

4

Protection of Legal and Equitable Property Rights before 1925

Learning Objectives

By the end of this chapter you should be able to:

- Demonstrate why legal property rights are 'stronger' than equitable property rights.
- Appreciate that legal property rights are good against the whole world.
- Appreciate that, by contrast, equitable property rights are (traditionally) subject to the doctrine of notice.
- Explain the elements of the equitable doctrine of notice, especially constructive notice and imputed notice.
- Explain the maxim 'first in time, first in right', and the implications of that maxim for equitable property rights.

Introduction

We have already mentioned in Chapter 1 that there are two systems in land law, namely unregistered land and registered land. The land law reforms of 1925 marked the shift away from unregistered titles to a centrally held land register. Much of England and Wales is now registered on the register of titles, and the unregistered land system has become less important. Despite this, there are still titles which are subject to the rules governing unregistered land. This chapter and the following two chapters are dedicated to discussing how legal and equitable rights are protected under unregistered titles.

This chapter focuses on the protection of legal and equitable rights in unregistered land prior to the 1925 legislation.

To understand this chapter you also have to accept an assertion which may not initially seem to make much sense. This assertion underlies much of what is said in this chapter. It is asserted that from the point of view of somebody who owns a property right, it is better that the right should be legal rather than equitable. This is because:

- legal property rights are good against the whole world;
- equitable property rights are subject to the doctrine of notice.

You must also appreciate that the equitable Doctrine of Notice, which dominates this chapter, only applies to land which is unregistered title.

4.1

Legal and Equitable Property Rights: Case Study – High Chimneys

Before going any further, you must familiarize yourself with the facts of this case study designed to illustrate most of the points which we will encounter in this chapter.

Imagine that last winter Roger purchased the fee simple in a large country house, High Chimneys, together with its quite extensive garden. Roger bought the house from Tatiana, a wealthy and elderly spinster. Before completing the purchase, Roger, his solicitor, and his surveyor made very careful enquiries regarding High Chimneys. There was a careful examination of the title deeds going back to a root of title in 1964, which was when Tatiana had bought the property. His surveyor and he himself made a very careful physical inspection of both the house and garden.

As a result of these careful enquiries Roger concluded that the land was not subject to any third party rights such as easements, profits, restrictive covenants, mortgages, etc. Roger therefore completed the purchase in March.

The last few months have been quite traumatic. First of all Roger had a visit from Olabode, owner of neighbouring Low Stacks. He produced a deed dated 1910. By that deed the then owner of High Chimneys granted to the then owner of Low Stacks a right of way across the garden of High Chimneys. This right of way was expressly granted for the benefit of Low Stacks, and was to last in perpetuity. Olabode explains that the right of way has not been used for five years (which is why Roger's surveyor did not detect any sign of a worn path or track), but that now he intends to use it every day as a short cut to the nearest station.

Soon after Olabode came Pierce, owner of Smokey Farm, which adjoins the foot of Roger's garden. He produced a deed dated 1920. By that deed the then owner of High Chimneys granted to the then owner of Smokey Farm a right to graze 15 sheep in the large garden. This right was expressly granted for the benefit of Smokey Farm, and was to last in perpetuity. Pierce explains that he has not owned any sheep for about the last eight years, but now he has acquired some and intends to graze them in Roger's garden. (Hopefully you have noted that Olabode owns a legal easement, while Pierce owns a legal profit.)

Lastly, Gianluca arrives. He explains that from 1967 to 2008 he lived with Tatiana, but they have now split up. He further explains that he contributed a substantial amount of money both to the original purchase of High Chimneys and to its subsequent renovation. He therefore has a constructive trust interest in the property. That interest is equitable. Gianluca claims that his equitable interest in the land binds Roger. He is very anxious to claim against Roger because Tatiana has taken the whole price paid to her and emigrated to Bolivia.

Do the rights of Olabode, Pierce, and Gianluca bind Roger?

4.1.1 The Legal Property Rights of Olabode and Pierce

Here the position is very simple. Roger is going to have to put up with Olabode tramping across his land and with Pierce's sheep. Each of these two rights is a legal property interest.

It is a fundamental principle that legal property rights are 'good against the whole world'. That means that, once a legal property right has been created with respect to a piece of land, that right binds everybody else who later acquires that land or other rights in that land.

Put another way, legal rights are in principle indestructible. It must be stressed that Roger is bound by Olabode's easement and Pierce's profit even though, at the time he bought High Chimneys, neither he nor his advisers knew or could have known of these rights. (Remember that they had all made careful enquiries. Incidentally, as Roger's solicitor and surveyor exercised all due care, there is no possibility of his suing them for professional negligence.)



Thinking point 4.1

John owned the legal fee simple in Fairview Gardens. In September 2006, John granted a legal lease of Fairview Gardens to Karanjit for twenty years, but Karanjit has not as yet taken any steps to occupy Fairview Gardens. John has now sold the fee simple in Fairview Gardens to Leon, who knew nothing of Karanjit's lease. Is Leon bound by the lease?

Now it may well strike you that as a matter of simple moral justice Leon should not be bound by Karanjit's lease. Leon probably had no way of knowing that there was a lease, and Karanjit could not even be bothered to take possession of Fairview Gardens. Yet the law is that Karanjit's lease does bind Leon. It is a legal property right, and (like Olabode's easement and Pierce's profit) will bind everybody who later acquires the relevant land or rights in that land. It is no good Leon saying, 'Karanjit was not in possession, so how could I know that there was a lease.'

4.1.2 The Equitable Property Right of Gianluca

Equitable rights are not totally indestructible. An equitable interest is good against the whole world except a bona fide purchaser for value of a legal estate or legal interest who took without notice of the equitable interest (also known as **Equity's darling**). Thus to be free of Gianluca's interest Roger must prove four things. He must prove that at the time he purchased High Chimneys:

1. he acted 'bona fide', ie in good faith; and
2. he was a purchaser for value; and
3. he acquired a legal estate or legal interest; and
4. he had no notice of Gianluca's equitable interest.

.....
equity's darling bona fide purchaser for value of a legal estate or legal interest without notice.

Before examining the four elements of the **doctrine of notice** listed above, we must recall a point made previously: 'From the point of view of somebody who owns a property right, it is better that the right should be legal rather than equitable'. Put slightly differently, legal property rights are stronger than equitable property rights.

.....
doctrine of notice equitable interests bind the whole world except the bona fide purchaser for value of a legal estate or legal interest without notice.



Thinking point 4.2

Consider the case study of High Chimneys from the points of view of Olabode and Pierce on the one hand, and Gianluca on the other. Olabode and Pierce can sleep soundly in their beds, while Gianluca's position may not be so comfortable. Why is that?

The crucial point for Olabode and Pierce is that they have legal interests (as had Karanjit in Thinking point 4.1). They can therefore relax. They can rest assured that whatever happens to High Chimneys, and whoever buys High Chimneys their rights will still continue. They will continue even against Roger, who knew nothing of their rights. Their rights are (in effect) indestructible.

Gianluca's position is not quite so comfortable. His right will bind somebody who is given or inherits the land. It will bind somebody who buys the land with notice of Gianluca's interest. But it has one weakness. It will not bind a bona fide purchaser for value of a legal estate or interest who took without notice of Gianluca's interest. If Roger is such a purchaser then Gianluca's rights will not bind Roger. His only claim will be against Tatiana for cash compensation. It will be his tough luck that she has just emigrated to Bolivia!

4.2

The Elements of the Doctrine of Notice

All four elements set out at 4.1.2 must be proved by a purchaser (Roger in the High Chimneys case study) if he is to take a piece of property free from an equitable interest affecting that property. James LJ in *Pilcher v Rawlins* (1872) 7 Ch App 259 explained:

I propose simply to apply myself to the case of a purchaser for valuable consideration, without notice, obtaining, upon the occasion of his purchase, and by means of his purchase deed, some legal estate, some legal right, some legal advantage; and, according to my view of the established law of this Court, such a purchaser's plea of a purchase for valuable consideration without notice is an absolute, unqualified, unanswerable defence, and an unanswerable plea to the jurisdiction of this Court. Such a purchaser, when he has once put in that plea, may be interrogated and tested to any extent as to the valuable consideration which he has given in order to show the *bona fides* or *mala fides* of his purchase, and also the presence or the absence of notice; but when once he has gone through that ordeal, and has satisfied the terms of the plea of purchase for valuable consideration without notice, then, according to my judgment, this Court has no jurisdiction whatever to do anything more than to let him depart in possession of that legal estate, that legal right, that legal advantage which he has obtained, whatever it may be. In such a case a purchaser is entitled to hold that which, without breach of duty, he has had conveyed to him.

The crucial point that is made here is that where the purchaser buys the property for valuable consideration and has no notice of any third party interests, the purchaser has an 'absolute, unqualified, unanswerable defence'. If it transpires later on that a third party right existed but the purchaser was unaware of it, equity will not intervene.

4.2.1 Bona Fide

When talking about the doctrine of notice, lawyers usually use the Latin phrase 'bona fide'. This simply means 'good faith'. A person acts in good faith if he acts honestly and without any fraudulent intent. In disputes which arise involving the doctrine of notice, it is usually easy for a purchaser to establish that he has acted in good faith. (As we shall see at 4.2.4, it may be much more difficult for him to prove that he is 'without notice'.)

4.2.2 Purchaser for Value

If a person acquires a piece of land as a result of an *inter vivos* gift, or if he inherits it from somebody, he is clearly not a purchaser for value. He will always be bound by any equitable interests affecting the land.



Thinking point 4.3

What would be the result if in the High Chimneys case study Tatiana had given Roger the property; or if she had died and left Roger the property by her will?

It is hoped you realized that in both cases Roger would always be bound by Gianluca's equitable interest. It would be no use his protesting that he had no 'notice' of Gianluca's interest. It would be wrong that he should lose his rights to somebody who has not had to do or pay anything for the property.

The Meaning of 'Value'

In the High Chimneys case study, Tatiana was so anxious to get a quick sale that she sold it to Roger at a bargain price which did not represent the real value of the land. Would Roger be a purchaser for value? The answer is 'yes'. What if Roger had paid only a nominal price of £1 for High Chimneys? Would Roger be a purchaser for value? The answer is still 'yes'!

In your studies of the law of contract you are probably already encountering the 'doctrine of consideration'. In contract law you learn that even the smallest payment, or the most minimal

'detriment' may constitute consideration. As you have probably guessed, anything which constitutes 'consideration' in the law of contract will be 'value' for the purposes of the law of property.

Marriage as 'Value'

This may seem a rather obscure point, but it is of some significance to the historic development of property law. Until 1970, an engagement to marry was a legally enforceable contract. (You have probably heard of actions for breach of promise of marriage!) As a result of the Law Reform (Miscellaneous Provisions) Act 1970, engagements to marry are no longer legally enforceable. It follows that a promise to marry is no longer 'consideration'; nor is it 'value' for the purposes of the doctrine of notice.

Consider the following developments from the High Chimneys case study. Tatiana conveyed High Chimneys to Roger and in return, he did not pay a cash price, but he promised to marry her. She then disappeared to Bolivia before they could have a ceremony. Roger would not be a 'purchaser for value' of High Chimneys. Had the facts occurred before 1970 (say, in 1965), he would have been a purchaser for value.



Thinking point 4.4

Change the case study in a slightly different way. Suppose Tatiana conveyed High Chimneys to Roger in March 2009 in return for his actually marrying her. Would Roger be a purchaser for value? (Put another way, is Roger's actually marrying her consideration?)

The crucial point in answering this question is to realize that the actual act of marrying is a 'detriment' suffered by Roger (he has given up the freedom of his single status). It is 'consideration' and therefore it is 'value'; thus (on this version of the case study) Roger is, even today, a purchaser for value!

4.2.3 Purchaser of a Legal Estate or Legal Interest

This may strike you as a rather technical and arbitrary aspect of the doctrine of notice. Under this rule, a purchaser of an equitable interest cannot claim the benefit of the doctrine of notice. If you buy only an equitable interest in Blackacre, any existing equitable interest(s) in Blackacre is/are automatically binding on you.

To illustrate this, in the High Chimneys case study Roger did not buy the legal fee simple; instead he entered into a contract with Tatiana under which she agreed to lease him the property for ninety-nine years. Roger paid her an agreed 'premium' (capital lump sum) of £100,000, and took possession. Tatiana then ran off to Bolivia without executing a deed in his favour. On these facts Roger 'purchased' only an equitable lease. Roger will therefore be bound by Gianluca's equitable interest, even if he can establish that he had no notice of that interest.

What if, by contrast, Tatiana did execute a deed leasing the property to Roger before she disappeared westwards? Now on this version of the case study Roger is a purchaser of a legal estate. He therefore will not be bound by Gianluca's interest if he can prove the other elements of the doctrine of notice. (Note that this last illustration confirms the proposition that legal property rights are 'better' than equitable property rights.)

Another way of looking at the same point is that if there are two or more equitable interests affecting the same piece of land the rule is 'first in time, first in right'. The first equitable interest to be created has the first claim, the second equitable interest has the second claim, and so on. For example, in 2007, Florian, the owner of Whitebarn, granted an equitable lease for ten years of Whitebarn to Yasuo. In 2008, while Yasuo was absent from Whitebarn because of a lengthy hospitalisation, Florian granted an equitable lease for ten years of Whitebarn to Zak.

Yasuo has just come out of hospital, and we now have Yasuo and Zak arguing as to who can occupy Whitebarn. Yasuo will win the argument. His equitable interest was created first, therefore he has first claim to the land. His right has priority over any later created equitable interest(s).

Let us now add just one more twist to this Whitebarn example. In 2009, Yasuo has no more use for Whitebarn, so he assigns (ie transfers) his equitable lease to his friend Abu. Can Zak come along and say, 'I got my interest before Abu got his; I am first in time and should now be allowed to occupy Whitebarn!'

Zak's claim to occupy Whitebarn will still fail. It is the order of creation of interests which matters, not the order of acquisition. Abu's interest was, of course, created before Zak's. It was created when, in 2007, it was granted to Yasuo. It would be very strange if, when Yasuo disposed of his equitable interest to Abu, that interest lost its priority.



Thinking point 4.5

In 1992, Hayden acquired Oakmere House. In 2004, his partner, Letitia, acquired a constructive trust interest in Oakmere House. (She paid substantial sums to renovate the house.) Hayden has now left, and has just granted an equitable lease of Oakmere House to Martha for six years. Does Letitia's right bind Martha?

Would your answer be different if Martha's lease was a legal lease?

On the first version of the facts, we have two competing equitable interests with respect to the same piece of land. It follows that we must apply the 'first in time, first in right' rule. Letitia's right will have 'priority' and will bind Martha.

If, however, Martha's lease was a legal lease, she would be a purchaser of a legal estate. Thus, if she acted in good faith, gave value (eg agreed to pay rent) and was without notice of Letitia's right, Martha would not be bound by Letitia's interest.

REVIEW QUESTION Jacques owns Blue House. In May he agrees in a signed, but not witnessed, document to lease the house to Alfonse. Alfonse planned to move into the house in August.

In June, Jacques (not the most honest of men) agrees in a signed but unwitnessed document to lease the house to Bert. Bert moves in immediately.

In July Alfonse, having never moved into Blue House, transfers his rights over the house to Connor. Connor is claiming possession of the house. Is he in the right?

(Consider 3.5.5, 3.6, and this chapter up to 4.2.3.)

4.2.4 Without Notice of the Equitable Interest

In any dispute involving the equitable doctrine of notice, the most likely cause for arguments is the question of whether the purchaser has notice of the relevant equitable interests. In the High Chimneys case study, the crucial question will be, 'Did Roger, at the time the fee simple estate in High Chimneys was conveyed to him, have notice of Gianluca's equitable interest?'

As purchaser Roger will have the task of proving that he was without any form of notice of Gianluca's interest. Notice comes in three forms:

- actual notice;

- constructive notice; and
- imputed notice.

This threefold division of notice is confirmed by s199(1)(ii) Law of Property Act 1925 (LPA 1925), which provides that a purchaser shall not have notice of an equitable interest unless:

Law of Property Act 1925

199. Restrictions on constructive notice

1. ...

(ii) ...

- (a) it is within his own knowledge, or would have come to his knowledge if such inquiries and inspection had been made as ought reasonably to have been made by him; or
- (b) in the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel, as such, or of his solicitor or other agent, as such or would have come to the knowledge of his solicitor or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent.

Actual Notice

A purchaser has actual notice if, at the time of the purchase, he actually knew of the existence of the equitable interest. It does not matter how the purchaser acquired the information. This does not, however, extend to casual conversations (*Lloyd v Banks* (1868) 3 Ch App 988).

Constructive Notice

A purchaser has constructive notice of any equitable interest which he would have discovered had he made those enquiries which a reasonable purchaser would make.

As you already know, when somebody buys a piece of land he needs to make all sorts of careful enquiries with respect to that land. Some of these enquiries may relate to the physical condition of the land (eg is it liable to subsidence or flooding?), but many of these enquiries relate (at least in part) to property law matters. When buying a piece of land the wise purchaser always checks:

- whether the vendor has a good title to the land; and
- whether there are any third party rights (legal or equitable) such as easements, profits or restrictive covenants affecting the land.

As you have probably already guessed the constructive notice rule in effect places a duty upon the purchaser to act wisely. The rule requires a purchaser to make those enquiries which a reasonable man, with competent legal advice, would make. (The rule makes no concessions to 'do-it-yourself' conveyancers who buy land without taking legal advice.)

Legal interests, you will recall, always bind the purchaser, whether he discovers them or not. So a wise purchaser always looks very carefully for legal interests. Under the constructive notice rule he is expected to look just as carefully for equitable interests. In particular, there are two types of enquiry which every purchaser is expected to make:

1. inspect the land;
2. investigate the vendor's title.

Inspect the Land

When the wise purchaser inspects the land, some of the things he is on the lookout for will relate to the physical condition of the land, eg is there evidence of subsidence? But the wise purchaser will also be on the alert for matters such as worn tracks or grazing sheep. Their presence might indicate the existence of easements or profits. He will also want to establish whether anybody other than the vendor is occupying the whole or part of the land. Such a person might have a lease (perhaps legal, perhaps equitable), or might claim a constructive trust interest in the land or possibly some other right in the land.

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rule in *Hunt v Luck*
 the purchaser must look for person(s) in possession, and if he finds anybody he must ask that person what interest he claims in the land.

If anyone (other than the vendor) is in possession of the land or part of it, the **rule in *Hunt v Luck*** [1902] 1 Ch 428 applies. Vaughan Williams LJ stated that:

if a purchaser or a mortgagee has notice that the vendor or mortgagor is not in possession of the property, he must make inquiries of the person in possession – of the tenant who is in possession – and find out from him what his rights are, and, if he does not choose to do that, then whatever title he acquires as purchaser or mortgagee will be subject to the title or right of the tenant in possession.

In the above passage his Lordship is using the word ‘tenant’ in the loose sense of any person in actual control of the land.

If the purchaser fails to discover a person who is in possession, or fails to ask such a person whether he claims any interest in the land, he has not made adequate enquiries. The purchaser is deemed to have constructive notice of any equitable interest owned by that person.

Put another way, a purchaser has notice of any equitable interest owned by a person in possession (of whole or part of the land) unless enquiry is made of that person and he does not reveal his interest.

There are additional facts in the High Chimneys case study that ought now to be considered. Darrell was living in the house last winter (when Roger bought it). Darrell moved into High Chimneys after Gianluca and Tatiana ended their relationship. Darrell also made substantial contributions to the renovation of the property. He too therefore has an interest in High Chimneys under a constructive trust.

When Roger visited High Chimneys, he somehow failed to realize that Darrell was there. (Or perhaps Roger saw him, but assumed that he was some kind of servant and so asked no questions.) Either way, Roger has not made proper enquiries. He will have constructive notice of Darrell’s equitable interest.

Let us now assume that Roger did see Darrell, and he went up to him and said, ‘Excuse me, do you claim any kind of right or lease over this house?’ If he tells Roger that he has made substantial contributions to the house, or words to that effect, Roger has actual notice of his interest. But if Darrell replies, ‘Mind your own business!’, or something similar, Roger has sufficiently pursued this line of enquiry. He will not have notice of Darrell’s interest.



Thinking point 4.6

In 1993, Nicole bought The Ridings. In 2007, Josh started to cohabit with her in The Ridings. He acquired a constructive trust interest in The Ridings by paying off the bulk of the mortgage on the house.

The relationship has now broken up, and Josh is living alone in The Ridings. This morning a couple of surveyors called wanting to inspect the house. Josh told them to ‘clear off!’ and refused to let them in. The surveyors left saying, ‘We will be back tomorrow.’

Advise Josh.

It is hoped you have concluded that Josh is a very lucky man, as he will get a second chance to tell the surveyors about his constructive trust interest. The surveyors are probably acting on behalf of a potential purchaser or mortgagee. Josh should tell them of his interest, so that the purchaser/mortgagee will have notice of his interest. If, on the other hand, Josh continues to be rude, then the purchaser/mortgagee will be able to say that he had made adequate enquiries and that he had no notice of Josh's interest.

Investigate the Title

As was explained in Chapter 1, a purchaser should always investigate the vendor's title. The deeds and other documents relating to the land must be inspected going back to the root of title, which is normally the most recent conveyance which is at least fifteen years old (s23 Law of Property Act 1969), ie the purchaser should inspect the root of title and all later documents. There is no duty to inspect documents which are dated before the root of title. These documents are said to be 'behind' the root of title.

If a purchaser fails to inspect a document which he should have inspected, then he has constructive notice of the contents of that document. In particular, he has constructive notice of all equitable interests created or revealed by that document.

The primary purpose of a conveyance is to transfer legal ownership from the vendor to the purchaser. But conveyances often do more than that. A conveyance will often also create third party rights such as easements, profits, and restrictive covenants. For example, Ella owned two adjoining fields, Woodbrook Field and Hill Top Field. She recently sold Woodbrook Field to Finley. As well as transferring ownership, the conveyance:

1. grants Finley a right of way (easement) over Hill Top Field to get to Woodbrook Field; and
2. contains a restrictive covenant entered into by Finley that he will use Woodbrook Field for agricultural purposes only.

Conveyances creating third party rights are commonplace. You may be more puzzled by the reference to conveyances revealing third party rights. The point is really a simple one: Where land is sold, that land may already be subject to third party rights such as easements or restrictive covenants. These may have been created some time ago, perhaps a hundred years or more. If land is sold subject to existing third party rights it is normal practice, though not absolutely obligatory, for the conveyance to mention ('recite') those existing rights.

4.3

Case Study – Brakenhill House

This case study provides an example of constructive notice through failure to investigate. The recent history of Brakenhill House is as follows:

- In 1929, Eric sold Brakenhill House to Norma
- In 1956, Norma sold Brakenhill House to Malcolm
- In 1973, Malcolm sold Brakenhill House to Leonard ← Root of title
- In 1989, Leonard sold Brakenhill House to Keith
- In 2001, Isobel purchased Brakenhill House from Keith

When Isobel bought the land in 2001, the correct root of title should have been the 1973 conveyance from Malcolm to Leonard. (It was the most recent document which was at least fifteen

years old.) Isobel should therefore have inspected both the 1973 and the 1989 conveyances. She (foolishly) inspected only the 1989 conveyance.

The 1973 conveyance, which Isobel did not inspect, revealed a restrictive covenant (not mentioned in the 1989 conveyance) in favour of a neighbouring property. That covenant, entered into as long ago as 1910, limited Brakenhill House to residential purposes only.

Isobel, who intended to convert Brakenhill House into offices, is bound by the restrictive covenant. She should have inspected the 1973 conveyance, and that would have revealed the 1910 covenant. She has constructive notice of that equitable interest.

What would be the position if the 1910 restrictive covenant was mentioned in the 1956 conveyance from Norma to Malcolm, but not in any later conveyances? Under the rule about 'root of title' Isobel did not have to investigate the 1956 conveyance. Therefore (whether or not she looked at the 1973 conveyance), she would not have had constructive notice of the covenant.



Thinking point 4.7

In 1922, Peter sold Chorley Hall to Quentin. The 1922 conveyance contained a restrictive covenant under which Quentin promised to use the house for residential purposes only. In 1989, Quentin sold Chorley Hall to Richard. Scott bought Chorley Hall from Richard in 2002. Did he have notice of the restrictive covenant?

Would your answer be different if the conveyance from Quentin to Richard took place in 1980?

On the basis that the sale from Quentin to Richard took place in 1989, there can be no doubt that Scott would have notice of the restrictive covenant. The root of title, the most recent conveyance at least fifteen years old, is that executed in 1922. If Scott looked at the 1922 conveyance he would have actual notice. If he did not bother to look at the 1922 conveyance, he would have constructive notice.

If the conveyance from Quentin to Richard took place in 1980, then that conveyance would be the root of title. If that (1980) conveyance recited the (1922) restrictive covenant, then Scott would still have notice of the restrictive covenant. But if the 1980 conveyance did not mention the restrictive covenant, then there would not be notice. The only mention of the covenant would be in a document 'behind the root of title', which Scott had no duty to investigate.

Imputed Notice

..... imputed notice

if, at the time of the purchase, the purchaser's agent (solicitor, surveyor, etc) knew or ought to have known of the existence of the equitable interest. (See also s199(1)(ii)(b) LPA 1925, already quoted at 4.2.4 above.)

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In most purchases of land, agents such as solicitors and/or surveyors are employed. The purchaser does not personally make the necessary enquiries. In view of this fact, a rule of **imputed notice** is essential if the doctrine of notice is to operate fairly. If an agent, while acting for a particular purchaser with respect to a particular transaction, receives actual or constructive notice of an equitable interest, that notice is ascribed to the purchaser himself. This rule applies to all forms of agent, and is not just confined to solicitors and surveyors.

To illustrate the point we have made we will use the facts from the Brakenhill House case study, Isobel employed a solicitor, Bloggs, to investigate the title to the house. Bloggs did look at the 1973 conveyance, noticed the 1910 restrictive covenant, but omitted to tell Isobel. Isobel will have imputed actual notice of the covenant.

What if Bloggs looked only at the 1989 conveyance, and failed to look at the 1973 conveyance? In that case Isobel would have imputed constructive notice of the restrictive covenant.

In either of these two situations Isobel would be justifiably annoyed with Bloggs! She would be bound by the restrictive covenant. But she would have one consolation. She could sue Bloggs for damages for professional negligence.

For a further example let us go back to one version of the High Chimneys case study. In one version of the case study (see p 79) Darrell, a friend of Tatiana's with a constructive trust interest in the property, is living in the property at the time of Roger's purchase.

Let us now assume that Roger did not visit High Chimneys prior to the purchase but left inspection of the property to his surveyor, Muggins. When Muggins visited the property, Darrell was out. Tatiana made no mention of Darrell, but there were male clothes lying around in some of the rooms. Muggins never reported this fact to Roger, nor did he take up with Tatiana the presence of the male clothing. It appears that Roger would have imputed constructive notice of Darrell's interest.

This last example is rather loosely based on *Kingsnorth Finance Ltd v Tizard* [1986] 1 WLR 783. Mr Tizard ('H') owned the legal title to the matrimonial home 'Willowdown', but Mrs Tizard ('W') had contributed substantially to the cost of acquisition and therefore had a constructive trust interest. The marriage broke down and W then spent most of her time with her sister nearby. However, W returned to Willowdown daily to help care for the couple's teenage children who still lived there. If H was away, W spent the night at Willowdown. W still kept personal clothes and belongings at Willowdown, shut up in a wardrobe.

H decided to remortgage Willowdown to Kingsnorth Finance. Kingsnorth (acting through local mortgage brokers) instructed a surveyor, Mr Marshall ('M'), to inspect the property. Because of his unusual family situation, H arranged for M to visit on a Sunday afternoon. H also cunningly arranged for W to take the children out for the day.

When M called, his suspicions were aroused when he spotted various items belonging to the children. H had described himself as single on the application form for the mortgage loan, but now admitted to M that he was 'separated'. M made no further enquiries, and M's report to Kingsnorth did not mention his suspicions that there might be a wife/mother with some kind of claim on the house.

Kingsnorth lent H a large sum of money on the security of a mortgage of Willowdown; H later defaulted on the payments. Kingsnorth tried to enforce the mortgage, but the deputy High Court judge (Judge Finlay) held that W's constructive trust interest had priority over the mortgage. Judge John Finlay QC in his assessment of the case said:

The plaintiffs were prejudicially affected by the knowledge of their agent, Mr Marshall, that Mr Tizard, contrary to what he had said in his application, was married: see section 199(1)(ii)(b). That put them on notice that further inquiries were necessary; the inquiries which in these circumstances ought reasonably to have been made by the plaintiffs would, in my judgment, have been such as to have apprised them of the fact that Mrs Tizard claimed a beneficial interest in the property; and accordingly, they would have had notice of such equitable rights as she had and the mortgage in these circumstances takes effect subject to these rights: see Section 199(1)(ii)(a).

I arrive at that conclusion without having considered the question: does the occupation of Mrs Tizard affect the mortgagees with notice of her rights, or are they only so affected if, as Mr Wigmore submits, they are aware of her occupation, that is, if they find her in occupation? On the balance of probabilities, I find that the reason Mr Marshall did not find Mrs Tizard in the house was that Mr Tizard had arranged matters to achieve that result. He told Mrs Tizard that on a particular Sunday, and I find in fact that it was the Sunday that Mr Marshall did inspect, he was going to entertain friends to lunch and would she take the children out for the day...

I have already stated my finding that the wife was in occupation... I conclude that had Mrs Tizard been found to be in occupation by the plaintiffs or their agent and so found in

the context of what had been said by Mr Tizard to Mr Marshall and stated or implied in the forms he had signed, they, the plaintiffs, would clearly either have learned of her rights by inquiry of her or been fixed with notice of those rights had not inquiry of her been made.

In the light of my finding that Mr Marshall's information about Mr Tizard's wife is to be imputed to the plaintiffs and my conclusion that further inquiries should have been made by the plaintiffs because of that imputed knowledge, do I ask myself whether such an inspection as would have disclosed that Mrs Tizard was in the premises is one which ought reasonably to have been made by them, or is the proper question: can the plaintiffs show that no such inspection was reasonably necessary? The latter appears to me to be the proper way to put it. The plaintiffs did not make any further inquiries or inspections; had they done so it would have been open to them to contend that they had done all that was reasonably required and if they still had no knowledge of Mrs Tizard's rights or claims, that they were not fixed with notice of them. But in the absence of further inquiries or inspections, I do not think that it is open to the plaintiffs to say that if they had made a further inspection they would still not have found Mrs Tizard in occupation.

I would put it briefly thus. Mr Tizard appears to have been minded to conceal the true facts; he did not do so completely; the plaintiffs had, or are to be taken to have had, information which should have alerted them to the fact that the full facts were not in their possession and that they should make further inspections or inquiries; they did not do so; and in these circumstances I find that they are fixed with notice of the equitable interest of Mrs Tizard....

Here Mr. Marshall carried out his inspection on a Sunday afternoon at a time arranged with Mr. Tizard. If the only purpose of such an inspection was to ascertain the physical state of the property, the time at which the inspection is made and whether or not that time is one agreed in advance with the vendor or mortgagor appears to me to be immaterial. Where, however, the object of the inspection (or one of the objects) is to ascertain who is in occupation, I cannot see that an inspection at a time pre-arranged with the vendor will necessarily attain that object. Such a pre-arranged inspection may achieve no more than an inquiry of the vendor or mortgagor and his answer to it. In the case of residential property an appointment for inspection will, in most cases, be essential so far as inspection of the interior is concerned. How then is a purchaser or mortgagee to carry out such inspection as ought reasonably to have been made for the purpose of determining whether the possession and occupation of the property accords with the title offered? What is such an inspection as ought reasonably to be made must, I think, depend upon all the circumstances. In the circumstances of the present case I am not satisfied that the pre-arranged inspection on a Sunday afternoon fell within the category of 'such inspections which ought reasonably to have been made,' the words in the Law of Property Act 1925, section 199, which I have already read. The plaintiffs not having established that they made such an inspection, the conclusion that I have reached by another route is, in my view, fortified...

When confronted by the suspicious circumstances on the Sunday afternoon, M, as a reasonable man, should have carried out further enquiries independent of H. In particular, while it would have been wrong to have gone around opening up cupboards etc, M should perhaps have called around *unannounced* in the hope of catching the mystery woman. Kingsnorth therefore had imputed constructive notice of W's constructive trust interest.

REVIEW QUESTION 'If you have a constructive trust interest in a property, stay put, and make your presence obvious. If anyone asks why you are there, tell them!'

Why this advice? Is there any practical difference if the property is not a house, but a farm, shop, or factory?

(Consider 4.2.4 and the discussion on notice.)

REVIEW QUESTION In 2000, you bought Primrose Cottage (unregistered title) from Alicia. Alicia had brought the cottage in 1984 from Bethany, who had bought the cottage from Oscar way back in 1923.

When Oscar conveyed the cottage to Bethany, that conveyance contained a restrictive covenant in favour of neighbouring Daffodil House that Primrose Cottage should not be used for business or professional purposes.

You have only just heard about this restrictive covenant. You are converting the cottage into a small guest house, and the current owner of Daffodil House is threatening to seek an injunction. Consider your position.

What if the solicitor you employed in 2000 knew about the restrictive covenant, but forgot to tell you?

(Consider what you have understood about the doctrine of notice.)

4.4

Position of Successors in Title to a Purchaser without Notice

If a purchaser of a legal estate to which an equitable interest was subject takes his estate free from the equitable interest because of the doctrine of notice, all persons who derive title from that purchaser take free from the equitable interest as well.

To explain this point we must go back to the original version of the High Chimneys case study (where Gianluca left in 2008).



Cross reference

see 4.1 for the High Chimneys case study.

In Roger's dispute with Gianluca, Roger will contend that he is a bona fide purchaser for value of a legal estate without notice of Gianluca's interest. Gianluca does not accept this, and sues Roger in a court case. Roger will succeed if he proves the following:

1. he was acting bona fide;
2. he was a purchaser for value;
3. that he purchased a legal estate;
4. that he was without notice of Gianluca's interest. (Remember that in the original version of the case study both of Roger's agents and he himself made very careful enquiries which did not reveal even Gianluca's existence.)

Assuming that he has been successful in proving all the above, let us now consider the following events. Roger wants to sell High Chimneys and decides to put it up for sale. Beatrice is the first prospective purchaser to visit the property. Luckily, she does not mind the sheep, nor does she mind Olabode cutting across the garden. But suddenly she says, 'Is this not the house there was that big court case about? A fellow called Gianluca came along and claimed he had some sort of share in it. I read all about it in the local paper.'

'Yes', Roger replies, 'but I won the case.'

'Congratulations', says Beatrice, 'but is there a risk that his claim will bind me? I seem to remember that you won because at the time you purchased you neither knew nor could have known of Gianluca's claim. I do know that Gianluca has a claim!'



Thinking point 4.8

Why has Beatrice no need to worry?

Beatrice need not worry, for the reason given in the first paragraph of this section: once an equitable interest is void against a purchaser for value without notice, it is void against everybody else who derives title from that purchaser. This is so even if (like Beatrice) a successor in title has actual knowledge of the equitable interest (Wilkes v Spooner [1911] 2 KB 473).

This is both logical and fair. It would be illogical if an invalid equitable interest could in effect revive against a later purchaser. Such a revival would also be grossly unfair to somebody in Roger's position. He (personally) would not be bound by Gianluca's claim. But nobody would want to buy from Roger for fear that Gianluca would claim against them.

One final point. Reference has been made to 'persons who derive title' from the purchaser without notice. 'Persons who derive title' is not just confined to later purchasers. It extends to anyone whose rights are derived directly or indirectly from the original purchaser without notice. So if Beatrice does buy, all her successors are also protected from Gianluca's claim. If Roger decides not to sell, but to lease, or perhaps even to give away the property, the lessee or donee is not bound by Gianluca's claim.

Concluding remarks

Before you became a law student, you probably already knew that buying land (a house or any other type of land) was time-consuming. You now know one of the major reasons for the delays. It is essential that if you are buying land you make very careful enquiries regarding easements, profits, constructive trust interests, etc. Moreover, if you fail to discover a legal property right (eg a legal easement) you are stuck with it. You are bound by the right even though the most careful of enquiries would not have revealed its existence.

But if you fail to discover (say) a constructive trust interest, you may yet escape. You will not be bound by the interest if you are what old-fashioned lawyers sometimes call 'equity's darling', ie a bona fide purchaser for value of a legal estate or interest without notice of the equitable interest.

Summary

Will a purchaser of land which is unregistered title be bound by third party property rights which exist against that land?

Legal Property Rights

A legal property right 'is good against the whole world'. This means it will bind the purchaser even if the purchaser neither knew of the right nor had any means of finding out about the right.

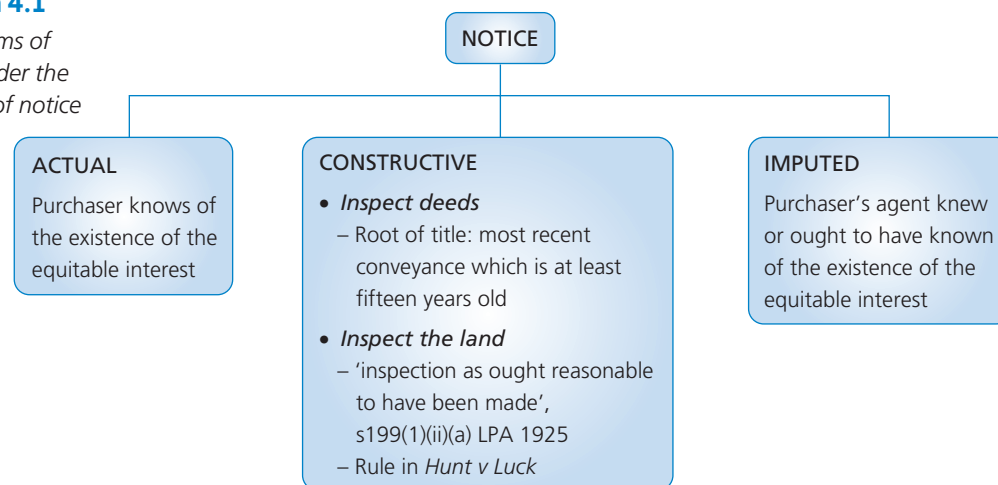
Equitable Property Rights

The Doctrine of Notice

This means equitable interests bind everyone except for the bona fide purchaser for value of a legal estate without notice.

Diagram 4.1

Three forms of notice under the doctrine of notice



As *Kingsnorth Finance v Tizard* demonstrates, it is crucial that purchasers (and people acting on their behalf) carry out all enquiries which a reasonable person would make.



Further reading

Howell, J, 'The doctrine of notice: an historical perspective' [1997] Conv 431

Article considers the role of the doctrine of notice in modern land law.

Howell, J, 'Notice: a broad view and a narrow view' [1996] Conv 34

Article considers the role of the doctrine of notice, and suggests that there are two types of 'notice' used in settling land disputes.

Neild, S, 'Imputed notice' [2000] Conv 196

This article evaluates what amounts to imputed notice and considers its application in the context of undue influence cases.

Thompson, MP, 'The purchaser a private detective' [1986] Conv 283

Critical case note on *Kingsnorth Finance v Tizard*.