THE ROLE OF EQUITABLE RIGHTS AND INTERESTS IN REAL PROPERTY LAW

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Abstract

The central concern of real property law is the protection of the purchaser. Thus, the question that usually arises in real property transactions is; among the litany of rights and interests that are commonly categorised as legal and equitable rights, which one(s) will affect or bind a purchaser in a given real property transaction? Legal rights inexorably will bind a purchaser irrespective of notice, while equitable rights are said to bind everyone except a purchaser of the legal estate for valuable consideration without notice. This paper attempts to examine how modern equitable entitlements in land have evolved from equity's historic thematic concerns with substance rather than form, with the inner reality of intent rather than the external manifestations of conduct, and above all with the priority of conscience – driven obligation over strict legal entitlement. Furthermore, in this paper, an attempt will be made to isolate the issues that are of primary concern to property lawyers and to explain the ways in which they will be dealt with within the context of the central concern of property law. The equitable character of certain entitlements in or over land is ultimately confirmed by statute, but equitable rights fall into one of two broad groups-inherently equitable rights and equitable analogues of legal right.

1. Introduction

The role of equitable interest in land has always been of major concern to property lawyers especially in dealing with property rights and interests from the point of view of a conveyancing transaction. [1] Although, the term "property right" can be given several different meanings,[2] our central concern is whether a particular right is capable of binding not just the parties who created it, but also third parties.[3] Usually, the issue is whether a purchaser from the person who created the right is bound. Any system of private ownership necessarily recognises that the owner's rights affect others. However, it does not follow that right other than ownership will all have that proprietary effect. Historically, the common law courts

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[1] The fundamental principle according to which equity acts is that a party having a legal right shall not be permitted to exercise it in such a way that the exercise amounts to unconscionable conduct (*Legione v Hately* (1983) 152 CLR 406 at 444 per Mason and Dean J J). See also *Australian Broadcasting Corpn v Lenah Game Meats Pty Ltd* (2000) 208 CLR 199 at 198) – (99) per Gummow and Hayne J.J.

[2] Jockson, *Principles of Property Law*, Chapters 2 and 3, especially PP 39-45 and 67-78.

[3] J.W. Harris, in Eekelaar and Bell (eds) Oxford Essays in Jurisprudence (Third Series), at pp 180-181, describes the doctrinal cleavages between those interests that bind purchasers and those that do not.

recognised a limited range of rights (legal rights), whereas other rights were recognised by the court of chancery (equitable rights).[4] Although the courts have been fused for well over a century, the distinction between legal and equitable interests/rights survives. For most equitable interests, the principal importance of the distinction lies in the narrower circumstances in which they may bind purchasers,[5] coupled with a generally more discretionary approach in dealing with them. In order to understand this point more clearly, one needs to understand two important axioms of real property law in context- wizie (i) that legal right binds the whole world and (ii) that equitable rights are governed by the doctrine of notice.

Furthermore, as previously mentioned, the equitable character of certain entitlements in or over land is ultimately confirmed by statute, but equitable rights fall into one or other two broad groups. They are (i) Inherent Equitable Rights and (ii) Equitable Analogues of Legal Rights.

(i) Inherent Equitable Rights

Some equitable rights enjoy their equitable status precisely because they are excluded from the categories of estate interest and charge statutorily declared capable of "subsisting or of being conveyed or created at law".[6] Such rights have no potential to exist at law, and their inherently equitable status can usually be rationalised in terms of the maxims and historic jurisdiction of equity. Examples include:

- estate contract
- equitable lien
- restrictive covenant and
- beneficial interest existing under a trust of land.

(ii) Equitable Analogues of Legal Rights

Some equitable interests/rights are, on the other hand, merely the analogue of rights which, on due compliance with some requirements of formal creation or transfer or of registration at Land Registry, would normally have ranked as legal rights. Examples include certain kinds:

- Leases
- Easements and Profit a'predre
- Mortgage charges

This paper will consider the present role and continuing effectiveness of equitable interest in real property law and practice in one jurisdiction which has embraced title-by-registration- England, and two jurisdictions which operate an unregistered conveyancing system –i.e. Nigeria and the Bahamas.

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[4] See the Supreme Court of Judicature Acts 1873-1875, s. 25 (11); See also *Walsh v Lonsdale* (1881) 21 Ch.D. 9.
[5] They are more likely than legal rights to require registration.
[6] Law of Property Act 1925, S. 1 (1) – (3) see also Conveyancing Acts 1881-82, ss 1-3

A comparison and contrast of these jurisdictions will demonstrate that they (equitable rights) are more likely than legal right to require registration and that these kinds of rights ought to be registered. It is strongly argued in this paper that the law should not recognise these rights and interests if they are not registered and/or if the other party is not aware of them (i.e. their existence) and that they should be overreached in a conveyancing transaction as beneficial interests. The property analogy is apt for the purpose of asking whether the law has got its priorities correctly ordered. However, there is little serious attempt to argue that these rights be proprietary in the sense in which lawyers use that term. We are interested or rather concerned about their potential to bind a purchaser.

2. The Role of Equitable Principle

Much of the land law cannot be understood without some sense of the way in which the conscience- based jurisdiction of equity has infused various sorts of leitmotiv into the formulation and recognition of rights and interests in land. This recurring theme can be seen in the way that equitable interests form a very significant aspect of English property Law and equitable interests in land are vital to the working of the modern law of property. In order to understand how equitable interests in land work, it is necessary to understand the court system that gave rise to them.[7]

Preference for substance over form pervades the approach of equity to dealing with property transactions. Equity looks to intent rather than to the form-and in this regard, it is said that:

> Courts of Equity makes a distinction in all cases between that which is matter of substance and that which is matter of form; and if it finds that by insisting on the form, the substance will be defeated, it holds it to be inequitable to allow a person to insist on such form and thereby defeat the substance.[8]

As previously mentioned in the beginning of this work, legal rights-frequently give expression to the external or formal elements of proprietary entitlements, while equitable rights as will be seen in the later part of this work tend to acknowledge the inner reality of transactions in respect of land. The approach of equity in dealing with estate contracts, equitable liens, restrictive covenants, and beneficial interest existing under a trust of land and options to purchase will be examined to demonstrate the above proposition in context.[9] In some important sense particularly in the context of trust,- legal rights can often be said to

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[7] For a brief historical background of the origin (and) development of English common law court and court of equity, see Rojer J. Smith, Property Law, Sixth Edition, Pearson Longman, Great Britain, 2009, pp. 23-24. The basis of land law was to be found in the common law courts. However, the increasing rigidity of the common law led to the chancellors exercising an additional jurisdiction. The jurisdiction commencing in the fourteenth century, led to the establishment of the Court of Chancery and the development of the principles known as equity.

[8] *Parkin v Thorold*, (1852) 16 Beav. 59 at 66-67, per Romily M.R.

[9] In relation to the equitable emphasis on the substance of the transaction rather than the form, see *Hewitt v Court* (1982) 149 CLR 639 at 668 per Deane J; *Corin v Patton* (1990) 169 CLR 540 at 579 per Deane J.

represent form, whereas equitable rights represent substance.[10] As far as land law is concerned, it is frequently the case that legal rights comprise merely a nominal or paper title, as evidenced in some superficial record, and therefore carry more of a connotation of responsibility than of entitlement. Equitable rights, on the other hand, reflect more clearly the inner reality (as distinct from the outer form) of a transaction and generally locate more accurately the substance of intended beneficial enjoyment.

Thus, if for instance, the question arises in a given real property dispute; who owns a particular piece of land? The common law instinct is to look either to the possessory position on the ground or to the name inscribed on the documentary title. Equity, by contrast attempts rather more subtly to determine the inner motivations of the relevant parties and to allocate ownership accordingly. It has been observed that it is indeed a constant characteristic of equity to look beneath the superficial appearance of transactions in order to discover and so far as conscience will allow, give effect to the substantive reality of the parties' actual or presumed intentions as responsible moral agents.[11] This paper will now examine some of the rights/interests mentioned in the preceding part of the work seriatim.

2.1 Estate Contract

It appears to be settled law that a contract to purchase land was treated as giving the purchaser an equitable interest in the land, subject of course to the payment of the purchase price.[12] This interest is described as an estate contract.[13] It can bind a purchaser and also has effect on the duties of vendor and purchaser.[14] A contract to create or transfer a legal estate in land is termed "an estate contract". At the risk of over-simplification, a specifically enforceable estate contract has the effect of passing to the intended disponee or transferee some kind of equitable estate in land.[15] The potential range of the estate contracts include contracts to transfer a fee simple estate or a term of years, together with contracts to create a lease, mortgage or charge

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[10] See *Sussmen v. AGC Advances Ltd* (1995) 37 NSW LR 37 at 45B, where Kirbu P referred to the rule of equity that substance is given priority over form. See *Hewitt v Court (Ibid)* per Deane J.

[11] See e.g. *Corin v Patton* (1990) 169 CLR 540 at 558 per Mason C.J. and Mettugh J. See also Kelvin Gray and Susan Francis Gray, *Elements of Land Law* (4th) Oxford University Press, Oxford, (2005) p. 739.

[12] The same reasoning applied to a contract to acquire any legal interest in the land.

[13] See *Lysaght v Edwards* (1876) 2 Ch D 499 at 507 per Jessel M.R: it seems difficult to accept argument of Hopkins (1998) 61 MLR. 486 that there is an equitable right in the land apart from the estate contract: the two are opposite sides of a single coin, the equitable interest being the substance of the (fee simple, lease, mortgage etc.) which is constituted by the estate contract, and it is well recognised specie of an equitable interest in real property law.

[14] The availability of specific performance as a remedy was particularly significant in contract for sale of land. The uniqueness of land results in specific performance being generally available, whereas contracts relating to other property rarely attract the remedy.

[15] See *Wollondilly Shire Council v Picton Power Lines Pty Ltd*, (1991) 5 BPR 11503 at 11508 per Young J. See also *London and South Western Railway Co v Gomm* (1882) 20 Ch D 562 at 581 per Jessel M.R (The right to call for a conveyance of the land is an equitable interest or equitable estate).

or to confer an estate in an incorporeal hereditaments or derivative real rights-such as an easement or servitude, and also contractual options to take any of the foregoing interests in or over land. The proprietary dimension of the estate contract carried certain important implications. Before looking at the rules for transferring and creating interests, it should be observed that the transfer or creation will usually be preceded by a contract. Such a contract is usually invariably entered into when land is sold.[16] The estate contract is one of the more important categories of land charges. It is defined by s. 2 (4) (IV) of the Land Charges Act 1972 (England and Wales) as being a contract by an estate owner to have a legal estate conveyed to him. The Land Charges Act in England and Wales record interests in lands i.e. interests and right in the form of incorporeal hereditament or subordinate interest affecting land. In Nigeria and the Bahamas, this interest can also be recorded (registered) in their land registries and in some instances, they are also recorded (registered) with corporeal (dominant interest or estate). Their registration merely serves the purposes of notice evidence and priority. In England and Wales on the other hand, non-registration of any of this interest renders them void or invalid as against a purchaser, whether with notice or without notice.[17] Furthermore, contract confers some form of equitable title and gives rise to trusteeship of the vendor. The general inexorability of due transfer or grant under a specifically enforceable contract activates the equitable maxim that "equity looks on that as done what ought to be done".[18] It would seem that equity anticipates the completion of the contract and regards the contractual promisee as already entitled in equity to an interest in the subject land.[19] As for the trusteeship of the vendor as mentioned above, it should be noted that the availability of the contractual remedy of specific performance engrafts, at least temporarily, some sort of trust upon the relationship between vendor and purchaser under an estate contract. It was actually in this regard that equity jurisprudence tended to regard it as settled law "that the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold".[20]

2.1.1 Options to Purchase

An option to purchase is a right given by the owner of land to another person, within a stated period of time, to purchase the land. Upon the grant of the option neither side is committed to

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[16] Contracts for interest in land have two special characteristics. First, they take effect as estate contracts and are thereby equitable interest in land. The second characteristic is that there are writing requirements. See s. 4, Statutes of Frauds 1677; s. 40, LPA 1925; s. 52, LPA 1925. Note that these contracts are unenforceable unless evidenced in writing.

[17] See *Midland Bank Trust Company Ltd v Greene* (1981) A. C. 513 at 526 per Lord Wilberforce.

[18] See *KLDE Pty Ltd v Commissioner of Stamp Duties* (Queensland) (1984) 155 CLR 288 at 296 (High Court of Australia)

[19] See *Re Flint* (A Bankrupt) (1993) Ch 319 at 326. *Mountney v Treharne* (2003) Ch 135 at (76) per Jonathan Parker L. J. In effect, contract generates some form of equitable title – a doctrine which accounts for many of the species of equitable proprietary entitlement as we previously hinted.

[20] *Lysaght v Edwards* (1876) 2 Ch. D 499 at 506 per Jessel M.R.

a purchase. The contract of sale arises when the grantee of the option exercises it thereby causing a binding contract to be created between the landowner and the grantee of the option. An option is a well recognised equitable interest in land. This well-recognised equitable interests are not all that common in real property conveyancing practice in Nigeria and the Bahamas, although it is possible for parties to a real property transaction in the two aforementioned jurisdictions to grant an option to purchase or an option to grant a lease in property. An option to purchase is registrable as a land charge, although once it has been registered, it is unnecessary to register, separately, the contract of sale which is created upon the exercises of the option.[21] Furthermore, a lease may give to the tenant the option at the end of the period granted the right to renew that lease for a further term.It should also be noted that an option to purchase an interest in land is a recognised equitable interest. An option to purchase legal estate comprises a form of estate contract.[22] It has been aptly said that an option blends aspect of an irrevocable offer of sale with features of a conditional contract in favour of the optionee.[23]

2.2 Equitable Lien

These equitable interests relate to unpaid vendors lien. Again, this is one of the recurring themes (leitmotiv) in real property law and conveyancing. Using a given real property transaction an example, from the moment of entering into a contract of sale, the vendor of land retains a lien at common law until the purchase price is paid.[24] More pertinently, the vendor retains an equitable lien on the land if he transfers the legal estate to the purchaser or gives him possession before the purchase money is paid in full.[25] The unpaid vendor's lien arises automatically by operation of law[26], quite independently of the parties agreement or subjective intentions, except in rare cases[27] where the retention of a lien is manifestly inconsistent with the provisions of the contract or with the true nature of the transaction as

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[21]*Armstrong & Holmes v. Armstrong and Dodds* (1994) 1 All E. R. 826. See N. Gravells (1994) Conv. 483.

[22] See generally *Barnsley's Land Options* (3rdedn, Richard Castle, 1990); S Tromans (1984) CLJ 55.

[23] See *Helby v Matthews* (1895) A. C. 471 at 482; *Griffith v Pelton* (1958) Ch 205 at 225. For the view that an option ultimately constitutes a 'relationship' *sui generis*, See *Spiro v Glencrown Properties Ltd* (1991) Ch 537 at 544 G per Hoffmann J. See also *Armstrong & Holmes Ltd* (1993) 1 WLR 1482 at 1488 A-C; *Freeguard v Royal Bank of Scotland Plc* (2000) 79 P & CR 81 at 87 per Robert Walker LJ.

[24] See *Re Birmingham Deed* (1959) Ch 523 at 529 per Upjohn J.

[25]*Winter v Lord Anson* (1827) 3 Russ 488 at 490-491, 38 ER 658 at 659-660; *Bridges v Mees* (1957) Ch 475 at 484; *Hewitt v Court* (1982) 149 CLR 639 at 645 per Gibbs C. J. The lien secures only the payment of purchase money as distinct from the performance of other contractual obligations which are expressed in money (see *Gracegrove Estates Ltd v Boateng* (1997) EGCS 103 per Aldous LJ).

[26]*Re Beirnstein* (1925) Ch 12 at 17-18, *Hewitt v Court* (1982) 149 CLR 639 at 663 Per Deane J. This lien, like all creatures of equity, is governed by the hard reality of the facts and is not excluded by the circumstance that the conveyance contains an express receipt for the money (Barclays Bank Plc v Estates and Commercial Ltd (1997) IWLR. 415 at 420 A-B).

[27]*Gracegrove Estates Ltd v Boateng* (1997) E GCS 103.

disclosed by the documents.[28] The above has its origin in equitable principle and the equitable lien gives expression to the elementary precept of justice that 'a person, having got the estate of another, shall not, as between them, keep it, and not pay the consideration.'[29] The lien arises where property has been specifically identified and appropriated to the performance of the contract between the two parties and the purchaser would be acting "unconscientiously and unfairly" if he were to dispose of the property without discharging the indebtedness which has arisen under the contract with the original vendor.[30] Thus, from a conveyancing perspective, it can be observed that the effect of this equitable principle is that the unpaid vendor's lien operates as the vendor's security for full payment of the agreed purchased price and is regarded, for the purpose the Law of Property Act 1925, as a specie of mortgage. However, it should be noted that, unlike most mortgages, the equitable lien transfers no title and confers on the unpaid vendor no right to possession of the land, but merely 'a right to enforce his lien through a declaration of charge and a court order for sale.'[31] Conversely, the same principle applies in favour of a purchaser whose contract of purchase remains unperformed through no fault of his own.[32] Like the vendor's equitable lien, the purchaser's lien to secure his deposit operates as an equitable charge, entitling the purchaser to apply for realization by judicial process and payment out of the proceeds.

2.3 Restrictive Covenants

Another important equitable interest/right in land is restrictive covenant. Although it is controversial to refer to restrictive covenant as an equitable interest per se, a restrictive covenant is an agreement between two estate owners limiting the use of the land of one for the benefit of the other. Restrictive covenants rank in English law as equitable proprietary interest in land. An agreement of this kind confers on the covenantee a degree of control over the use and enjoyment of the land of the covenantor, which, although marked less extensive than the control implicit in ownership of (say) the fee simple estate, is nevertheless of some significance. For over 150 years English law has recognised that such adjustments of the balance of power in respect of land connote the allocation of a distinct quantum of "property"

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[28]*Barclays Bank Plc v Estates & Commercial Ltd* (1997) WLR 415 at 421 E per Millett LJ; See also *MCDowell v Kelic* (1998) 9 BPR 16669 at 16671.

[29]*Mackneth V Symmons* (1808) 15 Ves 329 at 340, 33 ER 778 per Lord Eldon L C.

[30]*Hewitt v Court* (1982) 149 CLR 639 at 666-667 per Deane J. See likewise *Metcalfe v Archbishop of York* (1886) 1 My &Sr 547 at 557, 40 ER 485 per Lord Cottenham LC; *Western Wagon and Property Co v West* (1892) 1 Ch 271 at 275 per Chitty J; *Ecclesiastical Commissioners v Piney* (1899) 2 Ch T 29 at 735. For a Contrary View, see *Capital Finance Co Ltd v Strokes* (1969) 1 Ch 261 at 278 E-F per Harman L. J.

[31] Note that the equitable lien operates in effect, as a form of equitable charge, implied by law. Note further that the lien is not a negative right to retain some legal or equitable interest but essentially a positive right to obtain, in appropriate circumstances, an order for sale of property which in equity, is bound by the contract concerned. *Hewitt v Car* (182) 149 CLR 639 at 645 per Gibbs CJ; see also LPA 1925, s. 205 (1) (xvi).

[32] An equitable lien arises by operation of law as the purchaser's security for the recovery of any money (e.g. a contractual deposit which he has already contract. *Hewitt v Count*, (1982) 149 CLR. 639 at 664 per Deane J.

to the beneficiary of the arrangement. For this reason, the covenantee is acknowledged to be the owner of an equitable proprietary interest in the land of the covenantor – an entitlement which is known as a restrictive covenant.[33]

Restrictive covenants are usually entered into either as a condition of the sale of land to the covenantor or on the proffering by the covenantee of some money payment or other valuables consideration (such as a reciprocal covenant undertaken by the covenantee himself).[34] At common law only, the contracting parties may claim the benefit or be called upon to suffer the burden of contractual terms. But one of the most revolutionary contributions made by equity to the law of property remedied the contractual nature of restrictive covenant.[35]

The equitable regime recognised that contractually-bargained arrangements designed to protect the commercial and environmental value of land could "go beyond the frame of contract" and find enforcement, at least in equity if not at law, against third parties.[36] In the process, the contractual right of covenantee arrogated to itself the character of a proprietary interest in the convenator's land. As always, equitable property is "commensurate with equitable relief" and enforcement is said to be constitutive of the proprietary nature of the right.[37] But there have always been policy reasons for keeping land unfettered by private covenants and this must have informed the rationale behind keeping covenants within the realm of contract. This seems to have been reflected in the case law in *Keppel v Bailey*[38] where Lord Brougham L.C refused to allow that "incidents of a novel kind can be devised and attached to land at the fancy and caprice of any owner". He, thus, declined to enforce the burden of a covenant against a successor in the title of original covenantor, taking the view that such a burden, if enforced, would fetter the use and development of the land in perpetuity.[39] It is crucial to note here that the decision in the subsequence case of *Tulk v Moxhay* fundamentally changed the status of restrictive covenant as a personal or contractual interest in land into a "real" or proprietary interest in land, thereby elevating the status of restrictive covenant to a new specie of "equitable proprietary interest in land with obvious third party consequence". This marked what may be referred to as a transmogrification of a

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[33] See *Tulk v Moxhay* (1848) 2 Ph. 774, 41 E R 143

[34] But note that most restrictive covenants, being contained in a deed, are contractually enforceable even in the absence of valuable consideration. See also *Commonwealth of Australia v Western Australia* (1999) 196 CLR 392 at (282) per Callinan J.

[35] During the 19th Century, equity began to fashion special rules governing covenants between freeholders. These rules were founded, not on privity of contract or even privity of estate, but rather on the "equitable principle of conscience".

[36] *Forestview Nominess Pty Ltd v Perpetual Trustees WA Ltd* (1998) 193 CLR 154 at 160.

[37] E.g. *Wily v St George Partnership Banking Ltd* (1999) 161 ALR. 1 at 3-4,per Sackville J, 9 per Finkelstein J.

[38] (1834) 2 My & K 517 at 535, 39 ER. 1042 at 1049.

[39] Students should always strike a sharp distinction between the House of Lords' decision in *Keppel v Bailey* and *Tulk v Moxhay.*

transactional consequence into a legal principle. This writer will now briefly discuss the English House of Lords' seminal decision in *Tulk v Moxhay* in context.

2.3.1 The Decision in Tulk v Moxhay

The decision in *Tulk v Moxhay*[40] radically altered the landscape of real property law because the idea that the burden of a restrictive covenant may be imposed upon a non-party is a concept alien to the common law. In the case of *Tulk v Moxhay*, the courts of equity began to enforce freehold restrictive covenants on a par with other equitable interests in the land.[41] Lord Cottenham LC's ruling in this case is usually taken as marking the inception of a major development in the equitable rules concerning freehold covenants,[42] thereby reversing the earlier disinclination to allow land to be sterilised by the imposition of permanently binding freehold covenants. In *Tulk v Moxhay*, the claimant had sold vacant piece of land in Leicester Square to E, who covenanted on behalf of himself, his heirs and his assigns that he would keep and maintain that land 'in an open state, uncovered with any buildings, in neat and ornamental order". The land subsequently passed by a further conveyance into the hands of the defendant. The defendant's conveyance did not contain any such covenant as that spelt out in the original conveyance from the claimant, but it was common ground that he had notice of the restrictive covenant imposed in respect of the open land. When the defendant attempted to build there in defiance of the covenant, the claimant sought an injunction to prevent him from doing so. Lord Cottenham L.C upheld a decision at first instance granting the claimant the relief required.

Lord Cottenham L.C took an entirely different view from that adopted earlier by Lord Brougham L.C, in *Keppel v Bailey*. In the present case, Lord Cottenham L.C held that an injunction should be granted restraining the defendant from acting in violation of the restrictive covenant. This decision was grounded on the stern view taken by equity in matters of conscience.[43] In order to preclude such an unconscionable outcome, Lord Cottenham L.C concluded that the court should enforce the relevant covenant against any party purchasing

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[40] (1848) 12n Ph. 744, 41 E. R 1143

[41] See *Re Nobel and Potts Contract*s (1905) Ch 391 at 397-398 per Farwell J.

[42] It has been observed that the decision reached in *Tulk v Moxhay* was anticipated in two poorly reported cases decided by Sir Lancelot Shadwell, *Whatman v Gibson* (1838) 9 Sim 196 at 207, 59 ER 338; and *Mann v Stephens* (1846) 15 Sim 377 at 378, 60 ER 665 at 669. See AWB Simpson, *A History of the Land Law* (2nd Edition, Oxford University Press, 1988) pp 257-258.

[43] The Lord Chancellor accepted the argument that the real question was not whether the covenant runs with land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased of course, the price would be affected by the covenant, and nothing could be more inequitable than that the original purchaser should be able to sell the property the next day for a greater price, in consideration of the assignee being allowed to escape from the liability which he had himself undertaken (1848) 2 Ph 774 at 778, 41 ER 1143 at 1144.

with notice of it, for if an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased it. The decision in *Tulk v Moxhay* demonstrates that equity was prepared to intervene in restraint of any unconscionable conduct in respect of a contractual undertaking in relation to land of which the wrong doer albeit not a contracting party – nevertheless had notice.[44] The argument which had prevailed before Lord Cottenham L.C was capable of wide application. Indeed, the view adopted in the case of *Tulk v Moxhay*, far from leading to a sterilisation of land use, could even be seen as promoting the commerciability of land. As Lord Cottenham L.C clearly recognised, unless restrictive covenant could be enforced against a covenator's successor, "it would be impossible for an owner of land to sell part of it without incurring the risk of rendering what he retains worthless".[45] The decision in *Tulk v Moxhay* was invoked with enthusiasm during the year which followed. The ruling was applied to both positive and negative covenant;[46] It was applied on behalf of litigant who held no estate in the land benefited by the covenant; it was even applied outside the realm of real property.[47]

2.4 Beneficial Interest Existing Under a Trust of Land

A further, and extremely important category of equitable proprietary right in land emerged in the range of beneficial entitlements generated by various forms of trusts. The constitution of a beneficial interest in land is based on trust. The original basis upon which equity intervened was to enforce obligation of conscience and to redress defects in the common law. What also has emerged from the intervention of equity was the most important theoretical and practical development - the trust. Any claim to a beneficial interest in real property necessarily presupposes the existence of some kind of trust.[48] Per Lord Diplock in *Gissing v Gissing*,[49] it must be shown that the person in whom the legal estate is vested holds it as a trustee upon trust to give effect to the beneficial interest of the claimant as *cestuique* trust. The origin of this beneficial ownership lies in the willingness of equity to direct the legal owner (trustee) to carry out the trust which he has expressly or impliedly undertaken. And, because in the eyes of equity that that which ought to have been done is regarded as having been done, the

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[44] Note that consistent with its historic provenance, the covenantee entitlement is nowadays formalised, within the canon of property rights enshrined in the 1925 legislation, as an "equitable proprietary interest". See Gray and Gray, "The idea of Property in Land, in S. Bright and J. K Dewar (ed), *Land Law: Themes and Perspectives* (OUP, 1998) pp. 42-43. Note further that restrictive covenants, rather like easements, have helped to coordinate the simultaneous exercise of compatible modes of land use, without necessitating costly-buyouts of neighboring land in order merely to secure optimal benefits for one's own land. *Burns v Burns* (1984) Ch 317 at 326F, 330H-331 a per Fox LJ. Beneficial interest existing under a trust of land (9. 172).

[45] (1848) 2 Ph 774 at 777, 41ER 1143 at 1144.

[46]*Forestview Nominees Pty Ltd v Perpetual Trustees WA Ltd* (1996) 141 ALR 687 at 697.

[47] See A W B Simson, *A History of the Land Law* (2nd edn., Oxford University Press, 1986), p 259.

[48]*Gissing v Gissing* (1971) A C 886 at 900B per Viscount Dilhorn; see also *Burns v Burns* (1984) Ch 317 at 326F, 330H-331A per Fox LJ

[49] (1971) A C 886 at 904 G-H

beneficiary is treated as immediately entitled to his interest in the trust property whether or not an order to the execution of the trust has been made against the trustee.[50]

It is the opinion of this writer that in the light of the foregoing (that in this way that), a moral obligation is converted into an equitable entitlement and the beneficiary's rights, although founded on the ability of the court to make an order *in personam*, becomes a proprietary interest in the trust asset within the context of enforcement of a conscientious obligation.[51] The point being made here is that, equitable rights in real property are generated by the judicial recognition of conscience-driven obligations which bind an estate owner to deal with an asset or resources in a certain way.[52] In this regard, one can rightly say that the process actually represents at juristic level, the practical realisation of equity's central contribution to common law jurisprudence i.e. the idea that conscientious obligation takes priority over strict legal right.[53] The point cannot be overemphasised that the trust embodies the practical realisation of equity's historic leitmotiv - the idea that conscientious obligation takes priority over strict legal right. This does not mean however, that a trust arises in every case where broad consideration of justice or fair play seems to demand that a trust should come into existence. Such an outcome, it has been observed would ultimately cause every litigant's claim "to be consigned" to the formless void of individual moral opinion.[54] The tradition of English equity (as distinct, perhaps, from that practiced elsewhere in the common law world) is that the courts do not sit "as under a palm tree, to exercise a general discretion to do what the man in the street", on a general overview of the case, might regard as fair.[55] The ascertainment of a trust relationship is a measured task involving the structured application of equitable principle to pragmatic fact. It is nevertheless undeniable that some degree of controversy surrounds the definition of the precise circumstances which will permit equitable

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[50]*Swiss Bank Corpn v Loyds Bank Ltd*, (1979) Ch 548; See also *Mountney v Treharne* (2003) Ch 135 (71) per Jonathan Parker LJ.

[51] It should be noted here that there are indeed certain significant circumstances where the otherwise undifferentiated totality of estate ownership may require to be bifurcated between two or more owners, one owning the legal estate and the other or others owning the equitable estate. Such separation of legal and equitable entitlement is always doctrinally motivated. Here and elsewhere, equity calls into existence and protects equitable rights and interest in property only where their recognition has been found to be required in order to give effect to its doctrines. See *Commissioner of Stamp Duties (Queensland) v Living Stone* (1965) AC 694 at 712E per Viscount Radcliffe. See also *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties* (1978) INSWLR. 268 at 278D – E.

[52] See Patrick Parkinson, "Reconceptualising the Express Trust" (2002) *CLJ*. 657

[53] See Gray, 'Equitable Property" (1994) (47) (2) *CLP* 157 at 163, 207-214. See also *Legione v Hately* (1983)152 CLR 406 at 444 per Mason and Deane L J. J. "Every law student knows that equity may mitigate the rigour of the common law in circumstances where (according to developed principles) it is held that it would be unconscionable for an individual to rest on his strict legal rights (*Mountney v Triharne*(2002) EWCA civ 11-4, (2003) Ch 135 at (84) per Laws L. J.

[54] See *Carly v Farrelly* (1975) INZLR 356 at 367 per Mahon J. See also Kevin Gray and Sussan Frances Gray, *Elements of Land Law* (4th edn., Oxford University Press ,2005), para 9. 176.

[55]*Springe He v Defoe* (1992) 2 FLR 388 at 393D per Dilon L. J.

rights to be impressed on pre-existing legal titles under the mandate of conscience.[56]

3. The Role of Notice and Registration

The doctrine of notice plays an important role in relation to equitable interest. For instance, a registered land charge will bind a purchaser automatically; and notice is irrelevant[57] and an unregistered land charge will not affect a purchaser unless he has notice.[58] Therefore, it can be seen that registration or absence of registration is conclusive in dealing with certain categories of equitable interests. Where the system applies, the uncertainties of notice are banished and replaced by the simple question: is the interest registered? An important limitation, however, is that interests protected on the register are not guaranteed to exist. Any flaw in an interest, such as a contract being voidable for misrepresentation, is quite unaffected by its entry on the register.

Furthermore, it should be noted that if there is any registration legislation- i.e.- a statute requiring the registration of any statutory financial charges and equitable interests, non-registration of these interests will render them void against a purchaser with notice or without notice of them.[59] No case exemplifies the operation of this principle more clearly than the House of Lords decision in the leading case of *Midland Bank Trust v Greene*.[60] In this case, Water Greene granted his son, Geffrey, an option to purchase agricultural land, of which he was a tenant, for the sum of 22,000 pounds. This option was exercisable for a period of ten years. Some six years later, when the value of the land merely doubled in value, Walter met a lawyer somewhere or other and told him of the option. After this meeting, he consulted another solicitor and, within three days thereafter, he conveyed the land to his wife, Evelyn, for 500 pounds. The principal issue in the litigation was whether the option purchase of the land, which by then was worth in excess of 450,000 pounds, was binding upon Evelyn who, it was accepted, knew of the existence of the option, despite it having not been registered.

The majority of the English Court of Appeal had held the option to be enforceable despite it

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[56] It is submitted that equity's recognition of the trust focuses ultimately on matters of intention. And it has been observed that beneficial ownership depends fundamentally on intentions, proved or presumed, as to the equitable title to land. See *Hepworth v Hepworth* (1963) 110 CLR 309 at 317 per Windeyer J, (an intention, proved or presumed that a trust should exist is at the base of every trust); See also *Pettit v Pettit* (1970) AC 777 at 813D per Lord Upjohn ("the beneficial ownership of the property in the question must depend on the agreement of the parties determined at the time of its acquisition").

[57] L P A 1925, s. 198.

[58] *Midland Bank Trust Co Ltd v Green* (1981) AC 513.

[59] See the Land Charges Act 1972, s. 4; L P A 1925, s. 199 (1) (1); See also Midland Bank Trust Co Ltd v Green (1981) AC 513. Note that the land charges scheme was introduce in England and Wales in its present form by the Land Charges Act 1925, real in acted in the Land Charges Act 1972. It applies mainly to statutory financial charges and equitable interests but this still means that it has the vitally important effect of emasculating the doctrine of notice. See Roger Smith, Property Law, (6th), Pearson Longman (2009) Esses p 216.

[60] (1981) AC 513

not having been registered. One basis for this decision was that, because 500 pounds was a substantial undervalue, Evelyn should not be classified as a purchaser for money or money's worth.[61] An alternative reason was that one could not rely upon the statute as to do so would have been fraudulent; fraud in this context, according to Lord Denning M.R., being "any dishonest dealing done so as to deprive unwary innocents of their rightful dues".[62] The House of Lords unanimously referred to this decision and held that the option was void. There is a parallelism between the approaches of the English House of Lords in this case and the Nigeria Supreme Court decision in the noted case of *Savanah Bank v Ajilo*. The two cases demonstrate the irrelevance of good faith in what they (the English House of Lords and the Nigeria Supreme Court) seemingly regarded as clear and express legislation.

In *Mindland Bank Trust Co Ltd v Green*, the only speech was delivered by Lord Wilberforce, who applied traditional concepts of the doctrine of consideration and refused to consider its adequacy. In his view, 500 pounds clearly represent money or money's worth. He also declined either to read the notion of good faith into what he regarded as clear legislation, like the provisions of the Nigeria's Land use Act or to disallow the purchaser from relying on the legislation on the basis that the transaction was fraudulent. By fraud what was meant was something similar to the more colourful language of Lord Denning that, if the motive underlining the transaction was to defeat an unregistered interest, then this was fraudulent.[63] Taking the view that there may be mixed motives underlining a particular transaction; Lord Wilberforce saw such a test as being unworkable. Accordingly, the legislation was given its plain meaning with the result that, despite having actual knowledge of the unregistered land charge, the purchaser took free from it.

4. Conclusion

In the light of foregoing in this paper, it should be noted that the distinction between 'legal' and 'equitable' rights in land is both artificial and crude; but it is not the less clear: whether an entitlement can ever be legal depends quite simply on whether reference to it can be found in the catalogue of rights contend in section 1 (1)-(2) of the Law of Property Act 1925, i.e. the successor to Conveyancing Act 1881- 82 which is a statute of general application and whose provisions are almost similar in all respect to its successor legislation i.e. LPA 1925.[64] It follows that, simply by virtue of their categorical exclusion from the statutory canon, certain proprietary entitlements never have the potential to rank as legal right in or over land. Such rights and interests remain equitable irrespective of their mode of creation- e.g. even if created

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[61] . (1980) Ch 590 at 624 per Lord Denning M. R, at 628 per Eveleigh L.J.
[62] Ibid at 625.
[63] *Re Monolithic* (1915) 1 Ch. 643 at 669- 70 per Phillimore L. J. See also M. P. Thompson (1985) *CLJ* 280 at 280- 4
[64] See Martin George & Antonia Layard, *Thompson's Modern Land Law* (Seventh edn., Oxford University Press, 2019), Chap 3, pp 43-54.

by deed. This residue of right in real property law taxonomy remains inherently and inevitably equitable.[65] These rights include determinable fee simple estates-life interests- estate contracts (including options)-Restrictive covenant and beneficial interests existing under a trust of land.

As is apparent from the foregoing in this paper, English law from which our legal system was substantially transplanted, is heavily influenced by a distaste or disinclination for informal mechanisms directed towards the creation of property rights in land. Overriding interests and considerations of clarity and certainty argue strongly in favour of the use of formal means of rights creation such as those provided by a deed or other signed writing.[66] The paper discovered that notwithstanding the above, the seemingly powerful policy motivation underlying the general requirement of formality sometimes come into collision with even more significant concerns, particular of equitable origins, which, as we have seen in this paper, override the standard preference that rights in land should be created or evidenced by documentary means alone. The paper finds that equity attached ultimate priority to the underlying intent of transactions and to the demands of conscionable dealings. Although the conscience of equity is far from comprising a complete system of social or commercial morality, the longstop of equity is an abhorrence of fraud, especially where it subverts the basic intentions or shared understandings underpinning various sorts of transactions. In the final analysis, equity tends to avoid excessive formalism, tabulated legalism and dogmatic rigidity in its quest for realistic fairness and pragmatic justice in real property dealings/transactions.

[65] See LPA 1925, s. 1 (3). See also Goger J. Smith, *Property Law*, (6th edn., Pearson Longman, 2009), Chap 8, pp 90-125.

[66] See LPA 1925, SS 52 (1) which in its modern connotation amplifies the significance of its precursor legislation, i.e. the Statutes of Frauds 1677, s. 4 to the effect that the requirement of writing for a transaction involving an interest in land means that such transaction should be embodied in a deed. Thus, "writing in the foregoing context means being embodied".