innocently receive misapplied funds might feel their position was insufficiently protected if they had to make out a defence. In order to ascertain the respective practical merits of fault-based and strict liability, what is required is some more economic analysis (*cf.* Fox, above) both theorectical and empirical.

At root, the argument over whether knowing receipt should be a fault-based cause of action or strict, subject to defences, reflects a controversy about the very nature of the action. Is it about the imposition of the onerous duties of a trustee on the recipient of a fund (see *Re Diplock* [1948] Ch. 465 at p. 478; *Re Montagu's S.T.* [1987] Ch. 264 at p. 278B–C, cited in the *BCCI* case)? If so, it makes perfect sense to require that the recipient be at fault before he is subjected to those duties. Or is it about restitution of funds received (*El Ajou* v. *Dollar Land Holdings plc* [1993] 3 All E.R. 717 at p. 738 a–b; *Royal Brunei Airlines* v. *Tan* [1995] 2 A.C. 378 at p. 386 F)? Subject to any pragmatic concerns identified by economic analysis, strict liability would then be appropriate, in conformity with other restitutionary actions, but subject to defences, including those, such as bona fide purchase, which recognise that an equitable, not a legal, right is in issue. Or does the action combine, and confuse, both approaches, which should now be separated out, as suggested by Lord Nicholls in his essay "Knowing Receipt: The Need for a New Landmark" (ch. 15 in Cornish *et al.*, *Restitution: Past, Present and Future*)? As Lord Nicholls suggests, there might be a strict restitutionary action to recover funds received, coupled with a fault-based action to remedy improper dealings with property which, in equity, belongs to another.

There is to be no further appeal to the House of Lords in the *BCCI* case. It will not become the much needed landmark anticipated by Lord Nicholls.

RICHARD NOLAN

ENFORCING RESTRICTIVE COVENANTS IN LEASES: THE CASE OF COUNTY HALL

THE important recent decision of Neuberger J. in *Oceanic Village Ltd.* v. *United Attractions Ltd.* [2000] Ch. 234 considers the enforceability of a restrictive covenant, contained in a lease, which relates to other adjacent land of the landlord. All relevant title was registered, and the case raised the problem addressed in relation to unregistered land by *Dartstone Ltd.* v. *Cleveland Petroleum Co. Ltd.* [1969] 1 W.L.R. 1807 where Pennycuick J. held that, as such

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covenants were not registrable under the land charges legislation, all depended on an application of the doctrine of notice. Shirayama, the Japanese freeholders and registered proprietors of the old County Hall, granted a lease in February 1997 of premises in the building to the claimants, Oceanic, for a term of 20 years. Oceanic covenanted not to use the premises otherwise than as a high quality gift shop without the landlord's written consent. By clause 4.6 of the Oceanic lease, the landlord covenanted "not to permit any other gift shop to be operated in the Building provided that the restriction shall not apply to any hotel in the Building". In July 1998, Shirayama granted a lease of another unit in the building to the defendants, United, for a term of 15 years. Under the United lease, the use of their unit was to be restricted to a Football Hall of Fame and ancillary commercial uses. There was no specific restriction of gift shop use. When Oceanic sought assurances from United that they would not operate a gift shop selling football shirts, and such assurances were not forthcoming, they sued, seeking an injunction and damages. While it may seem strange that Oceanic sought to enforce a "landlord covenant" against United, which was a tenant, United was not a tenant of the premises demised to Oceanic, but of other premises in the complex. United had acquired an interest in those premises from Oceanic's landlord. There was no reason in logic why United's status as tenant (as opposed to freeholder) of its unit should make any difference to the outcome.

Neuberger J. first held, adopting a common sense interpretation of clause 4(6), that it imposed an obligation on Shirayama as landlord not to use any part of the building as a gift shop. As both Oceanic and United leases, being granted after 31 December 1995, were subject to the statutory principles for the enforceability of covenants by and against successors in title set out in the Landlord and Tenant (Covenants) Act 1995, Oceanic argued that, applying section 3(5), the restrictive covenant was capable of enforcement not only against an assignee (*sc.* of the landlord or tenant as the case may be) but also against United being an occupier of demised premises (*i.e.* the building) to which the covenant related. The covenant clearly related to all units within the building, as it was intended to protect the proposed use of Oceanic's unit as a gift shop. Construing section 3(5), the question for the court was whether United occupied "demised premises to which the covenant relates". Neuberger J., realising that the literal meaning of section 3(5) was hopelessly wide, limited it by deciding that enforceability of the restrictive covenant was possible only against an owner or occupier of "any of the premises demised by the lease in question".

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This purposive interpretation of a difficult provision accords well with the general intention of section 3. While it has the effect that few landlord covenants will be enforceable by virtue of this provision, which on its face is supposed to apply to both landlord and tenant covenants, the likelihood is (and we must speculate—there is no clear indication in its legislative history) that it was primarily intended to provide a means of enforcing "tenant covenants" against sub-tenants—the most obvious "occupiers" of the demised premises to which the covenant relates. It is likely, as Neuberger J. surmises, that it may also have been applied to "landlord covenants" to facilitate enforcement of such covenants against a landlord who has obtained possession of part of the land subject to the tenancy following forfeiture or a surrender by a tenant.

The covenant was not registrable by means of a notice, as the Land Registration Act 1925, s. 50(1), specifically excludes a "covenant or agreement made between a lessor and lessee", and these words include covenants relating to other land of the lessor (see the interpretation of Land Charges Act 1972, s. 10, in *Dartstone Ltd.* v. *Cleveland Petroleum Co. Ltd.*, above). Nor did the provisions of the Land Registration Act 1925, in particular section 20(1), support the invocation of the doctrine of notice in circumstances such as these. It was immaterial that a different result would ensue according to whether the title to land was registered or not. Neuberger J.'s unconcern about the uniformity of substantive principle in the parallel systems of registered and unregistered title echoes the sentiments of, amongst others, Lord Wilberforce in *Williams & Glyn's Bank* v. *Boland* [1981] A.C. 487, 504.

Oceanic Village discloses a failure in the current registration machinery, as a restrictive covenant contained in a lease does not appear to be capable of adequate protection against those not privy to the estate. Not only is registration by notice ruled out by section 50(1), there are profound difficulties with other means of registration. Taking the lead from Ruoff & Roper's *Registered Conveyancing,* para. 21–29, Neuberger J. proposed the entry of a restriction on the title of the landlord's land, recording the fact that there should be no entry in the property or charges register of the burdened land without the tenant's consent. This is all very well, but the limitations of this course of action are not spelt out. A restriction is only available to restrict the disposition of a registered interest, and it cannot be used to restrict the disposition of a minor or overriding interest. If, subsequent to registration of a restriction protecting the tenant's rights, the landlord were to grant a lease

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which did not itself require registration, the restriction would not bind. Indeed, in *Oceanic Village* itself, the entry of a restriction would have been futile, as the lease to United, the tenants against whom the restriction would be hoped to bite, was not a disposition requiring registration: it was granted for a term of less than 21 years. Nor would a caution against dealings, accurately described by Neuberger J. as giving rise to "complex, time-consuming, expensive and uncertain consequences", be likely to provide a panacea, not only because premature registration may lead to liability in damages (see J.E.A. [2000] Conv. 193, 194), but also because a caution is only effective to give notice of a claim, not to confer priority in its own right: see *Clark* v. *Chief Land Registrar* [1994] Ch. 370. If truth be known, the only satisfactory solution to the gap in protection identified in *Oceanic Village* lies in amendment of the title registration legislation

STUART BRIDGE

ESTOPPEL, UNCONSCIONABILITY AND FORMALITIES IN LAND LAW

KEN Holt was a wealthy farmer in Lincolnshire. In 1952 he befriended Geoffrey Gillett and then persuaded the young man to work on the farm instead of continuing at school. For nearly 40 years, Gillett was Holt's right arm, a relationship that did not falter when Gillett married. Over these years, when Gillett managed the farm and eventually entered into partnership with Holt, Holt repeatedly promised that Gillett would be the principal beneficiary of his will. These were no idle boasts, but were repeated often, in public, and were given effect in several versions of Holt's will. In 1992, Holt formed a friendship with Mr Wood (a trainee solicitor), the result of which was the eventual breakdown of his relations with the Gillett family and their exclusion from his will. In *Gillett* v. *Holt* [2000] 3 W.L.R 815 Geoffrey Gillett asserted that Holt was estopped from changing his will so as to deny Gillett his expected legacy. As we might think, a simple case of proprietary estoppel based on assurance, reliance and detriment. However, Carnwath J. at first instance thought otherwise and rejected estoppel because first, Gillett could not establish that Holt had made an irrevocable promise not to change his will (and everyone knows that wills may be changed), and secondly, Gillett had suffered no detriment.

The Court of Appeal allowed Gillett's appeal, noting that estoppel was an equitable doctrine, designed to remedy unconscionability, and that each case was to be looked at "in the

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