**Thompson v Foy [2010] 1 P & CR 16 High Court**

**Issues:** Actual occupation; priority under Land Registration Act 2002; undue influence and proprietary estoppel

**Facts:** The owner of property Mrs Thompson, transferred the title to her daughter Mrs Foy so her daughter could raise money on a mortgage. At the time of the transfer Mrs F had built at her own expense an extension to the property. Mrs T expected Mrs F to transfer money back to her after she received the loan from the mortgagees but she paid her nothing. The property was repossessed by the mortgagees after Mrs F fell into arrears with the repayments of the mortgage. At the time of the loan Mrs T had removed her personal belongings from the property but some furniture remained. However, on the date of registration of the mortgage none of her personal belongings remained in the property. Mrs T argued that her daughter had exerted undue influence over her in persuading her to transfer the title to her and she claimed that the transaction should therefore be set aside. Mrs T also argued that her right in the property would therefore exist as an equity and would take priority over the mortgagees.

**Held:** There was neither actual nor presumed undue influence. Mrs T had entered into the transaction of her own free will. Therefore, Mrs T did not have an equity in the property and she could not claim to have a right that could override the claim of the mortgagees. Even if there had been undue influence allowing the transaction to be set aside then the time when the Mrs T would have to be in occupation would be both at the time when the mortgage was granted as well as the time when the mortgage was registered, in this case five days later.

**Also note:** That the court upheld Mrs F’s claim under proprietary estoppel to a right to the extension to the property. Although there had been no express assurance it was clear that Mrs T intended Mrs F to have rights in the extension and there was proof of reliance and detriment.

**HSBC plc v Dyche, HSBC plc v Collelldevall [2009] EWHC 2954 High Court**

**Issues:** Priority; overreaching

**Facts:** Mr Collelldevall transferred his house to his daughter Mrs D and her husband X, for a price significantly below the true value. Mr C had been declared bankrupt and the transfer was part of an arrangement which allowed him to remain living in the property. Mrs D took out a loan to pay for the purchase and it was intended that Mr C would repay that loan and then the property would be transferred back to Mr C. Mrs D divorced X and as part of the transaction the property was transferred to X alone for a nominal sum on the same day as a further loan was taken out with HSBC.
Mr C claimed that the property was held in trust for him and his rights took priority over HSBC as an overriding interest. HSBC claimed that his rights had been overreached.

**Held:** that the property was held on constructive trust for Mr C by Mrs D and X. Mr C’s interest took priority over the mortgage in favour of HSBC because it was an overriding interest based on actual occupation. In this case overreaching did not take place in spite of the fact that there were two trustees because C was not a purchaser good faith.

**Also note:** Although on the facts this appears to be a fair decision it is unsatisfactory because it imports into the legislation an element of good faith in the mind of a purchaser which has not traditionally been found necessary in transactions involving registered land. An attempt to do so in the case of *Peffer v Rigg* [1977] 1 WLR 285 was not followed in later cases and was later discredited in subsequent cases in particular *Williams & Glyn’s Bank v Boland* [1981] AC 487.

**Davill v Pull [2009] EWCA Civ 1309 Court of Appeal**

**Issues:** Easement; right of way

**Facts:** Davill, Pull and S all owned plots of land called ‘garden ground’ which was served by the same access track. The conveyance to each of them allowed a right to use such part of the track necessary to give access to and from each plot for ‘all reasonable and usual purposes’. D obtained planning permission to build on the plots. P and S objected to the use of the track for the purposes of accessing the plots for the building work and also for the use of the track when the building was complete. They contended that the term ‘garden land’ precluded any right to using the right of way for residential property.

**Held:** The Court of Appeal concluded that the purpose of a right of way will not automatically be limited by the original use of the dominant land. Although the original use had been as termed ‘garden land’ it was neither unreasonable nor unusual to use the land for residential purposes and the right of way could be used for those purposes. Therefore D was able to use the track both for building purposes and also as access to the new house.

**Horsham Properties Group Ltd v Clark and Beech [2009] 1 WLR 1255 High Court**

**Issues:** Mortgages; power of sale; rights of the mortgagor

**Facts** A receiver had been appointed by the mortgagees who sold the property to H without first obtaining an order for possession and whilst the mortgagor remained in occupation of the property. The purchaser H then sought an order for possession against the mortgagor arguing that the mortgagor’s rights would have been overridden by the sale. The mortgagor challenged the right to sell under s.101 Law of Property Act 1925 arguing that the mortgagees should have obtained an order for possession before exercising their right to sell and that the sale conflicted with Article 1 of Protocol 1 of the European Convention of Human Rights because possession had not been obtained by court order.

**Held:** the mortgagee had the right to sell the property to the purchaser and was not first bound to take possession of the property and could sell even if the mortgagor...
remains in possession. The mortgagor’s rights under the European Convention of Human Rights had not been violated.

Also note: The mortgagors could not rely on the statutory protection given to mortgagors of dwelling houses under s.36 Administration of Justice Act 1970 as against a mortgagee because in this case, possession was not being claimed by a mortgagee but by a purchaser of the property from a mortgagee.

**Lester v Woodgate [2010] EWCA Civ 199 Court of Appeal**

**Issues:** Proprietary estoppel; easements; the doctrine of laches

**Facts:** A right of way had been granted by X to his neighbour Y, for pedestrian access. The owner of the land X carried out works which prevented Y from exercising his right of way for over a year. The land was re-surfaced and was used for parking. Both X and Y sold their land and the purchasers of Y’s land sought an injunction to reinstate the right of way over the land. The purchasers of X’s land argued that the claimant’s predecessors in title had acquiesced in the change of the land from a pedestrian access into land for parking and they argued that it would be in equitable for the claimants now to seek to enforce the right of way.

**Held:** The court held that Y’s delay in bringing action and the acquiescence of his predecessor in title was sufficient to allow estoppel to operate and so prevent Y’s successor in title claiming the right of way.

Also note: Although proprietary estoppel was normally used to found claims where the defendant acquires a right over the claimant’s property as a result of the claimant’s conduct towards the defendant, there was no reason why the principles of proprietary estoppel should not be applied to a case where the defendant was alleged to have committed an act of nuisance by interfering with an easement over his land. In this case Y had stood by and induced X to believe that the right will not be enforced and he had acted in such a way that would make subsequent enforcement of the right unconscionable.

**Manchester City Council v Pinnock [2010] UKSC 45 Supreme Court**

**Issues:** Human Rights; right to possession of land owned by a local authority

**Facts** A local authority successfully repossessed property from tenants. The tenants later claimed that although the tenancy had come to an end under law they had the right to challenge the repossession individually on the grounds of Article 8 of the European Convention of Human Rights.

**Held:** It was possible for a tenant to rely on Article 8 when challenging repossession and to rely on individual circumstances even where repossession has been carried out strictly according to law. The court must consider whether in making the possession order it is a proportionate means of achieving the legitimate aim of a public landlord with public responsibilities.

Also note: This decision marks a reversal in a series of decisions Harrow LBC v Qazi [2003] 3 WLR 792; Kay v Lambeth LBC [2006] 2 WLR 570; Doherty v Birmingham CC [2009] 1 AC 367 where it had been held that a human rights challenge could only be made to the entire statutory scheme underlying the local authority’s right to possession.

Issues: Human Rights, Local Authority landlords' rights to possession

Facts: This series of cases concerned very similar facts to Manchester City Council v Pinnock [2010] UKSC 45 (see above). The tenants challenged orders for possession on the grounds that their rights under Article 8 of the European Convention of Human Rights had been violated.

Held: This case clarified a number of issues raised in Pinnock but also upheld its underlying principle which was that a court can refuse to order possession in favour of a public authority even where the occupier has no lawful right to remain on the grounds that it would be a disproportionate interference with their Article 8 right to a home. Secondly, it was held that the human rights issue can only be considered if the claimant occupier has raised it during proceedings. Thirdly, the court need only consider the human rights issue if the occupier can make out a seriously arguable case on the issue of proportionality. Fourthly, even if the occupier can make out a seriously arguable case the court must still assess whether making the possession order would be disproportionate to the rights of the occupier based on his/her exceptional circumstances. Fifthly, even where exceptional circumstances are proved the court may still refuse to make an order because the court must give weight to the proprietary rights of the landowner.

Hewitt v First Plus Financial Group Plc [2010] EWCA Civ 312 Court of Appeal

Issues: Undue influence

Facts: A husband persuaded his wife to remortgage their home, owned in joint names, in order to pay off his personal debts, concealing an extra-marital affair from her. His wife agreed to do so because the family home was under threat. He later left his wife and the property.

Held: The transaction should be set aside because he had failed to disclose a material fact to her when persuading her to agree to the mortgage, namely the extra-marital affair.

Abolition of Presumption of Advancement

The Equality Act 2010

s. 199(1) The presumption of advancement (by which, for example, a husband is presumed to be making a gift to his wife if he transfers property to her, or purchases property in her name) is abolished.

(2) The abolition by subsection (1) of the presumption of advancement does not have effect in relation to –
(a) anything done before the commencement of this section, or
(b) anything done pursuant to any obligation incurred before the commencement of this section.

Where property is purchased in the name of one person X with money provided by another Y then X is presumed to hold that property on resulting trust on behalf of Y. Previously this would not apply where the relationship between X and Y was one of
close family such as husband providing the money for the purchase of property by his wife or a father providing the money for the purchase of property by his child. It never applied in favour of a husband or child where the money was provided by the wife or mother. This out dated presumption has now been abolished by the Equality Act 2010.

It is still possible to show that a gift was intended by the recipient of the money but that must be demonstrated rather than presumed.

**Law Commission Report on Easements & Covenants**

The Law Commission published its report on June 8th 2011 after a period of consultation.

In the report they recommended a number of reforms which included the following:

- To make it possible for both the benefit and the burden of positive covenants to be enforced by and against subsequent owners;
- To simplify and make clearer the rules relating to the acquisition of easements by prescription and also the acquisition of an easement by implication and to simplify the rules for the termination of an easement by abandonment;
- To give greater flexibility to developers to establish the web of rights and obligations that allow modern estates to function;
- To facilitate the creation of easements that allow a substantial use of land by the benefitting owner. The example given by the law Commission is of parking a car;
- To expand the jurisdiction of the Lands Chamber of the Upper Tribunal to allow for the discharge and modification of easements and profits created post-reform.

If the reforms are adopted they would not affect the validity and enforceability of existing rights.