PROPERTY LAW & PRACTICE

PRE-READING: LAND LAW
Concepts of property are central to our society. Land is one of the most valuable assets that can be owned. The Property course on the LPC is about the transfer of legal title to land – usually the sale or lease of a property by one person to another.

A good understanding of land law will help you succeed on the Property course. As it may be some time since you studied land law, this handout has been prepared for your assistance and covers some basic concepts.


1. WHAT IS LAND?

In the Property course we look at the sale of land (and the buildings on the land). The sale will include fixtures, which are regarded as part of the property, as opposed to fittings (contents), which have to be dealt with separately as part of the contract if the buyer wishes to acquire them.

2. LEGAL ESTATES

Selling or leasing a property involves the transfer of title to a legal estate in land. Since 1925, there are only two legal estates in land. The technical terms for these are the estate in fee simple absolute in possession, and the term of years absolute. You may know them better as freehold and leasehold, respectively.

A lease is created when a landlord gives exclusive possession of the property to a tenant for a term. Usually a rent is paid. Every legal lease, however short its term, creates a legal estate.

Whether the land is freehold or leasehold, it may be subject to and/or have the benefit of the third party interests set out below in section 3.

3. THIRD PARTY INTERESTS

3.1 Easements

An easement is a right for the benefit of one piece of land over another, often adjoining, piece of land. Typical examples of the easements that may be met on this course are rights of way, rights of drainage, rights to use pipes and cables and rights of light.

Easements are normally created when one piece of land is split up into smaller pieces, i.e. when there is a 'sale of part'. For example, a builder may sell off the individual houses or flats on a new development by selling the freehold or granting long leases, or may develop an industrial estate by selling or leasing individual units in a similar way. On these occasions, easements will normally be expressly created by the deed effecting the sale. There may be easements for the benefit of the part sold off over the land retained by the seller (“grants”) or for the benefit of the land retained by the seller over the part sold off (“reservations”).
In addition to the express creation of easements, easements can also be created by implication or by prescription (i.e. by establishing that there has been user for at least 20 years). The rules relating to the acquisition of easements in these ways are complex and we will refresh your memory about them during the course.

3.2 Covenants

Covenants are an important topic for a property lawyer in practice. In this context a covenant is a promise by the owner of an estate in land to the owner of another estate to do or not to do something on the land in question.

**Tip: Terminology**
The person who has the burden of complying with the covenant is the **covenantor**
The person who has the benefit of a covenant is the **covenantee**

Examples are:

- A sells part of her freehold garden to a builder who covenants only to build one bungalow on the land; and
- A covenants to put up a fence along the new boundary line.
- B lets a flat for a year to three students who covenant to pay rent termly in advance; and
- B covenants to carry out repairs to the flat.

As these examples show, covenants occur in freehold and leasehold transactions. A covenant to do something (e.g. repairs) is a positive covenant and a covenant not to do something (e.g. not to build anything except one bungalow) is a negative or restrictive covenant.

**Tip: How to distinguish covenants from easements**
An easement is a right for X over Y’s land
A covenant is a promise by X to do/not to do something on X’s own land

3.3 Mortgages

A **mortgage** is created when one person borrows money from another and the borrower charges his land to the lender by way of legal mortgage as security for the loan. The borrower is known as the mortgagor and the lender is known as the mortgagee.

**Tip: How to remember these terms**
The first vowel in borrower is ‘o’ = mortgagor
The first vowel in lender is ‘e’ = mortgagee
So there are two elements:

- the mortgagee lends money to the mortgagor; and
- the mortgagor mortgages his/her land to the mortgagee.

The Law of Property Act 1925 (“LPA 1925”) gives extensive powers to the mortgagee over the mortgaged land. If the mortgagor fails to repay the loan the mortgagee may:

- repossess the property and evict the mortgagor;
- sell the mortgaged land;
- use the proceeds of sale to pay off the debt.

3.4 Trusts

We will not expect a detailed knowledge of trusts in the Property course apart from the basic rules on joint tenancies and tenancies in common. These are outlined in section 7 of this handout.

3.5 Adverse possession

Adverse possession is basically the process by which an occupier of land can obtain title to that land by occupying it for a number of years without the paper title owner’s consent (commonly referred to as “squatters’ rights”). The occupier or squatter would generally have to show 12 years’ undisturbed occupation to gain title (though the period in more recent cases in registered land has been reduced by Land Registration Act 2002 to 10 years). In addition, for claims under Land Registration Act 2002, additional conditions (which are beyond the scope of the course) need to be satisfied.

4. PROTECTION OF THIRD PARTY INTERESTS

Mortgages, leases, easements, freehold covenants and trusts are examples of situations where a third party has an interest in a piece of land belonging to another person. Rights of this nature need to be protected in some way, to ensure that they can be enforced against the current owner of the land that they affect.

We now need to look at the protection of these and other third party interests in more detail. To do that, we need to discuss registered and unregistered titles as the method of protection of these interests differs in each system.

5. REGISTERED TITLES

5.1 Background to Registered Title system

Originally all land owners proved their ownership of the land that they intended to sell by producing a deed showing that the seller or his/her predecessors had acquired the land in question at least 15 years ago. This system of land ownership, known as unregistered title, still exists in England and Wales today but is being replaced with the system of registered title.

In registered title, the title to the land and information relating to a particular estate in land is kept on a State maintained and guaranteed register, which is stored
electronically by the Land Registry. The details of the owners of the land and most third party interests affecting it can be accessed from the register by the general public.

5.2 Electronic conveyancing

The Register is stored electronically. The Land Registry is steadily extending computerization so that more and more types of applications can be done via the internet. The Land Registry’s website is https://www.gov.uk/government/organisations/land-registry. It contains all its forms and has a number of helpful Practice Guides that explain how different aspects of the system work.

Did you know?
The register has been open to the public since 1990. In January 2005 it was made accessible over the internet. Go to the Land Registry’s website to see what information is available. For a small fee you can obtain details of any registered title.

5.3 First Registration

At first only a small part of the country was subject to registration. However, on 1 December 1990 the whole of England and Wales became subject to registration following “trigger” events. The “triggers” for compulsory registration now include all the major transactions in land.

When a trigger event occurs, such as a sale, the Land Registration Act 2002 provides that the application for first registration of the estate must be submitted to the Land Registry so that the title can become registered. In this way unregistered titles are becoming registered on a piecemeal basis.

5.4 The Registered Title system and protection of third party interests

5.4.1 Advantages of Registration

The aim of the registered title system is to ensure that all relevant information about the legal estate is set out on the Register for all to see i.e. details of the owner and third party interests that affect the estate.

In essence, any third party interests must be put on to the Register if they are to be enforceable against a buyer.

However, there is one major category of third party interests that will not appear on the register: “interests that override”.

5.4.2 Interests that override

These are third party rights that will bind a buyer even though they do not appear on the Register. They constitute a gap in the registered title system and are a trap for the unwary buyer.
The most important interests that override are:

- legal leases of seven years or less;
- the interest of a person in actual occupation of the land; and
- some legal easements which arise by implication of law or by prescription.

Therefore, it is important that a person intending to buy registered land (or his/her solicitor) makes particular enquiries to find out if any interests that override exist.

6. UNREGISTERED TITLES

6.1 Background to the Unregistered Title system

In an unregistered title ownership of land is proved by producing a deed showing that:

- the seller or his/her predecessors had acquired the land at least 15 years ago; and
- any changes in ownership since the date of that deed.

6.2 Protection of third party interests

Is the buyer going to be bound by third party interests that were created in the past, perhaps many years ago? In unregistered land, there are three ways of protecting third party interests as set out below.

6.2.1 Legal Interests

Generally speaking, all legal estates (such as leases) and all legal interests (such as legal easements and first legal mortgages) bind the buyer irrespective of notice, i.e. irrespective of whether he/she actually finds out about and knows about them. This is because generally speaking, legal estates and interests “bind the world”.

6.2.2 The Doctrine of Notice

Equitable interests may also bind the buyer, for example, interests under a trust of land or restrictive covenants created before 1926, if the buyer has notice of the interest. This is called the doctrine of notice. There are various ways in which the buyer could acquire notice but typically the buyer may have notice because he/she has been told about the interest by the seller or because he/she should have found out about the interest when investigating the seller's title as part of the property transaction.

6.2.3 Land Charges

Onto this basic division between legal interests that bind the world and equitable interests that will bind only if there is notice is superimposed a system of land charges.
Certain legal and equitable interests in unregistered land are registrable as land charges in a register maintained by the Land Charges Department.

A buyer:

- is bound by such an interest if it has been registered BUT
- is not bound by it if it has not been registered.

Whether or not the buyer knows of the interest is irrelevant.

Land Charges are divided into six classes (A-F), some of which are divided into subclasses. The most common interests which are registrable as land charges are:

- Class D(ii): restrictive covenants created after 1925;
- Class C(iv): contracts to sell or lease land (called 'estate contracts');
- Class C(i): second and other subsequent legal mortgages; and
- Class F: home rights – a spouse/civil partners’ statutory right to occupy the matrimonial/partnership home of which he/she is not the legal owner.

Therefore it is important that a person intending to buy unregistered land (or his/her solicitor) makes a search at the Land Charges Department to find out if there are any land charges affecting the land being bought.

6.3 Summary

We can therefore summarise the position for unregistered title as follows: the buyer will take subject to:

(i) legal estates and interests that bind the world;

(ii) third party interests which are registrable as Land Charges AND have been registered as land charges against the correct name prior to the purchase; and

(iii) equitable interests which are not registrable as Land Charges AND of which the buyer has notice pursuant to the Doctrine of Notice.

7. TRUSTS

7.1 The statutory trust

Under the LPA 1925 all land owned by two or more people is held on trust. The LPA 1925 automatically imposes a statutory trust. The trust can be expressly created, but in any event is implied. The trust of land is governed by the Trusts of Land Appointment of Trustees Act 1996.

The owners of the legal estate hold it as trustees on trust for the beneficiaries.

The beneficiaries are often the same people as the trustees. This will usually be the situation where husband and wife own the family home jointly. They would hold the legal title as trustees for themselves as beneficiaries.
7.2 Joint tenancies and tenancies in common

Joint tenancy carries the right of survivorship which means that when a joint tenant dies the other joint tenant(s) inherit his or her interest. On the other hand, a tenancy in common does not carry the right of survivorship. When a tenant in common dies his or her share passes to the person(s) named in the will. If the tenant in common has died intestate, i.e., without a valid will, then his or her share passes to the people entitled on his or her intestacy.

Under LPA 1925 the trustees who hold the legal estate can only hold the property as joint tenants. This means that the right of survivorship always applies to the legal title.

The beneficial, equitable, title can be held as either joint tenants or as tenants in common.

7.3 Transmission on death

On the death of one of two beneficial joint tenants, the survivor acquires the legal estate by survivorship (as this must be held on a joint tenancy) and the survivor also acquires the whole beneficial interest by survivorship; the survivor therefore becomes the absolute (“beneficial”) owner.

However, on the death of one of two beneficial tenants in common, although the survivor will acquire the whole legal estate (as this is inevitably held on a joint tenancy) the deceased’s share under the tenancy in common will pass into his or her estate. It may of course coincidentally devolve on the survivor, who will then own the whole legal and beneficial interests, but otherwise the trust continues, with the survivor holding the legal estate upon trust for himself or herself and the person to whom the deceased’s interest has passed. [NB In these circumstances the survivor would have to appoint a second trustee in order to sell the property and overreach the beneficial interests – see 7.5 below].

7.4 Distinguishing between joint tenancies and tenancies in common

The law will assume a beneficial joint tenancy, unless:

(i) there are express words to the contrary; or

(ii) there is a clear indication that the parties wish to hold distinct shares in the property because they have contributed unequal amounts of money i.e. in an investment property; or

(iii) where the co-owners own the property as part of a business.

In these situations, a tenancy in common is more appropriate.

7.5 “Overreaching”

“Overreaching” means that provided that the purchase money is paid to all of the trustees, the purchaser takes free of the beneficial interests which are transferred to the purchase money. The beneficiaries under the trust acquire an interest in the proceeds of sale instead of their interest in the land itself. If the beneficiaries are
occupying the land they have to move out. Therefore, a purchaser does not need to be concerned about the interests of the beneficiaries.

**Overreaching will only occur if the purchase money is paid to all the trustees.** The LPA 1925 requires there to be at least two trustees or a trust corporation. Thus, if there were three trustees - perhaps three people buying a house jointly to share it - the purchase money must be paid to all three in order for the beneficial interests to be overreached. In practice this means that all three must be parties to the deed; all three held the legal estate which is being transferred to the purchaser jointly and all three are needed to give the receipt contained in the deed.

If there is only one trustee, that sole legal owner would need to appoint a second trustee (possibly but not necessarily the person who had acquired the beneficial interest) in order to overreach the beneficial interests on a sale.