COMMONWEALTH CARIBBEAN PROPERTY LAW

Gilbert Kodilinye, MA, LLM, Barrister

Professor of Property Law
University of the West Indies

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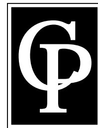

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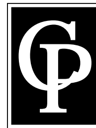

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PREFACE

Property law (land law) is a subject area which students throughout the common law world find difficult and 'technical'. This may be due partly to the fact that, as Oliver Cromwell put it, English land law is 'an ungodly jumble', but one suspects that it may also be due to lack of imagination in the presentation of the subject by some law teachers. The aim of this book is to demystify the subject by analysing and explaining the concepts and principles of land law in a modern setting which the reader can readily identify and appreciate. Whenever possible, Commonwealth Caribbean cases have been used in illustration, with reference to the more important statutory provisions in Caribbean jurisdictions.

Although conceived primarily as a text for students reading for the LLB degree in West Indian universities, it is hoped that practitioners also will find the book useful as a work of reference. It may also be of interest to those real estate agents, surveyors and other professionals who require some knowledge of land law.

I am grateful to Mr Christopher Malcolm and Mrs Tara Leevy-Malcolm, Attorneys-at-Law (Kingston), for sending me some very useful materials. My dear wife, Vanessa Kodilinye, Attorney-at-Law (Bridgetown), was a constant source of encouragement to me, particularly at times when my enthusiasm for the project was at a low ebb. She also diligently and cheerfully assisted me in the preparation of the tables and index, in proof reading, and in making several very useful suggestions for improving the text. I should like also to express my appreciation for the efforts of the students who have patiently and, in most cases, successfully applied themselves to the study of property law in this region. I sincerely hope that they will begin to see the beauty of land law through a new, more diaphanous veil!

Lastly, my thanks are due to the staff of Cavendish Publishing for their professionalism and their co-operation at all stages of production of this book.

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January 2000

CONTENTS

Preface v
Table of Cases xiii
Table of Statutes xxxvii

1 INTRODUCTION 1

ORIGINS OF LAND LAW 1
THE DOCTRINE OF ESTATES 2
Fee simple estate (otherwise called 'freehold') 2
Leasehold estate 3
Life estate 3
Fee tail estate 3
LEGAL AND EQUITABLE ESTATES AND INTERESTS 3
Registration of title 4

2 CREATION OF LEASES 7

ESSENTIAL CHARACTERISTICS OF LEASES 7
Exclusive possession 8
Certainty of duration 13
FORMALITIES FOR CREATION OF LEASES 14
Effect of non-compliance with formalities 15
LEASE AND AGREEMENT FOR LEASE COMPARED 16
Dependency on specific performance 16
Third parties 17
TYPES OF TENANCIES 18
Lease for a fixed period 18
Periodic tenancy 18
Tenancy at will 19
Tenancy at sufferance 20
Tenancy by estoppel 21

3 LEASEHOLD COVENANTS 23

LANDLORD'S IMPLIED OBLIGATIONS 23
Covenant for quiet enjoyment 23
Covenant not to derogate from the grant 27
Covenant as to fitness for habitation 28
Covenant to repair 30
TENANT'S IMPLIED OBLIGATION 30
Obligation not to commit waste 30
EXPRESS COVENANTS 31
Covenant to pay rent 32
Covenant to repair 33

Covenant not to assign, sublet or part with possession of the demised premises 35
Option to purchase the reversion 37
Option to renew a lease 39

4 ASSIGNMENT, TERMINATION OF LEASES AND DISTRESS 41

ASSIGNMENT OF LEASE AND REVERSION 41
Touching and concerning the land 42
Running of the benefits and burdens of covenants 43
TERMINATION OF LEASES AND TENANCIES 44
Forfeiture 44
Surrender 53
Merger 54
Effluxion of time 54
Notice to quit 54
Frustration 57
DISTRESS 58
Time and place 59
Distrainable goods 62
Privileged goods 62
Third parties' goods 63
Procedure for levying distress 63
TENANT'S RIGHT TO FIXTURES 67

5 THE RENT RESTRICTION ACTS 71

SCOPE OF THE ACTS 72
SECURITY OF TENURE 73
Status of irremovability 73
Grounds for recovery of possession 79
Statutory tenancy by succession 88
RENT CONTROL 92
Standard rent 93
THE RENT RESTRICTION (DWELLING HOUSES) ACT 1981 (TRINIDAD AND TOBAGO) 94
THE LAND TENANTS (SECURITY OF TENURE) ACT 1981 (TRINIDAD AND TOBAGO) 96

6 LICENCES 101

TYPES OF LICENCE 101
Bare licence 101
Licence coupled with an interest 102
Contractual licence 102
Licence protected by estoppel 106

7 CO-OWNERSHIP **117**
JOINT TENANCY 117
Unity between joint tenants 118
TENANCY IN COMMON 119
Law and equity 119
Equitable presumption of tenancy in common 120
SEVERANCE OF JOINT TENANCY 122
Act of joint tenant operating upon his own share 123
Mutual agreement 124
Course of dealing 125
Other methods of severance 125
PARTITION 127

8 CONDOMINIUM **129**
CONDOMINIUM LEGISLATION 129
NATURE OF THE INTEREST OF THE UNIT OWNER 129
DEFINITION OF 'UNIT' AND 'COMMON PROPERTY' 131
METHOD OF ESTABLISHING A CONDOMINIUM 131
The declaration 131
Bylaws 135
THE BODY CORPORATE 135
Duties of body corporate 136
Default in payment of contributions 137
TERMINATION OF CONDOMINIUM SCHEME 138

9 RESTRICTIVE COVENANTS **141**
RUNNING OF THE BURDEN 142
The position at common law 142
The position in equity 143
Requirements for the running of the burden in equity 144
RUNNING OF THE BENEFIT 148
The position at common law 148
The position in equity 149
Annexation 150
Express assignment 155
Schemes of development 156
DISCHARGE AND MODIFICATION 162
Obsolescence (ground (a)) 163
Impeding the reasonable user of the land (ground (b)) 165
Agreement to discharge or modification (ground c)) 167
No injury to objectors (ground d)) 167

10 EASEMENTS **171**

DEFINITION 171
REQUIREMENTS FOR A VALID EASEMENT 172
There must be a dominant and a servient tenement 173
An easement must accommodate the dominant tenement 174
The right must be capable of forming the subject matter of a grant 176
An easement must be negative from the point of view of the servient owner 180
ACQUISITION OF EASEMENTS 181
Express grant 181
Express reservation 181
Implied grant 182
Implied reservation 188
ACQUISITION UNDER STATUTORY PROVISIONS 189
Purpose of the sections 190
Limitations on the application of the sections 191
ACQUISITION BY PRESUMED GRANT (PRESCRIPTION) 194
Basis of prescription 194
Requirements for prescription 195
METHODS OF PRESCRIPTION 199
Prescription at common law 199
Prescription under the doctrine of the lost modern grant 199
Prescription under the Prescription Acts 200
OTHER PROVISIONS IN THE ACTS 202
Enjoyment 'next before action' 203
Unity of ownership or possession 203
Statutory interruption 204
EASEMENT OF LIGHT 204
RIGHT TO USE A BEACH 205
Extent of easements 206
Extinguishment of easements 211

11 MORTGAGES **215**

FORM 215
RIGHTS OF THE MORTGAGOR 216
Legal right to redeem 216
Equitable right to redeem 217
The equity of redemption 217
Clogging the equity of redemption 218
Excluding the right to redeem 218
Postponement of right to redeem 220
Collateral advantages 221
Restraint of trade 223

RIGHTS OF MORTGAGOR IN POSSESSION 224
RIGHTS OF MORTGAGEE 225
Action on the personal covenant 225
Right to enter into possession 225
Right to appoint a receiver 228
Power of sale 229
Mortgagee's duty of care 234
Right to foreclose 238
RIGHTS OF EQUITABLE MORTGAGEE 239
TACKING AND CONSOLIDATION 240
Right to tack further advances 240
Right to consolidate 241

12 ADVERSE POSSESSION 243
DISPOSSESSION OF TENANT 244
INCHOATE RIGHTS OF ADVERSE POSSESSOR 245
REQUIREMENTS FOR ACQUISITION OF TITLE BY 245
ADVERSE POSSESSION 245
Discontinuance of possession 245
Possession by adverse possessor 246
NATURE OF ACTS AMOUNTING TO ADVERSE POSSESSION 248
User of part of the land 250
RESUMPTION OF POSSESSION BY PAPER OWNER 252

Index 255

TABLE OF CASES

Abbey National Building Society v Maybeech Ltd [1984] 3 All ER 262 52
Abbeyfield (Harpenden) Society Ltd v Woods [1968] 1 WLR 374 9
Adam v Besseling (1987) High Court, Trinidad and Tobago, No 2504 of 1987 (unreported) 32
Adams v Workers Trust and Merchant Bank Ltd (1992) Supreme Court, Jamaica, No CLA 130 of 1989 (unreported) 238
Adams and Kensington Vestry, Re (1884) 27 Ch D 394 38
Aldin v Latimer, Clark, Muirhead and Co [1894] 2 Ch 437 27
Alexander v Rampersad (1989) High Court, Trinidad and Tobago, 1780 of 1988 (unreported) 20, 97, 98
Ali v Asharph (1964) 7 WIR 354 88
Ali v Enmore Estates Ltd (1971) High Court, Guyana, No 3619 of 1969 (unreported) 24
Allen v Taylor (1880) 16 Ch D 355 186
Alleyne v Ali (1966) 11 WIR 69 83, 84
Alpras Investments Ltd v National Commercial Bank of Trinidad and Tobago Ltd (1992) High Court, Trinidad and Tobago, No 2389 of 1991 (unreported) 232
American British Canadian Motors Ltd v Imperial Life Assurance Company of Canada (1990–91) Carib Comm LR 258 233
American Concentrated Must Corporation v Hendry (1893) 62 LJ QB 388 60, 61
Angel v Scott Land and Investment Co Ltd (1987) High Court, Trinidad and Tobago, No 187 of 1987 (unreported) 97
Angus and Co v Dalton (1877) 3 QBD 85 199
Ansaldi v Lee Lum [1920] Trin LR 80 197, 198
Anstruther-Gough Calthorpe v McOscar [1924] 1 KB 716 33, 34
Antigua v Boxwill (1971) 16 WIR 136, PC 183
Antoniades Villiers [1988] 3 All ER 1058 8
Archer v Georgiana Holdings Ltd (1974) 12 JLR 1421 246, 248
Arima Agricultural Co-operative Society Ltd v Armstrong (1987) High Court, Trinidad and Tobago, No 217 of 1980 (unreported) 38
Arlesford Trading Co Ltd v Servansingh [1971] 3 All ER 1130 44
Arman v Pooran (No 2) (1977) Court of Appeal, Trinidad and Tobago, Civ App No 9 of 1976 (unreported) 89
Ashburn Anstalt v Arnold [1988] 2 All ER 147 106, 172
Ashby v Tolhurst [1937] 2 KB 242 102
Asher v Whitlock (1865) LR I QB 1 245
Attack v Bramwell (1863) 122 ER 196 66
Austerberry v Oldham Corporation (1885) 29 Ch D 750 142

Bailey v Barnes [1894] 1 Ch 25 231
Bailey v Stephens (1862) 142 ER 1077 175

Baksh v Rahaman (1973) High Court, Trinidad and Tobago, No 1942 of 1969 (unreported) 82
Ballard's Conveyance, Re [1937] 2 All ER 691 154, 155
Bank of England v Cutler [1908] 2 KB 208 21
Bank of Nova Scotia v GLT Corporation Ltd (1986) Supreme Court, The Bahamas, No 112 of 1982 (unreported) 129
Bank of Nova Scotia v Morrison (1995) Supreme Court, The Bahamas, No 1579 of 1991 (unreported) 226
Bank of Nova Scotia Co of Trinidad and Tobago Ltd v Manswell (1992) High Court, Trinidad and Tobago, No 1324 of 1989 (unreported) 237
Baptiste v Supersad (1967) 12 WIR 140 62
Barclays Bank Ltd v Bird [1954] 1 All ER 449 240
Barclays Bank plc v Clarke (1998) Supreme Court, The Bahamas, No 517 of 1996 (unreported) 216
Barrett v Hartley (1866) LR 2 Eq 787 221
Barrow v Isaacs [1891] 1 QB 417 36
Bartholomew v Young (1990) High Court, Trinidad and Tobago, No 2363 of 1981 (unreported) 24
Basham, Re [1987] 1 All ER 405 115
Bass Holdings Ltd v Morton Music Ltd [1987] 2 All ER 1001 40
Bassett v Whiteley (1982) 45 P & CR 87 39
Bates v Sylvester (1960) 3 WIR 136 45
Baxter v Four Oaks Properties [1965] 1 All ER 906 158
Bay Distributors, Re (1988–89) 1 Carib Comm LR 358 163, 168
Bay Distributors Ltd v Goddard (1989) Court of Appeal, Barbados, No 19 of 1988 (unreported) 168
Beach Control Authority v Price (1961) 3 WIR 115 172, 205
Beer v Bowden [1981] 1 WLR 522 32
Beesley v Hallwood Estates Ltd [1960] 2 All ER 314 39
Belbridge Property Trust Ltd v Milton (1934) 78 SJ 489 26
Bengal, Re (1994) Supreme Court Jamaica, No ERC 71 of 1992 (unreported) 166
Benn v Hardinge (1992) 66 P & CR 246 212
Bent v Williams (1976) 14 JLR 252
Berkeley Road, NW9, Re 88 [1971] 1 All ER 254 126
Bernard v Jennings (1968) 13 WIR 501 210
Bhopa v Bhopa (1998) High Court, Trinidad and Tobago, No 1101 of 1997 (unreported) 108, 201
Bickel v Duke of Westminster [1976] 3 All ER 801 37
Biggs v Hoddinott [1898] 2 Ch 307 218, 222
Binions v Evans [1972] 2 All ER 70 105, 106, 172
Biondi v Kirklington and Piccadilly Estates Ltd [1947] 2 All ER 59 40
Bird v Hildage [1947] 2 All ER 7 80

Birmingham Citizen's Permanent Building Society v Caunt [1962] 1 All ER 163 226, 227
Birmingham, Dudley and District Banking Co v Rose (1888) 38 Ch D 295 27
Blaides v Thomas (1963) Court of Appeal, Trinidad and Tobago, No 424 of 1963 (unreported) 80
Blake v First Jamaica National Bank (1994) Supreme Court, Jamaica, No CLB 017 of 1992 (unreported) 234
Boisson v Letrean (1989) High Court, Trinidad and Tobago, No 4435 of 1985 (unreported) 184
Boodhoo v Jammuna (1989) High Court, Trinidad and Tobago, No 438 of 1987 (unreported) 173
Booker v Palmer [1942] 2 All ER 674 11
Boyce v Mungaree (1980) Court of Appeal, Trinidad and Tobago, Civ App No 201 of 1984 (unreported) 94
Boyer v Warbey [1953] 1 QB 234 17
Brace v Duchess of Marlborough (1728) 2 P Wms 491 241
Bradbury v Grimble and Co [1920] 2 Ch 548 38
Breams Property Investment Co Ltd v Stroulgar [1948] 1 All ER 460 42
Bridges v Smith (1829) 130 ER 1119 66
Bridwell Hospital Governors v Fawkner (1892) 8 TLR 637 37
Brilliant v Michaels [1945] 1 All ER 121 14
Bristol v Ramoutar (1996) High Court, Trinidad and Tobago, No 231 of 1993 (unreported) 66
British American Cattle Co v Caribe Farm Industries Ltd [1998] 4 LRC 547 5
British Hoffman Ltd v Bella Vista Beach Apartments Ltd (No 2) (1979–80) 1 LRB 519 158
British Railways Board v Glass [1964] 3 All ER 418 209
Broadway Import and Export Ltd v Levy (1996) Supreme Court, Jamaica, No CL 1993 B081 (unreported) 15, 37, 38, 40
Brooks v Ammon (1987) High Court, Trinidad and Tobago, No 57 of 1979 (unreported) 18
Broomfield v Williams [1897] 1 Ch 602 192
Brothers Ltd v Lando (1967) Court of Appeal, Trinidad and Tobago, No 217 of 1981 (unreported) 79
Brown v Alabaster (1887) 37 Ch D 490 186
Brown v Brash [1948] 2 KB 247 77
Brown v Brown [1971] 2 All ER 1505 32
Brown v Gould [1972] 1 Ch 53 32
Brown v Silvera [1898] Stephens' R 1257 16
Browne v Flower [1911] Ch 219 25, 27, 177
Browne v Perry (1987) 40 WIR 165 253
Buckby v Coles (1814) 128 ER 709 211
Buckingham Canal Co v Cartwright (1879) 11 Ch D 421 39

Buckinghamshire County Council v Moran [1989] 2 All ER 225 247, 248
Bull v Bull [1955] 1 All ER 253 118
Bulstrode v Lambert [1953] 2 All ER 728 207
Burgess v Rawnsley [1975] 3 All ER 142 123, 124
Burke v Whitters Worldwide Properties Ltd (1993) 30 JLR 6 247

Campbell v HV Holdings Ltd (1998) High Court, Trinidad and Tobago, No S 951 of 1995 (unreported) 98
Campbell v Holyland (1877) 7 Ch D 166 239
Canadian Imperial Bank of Commerce v Wells (1996) Supreme Court, The Bahamas, No 287 of 1995 (unreported) 216
Cargill v Gotts [1981] 1 All ER 682 209
Caribbean Asbestos Products Ltd v Lopez (1974) 21 WIR 462 38
Caribbean Commercial Bank Ltd v Turney (1990) High Court, Barbados, No 236 of 1987 (unreported) 48
Carr v Foster (1842) 114 ER 629 204
Carter v Carter (1829) 130 ER 1118 66
Cayman Arms (1982) Ltd v English Shoppe Ltd [1900–91] CILR 299 45, 46
Central Estates (Belgravia) Ltd v Woolgar [1971] 3 All ER 647 52
Central Estates (Belgravia) Ltd v Woolgar (No 2) [1972] 3 All ER 610 45, 46
Central Mining and Excavating Ltd v Croswell (1993) Court of Appeal, Jamaica, Civ App No 16 of 1992 (unreported) 163
Chalmers v Pardoe [1963] 3 All ER 552 108, 115
Chandler v Alexis (1986) Court of Appeal, Trinidad and Tobago, Mag App No 39 of 1984 (unreported) 95, 96
Chandler v Doulton (1865) 34 LJ Ex 89 67
Chandler v Kerly [1978] 2 All ER 942 103
Chaplin v Smith [1926] 1 KB 198 36
Charles v Maharaj (1976) Court of Appeal, Trinidad and Tobago, Mag App No 205 of 1975 (unreported) 72
Chatman Empire Theatre Ltd v Ultrans Ltd [1961] 2 All ER 381 53
Chatoo v Gooding (1991) Court of Appeal, Trinidad and Tobago, No 17 of 1986 (unreported) 94
Chatsworth Estates Co v Fewell [1931] 1 Ch 224 162
Cherkiss Enterprises Ltd v Depass (1989) 26 JLR 196 39
Chong v Wooming (1984) Court of Appeal, Jamaica, Civ App No 33 of 1983 (unreported) 85
Chrisdell Ltd v Tickner [1987] 2 EGLR 123 45
Christian v Mitchell-Lee (1969) 13 WIR 302 119
Christian v Republic Finance and Merchant Bank Ltd (1997) High Court, Trinidad and Tobago, No 2494 of 1900 (unreported) 234
Chung v Charles (1977) Court of Appeal, Trinidad and Tobago, Civ App No 97 of 1975 (unreported) 72

Chung Qui v Lucien (1964) 7 WIR 449 84, 86, 88
Cityland and Property (Holdings) Ltd v Dabrah [1967] 2 All ER 639 221
Civil Service Co-operative Society Ltd v McGrigor's Trustee [1923] 2 Ch 347 46
Clark v Elphinstone (1880) 6 App Cas 164 251
Clarke v Grant [1949] 1 All ER 768 8, 11
Clarke v Kellarie (1970) 16 WIR 401 110
Clore v Theatrical Properties Ltd [1963] 3 All ER 483 9, 105
Coatsworth v Johnson (1886) 55 LJ QB 220 17
Cobb v Lane [1952] 1 All ER 1199 8, 9, 11
Coe v Bush (1983) 20 JLR 99 40
Collins v Hopkins [1923] 2 KB 617 28
Colonial Minerals Ltd v Joseph Dew and Son Ltd (No 1) (1951) 2 OECSLR 243 49
Colonial Minerals Ltd v Joseph Dew and Son Ltd (No 2) (1959) 2 OECSLR 248 50
Constant Spring and Norbrook Estates, Re (1961) 3 WIR 270 166
Cook v Shoesmith [1926] 1 KB 752 36
Copeland v Greenhalf [1952] 1 All ER 809 178
Cornwall v Trincity Commercial Centre Ltd (1996) High Court, Trinidad and Tobago, No 1437 of 1995 (unreported) 59, 62, 63, 65
Cotsworth v Betison (1696) 91 ER 965 64
Cottage Holiday Associates Ltd v Customs and Excise Commissioners [1983] QB 735 14
Covenant Community Church, Re (1990) 27 JLR 368 163
Crabb v Arun District Council [1975] 3 All ER 865 115
Crampad International Marketing Co Ltd v Thomas [1989] 1 WLR 242 76, 91
Crate v Miller [1947] KB 946 55
Crevelle v Agana (1986) Court of Appeal, Trinidad and Tobago, Mag App No 315 of 1984 (unreported) 94
Cricklewood Property and Investment Trust Ltd v Leighton's Investment Trust Ltd [1945] AC 221 58
Crooks v Browne (1986) 23 JLR 475 183
Crow v Wood [1970] 3 All ER 425 180
Cuckmere Brick Co Ltd v Mutual Finance Ltd [1971] 2 All ER 633 234, 235, 236, 237
Cyrus v Gopaul (1989) Court of Appeal, Trinidad and Tobago, Mag App No 69 of 1987 (unreported) 8, 19, 98

Dagger v Shepherd [1946] KB 215 55
Dalton v Angus (1881) 6 App Cas 740 194, 195
Daniel v North (1809) 103 ER 1047 198
Darling v Clue (1864) 176 ER 586 199
Davey v Durant (1857) 26 LJ Ch 830 234
David v Stollmeyer Ltd (1959) 1 WIR 153 193
David v Williams (1835) 57 ER 485 46

Davis v Franklyn (1994) Supreme Court, Jamaica, No E 148 of 1982 (unreported) 236
Davis v Lisle [1936] 2 KB 434 102
Davis v Symons [1934] Ch 442 218
De Hayney v Ali (1986) Court of Appeal, Trinidad and Tobago, Mag App No 169 of 1984 (unreported) 20, 97, 98
Dear v Wilkinson (1960) 2 WIR 309 213
Deen v Mahabir (1970) 17 WIR 21 20
Dendy v Nicholl (1858) 140 ER 1130 45
Denson v Bush [1980–83] CILR 141 110, 172
Deosarran v Mohammed (1988) High Court, Trinidad and Tobago, No HCA 493 of 1978 (unreported) 88
Derrick v Trinidad Asphalt Holdings Ltd (1979) 33 WIR 273 230
Dibble v Bowater (1853) 118 ER 879 59
Dickson v Playa del Sol Ltd (1982) 1 BZLR 370 230, 235
Diego Martin Consumers Co-operative Society Ltd v Liverpool (1997) High Court, Trinidad and Tobago, No 2752 of 1996 (unreported) 53, 59, 64
Dillwyn v Llewelyn [1861–73] All ER Rep 384 107
Diment v Foot (NH) Ltd [1974] 2 All ER 785 196
Dodsworth v Dodsworth (1973) 228 EG1115 114, 115
Doe d Henniker v Watt (1828) 8 B & C 308 44
Dolphin's Conveyance, Re [1970] 2 All ER 664 158
Doolan v Ramlakan (1967) 12 WIR 146 62
Douglas v Pereira (1966) 11 WIR 20 83, 84
Drake v Gray [1936] 1 All ER 363 150
Draper's Conveyance, Re [1967] 3 All ER 853 124, 126
Dreckett v Rapid Vulcanizing Co Ltd (1988) 25 JLR 130 236, 237
Dunn v Pantin (1992) High Court, Trinidad and Tobago, No 3203 of 1991 (unreported) 95
Dunnachie v Irwin [1951] NZLR 79 75
Duplessis v Moore (1993) High Court, Barbados, No 1082 of 1988 (unreported) 45
Duppa v Mayo (1668) 1 Wms Sound 282 47

E and GC Ltd v Bate (1935) 79 LJ News 203 142
Earl v Spence (1992) Court of Appeal, Jamaica, Civ App No 69 of 1989 (unreported) 169
Ecclesiastical Commissioners for England v KiNo (1880) 14 Ch D 213 212
Edelweiss Chalets Condominium Association v Davis (1998) Supreme Court, The Bahamas, No FP 160 of 1997 (unreported) 138, 230
Edwards v Brathwaite (1978) 32 WIR 85 9, 13
Elias (Emile) and Co Ltd v Pine Groves Ltd [1993] 1 WLR 305 159
Ellenborough Park, Re [1955] 3 All ER 667 173, 174, 177
Elliston v Reacher [1908] 2 Ch 374 157, 158, 160, 161

Errington v Errington [1952] 1 All ER 149 11, 105, 106, 172
Esdaile v Lewis [1952] 2 All ER 357 36
Esso Petroleum Co Ltd v Harper's Garage Ltd [1967] 1 All ER 699 224
Evans v Enver [1920] 2 KB 315 47
Evelyn v Alkins (1970) 16 WIR 444 83, 87
Ewart v Fryer [1901] 1 Ch 499 53
Expert Clothing Service and Sales Ltd v Hillgate House Ltd [1985] 2 All ER 998 51
Eyre v Johnson [1946] 1 All ER 719 58

Facchini v Bryson [1952] 1 TLR 1386 9
Fairclough v Marshall (1878) 4 Ex D 37 149
Fairclough v Swan Brewery Co Ltd [1912] AC 565 221
Falcke v Scottish Imperial Insurance Co (1886) 34 Ch D 234 112
Farmiloe's Application, Re (1983) 48 P & CR 317 170
Farrington v Bush (1974) 12 JLR 1492 248, 249
Federal Motors Ltd's Application, Re (1966) 9 WIR 375 167
Federated Homes Ltd v Mill Lodge Properties Ltd [1980] 1 All ER 371 152, 153, 155
Felix v Roberts (1990) High Court, Trinidad and Tobago, No 1617 of 1981 (unreported) 73
Fenton v Logan (1833) 131 ER 767 65
Ferreira v Antoine (1972) Court of Appeal, Trinidad and Tobago, Mag App No 97 of 1972 (unreported) 92
Ferreira v Mansfield [1947] LRBG 73 23
Ferreira v Rudder (1961) 4 WIR 79 92
First Citizens Bank Mortgage and Trust Co Ltd v Anthony (1997) High Court, Trinidad and Tobago, No 708 of 1996 (unreported) 234
Fletcher v Nokes [1897] 1 Ch 271 49
Flores v Wright (1985) 1 BZLR 385 110
Flowers v Forbes [1971–76] 1 LRB 340 248
Forbes v Bonnick (1968) 11 JLR 67 118
Forest Villas Condominium Association v Caneiro (1992) 422 SE 2d 884 (Ga App 1992) 138
Forgac's Application, Re (1976) 32 P & CR 464 170
Formby v Barker [1903] 2 Ch 539 143
Foster v Robinson [1950] 2 All ER 342 53
Four Maids Ltd v Dudley Marshall (Properties) Ltd [1957] 2 All ER 35 225, 226
Francis v Daley (1964) 6 WIR 256 32
Freeman v Laing [1899] 2 Ch 355 241
Friary Holroyd and Healey's Breweries Ltd v Singleton [1899] 2 Ch 261 39
Fung v Kit (1985) Court of Appeal, Trinidad and Tobago, Mag App No 149 of 1984 (unreported) 87

GLT Corporation Ltd v Bank of Nova Scotia, No E 56 of 1980 (unreported) 132
Gabriel v Ramlal (1968) Court of Appeal, Trinidad and Tobago, Mag App No 304 of 1968 (unreported) 73
Gadd's Land Transfer, Re [1966] Ch 56 145
Gaffoor and Sons Ltd v Boodhan, No 2626 of 1968 (unreported) 82
Gainsborough Avenue, Re 13 (1990) Supreme Court, Jamaica, No ERC 184 of 1987 (unreported) 162, 166, 167
Gamble v Hankle (1990) 27 JLR 115 123
Gardner v Hodgson's Kingston Brewery [1903] AC 229 196
Gardner v Ingram (1889) 61 LT 729 55
Geon Contractors and Associates Ltd v National Commercial Bank (Jamaica) Ltd (1991) 28 JLR 409 241
Ghany Investments Ltd v Ward (1995) Court of Appeal, Trinidad and Tobago, Civ App No 5 of 1989 (unreported) 96, 97, 98
Ghey and Galton's Application, Re [1957] 3 All ER 164 165, 169
Gibbs v Messer [1891] AC 248 5
Gibson v Martin (1961) 3 WIR 335 72
Gibson v Walton (1992) 28 Barb LR 113 120, 126
Giles v County Building Constructors Ltd (1971) 22 P & CR 978 209
Gill v Lewis [1956] 1 All ER 844 47
Gillette v Abouhamad (1966) 9 WIR 278 83, 86
Gittens v Bernard (1962) 5 WIR 256 80
Glass v Kencakes Ltd [1964] 3 All ER 807 51
Glenwood Lumber Co Ltd v Phillips [1904] AC 405 8
Glinton v Albacore Developments Ltd (1988) Supreme Court, The Bahamas, No 488 of 1988 (unreported) 133
Glover v Coleman (1874) LR 10 CP 108 204
Golden Star Manufacturing Co Ltd v Jamaica Frozen Foods Ltd (1986) Court of Appeal, Jamaica, Civ App No 13 of 1986 (unreported) 71
Goldstein v Sanders [1915] 1 Ch 549 42
Goodyear v Maynard (1983) Supreme Court, The Bahamas, No 981 of 1982 (unreported) 132
Grant v Bennett (1959) 2 WIR 140 72
Grant v Francis (1997) Supreme Court, The Bahamas, No 957 of 1996 (unreported) 133
Gray v Bonsall [1904] 1 KB 601 53
Greasely v Cooke [1980] 3 All ER 710 113, 114
Great Central Rly Co v Bates [1921] 3 KB 578 102
Great Western Rly v Smith (1876) 2 Ch D 235 48
Greater London Council v Connolly [1970] 1 All ER 870 32
Greaves v Barnett (1978) 13 Barb LR 129 247
Green v Ashco Horticulturalist Ltd [1966] 2 All ER 232 191, 192

Green v Thomas (1977) High Court, Trinidad and Tobago, No 3 of 1972 (unreported) 23
Green Valley Estates Ltd v Lazarus (1991) 28 JLR 399 246
Greenwich London Borough Council v Discreet Selling Estates Ltd (1991) 81 P & CR 405 46
Griffith v Pelton [1957] 3 All ER 75 38
Griffiths v Williams (1977) 248 EG 947 115
Grigsby v Melville [1973] 1 All ER 385 178
Grimes (AP) Ltd v Grayshott Motor Co Ltd (1967) 201 EG 586 39
Grimwood v Moss (1872) LR 7 CP 360 46
Guyadeen v Glasgow (1963) 6 WIR 477 73, 77

HV Holdings Ltd v Jumadeen (1988) High Court, Trinidad and Tobago, No S 2483 of 1986 (unreported) 57
Hadad v Elias (1993) High Court, Trinidad and Tobago, No 97 of 1992 (unreported) 10, 40
Halfmoon Bay Ltd v Crown Eagle Hotels Ltd (1996) Supreme Court, Jamaica, Nos ERC 63 and 418 of 1995 (unreported) 151
Halifax Building Society v Clark [1973] 2 All ER 33 225
Hall v Ewin (1887) 37 Ch D 74 145
Halsall v Brizzell [1957] 1 All ER 371 147
Haloute's Application, Re (1986) High Court, Barbados, No 156 of 1986 (unreported) 163
Hamblin v Samuel (1966) 11 WIR 48 29
Hammond v Pryce (1990) 27 JLR 145 78
Hansford v Jago [1921] 1 Ch 322 186
Harris v Goddard [1983] 3 All ER 242 124, 126
Harrysingh v Ramgoolam (1984) High Court, Trinidad and Tobago, No 744 of 1978 (unreported) 21, 54, 55, 94
Hart v Pierce (1967) 11 WIR 179 174, 201
Haseler v Lemoynes (1858) 141 ER 214 67
Haskell v Marlow [1928] 2 KB 45 35
Hayes v Walke (1989) High Court, Trinidad and Tobago, No 2513 of 1982 (unreported) 80
Hayes' Estate, Re [1920] 1 Ir 207 124
Haynes v Minors (1972) 2 OECSLR 235 116
Hearn v Republic Bank Ltd (1991) High Court, Trinidad and Tobago, No 3738 of 1990 (unreported) 232
Henderson v Griffith (1970) High Court, Guyana, No 2488 of 1967 (unreported) 183
Henry v Lewis (1988) Court of Appeal, Trinidad and Tobago, Civ App No 173 of 1987 (unreported) 82

Hepburn v Hanley (1981) Court of Appeal, The Bahamas, No 17 of 1980 (unreported) 247
Hewitt v Porter (1987) 24 JLR 51 80
Higgins v Texaco Bahamas Ltd (1987) Supreme Court, The Bahamas, No 233 of 1986 (unreported) 46
Higgs v Nassauvian Ltd [1975] 1 All ER 95 243, 247, 251
Hill v Booth [1930] 1 KB 381 42
Hill v Tupper [1861–73] All ER Rep 696 175
Hobbs v Laurie (1992) High Court, Barbados, No 217 of 1988 (unreported) 198
Hoffmann v Fineberg [1949] Ch 245 51
Holland v Hodgson (1872) LR 7 CP 328 67
Hollins v Verney (1884) 13 QBD 304 197
Home Property and Investment Co Ltd v Walker [1947] 1 All ER 789 36
Horn v Hiscock (1872) 223 EG 1437 186
Houlder Bros and Co Ltd v Gibbs [1925] 1 Ch 575 37
Howard v Shaw (1841) 151 ER 973 20
Hulbert v Dale [1909] 2 Ch 570 204
Hunter's Lease, Re [1942] 1 All ER 27 43
Hurst v Picture Theatres Ltd [1915] 1 KB 1 102
Hutchinson, Re (1992) High Court, St Vincent and The Grenadines, No 504 of 1991 (unreported) 59
Hyman v Rose [1912] AC 623 52

International Hotels Ltd v Cornwall Holdings Ltd (1996) Supreme Court, Jamaica, No CLI 036 of 1994 (unreported) 34
International Tea Stores Ltd v Hobbs [1903] 2 Ch 165 190, 191
Inwards v Baker [1965] 1 All ER 446 109, 110, 115, 116
Iron Trades Employers' Insurance Association v Union Land and House Investors Ltd [1937] 1 All ER 481 224
Ironside v Cook (1978) 41 P & CR 326 197
Isaac v Hotel de Paris Ltd [1960] 1 All ER 348 8, 9, 10, 11
Ives (ER) Investments Ltd v High [1967] 1 All ER 504 115, 116, 172

JJ Pharmacy Ltd v Parillon Investments Ltd (1988) High Court, Trinidad and Tobago, No 1495 of 1988 (unreported) 59, 64
Jackson, Re (1887) 34 Ch D 732 121
Jacob (CR) and Sons Ltd v Oudkirk [1947] LRBG 81 82, 87
Jaeger v Mansions Consolidated Ltd (1902) 87 LT 690 26
Jagroo v Khan (1990) High Court, Trinidad and Tobago, No 1041 of 1985 (unreported) 24
Jalname Ltd v Ridewood (1989) 61 P & CR 143 207
Jamaica Citizens Bank Ltd v Reid (1995) Supreme Court, Jamaica, Nos CLJ 822 of 1987 and CLJ 230 of 1988 (unreported) 234

Jamaica Mutual Life Assurance Society v Hillsborough Ltd
[1989] 1 WLR 1101 152, 154, 159
James v James (1873) LR 16 Eq 153 239
Jangoo v Williams (1991) High Court, Trinidad and Tobago,
No 598A of 1990 (unreported) 88
Jeff's Transfer (No 2), Re [1966] 1 All ER 937 154
Jelbert v Davis [1968] 1 All ER 1182 207
Jenkins v Jackson (1888) 40 Ch D 71 26
Jennings v Jordan (1881) 6 App Cas 698 241
Jeremiah v Marcelle (1988) Court of Appeal, Trinidad and Tobago,
Mag App No 67 of 1986 (unreported) 87
Jeune v Queen's Cross Properties Ltd [1973] 3 All ER 97 30
John v Samuel (1987) High Court, Trinidad and Tobago,
No 4147 of 1978 (unreported) 201
Johnson v Morris [1988–89] Carib Comm LR 351 84, 87
Johnson v Myers (1988) 25 JLR 74 246, 247, 248
Johnson v Wallace (1988–89) 1 Carib Comm LR 49 133, 134
Johnstone v Holdway [1963] 1 All ER 432 181, 182
Jones v Johnson (1850) 155 ER 377 65
Jones v Lavington [1903] 1 KB 253 23
Jones v Price [1965] 2 QB 618 180
Jones v Price (1992) 64 P & CR 404 200
Jones v Williams [1835–42] All ER Rep 423 252
Joseph v Edwards (1994) High Court, Trinidad and Tobago,
No 508 of 1991 (unreported) 97

Kain v Norfolk [1949] 1 All ER 176 207
Kanhai v Gosine (1988) Court of Appeal, Trinidad and Tobago,
Mag App No 125 of 1986 (unreported) 19, 95
Kassim v Georgetown Clerk (1961) 4 WIR 135 9
Keefe v Amor [1964] 2 All E R 517 174
Kennedy v De Trafford [1897] AC 180 234, 235
Kenny v Preen [1962] 3 All ER 814 24, 25
15 Kensington Crescent, Re (1996) Supreme Court, Jamaica,
No ERC 10 of 1995 (unreported) 163
Khan v Khan (1994) High Court, Trinidad and Tobago,
No 1022 of 1993 (unreported) 108, 115
Khan v Reece (1989) Court of Appeal, Trinidad and Tobago,
Civ App No 149 of 1988 (unreported) 93
Kidderminster Mutual Benefit Building Society v Haddock [1936] WN 158 238
Kilgour v Gaddes [1904] 1 KB 457 176, 198
King, Re [1963] 1 All ER 781 43
King v David Allen and Son (Billposting) Ltd [1916] 2 AC 54 104

King's Motors (Oxford) Ltd v Lax [1970] 1 WLR 426 32
Knightsbridge Estates Trust Ltd v Byrne [1939] Ch 441 220, 221
Knowles v Rolle (1984) Supreme Court, The Bahamas,
No 276 of 1980 (unreported) 243, 247
Kotak v Jadav [1958] EA 772 79
Kreglinger v New Patagonia Meat and Cold Storage Co Ltd [1914] AC 25 223
Kuarsingh v Stephens (1996) High Court, Trinidad and Tobago,
No 1497 of 1991 (unreported) 173

Lace v Chantler [1944] KB 368 13
Lake v Craddock (1732) 24 ER 1011 121
Lake v Gibson (1729) 21 ER 1052 120
Lamb v Midac Equipment Ltd (1996) 52 WIR 290 151, 159
Landfall, Re (1970) 17 WIR 178 163
Lavender v Betts [1942] 2 All ER 72 23
Lawrence v South County Freeholds [1939] 2 All ER 503 157
Lazzari v Lazzari [1997] CILR 350 199
Lee v Gransel [1558–1774] All ER Rep 468 61
Lee v K Carter Ltd [1948] 2 All ER 690 37
Lee v Mitchell (1957) Court of Appeal, Trinidad and Tobago,
No 246 of 1957 (unreported) 93
Lee Kin v Cumana Consumers Co-operative Society Ltd (1984)
High Court, Trinidad and Tobago, No 2109 of 1981 (unreported) 57
Lee-Parker v Izzett [1971] 3 All ER 1099 30
Legge v Matthews [1960] 1 All ER 595 75
Leigh v Jack (1879) 5 Ex D 264 246
Lewin v American and Colonial Distributors Ltd [1945] 2 All ER 271 42
Lewis v Bhajwatsingh (1985) Court of Appeal, Trinidad and Tobago,
Mag App No 175 of 1984 (unreported) 83, 87
Lewis v Davis (1989) Court of Appeal, Trinidad and Tobago,
Mag App No 167 of 1987 (unreported) 82
Lewis v McLean (1982) Court of Appeal, Jamaica,
Civ App No 40 of 1981 (unreported) 113
Lewis v Read (1845) 153 ER 350 66
Lewis and Allenby Ltd v Pegge [1914] 1 Ch 782 37
Liverpool City Council v Irwin [1976] 2 All ER 39 28, 181
Liverpool Corporation v Coghill [1918] 1 Ch 307 196
Lloyds Bank Ltd v Marcan [1973] 3 All ER 754 32
Lock v Pearce [1893] 2 Ch 271 49
London and Blenheim Estates Ltd v Ladbroke Retail Parks Ltd
[1993] 1 All ER 307 179
London and County Ltd v Wilfred Sportsman Ltd [1970] 2 All ER 600 43
London and South Western Rly Co v Gomm (1882) 20 Ch D 562 38

London and Suburban Land and Building Co (Holdings) Ltd
v Carey (1991) 62 P & CR 480 207
London (Corporation of) v Riggs (1880) 13 Ch D 798 208
London County Council v Allen [1914] 3 KB 642 144
Long v Gowlett [1923] 2 Ch 177 192
Lord Advocate v Lord Blantyre (1879) 4 App Cas 770 251, 252
Lord Advocate v Lord Lovat (1880) 5 App Cas 273 246, 248, 252
Lot 10, McAuley Heights, Re (1989) Supreme Court, Jamaica,
No ER R/C 70 of 1983 (unreported) 169, 170
Lots 12 and 13, Fortlands, Re (1969) 15 WIR 312 164
Lot 49 Ebony Glades, Re (1996) Supreme Court, Jamaica,
No ER R/C 220 of 1991 (unreported) 169
Lovell v Smith (1857) 140 ER 685 212
Lowenthal v Vanhoute [1947] 1 All ER 16 57
Luker v Dennis (1877) 7 Ch D 227 143
Lurcott v Wakely [1911] 1 KB 905 33
Lush v Duprey (1966) 10 WIR 389 170, 171, 183, 185
Lyde v Russel (1830) 109 ER 834 68
Lynes v Snaith [1989] 1 QB 486 8
Lyons v Elliott (1876) 1 QBD 210 62
Lyons v Quamina (1989) High Court, Trinidad and
Tobago, No 97 of 1986 (unreported) 23

MRA Engineering Ltd v Trimster Co (1987) 56 P & CR 1 184
MacLeod v Jones (1883) 24 Ch D 289 233
Mahadeo v Dass (1988) High Court, Trinidad and
Tobago, No 1570 of 1980 (unreported) 8, 98
Maharaj v Constance (1981) High Court, Trinidad and
Tobago, No 1611 of 1981 (unreported) 89
Maillis v Town Court Ltd [1989–90] 1 LRB 184 137
Majadsingh v Lutchmansingh (1989) Court of Appeal,
Trinidad and Tobago, Mag App No 33 of 1987 (unreported) 83, 87
Majid v Beepath (1981) High Court, Trinidad and Tobago,
No 882 of 1976 (unreported) 173, 176, 189
Malayan Credit Ltd v Jack Chia-MPH Ltd [1986] 1 All ER 711 122
Malcolm Allotments, Re (1981) Supreme Court, The Bahamas,
No 593 of 1965 (unreported) 243, 244
Manchester, Sheffield and Lincolnshire Rly Co v Anderson [1898] 2 Ch 394 27
Mander v Falcke [1891] 2 Ch 554 146
Mangal v Camacho (1975) High Court, Trinidad and
Tobago, No 1734 of 1972 (unreported) 74
Manjang v Drammeh (1990) 61 P & CR 194 184
Mapp v Barclays Bank International Ltd (1992) 43 WIR 30 216

Marchant v Charters [1977] 3 All ER 918 — 9
Marcroft Wagons Ltd v Smith [1951] 2 All ER 271 — 9, 11
Markham v Paget [1908] 1 Ch 697 — 23
Marlborough (Duke of) v Oxborn (1864) 122 ER 758 — 32
Marriott v Anchor Reversionary Co (1861) 45 ER 846 — 228
Marten v Flight Refuelling Ltd [1961] 2 All ER 696 — 149
Martin v Boodham (1984) High Court, Trinidad and Tobago, No 1230 of 1982 (unreported) — 94, 95
Martin v Smith (1874) LR 9 Ex 50 — 15
Matharu v Matharu (1994) 68 P & CR 93 — 115
Matthews v Smallwood [1910] 1 Ch 777 — 45
Matthey v Curling [1922] 2 AC 180 — 58
Maychem v Lucayan Towers South Condominium Association (1993) Supreme Court, The Bahamas, No 1581 of 1991 (unreported) — 137
Mayfield Holdings Ltd v Moana Reef Ltd [1973] 1 NZLR 309 — 102
McCollin v Carter (1974) 26 WIR 1 — 113
McDoom v Fung [1946] LRBG 2891 — 82
McGarnon v Brathwaite (1963) Court of Appeal, Trinidad and Tobago, No 395 of 1963 (unreported) — 93
McIntosh v Marzouca (1955) 6 JLR 349 — 85
McMorris v Brown [1998] 3 WLR 971 — 169, 170
Megson v Mapleton (1884) 49 LT 744 — 66
Meredith v Gray (1968) 11 JLR 100 — 21
Metcalfe v Boyce [1927] 1 KB 758 — 54
Metcalfe and Eddy Ltd v Edghill (1963) 5 WIR 417 (Court of Appeal, Trinidad and Tobago) — 15, 16
Meyer v Charles (1992) 43 WIR 169 — 187
Miller v Emcer Products [1956] 1 All ER 237 — 23, 174, 178, 179
Milner's Safe Co Ltd v Great Northern and City Rly Co [1907] 1 Ch 208 — 208
Milo Butler and Sons Investment Co Ltd v Monarch Investments Ltd (1998) Supreme Court, The Bahamas, No 10 of 1989 (unreported) — 30, 31, 33
Mitchell v Cowie (1964) 7 WIR 118 — 69
Mohammed v Ali (1998) High Court, Trinidad and Tobago, No 1737 of 1980 (unreported) — 184, 202
Mohan v Ramjag (1969) 14 WIR 500 — 82
Mona and Papine Estates, Re (1994) Supreme Court, Jamaica, No ERC 147 of 1991 (unreported) — 163
Montrichard Enterprises Ltd v Attorney General (1998) High Court, Trinidad and Tobago, No CV 350 of 1989 (unreported) — 36
Moody v Steggles (1879) 12 Ch D 261 — 174
Moonan v Moonan (1988) Court of Appeal, Trinidad and Tobago, Mag App No 12 of 1987 (unreported) — 19, 67
Moore v Rawson (1824) 107 ER 756 — 212

Morales v Birchwood, Privy Council Appeal, 1982 (unreported) 93
Morales v Roberts (1976) Court of Appeal, Trinidad and Tobago, Mag App no 227 of 1975 (unreported) 80
Morley v Bird (1798) 30 ER 1192 120
Moss v Barton (1866) LR 1 Eq 474 39, 40
Moss Empires Ltd v Olympia Ltd [1939] 3 All ER 460 43
Multiservice Bookbinding Ltd v Marden [1978] 2 All ER 489 222
Mums Inc v Cayman Capital Trust [1988–89] CILR 485 122, 127
Murmarson Ltd v Eldemire [1988–89] CILR 61 162
Murphy v Murphy [1980] IR 183 247
Murray, Bull and Co Ltd v Murray [1952] 2 All ER 1079 11

Nall v Cox (1987) High Court, Barbados, No 718 of 1987 (unreported) 252
Narine v Narine (1973) High Court, Guyana, No 437 of 1972 (unreported) 23
Nash v Lucas (1867) LR 2 QB 590 60
National Bank of Australasia v United Hand-in-Hand and Band of Hope (1879) 4 App Cas 391 235
National Carriers Ltd v Panalpina Northern Ltd [1981] 1 All ER 161 57
National Provincial Bank Ltd v Ainsworth [1965] 2 All ER 472 105
National Trust v White [1987] 1 WLR 907 207
New River Company v Crumpton [1917] 1 KB 762 50
Newman v Jones, 22 March 1982, unreported 179, 192
Newman v Real Estate Debenture Corp Ltd [1940] 1 All ER 131 27
Newton Abbot Co-operative Society Ltd v Williamson and Treadgold Ltd [1952] 1 All ER 279 156
Nickerson v Barraclough [1979] 3 All ER 312; on appeal, [1981] 2 All ER 369 183
Nielson-Jones v Fedden [1974] 3 All ER 38 124, 125
Niles v Shaw (1966) Court of Appeal, Trinidad and Tobago, Mag App No 342 of 1966 (unreported) 88
Noakes v Rice [1902] AC 24 222
Noel v Inniss (1982) High Court, Trinidad and Tobago, No 1371 of 1982 (unreported) 96
48 Norbrook Avenue, Re (1994) Supreme Court, Jamaica, No ERC 80 of 1990 (unreported) 163, 165

O'Brien v Robinson [1973] 1 All ER 583 30
O'Brien Loans Ltd v Missick [1977] 1 LRB 49 69
Ocean Accident and Guarantee Corp Ltd v Ilford Gas Co [1905] 2 KB 493 240
Ocean Estates Ltd v Pinder [1969] 2 AC 19 243, 244, 252
Old Grovebury Manor Farm Ltd v W Seymour Plant Sales and Hire Ltd (No 2) [1979] 3 All ER 504 48
Ou Wai v Jordan (1982) Court of Appeal, Trinidad and Tobago, No 21 of 1981 (unreported) 78

Palfrey v Palfrey (1974) 229 EG 1593 246
Palk v Mortgage Services Funding plc [1993] 2 All ER 481 234
Palmer v Rich [1987] 1 Ch 134 124
Pantin v Mahadeo, Court of Appeal, Trinidad and Tobago,
Civ App No 15 of 1971 (unreported) 24
Pantin v Williams (1995) High Court, Trinidad and Tobago,
No 1379 of 1991 (unreported) 19, 48
Panton v Roulstone (1976) 24 WIR 462 117, 121
Paradise Beach and Transportation Co Ltd v Price-Robinson
[1968] 1 All ER 530 247
Paradise Island Ltd v Condor Enterprises Ltd (1993)
Supreme Court, The Bahamas, No 873 of 1992 (unreported) 162
Pascoe v Turner [1979] 2 All ER 945 115
Pass v Ramsahoye (1986) High Court, Barbados, No 231 of 1986 (unreported) 151
Patrick v Beverley Gardens Development Co Ltd (1974) Court of
Appeal, Jamaica, Civ Apps No 36 of 1972 and 21 of 1974 (unreported) 45
Perera v Vandiyar [1953] 1 All ER 1109 24
Perry v Barker (1806) 33 ER 269 239
Perry v Davis (1858) 140 ER 945 45
Perry v Woodfarm Homes Ltd [1975] IR 104 244
Phillips v Halliday [1891] AC 228 175
Phipps v Pears [1964] 2 All ER 35 177, 191
Pinewood Estate, Re [1957] 2 All ER 517 156
Plantel Ltd v Manick (1987) High Court, Trinidad and Tobago,
No 2315 of 1987 (unreported) 62
Plasycoed Collieries Co v Partridge [1912] 2 KB 345 67
Poggott v Birtles (1836) 150 ER 507 66
Pollard v Dick (1977) 2 OECSLR 239 247
Pollonais v Gittens (1975) Court of Appeal, Trinidad and Tobago,
Mag App No 224 of 1974 (unreported) 56
Poole's Case (1703) 91 ER 320 67
Port v Griffith [1938] 1 All ER 295 27
Powell v McFarlane (1977) 38 P & CR 452 245
Preston Borough Council v Fairclough (1982) The Times, 15 December 54
Previous v Reedie [1924] All ER 573 56
Prior's Case, The (1368) YB 42 Ed III, P1, 14, fol 3A 149
Pro-Jam Ltd v Gilbraltar Trust Ltd (1997) Supreme Court,
Jamaica, No CLP 137 of 1986 (unreported) 67, 68
Proudfoot v Hart (1890) 25 QBD 42 33
Prudential Assurance Co Ltd v London Residuary Body [1992] 3 All ER 504 13
Pugh v Savage [1970] 2 All ER 353 198
Purchase v Lichfield Brewery Co [1915] 1 KB 184 17
Pwllbach Colliery Co Ltd v Woodman [1915] AC 634 185
Pyer v Carter (1857) 156 ER 1472 186

Quan v Gonzales (1966–69) 19 Trin LR (Pt V) 331 8, 12
Queen's Club Garden Estates Ltd v Bignell [1924] 1 KB 117 56
Quennell v Matlby [1979] 1 All ER 568 224, 227
Quinlan v Philip (1965) 9 WIR 269 81, 85

R v Hussey (1924) 18 Cr App R 160 45
RPC Holdings Ltd v Rogers [1953] 1 All ER 1029 211
Rains v Buxton (1880) 14 Ch D 537 245
Rajcoomar v Rampersad (1968) Court of Appeal, Trinidad and Tobago, Mag App No 212 of 1968 (unreported) 80
Ram v Ramkissoon (1968) 13 WIR 332 23, 24
Ramdass v Ramdass (1989) High Court, Trinidad and Tobago, No 1171 of 1988 (unreported) 184, 185
Ramesar v Ramdial (1977) High Court, Trinidad and Tobago, No 791 of 1975 (unreported) 93
Ramjattansingh v Khan (1977) High Court, Trinidad and Tobago, No 3210 of 1976 (unreported) 46
Ramkissoon v Sookwah (1990) High Court, Trinidad and Tobago, No 169 of 1971 (unreported) 181
Ramlal v Chong (1990) Court of Appeal, Trinidad and Tobago, Mag App No 107 of 1989 (unreported) 56
Ramoutar v Abdool (1993) High Court, Trinidad and Tobago, No 957 of 1983 (unreported); on appeal, (1998) Court of Appeal, Trinidad and Tobago, Civ App No 11 of 1989 (unreported) 21, 97
Rampersad v Alexander (1998) Court of Appeal, Trinidad and Tobago, Civ App No 11 of 1989 (unreported) 98
Rampersad v Jattan (1989) High Court, Trinidad and Tobago, No 4556 of 1988 (unreported) 184, 185
Ramsden v Dyson (1866) LR 1 HL 129 109, 111
Rance v Elvin (1983) 49 P & CR 65 180
Ranelagh (Lord) v Melton (1864) 2 Drew and Sim 278 39
Ravenseft Properties Ltd v Davstone (Holdings) Ltd [1979] 1 All ER 929 34
Ray, Re [1896] 1 Ch 468 193
Redmond v Dainton [1920] 2 KB 256 58
Reece v Byer (1991) High Court, Trinidad and Tobago, No 3853 of 1990 (unreported) 94, 95
Reece v Khan (1988) High Court, Trinidad and Tobago, No 5373 of 1983 (unreported); on appeal, *sub nom* Khan v Reece (1989) Court of Appeal, Trinidad and Tobago Civ App No 149 of 1988 (unreported) 93
Reeve v Lisle [1902] AC 461 219
Regent Oil Co v JA Gregory (Hatch End) Ltd [1966] Ch 402 145
Regis Property Co Ltd v Redman [1956] 2 All ER 335 180
Reid v Bickerstaff [1909] 2 Ch 305 156, 160

Reidy v Walker [1933] 2 KB 266 76
Remon v City of London Real Property Co Ltd [1921] 1 KB 49 96
Renals v Cowlishaw (1878) 9 Ch D 125 151
Reyes v Ali (1998) High Court, Trinidad and Tobago,
No 4278 of 1995 (unreported) 60
Ribero v Fortune (1965) Court of Appeal, Trinidad and Tobago,
No 283 of 1965 (unreported) 82
Richards v Walker (1982) 19 JLR 236 55, 91
Richardson v Emmanuel (1970) Court of Appeal, Trinidad and
Tobago, Mag App No 401 of 1969 (unreported) 79
Ricketts v Enfield Churchwardens [1909] 1 Ch 544 42
Ridley v Taylor [1965] 2 All ER 51 168
Riley v Brathwaite (1979) 37 WIR 66 247
Rivers v Darceuil (1997) High Court, Trinidad and Tobago,
No 2024 of 1984 (unreported) 184
Roake v Chadha [1983] 3 All ER 503 154
Roberts, Re ex p Brook (1878) 10 Ch D 100 68
Roberts v Albacore Developments Ltd (1992) Supreme Court,
The Bahamas, No 503B of 1992 (unreported) 134
Roberts Realty of The Bahamas Ltd v Innscinz, No E 419 of 1972 (unreported) 132
Robley v Samuel (1987) High Court, Trinidad and Tobago,
No 8 of 1986 (unreported) 201
Robson v Hallett [1967] 2 QB 939 101, 102
Rogers v Hosegood [1920] 2 Ch 388 150, 151, 156
Rogers v Regis (1993) High Court, Trinidad and Tobago,
No 1475 of 1992 (unreported) 72
Romany v Guelmo (1994) High Court, Trinidad and Tobago,
No 1688 of 1991 (unreported) 60
Romany v Romany (1972) 21 WIR 491 9, 19
Rose Hall Ltd v Chase Merchant Bankers (Jamaica) Ltd (1976)
Supreme Court, Jamaica, No E 211 of 1976 (unreported) 237
Ross v Cable and Wireless (WI) Ltd [1952–79] CILR 240 178
Rugby School Governors v Tannahill [1935] 1 KB 87 51
Ruiz v Lazar (1984) High Court, Trinidad and Tobago,
No 1941 of 1982 (unreported) 95
Rushton (A Bankrupt), Re [1972] Ch 197 123
Russell v Archdale [1962] 2 All ER 305 154
Rye v Rye [1962] 1 All ER 146 193

Salt v Marquess of Northampton [1892] 2 Ch 307 218
Samad v Jordan (1972) High Court, Guyana, No 1289 of 1970 (unreported) 36
Samuel v Jarrah Timber and Wood Paving Corp Ltd [1904] AC 323 219
Samuel Keller (Holdings) Ltd v Martins Bank Ltd [1970] 3 All ER 950 231

San Fernando Medical Centre Ltd v Republic Finance and Merchant Bank Ltd (1995) High Court, Trinidad and Tobago, No 118 of 1993 (unreported) 232
Sarson v Roberts [1895] 2 QB 395 28
Saul v Saul [1963] LRBG 299 23
Savva v Costa (1981) 131 NLJ 1114 112
Sawyer v Butler (1991) Supreme Court, The Bahamas, No 356 of 1990 (unreported) 115
Sawyer v Family Guardian Insurance Co (1992) Supreme Court, The Bahamas, No 503B of 1992 (unreported) 134
Scala House and District Property Co Ltd v Forbes [1973] 3 All ER 308 49, 51, 52
Scantlebury v Young (1948–57) 1 Barb LR 23 247
Schwab v McCarthy (1976) 31 P & CR 196 53
Schwann v Cotton [1916] 2 Ch 120 189
Scott v Lerner Shop Ltd (1988) 25 JLR 219 54
Sealandaire Ltd v Paul (1994) High Court, Trinidad and Tobago, No 169 of 1994 (unreported) 59, 65, 66
Sealy v Sealy (1990) High Court, Barbados, No 1492 of 1987 (unreported) 107, 115
Seepersad v Colonial Life Insurance Co (Trinidad) Ltd (1990) High Court, Trinidad and Tobago, No 404 of 1990 (unreported) 232
Seetahal v Batchasingh (1987) High Court, Trinidad and Tobago, No 89 of 1983 (unreported) 21, 98
Segal Securities Ltd v Thoseby [1963] 1 All ER 500 45
Selwyn's Conveyance, Re [1967] 1 All ER 339 154
Seymour v Ebanks [1980–83] CILR 252 115
Shamku v Howard (1988) Court of Appeal, Trinidad and Tobago, Mag App No 274 of 1985 (unreported) 80
Shannon Ltd v Venner Ltd [1965] 1 All ER 590 181
Sharp v Waterhouse (1857) 119 ER 1449
Shirley Apartments Ltd v Rogers (1987) Supreme Court, The Bahamas, No 198 of 1985 (unreported) 55
Shubrook v Tufnell [1916] 2 Ch 120 188
Simmonds v Crossley [1922] 2 KB 95 56
Simmons v Dobson [1991] 4 All ER 25 198
Simper v Folly (1862) 70 ER 1179 212
Simpson v Hartopp [1558–1774] All ER Rep 453
Singh v Mortimer (1966) 10 WIR 65 117
Singh v Szala (1975) Full Court, Guyana (unreported) 23
Skinner v Geary [1931] 2 KB 546 76, 77
Smiley v Townshend [1950] 1 All ER 530 58
Smith v City Petroleum Co Ltd [1940] 1 All ER 260 68
Smith v Enright (1893) 63 LJQB 220 66
Smith v Marrable (1843) 152 ER 693; 174 ER 598 28

Smith v Seghill Overseers (1875) LR 10 QB 422 9
Smith v Wright (1861) 158 ER 338 64
Smith and Snipes Hall Ltd v River Douglas Catchment
Board [1949] 2 All ER 179 149
Snaith and Dolding's Application, Re (1995) 71 P & CR 104 170
Solomon v Khan (1962) 5 WIR 132 80
Sooknanan v Sooknanan (1995) High Court, Trinidad and Tobago,
No S 622 of 1994 (unreported) 108
Sookoo v Edgecombe (1997) High Court, Trinidad and Tobago,
No 412 of 1990 (unreported) 183
Sotheby v Grundy [1947] 2 All ER 761 34
Southair (Bahamas) Ltd v Signet Bank (Bahamas) Ltd (1993)
Supreme Court, The Bahamas, No 112 of 1992 (unreported) 130
Southam v Smout [1963] 3 All ER 104 60
Sovmots Investments Ltd v Secretary of State for the Environment
[1977] 2 All ER 385 187, 192, 193
Spencer v Esso Standard Oil (SA) Ltd (1969) 13 WIR 108 10
Spencer's Case (1853) 77 ER 72 43
Spicer v Martin (1888) 14 App Cas 12 157
St Edmundsbury Diocesan Board v Clark [1975] 1 All ER 772 208
Stanhope v Haworth (1886) 3 TLR 34 48
Stanley v White (1811) 104 ER 630 252
Stannard v Issa [1987] AC 175 165, 166, 168
Stephenson v Liverant (1972) 18 WIR 323 163, 164, 169
Stokes v Mixconcrete (Holdings) Ltd (1978) P & CR 448 180
Strachan v The Owners, Strata Corporation VR574 (1992) 28 RPR (3d) 279 136
Street v Mountford [1985] 2 All ER 289 8, 9
Stuart v Kirton (1994) 30 Barb LR 405 126
Superville v Eversley (1986) High Court, Trinidad and Tobago,
No 2651 of 1985 (unreported) 98
Swan v Sinclair [1924] 1 Ch 254; affirmed [1925] AC 227 212
Sylvester v Cyrus (1959) 1 WIR 407 10
System Sales Ltd's Application, Re (1992) 43 WIR 19 168, 169

Tanner v Tanner [1975] 3 All ER 776 103, 104
Tapper v Myrie (1968) 11 JLR 102 24, 26
Taylor v Russell [1892] AC 244 241
Taylors Fashions Ltd v Liverpool Victoria Trustees Co Ltd [1982] 1 All ER 897 112
Tecbild Ltd v Chamberlain (1969) 20 P & CR 633 248
Tehidy Minerals Ltd v Norman [1971] 2 All ER 475 200
Texaco Antilles Ltd v Kernochan [1973] 2 All ER 118
Thomas v Barath (1986) High Court, Trinidad and Tobago,
No 1686 of 1980 (unreported) 8, 98

Thomas v Hayward (1869) LR 4 Ex 311 43
Thomas v Walker (1984) 21 JLR 376 82
Thompson v Facey (1976) 14 JLR 158 60
Thompson v M'Latamou (1989) Supreme Court, The Bahamas,
No 1187 of 1986 (unreported) 127
Thornborough v Baker (1675) 36 ER 1000 217
Tichborne v Weir (1892) 67 LT 735 244
Tickner v Buzzacott [1965] Ch 426 19, 48
Todrick v Western National Omnibus Co Ltd [1934] Ch 190 207
Tomlin v Luce (1889) 43 Ch D 191 235
Torminster Properties Ltd v Green [1983] 2 All ER 457 53
Towers Condominium Association v Lawrence [1995] VIR 185 138
Treloar v Nute [1977] 1 All ER 230 243, 247
Tecnchfield v Leslie (1994) Court of Appeal, Jamaica, Civ App
No 20 of 1994 (unreported) 114
Triple Ecstasy Ltd v Bay View Village Management Ltd (1988–89)
1 Carib Comm LR 334 130, 137
Truman, Hanbury, Buxton and Co Ltd's Application, Re [1955] 3 WLR 704 163, 165
Trustees, Executors and Agency Co Ltd v Short (1883) 13 App Cas 793 244
Tse Kwong Lam v Wong Chit Sen [1983] 1 WLR 1394 235
Tucker v Grant (1962) 4 WIR 282 93
Tulk v Moxhay (1848) 41 ER 1143 143–146

Union Lighterage Co v London Graving Dock Co [1902] 2 Ch 557 196
Union of London and Smith's Bank Ltd's Conveyance,
Re, Miles v Easter [1933] Ch 611 150, 155
Uniproducts (Manchester) Ltd v Rose Furnishers Ltd [1956] 1 All ER 146 30
Unity Joint Stock Mutual Banking Association v King (1858) 25 Beav 72 115

Vernon v Smith (1821) 106 ER 1094 42
Verrall v Great Yarmouth Borough [1980] 1 All ER 839 103

Walker v Marcano (1990) High Court, Trinidad and Tobago,
No 2085 of 1988 (unreported) 15
Wallis's Cayton Bay Holiday Camp Ltd v Shell-Mex and BP Ltd
[1974] 3 All ER 575 246, 247
Walsh v Lonsdale (1882) 21 Ch D 9 15, 16, 193, 216
Waltham Forest London Borough v Webb (1974) 232 EG 461 234
Waring (Lord) v London and Manchester Assurance
Co Ltd [1935] Ch 310 230, 231
Warmington v Miller [1973] 2 All ER 372 16
Warren v Keen [1954] 1 QB 15 31
Waterlow v Bacon (1866) LR 2 Eq 514 212

Webb v Bird (1861) 143 ER 332 176
Weg Motors Ltd v Hales [1960] 3 All ER 758 42
Welch v Broomes (1981) 16 Barb LR 177 245
Wellesley Ltd v Suto Ltd (1992) Supreme Court, The Bahamas, No 180 of 1988 (unreported) 223
39 Wellington Drive, Re (1991) Supreme Court, Jamaica, No ERC 139 of 1990 (unreported) 162, 163, 164
Wells v Bayparl Ltd (1991) Supreme Court, The Bahamas, No 1058 of 1983 (unreported) 23
Werth v London and Westminster Loan Co (1889) 5 TLR 521 59
West Bank Estates Ltd v Arthur [1967] AC 665 250, 251
West Country Cleaners (Falmouth) Ltd v Saly [1966] 3 All ER 210 39, 40
Wheeldon v Burrows (1879) 12 Ch D 31 182, 186, 187, 189
Wheeler v Baldwin (1934) 52 CLR 609 245
Wheeler v Mercer [1956] 3 All ER 631 19
White v Brown (1969) 13 WIR 523 53, 59, 66, 77
White v City of London Brewery Co (1889) 42 Ch D 237 228
White v Grand Hotel (Eastbourne) Ltd [1913] 1 Ch 113 207
White v Richards (1993) 68 P & CR 105 207
Wilks, Re [1891] 3 Ch 59 123
William Bros Direct Supply Stores Ltd v Raftery [1957] 3 All ER 593 249
Williams v Earle (1868) LR 3 QB 739 42
Williams v Hensman (1861) 70 ER 862 122, 123, 124, 125
Williams v James (1867) LR 2 CP 577 209, 211
Williams v Morgan [1906] 1 Ch 804 238
Williams v Staite [1978] 2 All ER 928 115
Williams v Storey (1973) Full Court, Guyana, No 1860 of 1972 (unreported) 82
Willis v Earl Howe [1893] 2 Ch 545 243
Willmott v Barber (1880) 15 Ch D 96 111, 112
Wilson v Bell (1843) 5 Ir Eq R 501 124
Wilson v Bodden [1988–89] CILR N18 207
Wilson v Finch-Hatton (1877) 2 Ex D 336 28
Wimbledon and Putney Commons Conservators v Dixon (1875) 1 Ch D 362 202
Wimpey (George) and Co Ltd v Sohn [1966] 1 All ER 232 248
Winsey v Reece (1967) Court of Appeal, Trinidad and Tobago, Mag App No 382 of 1967 (unreported) 87
Winter Garden Theatre (London) Ltd v Millenium Productions Ltd [1947] 2 All ER 331 102, 103
Wiscot's Case (1599) 76 ER 555 125
Wong v Beaumont Property Trust [1964] 2 All ER 119 183, 185
Wood v Leadbitter [1843–60] All ER Rep 190 102
Woodall v Clifton [1905] 2 Ch 257 38

Woodhouse and Co Ltd v Kirkland [1970] 2 All ER 587 209
Wright v Macadam [1949] 2 All ER 565 176, 179, 190, 192, 193

Yellowly v Gower (1855) 156 ER 833 30
York v Stone (1709) 91 ER 146 123
Young v Morales (1995) Court of Appeal, Trinidad and Tobago,
Mag App No 21 of 1991 (unreported) 72, 93

Zetland (Marquess of) v Driver [1938] 2 All ER 158 154

TABLE OF STATUTES

Administration of Estates Ordinance Ch 8 No 1 (Trinidad and Tobago)
- s 10(4) 90
- s 20 90

Administration of Justice Act 1970 (UK)
- s 36 226

Administration of Justice Act 1973 (UK)
- s 8(1) 226

Common Law Procedure Act 1852
- s 10 47

Condominium Act, Cap 224A (Barbados)
- s 4(1) 131, 134, 135
- s 4(5) 134
- s 4(6) 134, 135
- s 6 134
- s 13(1) 135
- s 13(2) 135
- s 14 136
- s 18(2) 137
- s 21 137
- s 23(3) 136
- s 31 138

Condominium Act 1986 (Bermuda) 129

Condominium Act RSCB 1979, c 61 (British Columbia)
- s 14 136
- s 40 136

Condominium Act, Cap 60 (Grenada) 129

Condominium Act, Cap 227 (St Vincent and the Grenadines) 129

Condominium Act 1981, Ch 124 (Trinidad and Tobago) 130

Conveyancing Act 1983 (Bermuda)
- s 7 190
- s 10 43
- s 11 43
- s 21 152
- s 22(1) 145
- ss 30–33 228, 229

Conveyancing Act, Cap 24 (Cayman Islands)
- s 21 228, 229

Conveyancing Act 1973 (Jamaica)
- s 12 43
- s 13 43
- s 17 48
- s 18 216
- s 20 242
- s 21 224
- ss 22–25 228, 229, 230
- s 24(1) 231
- s 24(2) 231
- s 28(2) 239
- s 61 152, 153

Conveyancing Act 1881 (UK)
- s 10 43
- s 11 43
- s 14 49, 50

Conveyancing and Law of Property Act, Ch 123 (The Bahamas)
- s 6 190
- s 10 43
- s 11 43
- s 16 48
- s 17 216
- s 19 242
- s 20 224
- ss 21–23 138, 228, 229, 230, 231
- s 27 239
- s 42 231

Conveyancing and Law of Property Act, Cap 54:01 (Dominica)
- s 16 190
- ss 39–45 228, 229
- s 66 43
- s 67 43
- s 70 48

Conveyancing and Law of Property Act, Cap 64 (Grenada)
s 3 190
ss 9–12 228, 229
Conveyancing and Law of Property Ordinance, Cap 220 (British Virgin Islands)
s 16 190
ss 38–44 228, 229
s 65 43
s 66 43
s 69 48
Conveyancing and Law of Property Ordinance, Cap 271 (St Kitts/Nevis)
s 16 190
ss 39–45 228, 229
s 66 43
s 67 43
s 70 48
Conveyancing and Law of Property Ordinance, Ch 27 No 12 (Trinidad and Tobago)
s 16 190, 193, 194
s 23 231
s 27 216
ss 32–35 216
s 37 224
ss 39–45 228, 229, 230
s 42 231
s 48 216
s 49 239
s 66 43
s 67 43
s 70 48
Distress for Rent Act, Ch 154 (The Bahamas)
s 1 65
s 4 67
Distress for Rent (No 2) Act, Ch 155 (The Bahamas)
s 22 65
Forcible and Clandestine Entries Act, Cap 132 (Barbados) 45
Forcible Entry Acts 1381–1623 (UK) 45
Housing Act 1957 (UK)
s 4(1) 29
Land Registration Act, Cap 229 (Barbados) 5
s 12 134
s 33 146
Part VIII 216
Land Registration Act 1984 (St Lucia)
s 30 146
Land Registry Act, Cap 5:02 (Guyana) 5
Land Tenants (Security of Tenure) Act 1981, Ch 59:54 (Trinidad and Tobago) 8, 96
s 2 97, 98
s 3 97
s 4 21, 97, 98
s 5 98
s 9 98
s 10 99
Land Tenants (Security of Tenure) (Amendment) Act 1983 (Trinidad and Tobago) 96
Landlord and Tenant Act, Cap 230 (Barbados)
s 16 59
s 19 59
s 23 65
s 24 65
s 32 67
s 149 14
Landlord and Tenant Act, Cap 153 (Belize)
s 6 28
s 11 31
s 13 68
s 15(1) 48
s 15(2) 52

s 15(4) 52
ss 19–21 43
s 34 65
s 35(a) 63
s 36 67
s 44 63

Landlord and Tenant Act, Cap 61:01 (Guyana)
s 6 14
s 8 31
s 10(1) 48
s 10(2) 52
s 10(4) 52
s 14(a) 63
s 15 68
s 18 43
ss 22–24 63
s 22(3) 59
s 36 63
s 44(1) 28

Landlord and Tenant Act, No 19 of 1981 (Trinidad and Tobago)
s 29(1) 36

Landlord and Tenant Act, Cap 206 (Jamaica)
s 3 59

Landlord and Tenant Ordinance, Cap 27 No 16 (Trinidad and Tobago)
s 3 15
s 8 59
s 9 59
s 19 59
s 27 63

Law of Property Act, Cap 154 (Belize)
s 3 181
s 38(2) 126
s 43 181
s 62(1) 145, 152
s 64 216
s 65 216

Law of Property Act 1925 (UK)
s 36(2) 126
s 62 179, 189–94
s 65(1) 182
s 78 152–154
s 84(1) 162
s 94 241
s 141 43
s 142 43
s 146 49, 50, 52

Law of Property Amendment Act, Ch 93 (Leeward Islands)
s 9(1) 50

Law of Property and Conveyancing (Condominium) Act, Ch 124 (The Bahamas)
s 3 131
s 4(1) 131, 132, 133
s 4(4) 134
s 5(1)–(3) 134
s 6(1) 134
s 6(2) 135
s 6(3) 130
s 6(4) 132
s 13(1) 135
s 13(2) 135
s 14 136, 137
s 18(2) 137
s 21 137
s 23(3) 136
s 31(1) 138

Law Reform (Landlords and Tenants) Act 1979 (Jamaica)
s 3 59

Law Reform (Property) Act 1976 (Trinidad and Tobago)
s 2 5

Letting of Houses (Implied Terms) Act, Ch 27, No 8 (Trinidad and Tobago)
s 3 28

Limitation Act (Bermuda), Title 8, Item 42
s 16 243

Limitation Act, Cap 173 (Grenada)
s 4 243
Limitation Law 1991 (Cayman Islands)
s 19 243
Limitation and Prescription Act, Cap 232 (Barbados)
s 35 200, 201, 202
Limitation of Actions Act 1997 (Barbados)
s 25 243
Limitation of Actions Act (Jamaica)
s 3 243
Limitation Ordinance, Cap 43 (British Virgin Islands)
s 6(3) 63
Magistrates Act, Ch 42 (The Bahamas)
s 73 63
Married Women's Property Act 1882 (UK) 124
s 17 126
Partition Act, Cap 305 (Antigua and Barbuda)
s 4 127
s 5 127
s 8 127
Partition Act, Ch 143 (The Bahamas)
ss 3–5 127
Partition Act 1914, Title 26 (Bermuda)
s 1 127
s 2 127
Partition Act, Cap 226 (British Virgin Islands)
s 4 127
s 5 127
s 8 127
Partition Act, Cap 54:09 (Dominica)
s 4 127
s 5 127
s 8 127
Partition Act, Cap 225 (Grenada)
s 4 127
s 5 127
s 8 127
Partition Act, Cap 245 (St Vincent and the Grenadines)
s 3 127
s 15 127
Partition Law, Cap 117 (Cayman Islands)
s 2 127
Partition Ordinance, Ch 27 No 14 (Trinidad and Tobago)
ss 3– 5 127
Prescription Act, Cap 338 (Antigua and Barbuda)
s 3 200
Prescription Act, Ch 148 (The Bahamas)
s 2 200
Prescription Act, Cap 155 (Belize)
s 3 200
Prescription Act, Cap 58 (British Virgin Islands)
s 3 200
Prescription Act, Cap 131 (Cayman Islands)
s 2 200
Prescription Act, Cap 7:02 (Dominica)
s 3 200
Prescription Act, Cap 252 (Grenada)
s 2 200
Prescription Act 1973 (Jamaica)
s 2 200
s 3A(1) 172, 205
Prescription Act, Cap 60 (St Kitts/Nevis)
s 3 200
Prescription Act, Cap 246 (St Vincent and The Grenadines)
s 2 200

Prescription Act 1832 (UK)
s 2 200, 204
s 3 204, 205
s 7 203
s 8 203
Prescription (Amendment) Law 1955 (Jamaica)
s 2 205
Prescription Ordinance, Ch 5, No 8 (Trinidad and Tobago)
s 2 210
s 4 210
Property Act, Cap 236 (Barbados)
s 3 181
s 43(1) 126
s 45 127
s 47 108
s 50(1) 5
s 60 108, 181
s 66(1) 190
s 69 182
s 83(1) 152
s 84(1) 145
s 96 216
s 97(1) 225
s 98(2)(b) 226
s 101 239
s 103 241
s 104 242
s 108 224
ss 110–16 228, 229, 230
s 112 231
s 114(1) 231
s 157(c) 30, 33
s 157(d) 28, 29
s 157(e) 30
s 158(c) 33
s 158(f) 36
s 159 33
s 160 43
s 161 43
s 165(1)(a) 53
s 167 48
s 168(1) 52
s 168(2) 52
s 196(1) 162
Real Property Limitation Act, Cap 54:07 (Dominica)
s 2 243
Real Property Limitation Acts 1833 and 1874, Ch 150 (The Bahamas) 243
Real Property Limitation Ordinance, Ch 5 No 7 (Trinidad and Tobago)
s 3 243
Real Property Ordinance, Ch 27, No 11 (Trinidad and Tobago) 5
Registered Land Act, Cap 374 (Antigua and Barbuda) 5
s 30 146
Registered Land Act, Cap 157 (Belize) 5
s 33 146
Registered Land Law 1971 (Cayman Islands)
s 96 162
s 100 127
Registered Land Ordinance Cap 229 (British Virgin Islands)
s 30 146
Registration of Titles Act 1973 (Jamaica) 5
s 105 229
s 106 229
Registration (Strata Titles) Act (Jamaica) 129
Rent and Mortgage Interest (Restrictions) Act 1920 (UK) 71
Rent and Mortgage Interest (Restrictions) Act 1939 (UK) 71, 90
Rent Control Act, Ch 153 (The Bahamas)
s 30 92

Rent Recovery Ordinance, Ch 19 (St Vincent)
s 3 59
ss 4–8 59
Rent Restriction Act, Cap 378 (Antigua and Barbuda) 71
Rent Restriction Act, Cap 158 (Belize) 71, 72
s 5 92
Rent Restriction Act, Cap 286 (Grenada) 71
Rent Restriction Act, Cap 36:23 (Guyana) 71
s 16(1) 81
Rent Restriction Act (Jamaica) 71
s 10 93
s 11 93
s 12 93
s 17 92
s 21 92
s 25 81–88
s 27 91
s 31 91
Rent Restriction Act, Cap 307 (St Kitts/Nevis) 71
s 10 92
s 14 92
Rent Restriction Act, Cap 249 (St Vincent and The Grenadines) 71, 72
Rent Restriction Act, Ch 59:50 (Trinidad and Tobago) 71
s 2 73, 88–90
s 7 93
s 8 93
s 9 93
s 10 92
s 11 92
s 13 96
s 14 79–90
s 15 96
Rent Restriction Ordinance 1959 (St Lucia) 71, 72
Rent Restriction (Dwelling Houses) Act 1981, Ch 59:55 (Trinidad and Tobago)
s 2 94, 95
s 6 95
s 7 94, 95
s 8 95
s 9 95
s 11 95
s 15 96
Rent Restriction (Exclusion of Premises) Order 1954 (Trinidad and Tobago)
cl 2 29
Rent Restriction (Exclusion of Premises) Order 1969 (Trinidad and Tobago) 72
Rent Restriction (Public and Commercial Buildings Exemption) Order 1983 (Jamaica) 72, 89
Restrictive Covenants (Discharge and Modification) Act (Jamaica)
s 3(1) 162–170
s 5 159
Rules of the Supreme Court (Barbados)
Ord 92, r 1 252
Statute of Frauds 1677 (UK)
s 3 53
Statute of Westminister 1275 (UK) 195
Statute *Quia Emptores* 1290 (UK) 2
Summary Ejectment Ordinance (Trinidad and Tobago)
s 3 20
Supreme Court Act, Cap 28 (Dominica)
s 27 4
Supreme Court of Judicature Act, Cap 117 (Barbados)
s 31 4

Supreme Court of Judicature Act, Ch 4:01 (Trinidad and Tobago)
s 12 4
Title by Registration Act, Cap 56:50 (Dominica) 5
Title to Land (Prescription and Limitation) Act, Cap 184 (British Guiana)
s 3 250
Title to Land (Prescription and Limitation) Act, Cap 60:02 (Guyana) 243

INTRODUCTION

Land law, or the law of real property, as it is often called, is concerned with the rights and liabilities which arise in respect of immovable property. In its legal sense, 'land' includes not just the soil and things growing naturally on it, but any buildings and fixtures erected thereon. It is a peculiar feature of land that, being immovable and indestructible, it is normally subject to a wide variety of rights, obligations and interests which would not normally affect pure personalty. If X is the owner of a gold watch, it is unlikely that any person other than X will have any right or interest in the watch, nor will X be restricted in his enjoyment of the watch; he may simply use it until it wears out, or until he decides to give it away to someone else. Similarly, if X is the owner of a car, the only other 'person' who is likely to have any right or interest in the car is the finance company (if it has been bought on hire purchase), and X's only obligation in relation to the car will be to insure it, license it, and drive it with due care. On the other hand, if X is the 'owner' of land, there will invariably be several other persons having rights over the land, and he will be burdened with a number of restrictions and obligations (called 'incumbrances') in respect of it. For instance, it is likely that he will have mortgaged it to a bank as security for the loan of the purchase money; that a neighbour, Y, will have a right to run his drains under part of it and to have access over a pathway on it; that the land will be burdened by restrictive covenants prohibiting X and his successors from, for example, subdividing the land or using it for a trade or business; and, if the land is let to a tenant, X will be excluded from possession until expiry of the lease. Furthermore, the 'ownership' of the land may be fragmented. For instance, X may have inherited the land under the will or intestacy of a deceased relative in common with his two brothers, P and Q, so that the land will be 'co-owned' by all three, who will have equal rights to enjoy it. Lastly, X, as 'owner', will be subject to town and country planning legislation, which will require him to seek planning permission to develop the land; and to revenue laws, requiring payment of rates and taxes.

ORIGINS OF LAND LAW

The land laws applicable in Commonwealth Caribbean jurisdictions are derived from English common law and, in Guyana and St Lucia, also partly from Roman-Dutch and civil law respectively. The theory of landholding under the English system was based on the concept of 'tenure'. Under the

feudal system, introduced into England by the Normans after the conquest of 1066, all land belonged to the king, who granted possession of areas to certain barons (his 'tenants-in-chief') in return for services, such as the provision of soldiers for the king's army. These barons in turn granted possession of land to lesser lords, in return for services, and the lords themselves granted subtenancies to others. There was no limit to the number of subtenancies that could be granted and, as a result, 'innumerable petty lords sprang up between the great barons and the immediate tenant of the soil'.[1] This process, known as subinfeudation, persisted for 200 years, but was eventually prohibited in 1290 by the statute of *Quia Emptores*, which provided that, henceforth, no new subtenancies could be granted. If the holder of land wished to grant possession to another, he could do so only by outright alienation (called 'substitution'). The effect was that, gradually, the petty ('mesne') lords disappeared from the picture, leaving the actual occupant of the land theoretically holding directly from the Crown, rendering services to no one, and looking to all intents and purposes like the absolute owner.

THE DOCTRINE OF ESTATES

We have seen that, according to the theory of English land law, no one but the Crown actually owns land, and the actual occupant only has 'tenure'. The principle, which still holds good today, is that a person cannot own land; *he can only own an interest in land*. The doctrine of estates defines the period for which any such interest will last. In the modern law, there are four principal estates, of which the first two are by far the most important.

Fee simple estate (otherwise called 'freehold')

The fee simple estate is the closest one can come to actual ownership of land. This estate comprises the right to use and enjoy the land for the duration of the life of the grantee and those of his heirs (both lineal and collateral) and successors. A fee simple estate is freely transferable, by *inter vivos* disposition or by will, and although, in theory, it is possible for a person to die without any heirs at all, this is most unlikely to happen, and it is accepted in the modern law that a fee simple is equivalent to permanent ownership of the land.

1 Hayes, *Introduction to Conveyancing*, Vol 1, p 9.

Leasehold estate

A leasehold estate gives a right to possession, use and enjoyment of land for a definite period of time, for example, one month, one year, 21 years, 99 years or any other certain period. A leasehold may be carved out of a fee simple, so that the fee simple owner becomes the lessor (landlord) of the lessee; a leasehold may also be carved out of a leasehold, in which case the leaseholder becomes the sublessor (landlord) of the sublessee.

Life estate

A life estate is most often found in family settlements where, for example, a deceased leaves his property by will to his widow for life and then to his children or remoter issue. As in the case of leaseholds, a life estate is most often carved out of a fee simple. It gives the holder the right to use and enjoy the rents, profits and income of the property until his/her death, when the estate terminates.

Fee tail estate

The fee tail estate gives the right to use the land for the life of the grantee and that of his lineal descendants. The fee tail estate is virtually unknown in Caribbean jurisdictions, and even in England no new fee tails can be created after 1 January 1997.

LEGAL AND EQUITABLE ESTATES AND INTERESTS

The distinction between legal and equitable rights is fundamental to English land law. A legal right, estate or interest is one which historically was recognised and enforced by the common law courts such as the old King's Bench or Common Pleas Courts. These courts tended to adopt a very inflexible approach and would deny a remedy to a deserving plaintiff merely because he had not observed the proper formalities. The Court of Chancery, on the other hand, where rules of equity were applied, habitually mitigated the harshness of the common law by recognising new rights, such as the beneficiary's interest under a trust, and by granting new remedies to deserving plaintiffs, such as injunctions and specific performance, despite the absence of the proper formalities. The contribution of equity, therefore, was twofold: (a) it recognised new rights where none existed before: in particular, interests under trusts; and (b) it developed new remedies where the common law remedies would be inadequate. In Commonwealth Caribbean

jurisdictions, the superior courts are empowered by statute to apply common law and equitable principles concurrently.[2]

In modern land law, equitable interests fall into three categories:

(a) Estates and interests taking effect behind trusts, that is, where the legal title to the property is vested in trustees, holding upon trust for the beneficiaries, who have equitable interests in the property. For example, where Blackacre is held by trustees 'upon trust for X for life, remainder to Y and Z', X has an equitable life interest, and Y and Z have concurrent equitable interests in the fee simple. Equitable interests under trusts are usually encountered in family settlements.

(b) Estates and interests created without the necessary legal formalities, which are void at common law, but which may take effect as equitable interests – for example, equitable leases or easements arising under the *Walsh v Lonsdale*[3] principle, and equitable mortgages by deposit of title deeds.[4]

(c) Interests created and recognised by equity, such as restrictive covenants[5] and proprietary estoppel.[6]

It is important to distinguish between legal and equitable interests because, whereas legal estates and interests are rights *in rem*, binding on the whole world, equitable interests suffer from the infirmity that they are not binding on a *bona fide* purchaser of a legal estate in the land who has no notice of the existence of the equitable interest. Such a purchaser will take the land free from the equitable interest which, in effect, will be extinguished.

In this connection, equity recognises three types of notice: (a) actual notice, where the purchaser in fact knows of the existence of the equitable interest; (b) constructive notice, where the purchaser ought to and would have acquired notice if he had made due inquiries and investigated the land and the title; (c) imputed notice, where the purchaser's legal adviser acquires actual or constructive notice. A purchaser who is affected by any of these three kinds of notice will be bound by existing equitable interests in the land.

Registration of title

Modern land law systems have been significantly affected by the concept of registration of title, which has been introduced by statutes into most

2 See, eg, Supreme Court of Judicature Act, Cap 117, s 31 (Barbados); Supreme Court Act, Cap 28, s 27 (Dominica); Supreme Court of Judicature Act, Ch 4:01, s 12 (Trinidad and Tobago).

3 (1882) 21 Ch D 9 (below, p 15).

4 See below, p 216.

5 See below, Chap 9.

6 See below, pp 106–16.

Commonwealth Caribbean jurisdictions.[7] Its main aim is to simplify conveyancing and 'to ensure that someone dealing with the registered proprietor of title to the land in good faith and for value will obtain an absolute and indefeasible title, whether or not the title of the registered proprietor from whom he acquires was liable to be defeated by title paramount or some other cause'.[8] 'The object is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author's title, and to satisfy themselves of its validity.'[9]

Put in another way, registration of title is a guarantee by the State that the person registered as proprietor is the true owner of the land, and a purchaser need make no further investigation as to the validity of the title, in the certainty that it would have been thoroughly investigated and approved by the Land Registry officials before it was first registered.[10] By contrast, in unregistered land, the title is to be found in the title deeds, and each prospective purchaser must go to the trouble and expense of investigating the 'root of title' by perusing the title deeds going back for the requisite period (such as 20[11] or 30[12] years), in order to be confident that he will obtain a good title to the land. Unfortunately, conversion from the 'old' unregistered system to the 'new' registered system in most jurisdictions takes many years, even where it is provided that registration is 'compulsory', that is, that on any future sale of unregistered land, the title must be brought on the register, so as to convert the land from unregistered to registered, and to invest the purchaser and all future purchasers with a registered title. It is still, therefore, the case that the majority of titles in Caribbean jurisdictions remain unregistered.[13]

Under the registered system, only the titles themselves can be entered fully on the register. Other interests in the land receive protection in various ways, in accordance with the legislation or the Registrar's practice in the

7 Eg, Registration of Titles Act 1973 (Jamaica); Title by Registration Act, Cap 56:50 (Dominica); Land Registration Act, Cap 229 (Barbados); Registered Land Act, Cap 157 (Belize); Registered Land Act, Cap 374 (Antigua and Barbuda); Real Property Ordinance, Ch 27, No 11 (Trinidad and Tobago); Land Registry Act, Cap 5:02 (Guyana).

8 *British American Cattle Co v Caribe Farm Industries Ltd* [1998] 4 LRC 547, Privy Council Appeal from the Court of Appeal, Belize, p 552, *per* Lord Browne-Wilkinson.

9 *Gibbs v Messer* [1891] AC 248, p 254.

10 However, the success of a system of registered title depends to a large extent on the efficiency of the administrative machinery in the Registry, including the presence of sufficient and skilled manpower: Wylie, *Land Laws of Trinidad and Tobago*, 1986, Port of Spain: Government of Trinidad and Tobago, p 558.

11 As in Barbados (Property Act, Cap 236, s 50(1)).

12 As in Trinidad and Tobago (Law Reform (Property) Act 1976, s 2).

13 An exception is Jamaica, where most land has been registered and certificates of title issued to the proprietors under the Registration of Titles Act.

particular jurisdiction, such as by the lodging of a *caveat* to be endorsed on the certificate of title as a warning to persons dealing with the proprietor, or by the entry of a memorandum on the certificate of title, or a caution, inhibition or restriction on the register. Interests requiring protection are mainly equitable ones, such as beneficial interests under trusts, restrictive covenants, equitable easements, equitable mortgages, and contracts affecting the land, such as agreements to lease or sell which, if not protected, are liable to be defeated by a transfer of the legal estate in the land to a *bona fide* purchaser for value without notice of the interest.

CREATION OF LEASES

The law of landlord and tenant governs the relationship between lessor and lessee (otherwise called landlord and tenant respectively), defines the rights and obligations of the parties to leases and tenancies, and lays down the formalities for the creation and the termination of the lessor/lessee relationship. Leaseholds, also known as 'demises' or 'terms of years', have a long history. In early medieval times, leaseholds were regarded merely as contractual rights to occupy land. A lessee could be evicted at any time. He had no estate in the land, and his only remedy for wrongful dispossession was an action for damages against the dispossessor. Later, with the development of the action of ejectment, by the end of the 15th century, it became possible for a dispossessed tenant to recover possession of the land, and at that point the leasehold may be said to have acquired the status of a proprietary interest and an estate in the land. Leaseholds, in fact, always remained outside the feudal system of landholding, to which the freehold estates belonged, but when leaseholds 'became a new type of estate, it was impossible to deny that they were also a new type of tenure; for every tenant must hold by tenure of some sort if he is to hold an estate at all'.[1] Ironically, the leasehold, originally conceived outside the doctrine of tenures, is today the only form of 'tenure' which has any practical significance. The nature of this tenure, signified by the words 'landlord' and 'tenant', is that the tenant pays 'rent service' (now known simply as 'rent') to the landlord in return for his right to occupy the land, and the landlord retains a right to levy distress against the tenant's goods in the event of non-payment of rent and, more importantly, in some circumstances, a right to forfeit the lease if the tenant is in breach of his obligations.

ESSENTIAL CHARACTERISTICS OF LEASES

There are two requirements for a right to occupy land to be capable of taking effect as a lease:

(a) the right to exclusive possession must be given;

(b) the duration of the lease must be certain.

These requirements must now be considered in turn.

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1 Megarry and Wade, *Law of Real Property*, 5th edn, 1984, London: Stevens, p 43.

Exclusive possession

It is a necessary characteristic of a lease or tenancy that the tenant must have exclusive possession of the premises. This means that the tenant must be given the right to exclude all other persons from the land, including the landlord. However, the mere fact that a person has exclusive possession of land does not necessarily make him a tenant; for he may be only a licensee, having merely a personal privilege to occupy and no interest in the land. The most important distinctions between a lease and a licence are:

(a) a lessee, holding a legal lease, has an interest in land which is binding on the whole world; a licensee has a mere personal right which, at most, binds only licensor and licensee;

(b) a lessee, but not a licensee, may maintain an action in trespass against any person who interferes with his right to possession;

(c) a lessee may assign his lease, whereas a licensee has no proprietary interest capable of assignment;

(d) a lessee, but not a licensee, enjoys the protection of the Rent Restriction Acts.[2]

Distinguishing between leases and licences

In determining whether a lease or a licence has been created, it was once the rule that, where exclusive possession was granted, there was a lease.[3] Later, a more flexible test was used, viz, that the answer to the question depended on the intention of the parties to be inferred from the surrounding circumstances, and the fact that exclusive possession was granted was not decisive in favour of a lease.[4] Then, in 1985, the decision of the House of Lords in *Street v Mountford*[5] appeared to abandon the flexible test in favour of the more rigid proposition that:[6]

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2 Also, lessees, but not licensees, are entitled to claim a statutory, 30 year lease in respect of land on which a house is erected, under the Land Tenants (Security of Tenure) Act 1981, Ch 59:54 (Trinidad and Tobago). See *Mahadeo v Dass* (1988) High Court, Trinidad and Tobago, No 1570 of 1980 (unreported); *Thomas v Barath* (1986) High Court, Trinidad and Tobago, No 1686 of 1980 (unreported); *Cyrus v Gopaul* (1989) Court of Appeal, Trinidad and Tobago, Mag App No 69 of 1987 (unreported). See below, Chap 5.

3 *Lynes v Snaith* [1989] 1 QB 486; *Glenwood Lumber Co Ltd v Phillips* [1904] AC 405.

4 See, eg, *Cobb v Lane* [1952] 1 All ER 1199; *Clarke v Grant* [1949] 1 All ER 768; *Isaac v Hotel de Paris* [1960] 1 All ER 348, PC; *Quan v Gonzales* (1966–69) 19 Trin LR (Pt V) 331.

5 [1985] 2 All ER 289. The decision in *Street v Mountford* was designed to prevent landlords from avoiding the consequences of the Rent Restriction Acts (see below, Chapter 5) by framing what were essentially tenancy agreements as ‘licences’. The courts are now astute in detecting such ‘sham’ licences, described by Lord Templeman in *Antoniades v Villiers* [1988] 3 All ER 1058, p 1064 as ‘a pretence intended only to get round the Rent Acts’.

6 [1985] 2 All ER 289, p 300.

> where the only circumstances are that residential accommodation is offered and accepted with exclusive possession for a term at a rent, the result is a tenancy ...

In other words, if the three requirements, viz, exclusive possession, a fixed or periodic term, and rent are present, there will be a tenancy, unless there are exceptional circumstances which point to a licence. Under this test, it appears that the intentions of the parties as to whether a lease or a licence was to be created are irrelevant, and the only intention which is to be regarded as relevant is the intention to give exclusive possession of the premises.[7]

Whether the courts in the Commonwealth Caribbean will apply the *Street v Mountford* test to the exclusion of the 'intention of the parties' test remains to be seen. Being a House of Lords decision, it will be regarded as a highly persuasive authority. On the other hand, the decision of the Privy Council in *Isaac v Hotel de Paris Ltd*,[8] in which the 'intention of the parties' test was applied, will be binding on the courts in Trinidad and Tobago, whence the appeal came, and perhaps also on the courts of other jurisdictions in the region.

There are numerous Commonwealth Caribbean cases in which the issue as to whether a lease or a licence was created fell for decision, and the courts have almost invariably used the 'intention of the parties' test. Whichever test is used, it is likely that, in the following circumstances, a licence and not a lease will be created:

(a) where a person is given exclusive possession of premises as an 'act of friendship or generosity'[9] or by way of family arrangement;[10]

(b) where services such as regular cleaning and meals are provided by the owner of the property, which require the owner to have unrestricted access to the premises;[11]

(c) where an employee occupies premises belonging to his employer in order that he can carry out his duties more effectively (called a 'service occupancy');[12]

(d) where the physical situation of the premises indicates that only a licence was intended – for example, a stall in a market[13] or a kiosk in a theatre foyer.[14]

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7 [1985] 2 All ER 289, p 300.

8 [1960] 1 All ER 348.

9 *Marcroft Wagons Ltd v Smith* [1951] 2 All ER 271; *Facchini v Bryson* [1952] 1 TLR 1386.

10 *Cobb v Lane* [1952] 1 All ER 1199; *Edwards v Brathwaite* (1978) 32 WIR 85; *Romany v Romany* (1972) 21 WIR 491.

11 *Abbeyfield (Harpenden) Society Ltd v Woods* [1968] 1 WLR 374; *Marchant v Charters* [1977] 3 All ER 918; *Street v Mountford* [1985] 2 All ER 289 ('a lodger is entitled to live in the premises, but he cannot call the place his own', *per* Lord Templeman, p 293).

12 *Smith v Seghill Overseers* (1875) LR 10 QB 422, p 428.

13 *Kassim v Georgetown Clerk* (1961) 4 WIR 135, Supreme Court, British Guiana.

14 *Clore v Theatrical Properties Ltd* [1963] 3 All ER 483.

Examples of the lease/licence dichotomy in the Caribbean

In *Sylvester v Cyrus*,[15] S was in urgent need of accommodation, as the house in which she was living was to be demolished. As a result of a conversation between S and C, in September 1957 C let S into occupation of a house of which C was herself a monthly tenant. It was agreed that S would pay a premium of $150 and $12 a month as rent. C moved out of the house, taking her telephone with her, and had the electricity meter removed. When, in February 1958, C re-entered the house, S brought an action for trespass. The trial judge held that the relationship between the parties was one of licensor and licensee; that the licence had been effectively revoked by C's re-entry; and that C was not liable in trespass.

On appeal, the Federal Supreme Court held that, from the fact that S was given exclusive possession of the house, an intention to create a monthly subtenancy was to be inferred, and there were no special circumstances to negative the inference. C was, accordingly, liable for trespass. Lewis J said:[16]

> I am unable to find in the evidence any special circumstances or conduct of the parties which negative the inference normally to be drawn where a person having a possessory interest in land puts another person into exclusive possession of that land, namely an intention to create a tenancy. The facts as found by the trial judge all point to that inference as being the proper one. It is true that in July to September 1956, when [S] was negotiating with [C], she was in urgent need of a house, but that is not an unusual situation, and the fact that [C] demanded and received a premium of $150 suggests that this was a business transaction rather than a personal privilege motivated by charitable or humane considerations. It is also clear that [C] wished to be in a position to recover possession of the apartment should she at any time need to do so, but this she could have done by giving the proper notice to [S], who would not, in the circumstances, have been able to avail herself of the protection of the Rent Restriction Ordinance. I have come to the conclusion, therefore, that the trial judge erred in holding that the relationship between the parties was that of licensor and licensee. In my judgment, this was a simple case of subtenancy at a monthly rental.

In *Isaac v Hotel de Paris*,[17] the respondent company was the lessee of part of a building in Port of Spain which was used as a hotel. In December 1955, the

15 (1959) 1 WIR 407.

16 *Ibid*, p 412.

17 [1960] 1 All ER 348, PC, on appeal from the Federal Supreme Court. See, also, *Spencer v Esso Standard Oil (SA) Ltd* (1969) 13 WIR 108, Court of Appeal, West Indies Associated States, where it was held that an agreement, whereby the appellant had been permitted to occupy land for the specific purpose of operating a motor service station erected thereon by the respondent company, was a licence and not a lease, as his possession was of a restricted nature, amounting to a personal privilege, with no interest in the land. On the other hand, in *Hadad v Elias* (1993) High Court, Trinidad and Tobago, No 97 of 1992 (unreported), it was held that, where H had entered into an agreement with the owner of the premises whereby H was to operate a patisserie therein, a tenancy had been created.

company let the appellant into possession of the first floor of the building under an arrangement that the appellant would operate a night bar for the company.

In February 1956, after a dispute between the parties, it was agreed that the appellant would pay $250 a month as 'rent' (the amount payable by the company as head rent) and all expenses incurred in the running of the bar, and in return that the appellant could retain all the profits for himself. In May 1956, the company gave the appellant seven days' notice to quit the premises.

It was held by the Privy Council that the circumstances in which the appellant was allowed to occupy the premises showed that the company never intended to accept him as a tenant and that he was fully aware of that fact. A licence had been created, and the notice was sufficient to terminate it. Lord Denning said:[18]

> It was submitted by counsel for the appellant that there were all the *indicia* of a monthly tenancy. There was not only exclusive possession but there was also the payment and acceptance of rent. (Furthermore, the appellant paid the disbursements, and so forth.) Counsel admitted that these would not be decisive to establish a tenancy in the case of premises within the Rent Restriction Acts such as *Marcroft Wagons Ltd v Smith*[19] and *Murray, Bull and Co Ltd v Murray*,[20] but it was altogether different, he said, in the present case where the premises were not subject to rent restriction legislation. The only proper inference here was a monthly tenancy. Their Lordships cannot accept this view. There are many cases in the books where exclusive possession has been given of premises outside the Rent Restriction Acts and yet there has been held to be no tenancy. Instances are *Errington v Errington*[21] and *Cobb v Lane*,[22] which were referred to during the argument. It is true that in those two cases there was no payment or acceptance of rent, but even payment and acceptance of rent – though of great weight – is not decisive of a tenancy where it can be otherwise explained: see *Clarke v Grant*.[23] As Lord Greene MR said in *Booker v Palmer*:[24]
>
> > There is one golden rule which is of very general application, namely, that the law does not impute an intention to enter into legal relationships where the circumstances and the conduct of the parties negative any intention of the kind.
>
> It appears to their Lordships that the law on this matter was correctly interpreted and applied by Archer J in the Federal Supreme Court when he said:

18 [1960] 1 All ER 348, p 351.
19 [1951] 2 All ER 271.
20 [1952] 2 All ER 1079.
21 [1952] 1 All ER 149.
22 [1952] 1 All ER 1199.
23 [1949] 1 All ER 768.
24 [1942] 2 All ER 674, p 677.

> It is clear from the authorities that the intention of the parties is the paramount consideration and while the fact of exclusive possession together with the payment of rent is of the first importance, the circumstances in which exclusive possession has been given and the character in which money paid as rent has been received are also matters to be considered. The circumstances in which the [appellant] was allowed to occupy the Parisian Hotel show that Joseph never intended to accept him as a tenant and that he was fully aware of it. The payments he made were only part of the disbursements for which he made himself responsible, and the so called rent was in the nature of a reimbursement of the rent payable by the [respondent company].

> Their Lordships are, therefore, of opinion that the relationship between the parties after 17 February 1956 was not that of landlord and tenant, but that of licensor and licensee. The circumstances and conduct of the parties show that all that was intended was that the appellant should have a personal privilege of running a night bar on the premises, with no interest in the land at all.

In *Quan v Gonzales*,[25] the plaintiff and the defendant executed a deed whereby the defendant, the owner in fee simple of business premises, granted to the plaintiff an option exercisable during a five year period to purchase the premises for $75,000, payable by monthly instalments. It was also provided that 'in order the better to enable the [plaintiff] to determine whether or not he shall exercise the said option, the [defendant] has agreed to allow him to occupy and carry on the business of a drug store' in the premises on certain terms, among them the payment of $25 per month during the currency of what was described as the 'licence'.

The main issue for determination was whether the plaintiff was in occupation of the premises as a tenant protected by the Rent Restriction Ordinance, or whether he was merely a licensee. It was held that:

(a) there is a strong presumption in favour of a tenancy where a person is given exclusive possession of premises;

(b) in the present case, the parties had entered into a formal agreement which purported to define their relationship and rights. There were clauses in the deed which were consistent with a tenancy agreement but, equally, they were not inconsistent with a licence coupled with an option to be exercised over an extended period;

(c) it was impossible in the circumstances of the case to impute any intention on the part of the parties to enter into the relationship of landlord and tenant: their relationship was as set out plainly in the deed – that of licensor and licensee;

(d) the option not having been exercised during the period, the licence which was concurrent with it terminated by effluxion of time.

25 (1966–69) 19 Trin LR (Pt V) 331.

In *Edwards v Brathwaite*,[26] B's mother, the owner of a parcel of land, had, before her death in 1939, put B in possession of a house spot and curtilage. B placed his chattel house on the land and lived there up to the time of the present action. After the mother's death, B's father had continued to live on the land. At no time did he require B to pay any rent. During the period of his occupation, B erected a fence around his house and cultivated a kitchen garden and fruit trees. The main question which arose was whether B was a tenant at will or a licensee, for only if he were a tenant at will would he be able to acquire a possessory title under s 8 of the Limitation and Prescription Act, Cap 232.

Worrell J held that B was a licensee. He said:[27]

> The first question which must be determined here is whether the claimant's occupation of the land was under a tenancy at will or under a licence ... On the evidence before me, I find that, when the claimant went into occupation of the land, it was nothing more than a family arrangement. I also find that, on the death of the claimant's mother, he continued in occupation by family arrangement during the lifetime of his father.

Certainty of duration

The general rule is that a lease must have a certain beginning and a certain ending. This requirement will be satisfied where, for example, L grants T a lease of Greenacre 'for a term of five years commencing on 1 March 1998'. The requirement of certainty of duration is also satisfied where a periodic tenancy (such as a weekly, monthly or yearly tenancy) is granted, since although, in the absence of notice to quit by either party, the tenancy may continue indefinitely, each period of the tenancy is of certain duration. Where, however, L granted T a lease of premises 'for the duration of the war', the lease was held void, since there was no certainty as to when the war would end.[28] And where a local authority granted a lease of a strip of land fronting a public road on terms that 'the tenancy shall continue until the land is required by the [local authority] for the purpose of widening the road', the lease was held void for uncertainty.[29]

Certain other principles have been established, viz:

(a) the requirement that the commencement date must be certain is satisfied where the parties agree that it shall begin upon the occurrence of an

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26 (1978) 32 WIR 85.

27 *Ibid*, pp 89, 90.

28 *Lace v Chantler* [1944] KB 368.

29 *Prudential Assurance Co Ltd v London Residuary Body* [1992] 3 All ER 504.

uncertain event, as, for example, upon possession of the premises becoming vacant;[30]

(b) a lease for the life of a person or persons is not void for uncertainty – for example, a term granted to T for life or to T during the lives of X and Y is valid at common law, as also is a lease for a period determinable with a life or lives, for example, 'to T for five years if X shall so long live';

(c) a lease may be validly granted for a discontinuous period, as in the case of some timeshare agreements relating to holiday homes. For example, it has been held that the lease of a house for one week in each year for 80 consecutive years was a valid lease for a discontinuous period of 80 years.[31]

FORMALITIES FOR CREATION OF LEASES

Statutory provisions in the various jurisdictions require certain formalities for the creation of legal leases. In England, the effect of ss 52 and 54 of the Law of Property Act 1925 (re-enacting, in substance, s 1 of the Statute of Frauds 1677 and s 3 of the Real Property Act 1845) is that leases for a period of more than three years must be made by deed in order to be valid at law, whilst leases for three years or less may be made by simple writing or orally, provided they are to 'take effect in possession ... at the best rent reasonably obtainable without taking a fine'. Periodic tenancies may be validly created orally or by simple writing.

In Commonwealth Caribbean jurisdictions, the statutory requirements are varied. Examples are:

(a) Guyana, Cap 61:01, s 6: leases for more than three years must be made by deed; leases for three years or less must be in writing;

(b) Barbados, Cap 230, s 149: leases for more than one year must be made in writing; leases for one year or less than one year may be oral; periodic tenancies may be oral;

30 *Brilliant v Michaels* [1945] 1 All ER 121.

31 *Cottage Holiday Associates Ltd v Customs and Excise Commissioners* [1983] QB 735.

(c) Trinidad and Tobago, Ch 27, No 16, s 3: leases for more than three years must be made by deed;[32] leases for three years[33] or less may be made by deed or in writing; periodic tenancies and tenancies at will may be oral.

Effect of non-compliance with formalities

A lease which does not comply with the necessary statutory formalities is void at law, but it has long been the rule that if the intended tenant goes into possession with the landlord's consent, a tenancy at will arises, and if the tenant then pays rent which is accepted, he becomes a yearly or other periodic tenant depending on the period with reference to which rent is paid.[34] Thus, for example, if T goes into possession under a lease which is void for lack of formality and pays rent monthly, he becomes a monthly tenant at law.[35]

In equity, on the other hand, a lease which fails to conform with the statutory formalities nevertheless takes effect as *an agreement for a lease* which, if specifically enforceable, will be effective as between the parties.[36] Such an informal lease is known as an 'equitable lease'. The relationship between an agreement for a lease in equity and a yearly tenancy at law is illustrated by the leading case of *Walsh v Lonsdale.*[37] In this case, L agreed in writing to grant to T the lease of a mill for seven years. It was agreed that a deed should be executed containing, *inter alia,* a term that, on demand, T would pay one year's rent in advance. No deed was executed, but T was let into possession and paid rent, in arrear, for a year and a half, thereby becoming a yearly tenant at law. L then demanded a year's rent in advance and, upon refusal by T, distrained for the amount. T brought an action for, *inter alia,* damages for illegal distress and an injunction to restrain the distress.

T argued that he was under no obligation to pay rent in advance since he was, at law, only a yearly tenant and the payment of rent in advance was inconsistent with a yearly tenancy which could be determined by half a year's notice; L's distress was, therefore, illegal. It was held, however, that a tenant who holds under an agreement for a lease of which specific performance will

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32 The deed must be duly registered. Ch 27, No 16, s 3 goes on to provide that any agreement in writing to let land for a period of more than three years shall take effect as an agreement to lease; and the person in possession pursuant to the agreement may, from payment of rent or other circumstances, be construed to be a tenant from year to year.

33 See *Walker v Marcano* (1990) High Court, Trinidad and Tobago, No 2085 of 1988 (unreported).

34 *Martin v Smith* (1874) LR 9 Ex 50.

35 See *Metcalfe and Eddy Ltd v Edghill* (1963) 5 WIR 417, Court of Appeal, Trinidad and Tobago (see below, p 16).

36 *Broadway Import and Export Ltd v Levy* (1996) Supreme Court, Jamaica, No CL 1993 B081 (unreported), *per* Langrin J.

37 (1882) 21 Ch D 9.

be decreed is in the same position vis à vis the landlord (as regards rights and liabilities) as if a formal lease had been executed ('equity regards that as done which ought to be done'), and, since L would have been entitled to distrain for rent had the lease agreed upon been granted by deed, the distress was lawful in equity. In so far as there was a conflict between the position at law (in which there was a yearly tenancy) and the position in equity (where there was an equitable lease for seven years), the equitable rule prevailed.

The principle in *Walsh v Lonsdale* was applied in *Metcalfe and Eddy Ltd v Edghill.*[38] In this case, there was an oral agreement for a lease for a period of three years and 15 days. The appellant tenant went into possession of the respondent landlord's premises, paying $350 a month as rent in accordance with the agreement. The oral agreement was subsequently reduced into writing and signed by both parties, but no deed, as required by s 3 of Ch 27, No 16, was executed. Shortly afterwards, the tenant gave one month's notice to quit and, on expiry of the period of notice, vacated the premises. The landlord disputed the validity of the notice and claimed specific performance of the agreement. The tenant argued that he had entered into possession under a monthly tenancy which had been validly determined, and this argument was accepted by the trial judge.

The Court of Appeal of Trinidad and Tobago held, on appeal, that there was a binding contract to execute a lease for the fixed term stated therein under the rule in *Walsh v Lonsdale*, and it was specifically enforceable as such.

LEASE AND AGREEMENT FOR LEASE COMPARED

We have seen[39] that, as between the landlord and the tenant, 'an agreement for a lease may be as good as a lease', particularly having regard to the rule that the stipulations in the agreement are as binding on the parties as if they had been contained in a formal lease binding in law. However, in three respects, an agreement for a lease is not as effective as a lease. These are:

Dependency on specific performance

An agreement for a lease depends for its effectiveness on the willingness of the court to grant specific performance of the agreement. As Stamp J explained:[40]

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38 (1963) 5 WIR 417, Court of Appeal, Trinidad and Tobago. Another example of the application of the *Walsh v Lonsdale* principle is the Jamaican case of *Brown v Silvera* [1898] Stephens' R 1257.

39 See above.

40 *Warmington v Miller* [1973] 2 All ER 372, p 377.

> The equitable interests which the intended lessee has under an agreement for a lease do not exist *in vacuo*, but arise because the intended lessee has an equitable right to specific performance of the agreement. In such a situation, that which is agreed to be and ought to be done is treated as having been done and carrying with it in equity the attendant rights.

Specific performance, like other equitable remedies, is discretionary, and if, for any reason, the court will not grant the remedy, an agreement for a lease will be ineffective. Instances where the court may refuse the remedy are where the tenant is unable to perform the covenants to be contained in the lease because he is insolvent,[41] or where he has already been in breach of a covenant that would have formed part of the lease.[42]

Third parties

An agreement for a lease is less effective than a lease where third parties are involved. This is so in two respects:

(a) Since an agreement for a lease creates a mere equitable interest, it may be defeated by a *bona fide* purchaser for value of a legal estate in the land.[43] Thus, for example, if L agrees to grant a five year lease of Blackacre to T, and one week later sells and conveys the fee simple to P, who has no notice of the agreement, P will take free of the agreement, which will be extinguished. If, on the other hand, it is possible in the particular jurisdiction to protect equitable interests by registration, and the agreement is registered before conveyance of the fee simple, the purchaser will take subject to it.

(b) In a lease, there is privity of estate between landlord and tenant, and those covenants which 'touch and concern' the land are enforceable by and against assignees of the lease,[44] but, in an agreement to lease, the normal principle of contract law applies, which is that only benefits, and not burdens, are assignable.[45] Thus, for example, where T1 assigns his equitable lease to T2, T2 may enforce the landlord's covenants since they are benefits to him, but he is not liable on the tenant's covenants – for example, the covenant to pay rent.[46]

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41 Cheshire and Burn, *Modern Law of Real Property*, 14th edn, 1988, London: Butterworths, p 363.

42 *Coatsworth v Johnson* (1886) 55 LJQB 220.

43 *Broadway Import and Export Ltd v Levy* (1996) Supreme Court, Jamaica, No CL 1993 B081 (unreported), *per* Langrin J.

44 See below, pp 41–44.

45 *Op cit*, Megarry and Wade, fn 1, p 643.

46 *Purchase v Lichfield Brewery Co* [1915] 1 KB 184. But, in *Boyer v Warbey* [1953] 1 QB 234, p 246, Lord Denning expressed the view that an assignee of an equitable lease should be bound in the same way as an assignee of a legal lease.

TYPES OF TENANCIES

Lease for a fixed period

A lease may be granted for any fixed period, however short or long, provided there is a certain beginning and a certain ending within the principles previously described. Leases for one year, two years or five years on the one hand, and leases for 21, 99 or 999 years on the other, are common.

A lease for a fixed period terminates automatically when the period expires; there is no need for any notice to quit by the landlord or the tenant. Another basic characteristic of a fixed term lease is that the landlord cannot terminate the lease before the end of the period unless the tenant has been in breach of a condition in the lease, or the lease contains a forfeiture clause and the tenant has committed a breach of covenant which entitled the landlord to forfeit the lease. Nor can the tenant terminate the lease before it has run its course; he may only ask the landlord to accept a surrender of the lease, which offer the landlord may accept or reject as he pleases.

A lease for a fixed term is a proprietary interest which, on the death of the tenant, passes under his will or intestacy; similarly, the landlord's reversion is capable of passing under his will or intestacy.

Periodic tenancy

Weekly, monthly, quarterly and yearly tenancies are the commonest examples of periodic tenancies. Such tenancies continue indefinitely until terminated by a proper notice to quit by the landlord or the tenant. Subject to agreement to the contrary, the length of notice required to terminate a periodic tenancy depends on the form that the tenancy takes, viz, a weekly tenancy can be terminated by a week's notice; a monthly tenancy by one month's notice; and a quarterly tenancy by three months' notice. An exception to this rule is the yearly tenancy, which is terminable by half a year's notice.

A periodic tenancy may be created expressly or by implication. It is created expressly where some words such as 'yearly tenant' or 'monthly tenant' or 'tenant from year to year (or from month to month)' are used. More often, such a tenancy will arise by implication of law. In such a case, the periodic tenancy will be measured according to the frequency of payment of rent. Thus, if L lets land to T at '$12,000 a year', a yearly tenancy arises; if it is at '$1,000 per month', there is a monthly tenancy,[47] and so on. Where a tenant under a lease for a fixed term 'holds over', that is, remains in possession after

47 *Brooks v Ammon* (1987) High Court, Trinidad and Tobago, No 57 of 1979 (unreported).

expiry of the term, and rent is paid and accepted on a periodic basis, for example, monthly, a periodic tenancy arises.[48] But no such tenancy will be implied where the tenant remains in possession as a statutory tenant under the rent restriction legislation, or where there is evidence that the landlord wished to evict the tenant, or where he did not know the relevant facts, such as where the tenant had died, unknown to the landlord, and the landlord had accepted rent from the tenant's widow.[49]

Tenancy at will

If L permits T to occupy L's land as tenant on the terms that the tenancy may be terminated by L or T at any time, a tenancy at will arises.

This type of tenancy was described by de la Bastide JA, in *Romany v Romany*, thus:[50]

> A tenancy at will exists when a person occupies the land of another on the understanding that he may go when he likes and that the owner may terminate his interest at any time the owner wishes so to do. A tenancy at will has been properly described as a personal relationship between the landlord and his tenant and it is important, in this case, to note that it is determined by the death of either of them or by one of a variety of acts, even by an involuntary alienation, which would not affect the subsistence of any other tenancy.[51]

In *Cyrus v Gopaul*,[52] Edoo JA further emphasised that 'the rule is clear. A tenancy at will can only exist as a result of an agreement between the parties and an intention on the part of the landlord to create such a tenancy'. Thus, where, in this case, the owner of land permitted the plaintiff, who was a friend of a deceased statutory tenant, to remain in occupation of the land for four years after the tenant's death, it was held that she occupied the land as a mere licensee and not as a tenant at will, since there was no intention on the part of the owner to accept her as a tenant.

A tenancy at will may be created either expressly or by implication. Examples of a tenancy at will arising by implication are where a purchaser of land has been let into possession pending completion; where T takes

48 See *Kanhai v Gosine* (1988) Court of Appeal, Trinidad and Tobago, Mag App No 125 of 1988 (unreported); *Pantin v Williams* (1995) High Court, Trinidad and Tobago, No 1379 of 1991 (unreported).

49 *Tickner v Buzzacott* [1965] Ch 426.

50 (1972) 21 WIR 491, p 496.

51 *Wheeler v Mercer* [1956] 3 All ER 631, p 634.

52 (1989) Court of Appeal, Trinidad and Tobago, Mag App No 69 of 1987 (unreported). See, also, *Moonan v Moonan* (1988) Court of Appeal, Trinidad and Tobago, Mag App No 12 of 1987 (unreported).

possession under a void lease or under an agreement for a lease and has not yet paid rent; where T 'holds over' after expiry of his lease, without having yet paid rent; and where T is allowed to occupy a house rent free for an indefinite period. Unless it is agreed that the occupation is to be rent free, T must pay L compensation for the 'use and occupation' of the land.[53]

An example of a rent free tenancy at will is to be found in the Trinidadian case of *Deen v Mahabir*.[54] Here, M verbally agreed to allow D, with whom he was on friendly terms, to occupy his house rent free for three to four months whilst D's house was under construction. After some considerable time had elapsed, M repeatedly requested D to leave the house, but D remained in occupation. An ejectment order was made by the magistrate, against which D appealed on the ground that the magistrate had no jurisdiction to determine the complaint because the relationship of landlord and tenant had not existed between the parties within s 3 of the Summary Ejectment Ordinance. The Court of Appeal held that, where exclusive possession was given to a new occupant, it was to be inferred that a tenancy had been created, unless special circumstances existed which showed that only a licence had been intended. In the present case, the fact that D did not pay rent or that his occupation of the premises had been the result of 'generosity or indulgence' on the part of M, was as consistent with the grant of a rent free tenancy at will as it was with the grant of a gratuitous licence, and there were no special circumstances or conduct to negative a tenancy.

A tenancy at will terminates when either party does an act which is incompatible with its continuance, for example, where T commits voluntary waste, or where L enters the land and cuts trees or carries away stone, or where either party gives notice of termination to the other.

Tenancy at sufferance

Where T remains in possession of the land after the expiry of his lease without L's assent or dissent,[55] a tenancy at sufferance arises. A tenant at sufferance differs from a trespasser in that his original entry was lawful, and from a tenant at will in that his tenancy exists without L's consent. L may claim possession at any time, and he is entitled to claim compensation for T's 'use and occupation'. The relationship may be converted into a periodic tenancy by the payment of rent.

53 *Howard v Shaw* (1841) 151 ER 973.

54 (1970) 17 WIR 21.

55 The commencement of ejectment proceedings constitutes dissent by the landlord, and precludes the implication of a tenancy at sufferance: *De Hayney v Ali* (1986) Court of Appeal, Trinidad and Tobago, No 169 of 1984 (unreported), *per* McMillan JA. Similarly, where the landlord protests at a holding over by the tenant: *Alexander v Rampersad* (1989) High Court, Trinidad and Tobago, No 1780 of 1988 (unreported), *per* Blackman J.

The following definition of tenancy at sufferance from *Woodfall*[56] was quoted with approval by Deyalsingh J in *Seetahal v Batchasingh*:[57]

> A tenant at sufferance is one who has entered by a lawful demise or title, and, after that has ceased, wrongfully continues in possession without the assent or dissent of the person next entitled; as where a tenant for years holds over after expiry of his term; or where anyone continues in possession without agreement after a particular estate is ended ... An undertenant who is in possession at the determination of the original lease, and is suffered by the reversioner to hold over, is only a tenant at sufferance. Where a tenancy at will is determined by the landlord exercising acts of ownership, and the tenant remains in possession, he becomes a tenant on sufferance only: but slight evidence would be sufficient to show a new creation of a tenancy at will, or he may by payment of rent, or other acknowledgment of tenancy, become tenant from year to year.

In the *Seetahal* case, S's claim that he had become a tenant at sufferance was rejected, since he could not show that he had ever owned an estate in the land; at most, his occupation had been as a licensee. He was not, therefore, protected by the Land Tenants (Security of Tenure) Act 1981.[58]

Tenancy by estoppel

If L purports to grant a lease of land to T but L has no title to the land, L is estopped from repudiating the tenancy and T is also estopped from denying L's title and the tenancy's existence.[59] In such a case, there arises a 'tenancy by estoppel' which, although invalid vis à vis third parties, is binding on L and T and, as between them, has the attributes of a true tenancy. As Farwell LJ described it:[60]

> It is true that a title by estoppel is only good against the person estopped and imports from its very existence the idea of no real title at all, yet as against the person estopped it has all the elements of a real title.

Thus, covenants contained in the lease are enforceable by and against L and T and their successors.

56 *Landlord and Tenant*, 28th edn, 1978, London: Sweet & Maxwell, p 8.

57 (1987) High Court, Trinidad and Tobago, No 89 of 1983 (unreported).

58 See below, Chap 5. Cf *Ramoutar v Abdool* (1993) High Court, Trinidad and Tobago, No 957 of 1983 (unreported), where Permanand J held that the plaintiffs, as tenants at sufferance of building land, were entitled to rely on s 4 of the Act.

59 *Meredith v Gray* (1968) 11 JLR 100, Court of Appeal, Jamaica; *Harrysingh v Ramgoolam* (1984) High Court, Trinidad and Tobago, No 744 of 1978 (unreported).

60 *Bank of England v Cutler* [1908] 2 KB 208, p 234.

LEASEHOLD COVENANTS

The liabilities of lessor and lessee are normally to be found in the express covenants (that is, obligations) contained in the deed of lease, or in the covenants implied by statute or by the common law. They may be considered under the following heads.

LANDLORD'S IMPLIED OBLIGATIONS

Covenant for quiet enjoyment

At common law, there is implied in every lease a covenant on the part of the landlord that the tenant shall be put into possession[1] of the demised premises and that he shall have 'quiet enjoyment' of the premises during the continuance of the lease.[2] The tenant is entitled to recover damages from the landlord if the landlord or any other person claiming through him substantially disturbs or physically interferes with the tenant's enjoyment of the land.[3]

Examples of breaches of this covenant are where L, having reserved the right to work minerals under the demised land, conducts mining operations in such a way as to cause the land to subside;[4] or where L, in order to 'get rid of' T, removes the doors, windows or roof of the building,[5] causes the

1 *Miller v Emcer Products Ltd* [1956] 1 All ER 237. In *Singh v Szala* (1975) Full Court, Guyana (unreported), L granted a monthly tenancy of a cottage and a storeroom below. L kept the storeroom locked and never gave T possession of it up to the time of the present action. Bollers CJ and Mitchell J held that 'there was a direct physical interference with the room ... by keeping it locked', and 'impliedly [L] was under an obligation at the commencement of the tenancy to put [T] into possession of that tenancy ... and to see that he remained quietly in possession of it. It is our view that if he did not put him in possession of the tenancy to which he was entitled, [T] has a cause of action in Guyana for breach of the implied covenant for quiet enjoyment'.

2 *Markham v Paget* [1908] 1 Ch 697.

3 *Jones v Lavington* [1903] 1 KB 253; *Ferreira v Mansfield* [1947] LRBG 73; *Saul v Saul* [1963] LRBG 299, High Court, British Guiana; *Wells v Bayparl Ltd* (1991) Supreme Court, The Bahamas, No 1058 of 1983 (unreported); *Green v Thomas* (1977) High Court, Trinidad and Tobago, No 3 of 1972 (unreported); *Narine v Narine* (1973) High Court, Guyana, No 437 of 1972 (unreported).

4 *Markham v Paget* [1908] 1 Ch 697.

5 *Lavender v Betts* [1942] 2 All ER 72; *Ram v Ramkissoon* (1968) 13 WIR 332; *Lyons v Quamina* (1989) High Court, Trinidad and Tobago, No 97 of 1986 (unreported).

electricity or water supply to be cut off,[6] or subjects T to persistent harassment[7] or intimidation.[8]

There are many examples of breach of the covenant for quiet enjoyment in the Commonwealth Caribbean. In the Guyanese case of *Ali v Enmore Estates Ltd*,[9] for instance, the plaintiff was a yearly tenant of agricultural land owned by the defendants. The defendants wished to extend their sugar cane agriculture and attempted to persuade the plaintiff to surrender his tenancy in return for a tenancy of other land. On the plaintiff's refusal to vacate his plot, the defendants moved in with a bulldozer, dismantled the plaintiff's palings and threatened to remove his house. Gonsalves-Sabola J held that there had been a flagrant breach of the implied covenant for quiet enjoyment for which the defendants were liable. He said:

> The defendants' self-help, whether inspired by ignorance, *bona fides* or pressing need, was executed with a high hand and the court, in stepping forth to the rescue and protection of the humble tenant of at least 25 years' standing, can perceive the landlord's conduct in no other light than as attracting aggravated damages.

In *Ram v Ramkissoon,*[10] the appellant was a statutory tenant of two rooms in a central portion of a building where he carried on business as a jeweller. The building was old and in a bad state of repair, and its two end portions had been unoccupied for several years. The respondent landlord, who owned the whole building, wished to obtain vacant possession of the central portion also. While ejectment proceedings were pending, the respondent removed the galvanised iron sheets from the roof of both end portions of the building. The appellant complained that, as a direct consequence of the removal of the roof, rainwater seeped through the rooms he occupied, causing annoyance, discomfort and physical damage to his property. He claimed damages for, *inter alia*, breach of the landlord's implied covenant for quiet enjoyment. The Court of Appeal of Trinidad and Tobago held, reversing the trial judge's decision, that the damage suffered by the appellant was sufficiently substantial to constitute a breach of the covenant for quiet enjoyment. Wooding CJ said:[11]

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6 *Tapper v Myrie* (1968) 11 JLR 102, Court of Appeal, Jamaica; *Perera v Vandiyar* [1953] 1 All ER 1109.

7 *Pantin v Mahadeo*, Court of Appeal, Trinidad and Tobago, Civ App No 15 of 1971 (unreported).

8 *Kenny v Preen* [1962] 3 All ER 814.

9 (1971) High Court, Guyana, No 3619 of 1969 (unreported). See, also, *Jagroo v Khan* (1990) High Court, Trinidad and Tobago, No 1041 of 1985 (unreported), where L unlawfully entered land in the possession of T and destroyed T's boundary fences.

10 (1968) 13 WIR 332, Court of Appeal, Trinidad and Tobago. See, also, *Bartholomew v Young* (1990) High Court, Trinidad and Tobago, No 2363 of 1981 (unreported).

11 (1968) 13 WIR 332, p 334.

It was agreed that a covenant for quiet enjoyment must be implied from the respondent's contract of letting. It was also agreed that, to constitute an actionable breach, the interference with the tenant's enjoyment of the tenancy must be substantial: see *Browne v Flower*.[12] But I am not at all sure that the parties are at one as to what is meant by substantial. Be that as it may, what was alleged here? The appellant's tenancy related to the central portion of a building which was to a large extent protected by the two end portions against wind and weather. The rented premises were deprived of that protection by the deliberate act of the respondent who was under no pressure or notice to do what he did. The end portions had been unoccupied and in a state of dilapidation for some five or six years at least, so it seems odd that he should suddenly have decided to remove their roofs. He had terminated the appellant's contractual tenancy and was currently pursuing ejectment proceedings to put an end to his statutory tenancy. Three months after instituting these proceedings, he effected the first removal. And three months later he began some more. The appellant points to all this as evidencing a resolve on the part of the respondent, and a carrying out of the resolve, to nudge him out of his possession of the rented premises. It may well be so. But, even then, the facts here would fall very far short of those in *Kenny v Preen*,[13] upon which his counsel relied.

In that case, it was found that:

> There was a deliberate and persistent attempt by the landlord to drive the tenant out of her possession of the premises by persecution and intimidation, and intimidation included threats of physical eviction of the tenant and removal of her belongings.

And, in the view of the court:

> That course of conduct by the landlord seriously interfered with the tenant's proper freedom of action in exercising her right of possession, tended to deprive her of the full benefit of it, and was an invasion of her rights as tenant to remain in possession undisturbed, and so would in itself constitute a breach of covenant, even if there were no direct physical interference with the tenant's possession and enjoyment.

Here, it may be, as I said, that the respondent had begun to embark upon a campaign deliberately planned to drive the appellant out of his possession of the rented premises. But there was no finding to that effect. Nor was it any part of the appellant's case at the trial ... although he admitted taking off the galvanised roofing while the ejectment proceedings were pending, he denied that he did so in order to 'smoke out' the appellant.

Nevertheless, I think there was some physical interference with the enjoyment of the tenancy. By depriving the central portion of the building of such protection against wind and weather as the two end portions afforded, there was, whenever rain fell, enough irruption of water upon the rented premises to cause Dr Singh to regard the seepage as at least not minimal. So there was an

12 [1911] 1 Ch 219, p 228.

13 [1962] 3 All ER 814.

> invasion of the appellant's right as tenant to remain in possession undisturbed by such irruptions. In my judgment, that was damage sufficiently substantial, if only because of its frequency, to constitute a breach of the covenant. And I so hold.

In *Tapper v Myrie*,[14] a tenant of residential accommodation paid an agreed rent of £2 15s a month and a further sum of 5s for electricity. When the landlord demanded an additional payment of 5s a month for rent, the tenant refused to pay, whereupon the landlord gave him notice to quit. The tenant did not leave, and one night when he returned home he found there was no electricity in his room. He spoke to the landlord about it, and the latter retorted: 'I cut off your light because I want you to come out, and you won't come out.' The Jamaican Court of Appeal, affirming the decision of the trial magistrate, held that the action of the landlord in disconnecting the electricity supply was a breach of the implied covenant for quiet enjoyment, notwithstanding that the act complained of was done off the premises, since it was 'a physical interference with the demised premises'. Nor was there any merit in the landlord's argument that there were two separate contracts – one for renting the premises, and one for the supply of electricity – and even if there had been a breach of the latter contract, this did not amount to a breach of the covenant for quiet enjoyment. Fox JA said:[15]

> It is clear that the parties had bargained on the footing that electric current should come into the premises. This became a benefit which was in no way dissimilar from other benefits incidental upon the rental of the premises. Viewed in this manner, it is idle to inquire whether the arrangement in respect of electricity is regarded as having been embodied in the contract of rental, or independent thereof. To deprive the plaintiff of his supply of electricity would be in breach of the defendant's implied undertaking not to do so, and would render him liable, as the learned resident magistrate has found.

On the other hand, since there must be some physical interference with the enjoyment of the premises let, mere noise or disorderly conduct emanating from the landlord's adjoining premises may not amount to breach of the covenant for quiet enjoyment,[16] though it may be actionable as a nuisance or constitute a derogation from the lessor's grant if the latter has participated in it. Where no participation by the lessor is proved, he will not be liable merely for having failed to take steps to prevent it.[17] Furthermore, a disturbance of enjoyment, even where caused by the lessor, which is merely temporary and

14 (1968) 11 JLR 102.

15 *Ibid*, p 105.

16 *Jenkins v Jackson* (1888) 40 Ch D 71; *Jaeger v Mansions Consolidated Ltd* (1902) 87 LT 690, p 694.

17 *Belbridge Property Trust Ltd v Milton* (1934) 78 SJ 489, where the lessor was held not liable for an invasion by rats, where he had done nothing to attract them to the demised premises, nor let them loose there.

which does not interfere with the lessee's possession, is not a breach of the covenant.[18]

Covenant not to derogate from the grant

There is an implied covenant that the landlord will not derogate from his grant. As Bowen LJ said, 'a grantor, having given a thing with one hand, is not to take away the means of enjoying it with the other'.[19] In the context of leaseholds, this means that the landlord 'must not frustrate the use of the land for the purposes for which it was let'.[20] For instance, there was a breach of the covenant where L, having let land to T for the purpose of carrying on a business as a timber merchant, erected buildings on adjoining land which interrupted the free flow of air to the sheds which T used for drying timber.[21] Similarly, where L lets to T an apartment in a building intended for purely residential use, he commits a breach of covenant if he subsequently lets most of the other apartments in the building for business purposes.[22]

To constitute a breach of the covenant, L must do some act which renders the demised premises 'substantially less fit for the purposes for which they were let'.[23] Thus, there will be no breach where L, having let premises to T for use in a particular trade, later lets adjoining premises to a rival trader, because the premises let to T will still be fit for the purpose for which they were let, albeit that T's profits may be reduced.[24] Nor will an act by L which constitutes a mere invasion of T's privacy amount to a breach of the covenant, as where, for example, having let a ground floor apartment to T, L erects an outside staircase to an upper apartment which passes directly in front of T's bedroom window.[25]

Many acts which constitute a breach of this covenant may also constitute a breach of the covenant for quiet enjoyment; for instance, where L operates machinery on adjoining land which causes structural damage to the house let to T; or where excessive dust and fumes emitted from neighbouring land seriously interfere with T's enjoyment of his premises.

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18 *Manchester, Sheffield and Lincolnshire Rly Co v Anderson* [1898] 2 Ch 394, p 401.

19 *Birmingham, Dudley and District Banking Co v Rose* (1888) 38 Ch D 295, p 313.

20 *Browne v Flower* [1911] 1 Ch 219, pp 225–27; Cheshire and Burn, *Modern Law of Real Property*, 14th edn, 1988, London: Butterworths, p 378.

21 *Aldin v Latimer, Clark, Muirhead and Co* [1894] 2 Ch 437.

22 *Newman v Real Estate Debenture Corpn Ltd* [1940] 1 All ER 131.

23 Megarry and Wade, *Law of Real Property*, 5th edn, 1984, London: Stevens, p 696.

24 *Port v Griffith* [1938] 1 All ER 295.

25 See *Browne v Flower* [1911] 1 Ch 219.

Covenant as to fitness for habitation

At common law, there is no implied covenant by a landlord that the premises let are or will be fit for human habitation, nor is there any implied covenant that the landlord will do any repairs whatever.[26] However, there are the following exceptions:

Furnished lettings

Where residential premises are let furnished, there is an implied condition that they are fit for habitation at the commencement of the tenancy;[27] for example, the drains must not be defective,[28] nor must the premises be infested with bugs.[29] But the landlord has no obligation to *keep* the premises habitable; so, if they subsequently become unfit, the landlord is not liable.[30]

High rise apartment buildings

It was held in *Liverpool CC v Irwin*[31] that a landlord of residential apartments in a high rise building is under an implied duty to keep in a reasonable state of repair the lifts, staircases and other common facilities, such as lighting and garbage chutes, for the benefit of all the tenants in the building.

Statutory provisions

The common law position has been modified or altered by statute in some Commonwealth Caribbean jurisdictions. For instance, s 157(d) of the Property Act, Cap 236 (Barbados) provides that, 'in the case of a lease of a dwelling house, or part thereof', there is an implied covenant 'that the house or part thereof is fit for human habitation at the commencement of the tenancy'; and s 6 of the Landlord and Tenant Act, Cap 153 (Belize), s 44(1) of the Landlord and Tenant Act, Cap 61:01 (Guyana) and s 3 of the Letting of Houses (Implied Terms) Act, Ch 27, No 8 (Trinidad and Tobago) provide that: '... in any contract for letting any house for human habitation there shall, notwithstanding any stipulation to the contrary, be implied a condition that the house is, at the commencement of the tenancy, and an undertaking that the house will be kept by the landlord during the tenancy, in repair and in all respects reasonably fit for human habitation.'

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26 *Op cit*, Cheshire and Burn, fn 20, p 373.

27 *Collins v Hopkins* [1923] 2 KB 617.

28 *Wilson v Finch-Hatton* (1877) 2 Ex D 336.

29 *Smith v Marrable* (1843) 152 ER 693; 174 ER 598.

30 *Sarson v Roberts* [1895] 2 QB 395.

31 [1976] 2 All ER 39.

It will be seen that s 157(d) of Cap 236 modifies the common law position in that it imposes an obligation on a landlord of any dwelling house – not merely furnished dwellings – to ensure that it is fit for human habitation at the commencement of the tenancy. Caps 153, 61:01 and 27, No 8, on the other hand, extend the obligation still further by providing that a landlord of any dwelling house must not only make the house fit for habitation at the commencement of the tenancy, but also keep it in such a state throughout the tenancy.

The meaning of 'fit for human habitation' within cl 2 of the Rent Restriction Exclusion of Premises Order 1954 was in issue in a Trinidadian case, *Hamblin v Samuel*.[32] In this case, the owner of a house decided to convert the basement area into two self-contained apartments. Officials of the Rent Assessment Board visited the premises and found that the ventilation of the apartments was inadequate, that the one bedroom window in each apartment could not be opened at all, and that the one sitting room window in each had generally to be kept closed because of the prevailing dust. According to Wooding CJ, 'the Board would appear to have regarded the conditions to which the apartments were subject as almost, if not wholly, subhuman'. In ascertaining the meaning of 'fit for human habitation', the learned Chief Justice gave it 'its natural meaning', which may tersely be said to be: 'fit for human beings to live in.'

Wooding CJ regarded s 4(1) of the Housing Act 1957 (UK) as a reasonable guide as to whether premises are fit for human habitation. The sub-section provided:

> In determining for any of the purposes of this Act whether a house is unfit for human habitation, regard shall be had to its condition in respect of the following matters, that is to say:
>
> (a) repair;
>
> (b) stability;
>
> (c) freedom from damp;
>
> (d) natural lighting;
>
> (e) ventilation;
>
> (f) water supply;
>
> (g) drainage and sanitary conveniences;
>
> (h) facilities for storage, preparation and cooking of food and for the disposal of waste water,
>
> and the house shall be deemed to be unfit for human habitation if and only if it is so far defective in one or more of the said matters that it is not reasonably suitable for occupation in that condition.

32 (1966) 11 WIR 48.

Covenant to repair

Repairing covenants, other than covenants as to fitness for habitation, are normally expressly inserted in leases. At common law, there is no implied obligation on a landlord to do repairs, but statutory obligations are imposed in some jurisdictions. For instance, s 157(c) of Cap 236 (Barbados) implies a covenant 'to keep in repair the roof, main walls and main drains and, where part only of a building is leased, the common passage and common installations', and s 157(e) imposes an obligation 'to repair the leased premises in the case of destruction by fire , earthquake, hurricane, flood or riot'.

Where a landlord has covenanted or is subject to a statutory obligation to repair[33] and, having been notified by the tenant of the need for certain repairs,[34] fails to carry them out, the tenant is entitled to arrange to have the repair work done and to deduct the cost from future payments of rent.[35] A recent Bahamian example is *Milo Butler and Sons Investment Co Ltd v Monarch Investments Ltd*,[36] where the landlord had covenanted 'to keep and maintain the main structure and all exterior parts ... including the roof ... in good and tenantable repair'. The tenant informed the landlord in writing that the roof was in urgent need of repair and, after the landlord's failure to respond, the tenant gave notice of his intention to effect the repairs and to deduct the cost from future rent payments. Allen J, in the Supreme Court of The Bahamas, held that the tenant was not liable for failure to pay rent equivalent to the cost of carrying out the necessary repairs.

TENANT'S IMPLIED OBLIGATION

Obligation not to commit waste

A tenant for a fixed term is liable for both voluntary waste (that is, positive acts of injury to the property, such as altering or destroying it) and permissive waste (that is, allowing the property to become dilapidated, through omission to repair) and, therefore, in the absence of an express stipulation to the contrary, he must keep the premises in proper repair.[37]

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33 The court has a discretionary power, which should be cautiously exercised, to order a landlord to do some specific work under a covenant to repair. Where there has been a clear breach of a repairing covenant, and there is no doubt as to what is required to be done to remedy the breach, an order of specific performance ought to be made: *Jeune v Queen's Cross Properties Ltd* [1973] 3 All ER 97.

34 A landlord's liability to repair does not arise until he has been notified of the need for repair, or otherwise acquires knowledge of such need: *O'Brien v Robinson* [1973] 1 All ER 583; *Uniproducts (Manchester) Ltd v Rose Furnishers Ltd* [1956] 1 All ER 146.

35 *Lee-Parker v Izzett* [1971] 3 All ER 1099. See Rank, PM (1976) 40 Conv (NS) 190; Waite, A [1981] Conv 199; Smith, PF (1980) 131 NLJ 330.

36 (1998) Supreme Court, The Bahamas, No 10 of 1989 (unreported).

37 *Yellowly v Gower* (1855) 156 ER 833.

A yearly tenant is certainly liable for voluntary waste,[38] but there is uncertainty as to the extent of his liability for permissive waste. According to one view, a yearly tenant's liability is the same as that of a tenant for a fixed term.[39] Another view is that he is merely liable to keep the premises wind and watertight, fair wear and tear excepted.[40] A third view is that his liability is no greater than that of a weekly, monthly or quarterly tenant, viz, his only obligation is to use the premises 'in a tenant-like manner'.[41] The meaning of this latter phrase was explained by Lord Denning thus:[42]

> The tenant must take care of the place ... He must clean the chimneys, when necessary, and also the windows. He must mend the electric light when it fuses. He must unstop the sink when it is blocked by his waste. In short, he must do the little jobs about the place which a reasonable tenant would do. In addition, he must, of course, not damage the house, wilfully or negligently; and he must see that his family and guests do not damage it: and if they do, he must repair it. But apart from such things, if the house falls into disrepair through fair wear and tear or lapse of time, or for any reason not caused by him, then the tenant is not liable to repair it.

Section 11 of Cap 153 (Belize) and s 8 of Cap 61:01 (Guyana) impose liability on all tenants for voluntary waste, but are silent as to liability for permissive waste. The sections provide that 'a lessee shall not make voluntary waste of the land held under the tenancy without the permission of the lessor and, if he does so, the lessee shall be liable to pay damages to the lessor', but 'no action shall be brought by any landlord against any tenant on or in whose land or buildings any fire shall accidentally begin in respect of any damage suffered by him in consequence thereof'.

EXPRESS COVENANTS

To a large extent, the rights and liabilities of landlord and tenant are regulated by express covenants inserted in the lease or tenancy agreement. There is an infinite variety of such covenants, but those most significant and commonly encountered concern payment of rent, obligation to repair, and obligation not to assign, underlet or part with the possession of the premises without the landlord's consent.

38 See *Warren v Keen* [1954] 1 QB 15, p 21.

39 Yates and Hawkins, *Landlord and Tenant Law*, p 205.

40 *Op cit*, Megarry and Wade, fn 23, p 702.

41 *Op cit*, Cheshire and Burn, fn 20, p 379; *Milo Butler and Sons Investment Co Ltd v Monarch Investments Ltd* (1998) Supreme Court, The Bahamas, No 10 of 1989 (unreported), *per* Allen J.

42 *Warren v Keen* [1954] 1 QB 15, p 20.

Covenant to pay rent

The rent payable by a tenant under a lease is more properly called 'rent service', which signifies that, historically, T held the land in return for services which were later commuted into fixed money payments. Although, today, rent almost invariably consists of money payments, there is nothing to prevent rent taking the form of delivery of chattels or produce,[43] or the performance of personal services.[44]

The amount to be paid as rent must be sufficiently certain. It need not be certain at the date of the lease, but it must be 'calculated with certainty at the time when payment comes to be made'.[45] It has been held that a contract for a tenancy is void for uncertainty if the rent is 'to be agreed',[46] but a term in a council tenant's rent book to the effect that rent was 'liable to be increased or decreased on notice being given' was held valid,[47] as also was an option to renew a lease 'at a rent to be fixed at a price to be determined, having regard to the market valuation of the premises at the time of exercising the option'.[48] It is also sufficient if the parties provide that the rent shall be fixed by a third party.[49] Further, once a lease has been granted, the court will do what it can to interpret provisions as to rent in such a way as to achieve sufficient certainty. Thus, for example, where in a 10 year lease rent was fixed for the first five years and was thereafter to be 'as agreed', it was held that a reasonable rent, to be assessed at the end of the first period, was payable for the second period.[50]

A lease may contain a 'rent review clause', enabling rent to be raised at regular intervals to reflect the fair market value of the demised premises. The clause may provide for reviews, for example, every seven, five or three years, and will specify the administrative procedure for ascertaining the fair market rent.[51]

At common law, rent is payable in arrear, but this may be, and usually is, displaced by agreement between the parties or by a custom that the rent should be paid in advance.[52]

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43 Co Litt 142a.

44 *Duke of Marlborough v Oxborn* (1864) 122 ER 758.

45 *Op cit*, Cheshire and Burn, fn 20, p 381.

46 *King's Motors (Oxford) Ltd v Lax* [1970] 1 WLR 426. But in *Adam v Besseling* (1987) High Court, Trinidad and Tobago, No 2504 of 1987 (unreported), Mustapha Ibrahim J pointed out that, where there was an option to renew a lease at a rent to be agreed, the uncertainty could be cured and the agreement rendered valid if the parties agreed on a rent before the time for the exercise of the option had arrived. See, also, *Brown v Gould* [1972] 1 Ch 53.

47 *Greater London Council v Connolly* [1970] 1 All ER 870.

48 *Brown v Brown* [1971] 2 All ER 1505.

49 *Lloyds Bank v Marcan* [1973] 3 All ER 754.

50 *Beer v Bowden* [1981] 1 WLR 522.

51 See Aldridge, *Leasehold Law*, paras 4038–48; *op cit*, Cheshire and Burn, fn 20, p 382.

52 See *Francis v Daley* (1964) 6 WIR 256.

Covenant to repair

The obligation to repair the demised premises may rest on the landlord, or on the tenant, or partly on the landlord and partly on the tenant. The matter is entirely one for negotiation between the parties, and the extent of the obligation depends upon the wording of the covenant.[53] Expressions often used are 'good tenantable repair',[54] 'sufficient repair', 'good and substantial repair'; though it has been suggested that these phrases do not increase the burden imposed by the single word 'repair'.[55] If there is no express provision for repairs in the lease, the tenant may be held liable for them under the doctrine of waste.[56] Further, statutory provisions may impose obligations to repair. For instance, as we have seen, s 157(c) of Cap 236 (Barbados) implies a covenant by the landlord 'to keep in repair the roof, main walls and main drains and, where part only of a building is leased, the common passage and common installations'; and s 158(c) of the same Act imposes an obligation upon the tenant 'to keep the interior of the leased premises in good repair, reasonable wear and tear excepted'. Both of these implied covenants are, however, subject to any express provision to the contrary in the lease.

At common law, the standard of repair required is that in which, after making due allowance for the locality, character and age of the premises at the date of the lease, a reasonably minded owner would keep them.[57] This standard is also required by s 159(1) of Cap 236, which provides that 'repair' means 'the state of repair in which a prudent owner might reasonably be expected to keep his property, due allowance being made for the age, character and location of the premises at the commencement of the lease'.

As regards locality, it is clear that a house situated in an exclusive residential suburb would demand a higher standard of repair than one situated in a run-down urban or inner city area.[58] As regards character, it is equally clear that the standard of repair applicable to a mansion house would be much higher than that applicable to an agricultural worker's cottage.[59] An

53 See Hill and Redman, *Law of Landlord and Tenant*, 18th edn, paras 13.024, 13.025; *Milo Butler and Sons Investment Co Ltd v Monarch Investments Ltd* (1998) Supreme Court, The Bahamas, No 10 of 1989 (unreported).

54 'Good tenantable repair' has been held to mean 'such repair as, having regard to the age, character and locality of the house, would make it reasonably fit for the occupation of a reasonably minded tenant of the class who would be likely to take it': *Proudfoot v Hart* (1890) 25 QBD 42, p 52, *per* Lord Esher MR; *Milo Butler and Sons Investment Co Ltd v Monarch Investments Ltd* (1998) Supreme Court, The Bahamas, No 10 of 1989 (unreported).

55 *Anstruther-Gough-Calthorpe v McOscar* [1924] 1 KB 716, pp 722, 723.

56 See above, pp 30, 31.

57 *Lurcott v Wakely* [1911] 1 KB 905; *Anstruther-Gough-Calthorpe v McOscar* [1924] 1 KB 716.

58 *Op cit*, Cheshire and Burn, fn 20, p 385.

59 *Op cit*, Cheshire and Burn, fn 20, p 385.

important principle is that it is the character of the premises and the locality at the beginning of the tenancy which must be considered. Thus, if, at the commencement of a long lease, the house is a desirable one situated in an expensive and fashionable locality, but after several years the neighbourhood and the property become run-down, the covenantor must put the property back into its original state: he cannot argue that his obligation is to be measured by the current low standards of the locality.[60]

With regard to the age of the property, the covenantor is under an obligation to keep it in a reasonably good condition for a building of that age.[61] If, in order to keep the property in such a condition, it becomes necessary to renew or replace parts of the building, such as a defective wall or roof, the covenantor must do the renewal or replacement. However, the covenantor is not bound to *reconstruct* the building: so, for example, 'the tenant of an old house is not bound to replace defective foundations with foundations of an entirely different character',[62] because that would, in effect, amount to reconstruction. The obligation to repair does not normally require the rebuilding of premises which, 'through inherent defects, have passed beyond repair, or doing work which cannot fairly be called repairing the premises as they stood when demised',[63] and 'it is always a question of degree whether that which the tenant is being asked to do can properly be described as repair, or whether, on the contrary, it would involve giving back to the landlord a wholly different thing from that which he demised'.[64]

In the recent Jamaican case of *International Hotels Ltd v Cornwall Holdings Ltd*,[65] where a lease of a hotel required the tenant to keep and maintain the premises, with its fixtures and fittings, 'in good and substantial repair and condition', Harris J held that it was 'obligatory on the part of a tenant, who is under liability to substantially repair demised premises and to keep them in a state of good repair, to do so, even if they were not in a state of tenantable repair at the inception of the tenancy', so long as it will not 'involve giving back to the landlord a wholly different thing from that which he demised'. In this case, the replacement of dilapidated equipment with upgraded equipment, currently available on the market, could 'not be regarded as the [tenant] giving back to the landlord a wholly different thing from that for which it had covenanted at the commencement of the lease'.

These principles were first established in *Ravenseft Properties Ltd v Davstone (Holdings) Ltd*,[66] where it was held that, where an inherent defect has caused

60 *Anstruther-Gough-Calthorpe v McOscar* [1924] 1 KB 716.

61 *Op cit*, Cheshire and Burn, fn 20, p 385.

62 *Op cit*, Cheshire and Burn, fn 20, p 385; *Sotheby v Grundy* [1947] 2 All ER 761.

63 *Op cit*, Megarry and Wade, fn 23, p 27.

64 *Ravenseft Properties Ltd v Davstone (Holdings) Ltd* [1979] 1 All ER 929, p 937, *per* Foster J.

65 (1996) Supreme Court, Jamaica, No CLI 036 of 1994.

66 [1979] 1 All ER 929.

damage, the tenant may be under an obligation to rectify not only the damage but the cause of the damage, even though it is an inherent defect, if it is the proper practice to do so, or it is necessary to do so in order to do 'the job properly once and for all'. Thus, in the *Ravenseft* case, where the stone cladding on a building became cracked owing to the absence of expansion joints, which were not included in the original design, the tenant was obliged not only to replace the stone cladding, but also to insert expansion joints in order to prevent recurrence of the problem.

Fair wear and tear

Tenants frequently covenant to keep the premises in repair, 'fair wear and tear excepted'. The effect of the phrase is to absolve the tenant from liability for:

(a) damage due to the ordinary operation of natural causes such as wind and rain; and

(b) disrepair resulting from the reasonable use of the premises.

However, although the tenant is not liable for the original damage or deterioration constituting wear and tear, he is liable for any consequential damage resulting from his failure to rectify the original damage, where it should be obvious to a reasonable person that, if not rectified, further and lasting damage would ensue. As Talbot J put it in *Haskell v Marlow*:[67]

> The tenant is bound to do such repairs as may be required to prevent the consequences flowing originally from wear and tear from producing others which wear and tear would not directly produce. For example, if a tile falls off the roof, the tenant is not liable for the immediate consequences; but if he does nothing and in the result more and more water gets in, the roof and walls decay and ultimately the top floor, or the whole house, becomes uninhabitable, he cannot say that it is due to reasonable wear and tear ... On the other hand, take the gradual wearing away of a stone floor or staircase by ordinary use. This may in time produce a considerable wear and tear, and the tenant is not liable in respect of it.

Covenant not to assign, sublet or part with possession of the demised premises

In the absence of any express stipulation to the contrary, a tenant is free to assign, sublet or part with the possession of the demised premises to a third party. However, in order to ensure that the premises do not fall into the hands of an irresponsible person, it is usual for a lease to contain an express covenant either that the tenant will not assign or sublet the premises (an 'absolute covenant') or, more commonly, that the tenant will not assign or sublet

67 [1928] 2 KB 45, pp 58, 59.

without the consent of the landlord (a 'qualified covenant'). The qualified covenant may be subject to an express proviso that the landlord will not unreasonably refuse his consent to an assignment or subletting. Such a proviso is implied in England under s 19 of the Landlord and Tenant Act 1927, but there is no such statutory implication in Commonwealth Caribbean jurisdictions, apart from that contained in s 29(1) of the Landlord and Tenant Act 1981 of Trinidad and Tobago, which has yet to be brought into force. In Barbados, s 158(f) of Cap 236 provides that there is an implied covenant that the tenant shall not 'transfer, charge, sublet or otherwise part with the possession of the leased premises without the written consent of the lessor'.

The courts construe covenants against assigning, subletting, or parting with possession strictly against the landlord. Thus, for instance, a covenant against parting with possession is not broken where the tenant allows another person to have the use of the premises without giving him legal possession;[68] nor is a covenant against assignment broken by a subletting of the premises; and a covenant 'not to sublet' the premises is not broken by a subletting of part of the premises.[69]

Effect of breach

The effect of breach of a covenant against assigning or underletting may be summarised thus:

(a) an assignment or subletting made in breach of an absolute or qualified covenant is nevertheless valid,[70] but the breach may give rise to forfeiture of the lease and/or a claim for damages;

(b) in the case of a qualified covenant, if the tenant omits to apply for consent to an assignment or underletting, he is liable for damages in any event and to forfeiture of the lease,[71] though the court may grant relief against forfeiture;[72]

(c) in the case of a qualified covenant containing a proviso that the landlord will not unreasonably refuse consent, a tenant to whom consent has been refused may nevertheless go ahead with the assignment or subletting and, if it is later found that the landlord's refusal was unreasonable, the tenant will not be in breach of covenant; if, on the other hand, the landlord's

68 *Chaplin v Smith* [1926] 1 KB 198.

69 *Cook v Shoesmith* [1951] 1 KB 752, p 753; *Esdaile v Lewis* [1952] 2 All ER 357, p 359; *Montrichard Enterprises Ltd v AG* (1998) High Court, Trinidad and Tobago, No CV 350 of 1989 (unreported). Accordingly, a well drawn lease should include a covenant against assigning, underletting or parting with possession of all or any part of the premises.

70 *Samad v Jordan* (1972) High Court, Guyana, No 1289 of 1970 (unreported).

71 *Barrow v Isaacs* [1891] 1 QB 417.

72 *Home Property and Investment Co Ltd v Walker* [1947] 1 All ER 789.

refusal is found to be reasonable, there will be a breach of covenant and the tenant will be liable for damages and to forfeiture, as in (b).[73]

Reasonableness of refusal of consent

The question of reasonableness of a refusal of consent is essentially a question of fact depending on all the circumstances of the case,[74] but there is strong authority for the view that, in order to be reasonable, the reason for refusal must be connected with the personality of the assignee, or with the user or occupation of the premises.[75] For example, it may be reasonable to refuse consent where the proposed assignee intends to use the demised premises for a purpose that will be injurious to the property or to other property owned by the landlord;[76] or where the assignee's financial position is precarious; or where the assignment will enable the assignee to acquire a statutory tenancy protected by the rent restriction legislation, such protection not being available to the assignor.[77]

Option to purchase the reversion

An option to purchase the reversion will often take the form of a covenant in the lease to the effect that, if the lessee within a specified period gives to the lessor notice in writing of a specified length of his desire to purchase the freehold reversion of the premises, the lessor will, on payment of a specified purchase price and all arrears of rent, convey the freehold of the demised premises to the lessee.[78]

The nature of such an option was described by Langrin J in the Jamaican Supreme Court, in *Broadway Import and Export Ltd v Levy*:[79]

> An option to purchase is the right to purchase a particular estate in land for a particular sum within a particular period. The holder of the option can call for the sale of the land to him for the agreed price at any time within the agreed period. Thus, with an option to purchase, the option holder is the prime mover. The option agreement constitutes an irrevocable offer to sell and once the plaintiff has accepted that offer by exercising the option, a contract has come into being.

73 *Lewis and Allenby Ltd v Pegge* [1914] 1 Ch 782, p 785.

74 *Bickel v Duke of Westminster* [1976] 3 All ER 801, p 804.

75 *Houlder Bros and Co Ltd v Gibbs* [1925] 1 Ch 575, p 585, *per* Warrington LJ; though, in *Bickel v Duke of Westminster* [1976] 3 All ER 801, pp 804, 805, Lord Denning MR advocated a broader approach to the question of reasonableness. See Kodilinye, G [1988] Conv 45.

76 *Bridwell Hospital Governors v Fawkner* (1892) 8 TLR 637.

77 *Lee v K Carter Ltd* [1948] 2 All ER 690.

78 *Op cit*, Hill and Redman, fn 53, para 735.

79 (1996) Supreme Court, Jamaica, No CL 1993 B 081 (unreported).

And, in *Caribbean Asbestos Products Ltd v Lopez*, Luckhoo P had this to say:[80]

> An option, when granted for value, confers a right or privilege in the optionee to call for the sale to him of the land in accordance with the conditions specified for the exercise of the option, and the lessor undertakes that he will not within the time, if any, specified in the option clause, which is indeed a separate contract, deal with the land in any way inconsistent with the right of the optionee to purchase the land, together with a binding agreement not to revoke the offer during the time, if any, specified in the option. If the offer is accepted within the time specified, a contract of sale is made ... If the lessor, in breach of his agreement, purports to revoke his offer, his revocation is ineffectual to prevent the formation of a contract by the acceptance of the offer within the specified time.

It is an established principle that an option to purchase affects the parties *qua* vendor and purchaser, not *qua* landlord and tenant.[81] It does not 'touch and concern' the land and, therefore, does not run automatically with the lease or the reversion.[82] However, an option to purchase the reversion is a proprietary interest which forms part of the lease, and the benefit will pass on an assignment of the lease,[83] even, it seems, where the assignment makes no mention of the option.[84] It has been held that an option which is expressed to be binding on the lessor's successors in title will be binding on an assignee of the reversion if it has been registered as an estate contract,[85] which, in Commonwealth Caribbean jurisdictions, would mean that it will be binding on a purchaser of the reversion having notice of the option[86] or, where title to the land is registered, where it is protected by entry of a caution or caveat on the register or certificate of title. On the death of the lessee, the benefit of the option devolves with the lease on his personal representatives.[87]

It has also been established that:

(a) an option to purchase the reversion will usually terminate on expiry of the lease and will not be exercisable by a tenant who holds over after such expiry;[88]

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80 (1974) 21 WIR 462, p 466.

81 *Woodall v Clifton* [1905] 2 Ch 257, p 279, *per* Romer LJ. In *Arima Agricultural Co-operative Society Ltd v Armstrong* (1987) High Court, Trinidad and Tobago, No 217 of 1980 (unreported), it was held that an option to purchase fixtures and fittings did not touch and concern the land, being a merely personal agreement.

82 See below, p 42.

83 *London and South Western Rly Co v Gomm* (1882) 20 Ch D 562; *Griffith v Pelton* [1957] 3 All ER 75, p 84.

84 *Griffith v Pelton* [1957] 3 All ER 75.

85 *Ibid.*

86 *Broadway Import and Export Ltd v Levy* (1996) Supreme Court, Jamaica, No CL 1993 B 081 (unreported), *per* Langrin J.

87 *Re Adams and Kensington Vestry* (1884) 27 Ch D 394.

88 *Bradbury v Grimble and Co* [1920] 2 Ch 548.

(b) where certain matters are made conditions precedent to the exercise of the option, the conditions must be observed strictly:[89] for example, notice of a desire to exercise the option must be given within the specified period, as time will normally be of the essence of the contract;[90] and, if payment of the purchase money at the expiration of the notice is made a condition precedent, the payment must be duly made, otherwise the option will be unenforceable.[91] Again, if the lease expressly states that performance of all the covenants therein is to be a condition precedent for the exercise of the option, the lessee must show such performance;[92] though strict performance may be waived by the lessor;[93]

(c) the lease will normally require notice of interest to exercise an option to be in writing;[94] and where writing is not expressly required, such a requirement will be implied;[95]

(d) the purchase price of the freehold will normally be specified; in the absence of an agreed price, it will be the open market value of the freehold subject to the existing lease.[96]

Option to renew a lease

A lease may contain a term granting the lessee an option to renew the lease for a further period.[97] Such an option will devolve upon the lessee's, and will be binding on the lessor's, personal representatives.[98] Unlike an option to purchase the reversion, it touches and concerns the land and, therefore, runs automatically with the lease and the reversion.[99] It is an interest in the land, is capable of assignment, and is binding on a purchaser of the freehold with notice or, where the land is registered, is binding on purchasers if protected by an entry on the register or certificate of title.[100]

A lessee who seeks to exercise the option must abide by any terms or conditions as to its exercise expressed in the lease. Further, if the option is made conditional on the lessee having complied with all the terms of the

89 *West Country Cleaners (Falmouth) Ltd v Saly* [1966] 3 All ER 210.
90 *Lord Ranelagh v Melton* (1864) 2 Drew and Sim 278.
91 *Ibid.*
92 See *Bassett v Whiteley* (1982) 45 P & CR 87.
93 *Friary Holroyd and Healey's Breweries Ltd v Singleton* [1899] 2 Ch 261.
94 See, eg, *Cherkiss Enterprises Ltd v Depass* (1989) 26 JLR 196, Supreme Court, Jamaica.
95 *Buckingham Canal Co v Cartwright* (1879) 11 Ch D 421, p 434.
96 *Grimes (AP) Ltd v Grayshott Motor Co Ltd* (1967) 201 EG 586.
97 *Moss v Barton* (1866) LR 1 Eq 474.
98 *Op cit*, Hill and Redman, fn 53, para 764.
99 *Weg Motors Ltd v Hales* [1961] 3 All ER 181.
100 *Beesley v Hallwood Estates Ltd* [1960] 2 All ER 314.

lease,[101] any breach of covenant existing at the relevant date will disentitle the lessee from exercising the option, even though the breach may be trivial and the lessor has not complained of it.[102] On the other hand, past breaches, which have become 'spent', will not prevent exercise of the option, whether the covenants concerned were positive or negative.[103] Usually, an option to renew must be exercised by a written notice[104] given at or before a stated time before the termination of the lease;[105] but if no time is stipulated for exercise of the option, it may be exercised so long as the relationship of landlord and tenant exists, even though the original lease has terminated.[106]

101 As in *Broadway Import and Export Ltd v Levy* (1996) Supreme Court, Jamaica, No CL 1993 B081 (unreported).

102 *West Country Cleaners (Falmouth) Ltd v Saly* [1966] 3 All ER 210.

103 *Bass Holdings Ltd v Morton Music Ltd* [1987] 2 All ER 1001.

104 But where there is no stipulation for the option to be exercised in writing, an oral exercise will be valid: *Hadad v Elias* (1993) High Court, Trinidad and Tobago, No 97 of 1992 (unreported).

105 *Biondi v Kirklington and Piccadilly Estates Ltd* [1947] 2 All ER 59.

106 *Moss v Barton* (1866) LR 1 Eq 474; *Coe v Bush* (1983) 20 JLR 99, Court of Appeal, Cayman Islands, in which Carey JA also held that where the lease is silent as to the mode of exercising an option to renew, it may be exercised either expressly or by conduct.

ASSIGNMENT, TERMINATION OF LEASES AND DISTRESS

ASSIGNMENT OF LEASE AND REVERSION

Since a lease is a proprietary interest, it may be assigned by the lessee to another person. Similarly, the reversion is property in the hands of the lessor, and he may assign it. Where a lessee assigns the lease or the lessor assigns the reversion, the question arises as to whether the assignee:

(a) is entitled to the benefits of the covenants made in favour of the assignor; and

(b) is subject to the burdens of the covenants entered into by the assignor.

In other words, where T1 assigns his lease to T2, is T2 entitled to enforce the landlord's covenants (for example, where the landlord has covenanted to repair), and is T2 bound by the tenant's covenants (for example, where T1 has covenanted to pay rent)?

Similarly, where L1 assigns the reversion to L2, is L2 entitled to enforce the tenant's covenants, and is L2 bound by the landlord's covenants?

The principles may be summarised as follows: where there is *privity of contract* between the parties, both are bound. There is privity of contract between the original lessor and the original lessee. This relationship, created by the contract of lease itself, continues to subsist between lessor and lessee despite any assignments of their respective interests. Thus, if L1 and T1 are parties to a lease, and T1 later assigns the lease to T2, L1 remains liable to T1 and T1 remains liable to L1 on the covenants in the lease because there is privity of contract between them. Similarly, if L1 assigns the reversion to L2, L1 and T1 remain liable to one another on the covenants, because there is privity of contract between them.

Where there is merely *privity of estate* between the parties, only covenants which touch and concern the land are enforceable. Privity of estate 'describes the relationship between two parties who respectively hold the same estates as those created by the lease'. It arises 'when the relationship of landlord and tenant exists between them under the lease which contains the covenant in question'.[1] Thus, there will be privity of estate between the parties where:

1 Cheshire and Burn, *Modern Law of Real Property*, 14th edn, 1988, London: Butterworths, p 431.

(a) T1 (the original lessee) holds the lease and L1 (the original lessor) holds the reversion; that is, where there has been no assignment of the lease or the reversion. In this case, there is also privity of contract between T1 and L1;

(b) T2 (an assignee) holds the lease and L1 (the original lessor) holds the reversion;

(c) T1 (the original lessee) holds the lease and L2 (an assignee) holds the reversion; and

(d) T2 (an assignee) holds the lease and L2 (an assignee) holds the reversion.

Touching and concerning the land

A covenant 'touching and concerning' the land has been defined as one which 'affects the landlord in his normal capacity as landlord, or the tenant in his normal capacity as tenant'.[2] Examples of such covenants are:

(a) to pay rent;[3]

(b) to repair;[4]

(c) to insure the premises against fire;[5]

(d) not to assign or sublet without consent;[6]

(e) to renew the lease;[7]

(f) not to serve notice to quit for three years, unless the premises are required for the landlord's own occupation;[8]

(g) not to allow a third party, X, to participate in the running of a business on the premises;[9]

(h) not to build on adjoining land so as to interfere with the enjoyment of the demised property.[10]

On the other hand, personal or collateral covenants do not touch and concern the land, since they are not directly relevant to the relationship of landlord and tenant. Examples are:

2 *Op cit,* Cheshire and Burn, fn 1, p 425.

3 *Hill v Booth* [1930] 1 KB 381.

4 *Williams v Earle* (1868) LR 3 QB 739.

5 *Vernon v Smith* (1821) 106 ER 1094.

6 *Goldstein v Sanders* [1915] 1 Ch 549.

7 *Weg Motors Ltd v Hales* [1960] 3 All ER 758.

8 *Breams Property Investment Co Ltd v Stroulgar* [1948] 1 All ER 460.

9 *Lewin v American and Colonial Distributors Ltd* [1945] 2 All ER 271.

10 *Ricketts v Enfield Churchwardens* [1909] 1 Ch 544.

(a) a covenant by either party to pay a sum of money to the other[11] (unless inextricably bound up with some other covenant which touches and concerns the land);[12]

(b) a covenant entitling the tenant to purchase the reversion at any time during the lease[13] (because it affects the parties *qua* vendor and purchaser, not *qua* landlord and tenant);

(c) a covenant by the landlord that he would not open another public house within half a mile of the demised premises (because it did not oblige the landlord to do or refrain from doing anything in the demised premises).[14]

Running of the benefits and burdens of covenants

At common law or under statutory provisions, the position now is that, in a legal lease, the benefits and burdens of covenants touching and concerning the land are enforceable not only by and against L1 and T1 but also by and against L2 and T2 and further assignees of the lease and the reversion, viz:

(a) under the rule in *Spencer's Case*,[15] the benefits of the landlord's covenants and the burdens of the tenant's covenants run with the lease;

(b) by ss 10 and 11 of the Conveyancing Act 1881 (UK), the benefits of the tenant's covenants and the burdens of the landlord's covenants 'go with' the reversion. These provisions were reproduced in ss 141 and 142 of the Law of Property Act 1925 (UK) and in ss 19–21 of Cap 153 (Belize).[16] Section 18 of Cap 61:01 (Guyana) contains a much shorter provision, which would appear to have the same effect. Sections 160 and 161 of Cap 236 (Barbados) are also of similar effect.

It has been held[17] that the effect of the latter sections is that the assignee of the reversion is the only person entitled to sue the tenant for rent or for any breach of covenant, whether such rent accrued or such breach occurred before or after the assignment. Thus, for example, on 1 February 1998, L1 grants a 10 year lease to T1. On 1 April 1999, T1 assigns the lease to T2. On that date, T1 owes L1 arrears of rent amounting to $6,000. On 1 May 1999, L1 assigns the

11 *Re Hunter's Lease* [1942] 1 All ER 27.

12 *Moss Empires Ltd v Olympia Ltd* [1939] 3 All ER 460.

13 Cheshire and Burn, *Modern Law of Real Property*, 15th edn, 1994, London: Butterworths, p 448.

14 *Thomas v Hayward* (1869) LR 4 Ex 311.

15 (1853) 77 ER 72.

16 See, also, Ch 123, ss 10, 11 (The Bahamas); Cap 271, ss 66, 67 (St Kitts/Nevis); Conveyancing Act 1973, ss 12, 13 (Jamaica); Ch 27, No 12, ss 66, 67 (Trinidad and Tobago); Cap 54:01, ss 66, 67 (Dominica); Conveyancing Act 1983, ss 10, 11 (Bermuda); Cap 220, ss 65, 66 (BVI).

17 *Re King* [1963] 1 All ER 781 (covenant to repair); *London and County Ltd v Wilfred Sportsman Ltd* [1970] 2 All ER 600 (covenant to pay rent).

reversion to L2. T2 owes no arrears of rent. In this case, only L2 can sue T1 for the $6,000 rent, even though the obligation arose before L2 acquired the reversion, and there never was any privity of estate between L2 and T1.[18]

TERMINATION OF LEASES AND TENANCIES

A lease or tenancy may be terminated by:

(a) forfeiture;

(b) surrender;

(c) merger;

(d) effluxion of time;

(e) notice to quit;

(f) frustration.

Forfeiture

At common law, a distinction is drawn between breach of a condition[19] and breach of a covenant.[20] Where a condition in a lease is broken, the landlord is entitled to resume possession by re-entry upon the premises and the lease will be terminated, as the continuance of the lease has been made conditional on the tenant's carrying out his obligations. Where a covenant is broken, on the other hand, the landlord is entitled to re-enter only if the lease contains an express forfeiture clause. Whether a stipulation in a lease amounts to a condition or a covenant depends on the intention of the parties.[21] In practice, covenants are far more common than conditions.

It is, in any event, the usual practice for a lease to contain a forfeiture clause[22] reserving to the landlord the right of re-entry if the tenant is in breach of one or more of the covenants in the lease, and providing that, upon re-entry, the lease shall be forfeited. If there is a breach of covenant, the lease becomes voidable, in the sense that the landlord has the option whether to terminate it or not. It is only when the landlord does some unequivocal act

18 See *Arlesford Trading Co Ltd v Servansingh* [1971] 3 All ER 1130.

19 Ie, where the lease is granted, for instance, 'on condition that', or 'provided always that' certain things are done or are not done. In such a case, the continuance of the lease is made conditional on the tenant performing his obligations.

20 Eg, where 'the tenant hereby covenants with the landlord as follows'.

21 *Doe d Henniker v Watt* (1828) 8 B & C 308.

22 Eg, 'Provided always that if any part of the said rent shall be in arrears for 21 days, whether lawfully demanded or not, the lessor or his assigns may re-enter upon the said premises, and immediately thereupon the said term shall absolutely determine'.

which shows that he intends to terminate it that the lease will be avoided. Such an act may be:

(a) actual re-entry by the landlord; or
(b) the granting of a new lease to a third party; or
(c) the commencement of ejectment proceedings, in which the landlord seeks a possession order from the court.

An action for ejectment is the most usual method of forfeiting a lease in modern times; this is because, if force is used in re-entry, the landlord may be criminally liable for forcible entry.[23] Where ejectment proceedings are commenced, the forfeiture does not become final until the court grants a possession order. Before then, the tenant has a right to seek relief against forfeiture which, if granted, will re-establish the lease. In the meantime, the court may order the tenant to pay to the landlord an amount as 'mesne profits' (where the landlord's action is successful) or rent (where the tenant succeeds in obtaining relief).[24]

Waiver of forfeiture

Where a landlord (a) knows of a breach of covenant which makes the lease liable to forfeiture, and (b) does some unequivocal act recognising the continued existence of the lease,[25] he is said to waive the forfeiture and he loses the right to terminate the lease. A merely passive attitude on the landlord's part does not amount to waiver,[26] nor is there waiver where the landlord refrains from taking action because he believes he will not be able to prove a suspected breach of covenant.[27] On the other hand, it is well established that there is waiver if the landlord, with knowledge of the breach, demands,[28] sues for[29] or accepts[30] rent falling due after the breach, notwithstanding that his acceptance is stated to be 'without prejudice',[31] or

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23 Forcible Entry Acts, 1381–1623; Forcible and Clandestine Entries Act, Cap 132 (Barbados). See *Duplessis v Moore* (1993) High Court, Barbados, No 1082 of 1988 (unreported); *Patrick v Beverley Gardens Development Co Ltd* (1974) Court of Appeal, Jamaica, Civ Apps Nos 36 of 1972 and 21 of 1974 (unreported). Further, such entry may be perilous for the landlord. In *R v Hussey* (1924) 18 Cr App R 160, a tenant who shot his landlady while she was trying to evict him forcibly, pursuant to an invalid notice to quit, was held not guilty of unlawful wounding.

24 See Megarry and Wade, *Law of Real Property*, 5th edn, 1984, London: Stevens, pp 672, 673.

25 *Matthews v Smallwood* [1910] 1 Ch 777, p 786.

26 *Perry v Davis* (1858) 140 ER 945.

27 *Chrisdell Ltd v Tickner* [1987] 2 EGLR 123.

28 *Segal Securities Ltd v Thoseby* [1963] 1 All ER 500; *Cayman Arms (1982) Ltd v English Shoppe Ltd* [1990–91] CILR 299, Grand Court, Cayman Islands.

29 *Dendy v Nicholl* (1858) 140 ER 1130.

30 *Central Estates (Belgravia) Ltd v Woolgar (No 2)* [1972] 3 All ER 610; *Bates v Sylvester* (1960) 3 WIR 136 (Supreme Court, Appellate Jurisdiction, Trinidad and Tobago).

31 *Segal Securities Ltd v Thoseby* [1963] 1 All ER 500.

that an agent of the landlord accepted it by mistake.[32] There is also waiver where the landlord distrains for rent, whether due before or after the breach.[33]

A waiver of a breach of covenant extends only to the particular breach in question. It does not extend to future breaches. Where there is a continuing breach – for example, where there is breach of a repairing covenant – a demand for or acceptance of rent waives the forfeiture only up to the date of the demand or acceptance; it does not preclude the landlord from forfeiting the lease if the breach continues.[34]

Another established rule is that, once the landlord has shown his final decision to treat the lease as forfeited by commencing an ejectment action, a subsequent demand or acceptance of rent will not amount to waiver.[35] This principle was applied in a Trinidadian case, *Ramjattansingh v Khan*.[36] Here, R let a building to K for a five year term from 1 December 1975, at a monthly rent of $400. K covenanted in the lease 'not to use or permit the demised premises or any part thereof to be used otherwise than for business purposes, such business to include only grocery, bar, poultry depot, and for residential purposes'. K later erected an extension to the building in the form of a shed, which he used as a pool room. This constituted a breach of the covenant. R knew of the breach in August 1976 and, in December 1976, he issued and served a writ claiming possession. There was evidence that, in December 1977, K paid and R accepted one month's rent. K argued that the acceptance of rent with knowledge of the breach operated as a waiver of R's right to forfeiture. Cross J held that the issue and service of the writ for possession demonstrated clearly and unequivocally R's decision to treat the lease as forfeited, and the subsequent acceptance of rent did not affect it. He said:

> The question is, does the acceptance of rent after knowledge of breaches of the covenants constitute an unequivocal affirmation of the tenancy and therefore operate as a waiver, as the defendants maintain by the amended defence?
>
> In support of this contention, counsel for the defendants relies on the judgments of the Court of Appeal of England in *Central Estates (Belgravia) Ltd v Woolgar (No 2)*; the judgment of Lord Denning MR contains the following words:[37]

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32 *Central Estates (Belgravia) Ltd v Woolgar (No 2)* [1972] 3 All ER 610.

33 *David v Williams* (1835) 57 ER 485.

34 See *op cit*, Megarry and Wade, fn 24, pp 674, 675. See, also, *Higgins v Texaco Bahamas Ltd* (1987) Supreme Court, The Bahamas, No 233 of 1986 (unreported), *per* Georges CJ. Where there has been a waiver of a breach by demand or acceptance of rent after a 's 146 notice' has been served, and the breach is a continuing one, no further notice need be served where the landlord wishes to forfeit the lease at some time in the future: *Cayman Arms (1982) Ltd v English Shoppe Ltd* [1990–91] CILR 299, *per* Harre J, following *Greenwich LBC v Discreet Selling Estates Ltd* (1991) 81 P & CR 405.

35 *Civil Service Co-operative Society Ltd v McGrigor's Trustee* [1923] 2 Ch 347; *Grimwood v Moss* (1872) LR 7 CP 360.

36 (1977) High Court, Trinidad and Tobago, No 3210 of 1976 (unreported).

37 [1972] 3 All ER 610.

> Probably also an absolute and unqualified demand of rent due after the cause of forfeiture, made by the landlord or his duly authorised agent, operates as a waiver. But if the landlord has already shown a final determination to take advantage of the forfeiture, for instance by commencing an action to recover possession, no subsequent act, whether receipt of rent, or distress, or otherwise will operate as a waiver.

If further authority for this view were needed, it is to be found in the judgment of Lord Coleridge J in *Evans v Enver*,[38] where the learned judge says:

> But there is a series of cases which establish that if an action is brought for recovery of possession for breaches of covenants in the lease, that is an irrevocable election to determine the lease, and that no subsequent acts of the plaintiff can be relied on as qualifying that position.

In his closing address, counsel for the defendants urged that even if the plaintiffs were entitled to re-enter, this was a proper case for the court to grant relief against the forfeiture. This relief has not been sought in the pleadings nor is there any evidence to warrant such an exercise of the court's power. For the reasons stated, there will be judgment for the plaintiffs for possession.

Forfeiture for non-payment of rent

The procedure for forfeiture for non-payment of rent differs from the procedure for forfeiture for breaches of other covenants. At common law, unless exempted by the terms of the lease, a landlord who intends to assert his right of re-entry is required before doing so to make a 'formal demand' for the rent due. A formal demand is made by the landlord or his agent, demanding on the demised premises the exact sum due between sunrise and sunset on the day when it is payable.[39] Section 10 of the Common Law Procedure Act 1852 (UK) modified the position by providing that if (a) half a year's rent is in arrears, and (b) there are not sufficient chattels to be found on the premises to enable the landlord to recover the arrears due by levying distress, then the landlord is exempted from making a formal demand. In practice, a well drawn lease will expressly exempt the landlord from the requirement of making a formal demand.[40]

Relief against forfeiture

A tenant whose lease is being forfeited for non-payment of rent may apply for relief. The court's jurisdiction to grant relief has been explained thus:[41]

> The function of the court in exercising this equitable jurisdiction is to grant relief when all that is due for rent and costs has been paid up, and (in general)

38 [1920] 2 KB 315, p 320.

39 Notes to *Duppa v Mayo* (1668) 1 Wms Sound 282, p 287.

40 See above, fn 22.

41 *Gill v Lewis* [1956] 1 All ER 844, p 853, *per* Jenkins LJ.

> to disregard any other causes of complaint that the landlord may have against the tenant. The question is whether, provided all is paid up, the landlord will not have been fully compensated; and the view taken by the court is that if he gets the whole of his rent and costs, then he has got all that he is entitled to so far as rent is concerned, and extraneous matters of breach of covenant, and so forth, are, generally speaking, irrelevant.

In most cases, relief will be granted as a matter of course where the tenant pays the arrears of rent and costs, but the court must also be satisfied that it is just and equitable to grant it, and there may be circumstances where, in the exercise of its discretion, the court will refuse relief: for example, where the tenant has been guilty of inordinate conduct, or where, in the meantime, the landlord has altered his position in the belief that the forfeiture was effective.[42] Moreover, relief may be granted on terms, for example, that the tenant should carry out outstanding repairs. The effect of a grant of relief is that the tenant holds under the terms of the original lease.

Where a lease is forfeited, any sublease is automatically destroyed,[43] but the sublessee has the same right to apply for relief against forfeiture as the tenant under the headlease. Similarly, a mortgagee of a leasehold interest holding under a subdemise or under a charge by way of legal mortgage may apply for relief. However, relief is not available to a squatter who has dispossessed the lessee.[44]

Forfeiture for breaches of other covenants

Before a lessor can proceed to forfeit a lease for breach of any covenant other than the covenant to pay rent, he must first serve on the tenant[45] a statutory notice:

(a) specifying the particular breach complained of; and

(b) if the breach is capable of remedy, requiring the lessee to remedy the breach; and

(c) requiring the lessee to make compensation in money for the breach.[46]

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42 *Stanhope v Haworth* (1886) 3 TLR 34.

43 *Great Western Rly v Smith* (1876) 2 Ch D 235, p 253.

44 *Tickner v Buzzacott* [1965] 1 All ER 131.

45 *Pantin v Williams* (1995) High Court, Trinidad and Tobago, No 1379 of 1991 (unreported), *per* Warner J. Where a lease has been assigned in breach of a covenant against assigning without consent, the notice must be served on the assignee and not on the original lessee; *Old Grovebury Manor Farm Ltd v W Seymour Plant Sales and Hire Ltd (No 2)* [1979] 3 All ER 504; *Caribbean Commercial Bank Ltd v Turney* (1990) High Court, Barbados, No 236 of 1987 (unreported).

46 See, eg, Cap 153, s 15(1) (Belize); Ch 123, s 16 (The Bahamas); Cap 271, s 70 (St Kitts/Nevis); Conveyancing Act 1973, s 17 (Jamaica); Cap 54:01, s 70 (Dominica); Cap 220, s 69 (BVI); Cap 61:01, s 10(1) (Guyana); Cap 236, s 167 (Barbados); Ch 27, No 12, s 70 (Trinidad and Tobago).

If, within a reasonable time, the lessee fails to remedy the breach (if it is capable of remedy), and to pay reasonable compensation to the satisfaction of the lessor, the lessor may proceed with the forfeiture. The notice must be sufficiently precise to direct the tenant's attention to the particular matters of which the landlord complains, so that he may understand with reasonable certainty what he must do to remedy the situation.[47]

Manning J pointed out in the Antigua High Court in *Colonial Minerals Ltd v Joseph Dew and Son Ltd (No 1)*[48] that the object of these statutory provisions (which first appeared in s 14 of the Conveyancing Act 1881 (UK) and were reproduced in s 146 of the Law of Property Act 1925 (UK) and in equivalent legislation in Commonwealth Caribbean jurisdictions) was:

> ... clearly to curb landlords in insisting on their rights of re-entry and forfeiture accruing from breaches of covenants by tenants. In what seemed reasonably clear terms, it provided that, in all cases, the tenant should be given the opportunity of paying compensation for the breach, and that if such compensation was paid to the satisfaction of the lessor, there should be no re-entry and no forfeiture.

However, as Manning J pointed out, in subsequent cases the provision was interpreted unfavourably to tenants, in that the words 'requiring the lessor to make compensation in money for the breach' were interpreted as applying only where the landlord wanted compensation: thus, where the breach is incapable of remedy, the landlord can decide not to seek compensation, but to insist on forfeiture. In Manning J's words:[49]

> One learned judge asked, 'why should the landlord ask for compensation if he doesn't want it?' The answer was that statute law said he must ask for compensation before insisting on his right of re-entry. The construction placed on the words dates back to *Lock v Pearce*,[50] and it is too late now for a court in the Colonies to construe them in any other way.

Reasonable time

Where a breach is capable of remedy (for example, where there is breach of a repairing covenant), three months is usually regarded as a 'reasonable time' for the tenant to comply with the notice;[51] but where the breach is incapable of remedy (for example, where there has been breach of a covenant against immoral user and a 'stigma' has attached to the premises), it has been held that the lessor may proceed to forfeit the lease after 14 days.[52]

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47 *Fletcher v Nokes* [1897] 1 Ch 271, p 274.

48 (1959) 2 OECSLR 243, p 246.

49 *Ibid.*

50 [1893] 2 Ch 271.

51 Hayton, *Megarry's Manual of the Law of Real Property*, 6th edn, 1982, London: Stevens, p 354.

52 *Scala House and District Property Co Ltd v Forbes* [1973] 3 All ER 308.

In *Colonial Minerals Ltd v Joseph Dew and Son Ltd (No 2)*,[53] D Ltd granted a 10 year mining lease of a plantation to G, who later assigned the lease to C Ltd. The lease contained a term to the effect that, if the tenant at any time during the period of the lease ceased to work the mine for 12 successive calendar months, the landlord should have the right to re-enter and forfeit the lease.

Manning J, in the lower court, held that there had been a breach of the covenant since the tenant had ceased to work the mine for 12 successive months, and the only issue remaining was whether a proper notice had been served within s 9(1) of the Law of Property Amendment Act, Ch 93 (Leeward Islands), which was an almost exact replica of s 14 of the Conveyancing Act 1881 and s 146 of the Law of Property Act 1925. In this case, a notice revoking C Ltd's 'licence, liberty and authority ... to work [the] mine' was served on C Ltd on 9 September 1949, the same day as D Ltd re-entered. There was no request for compensation in the notice and no request to remedy the breach. Manning J held that, in accordance with earlier authorities, there was no need for a landlord to ask for compensation if he did not want it, and so there could be no objection to the lack of such a request in the instant case. Nor could there be any objection to the lack of any request to remedy the breach of covenant, as the breach in this case was incapable of remedy in so far as 'it was impossible for [C Ltd] to put the clock back and work the mine properly for the 12 months preceding 9 September 1949'.

On appeal, D Ltd put forward a different argument. D Ltd conceded that the notice of 9 September, standing alone, did not comply with s 9(1) and that it was only an intimation that D Ltd had already re-entered. However, D Ltd contended that a letter addressed to C Ltd, dated 26 April 1948, had given notice of D Ltd's intention to re-enter on 31 July 1948 if C Ltd did not commence working the mine before that date. The Court of Appeal held that the letter of 26 April did not constitute a proper notice within s 9(1) because the breach alleged in that letter was not the same as the breach alleged in the notice of 9 September. Perez CJ, delivering the judgment of the court, said:[54]

> The respondent did not re-enter but in spite of the basis on which the trial of the action was conducted, now seeks refuge in this expressed intention to re-enter if certain conditions were not fulfilled. In support of his argument counsel cited the case of *New River Company v Crumpton*.[55] There the defendant, a tenant to plaintiff under a lease containing a covenant to repair, was on 11 December 1914 served with a notice under the Conveyancing Act 1881 specifying the breach of the covenant to repair and the repairs required to be done. On 22 March 1916 the notice to repair was substantially uncomplied with and the plaintiff on that date brought an action for possession. It was held

53 (1959) 2 OECSLR 248.

54 *Ibid*, p 252.

55 [1917] 1 KB 762.

> that as the only object of the notice under the Act was to inform the tenant what she was required to do, no new notice was necessary to support the action even though so long an interval as 12 months had elapsed between the expiry of the notice and the commencement of the action. In that case the breach was a continuing one, was clearly specified and was not subject to change, whereas in the present case the period of the breach envisaged by the covenant is peculiarly related to the date of the notice; the breach must in our view on the date of the notice have existed for 12 months last past; that is for the 12 months immediately preceding the notice. The breach alleged in the letter of 26 April 1948 is not the same as that alleged in the notice of 9 September 1949 and is not the same as that pleaded. The respondent's submission must therefore fail. To sustain the view submitted on behalf of the respondent would be to permit after a lapse of years the revival of a conditional notice to re-enter for a limited and specified breach of a non-continuing nature. This would be concordant neither with the spirit nor language of the statute, and, moreover, would be a violation of its plain meaning.

Remediability of the breach

The question of whether a breach of covenant is capable of remedy is important since, if it is so capable, the statutory notice must require it to be remedied, otherwise the notice will be ineffective. There is no doubt that where a *positive* covenant, for example, a covenant to repair, has been broken, the breach is capable of remedy and so the notice must require the tenant to remedy the breach.[56] But where the covenant is *negative*, it may be difficult to decide whether the breach can be remedied. One view is that all negative covenants are incapable of remedy, so that recovery of possession by the landlord would then depend solely on whether the court was willing to grant relief against forfeiture.[57] It has been held, for instance, that breach of a covenant against subletting without consent is a 'once-for-all' breach which cannot be remedied, even by obtaining a surrender of the sublease from the subtenant;[58] and it has been held that breach of a covenant against immoral user cannot be remedied where the immoral user causes a 'stigma' to be attached to the premises (and, therefore, to the landlord's reputation) which cannot be erased.[59] On the other hand, where the immoral user is not by the tenant but by his subtenant, and the tenant takes immediate steps to forfeit the sublease, then the breach may apparently be regarded as capable of remedy.[60] It has been suggested that, in order to avoid such difficulties, the landlord in

56 *Expert Clothing Service and Sales Ltd v Hillgate House Ltd* [1985] 2 All ER 998, p 1008, where it was held that, where a tenant had committed a once-and-for-all breach of covenant by failing to carry out repairs by a certain date, the breach was capable of remedy, even after that date.

57 *Hoffmann v Fineberg* [1949] Ch 245, p 254, *per* Harman J.

58 *Scala House and District Property Co Ltd v Forbes* [1973] 3 All ER 308.

59 *Rugby School Governors v Tannahill* [1935] 1 KB 87.

60 *Glass v Kencakes Ltd* [1964] 3 All ER 807.

his statutory notice should require the tenant to remedy the breach 'if capable of remedy', so that the landlord may claim in his action either that the breach is incapable of remedy, or, if it is capable of remedy, that it has not been remedied.[61]

Relief against forfeiture

As soon as the landlord has served his statutory notice, the tenant may apply to the court for relief against forfeiture. Statutory provisions in Belize[62] and Guyana,[63] which are modelled on s 146(2) of the Law of Property Act 1925, and in Barbados,[64] which are differently worded, but of similar effect, provide that the court may grant or refuse relief as, having regard to the conduct of the parties and all other circumstances, it thinks fit. The discretion given to the court is wide, and there are no firm rules upon which relief may be granted or refused,[65] though it has been held that, where the breach involves immoral user, relief will be granted only in rare cases.[66] If the court decides to grant relief, it may do so on such terms as it deems proper. Where relief is granted, the effect is as if the lease had never been forfeited.[67] If the court grants relief on terms, for example, where the tenant is ordered to carry out repairs within a certain period of time, and those terms are not observed, the order for relief is nullified, unless the court gives the tenant extra time to satisfy the terms.[68]

As regards the time within which a tenant may apply for relief, the tenant is in a worse position than in the case of forfeiture for non-payment of rent; this is because of the wording of the statutes, which provide 'where a lessor is proceeding ... to enforce such a right of re-entry or forfeiture'.[69] It has been held[70] that the landlord cannot be said to be 'proceeding' where he has obtained judgment and actually re-entered the premises. This means that, once the landlord has re-entered, the tenant may no longer seek relief against forfeiture, whereas, in the case of forfeiture for non-payment of rent, the tenant may apply for relief even after the landlord has re-entered.

Under the statutes, a sublessee (including a mortgagee) may apply for relief against the forfeiture of the headlease for breach of any covenant, whether or not the tenant under the headlease can claim relief. If the court decides to grant relief, it may make an order vesting the whole or any part of

61 *Op cit,* Cheshire and Burn, fn 13, p 438.

62 Cap 153, s 15(2) and (4).

63 Cap 61:01, s 10(2) and (4).

64 Cap 236, s 168(1) and (2).

65 *Hyman v Rose* [1912] AC 623, p 631, *per* Lord Eldon LC.

66 *Central Estates (Belgravia) Ltd v Woolgar* [1971] 3 All ER 647, p 649.

67 *Scala House and District Property Co Ltd v Forbes* [1973] 3 All ER 308.

68 *Op cit,* Cheshire and Burn, fn 13, p 440.

69 Cap 236, s 168 (Barbados) contains no such wording.

70 *Abbey National Building Society v Maybeech Ltd* [1984] 3 All ER 262.

the demised premises in the sublessee 'for the whole term of the lease or any less term' on such terms and conditions as it thinks fit, but the sublessee is not 'entitled to require a lease to be granted to him for any longer term than he had under his original sublease'. It has been held that the second of these two conflicting provisions prevails, and the court will not grant the sublessee a term longer than his sublease.[71] The court may impose conditions, such as one that the sublessee is to pay to the head landlord a higher rent than that required under the original sublease,[72] or that the sublessee is to make good the breaches of covenant in the headlease which caused the forfeiture, and to perform for the future the covenants in the forfeited lease.[73]

Surrender

Where a tenant surrenders his lease to his immediate landlord, the lease is extinguished, though the landlord will be bound by any sublease previously granted by the tenant.[74] Surrender releases both landlord and tenant from all future obligations under the lease, but they remain liable for obligations already incurred.[75]

Surrender may be express or implied by law. Express surrender requires writing,[76] even though the lease or tenancy was created orally.

Surrender by operation of law occurs where the conduct of the parties shows an intention that the lease shall be yielded up, in circumstances where it would be inequitable for either party to rely on the lack of an express surrender by deed or writing. Estoppel is thus the basis of this type of surrender. Examples are:

(a) where the tenant gives up possession of the premises by delivery of the key, and the landlord accepts it;[77]

(b) where it is agreed that the tenant will remain in possession rent free, not as tenant, but as a licensee;[78]

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71 *Ewart v Fryer* [1901] 1 Ch 499, p 515, *per* Romer LJ.

72 *Chatman Empire Theatre Ltd v Ultrans Ltd* [1961] 2 All ER 381.

73 *Ewart v Fryer* [1901] 1 Ch 499; *Gray v Bonsall* [1904] 1 KB 601, p 608.

74 *Schwab v McCarthy* (1976) 31 P & CR 196.

75 *Torminster Properties Ltd v Green* [1983] 2 All ER 457.

76 Eg, Cap 236, s 165(1)(a) (Barbados); Statute of Frauds 1677, s 3.

77 *White v Brown* (1969) 13 WIR 523, Court of Appeal, Jamaica. In *Diego Martin Consumers Co-operative Society Ltd v Liverpool* (1997) High Court, Trinidad and Tobago, No 2752 of 1996 (unreported), Warner J held that surrender could be implied from the fact that the tenant had given up possession of the premises, notwithstanding that he never handed over the keys to the landlord.

78 *Foster v Robinson* [1950] 2 All ER 342.

(c) where the tenant has been absent from the premises for a long time and owes substantial arrears of rent; though mere abandonment will not in itself constitute surrender, for the landlord may wish the lease to continue;[79]

(d) where the tenant accepts a fresh lease from the landlord, even though the new lease is for a shorter term than the original one.[80]

Merger

A lease and a reversion cannot be held by the same person at the same time. Accordingly, if they both become vested in the same person – for example, where the landlord conveys his fee simple to the tenant – the lease is said to be 'merged' into the fee simple and is destroyed.[81]

Effluxion of time

On expiry of the agreed period in a lease for a fixed term, the lease terminates automatically 'by effluxion of time'.[82] There is thus no need for notice to quit to be given by either party. The position has, however, been drastically affected by the rent restriction legislation, which gives a tenant a statutory right (amounting to a 'statutory tenancy' or a 'status of irremovability') to remain in possession of the premises after expiry of the contractual lease and subject to the same terms.[83]

Notice to quit

As has been seen,[84] a periodic tenancy is determinable by a proper notice to quit by either the landlord[85] or the tenant; subject, as in the case of a lease for a fixed term, to the application of the rent restriction legislation. In the absence

79 *Preston BC v Fairclough* (1982) *The Times*, 15 December.

80 *Metcalfe v Boyce* [1927] 1 KB 758.

81 *Blackstone's Commentaries*, Vol 2, p 177.

82 It was held by the Jamaican Court of Appeal in *Scott v Lerner Shop Ltd* (1988) 25 JLR 219 that, in making a possession order on expiry of a lease by effluxion of time, the resident magistrate has a discretion to postpone the order for possession for a period (eg, 12 months) to give the tenant time to find alternative accommodation.

83 See below, Chap 5.

84 See above, p 18.

85 Notice to quit given by one co-owner of the property is sufficient to determine a tenancy: *Harrysingh v Ramgoolam* (1984) High Court, Trinidad and Tobago, No 744 of 1978 (unreported).

of a valid notice to quit, a periodic tenancy will continue indefinitely, and will not expire at the end of a period.[86]

The rules relating to notice to quit may be summarised thus:

(a) A notice to quit must be unconditional, in the sense that there must be 'plain, unambiguous words claiming to determine the existing tenancy at a certain time'.[87] Thus, for example, a notice by a tenant would be void if it stated his intention to quit the premises on a certain date 'unless I am unable to obtain accommodation elsewhere' by that date.[88]

(b) In the absence of agreement to the contrary,[89] a yearly tenancy is determinable by a half-year's notice expiring either on the last day of a year of the tenancy (that is, the day before the anniversary of the beginning of the year) or on the following day. This may be achieved by the following formula: 'at the expiration of the year of your tenancy which will expire next after the end of one half-year from the service of this notice'.[90]

(c) In the absence of agreement to the contrary, a weekly, monthly or quarterly tenancy is determinable by a full period's notice, that is, a weekly tenancy by one week's notice, a monthly tenancy by one month's notice, and a quarterly tenancy by a quarter's notice.[91]

(d) A notice to quit 'on or before' or 'by' a certain date is valid if given by the landlord,[92] but void if given by the tenant, for in the former case the tenant can be in no doubt as to when he is required to leave, whereas, in the latter, the landlord is left in doubt as to when the tenant will leave.[93]

(e) In the case of a weekly tenancy, the notice need not be seven clear days. Thus, for example, a weekly tenancy commencing on a Wednesday can be terminated by a notice to quit given on or before one Wednesday to expire at midnight on the following Tuesday.[94]

(f) In the case of a monthly tenancy, the notice must expire at the end of a month of the tenancy. 'Month' means a calendar month; the notice must therefore expire on the corresponding day of the following month or, it seems, on the previous day[95] (for example, notice to quit given on 15

86 *Richards v Walker* (1982) 19 JLR 236, Court of Appeal, Jamaica.

87 *Gardner v Ingram* (1889) 61 LT 729, p 730, *per* Lord Coleridge.

88 *Op cit*, Cheshire and Burn, fn 13, p 461.

89 See *Shirley Apartments Ltd v Rogers* (1987) Supreme Court, The Bahamas, No 198 of 1985 (unreported), *per* Georges CJ.

90 See *op cit,* Megarry and Wade, fn 24, p 651.

91 See *op cit,* Megarry and Wade, fn 24, p 651.

92 *Dagger v Shepherd* [1946] KB 215; *Harrysingh v Ramgoolam* (1984) High Court, Trinidad and Tobago, No 744 of 1978 (unreported).

93 Megarry and Wade, *Law of Real Property*, 4th edn, 1975, London: Stevens, p 638.

94 *Crate v Miller* [1947] KB 946.

95 *Ibid.*

> March must expire on 15 or 14 April). Where there is no corresponding day in the following month (for example, where notice to quit is given on 31 August), the notice will expire on the last day of that month (for example, 30 September).

The validity of a notice to quit in the case of a monthly tenancy was in issue in the Trinidadian case of *Pollonais v Gittens*.[96] Here, a monthly tenancy commenced on 3 April 1969. On 10 February 1973, the landlord (respondent) served a notice on the tenant to quit 'at the end of one full month which will expire on 9 March'. The Court of Appeal held that the notice was invalid, because the date of expiry of the notice was not the end of a current period of the tenancy, which ran from the third of each month to the third of the following month. Rees JA explained:

> There has been a conflict of judicial opinion whether, in the case of a monthly or weekly tenancy, notice to quit must expire at the end of the current period, but the question is now well settled that to determine a monthly tenancy, a month's notice expiring with a month of the tenancy is required. In *Simmonds v Crossley*,[97] a Divisional Court consisting of Swift and Acton JJ decided that in the case of a monthly tenancy it was not necessary for a notice to quit to expire at the end of a current period of the tenancy, but in the later case of *Queen's Club Garden Estates Ltd v Bignell*,[98] to which we were referred, Lush J, in a very careful judgment, analysed and examined the question in detail and rejected as incorrect the view expressed in the *Crossley* case. He said:[99]
>
> > I think the true view is that in any periodic tenancy, whether it be yearly, quarterly, monthly or weekly, the notice to quit must expire at the end of the current period.
>
> In *Previous v Reedie*,[100] Bailhache J supported the view of Lush J in giving the decision of the court. After referring to the *Crossley* case and the *Bignell* case, he said that they came to the conclusion that, to determine a monthly tenancy, a notice to quit must correspond in length with the period of the tenancy and must terminate on the date of the month on which the tenancy began, unless there was some agreement to the contrary.

In *Ramlal v Chong*,[101] McMillan JA emphasised that 'a notice to quit need not be served on a tenant personally. It may be served on a person constituted the agent of the tenant for the purpose of receiving the notice'. Thus, service made at the house of the tenant upon a person whose duty it would be to deliver the notice to the tenant was sufficient to sustain ejectment proceedings, even though the notice was never actually received by the tenant. Accordingly, service on a servant of the tenant at the latter's residence or on someone left in

96 (1975) Court of Appeal, Trinidad and Tobago, Mag App No 224 of 1974 (unreported).

97 [1922] 2 KB 95.

98 [1924] 1 KB 117.

99 *Ibid*, p 124.

100 [1924] All ER 573.

101 (1990) Court of Appeal, Trinidad and Tobago, Mag App No 107 of 1989 (unreported).

control of the premises would be sufficient. Similarly, in *HV Holdings Ltd v Jumadeen*,[102] Blackman J held that service of notice to quit on a member of the tenant's household – in this case, the tenant's common law wife – was sufficient.

The effect where one notice to quit is followed by another was in issue in *Lee Kin v Cumana Consumers Co-operative Society Ltd*.[103] In this case, the landlords served a valid notice to quit on the tenant on 30 March 1979. The tenant remained in possession, asking for two extensions of time, which were granted. Finally, on 20 March 1981, the landlords served a second notice to quit requiring possession on or before 30 April 1981. When the tenant failed to vacate the premises, the landlords brought proceedings for possession. Collymore J, in the Trinidad and Tobago High Court, held that *Lowenthal v Vanhoute*[104] was authority for the proposition that, where a valid notice to quit has been given, a subsequent notice is of no effect unless it can be inferred from other circumstances that a new tenancy has been created after expiry of the first notice. An agreement to grant a new tenancy cannot be inferred from the fact that a second notice to quit was given; nor is the first notice waived by the second. In the instant case, no new tenancy had come into being; the tenant had merely been granted the indulgence of more time to find alternative accommodation. The clear inference from the parties' conduct was that the tenancy had been terminated by the first notice in 1979, and the second notice in March 1981 was therefore superfluous, as far as the termination of the tenancy was concerned; its only effect was to bring to the notice of the tenant that the landlords intended to pursue their right to possession by legal action, and the granting of the indulgence could not defeat that right.

Frustration

The question of the application of the doctrine of frustration to leaseholds is a problematic one. The orthodox view was that the doctrine could never apply to a lease because a lease is not merely a contract, but creates an interest in land which, once vested in the lessee, cannot be divested except by one of the methods described above. However, in *National Carriers Ltd v Panalpina Northern Ltd*,[105] the House of Lords accepted that the doctrine could apply to a lease on the same basis as frustration of a contract, though the occasions on which it would be applicable must be extremely rare. A majority of their Lordships in the *National Carriers* case took the view that a lease might be

102 (1988) High Court, Trinidad and Tobago, No S 2483 of 1986 (unreported).

103 (1984) High Court, Trinidad and Tobago, No 2109 of 1981 (unreported).

104 [1947] 1 All ER 16.

105 [1981] 1 All ER 161.

frustrated not only by physical catastrophe, such as where 'some vast convulsion of nature swallowed up the property altogether, or buried it in the depths of the sea',[106] but also by a supervening event so far beyond the contemplation of the parties that it would be unjust to enforce the lease. On the facts of the case itself, where there was a 10 year lease of a warehouse, it was held that there was no frustration and rent remained payable by the tenant when the local authority closed the only access road to the warehouse, rendering it unusable for a 20 month period in the middle of the 10 year term; though a larger interruption might have frustrated the lease, the matter being treated as one of degree. Earlier cases are examples of leases not being frustrated. In *Cricklewood Property and Investment Trust Ltd v Leighton's Investment Trust Ltd*,[107] for instance, it was held that a building lease for 99 years from May 1936 was not frustrated and rent remained payable when wartime legislation prohibited building. Similarly, it has been held that the tenant remains liable for rent notwithstanding that a building on the demised land is destroyed by fire,[108] or by an enemy bomb,[109] or requisitioned by the government,[110] and it has been held that a covenant to repair imposes an absolute obligation on the covenantor, and he remains liable in damages for failure to carry out repairs, notwithstanding that he has been prevented from doing so by some extraneous cause, such as the requisitioning of the premises[111] or the refusal of the authorities to grant him a building licence.[112] It may be assumed, however, that, since the *National Carriers* case, the court may exceptionally treat any such circumstances as being so far beyond the contemplation of the parties as to give rise to frustration.

DISTRESS

Distress is an ancient common law remedy, a survival of the feudal concept of tenure, which entitles a landlord, where rent is in arrear, to seize the tenant's goods and chattels found on the premises and to sell them in order to recover the amount of rent owed. Its great advantage is that it is a remedy of 'self-help', and enables the landlord to recover his rent speedily and without the necessity for court proceedings. The remedy is rarely exercised in England

106 *Cricklewood Property and Investment Trust Ltd v Leighton's Investment Trust Ltd* [1945] AC 221, p 229, *per* Lord Simon.

107 *Ibid.*

108 *Matthey v Curling* [1922] 2 AC 180.

109 *Redmond v Dainton* [1920] 2 KB 256.

110 *Eyre v Johnson* [1946] 1 All ER 719.

111 *Smiley v Townshend* [1950] 1 All ER 530.

112 *Eyre v Johnson* [1946] 1 All ER 719.

nowadays, but it is still frequently invoked in some Commonwealth Caribbean jurisdictions.[113] Distress for rent has been abolished in Jamaica.[114]

Time and place

The right to 'levy distress' (or to 'distrain') does not arise until rent is 'in arrear', which does not occur until the day after it falls due.[115] At common law, distress cannot be levied between sunset and sunrise, nor on a Sunday.[116]

The right to distrain is *prima facie* limited to goods found on the premises out of which the rent issues, but statutory provisions in some jurisdictions provide that, where the tenant has fraudulently or clandestinely removed his goods from the demised premises in order to prevent the landlord from distraining on them, they may be seized by the landlord wherever they are found.[117] Such a provision was in issue in *White v Brown*, a Jamaican case decided before distress for rent was abolished in that country.[118] Here, W rented a room from B on a monthly tenancy. B served W with a notice to quit, but W continued to occupy the room after expiry of the notice. B filed ejectment proceedings against W. W moved to new premises on 24 September 1965, handing B the key to the room on the same day. On 26 October 1965, B employed a bailiff to levy distress on W's furniture at her new residence for arrears up to 28 September 1965. W brought an action against B for trespass consequent on illegal distress. B pleaded s 3 of the Landlord and Tenant Law, Cap 206 (Laws of Jamaica), which permitted a landlord to levy distress on chattels found on premises other than those out of which the rent issued, where the tenant had fraudulently or clandestinely removed his chattels in

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113 Particularly in Trinidad and Tobago, where ss 8 and 9 of the Landlord and Tenant Ordinance, Ch 27, No 16, give to landlords and tenants the same right to levy distress and to replevy respectively as is given by the law of England in like cases: *Cornwall v Trincity Commercial Centre Ltd* (1996) High Court, Trinidad and Tobago, No 1437 of 1995 (unreported), *per* Warner J; *Diego Martin Consumers Co-operative Society Ltd v Liverpool* (1997) High Court, Trinidad and Tobago, No 2752 of 1996 (unreported), *per* Warner J; *Sealandaire Ltd v Paul* (1994) High Court, Trinidad and Tobago, No 169 of 1994 (unreported), *per* Bharath J.

In St Vincent and The Grenadines, the recovery of rent by common law distress was abolished by s 3 of the Rent Recovery Ordinance, Ch 19, unless reserved by deed, though ss 4–8 provide a procedure for the attachment and sale of goods for arrears of rent. See *Re Hutchinson* (1992) High Court, St Vincent and The Grenadines, No 504 of 1991 (unreported).

114 By Law Reform (Landlords and Tenants) Act 1979, s 3.

115 *Dibble v Bowater* (1853) 118 ER 879.

116 *Werth v London and Westminster Loan Co* (1889) 5 TLR 521; *JJ Pharmacy Ltd v Parillon Investments Ltd* (1988) High Court, Trinidad and Tobago, No 1495 of 1988 (unreported).

117 Eg, Landlord and Tenant Ordinance, Ch 27, No 16, s 19 (Trinidad and Tobago); Landlord and Tenant Act, Cap 61:01, s 22(3) (Guyana). See, also, Landlord and Tenant Act, Cap 230, ss 16, 19 (Barbados).

118 (1969) 13 WIR 523.

order to prevent the landlord from levying distress on them. The Jamaican Court of Appeal held that:

(a) the tenancy had been brought to an end when B accepted the key to the room on 24 September, and B's right to levy distress ceased at that moment;[119]

(b) there was no evidence that W's removal of her furniture to the new premises was fraudulent or clandestine or designed to elude distress; so B had no right to seize W's goods there.

B was therefore liable in damages for illegal distress.

The distrainor may enter the land through an unlocked door,[120] and he may enter by unlocking a door or padlock with a key in the normal way,[121] but he may not break open an *outer* door,[122] nor may he enter through a closed window.[123] In another Jamaican case, *Thompson v Facey*,[124] F was the headlessee of a house of which T was landlord. The house consisted of four apartments, three of which were occupied by F, the fourth being sublet to E. When F fell into arrears with his rent, T decided to distrain upon F's goods. Being unable to enter through F's front door, T gained access to F's part of the building by first entering E's room through an unlocked door, then breaking the lock of the door connecting E's room with F's part of the building.

One of the issues in the case was whether T's entry into F's part of the premises was lawful. T contended that his entry was lawful, since the connecting door broken by him was an inner, not an outer door; but the magistrate held that, although the door was inside the building, it was to be treated as an outer door because it in fact separated his holding from E's. The Jamaican Court of Appeal held that the real test for determining whether a door is an outer door is whether it 'served the purpose of a protection against the outer world'. The door broken in this case did not serve that purpose: it 'served only to provide privacy as between the respective occupants of the rooms on either side thereof'. T's entry was, therefore, not unlawful. Watkins JA explained the position thus:[125]

> Was the levy illegal? This was of course the paramount question. 'An illegal distress is one which is wrongful at the very outset, that is to say, either where there was no right to distrain or where a wrongful act was committed at the

119 See, also, *Reyes v Ali* (1998) High Court, Trinidad and Tobago, No 4278 of 1995 (unreported), *per* Gobin J.

120 *Southam v Smout* [1963] 3 All ER 104.

121 *Atkin's Court Forms*, 2nd edn, Vol 15, p 207; *Romany v Guelmo* (1994) High Court, Trinidad and Tobago, No 1688 of 1991 (unreported).

122 *American Concentrated Must Corp v Hendry* (1893) 62 LJQB 388.

123 *Nash v Lucas* (1867) LR 2 QB 590.

124 (1976) 14 JLR 158.

125 *Ibid*, p 160.

beginning of the levy invalidating all subsequent proceedings so as to render the distrainor a trespasser *ab initio*' (*Halsbury's Laws of England*, 2nd edn, Vol 10, para 738). That learned author proceeded to give examples of illegal distress among which the following are relevant:

(a) when no rent is in arrear;

(b) a distress made in an unlawful manner, as by breaking open an outer door.

In the instant case, it was not challenged that rent was in arrear and, indeed, the single question was as to whether that door intervening between Miss Edward's and Facey's respective abodes which was admittedly forcibly opened was indeed an *outer* door. The answer is to be determined not only by a consideration of the structure of the house but also by reference to a consideration of the policy and purpose behind the ancient and long settled rule of law that a distrainor for rent may break an inner door but may not break open an outer door. In *American Concentrated Must Corporation v Hendry,*[126] the matter was the subject of extensive and learned analysis by Bowen LJ, who said:

> The doctrine of the inviolability of the outer doors of a house and its precinct has long been established by English law. The principle is one which carries us back in imagination to wilder times, when the outer door of a house, or the outer gates and enclosures of land, were an essential protection, not merely against fraud, but violence ...
>
> All creditors and all aggrieved persons who respected the King's peace, the sheriff in a civil suit, and the landlord in pursuit of his private remedy for rent and services, were both of them held at bay by a bolted door or barred gate. To break open either was to deprive the owner of the protection against the outer world for his family, his goods and furniture and his cattle.

See, also, *Lee v Gransel.*[127] Applying this purpose of the ancient law to the facts of the instant case, could it be really asserted with any conviction that this intervening door served the purpose of a protection against the outer world for the respondent? The outer door to the area in his occupation was by way of a veranda which the landlord bailiff had tried but, having found barred and bolted, had left untouched. It was contended, however, that whilst that intervening door constituted an inner door looking at the house as a whole, it in fact constituted an outer door in relation to the area occupied by the respondent and this indeed was the ground on which the decision of the learned resident magistrate in his favour rested. 'For all practical purposes', he said, 'this was the plaintiff's outside door, for it separated his holding from that of the subtenant Vera Edwards'. With respect to the learned resident magistrate and to counsel at the Bar, this, it seems on the authorities, is not the test at all. First of all, the right of distress extends over all the demise out of which the rent issues. The entire house in the instant case formed a part of the relevant demise and not merely the portion in actual occupation by the

126 (1893) 62 LJQB 388, p 390.

127 [1558–1774] All ER Rep 468.

> respondent. Next, the real test is as to whether the door or other apparatus, whatever it may be, which has been broken or forcibly unbarred, served as a protection against the outer world. This intervening door served only to provide privacy as between the respective occupants of the rooms on either side thereof.

Distrainable goods

At common law, the basic rule is that all goods and chattels found on the premises out of which the rent issues are distrainable, whether they belong to the defaulting tenant or to a third party,[128] such as a lodger; but this power has been severely curtailed by:

(a) the concept of privileged goods; and

(b) statutory provisions designed to protect third parties from seizure of their chattels.

It has also been held in Trinidad and Tobago that a chattel house is not distrainable, on the basis that chattel houses are so fixed to the land as to form part of the land during the period of tenancy. The position was explained by Wooding CJ in *Doolan v Ramlakan*,[129] following his earlier decision in *Baptiste v Supersad*,[130] as follows:

> It is a long established practice in this country that, if a house is let to a tenant who gets into arrear with his rent, the landlord distrains the tenant's furniture if the tenancy is of a house, but if building land is let to a tenant who is likewise in arrear, he distrains or purports to distrain the building of the tenant standing thereon. How this practice began it is difficult to say, but it certainly has become established. However, as the landlord discovered in the case to which I referred, the practice is wrong and indefensible in law. The mistaken notion that it is the right thing to do should therefore be removed from the minds of landlords and bailiffs as speedily as possible. So although it does not arise in this case ... we have gone out of our way to call attention to the law on the point so that not only tenants, landlords and bailiffs may be guided by what is really no more than a restatement of the law of distress, but also the attention of those who administer the courts will be directed accordingly.

Privileged goods

The list of privileged goods is derived partly from the common law and partly from statute. Examples are:

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128 *Lyons v Elliott* (1876) 1 QBD 210; *Plantel Ltd v Manick* (1987) High Court, Trinidad and Tobago, No 2315 of 1987 (unreported); *Cornwall v Trincity Commercial Centre Ltd* (1996) High Court, Trinidad and Tobago, No 1437 of 1995 (unreported).

129 (1967) 12 WIR 146, p 148.

130 (1967) 12 WIR 140.

(a) things in actual use;
(b) things delivered to a person by way of his trade or business, such as cloth handed to a tailor to be made into a dress;[131]
(c) wearing apparel and bedding of the tenant or his family up to a certain value;[132]
(d) tools and implements of the tenant's trade up to a certain value; and
(e) machinery belonging to a third party which is on an agricultural holding under a contract of hire.[133]

Third parties' goods

Statutory provisions in some jurisdiction have given to third parties whose goods are found on the demised premises a means of avoiding their seizure. These statutes[134] provide that a subtenant or lodger or any other person not being a tenant of the premises and not having a beneficial interest in the tenancy may serve a notice on the landlord declaring that:
(a) the tenant has no property in the goods;
(b) the goods are not goods excepted by the statute;
(c) so much rent (if any) is due from him to the tenant;
(d) future instalments of rent will become due on stated days; and
(e) he will pay such rent to the landlord.

With this notice, the third party must send an inventory of his goods. If the landlord levies distress on the third party's goods after receipt of the notice and inventory, he will be guilty of illegal distress, and the third party may apply to the court for replevin (that is, the restoration of his goods).

Procedure for levying distress

Statutory provisions govern the procedure for levying distress. For instance, s 29 of Cap 153 (Belize)[135] provides that, when any rent not exceeding $3,600 becomes due and the tenant remains in default of payment for seven days

131 *Simpson v Hartopp* [1558–1774] All ER Rep 453. In *Cornwall v Trincity Commercial Centre Ltd* (1996) High Court, Trinidad and Tobago, No 1437 of 1995 (unreported), Warner J held that musical equipment hired by the plaintiff to the tenant who operated a discotheque on the premises were privileged under this head, since the equipment had been delivered to the tenant for use in his business of providing music for dancing.

132 Cap 153, s 35(a) (Belize); Cap 61:01, s 14(a) (Guyana); Ch 42, s 73 (The Bahamas).

133 Cap 61:01, s 14(b) (Guyana); Cap 153, s 35(b) (Belize).

134 See, eg, Cap 153, s 44 (Belize); Cap 61:01, s 36 (Guyana); cf Ch 27, No 16, s 27 (Trinidad and Tobago).

135 Cf Cap 61:01, ss 22–24 (Guyana).

thereafter, the landlord may apply to a magistrate for a distress warrant. The magistrate may then issue a warrant authorising a police officer or bailiff to enter the premises, if necessary by force, between 8 am and 4 pm, and to distrain the goods found therein, subject to any privilege from distress at common law or under the statute. The landlord must then make out and leave with the tenant an inventory of the goods distrained.[136] The goods may be set up for sale by public auction five days after the distress, unless the tenant, before the sale, serves the bailiff with a notice that he desires to replevy the goods and deposits the amount of the rent due and $25 as security for costs.

Impounding

Impounding is the act of keeping custody of goods in a secure place or enclosure, which may be on the demised premises or elsewhere, after they have been seized.[137] The distrainor must not use the goods impounded, since he holds them merely as a pledge, and he is answerable for the condition of the pound, so that if the goods are stolen or damaged, he will be liable.[138] The effect of impounding is that the goods are placed in the custody of the law. Any person who removes them from the pound without the distrainor's consent and with knowledge of the impounding, commits the tort of pound breach, and is liable for 'treble damages', that is, for three times the value of the goods removed, even where the distress itself was unlawful.[139] However, if the distrainor himself takes the goods out of the pound for the purpose of using them unlawfully, the owner is entitled to retake possession from the distrainor without being liable for pound breach.[140]

Pound breach must be distinguished from 'rescue', which is the removal of distrained goods without the distrainor's consent *after seizure but before impounding*. If the distress was illegal, and impounding has not yet taken place, the owner may lawfully rescue the goods;[141] otherwise, rescue is a tort giving rise to a claim for treble damages, as in the case of pound breach.[142]

136 It has also been pointed out that, at common law, the distrainor, on completion of the seizure, is required to make an inventory of the goods intended to be included in the distress, and to give notice of the distress to the tenant. See *JJ Pharmacy Ltd v Parillon Investments Ltd* (1988) High Court, Trinidad and Tobago, No 1495 of 1988 (unreported). In Trinidad and Tobago, a bailiff who levies distress must deliver to the tenant a notice of the distress, including an inventory and a statement of authorised charges; the goods cannot be sold until this has been done: *Diego Martin Consumers Co-operative Society Ltd v Liverpool* (1997) High Court, Trinidad and Tobago, No 2752 of 1996 (unreported), *per* Warner J.

137 *Op cit*, Atkin, fn 121, p 208; Daniel, *Law of Distress for Rent*, 7th edn, p 65.

138 *Ibid*, Daniel, p 65.

139 *Cotsworth v Betison* (1696) 91 ER 965.

140 *Smith v Wright* (1861) 158 ER 338.

141 *Cotsworth v Betison* (1696) 91 ER 965.

142 See *Smith v Wright* (1861) 158 ER 338.

Replevin

Replevin is the remedy whereby a tenant may recover possession of goods which have been illegally distrained. The process was explained by Bharath J in the Trinidad and Tobago High Court in *Sealandaire Ltd v Paul*, thus:[143]

> This type of action, where an illegal distress is alleged and a claim is made for restoration of the goods, is known as an action in replevin, the procedure for which is set out in s 10 of the Landlord and Tenant Ordinance, Ch 27, No 16. That section provides, on complaint to the magistrate for the district, for security to be provided for the goods by means of a bond in double the value of the goods distrained before deliverance, and for returning the goods and chattels and prosecuting a suit for illegal distress without delay in the Supreme Court.

The remedy thus consists of two parts:

(1) The replevy, by which the tenant obtains re-delivery of the goods; and

(2) The action of replevin, in which the validity or otherwise of the distress is determined.[144]

Replevin is available only where the distress was illegal; not where it was merely excessive or irregular. Examples of illegality giving rise to replevin are (a) where no rent was due; (b) where there was no demise at a fixed rent; and (c), as in *Sealandaire*,[145] where the relationship of landlord and tenant had terminated before the distress was levied.

The tenant may exercise his remedy at any time, so long as the goods have not been sold;[146] although, as Warner J pointed out in *Cornwall v Trincity Commercial Centre Ltd*,[147] under s 11 of the Landlord and Tenant Ordinance of Trinidad and Tobago, the distrainor is empowered to sell the distrained goods if replevy is not made within five days; so the claimant must act promptly, otherwise he will be without remedy. Proceedings may be brought by the person whose goods have been seized, whether the tenant or a third party,[148] against either the bailiff who levied or the landlord, if he authorised the distress, or both.[149]

The action of replevin is commenced, in High Court actions, by writ of summons. If the plaintiff is successful, he will not be entitled to damages for the value of the goods if they were returned to him when the replevy was

143 (1994) High Court, Trinidad and Tobago, No 169 of 1994 (unreported).

144 *Op cit*, Daniel, fn 137, p 86.

145 *Op cit*, Daniel, fn 137, p 86.

146 See Cap 153, s 34 (Belize); Cap 230, ss 23, 24 (Barbados); Ch 154, s 1 and Ch 155, s 22 (The Bahamas).

147 (1996) High Court, Trinidad and Tobago, No 1437 of 1995 (unreported).

148 *Fenton v Logan* (1833) 131 ER 767.

149 *Jones v Johnson* (1850) 155 ER 377.

made (as would normally be the case), but he may recover general damages for annoyance and for injury to trade, credit and reputation.[150]

Illegal, excessive and irregular distress

A wrongful distress may be either (a) illegal; (b) excessive; or (c) irregular.

Illegal distress occurs where there was no right of distress at all (for example, where the relationship of landlord and tenant had ceased to exist at the time of the distress),[151] or where, although there was a right of distress, a wrongful act was committed *in the course of the levy itself* (for example, where privileged goods were seized).[152]

Excessive distress occurs where more goods are seized than are reasonably necessary to satisfy the arrears of rent and proper charges of the distress.[153]

Irregular distress occurs where, although there was a right of distress, a wrongful act was committed at some stage of the proceedings *subsequent to the seizure*[154] (for example, where the proper procedure for selling the distrained goods was not followed).

The difference between the three types of wrongful distress is significant with respect to (a) the persons against whom action can be brought, and (b) the damages available. Where distress is illegal, action should be brought against the bailiff who actually committed the illegal act, not against the landlord, unless the latter expressly authorised or ratified it.[155] Damages obtainable for illegal distress extend to the full value of the goods removed and sold, with no deduction for the rent owed,[156] though the landlord can counterclaim for arrears of rent.[157] Where distress is excessive, action may be brought against the landlord or the bailiff.[158] The measure of damages for excessive distress is the value of the goods wrongfully seized, less the arrears of rent and the costs of the distress.[159] Where the excess goods seized have not

150 *Smith v Enright* (1893) 63 LJQB 220.

151 As in *White v Brown* (1969) 13 WIR 523 (above, p 59); *Sealandaire Ltd v Paul* (1994) High Court, Trinidad and Tobago, No 169 of 1994 (unreported); *Bristol v Ramoutar* (1996) High Court, Trinidad and Tobago, No 231 of 1993 (unreported), where Sealey J also held (following *Bridges v Smith* (1829) 130 ER 1119) that, where a landlord brings ejectment proceedings, he thereby treats the tenant as a trespasser, and he no longer has any right to distrain, though he may have a right to claim for mesne profits in an action in trespass; nor is the effect of the commencement of ejectment proceedings nullified by the subsequent withdrawal of the proceedings.

152 *Op cit*, Daniel, fn 137, p 80; *Op cit*, Atkin, fn 121, Vol 15, p 213.

153 *Carter v Carter* (1829) 130 ER 1118.

154 *Op cit,* Atkin, fn 121.

155 *Lewis v Read* (1845) 153 ER 350.

156 *Attack v Bramwell* (1863) 122 ER 196.

157 *Op cit*, Daniel, fn 137, p 81.

158 *Megson v Mapleton* (1884) 49 LT 744.

159 See *Poggott v Birtles* (1836) 150 ER 507.

been sold, so that the tenant has suffered no actual damage, he will recover only nominal damages.[160] In the case of irregular distress, action may be brought against either the landlord, or the bailiff, or both.[161] The tenant may recover only for any special damage sustained.[162]

Action for double value

Where (a) no rent was owed at the time of the distress and (b) the distrainor has sold the goods, the owner may recover against the distrainor double the value of the goods distrained and the full costs of the action.[163]

Injunction

Where a tenant alleges wrongful distress, or where he anticipates that a wrongful distress will take place, he may obtain an interlocutory injunction to restrain the distress until the matter can be brought to trial;[164] but the court will usually grant an injunction only on the terms that the tenant pay into court the full arrears of rent.

TENANT'S RIGHT TO FIXTURES

At common law, the maxim *quicquid plantatur solo, solo cedit* ('whatever is attached to the soil becomes part of the soil') applies, so that any fixture attached by a tenant during his tenancy *prima facie* belongs to the landlord.[165] However, it has long been established that, as an exception to this rule, a tenant is entitled to remove any trade,[166] ornamental and domestic fixtures attached by him; these are classified as 'tenant's fixtures'.[167] Trade fixtures are those items which have been affixed for the purpose of carrying on a particular trade: examples are fixed engines and boilers, a shed for making varnish, the fittings of a public house or bar, shrubs planted by a market

160 *Chandler v Doulton* (1865) 34 LJ Ex 89.

161 *Haseler v Lemoynes* (1858) 141 ER 214.

162 *Plasycoed Collieries Co v Partridge* [1912] 2 KB 345.

163 *Op cit*, Daniel, fn 137, p 82; Ch 154, s 4 (The Bahamas); Cap 153, s 36 (Belize); Cap 230, s 32 (Barbados).

164 *Op cit*, Daniel, fn 137.

165 *Holland v Hodgson* (1872) LR 7 CP 328; *Moonan v Moonan* (1988) Court of Appeal, Trinidad and Tobago, Mag App No 12 of 1987 (unreported).

166 *Poole's Case* (1703) 91 ER 320.

167 In *Pro-Jam Ltd v Gibraltar Trust Ltd* (1997) Supreme Court, Jamaica, No CLP 137 of 1986 (unreported), Chester Orr J held that the following items were tenant's fixtures: air conditioning units, carpeting, burglar alarm system, mirrors and company directory sign.

gardener, and gasoline pumps installed at a petrol station.[168] Ornamental and domestic fixtures are those items which have been attached to a house 'for the sake either of ornament or convenience', for example, mirrors, kitchen stoves and window blinds. But fixtures which are in the nature of a permanent improvement to the house and which cannot be removed without causing substantial damage, such as a conservatory connected by a door to one of the living rooms, are not removable as ornamental or domestic fixtures.[169]

At common law, the tenant's right to remove trade, ornamental and domestic fixtures must be exercised during the tenancy (including a statutory tenancy), otherwise they become a gift to the landlord.[170] However, there are at least three exceptions to this rule, viz:

(a) a further period of grace is permitted for removal where the tenant continues in possession of the demised property after expiry of a fixed term 'under a reasonable supposition of consent on the part of the landlord';[171]

(b) where a periodic tenancy (for example, a weekly tenancy) or a tenancy at will is terminated by the landlord, the tenant is allowed a reasonable time after the expiration of the notice to quit to remove his fixtures;[172]

(c) the right of removal will continue where the landlord exercises a right of forfeiture and the tenant remains in possession for such a reasonable time as would enable him to remove his fixtures.[173]

In some jurisdictions, the common law principles regarding removal of fixtures by a tenant have been superseded by statutory rules; for instance, s 13 of Cap 153 (Belize) and s 15 of Cap 61:01 (Guyana) provide, in summary, as follows:

(a) the doctrine *quicquid plantatur solo, solo cedit* does not apply to tenant's fixtures, which are the property of and are removable by the tenant before or after the termination of the tenancy;

(b) in removing any fixture, the tenant must not do any avoidable damage to any part of the demised premises; and the tenant must immediately make good any unavoidable damage;

(c) before removing any fixture, the tenant must give one month's previous notice in writing to the landlord of his intention to remove it, and the landlord may, before expiry of the notice, elect by notice in writing to

168 See *op cit*, Hayton, fn 51, p 21; *Smith v City Petroleum Co Ltd* [1940] 1 All ER 260.

169 See Woodfall, *Landlord and Tenant*, 28th edn, 1978, London: Sweet & Maxwell, Vol 1, paras 1557, 1558; *op cit*, Hayton, fn 51, p 21.

170 *Lyde v Russel* (1830) 109 ER 834. See, generally, Kodilinye, G [1987] Conv 253.

171 *Re Roberts ex p Brook* (1878) 10 Ch D 100, p 109, *per* Thesiger LJ.

172 *Smith v City Petroleum Co Ltd* [1940] 1 All ER 260, p 262, followed in *Pro-Jam Ltd v Gibraltar Trust Ltd* (1997) Supreme Court, Jamaica, No CL P137 of 1986 (unreported).

173 *Re Roberts ex p Brook* (1878) 10 Ch D 100, p 109.

purchase such fixture at the fair value thereof to an incoming tenant; any dispute about the valuation is to be adjudicated upon by the court.

Chattel houses

There has been some discussion in the Caribbean as to the legal consequences of a tenant's placing a chattel house on land (sometimes called a 'house spot') of which he is tenant.[174] In particular, the question may arise as to whether the chattel house, when placed on the land, remains a chattel, or whether it is to be regarded as a fixture.[175] As far as the law of landlord and tenant is concerned, the question would seem to be a sterile one, as, in any case, the tenant will be entitled to remove his chattel house at the end of the tenancy, either because it is deemed to be a chattel, or because it comes within the category of domestic fixtures which are removable before or at the expiration of the tenancy, so long as no damage is caused to the land.

174 See, eg, Alexis, Menon and White (eds), *Commonwealth Caribbean Legal Essays*, Liverpool: NJO, pp 197–203; McIntosh, SCR (1995) 5 Carib LR 32; Gibson, M (1984) 10(3) Bulletin of Eastern Caribbean Affairs 56–87, pp 70–75; Glenn, JM and Toppin-Allahar, C (1997) 7 Carib LR 368–70.

175 See *Mitchell v Cowie* (1964) 7 WIR 118, p 12, Court of Appeal, Trinidad and Tobago, *per* Wooding CJ; *O'Brien Loans Ltd v Missick* [1977] 1 LRB 49, pp 55–57, Court of Appeal, The Bahamas, *per* Georges JA.

THE RENT RESTRICTION ACTS

The Rent Restriction Acts have had a profound effect on the law of landlord and tenant in those territories which have enacted such legislation. The purpose and effect of the Jamaican legislation were concisely explained by Carberry JA in *Golden Star Manufacturing Co Ltd v Jamaica Frozen Foods Ltd*:[1]

> Now the Rent Restriction Act, and it has by now a fairly long history in Jamaica, was introduced in 1944 to protect tenants against landlords. Speaking generally, it has done so in two ways: (a) by controlling the quantum of rent which could be charged, and (b) by protecting the tenant's occupation of the rented premises. (a) has been achieved by the establishment of Rent Boards empowered to fix the rents that may be required of a tenant, while (b) has been achieved by limiting the power of courts to make orders requiring the tenant to give up possession of the premises. Landlords may recover possession only if they show (i) that they would have been so entitled at law, by the termination of the contractual tenancy by an appropriate legal method, and in addition (ii) they must satisfy the additional requirements laid down in the Act [see RRA (J), ss 25, 26].
>
> The provisions of both (a) and (b) above are protected by the sanctions of the criminal law: it is an offence to demand and receive more than the controlled rent, and it is an offence to take the law into your own hands and summarily eject a tenant by force, or fraud or the like [see RRA (J), ss 20(3), 27].
>
> The protection given by (b) has had the effect of creating a new type of tenancy, or tenant: the statutory tenancy or statutory tenant, which describes the situation in which the contractual tenancy has been duly determined, but the tenant, protected by the provisions in (b) is allowed to continue to hold over on such terms and conditions of the original tenancy as are consistent with the provisions of the Act, particularly those fixed under (a): see s 28 of the Act.

Carberry JA's explanation applies equally to the Rent Restriction Acts in other Caribbean jurisdictions.[2] These statutes are modelled, to some extent, on English legislation, in particular the Increase of Rent and Mortgage Interest (Restrictions) Act 1920 and the Rent and Mortgage Interest (Restrictions) Act 1939, but have departed from them in several important respects. For example, unlike the English Rent Acts, which apply to residential tenancies only, the Caribbean Acts apply to building land and residential, commercial

1 (1986) Court of Appeal, Jamaica, Civ App No 13 of 1986 (unreported).

2 RRA, Ch 59:50 (Trinidad and Tobago); RRA, Cap 378 (Antigua and Barbuda); RRA, Cap 158 (Belize); RRA, Cap 286 (Grenada); RRA, Cap 36:23 (Guyana); RRA, Cap 307 (St Kitts/Nevis); RRA, Cap 249 (St Vincent); RR Ord 1959 (St Lucia).

and public premises.[3] Thus, cases interpreting sections of the English Acts will often be of no relevance to the Caribbean legislation, though there are also many aspects of the English legislation which are similar to the Caribbean statutes and where English cases are reliable authorities.

SCOPE OF THE ACTS

The Rent Restriction Acts apply 'to all land which is building land ... and to all dwelling houses and public or commercial buildings whether in existence or let at the commencement of [the Act] or let thereafter, and whether let furnished or unfurnished ...'. Dwelling houses let at a rent which includes payment for board and attendance, and building land let on a building lease for a term of 25 years or more, are excluded from the Acts.

'Building land' is defined as 'land let to a tenant for the purpose of the erection thereon by the tenant of a building used, or to be used, as a dwelling or for the public service or for business, trade or professional or for a combination of such purposes, or land on which the tenant has lawfully erected such a building'.

In *Grant v Bennett*,[4] Duffus J held that a tenant who had been granted a tenancy of land for the purpose of building a dwelling house thereon, and who built a house with several rooms which he eventually sublet to subtenants, was entitled to the protection of the Jamaican Rent Restriction Act. There was no requirement in the Act that the tenant must personally reside in the house. The Jamaican Act differed from the English legislation, in that the latter was confined to dwelling houses, whereas the Jamaican Act extended to building land and to commercial premises. Accordingly, English cases which had established that a tenant must reside on the premises in order to claim the protection of the Acts were inapplicable in Jamaica.

3 Though the majority of commercial premises in Trinidad and Tobago have subsequently been decontrolled. See Rent Restriction (Exclusion of Premises) Order 1969, which excluded from the Act all commercial premises the standard rent of which on 11 February 1969 exceeded $600 per year (see *Rogers v Regis* (1993) High Court, Trinidad and Tobago, No 1475 of 1992 (unreported); *Young v Morales* (1995) Court of Appeal, Trinidad and Tobago, Mag App No 21 of 1991 (unreported)). A similar process of decontrol has taken place in Jamaica. See Rent Restriction (Public and Commercial Buildings – Exemption) Order 1983, which decontrolled public or commercial buildings certified by a Rent Assessment Officer as being of such a valuation at 31 August 1980, as to warrant being let at that date at a rent of $6 or more per square foot in certain urban areas or $4 or more per square foot outside those areas.

RRA, Cap 158 (Belize) applies to dwelling houses only. RRA, Cap 249 (St Vincent) and RR Ord 1959 (St Lucia) apply to building land and dwelling houses.

The onus of showing that premises are decontrolled rests on the landlord: *Charles v Maharaj* (1976) Court of Appeal, Trinidad and Tobago, Mag App No 205 of 1975 (unreported); *Chung v Charles* (1977) Court of Appeal, Trinidad and Tobago, Civ App No 97 of 1975 (unreported); *Gibson v Martin* (1961) 3 WIR 335.

4 (1959) 2 WIR 140.

On the other hand, in *Felix v Roberts*,[5] where a dwelling house was already erected on the land when it was leased to the tenant, Warner J held that the land was not building land within s 2 of the Rent Restriction Act of Trinidad and Tobago, as there was no term in the lease which required the tenant to build. The only reference to building in the deed of lease was a provision that the lessee was entitled to remove any building erected by him during the lease. In the absence of any stipulation that *required* the tenant to erect a building, the Act did not apply.

'Dwelling house' under the Acts means 'a building, a part of a building separately let, or a room separately let, which at the material date was used mainly as a dwelling or place of residence ...'.

The meaning of 'separately let' was explained by Wooding CJ in *Gabriel v Ramlal* thus:[6]

> The premises must not be shared either with the landlord or with any tenant of the landlord or, for that matter ... with any licensee of the landlord ... To create a separate letting, the tenant must be given by his landlord exclusive possession of the rented premises without any liability to share any part thereof as a term or condition of the letting.

Accordingly, there would be a separate letting notwithstanding that the tenant may have sublet the whole or part of the premises to a subtenant.

SECURITY OF TENURE

Status of irremovability

It has often been said that a statutory tenancy under the Rent Restriction Acts is not really a 'tenancy' at all in the common law sense of the word; the tenant acquires no estate or interest in the land, but a mere personal right of occupation – a 'status of irremovability'. Thus, he cannot dispose of his statutory tenancy by assignment, or by will, nor will it vest in his trustee in bankruptcy. In *Guyadeen v Glasgow*, Hyatali JA, in the Court of Appeal of Trinidad and Tobago, explained the status of irremovability thus:[7]

> It is well established that whereas a contractual tenant has a proprietary interest in the subject matter of the demise, and may validly assign it to a third party, a statutory tenant has no such interest. He merely has, so long as he retains possession, a personal right of occupation as against the landlord or anyone claiming under him ... Thus, any purported assignment or transfer of his personal right, which by its very nature is incapable of being passed to a

5 (1990) High Court, Trinidad and Tobago, No 1617 of 1981 (unreported).

6 (1968) Court of Appeal, Trinidad and Tobago, Mag App No 304 of 1968 (unreported).

7 (1963) 6 WIR 477, p 480.

> third person, will vest exactly nothing in the alleged assignee or transferee ... If he abandons, transfers or parts with possession of the premises he forfeits his status as a statutory tenant and loses the protection of the [Act].

The implications of the status of irremovability were explained further in *Mangal v Camacho*.[8] Here, the tenant had been in possession of business premises under a lease which terminated by effluxion of time in 1961. He remained in possession, paying $95 rent monthly. In 1970, by virtue of the Rent Restriction (Exclusion of Premises) Order 1969, the premises became decontrolled and no longer subject to the Rent Restriction Ordinance. The landlord sought to increase the rent to $750 monthly. The tenant refused to pay the increased rent. The landlord gave the tenant one month's notice to quit. Brathwaite JA posed the question:

> What is the legal position of the occupier vis à vis such premises when they by operation of law ceased to be protected by the Rent Restriction Ordinance? ... The answer is that the [tenant] was not entitled as of right to remain in possession of the premises. Only if a new contractual relationship was established between the [landlord and the tenant] could the [tenant] lawfully remain in possession.

He continued:

> I find it necessary to distinguish the common law position of the defendant from this statutory position. At common law, the defendant's holding over after the termination of the lease with the consent of the landlord converts the holding into a yearly tenancy. Once, as I see it, the premises are subject to the Rent Restriction Ordinance, the landlord's hands are tied, that is to say the relationship between him and the occupier is no longer contractual but statutory.
>
> To resolve this question I first look at what may well be regarded as the classic position of the so called statutory tenant as described in the 9th edition of *The Rent Acts* by Megarry, p 182:
>
>> It has been said time and time again that the statutory tenant has no estate or property as tenant at all, but has a purely personal right to retain possession of the property. The tenancy has been called '*nothing more than a status of irremovability*'.
>
> When, then, this 'status' is removed by the same law by which it was created, it now, as I see it, becomes 'a status of removability' and does so according to the ordinary law of the land (as distinct from the extraordinary position in which he was placed by the Rent Restriction Ordinance).
>
> It seems to me that the tenant holding over after the termination of his term through the intervention of the Rent Restriction Ordinance lost his status of a yearly tenant but gained the 'status of irremovability', only to lose it when that Ordinance ceased to protect him. Then he became, at most, a tenant at sufferance. In this connection, the *dictum* of Pearce LJ in the case of *Legge v Matthews* seems to be helpful. This is what the learned judge said:[9]

8 (1975) High Court, Trinidad and Tobago, No 1734 of 1972 (unreported).

9 [1960] 1 All ER 595, p 597.

> If one leaves out of account for the moment the transitional period, the effect of the decontrol of this house in July 1957 was to destroy the statutory tenancy immediately. This was so decided in *Dunnachie v Urwin*, a case in New Zealand, where statutes similar to our Rent Acts are in force. Adams J there said:[10]
>
> > The evidence shows that the rights of the defendant after the determination of the lease in December 1949 rested wholly on the statute, there being no ground for holding that any new tenancy was created; and I think it is clear that, when he ceased to be entitled to the protection of the statute, he was relegated to the same position as would have been his on the termination of the lease if no such statute had been in force.
>
> If we may say so respectfully, that decision is clearly right.

It is my considered view that he could not by operation of law or otherwise regain the status which he may have held under the common law; that is to say, a yearly tenant; unless there was a specific agreement to that effect. If, as I find in this action to be the case, the plaintiff landlord accepted him to be a monthly tenant, then his new status after his period of 'suspended animation' must of necessity be that of a monthly tenant. His tenancy could therefore be terminated by a month's notice. This was so done in the instant case.

The defendant could not approbate and reprobate. If indeed he was a tenant after decontrol he was a monthly tenant, but his rental could not be $95. The landlord was entitled to ask for a reasonable rent and so she did; and she was entitled to assume that by remaining in possession he was doing so as a monthly tenant at $750 per month. The sum of $95 was never an agreed rent. It was the statutory rent and the landlord was obliged to accept it until decontrol subject to such statutory increases as would have been proper under the Rent Restriction Ordinance. The plaintiff was right in implying agreement to pay the increased rent from the fact of the defendant remaining in possession after his right to do so had expired. If the defendant thought the new rent was not acceptable, his course was to give up possession, but he could not remain in occupation and refuse to pay the rental required by the plaintiff.

So far as the landlord's right to increase the rental of the premises is concerned, there is nothing in the law to indicate to me that this right is circumscribed by any regulatory prescription.

The corporate tenant

The English Rent Restriction Acts were designed to protect tenancies of dwelling houses by preventing landlords from recovering possession except on certain grounds, such as the ground that the landlord reasonably required the house for his own occupation. It became established, accordingly, that a

10 [1951] NZLR 79, p 81.

corporate tenant, being incapable of residing in a dwelling house in a domestic sense, could not acquire the status of a statutory tenant.[11]

In *Crampad International Marketing Co Ltd v Thomas*,[12] where a dwelling house had been let to the appellant company, the Jamaican Court of Appeal, citing *Skinner v Geary*[13] and *Reidy v Walker*,[14] held that the Rent Restriction Act of Jamaica did not apply at all to a tenancy of a dwelling house in favour of a limited company which, in the nature of things, cannot be personally in occupation. The Privy Council, however, took the view that the Jamaican Act should not be construed in the same way as the English Acts since, whereas the English Acts protected only residential tenancies, the Jamaican statute was expressly framed to cover not only residential premises, but also building land and premises used for business, commercial and public purposes. Lord Oliver said:[15]

> In relation to [premises used for business, commercial and public purposes], in the absence of a clear context to the contrary (of which there is none), it is not readily conceivable that the legislature should have designed to exclude perhaps the most obvious example of a typical business or commercial tenant, the limited company. In the case of such a tenant, there can be no policy consideration which dictates that the tenant, to gain the protection of the Act, must be an individual personally in occupation.

It was accordingly held that the corporate tenant was protected by the Rent Restriction Act and that a notice to quit served on the tenant was invalid in so far as it failed to comply with s 31 of the Act, which requires the landlord to state the reason for the requirement to quit.

The non-occupying tenant

In *Skinner v Geary*,[16] the statutory tenant and his wife had been living elsewhere for 10 years. A majority of the Court of Appeal in England held that he had forfeited his right to Rent Act protection. Scrutton LJ took the view that:[17]

> Parliament was dealing with a tenant who was in occupation and who was not to be turned out; it was not dealing, and never intended to deal, with a tenant who was not in occupation but who wished to say: 'Although I am not in actual occupation, I claim the right, so long as I pay the rent, to retain my tenancy'.

11 *Reidy v Walker* [1933] 2 KB 266, p 272, *per* Goddard J.
12 [1989] 1 WLR 242.
13 [1931] 2 KB 546.
14 [1933] 2 KB 266.
15 [1989] 1 WLR 242, p 251.
16 [1931] 2 KB 546.
17 *Ibid*, p 560.

In other words, the Acts were not intended to apply to a tenant who was not in personal occupation and who had no intention of returning to the premises; but Scrutton LJ accepted that a temporary absence, for example, where a sea captain was away for several months leaving his wife and family in occupation of the house, would not disqualify the tenant. Green LJ took a different approach to the non-occupation point. In his view,[18] mere non-residence did not justify the court in making an order for possession since a tenant could remain in possession in law, even though not physically on the premises, through a licensee occupying on his behalf. In his opinion, it was only where the tenant had sublet the premises in order to make money that he lost the protection of the Acts.

The principle expressed by Scrutton LJ in *Skinner v Geary* was further developed in another leading case, *Brown v Brash*,[19] which established that a non-occupying tenant *prima facie* forfeited his status as a statutory tenant where his absence was 'sufficiently prolonged or unintermittent to compel the inference ... of a cesser of possession or occupation'.[20] The onus was on the tenant to rebut the presumption that his possession had ceased by showing both an intention to return (*animus revertendi* or *possidendi*) and a physical state of affairs which clothed the inward intention (*corpus possessionis*). In *Brown*, the statutory tenant had been sent to prison for theft, leaving his mistress and their two children in occupation of the premises but they left afterwards, taking with them all but three items of furniture. The Court of Appeal held that the tenant had ceased to possess the premises (and, therefore, had lost the protection of the Acts) when his mistress and children left, and nothing could thereafter revive his possession or his statutory status. Although he had the requisite *animus possidendi*, there was no *corpus possessionis*, because the three items of furniture were not intended to be symbols of continued possession.

The principle in cases such as *Brown* has been applied in Jamaica and in Trinidad and Tobago in respect of both residential and commercial premises.[21] In *Guyadeen v Glasgow*,[22] the statutory tenant of a dwelling house purported to assign his interest to G, and G entered into possession. The Court of Appeal of Trinidad and Tobago held that, whereas a contractual tenant had a proprietary interest in the demised property and could validly assign the lease to a third party, a statutory tenant had no such interest. He merely had a personal right of occupation (so long as he remained in possession) as against

18 [1931] 2 KB 546, p 565.

19 [1948] 2 KB 247; Megarry, RE (1948) 64 LQR 452. See, also, Brierley, AHR [1991] Conv 345 and 432.

20 [1948] 2 KB 247, p 254; *White v Brown* (1969) 13 WIR 523, Court of Appeal, Jamaica.

21 See, generally, Kodilinye, ZV, *Some Aspects of Rent Restriction Legislation in Trinidad and Tobago*, 1996, unpublished LLM thesis, Cave Hill, Barbados: University of the West Indies, Law Library.

22 (1963) 6 WIR 477.

the landlord or anyone claiming under him. Consequently, since the tenant in this case had parted with possession of the premises, he had forfeited his status as a statutory tenant and had lost the protection of the Ordinance.

In *Ou Wai v Jordan,*[23] the statutory tenant of commercial property, which was used as a shop, had abandoned the premises 14 years previously and had never returned, having taken up permanent residence in Hong Kong. The business was being carried on by one L, whom the tenant alleged to be his agent. This allegation was rejected by the court on the evidence, but Sir Isaac Hyatali CJ accepted the tenant's contention that there was a difference between the occupation of residential premises and that of commercial premises. He said:

> [Counsel for the tenant] is quite right in saying that when you examine the question of personal occupation in relation to commercial premises, one must take care to understand that business premises can be occupied by the tenant even though he himself is not occupying them.

However, the case was not one where there had been accounting between the person who was carrying on the business and the tenant himself, or any similar transaction indicating that the person in occupation was the agent of the tenant or was carrying on the business with his authority and on his behalf. Rather, this was case of a 'tenant who has not retained possession, who is a non-occupying tenant', without an *animus possidendi* or *corpus possessionis.*

In *Hammond v Pryce,*[24] the tenant of a restaurant left Jamaica to reside abroad, leaving the business to be operated by his agents. A few months after the tenant's departure, the agents closed the restaurant and put padlocks on the door. The tenant paid no rent for almost two years, after which period he returned, claiming that there had been no abandonment of the tenancy. In order to rebut the presumption of abandonment, the tenant argued, *inter alia,* that certain appliances and furniture which he had left in the premises were sufficient symbols of continued possession. In holding that there had been abandonment of the tenancy, the Jamaican Court of Appeal seems to have disregarded the presence of the tenant's appliances and furniture and, on the facts, was correct in doing so. It is regrettable, however, that the court did not take the opportunity to give a ruling on the question as to what could be a sufficient *corpus possessionis* in relation to commercial premises under the Jamaican Act.

It seems that there is some confusion in the Trinidadian cases between, on the one hand, the principle of cesser of occupation or abandonment in *Brown v Brash* and, on the other hand, s 14(1)(m) of the Rent Restriction Act, which provides that judgment for the recovery of possession by the landlord can be given where 'the tenant has sublet or parted with possession of the whole or

23 (1982) Court of Appeal, Trinidad and Tobago, No 21 of 1981 (unreported).

24 (1990) 27 JLR 145. See, also, Macaulay, B (1989) 13 WILJ 35.

any part of the premises without either obtaining the consent of the landlord or being expressly authorised by or under the tenancy agreement or lease so to do'.

In *Ou Wai*, the magistrate had made an order for possession on the ground that the tenant had parted with possession within s 14(1)(m), although there was apparently no evidence that the tenant had done so without the landlord's consent or without express authorisation in the tenancy agreement. Hyatali CJ considered that the magistrate's order, if not supportable on that ground, was nevertheless supportable on the ground of abandonment. Similarly, in *Brothers Ltd v Lando*,[25] where the tenant of residential premises had left Trinidad 15 years previously and had returned on only two occasions, once for a holiday and once to buy goods, there was held to be abandonment within *Brown v Brash*, and insufficient evidence of *animus possidendi* or *corpus possessionis*, but Phillips JA, in the Court of Appeal, considered the question in issue to be 'whether the tenant had parted with possession of the premises', presumably within the meaning of s 14(1)(m).

A clear distinction should be drawn between, on the one hand, loss of protection because of non-occupation amounting to abandonment and, on the other, recovery by the landlord on the ground of the tenant's parting with possession within s 14(1)(m). Where the landlord seeks an order under s 14(1)(m), he must show that the tenant has sublet or given up possession of all or part of the premises to another person, and that such parting with possession was without the landlord's consent. Where, however, the doctrine of abandonment is relied upon, there is no need to show a parting with possession to any other person; it is sufficient to show that the tenant went out of occupation for a long period of time, thus putting the onus on the tenant to show an *animus revertendi* and *corpus possessionis*. Therefore, any argument by a non-occupying tenant to the effect that he never transferred or parted with possession of the premises, but continued to pay rent while he lived elsewhere, so that his status as a statutory tenant had been preserved, will not succeed where the *Brown v Brash* principle is applied.[26]

Grounds for recovery of possession

A landlord is not entitled to an ejectment order in respect of premises controlled by the Acts unless he can establish one or other of the grounds for possession specified by the Acts. Some of the grounds do not appear to have been litigated in the courts. Those most commonly litigated are (a) that the

25 (1967) Court of Appeal, Trinidad and Tobago, No 217 of 1981 (unreported). See, also, *Richardson v Emmanuel* (1970) Court of Appeal, Trinidad and Tobago, Mag App No 401 of 1969 (unreported).

26 *Kotak v Jadav* [1958] EA 772.

landlord reasonably requires the premises for his own use as a residence, or for business, trade or professional purposes, and (b) that the landlord requires the premises for the purpose of being repaired, improved or rebuilt.

Other grounds include:

(a) where rent payable by the tenant is overdue for 30 days or more;[27]

(b) breach of some other covenant by the tenant;[28]

(c) commission of a nuisance or annoyance to adjoining occupiers[29] by the tenant or a person residing with him;

(d) user of the premises for an immoral or illegal purpose, or allowing them to become insanitary through acts of waste or neglect;[30] and

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27 In *Morales v Roberts* (1976) Court of Appeal, Trinidad and Tobago, Mag App No 227 of 1975 (unreported), it was held that an order for possession will be made where the tenant is a persistent defaulter in the payment of rent over a period of years.

The material date for determining whether there had been non-payment of rent 'lawfully due' for at least 30 days is the date of the making of the order for possession, and not the date of institution of ejectment proceedings: *Blaides v Thomas* (1963) Court of Appeal, Trinidad and Tobago, No 424 of 1963 (unreported), *per* Phillips JA. A tender of rent by the tenant before the date of institution of proceedings but after the contractually due date, is sufficient to prevent the rent from being 'lawfully due', unless time is made the essence of the contract; but a tender after such date does not prevent the court from making a possession order, eg, where there has been a long history of default: *Blaides v Thomas*; *Halsbury's Laws of England*, 3rd edn, 1958, Vol 23, p 818; *Bird Hildage* [1947] 2 All ER 7. An unconditional order for possession will not usually be made where the only ground is arrears of rent. Special circumstances, such as evidence that the tenant is a persistent defaulter, must be shown for an unconditional order to be made: *Rajcoomar v Rampersad* (1968) Court of Appeal, Trinidad and Tobago, Mag App No 212 of 1968 (unreported), *per* McShine JA.

At common law, there can be an increase in rent if consented to by the tenant; while under the Ordinance, an increase in rent can only be effected if the Rent Assessment Board authorises the increase. Thus, if premises are registered under the Ordinance, and the landlord unilaterally increases the rent, but the tenant continues to tender the old rent, the difference between the new and the old rent will not be 'rent lawfully due' after 30 days at the material time: *Hayes v Walke* (1989) High Court, Trinidad and Tobago, No 2513 of 1982 (unreported).

28 In *Solomon v Khan* (1962) 5 WIR 132, p 134, Wooding CJ held that there was 'a clear distinction between a user in breach of a tenancy agreement, which is a breach of covenant, and a mere departure from the use contemplated by a tenancy agreement'. Thus, eg, where premises are let for commercial purposes, but, in fact, are used for residence, there is no breach of covenant, in the absence of an express term restricting their use to commercial purposes: *Shamku v Howard* (1988) Court of Appeal, Trinidad and Tobago, Mag App No 274 of 1985 (unreported). See, also, *Gittens v Bernard* (1962) 5 WIR 256.

29 'Adjoining occupier' refers to a situation where there are separate tenancies, albeit of apartments in the same building: *Hewitt v Porter* (1987) 24 JLR 51, Court of Appeal, Jamaica.

30 Under the Act, acts of waste are associated with waste of the premises and not of furniture. Thus, where furnished premises were let and the furniture was found to be smashed, this was held not to be waste within s 14(1)(c) of the RRA, Ch 27, No 18. Destruction of furniture ought to be subject to an agreement for reimbursement in consideration of occupying the furnished premises: *Rajcoomar v Rampersad* (1968) Court of Appeal, Trinidad and Tobago, Mag App No 122 of 1968 (unreported).

(e) subletting or parting with the possession of the premises without the landlord's consent.

Premises reasonably required for landlord's own use

The Rent Restriction Acts[31] provide that an ejectment order may be made on the ground that:

> ... the premises, being a dwelling house or a public or commercial building, are *reasonably required* by the landlord for:
>
> (i) occupation as a residence for himself or for some person wholly dependent upon him, or for any person *bona fide* residing or to reside with him, or for some person in his whole time employment;
>
> (ii) use by him for business, trade or professional purposes;
>
> (iii) a combination of the purposes in subparas (i) and (ii) above.

'Reasonably required'

The meaning of 'reasonably required' was considered in the leading case of *Quinlan v Philip*.[32] In this case, D, who for some time had been a tenant in an apartment, purchased a house in which he wished to reside as owner. At the time of the purchase, the house was occupied by P, her husband, aunt and seven children. D offered 'alternative accommodation' in return for P's surrendering her tenancy of the house, but P refused the offer on the ground that the apartment offered was not large enough for herself and her family. D's application for an ejectment order was refused by the magistrate. The Court of Appeal of Trinidad and Tobago held that D had failed to show that he reasonably required the house for his own use. It was merely his desire to be the owner rather than a tenant of the premises in which he lived that had prompted his action to eject P. 'Reasonably required' means 'reasonably needed', and although reasonable need was not to be equated with absolute necessity, it did connote something more than mere desire. Wooding CJ said:[33]

> The ground on which the appellant relied is that Dyer (hereafter referred to as 'the landlord') reasonably required the Bank Hill house for his own use. It has long been accepted that 'reasonably required' means 'reasonably needed' and not merely 'reasonably claimed'. 'Reasonably needed' manifestly cannot be equated with absolute necessity, but it undoubtedly connotes rather more than desire; see *Megarry on the Rent Acts,* 9th edn, p 258. What, then, are the facts? The evidence discloses that the landlord wanted to cease being himself a tenant and therefore to get a home of his own. In pursuance of that desire, he bought

31 See RRA, s 14(1) (Trinidad and Tobago); RRA, s 25(1) (Jamaica); RRA, s 16(1) (Guyana); cf RRA, s 10(1) (Belize).

32 (1965) 9 WIR 269, Court of Appeal, Trinidad and Tobago.

33 *Ibid*, p 270.

> the Bank Hill house which he knew to be in the occupation of the respondent as tenant but which on the strength of the assurance given him by the appellant he hoped to be able to secure. No other circumstance was put forward to support his claim that he reasonably required it. On the contrary, the fact is that he has been at all material times and still is adequately housed. Stripped, therefore, of all irrelevancies, it comes to this – that it is his desire to be the owner rather than a tenant of the home in which he lives that prompted his demand to eject the respondent. In our opinion, such a desire, laudable as it must be acknowledged to be, may found a reasonable claim but is a far cry from any reasonable need.

In order to be reasonably required, the landlord must have a genuine *present* need for the premises. Such a need was lacking in the Guyanese case of *Williams v Storey*,[34] where the landlord's application for an ejectment order was in the anticipation that at some future date his present residence would be too large for himself and his wife in their old age, and he wished to prepare for such eventuality. In the opinion of Bollers CJ and Churuman J, the application was not *bona fide*, and the evidence fell far short of showing a genuine present need.

On the other hand, in *Ribero v Fortune*, *Gillette v Abouhamad* and *Evelyn v Alkins*, the respective landlords did succeed in showing a genuine present need for possession.

In *Ribero v Fortune*,[35] the landlord's claim was to the effect that: 'I want my place at Rosalino Street for my own use. The place is more convenient.' McShine JA considered that, in construing the word 'convenient', all the evidence ought to be considered. In this case, the evidence was that the landlord was living in rented accommodation where he was paying $160 per month, whilst his own property was let to the appellant tenant at an uneconomic rent of $40 per month. From an economic point of view, it could clearly be said that it would be more convenient for the landlord to reside in his own property at Rosalino Street and he had therefore shown a genuine present need for the premises.

34 (1973) Full Court, Guyana, No 1860 of 1972 (unreported), following the earlier Guyanese cases of *McDoom v Fung* [1946] LRBG 2891; *Jacob (CR) and Sons Ltd v Oudkirk* [1947] LRBG 81; *Gaffoor and Sons Ltd v Boodhan* (1968) No 2626 of 1968 (unreported).

35 (1965) Court of Appeal, Trinidad and Tobago, No 283 of 1965 (unreported). See, also, *Mohan v Ramjag* (1969) 14 WIR 500, where it was held that the landlord had a genuine present need of a lot of building land for the purpose of extending his business (alternative accommodation had been offered by the landlord and it was reasonable to make the possession order); *Baksh v Rahaman* (1973) High Court, Trinidad and Tobago, No 1942 of 1969 (unreported); *Henry v Lewis* (1988) Court of Appeal, Trinidad and Tobago, Civ App No 173 of 1987 (unreported); *Mohan v Ramjag* (1969) 14 WIR 500; *Thomas v Walker* (1984) 21 JLR 376, Court of Appeal, Jamaica; *Lewis v Davis* (1989) Court of Appeal, Trinidad and Tobago, Mag App No 167 of 1987 (unreported).

In *Gillette v Abouhamad*,[36] premises at 9 Independence Square, Port of Spain, had been let to the respondent's father (F) as a dwelling house from 1925 until his death in 1960. Thereafter, F's widow, by agreement with the landlord, became a contractual tenant. In 1963, the widow died and the respondent, who was the eldest child, became a statutory tenant. In May 1964, the appellant purchased the reversion of No 9 together with No 11, the adjacent property, and thus became the respondent's landlord. The appellant sought possession of No 9 on the ground that he reasonably needed it for his hardware business, as the building at No 11 was inadequate for that purpose. It was held by the Trinidad and Tobago Court of Appeal that the appellant had succeeded in showing a genuine present need for the premises.

Finally, in *Evelyn v Alkins*,[37] the landlord was a married woman whose husband was out of the country. The woman, her two children and their grandmother shared a partitioned bedroom in lodgings which 'could hardly be considered the most comfortable accommodation for a woman with two children'. It was held that she had shown she reasonably required possession of her own house for her personal use.

Premises required for repairs, improvement or rebuilding

The Rent Restriction Acts provide that an ejectment order may be made on the ground that:

> ... the premises, being a dwelling house or a public or commercial building, are required for the purpose of being repaired, improved, or rebuilt.

Required

A distinction has been drawn between the meaning of 'required' in this subsection and that of 'reasonably required' for the landlord's own use. In *Douglas v Pereira*,[38] the landlord sought an order for possession of business premises on the ground that they were 'required for the purpose of being repaired, improved or rebuilt' within s 14(1)(i) of the Trinidadian statute. The Court of Appeal held that, where premises are to be 'reasonably required' under s 14(1)(e), the landlord must show a genuine present need; but where they are to be 'required' under s 14(1)(i), it is sufficient that the landlord shows a genuine desire, want or intention which may be something short of actual need. In the present case, the premises were in a bad state of repair and, in the

36 (1966) 9 WIR 278, Court of Appeal, Trinidad and Tobago.

37 (1970) 16 WIR 444, Court of Appeal, Trinidad and Tobago. See, also, *Majadsingh v Lutchmansingh* (1989) Court of Appeal, Trinidad and Tobago, Mag App No 33 of 1987 (unreported).

38 (1966) 11 WIR 20, Court of Appeal, Trinidad and Tobago. Similar facts occurred in *Alleyne v Ali* (1966) 11 WIR 69 and *Lewis v Bhajawatsingh* (1986) Court of Appeal, Trinidad and Tobago, Mag App No 175 of 1984 (unreported).

opinion of the city engineer, were potentially dangerous. Since the repairs could not be conveniently and economically carried out while the tenant remained in occupation, an order for possession was justified. Wooding CJ explained the position thus:[39]

> The principal ground on which the order was made in this case is that the respondent landlord required the premises for the purpose of being repaired ... As regards that, it is important, we think, to observe that s 14(1)(i) does not speak of the premises being reasonably required for the purpose of being repaired, but rather speaks simply of the premises being required. It will be observed also that some of the paragraphs of the sub-section speak of the rented premises being reasonably required while others, like para (i), speak of them simply as being required. We think that a distinction falls to be made between the two terms.
>
> As has often been said, 'required' is a word of ambiguous import. It may mean wanted in the sense of being demanded or claimed, or it may mean needed. When there is the collocation 'reasonably required', it has been held to mean 'needed', not in the true sense of absolute necessity but nevertheless connoting something more than mere want or desire; something in the nature of a genuine present need for. Hence, when the word 'required' is used without qualification, we think that it must signify something less than such a genuine present need.

The principles in *Douglas v Pereira* were applied by the Jamaican Court of Appeal in *Johnson v Morris.*[40] In this case, J became the landlord of five similar apartments which were let to tenants. He sought possession of the apartments under s 25(1)(h) of the Rent Restriction Act on the ground that the premises were required for the purpose of being repaired, improved or rebuilt. In particular, J claimed that he required possession in order to lay parquet flooring in the bedrooms and living rooms. It was held that there was sufficient evidence, applying the *Douglas v Pereira* test, of a genuine desire on the part of the landlord to carry out the improvements, though the possession order was refused on the hardship test.

The *Douglas v Pereira* test was applied to commercial premises in *Alleyne v Ali.*[41] In this case, the appellant was the tenant of premises in which he carried on a poultry business. The respondent landlord sought possession for the purpose of rebuilding. The building was about 60 years old and certain parts, which originally stood off the ground, were, by the time of the present action, actually resting on the ground. The building was leaning to one side, its supports were rotting, and it was 'unsafe and beyond repair'. The Court of Appeal of Trinidad and Tobago held that the landlord did require possession of the premises for rebuilding within s 14(1)(i).

39 (1966) 11 WIR 20, p 21.

40 [1988–89] Carib Comm LR 351, Court of Appeal, Jamaica.

41 (1966) 11 WIR 69, Court of Appeal, Trinidad and Tobago. See, also, *Chung Qui v Lucien* (1964) 7 WIR 449.

Hardship and reasonableness

The Acts provide that no order or judgment can be made or given unless:

> ... the court ... considers it reasonable to make such order or give such judgment,

and unless:

> ... the court is also satisfied that, having regard to all the circumstances of the case, less hardship would be caused by granting the order or judgment than by refusing to grant it: and such circumstances ... include ... the question of whether other accommodation is available for the landlord or the tenant.

In *Quinlan v Philip*,[42] the facts of which have already been outlined, Wooding CJ emphasised that the Rent Restriction Ordinance placed the onus of proof on the landlord to show that less hardship would be caused by granting than by refusing a possession order, unlike under the English legislation, where the onus was the other way; that is, it was on the tenant to show that greater hardship would be caused by granting than by refusing the order. Under the Trinidadian legislation, 'if in the result the issue lies *in medio*, it must be resolved in favour of the tenant'.[43] On the particular facts, where the landlord had offered the tenant an apartment as alternative accommodation for the house presently occupied by the tenant, it was held that the landlord had not satisfied the onus of proof of hardship, since the apartment was clearly less adequate for the tenant in that it had smaller bedrooms and a higher rent and, moreover, 'if the [tenant] were transferred there, she would have to put up with the inconvenience of uprooting herself from a home in which she has lived for 14 years and of settling into inadequate accommodation elsewhere'.[44] On the other hand, 'the landlord having bought in the expectation of moving into a house of his own would suffer disappointment and, maybe, receive an inadequate return on the money he expended, but all that is but the result of the calculated risk he took, and in the circumstances should count little for hardship'.[45]

In addition to being satisfied that the landlord has discharged the onus of proof of hardship, the court must consider that it is reasonable in all the circumstances of the case to grant the possession order. In most cases, the courts appear to have treated the element of reasonableness as inextricably bound up with the question of hardship, but one case in which reasonableness was treated as a separate question is *Douglas v Pereira* where, as we have seen, the landlord sought possession of premises on the ground that he needed to

42 (1965) 9 WIR 269, Court of Appeal, Trinidad and Tobago. See, also, *Chong v Wooming* (1984) Court of Appeal, Jamaica, Civ App No 33 of 1983 (unreported); *McIntosh v Marzouca* (1955) 6 JLR 349.

43 (1965) 9 WIR 269, p 270.

44 *Ibid.*

45 *Ibid.*

carry out repairs. Wooding CJ dealt with the question whether it was reasonable to make the order in the following passage:[46]

> The Ordinance ... prohibits the court from making an ejectment order unless the landlord shows, first, that it is reasonable to make it and, secondly, that on a balance of hardship, taking all the circumstances into consideration, less hardship would be caused by granting than by refusing to grant it ...
>
> The question therefore next arises, was it reasonable to make an order? The evidence established that these premises are in a bad state of repair, that they are getting progressively worse, that, in the view of the city engineer in March 1964, they had reached the potentially dangerous stage – maybe not so dangerous as to require a demolition order to be then served, but nevertheless sufficiently dangerous for him to enter what I may call a *caveat.* The evidence further establishes that, although it is quite true that the ground floor of the premises, which is the part occupied by the appellant, is not nearly in as bad a condition as are the first floor, the stairway to it and the balcony overhanging the public footway, nevertheless the necessary repairs cannot be conveniently and economically effected if and so long as the appellant remains in occupation carrying on his drugstore. To do so conveniently, to do so economically, to do so effectively, it is essential that the appellant should leave the premises and that the landlord should have vacant possession of them.

Alternative accommodation

Under the Acts, the availability of alternative accommodation for the tenant or the landlord is a factor which may be taken into account by the court in considering the balance of hardship. In *Gillette v Abouhamed*,[47] Fraser JA stated that in *Chung Qui v Lucien*[48] the Court of Appeal of Trinidad and Tobago had pointed out that the availability of other accommodation is not made an essential prerequisite for the making of an order for possession, but is merely one of the matters to be taken into consideration in determination of the question of reasonableness as well as of the balance of hardship.

As to the meaning of 'other accommodation', according to McShine, Phillips and Fraser JJ, it means no more than 'alternative premises reasonably suitable to the needs of the landlord or the tenant and available at the time of the hearing before the magistrate'.[49] 'Other accommodation' is not to be equated with 'suitable alternative accommodation' as required under the English legislation.[50]

46 (1966) 11 WIR 20.
47 (1966) 9 WIR 278.
48 (1964) 7 WIR 449, pp 453, 454.
49 (1965) 9 WIR 278, p 281.
50 Rent and Mortgage Interest Restrictions (Amendment) Act 1933, s 3(3).

In *Evelyn v Alkins*,[51] Fraser JA stressed that the decisive factor was whether it was reasonable to make the possession order, having regard to the comparative circumstances of the parties and the fact that the landlord had made several offers of reasonably suitable accommodation which the tenant had persistently and unreasonably refused. Thus, in *Winsey v Reece*,[52] where the tenant, a single person, had been offered and refused six different premises as alternative accommodation, and where he had declined to find accommodation for himself, Wooding CJ held that 'if a tenant is shown to be unreasonable in refusing such alternative accommodation as has been offered him, that is a factor which may be put in the scale against him.'

As to whether a tenant is under an obligation to attempt to find alternative accommodation for himself, the cases are at variance. In *Ribero v Fortune*,[53] McShine JA, in the Trinidad and Tobago Court of Appeal, was in no doubt that 'the law requires [the tenant] to make some effort and to show some energy in attempting to get alternative accommodation for himself', and in the earlier Guyanese case of *Jacob (CR) and Sons Ltd v Oudkirk*,[54] Worley CJ went so far as to assert: 'The onus lies on the tenant to show that he has done his best to secure other accommodation ... He cannot sit down and do nothing but wait until the landlord has found alternative accommodation for him.' On the other hand, in *Johnson v Morris*,[55] the Jamaican Court of Appeal, in considering the proviso to s 25(1) of the Rent Restriction Act (Jamaica), cited two earlier Jamaican cases as authority for the view that there was no onus on the tenant to show that he had made reasonable efforts to secure alternative accommodation.

These conflicting views are not necessarily irreconcilable, however, for it is clear that, on the one hand, since the onus of proof of the balance of hardship lies on the landlord, it would be tactically advantageous for him to be able to show that the tenant was offered alternative accommodation which he unreasonably refused. On the other hand, if the tenant had been offered apparently satisfactory alternative accommodation by the landlord and had rejected it, the issue of hardship might be decided against him unless he were able to show that he had made an effort to find suitable accommodation for himself.

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51 (1970) 16 WIR 444. The principles in *Evelyn* were applied in *Lewis v Bhajwatsingh* (1985) Court of Appeal, Trinidad and Tobago, Mag App No 175 of 1984 (unreported), *per* Narine JA; *Jeremiah v Marcelle* (1988) Court of Appeal, Trinidad and Tobago, Mag App No 67 of 1986 (unreported), *per* Davis JA; and *Majadsingh v Lutchmansingh* (1989) Court of Appeal, Trinidad and Tobago, Mag App No 33 of 1987 (unreported), *per* Edoo JA, in which a possession order was granted where the tenant had been 'obstructive' in refusing accommodation offered. See, also, *Fung v Kit* (1985) Court of Appeal, Trinidad and Tobago, Mag App No 149 of 1984 (unreported).

52 (1967) Court of Appeal, Trinidad and Tobago, Mag App No 382 of 1967 (unreported).

53 (1965) Court of Appeal, Trinidad and Tobago, No 283 of 1965 (unreported).

54 [1947] LRBG 81, p 85.

55 [1988–89] Carib Comm LR 351.

Whether the available alternative accommodation is 'reasonably suitable to the needs of the ... tenant' is a question of fact in each case. In *Niles v Shaw*,[56] for instance, the Court of Appeal of Trinidad and Tobago held that, in considering the adequacy of the alternative accommodation offered, the magistrate had been in error in limiting himself to considering whether it was adequate for the tenant and his wife only, whereas he ought to have considered its adequacy for the tenant's whole household, which included his two sons, two nieces and four grandchildren. The magistrate had also failed to take into account the fact that, from the premises let, the tenant could travel to work by bus, whereas from the alternative accommodation, he would have had to use a taxi, with the attendant additional expense. Further, the alternative accommodation had no kitchen, the toilet facilities were about 30 ft from the yard, and the yard abutted on a river, which was a particular hazard for the tenant, who was blind.

A final point is that it was held in *Chung Qui v Lucien*[57] that there was 'no warrant for the suggestion that, before an order for possession can properly be made, it is imperative that any other accommodation available for the tenant should be protected by the provisions of the Rent Restriction Ordinance', though it is a matter which the court may take into account along with all the other circumstances of the case.

Statutory tenancy by succession

Section 2(1)(b) of the Rent Restriction Act (Trinidad and Tobago) provides that the definition of statutory 'tenant' includes:

> [1] the widow of a tenant who was residing with him at the time of his death, or [2] where the tenant leaves no widow or is a woman, such member of the tenant's family as was residing with the tenant for not less than six months immediately before the death of the tenant ...[58]

This provision, which has no equivalent in the Jamaican Rent Restriction Act, is modelled on similar provisions in the English legislation, which applies only to residential tenancies. The difficulties in applying this provision to tenancies of commercial premises are illustrated by *Ali v Ashraph*.[59] Here, the tenant of commercial premises died intestate. At the time of his death, his

56 (1966) Court of Appeal, Trinidad and Tobago, Mag App No 342 of 1966 (unreported).

57 (1964) 7 WIR 449.

58 See *Jangoo v Williams* (1991) High Court, Trinidad and Tobago, No 598A of 1990 (unreported), *per* Ramlogan J. In *Deosarran v Mohammed* (1988) High Court, Trinidad and Tobago, No HCA 493 of 1978 (unreported), Deyalsingh J held that the section applies equally to tenants of dwelling houses and tenants of building land. In this case, there was ample evidence that the claimant had been residing with his father on building land of which the father had been a statutory tenant, for more than six months prior to the father's death.

59 (1964) 7 WIR 354.

widow (W) resided with him in other premises. Following the tenant's death, W continued to carry on the tenant's business on the demised premises, and the landlord eventually obtained an order of possession from the magistrate against W, without satisfying any of the requirements imposed by s 14(1) of the Rent Restriction Ordinance. It was held by the Trinidad and Tobago Court of Appeal that the primary object of the legislation was to confer personal security upon a tenant and his family in respect of the home in which they resided and, accordingly, the widow could not invoke the provisions of s 2(1)(b) of the Ordinance to establish a claim to a tenancy of business premises in which she was not residing at the time of the tenant's death. *Ali v Ashraph* was followed by the Court of Appeal in *Arman v Pooran (No 2)*,[60] on similar facts, but the significance of these two decisions has been greatly reduced, since most commercial premises in Trinidad and Tobago have now been decontrolled and are no longer subject to the Rent Restriction Act.[61]

The position where the claimant was residing with a deceased statutory tenant in a chattel house situated on the demised land was considered in *Maharaj v Constance*.[62] In this case, N was the tenant of a building lot upon which he had erected a chattel house. KC, a relative of N, resided with N in the house for a considerable period of time and was so residing at the time of N's death in November 1975. The plaintiff later became the registered proprietor of the land. KC claimed to be a statutory tenant of the building lot within s 2(1) of the Rent Restriction Act, Ch 59:50, on the basis that she was a 'member of the [deceased] tenant's family residing with the tenant for not less than six months immediately before the death of the tenant'. It was held that KC had not become a statutory tenant of the building lot. If a chattel house owned by a deceased is erected on building land of which the deceased was a statutory tenant, the mere fact that a person has been in occupation of such chattel house and satisfies the residence conditions in s 2(1) of the Act does not confer upon her the status of a statutory tenant of the land.

Edoo J explained the position thus:

> The Rent Restriction Act, Ch 59:50, is an Act which was designed to restrict the rents of certain premises and the right to recover possession of such premises. By s 3, land which is building land, subject to certain exceptions, falls within the purview of the Act. A tenant to whom the Act applies and to whom protection is afforded is defined in s 2(l) as follows:
>
> > ... the widow of a tenant who was residing with him at the time of his death, or where a tenant leaves no widow or is a woman, such member of the tenant's family as was residing with the tenant for not less than six months immediately before the death of the tenant ...

60 (1977) Court of Appeal, Trinidad and Tobago, Civ App No 9 of 1976 (unreported).

61 See Rent Restriction (Exclusion of Premises) Order 1969.

62 (1981) High Court, Trinidad and Tobago, No 1611 of 1981 (unreported).

I turn to consider whether on the law, as it now stands, Kathleen can be considered the statutory tenant of the land on which the house was built.

The Rent Restriction Act applies, with certain exceptions as indicated above, to building land. In s 2(1), building land is defined to include land let to a tenant for the purpose of the erection thereon by him of a building used, or to be used, as a dwelling, or land on which the tenant has lawfully erected such a building.

The 'chattel house' concept is a peculiarity of the law of Trinidad and Tobago. It finds no favour in English law. A house or building attached to the soil in that jurisdiction is for all intents and purposes part of the realty, and a dwelling house, to which the Rent and Mortgage Interest (Restrictions) Act 1939 [UK] (the counterpart of the Rent Restriction Act of Trinidad and Tobago) applies, comprises the land on which the house is erected. A statutory tenant in the English context is a tenant of both the dwelling house and the land, both being vested in a common ownership, unlike the distinction made in Trinidad and Tobago where land and building may reside in different ownerships.

In resolving this question, it is necessary to consider the legal position as it affects the occupant of a chattel house erected on land of which a deceased person was the tenant.

On the death of any person, all his estate, both real and personal, vests in the Administrator General until divested by the grant of probate or letters of administration to some other person or persons: Administration of Estates Ordinance, Ch 8, No 1, s 10(4).

Under s 20 of the Ordinance, where a person dies intestate without leaving next of kin, the Administrator General may apply for a grant of letters of administration on behalf of the State. There being no next of kin, the property of the deceased becomes *bona vacantia* and is escheated to the State. ...

It is my considered opinion that if a person satisfies the conditions of residence stipulated in s 2(1) of the Rent Restriction Act, he can only become a statutory tenant of a dwelling house of which the deceased was a tenant at the time of his death. If the dwelling house is a chattel house owned by the deceased and erected on land of which the deceased was a tenant, the mere fact that a person has been in occupation of such chattel house and satisfies the conditions of the Act, does not confer the status of statutory tenant of the building on him. In other words, a person cannot become a statutory tenant of building land in these circumstances.

To so hold would result in a quite untenable and illogical proposition in that the occupant of a chattel house of which he is precluded from becoming the owner or from acquiring any legal title can, by the mere fact of his occupancy, become the statutory tenant of the land on which it is erected after the death of the contractual tenant.

Prohibition of eviction

Section 27 of the Rent Restriction Act (Jamaica) provides that:

(1) Except under an order or judgment of a competent court for the recovery of possession of any controlled premises, no person shall forcibly remove the tenant from those premises or do any act, whether in relation to the premises or otherwise, calculated to interfere with the quiet enjoyment of the premises by the tenant or to compel him to deliver up possession of the premises.

(2) Every person who contravenes any of the provisions of sub-s (1) shall, upon summary conviction thereof before a resident magistrate, be liable to be imprisoned for any term not exceeding 12 months.

In *Richards v Walker,*[63] it was pointed out by Rowe JA that the purpose of this section is 'to restrict the powers of landlords in relation to their tenants, and to compel them to seek the assistance of the court. In the absence of self-help, a landlord of any controlled premises can only obtain possession from an unwilling tenant through an order of the court'.

Further protection is given to tenants by s 31 of the Jamaican Act, which provides that:

(1) no notice given by a landlord to quit any controlled premises shall be valid unless it states the reason for the requirement to quit; and

(2) where the reason given in any notice referred to in (1) is that some rent lawfully due from the tenant has not been paid, the notice shall, if the rent is paid before the date of expiry of the notice, cease to have effect on the date of payment.

It was held in *Richards v Walker*[64] that, where a landlord seeks possession of controlled premises under s 25(1) of the Act on the ground of non-payment of rent by the tenant, he must first serve a valid notice to quit on the tenant within s 31. It was further stated in this case, by Rowe JA, that the effect of s 31(2) is that: 'a delinquent tenant, when presented with a notice to quit for non-payment of rent, has the better part of 30 days within which to pay up all his arrears. Only if he neglects to do so during the currency of a notice under s 31(1) can the landlord rely on that notice for its validity in terminating the tenancy.'

63 (1982) 19 JLR 236.

64 *Ibid.* See, also, *Crampad International Marketing Co Ltd v Thomas* [1989] 1 WLR 242.

RENT CONTROL

The second major feature of the Rent Restriction Acts is the scheme of control of rents,[65] under which a landlord is prohibited from recovering as rent more than the maximum permitted rent for the particular premises, which is called the 'standard rent', and, in addition, any permitted increases as allowed by special order or by the legislation itself, to take into account such factors as increases in rates and taxes payable by the landlord and expenditure by the landlord on substantial improvements to the property. Further, the landlord is prohibited from charging any fine or premium for the grant, renewal or continuance of a tenancy of any controlled premises.

Statutory provisions governing rent control vary considerably between the different jurisdictions, though there are certain basic features which are common to most. Among those common features are the following:

(a) The Acts give power to set and control rents to statutory bodies,[66] such as a Rent Assessment Board,[67] a Rent Control Board[68] or Rent Commissioners.[69] In Jamaica, a 'standard rent' is fixed by a Rent Assessment Officer, but the Rent Assessment Board has overriding powers, such as power to review rental as assessed by the Assessment Officer.[70]

(b) Another feature of the Rent Restriction Acts is that a tenant may recover any excess rent he has paid, or he may deduct the amount from future payments of rent.[71]

(c) The landlord can generally seek an increase in rent where he has made improvements or alterations to the premises beyond normal decoration or repairs, or where there has been an increase in the rates and taxes payable by the landlord.[72]

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65 See Kodilinye, ZV, *Some Aspects of Rent Restriction Legislation in Trinidad and Tobago*, 1966, unpublished LLM thesis, Cave Hill, Barbados: University of the West Indies, Law Library.

66 In Guyana, these powers are exercised by a magistrate: RRA, Cap 36:23, s 5.

67 As in Trinidad and Tobago and Belize.

68 As in the Bahamas.

69 As in St Kitts/Nevis.

70 See RRA, s 17.

71 See, eg, Rent Control Act, Ch 153, s 27 (The Bahamas); RRA, s 5 (Belize); RRA, s 10 (Trinidad and Tobago); RRA, s 11 (Jamaica); RRA, s 14 (St Kitts/Nevis).

72 See, eg, RRA, s 5 (Belize); RRA, s 10 (St Kitts/Nevis); RRA, s 21 (Jamaica); RRA, s 11 (Trinidad and Tobago). In *Ferreira v Rudder* (1961) 4 WIR 79, Court of Appeal, Trinidad and Tobago, at the time when the standard rent of a dwelling house was fixed, the property was in a dilapidated state. About six years later, the landlord effected repairs as follows: replaced a ceiling, replaced the porch with a verandah, replaced the windows, replastered the walls, rebuilt the kitchen, and repainted the entire building. It was held that these were in the nature of repairs necessary to make the premises fit for human habitation and were not substantial improvements. On the other hand, in *Ferreira v Antoine* (1972) Court of Appeal, Trinidad and Tobago, Mag App No 97 of 1972 (unreported), it was held that removal of an outdoor privy and replacement with an indoor toilet was a 'substantial improvement' by the landlord.

Standard rent

The definition of 'standard rent' has been considered by the courts in Trinidad and Tobago. Section 7 of the Trinidadian Act states that, until the standard rent has been determined by the Rent Assessment Board under s 9, the standard rent of a particular category of letting is the rent at which the premises were let on the prescribed date; or, where they were first so let after the prescribed date, the rent at which they were first so let.[73]

According to the Privy Council in *Morales v Birchwood*,[74] where there has been a prior letting, there is no obligation on the landlord to apply to the Board to fix a standard rent, since s 7 provides the answer to the question, 'What is the standard rent?' On the other hand, the effect of s 8(2) is that, where premises are intended to be let for the first time, that is, without having been previously let in the same category, it is the duty of the landlord to apply to the Board to fix the provisional standard rent. Failure so to apply is a criminal offence under the sub-section. The rationale for this provision is that, where there had been no prior letting, it is necessary to provide for a mandatory application to the Board to fix a standard rent because s 7 will not yield a standard rent. However, failure on the part of the landlord to apply to the Board to fix a standard rent does not invalidate or render illegal any letting he may make without complying with the sub-section.

This latter proposition was applied by the Court of Appeal of Trinidad and Tobago in *Khan v Reece*,[75] where the tenant had argued that the landlord's action to recover arrears of rent should fail, on the basis that the tenancy was illegal, on account of the landlord's neglect to apply to the Board to fix a standard rent for premises being let for the first time as commercial premises. Bernard CJ said:

> I take the view that the Act does not by the fact that it creates an offence and imposes a penalty under ss 8(2) and 17 thereof render an agreement illegal and void or unenforceable on grounds of public policy for a breach of s 8(2) by a landlord. Rather, I am of opinion, having regard to the provisions of s 7, read together with ss 8 and 9, that the enforcement of the penalty in s 8(2) is meant to be the only remedy for a breach thereof. The contractual rent fixed by the written agreement was the standard rent for the purposes of s 7. It was open to the [tenant] to apply thereafter to the Board for a determination of the standard rent under s 9, but he did not do so ... Accordingly, he is liable both for the rents as stipulated in the written agreement and mesne profits.

73 See, also, RRA, ss 10, 11, 12 (Jamaica); *Tucker v Grant* (1962) 4 WIR 282.

74 (1982) Privy Council Appeal (unreported).

75 (1989) Court of Appeal, Trinidad and Tobago, Civ App No 149 of 1988 (unreported), upholding the decision of Hamel-Smith J in *Reece v Khan* (1988) High Court, Trinidad and Tobago, No 5373 of 1983 (unreported). See, also, *Ramesar v Ramdial* (1977) High Court, Trinidad and Tobago, No 791 of 1975 (unreported); *McGarnon v Brathwaite* (1963) Court of Appeal, Trinidad and Tobago, No 395 of 1963 (unreported); *Young v Morales* (1995) Court of Appeal, Trinidad and Tobago, Mag App No 21 of 1991 (unreported).

THE RENT RESTRICTION (DWELLING HOUSES) ACT 1981 (TRINIDAD AND TOBAGO)

This statute[76] seeks to fix a maximum rent payable in respect of certain dwelling houses which were let as at 31 December 1978, or, where at that date the house was not let, at the commencement of the first letting after that date. The maximum rent is the 'base rent', which is $1,000 per month in the case of an unfurnished dwelling and $1,500 per month in the case of a furnished dwelling. The tenant is not precluded from applying to the Rent Assessment Board to fix the standard rent of a dwelling house subject to the Rent Restriction Act, Ch 59:50. A standard rent may be less than the base rent, but the Board cannot increase the standard rent beyond the base rent; and, as Persaud JA pointed out in *Crevelle v Agana*,[77] it was the clear intention of the legislature that Ch 59:50 and Ch 59:55 should be read together.

'Dwelling house' is defined by s 2 as 'a *building, part of a building* separately let, or a *room*[78] separately let which is used mainly as a dwelling or place of residence, and includes land occupied with the premises under the tenancy but does not include a building, part of a building or room when let with agricultural land'.

'Tenant' under the Act includes (a) a subtenant and any person deriving title from the original tenant or subtenant, and (b) the surviving spouse of a tenant who was residing with the tenant in the dwelling house up to the date of the tenant's death and, where the tenant leaves no surviving spouse, such member of the tenant's household who was residing in the dwelling house for at least six months immediately before the death of the tenant as may be decided, in default of agreement, by the Rent Assessment Board. Accordingly, it has been held that a mere licensee or lodger is not protected by the Act.[79]

'Letting' is not defined by the Act, but it was held by Edoo J in *Harrysingh v Ramgoolam*[80] that it includes both contractual and statutory tenants protected by the Rent Restriction Act, Ch 59:50. In this case, the particular tenancy was excluded from Ch 59:50 and the tenant, having been served with a valid notice to quit, had become a trespasser.

By s 7, where a landlord effects repairs to any premises to which the Act applies, he may apply in writing to the Board for permission to increase the

76 Ch 59:55, Laws of Trinidad and Tobago.

77 (1986) Court of Appeal, Trinidad and Tobago, Mag App No 315 of 1984 (unreported).

78 See *Boyce v Mungaree* (1980) Court of Appeal, Trinidad and Tobago, Civ App No 201 of 1984 (unreported); *Chatoo v Gooding* (1991) Court of Appeal, Trinidad and Tobago, No 17 of 1986 (unreported). In *Reece v Byer* (1991) High Court, Trinidad and Tobago, No 3853 of 1990 (unreported), Razack J held that premises used partly as a parlour and partly as a residence came within the definition of 'dwelling house'.

79 *Martin v Boodhan* (1984) High Court, Trinidad and Tobago, No 1230 of 1982 (unreported), *per* Edoo J.

80 (1988) High Court, Trinidad and Tobago, No 744 of 1978 (unreported).

rent beyond the base rent or beyond the 'authorised rent' (that is, the base rent together with any increase as authorised by the Minister under s 6 or the Board under s 7).

Section 8 prescribes penalties against a landlord who receives rent in excess of the base rent or authorised rent, and s 9 provides that, where a landlord receives rent in excess of the base rent or the authorised rent, the tenant may recover the excess from the landlord as a civil debt. Thus, for example, in *Reece v Byer*,[81] Razack J held that, under s 9, a tenant was entitled to recover the sum of $23,000 as excess rent paid over the base rent.

Section 11 provides that every tenant and every landlord of a dwelling house (whether or not it is one to which the Act applies) shall register with the Board within three months of the commencement of the Act or of the tenancy, whichever is the later. Registration is to be in the form set out in the Schedule to the Act. It has been held in several cases[82] that a tenant who failed to register with the Board within the prescribed time limit under s 11 could not rely on s 9, nor on the provisions of the Rent Restriction Act, Ch 59:50. In *Kanhai v Gosine*,[83] for instance, McMillan JA, in the Court of Appeal, found that the tenant 'has never registered his tenancy and, consequently, the landlord's right to recover possession of the premises is not subject to any statutory restrictions'. But, in *Dunn v Pantin*,[84] Hosein J held that failure to register only prevented the *tenant* from claiming the statutory protection. It did not prevent a member of a deceased tenant's family who was residing in the dwelling house for at least six months immediately before the tenant's death from succeeding to a statutory tenancy under s 2 of the Rent Restriction Act, Ch 59:50, because such tenancy was 'new and separate'. Accordingly, on the death of the tenant, the family member was entitled to register his tenancy within three months of the death.

It was pointed out by Edoo J, in *Martin v Boodhan*,[85] that the effect of s 2(2) is that, where a landlord fails to register, the Board is entitled to accept as correct all the information contained in the tenant's registration form (if submitted). But the landlord is not bound by such information, so that if the tenant enters on the form as rent an amount less than the actual base rent, the landlord is not bound to accept the lesser amount.

81 (1991) High Court, Trinidad and Tobago, No 3853 of 1990 (unreported).

82 Eg, *Ruiz v Lazar* (1984) High Court, Trinidad and Tobago, No 1941 of 1982 (unreported), *per* Mustapha Ibrahim J; *Martin v Boodhan* (1984) High Court, Trinidad and Tobago, No 1230 of 1982 (unreported), *Chandler v Alexis* (1986) Court of Appeal, Trinidad and Tobago, Mag App No 39 of 1984 (unreported).

83 (1988) Court of Appeal, Trinidad and Tobago, Mag App No 125 of 1986 (unreported).

84 (1992) High Court, Trinidad and Tobago, No 3203 of 1991 (unreported).

85 (1984) High Court, Trinidad and Tobago, No 1230 of 1982 (unreported).

Finally, it has been held in at least two cases[86] that the effect of s 15 is to incorporate as part of the 1981 Act the provisions of ss 13, 14 and 15 of the Rent Restriction Act, Ch 59:50. In *Noel v Inniss*,[87] a monthly tenancy of a dwelling house was validly determined by a notice to quit taking effect on 31 March 1981. It was conceded that the Rent Restriction Act, Ch 59:50 had ceased to apply to the premises before the coming into operation of the Rent Restriction (Dwelling Houses) Act 1981. The question in the case was, in McMillan J's words:

> What is the effect of the Act of 1981 on the right of the landlord to recover possession of a dwelling house to which the Act of 1981 applies where, prior to the commencement of the Act, the tenancy had been duly determined and the landlord had commenced proceedings to recover possession?

It was held that:

(a) the effect of s 15(1) of the Act of 1981 was to apply the provisions of ss 13, 14 and 15 of Ch 59:50 as if those provisions were included as part of the 1981 Act; and

(b) on the authority of *Remon v City of London Real Property Co Ltd*,[88] the tenant was entitled to the protection of the 1981 Act, notwithstanding that the 'tenancy' of the dwelling house referred to in s 15 had been duly determined before the 1981 Act came into force. The tenant could qualify as 'tenant' within the 1981 Act and Ch 59:50 so long as he was willing to pay the authorised rent and to carry out the terms of the old tenancy.

THE LAND TENANTS (SECURITY OF TENURE) ACT 1981 (TRINIDAD AND TOBAGO)

The object of this legislation,[89] which has spawned voluminous litigation in the courts of Trinidad and Tobago, is to provide security of tenure for any residential tenant who, on the date on which the Act came into force ('the appointed date'), was entitled to possession of building land on which he had erected or was in the process of erecting a chattel house. In *Ghany Investments Ltd v Ward*,[90] Hamel-Smith JA explained the purpose of the Act thus:

> The Act was established at a time when certain tenants of land (known as 'building land') found themselves in the invidious position of having to vacate the land, the tenancy having come to an end, but being unable to remove the

86 *Noel v Inniss* (1982) High Court, Trinidad and Tobago, No 1371 of 1982 (unreported); *Chandler v Alexis* (1986) Court of Appeal, Trinidad and Tobago, Mag App No 39 of 1984 (unreported).

87 *Noel v Inniss* (1982) High Court, Trinidad and Tobago, No 1371 of 1982 (unreported).

88 [1921] 1 KB 49.

89 See, also, Land Tenants (Security of Tenure) (Amendment) Act 1983.

90 (1995) Court of Appeal, Trinidad and Tobago, Civ App No 5 of 1989 (unreported).

> dwellings which they had erected thereon. These dwellings, unlike the common law chattel house, were 'attached' to the ground and were incapable of being removed without destruction. The Act sought to regularise such tenancies of land by giving a measure of security of tenure to such tenants by converting the tenancies into 30 year 'statutory' leases. It also contained another provision giving the tenants an option to purchase the reversionary interest of the landlord at 50% of the open market value.

'Chattel house' is given an extremely wide definition by s 2, to include any 'building erected by a tenant upon land comprised in his tenancy with the consent or acquiescence of the landlord and affixed to the land in such a way as to be incapable of being removed from its site without destruction'. In *Angel v Scott Land and Investment Co Ltd*,[91] for instance, Crane J held that two buildings comprising nine separate apartments were within the definition of chattel houses, as they were buildings which could not be removed without their demolition, rather than chattel houses in the generally accepted sense of houses complete in themselves which could easily be removed as chattels and which a tenant had a right to remove at common law.

On the other hand, in *Joseph v Edwards*,[92] where there was an old tapia house on the land which, according to the valuer, was 'obsolete' and practically destroyed, Lucky J held that the tenant was not entitled to claim a statutory lease since, under the Act, 'there must be a structure of some permanency ... which is being used as a dwelling house ... The Act protects tenants from being evicted from their dwelling houses by unscrupulous landlords of the lands on which the house has been erected. Therefore, if there is no chattel house on the lands, the provisions of the Act are not applicable'.

The Act applies only to contractual tenancies (including tenancies at will and at sufferance);[93] it does not apply to statutory tenancies arising under the

91 (1987) High Court, Trinidad and Tobago, No 187 of 1987 (unreported). It was also held in this case that the buildings were 'used as a dwelling' within s 3(1) of the Act. The Act does not preclude two or more dwelling houses from falling within its purview, if they exist on premises let by a landlord under the same tenancy. According to the general rule of statutory interpretation in the Interpretation Act, Ch 3:01, s 16(2)(a), the singular ('dwelling') includes the plural ('dwellings'). See, also, *Ghany Investments Ltd v Ward* (1995) Court of Appeal, Trinidad and Tobago, Civ App No 5 of 1989 (unreported).

92 (1994) High Court, Trinidad and Tobago, No 508 of 1991 (unreported).

93 In *Ramoutar v Abdool* (1993) High Court, Trinidad and Tobago, No 957 of 1983 (unreported), Permanand J held that the plaintiffs as tenants at sufferance of building land were entitled to rely on s 4 of the Act. A tenancy at sufferance exists where a tenant is in possession without the assent or dissent of the landlord. The commencement of ejectment proceedings constitutes dissent by the landlord and precludes the implication of a tenancy at sufferance: *De Hayney v Ali* (1986) Court of Appeal, Trinidad and Tobago, Mag App No 169 of 1984 (unreported), *per* McMillan JA. Similarly, where the landlord protests at a holding over by the tenant: *Alexander v Rampersad* (1989) High Court, Trinidad and Tobago, No 1780 of 1988 (unreported), *per* Blackman J.

Rent Restriction Act. Thus, it was held by McMillan JA in *De Hayney v Ali*[94] that, where a contractual tenancy had been determined by a valid notice to quit, but the tenant remained in possession as a statutory tenant, he could not claim the benefit of the Land Tenants Act. This conclusion resulted from the definition of 'tenant' in s 2, which included 'any person entitled in possession to land *under a contract of tenancy*, whether express or implied'. Nor, as has been held in several cases,[95] is a mere licensee within the purview of the Act; nor, *a fortiori*, is a squatter who erects a house on the land within the scope of the Act.[96] And, in *Seetahal v Batchasingh*,[97] Deyalsingh J held that the child of a deceased tenant never had an estate in the land, and so was not protected by the Act.

It was established in *Ghany Investments Ltd v Ward*[98] that it is not necessary that a tenant who wishes to enjoy the benefits of the Act should have been in actual occupation of the chattel house on the appointed date. It is sufficient that the chattel house was being used as a dwelling on that date, so that, for instance, it is 'possible for a person acquiring an interest by operation of law (for example, under a will) to inherit the tenancy with a chattel house thereon "used as a dwelling" and so claim the protection of the Act) without assuming occupation thereof'.[99]

By s 4, all tenancies to which the Act applies and which were subsisting immediately before the Act came into force, are converted into 30 year leases, with an option to renew for a further 30 year term. Section 5 contains detailed rent control provisions, and further gives sitting tenants the option of purchasing the land 'at any time during the term of the statutory lease at a price not exceeding 50% of the open market value of the land without the chattel house, ascertained at the date of the service on the landlord of notice of purchase under s 9(1)'. A tenant who exercises the option to purchase is precluded from reselling the land at a higher price to any purchaser other than the State for a period of five years.

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94 (1986) Court of Appeal, Trinidad and Tobago, Mag App No 169 of 1984 (unreported). A similar view was taken by Blackman J in *Alexander v Rampersad* (1989) High Court, Trinidad and Tobago, No 1780 of 1988 (unreported) and, on appeal, by Hamel-Smith JA in *Rampersad v Alexander* (1998) Court of Appeal, Trinidad and Tobago, Civ App No 11 of 1989 (unreported).

95 *Mahadeo v Dass* (1988) High Court, Trinidad and Tobago, No 1570 of 1980 (unreported), *per* Hamel-Smith J; *Thomas v Barath* (1986) High Court, Trinidad and Tobago, No 1686 of 1980 (unreported), *per* Edoo J; *Cyrus v Gopaul* (1989) Court of Appeal, Trinidad and Tobago, Mag App No 69 of 1987 (unreported).

96 *Superville v Eversley* (1986) High Court, Trinidad and Tobago, No 2651 of 1985 (unreported).

97 (1987) High Court, Trinidad and Tobago, No 89 of 1983 (unreported).

98 (1995) Court of Appeal, Trinidad and Tobago, Civ App No 5 of 1989 (unreported).

99 *Per* Hamel-Smith JA. See *Campbell v HV Holdings Ltd* (1998) High Court, Trinidad and Tobago, No S 951 of 1995 (unreported).

A statutory tenant has the right to assign or sublet with the consent of the landlord, which is not to be unreasonably withheld. Under s 10, a tenant who wishes to assign or sublet must serve on the landlord an application in writing for consent. Within one month of receipt of the application, the landlord must serve the tenant with a notice in writing, either consenting or refusing and, in the case of a refusal, the landlord must give his reasons for such refusal. In the absence of any notice by the landlord, he is deemed to have consented.

LICENCES

A licence is essentially a permission given by the owner or occupier of land (the 'licensor') to another person (the 'licensee') to enter upon the land for some purpose, for example, to lodge in a room, to view a film or to swim in a pool: acts which might otherwise amount to a trespass.

Until recently, a licence was considered to be, at most, a mere contractual arrangement between two persons, subject to the usual privity rule; but in the last 25 or so years, some licences have come to be regarded almost as proprietary interests in land, which are binding not only on the licensor, but also on third parties. This is particularly the case with licences arising by estoppel, where a party has no recognised legal or equitable interest in the land, but it would be inequitable in the particular circumstances for him to be denied a right to occupy. This is an area of the law which is still in the process of development, and it may be that a new right *in alieno solo* is emerging.

TYPES OF LICENCE

There are four generally accepted categories of licence:

(a) bare licence;

(b) licence coupled with an interest;

(c) contractual licence;

(d) estoppel licence.

Bare licence

A bare licence is one granted otherwise than for valuable consideration. It amounts to a mere permission to enter upon the licensor's land, for example, an invitation to dinner, or to play a game of tennis. Such licences may also be implied; for instance, a postman has an implied licence to enter premises in order to deliver mail, and it has been suggested that, in the absence of a locked gate, the occupier of a dwelling house gives an implied licence to any member of the public to pass through his garden or yard and up to his front door in order to communicate with the occupier;[1] also, a commercial organisation

1 *Robson v Hallett* [1967] 2 QB 939.

may be taken to give implied licences to persons who enter in good faith in order to do business or acquire information.[2] A bare licence can be withdrawn at any time by the licensor without notice, but the licensee must be given a reasonable time to leave. What is a reasonable time will depend on the circumstances.[3]

Licence coupled with an interest

The prime example of this type of licence is where a person who has been granted a *profit à prendre*, such as a right to take growing timber or game from the land, acquires a licence to enter the land in order to enjoy the right. Such a licence is not effective at law unless the profit has been formally granted by deed.[4] Being incidental to the enjoyment of an interest in land, a licence coupled with an interest is irrevocable[5] and binding on third parties.

Contractual licence

A contractual licence is one granted for valuable consideration. It may be 'short term', for example, where a person buys a ticket for a cinema, or for a football or cricket match,[6] or for temporary car parking;[7] it may be 'medium term', an example of which would be annual membership of a golf or tennis club; or 'long term', as in the case of the lodger who is given the right to occupy a dwelling house for a period, such right not amounting to a lease or tenancy.

Revocability of contractual licence

At common law, a licence other than one coupled with a grant or interest is revocable at any time by the licensor, whether the licence is gratuitous or contractual. Thus, in *Wood v Leadbitter*,[8] where Wood had bought a ticket to view horse racing and was forcibly ejected from the racecourse in breach of the contract, it was held that Leadbitter, the licensor, was entitled to revoke Wood's licence at any time and, once he did so, Wood became a trespasser

2 See *Davis v Lisle* [1936] 2 KB 434; *Great Central Railway Co v Bates* [1921] 3 KB 578.

3 *Robson v Hallett* [1967] 2 QB 939.

4 *Wood v Leadbitter* [1843–60] All ER Rep 190.

5 *Ibid.*

6 See, eg, *Winter Garden Theatre (London) Ltd v Millennium Productions Ltd* [1947] 2 All ER 331; *Hurst v Picture Theatres Ltd* [1915] 1 KB 1, where the court somewhat misleadingly categorised the licence as one coupled with an interest; *Mayfield Holdings Ltd v Moana Reef Ltd* [1973] 1 NZLR 309.

7 *Ashby v Tolhurst* [1937] 2 KB 242, p 249.

8 [1843–60] All ER Rep 190.

who could be lawfully ejected with reasonable force. Wood's argument that he had an irrevocable licence to enter and remain in the racecourse enclosure during the whole period of the race meeting was rejected. Accordingly, Wood could not sue Leadbitter for assault, and his only remedy was for damages for breach of contract, which would be nominal.

However, equity may come to the aid of the licensee in that, where a contractual licence purports to confer a right to enter and remain on land for a particular purpose or for a specified period, the court may imply a negative contractual term to the effect that the licensor will not revoke the licence before the purpose or period has been completed. Further, a court of equity may grant an injunction to restrain the licensor from revoking the licence in breach of the contractual term[9] and, where appropriate, may compel the licensor to carry out the bargain by means of a decree of specific performance.[10] Of course, in the case of very short term licences such as that in *Wood v Leadbitter*, the award of an injunction or specific performance would be impracticable, and so the licensee's only remedy would be damages. But, where there is a long or medium term contractual licence, which, on a proper construction of the contract, is irrevocable, then its revocation may be prevented by injunction and/or specific performance. As Lord Denning MR explained:[11]

> Since *Winter Garden Theatre (London) Ltd v Millennium Productions Ltd*,[12] it is clear that once a man has entered under his contract of licence, he cannot be turned out. An injunction can be obtained against the licensor to prevent his being turned out. On principle, it is the same if it happens before he enters. If he has a contractual right to enter, and the licensor refuses to let him come in, then he can come to court and in a proper case get an order for specific performance to allow him to come in.

The concept of the contractual licence has been applied with a degree of flexibility in the family home context where, in order to do justice to 'deserted' cohabitees, the courts have been willing to imply contractual licences in situations where there was little evidence of any contractual arrangement between the parties. In Lord Denning's words, the court may 'imply a contract by [the licensor] ... or, if need be, impose the equivalent of a contract by him'.[13] An example is *Chandler v Kerly*.[14] Here, Chandler and Mrs Kerly, who was separated from her husband, formed a relationship. Chandler later purchased the matrimonial home of Mrs Kerly and her husband and moved in with Mrs Kerly and her two children. However, Chandler ended the

9 *Winter Garden Theatre (London) Ltd v Millennium Productions Ltd* [1947] 2 All ER 331.

10 *Verrall v Great Yarmouth Borough* [1980] 1 All ER 839.

11 *Ibid*, p 844.

12 [1947] 2 All ER 331.

13 *Tanner v Tanner* [1975] 3 All ER 776, p 780.

14 [1978] 2 All ER 942.

relationship and sought possession of the house. It was held that Mrs Kerly had a contractual licence terminable by reasonable notice, which, in the circumstances, was taken to be 12 months. Another example is *Tanner v Tanner*,[15] which concerned an unmarried couple with children. The father had purchased a house for the mother and children to live in, and the mother had given up Rent Act protected accommodation to move into the house. The mother was held to have no proprietary interest in the house, but she was entitled to a contractual licence to live in the property which the father could not revoke until the children were no longer of school age.

In this context, the contractual licence is used as a flexible device in order to achieve an equitable result. Accordingly, there are no rigid rules or principles as to when a court will and when it will not find a contractual licence in the family home situation. It appears rather that the courts first decide what would be a desirable result and then work backwards, utilising whatever legal concept seems best to bring about the result; whether contractual licence, estoppel licence, or resulting or constructive trust. For this reason, it will be found that some cases decided on the basis of a contractual licence may seem to fit more neatly into the category of estoppel licences, or vice versa; and in others, it may be extremely difficult to determine, from legal reasoning, into which category the case falls.

Contractual licences and third parties

Notwithstanding the enhanced status of the contractual licence as against the licensor brought about by the use of equitable remedies, it seems that a contractual licence remains incapable of binding third parties, even with notice. The traditional view is that a contractual licence binds only the parties to it, and does not confer any proprietary interest in land capable of running with the land. One of the leading cases is *King v David Allen and Sons (Billposting) Ltd*.[16] There, the licensor gave to the licensee the exclusive permission to affix advertisements to the walls of a cinema. Subsequently, the licensor granted a lease of the cinema to a third party, without any express mention of the licence. The lessee refused to allow the licensee to continue affixing the advertisements and the licensee sued the licensor for breach of contract. The licensor would be liable for damages for breach if the lease had the effect of depriving the licensee of his right to affix the advertisements; in other words, if the licence were not binding on the lessee. The House of Lords held that the licence was not binding and, therefore, the action for damages succeeded.

15 [1975] 3 All ER 776.

16 [1916] 2 AC 54.

Cases such as *King v David Allen and Sons (Billposting) Ltd*[17] had clearly established that a contractual licence would not be binding on third parties, with or without notice, but two cases, in both of which Lord Denning MR gave the leading judgment, suggest that it could be so binding. The first of these was *Errington v Errington.*[18] Here, a father purchased a house in his own name subject to a mortgage. Wishing to provide a home for his son, who had recently married, he agreed that his son and daughter-in-law could occupy the house and that, provided they paid all monthly mortgage instalments, he would convey the legal estate to them. They paid the instalments as they became due, but the payments were not completed when, nine years later, the father died, having devised the house to his widow. Shortly after the father's death, the couple separated; the son went to live elsewhere, and the daughter-in-law remained in occupation and continued to pay the mortgage instalments. The widow brought an action for possession, but her action was dismissed by the Court of Appeal on the ground that the son and daughter-in-law were contractual licensees. The promise of the house in return for paying the mortgage instalments could not be revoked, and this 'licence coupled with an equity' was binding on the widow.

The reasoning in *Errington* does not necessarily lead to the conclusion that a contractual licence can bind third parties, as the decision in that case would seem to be better explained on the ground of estoppel. Moreover, in *National Provincial Bank Ltd v Ainsworth,*[19] the House of Lords was reluctant to regard a contractual licensee as having more than a personal right, holding that such a right could not be converted into an equitable interest binding on third parties merely because the licensor could be restrained from revoking the licence.

The other case in which a contractual licence was held to bind a third party is *Binions v Evans.*[20] Mrs Evans had been allowed by the trustees of the estate, for which her late husband had worked, to reside rent free in a cottage on the estate for the rest of her life. This licence was part of a written agreement which imposed on Mrs Evans an obligation to keep the interior of the cottage in repair and to maintain the garden. Subsequently, the trustees sold and conveyed the cottage to Binions expressly subject to the agreement, and Binions paid a reduced price because of this. In an action by Binions for possession of the cottage, the Court of Appeal held that Mrs Evans was protected. Megaw and Stephenson LJJ found for Mrs Evans on the ground that she was a tenant for life under the Settled Land Act 1925. Lord Denning MR, on the other hand, held that Binions was bound by Mrs Evans' contractual licence because, in the first place, Binions had purchased the cottage expressly subject to Mrs Evans' rights and could not ignore them, and,

17 See, also, *Clore v Theatrical Properties Ltd* [1936] 3 All ER 483.

18 [1952] 1 All ER 149.

19 [1965] 2 All ER 472.

20 [1972] 2 All ER 70.

secondly, because the licence gave rise to a constructive trust which bound Binions to allow Mrs Evans to live in the cottage for the rest of her life.

It is clear that neither *Errington* nor *Binions* is authority for any general principle that contractual licences are binding on third parties, for both decisions can be supported only on their special facts. Furthermore, in the later case of *Ashburn Anstalt v Arnold*,[21] the Court of Appeal held, *obiter*, that, where land was conveyed to a purchaser expressly 'subject to' a contractual licence, the licence was not a proprietary interest capable of binding third parties. Fox LJ said:[22]

> The far-reaching statement of principle in *Errington* was not supported by authority, not necessary for the decision of the case, and *per incuriam* in the sense that it was made without reference to authorities which, if they would not have compelled, would surely have persuaded the court to adopt a different *ratio*. Of course, the law must be free to develop. But as a response to problems which had arisen, the *Errington* rule (without more) was neither practically necessary nor theoretically convincing. By contrast, the finding on appropriate facts of a constructive trust may well be regarded as a beneficial adaptation of old rules to new situations ... The court will not impose a constructive trust unless it is satisfied that the conscience of the estate owner is affected ... The words 'subject' will, of course, impose notice. But notice is not enough to impose on somebody an obligation to give effect to a contract into which he did not enter.

Licence protected by estoppel

The doctrine of proprietary estoppel prevents the revocation of a right affecting land which one party has been led by the other to believe to be permanent. The doctrine is founded on the wider equitable principle against unconscionability, and its effect is to prevent a person from enforcing his strict legal rights when it would be inequitable for him to do so in the light of the parties' conduct and the dealings which have taken place between them. Thus, where X, the owner of land, allows Y to expend money on that land or otherwise act to his detriment under an expectation, created or encouraged by X, that Y will be able to remain on the land or acquire an interest in it, equity will step in and ensure that Y's expectations will not be defeated.

The estoppel doctrine is inextricably bound up with the law of licences in two respects. First, in many of the cases, the owner of the land has given a person a licence to do something on the land, such as a licence to build a house on the land, or to exercise a right of way across it. Such licence may be protected by estoppel if the requirements of the doctrine, such as an assurance by the licensor and detrimental reliance by the licensee, are present. Secondly,

21 [1988] 2 All ER 147.

22 *Ibid*, p 164.

in order to 'satisfy the equity' which may have arisen in favour of the person who has relied on the owner's assurance, the court may grant that person an irrevocable licence to occupy the land.

We may now examine the three classes of cases to which the doctrine of proprietary estoppel may apply:

(a) cases of incomplete gifts;

(b) cases where a reasonable expectation of a right to remain in occupation of land was created; and

(c) cases of unilateral mistake.

Incomplete gifts

An estoppel may arise where X intends to make a gift of land to Y, but the gift is incomplete because the appropriate formalities have not been complied with. A well known example is *Dillwyn v Llewelyn*,[23] where a father allowed his son to have possession of his (the father's) land and signed an informal memorandum purporting to transfer the fee simple to the son. The latter spent a large sum on building a house for himself on the land. After the father's death, the son claimed to be entitled to the fee simple. It was held that the father's representations, together with the son's expenditure, entitled the son to call for the imperfect gift to be perfected (as an exception to the maxim that 'equity will not perfect an imperfect gift') by conveyance of the fee simple to him.

An analogous situation is where the owner of land expressly promises that he will make a gift of the land at some time in the future and the promisee incurs expenditure in reliance on the promise. Two Commonwealth Caribbean cases neatly illustrate the application of proprietary estoppel in this context. In the Barbadian case of *Sealy v Sealy*,[24] a father had invited and encouraged his son to erect a dwelling house on half an acre of the father's land, promising that, when the building reached a certain stage, he would convey the land to the son by way of gift. The father failed to carry out his promise. King J (Ag) held that an equity had arisen in the son's favour, which would be satisfied by ordering the father to convey the plot to the son. He said:

> Lord Westbury in *Dillwyn v Llewellyn* [said]:[25]
>
> > If A puts B in possession of a piece of land, and tells him, 'I give it to you that you may build a house on it', and B, on the strength of that promise, with the knowledge of A, expends a large sum of money in building a house accordingly, I cannot doubt that the donee acquires a right from the

23 [1861–73] All ER Rep 384.

24 (1990) High Court, Barbados, No 1492 of 1987 (unreported).

25 [1861–73] All ER Rep 384, p 387.

> > subsequent transaction to call on the donor to perform the contract and complete the imperfect donation which was made.
>
> It is clear from the above that, once an equitable right has arisen, the donee may call on the donor to complete his promise. In other words, the plaintiff in this instant case may sue for the promise to be made good and this court has jurisdiction to hear and determine the matter.

After stating that ss 47 and 60 of the Property Act, Cap 236, had no application to the case, King J (Ag) continued:

> The defendant not only invited and encouraged the plaintiff, but worked on building the house ... The defendant failed to carry out his promise after falling out with the plaintiff. What relief is the plaintiff entitled to? The defendant had offered to execute a declaration at the plaintiff's expense that he holds 809.70 square metres of land on trust for the plaintiff. The plaintiff had made his final plea for a conveyance of the fee simple in half an acre of land.
>
> In *Chalmers v Pardoe*, Sir Terence Donovan said:[26]
>
> > There can be no doubt on the authorities that where an owner of land has invited or expressly encouraged another to expend money on part of his land on the faith of an assurance or promise that part of the land will be made over to the person so expending his money, a court of equity will prima facie require the owner by appropriate conveyance to fulfil his obligation; and when, for example for reasons of title, no such conveyance can effectively be made, a court of equity may declare that the person who has expended the money is entitled to an equitable charge or lien for the amount expended.
>
> I have given careful consideration to all of the cited authorities and have chosen to be guided by the above, together with *Pascoe v Turner*,[27] in which a considerable number of cases were commented on, and approaches to be adopted in these matters recommended. All those authorities point to the conclusion that this plaintiff is entitled to a conveyance of the fee simple by the defendant.

Another example is the Trinidadian case of *Khan v Khan*.[28] Here, the plaintiffs were the son and daughter-in-law of the defendant. The plaintiffs purchased a parcel of land on which they had intended to build their matrimonial home, but the defendant persuaded them instead to come and live with him in his house, which they did, having been assured by the defendant that he would leave his share of the house to them by his will. The plaintiffs subsequently spent their money on repairing and renovating the defendant's house and building a garage, with the encouragement of the defendant. Later, a dispute arose between the parties and the defendant ordered the plaintiffs to leave the

26 [1963] 3 All ER 552, p 555.

27 [1979] 2 All ER 945.

28 (1994) High Court, Trinidad and Tobago, No 1022 of 1993 (unreported). See, also, *Bhopa v Bhopa* (1998) High Court, Trinidad and Tobago, No 1101 of 1997 (unreported); *Sooknanan v Sooknanan* (1995) High Court, Trinidad and Tobago, No S 622 of 1994 (unreported).

house. Shah J held that the plaintiffs had acquired an equity in the defendant's house by estoppel, which would be satisfied by the court's ordering the defendant to convey his share in the house to himself for life, and after his death to the plaintiffs in fee simple.

Reasonable expectation of acquisition of a right

Proprietary estoppel may arise in cases where there is no clear express promise of a gift by X, but where X and Y have nevertheless consistently dealt with one another in such a way as to cause Y to believe that he would acquire a right to remain in possession of X's land. In a dissenting judgment in *Ramsden v Dyson*,[29] Lord Kingsdown said:

> If a man, under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, *under an expectation, created or encouraged by the landlord*, that he shall have a certain interest, takes possession of such land, with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, a court of equity will compel the landlord to give effect to such promise or expectation.

This type of case thus resembles the cases of incomplete gifts, but the main difference is that, in this class of case, there is no attempted gift or express promise to give in the future, only conduct which causes an expectation in the mind of the person expending his money that the expenditure will be justified. In order to satisfy the equity in this type of case, the court may grant an irrevocable licence to occupy the land. The leading example is *Inwards v Baker*,[30] where a father allowed his son to build a house on his (the father's) land. The son was under the impression that he would be permitted to live there as long as he wished. When the father died, the trustees of the father's will allowed the son to remain in occupation for 12 years, after which they sought possession. Possession was refused by the Court of Appeal on the ground that the son had acquired, as against his father, an irrevocable licence arising by proprietary estoppel. The licence gave the son the right to remain in occupation for the rest of his life, and the trustees were bound by the licence because they had acquiesced in the son's continued occupation after they had notice of it. Lord Denning MR said:[31]

> If the owner of land requests another, or indeed allows another, to expend money on the land under an expectation created or encouraged by the (owner of the land) that he will be able to remain there, that raises an equity in the licensee such as to entitle him to stay.

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29 (1866) LR 1 HL 129, p 170.

30 [1965] 1 All ER 446.

31 *Ibid*, p 448.

Two Commonwealth Caribbean cases which illustrate the application of the rule are *Clarke v Kellarie* and *Denson v Bush*. In *Clarke*,[32] C acquired a tenancy of leasehold premise occupied by K, her brother-in-law, and his family. C assured K that he and his family could continue to occupy the premises until K's death. K thereafter decided to erect a building on the land and, although C did not give K any express permission to build, she regularly visited the site and raised no objection to the construction work. After the building had been completed, C acquired a long lease of the property and shortly afterwards sought to dispossess K. According to the evidence, K was illiterate and 'of very limited intelligence', whereas C was 'intelligent, alert and keenly alive to her interests'. Rees J held that K was a licensee. An equity by estoppel had been created by C's conduct which would be satisfied by an order that K be entitled to occupy the land as licensee for so long as C was a lessee thereof, and that K should pay to C an amount equivalent to the rent reserved under the lease for the specified period.

In *Denson v Bush*,[33] R, the owner of a house, lived abroad. The defendants, who were close relatives of R, were encouraged by other members of the family to occupy the property, and were led to believe that they could remain in occupation for the rest of their lives. The property was dilapidated, and the defendants spent their money in carrying out repairs, with the acquiescence of R. No rent was paid by the defendants, nor did R spend any money on repairs to the property. R subsequently transferred the property to his son, the plaintiff, who had full knowledge of the position of the defendants. The plaintiff later gave the defendants notice to quit. Summerfield CJ held that, since the defendants had been encouraged to believe that they would be allowed to remain in occupation indefinitely and had spent money on repairs to the property in reliance on that belief, an equity had arisen in their favour, which would be satisfied by giving them a licence to occupy the house for the rest of their lives. The learned Chief Justice said:[34]

> The case of *Inwards v Baker* has much in common with this one. The only difference here is that the expectation was induced or encouraged by the apparent agent of the owner, but that does not affect the principle. Where the circumstances point to the fact that a person giving permission to occupy premises, and giving assurances in relation to the occupancy, is acting as the agent of the owner and the person receiving those assurances has no reason to doubt that he is the agent; and the owner, with the knowledge that occupation has been permitted on his behalf, does nothing to disabuse the resultant possessor of any assurances given on his behalf before the possessor acts on them to his detriment then, in my view, the principles in *Inwards v Baker* apply as if those assurances had been given by the owner himself. Certainly, in this case, the owner's acquiescence in the state of affairs which existed over 16

32 (1970) 16 WIR 401, High Court, Trinidad and Tobago.

33 [1980–83] CILR 41, Grand Court, Cayman Islands.

34 *Ibid*, p 46. See *Flores v Wright* [1985] Bz LR 385, Supreme Court, Belize.

> years, with full knowledge that the house would have to be repaired and maintained by the defendants, encouraged the expectation which his apparent agents had given to the defendants.
>
> One must remember that this was a family affair, with one member of the family dealing with another and none would question the authority of the other to do what he or she purported to do. It was also at a time when the owner, Robert Chesley Bush, had been away from the island continuously for about 14 years with no apparent prospect of an early return if, indeed, there was any prospect at all. Although the money was raised by the second defendant, the defendants are husband and wife and there can be no doubt that the repairs and maintenance were a joint enterprise, the first defendant doing a lot of the work himself.
>
> I am of the opinion that the principle in *Inwards v Baker* applies to this case and that the defendants have a licence coupled with an equity in the property and it is accordingly so declared.
>
> The plaintiff was not a *bona fide* purchaser for value without notice of that licence coupled with an equity so as to destroy the defendant's equitable rights in the property.
>
> There remains the question of the manner in which the equity should be satisfied. The nature of the equity was that it gave each defendant the right to remain in occupation of the property for the remainder of his or her life. There is no reason why the protection afforded by this court should not reflect the nature of the equity – as was done in the case of *Inwards v Baker*. The equity should therefore be satisfied by allowing either or both defendants to remain in occupation of the property for as long as either desires.

Unilateral mistake

The application of estoppel principles to cases of unilateral mistake was explained by Lord Cranworth in *Ramsden v Dyson*:[35]

> If a stranger begins to build on my land supposing it to be his own, and I, perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a court of equity will not allow me afterwards to assert my title to the land in which he had expended money on the supposition that the land was his own. It considers that, when I saw the mistake into which he had fallen, it was my duty to be active and to state my adverse title, and that it would be dishonest in me to remain wilfully passive on such an occasion in order afterwards to profit by the mistake which I might have prevented.

The requirements for a successful plea of estoppel under the *Ramsden v Dyson* rule were outlined by Fry J in *Willmott v Barber* (often referred to as 'the five *probanda*').[36] These may be summarised as follows, A being the true owner and B the person who has expended money:

35 (1866) LR 1 HL 129, p 140.

36 (1880) 15 Ch D 96, p 105.

(a) B must have been mistaken as to his legal rights; if he was aware that he was infringing the rights of another, he cannot resist the claims of that other;

(b) B must have expended some money or must have done some act on the faith of his mistaken belief; otherwise he will not suffer by A's subsequent assertion of his rights;

(c) A must have known of the existence of his own right which is inconsistent with the right claimed by B, since acquiescence is founded on conduct with knowledge of one's legal rights;

(d) A must have known of B's mistaken belief as to his rights; with such knowledge it is inequitable for him to remain silent and allow B to proceed on his mistake;

(e) A must have encouraged B in his expenditure of money or other act, either directly or by abstaining from asserting his legal rights.

The modern approach

Social and economic changes in the second half of the 20th century have given increased significance to the doctrine of proprietary estoppel, and the courts have moved away from applying restrictive criteria such as those in *Willmott v Barber*. According to Oliver J, in *Taylors Fashions Ltd v Liverpool Victoria Trustees Co Ltd*,[37] the courts should adopt a 'much broader approach' to the doctrine 'which is directed ... at ascertaining whether, in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which, knowingly or unknowingly, he has allowed or encouraged another to assume to his detriment'. It has now become accepted that a claimant will be able to establish an estoppel if he can prove (a) an assurance; (b) reliance; and (c) a detriment, in circumstances where it would be unconscionable to deny a remedy to the claimant.

Assurance

In order that an equity may arise by proprietary estoppel, it is essential that the claimant can show some assurance on the part of the person to be estopped amounting to 'a representation or expectation created by the landowner'.[38] Mere 'expenditure with consent' does not give rise to an estoppel, and 'one who voluntarily improves another's land without encouragement or promise of reward does so "entirely at his own risk"'.[39] In the well known *dictum* of Bowen LJ,[40] 'liabilities are not to be forced upon

37 [1982] 1 All ER 897, p 915.

38 *Savva v Costa* (1981) 131 NLJ 1114.

39 Gray, *Elements of Land Law*, 1987, London: Butterworths, p 397.

40 *Falcke v Scottish Imperial Insurance Co* (1886) 34 Ch D 234, p 248.

people behind their backs, any more than you can confer a benefit upon a man against his will'.

There must be an express or implied assurance made by the landowner or his employee or agent which led the claimant reasonably to believe that he had or would acquire some rights over the land in question. Such assurance was lacking in the Jamaican case of *Lewis v McLean*,[41] where a tenant, with the permission of the landlord, erected on the rented land a two bedroom dwelling house, a licensed bar and a hardware and lumber store. When the landlord gave the tenant notice to quit, the tenant claimed for reimbursement of his expenditure, basing his claim on proprietary estoppel. The Jamaican Court of Appeal held that the tenant's claim failed, since 'there never was any promise or assurance of the land to the [tenant] on the faith of which he erected the building'. Campbell JA (Ag) distinguished the Barbadian case of *McCollin v Carter*,[42] where Carter entered into possession of McCollin's land as a licensee. McCollin had promised to make a gift of the land to Carter's daughter. McCollin, knowing that there was no enforceable agreement to transfer the land to Carter, acquiesced in Carter's carrying out substantial improvements on the land, and Douglas CJ accordingly held that Carter was entitled to compensation for his expenditure. In *Lewis v McLean* there was no such assurance and acquiescence.

Reliance

For an estoppel to arise, it is essential that the claimant should have relied on the assurance, in the sense that he was induced to act in a certain way because of the assurance given to him. Since a claimant may in practice have difficulty in proving reliance on his part, the court may infer reliance in cases where such reliance may plausibly explain the claimant's conduct; as, for example, in *Greasely v Cooke*,[43] where it was held that, if clear assurances have been made, and a detriment has been suffered, the court may presume that there has been reliance. The effect of cases such as *Greasely v Cooke* is to shift the burden of proof on to the defendant to show that there has been no reliance. He may discharge this burden by showing that the claimant would have done the detrimental acts irrespective of any assurance given to him.

Detriment

The requirement that a claimant in proprietary estoppel must show he has suffered some detriment in relying on the defendant's assurance is a manifestation of the principle that equity does not assist volunteers, that is, persons who have given no consideration in the form of a benefit or a

41 (1982) Court of Appeal, Jamaica, Civ App No 40 of 1981 (unreported).

42 (1974) 26 WIR 1, High Court, Barbados.

43 [1980] 3 All ER 710 (see below, p 114).

detriment in return for a promise. A detriment in this context may take any form, so long as it is not minimal or trivial.[44] The most common example of a sufficient detriment is expenditure of money in building on the land, but it is not necessary that the detriment be related to the land at all. For instance, it has been held to be sufficient that the claimant has given up employment or property in another place in order to come and live with the defendant.[45] Another example is *Greasely v Cooke*.[46] There, C, in 1938, then aged 16, came to live as a maid in a house occupied by a widower, his three sons K, H and O, and his mentally retarded daughter. In 1946, C and K started to cohabit as man and wife and, from 1948 onwards, C received no wages but continued to manage the house and nursed the daughter until the latter's death in 1975. She had been given vague assurances by H and K that she would be able to live in the house for as long as she wished, but after K's death, H and O's daughters, in whom the house had vested, sought possession. It was held (a) that the statements of K and H were sufficient to amount to assurances for the purposes of proprietary estoppel; (b) that it could be assumed that C had acted on the faith of those assurances, and it was for the plaintiffs to prove otherwise; and (c) that the expenditure of money is not a necessary element of detriment: it is sufficient that the party to whom the assurance was made has acted on the faith of the assurance in circumstances where it would be inequitable for the parties making the assurance to go back on it.

A somewhat similar case which came before the Jamaican Court of Appeal is *Trenchfield v Leslie*.[47] Here, L lived in her uncle's house for three years, physically taking care of him without payment, and spending her money on repairs to the house. There was some evidence that the uncle had promised to leave her the house by his will, but no concluded agreement to that effect.[48] After the uncle's death, T, an executrix of his will and devisee of the house, sought possession of the house. The magistrate refused to grant possession to T and the Court of Appeal dismissed T's appeal. In the words of Patterson JA (Ag):

> A person may obtain an interest in land if he is led by the owner thereof to believe that he will be granted such an interest and, as a result, he acts to his detriment ... The respondent's occupation was that of licensee ... the respondent's licence may aptly be described as a 'licence coupled with an equity'.

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44 Dixon, M, *Principles of Land Law*, 3rd edn, 1999, London: Cavendish Publishing, p 305.

45 *Dodsworth v Dodsworth* (1973) 228 EG 1115.

46 [1980] 3 All ER 710.

47 (1994) Court of Appeal, Jamaica, Civ App No 20 of 1994 (unreported).

48 Patterson JA (Ag) pointed out that it was common in Jamaica for persons to enter into valid contracts whereby someone would care for a person in his sickness or old age in return for a devise of land in the will of that person, but there was no such valid contract in this case.

Satisfying the claimant's equity

We have seen that, in Lord Denning's words, where a claimant has acquired a right by estoppel, 'it is for the court in each case to decide in what way the equity can be satisfied'.[49] Thus, it is open to the court to award the claimant any remedy it considers appropriate. He may be awarded the fee simple in the land;[50] an easement over the land;[51] a right under a testamentary disposition;[52] a charge or lien over the land;[53] a long lease;[54] or a licence to occupy for life[55] or for a shorter period.[56]

A Caribbean case which is illustrative of the problem of how to satisfy a claimant's equity is *Seymour v Ebanks*.[57] In this case, S, in 1958, went into possession of E's land on which, with E's consent, he built a cinema at a cost of £4,500. In 1977, after operating the cinema for almost 20 years, S was dispossessed of the land by an order of the court, and the land was later sold to a third party. S claimed that he had a licence coupled with an equity, and the question arose as to how that equity should be satisfied. The lower court awarded S compensation of £3,000, being the value of the building at the time of dispossession. It was held, on appeal, that S had occupied the land by licence, and the fact that E had acquiesced in S's expenditure of money in reclaiming the land and building a cinema thereon raised an equity in S's favour. It was this licence coupled with an equity that was lost when S was dispossessed of the land. Accordingly, S was entitled to be compensated by means of an equitable charge or lien on the property for the amount of his expenditure, which was £4,500, and not merely for the value of the building.

Rowe JA explained the decision thus:[58]

> The learned Chief Justice in the lower court asked the question as to how the equity should be satisfied and the answer he gave was that, as the appellant had had the use of the premises for 20 years before he was dispossessed, in all the circumstances the proper way to satisfy the equity was by compensation, which should be the value of the building at the time of the dispossession ...

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49 *Ives (ER) Investments Ltd v High* [1967] 1 All ER 504, p 507.

50 *Pascoe v Turner* [1979] 2 All ER 945; *Sealy v Sealy* (1990) High Court, Barbados, No 1492 of 1987 (unreported); *Khan v Khan* (1994) High Court, Trinidad and Tobago, No 1022 of 1993 (unreported).

51 *Crabb v Arun DC* [1975] 3 All ER 865; *Ives (ER) Investments Ltd v High* [1967] 1 All ER 504; *Sawyer v Butler* (1991) Supreme Court, The Bahamas, No 356 of 1990 (unreported).

52 *Re Basham* [1987] 1 All ER 405.

53 *Unity Joint Stock Mutual Banking Association v King* (1858) 53 ER 563; *Chalmers v Pardoe* [1963] 3 All ER 552; *Seymour v Ebanks* [1980–83] CILR 252, Court of Appeal, Cayman Islands.

54 *Griffiths v Williams* (1977) 248 EG 947.

55 *Inwards v Baker* [1965] 1 All ER 446; *Williams v Staite* [1978] 2 All ER 928; *Matharu v Matharu* (1994) 68 P & CR 93.

56 *Dodsworth v Dodsworth* (1973) 228 EG 1115.

57 [1980–83] CILR 252, Court of Appeal, Cayman Islands.

58 *Ibid*, p 259.

> In my opinion, the equity which the appellant lost was the equity to continue to operate his cinema for his own benefit. It can be inferred from the facts found by the learned Chief Justice that the appellant has in contemplation a tenure for an indefinite period at his option. The appellant clearly did not wish to give up his cinema operations, nor did he wish to confer a benefit upon the respondent to the extent of his original expenditure on the respondent's land. My first inclination, therefore, is that the most favourable way to arrive at the value and extent of the appellant's equity is to take evidence to show what would be an appropriate period for an indefinite personal licence to operate a cinema. Problems might, however, arise as to whether any period between 20 and 40 years, having regard to the age of the appellant at the time when the equity arose, could be regarded as the optimum period and consequently speculation might therefore replace sound reasoning.
>
> I have therefore considered the alternative course proposed by White JA, which is that in the circumstances of the case, where the property has been sold to a third party, a court of equity can declare that a person who has expended his money on another's land is entitled to an equitable charge or lien for the amount so expended. What the appellant expended on the respondent's land is the known and accepted sum of £4,500. The appellant had reclaimed the respondent's land and had rendered it suitable for building purposes. He had built a cinema thereon, which structure was still in existence at the time of his dispossession. The appellant should surely have an equity equivalent to his complete outlay.

Estoppel licences and third parties

It is well established that a licence protected by estoppel is binding on third parties with notice of its existence.[59] Thus, for example, in *Inwards v Baker*,[60] where, as we have seen, a father encouraged his son to build a house on the father's land in the expectation that he would be allowed to live there indefinitely, the court refused to permit the trustees of the father's will to evict the son, who was held to be entitled to a licence to occupy the land for as long as he wished. And in *Ives (ER) Investments Ltd v High*,[61] where X had informally granted his neighbour, Y, a right of way across his land, and Y had incurred expenditure in building a garage so sited that it could only be approached over X's land, and X acquiesced in the building, it was held that purchasers of X's land with notice of Y's right were not entitled to revoke it. It seems, however, that such a right will be defeated by a *bona fide* purchaser of the legal estate without notice of the right.

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59 Though in *Haynes v Minors* (1972) 2 OECSLR 235, pp 238, 239, Cecil Lewis JA, in the Court of Appeal of St Vincent, took the view that an estoppel licence, as a mere equity, was incapable of binding successors in title, even with notice.

60 [1965] 1 All ER 446.

61 [1967] 1 All ER 504.

CO-OWNERSHIP

Where two or more persons become entitled to possession of land simultaneously, they are said to hold concurrent interests in the land, or to be co-owners; for example, where T by his will leaves a plot of land to his children, X, Y and Z, in fee simple, the children will be co-owners of the land.

There are two types of co-ownership in the modern law:

(a) joint tenancy; and

(b) tenancy in common.

JOINT TENANCY

A joint tenancy occurs where land is conveyed or devised to two or more persons without 'words of severance', that is, words which indicate that each person is to take a separate share; for example, where Blackacre is devised 'to Bill and Ben in fee simple'.

The essence of a joint tenancy is that there is one title and the joint tenants are collectively regarded as a single owner, although, as between themselves, they have separate rights, such as the right to sever the joint tenancy. The other important characteristic of the joint tenancy is the right of survivorship (*ius accrescendi*) whereby, on the death of one joint tenant, his interest automatically accrues to the surviving joint tenants, so that he has no interest to transfer under his will or intestacy. He may avoid this result, however, by severing his joint tenancy during his lifetime and converting himself into a tenant in common with a distinct share which can pass under his will or intestacy.

As Robinson P explained in the Jamaican Court of Appeal, in *Panton v Roulstone*:[1]

> As against third parties, [joint tenants] are in the position of a single owner, but as against each other, each has equal rights. Each has an equal interest in the land. And the interest of each is severable, should he care to do so in his lifetime. It is only if he dies without having in his lifetime severed that interest, that his interest is extinguished and accrues to the survivor.

1 (1976) 24 WIR 462, p 469. The right of survivorship applies equally to joint tenancies in Guyana: *Singh v Mortimer* (1966) 10 WIR 65, p 75, *per* Stoby C.

Unity between joint tenants

For a joint tenancy to exist, the 'four unities' must be present. They are: unity of possession; unity of interest; unity of title; and unity of time.

Unity of possession

This means that each joint tenant is entitled to physical possession of the whole of the land. No tenant can point to any part of the land as his own to the exclusion of the others, and each is entitled to enjoy the fruits of possession, such as rents and profits derived from the land. Unity of possession applies equally to tenancy in common.[2]

Unity of interest

Each joint tenant's interest in the property must be of the same extent, nature and duration, since it would be inconsistent with the nature of a joint tenancy for the tenants to have different interests. Thus, for instance, both must be freeholders or both leaseholders, and both must be entitled in possession or both in remainder.

Unity of title

This means that the joint tenants must have derived their titles from the same document, for instance, from the same will or conveyance; or where they claim title by adverse possession, they must have taken possession simultaneously.

Unity of time

The interest of each tenant must vest at the same time. Where there is unity of title, there will usually be unity of time also, but not necessarily so. For instance, if land is conveyed 'to X for life, remainder to the heirs of Y and Z', and Y and Z die at different times during X's lifetime, Y's and Z's heirs cannot take as joint tenants, since, although there is unity of title, there is no unity of time,[3] their interests having been acquired at different times.

2 *Bull v Bull* [1955] 1 All ER 253; *Forbes v Bonnick* (1968) 11 JLR 67, Court of Appeal, Jamaica.

3 Co Litt 188a.

TENANCY IN COMMON

Tenancy in common differs fundamentally from joint tenancy in that: (a) the only unity is the unity of possession; and (b) there is no right of survivorship. Tenants in common are said to hold 'in undivided shares'. This means that each tenant has a distinct fixed share in the property (for example, one-half, one-third, one-quarter), albeit that the land at present is undivided and treated as a single unit, which can be realised if and when the property is sold; and, since there is no *ius accrescendi*, a tenant in common may dispose of his share by will or it may pass on his intestacy.

A tenancy in common arises:

(a) where land is granted to two or more persons with words of severance (such as, 'in equal shares', 'equally', 'to be divided amongst', 'shares respectively');[4]

(b) where equity treats a joint tenancy at law as a tenancy in common;[5] and

(c) where a joint tenant severs his joint tenancy by alienation, acquisition of a greater interest, agreement or course of dealing.[6]

Law and equity

In Commonwealth Caribbean jurisdictions, apart from Belize, the pre-1926 co-ownership rules apply. Under these rules, both joint tenancies and tenancies in common can exist at law and in equity as legal estates and equitable interests respectively. The possibility of creating tenancies in common at law is extremely inconvenient for conveyancers, as the effect of the fragmentation of the legal estate between numerous tenants in common is that each individual title must be investigated before a good title can be transferred to a purchaser of the land. To avoid this problem, the 1925 legislation in England and Wales provided that tenancies in common of the legal estate could no longer exist. The legal title henceforth had to be held by trustees as joint tenants on trust for sale for the benefit of the beneficiaries, who may be either joint tenants or tenants in common of the beneficial (equitable) interest. This scheme of 'statutory trusts' has been adopted in Belize by ss 36–38 of the Law of Property Act, Cap 154.

4 *Christian v Mitchell-Lee* (1969) 13 WIR 302, Court of Appeal, West Indies Associated States.

5 See below, pp 120–22.

6 See below, pp 122–26.

Equitable presumption of tenancy in common

Whereas the common law favoured joint tenancies, equity has always leaned in favour of tenancies in common, as equity 'preferred the certainty and equality of a tenancy in common to the element of chance which the *ius accrescendi* of a joint tenancy introduced'.[7] Consequently, in the following four instances, equity presumes that a tenancy in common has been created.

Purchase money provided in unequal shares

Where two or more persons together purchase land, providing the purchase money in unequal shares, a tenancy in common of the property is presumed in equity, and the purchasers take shares proportionate to the amounts advanced by each.[8] Thus, for example, if X and Y purchase land for $100,000, with X providing $75,000 of the purchase money and Y $25,000, and take a conveyance to themselves jointly, on X's death Y will become entitled to the whole of the property at law, but in equity he will be deemed to be a trustee for X's personal representatives of a three-quarters share in the property and to take the remaining one-quarter share beneficially.[9] On the other hand, if X and Y had provided $50,000 each, on X's death Y would have become entitled to the whole property beneficially, both at law and in equity, for where purchase money is advanced equally, equity will presume that the parties intended the *ius accrescendi* to apply.

Loan on mortgage

Where two or more persons advance money, whether in equal or unequal shares, and take a mortgage of the land from the borrower to themselves jointly, they are joint tenants at law but are treated in equity as tenants in common, and the survivor is a trustee of the deceased mortgagee's share for the latter's personal representatives; for 'though they take a joint security, each means to lend his own and take back his own'.[10]

This rule is unaffected by the practice of inserting a 'joint account clause' in mortgages where two or more persons lend money. The effect of such a clause is that, on the death of one of the mortgagees, the receipt of the survivor shall be a sufficient discharge for the money, so that the mortgagor may safely repay the loan to the survivor, who can re-convey the land without the concurrence of the personal representatives of the deceased mortgagee.

7 Hayton, *Megarry's Manual of the Law of Real Property*, 6th edn, 1982, London: Stevens, p 304.

8 *Lake v Gibson* (1729) 21 ER 1052.

9 See *Gibson v Walton* (1992) 28 Barb LR 113, High Court, Barbados.

10 *Morley v Bird* (1798) 30 ER 1192, p 1193, *per* Arden MR.

The joint account clause is merely a conveyancing device which affects the position as between the mortgagees and the mortgagor; it does not affect the presumption of a tenancy in common as between the mortgagees *inter se*.[11]

Partnership assets

Where business partners purchase land as part of their partnership assets, they are presumed to do so as tenants in common, for *ius accrescendi inter mercatores locum non habet*[2] ('the right of survivorship has no place between merchants'). Although the legal estate may be held on a joint tenancy, in equity the surviving partners hold a deceased partner's share on trust for his estate. Thus, in *Lake v Craddock*,[13] where five persons joined in buying some waterlogged land with a view to its improvement by drainage, it was held that they must be presumed to have acquired the land as tenants in common, as the right of survivorship was incompatible with a commercial undertaking.

The presumption extends to any joint undertaking with a view to profit, even where there is no formal partnership agreement between the parties. In *Panton v Roulstone*,[14] two ladies had purchased six parcels of land, taking conveyances in their joint names. There was no evidence as to the extent of their respective contributions to the purchase price, but a majority of the Jamaican Court of Appeal inferred that the women were business associates and were therefore tenants in common of the beneficial interest in the land and, on the death of one, the property did not devolve on the survivor under the *ius accrescendi*. As Watkins JA (Ag) explained:[15]

> Where property is held by A and B in joint tenancy at law, but as tenants in common in equity, upon the prior death of A, B holds the bare legal title by right of survivorship but in trust for himself and the estate of A. Where property is held by A and B in joint tenancy at law and in equity, upon the prior death of A, B takes the property by right of survivorship and the property does not pass under the will or intestacy of A. The right of survivorship operates by law and not by virtue of the intention or pursuant to the will of any deceased co-owner. Any attempt to dispose by will of property in which the legal and beneficial interests subsist in joint tenancy is wholly ineffectual. Contrariwise, where property is held by two persons as joint tenants at law but as tenants in common in equity, the equitable interest of either passes on death either pursuant to his will or on intestacy, and not otherwise, and no mere declaration of intention of such a co-owner prior to death is effectual to achieve the desired disposition.

11 *Re Jackson* (1887) 34 Ch D 732.
12 Co Litt 182a.
13 (1732) 24 ER 1011.
14 (1976) 24 WIR 462.
15 *Ibid*, p 465.

Robinson P (dissenting) took the view that, on the evidence, the parties were not business partners, pointing out that:[16]

> ... it is when the joint tenants engage in trade or business such as the buying and selling of lands for profit, or the farming of lands acquired for the purpose, or the building of houses on lands acquired for the purpose and the selling of same for profit, or some trading or business activity other than the mere purchasing and accumulation of land, that equity will presume a tenancy in common of the beneficial interest.

In this case, since the parties had acquired the properties as joint tenants, and in the absence of any evidence that they had used the land in the way of trade or business, Robinson P was unable to agree that they held the beneficial interests as tenants in common.

Individual business purposes

The Privy Council has held in *Malayan Credit Ltd v Jack Chia-MPH Ltd*[17] that business tenants who had paid rent and service charges in agreed proportions were tenants in common. In the course of his judgment, Lord Brightman suggested that the cases in which joint tenants at law would be presumed to hold as tenants in common were not necessarily limited to cases of purchases in unequal shares, joint mortgagees and partners, and that there were 'other circumstances in which equity may infer that the beneficial interest is intended to be held by the grantees as tenants in common', such as 'where the grantees hold the premises for their several individual business purposes'.[18]

SEVERANCE OF JOINT TENANCY

It is always open to a joint tenant to avoid the consequences of the *ius accrescendi* by severing his joint tenancy and thereby converting it into a tenancy in common.[19] In the leading case of *Williams v Hensman*, Page Wood VC identified three types of circumstances which will amount to severance:[20]

(a) act of a joint tenant 'operating upon his own share';

(b) mutual agreement;

(c) course of dealing (mutual conduct).

16 (1976) 24 WIR 462, p 465.

17 [1986] 1 All ER 711.

18 *Ibid*, p 715.

19 But see *Mums Inc v Cayman Capital Trust* [1988–89] CILR 485.

20 (1861) 70 ER 862, p 867.

Act of joint tenant operating upon his own share

In order to bring about a severance, the act of the joint tenant must be of a final and irrevocable character, which effectively estops him from claiming any interest in the subject matter of the property.[21]

Alienation

Total or partial alienation of his interest by a joint tenant is the clearest type of act within this head. Where a joint tenant alienates his interest *inter vivos*, his joint tenancy is severed and the transferee takes as a tenant in common, since he has no unity of title with the other joint tenants. Such severance does not affect the other joint tenants, who remain joint tenants *inter se*. Thus, if X, Y and Z are joint tenants, and X sells his interest to P, P becomes a tenant in common as to one-third and Y and Z joint tenants of two-thirds. If Y then dies, Z will become entitled to two-thirds by the right of survivorship, and P and Z will be left as tenants in common of one-third and two-thirds respectively. Severance by alienation also occurs where a joint tenant mortgages his interest[22] or becomes bankrupt,[23] and, since equity regards that as done which ought to be done, a joint tenancy of an equitable interest will be severed by an enforceable contract to alienate the interest.[24]

In the Jamaican case of *Gamble v Hankle*,[25] the plaintiff and her husband had been registered as joint proprietors of certain land. After her husband's death, the plaintiff claimed to be solely entitled to the property by virtue of the *ius accrescendi*. The husband had, however, during his lifetime purported to convey the land to the defendant by a deed of gift. The question in issue was whether the deed of gift had effected a severance of the joint tenancy. Wolfe J held that it had, notwithstanding that the deed of gift was not in the form stipulated in the Registration of Titles Act. In Wolfe J's view, the deed of gift was an act which came within the ambit of the first of the three methods of severance mentioned by Page-Wood VC in *Williams v Hensman*.

Commencement of litigation

There is authority for the proposition that the formal commencement of litigation concerning a joint tenancy is 'an act operating on the share' of the

21 *Re Wilks* [1891] 3 Ch 59, p 61.

22 *York v Stone* (1709) 91 ER 146.

23 *Re Rushton (A Bankrupt)* [1972] Ch 197, p 203.

24 *Burgess v Rawnsley* [1975] 3 All ER 142.

25 (1990) 27 JLR 115.

joint tenant commencing the proceedings,[26] notwithstanding that the proceedings could always be abandoned or discontinued.

Mutual agreement

A specifically enforceable contract for the alienation of a joint tenant's interest will certainly have the effect of severing the joint tenancy. However, in order to effect a severance, it is not necessary that an agreement to sever should be specifically enforceable,[27] nor that there should be written evidence of it,[28] nor that any valuable consideration should have passed between the parties;[29] nor will the subsequent repudiation of the agreement prevent a severance.[30]

As for the content of the agreement, it may either expressly provide for severance, or it may simply contemplate a dealing with the property which necessarily involves severance:[31] for example, where joint tenants agree to join in a sale[32] or lease[33] of the property to a third party and to divide the proceeds between them, and where joint tenant spouses enter into a separation agreement which provides for sale and distribution of matrimonial property in specified shares.[34]

The leading case of *Burgess v Rawnsley*[35] may be regarded as an example of severance of a joint tenancy by mutual agreement. Here, an elderly couple, H and R, joined in the purchase of a house, taking a conveyance of the legal title upon trust for sale for themselves as beneficial joint tenants, each providing half the purchase price. When the relationship broke down, H negotiated with R to buy her out, and there was evidence that R had orally agreed to sell her interest to H for a specified price. R later repudiated the agreement and demanded a higher price, but H died before the negotiations could continue. It was held that H had effectively severed the joint tenancy before his death

26 *Re Draper's Conveyance* [1967] 3 All ER 853, p 857; *Harris v Goddard* [1983] 3 All ER 242, p 246, where Lawton LJ took the view that the service of a summons with supporting affidavit under the Married Women's Property Act 1882 for an order directing sale of the jointly owned matrimonial home and equal distribution of the proceeds of sale in *Draper* were acts effectual to sever the joint tenancy within *Williams v Hensman.*

27 Compare with severance under the first head of the *Williams v Hensman* rule (above, p 123) where, in order to constitute 'an act operating upon his own share' sufficient to bring about a severance, the agreement by the joint tenant to alienate his share must be specifically enforceable.

28 *Wilson v Bell* (1843) 5 Ir Eq R 501, p 507.

29 *Burgess v Rawnsley* [1975] 3 All ER 142.

30 *Ibid.*

31 *Ibid.*

32 *Re Hayes' Estate* [1920] 1 Ir 207, p 211.

33 *Palmer v Rich* [1987] 1 Ch 134, p 143.

34 *Re McKee* (1975) 56 DLR (3d) 190, p 196. But see *Nielson-Jones v Fedden* [1974] 3 All ER 38.

35 [1975] 3 All ER 142.

and that his estate was accordingly entitled to a half-share in the proceeds of sale of the property.

Course of dealing

According to Page-Wood VC, severance may be effected 'by any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common'.[36] This head may be difficult to distinguish from Page-Wood VC's second head (mutual agreement), but it is accepted that the third category is not a mere subheading of the second.

Severance under this head does not require any express act of severance, nor any agreement or declaration of trust. All that is required is 'a consensus between the joint tenants, arising in the course of dealing with the co-owned property, which effectively excludes the future operation of a right of survivorship'.[37] Thus, for example, where spouses who are joint tenants of property negotiate with one another for some arrangement of their interests on divorce, it may be possible to infer from the circumstances a common intention to treat each other as tenants in common, even where the negotiations break down.[38] On the other hand, a unilateral declaration by one party of an intention to sever will not suffice.[39] As Page-Wood VC put it:[40]

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

Other methods of severance

Apart from Page-Wood VC's three methods, there are two other ways of effecting severance of a joint tenancy, one derived from the common law and the other from statute:

Acquisition of an additional estate in the land

Where a joint tenant subsequently acquires an additional estate in the land, the unity of interest between himself and the other joint tenants is destroyed and the joint tenancy is severed.[41] For example, if land is granted to X, Y and Z as joint tenants for life, with remainder to R in fee simple, and Y acquires the fee simple from R, Y's life estate will be merged in the fee simple and the joint tenancy will be severed, leaving X and Z as joint tenants *inter se*.

36 (1861) 70 ER 862, p 867.

37 Gray, *Elements of Land Law*, 1987, London: Butterworths, p 329

38 See *op cit*, Hayton, fn 7, p 326.

39 *Nielson-Jones v Fedden* [1974] 3 All ER 38.

40 (1861) 70 ER 862, p 867.

41 *Wiscot's Case* (1599) 76 ER 555.

Severance by written notice

Section 36(2) of the Law of Property Act 1925 (UK) provided a new method of severance of a beneficial joint tenancy, viz, by a joint tenant giving notice in writing to the other joint tenants of his desire to sever. This method has not been introduced into Commonwealth Caribbean jurisdictions, except in Barbados and Belize.[42]

This statutory method of severance is convenient, in that it may be unilateral, no consent being required from the other joint tenant;[43] nor is it necessary that the notice should have been actually received by the other tenant; it is sufficient that there is evidence that it was duly posted to him.[44] The notice need not be signed, and it is established that it may take the form of a writ or originating summons commencing litigation for the purpose of determining the rights of the parties *inter se*. In *Re Draper's Conveyance*,[45] a wife applied by summons under s 17 of the Married Women's Property Act 1882 for an order that the jointly owned matrimonial home be sold and the proceeds of sale distributed in accordance with the parties' respective interests. Shortly after the court had made the order requested, the husband died intestate. Plowman J held that the wife's summons, coupled with her affidavit in support, showed an intention inconsistent with a continued joint tenancy, and operated to sever her beneficial joint tenancy during her husband's lifetime, both at common law and under s 36(2).

The principle in *Draper* has been applied in the Barbados High Court. In *Gibson v Walton*,[46] a husband and wife purchased two apartment buildings which were conveyed to them as beneficial joint tenants. When the relationship became strained, the wife applied under s 191 of the Property Act, Cap 236, for a determination by the court of her interest in the property. The husband died, and the question arose as to whether there had been a severance of the joint tenancy. Belgrave J held that the application by the wife constituted a written notice to the husband of her intention to sever; alternatively, an affidavit sworn by the husband, in which he expressed his desire that the joint tenancy be severed and the property sold and the proceeds of sale distributed in the proper proportions, had the same effect.

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42 Property Act, Cap 236, s 43(1) (Barbados); Property Act, Cap 154, s 38(2) (Belize).

43 *Harris v Goddard* [1983] 3 All ER 242, p 246.

44 *Re 88 Berkeley Road, NW9* [1971] 1 All ER 254 (where notice was sent by recorded delivery, but was never received).

45 [1967] 3 All ER 853.

46 (1992) 28 Barb LR 113. See, also, *Stuart v Kirton* (1994) 30 Barb LR 405, where Waterman J held that severance had been brought about by, *inter alia*, a joint tenant's filing a writ and seeking an order of sale of the property and equal distribution of the proceeds of sale.

PARTITION

Co-owners, whether joint tenants or tenants in common, may agree voluntarily to put an end to the co-ownership by dividing up the property into separate parcels, each former co-owner henceforth becoming a single owner of his parcel. This process is known as 'partition'. At common law, if the co-owners could not agree, there was no right in any of them to compel the others to submit to such partition. However, the Partition Acts 1539 and 1540 (UK) conferred a statutory right to bring an action to compel partition, so that one co-owner, whether joint tenant or tenant in common, could insist upon a partition, however inconvenient it might be to the other co-owners;[47] later, the Partition Act 1868 conferred on the court a power to decree a sale of the land instead of partition, which would be desirable where, for instance, the property was too small to be conveniently or sensibly divided up between the co-owners.

The statutory provisions as to compulsory partition and orders of sale in lieu of partition have been reproduced in most Commonwealth Caribbean jurisdictions,[48] so that co-owners can apply to the High Court for an order for partition or, alternatively, for an order of sale,[49] the effect of which will be that each co-owner will obtain a precise share out of the proceeds of sale.

47 In the absence of agreement, partition always requires an application to the court: *Thompson v M'Latamou* (1989) Supreme Court, The Bahamas, No 1187 of 1986 (unreported), *per* Smith J.

48 See PA 1855, Title 26, Item 30, s 2 and PA 1914, Title 26, Item 31, ss 1, 2 (Bermuda); PA, Ch 143, ss 3–5 (The Bahamas); P Ord, Ch 27, No 14, ss 3–5 (Trinidad and Tobago); PA, Cap 225, ss 4, 5, 8 (Grenada); PA, Cap 54:09, ss 4, 5, 8 (Dominica); PA, Cap 226, ss 4, 5, 8 (BVI); PA, Cap 245, ss 3, 15 (St Vincent); PA, Cap 305, ss 4, 5, 8 (Antigua); P Law, Cap 117, s 2 (Cayman Islands); cf Property Act, Cap 236, s 45 (Barbados), which contains no power to order a sale.

49 It was held, in *Mums Inc v Cayman Capital Trust* [1988–89] CILR 485, Grand Court, Cayman Islands, *per* Harre J, that, by virtue of s 100 of the Registered Land Law (Law 21 of 1971, revised 1976), dispositions of land held under joint tenancy are not permitted without the concurrence of all the joint tenants, so that the court had no power to order a partition or sale of jointly owned property to satisfy a judgment debt.

CONDOMINIUM

Unlike in North America and elsewhere, condominium development in the Caribbean has not been brought about by the pressures of land shortages in the metropolitan areas or the desire for city living, but, rather, by the needs of the tourism industry. Thus, condominium structures in the Caribbean tend not to be high rise, multistorey edifices used by local residents as their only or principal home, but relatively small two or three storey buildings sited near the sea, and used by vacationing foreign residents. The condominium concept is intended to incorporate the economic advantages of co-operative apartment living with the economic and psychological advantages of home ownership, but, in the Caribbean, these aims are perhaps less important then the desire to enjoy or benefit from holiday accommodation in an idyllic location. In addition, condominium development in the Caribbean is often commercial – utilised by small businesses such as beauty salons, boutiques and souvenir shops in resort areas.

CONDOMINIUM LEGISLATION

Although several Commonwealth Caribbean jurisdictions have introduced condominium legislation,[1] only the Bahamian Act has attracted significant case law. The account in this chapter will, therefore, focus primarily on the Law of Property and Conveyancing (Condominium) Act, Ch 124, of The Bahamas, and the similarly drafted Condominium Act, Cap 224A, of Barbados. Both Acts are based substantially on the Model Act prepared in 1961 by the American Federal Housing Administration (FHA), which has been the model for much of the condominium legislation in the United States and Canada.

NATURE OF THE INTEREST OF THE UNIT OWNER

In *Bank of Nova Scotia v GLT Corporation Ltd*,[2] Smith J explained the genesis of the condominium concept in The Bahamas:

1 See, eg, Cap 60 (Grenada); Condominium Act 1986 (Bermuda); Registration (Strata Titles) Act (Jamaica); Cap 227 (St Vincent).

2 (1986) Supreme Court, The Bahamas, No 112 of 1982 (unreported).

> Up until the coming into operation of the Law of Property and Conveyancing (Condominium) Act 1965, there was no provision in our law for the horizontal division-up of the fee simple estate in land. In other words, the fee simple estate in a part of a second or other storey of a building could not be in a totally different ownership than that of the ground floor of the same building. The Act was passed to make provision for the ownership in fee simple of units in multi-unit buildings, thus providing for horizontal division of a fee simple.

And, in the words of Gonsalves-Sabola J in *Triple Ecstasy Ltd v Bay View Village Management Ltd*:[3]

> The Condominium Act, enacted in 1965, introduced in The Bahamas the condominium concept of ownership, whereby a building could be subdivided among several owners, each owner owning absolutely his compartmentalised unit, but yet having defined rights over other parts of the property, subject to his liability to make financial contributions towards the general maintenance of the condominium.

Under the Act, therefore, the purchaser of a condominium acquires a fee simple interest in the individual unit purchased, together with an individual share in the 'common property'. As with most condominium legislation (an exception being the Condominium Act 1981 of Trinidad and Tobago), Ch 124 and Cap 224A preclude the creation of a condominium on a leasehold, because of the disadvantage that, in a leasehold, the financial independence of individual unit owners from the other unit owners may be compromised. The legislation also contemplates the use of individual mortgages for each unit, and the separate alienability of each. The provision, in s 6(3) of Ch 124, to the effect that each unit together with the individual share in the common property 'shall for all purposes constitute an estate in real property' ('estate in land' in Cap 224A) seems to have been intended to allay any fears on the part of mortgagees as to the nature of the security. Finally, in *Southair (Bahamas) Ltd v Signet Bank (Bahamas) Ltd*,[4] Strachan J stated that a unit owner's fee simple estate has the maximum lifespan that the law permits, and survives the destruction of the building. This seems to settle, for The Bahamas at least, the vexed question as to whether a unit owner's interest is confined to the tangible parts of the property (the earth, bricks and plaster) inside its boundary, or whether it includes the air space within the boundary. In the case of the former, where a building containing units is destroyed by fire, earthquake, etc, the units will vanish; in the case of the latter, they will not be affected.

3 (1988–89) 1 Carib Comm LR 334, p 347.

4 (1993) Supreme Court, The Bahamas, No 112 of 1992 (unreported).

DEFINITION OF 'UNIT' AND 'COMMON PROPERTY'

'Unit' is defined in Ch 124, s 3, as:

> ... a part of the property to which a declaration relates, intended for any type of independent use, and which includes one or more floors or parts thereof in a building, and which has direct access to a street or to common property leading to a street, and may include any appurtenance such as a balcony, terrace or patio or any other structure such as a garage, store or parking place which may be situated in some other part of the property.

The requirement in the section that each unit must have a direct exit to a public street or common area leading to a public street is clearly intended to preclude the further subdividing of apartments into smaller units.

The Act defines 'common property' somewhat unhelpfully as 'so much of the property as is not contained within the boundaries of any unit'. The FHA Model Act is much more specific, and states that the common property is to include, *inter alia*: (a) the land on which the building is located; (b) all structural members, bearing walls, lobbies, roofs, halls, corridors, stairways, etc; (c) basements, yards, gardens, parking and storage space; (d) caretakers' lodgings; (e) central utilities such as power, water, air conditioning; and (f) all other parts of the property normally in common use.

It is possible that, should the need arise, reference will be made to the Model Act for the purpose of defining common property in The Bahamas. Preferably, however, each declaration should contain a comprehensive definition of 'common property'.

METHOD OF ESTABLISHING A CONDOMINIUM

The Act requires the following documents: (a) declaration; (b) bylaws; and (c) individual unit deeds.

The declaration

Section 4(1) of Ch 124 and Cap 224A specify what a declaration must contain. This includes:

(a) a description of the property sufficient to identify it and its location precisely;

(b) a description of the building (with number of storeys, basements, cellars and units), and the principal materials of which it is constructed;

(c) a description of every unit by reference to its floor area, limits, boundaries, etc;

(d) drawings and plans of the building;

(e) a statement of covenants, conditions and restrictions affecting the use of the units;

(f) the bylaws applicable to the property;

(g) the method of amendment of the declaration by the unit owners.

In addition, a declaration may contain any other matters (not inconsistent with the Acts) which the person executing the instrument considers desirable.

In *Goodyear v Maynard*,[5] Henry J emphasised that the 'declaration is the foundation stone on which the entire legal edifice in the Act was built', and 'if the declaration is defective, the edifice must fall'.

In this case, the defendant refused to complete the purchase of a condominium apartment in Freeport, on the ground that the declaration failed to comply with s 4(1) of the Act. By that section, a declaration must provide for 'the methods ... to be observed and the conditions to be fulfilled for the amendment of the declaration by the unit owners'. The plaintiff vendor argued that cl 10 of the declaration, which provided, *inter alia*, that the unit entitlement of each owner could be varied by the consents by deed of all the unit owners affected, satisfied s 4(1)(1). Henry J did not accept this argument. He pointed out that a variation within clause 10 of unit entitlements prescribed in the schedule to the declaration would certainly result in an amendment of the declaration *pro tanto*, but it did not provide for the amendment of any other portion of the declaration. But, were the provisions of s 4(1)(1) mandatory, so that failure to comply with them would render the declaration void? There was a conflict of authority on this question. In *Roberts Realty of The Bahamas Ltd v Innscinz*,[6] Brice CJ had held that, although some of the particulars required by s 4(1) obviously had to 'be included in order to carry out the purpose and intention of the Act', others, like s 4(1)(1), were 'more in the nature of ancillary matters', so that a declaration need contain provisions for the amendment only of those particulars which were contemplated as being capable of amendment. Henry J disagreed with this view, and preferred the contrary view of da Costa J in *GLT Corporation Ltd v Bank of Nova Scotia*,[7] that the provisions of s 4(1)(1) were mandatory. Henry J pointed out that, under s 6(4), the provisions of the Act, and the declaration when recorded, were binding on the owners of all units in the building. The Act clearly recognised the necessity to empower the unit owners in appropriate cases to amend the declaration, and, to this end, it was necessary for the declaration to contain a provision for such amendment. In the absence

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5 (1983) Supreme Court, The Bahamas, No 981 of 1982 (unreported).

6 No E 419 of 1972 (unreported), cited in *Goodyear v Maynard* (1983) Supreme Court, The Bahamas, 981 of 1982 (unreported).

7 No E 56 of 1980 (unreported), cited in *Goodyear v Maynard* (1983) Supreme Court, The Bahamas, No 981 of 1982 (unreported).

of any such provision, the declaration was void, the vendor was unable to show a good title, and the defendant was, therefore, entitled to refuse to complete.

Who must execute declaration

Section 4(1) of Ch 124 provides that a declaration must be executed by 'the person or persons having the legal and equitable title in fee simple absolute to the property to which the declaration relates'. This requirement has been discussed in a number of cases, in which the courts have consistently held that the provisions relating to execution of the declaration are mandatory, and failure to abide by them will render the declaration, and, therefore, the whole condominium scheme invalid.

In *Johnson v Wallace*,[8] for instance, a declaration was held void on the ground that a prior mortgagee had not joined in its execution. Georges CJ accordingly set aside the conveyances of units to several purchasers on the ground that they had been based on a false assumption, common to vendor and purchaser, that the property being conveyed was, in fact, a condominium under the Act. These were instances of 'common mistake', in which 'equity would regard the contract as a nullity and set it aside notwithstanding that it has been executed; imposing terms if necessary to ensure justice between the parties'. It was also held that, on the assumption that the developer executed and registered a new declaration, it would be sufficient, in order to cure the defects in the purchasers' titles, to execute confirmatory conveyances reciting the facts which made such conveyances necessary.

In *Glinton v Albacore Developments Ltd*,[9] the question arose as to whether it was permissible to include, in a new declaration, terms which were different from those contained in the original defective one. One argument was that, since the original declaration was void, it was to be treated as if it had never existed in law, so there was no reason why the new declaration should adhere to its terms. On the other hand, it could be argued that, although the original declaration was invalid, it in fact constituted representations made by the developer to prospective purchasers of the condominiums, and such purchasers agreed to buy units on the faith of those representations. Now that it had been discovered that the declaration was invalid, the developer was under a duty to convey in keeping with the representations then made. If the terms of the declaration were altered, this would amount to an alteration of the contractual terms, so that there was a danger of actions being brought

8 (1988–89) 1 Carib Comm LR 49. In *Grant v Francis* (1997) Supreme Court, The Bahamas, No 957 of 1996 (unreported), Allen J held that a wife who was entitled to dower rights in her husband's property to which a declaration related was not 'a person having the legal and equitable title in fee simple absolute', and so a declaration executed without her concurrence was not void.

9 (1988) Supreme Court, The Bahamas, No 488 of 1988 (unreported).

against the developer by aggrieved purchasers. Georges CJ held that the original declaration constituted a contractual warranty which could not be varied, and the terms of the new declaration should, therefore, not differ from those in the old one.

Registration of declaration

In Barbados, a declaration must be registered in the Condominium Land Register, which the Registrar of Titles is required to compile under s 12 of the Land Registration Act, Cap 229 (s 6 of Cap 224A). In The Bahamas, where there is no system of registration of title, the declaration must be lodged for recording at the Registry of Records (s 6(1) of Ch 124).

Unit entitlement

The declaration must contain a schedule stating the 'unit entitlement' of each unit in the scheme, expressed as a fraction or percentage of the aggregate estimated value of all the units taken together, or of the aggregate floor area. This is a crucial factor in any condominium scheme, because it determines: (a) the voting rights of each unit owner in the body corporate; and (b) the amount of contribution to the common expenses required of the unit owner (Cap 224A, s 4(5); Ch 124, s 4(4).

Drawings and plans

Cap 224A, s 4(1) and (6) and Ch 124, s 5(1)–(3) provide for a complete set of drawings and plans of the building to be annexed to the declaration. Such plans must be accompanied by a certificate of a qualified architect (and, under Cap 224A, must also be approved by the Chief Town Planner), certifying that the drawings are accurate. In *Sawyer v Family Guardian Insurance Co*,[10] the question arose as to whether an architect's certificate submitted subsequently to an original void declaration could be incorporated into a second valid declaration without express words of incorporation. Strachan J was able to answer this question in the affirmative, following *Roberts v Albacore Developments Ltd*[11] and *Johnson v Wallace*.[12] Ch 124, s 5(2) also provides that where, at the date of recording of the declaration, the building is not complete, the architect's statement is to be lodged for record in the registry upon completion[13] of the building and before any unit is conveyed. It was emphasised in *Sawyer* that the provisions of sub-ss (1) and (2) of s 5 are

10 (1992) Supreme Court, The Bahamas, No 503B of 1992 (unreported).

11 (1988) Supreme Court, The Bahamas, No 267 of 1988 (unreported).

12 (1988–89) 1 Carib Comm LR 49.

13 It is debatable whether 'completion' in s 5(2) includes substantial completion.

mandatory. On the other hand, it is arguable that the provisions of Cap 224A, s 4(1) and (6) are not mandatory, as the Act speaks of the annexation of such plans 'as are deemed necessary or convenient'.

Existing mortgages

Ch 124, s 6(2) provides that where, before the first conveyance of any unit, there is in being any mortgage or charge affecting such unit, every such mortgage or charge must be satisfied, or the unit must be released from the incumbrance, or the mortgagee or chargee must join in the conveyance. In *Bank of Nova Scotia v GLT Ltd*,[14] an argument to the effect that the execution of a declaration of condominium had the effect of extinguishing an existing mortgage over the building was rejected by the court.

No partition of common property

The Acts provide that no share in the common property shall be disposed of, except as appurtenant to the unit to which it relates; and no unit owner may bring an action for partition of any interest in the common property. An exception to the latter is where the court orders the removal of the property from the provisions of the Act.[15]

Bylaws

In addition to the declaration, every condominium scheme must have bylaws containing rules concerning such matters as the composition of the board of management, procedure for election to and removal from the board, duties and powers of the board, voting procedures and the duties of unit owners. Some of these rules may be duplicated in the declaration. In the absence of expressly drafted bylaws, those set out in the Schedules to the Acts are deemed to apply.

THE BODY CORPORATE

Under Cap 224A, s 13(1) and Ch 124, s 13(1) and (2), as from the date of the recording of the declaration, all the owners from time to time of the units constitute a 'body corporate' in whom the operation of the property is vested. It is to be a non-profit making body, having perpetual succession and a common seal, and capable of suing and being sued in its corporate name. In

14 (1986) Supreme Court, The Bahamas, No 795 of 1982 (unreported).
15 Ch 124, s 7(2); Cap 224A, s 7(2).

many United States jurisdictions, the equivalent body is not a company but an unincorporated association (for example, in the US Virgin Islands).

Duties of body corporate (Ch 124, s 14; Cap 224A, s 14)

The main duties of the body corporate under the sections are:

(a) to operate the property for the benefit of all unit owners and to be responsible for the enforcement of the bylaws;

(b) to keep the common property in good repair; and

(c) to insure the building to its replacement value against fire, hurricane and seawave.

Questions may arise as to the extent of the duty of a body corporate to enforce the bylaws against defaulting unit owners, in the light of the provisions of s 14(1) and s 23(3) of Ch 124 and Cap 224A. As stated above, s 14(1)(a) provides that the duties of the body corporate include responsibility for the enforcement of the bylaws; and s 23(3) provides that an action to enforce compliance with the bylaws 'shall be maintainable by the body corporate acting on behalf of the unit owners, or by an aggrieved unit owner'. The issue has not yet arisen in the courts of The Bahamas or Barbados, but there is a case from British Columbia which is apposite. In *Strachan v The Owners, Strata Corporation VR574*,[16] a unit owner applied under s 40 of the Condominium Act (BC) for an order requiring the strata corporation to enforce bylaws prohibiting the owners from making alterations to the exterior of the condominium structure without the written permission of the condominium council, and prohibiting use of strata lots for commercial purposes. Section 14 of the Condominium Act was similar in its terms to s 14 of the Bahamian and Barbadian Acts: 'The strata corporation is responsible for the enforcement of the bylaws, and the control, management and administration of the common property, etc.' On the other hand, the British Columbia statute contained a provision in s 40 which does not appear in the two Caribbean statutes: 'Where a strata corporation fails to fulfil an obligation under this Act or bylaws, the owner of a strata lot, or a registered mortgagee, may apply to the court for a mandatory injunction requiring the strata corporation to perform the obligation.' Blair J held that the strata corporation had an obligation to enforce its own bylaws (and, indeed, the defendant corporation admitted that it was under such a duty), and that failure to do so gave the petitioning lot owner the right to seek a mandatory injunction. It seems that, should the issue arise in The Bahamas or Barbados, the court should come to the same conclusion on the wording of s 14 of Ch 124 and Cap 224A for, despite the absence of any provision equivalent to s 40 of the British Columbia statute, s 23 of the

16 (1992) 28 RPR (3d) 279.

Caribbean statutes, giving the aggrieved unit owner the right to enforce compliance with the bylaws, should ultimately have the same effect.

The duty of the body corporate to insure the property was in issue in *Maychem v Lucayan Towers South Condominium Association*,[17] where Strachan J rejected an argument to the effect that there was no mandatory duty to insure because the body corporate was empowered to decide by unanimous resolution not to do so. In Strachan J's view, the association had a duty, under s 14(1)(c), to insure against the specified risks for the full replacement value of the building, unless the unit owners by resolution decided otherwise.

A body corporate is invested by the statutes with certain powers of management, among which are the power to raise money to cover administrative expenses, employment of staff,[18] insurance premiums, capital improvements and renewals of common property, etc; such amounts may be raised by levying contributions on the unit owners in proportion to their respective unit entitlements.

Default in payment of contributions

As Gonsalves-Sabola J pointed out in *Triple Ecstasy Ltd v Bay View Village Management Ltd*,[19] the success of the condominium idea depends on the punctual discharge by the unit owners of their financial obligations. To ensure this, the legislature has provided 'machinery for effectively protecting the rights of the unit holders against breach by any of them of these financial obligations'. Thus, where a unit owner is in default in payment of contributions levied by the body corporate for common expenses, the body corporate has two methods of recovery, which exist concurrently: (a) to bring an action for debt in respect of the amount owed (Ch 124, s 18(2); Cap 224A, s 18(2)); (b) to enforce a charge (Ch 124, s 21) or a lien (Cap 224A, s 21) against the unit of the offender. In the *Triple Ecstasy* case, Gonsalves-Sabola J rejected an argument to the effect that the charge created by s 21 was equitable only, holding that the Act must be interpreted as providing for a legal charge, otherwise the body corporate would only be able to put up for sale an inferior interest, and this would defeat the purpose of the Act. Further, it is noteworthy that s 21(4) gives the body corporate the same powers of sale for

17 (1993) Supreme Court, The Bahamas, No 1581 of 1991 (unreported).

18 In *Maillis v Town Court Ltd* [1989–90] 1 LRB 184, where a unit owner had been robbed and shot by a masked bandit in the condominium car park, Gonsalves-Sabola J emphasised that the scope of the duty of care in the management of the condominium, including the provision of illumination and the employment of security personnel, was restricted by the financial resources made available to management through the contributions of the unit owners.

19 (1988–89) 1 Carib Comm LR 344, p 347.

the purpose of enforcing the charge as a mortgagee under the provisions of the Conveyancing and Law of Property Act, Ch 123, ss 21–23.[20]

An issue which arose on similar legislation in the US Virgin Islands was whether the obligation to pay contributions (called 'common assessment') was independent of the condominium association's duty to repair and maintain the units or common areas; and a further question was whether the condominium association had the authority to disconnect the water supply to recalcitrant unit owners who had failed to pay their assessments. In *Towers Condominium Association v Lawrence*,[21] the Territorial Court of the Virgin Islands held that the alleged breaches of duty by the Association in failing to maintain the buildings, facilities and common areas of the condominium did not justify the unit owners' withholding of the common charges payable by them. Meyers J emphasised that:[22]

> Nowhere in the declaration, the bylaws or the Condominium Act is a unit owner authorised or permitted to withhold the payment of common assessments for any reason. This payment is mandatory, without any exceptions.

A unit owner's duty to pay assessment fees was conditional solely on his acquisition of title. Thus, a unit owner who was involved in a dispute with the association concerning its services and operations was not entitled to 'exert leverage in that controversy by withholding payment, but must seek other remedy'.[23] The obligation to pay assessments was independent of the association's obligation to carry out repairs; and it was further held, in this case, that the association acted within the scope of its authority and was justified in disconnecting the water supply of delinquent unit owners, as the policy had been approved by the board of directors as a means of abating violations of the bylaws, and in order to prevent the disconnection of the entire complex by the water authority because of the refusal of a few unit owners to pay their assessments.

TERMINATION OF CONDOMINIUM SCHEME

Property may be removed from the Acts by an Order of the Supreme Court (under Ch 124, s 31(1)) or the High Court (under Cap 224A, s 31(1)) where the court is satisfied that either at least 90% of the unit owners have resolved to

20 See below, p 229; *Edelweiss Chalets Condominium Association v Davis* (1998) Supreme Court, The Bahamas, No FP160 of 1997 (unreported).

21 [1995] VIR 185.

22 *Ibid*, p 188.

23 *Ibid*, p 189, citing *Forest Villas Condominium Association v Caneiro* (1992) 422 SE 2d 884 (Ga App 1992), p 886.

terminate the scheme and all mortgagees have consented, or the building has been destroyed or damaged and is not to be reconstructed, or it is just and equitable to remove the property from the Act.

Upon dissolution, the building is deemed to be owned in common by all unit owners in undivided shares in the same proportion as they had originally been entitled to the common property.

RESTRICTIVE COVENANTS

Freehold covenants, that is, covenants entered into by one freeholder in favour of another freeholder, are an important means of controlling the use of land. The majority of such covenants are restrictive in substance – for example, a covenant not to carry on any trade or business on the land, or a covenant not to build more than one dwelling house thereon; consequently, this topic is usually referred to as the law of restrictive covenants.

Covenants, being promises made by deed, are contractual obligations which remain enforceable as between the original parties. The main difficulty is in determining whether: (a) the benefit of such a covenant has run to a successor in title of the covenantee; and (b) the burden has run to a successor in title of the covenantor. The basic problem may be illustrated as follows: V (covenantee) sells part of his land to P (covenantor), who covenants not to use the land other than for residential purposes. Later, V sells his retained land to X and P sells his land to Y. In what circumstances can X (the assignee of the covenantee) enforce the covenant against Y (the assignee of the covenantor)?

In this example, the covenantee was the vendor of land, and the covenantor the purchaser. This would be the usual position; however, the positions may be the reverse, viz, the vendor may be covenantor and the purchaser covenantee. Further, the parties may not be vendor and purchaser at all, but may have acquired their respective plots (Blackacre and Whiteacre) from a third person, or from two different persons; later, in order to preserve the value of Blackacre, the owner may agree to pay the owner of Whiteacre $50,000 in return for a covenant that Whiteacre should be used for residential purposes only. When the owner of Whiteacre enters into the covenant, the value of Whiteacre will depreciate, whilst the value of Blackacre will appreciate.

The position may thus be summarised by saying that:

(a) covenants usually involve a sale between covenantee and covenantor, but do not necessarily do so;

(b) if a sale is involved, the vendor may be covenantee or covenantor, and the purchaser may be covenantor or covenantee.

In dealing with the running of the benefits and the burdens of covenants between freeholders, it is essential to bear in mind that common law and equity have different rules, and that there are always two main questions:

(a) has the benefit of the covenant passed to the assignee of the covenantee?;

(b) has the burden of the covenant passed to the assignee of the covenantor?

For purposes of exposition, it is more convenient to deal with the passing of the burden before considering the passing of the benefit.

RUNNING OF THE BURDEN

The position at common law

It is well established that the burden of a covenant between freeholders does not run at common law. The position is different where leaseholds are concerned, as the burden of a covenant in a legal lease runs under the rule in *Spencer's* case.[1]

The leading case which illustrates the proposition that the burden of a freehold covenant does not run at common law is *Austerberry v Oldham Corpn*.[2] In this case, X conveyed the freehold of part of his land to trustees, who covenanted for themselves, their heirs and assigns, that they would form the piece of land into a road, and would for ever afterwards keep it in repair. The road was duly made, and, later, X sold to the plaintiff the part of his land which ran along both sides of the road. The defendant corporation then took over the road from the trustees under statutory powers, and sought to make the plaintiff bear a share of the cost of maintaining the road for which frontagers were liable by statute. The plaintiff contended that the burden of the covenant to maintain the road had passed from the trustees to the defendant corporation, and that the latter was accordingly liable to bear the cost of maintaining the road. It was held that the plaintiff's argument failed, since the burden of a freehold covenant can never run with the land of the covenantor at common law.

It will be noticed that, in *Austerberry*, the covenant was *positive*, that is, it required the covenantor to do some positive act on the burdened land which would involve expenditure on the part of the covenantor. If the covenant had been *restrictive* (that is, negative in substance), then, as we shall see, the burden would have run in equity under the rule in *Tulk v Moxhay*.[3] Since the covenant was positive, however, the burden could not run either at common law or in equity.

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1 See above, p 43.

2 (1885) 29 Ch D 750. The principle in *Austerberry's* case was followed in *E and GC Ltd v Bate* (1935) 79 LJ News 203, where it was held that the burden of a covenant to construct a road did not pass to the devisee of the covenantor.

3 (1848) 41 ER 1143.

The position in equity

In the leading case of *Tulk v Moxhay*,[4] equity introduced what was then a revolutionary principle, to the effect that the burden of a *restrictive* covenant entered into by the owner of Whiteacre with the owner of neighbouring Blackacre imposes an equitable burden on Whiteacre which is enforceable against all successors in title, except for a *bona fide* purchaser for value of the legal estate in Whiteacre having no notice of the covenant. In other words, where the covenant is restrictive, the common law rule that the burden of a freehold covenant does not run with the burdened land is outflanked, and equity will enforce the covenant against successors in title by granting an injunction to restrain any breach. The rule in *Tulk v Moxhay* introduced a new right of property, since its effect was that a restrictive covenant was not only enforceable against the original covenantor as a contract, but became an incumbrance on the land binding on successors in title of the covenantor.

The facts of *Tulk v Moxhay* were simple. In 1808, the plaintiff, who was owner in fee simple of a plot of vacant land in the centre of Leicester Square, London, as well as other land in the Square, sold the plot to one Elms, who covenanted for himself and his assigns that he and they would forever keep the plot in an open state, uncovered by any buildings. The plot passed by various conveyances into the hands of the defendant, who admitted that he had taken the land with notice of the covenant. He then proposed to erect buildings on the land. The plaintiff, who was still the owner of several adjacent houses, sought an injunction to restrain the threatened breach of covenant, and succeeded. The basis of the decision was simply that the defendant had purchased the land with notice of the covenant, and a court of equity would not permit him to disregard it. It was contrary to conscience that a person should come to the land with notice of a covenant affecting it, and to act in a manner inconsistent with such covenant.

This principle was applied in several later cases,[5] but, at the end of the 19th century, there was a change of emphasis. By then, it had become clear that to rest the doctrine solely on the question whether the defendant had notice of the covenant or not would mean that a burden would be imposed on land without any corresponding interest in the plaintiff which required protection. It was at this point that, by analogy with the law of easements, the concept of dominancy and serviency emerged in the law of restrictive covenants; thus, in *Formby v Barker*,[6] it was established that equity would enforce a restrictive covenant against an assignee of the burdened land only if the covenant had been made for the protection of other land retained by the

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4 (1848) 41 ER 1143.

5 See, eg, *Luker v Dennis* (1877) 7 Ch D 227.

6 [1903] 2 Ch 539.

covenantee. In other words, there must be a dominant as well as a servient tenement; the covenant must touch and concern the dominant tenement of the covenantee; and the covenant must be intended to protect that land against certain uses of the servient tenement which would be detrimental to the enjoyment or value of the dominant tenement.

Requirements for the running of the burden in equity

The covenant must be negative in nature

The burden of a positive covenant – that is, one which involves expenditure of money by the owner of the burdened land, for example, a covenant to maintain a road or drains – does not run in equity; the covenant must be negative – for example, a covenant not to use a building for any trade or business. It should be noted that what is required is that the covenant must be negative in substance, not necessarily in form. For instance, the covenant in *Tulk v Moxhay* to keep the land as an open space was positive in form but negative in substance (that is, it required the covenantor *not to build* on the land). Conversely, a covenant not to let premises fall into disrepair is negative in form, but positive in substance, as it requires expenditure on the part of the servient owner, and is therefore outside the rule.

The reason why equity will enforce only negative covenants against successors in title of the covenantor is that, where the covenant is negative, all the court needs to do is to issue an injunction restraining breach of the covenant; whereas, in the case of a positive covenant, the court may be called upon to supervise the performance of the covenant – for example, to ensure that repairs are satisfactorily carried out under a covenant – something which courts of equity have always been reluctant to do.

The covenant must be made for the protection of other land retained by the covenantee

As we have seen, there must be a dominant land capable of deriving a benefit from the restriction on the use of the servient land. If, at the time the covenant was made, the covenantee retained no adjacent land capable of being protected by the covenant, the burden will not run to assignees of the covenantor, but will be enforceable only against the covenantor; in other words, it will be treated as a merely personal contract between covenantor and covenantee, and will not be an incumbrance on the covenantor's land. In *LCC v Allen*,[7] A, a builder, in return for permission to lay out a new street on his land, entered into a covenant with the council not to build on a plot which was located across the end of the proposed street. The plot was eventually

7 [1914] 3 KB 642.

conveyed to X, who built three houses on it, and mortgaged it to Y. The question was whether the covenant was binding on X and Y. It was held that it was not, since the council never had any land capable of being protected by the covenant, and the fact that X and Y had notice of the covenant was irrelevant. On the other hand, in *Re Gadd's Land Transfer*,[8] it was held that, in the circumstances of the particular case, the retention by the covenantee of a road leading to the servient tenement was sufficient to enable him to enforce a restrictive covenant against successors in title of the original covenantor.

There is an apparent exception to the rule that the covenantee must retain some land adjacent to the servient tenement. This exception concerns leaseholds. Where a restrictive covenant is contained in a lease, there will be no need to depend on the *Tulk v Moxhay* principle, as the lessor will be able to enforce it against assignees of the original lessee under the rule in *Spencer's* case and the doctrine of privity of estate.[9] However, if the lessee grants a sublease, there will be no privity of estate between lessor and sublessee, so that any negative covenants in the lease will be enforceable against the sublessee only if the post-*Tulk v Moxhay* requirements are satisfied. With respect to the requirement of retention of adjacent land by the covenantee (the lessor), it seems that the lessor's reversion in the demised premises is sufficient to satisfy the requirement. There is no need for him to have retained any other land which could be called a dominant tenement.[10]

It must have been the common intention of the parties that the burden of the covenant should run with the covenantor's land

It is provided by statute in some jurisdictions that, unless a contrary intention appears, covenants relating to the covenantor's land are deemed to have been made by the covenantor on behalf of himself, his successors in title, and the persons deriving title under him or them.[11] In other words, in the absence of any express words indicating that the covenant is to be binding on the covenantor alone and not his successors in title, it will be inferred that the intention was to bind successors.

In other Caribbean jurisdictions, it would seem that affirmative evidence will be required to establish an intention that the burden of a restrictive

8 [1966] Ch 56.

9 See above, pp 41–44.

10 *Hall v Ewin* (1887) 37 Ch D 74. See, also, *Regent Oil Co v JA Gregory (Hatch End) Ltd* [1966] Ch 402, p 433, *per* Harman LJ, where it was held that a mortgagee's interest in the mortgaged property is a sufficient interest to enable him to enforce a restrictive covenant affecting the land.

11 See, eg, Property Act, Cap 236, s 84(1) (Barbados); Law of Property Act, Cap 154, s 62(1) (Belize); Conveyancing Act 1983, s 22(1) (Bermuda).

covenant should run to successors in title of the covenantor, such as by express words to that effect in the covenant.

Persons bound by restrictive covenants

Under *Tulk v Moxhay*, the burden of a covenant is a burden, not on the estate of the defendant, but on the servient tenement itself. Thus, it is not necessary to show that the defendant holds the same estate which the covenantor had. The defendant is bound merely by the fact that he occupies the servient land, whether as fee simple owner, or lessee, or sublessee, or as a mere licensee having no interest in the land. The occupier is bound irrespective of the nature of his occupation. Thus, for example, in *Mander v Falcke*,[12] a lessee had covenanted not to use the demised premises for any purpose which would cause annoyance or inconvenience to adjoining property owned by the lessor. The lessee sublet the premises, and the sublease eventually became vested in X, who did not occupy the premises himself, but gave an occupational licence to his father. While in occupation, X's father used the premises ostensibly as an oyster bar and refreshment room, but in reality as a notorious brothel, 'to the great annoyance of the neighbourhood'.[13] The plaintiff, who had acquired the reversion, sought an injunction to restrain breach of the covenant, and the injunction was granted. The mere occupation by the father was sufficient to enable the covenant to be enforced against him by injunction.

Registration

Being an equitable interest only, a restrictive covenant will not be binding on a *bona fide* purchaser of a legal estate in the servient land without notice of the covenant. However, in those jurisdictions in which the system of registration of title operates, a restrictive covenant can be protected by entry of a memorandum on the certificate of title or a caution on the register of the servient tenement.[14]

Positive covenants

We have seen that the burden of a positive freehold covenant, that is, one which requires expenditure on the part of the servient owner, does not run with the land of the covenantor, either at common law or in equity, so that only the original covenantor will be liable on it.[15] This is recognised as a

12 [1891] 2 Ch 554.

13 *Ibid*, p 555.

14 See, eg, Land Registration Act, Cap 229, s 33 (Barbados); Registered Land Act, Cap 157, s 33 (Belize); Registered Land Act, Cap 374, s 30 (Antigua and Barbuda); Registered Land Ordinance, Cap 229, s 30 (BVI); Land Registration Act 1984, s 30 (St Lucia).

15 See above, pp 142, 144.

serious defect in the law, particularly where there are apartment buildings or housing estates in which purchasers have covenanted to contribute towards the cost of maintenance of facilities, such as access roads, drainage, or fences and hedges. Such liability for maintenance costs will be essential for the convenience of the various owners and for the preservation of the value of the properties. In some jurisdictions, 'condominium' legislation[16] has solved the problem, as far as multi-storey apartment buildings are concerned, by creating enforceable obligations as between freehold purchasers and their successors in title; but such condominium legislation does not affect freehold properties on residential housing estates.

In order to avoid the consequence of the non-enforceability of positive covenants against successors, a number of methods or devices may be used, viz:

(a) Leasing the land to be burdened instead of selling the freehold, so that the burden of the covenants will run by privity of estate, under the rule in *Spencer's* case.[17]

(b) Chains of indemnity covenants. Since an original covenantor remains liable even after he has parted with the land, he may protect himself by taking a covenant of indemnity from his purchaser. Each successive purchaser may enter into a similar covenant with his vendor, so that a 'chain' of indemnity covenants will be created. In theory, the original covenantee should be able to secure the observance of the positive covenant by the current owner of the servient land by suing the original covenantor. However, as has been pointed out,[18] in practice, this device will sooner or later become ineffective, as a result of the death or disappearance of the original covenantor, or because of a break in the chain of indemnity covenants.

(c) A right of re-entry may be reserved in the conveyance, exercisable on events amounting to a breach of the positive covenant. The right of re-entry will run with the burdened land, but will be subject to the rule against perpetuities.[19]

(d) The rule in *Halsall v Brizzell*.[20] Under this principle, a person who wishes to take advantage of a shared service or facility, such as drains, a park, or an access road on a residential estate, must comply with any corresponding obligation to contribute to the cost of providing or

16 See, eg, Law of Property and Conveyancing (Condominium) Act, Ch 124 (The Bahamas); Condominium Act, Cap 224A (Barbados). See above, Chapter 8.

17 See above, pp 41–44.

18 Report of the Committee on Positive Covenants Affecting Land, Cmnd 2719, 1965, para 8.

19 See Maudsley and Burn, *Land Law: Cases and Materials*, 5th edn, 1986, London: Butterworths.

20 [1957] 1 All ER 371.

maintaining it. The principle is expressed by the maxim, 'he who accepts the benefit must accept the burden', and is illustrated by the facts of the case itself. There, a building estate had been developed in 1851 and the various plots sold freehold. Each purchaser covenanted that he and his successors would contribute to the cost of maintaining the roads and sewers on the estate, and a promenade and sea wall. The question was whether the defendant, who was a successor in title of one of the purchasers, was bound to make the agreed contributions. It was held that, since the covenant was positive, it did not run with the burdened land at law or in equity, but since the defendant, along with the other plot-owners, needed to use the roads and other amenities, then he must accept the burden of contributing to their upkeep.

RUNNING OF THE BENEFIT

The position at common law

The benefit of a covenant between freeholders, unlike the burden, is capable of running at common law, provided two conditions are fulfilled:

(a) the covenant touches and concerns the covenantee's land;

(b) the covenantee has a legal estate in the land benefited.

Covenant must touch and concern the land

This requirement will be satisfied if the covenant is made for the benefit of the covenantee's land and not merely for the covenantee's personal advantage. It must affect the value of the dominant land. Whether a covenant touches and concerns the land is a question of fact to be determined on expert evidence presented to the court. The onus is on the covenantor to show that a covenant does not touch and concern either originally (that is, when it was entered into) or at the date of the action.

Covenantee must have a legal estate

Any legal estate suffices here. Thus, not only an assignee of the fee simple of the dominant land, but also a tenant under a legal lease of the land, will be entitled to enforce the covenant.

Positive and negative covenants

As far as the running of the benefit of a covenant at common law is concerned, it is immaterial whether the covenant is positive or negative: in either case, the

benefit may run. Thus, for example, in *Sharp v Waterhouse*,[21] it was held that the benefit of a covenant to supply the covenantee's land with pure water was enforceable by successors of the covenantee; and, in *Smith and Snipes Hall Ltd v River Douglas Catchment Board*,[22] it was held that the benefit of a covenant by the Catchment Board to maintain the banks of a river had passed to a tenant of the assignee.

No need for servient tenement

For the running of the benefit of a covenant, there must be a dominant tenement but there need not be a servient tenement; in other words, there is no requirement that the covenant should impose a burden on any land belonging to the covenantor, and the latter will be bound even though he owns no land. Thus, in *Smith and Snipes Hall*,[23] the benefit of the covenant passed despite the fact that the Catchment Board did not own any servient land; and in *The Prior's Case*, where a prior covenanted with the lord of a manor to sing divine service regularly in the manor chapel, it was held that the lord's successor could sue the prior for failure to perform the covenant.[24]

The position in equity

If it is possible for the assignee of the covenantee to enforce the covenant under common law principles, there is no difficulty. However, there are a number of severe limitations to the running of the benefit at common law, the effect of which is that it is rarely possible to rely on the common law rules. In such cases, the assignee will be obliged to depend on the equitable rules for the running of the benefit.

The circumstances in which the equitable rules must be relied on are as follows:

(a) where the covenantee or the assignee are merely equitable owners of the land benefited;[25]

(b) where the covenantor is no longer the owner of the servient tenement but has assigned it, so that enforcement against the assignee of the servient tenement depends upon the rule in *Tulk v Moxhay*;[26]

21 (1857) 119 ER 1449.
22 [1949] 2 All ER 179.
23 *Ibid.*
24 (1368) YB 42 Ed III, Pl 14, fol 3A.
25 *Fairclough v Marshall* (1878) 4 Ex D 37.
26 *Marten v Flight Refuelling Ltd* [1961] 2 All ER 696.

(c) where only part of the benefited land is assigned to the plaintiff, since at common law the benefit cannot be assigned in pieces;[27]

(d) where the plaintiff relies upon his land being part of a scheme of development.[28]

In order to establish that the benefit of a covenant has run in equity, the plaintiff must show that there has been:

(a) annexation of the benefit to the dominant land; or

(b) express assignment of the covenant; or

(c) a scheme of development.

Annexation

If the assignee of the covenantee can show that the covenant is annexed to the land benefited, then he and his successors in title can enforce the covenant, that is, the benefit will pass to them. Annexation is an abstract concept, whereby the covenant is deemed to be attached to the title of the land so that all future owners will automatically be entitled to the benefit. Whether a particular covenant is annexed to the land benefited depends upon 'the intention of the parties to be inferred from the language which they used in the deed creating the covenant'.[29] The requirement is that the land benefited must be clearly identified in the conveyance of the servient land which contains the covenant.

The classic formula for annexation is that used in the leading case of *Rogers v Hosegood*, as follows:[30]

> ... with intent that the covenants might so far as possible bind the premises thereby conveyed and every part thereof and might enure to the benefit of the vendors ... their heirs and successors and others claiming under them to all or any of their lands adjoining or near to the said premises.

In *Drake v Gray*,[31] Greene LJ suggested that it was sufficient for annexation that a covenant is made 'with X, owner or owners for the time being of Blackacre (the dominant tenement)' or simply 'for the benefit of Blackacre'. In other words, the benefit will be annexed to the dominant land so as to run with it if in the conveyance of the servient land the covenant is either stated to be made with the covenantee in his capacity as owner of the dominant land, or stated to be made for the benefit of the land, for in either case it would be obvious that future owners of that land are intended to benefit.

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27 *Re Union of London and Smith's Bank Ltd's Conveyance, Miles v Easter* [1933] Ch 611, p 630, *per* Romer LJ.

28 See below, pp 156–62.

29 Cheshire and Burn, *Modern Law of Real Property*, 15th edn, 1994, London: Butterworths, p 623.

30 [1900] 2 Ch 388.

31 [1936] 1 All ER 363, p 377, *per* Greene LJ.

On the other hand, it was held in *Renals v Cowlishaw*[32] that there was no annexation where the covenantor covenanted with 'the vendors, their heirs, executors, administrators and assigns', because there was no reference to any land, and the reference to executors, etc, left it uncertain as to whether the covenant was intended to benefit the successors to the covenantee's land or the successors to his personalty. And, in *Pass v Ramsahoye*,[33] Williams J in the Barbados High Court held that, where the covenantor covenanted in the conveyance 'to the intent that the burden of the covenant shall run with the land hereby granted', there was no annexation in the absence of any 'indication of an intention, to annex the *benefit* of the covenant to any particular land'.

Again, in *Halfmoon Bay Ltd v Crown Eagle Hotels Ltd*,[34] where the purchaser for itself and its successors covenanted 'with the vendor, its successors and assigns', Langrin J in the Jamaican Supreme Court held there was no annexation of the benefit of the covenants. He said:

> There is no expression of the covenants being for the benefit of any land or made with the vendor as owner of any particular parcel of land ... to be benefited. Even if it is clear that the parties intended to annex the benefit of the covenant to some land, by express words or necessary implication, three further questions arise. The court must ascertain the identity of the land to which the covenant is annexed; determine, upon the construction of the words by which the annexation is effected, whether the covenant is annexed to the whole of the land referred to as a whole, or to such land as a whole and also to each and every part of it; and decide whether the land to which the parties have purported to annex the benefit of the covenant is 'touched and concerned' by the covenant: if not, the annexation fails.

The insistence upon a strict form of words such as those used in *Rogers v Hosegood* has been much criticised and, as Professor Wade has pointed out,[35] it seems that a struggle has been taking place between, on the one hand, conveyancers who insist on strictness of form in the interest of conveyancing convenience and certainty, and, on the other, certain judges who seek to liberalise the law by looking for the intention of the parties rather than a mechanical formula.

Implied annexation

One theory which has been canvassed and recently relied upon by the Jamaican Court of Appeal is that of 'implied annexation'. According to

32 (1878) 9 Ch D 125.

33 (1986) High Court, Barbados, No 231 of 1986 (unreported). See, also, *Lamb v Midac Equipment Ltd* (1996) 52 WIR 290, Court of Appeal, Jamaica, *per* Carey JA.

34 (1996) Supreme Court, Jamaica, Nos ERC 63 and 418 of 1995 (unreported).

35 (1972) 31 CLJ pp 163, 164.

Megarry and Wade, annexation can be implied where the facts make the connection with the benefited land so obvious that to ignore it would be not only an injustice, but a departure from common sense.[36] Thus, if annexation can be implied, the benefit of the covenant will run even though the accepted form of words is not used. Arguments against insistence on formal annexation, and therefore in favour of implied annexation, include the following:

(a) no formal annexation is required in order that the benefit of a covenant may run at common law: the only requirements are that the covenant should touch and concern the covenantee's land and that the assignee should have a legal estate, and it is out of character for equity to be more formalistic than the common law;

(b) express annexation is not required in order that the burden of a covenant may run, nor for the running of benefits or burdens in leases under *Spencer's Case*, nor for the running of the benefit or burden of easements;

(c) the benefit of a covenant can be assigned in equity without the need for any particular form of words.

In *Jamaica Mutual Life Assurance Society v Hillsborough Ltd*,[37] there were no express words in the conveyance to the covenantor stating that the restrictive covenants contained therein were intended for the benefit of any land retained by the covenantee. Nevertheless, the Jamaican Court of Appeal held that annexation could be implied from the surrounding circumstances. In Carey JA's words:

> The real question is ... one of intention, which it is permissible to ascertain from an examination of the surrounding facts at the time of sale.

On appeal to the Privy Council, however, the Board appeared to rule out the possibility of implied annexation, and held that, since there were no express words 'stating that the restrictions ... were intended for the benefit of any land retained by (the covenantee)', there was no annexation of the covenants.

Statutory annexation

According to *Federated Homes Ltd v Mill Lodge Properties Ltd*,[38] s 78 of the Law of Property Act 1925 has the effect of annexing the benefit of a covenant to the dominant land, without the need for express words of annexation. Section 78, the wording of which has been substantially reproduced in some Commonwealth Caribbean statutes,[39] provides that:

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36 Megarry and Wade, *Law of Real Property*, 5th edn, 1984, London: Stevens, p 784.

37 [1989] 1 WLR 1101.

38 [1980] 1 All ER 371.

39 See, eg, Property Act, Cap 236, s 83(1) (Barbados); Conveyancing Act 1983, s 21 (Bermuda); Law of Property Act, Cap 154, s 62 (Belize); Conveyancing Act 1973, s 61 (Jamaica).

> a covenant relating to any land of the covenantee shall be deemed to be made with the covenantee and his successors in title and the persons deriving title under him or them, and shall have effect as if such successors and other persons were expressed. For the purposes of this sub-section, in connection with covenants restrictive of the user of land, 'successors in title' shall be deemed to include the owners and occupiers for the time being of the land of the covenantee intended to be benefited.

In *Federated Homes*, M Ltd owned a site which included three areas of land, coloured red, green and blue on the plan. M Ltd obtained planning permission to develop the site by erecting up to 1,250 houses. In February 1971, M Ltd sold and conveyed the blue land to the defendants. In the conveyance, the defendants covenanted with the vendor that, in carrying out the development of the blue land, they would not build 'at a greater density than a total of 300 dwellings so as not to reduce the number of units which the vendor might eventually erect on the retained land under the planning consent'. The retained land was described as 'any adjoining or adjacent property retained by' M Ltd (that is, the red and green land). By a series of transfers, the plaintiffs became the owners of the red and green land. In 1977, the plaintiffs obtained planning permission to develop the red and green land. They then discovered that the defendants had obtained planning permission to develop the blue land at a higher density than permitted by the covenant, and that the density was likely to prejudice the development of the red and green land. The plaintiffs sought an injunction to restrain the defendants from building on the blue land at a density which would be in breach of the covenant. The main question for decision was whether the benefit of the covenant had passed to the plaintiffs either by annexation or assignment. As regards annexation, the trial judge held that the benefit of the covenant had not been annexed to the retained land because the conveyance to the defendants had not expressly or impliedly annexed it, and s 78 did not have the effect of annexing the benefit to the retained land. But the Court of Appeal overruled the trial judge on this point, holding that, since the covenant touched and concerned the covenantee's land, s 78 had the effect of annexing the benefit to the land.

One important feature of *Federated Homes* is that the defendants were the original covenantors, not assignees. Thus, there was no need to rely on the *Tulk v Moxhay* principle, and it was possible to decide the case on common law principles. But it can be presumed that, in view of the interpretation put on s 78, the Court of Appeal would have reached the same decision if the defendants had been assignees of the burdened land, provided, of course, that the requirements for the running of the burden were satisfied.

It is perhaps surprising that an argument based on the Jamaican equivalent of s 78, viz, s 61 of the Conveyancing Act 1973, was not presented

in *Jamaica Mutual Life Assurance Society v Hillsborough Ltd.*[40] It would seem that, as in *Federated Homes*, s 61 of the Jamaican statute should have had the effect of annexing the benefit of the restrictive covenants to the dominant land, so that no express words of annexation were necessary.

It has since been held, in *Roake v Chadha*,[41] that, where the original covenanting parties had expressly stipulated that the benefit of their covenant should not pass to subsequent purchasers of the dominant tenement unless the benefit were expressly assigned, s 78 could not apply so as to pass the benefit.

Area to be benefited

It was established in *Re Ballards' Conveyance*[42] that there will be no effective annexation if the area of the dominant land is greater than can reasonably be benefited; put in another way, there can be no annexation unless substantially the whole of the dominant land is capable of benefiting from the covenant. In that case, a covenant was stated to be made for the benefit of 'the owners for the time being of the Childwickbury Estate'. The area of the estate was about 1700 acres, and the restriction was imposed on a plot of only 18 acres. It was found as a fact that most of the estate could not possibly be directly affected by a breach of the covenant. It was accordingly held that the covenant was not enforceable by assignees of the *whole* of the dominant tenement. Clauson J refused to sever the covenant so as to regard it as annexed to the part of the estate which was in fact benefited. On the other hand, if the covenant had been stated to be for the benefit of the whole *or any part* of the estate, it could have been enforced by the successor in title to any part of the land which the covenant in fact benefited.[43]

An additional reason for annexing the benefit expressly to the whole or any part of the dominant tenement is that, if the benefit is annexed only to the whole, and the covenantee or a successor sells part of the land, the purchaser of the part will be unable to enforce the covenant. Thus, in *Re Jeff's Transfer (No 2)*,[44] following the earlier case of *Russell v Archdale*,[45] it was held that a covenant expressed to be 'for the benefit of the remainder of the Chorleywood Estate belonging to the vendor' was annexed only to the whole and not to each and every part of the estate, so that a purchaser of part only could not enforce the covenant. On the other hand, in *Re Selwyn's Conveyance*,[46] it was

40 [1989] 1 WLR 1101.
41 [1983] 3 All ER 503.
42 [1937] 2 All ER 691.
43 See *Marquess of Zetland v Driver* [1938] 2 All ER 158.
44 [1966] 1 All ER 937.
45 [1962] 2 All ER 305.
46 [1967] 1 All ER 339.

held that a covenant 'for the benefit of the adjoining or neighbouring land part or lately part of the Selwyn Estate' did annex the benefit to separate parts of the land.

The rule that the benefit of a covenant which is annexed to the whole of the dominant land cannot be enforced by a purchaser of part of the land has been criticised as 'arbitrary and inconvenient', and, in *Federated Homes Ltd v Mill Lodge Properties Ltd*,[47] where the plaintiffs, who were seeking to enforce the covenant, were purchasers of two separate parts of the dominant land, Brightman LJ said:[48]

> It was suggested by counsel for the defendants that if this covenant ought to be read as inuring for the benefit of the retained land, it should be read as inuring only for the benefit of the retained land as a whole and not for the benefit of every part of it ... I find the idea of the annexation of a covenant to the whole of the land but not to a part of it a difficult conception fully to grasp ... I would have thought that if the benefit of a covenant is, on a proper construction of a document, annexed to the land, *prima facie* it is annexed to every part thereof, unless a contrary intention appears.

It was accordingly held that the plaintiffs could enforce the covenant. It remains to be seen whether the Privy Council and the House of Lords will endorse the view of Brightman LJ, and, if they do, whether the difficulties encountered in *Re Ballard's Conveyance*[49] will also be resolved.

Express assignment

Express assignment of the benefit of a covenant will occur where the dominant land, to which no covenant has been annexed, is sold and conveyed 'together with the benefit of covenants entered into by X (the covenantor)'. There are five requirements, which were laid down by Romer LJ in *Re Union of London and Smith's Bank Ltd's Conveyance, Miles v Easter*:[50]

(a) the covenant must have been taken for the benefit of the land of the covenantee;

(b) the dominant tenement must be indicated with reasonable certainty. This indication need not appear in the conveyance creating the covenant. It is sufficient if, in the light of the surrounding circumstances, the identity of the dominant land is in some other way ascertainable with reasonable certainty;

(c) the dominant tenement must be retained in whole or in part by the plaintiff;

47 [1980] 1 All ER 371.

48 *Ibid*, p 380.

49 [1937] 2 All ER 691.

50 [1933] Ch 611.

(d) the dominant tenement must be capable of benefiting from the covenant; and

(e) the assignment of the covenant and the conveyance of the land to which it relates (that is, the dominant land) must be contemporaneous.

Unlike in the case of annexation, there is no doubt that an express assignment of the benefit of a covenant to a purchaser of part only of the dominant tenement is effective.[51] The benefit of a covenant can also be assigned by operation of law; for instance, on the death of a covenantee, the benefit automatically passes to his personal representatives upon trust for the devisee of the dominant tenement, and may be assigned to him.[52] A final question is whether the effect of expressly assigning the benefit of a covenant on the sale of the dominant land is to annex it to the land, so that it will automatically pass to future owners without the need for express assignment, or whether, each time the dominant land is sold, there must be a fresh assignment of the benefit, viz, a continuous chain of assignments. In *Re Pinewood Estate,*[53] it was assumed without argument that a chain of assignments is necessary, but *dicta* in other cases[54] suggest the contrary, that is, that assignment of the benefit does have the effect of annexing it to the land, so that no further assignments are necessary.

Schemes of development

Where a scheme of development (or 'building scheme', as it is often called) exists, restrictive covenants are enforceable in equity by and against successors of the original contracting parties. Cheshire and Burn explain the nature of the concept thus:[55]

> A scheme of development comes into existence where land is laid out in plots and sold to different purchasers or leased to different lessees, each of whom enters into a restrictive covenant with the common vendor or lessor agreeing that his particular plot shall not be used for certain purposes. In such a case these restrictive covenants are taken because the whole estate is being developed on a definite plan, and it is vital, if the value of each plot is not to be depreciated, that the purchasers or lessees should be prevented from dealing with their land so as to lower the tone of the neighbourhood. When the existence of a scheme of development has been established, the rule is that each purchaser and his assignees can sue or be sued by every other purchaser and his assignees for a breach of the restrictive covenants. In such an action for

51 *Op cit*, Cheshire and Burn, fn 29, p 629.

52 *Newton Abbot Co-operative Society Ltd v Williamson and Treadgold Ltd* [1952] 1 All ER 279.

53 [1957] 2 All ER 517.

54 *Reid v Bickerstaff* [1909] 2 Ch 305, p 320; *Rogers v Hosegood* [1900] 2 Ch 388, p 408.

55 *Op cit*, Cheshire and Burn, fn 29, p 630.

> breach, it is immaterial whether the defendant acquired his title before or after the date on which the plaintiff purchased his plot. In other words, the restrictive covenants constitute a special local law for the area over which the scheme extends, and not only the plot-owners, but even the vendor himself, become subject to that law, provided that the area and the obligations to be imposed therein are defined. They all have a common interest in maintaining the restriction. This community of interest necessarily requires and imports reciprocity of obligation.[56] There thus arises what Simonds J has called 'an equity which is created by circumstances and is independent of contractual obligation'.[57]

A scheme of development has the following advantages:

(a) no special formula for annexation is required, since the annexation of the benefit of the covenants to every plot still unsold proves itself from the surrounding facts;

(b) the owners of plots sold previously are shown by the facts to be within the benefit of the covenants, even though they are not expressly mentioned as covenantees;

(c) no unsold plot can later be disposed of by the vendor without his requiring the purchaser to enter into the covenants of the scheme;

(d) a restrictive covenant normally is discharged where the titles to the dominant and servient tenements become vested in the same person; but where there is a scheme of development, such 'unity of seisin' does not automatically discharge a covenant within the area of unity, and it will revive on severance, unless the parties intended otherwise.[58]

As soon as the first sale under the scheme has been made, the scheme crystallises, and all the land within the scheme is bound. There is no need for the vendor to have bound himself by the covenants, since he is in the position of a trustee and cannot authorise breaches of the covenants.

The subject matter of a scheme of development is usually freehold land which is to be sold off in lots to persons who wish to build houses; but it may also apply to apartment blocks or to houses already built, and to leaseholds as well as freeholds. It is also possible to create a subscheme within an area subject to an existing scheme of development.

The requirements for the existence of a scheme of development were formulated by Parker J in *Elliston v Reacher*:[59]

56 *Spicer v Martin* (1888) 14 App Cas 12, p 25, *per* Lord Macnaghten.

57 *Lawrence v South County Freeholds* [1939] 2 All ER 503, p 524.

58 *Texaco Antilles Ltd v Kernochan* [1973] 2 All ER 118, PC appeal from the Court of Appeal of the Bahamas.

59 [1908] 2 Ch 374, p 385.

(a) both the plaintiff and the defendant in the action for breach of the restrictive covenant must have derived their titles to the land from a common vendor;

(b) before the sale of the plots to the plaintiff and the defendant, the common vendor must have laid out his estate for sale in lots subject to restrictions which it was intended to impose on all the lots, and which were consistent only with some general scheme of development;

(c) the restrictions were intended by the common vendor to be and were for the benefit of all the lots sold. This intention is gathered from all the circumstances of the case, but if the restrictions are obviously calculated to enhance the value of each lot, the intention is readily inferred;[60]

(d) the original purchasers must have bought their lots on the understanding that the restrictions were to enure for the benefit of the other lots;

(e) the geographical area to which the scheme extends must be ascertained with reasonable certainty.

Although the requirements in *Elliston v Reacher* are still considered to be a valuable guide as to the existence or otherwise of a building scheme, there are cases in which schemes of development have been held to exist despite the absence of one or more of the requirements. In *Baxter v Four Oaks Properties*,[61] for instance, the second requirement was lacking, as there was no evidence that the common vendor had laid out the estate in lots before beginning to sell it off. He merely sold plots, of the size which each purchaser wished to take, to purchasers as they came along. Nevertheless, Cross J held that there was sufficient evidence of an intention to create mutually binding covenants. And, in *Re Dolphin's Conveyance*,[62] Stamp J found the existence of a scheme of development despite the absence of both a common vendor and prior lotting.

The modern position

It now seems to be generally accepted that, under the modern law, there are only two requirements which are needed in order to establish a scheme of development, viz:

(a) that the land to which the scheme relates must be identified; and

(b) that there must be a common intention on the part of the purchasers that there should be 'reciprocity of obligation'.[63]

60 See *British Hoffman Ltd v Bella Vista Beach Apartments Ltd (No 2)* (1979–80) 1 LRB 519, Supreme Court, The Bahamas.

61 [1965] 1 All ER 906.

62 [1970] 2 All ER 664.

63 See Gray, *Elements of Land Law*, 1987, London: Butterworths, pp 718, 719.

These requirements were confirmed by the Privy Council in two cases originating from Jamaica and Trinidad and Tobago respectively.

In the first case, *Jamaica Mutual Life Assurance Society v Hillsborough Ltd*,[64] the predecessors in title of the applicant and of the first and second objectors had purchased their respective parcels of land from common vendors, subject to covenants not to subdivide the land into lots of less than one acre each, and not to carry on any trade or business thereon. The instruments of transfer did not annex the benefit of the covenants to any land retained by the vendors, nor was there any subsequent assignment of the benefit of the covenants to any of the objectors' predecessors in title. The third and fourth objectors were purchasers of neighbouring land subject to the same restrictions. The applicant proposed to develop its land as a multi-unit residential complex, and sought a declaration in the Jamaican Supreme Court under s 5 of the Restrictive Covenants (Discharge and Modification) Act 1960 as to whether its land was affected by the restrictions and as to whether and by whom the restrictions were enforceable.

On the question as to whether there was a scheme of development so that the covenants in the applicant's title ran with the land and enured to the benefit of the objectors and their successors, the Privy Council held that there was nothing in the instruments of transfer to suggest that the vendors were selling off a number of lots as part of a scheme, nor was there any indication that the purchasers had assumed obligations to any persons other than the vendors[65] or had acquired the benefit of obligations incurred by other persons. Further, there was no evidence as to whether the sales of the lots were advertised or as to what, if any, representations were made by the vendors to the purchasers:[66]

> In the absence of any such extraneous evidence, the terms of the instruments of transfer alone [fell] far short of what is required to establish community of interest or reciprocity of obligation between purchasers ... To imply a building scheme from no more than a common vendor and the existence of common covenants would be going much too far.

In the Trinidadian case of *Emile Elias and Co Ltd v Pine Groves Ltd*,[67] the Privy Council again found that there was no scheme of development. In this case, a company, in 1938, divided an area of its land into five lots, which were sold to four purchasers. Lot 5 was shown on a plan annexed to the conveyance to the purchaser of lots 4 and 5, but not on the general plan annexed to the other conveyances. The purchasers of lots 1, 4 and 5 covenanted with the company

64 [1989] 1 WLR 1101.

65 See, also, *Lamb v Midac Equipment Ltd* (1996) 52 WIR 290, Court of Appeal, Jamaica, *per* Carey and Patterson JJA.

66 [1989] 1 WLR 1101, p 1108.

67 [1993] 1 WLR 305.

and its assigns, *inter alia*, not to erect any building other than one dwelling house, and the purchasers of lots 2 and 3 entered into a similar covenant, but they also entered into other covenants which were substantially different from those applicable to lots 1, 4 and 5. The plaintiff and defendant subsequently became the owners of lots 3 and 1 respectively. When the defendant started to build more than one house on his lot, the plaintiff brought proceedings to enforce the restriction, contending that a building scheme had been established in 1938. Lord Browne-Wilkinson, delivering the judgment of the Board, held that, apart from the requirement of derivation of title from a common vendor and the laying out of the land in lots, none of the *Elliston v Reacher*[68] requirements were satisfied. He continued:[69]

> *Was the area of the scheme defined?*
>
> The rationale for the requirement that the area of a scheme should be defined is explained in *Reid v Bickerstaff*[70] by Cozens-Hardy MR:
>
> > In my opinion, there must be a defined area within which the scheme is operative. Reciprocity is the foundation of the idea of a scheme. A purchaser of one parcel cannot be subject to an implied obligation to purchasers of an undefined and unknown area. He must know both the extent of his burden and the extent of his benefit.
>
> This shows that it is not sufficient that the common vendor has himself defined the area. In order to create a valid building scheme, the purchasers of all the land within the area of the scheme must also know what that area is.
>
> In this case, there was one plan, the general plan, which was attached to all four 1938 conveyances, but this plan did not show lot 5. If, therefore, lot 5 falls to be treated as part of the designated scheme area, it has not been proved that in 1938 the purchasers of lots 1, 2 and 3 were aware of that fact. Mr Fitzpatrick suggested that it could be inferred from the fact that all the purchasers were associated with the golf club and, by the time of the 1948 deed, were aware of lot 5, that they were so aware in 1938. Their Lordships feel unable to attach to any such inference sufficient probative force to reach an affirmative conclusion that all the purchasers of the lots in 1938 knew that lot 5 was included. If lot 5 was to be part of a scheme area giving rise to mutually enforceable obligations between all the lots, it would surely have been shown on the plan annexed to each of the conveyances.
>
> In the view of the Board, if there was any intention to create mutually enforceable rights in a scheme area, lot 5 must have been part of that area. It was sold at the same time as lots 1–4 and was subjected to the same covenants as affected lot 4 and lot 1. It is entirely incredible that there was any intention to create rights which would be mutually enforceable between the owners of lots 1, 2, 3 and 4 but not enforceable by and against the owner of lot 5.

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68 [1908] 2 Ch 374.

69 [1993] 1 WLR 305, p 310.

70 [1909] 2 Ch 305, p 319.

Accordingly, lot 5 being part of any scheme that could be established and it not having been shown that the purchasers of lots 1–3 were aware of that fact, the requirements of a defined scheme area known to the original purchasers cannot be satisfied.

Lack of uniformity in the covenants

It is one of the badges of an enforceable building scheme, creating a local law to which all owners are subject and of which all owners take the benefit, that they accept a common code of covenants. It is most improbable that a purchaser will have any intention to accept the burden of covenants affecting the land which he acquires being enforceable by other owners of the land in the scheme area unless he himself is to enjoy reciprocal rights over the lands of such other owners: the crucial element of reciprocity would be missing. That does not mean that all lots within the scheme must be subject to identical covenants. For example, in a scheme of mixed residential and commercial development, the covenants will obviously vary according to the use intended to be made of each category of lot. But if, as in the present case, the lots are all of a similar nature and all intended for high class development consisting of one dwelling on a substantial plot, a disparity in the covenants imposed is a powerful indication that there was no intention to create reciprocally enforceable rights.

The covenants imposed on lots 1, 4 and 5 differ in matters of substance from those imposed on lots 2 and 3. Lots 2 and 3 (in addition to the restriction against erecting more than one dwelling house) contain a covenant restricting the use of the building when erected to use as a private dwelling house only. Lots 4, 5 and 1 contain no such restriction on the user. It cannot be realistically supposed that, for example, the purchaser of lot 2 ever intended to enter into an obligation whereunder the owner of lot 1 could restrain him from taking lodgers whereas, if lot 1 were to take lodgers, lot 2 could not object.

Again, the owners of lots 2 and 3 entered into a covenant not to cause a nuisance to those occupying lands in the neighbourhood, whereas lots 4, 5 and 1 were not subjected to such covenants. This disparity again militates against the finding of any intention to create a mutually enforceable local law based on reciprocity. Therefore the second of the requirements laid down by Parker J in *Elliston v Reacher*[71] is not satisfied in the present case.

Generally

If one steps back and looks at the matter generally, there is no convincing proof that the parties' intention was to produce mutually enforceable covenants. The covenants in the 1938 conveyances were made with the company alone and were not expressed to be made for the benefit of any land not owned (because previously sold) by the company. The company itself as owner of the rest of the golf course had an interest in obtaining the covenants so as to preserve the character of the land retained. The purchasers of lots 1–3 did not know of lot 5. There is no consistent set of covenants affecting each of the lots. Therefore, all the contemporaneous evidence of what the parties intended in 1938 is far from

71 [1908] 2 Ch 374, p 384.

being consistent only with an intention to create a building scheme giving rise to mutually enforceable rights.

DISCHARGE AND MODIFICATION

The court has an inherent power to discharge or modify a restrictive covenant if there is sufficient evidence (a) that a covenantee (or his assignees) has acquiesced in a course of conduct which is inconsistent with its continuance, as where he has disregarded past breaches of the covenant, or (b) that the character of the neighbourhood has changed to such an extent that it would be inequitable or senseless to continue to insist on observance of a covenant which, in effect, has become redundant.[72]

In addition to the inherent power, statutory provisions in Barbados and Jamaica, which are modelled on the original s 84 of the Law of Property Act 1925 (UK), provide for the discharge or modification of restrictive covenants; and, in those jurisdictions, it is invariably the statutory provisions which are relied upon. Section 3(1) of the Restrictive Covenants (Discharge and Modification) Act of Jamaica[73] provides that an application for discharge or modification may be made on all or any of the following grounds:[74]

(a) that, by reason of changes in the character of the property or the neighbourhood or other circumstances of the case which the judge may think material, the restriction ought to be deemed obsolete; or

(b) that the continued existence of such restriction, or the continued existence thereof without modification, would impede the reasonable user of the land for public or private purposes, without securing to any person practical benefits sufficient in nature or extent to justify the continued existence of such restriction or, as the case may be, the continued existence thereof without modification; or

(c) that the persons of full age and capacity for the time being or from time to time entitled to the benefit of the restriction, whether in respect of estates in

72 *Chatsworth Estates Co v Fewell* [1931] 1 Ch 224; *Paradise Island Ltd v Condor Enterprises Ltd* (1993) Supreme Court, The Bahamas, No 873 of 1992 (unreported).

73 Section 196(1) of the Property Act, Cap 236 (Barbados) is similarly worded. Cf Registered Land Law, s 96 (Cayman Islands), which provides for the discharge or modification of easements, 'restrictive agreements' and profits on similar grounds, but omitting the ground of agreement to discharge. See *Murmarson Ltd v Eldemire* [1988–89] CILR 61.

74 The burden of proof lies on the applicant to satisfy the court that one or more of the grounds has been made out. And even if he succeeds in doing so, the court still has a discretion as to whether or not to order discharge or modification: *Re 13 Gainsborough Avenue* (1990) Supreme Court, Jamaica, No ERC 184 of 1987 (unreported), *per* Bingham J; *Re 39 Wellington Drive* (1991) Supreme Court, Jamaica, No ERC 139 of 1990 (unreported), *per* Courtenay Orr J. There is no burden of proof on the objectors as, in objecting, they are merely exercising their right to preserve their entitlement to the benefit of the covenants which they enjoy.

fee simple or lesser estates or interests in the property to which the benefit of the restriction is annexed, have agreed either expressly or by implication by their acts or omissions to the same being discharged or modified; or

(d) that the proposed discharge or modification will not injure the persons entitled to be benefit of the restriction.

Obsolescence (ground (a))

This provision essentially reproduces the inherent jurisdiction (above, p 162). The requirements of this ground have proved to be extremely difficult to satisfy since, as Smith JA pointed out in the Jamaican Court of Appeal in *Stephenson v Liverant*,[75] 'a change in the character of the neighbourhood[76] does not necessarily result in the covenant being deemed obsolete. The court is obliged to consider the further question whether the changes are such that the covenant ought to be deemed obsolete'. The test for determining whether a covenant ought to be deemed obsolete was laid down by Romer LJ in *Re Truman, Hanbury, Buxton and Co Ltd's Application*,[77] viz, whether the original purpose for which the covenant was imposed can or cannot still be achieved; if it can, the covenant is not obsolete; if it cannot, it is. An example given by Romer LJ of a sufficient change which might render covenants obsolete is where an area once intended to be residential has, through express or tacit waiver of the covenants, become substantially commercial.[78]

In *Stephenson v Liverant*,[79] purchasers of lots in a private residential development entered into covenants prohibiting the erection of any building other than a private dwelling, and the use of any building for any trade or business. The applicants, who owned two of the lots in the development,

75 (1972) 18 WIR 323, p 336.

76 The test to be applied in determining whether the character of a neighbourhood has changed is the 'estate agent's test', that is, 'what does the purchaser of a house in that road or part of the road expect to get?' (*Re 39 Wellington Drive* (1991) Supreme Court, Jamaica, No ERC 139 of 1990 (unreported), *per* Courtenay Orr J; *Re 48 Norbrook Avenue* (1994) Supreme Court, Jamaica, No ERC 80 of 1990 (unreported), *per* Harris J (Ag); *Re 15 Kensington Crescent* (1996) Supreme Court, Jamaica, No ERC 10 of 1995 (unreported), *per* Harrison J).

77 [1955] 3 WLR 704.

78 Applications for discharge or modification under this sub-section failed in *Re Bay Distributors Ltd* (1988–89) 1 Carib Comm LR 358 and *Re Landfall* (1970) 17 WIR 178, High Court, Barbados, on the ground that the areas in which the covenants existed had retained their residential and secluded character. See, also, *Re Haloute's Application* (1986) High Court, Barbados, No 156 of 1986 (unreported); *Re 39 Wellington Drive* (1991) Supreme Court, Jamaica, No ERC 139 of 1990 (unreported); *Central Mining and Excavating Ltd v Croswell* (1993) Court of Appeal, Jamaica, Civ App No 16 of 1992 (unreported); *Re Covenant Community Church* (1990) 27 JLR 368, Supreme Court, Jamaica; *Re Mona and Papine Estates* (1994) Supreme Court, Jamaica, No ERC 147 of 1991 (unreported). An application for modification was granted on grounds (a), (b) and (d) in *Re 15 Kensington Crescent* (1996) Supreme Court, Jamaica, No ERC 10 of 1995 (unreported).

79 (1972) 18 WIR 323.

sought the modification of the covenants, so as to enable them to erect a number of apartment blocks for letting to tourists. The main ground of the application was that, by reason of changes in the character of the neighbourhood and breaches of the covenants by the owners of other lots in the development, the covenants should be deemed obsolete. One of the questions before the court was whether, by letting their houses to tourists, the owners were in breach of the covenants prohibiting use of the land for any trade or business and, if the answer were in the affirmative, whether, in the light of such breaches, there could be said to have been a change in the character of the neighbourhood sufficient to enable the court to hold that the covenants ought to be deemed obsolete.

The Jamaican Court of Appeal, affirming the decision of Parnell J, held that, notwithstanding any proved or admitted breaches of the covenants, the changes in the character of the neighbourhood were not so far reaching as to render the covenants obsolete.

Fox JA explained the decision thus:[80]

> The contention that, by renting to tourists, business is being carried on upon the land, requires a closer examination. It is clear that the owners of nearly all the houses derive a steady annual income from such rent. Looked at in this light, it is true to say that the houses are being used for the purposes of business. But it should be noticed that within the houses themselves no business is being carried on. The houses are not being used as a shop, a school, a chapel, or a nursing home or a racing stable. They are being used as private dwellings. Such user does not really jeopardise to any significant extent those incidents which the first part of covenant 5 was intended to secure. Neither would the transactions, which may be necessary to conclude a contract of tenancy, impeach the spirit of the latter part of that covenant. If, in fact, those transactions took place upon the land, and as to this the evidence is vague (they could have been effected elsewhere), in their nature the transactions do not go beyond the business which the owner of any dwelling house may be obliged to complete in his home from time to time. In addition, the business is done with delicacy, discretion, and an absence of physical exhibition. There is no evidence that any lot is used for advertising, or contains an office set apart for the discharge of formalities, or is possessed of any means of entertainment beyond those that may be expected in any private dwelling house. Having regard to these considerations, I take the view that even if it is admitted that most houses are being used for the purpose of a business, such user has not caused such a change in the residential character of the neighbourhood as to justify a conclusion that the covenants are obsolete.

80 (1972) 18 WIR 323, p 331. See, also, the observations of Parnell J in the lower court, *sub nom Re Lots 12 and 13 Fortlands* (1969) 15 WIR 312, p 321, who pointed out that a balance had to be struck between the public interest in satisfying the demand for residential accommodation and the need to protect the private benefits which flowed from the enjoyment of enforceable restrictions. In *Re 39 Wellington Drive* (1991) Supreme Court, Jamaica, No ERC 139 of 1990 (unreported), Courtenay Orr J emphasised that the general economic state of the country and the housing shortage factor were irrelevant considerations in determining whether a covenant was obsolete.

More recently, in *Re 48 Norbrook Avenue*,[81] Harris J (Ag) found on the evidence that there had been a general tendency towards subdivision of lots in the neighbourhood, resulting in differences in the style, appearance and arrangement of the houses. Whereas there had been single family dwellings on some lots, there were now multiple dwellings, such that it could be said that there had been changes in the character of the neighbourhood. However, applying the test in *Re Truman, Hanbury,* Harris J (Ag) held that the covenants ought not to be deemed obsolete.

Impeding the reasonable user of the land (ground (b))

In order to satisfy this ground, it must be shown:

(a) that the restriction impedes the reasonable use of the land; and

(b) that the restriction does not secure practical benefits to any person sufficient to justify its continued existence.

As with ground (a), the courts have taken a very restrictive approach to the provision, and successful applications under (b) are rare. One difficulty, of course, is that the requirement of (b) is a double one. Another difficulty is that, in *Stannard v Issa*,[82] the Privy Council emphasised that, in order to succeed under this ground, an applicant for the discharge or modification of a restrictive covenant on the ground that it 'impedes the reasonable user of the land' 'has to go a great deal further than merely to show that, to an impartial planner, his proposal appeared a good and reasonable proposal'. Where, for instance, a developer who purchases land subject to a covenant restricting building to a single dwelling house proposes to erect an apartment block for rental to tourists or residents, it is not sufficient for him to argue that this proposal is one which would make a reasonable use of the land, 'having regard to current pressures of population and current notions of optimum density'; nor will the fact that he has obtained planning permission for his proposal necessarily assist his case. The majority of the Jamaican Court of Appeal in *Stannard v Issa* seemed to have been of the view that all the applicant needed to show was that the proposed use was (a) reasonable and (b) impeded to a sensible degree by the restrictions sought to be modified. They adverted to the fact that the neighbourhood in this case was a tourist resort area, and the proposed development was in harmony with it. The Privy Council, however, preferred and, indeed, wholeheartedly endorsed the 'powerful' dissenting judgment of Carey JA, who had stated that the applicant

81 (1994) Supreme Court, Jamaica, No ERC 80 of 1990 (unreported).

82 [1987] AC 175, p 187; (1986) 34 WIR 189, p 196; *Re Ghey and Galton's Application* [1957] 3 All ER 164, p 171, *per* Lord Evershed MR.

must show that the restrictions '*have sterilised the reasonable use of the land*'.[83] Put in another way, the court must be satisfied (a) that the permitted use is no longer a reasonable one, and (b) that the applicant's proposed use is the only reasonable one. These tests are very difficult to satisfy.

Even if the applicant succeeds in showing that the restrictions have sterilised the reasonable use of the land, he has another hurdle to surmount, which is to show that the restrictions do not secure practical benefits to any person.

The statutes do not define 'practical benefits', but it is accepted that they would include such benefits as privacy and view, low density of occupation, peace and quiet, security, and maintenance of property values.[84] Most of these benefits were enjoyed by the residents in *Stannard v Issa*.[85] In this case, an area of land on the coast between Ocho Rios and Tower Isle in Jamaica was, in 1952, subdivided into 11 lots, 10 of which were sold subject to common covenants not to subdivide the lots, not to erect any building of less than £2,000 prime cost, and not to carry on any trade or business or use the land for any commercial purposes, save that of a medical practice. Up to the end of 1952, the development was entirely residential, constituting, in the trial judge's words, a 'peaceful seaside enclave of a family nature'. The applicant, an original covenantor, who was the owner of two lots, obtained planning permission to erect six blocks of three storey buildings, comprising 40 residential apartments together with amenities, including two swimming pools. She applied to a judge in chambers for modification of the covenants so as to permit this development. The owners of other lots subject to the same restrictions objected to the application. Theobald J rejected the application, holding that the continued existence of the covenants in their present form did not impede the reasonable use of the applicant's land, and that the proposed modification would adversely affect the practical benefits secured to the objectors by the covenants. The Jamaican Court of Appeal, by a majority, reversed that decision and granted the modification. The Privy Council advised that Theobald J's decision be restored. There was no evidence of any difficulty in developing the applicant's land or in disposing of it for development within the framework of the existing restrictions, nor was there any suggestion that the restrictions had the effect of sterilising the land.[86]

It was also emphasised by the Privy Council in this case[87] that it was incorrect to interpret s 3(1)(b) of the Jamaican Act as if it were identical to the

83 [1987] AC 175, p 195.

84 See Wilkinson, HW (1979) 129 NLJ 523, p 524.

85 See, also, *Re Constant Spring and Norbrook Estates* (1961) 3 WIR 270, Supreme Court, Jamaica; *Re Bengal* (1994) Supreme Court, Jamaica, No ERC 71 of 1992 (unreported).

86 See, also, *Re 13 Gainsborough Avenue* (1990) Supreme Court, Jamaica, No ERC 184 of 1987 (unreported), *per* Bingham J.

87 [1987] AC 175, pp 186, 187.

equivalent English provision (s 84(1) of the Law of Property Act 1925), as the latter section had been amended in 1969 by s 28 of the Law of Property Act of that year by substitution of the phrase 'some reasonable user' for 'the reasonable user'. The purpose of this amendment had been to widen the scope of the section and thereby make it easier for applicants to secure discharge or modification where money would be adequate compensation for the objectors. The Jamaican section had thus to be interpreted in the light of cases decided before 1969, and based on the narrower wording.

Agreement to discharge or modification (ground (c))

A covenant may be discharged or modified where the dominant owners[88] have agreed, either expressly or by implication, by their acts or omissions, to such discharge or modification. This ground is rarely relied upon, and it must be regarded as virtually redundant since, if all the dominant owners come to such an agreement, they will normally execute a deed to that effect. Applying to the court in such a case would be a waste of time and money. It seems that the only situation in which an application on ground (c) might be needed is where the dominant owners indicated that they would agree to a discharge or modification but then refused to execute the formal deed.

A more useful application of this paragraph would be in cases of implied consent, viz, where the persons entitled to the benefit of covenants have acquiesced in past breaches to such an extent that they must be presumed to have consented to the discharge of the covenants. However, this argument was rejected in *Re Federal Motors Ltd's Application*,[89] where the applicant company sought the discharge of a restrictive covenant in order to enable it to service vehicles on its land. Graham-Perkins J (Ag) in the Jamaican Supreme Court held that the fact that the surrounding owners had not objected to the applicant's breaches of covenant for more than two years did not indicate agreement by implication to the discharge of the covenant.

No injury to objectors (ground (d))

Under (d), a covenant may be discharged or modified on the ground that the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction. This paragraph has much in common with the second limb of (b): 'without securing to any person practical benefits sufficient in nature or extent to justify the continued existence of such restriction'; and,

88 It is essential that all the dominant owners are in agreement: the agreement of some only is not sufficient: *Re 13 Gainsborough Avenue* (1990) Supreme Court, Jamaica, No ERC 184 of 1987 (unreported), *per* Bingham J.

89 (1966) 9 WIR 375, p 381.

in many cases, where an applicant fails to satisfy the second limb of (b), he will inevitably fail to satisfy (d) also. For instance, in *Stannard v Issa*,[90] once it was decided that the continued existence of the covenants did secure substantial practical benefits to the objectors in the preservation of 'the privacy and quietude of an enclave of single dwellings in large gardens', it was a short step to holding that the objectors would be injured by the proposed modification of the covenant, in the sense that it would have seriously interfered with those benefits by permitting the construction of 40 residential apartments. Similarly, in *Re Bay Distributors*,[91] an application under (d) failed, since the applicant was unable to produce sufficient evidence to show that the practical benefits of peace, privacy and seclusion hitherto enjoyed by the objectors would not be adversely affected by the proposed modification.

The scope of ground (d) has been severely limited by the restrictive interpretation put on it in *Ridley v Taylor*[92] by Russell LJ, who stated that the ground was 'designed to cover the case of the, proprietorially speaking, frivolous objection', and that it was 'so to speak, a long-stop against vexatious objections to extended user'.

This narrow interpretation of the scope of ground (d) was applied in *Re System Sales Ltd's Application*,[93] where lots within a residential scheme of development, described as 'a quiet and peaceful enclave', were subject to covenants not to erect more than one freehold dwelling house on each lot, not to subdivide any lot, and not to use the land for any trade or business. The Barbados Telephone Company wished to erect a substation on part of one lot, and, with the consent of the owner of the lot, S Ltd, had obtained planning permission to do so. S Ltd sought a discharge or modification of the covenants. Objections were raised that the volume of vehicular traffic would grow, the value of the properties would fall, and the removal of the restrictions attaching to the applicant's lot would encourage other lot owners to make similar applications for subdivision or for setting up other types of business. After citing Russell LJ's *dictum*, Williams CJ, in the Barbados High Court, stated[94] that 'the issue is whether [S Ltd] has established that the objections raised are trifling and insubstantial and can be dismissed as no more than frivolous ... Under [para (d)] I am not authorised to weigh the practical benefits of one course against the other. I am only concerned with whether [S Ltd] has established that the objectors, as persons who have bought into the development, have raised only insubstantial matters'. Concluding that the objections were not insubstantial, Williams CJ refused the application for modification.

90 [1987] AC 175, p 187; (1986) 34 WIR 189, p 196.

91 (1988–89) 1 Carib Comm LR 358; affirmed in *Bay Distributors Ltd v Goddard* (1989) Court of Appeal, Barbados, No 19 of 1988 (unreported).

92 [1965] 2 All ER 51, p 58.

93 (1992) 43 WIR 19.

94 *Ibid*, p 27.

In *Re McAuley Heights*,[95] on the other hand, where a lot of land situated in an isolated area was burdened with covenants restricting subdivision of the land and prohibiting the erection of more than one private dwelling house thereon, modification so as to permit a subdivision into two lots and the erection of a dwelling house on each lot was granted under (d), on the ground that the objections to modification were insubstantial, and the proposed modification would 'not injure in any way the persons entitled to the benefit of the restriction'.[96] The circumstances in this case were a far cry from those in *Stannard v Issa* and *Stephenson v Liverant*.[97] Here, there was:

> ... a dwelling house designed to give the appearance of a single unit, the architecture of which [was] consistent with the design and external appearance of the houses already built in the subdivision, but capable of accommodating two families because of its internal dividing wall. Each unit would provide security for the other in an isolated area of a crime-prone parish, and, by their very presence, would provide additional security for the neighbourhood, including the houses of the objectors.[98]

The 'thin end of the wedge' argument

Mention should be made of an argument accepted in some of the cases, notably *Stephenson v Liverant*,[99] *Re System Sales Ltd's Application*[100] and numerous English cases,[101] to the effect that a discharge or modification should not be approved within ground (d) where this might set a precedent for the granting of future applications for discharge or modification – the 'thin end of the wedge' which might ultimately lead to the dismantling of the entire residential scheme. Recently, in *McMorris v Brown*,[102] a Privy Council appeal from Jamaica, Lord Cooke expressly approved of this approach. He said:[103]

> Cases may arise in which it is very difficult to say that the particular thing which the applicant wishes to do will of itself cause anyone any harm; but that harm may still come to the persons entitled to the benefit of the restriction if it were to become generally allowable to do similar things. Or such harm may

95 (1989) Supreme Court, Jamaica, No ER R/C 70 of 1983 (unreported). See, also, *Re Lot 49, Ebony Glades* (1996) Supreme Court, Jamaica, No ER R/C 220 of 1991 (unreported), *per* Chester Orr J.

96 *Per* Edwards J.

97 (1972) 18 WIR 323.

98 *Re Lot 10 McAuley Heights* (1989) Supreme Court, Jamaica, No ER R/C 70 of 1983 (unreported), *per* Edwards J.

99 (1972) 18 WIR 323, p 330. See, also, *Earl v Spence* (1992) Court of Appeal, Jamaica, Civ App No 69 of 1989 (unreported).

100 (1992) 43 WIR 19, p 28.

101 See *op cit*, Wilkinson, fn 84, p 524; *Re Ghey and Galton's Application* [1957] 3 All ER 164.

102 [1998] 3 WLR 971.

103 *Ibid*, p 978.

> flow from the very existence of the order making the modification through the implication that the restriction is vulnerable to the action of the Lands Tribunal in England or the Supreme Court of Jamaica ... The prevailing approach is as indicated in *Re Snaith and Dolding's Application*,[104] where it was observed that:
>
> > '... it is ... legitimate, in considering a particular application, to have regard to the scheme of covenants as a whole and to assess the importance to the beneficiaries of maintaining the integrity of the scheme'. In so far as the application would have the effect, if granted, of opening a breach in a carefully maintained and outstandingly successful scheme of development, to grant the application would ... deprive the objectors of a substantial practical benefit, namely the assurance of the integrity of the building scheme.

Lord Cooke continued[105] by stating that the onus was on the applicant to show that a first relaxation of the covenant against subdivision in the *McMorris* case would not 'constitute a real risk as a precedent, so disturbing the pattern of a block of family homes in exceptionally extensive grounds'; '... bearing in mind the subdivisional tendencies and pressures for housing sites in Forest Hills generally', the applicant had not discharged that onus. Accordingly, the application for modification under ground (d) failed in this case.

The 'thin end of the wedge' argument has not been universally accepted, however, and a contrary view is that, if a modification will in itself cause no injury to the objectors, it should not be refused on the ground that subsequent successful applications for modification might do so, since each application must be decided on its merits.[106] This view has particular validity in the Caribbean, where applications are heard by a High Court judge for, as Edwards J observed in *Re Lot 10 McAuley Heights*,[107] 'the "thin end of the wedge" argument assumes that the judiciary is incapable of exercising the discretion which Parliament saw fit to entrust to it'.

104 (1995) 71 P & CR 104, p 118.

105 [1998] 3 WLR 971, p 979.

106 *Re Farmiloe's Application* (1983) 48 P & CR 317. See, also, *Re Forgac's Application* (1976) 32 P & CR 464.

107 (1989) Supreme Court, Jamaica, No ER R/C 70 of 1983 (unreported).

EASEMENTS

DEFINITION

An easement is a right *in alieno solo* (over the land of another). Circumstances can arise where a landowner may wish to grant certain rights over his land to another person, which fall short of a grant of possession. For example, he may wish to grant to an adjoining landowner a right to pass and repass over his land on foot or with vehicles (an easement of way); or a right to lay pipes under his land to convey water or sewage; or he may agree to curtail his own rights in favour of another, for example, to agree not to build on a defined portion of his land so as to ensure that light continues to reach his neighbour's windows (an easement of light); or he may agree not to pull down his own portion of a duplex house so as to withdraw support from his neighbour's portion (an easement of support).[1] Interference with an easement may give rise to an action for damages in nuisance, and for an injunction[2] to restrain further interference.

Some of these rights may be granted not only by way of easement, but also by means of restrictive covenant[3] or licence.[4] Restrictive covenants are particularly appropriate where the right granted is a 'negative' one – that is, one under which the grantor agrees not to use his land in a particular way (for example, not to erect a building on his land). Licences are more appropriate where the right granted is 'positive' – that is, one which allows the grantee to use the grantor's land in a particular way (for example, to use a footpath on the grantor's land). Both types of right, positive and negative, can be created by easement. It should be noted, however, that there is another sense in which the words 'positive' and 'negative' are used. The other meaning is that a right is positive if it requires expenditure of money by the grantor; it is negative if it does not require expenditure. The general rule is that the law does not recognise positive easements in this sense: in other words, a right will not be held to be an easement if it requires expenditure of money by the grantor. The one exception to this is the easement of fencing, which requires the grantor to maintain a fence for the benefit of the grantee: this easement is well accepted, but it is anomalous, and has been called a 'spurious easement'.[5]

1 See, generally, Jackson, *Law of Easements and Profits*, 1978, London: Butterworths.

2 *Lush v Duprey* (1966) 10 WIR 389, Court of Appeal, Trinidad and Tobago.

3 See above, Chap 9.

4 See above, Chap 6.

5 See below, p 180.

Of these three rights – easements, restrictive covenants and licences – the fullest in law is the easement, since a legal easement is a right *in rem*, binding on the whole world, whereas a restrictive covenant is binding only in equity and may be defeated by a *bona fide* purchaser for value of the legal estate without notice of the covenant or, where title to the burdened land is registered, it may be void against a subsequent purchaser unless protected by an entry on the register.

A licence is a much less valuable right than an easement, since it is a right *in personam*, and, if contractual, is generally binding only on the original parties to the agreement and is not binding on successors in title to the original parties;[6] an estoppel licence, on the other hand, is binding only on successors in title having *notice* of its existence.[7] If the licence is neither contractual nor arising by estoppel, for example, an oral permission unsupported by consideration to use a footpath on the licensor's land, then the rights of the grantee can be revoked at any time by the licensor and cannot be legally enforced at all, even against the licensor.

An easement must also be distinguished from a customary or public right. As will be seen, the essence of an easement is that it is a right 'appurtenant' to a particular parcel of land, that is, a right which is exercisable by the owner for the time being of the land for the benefit of which the easement exists. A right which is exercisable by the general public may take effect as a local customary right or a public right, but it is not an easement, because it is not appurtenant to any land. For example, at common law, the right of the inhabitants of a village to walk across another's land to reach the local church, or the right of fishermen to dry their nets on another's land, may be valid customary rights, but they are not easements; and the rights of the general public to pass along a highway, to fish in the sea, or to bathe on a beach, are not easements but public rights.[8]

REQUIREMENTS FOR A VALID EASEMENT

The concept of the easement is based on dominance and servience. An easement may be defined broadly as a right attached to land (the dominant tenement) which gives the owner of that land a right to use the land of

6 *Ashburn Anstalt v Arnold* [1988] 2 All ER 147, p 164, *per* Fox LJ, disapproving earlier authorities such as *Errington v Errington* [1952] 1 All ER 149 and *Binions v Evans* [1972] 2 All ER 70. See above, pp 104–06.

7 See *Ives (ER) Investments Ltd v High* [1967] 1 All ER 504; *Denson v Bush* [1980–83] CILR 141, Grand Court, Cayman Islands.

8 See Megarry and Wade, *Law of Real Property*, 5th edn, 1984, London: Stevens, pp 843, 844. Under the Prescription Act, s 3A(1) (Jamaica), a right to use a beach for fishing, bathing or recreation may be acquired by prescription in the same way as an easement of light. See *Beach Control Authority v Price* (1961) 3 WIR 115, below, p 205.

another (the servient tenement) in a particular way (for example, to walk or drive across it), or to prevent the servient owner from using the servient tenement in a particular way (for example, to prevent the servient owner from building so as to obstruct the light coming to the windows of the dominant tenement). Such a right is enforceable by all successors in title to the dominant tenement against all successors in title to the servient tenement, irrespective of whether the successors to the servient tenement had notice of the existence of the easement.

For such rights to exist as easements, certain requirements must be satisfied, as follows.[9]

There must be a dominant and a servient tenement

It is essential that the right must be *appurtenant* to land, that is, that there must be a dominant tenement to which the right is attached. If X, the owner of Whiteacre, grants to Y, who does not own any neighbouring land, the right to use a pathway running across Whiteacre, Y's right cannot be an easement. It is a privilege which is personal to Y, as there is no dominant land to which the right can be said to be attached. Y's right will be, at most, a mere licence. But if Y is the owner[10] of adjoining land, Blackacre, then the right will be an easement (assuming the other requirements of an easement are satisfied), since X has granted the right not to Y personally, but to Y in his capacity as owner of Blackacre, and the right may be said to have been granted for the benefit of Blackacre. Thus, not only Y, but all Y's successors in title will be entitled to exercise the right of way.

A technical expression which is often used to describe the rule is that 'there cannot be an easement in gross', that is, an easement that is independent of the ownership of land by the claimant. It should be noted that 'ownership' here includes not only the fee simple owners of the dominant tenement, but also those who own lesser estates in the land; for example, a lessee of the dominant tenement is entitled to enjoy all easements which exist for the benefit of that tenement.

As well as a dominant tenement, there must be a servient tenement over which the easement is to be exercised. The servient tenement must be defined

9 See *Re Ellenborough Park* [1953] 3 All ER 667; *Majid v Beepath* (1981) High Court, Trinidad and Tobago, No 882 of 1976 (unreported).

10 In *Boodhoo v Jammuna* (1989) High Court, Trinidad and Tobago, No 438 of 1987 (unreported), Hamel-Smith J emphasised that one who claims to be entitled to an easement must show that he owns the fee simple or is lessee of the dominant tenement. In this case, the El Socorro Sanatan Dharma Sudhar Sabha, being an unincorporated association, was incapable of owning land, unless trustees were appointed in whom the land could be vested. In the absence of appointment of trustees, there could be no claim to an easement. See, also, *Kuarsingh v Stephens* (1996) High Court, Trinidad and Tobago, No 1497 of 1991 (unreported).

sufficiently clearly in the grant. That is normally done by means of a plan of the servient tenement, as in *Keefe v Amor*,[11] where land was conveyed 'together also with a right of way on foot or with vehicles over the land shown and coloured brown on the plan hereto annexed'. It should be noted that, where an easement is acquired by prescription, that is, by virtue of long usage and without any express grant, there will be no documents to define the dominant and servient tenements. Oral evidence will thus be required to establish what those tenements are.

An easement must accommodate the dominant tenement

This requirement means that the right claimed must be sufficiently 'connected with the enjoyment of the dominant tenement and must be for its benefit'.[12] The easement must not merely confer some personal benefit on the grantee, but must serve to make the dominant tenement 'a better and more convenient property'.[13] In deciding whether an alleged easement benefits the dominant tenement, regard must be had to the purposes for which the dominant tenement is used. For example, if the dominant tenement is a dwelling house, a right to use a garden on adjoining property[14] or to cross adjoining land to reach a beach[15] will accommodate the tenement, since it enhances its use and enjoyment. If the dominant tenement is an apartment used for business purposes, the right to use a washroom in the apartment immediately above will accommodate the dominant tenement since it enhances its use.[16] Where the dominant tenement is a public house, an easement to fix a signboard to an adjacent building will accommodate the dominant tenement, even though it benefits the business carried on in the pub rather than the dominant tenement itself.[17] The fact that the existence of the easement increases the value of the dominant tenement is not conclusive as to whether it accommodates the tenement, but it is a relevant factor to be considered.

Propinquity

Normally, the dominant and servient lands will be adjacent to one another, but it is not essential that this should be so, provided they are sufficiently close so that the dominant land receives a practical benefit from the right. On the

11 [1964] 2 All ER 517.

12 Gale, *Easements*, 12th edn, London: Sweet & Maxwell, p 12.

13 *Op cit*, Megarry and Wade, fn 8, p 836.

14 *Re Ellenborough Park* [1955] 3 All ER 667.

15 *Hart v Pierce* (1967) 11 WIR 179, High Court, Barbados.

16 *Miller v Emcer Products Ltd* [1956] 1 All ER 237.

17 *Moody v Steggles* (1879) 12 Ch D 261.

other hand, if the two tenements are many miles apart, clearly there can be no easement in favour of one against the other. As Byles J once said:[18] 'You cannot have a right of way over land in Kent appurtenant to an estate in Northumberland [about 300 miles from Kent].' An unusual example of a servient tenement being held to be sufficiently close to the dominant tenement to accommodate it was where a pew in a church was held to be sufficiently close to a house in the parish, so that the owners of the house acquired an easement to use the pew.[19]

Personal advantages

A right will not accommodate the dominant tenement if it is granted solely for the personal benefit of the grantee, and not for the benefit of the land occupied by him. The leading case is *Hill v Tupper*.[20] A canal company leased land adjoining the canal to Hill, granting him the sole and exclusive right to put pleasure boats on the canal. Tupper disregarded this privilege by putting his own rival boats on the canal. Hill sought to restrain Tupper, claiming that Tupper was interfering with his easement to put pleasure boats on the canal. It was held that the right granted to Hill was not an easement, but only a licence, since it was not acquired in order to benefit Hill's land as such, but merely so that he could further an independent business enterprise. The result might have been different if, for example, the right granted had been to cross the canal in order to have access to and from Hill's land, and if Tupper's boats had been so numerous that they interfered with that right.[21] In such a situation, Hill would have had an easement of way and he could have obtained an injunction to restrain Tupper from interfering with the easement.

The dominant and servient tenements must not be both owned and occupied by the same person

Since the essence of an easement is that it is a right *in alieno solo* (over the land of another), it is a basic rule that a person cannot have an easement over his own land. For example, if X is the fee simple owner of two adjacent plots, Blackacre and Whiteacre, and he is in the habit of driving across Whiteacre in order to reach the main road, he is not exercising an easement of way over Whiteacre; he is simply exercising his rights of ownership of Whiteacre itself. X's right in this case is called a quasi-easement for some purposes, and, as will be seen later, if X later sells the quasi-dominant tenement (Blackacre) and

18 *Bailey v Stephens* (1862) 142 ER 1077.
19 *Phillips v Halliday* [1891] AC 228.
20 [1861–73] All ER Rep 696.
21 *Op cit*, Megarry and Wade, fn 8, p 837.

retains the quasi-servient tenement (Whiteacre), the purchaser of Blackacre may acquire a permanent easement over Whiteacre.

It is only where the dominant and servient tenements are both owned and occupied by the same person that an easement is incapable of arising. In the example given, X is both owner and occupier of both tenements. But suppose that X, whilst remaining the fee simple owner of both plots, lets Blackacre to T, a tenant. The two plots are now occupied by different persons. The question is, can T, the tenant occupying Blackacre, acquire an easement over Whiteacre occupied by his landlord, X? The answer is that T can acquire such an easement over Whiteacre by express or implied grant,[22] but he cannot acquire an easement by prescription.[23] Similarly, if X lets Blackacre to T and Whiteacre to S, there will be diversity of occupation, and T can acquire an easement over Whiteacre by implied or express grant,[24] though not by prescription.[25]

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

The basic principle is that all easements 'lie in grant'; that is, in theory, every easement is created by grant, whether express, implied or presumed. Thus, no right can be an easement unless it is capable of being granted. This proposition is somewhat unhelpful, since it does not define what characteristics a right must possess in order that it may be granted. However, it appears from the case law that there are at least four requirements.

The right must be sufficiently defined: it must not be too vague

If the right claimed as an easement cannot be reasonably defined, then it cannot exist as an easement; for example, a right to light shining into a particular window on the dominant tenement is sufficiently certain to be an easement; but a general right to the air flowing indiscriminately over the servient tenement is too vague to be an easement. Thus, in *Webb v Bird*,[26] where the plaintiff claimed an easement of the free access of air to the sails of his windmill which he had enjoyed for 30 years (that is, the claim was by prescription), and which had been obstructed by a building erected by the

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22 As in *Miller v Emcer Products Ltd* [1956] 1 All ER 237 and *Wright v Macadam* [1949] 2 All ER 565.

23 *Kilgour v Gaddes* [1904] 1 KB 457.

24 In *Majid v Beepath* (1981) High Court, Trinidad and Tobago, No 882 of 1976 (unreported), Edoo J pointed out that 'a tenant may acquire an easement against another tenant of the same landlord by grant, but for a period not exceeding that of the latter tenant's lease'.

25 *Kilgour v Gaddes* [1904] 1 KB 457.

26 (1861) 143 ER 332.

defendant, it was held that he could not acquire a right to wind and air coming in an undefined channel, for this was not a right known to the law; it was too vague and uncertain.

Another example of a right held to be too uncertain to rank as an easement is a right to privacy. In *Browne v Flower*,[27] an apartment consisting of 12 rooms on the ground, first and second floors of a building was let to T. Two years later, another apartment on the ground floor was let to the plaintiff. Both apartments had windows overlooking a garden used by the landlord. Some time afterwards, T subdivided her apartment and, with the landlord's consent, built an iron staircase leading from the garden to an entrance to her apartment on the first floor. The staircase was erected in such a way that persons going up and down could see directly into the plaintiff's bedroom. It was held that there was no easement which had been interfered with by the building of the staircase. The law does not recognise any easement of privacy.

Another type of right which is considered to be too vague to be an easement is the *jus spatiandi* – a right to wander at large over the servient tenement, for example, where the servient tenement is a park or field. The right to use a defined pathway across the servient tenement to pass from the dominant tenement to a place beyond the servient tenement is, of course, recognised as an easement of way, but the right to wander at large for recreation has always been considered to be too vague and uncertain to be an easement.

However, in the leading case of *Re Ellenborough Park*,[28] there appeared to be a change of judicial attitude. The facts were that the 'White Cross Estate', which included Ellenborough Park, was being developed as a housing estate. The land surrounding the park had been divided into plots and sold to different purchasers. The conveyances of each plot granted to the purchaser 'full enjoyment at all times hereafter, in common with the other persons to whom such easements may be granted, of the pleasure ground'. The vendors covenanted to keep Ellenborough Park as an ornamental pleasure ground, the expense to be shared by all the purchasers. It was held that the rights were valid easements, notwithstanding that they might involve a *jus spatiandi* or some analogous right, since:

- there were clearly dominant and servient tenements;
- the servient tenement accommodated the dominant tenements (the adjacent dwelling houses) since the right to use the park was connected with the enjoyment of the residences. The park was to be a communal garden for the benefit of the owners of the adjoining houses and clearly enhanced the enjoyment of those houses; and

27 [1911] Ch 219. See, also, *Phipps v Pears* [1964] 2 All ER 35, where it was held that an easement of protection from the weather was too uncertain to be the subject matter of a grant.

28 [1955] 3 All ER 667.

- the right was not too vague or uncertain, since it was for the benefit of a limited number of houses, all bordering the park.

The right must not substantially deprive the servient owner of possession of the servient tenement

Since an easement is essentially a right to do an act on land in the occupation of someone else, a right will not be recognised as an easement if it substantially deprives the owner of the servient tenement of his possession of the land or if it amounts to a claim to joint possession of the servient tenement. The leading case is *Copeland v Greenhalf.*[29] There, the plaintiff was the owner of an orchard and an adjoining house. Access to the orchard was by way of a strip of land (also owned by the plaintiff) about 150 ft long and averaging 25 ft in width. The defendant was a wheelwright, whose premises were directly opposite the strip of land. The defendant proved that, for 50 years, he and his father before him had, to the knowledge of the plaintiff, used one side of the plaintiff's strip of land to store and repair vehicles in connection with his business. He always left room for the plaintiff to have access to the orchard. The defendant claimed that he had acquired an easement by prescription to park and repair his vehicles on the strip. The plaintiff sought to restrain him from doing so. It was held that the right claimed by the defendant was not an easement, since it 'was virtually a claim to possession of the servient tenement', in that the defendant claimed to leave as many vehicles as he liked there, for as long as he liked, and he claimed to enter whenever he liked and do repair work there. Upjohn J said: 'In my judgment, that is not a claim which can be established as an easement. It is virtually a claim to possession of the servient tenement; if necessary, to the exclusion of the owner; or at any rate to a joint user.'[30] In so ruling, his Lordship appeared to be of the view that the right claimed was both too uncertain and too extensive to be an easement. He was careful to point out, however, that this was a claim to an easement by prescription, and he expressly left open the question whether such a right could be acquired as an easement by express grant or reservation.

The principle in *Copeland* was followed in *Grigsby v Melville*,[31] where Brightman J held that the right to occupy a cellar in the plaintiff's house could not be an easement since, to all intents and purposes, it would give an exclusive right to use the whole of the servient tenement (the cellar) and

29 [1952] 1 All ER 809.

30 Another consequence of this proposition is that 'no right to which attaches the characteristics of an easement of way, and which would seek to prevent the servient owner ... from making ordinary use of his land, can ever be acquired by prescription': *Ross v Cable and Wireless (WI) Ltd* [1952–79] CILR 240, Grand Court, Cayman Islands, *per* Graham-Perkins J (Ag).

31 [1973] 1 All ER 385.

would substantially deprive the owner of the servient tenement of possession of it.

Brightman J expressly followed *Copeland*, though it seems he need not have done so, for the following reasons:

- In *Grigsby*, the easement of storage was claimed by way of express reservation in the conveyance, which read: '... there is reserved to the vendor such rights and easements as may be enjoyed in connexion with the said adjoining property.' As was noted earlier, *Copeland* was a case of prescription; Upjohn J, in that case, pointed out that his decision was concerned only with cases of prescription, and he expressly left open the question whether an easement such as the one claimed could have been acquired by express grant or reservation. Thus, it was not necessary for Brightman J to have followed *Copeland*.
- *Grigsby* is difficult to reconcile with the earlier decision of *Wright v Macadam*,[32] where it was held that the right of a tenant to store her coal in a shed was capable of being an easement and could pass on a conveyance under s 62 of the Law of Property Act 1925. Brightman J, in *Grigsby*, disposed of *Wright* on the ground that the facts were not wholly clear from the report, so that it was difficult to know whether the tenant had exclusive use of the coal shed or of any defined part of it. There is also the case of *Miller v Emcer Products Ltd*,[33] where an easement to use a washroom was upheld, even though it could be argued that the servient owner would be dispossessed from the washroom when it was in use. It thus seems that it is still uncertain whether rights of storage can rank as easements.

Parking

It is also doubtful whether a right to park a vehicle in a particular place can be an easement. It has been suggested that a right to park a car anywhere in a large area does not amount to a claim to possession of any space and so can rank as an easement, and this was confirmed in *Newman v Jones*,[34] but that a right to park a car in a particular reserved space amounts to a claim to possession of the whole servient space, and so cannot be an easement. This would be particularly inconvenient where there are apartment or condominium blocks with ground floor or basement car parks, and where car

32 [1949] 2 All ER 565.

33 [1956] 1 All ER 237.

34 22 March 1982, unreported. In *London and Blenheim Estates Ltd v Ladbroke Retail Parks Ltd* [1993] 1 All ER 307, p 317 (affirmed [1993] 4 All ER 157), Judge Paul Baker QC said that 'the essential question is one of degree. If the right granted in relation to the area over which it is to be exercisable is such that it would leave the servient owner without any reasonable use of his land, whether for parking or anything else, it could not be an easement, though it might be some larger or different grant'.

spaces are allotted to the residents. It has been suggested[35] that, if this interpretation of *Copeland* and *Grigsby* is correct, the most practical solution would be either to grant leases or licences of each parking space to each resident, or to grant a general easement of parking to all the residents, ensuring that some sort of practical arrangement is worked out as between all the residents involved.

There must be a capable grantor and grantee

As a corollary to the rule that the right must be capable of being the subject matter of a grant, there must be a capable grantor and a capable grantee. In the case of the grantor, it is obvious that, if the grantor has no power to grant easements (for example, where the grantor is a company or a statutory corporation and the grant would be *ultra vires*), then any purported grant would not create an easement. As regards the grantee, the example usually given of an incapable grantee is a wide and fluctuating body of persons, such as the inhabitants of a village. Such a body cannot acquire an easement, although, as we have seen,[36] it can acquire a customary right to do something: for example, to use a footpath across private land in order to reach the local church, or to play cricket on an area of land.

An easement must be negative from the point of view of the servient owner, that is, it must not involve the servient owner in any expenditure

A right cannot be an easement if it involves expenditure by the alleged servient owner. By the same token, a servient owner is under no obligation to carry out any maintenance or construction work which may be needed for the enjoyment of an easement.[37] To this general rule, there are at least two recognised exceptions:

(a) where there is an easement of fencing, the servient owner is bound to maintain the fence for the benefit of the dominant tenement, notwithstanding that the maintenance will involve expenditure of money;[38]

(b) where the parties have expressly or impliedly agreed that the servient owner is to be responsible for maintenance; for example, a local authority

35 See Hayton, DJ (1973) 37 Conv (NS) 60.

36 See above, p 172.

37 See, eg, *Rance v Elvin* (1983) 49 P & CR 65; *Regis Property Co Ltd v Redman* [1956] 2 All ER 335; *Stokes v Mixconcrete (Holdings) Ltd* (1978) P & CR 448.

38 *Crow v Wood* [1970] 3 All ER 425; *Jones v Price* [1965] 2 QB 618.

which had let apartments in a high-rise building to tenants was held liable as under an implied contract to maintain easements of access over the common parts of the building.[39]

Legal and equitable easements

Easements have been recognised at common law from medieval times, and they usually take effect as legal interests binding all successors in title to the servient tenement. However, in order to be valid at law, an easement must be created by deed[40] or writing. Legal easements may also be acquired by prescription, in which case long use in effect takes the place of a deed.[41]

An easement which is granted without the proper formalities may take effect as an equitable easement under the *Walsh v Lonsdale*[42] principle, and, in Barbados and Belize, as in England, an easement other than one for an interest in fee simple or for a term of years (for example, an easement for life) will take effect as an equitable easement only.[43]

ACQUISITION OF EASEMENTS

Express grant

No special form of words is required for the express grant of an easement, provided the extent of the easement and the description of the dominant and servient tenements are reasonably clear. Usually, the dominant tenement will be described in the deed, but, if it is not, the court may consider all the surrounding circumstances in ascertaining whether there is a dominant tenement.[44]

Express reservation

The question of reservation arises where the owner of land sells part and retains the rest, and wishes to reserve an easement over the land sold in favour of the land retained by him. At common law, a vendor cannot directly

39 *Liverpool CC v Irwin* [1976] 2 All ER 39.

40 This is the position at common law, though statutory provisions in the Caribbean require only writing. See, eg, Cap 154, s 43 (Belize); Cap 236, s 60 (Barbados).

41 See below, pp 194–205.

42 (1882) 21 Ch D 9. See above, pp 15, 16; *Ramkissoon v Sookwah* (1990) High Court, Trinidad and Tobago, No 169 of 1971 (unreported).

43 See Property Act, Cap 236, s 3 (Barbados); Law of Property Act, Cap 154, s 3 (Belize).

44 *Johnstone v Holdway* [1963] 1 All ER 432; *Shannon Ltd v Venner Ltd* [1965] 1 All ER 590.

reserve for himself any easements over the land sold. He can only do so indirectly by getting the purchaser to regrant the easement back to him by executing the conveyance. Statutory provisions[45] in some jurisdictions have now made such a regrant unnecessary, by providing that the reservation of a legal estate or interest shall 'operate at law without any execution of the conveyance by the grantee or any regrant by him'. In other words, it is possible on the sale of land for the vendor to reserve for himself an easement in favour of the land retained by him and against the land sold. An example where this was done is *Johnstone v Holdway*,[46] where the vendor conveyed land to the purchaser, and in the conveyance inserted the following words: '... except and reserving unto the company and its successors in title ... a right of way at all times and for all purposes (including quarrying).' It was held that an easement of way had been validly reserved by the vendor.

Implied grant

We have seen that a person cannot have an easement over his own land.[47] If D owns two adjacent plots, Blackacre and Whiteacre, and D habitually crosses Whiteacre in order to reach a minimart on the other side of Whiteacre, D is not exercising any easement, but simply making use of his rights as owner of Whiteacre. The position we have to consider now, however, is what happens when D sells Blackacre and retains Whiteacre; or when D sells both Blackacre and Whiteacre, but to different persons. For although a person cannot have an easement over his own land, there is nothing to prevent a purchaser of land from acquiring an easement over other land retained by the vendor. In this case, Blackacre is called the quasi-dominant tenement and Whiteacre the quasi-servient tenement. Such an easement may be granted expressly, as we have already seen; but if, owing to incompetent drafting of the conveyance or for any other reason, no express grant of easements is made, the purchaser may still be able to rely on the rules of law whereby easements are implied in his favour. There are three categories of easement which may be implied in favour of the purchaser:

(a) easements of necessity;

(b) intended easements;

(c) easements within the rule in *Wheeldon v Burrows*.[48]

45 Law of Property Act 1925, s 65(1) (UK); Cap 236, s 69 (Barbados).

46 [1963] 1 All ER 432.

47 See above, p 175.

48 (1879) 12 Ch D 31.

Easements of necessity

An easement of necessity most often arises where the land sold is completely surrounded by the land retained by the vendor, or by the retained land and land in the possession of a third party, and unless a right of way is implied over the surrounding land, the purchaser of the landlocked plot would have no access to and from his land. In all such cases, an easement of way will be implied over the quasi-servient tenement.[49]

In *Nickerson v Barraclough*,[50] Megarry J at first instance took the view that the doctrine of easements of necessity is based on public policy, in that it is against public policy that land should be made inaccessible. But the English Court of Appeal[51] denied that view, and stated that the doctrine was based on the presumed intention of the parties. In so doing, the Court of Appeal appears to have blurred the distinction between easements of necessity and intended easements.

Another case in which the distinction between easements of necessity and intended easements became blurred is *Wong v Beaumont Property Trust*,[52] which is also unusual in that it was not a case of a landlocked plot. The facts were that, by a lease made in 1957, three cellars were let to the predecessor in title of the present tenant by the predecessors of the present landlord, for a period of 21 years. In the lease, the tenant covenanted to use the premises as a 'popular restaurant' and to control all odours according to health regulations and so as not to become a nuisance. Although the parties did not realise it at the time the lease was made, it was necessary, in order to prevent smells, to construct a ventilation duct to the outside wall of the premises, the wall being in the possession of the landlord. Because the parties did not realise the necessity for this, no duct was built. In 1961, the plaintiff bought the remainder of the lease and developed the premises into a successful Chinese restaurant. The odours coming from the restaurant caused the occupant of the floor above to complain, and the public health inspector required the duct to be built. The landlord refused to allow the duct to be built, and the plaintiff sought a declaration that he was entitled to do so. Lord Denning MR said:[53]

> The question is: has the tenant a right to put up this duct without the landlord's consent? If he has any right at all, it must be by way of easement ... in particular, an easement of necessity.

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49 *Lush v Duprey* (1966) 10 WIR 389, Court of Appeal, Trinidad and Tobago; *Antigua v Boxwill* (1971) 16 WIR 136, PC Appeal from the Court of Appeal, Guyana; *Henderson v Griffith* (1970) High Court, Guyana, No 2488 of 1967 (unreported); *Crooks v Browne* (1986) 23 JLR 475, Court of Appeal, Jamaica; *Sookoo v Edgecombe* (1997) High Court, Trinidad and Tobago, No 412 of 1990 (unreported).

50 [1979] 3 All ER 312.

51 [1981] 2 All ER 369, p 379, *per* Brightman LJ.

52 [1964] 2 All ER 119.

53 *Ibid*, p 122.

All three judges in the Court of Appeal agreed that the plaintiff was entitled to an easement of necessity, since the covenants in the lease relating to the carrying on of the restaurant business, not to cause a nuisance by odours, and to comply with the Public Health Regulations, could not be performed without the ventilation duct. The result was that the plaintiff was entitled to construct the duct and to enter the landlord's part of the premises in order to maintain and repair it.

Meaning of 'necessity'

It is well established that an easement of necessity will be implied in a conveyance only where, without such an easement, the property could not be used at all. It will not be implied merely on the ground that it would be necessary to the reasonable enjoyment of the property. Thus, in *MRA Engineering Ltd v Trimster Co*,[54] the court refused to read into the conveyance of the quasi-dominant tenement an easement of necessity in the form of a driveway for cars. Certainly, there was no existing access to the property by car, but there was access by foot over a public footpath. The lack of access by car made the use of the quasi-dominant tenement more difficult and inconvenient, but it was not inaccessible.

Similarly, in *Manjang v Drammeh*,[55] where access was available by water across the River Gambia, 'albeit less convenient than access across *terra firma*', the Privy Council held that no easement of necessity would be implied. And in the Trinidadian case of *Boisson v Letrean*,[56] Hamel-Smith J refused to imply an easement of necessity where there was a means of access, albeit over mountainous and difficult terrain. He said:

> The law is clear. The right only arises by way of necessity, not convenience. I fully appreciate that this is mountainous terrain and access ... to the dominant land is going to be difficult. But there is access, and a way of necessity can only exist where the alleged implied grantee of the easement has no other means of reaching his land. If other means of access exist, no matter how inconvenient, an easement of necessity cannot arise, for the mere inconvenience of an alternative way will not itself give rise to a way of necessity.

The scope of the doctrine of easements of necessity was further examined by Hamel-Smith J in *Rampersad v Jattan*[57] and *Ramdass v Ramdass*.[58] He emphasised the following points:

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54 (1987) 56 P & CR 1.

55 (1990) 61 P & CR 194.

56 (1989) High Court, Trinidad and Tobago, No 4435 of 1985 (unreported). See, also, *Rivers v Darceuil* (1997) High Court, Trinidad and Tobago, No 2024 of 1984 (unreported); *Mohammed v Ali* (1998) High Court, Trinidad and Tobago, No 1737 of 1980 (unreported).

57 (1989) High Court, Trinidad and Tobago, No 4556 of 1988 (unreported).

58 (1989) High Court, Trinidad and Tobago, No 1171 of 1988 (unreported).

(a) the doctrine applies not only where the common owner of two parcels of land sells one for value (retaining the other), but also where one parcel is devised by will or conveyed voluntarily *inter vivos*;[59]

(b) once the plaintiff has established that his parcel is landlocked, the onus shifts to the defendant to show the existence of an alternative route;[60]

(c) the defendant must show that there is a legally enforceable means of access. Any access over private land, where use is by permission of the owner, will be disregarded;[61]

(d) where the court does imply an easement of necessity, it must be a convenient one;[62]

(e) a way of necessity, once created, may not be varied by the servient owner, even where the altered way is equally convenient.[63]

Intended easements

In *Pwllbach Colliery Co Ltd v Woodman*,[64] Lord Parker stated:

> The law will readily imply the grant or reservation of easements as may be necessary to give effect to the common intention of the parties to a grant of real property, with reference to the manner or purposes in and for which the land granted ... is to be used. But it is essential for this purpose that the parties should intend that the subject of the grant ... should be used in some definite and particular manner.

It has been pointed out[65] that intended easements in this sense are not essentially different from easements of necessity, in that a common intention to grant a particular easement will normally exist only in cases of necessity. *Wong v Beaumont Property Trust*[66] is an example of a case which can be categorised under either heading; similarly, the mutual easements of support

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59 *Rampersad v Jattan* (1989) High Court, Trinidad and Tobago, No 4556 of 1988 (unreported).

60 *Ibid.*

61 *Ibid.*

62 *Ramdass v Ramdass* (1989) High Court, Trinidad and Tobago, No 1171 of 1988 (unreported). It was held in *Lush v Duprey* (1966) 10 WIR 388, Court of Appeal, Trinidad and Tobago, *per* Wooding CJ, p 395, that the convenience to be afforded by a way of necessity 'falls to be determined as at the date of the acquisition of the right, and the claimant cannot claim any enlargement of that right simply because he subsequently executed work which improved the convenience and facilities of the way'.

63 *Ramdass v Ramdass* (1989) High Court, Trinidad and Tobago, No 1171 of 1988 (unreported) .

64 [1915] AC 634, p 646.

65 Gray, *Elements of Land Law*, 1987, London: Butterworths, p 671.

66 [1964] 2 All ER 119.

implied in favour of adjoining duplex houses would appear to fall under both heads.

Easements implied under the rule in Wheeldon v Burrows

Where X owns two adjoining tenements, Greenacre and Blueacre, and he is in the habit of walking or driving across Blueacre as an alternative means of access from Greenacre to the outside world, one cannot speak of X enjoying an easement over Blueacre, as X is merely exercising his right as owner of Blueacre itself; but if X sells Greenacre to Y, the doctrine of non-derogation from grant requires that Y should not be in a less favourable position than X was, and Y may become entitled to an easement of way over Blueacre. In this context, X's enjoyment of the use of Blueacre may conveniently be called a quasi-easement, which, on the sale of Greenacre, ripens into a full legal easement. This principle was established in *Wheeldon v Burrows*,[67] where it was held that upon the grant of part of the grantor's land, there would pass to the grantee as easements all quasi-easements over the land retained which:

(a) were continuous and apparent; and

(b) were necessary to the reasonable enjoyment of the land granted; and

(c) had been, and were at the time of the grant, used by the grantor for the benefit of the part granted.

'Continuous and apparent' quasi-easements

These are quasi-easements which are 'accompanied by some obvious and permanent mark on the land itself, or at least by some mark which will be disclosed by a careful inspection of the premises',[68] such as a made road[69] or a worn track,[70] drains discoverable with ordinary care,[71] and windows enjoying light.[72]

Necessary to the reasonable enjoyment of the land

This does not mean that the easement must be one of necessity, and the requirement may be satisfied despite the presence of some alternative means of access.[73] It seems that if the easement simply enhances the enjoyment of the

67 (1879) 12 Ch D 31, p 49.

68 Cheshire and Burn, *Modern Law of Real Property*, 15th edn, 1994, London: Butterworths, p 541.

69 *Brown v Alabaster* (1887) 37 Ch D 490.

70 *Hansford v Jago* [1921] 1 Ch 322.

71 *Pyer v Carter* (1857) 156 ER 1472.

72 *Allen v Taylor* (1880) 16 Ch D 355.

73 *Horn v Hiscock* (1972) 223 EG 1437, p 1441.

land – for example, where it affords a 'short cut' to some place outside – the requirement will be satisfied.

'Used prior to and at the time of the grant'

An easement cannot be acquired under *Wheeldon v Burrows* unless there is evidence of actual use by the common owner prior to and at the time of the grant. In *Sovmots Investments Ltd v Secretary of State for the Environment*,[74] a large high-rise office complex, 'Centre Point', was owned by Sovmots. At the time of the action, the building had never been occupied, although it had been completed several months previously. Thirty-six maisonettes on the top six floors of the building were compulsorily acquired by Camden Borough Council, which claimed that it had acquired easements of support for the maisonettes from the building below. The council argued, *inter alia*, that the easements had passed under the *Wheeldon v Burrows* doctrine. The House of Lords held that the doctrine did not apply since (a) it was based on the principle that a grantor must not derogate from his grant, and it had no application where the quasi-dominant tenement was acquired by compulsory purchase order; and (b) the third requirement of the *Wheeldon v Burrows* rule was not satisfied, viz, that there must be actual use and enjoyment of the quasi-easement by the grantor at the time of the grant. This was not satisfied, since Centre Point had never been occupied.

An example of the application of the rule in *Wheeldon v Burrows* in the Caribbean is *Meyer v Charles*.[75] In this case, M agreed to sell a parcel of land in Antigua to C. The only means of access to the parcel was by an access road over land retained by M. Although it seems that, in any event, C was entitled to an easement of necessity over the road, the Court of Appeal of the Eastern Caribbean States in fact held that C had acquired an easement under the rule in *Wheeldon v Burrows*. Floissac CJ said:[76]

> All the prerequisites to the implication of a grant of an easement in the form of a right of way over the access road have been satisfied. First, the appellants were the common owners of parcel 55 and the access road. Secondly, during the common ownership, the appellants used the access road as the sole means of access to parcel 55 from the public road, and vice versa. Thirdly, the user of the access road was continuous and apparent (in the sense that it was exercised over a visible access road) and was evidently necessary for the reasonable enjoyment of parcel 55. Fourthly, had parcel 55 and the access road belonged to different owners, the user of the access road would have been indicative of

74 [1977] 2 All ER 385. See Harpum, C (1977) 41 Conv (NS) 415.

75 (1992) 43 WIR 169.

76 *Ibid*, p 173. Another ground for the decision was that, because M had represented to C during negotiations leading up to the sale that a right of way over the access road would be available for the benefit of the parcel to be sold, M was estopped by this assurance from denying C's right of way (p 174).

> an easement or right whereby parcel 55 would have been classified as the dominant tenement and the access road would have been classified as the servient tenement.
>
> In these circumstances, when the appellants severed their ownership by selling parcel 55 (the quasi-dominant tenement) to the respondents and retained the access road (the quasi-servient tenement), the grant of an easement or right of way over the access road for the benefit of parcel 55 had to be implied.

Implied reservation

Implied reservation may arise where the common owner of two tenements sells the quasi-servient tenement and retains the quasi-dominant tenement. Because of the principles (a) that a grant is construed in favour of the grantee, and (b) that a grantor must not derogate from his grant, the law is reluctant to imply easements in favour of the vendor of land. If the vendor wishes to retain rights over the quasi-servient tenement, he should expressly reserve them in the conveyance. The only easements which will be implied in favour of the vendor are:

(a) easements of necessity; and

(b) intended easements.

Easements of necessity

The same rules apply here as apply to implied grant. Thus, if the quasi-dominant tenement (Blackacre) is completely surrounded by other land and the only means of access to and from it is by way over the quasi-servient tenement (Whiteacre), on a sale of Whiteacre by the common owner, an easement of way over Whiteacre will be impliedly reserved for the benefit of Blackacre retained by the vendor.

Intended easements

As in the case of implied grant, any easements which are required in order to carry out the common intention of the parties will be impliedly reserved for the grantor. For example, where the owner of a duplex house sells one part and retains the other, an easement of support will be impliedly reserved for the vendor's part,[77] since this would be necessary to carry out the parties' common intention.

77 *Shubrook v Tufnell* [1916] 2 Ch 120.

Non-applicability of Wheeldon v Burrows

The rule in *Wheeldon v Burrows* does not apply where the quasi-servient tenement is sold and the quasi-dominant tenement retained. Therefore, if the vendor wishes to reserve easements in his favour, he should do so expressly in the deed of conveyance.[78]

Sales of both quasi-dominant and quasi-servient tenements

Where the common owner does not retain any land but sells both tenements to different purchasers, the result depends upon whether the sales are contemporaneous or not.

(a) Where the sales are contemporaneous, the rule in *Wheeldon v Burrows* applies.[79] Thus, all those continuous and apparent quasi-easements which were in use at the time of the sales pass by implication with the quasi-dominant tenement. In other words, where V sells the quasi-dominant tenement to X and the quasi-servient tenement to Y, and the sales are contemporaneous, the result is the same as if V had sold the quasi-dominant tenement and retained the quasi-servient tenement; X will be entitled to easements of necessity, intended easements and continuous and apparent easements under *Wheeldon v Burrows.*

(b) Where the sales take place at different times, the rule is that the later purchaser is in the same position as his vendor. Thus, if the vendor first sells the quasi-servient tenement, he will not, in the absence of an express reservation, be entitled to easements over the land sold, except for easements of necessity and intended easements, nor will a subsequent purchaser of the quasi-servient tenement be in any better position. But if he first sells the quasi-dominant tenement, the purchaser may also enforce continuous and apparent easements under *Wheeldon v Burrows* against a subsequent purchaser of the quasi-servient tenement to the same extent as he could have done against the vendor.[80]

ACQUISITION UNDER STATUTORY PROVISIONS

Section 62(1) of the Law of Property Act 1925, re-enacting s 6(1) of the Conveyancing Act 1881, provides that, unless a contrary intention is expressed in the conveyance:

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78 *Majid v Beepath* (1981) High Court, Trinidad and Tobago, No 882 of 1976 (unreported), *per* Edoo J.

79 *Schwann v Cotton* [1916] 2 Ch 120.

80 *Op cit*, Cheshire and Burn, fn 68, p 513.

> A conveyance of land shall be deemed to include, and shall by virtue of this Act operate to convey with the land, all buildings, erections, fixtures, commons, hedges, ditches, fences, ways, watercourses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land or any part thereof, or reputed or known as part or parcel of or appurtenant to the land or any part thereof.

Similar provisions have been enacted in most Commonwealth Caribbean jurisdictions.[81]

Purpose of the sections

The object of the sections is to ensure that a purchaser of land will automatically acquire the benefit not only of easements appurtenant to the land, but also of other rights and privileges which have previously been enjoyed by the owners and occupiers of that land. Thus, the purchaser will acquire all such rights without the need for express words in the conveyance. The significance of the section is that its wording is so wide that the purchaser will acquire even those privileges that were previously enjoyed only by way of permission of the vendor; that is, the section has the effect of converting mere licences into easements. Thus, for example, in *International Tea Stores Ltd v Hobbs*,[82] the defendant, who owned two houses, let one of them to a tenant for business purposes, and frequently gave permission to the managers of the business to pass and repass across a yard in the defendant's possession. The tenant later purchased the reversion of the property let, nothing being expressed in the conveyance about any right of way across the yard. It was held that he had acquired an easement of way by virtue of s 6 of the Conveyancing Act 1881, since the statute was wide enough to convert mere licences into easements.

The sections apply whenever there is a conveyance of land. It has been held that 'conveyance' includes not only a conveyance on sale of the fee simple, but also the renewal of a lease, provided that it is made by deed or writing and not merely by word of mouth. The leading case is *Wright v Macadam*.[83] In 1940, M let a top floor flat in his house to W for one week. After the end of the week, W continued in occupation as a statutory tenant under the Rent Acts. In 1941, M gave W permission to use a shed in the garden (in the occupation of M) to store her coal. In 1943, M granted a new tenancy of the flat to W by an unsealed written document which made no reference to the

81 Cap 236, s 66 (Barbados); Ch 123, s 6 (The Bahamas); Conveyancing Act 1983, s 7 (Bermuda); Cap 220, s 16 (BVI); Cap 54:01, s 16 (Dominica); Cap 64, s 3 (Grenada); Conveyancing Act 1973 Rev, s 9 (Jamaica); Cap 27, No 12, s 16 (Trinidad and Tobago); Cap 271, s 16 (St Kitts/Nevis).

82 [1903] 2 Ch 165.

83 [1949] 2 All ER 565.

use of the shed. W enjoyed the use of the shed until 1947, when M demanded that she pay an extra rental for the privilege. When W refused, M denied her further use of the shed. It was held that W had acquired an easement to use the shed under s 62, and was entitled to an injunction to restrain interference with her use of it. Several points emerge from the judgment:

(a) the word 'conveyance' in s 62 included a tenancy made in writing, since the agreement passed a legal estate and therefore amounted to a conveyance;
(b) a right enjoyed by mere permission can pass as an easement under s 62 (as in *Hobbs*);[84]
(c) to pass as an easement, the right must be one known to the law, that is, one which is capable of being recognised as an easement. A right to use a coal shed for the purpose of storing coal for domestic use could clearly be recognised as an easement. It was a right of a kind which could have been included in a lease or conveyance by the use of appropriate express words;
(d) in the circumstances of the case, it could not be said that the parties intended a merely temporary right to use the shed, since no time limit was set for the use.

Limitations on the application of the sections

We have seen that, in order to become an easement under s 62 and its equivalents, it is irrelevant whether the purchaser had an enforceable right over the vendor's land before the conveyance. The question is solely whether a licence or privilege was in fact enjoyed by the purchaser. If it was enjoyed, then it will ripen into an easement by virtue of the section. Thus the vendor of land (as in *Hobbs*), or the lessor about to renew a lease, should be careful expressly to exclude the operation of the sections from the conveyance, lest any licences or privileges should be converted into fully fledged easements.

The right claimed under the sections must be capable of being an easement, that is, it must be recognised by the law as an easement

If the right claimed under the sections is not capable of being an easement, such as a right to protection from the weather,[85] or a right to privacy, the claim will fail. Another case in which a claim to an easement under s 62 failed on this principle is *Green v Ashco Horticulturalist Ltd*.[86] There, the landlord, B, in 1939 granted a lease of premises to Green for use as a shop. When this lease

84 [1903] 2 Ch 165.

85 *Phipps v Pears* [1964] 2 All ER 35.

86 [1966] 2 All ER 232.

expired, in 1945, B renewed the lease, and in 1959 the lease was further renewed. B, who also owned adjoining property, allowed Green to use a passageway which ran from the back of the demised premises to the High Street, for the purpose of loading and unloading his fruit. Green made considerable use of this passageway, but B told him he could not use it at certain times when B required it for his own purposes. Green acquiesced in that position. Green claimed that this privilege had been converted into an easement of way by virtue of s 62 when the lease was renewed in 1945. It was held that the right claimed was incapable of being an easement, since Green's alleged right of way was restricted in that he could only exercise it when B permitted him to do so. Cross J said that 'a purported right of way for such period as the servient owner may permit one to use it would not confer any legal right at all'. Such a restriction is inconsistent with an easement of way, the essence of which is that it can be exercised at any time without regard to the wishes of the owner of the servient tenement. Green could not, therefore, claim that he had acquired an easement under s 62.

On the other hand, we have seen that, in *Wright v Macadam*,[87] the right to store coal in a shed on the servient land was held to be capable of being an easement and passed as such under s 62. Similarly, in *Newman v Jones*,[88] Megarry VC said:

> In view of *Wright v Macadam* ... I feel no hesitation in holding that a right for a landowner to park a car anywhere in a defined area nearby is capable of existing as an easement.

He therefore went on to hold that a right to park on the forecourt of an apartment block passed as an easement under s 62.

Section 62 will not operate unless there has been some diversity of ownership or occupation of the dominant and servient tenements prior to the conveyance

This principle, which was established in *Long v Gowlett*,[89] has been criticised by academic writers,[90] and there was some authority to the contrary,[91] but it was confirmed by the House of Lords in *Sovmots Investments Ltd v Secretary of State for the Environment*,[92] the facts of which have been mentioned earlier.[93] One of the claims of Camden Borough Council was that the effect of the compulsory purchase order relating to the maisonettes in the Centre Point

87 See above, p 190.

88 22 March 1982 (unreported).

89 [1923] 2 Ch 177.

90 See Jackson, P (1966) 30 Conv (NS) 343; Smith, PF [1978] Conv 449.

91 *Broomfield v Williams* [1897] 1 Ch 602.

92 [1977] 2 All ER 385, pp 391, 397; see Harpum, C (1977) 41 Conv (NS) 415.

93 See above, p 187.

complex was to bring s 62 into play, so that the council acquired all ancillary rights of support, drainage, etc, automatically as easements. It was held, however, that s 62 did not apply, since there had been no diversity of ownership or occupation prior to the conveyance, in that Sovmots Ltd had at all times owned the entire complex and no part of it had been occupied by anyone else. Lord Wilberforce explained the reason for the rule thus:[94]

> The reason is that when land is under one ownership, one cannot speak in any intelligible sense of rights or privileges or easements being exercised over one part for the benefit of another. Whatever the owner does, he does as owner, and until a separation occurs, of ownership or at least of occupation, the condition for the existence of rights, etc, does not exist.

There must be a 'conveyance' of land

We have seen that, in *Wright v Macadam*,[95] the word 'conveyance' was interpreted widely to include not only deeds of conveyance and leases by deed, but also tenancies made by writing. Not included, however, are purely oral tenancies,[96] nor agreements to lease.[97] This is another respect in which an agreement to lease within the *Walsh v Lonsdale*[98] principle is less effective than a legal lease.[99]

Section 62 may be excluded by express exception in conveyance

It is always open to the vendor or lessor expressly to exclude the operation of s 62 or its equivalents in the conveyance or lease. The best way to do this is to insert a clause in the conveyance or lease expressly excepting from it any advantages, privileges or licences hitherto enjoyed in respect of the land sold. Indeed, the prudent vendor or lessor should always ensure that such a clause is inserted.

An example of the application of the above principles in the Caribbean is *David v Stollmeyer Ltd*,[100] a case decided under s 16(2) of the Conveyancing and Law of Property Ordinance, Cap 27, No 12 (Laws of Trinidad and Tobago). In this case, in April 1946, CS granted a 99 year lease of a parcel of land with a dwelling house thereon to the defendant/appellant. The lease contained the usual covenants, but there was no reference in the lease to the supply of water. At the time of the execution of the lease, water was supplied

94 [1977] 2 All ER 385, p 391.
95 [1949] 2 All ER 565.
96 *Rye v Rye* [1962] 1 All ER 146.
97 *Re Ray* [1896] 1 Ch 468.
98 (1882) 21 Ch D 9.
99 See above, pp 16, 17.
100 (1959) 1 WIR 153.

to the premises by a pipe through which it was conveyed by natural gravitation from a reservoir situated on premises which were retained by CS. The source of the water that flowed into the reservoir was a natural spring. These waterworks had been operated by CS for many years prior to the lease, and, after execution of the lease, the appellant continued to receive water from the reservoir. In February 1951, the reversion in the parcel of land demised to the appellant, together with the other part of the estate retained by CS, was sold and conveyed to the plaintiff/respondent company. The company brought an action claiming the sum of $74 for water supplied to the appellant. The appellant argued that he had a right to the supply of water by way of easement which had arisen on the execution of the lease, by virtue of s 16(2) of the Conveyancing and Law of Property Ordinance, which provided that 'a conveyance of land, having houses or other buildings thereon, shall be deemed to include and shall ... operate to convey with the land ... all watercourses, liberties, privileges, easements, rights and advantages ... appertaining ... to the land ... or at the time of the conveyance ... enjoyed with ... the land'.

Gomes CJ held that, at the time of the execution of the lease, the appellant acquired a right to the normal supply of water that flowed from the reservoir to the demised premises, such right being capable of passing to a lessee under s 16(2) of the Ordinance.

ACQUISITION BY PRESUMED GRANT (PRESCRIPTION)

Under this method of acquisition, the law presumes that a person who has, in fact, enjoyed a right for a considerable period of time was, at some time in the past, granted an easement by deed. This concept of acquisition by long enjoyment is called prescription. The doctrine of presumed grant is, of course, a legal fiction, designed, on the one hand, to uphold a right which has been continuously enjoyed and, on the other, to pay lip service to the principle that every easement must originate in a grant.

Basis of prescription

The doctrine of prescription is based on acquiescence by the servient owner in allowing somebody to exercise what amounts to an easement over his land for a long time without doing anything to stop him. Fry J in *Dalton v Angus* explained the nature of prescriptive acquisition thus:[101]

101 (1881) 6 App Cas 740, p 773.

> In my opinion, the whole law of prescription and the whole law which governs the presumption or inference of a grant or covenant rests upon acquiescence. The courts and the judges have had recourse to various expedients for quieting the possession of persons in the exercise of rights which have not been resisted by the persons against whom they are exercised, but in all cases it appears to me that acquiescence and nothing else is the principle upon which the expedients rest. It becomes, then, of the highest importance to consider of what ingredients acquiescence consists. In many cases, as, for instance, in the case of that acquiescence which creates a right of way, it will be found to involve, first, the doing of some act by one man on the land of another; secondly, the absence of a right to do that act in the person doing it; thirdly, the knowledge of the person affected by it that the act is done; fourthly, the power of the person affected by the act to prevent such act either by act on his part or by action in the courts; and lastly, the abstinence by him from any such interference for such a length of time as renders it reasonable for the courts to say that he shall not afterwards interfere to stop the acts being done. In some other cases, as, for example, in the case of lights, some of these ingredients are wanting; but I cannot imagine any case of acquiescence in which there is not shown to be in the servient owner:
>
> (i) knowledge of the acts done;
>
> (ii) a power in him to stop the acts or to sue in respect of them; and
>
> (iii) an abstinence on his part from the exercise of such power.

Requirements for prescription

The long enjoyment must be:

(a) as of right;

(b) continuous;

(c) in fee simple.

User as of right

This requirement means that the enjoyment must not have been by force, in secret or by permission (*nec vi, nec clam, nec precario*).

Nec vi: user by force includes not only physical violence (for example, where the claimant breaks open a locked gate or pulls down a fence), but also where the claimant continues his user despite the servient owner's continual protests,[102] for in neither case can the enjoyment be said to have been acquiesced in by the servient owner.

Nec clam: where the user was secret, that is, without the knowledge of the servient owner, there can be no prescription: for example, where the plaintiffs

102 (1881) 6 App Cas 740, p 786.

claimed an easement to discharge waste fluid from a factory into sewers belonging to a local authority, it was held that the plaintiffs had not acquired an easement by prescription since the discharge had been at night and intermittently, and without the knowledge of the local authority;[103] similarly, where D claimed an easement of support for its wharf, the claim failed because D had fixed its wharf to P's land by means of underwater rods which were invisible, apart from two nuts protruding above the surface of the water.[104] It should be noted, however, that if the servient owner deliberately shuts his eyes to the conduct of the claimant, the defence of *clam* will not avail him, since he will be held to have had constructive knowledge of the user.[105] In *Diment v Foot (NH) Ltd*,[106] D and F owned adjacent farms. F claimed that, between 1936 and 1976, he and his predecessors in title had used a way across an outlying part of D's farm. The only visible evidence of access from F's farm to D's farm was a gate fixed at the point where F claimed the access. During the period of user, D had been absent from her farm, visiting it only once a year. The farm had been let on four separate agricultural tenancies, and a firm of surveyors had been appointed as agents to manage the land during D's absence. D argued that F could not have acquired an easement by prescription since she (D) was unaware that F or his predecessors were crossing her land. Her argument succeeded. It was held that:

(a) D did not have constructive knowledge of F's user; the mere sight of a gate leading to F's land would not have put D on any further inquiry as to why the gate was there;

(b) although there is a presumption that the servient owner knows of a user of way, the presumption could be rebutted by evidence that he did not have such knowledge, as was the case here;

(c) no knowledge was proved to have been acquired by D's agent, so no knowledge could be imputed to D.

Nec precario: A user which has been enjoyed with the permission of the servient owner cannot become an easement by prescription, for the fact that the permission was granted shows that the servient owner cannot have acquiesced in the claimant's exercising the easement *as a matter of right*, since the permission could be withdrawn at any time. User by permission can only be, at most, a licence. The leading case is *Gardner v Hodgson's Kingston Brewery*,[107] where it was held that a woman who had used a cartway from her stables through the yard of an adjoining inn for 60 years did not acquire an easement, because she paid 15 shillings a year for the privilege. The user was

103 *Liverpool Corpn v Coghill* [1918] 1 Ch 307.

104 *Union Lighterage Co v London Graving Dock Co* [1902] 2 Ch 557.

105 [1902] 2 Ch 557, p 571.

106 [1974] 2 All ER 785.

107 [1903] AC 229.

by permission and not as of right. This case shows that a landowner can easily prevent a neighbour from acquiring a prescriptive easement of way over his land by requiring that the neighbour make a nominal periodic payment for the use of the way.[108] It is equally clear that a licence or permission granted as an act of good neighbourliness cannot be converted into an easement by prescription.[109]

Finally, it may be noted that, although a licence to do something on the servient owner's land, whether gratuitous or contractual, cannot develop into an easement by prescription, since the user will be by permission, it may be converted into an easement under s 62 of the Law of Property Act 1925 or its equivalents, if the conditions of the sections are met.[110]

Continuous user

This requirement does not necessarily demand that the user be non-stop or on a 24 hour basis. Rather, the degree of continuity needed depends on the type of easement claimed.[111] For instance, an easement to receive support from a building must necessarily be enjoyed 'round the clock'; whereas an easement to receive an uninterrupted flow of light must be enjoyed during the daylight hours. An easement of way, on the other hand, will be regarded as sufficiently continuous even where it is used only intermittently, for, by its very nature, it will be used from time to time.[112] If, however, the user is very occasional, as, for example, in one case where a way was used only three times in 36 years, clearly there can be no claim to an easement by prescription.[113] Whether the user of the way is sufficiently continuous is thus a matter of degree. Megarry and Wade suggest that user 'whenever the circumstances require it'[114] will normally be sufficient to satisfy the requirement of continuity, provided the intervals are not excessive. It may also be noted that the user need not have been by the same person throughout the whole period. It is sufficient that the user is by successive owners or occupiers of the dominant tenement – which would be the most usual case;[115] nor need the user be by the owner or occupier personally. It is sufficient if members of his family or regular employees enjoy the user.[116]

108 [1903] AC 229, p 231.

109 *Ironside v Cook* (1978) 41 P & CR 326.

110 See above, pp 189–94.

111 *Hollins v Verney* (1884) 13 QBD 304.

112 *Ibid.*

113 *Ibid.*

114 *Op cit*, Megarry and Wade, fn 8, p 874.

115 *Op cit*, Cheshire and Burn, fn 68, p 516.

116 *Ansaldi v Lee Lum* [1920] Trin LR 80, p 82, West Indian Court of Appeal. But it was held in this case that use of a way by occasional day labourers going to and from their work did not confer an easement on the employer/owner.

User in fee simple

The user cannot ripen into an easement unless it is by or on behalf of a fee simple owner against another fee simple owner. This rule has the following practical effects:

(a) an easement for a term of years cannot be acquired by prescription[117] (though it can be acquired by express or implied grant or reservation).[118] An easement acquired by prescription must be for an estate equivalent to a fee simple estate;

(b) in order to acquire an easement by prescription, it must be shown that the user began at a time when the servient tenement was in the hands of a fee simple owner, since only then could a grant by a fee simple owner be presumed. Thus if, at the time when the user began, the servient tenement was occupied by a tenant under a lease, there can be no easement by prescription.[119] However, provided the servient tenement was occupied by a fee simple owner at the beginning of the period of user, an easement may be claimed despite the fact that, subsequently, the servient tenement was let to a tenant;[120]

(c) a tenant can claim an easement by prescription only on behalf of his landlord, that is, he cannot claim an easement for the remainder of his tenancy only. The rule that the tenant's claim must be on behalf of his landlord has the following consequences:

- a tenant cannot claim an easement by prescription over other land occupied by his landlord, since a person cannot have an easement against himself. Thus, for example, if L, the owner of a two storey building, lets the upper apartment to T, and occupies the lower apartment himself, T cannot acquire by prescription an easement to use a toilet on the ground floor; though he could acquire such an easement by express grant or under s 62 of the Law of Property Act 1925 and its equivalents;
- if the landlord leases two separate plots to two tenants, one tenant cannot acquire an easement by prescription against the other tenant, since the landlord cannot have an easement against himself.[121]

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117 *Ansaldi v Lee Lum* [1920] Trin LR 80.

118 See above, pp 181–94.

119 *Daniel v North* (1809) 103 ER 1047.

120 *Pugh v Savage* [1970] 2 All ER 353.

121 *Kilgour v Gaddes* [1904] 1 KB 457; *Simmons v Dobson* [1991] 4 All ER 25; *Hobbs v Laurie* (1992) High Court, Barbados, No 217 of 1988 (unreported).

METHODS OF PRESCRIPTION

There are three separate methods whereby an easement may be acquired by prescription. These methods are cumulative, and it is common for claimants to rely upon all three simultaneously.

Prescription at common law

In order to acquire an easement by prescription at common law, the claimant must show that he has enjoyed the user since time immemorial, that is, from the time at which legal memory is taken to have begun. The date from which legal memory begins was fixed at 1189 by the Statute of Westminster 1275. The claimant must, therefore, show enjoyment since 1189. In order to relieve the claimant from discharging this impossible burden of proof, the courts are willing to presume that enjoyment has lasted from 1189, if proof is given of an actual enjoyment for 20 years.[122] This concession, however, is subject to one major difficulty; it is that the presumption that user has been since time immemorial can be rebutted by proof that the easement could not possibly have existed since 1189. For example, if an easement of light to a building is claimed, the servient owner can rebut the presumption of user from 1189 by proving that the building was constructed in 1955. Again, if the servient owner can show that at any time since 1189 the dominant and servient tenements were owned and occupied by the same person, any easement would have been extinguished and the claim at common law would fail. For this reason, claims to prescription at common law rarely succeed, and claimants prefer to rely on the other two methods.

Prescription under the doctrine of the lost modern grant

In order to avoid the difficulty that a claim to prescription at common law could be defeated by proof that the easement could not have been enjoyed since 1189, the courts developed what has been variously described as the 'very questionable theory',[123] and the 'revolting fiction'[124] of the lost modern grant. Under this doctrine, if the claimant can show actual enjoyment of an easement for at least 20 years,[125] the court will presume that an actual grant was made at the time when enjoyment began, but that the deed had been lost.

In *Tehidy Minerals Ltd v Norman*,[126] it was held that the presumption of the lost modern grant cannot be rebutted by evidence that no such grant was, in

122 *Darling v Clue* (1864) 176 ER 586.

123 *Op cit*, Cheshire and Burn, fn 68, p 518.

124 *Angus and Co v Dalton* (1877) 3 QBD 85, p 94, *per* Lush J.

125 *Lazzari v Lazzari* [1997] CILR 350, Grand Court, Cayman Islands.

126 [1971] 2 All ER 475.

fact, made. The doctrine is a pure legal fiction. In this case, the defendants proved that they had been accustomed to graze their sheep on the servient tenement for more than 21 years. It was held that they had acquired a profit of pasture under the doctrine of the lost modern grant. The court presumed that sometime between 20 January 1920, when the user began, and 5 October 1921, a grant by deed had been made, but the deed had been lost in circumstances unknown to anyone. Even though it was extremely unlikely that this had happened, the court was prepared, albeit reluctantly, to uphold the fiction.

Prescription under the Prescription Acts

Easements other than light

Section 2 of the Prescription Act 1832 Act lays down two prescription periods: one of 20 years, the other of 40 years:

> (1) Where an easement has been actually enjoyed without interruption for 20 years, it shall not be defeated by proof that it commenced later than 1189, but it may be defeated in any other way possible at common law.

The effect of the sub-section is that the claim will not be defeated by showing that the right cannot have been enjoyed since time immemorial, but it can be defeated by proof, for example, that it was enjoyed by force, or secretly, or by permission, or that there was no capable grantor.

> (2) An easement which has been enjoyed without interruption for 40 years is to be absolute and indefeasible unless it appears that it was enjoyed by some consent or agreement expressly given by deed or writing.

Apart from the difference in the period of user, it seems that the only distinction between the 20 year and the 40 year prescription periods is that an oral permission may defeat a claim under the 20 year period, but not one under the 40 year period.[127] In particular, despite the wording 'absolute and indefeasible' in sub-s (2), it appears that user must be as of right and there must be a capable grantor.

The Limitation and Prescription Act, Cap 232, s 35 (Barbados),[128] contains provisions identical to those of s 2 of the 1832 Act, whereas under the

127 See *op cit*, Cheshire and Burn, fn 68, pp 522, 523. In *Jones v Price* (1992) 64 P & CR 404, it was held that oral permission given within the 40 year period will negative user as of right; so, also, will a user which continues on a common understanding that the user is and continues to be permissive (*per* Parker LJ, p 407).

128 See, also, Cap 338, s 3 (Antigua and Barbuda); Ch 148, s 2 (The Bahamas); Cap 155, s 3 (Belize); Cap 58, s 3 (BVI); Cap 131, s 2 (Cayman Islands); Cap 7:02, s 3 (Dominica); Cap 252, s 2 (Grenada); Prescription Act, 1973 Rev, s 2 (Jamaica); Cap 60, s 3 (St Kitts/Nevis); Cap 246, s 2 (St Vincent).

Prescription Ordinance, Ch 5, No 8, s 2 (Trinidad and Tobago), there is a single prescription period of 16 years.[129] The latter section provides:

> When any claim shall be made to any right of common or pasture, or other pasture, or other profit or benefit, except rent and services, or to any way or other easement, or to any watercourse, or the use of any water, to be taken or enjoyed or derived upon, over or from any land or water of the State, or of any body corporate or person, and such right of common or matter as hereinbefore mentioned shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of sixteen years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing.

One of the few Caribbean illustrations of acquisition of easements by prescription is *Hart v Pierce*,[130] a case which came before the Barbados High Court. Here, the plaintiffs owned a property called 'Cleveland', situated on the seaward side of the main road at Worthing, Christ Church. The defendant owned a neighbouring house, 'Penrith'. He was also the owner of a narrow strip of land, which he had purchased in 1962, located behind 'Cleveland' and stretching from the main road to the sea. This strip was 20 ft wide and about 280 ft long, and provided the occupiers of 'Penrith' with access to the beach. The plaintiffs claimed that, from 1943 (when they purchased 'Cleveland') until 1964, they, their children and their servants had habitually walked over the strip to the beach without objection from the owners of the strip and without any permission to do so. The defendant argued that there was uncertainty as to the way over which the easement was claimed, in that it was not clear whether the plaintiffs had habitually walked down the centre of the strip to the beach or whether they had used a 4 ft way running along the eastern portion of the strip.

It was held that the plaintiffs were entitled to a right of way under s 35 of the Limitation and Prescription Act by virtue of their continued use of the strip for 21 years. The uncertainty as to the precise path used by the plaintiffs was not fatal to their claim, and the path which they were entitled to use would be that which constituted the nearest way they could take to the beach. As Douglas CJ explained:

> Mr Forde's point is that there must be certainty as to the way over which the right is claimed. The evidence given by the second plaintiff is that she walked down the centre of the strip of land to the beach, and that notwithstanding, her claim is in respect of a 4 ft way running along the eastern portion of the defendant's land. The first plaintiff's evidence on this point is not precise – she

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129 See *Robley v Samuel* (1987) High Court, Trinidad and Tobago, No 8 of 1986 (unreported); *John v Samuel* (1987) High Court, Trinidad and Tobago, No 4147 of 1978 (unreported); *Bhopa v Bhopa* (1998) High Court, Trinidad and Tobago, No 1101 of 1997 (unreported).

130 (1967) 11 WIR 179, High Court, Barbados.

merely says that her family and her servant 'went through the wicket gate and straight down to the beach on the adjoining piece of land'. Later, she speaks about using 'this wicket gate and path' but does not specify where the path was.

I do not think this is fatal to the case of the first and second plaintiffs. In *Wimbledon and Putney Commons Conservators v Dixon*, James LJ said:[131]

> If, from one terminus to another, say from the gate here to the end of a road 200 yds off, persons have found their way from time immemorial across a common, although sometimes going by one track and sometimes by another, I am not prepared to say that a right of road across the common from one terminus to the other may not be validly claimed, and may not be as good as a right over any formed road ...

This statement is, of course, *obiter*, but seems to accord with principle and with common sense. In the instant case, it must be borne in mind that the entire strip of land was only 20 ft wide, that it was not cultivated, and that the only things on it were some shrubs and grape trees. I would be very surprised to find the claimants using one path for the entire period concerning which evidence is given. It is more likely that they found their way to the beach avoiding the shrubs and bushes and the trees which grew there as best they could.

In respect of the Harts, I am satisfied that they are entitled under the terms of s 35 of the Limitation and Prescription Act, by reason of their continued user since 1943 when they bought, to a right of way over the defendant's land as they have claimed. That way has never been defined and there will be an order of the court declaring that the first and second plaintiffs are so entitled and, in accordance with the dictum of Mellish LJ in the *Wimbledon* case, the path which the successful plaintiffs are entitled to take is that which constitutes the nearest way they can take. That way is one of which the plaintiffs gave particulars.

OTHER PROVISIONS IN THE ACTS

The Prescription Act 1832 and its equivalents contain further requirements, which may be summarised thus:

(a) enjoyment must be for the period 'next before the action', that is, for 20 or 40 years immediately preceding the action;

(b) enjoyment must be without interruption by the servient owner, but no act of the servient owner will be declared to be a statutory interruption unless acquiesced in by the dominant owner for one year after he had notice of the interruption;[132]

131 (1875) 1 Ch D 362, pp 368, 369.

132 See *Mohammed v Ali* (1998) High Court, Trinidad and Tobago, No 1737 of 1980 (unreported).

(c) any period during which the servient owner was under a disability (that is, was an infant, lunatic or tenant for life, or during which an action was pending and diligently prosecuted) must be deducted from the 20 year period. Except for the tenancy for life, these disabilities do not apply to the 40 year period; though any period during which the servient tenement was held for a term of years exceeding three years must be deducted from the 40 year (but not from the 20 year) period.[133]

Enjoyment 'next before action'

The period of user must be the period immediately before and leading up to the action in which the claim to an easement is sought to be established. Thus, for example, if, on 1 July 1999, the dominant owner brings an action in the High Court for a declaration that he is entitled to an easement of way on the basis that he has enjoyed the way for 20 years, he must show an uninterrupted user from 2 July 1979 right up to 1 July 1999. It would not be sufficient for him to show that he enjoyed the user, for example, from 2 July 1970 to 1 January 1999, for, although the period is 29 and a half years, it does not immediately precede the court action, there being a six month gap between cessation of the user and commencement of the action.

Unity of ownership or possession

One particular circumstance in which a 20 year period of enjoyment would not satisfy the statutes is where, for part of that period, both dominant and servient tenements came into the ownership or possession of the same person, that is, where there was 'unity of ownership or possession'. The reason for this is that, where there is such unity, any rights exercised over the quasi-servient tenement by the common owner of both tenements are deemed to be exercised not as easements, but by virtue of ownership or possession of the quasi-servient tenement itself. It is an implication of the principle that a person cannot have an easement over his own land. Thus if, for example, the fee simple owner of the dominant tenement proves that he and his predecessors in title have enjoyed a right of way over the servient tenement for 35 years, apart from a period of 12 months, five years ago, when his immediate predecessor in title took a one year lease of the servient tenement and occupied a house on the land for that period, a claim under the Acts will fail, because during part of the 20 years immediately before the action there was unity of possession of both tenements. It has been held, however, that a

133 Prescription Act 1832, ss 7, 8.

claim to an easement in such circumstances may succeed under the doctrine of the lost modern grant.[134]

Statutory interruption

The Prescription Acts give a special meaning to 'interruption', viz, some overt act, such as the obstruction of a right of way by the erection of a barrier or fence, which shows that the easement is disputed.[135] Interruption will, thus, normally be by the servient owner. However, the Acts go on to provide that no act will be deemed to be a statutory interruption unless it has been submitted to or acquiesced in by the dominant owner for at least one year after he had notice of the interruption and of the person responsible for it. For example, the dominant owner has used a footpath over the servient tenement since 1 January 1979, and, on 1 July 1998, the owner of the servient tenement erects a wall across the footpath, blocking use by the dominant owner. If, on 1 January 1999, the dominant owner brings an action in court for a declaration that he is entitled to an easement of way over the servient tenement and for an injunction restraining the servient owner from interfering with the easement, the dominant owner will be entitled to succeed. The servient owner's act in barring the way is not a statutory interruption, because it has not been submitted to or acquiesced in by the dominant owner for one year, but only for six months. The commencement of the action by the dominant owner is sufficient proof that he does not acquiesce in the interruption. Other ways of establishing non-acquiescence by the dominant owner include removing the obstruction, and protesting clearly and forcefully, with or without the threat of legal proceedings.[136]

EASEMENT OF LIGHT

Section 3 of the Prescription Act 1832 provides that, 'when the use of light to any dwelling house, workshop or other building shall have been actually enjoyed for the full period of 20 years without interruption, the right thereto shall be deemed absolute and indefeasible, unless the same was enjoyed by some consent given for that purpose by deed or writing'.

The main differences between acquisition of an easement of light and acquisition of other easements under the Acts are that, in easements of light:

134 *Hulbert v Dale* [1909] 2 Ch 570.

135 *Carr v Foster* (1842) 114 ER 629, *per* Parke B.

136 *Glover v Coleman* (1874) LR 10 CP 108.

(a) user need not be as of right; all that the claimant under the Acts needs to show is 20 years' uninterrupted user and absence of a written consent;

(b) user need not be by or on behalf of one fee simple owner against another fee simple owner. Thus, the mere fact that the servient tenement has been let to a tenant for the whole period of user does not prevent acquisition of an easement of light; further, one tenant (X) can acquire an easement of light by prescription over another tenant (Y) of the same landlord, so that X and his successors will acquire an easement not only against Y but also against the common landlord and all successors in title to the servient tenement;

(c) none of the disabilities apply to the easement of light.

On the other hand, the same principles regarding interruption apply to the easement of light as to other easements, and the period of user must immediately precede the action.

RIGHT TO USE A BEACH

Section 3A(1) of the Prescription Act of Jamaica[137] provides:

> When any beach has been used by the public or any class of the public for fishing or for purposes incident to fishing, or for bathing or recreation, and any road, track or pathway passing over any land adjoining or adjacent to such beach has been used by the public or any class of the public as a means of access to such beach without interruption for the full period of 20 years, the public shall, subject to the provisos hereinafter contained, have the absolute and indefeasible right to use such beach, land, road, track or pathway as aforesaid, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.

It will be noticed that this section follows, *mutatis mutandis*, the wording of s 3 of the Prescription Act 1832 (UK) and its Jamaican equivalent, s 3 of the Prescription Act (Jamaica), which govern the acquisition of easements of light. Section 3A affords the public a right by prescription to use a beach and any means of access to a beach where uninterrupted user of such beach or access for 20 years is proved.

The effect of the section was considered in *Beach Control Authority v Price*.[138] In this case, the Beach Control Authority, a statutory body, sought a declaration on behalf of the inhabitants of Drapers, a small coastal village, that a right of way existed across the defendant's land as a means of access to a beach, together with a right to use the beach itself. It was established on the evidence before the magistrate that (a) many villagers of Drapers from 1926 to

137 This section was inserted by s 2 of the Prescription (Amendment) Law 1955.

138 (1961) 3 WIR 115, Court of Appeal, Jamaica.

1948 had used the beach for the purpose of bathing, and that they had used a pathway across the defendant's land in order to reach a spring where they washed their clothes; also to reach a stream which ran across the beach to the sea, for the purpose of bathing; and (b) between 1949 and 1954, the user of the stream, pathway and beach ceased, except that a few individuals, not exceeding 20, were given personal permission by the overseer in charge to use the beach for bathing.

The Jamaican Court of Appeal held (a) that under s 3A, as in the case of easements of light, it was not necessary for the user of the beach to have been 'as of right'; therefore, the fact that user of the beach may have been by permission did not prevent a prescriptive right from being acquired; but (b) that user of the beach by the public or a class of the public as such was necessary, and in this case the evidence showed that the user between 1948 and 1954 was not by the people of Drapers as a group, but rather, by certain individual persons who may or may not have been inhabitants of Drapers. Accordingly, no right to use the beach or the access thereto had been established under s 3A.

Extent of easements

Having established that an easement has been acquired, it may be necessary to decide how extensive that easement is. For instance, where an easement of way is established, it may be necessary to determine whether it is restricted to use by pedestrians or whether it includes use by vehicles. Another question which commonly arises relates to a change in the circumstances of the user. For example, at the time when the easement commenced, the dominant tenement may have been agricultural land. It may have subsequently been developed as a housing estate, a hotel, or a factory. The question may arise as to whether the dominant owner is entitled to use the way for the purposes of the present development (for example, as a means of access to a hotel), or whether the easement is confined to its original use, that is, only for the benefit of agricultural land. The answer to these questions depends primarily on the method by which the easement was acquired – whether it was by express grant or reservation, implied grant or reservation, or prescription.

Easements acquired by express grant or reservation

The extent of an easement acquired by this method depends upon the proper construction of the document which created it. For instance, if an *unrestricted* right of way is granted expressly, it will not be confined to the purpose for which the dominant land was used at the time of the grant.

In *White v Grand Hotel (Eastbourne) Ltd,*[139] an unrestricted right of way over the servient tenement, granted expressly to the owner of a private house on the dominant tenement, was held not to be limited to the purposes existing at the time of the grant (that is, use for the benefit of a private house). Thus, when the private house was later converted into a hotel, the owners of the hotel were entitled to use of the way for the general purposes of the hotel. In *Kain v Norfolk*,[140] an easement was granted in 1919 'to pass and repass at all times hereafter with or without horses, carts and agricultural machines and implements'. Subsequently, a sand and gravel pit was opened on the dominant tenement and a large number of trucks were driven across the servient tenement to and from the pit. It was held, following *White v Grand Hotel (Eastbourne) Ltd*, that the easement was not restricted to use by horses and carts, but included use by trucks. And, in *Bulstrode v Lambert*,[141] it was held that a right 'to pass and repass with or without vehicles over the servient tenement, included a right to park vehicles for the purpose of loading and unloading, as this was an incident of the right of way. In *National Trust v White*,[142] the plaintiff was the grantee of a right of way over a track across the defendant's farm, under a 1921 conveyance, for the purpose of access to an historic site. In 1973, the plaintiff built a large car park at the end of the track. The defendant complained of the increase in the volume of traffic using the track, alleging that it adversely affected the enjoyment of the defendant's land. It was held that the user of the easement of way was not excessive, since access to the car park was required not for the enjoyment of the car park itself, but in order to visit the site; the user was ancillary to this purpose and came within the terms of the grant.

In any case of difficulty in construing the grant or reservation, for example, where there is a simple grant of a 'right of way' without any words defining the extent of the easement, the physical circumstances of the *locus in quo* must be considered, and the court will, if necessary, examine the land itself in order

139 [1913] 1 Ch 113. Similarly, in *Wilson v Bodden* [1988–89] CILR N 18, Grand Court, Cayman Islands, Collett CJ held that 'the extent of the permitted user of an unrestricted right of way need not be limited to the particular purpose for which it was originally granted'. If that purpose was originally to facilitate personal and domestic access to and from his home, the grantee was entitled to extend the use to accommodate residential and commercial tenants, his employees and their families. He was also entitled to make up the road surface of the right of way so as to make it suitable for private and commercial vehicles of a size and width commensurate with the road's width and surface structure. Any limitation that might be imposed should depend on evidence that the proposed use would be more than the actual road could bear, or that the use interfered unreasonably with the lawful use of the right of way by the other persons having similar entitlements. Cf *Todrick v Western National Omnibus Co Ltd* [1934] Ch 190; *Jelbert v Davis* [1968] 1 All ER 1182; *White v Richards* (1993) 68 P & CR 105; *Jalnarne Ltd v Ridewood* (1989) 61 P & CR 143.

140 [1949] 1 All ER 176.

141 [1953] 2 All ER 728. But see *London and Suburban Land and Building Co (Holdings) Ltd v Carey* (1991) 62 P & CR 480.

142 [1987] 1 WLR 907.

to decide what the parties must have intended. An example of this principle is *St Edmundsbury Diocesan Board v Clark.*[143] In this case, land adjoining a church was conveyed by the church authorities to the defendant subject to a reservation of 'a right of way over the land coloured red on the plan to and from St Botolph's Church'. The question was whether the right of way reserved by the church authorities was a right exercisable on foot only, or whether it included use with vehicles. In construing the reservation, the court looked at the circumstances of the land itself. The land over which the right was exercisable was a narrow strip, two thirds of it being a derelict gravel and sandy path covered with leaves. It was only 4.5 ft wide, and there were two gateposts at the end of it, only 4 ft apart. There was no evidence that the path had been used by vehicles before the time of the grant in 1945. It was held that, in the light of the surrounding circumstances, the right of way would be construed as being limited to use as a footpath only.

Easements acquired by implied grant or reservation

In *Corporation of London v Riggs,*[144] it was held that a way of necessity is strictly limited to the circumstances of the necessity which existed at the time of the conveyance. In that case, the land conveyed by the vendor to the corporation completely surrounded land retained by the vendor. At the time of the conveyance, the landlocked plot was used for agricultural purposes. It was held that the easement of necessity was limited to those purposes and could not subsequently be used for carrying building materials to and from the dominant tenement on which the owner proposed to build a restaurant. It will be noted that this was a case of implied reservation which, in accordance with the rule that a grantor must not derogate from his grant, was construed strictly against the vendor.[145] Whether a similar decision would have been reached if the case had been one of implied grant is not clear, though it has been suggested that, even in cases of implied grant, the extent of the right will be limited by reference to the established or contemplated use at the time of the conveyance or transfer that gave rise to the easement.[146] Thus, in *Milner's Safe Co Ltd v Great Northern and City Rly Co,*[147] it was held that, where a testator devised adjacent plots to different persons, one of which was later bought by the defendants for conversion into a railway station, a right of way which had been used in the testator's lifetime for domestic purposes could not be converted into a means of access to the station for the general public.

143 [1975] 1 All ER 772.

144 (1880) 13 Ch D 798.

145 See above, p 188.

146 Gravells, *Land Law: Text and Materials*, 1995, London: Sweet & Maxwell, p 595.

147 [1907] 1 Ch 208.

Easements acquired by prescription

Where an easement is acquired by long use, its extent is limited to the purposes for which the land has, in fact, been used during the prescription period. The principle is that the easement cannot be extended to purposes radically different from those enjoyed during the period. Thus, for example, if a right of way over the servient tenement was acquired by 20 years' user, during which time it was used for carrying agricultural produce to and from the dominant tenement, it cannot subsequently be used for transporting heavy machinery to and from a factory which is later built on the dominant tenement.[148]

However, there is no objection to the right of way being used more intensively, that is, as regards the number of people or vehicles using it, provided that the user is not different in character. Thus, for example, where an easement to use a path leading to a shop is acquired by prescription, and there is an expansion of the business and consequent increase in the number of customers coming to the shop, the easement will extend to the increased use, since it is a matter of increase in intensity rather than a change in character of the user.[149] The result was similar where two existing houses on the dominant tenement were replaced by seven modern dwelling units,[150] and a right of way appurtenant to a golf club would not be exceeded merely because the membership of the club, and therefore the user of the way, increased.[151]

In *Cargill v Gotts*,[152] C, the owner of a farm, and his employees had, since 1928, continuously drawn water from a pond on G's land. After 1950, the quantity of water taken from the pond increased greatly, since from that time onwards it was used not only for watering cattle, but also for spraying crops. C sought a declaration that he had acquired an easement by prescription to abstract water from the pond for the general purposes of his farm, and that this extended to use for crop spraying. G, on the other hand, argued that the user required to support prescription must be certain and uniform in its character and extent throughout the prescription period, and that the burden on the servient tenement must remain substantially the same. In the present case, that burden had increased greatly for the past 15 years of the user. It was held, however, that C was entitled to the declaration he sought. The increase in intensity of the user since 1950 did not prevent acquisition of the easement to draw water, since it was not user of a different character.

148 *Williams v James* (1867) LR 2 CP 577, p 582.
149 *Woodhouse and Co Ltd v Kirkland* [1970] 2 All ER 587.
150 *Giles v County Building Constructors Ltd* (1971) 22 P & CR 978.
151 *British Railways Board v Glass* [1964] 3 All ER 418, p 432.
152 [1981] 1 All ER 682.

An interesting Caribbean case in which the excessive user of an easement was in issue is *Bernard v Jennings*.[153] In this case, TB, the plaintiffs'/appellants' predecessor in title, had regularly used a strip of land on the defendants'/respondents' adjacent property for gaining access to his property both on foot and with a mule-drawn cart which he used for conveying cocoa and copra. After TB died in 1947, the plaintiffs tended TB's land and continued to use the strip of land, but only on foot. In 1962, the plaintiffs conveyed a portion of their land to CA, who built a house thereon. Shortly afterwards, the defendants erected a barbed wire fence and placed logs across the strip in order to prevent cars from passing along it. The plaintiffs sought a declaration that they were entitled to an easement of way over the strip on foot and with vehicles, under ss 2 and 4 of the Prescription Ordinance (Trinidad and Tobago). The trial judge held that a right of way on foot had been established under the Ordinance, but the enjoyment of the way for animal-drawn vehicles not having been exercised for more than 16 years up to the time of action, the claim to such a right under the Ordinance should fail. He awarded the plaintiffs damages for interference by the defendants with the easement of way, on the ground that the obstruction of the strip made it inconvenient for pedestrians to use it. The Trinidad and Tobago Court of Appeal held that:

(a) the trial judge was correct in his finding that a right of way on foot had been acquired by the plaintiffs under the Prescription Ordinance;

(b) the award of damages was not justified, since the obstruction of the way was not wrongful, being designed to prevent the passage of vehicles and not that of pedestrians;

(c) if the excessive user of an easement cannot be abated without obstructing the whole user of the easement by the person who is unlawfully exceeding his right, the owner of the servient tenement is entitled to obstruct the whole of that user.

Fraser JA said:

> It is unnecessary to go behind the trial judge's findings of fact. The evidence justified his conclusion that a right of way on foot had been acquired by virtue of the Prescription Ordinance; but it is helpful to understand its implications. The appellants' father had acquired a right to pass on foot and with animal-drawn carts. He used the way largely for agricultural purposes which ceased on his death. The only user which continued thereafter was such as was necessary to provide ingress and egress to the appellants' dwelling. True enough, it was a right of way enjoyed by the dominant tenement over the servient tenement, but in its use after Bernard's death it had become restricted to a way on foot. That this was understood by all the parties concerned is supported by the appellants' requests for the passage of motor vehicles to facilitate the construction of the Chin Aleongs' house. It is nowhere suggested

153 (1968) 13 WIR 501, Court of Appeal, Trinidad and Tobago.

> that the respondents at any time attempted to interfere with the appellants' continuing right to pass on foot and it is significant that the interference occurred only after construction of the Chin Aleongs' house. It stemmed directly from the threatened use of the way by the Chin Aleongs for the passage of motor cars.
>
> Clearly, the appellants and their agents, the Chin Aleongs, were seeking to enlarge their right. At the same time, they were attempting to increase the burden on the servient tenement. This they could not legally do.

Bovill CJ in *Williams v James* said:[154]

> When a right of way to a piece of land is proved, then that is, unless something appears to be the contrary, a right of way for all purposes according to the ordinary and reasonable use to which that land might be applied at the time of the supposed grant. Such a right cannot be increased so as to affect the servient tenement by imposing upon it any additional burden.

The same principle was more recently applied by Harman J in *RPC Holdings Ltd v Rogers* in which, after discussing a number of the relevant authorities, he said:[155]

> It seems to me ... that the question of the extent of the right is one of fact which I as a juryman have got to determine, but that I am not to conclude from the mere fact that while property was in one state the way was for all purposes for which it was wanted, therefore, that is a general right exercisable for totally different purposes which only came into existence at a later date. Sitting as a juryman, I can feel no doubt that the way here was a way limited to agricultural purposes, and that to extend it to the use proposed would be an unjustifiable increase of the burden of the easement.

Extinguishment of easements

An easement may come to an end in any of the following ways.

By unity of ownership and possession of the dominant and servient tenements

If the fees simple of both tenements become vested in the same person, and that person is in actual possession of both (for example, where the dominant owner sells the dominant tenement to X, and the servient owner leaves the servient tenement to X in his will and X occupies both plots), then any easement of way across the servient tenement is extinguished.[156] If X later sells the two plots to different persons, the easement is not revived. If there is

154 (1867) LR 2 CP 577, p 580.

155 [1953] 1 All ER 1029, p 1035.

156 *Buckby v Coles* (1814) 128 ER 709.

unity only of ownership, the easement continues until there is also unity of possession; and if there is unity only of possession, the easement is merely suspended until the unity of possession ceases. Thus, where the fee simple owner of the dominant tenement acquires a lease of the servient tenement, any easement will be merely suspended and will revive when the lease terminates or is assigned.[157]

By express release by deed

At common law, a deed is required for an express release of an easement;[158] however, in equity, an informal release is effective if, in the circumstances, it would be inequitable for the dominant owner to claim that the easement still exists; for example, where he has given verbal consent to his light being obstructed and the servient owner has expended money in building the obstruction.[159]

By implied release ('abandonment')

If the dominant owner, by his conduct, shows an intention to abandon the easement, then it will be extinguished by implied release. Whether there was an intention to abandon is a question of fact in each case. Conduct showing such intention may take the form of any of the following:

(a) a particular act, such as where the dominant owner has an easement of light to a building, and he demolishes the building without any intention to replace it with a new one;[160]

(b) non-user for a period sufficiently long to raise a presumption of abandonment. Twenty years' non-user will normally be sufficient to raise the presumption,[161] but non-user will not suffice if there are other circumstances which show that the dominant owner did not intend to abandon. For example, if the user of a right of way has been discontinued for many years because the dominant owner had a more convenient route over his own land,[162] this may be a satisfactory explanation of the non-user, and there will be no abandonment. In *Swan v Sinclair*,[163] a number of lots were sold and conveyed in 1871 on the terms that each purchaser should have a right of way along a road that was to be constructed on a strip of land at the back of the lots. By 1923, the date of the action, no road

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157 *Simper v Folly* (1862) 70 ER 1179.

158 *Lovell v Smith* (1857) 140 ER 685.

159 *Waterlow v Bacon* (1866) LR 2 Eq 514.

160 *Ecclesiastical Commissioners for England v Kino* (1880) 14 Ch D 213.

161 *Moore v Rawson* (1824) 107 ER 756.

162 *Benn v Hardinge* (1992) 66 P & CR 246.

163 [1924] 1 Ch 254; affirmed [1925] AC 227.

> had been constructed, fences had been erected across its proposed site, and the owner of lot 1, which was next to the proposed road, had, in 1883, levelled up his plot, thus causing a 6 ft drop between lots 1 and 2. The plaintiff wished to build a garage on lot 2, and he claimed to be entitled to a right of way over the strip of land at the back of lot 1. It was held that the claim failed; the continued existence of the fences and the raising of the level of lot 1 were evidence of an intention on the part of the owners of the various lots to abandon the proposed right of way.

A somewhat similar example of abandonment is the Barbadian case of *Dear v Wilkinson*.[164] Here, the plaintiff and defendant were the fee simple owners of two adjoining properties, known as 'Deal' and 'Bungalow' respectively, which were originally part of a large area in common ownership. The conveyance of 'Deal' to the plaintiff's predecessor in title in 1913 included a grant of a right of way to the sea over a pathway which was to be laid out across the 'Bungalow' property. No pathway was ever laid out, and the condition of 'Bungalow' underwent changes, including levelling up, the erection of a sea wall, the planting of trees, and enclosure with a wire fence. The successive owners of 'Deal' were allowed access to the sea across 'Bungalow' by, in one case, written, and in the other, oral permission, on payment of an annual fee. The plaintiff in the present action claimed he had an easement of way across 'Bungalow' under the terms of the 1913 conveyance. The defendant pleaded abandonment.

Field J held that:

(a) there had been a valid grant of an easement of way in the 1913 conveyance; and

(b) the fact of non-user, coupled with the acquiescence of the successive owners of 'Deal' in the conduct of the owner of 'Bungalow', amounted to abandonment, and the easement had accordingly become extinguished.

164 (1960) 2 WIR 309, Supreme Court, Barbados.

MORTGAGES

A mortgage has been defined as 'a conveyance or other disposition of an interest in property designed to secure the payment of money or the discharge of some other obligation'.[1] A mortgage of land may be legal or equitable, and it may relate to freehold or leasehold land.

A mortgage is, essentially, a real security for the repayment of money lent. The creditor (the 'mortgagee') obtains rights over the property of the debtor (the 'mortgagor') which are exercisable in priority to the claims of the debtor's general – that is, unsecured – creditors. Since a real security gives priority over general creditors, it is more attractive to a creditor than a debtor's personal credit or a personal security such as suretyship, the usefulness or efficacy of which depends on the solvency of the debtor or guarantor. Another feature of a mortgage is that, so long as the mortgaged property remains worth as much as the amount of the debt, the mortgagee will be sure to receive payment of the debt in full; if, on the other hand, the property depreciates in value so that it becomes worth less than the loan, the mortgagee will recover the value of the property, but, with respect to the balance, he will be in no better a position than the mortgagor's general creditors.

A charge may be used as an alternative to a mortgage. A charge is the appropriation of real or personal property for the discharge of a debt or other obligation, and differs from a mortgage in that the chargee is not vested with either the general or the special property in the subject matter of the charge, nor does he have possession of the subject matter. However, the chargee is entitled to realise his security in much the same way as a mortgagee.

In modern times, mortgages and charges are used as security for the purchase of land and dwelling houses by private individuals, or for the purchase of business premises; and, in the Caribbean, mortgagees are most often banks or insurance companies.

FORM

A legal mortgage of unregistered land may be created by a conveyance of the mortgagor's fee simple estate to the mortgagee subject to a proviso that, upon redemption (that is, repayment of the debt), the property should be

1 Cheshire and Burn, *Modern Law of Real Property*, 15th edn, 1994, London: Butterworths p 657.

reconveyed to the mortgagor. Where the mortgagor has only a leasehold estate, a mortgage is created by subdemise, subject to a proviso for cesser on redemption. This method of creating a mortgage applies in most Commonwealth Caribbean jurisdictions.[2] In Barbados, a mortgage of a legal estate can be effected only by a charge by deed.[3]

A mortgage of registered land is created by execution of a memorandum of charge in the prescribed form, which must be lodged for registration in the Land Registry.[4]

Equitable mortgages are created:

(a) by deposit of title deeds, usually with a bank to secure an overdraft or loan;[5]

(b) under the *Walsh v Lonsdale* principle, where there is an agreement to grant a legal mortgage;

(c) where the mortgagor has only an equitable interest in property, by assignment of the interest to the mortgagee.

RIGHTS OF THE MORTGAGOR

Legal right to redeem

A mortgage deed refers to the loan, and conveys the mortgaged property to the mortgagee subject to the right of the mortgagor to redeem (that is, to repay the loan plus interest and recover his property) on a fixed date which is, by tradition, normally six months from the date of execution of the mortgage. There is, therefore, a contractual right to redeem on the stipulated date. At

2 See, eg, Conveyancing and Law of Property Act, Ch 27, No 12, ss 27, 32–35, 48 (Trinidad and Tobago); Conveyancing and Law of Property Act, Ch 123, s 17 (The Bahamas); Conveyancing Act, s 18 (Jamaica). Cf Law of Property Act 1954, ss 64, 65 (Belize). See *Canadian Imperial Bank of Commerce v Wells* (1996) Supreme Court, The Bahamas, No 287 of 1995 (unreported).

3 Property Act, Cap 236, s 96. Unlike in the case of the conventional mortgage, the chargor by deed can create successive legal mortgages (charges) on his land.

4 See, eg, Land Registration Act, Cap 229, Pt VIII (Barbados).

5 In *Mapp v Barclays Bank International Ltd* (1992) 43 WIR 30, Court of Appeal, Barbados, a husband was sole owner at law and trustee of the matrimonial home, but his wife had an equitable interest in the property by virtue of her financial contribution to its purchase. Unknown to the wife, the husband created an equitable mortgage by depositing the title deeds with the respondent bank. Williams CJ held that, in the absence of any fraud or negligence on the part of the wife, her equitable interest, being earlier in time, had priority over the bank's equitable mortgage.

An equitable mortgagee by deposit is entitled to call for a legal mortgage, even in the absence of an express agreement to execute a legal mortgage, unless the right is excluded by agreement; and a deposit of title deeds by a person other than the debtor is enforceable in the same manner; *Barclays Bank plc v Clarke* (1998) Supreme Court, The Bahamas, No 517 of 1996 (unreported), *per* Dunkley J (Ag).

common law, if the mortgagor failed to redeem his property on the exact day fixed by the agreement, then the estate of the mortgagee became absolute and the mortgagor's interest in the land was extinguished. In modern mortgages, on the other hand, principal and interest are normally repayable by monthly instalments over a long period, for example, 25 years.[6]

Equitable right to redeem

Equity considered the common law rule – that failure to repay the loan on the day fixed by the mortgage resulted in loss of the mortgagor's estate – to be unduly harsh, bearing in mind that the purpose of a mortgage was merely to afford security for a loan. In the eyes of equity, it was unconscionable that a mortgagor should lose his property merely because of his failure to make prompt repayment of a loan, since, so long as the property remained intact, the mortgagee would still have his security, despite the delay in repayment. In Lord Nottingham's words:[7]

> In natural justice and equity, the principal right of the mortgagee is to the money, and his right to the land is only as a security for the money.

Accordingly, equity permitted a mortgagor to redeem his property at any time after the contractual redemption date had passed, and this remains the position today. The right is called the 'equitable right to redeem'.

The equity of redemption

The equity of redemption is the sum total of the mortgagor's interests in the mortgaged property after the mortgage has been created. This arises from his right to redeem and, in fact, the concept of equity of redemption is often used interchangeably with the right to redeem, but, technically, they differ in meaning. The equitable right to redeem arises after the contractual redemption date has passed, whereas the equity of redemption comes into existence as soon as the mortgage is created. The equitable right to redeem is a particular right, while the equity of redemption represents the aggregate of the mortgagor's rights. It is an equitable interest which represents the value of

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6 An instalment mortgage will normally take one of two forms, either:
   (a) the mortgagor covenants to repay the whole debt on a nominal redemption date (usually six months from the date of the mortgage); further clauses provide for repayment by instalments if (as anticipated) there is no repayment on the redemption date; or
   (b) there is no nominal redemption date. The mortgagor covenants to repay by instalments, with a proviso that, if he becomes in arrears (eg, by two months), the whole capital debt is to become repayable.

7 *Thornborough v Baker* (1675) 36 ER 1000.

the mortgagor's interest in the property after it has been conveyed to the mortgagee as a security, and is freely transferable.

Clogging the equity of redemption

Equity has always sought to promote fair dealing and to prevent anything which suggests oppression; in particular, equity will not allow a mortgagee to take advantage of the financial circumstances of the mortgagor by:

(a) excluding the mortgagor's right to redeem, for example, by reserving an option to purchase the mortgaged property; or

(b) postponing the right to redeem for an unreasonably long time; or

(c) reserving certain benefits ('collateral advantages') to be enjoyed after redemption.

Since the purpose of a mortgage is simply to provide the mortgagee with security for a loan, equity views with disfavour any provision in the agreement which tends to hinder the mortgagor in recovering his property upon performance of his obligations. In short, the equitable maxim is 'once a mortgage, always a mortgage', and any term in the mortgage agreement which constitutes a 'clog' on the equity of redemption will be void.[8]

It is important to note, however, that the traditional hostility of equity towards clogs on the equity of redemption has diminished somewhat in modern times, especially where mortgagor and mortgagee are business concerns of equal bargaining power, and the principle of sanctity of contract now often overrides the notion of protection of the mortgagor. The modern approach of the courts, therefore, is that a bargain freely entered into by mortgagor and mortgagee must be adhered to, unless there is evidence of harsh and unconscionable dealing or inequality of bargaining power.

Excluding the right to redeem

Any provision which excludes or unduly restricts the mortgagor's right to redeem may be held void: for example, an agreement that only the mortgagor and the heirs of his body should be entitled to redeem;[9] an agreement which rendered part of the mortgaged property absolutely irredeemable; and an agreement that if the mortgagor predeceased his father, the mortgaged property should become the absolute property of the mortgagee.[10]

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8 *Biggs v Hoddinott* [1898] 2 Ch 307.

9 *Salt v Marquess of Northampton* [1892] 2 Ch 307, p 315.

10 *Davis v Symons* [1934] Ch 442.

The position where the mortgage deed grants to the mortgagee an option to purchase the mortgaged property was considered in *Samuel v Jarrah Timber and Wood Paving Corp Ltd*.[11] In this case, there was a mortgage of £30,000 of debenture stock to secure a loan of £5,000 at 6% interest to Samuel, who reserved to himself 'the option to purchase the whole or any part of such stock at 40% at any time within 12 months'. Samuel sought to exercise the option. The company succeeded in its claim to redeem and to have the option declared illegal and void. Lord Halsbury expressed his reluctance in coming to this conclusion in the following terms:[12]

> A perfectly fair bargain made between two parties to it, each of whom was quite sensible of what they were doing, is not to be performed because at the same time a mortgage arrangement was made between them. If a day had intervened between the two parts of the agreement, that part of the bargain which the appellant claimed to be performed would have been perfectly good and capable of being enforced; but a line of authorities going back for more than a century has decided that such an arrangement as that which was here arrived at is contrary to a principle of equity, the sense or reason of which I am not able to appreciate, and very reluctantly I am compelled to acquiesce in the judgments appealed from.

Lord Macnaghten was equally unhappy with the state of the authorities establishing this rule, which he found not to have been departed from for nearly 150 years. He suggested that he would not:

> ... be sorry if your Lordships could see your way to modify it so as to prevent its being used as a means of evading a fair bargain come to between persons dealing at arms' length and negotiating on equal terms. The directors of a trading company in search of financial assistance are certainly in a very different position from that of an impecunious landowner in the toils of a crafty moneylender.[13]

In *Reeve v Lisle*,[14] on the other hand, it was held that, where an option to purchase the mortgaged property is granted by a subsequent and independent transaction, the option may be held valid. In this case, a ship and other properties were mortgaged to secure a loan. Some time after the mortgage had been executed, the mortgagees were granted an option to enter into a partnership with the mortgagors, and it was further agreed that, if the option should be exercised within five years, the mortgagors should be relieved of liability to repay the mortgage debt and the ship should be transferred free from the mortgage and form part of the partnership assets. The House of Lords considered these two transactions to be separate and

11 [1904] AC 323.
12 *Ibid*, p 325.
13 *Ibid*, p 327.
14 [1902] AC 461.

independent of each other, and the option was therefore valid and enforceable.

The reasoning in such cases is that equity seeks to protect a borrower who finds himself in financial straits and consequently loses his bargaining power. If, on the other hand, the loan has been granted and the mortgage executed without any restrictive or oppressive condition, the borrower does not need the protection any longer. Where, therefore, subsequent to the execution of the mortgage, the mortgagor enters into a separate and independent transaction whereby he gives the mortgagee an additional right over the mortgaged property, he cannot claim the protection of equity in his efforts to escape from the effect of the second transaction, even if the second transaction destroys his equity of redemption completely.

Postponement of right to redeem

Where a provision in a mortgage precludes the mortgagor from redeeming within a certain period (for example, where it is expressly stipulated that the loan is not to be repaid within a period of seven years from the execution of the mortgage), according to Sir Wilfred Greene MR, 'equity is concerned to see two things – one, that the essential requirements of a mortgage transaction are observed, and the other, that oppressive and unconscionable terms are not enforced'.[15]

The objection to a clause postponing the mortgagor's right to redeem is the familiar one – that a mortgage is merely a security for a loan, and a provision prolonging the security beyond the time when the mortgagor is ready and willing to repay the loan constitutes a clog on the equity of redemption. However, in the leading case of *Knightsbridge Estates Trust Ltd v Byrne*,[16] the Court of Appeal made it clear that such a clause will be valid, provided: (a) that the mortgage as a whole is not so oppressive and unconscionable that equity would not enforce it; and (b) that it does not render the equitable right to redeem illusory. In this case, Knightsbridge had mortgaged a large number of properties, including houses, shops and an apartment block, to an insurance company to secure a loan of £30,000 at 6.5% interest, on the terms that repayment should be made by half-yearly instalments over a period of 40 years. The mortgagee agreed not to call in the money before the end of this period, provided that the instalments were punctually paid. Six years later, Knightsbridge sought a declaration that they were entitled to redeem the mortgage, arguing, *inter alia*, that it was unreasonable and oppressive that they should be unable to redeem their properties for 40 years. It was held, however, that, in the circumstances, the agreement was fair and not

15 *Knightsbridge Estates Trust Ltd v Byrne* [1939] Ch 441, p 457.

16 *Ibid.*

unreasonable, particularly since the agreement was a commercial one 'between two important corporations experienced in such matters, and had none of the features of an oppressive bargain where the borrower is at the mercy of an unscrupulous lender',[17] and 'a contract freely entered into after due deliberation by parties dealing with each other at arm's length is not lightly to be interfered with'.[18]

Similarly, a provision which renders the right to redeem illusory will be void. In *Fairclough v Swan Brewery Co Ltd*,[19] there was a mortgage of a lease having 17 and a half years to run. The mortgagor was precluded by the agreement from redeeming the mortgage until a date six weeks before the lease expired. Although there was no evidence of oppression, it was held that the provision postponing redemption rendered the right to redeem illusory, and was void. Accordingly, the mortgagor was entitled to redeem at an earlier date.

Collateral advantages

A collateral advantage in the mortgagee's favour denotes some benefit conferred on him by the mortgagor in addition to repayment of the loan plus interest; for instance, where the mortgagor of a public house agrees to sell on the premises only beer brewed by the mortgagee. Two general rules apply:

(a) the collateral advantage must not be unfair or unconscionable;

(b) the collateral advantage must not unfairly restrict redemption.

Unfairness and unconscionability

It is a question of fact as to whether a collateral advantage is unfair or unconscionable. It is well established that the courts will set aside 'any oppressive bargain or any advantage exacted from a man under grievous necessity and want of money'.[20] In *Cityland and Property (Holdings) Ltd v Dabrah*,[21] the mortgagor was the mortgagee's tenant and a man 'obviously of limited means'. He undertook in the mortgage agreement to pay a premium which represented either not less than 57% of the amount of the loan, or interest at 19%. It was held that this provision was unconscionable and void. This was not a 'bargain between two large trading concerns', and the mortgagor was entitled to redeem by repaying the loan with reasonable

17 *Knightsbridge Estates Trust Ltd v Byrne* [1939] Ch 441, p 455, *per* Sir Wilfred Greene MR.

18 *Op cit*, Cheshire and Burn, fn 1, p 675.

19 [1912] AC 565.

20 *Barrett v Hartley* (1866) LR 2 Eq 787, p 795, *per* Stuart VC.

21 [1967] 2 All ER 639.

interest fixed by the court. In *Multiservice Bookbinding Ltd v Marden*,[22] on the other hand, Browne-Wilkinson J stressed that, for a collateral advantage to be declared void, it must be unfair and unconscionable and not merely unreasonable, and unfair and unconscionable meant 'imposed in a morally reprehensible manner, that is to say, in a way which affects [the mortgagee's] conscience'.[23] In this case, the mortgagor was a small company which needed a loan in order to expand its business. The terms of the mortgage were that: (a) interest was payable at 2% above bank rate; (b) the loan was to be irredeemable for 10 years; and (c) the value of the capital and interest was to be index linked to the Swiss franc. After 10 years, when the mortgage became redeemable, the total capital repayment had risen from the £36,000 lent to £87,588, because of devaluation of the pound against the Swiss franc, and the average rate of interest amounted to 16%. It was held that the agreement was valid. Although the bargain was a hard one from the mortgagor's point of view, it was not unfair or unconscionable in the sense defined by Browne-Wilkinson J.

Restriction of redemption

A collateral advantage will be void if it unfairly restricts redemption, in the sense that it prevents the mortgagor from redeeming his property free from all the conditions of the mortgage and from being restored to his original position. Accordingly, the rule has emerged that a collateral advantage which is not unconscionable is valid until redemption, but not afterwards.

In *Biggs v Hoddinott*,[24] the collateral advantage was to last only during the continuance of the mortgage. Here, the owner of a hotel mortgaged it to a brewer as security for a loan of £7,654. The mortgage was not to be redeemable for five years, and the mortgagor agreed that, during the five year period, he would sell on the premises no beer other than that of the mortgagee. It was held that the agreement was valid, so that the mortgagor was not entitled to redeem the property after only two years and be released from the solus agreement.

In *Noakes v Rice*,[25] on the other hand, the lessee of a public house under a lease which had 26 years to run mortgaged the premises and covenanted that, for the duration of the lease, whether he had redeemed the mortgage or not, he would not sell any malt liquors other than those supplied by the mortgagee. After three years, the mortgagor sought to be released from the covenant on repayment of the loan plus interest. It was held that the mortgagor was entitled to be released from the covenant, on the ground that its effect was that he would still be fettered by the terms of the mortgage after redemption, as he would be redeeming a 'tied house' in place of a 'free house'.

22 [1978] 2 All ER 489.

23 [1978] 2 All ER 489, p 502.

24 [1898] 2 Ch 307.

25 [1902] AC 24.

A different approach was taken by the House of Lords in the leading case of *Kreglinger v New Patagonia Meat and Cold Storage Co Ltd*,[26] which shows that the courts, in order not to disturb commercial contracts entered into by business organisations enjoying equality of bargaining power, may permit collateral advantages to remain binding even after redemption. In this case, a firm of wool brokers lent £10,000 to a meat company. The security took the form of a floating charge on the borrower's assets. It was agreed that, for five years from the date of the loan, the company would not sell sheepskins to any person without first offering them to the lenders at the full market price, the borrowers further agreeing to pay the lenders a commission of 1% of the sale price of all sheepskins sold to anyone other than the lenders. It was also agreed that the lenders would not call in the loan before the end of the five year period. After two years, the borrowers paid off the loan and disputed the right of the lenders to enforce their option to purchase the sheepskins. The House of Lords held that the lenders were entitled to an injunction restraining the borrowers from selling sheepskins to third parties during the remainder of the five year period, notwithstanding that the borrowers would be less free in the conduct of their business after repayment of the loan than they were at the date of the loan. The reasoning of the court was expressed by Viscount Haldane thus:[27]

> The question in the present case is whether the right to redeem has been interfered with. And this must ... depend on the answer to a question which is primarily one of fact. What was the true character of the transaction? Did the appellants make a bargain such that the right to redeem was cut down, or did they simply stipulate for a collateral undertaking, outside and clear of the mortgage, which would give them an exclusive option to purchase the sheepskins of the respondents? The question is, in my opinion, not whether the two contracts were made at the same moment and evidenced by the same instrument, but whether they were in substance a single and undivided contract or two distinct contracts ... if your Lordships arrive at the conclusion that the agreement for an option to purchase the respondent's sheepskins was not in substance a fetter on the exercise of their right to redeem, but was a preliminary and separable condition of the loan, the decided cases cease to present any great difficulty.

Restraint of trade

In addition to any objection based on clogging the equity of redemption, mortgages are subject to the doctrine of restraint of trade. Under this doctrine, any stipulation in a contract which imposes an unreasonable restriction on the freedom of a person to engage in trade or to pursue a profession will be *prima*

26 [1914] AC 25.

27 *Ibid*, p 38. This principle was applied in *Wellesley Ltd v Suto Ltd* (1992) Supreme Court, The Bahamas, No 180 of 1988 (unreported).

facie void. The onus is on the party imposing the restraint (in this context, the mortgagee) to show that the restraint is reasonable (a) as between the parties, and (b) in the public interest. Thus, as *Esso Petroleum Co Ltd v Harper's Garage Ltd*[28] shows, a postponement of redemption which is not unconscionable or oppressive may, nevertheless, be declared void if it constitutes an unreasonable restraint upon the mortgagor's business activities. In this case, a garage was mortgaged to Esso. The mortgagors covenanted that they would not redeem the mortgage for 21 years and, during that period, would sell only fuel supplied by Esso. It was held that the solus agreement was void as being in restraint of trade, and the mortgage was redeemable before the expiration of the 21 years.

RIGHTS OF MORTGAGOR IN POSSESSION

A mortgagor who remains in possession of the property has the following rights:

(a) a right to the rents and profits. A mortgagor in possession is not liable to the mortgagee for any such rents and profits, even though he may be in default in the payment of interest. The mortgagor is entitled to sue in his own name for the recovery of rents and profits;

(b) a right to sue for trespass or any wrong done to the land;

(c) a right to grant valid leases. At common law, a mortgagor in possession was entitled to grant leases of the property which were binding as between himself and the lessee, but, if made without the consent of the mortgagee, could be set aside by the latter.[29] Section 18 of the Conveyancing Act 1881 granted the mortgagor a statutory right to grant agricultural or occupational leases for any term not exceeding 21 years, and building leases for any term not exceeding 99 years. Such a lease must be made to take effect in possession not later than 12 months after its date, at the best rent reasonably obtainable. The statutory leasing powers may be expressly excluded by the mortgage deed, as, for instance, by a provision requiring the mortgagee's consent before the leasing power can be exercised. Similar provisions have been enacted in some Caribbean jurisdictions.[30]

28 [1967] 1 All ER 699.

29 *Iron Trades Employers' Insurance Association v Union Land and House Investors Ltd* [1937] 1 All ER 481; *Quennell v Maltby* [1979] 1 All ER 568.

30 See, eg, Conveyancing Act, s 21 (Jamaica); Ch 27, No 12, s 37 (Trinidad and Tobago); Ch 123, s 20 (The Bahamas) (applicable to both mortgagors and mortgagees). Cf Cap 236, s 108 (Barbados).

RIGHTS OF MORTGAGEE

There are five of these, viz:

(a) right to sue on the personal covenant;

(b) right to enter into possession of the mortgaged property;

(c) right to appoint a receiver;

(d) right to sell the mortgaged property;

(e) right to foreclose the mortgage.

These remedies are both concurrent and cumulative: the mortgagee can pursue all or any simultaneously as soon as the mortgagor is in default, and, if one remedy proves insufficient to satisfy what is owing to him, he may pursue another remedy in order to recover the balance. The only exception is foreclosure, which, once made absolute, extinguishes the other remedies. Each remedy may now be considered in turn.

Action on the personal covenant

The mortgagor will normally covenant[31] expressly to repay the loan on a certain date (usually six months from the date of the mortgage) and to pay interest on the loan at a certain date; alternatively, the loan may be stated to be repayable by instalments falling due on a particular day of the month. As soon as the date stipulated for repayment (including the date for payment of an instalment)[32] has passed, the mortgagee may sue on the covenant to recover the principal sum and any arrears of interest. The mortgagor remains liable on the covenant, even though he has transferred his interest; he should, therefore, take an indemnity from the transferee.

Right to enter into possession

As Harman J emphasised in *Four Maids Ltd v Dudley Marshall (Properties) Ltd*, a legal mortgagee has a right to take possession of the mortgaged property 'before the ink is dry on the mortgage', unless there is something in the contract whereby he has contracted himself out of that right; and 'the right of

31 The mortgagor normally enters into the following covenants: for title; to insure; to repair; to pay rates and taxes. By Cap 236, s 97(1) (Barbados), similar covenants are implied, in the absence of express covenants in the memorandum of mortgage.

32 It is common, in an instalment mortgage, for the mortgage deed to stipulate that, on failure to pay an instalment by the due date, the whole amount of the debt shall become due: see, eg, *Halifax Building Society v Clark* [1973] 2 All ER 33.

the mortgagee to possession ... has nothing to do with default on the part of the mortgagor'.[33]

In practice, a mortgagee will not take possession of the mortgaged property except as a preliminary to exercising his statutory power of sale after a default by the mortgagor. Where there has been such default, it will, in most cases, be essential for the mortgagee to exercise his right so that he may sell with vacant possession. Where the mortgagor is in possession of the property, it will be necessary for the mortgagee to bring an action for recovery of possession.

After an amendment to the Rules of the Supreme Court (UK) in 1936, which assigned proceedings for possession from the King's Bench Division to the Chancery Division,[34] it became possible for mortgagors to obtain equitable relief in possession actions, and the Master thus had a discretion to refuse a possession order if it was just and equitable to do so. This discretion was apparently terminated in *Birmingham Citizens' Permanent Building Society v Caunt*[35] by Russell J, who declared that the equitable discretion was without legal foundation. He said:[36]

> Where (as here) the legal mortgagee under an instalment mortgage ... is entitled to possession, the court has no jurisdiction to decline the order or to adjourn the hearing whether on terms of keeping up payments or paying arrears, if the mortgagee cannot be persuaded to agree to this course. To this the sole exception is that the application may be adjourned for a short time to afford to the mortgagor a chance of paying off the mortgagee in full or otherwise satisfying him; but this should not be done if there is no reasonable prospect of this occurring.

In the Bahamian case of *Bank of Nova Scotia v Morrison*,[37] the mortgagor was in default of her monthly mortgage payments to the tune of $17,079 principal and $1,752 interest, in respect of which a demand notice had been served. When the mortgagor continued to be in default, the mortgagee sought possession of the mortgaged property with a view to putting it up for sale. Osadebay J, following the judgment of Russell J in *Caunt*, held that he had no power to deprive the mortgagee of his right to possession. He said:

> The nature of the defence in this matter has been such that this court could not adjourn the hearing, whether on terms of keeping up payments or paying

33 [1957] 2 All ER 35, p 36. This common law right has been abolished in Barbados by the Property Act, Cap 236, s 98(2)(b). The sub-section provides that a mortgagee may apply to the court for a possession order.

34 See Cousins, *Law of Mortgages*, 1989, London: Sweet & Maxwell, p 244.

35 [1962] 1 All ER 163. In England and Wales, the courts have a wide discretionary jurisdiction under the Administration of Justice Act 1970, s 36 and Administration of Justice Act 1973, s 8(1) to postpone possession orders with respect to dwelling houses.

36 [1962] 1 All ER 163, p 182.

37 (1995) Supreme Court, The Bahamas, No 1579 of 1991 (unreported).

> arrears, without the request of the [mortgagor] and the concurrence of the [mortgagee].

On the other hand, it was the view of Lord Denning MR, in *Quennell v Maltby*,[38] that a court of equity may restrain a mortgagee from recovering possession where the action is not brought in good faith for the purpose of enforcing his security. In this case, Q mortgaged his house to a bank. Under the mortgage agreement, Q was prohibited from granting tenancies of the property without the consent of the bank. In breach of this covenant, Q granted a tenancy to M, a student, who subsequently became a statutory tenant under the Rent Restriction Acts. The tenancy was binding on Q, but it was void as against the bank. Q wished to recover possession of the premises in order to sell with vacant possession, and he asked the bank to bring a possession action against M. When the bank declined to do so, Q's wife paid off the loan and procured a transfer of the mortgage from the bank. She then sought possession as mortgagee, but her action failed. Bridge and Templeman LJJ held that she could not recover, because she was acting as agent of Q who, as mortgagor, was not entitled to possession as against M. Lord Denning MR, on the other hand, expressed a wider principle, holding that Q's wife could not recover possession, because her purpose in bringing the action was not to enforce her security as mortgagee, but simply to evict M. He said:[39]

> The objective is plain. It was not to enforce the security or to obtain repayment or anything of the kind. It was in order to get possession of the house and to overcome the protection of the Rent Acts ... Equity can step in so as to prevent a mortgagee, or a transferee from him, from getting possession of a house contrary to the justice of the case. A mortgagee will be restrained from getting possession except when it is sought *bona fide* and reasonably for the purpose of enforcing the security, and then only subject to such conditions as the court thinks fit to impose.

It is doubtful whether the wide principle enunciated by Lord Denning represents the law, as it is irreconcilable with the principle that the mortgagee has a right to take possession of the mortgaged property 'before the ink is dry on the mortgage'. Lord Denning's principle suggests that taking possession exists only as a remedy to enforce the security, rather than as a right, and this is clearly at variance with the principle expressed by Russell J in *Birmingham Citizens' Permanent Building Society v Caunt*.[40]

The reason why mortgagees usually do not take possession, except as a prelude to selling, is that equity requires a mortgagee in possession to account strictly not only for what he has actually received from the property while in possession, but also for what he ought to have received by better

38 [1979] 1 All ER 568.

39 *Ibid*, p 571.

40 [1962] 1 All ER 163.

management. Thus, for example, if he leaves the property vacant when he might have let it to a tenant, he will be personally liable to pay an occupational rent.[41] In *White v City of London Brewery Co*,[42] the mortgagees took possession of the mortgaged premises and let them to a tenant subject to a restriction that he should purchase his entire beer supply from them. It was held that they were accountable for the additional rent they would have obtained if they had let the premises without such a restriction (that is, as a 'free house' instead of a 'tied house').

Right to appoint a receiver

Mortgagees have a statutory right to appoint a receiver of the mortgaged property, where the mortgage is made by deed.[43] The appointment must be made in writing. The right to appoint a receiver arises and is exercisable in the same circumstances as the statutory power of sale.[44] On appointment, the receiver is deemed to be the agent of the mortgagor, so that the sole responsibility for his acts and defaults rest on the mortgagor.

The advantage of appointing a receiver is that, where interest payments are in arrears, he may intercept any rents and profits from the land and apply them towards paying off the arrears. In order to achieve this purpose, it is better for the mortgagee to appoint a receiver than to go into possession himself, because of the liability of the mortgagee in possession to account strictly, as explained above.[45]

A receiver is required by the statutes to apply any money received by him in the following order:

(a) in discharge of rents, taxes, rates and outgoings;

(b) in keeping down annual sums and the interest on principal sums having priority to the mortgage;

(c) in payment of his own commission and insurance premiums and, if so directed in writing by the mortgagee, the cost of repairs;

(d) in payment of the interest under the mortgage;

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41 *Marriott v Anchor Reversionary Co* (1861) 45 ER 846.

42 (1889) 42 Ch D 237.

43 Ch 27, No 12, ss 39–45 (Trinidad and Tobago); Cap 236, ss 110–116 (Barbados); Cap 24, s 21 (Cayman Islands); Ch 123, ss 21–23 (The Bahamas); Cap 220, ss 38–44 (BVI); Cap 54:01, ss 39–45 (Dominica); Cap 64, ss 9–12 (Grenada); Conveyancing Act (1973 Rev), ss 22–25 (Jamaica); Conveyancing Act 1983, ss 30–33 (Bermuda); Cap 271, ss 39–45 (St Kitts/Nevis).

44 See below, p 229.

45 See above, pp 227, 228.

(e) if so directed by the mortgagee, in discharging the principal sum lent; otherwise, it must be paid to the person who would have received it if the receiver had not been appointed, that is, to the mortgagor.

Any residue which remains after discharging the above liabilities must be paid to the mortgagor.

Power of sale

Statutory provisions[46] give a mortgagee power to sell the mortgaged property out of court, provided the mortgage is made by deed. The statutory power enables the mortgagee to vest the fee simple in a purchaser, notwithstanding that the mortgagee may have only a term of years or a legal charge. The power *arises* as soon as the date fixed for repayment has passed or, in the case of a mortgage repayable by instalments, as soon as an instalment is due and unpaid; but the power only becomes *exercisable* when either:

(a) notice requiring repayment of the mortgage money has been served on the mortgagor and default has been made in payment of part or all of it for three months thereafter; or

(b) some interest under the mortgage is two months or more in arrears; or

(c) there has been a breach of some provision contained in the Acts or in the mortgage deed (other than the covenant for payment of the mortgage money or interest) which should have been observed or performed by the mortgagor or by someone who concurred in making the mortgage. (Thus, for example, the power will become exercisable if the mortgagor is in breach of an undertaking to keep the premises in repair.)

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46 Ch 27, no 12, ss 39–45 (Trinidad and Tobago); Cap 236, ss 110–116 (Barbados); Cap 24, s 21 (Cayman Islands); Ch 123, ss 21–23 (The Bahamas); Cap 220, ss 38–44 (BVI); Cap 54:01, ss 39–45 (Dominica); Cap 64, ss 9–12 (Grenada); Conveyancing Act (1973 Rev), ss 22–25 (Jamaica); Conveyancing Act 1983, ss 30–33 (Bermuda); Cap 271, ss 39–45 (St Kitts/Nevis).

In Jamaica, where the majority of mortgaged properties have a registered title, ss 105 and 106 of the Registration of Titles Act 1973 govern the arising and exercise of the power of sale in relation to registered land. Section 105 provides that, where there is a default by the mortgagor in payment of principal or interest or any part thereof or in the performance or observance of any express or implied covenant, and such default continues for one month (or for such other period as may be fixed by the mortgage), the mortgagee 'may give to the mortgagor ... notice in writing to pay the money owing ... or to perform or observe the aforesaid covenants'. And, by s 106, if such default continues for one month after service of the notice (or for such other period as may be fixed), the mortgagee may sell the land, or part thereof, altogether or in lots, by public auction or private contract. It is not clear whether the provision as to the giving of notice is mandatory or merely directory, bearing in mind that s 105 states that the mortgagee 'may' give notice. If the giving of notice is not a mandatory requirement, the reference in s 106 to default in payment or performance for one month will apply only where notice has in fact been given. In practice, mortgage agreements either expressly exclude the requirement of notice, or provide expressly for the issue of a notice and a 14 day period for compliance.

It was held in *Derrick v Trinidad Asphalt Holdings Ltd*[47] that the statutory restrictions governing exercise of the power of sale may be negatived or varied by the mortgage deed, and this is the view taken by textbook writers. However, in *Dickson v Playa del Sol Ltd*,[48] Alcantara J, in the Supreme Court of Belize, expressed the view (*obiter*) that the parties cannot contract out of the statutory restrictions. He said:[49]

> Taking into consideration that the courts of equity have always mitigated the harshness of the common law, and the fact that originally a mortgagee had to come to court to be able to sell the property mortgaged, I am of the opinion that the intention of the legislature was to make s 82(2) mandatory and not capable of being contracted out. The whole purpose of advertising in three issues of the *Gazette* and in a newspaper is to bring to the attention of persons interested, that is, second mortgagee, etc, that a sale is going to take place.

A distinguishing feature of s 82(2) of the Belize statute is the requirement for an advertisement, as mentioned by Alcantara J. This requirement is absent from the equivalent legislation in other jurisdictions, so that the force of the learned judge's argument is reduced with respect to jurisdictions other than Belize. It has to be admitted, however, that there seems to be little point in having statutory provisions designed to protect mortgagors in important respects (as in the case of the restrictions on exercise of the mortgagee's power of sale) if those provisions can, in any case, be excluded by the mortgagee in the mortgagee deed; and there is, it is respectfully submitted, much merit in Alcantara J's view.

Mode of sale

The mortgagee may sell the property, or part thereof, either subject to prior charges or not, and either together or in lots, by public auction or by private contract, and subject to such conditions respecting title or other matters as he thinks fit.[50]

Effect of sale

As soon as a contract for sale has been concluded, the mortgagor's equity of redemption is extinguished[51] and the subsequent conveyance operates to pass

47 (1979) 33 WIR 273.

48 (1982) 1 BZLR 370.

49 *Ibid*, p 373.

50 Ch 123, s 21 (The Bahamas); Conveyancing Act, s 22 (Jamaica); Cap 236, s 110 (Barbados); Ch 27, No 12, s 39 (Trinidad and Tobago).

51 Accordingly, once a valid contract of sale has been concluded, it is too late for the mortgagor to tender the mortgage money and become entitled to have the property reconveyed to him: *Lord Waring v London and Manchester Assurance Co Ltd* [1935] Ch 310, p 318, *per* Crossman J; *Edelweiss Chalets Condominium Association v Davis* (1998) Supreme Court, The Bahamas, No FP 160 of 1997 (unreported), *per* Osadebay J.

the mortgagor's legal fee simple or lease, as the case may be, to the purchaser. The rights of subsequent mortgagees are also extinguished, but the rights of any prior mortgagees remain intact and the purchaser takes subject to them.[52]

Protection of purchaser

The difference between the power of sale arising and becoming exercisable is that, where the power has not arisen, the mortgagee has no right to sell; but so long as the power has arisen, he can pass a good title to a purchaser notwithstanding that the power has not become exercisable. A purchaser is, therefore, only concerned to see that the power has arisen, and he need not inquire into whether it has become exercisable or it has been properly exercised;[53] though it has been held that, if the purchaser 'becomes aware ... of any facts showing that the power of sale is not exercisable, or that there is some impropriety in the sale, then ... he gets no good title on taking the conveyance'.[54] The latter proposition has been explained on the ground that to hold otherwise would be to allow a statute to be used as an instrument of fraud.

Application of proceeds of sale

A mortgagee who sells the mortgaged property under his statutory power is a trustee of the proceeds of sale, and must apply them in the following order:[55]

(a) in paying all expenses incidental to the sale;

(b) in paying to himself the principal, interest and costs due under the mortgage;

(c) in paying the balance to the next subsequent mortgagee[56] or, if none, to the mortgagor.

Bad faith

In *Lord Waring v London and Manchester Assurance Co Ltd*, Crossman J said:[57]

> After a contract has been entered into, however, it is in my judgment perfectly clear ... that the mortgagee (in the present case, the company) can be restrained

52 Ch 27, No 12, s 23 (Trinidad and Tobago); Ch 123, s 42 (The Bahamas); Cap 73, s 24(1) (Jamaica); Cap 236, s 112 (Barbados).

53 See Cap 236, s 114(1) (Barbados); Ch 27, No 12, s 42 (Trinidad and Tobago); Ch 123, s 23 (The Bahamas); Cap 73, s 24(2) (Jamaica).

54 *Bailey v Barnes* [1894] 1 Ch 25, p 35.

55 *Lord Waring v London and Manchester Assurance Co Ltd* [1935] Ch 310, p 318, *per* Crossman J.

56 See *Samuel Keller (Holdings) Ltd v Martins Bank Ltd* [1970] 3 All ER 950.

57 [1935] Ch 310, p 318.

> from completing only on the ground that he has not acted in good faith and that the sale is therefore liable to be set aside.

A number of cases have come before the Trinidadian courts in which mortgagors have sought to restrain mortgagees from selling under their powers of sale, on the ground that the mortgagees had acted in bad faith. One such case is *Seepersad v Colonial Life Insurance Co (Trinidad) Ltd*.[58] Here, the mortgagor had fallen behind in his mortgage payments, and the mortgagees were proposing to sell the land under their statutory power. There was evidence that one Mrs B, who was employed by the mortgagees as a debt collector, had suggested to the mortgagor that, if he paid his arrears, the mortgagees would not proceed with the sale. The mortgagor accordingly paid part of the arrears, but the mortgagees nevertheless entered into an agreement to sell the land by private auction. The mortgagor contended that the agreement should be set aside, on the ground that Mrs B had misled him into believing that the mortgagees would not go ahead with the sale, and that, by entering into the contract of sale in these circumstances, the mortgagees had acted in bad faith. Lucky J held the mortgagor's argument to be unsupportable; Mrs B was not an agent of the mortgagees 'for purposes of binding the company by her actions or her words ... she was simply an agent for the purpose of collecting debts'. He continued:

> In the *Waring* case, it has been held that a mortgagee's exercise of his power under s 101 of the Law of Property Act 1925, which is equivalent to s 39 of our Act, to sell the mortgaged property by public auction or private contract is binding on the mortgagor before completion, unless it is proved that he exercised it in bad faith, and there is no evidence, in my view, that there is any bad faith in this case ...
>
> In the *Waring* case, it is to be noted that while the plaintiff is still entitled to redeem, that is to have the property re-conveyed to him, he can only have the property re-conveyed to him on payment of principal, interest and costs. A mortgagee, strictly speaking, is not a trustee with respect to the power of sale: it is a power given to him for his own benefit to enable him to realise his debt. If he exercises it for that purpose, without corruption or collusion with the purchaser, the court ought not to interfere even though the sale may be very disadvantageous, unless indeed the price is so low as in itself to be evidence of fraud.

On the other hand, in *Alpras Investments Ltd v National Commercial Bank of Trinidad and Tobago Ltd*,[59] bad faith was found to be present. In this case, the mortgagor company, which was in arrears with its payments, had applied to

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58 (1990) High Court, Trinidad and Tobago, No 404 of 1990 (unreported). See, also, *San Fernando Medical Centre Ltd v Republic Finance and Merchant Bank Ltd* (1995) High Court, Trinidad and Tobago, No 118 of 1993 (unreported).

59 (1992) High Court, Trinidad and Tobago, No 2389 of 1991 (unreported); see, also, *Hearn v Republic Bank Ltd* (1991) High Court, Trinidad and Tobago, No 3738 of 1990 (unreported).

the court for an order permitting it to redeem the mortgaged property upon payment to the mortgagees of a sum of money to be obtained from a sale of the property by the mortgagor; alternatively, for an extension of time to repay the mortgage debt. Whilst the summons was pending before the court, with the mortgagees' attorney attending, the mortgagees proceeded to exercise their power of sale and sold the property, without providing the mortgagor with any account or statement as to the amount owing to the mortgagees. Wills J held that the mortgagees had acted in bad faith. He said:

> In my judgment, a mortgagee who intends to exercise his powers of entry and sale must do so in good faith. And while he is, in general, entitled to exercise such powers in a way conducive to his best interest, subject to any express conditions contained in the mortgage instrument, he must act in good faith and not capriciously. Furthermore, while to him it may be commercially necessary to sell the mortgaged property primarily for his own benefit to recover the money lent, he is not entitled to ignore the interests of the mortgagor with impunity. At law, the mortgagee is not a trustee of the power of sale for the mortgagor. And while he has a right to look after his own interest, he is not at liberty to act either recklessly or with wilful disregard or indifference, sacrificing the interest of the mortgagor.
>
> The circumstances of this case seem to follow a trend which is prevalent at times like these when there appears to be economic recession, during which the principles of equity seem to be ignored by financial institutions. I find that the property in this case has been sold in questionable circumstances, but I am constrained by the remedy sought in the summons from granting the kind of remedy which in my view might have been available to the plaintiff.
>
> In the circumstances of this case, I find the defendant's conduct in proceeding to exercise its power of sale was, to say the least, draconian, and its effect was such as to make the memorandum of mortgage a deed of defeasance. The defendant bank, in acting as it did, clearly demonstrated a reckless and/or conscious indifference as to whether or not its act of selling the mortgaged property could or could not interfere with the proper dispensation of justice.
>
> Not only has the defendant proceeded to sell the property in the face of the pending proceedings, but failed to provide the plaintiff with an account when it should be obvious to the lender bank and/or its advisers that in law, on a sale being completed, it becomes trustee of any surplus in its hands. It ought also to be aware that, on the completion of the sale, interest ceases to run against the mortgagor.

Restraining exercise of the power of sale

It was emphasised by Gonsalves-Sabola CJ, in the Bahamian Supreme Court in *American British Canadian Motors Ltd v Imperial Life Assurance Company of Canada,*[60] that the court will not grant an interlocutory injunction to restrain

60 (1990–91) 4 Carib Comm LR 258, p 261, following *Macleod v Jones* (1883) 24 Ch D 289.

exercise of a mortgagee's power of sale, except on the terms of the mortgagor paying into court the amount sworn by the mortgagee to be due for principal, interest and costs. He continued:

> I agree with the submission of counsel for the defendant that to allow any other course would create havoc in the marketplace. A mortgagor, fat with the mortgagee's funds, who seeks to avoid the mortgage instrument when the power of sale it confers is sought to be exercised, has no right to come empty-handed to court to restrain the mortgagee. Had the rule been otherwise, it requires but little imagination to foresee how a succession of defaulting mortgagors, temporising with technical objections, could employ the interlocutory injunction to constipate the cash flow in the mortgagee's business and frustrate its normal course, with all the serious implications that that entails.

Mortgagee's duty of care

A mortgagee, as we have seen, is a trustee of the proceeds of sale,[61] but he is not a trustee of the power of sale itself,[62] which he is entitled to exercise in his own interest. Thus, for instance, if at the time he wishes to sell the property the market is depressed, he is not obliged to wait for a rise in market prices,[63] even though it is clear that by selling immediately there will be a smaller surplus to hand over to the mortgagor; nor is he obliged to put the property in a better state of repair in order to obtain a higher price;[64] nor to attempt to sell by auction before selling by private contract. As Salmon LJ explained in the leading case of *Cuckmere Brick Co Ltd v Mutual Finance Ltd*:[65]

> It is well settled that a mortgagee is not a trustee of the power of sale for the mortgagor. Once the power has accrued, the mortgagee is entitled to exercise it for his own purposes whenever he chooses to do so. It matters not that the moment may be unpropitious and that, by waiting, a higher price could be obtained. He has the right to realise his security by turning it into money when he likes. Nor, in my view, is there anything to prevent a mortgagee from accepting the best bid he can get at an auction, even though the auction is badly attended and the bidding exceptionally low. Provided none of those adverse factors is due to any fault of the mortgagee, he can do as he likes. If the

61 Above, p 231.

62 *Kennedy v De Trafford* [1897] AC 180. See *Jamaica Citizens Bank Ltd v Reid* (1995) Supreme Court, Jamaica, Nos CLJ 822 of 1987 and CLJ 230 of 1988 (unreported); *First Citizens Bank Mortgage and Trust Co Ltd v Anthony* (1997) High Court, Trinidad and Tobago, No 708 of 1996 (unreported); *Christian v Republic Finance and Merchant Bank Ltd* (1997) High Court, Trinidad and Tobago, No 2494 of 1990 (unreported); *Blake v First Jamaica National Bank* (1994) Supreme Court, Jamaica, No CLB 017 of 1992 (unreported).

63 *Davey v Durant* (1857) 26 LJ Ch 830. On the other hand, it was held, in *Palk v Mortgage Services Funding plc* [1993] 2 All ER 481, that the court has a discretion to order a sale at a depressed market price, even against the wishes of the mortgagee since, where the value of the property is less than the amount of the loan, a sale will terminate the mortgage and relieve the mortgagor of mounting interest payments.

64 *Waltham Forest London Borough v Webb* (1974) 232 EG 461.

65 [1971] 2 All ER 633, p 643.

> mortgagee's interests, as he sees them, conflict with those of the mortgagor, the mortgagee can give preference to his own interests, which of course he could not do were he a trustee of the power of sale for the mortgagor.

Later in his judgment, Salmon LJ said:[66]

> It is impossible to pretend that the state of the authorities on this branch of the law is entirely satisfactory. There are some *dicta* which suggest that unless a mortgagee acts in bad faith he is safe. His only obligation to the mortgagor is not to cheat him. There are other *dicta* which suggest that in addition to the duty of acting in good faith, the mortgagee is under a duty to take reasonable care to obtain whatever is the true market value of the mortgaged property at the moment he chooses to sell it: compare for example *Kennedy v De Trafford*[67] with *Tomlin v Luce*.[68]
>
> The proposition that the mortgagee owes both duties, in my judgment, represents the true view of the law ...
>
> I accordingly conclude, both on principle and authority, that a mortgagee in exercising his power of sale does owe a duty to take reasonable precautions to obtain the true market value of the mortgaged property at the date on which he decides to sell it. No doubt in deciding whether he has fallen short of that duty, the facts must be looked at broadly, and he will not be adjudged to be in default unless he is plainly on the wrong side of the line.

In *Cuckmere Brick,* the mortgagee was held liable in damages for negligence because, in advertising the property for sale, it carelessly omitted to mention that planning permission had been granted for the erection of apartments on the mortgaged land, and it thus obtained a lower price than it ought to have done. The mortgagee was thus liable for the difference between the price obtained and the proper market value of the property. *Cuckmere Brick* is accordingly authority for the proposition that the mortgagee must take reasonable care to obtain the true market value of the property.

A sale by a mortgagee must be genuine. A 'sale' by the mortgagee to himself, either alone or with others, is not a true sale and may be set aside, even though the price offered is the full value of the property.[69] A sale to a company in which the mortgagee is a shareholder will not necessarily be set aside,[70] but where the company is managed and controlled by the mortgagee, the 'sale' may be set aside as a sham, especially where it is at a gross undervalue.[71] The onus is on the mortgagee to show that the sale was *bona fide* and that he took precautions to obtain the best price reasonably obtainable.

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66 [1971] 2 All ER 633, p 643.

67 [1897] AC 180.

68 (1889) 43 Ch D 191.

69 *National Bank of Australasia v United Hand-in-Hand and Band of Hope* (1879) 4 App Cas 391.

70 *Tse Kwong Lam v Wong Chit Sen* [1983] 1 WLR 1394.

71 *Dickson v Playa del Sol Ltd* (1982) 1 BLZR 370, p 375, Supreme Court, Belize, above, p 230.

The principle in *Cuckmere Brick Co Ltd v Mutual Finance Ltd* was applied by the Jamaican Court of Appeal in *Dreckett v Rapid Vulcanizing Co Ltd.*[72] In this case, the appellant mortgaged his land, with house thereon, of which he was registered proprietor, to the respondent company to secure a loan of $6,400. The appellant fell into arrears with the mortgage payments, resulting in the respondent exercising its power of sale. The property was sold by public auction to DP, a real estate broker, for $6,400. Some nine months later, DP resold the property for $14,400 to CM, and the property was duly registered in the purchaser's name. The appellant claimed that the respondent had been negligent in failing to ascertain the current market value of the property at the time of the sale to DP, and in failing to fix a reserve price at the auction. Wolfe J, in the lower court, held that the appellant had failed to show negligence on the part of the respondent within the *Cuckmere Brick* principle, and this decision was upheld by the Court of Appeal. Carberry JA said:[73]

> ... the crucial question in the case is, what was the market value of this land when sold by the mortgagees at the auction? Was it sold at an undervalue? And if so, by how much? If the mortgagor was to gain any redress in this action in respect of his complaint that the premises had been sold recklessly or negligently at an undervalue, he had the onus of producing evidence to establish what was the market value of 6 Tangerine Road on or about 2 December 1970. [Carberry JA found that there was no evidence as to the value of the property at the material time, and, after reviewing the case law on the subject of exercise of the mortgagee's power of sale, he continued:]
>
> It is fair to say that [the law] is not in a very satisfactory state. The authorities that have been cited, and there were many, show that the courts have alternated between showing concern for the mortgagor and a wish to protect him against a mortgagee who recklessly sells off the mortgaged premises, concerned only to recover his money on the borrower's default, and that the object of the mortgage was to enable this to be done speedily and at the mortgagee's convenience.
>
> The instant case was conducted on the basis that the *Cuckmere*[74] case should be adopted and followed by the courts in Jamaica, and if there was any doubt on the matter I think it should be received and followed by the courts of Jamaica.[75] In fact, the industry of counsel discovered a first instance case in

72 (1988) 25 JLR 130. See, also, *Davis v Franklyn* (1994) Supreme Court, Jamaica, No E 148 of 1982 (unreported), where Malcolm J emphasised that 'a mortgagee's duty on sale is to take reasonable precautions to obtain a proper price, not the best price'.

73 (1988) 25 JLR 130, pp 133, 134, 140.

74 [1971] 2 All ER 633.

75 Carberry JA also pointed out (p 140) that the instant case concerned land under the Registration of Titles Act, which provided in s 105 that the registration of a mortgage does not, unlike at common law, operate as a transfer of the title to the land, and, if the mortgagee wishes to realise the mortgage by sale, he must comply with ss 105 and 106.

which Rowe J (as he then was) followed and applied the *Cuckmere* case. See *Rose Hall Ltd v Chase Merchant Bankers (Jamaica) Ltd.*[76]

I have reluctantly come to the conclusion that the mortgagor has failed to discharge the burden of establishing that the property was sold at under the market value of the property at the time of the sale, or to show that for some identifiable reason the auction here failed to realise a proper price or the market value at the date of the auction.

Campbell JA said:

The view of Salmon LJ in the *Cuckmere Brick* case is most apposite. He said:[77]

> Nor in my view, is there anything to prevent a mortgagee from accepting the best bid he can get at an auction, even though the auction is badly attended and the bidding is exceptionally low. Providing none of those adverse factors is due to any fault of the mortgagee, he can do as he likes.

Thus Salmon LJ was saying that, consistent with the principle which he later enunciated,[78] an auction which has not been manipulated by the mortgagee is evidence of reasonable precaution taken by the mortgagee to obtain the true market value of the mortgaged property on the date on which he decides to sell. The view expressed by Salmon LJ negatives any obligation of the mortgagee to fix, or have fixed, a reserve price (in circumstances where he does not bid at the auction), because he has the right to accept the highest bid even if it was below what was the ascertained true market value. Equally, the mortgagee is not obliged to obtain an independent prior valuation to determine the market value on the basis of which to fix a reserve price when the sale is by auction. He can properly rely on the independent competitive biddings at the auction to obtain the true market value, and even if this is not obtained through poor attendance at the auction and/or exceptionally low bids, he is not on that account per se liable to his mortgagor for breach of any duty to take reasonable precautions to obtain the true market value. To the contrary, the mortgagee could say that he had taken the reasonable precautionary steps to protect the mortgagor by having an auction which has been conducted without any impropriety.

In the present appeal, no impropriety as to the conduct of the auction is alleged or proved. The bases on which the mortgagee is being held to have failed in its duty are that it failed to ascertain the then current market value by valuation prior to the auction, and failed to fix a reserve price. These failures, I have already said, do not individually or collectively constitute breaches of duty, particularly in an auction sale in which the mortgagee has not participated and where no impropriety in relation to the auction itself has been alleged or appears on the evidence. The situation fits neatly into the case postulated by Salmon LJ of poor attendance and exceptionally low bids.

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76 (1976) Supreme Court, Jamaica, No E 211 of 1976 (unreported). See, also, *Bank of Nova Scotia Co of Trinidad and Tobago Ltd v Manswell* (1992) High Court, Trinidad and Tobago, No 1324 of 1989 (unreported).

77 [1971] 2 All ER 633, p 643.

78 *Ibid*, p 646.

In *Adams v Workers Trust and Merchant Bank Ltd*,[79] the circumstances were that the mortgagee, having made an abortive attempt to sell by public auction, sold the property to X by private treaty. The mortgagee had obtained a valuation of the property, but took no steps to advertise before selling. In addition, the mortgagee had rejected a higher offer, in the erroneous belief that it was contractually bound to sell to X.

James J (Ag), in the Jamaican Supreme Court, took the view that, 'by advertising, the property could have been exposed to prospective purchasers in the open market', and the mortgagee's failure to advertise, coupled with its mistake of law, led to the conclusion that it had 'fallen short of the standard of the duty of care owed' to the mortgagor, and it was therefore liable for the loss incurred.

Right to foreclose

As we have seen,[80] after the contractual redemption date has passed, the mortgagor has an equitable right to redeem. In order to balance the rights of the parties, equity gives the mortgagee a simultaneous right to foreclose the mortgage, that is, to bring an action in court in order to extinguish the equitable right to redeem and to acquire for himself the legal and equitable title to the property, freed from the equity of redemption. The right to foreclose does not arise until repayment has become due at law,[81] which includes not only the case where the contractual redemption date has passed, but also cases where the mortgage deed expressly provides that repayment is to fall due on breach of any term of the mortgage (for example, failure to pay an instalment of interest or principal) and such breach has occurred.[82]

A foreclosure action can be brought by any mortgagee, whether he is a first or subsequent mortgagee or an assignee of an original mortgagee. The effect of a foreclosure order absolute is to foreclose all subsequent mortgagees, but to leave intact the rights of prior mortgagees. Thus, for example, if land is mortgaged to A, B, C and D, and B forecloses, the interests of C and D as well as that of the mortgagor will be extinguished, whilst A's interest will be unaffected. Where there are several mortgagees, the court in the order nisi may direct that any subsequent mortgagees be given an opportunity to redeem by paying the amount due to the foreclosing mortgagee on the date appointed. Accordingly, subsequent mortgagees must be made parties to the foreclosure action.

79 (1992) Supreme Court, Jamaica, No CLA 130 of 1989 (unreported).

80 Above, p 217.

81 *Williams v Morgan* [1906] 1 Ch 804.

82 *Kidderminster Mutual Benefit Building Society v Haddock* [1936] WN 158.

Foreclosure is in two stages. First, the court makes a foreclosure order nisi, which directs that accounts be taken and provides that, if the mortgagor pays the money due by a fixed day (which is normally six months from the settling of the accounts), the mortgage will be discharged, but that, if the mortgagor fails to pay, a motion may be brought to make the foreclosure absolute.

Re-opening of a foreclosure

An order of foreclosure absolute may be 're-opened' in certain circumstances: for instance, where the mortgagee, after obtaining an order absolute, proceeds to bring an action on the personal covenant;[83] where a mishap at the last moment prevents the mortgagor from repaying the debt; where there is a marked difference between the value of the property and the amount of the debt; and where the property is of special value to the mortgagor (for example, where it is an old family estate).[84]

Sale in lieu of foreclosure

The court has a statutory power to order a sale instead of a foreclosure at the request of any person interested[85] (for example, a later mortgagee or the mortgagor). The power is most likely to be used where the value of the property far exceeds the amount of the mortgage debt. In such a case, the court may order a judicial sale, the effect of which is that each mortgagee is paid what is due to him in order of priority and the balance is given to the mortgagor.[86]

RIGHTS OF EQUITABLE MORTGAGEE

The equitable mortgagee's right to sue for the money due is the same as for a legal mortgagee. He may also foreclose in the same way as a legal mortgagee. Since the equitable mortgagee has no legal estate, the court's order absolute will direct the mortgagor to convey the land to the mortgagee free from the right to redeem.[87] An equitable mortgagee is entitled to exercise the statutory powers of sale and appointing a receiver only where his mortgage is made by deed, as where there is a deposit of title deeds accompanied by a memorandum of deposit made by deed. Where there is no statutory power of

83 *Perry v Barker* (1806) 33 ER 269.

84 See *Campbell v Holyland* (1877) 7 Ch D 166, p 173, *per* Jessel MR.

85 Ch 27, No 12, s 49 (Trinidad and Tobago); Ch 123, s 27 (The Bahamas); Cap 73, s 28(2) (Jamaica); Cap 236, s 101 (Barbados).

86 That is, the proceeds are applied in the same way and in the same order as in the case of a sale under a mortgagee's power of sale. See above, p 231.

87 *James v James* (1873) LR 16 Eq 153.

sale out of court, the court may order a sale and vest a legal term of years in the mortgagee so that he can convey a legal estate to a purchaser. It seems that an equitable mortgagee has no right to possession of the mortgaged property;[88] but the court has power to make an order of possession in his favour,[89] and the mortgage agreement may expressly grant such right.[90]

Since an equitable mortgagee has no legal estate to convey to the purchaser, in exercising his statutory power of sale, it may be necessary to employ one or the other of the following conveyancing devices:

(a) insertion of an irrevocable power of attorney in the memorandum, empowering the mortgagee or his assigns to convey the legal estate;

(b) insertion of a declaration of trust in the memorandum, whereby the mortgagor declares that he holds the legal estate upon trust for the mortgagee, and empowering the mortgagee to appoint someone, including himself, as trustee in place of the mortgagor. This will enable the mortgagee to vest the legal estate in himself or the purchaser.

TACKING AND CONSOLIDATION

Right to tack further advances

It is a common practice for banks not only to undertake to lend money for a present purpose, but also to agree to make further advances in the future on the same security. In certain circumstances, where the mortgagor creates a later mortgage in favour of a third party, the bank as first or prior mortgagee may be entitled to 'tack' further advances so as to obtain priority for them over the intervening mortgage or mortgages. For example, in January, B mortgages his land to X Bank to secure an overdraft of $20,000. It is a term of the mortgage deed that 'this mortgage secures a loan of $20,000 and any further advance which the mortgagee chooses to make'. In March, B grants a mortgage of the same land to Y to secure a loan of $10,000, and in April, another mortgage to Z to secure a loan of $15,000. In May, X Bank consents to an increase of the overdraft to $50,000. X Bank may be entitled to obtain priority over Y and Z, so that it will recover its $50,000 before Y and Z receive anything.

88 Since he has no legal estate.

89 *Barclays Bank Ltd v Bird* [1954] 1 All ER 449.

90 *Ocean Accident and Guarantee Corp Ltd v Ilford Gas Co* [1905] 2 KB 493.

Tacking is permitted under the general law:[91]

(a) where the intervening mortgagee agrees to tacking; or

(b) where the prior mortgagee holds the legal title, and has no notice of the intervening mortgage at the time of making the further advance.[92]

Where the prior mortgagee is under an obligation to make further advances and has no notice of the intervening mortgage, registration of the intervening mortgage in a Land or Deeds Registry does not, in itself, constitute notice.

Statutory provisions enacted in Barbados[93] and modelled on s 94 of the Law of Property Act 1925 (UK) have modified the general law in two respects:

(a) registration of the intervening mortgage in the Land Registry constitutes actual notice of the mortgage, except where the prior mortgage expressly secures not only the original loan, but also further advances or a current account (in which case, the position is the same as under the general law);

(b) where the prior mortgage imposes an obligation on the mortgagee to make further advances, tacking will apply to such advances notwithstanding that, at the time of making them, the prior mortgagee had notice of the intervening mortgage.

Right to consolidate

Where two or more mortgages have become vested in the same mortgagee, he has the right to refuse to allow one mortgage to be redeemed unless the other or others are also redeemed.[94] This is often cited as an illustration of the maxim that 'he who seeks equity must do equity'. For example, X has mortgaged both Redacre and Greenacre to Y to secure loans of $100,000 on each property. At the time the mortgages were created, both properties were worth $130,000. Later, the value of Greenacre appreciates to $200,000, but that of Redacre sinks to $80,000. It would be unfair to the mortgagee, Y, if X were allowed to redeem Greenacre and to leave Redacre unredeemed. Accordingly, equity will allow Y to consolidate, that is, to insist that the two properties be treated as one and redeemed together, or not at all.

91 *Brace v Duchess of Marlborough* (1728) 2 P Wms 491; *Taylor v Russell* [1892] AC 244. But it was held by Langrin J, in *Geon Contractors and Associates Ltd v National Commercial Bank (Jamaica) Ltd* (1991) 28 JLR 409, that the doctrine of tacking does not apply to mortgages under the Registration of Titles Act, as 'tacking and consolidation have no place under the Torrens system' (p 412).

92 *Freeman v Laing* [1899] 2 Ch 355.

93 Cap 236, s 104.

94 *Jennings v Jordan* (1881) 6 App Cas 698, p 700.

Statutory provisions in most jurisdictions provide that there shall be no right to consolidate unless a contrary intention is expressed in one or more of the mortgage deeds.[95] Accordingly, it is usual for mortgage deeds expressly to grant the right to consolidate.

95 See, eg, Cap 73, s 20 (Jamaica); Cap 236, s 103 (Barbados); Ch 123, s 19 (The Bahamas).

ADVERSE POSSESSION

The concept of adverse possession is rooted in the theory that the basis of title to land in English law is possession. The fact of possession gives a title to the land which is good against all persons except one who has a better right to possession. All titles to land are relative, in the sense that a person's title, including the person who has the documentary (or 'paper') title, is only good in so far as there is no other person who can show a better title. The effect of adverse possession is that a person who is in possession as a mere trespasser or 'squatter' can obtain a good title if the true 'owner' fails to assert his superior title within the requisite limitation period in the particular jurisdiction.[1]

Limitation of actions in this context expresses the idea that, whilst it may seem unjust that a wrongdoer should, after expiry of the limitation period, be allowed to retain the land as against the true 'owner', it would be detrimental to the public interest if persons were to be allowed to bring 'stale' claims. In the words of Lord St Leonard's:[2]

> All statutes of limitation have for their object the prevention of the rearing up of claims at great distances of time when evidences are lost and, in all well regulated countries, the quieting of possession is held an important point of policy.

Accordingly, after the limitation period has expired, the true 'owner' who has 'slept on' his rights will be barred from asserting them against the person in adverse possession, and his rights will be extinguished. The 'squatter' in possession will then have the best claim to the land, and will be able to acquire a good title by registration, or he may simply remain in possession which can

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1 *Treloar v Nute* [1977] 1 All ER 230, p 234, *per* Pennycuick J. See, eg, Limitation of Actions Act 1997, s 25 (Barbados) (10 years); Limitation of Actions Act, s 3 (Jamaica) (12 years); Real Property Limitation Act, Cap 54:07, s 2 (Dominica) (12 years); Limitation Act, Title 8, Item 42, s 16 (Bermuda) (20 years); Title to Land (Prescription and Limitation) Act, Cap 60:02, s 3 (Guyana) (30 years); Limitation Act, Cap 173, s 4 (Grenada) (12 years); Real Property Limitation Ordinance, Ch 5, No 7, s 3 (Trinidad and Tobago) (16 years); Limitation Law 1991, s 19 (Cayman Islands) (12 years).

In The Bahamas, the Real Property Limitation Acts 1833 and 1874, Ch 150, require 20 years' continuous possession: see *Re Malcolm Allotments* (1981) Supreme Court, The Bahamas, No 593 of 1965 (unreported), *per* Blake J; *Knowles v Rolle* (1984) Supreme Court, The Bahamas, No 276 of 1980 (unreported), *per* Adams CJ; *Ocean Estates Ltd v Pinder* [1969] 2 AC 19; *Higgs v Nassauvian Ltd* [1975] 1 All ER 95, Privy Council appeal from the Court of Appeal of The Bahamas, p 98, *per* Sir Harry Gibbs.

2 *Willis v Earl Howe* [1893] 2 Ch 545, p 553; *Re Malcolm Allotments* (1981) Supreme Court, The Bahamas, No 593 of 1965 (unreported).

no longer be disturbed. In either case, he will have acquired a fee simple interest in the land.

The possession of a series of adverse possessors may be aggregated in order to make up the appropriate limitation period. Thus, if O, the original 'paper' owner, is dispossessed by X who, in his turn, is dispossessed by Y, Y may aggregate the period of X's possession with that of his own to defeat O's action for recovery of the land,[3] although X may recover the land from Y before the latter's independent period of adverse possession has lasted for the length of the limitation period.

In order that the periods of adverse possession may be aggregated, they must be continuous. Thus, if X abandons his adverse possession within the limitation period and, after an interval of, say, two months, Y begins to possess adversely, Y cannot add his period of possession to that of X, as the periods were not continuous. The break in the adverse possession will have the effect of restoring the full rights of the 'paper' owner, and the limitation period will start afresh with the commencement of Y's adverse possession.[4]

DISPOSSESSION OF TENANT

Where a tenant is dispossessed by X during the term of the lease, the adverse possession of X begins to run immediately as against the tenant, but as against the landlord it does not begin to run until the date of expiry of the lease.[5]

An adverse possessor who dispossesses a tenant cannot be sued directly by the landlord for rent or for damages for breach of covenant, as the squatter is not an assignee of the lease and there is no privity of estate between him and the landlord.[6] However, in the event of a breach of covenant, the landlord may decide to bring forfeiture proceedings, and since an adverse possessor has no right to seek relief against forfeiture, such proceedings are likely to result in his eviction.[7]

3 *Trustees, Executors and Agency Co Ltd v Short* (1883) 13 App Cas 793, p 798, *per* Lord Macnaghten; *Ocean Estates Ltd v Pinder* [1969] 2 AC 19, PC appeal from the Court of Appeal of The Bahamas, p 24, *per* Lord Diplock; *Re Malcolm Allotments* (1981) Supreme Court, The Bahamas, No 593 of 1965 (unreported).

4 *Perry v Woodfarm Homes Ltd* [1975] IR 104.

5 *Tichborne v Weir* (1892) 67 LT 735, p 737.

6 *Tickner v Buzzacott* [1965] Ch 426, p 434.

7 See above, p 52.

INCHOATE RIGHTS OF ADVERSE POSSESSOR

Another manifestation of the principle of relativity of title is that an adverse possessor acquires inchoate rights, even before expiry of the limitation period, which are good against all persons except the paper owner or any person who can show a superior title.[8] The adverse possessor is deemed to have a fee simple estate from the moment he enters into possession of the land, notwithstanding that his entry may have been wrongful, and notwithstanding that his possession is liable to be terminated by legal action before expiry of the limitation period.9 Such estate may be assigned by the adverse possessor *inter vivos*, or may be disposed of by his will.[10] An assignee may add the period of his possession to that of the assignor in order to establish completion of the limitation period.[11]

REQUIREMENTS FOR ACQUISITION OF TITLE BY ADVERSE POSSESSION

A person claiming title to land by adverse possession must show either:

(a) discontinuance of possession by the paper owner followed by possession by the claimant or his predecessor; or

(b) dispossession, that is, ouster of the paper owner.

The difference between 'dispossession' and 'discontinuance' of possession 'might be expressed in this way: the one is where a person comes in and drives out the others from possession; the other case is where the person in possession goes out and is followed into possession by other persons'.[12]

Discontinuance of possession

There is a strong presumption that possession is retained by the paper owner or by some person claiming through him.[13] In order to succeed in a claim of adverse possession, the claimant must show 'positively that the true owner has gone out of possession of the land, that he has left it vacant with the

8 *Asher v Whitlock* (1865) LR 1 QB 1, p 5.

9 *Wheeler v Baldwin* (1934) 52 CLR 609, p 632.

10 *Asher v Whitlock* (1865) LR 1 QB 1. See *Welch v Broomes* (1981) 16 Barb LR 177, High Court, Barbados.

11 Even without an assignment of the fee simple, the next successive squatter may add his period of possession to that of the previous squatter in order to complete the limitation period. See above, p 244.

12 *Rains v Buxton* (1880) 14 Ch D 537, p 539, *per* Fry J.

13 *Powell v McFarlane* (1977) 38 P & CR 452, p 470.

intention of abandoning it'.[14] The mere fact that the paper owner is shown to have made no use of the land during the period does not necessarily amount to discontinuance of possession;[15] nor will there be discontinuance of possession in cases where another person was in occupation of the land, if there is evidence that the paper owner intended to retain the land for some specific use at a later date.[16] As Lord Denning MR said,[17] the paper owner is not defeated 'simply because some other person enters on it and uses it for some temporary ... or ... seasonal purpose ... even if this temporary or seasonal purpose continues year after year for 12 years or more'.

Possession by adverse possessor

The factual possession required must have characteristics similar to those required for a claim to an easement by prescription,[18] viz, the possession must be open (*nec clam*), peaceful (*nec vi*) and adverse (*nec precario*). Furthermore, factual possession must be accompanied by an *animus possidendi*, that is, an intention to enjoy possession to the exclusion of the paper owner.

The requirement of openness means that the possession of the claimant must be 'notorious and unconcealed',[19] for otherwise the paper owner would not be made aware of the need to challenge the adverse possessor before expiry of the limitation period. On the other hand, it is not necessary that the paper owner should have been aware that he had a good title,[20] nor that the adverse possessor should have had knowledge of the true ownership of the property. It is sufficient that he performed acts which were 'inconsistent with [the paper owner's] enjoyment of the soil for the purposes which he intended to use it'.[21]

14 *Archer v Georgiana Holdings Ltd* (1974) 12 JLR 1421, p 1426, *per* Swaby JA.

15 *Leigh v Jack* (1879) 5 Ex D 264, p 271; *Archer v Georgiana Holdings Ltd* (1974) 12 JLR 1421, p 1426, Court of Appeal, Jamaica, *per* Swaby JA. Thus, 12 years' non-activity by the paper owner on ruinate land may not mean that he has given up ownership: *Green Valley Estates Ltd v Lazarus* (1991) 28 JLR 399, Supreme Court, Jamaica.

16 *Leigh v Jack* (1879) 5 Ex D 264; *Johnson v Myers* (1988) 25 JLR 74, p 77, Court of Appeal, Jamaica.

17 *Wallis's Cayton Bay Holiday Camp Ltd v Shell-Mex and BP Ltd* [1974] 3 All ER 575, p 580.

18 See above, pp 195, 196.

19 *Lord Advocate v Lord Lovat* (1880) 5 App Cas 273, pp 291, 296.

20 *Palfrey v Palfrey* (1974) 229 EG 1593.

21 *Leigh v Jack*, (1879) 5 Ex D 264, p 273.

The requirement that possession must be adverse to that of the paper owner is the most crucial one.[22] In particular, any possession which is concurrent with that of the paper owner will not qualify;[23] nor must possession be founded on a licence[24] or lease[25] granted by the paper owner, nor be by way of family arrangement,[26] as, in all such cases, the possession will not be adverse, but by consent. Claims to acquisition of title in the Commonwealth Caribbean have often failed on this ground; as, for example, where the claimant was the half-brother of the paper owner who was allowed to occupy and enjoy the fruits of the land in return for his paying the rates and taxes;[27] and where the claimant was the daughter of the owner and lived in the house as the 'guest' of her mother until the latter's death.[28]

Animus possidendi

In addition to factual possession, there must exist the necessary *animus possidendi* on the part of the claimant. This was defined by Slade J in *Powell v McFarlane*[29] as 'the intention, in one's own name and on one's own behalf, to exclude the world at large, including the owner with the paper title in so far as is reasonably practicable and so far as the processes of the law will allow'. More recently, in *Buckinghamshire CC v Moran*,[30] it was held that it is sufficient that the squatter should have shown an intention to exclude the paper owner *for the time being*; so that the requirement was satisfied where there was an intention to continue in possession of the land only until such time as the paper owner decided to build a proposed highway across it. Accordingly, the adverse possessor was able to acquire a title on expiry of the limitation period, notwithstanding the 'temporary' nature of the possession.

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22 In The Bahamas, possession need not be adverse in order to bar a paper title. Thus, in a dispute between co-tenants, X and Y, where the right of entry has accrued more than 20 years before action is brought, and where X only has been in possession, Y's title may be extinguished: *Knowles v Rolle* (1984) Supreme Court, The Bahamas, No 276 of 1980 (unreported), *per* Adams CJ (Ag), following *Paradise Beach and Transportation Co Ltd v Price-Robinson* [1968] 1 All ER 530, PC appeal from the Court of Appeal of The Bahamas, *per* Lord Upjohn. See, also, *Higgs v Nassauvian Ltd* [1975] 1 All ER 95, p 100, *per* Sir Harry Gibbs.

23 *Treloar v Nute* [1977] 1 All ER 230.

24 *Wallis's Cayton Bay Holiday Camp Ltd v Shell-Mex and BP Ltd* [1974] 3 All ER 575; *Hepburn v Hanley* (1981) Court of Appeal, The Bahamas, No 17 of 1980 (unreported); *Burke v Whitters Worldwide Properties Ltd* (1993) 30 JLR 6, p 10, Supreme Court, Jamaica, *per* Langrin J ('where a person takes possession under a licence or permission, time cannot begin to run until the licence or permission has been terminated').

25 *Johnson v Myers* (1988) 25 JLR 74, p 76, Court of Appeal, Jamaica.

26 *Murphy v Murphy* [1980] IR 183; *Riley v Brathwaite* (1979) WIR 66, Court of Appeal, Barbados.

27 *Scantlebury v Young* (1948–57) 1 Barb LR 23, Court of Error, Barbados.

28 *Greaves v Barnett* (1978) 13 Barb LR 129, High Court, Barbados.

29 (1977) 38 P & CR 452, pp 471, 472.

30 [1989] 2 All ER 225.

On the other hand, in *Pollard v Dick*,[31] where it was clear that the paper owner had no intention to part with possession, Davis CJ, in the Court of Appeal, St Vincent, held that the adverse claimant had failed to show the necessary *animus possidendi,* as he had entered the land, not with an intent to dispossess the owner, but in the expectation of purchasing it from someone who purported to be the true owner. Such evidence was fatal to the claim based on adverse possession; similarly, the claim in *Farrington v Bush*[32] failed, on the ground that the claimant had taken possession in the erroneous belief that the land had been conveyed to him, rather than with the intention to exclude the owner.

NATURE OF ACTS AMOUNTING TO ADVERSE POSSESSION

In order to qualify as sufficient adverse possession, the acts of the claimant must not be 'trivial'[33] or 'equivocal', and, in determining whether the claimant has shown sufficient factual possession to found a claim to title by adverse possession, regard must be had to the circumstances of the individual case, and acts which might be held to be sufficient in one case will not necessarily be sufficient in another. In the words of Lord O'Hagan:[34]

> As to possession, it must be considered in every case with reference to the peculiar circumstances. The acts implying possession in one case may be wholly inadequate to prove it in another. The character and value of the property, the suitable and natural mode of using it, the course of conduct which the proprietor might reasonably be expected to follow with a due regard to his own interests – all these things, greatly varying as they must, under various conditions, are to be taken into account in determining the sufficiency of a possession.

It is generally accepted that enclosure of the land by a wall[35] or fencing[36] will usually be sufficient evidence of factual possession by the adverse possessor, though, as Swaby JA pointed out in *Archer v Georgiana Holdings Ltd*,[37] 'fencing may be equivocal because ... that act may have been done for the purpose of protecting rights not inconsistent with ownership of the freehold'. Thus, for

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31 (1977) 2 OECSLR 239.

32 (1974) 12 JLR 1492, see below.

33 Eg, merely parking vehicles on land: *Johnson v Myers* (1988) 25 JLR 74, Court of Appeal, Jamaica. See, also, *Tecbild Ltd v Chamberlain* (1969) 20 P & CR 633.

34 *Lord Advocate v Lord Lovat* (1880) 5 App Cas 273, p 288.

35 See *Flowers v Forbes* [1971–76] 1 LRB 340, Supreme Court, The Bahamas.

36 *George Wimpey and Co Ltd v Sohn* [1966] 1 All ER 232, p 241; *Buckinghamshire CC v Moran* [1989] 2 All ER 225, p 236.

37 [1974] 12 JLR 1421, p 1429.

example, in *George Wimpey and Co Ltd v Sohn*,[38] the enclosure of the land by fences and hedges and the erection of a brick wall and a gate which was kept locked were held to be equivocal acts, in that they may have been done to protect the property from intrusion by the public, and not to dispossess the true owner.

In *Farrington v Bush*,[39] Graham-Perkins JA, in the Jamaican Court of Appeal, summarised the position as to acts of possession thus:[40]

> Adverse possession of land is, and always has been, a complex concept. It involves the co-existence of two essential elements, namely the assumption of actual physical possession by, and the presence of a particular mental element directed towards the true owner in the adverse possessor. It is, in our view, a mistake to think that mere entry upon, and user of the land of another can, without more, be equated with an assumption of possession. It must be possession of such a nature as to amount to an ouster of the original owner of the land: see, for example, *Williams Bros Direct Supply Stores Ltd v Raftery*.[41] To support a finding of adverse possession there must be positive and affirmative evidence of acts of possession, unequivocal by their very nature and which are demonstrably consistent with an attempt, and an intention, to exclude the possession of the true owner. Where alleged acts of possession are intrinsically equivocal they will almost always be found to be mere acts of trespass. In this context, an equivocal act means an act of such a nature as to provide an equal balance between an intention to exclude a true owner from possession and an intention merely to derive some enjoyment or benefit from the land wholly consistent with such use as the true owner might wish to make of it.
>
> In order to determine the precise nature of an alleged act of possession, the geography and nature of the land are to be regarded as critical considerations. Equally important, from the point of view of the true owner, is the nature of the user of which his land is shown to be capable and his intention in relation thereto.

In this case, the acts relied upon by the claimant were: (a) monthly visits to the land; (b) clearing the land; (c) putting up a 'no trespassing' sign; (d) putting down boundary markers; and (e) registering the land under an invalid conveyance. It was held that these acts were equivocal and insufficient, since the claimant had mistakenly believed that the land had been conveyed to him, and his actions were as consistent with an intent to use *qua* owner as with an intention to establish a title by adverse possession.

38 (1966) 1 All ER 232.

39 (1974) 12 JLR 1492.

40 *Ibid*, p 1493.

41 [1957] 3 All ER 593.

User of part of the land

The question whether acts of usage exercised over part only of the disputed land can constitute adverse possession of the whole has been in issue in the Commonwealth Caribbean. In the Guyanese case of *West Bank Estates Ltd v Arthur*,[42] the respondents sought to establish a prescriptive title to land under s 3 of the Title to Land (Prescription and Limitation) Act, Cap 184 (Laws of British Guiana),[43] which provided that:

> Title to land ... may be acquired by sole and undisturbed possession, user or enjoyment for 30 years, if such possession, user or enjoyment is established to the satisfaction of the court and was not taken or enjoyed by fraud or by some consent or agreement expressly made or given for that purpose.

In this case, the respondents, who were peasant farmers, claimed a prescriptive title to an area of land by virtue of various acts, such as cutting timber, fishing and growing rice on the land, throughout the prescription period. The trial judge, Bollers J, held that these acts were insufficient to prove the sole possession which was required, and they were not inconsistent with the enjoyment of the land by the person entitled. The Federal Supreme Court, on the other hand, took the view that the respondents had proved that they had made what was, for persons of their means and class, normal use of the land, and their actions were sufficient to establish adverse possession. The Privy Council preferred the view of Bollers J. In the words of Lord Wilberforce:[44]

> Admitting the utility of the respondents' operations, and that they did what was normal for small peasant farmers, this still does not establish a sufficient degree of sole possession and user to satisfy the Ordinance, to carry the matter beyond a user which remains consistent with the possession of the true owner. What is a sufficient degree of sole possession and user must be measured according to an objective standard, related no doubt to the nature and situation of the land involved but not subject to variation according to the resources or status of the claimants.

The second issue which arose in this case was whether proof of the respondents' user of part of the land was evidence of their possession of the whole. Lord Wilberforce stated that the true question was as to the extent of the land the respondents did in fact use and occupy, and, in determining whether acts of use of part could be evidence of possession of the whole, a distinction had to be drawn between, on the one hand, an area of land surrounded by hedges, and, on the other, one which lacked defined boundaries. In the former, acts done in one part would be evidence of the

42 [1967] AC 665.

43 Now Cap 60:02, Laws of Guyana, s 3.

44 [1967] AC 665, p 678.

possession of the whole,[45] but in the latter, no such inference could be drawn. In the present case, the boundaries of the land were undefined, and Bollers J was correct in finding that there was insufficient evidence of possession of the whole by the respondents.

In the Bahamian case of *Higgs v Nassauvian Ltd*,[46] there was evidence that, at various dates during the 20 year period laid down by the Real Property Limitation Acts 1833 and 1874, the claimants' predecessors and their tenants had farmed parts of the disputed land, producing vegetables and other small crops, the practice of the farmers being to cultivate a small area, to reap the harvest, and then to move on to another area, leaving the first to become overgrown. The land was, for the most part, arable, though some of it consisted of pine barren. It was not fenced or otherwise enclosed, but the boundaries were known and were not disputed.

The Privy Council upheld the findings of fact of the trial judge, supported by the Court of Appeal of The Bahamas, that there was insufficient evidence of possession by the adverse claimants; however, Sir Harry Gibbs, delivering the judgment of the Board, emphasised that, unlike in *West Bank Estates Ltd v Arthur*,[47] where the boundaries of the land were disputed and undefined, in the present case, although the land was unfenced, its boundaries were known and undisputed and, accordingly, possession of the whole by the claimants might have been established by acts done on part of it. He continued:[48]

> The members of the Court of Appeal were wrong in viewing it as laying down a general principle that to establish possession of an area of land, a claimant must show that he has made physical use of the whole of it, or as deciding that a farmer can never establish possession of an area of land over parts of which he works in rotation. It is clearly settled that acts of possession done on parts of a tract of land to which a possessory title is sought may be evidence of possession of the whole. In *Lord Advocate v Lord Blantyre*, Lord Blackburn said:[49]
>
>> And all that tends to prove possession as owners of parts of the tract tends to prove ownership of the whole tract; provided there is such a common character of locality as would raise a reasonable inference that if the barons possessed one part as owners they possessed the whole, the weight depending on the nature of the tract, what kind of possession could be had of it, and what the kind of possession proved was.

45 *Clark v Elphinstone* (1880) 6 App Cas 164.

46 [1975] 1 All ER 95.

47 [1967] AC 665.

48 [1975] 1 All ER 95, p 101.

49 (1879) 4 App Cas 770, p 791.

> This rule is not applicable to a question of undefined and disputed boundary (*Clark v Elphinstone*,[50] *West Bank Estates Ltd v Arthur*)[51] but this does not mean that acts done on part of the land are only relevant to prove possession of the whole if the land is enclosed by a wall or other physical barrier. The property claimed by possession may be sufficiently defined in other ways, for example, where the claim is to trees in a belt of woodland (*Stanley v White*),[52] to the bed or foreshores of a river (*Jones v Williams*,[53] *Lord Advocate v Lord Blantyre*),[54] or to the right to fish in a river (*Lord Advocate v Lord Lovat*).[55]

RESUMPTION OF POSSESSION BY PAPER OWNER

In order to prevent an adverse possessor from acquiring an indefeasible title under the Limitation Acts, the paper owner must show that, before expiry of the limitation period, he performed acts amounting to dispossession of the squatter and resumption of possession by him. Mere entry upon the land is not sufficient.[56]

Alternatively, the paper owner should bring legal action for possession within the period. In some jurisdictions, the Rules of the Supreme Court[57] provide that, where a person claims possession of land which he alleges is occupied by a person or persons (other than a tenant or tenants holding over after the termination of the tenancy) who entered into or remained in occupation without his or his predecessor in title's licence or consent, proceedings for the recovery of possession may be brought by originating summons. This 'fast possession action' is not appropriate, however, where there is any serious triable issue (for example, as to whether the occupant is a tenant or licensee, or has a valid defence), or where the tracing of the title is complicated.

50 (1880) 6 App Cas 164, pp 170, 171.

51 [1967] AC 665.

52 (1811) 104 ER 630.

53 [1835–42] All ER Rep 423.

54 (1879) 4 App Cas 770.

55 (1880) 5 App Cas 273, p 289.

56 See *Bent v Williams* (1976) 14 JLR 122, Court of Appeal, Jamaica, where entries by the paper owner to pick mangoes and in unsuccessful attempts to collect rent were held to be insufficient to prevent title from being acquired by adverse possession. On the other hand, it has been emphasised by the Privy Council that 'the slightest acts by the person having title to the land or by his predecessors in title, indicating his intention to take possession, are sufficient to enable him to bring an action for trespass against a defendant entering upon the land without any title, unless there can be shown a subsequent intention on the part of the person having the title to abandon the constructive possession so acquired': *Ocean Estates Ltd v Pinder* [1969] 2 AC 19, p 25, *per* Lord Diplock, PC appeal from the Court of Appeal of The Bahamas.

57 Eg, RSC Ord 92 r 1 (Barbados). See *Nall v Cox* (1987) High Court, Barbados, No 718 of 1987 (unreported); Kodilinye and Kodilinye, *Commonwealth Caribbean Civil Procedure*, 1999, London: Cavendish Publishing, p 15.

A claim to adverse possession of land may also be defeated by a written acknowledgment, made by the person in possession to any person claiming to be the proprietor, to the effect that the latter's claim is admitted.[58]

58 *Browne v Perry* (1991) 40 WIR 165.

INDEX

A

Abandonment,
- easement, of, 212, 213
- statutory tenancy, of, 76–79

Accommodation, alternative, 86–88

Adverse possession,
- *animus possidendi*, 247, 248
- dispossession, 244
- limitation of actions, 243, 244
- possession,
  - discontinuance of, 245, 246
  - nature of, 248–52
  - part of land, of, 250–52
- resumption of, 252, 253

Agreement to lease, 15–17

Annexation,
- benefit of restrictive covenant, of,
  - *See* Restrictive covenants.

Assignment,
- benefit of restrictive covenant, of
  - *See* Restrictive covenants.
- covenant against, 35–37
- equitable lease, of, 17
- legal lease, of, 41–44
- reversion, of, 41–44

B

Bare licence, 101, 102

Breach of covenant,
- waiver of, 45–47

C

Caution,
- registered land, in, 6, 146

Certificate of title, 5, 6

Charge,
- mortgage compared, 215
- registered, 216

Condominium,
- body corporate, powers of, 135–38
- bylaws, 135
- common property, 131
- contributions, default in
  - payment of, 137, 138
- declaration of, 131–35
- drawings and plans, 134
- termination of, 138, 139
- unit owner, interest of, 129, 130, 134

Consent,
- landlord of, assignment
  - or subletting for, 36, 37

Contract,
- lease, to, 15–17
- privity of, 41

Controlled tenancy, 71–73

Conveyance,
- definition of, 193

Co-ownership,
- creation of, 117–19
- four unities, 118
- joint tenancy, 117, 118
- partition, 127
- possession, right of, 118
- sale in lieu of partition, 118
- severance of joint tenancy, 122–26
- survivorship, right of, 117, 119, 120
- tenancy in common,
  - equitable presumption of, 120–22

Covenants,
- assignment, against, 35–37
- benefit of, assignable, 41–44
- burden of, assignable, 41–44
- contract, privity of, and, 41
- estate, privity of, and, 41–44
- express 31–40
- human habitation, fitness for, 28, 29
- implied, 23–31
- leases, in, 23–40
- non-derogation from
  - grant, against 27
- quiet enjoyment, for, 23–27
- repair, to, 30, 33–35
- restrictive, *See*
  - Restrictive covenants.
- running with land, 43, 44

running with reversion, 43, 44
touching and concerning land, 42, 43
underletting, against, 35–37
Customary right,
easement compared, 172

D

Damages,
covenant in lease,
breach of, for, 48, 49
Deposit,
title deeds, of, 216, 239
Distress,
bailiff, by, 63, 64
distrainable goods, 62
impounding, 64
privileged goods, 62, 63
procedure for, 63–66
replevin, 65
third parties' goods, 63
time and place for, 59–62
Domestic fixtures, 68, 69
Duty of care,
mortgagee, of, 234–38
Dwelling,
base rent of, 94
definition of, 94
rent restriction as to, 92–96
security of tenure as to, 73–91
standard rent of, 93

E

Easements,
abandonment of, 212, 213
acquisition of, 181–206
express grant, by, 181
express reservation, by, 181, 182
implied grant, by, 182–88
implied reservation, by, 188, 189
prescription, by, 194–206
continuous user, 197
fee simple, user in, 198
right, as of, user, 195–97
apparent, 186
characteristics of, 171–80
continuous, 186, 197
customary rights,
distinguished from, 172
equitable, 181
essentials of, 172–80
extent of, 206–11
extinguishment of, 211–13
intended, 185, 188
legal, 181
light, of, 204, 205
nature of, 171, 172
necessity, of, 183–85, 188
negative, meaning of, 171
positive, meaning of, 171
Equitable interests,
protection of, 4–6
Equitable right to redeem,
restrictions on, 218–23
Equity of redemption
See, also, Mortgages.
clogs on, 218–24
collateral advantages, 221–24
nature of, 217, 218
termination of, 238, 239
transferability of, 218
Estates, doctrine of, 2, 3
freehold, 2
leasehold, 3
Estoppel,
licence by, 106–16
proprietary, 106–16
tenancy by, 21
Exclusive possession,
leases, in, 8–13
licences, in, 8
Expiration of lease, 54, 68

F

Fair wear and tear, meaning of, 35
Fee simple,
  nature of, 2
  user in, 198
Fee tail, 3
Fish, right to, 172, 205
Foreclosure, *See* Mortgages.
Forfeiture of lease,
  conditions for, 47–49
  negative covenants,
    breach of, for, 51
  non-payment of rent, for, 47
  relief against , 47, 48, 52, 53
  subtenant, position of, 52, 53
  waiver of breach, where, 45–47
Furnished lettings, 28

H

Hardship,
  balance of, 85–88
Human habitation,
  fitness for, 29

I

Immoral user, covenant against, 51, 52
Informal lease, 15
Insurance,
  fire, against, 42

J

Joint tenancy,
  alienation of, 123
  beneficial, 119
  creation of, 117
  determination of,
    partition, by, 127
    severance, by, 122–26
  four unities, 118
  nature of, 117, 118
  severance of, 122–26
    acquisition of another
      estate, by 125
    alienation, by, 123
    course of dealing, by, 125
    mutual agreement, by, 124
    written notice, by, 126
  survivorship, right of, 117, 119, 120

L

Land,
  definition of, 1, 67
Landlord. *See*, *also*, Leases.
  consent of, assignment for, 36, 37
  distress levied by, 58–64
  fixtures of, 67
  grounds for possession by, 79–84
  notice to quit by, 54–57
  repairs, liability for, 30
  rights and duties of, 23–40
  statutory notice of breach,
    required, 48, 49, 51, 52
  waiver of breach by, 45–47
Lease, *See*, *also*, Tenancy.
  agreement for, 15–17, 193
  assignment of, 41, 42
  certainty of duration of, 13, 14
  condition, breach of, 44
  creation of, 14, 15
  covenants in, *See* Covenants.
  deed, where required, 14, 15
  duration of, 13, 14
  equitable, 15
  essentials of, 8–14
  exclusive possession,
    requirement of, 8, 9
  forfeiture of, 44–53
  frustration of, 57, 58
  legal, 15, 16, 43
  mortgagor's power to grant, 224
  privity of contract, 41
  privity of estate, 41, 42
  re-entry by landlord, 45

rights and duties of parties under, 23–40
specific performance of, 16, 17
surrender of, 53, 54
tenant's fixtures, when removable, 67–69
termination of,
effluxion of time, by, 54
forfeiture, by, 44–53
frustration, by, 57, 58
merger, by, 54
surrender, by, 53, 54
waste under, 30, 31
Leasehold estate, 3
Licences,
classification of, 101
bare, 101, 102
contractual, 102–06
coupled with interest, 102
estoppel, 106–16
easements and, compared, 171, 172
leases and, compared, 8–13
restrictive covenants and, compared, 171
Life estate, 3
Limitation period,
adverse possession, for, 243, 244

M

Mortgage,
charge, compared with, 215
consolidation of, 241, 242
creation of, 215, 216
deposit, by, 216, 239
equitable, 216
foreclosure of, 238–40
freehold, of, 215, 216
irredeemable, 218–20
leasehold, of, 215, 216
oppressive terms of, 221, 222
postponement of redemption, 220, 221
remedies of mortgagee, 225–34
restraint of trade in, 223, 224
sale by mortgagee, 229–38
mode of sale, 230
power of sale, 229, 230
proceeds of sale, 231
protection of purchaser, 231
unconscionable terms of, 221, 222
Mortgagee,
account, duty to, 226
bad faith of, 231–33
consolidate, right to, 241, 242
negligence of, 235
remedies of,
foreclosure, 238, 239
personal covenant, action on, 225
possession, right to, 225–28
receiver, appointment of, 228, 229
sale, 229–38
suit for money due, 225
tacking, 240, 241
trustee of proceeds of sale, as, 231
Mortgagor,
leasing powers, 224
redeem, equitable right to, 217
redemption, equity of, 217–23
relief of, against possession, 226
rights of, 224

N

Negligence,
mortgagee, of, 234–38
Non-derogation from grant,
easement, grantor of, by, 188, 189
lessor, by, 27
Notice,
doctrine of, 4
quit, to, 54–57
restrictive covenant, of, 143
without, *bona fide* purchaser, 4
Notice to quit,
lessee, by, 54–57
lessor, by, 54–57

O

Option,
  purchase reversion, to, 37–39
  renew lease, to, 39, 40
Ornamental fixtures, 68

P

Partition, 127
  sale in lieu of, 127
Possession,
  adverse, 243
  factual, by squatter 248, 249
  mortgagee, by, 225–28
  unity of, 118
Power of attorney, irrevocable, 240
Prescription, 194–206
  Acts, 200–06
  requirements for, 195–98
  user as of right in, 195–96
Privacy,
  no easement of 177
Proprietary estoppel, 106–16
Purchaser,
  bona fide for value, 4

Q

Quasi-easements, 182–88
Quiet enjoyment,
  covenant for, 23–27

R

Receiver,
  appointment of,
    mortgagee, by, 228, 229
Redemption, equity of, 217
  clogs on, 218–23
  protection of, 218–23
  transfer of, 218
Rent,
  covenant to pay, 32
  non-payment of, forfeiture for, 47
  restriction on, *See* Rent Restriction Acts.
Rent Restriction Acts,
  abandonment of statutory tenancy, 76–79
  corporate tenant under, 75, 76
  eviction, prohibition of, 91
  landlord, recovery of possession by, 79–88
    alternative accommodation, availability of 86–88
    grounds of recovery, 79–81
    hardship, proof of, 85, 86
    premises reasonably required, 81–83
    premises required, 83, 81
    reasonableness, 85, 86
  non-occupying tenant, 76–79
  rent control, 92–93
    base rent, 94
    standard rent, 93
Repair,
  covenant to, 30, 33–35
  'fair wear and tear', meaning of, 35
  human habitation, fitness for, 28, 29
  liability for, 30, 33–35
  standard of, 33–34
Restraint of trade,
  mortgages, in, 223, 224
Restrictive covenants, 141–70
  annexation of benefit of, 150–54
  assignment of benefit of, 155, 156
  benefit of, at law, 148,149
  benefit of, in equity, 149–62
  building scheme, in, 156–62
  burden of, at law, 142
  burden of, in equity, 143–48
  discharge of, 162–70
  easement compared with, 143, 171, 172

impeding user of land, 165–67
lessor and lessee, between, 145
modification of, 162–70
nature of, 141, 142, 159, 160
negative in substance,
must be, 144
notice of, 143, 146
obsolete, 163–65
positive covenants,
enforceability of, 146–48
scheme of development, in, 156–62
touching and concerning land, 148
waiver of breach, 163–65

Reversion in lease,
assignment of, 41–44

Right of re-entry, 44, 45,

Right of way, *See* Easements.

Rights of light,

acquisition of, 204, 205

Rights of support, 185–87, 193

S

Sale
co-owned land, of, 123, 127
mortgaged land of 229–39

Security of tenure,
land tenants, of, 96–99
statutory tenants, of, 73–91

Severance,
joint tenancy, of 122–26

Specific performance,
leases, grant of, 16,17
licence, of 103

Squatters,
adverse possession of, 245–49
successive, 244
title of, 243–45

Statutory tenancy,
abandonment of, 76–79
nature of, 73–75
recovery of possession
by lessor, grounds for, 79–81
succession by, 88–89

Subtenant,
forfeiture and, 48

Support right of 185–87, 193

Surrender, lease, of 53, 54

Survivorship, right of, 117, 119, 120

T

Tacking, 240, 241

Tenancies, *See, also,* Leases.
estoppel, by 21
monthly, 18, 19, 31
notice to quit 54–57
periodic, 18, 19
sufferance, at, 20, 21
termination of 18, 54–57
weekly, 18, 31
will, at, 19, 20
yearly, 18, 55

Tenancy in common
creation of, 119
equitable presumption of, 120–22
loan on mortgage, where, 120
partnership assets held as, 121, 122
purchase money in
unequal shares, 120
severance, words of 119
unity of possession in, 118

Tenant, *See, also,* Leases.
abandonment by, 76–79
corporate 75, 76
distress levied against, 58–69
eviction of, 91
fair wear and tear by, 35
licensee distinguished from, 8–13
option to purchase reversion, 37, 38
relief against forfeiture, 47, 48, 52, 53
rent, payment of, by 32
rent restriction, *See* Rent Restriction Acts.
repair, obligation to, 33–35

security of tenure of, 73–90
sufferance at, 20, 21
surrender of lease by, 53, 54
waste, liability for, 30, 31
will at, 19, 20

Third parties,
goods of, distrained 63
leases, whether binding on, 17
licences, whether
binding on, 104–06, 116

Title,
certificate of, 5
denial of, lessor of, 21
registration of, 4–6
unity of, 118

Title deeds,
deposit of, 216

Touching and concerning land,
meaning of, 42, 43

Trade fixtures, 67, 68

Trust,
constructive, 105
declaration of, mortgagor, by, 240

U

Unity of possession,
co-ownership, in, 118
easement, in 175, 176, 211, 212
scheme of development, in, 157

User
apparent, 186
change of, 208–11
consent to, 196, 197
continuous, 186, 197
fee simple, in, 198
right, as of, 195–97

V

Voluntary waste, 30, 31

W

Waiver,
forfeiture of, by landlord, 45–47

Waste,
obligation not to commit, 30, 31

Water,
easement to abstract 209