

Chapter 6

Question 1: How did equitable property rights develop?

There were formerly distinct sets of courts in England and Wales: the ‘common law’ courts on the one hand; ‘courts of equity’ on the other. These two sets of courts produced different sets of rules. Whilst the two sets of courts were subsumed into a single court system at the end of the 19th century, we are left with their legacy: a distinction between common law rules and equitable rules.

Lionel Smith argues that, due to their origin in courts of equity, equitable property rights have a special nature: they arise from the fact that equity allowed particular obligations owed by A to B to affect particular third parties, thereby turning ‘an obligation relating to a particular asset into a kind of property right’. Similarly, Hackney notes that the obligation of a trustee to hold an asset for a beneficiary, recognised by courts of equity, came to have an impact on third parties. This process of allowing B’s initial right to affect parties other than A is crucial in allowing B’s right to become more than just a personal right against A.

Question 2: Why might the term ‘equitable estate in land’ be misleading?

The Law of Property Act 1925 uses the term ‘legal estate’ and divides legal property rights in land into legal estates on the one hand and legal interests on the other. However, the Act avoids the term ‘equitable estate’: equitable property rights relating to land are known simply as ‘equitable interests’. On that technical level, it is therefore incorrect to refer to an ‘equitable estate’ in land.

There is a further reason for avoiding the term ‘equitable estate in land’. In Chapter 5, section 2, we examined the concept of a legal estate in land and saw that the content of such an estate is defined by reference to the concept of ownership: a holder of a legal estate in land has ownership of that land, either forever (a freehold) or for a limited period (a lease). If, for example, A1 and A2 hold a freehold on trust for B1 and B2, it may be tempting to state that B1 and B2 have an ‘equitable estate’. However, the ownership of the land is vested in A1 and A2 – B1 and B2 may have the *benefits* of that ownership, but the legal rights of ownership remain in A1 and A2.

Question 3: Why might a party with a freehold or lease decide to set up a trust of that right?

The trust can provide important flexibility to a party with a legal estate in land. As we saw in Chapter 5, sections 3 and 6, the list of permissible legal estates and legal interests in land is limited by the *numerus clausus* principle. This means, for example, that S, a freehold owner of land, cannot give B1 legal ownership of the land for B1’s life, whilst also giving B2 legal ownership of the land after B1’s death. However, S can instead transfer his or her freehold to A1 and A2 to hold on trust for the benefit of B1 during B1’s life, and for the benefit of B2 after B1’s death. As Worthington notes, a trust can thus be used to parcel out the benefits of ownership in ‘ingenious’ ways, without breaching the rules that limit the content of *legal* property rights in land.

Question 4: Is the limit on the number of permissible legal estates in land, imposed by s 1 of the Law of Property Act 1925, undermined by the variety of different rights which may be enjoyed by a beneficiary of a trust of land?

The central point is that, if the number of permissible legal estates was unlimited, a third party would find it very difficult to know what burdens he or she may have to bear if proceeding to buy the land. The variety of different rights which may be enjoyed by a beneficiary of a trust of land would similarly appear to undermine that protection conferred on third parties.

However, it is important to remember that equitable property rights operate differently from legal property rights. Firstly, equitable property rights are not capable of binding X, a trespasser, and therefore X’s protection is

not undermined. Secondly, equitable property rights are capable of binding C, a party who acquires a right from A, but C may be protected by the existence of a defence. As we shall see in Chapter 15, it is very difficult for C to rely on the lack of registration defence where B has a legal property right; but the defence is more readily available where B has an equitable property right. So it seems that the possibility of B's acquiring an equitable interest does not necessarily undermine the limit on the number of permissible legal estates in land, as an equitable interest operates differently from a legal estate.

Question 5: The criteria for proprietary status set out by Lord Wilberforce in *National Provincial Bank v Ainsworth* have been described as 'riddled with circularity'. Do you agree?

This description comes from Gray & Gray's *Elements of Land Law* (5th edn, 2009, p 97). The central point made by Gray & Gray is that the criteria used by Lord Wilberforce to test if a particular right counts as a property right simply mirror the effect of a property right. For example, the key effect of a property right is that it can bind third parties: so, if Mrs Ainsworth's 'deserted wife's equity' counted as a property right, it would have been capable of binding not only Mr Ainsworth, but also the National Provincial Bank. One of the criteria used by Lord Wilberforce to test if her 'deserted wife's equity' counted as a property right was precisely whether that right was 'capable in its nature of assumption by third parties'. This may suggest that, in order to decide if Mrs Ainsworth's right is capable of binding a third party, Lord Wilberforce asks if it is capable of binding a third party: a clearly circular approach.

Nonetheless, it may be possible to defend Lord Wilberforce's criteria, certainly as applied to the facts of *Ainsworth*. The point about the 'deserted wife's equity' is that it was a consequence of, and depended on, the particular relationship between a husband and his wife. In that sense, the right is innately personal: it depends on a specific, personal relationship. This means that such a right, in its very nature, is incapable of binding anyone other than a husband: it would be odd to say the National Provincial Bank had a duty to support Mrs Ainsworth. Further, it seems sensible to require that, to count as a property right, a right must be 'definable' and 'identifiable by third parties'. After all, if a right is to be capable of binding a third party, such a third party must be allowed the chance to discover the right.

Question 6: In what ways do equitable property rights have a different effect from that of legal property rights?

Swadling notes that, whilst equitable property rights do bind third parties, they do so in a 'slightly different fashion' to legal property rights. In particular, it is not usually true to say that an equitable property right is capable of binding *everyone*: if B acquires an equitable property right from A, the impact on that equitable property right will be limited to third parties who later acquire a right from A. In contrast, a legal property right is capable of binding all third parties, even if such a third party has not acquired a right from A. Penner describes this distinction as the difference between 'successor' liability and 'trespassory' liability. Equitable property rights can lead to the former but (in general) not to the latter.

Penner uses this distinction to sub-divide rights *in rem*: he thus takes the view that there are two different forms of property right. McFarlane and Stevens take a different view and argue that, since they are *not* capable of binding everyone, and because they need not relate to a physical thing, so-called 'equitable property rights' are not true property rights at all. On this view, the term 'property right' should be reserved for rights that (i) relate to a physical thing; and (ii) impose a *prima facie* duty on the rest of the world. McFarlane and Stevens's view is clearly an unconventional one, and judges are very unlikely to abandon the language of 'equitable property rights'. Nonetheless, it does emphasise the important point that the difference between equitable property rights on the one hand and legal property rights on the other does not depend simply on the difference historical origins of the rights, but is also reflected in their nature and effect.

McFarlane and Stevens's analysis must, however, be viewed in light of the decision in *Shell UK v Total UK*. The Court of Appeal decided that if X damages A's property which is held on trust for B, the consequential loss suffered by B is recoverable from X, at least if A is joined by B in any claim against X. This reasoning appears to

be contrary to the model proposed by McFarlane and Stevens; although it is important to note that the Court of Appeal regarded the case as forming an exception to the exclusionary rule preventing the recovery of carelessly caused economic loss, and thus decided that the loss suffered was purely economic loss – if B had instead had a legal property right, that rule would not have applied, as the loss could not possibly have been seen as *purely* economic loss. Moreover, the decision in *Shell* is, however, a controversial one (it seems to give insufficient weight, for example, to the prior House of Lords' decision in *The Aliakmon*) and the reasoning of the Court of Appeal could be said to provide further ammunition for McFarlane and Stevens, as it shows the dangers that can arise if we assume that equitable property rights have the same features, and should be treated the same way, as legal property rights.