

# Cliffnotes

## Property Law

The University of Hong Kong

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## Case References

## Development of Land Law

English land law was applied to the whole territory.

All case law and scheduled imperial legislation was applicable.

After 1997, case law became persuasive only and imperial legislation ceased.

## Tenure

There is no absolute private ownership – all land is owned by the crown.

People only had a timed right to the land (Estate) in return for services.

The service is tenure, now in pecuniary form.

Leasehold tenure = certain terms and conditions for use of the land.

## Estates

English estates include:

Fee Simple: Lasts as long as inheritable.

Fee Tail: Lasts as long as lineal descendants alive.

Life: Lasts as long as original grantee is alive.

Hong Kong is comprised mostly of leasehold estates.

Land leased for a fixed number of years.

## Interests in Land

The bundle of rights can be distributed to different people.

Legal Estate/Interest	Equitable Estate/Interest   Prevails
Fixed duration easements Created through appropriate formalities	Interest not created with formality
Enforceable against the whole world	Also enforceable against the whole world except a purchaser of the estate who does not know of the interest.

## What is Land? (p14)

This includes things attached permanently to things attached to land: **Fixtures**.

Tests: **Degree and purpose of annexation**

- Hamp v Bygrave*: Resting on its own weight provides prima facie inference as chattel. Rebuttal weight given to purpose and intent of the parties. Could the object be enjoyed on its own (like a painting or unlike an architectural extension)? Was the price included in the sale?
- Berkley v Poulet*: Pictures to be enjoyed as of themselves, not 'attached' to land and not part of landscape/architecture because the interior was designed for the pictures to be enjoyed of themselves. The heavy statue could be replaced by something else subject to the owner's taste – it did not affect the landscape. Held: chattels. Could they be removed without damage to the property? Heavy objects resting on their own weight could amount to fixtures.
- Irene Loong*: Moveable object  $\neq$  fixture. Degree of annexation gave way to purpose of air conditioner (to necessarily improve the atmosphere of ballroom), therefore fixture.
- Orient Leasing*: Similar to *Irene Loong* – looked at the improvement value of the ACs.
- Penta Land*: Did not look at purpose of the air conditioners – perhaps application of justice. Exception in test application.
- Elitestone v Morris*: In the case of buildings, since it is awkward to describe them as 'fixtures', they can be described as 'part and parcel' of the land. If the building cannot be moved without being destroyed, it should be considered part of the land. Also, if it cannot be enjoyed elsewhere but in situ, it should be held as a fixture. Whether it can be disassembled and moved is also taken into account.

# Easements

An easement is an irrevocable limited right to use another's land. Enforcement is against substantial interference by the grantor and third party infringement.

## Requirements

Dominant/servient lands with benefit | recognised, non-natural, unambiguous right  
Competent and different grantor/grantee | no exclusive possession | no expense

There must be a **dominant** and **servient** tenement (land).

The dominant **land** (not a person or business) **derives benefit** from the easement at the burden of the servient land. Note it is the land that should derive the benefit, not the person granted the interest and not the business granted the interest.

*Hill v Tupper*: right to put pleasure boats benefited business only, not the land – not an easement.

*Moody v Steggles*: right to hang signboard benefited business but land was used for that specific business for over 45 years and considered ongoing. Thus, what benefited the business was considered to benefit the land – held: easement.

*Bailey v Stephens*: The dominant and servient lands must be sufficiently close to practically benefit each other.

The owners must be **different people**.

It must be able to form the subject matter of the grant.

**Capable grantor**/grantee;

The right must be a **recognised non-natural** and **unambiguous** right.

Expansion of easement categories by analogy only.

*William Aldred*: 'view' too vague to be subject matter of a grant.

*Phipps v Pears*: protection from weather not recognized.

The easement must not give the dominant owner **exclusive possession**.

*Copeland v Greenhalf*: parking cars on narrow strip of land – exclusive use.

*Sweet & Maxwell v MM Advertising*: parking cars in large area – not exclusive use

*Miller v Emcer Products*: toilet use not exclusive.

*Grigsby v Melville*: storage in cell exclusive use on facts.

*Wright v Macadam*: storage in coal shed easement.

Easement must not impose **expense** on the servient owner.

*Regis Property v Redman*: hot water supply imposed expense (not easement).

*Crow v Wood*: fence maintenance costs OK by custom.

## **Acquisition of Easements**

### **Dominant Tenement**

The dominant tenement is passed on to inheritors as under the Conveyancing and Property Ordinance.

### **Servient Tenement**

Easements created by instrument must be registered under the Land Registration Ord.

Easements by oral grant must be communicated to or reasonably noticed by the purchaser to be enforceable against him.

### **Statute**

Public utility companies have statutory easements to lay infrastructure. For electricity, see: Electricity Networks (Statutory Easements) Ordinance Cap357. Statutory compensation is usually available.

### **Express Grant**

Legal easements to be granted by deed only: s4 CPO, else it is equitable with part performance and evidence in writing. The scope of the right will be interpreted widely.

### **Express Reservation**

Theoretically acts as a regrant from the purchaser.

S24 CPO: a reservation can be made without execution of the conveyance by the purchaser or any regrant by him. Ambiguities will be construed against the purchaser, see: *St. Edmundsbury*.

## **Unintentional Easements**

### **By Ordinance**

**S16 CPO**: Assignment of land to be along with all rights, interests and easements appertaining to the land or fixtures at that time, see: *Int'l Tea Stores v Hobbs*.

2 pieces of land A and B, separate owners.

O(A) gives O(B) a revocable right/license.

O(B) extends his lease with O(A).

That revocable right may transfer to become irrevocable, *Wright v Macadam*.

**Assignment** means a transfer of a government lease, a legal charge, a lease or any conveyance of land **by instrument**. Oral agreements will not do. S2 CPO.

*Borman v Griffith*: >3 year written lease not assignment. Deed required.  
*Rye v Rye*: <3 year written lease is assignment. Deed not required.

The right must have been **enjoyed immediately prior** to assignment.

*Penn v Wilkins*

The owners must be **different people**. This is because an owner cannot exercise a right against himself – and that cannot be transferred.

*Long v Gowlett*

There must be a **competent grantee/grantor**. A definable person or body.

*MRA Engineering v Trimster*: Servient land already sold to third party at time of sale of dominant land. Seller had no right to transfer any easement.

## Common Grant

### **Necessity**

Where a piece of land would be **useless** but for the easement, courts are ready to imply it – *Altmann v Boatman*: staircase sole entry point for flat.

*Tang Tim Fat v Chan*: Necessity must exist at time of assignment.

*Nickerson v Barraclough*: Courts cannot override express contrary intention.

### **Intended Easements**

Where both **parties intended** to a higher end, a ‘necessary’ easement may be implied.

*Wong v Beaumont Property*: parties intended premises to be restaurant. Compliance with health ordinance required easement – easement intended and granted.

*Cory v Davies*: All parties intended easement.

### **Wheeldon v Burrows**

When owner of 2 plots transfers (simply by agreement) one, he passes on:

all **continuous and apparent** easements; (passive, reasonably noticeable)

all easements necessary for **reasonable enjoyment** of the property,

that he has been experiencing, to the grantee.

*Squarey v Harries-Smith* (1981): Only one requirement.

*Millman v Ellis* (1996): Both conditions.

## Implied Reservation

Courts are reluctant to allow implied reservation and **strong evidence** of **necessity** or **common intention** need be adduced. This is because reservations are to the detriment

to an innocent party and if the vendor intended to reserve any rights, it should have been expressed clearly in the sale.

*Re Webb's Lease*: courts reluctant to allow implied reservation.

*Chiu v Merrillong Dyeing*: cogent evidence of necessity and intent required.

*MRA Engineering v Trimster*: Mere convenience not adequate.

*Richards v Rose*: easement of support impliedly reserved.

## **Presumed Grant**

Where a person has used a 'servient' land for a long time with knowledge of the servient owner who does not do anything about it, he should not be deprived of the benefit to use it later.

A claim under the English act is not possible as it is no longer part of HK law.

A claim requires:

Fee simple right (not possible in HK but subject to modification).

Right to be enjoyed **without permission**, force or secrecy.

Right must have been **continuous** (a matter of degree).

It must be brought under the 3 methods:

### ***The Prescription Act***

Not applicable to HK anymore.

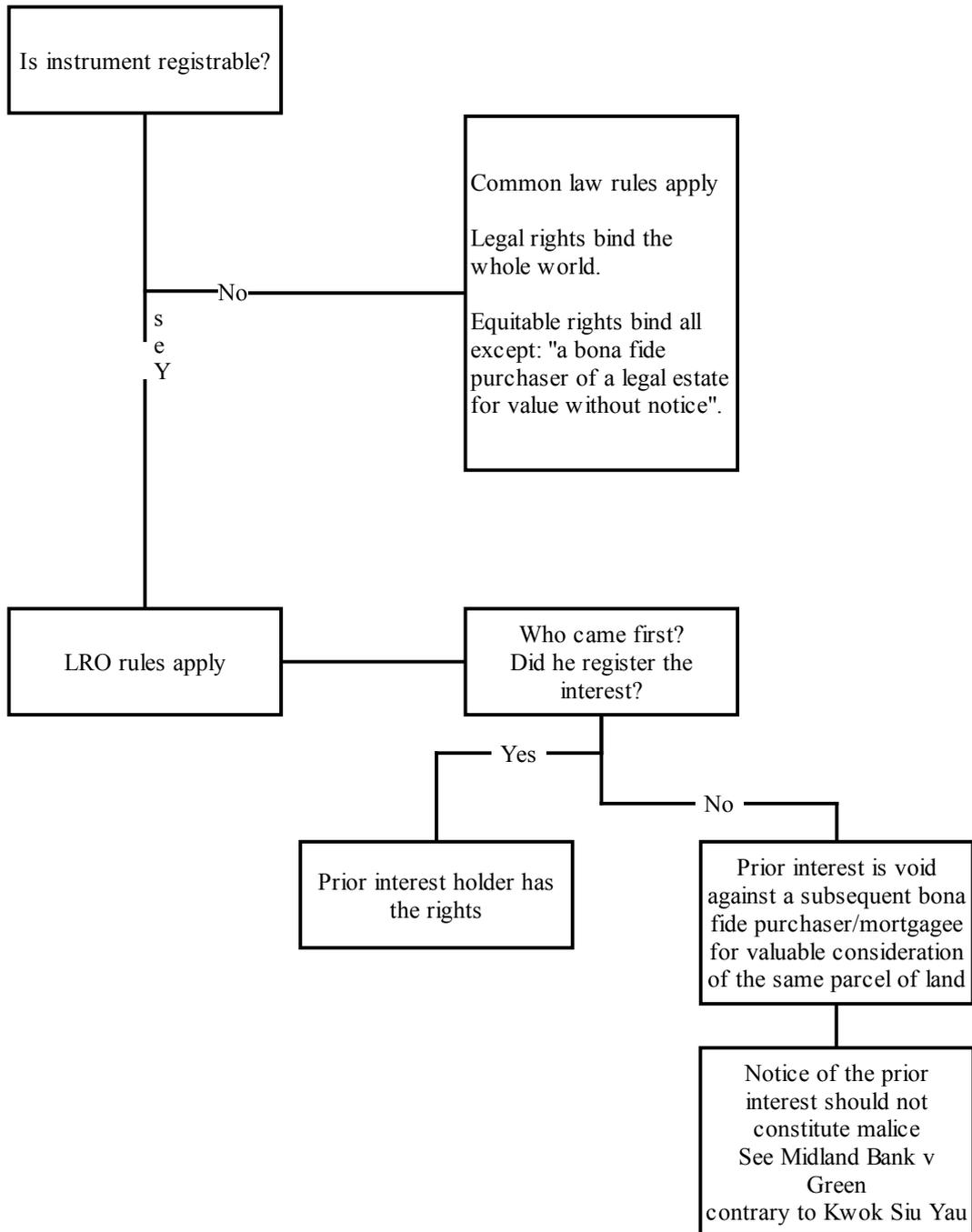
### ***Common Law***

The right must have been **enjoyed prior to 1189**. A presumption that it did may be assumed if the right has been enjoyed for over 20 years. But if it is proved that the right could not have been enjoyed prior to 1189 (no buildings, etc.) then the presumption is rebutted.

### ***Lost Modern Grant***

The right must be shown to have been enjoyed for **over 20 years**. Rebutted if, during that time, no person was capable of making or receiving the grant.

# Priority



## **Land Registration Ordinance**

Registration gives priority to the holder of the interest and it binds the whole world.

### **Registrable Interests**

Includes deeds, conveyances, other instruments in writing and all judgements by which any parcels of ground tenements or premises in Hong Kong may be affected.

Non-registration of a registrable interest makes it void against subsequent bona fide purchasers or mortgagees for valuable consideration.

### **Effect of Registration (Registrable interests) :: Prior v Subsequent**

#### ***Registered v Registered***

Priority according to respective **dates** of registration: s3(1), LRO.

If the instrument is registered within 1 month of its execution, the date is the date of execution, otherwise it is the date of registration.

#### ***Registered v Unregistered***

Registered interests have **priority**. If the first interest is legal, it binds the whole world, if it is equitable, it now binds the whole world as everyone has constructive notice.

#### ***Unregistered v Registered***

Non-registration of a registrable interest makes it **void** (priority lost) against subsequent bona fide purchasers or mortgagees for valuable consideration: s3(2). Notice of the prior interest, whether constructive or actual is irrelevant under s4 unless fraud is proved against the subsequent purchaser or mortgagee: *Mak Him v Chan*. Common law meanings of these words apply:

Purchaser: Any person who takes a grant of estate not by operation of law. This includes donees of gifts and 'buyers' (see above).

Mortgagee: Controversial because it might lead to a narrow interpretation of 'purchaser' to exclude 'tenants'.

Note, however, that **this disadvantage does not extend** to bona fide leases at rack rent for terms not exceeding 3 years: s(3). BUT if the lease has an option to renew, that option is registrable and void if unregistered.

1 January A's instrument is created

2 January B's instrument is created

4 February A's instrument is registered ← Priority under s3(1) [early registration. B should not register so to allow (2) to take effect, i.e. nullify A's interest.

5 February B's instrument is registered ← Priority under s3(2) i.e. nullify A's interest.

Where there are conflicts between s3(1) and (2), (2) should prevail because s3(1) is to be interpreted 'subject to the ordinance'.

Also, where the holder of the subsequent interest is not a bona fide purchaser or mortgagee for valuable consideration, doctrine of notice (common law) applies and the holder is bound by the prior unregistered interest. If the prior interest is registered, s3(1) might apply.

### ***Unregistered v Unregistered (as above but notice...)***

If the interest was registered outside the 1-month period and remained unregistered at the time the second interest was being created, then it is a case of unregistered v unregistered. The prior interest is void against the subsequent bona fide purchaser/mortgagee for valuable consideration of the same parcel of ground, s3(2).

**Notice will render the subsequent interest void** because:

S4 concerns registered interests only, implying notice is relevant for unregistered interests.

If common law applies, prior legal interests bind the whole world and equitable interests bind people with notice.

*Kwok Siu Lau* advanced the notion that subsequent notice by purchasers/mortgagees rendered them not(bona-fide). This was doubted by *Midland Bank v Green* where it was held that notice is not equivalent to fraud or bad faith.

## **Effect of Registration (Unregistrable interests) :: Prior v Subsequent**

### ***Registrable v Unregistrable***

Priority depends on whether the first interest is registered. If registered, it should take priority in accordance with general principles and common law rules. If it is not registered, it seems to lose priority to subsequent valid interest holders under s3(2). Notice may also be relevant subject to the discussion above.

### ***Unregistrable v Registrable***

First interest unregistrable so s3(1), (2) and s4 cannot apply. This position is governed by common law rules, see: *FISA v Baik Wba Int'l Trading*.

### ***Unregistrable v Unregistrable***

This position is governed by common law rules also.

## **Common Law Position**

Legal rights bind the whole world.

Equitable rights bind all *except*:

“a bona fide purchaser of a legal estate for value without notice”.

**Bona Fide:** The whole conscience of the purchaser is taken into account, see:

*Cheung Pik Wan v Tong*.

**Purchaser:** Any person who takes a grant of estate not by operation of law. This includes lessees, donees of gifts and ‘buyers’.

**Legal Estate:** The interest must be a legal one, else “where equities are equal, the first in time prevails”, see: *Chu Kit Yuk v CWI*. Equities may be unequal if one of the parties act inequitably.

**Value:** Any valuable consideration including money and future marriage. All money must be paid. This part excludes donees.

**Without Notice:** The purchaser must be free from notice to claim that his conscience was unaffected by any prior equitable interest. Notice can be actual notice or imputed/constructive notice whereupon reasonable inspection of things would have lead to notice, see: *Hunt v Luck*.

## **Relevant Legislation**

### **Land Registration Ordinance**

- S3 This ordinance does not extend to bona fide leases at rack rent for a term not exceeding 3 years.
- (1) All registrable instruments shall have priority construed according to their respective dates of registration [see s5].
  - (2) All registrable instruments not registered shall be void against any subsequent bona fide purchaser or mortgagee for valuable consideration of the same parcel of ground.
- S4 Notice of unregistered instruments do not affect registered instruments.
- S5 All registrable instruments registered within 1 month after the time of execution shall have priority deemed to take effect from the date of the interest’s execution. Those registered outside the 1-month limit are deemed to have been registered at the time of registration.

# Leases

## ***Introduction***

All property is granted through this interest. Right to renew subject to capability to pay money/premium. No real crisis from the fact that all land is granted for a set period of time. Government sells land through auction. It can also grant land to non-profit organizations such as schools and hospitals. Through the content of the lease, the government controls the nature of use of the land. Any change is subject to payment. The government may resume land for public purposes giving compensation.

## ***Defining 'Term of Years Absolute'***

S2 CPO defines that to be **any specified duration** including: “**from year to year**”. It is, in effect, a lease – a legal interest in land.

### **Ascertaining a 'Term of Years'**

There must be a fixed term ascertainable from a commencement date. A lease cannot be made for an **uncertain term**.

*Lace v Chantler*: Duration of a war held not certain.

*Birrel v Carey*: Length of trading term held not certain.

Beware of cases where one condition renders it certain and another renders it uncertain: e.g. vacancy of a flat. In uncertain terms, the grant will usually be treated as a license unless periodic tenancy or equitable lease could be made out.

If the lease is made subject to a condition precedent or a **future contingency**, it would only be enforceable if that event occurs.

*Brilliant v Michaels*: “Property let when vacant” so lease is enforceable when property is vacant.

### **Potential Perpetual Leases**

Some leases contain a clause allowing tenants to renew the ending lease on identical terms and conditions. Such leases can become perpetual if the estate is freehold. This does not violate the ‘fixed term’ requirement because each lease granted or renewed is for a fixed term and the fact that it can be renewed is ignored.

Given the high value of land today, courts are reluctant to allow **perpetual renewing** of a lease unless there is clear evidence showing that the landlord intended to give a tenant that right.

*Parkus v Greenwood*: Renewal clause ‘on identical terms’ specifically included the renewal covenant.

*Majorie Burnett v Barclay:* Lease granted for 7 years. Clause to renew for another 7 years and that lease “shall contain a like covenant for renewal for a further 7 years on expiration of that term granted”.

As you can see, the lease tended towards 2 lease renewals and the courts did not extend that ‘like covenant’ to include any renewal clauses for the final term.

### **Defining ‘Absolute’**

The English Law of Property Act’s definition for ‘Terms of Years Absolute’ includes a term of years liable to determination by notice whereas the HK version does not.

Many ‘leases’ in Hong Kong give both parties a right to give notice to termination. No longer is the term of years ‘absolute’ for the Ordinance concerned. UK legislation handles that but HK legislation does not. Technically, these land grants are not ‘legal’ so do not bind bona-fide purchasers for value without notice – but since these grants are often written and registered, they are enforceable against the whole world.

### ***Distinguishing Between Leases and Licenses***

Leases must confer a right of **exclusive possession** – *Street v Mountford*.

#### **Exclusive Occupation + Possession**

Exclusive occupation is not sufficient.

Tenant must have the **right to exclude** the whole world including the landlord.

*Somma v Hazelhurst:* not lease for landlord could enter as he pleased and could allow others to do so also.

*Lam v Lucky Apartment:* Not lease because the key was kept at entrance and there was a need to rouse the watchman to enter at night.

*May King Development:* Held lease because the occupant had key to room and main door despite rooms had to be cleaned by landlord subjects.

#### ***Exceptions - no lease/tenancy***

Family arrangements :: *Booker v Palmer*

Act of friendship/generosity/charity :: *Street v Mountford*

Service occupancy, company accommodation :: *Street v Mountford*

Gentleman’s agreement, honour and trust :: *Barnes v Barratt*

## Labels and not Conclusive

The labels 'license agreement' or license fee will not have weight. Courts will look at the entire agreement to see whether they are indicative of exclusive possession.

If the agreement itself is false e.g. in *Antoniades v Villiers*, where it allowed landlord to force a couple to share a small attic room, then the permission would be disregarded and a tenancy would be held.

## Rent

Rents are **not essential**. Free tenancy is possible.

*Ashburn v Arnold*

## Subject Matter of a Lease

Any part of land can be leased, except for the surface of a wall.

*Leung Kwok Kau v Tam*

## Types of Tenancy

### Fixed Term (p366)

A fixed term tenancy/lease has **no automatic renewal** and **no implied right to termination** for both parties. The term is expressly fixed, e.g. 7 years.

### Periodic Tenancy (p366)

A periodic tenancy/lease is **renewed automatically** and parties have an **irrevocable right to termination**. These are created expressly (e.g. from year to year) or more often, implied by law, where the period is the rent-payment period.

**Notice to quit:** yearly: 182 days. Weekly, monthly: as per period.

No **provisions** contrary to the nature of this tenancy will stand: e.g. rights to terminate only in long term: *Doe d Warner v Browne*.

### Other Tenancies (p368)

These tenancies occur when you occupy the land exclusively.

#### *Tenancy at Will*

Occupation/overstay with landlord's consent. Uncertain duration tenancy with right to terminate at any time. Payment of periodic rent that is accepted implies a periodic tenancy. Possession allows action against trespass.

#### *Tenancy at Sufferance*

Overstay without consent. Technically no tenancy.

#### *Tenancy at Estoppel*

Where a false owner lets the land, the lease remains enforceable against him.

## ***Creation of Leases***

### **Grant of Legal Lease (p370)**

A legal estate for a term of years must be granted by deed, s4(1) CPO.

EXCEPT where a lease is **≤3 years**, takes effect on possession at market value and without premium; s4(2)(d) CPO.

### **Contract to Grant a Legal Lease (p371)**

This contract to grant must be in writing; evidenced by a written memo or supported by sufficient past performance (e.g. taking possession or paying rent), s3 CPO.

EXCEPT where a lease is **≤3 years**, takes effect on possession at market value and without premium; s6 CPO.

### **Implied Periodic Tenancy (p371)**

Common law will recognize an implied periodic tenancy where there is **periodic rent payment** by the occupier and acceptance by the landlord (e.g. tenancy at will). The duration of the term is prima facie yearly but can be determined by the time between rent payments. Watch for possible conflict with equitable leases below.

### **Equitable Leases (p372)**

If a lease for more than 3 years is **not granted by deed** but has **partially been performed**, it will be recognized as an equitable lease: *Walsh v Lonsdale*. As mentioned before, if the agreement has been registered in the Lands Registry, then it becomes binding against the whole world – Equity's Darling included.

**Equity prevails** over common law so only when equity fails does common law's implied periodic tenancy come up to fill the gap.

## ***Assignment of Leases and Reversions***

A reversion is: an interest in an estate that reverts to the grantor at the end of a period.

A lease/reversion may be assigned **unless prohibited** by a covenant in the contract. And it must be done **under deed**.

## ***Determining the Duration of a Lease***

### **Via Time or Notice**

Fixed Term Lease: Ends at expiry of tenancy or by notice if there is a **break clause**.

Periodic Tenancy: No expiry because of perpetual renewal but must end after **notice** of termination by either party. The notice must be a full period or 6 months if it is a yearly tenancy.

Prior to **9 July 2004**, a fixed term leaseholder, upon expiry of term, could apply to the Lands Tribunal for a new tenancy. It must be ordered unless the landlord could reasonably oppose to it. This is no longer the case. For tenancies created before that date, there is a transitional period of one year after the tenancy expires where the landlord can give a termination notice not less than **12 months** before the intended termination date.

### **Surrender**

Requires the landlord's consent.

Must be done by deed unless by operation of law.

When a tenant accepts a grant of a new tenancy of the same property, the existing tenancy is surrendered by operation of law, see: *Wing Hang Bank v Fast King*.

A deed-of-variation which affects either the extent of the premises demised or the terms for which they are held constitutes a surrender by operation of law.

BUT a letter that asks for an increase of rent or deposit pursuant to the agreement does not create a new tenancy, see: *West Coast International v SJ*.

An equitable lease may be surrendered in writing.

### **Forfeiture... see below**

### **Disclaimer**

Two meanings

When the tenant challenges the ownership of the landlord, it gives the landlord the right to forfeit the lease.

When the tenant is declared bankrupt, the lease would be terminated by his trustees/liquidator in the interest of general creditors.

### **Merger**

When the tenant acquires his landlord's reversion, the lease merges with the reversions and ends.

### **Frustration**

The lease ends if uncontrolled external events make it impossible for obligations to be performed (landslides, etc.) or if performance would be substantially different from what was agreed on, see: *National Carriers v Panalpina*.

*Wong v Chinachem Investments*

# Leasehold Covenants

## *Covenants by the Landlord (p387)*

### Express covenants

These can be modified later at premium (cost) to allow redevelopment.

### Implied Covenants

The landlord must **not interfere** with the tenant's use of the land.

Covenants for quiet enjoyment are usually implied.

There are many types of interference, see:

*Union Assurance Society:* changing the name of building held to be interference because it altered the correspondence address, interfering with the use of the premises as a business.

A regular excessive noise can be interference but this does not cover things done before the grant of tenancy, see:

*Southwark v Mills:* lack of soundproofing allowed ordinary, day-to-day noise of neighbouring flats to interfere with the complainant's reasonable enjoyment of the land. There is no implied covenant for the landlord to improve the property.

Although covenants as to fitness and repair are not implied at common law, if the premises are **furnished** and let for **residential** purposes, then it is implied that the premises are **fit for human habitation** at the time of letting, see:

*Smith v Marrable.*

The court is also prepared to imply terms to give effect to the business efficacy of the leasehold agreement. Thus there may be an implied duty to keep common areas and facilities in good condition, see *Liverpool CC v Irwin.*

Government land should be fit for purposes stated in the government lease, see:

*Hang Tak v AG.*

### **Not to Derogate From the Grant**

Landlord must not do anything that **frustrates** the purpose for which tenancy was granted. However, merely making it more expensive or less profitable to carry out the intended use is insufficient, see:

*Lam v AG:* public toilet build by Crown (landlord) adjacent plaintiff's land merely reduced capacity of the land. No derogation.

## ***Covenants by the Tenant***

### **Express Covenants**

These tend to be extensive and can include agreements not to change fixtures on the premises, not to use the premises for immoral purposes, etc.

A sub-tenancy granted in breach of an express covenant to the contrary is still valid and the landlord may not sue until re-entry.

'Permit' means EITHER:

To allow an act which without the allowance cannot be done legally.

To abstain from taking reasonable (within a man's power) steps to prevent an act.

### **Implied Covenants**

Covenant to pay rent.

Covenant to pay rates and taxes.

Covenant not to commit **waste**, i.e. modification to the property. This is a tortious liability but has been cited in cases anyway, see: *Vane v Barnard*.

**Equitable waste** is wanton destruction of the property.

**Voluntary waste** (adversely) alters the nature of the property.

**Ameliorating waste** is a positive improvement to the property.

The difference between voluntary and ameliorating waste becomes apparent when dealing with damages.

Liability to permissive waste (failure to repair) is applicable to fixed-term tenants only.

### ***Usual Covenants***

Implied covenants (in **equitable leases**) include:

Tenant will pay rent

Tenant will pay rates and taxes.

Tenant will keep premises in repair.

If landlord has covenanted to repair, he is to be allowed reasonable access to repair.

Landlord shall allow tenant quiet enjoyment.

Landlord shall not derogate from his grant.

Landlord has implied right to re-enter if tenant fails to pay rent, see:

*Sun Hing v Brilliant Investment*.

## **Enforcement of Covenants - Legal Leases**

### **Privity of Contract and Estate**

Privity of contract remains only with the original tenant and landlord.

Privity of estate granted by the contract will change when the property is assigned.

There is a privity of contract and estate between subtenants and their landowner (T2) but none between them and the principal landowner (L).

### **Privity of Contract and Estate between Original Parties**

#### ***Tenant's Continuing Liability***

Common Law (**if statute does not apply**) and covenants signed before **3<sup>rd</sup> June 1998**: Under contract, the tenant remains liable for things done/not done by assignees after he has assigned his tenancy, see: *Friends' Provident Life v BRB*.

Normally however, the tenant ceases to be liable for future breach after he has assigned his tenancy under s41(8), CPO.

S41(8): subject to s41(3) and s41(2): a covenant shall not bind a person after he has ceased to have any interest in the land affected by the covenant except in respect of a breach committed before cessation.

S41(2), limitations – applying only if the covenant...

- (i) **Relates to the land** of the covenantor.
- (ii) The **burden of which is intended *or* expressed to run** with the land.  
Burden deemed intended to run. Covenant deemed, under s40, to be made by the covenantor on behalf of himself, his successors in title and persons deriving title through him. i.e.
- (iii) Is **intended *and* expressed to benefit the land of the covenantee** and his successors in title or persons deriving title to that land under or through him.  
Benefit deemed intended to run. Covenant deemed, under s39(1), to be made with the covenantee and his successors in title and persons deriving title through him.  
Expression may use the standard form as per above but a liberal approach is taken.

#### ***Landlord's Continuing Liability***

Common Law and covenants signed before 3<sup>rd</sup> June 1998: Under contract, the landlord remains liable for things done/not done by assignees after he has assigned the reversion, see: *Hui Sai Hoi v Chan*.

Normally however, the landlord ceases to be liable for his assignee's breach after he has assigned his reversion under s41(8), CPO above.

### ***Right to Sue after Assignment***

Landlords cannot enforce covenants after assigning reversion, see: *Re King*.

Because under s31(1): the benefit of every covenant, provision and condition (of re-entry) shall go with the reversionary estate in the land.

Tenants can sue for the landlord's breach of covenant done during the tenant's occupancy after assignment of their tenancies, see:

*City and Metropolitan Properties v Greycroft*:

Despite having the burden of the landlord running to his assignees, s32(1) states that these obligations may be enforced by the person in whom the term is from time to time vested by assignment.

## **Privity of Estate between Non-Original Parties**

### ***Covenants by Tenant, Benefiting Landlord:***

#### **Passing of benefit to landlord's assignees**

Benefit of lessee's covenants to run with reversion:

S31(1), CPO: Covenant must have reference to the subject matter of the lease.  
The lease must not be personal and should affect the mode of use.

#### **Passing of burden to tenant's assignees**

Burden passes under s41(3) provided that s41(2) are satisfied.

S41(3): A covenant shall run with the land and be enforceable against the occupiers of the land (tenants), the covenantor, his successors in title and persons deriving title under or through him...  
by the covenantee, his successors in title and persons deriving his title.

*Spencer's case*: Legal lease;  
Covenant must touch and concern the land;  
Privity of estate must exist.

### ***Covenants by Landlord, Benefiting Tenant:***

#### **Passing of benefit to tenant's assignees**

Benefit passes under s41(3) provided that s41(2) are satisfied.

*Spencer's case*: Legal lease;  
Covenant must touch and concern the land;  
Privity of estate must exist.

#### **Passing of burden to landlord's assignees**

Burden of lessor's/landlord's covenants to run with reversion:

S32(1), CPO: Covenant must have reference to the subject matter of the lease.  
The lease must not be personal and should affect the mode of use.

## **Position of Subtenants**

There is no privity of estate. Burden of *negative/passive* covenants [s41(5)] and benefit of [all] covenants pass to subtenants/occupiers under s41(3) provided that s41(2) are satisfied.

## **Enforcement of Covenants - Equitable Leases**

Now, *Spencer's Case* and s41(3) do not apply.

### **Between Original Parties**

All parties remain liable for breach of covenants by subsequent assignees despite assignment of property interests.

This is because s41(8) applies to covenants as provisions made under deed only.

### **Between Non-Original Parties**

#### ***Covenants by Tenant, Benefiting Landlord***

##### **Passing of benefit to landlord's assignees**

Benefit of covenant passes to landlord's assignee under s31(1), CPO.

This is because s31 deals with conditions and provisions as in equitable leases.

##### **Passing of burden to tenant's assignees**

Tenant's [positive] burdens do not pass to his assignees. *Spencer's case* is not applicable as it is a common law rule.

However under *Tulk v Moxhay*, tenant's negative burdens that touch and concern the land run with the land to his assignees.

#### ***Covenants by Landlord, Benefiting Tenant***

##### **Passing of benefit to tenant's assignees**

Benefit of covenant passes to tenant's assignee under express assignment.

*Spencer's case* and s41(3) do not apply.

##### **Passing of burden to landlord's assignees**

Burden of covenant passes to landlord's assignee under s32(1).

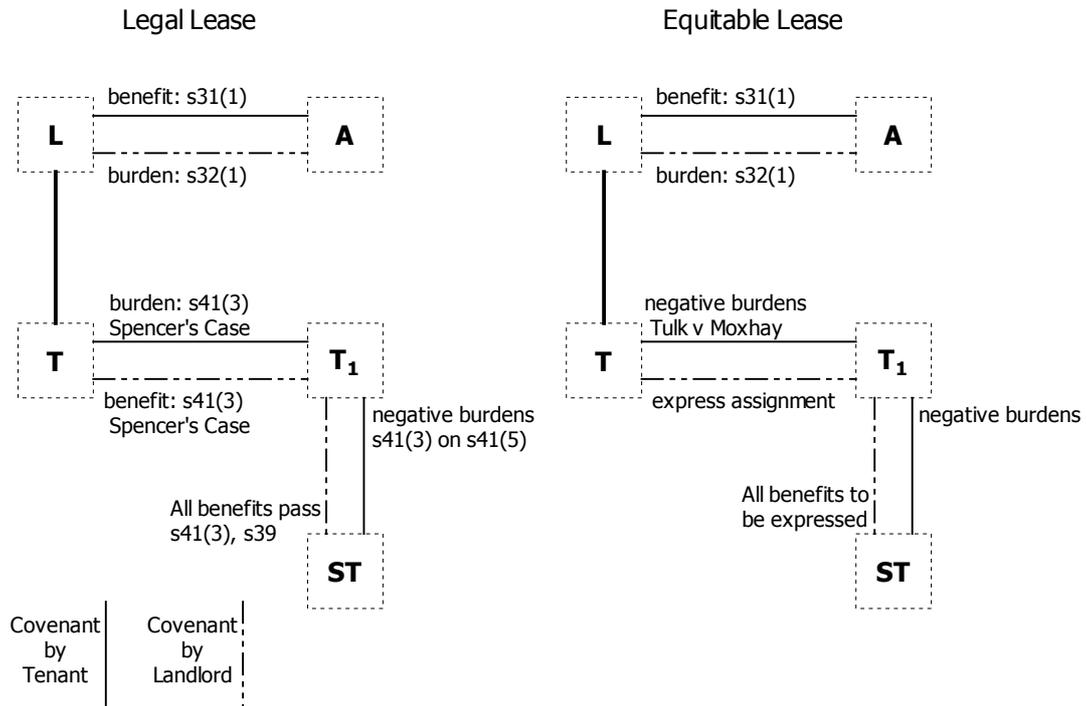
## **The Subtenants**

Only tenant's negative burdens pass to his subtenants.

*Spencer's case* and s41(3) do not apply.

Tenant's benefits pass to subtenant through express assignment only.

## A Comparison of Rights and Obligations



## **Remedies for Breach of Covenants (p443)**

Since a lease is a contract, with privity of contract, parties may sue for all standard contractual remedies, e.g. damages, specific performance, injunctions...

### **Landlord Remedies**

A landlord may not use force to enter – it is a breach of the ‘quiet enjoyment’ covenant and a criminal offence under the Public Order Ordinance CAP 245, s23. The tenant may also sue for trespass and nuisance.

#### **Distress/Right to Distrain (rent only)**

A codified common law remedy under part III of the Landlord and Tenant Consolidation Ordinance. It can only be used for arrears of rent and under the aforementioned ordinance, see: *Fuleeko v Spiral Tubes International*.

Remedy against **failure to pay rent** – landlord may enter and seize tenant’s property.

Apply to district court for warrant.

Implementation by bailiff but only within 9am and 7pm (s86) unless special leave is granted. Bailiff cannot break into property without special leave granted by court [s91(2)].

Inside the premises, doors can be broken into [s91(1)] and property not in actual use or in hands of tenant may be seized for up to 12 months (s79).

Notice is then given of items seized, amount of rent due and date when property is to be sold. If rent is paid within 5 days, the seized items are returned, otherwise, they will be sold to cover costs of distress and rent. Surplus is returned to the tenant.

#### **Forfeiture**

Re-entry, taking away a property by **terminating the lease** upon breach of covenant.

Forfeiture of **legal leases** require a break/**forfeiture clause**.

But there is an **implied right in equitable leases**.

#### **Waiver**

The breach must not have been **condoned** by the landlord.

Did the act unequivocally recognise the prohibited act?

Did the landlord have knowledge of the breach at the time of the waiver?

Was the act of condonation communicated to the tenant?

See: *Cornillie v Saba*.

Demand for and acceptance of rent can constitute waivers for covenants not being payment unless there is an express agreement to the contrary, see:

*Prudential Enterprises v PH Shek*.

If the breach is for a non-payment of **rent**, asking for and acceptance of rent is not waiver, unless the demand for rent was dispensed with by express agreement or statute.

See s69(2), District Court Ordinance and High Court Ordinance.

Once demand is made for the payment of rent and is not met, the landlord may re-enter. If the tenant refuses to give up possession, the landlord can take **forfeiture proceedings** and the tenant can apply for **relief**.

If the breach is for **other things**, the landlord must **serve notice** stating the breach and (if remediable,) a clause asking to remedy the situation. Any wanted compensation should be communicated as well. A void notice invalidates future forfeiture.

A breach is remediable if the harm suffered can be stopped with the tenant's compliance with the remedy and compensation notice within a reasonable time, see: *Expert Clothing Service v Hillgate House*.

Breaches of positive covenants are usually remediable because they can be cured by late performance.

Breaches of **negative covenants** are considered remediable if the harm is removed with cessation of breach. Harm to **reputation** is not recoverable, see: *Rugby School v Tannahill*.

Once the notice is served, the landlord may re-enter. If the tenant refuses to give up possession, the landlord can take **forfeiture proceedings** and the tenant can apply for **relief**.

---^--- parts above may be examined on the 20<sup>th</sup> of December 2004 ---^---

## Acquiring Land (no dispute)

### **Procedure**

There may be several agreements:

- Provisional agreement

- Formal Agreement

- Assignment (a deed)

Only the assignment is required for a transfer of legal title.

The prior agreements are used to fix the price and bind the parties to the sale under various terms. A breach of these gives rise to specific performance and/or damages.

### **Writing | Signing**

Under **s3(1)** CPO [and subject to s6(2)], the agreements must be **written and signed**. If they are not, the agreements are unenforceable though they may remain valid. Normally, a breach of the agreement by the purchaser would entitle the vendor to keep the deposit as compensation.

The written agreement requires:

- The property name;

- The price (essential term);

- Completion date (*Kwan v Yaacov Ozer*);

Any other terms; and

The signature of the one to be charged/sued.

The note or memo may be a **combination** of documents if such combination contains **sufficient information** and is **signed by the defendant**, see: *Timmins v Moreland*.

The condition for the test of the joining of documents is that the **later document must expressly refer to the earlier document**. It cannot just refer to the oral contract, rather than the document, if it is to be enforceable for the sale of land.

No special form of authorisation is required to allow another person to sign in your place, see: *Re Estate of Lau Wai Chan*.

For deeds, however, an instrument creating a power of attorney must be signed and sealed by the donor of the power.

### **Binding Effect**

The substance of the agreement will be taken into account. The intention of the parties and background information is important. Labels are inconclusive.

*Daiman Development v Mathew Lui*

*Grand Subject v Mable Road:*

Fax from vendor headed: "subject to contract" sent with 'offer letter'. Letter stated: "no binding obligation to sell". Background information: government consent required before sale could be effected. HELD: no binding obligation to sell because intent clearly expressed plus background information.

*Jonlin v Regal Success:*

Vendor had to prove good title to the satisfaction of the purchaser's solicitors. HELD: conditional contract; purchaser obliged to complete contract only when the requisite approval was made.

### **UK Miscellaneous**

Law of property (Miscellaneous Provisions) Act 1989

A contract for the sale of land can only be made in writing, only by incorporating all agreed terms in a single document.

This contrasts with Hong Kong law because a non-complying contract is invalid. There is more reliance on proprietary estoppel in the UK.

## Acquiring Land (dispute scenarios)

Written legal/equitable leases are registrable. Unregistrable documents must rely on common law.

An equitable remedy [specific performance to get a legal interest] may be granted if there is no discretionary bar, e.g. prejudicing of innocent third parties, dirty hands and delay for no good reason. Such contracts are *specifically enforceable contracts*.

What does take effect on possession mean?

Signing of the contract

Moving in

Agreement (unspecified move-in date)  move in 'immediately' after

If specified and a gap exists then it is not taking effect on possession.

Legal leases for > 3 years must be made by deed. A deed can create an equitable interest as well, e.g. s50, 51 CPO explicitly state equitable mortgage by deed.

Anything less than a deed but constituting an enforceable contract will create an equitable interest.

### No Dispute scenario:

#### **Equitable Leases**

*Walsh v Lonsdale*

Establishes the rights of the parties – equity treats as done what ought to be done.  
A no-dispute case.

### **Part Performance**

S3(2) states that the requirement of writing does not affect the law on part performance so despite an unwritten contract, part performance can be used to prove it and persuade courts to grant specific performance.

Something done **on reliance** of the contract, may not necessarily be actual performance of the contractual terms.

Part performance is used to prove existence of the contract.

*Maddison v Alderson* (not good authority)

Part performance: *unequivocally* referable to some agreement as that alleged.

Alternative explanations cannot be accepted. The standard is too high.

*Wakeham v Mackenzie*

CF *Maddison* where widow was obliged to serve in the first place. She gave up her property and moved into the widow's house claiming that she did so because widow left her the property. Court more lenient with different test: were her acts *consistent* with the contract alleged?

*Steadman v Steadman* [HoL]

On the **balance of probabilities**, is the act consistent with the contract alleged?  
Payment of required monies, borrowing of required monies and instruction of solicitor to prepare a deed.

Take the **whole circumstances** to see whether the acts were done in reliance on a contract – proved if more probable than not.

Acts done merely *in preparation* for contracts are insufficient but take care of *combinations* of acts.

Rationale for doctrine of part performance.

One party cannot stand by and knowingly let the other party incur expense on the faith of the agreement being valid.

Equitable principle to prevent fraud – any contract.

or

Rule of evidence to prove what happened – “contract relating to particular property”.



- **Read other 2 cases.**

Oral contract + part performance is unregistrable.

## **Summary**

If there is an enforceable contract for sale of land either:

in compliance with s3(1) CPO; or  
supported by sufficient acts of past performance,

“Equity looks on that as done which ought to be done” and the seller is treated as a trustee for the purchaser of the estate sold, see: *Lysaght v Edwards*.

□

If one of the parties refuses to carry on with the transaction, specific performance may be obtained provided there is no discretionary bar, see: *Coatsworth v Johnson* and *Warmington v Miller*.

□

Specific performance compels the wrongful party to perform the contract e.g. execute a deed to transfer legal title.

### ***Sample Fact Pattern***

There is an unwritten or poorly written agreement that may not comply with s3(1).

Argue for s3(1) using all the information inside and expressing concern for any missing information. If the document is fragmented into parts, use the joiner argument as well – *Timmins v Moreland*.

There may be more facts that point to part performance.

Argue for s3(2) stating that doctrine of past performance is not affected by s3(1) and use *Wakeham v Mackenzie* and *Steadman v Steadman* to illustrate the concepts of consistent acts and the balance of probabilities.

# Co-ownership and Multi-storey Buildings

## Introductory

Undivided shares are undivided because they form part of the property.

Right to exclusive use and enjoyment necessary in a deed of Mutual Covenant since unity of possession states that co-owners own all of the property and it would be chaotic without this express limitation. The DoMC is a contract between the developer and the first purchaser signed for and on behalf of all subsequent purchasers.

In *Chiu v Merrilong Dyeing Works*, it was held that one cannot have an easement over a common area since there must be different owners in creating an easement and as co-owner of a common area, that condition has failed.

### *JLW Management Services v Charter Dragon Development*

G assigned 9 units of the floor to D and the remaining 9 units to others including P. He gave D an 'irrevocable licence to exclusive use of part of the common area'. Subsequently, the owners of the floor all signed a DoMC adhering to full use of the common area. D had included it's allotted part of the common area in his office so P sued for restoration.

D said it had a licence to exclusive use. P relied on the DoMC.

HELD: binding effect on parties to the contract only.

Other owners had no notice of the license. Generally, notice is used for establishing a proprietary interest only so to bind a 3<sup>rd</sup> party, it must be proved that the third party had its conscience affected (e.g. where P got a lower price knowing of the license). See *Asburn Austalt v Arnold*.

Other owners were led to believe they had full use of the common area by D's signing of the DoMC.

## Essentials

### Types of Co-ownership

	Survivorship	Unities of... Possession	Interest	Title	Time
Joint Tenancy	✓	✓	✓	✓	✓
Tenancy in Common		✓			

### Survivorship

In survivorship, when a joint tenant dies, his share of the property is transferred by default to the other co-owner(s). Where they die at once, the elder is deemed to have died first – s11 CPO.

### **Unity of Possession**

All co-owners are entitled to use every part of co-owned property, unless there are express statements to the contrary e.g. DoMC. Therefore:

- Co-owners cannot sue each other in trespass unless he has been ousted.
- No co-owner may collect rent from each other. Monies collected from tenants may not be recovered by a co-owner from another.
- Co-owners not occupying co-owned property have forsaken their rights and thus cannot claim rent from co-owners in occupation.
- Repairs done by co-owners on co-owned property cannot be reimbursed by other co-owners

### **Joint Tenancies:**

#### **Unity of Interest**

Joint tenants hold the whole interest and must therefore act jointly in dealing with land. Rents and profits must be shared equally.

Where periodic tenancies are to be terminated, however, just one party needs to voice out, see: *Hammersmith v Monk*.

#### **Unity of Title**

Joint tenants must derive title from a single document.

#### **Unity of Time**

Joint tenants must derive title at the same time.

### **Determining Types of Co-ownership**

Legal Requirements – check the 4 unities.

Express Intention – check for phrases such as “as joint tenants” or “in equal parts”. See: *Ho Nga Sheung v Ma*. Contradictory expressions are solved in *Slingsby’s Case* where the first word prevails in a deed but last in a will.

Presumptions at LAW Before November 1984 – presumed joint tenancy

After November 1984 – presumed tenancy in common s9 CPO.

Presumptions in EQUITY to be tenancies in common:

*Unequal contributions (e.g. payment).*

*Money advanced on mortgage.*

*Business or partnership assets.*

### **Co-ownership in Equity**

Formalities: s5 CPO: equitable interests in land to be created and disposed of in writing signed by stated person, authorised agent, by will or by operation law.

A declaration of trust shall be in writing signed by a person who is able to declare such a trust or by his will.

Trusts implied by law are not affected by statute.

Trusts mean that legal title is vested in the trustee for the benefit of equitable owners who should derive benefit. The beneficiary may enforce his rights against all people except bona-fide purchasers of the legal title for consideration without actual/constructive notice.

## Resulting Trusts

See: *Re Superyield Holdings*:

*R and J contributed to the purchase of a flat but only J signed the relevant documents with the vendor.*

R cannot be the legal owner because there was neither unity of title nor unity of time. In the case of **unequal contributions**, R could be the equitable owner as tenant in common.

When real property is conveyed to a purchaser jointly with others, or to one or more persons other than the purchaser, a resulting trust will be presumed in favour of the person who is proved to have paid the purchase money in the character of purchaser as opposed to that of donor or lender.

*How do we quantify the share?*

The share would be split in accordance with the contributions paid – *Midland Bank v Cooke*.

*What if they were husband and wife?*

Presumption of **advancement**...

There is a **rebuttable** presumption that the husband gave the flat to the wife as a gift (not vice versa). Relations of loco-parentis (elder parent) also give rise to this assumption.

## Examples

G signs deed                      Legal owner

B pays for property      Equitable owner

G signs deed and pays 40%      Proportionate equitable ownership

B pays other 60%                      Proportionate equitable ownership

If married, possible but weak assumption of advancement. W has to be a legal owner and H gets no property rights. This assumption is easily rebuttable by any contrary intention, e.g. where H is poor or expressed co-contribution.

## What is 'Payment'?

*Springette v Defoe*:

H and W buy a house worth £24,000 as joint tenants. They paid £14,455 only because W was a local tenant for 11 years – a 41% discount. They were jointly responsible for a £12,000 mortgage.

HELD: discount amounted to payment + half mortgage + no intention to share  
→ resulting trust.

## Constructive Trusts

Where there is an express common intention to share the title/property (mere term of habitation is inadequate), the equitable ownership is split into that 'share'. Contributions are irrelevant and intent can be express or inferred. The claimant must have relied on that intention to her detriment.

*Burns v Burns* [old]:

The house was purchased in the name of B and he paid the purchase price. G only brought up their two children, performed domestic duties and recently contributed from her own earnings towards household expenses. She also bought various fittings, and a washing machine, and redecorated the interior of the house. The plaintiff left the defendant (they were unmarried) and claimed a beneficial interest in the house...

HELD: In the **absence of common intent and financial contributions** which could be related to the acquisition of the property, she was **not entitled** to a beneficial interest in the house.

*Grant v Edwards*:

M and brother signed a deed with the excuse given to W that it was good for her matrimonial proceedings. W contributed towards general household expenses, provided housekeeping and brought up the children.

HELD: H's **statement** that W's name would have appeared on the title except that it could cause prejudice in the matrimonial proceedings was **evidence of a common intention** that W should have beneficial interest (a half share) in the property. The statement is the crucial element as well as that the court saw detrimental reliance in the housework.

NOTES:

In cases like *Burns v Burns* by contrast, where there is no independent evidence of any agreement, evidence of intention can only be inferred from the contributions themselves. This requires a substantial contribution referable to the acquisition of the property, whereas in *Grant v Edwards*, all Mrs Grant had to show was that she had acted in a manner which was explicable only on the basis that she was to have an interest in the house. This is a **far less stringent requirement**. Further, the value of the beneficial interest was determined by the common intention (as evidenced by the defendant's statement), and not by the value of Linda Grant's contributions. In cases like *Burns v Burns*, by contrast, where there is **no express evidence** of a common intention, the **value of the contributions will also determine** the size of the beneficial interest (if any).

*Lloyd's Bank v Rosset*:

H and W decided to purchase a semi-derelict farmhouse for £57,000. The purchase money was to come out of a family trust fund, the trustees of which

insisted that the house be purchased in the H's sole name. The house required renovation, and it was intended that this should be a 'joint venture'. During this period, W spent a lot of time at the house, coordinating the renovations.

H was unable to fund the purchase and repairs entirely from the trust fund, and executed a legal charge on the property in Lloyd's Bank's favour. H defaulted on the repayments, and the bank sought possession. W claimed a beneficial interest in the property, binding the bank by virtue of her actual occupation as an overriding interest under the Land Registration Act 1925, s70(1)(g).

HELD: There was **no evidence of any agreement** between the parties to share the beneficial interest (first category), and W's contributions were regarded as de-minimis (second category).

Fundamental distinction by Lord Bridge:

"The fundamental question is whether there has **at any time** prior to acquisition, or exceptionally at some later date, been any agreement or understanding reached between them that the property is to be **shared beneficially**. This can only be based on **express discussions** between the partners, however imperfectly remembered and however imprecise their terms may have been. Once a finding to this effect is made it will only be necessary for the claimant against the legal owner to show that he or she has **acted to her detriment or significantly altered her position** in reliance on the agreement in order to give rise to a constructive trust or proprietary estoppel."

"Where there is no evidence of an agreement or arrangement to share, the court must rely entirely on the **conduct** of the parties both as the basis from which to infer a common intention to share the property beneficially and to a constructive trust. **Direct contributions** to the purchase price by the partner who is not the legal owner, whether initially or by payment of mortgage instalments, will justify the inference necessary to the creation of a constructive trust. And it is **extremely doubtful whether anything less will do.**"

## **Conflicts between Resulting and Constructive Trusts**

Sometimes there are cases where both things can occur.

*Midland Bank v Cooke* [1995 CA]:

Matrimonial home registered in H's name alone. The only financial contribution W made was half a wedding present of £1,100 from H's parents. She **did not make any contributions** to the mortgage but discharged other household outgoings and devoted much time and energy to the improvement of the house. The bank brought possession proceedings, claiming outstanding amounts. W claimed one-half beneficial interest in the property, overriding any interests of the bank.

It was common ground that at the time of purchase there had been **no discussion** between the parties as to how the property should be owned beneficially.

In *Springette v Defoe* (1992), it was held that the **absence of express discussions precluded any claim** to apportion shares otherwise than in proportion to contributions. This case took the view that *Springette* was not applicable in all instances, and that the lack of discussions or express agreement did not preclude the court from inferring an agreement on general equitable principles.

HELD [FI then CA]: First Instance held that her financial contributions merited a 6.47% equitable stake. CA held that the beneficial interests in the property should be shared equally on the basis of an **inferred agreement** despite the common ground that there had been no express discussions.

(is this judgement 'wrong?')

*Ip Man Shan v Ching Hing*.

HELD: **Whenever there is express common intent, a common trust will occur.** This is because a resulting trust is a mere presumption. RTs cannot apply where there is express common intent and detrimental reliance. Also, the quote "... extremely doubtful whether anything less will do" in *Rosset* was held to be tentative and could include other non-direct contributions.

## **Severance: Joint Tenancy → Tenancy in Common**

### **S8 CPO Severance of Joint Tenancy**

At law (binding on all except bona-fide purchasers):

By **notice** served by joint tenant to other joint tenants; or

By **instrument** (s2).

In equity:

By **notice** served by joint tenant to other joint tenants; or

By **any other method** that is effective in equity.

### **Equity**

*Williams v Hensman*:

Any act (to sell or dispose) operating on a joint tenant's own share. This breaks down one of the 4 unities required for a joint tenancy.

If S and Z are joint tenants, and S sells to B, Z and B hold as tenants in common.

An important distinction, is where A, B and C all hold a property as joint tenants, and where C sells his interest to Z, Z holds as tenant in common, his share passing on to his heirs. A and B continue as joint tenants between themselves;

Mutual agreement: "A mere sale or lease by all joint tenants does not result in a severance, because this arrangement is consistent with the continuation of joint ownership in the proceeds of sale or in the newly-acquired property. It follows

that an agreement to sell at some future time will not transform the nature of the co-ownership”;

Mutual course of dealing to suggest that the interests of *all* were mutually treated as constituting a tenancy in common. It was held in *Morgan v Davis* that the **mere fact of negotiation may not be adequate** and would depend on the facts.

## Proprietary Estoppel

This equitable doctrine can be used to bring an action: sword .vs. shield. *Promissory* estoppel merely removes requirement for consideration. *Proprietary* estoppel can be used to get various remedies. Generally need to prove an **assurance**, a **reliance** and a **detriment**. The courts will endeavour to make good that belief in that assurance. *Bestkey v Incorp Owners of Fine Mansion*.

### Framework

Prove assurance and detriment – assume reliance and get remedies.

*Ramsden v Dyson* [1866] DM11:

Tenant at will built on the land believing that he could.

HELD: The landowner shall be estopped from his action where he **created/encouraged an expectation** and someone **relied** on this to his **detriment**. This would also apply where one failed to stop someone building on the land when he knew that he had no right to. **Silence** can amount to assurance.

*Willmott v Barber* [1880] DM12:

HELD: 5 ‘probanda’:

1. Mistake
2. Acting on faith of mistake
3. Legal owner must know of his own right  
Not ignorant of what has happened
4. Legal owner must know of mistake
5. Encouraged claimant in his acts either actively or passively.

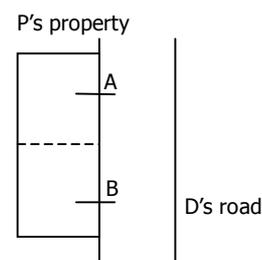
Is there any difference between this case and *Ramsden*?

Difficult to establish all 5.

Main focus is ‘mistaken belief’

*Crabb v Arun District Council*:

P’s house was next to D’s road. There was an access point A between the house and the road. P thought of dividing plot into 2 halves which would need another access point. D agreed. With that assurance, P divided the plot and sold it to someone without reserving any right of way over A. D reneged and blocked B leaving P’s land landlocked for 6 years. D demanded £3,000 for trade in easement.



HELD:

1. Is there any 'equity':

**Assurance** by D (no formal requirement)

Plaintiff acted on **reliance** to his own **detriment** (no reserving of right of way).

2. What is the **extent of that right** (boundaries of remedy)

The additional right of way *as agreed*.

3. Relief/**remedy** to satisfy that equity?

P should get the additional access point

D not playing fair and was 'heavy-handed' therefore not entitled to any money requested.

*\*Taylors Fashions v Liverpool Victoria Trustees [1981] DM14:*

Landlord/tenant on fixed term lease + irrevocable option (registrable but not registered ∴ unenforceable) to renew.

L → D and T → P on assignment – are they bound by the option to renew?

Is the new landlord acting unfairly? None of them knew about registration. They were all mistaken as to the validity/enforceability of the renewal option. No unconscionable conduct.

\*HELD: “**No preconceived formula** for PE as formulated by former cases. No universal yardstick – we should have a **broader approach** and we should look at individual circumstances for something **unconscionable**”. GENERALLY: assurance, detriment etc.

## ***Establishing 'Equity'***

### **Assurance**

*Re Basham.*

Stepdaughter and husband to get residue of estate if they do not move away.

Residue of estate: Estate remaining after people entitled to property under will have attained their shares.

She relied/**subordinating her wishes** (not moving out even though she was desperate) to her detriment.

HELD: **Assurance** as **vague** as this (future property) can constitute equity.

Detriment could be a sacrificing of an opportunity.

*Greasley v Cooke.*

D cohabited with son until he died. She also looked after a daughter until her death. She did this for no wages after master's death

Daughter claimed possession

ARGUED: **Detriment**: no wages after master's death  
**Encouraged** by family to believe that she could regard property as her home for the rest of her life.

Reliance ???

HELD: Once **assurance + detriment, reliance is presumed** and the onus is on the other party to rebut this. Proving someone did not rely on the assurance is difficult. {Only domestic or quasi-domestic?}

*Wayling v Jones*:

W was 21, J was 56 and owned a café and a hotel. They had cohabited for 16 years. W got pocket money for helping in business. J had made a will leaving the business to W. J then sold the hotel replacing it with a new one **assuring** W that the will would be altered. J failed to do so before he died.

W was made bankrupt on a leasing agreement on behalf of the new hotel. Was there reliance on the assurance to his detriment?

W claimed proceeds of new hotel's sale.

W said he would have stayed if there was no assurance BUT if there was assurance and it was broken, he would not have stayed.

HELD [FI]: no causation/reliance...

HELD [CA]: that is not the relevant question.

Promises → link → detrimental conduct.

~~Sole inducement~~. **Inducement is sufficient**.

Promises + conduct → **infer inducement** so burden of proof shifts to the other party to show the promise was not relied upon. [Quasi-domestic case].

CRITICISM: Too generous, there should be something positive done in reliance of an assurance to his detriment. Mere continuance should not suffice.

*Taylor v Dickens*:

Employee/employer relationship.

T worked for M as a gardener.

M told T that after her death, her house would belong to him. T then offered to work for nothing.

Before M died, she changed her will and left everything to another man. She did not tell T that the will had been changed since she believed that he would have left her.

HELD: Since there was no promise that will would not be revoked. The will could not amount to assurance and it was not unconscionable for M to change her mind.

CRITICISM: Differentiating between a promise to make a will and a promise not to revoke a will is artificial. Equity allows part compensation, e.g. a lien. Should testamentary promises be treated differently? A promise is an assurance and the equitable doctrine should be kept. The point of PE is that changing of

minds is irrelevant. Promises should be kept if it is unconscionable that they be broken.

*Gillett v Holt:*

G employed by H for 40 years. G married S and subordinated their wishes to those of H who made wills in favour of them.

H met W and changed his mind, firing G. H made a new will in favour of W.

HELD [FI]: ~~Promissory Estoppel~~. There was no irrevocable promise to leave the estate to G. Neither was there any detrimental reliance – Gillett received proper wages as an employee.

HELD [CA]: Judgement reversed. Promissory estoppel held. Testamentary differences are not irrelevant. There was indeed some detriment: that they had forgone opportunities to improve themselves for better careers and wealth management, that they had spent money on farm improvements. Monetary disadvantage not compulsory.

A balance is struck here – between the breadth of *Wayling* and the narrowness of *Taylor v Dickens*.

*AG v Humphreys Estate:*

All negotiations are subject to contract. Express provisions.

Government moved into the property before contract.

ARGUED: “We were sure we were going to get the property so we spent money to move in”.

HELD: Assurance? Not really as negotiations were subject to contract – there should be no **unrealistic expectations** on the part of the government. **Reliance on something not binding was unreasonable.**

**Presumption of reliance not appropriate in commercial cases.**

Assurance | Reliance | Detriment



Compare all equitable doctrines?

Part performance

Resulting trust

Constructive trust

Proprietary estoppel

## **Relief**

Many circumstances are taken into account in assessing relief so you may get less than what you initially wanted. Proprietary estoppel is an unpredictable doctrine. Thus it has both advantages and disadvantages.

In resulting and constructive trusts, you know that you will get some interest in land at the end of the day.

### **Remedial Examples**

Dismissal of action, e.g. eviction by landowner.

Monetary compensation.

Interest/title/licence in land – whatever interest was promised.

Extreme cases: ownership.

#### *Inwards v Baker.*

“You can stay in the house for as long as you like”.

Father died and his personal representatives tried to evict the son.

HELD: Son allowed to stay in house for as long as he desires. As it is for an indefinite time, it is a license.

#### *Dodsworth v Dodsworth.*

Sister (70 yrs) invited brother and wife to live with her. “You can stay here for as long as you wish”. Brother spent £700 on improving the property.

Sister changed her mind and tried to evict the couple.

HELD [FI]: Couple entitled to get back £700. But since the sister could not pay at once, the couple got a lien (temporary right to stay) until it was paid.

Relationship had deteriorated;

Small amount involved;

Sister wished to sell the house for savings (main point).

Sister died and some points mentioned became irrelevant.

HELD [CA]: Temporary right to stay only.

Settled land act applied to render couple as joint tenants with right to sell property. That right to sell was in gross addition to the sister’s promise and was unjustifiable.

Sister had debts to pay. Her personal reps needed \$ to discharge their duty.

Is it right that unknown circumstances can affect the rights of the claimant?

#### *Pascoe v Turner.*

Extreme case – legal interest granted.

Unmarried couple. Man says, “the house is yours”. Woman spent ¼ of her savings on improvements. She also stopped working.

Legal title or license?

HELD: Remedy must assure mistress with enjoyment without interference.

Mistress	Man
mid-50s	Rich
less chance of remarrying	
Not working	Ruthless
¼ savings spent	

### Discretionary bars

Clean hands, unreasonable delay, prejudice to innocent third party... etc.

If landowner is **government** or statutory body, then estoppel might not be able to be raised if the case is an exercise of a statutory discretion or performance of a **statutory duty**. Balancing act between public and personal interests.

*Western Fish Products v Penwith DC:*

*Tong Tim Nui v HK Housing Authority:*

Statutory Resettlement of a residential area.

Announcement 1:

“Some structures may have to be moved to allow for improvements”.

Announcement 2:

“Most residents will be allowed to reside in existing buildings indefinitely”.

Indefinitely here obviously means an uncertain duration. This was misinterpreted by the residents contrary to common sense.

There was also an occupation permit clause: “Permit-holder understands that his permit may be terminated any time by notice”.

HELD: No mistaken belief.

Even if there was a mistaken belief, it was not induced by the government.

OBITER: No proprietary estoppel may be established because the government had a statutory duty to perform.

## Comparing Proprietary Estoppel with Other Equities

### VS Constructive Trusts

Reliance and detriment overlap but constructive trusts needs a mutual understanding whereas PE just needs a unilateral communication for common intent and assurance. Also, financial detriment is unnecessary – mere detriment is sufficient. It is thus usually easier to establish proprietary estoppel.

## **VS Part Performance**

Part performance is totally different from all other equitable doctrines which are capable of giving an interest in land by virtue of themselves as it only gives an enforceable contract.

## **Adverse Possession (A Common Law Doctrine)**

Rationale is to punish people who waste their title of the land. Land will be taken away when he abandons it (discontinued possession) or when he fails to get it back from a squatter who was dispossessing him (adverse possession)

### ***Limitation Ordinance***

- S8: Person may an action to recover land when he either has been dispossessed or has discontinued his possession.
- S13: An action may arise only when a squatter has taken exclusive possession of the property. Adverse possession.
- S13(2): When there is a gap of time where one squatter moves out and another moves, in, the limitation period may aggregate if say some crops left by the first squatter continued to grow on the land.
- S7(2): The limitation period prior to 1<sup>st</sup> July, 1991 was 20 years.  
After 1991, it is now 12 years.
- S17: After that period in s7 has passed, the title of the actual owner is extinguished and no action may arise.

### **Scenario 1**

In 1970, the owner discontinued his possession.

In 1972, a squatter came to occupy the land. His possession must amount to adverse possession (exclusive and adverse, i.e. without owner's consent) – s13.

S7(2) if S has been in possession for at least 20 years,

O's title is 'extinguished' as against S only – s17.

S has a better title than O but O has a better title than anyone else does, including his landlord.

### **Scenario 2**

Owner is not living on his property. S took possession in 1992. O has not really abandoned his land.

S8: Therefore the landowner is being dispossessed from 1992 onwards.

If S is in exclusive possession, O cannot concurrently be in exclusive possession.

S7(2): 1991 amendment: 1<sup>st</sup> July limitation reduced to 12 years.

S17: O's title thus ineffective against S in 2004.

S7(1) government has 60 years to reclaim land during dispossession.

S8: present interests.

S9: future interests. E.g. reversion.

S12: certain tenancies.

*Treloar v Nute*: DM(9)

Adverse possession: discontinuance + S's exclusive possession or dispossession/ouster.

Problem was the use of the term: 'ouster' as it inferred the use of force.

*JA Pye (Oxford) v Graham*:

'Ouster' ≠ force.

Effect should be given to clear word's of statute.

Ouster would be inappropriate. S can be mistaken. Force should not be used.

### ***Adverse possession or proprietary estoppel?***

Depends on facts – which is easier to establish.

AP does not need knowledge by the owner.

*Powell v McFarlane [1979]*:

Land was used for growing trees.

Squatter (seeking declaration for adverse possession) grazed his cow, cut hay and felled trees on the property for profit.

HELD: Non-positive use of the land means no adverse possession. Mere extraction of resources inadequate.

He had no physical control (factual/exclusive possession) over the land – no fences, walls, etc.

Presumed no-intention since the squatter was only 14 years old.

DEFINED: Discontinuance is where the person discontinues possession and a squatter takes it. Limitation period runs from that point in time.

*Buckinghamshire CC v Moran [2000]*:

Plaintiff wanted to use land for road diversion purposes,

However, for more than 12 years, nothing was done.

The squatter on the adjoining piece of land moved in and put his lock on the gate on one side, the other side was controlled by him and the other two sides were fenced.

HELD: Irrelevant that the squatter knew of the plaintiff's intended use of the land. The use of a lock is good evidence of possession.

Intention to possess is sufficient. Intent to own is not necessary.

*Sze To Chun Keung v Kung* [PC]:

Crown in adverse possession through its licensee. That can be a tenant, etc.  
Where occupation on your behalf.

*Wong Tak Yue* [CFA]:

HELD: Willingness to pay rent amounts to no intent to possess. Followed *Sec for Environment*.

CRITICISM: This is inconsistent with *JA Pye (Oxford) v Graham*. They might want to possess but not to own...

*R v Sec of State for Environment* [PC]:

Did not follow *Ocean Estates*. Therefore wrongly decided.

*JA Pye (Oxford) v Graham* [HoL]:

**Willingness to pay rent does not vitiate intent** to possess.

S22 :: Where the owner is not **legally capable** – action may be brought at any time before the expiration of **6 years** from the date when he ceased to be under a disability or died, whichever first regardless of limitation expiry.

Normally, if the right accrued in 1980, the limitation period would expire in 20 years, 2000 but if he recovered, he has until 2006 to recover.

S23 :: If the squatter **acknowledges the owner's title**, everything will start afresh.

S24 :: Acknowledgement is to be made in writing with signature of squatter to person whose title is being acknowledged.

“I know you are the owner of the land, **Signature**”.

S17 :: Qualified extinguishment.

*Fairweather*:

Lease situation: title extinguished against squatter but remains good against freeholders.

Crown granted lease to lessee, squatter occupies lessee's land adversely.

Effect: Squatter has better title than lessee.

Lessee has better title than the Crown/landlord.

**Squatter > Lessee > Landlord** | but they are separate and distinct titles.

After the lease term expires, the land goes back to the landowner/crown and then another right of action accrues. Timer resets.

Theoretically, the land can be sold by the squatter.

*Chan Chu Hang*:

Statutory declaration – oath. Prima Facie evidence easily rebuttable.

S9 ::

S12 :: leasehold interests

Lease in writing + rent > \$20, rent received wrongfully by S. landlord's right of action accrued arr date when rent was first received by S.

*Tang Tak Hong v Sze To Chun Keung.*

CAP 152:

Renewal of crown leases in 1989 (75 + 24 years)

In 1973, all such leases are deemed to be renewed for 24 years.

Some people tried to use this renewal to reset the squatter timer.

Does renewal in 1973 give new title? 20 year limitation period would not expire yet.

REJECTED by *Chung Ping Kwan v Lam Island* [PC]

Administrative convenience → ~~new title~~.

CAP 150

All crown leases extended until 30 June 2047.

Op-out accepted under s5(1).

Is there a new title? HELD: ~~new title~~ – *Chan Tin Shi*.

## Priority

**Legal estate is by deed [s4(1)] LRO** but a deed does not always give a legal estate. A deed can give anything it purports to give.

Where a deed is invalid, if there is an enforceable contract [s3(1)] or part performance – [s3(2)] and no discretionary bar, there will be an equitable interest. That equitable interest and become legal with a court order for specific performance.

**A legal lease < 3 years does not have to be by deed - S4(2)(d) s6(2).** Part performance does not matter here as an unwritten/oral contract is at the bottom of the pile. Part performance only where the parties did not comply with the legal formalities, e.g. a deed but has written contract.

Adverse possession – no assignment by deed necessary.

## ***Equitable Doctrines***

Resulting Trust

Constructive Trust

Proprietary Estoppel

Widest of all – from monetary compensation to legal title. In-between lie interests in land (easements, lease and licenses).

## ***Deeds registration vs. title registration in the UK.***

In Hong Kong, a deed gives you title. Registration then gives you priority (to enforce interest against 3<sup>rd</sup> parties).

Is a purchaser bound by a pre-existing lease with a 3<sup>rd</sup> party?

The registration system in HK is not total proof about the owners of the property.

This has been changed (yet to be applied) by the new Lands Title Ordinance.

## ***Conflict***

### **Case 1**

H paid for property in W's name.

W sold property to 3<sup>rd</sup> party by valid deed and ran away.

H is not party to the contract and should not be bound.

Only W and 3<sup>rd</sup> party is bound.

Who has a better right to the property?

Resulting Trust (equitable interest) but presumption of advancement needs to be rebutted.

3<sup>rd</sup> party has a legal title by deed.

Equitable vs. subsequent Legal title.

If H's interest is registrable, use ordinance, else common-law rules.

H's interest is not registrable as it is not in writing. Common law rules apply so 3P must be a bona-fide purchaser for value without notice.

If both are registered, the first registered has priority – s3(1).

If an interest is not registered, it will lose interest to equity's darling.

## **Case 2**

5 Jan 1<sup>st</sup> mortgagee (\$5M) registered 20<sup>th</sup> Feb

2 Feb 2<sup>nd</sup> mortgagee (\$6M) registered 2<sup>nd</sup> Feb

Borrower is now unable to repay and property is worth only \$4M.

Which mortgagee has priority?

M2 has priority since it had registered the interest within 1 month (s5) and thus earlier than the M1.

## ***Charging Orders and Lis pendens***

S5A: For charging orders and lis pendens, the following day will be treated as the date of registration.

A charging order is an order that may be applied by a creditor who has lent to a debtor but is unable to recover. If he succeeds in his action against the debtor, he is called a judgment creditor. He is unsecured as it is an action in personam.

He could then apply for a charging order from the court. Property that is subject matter of the order could be sold under an application for sale.

1. Order nisi (preliminary order) objections possible.
2. Order absolute

Day following registration is the date of registration.

## ***What is registrable?***

S2(1): An instrument in writing; affecting HK land.

Written instruments for sale, purchase, mortgage and leases;

Charging orders affecting land;

Lis pendens affecting land only – *Chow Chiu Tai v Chan*.

*Citibank v Lai Tat Cheung*:

1978: Owner granted tenant 50-year lease orally.

1979: Lease reduced to writing in 1979.

1982: Owner granted a mortgage over the property.

Is the mortgagee bound by the 50 year lease? Is that leasehold interest registrable?

HELD: **As soon as there is a written agreement, the oral agreement is superseded.** The written agreement was not mere evidence of the oral transaction. It related to an interest in land (registrable) and to get priority over the plaintiff's mortgage, it needed to be registered under s2(1) LRO.

\*(LRO) *FISA v Baik Wba* [1985]:

Jan: Owner borrowed \$ from M1.

Feb 23 M2 paid money to discharge M1 for same priority as M1.

Mar 1 charging order nisi granted.

Mar 2 order registered {takes effect on 3<sup>rd</sup> (LRO s5A)}.

Mar 13 2<sup>nd</sup> mortgage deed executed.

Apr 8 2<sup>nd</sup> mortgage deed registered. {registered date effective on 13mar}

HELD: unregistrable equitable interest through act of payment by M2.

LRO does not apply.

M2 intended to have priority then and there and equity treats as done what ought to be done. There was an enforceable contract and the payment could not be for anything else. **Intervening event (i.e. charging order) between act of payment and subsequent written instrument prevents merger of the two incidents so the written agreement does not supersede the oral agreement.**

CF *Citibank v Lai Tat Cheung* above.

A month is a calendar month.

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## **LRO Rules**

### **s3(2): Registrable but unregistered**

- Interest void/priority lost against next bona fide purchaser/mortgagee;
- EXCEPT where the lease is at market rent not exceeding 3 years.  
I.e. 3 year leases retain priority even if they are not registered.

Examples:

*Fast Forward v Magicsound* [1991]:

All **registrable but unregistered instruments will be void** against a subsequently registered instrument whether or not the subsequent party had **notice** of the prior interest or not – s4. Also void even if the subsequent instrument was made **subject to** any prior, registrable and unregistered instruments.

Notice does not affect *bona fide*.

*Chan Yiu Tong v Wellmake Investments* [1996]:

A reversion expressed to be sold subject to an option to renew does not mean that the purchaser would take the reversion subject to a constructive trust. That might be the case where the purchaser was renegeing on a positive stipulation in favour of the tenant.

Property with existing tenancy (3 year leases) is sold to purchaser P, can he evict the tenants?

Insufficient information. Is the lease written? (s4(2) lease for 3 years does not require a deed). If it is in writing, it will be registrable and subject to this ordinance. If it is an oral lease, it will be unregistrable so common law rules will apply.

*Markfaith v Chiap Hua:*

The tenants here had leases < 3 years and an option to renew for two years. The landlord sold the property to P who registered the property and wanted to evict the tenants.

The tenancy agreements were registrable as they were in writing. They were not registered BUT that is irrelevant under s3(2), the unregistered interests (3 year leases at rack rent) do not lose priority to P's registered interest.

NOTE, however, that the **options to renew were not registered** and since that is not covered under the section (options are not leases), they must lose priority to P.

## **Common Law Rules**

Nature of interest – legal or equitable?

Legal > Equitable interests

If same nature, **first in time** prevails.

## **Scenarios**

### **Legal --- Equitable**

Legal interest prevails as it is both higher and first in time.

### **Equitable --- Equitable**

Equity is weird – justice and fairness is considered.

Additional requirement so first in time prevails only if **merits are equal**.

*Rice v Rice:*

3 vendors. Only vendor 1 received his share of purchase money. However, they assigned the full title to the purchaser P who created an equitable mortgage.

Vendors 1 and 2 had an unpaid vendor's lien, an equitable temporary right to retain the property that is valid until payment (imposed automatically by law).

However, they acknowledged receipt of the purchase money and delivered the title deeds to the purchaser.

The vendors then wanted to use this lien against P.

Equitable (V) --- Equitable (P)

The merits are not equal because despite that V did not receive all the money, they still delivered the title deeds. They had done something they ought not to have done so even though they were first in time, they lost priority against the subsequent purchaser of the legal interest.

### **Mere Equity --- Equity**

A mere equity would include a right to rectify a document for mutual mistake, a right to set aside a sale on the ground of fraud/undue influence, etc.

*Latec Investments:*

First in time vs. interest hierarchy.

Which to choose? There must be a third factor – notice.

If there is notice, it will tip the scales.

The mortgagee had no notice of the mere equity, therefore he gets priority.

Notice of the prior interest will bind the subsequent interest holder.

### **Equitable --- Legal**

Bona fide purchaser for value of the legal estate without notice prevails.

**Bona Fide** ≠ Without Notice.

*Pilcher v Rawlins* cited in *Midland Bank v Green*:

Hard to rebut bona fide.

Son worked on father's property as tenant. In 1961, the father gave an option to the son to purchase the farm – it was not registered. In 1967, the father assigned the farm to the mother. When the mother died, the son brought an action against the mother's estate for a declaration that the option to purchase was binding on them.

HELD: Unregistered option does not bind the mother.

Equity not only requires an absence of notice, it needs to be a genuine and honest absence of notice. Good faith is a separate test that needs to be proven notwithstanding the absence of notice. The test considers the purchaser's state of mind. In this case, the mother admitted using the law to her advantage but that did not defeat good faith.

CITED: *Chan Yiu Tong*.

### **Purchaser, for value**

Not by operation of law, e.g. intestacy.

Purchasers include buyers, mortgagees (not by operation of law), tenants (legal interest not thorough law)...

Donees and devisees cannot get priority because they did not pay.

## Legal estate

Deed must have already been executed.

**Without notice** – actual, constructive or imputed (knowledge agent ought to know will be imputed to you)

Law imposes duty on purchaser to make enquiries as to the title deeds (documents) and property itself.

*Hunt v Luck:*

Hunt assigned the property to Luck, who created a legal mortgage. Hunt died and his wife wanted to set aside the conveyance on the ground that it was a forgery.

Did the mortgagees have constructive notice of Hunt's right to set aside the conveyance on the ground of forgery? The mortgagee's agent had inspected the property and knew the tenants were paying rent to W. Was it reasonable to argue that the agents could question the validity of the conveyance?

*Wong Chim Ying v Cheng:*

H gave \$ → W to buy property. W bought the property and got sole legal title. She sold the property to P before she left H. A deed was executed.

Did H have any interest in the property?

Resulting trust gave equitable interest since he paid and presumption of advancement rebutted since he was poor.

Did the purchaser have notice? The courts applied *Williams & Glyn's Bank v Boland*. Accordingly, in purchases from one spouse, enquiries should be made about the other spouse who is not a legal owner.

Though that case was about registered land in the UK, the court in HK stated that they could extend the principle to unregistered land here. On the facts here, notice 'should' not be construed because it is awkward to ask the vendor about her spouse and marital relationship. The courts held otherwise.

The best thing to do, therefore, is to ask all occupants to declare their interests.

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## Lands Registration Ordinance Rules

### Section S3(1)

- Subject to this ordinance... (subsequently added)
- Registered instruments to have priority by time.
- S5: date of registration is kept as long as it is registered within a month
- S5A: lis pendens and charges have are considered registered one day after actual date of registration

{we should not read any extra criteria in s3(1)}

## Section 3(2)

- If first interest is registrable yet unregistered, it loses priority to subsequent bona-fide purchasers/mortgagees for value (whether registered or not).  
[ ] Bona Fide [ ] Purchaser/mortgagee [ ] For Value

Does the subsequent interest need to be registered?

No it does not – *Kwok Siu Lau*.

- **Notice of any prior interest is irrelevant** under s4 where the subsequent interest is registered – (see cases) and any notice does not mean any bad faith.
- **‘Purchaser’ should be interpreted strictly** as a buyer and tenants etc. are excluded from this section.

Whether a legal or equitable estate is involved is irrelevant, simplifying the law.

## Scenario Analysis

### Registrable v Registrable (LRO)

R --- R

S3(1) applies. Registered instruments to be prioritized by time.

R --- U

S3(1) applies since even if the second interest is registered immediately, it will have a later date of registration.

U --- R

S3(2) applies to make the prior interest void against the subsequent any interest and notice is irrelevant – s4. If the second interest holder is a volunteer, there may be a conflict – prefer common law approach.

U --- U

Does s3(2) apply? It could since the second interest need not be registered – *Kwok Siu Lau*: “s3(2) deals simply with unregistered instruments, penalizing them and postponing them to other instruments whether registered or not”. S4 does not apply since the second interest is not registered – *Kwok Siu Lau* DM64. The ordinance’s purpose is to encourage people to register. If both are unregistered, the first can rush to register and get priority over the second: “the penalty is severe but the escape is easy!”.

U --- U is yet an unseen hypothetical scenario.

When there is a lacuna and no section is directly applicable, the ordinance should be ignored and common law rules may apply.

*Keep Point* []:

Original owners/defendants sold property to Full Country (FC) who erected a building.

1994: FC gave an option to the defendants to purchase units in the building; the option was unregistered at that time.

1996: FC sold the property to P with agreement registered.

1998: The defendants went to register the option (it was later than the sale agreement's registration).

U --- R [s3(2)] and then later, R --- R [s3(1)]

PRINCIPLE: S3(2) says that an unregistered instrument is void against any subsequent bona fide purchaser, and even if that is not taken, s3(1) says that first registered shall have priority and the sale/purchase was first registered.

ARGUED: Should apply s3(2) so the 'bona fide' requirement is taken into account and since P had notice, it would not be bona fide.

HELD: Which section should be chosen as the ratio? S3(1) was taken as it was "not right" to apply s3(2). 'Bona fide' is therefore irrelevant and in any event, notice ≠ bad faith. The situation requiring s3(2) came before the situation requiring s3(1).

Cited *Midland Bank Trust v Green* – mother trying to defeat son's option held no bad faith and bad faith is hard to prove.

### Hypothetical Further Analysis:

U --- U | If the subsequent sale was not registered, the second interest would still get priority under s3(2) following *Kwok Siu Lau* though notice might affect him since s4 applies only to registered subsequent interests

U --- R | If the sale is registered before the option, s3(1) applies and subsequent holder is not affected by notice – s4.

R --- U | If the first interest is registered before the second, it would get priority under s3(1).

What if the subsequent interest holder **does not satisfy the requirements** of s3(2)?  
E.g. he is not bona fide or a purchaser/mortgagee for value?

U --- U | If the subsequent interest is not registered, then s3(2) does not apply to give priority to the second. Does the common law apply? The common law factors time and the nature of the interest. The volunteer is second in time. The result, whichever approach you adopt, is that the second one loses priority.

If the subsequent interest holder has registered, what applies? If s3(1) applies, the volunteer would have priority since it has no regard to the requirements of s3(2). S3(2) would say that the second interest holder does not get priority. Common law would also say that the second interest holder does not get priority since it has the rough requirements of s3(2). Note that s3(1) is written to be “subject to the ordinance” so if the subsequent registered interest does not satisfy the bona fide purchaser/mortgagee without notice requirements, he would not get priority.

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### **Where the second interest does not satisfy s3(2)**

*Yau Siu Yeung:*

Sale completed 28<sup>th</sup> June and registered 15<sup>th</sup> August

Order Nisi granted 23<sup>rd</sup> July and registered 2<sup>nd</sup> August.

An order nisi is not a purchase nor is it a mortgage since the consideration was past (when he lent the money to the debtor before securing it with an order).

HELD: This is a question of **validity** – no charging order could be granted against the flat after the owner had disposed of the interest. A charging order against property that is not the debtor’s is not possible.

Mayo J continued to ask whether the charging order could be treated as a purchase for value under s3(1) reaching the conclusion that a charging order is not a purchase. A charging order is not an interest in land but a notification to the world of the grantee’s judgement whereas the further application of a ‘sale of charged property’ might be.

*Tse Fook Choy:*

The charging order came between the sale & purchase agreement and the actual assignment of the whole title. S3(1) binding sale & purchase has a right to seek specific performance. In equity, the vendor is holding the property on constructive trust for the purchaser.

HELD: This is a question of **validity** – no charging order could be granted against the property after the owner had disposed of the interest.

The date of the sale & purchase agreement is fundamental in this line of cases.

### **Registrable --- Unregistrable**

Perhaps the common law rule should apply since the ordinance is not directly applicable since the second interest can never have a date of registration.

R --- N/A

U --- N/A

S3(2) does not say whether subsequent BFP for V should be registrable or not let alone registered. Notice under s4 will apply since the second interest is not even registrable. This position is consistent with the common law.

#### {WRITEUP LICENSES}

if there is an existing license and the subsequent purchaser, if his conscience has been affected, it means that he is taking advantage of the prior interest and the license should be binding on him with a constructive trust is to be imposed on the purchaser, the nature of the existing interest is not taken into account.

Exam to focus on second semester topics.

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## ***Liens, Pledges and Mortgages***

### **Lien**

Operates through law.

Legally a retention of chattels until the price for work done on chattels is paid.

Equitably unpaid vendor's lien.

### **Pledge**

Transfer of possession of chattels as security for loan with right to sell if not redeemed within a fixed period. E.g. pawn shop.

### **Mortgages**

#### ***Legal***

Created by parties through deed.

Before the CPO, it was an assignment of legal estate to the lender and the mortgagor retains an 'equity of redemption'. The mortgagee could take possession at any time...

After the CPO, only rights are granted to the mortgagee and the legal estate remains with the mortgagor. S44(2) removes the possibility of the mortgagee to take possession before a default in payments.

Before the CPO, the legal is reassigned to the borrower upon full repayment.

After the CPO, a deed by s4 or a signed receipt annexed to a mortgage deed for all money secured by that mortgage, executed by the lender/mortgagee – s56 is adequate.

## **Equitable**

S5(1)(a): A specifically enforceable contract through a legally invalid mortgagee created by instrument or an oral agreement + part performance, e.g. a deposit of title deeds until the loan is repaid. I then cannot deal with the land behind the bank's back. E.g. if someone is getting a land grant from the government and he does not take the whole interest until some conditions have been satisfied.

## **Rights and Powers of Mortgagees**

4<sup>th</sup> schedule. Paragraph 11: anyone to be satisfied for exercise of power:

Notice served, unpaid in 1 month

Interest in arrears and unpaid in 1 month

Breach of express or statutorily implied provision.

## **Possession Title Deeds**

### **Possession of Property**

#### **Appointment of Receiver**

In a (legal?) mortgage by deed, the mortgagee has an implied power to appoint a receiver who will have the same rights, powers and obligations as he does.

This power is **exercisable in writing** by the mortgagee – s50(1).

Any receiver is deemed the **agent of the mortgagor** and is responsible for the receiver's acts and defaults – s50(2).

This is an artificial agency since the mortgagee has all the benefits and the mortgagor has all the disadvantages. It is obviously unfair but it encourages people to appoint receivers.

## **Sale**

The mortgagee may elect to sell the property in question to a separate legal entity but he must be reasonable in obtaining the market value. He cannot sell to himself – *Tang Ying Ki v Maxitime*.

*China v South Sea Bank* [1990]:

The debtor has borrowed and there is a surety (personal guarantee for the loan) and also a company who had mortgaged its shares to the creditor. The creditor has 3 choices. The shares had become worthless. The creditor decided to sell the shares and no one could complain.

HELD: The mortgagee is entitled to decide *whether to sell* and when to do so.

If the mortgagee decides to sell, there is a duty to take reasonable care to obtain the true market value – *Cuckmere Brick*. Equity would only intervene where the results of the 'whether to sell' decision is injurious.

*Palk v Mortgage Services Funding*.

Mortgagor's liability would be increased if the rent were not enough to cover the mortgage's interest.

The court will, in considering whether the transaction was 'unfairly prejudicial', factor in the following:

Whether the mortgagor was a poor individual already bankrupt and cannot afford the interest accruing under the M.

And the mortgagee has more bargaining power (e.g. a company).

Mortgage for £50,000:

Before advertising the sale of the property, the mortgagors asked for valuation from professionals who stated that: if it were sold for housing development then the price would be £35,000 else for apartment development £50,000 could be gained.

The second option was not advertised in the sale and the land was auctioned for £44,000 – less than the value of the loan.

HELD: an auction is not enough. Reasonable steps must be taken to attract buyers and conduct the auction.

*Tse Kwong Lam (borrower) v Wong:*

The mortgagee and wife owned a company. The mortgagee went to sell the property and the mortgagee's wife went to bid on behalf of the company.

The reserve price was at \$1.2M whereas the [principal + interest] was \$1.4M.

Since there were no other buyers, the wife bought the property for \$1.2M.

HELD: Court does not prohibit sale of mortgagee property to mortgagee's company, a separate entity. It will be more difficult for the mortgagee to say he obtained the true market value but if reasonable steps are taken, no one can complain.

The transaction could not be set aside because the mortgagees took too long to bring an action. Discretionary bar of time not satisfied.

S52 CPO:

Where there is a sale under a mortgage, the title of the bona fide purchaser of the legal interest without notice shall not be affected even if the sale was improper.

In *Tse*, the purchaser was not bona fide and had notice therefore it's title should be affected.

### **Foreclosure**

A foreclosure is not a sale even though its effects are similar. In a sale, the property is sold to a third party and the proceeds would be used to repay the loan. A foreclosure does not involve a third party, but is where the mortgagor would assign all his title to the mortgagee. There is no actual paying of money and the mortgage is terminated.

The mortgagee has to apply for a foreclosure order which could be costly. Furthermore, objections are possible during the interim period which raises the uncertainty of this right. Foreclosure, therefore, is not popular.

### ***Personal action on mortgagor's covenant to repay***

To sue the borrower for the difference between the actual loan value and the actual gains.

### ***Use of the Moneys from Sale***

S54 CPO:

Money received by mortgagee or receiver from sale or other dealing with mortgaged property is to be applied in a prescribed order: e.g. where property sold at \$500k. The loan was at \$200k.

- 1 Government (taxes, rent, rates)
- 2 Prior incumbrances (earlier interest holders)
- 3 Cost of the receiver
- 4 Mortgagee exercising sale
- 5 Subsequent Mortgagees

Last: mortgagor.

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## **Equitable mortgages**

S47: the equitable mortgagee has no right to possess the title deeds but can inspect them.

If the equitable mortgage was created by deed, a receiver can be appointed – s50(1) and implied powers under s51(1), fourth schedule can allow the possession and sale of property. There cannot be a power to assign a legal estate, however, under s51(3).

## **Mortgagee's Priority [s45] not covered in exam**

### **Mortgagor's (borrower's) rights and protection**

The first legal mortgagee has right to possess the title deeds and under s47, the mortgagor can only inspect them.

He can live in the property – s49 and has a right to sell/lease/remortgage under the second schedule (with the mortgagee's consent – Part C).

Protection of a mortgagor's right of redemption (not covered). Of course, the mortgagee is not free to do whatever he wants and unfair terms (effect to turn M into sale) that deprive the right of redemption considered void. E.g. Where the mortgagee is given an irrevocable option to purchase property within 12 months of mortgage.

### **Undue Influence\***

Undue influence or misrepresentation may allow the court to set aside the mortgage. The alleged UI can come from the bank or the borrower (not being the mortgagor).

E.g. where H borrowed from the bank but W mortgaged the matrimonial home to the bank and now W claims UI by H and wants to set aside the mortgage.

W has to prove either that H was the bank's agent (archaic) or that the bank had actual/constructive notice of H's UI or misrep.

*NatWest v Morgan* [1985]

*CIBC v Pitt* [1993]

*Barclay's Bank v O'Brien* [1993]:

Class 1: actual undue influence

Class 2: presumed undue influence

A: categories to allow presumption of influence.

B: undue influence may be inferred from facts.

*Etridge* [2002]:

Proof that MOR placed trust and confidence in borrower coupled with a transaction that calls for explanation allows the court to infer that the transaction was procured by UI. |

The transaction must call for explanation: e.g. wife does not benefit from the loan and that there was a substantial risk that H used UI.

The mortgagee is deemed to have constructive notice and W may set the M aside if the bank fails to warn W of risk and advise her to take independent legal advice.

In the present case, H misrepresented amount of loan to W and the bank could only enforce mortgage against W to the extent of the misrepresented amount as it had not warned W of the risk nor advised her to take independent legal advice.

Followed by and confirmed by *Li Sau Ying v BOC*:

Class 2B UI to be inferred from the facts rather than presumed.

# Appendix

## *Property Law Origins*

### **Definition**

Property involves a bundle of rights that a person has over something. That something may or may not have economic value.

Rights to use, abuse, sell, exclude, stop interference from own use, transfer, etc. These are of course, subject to others' rights.

These rights must be supported by the state in a predictable way (courts, legislation) and enforceable against the whole world. I.e. not just against the party contracted with.

If there is a dispute as to ownership, we must consider the relationship between the various parties and the object. Then we would examine the rights involved, compare them between the parties to see who has the strongest claim. This is property law.

Public property is owned by the state and must consider the public's benefits.

The line between public property and co-owned private property is blurred. Shared private property and communal property owned by an exclusive group of people.

### **Justification**

#### ***Economic***

Private property rights → economic efficiency → wealth.

Market to shift resources to those who value them most if:

- The law protects exclusivity of ownership;

- It allows entitlements to be transferred;

- Many items are made available for exchange by many people.

The law then is considered to be a pricing mechanism.

The tragedy of the commons: a common pasture is let to farmers who would overgraze the land to the detriment of all. Since the costs are shared and the benefits are much greater than the costs, the farmers would exploit it to the hilt. E.g. overfishing. PP would contain the benefits and exploitation to the owner. Maybe if the pasture was regulated by the state, it would be better.

Even if the pasture was privately owned, it could be exploited. E.g. if it were an oilfield, corporates would be enticed to exploit it with consequences to be borne by the next generation.

PP introduces borders around property. CP has no borders but needs regulations to prevent abuse which are costly. However, if society gives too much property to too few, the breach of the PP boundaries may entail high costs.

Is economic efficiency better than other forms of ownership? There is no benchmark. Downfall of communist regimes may not be due to property ownership but due to the dissent resulting from non-democratic institutions.

Economic justification rests on the premise that most people are rational wealth maximizers. If enough people are not, the theories break down. Rationality and the presence of knowledge are proportional. Developing countries...

Economic theory must give way to other values. The law should also endorse morality, not only pecuniary prosperity.

Too much PP can hinder economic progress. Utilities that are shared by all should be state regulated (my opinion). Roads, electricity, water...

PP promotes inequality because differing abilities to bargain and trade will produce differences in wealth. But then again, inequality may be good.

### ***Utilitarianism / Utility***

Wealth, the accumulation of property, supports happiness. Achievable only if society provides a measure of security for the wealth: property law.

Any conduct could prove beneficial – mass reallocation of property – seizing property to rich for poor may increase utility but it may not. This approach depends on economical data. It also undermines security.

It has a vague formula relating pleasure to pain and thus should not be used.

### ***Freedom***

Without PP, freedoms may be given up. PP draws a line around an owner of property separating him from others. He has the freedom to do many things he wants inside the boundary.

Absence of government regulations: negative liberty. Not a result of PP but a necessary condition because the state endorses this freedom. The means to allow the enjoyment of this freedom/privacy is provided for by the state.

Empowerment: positive liberty. E.g. control one's destiny. Support democratic institutions and thwart totalitarian regimes. PP can impact government and control citizens. Large corporations as an example decentralize power but can create an oligarchy in the population. Family patriarchs can use PP to control others to their whims.

If PP promotes freedom, what about those without it? They lack power and compromise democratic processes. They are restricted by those who do have PP and are excluded from their land.

### **Personhood**

To develop, an individual needs to control resources in the external environment. PP could be an extension of our self. Acquisitiveness could be a basic human quality but not necessarily of PP. This argument emphasizes on peoples' need for security and privacy. Perhaps PP results in less dissension compared to other forms of ownership. It diverts attention away from other objectionable pursuits. Dangerous human proclivities such as aggression are channelled into more harmless acts.

There are human needs that PP cannot satisfy. PP may not be an enriching experience if just a channel for aggression. It instils fear and expensive precautions that owners employ to protect their property.

### **Labour and Dessert ???**

Individuals are entitled to things over which they have laboured. It is a natural right – a right that the law endorses and secures. In labour, we add something of ourselves to the material world and thus our rights of ownership come to rest upon worldly goods. This would happen only if there was enough to go around (what about unique items?) since property is originally owned by all. But even if land was apportioned, it is argued that the QoL of others would not decrease.

Problems arise since the situation described is one without scarcity and we do not know whether there is enough to go around. Land, for example, is finite and it is first come first served. Gift-giving goes against this theory as it has nothing to do with the receiver's contributions.

It is logical to state that if people are not rewarded, they will not work. See copyrights and patents.

But this becomes not a reason of why PP should be preferred but an answer to the question: to whom should PP be allocated. Those who take from a shared pool should be chastised. E.g. desert island.

### **Occupancy**

First come first served. This merely justifies who PP should be allocated to but it cannot explain why PP should be recognized in preference to other forms of ownership. If occupancy *does* justify PP, we must examine *how* occupancy is good. The problem is that occupancy imposes costs on those who seek but fail to be the first taker. It may also encourage premature exploitation of resources – American homestead gold rush in the 90s. Novel

1. Should PP be recognized in preference over other regimes?
2. When should PP prevail over the other forms?
3. Who should PP be allocated to?