



Chapter 2: Underpinning land law



Aims of this Chapter



2.1 Common law and equity



2.2 What is land?



2.3 Estates and interests in land



2.4 Leasehold – in outline



2.5 Title to land



Knowledge check



2.6 Chapter summary

Aims of this Chapter

This chapter will cover a number of fundamental ideas and principles which will run throughout your study and practice of conveyancing and private client.

“**Conveyancing**” describes the process required to transfer the ownership (that is, the legal title) of land from one owner to another. In a residential context, it will often describe the process of an owner moving from the house in which they currently live to their new home. This will involve the parties being in a “**chain**” of transactions. If the parties wish to move from one house to the other on the same day, they are said to have “**related**” transactions.

However, someone could be buying their first home, they would have no related sale and would be a “**first-time buyer**”. A homeowner may also wish to remain in their current home but simply change from one mortgage lending product to another. This is known as a “**remortgage**”, and a conveyancing firm will be involved in this process. We will consider the steps required to achieve these various transactions in later chapters.

However, to fully understand the conveyancing process, you need to understand the underlying land law principles. Land law is the “**black letter law**” upon which our conveyancing process stands. Often, it is the underlying land law which is the reason we have to take certain steps in the conveyancing process.

A trainee in the private client and conveyancing department will also need to understand the difference between common law and equity, what constitutes “**land**” and what might fit the description of a “**fixture**” or “**fitting**”. They might need to know this in the context of taking instructions to draft a will or in dealing with the estate of someone who has died or to deal with the transfer of the legal ownership of a property.

This chapter covers:

- common law and equity
- what is land
- estates and interests in land
- leasehold (in outline)
- title to land, and
- third-party rights in land.

CONTINUE

2.1 Common law and equity

Rights in land are capable of being legal or equitable. This means that you can have a legal lease or an equitable lease, a legal mortgage or an equitable mortgage. You will need to ask yourself whether a right has been created between two parties. If it has, you will need to decide if it is legal or equitable. You might well ask why we need to know this, and the answer is that there are significant differences between legal and equitable rights. This has particular implications when the land that a right affects is sold. We start with the development of equity before moving on to the rights themselves.

After the Norman Conquest in 1066, administrative and judicial functions were taken over by the King's Council, and over the next 300 years the courts of common law developed. The law developed based on the concept of precedent. We still have this today. This is the principle that a court will follow a previous decision of the same or a higher court in cases where the facts are the same.

There were defects with the common law, notably that the common law became very rigid and would not recognise the existence of new rights in land. For instance, a landowner might have wanted to ensure that his spouse was entitled to the property for life and after that to pass to his children. The legal estate might have been transferred to friends to hold the property for the benefit of the spouse for life and then for the children. The common law courts would not recognise that the spouse and children had any rights in the land and treated the friends as entitled to the land.



The Court of Chancery in the reign of King George I.

This was clearly unjust, so a system which had evolved to remedy defects in the common law, equity (administered in the Court of Chancery), intervened to remedy the injustice by recognising the rights

of the spouse and the children. The legal estate remained vested in the friends, but the spouse and children had equitable rights in the property. The Court of Chancery would compel the friends (known as the trustees) to account to the children and the spouse (known as the beneficiaries) for any benefit received. This system was one based on principles of “fairness” – this is where the term “equitable” comes from.

The common law courts and courts of equity ran as separate processes in parallel for many years. The jurisdictions of both courts were fused in the mid-1800s. This means that both common law and equitable remedies are available in the same court.

2.1.1 Enforcing legal and equitable rights

Legal rights in land bind *in rem*: they bind the world. This means that, if a person has a legal right over someone else’s land, that legal right will be binding on a subsequent buyer of the land. This is not true of equitable rights. There is one category of person, affectionately known as “equity’s darling” (the *bona fide* purchaser), who will be able to take free of such rights.

The following statement from Maitland’s *Equity*, defining equity’s darling, is therefore **crucial**:

Legal rights are good against all the world; equitable rights are good against all persons except a bona fide purchaser of a legal estate for value without notice, and those claiming under such a purchaser.

We will see later that the statement has, in a large number of cases, been superseded by statutory land registration. Nevertheless, the basic principle remains true. It is a very useful starting point for understanding an extremely important part of the course.

CONTINUE

2.1.2 Remedies

A legal remedy is the redress that someone will seek via the courts to put right a legal problem which has gone wrong. In most cases, the purpose of pursuing a remedy is to put a party in the position that they would have been had the problem not occurred or contract not been breached. The legal, common law remedy is damages. This is payment of a sum of money to the winning party to compensate for the loss sustained. **Note** that if the legal argument succeeds, the winning party is entitled to damages as of right.

Contrast this with remedies available in equity which are only available at the discretion of the court. This means that even if a party wins the argument in court, it is not guaranteed that they will be awarded the remedy which they seek. The court has a discretion as to whether or not to grant the remedy. Anyone seeking an equitable remedy must, themselves, have acted fairly in their dealings. This follows the equitable principle which states that “***he who comes to equity must come with clean hands***”.

There are various remedies available in equity; the most common of which are the award of an injunction or specific performance. An injunction is a court order which compels a party to do or refrain from doing certain specified acts.

An example might be if someone is building a structure without the appropriate permissions and which may be unsafe or a risk to the public. The local authority might want to stop building from going ahead, and may apply for an injunction to prevent the building from continuing.



An award of specific performance is an order in which a court requires a party to perform a specified act. A common example in a conveyancing context is for the court to compel a party to a contract for the sale of land to go through with the transaction.

A common feature of equitable remedies is that they are claimed where monetary compensation (i.e. damages) is not sufficient compensation for the aggrieved party.



Link to Practice

A seller and a buyer might have entered into a binding contract for the sale and purchase of a piece of land. The piece of land might be of particular interest to the buyer because it is in a location which the buyer is very keen on. The

seller might get a higher offer from someone else to buy the land and decide that it is worth pulling out of the contract that they have entered into with the buyer because, even if they have to pay financial penalties, they will still end up getting more money for the land.

This is a classic example of where a buyer might take the seller to court seeking an equitable remedy, that is a remedy based on fairness. It would not be fair on the buyer to lose this property simply because the seller wanted to go ahead with someone else. In this case, the buyer would ask the court to grant a decree of specific performance. If successful, the court would compel the seller to go through with the transaction to this particular buyer.

An important point for you to understand from the outset is that once a conveyancing transaction between a seller and a buyer is legally binding, it is happily quite rare that something goes wrong. Most conveyancing transactions proceed to completion. If, however, something does go wrong on a conveyancing transaction, you are unlikely to be dealing with it in the conveyancing department because the file would probably be passed over to your firm's litigation department.

2.1.3 Legal estates and beneficial interest in land

When thinking about property ownership, it is very important to understand the difference and interrelationship between the legal estate and the beneficial interest. This is a complex topic. We will only cover the key concepts in this course book. The holders of the legal estate have control over the property and are generally entitled to possess it, use it and sell it. Thus, when acting for a seller in a conveyancing transaction, you are acting for the holder of the legal estate.

If the title to the land is registered at HM Land Registry (HMLR), the legal owners will appear on the proprietorship register. However, this is only half of the story because the ownership of land is split between those who holds the legal estate and those who hold the behind-the-scenes, beneficial interest in the property. When we talk about the beneficial interest, we are talking about who has the right to take the benefit of the property, and, in a conveyancing context, the most obvious example of this is proceeds of sale, that is, **who has the right to the money when the property is sold?**

It is often the case that the same people hold the legal estate and the beneficial interest although this is not always the case. HMLR registers only legal estates. The register records the ownership of the legal estate in the property not the underlying ownership (the equitable or beneficial interests). The holder of the legal estate is called the **trustee**, and they hold the property on trust for the behind-the-scenes beneficiaries. This is known as the principle of the “**curtain**” – the idea that the equitable interests under the trust are hidden behind the legal ownership. A buyer is not concerned as to the beneficial interests protected (or not) behind the “curtain”, only that they pay the purchase price to those who are legally entitled to deal with the legal estate, that is, the trustees.

The legal estate **cannot** be held by more than four persons who are over 18 years. If there are more than four buyers of property, only four of them can act as owners of the legal

estate, although all of them are entitled to own the equitable interest. We will come back to this important topic later in the course book when we look at co-ownership. We will also look at how we tell with a registered title whether there are any behind-the-scenes equitable interests to worry about.

The basic position regarding the legal estate and beneficial interest is shown in **Figure 2.1a**.

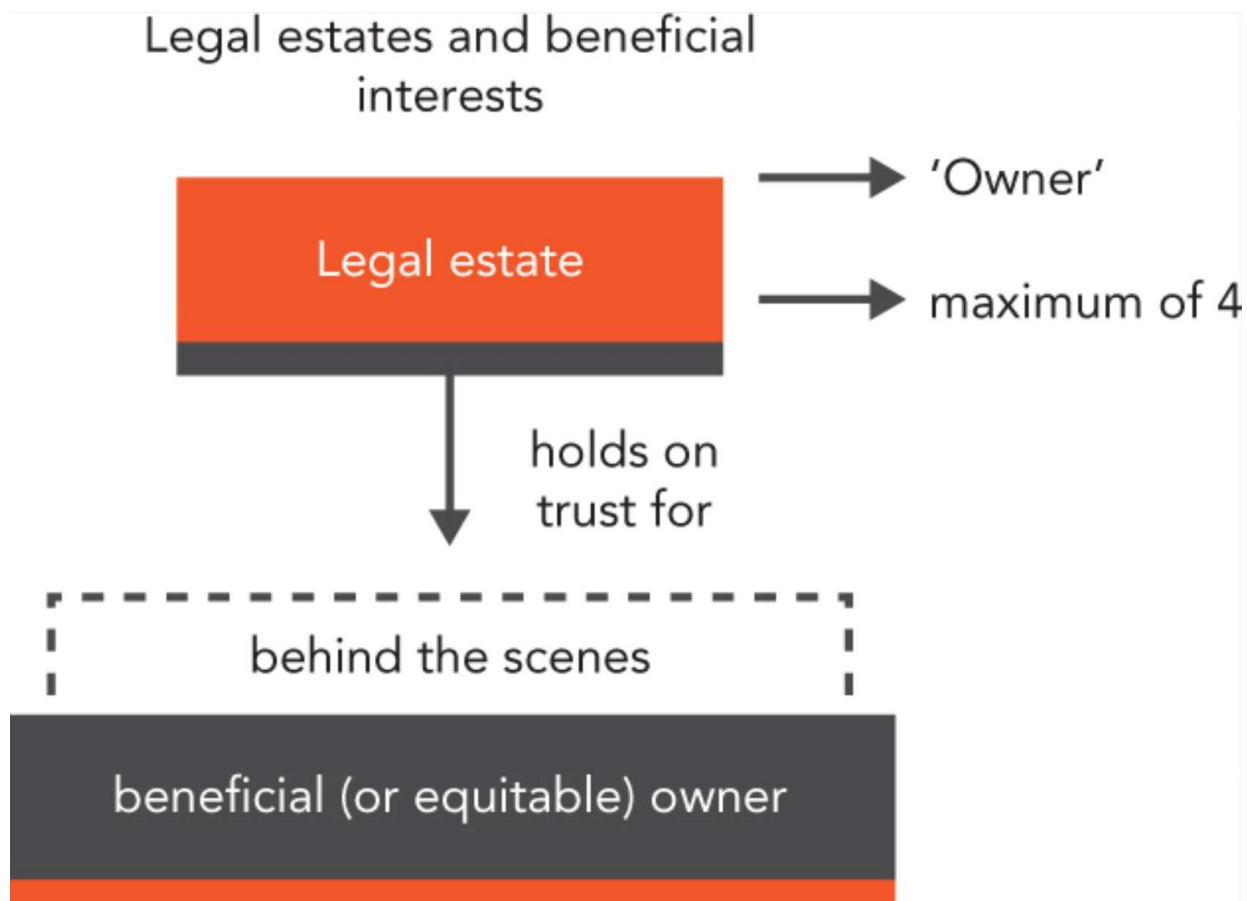


Figure 2.1a

Before we move on, let's look at a few examples.

Example 1

In conveyancing, the most typical scenario is that a couple purchase a house together, and they both contribute to the purchase price. If Alan and Jane purchase together and they both contribute equally to the purchase price, this can be shown in **Figure 2.1b**.

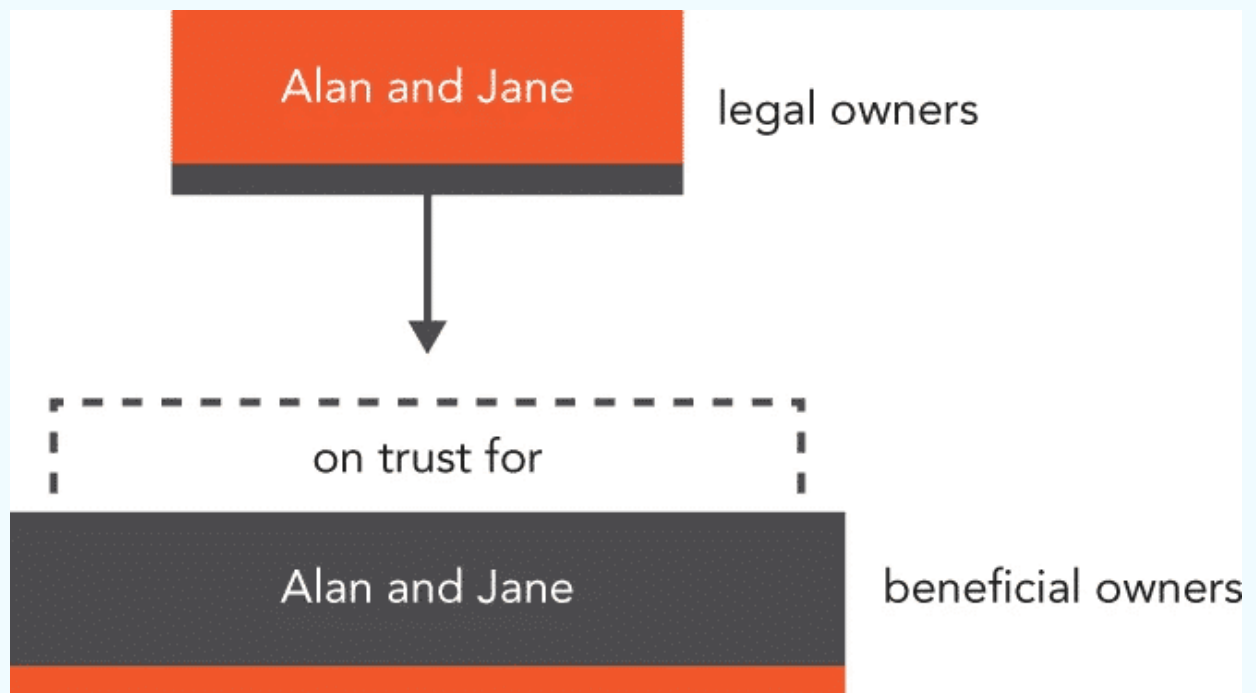


Figure 2.1b

You can see that Alan and Jane are the legal owners, and they are holding the beneficial interest on trust for themselves.

Example 2

Peter and Darren might both contribute towards the purchase price of a property but Darren does not want to appear on the legal title. The fact that he has made a financial contribution to the purchase price of the property gives him a behind-the-scenes beneficial interest in the property; that is, he has the right to part of the sale proceeds when the property is sold.

This example is illustrated in **Figure 2.1c**.

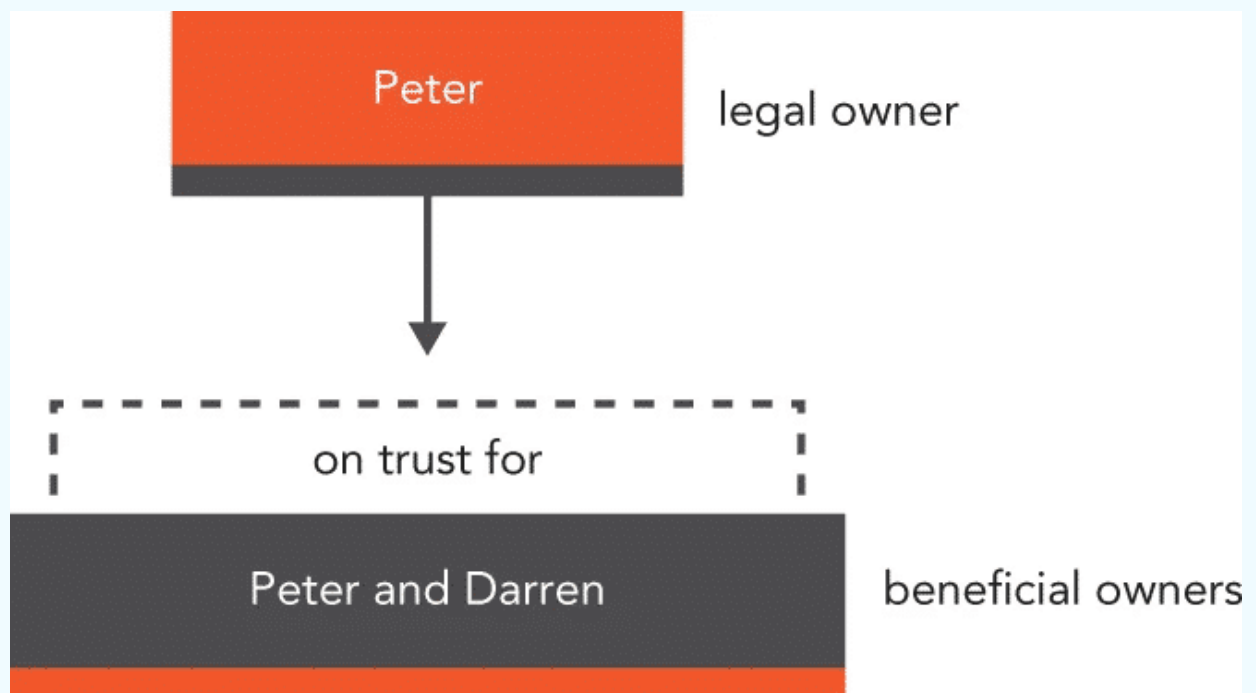


Figure 2.1c.

Example 3

Andrew might contribute the entire purchase price for a property but does not want to appear on the legal title. His friend, Morag, is going to appear on the legal title. The stark distinction between the legal title and beneficial interest is illustrated in **Figure 2.1d**.

In this example, Morag has no beneficial interest in the property at all as she has made no contribution. However English land law allows her to hold the legal estate. This means that if the property is sold, Morag will be the seller and a buyer will have no detail about Andrew or his contribution and, indeed, a buyer would not be entitled to such information. We will see later in the course book how Andrew's behind-the-scenes beneficial interest is protected.

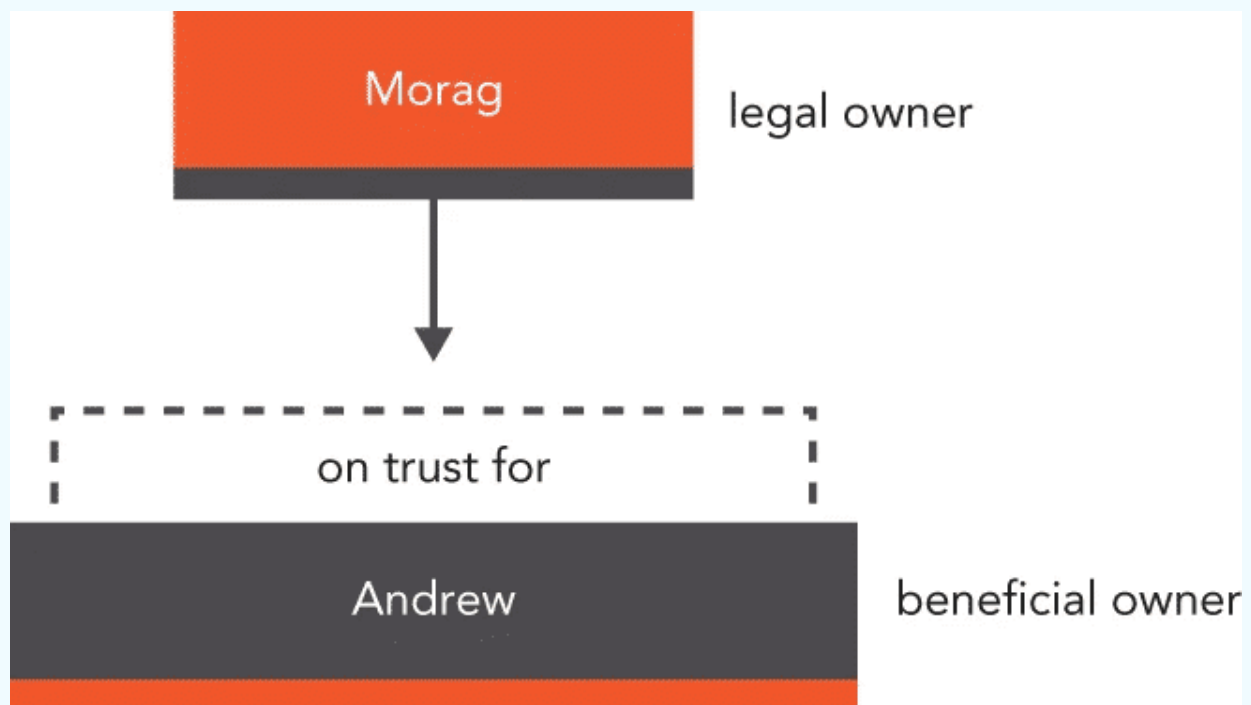


Figure 2.1d

CONTINUE

2.2 What is land?

Before we consider how someone demonstrates that they own a piece of land (i.e. have title to it), we need to consider the definition of land itself. On the face of it, this might seem quite obvious in that we expect land to be the tangible soil beneath our feet. However, from a legal point of view, **“land”** includes various tangible and intangible items which are attached to land.



Link to Practice

A buyer of land expects to receive various items with the land, such as the buildings constructed on it. If a seller wishes to retain (i.e. keep for themselves) any items included in the definition of land, this must be expressly stated in the documentation, usually in a Fittings and Contents Form.

We will see how this form is used in a later chapter.

The general rules governing what is included in the definition of land are from the common law and statute. Let's look at the statutory definition.

CONTINUE

2.2.1 Law of Property Act 1925 (LPA 1925)

s205(1)(ix) Law of Property Act 1925 (LPA 1925) defines land as including:

land of any tenure, any mines or minerals whether or not held apart from the surface, buildings or parts of buildings, whether the division is horizontal, vertical or made in any other way ... and other corporeal hereditaments ... and other incorporeal hereditaments.

This statutory definition seems rather technical but is, in fact, fairly simple:

- **“tenure”** refers to the way the land is held (i.e. freehold or leasehold);
- **“corporeal hereditaments”** mean physical or tangible objects (e.g. buildings); and
- **“incorporeal hereditaments”** are various intangible rights associated with the land (e.g. the benefit of a right of way, or the benefit of a restrictive covenant over the land of another).

So, we can see that “land” includes two important features:

- 1 physical items that make up the land, that is, the **corporeal hereditaments**; and
- 2 **incorporeal hereditaments**, that is, one person’s rights over another person’s land. Such rights are intangible and so are known as incorporeal rights. The most important of these are easements (such as rights of way) – discussed later.

There are two common law presumptions used to define the extent of land:

- ***“he who owns the land owns everything extending to the heavens and to the depths of the earth”***; and
- ***“whatever is attached to the ground becomes part of it”***.

These presumptions are subject to various limitations.

2.2.2 Limitations on the extent of land

2.2.2.1 Airspace

Infringing upon a person's airspace is as much a trespass to land as is walking across their garden. Common examples of trespass to airspace include overhanging guttering or billboards. In ***Anchor Brewhouse Developments v Berkley House (Docklands) Developments [1987]*** the jib of a crane trespassed in the airspace above the claimant's property. An injunction was granted to prevent this happening in the future.

Although ownership is said to be "to the heavens", the owner is only allowed rights in the airspace to such a height as is necessary for the ordinary use and enjoyment of their land and structures on it.



By virtue of **s76 Civil Aviation Act 1982**, a landowner cannot object to the passage of aircraft during normal flight over land. Thus, no action for trespass or nuisance can lie in respect of flights of aircraft over property at a reasonable height. What is reasonable depends on the prevailing weather conditions at the time.

Regulations on the use of unmanned aircraft systems outdoors were introduced by the **UK Civil Aviation Authority (Drone and Model Aircraft Code)** from 31 December 2020. These regulations are designed to control the use of drones in airspace over land and vary depending on the purpose and type of land overflown.

The Code is regularly updated and can be viewed at [View my registration | UK Civil Aviation Authority](#).

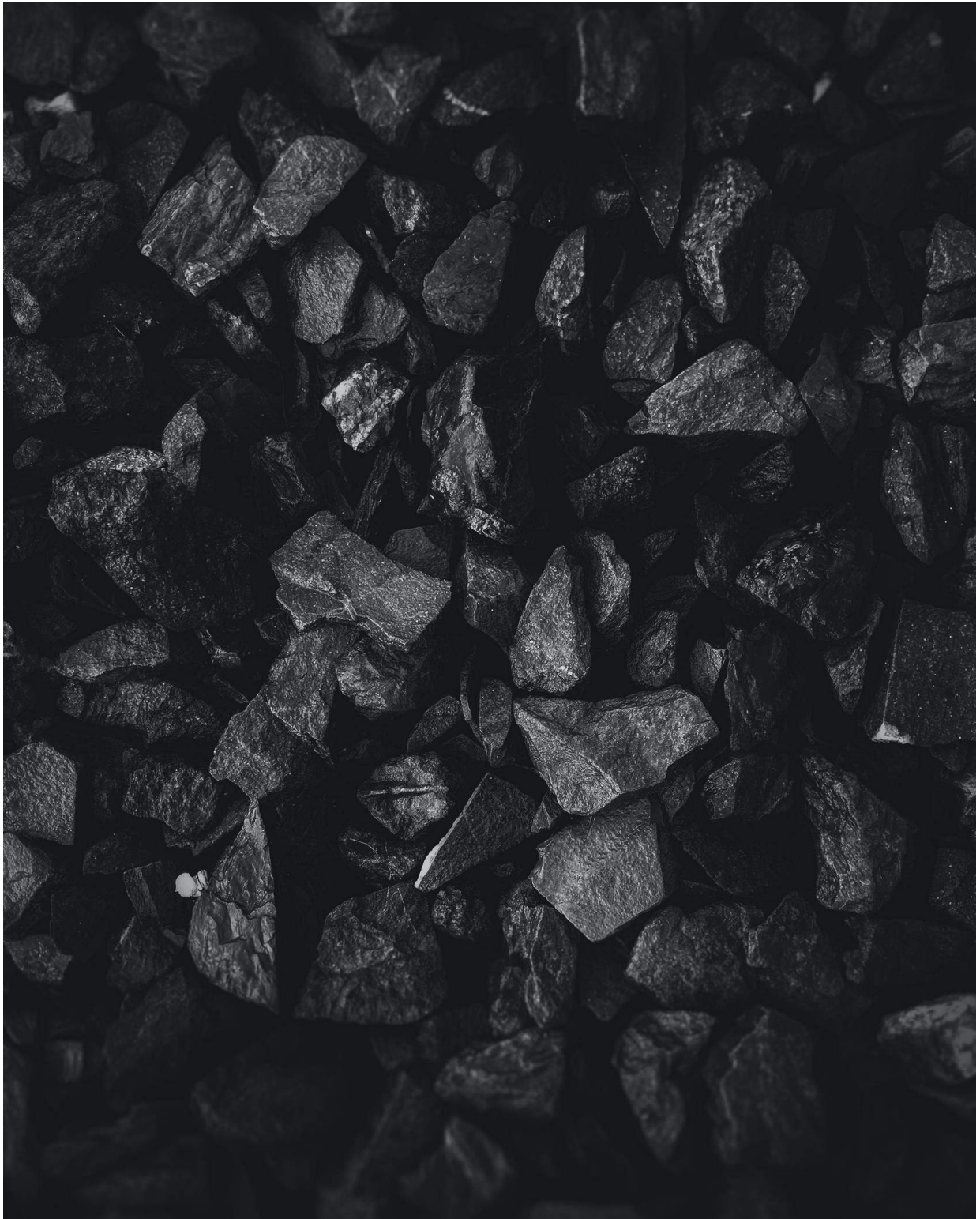


2.2.2.2 Underground

Tunnelling under a neighbour's property would amount to a trespass. There are, however, exceptions to this.

A landowner is **not** entitled to all minerals under their land.

- All mines of gold and silver belong to the Crown, as does treasure by virtue of the **Treasure Act 1996**.
- Oil extracted from the ground under the **Petroleum Act 1998** belongs to the Crown. The **Infrastructure Act 2015** allows fracking (drilling for shale gas) by oil and gas companies to take place below 300 metres under neighbouring land without the landowners' permission.
- Coal belongs to the Coal Authority by virtue of the **Coal Act 1938**.



2.2.2.3 Surface



The surface of the land is part of the land. Minerals found on the surface are part of the land and if a seller wishes to reserve mineral rights, they must do so expressly.

Buildings are part of the surface, as are trees and plants, because they are attached to the land. There are restrictions, however, in the form of planning regulations, including tree preservation orders, which can affect what a landowner does with the land.

CONTINUE

2.2.3 The distinction between real and personal property

The importance of land ownership can be illustrated by the way in which the courts used to settle disputes between landowners. Wealthy landowners who were dispossessed of their land would, quite naturally, want their land returned to them, and the courts were willing to allow this even though, for any other type of property dispute, damages was the only remedy available. Over the years, different procedures developed, and land emerged as a separate, and special, type of property.

Today, different types of property can be categorised as shown in **Figure 2.2a**.

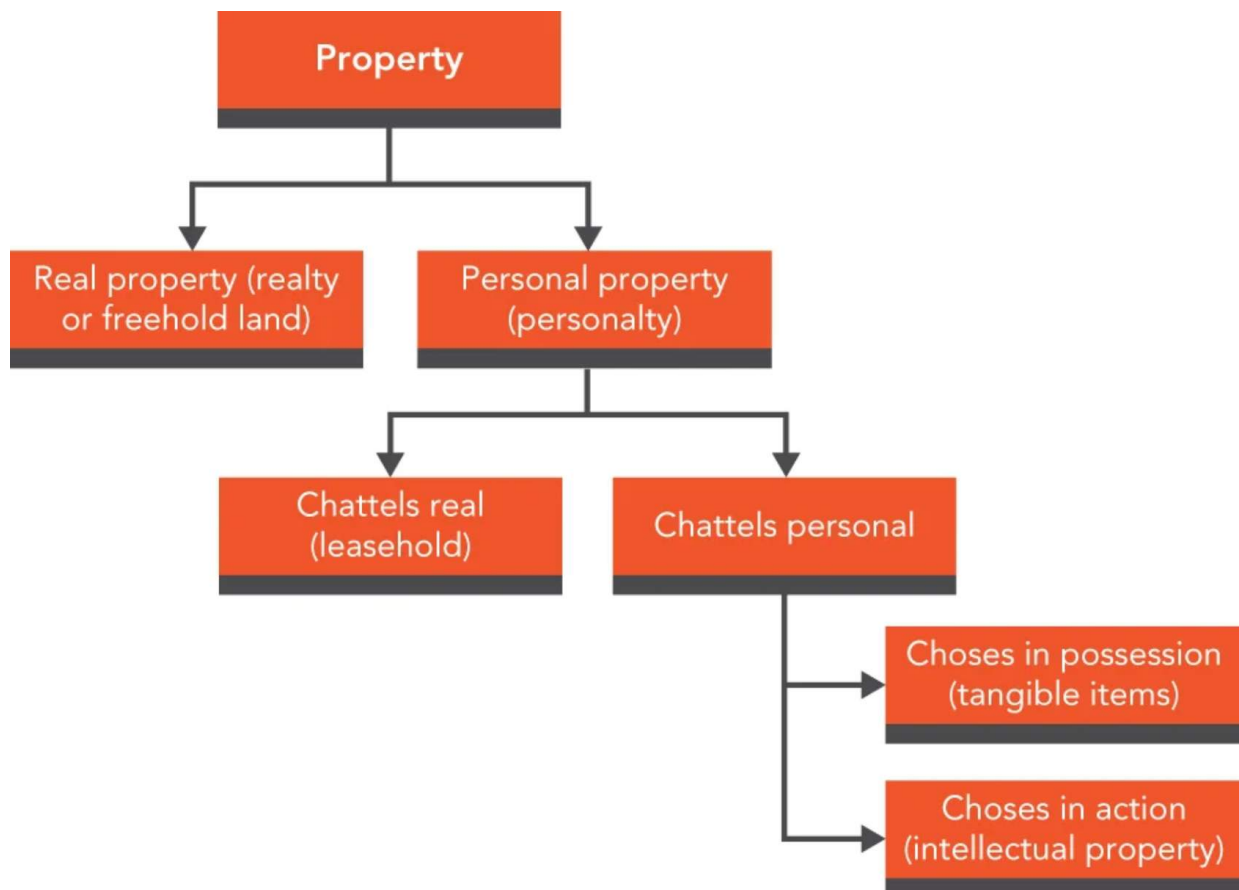


Figure 2.2a

The two main types of property are **real property (realty)** and **personal property (personalty)**.

Historically, if the owner of real property (freehold land) had been dispossessed of their land, they could commence an action in the courts for the land to be returned to them. This type of action was called a **real action** or an **action *in rem***.

On the other hand, personal property (personalty) could not be recovered but was merely the subject of an action for damages. This type of personal action was known as an **action *in personam***.

Personal property is also known as **chattels**. Chattels can be divided further into **chattels real** and **chattels personal**.

Chattels real, rather confusingly, consists of leasehold property (see later for further explanation of leasehold). This is because, in the past, a dispossessed tenant could obtain only damages (money), and was not entitled to the return of the land over which they had a lease. This is no longer the case.

There are two types of chattels personal:

- **choses in possession**, which consists of tangible items such as a pen or a car; and
- **choses in action**, which consists of intangible property such as copyright (one form of **intellectual property**), shares and debts.

In modern land law, leasehold (chattels real) and freehold (realty) are, on the whole, treated in the same way. The distinction between realty and personalty remains important in the law of succession, which governs what happens to a person's property when they die.

CONTINUE

2.2.4 The distinction between a fixture and a fitting

As noted above, anything attached to the land becomes part of it. This includes buildings, trees and plants. Such an attached object is known as a **fixture**, and when the land is sold, leased or mortgaged, fixtures will also pass as a part of the transaction unless the seller makes it clear that they are not intended to pass.

Other items that are not attached to the land are called **fittings** (sometimes referred to as chattels) and will not pass automatically with the land; unless agreed otherwise, the seller can remove fittings.

The traditional approach of the courts has been to make use of two tests to determine what amounts to a fixture in the event that there is a disagreement between a seller and a buyer. Neither of them is wholly satisfactory and there is a large degree of overlap between the two. The courts frequently use both tests together in order to reach a conclusion.

2.2.4.1 Degree of attachment —

The first test looks at the degree of attachment of the object. If it is attached to the land other than by its own weight, it is likely to be a fixture. In ***Holland v Hodgson [1872]*** spinning looms were bolted to the floor of a mill. Being attached other than by their own weight, the looms were held to be fixtures.

The degree of attachment test alone cannot, however, be conclusive. If it were, then it could be argued that items such as pictures and curtains would be part of the land.

2.2.4.2 Purpose of attachment —

The courts also adopt a second test, which looks at the purpose of the attachment: was the object attached for its own benefit – in which case it is likely to remain a fitting or chattel – or was it attached for the benefit of the land as a whole – in which case it may well be a fixture?

In ***Leigh v Taylor [1902]*** a tapestry that was nailed to the wall of the premises was held to be a fitting. Normally, one hangs a picture, painting or tapestry to show the object itself to its best advantage and not to benefit the house as a whole. There may be exceptions, such as where the object is part of a general decorative scheme. In ***D'Eyncourt v Gregory [1866]***, for instance, the court held that marble statues of lions in a garden were fixtures as they were there to increase the owner's enjoyment of the land.

2.2.4.3 Permanence of the attachment —

In addition to the above two tests, ***Botham v TSB Bank plc [1996]*** made clear that the permanence of the attachment is also relevant. How long the object is likely to be attached to the land is a separate issue from the degree of attachment. Lampshades and curtains are unlikely to be considered as fixtures, whereas light fittings and fitted shelves probably will be.

It is difficult to determine whether some common household items are fixtures. Carpets frequently cause problems: if sufficiently fitted, they are probably a part of the land. It is important to make quite clear, when selling land, what is being sold with the land and what is not.



Link to Practice

How are these arguments avoided in practice?

Why is a Fittings and Contents Form necessary?

The transfer or sale of land must be by deed (**s52 LPA 1925**), whereas the transfer or sale of goods need not be by deed. The sale of goods and other items will usually be valid even though the transaction is verbal or merely written.

When land is sold, it is important to distinguish between items that are part of the land (fixtures) and need to be transferred by deed, and those that are not part of the land (fittings or “chattels”) and that do not need to be transferred by deed.

In order to avoid disputes over the unexpected removal of items such as garden sheds, greenhouses or rotary washing lines, the Fittings and Contents Form should be completed.



Activity

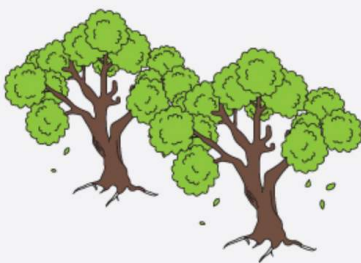
Go to **13.9** of your workbook and find the Fittings and Contents Form (TA10) which is one of the main Protocol forms.

Look through the form so that you can become familiar with the basic structure and content of the form. It will be attached to the contract in the majority of residential sale transactions.

You will see it is quite detailed – this is how we avoid arguments about fittings and contents in practice.

What does land include?

Airspace



Earth



Fixtures within the land

Ground below

Minerals on or in
the land

Figure 2.2b

(1) Land includes:

- the airspace above the ground;
- the surface; and
- underground.

(2) There are a number of limitations on the extent of land.

(3) Items that are fixtures are part of the land and are transferred on sale.

(4) Fittings (or chattels) are not transferred on sale, unless it is agreed otherwise.

CONTINUE

2.3 Estates and interests in land

2.3.1 Legal estates

2.3.1.1 What is an “estate”?

Strictly speaking, a landowner does **not** “own” land. We use this as a shorthand term but what someone who holds title to land has is, in fact, a right to **use** the land. They can either use the land for an indefinite period (now known as freehold) or their right to use the land is limited by time (now known as leasehold). What the landowner in these cases is said to have is an “estate” in the land.

The Crown is the ultimate owner of all land in England and Wales. Individual owners “hold” their land from the Crown.



Link to Practice

This is an example of where conveyancing and probate collide. If someone has died leaving a property as part of their estate, the title to that property will pass to the Crown if there is no one

who has an entitlement to inherit the land in question. This is known as "***bona vacantia***".



Activity

Go to the government website via the link below. When a person dies without leaving a will (or a valid will), they are said to die "**intestate**". How their estate is divided up is governed by a strict list of entitlement called the "**intestacy rules**". The detail is outside the scope of the course book, but you will see that the link takes you to "**Intestacy - who inherits if someone dies without a will?**".

1. Start the questionnaire online. Indicate that the deceased lived in England and Wales and click "next step".
2. After this click "no" to all of the remaining questions. You will see that the questions take you through a list of relatives following the spouse/civil partner and bloodline.
3. You will see that the Crown will be entitled to the estate in the event that there is no relative appearing on the intestacy rules.



Intestacy - who inherits if someone dies without a will?

Work out who is entitled to a share of someone's money, property and possessions if they die without making a will. This person will need to apply for probate.

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A freeholder and a leaseholder are said to hold an estate in land. An estate in land describes how long the land is to be held.

There are only two legal estates in land recognised by law under **s1(1) Law of Property Act 1925 (LPA 1925)**:

- the fee simple absolute in possession (freehold); and
- the term of years absolute (leasehold).

2.3.1.2 Fee simple absolute in possession

The technical definition of freehold ownership of land is a “**fee simple absolute in possession**”.

An estate in fee simple is one which passes to heirs on death (in the absence of a will to the contrary). The word fee means the land is capable of being inherited and the word simple means that there is no limitation on who can inherit. If an estate were limited to direct male descendants, then it could not be a fee simple.

If the fee simple is absolute, it is not subject to limitations which might bring the estate to an end prematurely. For example, a fee simple “*to my widow until she marries*” cannot be a fee simple absolute. To constitute a legal estate, there must be no such limitation.

The estate must also exist in possession. This means that the holder of the estate must have an immediate right to go into possession. Thus, an estate to take effect in the future, for example, “*to my son when he reaches 30*”, is not “*in possession*” and therefore cannot be a legal estate. **Note** that possession here includes the right to receive rent, so a landlord may hold an estate in fee simple absolute in possession even though the tenant is entitled to actual possession.

To be legal, the estate must be created by deed (**s52 LPA 1925**).

Freehold exists in perpetuity, that is, it goes on forever.

2.3.1.3 Term of years absolute

A term of years absolute is another name for a lease. A lease is an estate which exists for a fixed maximum duration. Leases can be fixed-term or periodic, thus, the expression “**term of years**” includes weekly or monthly tenancies (**s205(1)(xxvii) LPA 1925**).

Fixed-term tenancies terminate at the end of that time, but periodic tenancies must be terminated by a notice to quit.

There is no requirement that the lease be “in possession”. A lease may be granted to start in the future and still be a legal estate. To be valid, however, a lease must come into effect in possession within 21 years of its creation (**s149(3) LPA 1925**).

The lease must be created by deed to be legal. There is one exception to this. A lease taking effect in possession (i.e. immediately) for three years or less at a market rent may be created in writing or orally (**s54(2) LPA 1925**). A tenant under such a short-term lease has a legal estate in land despite the lack of any formal creation.

Figure 2.3a summarises the legal estates permitted by **s1(1) LPA 1925**.

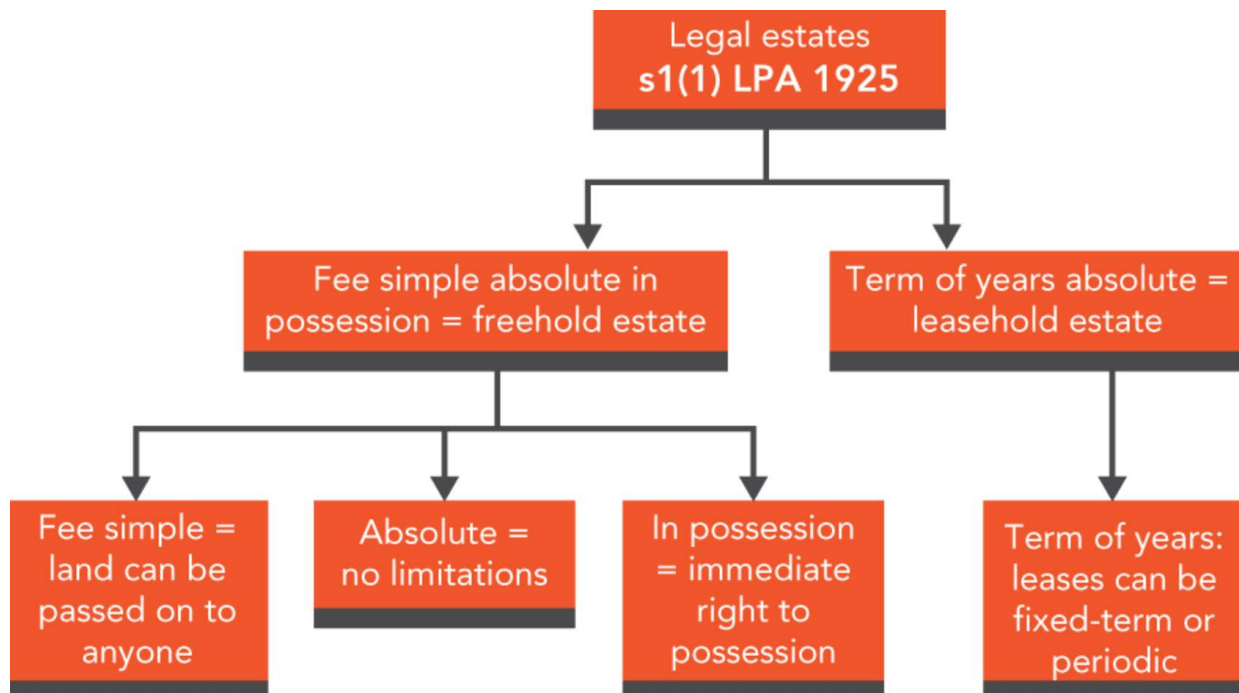


Figure 2.3a



Link to Practice

The detail of leases is outside the scope of this course book. However, note that most houses are sold on a freehold basis. Flats, on the other hand, are sold on long leases.



Activity

Go on to a website such as Rightmove or On the Market and find sales particulars for a freehold house in your town and a leasehold flat in your town. Compare the two sets of details. Look at the photographs of the properties. You will see that the leasehold flat has all of the other flats around it and possibly shared services such as a driveway, car parking, a garden and common hallways, etc. You will probably see that the sales particulars indicate the ground rent for the leasehold flat and an annual service charge. Generally speaking, you will not find these costs associated with buying a freehold house.

2.3.1.4 Commonhold

We have seen that the distinction between the two estates in land relates to the ability of the holder of the estate to use the land. The **freehold owner** has the right to use the land indefinitely, the **leasehold owner** has the right to use the land for a fixed duration or definite period.

There is a third, hybrid, way of owning land which did not gain traction when it was first introduced known as **commonhold**. However, the government has indicated a renewed interest in promoting commonhold as a form of land ownership accordingly, you do need to be aware of it.

Commonhold was introduced by the **Commonhold and Leasehold Reform Act 2002 (CLRA 2002)** in order to meet the needs of owners of flats or apartments and other properties where the owners are interdependent, for example, retirement homes and business parks.

Commonhold is not a new estate in land but is one that is created out of an absolute freehold registered estate. Where the commonhold system is to be used, the property is registered at the Land Registry as “commonhold land”. The owner of each individual unit is referred to as the unit-holder and is registered as its freehold owner (**s12 CLRA 2002**).

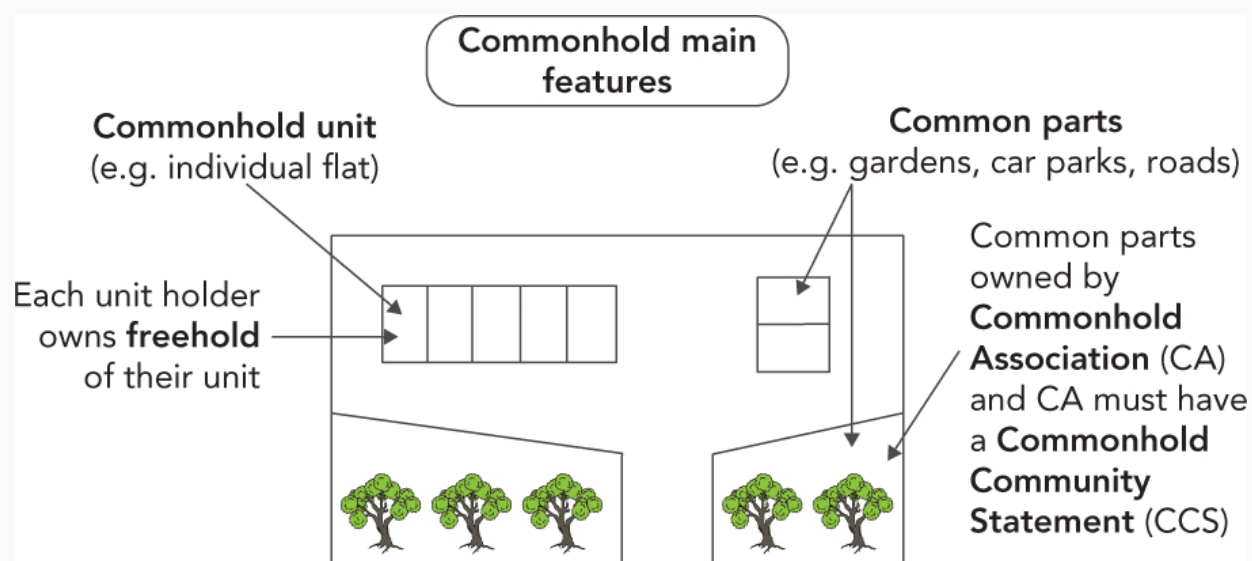
The Commonhold Council

The government has indicated a renewed interest in promoting commonhold as a form of land ownership. To facilitate this, the government has established a Commonhold Council, which will advise it on the implementation of a reformed commonhold regime. The Council will be responsible for advising the government about the required measures, the necessary steps to prepare the market, promoting commonhold to the public and ensuring commonhold can provide a workable alternative to leasehold.

The structure of a commonhold development

The owner of a commonhold unit (e.g. a flat or business unit) is referred to as a unit holder and is registered as the freehold owner of the unit. Note also that the common parts of the development (e.g. gardens and car parks) will be owned by a limited company called the commonhold association (CA), the members of which will be the unit holders. The communal management of the development will be achieved through the CA and a document called a commonhold community statement (CCS). The CCS sets out the rules and regulations governing the commonhold development.

The following diagram illustrates how this works:



CONTINUE

2.3.2 The five legal interests in land

Legal interests are rights over the land of someone else. Under **s1(2) LPA 1925**, there are five such legal interests.

2.3.2.1 Legal easements and profits

An easement is a right which one property owner may have over a neighbouring piece of land. Common examples include rights of way, and rights to use drains.

A profit is a right to take something from another's land. Common examples include grazing, fishing and shooting rights.

To be legal, an easement or profit must be equivalent to one of the two legal estates (i.e. for a definite period or in perpetuity) and be by deed. You will learn that there are some exceptions to this rule.



Link to Practice

Part of the job of the conveyancer is to ensure that the property which a buyer is purchasing enjoys all of the relevant rights. For example, there must be a legal right to gain access to the property and if pipes and cables run beneath the property, appropriate rights must exist to use these services.

Another way of looking at this is to realise that it is the rights which a property enjoys, which gives land its value in many cases. A buyer may be interested in a beautiful plot of land in a stunning location and might want to build a house on it. However, if there is no right of access to the

property and no services such as water, the value of the land would be diminished.

The conveyancer must also check that there are no rights affecting a piece of land which might deter a buyer from purchasing that land. For example, a buyer may wish to purchase a piece of land but find that it is subject to the right of a local neighbour to graze animals in the garden or walk across the property. This would limit the use of the land and may affect the value and future saleability of the land. You will see in a later chapter that these issues are brought to the buyer's attention in a report or advice which the buyer's conveyancer will give prior to exchange of contracts.

Thus, part of the job of the conveyancer when acting for a buyer is to look at the title to the property to check that it has the appropriate rights.

If the property benefits from a right, this will appear on the property register if the title is registered with HMLR. If the property is subject to a right, for example, the right of a neighbouring landowner to walk or drive over the property, this would appear on the charges register of the title.

We will see an example of this later in this chapter.

2.3.2.2 Legal rentcharge

A rentcharge is a right to a periodic payment of money, attached to land. A third party may be able to collect a sum of money, usually annually, from the owner of the land. Such a rentcharge, if perpetual or granted for a term of years absolute and if created by deed, will constitute a legal interest in land. The **Rentcharges Act 1977** restricted the creation of new rentcharges.



Link to Practice

If you work in a conveyancing department, you may be aware of some of the problems that rentcharges cause. Rentcharges used to be thought of as rather “old-fashioned” interests which did not crop up much in conveyancing practice.

However, increasingly property developers have been using rentcharges as a means of securing positive payments to pay for shared services on freehold developments, such as private roads or play areas.

We will **not** discuss rentcharges in detail in this course book.

2.3.2.3 Charge by way of legal mortgage

This is one of the ways of creating a legal mortgage. To be legal, the charge must be by deed and expressed to be by way of legal mortgage. This will give the mortgagee (the lender) the right to take possession of and sell the land if the mortgage is not repaid.



Link to Practice

This is the legal interest which you will come across most frequently in conveyancing practice.

In most cases, the buyer of a property will need to borrow money from an institutional lender to fund their purchase. The lender will take a legal charge over the property as security for the loan.

In a later chapter, you will see how the conveyancer deals with the legal charge. This will appear on the charges register of the register of title.

2.3.2.4 Certain charges arising under statute

These are of little practical significance.

2.3.2.5 Rights of entry in legal leases and legal rent charges

Where a landlord reserves the right to retake possession if the tenant does not comply with their obligations in the lease (e.g. they fail to pay the rent), this right of entry is a legal interest. A similar right of entry is usually contained in a rentcharge deed in order to ensure payment of the rentcharge.

Figure 2.3b summarises the most important legal interests and how they are created under s1(2) LPA 1925.

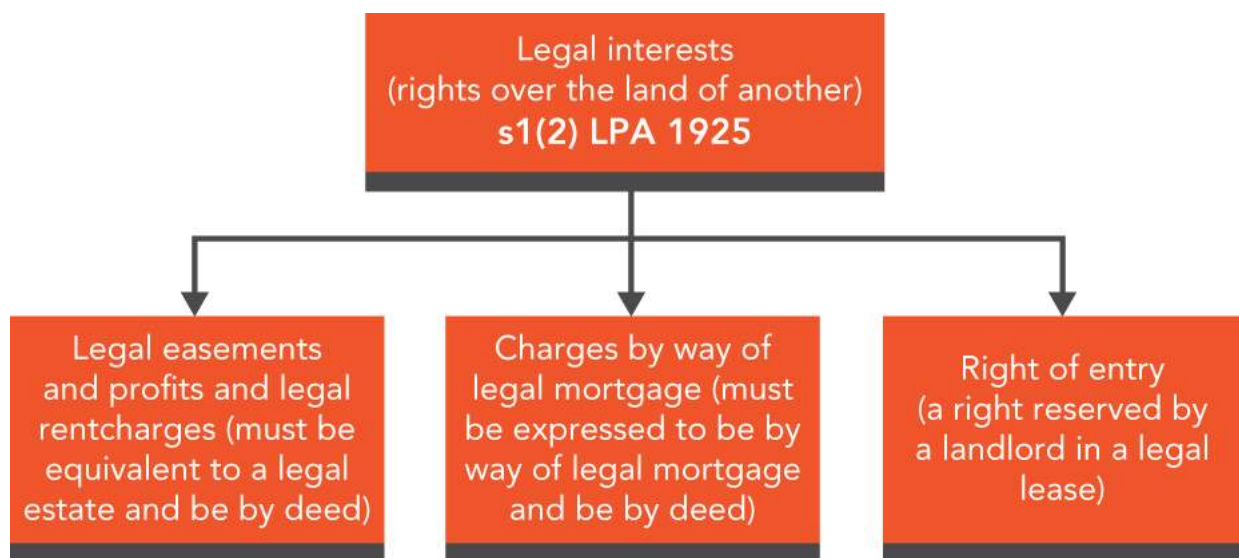


Figure 2.3b

2.3.3 Equitable interests

Any interest which does not qualify as a legal estate under **s1(1) LPA 1925** or legal interest under **s1(2) LPA 1925** will be equitable (**s1(3) LPA 1925**). Unlike a legal estate in land which can only be held by someone aged 18 or over, an equitable interest can be held by someone of any age.

These are interests that the courts of equity were willing to recognise which the common law courts, because of their rigid rules, refused to accept. For example, equity developed the concept of the trust. A trust can arise where property is held on behalf of another.

Trusts are only one example of equitable interests that can arise in English law.

Others include:

- interests which do not comply with the required formalities, for example, a **seven** year lease not created by deed, but which is in writing containing all agreed terms and signed by the parties, would be an equitable lease;
- following exchange of contracts, an estate contract arises – this is regarded as an equitable interest; and
- the benefit of a restrictive covenant (i.e. an obligation which can bind subsequent owners of a piece of land, such as not to use the land for business purposes).

Even equitable interests must comply with some formalities. They must be created in writing (**s53(1) LPA 1925**). There are some **exceptions**: these are implied trusts, called resulting or constructive trusts. The detail of these is outside the scope of this course book.

CONTINUE

2.3.4 Distinguishing legal estates and interests from equitable interests

There are **two** main categories of rights in land: legal estates and interests and equitable interests.

LEGAL ESTATES AND INTERESTS

Legal estates and interests are those which were developed by the common law. Legal estates and interests bind the world, which means that any buyer of the land will be bound by the legal estate or interest whether they know about them or not.

EQUITABLE INTERESTS

LEGAL ESTATES AND INTERESTS

Equitable interests are interests which were developed by the courts of equity and are based on the principle of fairness. Not all buyers will be bound by equitable interests. Generally speaking, for a buyer to be bound by an equitable interest, they need to be given notice of the interest.

EQUITABLE INTERESTS

CONTINUE

2.4 Leasehold – in outline

2.4.1 Key principles of leasehold land

Detailed consideration of leasehold title is outside the scope of this course book. However, it is important for you to have an outline understanding of the key principles and obligations relating to leasehold land.

We have seen that leasehold is the second of the two legal estates. It is important to establish whether someone has the benefit of a lease. If they do not have a lease, they merely have a permission to be on the land, which is called a **licence**.

The holder of a freehold estate can allow someone else to use that land. In the circumstances, it makes sense for the freeholder to set out the rights and obligations in relation to the use of the land, and they will usually do this in a lease. The party creating the lease is called the **landlord** or **lessor**, and the party occupying under the terms of the lease is called the **tenant** or **lessee**.

A lease can be a very short document if the tenancy is perhaps of a short duration or can be very complex, for example, if it relates to the long-term leasing of a property or business premises. The length of the lease is known as the “**term**”.

If the lease permits it, the tenant could create a further lease allowing another party to occupy the land in question. This would be called a “**sub-lease**”. The incoming tenant is the “**sub-tenant**”. In the circumstances, the original lease is called the “**head lease**”. The technical term for the property subject to the lease is the “**demised land**” or “**demised premises**”.

See **Figure 2.4a**.

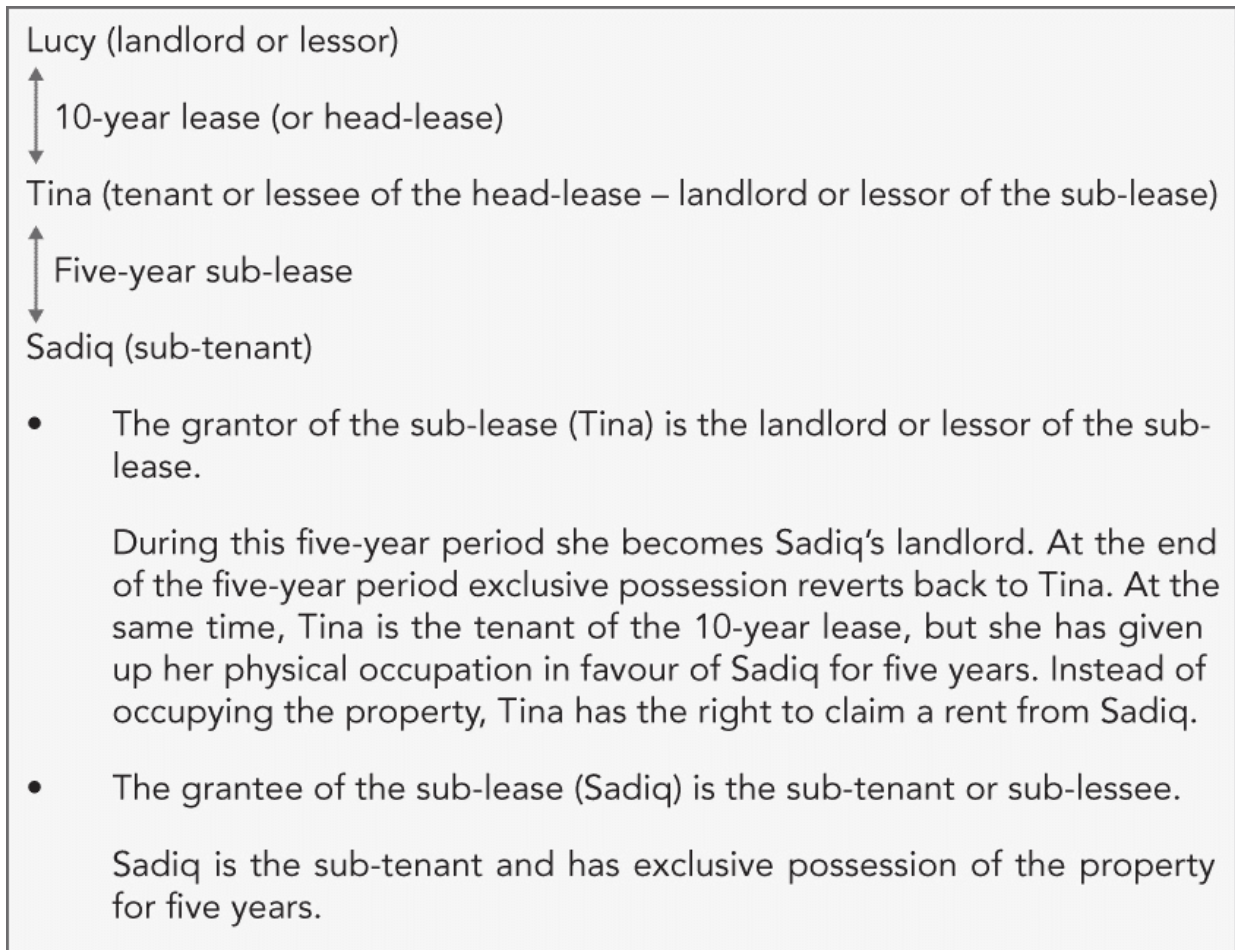


Figure 2.4a

If a tenant transfers their whole interest in the demised premises, this is known as "**assigning**" the lease. In its simplest terms, this means that the tenant has sold the demised premises. See **Figure 2.4b** below.

- The party selling their interest in the head-lease (Tina) is the seller or assignor. Tina will no longer have an interest in the property.
- The party buying the head-lease (Karl) is the buyer or assignee. Karl will be the tenant for the next seven years (for the rest of the 10-year lease term).



Figure 2.4b

For a valid lease to exist, the following criteria must be met:

- 1 The tenant must have a certain term. This means that the period must be fixed and definite. The classic example of this is the case of ***Lace v Chantler [1944]*** in which it was held that a lease “for the duration of the war” was not valid because at the time the document was entered into, the period for which it was granted was not certain.
- 2 The tenant must have “**exclusive possession**” of the demised premises. Exclusive possession is the right of the tenant to exclude everyone from the premises, including the landlord. The essential requirement of exclusive possession distinguishes a lease from a licence. If the occupier has exclusive possession then, subject to certain exceptions, they are a tenant. This is a really important distinction because tenants enjoy a lot of statutory protection (particularly in relation to the right not be evicted), whereas a licensee does not enjoy these protections.

Interestingly, rent is not an essential requirement of a lease.

A certain term and exclusive possession are the essential characteristics which must be present before a lease can exist. If they are not present, there will be at best a licence, and because a licence is not usually a proprietary interest in land, it cannot bind third parties.

If a lease is to be a legal lease, then it must be made by deed. However, if the parties try to enter into a legal lease but the formalities of creating a deed are not met, perhaps, for example, because one party did not sign the document, equity will come to the aid of the parties and a valid equitable lease will have been created in favour of the tenant.

CONTINUE

2.4.2 Leases of different types of property

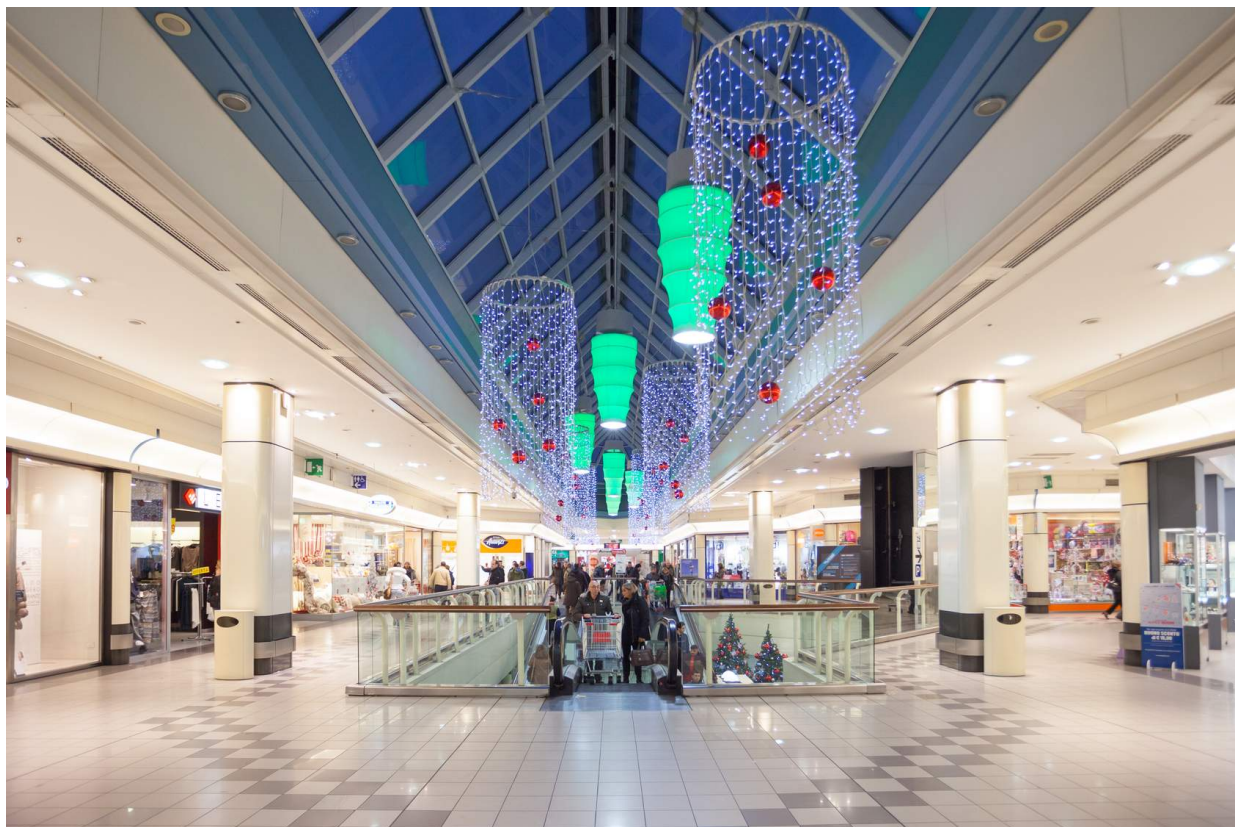
It is possible for the holder of a freehold estate to create a lease in relation to all or part of the land owned by that freeholder. Clearly, the nature of the lease and use of the land in question will be determined by the land itself. For example, if someone owns a bare field, they could lease it to someone for the purpose of grazing their horses.



A common form of lease relates to the short-term rental of a dwelling such as a house or flat. Typically, the tenant will have a lease for maybe six or 12 months and will pay a few hundred pounds per month in rent. This is an area of the law which is heavily influenced by statute. The most common type of lease document which will be used in the circumstances is the assured short hold tenancy.

Most shops on the high street and in shopping centres will be let to the tenants under a lease which could run for a number of years, and the tenant might pay thousands of pounds in rent per month.

Many office blocks and factory units will also be let on business leases. Tenancies of business premises are also subject to statutory protection.



Trainees working in residential conveyancing departments are most likely to deal with clients who are purchasing a long residential lease of a flat in a block. The term of such leases will be long, for example, 125 or 999 years. The rent payable under these leases is likely to be fairly modest, perhaps only £100 per year and is often referred to as “**ground rent**”. The rent is low because the length of the lease is considerable and will sell for similar prices to freehold land. The money paid for a lease is known as a “**premium**”.

Note that the **Leasehold Reform (Ground Rent) Act 2022** came into force for most long leases on 30 June 2022 (1 April 2023 for retirement properties). If rent is demanded for a **new** long residential lease, it **cannot** now be for more than a token “**peppercorn**” amount, thus effectively abolishing ground rent for such **new** leases granted after

the Act came into force. Ground rent will continue to be encountered for existing leasehold properties.

This course book considers the conveyancing process relating to a residential freehold transaction, and the above leases are outside the scope of this course book.

CONTINUE

2.4.3 Key terms of a lease: landlord covenants

A lease is a contractual document imposing obligations on both the landlord and the tenant. These obligations are known as “**leasehold covenants**”. Do not confuse these with freehold covenants which are mentioned later.

The extent of the demised premises must be accurately defined in the lease, along with the lease term and the amount of rent payable. The tenant will usually enter into covenants to pay rent, rates and taxes and will often be responsible for maintenance and repair of the demised premises. Many leases will also specify the use to which the demised premises can be put and the extent to which the tenant can alter the property, if at all. There may also be restrictions on assignment (that is, the sale of the lease).

The landlord generally takes on fewer obligations under the lease. The landlord will covenant to give “**quiet enjoyment**”. This means that the landlord will not interfere with the tenant’s use of the demised premises or enter the premises unless permitted to do so under the terms of the lease (or unless the tenant is in default).



They will often covenant to keep the exterior of the building in repair and may insure the building and maintain any common parts (such as shared corridors, parking areas, garden, etc). If the landlord incurs any expenditure on behalf of the tenants, this will often be recovered from the tenants via a service charge which is provided for in the lease.

Most leases will contain a provision allowing the landlord to bring the lease to an end before the expiry of the term in the event that the tenant defaults on any of the covenants imposed on them. This process is known as “**forfeiture**”. Statute does not imply many obligations into leases. Accordingly, it is very important for the conveyancers acting for the landlord and tenant to ensure that all appropriate rights and obligations are contained in the lease.

Note that a right to forfeit the lease, for example, will **not** be implied, and the landlord must ensure that a specific

provision to this effect is included.

CONTINUE

2.5 Title to land

2.5.1 The difference between unregistered and registered title

So, to recap, we now understand that “**land**” includes not only the soil, things growing on it and buildings constructed on it but also rights attached to it. We have also seen that there are two legal estates namely freehold and leasehold and five legal interests relating to land. Any other interest must, by definition, be an equitable interest.

The conveyancer’s job is to ensure the correct process is adopted to transfer the ownership of the land from the current owner (seller) to the new owner (buyer). The first step in this process is for the seller to demonstrate that they own the property in question. Remember that what we mean here is for the seller to demonstrate that they hold either the freehold estate or the legal estate. If the seller owns the land, they are said to have “**title**” to it.

There are two methods by which the seller can demonstrate their title to the land.

Land in England and Wales is either **registered** or **unregistered**.

When a landowner wishes to prove that they own land (e.g. when they want to sell it), they will either:

- produce a deed or set of deeds establishing ownership if the land is unregistered; or

- give details showing that the land is registered at HMLR in the form of an official copy of the land register.

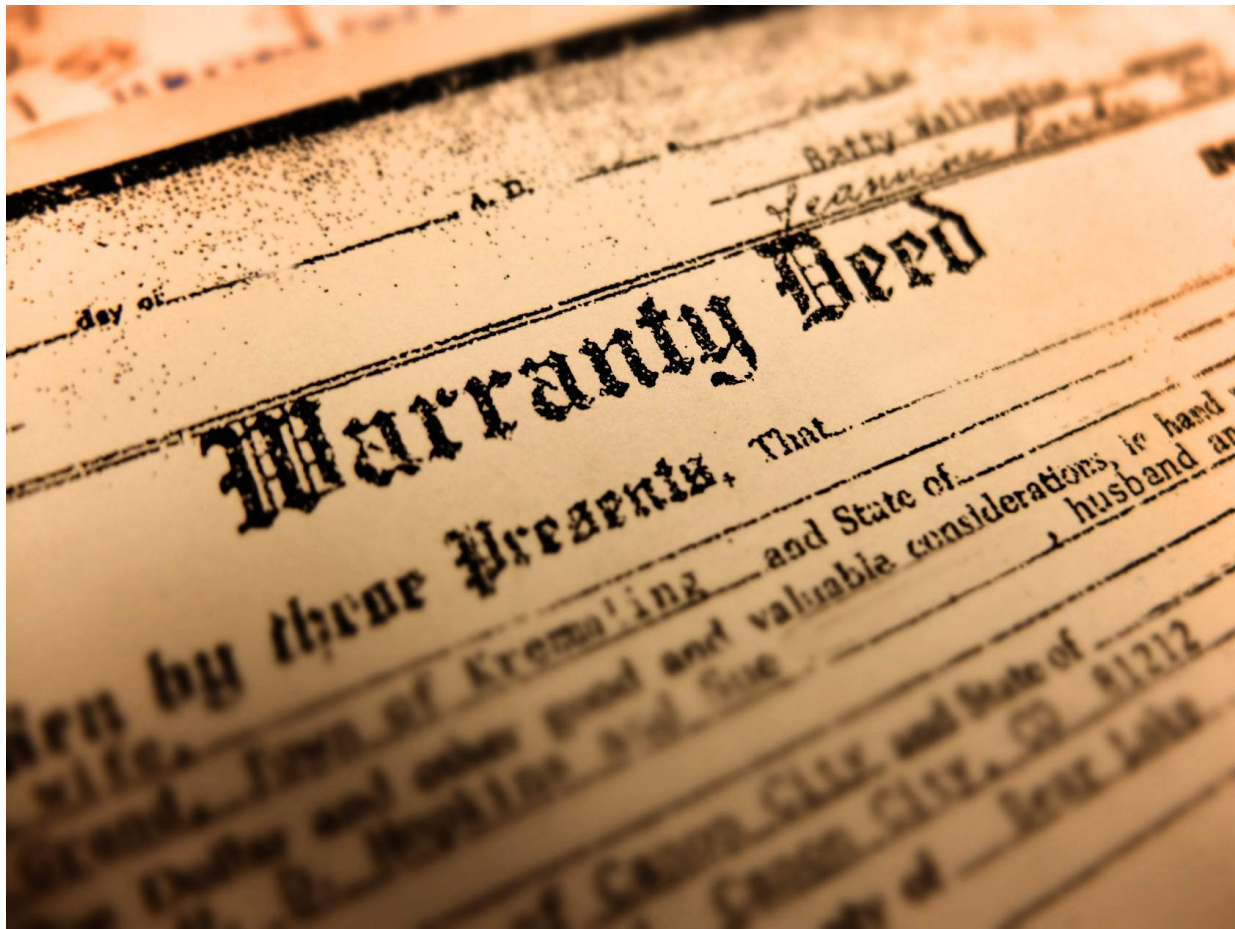
Land which is currently unregistered will eventually be registered. The register is a state guarantee of land ownership. Let's look at each of these in turn.

2.5.1.1 Unregistered land

The system of unregistered land is the traditional form of demonstrating ownership of land. It is based on the production of documentary evidence of title to the land in question. The seller must produce an unbroken chain of documents going back at least **15** years to prove ownership of the land.

The system of unregistered land has a number of **drawbacks**. In many cases, it is more complicated, and it is necessary to investigate the documents of title every time the land changes hands. This makes the process cumbersome and expensive. However, the main drawback relates to the fact that the documents of title can, of course, be lost. If the seller cannot produce these documents, they no longer have evidence of ownership of this important and valuable asset.

These drawbacks were recognised as long ago as the mid-1800s. There have been various attempts since then to create a centralised system of registration of title in England and Wales. This work culminated in the introduction of the system as we know it today.



The detail of unregistered land is outside the scope of this course book. However, you will come across terminology relevant to unregistered land when looking at a registered title, for example.

The most common forms of unregistered title deeds are as follows:

A conveyance on sale

This is the legal deed which transfers the ownership from a seller to a buyer.

A legal mortgage —

This is the deed which creates a legal charge over land where a lender has lent money to assist with the purchase of a property.

A deed of gift —

As the name implies, this is a document which transfers the ownership of a piece of land from someone who is gifting land to the recipient. The nature of this transaction is that no money changes hands and often takes place between family members.

Note however that not all documents are documents of title, meaning that there are some documents which, although very important, **do not** feature in the conveyancing process when transferring ownership of title to land. An example of this is a will.



Link to Practice

A will is a document which sets out how someone wishes their estate to be divided up on their death. The person making the will is called a “**testator**”. This is a very important document because it only comes into effect after someone has died. The testator will specify who they wish to appoint to

administer their estate when they die - these are called "**personal representatives**".

Trainees working in the private client department come across wills as part of their daily routine. They might help to take instructions from a testator to draft a will or assist with locating a will, obtaining a grant of probate and administering the estate in accordance with it once somebody has died.

It is important for trainees in both the private client and conveyancing departments to realise, however, that a will is **not** a document of title whether in the unregistered or registered system. A buyer of a property which is being sold by personal representatives is not entitled to request a copy of the will. It is not of concern to the buyer who is ultimately entitled to the proceeds of sale of the property.

Thus, **do not** fall into the trap of requesting a copy of a will when dealing with a conveyancing matter!

Note that a conveyancer does need to see evidence that personal representatives who are selling the house of someone who has died have the authority to deal with the estate. As we shall see later in this course book, the grant of representation is required for this purpose and so the grant constitutes a document of title.

2.5.1.2 Registered land

The **Land Registration Act 1925** introduced the system of land registration. This Act was repealed by the **Land Registration Act 2002**, but the system of title by registration was preserved. HMLR is a government agency which has responsibility for the production and maintenance of the system of land registration in England and Wales. Registration results in the production of a register of title for the land in question and acts as a state guarantee of title.

CONTINUE

2.5.2 Compulsory registration; the triggers for first registration

Since 1990 all sales of land must be registered. Where land is unregistered, a sale will trigger a process of compulsory first registration at HMLR. On the day of completion of the sale of unregistered land the legal estate is transferred. First registration must occur within **two months** of the completion date.

Registration of title is meant to provide a simpler method of conveyancing under which, eventually, all land will be registered with HMLR. The register entry will, in theory, alert a potential buyer of the land as to:

- what is actually being bought, including any beneficial rights over neighbouring land; and
- any rights which third parties may have in the land.

The process by which unregistered land is being superseded by registration of title is rather slow.

2.5.3 Important dates

1925

From 1925 onwards, various parts of England and Wales were designated as compulsory registration areas.

1990

In December 1990, all land in England and Wales was designated as falling within a compulsory registration area. This does not mean that all land is registered: it becomes registered only on a “**disposition**” of the land.

Since the introduction of **LRA 2002** in October 2003, a disposition is either:

- a sale of the legal freehold; or
- creation or sale of the legal lease with more than seven years left to run.

Such dispositions trigger compulsory registration.

1998

Since 1998, as well as sales, the following also trigger compulsory first registration:

- gifts;
- assents by personal representatives (whereby property is transferred to those entitled on a person's death);
- court orders (e.g. transferring property on divorce); and
- first legal mortgages of property.

All such triggers are now governed by **s6 LRA 2002**, which imposes a duty to register on any of the triggering events. A legal estate that has not been registered within the required time (two months) becomes void. This period can be extended.

2003

LRA 2002 came into force in October 2003.

The buyer's conveyancer must make the application to HMLR for first registration of an unregistered title within two months of completion. HMLR will create the registers of title upon receipt of that application. Once a registered title is created, the unregistered title deeds no longer have any legal significance.

You can see that land is being registered incrementally. The majority of the land in England and Wales is now registered with HMLR but both unregistered and registered systems must be known, and it is likely that there will be pockets of unregistered land for some time to come.

CONTINUE

2.5.4 What can be substantively registered?

When HMLR creates a register of title on an application for first registration, this is known as a “**substantive registration**”. This means that HMLR is creating a new register of title (for content see below).

The two most common registrations resulting in the creation of a new register of title are:

- the registration of a freehold estate; and
- the registration of a leasehold estate where the original term of the lease is over seven years.

This means that a lease which is granted for five years, for example, cannot be substantively registered in its own right.

The third-party rights which we discussed later (easements, covenants and mortgages) will appear on a register of title. The register entries are known as “**notices**”.

Note however that although the third-party rights appear on a register of title, they do **not** have their own register and title number.



Link to Practice

An application for first registration of an unregistered title must be made within two months of completion. The conveyancer will send the unregistered title deeds together with form FR1 and the appropriate fee to HMLR.

Note that form DL, in duplicate, must accompany form FR1 when the first registration application is lodged with HMLR. This is a list of the accompanying deeds and documents.

A copy can be found at: [Documents list \(DL\) - GOV.UK](#)

HMLR now scans most first registration applications to enable them to be processed electronically. Original deeds and documents will be scanned and electronically retained. The originals will be returned to the firm of

conveyancers submitting them and should be retained in case of requisitions from HMLR.

Conveyancers now also have the option of lodging first registration applications made up entirely of certified copy deeds and documents, provided that certain specified conditions imposed by HMLR are met. An original form FR1 and form DL must still accompany the application.

Once the new register of title is created, the unregistered title deeds no longer have any legal significance and are referred to as the “**pre-registration deeds**”.

Any subsequent dealing with the registered title which requires registration (for example, a sale, or creation of a new mortgage) will result in an application to HMLR using form AP1 in most cases. Again, accompanying documents and the appropriate fee must be paid.

As outlined in **Chapter 1**, many conveyancing firms will make most HMLR applications electronically using the portal.



Activity

Using the links below, download and save HMLR forms FR1 and AP1. Look through them – you will note that the AP1 is much more straightforward.

 **GOV.UK**



Change the register (AP1)

Use the AP1 form to change the register for a property including changing your name.

READ MORE GOV.UK

 **GOV.UK**



First registration: application (FR1)

Application form FR1 and checklist for first registration.

[READ MORE GOV.UK](#)

CONTINUE

2.5.5 Contents of the register

There are three registers – the property register, the proprietorship register and the charges register – which appear on each title.

The property register —

The property register contains a description of the property, by reference to the title plan. The title plan is a large-scale Ordnance Survey map, showing the boundaries of the property. It also states

whether the land is freehold or leasehold and includes details of any interests which **benefit** the registered land (e.g. details of any easements which benefit the land, such as a right of way).

The proprietorship register —

The **proprietorship register** sets out who owns the land and the class of title they have over the land. It includes the name and address of the registered proprietor and any restrictions affecting their right to deal with the land. Such restrictions can exist where there are co-owners, and the buyer will be obliged to pay the money to at least two trustees for overreaching to take place (we will refer to this later in the course book).

The proprietorship register also contains the class of title. This is based on HMLR's examination of the unregistered title deeds presented for first registration.

Absolute title is the best form of title that can be given. Possessory title is allocated when HMLR considers an application for registration based on mere physical possession of the land rather than on documentary evidence.

The class of title which is available in relation to leases is good leasehold. It is a lesser form of title than title absolute. In essence this means that HMLR has not checked the landlord's freehold title on application to register the leasehold title.

It is possible to "upgrade" the lesser classes of title to title absolute on production of appropriate evidence to HMLR. There are statutory time limits and particular documents which need to be produced. For example, if a registered proprietor of a leasehold title is registered with good leasehold obtains evidence of the freehold title, they can submit this title to HMLR to apply for an upgrade to title absolute.

The charges register —

The **charges register** contains details of all incumbrances or charges affecting the property. It will include, for example, restrictive covenants which **burden** the registered land or easements which **burden** the land.

Each piece of registered land will have its own title number. This is effectively, HMLR's exclusive identification number for the property in question.

When a title is registered for the first time, in addition to creating the registers of title referred to above, HMLR will also produce a title plan relating to that property. This is a plan of the property which, in most cases, shows the extent of the property outlined in red. The title plan will also contain coloured markings if relevant to show the route of things like rights-of-way and drainage rights.



Link to Practice

An important limitation of the title plan is that HMLR only produces plans which comply with the “**general boundaries rule**”. This means that the title plan does not denote the precise extent of the land in question, it is merely a representation of the extent of the land falling within the title based on the documents produced on first registration and produced by reference to the ordnance survey mapping.

This means that there may be a slight inaccuracy between the extent of the property as shown on the title plan and the property as it appears on the ground. This is why it is important for conveyancers to advise their buyer client to physically inspect the property before they commit to the purchase so that the buyer can satisfy themselves as to the extent of the property which they are purchasing.

2.5.6 Overriding interests

One of the objectives of the **LRA 1925** was to ensure that a register of title presented a complete picture of the state of the title at any point in time, that is it would show the registered proprietor (legal owner) and all rights and obligations to which the title is subject (such as rights-of-way or legal mortgages). Unfortunately for property lawyers, the **LRA 1925** introduced a class of interests which are capable of binding a buyer despite the fact they do not appear on the register of title. These are known as “**overriding interests**”. This means that a registered proprietor or a buyer from them might be bound by an interest that they do not know about. You can see that this goes against the principle of the register of title being as complete a record of title as possible and overriding interests have been described as “**a blot on the system of land registration**”.

The **LRA 2002** reduced the number of interests which are capable of overriding but still retained a number of them. The Act does distinguish between interests which override on first registration and those which are overriding in relation to registered land, however the detail is outside the scope of this course book. The most important point for you to understand is the fact that there are interests in land which are capable of binding a buyer despite the fact they do not appear on a register of title.

There are similar interests which affect unregistered land although in the unregistered context, these are not described as “**overriding interests**”. These are outside the scope of this course book.

The most common, and worrying, examples of overriding interests for conveyancers are:

- short leases – leases of land that do not have to be registered as overriding interests. Most (but not all) leases granted for a term of seven years or less do not have to be registered in their own right; and

- interests of persons in actual occupation – if someone is in occupation of a property, but is not on the register of title, their interest could be an overriding interest.



Link to Practice

You can see that overriding interests are therefore very dangerous for the conveyancer and their buyer client. These are interests which could bind a buyer even after a buyer has paid over their purchase money and the property transaction has completed.

So, **how do we find out about overriding interests?**

This is part of the job of the conveyancer when acting on a purchase. Later in the course book, you will see that the buyer's conveyancer will carry out **“pre-contract searches and enquiries”**.

This involves a number of things including:

- advising the buyer to physically inspect the property - a conveyancer will tell their buyer client to visit the property and look for occupiers and other potential problems; and
- checking the replies to the Property Information Form very carefully. If this reveals the existence of a non-owning occupier, the buyer's conveyancer will raise further enquiries of the seller's

conveyancer and will need to be satisfied that the occupier agrees to move out of the property on completion.



Activity

Please refer to the Property Information Form. Look for the question referring to occupiers – you will see that the seller is asked to indicate whether there is anyone who is not on the title living at the property – these are known as non-owning occupiers.

You have also been asked to download the contract incorporating the standard conditions of sale. Look at the last page of the contract and, in particular, special condition 7. You will see that this clause is the one which a non-owning occupier will sign as evidence of confirmation that they will move out of the property on completion (known as the “occupier’s consent clause”).



Law Explained

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Audio Transcript

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The first main point to appreciate is that there are currently two ways in which landowners can prove their ownership, or title, to land in England and Wales. Titles can either be registered or unregistered and the two systems currently run alongside each other. Lawyers must therefore be prepared to deal with either system when they are handling conveyancing and private client work, and they may not initially know whether any relevant land is registered or unregistered when they first take on new clients.

For example, a firm may take on a new client who has been appointed to act as executor in a deceased person's will. The client may tell the lawyer all about the deceased's bank accounts and investments and explain there is also a house to be sold as part of the work involved in dealing with the estate. At that point, the lawyer may not know whether the house has unregistered or registered title.

The unregistered system is the more traditional system, which has been in use for centuries. It has various drawbacks since it relies on the use of title deeds, which are not registered anywhere, but which are personal documents held by the landowner or sometimes the landowner's mortgage lender. These deeds need to be produced to prove the landowner's title to the land. As you can imagine, deeds can sometimes be lost or destroyed, for example by being burnt in a house fire, and in general terms the process of dealing with unregistered land is more complicated.

The system of land registration was introduced to deal with various drawbacks in the unregistered system and provides a system for putting title to land on a central register. Once the title has been registered, the deeds are no longer used to prove title and official copies of the register entries are used instead. The title documents cannot be lost or destroyed as they are kept centrally at a registry which can issue new official copies, if and when required, for a small fee.

The registration of land in England and Wales is dealt with by HM Land Registry, often simply called the Land Registry in practice. This is a government department, first created in 1862. The modern system of land registration has been gradually introduced from 1925 onwards and there are now more than 25 million registered titles, covering over 87 per cent of the land mass of England and Wales. The Land Registry has stated that it's aiming to achieve a system of comprehensive land registration by 2030, but as you can see from what we've said so far, some land is, as yet, still unregistered.

This is mainly because unregistered land does not have to be registered until something happens to it. More accurately, it does not have to be registered until a specified event takes place involving the land, termed a "trigger" event. The main example of this would be a sale of the land. When a trigger event happens, the unregistered land must be registered with the Land Registry for the first time (a process known as first registration). First registration must take place within two months of the relevant event, although the Land Registry does have power to extend the time limit. Failure to apply within the time limit has serious legal consequences.

So, some land remains unregistered because nothing has happened over the years to trigger first registration. Much of the land owned by the Church and the aristocracy in England and Wales has not been registered, as it has never been sold. Also imagine for example that an elderly person has lived in the same house all their life. It may be that nothing has happened to trigger first registration and therefore the title to the house remains unregistered.

So, how does a lawyer know when unregistered land must be registered for the first time?

Basically, the land must be in a compulsory registration area and there must be an event to trigger registration. Registration areas have been phased in across England and Wales over the years, but since December 1990, the whole of England and Wales has been designated as a compulsory registration area. So, the current position is that land must be registered for the first time when there is a trigger event, irrespective of its location, for instance whether it is in Cornwall or Northumberland.

The trigger events in England and Wales have varied over the years and become increasingly comprehensive as time has passed. We are only going to look here at the current events which have been in place since October 2003 under the Land Registration Act 2002, but lawyers dealing with unregistered titles must be capable of recognising whether past events may have led to an obligation to register.

Of the current trigger events, a very important one is a sale of a legal freehold estate. So, if Arun sells an unregistered freehold house to Zara, Zara's lawyer must apply for first registration after completion of Zara's purchase. Zara's lawyer must apply to the Land Registry within two months of completion, although the Land Registry has power to extend this time limit. Zara will then get her own title register with its own unique title number.

Another main trigger is the creation of a legal lease for a term of over seven years. So, if Cara grants a legal lease of her unregistered house to Daniel for ten years, Daniel's lawyer must apply for first registration of Daniel's ten-year lease at the Land Registry within two months of completion. Again, Daniel gets a new title register for his leasehold title with a unique title number.

Similarly, the sale of a legal lease with more than seven years left to run is a trigger for first registration. So, imagine that Edward owns an unregistered leasehold house and the legal lease has 120 years left before it expires. Edward sells the house to Famke so Famke is buying a 120-year lease. Famke's lawyer must apply for first registration within two months of completion. Again, Famke gets a new title register with a unique title number.

There are further trigger events which do not involve a sale or the creation of a new lease.

We will mention three of the main ones here for illustration:

The first is a Deed of Gift of unregistered land. So, imagine that Henry owns an unregistered freehold house. He wants to give the house to his adult daughter India. He transfers the legal estate in the land to India by means of a Deed of Gift. Following this transaction, India's lawyer must apply for first registration of India's title.

The second is an Assent of unregistered land. So, imagine here that Ivan has made a will, leaving his unregistered freehold house to his adult son Jasper. Ivan has died and the executor has transferred the house to Jasper using the appropriate documentation, an Assent. This will trigger compulsory first registration.

The third is a first legal mortgage of land. Imagine for example that Kelly owns freehold unregistered land which comprises a farm. There is no mortgage on the property but then Kelly decides she needs to raise money to improve some farm buildings. Kelly decides to take out a legal mortgage with a building society for £200,000 and enters into a mortgage deed. This triggers first registration of title to Kelly's land and Kelly's lawyer must apply for first registration following completion of the mortgage.

We'll finish by looking at what actually happens on first registration.

Essentially, first registration means that the lawyer or other applicant sends all the unregistered documentation, such as the title deeds, to the Land Registry after completion together with a standard application form. The Land Registry staff examine the unregistered title and create a brand-new register for the title together with a new title plan. They use the information in the application form and documentation to help them create this new register. For example, if the unregistered title contains restrictive covenants which are binding on the land, these will be reflected in the new register.

The unregistered land is therefore effectively "converted" to registered land.

It's important to appreciate that from this point onwards the title is dealt with, and referred to, as registered land under the registered system.

In this way, you can see that more and more titles are becoming registered as time goes by. Eventually therefore, unregistered land will become a thing of the past!

CONTINUE

Knowledge check

This knowledge check is a self-assessment to see how well you understood the content of this chapter and it does not count towards your course mark.

There are 2 questions in this knowledge check.

1. Within what period after completion of a sale must unregistered land be registered at HM Land Registry?

- ☐ a. One month
- ☐ b. Three months
- ☐ c. Six months
- ☐ d. Two months

SUBMIT



Complete the content above before moving on.

Enter a question title here...



A right of way over Blackacre
created in writing

Legal profit



A right to prevent the owner of
Greenacre from using it for business
purposes

Equitable easement



A right to graze sheep in Top Field
for five years

Restrictive covenant

SUBMIT



Complete the content above before moving on.

2.6 Chapter summary

(1) Conveyancing describes the process required to transfer the ownership of land from one owner to another. Land law is the underpinning legal foundation of conveyancing.

(2) The common law is based on the concept of precedent whereby a court will follow a previous decision of the same or a higher court in cases where the facts are the same.

(3) The common law became very rigid in its application and the principles of equity, based on fairness, developed in parallel.

(4) Common law and equitable remedies are now available in the same court.

(5) Damages are a common law remedy. This is payment to the winning party of a sum of money to compensate for the loss sustained and is available as of right.

(6) Equitable remedies are only available at the discretion of the court and the two which are most relevant to conveyancing are injunction and specific performance.

(7) The definition of "land" is very wide. It includes the surface, buildings and anything growing on the land plus various rights over the land.

(8) The extent of the definition of land is limited: the owner is only allowed rights in the airspace to such a height as is necessary for the ordinary use and enjoyment of their land and structures on it and a landowner is not entitled to all minerals under the land.

(9) Anything attached to the land becomes part of it including buildings, trees and plants. Such an attached object is known as a "fixture" and will pass automatically on sale, lease or mortgage unless the seller has made it clear that they are not intended to pass.

(10) Other items that are not attached to the land are called “fittings” (sometimes called “chattels”) and will not automatically pass with the land.

(11) In deciding whether an item is a fixture or a fitting, the court will apply two tests: degree of attachment and purpose of attachment.

(12) There are two legal estates: freehold and leasehold.

(13) The freehold estate entitles the holder to the right to use the land for an unlimited period of time.

(14) The leasehold estate entitles the estate holder to use the land for the period of the lease which created the estate.

(15) Commonhold is not a new estate in land but is an alternative way to enable owners of flats or apartments where the ownership is interdependent to hold land.

(16) There are five legal interests in land:
(a) legal easements and profits;

- (b) legal rent charge;
- (c) charge by way of legal mortgage;
- (d) certain charges arising under statute; and
- (e) rights of entry in legal leases and rentcharges.

(17) If an interest in land is not one of the two legal estates or the five legal interests then, by definition, it must be an equitable interest. Some common examples in conveyancing are equitable leases, equitable mortgages and a restrictive covenant.

(18) A lease is a document which sets out the terms of the arrangement between landlord and tenant. It can run for a matter of days or months or hundreds of years.

(19) For a valid lease to exist, the term must be certain and the tenant must have exclusive possession of the demised premises. Rent is not an essential requirement of a lease.

(20) Many different types of property can be subject to a lease including bare land and business premises but the most common in residential conveyancing is a long residential lease of a flat in a block.

(21) A landlord will typically enter into covenants for quiet enjoyment and possibly to maintain or insure a building.

(22) A tenant will enter into a larger number of covenants including to pay rent, conform to particular use, repair, pay of service charges.

(23) If the landlord wishes to have the right to bring the lease to an end before the expiry of the term in the event that the tenant defaults under the lease, they must include a right to forfeit the lease; this will not be implied by statute.

(24) There are two ways to demonstrate ownership of land. First the traditional system based on production of documentary evidence – unregistered title. The second is where the unregistered title has been registered at HMLR that is, registered title.

(25) If title to land is unregistered, a sale will trigger the process of compulsory first registration at HMLR and registration of the title must be made within two months of completion of the sale.

(26) The freehold estate can be substantively registered.

(27) A lease for more than seven years can be substantively registered.

(28) There are three registers of title: property register, proprietorship register and charges register.

(29) On registration, HMLR will allocate a class of title: absolute is the best form of title that can be granted.

(30) On registration, HMLR will allocate an exclusive title number to the property and will prepare a title plan.

(31) Overriding interests are a class of interests in registered land that are capable of binding a buyer despite the fact that they do not appear on the register of title.

You have completed Chapter 2.

EXIT