Chapter 2: Tenures and estates

Assessment question

'As every law student knows, land law is cluttered up with strange devices such as fees tail, determinable fees and fees upon condition subsequent. In 1989, the Law Commission merely proposed that no new entails should be created. This proposal, now enacted as part of the Trusts of Land and Appointment of Trustees Act 1996, does not go far enough.'

Critically examine this statement.

Specimen answer

On 8 June 1989 the Law Commission published a Report titled 'Transfer of Land: Trusts of Land' (Law Com. No. 181). The Report considered entailed interests and modified fees simple. It recommended that no new entailed interests should be created, but it did not recommend the prohibition of new modified fees. Although fees tail are now very few in number, and modified fees are virtually non-existent, it can still be argued that the Law Commission did not go far enough in its proposals for reform of these estates.

The fee tail is a strange legal relic which has somehow survived into the late twentieth century. Fees tail were first recognised as estates in land in 1285. Until the nineteenth century, land (particularly the large country estate) was often subject to a fee tail. Very few exist today. A fee tail is an estate of inheritance, i.e. it can pass from generation to generation within the same family and lasts as long as the original grantee or any of his lineal descendants are alive.

However, even today there are strict rules governing which of the descendants may inherit the fee tail. When an owner of the fee tail dies, the rules ensure that the land must pass to the 'heir' of the deceased owner. Thus the land will pass first to the eldest male descendant, and only if there is no male descendant will the land pass to the eldest female descendant.

A fee simple is different. As the word 'simple' informs us, it may be left to anybody, whether or not they are the 'heir'. A fee simple can be freely bought and sold. When the owner of a fee simple dies, the normal rules of succession apply to that fee simple. It can be left by will. If a fee simple owner dies intestate, the fee simple passes to the statutory next-of-kin. The concept of 'heir' has (since 1925) no application to a fee simple.

In its 1989 Report, the Law Commission acknowledged the irrelevance of fees tail to modern land ownership by recommending legislation to prevent the creation of any new fees tail (para. 16.1), and this proposal has now been enacted in the Trusts of Land and Appointment of Trustees Act 1996 (Schedule 1, para. 5). However, in making this recommendation, the Law Commission did not go far enough. The Working Paper which preceded the Report had recommended that existing fees tail should be converted into fees simple. It is regrettable that this recommendation did not appear in the final report. The very concept of inheritance by the 'heir' might be thought of as unsuitable to a modern legal system, providing as it does for inheritance by males in preference to females. It sits uneasily in the statute books with the Sex Discrimination Act 1975 (and current proposals to alter the rules for the succession to the Crown!). Fortunately, there are not many tenants in tail nowadays.

The vast majority of fees in existence today are 'absolute', which means that, in principle, they will last forever. An almost negligible minority of fees are said to be 'modified'. The determinable fee simple is a fee simple which is modified in such a way that it will terminate automatically upon the occurrence of a specified event. The

specified event must be such that it may never occur. Examples include: 'to John Smith in fee simple until he marries Fiona Bloggs' and 'to Ann Green in fee simple during the time that she remains a faithful protestant'. The essence of the modification is that it is of a temporal nature, using words such as 'until', 'while', and 'during'.

The fee simple upon condition subsequent can be defined as a fee simple where the grantee is given an apparently absolute fee simple, to which a clause is added to the effect that if a stated condition is broken, the estate shall be forfeit. For example: 'To John Smith in fee simple provided that he never marries Fiona Bloggs' and 'to Ann Green in fee simple unless she forsakes the Protestant religion'. The essence of the modification is that it is of a conditional nature, using words such as 'provided that', 'on condition', 'unless', and 'but not if'.

In its 1989 Report, the Law Commission considered modified fees (para. 17.1) and had the opportunity to recommend their abolition. The Commission did not take this opportunity and today it is still possible to create modified fees simple.

One argument in favour of their abolition is that they are out of line with modern ideas of freedom, particularly religious freedom. As things presently stand, modified fees limiting freedom to marry and freedom of religion are seemingly valid. Indeed, in 1975, the House of Lords unanimously upheld a condition subsequent which provided for forfeiture on the grantee becoming a Roman Catholic (*Blathwayt* v *Baron Cawley* [1976] AC 397).

Lord Wilberforce, delivering the leading speech, acknowledged that 'conditions such as this are, or at least are becoming, inconsistent with standards now widely accepted' but upheld the condition because in 1936, when the fee had been granted, the condition had been added through the exercise not of discrimination, but of choice.

His Lordship did tacitly acknowledge, however, that the condition might infringe the European Convention on Human Rights of 1950, which protects the enjoyment of freedoms without discrimination on ground of religion. In coming to the conclusion it did, the House of Lords sidestepped a dilemma. It is not actually the dilemma between the grantor's freedom of disposition and the grantee's freedom of religion. Nothing ever prevented the grantee from becoming a Roman Catholic! It is the dilemma between the grantor's freedom of disposition and the grantee's freedom, as a property owner, to hold a valuable estate without the threat that it might be lost through the exercise of freedom of religion. The Law Commission also sidestepped this dilemma in failing to recommend the abolition of modified fees.

Fees tail, determinable fees, and fees upon condition subsequent are 'strange devices' indeed. It will be interesting to see if they will survive the Human Rights Act 1998. This Act requires all new statutes to carry a statement of compatibility with the 1950 European Convention on Human Rights (or a minister of the Crown must state that government wishes the Act to proceed despite incompatibility). It also requires the courts (as public bodies) to interpret and apply all laws in the manner judged by them to be most compatible with convention rights.