

Chapter 7

Question 1: What is the key difference between a personal right and a property right? Is it true to say that, if B has a pre-existing property right that right will always bind C; whereas if B has only a personal right, then B will never have a claim against C?

If B has a personal right against A, this simply tells us about the legal relationship between A and B: so B's personal right against A is binding only on A. In contrast, if B has a property right, that right is capable of binding *anyone* – it is not simply personal, as it is not linked to a specific person, but is instead linked to specific property. Some care must be taken however. First, it is not true to say that B's pre-existing property right will always bind C: it may be possible for C to have a defence against B's right. We encountered the lack of registration defence, for example, in Chapter 3, and will consider defences in detail in Chapters 15, 16 and 17. Secondly, it is not true to say that if B has only a personal right against A, then B will never have a claim against C. B cannot assert against C the personal right against A, but that does not prevent B having a *different* right that binds C. We will consider some cases in which B can acquire such a right in section 3.3.

Question 2: What is the key feature of a licence? Does Hohfeld's distinction between a 'privilege', or 'liberty' on the one hand and a 'claim right' on the other help in understanding the position of a licensee?

The key feature of a licence is that it simply gives a party (B) *permission* to make some use of land belonging to another (A). To paraphrase Vaughan CJ in *Thomas v Sorrell*, a licence does not give B a property right; it simply allows B to act in a way that would otherwise interfere with A's property right.

Hohfeld's concept of a 'privilege', or 'liberty', is therefore useful in understanding the licence. If B has a privilege or liberty against A, then B is *not* under a duty to A. If A gives B a bare licence, this has the effect of removing a particular duty otherwise owed by B to A: for example, if I invite you to dinner, this removes your duty not to enter my land. Importantly, a bare licence does not impose a duty on the licensor: this means that A, simply by giving B a bare licence, does not come under a duty to B. For example, if I invite you to dinner, I am free to change my mind and revoke the invitation. In Hohfeld's terms, this means that, as A is under no duty to B, B has no claim right against A. Hohfeld's distinction between a 'privilege', or 'liberty' on the one hand and a 'claim right' on the other is thus very helpful when considering a bare licence.

Question 3: What are the different forms of licence? Given their variety, is it useful to think of licences as a single category?

In Chapter 7, we examine a number of different types of licence: (i) bare licences; (ii) contractual licences; (iii) estoppel licences; (iv) statutory licences; and (v) licences coupled with an interest. It is worth distinguishing bare licences as a distinct category as, in such cases, A, the licensor, is free to revoke B's permission to use A's land. If B has a contractual, estoppel or statutory licence, then A is generally under a duty not to revoke B's permission to use the land. However, it is worth distinguishing between those three categories as, in each case, there is a different *reason* for which A is under that duty to B. The final category, of licences coupled with an interest, is perhaps more dubious.

It is thus true that there is some variety in the general category of licences. After all, it is important to remember that licences form a residual category, encompassing all cases where B does not have a property right in A's land but does have permission to make some use of A's land. Nonetheless, it is worth considering licences as a whole in order to keep in mind the key point that, due to their essentially similar content, licences do not count as property rights and so give B, at most, a personal right against A. Failing to keep that fundamental point in mind can lead to problems, as we saw when considering whether estoppel licences can count as property rights.

Question 4: In what circumstances might a court refuse to order specific performance of A's duty not to revoke B's contractual licence?

If A breaches, or threatens to breach, a contractual licence the courts face the same question that arises in any breach of contract case: can B's right against A be adequately protected by ordering A to pay damages to B? If not, an order of specific performance may have to be made in order to protect B. When considering a contractual licence to use land, the courts generally recognise that, as each piece of land is unique, money will provide insufficient protection to B: as a result, A may be ordered to keep his promise not to revoke B's licence. The decision in *Verrall v Great Yarmouth Borough Council* provides a good example of this.

Nonetheless, there may be cases in which an order of specific performance would be inappropriate. For example, there is a general principle that specific performance will not be ordered if it would involve forcing A to co-operate, against his or her will, with B. That principle meant that, in *Thompson v Park*, the Court of Appeal held that specific performance should not be ordered where its effect would be to force A and B to live together and co-operate on the running of a school. It is worth noting that, even if specific performance is not available to protect B's contractual right, this does not mean that A can simply revoke B's licence and then use reasonable force to remove B from the land: see the extract from *Hounslow LBC v Twickenham GD Ltd*.

Question 5: When can B rely on a 'constructive trust' to assert a right against C? Does such a constructive trust arise as soon as A gives B a contractual licence, or does it only arise at a later point?

In *Binions v Evans*, Lord Denning MR took the view that, even if Mrs Evans (B) had only a licence to occupy the land sold to Mr and Mrs Binions (C), she could stop Mr and Mrs Binions removing her from the land. That view was based on the idea that a 'constructive trust' arose in favour of Mrs Evans and imposed a duty on Mr and Mrs Binions to allow her to remain in occupation of the cottage. The grounds on which such a constructive trust may arise were explored in more detail in both *Ashburn Anstalt v Arnold* and *Lloyd v Dugdale*. From those cases, it seems that the constructive trust, where it arises, may be explained as an application of the following principle: B acquired a direct right against C because: (i) C acquired some land from A; (ii) C made a promise to A to allow B to make some use of that land; and (ii) as a result of that promise, C gained an advantage from A (e.g. C paid A a lower price for the land). However, there is some debate as to the precise reason for which B's right against C arises, and also as to whether B's right should necessarily be seen as arising under a trust.

From the decision in *Binions v Evans*, and the discussion in *Ashburn Anstalt v Arnold* and *Lloyd v Dugdale*, as well as in *Chaudhary v Yavuz*, it seems that, if this form of constructive trust arises, it does so as a result of C's conduct when acquiring the land from A. For example, in *Lloyd v Dugdale*, Sir Christopher Slade emphasised the need for C to 'undertake a new obligation' to B when acquiring the land. As a result, it would be an error to say that the constructive trust arises as soon as A gives B a licence. In fact, in *DHN Food Distributors Ltd v London Borough of Tower Hamlets*, Lord Denning MR made exactly that error, by adopting reasoning later rejected in *Ashburn Anstalt v Arnold*.

Question 6: Do you think that particular forms of contractual licence may one day be recognized as property rights?

Various attempts have been made by the courts, chiefly by Lord Denning, to recognise at least some contractual licences as equitable property rights. Although these attempts have failed (and note that section 4(1) of the Law of Property Act 1925 seems to prevent judges recognizing any contractual licence as a new form of equitable property right in land), the fact that such attempts were made does show some desire for at least some contractual licences to count as property rights in land.

In section 3.3, we consider the arguments in favour of reforming the law so that at least some contractual licences count as property rights in land. The strength of these arguments necessarily varies according to the particular context in which a contractual licence arises. For example, if B occupies his or her home under a contractual licence from A, the argument based on the need to respect B's privacy and home life, as encapsulated by Article 8 of the European Convention on Human Rights, may have some force. Nonetheless, it is

important to consider some of the counter-arguments that can be used to defend the current position that no contractual licence counts as a property right in land. In particular, contrary to the position prevailing when Lord Denning attempted to confer proprietary status on contractual licences, a contract giving B a right to exclusive possession of land for a term will now almost always count as a lease.

Question 7: Are cases in which ‘estoppel licences’ bind third parties cases in which B has more than a licence, and instead has a recognized equitable interest, arising as a result of proprietary estoppel?

Given the basic similarity in the content of contractual licences and estoppel licences, it might be expected that each form of licence would have the same effect on third parties: i.e. either both types of licence count as a property right in land; or neither does. However, the law may seem to treat the two types of licence differently. Certainly, in *King v David Allan & Sons* and *National Provincial Bank v Ainsworth*, the House of Lords made clear that a contractual licence does not count as a property right. Yet there are some cases in which it has been assumed that an estoppel licence can bind a third party: for example, *Inwards v Baker*.

One explanation for this view is favoured by the Law Commission in its Report No 271 (*Land Registration for the Twenty-First Century*) at [5.29]-[5.32], and seemingly enacted by section 116(a) of the Land Registration Act 2002. This explanation is that, whenever B has an estoppel claim against A, B acquires an initial ‘equity by estoppel’ that is capable of binding C, a party later acquiring the land from A. On that view, B’s ‘equity by estoppel’ can bind C if C acquires his right before a court order is made in B’s favour, even if such a court order would recognize that B has only a licence. Some possible problems with this explanation are discussed in Chapter 10, section 4.3.

An alternative view is to regard a case such as *Inwards v Baker* as one in which B’s estoppel claim gave him more than a licence. For example, in *Inwards*, it may be that A (B’s father) was under a duty not merely to allow B to live on A’s land, but also to allow B to take the full benefit of the land for B’s life, or even to give B ownership of that land. In that case, the nature of A’s duty to B would give B a recognized equitable property right, and it is that property right, rather than any licence, that can then bind C, a third party later acquiring the land from A. However, this alternative view cannot explain all cases (e.g. *Williams v Staite*) in which an estoppel licence has been assumed to bind a third party. It is worth noting, however, that *Williams v Staite*, like *Inwards v Baker*, was decided at a time when a contractual licence was assumed to give B a property right and so it may well be that the approach in those cases can no longer be supported, given that it is clear that a contractual licence is not now regarded as a property right.