

### Answers to end of chapter Q&A

**Question 1: In *National Provincial Bank v Ainsworth*, Mrs Ainsworth acquired her 'deserted wife's equity' before National Provincial Bank acquired its charge. So why was her claim to remain in occupation of the land unsuccessful?**

As noted on p 168, the facts of *National Provincial Bank v Ainsworth* provide a good example of the priority triangle in practice. B (Mrs Ainsworth) had a right to occupy land belonging to A (Mr Ainsworth). A then gave a legal property right in that same land to C (the National Provincial Bank). It is true that Mrs Ainsworth thus acquired her right before the bank; but, as noted on p 168: '[t]o determine the priority question, we have to do more than simply ask whose right came first in time'. The problem for Mrs Ainsworth was that her right to occupy the land, a product of her 'deserted wife's equity', was simply a personal right against her husband. As a result, it could be asserted only against her husband and so could not be used to prevent the bank removing her from the land.

**Question 2: Do you agree with the approach to the *scintilla temporis* question adopted by the House of Lords in *Abbey National v Cann*? Should that approach be limited to cases in which a mortgage loan is necessary in order to enable the borrower to buy the land in question?**

This issue is discussed on pp 170-173, as part of our examination of the timing question. The *scintilla temporis* doctrine, when applied to charges, stated that, if C claimed to have acquired a charge from A, C must admit that A had a right *before* C acquired its charge. The doctrine has a logical basis: after all, A cannot give C a charge over land until A has himself acquired a right in that land.

In *Abbey National v Cann*, however, the House of Lords did not apply the *scintilla temporis* doctrine. In that case, George Cann (A) and Daisy Cann (B) bought a home together: each contributed to the purchase price, but the freehold was acquired by A alone, with the assistance of a mortgage loan from the Abbey National Building Society (C). As a result of her contributions to the purchase price, B acquired an equitable property right: A held his freehold on trust for both A and B. B's equitable property right arose as soon as A acquired his freehold. B therefore relied on the *scintilla temporis* doctrine to argue that her equitable property right arose before C acquired its charge. The House of Lords rejected that argument, stating that it would be unrealistic and artificial to view A, or anyone buying a home with the assistance of a mortgage, as ever holding the land free from a charge in favour of the lender.

It is possible to sympathise with the view that the *scintilla temporis* doctrine, whilst logically correct, is artificial. However, the artificiality seems to depend on viewing C's acquisition of a charge as essential to A's acquisition of his freehold. In a case where, as a matter of fact, A *could* have acquired his freehold without taking out the loan secured by the charge, this reason for rejecting the *scintilla temporis* doctrine seems much less convincing. Further, in a case such as *Cann*, A purchased the home by relying on *both* the mortgage loan from C *and* the money received from B: why then should C's charge be viewed as

arising before B's equitable property right? These problems with the reasoning in *Cann* are explored in the extract from Smith set out on pp 172-173.

**Question 3: In *Midland Bank Trust Co Ltd v Green*, Geoffrey Green acquired his equitable property right before Evelyne Green acquired her freehold. So why was Evelyne free to ignore Geoffrey's right? Should the fact that Evelyne was fully aware of Geoffrey's right make any difference to the result?**

As noted on pp 173-175, the facts of *Midland Bank Trust Co Ltd v Green* provide a good example of the priority triangle in practice. Geoffrey Green (B) had a right to purchase land belonging to his father, Walter Green (A). A then fell out with B and wished to prevent B buying his land. A therefore sold the land, at a very low price, to his wife, Evelyne (C). It is true that B acquired his right before C. And, in contrast to *National Provincial Bank v Ainsworth* (see Question 1 above), B's right counted as an equitable property right and so was capable of binding not just A, but also parties, such as C, later acquiring a right from A.

The problem for Geoffrey Green, however, was that it is possible for a third party, such as C, to have a *defence* to a pre-existing property right. That is why we say that an equitable property right is *capable* of binding a third party acquiring a right from A; we do not say that an equitable property right *always* binds such third parties.

In *Midland Bank Trust Co Ltd v Green*, as discussed on pp 174-175, the defence used by Evelyne Green can be called the 'lack of registration' defence: a crucial element of the defence was that Geoffrey had failed to register his right in the Land Charges Register. As a result, Evelyne would have a defence to that right, under section 13(2) of the Land Charges Act 1925, if she could show she was a 'purchaser of a legal estate for money or money's worth'. As she had acquired, and paid for, Walter's legal freehold, Evelyne thus had a defence to Geoffrey's pre-existing equitable property right. The fact that Evelyne knew about Geoffrey's right was irrelevant: the statute did not say that such knowledge prevents a third party from using the lack of registration defence.

As noted on p 175, it could be argued that Evelyne's knowledge *should* have prevented her from relying on the lack of registration defence. After all, registration is generally seen to be necessary because it allows a third party easily to discover a pre-existing property right. It could then be said that registration is unnecessary in a case such as *Green*, where Evelyne *in any case* knew about Geoffrey's pre-existing property right. However, as we will see on pp 486-489 and pp 515-518, there may be sound reasons for requiring registration in such a case, to ensure that the third party's position does not depend on the slippery question of knowledge.

**Question 4: What is an overriding interest? Can you explain why Mrs Hodgson had such a right in *Hodgson v Marks*, but Mrs Ainsworth did not in *National Provincial Bank v Ainsworth*?**

An overriding interest is best described as a property right, existing in relation to registered land, that is immune to the lack of registration defence. As seen on pp 175-176, the lack of registration defence provides important protection to a third party acquiring, for value, a

legal property right in registered land. The essence of the defence is that such a third party only be bound by a pre-existing property right in the land if that property right has been recorded on the register. However, as noted on pp 176-179, overriding interests are exempt from the lack of registration defence. So, if B's pre-existing property right counts as an overriding interest, C will never be able to use the lack of registration defence against B's right.

To determine if B's pre-existing property right is overriding, we simply need to look at the list of overriding interests provided by the Land Registration Act 2002. One particularly important provision is Schedule 3, paragraph 2. We will examine this rule in detail in Chapter 16, section 5.1. Its basic effect is that, if B is in actual occupation of the registered land at the relevant time, any property right held by B can then count as an overriding interest. In *Hodgson v Marks*, Mrs Hodgson relied on the equivalent provision in the Land Registration Act 1925. It meant that, as she had continued to live on the land after transferring her freehold to Mr Evans, her equitable property right (arising because Mr Evans held his freehold on trust for her) counted as an overriding interest. As a result, her failure to register her right could not prevent the right binding Mr Marks.

In *National Provincial Bank v Ainsworth*, Mrs Ainsworth was also in occupation of the land when the bank acquired its charge. However, as we saw in Chapter 4, section 5.4, Mrs Ainsworth did not have a property right in the land: her 'deserted wife's equity' gave her only a personal right against Mr Ainsworth. As Mrs Ainsworth had no property right, she could not have an overriding interest. After all, an overriding interest is a right that is immune to the lack of registration defence; and when B has no property right, C has no need to rely on any defence.

**Question 5: In a case such as *Abbey National Building Society v Cann*, does it make sense to say that Mrs Cann impliedly consented to the building society taking priority?**

As we saw on p 182, it is clear that C can have a defence to B's pre-existing property right if B expressly agrees that her right will not bind C. *Abbey National v Cann* raises the trickier question of when B can be said to have *impliedly* consented to not asserting her property right against C. As seen in the extract from Lord Oliver's speech, set out on pp 183-184, the House of Lords took the view that such consent could be implied from the fact that Daisy Cann (B) knew that her son, George (A), would have to borrow money in order to finance the purchase of their new home. Daisy knew that a mortgage loan would be necessary, and so impliedly agreed that any equitable property right she would acquire in the home could not bind a mortgage lender, C, acquiring a charge over the land.

As noted on pp 184-185, there may be some difficulties with the reasoning of the House of Lords on this point. After all, on the facts of *Cann*, Daisy knew that a further £4,000 was required to purchase the house; yet George, without Daisy's knowledge or consent, borrowed £25,000 and secured that loan by giving the Abbey National Building Society a charge over the land. It therefore seems that the notion of implied consent is, perhaps, being abused in order to protect mortgage lenders from the risk of being bound by certain types of pre-existing equitable property right. In the extract set out on pp 184-185, McFarlane argue that, given that such lenders are already protected (at least in relation to first mortgages) by the removal of the *scintilla temporis* rule (see Question 2 above), there

is no need for them to enjoy the extra protection provided by an artificial extension of the notion of implied consent.