

## Question

Mike is the registered proprietor of Button Manor, a rundown historic country house. In 2010 he invested his life savings to buy the property. As they were insufficient to meet the full sale price, Mike's father, Julian, contributed the shortfall. Alison moved in to Button Manor in 2013 when she married Mike.

In 2017 Julian's wife died. He sold their bungalow and accepted Mike and Alison's invitation to come and live with them in Button Manor. In 2019 Julian went off to New Zealand to visit his daughter, Kitty, after she gave birth to his first grandchild, Larry. Julian decided to extend his stay so that he could spend time watching Larry grow up.

By 2020 Mike was having great difficulty in meeting the running and repair costs of Button Manor. He therefore reluctantly decided to put the property on the market. Robin has been considering buying Button Manor to add to his chain of boutique hotels. He visited the property several times.

On the first occasion he bumped into Pat, the leader of the local Boy Scout troop. Pat explained that he was using a shortcut across the grounds of Button Manor to reach his nearby house.

On his second visit, Bunty, who lives in a neighbouring house, presented him with a document containing a covenant that appears to say Button Manor must only be used as a private residence.

Advise Robin about the legal position should he go ahead and purchase Button Manor.  
2021A

## Introduction

This is an advice for Robin about the legal position should he go ahead and purchase Button Manor. This advice will discuss who may have a potential claim on Button Manor. This advice will discuss the following:

**Julian** - contributed the shortfall and has a resulting trust also Proprietary Estoppel may apply also there is a risk of actual occupation.

**Pat** – Has a potential easement

**Bunty** - Has a potential restrictive covenant

## Julian

### Resulting Trust

In 2010 Julian contributed towards the purchase price of Button Manor which gives him a proprietary interest. Button Manor is in Mike's sole name. In Stack v Dowden [2007] 2 AC 432 the House of Lords said the starting point for determining beneficial interests where the legal title was held jointly is that beneficial interest will also be held jointly. This presumption may be displaced where there is evidence that Julian has made contributions to Button Manor and the property is held on some sort of resulting or constructive trust.

### Actual occupation

Julian accepted Mike and Alison's invitation to come and live with them in Button Manor Julian may be able to argue that he has an Overriding Interest by virtue of Schedule 3 paragraph 2 of the Land Registration Act 2002. If Julian can show he has proprietary interest and that he was in actual occupation she has a right to occupy the property without having to register his interest.

#### *An Interest*

The courts have developed the common intention doctrine in Gissing v Gissing [1971] AC 886 and Pettit v Pettit [1970] AC 777 and then in Lloyds Bank v Rosset [1989] Ch 350. These cases tell us that Julian will be able to assert that an interest has been created for his benefit in the land behind a trust where he acquires a beneficial share.

#### *Actual occupation*

What is actual occupation? In Hodgeson v Marks [1971] Ch 892 the court said the words "actual occupation" should be given a literal construction and should mean "mere physical presence". In Williams and Glynn's Bank v Boland [1981] AC 487, it was restated that actual occupation should be construed literally. The case of Chhokar v Chhokar [1984] Fam. Law 269 a woman who was in hospital having a baby, was absent from the home and this did not negative a finding of actual occupation. Lord Oliver, in Abbey National Building Society v Cann [1990] 1 All ER 1085 said "*actual occupation... does not necessarily, I think, involve the personal presence of the person claiming to occupy. A caretaker or the representative of a company can occupy.....on behalf of his employer. On the other hand, it does in my judgement; involve some degree or permanence and continuity which would rule out mere fleeting presence.*" In 2019 Julian went off to New Zealand to visit his daughter, Kitty, after she gave birth to his first grandchild, Larry. Julian decided to extend his stay so that he could spend time watching Larry grow up. Julian's absence from the property will not be a bar from claiming actual occupation. There is a plethora of case law on this Abbey National Building Society v Cann.

#### *Schedule 3 paragraph 2 of the Land Registration Act 2002*

If Julian can show he falls into paragraph 2 his interest will have Overriding effect over Robin acquiring Button Manor. Under this provision not all such an interest will be overriding, unless upon reasonable enquiry it is not disclosed by the interest-holder. Further it belonged to an individual whose occupation was not known to the purchaser and if it would not have been obvious on a reasonable inspection of the land. Such interests will only bind a new purchaser where it relates to the land which is being occupied.

Another way of protecting a beneficial interest behind the trust is placing a “Restriction” on the register. This will limit the ways in which registered proprietor may deal with the land (s.40 LRA 2002). Generally if Julian has placed a restriction on the register she will have an overriding interest against Robin. Placing a restriction is a precautionary measure and offers better protection.

### **Proprietary Estoppel**

In 2017 Julian’s wife died. He sold their bungalow and accepted Mike and Alison’s invitation to come and live with them in Button Manor. To some extent, the distinction between proprietary estoppel and the constructive trust is quite blurred. For example, there are some common elements to the situations in which proprietary estoppel and constructive trusts may be found, such as detrimental reliance. Nevertheless, there are significant differences: proprietary estoppel does not, for example, give rise to rights affecting third parties in the way a constructive trust typically will. Given equity’s flexible nature, the citing of a formula for circumstances under which an equitable remedy may arise is perhaps not advisable. Nevertheless, in order to invoke proprietary estoppel, we can broadly say that the cohabitant would have to establish the following factors:

- That the cohabitant has acted to his/her detriment
- That the cohabitant did so on the faith of a belief that he/she has been (or is going to be) given a right in the property
- That the cohabitant belief was known to and encouraged by the other cohabitant

### **Pat**

Mike agreed that he would allow Pat the leader of the local Boy Scout troop to use a shortcut across the grounds of Button Manor to reach his nearby house. Are these terms included in an agreement prepared by Mike’s solicitor, which was signed and witnessed? Section 1(2) LPA 1925 must be fulfilled when creating a legal interest. Easements when created must last for the length of legal estate. If an easement has not been created for this duration there can be no legal easement (in which case it will be equitable). Second, the easement needs to be created by deed (s.52(1) LPA 1925). We are not told whether this easement is created by deed, however if solicitor prepared the agreement would suggest all formalities have been complied with in the usual way. The advice to Robin is to do the necessary searches because legal easements need to be entered as a notice on the charges register of Mike’s estate. Easements acquired by express grant are ‘registrable dispositions’ and must be registered in addition to being created by deed for the duration equivalent to a

legal estate (s.27(2)(d) LRA 2002). When the registrar at the land registry receives and processes the registration application, a notice on the charges register will be entered to protect the new legal easement (s.38 LRA 2002).

### **Why are easements registerable as overriding interests in registered land?**

Legal easements existing at the date of first registration are overriding interests to which the land is subject.<sup>1</sup> Under the Land Registration Act 1925, equitable easements could take effect as overriding interests.<sup>2</sup> Under the Land Registration Act 2002, only legal easements can be overriding interests. Expressly granted easements, whether legal or equitable, will be entered on the register on first registration.<sup>3</sup> Any easement which was an overriding interest immediately before the coming into force of the Land Registration Act 2002 retains its overriding status.<sup>4</sup> Easements expressly granted on or after 13 October 2003 must be completed by registration to operate at law failing which they take effect only in equity. Such equitable easements are not overriding interests and must be protected by way of notice if they are to bind a subsequent owner of the land. Implied easements and prescriptive easements are not required to be completed by registration to be legal easements and will take effect as overriding interests.<sup>5</sup>

In relation to dispositions of registered land registered on or after 13 October 2006, a buyer of registered land for valuable consideration will not be bound by an implied or prescriptive easement arising after that date that is an overriding interest unless:

- (1) the buyer knows of it;
- (2) it is obvious from a reasonable inspection of the land; or
- (3) it has been exercised in the period of one year ending with the date of purchase.<sup>6</sup>

### **Bunty**

Bunty's owns a neighbouring house and after Bunty purchased they entered into an agreement. Mike agreed that he would only use Button Manor only as a private residence. Restrictive covenants being enforced have been developed by Equity and for any successor of servient land to be bound by the agreement then they will need to have actual knowledge (notice) of the covenants of any agreement. One way of doing this is by registering the interest on the register. For Bunty to create and protect an interest which is enforceable he needs to register his restrictive covenant as a notice on the charges section

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<sup>1</sup> See the Land Registration Act 2002 ss 11(4)(b), 12(4)(c); and real property and registration vol 87 (2022) para 349.

<sup>2</sup> See *Celsteel Ltd v Alton House Holdings Ltd* [1985] 2 All ER 562, [1985] 1 WLR 204; *Thatcher v Douglas* [1996] NPC 206, [1996] NLJR 282.

<sup>3</sup> See the Land Registration Rules 2003, SI 2003/1417, r 35; and real property and registration vol 87 (2022) para 366 See also the Land Registration Rules 1925, SI 1925/1093, r 40 (repealed).

<sup>4</sup> See the Land Registration Act 2002 Sch 12.

<sup>5</sup> Law Society Conveyancing Handbook (2012, 19th Edition) para B26.7.3.

<sup>6</sup> See the Land Registration Act 2002 Sch 3 para 3(1), Sch 12 para 10; and real property and registration vol 87 (2022) para 475

of the register of Button Manor (s.32 LRA 2002). Bunty's rights are protected against others if he has registered the notice. If he failed to do this then his rights will not be binding against any successor in title (s.29 LRA 2002).

**End.**