

Answers to end of chapter Q&A

Question 1: How did equitable property rights develop?

In Chapter 2, section 4, we noted that there were formerly distinct sets of courts in England and Wales: the 'common law' courts on the one hand; and '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.

In the extract on pp 82-83, 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, in the extract on pp 83-84, 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 3, 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. This point is discussed on p 85.

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

As noted on pp 86-87, the trust can provide important flexibility to a party with a legal estate in land. As we saw in Chapter 3, 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 in the extract on p 87, 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: In *Hodgson v Marks*, should the absence of written evidence have prevented Mrs Hodgson from proving that Mr Evans had held his freehold on trust for her?

Hodgson v Marks is examined on pp 89-92. It seems that, when Mrs Hodgson transferred her freehold, for free, to Mr Evans, the parties had agreed, or at least assumed, that he would be under a duty to use that right solely for Mrs Hodgson's benefit. In that way, Mrs Hodgson intended that Mr Evans would hold the freehold on trust for her. However, a statutory formality provision, section 53(1)(b) of the Law of Property Act 1925, states that if a party, such as Mrs Hodgson, wishes to prove that a trust of land has been declared in her favour, she needs to produce written, signed evidence of that declaration: see Chapter 11, section 2.1.1.

As a result, the absence of written evidence prevented Mrs Hodgson from simply proving that a trust had been declared in her favour. Nonetheless, it was held, by Ungood-Thomas J at first instance as well as by the Court of Appeal, that Mr Evans, immediately on receiving the freehold from Mrs Hodgson, held that right on trust for her. It was obviously felt that Mr Evans should not be able to rely on section 53(1)(b) in order to cheat Mrs Hodgson out of the benefit of her freehold. In Chapter 14, we will see that there is some debate about the precise nature of the principle applied in *Hodgson*: this can also be seen from the differences between the approach taken by Ungood-Thomas J on the one hand and Russell LJ on the other.

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). In Chapter 3, section 6, we considered an extract from that book dealing with this question: see pp 77-78. 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: after all, 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? Do these differences mean that equitable property rights should not be thought of as property rights at all?

These questions are discussed on pp 103-107. In the extract set out on p 103, 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.

In the extract set out on p 103, Penner uses this distinction to sub-divide rights *in rem*: he thus takes the view that there are two different forms of property right. Bright, in the extract set out on p 105, adopts the same approach and so, like Swadling and Penner in the extracts set out on p 103, is content to view equitable property rights as property rights, even though they function in a slightly different way to legal property rights. McFarlane, in the extract set out on pp 105-106, takes a different view and argues 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'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.