**Chapter 1 Definition of land**

*Mew v Tristmire [2011] EWCA Civ 912*

This case concerned issues that had been previously raised in *Elitestone v Morris* [1997] 1 WLR 687 (see Unlocking Land Law 3rd edition, page 10). The claimants lived on houseboats which were on wooden platforms around a harbour. The claimants wished to claim protection under the Rent Acts as had been argued successfully in *Elitestone v Morris*. They claimed that the houseboats were part of the land and were therefore fixtures. The Court of Appeal rejected their claim and held that the houseboats were chattels and so were not considered to be part of the land and would not gain Rent Act protection. The court held that the houseboats could easily be moved away from the harbour and so distinguished *Elitestone* which held that the building in that case was a fixture because it would have to be demolished in order for it to be moved. The court placed emphasis on the original intention of the parties which had always been that the houseboats would not be permanent.

**Chapter 3 Registered land**

*Thomas v Clydesdale Bank plc [2010] EWHC 2755*

The meaning of ‘actual occupation’ was revisited in this case which concerned the rights of the partner of a property owner and whether such rights could override the mortgagee’s bank interest. Under the Land Registration Act Schedule 3 para 2(c)(iii) a right of a person will be binding on land if the right would be obvious on a reasonably careful inspection of the land at the time of the disposition. In this case T had contributed to the purchase of property in the name of her partner X. Builders and interior designers were employed to carry out work before the couple and their children moved into the property. The respondent bank visited the property and saw the builders at work on the property and the court held that that was ‘occupation’ under the requirements of the Act and it would have been obvious on a ‘reasonably careful inspection’ of the property and as a result the bank had the requisite knowledge of T’s interest. Ramsey J commented that what had to be obvious was ‘the relevant signs of occupation’

(See also *Baxter v Mannion* on rectification of the register under Chapter 14 below.)
Chapter 4 The transfer of property interests in land

Whittaker v Kinnear (2011)

Mrs Whittaker owned a large property which she sold to a developer at undervalue. It was orally agreed that she would be able to remain on the property after the sale. The developer took out a mortgage over the property and defaulted on the repayments and the bank obtained a possession order against him. Mrs Whittaker claimed that she had the right to continue to live in the property on the basis of an equitable interest which arose under the doctrine of proprietary estoppel. She claimed that a promise had been made to her by the developers on which she had relied to her detriment. Her detriment was the selling of her property at undervalue. The County Court dismissed her claim on the basis that proprietary estoppel could not be a defence to the possession action bought by the mortgagees because it had been defeated by s.2 of the Law of Property (Miscellaneous Provisions) Act 1989. It held that although s.2 of the 1989 Act had preserved constructive trusts as a way of avoiding the statutory formalities that arose on the transfer of an interest it did not expressly preserve an interest that arose by proprietary estoppel. The High Court overturned the decision of the County Court and held that proprietary estoppel has survived the enactment of the 1989 Act and can be claimed as a defence to the lack of formalities. This case suggests that estoppel can still be pleaded in cases where the parties contemplated a formal contract. In the words of Bean J ‘notwithstanding Lord Scott’s dicta in Cobbe proprietary estoppel in a case involving land has survived the enactment of s.2 of the 1989 Act’.

Chapter 5 Equitable rights in land

Stack v Dowden [2007] 2 AC 432 was a highly significant decision in relation to jointly owned property and the quantification of the shares of each party. Baroness Hale declared that in these cases ‘equity should follow the law’ unless there were reasons to depart from this principle and such reasons were exceptional. Under this principle the parties will always share the equity equally unless there are exceptional circumstances. However this principle, in spite of being applied in several cases following Stack e.g. Fowler v Barron (2008), is still under scrutiny by the courts. Jones v Kernott also concerned jointly owned property and the Supreme Court decision. It gives some guidance on the circumstances when the courts can ignore the principle that equity follows the law.

Cases decided since Stack v Dowden:

Jones v Kernott [2011] UKSC 53

Property was jointly owned at law by Ms Jones and Mr Kernott who cohabited together. The parties did not declare their interests and when the relationship
broke down the issue before the court concerned quantification of their individual shares.

At first instance the court awarded the shares 90:10 with 90% being awarded to Ms Jones and 10% to Mr Kernott. The Court of Appeal reversed this finding and awarded the shares 50:50 following the principle that in joint ownership equity follows the law.

The Supreme Court reinstated the decision of the trial judge finding that in this case the principle that ‘equity follows the law’ had been displaced as the parties were shown to have intended their shares be different from a 50:50 split. The court found that although the size of the shares would have been 50:50 at the time of separation the shares then varied as a result of a change in the parties’ intentions after they had separated. The court accepted that intentions with regard to the shares in the property can change over a period of time and the court was able to take such changes into account when deciding on the size of the shares.

The court held that the primary search must always be to find what the parties actually intended to be deduced objectively from their words and actions. It is also possible to infer their intentions from the parties’ whole course of conduct. Where the parties’ actual intentions cannot be deduced then there may be no alternative but to ask what their intentions as reasonable and just people would have been had they thought about it at the time. An important fact in this case was that the parties had been separated for approximately 15 years before the decision. Ms Jones had remained in the home and Mr Kernott had purchased a separate property and he then ceased to contribute towards the mortgage for the family home and other outgoings. The court then inferred that at the moment the parties separated their intentions had changed and it could be was intended that Ms Jones should have a larger share than Mr Kernott. An important development in Jones v Kernott is the freedom it gives to a court to find the intention of the parties. Where the parties fail to declare their intentions expressly the court can either infer their intentions from their conduct or impute their intention which involves giving effect to an intention that the courts conclude they would have had if the parties had actually sat down and thought about their intention.

The court reinforced comments made in Stack that resulting trusts were not appropriate to be applied in domestic cases.

The difficulty remains even after Kernott v Jones to know when the court will vary the shares from a 50:50 split in property owned jointly at law.

Aspden v Elvy [2012] EWHC 1387 (Ch)

This was a dispute between an unmarried couple concerning property owned at one time by the claimant Mr Aspden but which had been transferred to the defendant Ms Elvy. Mr Aspden claimed a share in the property based on common intention. The court applied Stack v Dowden and Jones v Kernott.
preferring to rely on these cases rather than the seminal judgment of Lord Bridge in *Lloyd's Bank v Rossett*. The judge accepted that the law on sole ownership cases relied on showing common intention to share the property either expressly or impliedly but he pointed to comments made by Lord Walker in *Stack v Dowden* that ‘the law had moved on since Lord Bridge’s speech in that case. Therefore the judge was able to infer a common intention from contributions made by Mr Aspden to the renovation of the property owned by Ms Elvy. Judge Behrens also relied on the judgment of Griffiths LJ in *Bernard v Joseph* [1982] 3 AER 171 where he had held that ‘it might in exceptional circumstances be inferred that the parties agreed to alter their beneficial interests after the house was brought; an example would be if the man bought the house in the first place and the woman years later used a legacy to build an extra floor to make more room for the children. In such circumstances the obvious inference would be that the parties agreed that the woman should acquire a share in the greatly increased value of the house produced by her money’. Mr Aspden had contributed money towards improvements made on the property and these could be regarded as evidence of an intention to share. This appears to mark a significant shift away from the constraints of Lord Bridge’s judgment in *Lloyd's Bank v Rossett* but it may be fact specific in view of the fact that the claimant had originally been the sole owner of the property.

**Gow (FC) v Grant (Scotland) [2012] UKSC 29**

This case was heard by the Supreme Court on appeal from the Inner House of the Court of Session in Scotland. It also concerned an unmarried couple and a claim to a share of property which was registered in Mr Grant’s name alone. Ms Gow had sold property which she owned soon after the couple met and had contributed sums received from the sale towards the joint living costs of the parties and improvement to Mr Grant’s property, in particular a newly refurbished kitchen. The Inner House had overturned the decision of the Sheriff’s court which had awarded Ms Gow compensation in the sum of £39,500. Scottish law allows one unmarried partner to make a claim against property owned by the other party under s.28 Family Law (Scotland) Act 2006 where a former cohabitant can show she/he has suffered ‘economic disadvantage’. The Supreme Court upheld Ms Gow’s appeal and reinstated her right to compensation from Mr Grant. The court found that she had suffered economic disadvantage when she had been encouraged by Mr Grant to sell her own property and thereby suffered from the loss of benefit of the increase in value of her principal capital asset. The Supreme Court also discussed the disparity between Scottish law and the law in England and Wales and the failure of the latter to protect cohabitant’s rights. Lady Hale commented that there were lessons to be learnt from this case in England and Wales.
Crown Prosecution Service v Piper [2011] EWHC 3570

Unusually this case arose initially in the criminal courts. Mr Piper was found guilty of a serious drugs charge and the court imposed a confiscation order. When he failed to pay, the court instructed a receiver who claimed rights over property registered in the sole name of Mr Piper. Mrs Piper then claimed a share in the ownership of the property and further that her share should be excluded from the confiscation order. The court found that Mrs Piper had a 50% share in the property. Holman J applied Kernott v Jones in spite of the fact that this was a case of sole ownership where Mrs Piper had first to show that she had acquired a share in the property. He held that on the evidence co-ownership had been their common intention and that the word ‘co-ownership’ as used by a lay person denoted shared or equal ownership.

Chapter 7 Proprietary estoppel

(see also Whittaker v Kinnear above under Chapter 4)
(see also Aspden v Elvy above under Chapter 5)

Chapter 8 Co-ownership

(see also Crown Prosecution Service v Piper above under Chapter 5)

Chapter 10 Easements

Chaudhary v Yavuz [2011] EWCA 1314

A right to use a metal stairway was claimed as an equitable easement by the claimant. The defendant had purchased property which included the stairway and had denied that he was bound by the easement. Although the right had not been entered on the Charges Register the claimant claimed that such a right fell under Schedule 3 para 2 Land Registration Act 2002 and was therefore a right that overrode the register. The claimant argued that the defendant would be bound because the claimant was in actual occupation of the right at the time of sale. The Court of Appeal rejected this claim. The court held that the claimant was confusing ‘actual use’ with ‘actual occupation’. When the claimant was using the staircase they were making use of the easement as opposed to occupying the land belonging to the defendant. Further the right could not be claimed under a constructive trust which could only be imposed in exceptional circumstances and none arose here.
Chapter 12 Mortgages

*Halifax Plc v Curry Popeck* [2008] EWHC 1692

A mortgage fraud was created initially by two registered proprietors of land which included a bungalow, a garden and garages. The fraud arose when a mortgage was granted to Halifax Plc over what it believed was the entire plot but was in fact only over a narrow strip of land garages. By a series of transactions, a number of charges were obtained over the same piece of property by not only the Halifax but also the Royal Bank of Scotland and Cheltenham & Gloucester Building Society. The Royal Bank of Scotland obtained judgment against one of the fraudsters and a charging order over the bungalow. The order required the Bank to discharge any other securities over the bungalow that had priority to its charge. The property was sold and the court had to decide how to divide the proceeds of sale since there were insufficient funds to ensure that the claims of all the parties could be discharged in full. The Halifax successfully argued that its claim arose under estoppel because it lent money on the faith of an assurance by the borrowers that it would be granted a mortgage over the entire property rather than a mere strip of the land. The basic rule in priority of mortgages is that the first in time will prevail. In this case since the rights of the Halifax arose first it would have priority. However under s.29 the Land Registration Act 2002 a registered estate is cleared of all equities which have not been protected on the register where such a transfer is made for valuable consideration. The bank argued that under this section it would have priority and its interest would rank ahead of the interest of the Halifax because the Halifax had not entered the right on the register. However the court decided that s.29 only took effect if the transfer was for valuable consideration and in this case since there was no genuine transfer there was no valuable consideration and so the interest of the bank had to rank behind that of the Halifax.

Chapter 13 Leases

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

This case considered whether a challenge could be made under Article 8 of the European Convention of Human Rights where a claim for possession was made against an occupier of premises owned by the local authority. Article 8 protects one’s right to the peaceful enjoyment of home and family life. The issue that had already been considered in earlier cases such as *Kay v United Kingdom* [2010] ECHR; *Kay v Lambeth LBC* [2006] 2 WLR 570. The Supreme Court held that an occupier could raise a human rights defence to the enforcement of the landlord’s proprietary rights. The proprietary claim of the landlord would not bar a human rights defence although it could only be raised in exceptional circumstances. The Supreme Court held that even where a possession order could be claimed because the correct procedure had been followed the court must still apply Article 8 and consider whether making the order was proportionate. On the facts of this particular case the
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appeal by the claimant was dismissed but the effect of the Supreme Court finding is such that an occupier of property can defend an action for possession on the grounds that the order for possession is disproportionate. The Supreme Court also made it clear that any defence to a possession action on these grounds would be confined to public landlords and would not extend to private landlords.

**Berrisford v Mexfield Housing Co-operative [2011] UKSC 52**

This case revisits the question of whether a certain term is an essential quality of a lease. This principle has been considered in several cases including *Lace v Chantler* and *Prudential Assurance Co Ltd v London Residuary Body*. It has been subject to criticism but remains an essential feature of a valid lease. It came under scrutiny in the recent case of *Berrisford*. Mrs Berrisford entered into an agreement with Mexfield Housing Co-operative which prevented the landlord from terminating the lease if the tenant continued to comply with the terms of the leases. Termination could only be brought on four specific grounds which included the death of the tenant. Mexfield challenged this by seeking to terminate the lease on one month’s notice. It argued that unless the lease could be determined in this way it was a void lease as it had been made for an uncertain term. As the lease stood it had no maximum duration because unlike a periodic tenancy the parties were restricted in their ability to bring the tenancy to an end and this created uncertainty about the maximum term. Mexfield argued that if the lease was void it should be regarded as a monthly periodic tenancy giving the landlords the right to terminate on one month’s notice. The Court of Appeal accepted this and upheld the landlord’s right to terminate the tenancy in this way. The Supreme Court allowed an appeal by Mrs Berrisford accepting an argument on her behalf that a lease of uncertain duration under common law would automatically be converted into a lease for life and such a lease would automatically be converted into a term for 90 years under s.149(6) the Law of Property Act 1925. This seemed to be a relatively simple solution to the problem. Rather than overrule a principle that a lease must have a certain term in order to be valid the court accepted the alternative approach which appears to save such leases when granted to an individual. The problem lies with the fact that it is only available for individuals and not companies and so appears to differentiate between the two. The Supreme Court voiced considerable criticism of the principle which requires a certain term in order for a lease to be enforceable arguing that it is no longer tenable as it stands today.

**Chapter 14 Adverse possession**

**Baxter v Mannion [2011] EWCA Civ 120**

Mr Mannion was registered proprietor of a field which he purchased in 1996. Mr Baxter occasionally kept horses in the field and in 2005 he applied to the Land Registry to be registered as owner claiming he had been in adverse
possession for the required period of time. The Registry notified the registered proprietor Mr Mannion but he failed to respond due to a series of unfortunate personal problems. As no objection had been received from the registered proprietor the claimant was registered as owner. Mr Mannion discovered this and immediately raised an objection as required under the Land Registration Act and Land Registration Rules but his objection was four months late. The Land Registration rules do not give the Land Registry the right to extend time for an objection but it advised Mr Mannion to seek rectification of the register under Schedule 4 of the Land Registration Act 2002 which he then did. He argued that there had been a mistake and that the register should be rectified in order to give effect to that mistake. Mr Baxter argued that neither the Land Registry nor the court had the power to rectify a substantive mistake but merely power to rectify a procedural error. The Court of Appeal disagreed and held that its jurisdiction was not limited to correcting procedural errors. In this case the mistake identified by the court was that of the false information it had received by the claimant squatter. In his judgement Jacob LJ pointed to a footnote in Registered Land, Law and Practice under the Land Registration Act 2002 (2004) which had been co-authored by Charles Harpum who had played a significant role in drafting the Bill ‘...If an applicant was registered under the scheme provided by the LRA 2002 and then it transpired that he had not in fact been in adverse possession for 10 years, his registration would be a mistake, and there would therefore, be grounds for an application for rectification of the register: see LRA 2002 Sch 4 paras 2(1)(a), 5 (a)…’

This persuaded the court that any mistakes to be rectified under Schedule 4 were not confined merely to procedural errors but could give effect to mistakes that had been caused by fraud as in this case.

The Legal Aid, Sentencing and Punishment of Offenders Bill

The Legal Aid, Sentencing and Punishment of Offenders Bill proposes to make trespassing in a residential building a criminal offence. The bill has been subject to considerable debate particularly in the House of Lords where a number of uncertainties were challenged e.g., the fact that the offence has no specific timescale so it is not limited to immediate entry. The offence will be committed even where the trespassing first started many years earlier.

Zarb v Parry [2011] EWCA Civ 1306

This case concerned a strip of land on the boundary of two properties. It was wrongly registered as part of one plot (Plot A). Later a surveyor had incorrectly sited the boundary between the two properties favouring Plot A. The dispute was prolonged and by the time it came to court the owners of Plot A had been in possession of the strip of land for over ten years. The court held that the owners had now been in adverse possession of the property for the requisite period of time and had acquired possession of the property and the owners of Plot B could not claim the strip back. The claim came within the
exception under the Land Registration Act 2002 Schedule 6 para 5. One issue in that exception is whether the claimants reasonably believed that the land to which the application relates belonged to them. In this case the owners of Plot A clearly had a reasonable belief that the land belonged to them based on the surveyor’s findings and this belief continued to be reasonable over the ten-year period.