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FLOATING RIGHTS

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INTRODUCTION

THERE are a number of situations where it is possible to say that a person may, and in some cases almost certainly will, get rights in property at some time in the future. However, until that future time when the rights finally crystallise there is some degree of uncertainty. That uncertainty may derive from one of a number of different factors. Firstly, others may have the right to deal with and dispose of the property in which rights are anticipated, as is the case with gifts under a will or a floating charge, so that there is uncertainty as to the identity of the property in which rights will crystallise and even, in an extreme case, the possibility that there will be no property remaining.[1] Secondly, whether or not any rights materialise at all may be dependent on the acts or decisions of the present owner of the property; he may have the power to prevent the anticipated interest arising. A good example of this is a right of pre-emption. Thirdly, any rights may be dependent on the discretion of the court, leading to uncertainty as to whether any right will arise at all and uncertainty as to what the right will be. The most obvious example here is proprietary estoppel. Finally, the use of equitable tracing rules may have the effect that there is a choice of property over which an interest can be asserted.

Obviously, at some time in the future the uncertainty will come to an end and, in most cases, specific and recognised proprietary rights will come into existence. The issue considered here relates to the interim period between the act or event that initiates the interest and its final acquisition or crystallisation. The courts have taken very different approaches to the question of what rights, if any, come into existence in this interim period. It has been variously held that there are no rights at all, that there are purely personal rights, that there is some kind of floating right hovering above, but not at present attached to, property (which right may or

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[1] In many cases the power is simply to reduce the property available, for example where a personal representative has the power to sell property left in a will to pay debts. However, in other cases the power may be to alter the property, for example in a trust fund, or to alter, take away or add to the property, for example in the case of a floating charge.

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may not be proprietary) or that there is a proprietary interest, though this may be defeasible or only recognised or identifiable retrospectively. In many of the situations there is some uncertainty as to the nature of the rights acquired and the analysis by the courts has often been inadequate. Clearly what the courts are trying to do is to perform a balancing act and allow the present owner of the property some freedom to deal with the property because that is what was intended, while giving some protection to the claimant. However, there has been insufficient discussion as to whether the claimant should be recognised as having proprietary rights and there have been inconsistent approaches in similar situations. This article will consider the varying approaches taken by the courts in the different situations, their justification and their merits and demerits. A comparison will then be made to see how far there has been consistency of approach and whether there is a distinct entity or interest that can be described as a "floating right".

Uncertainty as to the Property in Which an Interest will be Acquired

Rights of a Beneficiary of Residue or on Intestacy during the Administration of the Estate

Personal representatives have the power to use property in a deceased's estate in order to pay any debts due and funeral expenses and they may need to sell property in order to pay any legacies. In most cases the property used would otherwise devolve as residue or on intestacy. Because of this it is not possible to identify what property will be available for the residuary beneficiary or those entitled on intestacy until the personal representatives have completed the administration of the estate.

There is clear authority to the effect that the beneficiary is regarded as having no proprietary rights in any of the assets during administration of the estate; he will acquire proprietary rights only when the administration of the estate is complete and the residue ascertained or if property is earlier allocated to him.[2] In the meantime the personal representatives are said to get full ownership of the assets, though only for the purpose of administration of the estate. The beneficiary gets only a right to due administration of

[2] *Commissioner of Stamp Duties (Queensland)* v. *Livingston* [1965] A.C. 694, PC (residue) applying *Lord Sudeley* v. *The Attorney-General* [1897] A.C. 11 and *Dr. Barnado's Homes* v. *Special Income Tax Commissioners* [1921] 2 A.C. 1; *Eastbourne Mutual Building Society* v. *Hastings Corp.* [1965] 1 W.L.R. 861 (intestacy). No court seems to have considered the potential effect of section 36(2) of the Administration of Estates Act 1925, which provides that an assent of an interest in real property relates back to death.

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the estate. This is a purely personal right which enables the beneficiary to sue the personal representatives for wrongful administration. The right to sue is transmissible by will.[3] However, at the same time there is no doubt that the beneficiary can also initiate on behalf of the estate an equitable proprietary claim based on following or tracing where assets are improperly abstracted from the estate.[4] This right to trace is inconsistent with the proposition that full ownership is in the personal representatives. An equitable proprietary claim consequent on tracing vindicates property rights; it is about the tracing of property rights from one asset to another.[5] It is necessary to show that the claimant had an equitable interest in property that was subject to a trust or fiduciary relationship. The equitable proprietary interest must exist before the misappropriation or as a result of it.[6] There is undoubtedly a fiduciary relationship between the personal representatives and the beneficiaries. However, it is also necessary for the equitable ownership to be separated from the legal ownership. Therefore, for a claim based on tracing to be possible the personal representatives cannot possess both. It would seem that the equitable interest is in the "estate", either from the outset or as a result of any misappropriation.[7] The "estate" must surely be the beneficiaries as a whole, since the fiduciary relationship is with them. Therefore, perhaps the beneficiaries can be seen as having proprietary rights in the totality of the assets, though not having beneficial ownership of individual assets.[8] These rights would be defeasible. The beneficiaries would consequently have indirect rights in individual assets. This approach is consistent with that in other areas considered below. The courts undoubtedly need to deal with the

[3] *Re Leigh* [1970] Ch. 277.
[4] *Commissioner of Stamp Duties (Queensland)* v. *Livingston* [1965] A.C. 694, 713–714.
[5] *Foskett* v. *McKeown* [2001] 1 A.C. 102.
[6] Lord Browne-Wilkinson, *Westdeutsche Landesbank Girozentrale* v. *Islington BC* [1996] A.C. 669, 716.
[7] *Commissioner of Stamp Duties (Queensland)* v. *Livingston* [1965] A.C. 694, 713–714. See also *Re Diplock* [1948] 1 Ch. 465, CA in which an action was brought by next-of-kin against charities who had received funds under void gifts in a will. The action was not clearly brought on behalf of the estate but it was said at p. 522 that recovery would be for the benefit of the estate. However, the Court of Appeal also referred to the next-of-kin as having an equitable interest. See also *Ayerst (Inspector of Taxes)* v. *C. & K. (Construction) Ltd.* [1976] A.C. 167, 178, a case concerned with the winding up of a company, in which Lord Diplock compared this situation and said that executors are not beneficial owners. He seemed to suggest that beneficial ownership is in suspense, but he was concerned only with showing that beneficial ownership was not in the legal owner, not with establishing where it was.
[8] There is support for this approach by Buckley J. in *Lall* v. *Lall* [1965] 1 W.L.R. 1249, 1251 where he said that the residuary legatee has some sort of interest in the totality of the assets but no particular interest in a particular asset. This suggests connotations of a floating charge and the rights to which that gives rise are discussed in detail below. There may also be recognition of this approach in *Commissioner of Stamp Duties (Queensland)* v. *Livingston* [1965] A.C. 694, 713.

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implications that the right to trace on behalf of the estate has for the equitable ownership of the estate and the assets contained in it.

The justification given by the courts for the beneficiaries having only personal rights is simply that the property is not identifiable; the residue is not yet in existence.[9] However, it is possible to point to the property in the estate at death that is not specifically disposed of by will and say that the beneficiary will receive that property unless it is used for the payment of debts or legacies. The property may be partially replaced by other property, such as where the proceeds of sale of an asset are more than enough to pay a debt, but proprietary rights can simply be traced into such replacement property. Similar situations are considered below where the courts have apparently recognised the existence of proprietary rights in a fund where property in that fund might be used, removed, replaced or added to. It also seems to have been assumed that a property right is not necessary because other remedies are available to control the personal representatives.[10] However, personal remedies may not always be adequate and the availability of a right to trace on behalf of the estate is, it has been argued, dependent on some kind of proprietary interest. In addition, the absence of a proprietary interest can have certain disadvantages, such as the loss of statutory rights of compensation for compulsory purchase over and above the site value.[11] Finally, it is intended, whether by the testator or by statute (in the case of intestacy), that the beneficiary, and not the personal representatives, becomes owner of all property not otherwise disposed of.

Rights of a Specific Legatee or Devisee during the Administration of the Estate

The property to which a specific legatee or devisee is prima facie entitled is identifiable. However, that property may need to be used to pay debts, although only if the residue is insufficient.

The position of the beneficiary during the administration is not clear. On the one hand, there are dicta, largely connected with the discussion of the position of a beneficiary of residue and most notably dicta of the Privy Council, to the effect that a personal representative gets full ownership of *all* the property in an estate.[12] This has already been discussed and criticised above. On the other

[9] Lords Halsbury L.C. and Herschell, *Lord Sudeley* v. *The Attorney-General* [1897] A.C. 11, 15, 18.

[10] *Commissioner of Stamp Duties (Queensland)* v. *Livingston* [1965] A.C. 694, 712.

[11] *Eastbourne Mutual Building Society* v *Hastings Corp.* [1965] 1 W.L.R. 861.

[12] *Commissioner of Stamp Duties (Queensland)* v. *Livingston* [1965] A.C. 694, 707, 708; *Re Leigh* [1970] Ch. 277; Ungoed-Thomas J., *Re Hayes' WT* [1971] 1 W.L.R. 758, 764; *Marshall* v. *Kerr* [1995] 1 A.C. 148, 157, 165.

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hand, there are dicta to the effect that the beneficiary gets an equitable interest from death subject to the right of the executors to control the assets until assent and use them if necessary to pay debts.[13] It is the case that on the completion of the administration the title of a specific legatee relates back to the death[14] whereas that is generally not the case with title to residue,[15] except land.[16] The two situations of a specific gift and a gift of residue can also be distinguished on the ground that in the former case the property is identifiable and ascertained, although it is true that it may need to be realised for the purposes of administration.

The same arguments in favour of the beneficiary getting a proprietary interest can be relied on here as in the case of a gift of residue. In addition, the testator may have wanted a particular asset to be received by the beneficiary and to ensure that outcome it is essential that the beneficiary can initiate a proprietary claim against a third party.[17]

Mutual Wills

Mutual wills arise where there has been an agreement between two individuals in relation to the disposal of their property on their deaths[18] and they have executed mutual wills in pursuance of this agreement. If not revoked beforehand, the agreement but not the will becomes irrevocable from the moment one of the parties to the agreement dies in order to prevent a fraud on the deceased who has died relying on the agreement.[19] On the death of the survivor his personal representatives will hold the property on trust for the intended beneficiaries. The relevant issue here concerns the rights the beneficiaries have in the property during the survivor's lifetime.

The courts may interpret the agreement as restricting the rights of the survivor to the property during his lifetime. In such a case a fixed trust will come into existence from the moment of the first death under which the survivor will have a life interest and the

[13] *IRC* v. *Hawley* [1928] 1 K.B. 578, 583; *Re Neeld* [1962] Ch. 643, 687–688, 691. See also Lord Upjohn, *Williams* v. *Holland* [1965] 1 W.L.R. 739, 744, CA (entitled in equity subject to the claims of administration). The Law Commission has expressed doubts as to the validity of such an analysis: Law Com. No. 188, *Transfer of Land: Overreaching: Beneficiaries in Occupation* (1989), para. [2.16] citing with approval Parry and Clark, *The Law of Succession*, 9th ed., by J.B. Clark (London 1988), p. 369.

[14] *IRC* v. *Hawley* [1928] 1 K.B. 578.

[15] *Dr. Barnado's Homes* v. *Special Income Tax Commissioners* [1921] 2 A.C. 1.

[16] Administration of Estates Act 1925, s. 36(2).

[17] Any purchaser from the personal representatives would be protected by statutory provisions: Law of Property Act 1925, s. 2(1)(iii), Administration of Estates Act 1925, s. 36(8).

[18] The agreement may cover only the property that the survivor inherits from the deceased; it may cover the property owned by both parties at the time of the first death; or it may also include property that the survivor later acquires.

[19] *Re Dale (dec'd)* [1994] Ch. 31 and the cases discussed therein, especially *Dufour* v. *Pereira* (1769) Dick. 419, 421.

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intended beneficiaries will have interests in remainder.[20] However, the courts accept that in many cases the survivor is intended to have an absolute interest in all the property during his lifetime and to be allowed to use both capital and income.[21] In such a case it is uncertain what property will remain to be inherited on the death of the survivor. Nevertheless it seems that the property becomes subject to a trust on the first death, but a trust of an unusual nature. Recent authority is to the effect that there is a floating obligation or constructive trust, suspended during the lifetime of the survivor, which crystallises on the property on his death.[22] The effect of this floating trust is that the survivor is subject to some restrictions on his use of the property. These restrictions relate primarily to gifts of the property: although ordinary gifts of small value would be valid,[23] *inter vivos* gifts or settlements intended to defeat the intention of the contract would not.[24] What is less clear is whether there are any restrictions on the use the survivor makes of the property for his own benefit; for example could he spend the money on a world cruise?[25] The fact that the survivor can use capital means that he has more than a life interest,[26] but the restrictions on his use of the property clearly indicate that he has less than absolute ownership. The courts have not in the past been prepared to recognise fixed trusts in similar terms because of lack of certainty as to the property that would go to the residuary beneficiary.[27] There is also little support in mutual wills cases for

[20] *Re Haggar* [1930] 2 Ch. 190; *Re Green* [1950] 2 All E.R. 913.

[21] See Dixon J., *Birmingham* v. *Renfrew* (1937) 57 C.L.R. 666, 689 as cited with approval in *Re Cleaver* [1981] 1 W.L.R. 939, 945–946.

[22] *Re Cleaver* [1981] 1 W.L.R. 939, 945–947 citing with approval *Birmingham* v. *Renfrew* (1937) 57 C.L.R. 666, 682–683, 689, 690; *Re Goodchild (dec'd)* [1996] 1 W.L.R. 694, 700, 702. The existence of such a type of trust has been accepted in the area of secret trusts in *Ottaway* v. *Norman* [1972] 1 Ch. 698, 713 (where the trust may be an express trust or a court imposed constructive trust—see further Hanbury & Martin, *Modern Equity*, 16th ed., by J.E. Martin (London 2001) p. 168) and in a case of proprietary estoppel where there was a belief in a future right (*Re Basham* [1986] 1 W.L.R. 1498, 1503–1504). In both cases there was reliance on mutual wills authorities. In a case of proprietary estoppel where there is a belief that the claimant will inherit property on the death of the landowner the only appropriate remedy during lifetime of the landowner would seem to be a floating trust.

[23] *Re Cleaver* [1981] 1 W.L.R. 939, 947.

[24] *Birmingham* v. *Renfrew* (1937) 57 C.L.R. 666, 689, 690.

[25] *Birmingham* v. *Renfrew* (1937) 57 C.L.R. 666 would seem to suggest that this would be acceptable as it was said at p. 689 that in substance the survivor generally gets full enjoyment for his own benefit and advantage. In addition there is no doubt that the survivor was intended to be the primary beneficiary. However, others disagree. For example, R.A. Pearce and J. Stevens, *The Law of Trusts and Equitable Obligations*, 2nd edn. (London 1998) suggest at p. 333 that the survivor should act in an ordinary way in accordance with his means and circumstances.

[26] The courts have not suggested that he has a life interest with power of appointment of capital in his own favour, thus giving the beneficiary a defeasible reversionary interest.

[27] So the primary beneficiary either gets an absolute interest (*Sprange* v. *Barnard* (1789) 2 Bro. C.C. 585) or is limited to a life interest (*Re Last* [1958] P. 137).

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this floating trust being a recognised substantive trust.[28] Some commentators prefer to regard the floating trust as a constructive trusteeship or in other words simply a fiduciary or personal obligation imposed on the survivor.[29] There is arguably some support for such an approach in the cases.[30] However, this would mean that the effect of mutual wills could vary considerably from case to case. In cases where the survivor is limited to a life interest the beneficiaries would have a proprietary interest from the outset with such consequences as the doctrine of lapse being inapplicable[31] and tracing and proprietary remedies being available. In cases where the survivor was intended to have an absolute interest only personal remedies would be available. The other possibility is that the floating trust is a new entity to be developed along the lines of a floating charge whereby there is from the first death a trust floating over all the property which only attaches to any particular item of property on crystallisation. Again there is some support in the cases.[32] However, there are obviously issues to be worked out. Though the beneficiaries do not have equitable ownership rights in individual assets prior to crystallisation, do they have *some* rights, whether direct or indirect, and what remedies would be available if the survivor disposed of property in breach of his obligations before crystallisation? The answer could be on the lines discussed in relation to rights of beneficiaries during the administration of an estate: individual assets could be owned collectively by the beneficiaries and the survivor, who, together, can be regarded as a separate entity, like an "estate", and any individual beneficiary could initiate an action on behalf of that entity to get property returned to the survivor as trustee. Thus the beneficiaries would

[28] The cases are either ones in which the survivor was restricted to a life interest (*e.g. Re Haggar* [1930] 2 Ch. 190, 195) or the issue was not properly discussed (*e.g.* Morritt J., *Re Dale (dec'd)* [1994] Ch. 31, 37) or the judgment as a whole is unclear (*e.g.* Nourse J. in *Re Cleaver* [1981] 1 W.L.R. 939, 947 says equity will impose a constructive trust on the property but arguably the judge is referring to the situation once the equity crystallises though he did consider that there was sufficient certainty of subject matter. Arguably the judgment of Dixon J. in *Birmingham* v. *Renfrew* (1937) 57 C.L.R. 666 is ambivalent (see note 30 below)).

[29] *E.g.* Underhill and Hayton, *Law Relating to Trusts and Trustees*, 14th ed., by D.J. Hayton (London 1987), p. 44.

[30] *E.g.* in *Birmingham* v. *Renfrew* (1937) 57 C.L.R. 666 there is reference at p. 683 to an equitable obligation and becoming a constructive trustee (Dixon J. says the obligation attaches to property, but does not say when). At p. 689 the judge refers to a floating obligation which crystallises into a *trust* at the survivor's death. Though he says at p. 690 that the constructive trust attaches to assets he says the survivor can enjoy the property subject to a fiduciary duty. There *may* also be some support in *Re Cleaver* [1981] 1 W.L.R. 939, 947 where Nourse J. says the trust on property is imposed when the survivor attempts to deal with the property inconsistently with the agreement. This suggests (a) there can be crystallisation before death like a floating charge but (b) before that time there are no property rights.

[31] *Re Haggar* [1930] 2 Ch. 190.

[32] *Birmingham* v. *Renfrew* (1937) 57 C.L.R. 666, 689 as cited with approval in *Re Cleaver* [1981] 1 W.L.R. 939, 945–946. See also *Re Basham* [1986] 1 W.L.R.1498 and *Ottaway* v. *Norman* [1972] 1 Ch. 698 discussed above in footnote 22.

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have indirect rights in the individual assets. On the other hand, the situation may be closer to that where there is a floating charge such that the beneficiaries may be regarded as having an equity in the individual assets which is enforceable against third parties but only after the survivor's death.

The reasons for the imposition of a trust have variously been expressed to be to prevent fraud,[33] to ensure that the property is not dealt with inconsistently with the agreement,[34] and to ensure that the agreement is enforceable.[35] It seems that the trust may be the automatic consequence in equity of the agreement being specifically enforceable,[36] but it is also arguable that underlying the trust is the point that the intended beneficiary would not otherwise be able to enforce the agreement.[37] At first sight, therefore, much of the justification for the imposition of a trust has been negatived by the Contracts (Rights of Third Parties) Act 1999. This Act will arguably enable any intended beneficiary to sue the survivor or his personal representatives for breach of contract.[38] He could therefore presumably sue for specific performance after the death of the survivor,[39] get an injunction to restrain any disposal in breach of contract,[40] or get damages if property is disposed of contrary to the agreement.[41] In addition, arguably any gifts of property by the survivor could be set aside under sections 423–425 of the Insolvency Act 1986 as transactions at an undervalue made with the purpose of putting assets beyond the reach of a person who may make a claim against him. No property could be retrieved from those who have given value (for example the providers of a world cruise) but equally no proprietary claim could be brought against them unless they had notice of the mutual wills agreement and that is exceedingly unlikely. Therefore it is arguable that the

[33] See note 19 above.

[34] *Dufour* v. *Pereira, Hargrave's Juridical Arguments* (1799), Vol. 2 p. 304; *Re Haggar* [1930] 2 Ch. 190, 195; Nourse J., *Re Cleaver* [1981] 1 W.L.R. 939, 947.

[35] *Re Goodchild (dec'd)* [1996] 1 W.L.R. 694, 700, CA.

[36] *Dufour* v. *Pereira, Hargrave's Juridical Arguments* (1799), Vol. 2 pp. 307–311; *Gray* v. *Perpetual Trustee Co., Ltd.* [1928] A.C. 391, 399; Dixon J., *Birmingham* v. *Renfrew* (1937) 57 C.L.R. 666, 683–689 and the cases cited therein; *Re Dale (dec'd)* [1994] Ch. 31. The view has been expressed in Australia that lack of writing is irrelevant even if the property includes land because the principle is ultimately based on fraud: Dixon J., *Birmingham* v. *Renfrew* at p. 690. English cases, such as *Re Cleaver* [1981] 1 W.L.R. 939, have concerned unwritten agreements and land with no reference to any need for writing.

[37] *Re Oldham* [1925] 1 Ch. 75; Dixon J., *Birmingham* v. *Renfrew* (1937) 57 C.L.R. 666, 690.

[38] A beneficiary could not have forced the personal representatives of the first to die to sue and, even had they been willing to, they might have been entitled only to nominal damages on the ground of having suffered no loss. It has been argued that the personal representatives could get an order for specific performance *e.g.* Hanbury & Martin, *Modern Equity* 16th ed., by J.E. Martin (London 2001) p. 321, relying on *Beswick* v. *Beswick* [1968] A.C. 58.

[39] See *Synge* v. *Synge* [1894] 1 Q.B. 466, 470–471, CA which concerned a party to a contract to leave property by will.

[40] *Schaefer* v. *Schuhmann* [1972] A.C. 572, 586, PC.

[41] *Synge* v. *Synge* [1894] 1 Q.B. 466.

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imposition of a trust and proprietary rights are neither necessary nor of any benefit. However, there does remain the potential problem of the requirement of writing in section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 in so far as the property includes land. Lack of writing has never in the past been an issue for mutual wills, but under the 1989 Act lack of writing makes the contract void and it is difficult to see that fraud can actually create a contract. A constructive trust may therefore be necessary in certain cases to get round the formality requirements[42] and a proprietary interest may therefore be essential after all. Whether or not a constructive trust is necessary for there to be any remedy available, the deceased has provided consideration for a promise that the beneficiary will acquire proprietary rights. This is not so different from a contract for sale, which undoubtedly does create proprietary rights on the basis that equity looks upon as done that which ought to be done, except that the property affected by the mutual wills may change over time.

Floating Charge

A floating charge is a form of security over the assets of a business which, unlike a fixed charge, enables the chargor to continue to run his business without constantly needing to ask the chargee for consent to the disposal of business assets. The chargor can dispose of assets in the ordinary course of business and anyone consequently acquiring an interest will not be affected by the floating charge.[43] Although most obviously appropriate in relation to stock in trade, a floating charge may be used over fixed assets. In either case it may thus apply to land. There are many, oft-cited, definitions of a floating charge.[44] Although they do vary in some respects (aspects of which will be considered below), there is no doubt that it is a charge or security over a constantly changing fund of assets. The charge floats or hovers over the assets for the time being of the chargor. On the occurrence of certain events it will crystallise into a fixed charge over assets then held. Crystallisation of the floating charge may never occur. Even if it does, it cannot be predicted in advance what property will be affected.

An important factor in determining the true nature of a floating charge is its effect on third parties acquiring an interest in company

[42] As allowed for in section 2(5) of the Act.

[43] See further R.M. Goode, *Legal Problems of Credit and Security*, 2nd edn., (London 1988), pp. 84–85.

[44] See, for example, Lord Macnaghten, *Government Stock Co.* v. *Manila Railway* [1897] A.C. 81, 86 and *Illingworth* v. *Houldsworth* [1904] A.C. 355, 358; Buckley L.J., *Evans* v. *Rival Granite Quarries Ltd.* [1910] 2 K.B. 979, 999.

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property before crystallisation of the charge. As already mentioned, anyone acquiring an interest in the ordinary course of business will not be affected by the charge. However, there is authority that a person who acquires an interest through a dealing which is outside the ordinary course of business will be bound by the charge[45] as will a person taking in breach of a restriction in the charge if he has notice of that restriction.[46] Any wrongful disposition does not necessarily crystallise the floating charge into a fixed charge and the disposals in these cases did not trigger crystallisation. Although in every decided case the charge had in fact crystallised at some time before the action, crystallisation does not appear to be retrospective: the chargee gets a fixed charge only from the moment of crystallisation.[47] Consequently, it must be the floating charge itself which binds. Any priority can only be asserted after crystallisation[48] although the chargee can seek an injunction to prevent a disposal of property outside the ordinary course of business.[49]

The nature and effect of a floating charge has never been fully analysed by the courts and the descriptions of it are sometimes inconsistent in some respects. There has been much academic discussion and analysis of the cases, and there are opposing views for all of which, it is claimed, support can be found in the cases.[50]

[45] *In re Benjamin Cope & Sons, Ltd.* [1914] 1 Ch. 800 (second floating charge); *Taylor* v. *M'Keand* (1880) 5 C.P.D. 358 (purchaser of goods). It seems to be assumed that they should know the disposal was outside the ordinary course of business.

[46] *The English & Scottish Mercantile Co., Ltd.* v. *Brunton* [1892] 2 Q.B. 700, 707, CA; *Cox* v. *Dublin City Distillery Co.* [1906] I.R. 446. A person acquiring a later interest can take free if there is no notice of the restriction, certainly if he acquires a legal interest: *The English & Scottish Mercantile Co., Ltd.* v. *Brunton*. There are cases in which a person acquiring an equitable interest took free, but there was not only no notice of the restriction, but also the equities were not equal because of the conduct of the chargee: *In re Castell & Brown, Ltd.* [1898] 1 Ch. 315; *In re Valletort Sanitary Steam Laundry Company, Ltd.* [1903] 2 Ch. 654. There are difficult issues which arise in relation to priority over an execution creditor which it is not proposed to deal with.

[47] The point is not entirely free from doubt. R.M. Goode, states, without authority, that crystallisation is not retrospective in *Legal Problems of Credit and Security*, 2nd ed., (London 1988), p. 50. There does seem to be support in *In re Woodroffes (Musical Instruments) Ltd.* [1986] 1 Ch. 366, 374 and *Re Household Products Co. Ltd.* (1981) 124 D.L.R. (3d) 325, 332 where it was said that crystallisation does not affect priority. On the other hand, Fletcher Moulton L.J. in *Evans* v. *Rival Granite Quarries Ltd.* [1910] 2 K.B. 979, 996 suggests that the floating charge retrospectively becomes a fixed charge.

[48] This is asserted by R.M. Goode in *Legal Problems of Credit and Security*, 2nd ed., (London 1988) p. 86 and must be right because the chargee has no right to resort to the property until then. There is no suggestion that the chargee could recover the property for the chargor to hold again. This must be correct as the chargor has disposed of all of his interest.

[49] Nourse J., *In re Woodroffes (Musical Instruments) Ltd.* [1986] 1 Ch. 366, 377–378.

[50] Whether a floating charge creates an immediate proprietary interest and, if so, the nature of that interest undoubtedly remains unresolved. For discussions of the issue see, in particular, E. Ferran, "Floating Charges—The Nature of the Security" [1988] C.L.J. 213 and S. Worthington, "Floating Charges—an Alternative Theory" [1994] C.L.J. 81. For further references, see the latter article at pp. 81–82. The topic has been the subject of much judicial discussion in Australia: see, for a recent illustration, *Wily* v. *St. George Partnership Banking Ltd.* (1999) 30 A.C.S.R. 204.

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It has been argued that a floating charge gives rise to no proprietary interest at all; that it is a mortgage of future assets and therefore simply an agreement to grant proprietary rights in the future.[51] This is inconsistent with both the cases discussed above in which third parties have been held bound by the charge and cases in which it has been held that the chargee does get some kind of proprietary interest before crystallisation.[52] An alternative view is that a floating charge is a defeasible equitable or fixed charge.[53] However, there is again strong authority against such an analysis to the effect that there is no charge over the specific assets.[54] In addition the law clearly accepts that there are two different entities: the fixed charge and the floating charge and there does not seem to be enough of a distinction between a fixed charge and a defeasible fixed charge. The analysis of the situation which seems to garner most support sees the floating trust as a distinct type of proprietary interest. The view is that the floating charge is an immediate security interest which gives a proprietary right even before crystallisation but it is a charge over the fund of assets only and is not attached to any specific property. It floats or hovers over the property until it becomes fixed at crystallisation. However, even if it is accepted that a floating charge is primarily a security interest in a fund of assets, there must surely also be a proprietary interest of some kind in each specific asset in order that those acquiring an interest in that asset can be bound. A proprietary right in a fund would only seem to be of any use in so far as there is also an interest in specific assets, otherwise there might as well be no proprietary interest.[55] The situation is distinguishable from an estate, as discussed above, or a trust fund, as discussed below, because the legal owner in this situation undoubtedly remains the equitable owner of the assets so it is difficult to see how the chargee could have an indirect interest in the individual assets via ownership of them by a body of which the chargee is a member.

[51] W.J. Gough, "The Floating Charge: Traditional Themes and New Directions", in P.D. Finn (ed.), *Equity and Commercial Relationships* (Sydney 1987), pp. 239, 253–254.

[52] *E.g. Driver* v. *Broad* [1893] 1 Q.B. 744; *Wallace* v. *Evershed* [1899] 1 Ch. 891; *Re Dawson* [1915] 1 Ch. 626. However, see *Agnew and Beardsley* v. *Commissioner of Inland Revenue* [2001] UKPC 28 at para. [41], [2001] 2 A.C. 710.

[53] This view has been recently revived by S. Worthington, "Floating Charges—an Alternative Theory" [1994] C.L.J. 81 and further developed in *Proprietary Interests in Commercial Transactions* (Oxford 1996) pp. 78–86 who finds some cases in support.

[54] Such as Buckley L.J., *Evans* v. *Rival Granite Quarries Ltd.* [1910] 2 K.B. 979, 999 and *Agnew and Beardsley* v. *Commissioner of Inland Revenue* [2001] UKPC 28 at para. [34], [2001] 2 A.C. 710.

[55] See M.H. McLelland, "Commentary" in P.D. Finn (ed.), *Equity and Commercial Relationships* (Sydney 1987), pp. 278, 283: "If a floating charge is a present security it must be a present interest in property. It is inherent in the nature of a security that it affects property. Furthermore if it affects all property within a particular class it must affect every separate item of property within that class." He tentatively suggests analysing the rights as a contingent charge at pp. 281–282.

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But without an interest affecting specific assets third parties will not be bound. The interest in specific assets could be an equitable interest which is both defeasible, in that it can be brought to an end by a transaction by the chargor within the ordinary course of business, and contingent, in that it is only enforceable in the future on the occurrence of crystallisation. However, the basic nature of the interest would be a security interest and that would be inconsistent with many descriptions of a floating charge which seem to make it clear that there is no security interest affecting particular assets until crystallisation.[56] An alternate analysis would be that the chargee has in every asset an equity which can become an equitable security interest and which itself can bind third parties.[57] Such an approach is not inconsistent with the cases. Most judges discuss only the property over which the charge operates. Although the general view is that there is no charge over specific assets until crystallisation, there are no clear statements to the effect that there is no lesser proprietary interest in specific assets.[58] Nevertheless, this analysis does lead to an odd situation because of the fact that the chargee cannot assert priority until after crystallisation: the floating right or equity binds third parties, but is only enforceable once it has been converted into an equitable charge.

There is arguably no doubt that in this area some kind of proprietary interest is essential. A chargee wants security, not just a personal remedy, and he has provided full consideration in return. He undoubtedly gets a proprietary interest from crystallisation, but also arguably needs such an interest before then to deal with wrongful disposals of assets.

Donatio Mortis Causa

A *donatio mortis causa* is a lifetime gift made conditional on and in contemplation of death. There must be delivery of the subject matter to the intended donee. The gift is not fully effective until the donor's death: it will consequently fail if the donee predeceases the donor and the donor can revoke it at any time before his death. Whether or not the donee actually acquires the property is therefore within the donor's control.

[56] For example, Lord Macnaghten, *Illingworth* v. *Houldsworth* [1904] A.C. 355, 358 and Buckley L.J., *Evans* v. *Rival Granite Quarries Ltd.* [1910] 2 K.B. 979, 999. On the other hand, Lord Macnaghten, *Government Stock Co.* v. *Manila Railway* [1897] A.C. 81, 86 refers only to a charge which remains dormant.

[57] This equity could exist from the outset, or be triggered by a wrongful disposal.

[58] *E.g.* Nourse J., *In re Woodroffes (Musical Instruments) Ltd.* [1986] 1 Ch. 366, 377–378; Lord Macnaghten, *Illingworth* v. *Houldsworth* [1904] A.C. 355, 358. Cf. Buckley L.J. in *Evans* v. *Rival Granite Quarries Ltd.* [1910] 2 K.B. 979, 1002 where he says that there is no equity before crystallisation.

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It is not entirely clear whether the donor keeps full ownership of the property until his death or whether the donee acquires a defeasible title. However, there is authority which supports the former approach. Where delivery of the subject-matter to the donee passes no title, there are dicta to the effect that the whole ownership of the property remains with the donor.[59] Where delivery passes legal title there are dicta which suggest that beneficial ownership remains with the donor.[60] This seems to be the correct approach for two reasons. First, that is the intention of the parties. Secondly, under the doctrine the courts are prepared to order completion of incomplete gift. If there has been an incomplete gift title will not have passed either at law or in equity and will not pass in equity until death. As far as possible the position should be the same even if all the required formalities for the passing of title have been complied with. What is clear is that on death the donee acquires title retrospectively to the lifetime acts.[61]

Interests of Beneficiaries in a Trust Fund

Beneficiaries under a trust of land undoubtedly are regarded as having an equitable interest in that property, even if the trustees have power to sell it.[62] The interest is defeasible by overreaching under section 2(1) of the Law of Property Act 1925, but if overreaching does not occur the interest of the beneficiaries can bind purchasers. Equally, beneficiaries have been regarded as having an absolute equitable interest in money held on trust in a bank account.[63] The nature of a trust fund is that the property within the fund will fluctuate over time because the trustees have power to sell the investments and replace them with others, but should the rights of the beneficiaries differ from those of beneficiaries of other trusts, particularly as the fund may contain similar assets? In addition, there will usually be a number of beneficiaries, each entitled to a proportion of the fund, but not to any particular assets within it.

There are three possible analyses of the rights of the beneficiaries. First, they could be regarded as having purely personal rights against the trustees. Secondly, they could be regarded primarily as having

[59] *Edwards* v. *Jones* (1836) 1 My. & Cr. 226, 235.
[60] *Staniland* v. *Willott* (1852) 3 Mac. & G. 664, 679. It was actually held in the case that in the event of revocation the donee would hold the property in trust for the donor.
[61] *Re Korvine's Trust* [1921] 1 Ch. 343, 348. A *donatio mortis causa* is seen as an incomplete *inter vivos* gift, not as a testamentary gift. Death takes away the power of revocation.
[62] *Williams & Glyn's Bank Ltd.* v. *Boland* [1981] A.C. 487. The house was actually held on trust for sale with a consequent duty to sell.
[63] *Foskett* v. *McKeown* [2001] 1 A.C. 102.

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proprietary rights in the fund rather than the specific assets. Thirdly, they may have proprietary rights in the specific assets which are defeasible provided there is a sale by the trustees within their powers. The cases have been extensively analysed by D.W.M. Waters[64] who finds it impossible to find a clear answer to the question as to what rights the beneficiaries have. The first possibility seems inadequate as it would apparently provide no rights against third parties.[65] In addition, this would mean that the trustees would have to be regarded as beneficial owners, which is unrealistic and not intended by the settlor.[66] The second possibility seems the most likely and can be supported by comparisons with the arguments put in relation to the rights of a beneficiary of residue during the administration of an estate[67] and a floating charge.[68] If the "fund" owns the specific assets and any beneficiary can initiate a proprietary claim on behalf of the fund, in reality the rights of the beneficiaries will be no less secure than those of a beneficiary of a trust of specific property. The third possibility seems unlikely where no individual beneficiaries can show entitlement to particular assets, though it could be argued that all beneficiaries should be seen as having an interest in all assets so they are treated the same as beneficiaries of specific property.

Uncertainty as to Whether a Right will Arise at All

Rights of a Beneficiary under a Will during the Testator's Lifetime

The beneficiary has no rights at all. The testator can change his mind at any time and revoke his will unless some other doctrine such as estoppel or a contract intervenes. This is consistent with the testator's intention and since the beneficiary has provided no consideration he should get no rights.

[64] "The Nature of the Trust Beneficiary's Interest" (1967) 45 Can. Bar Rev. 219. See also Hanbury & Martin, *Modern Equity*, 16th ed., by J.E. Martin (London 2001), pp. 17–20 who sits on the fence and says the answer depends on the issue. Hayton and Marshall, *Commentary and Cases on the Law of Trusts and Equitable Remedies*, 11th ed., by D.J. Hayton (London 2001), paras. [1]–[25] takes the view that there is an interest in each asset.

[65] See the discussion of this point above in relation to the rights of a beneficiary of residue during the administration of an estate.

[66] The situation seems incomparable with the administration of an estate where the courts are prepared to regard personal representatives as complete owners, because the administration of an estate will only last for a limited time.

[67] No rights in particular assets though recovery of property is possible but only for the benefit of the fund. The position is distinguishable, however, because the trustees have no powers to diminish the property, only to alter it.

[68] The comparison is drawn by R. Goode in "The right to trace and its impact in commercial transactions" (1976) 92 L.Q.R. 360, 529–530 and referred to in *Agnew and Beardsley* v. *Commissioner of Inland Revenue* [2001] UKPC 28 at para. [11], 2 A.C. 710. There is no need for the beneficiary to possess an equity in individual assets because the "fund" owns the assets and the beneficiary, as part owner of the fund, can initiate actions on its behalf.

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Rights of a Potential Beneficiary under a Discretionary Trust

A person within the class of potential beneficiaries under a discretionary trust merely has a hope that an appointment will be made in his favour. Whether or not he receives anything is at the total discretion of the trustees. As an individual the potential beneficiary has no proprietary rights.[69] He merely has a right to complain of any improper administration of the trust and although he can force the trustees to make an appointment, or consciously to exercise a power to accumulate income, he cannot demand an appointment in his favour.[70] Suggestions that beneficial ownership may be in the beneficiaries as a group[71] are inconsistent with revenue law cases.[72] In addition, consistently with other areas discussed here, this would have the effect that each individual beneficiary would have indirect rights in the assets, which cannot be right when there is nothing more than the hope of an interest.[73]

Option to Purchase which is Contingent on a Certain Event

The grant of an option usually indicates a final and irrevocable intention by the grantor that the grantee can insist on buying the grantor's property provided that he complies with the terms of the option. As such, it is not surprising that an option gives rise to a proprietary interest in the property from the outset.[74] The important point is that the grantor's estate can be taken away from him without his consent.[75]

An option may be made contingent on the occurrence of a certain event which may not occur. The general view seems to be that the option remains a proprietary interest from its creation; undoubtedly the grantor has still lost control over the disposal of his land. But what if the contingency is in the control of the grantor, for example an option to purchase should the grantor cease the present use of his land? The view has been expressed that

[69] *Vestey* v. *IRC (No. 2)* [1979] 2 All E.R. 225, 235–236.
[70] *McPhail* v. *Doulton* [1971] A.C. 424.
[71] See, for example, Hanbury & Martin, *Modern Equity*, 16th ed, by J.E. Martin (London 2001), pp. 210–211.
[72] *Gartside* v. *IRC* [1968] A.C. 553, 605–606; *Re Weir's Settlement* [1969] 1 Ch. 657; *Sainsbury* v. *IRC* [1970] Ch. 712. It is also difficult to contemplate if the class of beneficiaries is very large and they are not all identifiable.
[73] *Halsbury's Laws of England*, 4th ed., vol. 48 para. 633 n. 9 suggests that the beneficiaries' rights are similar to those of a residuary beneficiary under *Commissioner of Stamp Duties (Queensland)* v. *Livingston* [1965] A.C. 694. On this analysis there is no real difference between the rights of a potential beneficiary under a discretionary trust and the rights of a potential appointee under a fiduciary power of appointment. The rights of a potential appointee are only of any less value in so far as he may not be able to force the making of an appointment, although even this may be possible after *Re Mettoy Pension Trustees Ltd.* v. *Evans* [1990] 1 W.L.R. 1587.
[74] *London and South Western Railway Co.* v. *Gomm* (1882) 20 Ch. D. 562, 581.
[75] *Spiro* v. *Glencrown Properties Ltd.* [1991] Ch. 537, 543–544.

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the grantee still acquires a proprietary interest from the outset.[76] However, the grantor retains complete control over the disposal of his land—he can ensure that the contingency is not fulfilled. Authorities dealing with both options and rights of pre-emption[77] would suggest that no proprietary right arises until the grantor has lost control of his land and this would not be until the contingency has been fulfilled. Until then the grantee should, consistently with such authority, be seen as having only contractual rights. However, if that were the case the grantee would not have rights that could bind third parties and he could lose the right to acquire the land, a right he has paid for, through no fault of his own. Thus there is a strong argument in favour of the grantee having a proprietary right, despite the fact it may never be exerciseable.

Rights of Pre-emption

A right of pre-emption is a right of first refusal; the grantor promises that if he decides to sell his land he will first offer it to the grantee. The grantor is not thereby bound to sell at any time or even at all. The grantee is equally not obliged to buy should the grantor decide to sell, but will have the first chance to do so. The grantee will get nothing if the grantor does not decide to sell but there is no doubt as to the property over which he may acquire rights.

The leading authority on the effect of a right of pre-emption is the view of the majority of the Court of Appeal in *Pritchard* v. *Briggs*.[78] It was held that a right of pre-emption is not an interest in land when it is granted because, at this stage, the grantee merely has a hope of acquiring an interest and whether he does so is entirely at the volition of the grantor. However, the view was expressed that a right of pre-emption may become an interest in land at some later time.[79] This will occur if the grantor makes an offer to sell to the grantee, but only if the terms of the right of pre-emption, whether express or implied, require the grantor to keep that offer open for a specific period so that the mechanism of the right of pre-emption is unstoppable.[80] In such a case the grantee

[76] Walton J., *Pritchard* v. *Briggs* [1980] Ch. 338, 362; H.W.R. Wade (1980) 96 L.Q.R. 488, 490; Megarry and Wade, *The Law of Real Property*, 6th ed., by C. Harpum (London 2000), paras. 12–061–12–062; *Barnsley's Land Options*, 2nd ed., by R. Castle, (London 1992), p. 178.

[77] See the discussion of *Pritchard* v. *Briggs* [1980] Ch. 338 below.

[78] [1980] Ch. 338, as applied, for example, by the Court of Appeal in *Bircham & Co., Nominees (2) Ltd.* v. *Worrell Holdings Ltd.* [2001] EWCA Civ 775, (2001) 82 P. & C.R. 427 (Case 34).

[79] See Templeman and Stephenson L.JJ. at pp. 418 and 422 respectively. It was actually put in terms that the right then becomes an option. The general view is that the comments to the effect that the interest can become a proprietary interest were obiter: *London & Blenheim Estates Ltd.* v *Ladbroke Retail Parks Ltd.* [1994] 1 W.L.R .31, 38. Presumably where the right of pre-emption is activated by a contract with or conveyance to a third party the right becomes a proprietary right the moment before the contract or conveyance is effective.

[80] As was the case in *Pritchard* v. *Briggs* [1980] Ch. 338.

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has a right to purchase within that period and can therefore be regarded as having an option and thus an interest in land.[81] Without such a term within the right of pre-emption the grantor can change his mind about selling and withdraw his offer before a binding acceptance.[82] Consequently, although the right of pre-emption has become available, the grantee still has nothing more than a hope of acquiring the land and does not have an option or interest in the land; the grantor has not lost control over the sale of his property.[83] In such a case arguably no equitable interest would be acquired until there was a binding contract for sale. What if the grantor has sold the property to a third party or granted that third party an interest, such as an option, in clear breach of the pre-emption agreement? It would seem that the right of pre-emption then becomes an option to purchase;[84] the grantee acquires a right to insist on buying the property, not just a right of first refusal. There is authority that the same occurs when the grantor enters into a binding contract to sell to a third party,[85] and this is justifiable on the basis that such a contract undoubtedly shows an irrevocable decision to part with the property.[86] In conclusion it seems that a right of pre-emption is never an interest in land but it can become an option to purchase, which is a proprietary interest.

The view of the majority in *Pritchard* v. *Briggs* has been much criticised.[87] It has been argued that it is difficult to distinguish a right of pre-emption from a contingent option which, it is assumed, is a proprietary interest from the moment of its creation.[88] However, it has been argued above that this may not be so where the grantor retains control. There is also the objection that unless the right is proprietary from the outset those third parties who acquire interests in the property after the creation of the right but

[81] Templeman and Stephenson L.JJ., *Pritchard* v. *Briggs* [1980] Ch. 338, 418, 423; Chadwick L.J., *Bircham & Co., Nominees (2) Ltd.* v. *Worrell Holdings Ltd.* [2001] EWCA Civ 775 at paras. [32] and [35], (2001) 82 P. & C.R. 427 (Case 34).

[82] *Tuck* v. *Baker* [1990] 2 E.G.L.R. 195, CA.

[83] *Bircham & Co., Nominees (2) Ltd.* v. *Worrell Holdings Ltd.* [2001] EWCA Civ 775, (2001) 82 P. & C.R. 427 (Case 34).

[84] Templeman L.J., *Pritchard* v. *Briggs* [1980] Ch. 338, 419, discussing the grant of an option.

[85] Templeman L.J., *Pritchard* v. *Briggs* [1980] Ch. 338, 418–419; *Kling* v. *Keston Properties Ltd.* (1983) 49 P. & C.R. 212; *Bircham & Co., Nominees (2) Ltd.* v. *Worrell Holdings Ltd.* [2001] EWCA Civ 775 at [36], (2001) 82 P. & C.R. 427 (Case 34).

[86] The courts will prevent the sale taking place (*Manchester Ship Canal Co.* v. *Manchester Racecourse Co.* [1901] 2 Ch. 37), but arguably that should not allow the grantor to change his mind.

[87] These criticisms have been recognised by the courts in *London & Blenheim Estates Ltd.* v. *Ladbroke Retail Parks Ltd.* [1994] 1 W.L.R. 31, 38 and *Dear* v. *Reeves* [2001] EWCA Civ 277 at para. [43], [2001] 3 W.L.R. 662. In the latter case the Court of Appeal expressed the view that the law may require reconsideration in the light of these criticisms.

[88] Albery (1973) 89 L.Q.R. 462, 463; Wade (1980) 96 L.Q.R. 488; Megarry & Wade, *The Law of Real Property*, 6th ed., by C. Harpum (London 2000) paras. 12–061–12–062 (as cited in *Dear* v. *Reeves* [2001] EWCA Civ 277 at paras. [32]–[33], [2001] 3 W.L.R. 662). See also Walton J., *Pritchard* v. *Briggs* [1980] Ch. 338, 362.

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before it has become a proprietary interest will not be bound by it even if they knew of it. Depending on the precise terms of the agreement, some disposals of the property or an interest in it will not activate the right of pre-emption. This seems to include a gift or other voluntary transfer,[89] a mortgage,[90] the grant of an option which is not inconsistent with the right of pre-emption,[91] and the transfer on the death of the grantor.[92] There is also an objection in principle to interests that can change their nature.[93]

There are obviously two other approaches that could be taken in this situation. The first is to regard the rights of the grantee as only contractual at all times. The second is to treat a right of pre-emption as proprietary from the outset. The first of these was favoured by Goff L.J. in *Pritchard* v. *Briggs* because the grantee has no right to call for a conveyance, the interest is subject to the volition of the grantor and the interest should be of the same nature throughout.[94] Other judges and academics favour the latter approach[95] primarily for the reasons discussed above.[96] The Law Commission proposes that in registered land any right of pre-emption granted on or after the coming into effect of the Land Registration Bill should be of proprietary effect from the moment of creation.[97]

Is a proprietary interest necessary? A contractual right enables the grantee to apply for an injunction to prevent a proposed sale to

[89] *Governors of Peabody Donation Fund* v. *London Residuary Body* (1988) 55 P. & C.R. 355, 360. On the other hand, it was held in *Gardner* v. *Coutts & Co.* [1968] 1 W.L.R. 173 that a gift of the property will be regarded as a breach of an implied term not to act so as to defeat the right. Although the court was only asked to award damages against the grantor, the judgment suggested that the right of pre-emption would become exercisable in such a case. However, it is arguable that despite the generality of statements made at pp. 178–179 the terms of the right were important, in particular the fact that the right was exercisable not only if the grantor wanted to sell in his lifetime, but also on his death if he was still the owner. This suggests that he had no wish that anyone else should have that property. In other cases it is conceivable that the grantor would wish the property to remain in the family unless he had a need or a particular desire to sell for his own benefit.

[90] Assumed to be the position in *Barnsley's Land Options*, 2nd ed., by R. Castle, (London 1992), p. 163 and in Law Com. No. 254, *Land Registration for the Twenty-first Century: a Consultative Document* (1998), para. [3.31] on the grounds this does not indicate a desire to sell.

[91] *Pritchard* v. *Briggs* [1980] Ch. 338.

[92] Assumed in Megarry & Wade, *The Law of Real Property*, 6th ed., by C. Harpum (London 2000), para. [12–063].

[93] Goff L.J., *Pritchard* v. *Briggs* [1980] Ch. 338, 396. Stephenson L.J. did not share these concerns—see p. 423. Perhaps the interest does not change its nature, but instead becomes a different interest—see the discussion above.

[94] [1980] 1 Ch. 338, 388–389, 396.

[95] For example Walton J. at first instance in *Pritchard* v. *Briggs* [1980] Ch. 338; *Birmingham Canal Co.* v. *Cartwright* (1879) 11 Ch. D. 421; Megarry & Wade, *The Law of Real Property*, 6th ed., by C. Harpum (London 2000), paras. 12–061–12–063; Wade (1980) 96 L.Q.R. 488.

[96] In addition, it is generally thought that the actual outcome in *Pritchard* v. *Briggs* was very unfortunate for the grantees who, having acquired the property pursuant to their right of pre-emption, then had to sell it to the holder of a later granted option for a sum considerably less than they paid.

[97] Law Com. No. 271, *Land Registration for the Twenty-first Century: a Conveyancing Revolution* (2001), paras. [5.26]–[5.28].

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a third party,[98] or to damages.[99] There has been some discussion as to whether the grantee is entitled to apply for a mandatory injunction to compel an offer,[100] but this would only be effective where the offer, once made, cannot be revoked, at least for a certain period. In addition it would not be available against a third party. It is also suggested that a successor in title to the land could be liable for the tort of wrongfully inducing a breach of contract if he had knowledge of the right.[101] However, on the whole, these remedies will not give the grantee the land, and he has paid for the opportunity of acquiring it. There is therefore a strong case in principle for the interest being proprietary from the outset.

Rights Dependent on the Court's Discretion

Proprietary Estoppel

Proprietary estoppel arises where there have been acts by a claimant in reliance on a mistaken belief as to his present or future rights in land where the mistaken belief has been created or expressly or impliedly encouraged by the landowner and the claimant would suffer detriment if the landowner were allowed to enforce his strict legal rights. Proprietary estoppel gives to the claimant a right to go to court and seek a remedy.

The remedy is at the discretion of the court[102] and although the court will in most cases give effect to claimant's expectation[103] that is not inevitable. There can be no certainty before a court order what remedy, if any, will be granted, whether it will be a proprietary interest and what that proprietary interest will be. The courts have awarded compensation rather than an interest in land, even where it would have been possible to have awarded an interest in land.[104] The courts have sometimes refused to award any remedy

[98] Even when there is a binding agreement to sell to the third party: *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.* [1901] 2 Ch. 37.

[99] *Gardner* v. *Coutts & Co.* [1968] 1 W.L.R. 173.

[100] See A. Everton, "Towards a Concept of Quasi-Property" [1982] Conv. 118, 181–183. Megarry and Wade, *The Law of Real Property*, 6th ed., by C. Harpum (London 2000), para. [12–013] and *Barnsley's Land Options*, 2nd ed., by R. Castle (London 1992), p. 172 both find authority in support of such a remedy.

[101] Which he would have if the interest were registered. See J. Martin, "The Right of Pre-emption: a Potential Proprietary Interest?" [1980] Conv. 433, 441–442.

[102] For a discussion of the extent of the courts' discretion see S. Gardner, "The remedial discretion in proprietary estoppel" (1999) 115 L.Q.R. 438.

[103] See the discussion of the cases by E. Cooke, "Estoppel and the protection of expectations" (1997) 17 L.S. 258. See also R. Smith, "How Proprietary is Proprietary Estoppel?", Chapter 11 in F.D. Rose (ed.) *Consensus Ad Idem* (London 1996), pp. 235, 239–243 discussing how wide the discretion actually is. It is not relevant for the purposes of this article whether the doctrine of proprietary estoppel is reliance based or expectation based; the important point is that in some cases the expectation of the claimant will not be fulfilled.

[104] *E.g. Dodsworth* v. *Dodsworth* (1973) 228 E.G. 1115, CA; *Baker* v. *Baker* [1993] 2 F.L.R. 247, CA. This is generally so that the parties are not forced to live together or to avoid the application of the Settled Land Act 1925. The latter is no longer a problem since the Trusts

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at all where it was felt that the claimant has already received sufficient benefit[105] or because of the circumstances of the parties[106] or the behaviour of the claimant.[107] There is, of course, no doubt as to the land over which an interest may be awarded. In addition, in most cases it is possible to identify in advance the interest itself that might be granted. However, this is not possible in all cases. For example, the expectation may be somewhat vague[108] and a belief of a home for life has been dealt with in various ways by the courts.[109] In a very few cases a proprietary interest completely different from that expected has been granted[110] and in one case the interest was accelerated.[111] Having said all that, it is probably fair to say that the claimant will usually get an interest to satisfy his expectation unless there is good reason otherwise.

It is clear from the authorities that a claimant has some rights even before a court has recognised his claim and granted him a remedy: there are a number of authorities in which it has been said that a claimant acquires an equity to prevent the other party enforcing his strict legal rights.[112] This equity would seem to arise from the moment the claimant acts in reliance on the expectation.[113] It is possible that the equity will not remain in

of Land and Appointment of Trustees Act 1996. See also *Gillett* v. *Holt* [2001] Ch. 210, CA where the claim related to a number of properties and compensation was awarded instead of interests in some of them. The compensation may be for reliance (as in *Dodsworth* v. *Dodsworth*) or for loss of expectation (as in *Gillett* v. *Holt*). The latter was an unusual case because the claimant actually received an accelerated interest: he had been promised that he would inherit property on the landowner's death whereas the action was brought and the remedy awarded during his lifetime.

[105] *Appleby* v. *Cowley*, *The Times*, 14 April 1982; Hobhouse and Roch L.JJ., *Sledmore* v. *Dalby* (1996) 72 P. & C.R. 196, 204, 207, 209.

[106] Roch L.J., *Sledmore* v. *Dalby* (1996) 72 P. & C.R. 196, 204.

[107] *J. Willis & Son* v. *Willis* [1986] 1 E.G.L.R. 62, CA. See also dicta in *Williams* v. *Staite* [1979] Ch. 291, 299, 300–301, CA.

[108] See, for example, *Inwards* v. *Baker* [1965] 2 Q.B. 29, CA.

[109] For example, by the award of the fee simple in *Pascoe* v. *Turner* [1979] 1 W.L.R. 431, CA, negative protection in *Inwards* v. *Baker* [1965] 2 Q.B. 29, CA, an encouragement to negotiate a long lease at a low rent in *Griffiths* v. *Williams* (1977) 248 E.G. 947, CA.

[110] *Holiday Inns Inc.* v. *Broadhead* (1974) 232 E.G. 951 (co-ownership behind a trust for sale rather than the building lease which was now impossible. The aim was primarily for monetary compensation secured on land—see pp. 1096–1097).

[111] *Gillett* v. *Holt* [2001] Ch. 210, CA. This avoided the problem that would usually occur in the case of an expectation of inheriting on death when the action is brought during the landowner's lifetime of the court needing to grant an interest which is itself floating in order that the landowner has freedom to deal with his property as he wishes during his lifetime. (See *Re Basham* [1986] 1 W.L.R. 1498 where the action was brought after the landowner's death, but the view was expressed that a constructive trust like the one that arises in cases of mutual wills arose during the landowner's lifetime.) Such avoidance can only work in a case like the present where the landowner owned a substantial amount of property.

[112] *E.g. Crabb* v. *Arun D.C.* [1976] Ch. 179, 187–188, 192–193, CA.

[113] See for example *Voyce* v. *Voyce* [1991] 62 P. & C.R. 290 in which it was made clear that the claimant was the equitable owner well before the landowner tried to evict him, and numerous dicta which state that the equity is raised by reliance on an expectation *e.g.* Lord Denning M.R., *Crabb* v. *Arun D.C.* [1976] Ch. 179, 188. It has been suggested that the right arises only when the owner of the property seeks to enforce his strict legal rights unconscionably (K. Gray and S.F. Gray, *Elements of Land Law*, 3rd ed., (London 2001), p. 773) but there is little authority in support of this and it would be inconsistent with the cases in which an

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existence from the moment it arises until any court order. It has already been pointed out that the courts have refused to award a remedy where they feel that the claimant has already received sufficient benefit as compensation for reliance. The authorities suggest that the equity may well have expired before the action was brought before the court.[114] Similarly, the fact that the remedy will be affected by the circumstances of the parties suggests an equity which may fluctuate over time.[115]

The important issue is the nature of the equity from its creation until there is a court order. Is it a personal or proprietary interest? This is a controversial issue that cannot be said to have been finally settled by the courts.[116] However, despite some authority to the contrary,[117] the weight of authority is to the effect that the claimant has a proprietary interest prior to any court order[118] that is capable of binding the landowner's successors in title.[119] However, even on the assumption there is a proprietary interest before any court

equity has been asserted against successors in title—on Gray's view the equity would not have existed when they acquired the land so it is difficult to see how it could later be asserted against them. P Milne, "Proprietary estoppel, purchasers and mortgagees: an alternative approach" (1997) 5 Web J.C.L.I. suggests that the equity only arises when it would be unconscionable for the landowner to assert his strict rights but arguably if that requires something other than fulfilment of the requirements of proprietary estoppel it is too vague.

[114] In *Appleby* v. *Cowley*, *The Times*, 14 April 1982 the court was not prepared to say whether the decision was based on a failure to establish proprietary estoppel or a refusal to grant a remedy. However, it is clear that the court would have granted a remedy had the action been brought shortly after the reliance. In *Sledmore* v. *Dalby* (1996) 72 P. & C.R. 196, 209 Hobhouse L.J. referred to the equity being long exhausted and there being no estoppel. Roch L.J. was less clear: at p. 204 he referred to it being no longer inequitable for the landowner to enforce his rights whereas at p. 205 he referred to the minimum equity to do justice as an equity which has now expired.

[115] Roch L.J., *Sledmore* v. *Dalby* (1996) 72 P. & C.R. 196, 204. This case has been criticised by J.E. Adams [1997] Conv. 458, 463–464. A similar notion of an equity that may fluctuate over time is put forward by P. Milne, "Proprietary estoppel, purchasers and mortgagees: an alternative approach" (1997) 5 Web J.C.L.I. in the context of an argument the equity only arises when it would be unconscionable for the landowner to assert his rights.

[116] See Megarry and Wade, *The Law of Real Property*, 6th ed., by C. Harpum (London 2000), para. [13]–[028]. There has been much academic discussion. See, for example, K. Gray and S.F. Gray, *Elements of Land Law*, 3rd ed., (London 2001), pp, 1021–1024; G. Battersby, "Contractual and Estoppel Licences as Proprietary Interests in Land" [1991] Conv. 36, 45; D.J. Hayton, "Developing the Law of Trusts for the 21st Century" (1990) 106 L.Q.R. 87, 97; P. Ferguson "Constructive trusts—a note of caution" (1993) 109 L.Q.R. 114, 121–123.

[117] *United Bank of Kuwait plc* v. *Sahib* [1997] Ch. 107, 142, CA.

[118] Dillon L.J., *Voyce* v. *Voyce* (1991) 62 P. & C.R. 290, 294; Nourse L.J., *Sen* v. *Headley* [1991] Ch. 425, 439–440; *Birmingham Midshires Mortgage Services Ltd.* v. *Sabherwal* (2000) 80 P. & C.R. 256, 262.

[119] *Dodsworth* v. *Dodsworth* (1973) 228 E.G. 1115, CA (personal representatives); *Greasley* v. *Cooke* [1980] 1 W.L.R. 1306 (heirs); *Sledmore* v. *Dalby* (1996) 72 P. & C.R. 196 (donee). The authority in favour of purchasers being bound is less strong (see, for example, the criticisms of *E.R. Ives Investments Ltd.* v. *High* [1967] 2 Q.B. 379, CA by G. Battersby, "Contractual and Estoppel Licences as Proprietary Interests in Land" [1991] Conv. 36, 39–41 and in *United Bank of Kuwait plc* v. *Sahib* [1997] Ch. 107, 142) but nonetheless exists (see S. Baughen, "Estoppels over land and third parties. An open question?" (1994) 14 L.S. 147, 148–151 for a discussion of the pre-1926 authority and see also the collection of authorities by R. Smith, "How Proprietary is Proprietary Estoppel?", Chapter 11 in F.D. Rose (ed.), *Consensus Ad Idem* (London 1996), pp. 235, 237–238) and is accepted as probably determinative: Morritt L.J., *Lloyds Bank plc* v. *Carrick* [1996] 4 All E.R. 630, 642. See also Roch L.J., *Sledmore* v. *Dalby* (1996) 72 P. & C.R. 196, 201.

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order, its nature remains unclear. There are arguably three possibilities: that the claimant has a defeasible interest in the nature of the interest promised or expected; that he will retrospectively be recognised as having an interest; or that he has simply an inchoate equity. These three possibilities need further consideration.

The first possibility is that the estoppel creates an equitable interest[120] in the nature of the interest expected by the claimant. This interest is defeasible in the event that the court awards a different remedy. If the court fulfils the expectation the interest will continue, though it may be subsumed under the court's award. There does seem to be some support in the cases for such an approach.[121] There are problems with it. If the expectation is vague, such as the expectation of a home for life, it would not be possible to say with certainty what proprietary interest the claimant expected or the court is likely to award. Such an approach also does not seem to fit with the discretion of the court to award whatever is the appropriate remedy. It suggests a prima facie satisfaction of the claimant's expectation. Although that may be what happens in practice, the judges still assert their discretion in the matter. This approach could lead to an odd situation if, as sometimes happens, the court were to award a different proprietary interest than that expected. Any successor in title would surely remain bound, but it would be by a different interest from that which originally bound him. Finally, the interest would not only be defeasible depending on the court's award, but may also come to an end automatically should it become no longer inequitable for the landowner to assert his rights,[122] which is arguably too vague an occurrence.

The second possibility is that in the event that the court awards the claimant an interest in property that award will operate retrospectively. There is little that supports such an approach[123] and there is authority against in cases which suggest there are some

[120] It will have to be equitable because of the lack of formalities.

[121] *Re Basham* [1986] 1 W.L.R. 1498, 1509; Nourse L.J., *Sen* v. *Headley* [1991] Ch. 425, 439–440. Comments in *Birmingham Midshires Mortgage Services Ltd.* v. *Sabherwal* (2000) 80 P. & C.R. 256, 262 also seem to support this approach where it is said that the claimant would get equitable rights of a proprietary nature although these would be more precarious than the rights acquired under a resulting trust. There would also seem to be some unarticulated support in the cases in which the remedy granted by the court was a declaration which recognised that the claimant already had the interest in the property: *Duke of Devonshire* v. *Eglin* (1851) 14 Beav. 530; *Unity Joint Stock Mutual Banking Assocn.* v. *King* (1858) 25 Beav. 72; *Plimmer* v. *Mayor of Wellington* (1884) 9 App. Cas. 699; *Holiday Inns Inc.* v. *Broadhead* (1974) 232 E.G. 951 (where the interest granted was different from that expected); *Pascoe* v. *Turner* [1979] 1 W.L.R. 431, CA; *Greasley* v. *Cooke* [1980] 1 W.L.R. 1306, CA; *Taylors Fashions Ltd.* v. *Liverpool Victoria Trustees Co. Ltd.* [1982] Q.B. 133.

[122] See the discussion above at text to notes 114–115.

[123] There may be support by Dillon L.J. in *Voyce* v. *Voyce* (1991) 62 P. & C.R. 290, 294 but it is not entirely clear.

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rights before a court order[124] and the fact that successors in title have been held bound even where the court does not award a proprietary interest.[125] This is not a theoretically attractive approach. P. Ferguson points out that if the court were to award a legal interest it is difficult to see how it could be effective retrospectively before the existence of a deed and there should not be a difference in effect between a legal and equitable interest granted by a court.[126] Also, in theory, a court could not award compensation or a licence rather than a recognised property interest against a successor, even if this seemed to be the fairest remedy, because there would then retrospectively never have been an interest in the property that could have bound him.

The final possibility is that the claimant is regarded as having a distinct equity from the outset. This equity is basically a right to go to court for a remedy and it is itself a proprietary interest. There is support for such an approach in the cases.[127] This is arguably the most acceptable approach: it avoids the problems of the other two approaches; it is consistent with the authorities and in particular with the frequent references to "an equity" arising; and it clearly recognises that until a court order a claimant has only a right to request a remedy, which is a right different in nature to that the court can award. It remains to be determined whether it is classified as an equitable interest or a mere equity.[128] One issue that remains is whether the equity automatically comes to an end once there is a court order.[129] Generally there will be no need or wish to rely on it once there has been a court order. However, if the court neither clearly awards a proprietary interest nor refuses one[130] the claimant might still wish to rely on the equity as against successors.

Does the claimant need a proprietary interest? The courts will, in an appropriate case, award compensation instead of a

[124] *E.g. Griffiths* v. *Williams* (1978) 248 E.G. 947, 949; *Williams* v. *Staite* [1979] Ch. 291, 300–301.

[125] *Inwards* v. *Baker* [1965] 2 Q.B. 29, CA.

[126] "Constructive Trusts—a Note of Caution" (1993) 109 L.Q.R. 114, 122.

[127] Lord Denning M.R. in *Crabb* v. *Arun DC* [1976] Ch. 179, 188, in *Greasley* v. *Cooke* [1980] 1 W.L.R. 1306, 1311, in *E.R. Ives Investments Ltd.* v. *High* [1967] 2 Q.B. 379, 394, 395; Scarman L.J. in *Crabb* v. *Arun DC* [1976] Ch. 179, 192–193; Danckwerts L.J. in *Inwards* v. *Baker* [1965] 2 Q.B. 29, 38 cited by himself in *E.R. Ives Investments Ltd.* v. *High* at p. 400; Winn L.J. in *E.R. Ives Investments Ltd.* v. *High* at p. 405; *Griffiths* v. *Williams* (1978) 248 E.G. 947, 949. See also R. Smith, "How Proprietary is Proprietary Estoppel?", Chapter 11 in F.D. Rose (ed.), *Consensus Ad Idem*, (London 1996), pp. 235, 244.

[128] S. Baughen, "Estoppels over land and third parties. An open question?" (1994) 14 L.S. 147, 154 suggests it is too inchoate to be an equitable interest and analyses it as a mere equity coupled with whatever estate or interest the court chooses to grant. However, it would then be purely a personal equity if the court chose not to grant a proprietary interest. This issue is discussed further below.

[129] *Williams* v. *Staite* [1979] Ch. 291, CA suggests it does not as a purchaser was considered bound by an equity to stay awarded in earlier proceedings.

[130] As for example in *Inwards* v. *Baker* [1965] 2 Q.B. 29, although such a result is much less common now.

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proprietary interest. The courts have calculated compensation on the basis of the claimant's expectation.[131] In *Wayling* v. *Jones* the Court of Appeal awarded compensation against personal representatives who no longer had the property.[132] This has been criticised elsewhere on the ground that proprietary estoppel allows for a claim to an interest in land and should only be successful against the owner of that land,[133] but, if followed, would allow for an award of damages against the original landowner whenever he has disposed of the property. Therefore, the claimant would never be without remedy. However, damages would not have been an adequate remedy in many of the cases, most obviously where the claimant relied on having a right of access over his neighbour's land.[134] Of course, if *Wayling* v. *Jones* is not followed the claimant could only have a remedy where the original landowner has parted with the land if he has an interest which will bind successors in title. Finally, it must not be forgotten that this is a situation where the claimant has acted to his potential detriment in reliance on possessing or acquiring a proprietary interest.

Obviously any purchaser would argue that it would not be fair if he were bound by an amorphous interest but in most cases its existence will be discoverable and the purchaser could insist that the situation be resolved before the purchase. It is conceivable that in exercising its discretion in choosing the appropriate remedy the courts could take into account the fact the action is against an innocent third party.[135] Moreover, the equity can, where appropriate, be overreached.[136] Finally the Law Commission[137] proposes that proprietary estoppel should be regarded as giving rise to an interest in registered land from the moment it arises.

Contract for the Sale or Creation of an Interest in Land

Since a contract is binding it undoubtedly shows the final intention of the landowner to create or convey an interest in his property to the other party. There still remains some uncertainty as to whether

[131] *Baker* v. *Baker* [1993] 2 F.L.R. 247; *Wayling* v. *Jones* (1995) 69 P. & C.R. 170, CA. This was also the effective outcome in *Holiday Inns Inc.* v. *Broadhead* (1974) 232 E.G. 951.

[132] *Wayling* v. *Jones* (1995) 69 P. & C.R. 170, CA. This was not on the basis of tracing: see Balcombe L.J. at p. 175 confirming the decision of the judge. See also C.J. Davis [1995] Conv. 409, 413–414.

[133] C.J. Davis [1995] Conv. 409, 413–414.

[134] Compensation would probably have been inadequate in cases such as *Crabb* v. *Arun DC* [1976] Ch. 179 and *E.R. Ives Investments Ltd.* v. *High* [1967] 2 Q.B. 379. In other cases, such as those where the expectation is of inheriting another's estate, compensation may well be adequate.

[135] Although, as P. Critchley points out in "A via media for estoppel and third parties" [1998] Conv. 502, 507 the purchaser may still lose the costs of the action.

[136] *Birmingham Midshires Mortgage Services Ltd.* v. *Sabherwal* (2000) 80 P. & C.R. 256.

[137] Law Com. No. 271, *Land Registration for the Twenty-first Century: a Conveyancing Revolution* (2001), para. [5.31].

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the interest will finally be acquired because if the landowner refuses to complete any decree of specific performance is at the discretion of the court. However, there seems to be a presumption in favour of granting specific performance of a contract relating to land: it will be granted unless there is a strong reason otherwise.[138]

An equitable interest in the nature of that contracted to be created or conveyed arises from the moment the contract is specifically enforceable.[139] It is sufficient that "the subject-matter of the agreement [is] property of which specific performance would normally be decreed by the court".[140] The equitable interest therefore will arise once the contract has been validly created. It does not merely arise retrospectively once there has been an award of specific performance. In theory it must be a defeasible interest until full consideration has been paid.[141] It does not seem to fluctuate from time to time as circumstances occur which would mean specific performance would not be granted.[142] It seems only right that a contract gives rise to a proprietary interest because the purchaser has paid for the right to acquire that particular property.

A Choice by the Claimant

Equitable Proprietary Claims when Tracing Value into Substitute Property

The equitable owner of property can follow that property into whosesoever hands it falls and enforce his equitable interest against subsequent owners of that property provided that his interest has not been overreached[143] and that the defendant cannot claim to be, or to claim through, a bona fide purchaser of a legal estate for value without notice.[144] Alternatively, an equitable owner can trace the value of that property into substitute property[145] and claim a

[138] See Hanbury & Martin, *Modern Equity*, 16th ed., by J.E. Martin (London 2001), p. 716. Proprietary estoppel may be a situation where the courts enforce the expectation unless there is a good reason otherwise, but, by contrast with enforcement of a contract, there are a lot of factors that may justify non-enforcement.

[139] *Walsh* v. *Lonsdale* (1882) 21 Ch. D. 9, 14–15; *Oughtred* v. *IRC* [1960] A.C. 206, 227; *Neville* v. *Wilson* [1997] Ch. 144, CA; *Lloyds Bank plc* v. *Carrick* [1996] 4 All E.R. 630, 637, CA.

[140] Lord Radcliffe, *Oughtred* v. *IRC* [1960] A.C. 206, 227. The actual availability of specific performance seems not to be questioned: see S. Gardner, "Equity, Estate Contracts and the Judicature Acts: Walsh v. Lonsdale Revisited" (1987) 7 O.J.L.S. 60, 68 *et seq.*

[141] Once full consideration has been paid it seems that the vendor holds on a bare trust for the purchaser and the latter's rights are no longer dependent on specific performance: *Bridges* v. *Mees* [1957] Ch. 475, 484; Morritt L.J., *Lloyds Bank plc* v. *Carrick* [1996] 4 All E.R. 630, 637, 638, 641.

[142] See the analysis of the cases by S. Gardner, "Equity, Estate Contracts and the Judicature Acts: Walsh v. Lonsdale Revisited" (1987) 7 O.J.L.S. 60, 70–73.

[143] Under Law of Property Act 1925, s. 2(1).

[144] Or a transferee of registered land or a legal estate therein for valuable consideration under Land Registration Act 1925, ss. 20, 23 where relevant.

[145] The proceeds of sale of the original property or anything bought with those proceeds of sale.

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proprietary interest in that substitute property. Such a claim can be asserted as of right, subject only to the defence of bona fide purchaser for value without notice.[146] Generally the available proprietary interest is complete or partial beneficial ownership of the substitute property. However, where a claim is brought against a wrongdoer, or someone claiming through a wrongdoer, the claimant has the option of beneficial ownership or an equitable charge or lien. In addition, where the claimant's money has been used to alter, improve or maintain another's asset only a lien may be available.[147] A claimant might obviously have the option of asserting a claim to his original property or to one or more substitute properties.[148] In this situation the claimant has complete control over whether or not he asserts a claim over any particular property and, where there is a choice, what proprietary interest he claims. No-one, not even the courts, has the power to remove property from the ambit of his claim. The uncertainty before he successfully asserts a claim exists because he sometimes has a choice as to what proprietary interest he wants and because he may also have a choice as to the property over which he can assert a claim. Obviously, he can only recover once.

There seems to be no doubt that the claimant retains equitable ownership of the original property at all times. However, once the claimant has successfully asserted a right over substitute property he will no longer be able to enforce his rights over the original property. In practice, therefore, his rights are automatically defeasible in such an event. However, in theory there is arguably no change in the nature of his rights.

There has been more consideration in the cases of the claimant's rights in the substitute property. There seems to be no doubt that the claimant has a proprietary interest of some kind from the moment of substitution. The issue is whether he has an equitable

[146] Lords Browne-Wilkinson, Hoffmann, Hope and Millett, *Foskett* v. *McKeown* [2001] 1 A.C. 102, 108–109, 115, 118, 127–129. Their Lordships were consequently of the view that there is no discretion in the courts as to whether a remedy is available. However, Lord Browne-Wilkinson at p. 109 does suggest that fairness may be a relevant consideration in the case of money spent on the property of another. It is not clear how. It said there might be no proprietary interest if it would be unfair—is that because tracing is impossible or because a defence is available?

[147] This is certainly true where the money was used by an innocent volunteer: *Foskett* v. *McKeown* [1997] 3 All E.R. 392, CA and Lord Browne-Wilkinson [2001] 1 A.C. 102, 109. It may also be the only remedy available against a wrongdoer: see the comments by Sir Richard Scott V.-C. and Hobhouse L.J. in the Court of Appeal at pp. 404, 415–416.

[148] There may also be a choice of properties. For example, if a wrongdoer mixes the claimant's money with his own in a bank account and then makes withdrawals to purchase assets the claimant may have a choice between the assets bought or any money remaining in the account, though the point is not settled. See Hanbury & Martin, *Modern Equity*, 16th ed., by J.E. Martin (London 2001), pp. 694–695. Generally there will not be an option because the original property, and perhaps its original substitutes, will have been acquired by someone who can rely on the bona fide purchaser defence.

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interest or simply the power to alter the ownership of the property, which is regarded as a mere equity, although one that is capable of binding successors in title.[149] There is some authority in favour of both possibilities, but the weight of authority seems to support the existence of an equitable interest.[150] This will again be defeasible should the claimant successfully assert an inconsistent claim.

The most explicit support for a mere equity rather than an equitable interest has rested on a desire to protect purchasers of equitable interests from undiscoverable interests.[151] However, there is undoubtedly much to be said for the view that the claimant should not have a weaker interest in the substitute property than he had in the original property, particularly where his only possible claim is against that substitute property.[152] The issue as to whether there should be an equitable interest or only an equity has been the subject of much academic discussion.[153] Objections to the recognition of an equitable interest include the possibility that the claimant could have a multiplication of vested interests in the original property and a succession of substitute properties[154] but even if the claimant has only an equity he still has a multiplication of rights that can bind successors in title. The references to the claimant having an equitable interest in the substitute property seem to assume that he has a recognised equitable interest, in other words equitable ownership. However, in certain circumstances the claimant has a choice of remedy between beneficial ownership or an

[149] *Re Ffrench's Estate* (1887) 21 L.R.(Ir.) 283, 312.

[150] The main authority in support of there being an equitable interest is the decision of Fry J. in *Cave* v. *Cave* (1880) 15 Ch. D. 639 and statements made in the House of Lords in *Foskett* v. *McKeown* [2001] 1 A.C. 102 by Lord Browne-Wilkinson at p. 108, Lord Hoffmann at pp. 115–116 and Lord Millett at pp. 127 and 130. The clearest statements are by Lord Millett who said at p. 127 the "beneficiary of a trust is entitled to a continuing beneficial interest not merely in the trust property but in its traceable proceeds also". However, the comments were only dicta as the action was against volunteer successors in title of the wrongdoer, the issue was not raised directly and there was no question of multiplication of interests, which is the major objection to this approach. The authority in support of a mere equity is, however, much weaker, consisting of the Irish decision in *Re Ffrench's Estate* (1887) 21 L.R.(Ir.) 283, 312 and rather vague dicta by Lord Goff in *Lipkin Gorman* v. *Karpnale Ltd.* [1991] 2 A.C. 548, 573 and Millett J. in *El Ajou* v. *Dollar Land Holdings plc* [1993] 3 All E.R. 717, 737. See also the cases relied on by the authors in note 153.

[151] See *Re Ffrench's Estate* (1887) 21 L.R.(Ir.) 283, 312.

[152] An approach that seems to underlie *Foskett* v. *McKeown* [2001] 1 A.C. 102 and the analysis of the situation as vindicating existing property rights.

[153] *E.g.* P. Birks, "Mixing and Tracing: Property and Restitution" (1992) 45 C.L.P. 69, 89–95; P. Birks (ed.), *Laundering and Tracing* (Oxford 1995), pp. 307–311; L.D. Smith, *The Law of Tracing* (Oxford 1997), pp. 356–361; R.D. Pearce and J. Stevens, *The Law of Trusts and Equitable Obligations*, 2nd ed., (London 1998), pp. 784–786; S. Worthington, *Proprietary Interests in Commercial Transactions* (Oxford 1996), p. 175.

[154] See P. Birks, "Mixing and Tracing: Property and Restitution" (1992) 45 C.L.P. 69, 95. It might also not be clear when rights have determined as a consequence of a successful assertion of other rights. There is a possible problem should it be necessary to be able to assert an equitable proprietary interest at every link of the chain, which a power might avoid: P. Birks (ed.), *Laundering and Tracing*, (Oxford 1995), pp. 309–310.

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equitable lien.[155] If he is to be regarded as having a recognised equitable interest before he makes his choice, what is that equitable interest? There seem to be two possibilities: the claimant might have primarily a beneficial interest which he can convert into an equitable lien; or the claimant might be regarded as having two co-existing interests and he must choose which one to enforce. Dicta by Lords Browne-Wilkinson and Hoffmann in *Foskett* v. *McKeown* would seem to suggest that it is the first possibility; they both envisaged the beneficial interest in the original property moving over to the substitute property.[156] There were similar comments by Lord Millett,[157] although further comments by him give some support to the second possibility.[158] Neither possibility is altogether desirable. The objections to an interest which can change its nature were discussed in relation to proprietary estoppel, although in the context of tracing, whatever the ultimate interest, whether a beneficial interest or a lien, the defendant is subject to the same ultimate burden—a claim to a proportion of the proceeds of sale and the certainty that the property will be sold. On the other hand, if the claimant has two co-existing interests, what if the defendant can claim to take free of one of them?[159] This suggests a strong argument in favour of analysing the right as an amorphous right which can give rise to an identifiable interest in land at the option of the claimant,[160] but until then can itself bind successors in title. It would thus seem to be comparable with the interest acquired through proprietary estoppel. It is most likely a mere equity.

This is an area where the courts have decided that a proprietary remedy is appropriate. Although there will be a wrongdoer against whom the claimant could assert a personal claim that wrongdoer may be insolvent or have disappeared. There may be no possibility of a personal claim against the person with the property.[161] In principle there seems to be no reason why there should not be a proprietary interest: the property is identifiable and the existence of

[155] In addition, the available remedy may change down a chain of substitutions depending on what the money or proceeds of sale are spent on: P. Birks (ed.), *Laundering and Tracing* (1995), p. 310.

[156] [2001] 1 A.C. 102, 108, 115–116.

[157] At p. 127.

[158] At pp. 130, 131. He referred to the beneficiary choosing to assert his beneficial ownership or to enforce an equitable lien but gave undoubted primacy to the beneficial interest.

[159] This would only conceivably be a problem where title to the land is unregistered and the lien is presumably registrable as a C(iii) land charge under the Land Charges Act 1972 and the beneficial interest is dependent on overreaching and the doctrine of notice. In registered title both interests would need protection by registration or actual occupation so as to activate Land Registration Act 1925, s. 70(1)(g).

[160] With prospective effect only.

[161] If he is not a wrongdoer, liability must be established under dishonest assistance in a breach of trust or breach of fiduciary duty or under "knowing receipt" which requires some degree of knowledge and unconscionability, not just receipt of property.

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the interest is not dependent on the acts of another. Moreover, the fact that the claimant had a proprietary interest in the original property is a strong reason in favour of a proprietary interest in the substitute property.

Comparisons and Conclusions

The Range of Responses by the Courts and the Justifications Given; Consistency

On the whole the approach of the courts has been to analyse the rights that the claimant has in the property: the strength of those rights and the retention or loss of control by the landowner. Sometimes, but rarely, other factors such as the inability to identify the property affected have been relevant. The provision of consideration has not generally been a relevant consideration in determining the nature of the rights acquired. Throughout there is an obvious need for a balancing act between freedom for the owner of property until the claimant acquires full proprietary rights and protection for the claimant in the interim period. Any protection or rights afforded to the claimant will, of course, impose restrictions on the owner of the property, to a greater or lesser degree.

The results of the cases can be placed in four categories: no rights for the claimant; personal rights only; some kind of inchoate or floating right, which is probably proprietary;[162] and an immediate proprietary interest, which is generally defeasible and may also be contingent. A comparison of the strength of the claim, the freedom that the property owner retains and the rights recognised and enforced by the courts shows a substantial degree of consistency between the various situations. However, it must not be forgotten that in some of the situations considered above the law is uncertain, or the full effect of the rights recognised by the courts is unclear, or there are some aspects of the law that are subject to criticism.

The first possibility is where the owner of property is regarded as having complete freedom as to its disposal. The claimant is regarded as having merely a hope that he will acquire an interest in the future; the owner of the property has expressed no final intention in that regard. In addition the claimant has provided no consideration. The claimant thus has no rights at all. There is no justification for the existence of any rights. The prime example is the position of a beneficiary under a will where the testator is still alive. This also covers the donee under a *donatio mortis causa*

[162] See further below.

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before the death of the donor, although in this case there remains some uncertainty as to the law.

A step up from the first possibility is again where the claimant has merely a hope of acquiring a proprietary interest and again the property owner has expressed no final intention in this respect. Where this differs, however, is that the property owner is subject to limited constraints in his dealing with the property. For example, the grantor of a right of pre-emption has complete freedom to keep the property, but has agreed to limitations on his ability to dispose of the property. The grantor of an option contingent on a factor within the control of the grantor is in a similar position. The trustee of a discretionary trust has a limited freedom as to the disposition or retention of the trust property. These constraints justify personal liability to ensure they are not breached, but since the claimant may end up with nothing until an appropriate, binding decision is made in his favour, it is arguable that there should be no proprietary rights in the interim period. This seems to be the position of the courts. However, it is also arguable that where consideration has been provided for the opportunity to acquire particular property, as is the case with a right of pre-emption and an option, the grantee should acquire a proprietary interest in order to be protected against third parties.

In the next group of situations the claimant has more than a hope of acquiring a proprietary interest in the future. These are situations in which the property owner has made a final decision that the claimant should acquire an interest, subject to limited powers to use the property for other purposes. In all these cases there is certainty as to the nature of the interest that will be acquired, but the legal owner retains some degree of control over the property. The powers to use the property for other purposes obviously vary between the situations, as does the possibility that the claimant will ultimately receive a proprietary interest. The limited powers to use the property may also arise in different ways: imposed by law, as in the case of the rights of personal representatives to sell property to pay debts; expressly in a contract, as with a floating charge; impliedly in a contract, as is arguably the case with mutual wills; and expressly or impliedly in a trust as with a trust fund. In all of these situations the claimant may end up with nothing, but is unlikely to. It is arguable that the claimant in all of these situations should be regarded as having similar rights unless there are good reasons otherwise. In all of these cases there is a lack of certainty as to the rights acquired. In some cases this is because of inconsistent case law, in others it is because of inadequate analysis by the courts of the rights acquired. It seems

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that in all of these situations, except perhaps the administration of an estate,[163] some kind of floating right arises. This right may or may not be proprietary. It has been argued above in relation to all these situations that the claimant should acquire a proprietary right to ensure enforceability against third parties.

Perhaps in a category of its own is proprietary estoppel. The claimant has far more than a hope of acquiring a proprietary interest. It would seem that in practice, despite the court's discretion, the claimant will receive a proprietary interest unless there is a good reason otherwise. Although the landowner in most cases has no intention at all to that effect, the disposition of his property is completely out of his control, although his needs may be one of many factors taken into account. However, there is some uncertainty as to whether an interest will be acquired, and in addition some uncertainty as to what that interest will be. Whether there is personal liability is a moot point[164] but in many cases a personal remedy would be inadequate. As argued above, some kind of proprietary interest would seem to be called for, and that does seem to be the position. Comparing proprietary estoppel with those situations in the preceding category: there is more chance that a claimant under proprietary estoppel could end up with nothing; there is more uncertainty as to the circumstances in which he might receive less than expected; but in the above category there is more chance that the claimant will end up with an interest in less property than was there originally.[165]

The final category of situations covers those where it is almost certain that the claimant will acquire a proprietary interest and whether or not he does is completely out of the control of the landowner. Unlike proprietary estoppel, there is no uncertainty as to the interest that will be acquired or the property. The situations that obviously fit into this category are a contract to create or convey an interest in property and an option (except where it is subject to a contingency within the control of the grantor). Both of these are dependent on specific performance and thus in theory there is a chance the courts might not enforce, but that is very slight. The property owner has shown a final decision. Therefore, they would seem to be justifiably situations in which the claimant has a proprietary interest in the interim period.

[163] It has been argued above that this should be the position during the administration of an estate as regards the position of a beneficiary of residue or on intestacy and that statements otherwise show insufficient consideration of the position. A specific legatee has no real need of a floating right: because the property is identifiable, he could simply have a defeasible equitable interest.

[164] See *Wayling* v. *Jones* (1995) 69 P. & C.R. 170, CA discussed above.

[165] Except in the case of a trust fund.

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Where should the rights acquired through tracing fall? The claimant is certain to acquire an interest if he wants it and whether or not he does is outside the control of the property owner. In those respects, it is comparable with the final category of cases. However, the property owner never had any intent that he acquire an interest and the claimant may have a choice of interest thus meaning uncertainty as to its nature. In those respects it is closer to proprietary estoppel. In either case there are strong grounds for a proprietary interest.

In conclusion, many of the cases are consistent when looked at from the position of the original parties, although clarification of the law remains essential. However, consistency alone does not mean that the courts take the correct approach in all cases. It is arguably necessary to take account of factors other than loss of control by the owner of the property, such as the intention of the parties, whether there are adequate remedies available if the rights are not proprietary and whether there is a justification for holding third parties bound.

The Need for a Flexible Proprietary Interest

It has been argued that in many of the situations considered there is strong justification for a proprietary interest. In some areas, such as rights of pre-emption, that will require a change in the law. In most other areas it simply needs a clarification of the law. However, the courts need to be flexible. In many of these situations a recognised proprietary interest would be impossible because of the uncertainty. Since the uncertainty varies between the various situations, so must the solution.

Defeasible and Contingent Interests

In some situations such as tracing, options, and enforceable contracts[166] the claimant is regarded as having a defeasible equitable interest. This also appears to be one of the approaches taken in relation to the rights of a specific legatee during the administration of an estate. In other situations, such as the floating charge and proprietary estoppel, one possible analysis of the unclear rights recognised by the courts has been of a defeasible interest. There would seem to be no problem with the interest being defeasible at the instance of the grantor or landowner.[167] However, although recognition of a defeasible interest is a feasible solution in some of the situations considered above, there are problems in

[166] And possibly the rights of a specific beneficiary during the administration of an estate.

[167] See *Prudential Assurance Co. Ltd.* v. *London Residuary Body* [1992] A.C. 386, though this was a lease, not a fee simple.

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making use of defeasible interests in other situations. First, the use of a defeasible interest is inappropriate for proprietary estoppel and, to a lesser extent, tracing, because the range of possible interests that could be awarded is such that is impossible to identify the interest. Secondly, in the situations of a floating charge, trust fund, floating trust and estate of a deceased the property might be used, removed, replaced or added to and the courts might consider the use of a defeasible equitable interest too cumbersome a device. Thirdly, for a defeasible interest the determining events would need to be clear and detailed. In some of these cases the law is not settled, for example the use that can be made of property subject to a floating trust. In others, although the law is settled, it is vague, such as the discretion of the court in cases of proprietary estoppel. Finally, there could be perpetuities issues with tracing and trusts.[168] In conclusion, the use of a defeasible interest is most appropriate where the property and interest are identifiable from the outset and are not subject to change and the determining events are clear.

Rights of pre-emption and conditional options could simply be classified as contingent or conditional proprietary interests with the condition having no effect on their proprietary nature, just on the ability to exercise the rights. Again, this solution seems appropriate only where the interest and property are identifiable from the outset.

Floating Rights

Where it is not possible or desirable to have defeasible or conditional equitable interests, then some other approach will be necessary in the circumstances where it is felt that the claimant should have more than personal rights. Bearing in mind the uncertainties, the courts should recognise some kind of amorphous, changeable, determinable and flexible, yet proprietary, right to ensure the claimant retains the opportunity of acquiring property rights on crystallisation. This could be described as an equity or floating right. The courts have gone some way towards recognition of such rights in the cases. Some kind of floating right or equity seems to arise in three situations: a floating charge; a floating trust, as is particularly used in relation to mutual wills; and proprietary estoppel. There may also be a similar kind of right in a beneficiary of a trust fund, a beneficiary under a will and in tracing cases. However, as will have become clear from the above discussion, it is only in relation to tracing that the floating right or equity is undoubtedly regarded as proprietary, and in all cases there is doubt

[168] There will be no perpetuities problems in the other cases which concern either an interest that is not an ownership interest coming to an end or an interest that will inevitably determine within the perpetuity period.

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as to the full nature of the right. These rights therefore need further consideration.

The first point to make is that the justifications behind the need for a floating right are not the same in all the cases and consequently the floating rights will of necessity be of a different nature. The situations can be divided into two categories. In the first category the rights float because of powers that exist to make use of the property and to remove it from the ambit of any claim by the claimant, so there is uncertainty as to the property. This is true of floating charges, floating trusts and rights in a deceased's estate and to a more limited extent is true of the interest in a trust fund where the trustees can replace the property, but not make use of it for their own purposes. In the second category the amorphous nature is necessary because of the uncertain nature of the final interest and whether in fact there will be one. This is true of proprietary estoppel and tracing.

There are undoubted similarities between those cases that fall within the first category. The rights relate to a group of assets. Certain dealings are allowed with these assets. A chargor can use them in the ordinary course of business; a trustee can alter the investments provided he complies with various duties and criteria; personal representatives can use assets to pay debts; a legal owner subject to a floating trust has certain powers of disposition and use of the assets, although in this case the restrictions are not clearly defined. The floating right will crystallise into a recognised equitable proprietary interest on certain events, for example, liquidation of a company in the case of a floating charge, the death of the survivor in the case of mutual wills, the completion of the administration of an estate. There seems to be no reason why a variety of events could not be specified as effective to crystallise the rights. The rights do not seemingly crystallise on an unauthorised disposal of any of the assets.[169] There are differences, however, relating to the nature of the rights of the claimant and their enforceability against someone acquiring an interest in any of the assets through an unauthorised disposition before crystallisation. Beneficiaries of a trust fund and of a deceased's estate arguably have an equitable ownership interest in the fund or estate. They can assert equitable ownership of specific assets against a third party on behalf of that fund or estate at any time and get the assets returned to the fund or estate. They can be regarded as

[169] There are in fact no floating trust cases dealing with this issue. However, it is arguable that the position would be the same as with floating charges. The beneficiary is only intended to have an interest at a certain time in the future and a wrongful disposal would not seem to justify accelerating that interest.

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having indirect proprietary rights in the specific assets, which rights could be regarded as an equity, but there is no suggestion that these rights are directly enforceable and there is no need for them to be. A chargee under a floating charge arguably has an equitable security interest in the fund of assets. He cannot initiate an action to get assets returned to the fund, although he can prevent an unauthorised disposition by injunction. This seems right because if the charge never crystallises, which is possible, there will be no reason to impugn the title of the third party. The chargee can thus only assert his own rights against the third party after crystallisation. He must therefore have some proprietary right or equity in the specific assets. This issue of enforceability and the nature of the rights has not arisen in the context of a floating trust. The beneficiary could be regarded as having an ownership interest in the fund of assets (a defeasible reversionary interest?) and the ability to initiate an action on behalf of the fund from the outset to unravel an unauthorised disposition and return the property to the legal owner. This would be possible on the present state of authorities because in the situations in which it has been used so far the floating trust will crystallise on death and death will inevitably occur. Therefore, the beneficiary will inevitably acquire rights and should be able to demand the return of the property immediately. However, it may be that the courts would allow the creation of floating trusts that would crystallise on an event that may not occur, for example, someone's marriage. If so, the approach should be as with a floating charge and the beneficiary should be regarded as having an equity which is enforceable only after crystallisation because until crystallisation it is not certain that the third party's title can be impugned.

The rights in the second category are quite different. In the case of proprietary estoppel the claimant has a claim to an interest in the property. He can initiate crystallisation by the court at any time but he cannot be certain of what interest he will receive and in fact he cannot be sure that the equity will crystallise into an equitable interest in the property. In the case of a tracing right the claimant also has a claim to an interest in the property. It is at his choice whether the claim crystallises into an equitable interest. The interest into which his claim will crystallise depends in part on the property and the identity of the defendant, but may also be at his choice.

Are these floating rights proprietary interests? There is plenty of authority that these interests are capable of binding successors in title,[170] though in no case is there a clear answer as to which

[170] Except in relation to a floating trust.

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particular successors will be bound. In fact, it is still regarded as open to debate whether these interests are in fact merely personal interests which can bind successors whose conscience is affected. However, notice alone would not seem to be enough to affect someone's conscience and yet purchasers have been bound because of notice alone. Therefore, it is arguable not only that these floating rights should be proprietary interest, but also that the courts have shown some indications that they are.

Proprietary Interests: Equitable Interests and Equities

One of the major issues discussed above is whether the various rights acquired in the interim period are proprietary interests capable of binding third parties. Where the right acquired is either purely personal or a recognised equitable interest the position of third parties is clear and nothing further need be said. However, floating rights, for example a floating charge, and equities, such as that arising in a case of proprietary estoppel, have been held to be capable of binding some third parties, but it is not clear which.[171] Ultimately this will depend on how these rights are classified. There can be said to be an "equity" in existence in these situations, but this is no help because an "equity" is simply a right recognised in equity and it may be a personal or a proprietary right.

Generally, the terms "equitable interest" or "proprietary interest" are used to describe an equity which is capable of binding successors in title, including purchasers of an estate or interest in the land.[172] Prima facie, all equitable interests are of equivalent standing: they can be defeated by a purchaser of a legal estate without notice but where there is competition between two equitable interests, the first in time prevails.[173] It is not possible to give a conclusive definition of an "equitable interest" although

[171] The cases cannot be justified on the basis of the purchaser's conscience: this was never mentioned in the cases; some successors have been held to be bound automatically; purchasers have been bound on the basis of notice and arguably notice alone is not enough to affect someone's conscience (see *Ashburn Anstalt* v. *Arnold* [1989] 1 Ch. 1, 26).

[172] Lord Upjohn in *National Provincial Bank Ltd.* v. *Ainsworth* [1965] A.C. 1175, 1238 said that an equity to which a purchaser is subject must create an interest in land. See also Lord Hodson at p. 1223.

[173] However, this is provided that "the equities are equal". The cases make it clear that a person with an earlier created equitable interest can lose priority because of his conduct. It is also subject to requirements for registration under the Land Charges Act 1972 where title to the land is unregistered. Where title to the land is registered the basic rules appear to apply regardless of registration: see Law Com. No. 254, *Land Registration for the Twenty-first Century: a Consultative Document* (1998), paras. 7.12 and 7.17. The Law Commission did not propose any changes to the law because the introduction of electronic conveyancing will eventually require interests to be registered simultaneously with their creation such that in most cases priority will for all practical purposes be determined by the order of registration of interests. It is interesting to speculate whether the Law Commission would otherwise have proposed that priority should be determined by date of registration rather than date of creation.

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reference is often made to the attributes listed by Lord Wilberforce in *National Provincial Bank Ltd.* v. *Ainsworth*.[174] This suggests that prima facie floating charges, rights in a trust fund and tracing rights (if they are not recognised equitable interests) cannot be equitable interests because of their uncertainty, floating trusts cannot be equitable interests because of their indefinability and uncertainty and proprietary estoppel interests cannot be equitable interests because of their indefinability, uncertainty and discretionary nature.[175]

The courts are prepared to recognise that a lesser interest—a "mere equity"—can also bind successors in title, although this equity is of less standing than an equitable interest as it can be defeated by a purchaser of an equitable interest without notice.[176] Some authorities seem to suggest that this has the potential to be a wide-ranging category within which a number of equities could fall if they are seen as somehow lesser than an equitable interest but still worthy of protection against third parties.[177] Other authorities suggest that this is really a very limited class. It has in fact been said that a mere equity is simply a personal right which can only bind purchasers if it is ancillary to or dependent on an equitable estate or interest in the land.[178] What is a mere equity ancillary to or dependent on an equitable estate or interest in the land? Examples given in the cases are the right to set aside a document for fraud and a right to rectification of a document for mistake. Both of these are procedural rights which, if exercised, will mean that the claimant will have an enforceable equitable interest in the land.[179] Concentrating on the right to set aside a conveyance for fraud,[180] there seem to be two possible analyses of the situation,

[174] [1965] A.C. 1175, 1247–1248.

[175] Maybe for this reason rights asserted through tracing should not be seen as equitable interests, although there is simply a choice between two interests.

[176] *Phillips* v. *Phillips* (1862) 4 De G. F. & J. 208. This seems to be the position in registered title as well as unregistered title: see Law Com. No. 271, *Land Registration for the Twenty-first Century: a Conveyancing Revolution* (2001), para. [5.34]. The Law Commission propose to change the law so that equitable interests and equities are of the same standing: see para. [5.36].

[177] *Westminster Bank Ltd.* v. *Lee* [1956] Ch. 7; Lord Denning M.R., *National Provincial Bank Ltd.* v. *Hastings Car Mart Ltd.* [1964] Ch. 665, 686 (at p. 687 he gave as an example proprietary estoppel rights). See also *Nurdin & Peacock plc* v. *D.B. Ramsden and Co. Ltd.* [1999] 1 E.G.L.R. 119 discussed in note 179 below.

[178] Lord Upjohn, *National Provincial Bank Ltd.* v. *Ainsworth* [1965] A.C. 1175, 1238. See also Lord Cohen at p. 1228.

[179] Cf. *Nurdin & Peacock plc* v. *D.B. Ramsden and Co. Ltd.* [1999] 1 E.G.L.R. 119 in which the view was taken that the right to rectify the rent provision in a lease was capable of binding successors in title and thus could be an overriding interest under the Land Registration Act 1925, s. 70(1)(g). Such a right to rectify clearly has no effect on the ownership of the property. There was no consideration of the need for a mere equity to be ancillary to or dependent on an equitable estate or interest in land. This case could be regarded in three ways: as supporting a wide-ranging category of proprietary equities; as wrong; or as a special case dealing solely with the right to rectify the terms of a lease.

[180] The right to rectification seems susceptible to the same possible analyses.

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both of which can find some support in the cases.[181] The first is that the claimant retains equitable ownership at all times but needs to exercise the equity in order to activate the equitable interest and until activation his equitable interest is of less standing than it would normally be.[182] The second is that the equitable title has passed to the purchaser and thus the claimant only has an equity until he exercises it when it will give rise to an equitable interest.[183] If the latter is the correct analysis, it is the equity, which can lead to the acquisition of an equitable interest, which binds and this is arguably not so very different from the equity acquired under a floating charge. In fact the floating charge can be seen as a stronger interest as there is no need to rely on the intervention of the court for its effectiveness.[184] The equity acquired under proprietary estoppel can be distinguished because of the court's discretion as to whether it gives rise to a proprietary interest and which[185] but it is still an equity which can give rise to an equitable interest. Thus these interests could be categorised as equities capable of binding a purchaser. However, if the former is the correct analysis then it is undoubtedly the equity combined with the equitable interest that can bind purchasers and floating charges and interests under proprietary estoppel can be distinguished and prima facie could not be categorised as equities capable of binding purchasers. They would therefore have to be equitable interests despite their lack of certainty. However, other rights have been held to be equities capable of binding purchasers but less than equitable interests. For example, although the right in substitute property via tracing is, on the present state of authorities, most likely an equitable interest, there is other authority treating it as an equity capable of binding purchasers.[186] This is not an example of retaining equitable

[181] See A. Everton, "'Equitable interests' and 'equities'—in search of a pattern" (1976) 40 Conv. 209, 213–214 and Menzies J., *Latec Investments Ltd.* v. *Hotel Terrigal Pty. Ltd.* (1965) 113 C.L.R. 265, 288–291 and the cases cited in both.

[182] Taylor J., *Latec Investments Ltd.* v. *Hotel Terrigal Pty. Ltd.* (1965) 113 C.L.R. 265, 282–284.

[183] This interest is probably effective retrospectively. Support for this approach can be found, for example in the judgment of Kitto and Menzies JJ., *Latec Investments Ltd.* v. *Hotel Terrigal Pty. Ltd.* (1965) 113 C.L.R. 265, 277–278, 290 and there is clear authority to this effect in *Twinsectra Ltd.* v. *Yardley* [1999] Lloyds Rep. Banking 438, 461, CA. For further support see: Lord Wilberforce, *National Provincial Bank Ltd.* v. *Ainsworth* [1965] A.C. 1175, 1254; *Lonhro Plc* v. *Fayed (No. 2)* [1992] 1 W.L.R. 1, 11–12. Where a transaction is merely voidable and not void, it is difficult to accept that there is an equitable interest in existence until the procedural right has been enforced. This analysis can find indirect support in another procedural right which can bind purchasers with notice: the right to open a foreclosure: *Campbell* v. *Holyland* (1877) 7 Ch. D. 166. There is no doubt that foreclosure has the effect that a mortgagor loses all interest in the property.

[184] A point made by S. Worthington, *Proprietary Interests in Commercial Transactions* (Oxford 1996), p. 100.

[185] The rights to rectify and rescind are not discretionary except in the sense that they are equitable remedies. The claimant will get an interest unless an equitable defence such as laches is available.

[186] *Re Ffrench's Estate* (1887) 21 L.R.(Ir.) 283.

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ownership but of getting an interest in new property and there may also be a choice of interests. Such a power to acquire an interest has distinct similarities with proprietary estoppel and a floating charge.

In the future it seems likely that the distinction between equitable interests and equities capable of binding purchasers will become unimportant—all that will matter is whether the interest is capable of binding third parties. This is because the Law Commission proposals for reform of registered title[187] would give equities the same priority as equitable interests.

[187] Law Com. No. 271, *Land Registration for the Twenty-first Century: a Conveyancing Revolution* (2001), para. [5.36].

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