforded by the overriding interest category, if it is not the reason rightly precluded by *Boland*. In other words, these cases make sense if one regards actual occupation as a means of alerting potential purchasers to the fact that there may be a prior-interest holder whose interest does not appear on the register. They are more difficult to justify if it is the fact of actual occupation that makes the interest holder deserving of special protection.

Non-residential premises

In the case of non-residential premises, actual occupation in the *Boland* sense causes no particular difficulty if the interest holder is personally present on the premises and personally carrying on business there on his own behalf. However, 'constructive' presence via an employee may be problematic, as may personal presence *as* an employee: is actual occupation something that one can do on someone else's behalf? These issues were canvassed, if not conclusively settled, by the courts in *Strand Securities Ltd* v. *Caswell* [1965] Ch 958 (where, however, it was not accepted that the interest holder's step-daughter occupied on her step-father's behalf) and *Abbey National Building Society* v. *Cann* [1991] 1 AC 56, and *Stockholm Finance Ltd* v. *Garden Holdings Inc.* [1995] NPC 162 (where there was the added complication that the interest holder was a company). Again, the difficulty with these cases is that the courts are not always clear whether they are looking at occupation as a means of giving notice to potential purchasers, or as a factor justifying the conferment of protection on prior-interest holders.

15.4.6. Interests of persons in actual occupation: the 2002 Act

The interests of persons in actual occupation are overriding interests under the 2002 Act as well, but the definition is different in several significant respects. The new definition, which appears in paragraph 2 of Schedule 3 to the 2002 Act, is (in so far as relevant here) as follows:

> INTERESTS OF PERSONS IN ACTUAL OCCUPATION
>
> 2. An interest belonging at the time of the disposition to a person in actual occupation, so far as relating to land of which he is in actual occupation, except for –
>
> . . .
>
> (b) an interest of a person of whom inquiry was made before the disposition and who failed to disclose the right when he could reasonably have been expected to do so;
> (c) an interest –
>
> i. which belongs to a person whose occupation would not have been obvious on a reasonably careful inspection of the land at the time of the disposition, and
> ii. of which the person to whom the disposition is made does not have actual knowledge at that time; . . .

15.4.6.1. Causal link between interest and occupation

The first point to make about this is that there is nothing to suggest that 'interest' is intended to mean anything different from what 'right' meant under section 70(1)(g) of the 1925 Act, and so consequently it is still not necessary for there to be any causal link between the interest and the occupation.

15.4.6.2. Meaning of 'actual occupation'

Equally, there is nothing to suggest that 'actual occupation' is intended to bear a different meaning from that which it bore in section 70(1)(g) of the 1925 Act. If it does indeed mean the same, the old cases on what constitutes actual possession will therefore continue to be relevant. The paragraph is worded in such a way that 'actual occupation' appears to operate as a threshold test. In other words, a person claiming an overriding interest under this heading must first satisfy the court that she is in actual occupation within the meaning adopted in the old cases, before it can be established whether she is disqualified by paragraph 2(b) or (c) of Schedule 3.

15.4.6.3. The 'notice' element

By far the most important change is the qualification introduced by paragraph 2(c), which makes it explicit that actual occupation confers overriding status on interests only where the occupation would have been 'obvious' on a reasonably careful inspection of the land. The same criticisms can be made of this as are made in section 15.4.4 above in relation to the similar qualification of the easement and profit overriding interest category. By introducing what amounts to a 'notice'

qualification, the 2002 Act compounds the conceptual confusion as to the justifications for having an overriding interest class in the first place, and then makes matters worse by adopting an idiosyncratic notion of what constitutes notice, which is not obviously better than the traditional one.

There are other problems with the wording. Under paragraph 2(c)(i), it is the occupation, and not the interest, that has to be obvious. That means that, if a reasonably careful inspection would have thrown up clues as to the existence of the interest, but not as to the occupation (as could be said to have happened in *Kingsnorth Trust Ltd* v. *Tizard*, discussed in section 14.3.1 above), the interest will not be overriding.

Also, the timing of the 'reasonable inspection' is odd. The intention is surely that the purchaser/mortgagee should not be bound by an interest that he would not have discovered if he had made a reasonably careful inspection *at a time when it is reasonable to expect him to make an inspection*. If you are buying or taking security over land, the reasonable time to make an inspection is when there is still time for you to withdraw if there turns out to be something about the land that makes you decide not to proceed, or at least to renegotiate the terms. The 'time of the disposition' (i.e. the time when your purchase or mortgage is completed) is leaving it hopelessly late. Also, on this wording, if the title holder hides all traces of the interest holder's occupation at the sensible time (i.e. the time when you – reasonably – do in fact make your inspection) but puts everything back by the date of the disposition, you will take subject to the interest – which is presumably not what was intended.

15.4.6.4. Can minors be in actual occupation?

There are other changes worth noting. The unnecessary 'save where enquiry is made' proviso in section 70(1)(g) (unnecessary because only confirming what would anyway be the case under the general law) is retained but qualified so that it applies only to someone who fails to disclose his interest 'when he could reasonably have been expected to do so'. Enquiries of occupying interest holders are so rarely made in practice that this seems hardly worth saying. However, it may serve to provide another ground for challenging the already dubious decision of the Court of Appeal in *Hypo-Mortgage Services Ltd* v. *Robinson* [1997] 2 FLR 71, where it was held that a minor could not be in actual occupation under section 70(1)(g) of the 1925 Act. The reasons given were first, that minor children of a legal title holder 'are only there as shadows of occupation of their parents' (a concept flatly rejected by the House of Lords in *Boland*), and, secondly, that minors could not have been intended to have been included because 'no enquiry can be made' of them 'in the manner contemplated by that provision' (presumably because they would be too young to understand, or to take responsibility for their reply). Since the provision now contemplates that there may be circumstances when an interest holder could be asked but it would not be reasonable to expect him to give an accurate response, this ground for the decision also disappears. However, if the intention of the 2002

Act *was* to allow the interests of minors to be overriding, this is a very oblique way of doing it.

15.4.6.5. Occupation of part

The opening words of paragraph 2 reverse the effect of the decision of the Court of Appeal in *Ferrishurst Ltd* v. *Wallcite Ltd* [1999] 1 EGLR 85, where it was held that a person has an overriding interest over the whole of the land to which his interest relates, even if he is in actual occupation of only part of it. The decision attracted some criticism, and, as Robert Walker LJ accepted in the case itself, it could lead to anomalous results:

> [Counsel for the purchaser] suggested the example of a tenant of a small flat in the Barbican in the City of London who happened to have an option to purchase the freehold reversion to the entire Barbican estate, neither the lease nor the option being noted against the freehold title. That would, he suggested, mean that so long as he was in actual occupation of his flat, his option would bind a purchaser of the freehold of the entire estate; and also, he suggested, any tenant who subsequently took a lease of another flat in the Barbican.
>
> The example is rather far-fetched but it still merits consideration. A purchaser of the entire Barbican estate would undoubtedly be advised by his solicitors that he should before completion make inquiries of every person who appeared to be in actual occupation of any part of the estate. Whether he would follow that advice to the letter would be up to the purchaser. He might prefer to rely on his rights against the vendor, who would presumably not be impecunious.

However, the reversal of the rule brings its own difficulties. As a result of the 2002 Act, the interest of the person in occupation will be enforceable against a purchaser only in respect of the part of the land the interest holder occupies, not in respect of the rest of it. Ascertaining precisely how much of a title is occupied is easy enough when the occupation is clearly confined to a physically discrete unit, as in the Barbican example, but not so easy when the land in the title is not divided into physically discrete units. Also, an interest over just the occupied part may not be of much use to the interest holder. In *Ferrishurst*, the Court of Appeal had had to distinguish an earlier Court of Appeal decision, *Ashburn Anstalt* v. *Arnold* [1989] Ch 1, where the opposite conclusion had been reached, leading precisely to such a result. The lessee of a shop had given up the lease of his shop in exchange for a right to a new lease of a shop to be built in a new development which was to be built on land including the site of his old shop. The decision that his right to a new lease was confined to the site of the old shop resulted in his having a right to a lease of a shop but only if one was built in a position in the new development where no shop unit was to be, or could possibly be, positioned. Even worse, it may lead to an outcome that is inefficient overall, in that allowing the interest holder's right to be enforceable over part of the purchaser's title may diminish the value of the purchaser's title by an

amount that is greater than the value to the interest holder of an interest over only part of the land.

15.4.7. Complexity

On this last point, as in most of the others commented on above, the 2002 Act arguably has made matters worse by over-refinement. In seeking to cut down the number and type of interests that can be overriding, the Act in general refines the pre-existing categories by introducing qualifications. But, even if these qualifications produce a better balance between interest holders and purchasers in individual cases, replacing crude bright line rules with 'fairer' nuanced ones does purchasers few favours. Enforceability rules work best for purchasers when they are simple and produce predictable results, and the introduction of elements such as reasonableness, subjective knowledge, discoverability and uncertainty in boundaries inevitably makes outcomes less certain.

Notes and Questions 15.3

Read *Williams & Glyn's Bank Ltd* v. *Boland* [1981] AC 487, either in full or as extracted at www.cambridge.org/propertylaw/, and consider the following:

1 Compare the view expressed by the House of Lords in *Boland* about the need to protect interest holders in occupation, to that expressed by the Law Commission and Land Registry in their joint report, *Land Registration for the Twenty-First Century: A Conveyancing Revolution* (Law Commission Report No. 271, 2001) (Extract 15.2 above). Which do you think is correct?

2 What steps did the House of Lords consider it reasonable for prospective purchasers and mortgagees to take in order to discover whether there were any overriding interests affecting the property? If all such steps are taken, would it lead to the discovery of all such interests?

3 Despite the House of Lords' strong rejection of the argument that notice was relevant in construing section 70(1)(c), in later Court of Appeal decisions the court tended to drift back to the test of discoverability when trying to decide in marginal cases whether the interest holder could be said to be in actual occupation: see, for example, the Court of Appeal decisions in *Lloyds Bank plc* v. *Rosset* [1989] Ch 350 (interest holder supervising builders carrying out restoration work), *Hypo-Mortgage Services Ltd* v. *Robinson* [1997] 2 FLR 71 (young children in occupation with their parents) and *Malory Enterprises Ltd* v. *Cheshire Homes (UK) Ltd* [2002] 3 WLR 1, CA (derelict land).

4 Since the *Boland* decision, it has become very much more common for husbands and wives (and unmarried couples) to put their family homes in their joint names, a development encouraged by bank and building society mortgagees

because it enables them to overreach any beneficial interests. Also, in the immediate aftermath of the *Boland* decision, it became standard practice for institutional mortgagees to require all occupiers to sign 'consent' forms, confirming they agreed to the mortgage. On what basis would such a consent be binding on an interest holder? (See *Woolwich Building Society* v. *Dickman* [1996] 3 All ER 204.) Can the consent of a prior-interest holder ever be implied? (See *Paddington Building Society* v. *Mendelsohn* (1985) 50 P&CR 244.)

15.5. Indemnity

15.5.1. Function of indemnity

A land registration system provides an opportunity to solve one of the perennial problems of any property law system – how to balance the interests of innocent property holders whose interests conflict through some mistake or fraud, so that neither loses. In an unregistered system, one of the conflicting interest holders must lose, and there will be no prospect of compensation unless recovery can be made from the person responsible for the mistake or fraud. A registration system, however, can be made to generate an insurance fund out of which those who suffer loss can be compensated, via fees charged for dealing with registration applications.

To a certain extent this is what is done in our land registration system. Schedule 8 to the 2002 Act makes provision for the payment of indemnities by the Land Registrar, replacing provisions originally found in section 83 of the 1925 Act and amended by the Land Registration Act 1997. Under Schedule 8, indemnity is payable in essentially two circumstances. The first is to a person who suffers loss by reason of a rectification of the register or a mistake whose correction would involve rectification of the register (paragraph 1(1)(a) and (b): for an analysis of the circumstances in which the register can be rectified, see Farrand and Clarke, *Emmet and Farrand on Title*, paragraphs 9.022–9.029). The second is to a person who suffers loss by reason of a mistake in the registration process (for example, a mistake in a search result, or in a copy document kept at the registry, or a lost document): paragraph 1(1)(c)–(h). It is then provided by paragraph 5 that no indemnity is payable on account of any loss suffered by a claimant wholly or partly as a result of his own fraud, or as a result of his own lack of proper care (with the indemnity to be reduced proportionately if only partly as a result of his own proper care).

15.5.2. Shortfall in the provision of indemnity

The problem with all of this is that, while the indemnity should cover all cases where loss is caused by a malfunctioning of the system, it does not even aspire to cover all cases where the land registration machinery has to resolve the conflicting interests of innocent parties to the loss of one or other of the interest holders.

Three examples illustrate the shortfall. The first and most important is that indemnity has never been payable to those who suffer loss when the register is rectified to give effect to an overriding interest, because, it is said, no loss is suffered *by the rectification* – the title was subject to the overriding interest all along (see *Re Chowood's Registered Land* [1933] Ch 574 and *Re Boyle's Claim* [1961] 1 WLR 339). As noted above, the Law Commission recommended that this should be reversed, as this would 'go some way to enabling an acceptable balance to be achieved between competing innocent interests' (Law Commission, *Third Report on Land Registration* (Law Commission Report No. 158, 1987), paragraph 2.12; the proposal is set out in detail in paragraphs 2.6 to 2.14). The recommendation has never been implemented.

The second is demonstrated by the case of *Norwich and Peterborough Building Society* v. *Steed* [1993] Ch 116, CA. There a couple had tricked the registered proprietor into transferring the title in her house to them, and they had become registered as proprietors in her place and then charged the house to an innocent mortgagee. It was held that the original owner was entitled to have the register rectified against the couple but not against the innocent mortgagee (in other words, she got her title back but subject to the mortgage). Under Schedule 8, she would not be entitled to indemnity to compensate her for having to take subject to the mortgage. The transfer to the couple was voidable but not void at the time the couple mortgaged the house, so the mortgage was valid and so its registration was not a mistake. Since there was no rectification against the mortgagee, and no mistake to be corrected, there would be no entitlement to indemnity.

Finally, the same kind of problem can arise where there is a transfer which is void for some reason other than forgery (indemnity is expressly provided for those taking in good faith under forged disposition by paragraph 1(2)(b)). In *Malory Enterprises Ltd* v. *Cheshire Homes (UK) Ltd* [2003] 3 WLR 1, the innocent purchaser bought a derelict development site from a company which was, in effect, impersonating the actual registered proprietor (a different company with a similar name) and duly registered its title. The register was rectified to restore the real owner, on the doubtful basis that the purchaser never acquired more than the bare title (the transfer to it was void, so the beneficial interest never left the real owner, it was held) and also on the basis (equally doubtful) that the real owner's interest was overriding. The question of indemnity was never settled by the court, but it seems clear that, under Schedule 8, the purchaser would get no indemnity. It suffered no loss by reason of the rectification – its registration had always been subject to the real owner's beneficial interest.

15.5.3. Cost

Indemnity is payable out of a fund which is fed by profits made by the Land Registry out of the fees it charges for dealing with applications. On present figures, resources are more than adequate to meet an increase in the provision of indemnity.

The number of indemnity claims is insignificant in comparison with the number of applications the Land Registry deals with every year. According to the Land Registry's *Annual Report and Accounts 2002–2003*, they dealt with nearly 27 million applications in the year 2002/3, of which over 3.5 million were applications of registration. During the same period, they received 799 claims for indemnity, and paid out a total of £2,656,998.99 (£1,559,424.87 in respect of loss, minus £5,950.37 recovered under section 83(10) of the Land Registration Act 1925 – the Land Registry can sue any person responsible for causing the loss – plus £1,102,573.49 in costs). The largest payment was approximately £194,000 (including interest) in respect of loss arising from a forged transfer of a registered property. As the *Annual Report and Accounts* explains:

> The title was not rectified to reinstate the true owner, a company incorporated in Gibraltar, because by the time the forgery came to light the property had passed into the hands of innocent third parties who were in possession of it. The true owner was, however, entitled to be indemnified under section 83 of the Land Registration Act 1925. The whereabouts of the persons who committed the fraud are unknown, and the police have been unable to trace them. We have not, therefore, been able to try to recover the money from them under our statutory rights of recourse.

During the same period, the Land Registry's fee income was some £415 million, and towards the end of the accounting year in question they brought out the Land Registration Fee Order 2003 (SI 2003 No. 2092) adjusting fees *downwards* with a view to reducing fee income by 10.5 per cent. After meeting all costs and expenses (including a payment of £2.4 million towards the indemnity fund), they were left with a surplus of £97.9 million, £22.3 million of which was paid to the government via the Consolidated Fund.

Part 4

Proprietary relationships

16

Co-ownership

16.1. Introduction

We have already seen in Chapter 8 how ownership can be fragmented in a variety of ways to form a complex matrix of interlocking interests. It can be sliced across time via the mechanism of present and future interests; split at a qualitative level into its legal and equitable components; or divided via mechanisms that from a functional perspective separate management from enjoyment. The unifying factor in all of this is that in each case ownership has been sliced in such a way as to create two (or more) interests that are conceptually and functionally quite distinct from the other. For example, an interest in possession gives its holder wholly different rights to those belonging to the remainderman despite the fact that both interests are held in respect of the same object of property. Likewise, a legal interest gives those in whom it is vested a very different interest to that enjoyed by equitable interest holders in the same thing. The directors of BP, for example (or any other plc), possess rights which are quite distinct from those held by its shareholders.

In contrast, this chapter deals not with different interests in the same thing but with shared interests. The hallmark of co-ownership is that ownership has only been split (if at all) at a quantitative, and not a qualitative, level. If you and I co-own Blackacre, whether as private co-owners or as members of an association, the unifying notion is that our interests (whether as private co-owners or as members of the association) are (at a conceptual level) identical with all our fellow co-owners or association members. True, in certain circumstances (in the private property context) one person's interest might be bigger than the others' which admittedly, at a procedural level, might offer remedies that are not open to the other co-owner(s). But this should not obscure the fact that the co-owners have interests that are conceptually (if not always practically) identical.

Classically, treatises on English law describe co-ownership as a peculiarly narrow concept concerned only with the vesting of some form of shared title in private co-owners. We in contrast, after examining this aspect of co-ownership in the realms of both personalty and realty, will continue by considering other forms of co-ownership, including (briefly) the statutory form introduced under the Commonhold and Leasehold Reform Act 2002 (also considered in Chapter 17)

and other manifestations not normally recognised as such, including membership of unincorporated associations and public trust doctrine.

16.2. The classical approach to co-ownership: joint tenancies and tenancies in common

16.2.1. Basic concepts

Lawson and Rudden give a broad overview of the essentials of co-ownership in the following extract.

Extract 16.1 F. H. Lawson and B. Rudden, *The Law of Property* (3rd edn, Oxford: Clarendon Press, 2002), pp. 92–7

Ownership of the same thing at the same time and in the same way by a number of persons has been general from very early times. Indeed, some students of very early law think that ownership by communities such as families, tribes, or households preceded ownership by individuals. Roman law admitted common ownership and it has survived everywhere in one form or another. Everyday examples in English law are found where domestic partners together own their home, its furnishings, and the 'family car', or where commercial partners run a business. In such situations the law regulates both internal and external relations. It must handle the rights of the co-owners among themselves; and at the same time it needs to facilitate transactions so that third parties can simply and safely acquire, or lend money on the security of, the whole thing, or the rights of one of its co-owners.

In English law today there are two kinds of co-ownership, in accordance with which two or more persons enjoy what are called concurrent interests. They are respectively joint ownership and ownership in common. The reader needs to be warned, however, that for historical reasons they are often called 'joint tenancy' and 'tenancy in common'. In this context, the expression has nothing to do with leases ... [The] word tenancy comes from Latin via French and means 'holding'.

OWNERSHIP IN COMMON

The difference between joint owners and owners in common is that each of the latter owns an individual asset, a separate but not separated share in the asset held in common. Traditionally, it is called an 'undivided' share: this rather puzzling name means that, while the share itself is of course separate from the others, it does not entitle its owner to a particular physical part of the asset. But the 'undivided' share can be alienated (without needing the consent of the other co-owners) and will pass by will or on intestacy. The simplest way to grasp the idea is to think of shares in a company. The shareholders each have a separate thing which they can alienate or leave to pass on death, but none of them can go to the company's head office, point at a particular room and say 'I claim my share' (all the shareholders acting together would have to wind up the company – the legal person – and pay its debts before they could

physically divide its assets among themselves). So if there are two owners in common of a house each has a separate, though intangible, asset: it is the house which is not divided into separate shares. There is no need for the co-owners' shares to be equal. Although equality is the default status, other factors – such as agreement, or unequal contribution to the purchase price – may result in their having shares of unequal proportion and value.

JOINT OWNERSHIP

Joint ownership – or joint 'tenancy' to use the common legal name – is distinguished from tenancy in common by the striking rule that 'survivor takes all'. This means that, on death, a joint owner simply drops out: no interest in the asset held jointly descends under the deceased's will or by intestacy. So if something is given as a present to A, B, and C jointly and B dies, A and C between them own the gift. If A then dies, it goes to C who is now the sole owner with, of course, power to dispose of the whole thing while alive or on death. This right of survivorship at first sight gives such unfair results that it is difficult to see why anyone should want to hold property that way. But there are three factors that ensure the survival of the regime.

1 *Severance*. A co-owner can turn the joint entitlement into a separate, though undivided, share, i.e. can become owner in common. This is done most simply by giving notice to the others; and if the joint owner becomes insolvent, the trustee in bankruptcy will certainly take this step. So, in the example above, of a present being given to A, B, and C jointly, if A gives such a notice to B and C, A then holds a one-third separate, though notional, share in the undivided asset. The remainder is held by B and C as joint owners. If B then dies, the rule of survivorship means that C now owns a two-thirds share which will pass on C's death. So by giving notice, A has avoided the risk of losing everything by dying first, but has also forgone the chance of taking by survivorship if one of the others dies first.
2 *Spouses/domestic partners*. English law has no special category of matrimonial or family property: the default status of its property law applies to spouses the same regime that it does to strangers. So if, on getting married, the wife buys the house and the husband the car, the one is hers, the other his. But spouses and other domestic partners often wish that, on the death of one, most or all of the deceased's property will go to the survivor. This can be done, of course, by making a will, but it can also be achieved if they are joint owners of the home and other family assets. As regards the family home and similar property, including bank accounts, it is quite common for spouses or domestic partners to hold the assets jointly. Indeed, if the asset is transferred into both their names without more, the default rule will ensure that they hold jointly.
3 *Trustees*. Trustees are appointed to their office in order to hold and manage assets for the benefit of someone else. While there may be a single trustee (especially if it is a corporate body) it is common, when human beings are trustees, for there to be more than one (and usually two, three, or four). But of course these persons also have their own private assets, family, creditors, and so on. It would be extremely inconvenient if, on the death of one of them, some share of the trust property devolved on the personal

representatives of the deceased and then had to be separated from the private assets. Consequently, they always hold the trust assets jointly. Any attempt to sever and turn their holding into an undivided share would not work, so a trustee who dies simply drops out. If there is only one left, another is commonly appointed so that the trust property never devolves on the death of a trustee. Indeed, by a nineteenth-century statute, a human being can be joint trustee with a company, although it is virtually certain that the latter will outlive the former.

Any property may be held by concurrent owners. Partners, for instance may well be owners in common – that is, have separate shares in – the goodwill of their business, debts due to it, patents, copyrights and the like. Tangible moveables may be held in a similar way – racehorses owned by a syndicate are one example. A commercial example is to be found in the ownership of fungibles held in bulk, such as oil or grain aboard ship. By a fairly recent reform of the law on sale of goods, a buyer of goods which form part of an identified bulk owns a share in the bulk proportionate to the amount bought and paid for: so if that is 10 per cent at the time of purchase and the ship then unloads, for other consignees, half of the bulk, the buyer's share will be 20 per cent of the remainder.

Whether holding jointly or in common, all concurrent owners are entitled to possess and use the property. If it produces an income, say by being leased, they share the rent equally or, if they hold in common, in proportion to their holdings. To alienate the property they must, in principle, all agree, and must all concur in physical division. This is fair treatment among the co-owners, but can give rise to holdout problems and to disputes whose resolution might be very costly in comparison with the value of the thing owned. Consequently, in the case of chattels, the Law of Property Act 1925 (section 188) gives the court power to overcome a deadlock and to override the wishes of a minority interest. For land it laid down a different system, since amended, and explained below.

The two categories of co-ownership outlined above are exhaustive and mutually exclusive. They are exhaustive, in that nowadays they are the only two types which remain, older varieties having been long abolished in England and Wales. They are mutually exclusive, in the sense that the same people cannot at one and the same time have both joint and common entitlements to the enjoyment of property: the rule for joint holding – that the survivors take – is entirely incompatible with the rule for holding in common – that the deceased's estate takes. Because of this, when something is transferred to co-owners, it is important to know whether they are to hold jointly or in common. In most cases, of course, the transfer will make it clear: 'to A and B in equal shares'; or 'to A and B jointly'. But where it is unclear, and the transfer says only 'to A and B', the law needs default rules which, in the absence of any other indication, can be applied to solve the problem. The main ones are as follows:

1 If A and B are trustees, they take jointly.
2 If A and B are business partners, they take in common beneficially, though they will be joint managers of the business and joint holders of its assets.

3 If A and B are buyers who provided the purchase money in unequal shares, they take in common in the same shares.
4 If A and B fall into none of these three categories, they take jointly.

The first three default rules are perfectly sensible. The fourth, residual, rule may produce unexpected disappointments to the heirs of whichever co-owner dies first, and in some common law jurisdictions it has been altered, so that they are presumed to be owners in common. However, it is still the rule of English law; an argument in its favour is that it is relatively easy for a joint owner to become an owner in common by simply writing a letter to the others stating that he is severing his interest from theirs.

CONCURRENT INTERESTS IN FINANCIAL ASSETS

In considering the notion of a share in property, the reader is confronted with an intangible. A share in a horse is not the horse: you cannot ride it, nor can anyone tell by looking at the animal that you own a share in it. To sell the horse you would hand over the animal itself. But some other method – typically documentary – has to be used in selling a share in the horse. Yet such intangibles are often very valuable. The concept proves very useful in the modern world of dematerialized securities. Under this system investors have no separate share certificates or bonds – indeed these do not exist – nor are shares in listed companies numbered. It is thus impossible to say that they own any specific, identified, securities. What each investor has is an account with the custodian of a pool of identical securities, denoting entitlement to a share in the financial asset constituted by the pool. This protects the investment from the custodian's creditors in the event of the custodian's insolvency. Though of course if the financial asset itself becomes worthless (by collapse of the issuer of the securities or squandering by the custodian) the investor's property interest dies and he or she is left to whatever personal unsecured claim may be available.

CONCURRENT INTERESTS IN LAND

A word needs to be said here about the variant of co-ownership which is mandatory in England and Wales for any situation in which two or more persons are concurrently entitled to the possession of land. Above it was said that two (or more) persons cannot at the same time enjoy property jointly and in common. But it is perfectly possible for the same two or more persons to manage property jointly but enjoy it in common. It is not unusual to find two or more people holding joint powers of control and management in trust for themselves as owners in common. This means that, among themselves, each has a separate inheritable share as to the enjoyment of the property (its use, rents, and so on). But to the outside world they are joint owners, so a purchaser from the survivors need not concern herself with the estate of any deceased co-owner. So long as, in good faith, she pays the price to the survivors (and, in the case of land, so long as there are two of them) she takes free from any claim. The survivors hold the purchase price 'on trust' for themselves and for the deceased, whose share is fully protected against their insolvency, and largely protected against

their dishonesty. This technique is obligatory if the object is land. When two or more persons are concurrently entitled to freehold or leasehold land (whether jointly or in common) the title is held by them jointly as trustees with power to sell the land.

Notes and Questions 16.1

1 The common law is said to only provide for two different types of co-ownership – joint ownership and ownership in common. Do these two types of ownership adequately cover all types of 'common' ownership? Are they, for example, appropriate vehicles for dealing with:
   (a) family property?
   (b) the interests of flat-sharers (or other sharers of residential property who do not have family or co-habitation links with each other)?
   (c) property held by societies?
   (d) common rights of recreation enjoyed by the residents of New Windsor?

2 Do you agree with the premise with which this extract begins? Has private co-ownership supplanted its communal forebear or only supplemented it?

3 During this chapter consider what other types of co-ownership are recognised under either the common law or statute and what (if any) omissions exist.

4 What rights and obligations should co-owners have as against each other, and what actions will they need if their interests diverge?

5 The right of survivorship is sometimes described colloquially as the 'poor man's will'? To what do you think this refers, and of what relevance is it in light of provisions such as the Inheritance (Provision for Family and Dependants) Act 1975?

6 Is severance essentially a unilateral or multilateral act? Why is a joint owner not permitted to sever secretly and why, in the testamentary context, is severance by will a conceptual impossibility anyway?

7 Do you think the vast majority of joint owners understand the concept of survivorship or know about their rights to sever? Why might it be argued that the poor man's will is more akin to a secret lottery?

16.2.2. A comparison of joint tenancies and tenancies in common

There are two features that distinguish joint tenancies from tenancies in common, one associated with their creation and the other their determination.

16.2.2.1. Four unities versus one

A joint tenancy is commonly said to comprise the four unities of possession, interest, title and time, while only the first, possession, is a necessary pre-condition

for a tenancy in common. We will briefly consider this aspect of the distinction, but before doing so we should note the comments of Deane J who, in *Corin* v. *Patton* (1990) 169 CLR 540 at 572–3, cautions how the 'traditional ritual' of the four unities 'cloaks some obscurity of precise meaning, some overlapping between the unities and some conceptual difficulties about the essential character of joint tenancy'. Indeed, it is hard to find any case in which the appealing symmetry of the four unities has played any significant role beyond that which arises in the context of shareholdings under unity of interest. In reality, at least when considering the unities of title and time, they are no more than descriptions of the nature of a joint tenancy rather than hallmarks of authenticity – useful as an illustration but too imprecise for much else beyond.

Unity of possession

Unity of possession is critical to co-ownership, not only to joint tenancies and tenancies in common but also to the non-traditional examples of co-ownership we will consider below insofar as possession is a component of that shared right. It expresses the idea that all co-owners have the same right to use the thing as their fellow co-owners. Thus all the joint tenants of the fee simple estate in Blackacre have an equal right to possess the whole; as do all the tenants in common of a racehorse; and all the members of an association in respect of its assets (although they might, of course, collectively agree to limit the individual members' exercise of that right) – for how else can each individual in each group of co-owners enjoy their property rights in the shared thing?

Unity of interest

Unity of interest goes beyond unity of possession, signifying not only that all the co-owners have the same right to use the co-owned thing during the currency of their co-ownership but that the right to use arises from the same interest. In many respects, it is the one unity that, at a practical level, differentiates joint tenancies from tenancies in common. Thus under a joint tenancy of Blackacre all the co-owners own the same shared interest rather than separate shares in the same interest which is the hallmark of a tenancy in common. As Bagnall J noted in *Cowcher* v. *Cowcher* [1972] 1 WLR 425, '[a] joint interest in equal shares is a contradiction in terms' because each joint tenant is joint owner of the whole rather than an individual owner of his share in the whole. True, as we know from the unity of possession requirement, the interests of the tenants in common have not been divided up (hence the use of the term 'undivided share' to refer to the tenant in common's interest) but it is, nonetheless, a share in the whole, rather than a shared whole that they each own. It follows from this that the quantum of each share can (but does not have to) vary under a tenancy in common, although, as Bagnall J noted above, all talk of shares (be they equal or unequal) brings us squarely within the territory of the tenancy in common and breaks the unity of interest required under a joint tenancy.

Unity of title

Unity of title is concerned with how the interest originally arose and requires each joint tenant to derive his interest from the same act or document. Yet, as we shall see in *Antoniades* v. *Villiers* (where two separate but identical leasehold agreements each signed by one of two purported tenants in common were construed as two parts of the same document granting a joint tenancy to the pair), the courts have little difficulty side-stepping the formalistic implications of this unity. Despite such scepticism, however, the practical implications of unity of title are extremely important in the context of land-holding where (for reasons we considered in Chapter 10) the investigation of title is much more complex than it is with chattels. Under section 34(2) of the Law of Property Act 1925, statute has sought to reduce one aspect of this complexity by requiring that the legal title in land can only be held under a joint tenancy (and not a tenancy in common, which can only exist, if at all, behind a trust) so ensuring that (no matter how complex it is) there is only one title to investigate when any dealings take place in respect of the co-owned estate.

Unity of time

Unity of time simply requires the interest of each joint tenant to vest at the same time, which of course follows from their each owning the same interest derived from the same title.

Notes and Questions 16.2

Consider the following notes and questions both before and after reading *Antoniades* v. *Villiers* [1988] 2 WLR 1205, CA; [1990] AC 417, HL, and *A. G. Securities* v. *Vaughan* [1988] 2 All ER 173, CA; [1990] AC 417, HL, and the materials highlighted below, either in full or as extracted at www.cambridge.org/propertylaw/.

1 In what circumstances would it be appropriate for co-owners to choose one rather than the other form of co-ownership? Would it ever be appropriate for two or more companies to hold property as joint tenants?

2 Can you reconcile the approach of the Court if Appeal in *Antoniades* v. *Villiers* with its approach in *A. G. Securities* v. *Vaughan*. What were the grounds of the decision in each case and what would have been the effect if leave to appeal to the House of Lords had not been granted? Can you think of any sensible reason why the Court of Appeal reached two decisions that were so diametrically opposed? Do you agree with the analysis of any of the judges who gave judgment in the Court of Appeal?

3 What implications does the judgment of the House of Lords in *Antoniades* v. *Villiers* hold for unity of title? Is it a sensible decision that elevates substance

above form, or does it show how meaningless the four unities are when it comes to establishing the nature of any particular example of co-ownership? Why would even an affirmative answer to the latter question not undermine the importance of unity of title?

4 In *A. G. Securities* v. *Vaughan*, could it be argued that the four tenants held a single tenancy of the flat as tenants in common? Why was such an argument not pursued on their behalf and what implications does that hold for a system of law founded upon the doctrine of precedent?

5 Why does section 34(2) of the Law of Property Act 1925 prohibit tenancies in common of a legal estate or interest in land, and limit the number of legal co-owners to four? What would be the effect of a transfer purporting to convey a fee simple interest in land to 'all the second-year law students at New College Oxford absolutely as tenants in common'?

6 Why can the legal title to a chose in action be similarly co-owned only under a joint tenancy while the legal title to personalty can be held either under a tenancy in common or jointly? (See *Re McKerrell, McKerrell* v. *Gowans* [1912] 2 Ch 648 at 653.)

16.2.2.2. The right of survivorship (and how to avoid it)

The single most important factor distinguishing joint tenancies from tenancies in common is, of course, the right of survivorship which flows logically from the joint tenants' unity of interest. Under the right of survivorship, the interest of a joint tenant who predeceases one or more surviving joint tenants simply ends with his death. It does not pass to the remaining joint tenants, nor anyone else for that matter, but is simply determined by his death with a consequent reduction in the number of join tenants until only one remains. At this point, the joint tenancy comes to an end, enabling the sole survivor and owner to do as he wishes with his property including, of course, the right to pass his title by will or on intestacy.

Arguably, the right of survivorship is a throwback to a bygone age where the principle tended to reflect the wishes of co-owners in the context of family assets such as smallholdings and stock-in-trade. Whether or not it should still have a role to play in a modern era – in which co-ownership (even in the limited private property sense considered in this section) arises in a multiplicity of circumstances, often marked by a complexity which tends to undermine the simple rationale of survivorship – is perhaps open to question. Admittedly, equity's distaste for the inequities of survivorship (whereby a beneficial tenancy in common is presumed in all cases of unequal contribution and where the term share – or its equivalent – is used) and the presumption whereby a tenancy in common (either of the legal title in chattels or behind a trust in the context of land) arises in certain types of co-ownership such as business partnerships (see *Malayan Credit* v. *Jack Chia-MPH Ltd* [1986] AC 549) does much to redress the balance. Additionally, in relation to the

legal title to land, the requirement under section 34(2) (which permits only a joint tenancy of the legal estate) again aids simplicity and cuts transaction costs by ensuring nothing needs to be done on the death of a legal joint tenant (who simply disappears from the legal title). However, the default position under which co-owners hold as joint tenants except in particular circumstances or where the parties have expressly stated that they hold as tenants in common ensures that survivorship continues to play an important and often inappropriate role in the allocation of property rights on death.

As noted above by Lawson and Rudden, the remorseless and Darwinian logic of a principle in which the spoils go to the fittest (or at least the longest surviving) is often said to be ameliorated in practice by the ease with which a joint tenancy can be severed allowing the joint tenant henceforth to hold his interest under a tenancy in common. On its face, this is indeed true, but, as we shall see, the practical reality of severance, along with the somewhat rigid way in which it has been applied by the judiciary, tend to undermine the utility of a mechanism which, even if subject to a more benign judicial approach, would always be handicapped by the relative ignorance of many joint tenants who have no knowledge that they hold as such let alone the principle of survivorship and their right to sever.

Severance at common law

No discussion of severance at common law can take place without an examination of Page Wood VC's *dictum* in *Williams* v. *Hensman* (1861) 1 J&H 546 at 557–8; 70 ER 862 at 867 which appears to have been elevated, in the century following what was in all probability simply an extempore judgment, into something more akin to a statutory codification:

> A joint-tenancy may be severed in three ways: in the first place, an act of any one of the persons interested operating upon his own share may create a severance as to that share. The right of each joint-tenant is a right by survivorship only in the event of no severance having taken place of the share which is claimed under the *jus accrescendi* [i.e. the right of survivorship]. Each one is at liberty to dispose of his own interest in such manner as to sever it from the joint fund – losing, of course, at the same time, his own right of survivorship. Secondly, a joint-tenancy may be severed by mutual agreement. And, in the third place, there may be a severance by any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common. When the severance depends on an inference of this kind without any express act of severance it will not suffice to rely on an intention, with respect to the particular share declared only behind the backs of the other persons interested. You must find in this class of cases a course of dealing by which the shares of all the parties to the contest have been effected, as happened in the cases of *Wilson* v. *Bell* and *Jackson* v. *Jackson*.

Applying this *dictum*, it is usually said that there are consequently three ways of severing at common law:

1 acting upon one's share;
2 mutual agreement; and
3 mutual conduct.

But do you think it is sensible to regard this *dictum* as laying down three distinct (and mutually exclusive) means of severance? Note the logical fallacy inherent in the first category – how can one act upon one's share as a joint tenant given that a joint tenant has no share in the co-owned property until a severance has been effected? Furthermore, do you think it is sensible to regard the second and third categories as mutually exclusive requirements or simply as different points on a continuum illustrating when it would be equitable for the court to regard severance as having taken place? In his article, 'William v. Hensman and the Uses of History', Peter Luther notes that it is possible to read Page Wood VC's *dictum* less as an authoritative statement cast in stone than as a staging post en route to a liberal conception of severance based on fairness rather than formality. Luther says:

> The concept of the severance cases from the nineteenth century and earlier – focusing as they do on marriage settlements and bequests to a multiplicity of residuary legatees – appears far removed from that of the twentieth-century cases. To a great extent these concern matrimonial or quasi-matrimonial joint tenancy, which must have been a rare phenomenon in Page Wood's time: property acquired by a couple would normally have been held by the now obsolete tenancy by entireties, in which severance was not possible, while property already owned by a wife when she married would normally have been assigned on marriage to the trustees of her marriage settlement. In many of the modern cases legal action follows the breakdown of the couple's relationship. This change in focus would appear to have made it even more necessary that a liberal attitude to severance should be adopted. Marriage and co-habitation are, after all, states of choice, which can be brought to an end with (in many cases) as few (or fewer) formalities as are required for their commencement. And, if they are brought to an end there is a good chance that they will end in an atmosphere of acrimony. Couples occupied with terminating their emotional relationship will have quite sufficient to keep their minds busy without considering whether they have formed, or communicated, an unequivocal desire to bring another, possibly unappreciated, legal relationship to an end. In addition, to contemplate, discuss or agree severance of a joint tenancy requires contemplation of one's own (or one's partner's) death. For the vast majority of people this must be an activity engaged in as seldom as possible, and its only physical manifestation will be a reluctant and long-deferred visit to a solicitor to make a will. Cases in which the courts must consider both the breakdown of a relationship and the consequences of the death of one of the parties must inevitably be emotionally charged, and the courts' continued emphasis on 'intention' in such circumstances appears at times distinctly unrealistic. To an extent the problems posed by the severance cases mirror those the courts face in other types of dispute arising out of domestic co-ownership: There is an obvious similarity between the modern severance cases and the line of cases involving equitable co-owners who are seeking to claim

priority over a mortgagee who is seeking to take possession of a mortgaged property. In these cases the courts will also look at the parties' actions and their knowledge, and will impute to them an 'intention' on the basis of these factors. Again, as in the severance cases, this can lead to strained reasoning: claimants who had no knowledge, or at any rate no real appreciation, of events that were happening around them are deemed not merely to know about those events, but also to have formed a particular intention as to the (even less appreciated) legal consequences of the events. Similar reasoning can be detected in cases where the central issue is not whether the parties have terminated a joint tenancy (or, as in the mortgage cases, formed an 'intention' as to priority between claimants), but whether they have agreed that there should be any form of co-ownership at all. When the courts investigate claims that a constructive trust has been created, very similar problems of 'intention' arise, and for the same reason: the acts of the parties in very different (and, in general, happier) circumstances must be scrutinised in the light of the eventual breakdown of their relationship.

The early nineteenth-century approach appears somewhat more satisfactory. The cases from this period may include formal rhetoric, terms such as 'course of dealing', 'intention' and 'inferred agreement', but it is apparent that much of this language is designed simply to justify (or indeed conceal) the exercise of a broad notion of equity. Where the right of survivorship caused injustice, the courts would attempt to remedy that injustice. Page Wood's judgment in *Williams* v. *Hensman*, adopting and adapting the 'course of dealing' from *Jackson* v. *Jackson* and quietly approving the bold decision in *Wilson* v. *Bell*, was thus not a mere reiteration of long-established principles, but part of an incremental progression towards a more liberal approach. It would be unfortunate if either an over-close study of Page Wood's impromptu words, or an over-zealous search for their antecedents, were to hinder this.

Powerful as this analysis is, that is not how history has judged a *dictum* which today is increasingly regarded, in almost in a formalistic way, as articulating the three means by which a severance at common law might arise.

16.2.2.3. Acting upon one's share

Despite the logical fallacy considered above, this is the most unproblematic aspect of modern-day severance and is simply a different formulation of the rule that destruction of any of the unities of interest, title or time destroys the very basis of the joint tenancy (cf. the loss of unity of possession which terminates the co-ownership itself). For example, if a joint tenant sells his 'share', unity of title is lost, while if he decides to mortgage it that necessarily terminates the unity of interest. It might seem obvious but it is important for what comes next to note that severance under this head only requires a unilateral (but irrevocable) act. Difficult theoretical questions arise as to what happens if a joint tenant secretly mortgages his share in circumstances where the other joint tenants are none the wiser. It would seem there is no objection to concealed acts amounting to severance under this head (see, for example, *First National Securities* v. *Hegerty* [1985] QB 850 and *Ahmed* v. *Kendrick* (1988) 56 P&CR 120 at 126). But would the heirs of the

mortgagor be able to point to his unilateral act as evidence of severance where none of the other joint tenants knew that any such act had taken place in circumstances where it was likely that no such evidence would have emerged had the mortgagor been the sole survivor? The courts are clearly alive to the dangers of a joint tenant adopting a 'heads I win, tails you lose' stance and it is likely that estoppel arguments would be used to prevent heirs claiming a share in such a scenario (see *Re Murdoch and Barry* (1976) 64 DLR (3d) 222 at 229).

16.2.2.4. Mutual agreement

If one ignores the somewhat tautologous formulation, this too expresses a simple and, on its face, hard-to-doubt truth that joint tenants can, if they so wish, agree to sever the joint tenancy and henceforth co-own as tenants in common still maintaining unity of possession but no longer subject to the lottery of survivorship. However, in practice this has proved more problematic than it might at first appear due to the fact that the parties are often quite ignorant of the subtleties of survivorship. Thus their discussions, such as they are, are directed not towards effecting a severance but to terminating the co-ownership itself. If during the currency of those negotiations one party dies, the courts are often faced with the difficult task of attempting to locate an agreement to sever in circumstances where it is quite obvious that the parties had no knowledge of how they co-owned and less still the consequences of survivorship or how these might be avoided. In *Nielson-Jones* v. *Fedden* [1975] Ch 222, for example, where on the break-up of their marriage the parties agreed to sell their jointly owned house to enable the husband to buy a new house, Walton J makes the following seemingly logical observation in circumstances where the husband had died suddenly before the parties had decided how to finally divide up the proceeds of sale:

> It appears to me that, when parties are negotiating to reach an agreement, and never do reach any final agreement, it is quite impossible to say they have reached any agreement at all. Certainly, it is not possible to say that they have reached an agreement to sever merely because they have, in the course of those negotiations, reached an interim agreement for the distribution of comparatively small sums of money.

But the argument loses much of its force once one acknowledges that the agreement to which he refers throughout the first sentence is not an agreement to sever but an agreement to divide up the proceeds of sale (i.e. an agreement to end the co-ownership and not just the joint tenancy). In reality, the only way to find an agreement to sever in circumstances where the parties have no knowledge of how they co-own nor its consequences, is to impute one (see the views of Sir John Pennycuick below in *Burgess* v. *Rawnsley*). Now if the courts were tempted to go down this path, surely an interim agreement to distribute at least some of the proceeds would be enough to allow them to impute an agreement to sever as the circumstances would surely indicate that the right of survivorship was no longer an appropriate means of allocating their co-owned (and soon to be separated) interests should either of them die before the co-ownership had ceased?

However, when it comes to dividing up assets in the family home, the House of Lords at least has set its face against imputing agreements (at least in the context of constructive trusts – see *Pettitt* v. *Pettitt* [1970] AC 777 and *Gissing* v. *Gissing* [1971] AC 886 and generally Moffat, *Trusts Law*, pp. 454–8 – but cf. *Midland Bank* v. *Cooke* [1995] 4 All ER 562 and in another context *Bristol & West Building Society* v. *Henning* [1985] 2 All ER 606 and *Equity and Law Home Loans* v. *Prestidge* [1992] 1 All ER 909). It could, of course, be argued that the same arguments do not apply in the context of severance where there is little likelihood that imputing an agreement to sever will have any effect on third party lenders or transferees in the way it can when imputing an agreement to share the proceeds in the constructive trust setting. Nonetheless, against this backdrop, the courts would seem to have little appetite to begin imputing agreements to sever, particularly as a less problematic means of ushering in a more liberal approach to severance already exists in the form of mutual conduct.

16.2.2.5. Mutual conduct

Mutual conduct releases the courts from the need to find an agreement to sever, by focusing on the course of dealings between co-owners to establish whether they regarded themselves as in effect owning a severed share as co-tenants. Rather than looking backwards to (implicitly) establish the co-owners' knowledge as to the circumstances of their co-ownership, this approach looks forward to take account of the co-owners' mutual assumptions and aspirations in respect of the co-owned property.

Given the relative ignorance of most co-owners, this approach has obvious advantages providing the court with a means of adopting a sensible conclusion as to whether the parties acted in such a way to one another as to make survivorship no longer an appropriate mechanism for allocating their property rights on death. To those who argue that this sounds like the worst excesses of Denning's Court of Appeal and a return to palm tree justice, we would argue that, in the particular circumstances of survivorship (where one is not dealing with interests that might impinge on third party lenders or transferees), there is no downside to adopting a stance that emphasises fairness, and (as Peter Luther argued above) is fully in line with the stance adopted by Page Wood VC in *Williams* v. *Hensman*. It would be wrong, however, to give the impression that the courts have embraced such an approach. On the contrary, they have adopted a somewhat narrower view, as represented by the majority opinion in *Burgess* v. *Rawnsley* which we shall consider in Extract 16.2 below, along with Denning's more radical approach, after first considering the statutory form of severance.

16.2.2.6. Statutory severance

In addition to the common law forms of severance, a statutory form also exists under section 36(2) of the Law of Property Act 1925, whereby a joint tenant can unilaterally sever his interest by serving a written notice on all the other joint tenants. Unlike the common law forms of severance, which apply to joint tenancies of all types of property, it is arguable that this additional mechanism only applies to land (but

cf. the comments of Denning and Pennycuick in *Burgess* v. *Rawnsley* in Extract 16.2 below) and offers a clear and simple means of avoiding the lottery of survivorship. There is no requirement that the notice be signed, nor, under section 196(3) of the Law of Property Act 1925, even read or received provided there is evidence that it has been duly posted to all the other joint tenants. Thus, in *Kinch* v. *Bullard* [1999] 1 WLR 423, where a wife retrieved a written notice from the doormat of her husband's house after he had been hospitalised with a serious heart attack, the court held severance had occurred immediately the process of delivery to the other joint tenant's last-known abode or place of business had begun with her posting of the letter.

Notes and Questions 16.3

Consider the following notes and questions both before and after reading *Burgess* v. *Rawnsley* [1975] Ch 429, Extract 16.2 below.

1 What is meant by the *ius accrescendi* and how fundamental is this right to the distinction between joint tenancy and tenancy in common? Without such a right, would it be a distinction without meaning? Why does such a right exist? What are the drawbacks?

2 Why does the common law 'favour' joint tenancy? What is the attitude of equity? Why then does equity normally follow the law and in what circumstances will it be prepared to presume a tenancy in common even though there is a joint tenancy at law?

3 What is meant by severance? Is it essentially a unilateral or bilateral act? Can severance be hidden, or secret? What do Gray and Gray (*Elements of Land Law* (4th edn), para. 11.76) mean when they say that 'the "act" which operates on the joint tenant's share must have a final and irrevocable character which effectively estops any future claim that longevity has conferred the benefits of survivorship on that co-owner'?

4 Should the oft-quoted *dictum* of Page Wood VC in *Williams* v. *Hensman* (1861) 1 J&H 546 at 557–8; 70 ER 862 at 867 be subjected to detailed textual scrutiny as if it were a legislative enactment? Does the language adopted by Sir John Pennycuick in *Burgess* v. *Rawnsley* when he refers to 'rule 2' and 'rule 3' reveal any underlying assumptions about the status of this *dictum*?

5 Is there any significance in Page Wood VC's expression of regret at the start of the judgment that 'the legislature has not thought fit to interpose by introducing the rule, that express words shall be required to create a joint tenancy, in place of the contrary rule which is established'?

6 Was Page Wood VC's judgment a mere 'reiteration of long-established principles' or 'part of an incremental progression towards a more liberal

approach' or simply a failed attempt to move towards a more liberal regime of severance? How have subsequent courts interpreted *Williams* v. *Hensman*?

7 In situations where there is severance by agreement, can the courts meaningfully talk of an agreement to sever in circumstances where the parties do not know there is anything that needs severing? Can one even infer an agreement in such circumstances? Are the courts really being asked to infer an immediate common intention to sever from which to impute an agreement?

8 Should the formality requirements under section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 apply to severance by mutual agreement?

9 Does Browne LJ in *Burgess* v. *Rawnsley* hold that severance has taken place via mutual agreement or mutual conduct? Does he treat these as separate categories or different points on a continuum? How do Pennycuick's and Denning's approaches differ both from Browne LJ's and from each other's?

10 What is important when there is severance by a course of dealings? Do the courts need to be able to discover (or impute) an immediate common intention to sever (see *McDowell* v. *Hirschfield* [1992] 2 FLR 126; [1992] Fam Law 430) or simply discover (or impute) an immediate unilateral intention to sever which has been communicated to the other joint tenants? What were the views of Denning and Pennycuick on this point in *Burgess* v. *Rawnsley*? How, in the opinion of the Court of Appeal, was the joint tenancy severed?

11 If two parties are discussing the price at which one party will sell their interest to the other, have we not already passed the point at which the rights of survivorship continue to provide a sensible allocation of property rights on death? Why is an offer and counter-offer not sufficient to evidence that that point has been reached?

Extract 16.2 *Burgess* v. *Rawnsley* [1975] Ch 429

[An elderly man and woman purchased a house together under a mutual misunderstanding as to the nature of their relationship. On discovering that the woman did not share his romantic intentions, the man orally agreed to buy out her share. However, she then withdrew from the arrangement and the man subsequently died.]

LORD DENNING MR: . . . The important finding is that there was an agreement that she would sell her share to him for £750. Almost immediately afterwards she went back upon it. Is that conduct sufficient to effect a severance?

Mr Levy submitted that it was not. He relied on the recent decision of Walton J in *Nielson-Jones* v. *Fedden* [1975] Ch 222, given subsequently to the judgment of the judge here. Walton J held that no conduct is sufficient to sever a joint tenancy unless it is irrevocable. Mr Levy said that in the present case the agreement was not in writing. It could not be enforced by specific performance. It was revocable and was in fact

revoked by Mrs Rawnsley when she went back on it. So there was, he submitted, no severance.

Walton J founded himself on the decision of Stirling J in *Re Wilks, Child* v. *Bulmer* [1891] 3 Ch 59. He criticised *Hawkesley* v. *May* [1956] 1 QB 304 and *Re Draper's Conveyance* [1969] 1 Ch 486, and said that they were clearly contrary to the existing well-established law. He went back to *Coke upon Littleton*, 189a, 299b and to *Blackstone's Commentaries*. Those old writers were dealing with legal joint tenancies. *Blackstone* said, 8th ed. (1778), vol. 11, pp. 180, 185:

> The properties of a joint estate are derived from its unity, which is fourfold. The unity of interest, the unity of title, the unity of time, and the unity of possession ... [A]n estate in joint tenancy may be severed and destroyed ... by destroying any of its constituent unities.

[A]nd he gives instances of how this may be done. Now that is all very well when you are considering how a legal joint tenancy can be severed. But it is of no application today when there can be no severance of a legal joint tenancy, and you are only considering how a beneficial joint tenancy can be severed. The thing to remember today is that equity leans against joint tenants and favours tenancies in common.

Nowadays everyone starts with the judgment of Sir William Page Wood VC in *Williams* v. *Hensman* (1861) 1 John & Hem 546 ... Page Wood VC distinguished between severance 'by mutual agreement' and severance by a 'course of dealing'. That shows that a 'course of dealing' need not amount to an agreement, expressed or implied, for severance. It is sufficient if there is a course of dealing in which one party makes clear to the other that he desires that their shares should no longer be held jointly but be held in common. I emphasise that it must be made clear to the other party. That is implicit in the sentence in which Page Wood VC says:

> [I]t will not suffice to rely on an intention, with respect to the particular share, declared only behind the backs of the other persons interested.

Similarly, it is sufficient if both parties enter on a course of dealing which evinces an intention by both of them that their shares shall henceforth be held in common and not jointly. As appears from the two cases to which Page Wood VC referred of *Wilson* v. *Bell*, 5 Ir Eq R 501 and *Jackson* v. *Jackson*, 9 Ves Jun 591.

I come now to the question of notice. Suppose that one party gives a notice in writing to the other saying that he desires to sever the joint tenancy. Is that sufficient to effect a severance? I think it is. It was certainly the view of Sir Benjamin Cherry when he drafted section 36(2) of the Law of Property Act 1925. It says in relation to real estates:

> ... where a legal estate (not being settled land) is vested in joint tenants beneficially, and any tenant desires to sever the joint tenancy in equity, he shall give to the other joint tenants *a notice in writing of such desire or do such other acts or things as would, in the case of personal estate, have been effectual* to sever the tenancy in equity ...

I have [emphasised] the important words. The word 'other' is most illuminating. It shows quite plainly that in the case of personal estate one of the things which is effective in equity to sever a joint tenancy is 'a notice in writing' of a desire to sever. So also in regard to real estate.

Taking this view, I find myself in agreement with Havers J in *Hawkesley* v. *May* [1956] 1 QB 304, 313–14, and of Plowman J in *Re Draper's Conveyance* [1969] 1 Ch 486. I cannot agree with Walton J [1975] Ch 222, 234–5, that those cases were wrongly decided. It would be absurd that there should be a difference between real estate and personal estate in this respect. Suppose real estate is held on a joint tenancy on a trust for sale and is sold and converted into personal property. Before sale, it is severable by notice in writing. It would be ridiculous if it could not be severed afterwards in like manner. I look upon section 36(2) as declaratory of the law as to severance by notice and not as a new provision confined to real estate. A joint tenancy in personal estate can be severed by notice just as a joint tenancy in real estate.

It remains to consider *Nielson-Jones* v. *Fedden* [1975] Ch 222. In my view it was not correctly decided. The husband and wife entered upon a course of dealing sufficient to sever the joint tenancy ... Furthermore, there was disclosed in correspondence a declaration by the husband that he wished to sever the joint tenancy; and this was made clear by the wife. That too was sufficient.

It remains to apply these principles to the present case. I think there was evidence that Mr Honick and Mrs Rawnsley did come to an agreement that he would buy her share for £750. That agreement was not in writing and it was not specifically enforceable. Yet it was sufficient to effect a severance. Even if there was not any firm agreement but only a course of dealing, it clearly evinced an intention by both parties that the property should henceforth be held in common and not jointly.

BROWNE LJ: ... Mr Levy conceded, as is clearly right, that if there had been an enforceable agreement by Mrs Rawnsley to sell her share to Mr Honick, that would produce a severance of the joint tenancy; but he says that an oral agreement, unenforceable because of section 40 of the Law of Property Act 1925, is not enough. Section 40 merely makes a contract for the disposition of an interest in land unenforceable by action in the absence of writing. It does not make it void [but see now section 2 of the Law of Property (Miscellaneous Provisions) Act 1989]. But here the plaintiff is not seeking to enforce by action the agreement by Mrs Rawnsley to sell her share to Mr Honick. She relies upon it as effecting the severance in equity of the joint tenancy. An agreement to sever can be inferred from a course of dealing (see Lefroy B in *Wilson* v. *Bell*, 5 Ir Eq R 501, 507 and Stirling J in *Re Wilks, Child* v. *Bulmer* [1891] 3 Ch 59) and there would in such a case *ex hypothesi* be no express agreement but only an inferred, tacit agreement, in respect of which there would seldom if ever be writing sufficient to satisfy section 40. It seems to me that the point is that the agreement establishes that the parties no longer intend the tenancy to operate as a joint tenancy and that automatically effects a severance ...

This conclusion makes it unnecessary to consider the important and difficult questions of what the effect of negotiations not resulting in an agreement or of a mere declaration would have been and, in particular, the problem raised by the

decision of Plowman J in *Re Draper's Conveyance* [1969] 1 Ch 486, and Walton J in *Nielson-Jones* v. *Fedden* [1975] Ch 222. Further, if the evidence and the conclusion that there was an agreement in this case are rejected, I doubt whether there was enough evidence in this particular case as to a course of dealing to raise the question of the application of Page Wood VC's third category, 1 John & Hem 546, 557. I therefore prefer not to express any final opinion on these points. Lord Denning MR has dealt with them in his judgment and I have the advantage of knowing what Sir John Pennycuick is going to say about that aspect of the case. I agree with both of them that Page Wood VC's third category is a separate category from his second category. I agree also that the proviso to section 36(2) of the Law of Property Act 1925 seems to imply that notice in writing would, before 1925, have been effective to sever a joint tenancy in personal property. It is clear that section 36(2), as Sir John Pennycuick is going to point out, made a radical alteration in the previous law by introducing the new method of severance by notice in writing, and that cases before 1925, in particular *Re Wilks, Child* v. *Bulmer* [1891] 3 Ch 59, must now be read in the light of this alteration. I agree that an uncommunicated declaration by one joint tenant cannot operate as a severance.

SIR JOHN PENNYCUICK VC: ... It is not in dispute that an agreement for severance between joint tenants effects a severance. This is the rule 2 propounded by Sir William Page Wood VC in *Williams* v. *Hensman*, 1 John & Hem 546, 557. The words he uses are contained in one sentence: 'Secondly, a joint tenancy may be severed by mutual agreement.' For a clear and full general statement as to severance of a joint tenancy, see *Halsbury's Laws of England*, 3rd edn, vol. 32 (1980), p. 335. In the present case the judge found as a fact that Mr Honick and Mrs Rawnsley at the beginning of July 1968 agreed upon the sale by her to him of her share at the price of £750 ... Once that finding of facts is accepted, the case falls squarely within rule 2 of Page Wood VC. It is not contended that it is material that the parties by mutual consent did not proceed to carry out the agreement. Rule 2 applies equally, I think, whether the agreement between the two joint tenants is expressly to sever or is to deal with the property in a manner which involves severance. Mr Levy contended that in order that rule 2 should apply the agreement must be specifically enforceable. I do not see any sufficient reason for importing this qualification. The significance of an agreement is not that it binds the parties, but that it serves as an indication of a common intention to sever, something which it was indisputably within their power to do. It will be observed that Page Wood VC in his rule 2 makes no mention of specific enforceability. Contrast this position where severance is claimed under his rule 1 by reason of alienation by one joint tenant in favour of a third party ...

Mr Mummery advanced an alternative argument to the effect that, even if there were no agreement by Mr Honick to purchase Mrs Rawnsley's share, nevertheless the mere proposal by Mr Honick to purchase her share would operate as a severance under rule 3 in *Williams* v. *Hensman*, 1 John & Hem 546, 557 ...

I do not doubt myself that, where one tenant negotiates with another for some arrangement of interest, it may be possible to infer from the particular facts a common intention to sever even though the negotiations break down. Whether

such an inference can be drawn must I think depend upon the particular facts. In the present case the negotiations between Mr Honick and Mrs Rawnsley, if they can be properly described as negotiations at all, fall, it seems to me, far short of warranting an inference. One could not ascribe to joint tenants an intention to sever merely because one offers to buy out the other for £X and the other makes a counter offer of £Y.

I think it may be helpful to state very shortly certain views which I have formed in the light of the authorities.

(1) I do not think rule 3 in Page Wood VC's statement, 1 John & Hem 546, is a mere sub-heading of rule 2. It covers only acts of the parties, including, it seems to me, negotiations which, although not otherwise resulting in any agreement, indicate a common intention that the joint tenancy should be regarded as severed. I do not overlook the words which I have read from Page Wood VC's judgment, namely, that you must find a course of dealing by which the shares of the parties to the contract have been affected. But I do not think those words are sufficient to import a binding agreement.

(2) Section 36(2) of the Law of Property Act 1925 has radically altered the law in respect of severance by introducing an entirely new method of severance as regards land, namely, notice in writing given by one joint tenant to the other.

(3) Pre-1925 judicial statements, in particular that of Stirling J in *Re Wilks, Child* v. *Bulmer* [1891] 3 Ch 59, must be read in the light of this alteration in the law and, in particular, I do not see why the commencement of legal proceedings by writ or originating summons or the swearing of an affidavit in those proceedings, should not in appropriate circumstances constitute notice in writing within the meaning of section 36(2). The fact that the plaintiff is not obliged to prosecute the proceedings is I think irrelevant in regard to notice.

(4) Perhaps in parenthesis because the point does not arise, the language of section 36(2) appears to contemplate that even under the existing law notice in writing would be effective to sever a joint tenancy in personalty: see the words 'such other act or thing'. The authorities to the contrary are rather meagre and I am not sure how far this point was ever really considered in relation to personalty before 1925. If this anomaly does exist, and I am afraid I am not prepared to say positively that it does not exist, the anomaly is quite indefensible and should be put right as soon as possible.

(5) An uncommunicated declaration by one party to the other or indeed a mere verbal notice by one party to another clearly cannot operate as a severance.

(6) The policy of the law as it stands today, having regard particularly to section 36(2), is to facilitate severance at the instance of either party, and I do not think the court should be over-zealous in drawing a fine distinction from the pre-1925 authorities.

(7) The foregoing statement of principles involves criticism of certain passages in the judgments of Plowman J and Walton J in the two cases cited. Those cases, like all other cases, depend on their own particular facts, and I do not myself wish to go on to apply these *obiter* statements of principle to the actual decisions in these cases.

16.2.3. Use of co-owned property

16.2.3.1. Land

Prior to the enactment of the Trusts of Land and Appointment of Trustees Act 1996, co-ownership of land operated behind what was known as the trust for sale. This was a device adopted by the framers of the Law of Property Act 1925 to provide a mechanism that would facilitate the marketability of land by adopting a trust form whose default position was sale rather than retention of the co-owned land. Under the trust for sale, the land would (at least theoretically) have to be sold unless the trustees unanimously decided to postpone sale. As part of a process freeing up the market in land, the adoption of this mechanism should not be under-estimated although it is clear with hindsight that in over-emphasising marketability the Act went too far and elevated the exchange value of land above its use value (see section 2.4.4.2 above).

Admittedly, an important aspect of land ownership is its exchange value in both the commercial and the residential settings. However, the residential market is primarily concerned with the use value of land. Owner-occupiers do, of course, buy with an eye to their investment but their main purpose in purchasing land is (by definition) to provide themselves and their families with a home. To correct the obvious imbalance inherent in the trust for sale form, the courts in the decades following the 1925 Act slowly developed an approach that sought to supplant the preference for sale by asking what was the *collateral purpose* in buying the land to act as a counterweight to the impetus towards sale.

As we shall see, much of this case law is still relevant, but first we must consider the effect of the Trusts of Land and Appointment of Trustees Act 1996 which sought to restore equilibrium by adopting the trust of land rather than the trust for sale in all cases of co-ownership – replacing the statutory bias towards sale with a form that was neutral as between sale and retention to ensure that neither the exchange value nor the use value of land was elevated above the other. Although trusts for sale can still be expressly created, they are no longer imposed as a matter of course, and under section 4 trusts for sale created both before and after the 1996 Act take effect as trusts of land with the trustees given discretion to postpone sale as they think fit.

In considering use of co-owned land, we will concentrate on section 12 of the 1996 Act, under which beneficiaries in possession behind a trust of land have a conditional right to occupy the land, subject to the exclusions and restrictions detailed in section 13. Sections 12 and 13 provide:

> 12 THE RIGHT TO OCCUPY
>
> (1) A beneficiary who is beneficially entitled to an interest in possession in land subject to a trust of land is entitled by reason of his interest to occupy the land at any time if at that time –

(a) the purposes of the trust include making the land available for his occupation (or for the occupation of beneficiaries of a class of which he is a member or of beneficiaries in general), or
(b) the land is held by the trustees so as to be so available.

(2) Subsection (1) does not confer on a beneficiary a right to occupy land if it is either unavailable or unsuitable for occupation by him.
(3) This section is subject to section 13.

13 EXCLUSION AND RESTRICTION OF RIGHT TO OCCUPY

(1) Where two or more beneficiaries are (or apart from this subsection would be) entitled under section 12 to occupy land, the trustees of land may exclude or restrict the entitlement of anyone or more (but not all) of them.
(2) Trustees may not under subsection (1) –

(a) unreasonably exclude any beneficiary's entitlement to occupy land, or
(b) restrict any such entitlement to an unreasonable extent.

(3) The trustees of land may from time to time impose reasonable conditions on any beneficiary in relation to his occupation of land by reason of his entitlement under section 12.
(4) The matters to which trustees are to have regard in exercising the powers conferred by this section include –

(a) the intentions of the person or persons (if any) who created the trust,
(b) the purposes for which the land is held, and
(c) the circumstances and wishes of each of the beneficiaries who is (or apart from any previous exercise by the trustees of those powers would be) entitled to occupy the land under section 12.

(5) The conditions which may be imposed on a beneficiary under subsection (3) include, in particular, conditions requiring him –

(a) to pay any outgoings or expenses in respect of the land, or
(b) to assume any other obligation in relation to the land or to any activity which is or is proposed to be conducted there.

(6) Where the entitlement of any beneficiary to occupy land under section 12 has been excluded or restricted, the conditions which may be imposed on any other beneficiary under subsection (3) include, in particular, conditions requiring him to –

(a) make payments by way of compensation to the beneficiary whose entitlement has been excluded or restricted, or
(b) forgo any payment or other benefit to which he would otherwise be entitled under the trust so as to benefit that beneficiary.

(7) The powers conferred on trustees by this section may not be exercised –

(a) so as prevent any person who is in occupation of land (whether or not by reason of an entitlement under section 12) from continuing to occupy the land, or
(b) in a manner likely to result in any such person ceasing to occupy the land, unless he consents or the court has given approval.

(8) The matters to which the court is to have regard in determining whether to give approval under subsection (7) include the matters mentioned in subsection (4)(a) to (c).

Notes and Questions 16.4

1 What were the rationale and advantages of the trust for sale?

2 Who has a right to occupy under a trust of land? What are the alternative conditions that must be satisfied under section 12, and what is meant by the second one? Do these conditions have to be satisfied only at the outset or must they continue to be satisfied for the beneficiary to remain in occupation? Does the legal owner have a right of occupation? Do beneficiaries with remainder or reversionary interests have such a right? If land is bought for an investment does any right of occupation arise?

3 What do you think is meant by 'unavailability' and 'unsuitability' in section 12(2)? In *Chun* v. *Ho* [2003] 1 FLR 23, Parker LJ stated that:

> There is no statutory definition or guidance as to what is meant by 'unsuitable' in this context, and it would be rash indeed to attempt an exhaustive definition or explanation of its meaning. In the context of the present case it is, I think, enough to say that 'suitability' for this purpose must involve a consideration not only of the general nature and physical characteristics of the particular property but also a consideration of the personal characteristics, circumstances and requirements of the particular beneficiary. This much is I think, clear from the fact that the statutory expression is not simply 'unsuitable for occupation' but 'unsuitable for occupation by him', that is to say by the particular beneficiary.

4 Is a beneficiary liable to make payments in respect of occupation, and can he claim repayment of expenditure on the land?

5 In what circumstances might the right to occupy be excluded? Is it sufficient that the condition was satisfied at the outset, or must it continue to be the case for the right of occupation to continue? What is the relationship between section 12 and section 13?

6 Why will the trustees' power to determine entitlements under section 13 rarely be helpful in solving disputes between co-owners? Why does section 13 give trustees the power to impose reasonable conditions on the beneficiary in

occupation? Of whose views must the trustees take account when exercising their powers under section 13, and what is the position of beneficiaries already in occupation? What power does the court have to resolve issues relating to the trustees' exercise of their power?

7 What are the implications of the following analysis:

> What the Act seeks to do is to impose a regime that is quite hostile to the very nature of co-ownership as it has existed for centuries. If two people A and B are co-owners they enjoy unity of possession. This is the hallmark of their relationship *inter se*. The fact that they happen to be beneficiaries under a trust of land and that the legal estate is vested in others on trust for them is quite immaterial. Parliament has not abolished unity of possession. Indeed, the Act expressly preserves both forms of beneficial co-ownership [see paragraphs 3 and 4 of Schedule 2 to the 1996 Act]. Unity of possession, therefore, survives, and with it the incidents attaching to it at common law. Parliament readily accepted the [Law] Commission's proposals for the right to occupy [and] sections 12 and 13 passed through the entire legislative process without any comment or discussion. Perhaps these sections will operate successfully for succession trusts of land. What they certainly fail to do is to provide satisfactorily for the occupational rights of co-owners. The statutory rights seriously erode the general law rights to occupy. The Commission's claim to place concurrent interest owners in a comparatively better position is ill-founded. Fortunately, though no doubt unwittingly, the general law rights of co-owners relating to occupation have been preserved. They can be resorted to and enforced in any situation in which it is advantageous to do so. In this vital area of occupation, it is submitted that the [1996] Act may well turn out to be a dead letter. (Barnsley, 'Co-owners' Rights to Occupy Trust Property', pp. 144–5)

8 Under section 30 of the Family Law Act 1996, a spouse with no property rights might still assert a right of occupation in the family home. If a party has a right to occupy (either under section 12 of the Trusts of Land and Appointment of Trustees Act 1996 or under section 30 of the Family Law Act 1996), what power does the court have to vary those occupation rights? What is the position of cohabitants with no property interest in the family home?

16.2.3.2. Chattels

For obvious reasons (but do you know what these are?), co-ownership of chattels is not subject to the same regime as co-ownership of land. Unity of possession dictates that each co-owner has the right to possess the property and, as against the rest of the world, may exercise full rights of ownership whether or not he is acting with the consent of his fellow co-owners.

In cases of dispute between co-owners, section 188 of the Law of Property Act 1925 provides that a co-tenant with at least a half-share (by value) of the

co-owned chattel may make an application to the court for an order of division. However, in Australia at least, according to *Re Gillie, ex parte Cornell* (1996) 70 PCR 254, a co-owner (of any proportion) is lawfully entitled to unilaterally take his share of co-owned personalty providing this can be done without destroying the character or identity of the property which must consequently be physically severable, forming a common bulk of homogeneous quality.

Notes and Questions 16.5

Consider the following notes and questions both before and after reading *Re Gillie, ex parte Cornell* (1996) 70 PCR 254, *Spence* v. *Union Marine Insurance* (1868) LR 3 CP 427 and *Dennis* v. *Dennis* (1971) 45 ALJR 605, either in full or as extracted at www.cambridge.org/propertylaw/.

1 Should the rules governing the resolution of disputes between co-owners of chattels also apply to disputes between co-owners of land?

2 In *Re Gillie*, why was one co-owner held to have excluded the other when she only appropriated half of the herd?

3 What role (if any) would there be for section 188 of the Law of Property Act 1925 if *Re Gillie* was applied in this jurisdiction?

4 Is the judgment a sensible and practical solution or one that will promote self-help and conflict? What should the attitude of the courts be to extra-judicial means of settling co-ownership disputes?

5 Why might it be argued that the approach advocated in *Re Gillie* creates more problems than it solves? Do you think adoption of the judgment in England and Wales would reduce or increase the likelihood of such cases being litigated?

6 In *Dennis* v. *Dennis* (1971) 45 ALJR 605, a dispute arose as to the ownership of a racehorse and whether or not (in an echo of a similar dispute that recently arose between the manager of Manchester United and two shareholders in the club) one party had acquired a proprietary or personal interest. Why are such disputes particularly likely to arise in the context of personal property?

7 What is the difference between owning one-half of a horse and being entitled to one-half of the net winnings and one-half of the sale price?

8 In *Spence*, why did the court decide it was a tenancy in common and not a joint tenancy?

16.2.4. Sale and other dispositions of co-owned property

16.2.4.1. Land

As we have seen, prior to the enactment of the Trusts of Land and Appointment of Trustees Act 1996, the courts had developed the 'collateral purpose' doctrine in order to redress the balance and subvert the preference for sale inherent in the trust for sale machinery that arose in all cases of co-ownership (whether or not covered by the Law of Property Act 1925 – see *Bull* v. *Bull* [1955] 1 QB 234). Relying on a broad interpretation of the now repealed section 30 of the Law of Property Act 1925, the courts assumed a wide discretion including a discretion to refuse an order for sale while the collateral (or secondary) purpose of the trust was still capable of being fulfilled. However, in *Jones* v. *Challenger* [1961] 1 QB 176, in reversing the decision of the court of first instance which had refused to order a sale of the matrimonial home following the breakdown of the couple's marriage, Devlin LJ noted:

> The test is not what is reasonable. It is reasonable for the husband to want to go on living in the house, and reasonable for the wife to want her share of the trust property in cash. The true question is whether it is inequitable for the wife, once the matrimonial home has gone, to want to realise her investment. Nothing said in the cases which I have cited can be used to suggest that it is, and, in my judgment, it clearly is not. The conversion of the property into a form in which both parties can enjoy their rights equally is the prime object of the trust; the preservation of the house as a home for one of them singly is not an object at all. If the true object of the trust is made paramount, as it should be, there is only one order that can be made.

Although what amounted to a collateral purpose capable of surviving the breakdown of a relationship, such that a court would be justified in exercising its discretion under section 30 to postpone sale, depended upon the facts of each individual case, the presence of school-age children was normally a deciding factor, as illustrated in *Re Evers* [1980] 1 WLR 1327:

> This approach to the exercise of the discretion given by section 30 has considerable advantages in these 'family' cases. It enables the court to deal with substance, that is, reality, rather than form, that is, convenience of conveyancing; it brings the exercise of the discretion under this section, so far as possible, into line with exercise of the discretion given by section 24 of the Matrimonial Causes Act 1973; and it goes some way to eliminating differences between legitimate and illegitimate children in accordance with present legislative policy: see, for example, Part II of the Family Law Reform Act 1969.
>
> The relevant facts in the present case must now be examined. There is little or no dispute between the parties about them. Both the mother and the father have been married and divorced. The mother had two children of her marriage, both boys, now aged ten and eight. She met the father in May 1974. In August 1974, they began to live

together at the father's former matrimonial home; the two boys remained in the care of their father, the mother visiting them regularly. Early in 1976 the mother became pregnant by the father and gave birth to the child, who is the subject of the wardship proceedings, on December 22, 1976. At about that time, the two older boys joined their mother and from then until the separation in August 1979 all five lived together, at first at the father's former matrimonial home, until in April 1978 [when] the parties jointly acquired the cottage which is the subject of these proceedings. This property was purchased for £13,950, of which £10,000 was raised jointly on mortgage. The balance was provided as to £2,400 by the mother and as to £1,050 plus expenses by the father. The mother's contribution was derived from her share of her former matrimonial home. On April 28, 1978, the property was conveyed into their joint names as trustees upon a bare trust for sale with power to postpone the sale in trust for themselves as joint tenants.

The irresistible inference from these facts is that, as the judge found, they purchased this property as a family home for themselves and the three children. It is difficult to imagine that the mother, then wholly responsible for two children, and partly for the third, would have invested nearly all her capital in the purchase of this property if it was not to be available to her as a home for the children for the indefinite future. It is inconceivable that the father, when he agreed to this joint adventure, could have thought otherwise, or contemplated the possibility of an early sale without the consent of the mother. The underlying purpose of the trust was, therefore, to provide a home for all five of them for the indefinite future. Unfortunately, the relationship between the father and the mother broke down very soon, and the parties separated at the beginning of August 1979 in circumstances of great bitterness ...

It was argued that the father ought to be allowed to 'take his money out' or 'to realise his investment'. In point of fact, his investment amounted to less than one-fifth of the purchase price of the property, and was smaller than the mother's investment. The major part of the purchase price was provided by the mortgagees, and the mother is prepared to accept full responsibility for paying the interest on the mortgage, and keeping up the capital repayments. The father has a secure home with his mother. There is no evidence that he has any need to realise his investment. It is an excellent one, combining complete security with considerable capital appreciation in money terms. His share is now said to be worth about £5,000, i.e. it has more than doubled in value in two years. On the other hand, a sale of the property now would put the mother into a very difficult position because she cannot raise the finance to rehouse herself or meet the cost of borrowing money at present rates. So there is no justification for ordering a sale at the present time.

For these reasons the judge was right not to order an immediate sale but the form of his actual order is not satisfactory. Under section 30, the primary question is whether the court should come to the aid of the applicant at the 'particular moment and in the particular circumstances when the application is made to it ... see *Re Buchanan-Wollaston's Conveyance* [1939] 1 Ch 738, 747. In the present case, at the present moment and in the existing circumstances, it would be wrong to order a sale. But circumstances may change unpredictably. It may not be appropriate to order a sale when the child

reaches 16 years – a purely arbitrary date – or it may become appropriate to do so much sooner, for example on the mother's remarriage, or on it becoming financially possible for her to buy the father out. In such circumstances, it will probably be wiser simply to dismiss the application while indicating the sort of circumstances which would, *prima facie*, justify a further application. The ensuing uncertainty is unfortunate but, under this section, the court has no power to adjust property rights or to redraft the terms of the trust. Ideally, the parties should now negotiate a settlement on the basis that neither of them is in a position to dictate terms. We would therefore dismiss the father's appeal, but would vary the order to dismiss the application on the mother's undertaking to discharge the liability under the mortgage, to pay the outgoings and maintain the property, and to indemnify the father so long as she is occupying the property.

These matters are now governed by sections 14–15 of the Trusts of Land and Appointment of Trustees Act 1996, but, as the purposes behind the trust are still relevant to rights of occupation under section 12 and to the exercise of the court's discretion under section 14, it is generally accepted that the jurisprudence of 'collateral purpose' will continue to provide guidance in disputes arising under the 1996 Act (see Law Commission, Transfer of Land: Trusts of Land (Law Commission Report No. 181, 1989) paragraph 12.9).

Notes and Questions 16.6

Consider the following notes and questions both before and after reading *Jones* v. *Challenger* [1961] 1 QB 176, *Re Evers* [1980] 1 WLR 1327, *Re Citro* [1990] 3 WLR 880, *Abbey National plc* v. *Moss* [1994] 1 FLR 307, *Mortgage Corp. Ltd* v. *Shaire* [2001] Ch 743, *Re Holliday* [1981] Ch 405, *White* v. *White* [2003] EWCA Civ 924, section 30 of the Law of Property Act 1925 (now repealed), sections 14–15 of the Trusts of Land and Appointment of Trustees Act 1996, sections 335A–337 of the Insolvency Act 1986 and the cases listed below, either in full or as extracted at www.cambridge.org/propertylaw/.

1 Who was entitled to apply to the court for an order under section 30 of the 1925 Act?

2 By what criteria were the courts guided in exercising this discretion? What was the strength of the *sale* presumption of the trust for sale? Were different criteria applicable to different types of application?

3 What is the extent of the court's jurisdiction under the 1996 Act? What has happened to the preference for sale?

4 What role will the case law on the repealed section 30 have in the interpretation of the 1996 Act? What is the significance of section 15 of the 1996 Act? What is the position of secured creditors?

5 What facts might give rise to exceptional circumstances under section 335A(3) of the Insolvency Act 1986? What was really exceptional in the facts of *Re Holliday* [1981] Ch 405?

6 How do the provisions of sections 14–15 of the Trusts of Land and Appointment of Trustees Act 1996 and sections 335A–337 of the Insolvency Act 1986 dovetail with the provisions concerning the family to be found in section 24 of the Matrimonial Causes Act 1973, section 15 of the Children Act 1989 and Part IV of the Family Law Act 1996 (see *White* v. *White* [2003] EWCA Civ 924)?

7 Does the Human Rights Act 1998 have any role to play in this area?

16.2.4.2. Chattels

A purported sale by a co-owner of the entire interest without the consent of the other co-owners will be subject to the *nemo dat* rule and (unless one of the exceptions applies – see section 10.5 above) the purchaser will only acquire the seller's own interest which he will henceforth hold as tenant in common with the other co-owners. A co-owner who destroys or disposes of his fellow co-owners' interests is liable in conversion under section 10 of the Torts (Interference with Goods) Act 1977. This liability extends to situations where the co-owner purports to dispose of the entire interest even in circumstances where the other co-owners' interests are not lost, although this applies only to situations where he has purported to dispose of the entire interest rather than some lesser interest such as pledge or bailment.

16.3. Other forms of co-ownership

16.3.1. Commonhold

As we shall see in Chapter 17, a new form of statutory co-ownership has been introduced under the Commonhold and Leasehold Reform Act 2002 to help alleviate the problems faced by owners of flats particularly in multi-unit developments where the leasehold model has not generally proved a success in providing effective management of the common areas and resources. Commonhold uses the company structure to provide the freehold owners of individual units with membership of a commonhold association with its own legal personality in which the common parts of the development are vested. Only the unit-holders are permitted to belong to the association which is governed according to rules and regulations agreed by the membership and publicised via a 'Commonhold Community Statement'.

16.3.2. Unincorporated associations

The unincorporated association creates real difficulties for lawyers, for, as the name so crudely asserts, unlike the commonhold associations considered above,

they lack a corporate identity and thus have no legal personality. Some commentators have gone so far as to state that they do not therefore exist, and, while this is plainly not so, it is equally clear that they occupy a twilight legal world in which their existence is admitted but not wholly catered for (see Rideout, 'The Limited Liability of Unincorporated Associations'). The difficulties are most acute when property is purportedly given to such an association, for the law is then faced with the seemingly insoluble problem of trying to vest property in something in which title cannot vest. As many of these gifts take the form of testamentary dispositions (where the willing donor thus has no second chance to perfect his gift), the courts are rightly reluctant to declare them void and therefore embark upon often ingenious, but rarely convincing, attempts to solve the conundrum.

There were originally two basic ways in which a donor's gift to an unincorporated association might be construed (in the absence of the gift being construed as a charitable disposition or one of the small category of anomalous purpose trusts). The simplest method was to regard it as an outright gift to the existing members of the association, each of whom had a legal personality in which the interest could vest via either a joint tenancy or a tenancy in common. Despite its simplicity, there were two major drawbacks with this approach. First, with the rare exception of gifts intended to benefit existing members only, it did not perfect the gift in the way the donor intended. For, as a tenant in common (either from the outset or after unilaterally severing the joint tenancy), an individual member had an undivided share which he could do with as he liked without any obligation to use it in accordance with the purposes for which it was made. Secondly (in theory, if not in practice), there were onerous formal requirements to be met every time the membership of the association changed: under section 53(1)(c) of the Law of Property Act 1925, any member who subsequently left retained his interest unless he disposed of it by signed writing; any member who subsequently joined received no interest unless assigned to him in a similar fashion; while (save for joint tenants) even a member who died did not thereby lose his interest which devolved according to his will or intestacy.

The other way in which a gift might be validated was to regard it, not as an outright disposition, but as a gift on trust either for the purposes of the association or for present and future members. This did, indeed, avoid the drawbacks associated with absolute dispositions. Rather than ignoring the donor's wishes, these were now given priority under the terms of the trust. Equally, the formality issues were side-stepped because the gift did not vest in the current membership but was an endowment in which the capital was preserved with only the interest expended upon the present members and/or the current purposes. But the price paid was a high one. As a gift on endowment, there were very real perpetuity problems which meant that, unless limited to the perpetuity period, the trust would be void from the outset (*Leahy* v. *Attorney-General for New South Wales* [1959] AC 457). While, if held to be a gift for the purposes of the association, it was additionally liable to be regarded as a purpose trust which offended the beneficiary principle because the

beneficial interest was unowned. Admittedly, the courts did develop haphazard strategies to overcome these problems: occasionally appearing to regard unincorporated associations as exceptions to the beneficiary principle; and at other times avoiding perpetuity problems by regarding the trust as limited to current (and not future) members (*Re Drummond* [1914] 2 Ch 90, in which case it was unclear how it did not take effect as an absolute gift with all the attendant problems considered above). Notwithstanding such devices, the general position remained that a gift on trust for the purposes of the association or for its present and future members was liable to fail.

As a consequence, and despite the weaknesses in the first construction, a presumption developed in its favour, with the courts doing their best to validate gifts to unincorporated associations by, where possible, construing them as absolute dispositions to the current membership. But, while this preserved the gift, it did not take account of the donor's wishes and provided no means by which a disposition could be made in favour of present and future members. In the face of this, Cross J in *Neville Estates* v. *Madden* [1962] Ch 832 at 849 offered a third possible construction. Under this approach, there was still 'a gift to the existing members ... but subject to their respective contractual rights and liabilities towards one another as members of the association'. Thus, while the gift would vest in each member, it would do so subject to contractual obligations preventing them from taking their share and doing with it what they will. This is clearly a better solution, but it does not answer all the difficulties. For a start, the court has to be able to find either express or implied terms which contain such mutual undertakings which is not always possible (there was no contract between the members of the various orders in *Leahy* v. *Attorney-General for New South Wales* [1959] AC 457, for example). And, even if these can be established, we are still confronted by the formality problems that dog the first solution. Admittedly, the *inter vivos* requirements of the Law of Property Act 1925 could conceivably be catered for under a suitably drafted contract which each member might be made to sign upon joining; but the same could not be done in respect of the *post mortem* requirements of the Wills Act 1837. More fundamentally, despite appearances to the contrary, this construction does not (technically at least) take us much further in complying with the donor's intentions. It is not the terms of the gift, after all, but the rules of the association which determine whether or not the gift can be construed in such a way (see Matthews, 'A Problem in the Construction of Gifts to Unincorporated Associations'). Admittedly, in determining the rules, the courts do (by means of the implied term) engage in a degree of artistic licence, but the carrot is here wagging the dog with the gift, in effect dictating the rules. Furthermore, the rules can normally be changed (and according to some must always be capable of so being – *per* Vinelott J in *Re Grant* [1979] 3 All ER 359) which means that a gift which the donor specifically did not intend to pass to the membership will do just that, for instance on dissolution or as the result of a members' ballot.

Despite these and other more questionable criticisms, the 'contract holding theory' (as it soon became known) is the new orthodoxy. Yet it is at best little more than a fudge which relegates the wishes of the donor to the margins. This can ultimately be traced back to the courts' implicit assumption that the problem is essentially a private property matter which can best be solved by private law solutions. Thus gifts to unincorporated associations are made to vest in individual members of the association with scant regard for the formal difficulties of such an approach, nor the essential artificiality of construing a gift to the association as a gift to its members. But why are we so constrained? An unincorporated association is clearly an example of communal ownership in which the members of the association form the community. As Macpherson noted in 'Human Rights as Property Rights', under communal ownership the primary right of each individual is the right not to be excluded from the communal resource and is derived, not from the vesting of a particular interest, but from one's status as a member of a community. Thus we do not need to concern ourselves with the formal requirements of vesting because no vesting takes place. And, as a consequence, there are no legal formalities with which to comply when someone either acquires that status upon joining the association or loses it at the moment they leave (whether at the behest of themselves or their fellow members or after the seductive embrace of the grim reaper).

Now some will argue that all of this is foreign to the common law. But, as we showed in Chapter 2, notions of communal property pre-date what are often regarded as fundamental principles of English law such as the doctrine of tenure. More importantly, they continue to play a fundamental role including in specific areas such as common land, public rights of way, public spaces and highways, rights of navigation, and fishing rights, and more generally by fixing the limits of private property which is always circumscribed (to differing extents depending upon the type and nature of the thing) in deference to the wider interests of the community. And, while many of these issues will be played out beyond the narrow confines of the Chancery lawyer's field of competence, in areas as diverse as the law of obligations (e.g. *Hunter* v. *Canary Wharf* [1997] AC 655), public law (e.g. sections 79–82 of the Environmental Protection Act 1990) and the criminal law (e.g. section 3 of the Road Traffic Act 1972), this is by no means always so, and nor does it, in any sense, weaken the argument (see *New Windsor Corp*. v. *Mellor* [1975] 3 All ER 44; *Attorney-General, ex rel. Yorkshire Derwent Trust* v. *Brotherton* [1991] 3 WLR 1126; and Kohler, 'The Whittling Away of Way').

Even if one accepts the theoretical possibility of a communal property analysis of unincorporated associations, this does not, of itself, provide a means by which a gift to such an association will be perfected. However, developments in the law of trusts have provided an analysis which squares the circle of communal ownership with the necessary vesting of the formal legal title. In *Re Denley* [1969] 1 Ch 393, money was left on trust to provide a sports ground primarily for the use of company employees. Counsel for the residuary legatees argued that this was a

void purpose trust which contravened the beneficiary principle (as the beneficial interest was not vested in anyone). However, in an imaginative judgment, Goff J held that the trust was valid, despite the beneficial interest being unowned, because there were indirect beneficiaries (the company employees) who, despite not owning the trust property, still had *locus standi* to enforce the trustees' obligations.

The decision is a highly practical and sensible one and mirrors to some extent the position which pertains in respect of personal representatives who hold the legal title of the deceased's estate subject to the control, but not on behalf of, the beneficiaries under the will who are not, at that stage at least, regarded in law as owning the equitable interest. It also has an obvious application to unincorporated associations, as recognised generally by textbook writers who see in it a means of dealing with some of the difficulties that arise in respect of gifts on endowment. In the light of *Re Denley*, the members for the time being will be the indirect beneficiaries with *locus standi* to enforce the trust whenever a gift is made for the purposes of an association. Thus the only problem with gifts on endowment becomes one of perpetuity, which can always be dealt with by means of a suitably drafted disposition limiting the trust to the perpetuity period, at which point the capital passes either under the terms of the trust or under the principle of resulting trusts. But even this is not certain, for it is possible to argue that *Re Denley*-type purpose trusts are saved by the Perpetuities and Accumulations Act 1964 from invalidity because they are subject to the rule against remoteness of vesting rather than the rule against inalienability and are thus outside the exclusionary terms of section 15(4) (see Hayton and Marshall, *Cases and Commentary on the Law of Trusts* (9th edn), p. 196 – but cf. (10th edn), pp. 200–2). This is, however, of little solace when most gifts to unincorporated associations are not by way of endowment and, even where it is possible to construe a gift in this way, the courts lean heavily towards the 'contract holding' analysis.

Yet there is no reason why the *Re Denley* approach should be restricted to gifts on endowment. It is surely possible to construe any gift to an unincorporated association in this manner so that legal title vests in the officers of the association who are empowered to spend both interest and capital on the purposes of the trust with individual members having *locus standi* to enforce its terms but with no *Saunders* v. *Vautier* (1841) 10 LJ Ch 354 right to vary them or claim the beneficial interest for themselves. Admittedly, this does make the trust more inflexible but it would at least elevate the wishes of the donor above those of the membership who do, after all, retain the option of refusing the proffered gift. Once we had ventured down such a path, there might be room for manoeuvre allowing a degree of variation (not dissimilar to the *cy-près* doctrine encountered in the law of charities) but stopping short of allowing the membership to claim the equitable interest as their own (see Gardner, 'New Angles on Unincorporated Associations').

The point appeared to be accepted in *Re Lipinski* [1977] 1 All ER 33, where (in dealing with a bequest held expressly to be not by way of endowment) Oliver J stated that *Re Denley* 'accord[s] both with authority and common sense'. The case

involved a gift to the Hull Judeans (Maccabi) Association to be used solely for the maintenance and construction of a new building where it would have been quite possible to regard the association's members as indirect beneficiaries, with the ability to enforce but no beneficial interest to own. However, while purporting to adopt the reasoning of Goff J in *Re Denley*, Oliver J slips into the language of beneficial ownership in holding that '[*t*]*he beneficiaries*, as members of the association for the time being, are the persons who could enforce the purpose and they must, as it seems to me, be entitled not to enforce it or, indeed, *to vary it*' (emphasis added). Thus, despite suggestions to the contrary, Oliver J takes an approach which vests title, and the ultimate decision on how it is utilised, in the membership with the donor's wishes yet again being relegated to the margins.

Despite its ultimate failings, *Re Lipinski* does at least offer a tantalising glimpse of a more radical approach to the problems of unincorporated associations. The seeds of a fully fledged communal property analysis of their property holding capacity are at least planted if, ultimately, left unwatered. More obliquely (but perhaps of greater significance), Cross J in *Neville Estates* v. *Madden* [1962] Ch 832 invokes a different type of ownership model when, in adopting the now favoured construction, he appears to contemplate (without going into detail) a new form of co-ownership model distinct from either the traditional joint tenancy or the tenancy in common. Generally, however, the courts have failed to recognise the true significance of unincorporated associations, and this can be traced ultimately to a failure to recognise the true ambit of property law. If one is schooled in a tradition that emphasises only private property, it is hardly surprising that, when faced with difficulties of this nature, the courts adopt a private property analysis. Thus, even though unincorporated associations are self-evidently examples of communal ownership and a trust model exists by which they can be made to dovetail easily into the current law of property, the courts favour an approach which does violence to both principle and formality while relegating the donor's intentions to the margins or beyond.

Notes and Questions 16.7

Consider the following notes and questions both before and after reading *Leahy* v. *Attorney-General for New South Wales* [1959] AC 457, *Neville Estates* v. *Madden* [1962] Ch 832, *Re Denley* [1969] 1 Ch 393, *Re Recher* [1972] Ch 526, *Re Lipinski* [1977] 1 All ER 33 and *Re Grant* [1979] 3 All ER 359, either in full or as extracted at www.cambridge.org/propertylaw/.

1 What is an unincorporated association?

2 In *Leahy*, Viscount Simonds said that a purported gift to an unincorporated association could be analysed in three different ways, the correct analysis in any particular case depending on the intention of the donor. What are these three analyses? Why, according to Viscount Simonds, will the gift be void

unless it can be analysed in the first of these three ways? Why did he refuse to adopt the first analysis in this case?

3 Have the perpetuity problems referred to in *Leahy* been resolved by section 4(4) of the Perpetuities and Accumulations Act 1964?

4 A fourth analysis was pointed out in *Re Recher*. Does it satisfactorily explain how unincorporated associations hold property, and, if so, how can a member lose his vested interest absent compliance with section 53(1)(c)?

5 What was the fifth analysis employed in *Re Lipinski*? Does this offer a more imaginative solution to the conceptual difficulties posed by unincorporated associations? Does the analysis *implicitly* reject a private property solution in favour of communal property?

6 In *Grant*, why was the gift void? Could the Chertsey and Walton Constituency Labour Party secede from the Labour Party? If it did, what would happen to its property?

7 What do you think of Vinelott J's analysis in *Re Grant* of *Re Denley*? Is it convincing?

8 Can an association make a rule that it cannot change its rules without the consent of another body? If so, how (if at all) can it change that rule? Does it make any difference if the other body set up the association in the first place, and drafted its rules (including the rule about changing its rules)?

9 Can someone who gives money to an unincorporated association ensure that it is used for the purposes intended by the donor?

10 Can someone who gives money to the Conservative Party ensure that it is used for the purposes intended by the donor? Is a gift by will of money to the Conservative Party valid?

11 Are unincorporated associations really an example of communal property with members rights determined as a consequence of status rather than vesting?

16.3.3. Extending the limits of co-ownership: public trusts

If we step back from unincorporated associations for a moment, it does not take much to realise that the *Re Denley*-type purpose trust provides a means by which we might give renewed impetus to the ownership aspirations of communities. Such observations are not new in the context of trusts in general. Across the Atlantic, as Gray ('Equitable Property') has illustrated, the rhetorical and conceptual power of the trust has long been utilised to this end. International lawyers, for example, have invoked trust rhetoric in conceiving of an 'intergenerational equity' whereby each generation, as trustees, is burdened by obligations owed to future generations, as

beneficiaries (Weiss, 'The Planetary Trust'). On a more substantive level, the historic public trust doctrine, which initially confirmed state ownership (in the absence of Crown title) of navigable waters and tidelands on behalf of all citizens, seems to be in the process of extending beyond such narrow confines to include more general environmental resources such as the countryside (see *Paepcke* v. *Public Buildings Commissioner of Chicago*, 263 NE 2d 11 (1970)) and wildlife (see *Wade* v. *Kramer*, 459 NE 2d 1025 (1984)). Such developments have been at the behest of academics who have long seen the potential for such advances in both the width (Sax, 'The Public Trust Doctrine in Natural Resources Law') and the jurisdictional ambit (Ausness, 'Water Rights, the Public Trust Doctrine and the Protection of Instream Uses') and have contributed to a general change in the tone of the debate concerning environmental issues. In his seminal article, 'Should Trees Have Standing? – Towards Legal Rights for Natural Objects', for example, Christopher Stone argued that natural objects might be represented or defended by a friend with legal personality; this was echoed within days in the dissenting opinion of Justice William O. Douglas in the United States Supreme Court case of *Sierra Club* v. *Morton*, 405 US 727 (1972).

Interesting as these examples are, they are of little significance to the development of English trust law. In so far as the American public trust doctrine involves notions of trust, it is a specialised mechanism whose origin can be traced to the peculiar circumstances of the American Revolution and the displacing of Crown sovereignty by that of the people (see McCay, 'The Making of an Environmental Doctrine', pp. 85–7). In this jurisdiction, the public trust is limited to its charitable incarnation whereby trusts that fulfil certain requirements bestowing charitable status are exempt from some of the rules applicable to private trusts such as the rule against perpetual trusts and the beneficiary principle (see below). These conditions are not easy to fulfil, and require the trust, *in a way that the law recognises*, to promote the public benefit by relieving poverty, advancing religion or education or otherwise benefiting the community. While charitable trusts clearly have a role to play in the context of environmentalism and the aspirations of communities, they do not provide a complete answer. The law of charities develops incrementally on a case-by-case basis, which means that it tends to lag behind developments in society in general. Thus, in *Re Grove-Grady* [1929] 1 Ch 557, a gift to set up an animal refuge where the animals would be free from molestation by man was, somewhat surprisingly from today's perspective at least, deemed not to be charitable because no public benefit was deemed to arise. One suspects this is a precedent that would not survive a renewed outing in the Court of Appeal, but it underlines the essential conservatism of the law of charities made all the worse by a conception of the public good which requires judges to adopt an approach that necessarily favours the *status quo*. In *National Anti-Vivisection Society* v. *Inland Revenue Commissioners* [1948] AC 31, a trust to promote anti-vivisection was held not to be charitable because (i) on balance the House of Lords was not convinced its aims were in the public interest and (ii) it was deemed to be

too political because it advocated a change in the law. (Cf. the American *Restatement on the Law of Trusts*, p. 374, which states that: 'The courts do not take sides or attempt to decide which of two conflicting views of promoting the social interests of the community is the better adapted for the purpose, even though the views are opposed to each other. Thus a trust to promote peace by disarmament, as well as a trust to promote peace by preparedness for war, is charitable.')

It is thus to the law of private trusts, and *Re Denley* in particular, that we must turn for a mechanism that will provide communities and others with an ownership vehicle which will function irrespective of whether or not their aspirations are deemed to be of benefit to the public. Again, such an approach is not new. The case for stewardship is often articulated by reference to the trustee–beneficiary relationship (for example, Lucy and Mitchell, 'Replacing Private Property', p. 584), but this is usually as a simile with little substantive content (see Gray, 'Equitable Property', p. 206). Yet the *Re Denley*-type purpose trust, with its provision of a trustee in whom the legal title vests, does seem to offer communities without legal personality a substantive mechanism whereby they can enjoy open-textured interests such as estates in land.

For the purposes of communal property and common property rights in the environment, this could be an extremely important development. For in *Re Denley* lies the roots of what could become a fully fledged public trust doctrine removed from the constricting embrace of charitable status. In *Re Denley*, Goff J invokes the possibility of a purpose trust in which no one owns the beneficial interest yet which is freed from the threat of invalidity because of the presence of indirect beneficiaries capable of enforcing the trustees' obligations. Because a community is a collection of individuals with no legal personality of its own, a structure that does not require there to be an owner offers obvious possibilities. The trust can be held for the purpose of promoting the community's aims while the individual members of the community will qualify as persons with sufficient interest to enforce the trustees' obligations. There is, in such an analysis, the potential for such a trust to develop further to create a mechanism for promoting environmental goals by regarding the public in general as the indirect beneficiaries of such a trust with the necessary capacity to enforce the trustees' obligations. This, however, would require some conception of the public good which might necessarily collapse back into nothing more than a question regarding charitable status, which, after all, is the mechanism which currently exists in respect of purpose trusts deemed to be in the public interest. The real potential of the *Re Denley*-type purpose trust lies in its capacity to provide communities with a mechanism to promote their aims irrespective of whether or not those aims are regarded as being in the public interest. This has obvious advantages over the current analysis of such communities, which tends to deal with them as nothing more than a gathering of individuals each with a vested and, from a proprietary stance at least, alienable interest.

The question which needs to be addressed is: what does it take to become an indirect beneficiary with power to enforce the trustees' obligations? This is, in

effect, a question about *locus standi* and to whom the court will listen in any dispute concerning the exercise of the trustees' duties – a point to which Goff J pays little heed, simply stating that:

> [T]here may be a purpose or object trust, the carrying out of which would benefit an individual or individuals, where that benefit is so indirect or intangible or which is otherwise so framed as not to give those persons any *locus standi* to apply to the court to enforce the trust, in which case the beneficiary principle would, as it seems to me, apply to invalidate the trust. (*Re Denley* [1969] 1 Ch 373 at 382–3)

This, coupled with his insistence that all the indirect beneficiaries need to be capable of being listed, underlines that the decision is not as radical as one might imagine (although he may be excused on this latter point, as *Re Denley* predates *McPhail* v. *Doulton* [1971] AC 424, the case in which the House of Lords eventually removed the shackles from certainty of object). Thus, despite its liberal approach to the beneficiary principle, there is still a strong conservative element in the judgment which acts as a brake on the potential developments we have outlined above. From the tone of his comments, it seems likely that Goff J would not have needed much persuasion that a particular purpose was too abstract. This has necessarily led commentators to downplay its significance. Even Cotterrell ('Some Sociological Aspects'), who can normally be relied upon to offer interesting and illuminating insights in this field, has contented himself with the rather tame (but no doubt accurate) observation that 'the scope and long-term influence of this decision remains unclear'.

It would consequently be over-optimistic to see in *Re Denley* anything more than the potential to give new impetus to the ownership aspirations of communities within our society. However, it stands as a judgment which offers the possibility of such development which, with its reliance on a test of *locus standi*, empowers the community, by making their rules as to membership the litmus test of standing. In the public law arena, of course, the question of *locus standi* is still a matter of debate and argument. Yet, in the context of *Re Denley*, such issues seem less problematic, for here the court is relieved of the task of formulating a test of standing because the community, by reason of its status as a community, must necessarily have provided one (cf., in the public law context, *R.* v. *Somerset County Council, ex parte Dixon* [1998] Env LR 111; (1998) 75 P&CR 175). Of course, the test might not be referred to as such, and in many instances will be implicit rather than explicit. However, some form of test must exist, for otherwise it would be meaningless to talk of a community if there is no method of identifying to whom it applies. Thus, under a liberal interpretation of *Re Denley*, a community possesses a means by which legal title can be held on behalf of its members each of whom holds the common property right not to be excluded from the resource so held, provided they retain their status as members of the community.