The Concept of Vacant Possession: Theory and Practice

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Contents

For all those who didn't quite move out in time...

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Abstract

To the everyday man or woman on the street, the term 'vacant possession' raises its head most noticeably in the residential sphere, with many everyday people buying and selling property and being obliged to give, or entitled to receive, vacant possession. Furthermore, the term is by no means limited to a 'lay' usage: a wide range of business and professional people use the expression 'vacant possession' on a daily basis, and the term is in the lexicography of judges, conveyancers, litigators, surveyors, estate agents, commentators and others connected to property, including property owning landlords and tenants. All these stakeholders make use of the term in a formal and professional sense, and with reference to legal transactions for which vacant possession is an essential element.

Although it is an everyday term that is used by many, a common feature of these usages of the term is a lack of attention to what it actually means. For example, estate agents, who invariably use the term in their advertising particulars, seem able to distinguish between 'full vacant possession', 'immediate vacant possession' or 'complete vacant possession', with ostensibly no real justification as to how the prefacing adjective in each case adds anything to the message that they are seeking to convey to prospective purchasers, as to what they can expect to obtain on completion. Lawyers talk about 'giving VP on completion', but few documents ever actually define what vacant possession means with a capitalised 'V' and 'P'.[1] Furthermore, the courts have made decisions as to whether vacant possession was or was not given in a particular instance, but rarely found it necessary to explain what the term actually meant, or sought to explicitly apply an understanding of the concept to the facts of any particular case.

[1] See Shaw, K. 'Bone of contention' (2009) 1 Aug 2009 *Estates Gazette* 58-59.

Indeed, behind the familiarity of this common expression, lie years of uncertainty, misunderstanding and general neglect of the development of a sound and coherent theoretical model of vacant possession. There is very little case law and even less judicial guidance available. In 1988, and in two editions of the *Conveyancer and Property Lawyer*, Charles Harpum wrote what probably remains the most insightful learned article on the subject,[2] but since then the concept appears to have warranted very little scholarly or practitioner attention.

This thesis explores the concept of vacant possession and its meaning. Expounding the inconsistent evolution and development of the concept, the thesis explains the constituent elements of the concept of vacant possession, along with the practical manifestation of the term in everyday property cases. In doing so, it highlights the difficulties that lawyers, surveyors, judges and other third parties face on a day-to-day basis when seeking to interpret the nature, scope and extent of the obligation. Further, to link this work to wider theoretical debate in literature pertaining to possession, the thesis draws on other common property law concepts, those of actual occupation and adverse possession; such a discussion helps to explain why the inherently *infra-jural* concept of vacant possession cannot be 'tied down' to a precise legal definition or formulation.

In conclusion, and to facilitate understanding and usage of the term, the thesis draws on the analysis undertaken to promulgate a working articulation of the concept, and considers other provisions that can ameliorate the remedial entitlements for an injured party in the event of a breach of the obligation. These may go some way to assist all those who will encounter the concept in future legal transactions.

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[2] Harpum, C. 'Vacant possession - chameleon or chimaera?' (1988) *Conveyancer and Property Lawyer* 324, 400 (C.H.).

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Chapter 1

The Importance of Vacant Possession

The obligation to give vacant possession is generally understood to refer to the legal commitment to ensure that at the relevant date (for example, on completion of contracts or termination of a lease) a given property is in a state fit to be occupied (both physically and legally) and enjoyed.[1] Vacant possession is known to be relevant to the sale of freehold land and property (e.g. the transfer of estates in fee simple) and upon the grant, transfer and termination of leases and other tenancies (and perhaps informal agreements to occupy by consent).[2] Vacant possession is an essential element of any land transaction where the right to occupy a property is being vested in, or passed to, a third party.[3]

Figures obtained from the Land Registry Annual Reports and Accounts 2008/9 confirm that in the 255 working days of the year to which these accounts referred, there were over 319,000 first registrations (comprising land conveyed or leases granted out of unregistered titles). There were over 198,000 leases granted out of existing registered titles during this period. There were around four million dealings with registered titles (the transfer of whole or part of an existing registered title). These types of transactions will all have involved the issue of vacant possession. That is nearly five million transactions each year, some twenty thousand transactions per working day, approximately sixty transactions every minute. In other words, a transaction to which

[1] Shaw, K. 'Fit to be occupied' (2007) 27 Jan 2007 *Estates Gazette* 182; Shaw, K. 'More to it than meets the eye' (2010) 1 May 2010 *Estates Gazette* 4 and Shaw, K. 'All that you can't leave behind' (2010) 256 *Property Law Journal* 6.

[2] This is determined by what definition of Vacant Possession is adopted, as is discussed in later chapters. Upon termination of a licence a tenant will normally be obliged to vacate the premises, but it is arguable as to whether this is giving vacant possession as the tenant is not returning possession (as, for example, on termination of a lease). The essence of a licence, as opposed to a lease, is that it does not involve the grant of possession and this is what distinguishes it from a lease. Accordingly, as such, it does not amount to a legal estate or interest in land and does not bind third parties; but it is common for licences to (wrongly) make use of the term.

[3] Williams, T.C. 'Sale of Land with Vacant Possession' (1928) 114 *The Law Journal* 339 describes the receipt of vacant possession as "an integral part of the contract". The only category of transaction for which vacant possession will not be relevant concerns the purchase of reversionary interests (for example, a freehold subject to a long lease) and other estates that are not 'vested in possession'. The meaning of the term 'possession' is discussed in more detail in chapter 5.

vacant possession will be relevant takes place the equivalent of every second of each working day in England and Wales.[4]

It is therefore unsurprising that vacant possession is one of the most commonly used terms in the property professional's dictionary. Given that vacant possession arises on the majority of land transactions in England and Wales, the sheer scale on which the obligation is engaged causes the term to be relevant to a wide range of people. These include sellers and purchasers, landlords and tenants and third party occupiers both on residential and commercial transactions. From the outset it is important to appreciate why vacant possession is something of interest, and concern, to such people.

Who does Vacant Possession affect?

On the sale of a residential property, a seller will be keen to ensure that vacant possession is provided; otherwise the buyer may refuse to complete the purchase. If the buyer refused to complete because the premises could not be occupied without difficulty or objection on completion,[5] the buyer could serve a notice to complete and ultimately rescind the contract. All this will concern a seller who may have exchanged and be seeking completion themselves on the related purchase of a new property which he or she will not be able to effect until the sale of their current property has completed. On the purchase of the new property the seller (as buyer in respect of that purchase) could lose their deposit if they are unable to complete on time because the sale of their property has not taken place,[6] causing them not to have the funds required to complete the purchase. It is known for people in such circumstances to ultimately end up homeless in the interim when difficulties in completing the sale of their current property cause them to lose the right to purchase the property for which they have contracted to buy.[7]

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[4] See the Land Registry Annual Report and Accounts 2008/9. Calculation based on a working day comprising 6 working hours. Report Available at http://www.landreg.gov.uk/ar09/Annual_Report_0809_01.html.

[5] The tests to determine whether vacant possession is given are discussed in detail in chapter 6.

[6] For a discussion of the return of deposits see Bowes, C. and Shaw K. 'Can I have my money back?' (2008) 204 *Property Law Journal* 2.

[7] See Madge, N. 'Possession – the Changing Regime' (2001) *Law Society Gazette* 39 in which the importance of vacant possession is discussed in various contexts.

Normally on the sale of a residential property the parties will complete the transaction *before* an inspection of the property has taken place.[8] If the buyer does complete, only to then find that vacant possession has not been given, this could leave the buyer entitled to damages as a consequence of the seller's default. Such damages could be quite significant and pose a financial burden on the seller.[9] A seller is therefore well advised to ensure that the premises are fit for occupation by the buyer on completion irrespective of whether they have a related purchase to complete.[10]

The difficulties caused by not giving vacant possession can be even more onerous in the commercial context. A buyer may be a commercial organisation requiring immediate possession on completion in order to ensure business continuity from their previous premises. If vacant possession is not given on completion, then putting aside the legal remedies available, the buyer could lose important contracts or strain business relations and goodwill with existing suppliers and trades people because of its inability to continue to trade normally. Commercial organisations are often tied to service and other contracts which will include fixed penalties for non-compliance in accordance with contractual agreements. Such agreements may include pre-arranged liquidated damages clauses or other financial penalties. The consequences of not being able to immediately occupy a given premises can therefore be very serious.[11]

The most common situation in which vacant possession is relevant in the commercial context is with respect to the grant and termination of business leases over properties. It is common for a tenant to wish to bring their lease to an end before its contractual

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[8] It is stated on Lexis Nexis Butterworths Document [547] 10 Occupiers (accessible via subscriber service) that ideally "the buyer's conveyancers should check for any evidence as to rights of occupiers by either personally inspecting the property or advising the buyer client to do so...the buyer's conveyancers should raise a requisition of the seller's conveyancers requesting confirmation that vacant possession of the whole of the premises will be given on completion and that all occupiers have agreed to vacate". In practice, however, this does not normally occur.

[9] As discussed in later chapters, the obligation to give vacant possession is still actionable after completion.

[10] For a discussion of the doctrine of constructive notice (with respect to overriding interests and other adverse interests to which a sale may be subject), see Howell, J. 'Notice: A Broad View and a Narrow View' (1996) *Conv* 34; Partington, M. 'Implied Covenants for Title in Registered Freehold Land' (1988) *Conv* 18 and Sheridan, L.A. 'Notice and Registration' (1950) *NILQ* 33. The doctrine of constructive notice deems a party with having knowledge which they did not in fact have. Many have referred to the inequity of constructive notice; for example, "The doctrine is a dangerous one. It's contrary to the truth. It is wholly founded on the doctrine that a man does not know the facts, and yet it is said that constructively he does know them" – *Allen v Seckham* (1879) 11 ChD 790, *per* Lord Esher at 794. In respect of issues concerning title, registration has sought to obviate constructive notice considerations in recent years by protecting purchasers from the undiscoverable interests in their otherwise clean title. This is discussed in detail in chapter 7, where comparisons to the tests for vacant possession and policy decision making are critically evaluated.

[11] See Bowes, C. and Shaw K. 'Time's up...but I'm staying!' (2008) 218 *Property Law Journal* 9 and Bowes, C. and Shaw K. 'Reneging on the deal' (2009) 222 *Property Law Journal* 13 for a discussion of issues relevant to remaining in possession of property and the non-performance of obligations in legal agreements.

expiry by exercise of a break option, which allows the term of the lease to come to an end sooner than originally agreed. Commonly, exercise of the break can be conditional upon the procurement of vacant possession, or compliance with all covenants in the lease up to and including the break date. If the lease includes a covenant to 'yield-up' the premises on termination, this is likely to include an obligation to give vacant possession in any event, even if the procurement of vacant possession is not an express pre-condition for operation of the break.[12]

In a changing, and recently downward, property market, it is common for tenants to seek to reduce operating overheads and source alternative (and normally smaller) premises. This can only be achieved if their current lease is brought to an end. Giving vacant possession is therefore essential for the tenant in order to ensure that its current lease does not continue past the break date. If the tenant fails to operate the break option successfully and remains tied to its current lease along with a new tenancy that may already have commenced, or the tenant has become contractually bound to enter into, this could lead to dire financial circumstances. It is common for tenants to misunderstand the requirements for successful operation of a break option and unwittingly find that they remain liable and tied to the covenants contained in their current lease because of vacant possession not being given at the material time.[13]

The financial or covenant strength of the tenant, are relevant considerations for the landlord in such a situation. If the landlord has a tenant in occupation of its premises under the terms of a lease with a 'good covenant strength', or the tenant is paying rent higher than current market value, then there can be little incentive in allowing the tenant to move on. This may leave the landlord having to find a new tenant or face paying empty rates tax on a property earning no revenue for them in the short term.[14] The bespoke nature of some premises can cause the potential for an open market letting to be very restrictive in respect of appealing to only a limited range of potential new tenants. Further, commonly to secure a new letting a landlord may have to offer other

[12] See Martin, J. 'Tenant's Break Options' (2003) 153 *New Law Journal* 759 where the requirement to give vacant possession when operating a break option in a lease is discussed.

[13] See Higgs, R. 'Leave Your Keys on Your Way Out' (2005) 155 *New Law Journal* 149, in which the difficulties of appreciating what 'yielding-up' at the end of the lease may involve were discussed. Higgs states "there has been very little guidance from case law as to what constitutes yielding up...[n]either has Parliament ever prescribed the meaning of the expression".

[14] See Todd, L. 'Empty Property Rate Relief – Have the fears become a reality?' (2008) 217 *Property Law Journal* 6.

financial incentives (such as rent free periods) to potential new tenants, which can also be straining financially on the landlord. All this work would cause the landlord to incur time and cost in any event, and is therefore not appealing or attractive.

A landlord may wish to seek to prevent a tenant successfully exercising a break option in such circumstances, and use whatever arguments are available to it to claim that the lease has not come to an end. Common arguments include an invalid break notice served pursuant to the express terms of the lease,[15] or non-payment of all amounts due up to and including the break date (which are normal pre-conditions for the exercise of a break option).[16] However, vacant possession can be used as perhaps the most effective and decisive means of preventing a lease coming to an end as per the tenant's intention. If the landlord can construct an argument to the effect that vacant possession was not given at the material time (whether this is because of a physical or legal impediment preventing enjoyment of the property at the relevant date)[17] the landlord may thereby force a tenant to remain principally liable under the terms of the lease, with the corresponding ongoing liabilities (including, most notably, the payment of rent). In such a case, a tenant may only be able to divest itself of its ongoing liability by assigning or subletting the lease to a third party (but this will be determined by the terms of the lease and relevant applicable statute).[18] This is a better situation for the landlord given that the original tenant can be made to effectively 'underwrite' any default by an immediate assignee to a lease originally granted after 1995[19] (or remains liable in any event for leases granted before 1995). The post-1995 legislation is a mechanism by which the original tenant, with perhaps the stronger covenant strength, can be held to perform the covenants in the lease even after assignment,[20] in the event that the new tenant was to default and the Authorised Guarantee Agreement was to be called upon.

[15] This would normally involve taking a technical point, for example in respect of the content or form of the notice, or the service thereof.

[16] Martin, above n12, explains that a common pre-condition to exercise a tenant's break option includes, along with vacant possession, payment of all rent(s) due up to and including the break date. This can be an issue when the break date falls on a quarter day, upon which the whole quarter's rent falls due in advance.

[17] Impediments to vacant possession are summarised below, and discussed in more detail in chapters 5 and 6. Madge, above n7, also discusses vacant possession in such circumstances.

[18] For example, the statutory provisions of the Landlord and Tenant Act 1927.

[19] These are known as Authorised Guarantee Agreements (AGAs) – section 6, Landlord and Tenant (Covenants) Act 1995.

[20] Subject to a subsequent assignment of a post-1995 lease, which would cause the AGA to fall away.

Further, if the tenant who has failed to comply with his obligation to give vacant possession is forced to divest its ongoing liabilities by seeking to sublet the whole or part of the premises to a third party, then this is also not a fully satisfactory solution as far as the tenant is concerned. A subletting takes effect out of the tenant's interest and therefore the tenant remains principally liable to the landlord under the terms of the (head) lease for compliance with covenants under the (head) lease. In the event that the sub-tenant defaults on payments under the sub-lease (as between tenant and sub-tenant) this is an issue between tenant and sub-tenant (and not landlord).[21] The tenant will still remain principally liable to the landlord for compliance with covenants under the (head) lease.[22] To mitigate loss a tenant can often find that they are faced with the prospect of having to sub-let at a lower passing rent than they currently pay to their landlord (if the terms of the lease permit this) and to make up any shortfall themselves.[23]

Vacant possession is also relevant to the return of possession when a lease comes to an end by effluxion of time (and no statutory or common law rights to remain in the property are engaged).[24] It is common for landlords to advance damages claims when a tenant does not vacate by the contractual termination date in a lease and this causes loss or inconvenience. Normally, such a claim will be part of other so called 'terminal' claims including claims for dilapidations (as a consequence of the tenant's failure to keep the premises in the state of repair required by the covenants contained in the lease).

Vacant possession is therefore key to the majority of land transactions in a residential and commercial context and presents a significant area of risk for sellers and buyers, and landlords and tenants. It can be an issue when, innocently, two people agree to the sale and purchase of a property and something prevents the premises being fit for occupation at the relevant time. In contrast, it can be invoked as a 'commercial sword' when landlords seek to use the vacant possession obligation to protect their financial position in the current market place by preventing a tenant bringing a lease to an end

[21] A sub-lease does not affect the contractual relationship between superior landlord and tenant – see Skinner, P.G., Schear, A.J. and Katz S.S. 'Assignment vs subletting: Do you care which you use? Why?' (2002) 4 *Journal of Corporate Real Estate* 337.

[22] Ibid. A sublease will be expressed to have no effect on the headlease out of which title is derived.

[23] See Shaw, K. 'Reoccupation and Renewal' (2006) 174 *Property Law Journal* 3; and Baker, M. and Shaw K. 'New lease...new rent' (2007) 187 *Property Law Journal* 22.

[24] See Bowes, C. and Shaw K. 'Time's up...but I'm staying!' (2008) 218 *Property Law Journal* 9; and Bowes, C and Shaw K. 'Term of years...uncertain' (2009) 225 *Property Law Journal* 7 in respect of possession on the termination of leases.

prematurely. It is therefore an issue that has a real impact on people and their lives, and so it is important to have a clear understanding of the nature and effect of the obligation. An understanding of the obligation is essential in order to appreciate the responsibilities and liabilities of each party in a given instance, and the issues of risk and responsibility which are engaged in transactions of this kind.

What is the obligation?

The obligation to give vacant possession will normally appear as a term in a legal agreement, conveyance, contract or transfer. This can either be express or implied. Express terms are terms that have been specifically mentioned and agreed by both parties at the time the contract is made.[25] They can be oral but will usually be in writing as part of the legal contact or agreement.[26] It is common, however, for a term which has not been mentioned by either party to nevertheless be incorporated as part of a contract, because the term is necessary for the contract to have commercial sense. These terms are known as implied terms and can be implied by either statute (for example, various implied terms in the Sales of Goods Act 1979) or the courts. When implied by the courts this can be as a matter of fact, or as a matter of law.[27]

When implying terms in fact, the exercise involved is that of ascertaining the presumed intention of the parties,[28] that of both parties to the contract, collected from the words of

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[25] Furmston, M.P. *The Law of Contract* (3rd edn Butterworths Tolley, London 2007) 3.1.

[26] It is good practice for express terms to appear in writing in the contract or legal agreement in order for there to be a valid contract under section 2 of the Law of Property (Miscellaneous Provisions) Act 1989.

[27] Some terms are generally known to be included in contracts in a particular trade or locality as well by a course of dealings of by custom. For example, amongst bakers, 'one dozen' means thirteen but it is not necessary to include terms in every contract specifying this. See *Hutton v Warren* (1836) 1 M & W 466; *Gibson v Small* (1853) 4 HL Cas 353; *Dale v Humfrey* (1858) EB & E 1004; *Tucker v Linger* (1882) 21 Ch D 18; *Pike, Sons & Co v Ongley & Thornton* (1887) 18 QBD 708; *Fox-Bourne v Vernon & Co Ltd* (1894) 10 TLR 647; *Produce Brokers Co Ltd v Olympia Oil and Cake Co Ltd* [1916] 1 AC 314; *Lord Eldon v Hedley Bros* [1935] 2 KB 1; *E E & Brian Smith (1928) Ltd v Wheatsheaf Mills Ltd* [1939] 2 KB 302; *Mount v Oldham Corpn* [1973] QB 309 and *Novorossisk Shipping Co v Neoptera Co Ltd* [1990] 1 Lloyd's Rep 425 at 431.

[28] See *Liverpool City Council v Irwin* [1977] AC 239, *per* Lord Edmund-Davies at 266; *Rhodes v Forwood* (1876) 1 App Cas 256, *per* Lord Chelmsford at 268; *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108, *per* Lord Wright at 137; *KC Sethia (1944) Ltd v Partabmull Rameshwar* [1950] 1 All ER 51, *per* Jenkins L.J. at 59; *Abbott v Sullivan* [1952] 1 KB 189, *per* Morris L.J. at 219; *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* [1973] 2 All ER 260, *per* Lord Pearson at 267; *Attica Sea Carriers Corpn v Ferrostaal Poseidon Bulk Reederei GmbH* [1976] 1 Lloyd's Rep 250, *per* Lord Denning M.R. at 254; *Shell UK v Lostock Garages* [1977] 1 All ER 481, *per* Lord Denning M.R. at 488; *Liverpool City Council v Irwin* [1977] AC 249; *Duke of Westminster v Guild* [1985] QB 688, *per* Slade L.J. at 699; *Bank of Nova Scotia v Hellenic Mutual War Risk Association (Bermuda) Ltd, The Good Luck* [1990] 1 QB 818, [1989] 3 All ER 628; *National Bank of Greece SA v Pinios Shipping Co, The Maira* [1990] 1 AC 637, [1989] 1 All ER 213; *Ashmore v Corpn of Lloyd's (No 2)* [1992] 2 Lloyd's Rep 620, *per* Gatehouse J. at 626; *Hughes v Greenwich London Borough Council* [1994] 1 AC 170, *per* Lord Lowry at 179; *McVitae v Unison*

the agreement[29] and the surrounding circumstances.[30] Something that is so obviously included that it did not need to be mentioned in the contract will normally be implied as a matter of fact. In *Shirlaw v Southern Foundaries Ltd,* Mackinnon L.J. said:

> "Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if while the parties were making their bargain an officious bystander were to suggest some express provision for it in the agreement, they would testily suppress him with a common 'Oh, of course'."[31]

Terms can also be implied by the courts as a matter of law, and this concerns more general considerations of public policy where the courts are prescribing how the parties to certain types of contract ought to behave. It is said that "terms implied in law are in reality incidents attached to standardised contractual relationships".[32] Terms are implied in law where the contract is of a defined type, encompassing "those relationships which are of common occurrence, such as...seller and buyer, owner and hirer, master and servant, landlord and tenant, carrier by land or by sea, contracts for building work and so forth".[33] The implication is not based on the parties' intention "but on more general considerations".[34] There are two basic requirements for the implication of a term in law: "the first requirement is that the contract in question should be of a defined type...[t]he second requirement is that the implication of the terms should be necessary".[35] Examples of terms implied by law in established contracts include the lease of a

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[1996] IRLR 33, *per* Harrison J. at 39; *Harrods Ltd v Harrods (Buenos Aires) Ltd* [1997] FSR 420, *per* Neuberger J. at 453 and *Ennstone Building Products Ltd v Stanger Ltd* [2002] EWCA Civ 916, [2002] 2 All ER (Comm) 479.

[29] *Duke of Westminster*, above n28 *per* Slade L.J. at 69 and *Bank of Nova Scotia*, above n28.

[30] *Ali v Christian Salvesen Food Services Ltd* [1997] 1 All ER 721, *per* Waite L.J. at 726.

[31] [1939] 2 KB 206 at 227. See also *Spring v N.A.S.D.S.* [1956] 1 WLR 585, *per* Sir Leonard Sachs V-C at 599; *Gardner v Coutts & Co* [1968] 1 WLR 173, *per* Cross J. at 176–7, *Alpha Trading Ltd v Dunshaw – Patten Ltd* [1981] QB 290, *per* Lawton L.J. at 308; *Mosvolds Rederi A/S v Food Corpn of India, The Demoder General T J Parke and King Theras* [1986] 2 Lloyd's Rep 68, *per* Steyn J. at 71; *El Awadi v BCCI SA* [1990] 1 QB 606, [1989] 1 All ER 242, *per* Hutchinson J. at 252 and *Fal Bunkering of Sharjah v Grecale Inc of Panama* [1990] 1 Lloyd's Rep 369.

[32] Furmston, M.P. *The Law of Contract* (2nd rev edn Butterworths, London 2003), section 3.21. Also *Society of Lloyd's v Clementson* [1995] CLC 117, *per* Steyn L.J. at 131; *Shell UK*, above n28 *per* Lord Denning M.R. at 487; *Mears v Safecar Security Ltd* [1983] QB 54; *Ali Shipping Corpn v Shipyard Trogir* [1998] 2 All ER 136, *per* Potter L.J. at 147 where it is stated that "[c]onsiderations of business efficacy, particularly when based on the "officious bystander" test, are likely to involve a detailed examination of the circumstances existing at the time of the relevant contract...whereas the parties have indicated their presumed intention simply by entering into a contract to which the court attributes particular characteristics".

[33] *Shell UK*, above n28, *per* Lord Denning M.R. at 487; *El Awdi v BCCI* [1989] 1 All ER 242, *per* Hutchinson J. at 253; *Bank of Nova Scotia*, above n28.

[34] *Industrie Chimiche Italia Centrale and Cerealfin SA v Alexander G Tsavlisis & Sons Maritime Co, The Choko Star* [1990] 1 Lloyd's Rep 516, *per* Slade L.J. at 526; *Luxor (Eastbourne) Ltd*, above n28, *per* Lord Wright at 137; *Shell UK*, above n28, *per* Lord Denning M.R. at 487. It has been suggested that "the essence of the test is a consideration of the contract and how to maximise the social utility of the relationship" – see Peden, E. 'Policy Concerns Behind Implication of Terms in Law' (2001) 117 *LQR* 459.

[35] See *El Awadi*, above n31, *per* Hutchinson J. at 253.

furnished house where it has long been accepted that a term will be implied that at the time of commencement of the tenancy the house will be reasonably fit for habitation.[36] The same applies in relation to a contract for the sale of land and the building of a house on it that will be reasonably fit for habitation.[37]

Vacant possession, when operating as an implied term, can be seen as a term implied by the courts as a matter of law. Various cases have confirmed this,[38] including the decision in *Cook v Taylor*[39] in which Simons J. said in general terms that:

> "where a contract is silent as to vacant possession, and silent as to any tenancy to which the property is subject, there is impliedly a contract that vacant possession will be given on completion."[40]

In *Edgewater Developments Co v Bailey* it was said that "[w]here nothing was said about possession it was often said that there was an implication that property was to be sold with vacant possession".[41] This is logical given that the seller/buyer relationship is embodied in a sale and purchase contract which is of an established and defined type, and it is illogical for a contract for the sale of land or property not to provide the buyer with a right to possession of the estate in land on completion when an immediate right of possession is being conveyed (that is, the sale is not of an estate in reversion).[42] This type of sale and purchase contract ought to "behave in such a way".[43] As discussed in chapter 4, the treatment of vacant possession as an express and implied term in the standard form conditions of sale has changed over time, and this has an effect on the responsibilities and entitlements of the parties to any given transaction.

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[36] See *Smith v Marrable* (1843) 11 M&W 5; *Wilson v Finch Hatton* (1877) 2 Ex D 336 and *Collins v Hopkins* [1923] 2 KB 617.

[37] See *Perry v Sharon Development Ltd* [1937] 4 All ER 390; *Lynch v Thorne* [1956] 1 WLR 303; and *Hancock v BW Brazier (Anerley) Ltd* [1966] 1 WLR 1317.

[38] See also *Midland Bank Ltd v Farmpride Hatcheries Ltd* [1981] 2 EGLR 147, *per* Shaw L.J. at 148: "Prima facie a prospective vendor of property offers the property with vacant possession unless he otherwise states and that would ordinarily be implied in the contract of sale in the absence of stipulation to the contrary", and Walford, E.O. *Contracts and Conditions of Sale of Land* (Sweet and Maxwell Limited, London 1957) 169. Wilkinson, H.W. *Standard conditions of sale of land: a commentary on the Law Society and National general conditions of sale of land* (4th Edition Longman, London 1989) 15 reports that where a person contracts to sell a dwelling-house with vacant possession, there is also term implied into the contract that the vendor will procure the cancellation of any Class F land charge registered against the property, pursuant to section 4(1) of the Matrimonial Homes Act 1967. These decisions are discussed in later chapters but show how vacant possession as an implied term has been established by decisions in case law.

[39] [1942] Ch. 349, *per* Simonds J. at 352.

[40] Ibid, 352.

[41] [1974] 118 Sol Jol 312, *per* Lord Denning M.R. at 314.

[42] Williams, above n3, describes receiving vacant possession as "an integral part of the contract".

[43] See *Shell*, above n28 at 487; *El Awdi*, above n33 at 253; *Bank of Nova Scotia*, above n28; *Perry; Lynch;* and *Hancock;* all above n37.

How is the obligation breached?

It has been suggested that where a property is sold with vacant possession, the vendor has to satisfy the purchaser that there is no adverse claimant and no occupier of the premises at the relevant time.[44] It has been stated that:

> "An undertaking that vacant possession will be given is usually taken to mean that possession will be given free from any occupation by the vendor or a third party and free from any claim to a right to possession of the premises."[45]

Over time, case law has tended to take broad view of the proposition that any impediment which prevents the purchaser from obtaining the quality of possession for which he/she had contracted, will constitute a breach of the seller's obligation.[46] Indeed, it would appear that there are various potential obstacles to the receipt of vacant possession and that these can be divided into several different categories, each category raising issues which the law has failed to adequately address. These are discussed further in chapter 2, but summarised briefly below by way of introduction.

Tangible impediments

The most common example of an impediment to vacant possession is when items that should have been removed by the seller or party required to give vacant possession are left at a property on completion. There has been a plethora of case law dealing with the non-procurement of vacant possession in these terms. Some of the very oldest case law, concerning the service of summons in ejectment cases[47] dealt (somewhat crudely) with vacant possession not being given due to items being left in the premises on completion. In *Savage v Dent,*[48] beer was left in a cellar by the party required to give vacant possession on completion and this was held to amount to a breach of the obligation. In *Isaacs v Diamond,*[49] furniture and goods remaining on the premises at completion was

[44] Williams on *Vendor and Purchaser* (4th edn Sweet and Maxwell, London 2008) 201.
[45] Emmet, L.E. *Emmet on Title* (19th rev edn Sweet and Maxwell, London 2008) 6.006.
[46] *Korogluyan v Matheou* [1975] 239 E.G. 649.
[47] For example, removal of persons for the non-payment of rent or other contractual amounts falling due under a lease or other legal document.
[48] [1736] 2 Stra 1064.
[49] (1880) WN 75. It is arguable that these are not authorities for the conventional use of the term 'vacant possession' as is discussed later in this chapter, but the principle of vacant possession can be extracted from the cases.

held to be a breach of the obligation to give vacant possession. In each case, the items being left at the premises were seen to be consistent with the seller keeping possession of the premises for their own purposes.[50]

Persons in occupation

A second common obstacle to the receipt of vacant possession is that of persons remaining in the property on completion. There is a wealth of case law confirming that the presence of an existing tenant or other occupier at the premises on completion will prevent vacant possession being given. This is commonly because the lease is still continuing (i.e. the party has contractual or statutory rights to remain in occupation of the property) or because other persons prevent the delivery of vacant possession on completion.[51] In *Royal Bristol Permanent Building Society v Bomash*[52] the purchaser agreed to buy two houses, vacant possession of which was to be given on completion. When the day fixed for completion arrived, the houses were occupied by someone who was 'holding over' (that is, continuing to occupy on the same terms of the tenancy which had technically come to an end by effluxion of time). It was held that the vendor was in breach of his obligation to give vacant possession on completion and damages were awarded accordingly. Similarly in *Beard v Porter*[53] the vendor had agreed to sell to the purchaser a dwelling-house which was occupied by a sitting tenant. The vendor expressly agreed that the purchaser was to be given vacant possession on completion. The purchase was completed, but the tenant refused to quit the house. The purchaser sued and was awarded damages for breach of the vendor's undertaking to give vacant possession on that date.[54] Case law has, however, taken an inconsistent view as to how

[50] More recent examples include *Cumberland Consolidated Holdings Ltd v Ireland* [1946] KB 264 and *Hynes v Vaughan* [1985] 50 & CR 444. See also *Scotland v Solomon* [2002] EWHC 1886 (Ch) (discussed further in chapter 2).

[51] For a discussion of the problems of so-called 'sitting tenants', see Stocker, J. 'The Problem of the Protected Sitting Tenant' (1988) 85 *Law Society Gazette* 14 and the Legal Update in (1988) 85 *Law Society Gazette* 36.

[52] [1886-90] All ER Rep 283 and *Engell v Finch and others* (1869) L.R. 4 Q.B. 659.

[53] [1948] 1 KB 321. Other similar cases include *Sharneyford Supplies Ltd v Edge* [1987] Ch 305; *Cleadon Trust Ltd v Davis* [1940] Ch. 940; *Leek and Moorland Building Society v Clark* [1952] 2 QB 788 and *Appleton v Aspin* [1988] 4 EG 123. See also *Reynolds v Bannerman* [1922] 1 KB 719; *Watson v Saunders-Roe* [1947] KB 437 CA and *Carter v Green* [1950] 2 KB 76 CA in relation to protected rights of tenants, along with The Rent Act 1977 and The Housing Act 1988. See also News Report in (1987) 84 *Law Society Gazette* 2417.

[54] For a discussion of the problems caused by unlawful third parties being in occupation on completion, and preventing the delivery of vacant possession, see Jones, P.V. 'Squatting and Squatting' (1991) 141 *New Law Journal* 1543. This is further discussed in chapter 5 with reference to the decision in *Sheikh v O'Connor* [1987] 2 EGLR 269.

this affects vacant possession where the persons in occupation have no lawful claim to possession of the property.[55]

Legal impediments

The third main type of impediment to the receipt of vacant possession are obstacles of a legal nature. Examples include the transfer of a strip of land subject to dedication as a public highway. In *Secretary of State for the Environment v Baylis and Bennett*[56] it was held that vacant possession of the land could not be given because the highway authority had the right to possession rather than the owner of the sub-soil. Other instances include a property (with an existing first floor tenancy) being sold with 'vacant possession of the ground floor' but with a Housing Act notice limiting occupation of the whole house to one household, thus preventing the delivery of vacant possession as far as the ground floor was concerned.[57] A number of cases concern the property in question being compulsorily purchased or requisitioned in some way after the exchange of contracts,[58] ostensibly creating a legal obstacle which prevents the giving of vacant possession on completion.

How do you define the obligation?

As the obligation to give vacant possession is relevant to so many transactions, and so widely used and referred to in legal agreements, it could be reasonable to assume that the concept would have a clear, settled and agreed definition. This is far from the case. Whilst of universal use, the term is one of the most misunderstood among all property terms, with few being able to explain what procuring vacant possession actually means or involves. Over time, lawyers, surveyors, judges and laymen have all struggled in seeking to interpret what the obligation to give vacant possession actually refers to in cases where the procurement of vacant possession is a decisive issue.

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[55] See *Sheikh v O'Connor* [1987] 2 EGLR 269. This is discussed in detail in chapter 5.
[56] [2000] 80 P.&C.R. 324.
[57] *Topfell Ltd v Galley Properties Ltd* [1979] 1 W.L.R. 446.
[58] See *Re Winslow Hall Estate Company v United Glass Bottle Manufacturers Ltd* [1941] Ch 503; *Hillingdon Estates Co v Stonefield Estates Ltd* [1952] Ch. 627; E *Johnson & Co (Barbados) Ltd v NSR Ltd* [1997] AC 400; *James Macara, Ltd v Barclay* [1945] K. B. 148; *Cook v Taylor* [1942] Ch 349 and *Korogluyan*, see above n46. These decisions are critically evaluated in chapter 6.

The expression 'vacant possession', when used in legal transactions, does not seem to have any great foundation in theoretical analysis, or historical root. Indeed, in the case of *Cumberland Consolidated Holdings Ltd v Ireland*[59] counsel for the Defendant summarised by stating that:

> "...there are two classes of cases in which the question arises of what is meant by 'vacant possession'. The first class to which Savage v. Dent and Isaacs v. Diamond belong are cases relating to service of proceedings for recovery of land when personal service cannot be effected. In those cases it is essential that the premises by means of which substituted service is to be effected shall be *completely deserted*...As between vendor and purchaser, however, vacant possession involves the absence of any adverse claim by anyone else to a right in respect of the property being sold."[60]

Counsel for the Claimant clarified that a lack of authority existed as to the obligation:

> "'vacant possession' is not limited in meaning to the absence of any adverse claim. This limited meaning only applies to cases relating to substituted service and that is because in dealing with service the finding of a person is essential and substituted service can only be made on deserted premises. That does not assist in determining the meaning of 'vacant possession' as between vendor and purchaser, a matter not decided by any authority."[61]

Counsel correctly stated that the expression 'vacant possession' had never been authoritatively defined.[62] It has been noted by the judiciary that the law surrounding vacant possession is an area deficient in legal authority[63] with various leading counsel struggling, in vain, to cite relevant case law to support the legal positions that they advance. Various judges have grappled to explain exactly what is meant by 'vacant possession'. Further, the meaning of the words 'vacant possession' have been said to vary according to the context in which they are used,[64] providing little certainty to those who are eager to ensure that vacant possession is procured at the relevant time (for example, commercial tenants) but, perhaps, hope to those who would argue that it has

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[59] Above, n50 at 268.
[60] Ibid at 268, *per* Ashworth (for the Defendant). Emphasis added.
[61] Ibid at 268, *per* Heilpern (for the Claimant). Emphasis added.
[62] See also Higgs, above n13, in which the difficulties of understanding what 'yielding-up' at the end of the lease may involve is discussed with reference to the requirement to give vacant possession. See also Dowding, M.A., Morgan, H.H.J., Rodger, M. and Peters E. (eds) *Woodfall's Landlord and Tenant* (Sweet and Maxwell, March 2010) 19.003.
[63] See *Sheikh*, above n55.
[64] According to *Topfell Ltd v Galley Properties Ltd* [1979] 1 EGLR 161, *per* Templeman J. at 162. The intention of the parties will also be a materially relevant consideration.

not been (such as commercial landlords who want their current tenant to remain liable under the terms of a lease).

Where a vendor expressly or impliedly contracts to convey an estate in land free from incumbrances, it has been established that it is, in principle, a term of the contract that the purchaser shall on completion obtain the *right* to actual (and not constructive) possession of the estate in land that is transferred.[65] It has been said that:

> "the phrase 'vacant possession' is no doubt generally used in order to make it clear that what is being sold is not an interest in a reversion."[66]

This would seem to imply that vacant possession is a legal issue inextricably interrelated with the passing of possession itself. In practice, however, it is clear that vacant possession has been held not to have been given if the purchaser cannot *enjoy* the legal right of possession without first having to take action itself.[67] Indeed, the term vacant possession would seem to go beyond just a legal transfer of possession (and the right thereto) and be concerned also, on a practical level, with actual occupation (in a factual and practical sense) of the property in question:

> "...the right to actual unimpeded physical enjoyment is comprised in the right to vacant possession."[68]

As will be shown later, the tests that have developed to determine whether vacant possession has been given are objective in nature and focus on whether the purchaser (or party with the right to vacant possession on completion) can occupy without difficulty or objection. The courts are required to determine whether the physical or legal impediment complained of substantially prevents or interferes with the enjoyment of a substantial part of the property. These seem to embody the practical dimension of vacant possession as a factual, as well as legal, matter. This then causes one to question, whether vacant possession is actually concerned with the transfer of 'possession', or 'occupation' which follows from a transfer of possession (or perhaps, both). Indeed, other authorities have taken a restrictive view of the obligation to give vacant

[65] *Hughes v Jones* (1861) 3 De. G.F. & J.307 and *Horton v Kurzke* [1971] 1 WLR 769, *per* Goff J. at 771-2.
[66] *Cumberland,* above n50 at 270.
[67] This was a point discussed in *Sheikh,* above n55.
[68] *Cumberland,* above n50 at 272.

possession as being just a legal 'right', claiming that such a right "in the absence of some competing *legal* claim, passes to the purchaser on completion", so that the purchaser can then take county court action of their own to enforce if necessary. Such comments are potentially a source of confusion and uncertainty as to whether illegal or unlawful occupiers should be treated differently to persons who remain in occupation with *legal* claims. The scope of the obligation to give vacant possession in various differing contexts is analysed in detail in chapter 5.

Conclusion and chapter outline

The obligation to give vacant possession is pervasive to land transactions in England and Wales, and of relevance to a wide range of people and other legal entities. Given the lack of understanding associated with the term, it is not surprising that the nature, scope and extent of the commonly misunderstood obligation to give vacant possession causes a wide range of problems to the thousands of people that the term affects in everyday property transactions. Chapter 2 outlines the problems with 'vacant possession' in the current legal system in order to demonstrate the magnitude of the issues associated with the term. The chapter explains how problems arise in interpreting the obligation at every stage: whether the obligation has arisen; what the obligation relates to; what can constitute a breach of the obligation; whether there has, in fact, been a breach; and, if so the remedies available to parties. In doing so, this chapter sets these issues, analysed in more detail throughout the thesis, in context. This chapter also highlights the issues of risk and responsibility which are engaged when parties contract (expressly or impliedly) to give vacant possession.

In chapter 3 the role of vacant possession as a term of a contract for the sale or lease of land is explored by reviewing its interaction with other terms or conditions. In particular, the interactions between a clause providing for vacant possession and two other more standard clauses (namely, 'subject to local authority requirement' clauses and 'no annulment, no compensation' clauses) are discussed through an analysis of relevant case law. The decisions in case law on such interactions were inconsistent prior to 1979 (when the landmark decision in *Topfell Ltd v Galley Properties Ltd*[69] was laid down).

[69] Above, n64.

The decisions and lack of reasoning by trial judges in cases prior to 1979 demonstrate that there was a misunderstanding (and apparent failure to take full account of) the force and effect of the obligation. As the decisions related only to situations in which there was a conflict with an express clause providing for vacant possession (when appearing as a *special* condition), this chapter also discusses how the position may differ when there is a conflict with only an express *general* (as opposed to special) condition for vacant possession, or when the conflict arises with an *implied* obligation to give vacant possession. Here, different rules of construction and interpretation may apply even though, as the chapter will demonstrate, a lack of authority continues to leave the position unclear.

Having established that vacant possession will be a term of the contract, chapter 4 develops this understanding of vacant possession by proceeding on a chronological journey through the editions and versions of the standard conditions of sale, first published in 1902, and since then routinely incorporated into the majority of contracts for the sale and purchase of freehold land (and leasehold estates and interests). By documenting how the obligation has been incorporated through the history of the conditions of sale, much is revealed about the profession's understanding at various intervals since the publication of the first conditions of sale. This analysis, providing contemporaneous evidence of the development of the concept, sheds light on the understanding and recognition by practitioners and other professionals of the nature, scope and extent of the obligation to give vacant possession and its implications for sale and purchase transactions over the history of the conditions of sale.

In the first of two chapters that explore the nature and form of the obligation, chapter 5 seeks to develop a more coherent and informed understanding with reference to persons in occupation of a property on completion. Inconsistencies in case law as to whether the obligation can be breached by unlawful as well as legal occupiers being present in the property on completion raises questions as to the content of this commonly undertaken obligation, as a matter of fact and law. What is particularly noteworthy from these decisions (nearly all of which were at first instance) is that the actual meaning of 'vacant possession' was never discussed or debated, and was a term that was rather 'assumed' to have a recognised meaning by the courts. This, it will be seen, is one explanation for the

lack of consistency across a range of decisions relating to similar issues or statutory provisions.

This chapter proposes a model of the obligation to give vacant possession as comprising both a legal and factual dimension. Scholarly literature surrounding the development and evolution of the concept of 'possession' is also analysed to further substantiate the binary nature of possession in the context of vacant possession. Vacant possession, which necessarily concerns actual (*de facto*) possession on completion, pursuant to the right to possession which is transferred with the legal estate in land *(de jure)*, is contrasted with notions of constructive possession (i.e. possession *otherwise* than by actual occupation) in order to demonstrate why the legal and factual elements are intrinsic to the obligation.

As such, it is demonstrated that only a proper understanding of both the legal and factual dimensions of vacant possession can enable a coherent interpretation of the essential nature of the obligation as manifest in the body of case law which has emerged on this subject. This analysis also helps to explain what otherwise may seem to be contradictory decisions in case law. It is suggested that these previous inconsistencies are a consequence of there not having been sufficient conceptual infrastructure to explain the vacant possession obligation.

This understanding of the legal and factual dimensions to the obligation is then applied to cases concerning so-called 'legal obstacles' to the receipt of vacant possession in chapter 6. 'Legal obstacles' relate to impediments of a legal nature, such as the requisitioning of a property for government purposes, or compulsory purchase orders. In this chapter, the model of vacant possession expounded in the previous chapter is used to explain why the applicable case law provides an inconsistent understanding of the vacant possession construct. Whilst the obligation is interpreted in the wider context of the transaction more generally, it is suggested that this is another area in which the case law appears to demonstrate that the concept has not been coherently understood. Analysis of these cases based on the model proposed in the previous chapter enables the inconsistencies to be explained, and further supports the proposition that the constituent elements of vacant possession comprise both the right to possession (pursuant to the

transfer of an estate vested in possession) and the factual enjoyment of that estate in land on completion, or at the operative date.

Whilst the obligation must have an inherently legal and factual dimension, it is necessary to evaluate in more detail what will amount to a breach of the factual element of the obligation at the point of completion, and how case law has sought to determine a breach. In providing such an analysis, chapter 7 also compares the obligation to give vacant possession with other (more developed) property law concepts, such as actual occupation and adverse possession, and draws parallels between the respective determinations in each case. The respective limbs of the test to determine a breach of the obligation to give vacant possession are found to be highly context and fact specific, in similar terms to the tests to establish actual occupation and adverse possession. Further, in similar terms to actual occupation and factual possession, in the context of adverse possession, one limb of the test for vacant possession is shown to be an objective test with reference to the specific circumstances of the land and other relevant contextual factors pertaining to the property. In particular, the conclusions drawn from this chapter are used to locate the model of vacant possession posed by this work within the broader theoretical framework of possession, and also used to further elaborate on the understanding of the concept of possession in the law of England and Wales. This supports, and expands, current legal thinking in this regard.

Having discussed the tests to determine a breach of the obligation, chapter 8 identifies which potential obstacles to the receipt of vacant possession (for example, chattels) the scope of the obligation will/should include, and what potential 'barriers' to vacant possession may be outside of the scope of the obligation. For example, traditionally, fixtures are not seen to be relevant to the vacant possession obligation. As this chapter will demonstrate, whilst the nature of the obligation can be explained by reference to the model proposed, the scope and extent of the obligation remains unclear in a variety of respects. The analysis suggests that traditional distinctions between, for example, fixtures and chattels, are not relevant in the context of vacant possession, and that the crucial issue relates to whether the item is a 'substantial obstacle' to the receipt of the 'right to possession'. In the context of a new understanding of impediments proposed by this chapter, so called 'lesser interests' (such as certain *profits*) are also discussed and

found not be relevant to the vacant possession determination, given that (by their very nature) they do not amount to impediments that can affect the right to 'possession'. Further, analysis of the obligation's interaction with a third common type of general condition ('actual state and condition' clauses), in the context of impediments to vacant possession that are more akin to the nature of the premises, also provides further support for the conclusions reached in chapter 3 with respect to the interaction between vacant possession and other conflicting contractual terms.

When an obligation to give vacant possession exists, and a breach of that obligation is held to have taken place, the next determination for a court will be the remedy or relief that can be awarded to the successful party. The remedy normally awarded to an injured party for a breach of the obligation to give vacant possession will be damages, which can often be largely unsatisfactory to a purchaser who, having already paid their money before finding the property is not vacant, will be unable to occupy the property as they wish to. Chapter 9 explores the remedies available with reference to the connection and interaction between vacant possession and title, in seeking to consider whether vacant possession as a proprietary, rather than contractual, obligation would more evenly balance the issues of risk and fairness between parties. This goes to the heart of an academic inquiry into the nature and form of the obligation to give vacant possession and its place in the wider theoretical understanding of possession in property law; it also addresses the thematic issues of risk and responsibility and their relevance to the operation of the obligation in real life scenarios.

The conclusion to this thesis draws together the historical evolution and development of the vacant possession concept. Demonstrating that an informed understanding of the concept contributes to the current literature in the field of possession, the conclusion explains how this work can be placed in the wider theoretical framework of possession literature. Suggesting how the obligation should subsequently be moved forward, both a 'definition' of the term, and provisions that would enhance the remedies available in the event of a breach of the obligation, are provided, along with other proposals that may ameliorate the problems associated with vacant possession in the leasehold context. The conclusion also provides a comprehensive overview of other findings of the thesis, and identifies where further academic enquiry may be progressed in the future.

Chapter 2

The Current Problems with Vacant Possession

There is no generally accepted understanding of the nature, scope and extent of the obligation to give vacant possession. Not surprisingly, this causes a wide range of issues for the cross section of people to whom the obligation frequently affects. In order for all the problematic issues currently associated with the term to be fully appreciated, it is appropriate to provide an insight into the real life scenarios in which the expression 'vacant possession' is used and applied. This will assist in explicating the difficulties faced by this wide variety of people on a day-to-day basis and the issues of risk and responsibility which overshadow the giving of vacant possession.

An appreciation of the contexts in which the obligation is engaged reveals a number of problems which the law has hereto failed to satisfactorily address. Whilst the nature, scope and extent of the obligation, and the remedies that flow from a breach of the term, can be properly described as opaque (as shall be discussed shortly), these only become relevant if an obligation to give vacant possession has actually arisen – something which cannot be assumed to be self evident in every case.

Has an obligation to give Vacant Possession arisen?

The issue of vacant possession can arise on the sale of freehold land (for example, the transfer of estates in fee simple) and upon the grant, transfer and termination of leases and other tenancies (and perhaps informal agreements to occupy by consent).[1] With respect to leases, procuring vacant possession is generally seen as an essential, and likely, element of the obligation to yield-up the premises at the contractual termination of the lease. Further, vacant possession itself can also be an express pre-condition for the exercise, by a tenant, of a break option in a lease or tenancy.[2] From the outset it is

[1] Upon termination of a licence a tenant will normally be obliged to vacate the premises, but it is arguable as to whether this is giving vacant possession as the tenant is not returning possession (as, for example, on termination of a lease). See chapter 1, n2.

[2] Shaw, K. 'Fit to be occupied' (2007) 27 Jan 2007 *Estates Gazette* 182; Shaw, K. 'More to it than meets the eye' (2010) 1 May 2010 *Estates Gazette* 4 and Shaw, K. 'All that you can't leave behind' (2010) 256 *Property Law Journal* 6. See also Martin, J. 'Tenant's Break Options' (2003) 153 *New Law Journal* 759 where the requirement to give vacant possession when operating a break option in a lease is discussed.

important to be aware of whether an obligation to give vacant possession has arisen and, if so, on what basis. This is because the manner in which the obligation arises would seem to determine what that obligation may encompass.

It is common for a contract for the sale and purchase of land to include an express obligation to give vacant possession on completion, for example 'the property is sold with vacant possession on completion', but often the contract will simply prescribe that the property must be 'transferred free from all incumbrances'. It is unclear whether this can be construed as simply referring to legal incumbrances on title[3] or whether this may actually relate to providing vacant possession in respect of referring to any and all impediments that could affect enjoyment of the property on completion. Whilst, in practice, the question is ultimately one of the intention of the parties as shown by the contract,[4] it is sometimes difficult to determine the intention of the parties especially when a specific clause is read in conjunction with the standard conditions of sale (which have over time included clauses relating to vacant possession), given that these will normally have been incorporated into the contract only by reference and not specifically considered by the contracting parties.[5]

Indeed, even when the contract clearly includes an express obligation to give vacant possession, it has over time been unclear as to whether such an obligation can be contradicted by other general conditions of sale that do not directly refer to vacant possession, for example, a general condition that a purchaser buys subject to notices and to anything which would have been revealed by local searches and enquiries. In *Topfell Ltd v Galley Properties Ltd,*[6] it was held that an express obligation to give vacant possession could not be contradicted by the usual general conditions of sale, but this decision is in direct conflict with the decision in *Krogluyan v Matheou*[7] (concerning so-called 'subject to local authority requirements' clauses)[8] and also with the decision in

[3] The meaning of the term 'incumbrances' has itself been said to vary according to the circumstances, see *Belvedere Court Management Ltd v Frogmore Development Ltd* [1997] QB 858 at 887.
[4] See *Lake v Dean* (1860) 28 Beav 607 and *Re Crosby's Contract* [1949] 1 ALL E.R. 830. Farrand, J.T. *Conveyancing contracts: Conditions of Sale and Title* (Oyez Publications, London 1964) 209 wrote "What the purchaser is entitled to get in the way of vacant possession on completion depends, of course, on what the contract says".
[5] See chapter 4 for a detailed discussion of the incorporation of vacant possession in conditions of sale since 1904.
[6] [1979] 1 EGLR 161.
[7] [1975] 239 E.G. 649.
[8] A clause like this will provide that the purchaser is to take the land: 'subject to all notices, orders or requirements given, made or required by the local or other authorities'. See *Korogluyan*, above n7. Such a clause may be relevant to

Curtis v French[9] (concerning so-called 'no annulment, no compensation' clauses)[10] where the exact opposite was held. It has therefore proven difficult to interpret the extent of an obligation to give vacant possession when such an express obligation has been found to interact with (or be qualified by) other standard conditions of sale that are incorporated into the contract more generally.[11]

Further, even if other contractual conditions can modify an obligation to give vacant possession, it is unclear which will (and will not) be relevant to the obligation to give vacant possession. Indeed, it has been argued that standard conditions relating to the state and condition of the property can operate to affect or otherwise modify the express obligation,[12] but there remains no actual authority on the position where the seller's inability to give vacant possession is due to the physical state of the property, and how a general condition in these terms could be relevant.[13] It is therefore unclear which 'other conditions' are actually relevant to the obligation, given its nature and form.

While a vacant possession obligation can appear as an express clause in the contract, it is also common for conditions to fail to cater for vacant possession expressly. Ordinarily, this will mean that vacant possession will be no more than an *implied* term of the contract. Cheshire notes that "it is an implicit term of the contract of sale that vacant possession shall be given to the purchaser on completion".[14] In *Cook v Taylor* it was held that where a contract is silent as to vacant possession, and silent as to any tenancy to which the property is subject, there is impliedly a contract that vacant

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the obligation to give vacant possession where a legal obstacle (such as a compulsory purchase order) purportedly prevents the giving of vacant possession on completion.

[9] [1929] 1 Ch. 253, *per* Eve J.

[10] Clauses like these are likely to state that: 'no error, misstatement or omission in the particulars, sale plan or conditions shall annul the sale, nor shall any compensation be allowed either by the vendor or the purchaser in respect thereof'. See *Curtis v French*, above n9. If a seller expressly contracted to sell land with vacant possession but then found that he could not, because of an impediment of which he had been unaware at the time of contract, the effect of a general condition of this kind on the express obligation given by the seller as to vacant possession must be considered. In theory, if the impediment amounted to an 'error, misstatement or omission' from the particulars of sale, a general condition of this kind may have an effect on the express condition as to vacant possession, as explained in chapter 3.

[11] The interaction between vacant possession and standard contractual terms, and the treatment of vacant possession as a special or standard condition of sale, is discussed in more detail in chapters 3 and 4.

[12] See *Topfell Ltd*, above n6.

[13] According to Harpum, C. 'Vacant possession - chameleon or chimaera?' (1988) *Conveyancer and Property Lawyer* 324, 400 (C.H.) C.f. *Hynes v Vaughan* [1985] 50 P. & C.R. 444, *per* Scott J. (and discussed in detail in chapter 8).

[14] Cheshire, G.C. and Burn E.H. *Modern law of real property* (12th edn Butterworths, London 1976) 740. See also Farrand, above n4 at 209-213.

possession will be given on completion.[15] The case concerned a vendor who had entered into a written agreement (which incorporated the Law Society's Conditions of Sale 1934) with a purchaser for the sale of a freehold property. The agreement contained no reference to vacant possession, but particulars containing the statement 'vacant possession on completion' had been delivered by the vendor's agents to the purchaser. Before the date fixed for completion, the house was requisitioned by the Government under the Defence (General) Regulations 1939 (which were war time provisions for the compulsory acquisition of property). The judge decided that the particulars were used in connection with the contract and were incorporated therein by the Law Society's Conditions of Sale; therefore there was a contract expressly to sell the property with vacant possession. Apart from that, however, it was held that according to the general law there was an implication that the property was to be sold with vacant possession. This decision was later followed in *Re Crosby's Contract, Crosby v Houghton.*[16]

When an obligation to give vacant possession has arisen impliedly, it is important to note that the implied assumption will be subject to specific circumstances and actual knowledge of the parties. For example, where one party is aware, when entering into a contract, that the interest is subject to some impediment to vacant possession, case law suggests that if the purchaser knows that the obstacle to the receipt of vacant possession is *irremovable,* then the implied obligation to give vacant possession will *not* extend so as to include that obstacle. In *Timmins v Moreland Street Property Co Ltd*[17] the vendor brought an action for damages for repudiation of a contract to buy certain freehold property under an oral agreement. The defendants contended, inter alia, that the documents relied on a memorandum that did not comply with section 40 of the Law of Property Act 1925 and (amongst other matters) omitted to state that the property was sold subject to a lease. It was held that the omission to refer to the lease did not vitiate the memorandum and that the defendants, by virtue of their knowledge (that the

[15] [1942] Ch. 349 at 352. In this case some importance was attached to the fact that the property was seen to be vacant on inspection, but Simons J. did say in general terms that "where a contract is silent as to vacant possession, and silent as to any tenancy to which the property is subject, there is impliedly a contract that vacant possession will be given on completion". See also Walford, E.O. *Contracts and Conditions of Sale of Land* (Sweet and Maxwell Limited, London 1957) 169. See also chapter 1, n38.

[16] [1949] 1 All ER 830. See also *Midland Bank Ltd v Farmpride Hatcheries Ltd* [1981] 2 EGLR 147: "Prima facie a prospective vendor of property offers the property with vacant possession unless he otherwise states and that would ordinarily be implied in the contract of sale in the absence of stipulation to the contrary", *per* Shaw L.J. at 148; and Lord Denning M.R. in *Edgewater Developments Co v Bailey* [1974] 118 Sol Jol 312: "Where nothing was said about possession it was often said that there was an implication that property was to be sold with vacant possession". Walford, above n15 also discussed the implied term as to vacant possession.

[17] [1958] Ch 110.

plaintiff's interest was subject to the lease) when they entered into the contract, were precluded by implication of law from objecting to take the property subject to the lease (whether it was or was not referred to in the memorandum). Their knowledge of the lease (as an irremovable obstacle) on exchange meant that an implied obligation to give vacant possession did *not* extend so as to include that obstacle on completion,[18] and accordingly the lease was not held to constitute a breach of the obligation to give vacant possession on completion.

If at the time the contract was made, the purchaser knew of only a *removable* obstacle however, then the implied obligation to give vacant possession will *not* be deemed to exclude such an obstacle, and if the removable obstacle is still on the premises on completion, the obligation to give vacant possession will have been breached.[19] In *Norwich Union Life Insurance Society v Preston*[20] a mortgagor was ordered, on 10 July 1956, within twenty-eight days, to deliver possession to the mortgagees of the mortgaged premises. In September 1956, the order was served on the mortgagor, and in December 1956, possession not having been given, a writ of possession was issued. In January 1957, the sheriff's officer evicted the mortgagor. The mortgagor left his furniture in the mortgaged premises and refused to remove it, contending that the order for possession was spent. The mortgagees applied for an order that the mortgagor should within four days remove his furniture. It was held that the mortgagees were entitled to the order because the mortgagor had not given vacant possession in compliance with the order. Leaving his furniture on the premises was seen by the court to amount to the mortgagor claiming a right to continue to use the premises for his own purposes. It did not matter that the mortgagee was aware of the presence of the furniture at the material time, for such items were clearly capable of being removed. The implied obligation to give vacant possession *did* therefore include the removable items, which

[18] Ibid, c.f. *Farrell v Green* [1974] 232 EG 578 at 589 which was decided *per incuriam* on the point that knowledge of irremovable impediments is irrelevant to the scope of the implied obligation. It remains an authority for the proposition that vacant possession can be an implied term however. Note also that in *Lake v Dean* (1860) 28 Beav 607 notice that the property was 'in the occupation of a third party' (as opposed to the disclosure of express terms of tenancies) was held not to be sufficient to amount to the disclosure of a tenancy sufficient to constitute knowledge of an irremovable obstruction that could modify an implied obligation to give vacant possession. However constructive notice of the existence of a tenancy may be imputed to the buyer; for example, if the purchaser knows that a person is in occupation of the property, he is presumed to know the rights of the occupier, and where the occupier has such a legal tenancy the buyer will, according to *Hunt v Luck* [1902] LRA 2002 24, take subject to that tenancy.

[19] Subject to the removable items not being *de minimis* – as discussed in chapter 7. The analogy and similarity between the obligation to give vacant possession and the requirement to give good title in this regard can be used to construct an argument that vacant possession should not be merely a contractual term, but rather proprietary in nature. This is explored in chapter 9.

[20] [1957] 1 WLR 813. As such, a purchaser's knowledge of a removable obstruction to vacant possession is irrelevant.

were known of on exchange, and as they were not removed (and the items were sufficiently substantial in nature) there was accordingly a breach by the mortgagor of the obligation to give vacant possession at the material time.

The position on removable and irremovable obstructions with respect to the implied obligation to give vacant possession, can be contrasted with the position where there is an express obligation to give vacant possession. Here the position is entirely different. It has been held that an express obligation to give vacant possession *will* prevail regardless of the nature of any known potential impediment to vacant possession (removable or irremovable). In *Sharneyford Supplies Ltd v Edge*[21] the plaintiff purchased land from the defendant by a contract which incorporated the Law Society's General Conditions of Sale (1973 revision). It provided by general condition 3(1) that, unless the special conditions otherwise provided, the property was sold with vacant possession on completion. The plaintiff, aware that the land was occupied, had stressed from the outset that vacant possession was required and had received answers to pre-contractual enquiries from the defendant that the occupants had no right to remain in possession. The occupants refused to vacate the land on completion. The express obligation to give vacant possession meant that the defendant was in breach even though the purchaser knew, at the time the contract was formed, of the irremovable obstruction to the delivery of vacant possession (i.e. the lease).[22] As Parker L.J. observed:

> "If ... a vendor sells land, which he knows is subject to a tenancy, and contracts specifically to sell with vacant possession, he makes in effect, a specific promise that he will get the tenants out."[23]

That is, an express clause providing for vacant possession makes knowledge of any potential obstructions (whether removable or irremovable) entirely irrelevant.

From a practitioner's point of view, ascertaining *how* the obligation to give vacant possession has arisen (by express provision or implied by law)[24] is therefore essential in order to determine what the obligation can be deemed to encompass. Imagine that a

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[21] [1987] Ch 305.
[22] See also *Hissett v Reading Roofing Co Ltd* [1996] 1 WLR 1757.
[23] [1987] Ch. 305, *per* Parker L.J. at 325.
[24] Discussed in further detail below.

seller contracts to convey land to a purchaser and that, upon exchange, the purchaser knew of large items in the property (which we will assume were clearly irremovable). The only possible reference to vacant possession in the contract was a clause stating that 'the property is sold free from legal incumbrances on completion'. It is therefore unclear whether this refers to vacant possession expressly. On completion, the large items remain on the property and the purchaser claims that the seller has not given vacant possession because of the existing presence of these goods. The purchaser claims that the seller expressly contracted to provide vacant possession, and is therefore in breach. Conversely, the seller claims that the clause in question referred only to title issues and therefore that any obligation to procure vacant possession is implied. The seller further claims that because the purchaser was aware of the large items in the property on exchange, and that they were clearly irremovable, the implied obligation to give vacant possession did not extend to include these items. The seller therefore contends that it is not in breach and was not required to remove such items. How the obligation arose (expressly or impliedly) will determine whether the seller or purchaser is correct in their respective claims as to whether the irremovable obstruction constitutes a breach of the obligation to give vacant possession.

It is common for contracts to include other ambiguous clauses that could be construed as referring expressly to the procurement of vacant possession, for example:

> *"The purchaser will be entitled to actual possession on completion"*
>
> *"On completion the purchaser is to have undisturbed enjoyment of the property"*
>
> *"[T]he seller will convey the land free from all legal impediments"*
>
> *"[T]he purchaser will be entitled to free occupation on completion"*
>
> *"[T]he legal right to unencumbered enjoyment...will pass on completion"* [25]

[25] These are all examples that have appeared in documents reviewed by the author.

It is not clear as to whether any of these would amount to an express obligation to give vacant possession, and the context of the clause in the contract and the intention of the parties would have to be considered in making any determination.

The example referred to above assumed that the large items in question were *irremovable* but, unhelpfully, there is no actual guidance as to what is deemed removable or irremovable in this context. In *Hughes v Jones*[26] a lease was said to be irremovable, but a seller may claim that they will seek to agree a surrender of that interest between exchange and completion and, in that regard, a purchaser could legitimately claim to have assumed it to be removable before completion, causing the implied obligation to technically encompass the leasehold interest.[27]

Whether an obligation to give vacant possession has arisen is by no means limited to the sale and purchase of freehold land and buildings. Whether, and how, the obligation can arise is equally as important to leases. For example, in the leasehold context, a tenant may have the right to exercise a break option in a lease and bring that lease to an end earlier than the contractual termination date. Practically speaking, it is advantageous that a tenant avoids the procurement of vacant possession as a pre-condition for exercise of the break option (and that any agreement to provide vacant possession is entirely separate from the exercise of the break option). This way, the tenant will not be prevented from exercising the break if vacant possession cannot be given and the landlord, rather than seeking to contend that the lease is still continuing, will instead be forced to rely on other remedies to deal with the vacant possession issue. In practice however, vacant possession is often an express pre-condition for the exercise of a break, or alternatively, can be implied by virtue of a more general pre-condition upon exercise of the break option, namely that the tenant has 'materially complied' with all tenant covenants under the lease. Where a break option is conditional upon the tenant's

[26] (1861) 3 De GF & T 307. Also *Re Englefield Holdings, Ltd v Sinclair's Contract* [1962] 1 WLR 1119. This is obviously subject to contra-indications or other intentions of the parties as shown by the contract.

[27] In *District Bank Ltd v Webb* [1958] 1 WLR 148 a lease was not treated as an incumbrance. Whilst these cases are in the context of defects of title, as discussed in chapter 8 the principles relevant to vacant possession in this regard bear a strong resemblance to those applicable to a vendor's duty to disclose latent defects in title, which can be implied in a like manner. It is also relevant to consider the nature and form of the lease or tenancy. Walford, E.O. *Conditions of Sale of Land* (Sweet and Maxwell Limited, London 1940) 189 states that "It must not be supposed that a general statement that the property is "in the occupation" of a third party will cover lengthy tenancies". In *Caballero v Henty* (1874) LR 9 Ch 447, such a description was held not to cover a lease of which the unexpired terms was around eight years (this was prior to the 1954 Act and various Rent Acts coming into force however). The point to note is that a lease or other tenancy or agreement pertaining to occupation may not *always* be an irremovable incumbrance on this analysis.

material compliance with covenants up to and including the break date, this will almost certainly encompass the 'yielding-up' obligation that will take effect on termination of the lease. The yielding-up obligation will include the return of the premises as demised which can therefore be seen to include the obligation to give vacant possession on completion.[28]

For example, imagine that a tenant has trouble paying the rent on a lease and decides to move to smaller premises. The tenant exercises a break option in its lease with the landlord which is conditional upon compliance with all covenants in the lease up to and including the break date. On the break date the premises are not cleared of tenant's chattels. The tenant claims that vacant possession was not a condition of the break option in the lease. The landlord takes the position that the condition that the tenant must have complied with all covenants up to and including the break date includes the tenant's covenant to yield-up at the end of the lease, which itself includes the return of the premises as demised (and therefore the giving of vacant possession). The landlord is likely to be correct, in which case the tenant remains liable under the terms of the lease, which continues. In this regard, a landlord can use the issue of vacant possession to prevent the tenant exercising a contractual break option in a lease if the landlord would prefer the lease to continue. The implied requirement to give vacant possession thus arises as a consequence of the yielding-up obligation in the lease being incorporated as a condition of the break. In such a case, it is likely that a tenant will not appreciate this until the issue is raised, normally *after* the break date, when the tenant's opportunity to give vacant possession will have passed.[29]

It is therefore clear that, in everyday transactions, confusion is rife as to *when* an obligation to give vacant possession is engaged or operative and, in turn, what that obligation will actually refer to or encompass. In the freehold context, lawyers struggle to advise clients as to whether a contractual provision amounts to an express obligation to give vacant possession and therefore, in turn, whether a purchaser's knowledge of an

[28] The actual wording of the yielding-up obligation will be crucial. The normal phrase is 'on the expiry or sooner determination of the term' but if there is reference only to 'expiry' then compliance may not be required at an earlier point in time when the lease is broken.

[29] The situation is more complex when the yielding-up obligation refers not to 'material compliance' but rather to just 'compliance' or 'reasonable compliance'. In such cases, whether the yielding up obligation causes a breach of vacant possession would then be a question of fact for a court to determine with reference to an interpretation of the meaning of the covenants in the lease, causing greater uncertainty for all parties.

irremovable obstruction at the time that contracts were exchanged is relevant to the delivery of vacant possession on completion. In cases where the obligation to give vacant possession is only *implied*, whether an obstruction is properly classified as *removeable* or *irremovable* has currently not been clarified with sufficient precision, thus causing further uncertainty for all involved. With respect to leases, it is generally not appreciated how vacant possession can creep into the operation of break options in leases by virtue of the drafting of the lease more generally, thus causing the obligation to have arisen (almost inadvertently). As such, the parties subject to a given transaction can find themselves in a difficult position given the ambiguity in cases of this kind, and therefore fail to appreciate the risk involved in entering into a given transaction, and what responsibilities may be engaged with respect to the other party to a transaction. Chapters 3 and 4 explore how vacant possession, as a term of contract, can arise and how its interaction with other contractual terms can affect the parties to a given transaction.

What does an obligation to give Vacant Possession refer to?

As noted in chapter 1, obstacles to the receipt of vacant possession can be divided into several different categories, each category raising issues that the law has currently failed to adequately address. It is insightful to elaborate on the common types of obstacle to the receipt of vacant possession in more detail, in order to explain the problems associated with each.

Tangible impediments

The most common example of an impediment to vacant possession is when items that should have been removed by the seller or party required to give vacant possession are left at a property on completion. Beer in the cellar,[30] furniture and goods remaining on the premises[31] and other chattels of the party required to give vacant possession[32] have been held to breach the obligation. In each case, the items being left at the premises

[30] *Savage v Dent* [1736] 2 Stra 1064.
[31] *Isaacs v Diamond* (1880) WN 75.
[32] *Cumberland Holdings Ltd v Ireland* [1946] KB 264.

were seen to be consistent with the seller keeping possession of the premises for their own purposes.

Whilst determined by the facts of each case, historically case law never sought to extract general principles which could be applied universally across the board in order to determine what giving vacant possession actually means. In some cases rubbish and left over chattels caused a breach of the obligation, whereas in other cases items such as furniture being left behind were seen as irrelevant.[33] Historically it was unclear whether a *de minimis* threshold operated with respect to left over items which may have explained the differing decisions reached by respective judges on ostensibly similar questions of fact. More recently, case law has sought to develop tests to avoid *ad hoc* value judgments being made as to whether left over items prevented the delivery of vacant possession in any given instance but, as discussed in the next section, it is arguable whether such tests have resolved a number of issues posed by the vacant possession obligation.

Later case law has indicated that the vacant possession obligation is subject to a *de minimis* rule,[34] but how that operates in practice and what such a threshold refers to remains unclear. The quantity of items left, their size, movability and degree and purpose of annexation would seem to be relevant factors in determining whether the items left behind cause a breach of the obligation to give vacant possession. Further, case law also seems to suggest that it may be relevant to consider the location of items in, around or outside the property concerned. In *Hynes v Vaughan*[35] a vendor left large amounts of rubbish (rotting vegetation, soil, timber, broken glass, paint tins and rubble) in the garden which, it was claimed, prevented the transfer of vacant possession. The rubbish was held to be consistent with the character of the property sold and could not be said to substantially prevent or interfere with the enjoyment of the right of possession of a substantial part of the property, since it was outside in the garden. However, a

[33] Even in recent times this is still true, for example: *Scotland v Solomon* [2002] EWHC 1886 (Ch).
[34] Following *Cumberland Consolidated Holdings Ltd v Ireland* [1946] KB 264 where the obligation was stated as being subject to such a rule.
[35] [1985] 50 & CR 444.

different decision may very well have been reached if the rubbish had been inside the premises.[36]

Another problem commonly experienced is with regard to the status of items left at the property on completion. Disputes can arise as to whether items left behind at a property are fixtures (and therefore part of the land) or chattels (personal property of the tenant obliged to procure vacant possession).[37] Traditionally the law has been clear that if the seller's failure to give vacant possession is due to the presence on the property of *chattels* which affect usability of the premises, then provided the chattels substantially interfere with enjoyment of a substantial part of the premises on completion, a breach will have occurred.[38] Conversely, fixtures (which pass as part of the land conveyed under the contract of sale) would not be relevant to the obligation to give vacant possession.

Imagine that a seller contracts to convey a property to a purchaser, the contract providing expressly that vacant possession is to be given on completion. The purchaser intends to grant a lease to a business tenant of the property on the same day. The tenant requires occupation that day given the nature of its business. On the morning of completion the transaction completes and the purchaser is given the keys. Later in the day the purchaser meets his proposed new tenant at the premises to sign the lease and hand the keys over. Upon inspection of the property, however, the purchaser and the proposed tenant see that furniture and other items have been left by the seller. The proposed tenant refuses to sign the lease because he cannot immediately occupy the property as he needs to. Instead he takes a lease of an adjacent unit the following week. Two months later the purchaser manages to lease out the property to a third party tenant at a rent lower than had been agreed with the proposed tenant due to a decline in the market. The purchaser claims that the seller was in breach of his express contractual obligation to give vacant possession and claims that loss has been suffered as a consequence. The seller argues that the items left were fixtures (and therefore part of the land) or, in the alternative, that they came within the *de minimis* threshold and therefore that no breach arose. The proper determination of the status of the items can be seen as a

[36] See chapter 8 for an analysis of how the scope and extent of the obligation is context specific.
[37] *Elitestone Ltd v Morris* [1997] 2 All ER 513, which sought to differentiate between fixtures and chattels based on their respective degree and purpose of annexation.
[38] See *Cumberland*, above n34.

preliminary issue in seeking to establish whether the items had been left behind by the seller unlawfully, and therefore caused a breach of the vacant possession obligation. Whether the items could be argued to be *de minimis* would also be a relevant point. As will be seen in chapter 7 however, it can be argued that this distinction is itself misleading and artificial in the context of vacant possession.

As the next section highlights, determining what will constitute a sufficient impediment to prevent the delivery of vacant possession in any particular instance remains a difficult task, even following the tests that have developed to assist in this regard.

Persons in occupation

There is a wealth of case law confirming that the presence of an existing tenant or other legal occupier at the premises on completion will prevent vacant possession being given.[39] This may be because the lease is still continuing, or because the party has contractual or statutory rights to remain in occupation of the property. In *Sharneyford Supplies Ltd v Edge*[40] the plaintiff purchased land from the defendant under a contract that expressly provided for vacant possession on completion. The occupants refused to vacate the land and claimed the benefit of a business tenancy within the Landlord and Tenant Act 1954. The defendant was liable for not giving vacant possession at the material time. Crucially, this decision, and decisions in similar cases such as *Beard v Porter,*[41] dealt with purportedly 'lawful' claims to remain in occupation of the property (i.e. because of a statutory or common law continuation tenancy).

While the traditional definitions of vacant possession refer to delivery of the property 'free from any claim to a *right* to possession of the property', it has been questioned whether this remains the case with respect to persons who may be in occupation with no *lawful* claim or right (for example, squatters or trespassers). There is conflicting *obiter dicta* with regard to whether people in *unlawful* occupation breach the obligation to provide vacant possession. Some statements[42] suggest that the obligation would be

[39] *Beard v Porter* [1948]1 KB 321.
[40] [1987] Ch 305.
[41] [1948] 1 KB 321.
[42] *Obiter* comments in *Cumberland,* above n34.

breached in this situation, presumably on the basis that it is the duty of the seller (as the person responsible for providing vacant possession) to ensure that trespassers are evicted. In *Cumberland Holdings Ltd v Ireland*[43] it was noted that a seller's duty extends to removing unlawful occupants on completion. The case itself concerned left over goods at the premises but the judge considered *obiter* that the existence of a physical impediment, which substantially prevented or interfered with the enjoyment of the right of possession of a substantial part of the property, stood in the same position as an impediment caused by the presence of a trespasser.[44]

Other *obiter* comments, however, suggest that a seller would not be in breach by virtue of there being a person in unlawful occupation of the property at completion. Here receiving a property free of unlawful occupants on completion seems to be treated as a right which (in the absence of any competing legal claim) passed to the purchaser on completion (and which the purchaser could take county court action of their own accord to enforce if necessary), rather than an obligation of the seller. In *Sheikh v O'Connor*[45] the vendor contracted to sell a property to the plaintiff. Most of the property was tenanted but the vendor expressly contracted to sell one of the rooms with vacant possession. After completion, the purchaser complained that the room which should have been vacant was in fact occupied by one of the tenants as a trespasser. The purchaser sued the vendor for damages for his failure to give vacant possession. One of the issues was purely factual and concerned whether the tenant had taken possession of the room before, or after, the completion date. Deputy Judge Wheeler concluded that it had been after completion. That was enough to dispose of the case in the defendant's favour, given that the presence of the tenant was not a barrier to the receipt of vacant possession at the point of completion, and the action was dismissed. However, the judge went on to consider the position in the event that his finding of fact was incorrect (and as such the comments are *obiter*). The judge accepted that a vendor who had contracted to give vacant possession did not fulfil his contractual obligation if, at the date fixed for completion, there was a third party who had a *legal* claim to possession, but he considered it to be otherwise in relation to a trespasser. In such a case he considered that

[43] Ibid at 246.
[44] Supporting *Royal Bristol Permanent Building Society v Bomash* [1886-90] All ER Rep 283 and *Engell v Finch and others* (1869) L.R. 4 Q.B. 659.
[45] [1987] 2 EGLR 269.

it was for the purchaser to seek his remedy in the county court against the trespasser, given that the right to possession had passed to him/her on completion.

While recent case law would seem to suggest that trespassers will be treated in similar terms to persons with lawful claims to possession,[46] understanding of the meaning of vacant possession has historically been far from clear on this point. Indeed, in the decision in *Sheikh* where this issue was specifically addressed, it was noted that neither counsel could find any authority which pertinently dealt with the matter before the judge.[47]

The possible distinction between lawful and unlawful occupiers is moreover a problem because of the way contracts and, in particular, (ostensibly) express obligations to give vacant possession, are often drafted. For example, imagine a seller contracts to convey land to a purchaser. The only possible reference to vacant possession in the contract is a clause stating that 'the property is sold free from legal incumbrances on completion'. It is unclear as to whether this refers to vacant possession expressly. On the evening before completion, a group of new age travellers effect an entry to the premises and commence using the premises as a place of refuge. On the day of completion the seller and purchaser complete. The purchaser then goes round to the premises and realises that persons are in unlawful occupation. The seller will claim that the clause in the contract was an express contractual undertaking to give vacant possession that was restricted to legal incumbrances. As such, and because the trespassers are clearly in the premises unlawfully, the seller will argue that the squatters do not cause the obligation to have been breached. The purchaser will claim that the seller has not given vacant possession because of the trespassers. The purchaser's position will be that the clause does amount to an express contractual obligation to give vacant possession (which therefore includes all impediments to vacant possession, including unlawful occupiers) or that, if not, the obligation to give vacant possession will be implied. The purchaser claims that any such implied obligation will encompass the trespassers because they were not known of by him on exchange (i.e. the purchaser did not know of an irremovable obstacle to the receipt of vacant possession, at the time of contract) and that the implied obligation to

[46] *Cumberland*, above n34.
[47] *Sheikh*, above n45 at 271.

give vacant possession refers to the delivery of the property free from all claims (lawful and unlawful) to a right to possession by others.

Clearly the issue above arises because of the uncertainty as to whether a distinction between lawful and unlawful occupation can be made. If a distinction can be made, it would be necessary to consider what actually constitutes 'unlawful' occupation. It is arguable that a further distinction may need to be made between, for example, squatters (who never had a right to occupy) and former licensees (who at one time had consent to occupy) but it is possible that both could be categorised as persons in occupation with no lawful claim. Indeed, the example above would be even more confusing for a practitioner if the party in occupation on completion was claiming some implied periodic tenancy as a result of previous occupation, or rights under the Landlord and Tenant Act 1954, which was disputed by the seller. Sitting tenants have previously been treated as persons lawfully claiming rights,[48] but when such claims are found to have no justification it is difficult to understand why these should not be treated as unlawful claims.[49] If vacant possession only refers to the delivery of the premises free from *legal* claims of right (following an understanding of vacant possession as being the transfer of possession and the legal right thereto),[50] it would be questionable whether the presence of illegal third parties should be a barrier to the delivery of vacant possession, as between seller and purchaser. If, as it currently appears, vacant possession refers to all claims (lawful and unlawful), then it would seem that understandings of vacant possession have broadened over time, away from traditional understandings and formulations concerning the transfer of possession in a strictly *legal* sense. As discussed in chapter 5, a distinction between the transfer of 'possession' (and associated rights thereto) and being in 'occupation' (which inevitably follows from the transfer of the right to possession), and how these are both part of the obligation to give vacant possession, further expounds the complexities associated with this issue as far as third parties in occupation are concerned.[51] All these issues are relevant to sellers and purchasers given that they determine which party will be held to be in breach and (potentially) what remedies each will have against the other. Accordingly, these issues are not purely theoretical, but must be understood as defining the responsibilities of

[48] *Sharneyford Supplies Ltd v Edge* [1987] Ch. 305.
[49] See also *Horton v Kurzke* [1971] 2 All ER 577, discussed in detail in chapter 8.
[50] As discussed in more detail in chapter 5.
[51] See chapter 7 which explains why vacant possession is an *infra-jural* concept.

each party in a given transaction, thus underlying the risks associated with non-compliance in any particular respect.

Legal obstacles

It is possible that a legal obstacle may prevent the delivery of vacant possession on completion, for example, the transfer of a strip of land subject to dedication as a public highway,[52] on the basis that the highway authority has the right to possession rather than the owner of the sub-soil. Other instances would include a property (with an existing first floor tenancy) being sold with 'vacant possession of the ground floor' but with a Housing Act notice limiting occupation of the whole house to one household.[53] While these cases would seem clear, case law provides an inconsistent picture of whether vacant possession can be, and is, given at the relevant time with respect to orders to requisition a property or the service of notices of compulsory purchase.[54]

A small collection of cases concern the government requisitioning of properties under certain provisions of the Defence (General) Regulations 1939; the common set of circumstances to these cases being that the parties had entered into written agreements for sale and purchase of a property that became subject to a requisitioning notice. Some case law is clear that a requisitioning notice will *not* create an encumbrance on the land so as to prevent a seller from giving vacant possession. In *Re Winslow Hall Estate Company v United Glass Bottle Manufacturers Ltd*[55] a contract for the sale of land had been entered into between the parties. Following this, but before completion, notice was given on behalf of the government to the purchasers that it was intended to requisition the land under the Defence (General) Regulations 1939. The Court held that at the relevant date the vendors *were* able to give vacant possession. The 'giving' of the requisition notice was held *not* to create an encumbrance on the land which prevented the vendors from performing their contract.

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[52] *Secretary of State for the Environment v Baylis and Bennett* [2000] 80 P. & C.R. 324.
[53] *Topfell Ltd*, above n6.
[54] A sale contract may provide that it is for the purchaser (or seller) to comply with outstanding public requirements or that the sale of the property will be subject to such matters as requisitions or compulsory purchases. In such a case, the risk of such matters will already have passed to the purchaser, or been retained by the seller (as appropriate). See chapter 3.
[55] [1941] Ch. 503.

Other authorities suggest that from the moment when the requisition notice was served on the seller they were not in a position to give vacant possession; that is, the notice prevented the giving of vacant possession. In the Court of Appeal decision in *James Macara, Ltd v Barclay,*[56] the defendant agreed to sell certain property to the plaintiffs, with vacant possession to be given on completion. Following exchange, but before completion, the government served the defendant with a notice requisitioning the property. The defendant's solicitors sent a copy of the requisition notice to the plaintiffs, and the plaintiffs subsequently gave notice to the defendant that they rescinded the contract on the ground of the defendant's inability to give vacant possession. The defendant disputed this and contended that the requisition notice did not, upon its true construction, amount to an exercise of the power to enter into possession under the regulations, and that, in fact, no actual entry had been made. It was held that since actual entry was not necessary to exercise the power given by the regulations, the serving of the requisition notice on the defendant was sufficient to show a present intention to enter into possession of the property. The vendor, therefore, was not at the date of completion able to give vacant possession of the property and the first instance decision was affirmed. It was noted in *James Macara* that the notice served was in the same form as that in *Re Winslow Hall.* The differing decisions on the same provisions are difficult to reconcile.

Cases relating to compulsory purchase orders also provide a confusing picture. Where a compulsory purchase order is made over the property between exchange and completion the question arises as to whether the purchaser may claim that the contract has been frustrated (because vacant possession cannot be given) and that, as a result, he is not obliged to complete.

In *Hillingdon Estates Co v Stonefield Estates Ltd*[57] the parties agreed to the sale and purchase of certain land. The contract provided that the purchasers were entitled to take up the property in January 1939. The completion of the transaction was delayed by, *inter alia,* the outbreak of war, and in October 1948, when the contract was still uncompleted, the local county council made a compulsory purchase order affecting the whole of the property. In July 1949, notices to treat under the order were served. The

[56] [1945] K. B. 148.
[57] [1952] Ch. 627.

purchasers claimed that, on or before the date of the service of the notices to treat, they were discharged from their contract to purchase the property. The court held that the purchasers were treated as owners in equity as soon as a binding contract was made. The service of a notice to treat did not affect the sellers, whose sole interest was to receive the purchase money; it followed that the risk of compulsory purchase properly fell on the purchasers, who were not entitled to rescind the contract. The sellers were thus held to be in a position to give vacant possession on completion. The same decision was reached in *E Johnson & Co (Barbados) Ltd v NSR Ltd* (a decision of the Privy Council)[58] where the publication of a statutory notice warning that land under a contract of sale was likely to be required for Crown purposes, did not amount to a frustrating event, and the court held that vacant possession *could* be given by the sellers on completion.

In *Korogluyan v Matheou,*[59] the question to be decided was whether notices served pursuant to the provisions of the Compulsory Purchase Act 1965, stating that the acquiring authority would be entering upon the land, meant that it was no longer possible for the seller to give vacant possession, and that the purchaser ought therefore to be discharged from his obligation under the agreement. Here, however, it was said *obiter* that, given the nature of the notices served, the plaintiff *was* not in a position to sell with vacant possession in the sense in which the judge felt the words ought sensibly to be construed in the context of the whole transaction. Whilst the seller escaped liability for the payment of damages to the buyer because of other contractual conditions,[60] this case clearly suggested that the compulsory purchase notice *prevented* the seller being able to deliver vacant possession (contrary to other case law).

Whilst the specific nature of the relevant provisions of the statute in question, and the form of notice served, will have a bearing on the matter, as will express terms of the legal documentation in question, the current case law does not appear to provide a consistent position on these issues from which any general principles can be extracted.

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[58] [1997] AC 400.
[59] Above, n7.
[60] See [1975] 239 E.G. 649 where it said by Whitford J that "...were it not for the fact that I think the defendant's case fails on special condition 9 and general condition 6, I would have come to the conclusion that at the relevant time the plaintiff was not in a position to sell with vacant possession". The express conditions in the documentation determined the outcome of the case. An interaction between competing contractual conditions is discussed in more detail in chapter 3, and explains this decision.

Again it would seem that various judges have grappled with how a mandatory order to purchase a property affects a prior agreement of contracting parties that includes an obligation to give vacant possession at a specific time in respect of the compulsorily acquired property.[61]

Further, it is unclear as to what can amount to a 'legal obstacle' to the procurement of vacant possession. Indeed, the above cases are set in the context of fully fledged rights to possession, but it is possible to acquire or be granted less extensive rights over land, such as a *profit à prendre* or even the exercise of certain easements or rights of way over a property. It is not clear if such rights, while amounting to less than possession but still encumbering the estate being transferred in some way, would also be legal obstacles to the receipt of vacant possession.

Imagine that a seller contracts to convey land to a purchaser. The contract provides expressly that vacant possession is to be given on completion. Between exchange and completion a third party applies to register (and succeeds in registering) adverse rights of way against the property that will prevent development of the land by the purchaser in the manner desired. While the purchaser may have contractual remedies against the seller with respect to disclosure of third party rights, from a vacant possession perspective, it is questionable whether the seller is able to transfer the land to the purchaser on completion in compliance with the seller's obligation to give vacant possession. The third party's right of way is clearly an interest over the land rather than a competing claim to possession, but it prevents delivery of the property free from a claim of right over the land (i.e. the right to pass and re-pass) that is adverse to the purchaser. Further the purchaser may claim that the third party's right to pass and re-pass constitutes (albeit infrequent) third party occupation of the land. The purchaser could clearly argue that the adverse right of way was a legal impediment that prevented it from obtaining the quality of possession for which it had contracted. If a seller's obligation to procure vacant possession does not refer to transferring the estate free from all conceivable adverse legal obstacles to enjoyment, it is necessary for the law to determine what 'lesser interests' do and do not qualify as obstacles to the receipt of vacant possession.

[61] This issue is analysed in more detail in chapter 6.

The law at present has failed to address this or provide a satisfactory account of how an obligation to give vacant possession is affected by intervening legal matters that potentially act as obstacles to the procurement of vacant possession. Indeed, *Horton v Kurzke*[62] would appear to be the only case on this point. This case concerned the sale and purchase of land (with vacant possession) where following exchange the purchaser learnt of an agricultural grazing right purportedly affecting the land. It was (unhelpfully) held that "whether one looks at it as a question of vacant possession or of title, one gets back to the same position and must apply the same test".[63] It can therefore be questioned whether so called 'lesser-interests' are issues of vacant possession or title, something that would be of concern to both seller and purchaser in this example. Following a discussion of the nature, scope and extent of the obligation, chapter 8 seeks to explain the role of 'lesser interests' in cases concerning vacant possession and their similarity (or difference) to the other legal obstacles referred to.

All these potential legal obstacles obviously put both the seller and purchaser in a difficult position given that, through no fault of their own, it may not be possible to complete the contract entered into. The seller may lose a sale at the agreed purchase price to the purchaser (or the purchaser may advance a claim for damages against the seller if consequential loss has been suffered as a result of the contract falling away). Alternatively, the purchaser may be forced to take a property on completion that is burdened with some supervening requisition that was not known of on exchange (and which will shortly take effect thereafter, depriving them of what they had sought to purchase in the long term). In essence, the purchaser will complain that it is receiving far less than it had contracted for. Commercially, neither situation is satisfactory for parties entering into a contract for the sale of land or property in good faith. The issues of risk and responsibility which these situations pose are highlighted in more detail in chapter 5.

Has the obligation been breached?

Given the uncertainty as to when an obligation to give vacant possession has arisen, and what any obligation may specifically refer to, it is perhaps not surprising that there are

[62] [1971] 1 W.L.R. 769.
[63] Ibid, *per* Goff J. at 771.

further complications in seeking to ascertain whether a breach of the obligation has taken place. Historically, decisions as to whether an obligation to give vacant possession had been breached generally proceeded on an *ad hoc* basis with respect to the particular case in issue. Whilst the specific facts of any particular case will obviously have a bearing on whether a breach of the obligation has arisen (that is, there will also be a fact specific element to the determination), historically no general principles were established to ensure consistency and continuity with respect to differing decisions on (ostensibly) similar facts. It was not until 1946, in a case concerning rubbish that had been left at the premises, that the court first laid down what could be seen as a 'test' to determine whether vacant possession had been given.

In *Cumberland Consolidated Holdings Ltd v Ireland*[64] the plaintiffs contracted to buy a disused freehold warehouse from the defendants. By a special condition the property was sold 'with vacant possession on completion.' The cellars extending under the whole warehouse were made unusable by rubbish including many sacks of cement that had hardened. The defendant refused after completion to remove the rubbish and the plantiffs brought proceedings for damages for breach of the condition for delivery of the property with vacant possession on completion. It was held that the defendant had failed to give vacant possession of the property sold. It was stated that a vendor who leaves his own chattels on property sold by him to an extent depriving the purchaser of the physical enjoyment of part of the property, failed to give vacant possession. Such acts were consistent with the vendor seeking to continue to use the premises for his own purposes,[65] rather than passing possession to the purchaser in accordance with the terms of the contract. It was further noted that it was no answer for the vendor to claim to have abandoned his/her ownership of the chattels on completion to prevent a breach of the obligation. The court held that a breach of the obligation to give vacant possession would occur where there was:

> "...the existence of a physical impediment, which substantially prevented or interfered with the enjoyment of the right of possession of a substantial part of

[64] Above, n34.

[65] The decision in *Lysaght v Edwards* (1876) 2 Ch D 499 discussed the use of the premises as a dump for one's own purposes or for leaving there that which substantially prevented or interfered with the enjoyment of possession of a substantial part of the property. See also *Norwich Union Life Insurance Society v Preston* [1957] 2 All ER 428 where a mortgagor which had left furniture in the premises after a court order requiring him to give up possession was held not to have complied with the law, and was seen to be using the premises for his own purposes as a place for the storage of his goods.

> the property, to which the purchaser did not expressly or impliedly consent to submit..."[66]

This was qualified as being subject to a *de minimis* rule, even though no specific details as to the nature and form of that rule were elaborated upon. The *Cumberland* test (as it is known) remains good law, and was further elaborated upon in recent years in the context of the procurement of vacant possession when exercising a contractual break option in a lease.

In *John Laing Construction Limited v Amber Pass Limited*[67] the claimant was the tenant of commercial premises under a lease granted by the defendant's predecessor-in-title. A clause in the lease provided that the lease might be determined by, *inter alia*, the 'yielding-up of the entirety of the demised premises'. The claimant sought a declaration that, pursuant to a notice given under the break clause, it had validly terminated the lease. That claim was contested by the defendant, which sought to counter-claim for declarations that the purported break notice was ineffective and the lease was therefore still continuing. The defendant contended that the claimant had not 'yielded-up' the property, relying, *inter alia*, on the continued presence of security guards at the premises, and the claimant's failure to hand back the keys to the premises, claiming that these were inconsistent with providing vacant possession at the end of the term.

The claim was allowed. On the facts of the case, it was held that the claimant had plainly and obviously manifested a desire to terminate the lease and was accordingly entitled to the declaration sought. The continued presence of security guards at the premises and the tenant's failure to hand back the keys had not prevented vacant possession being given. The Court held that the task of the court was:

> "to look objectively at what had occurred and determine whether a clear intention had been manifested by the person whose acts were said to have brought about a termination to effect such termination, and whether the landlord could, if it wanted to, occupy the premises without difficulty or objection."[68]

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[66] [1946] KB 264, *per* Lord Greene at 269.
[67] [2004] All ER (D) 115 (Apr).
[68] [2004] 2 EGLR 128, *per* Robert Hildyard QC at 131.

The problem with these tests, however, is that they do not really help lawyers on a day to day basis when the facts of a particular circumstance have to be applied. For example, it is not clear what extent of difficulty is required and whether this must be general inconvenience or significant distress. *Cumberland* suggests that a tenant has to remove all chattels and also rubbish which 'substantially prevents or interferes with enjoyment of a substantial part of the property', but there is no definition of what constitutes 'substantial' or whether this test is purely objective. Indeed, one can question whether the test should be judged against any purchaser or any purchaser with particular qualities to the purchaser in question. It can be questioned whether the court should consider more generally whether rubbish left at the property on the break of a lease or completion of a sale prevents the average purchaser or landlord (objectively speaking) from (re) occupying without difficulty or objection or (objectively speaking) the actual purchaser or landlord in question given its specific characteristics and circumstances. It is also unclear whether there has to be an actual interference, or whether the likelihood or potential for the left over items to cause a substantial interference will be sufficient. Further, what counts as a valid objection has not been clarified, and again whether factors relating to the actual purchaser or landlord in question must be taken into account when determining whether they can (objectively speaking) (re)occupy without such an objection. This raises the likelihood that a materially similar objection could be deemed valid in one context, but not in another, given the specific subjective circumstances of the parties in question.

Imagine that a tenant has trouble paying the rent on a lease and decides to move to smaller premises. The tenant exercises a break option in its lease which is conditional on vacant possession being given on the break date. On the break date the premises are empty except for one room that is half filled with boxes of floor tiles that the tenant failed to remove in time for the break date under its lease. The tenant claims that vacant possession was given and that the lease has come to an end. The landlord claims the converse and argues the lease will now continue until its contractual expiry in another 10 years time. The answer to whether a room that is half filled with tiles breaches the vacant possession condition may well turn on the nature of the tenant's business. If the tenant is a carpet tile supplier, the landlord will have a good case for saying that the tenant is still using the premises beneficially, for the storage of goods for the purposes of its business and therefore that a clear intention has not been manifested by the tenant

to effect a termination of the lease.[69] Alternatively, if the same tiles were brought onto the premises by the tenant to re-carpet the floor but it did not complete this in time, different arguments would apply, and the tenant might succeed in establishing that the tiles did not constitute a substantial impediment to the landlord's resumption of possession of the premises, and that the tiles remaining in the premises on completion were not consistent with the tenant continuing to use the premises for its own purposes.

It must also be borne in mind that this confusion is in the context of physical and tangible items which are claimed to cause a breach of the vacant possession obligation. It would moreover be problematic to seek to apply the test laid down to a situation where, for example, it was claimed that the difficulty or objection related to the state of the premises (which may, for example, have been destroyed by fire immediately before completion). As noted earlier, there remains no authority on how the tests would be applied where the seller's inability to give vacant possession is due to the physical state of the property.[70] The specific nature and form of any potential legal impediment to vacant position could also render the tests relatively ineffective in certain contexts. This raises a question as to whether the current tests are adequate to determine whether there has been a breach of the obligation to give vacant possession in a wide variety of everyday circumstances.

The consequence of the current inadequacies is that the parties in any given case will be unsure as to their legal rights and obligations, and accordingly unable to determine, with certainty, how they should seek to resolve the situation. This potentially puts a greater burden on the party with the weaker financial strength and resource who may be unable, or unwilling, to litigate on any dispute that may arise. The effect of the uncertainty surrounding what may constitute a breach of the obligation to give vacant possession on parties 'negotiating in the shadow of the law' is analysed in detail in chapter 7, where the tests (and integral parts thereof) for vacant possession are critically expounded; the implications to the parties in question in any given case are also discussed with reference to their obligations.

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[69] Compare this with *Legal & General Assurance Society Ltd v Expeditors International (UK) Ltd* [2006] EWHC 1008 (Ch), where a major part of the judge's decision that vacant possession had not been given rested on the fact that the warehouse was still being used for the storage of 'a few pallets and parcels in a largely empty warehouse', which remained useful to the tenant's business.

[70] According to Harpum, above n13.

Remedies for breach

On the basis that an obligation to give vacant possession has arisen and is breached by the party required to give vacant possession, it must be considered where this leaves the party who had contracted for something more than is actually obtained at the relevant time.

It has been argued that if vacant possession is a term of a contract (either expressly or impliedly) and between exchange and completion some supervening event makes it impossible for the seller to give vacant possession to the purchaser on completion, then the contract may be deemed 'frustrated'. As noted above, examples include cases relating to compulsory purchase orders[71] and the requisitioning of a property for specific purposes.[72] Frustration is very rarely claimed however, and case law appears to have shown an unwillingness to find frustration.[73]

If on the day of completion (but before completion is effected) a purchaser were to inspect the premises and see that they were not vacant, it could:

1. Apply to the court for an order for specific performance,[74] and claim damages;

2. Serve a notice to complete on the seller and after expiry of that notice (which will be determined by contractual provisions) rescind the contract, recover any deposit paid and claim damages; or

3. Choose to complete without prejudice to a right to claim damages.[75]

In perhaps 99% of cases, the property is not inspected prior to completion.[76] The first point at which a purchaser will know about the problem with vacant possession is after

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[71] *Korogluyan*, above n7.
[72] *Cook*, above n15 and *James Macara Ltd*, above n56.
[73] *Hillingdon Estates Co v Stonefield Estates Ltd* [1952] Ch 627, applied by Privy Council in *E Johnson & Co (Barbados) Ltd v NSR Ltd* [1997] AC 400.
[74] According to *Wroth v Tyler* [1964] Ch 30 a seller will not normally be obliged by an order for specific performance to undertake 'hazardous' litigation to obtain possession, but would still remain liable in damages. A vendor who sold with vacant possession had, if necessary, to take proceedings against any wrongful occupant but he would not usually be required to embark on difficult or uncertain litigation.
[75] The availability and amount of damages will depend on the circumstances and the nature of the losses. A purchaser's remedies may also be restricted by the express terms of the contract.
[76] It is advisable for the property to be inspected prior to completion – see chapter 1, n8.

completion when they arrive at the premises to find that all is not as they had expected. At this point, the contract has been completed (the seller has the sale monies in cleared funds) and the purchaser is left having to claim damages for a property that they cannot immediately occupy as they wished to. This is unsatisfactory because it leaves the purchaser with the burden of having to advance a claim to recover the loss sustained as a consequence of the breach of the vacant possession obligation; this may prove difficult, or impossible, for example if the seller has weak covenant strength. If the obstacle to vacant possession is a person or entity with a right to remain in occupation, the purchaser may have difficulty in removing them from the premises and take subject to their interest.[77]

It should be noted that there is authority for the position that the breach of an obligation to give vacant possession gives a purchaser the right to rescind the contract even *after* completion (rather than claiming damages). This is because the obligation to give vacant possession has been held not to merge in the conveyance or transfer and thus remains actionable after completion (even in the absence of an express non-merger clause).

The decision in *Hissett v Reading Roofing Co Ltd*[78] is authority for the obligation to give vacant possession being actionable after completion. Here the defendants, by a written contract, agreed to sell to the first plaintiff property comprising offices, depot space and a flat; the property was sold subject to the special condition that vacant possession be given on completion. Condition 33 of the Law Society's Conditions of Sale 1953 stated that:

> "Notwithstanding the completion of the purchase any General or Special condition or any part or parts thereof to which effect is not given by the conveyance and which is capable of taking effect after completion ... shall remain in full force and effect."[79]

The contract was completed and on the direction of the first plaintiff it was transferred to the second plaintiffs, a company. The plaintiffs were unable to get vacant possession

[77] This is based on the doctrine of constructive notice – see chapter 1, n10.
[78] [1969] 1 WLR 1757. In *Hissett* the obligation was express but the result should be the same even if the term for vacant possession was implied.
[79] [1969] 1 WLR 1757.

of the whole property because the flat was at all material times occupied by a protected tenant. It was held that the defendants had failed to give vacant possession in accordance with the special condition which was (in the words of condition 33) a condition 'capable of taking effect after completion'. Further the condition did not merge with the conveyance which covered only part of the ground covered by the contract for sale. In *Gunatunga v Dealwis*[80] it was noted that there was established authority for the proposition that a contractual term that vacant possession shall be given on completion did not merge in the conveyance. In that case the respondent's conduct post-completion, seeking to run the business in order to prevent its collapse and the loss of its goodwill, was not held to amount to affirmation of the contract. The failure by the appellants to give vacant possession on the relevant date was held to have given rise to a new and separate right to rescind the contract.

In practice, by the time a purchaser becomes aware of the breach of vacant possession a period of time (sometimes a number of days) will have passed and the purchaser may have commenced using the premises and can therefore, by conduct, be deemed to have affirmed the contract (although as noted in *Guntunga* this will normally be a question of fact and law given the circumstances of the case). Even then, with the monies having been transferred over to the seller to effect completion, this leaves the purchaser having to embark on expensive court action (which they may not be able to fund) to seek to unravel the contract, and require the monies to be returned. There are further practical problems with seeking to rescind post-completion given that the seller may have already used the money or transferred it to third parties, in which case the purchaser would at best obtain an order from the court for the return of the monies which would amount to a contractual debt. The purchaser would then be left with no property and with the need to enforce the contractual debt in some way. If enforcement proved futile (for example if the seller is a trading company in some financial difficulty) the purchaser could be left with having to bring an action petitioning for 'winding up' (if a company) or commence bankruptcy proceedings (if an individual). Purporting to rescind after completion is therefore fraught with danger (financially and otherwise) and, in practice, is rarely ever claimed.[81] As such, it is commonplace for a breach of the obligation to give vacant

[80] [1996] 72 P.& C.R. 161.

[81] Upon a survey of lawyers at Pinsent Masons LLP it was determined that (nationally) no lawyer in the employ of the firm in June 2008 had ever sought to argue this point or come across a case where it has been argued. There is no other case law dealing with this issue.

possession to be actioned, post-completion, only by way of a damages claim against the seller. As discussed in chapter 9, the basis of the assessment of damages reflects the removability (or otherwise) of the impediment.

At present, the current law and practicalities of completion put the seller in a much stronger position as far as a breach of a vacant possession obligation is concerned, with the contract having been completed (and the seller having received the purchase monies) before an inspection of the property has taken place. A purchaser will often therefore be left in the difficult position of advancing a claim for damages having suffered interruption as a consequence of not being able to immediately occupy without difficulty or objection. The purchaser can sometimes suffer even greater detriment if they had already contracted to demise the premises to a tenant on the basis that a transfer to them takes place. This can result in the purchaser themselves being subject to breach of contract claims (with respect to an anticipated tenant) giving rise to consequential losses. As noted earlier, in the leasehold context, the landlord currently has the upper hand and can use the issue of vacant possession to seek to prevent their tenant exercising a contractual break option in a lease if the landlord would prefer the lease to continue. This is not just when vacant possession is an express condition of lawful operation of the break but also in circumstances where the break is conditional upon material compliance with covenants which, by virtue of the yielding-up obligation, will include a requirement to give a form of vacant possession in any event.

As such, the current remedies available for a breach of the vacant possession obligation are intrinsically unsatisfactory, and highlight the risk, responsibility and potential exposure to the injured party in any given situation. Chapter 9 discussed the issue of remedies in more detail and, with reference to parties' obligation and responsibilities, queries whether vacant possession, as a contractual obligation, is the most satisfactory means by which parties can be treated equitably by the court in any given circumstance.

Conclusion

It is clear from the above that problems are manifest at every stage with respect to the obligation to give vacant possession. Even if one can determine that an obligation has

arisen (expressly or impliedly) what this will actually refer to is likely to be unclear, and how a breach can be made out will potentially be difficult to establish. Even then, remedies flowing from any breach established may be inadequate or unsatisfactory. Therefore at every stage, the issues of risk and responsibility for the parties in question can be seen to be a major issue and pervasive to all aspects of the obligation to give vacant possession.

In order to consider how the obligation could be better understood, it is first necessary to fully evaluate how it has been understood (or misunderstood) over time. As such, the next chapter develops the notion of vacant possession as an express and implied term of the contract by examining how the term has interacted with other terms, and what this reveals about the nature of the obligation to give vacant possession in the context of standard sale and purchase contracts, which then becomes the focus of chapter 4.

Chapter 3

Vacant Possession and Contractual Conditions

Chapter 2 highlighted the current problems with the obligation to give vacant possession. It was shown that a number of uncertainties surround the very essence of the obligation in terms of when it may have arisen, what it refers to, how it may have been breached and what remedies will be available for a breach. The uncertainties identified through the case law suggest that, to date, there has been no coherent concept of vacant possession but rather a lack of understanding as to the obligation's nature, scope and extent throughout its evolution.

This chapter considers the role of vacant possession as a term of a contract by reviewing its interaction with other terms (or conditions) in case law over previous years. In particular, the interaction between a clause providing for vacant possession and two other more standard clauses is discussed. The decisions in case law on such interactions were inconsistent prior to 1979 (when a landmark decision was laid down), and the decisions and reasoning (or lack of) by the trial judges assist in demonstrating how, for some time, there appears to have been a misunderstanding (and apparent failure to take full account of) the obligation's full force and effect. As the decisions evaluated only related to situations in which there was a conflict with an express clause providing for vacant possession (when appearing as a *special* condition), this chapter also discusses how the position may differ when there is a conflict with only an express *general* (as opposed to special) condition for vacant possession, or when the conflict arises with an *implied* obligation for vacant possession. Here, different rules of construction and interpretation are shown to apply even though, as discussed, a lack of authority continues to leave the position largely unclear.

Express Vacant Possession clauses

The precise terms of the sale and purchase contract are key to understanding the issue of vacant possession:

> "What the purchaser is entitled to get in the way of possession on completion depends, of course, on what the contract says."[1]

As noted in chapter 1, the obligation to give vacant possession normally appears expressly as a term in a legal agreement, conveyance, contract or transfer. In practice (and since 1902), contracts for the sale of land have incorporated standardised conditions of sale by reference (as an appendix to the contract) and these have included conditions for vacant possession. These conditions of sale (which are incorporated as terms of the contract)[2] ultimately determine the parties' rights and obligations under the contract, and remedies in the event of a breach by either party.[3] The various editions and versions of the conditions of sale each set out the 'general' and 'special' conditions of the sale and purchase agreement.[4] The general conditions dealt with various issues relevant to the sale and purchase of property and evolved over the twentieth century, for example insurance, deposits, requisitions and matters relevant to completion. Special conditions highlighted specific aspects of the transaction especially of importance to the parties and provided an opportunity to address any unique factors that the general conditions did not adequately cater for. Unlike the general conditions, which are a standard printed set

[1] Farrand, J.T. *Conveyancing contracts: Conditions of Sale and Title* (Oyez Publications, London 1964) 259, under section entitled 'Vacant Possession'.
[2] Cheshire, G.C. and Burn, E.H. *Modern law of real property* (12th edn Butterworths, London 1976) 74.
[3] A detailed discussion of the standard conditions of sale and their origin follows in chapter 4.
[4] See the Law Society's General Conditions of Sale 1925 (The Law Society, London 1925); The Law Society's General Conditions of Sale 1925, Second Edition issued 1928 (The Law Society, London 1928); The Law Society's General Conditions of Sale 1934 (The Law Society, London 1934); The Law Society's General Conditions of Sale 1934 (1949 Revision) (The Law Society, London 1949); The Law Society's General Conditions of Sale 1953 (The Law Society, London 1953); The Law Society's General Conditions of Sale (1970 Edition) (The Law Society, London 1970); The Law Society's Contract for Sale (1973 Revision) (The Law Society, London 1973); The Law Society's Contract for Sale (1980 Edition) (The Law Society, London 1980); The Law Society's Contract for Sale (1984 Revision) (The Law Society, London 1984); The Standard Conditions of Sale (First Edition) (The Law Society, London 1990); The Standard Conditions of Sale (Second Edition) (The Law Society, London 1992); The Standard Conditions of Sale (Third Edition) (The Law Society, London 1995); The Standard Conditions of Sale (Fourth Edition) (The Law Society, London 2003); Standard Commercial Property Conditions (First Edition) (The Law Society, London 1999); Standard Commercial Property Conditions (Second Edition) (The Law Society, London 2003); The National Conditions of Sale, 11th Edition (The Solicitor's Law Stationery Society Limited, London January 1930); The National Conditions of Sale, 12th Edition. (The Solicitor's Law Stationery Society Limited, London August 1932); The National Conditions of Sale, 13th Edition (The Solicitor's Law Stationery Society Limited, London March 1935); The National Conditions of Sale, 14th Edition (The Solicitor's Law Stationery Society Limited, London May 1948); The National Conditions of Sale, 15th Edition (The Solicitor's Law Stationery Society Limited, London November 1948); The National Conditions of Sale, 16th Edition (The Solicitor's Law Stationery Society Limited, London August 1953); The National Conditions of Sale, 17th Edition (The Solicitor's Law Stationery Society Limited, London 1959); The National Conditions of Sale, 18th Edition (The Solicitor's Law Stationery Society Limited, London 1969); The National Conditions of Sale, 19th Edition (The Solicitor's Law Stationery Society Limited, London 1976) and The National Conditions of Sale, 20th Edition, 1981 (The Solicitor's Law Stationery Society Limited, London 1981).

of conditions attached to the main contract, special conditions are manually written or typed on a separate page.[5]

A special condition (or express statement in the particulars of sale)[6] that required vacant possession to be given on completion, was obviously something that the parties would have specifically considered before recording it expressly in their agreement. Whilst it was common for contracts to include such an express special condition for vacant possession, it is also commonplace for such contracts to include other clauses within the agreement that may have reference to, or an effect on, the issue of vacant possession (for example, clauses dealing with liability for errors and omissions in particulars of sale which themselves are likely to include references to vacant possession). When such clauses could be construed as being at odds with each other in some respect, a conflict arises in respect of how these conditions should be interpreted as modifying (or altering) the vacant possession clause. When such a conflict arose between a term relating to vacant possession and another contractual term, it would ultimately be the role of the courts to determine which condition should prevail and which should be subordinate. Historically, purely 'mechanical' type rules were employed to resolve such contradictory provisions of contractual documents. In *Forbes v Git*[7] Lord Wrenbury said that:

> "if in a deed an earlier clause is followed by a later clause which destroys altogether the obligation created by the earlier clause, the later clause is to be rejected as repugnant and the earlier clause prevails."[8]

In recent years, a series of decisions in the House of Lords[9] has led to a 'fundamental change'[10] in the approach taken by the courts to the interpretation of documents of all kinds. The insight lying behind the modern approach to the interpretation of documents is that the meaning that should be attached to particular words is heavily dependent upon the context in which those words have been used. The court is normally seen to try

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[5] See a copy of Standard Commercial Property Conditions (Second Edition) (The Law Society, London 2003) in the Appendix (on page 297) as an example.

[6] Special conditions are deemed to include the terms of the particulars of sale, see for example the National Conditions of Sale, 20th Edition, 1981, above n4.

[7] [1922] 1 A.C. 256, *per* Lord Wrenbury (P.C.) at 259.

[8] Ibid, 259.

[9] In particular, *Prenn v Simmonds* [1971] 1 WLR 1381; *Reardon Smith Line v Hansen-Tangen* [1976] 1 WLR 989; *Charter Reinsurance v Fagan* [1997] AC 313; *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749; *Investors Compensation Scheme Ltd v West Bromwich BS* [1998] 1 WLR 896; *Bank of Credit and Commerce International SA v Ali* [2002] 1 AC 251 and *Sirius International Insurance Co v FAI General Insurance* [2004] 1 WLR 3252.

[10] *ICS Ltd v West Bromwich BS* [1998] 1 WLR 896, *per* Lord Hoffmann at 912.

to give effect to every clause in the contract,[11] seeking to interpret each (so far as is possible) in order:

> "to bring them into harmony with the other provisions of the [contract], if that interpretation does no violence to the meaning of which they are naturally susceptible."[12]

This will often lead to the court concluding that one clause qualifies another in some way. A clause will be rejected as being contrary to the tenor of the agreement if there really is no alternative.[13] Normally, in the event that there are two competing or conflicting clauses in a contract, the court will have to make a determination as to which is the leading provision, and which must be viewed as subordinate, and therefore only able to be given meaning to the extent that it does not contradict the express clause.[14]

Vacant Possession: Express Special Conditions

Over time, a number of judges have ruled on the interaction between an express obligation to give vacant possession (when appearing as a special condition) and other contractual terms. The outcomes of some of these decisions have led to criticism[15] and subsequently been overruled (or not followed),[16] as the following sections will demonstrate. It is appropriate to review two types of contractual condition that have been found to interact with an express special condition for vacant possession to elucidate how the court determined whether the express special condition for vacant possession, or the conflicting contractual term, should take precedence, and how the respective terms could be held to modify or interpret each other. This review serves to highlight a misunderstanding, or lack of awareness, of the true nature, scope and extent of a term for vacant possession over time.[17]

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[11] *Chitty on Contracts* (30th edn Sweet and Maxwell, London 2008) 12-041.
[12] *Chamber Colliery Co. Ltd v Twyerould* [1915] 1 Ch. 268, *per* Lord Watson H.L. at 272.
[13] *Forbes*, above n7, *per* Lord Wrenbury at 259.
[14] Mackay, L. (eds) *Halsbury's Laws* (4th edn Butterworths, London 1983) 872; *Institute of Patent Agents v Lockwood* (1894) A.C. 347 at 360, *per* Lord Herschell L.C. See also Harpum, C. 'Vacant possession - Chameleon or chimaera?' (1988) *Conveyancer and Property Lawyer* 324, 400 (C.H.).
[15] Ibid, Harpum. See also Barnsley, D.G. 'Completion of a contract for the sale and purchase of land: Part 3' (1991) *Conv* 185 at 188.
[16] See Templeman J. in *Topfell Ltd v Galley Properties Ltd* [1979] 1 W.L.R. 446.
[17] Harpum, above n14 discusses these terms in a discussion of the comparison between vacant possession and title.

'No annulment, no compensation' clauses

The first specific context in which a conflict has been seen to arise is with respect to so-called 'no annulment, no compensation' clauses. Clauses like these are likely to state that:

> "no error, misstatement or omission in the particulars, sale plan or conditions shall annul the sale, nor shall any compensation be allowed either by the vendor or the purchaser in respect thereof."[18]

If a seller expressly contracted to sell land with vacant possession but then found that he could not, because of an impediment that he had been unaware of at the time of contract, the effect of a general condition of this kind on the express obligation given by the seller as to vacant possession must be considered. In theory, if the impediment amounted to an error, misstatement or omission from the particulars of sale, a general condition of this kind may have an effect on the express special condition as to vacant possession. The vendor may argue that he is not in breach of his obligation to give vacant possession by virtue of the 'no annulment, no compensation' clause, which has the effect of preventing the sale from being declared void as a result of an error or misstatement. In such a case, the purchaser would be required to take the property subject to the impediment even though the purchaser believed that he was contractually entitled to vacant possession on completion. In other words, the clause may enable the seller *not* to give vacant possession (as has been contracted for) and escape liability for this breach.

This question arose in *Curtis v French*[19] where the defendant contracted to sell a cottage to the plaintiff. The contract incorporated the National Conditions of Sale (10th edition) and included as condition 10 a 'no annulment, no compensation' clause as a general condition which provided that:

[18] For example, see the National Conditions of Sale (10th edition) condition 10. Similar provisions are currently included in the general conditions of the Standard Conditions of Sale (Fourth Edition) condition 7.1, and Standard Commercial Property Conditions (Second Edition) condition 9.1. All above n4.
[19] [1929] 1 Ch. 253, *per* Eve J.

> "No error mis-statement or omission in the particulars . . . shall annul the sale nor shall any compensation be allowed either by the vendor or purchaser in respect thereof."[20]

The particulars of sale included an express special condition as to vacant possession and stated that the property was let to:

> "a local farmer, for one of his employees. The tenant formally and legally terminated the tenancy, but has not yet handed over vacant possession, the vendor has not yet pressed for possession, allowing the occupier to remain on sufferance, but the premises will be sold with vacant possession."[21]

The statement in the particulars was materially incorrect. The local farmer had not terminated the sub-tenancy and the sub-tenant was in any event a statutory protected tenant under the Increase of Rent and Mortgage Interest (Restrictions) Act 1920. The seller had unsuccessfully sought possession for some time but had not commenced any proceedings to evict the occupier. Accordingly, the court was charged with determining whether the seller could be allowed to rely on the 'no annulment, no compensation' clause when the purchaser apparently 'affirmed' the contract[22] and sought damages for the seller's failure to give vacant possession.[23]

Eve J. decided that reliance *could* be placed on the 'no annulment, no compensation' clause by the seller, even though the seller was fully aware that the presence of the tenant would prevent him from giving vacant possession, and that he had failed to adequately disclose this to the purchaser. In accordance with established principles and case law, reliance on the clause should not have been permitted *per se* because of the non-disclosure.[24] Specifically with reference to the issue of the procurement of vacant possession, counsel for the purchaser argued that:

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[20] Ibid, 260.
[21] Ibid, 260.
[22] The purchaser sued for specific performance, opting at trial for loss of bargain damages in lieu under the Chancery Amendment Act 1858 (known as 'Lord Cairns' Act'). Eve J. treated this as an affirmation of the contract. Generally in these circumstances a purchaser may choose to affirm the contract or be compelled to (because the defect is insubstantial, for example).
[23] The decision rests on a series of premises which have been questioned by subsequent authorities. For example, see *Sharneyford Supplies Ltd. v Edge* [1987] Ch. 305 where a vendor who fails to give vacant possession because of the presence of a tenant whom he has taken no steps to evict is liable to damages.
[24] See *Flight v Booth* (1834) 1 Bing. (N.C.) 370 in respect of mis-description and *Re Puckett and Smith's Contract* [1902] 2 Ch. 258 C.A. concerning non-disclosure. Also *Nottingham Patent Brick and Tile Co v Butler* (1885) 15

> "The vendor cannot use [the 'no annulment, no compensation' clause] for the purpose of converting the express promise that the premises will be sold with vacant possession on completion into the exact opposite."[25]

Whilst both these points were advanced in argument, neither was even referred to in the judgment. Eve J. did, however, show an appreciation of the hierarchy of special and general conditions and the extent to which one type of condition should take precedence over another:

> "...there are the special conditions primarily, and, in a secondary sense, the general conditions which are to be treated as incorporated with the special conditions except so far as the special ones contradict, or are at variance or are inconsistent with, the general ones. In those cases, if any there be, the special conditions are to prevail."[26]

However, on construction of the document, Eve J held that it was necessary to:

> "...read into condition 10 of the general conditions condition 8 of the special conditions, which provides that: "*Each lot is sold subject to all tenancies*, outgoings and rights, easements and exceptions and any other matters referred to in the particulars, and the conveyance to the purchaser of each lot shall contain reservations in respect of these matters."[27]

Eve J. considered that the interpretation of the general 'no annulment, no compensation' condition in this context was such that it should override the special condition for vacant possession, which should thus be subject to the general condition. Whilst not explicitly dealt with in the judgment, it would seem that by reading into the general 'no annulment, no compensation' clause the reference to "each lot is sold subject to all tenancies" (from special condition 8), Eve J. considered it appropriate for the seller's express statement that he was selling the land with vacant possession to be subordinate to the general 'no annulment, no compensation' condition. This was notwithstanding the misrepresentation by the seller in the particulars of sale as to the tenant remaining in the property on sufferance and the seller not having pressed for possession. Crucially, this required the purchaser to take the property subject to the non-disclosed tenancy,

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Q.B.D. 261, *per* Wills J at 261; subsequently applied by Millett J. in *Rignall Developments Ltd v Halil* [1988] Ch. 190 at 197-198.

[25] [1929] 1 Ch. 253, *per* Ronald Roxburgh (for the Purchaser) at 256.

[26] Ibid, *per* Eve J. at 257.

[27] Ibid, at 257. Emphasis added.

rendering worthless the seller's express undertaking to give vacant possession, by the exclusion of any remedy for its breach.[28] This undermined the nature and effect of the express special condition providing for vacant possession in the contract, thus casting doubt on the force of a condition for vacant possession, which is a, if not *the,* fundamental part of a contract for the sale and purchase of a (non-reversionary) estate in land.[29] The decision effectively subordinated the special condition for vacant possession in favour of a general condition of the contract, and deprived the buyer of the right to receive the property in the manner in which he believed he had contracted with the seller.

Commentators have criticised this decision and expressed doubt as to whether it could be treated as good law. Farrand considered that the inclusion of such a general condition amounted to an 'un-justifiable trap' and warned that reliance on the decision, in seeking to deprive a purchaser of damages, "might yet turn out to be misplaced".[30] Referring to the decision as "difficult to understand or reconcile with other authorities", Walford[31] supported the above analysis of the judgment and suggested that the misrepresentation by the seller was 'ignored' by Eve J. because it was not made in bad faith. Walford said:

> "...this decision may best be supported on the ground that the vendor's *representation* as to the tenancy was an innocent one...although it is true that the vendor had not actually put the legal status of the tenant to the test by proceedings."[32]

Williams' review of the decision specifically focused on the issue of the alleged *misstatement* as to vacant possession. Stating that "with great respect...to the learned judge...the writer must venture to question its correctness", Williams argued that:

> "...the words annexed as above mentioned to the Particulars, *"the property will be sold with vacant possession on completion"* were not a statement or a misstatement within the meaning of Condition 10 of the National Conditions, but were a *promise,* and amounted to an undertaking, which was part of the

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[28] In theory, there is no reason why a 'no annulment, no compensation' clause cannot still be given meaning in the overall context of the contract if it is confined to matters not affecting the express obligation to give vacant possession (and other terms to which the general condition should be subject).

[29] See Williams, T.C. 'Sale of Land with Vacant Possession' (1928) 114 *The Law Journal* 339 in which he described vacant possession as "an integral part of the contract".

[30] Farrand, above n1 at 264.

[31] Walford, E.O. *Conditions of Sale of Land* (Sweet and Maxwell Limited, London 1940) 91.

[32] Ibid.

> contract, that the purchaser should have vacant possession on the completion of the purchase. And it is very respectfully contended that Condition 10 is only applicable to errors, either by statement or omission, in the *description* of the property sold, and cannot rightly be read as nullifying an express promise by the vendor *to do some act* in performance of the obligations he has undertaken. Such a promise...is...an integral part of the contract...And it is contended that "error" or "omission" mentioned in Condition 10 cannot reasonably be construed as extending to the vendor's error or omission in not performing an act [the procurement of vacant possession] which he had contracted to do; and that those words were never intended to exempt the vendor from liability for the non-performance of this act..."[33]

Williams clearly distinguished between a misstatement (or misrepresentation) and a promise to cogently argue that the vendor's failure to perform his express promise to give vacant possession on completion should not have been caught or modified by the general condition which related to misstatements, and not such 'promises'. On this basis, even on Eve J.'s construction of the general 'no annulment, no compensation' clause, the general condition should have had *no* effect on the express undertaking to give vacant possession, which should have prevailed. This view gains further support from the established principle that special conditions should override general conditions of sale where there is ambiguity. Indeed, the various versions of the conditions of sale themselves confirm that special conditions (of which vacant possession will normally be one, as was the case here) have priority over any inconsistent general provisions. The special conditions provide that "the general conditions apply so far as they are not varied by or inconsistent with these special conditions".[34] An express undertaking to give vacant possession (appearing as a special condition) should, according to the various editions and revisions of standard conditions of sale, and as counsel suggested in the case, have prevailed and overridden the general 'no annulment, no compensation' condition. This would also now be in line with the modern approach to the interpretation of documents adopted by the court,[35] which would have given meaning to

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[33] Williams, above n29. See also Potter, H. 'Conditions of the Sale of Land' (1937) 1 *Conv* 306.

[34] For example, under the Law Society's Contract for Sale (1984 Revision), above n4, special condition A provides that the general conditions apply "so far as they are not varied by or inconsistent with these special conditions". The National Conditions of Sale provide that the general conditions apply so far as they are "not inconsistent" with the special conditions (see, for example, The National Conditions of Sale, 19th Edition, 1976, above n4). This was an established principle from the conception of the Conditions of Sale, e.g. see (1953) 97 *Sol Jol* 395. The conditions of sale are discussed in more detail in chapter 4.

[35] In particular, *Prenn v Simmonds* [1971] 1 WLR 1381; *Reardon Smith Line v Hansen-Tangen* [1976] 1 WLR 989; *Charter Reinsurance v Fagan* [1997] AC 313; *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749; *Investors Compensation Scheme Ltd v West Bromwich BS* [1998] 1 WLR 896; *Bank of Credit and Commerce International SA v Ali* [2002] 1 AC 251 and *Sirius International Insurance Co v FAI General Insurance* [2004] 1 WLR 3252.

the general condition in so far as it did not affect or modify a superior provision in the contract (that being the express special condition for vacant possession).[36]

Moreover, it has since been established that a seller who fails to give vacant possession because of the presence of a tenant, whom he has taken no steps to evict, will breach the obligation to give vacant possession, and be liable to pay damages to the seller. In *Sharneyford Supplies Ltd v Edge*[37] the plaintiff purchased land from the defendant under a contract that expressly provided for vacant possession on completion. The occupants refused to vacate the land and claimed the benefit of a business tenancy within the Landlord and Tenant Act 1954. The defendant was held in breach for not giving vacant possession at the material time and ordered to pay damages assessed in accordance with the general law. As such, there are a number of bases on which to claim that *Curtis v French* was wrongly decided and that Eve J. failed to acknowledge the true nature, scope and extent of the seller's express promise (appearing as a special condition) that vacant possession would be given, in the context of the other conditions of sale. This reflected an apparent failure by the court to fully appreciate the significance of an express special condition for vacant possession, with the judge being prepared to give effect to other general conditions of sale to the detriment of the special condition for vacant possession, which was effectively subordinated as a consequence. As will be shown in the next section, this decision was not the only case of its type, with a further ruling also failing to appreciate the precedence of an express special condition for vacant possession.

'Subject to local authorities' requirements' clauses

A second type of conflicting contractual condition which elucidates how the court has had to determine whether the term for vacant possession or the conflicting term should take precedence, and how the terms could be held to modify or interpret each other, is a 'subject to local authority requirements' clause. The sort of clause in issue here commonly provides that a purchaser is required to accept the property on completion

[36] It is, however, unclear how the position would have changed if the obligation to give vacant possession was implied rather than express. In theory an implied term is as enforceable as an express term, but the implied obligation cannot arise if that would be inconsistent with an express provision of the contract. See *Rignall,* above n24 at 200. The issue of interactions between contractual conditions and implied obligations to give vacant possession is discussed in more detail later in this chapter.

[37] [1987] Ch. 305 CA. See also, Williams, above n29 and chapter 2.

subject to any notices served in respect of the property. Examples of such notices include compulsory purchase orders, Housing Act stipulations as to occupation or even tree preservation orders. Such a clause would typically provide that the purchaser is to take the land:

> "subject to all notices, orders or requirements given, made or required by the local or other authorities."[38]

Whitford J. considered a 'subject to local authorities' requirements' clause in *Korogluyan v Matheou*.[39] This case has striking parallels, in principle, to the decision in *Curtis v French* given that the court was also required to rule on the interaction between an express clause (appearing as a special condition) providing for vacant possession and other conflicting conditions of sale and, as discussed below, also gave precedence to the other conditions. Both decisions also made similar, and yet fundamental, errors based on their apparent disregard of the non-disclosure of burdens on title by the respective sellers.

In *Korogluyan v Matheou* the property was sold at auction with the particulars of sale stating that vacant possession would be given on completion (that is, there was an express contractual obligation to give vacant possession, equivalent to a special condition). The contract of sale incorporated a 'subject to local authorities' requirements' general condition (as general condition 6):

> "Each purchaser shall be deemed to purchase with full knowledge of the state of repair of the lot or lots purchased by him and of the tenancies thereof (if any) and shall be responsible for all repairs including sanitary requirements and all requirements of the lessor local or other authorities. The properties are sold subject to all notices, orders or requirements whether referred to in the particulars or not, given, made or required by the local or other authorities. Each property shall as from the date of the contract be at the sole risk of the purchaser thereof."[40]

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[38] Local authority requirement clauses are common to the various editions and revisions of the conditions of sale. For example, see The National Conditions of Sale, 18th Edition, 1969, above n4, special condition 9. Such clauses are incorporated into current editions as general conditions: Standard Conditions of Sale (Fourth Edition) condition 3.1.2(e) and Standard Commercial Property Conditions (Second Edition) condition 3.1.2(e), both above n4.
[39] [1975] 30 P. & C.R. 309.
[40] Ibid at 315.

The contract also contained a *special condition* (number 9) that the purchaser was buying with full knowledge of burdens and requirements for the property. It provided that the purchasers:

> "having had the opportunity of making all appropriate inquiries of the local authorities shall be deemed to purchase with full knowledge of all entries on the registers kept by them and of all their requirements or proposals relating to the property and shall raise no objection or requisition whatsoever in respect of or in relation thereto."[41]

Before the sale, the local authority served a notice to enter on the seller pursuant to a compulsory purchase order, which was not revealed at auction. As such, on completion it was not possible for the seller to give vacant possession as had been stipulated in the particulars of sale.

In his judgment, Whitford J. held that the seller was able to rely on the general and special conditions referred to above. Although the auction particulars clearly said that vacant possession would be given on completion, according to the judge, general condition 6 and special condition 9 of the agreement 'put the purchaser to inquiry' as to local authority requirements and possible notices affecting the property. He considered that the effect of those conditions was to preclude the possibility of any complaint that as a result of any notice by the local authority it became impossible for the plaintiff to give vacant possession:

> "general condition 6 and special condition 9...do draw the attention of the purchaser to the fact that it may be sensible to see what the position *vis-à-vis* any local authority requirements may be in relation to this particular property, and do draw the purchaser's attention to the fact that if notices may have been served, then the purchase is going to be effected subject to such burdens as the notices given may place upon the property in question."[42]

Whitford J. assumed that the conditions sufficiently alerted the purchaser to the risk that there might be a compulsory purchase order, and treated this as sufficient to qualify the express undertaking to give vacant possession that the seller had provided in the

[41] Ibid at 315.
[42] Ibid at 317.

particulars of sale. His decision was therefore that the express obligation to give vacant possession was rightly qualified by these conditions.[43]

Given his knowledge of the compulsory purchase order at the time of the auction, but corresponding lack of disclosure, in a similar manner to the seller in *Curtis v French,* the seller in the present case should not have been able to rely on the (general) 'subject to ...' condition as a matter of law. This is because, as well documented in the law on title, a vendor who knows or ought to have known of such a notice, order or requirement, cannot rely on such a condition if the burden is not disclosed at the time of contracts.[44] Further, as outlined in chapter 2, case law has confirmed that a seller's *express* guarantee/promise to give vacant possession had the effect of making a purchaser's knowledge of *any* impediment (removable or irremovable) to vacant possession immaterial.[45] As such, even if the purchaser could be *deemed* to have had knowledge of the risk of such a notice being served (as the judge suggested), that impediment to vacant possession should have been of no consequence in the light of the express promise as to vacant possession.[46] It is therefore arguable that special condition 9 was irrelevant *per se* because the seller expressly contracted to sell the property with vacant possession.

Moreover, for the same reasons provided by Williams above, the seller should not have been allowed to qualify his express undertaking to give vacant possession by other conditions in any event, otherwise the express vacant possession term was being undermined. The express condition that the seller will provide vacant possession on completion, as an integral part of the contract, ought to have prevailed over such a 'subject to ...' clause, and the other conditions of sale should not have been allowed to negate the express undertaking as to vacant possession.[47] Logically, the operation of the other conditions should have been confined to matters which did not modify, affect or

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[43] Ibid at 317.

[44] *Nottingham Patent Brick and Tile Co v Butler* (1885) 15 Q.B.D. 261, *per* Wills J. at 271; subsequently applied by Millett J. in *Rignall* above n24 at 197-198.

[45] See chapter 2, page 26.

[46] *Sharneyford,* above n23. It should also be noted that the purchaser was not actually objecting to the compulsory purchase order in its own right anyway, but to the seller's failure to provide vacant possession pursuant to his express obligation to do so in the relevant particulars of sale. See also the closely analogous case on title – *Phillips v Caldcleugh* (1868) L.R. 4 Q.B. 159.

[47] As previously noted, the various versions of the conditions of sale themselves confirm that special conditions (of which vacant possession will normally be one) have priority over any inconsistent general provisions. See above, n34.

derogate from the seller's ability to give vacant possession, as expressly contracted for. This was a conclusion not reached in this case, thus rendering effectively worthless the express promise as to vacant possession as a result.

Whitford J. made no reference to the decision in *Curtis v French* in which Eve J. was willing to disregard a special condition providing for vacant possession in favour of a general condition in such similar terms. It could be argued that the decision in *Curtis v French* actually supported, in principle, the conclusion reached in *Korogluyan v Matheou,* namely that the seller could rely on other conditions of sale to effectively 'convert' the express promise that the premises would be sold with vacant possession on completion into the exact opposite. It is therefore surprising that *Curtis v French* was not cited as an authority in *Korogluyan v Matheou.* As such, over the period 1925 – 1975 decisions in case law which ruled on the interaction between a special condition for vacant possession, and other contractual terms, gave precedence to the non-vacant possession terms. These terms (whether general or special) were seen to take precedence over a special condition for vacant possession, which was effectively subordinated as a consequence. In both decisions referred to above, the sellers were therefore able to escape liability for not giving vacant possession by virtue of these 'other terms'. As the discussion below will demonstrate, it was not until much later that the courts clarified the correct position in this point.

Precedence of the obligation

The decisions in *Curtis v French* and *Korogluyan v Matheou* undermined the precedence of an express special condition as to vacant possession, and seemed to disregard the hierarchy between special conditions and general contractual conditions. These decisions, negating the effect of an express promise as to vacant possession, stood as authorities up to 1979 and the decision of Templeman J. in *Topfell Ltd v Galley Properties Ltd.*[48] This provided the first coherent statement of what a special condition for vacant possession provided in the context of a contract for the sale and purchase of land, and what place it has with reference to other incorporated conditions.

[48] Above, n16, *per* Templeman J. at 450.

In *Topfell* the purchaser acquired a property from the defendant with the particulars of sale stating (in bold type) that the property was sold with vacant possession of the ground floor.[49] As such, it was an express special condition of the contract that vacant possession would be given. Prior to the sale, the local authority served a notice under the section 19 of the Housing Act 1961 directing that the house was to be occupied by only one household. A pre-existing tenancy of the first floor precluded occupation of the ground floor by another household. Vacant possession of the ground floor could not therefore be given on completion contrary to the express contractual provision that vacant possession would be given.

The sellers knew of this notice but did not disclose it to the purchaser. The purchaser successfully sued for specific performance with an abatement of the price. The contract contained, and the sellers relied upon by way of defence, a 'subject to local authorities' requirements' clause (which was a general condition):

> "Each purchaser shall be deemed to purchase with full knowledge of the state of repair of the lot or lots purchased by him and of the tenancies thereof if any and shall be responsible for all repairs including sanitary requirements and all requirements of the lessor, local or other authorities. The properties are sold subject to all notices, orders or requirements, whether referred to in the particulars or not, given, made or required by the local or other authority. Each property shall as from the date of the contract be at sole risk of the purchaser thereof."[50]

The sellers also relied upon a 'no annulment, no compensation' clause (which was a special condition of the contract):

> "The purchaser having had the opportunity of making all appropriate inquiries of the local and other authorities shall be deemed to purchase with full knowledge of all entries on the registers kept by them and of all their requirements or proposals relating to the property and shall raise no objection or requisition whatsoever in respect of or in relation thereto."[51]

[49] Ibid, 450.
[50] Ibid, 450.
[51] Ibid, 450.

In a similar manner to *Korogluyan v Matheou*,[52] it was argued in submissions that if the purchaser had in fact made local searches and inquiries the direction imposed under the Housing Act 1961 would have come to light. In other words, it was argued that the purchasers had notice of the risk of such notices and should therefore take the property subject to that legal obstacle to the receipt of vacant possession, in accordance with the aforementioned general and special conditions.

Templeman J. focused instead on how the interaction between the express special condition for vacant possession, and these apparently contradictory general and special conditions, should be dealt with. He said:

> "...these special and general conditions cannot be allowed to contradict the contractual obligation into which the [sellers] entered ... to give vacant possession."[53]

As a matter of construction, Templeman J. regarded the express special condition to give vacant possession as the paramount provision, and the other special and general conditions of sale as subordinate to it.[54] *Topfell* therefore held that an express undertaking to give vacant possession constitutes an overriding guarantee by the seller; that is, an express vacant possession obligation (appearing as a special condition) is the leading provision. Accordingly, *Topfell* held that any condition of sale which would otherwise have limited or modified the obligation should be construed as being qualified by, and therefore subordinate to, the express special condition. This was seen to apply against general and other special conditions of the contract, with the express special condition for vacant possession taking precedence.[55]

Harpum used the decisions discussed above to illustrate (*inter alia*) that established principles of construction had not been applied correctly with respect to interactions between competing conditions of sale, with a view to highlighting the similarities

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[52] Above, n39.

[53] *Topfell* above n16, *per* Templeman J. at 450.

[54] In light of their knowledge of the Housing Act notice, the vendors could not have relied upon the conditions of sale in any event.

[55] [1946] K.B. 264, *per* Heilpern (for the plaintiffs) at 269 discussing condition 9(3) (relating to the state and condition of the property sold) notes that this did not assist the defendant: "That condition cannot prevail against the special condition for vacant possession". Even though condition 9(3) referred to the state of the property of whatever tenure, and was not held to apply to rubbish left on the premises in any event, the statement is of application to other applicable conditions.

between vacant possession and title:[56] Harpum, discussing these decisions, concluded that the decision in *Topfell* was to be preferred, and stated that:

> "An express undertaking to give vacant possession constitutes an *overriding guarantee* by the vendor. *Any* condition of sale which would otherwise have limited the obligation should in general be construed as being qualified by the express undertaking and not vice versa."[57]

Harpum did not explicitly indicate why the decision in *Topfell* was to be regarded as the most correct, simply stating that "it is respectfully suggested that this conclusion is the right one".[58] However, a number of justifications can be offered which support the claim that *Topfell* is the better decision.

Firstly, as Harpum indicated, the decision in *Topfell* supports the hierarchy that has long been established between special and general conditions of sale whereby the obligation to give vacant possession (when appearing as a special condition) should take precedence over competing (or conflicting) general conditions. The decisions in *Curtis v French* and *Korogluyan v Matheou* allowed general conditions to negate the express special condition for vacant possession, contrary to established principles. The decision in *Topfell* supports the precedence on special conditions in the context of the entire contract. Preferring *Curtis v French* and *Korogluyan v Matheou* would do violence to the purpose and effect of the status of general and special conditions and the certainty that the hierarchy creates in the context of such contracts. Indeed, *Halsbury's Laws* states that:

> "[s]ince special conditions prevail over general conditions, and since the provision for vacant possession is usually stated in the special conditions, it is essential that any qualification of that provision should also be stated in the *special conditions.*"[59]

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[56] Discussed in more detail in chapter 8. Interestingly, no reference was made to the earlier 'authorities' on this point, thus leaving it unclear whether such decisions were overlooked or disregarded. The fact that *Topfell* (like *Korogluyan*) failed to cite previous decisions, in which a vacant possession condition conflicted with other conditions of sale, suggested a lack of coherence with the development of the vacant possession concept. Indeed, one reason why vacant possession took so long to develop as a term in its own right may have been as a result of the courts' lack of awareness as to similar and related decisions. See chapter 4.

[57] Harpum, above n14.

[58] Ibid, 400.

[59] Mackay, L. (eds) *Halsbury's Laws* (4th edn Reissue Butterworths, London 1999) 101. Emphasis added.

Further, the passage from *Halsbury's* also supports the reasoning in *Topfell* that the special condition for vacant possession will prevail over *other* special conditions of the contract. The passage confirms that any qualification to an express special condition for vacant possession must be 'stated in the special conditions', in order to override the special condition for vacant possession (which will otherwise have priority). The discussion in chapter 4, exploring how vacant possession has been incorporated as a general and special condition in sale and purchase contracts and the implications for the transaction more generally, further supports this hierarchy and the appropriateness of the *Topfell* decision.

Secondly, since the decision in *Topfell* gives substance to the integral obligation of a sale and purchase contract, namely that vacant possession will be given, preferring that decision would seem logical from a practitioners' perspective. In chapter 1, the importance of vacant possession for parties on all sides of the transaction was highlighted. Vacant possession is an essential, if not *the* essential part of a contract for the sale and purchase of land.[60] The importance of vacant possession being given in such cases is what led to the obligation being implied by the courts,[61] as a matter of law, into contracts of this kind.[62] If the decision in *Topfell* is not preferred, the essential element of such standard contracts would continue to be subordinated; if other conditions can be argued to modify the vacant possession obligation, buyers would be unable to require sellers to deliver the property to them in a state contemplated by the contract. In such a case, the standard form contract would no longer 'behave in the way that it should'.[63]

Thirdly, in the conveyancing process, a special condition (or express statement in the particulars of sale) that required vacant possession to be given on completion, is

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[60] See Williams, T.C. above n29 in which he described vacant possession as "an integral part of the contract".
[61] Furmston, MP *The Law of Contract* (2nd rev edn Butterworths Law, London 2003) 3.21. Also *Society of Lloyd's v Clementson* [1995] CLC 117, *per* Steyn L.J. at 131; *Shell UK v Lostock Garages* [1977] 1 All ER 481, *per* Lord Denning M.R. at 487; *Mears v Safecar Security Ltd* [1983] QB 54 and *Ali Shipping Corpn v Shipyard Trogir* [1998] 2 All ER 136, *per* Potter L.J. at 147 where it is stated that "[c]onsiderations of business efficacy, particularly when based on the "officious bystander" test, are likely to involve a detailed examination of the circumstances existing at the time of the relevant contract...whereas the parties have indicated their presumed intention simply by entering into a contract to which the court attributes particular characteristics".
[62] See *Shell UK*, above n61, *per* Lord Denning M.R. at 487; *El Awdi v BCCI* [1989] 1 All ER 242, *per* Hutchinson J. at 253; *Bank of Nova Scotia v Hellenic Mutual War Risk Association (Bermuda) Ltd* [1989] 3 All ER 628.
[63] See *Shell* UK, above n61, *per* Lord Denning M.R. at 487; *El Awdi*, above n62 *per* Hutchinson J. at 253; *Bank of Nova Scotia*, above n62; *Perry v Sharon Development Ltd* [1937] 4 All ER 390; *Lynch v Thorne* [1956] 1 WLR 303 and *Hancock v BW Brazier (Anerley) Ltd* [1966] 1 WLR 1317.

obviously something that the parties specifically consider before recording expressly in their agreement. In contrast, a similar amount of consideration is most likely not given to the general conditions of a sale and purchase contract, which have been incorporated as a generic printed set of terms and without special attention to detail. It is therefore 'fairer' for the parties to be held to an express promise over other conditions incorporated only by reference.[64] As such, the decision in *Topfell* makes sense in the real legal world and with respect to the nature of the contract that the parties are entering into.

Fourthly, adding weight to the claim that the decision in *Topfell* should be preferred, the decision has been used to support arguments made in a number of subsequent decisions where the meaning of vacant possession was in issue.[65] By contrast, the decisions in *Curtis v French* and *Korogluyan v Matheou* have never been approved or followed. The judgment in *Korogluyan* did not even refer to *Curtis,* even though the decision in *Curtis* could be seen to have supported the decision made in *Korogluyan.*

As such, there are a number of justifications, in a theoretical and practical sense, for supporting the decision in *Topfell* over previous judgments and thus providing certainty for the parties in cases where the contract contains an express special condition for vacant possession. It can therefore be understood that, subject to contrary indication, an express special condition for vacant possession *will* take precedence over other competing contractual conditions (special or general).

Vacant Possession: Express General Conditions

Whilst clarifying the precedence of an express special condition for vacant possession, it is important to note that the decision in *Topfell* did not provide authority for all types of vacant possession obligations. This is because, in *Topfell* the vacant possession term appeared expressly as a *special condition.* Indeed, all of the cases referred to above have

[64] The fact that a special condition for vacant possession should even override another conflicting special condition can be seen to embody Templeman J.'s regard to the vacant possession clause as having precedence over *all* other terms of the contract, given the integral place of vacant possession in the contract.

[65] See *Secretary Of State For The Environment, Transport And The Regions v Baylis (Gloucester) Ltd and Another* [2000] 3 PLR 61 and *E. Johnson & Co. (Barbados) Ltd Appellants v N.S.R. Ltd. Respondents* (Appeal from the Court Of Appeal Of Barbados [1997] A.C. 400). These decisions are discussed in more detail in chapter 6.

in common the fact that the obligation to give vacant possession in each case was expressly incorporated as a special condition. As chapter 4 will show, over time an express obligation to give vacant possession has sometimes appeared as a *general* condition.[66] It is also important to consider whether, and if so how, Templeman J.'s decision would have changed in such circumstances.

In *Topfell* the court held that an express special condition for vacant possession should take precedence over other inconsistent conditions. This is logical because, as noted previously, in the conveyancing process a special condition (or express statement in the particulars of sale) that required vacant possession to be given on completion, was obviously something that the parties would have specifically considered before recording expressly in their agreement. The parties should therefore be held to that promise over other (general) conditions incorporated by reference. Indeed, it is often the case that a similar amount of consideration is not given to the general conditions of the sale and purchase contract, which have been incorporated without special attention to detail as a set of generic printed conditions.[67] One must therefore question whether a different approach must be taken where a *general* (and not special) condition for vacant possession contradicts with another general condition (such as a 'no annulment, no compensation' or 'subject to local authorities' requirements' clause); that is, the conflict is between terms incorporated with the *same* status.

For example, the 1970 edition of the Law Society's Conditions of Sale included a general condition as to vacant possession at condition 3(1):

> "Unless the Special Conditions otherwise provide the property is sold with vacant possession on completion."[68]

And a 'subject to local authorities' requirements' clause as condition 2(1):

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[66] See the Law Society's General Conditions of Sale (1970 Edition); The Law Society's Contract for Sale (1973 Revision) and The Standard Conditions of Sale (First Edition), all above n4.

[67] The fact that a special condition for vacant possession should even override another conflicting special condition can be seen to embody Templeman J.'s regard to the vacant possession clause as having precedence over *all* other terms of the contract, given the integral place of vacant possession in the contract. See the Appendix at page 301 for an example of the general conditions that are incorporated into a sale and purchase contract by reference.

[68] The Law Society's General Conditions of Sale (1970 Edition), above n4.

"...the property is sold subject –

(c) to all requirements, proposals or requests (whether or not subject to any confirmation) of any such authority."[69]

One can question which general condition would have prevailed in a case where, for example, a compulsory purchase order was made over the property between exchange and completion. One view would be that the reference to "unless the Special Conditions otherwise provide the property is sold with vacant possession..." implies that other general conditions *cannot* modify the general condition as to vacant possession (and only *special* conditions would be so able to). On this basis, the general condition for vacant possession would take precedence over other general conditions of the contract. However, this interpretation would not be possible in the 1990 edition of the Standard Conditions of Sale, in which the general condition as to vacant possession simply provided that:

"The buyer is to be given vacant possession of all the property on completion; this does not apply to any part of it included in a lease or tenancy ("tenancy") subject to which the agreement states the property is sold."[70]

Here, there was no intimation that other *general* conditions of sale could not take precedence over the general condition for vacant possession, with each apparently having the same status. As such, Templeman J.'s statement, that an express undertaking to give vacant possession (appearing as a special condition) constitutes an overriding guarantee by the seller, and should take precedence over all other conditions of the contract (special and general), is not applicable where the obligation to give vacant possession appears as a general condition (with, one would assume, the same status as other general conditions).

Templeman J. held that a special condition for vacant possession should even override another conflicting special condition, on the basis that the vacant possession clause should have precedence over *all* other terms, given its integral place in the contract. By analogy, it could be argued that a general condition for vacant possession should take

[69] Ibid, condition 2(1).
[70] The Standard Conditions of Sale (First Edition), above n4, condition 3(1).

precedence over another conflicting general condition on the same basis (i.e. that the vacant possession condition is integral and, by default, should be given precedence over other incorporated terms of the same status). Whilst there is no authority on such a position, this analysis is in the mischief of the decision of Templeman J. This does however cause the position for parties to remain unclear and this uncertainty creates greater risk for contracting parties who cannot rely on the law to assist them in seeking to interpret their rights and responsibilities in an instance of this kind.

It can also be questioned what the position would be if a 'no annulment, no compensation' or 'subject to local authorities' requirements' clause was a special condition (with vacant possession only a general condition).[71] Whilst the lack of express consideration does not detract from the contractual status of general conditions in a legal contract for the sale and purchase of land, it can legitimately be taken into account when determining the relative weight that may be attached to such a term of the contract by the parties, as compared to other conditions which may have been more particularly considered (i.e. the special conditions).[72] According to established principles previously referred to, in such a case as this, the special condition should logically prevail on the basis that the general condition for vacant possession can only apply so far as it is 'not inconsistent' with any special conditions.[73] A general condition for vacant possession would therefore only be permitted to have effect in so far as it did not qualify the conflicting special condition, which would be treated as the 'dominant provision' (contrary to an intuitive view) of vacant possession. Given the precedence that Templeman J. gave to a condition for vacant possession, one may try and construct an argument that the vacant possession condition should be treated differently to other general conditions of the contract, and be an exception to the established rule that special conditions must take precedence. There is, however, no authority indicating such a position and this would both defy the established hierarchy of terms referred to previously, and be contrary to the terms of a contract that have been freely negotiated between the parties. If the parties complete a document which provides for vacant

[71] See the 1970 edition or 1973 revision of the Law Society's General Conditions of Sale, or the Law Society's Standard Conditions of Sale 1990, where vacant possession was a general condition (all above n4). Chapter 4 reviews the changes in standard form conditions of sale as to the incorporation of the term for vacant possession, and it is documented how the term moves back and forth, from a general to a special condition.
[72] See Harpum, above n14.
[73] As noted previously, the special conditions provide that the general conditions apply "so far as they are not varied by or inconsistent with these special conditions". See n34.

possession only as a general condition, with other (potentially conflicting) terms being afforded greater status, it would be potentially unjust for the law to look behind such a bargain and assign the terms different status to that afforded by the actual contract.

Implied Vacant Possession clauses

The above discussion was set in the context of *express* vacant possession clauses, which have historically been included in a contract for the sale or lease of land as general or special conditions. However, there is a further permutation to consider if a term for vacant possession is not included in the contract as a general or special condition. In such a case it has been established in case law that the term that vacant possession will be given is *implied.*

In *Cook v Taylor*[74] it was held that where a contract is silent as to vacant possession, and silent as to any tenancy to which the property is subject, it is implied that vacant possession will be given on completion. Similarly in *Midland Bank Ltd v Farmpride Hatcheries Ltd* it was said that:

> "prima facie a prospective vendor of property offers the property with vacant possession unless he otherwise states and that would ordinarily be implied in the contract of sale in the absence of stipulation to the contrary."[75]

In *Edgewater Developments Co v Bailey* it was said that "where nothing was said about possession it was often said that there was an implication that property was to be sold with vacant possession".[76] In *Farrell v Green*[77] it was held that the term is implied by law.[78]

However, it has also been established that the implied obligation will not arise if that would be inconsistent with an express provision of the contract. In *Rignall*

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[74] [1942] Ch. 349 at 352.
[75] [1981] 2 EGLR 147, *per* Shaw L.J. at 148.
[76] [1974] 118 Sol Jol 312, *per* Lord Denning M.R. at 313.
[77] [1974] 232 EG 587. The case was decided *per incuriam* on the point that knowledge of irremovable impediments is irrelevant to the scope of the implied obligation. It remains an authority for the proposition that vacant possession can be an implied term however.
[78] Walford, above n32, 169 also discussed the implied term as to vacant possession.

Developments Ltd. v Halil,[79] Millett J. spoke of "the obvious impossibility ... of implying a term inconsistent with an express term of the contract." Indeed, it has been held in Australia that "[a]part from any *special* [80] conditions of sale it is the duty of the vendor to give vacant possession".[81] That is, the obligation will be implied by law subject to a special condition to the contrary. However, an implied obligation to give vacant possession may also be modified or need to be properly interpreted with regard to *general* conditions of the contract as well (i.e. not just special conditions, as suggested by Harvey J. in *Reynolds v Doyle*). Indeed, Oliver L.J. in *Squarey v Harris-Smith*[82] said that any general condition having been incorporated:

> "must be given its full status as a contractual term and cannot just be ignored because it is one of a number of printed conditions which the parties may well not actually have read."[83]

Therefore, if any impediment to vacant possession is latent and irremovable, and at the time of contracting the obstacle was not known of (and could not reasonably be deemed to have been known) to the seller,[84] or if the impediment is removable (thus caught by the implied obligation to give vacant possession), both general and special conditions of the contract may properly affect the nature, scope and extent of the implied obligation to give vacant possession (which will encompass such an obstacle).[85] As such, an implied obligation to give vacant possession must be understood as potentially being capable of qualification by both *general* and *special* conditions of the contract, both of which are capable of modifying the implied obligation.

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[79] Above, n24, *per* Millett J. at 200. This was in an alternative context but the statement is of general application.
[80] Emphasis added.
[81] *Reynolds v Doyle* [1919] 19 S.R. (N.S.W.) 108, *per* Harvey J. at 110.
[82] *Squarey v Harris-Smith* [1981] 42 P. & C.R. 118, *per* Oliver L.J. at 128.
[83] Wilkinson, H.W. 'Conveyancer's Notebook' (1985) *Conv* 243 provides a critical appraisal of such reasoning and why such general conditions are as enforceable as other conditions in the contract, even though they will have been incorporated by reference and probably not considered in great detail. It is correct to state that this approach has not been consistently applied however. In *Lyme Valley Squash Club Ltd v Newcastle under Lyme Borough Council* [1985] 2 All E.R. 405 at 410-412 Blackett-Ord V-C. described a general condition as "very much part of the small print", and added that "no one gave it a thought ... therefore it is right to go behind it".
[84] If the seller knew (or ought to have known) of the impediment and had failed to make full and frank disclosure of it to the purchaser, then the seller will not be able to rely on any condition of sale in general terms which excludes or modifies their obligation to give vacant possession. The implied obligation to give vacant possession will not readily be excluded or modified in such a circumstance (see *Re Crosby's Contract* [1949] 1 All E.R. 830). This is an application of the rule that if there is any ambiguity, a condition of sale will be construed against the vendor because it restricts the rights of the purchaser (see *Leominster Properties Ltd v Broadway Finance Ltd* [1981] 42 P. & C.R. 372, *per* Slade J. at 387).
[85] *Timmins v Moreland Street Property Co Ltd* [1958] Ch 110.

It is currently not clear how other conditions (for example, 'no annulment, no compensation' or 'subject to local authorities' requirements' clauses), which normally appear as general conditions, would be construed when there is only an implied obligation to give vacant possession. Whilst an express special condition for vacant possession has been held to override other conflicting (special and general) conditions, it does not follow that this should be the case where the vacant possession obligation is implied. In such a case, on the basis of established principles of the construction of documents, and in line with established case law,[86] it would be appropriate to give the conflicting express (special or general) condition(s) precedence over the implied vacant possession obligation on the basis that such a condition would constitute a 'contrary indication' or 'stipulation to the contrary'.[87] If this is correct, then any other condition having an effect on vacant possession would have to be given its full meaning before the implied obligation could be interpreted. Whilst there is currently no authority on this point, and the decision in *Topfell* does not have direct application to implied vacant possession terms, the decision in *Topfell* does reinforce the importance of a hierarchy of terms, and consistent with this would be to claim that expressly agreed terms are to be afforded greater weight than terms that are only implied, when a conflict arises. Again, the uncertainty surrounding this issue will cause difficulties for the parties to a contract who will be unsure of their legal rights and responsibilities. It is suggested that it is more likely that 'other conditions' of the contract (expressly incorporated), and which may have an effect on vacant possession, would have to be given their full meaning above any contrary implied obligations (but there remains a lack of a specific authority on this point). As such, there is a very strong argument for always making vacant possession an express term of the contract (and particularly, an express *special* condition) if it is desired that the seller should unconditionally be under an obligation to give vacant possession on completion (regardless of any other competing or conflicting contractual terms).

[86] For example, *Rignall*, above n24, where Millett J. at 200 spoke of "the obvious impossibility ...of implying a term inconsistent with an express term of the contract".

[87] In *Midland Bank Ltd v Farmpride Hatcheries Ltd,* above n75, it was said that "prima facie a prospective vendor of property offers the property with vacant possession unless he otherwise states and that would ordinarily be implied in the contract of sale in the absence of stipulation to the contrary".

Conclusion

The precedence of an express *special* condition for vacant possession over other conflicting terms was suggested by the decision in *Topfell* in 1979. This decision was clear that the special and general conditions could not be allowed to contradict the seller's contractual obligation to give vacant possession (when appearing as a special condition).[88] This decision supports the established hierarchy of special and general conditions and also makes sense in a practical context with respect to an express special condition providing that vacant possession will be given on completion. The decision has also been approved of, and followed, in subsequent decisions, adding weight to the claim that it should be viewed as preferred. This assists parties to a transaction by enabling them to assert their respective positions with reference to the understood and acknowledged precedence of an express special condition for vacant possession. Accordingly, it can be seen as best practice to always deal with the issue of vacant possession expressly as a special condition.

It was, however, noted that the interaction between a term for vacant possession and other contractual terms, when appearing as an express *general* condition was not as clear, and that *Topfell* could not be treated as an authority for all types of express condition for vacant possession. Where the term for vacant possession is only incorporated as a general condition, conflicting special conditions would logically take precedence over the general condition for vacant possession given the established hierarchy of terms. Where the vacant possession condition, and conflicting term, were both general conditions, the position would be less clear, and there is no authority for the proposition that the general condition for vacant possession would take precedence over other terms incorporated with the same status (and the express terms of the contract would have to be considered in detail for any indications).

Further, the full nature and effect of an obligation to give vacant possession, when merely *implied* into the contract, remains even more unclear. There is no authority on whether and if so, to what extent, special and general conditions of the contract should take precedence over an implied term for vacant possession and rebut the implication

[88] *Topfell Ltd*, above n16, *per* Templeman J. at 450.

established by case law, but logically 'other' express terms of the contract (even if not directly relating to vacant possession) should take precedence over implied terms, including those for vacant possession. This is the case even if the contract is of a 'defined type' where vacant possession was assumed, by the parties, to have been a requirement. This demonstrates how fundamental questions with the term, and its incorporation into standard contracts, remain unanswered at the present time, thus creating risk and uncertainty for the parties in any given instance, who cannot rely on established case law to provide clarify as to their liabilities and responsibilities in many respects.

The current uncertainty that exists causes difficulties to practitioners, and those who are faced with the task of seeking to determine whether the obligation to give vacant possession is engaged in any particular instance. It causes problems in ascertaining the full nature and effect of any given contractual term in the context of the transaction more generally. As discussed in chapter 1, whether an obligation has even arisen is one of the first questions that needs to be addressed and this can be difficult to ascertain if the obligation may be qualified by other conditions, or not arise at all if other conditions rebut an implied obligation from even arising. The fact that uncertainties still exist suggests that there has not been and currently is no structured theoretical and coherent concept of vacant possession. This may, at least in part, be the reason behind the problems with vacant possession (as outlined in chapter 2), and the misunderstandings that have taken place in case law over the years, as evidenced earlier in that chapter. Clearly, uncertainty continues to surround various aspects of the obligation to give vacant possession, as a term of the contract, and the need for greater clarity in the future is evident. This can be seen to underlie the history of the emergence of the term in respect of the confused and incoherent conceptual development that case law exhibits. Chapter 7 explores in detail the concept of parties 'negotiating in the shadow of the law' and how this can be argued to be apparent with respect to the obligation to give vacant possession, given the issues expounded by this chapter.

To further elucidate the apparent lack of appreciation and understanding of the vacant possession term over time, the next chapter reviews the term's treatment in the various editions and revisions of the so-called 'standard conditions of sale'. This reveals more

about how the obligation has been interpreted and understood at various intervals during its development, thus supporting the claim that the obligation to give vacant possession was not clearly articulated or coherently conceptualised throughout the twentieth century.

Chapter 4

Vacant Possession and Conditions of Sale

In chapter 3, the court's interpretation of terms for vacant possession, and their interaction with other contractual conditions, was considered. The priority given to an express clause for vacant possession (when appearing as a special condition) over other conflicting terms was evaluated. This was also contrasted with an analysis of an express general condition for vacant possession, or an implied obligation for vacant possession, where the full nature and effect of interactions with other contractual terms remains less clear, currently creating confusion for conveyancers and parties to standard form sale and purchase contracts.

This chapter develops an understanding of vacant possession as an express or implied term by proceeding on a chronological journey through the various editions and versions of the standardised conditions of sale, first published in 1902, and since then routinely incorporated into the majority of contracts for the sale and purchase of freehold land (and leasehold estates and interests). By documenting how the obligation has been incorporated through the history of the conditions of sale, much is revealed about the profession's understanding at various intervals since the first set of standardised conditions of sale was published. It is intended that this analysis, providing contemporaneous evidence of the development of the concept, will be insightful in shedding light on the understanding and recognition by practitioners and other professionals, of the true nature, scope and extent of the obligation to give vacant possession, and its implications to sale and purchase transactions over the history of the conditions of sale.

The chapter starts by providing the context of the emergence of standard conveyancing provisions and how they developed into a universal set of standard conditions of sale (and for commercial transactions, standard commercial property conditions). The evolving development of the vacant possession obligation in conditions of sale is then evaluated over the course of their history. Although the reasons for some of these developments were not documented or explained contemporaneously, where possible

documentary evidence in the form of committee minutes, journal articles and commentaries are cited to support the analysis undertaken and justify the assertions made.

Origin of conditions of sale

Historically, precedent books published by eminent draftsmen have been a source of standard conveyancing provisions for use by practitioners across England and Wales. Thomas Martin and Charles Davidson, in *Practice of Conveyancing*, first published in 1837,[1] gave examples of such books from as far back as *The Chartuary* of 1534 and Dr. Phayer's *Boke of Instruments* in 1543. They also listed a number of other authors, including Sir Orland Bridgman's work, published in 1682, Nathaniel Pigot in 1739, Booth, Fearne, Butler and Sanders in the eighteenth century and Humphreys in the early nineteenth century.[2] Modern counterparts to these texts include Key and Elphinstone's *Precedents in Conveyancing*,[3] and Prideaux, Wigan and Phillips' *The Encyclopaedia of Forms and Precedents*,[4] and such sources remain of central use to practitioners in their day-to-day work in conveyancing and other aspects of transactional land law.

Whilst early works dealt predominantly with techniques for the drafting of deeds, authors in time began to suggest standard contractual provisions. In 1790 in his *Original Precedents in Conveyancing*,[5] Williams included an agreement for the sale of a freehold estate where the purchaser was to be 'at the charge of the deeds' for conveying the property and 'all attested copies of the title deeds and covenants to produce the same'.[6] Powell, Barton and Bird in their various *Precedents in Conveyancing* published in the early 1800s[7] gave forms of agreement for the sale of land containing several clauses,

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[1] Martin, T. *Practice of conveyancing, with forms of assurances* (Saunders and Denning, London 1837). See also, Martin, T. and Davidson C. *Practice of conveyancing, with forms of assurances* (Saunders and Denning, London 1837-1844); Stuart, J. *Practice of conveyancing* (Saunders and Denning, London 1827-1831) and Stuart, J. *Practice of conveyancing* (2nd edn Saunders and Denning, London 1832).

[2] Martin did not provide explicit references to these texts even though he referred to them at various points in his work.

[3] Key, T. and Elphinstone, H.W. *Precedents in conveyancing* (15th edn Sweet and Maxwell, London 1953).

[4] Prideaux, F, Wigan, T.K. and Phillips I.M. *Forms and precedents in conveyancing* (25th edn Stevens and Sons and The Solicitors Law Stationery Society Limited, London 1958-1959).

[5] Williams, T.W. *Original precedents in conveyancing* (Zachariah Jackson, Dublin 1790).

[6] Ibid, 3.

[7] Powell, J.J. and Barton C. *Original precedents in conveyancing, selected from the manuscript collection of the late John Joseph Powell* (W. Clarke and Sons, London 1802); Barton, C. *Series of original precedents in conveyancing* (W. Clarke and Sons, London 1807-1808); Barton, C. *Modern precedents in conveyancing.* Volume 1 (W. Clarke and Sons, London 1811); Barton, C and Bird J.B. *Modern precedents in conveyancing* (2nd edn W. Clarke and Sons,

some of which are recognisable to conveyancers today.[8] Similarly, William Hughes' *Concise Precedents in Modern Conveyancing*[9] gave precedents for some auction conditions which are close to those originally incorporated into early editions of conditions of sale.[10] In the second half of the nineteenth century, more complete sets of conditions were drafted in order to assist conveyancers in covering every aspect of the property transaction. Auction room conditions of the Liverpool Law Society, issued in 1865, are the earliest which texts have traced,[11] whilst Birmingham Law Society in 1871 and Bristol Law Society in 1884 are known to have issued their own common form conditions.[12]

Up to the early 1900s it was common practice for solicitors to prepare their own form of sale and purchase contract, including particulars and conditions. Indeed various texts, including Farrer in 1902, set out general rules to be considered in "framing conditions of sale and particulars".[13] The emphasis in such texts was on how the individual solicitor should go about the be-spoke drafting of the relevant particulars and sale contract unique to the specific transaction.

Williams took the view that such bespoke conditions (drafted, by convention, by the seller's solicitor) were used to curtail the benefits that the purchaser would otherwise gain under open contract rules:

> "It is usually desired, on the vendor's part at least, not to enter into an open contract...but to modify by express stipulation the legal incidents of the bargain."[14]

London 1811-1814 and 2 supplements 1815 and 1817) and Barton, C. and Bird J.B. *Modern precedents in conveyancing* (3rd edn Charles Hunter, London 1821).

[8] For example, that the conveyance shall be prepared by the purchaser at his own expense; that interest shall be paid on the purchase money for delay caused by the purchaser and that the vendor shall deduce a clear and marketable title within a stipulated time.

[9] Hughes, W. *Concise precedents in modern conveyancing* (Law Times Office, London 1855-1857).

[10] See for example, the original conditions in the Law Society's General Conditions of Sale 1925 (The Law Society, London 1925).

[11] Wilkinson, H.W. *Standard conditions of sale of land: a commentary on the Law Society and National general conditions of sale of land* (4th edn Longman, London 1989) 1.

[12] Ibid.

[13] Farrer, F.E. *Precedents of conditions of sale of real estate, revisions, policies etc* (Stevens and Sons Limited, London 1902).

[14] Williams, T.C. *Treatise on the law of vendor and purchaser of real estate and chattels real* (Sweet and Maxwell, London 1904-1906).

Farrand notes that it was not until the early 1900s that:

> "practitioners apparently became more appreciative of their responsibilities when acting for the purchasers and began to contest any conditions [proposed by the seller's solicitors] going too far. As a result, sets of conditions of sale were drafted which could be applied to any sale and which endeavoured to adjust the balance more fairly between the vendor and the purchaser."[15]

It was also noted that the increasing professionalism of conveyancing and growth in the number of land transactions in the early 1900s caused there to be a demand for a means by which transactions could be effected more smoothly and with greater speed.[16]

Conditions of sale

It was in 1902 that a solicitor's managing clerk from Norwich, Mr Alfred Kendall, suggested to the Solicitors' Law Stationery Society that a form of conditions of sale which he had prepared should be published. The draft was settled by Mr E.P. Wolstensholme and the first edition of the National Conditions of Sale was published around 1902.[17] Six editions were published under the pre-1926 law and fourteen since commencement of the Law of Property Act 1925.[18]

In addition to the National Conditions of Sale, an alternative set of conveyancing precedents were published by the Law Society from 1926. Wilkinson[19] reported that the Law Society's Conditions were first published "to facilitate conveyancing under the 1925 property legislation" and were used from 1 January 1926. They were intended to complement the Lord Chancellor's statutory conditions (which applied to contracts by correspondence)[20] and to relate to sales by public auction or by private agreement, other

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[15] Farrand, J T. *Contract and conveyance* (4th edn Oyez Publications, London 1983).
[16] See (1926) 23 *Law Society's Gazette* 64 where facilitation of transactions, especially in light of the Law of Property Act 1925 taking effect on 1 January 1926, is discussed and Walford, E.O. *Conditions of Sale of Land* (Sweet and Maxwell Limited, London 1940) 2-3 with reference to the increase in conveyancing transactions.
[17] National Conditions of Sale, First Edition (The Solicitors' Law Society Stationery Society Limited, London 1902).
[18] Amongst the draftsmen have been Mr T. Cyprian Williams and Sir Benjamin Cherry (according to early versions of the National Conditions of Sale) and Walford, above n16.
[19] Wilkinson, above n11.
[20] The Statutory Form of Conditions of Sale, 1925 (better known as the Lord Chancellor's Conditions) applied to contracts for the sale of land made by correspondence. See Prideaux, F., Cherry, B.L. and Maxwell J.R.P. *Forms and Precedents in Conveyancing* (22nd edn Stevens and Sons Limited, London 1926) 326. The Conditions were promulgated under section 46 of the Law of Property Act 1925 but applied only where no contrary intention was expressed. They are rudimentary and seem to have been little used (e.g. see *Stearn v Twitchell* [1985] 1 All ER 631).

than by correspondence.[21] They were first drafted by Sir Benjamin Cherry, who was previously involved in drafting the National Conditions of Sale.[22]

The use of standard form conditions was formalised by clause 46 of the Law of Property (Consolidation) Bill 1925[23] which became section 46 of the Law of Property Act 1925,[24] and which stated that:

> "the Lord Chancellor may from time to time prescribe and publish forms of contract and conditions of sale."[25]

The Lord Chancellor sent draft copies of certain forms and conditions to the Law Society for comment,[26] and the Council then referred the matter to the Land Transfer Committee, who sent copies of the draft to Provincial Law Societies for comment in early 1925.

The Law Society's Land Transfer Committee minutes of 30 June 1925[27] record that the Council was urged to issue a general form of condition of sale in view of the fact that the Lord Chancellor had found that the statute did not, in his opinion, empower him to do so. A resolution of the Associated Provincial Law Societies had been received, which urged that the forms of General Condition as now amended be adopted and the Law Society was invited to deal with this matter. The Land Transfer Committee agreed that the Law Society should secure the copyright of the General Conditions of 1925. The Council of The Law Society hoped that these conditions would secure some 'uniformity of practice' with respect to the use of these conditions (as opposed to bespoke conditions drafted by each solicitor's office) for conveyancing transactions:

> "The Council of The Law Society, with the assistance of Sir Benjamin Cherry and the approval and co-operation of the Provincial Law Societies have prepared a form of Conditions of Sale, for use in London and the Provinces on

[21] See the notes in (1925) 22 *Law Society's Gazette* 156.
[22] Wilkinson, above n11.
[23] The Law of Property (Consolidation) Bill 1925.
[24] Law of Property Act 1925.
[25] Also referred to in the Law Society Annual Reports 1924-1931 (The Law Society, London 1932) 34.
[26] Private and Confidential Minutes of the Law Society Council meeting of 16 January 1925 (accessed through the Law Society Library – copies available on request).
[27] Private and Confidential Minutes of the Law Society Land Transfer Committee of 30 June 1925 (accessed through the Law Society Library – copies available on request).

> sales of land by auction and private contract. The Conditions, which are the copyright of the Law Society, have been prepared with the object of securing uniformity of practice and of facilitating conveyancing transactions under the new Law of Property Legislation which came into operation on the 1st January 1926."[28]

Two sets of conditions

From 1925 there therefore existed two effectively 'competing' sets of conditions that could be incorporated into contracts for the sale and purchase of land: Oyez's National Conditions of Sale and the Law Society's General Conditions of Sale. Various editions and revisions of these competing sets of conditions were published up to 1990.[29] It was clear from the 1930s that the alternative versions of the conditions of sale were being used by solicitors across the board:

> "Owing to the exigencies of modern affairs it has become a very usual practice to incorporate by reference certain standard Conditions of Sale, and those most commonly employed are the Law Society's Conditions of Sale...and the (so-called) National Conditions of Sale issued by the Solicitor's Law Stationery Society....The practice referred to has grown notwithstanding considerable resistance upon the ground that such forms include in the majority of cases many clauses which are unsuitable or have no relation whatsoever to the subject-matter of the particular contract. These forms do, however, involve a considerable saving of time for the vendor's solicitors, and also assist, to some extent, in the elimination of mistakes in the draft contract, since the material to be written or typed is reduced to a minimum. They also save the purchaser's solicitor some little time in connection with the reading and examination of the engrossments on exchange."[30]

In many respects, having two alternative sets of standard form conditions was not ideal, indeed Silverman claimed that:

> "A particular problem confronting a solicitor who is faced with sale and purchase contracts drawn on different sets of conditions is that the two sets are not compatible when used together..."[31]

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[28] (1926) 23 *Law Society's Gazette* 64.

[29] As discussed below, from 1990 the Law Society Standard Conditions of Sale were published and these superseded the previous pre-fusion conditions. The Law Society Standard Conditions of Sale (First Edition) 1990 were expressed to also be known and referred to as The National Conditions of Sale 21st Edition and the Law Society's General Conditions of Sale 1990 (i.e. the next editions of the respective pre-fusion conditions).

[30] Walford, above n16.

[31] Silverman, F. *Conditions of Sale, a Conveyancers Guide* (Butterworth & Co (Publishers) Ltd, London 1983) v.

Further, Wilkinson noted that:

> "The two sets of conditions sometimes take different approaches to the same problem, however, and the practitioner [should] be aware of the differences between them." [32]

It does not seem that any protocol was developed to govern which set of conditions should be used in any particular transaction and that the forms of conditions could largely be selected on an *ad hoc* basis. Indeed, one commentator observed that:

> "Most solicitors habitually use one set of conditions in preference to the other, therefore some problems inevitably arise when a solicitor receives a purchase contract drafted on the set of conditions with which he is not familiar. Most problems arise quite simply from the fact that the solicitor is not fully aware of the differences between the two sets of conditions and therefore proceeds with the transaction on the assumption that the two sets contain more or less the same provisions."[33]

It was therefore apparent that two competing sets of conditions, drafted differently with inconsistent provisions, actually created the confusion and the very need for attention to detail in each particular case that these conditions, by replacing the previous be-spoke drafting on a transaction specific basis, had sought to avoid.[34] The assumptions that some practitioners were making, that both sets of conditions were identical, were dangerous and problematic and a sufficient awareness of the material differences was not commonplace. It was clear that this state of affairs was not ideal and that a universal set of conditions was required.

'Standard Conditions of Sale'

In 1990 a fused set of conditions came into existence. It was noted in 1989 that:

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[32] Wilkinson, above n11.
[33] Silverman, above n31, 245.
[34] See Walford, above n16.

> "The Law Society and National conditions [had] undergone a long process of development and refinement and [were] now a sophisticated set of rules designed to govern the contract of sale of land both in sickness and in health."[35]

However, to facilitate everyday property transactions, and to prevent lawyers having to negotiate contracts on alternative sets of standard conditions, the first edition of the Standard Conditions of Sale was published by the Law Society in 1990. This was in conjunction with the launch, by the Law Society, of a Protocol for Domestic Conveyancing which was an initiative which sought "...to bring about the standardization and simplification of conveyancing procedures for the benefit of the client".[36]

The fused Law Society's Standard Conditions of Sale were:

> "...intended to hold the balance evenly between the seller and the buyer and be entirely general in scope. They were radically different from their predecessors in arrangement and style and also make some significant changes in substance."[37]

These conditions superseded the two (previously separate) sets of conditions.[38] Aldridge's *Companion to the standard conditions of sale* stated that:

> "For many years conveyancers have based their contracts for the sale of land either on the National Conditions of Sale (first published 1902) or on the Law Society's General Conditions of Sale (of which the first edition came into use in 1926). With the rise in recent years of chains of linked transactions, particularly for the sale and purchase of domestic property, the inconvenience of employing two sets of conditions, with slight but significant variation in their terms, have become obvious. The *Standard Conditions of Sale* resulted from an initiative by the publishers of the two established sets of conditions to offer a single unified set."[39]

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[35] Wilkinson, above n11, 4. It was reported that changing market conditions relating to the sale of land were reflected in the changes made in successive editions of the conditions over time. See also Mills, J. (QC) *Conditions of Sale* (1961) 105 *Sol Jol* 497.
[36] Silverman, F. *Standard Conditions of Sale: a conveyancers guide* (3rd edn Fourmat Publishing, London 1990) v.
[37] Silverman, F. *The Law Society's Conveyancing Handbook 1993* (The Law Society, London 1993).
[38] The Standard Conditions of Sale (First Edition) 1990 were expressed to also be known and referred to as The National Conditions of Sale 21st Edition and the Law Society's General Conditions of Sale 1990, above n29.
[39] Aldridge, T.M. (1990) *Companion to the standard conditions of sale.* Pamphlet volume 98 (Longman, London 1990) iii.

Commentators at the time emphasised the regularisation in practice that these new fused conditions achieved:

> "The two sets of conditions have run in rivalry ever since, with 20 editions of the [National Conditions of Sale] and many editions and revisions of the [Law Society's Conditions of Sale]...[C]ommon cause has now been made and there will be no more danger of chain transactions where on contract A the notice to complete gives a period "within 15 working days" (Law Society, 1984 revision, condition 23(3)) and contract B gives "within sixteen working days" (National, 20 edition, condition 22(2)) [now] the Standard Conditions are uniformly accepted."[40]

The 1990 conditions were broadly welcomed in the profession given that "...for the first time in living memory, practitioners may all be using one single set of conditions of sale in property transactions".[41] In many respects, these fused conditions sought to achieve a situation originally contemplated in the early 1900s where any sale could proceed on the basis of an established, and understood, set of conditions which ensured a fair balance between the vendor and the purchaser, rather than alternative sets of standardised conditions, or be-spoke conditions drafted on an *ad hoc* and transaction specific basis by individual practitioners.[42]

Whilst originally the 1990 conditions were not expressed to be confined to domestic conveyancing, but to be a 'total replacement'[43] to previous pre-fusion sets of conditions, from 1999 the Law Society's Standard Commercial Property Conditions[44] (based on the third edition of the Standard Conditions of Sale) were devised and these, co-existing with the Standard Conditions of Sale, are for use in specifically 'commercial' property transactions. The Standard Conditions of Sale (retained for residential transactions) are currently in their fourth edition, whilst the Standard Commercial Property Conditions are now in their second edition.

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[40] Wilkinson, H.W. 'The new conditions of sale' (1990) 140 *New Law Journal* 487.
[41] Silverman, above n36.
[42] As reported by Farrand, above n15, 263.
[43] Silverman, above n36, v.
[44] Standard Commercial Property Conditions (First Edition) (The Law Society, London 1999); Standard Commercial Property Conditions (Second Edition) (The Law Society, London 2003).

Content of the conditions of sale

Contracts for the sale of land have incorporated standard conditions of sale by reference[45] (effectively as an appendix to the contract) since 1902; these conditions ultimately determine the parties' rights and obligations under the contract, and remedies in the event of a breach by either party. In terms of referring to the standard provisions as 'conditions', Cheshire discussed the status of these conditions, and referred to Danckwerts L.J. who commented on:

> "...the longstanding practice which has arisen among conveyancers of referring to the provisions in a contract for the sale of land as "conditions of sale" whether special or general (such as those provided by the common forms produced under the name of the National Conditions of Sale, or those produced by the Law Society)..."[46]

Danckwerts L.J. explained what was meant by the word 'condition' in this context:

> "The word "condition" is traditional rather than appropriate, and these provisions are not so much concerned with the validity of the contract of sale as with the production of the title and the performance of the vendor's and purchaser's obligations leading up to completion by conveyance. Shortly they are no more than terms of the contact."[47]

The various editions and versions of the conditions of sale over time each included 'general' and 'special' conditions (or terms). In 1926, Davidson and Murray's guidance on conveyancing precedents noted that:

> "...it has become the practice...to embody in the contract a form of general conditions, which can be adapted or varied by special conditions applicable to the particular circumstances affecting the property to be sold."[48]

As the discussion in chapter 3 has noted, the general conditions deal with various issues relevant to the sale and purchase of property including, for example, insurance, deposits, requisitions and matters relevant to completion. They comprise a set of pervasive

[45] It is not obligatory to incorporate the conditions, but it is standard practice.
[46] Cheshire, G.C. and Burn E.H. *Modern law of real property* (12th edn Butterworths, London 1976) 74.
[47] *Property and Bloodstock Ltd v Emerton* [1968] Ch 94, *per* Danckwerts L.J. at 118.
[48] Davidson, C. and Murray A.T. *Concise precedents in conveyancing: with practical notes* (21st edn Sweet and Maxwell Limited, London 1926).

conditions that cover a variety of issues that *may* arise on a sale and purchase transaction, even though a great many of the conditions will never be relied upon in the majority of transactions. Special conditions, on the other hand, highlight specific aspects of the transaction especially of importance to the parties including, for example, interest rates and incumbrances on the property. These also provide an opportunity to address any unique factors relevant to the transaction that the general conditions do not adequately cater for. Cheshire[49] reported that a 'professionally drawn contract' will incorporate either set of standard conditions 'with variations to meet the particular case'. Matters which are commonly the subject of special conditions were, according to Cheshire, the root and length of title, the date on which possession was to be given, interest due (for example in the event that payment of the completion monies was delayed), mis-descriptions and relevant planning matters.

By agreement between the parties to the contract, the conditions of sale could be accepted in whole or in part and varied as required. Cheshire and Burn noted that:

> "The Law Society General Conditions of Sale and the National Conditions of Sale contain standard forms of conditions and these are usually employed with such alterations as the parties may make to fit the particular transaction."[50]

The conditions were designed to facilitate common everyday property transactions by providing a universally recognised set of relevant conditions "intended to hold the balance evenly between the seller and the buyer...".[51] The general intention was therefore that they should not be changed as this could make them more biased towards a seller or a buyer, subject to the specific circumstances of any transaction requiring otherwise.[52]

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[49] Cheshire, G.C. and Burn, E.H., above n46, 741.
[50] Cheshire, G.C. and Burn, E.H. *Modern law of real property* (13th edn Butterworths, London 1982) 110.
[51] Above n37, 665.
[52] Cheshire, G.C. and Burn, E.H., above n50, 110.

Vacant Possession in conditions of sale

Vacant possession will often be an express term of a contract for the sale of land. The decision in *Topfell Ltd v Galley Properties Ltd*[53] established that an express provision (appearing as a special condition) that vacant possession will be given on completion will be the 'dominant' provision, given that such a special condition[54] is something that the parties will have specifically considered before recording expressly. General provisions of the contract should therefore be qualified by an express vacant possession clause (when appearing as a special condition) and not restrict the nature and effect of that clause in any way. Otherwise, a proper interpretation of the document's construction would derogate from the character of the express special condition for vacant possession, which amounts to a promise or guarantee that vacant possession will be given on completion.[55]

Chapter 3 explained that where the conditions of sale do not expressly cater for vacant possession, the obligation will (according to case law) be implied into the contract. This is evidenced in the following review of the conditions of sale, and arose from case law over time including, most notably, the decision in *Cook v Taylor.*[56] Here, as previously noted, it was held that where a contract is silent as to vacant possession, and silent as to any tenancy to which the property is subject, there is impliedly a contract that vacant possession will be given on completion.

Chapter 3 also made clear that the implied obligation will not arise if that would be inconsistent with an express provision of the contract.[57] Further, the implied assumption, that vacant possession is to be given, will be subject to specific circumstances and actual knowledge of the parties. For example, and as discussed in chapter 2, where one party is aware, when entering into a contract, that the interest is subject to some impediment to vacant possession, case law suggests that if the purchaser knows that the obstacle to the receipt of vacant possession is *irremovable,* then the

[53] *Topfell Ltd v Galley Properties Ltd* [1979] 1 W.L.R. 446, *per* Templeman J.'s decision.
[54] Special conditions are deemed to include the terms of the particulars of sale as well.
[55] *per* Templeman J.'s decision in *Topfell,* above n53. When the condition for vacant possession was *general* and not special, different considerations were found to apply and the position remains uncertain as to whether a conflicting provision will take precedence. This will be a matter of construction of the document.
[56] *Cook v Taylor* [1942] Ch 349.
[57] *Rignall Developments Ltd v Halil* [1988] Ch. 190. This was in an alternative context but the statement is of general application.

implied obligation to give vacant possession will not extend so as to include that obstacle.[58] If at the time the contract was made, the purchaser knew of only a *removable* obstacle, then the implied obligation to give vacant possession will *not* be deemed to exclude such an obstacle, and if the removable obstacle is still on the premises on completion the obligation to procure vacant possession will have been breached.[59] As will be shown below, these principles are relevant to the incorporation of conditions for vacant possession in standard conditions of sale.

Chronology of conditions of sale

An understanding of vacant possession can be documented by reviewing its position within the standard form conditions of sale, from the first edition of the (then) Law Society's General Conditions of Sale in 1925,[60] and the (then) 11th Edition of Oyez's National Conditions of Sale in 1930.[61]

Conditions of sale prior to 1953

In the Law Society's General Conditions of Sale from 1925 to 1949 there was no specific mention of vacant possession. In the first edition under condition 5 of the general conditions, referred to as 'Completion Possession and Apportionment', subparagraph 3 stated that:

> "A purchaser paying his purchase money, or, where a deposit is paid, the balance thereof, shall (but subject to the execution of any conveyance which ought to be executed by him), as from the date fixed for completion, *be let into possession* or receipts of rents and profits."[62]

[58] See *Timmins v Moreland Street Property Co Ltd* [1958] Ch 110.
[59] See *Norwich Union Life Insurance Society v Preston* [1957] 1 WLR 813.
[60] The Law Society's General Conditions of Sale 1925, above n10.
[61] The National Conditions of Sale, 11th Edition (The Solicitor's Law Stationery Society Limited, London January 1930). In a personal communication with Richard Strong, Executive Manager of Oyez Forms Publishing on 5 November 2008 it was noted that the Solicitors' Law Stationery Society Limited was founded in 1888 and over the course of 120 years it has undergone many changes of ownership which has resulted in loss of historical data, including old records being either lost or destroyed (due to the aerial bombing of London in the Second World War). As such, copies of pre-11th edition National Conditions of Sale are no longer available and the Law Society Library does not have such copies either.
[62] The Law Society's General Conditions of Sale 1925, above n10, condition 5(3), emphasis added.

Being the only term purporting to deal with the delivery of the property from the seller to the purchaser on completion, this condition seemed to suggest that a purchaser had the entitlement to enter into possession of the property on completion when, having paid the purchase monies, the property was legally transferred to him. This would, however, have to be interpreted with respect to a standard provision on tenancies. Indeed, in condition 22, dealing with 'Tenancies and apportionment of rents for purposes of the sale', subparagraph 1 stated that:

> "The property is sold, and, except where the title is registered, will if the vendor so requires, be conveyed, *subject*, so far as the same may be subsisting, to any leases or tenancies *referred to in the contract* and affecting the same, and to any tenant right annexed thereto, but not so as to confirm any lease or tenancy liable to be determined."[63]

Condition 22(1) modified condition 5(3) and provided that possession for the purchaser was subject to tenancies that would still be in force on completion and referred to in the contract. Subparagraph 2 of condition 22 contained a provision providing for inspection of such tenancies in order for a purchaser to become aware of the tenancies or leases that the sale would be subject to. It provided:

> "The leases or agreements (if in writing) under which the tenants hold or abstracts or copies thereof:-
>
> (a) in a sale by private treaty, may be inspected by a purchaser and, if so required by him, shall be produced at the office of the vendor's solicitors before the contract is signed..."[64]

Obviously if the sale was subject to a continuing tenancy, then the 'possession' that would be transferred would be the right to receive rents and profits from the estate as per the final clause of the final sentence to condition 5(3).[65]

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[63] Ibid, emphasis added.

[64] Ibid, condition 22(2).

[65] Section 205 (1) (xix) Law of Property Act 1925 provides that "*Possession* includes receipt of rents and profits or the right to receive the same, if any". According to Farrand, J.T. *Contract and conveyance* (Oyez Publications, London 1964) 259, this amounts to being passed 'constructive possession'. See also chapter 5 for a discussion of the various meanings of possession.

None of the special conditions in the 1925 edition referred to 'vacant possession'. This position was replicated in the second edition of the conditions in 1928,[66] the 1934 conditions[67] and the 1949 revision of the 1934 conditions.[68] In fact, up to and including the 1949 revision of the 1934 edition, the term 'vacant possession' was not used in General Conditions of Sale prepared by the Law Society. The default position under these conditions therefore was that 'possession' was to be given as a matter of course (subject to any subsisting tenancies disclosed to the purchaser in the contract) by virtue of the general conditions referred to above. In this regard, vacant possession did not appear to be a recognised legal term in and of itself at this time (given its explicit absence from these conditions), even though some early texts made use of the undefined expression 'vacant possession'.[69] In addition, the obligation to give 'vacant possession' as an implied term was not authoritatively established until the decision in *Cook v Taylor*[70] in 1942.

Whilst a full discussion of the differing meanings of 'possession' is undertaken in chapter 5, it is useful to note at this stage the distinction between *legal* and *de-facto* possession. Legal possession is concerned with the 'right' to possession;[71] a person has a *right* to possess an estate if they have acquired a title to it which is 'vested in possession',[72] giving them an immediate fixed right to the estate in land. By contrast, the vernacular meaning of 'possession' is the physical occupation of tangible land, also referred to in case law as 'actual' possession.[73] 'Actual possession' or *de-facto* possession is normally used to denote the state of being 'in' possession of the estate, rather than merely having the 'right' to possess it (or having constructive possession of it) in a

[66] The Law Society's General Conditions of Sale 1925, Second Edition issued 1928 (The Law Society, London 1928).
[67] The Law Society's General Conditions of Sale 1934 (The Law Society, London 1934).
[68] The Law Society's General Conditions of Sale 1934 (1949 Revision) (The Law Society, London 1949).
[69] See, for example, Webster, F.W. *Law relating to particulars and conditions of sale on sale of land* (3rd edn Stevens and Sons Limited, London 1907) 334. It is entirely possible that this term was carried over from use of the expression 'vacant possession' in the 1800s in a different context to its conventional usage.
[70] [1942] Ch. 349 at 352. Here is held that where a contract is silent as to vacant possession, and silent as to any tenancy to which the property is subject, there is impliedly a contract that vacant possession will be given on completion. Note that Simmonds J. treated the contract (incorporating the 1934 Law Society Conditions of Sale) as 'silent' as to vacant possession in this case, confirming the above analysis that no express vacant possession clause was incorporated.
[71] As discussed in chapter 5, there is also a factual element to possession given that possession has been held to comprise a relationship of right and fact. See Wonnacott, M. *Possession of Land* (Cambridge University Press, Cambridge 2006) 114.
[72] *Fearne's Contingent Remainders* (4th edn Stahan & Woodhfall, London 1844) vol 1, 2, cited with approval in *Pearson v IRC* [1981] AC 753, 772.
[73] *Prasad v Wolverhampton BC* [1983] 2 All ER 140, 153.

strictly legal sense.[74] Legal possession is a matter of law, *de-facto* possession is a matter of fact. As such, someone can be in *de-facto* possession of an estate in land which they have *no* legal right to occupy or be in possession of (for example, a squatter or trespasser).

It is arguable whether the reference to 'possession or the receipt of rents and profits' in the Law Society's General Conditions of Sale during the period from 1925 to 1949 was simply a reference to the legal transfer of the estate pursuant to the contract, or a condition relating to factual possession of the estate in a physical sense in respect of actual occupation. Indeed, it was noted by Farrand that this provision in the conditions of sale was "somewhat ambigious".[75] Contemporaneous texts interpreted the references to possession as being to 'vacant possession' and interpreted this meaning in the sense of *de-facto* possession. Walford, in 1940, discussed condition 21(1) of the Standard Conditions of Sale 1934 (the old condition 22(1) from previous editions) and noted that:

> "Apart from the express particulars of tenancies the purchaser may be unable to insist on *vacant possession* if he has notice in the particulars that the property is "in the occupation of" a third party..."[76]

Walford clearly defined 'possession' as 'vacant possession' with the reference to third party occupation focusing attention on the physical ability to enter into possession in a factual sense. This is supported by earlier texts, including Webster in 1907 which stated:

> "In a condition of sale 'possession' means, primarily, vacant possession."[77]

Walford did, however, go on to clarify that particulars or conditions may show a contrary intention, citing the example of *Lake v Dean*[78] in which 'possession subject to the tenancy' was held to be the correct meaning of possession in that context. However,

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[74] A relationship of fact (that is, being 'in' possession or 'having' or 'entering into' possession) exists when a person is, as a matter of observable fact, actually enjoying the rights and incidents of an estate in land, according to Howe, M. (eds) *The Common Law* (Little Brown & Co, Boston 1963) 170.
[75] Farrand, above n65, 263.
[76] Walford, above n16,189. Emphasis added.
[77] Webster, above n69, 334. Whilst the term was used in 1907, it did not appear to have a specific or agreed meaning at this stage and no definition was provided in this text. It is arguable that the traditional term 'vacant possession' was meant by such expressions.
[78] (1860) 28 Beav 607. See also *North v Loomes* [1919] 1 Ch 378 in which a presumption was rebutted by implication (with reference to an implied vacant possession term).

in that case, 'possession' did still refer to factual enjoyment of the land (as opposed to legal possession), albeit the receipt of rents and profits with respect to the area of land subject to the tenancy.[79] Further, the wording in the Law Society's Conditions of Sale from 1925 to 1949 referred to "being let into possession or receipts of rents and profits".[80] The words 'let into' appeared to suggest (in line with the interpretation of Walford and Webster) that *de-facto* possession should be attributed to the term 'possession' in this context (as opposed to legal possession) even though the term 'vacant possession' itself was not used.

An alternative interpretation of the use of "let into possession or receipt of rents and profits" is that the condition referred to possession in a legal sense (i.e. the right to possession) and not *de-facto* possession (the fact of 'being' in possession). This view, whilst not supported by contemporaneous authority, gains some support in light of the retention of these general conditions in the later 1953 edition.[81] It is logical that, if the general conditions were intended to have dealt with *de-facto* possession (as suggested by Walford and Webster), they would have been meaningfully amended in some way when vacant possession appeared expressly as a special condition in the 1953 edition (as is discussed later). As there was no material change to these general conditions in 1953,[82] it could be inferred that they had no direct relevance to the *de-facto* sense of factual possession, and only referred to possession or the receipt of rents and profits in a strictly legal sense (explaining why no change to them was made). This view is contrary to definitions of possession in literature around the time however[83] and not supported by any authority.

Given that neither set of conditions provided expressly that the seller would deliver 'vacant possession' to the buyer as a condition of the contract,[84] in this period vacant

[79] See also Barnsley, D.G. 'Completion of a contract for the sale and purchase of land: Part 3' (1991) *Conv* 185 at 188.
[80] The Law Society's General Conditions of Sale 1925, above n10, condition 5(3).
[81] Albeit with a slight amendment as to only referring to 'rents and profits' and not 'possession'. As noted before, it is difficult to understand why the expression 'let into possession' was removed from subparagraph 3 of condition 5 when the entitlement to take possession or receive the rents and profits (as the case may be) was referred to in condition 5(4). It is submitted that this has no significance in the context of vacant possession being introduced as a special condition at the time. If the introduction of vacant possession was intended to replace these references, then 'receipt of rents and profits' as well as 'possession' should both have been removed.
[82] i.e. both 'let into possession' and 'receipt of rents and profits' were still used in the general conditions.
[83] For example, the explicit definition of possession in conditions of sale given by Webster, above n69, 334.
[84] Even though there were references to 'possession' in Law Society General Conditions of Sale (which arguably meant 'vacant possession' on a proper construction), these were references and not embodied in an express clause stating that the seller was obligated to give vacant possession. There was therefore no express vacant possession

possession would have been an implied term of the contract. This claim is supported by the decision in *Cook v Taylor* in 1942[85] where Simmonds J. observed that under the Law Society Conditions of Sale 1934 (as they were then drawn) it was implied that the purchaser was entitled to vacant possession where no tenancy was disclosed.[86] That is, the obligation was implied in these conditions. Subsequent authorities have also commented upon how standard sale contracts, of a defined type, encompassing "those relationships which are of common occurrence, such as...seller and buyer...",[87] will include an implied assumption as to vacant possession.[88]

As previously noted, Oyez's National Conditions of Sale originated in 1902. The 11th edition of these conditions was published in 1930, and earlier versions are no longer available.[89] In the 11th edition of the National Conditions of Sale[90] there was no reference to the term 'possession'. The only clause that could be construed as having any relevance to possession was general condition 10. General condition 10(1) under the heading 'Property sold subject to all rents, easements, and tenancies...' read:

> "The Property is sold subject to...tenancies, *whether mentioned in the particulars of sale or not*, and to the rights and claims of tenants. No error, misstatement or omission in the particulars, sale plan or conditions shall annul the sale, nor (save where the error, statement or omission relates to a matter materially affecting the value of the property) shall any compensation be allowed by the vendor or purchaser on respect thereof."[91]

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clause. The decision in *Cook v Taylor* justifies this analysis as Simmonds J. would have not treated the contract (incorporating the 1934 Law Society Conditions of Sale) as silent as to vacant possession if any of the references to possession constituted an express provision as to vacant possession.

[85] [1942] Ch 349.

[86] See also Walford, E.O. *Contracts and Conditions of Sale of Land* (Sweet and Maxwell Limited, London 1957) 25.

[87] *Shell UK v Lostock Garages* [1977] 1 All ER 481, Lord Denning M.R. at 487; *El Awdi v BCCI* [1989] 1 All ER 242, *per* Hutchinson J. at 253; *Bank of Nova Scotia v Hellenic Mutual War Risk Association (Bermuda) Ltd* [1989] 3 All ER 628 at 665.

[88] For example, in *Midland Bank Ltd v Farmpride Hatcheries Ltd* [1981] 2 EGLR 147, *per* Shaw L.J. at 148 it was said that "prima facie a prospective vendor of property offers the property with vacant possession unless he otherwise states and that would ordinarily be implied in the contract of sale in the absence of stipulation to the contrary". In *Edgewater Developments Co v Bailey* [1974] 118 Sol Jol 312, *per* Lord Denning M.R. at 313 it was said that "where nothing was said about possession it was often said that there was an implication that property was to be sold with vacant possession". In *Farrell v Green* [1974] 232 EG 587 it was held that the term is implied by law. Walford, above n86, also discussed the implied term as to vacant possession.

[89] As noted above, it is not possible to obtain earlier editions but it is understood that none of the earlier versions make any reference to vacant possession.

[90] The National Conditions of Sale, 11th Edition, above n61.

[91] Ibid, condition 10(1). Emphasis added.

This clearly made the possession that was passed to the purchaser subject to tenancies, thus qualifying what was being transferred. It also contained a standard 'no annulment, no compensation' clause, with reference to mis-descriptions which, as was discussed in chapter 3, purported to exclude liability for omissions or errors in the particulars of sale of the contract.

The position under the 11th edition (1930) of the National Conditions of Sale was replicated in the 12th Edition (1932),[92] the 13th Edition (1935),[93] the 14th Edition (1948)[94] and the 15th Edition (1948).[95] The position on vacant possession in the National Conditions of Sale from 1930 – 1948 was therefore materially similar to that for the Law Society's General Conditions of Sale from 1925 – 1949; neither set of pre-fusion conditions specifically referred to the term 'vacant possession'. In that respect, vacant possession was not a concept which could be used in its own right as a term in standard conditions of sale prior to 1953, even though the courts had made use of the term (without properly defining the obligation) during this period[96] and, as noted previously, some early texts made use of the undefined expression 'vacant possession'.[97] The expression, whilst in the vocabulary of the courts and third parties, had not acquired a specific or defined meaning at this point in time, and was thus only an implied term of contracts for the sale and purchase of land, during this period, in either set of conditions.

An interesting feature during this period is the exact wording relating to sales subject to tenancies. This is because the sale being subject to tenancies (or other leases) affected the 'possession' that was being transferred, and was therefore a qualification to the possession that the buyer was contracting to enjoy from completion. In both sets of conditions, the standard form provided that the property was sold subject to tenancies, but the conditions relating to disclosure favoured the seller (rather than the purchaser) in the National Conditions of Sale. This is because, in the National Conditions of Sale,

[92] The National Conditions of Sale, 12th Edition (The Solicitor's Law Stationery Society Limited, London August 1932) condition 12(1).
[93] The National Conditions of Sale, 13th Edition (The Solicitor's Law Stationery Society Limited, London March 1935).
[94] The National Conditions of Sale, 14th Edition (The Solicitor's Law Stationery Society Limited, London May 1948).
[95] The National Conditions of Sale, 15th Edition (The Solicitor's Law Stationery Society Limited, London November 1948).
[96] For example, *Curtis v French* [1929] 1 Ch. 253, as discussed in chapter 3.
[97] See, for example, Webster, above n69, 334. It is entirely possible that this term was carried over from use of the expression 'vacant possession' in the 1800s in a different context to its conventional usage.

under general condition 10(1) the buyer had deemed notice of all tenancies even in the event of partial or incomplete statement in the particulars with reference to the tenancies:

> "The Property is sold subject to...tenancies, *whether mentioned in the particulars of sale or not*, and to the rights and claims of tenants. No error, misstatement or omission in the particulars, sale plan or conditions shall annul the sale, nor (save where the error, statement or omission relates to a matter materially affecting the value of the property) shall any compensation be allowed by the vendor or purchaser on respect thereof."[98]

In the Law Society's Conditions of Sale during this period, the sale was subject only to tenancies that were disclosed in the sale and purchase agreement. The relevant condition at this time provided that the sale was subject:

> "so far as the same may be subsisting, to any leases or tenancies *referred to in the contract* and affecting the same."[99]

The National Conditions of Sale therefore posed a potential danger to unsuspecting purchasers who were deemed to have notice of 'all tenancies', even if they did not and could not know about them. Walford highlighted the unsatisfactory consequences of this state of affairs and explained that in order not to be caught out by the general condition relating to tenancies:

> "it is ...essential that a purchaser who is to be given vacant possession should insert a Special Condition to that effect, if the National Conditions of Sale are applicable."[100]

[98] Ibid, condition 10(1). Emphasis added.
[99] The Law Society's General Conditions of Sale 1925, above n10, condition 22(1) emphasis added, and the Law Society's General Conditions of Sale 1925, Second Edition issued 1928, above n66, condition 22(1). In the Law Society's General Conditions of Sale 1934, condition 21(1), and the Law Society's General Conditions of Sale 1934 (1949 Revision), condition 21(1), the wording changed slightly but the sale was still subject to disclosed tenancies as confirmed by Walford, above n86, 169 (when commenting on the identical provision which appears in the 1953 Conditions of Sale). Emphasis added.
[100] Walford, above n86, 25.

This was particularly important since, as discussed previously, an express obligation (as a special condition) to give vacant possession would override the inconsistent general condition of sale that the purchaser had deemed notice of any and all tenancies.[101]

If such a special condition was not used, the wording of the National Conditions of Sale would modify the implied obligation to give vacant possession in such instances. This is because, as discussed in chapter 2 and earlier in this chapter, such an implied obligation would not include an irremovable obstacle to the receipt of vacant possession (the tenancy or tenancies)[102] which the purchaser had knowledge of at the time of contract. In such a case, the purchaser would have had 'deemed' knowledge of the tenancy by virtue of the wording of the condition[103] and would therefore be required to take the property subject to that tenancy, given that it would fall outside of the scope of the implied obligation to give vacant possession.

In contrast, under the Law Society's Conditions of Sale, a lack of actual knowledge of the tenancy at the time of contracts would not adversely affect the purchaser and would cause the seller's implied obligation to give vacant possession to extend to, and include, the lease or tenancy. This is because the wording under these conditions required the tenancy to have been 'disclosed' in the contract. Walford notes that:

> "The Law Society's Condition...which fixes the purchaser with notice of leases or tenancies affecting the property applies only where the property is sold subject to such leases or tenancies, and therefore does not apply where the particulars and special conditions are silent."[104]

This significant difference between the respective pre-fusion conditions underlied the particular problem that faced solicitors with sale and purchase contracts drawn on different sets of conditions,[105] and highlighted on a practical level the implications for purchasers who could unwittingly be required to take a property subject to a subsisting

[101] The various versions of the conditions of sale which themselves confirm that special conditions (of which vacant possession will normally be one) have priority over any inconsistent general provisions. The special conditions provide that the general conditions apply so far as they are not varied by or inconsistent with these special conditions. See also Templeman J.'s decision in *Topfell Ltd v Galley Properties Ltd* [1979] 1 W.L.R. 446 and chapter 3.

[102] A lease that will continue after completion has been held to be an 'immovable obstacle' in *Hughes v Jones* (1861) 3 De GF & T 307. Also *Re Englefield Holdings, Ltd v Sinclair's Contract* [1962] 1 WLR 1119. This is obviously subject to contra-indications or other intentions of the parties as shown by the contract.

[103] It is arguable however as to whether specific performance would be ordered in such a case.

[104] Walford, above n86, 169.

[105] Silverman, above n31, 245.

lease that they did not have 'actual' knowledge of. The lack of express reference to the obligation to give vacant possession clearly compounded the risks and therefore left the position largely unsatisfactory for all involved during this period.[106]

The 1953 conditions

Under the Law Society General Conditions of Sale in 1953, the wording of the general conditions relating to possession slightly changed.[107] Here condition 5(3) read:

> "Subject to his having paid the purchase money or the balance thereof and having executed any conveyance requiring execution by him, the purchaser shall, from the date fixed for completion (excluding that day), be entitled to [possession not included here] the rents and profits, and be liable for all outgoings..."[108]

This condition omitted the earlier reference to 'possession' and only retained 'rents and profits'. Condition 5(4) continued:

> "In the absence of express stipulation and of such authorisation as is mentioned in Condition 6 [dealing with possession before completion] the purchaser shall not be entitled to *take possession of the property* or to receive the rents and profits thereof (as the case may be) except upon payment of the purchase-money and any balance of apportionments, and subject to his executing any such conveyance as is aforesaid."[109]

It is difficult to understand why the expression 'let into possession' was removed from subparagraph 3 of condition 5 in 1953 when the entitlement to take possession or receive the rents and profits (as the case may be) was referred to in condition 5(4). These amended general conditions could nevertheless be interpreted as seeking to replicate the previous position with respect to the purchaser taking possession (or being

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[106] The doctrine of constructive notice deems a party with having knowledge which they did not in fact have. See chapter 1, n10.
[107] The Law Society's General Conditions of Sale 1953 (The Law Society, London 1953).
[108] Ibid, condition 5(3). The National Conditions of Sale (prior to 1953) effectively put the purchaser on constructive notice as to any tenancies affecting the property.
[109] The Law Society's General Conditions of Sale 1953, above n107, condition 5(4). Emphasis added.

entitled to the receipt of rents and profits) on completion.[110] This position is supported by Walford's analysis of the 1953 conditions where he wrote:

> "Although the wording of the relevant General Condition 5(3) now omits any reference to... possession it is thought that when the new condition 5(3) is read with Condition 23 the position remains as it was under the previous General Conditions in that respect."[111]

Moreover, this view is further strengthened by the fact that the 1953 conditions included only a slightly modified version of condition 21(1) from the previous editions relating to tenancies. Appearing as condition 23(1) it replicated the position with respect to the sale being subject to disclosed tenancies,[112] and read:

> "Where the property *is stated* to be sold subject to any lease or tenancy the purchaser, whether or not he inspects the counterpart of the lease or tenancy agreement (if in writing) or a copy or abstract thereof, *shall be deemed* to have notice of, and shall take *subject to* the terms of such lease or tenancy, and the sale shall not be affected by any partial, incomplete or inaccurate statement in the contract with reference thereto..."[113]

This was consistent with the same position (as in the previous version) being maintained, namely that possession was being transferred on completion to the buyer. It would have been rather strange for a sale and purchase contract to only pass to the buyer the right to receive rents and profits so this conclusion is also a matter of common sense as well as logic. As such, despite the apparent infelicity with respect to the reference to possession being omitted from condition 5(3), on an interpretation of these conditions in context the default position appeared to have been maintained in the 1953 edition of the Law Society Conditions of Sale, namely that the purchaser was to be 'let into possession' on completion or be entitled to rents and profits if the sale is subject to a tenancy (expressly referred to in the contract) that would subsist after completion.

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[110] Farrand, above n65, 263 also notes that there had been "some change of mind" here.
[111] Walford, above n86, 25.
[112] It is possible that the change in the wording from 'referred to in the contract' to 'stated to be sold subject to' was to reflect the specific wording of the new special condition introduced in that edition (and discussed below) which required the position on vacant possession to be 'stated'.
[113] The Law Society's General Conditions of Sale 1953, above n107, condition 23(1). Emphasis added.

The 1953 conditions went on, however, to include an additional special condition to those stated in previous editions and revisions. Under the special conditions to the 1953 edition, special condition 4 (with the relevant footnote) stated:

> "The property is sold...(b)
>
> (b) State whether the property is sold with vacant possession. If not, give particulars."[114]

The 1953 conditions therefore saw the first use of the term 'vacant possession' in the context of an additional special condition. Interestingly, the explanatory note to the 1953 conditions did *not* see it as necessary to explain to conveyancers why vacant possession was, for first time, being used as a term in this way, and why it appeared for the first time as a special (as opposed to general) condition.

In the section of the explanatory note dealing with 'Other Changes' in the special conditions, it was stated that:

> "The revisions contained in Form 'B' [the special conditions section] are *mainly self-explanatory* but attention is drawn to the following points..."[115]

Vacant possession was *not* referred to as one of the highlighted points. Its emergence therefore appears to have been treated as 'self explanatory' – something supposedly understood and obvious to all parties. Given that the term had never appeared previously in any of the Law Society Conditions of Sale, this would seem to suggest that it *was* something that was known about amongst conveyancers, but not considered sufficiently important to explicitly refer to or explain in the accompanying notes. There was also no mention of the change in any of the reports of the Scale Committee, a committee of the Law Society which sat at the time, which decided that a new edition was required:

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[114] The Law Society's General Conditions of Sale 1953, above n107, special condition 4.
[115] Explanatory note to the Law Society's General Conditions of Sale 1953 (The Law Society, London 1953). Emphasis added.

> "The Committee have for some time been engaged in the preparation of a new edition, having regard to the changes in the law and conveyancing practice since 1934. To that end they have undertaken a full revision both of General Conditions of Sale (Form A) and of the Particulars, Special Conditions of Sale and Contract (Form B)."[116]

Journal articles also neglected to point out the emergence of the special condition as to vacant possession.[117] Contemporary periodical literature, such as the *Solicitors Journal* did, however, discuss other changes (including changes in special conditions):

> "There are two major changes which require immediate consideration; first, the new condition designed to expedite the signing of contracts by avoiding the necessity for making searches and local authority inquiries before contract, and secondly, the provisions now in the General Conditions for dealing with town and country planning matters (which take the place of the Special Condition inserted in the 1949 Revision). Other changes of importance arise out of conditions relating to (1) misdescription and compensation, (ii) the vendor's right to resell on default by the purchaser, and (iii) the extent of the liability of a defaulting purchaser on resale or attempted resale. There are a considerable number of other alterations but they deal with points not arising as often, and many of them can be described as matters of drafting."[118]

The inclusion of a special condition as to vacant possession therefore appeared not to have justified comment. The profession therefore did not appear surprised by formal introduction of the special condition for 'vacant possession' as a legal term (with a supposedly 'understood' meaning) in 1953.

In the 16th Edition of Oyez's National Conditions of Sale, also published in 1953,[119] the term vacant possession also made a first appearance as a special condition which stated:

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[116] Private and Confidential Report of the Scale Committee on the Law Society's Conditions of Sale New Edition, Friday 14th November 1952 (The Law Society, Reports London 1951-1956) 287. See also (1953) 50 *Law Society Gazette* 341 and Private and Confidential Minutes of the meeting of the sub committee of the Scale Committee on the Law Society's Conditions of Sale New Edition, 19 January 1952.

[117] For example see (1953) 97 *Solicitors Journal* 409, 429, 445, 497, 551, 669. All these articles discussed the 1953 conditions but failed to discuss vacant possession.

[118] (1953) 97 *Solicitors Journal* 395.

[119] The National Conditions of Sale, 16th Edition, August 1953 (The Solicitor's Law Stationery Society Limited, 1953).

"G The property is sold

State whether the property is sold with vacant possession or subject to tenancies (giving particulars of them)."[120]

Yet, notwithstanding the emergence of this special condition, a modified version of the general condition which had appeared in editions 11-15 of the National Conditions of Sale, under the heading 'Property sold subject to all rents, easements, and tenancies...', also *remained* incorporated. The general condition (appearing as condition 14(1)) was identical save for an additional proviso clause and still made the sale subject to all tenancies affecting the property, whether expressly mentioned or not. It read:

> "Without prejudice to the duty of the vendor to disclose all latent easements and other liabilities known to the vendor to affect the property, the property is sold subject to...tenancies, *whether mentioned in the particulars of sale or not*, and to the rights and claims of tenants. Without prejudice to any express right of either party to rescind the contract, [n]o error, misstatement or omission in the particulars, sale plan or conditions shall annul the sale, nor (save where the error, statement or omission relates to a matter materially affecting the value of the property) shall any compensation be allowed by the vendor or purchaser on respect thereof." [121]

It is difficult to explain why this condition remained necessary in the 16th edition when the new special condition dealt explicitly with vacant possession and tenancies. The standard clause relating to the disclosure of tenancies (with minor amendment) also remained in the general conditions. Under condition 18(1) it read:

> "Abstracts or copies of the leases or agreements (if in writing) under which the tenants hold *having been made available*, the purchaser (whether he inspects the same or not) shall be deemed to have notice of and shall take subject to the terms of all the existing tenancies, whether arising during the continuance of or after the expiration thereof, and such notice shall not be affected by any partial or incomplete statement in the particulars with reference to the tenancies, and no obligation shall be made on account of there not being an agreement in writing with any tenant."[122]

[120] The National Conditions of Sale, 16th Edition, August 1953, special conditions, above n119.
[121] Emphasis added.
[122] The National Conditions of Sale, 16th Edition, August 1953, above n119, condition 18(1). Emphasis added.

The amendment had changed from the previous version which referred to the process by which copy documents could be inspected rather than being made available. It stated:

> "Abstracts or copies of the leases or agreements (if in writing) under which the tenants hold *may be inspected* at the office of the vendor's solicitors during a period of five days next preceding the day of sale, or in the same-room at the time of sale..."[123]

It would seem that the seller's obligation to make available copies of all tenancies to the purchaser (rather than the purchaser just having the right to inspect them) was incorporated to make this consistent with the special condition where tenancies were listed, yet this was inconsistent with the general condition in clause 14(1) whereby the sale was nevertheless subject to tenancies, whether mentioned in the particulars of sale or not. It seems perverse for the National Conditions of Sale to have incorporated a special condition addressing vacant possession and the specific disclosure of tenancies by the seller (itself reinforced by the amended general condition 18(1) which required copies to have been 'made available') to then retain the previous provision in 14(1) dealing with the sale being deemed to be subject to all tenancies in any event, and whether disclosed or not, as this was internally inconsistent. Indeed, Walford noted that:

> "It is true that a statement in the particulars that vacant possession will be given is inconsistent with a general condition that the property is sold subject to all tenancies."[124]

Whilst practitioners' articles and commentaries in publications such as *Solicitors Journal* at the time made little of the invocation of the new special condition (in both sets of pre-fusion conditions), the inconsistency created by the National Conditions of Sale was identified in a later academic account of the conditions of sale by Walford, who wrote:

> "General Condition 14 [of the National Conditions of Sale, 1953] states that the sale is subject to tenancies "whether mentioned in the Special Conditions or not"...It is submitted that that Condition amounts to an unjustifiable trap, e.g.,

[123] National Conditions of Sale, 15th Edition, above n95, condition 17(1). Emphasis added.
[124] Walford, above n16, 91.

where the property is vacant, but the vendor has granted, but not disclosed [as required by the conditions], a tenancy of the property."[125]

Walford highlighted the need for the special condition to be used when incorporating the National Conditions of Sale 1953 in order for the contract between the parties to cater expressly for the position on vacant possession and tenancies to which the sale was subject. This would have the effect of expressly overriding the inconsistent general condition, which would thus be subordinate to the special condition.[126]

Vacant possession made its first appearance, as a term in its own right, in the form of a special condition in the Law Society's Conditions of Sale 1953 and the National Condition of Sale (16th Edition) 1953. Texts at the time failed to discuss invocation of the new special condition for vacant possession and its appearance appears to have been greeted with 'silence' across the profession. This could be interpreted as reflecting a general lack of attention paid to the obligation, which may explain why the term developed in the confused and unclear manner, thus causing the problems associated with the term that were outlined in chapter 2. This is perhaps because the expression was not, itself, new in the profession but rather that specific use of the term in standard form conditions of sale had finally been recognised as important. The fact that the 1953 National Conditions of Sale failed to amend the general condition, which provided that the sale was deemed to be subject to *all tenancies* in any event, itself was a notable example of what appeared a lack of understanding of, and appreciation as to, the true nature, scope and extent of the vacant possession obligation and its ability to interact and therefore modify, qualify and contradict other contractual terms. The fact that practitioner's commentaries at the time also failed to discuss this infelicity (leaving it to the academic reviews of the conditions of sale) also reflects a lack of attention to the obligation among the profession at that time, even though it would seem that vacant possession was known to practitioners as being an element of the sale and purchase contract. As discussed further in chapter 7, when case law relating to breaches of the obligation to give vacant possession are discussed, it is likely that first appearance of the term in 1953 was connected to decisions in case law from the 1940s in which vacant

[125] Walford, above n86, 25.

[126] The special conditions provide that the general conditions apply so far as they are not varied by or inconsistent with these special conditions. See also Templeman J.'s decision in *Topfell Ltd v Galley Properties Ltd* [1979] 1 W.L.R. 446 and chapter 3, which established the precedence of an express special condition for vacant possession.

possession was, for the first time, properly discussed and debated. It thus at this time can be seen to have entered the courts lexicography as a legal term with a contemporary property law meaning, opposed to an old understanding of the term attributable to case law in the 1800s.[127] Whatever the reason, its silent entry into conditions of sale is especially noteworthy given that texts and explanatory notes *did* discuss other changes to conditions of sale at that time.

The National Conditions of Sale between 1959 and 1981

The 17th edition of the National Conditions of Sale in 1959[128] recognised the internal inconsistency between the special condition for vacant possession and general condition 14(1). The same special condition for vacant possession was used but the general condition relating to what the property was sold subject to was modified to *exclude* tenancies. Condition 14(1) headed 'Property subject to land tax, easements etc' read:

> "Without prejudice to the duty of the vendor to disclose all latent easements and other liabilities known to the vendor to affect the property, the property is sold subject to...[tenancies omitted from the list], whether mentioned in the particulars of sale or not, and to the rights and claims of tenants. Without prejudice to any express right of either party to rescind the contract, [n]o error, misstatement or omission in the particulars, sale plan or conditions shall annul the sale, nor (save where the error, statement or omission relates to a matter materially affecting the value of the property) shall any compensation be allowed by the vendor or purchaser on respect thereof."[129]

This amended condition did not now contradict the special condition for vacant possession which required tenancies to be listed, itself reinforced by general condition 18(1) providing for abstracts or copies of the disclosed leases or tenancies to be made available to the purchaser. This no longer contradicted the express reference to the vacant possession term as a special condition of the contract therefore, and for the first time saw the term accommodated into the National Conditions of Sale in a meaningful and logical manner. Farrand, referring to Walford, noted that:

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[127] For example, the decision in *Cumberland Consolidated Holdings v Ireland* [1946] KB 264.
[128] The National Conditions of Sale, 17th Edition, 1959 (The Solicitor's Law Stationery Society Limited, London 1959).
[129] Ibid.

> "...the National Conditions, whilst having nothing about vacant possession, used to make the sale subject, *inter alia*, "to tenancies, whether mentioned in the special conditions or not"... Now this has been dropped from the present seventeenth edition, perhaps because it has been stigmatised as an 'unjustifiable trap'."[130]

Similar provisions maintaining this position as to vacant possession and tenancies were replicated in the 18th edition (1969),[131] 19th edition (1976)[132] and 20th edition (1981)[133] of the National Conditions of Sale. As such, the position after 1953 continued to be that vacant possession was a special condition. A buyer could expect to receive vacant possession subject to any tenancies that were explicitly listed in the special conditions. Further, a general condition in the contract provided the seller with a duty of disclosure of copies of such tenancies; this complemented and supported the nature and form of the special condition requiring tenancies which the property was to be sold subject, to be disclosed.

The National Conditions of Sale, between 1959 and 1981, therefore worked as one coherent document, providing the parties with certainty on the issue of vacant possession (by way of special condition), something that had not been achieved in previous editions where vacant possession was either not referred to at all or expressly contradicted other conditions of sale (with the sale purportedly subject to *all* tenancies in any event thus undermining the whole purpose of the use of the special condition for vacant possession).

The 1970 edition and 1973 revision of the Law Society's General Conditions

Unlike the National Conditions of Sale, the Law Society General Conditions of Sale made further changes to the treatment of vacant possession in 1970 and 1973.

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[130] Farrand, above n65, 259.
[131] The National Conditions of Sale, 18th Edition, 1969 (The Solicitor's Law Stationery Society Limited, London 1969).
[132] The National Conditions of Sale, 19th Edition, 1976 (The Solicitor's Law Stationery Society Limited, London 1976).
[133] The National Conditions of Sale, 20th Edition, 1981 (The Solicitor's Law Stationery Society Limited, London 1981).

The explanatory note to the 1970 edition of the Law Society's General Conditions of Sale stated that:

> "So far as possible, the need for special conditions has been kept to a minimum by the inclusion in the General Conditions of the most common matters previously dealt with in special conditions, the salient points being noted below:
>
> ....
>
> (ii) Condition 3(1) provides that the property is sold with vacant possession unless otherwise specified in special conditions."[134]

Indeed, this was the wording of condition 3(1) which appeared under the heading 'Vacant Possession and Tenancies':

> "Unless the Special Conditions otherwise provide the property is sold with vacant possession on completion."[135]

The condition went on to deal with tenancies in the following way in 3(2):

> "Where the property is sold subject to any lease or tenancy the vendor shall furnish to the purchaser or his solicitors a copy or abstract containing full particulars of any lease or agreement in writing, or where not in writing such evidence of the nature and terms of the tenancy as the vendor may be able to supply, together with copies of any notices, in the vendor's possession served by or upon the lessee or tenant."[136]

This was a provision to ensure that disclosure of any tenancies referred to could take effect. This would be in order for the buyer to ascertain the nature and terms of the tenancies.

The explanatory note provided further clarity as to why vacant possession was appearing as a general condition and explained that the invocation of the general

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[134] Guide to the Law Society's Form of Contract for Sale and General Conditions of Sale (1970 Edition) (The Law Society on The Law Society's General Conditions of Sale, London 1970).
[135] The Law Society's General Conditions of Sale (1970 Edition) (The Law Society, London 1970) condition 3(1).
[136] Ibid, condition 3(2).

condition for vacant possession was to avoid doubt and the need for a special condition in each case:

> "Again it is common practice of a purchaser buying a property which is subject to a tenancy to satisfy himself as to the terms of the tenancy before contracts are exchanged and for [the] vendor to provide all information reasonably available to him for the purpose...For the removal of doubt and to save insertion of [a] Special Condition it is provided that the property is sold with vacant possession unless otherwise stated."[137]

In the context of the revised conditions, this reflected an intention manifest in the explanatory note to the 1970 conditions[138] for the general conditions to deal with as many aspects of the transaction as possible, and to keep special conditions to a minimum. This embodied the underlying motivation of the General Conditions of Sale to facilitate everyday property transactions and leave as little as possible to be specifically dealt with by the parties, as Walford had noted, in order to ensure:

> "...considerable saving of time for the vendor's solicitors, and also assist, to some extent, in the elimination of mistakes in the draft contract, since the material to be written or typed is reduced to a minimum. They also save the purchaser's solicitor some little time in connection with the reading and examination of the engrossments on exchange."[139]

Further, specifically discussing the term 'vacant possession' for the first time in the explanatory notes, this edition of the standard conditions clearly can be seen to have considered and categorised the obligation to give vacant possession, along with other standard contractual terms, as a 'common matter' that could not justify the continued invocation of the special condition which was introduced in 1953.[140] A special condition would only be appropriate if it was necessary to spell out anything that the property was explicitly being sold subject to. Indeed, in the event that the property was to be sold subject to a tenancy or other incumbrance, this was to be provided for by a specific reference in special condition 5 to the 1970 conditions (and the 1973 revision)[141] which stated "The property is sold and will be conveyed subject to...". In the event that vacant

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[137] Guide to the Law Society's Form of Contract For Sale and General Conditions of Sale (1970 Edition), above n135.
[138] "So far as possible, the need for special conditions has been kept to a minimum by the inclusion in the General Conditions of the most common matters previously dealt with in special conditions", above n135.
[139] Walford, above n16, 2-3 commenting generally on the purpose of both sets of pre-fusion conditions.
[140] Guide to the Law Society's Form of Contract For Sale and General Conditions of Sale (1970 Edition), above n135.
[141] The Law Society's General Conditions of Sale (1970 Edition), above n135, special condition 5 and The Law Society's Contract for Sale (1973 Revision) (The Law Society, London 1973) special condition 5.

possession *was* being given (the default position) this clause would be struck out of the special conditions or simply left blank, meaning that it had no effect, maintaining the default position provided by the general conditions of sale that the property is sold with vacant possession on completion, subject to any express alternative stipulation.

In some respects, both the 1953 and 1970 Law Society Conditions concurred in treating vacant possession as an 'obvious' point with the sets of conditions differing only in respect of how this apparently common and everyday issue should best be dealt with in the context of standard agreements for the sale and purchase of land. The 1953 conditions saw vacant possession as an obvious point that should be specifically dealt with by special condition, whereas the 1970 edition preferred vacant possession to be one of the many general conditions of the contract, unless there was a specific reason to deal with it as a special condition (which would state how that obligation was qualified).

The 1973 revision[142] carried forward the 1970 position with respect to the treatment of vacant possession as a general condition in identical terms. The revision continued to prefer the default position (under the general conditions) that vacant possession would be given unless explicitly indicated otherwise by use of a special condition, in which case, tenancies would be listed. The 1973 edition also sought to reduce the number of special conditions, making the conditions of sale as standard and generic as possible. Vacant possession therefore remained one of a number of general conditions that were printed in standard form and would, most likely, not be specifically considered or even read by the contracting parties. In some respects, following the explicit introduction of vacant possession as a special condition in 1953, the 1970 edition and 1973 revision could be seen to have 'demoted' the importance of the term by changing it to a general condition, along with the majority of other terms of the contract that were not particularly considered, and were subject to special conditions (which obviously had priority over them).[142a]

[142] The Law Society's Contract for Sale (1973 Revision), above n141.

[142a] A contrary view is that, by making vacant possession a general condition, this had the effect of ensuring that the condition was *always* included by default, albeit as one of many general conditions, but nevertheless actually improving the prospects of the term being incorporated into the contract expressly. .

The 1980 edition and the 1984 revision of the Law Society's General Conditions

The 1980 edition of the Law Society's General Conditions of Sale[143] marked a further change in the treatment of vacant possession, and a shift back to the 1953 position where vacant possession was included as a special condition. This was suggestive of a further development in thinking by the relevant Law Society Committee with respect to the approach that should be taken by the standard conditions of sale and their place in standard form contracts, which was not paralleled in the National Conditions of Sale.

In the special conditions to the 1980 Edition of the Law Society's General Conditions of Sale, special condition F stated:

> "The property is sold with vacant possession on completion
>
> OR
>
> The property is sold subject to the following leases or tenancies."[144]

In practical terms, the conveyancer would strike out the inappropriate term, and if the latter term remained, would list the leases and tenancies to which the sale was subject.

The explanatory notes to the 1980 Edition do not specifically deal with vacant possession at any point, but the introduction to the note did reflect a general mood that a new set of conditions was necessary following comments and observations made:

> "The Council, in 1978, set up a Sub-Committee to look into the need for any changes since the Contract and Conditions of Sale had last been revised in April 1973. The Sub-Committee, after having invited representations from the profession and having taken into account the replies that were received from local Law Societies and Associations, and many individual members of the profession, and the many developments in conveyancing law and practice since 1973, recommend that there should be a completely new edition, *the better to meet current needs.*

[143] The Law Society's Contract for Sale (1980 Edition) (The Law Society, London 1980).
[144] The Law Society's Contract for Sale (1980 Edition), above n143, special condition F.

> The new conditions, which are known as the 1980 Edition, differ markedly in content and order from the 1973 Revision, and it has therefore been decided that some explanatory notes should be published..."[145]

The issue of tenancies remained part of the general conditions. General condition 6(1) stated that:

> "This condition applies *if* the property is sold subject to any lease or tenancy and shall have effect notwithstanding any partial, incomplete or inaccurate reference to any lease or tenancy in the special conditions or the particulars of the property."[145(a)]

General condition 6 then went on to deal with disclosure of tenancies and, in addition to the obligation to disclose tenancies or leases which the property was being sold subject to, the seller also was given the express duty, between exchange and completion, to notify the purchaser of any alteration in the terms or any termination of such a tenancy. General condition 6 continued:

> " (2) Copies or full particulars of all leases or tenancies not vested in the purchaser having been furnished to him, he shall be deemed to purchase with full knowledge thereof and shall take the property subject to the rights of the tenants thereunder or by reason thereof
>
> ...
>
> (4) The vendor shall inform the purchaser of any change in the disclosed terms and conditions of any lease or tenancy."[146]

The explanatory note did address this issue and explain why greater disclosure was being sought, although it failed to go further and incorporate this into a discussion about the implications to the concept of vacant possession in respect of how that obligation (appearing as a special condition) would be qualified by disclosed tenancies.[147]

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[145] The Law Society's Contract and Conditions of Sale (1980 Edition) Explanatory Notes (The Law Society, London 1980). Emphasis added.

[145(a)] The Law Society's Contract for Sale (1980 Edition), above n143, condition 6(1). Emphasis added. The condition was clear that it only applied if the sale was subject to tenancies, that would be listed in the special condition.

[146] Ibid, condition 6.

[147] The Law Society's Contract and Conditions of Sale (1980 Edition) Explanatory Notes, above n145, 3.

Clearly, the issue of what the property was being sold subject to, and therefore whether vacant possession was to be given, was changed. Somewhat surprising is that the explanatory note, prepared by those who drafted the amended conditions at the Law Society, saw no need to explain why this was the case or why the vacant possession condition (unlike the increased disclosure of tenancies which remained part of the general conditions) went back to being a special condition. One possibility is that, with the seller's duty of disclosure with respect to tenancies increasing in the context of the general conditions, it was considered necessary for the issue of vacant possession and subsisting tenancies to be expressly stated for each transaction by special condition (which therefore warranted particular attention to detail). Indeed, conveyancing guides commenting on the 1980 conditions were keen to point out that:

> "If the contract is silent, it is implied that vacant possession will be given, thus details of relevant tenancies *must* be disclosed, if only to prevent the purchaser from being able to withdraw from the contract at a later stage...[Special condition C] is used to state that vacant possession will be given or to give details of the tenancies to which the property is subject...The vendor should also supply the purchaser with copies of the tenancy agreements and details of the current rents..."[148]

Again though, it would seem that the matter was so common and obvious that there was no need to discuss or flag up this change in the explanatory note. This was moreover significant given that the 1980 Edition was referred to as: "...a completely new edition, the better to meet current needs".[149] The 1984 revision[150] went on to replicate the 1980 edition in respect of the disclosure of tenancies and continued to require that vacant possession, and any applicable tenancies, should be included as a special condition of sale.

A Summary of Conditions of Sale from 1953

From the first specific reference to the vacant possession term in 1953, various changes in the Law Society's General Conditions of Sale with respect to the treatment of vacant possession can therefore be seen to have taken place. From explanatory notes and other

[148] Silverman, above n31, 16. Emphasis added.
[149] The Law Society's Contract and Conditions of Sale (1980 Edition) Explanatory Notes, above n145, 1.
[150] The Law Society's Contract for Sale (1984 Revision) (The Law Society, London 1984).

contemporaneous evidence it would appear that the respective committees made decisions taking into account the current legal climate[151] and views that practitioners had expressed in respect of the use and operation of the Law Society's General Conditions of Sale in the practical context.[152] Along with amendments to reflect comments from third parties,[153] and changes in light of changing market conditions,[154] the issue of subsisting tenancies, and how these could be seen as a trap to purchasers, was instrumental to changing decisions as to the term's incorporation over time as either a general or special condition.[155] As such, the Law Society Conditions of Sale exhibited no overall consensus or consistent position as to how vacant possession should be dealt with in the conditions of sale between 1953 and 1984; rather they changed and evolved in seeking at various intervals to create a fair and balanced platform for agreement between contracting parties, which was the original purpose of the conditions of sale.[156] It was apparent that 'vacant possession', as a legal term, whilst conceived into the conditions of sale in 1953, still lacked coherence over its evolution during this period in respect of its place in standard form contracts for the sale and purchase of land as either a special or general condition.

It is notable, by contrast, that the National Conditions of Sale did not exhibit similar changes between 1953 and 1990, leaving vacant possession as a special condition throughout this period. In 1953, however, the National Conditions of Sale did exhibit an apparent internal inconsistency whereby the special condition (requiring tenancies to be disclosed) contradicted a general condition carried over from the previous version (that the sale was deemed to be subject to all tenancies whether disclosed in the contract or

[151] For example, see Mills, J. 'The National Conditions of Sale Editions 1-17 and beyond' (1961) 105 *SJ* 497 which discusses how changing market conditions relating to the sale of land were reflected in the changes made in successive editions of the Conditions over time.

[152] For example, the explanatory notes to the 1980 Edition of the Law Society's Contract and Conditions of Sale note that "The Sub-Committee, after having invited representations from the profession and having taken into account the replies that were received from local Law Societies and Associations, and many individual members of the profession, and the many developments in conveyancing law and practice since 1973, recommend that there should be a completely new edition, the better to meet current needs". Clearly, the conditions reflected changes in law, practice and comments on their use and application.

[153] See the Law Society's Conveyancing Handbook 1993, above n37, 665 on The Standard Conditions of Sale (Second Edition) 1992 and Aldridge, T.M. *Companion to the standard conditions of sale.* Pamphlet volume 115 (2nd edn, Longman, London 1992).

[154] Changing market conditions relating to the sale of land were reflected in the changes made in successive editions of the conditions according to John Mills QC in his article in (1961) 105 *Sol Jol* 497.

[155] See Silverman, above n36; Standard Conditions of Sale (first edition): a guide for clients (Miscellaneous publications of the Law Society) (Law Society Stationery Society, London 1990); The Law Society's Conveyancing Handbook 1993, above n37 on The Standard Conditions of Sale (Second Edition) 1992; and Aldridge, above n153.

[156] See Walford, above n16, 2-3. Farrand, above n65, 259 also notes the 'change of mind' over this period in the conditions of sale.

not). Whilst this was identified and corrected six years later in the 17th edition, at the conception of the term 'vacant possession' into the National Conditions of Sale as a special condition, its effect was clearly not sufficiently appreciated or acknowledged, with the later editions indicating the desire to avoid the inconsistencies and ambiguities by appropriately amending the conditions by hand (contrary to their intended use as a set of pre-prepared standard conditions). The effect of the invocation of the special condition on vacant possession was not cross-checked with the existing general conditions at that time, as otherwise the 'trap' created by those conditions[157] would not have come into existence and later required amendment in the subsequent edition. This again compounded a failure to properly appreciate how the obligation to give vacant possession might interact with other conditions, which was manifest in decisions in case law during this period (as discussed in chapter 3) where the interaction between express terms for vacant possession and other conflicting contractual terms were wrongly interpreted and understood.[158]

The 'Standard Conditions of Sale'

The Standard Conditions of Sale were first produced by the Law Society and The Solicitors' Law Stationery Society Ltd in 1990, and they superceded and replaced both the Law Society's General Conditions of Sale and Oyez's National Conditions of Sale.[159] They were described as "radically different from their predecessors in arrangement and style and also [to make] some significant changes in substance".[160] Publication of the Standard Conditions of Sale in 1990 meant, for the first time in the history of conditions of sale, that practitioners would all use one single (or 'fused') set of conditions of sale in property transactions.[161]

The first edition of the Standard Conditions of Sale in 1990[162] altered the position on vacant possession compared to the previous respective sets of pre-fusion conditions.

[157] As described by Walford, above n86, 25.
[158] See Templeman J. in *Topfell Ltd v Galley Properties Ltd* [1979] 1 W.L.R. 446 as compared to decisions in *Curtis v French* [1929] 1 Ch. 253, *per* Eve J. and *Korogluyan* v *Matheou* [1975] 30 P. & C.R. 309, *per* Whitford J.
[159] The Standard Conditions of Sale (First Edition) 1990 were also known and referred to as The National Conditions of Sale 21st Edition and the Law Society's General Conditions of Sale 1990, above n29. See Silverman, above n36, v in which they are described as a 'total replacement'.
[160] The Law Society's Conveyancing Handbook, above n37, 665.
[161] Silverman, above n36, v.
[162] The Standard Conditions of Sale (First Edition) (The Law Society, London March 1990).

Here, vacant possession was specifically dealt with as a general condition, but under condition 3 marked 'Tenancies', condition 3.3.1 stated:

> "The buyer is to be given vacant possession of all the property on completion; this does not apply to any part of it included in a lease or tenancy ("tenancy") subject to which the agreement states the property is sold."[163]

This provision could be given a restricted construction in its context as applying only to tenancies and not more generally to the sale. On this construction the 1990 conditions would be entirely silent as to 'vacant possession'. It would have been peculiar for the Standard Conditions of Sale to change the position that had been manifest in one form or another in the respective sets of pre-fusion conditions of sale since 1953, and revert to the pre-1953 position where no explicit reference to vacant possession could be found. It was therefore more likely that this clause should be interpreted as a general condition that vacant possession was to be given subject to any disclosed tenancies, a view supported by commentaries on the conditions where the condition is seen as a general rule:

> "Condition 3.3.1 introduces a *general rule* that the property is sold with vacant possession, save to the extent that it is tenanted and the sale is subject to a tenancy. This is a departure from the previous editions of both the Law Society Conditions and the National Conditions, in which the question of vacant possession was left to be dealt with by Special Conditions."[164]

Other texts also interpreted the general condition to have application to the entire contract, thus supporting this position:

> "Where the property is sold subject to a tenancy this fact must be disclosed by special condition, otherwise Condition 3.3.1 will apply, which states that unless tenancies are disclosed, vacant possession will be given on completion."[165]

The form of special conditions to the 1990 Edition did not, however, specifically include a special condition where any tenancies could be explicitly stated (unlike in the pre-fusion conditions). It is likely that if the property was to be sold subject to a tenancy

[163] Ibid, condition 3.3.1.
[164] Standard Conditions of Sale (First Edition): a guide for clients, above n155. Emphasis added.
[165] Silverman, above n36, 149.

or lease then an additional special condition would need to be included, as suggested by Silverman,[166] unless the tenancy could be described as a 'burden' on the property. Indeed, it was unclear what was the purpose or effect of special condition 2:

> "The Property is sold subject to the Burdens on the Property [as explicitly listed under the heading "Burdens on the standard form contract] and the Buyer will raise no requisitions on them."[167]

It was also not clear how this special condition sat with general condition 3.3.2 which imposed an obligation on the seller to disclose tenancies before contract in any event:

> "Before the contract is made, the seller is to provide the buyer with full details of each tenancy or copies of the documents creating it. The buyer is treated as entering into the contract knowing and fully accepting the terms of the tenancy."[168]

Nor was it clear whether that would be expressly qualified by the disclosure of some burdens (as a special condition) which did *not* make reference to tenancies. Burdens are normally concerned with title[169] but it seemed that vacant possession could be included as a burden on title under the drafting of the 1990 Standard Conditions of Sale which raised questions with respect to the disclosure of burdens on title and how, if at all, that was connected to the disclosure of obstacles or qualifications to the receipt of vacant possession.

The lack of provision of a specific special condition to modify general condition 3.3.1 (if required in a given case) was not a satisfactory position and this manifested an internally inconsistent and unclear set of conditions, where it was not clear how obstacles to the receipt of vacant possession should be disclosed. The removal of the standard form special condition (under the pre-fusion Law Society Conditions of Sale 1984 and National Conditions of Sale 1981), where tenancies and other obstacles *specifically* to the receipt of vacant possession were listed, clearly compounded further

[166] Ibid.
[167] The Standard Conditions of Sale (First Edition), above n162, special condition 2.
[168] The Standard Conditions of Sale (First Edition), above n162, condition 3.3.2.
[169] Various texts refer to burdens on title. The interaction between title and vacant possession is discussed in more detail in chapter 9, but if vacant possession could be described as an issue affecting title, rather than a contractual obligation which is not proprietary in nature, then the remedies for a breach would alter, thus changing the whole nature and form of the obligation.

the possibility that qualification to vacant possession could actually be disclosed as burdens on title. The internal inconsistency that was created appears to have been something that was known of at the time, indeed comments from one of the authors of the first edition reflected on how the new conditions had been drafted very quickly, which may explain why greater thought was not given to the form of special conditions:

> "The publication of the Standard Conditions of Sale followed *very quickly* on the announcement by the Law Society of its intention to revise the conditions and, as an author, I was faced with the choice of either trying to prepare a new edition quickly, or of taking more time and re-writing large areas of text, some of which felt stylistically old fashioned, not having been substantially altered since the publication of the first edition. I chose the former option – that of preparing the book quickly..."[170]

Further, commentary on the 1992 revision of the 1990 Standard Conditions of Sale also reflected an awareness of the need to revise the first edition which was prepared in haste. The explanatory note to the 1992 Revision (the second edition) stated that:

> "At the time of their [the first edition] publication, it was foreseen that a second edition would be required at an early stage...It maintains the principles on which the first edition was based, but makes some significant changes, often in response to comments from practicing conveyancers..."[171]

The commentary on the second edition itself showed an appreciation of some of the confusion and inconsistencies that the first edition contained and a desire to 'smooth out difficulties'. It explained that:

> "It had always been expected that, following replacement of the National Conditions of Sale and the Law Society's General Conditions of Sale by the Standard Conditions of Sale in 1990, a second edition of the new conditions would be required relatively soon. This would allow the publisher to take account of users' reactions, smooth *out difficulties* and take account of further developments in law and practice. The second edition has now been published, and this companion has been fully revised to take account of the changes."[172]

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[170] Silverman, above n36, vi. Emphasis added.
[171] The Law Society's Conveyancing Handbook 1993, above n37, 665 on The Standard Conditions of Sale (Second Edition) 1992.
[172] Aldridge, above n153. Emphasis added.

In the explanatory note to the Second Edition it is noteworthy that the first point to be addressed was vacant possession. The note read:

> "Under the first edition, vacant possession was dealt with by the general conditions (the old condition 3.3.1). The current edition contains no provision relating to vacant possession [in the general conditions], and accordingly the position must be dealt with by a special condition (see the alternative versions of the printed special condition 4)."[173]

The companion to the second condition was also clear in pointing out that invocation of a special condition (as was provided by the final respective versions of the pre-fusion conditions of sale) was now restored:

> "The conditions now contain no obligation on the seller to give vacant possession on completion (formerly condition 3.3.1). This can be dealt with by special condition, and the published form provides for this."[174]

In respect of the special condition provided for by the second edition, the alternatives to special condition 4 stated:

> "The property is sold with vacant possession on completion
>
> OR
>
> The property is sold subject to the following leases or tenancies."[175]

This replicated special condition 4 from the 1980 Edition of the General Conditions of Sale and like the 1980 edition it was for the conveyancer to strike out the inappropriate alternative and, if the latter of the two remained, to list the leases and tenancies to which the property was sold subject.

The comment in the explanatory note appeared to reflect an awareness of the confusion that the 1990 Edition had caused. The second edition of the Standard Conditions of Sale thus clearly demarcated qualifications to vacant possession from burdens on title,

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[173] Aldridge, above n153.
[174] Aldridge, above n153, 16.
[175] Standard Conditions of Sale (Second Edition) (The Law Society, London 1992).

following the previous inconsistencies and uncertainty caused by the 1990 edition in which there was nothing to prevent tenancies and other obstacles to vacant possession potentially being disclosed as burdens on title. This was achieved by providing a form of special condition relating solely to vacant possession which could be used to disclose tenancies, as had previously been used in earlier editions of Law Society's General Conditions of Sale (and National Conditions of Sale).[176] There was therefore no opportunity for confusion between incumbrances on title and obstacles to vacant possession under the second edition of the Standard Conditions of Sale. The third edition of the Standard Conditions of Sale[177] was published in 1995 and this replicated the second edition of the Standard Conditions of Sale with respect to the treatment of vacant possession. The fourth edition[178] also replicated the second edition and remains the current edition used by conveyancers. As such, the position under the Standard Conditions of Sale at the present time is that vacant possession is a special condition in the form outlined above.

The universal and fused Standard Conditions of Sale, brought in to create uniformity of practice, therefore themselves exhibited early change in their position on how to incorporate the vacant possession term, with it originally appearing as a general condition (in 1990) but thereafter being a special condition. The change in 1992 can be seen as a further (and to date, final) change in a long line of shifting thinking (by the respective Law Society Committees who sat over time and discussed and debated changes to the evolving editions and versions of the conditions of sale) as to the most appropriate means, for conveyancers and the parties subject to the contract, to cater for the obligation to give vacant possession (i.e. as either a general or special condition). It is possible, although there is no authority to confirm, that the return to a special

[176] In personal communications with Philip Freeman, former member of the Law Society Working Party, 29 July 2008 (a member of the editorial board of the Law Society's Conveyancing Handbook 1993, above n37, which provided the explanatory note to the 1992 revision) he said that the reason that vacant possession was made a special condition was to restore the position before the fusion of previous versions of conditions. There, the Law Society Conditions of Sale had dealt with vacant possession as a special condition. It was noted that given that a lot of properties were being sold subject to a lease or tenancy, a general condition as to vacant possession was not appropriate and the matter was more properly dealt with by a special condition in the contract. This provided the seller with the opportunity to expressly warrant that vacant possession was to be given, or list any subsisting tenancies or leases to which the property was subject. It therefore prevented the parties being unwittingly 'caught out' by the effect of the general vacant possession condition which was "nested along with various other general conditions often not properly considered or understood". This clearly overcame the problems with the 1990 edition which did not adequately provide a means by which qualification to the (otherwise) express obligation to give vacant possession (as a general condition) could be incorporated into the contract.

[177] Standard Conditions of Sale (Third Edition) (The Law Society, London 1995).

[178] Standard Conditions of Sale (Fourth Edition) (The Law Society, London 2003).

condition in 1992 was to prevent the potential interaction that had been created in the first edition between vacant possession and title. It is also possible that the shift to special condition was to prevent further interactions between vacant possession and other conflicting general conditions that had previously been exhibited. Indeed, support for this claim comes from comments in the explanatory note to the Second Edition which went on to say that:

> "...It should be noted that any such special condition will override any inconsistent provision in the general conditions."[179]

In making vacant possession a special condition, the explanatory note highlighted how that would override any inconsistent general condition that was at odds with what the special condition now provided for. This reflected some awareness, for the first time, of the significance of the interactions between the obligation to give vacant possession and other contractual conditions and was the first reference in practitioners' texts to this issue.

Whilst the nature and form of the vacant possession term in conditions of sale has exhibited much change and amendment, it is pertinent to note how the various changes in the manner of incorporation of vacant possession in the conditions of sale over time can be contrasted to other general and special conditions, none of which move from general conditions to special conditions in the same way that vacant possession did. In fact, whilst general and special conditions may have been re-drafted over time, vacant possession is the only example of a condition which moved back and forth from a general to special condition. When one takes into account the many conditions that are contained in the various editions and versions of respective standard conditions, this is perhaps the most telling sign of an apparent difficulty in determining the nature and scope of the condition. A review of the conditions of sale over time most notably reveals that the obligation to give vacant possession, and associated issues, are certainly not as clear and easy to reconcile as other general or special conditions of standard form sale and purchase contracts. This in many respects supports the argument/proposition that there has been a struggle throughout the evolution and development of the term to

[179] Aldridge, above n153.

fully appreciate its nature and place in transactions in the context of sale and purchase contracts, in which it is a fundamental term.[180]

Standard Commercial Property Conditions

In 1999 the Law Society published a set of Standard Commercial Property Conditions[181] which were specifically intended to be used for medium – large commercial transactions (even though no definition of this was provided). These were based on the third edition of the Standard Conditions of Sale and were intended to replace these in relation to commercial property transactions. From that point on, the Standard Conditions of Sale were primarily intended for use in residential sales:

> "The SCPC [Standard Commercial Property Conditions] are intended primarily for use in more complex commercial transactions. Conveyancers are likely to find that, for residential sales and the sale of small business premises, the Standard Conditions of Sale (the "SCS") are better suited to their needs."[182]

It is important to review the treatment of vacant possession in the specially developed commercial conditions because it provides a further point of comparison and analysis which elucidates the treatment of the vacant possession obligation by committees of the Law Society.

Both the first edition (1999) and the second edition (2003)[183] of the Standard Commercial Property Conditions dealt with vacant possession as a special condition. In the first edition special condition 3 replicated the special condition for vacant possession in the third edition of the Standard Conditions of Sale, namely:

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[180] See Williams, T.C. 'Sale of Land with Vacant Possession' (1928) 114 *The Law Journal* 339 in which he described vacant possession as "an integral part of the contract".
[181] Standard Commercial Property Conditions (First Edition), above n44.
[182] Explanatory Notes on the Standard Commercial Property Conditions (Second Edition) (The Law Society, London 2004) 1.
[183] Standard Commercial Property Conditions (Second Edition), above n44.

"The property is sold with vacant possession on completion

OR

The property is sold subject to the following leases or tenancies..."[184]

The Second Edition made a small change to the wording of the special condition, namely:

"The property is sold with vacant possession

OR

The property is sold subject to *the leases or tenancies set out on the attached list but otherwise with vacant possession on completion.*"[185]

The issue of properties which are subject to tenancies was discussed and debated at various points in the history of the Law Society's General Conditions of Sale and Standard Conditions of Sale,[186] and was a consideration in decisions made as to whether the vacant possession condition should be general or special, or should appear part of a section on tenancies[187] as opposed to a free standing term in its own right.

Whilst an estate being sold subject to a single lease or tenancy, or other such interest, is the most common obstacle that would prevent the procurement of vacant possession on completion,[188] it is important to acknowledge that selling a property subject to a tenancy may, depending on construction of the document, give no guarantee of vacant possession outside the scope of that disclosure. This was something that appears to have

[184] Standard Commercial Property Conditions (First Edition), above n44, special condition 3.
[185] Emphasis added. Standard Commercial Property Conditions (Second Edition), above n44, special condition 2. See also Abbey, R. and Richards, M. *A practical approach to conveyancing* (9th edn Oxford University Press, Oxford 2007) 94.
[186] For example, there is discussion of the position on tenancies in Silverman, above n36; Standard Conditions of Sale (First Edition): a guide for clients, above n155; The Law Society's Conveyancing Handbook 1993, above n37, on The Standard Conditions of Sale (Second Edition) 1992; and Aldridge, above n153.
[187] As in the 1990 fused edition of the Law Society's Standard Conditions of Sale.
[188] The majority of case law deals with leases and tenancies, as discussed in chapter 5.

been picked up by the second edition of the Standard Commercial Conditions of Sale which amended the special condition from the first edition to read:

> "The property is sold subject to the leases or tenancies set out on the attached list *but otherwise with vacant possession on completion.*"[189]

This changed from the first edition, which read:

> "The property is sold subject to the following leases or tenancies..."[190]

The wording of the special condition to the second edition clearly puts the seller under an obligation to give vacant possession of the property *other than* with respect to the part that is subject to the disclosed tenancy. No explanation is given in the explanatory note to the second edition as to why this change was made[191] but a possible reason for this subtle amendment, especially in the commercial context, is that a commercial or industrial property can often be a large premises and a tenancy or lease can commonly exist with respect to only *part* of the premises. In the second version of the condition, an obligation to give vacant possession would arise expressly with respect to the rest of the premises not affected or subject to the lease, whereas in the old version no express obligation with respect to the rest of the premises would have arisen. Whilst an *implied* obligation with respect to the rest of the premises may have nevertheless arisen, subject to the intention of the parties and general construction of the document, the second version of the conditions expressly caters for vacant possession in this way (thus avoiding the need to rely on implied terms and knowledge of the parties at a given time).

A comparison of the wording of the special condition for vacant possession in the Standard Conditions of Sale and Standard Commercial Property Conditions reveals that the second, third and currently fourth edition of the fused Standard Conditions of Sale (now used primarily for residential transactions) retain the original special condition

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[189] Emphasis added. Standard Commercial Property Conditions (Second Edition), above n44, special condition 2.
[190] Standard Commercial Property Conditions (First Edition), above n44, special condition 3.
[191] The explanatory notes on the Standard Commercial Property Conditions (2nd edn The Law Society, London 2004) 4 deals with the special conditions and discusses conditions 1-3 only; no mention of the change of wording in the vacant possession special condition is made.

from the first edition. This is potentially an issue for sales of a partly tenanted residential dwelling because vacant possession will not be given expressly with respect to the rest of the property (that is not subject to the disclosed tenancy) under this form of the special condition. This is perplexing in and of itself given that the general condition included in the first edition of the Standard Conditions of Sale in 1990 (that the buyer is to be given vacant possession of all the property on completion, but that this does not apply to *any part* of it included in a lease or tenancy subject to which the agreement states the property is sold) would have been the most appropriate wording for the special condition in the second edition. Instead the wording of the special condition from the 1980 edition (and 1984 revision) of the pre-fusion Law Society's General Conditions of Sale was invoked for the second edition of the Standard Conditions of Sale. This was rather than adopting (and amending as appropriate) the wording of the first edition (1990) general condition which had been drafted following the comprehensive review of the conditions and their appropriateness with respect to that new edition in 1990. No explanation has been found as to why this took place in any relevant texts commenting on the second edition but this arguably further reflects the *ad hoc* nature of decisions that took place in amendments to drafting of terms for vacant possession in the conditions of sale, and supports the argument that the understanding of those involved was somewhat inconsistent, if not confused.

As such, even when the status of a term for vacant possession as a special condition appears to have been settled in the Standard Conditions of Sale and Standard Commercial Property Conditions (whereby the seller expressly promises to the buyer that it will receive vacant possession on completion) a comparison of the two reveals that the second version of the Standard Commercial Property Conditions has subtly amended the wording of the special condition in order to ensure that the obligation will still be engaged with respect to the rest of a premises not included in a disclosed tenancy, to which the sale will thus be subject. Again, this change was not fully explained upon implementation, and represents a nuance between the Standard Conditions of Sale and Standard Commercial Property Conditions which practitioners may not be aware of, and therefore may not appreciate the full implications thereto, and which remains apparent at this time.

Conclusion

The review of the various editions and revisions of the conditions of sale over time has revealed a great deal about the treatment and understanding of vacant possession. Prior to 1953 the term in and of itself was not recognised in the conditions of sale, even though commentaries associated the use of the term 'possession' with the meaning 'vacant possession'. The Law Society's Conditions of Sale 1953 and the National Conditions of Sale 16th Edition saw vacant possession making its first appearance in the form of a special condition in 1953. Texts at the time did not discuss the invocation of the new special condition for vacant possession, however, and its appearance appears to have been broadly 'silent' across the profession.

From 1953 the term was dealt with entirely differently in the respective sets of pre-fusion conditions of sale up to 1990. An internally inconsistent position on how to address vacant possession, as either a general or special condition, was manifest in the various changes in how it was incorporated into the Law Society's General Conditions of Sale between 1953 and 1990. Whilst the National Conditions of Sale maintained its position from 1953 in making vacant possession a special condition, the 1953 edition disregarded the effect of the invocation of vacant possession as a special condition on other general conditions relating to tenancies; this was only remedied six years later in the 1959 edition.[192]

The 'fused' Standard Conditions of Sale, originally published in 1990, changed the first edition position on the incorporation of the vacant possession term as a general condition in 1992, with a shift back to vacant possession being a special condition in the second edition published that year. This reflected a further change in a long line of shifting Law Society committee thinking as to how best to deal with vacant possession (as either a general or special condition). Further, there remains a nuance in the differing wording of the special condition for vacant possession in the Standard Conditions of Sale as compared to the Standard Commercial Property Conditions at this time.

[192] Walford, above n86, 25.

By virtue of the frequency of changes, and infelicities over time in the incorporation of those changes into the relevant editions and versions of the conditions of sale (especially when compared to other conditions which did not exhibit such changes), it is clear that no consistent line was taken, across the board, on how best to cater for the obligation to give vacant possession. Commentaries on the conditions of sale, explanatory notes and other texts and articles highlight a lack of awareness and appreciation as to the nature and effect of the term in and of itself (i.e. as a stand alone obligation), with respect to other conditions of sale (i.e. in terms of its interaction with other conditions of sale) or with issues affecting the transaction more generally. This treatment is consistent and can be compared with decisions in case law over similar periods (as was discussed in chapter 3), which also failed to cater for the interaction between vacant possession and other conditions of sale, by manifesting a lack of appreciation, or (at that time) exhibiting a lack of coherent development of the concept for vacant possession in terms of recognising its status in a sale and purchase contract with respect to other incorporated terms. This struggle over the evolution and development of the term to fully appreciate its nature and relevance in transactions, especially when one takes account of how it is one of, if not, *the* most fundamental part of a sale and purchase contract,[193] is perhaps the most salient indicator of the lack of a coherent concept of vacant possession, and lack of understanding and appreciation of its place in standard contracts since the first use of the term in 1953.

[193] See Williams, above n180.

Chapter 5

The Nature of the Obligation – Persons in Occupation

As the discussion in chapters 3 and 4 has demonstrated, there has been no consistent interpretation of the obligation to give vacant possession. In chapter 3 a review of case law, in which judges ruled on the interaction between vacant possession and other conditions of sale, showed how the courts were prepared to subordinate an express special condition for vacant possession in favour of other general conditions of the contract. In chapter 4, a review of the incorporation of the obligation to give vacant possession into standard conditions of sale, since their evolution in the early 1900s, highlighted an inconsistent approach to incorporation of the term by Law Society working party committees and other practitioners and draftsmen, as either a general or special condition. When the term for vacant possession interacted with other related conditions of sale of the contract (such as provisions relating to the disclosure of tenancies), or with issues affecting the transaction more generally, it was further highlighted how the full implications of this interaction were not properly appreciated or considered, in a similar manner to the court's misinterpretation of terms for vacant possession, as discussed in chapter 3.

This chapter seeks to develop a more coherent and informed understanding of the nature and form of the obligation to give vacant possession, with reference to persons in occupation of a property on completion. Inconsistencies in case law as to whether the obligation can be breached by unlawful as well as legal occupiers being present in the property on completion raises questions as to the content of this commonly undertaken obligation, as a matter of fact and law. What is particularly noteworthy from these decisions (nearly all of which were at first instance) is that the actual meaning of 'vacant possession' was never discussed or debated, and was a term that was rather 'assumed' to have a recognised meaning by the respective judges in the cases. This, it will be seen, is one explanation for the lack of consistency in decisions relating to the same issues or statutory provisions.

An analysis of the obligation to give vacant possession, as comprising both a legal and factual dimension, helps to gain a greater insight into the nature of the concept. Scholarly literature surrounding the development and evolution of the concept of possession is also analysed to further justify the binary nature of possession, in the context of vacant possession, that is proposed in this chapter. Vacant possession, which necessarily concerns actual (*de facto*) possession on completion, in exercise of the right to possession which is transferred with the legal estate in land *(de jure)*, is contrasted with the notion of constructive possession (i.e. possession *otherwise* than by actual occupation) in order to demonstrate why the legal and factual elements are intrinsic to the obligation.

This chapter demonstrates that only a proper understanding of both the legal and factual dimensions of vacant possession can assist in interpreting the essential nature of the obligation as manifest in the case law which has emerged on this subject. Such an analysis also helps to explain what otherwise may seem to be contradictory decisions in case law. It is suggested that these inconsistencies are a consequence of insufficient conceptual infrastructure to support the vacant possession obligation.

Lawful and unlawful occupation

There is a wealth of case law confirming that the presence of an existing tenant or other legal occupier at the premises on completion will prevent the giving of vacant possession.[1] This is commonly because the lease is still continuing (for example, the occupier has contractual or statutory rights to remain in occupation of the property) or because other persons with a lawful right to occupation prevent the delivery of vacant possession on completion (such as, licensees who are in the property).[2] A number of cases discussed in this section illustrate this scenario. As noted below, the decisions in these cases did not centre on the meaning of vacant possession but rather merely confirmed (somewhat crudely) that the obligation had been breached because of the lawful occupier.

[1] For example, *Sharneyford Supplies Ltd v Edge* [1987] Ch 305; *Cleadon Trust Ltd v Davis* [1940] Ch. 940; *Leek and Moorland Building Society v Clark* [1952] 2 QB 788 and *Beard v Porter* [1948] 1 KB 321.
[2] For a discussion of the problems of so-called 'sitting tenants' see Stocker, J. 'The Problem of the Protected Sitting Tenant' (1988) 85 *Law Society Gazette* 14.

An example is the case of *Sharneyford Supplies Ltd v Edge*[3] where the plaintiff purchased land from the defendant under a contract that expressly provided for vacant possession on completion. The occupants refused to vacate the land and claimed the benefit of a business tenancy within the statutory provisions laid down in the Landlord and Tenant Act 1954. It was held that the occupants had a legal right to remain in occupation and accordingly the defendant was liable for failing to give vacant possession at the material time, and the claimant was entitled to damages. The judgment did not discuss the meaning of the term 'vacant possession' but simply assumed that the obligation was breached due to the presence of a lawful third party in the premises at the material date. Instead, the decision focused on the quantum of damages recoverable by the plaintiff, as a result of the defendant's breach of the obligation to give vacant possession, and whether these could be limited in accordance with the rule in *Bain v Fothergill*[4] (it was ultimately held that they could not be). As summarised by counsel in submissions:

> "The Court of Appeal is bound by the interpretation of Bain v. Fothergill ...in order to obtain the benefit of the application of the rule...the vendor must satisfy the court, the onus resting upon him, that he did all that he reasonably could to fulfil his contract by completing the sale with vacant possession. But he falls far short of what is required of him because he failed to take any steps to obtain possession of the farm prior to contract or completion, or after those dates..."[5]

A further illustration is provided by *Cleadon Trust Ltd v Davis.*[6] Here, the parties agreed to the sale and purchase of certain land. The land in question was, at the material date, occupied by persons who had formerly been tenants, but whose tenancies had expired. The tenants had, however, stayed on with the consent of the landlords and so were licensees. Accordingly it was held that it was not possible for the vendor to give vacant possession in accordance with the contract at the relevant time because of the continued presence of these persons, and damages were awarded. In a terse judgment, no discussion about the concept of vacant possession was undertaken, rather it was simply assumed that a breach had arisen on the facts of the case.

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[3] [1987] Ch 305.
[4] (1874) L.R. 7 H.L. 158.
[5] [1987] Ch 305, *per* Eben Hamilton Q.C. and Terence Mowschenson (for the plaintiff) at 308. The rule has been subsequently abolished by the Law of Property Act 1989.
[6] Above, n1.

In keeping with these decisions is the judgment in *Leek and Moorland Building Society v Clark*.[7] Here, a joint tenancy was purportedly surrendered but this was undertaken by only one of the joint tenants. The court held that the purported surrender was insufficient to terminate the joint tenancy[8] and the joint tenants' continuing rights to remain in occupation therefore prevented the delivery of vacant possession on completion:

> "By agreeing to sell...with vacant possession Mr Ellison was, it seems to us, agreeing that the tenancy would be surrendered on completion. If he had been the sole tenant, completion would itself presumably have effected a surrender...In fact, the tenancy was one in which he and his wife were joint lessees, and, as will be seen, he never had any authority from her to surrender or terminate that tenancy. Though he is, of course, bound by the agreement which he signed, he may not have realised its effect. The question is whether in these circumstances the joint tenancy has been surrendered or otherwise terminated."[9]

The case did not discuss or debate what was meant by the expression 'vacant possession' and took for granted that the sellers, who had contracted to give vacant possession on a sale of the property subject to the joint tenancy, were unable to deliver vacant possession in accordance with the contract because of the continued presence of the wife, as a lawful occupier.

Other cases also manifest the court's assumption that the obligation to give vacant possession was understood by all parties from the outset. The case of *Beard v Porter*[10] was another case concerning residential occupation. Here, the vendor had agreed to sell to the purchaser a dwelling-house which was occupied by a sitting tenant with rights to remain in occupation pursuant to the Rent Restriction Acts.[11] In reliance on a representation from the tenant that he intended to leave, the vendor expressly agreed that the purchaser was to be given vacant possession on completion. The purchase was completed, but the tenant then refused to quit the house. Given the tenant's statutory protection the vendor had no means of compelling the tenant to adhere to his expressed

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[7] Above, n1.

[8] The decision in *Re Viola's Indenture of Lease* [1909] 1 Ch 244 was approved of and followed. The case of *Re Viola* concerned the right of determination conferred on husband and wife as joint lessees at the end of three years in a lease. The notice given pursuant to the lease was given by the husband only, and its validity was disputed on this ground. It was held that where a lease contains a proviso enabling the 'lessees' to determine the lease by notice, a notice given by one of two lessees will not, in the absence of evidence of authority from the other lessee to give it or of circumstances from which the Court can infer such authority, be effectual to determine the lease.

[9] [1952] 2 QB 788, *per* Somervell L.J. at 792.

[10] [1948] 1 KB 321.

[11] The specific acts were not referred to in the judgment.

intention to vacate; he therefore remained a lawful occupier at all material times. The purchaser sued and was awarded damages for breach of the vendor's undertaking to give vacant possession on the relevant date. No concern was expressed as to the meaning of vacant possession in the judgment and Evershed L.J., sitting as a Court of Appeal judge, seemed to assume that the meaning of the term 'vacant possession' was commonly understood and obvious:

> "Since it was *of the essence of the matter* that vacant possession should be given, and the plaintiff only entered into the transaction on that footing, one would have expected the contract to take the form, usual in such cases, that completion would take place when vacant possession was given, so that, should the defendant fail to implement this vital part of his promise, the plaintiff would be entitled to treat the contract as at an end and abandon a transaction which had ceased to be of use to him."[12]

No party sought to debate or discuss why vacant possession was not being given in the circumstances, assuming (it would seem) that the presence of the sitting tenant was a clear breach of the obligation.[13] This was especially disappointing given that this is one of a very small number of decisions that went *beyond* first instance and was specifically

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[12] [1948] 1 KB 321, *per* Evershed L.J. at 322. Emphasis added.

[13] See also *Appleton v Aspin* [1988] 4 EG 123 where the seller's mother lived in the house under an occupation agreement within the Rent Act 1977, but joined in the contract (even though not paid to do so) promising not to exercise any right of possession against the purchaser. The seller's mother later refused to vacate and the purchaser claimed specific performance of the contract which provided for vacant possession. It was held that the seller's mother was not required to leave pursuant to section 98(1) of the Rents Act 1977 and therefore the seller would not deliver vacant possession on completion. Wilkinson, H.W. *Standard conditions of sale of land: a commentary on the Law Society and National general conditions of sale of land* (4th edn Longman, London 1989) 4 suggests that this principle is also applicable to business leases where a statutory protected tenant may have purported to agree to move out on the completion of a sale of the freehold interest but then later reneges. See also *Reynolds v Bannerman* [1922] 1 KB 719; *Watson v Saunders-Roe* [1947] KB 437 CA and *Carter v Green* [1950] 2 KB 76 CA in relation to protected rights of tenants, along with The Rent Act 1977 and The Housing Act 1988.
Allowing the purchaser into possession *before* completion may also have an affect on the procurement of vacant possession. In *Sophisticated Developments v Steladean and Moschi* [1978] CLYB 347 C.A. a contract for the sale of land contained a clause that the purchaser would, from the date of contract, "be responsible for the day to day management of the property and would take the rents and profits". Delay in completion occurred and the vendor served notice to complete but the purchaser argued that the vendor had repudiated the contract because there were trespassers in occupation of part of the property when the notice to complete expired. It was held that it was an arguable point as to whether the vendor was unable to complete even though the purchaser had had day to day management of the property since exchange. That is, the purchaser's neglect (in allowing trespassers to take possession) did not prevent him arguing that the vendor was in breach of his obligation to give vacant possession.
It has also been held that a third party taking possession before completion can result in rights being established. See *Abbey National Building Society v Cann* [1989] (The Times 15 March) where Mrs Cann's son secretly obtained a mortgage on the purchase of her house but kept most of the money and defaulted. Mr Cann had been allowed into occupation just before completion and it was argued that this created an overriding interest which had priority over the mortgage company. The claim failed on the ground of fraud but Dillon LJ considered that the occupation would otherwise have constituted an overriding interest which would have prevented the delivery of vacant possession to a third party. In *Lloyds Bank v Rossett* [1988] 3 WRL 1301 builders were allowed into a house to renovate it before completion (supervised regularly by the purchaser's wife) and this was held to give the wife an overriding interest against the lenders of whom the wife had not known. At the date of completion, which was also the date of the loan, the wife's interest had become established and had priority; this would prevent the passing of vacant possession to a

relevant to vacant possession. The lack of debate and discussion of what was meant by the term echoes the treatment of the term in standard conditions of sale. In chapter 4 it was noted, at various points, that respective Law Society Committees did not appear to have due regard to the nature and effect of the term, and to which other parts of the contract could be affected by incorporation of the term (for example, when vacant possession moved from a general to special condition). Accompanying explanatory notes to the new conditions also omitted to refer to any of the changes manifest in the conditions of sale to which the notes related. In similar terms, it was suggested in chapter 4 that the obligation to give vacant possession was treated as 'obvious and self explanatory'. These judgments suggest that the courts have taken a similar approach to the Law Society Committees who drafted and amended respective editions and versions of standard conditions of sale. In fact, the legal and factual dimensions to the obligation are far from self explanatory, and rather complex in nature given the hybrid of objective and fact specific factors in play.

What is apparent from the decisions referred to above is that they dealt with purportedly 'lawful' claims to remain in occupation of the property (i.e. because of a statutory or common law tenancy or licence). The courts have questioned whether this remains the case with respect to persons who may be in occupation with no *lawful* claim or right (for example, squatters or trespassers). Indeed, there has been conflicting *obiter dicta* with regard to whether the presence of people in *unlawful* occupation at the point of completion breaches the obligation to provide vacant possession.[14] Some statements suggest that the obligation would be breached in this situation, apparently on the basis that it is the duty of the seller (as the person responsible for providing vacant possession) to ensure that trespassers are evicted. For example, in *Cumberland Holdings Ltd v Ireland*[15] it was noted that a seller's duty extends to removing unlawful occupants on completion. The case itself concerned left over goods at the premises but the judge considered (*obiter*) that the existence of a trespasser could be equated with a physical impediment preventing the delivery of vacant possession:

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third party. These all demonstrate, as further illustrations, how unintended third parties can also become (legal) barriers to the procurement of vacant possession on completion.

[14] For a discussion of the problems caused by unlawful third parties being in occupation on completion, and preventing the delivery of vacant possession, see Jones, P.V. 'Squatting and Squatting' (1991) 141 *New Law Journal* 1543.

[15] [1946] KB 264.

> "We cannot see why the existence of a physical impediment to such enjoyment to which a purchaser does not expressly or impliedly consent to submit should stand in a different position to an impediment caused by the presence of a trespasser."[16]

This decision clearly treated physical/tangible impediments in similar terms to persons in unlawful occupation with respect to a breach of the obligation to give vacant possession. It therefore made no distinction on the grounds of the lawfulness (or otherwise) of the persons in occupation.

Other dicta, however, suggests that a seller would *not* be in breach by virtue of there being a person in unlawful occupation of the property at completion. In *Sheikh v O'Connor*[17] the vendor contracted to sell a property to the plaintiff. Most of the property was tenanted but the vendor expressly contracted to sell one of the rooms with vacant possession. After completion, the purchaser complained that the room which should have been vacant was in fact occupied by one of the tenants as a trespasser. The purchaser sued the vendor for damages for his failure to give vacant possession. One of the issues was purely factual and concerned whether the trespasser had taken possession of the room before, or after, the completion date. Deputy Judge Wheeler concluded that it had been *after* completion, which was sufficient to dispose of the case in the defendant's favour, so that the action was dismissed. However, the judge went on to consider (*obiter*) the position in the event that his finding of fact was incorrect and the trespasser had been in unlawful occupation of the premises at the material time.

The judge accepted that a vendor who had contracted to give vacant possession did not fulfill his contractual obligation if, at the date fixed for completion, there was a third party who had a *legal* claim to possession, but he considered the position to be different in relation to a trespasser. In such a case he considered that it was for the purchaser to seek his remedy in the county court against the trespasser, given that the *legal* right to possession had passed to the purchaser on completion. The judge posed the following scenario:

[16] [1946] KB 264 at 268, *per* Lord Greene at 270.
[17] [1987] 2 EGLR 269.

> "Suppose that a vendor (V) contracts to sell property to a purchaser (P) with completion fixed for say, March 1, that at some time prior to completion squatters break in, unknown to V or P, that on March 1, without visiting the property, the parties complete, the balance of the purchase price is paid and keys are handed over, and then on the following day P visits the property and discovers that the squatters have been there for several days. Is P *then* entitled to claim rescission or damages on the ground that V has failed to give vacant possession?.."[18]

The learned judge took the view that the answer should be in the negative. He continued:

> "Does it make any difference, then, if V had at least constructive notice prior to completion that squatters were on the property or were threatening to go into it? And if so, is the position any different according to the length of time prior to completion that V learnt about the squatters? I suggest not ... At most, I am inclined to think, V's knowledge puts him under an obligation to act reasonably as circumstances permit in the light of that knowledge. But this would not ... extend to requiring him to take legal action to evict the squatters, though he might at least be wise to put P in the picture."[19]

These comments manifest an awareness of having to consider the equity of the situation, and what steps an innocent party may have to go to in order to seek to discharge their duty to deliver vacant possession. They highlight the issues of risk and responsibility relevant to both parties when an obligation to give vacant possession is operative. With that said, the problem with the judge's *obiter* comments in this decision for the purposes of an analysis of unlawful occupation is that, if correct, they take all substance from the vendor's contractual undertaking to give vacant possession. The *obiter* comments suggest that a vendor will not be liable, even if he expressly contracts to give vacant possession, in the event that persons with no lawful claim prevent the delivery of vacant possession on completion. This will leave a purchaser with no remedy against the seller and no legal right to sue or seek specific performance of obligations under the conditions of sale. It therefore negates the obligation being operative in the sale and purchase contract between the parties. As was noted in chapter 3, in a sale and purchase contract, where an immediate right to possession is being passed, the obligation to give vacant possession is fundamental and it is an essential element of such a contract that the buyer will want to be able to take possession of the property.[20] Such a determination in *Sheikh* is therefore

[18] Ibid, *per* Deputy Judge Wheeler at 271.
[19] Ibid.
[20] Williams, T.C. 'Sale of Land with Vacant Possession' (1928) 114 *The Law Journal* 339 in which he described vacant possession as "an integral part of the contract".

entirely inconsistent with the nature and effect of the obligation to give vacant possession as being, perhaps, the most crucial part of the contract and the very reason for which the contractual relationship between the parties was formed.

The obiter comments in *Sheikh*, suggesting that the presence of trespassers would not cause a breach of the obligation to give vacant possession in such cases, conflict with earlier established authority on the point. In *Royal Bristol Permanent Building Society v Bomash*[21] the purchaser agreed to buy two houses, vacant possession of which was to be given on completion. When the day fixed for completion arrived, the houses were occupied by someone who was holding over unlawfully. It was held that the vendor was in breach of his obligation to give vacant possession on completion notwithstanding that the person in occupation had no right to be in the premises:

> "I think the vendors were in fault, that they had contracted to give vacant possession, that they were not prepared to give vacant possession at the time when the contract ought to have been completed, and that in fact the purchaser could not have got within a reasonable time that vacant possession for which he had contracted; and to that extent he has obtained something less than that which he contracted to buy."[22]

Damages to compensate were awarded by the court. Again, however, no concern as to the meaning of the expression 'vacant possession' was expressed or discussed. The reference to "obtain[ing] something less than that which [the purchaser had] contracted to buy" appeared to manifest a pre-disposed understanding as to what giving vacant possession involved, but the judge did not elaborate on that in any detail. Again it is arguable that this was because it was thought that there was no need to do so, given that the meaning of the term was assumed to be understood by all in the context of there being persons in occupation of the property on completion.

Similarly, in *Engell v Finch*[23] the defendants, mortgagees of a house with a power of sale, sold it by auction to the plaintiff, the particulars of sale stating that possession would be given on completion of the purchase:

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[21] [1886-90] All ER Rep 283.
[22] Ibid, *per* Kekewich J. at 291.
[23] (1869) L.R. 4 Q.B. 659.

> "The defendants contracted to sell and deliver *possession* on the completion of the purchase..."[24]

The plaintiff soon afterwards contracted for a resale. On investigation the title was satisfactory, but on the plaintiff requiring possession before completing the purchase, it appeared that the mortgagor was in possession and refused to give it up. The defendants were in a position to have ousted him by ejectment, but failed to do so and subsequently refused to complete the sale.[25] On this basis, the plaintiff brought an action for a breach of the contract of sale and it was held that a breach of contract arose: that is, the mortgagor's continued unlawful presence on the property constituted a breach of the obligation to give vacant possession on completion pursuant to the contractual terms. What is particularly noteworthy about this decision is that the judgment did not make a single reference to the term 'vacant possession', referring only to the breach of contract (which was the breach of the contractual term providing for vacant possession) and simply noting that 'possession' was required:

> "What we have then to consider is, when a vendor, not by reason of any want of title, but by reason of not choosing to oust the mortgagor, refuses to complete, and the action is really a breach of contract to deliver *possession*, whether under such circumstances the vendee is entitled to recover the difference between the contract price and the market value at this time of breach."[26]

This is perhaps reflective of how, in the 1800s, the concept of vacant possession had not emerged as a term in it own right, as was discussed in chapter 4. However, as noted above, in *Royal Bristol Permanent Building Society v Bomash*[27] (a decision just some 20 years later) vacant possession *was* used as a term in its own right, albeit without any clear definition of its meaning. In *Engell v Finch* the judge used the expression 'possession' to mean what we now understand as 'vacant possession'. Indeed, as noted in chapter 4, by the early 1900s (and most likely before then) it was established that in respect of contractual conditions of sale "'possession' mean[t], primarily, vacant possession".[28]

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[24] Ibid, *per* Kelly C.B. at 663. Emphasis added.

[25] Ibid at 663. On the 31st of January 1866, the defendants had commenced an action of ejectment to recover possession of the house, and on the 24th of the following April, they got judgment that they were entitled to possession from the 31st of January. They were perfectly at liberty to enforce the order therefore, but chose not to do so.

[26] (1869) L.R. 4 Q.B. 659, *per* Kelly C.B. at 663. Emphasis added.

[27] Above, n21.

[28] Webster, F.W. *Law relating to particulars and conditions of sale on sale of land* (3rd edn Stevens and Sons Limited, London 1907) 334.

There is no evidence that the position in law with respect to unlawful occupiers, as established in the 1800s, was changed over time. Indeed, the position remains the same as shown in recent case law such as the decision in *Herkanaidu v Lambeth London Borough Council* [29] where the defendant council sold one of its properties at an auction with vacant possession. The claimant was the successful bidder for the property. There was no completion on the due date and four days later the claimant's solicitors raised for the first time the question of squatters. The defendant's officers inspected the property, found no squatters and considered that the allegation was a device to avoid completion. Accordingly, a notice to complete was served thereafter. As completion had not taken place, the defendant rescinded the contract and informed the claimant that the deposit was forfeited. The claimant brought an action against the defendant reclaiming the deposit, valuers' fees and legal costs of the abortive purchase on the grounds (*inter alia*) that the defendant had been unable to provide vacant possession of the property. The Master rejected the claim. It was noted that where a potential physical impediment was discovered pre-completion, a breach of the obligation to provide vacant possession would occur if it was not remedied before completion. That is, the presence of squatters would breach an obligation to give vacant possession at the relevant time. No specific analysis of the obligation was provided however, with the only explanatory comment from the judge amounting to a generic description of vacant possession:

> "...where there is a potential physical impediment discovered before completion (as here) a breach of the obligation to provide vacant possession would only occur if it is not remedied before completion. This would be the case if a vendor remained living in the property or had furniture there prior to completion. The obligation would be to give vacant possession on completion...Breach would only occur when the vendor failed to do so."[30]

This is the most simple description that could be afforded to the concept, referring to left over chattels in the property. This reiterated the point that the obligation was treated as something common and obvious to the parties, for which further debate or elaboration was not required.

[29] [1999] All ER (D) 1420.
[30] Ibid, *per* Mr. David Vaughan QC at 1429.

Commentaries have also confirmed the position with regard to unlawful occupiers breaching the obligation to give vacant possession. In *Williams on Vendor and Purchaser* it is suggested that "where property is sold with vacant possession, the vendor has to satisfy a purchaser that there is *no adverse claimant* and no occupier of the premises...",[31] and the context of this paragraph suggests that the reference to 'adverse claimant' should be understood as relating to an unlawful occupier. Megarry and Wade, when referring to the *Sheikh* decision, also state that "the better view is that it is the duty of the vendor to evict trespassers".[32] In the following section the specific nature of the obligation to give vacant possession is analysed and found to consist of both a legal and factual dimension. The *fact* of a third party being in occupation on completion is shown to be one element in causing a breach of the obligation. As such, it will be argued that it is immaterial whether the third party occupier is lawful or unlawful as that does not change their factual presence in the premises on completion.

These decisions show the comments of Deputy Judge Wheeler in *Sheikh* to conflict with established authority. Whilst the decision in *Sheikh* has been widely criticised and discredited,[33] the issues raised by the judge in that case do, however, relate to important questions about the content of the obligation to give vacant possession, in terms of its constituent parts. As noted, in *Sheikh* only a strictly legal dimension to the obligation was considered, with the obligation being treated as a *right* which, in the absence of any competing *legal* claim, passes to the purchaser on completion. As explained below, however, an analysis of the constituent elements of the obligation to give vacant possession reveals a factual element as well. It will be shown that it was a lack of appreciation of this factual element to the obligation in *Sheikh* which led the learned judge to conclude that a distinction between lawful and unlawful occupiers could be made, and that the presence of unlawful occupiers did not breach the obligation to give vacant possession. A closer examination of the constituent elements is therefore essential to elucidate why the obligation is both legal and factual in nature, and why the factual presence of an unlawful occupier causes a breach of the obligation in similar terms to lawful occupiers.

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[31] *Williams on Vendor and Purchaser* 4th edition, 201.
[32] Megarry, W. and Wade W. *The law of real property* (7th edn Sweet and Maxwell, London 2008) 672.
[33] See for example Harpum, C. 'Vacant possession - chameleon or chimaera?' (1998) *Conveyancer and Property Lawyer* 324, 400, and Barnsley, D.G. 'Completion of a contract for the sale and purchase of land: Part 3' (1991) *Conv* 185 at 188.

Interpreting the obligation

It has been noted that the phrase 'vacant possession' has never been authoritatively defined, with the area lacking judicial comment and debate: "[t]his [is] an area deficient in legal authority...". [34] Various leading counsel have struggled, in vain, to cite relevant case law to support the legal positions that they advance. In *Cumberland*, Counsel for the claimant indicated that there was a lack of authority on which to base their submissions: "[t]hat does not assist in determining the meaning of "vacant possession" as between vendor and purchaser, a matter not decided by any authority".[35] Judges have also made similar observations. In the context of the meaning of the obligation to give vacant possession, Deputy Judge Wheeler noted: "I should add that neither counsel was able to refer me to any authority which threw light on this problem".[36]

It is not surprising therefore that judges have struggled to explain exactly what is meant by the term 'vacant possession'.[37] This has especially been the case given that the meaning of the words 'vacant possession' have been said to vary according to the context in which they are used: "[the] meaning of the words 'vacant possession' can, I think, vary from context to context".[38] In practice, the intention of the parties as shown by the contract will be of importance.[39] Further, the equity of the situation for the parties in question may be something a judge wishes to consider as relevant. These all point to an inherently fact specific aspect to the term 'vacant possession', making a universal 'definition' difficult to arrive at.

With that said, there would appear to be some fundamental legal principles associated with the obligation that can be extracted from case law in previous years and which are of universal application to the concept, in whatever context it may arise. The obligation

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[34] *Sheikh v O'Connor* [1987] 2 EGLR 269.

[35] Submissions of Heilpern in *Cumberland Consolidated Holdings Ltd v Ireland* [1946] KB 264 at 268. See also Higgs, R. 'Leave Your Keys on Your Way Out' (2005) 155 *New Law Journal* 149 in which the difficulties of understanding what yielding-up at the end of the lease may involve are discussed with reference to the requirement to give vacant possession. Higgs states "there has been very little guidance from case law as to what constitutes yielding up...[n]either has Parliament ever prescribed the meaning of the expression". See also Dowding, M.A., Morgan, H.H.J., Rodger, M. and Peters E. (eds) *Woodfall's Landlord and Tenant* (Sweet and Maxwell, March 2010) 19:003 which states that "there is no clear authority which holds that a tenant is liable to deliver up vacant possession in a sense in which that expression is used in freehold conveyancing".

[36] *Sheikh*, above n34, *per* Deputy Judge Wheeler at 274. See also Higgs, above n35.

[37] See for example, the submissions in *Cumberland*, above n35.

[38] *Topfell Ltd v Galley Properties Ltd* [1979] 1 EGLR 161, *per* Templeman J. at 162.

[39] See *Lake v Dean* (1860) 28 Beav 607 and *Re Crosby's Contract* [1949] 1 ALL E.R. 830.

to give vacant possession can be seen to have both a legal and factual dimension, and it is appropriate to explore the content of these constituent elements in more detail.

The legal element

The first element of the obligation (the element highlighted in the decision in *Sheikh*) is the legal dimension. Where a vendor expressly or impliedly contracts to convey an estate in land free from incumbrances, it has been established that it is, in principle, a term of the contract that the purchaser shall on completion obtain the legal right to actual (and not constructive) possession of the estate in land transferred.[40] It has been said that: "the phrase "vacant possession" is no doubt generally used in order to make it clear that what is being sold is not an interest in a reversion".[41]

This would seem to imply that vacant possession is a constituent element of the legal transfer of the estate in land itself. This is the dimension of vacant possession which Deputy Judge Wheeler in *Sheikh* highlighted when he said that:

> "[vacant possession] is a right, and it is a right which, in the absence of some competing *legal* claim, passes to the purchaser on completion [i.e. when the estate in land is legally transferred]."[42]

This clearly showed that vacant possession was treated solely as a right which follows from the legal transfer of an estate in land. In practice, however, it is clear that vacant possession is not confined to just a legal right to possession that follows from the transfer of an estate in land, but that the obligation also comprises a factual element.

The factual element

The term vacant possession goes beyond the legal transfer of the estate in land and rights consistent with the transfer, and also concerns possession in a factual sense of the property in question: "...the right to *actual unimpeded physical enjoyment* is comprised

[40] See *Hughes v Jones* (1861) 3 De. G.F. & J.307, 314, c.f. *Horton v Kurzke* [1971] 1 WLR 769, *per* Goff J. at771-2.
[41] *Cumberland*, above n35, *per* Lord Greene at 270.
[42] *Sheikh*, above n34, *per* Deputy Judge Wheeler at 271.

in the right to vacant possession".[43] Indeed, in *Cumberland,* Heilpern for the plaintiffs argued that:

> "...vacant possession is not limited in meaning to the absence of any adverse claim. This limited meaning only applies to cases relating to substituted service... That does not assist in determining the meaning of "vacant possession" as between vendor and purchaser, a matter not decided by any authority. *The right to vacant possession must give a right to physical enjoyment*....Vacant possession must mean possession without impediments."[44]

These comments show that vacant possession is not just concerned with the legal transfer of the estate in land, and associated rights thereto, but that the obligation *also* concerns the exercise (in a factual sense) of the purchaser's legal rights to occupy pursuant to the transferred estate. Indeed, vacant possession has been held *not* to have been given if the purchaser cannot actually enjoy the right of possession passed to them without first having to take legal action themselves. This was a point specifically made by Counsel in *Sheikh*:

> "...is 'vacant possession' given if the purchaser cannot enjoy the right of possession without first taking legal action?"[45]

In *Sheikh*, the learned judge, whilst expressing sympathy with such a submission, concluded that vacant possession *was* given if the only occupiers in the premises on completion were unlawful. As noted earlier, in *Sheikh,* receiving a property free of unlawful occupants on completion was treated solely as a legal right which (in the absence of any competing legal claim) passed to the purchaser on completion, which the purchaser could take county court action of their own accord to enforce if necessary, rather than an obligation of the seller:

> "I have sympathy with this approach, but I do not see, on the facts of this case, what [the vendor] could *reasonably* have been expected to do in the light of such actual or constructive knowledge as he had: and, as I have indicated, once completion had taken place...the *right* to vacant possession had passed to the

[43] *Cumberland,* above n35, *per* Lord Greene at 272. Emphasis added.
[44] Ibid, at 272, *per* Lord Greene at 272. Emphasis added.
[45] *Sheikh,* above n34 at 271. Submission of Mr Cogley.

> plaintiff and it was he, and he alone, who was entitled to assert that right against [the unlawful occupier]."[46]

Other case law, however, confirmed that these *obiter* comments only refer to one element (the legal element) of the obligation to give vacant possession; the obligation to give vacant possession being more than just the legal transfer of the *right* to possession. Indeed the conclusion in *Sheikh* is contrary to previous authority addressing the barrier to vacant possession which unlawful occupiers pose. This specific issue was addressed in *Royal Bristol Permanent Building Society v Bomash,*[47] where Kekewich J. made clear that transfer of the legal *right* to vacant possession is not all the purchaser contracts for. He said:

> "I do not think that a purchaser having a contract to sell with vacant possession, is bound to take possession from the sheriff when he knows, as he did know in this case, that the man to be evicted, the man who had been holding over, was still [physically] on the premises and would have to be turned out by force. I think the purchaser is, under those circumstances, entitled to say, "*Exercise your rights; first turn the man out, and then give me vacant possession*". Therefore I think the vendors were in fault, that they had contracted to give vacant possession, that they were not prepared to give vacant possession at the time when the contract ought to have been completed..."[48]

Here it was quite clear that the vendor should exercise his rights first (i.e. ensure that factual possession of the property can be given to a purchaser by, if necessary commencing its own legal proceedings to evict the man in occupation), before being able to complete the purchase and give vacant possession (both legally and factually). The judge did not accept that the vendor was giving vacant possession by simply purporting to pass the *legal* right to possession to the purchaser on completion of the contract (when the estate in land was transferred) and expecting the purchaser to use its legal right to possession to obtain factual possession (by, for example, issuing proceedings for an order for possession against the man who had remained in occupation); that was not enough. The decision in *Engell v Finch*[49] also supports this position. As noted previously, in this case a breach of contract arose because the defendants had not taken the necessary steps to secure possession pursuant to the agreement. Whether the defendants had taken all

[46] Ibid, *per* Deputy Judge Wheeler at 274. Emphasis added.
[47] (1887) 35 Ch.D. 390.
[48] Ibid, *per* Kekewich J. at 394. Emphasis added.
[49] Above, n23.

action open to them was held to be irrelevant if possession could not be given on completion. This confirmed the requirement, in a practical sense, that factual possession (as well as legal possession) had to pass in order to give vacant possession and that only when the occupier had been 'turned out' (to use the language of Kekewich J.) could vacant possession be given. The judgment of the County Court judge at first instance in *Cumberland* (affirmed by the Court of Appeal), also supports this position, where it was said that:

> "the words [vacant possession] were not limited to mean only that the purchasers would be given immediate and actual possession without any adverse claim to possession by any person *rightfully* claiming: they meant also that the purchaser would be given such substantial, actual, physical and empty possession as would allow him *to occupy and use the property purchased*..."[50]

All these decisions highlight the need for the party receiving vacant possession to be able to occupy the said property in a factual sense (over and above having the *legal* right to possession which follows from the transfer of the estate in land). Indeed, as discussed in chapter 2, the tests that case law has developed to determine whether vacant possession has been given are objective in nature and are concerned with whether the purchaser (or party with the right to vacant possession on completion) can occupy without difficulty or objection. The courts are required to determine whether the physical (or legal) impediment substantially prevents or interferes with the enjoyment of a substantial part of the property. These embody the practical dimension of vacant possession as a factual, as well as legal, matter. The next section expands analysis of the factual element of the obligation by focusing on the timing of this factual requirement.

Timing of the factual element

When understanding the factual dimension of the obligation to give vacant possession it is important to note further that the tests referred to are applied on 'completion' (or the operative date). The factual element of the obligation to give vacant possession therefore concerns one's ability (on a practical level) to *actually* enjoy the right to vacant possession *immediately* on completion.

[50] *Cumberland*, above n35, *per* Lord Greene at 266. Emphasis added.

As noted above, case law confirms that the right to vacant possession also requires the purchaser to be able (as a matter of fact) to actually enjoy that legal right to possession: it refers to the practical, physical and factual sense of being able to immediately occupy the property (as distinct from *just* the transfer of the legal *right* to enjoyment that follows from the transfer of the estate in land). A number of judgements emphasise that this factual right to possession is on completion:

> "I have come to the conclusion that [the sellers] were contractually bound, *on completion*, to hand over the ground floor in a condition which would allow the plaintiffs *to occupy it*. It is quite plain that at the date of the contract and at *the date fixed for completion*, the vendors cannot do that...The vendors cannot occupy it themselves, they cannot sell it to somebody who wishes to purchase it in order to go and live there himself and they cannot let it."[51]

Indeed, the fact of occupation on completion was also referred to in *Cumberland*:

> "...a vendor who leaves property of his own on the premises cannot ... be said to give vacant possession since [this is] inconsistent with the right which the purchaser has *on completion* to undisturbed enjoyment..."[52]

Here, the Court of Appeal in a case which primarily dealt with left over chattels on the premises on completion, held that a vendor who left goods of his own on property sold by him to an extent which deprived the purchaser of physical enjoyment of the property on completion, failed to give vacant possession. This reflected an awareness that the operative time for enjoyment was completion, and a lack of enjoyment at that time would cause the obligation to have been breached: that is, the purchaser having received only the legal *right* to possession on completion would not be sufficient and would constitute a breach of the obligation. This was also true in *Herkanaidu v Lambeth London Borough Council* where it was stated:

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[51] *Topfell*, above n38, *per* Templeman J. at 162. Emphasis added.
[52] *Cumberland*, above n35, *per* Lord Greene at 272. Emphasis added.

> "...where there is a potential physical impediment discovered before completion (as here) a breach of the obligation to provide vacant possession would only occur if it is not remedied *before completion.* This would be the case if a vendor remained living in the property or had furniture there prior to completion. The obligation would be to give vacant possession *on completion*...Breach would only occur when the vendor failed to do so." [52(a)]

Commentaries support the view that the purchaser must be able to enjoy the right to possession (i.e. obtain factual possession as well as legal possession) on completion:

> "Vacant possession, express or implied, requires the vendor to assign the property free from any claim of right to possession...*and includes* "the right to actual un-impeached physical enjoyment" of the property....the premises should be free *at completion* from any occupation by the vendor, a tenant, former tenant, a squatter and even material quantities of rubbish or furniture."[53]

This further supports the analysis of the constituent parts of the obligation undertaken in this chapter, and in particular the timing of the factual element.

The elements of the obligation

With this in mind, it is apparent that the decision in *Sheikh* failed to appreciate both dimensions to vacant possession (*de jure* and *de facto*) namely:

1. The obligation to give vacant possession arises from the transfer of a non-reversionary estate in land (and amounts to a *legal right* to possession of the transferred estate); but

2. Vacant possession is only given when the party with the legal right to possession (of the estate in land that has been transferred) can:

   (i) *actually* enjoy that right of possession in a factual and practical sense

   (ii) *immediately* on completion (or at the operative date).[54]

[52(a)] [1999] All ER (D) 1420, *per* Mr. David Vaughan QC at 1429. Emphasis added.
[53] Bacon, N. 'Conveyancing: Vendor's Duty of Disclosure' (1995) *Law Lectures for Practitioners* 8.
[54] The tests that establish whether vacant possession has been procured are discussed in more detail in chapter 6.

This analysis assists in gaining an appreciation of the obligation to give vacant possession as constituting both a legal and factual dimension.

If vacant possession was only about legal claims to possession then the lawfulness of occupation, and how one determines that, would be relevant. However, as this is not the case, Megarry and Wade[55] are correct in asserting that "it is the better view" that trespassers do cause a breach of the obligation to give vacant possession, as will be further demonstrated in the next section.

In the next section the concept of possession is discussed in more detail to consider further what these constituent elements actually require. A review of the literature surrounding the concept of possession is helpful in elucidating the nature of the constituent elements of the obligation, as both legal and factual manifestations of possession. When applied, this can then be used to further explain how the decision in *Sheikh* failed to properly appreciate the full nature of the obligation in respect of its inherently factual, as well as legal, dimension.

Possession as a property law concept

The concept of 'possession' in English land law is fundamental and a number of sources emphasise that it is almost impossible to understand modern English land law without understanding the nature and significance of possession. It has been said that "[t]hroughout the history of English land law the operative concept has been possession rather than ownership".[56] Some have likened the importance of the concept of possession to other fundamental parts of the law of England and Wales, stating that "[p]ossession is a conception which is only less important than contract".[57] Others have highlighted the predominant nature of possession in English land law. For example, Cheshire and Burn have noted that "[i]t has been said, rightly, that there is no law of ownership of land in England and Wales, only a law of possession".[58]

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[55] Megarry, W. and Wade W. above n32, 672.
[56] Gray, K. and Gray S. 'The Idea of Property' in Bright, S. and Dewar J. (eds) *Land Law Themes and Perspectives* (Oxford University Press, Oxford 1988) 21.
[57] Howe, M. (eds) *The Common Law* (Little Brown & Co, Boston 1963) 163.
[58] Cheshire, G. and Burn E. *Modern Law of Real Property* (15th edn Butterworths, London 1994) 26.

Historically, possession was explained through the concept of 'seisin' which lay in the actual or *de facto* possession of land.[59] It is for that reason that, unlike ownership, which is seen as a *de jure* (legal) relationship between a person and a thing (and therefore a question of law),[60] possession is commonly viewed as a *de facto* (factual) relationship between a person and an object. Salmond wrote that "whether a person has ownership depends on rules of law; whether a person has possession is a question that could only be answered as a matter of fact and without reference to law at all".[61] It is true to say however that 'possession' can be a question of law as well as just fact alone. Indeed, the term possession can be used, and has been applied over time, in a number of distinguishable respects. It is essential to define these differing uses given that they have a direct bearing upon the differing meanings associated with the term. Exploring the meanings of possession from the literature surrounding them helps to interpret the obligation to give vacant possession more insightfully given that "[a]ny answer which does not distinguish between the different meanings of "possession" is inevitably going to be misleading at best, and simply wrong at worst".[62]

Legal possession

Commonly, the term 'possession' is used to describe a relationship between a person (or legal entity) and an estate in land (for example, fee simple or a lease).[63] Legal possession, also referred to as *de jure* possession, signifies the 'right' to possession. Legal possession has been said to be enforceable in *rem* (that is, against the whole world at large), reflecting that such a proprietary right (to possession) is enforceable at law.

A person has a *right* to possess an estate if they have acquired a title to it which is 'vested in possession'. For a right to be vested in possession, the person or legal entity must have "a present fixed right to it now".[64] An example of an interest vested in possession would be the common scenario of the sale and purchase of a residential property where the transferor normally covenants to transfer the estate in land with the immediate right to

[59] See Lightwood, J.M. *Possession of Land* (Kessinger Publishing, London 1894) 114-121.
[60] Wonnacott, M. *Possession of Land* (Cambridge University Press, Cambridge 2006) 1.
[61] Salmond, J.W. *Jurisprudence* (12th edn Sweet & Maxwell, London 1966) 265.
[62] Wonnacott, above n60, 13.
[63] Here possession is not intended to describe the relationship between a person and any tangible property (such as a specific plot of land or a house).

possession for the purchaser/transferee on completion. This can be distinguished from a right to enjoyment[65] at some point in the future. Here the right to possession is vested only 'in interest'. An example of an estate vested only 'in interest' is a reversionary lease, granted to begin at some time in the future, usually after the prior existing lease has expired. A reversionary lease is 'vested' as soon as it is granted but until the term begins it is vested only 'in interest' or 'reversion', and not 'in possession': it gives no present right to enjoy any estate in land.[66] The obligation to give vacant possession refers, in part, to the legal right to possession of the estate that has been transferred, normally pursuant to the sale and purchase contract and which is 'vested in possession'. This is the first constituent element to vacant possession.

Factual possession

The vernacular meaning of 'possession' is physical occupation of tangible land, also referred to in case law as 'actual' possession.[67] To have actual possession, a person must have a sufficient degree of control over the thing in question.[68] Holmes wrote that "a man must stand in a certain physical relation to the object and to the rest of the world, and must have a certain intent".[69] The term 'actual possession' is sometimes used to denote the state of being 'in' possession of an estate, rather than merely having a right to possess it or having constructive possession of it. It has been said that "in the modern law, *de facto* or actual possession is the closest to the ordinary or lay meaning of the term".[70] The term 'natural possession' is also sometimes used along with occupation.[71] 'Occupation' itself is not a legal term of art with a single and uniform meaning; its meaning has been held to vary according to the subject matter and context,[72] and the term 'occupier' has been said to be an expression of varying meanings.[73] Furthermore it has been suggested

[64] Fearne, C. *Contingent Remainders* (4th edn Stahan & Woodfall, London 1844) volume 1, 2, cited with approval in *Pearson v IRC* [1981] AC 753, 772.
[65] That is, the exercise and use of the right and having the full benefit of it – see *Kenny v Preen* [1963] 1 QB 499, *per* Pearson L.J. at 511.
[66] *Long v Tower Hamlets LBC* [1996] 2 All ER 683.
[67] *Prasad v Wolverhampton RC* [1983] 2 All ER 140.
[68] Panesar, S. *General Principles of Property Law* (Longman, Essex 2001) 134.
[69] Holmes, O.W. *The Common Law* (Belknap, Cambridge, Mass: 1963) 216.
[70] Wonnacott, above n60, 13.
[71] Ibid, 13.
[72] *Graysim Holdings v P&O Property Holdings* [1996] 1 WLR 109, *per* Lord Nicolls at 110.
[73] *Hunter v Canary Whart* [1997] AC 655, *per* Lord Cooke at 712.

that "[t]he difference between possession and occupation is rather technical and, even to those experienced in property law, often rather elusive and hard to grasp".[74]

A person who is physically present on land is in occupation of it. The presence might be personal, or through goods and chattels or agents or employees. A person who does not have a physical presence on land might, nonetheless, be treated as occupying it in certain cases.[75] As discussed above, "the right to actual unimpeded physical enjoyment has been said to be comprised in the right to vacant possession",[76] a right that should be capable of immediate enjoyment on completion (or the operative date under a contract). It is therefore possible to identify this factual sense of possession as the second constituent element of the obligation to give vacant possession. Indeed, it has been said that:

> "... if an estate carries with it a right of occupation, then a person's possession of the estate is frequently made manifest by occupation."[77]

This would seem an appropriate means to explain the second constituent element of the obligation to give vacant possession, and the obligation more generally. Deputy Judge Wheeler in *Sheikh* seemed to have reduced the obligation to give vacant possession to the legal *right* to possession that followed from the transfer of the estate in land. As noted earlier, it was said that the *right* to vacant possession had been passed to the purchaser:

> "...once completion had taken place on January 5 1984 the *right* to vacant possession had passed to the plaintiff and it was he, and he alone, who was entitled to assert that right against [the unlawful occupier]."[78]

It is clear that the judge failed to appreciate the second dimension of vacant possession, the ability to occupy the estate in a factual sense (i.e. the ability to enjoy the right to

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[74] *Alici v LR Butlin Ltd* [2006] 1 WLR 201, *per* Neuberger L.J. at 207.
[75] *Bacchiochii v Academic Agency Ltd* [1998] 1 WLR 1313; c.f. *Esselte v Pearl Assurance* [1997] 1 WLR 981 and *Barnett v O'Sullivan* [1994] 1 WLR 1667. A person in legal possession of an estate in land is also often in occupation of it and it is for this reason that the term 'possession' is often used to refer to occupation and the two seen as largely interchangeable. However a double dissociation can be drawn: a person in occupation of land is not necessarily in possession of any estate in it, and a person in possession of an estate is not necessarily occupying any tangible land in which that estate subsists. Wonnacott, above n60, 13 gives four examples of the dissociation between possession of an estate in the land and occupation of the physical land. Where possession and occupation are confused, perverse decisions have been laid down – see *Bruton v London and Quadrant Housing* Trust (1874) 2 EGLR 59 and *Allan* v *Liverpool Overseers* (1874) LR 9 QB 180.
[76] *Cumberland*, above n35, *per* Lord Greene at 272.
[77] Wonnacott, above n60, 114.
[78] *Sheikh*, above n34, *per* Deputy Judge Wheeler at 274.

possession that was transferred). If the judge had taken into account the factual dimension then he would not have described vacant possession merely as a right which, in the absence of any competing legal claim, passes to the purchaser on completion and, further held that in such cases, the seller would not be in breach of his obligation to give vacant possession so long as the legal right to possession had passed. In fact, it is more accurate and consistent with understandings of 'possession' in property law more widely to say that vacant possession is only given if enjoyment (in the sense of actual occupation) is achievable on completion (or at the relevant time) pursuant to the right to possession which is received by the buyer upon legal transfer of the estate in land. This on a practical level is also essential in the majority of cases (for example, where the purchaser is moving house and will want to take up occupation of their new property that day). As such, it reflects the inherently practical dimension to the procurement of vacant possession.

Constructive possession

A third meaning associated with the term possession is that of 'constructive possession'. This is commonly used in contrast to 'actual possession', to refer to possession of something *otherwise* than by actual occupation. This is common in so called 'land tax' cases where the taxation consequences sometimes depend upon whether a person in possession of an estate is also in occupation of the land.[79] 'Constructive possession' is also commonly used in a fictional sense to refer to the process by which the law deems a person presently to be 'in' possession of an estate, when, in fact, he or she is not.[80]

A reversionary freehold gives no present right to enjoy any estate in land;[81] the right to enjoy the estate is postponed until some future date, as the tenant has the immediate right to possession vested in them. As such, the reversioner is only entitled to the receipt of rents and profits. The phrase 'rents and profits' was applied in the context of section 70(1)(g) of the Land Registration Act 1925, which has since been repealed by the Land

[79] Panesar, above n68, 134.
[80] Ibid, 114. The idea of constructive possession can be compared to the doctrine of 'constructive notice' which deems a party with having knowledge which they did not in fact have. See also Howell, J. 'Notice: A Broad View and a Narrow View' (1996) *Conv* 34; Partington, M. 'Implied Covenants for Title in Registered Freehold Land' (1988) *Conv* 18 and Sheridan, L.A. 'Notice and Registration' (1950) *NILQ* 33.
[81] *Long v Tower Hamlets*, above n66.

Registration Act 2002 and replaced with schedule 3, paragraph 2, discussed further below.[81(a)] Under the Land Registration Act 1925, all third party rights in registered land took effect in equity as minor interests, other than those registrable in their own right (such as, registered charges) and overriding interests.[82] The list of overriding interests was set out in section 70 of the 1925 Act. An overriding interest would override any registered disposition of the land, although the interest did not appear on the title register, and even though a buyer may have had no notice of it. One of those overriding interests was set out in section 70(1)(g) which conferred overriding status on:

> "The rights of every person in actual occupation of the land or in *receipt of the rents and profits* thereof, save where enquiry is made of such person and the rights are not disclosed."[83]

The rights under section 70(1)(g) extended to cover the person who, although not in actual occupation of the land, was in receipt of rents and profits from the land. A buyer had, therefore, to enquire of every occupier to whom they paid rent.[84] Commentators have used constructive possession to refer to the receipt of an estate in land subject to some prior interest (such as a lease or tenancy). Farrand explains that a sale subject to a pre-existing lease or tenancy would cause only constructive possession to be passed:

> "What the purchaser is entitled to get in the way of possession on completion depends, of course, on what the contract says. Thus, if the sale were made expressly subject to some tenancy or other, then the purchaser would only be entitled to constructive possession (i.e. the receipt of rents and profits)..."[85]

Yet, vacant possession is necessarily concerned with the entitlement to be put into 'actual possession' on completion or at the relevant time, pursuant to the right to possession which is passed with transfer of the estate in land. As Farrand continued:

[81(a)] Section 70(1)(g), Land Registration Act, 1925 and schedule 3, paragraph 2, Land Registration Act 2002.
[82] Section 2, Land Registration Act, 1925. Chapter 7 includes a detailed analysis of these provisions.
[83] Section 70(1)(g), Land Registration Act, 1925. Emphasis added.
[84] The person had to actually be in receipt of rent. Protection was lost if no steps are taken to enforce payment or rent is waived – see *ES Schwab & Co v McCarthy* [1975] 31 P & CR 196 and *Strand Securities v Caswell* [1965] 1 Ch 958. See also *UCB Group Ltd v Hedworth* [2002] 46 EG 200.
[85] Farrand, J T. *Contract and conveyance* (Oyez Publications, London 1964) 259.

> "...if the sale were made expressly with vacant possession on completion, then the purchaser would be entitled to *actual possession*, i.e. in the sense of occupation..."[86]

Pollock and Wright[87] suggested that constructive possession represents a third type of possession distinct from legal and factual possession. They equate constructive possession with 'the right to possession' which is seen "to vest in the true owner even where the subject matter of the possession is vested in another person, albeit that the other person is a wrongful possessor".[88] Panesar[89] stated that "a person will be deemed to have constructive possession when he or she has *a right* to take actual possession". Bell[90] also viewed constructive possession as a third distinct type of possession (after legal and factual possession) and defined 'immediate constructive possession' as being where a person has an immediate and unqualified right to take actual possession. In the event that the party with the right to vacant possession is not so able to take actual possession (perhaps because of an unlawful occupier in the premises at completion), but legally has the estate vested in them, their right to immediate actual possession could be seen to cause them to be in 'immediate constructive possession' on Bell's definition of the term.[91]

Indeed, the obiter comments in *Sheikh* could be likened to this definition of constructive possession. In *Sheikh* the judge considered that a vendor who had contracted to give vacant possession did fulfill his contractual obligation if, at the date fixed for completion, there was a third party who had no legal claim to possession. In such a case he considered that it was for the purchaser to seek his remedy in the county court against the trespasser, given that the "legal right to possession had passed to the purchaser on completion".[92] Where the purchaser has the right to possession even though the property was occupied by another person, albeit that the other person was a wrongful possessor, the purchaser can be seen to be in immediate constructive possession, on Bell's analysis.

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[86] Ibid.
[87] Pollock, E. and Wright R. *Possession in the Common Law* (Clarendon Publishing, Oxford 1888) 17.
[88] Ibid, 17.
[89] Wonnacott, above n60, 13.
[90] Bell, A.P. *The Modern Law of Personal Property in England and Ireland* (Butterworths, London 1989) 53.
[91] As noted, this contrasts with the view expressed by Farrand, above n85, 278, however, that receiving an estate subject to a lease or some other incumbrance to enjoyment could constitute obtaining constructive possession by virtue of being entitled to the receipts of rents and profits (section 205 (1) (xix) Law of Property Act 1925).
[92] *Sheikh*, above n34, *per* Deputy Judge Wheeler at 271.

This further underlies how the (obiter) comments in *Sheikh* failed to reflect both essential elements of the obligation to give vacant possession, which necessarily concerns actual possession on completion pursuant to the right to vacant possession that had been transferred. As discussed earlier in this chapter, other cases[93] appreciated the factual dimension to vacant possession (even though they did not show any explicit awareness of this in the respective judgements), in addition to the legal aspect. As such, by focusing only on the legal right to possession, the understanding of vacant possession proposed in *Sheikh* was more analogous with a form of constructive possession, than vacant possession (which includes the factual element of actual occupation) on completion. This is inherently contradictory to the substance of the obligation to give vacant possession in its practical context as referring to the immediate right to actual occupation of an estate vested in possession.

As noted above, the rights under section 70(1)(g) of the Land Registration Act 1925 extended to cover a person who, although not in actual occupation of the land, was in receipt of rents and profits from the land. Under the Land Registration Act 2002, the term 'overriding interests' is abandoned,[94] rather the 2002 Act refers to unregistered interests which override first registration, which are listed in schedule 1, and unregistered interests which override a registered disposition, which are listed in schedule 3. One such unregistered interest which will override first registration are the interests of persons in actual occupation:

> "An interest belonging to a person in actual occupation so far as the interest relates to the land of which the person is in occupation, except for an interest under a settlement under the Settled Land Act 1925."[95]

This category of interest is, however, more restricted in that protection is limited to the land that is actually occupied.[96] Further, protection is no longer given to those who are in receipt of rents and profits of the land. The subtle change to section 70(1)(g) of the Land Registration Act 1925 in the Land Registration Act 2002 can be seen, perhaps

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[93] For example, *Cumberland*, above n35; *Royal Bristol Permanent Building Society*, above n21 and *Engell v Finck*, above n23.

[94] Although the term reappears in the Land Registration Rules 2003, perhaps inadvertently. See rules 28 and 57. These seem to have been copied over from rules under the 1925 Act.

[95] Paragraph 2, schedule 1, Land Registration 2002.

[96] To the extent that the interest relates to land that is not actually occupied, the interest is not protected. The Land Registration Act 2002 effectively reverses the effects of *Ferrishurst Ltd v Wallcite Ltd* [1999] Ch 355.

inadvertently, to strengthen the analysis of the constituent elements of the obligation to give vacant possession which has been undertaken in this chapter. As noted above, the 2002 Act no longer affords protection to those in receipt of rents and profits (i.e. those in constructive possession) but only to those in *actual* occupation of the specific extent of the property in question. On a first registration of unregistered land, under schedule 1 to the 2002 Act, those in receipts of rents and profits (i.e. those in constructive possession on Farrand's definition of the term) will no longer pose a barrier to the receipt of vacant possession by the purchaser (previously under the 1925 legislation they would have). Only those in actual/factual occupation of an estate vested in possession will constitute a barrier to vacant possession being given. This is consistent with the analysis of the obligation undertaken in this chapter and the focus on the legal and factual dimension to the obligation. Those who would previously have been able to claim an overriding interest by some form of constructive possession only will now fail under the 2002 Act given that their interest would have to be vested in possession and be factually apparent to constitute a barrier to vacant possession. This therefore supports the analysis in this thesis of the essential elements of vacant possession as a property law concept.[97]

Conclusion

This chapter has developed a more coherent understanding of the obligation to give vacant possession. A discussion of conflicting case law relating to unlawful occupation assisted in identifying two aspects to the obligation to give vacant possession: the legal right to possession (which follows from the transfer of a non-reversionary estate in land) and the ability for the party with that right to actually possess the land (in a factual sense) pursuant to that right. It was further shown that there is a timing element to the factual part of the obligation, with occupation of the estate being judged at the point of completion. This is fundamental to an understanding of the nature of the obligation and resolves the previous uncertainty as to whether trespassers breached the vacant possession obligation. Given that unlawful occupiers, like legal tenants or licensees, prevent the receiving party from being able to immediately occupy the estate in land as a matter of fact, the obligation will be breached just as when legal (or lawful) occupiers remain in the property on completion. This becomes explicable by articulating vacant

[97] A more detailed discussion of the issues connected to section 70(1)(g) is undertaken in chapter 7, including a

possession as involving both the legal right to possession (which follows from the transfer of the estate in land) and factual occupation of the estate. Some case law failed to recognise both elements of the vacant possession obligation, such as the decision in *Sheikh* where only the legal element of the obligation was considered. Analysis of such a decision, and competing authorities on the point, is valuable in identifying the nature of the obligation in the practical context as involving a factual as well as a legal element. As such, the obligation comprises two parts which must be understood together and not in isolation of each other.

The decision in *Sheikh*, and other decisions relating to third party occupation, emphasised the absence of a coherent concept of vacant possession. Some decisions did not even refer to the term, whilst others used the term but did not go into detail on what the expression actually meant. The decisions reflected a pre-disposed, but unarticulated, understanding of what vacant possession meant, treating it as something assumed and understood and therefore not needing proper comment, discussion or elaboration. There was therefore no consistent concept of vacant possession, but rather a lack of sufficient infrastructure to interpret the obligation throughout the decisions. This further explains why there has been a lack of coherent understanding as to the nature and effect of the term. A lack of consideration of the constituent parts of the obligation explains why judges and others have failed to articulate what giving vacant possession actually involves.

A review of literature defining key concepts such as 'possession' and 'occupation' assisted in interpreting the legal right to possession, and the factual ability to occupy, as two distinct yet interrelated elements of the vacant possession obligation. Possession is a term with varying meanings but, in the context of vacant possession, it has been shown to refer to both legal (*de jure*) and factual (*de facto*) possession. The legal possession manifest in the obligation relates to the passing of the right to occupy an estate in land that is vested in possession (i.e. not in interest or reversion). The factual element has been shown to relate to actual occupation of the estate transferred at the point of completion. Vacant possession is therefore not concerned with notions of constructive possession or deemed possession, by virtue of the receipt of rents and profits. The exclusion in the

review of the development of the rights afforded to people in actual occupation over time.

Land Registration Act 2002, of a person in receipts of rents and profits from the definition of persons who may be able to claim an overriding interest, reflects the principle that only interests vested in possession, and which are factually apparent, are relevant barriers to the procurement of vacant possession. This is consistent with the two dimensional nature of the obligation to give vacant possession, proposed in this chapter. It is also fundamental to an appreciation of the concept of vacant possession in the wider context of scholarly literature on possession in English law, and its place in those legal transactions where it is an essential element. This new definition of vacant possession supplements existing understandings of 'possession' in other and alternative manifestations of the term. Chapter 8 further develops this understanding of vacant possession, in the wider theoretical framework of possession, with reference to other possession-type concepts, those of actual occupation and adverse possession.

This understanding of the legal and factual dimensions to the obligation can now be applied, in the following chapter, to cases concerning so-called 'legal obstacles' to the receipt of vacant possession. As noted in chapter 1, so called legal obstacles do not relate to physical items or persons, but impediments of a legal nature (such as the requisitioning of a property for government purposes, or compulsory purchase orders).[98] It is in this context that the analysis can be applied to explain why the law appears inconsistent. This further supports the proposition that the constituent elements of vacant possession comprise both the right to possession (pursuant to the transfer of an estate vested in possession) and the factual enjoyment of that estate on completion or at the operative date, and how understanding of these is a prerequisite to an understanding of case law pertaining to the obligation.

[98] See *Topfell,* above n38; Re *Winslow Hall Estate Company v United Glass Bottle Manufacturers Ltd* [1941] Ch 503; *Hillingdon Estates Co v Stonefield Estates Ltd* [1952] Ch. 627; E *Johnson & Co (Barbados) Ltd v NSR Ltd* [1997] AC 400; *James Macara, Ltd v Barclay* [1945] K. B. 148; *Cook v Taylor* [1942] Ch 349 and *Korogluyan v Matheou* [1975] 239 E.G. 649.

Chapter 6

The Nature of the Obligation – Legal Obstacles

Chapter 5 analysed the legal and factual elements of the obligation to give vacant possession in order to provide further understanding of the nature of the obligation. Possession is a term with varying meanings but, in the context of vacant possession, it was shown to refer to both legal and factual possession. The legal possession manifest in the obligation relates to the passing of an estate in land that is vested in possession (i.e. not in 'interest' or in 'reversion'). The factual element was shown to relate to actual occupation of the estate transferred at the point of completion.

This understanding of the legal and factual dimensions to the obligation can now be applied to cases concerning so-called 'legal obstacles' to the receipt of vacant possession. As noted in chapter 1, so-called legal obstacles relate to impediments of a legal nature (such as the requisitioning of a property for government purposes, or compulsory purchase orders).[1] It is in this context that the model of vacant possession expounded in the previous chapter can be used to explain why the relevant cases otherwise appear inconsistent. Whilst the obligation is interpreted in the wider context of the transaction more generally, it is suggested that this is another area in which case law demonstrates that the concept has not been coherently developed. Analysis of these cases, based on the model proposed in the previous chapter, further supports the proposition that the constituent elements of vacant possession comprise both the right to possession (pursuant to the transfer of an estate vested in possession) and the factual enjoyment of that estate on completion (or at the operative date). They also demonstrate how invocation of such a model is essential in order to articulate the meaning of vacant possession in any given case.

[1] See *Topfell Ltd v Galley Properties Ltd* [1979] 1 W.L.R. 446; Re *Winslow Hall Estate Company v United Glass Bottle Manufacturers Ltd* [1941] Ch 503; *Hillingdon Estates Co v Stonefield Estates Ltd* [1952] Ch. 627; E *Johnson*

What are legal obstacles?

Examples of legal obstacles which prevent the delivery of vacant possession on completion include the transfer of a strip of land subject to dedication as a public highway,[2] on the basis that the highway authority has the right to possession of the surface (although not owner of the sub-soil); or a property (with an existing first floor tenancy) being sold with 'vacant possession of the ground floor', but with a Housing Act notice limiting occupation of the whole house to one household.[3]

In *Weir v Area Estates Limited,*[4] the claimant contracted to purchase freehold property with vacant possession (having successfully bid for it at auction). The register of title to the freehold estate included an entry of a nine year lease of the property granted in 2004. The lease had purportedly been surrendered by the tenant in 2006, but notice of the lease had not been removed from the register. In the sale contract, the seller expressly contracted to give vacant possession, and other terms stated that the lease, whilst still referred to on the register, had been determined by operation of law, and that the buyer would:

> "accept the position and shall not be entitled to require any further proof of the determination."[5]

At the time of the purported surrender of the lease, a petition in bankruptcy had been presented against the tenant who was subsequently declared bankrupt. As such, the lease was held not to have been validly surrendered pursuant to section 284 of the Insolvency Act 1986, which renders void any disposition of property by a bankrupt in the period beginning with the day upon which the bankruptcy petition is presented at court and ending on the statutory vesting of the bankrupt's estate in the trustee in bankruptcy.

The court granted summary judgment to the purchaser to rescind the contract, and dismissed the seller's counterclaim for damages (given it had subsequently sold the

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& Co (Barbados) Ltd v NSR Ltd [1997] AC 400; *James Macara, Ltd v Barclay* [1945] K. B. 148; *Cook v Taylor* [1942] Ch 349 and *Korogluyan v Matheou* [1975] 239 E.G. 649.

[2] *Secretary of State for the Environment v Baylis and Bennett* [2000] 80 P. &C.R. 324.

[3] *Topfell Ltd,* above n1.

[4] [2009] All ER (D) 189 (Dec).

[5] Ibid, 192.

property to a third party for a lower price than had been bid by the purchaser at auction). As the seller had contracted to sell with vacant possession, the seller could not convey the property with vacant possession until the lease had been validly surrendered or disclaimed by the tenant's trustee in bankruptcy. As this had not taken place, and the lease was held to still be in existence at completion, the seller was accordingly in breach.[6]

Whilst these cases provide clear examples of legal impediments to vacant possession, other cases have provided an inconsistent picture as to whether vacant possession can be, and is, given at the relevant time, with respect to orders to requisition a property or the service of notices of compulsory purchase. Decisions which appear inherently contradictory can, however, be explained when analysed on the basis of an interpretation of the obligation to give vacant possession as involving a factual and legal dimension, as proposed in the previous chapter.

The following discussion demonstrates that where the acquiring authority had actually taken factual possession, or had the legal right to possession vested in them (legal possession), at the date fixed by the parties for completion, the vendor was held to be unable to give vacant possession; the legal right to possession and the factual ability to occupy pursuant to that right (the elements of the obligation to give vacant possession) no longer both being vested in the vendor, and therefore no longer capable of being passed from the vendor to the purchaser. The decisions (such as those set in war time and when the government required land for a specific public purpose), also show the courts taking account of the wider context of the relevant circumstances when interpreting the obligation to give vacant possession, confirming the inherently fact specific nature of the obligation that was also highlighted in the previous chapter.

[6] The decision appears to have turned on particular insolvency provisions and their interpretation, and may well be appealed on the basis that a surrender of the lease had been validly effected. The effect of the decision, however, is to correctly confirm that a subsisting legal estate or interest will be a legal barrier to the receipt of vacant possession, as expressly contracted for, on completion.

Requisitioning of properties

A small collection of cases concern the government requisitioning of properties under provisions of the Defence (General) Regulations 1939; the common set of circumstances to these cases being that the parties had entered into written agreements for sale and purchase of a property that became subject to a requisitioning notice before completion. In war time it was necessary for properties to be requisitioned for defence-related purposes and obviously important that the government was given vacant possession pursuant to the requisitioning notice. This was in order for the property to immediately be put to official use. Some cases are clear that a requisitioning notice will *not* create an encumbrance on the land so as to prevent a seller from giving vacant possession to the purchaser. Conversely, other cases suggest that such requisitioning *will* prevent the seller from delivering vacant possession to the purchaser at the material time pursuant to the contract for sale.[7]

In *Re Winslow Hall Estate Company v United Glass Bottle Manufacturers Ltd,*[8] a contract for the sale of land had been entered into between the parties. Following the contract, but before completion, notice was given on behalf of the government to the purchasers that it intended to requisition the land under the Defence (General) Regulations. Regulation 51, made under the provisions of the Emergency Powers (Defence) Acts 1939 and 1940, provided that:

> "A competent authority, if it appears to that authority to be necessary or expedient so to do in the interests of the public safety, the defence of the realm or the efficient prosecution of the war, or for maintaining supplies and services essential to the life of the community, may take possession of any land, and may give such directions as appear to the competent authority to be necessary or expedient in connection with the taking of possession of that land."[9]

The purchasers took out a vendor and purchaser summons under section 49 of the Law of Property Act 1925, seeking rescission of the contract. They asked for a declaration that the vendors were unable to show a good title to the premises or to perform their part of the contract because they had impliedly contracted, or were estopped from denying

[7] The effect of this for the requisitioning authority is expounded in the detailed analysis that follows.
[8] Above, n1.
[9] Regulation 51, Emergency Powers (Defence) Acts 1939 and 1940.

that they had contracted, to give vacant possession and could not do so as a result of the notice. Alternatively, it was claimed that the sellers had impliedly contracted to convey free from any incumbrance not mentioned in the contract and were now unable to do so. The 'giving' of the requisition notice was held *not* to create an encumbrance on the land. Bennett J. observed that, in the context of the regulation which he was considering, there was no requirement for the giving of a notice. He explained:

> "There is no provision in the Emergency Powers (Defence) Acts 1939 and 1940, and there is no provision in the regulations to which I have been referred which makes it incumbent upon the Office of Works, or upon any other competent authority, to exercise the powers which reg 51 gives them to give notice of their intention so to do to persons whose property they propose to take under the provisions of the regulation. It seems to me really a polite intimation on the part of the government that they propose to act, and it does not, in my judgment, create any greater incumbrance upon the land of the purchasers which it is proposed to take under this regulation. Anybody's land in Great Britain to-day is liable to be taken under the provisions of this regulation. In my judgment, it is not possible to hold that the notice of 25 January created an incumbrance so as to prevent the vendors from performing the contract into which they had entered."[10]

Further, at the date that was set for completion, the government had *not* actually *taken* possession of the land, and as such it was held that the vendors were able to give vacant possession to the purchaser (who would then, themselves, lose the land when the government later took possession pursuant to the notice that was binding on the property). However, the court held that:

> "I am not going to decide what the position of the parties would have been if possession *had* been taken *before* the date fixed for completion or before the vendors were in a position to complete, since it appears from the evidence that on February 3, 1941, the vendors *were* in a position to hand to the purchasers a properly executed conveyance and to give them vacant possession of the property which they had contracted to sell."[11]

[10] [1941] 3 All ER 124, *per* Bennett J. at 127.
[11] Ibid, *per* Bennett J. at 131. Emphasis added.

Clearly, therefore, the judge did not consider that service of the notice *itself* prevented the sellers from giving vacant possession on completion, and the fact that the government had *not* actually taken possession before completion seemed material in providing that vacant possession could be given on completion as between vendor and purchaser. However, the judge seemed to suggest that if possession had been taken by the government *before* completion, then different considerations would have applied.

The case of *Cook v Taylor*[12] dealt with the effect of a requisitioning notice under the same defence regulations. Simonds J. reached the conclusion that, a notice having been served, the appropriate government authority had in fact 'entered into possession', because there had been what he described as the "symbolic handing over of the keys of the property" in question.[13] He referred to the decision of Bennett J. in *Re Winslow Hall Estates*, and drew a distinction between that case and the case before him, holding that on the date fixed for completion in this case the vendor was not in a position to complete because the parting with the keys of the property was, as he put it, equivalent to symbolic delivery of the property to the requisitioning authority:

> "In the first place it was said that the requisition notice and what took place before...the date fixed for completion...did not preclude actual possession from being given. I do not take that view. It seems to me that, from the moment when the requisitioning authority served the notice *and took the keys from the vendor*, the vendor was *not* in a position to give vacant possession and was *not* in a position to allow the purchaser to enter on the property. It does not appear to me to be material whether it was before or after February 25 that occupation was actually taken by those persons who ultimately became the occupants."[14]

The judge distinguished between the similar case of *Re Winslow Hall Estates* with respect to the taking of possession:

> "On that part of the case I refer to the decision of Bennett J. in *re Winslow Hall Estates,* the facts of which were not very dissimilar but differ in one vital point.... the government had *not* taken possession of the land. In the report there is no reference to any taking possession of the land until occupation was taken by the persons concerned... The vital difference between that case and this, as it appears to me, is that here, as I hold, on the date fixed for completion the vendor was not in a position to do that which he had contracted to do and

[12] Above, n1.
[13] Ibid, 352.
[14] Ibid, 352. Emphasis added.

> give vacant possession to the purchaser, for he had already, pursuant to a proper requisition, *parted with the keys of the property*, which is equivalent to symbolical delivery of the property to the requisitioning authority. From that moment he could *not* give vacant possession to the purchaser."[15]

Clearly, the service of the requisition notice under regulation 51(1), followed by the handing over of the keys to the acquiring authority between the contract date and the completion date, was held to have deprived the vendor of the ability to give vacant possession on the latter date, given that possession was no longer vested in the vendor. Other authorities, however, suggest that from the moment when the requisition notice was served on the vendor it was not in a position to give vacant possession; that is, the notice *itself* prevented the giving of vacant possession.

Indeed, a third case dealing with the same regulations is the Court of Appeal decision in *James Macara Ltd v Barclay,*[16] where the defendant agreed to sell certain property to the plaintiffs. Vacant possession was to be given on completion. Following exchange, but before completion, a government department, as the competent authority under the same Defence (General) Regulations 1939, served the defendant with a notice requisitioning the property. The defendant's solicitors sent a copy of the requisition notice to the plaintiffs; and the plaintiffs subsequently gave notice to the defendant that they rescinded the contract on the ground of the defendant's inability to give vacant possession.[17] The defendant disputed this and contended that the requisition notice did not, upon its true construction, amount to an exercise of the power to enter into possession under the regulations, and, in fact, no actual entry had been made. Uthwatt J., giving the only judgment of the Court of Appeal, observed that actual entry on the land was not necessary for the due exercise of the power to take possession under the regulations, and stated:

> "What is required is that the immediate interest—an interest in possession—entitling the Crown to control of the land should be at the disposition of the Crown...the power to take possession has been effectively exercised, although de facto possession has not been obtained. If actual entry be not necessary, there can, we think, be no doubt that the power is effectively exercised *by notice* which fairly brings to the mind of the person affected that the power is

[15] Ibid, 352. Emphasis added.
[16] Above, n1.
[17] Ibid, 149.

being exercised. A present intention stated to be exercised and communicated to the persons concerned is sufficient."[18]

Whilst the cases of *Re Winslow Hall Estates* and *Cook v Taylor* were referred to in argument, they were not discussed in the single judgment delivered by Uthwatt J. Clearly, on the construction of the regulation in question, the Court of Appeal came to the conclusion that whilst actual entry (i.e. taking factual possession) would no doubt be one way of establishing possession and effecting the right conveyed by the regulation, such an actual entry on the land was *not* necessary for the exercise of the power. This was because there was not any *particular* provision, so far as the regulation was concerned, which would determine the way in which the power to take possession might be exercised. The first instance decision was therefore affirmed. This clearly established that the service of the notice *itself* conferred the legal right of possession on the Crown, meaning that vacant possession could not be given as between seller and purchaser thereafter. On this basis, the decision in *Re Winslow Hall Estates* must be seen as overruled because whilst the judge did not consider that he needed to decide what the position of the parties would have been if possession *had* been taken before the date fixed for completion in that case, on the basis that the right to possession was transferred when the notice was served (and not when actual possession was later taken) he should have considered that very question, and ruled that vacant possession could not be given on completion, given that the government could be treated as having 'entered into possession' pursuant to the prior service of the notice *itself.*

It is apparent that differing judges' interpretations of the defence regulations determined the decisions that were arrived at, and further, that this was based on the effect of the regulations in transferring possession to the acquiring authority (as is discussed in more detail below). The judges in each of the three cases sought to address the issue of whether the acquiring authority had actually taken factual possession, or had the legal right to possession, at the date fixed by the parties for completion. All the decisions clearly demonstrated that where the acquiring authority had actually taken factual possession, or had the legal right to possession, at the date fixed by the parties for completion, the vendor was held unable to give vacant possession; the legal right to possession and the factual ability to occupy pursuant to that right (the essential elements

[18] Ibid, *per* Uthwatt J. at 154.

of the obligation) no longer being vested in the vendor. A clearer articulation of the nature and form of the two constituent elements of vacant possession therefore assists in understanding what otherwise appear to be irreconcilable decisions. Without demarcating the legal and factual elements, the decisions prove incapable of explanation.

A purposive interpretation of the regulations, reflecting the (then) war time situation, and need for the government's efforts not to be hindered, may also be inferred from the cases. Whilst none of the decisions specifically dealt with the meaning of the term, universal to all the decisions is the fact that the government was at no time hindered in achieving its objectives by any of the decisions reached. In *Re Winslow Hall*[19] it was held that the government had not actually taken possession of the land at the completion date, and as such it was held that the sellers were able to give vacant possession to the purchaser: that is, the decision did not adversely affect the governments' objectives. In *Cook v Taylor* [20] Simonds J. reached the conclusion that vacant possession could not be given on completion. He drew an (arguably artificial) distinction between the case before him and the decision of Bennett J. in *Re Winslow Hall Estates*, holding that on the date fixed for completion in the case before him, the vendor was not in a position to complete because the parting with the keys of the property was, as he put it, equivalent to 'symbolic delivery' of the property to the requisitioning authority. This enabled the government to take up occupation as was required, notwithstanding that factual possession had not actually been taken. In *James Macara Ltd v Barclay*,[21] Uthwatt J. observed that actual entry on the land was not necessary for the due exercise of the power to take possession under the regulations.[22] It was held that a "present intention stated to be exercised and communicated to the persons concerned" was sufficient,[23] and that service of the notice *itself* (rather than later acts undertaken) achieved this, thus reflecting the government's need for an immediate interest in possession, notwithstanding that it hadn't actually undertaken any subsequent acts consistent with the taking of possession. These observations perhaps reflect a contemporaneous interpretation of the obligation in the context of the specific circumstances during the

[19] Above, n1.
[20] Above, n1.
[21] Above, n1.
[22] Ibid, *per* Uthwatt J. at 154.
[23] Ibid.

war time period, and the overriding need for the government to have possession pursuant to the regulations in these cases. This was reinforced when the decision of Bennett J. in *Re Winslow Hall Estates* was overruled by the Court of Appeal decision in *James Macara Ltd v Barclay.* It is arguable that Bennett J.'s determination as to whether possession had been taken up was more policy-driven than doctrinal, given the circumstances of the case before him and specific government requirements at that time.

Compulsory purchase orders

Cases relating to compulsory purchase orders also appear, on the surface, to provide an inconsistent account of the meaning and context of the obligation to give vacant possession. When considered in detail, and with reference to the preceding analysis, however, such cases can assist in understanding the obligation to give vacant possession in its factual and legal senses.

A compulsory purchase order allows certain bodies which need to obtain land or property to do so without the consent of the owner. It may be used, for example, when developing infrastructure (e.g. new roads) where a land owner does not wish to dispose of the affected land. In respect of such orders, the authority acquiring the land or property may serve a 'notice to treat', which is an invitation (by the acquiring authority) to negotiate with the owner of the land that the authority wishes to procure. Once the acquiring authority has served the notice to treat, and if private negotiations are not successful, it is entitled to serve a 'notice of entry' which enables the authority to take possession of the land pursuant to the compulsory purchase order.

Where a compulsory purchase order is made over the property between exchange and completion, one question that has arisen is whether the purchaser could claim that the contract has been 'frustrated' and that, as a result, the purchaser is not obliged to complete. In such cases, the obligation to give vacant possession will no longer arise as parties will be discharged from obligations under the contract.

If a contract is made, and for whatever reason it later becomes impossible for one party to perform their obligations, then the doctrine of frustration may apply. The particular

situation in question may have been expressly provided for in the contract, in the context of a *force majeure* clause. Alternatively, an event may take place that was not contemplated by the parties but which renders further performance impossible. Examples include the destruction of the subject matter of the contract,[24] the unavailability of an employee in an employment contract,[25] or a subsequent change in the law or circumstances which makes performance illegal.[26] Most appropriate in the context of vacant possession is the unavailability of the subject matter of the contract (ie the property or land). For example, in *Re Shipton, Anderson & Co* the owner of a specific parcel of wheat in a warehouse contracted to sell it on the terms "payment cash within seven days against transfer order".[27] Before delivery and before the property passed to the buyer the wheat was requisitioned by and delivered to His Majesty's Government under the powers of an Act passed before the date of the contract. It was held that delivery of the wheat by the seller to the buyer had been rendered impossible by the lawful requisition of the product by the Government. As such, the seller was excused from performance of the contract.[28]

When a frustrating event occurs the contract is automatically discharged and the parties are excused from their future obligations. Because no one party is at fault, neither party may claim damages for the other's non-performance.[29] It is for this reason that a party may seek to claim that a contract has been 'frustrated' and that, as a result, the seller is discharged from its obligation to give vacant possession on completion.

In *Korogluyan v Matheou*[30] the question to be decided was whether notices served pursuant to the provisions of section 11 of the Compulsory Purchase Act 1965, stating that the acquiring authority would be 'entering upon the land', meant that it was no longer possible for the seller to give vacant possession. It was held that although still in

[24] *Taylor v Caldwell* (1863) 3 B&S 826.
[25] *Condor v The Barron* Knights [1966] 1 WLR 87 and *Hare v Murphy Bros* [1974] I.C.R. 603.
[26] *Denny Mott & Dickson Ltd v James B Fraser & Co Ltd* [1944] A.C. 265 and *Ibrosa v Fairbairn* [1943] AC 32.
[27] [1915] 3 KB 676.
[28] See also *Bank Line Ltd v Arthur Capel & Co* [1919] A.C. 435.
[29] The general rule is that the 'loss lies where it falls' so no claim can be made for the value of a partially completed contract. See *Appleby v Myers* (1867) LR 2 CP 651.
[30] [1975] 30 P. & C.R. 309.

possession, the seller was unable to give vacant possession on completion in accordance with the contract.[31] Whitford J said:

> "...the word 'possession' should be considered in what might perhaps be described as its *popular rather than its technical sense*, and that if one considers the position of a person buying a property of this kind and buying it upon this basis, that they are expecting to get vacant possession when the purchase is completed, it would really be distorting language to suggest that if it was being sold to them in circumstances where there had been a compulsory purchase order and a notice to treat and a notice to enter, they were in fact getting anything which *could sensibly be described* as vacant possession...Were it not for the fact that I think the defendant's case fails on special condition 9 and general condition 6, I would for my own part have come to the conclusion that in fact at the relevant time the plaintiff was *not* in a position to sell with vacant possession, in the sense in which I think those words ought sensibly to be construed *in the context of the whole transaction.*"[32]

Whist these comments were *obiter*, this decision clearly suggested that the service of the notice prevented the delivery of vacant possession as was contracted for. The language of the judgment suggested that the judge was seeking to apply a common sense analysis to the context of the case, to determine whether what 'could sensibly be described as vacant possession' could be given in such a case (even though no actual definition was provided).

These obiter comments can be shown to conflict with established authorities however, such as *Hillingdon Estates Co v Stonefield Estates Ltd.*[33] In this case the parties agreed to the sale and purchase of certain land. The completion of the transaction was delayed, *inter alia*, by the outbreak of war, and at a time when the contract was still uncompleted, the local County Council made a compulsory purchase order affecting the whole of the property. Notices to treat under the order were served on the vendors and on the purchasers. The purchasers claimed that, on or before the date of the service of the notices to treat, they were discharged from their contract to purchase the property alleging that they had entered into the contract on the footing that they would be able to develop the land after completion.[34] This would not be possible if the property was compulsorily purchased. They therefore claimed a declaration that they were discharged

[31] Even though the purchaser was deprived of damages by certain conditions of sale.
[32] Above, n30, *per* Whitford J. at 311. Emphasis added.
[33] Above, n1.
[34] Ibid, 627.

from liability under the contract and entitled to the return of interest on the deposit paid. Vaisey J. did not regard the service of the notice to treat as a frustrating event. He said:

> "I cannot hold that the contract here has been frustrated fundamentally, or indeed, at all. The purchasers in this case are certainly no worse off than they would have been if they had completed their contract in a period rather less than 12 years from the time when they agreed to complete it. Had they completed the contract without the delay of 12 years, quite clearly the compulsory purchase order would have affected them. However that may be, I have to consider the matter as I find it; and taking into consideration the long delay which has taken place, I still think that the contract, so far from being frustrated, can and should be carried out."[35]

The court held that the purchasers were treated as owners in equity as soon as a binding contract was made. The service of a notice to treat did not affect the vendors given that their interest was to receive the purchase money; it followed that the risk of compulsory purchase properly fell on the purchasers, who were not entitled to rescind because of a future incumbrance. The incumbrance was therefore *not* a frustrating event as far as the contract was concerned. Vacant possession *could* be given in accordance with the contract, even though this was not the substantive issue in the case which came before the court.

The same decision was reached in *E Johnson & Co (Barbados) Ltd v NSR Ltd,*[36] a decision of the Privy Council, in which the court held that the publication of a notice under section 3 of the Land Acquisition Act (Barbados),[36(a)] warning that land under the contract of sale was likely to be required for Crown purposes, did not frustrate the contract. It was held that it was to be presumed, in the absence of specific provision to the contrary, that the purchaser had agreed to accept the normal risks incidental to land ownership as from the date of the contract, including the risk of interference with land-owning rights by the Crown. Their Lordships referred to *Re Hillington Estates* where Vaisey J., in the context of a notice to treat served by an acquiring authority after exchange of contracts but before completion, had remarked:

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[35] Ibid, *per* Vaisey J. at 631.
[36] Above, n1.
[36(a)] The specific year of the Act was not referred to in the judgment or case reports.

> "No doubt these departmental interferences and interventions do make a very great difference to ordinary life in this country, but that does not mean that, whenever such interference or intervention takes place, parties are discharged from bargains solemnly entered into between them. In my judgment, it is the duty of the parties, in such a case as this, to carry out their obligations; and I cannot see that there is in this case any reason at all for supposing that there is either an implied term of this contract that it should be frustrated in the event which has happened, or that there has been such a destruction of the fundamental and underlying circumstances on which the contract is based as to justify my saying that the contract did not exist, or ceased to exist at the date when the notice to treat was served..."[37]

Their Lordships considered that these observations were equally applicable to the position in this case after the publication of the section 3 notice.[38] They also referred to the case of *Amalgamated Investment & Property Co. Ltd v John Walker & Sons Ltd,*[39] where a building was entered in the statutory list of buildings of special architectural or historical interest a few days after the date of a contract for its sale. The listing had the effect of dramatically reducing its market value.[40] The Court of Appeal held that the risk of a building being listed was one that every owner and purchaser must recognise that he is subject to with the result that the contract was not frustrated. The judges considered that a section 3 notice could not amount to a frustrating event on the same basis.[41] What is most salient in the decision is that, in holding that the notice did not amount to a frustrating event, it was held that the limited powers accruing to the Crown pursuant to the issue of a section 3 notice did not extend to a right to *immediate possession:*

> "The crucial question was whether the possession which [the vendor] had been in a position to give on the date for completion was something other than vacant possession within the meaning of the contract. If the acquiring authority had the right to *immediate possession* at completion date, then the vendor could not then give vacant possession, but a section 3 notice did not give the Crown

[37] Above, n1, *per* Vaisey J. at 634.
[38] The abolition of the equitable doctrine of conversion by section 213 of the Property Act 1979 did not discredit the reasoning in *Hillingdon Estates Co. v Stonefield Estates Ltd* [1952] Ch. 627. Land which is subject to a contract, at the time of the decision, devolved to those entitled to realty rather than to those entitled to personality. As between the parties to a contract the incidence of beneficial ownership and risk continued to be governed by the fundamental principle flowing from the specifically enforceable nature of the contract which allocated equitable ownership and risk to the purchaser on exchange of contracts.
[39] [1977] 1 W.L.R. 164.
[40] Ibid, 164.
[41] Ibid, 164.

> any such right. Johnsons had been in a position to give vacant possession on completion..."[42]

The effect of the notice, in terms of whether it took from the seller the right to possession, was analysed and, because the notice did not give the Crown an 'immediate right' to possession, it did not prevent the owner of the land from being able to give vacant possession on completion. Accordingly, the vendors were in a position to give vacant possession on completion and the purchasers were in breach of contract for refusing to complete.[43] Most saliently, the judgment clarified that the rights of entry and inspection conferred by section 3 of the relevant statute fell well short of the right of possession conferred by a requisition notice under regulation 51 of the Defence (General) Regulations 1939 (such as was found in the decisions in *Re Winslow Hall*, *Cook v Taylor* and *James Macara v Barclay*), or by notice of entry under section 11(1) of the Compulsory Purchase Act 1965. This was because both of these provisions entitled the relevant authority to dispossess the owner of the land (i.e. take possession from them). In this case it was held that the purchasers remained free to enter onto the land and to use it for any purpose, that is, they retained the *right to possession* and ability to occupy pursuant to that right. As such, the obligation to give vacant possession was therefore held to be 'capable of being performed' (i.e. they could pass, *on completion*, legal possession with the immediate ability for the purchaser to factually occupy – the essential elements of the obligation to give vacant possession, as set out in chapter 5). Further, the effect of the notice did not render the procurement of vacant possession something "radically different from that which was undertaken by the contract".[44] The possession that could be transferred was the possession that was contracted for by the purchasers. The judge held that:

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[42] Above, n1 *per* Vaisey J. at 634.
[43] Above, n39.
[44] *Davis Contractors Ltd v Fareham Urban District Council* [1956] A.C. 696, *per* Lord Radcliffe at 729.

> "...a threat of compulsory purchase, and publication of a section 3 notice...does not radically alter the nature of the contract of sale. What it does is simply to increase the likelihood of an existing albeit remote risk becoming an eventuality."[45]

This demonstrated an appreciation by the judge that the context of the transaction was relevant to the court's interpretation of what the obligation to give vacant possession meant, although this was not explicitly discussed. The determinative point from this case was that the issue of a section 3 notice did not extend to a right to 'immediate possession' so as to prevent the owner of the land from being able to give vacant possession to a purchaser *on completion.* This was the crucial finding; the fact that the property may ultimately have been compulsorily purchased (pursuant to notice) *after* completion, was irrelevant to whether the seller had possession (in law) and could factually occupy pursuant to that right *on completion.* Barriers to vacant possession which occur after that date are not relevant, thus supporting the timing element to the factual part of the obligation as proposed in the previous chapter.

As such, the decision in *E Johnson & Co* casts doubt on the obiter comments of Whitford J. in *Korogluyan v Matheou* which suggested that the service of a notice under section 11 of the Compulsory Purchase Act 1965 would prevent vacant possession being given, even though the seller remained in possession himself at the material time.[46] These comments can be seen as incorrect given that they failed to properly consider whether the effect of the notice was to deprive the seller of legal or *de facto* possession of the estate (the constituent elements of the obligation to give vacant possession) at the point of completion. The learned judge's failure to properly consider the legal and factual dimensions to the obligation was reinforced by Lord Jauncey's remarks in *E Johnson & Co* on *Korogluyan v Matheou,* where he stated that:

> "whether [the] views [expressed in *Korogluyan v Matheou*] were right or wrong they threw no light on the effect of the notice in the case before [the

[45] Ibid, 729.

[46] See above, n30, *per* Whitford J. at 317 where it was held that "were it not for the fact that I think the defendant's case fails on special condition 9 and general condition 6, I would for my own part have come to the conclusion that in fact at the relevant time the plaintiff was not in a position to sell with vacant possession, in the sense in which I think those words ought sensibly to be construed in the context of the whole transaction".

> judge], since it gave the Crown no right to *immediate possession* before *or by the time fixed for completion.*"[47]

Clearly, in *E Johnson & Co* Lord Jauncey accepted that the judgment in *Korogluyan v Matheou* failed to address what this chapter has identified as the central issues relevant to whether the legal right to possession, and ability to factually occupy pursuant to that right, had passed to the requisitioning authority pursuant to the notice.[48] Only a detailed analysis of the constituent elements of vacant possession can explain why the decision reached was incorrect; this follows from an understanding of the meaning of 'possession' in the context of the term 'vacant possession'.

In all the cases discussed in this chapter, the debate centred around whether the rights conferred on the acquiring authority by the relevant notice included the right to possession (rendering the obligation to give vacant possession as between seller and purchaser as being 'incapable of being performed') or whether the notice did no such thing, leaving the vendor/owner free to enjoy the land and pass the right to vacant possession in accordance with the contract. These decisions which, on the surface, appear inconsistent, can therefore be understood from a more informed analysis of the constituent elements of the obligation to give vacant possession. Where the rights of entry and inspection conferred by section 3 of the Land Acquisition Act (Barbados) fell well short of the right of possession conferred by a requisition notice under regulation 51 of the Defence (General) Regulations 1939, or by notice of entry under section 11(1) of the Compulsory Purchase Act 1965 (both of which entitle the relevant authority to dispossess the owner of the land), and rather the purchasers remained free to enter onto the land and to use it for any purpose, the contract was capable of being performed and vacant possession being given at the material time. This was because the seller still had legal possession of the estate to pass, and the purchaser could take factual possession at the point of completion pursuant to the transfer of that legal right.

As such, the obstacle posed by the service of legal notices goes to the heart of the constituent elements of the obligation, in terms of the effect of the service of the notice or subsequent actions (e.g. handing over of keys) in taking from the seller the legal right

[47] See above, n35, *per* Vaisey J. at 631. Emphasis added.
[48] As found in the *Sheikh* decision, when both elements are not properly considered, a perverse decision is arrived at.

of possession and the factual ability to occupy the estate, which the buyer is immediately entitled to on completion. The character of the contract (in terms of the vacant possession that the purchaser contracted to acquire) changes when the right to possession and ability to exercise that right can no longer be passed because of a legal obstacle preventing the delivery of either of these constituent elements of vacant possession on completion (or at the relevant time).

Conclusion

When an analysis of the constituent elements of vacant possession, as proposed by chapter 5, is applied to cases concerning so-called 'legal obstacles' to vacant possession, these apparently conflicting decisions and inconsistencies can be better understood. The relevant determination in cases concerning compulsory purchases and requisitioning notices was whether the notice (or subsequent acts pursuant to that notice) passed the right to possession, and ability to occupy pursuant to that right (the essential elements of the obligation to give vacant possession), to the requisitioning authority. Where it did, vacant possession (as between seller and purchaser) could not be given. Again, understanding the two essential elements to the obligation explained the decisions reached and reasoning for the respective judgments, thus supporting the model proposed by the previous chapter.

The judgments analysed were also shown to be highly contextually specific. A contemporary interpretation of the obligation in the context of the specific circumstances during the war time period, and the overriding need for the government to have possession pursuant to the regulations, was reflected in the differing decisions that were reached (and in the case of *Korogluyan v Matheou*, reached incorrectly, even though the desired outcome was still arrived at by virtue of other conditions of the contract that the judge placed reliance upon).[49] Universal to all such decisions is the fact that the government at no time was hindered in achieving its objectives by any of the decisions concerning the procurement of vacant possession. This again re-affirmed that beyond the core, objective elements, there is an inherently fact specific element to

[49] Indeed, as discussed in chapter 3, it can be argued that reliance on the 'other conditions' of the contract was itself incorrect. The fact that the judge allowed these to be used further reinforces how the judge sought to achieve the particular outcome desired in the case before him, given the relevant circumstances in issue.

the obligation to give vacant possession which enables the obligation to be interpreted in the context of the more general circumstances of the contract, and further reflects the practical dimension of the obligation.[50] This fact-specific element does, of course, make a detailed or overarching 'definition' of the term harder to achieve.

With an understanding as to the dual nature of the obligation (as factual and legal) having been acquired, and then tested and applied to explain otherwise contradictory decisions, the next step is to further analyse the obligation in terms of which obstacles do, and do not, interfere with one's ability to immediately occupy the estate in land on completion, pursuant to the right to possession that has been passed. As will be seen, case law has developed bespoke tests to determine whether possession is impeded by any given obstacle, but these seem to be largely determined as questions of fact in each case. This supports the fact sensitive nature of the obligation that has been highlighted in this chapter. However, the courts have not clarified the scope and extent of the obligation, and whether the state and condition of the property, and legal interests falling short of interests in possession, can be a barrier to vacant possession in the same terms as tangible impediments (such as chattels) can be. The next chapters address these issues.

[50] See *Topfell Ltd*, above n1, *per* Templeman J.

Chapter 7

Breaching the Obligation to give Vacant Possession

The constituent elements of the obligation to give vacant possession were set out in chapter 5. A discussion of conflicting case law relating to unlawful occupation assisted in defining the obligation to give vacant possession as concerning both the legal right to possession, and the ability for the right holder to actually occupy the land (in a factual sense at the point of completion). A review of literature defining key concepts such as possession and occupation assisted in interpreting the legal right to possession (*de jure*), and the factual ability to occupy (*de facto*), as two distinct yet interrelated elements of the vacant possession obligation. When this analysis was then applied to cases concerning so-called legal obstacles to vacant possession (in chapter 6), this definition helped delineate an understanding of what were apparently conflicting decisions and inconsistencies in the vacant possession case law. It was thereby highlighted that only a conceptual analysis of the obligation could assist in understanding what appeared to be otherwise contradictory decisions; as previously, whilst the inconsistencies had been alluded to, no explanation had been provided as to how they could be accounted for.

This chapter seeks to further develop understanding with reference to what may constitute a breach of the obligation. Whilst the obligation must have legal and factual dimensions, as discussed in chapter 5, it is necessary to evaluate in more detail what will amount to a breach of the factual element of the obligation at the point of completion. This is because whether there has been a breach of the obligation will be fundamental in determining the rights and corresponding responsibilities of the parties in question.

This chapter firstly highlights the issues of risk and responsibility which are engaged in such cases; this demonstrates why determinations as to breach are so important. It then proceeds to explain the tests that case law has developed to determine whether a breach of the obligation has occurred, and contrasts the obligation with other 'possession-type' concepts (actual occupation and adverse possession) which exhibit similar context specific requirements. The comparisons also reflect how policy decisions manifest in

recent legislation have a bearing on the outcomes for the parties involved, and how a contractual 'definition' of vacant possession, and enhanced contractual provisions relating to remedies, could potentially rebalance risks and responsibility between the parties in similar terms.

Risks and responsibilities

Given that vacant possession arises on the majority of land transactions in England and Wales, the sheer scale on which the obligation is engaged causes the term to be relevant to a wide range of people.[1] These include sellers and purchasers, landlords and tenants and third party occupiers both on residential and commercial transactions. As such, in determining whether a breach of the obligation to give vacant possession has occurred, it is essential to be mindful of the issues of risk and responsibility that are at play for the various parties in question on each occasion.

In the commercial world the ways that risks will fall on different parties is often influenced by considerations of policy, convention or efficiency. As has been noted in previous chapters, in various circumstances the law has made determinations as to who was responsible for the non-procurement of vacant possession, and with whom the risk of failing to pass vacant possession should rest. On the sale of a residential property, a seller will be keen to ensure that vacant possession is provided; otherwise the buyer may refuse to complete the purchase. In turn, this will be a matter of concern for a seller who may have exchanged and be seeking completion themselves on the related purchase of a new property which he or she will not be able to effect until the sale of their current property has completed. On the purchase of the new property the seller (as buyer in respect of that purchase) could lose their deposit if they are unable to complete on time because the sale of their property has not taken place, causing them not to have the funds required to complete their purchase.[2] If the buyer does complete, only to find that vacant possession has not been given, this would leave the buyer entitled to damages as

[1] Shaw, K. 'Fit to be occupied' (2007) 27 Jan 2007 *Estates Gazette* 182; Shaw, K. 'More to it than meets the eye' (2010) 1 May 2010 *Estates Gazette* 4 and Shaw, K. 'All that you can't leave behind' (2010) 256 *Property Law Journal* 6; and the discussion in chapter 1.

[2] For a discussion of the return of deposits see Bowes, C. and Shaw K. 'Can I have my money back?' (2008) 204 *Property Law Journal* 2.

a consequence of the seller's default. Such damages could be quite significant and pose a financial burden on the seller.

As noted in chapter 1, the difficulties caused by failing to give vacant possession can be even more onerous in the commercial context. A buyer may be a commercial organisation requiring immediate un-incumbered possession on completion in order to ensure business continuity from their previous premises. The risks of not being able to immediately occupy a given premises can therefore be very serious in both a residential and commercial context. The non-procurement of vacant possession poses risks for both parties, even though the legal responsibility for giving vacant possession rests with the seller pursuant to the terms of a standard sale and purchase contract.

The most common situation in which vacant possession is relevant in the commercial context is with respect to the grant and termination of business leases over properties. It is common for a tenant to wish to bring their lease to an end before its contractual expiry by exercise of a break option, which allows the term of the lease to come to an end sooner.[3] Clearly, when exercising a tenant's break option in a lease, it is the tenant who must take ownership of the risk and responsibility for compliance with any applicable pre-conditions (including, most notably, vacant possession). It must be noted, however, that there is also risk for the landlord if it has sourced an alternative tenant to take a new lease of the property following the break, only to then find that the tenant does not so comply, causing the lease to continue. Whilst the parties could agree to surrender the lease by mutual consent, the landlord would not be able to force the tenant to vacate if the lease were to continue due to non-compliance with break conditions.[4]

Vacant possession is also relevant to the return of possession when a lease comes to an end by effluxion of time (and no statutory or common law rights to remain in the property are engaged). It is common for landlords to advance claims for damages when a tenant does not vacate by the contractual termination date in a lease and this causes loss or inconvenience. Here, whilst the responsibility (and liability) rests with the

[3] See Martin, J. 'Tenant's Break Options' (2003) 153 *New Law Journal* 759 where the requirement to give vacant possession when operating a break option in a lease is discussed.
[4] See Bowes, C. and Shaw K. 'Time's up...but I'm staying!' (2008) 218 *Property Law Journal* 9 and Bowes, C. and Shaw K. 'Reneging on the deal' (2009) 222 *Property Law Journal* 13 for a discussion of issues relevant to remaining in possession of property and the non performance of obligations in legal agreements.

tenant, there is risk for both parties in securing possession and any related implications. The landlord may be unable to grant a new lease of the premises as desired given that the new tenant would be unable to take up immediate occupation.

Vacant possession is therefore key to the majority of land transactions in a residential and commercial context. Appreciation of the issues of risk and responsibility are essential in any determination as to whether the obligation has been complied with, or whether a breach has arisen, as any determination will have a real impact on the parties subject to the transaction. This chapter, in seeking to explain what will amount to a breach of the obligation to give vacant possession, highlights how the balance of risk can be seen to lie on the respective parties in a given situation in the legal system of England and Wales, and who the law treats as being responsible in any particular instance. This is then drawn upon in chapters 9 and 10 where a contractual description of vacant possession, and improved remedies for breach, are proposed. Given the unfair burden that is shown to be placed upon purchasers in standard sale and purchase transactions at this time, these proposals seek to redress the balance of risk and responsibility and allocate it more evenly between the parties. As will be shown later in this chapter, the law has already sought to balance competing risks and responsibilities through legislation in other cases involving the concepts of possession and occupation; those being actual occupation and adverse possession, and reviewing literature in this area helps to explain how legislation and policy decisions can reallocate risk between the parties.

A breach of the obligation

The most common example of an impediment to vacant possession is when items that should have been removed by the seller or party required to give vacant possession are left at a property on completion. As noted in chapter 2, beer in the cellar,[5] furniture and goods remaining on the premises[6] and other chattels of the party required to give vacant possession[7] have been held to breach the obligation. In each case, leaving the items at the premises was seen to be consistent with the seller keeping possession of the

[5] *Savage v Dent* [1736] 2 Stra 1064.
[6] *Isaacs v Diamond* (1880) WN 75.
[7] *Cumberland Holdings Ltd v Ireland* [1946] KB 264.

premises for their own purposes, and therefore inconsistent with passing vacant possession to the other party. As explained in *Scotland v Solomon*[8] "a vendor who leaves property of his own on the premises cannot...be said to give vacant possession since [this is] inconsistent with the right which the purchaser has on completion to undisturbed enjoyment".[9]

Historically, decisions as to whether an obligation to give vacant possession had been breached generally proceeded on an *ad hoc* basis with respect to the particular case in issue. No general principles were established, either on the face of the cases or in conveyancing manuals or property law texts, to ensure consistency and continuity with respect to differing decisions on (ostensibly) similar facts.[10] For example, in *Savage v Dent*[11] leaving beer in a cellar was held to be consistent with the keeping of possession. The summary to the case provides that:

> "The lessee of a publick house took another, and removed his goods and family, but left beer in the cellar. And there being rent in arrear, the landlord sealed a lease as on a vacant possession, delivered an ejectment, and signed judgment; which was set aside, the lessee still continuing in possession."[12]

It was also noted that the same was true with respect to the 'leaving of hay' in a barn:

> "And a case was mentioned, where leaving hay in a barn at Hendon was held to be keeping possession..."[13]

No reference to the nature or quantity of the left over goods was made. This was also the case in *Isaacs v Diamond*[14] where furniture and goods being left on the premises was held to be contrary to giving vacant possession. Again, no analysis of the size or significance of these items, with respect to the rest of the premises, was undertaken. It was not until 1946, in *Cumberland Consolidated Holdings Ltd v Ireland,*[15] a case concerning rubbish that had been left at a property that was sold, that the court first laid

[8] [2002] EWHC 1886 (Ch).
[9] Ibid, *per* David Kitchin QC at 1887. This follows *Cumberland*, above n7.
[10] For example, see *Savage v Dent*, above n5, and *Isaacs v Diamond*, above n6.
[11] Above, n5.
[12] Ibid, case summary. Judgment not reported.
[13] Ibid.
[14] Above, n6.
[15] Above, n7.

down what could be seen as a 'test' to determine whether vacant possession had been given; that is, a formulation for vacant possession that could then be reapplied in later cases.

Tests for breach

In *Cumberland* the plaintiffs contracted to buy a disused freehold warehouse from the defendants. By a special condition the property was sold 'with vacant possession on completion'. The cellars extending under the whole of the warehouse were made unusable by rubbish including many sacks of cement that had hardened thus making their removability particularly difficult. The defendant refused after completion to remove the rubbish and the plaintiffs brought proceedings for damages for breach of the condition for delivery of the property with vacant possession on completion. It was held that the defendant had failed to give vacant possession of the property sold. It was stated that a vendor who leaves his own chattels on property sold by him to an extent depriving the purchaser of the physical enjoyment of part of the property, failed to give vacant possession.[16] Such acts were consistent with the vendor seeking to continue to use the premises for his own purposes,[17] rather than passing possession to the purchaser in accordance with the terms of the contract. It was further noted that it was no answer for the vendor to claim to have abandoned his or her ownership of the chattels on completion to prevent a breach of the obligation. The court held that a breach of the obligation would occur in cases where there was the existence of a physical impediment, which substantially prevented or interfered with the enjoyment of the right of possession of a substantial part of the property, which the purchaser did not consent to (whether expressly or impliedly).[18]

[16] Ibid, 268.

[17] See also *Norwich Union Life Insurance Society v Preston* [1957] 2 All ER 428 where a mortgagee which had left furniture in the premises after a court order requiring him to give up possession has not complied with the law and was using the premises for his own purposes as a place for the storage of his goods. In *Scotland v Solomon* [2002] EWHC 1886 (Ch) the High Court reiterated the rule that "a vendor who leaves property of his own on the premises cannot...be said to give vacant possession since [this is] inconsistent with the right which the purchaser has on completion to undisturbed enjoyment".

[18] Above, n7, *per* Lord Greene at 269. It is common for parties to agree that certain chattels may be left behind.

The *Cumberland* decision can therefore be seen to have two distinct limbs. The first is directed at the activities of the party required to give vacant possession (i.e. tenant on exercising a break, or seller when transferring an interest in land), and provides that if the conduct of the party in question indicates that they, as seller or tenant, are continuing to use the premises for their own purposes in a non-trivial way (for example, by leaving goods in the premises), then they will fail to establish that vacant possession has been given. As such, this first limb can be seen to be inherently fact specific with reference to the actual seller or tenant in question, and whether their conduct openly manifests an intention to give vacant possession. The second test is directed at whether the contents of the premises present, objectively speaking, a substantial obstacle to the buyer's or landlord's own physical enjoyment of the premises on completion (or the operative date). If they do, vacant possession will not have been given.

The courts have elaborated on both limbs of the test in recent years, in the context of the procurement of vacant possession when exercising a contractual break option in a lease. In *John Laing Construction Limited v Amber Pass Limited*[19] the claimant was the tenant of commercial premises under a lease granted by the defendant's predecessor-in-title. A clause in the lease provided that the lease might be determined by, *inter alia,* the "yielding up of the entirety of the demised premises".[20] The claimant sought a declaration that, pursuant to a notice given under the break clause, it had validly terminated the lease. That claim was contested by the defendant, which sought to counter-claim for declarations that the purported break notice was ineffective and the lease was subsisting. The defendant contended that the claimant had not 'yielded-up' the property, relying, *inter alia*, on the continued presence of security guards at the premises and the claimant's failure to hand back the keys to the premises. It was argued that these were inconsistent with providing vacant possession at the end of the term. This did not persuade the court and the claim was allowed. On the facts of the case, it was held that the claimant had plainly and obviously manifested a desire to terminate the lease and was accordingly entitled to the declaratory relief sought. The continued presence of security guards at the premises, and the tenant's failure to hand back the keys, was held not to have prevented vacant possession being given. The court held that the task of the court was:

[19] [2004] 2 EGLR 128.
[20] Ibid.

> "to look objectively at what had occurred and determine whether a clear intention had been manifested by the person whose acts were said to have brought about a termination to effect such termination, and whether the landlord could, if it wanted to, occupy the premises without difficulty or objection."[21]

The decision in *John Laing* supports the first limb of the *Cumberland* test referring to the intention of the party required to give vacant possession, as manifest by their conduct:

> ".. to look objectively at what had occurred and determine whether a clear intention *had been manifested by the person whose acts were said to have brought about a termination to effect such termination...*" [22]

This would suggest that some intent on the part of the seller or tenant, to manifest their desire to give vacant possession (through their actions and conduct) to the buyer or landlord, is necessary. This intention to vacate is equivalent to the first limb of the *Cumberland* test where the acts of the party required to give vacant possession are evaluated in determining whether such actions and conduct are inconsistent with the giving of vacant possession (for example, because the party required to give vacant possession is purporting to continue to use the premises for their own purposes, to store their goods and chattels).

The decision in *John Laing* can also be seen to have further developed the second limb of the *Cumberland* test, providing guidance as to how it should be interpreted. The decision explained that the party with the right to vacant possession must be able to occupy without 'difficulty or objection'. Notwithstanding this further guidance, the second limb of the test does not really help lawyers, on a day to day basis, when the test must be applied to the facts of a particular circumstance. For example, it is unclear what extent of 'difficulty' is required and whether this must be general inconvenience or significant distress. The decision in *Cumberland,* upon which the *John Laing* decision is based, suggests that a seller or tenant has to remove all chattels and also rubbish which "substantially prevents or interferes with enjoyment of a substantial part of the

[21] Ibid, *per* Robert Hildyard QC at 131.
[22] Ibid. Emphasis added.

property",[23] but there is no definition of what constitutes 'substantial'. It is also unclear whether there has to be an actual interference, or whether the likelihood or potential for the left over items to cause a substantial interference will be sufficient to prevent the buyer or landlord from re-occupying without difficulty at the material time. Further, it is not clear what may count as a valid objection, and this is likely to proceed on a case by case basis (as discussed in more detail below).

The specific characteristics of the party with the obligation to give vacant possession (e.g. the seller or tenant) appear determinative in respect of the first limb of the test, which is directed at their *own* activities, and whether they are consistent with them seeking to give vacant possession. If they leave behind chattels and other goods, such conduct can be seen to be suggestive of a lack of intention and commitment on their part to vacate the premises. It can, also be suggested that specific characteristics and contextual factors are relevant to the so called 'objective' second limb of the test in respect of the buyer's commencement of possession (or the landlord's resumption of use following termination of a lease). It can be argued that specific characteristics relating to the buyer or landlord in question should be taken into account when determining whether the seller or landlord can (objectively speaking) (re)occupy without such an objection. Indeed, the so-called 'objective' test itself appears to refer to the specific characteristics of the party with the right to vacant possession:

> "and whether *the landlord could, if it wanted to*, occupy the premises without difficulty or objection."[24]

As such, the second limb of the test is not completely objective, but rather can best be understood as an objective test with reference to the particular circumstances and characteristics of the party with the right to vacant possession. It is arguable therefore that the test should be judged, not against any purchaser/landlord, but any purchaser/landlord with the particular qualities of the purchaser/landlord in question. A court should not consider more generally whether rubbish left at the property on the break of a lease or completion of a sale prevents the average purchaser or landlord (objectively speaking) from (re)occupying without difficulty or objection, but

[23] Above, n19, *per* Robert Hildyard QC at 131.
[24] [1946] 1 All ER 284, *per* Lord Greene at 287. Emphasis added.

(objectively speaking) the *actual* purchaser or landlord in question given its specific circumstances and characteristics. As such, it is possible that a materially similar objection could be deemed valid in one context, but not in another, given the specific characteristics of the parties in question, and all relevant contextual circumstances. This further highlights that whether or not vacant possession has been given will be a fact specific determination on a case by case basis.

The decision in *John Laing* can therefore be seen to reformulate, in slightly different words, the sentiment and spirit of both limbs of the *Cumberland* test and the focus on both the intention of the party required to give vacant possession, as manifest by their conduct, and whether, objectively speaking, the premises are vacant on completion and capable of (re)occupation by the party with the right to vacant possession.

An example illustrates the issues further. Imagine that a tenant has trouble paying the rent on a lease and decides to move to smaller premises. The tenant exercises a break option in its lease with the landlord which is conditional on vacant possession being given on the break date. On the break date the premises are empty except for one room that is half filled with boxes of floor tiles that the tenant failed to remove in time for the break date under its lease. The tenant claims that vacant possession was given and that the lease has come to an end. The landlord claims the converse and argues the lease will now continue until its contractual expiry in another 10 years time. The answer as to whether a room that is half filled with tiles breaches the vacant possession condition may turn on the nature of the tenant's business. If the tenant is a carpet tile supplier, the landlord will have a strong argument for saying that the tenant is still using the premises beneficially, for the storage of goods for the purposes of its business and therefore that a clear intention has not been manifested by the tenant to effect a termination of the lease. As such, the tenant will fail on the first limb of the *Cumberland test.*[25] Alternatively, if the same tiles were brought onto the premises by the tenant, who runs an office from the premises, to re-carpet the floor (in compliance with its repairing obligations, for example) but it did not complete this in time, different arguments would apply, and the

[25] This can be compared with *Legal & General Assurance Society Ltd v Expeditors International (UK) Ltd* [2006] EWHC 1008 (Ch); [2006] L&TR 22, where a major part of the judge's decision that vacant possession had not been given resided in the fact that the warehouse was still being used for the storage of 'a few pallets and parcels in a largely empty warehouse', which remained useful to the tenant's business. See also Fetherstonhaugh, G. 'Can premises that are left half empty or half full be vacant?' (2008) 31 May *Estates Gazette* 34.

tenant might succeed in establishing that the tiles remaining in the premises on completion was not consistent with the tenant continuing to use the premises for its own purposes (the first limb), and (if not great in number) that the tiles did not constitute a substantial impediment to the landlord's resumption of their possession of the premises (the second limb), and therefore did not prevent occupation without 'difficulty or objection'. What the landlord, as the party with the right to vacant possession, will use the premises for (compare a large industrial warehouse to a small corner shop) may also be key in determining whether the leftover items are a substantial impediment to the receipt of vacant possession (and therefore constitute a breach of the second limb of the test).

Support for the contention that the second limb of the *Cumberland* test is not purely objective, and must be understood as an objective test with reference to the party with the right to vacant possession, is provided through an analysis, by analogy, with determinations relating to actual occupation and adverse possession. This analysis argues that more general contextual factors directly affect the determination as to whether a given impediment prevents the party with the right to occupy from being able to obtain enjoyment of a substantial part of the property at completion. It therefore seeks to delineate further the currently superficial formulation of the second limb of the test to determine what will constitute a breach of the obligation to give vacant possession. The analysis explains the nature and form of the second limb of the test and how it must be applied to the facts of actual cases. In the next chapter, this analysis is further developed in the context of a discussion as to the relevance of the state and condition of the property or land to which the obligation relates. This can also be seen to be directly relevant to operation of the so-called 'objective' limb of the *Cumberland* test, and to whether the party with the right to vacant possession can occupy without difficulty or objection. This further analysis also draws on cases of adverse possession and actual occupation, which are similarly sensitive to the nature of the land or property in question, and how this can affect the relevant determination in issue.

At the present time, therefore, it remains unclear, principally due to a lack of relevant case law, whether a breach of the obligation would be found to have occurred on any given set of facts. It is therefore arguable whether invocation of the tests to determine a

breach of the obligation have actually resolved a number of issues posed by the vacant possession obligation (which would appear to be highly factually dependent in each given case), or simply created an arena for further uncertainty and confusion.

De minimis and substantiality

Historically it was unclear whether a *de minimis* threshold operated in determining whether the obligation to give vacant possession had been breached, and this may explain the differing decisions reached by respective judges on ostensibly similar questions of fact.[26] More recently, case law has suggested that the obligation is qualified as being subject to a *de minimis* rule.[27] Lord Greene in *Cumberland* stated:

> "*Subject to the rule de minimis* a vendor who leaves property of his own on the premises on completion cannot, in our opinion, be said to give vacant possession."[28]

De minimis is a Latin expression relating to 'minimal things', normally in the phrases *de minimis non curat praetor* or *de minimis non curat lex*, meaning that the law is not interested in trivial matters or that "the law does not care about very small matters".[29] The expression has also been used to describe a constituent or component part of a wider transaction, where it is in itself insignificant or immaterial to the transaction as a whole, and will have no legal relevance or bearing on the end result. In a more formal legal sense it means something that is unworthy of the law's attention. In risk assessment, for example, it refers to a level of risk that is too small to be concerned with; some refer to this as a 'virtually safe' level.[30]

[26] For example, in the cases of *Savage v Dent*, above n5, and *Isaacs v Diamond*, above n6.
[27] Above, n7.
[28] Ibid, *per* Lord Greene at 270. Emphasis added.
[29] See Ehrlich, E. *Amo, Amas, Amat and More*p (Harper Row, New York 1985) 100. Literally it means that "the law does not concern itself with trifles".
[30] See the National Library of Medicine Toxicology Glossary - Risk *De minimis*.

In the context of vacant possession, *de minimis* can be seen to refer to small or insignificant obstacles to the receipt of vacant possession. Whilst case law has indicated that the vacant possession obligation will be subject to a *de minimis* rule,[31] how that operates in practice remains unclear however, and this situation has not been elaborated upon by the courts. For example, in *Legal & General Assurance Society Ltd v Expeditors International (UK) Ltd*[32] a rubbish bin, a table, coffee mugs and a swivel chair left at the premises were considered unimportant and merited no further reference in the decision on the point. Clearly, by themselves, the items would not have prevented vacant possession from being given. By contrast, in *Cumberland*[33] rubbish that filled two-thirds of the warehouse cellars led the court to hold that vacant possession had not been given. It is difficult to draw the line when the facts lie somewhere between these two examples. What is clear, from the decision in *Cumberland,* is that the interference must be of some substantial nature:

> "When we speak of a physical impediment we do not mean that any physical impediment will do. It must be an impediment which substantially prevents or interferes with the enjoyment of the right of possession of a substantial part of the property."[34]

As such, with respect to both limbs of the *Cumberland* test it is clear that an element of 'substantiality' is manifest in the determination as to whether the party seeking to give vacant possession is continuing to use the premises for their own purposes (based on what goods and chattels are left behind), and whether the party with the right to vacant possession can (re)commence occupation without difficulty or objection.

It would also seem that the quantity of items left, their size, movability and degree and purpose of annexation (issues not considered by the small array of earlier vacant possession case law)[35] may be relevant factors in determining whether the items left cause a breach of the obligation to give vacant possession. Indeed, case law suggests that it may be relevant to consider the location of items in, around or outside the property concerned. In *Hynes v Vaughan*[36] a vendor left large amounts of rubbish

[31] Following *Cumberland,* above n7 where the obligation was stated as being subject to such a rule.
[32] [2006] EWHC 1008 (Ch); [2006] L&TR 22. Upheld on appeal, [2007] All ER (D) 166 (Jan).
[33] Above, n7.
[34] Ibid, *per* Lord Greene at 287.
[35] See, for example, *Savage v Dent,* above n5, and *Isaacs v Diamond,* above n6.
[36] [1985] 50 P. & C.R. 444.

(rotting vegetation, soil, timber, broken glass, paint tins and rubble) in the garden which, it was claimed, prevented the transfer of vacant possession. The rubbish was held to be consistent with the character of the property sold and could not be said to substantially prevent or interfere with the enjoyment of the right of possession of a substantial part of the property, since it was outside in the garden:

> "The state of this property of which complaint is made was, in my view, reasonably in keeping with the character of the property. There has been no suggestion that it was not reasonably consistent with the state of the property at the date of the contract...The concrete blocks and the wooden frames are neatly stacked. Their presence does not, by any stretch of the imagination, constitute "an impediment which substantially prevents or interferes with the enjoyment of the right of possession."[37]

As discussed in the next chapter with reference to the state and condition of the property, a different decision may very well have been reached if the rubbish had been inside the premises concerned, raising issues as to the scope of the obligation in a particular context.

The decision in *Hynes v Vaughan* is useful in demonstrating that it is difficult to interpret where a *de minimis* level may be set. In recent months, some further guidance has been provided on this point from the decision in *Ibrend Estates BV v NYK Logistics (UK) Ltd.*[38] In this case the claimant was the landlord and the defendant was the tenant under a lease of warehouse premises which contained a break clause permitting the defendant, by six months' prior notice to the claimant, to bring the term to an end, provided it had paid the rent up to date and delivered vacant possession of the premises.

[37] *Hynes v Vaughan*, above n39, *per* Scott J. at 457.
[38] [2010] PLSCS 186 - June 2010.

The defendant gave notice of its intention to break the lease in April 2009. The claimant had prepared a terminal schedule of dilapidations in January 2009 and it was agreed on that date that the defendant had substantially complied with its repairing and redecorating obligations, but outstanding items of repair were identified. It was impossible to carry these out by the break date, and so the defendant suggested that it could carry them out within a week thereafter, and that it should in the meantime continue its security cover of the premises. Further communications between the parties took place including return of the keys to the premises; meanwhile, the defendant completed the necessary repairs after the break date.

The claimant applied for a declaration that the defendant had not effectively broken the lease since it had failed to give vacant possession on the break date. It relied on the continued presence of the defendant's workmen to carry out the required repairs, some items of the defendant's property, and security staff, who it claimed had prevented access by its representative. The defendant argued that it had given vacant possession or alternatively that the claimant had waived the breach in any event.

The court held that the claim should succeed. The court held that the tenant fell short of compliance with the first test, given the continued presence of the defendant's workmen to carry out repairs. Crucially, there was no obligation on the defendant to complete any works before vacating, the only preconditions (as referred to above) were to pay rent up to the break date and give vacant possession. As such, the tenant should have cleared the premises by the break date and left any outstanding disputes about unrepaired items to be dealt with thereafter. By continuing to carry out works after the break date, the defendant had remained in possession simply for its own purposes and its use of the premises was more than *de minimis*. Accordingly, the defendant had not validly broken the lease in April 2009 and thus remained liable under the terms of the lease moving forward.[39]

Most interestingly however, in relation to that second test, is that it was held that the 'small quantity' of goods left by the tenant were not sufficient to amount to a substantial obstacle to the receipt of vacant possession by the landlord. In considering that the

[39] Shaw, K. 'All that you can't leave behind' (2010) 256 *Property Law Journal.*

tenant did not fail on the second test, the court noted that the second test was only likely to be satisfied by a claimant in 'exceptional circumstances'. Whilst the court did not go further and provide an example of what such 'exceptional circumstances' may have constituted (either specifically with reference to this case, or more generally), the decision does however suggest that the second test will be 'strictly interpreted' in any particular context. This can therefore be seen to suggest that the second limb is subject to a more robust *de minimis* (or substantiality) threshold than the first.

Whilst indicative, and perhaps more helpful than all previous decisions, regrettably this case still follows earlier cases in falling short of providing further detail about the nature of the obligation to give vacant possession, and the particular application of the tests in any given case.[40] As such, application of the tests, and operation of the *de minimis* (or substantiality) thresholds for each of the respective limbs, still remains unclear at this time, even following the *Ibrend* decision.

The *Ibrend* case does, however, make plain that the respective limbs of the tests for vacant possession are separate tests (that is, only one of the limbs of *Cumberland* or *John Laing* needs to be made out by a claimant to establish that vacant possession has not been given). This is something that is implicit in all previous decisions pertaining to vacant possession, but something that has rarely been *explicitly* stated.

Bargaining in 'the shadow of the law'

It is apparent in each case in which a decision has to be made as to whether a breach has occurred that the determination tends to be based on a judgment of the court using the evidence available to the judge, rather than the application of a clearly delineated formula. In many respects this creates a situation where parties in dispute over whether vacant possession has been given (prior to court proceedings or in the conduct of litigation prior to trial) are 'negotiating in shadow of the law'.[41] As Cooter, Marks and Mnookin explain:

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[40] This is true of judgments in the County Court and the High Court, as well as the Court of Appeal.

[41] See also Posner, R.A. 'An Economic Approach to Legal Procedure and Judicial Administration' (1973) 2 *Journal of Legal Studies* 399; Mnookin, R. H. and Kornhauser L. 'Bargaining in the shadow of the law: The case of divorce' (1979) 88 *Yale Law Journal* 950; Toulmin, S. E. *The Uses of Argument* (Cambridge University Press, Cambridge 1958); Bibas, S. 'Plea bargaining outside the shadow of the trial' (2004) 117 *Harvard Law Review* 2464; Allen, L. and Games E. 'Bargaining: A Proposed Application of the Theory of Games to Collective Bargaining' (1956) 65 *Yale Law*

> "Pre-trial bargaining may be described as a game played in the shadow of the law. There are two possible outcomes: settlement out of court through bargaining, and trial, which represents a bargaining breakdown. The Courts encourage private bargaining but stand ready to step from the shadows and resolve the dispute by coercion if the parties cannot agree."[42]

The courts have provided some guidance which can be extracted by practitioners in seeking to determine whether an obligation to give vacant possession has been complied with, but have fallen short of prescribing an actual formula which can be applied. In this respect, they have (perhaps unintentionally, inadvertently or simply by default) retained for themselves a great amount of discretion in being able to make a decision that they consider appropriate. For example, as noted previously, in *Legal & General Assurance Society Ltd* v *Expeditors International (UK) Ltd*[43] a rubbish bin, a table, coffee mugs and a swivel chair left at the premises were considered unimportant and merited no further reference in the decision on the point whereas, by contrast, in *Cumberland*[44] rubbish that filled two-thirds of the warehouse cellars led the court to hold that vacant possession had not been given. It is difficult to draw the line when the facts lie somewhere between these two examples and a lack of available case law means that the judge in question will have a great amount of discretion in deciding which side of the line his decision should fall (i.e. whether a breach or not a breach of the obligation).

This state of affairs does not help the parties in dispute and the uncertainty that remains causes their negotiations to be undertaken in the 'shadow of the law', where issues such as personal circumstances, financial resource and contingent or connected commitments may cause one party to achieve a better deal than the other. The uncertainty that remains over whether the obligation has been breached in a given situation, due to the lack of a clear formula for determination, or sufficient case law to generate rules of thumb, can be seen to disadvantage the weaker party. Further, it can potentially give rise to settlements that do not reflect the actual legal position as to whether, as a matter of fact and law,

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Journal 660; Bellucci, E. 'Developing Compensation Strategies for the construction of Negotiation Decision Support Systems' (2004) PhD thesis, La Trobe University, Bundoora, Victoria, Australia; Bellucci, E. and Zeleznikow J. 'Representations for decision making support in negotiation' (2001) 10 *Journal of Decision Support* 449; Kennedy, G. McMillan, J. and Benson J. *Managing negotiations* (2nd edn Hutchinson Business, London 1984); Williams, G. *Legal Negotiation and Settlement* (West Publishing Co, St. Paul, Minnesota 1983); Rawls, J. *A Theory of Justice* (The Belknap Press of Harvard University Press, Cambridge MA 1971).

[42] Cooter, R., Marks, S. and Mnookin R. 'Bargaining in the shadow of the law: a testable model of strategic behaviour' (1982) 11 *The Journal of Legal Studies* 225.

[43] Above, n35.

[44] Above, n7.

vacant possession was or was not given. Obviously if clearer, and more specific, guidance was available, there would be less discretion for the individual judge, but conversely more certainty for parties litigating on the point. The current situation therefore has the effect (albeit unintentionally or inadvertently) of placing the risk of any given dispute on the weaker party who may not be the author or creator of the risk, and who may not be responsible for the adverse consequences in question. As noted earlier in the chapter, at present a purchaser is more exposed to the risk of not receiving vacant possession than a seller on a standard residential purchase, given the mechanics of the conveyancing process which provide that completion is normally affected *prior* to an inspection of the property.

The fact sensitive nature of a determination as to whether there has been a breach of the obligation to give vacant possession makes it impossible to objectively define a threshold at which the *de minimis* rule should operate in this respect, or to predict what may be considered 'sufficiently substantial' (with respect to the second limb of the test). Whilst this is the case, it can be noted that such a state of affairs is not unique to the vacant possession concept; indeed, application of the test to determine a breach of vacant possession can be usefully compared to other issues concerning possession in property law. These include determinations in cases concerning actual occupation and adverse possession, where a greater amount of case law is available. Here, by analogy, it is found that the relevant test is highly fact specific and parallel issues with respect to the relevance of specific contextual circumstances, and the nature of the land in question, are also found to arise.

The fact sensitive nature of possession

The tests to determine a breach of the obligation to give vacant possession can be usefully compared to other issues concerning possession in property law, such as determinations in cases concerning actual occupation and adverse possession. These are analysed in detail and then compared and contrasted to literature which has also emphasised the fact specific nature of so called 'possession-type' concepts, and the importance of contextual considerations. In this regard, this discussion also highlights

policy decisions in recent legislation which determine the rights and liabilities of given parties in any specific set of circumstances.

Actual occupation

A parallel issue to that experienced with respect to the obligation to give vacant possession arises with respect to persons in actual occupation of land or property. Here, the determination under recent legislation is shown, like the second limb of the vacant possession test, to be objective, but also with reference to the facts of any given case.

Prior to 1925, if a purchaser did not know about an equitable adverse interest affecting a property having made full inquiries and investigations, and so did not have notice of the interest, he or she was classed as a 'bona fide purchaser for value without notice' and could therefore acquire the legal title to the property free of the equitable interest. Notice meant that the purchaser knew of the equitable rights, actually or constructively.[45]

The 1925 legislation (specifically the Law of Property Act 1925 and Land Registration Rules 1925) drastically reduced the number of estates and third party rights that could subsist at law, and so reduced the number of interests that automatically bound a purchaser. Under the Law of Property Act 1925, section 1(1) provided that the only two estates that could subsist at law were the fee simple absolute in possession (the holder of such an estate is effectively the owner of the land) and the term of years absolute (i.e. the legal lease). The only legal interests that could subsist at law were listed in section 1(2) and included an easement and a charge by way of legal mortgage. All other estates and interests were to take effect in equity (i.e. they are equitable interests).[46]

Most notably for unregistered land, the establishment of a Land Charges Register, and the development of the principle of overreaching, were both established under the 1925 legislation, although the doctrine of notice still applied in cases where overreaching or

[45] Actual notice amounted to actual knowledge. Constructive notice is notice of all facts of which a person would have had actual notice if he or she had made those inquiries and inspections which he or she ought to have made. Notice could also be imputed by virtue of, for example, an agent's knowledge.
[46] See section 1, Law of Property Act 1925.

registration as a land charge was not possible. For registered land, the Land Registration Act 1925 required interests in land, which were not registerable in their own right, to be protected by notice or caution (minor interests) if to be enforceable against purchasers and mortgagees, except for so called 'overriding interests', which remained enforceable whether or not they were so protected:

> "Overriding interests are interests to which a registered title is subject, even though they do not appear on the register. They are binding both on the registered proprietor and on a person who acquires an interest in the property...the term itself was first introduced in the [Land Registration Act] 1925."[47]

Overriding interests were introduced by section 70 of the Land Registration Act 1925 and were created because it was perceived that, for several classes of interest, it would be unreasonable to expect such interests to be registered. Such interests included, for example, short term leases, which were seen as being too insignificant an interest to burden with the bureaucracy of registration.[48] The justification for some interests being overriding is that they were legal interests, which prior to the enactment of the Land Registration Act 1925, bound the whole world. Here, the 1925 Act merely gave effect to the *status quo ante*, for example, providing for legal easements and profits under section 70(1)(a), rights acquired under the Limitation Acts under section 70(1)(f), and some leases under section 70(1)(k). It was, by contrast, not possible to justify making *equitable* interests overriding interests on this basis, but possible justifications for making the interests of persons in actual occupation capable of amounting to overriding interests, under section 70(1)(g) of the Law of Property Act 1925, were that such interests were likely to be created informally, in circumstances where the persons concerned would not consider registering them, and that purchasers ought to be aware of anybody in occupation. On this basis, it was seen as reasonable for a purchaser to be bound in circumstances where they would have similarly been bound prior to 1925 (where the old rules of notice would have applied).

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[47] Land Registry Practice Guide 15: Overriding Interests and their Disclosure. The Land Registry, December 2005. Crown Copyright, p.5.
[48] Section 70(1)(k), Land Registration Act 1925.

Section 70(1)(g) of the Land Registration Act 1925 protected an interest in land where its owner was in *actual occupation* of the land; an interest only lost its overriding status "where enquiry is made of such person... and the rights [were] not disclosed".[49] Under section 70(1)(g), occupiers' interests were overriding whether discoverable by a purchaser or not. Gray and Gray noted that:

> "The term 'actual occupation' has a long history in the context of land registration legislation. Although this critical expression has never been statutorily defined, some guidance as to its meaning emerges from the case law under the Land Registration Act 1925."[50]

It is true that the substantial body of case law on actual occupation, for the purposes of section 70(1)(g),[51] has developed our understanding of the concept's meaning.[52] For example, the courts have indicated that there must be some physical presence, and not simply a legal entitlement to occupy, but the occupier need not be living or working at the property.[53] Parking a car regularly in a garage may amount to occupation (even though it would not be sufficient for factual possession in the context of adverse possession).[54] Occupation does not necessarily require the personal presence of the person claiming the right; an employee, agent or contractor may occupy on behalf of the employee if specifically employed for a purpose that entails being in occupation; occupation by a friend or relative for their own purposes is not, however, sufficient.[55] Temporary absence does not prevent a person from being in occupation if their presence is still evident.[56]

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[49] Ibid.
[50] Gray, K. and Gray S.F. *Elements of Land Law* (5th edn Oxford University Press, Oxford 2009) 1120.
[51] Section 70(1)(g), Law Registration Act, 1925 and paragraph 2, schedule 1, Land Registration 2002.
[52] McFarlane, B., Hopkins, N. and Nield S. *Land Law: Text, Cases and Materials* (Oxford University Press, Oxford 2009) wrote that "Decisions made under that legislation remain of interest, although caution must be exercised, because the current provision has made substantive differences to the scope of the provision...The general principles developed in case law under that earlier provision may be expected to remain authoritative—but this is subject to the qualification...that Sch 3, para 2, has introduced a defence based on reasonable inspection".
[53] *Lloyds Bank Plc v Rosset* [1989] Ch 350
[54] See *Kling v Keston Properties Ltd* [1983] 49 P & CR 212; *Re Boyle's Claim* [1961] 1 WLR 339 and *Epps v Esso Petroleum Co Ltd* [1973] 1 WLR 1071.
[55] *Strand Securities Ltd v Caswell* [1965] Ch 958; *Lloyds Bank Plc v Rosset* [1989] 1 Ch 350 and *Abbey National BS v Cann* [1991] 1 AC 56.
[56] For example, furniture and possessions – see *Kingsnorth Finance Ltd v Tizard* [1986] 1 WLR 783 and *Chhokar v Chhokar* [1984] FLR 313.

With respect to determinations pertaining to actual occupation, here comparisons with vacant possession can be made. Indeed, in analysing case law in this area under the 1925 legislation, Gray and Gray noted that "[t]he acts which constitute 'actual occupation' vary in accordance with the nature of the premises concerned".[57] This assertion would seem to be on the basis of the Court of Appeal decision *in Lloyds Bank v Rosset* [58] where Mustill LJ stated that:

> "[t]he acts which constitute actual occupation of a dwelling house, a garage or woodland cannot all be the same."[59]

Gray and Gray further noted that "In *Rosset's* case there was general agreement in the Court of Appeal that differing standards of 'actual occupation' might be relevant to an ordinary dwelling house fit for habitation and a semi-derelict property".[60]

Here a parallel can be drawn between cases of actual occupation and cases of vacant possession. Both the test for vacant possession and determinations in cases concerning actual occupation can be seen to share the characteristics of being fact specific, and proceeding on a case by case basis with respect to the particular circumstances in issue.[61] This creates a lack of consistency and risk of uncertainty which may disadvantage parties to a given dispute due to the absence of a formalised code. In a similar manner to cases concerning vacant possession, the courts were unwilling to establish a statutory code to delineate the test of 'actual occupation';[62] no general rules or codes formulated (save for a few generic principles or statements) have been promulgated, possibly because it has not been possible to do so, or the courts did not consider it their role. Instead, as in cases of vacant possession, the courts have provided guidance in case law which can be seen to take effect as heuristic rules, or 'rules of thumb'. Over time, case law has explained a number of facets now known to be part of the meaning of actual occupation. Whilst the case law in this area is more extensive and

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[57] Above, n50, 1120.
[58] [1989] Ch 350. Reversed by House of Lords [1991] 1 AC 107, but these observations were not material to the later decision and remain valid.
[59] Ibid, *per* Mustill L.J. at 394.
[60] Above, n50, 1120.
[61] The issues of objectivity and discoverability of overriding interests are discussed in Sparkes, P. 'The Discoverability of Occupiers of Registered Land' (1989) *Conv* 342; Tee, L. 'The Rights of Every Person in Actual Occupation: An Enquiry into Section 70(1)(g) of the Land Registration Act 1925' (1988) 57 *CLJ* 328 and Smith, R. 'Overriding Interests and Wives' (1979) 95 *LQR* 501.
[62] *Hodgson v Marks* [1971] Ch 892.

therefore potentially of greater use to parties in similar situations, the plethora of decisions which exist has, however, still not enabled a universal definition or formula to be promulgated, again echoing the vacant possession obligation, which remains undefined in case law or statute.

With respect to case law relating to section 70(1)(g) of the Land Registration Act 1925, two strands of approach are discernable: an 'absolutist' and a 'constitutionalist' view. The absolutist view holds that a person is bound by the rights of every person in occupation, regardless of how difficult it is to ascertain their presence. By contrast, the constitutionalist view holds that occupation should be interpreted in light of traditional conveyancing principles; particularly the unregistered land concept of 'constructive notice' which is based on reasonable enquiries. Hayton specifically identified these two approaches to the interpretation of actual occupation and wrote:

> "On the absolutist view [...] a person is absolutely bound by the rights of every person in actual occupation of the land [...]. It matters not that it is unreasonably difficult to ascertain the actual occupier [...]; it matters not that it is unreasonable to expect someone to discover certain unusual rights of the occupier...Any traditional doctrine of notice is excluded from the self-contained paragraph...The constitutionalist view of those accustomed to traditional conveyancing is that a person is only bound by the rights of every person in actual occupation...so far as such rights are binding according to traditional conveyancing principles (concerned with legal interests, equitable interests and the doctrine of notice, express, constructive and imputed) except as expressly limited or extended by statute."[63]

Which view is adopted becomes significant in cases of occupation which may not be discoverable by a purchaser. For example, *Williams & Glyn's Bank v Boland*,[64] the House of Lords adopted an absolutist approach:[65]

> "Were the wives here in "actual occupation"? ... I ask: why not? There was physical presence, with all the rights that occupiers have, including the right to exclude all others except those having similar rights...Occupation, existing as a fact, may protect rights if the person in occupation has rights. On this part of

[63] Hayton, D.J. *Registered Land* (3rd edn Sweet & Maxwell, London 1981) 87
[64] [1981] AC 487 HL, *per* Lord Wilberforce at 504-6. .
[65] The adoption of the absolutist approach to defining occupation was only one step in the decision that led to the enforcement of Mrs Boland's interest, but the approach to occupation was significant. Lord Wilberforce compared 'notice' to 'actual occupation' and rejected the notion that it should be applied similarly, upholding the 'absolutist' factual test (based on the fact of occupation alone).

> the case I have no difficulty in concluding that a spouse, living in a house, has an actual occupation capable of conferring protection, as an overriding interest, upon rights of that spouse."[66]

The House of Lords held that Mrs Boland's beneficial interest was therefore enforceable against the bank as an overriding interest. Tee[67] criticized such an approach as being narrow in focus, emphasising that the danger of the *Boland* approach was that it seemed to leave purchasers and mortgagees vulnerable to beneficial interests claimed by those whose occupation was not discoverable:

> "The *Boland* judgments were uncompromising, and suggested that it would no longer be necessary or relevant to consider concepts of notice when assessing occupation [...]. However, such a radical departure from previously held assumptions is not generally successfully achieved by one case alone, even if that case emanates from the House of Lords."[68]

Despite the decision in *Boland,* the constitutionalist view of occupation gathered support at Court of Appeal level in the decision in *Lloyds Bank plc v Rosset,*[69] where Purchas L.J. stated that:

> "this appeal has given me the most concern. The provisions of [section 70(1)(g)] clearly were intended to import into the law relating to registered land the equitable concept of constructive notice. Thus, a purchaser or a chargee acquiring the title to or an interest in the land where the vendor was not in actual possession in order to protect his interest had to make appropriate inquiries if he found someone else in occupation of the property...In order for the wife's interest in the property to qualify as an overriding interest under section 70(1)(g) two things must be established: (a) was she in actual occupation? and (b) would appropriate inquiries made by the bank have elicited the fact of her interest?"[70]

The majority of the Court of Appeal held that Mrs Rosset was in occupation and had a beneficial interest enforceable against the bank. However, on appeal to the House of Lords, it was held that Mrs Rosset did not, in fact, have a beneficial interest.[71] She did

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[66] Above, n64, *per* Lord Wilberforce at 504-6.
[67] Tee, above n61, 345.
[68] Ibid.
[69] Above, n55.
[70] Ibid, *per* Purchas L.J. at 403-404.
[71] Ibid.

not, therefore, have any property right capable of protection as an overriding interest and the issue of actual occupation did not arise for decision by the House of Lords.

Sparkes suggested that the approaches to occupation in *Boland* and *Rosset* may have separate fields of application:

> "It remains to be seen how this notice-orientated test to the finding of actual occupation [in *Rosset*] is to be reconciled with the plain English test proposed by Lord Wilberforce in *Boland*. Lord Wilberforce was concerned with a person who clearly was in physical occupation albeit sharing with the mortgagor, and not a person whose occupation was marginal. It is tentatively submitted that his dictum should not be viewed as having binding force in these different circumstances...The classic illustration of marginal occupation is undiscoverable occupation. The denial by Lord Wilberforce in *Boland* of a link between overriding interests and notice occurred in a case in which occupation was obvious. It was left to academics to formulate hypothetical cases in which the issue would precisely arise for decision. Situations which five years ago had seemed fanciful products of the need for academic novelty have now emerged from the examination room to become the concern of practicing conveyancers and the courts. A choice between absolutism or constitutionalism is likely to form the ratio of a decision very shortly, probably in relation to undiscoverable occupiers."[72]

No such decision was forthcoming at the time of the Land Registration Act 2002. Prior to 2002 therefore there was an apparent inconsistency as to which approach was or is the correct one, and to what extent notice was and is a relevant consideration.

The Land Registration Act 2002 had a clear objective to further reduce the number of overriding interests:

> "The [Land Registration Act] 2002 seeks to reduce the number of overriding interests, and to replace as many as possible of them with register entries. This is in keeping with its overall objective of making the register as complete a record of title as possible."[73]

With that said, in 2002 the Law Commission did not consider that it was possible for overriding interests to be made redundant altogether. In their consultative document

[72]Sparkes, above n61, 346-7.
[73] Land Registry Practice Guide 15: Overriding Interests and their Disclosure. Above, n47, 5.

'Land Registration for the Twenty First Century',[74] the Law Commission and the Land Registry acknowledged that abolition of the overriding status could lead to results that are harsh and capricious:

> "The [2002] Act seeks to achieve a balance that reflects the needs of the parties...The legislation will continue to protect those rights which, if not afforded the status of an overriding interest, could lead to the loss of a home..."[75]

As such, whilst seeking to achieve parity with the mirror principle of conveyancing,[76] attaining a transparent, accurate and comprehensive Land Register,[77] the 2002 Act recognised that the rights of persons in actual occupation still required some protection.[78] The policy adopted by the 2002 Act (as explained by the Law Commission) is that "interests should only have overriding status where protection against buyers was needed, but where it was neither reasonable to expect nor sensible to require any entry on the register".[79] Further, in seeking to 'balance out' interests and risks, and protect purchasers who may otherwise be saddled with so-called lurking interests, they sought to achieve a fair balance by providing that an equitable interest will only gain overriding status if the person's actual occupation is "reasonably obvious upon a careful inspection" of the land at the time of the disposition, or if the buyer had actual knowledge of the interest:[80]

> "The object of this exception is, therefore, to protect buyer and other registered disponees for valuable consideration in cases where the fact of occupation is neither subjectively known to them nor readily ascertainable. Once an intending buyer becomes aware of the occupation, he or she should make inquiry of the occupier...All of those who responded to the proposal in

[74] Law Commission, 'Land Registration for the Twenty-First Century' (Law Com No 254, 1998) and Joint Law Commission and HM Land Registry Report (Law Com 271, 2001).
[75] Bogusz, B. 'Bringing Land Registration into the Twenty-First Century – The Land Registration Act 2002' (2002) 65(4) *MLR* 559.
[76] See Thomas, M. *Blackstone's Statutes on Property Law 2005-2006* (13th edn Oxford University Press, Oxford 2005).
[77] Thompson, M. *Modern Land Law* (2nd edn Oxford University Press, Oxford 2003); Bogusz, above n75, 556-567; Kenny, P.H. 'Children Are Spare Ribs' (1997) *Conv* 84; Pascoe, S. 'Triumph for Overriding Interests' (1999) *Conv* 144. Such interests are now comprehensively listed in schedules 1 and 3, Land Registration Act 2002.
[78] Hayton, D.J. *Registered Land* (3rd edn Sweet & Maxwell, London 1981) 76.
[79] Joint Law Commission and HM Land Registry Report, above n74, 8.6. Schedule 3, para 2(c)(i) comprises the qualification to the scope of protection afforded to occupiers based on reasonable inspection.
[80] See schedule 3, paragraph 2, Land Registration Act 2002.

> the Consultative Document that a person's actual occupation should be apparent supported it."[81]

Firstly, this approach confirmed the test for actual occupation to be objective. Indeed, the 2002 Act confirmed that it is the objective fact of being *in occupation*, and that occupation being reasonably obvious upon an inspection, which is determinative of the equitable right being overriding:

> "[f]or the purposes of the bill, it is not the *interest* that has to be apparent (as is the case in relation to contracts for the sale of land), but the occupation of the person having the interest."[82]

It can therefore be noted that this category is different in its scope from all other categories of overriding interest which confer the status of overriding interest on a *particular* property right. This paragraph, in conferring the status of 'overriding interest' on the property right held by a person in occupation, focused on the factual position of the holder of the right (with reference to all the relevant case specific circumstances in issue), not the type of property right held.[83] As such, occupation must be understood as the trigger for protection, but not the subject of protection (which is the occupier's property rights).[84]

Secondly, whilst the Land Registration Act 2002 does not *explicitly* adopt either the absolutist or constitutionalist approach, it can be seen to limit the scope of protection afforded to those in occupation by a 'reasonable inspection' qualification:

> "This provision steers a careful course between *Boland* and *Rosset,* and between the absolutist and constitutionalist views. The absolutist view is rejected, in so far as the rights of those in occupation do not necessarily bind a purchaser or mortgagee. But in mapping the scope of the exception, the Law Commission disavows the relevance of concepts derived from the doctrine of notice."[85]

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[81] Law Commission, Land Registration for the Twenty-First Century, above n74, 167.
[82] Ibid, 165.
[83] Cooke, E. *The New Law of Land Registration* (Hart Publishing, London 2003) 79.
[84] See, for example, *Webb v Pollmount* [1966] Ch 584, in which a tenant's option to purchase the freehold reversion was protected as an overriding interest.
[85] McFarlane, B., Hopkins, N. and Nield S. *Land Law: Text, Cases and Materials* (Oxford, Oxford University Press, 2009) 508.

Indeed, logically the insertion of the reasonable inspection qualification necessarily means that an absolutist approach must be rejected. Nevertheless, the qualification is not necessarily an endorsement of the constitutionalist view because, in recommending its adoption, the Law Commission renounced the relevance of concepts derived from the doctrine of notice, and it must be noted that the constitutionalist view necessarily considers notice as a context in which to interpret actual occupation. The Law Commission stated that:[86]

> "Any requirement that [occupation should have to be apparent] it was said, would introduce into land registration the doctrine of notice. [...] While we entirely agree that the doctrine of notice should not be introduced into registered land, we do not agree that limiting actual occupation to cases where it is apparent would have that effect...The test is whether the right is apparent on a reasonable inspection of the land, not whether the right would have been discovered if the purchaser had made all the enquiries..."[87]

McFarlane, Hopkins, and Nield suggest that, subject to the exclusion of those whose occupation falls outside the qualitative requirement, the decision in *Boland* remains authoritative "as the general approach to adopt to defining actual occupation".[88] Many however, still question the usefulness of the reasonable inspection qualification.[89]

A practical example illustrates the issues in more detail. One can imagine a situation in which a vendor is selling a property with vacant possession, and he does that while his tenant occupier is away on holiday (with all the occupier's possessions being hidden away). Under s70(1)(g) of the Land Registration Act 1925, the occupier would have been in actual occupation (given that under s70(1)(g) an interest lost its overriding status only "where enquiry is made of such person... and the rights are not disclosed").[90] That is, under s70(1)(g), a purchaser was bound rendering occupiers' interests overriding whether discoverable by a purchaser or not.[91] Under schedule 3,

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[86] This has its first origins in *Hunt v Luck* [1901] 1 Ch. 45 which provides that occupation gives notice of the occupier's rights.
[87] Law Commission, 'Land Registration for the Twenty-First Century: A Consultative Document', above n74, 5.71-5.72.
[88] McFarlane, B., Hopkins, N. and Nield S., above n52, 508.
[89] See Jackson, N. 'Title by Registration and Concealed Overriding Interests: The Cause and Effect of Antipathy to Documentary Proof' (2003) 119 *LQR* 660, 665-7 argues that the reasonable inspection qualification is misconceived.
[90] Section 70(1)(g), Land Registration Act 1925.
[91] In Sparkes, above n61, a discussion is undertaken as to the extent to which section 70(1)(g) protects those whose occupation could not be discovered by a purchaser, and whether an undiscoverable occupier should be allowed to enjoy the protection of an overriding interest.

paragraph 2 of the Land Registration Act 2002, the occupier would not be in actual occupation for these purposes because under the 2002 legislation a purchase would not be subject to the interest of someone "whose occupation would not have been obvious on a reasonably careful inspection of the land at the time of the disposition",[92] as would be the case in this example.

As such, the main effect of the Land Registration Act 2002, in altering the nature of establishing actual occupation, can be seen to change the balance of risk between the parties to sale and purchase transaction by making determinations of actual occupation an objective matter of discoverability. This objective focus of the 2002 legislation (appearing to favour the more constitutionalist approach referred to above) can be seen to afford greater protection to buyers and lenders who, under the 1925 legislation, would have taken a property subject to a person in actual occupation (even if not known of, or obvious upon reasonable inspection) if enquiry of that person had not been made. As such, the law has adjusted the risk and responsibility of parties to a transaction and shifted the risk *away* from buyers and lenders, leaving the occupier in greater danger of losing his or her rights of occupation, with a view to creating a more balanced allocation of risk:[93]

> "It is clear then, that the contemporary approach taken to determining questions of actual occupation under Schedule 3, paragraph 2 expresses a decisive and unquestioned policy choice in favour of purchasers."[94]

Chapter 10, which proposes improved remedies for a breach of the obligation to give vacant possession, highlights how adoption of a 'reasonably discoverable impediments' condition could similarly alter the balance of power as between seller and purchaser, in cases where there is a breach of the obligation to give vacant possession. Incorporation of such a condition into standard conditions of sale (for example) would also reflect a policy decision in similar terms to the policy decision manifest in the more constitutionalist approach to actual occupation that has now been adopted by legislation.

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[92] Schedule 3, paragraph 2, Land Registration Act 2002. In many respects, the new position can be likened to the position in unregistered land where the purchaser's obligation depends on what he has (actual or constructive) notice of.

[93] Bogusz, above n75.

[94] Dixon, M. 'The Reform of Property Law and the Land Registration Act 2002: A Risk Assessment' (2003) *Conv* 136.

It is clear from the above analysis that the concept of actual occupation under the Land Registration Act 2002 shares similarities with the vacant possession construct. Both concepts have objective tests that are fact sensitive in their application. The second limb of the test for vacant possession is, like the test for actual occupation, inherently objective in nature, but only capable of proper interpretation with reference to the specific circumstances of the case in issue (including, the property or land in question). Therefore, neither are objective tests which exist in a vacuum, but rather objective tests in context.[95] In cases of actual occupation there is no suggestion that *intent* on the part of either party is at all relevant, with the test strictly objective in nature. This is also true of the second limb of the test for vacant possession, but can be set apart from the first limb of the *Cumberland* test for vacant possession, where the intention of the party (as manifested by their conduct) in purporting to give vacant possession, is relevant to the determination as to whether vacant possession is being given.

Also noteworthy is that, in taking this step towards a more constitutionalist approach, no actual definition of actual occupation was provided by the 2002 Act. This was despite the draft Land Registration Bill (preceding the 2002 Act) itself including a partial definition of actual occupation as being "physically present there",[96] which the 2002 Act did not ultimately incorporate. As such, the statutory concept of actual occupation remains largely undefined:

> "The legislation provides no guidance on the interpretation of the crucial phrase 'actual occupation'."[97]

This also remains true of vacant possession. The concept has originated from common law, and not statute, but recent developments in the promulgation of tests to determine a breach of the obligation have developed without a formal definition being provided. As discussed below, this may well be because so-called 'possession-type' concepts are inherently fact sensitive and so not suitable for rigid legal definition, as further explored in the later sections of this chapter.

[95] It can also be found that specific contextual factors are relevant to the determination as to whether a given person is in factual possession for the purposes of adverse possession, which is discussed below.
[96] Joint Law Commission and HM Land Registry Report, above n74, 124.
[97] Sparkes, above n61.

Adverse possession

Acquiring land by adverse possession is the process by which a person who is not the legal owner of the land can acquire a title to that land by possessing the land for a specified period of time.[98] Whilst the law relating to adverse possession was considered in some detail in a joint consultation paper by the Law Commission and the Land Registry, and subsequently reformed in the Land Registration Act 2002,[99] three elements to a claim for adverse possession remain the same, regardless of whether the claim is in respect of registered or unregistered land. To claim title by adverse possession, the claimant needs to prove uninterrupted factual possession of the land by the applicant for the requisite period, without consent, and with an intention on the part of the claimant to possess the land during that period. What is particularly interesting for the purposes of this thesis, however, is whether, as noted previously, the determination is strictly objective in nature, or whether the specific context and circumstances are also relevant. It is useful to consider cases of adverse possession because the nature of the determination in such cases can be seen to share characteristics with the tests for vacant possession, thus providing a potential parallel in so-called 'possession type' concepts.

The most recent landmark decision concerning claims of adverse possession was laid down by the House of Lords in *J A Pye (Oxford) Ltd v Graham.*[100] In this case the personal representatives of the late Michael Graham (and Mrs Graham) claimed rights to agricultural land belonging to J A Pye based on possession of the land since 1984. Pye sought to defend the claim by arguing that they had a future intention to build on the land and that the Grahams had not dispossessed them given their knowledge that the land belonged to Pye and their willingness to pay for use of the land. At first instance the Grahams case was made out, but this was reversed by the Court of Appeal who held that the Grahams had not dispossessed Pye of the land. This was because of the subjective intentions and knowledge of both the Grahams and Pye:

[98] See Bowes, C. and Shaw K. 'You snooze, you lose' (2008) 207 *Property Law Journal* 6 and Bowes, C. and Shaw K. 'Time's up... but I'm staying!' (2008) 221 *Property Law Journal* 9.
[99] 'Land Registration for the 21st century: A Consultative Document', above n74.
[100] [2002] 3 WRL 221.

> "The subjective intention was held to be crucial by the Court of Appeal because it was indicative of a form of implied licence by Pye that the Grahams could use the land. The decision in the Court of Appeal begged the question whether a successful claim to adverse possession rested on the subjective intentions of both the squatter and the paper owner or whether on the objective intention to possess land for the requisite period of time under the Limitation Act 1980."[101]

The House of Lords overruled the Court of Appeal decision, reaffirming the importance of possession in common law and in claims of adverse possession. The House of Lords did not consider that it mattered that the adverse possessor did not have an actual subjective belief that he or she was acting as owner, nor did it matter that a squatter was prepared to have paid for occupation of the land. Commenting on the decision, Panesar remarked:

> "his Lordship referred to the words of Slade LJ in *Buckingham County Council v Moran* who said that what was required was 'not an intention to own or even an intention to acquire ownership but an intention to possess'. On the basis of these principles, Lord Browne-Wilkinson explained that the Grahams had established a satisfactory possessory title to the land belonging to Pye...Their willingness to pay did not alter the fact that they had the necessary factual possession for the period of time prescribed by the Limitation Act 1980."[102]

[101] Panesar, S. 'Adverse Possession of Land' (2002) 24 *Liverpool Law Review* 237, 238. Between 1983 and 1986 a series of articles debated the relevance of subjective intent in cases of adverse possession, and whether belief of ownership was relevant in such cases – see Helmholz, R.H. 'Adverse Possession and Subjective Intent' (1983) 61 *Washing University Law Quarterly* 331; Cunningham, R.A. 'Adverse Possession and Subjective Intent: A reply to Professor Helmholz' (1986) 64 *Washington University Law Quarterly* 1 and Helmholz, R.H. 'More on Subjective Intent: A Response to Professor Cunningham' (1986) 64 *Washing University Law Quarterly* 64.
[102] Panesar, above n101, 238.

The 'implied licence theory' was established by Bramwell L.J. in *Leigh v Jack*,[103] namely that possession of the paper owner could not be disturbed by a squatter if the paper owner could show a future intention to use the land. This was also rejected by the House of Lords in *Pye*, affirming the Court of Appeal decision in *Buckingham County Council v Moran.*[104] Any such intention of the paper title owners to use the land in the future, even if evidenced, was deemed irrelevant in cases where the necessary factual possession for the requisite period of time could be established. The House of Lords held that factual possession was an *objective* question of fact, and not sensitive to subjective belief or future intentions, in apparently similar terms to the fact of being obviously in occupation for the purposes of claiming an overriding interest on the basis of actual occupation, where intention is also not relevant (but rather the objective fact of occupation is).[105] Clearly, the test for adverse possession relates, not just to factual possession, but also to the squatter's 'intention to possess' the land (in addition to the requirements for a lack of consent), and this intention can be likened to the first limb of the *Cumberland* test, looking at whether the party required to give vacant possession is, by their actions, manifesting such an intention to vacate the premises.

What is clear, however, is that both elements of factual possession, and intention to possession, will be case specific determinations, based on fact and degree. To show factual possession there will need to be a sufficient degree of exclusive physical control over the land but, crucially, what is sufficient has been held to depend on the specific circumstances in question. In *Wretham* v *Ross and Shaw*,[106] it was noted that factual possession should be *objectively* assessed by consideration of both the acts of the claimant which it claims amount to possession and the absence of any acts of possession on the part of the paper title owners. In particular, case law on adverse possession suggests that the nature of the land and the manner in which land of that nature is commonly used will be key in determining whether factual possession has been

[103] (1879) 5 EX D 264.
[104] [1990] Ch 623.
[105] Such a debate has also emerged in the American legal system. In the landmark 2006 case of *Walling v Przyblo* (7 N.Y. 3d 228. 2006), the highest appellate court in New York, the Court of Appeals, held that actual occupation, not subjective knowledge, determines whether the claim of right element of an adverse possession claim is satisfied. Two years after the *Walling* decision by the Court of Appeals, however, the New York State Legislature amended New York Real Propeity Actions and Proceedings Law Section 501 in order to overturn the precedent set by *Walling*. The current position is that if one knows or should know one is occupying someone else's land, one cannot establish a 'claim of right'. Occupation is therefore no longer determinative to establishing a claim of right in the American legal system, and subjective knowledge and intentions are relevant in that legal system, in contrast to the law of England and Wales.
[106] [2005] EWHC 1259.

achieved. In discussing factual possession, Lord Browne-Wilkinson quoted Slade J. in the case of *Powell v McFarlane*:

> "Factual possession signifies an appropriate degree of physical control. It must be a single and [exclusive] possession, though there can be a single possession exercised by or on behalf of several persons jointly. Thus an owner of land and a person intruding on that land without his consent cannot both be in possession of the land at the same time. The question what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, in particular the nature of the land and the manner in which the land of that nature is commonly used or enjoyed. Everything must depend on the particular circumstances, but broadly, I think what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land as an occupying owner might have been expected to deal with it and that no-one else has done so."[107]

In other cases the courts have emphasised that, in deciding whether acts amount to possession, regard must be had to the nature of the land, and the manner in which land of that nature is commonly used or enjoyed. The quotation from Slade J. is a paraphrase of an often cited dictum of Lord Hagan in *Lord Advocate v Lord Lovat*,[108] where he said:

> "As to possession, it must be considered in every case with reference to the peculiar circumstances. The acts, implying possession in one case, may be wholly inadequate to prove it in another. The character and value of the property, the suitable and natural mode of using it, the course of conduct which the proprietor might reasonably be expected to follow with a due regard to his own interest. All these things, greatly varying as they must, under various conditions, are to be taken into account in determining the sufficiency of a possession."[109]

Further, in *Red House Farms (Thorndon) Ltd v Catchpole*, Cairns LJ said:

> "The authorities make it clear that what constitutes possession of any particular piece of land must depend upon the nature of the land and what it is capable of use for."[110]

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[107] [1977] 38 P&CR 452 at 470. Emphasis added.
[108] (1880) 5 App Cas 273.
[109] Ibid, *per* Lord Hagan at 288. That passage was cited with approval by Lord Macnaghten in *Johnson v O'Neill* [1911] AC 552 at 583, the Privy Council in *Kirby v Cowderoy* [1912] AC 599 at 603, and by Sir John Pennycuick giving the judgment of the Court of Appeal in *Treloar v Nute* [1976] I WLR 1295 at 1299G-H.
[110] [1977] 2 EGLR 125, *per* Cairns L.J. at 126. See also the more recent case of *Port of London Authority v Ashmore* [2009] EWHC 954 (Ch).

As noted by Lee, the question of what amounts to an 'intention to possess', another requirement of adverse possession, is similarly case specific:

> "The question of intention to possess...is one of fact. Whether it can be established depends on an assessment of all the circumstances in a particular case."[111]

The relevance of case-specific circumstances and characteristics in cases of adverse possession can be likened to the test to determine whether an obligation to give vacant possession has been satisfied, and specifically the second limb of the *Cumberland* test with respect to the ostensibly 'objective' requirement of being able to occupy without 'difficulty or objection'. Therefore for both factual possession, in the context of adverse possession, and actual occupation, the relevant test in each case can be seen to be objective, but with reference to the particular context. This is consistent, by analogy, with the second limb of the test for vacant possession, which is an objective test with reference to the particular circumstances in issue.[112]

By contrast, the first limb of the test for vacant possession can be seen to be inherently fact specific with reference to the actual seller or tenant in question, and whether their conduct openly manifests an intention (on their part) to give vacant possession. In this respect, some 'intention' to give vacant possession on the part of seller or tenant is relevant, but only by reference to whether such intention is outwardly manifested in the conduct of the party so seeking to provide vacant possession (that is, the intent is demonstrated through conduct). If the party required to give vacant possession claimed to have had an intention to provide vacant possession, but that was not obviously manifested in their conduct, such a claimed intention would be irrelevant. As such, this discussion of 'intention' is not concerned *per se* with 'state of mind' (or *mens rea*), but rather with conduct that outwardly manifests the alleged intention (or attempt by the party) to provide vacant possession.

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[111] Lee, A. 'Adverse Possession and Proprietary Estoppel as Defences to Actions for Possession' (1999) 29 *Hong Kong Law Journal* 31.

[112] The intended use of the property by the party with the right to vacant possession can also be seen more generally to form part of the specific factual circumstances to which the objective test has been shown to be subject.

This type of intention can be compared with one's 'intention to possess' in determinations relating to adverse possession, which similarly requires some 'intent' on the party making the claim, and which is also, in adverse possession terms, likely to be manifested by conduct (for example, an intention to possess a field will be manifest by fencing and gating the field, and displaying signs saying 'keep out' – again reflecting the fact specific nature of such a determination). In the next chapter, when discussing the relevance of the state and condition of a property to the obligation to give vacant possession, support is provided to justify the assertion that the nature of the land (as well as other contextual factors) is relevant to determinations relating to vacant possession (in a similar manner to adverse possession and actual occupation), thus further supporting the fact sensitive nature of the obligation.

As such, whilst there is little case law or academic discussion on this point in a vacant possession arena, analysis (by analogy) of (more developed) property law concepts, which exhibit similar characteristics and which are 'possession based', give support to the proposition advanced by this chapter that the objective second limb of the *Cumberland* test should be interpreted in the context of the particular circumstances of the case (including consideration of the party with the right to possession and the nature of the property or land more generally). In cases of actual occupation, adverse possession and vacant possession, case specific factors would appear to directly affect the application of the relevant tests.

Fairness and policy considerations

Inherent to the discussion of whether and, if so, to what extent, case specific factors should be relevant to claims of adverse possession and actual occupation (and, in turn, vacant possession) is the issue of fairness between the parties. For example, the concept of adverse possession seeks to resolve a conflict between two parties – the legal owner of the land and the party who purports to have acquired ownership due to previous (and usually current) possession of the land. The doctrine of adverse possession can therefore be seen as a means by which persons who have used land for a requisite period of time can avoid having such land 'taken from them' by claiming their entitlement, on the basis that:

> "The law refrains from depriving people of lands they have long occupied because doing so would cause them too much pain."[113]

In doing so, this clearly subordinates the rights of the 'true' owner to regaining possession of land to which they hold the paper title. Stake discusses the arguments for and against adverse possession and highlights the balance that the law is seeking to strike between competing rights in this regard. Stake wrote:

> "..adverse possession...does serve a useful purpose and can continue to do so in the future. For various reasons, a judicial allocation of land can turn out to be a lasting allocation of that land. The purpose of adverse possession is to reduce losses by getting that allocation right. When a case of adverse possession arises, someone loses land. Modern experimental psychology gives us good reason to believe that the doctrine places the loss on the person who will suffer it least – the person whose roots are less vitally embedded in the land."[114]

It is clear that the issue of fairness is engaged in cases of adverse possession, with Stake suggesting that the law seeks to place the loss on the party who will be least directly prejudiced. It can be argued that this is now reflected in the three limited exceptions to the general rule on adverse possession in the Land Registration Act 2002, which otherwise reflects a clear policy shift in favour of protecting those with established registered estates in land, and away from the pre-2002 position where adverse possession was much more easily obtainable against registered titles.[115] This was justified on the basis that the fact of registration, and not possession, is now the basis of title, and that this strikes a fairer balance the parties. As the commentary on the new rules makes clear:

> "The Bill....creates new rules in relation to registered land that will confer greater protection against the acquisition of title by persons in adverse possession. This is consistent with one of the objectives of the Bill that it is registration alone that should confer title...*We consider that this new scheme strikes a fairer balance between landowner and squatter than does the present*

[113] Stake, J.E. 'The Uneasy Case for Adverse Possession' (2001) 89 *The Georgetown Law Journal* 2419, 2473.
[114] Ibid, 2420
[115] Cobb N. and Fox L. 'Living Outside the System: The (Im)morality of Urban Squatting after the Land Registration Act 2002' (2007) 27 *Legal Studies* 236. Such a change in policy promotes the benefits of registration. This is also reinforced by the fact that the rules relating to unregistered land have not been affected, thus favouring those acquiring land by adverse possession. However, in balancing the rights of competing parties, the Land Registration Act 2002 expressly acknowledged that those who obtained 12 years of adverse possession under the pre-2002 legislation have their right to be registered under those pre-2002 rules, provided (following expiry of the transitional provisions) they have remained in occupation.

> *law.* It also reflects the fact that the basis of title to registered land is the fact of registration, not (as is the case with unregistered land) possession."[116]

In determinations of this kind it is apparent that the law has tried to achieve fairness to the parties, whilst at the same time being aware that one party is likely to be aggrieved by the decision. The fact that adverse possession can still be achieved against a registered title following an objection, if steps are not taken to evict the squatter or regularise the position, is one such example of the law seeking to remain fair to all parties in this regard.[117]

Such checks and balances as to fairness are also manifest in cases involving vacant possession, where parties will be affected by a determination as to whether they are liable for a breach of the obligation, or are entitled to compensation as a result. In cases of vacant possession the law, in a similar manner to cases of adverse possession and actual occupation, is effectively seeking to determine which party has suffered the greatest (the party claiming that vacant possession has been given, or the party saying that it has not been) and whether the party receiving a property has obtained what they contracted for, or whether (for example) items left at the premises are actually too substantial to allow the seller not to be held liable in some regard. This, by analogy, can be likened to decisions concerning actual occupation where the law has to balance the rights of those in actual occupation with the rights of those seeking to purchase or take a mortgage over the property, deciding that a purchaser or mortgagor should only be bound by rights which were reasonably discoverable under the 2002 legislation. The law has determined that it is a greater hardship or injustice to a purchaser or mortgagor to hold them subject to an undiscoverable overriding interest, than to deprive that person of their equitable rights in such an instance. Such decisions are overlaid with the issues and risk and responsibility inherent in such cases.

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[116] Law Commission, Land Registration for the Twenty-First Century, above n74, 4. Emphasis added. There are also arguments based on economic efficiency to support the current legal stance on adverse possession.

[117] See Gordley, J. and Mattei U. 'Protecting possession' (1996) 44 (2) *The American Journal of Comparative Law* 297 which explains the differing ways in which protection can be offered to the rights of persons in possession of land.

Manifest in all decisions relating to actual occupation, adverse possession and vacant possession, is a case specific element as to whether the given facts are sufficient to establish factual possession, actual occupation or a breach of the obligation to give vacant possession. It is a determination in each case for the court based on the particular acts in issue. For example, an impediment to vacant possession that was only *de minimis* (or not substantial enough in nature, with respect to the second limb of the test) would not be held to cause a party to have breached their obligation, just as a lack of exclusivity of possession may prevent a landowner having their title barred by adverse possession, or a lack of obvious occupation prevent a purchaser taking a given property subject to an overriding interest. As such, the uncertainty about whether the facts are sufficient in any given instance leave the parties 'bargaining in the shadow of the law', where financial resource and other factors may determine how a particular case is settled. The fact that decisions will proceed on a case by case basis also explains why a legal 'definition' of vacant possession is not appropriate. Rather, a 'description' of vacant possession with its application determined on a case by case basis is more suitable. Indeed, in chapter 10 an overriding and principled statement of what vacant possession means, which must be interpreted with reference to a number of relevant variables, is proposed. The need for the law to provide an overriding formula (which requires interpretation in any given case) is similar to other models of possession-like concepts; indeed, both adverse possession and actual occupation are based in guiding principles that have to be interpreted in a specific factual context.[118] This further implies that there is something more generally about issues of 'possession' which require any determination to be fact specific in a given particular context, an assertion developed further in the next section.

Possession as a fact specific determination

Chapter 5 discussed the legal and factual manifestations of the concept of possession, and tied both the legal and factual elements to the obligation to give vacant possession. Vacant possession was shown to relate to the right to possession (which follows from the transfer of the estate in land) but also the fact of being able to actually occupy at the

[118] For example, in cases of adverse possession the law says the squatter must have (1) factual possession of the land in an exclusive manner (2) with an intention to possess the land (3) without consent – but what these mean, and whether they are satisfied in any particular case, will be entirely determined by the facts of the case in issue.

point of completion, pursuant to that legal right. The above analysis has identified a common factual dependency for the concepts of adverse possession, actual occupation and vacant possession, suggesting that it is a characteristic feature of possession-type concepts more generally that their meaning cannot be adequately expressed as a strictly *legal* matter (i.e. devoid of factual circumstances). That is, the law *alone* cannot define and explain these concepts, legal statements must be interpreted in light of the facts of particular cases.

As noted in chapter 5, possession has been said to be a word of ambiguous meaning[119] with no other legal conception more open to a variety of meanings.[120] It is true to say that many have emphasised the complex nature of possession. For example, Salmond wrote:

> "In the whole range of legal theory there is no conception more difficult than that of possession."[121]

Tay suggested that the difficulties with analysis may have been caused by a focus on the theory, and not the *practical* manifestation of the concept of possession:

> "The unsatisfactory state of conceptual analysis and juristic formulation in the field of possession is now widely recognized. Some ascribe it to the difficulties inherent in whatever basic concept of possession there may be; others to confusions of terminology, *a priori* imposition of theory and a misguided endeavour to reduce decisions that have developed in the context of specific branches of law and of separate remedies to smooth components of a coherent system."[122]

Dias and Hughes also blame a preoccupation with theory and state that:

> 'If a topic has ever suffered from too much theorising it is that of possession, and nowhere else is the danger of an *a priori* approach to jurisprudence better illustrated. The actual working of the law has not only been obscured by a fog

[119] *Bourne v Fosbrooke* (1865) 18 C.B. (N.S.) 515, 526; 144 E.R. 545, *per* Erle C.J. at 549.
[120] *Lyell v. Kennedy* (1887) 18 Q.B.D. 796, *per* Fry L.J at 813.
[121] Salmond, J.W. *Jurisprudence* (10th edn Sweet and Maxwell, London 1947) 285.
[122] Tay, A. 'The Concept of Possession in the common law: Foundations for a new approach' (1963) 4 *Melb UL Rev* 476.

> of speculation, but, what is worse, decisions have been falsified so as to fit them into some preconceived theory."[123]

In suggesting that possession must be tied to fact and cannot just be legal in nature, Hart[124] expressed the view that legal concepts cannot be defined, but only described, and argued that there are a number of factors relevant to possession and recognised by the courts. These factors cannot, in and of themselves, serve to define possession, however, because no single factor is decisive. Further, Hart noted that not all factors will always be relevant in any given instance[125] Hart thus took the view that so-called 'living bodies of law' (like possession) cannot be constrained in such an *a priori* manner for this very reason:

> "A living body of law cannot be tied into the strait-jacket of an *a priori* conceptual system: but to insist, as a *matter of principle*, that we should not ask for general conceptions underlying what appear to be specific rules separating one possession from another, is to live in the intellectual Ice Age in which the first forms of action were born."[126]

Tay claimed that the defect with early writings on possession was that the theoretical distinctions made "confront[ed] us as *ad hoc* distinctions, as saving devices, forced upon [us] in the process of fitting their scheme to the law".[127] Tay claimed that in the work of Salmond, for example, and in the process of matching his conceptual scheme and the law, "vicious falsification of legal developments and decisions were arrived at".[128] Tay suggested that the problem with such an analysis of possession is that the theory has been wrongly separated from practice:

> "The fault, I should argue, lies not in the aim of reaching a complete theory of possession...The fault lies in his separation of the analysis of the concept from the study of its working in the legal system."[129]

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[123] Dias, R. and Hughes G. *Jurisprudence* (Butterworths, London 1964) 308.
[124] Hart, H. 'Definition and Theory in Jurisprudence' (1954) 70 *Law Quarterly Review* 37.
[125] Harris, D.R. 'The Concept of Possession in English Law' in Guest, A.G. *Oxford Essays in Jurisprudence* (Oxford University Press, Oxford 1961).
[126] Hart, H.L.A. 'The Ascription of Responsibility and Rights' (1948-1949) 49 *Proceedings of the Aristotelian Society* 171. Professor Hart's view has been effectively criticized by Mackie, J.L. 'Responsibility and Language' (1955) 33 *Australasian Journal of Philosophy* 143.
[127] Tay, above n116.
[128] See also Williams, C. 'Language and the Law—IV' (1945) *61 Law Quarterly Review* 384, 390, 391 and (for the distortion of decisions on finding by Salmond as well as other writers) Goodhart, A.L. 'Three Cases on Possession' (1928) 3 Cambridge *Law Journal* 195.
[129] Tay, above n116.

Tay further explained that the important task to focus on is not 'defining' the word possession (or indeed, the concept of vacant possession) as a legal term of art, but rather its practical manifestation:

> "Concepts are concepts in use, 'possession' is a term with a certain role. To understand possession, we must look, not at the word, but at the way in which possession entered our legal system, the parts it was called upon to play in it, the character and problems of its development. If we do this, we do emerge with a general concept of possession implicitly recognised and applied in our law. Only in terms of such a general concept, I shall argue, can we understand the special problems that have arisen in specific fields."[130]

This underlines the central observation made in this analysis of vacant possession, adverse possession and actual occupation. All three are 'possession-type' concepts and none of the three can be understood, explained or defined, by reference just to the 'word' (as a legal concept with a specific definition), but rather one must consider the factual manifestation of the possession or occupation in a particular context. This is because possession is viewed as infra-jural, and not jural (i.e. possession is *beyond* just a legal definition and also hinges on the facts of a particular case in issue). Tay claimed that:

> "The fact that possession is an infra-jural relation accounts for some of the difficulties that have accompanied the attempt to define it. The problems of describing and ultimately confining its nature are like those that arise in determining what is or constitutes consent and what amounts to a tenement, they are not like telling a man how to become a trustee or how to contract a marriage. Precisely for this reason we need a definition that is open-textured, that uses another infra-jural term...which gives a court guidance on the criteria to emphasise without tying it in a straitjacket of formal definitions and concepts."[131]

This further highlights how the very essence of the concept of 'possession' is such that understanding its meaning is only possible in a given case based on the facts of any particular circumstance. An *a priori* assumption or definition of possession type concepts (i.e. a specifically *jural* definition) is impossible given the 'open textured' nature of the term.

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[130] Ibid.
[131] Ibid.

As suggested earlier, each and every determination, in context, will provide guidance for future determinations, which will then enable so-called 'rules of thumb' to develop as to what may or may not amount to actual occupation, adverse possession or vacant possession in a given situation or on a certain set of facts. As such, and as the next chapters further explain, there will never be one universally agreed 'definition' of vacant possession, but it will be possible to develop an overriding and principled statement which must be interpreted with reference to a number of relevant variables of which practitioners must be aware. Vacant possession cannot be confined to a strictly legal definition (and constitute a *jural* definition), devoid of context and pragmatic interpretation. This is reflected in the statement of vacant possession that is provided in the conclusion to this thesis.

Conclusion

This chapter has explained that the test to determine a breach of the obligation to give vacant possession has two limbs: the first is directed at the activities of the party required to give vacant possession and provides that if the conduct of the party in question indicates they, as seller or tenant, are continuing to use the premises for their own purposes in a non-trivial way (for example, by leaving goods in the premises), then they will fail to establish that vacant possession has been given. As such, this first limb focuses on the party required to give vacant possession and whether the actions and conduct of that party, on the facts, manifest an intention to vacate the premises. By contrast, the second test is directed at whether the contents of the premises present, objectively speaking, a substantial obstacle to the buyer's or landlord's own physical enjoyment of the premises on completion (or at the operative time). The second limb of the *Cumberland* test is objective in nature, but with reference to specific contextual circumstances (such circumstances including the nature of the property or land in question, as will be explored in more detail in the next chapter). This can be likened to, and compared with, determinations relating to factual possession (in the context of adverse possession), and actual occupation, where the context has been seen to be highly relevant to application of the objective determination in each case.[132]

[132] The next chapter further supports the contention that the nature of the land is relevant to the vacant possession determination in the context of the state and condition of a given property.

In determinations connected to the second limb of the test, subjective intent has no place; the test is objective, but objective *in context* and not in a vacuum. Whilst intent has some relevance in respect of the first limb, it is only intent manifested by conduct (as compared to purely subjective intent - *mens rea*) which a party with the obligation to give vacant possession will be able to rely on in claiming that they have sought to procure vacant possession.

Common to cases of adverse possession, actual occupation and vacant possession is the fact that, whilst some general guidance had been laid down, any determination has been shown to proceed on a case by case basis, with so-called 'rules of thumb' developing. As such, no recognised definition has emerged (or, it can be argued, is capable of emergence). Given that this is apparent from all three property law concepts, it would seem to be more generally characteristic of the concept of possession in its various manifestations that it requires a fact-specific determination rather than existing in its own right as an inflexible legal term with a defined and specific meaning. Indeed, the concept of possession has been shown to have had a long tradition of (wrongly) only being interpreted in a strictly legal sense, devoid of factual considerations, something which has led to perverse and incorrect definitions and analysis. This is similar to the treatment of vacant possession as specifically just a *legal right* to possession in the decision in *Sheikh,* as discussed in chapter 5.[133]

Cases of adverse possession, actual occupation and vacant possession also share the fact that, in cases where a determination has been made, judges have appeared willing to only provide *some* explanation based on the facts of that particular case, rather than more generic principles which could be applied in subsequent cases. This highlights not only the case specific nature of these concepts in their practical context, but also the issues of risk, responsibility and fairness which are engaged when determinations have to be made. Certainly, at present, parties can be seen to be negotiating in the 'shadow of the law' in determinations relating to vacant possession, given that there is insufficient guidance in case law to accurately assess, or predict, how a court may rule in any given case. This causes issues such as bargaining strength and financial resource to be more salient considerations in parties' decisions to litigate or settle disputes. As more

[133] *Sheikh v O'Connor* [1987] 2 EGLR 269.

developed property law concepts, the existence of a greater wealth of case law for adverse possession and actual occupation, along with legislative intervention to reflect policy decisions, reduces the uncertainty to some extent in these cases, however, the determinations remain fact specific and therefore there is still an element of 'bargaining in the shadow of the law'. Chapter 10 proposes a contractual formulation of vacant possession, and proposed wording to ameliorate the position on available remedies, in order to seek to more evenly distribute risk and responsibility between the parties to any given transaction, and to reduce uncertainty and exposure for the weaker party. Such a formulation (also explaining the variables that must be taken into account when interpreting the test in any given context) also seeks to bring clarity to a currently ambiguous property law concept, while at the same time acknowledging that the concept cannot be straight-jacketed into a single legal statement. Such proposals (if adopted) would, like legislative intervention in the cases of adverse possession and actual occupation, reflect a policy decision that defines the rights and responsibilities of parties in a certain way.

Whilst in the context of a breach of the obligation to give vacant possession, the tests to establish a breach have been shown to be highly context and fact specific, it is also relevant to consider what may (if sufficiently substantial) amount to a potential barrier to the receipt of vacant possession, and therefore be relevant to the scope of the obligation to which the tests must be applied. The next chapter examines the scope and extent of the obligation in more detail, with specific reference to the nature of the property or land, and its state and condition. This builds on the analysis and conclusions in this chapter, further highlighting the fact specific nature of the obligation, and further develops understanding of the vacant possession concept in a way not previously considered by case law and commentary.

Chapter 8

The Scope and Extent of the Obligation

Whilst the tests to establish a breach of the obligation to give vacant possession have been shown to be highly fact specific, it is necessary to consider what may (if sufficiently substantial) amount to a potential barrier to the receipt of vacant possession, and therefore be relevant to application of either limb of the tests for vacant possession. Traditionally, fixtures are not seen to be relevant to the vacant possession obligation but, as this chapter will demonstrate, the scope and extent of the obligation can be argued to encompass *more* than just chattels, which are generally understood as the most common impediment to the receipt of vacant possession. In this context, the uncertainty caused by interacting contractual conditions is also apparent, and analysis from chapters 3 and 4 is drawn upon to support the propositions being advanced. The chapter also considers the relevance of so called 'lesser interests' to the obligation, in seeking to fully explain the scope and extent of the tests for vacant possession, and how they necessarily relate only to impediments that affect the right of 'possession' of the property or land in question.

Status of items

The most obvious difficulty in seeking to determine the scope and extent of the obligation to give vacant possession is with regard to what status items left at the property on completion may have. Disputes can arise as to whether items left behind at a property are fixtures (and therefore part of the land) or chattels (which are personal property of the tenant obliged to procure vacant possession, and which must therefore be removed). Indeed, it has been commonly established that if the seller's failure to give vacant possession is due to the presence on the property of *chattels*, which affect usability of the premises, then a breach of the obligation to give vacant possession will arise if the impediment substantially interferes with enjoyment of a substantial part of

the premises on completion.[1] This is why the distinction between fixtures and chattels has traditionally been seen to be so important.

Fixtures are physical objects which accede to the realty. Any physical object classed as a fixture as a matter of law merges with the land, title to it automatically vests in the owner of the freehold, and the object itself cannot be severed from the land by anyone other than the freehold owner.[2] Further the purchaser of a freehold is entitled to all fixtures on the land at the date of exchange of contracts.[3] This is all based on the maxim of law *quicquid plantatur solo, sols cedit*, meaning 'whatever is affixed to the soil accedes to the soil'.[4] Chattels are physical objects which retain their independent character as personalty despite close association with realty. They thus do not attach to the land and do not pass with a conveyance of the land unless stipulated in the conveyance. A seller is entitled, and indeed obliged, to remove such items before completion.

The fixtures and chattels distinction turns on two distinct but connected tests. The first test concerns the degree of physical annexation to the land. The more permanently and irreversibly the object is affixed to the land the more likely it is to be considered a fixture. A form of gravity test for a chattel has developed out of this, in that an object that merely rests on the land due to its own weight will be classed a chattel, and one more permanently fixed will be classed as a fixture. In *Holland v Hodgson*[5] spinning looms bolted to the floor were classed as fixtures, but in *Hulme v Bingham*[6] heavy machinery otherwise unattached was considered a chattel. In *Botham v TSB Bank Plc*[7] kitchen appliances that were only connected electrically to the land (remaining in

[1] See *Cumberland Holdings Ltd v Ireland* [1946] KB 264. Also, Megarry, W. and Wade W. *The law of real property* (7th edn Sweet and Maxwell, London 2008) 672 state that "removeable physical impediments" are relevant to the obligation – i.e. chattels and not fixtures which are attached permanently to the land and which pass under the contract of sale.

[2] A plethora of case law exists - see *Reynolds v Ashby & Son* [1904] AC 466; *Meeluish v BMI (No 3) Ltd* [1996] AC 454; *Wessex Reserve Forces and Cadets Association v White* [2005] 3 EGLR 127, *per* Michael Harvey QC at 21 and 23; *Elwes v Law* (1802) 3 East 38 at 55; *Wiltshear v Cottrell* (1853) I E & B 674; *Deen v Andrews* [1986] 52 P & CR 17; *Kennedy v Secretary of State for Wales* [1996] EGCS 17; *Hulme v Brigham* [1943] KB 152; *Hamp v Bygrave* [1983] I EGLR 174; *Webb v Bevis Ltd* [1940] 1 All ER 247 and *Jordan v May* [1947] KB 427. The degree of affixation is not necessarily the same in every type of case; see, for example, *London County Council v Wilkins* [1955] 2 QB 553 – affirmed [1957] AC 362 and *Buckland v Butterfield* (1820) 2 Brod & Bing 54.

[3] *Taylor v Hamer* [2002] EWCA Civ 1130.

[4] Burn, E.H. and Cartwright J. *Modern Law of Real Property* (17th edn Oxford University Press, Oxford 2006) 156.

[5] (1872) LR 7 CP 328.

[6] [1943] KB 152.

[7] [1996] 73 P & CR D1, CA.

position by their own weight) were considered chattels on this test. Gray and Gray[8] argue that the trend in recent case law suggests the above test is being overtaken by the second test concerning the objectively understood purpose (or object) of the annexation. The key question in respect of this test is whether the installation of the object was intended to effect a permanent improvement to the realty or was merely a temporary addition to enhance the enjoyment of the chattel.[9] Blackburn J in *Holland v Hodgson*[10] gave the following example:

> "Blocks of stone placed one on top of another without any mortar or cement for the purpose of forming a dry stone wall would become part of the land, though the same stones, if deposited in a builder's yard and for convenience sake stacked on the top of each other in the form of a wall, would remain chattels."[11]

As such, both the item's degree and purpose of annexation are key in the determination of the status of an item, which will proceed on a case by case basis, as Burn and Cartwright state:

> "[The] question of whether a chattel has been so annexed to land as to become part of it is sometimes difficult to answer. It is a question of law for the judge, but the decision on one case is no sure guide in another, for everything turns on the circumstances and mainly, though not decisively, upon two particular circumstances, the degree of annexation and the object [or purpose] of annexation."[12]

An example of the importance of this distinction for vacant possession arose in the case of *Hynes v Vaughan.*[13] In this case, one issue surrounded a chrysanthemum growing frame and sprinkler system, and whether these could be argued to be fixtures or chattels. The seller defendants had removed these from the property after the date of the contract, which was unlawful if they were fixtures as they had passed with the land to the purchaser.[14] In view of the functions of the chrysanthemum growing frame and installation of the sprinkler system, it was determined that those items could not be seen as fixtures on the property so as to pass under the contract to the plaintiff. As such, they

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[8] Gray, K. and Gray S.F. *Elements of Land Law* (5th edn Oxford University Press, Oxford 2006) 32 – 38.
[9] *Elitestone Ltd v Morris* [1997] 1 WLR 687, *per* Lord Lloyd at 690.
[10] (1872) LR 7 CP 328.
[11] Ibid, *per* Blackburn J. at 334.
[12] Burn, E.H. and Cartwright J., above n4, 156.
[13] [1985] 50 P. & C.R. 444.
[14] *Taylor v Hamer*, above n3.

were chattels which should have been moved in accordance with the obligation to give vacant possession. The judge explained:

> "The question of whether or not the defendants were entitled to remove the growing frame and sprinkler system after the contract for sale had been signed depends on whether or not the apparatus could properly be described as a fixture. If it was a fixture, the plaintiff had contracted to purchase it along with the property, and the defendants were not entitled to remove it. If it was not a fixture, the defendants were fully entitled to remove it before completion..."[15]

The judge went on to explain that the items were considered to be chattels, given their degree and purpose of annexation to the land:

> "I do not agree ... that it is even remotely arguable that the growing frame and sprinkler system were a fixture. The function of a growing frame requires the frame to be movable up and down the supports as the height of the growing plants requires. The function of a growing frame requires that it be dismantled from time to time in order to enable the flower bed to be cultivated and prepared for the new seedlings. The proposition that a growing frame on a flower bed can be a fixture contradicts its function. It is, in my view, an untenable proposition. As to the sprinkler, it would be possible to have a sprinkler system with underground water pipes permanently installed, but... the sprinkler system at [the property] was attached by a rubber or plastic hose to a garden tap. How anyone, lay person or lawyer, could regard that as a fixture defeats me. It plainly, in my view, was not. On this part of the case, the plaintiff's contentions [that the items are fixtures] are not, in my view, capable of being seriously argued."[16]

The judge's determination that the items were chattels was supported by witness statement evidence of a professional nurseryman which stated that "it would be obvious in any event, that the growing frame was removed in order during the winter months to enable the land to be prepared for the new season's plants".[17] The growing frame was not fixed to the land so as to pass to the purchaser under the contract, and as such, the defendant sellers were correct to remove these items; if they had not, and on the basis that they were substantial in nature, that would have constituted a breach of the obligation to give vacant possession under the contract of sale.

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[15] Above, n13, *per* Scot J. at 453.
[16] Ibid, *per* Scot J. at 453.
[17] Above, n13 at 454.

This is a common issue on the sale and purchase of property. Imagine that a seller contracts to convey a property to a purchaser, the contract providing expressly that vacant possession is to be given on completion. On the morning of completion the transaction completes and the purchaser is given the keys. Later in the day the purchaser meets his proposed new tenant at the premises to sign the lease and hand the keys over. Upon inspection of the property, however, the purchaser and the proposed new tenant see that items have been left by the seller. The tenant refuses to sign the lease because the tenant says that he cannot immediately occupy the property as he needs to. Instead he takes a lease of an adjacent unit the following week. In two months time the purchaser manages to lease out the property to a third party tenant at a rent lower than had been agreed with the original proposed tenant due to a decline in the market. The purchaser, however, claims that the seller was in breach of his express contractual obligation to give vacant possession and claims that loss has been suffered as a consequence. The seller claims that the items left were fixtures (and therefore part of the land). The proper determination of the status of the items can be seen as a preliminary issue in seeking to establish whether the items had been left behind by the seller unlawfully, and therefore constitute a breach of the vacant possession obligation (if sufficiently substantial).

The status of items (and whether they have to be removed) would therefore seem important to interpretation of the scope and extent of the vacant possession obligation, and whether a seller (or party with the obligation to give vacant possession) may be in breach. However, whilst left over chattels are clearly a barrier to vacant possession, there is reason to question whether *only* chattels are relevant to a breach of the obligation, or whether fixtures, and matters pertaining to the state and condition, and nature, of the property or land may also be relevant barriers to the receipt of vacant possession. This, in turn, thus causes one to question whether the status of items (i.e. the fixtures and chattels distinction) is really all that important after all in the context of vacant possession.

State and condition

Whilst items can be classified as fixtures or chattels, it is questionable whether this distinction is relevant to the obligation to give vacant possession in the manner previously assumed. For example, it can be questioned whether items which are more akin to fixtures, and constitute part of the state and condition of a given property, can ever be a barrier to the procurement of vacant possession. Further, in such a case, it would also be necessary to question how any such impediment may be overridden in the context of other competing contractual conditions. As noted previously, it is commonly established that if the seller's failure to give vacant possession is due to the presence on the property of chattels (which affect usability of the premises), then a breach of the obligation to give vacant possession will arise if the impediment substantially interferes with enjoyment of a substantial part of the premises on completion (or at the material time).[18] There is, however, no authority on the position where the vendor's inability to give vacant possession is due to the physical state of the property.[19] It is therefore not clear if an impediment to vacant possession that is not a chattel, but more 'part and parcel' of the state and condition of the property itself (i.e. more akin to a fixture), can ever amount to a breach of an obligation to give vacant possession. The only case that can be argued to have some relevance to this point is the decision in *Hynes v Vaughan*.[20]

As noted previously, the first issue in this case surrounded the status of a chrysanthemum growing frame and sprinkler system as chattels and not fixtures. The second issue for determination related to garden and stable rubbish piles and bonfire sites; the claimants (as purchasers) complained that the presence of these constituted a breach by the defendants (as sellers) of their obligation to give vacant possession of the property. There were eight areas where material of this nature was found. Seven of these areas were outdoors and the material included such items as rotting vegetation, plastic, string, paper, soil, pieces of timber, domestic furniture and prunings, concrete blocks, broken glass, paint tins, hardcore rubble, various timbers, corrugated iron, galvanised type wire and glass bottles.[21] The claimants contended that the presence of these various

[18] See *Cumberland*, above n1.
[19] See Harpum, C 'Vacant possession - chameleon or chimaera?' (1998) *Conveyancer and Property Lawyer* 324, 400 (C.H.).
[20] Above, n13.
[21] Above, n13, 452.

items of alleged rubbish involved a breach by the defendants of their obligation to give vacant possession of the property. This was based on the Court of Appeal decision in *Cumberland* which, as noted, concerned a contract for the sale of a disused warehouse. There were cellars under the ground floor of the warehouse which had been left filled with rubbish consisting mainly of bags of cement and empty drums. Damages for breach by the defendant of its obligation to give vacant possession were awarded by the court on the basis that such items were inconsistent with the obligation to give vacant possession.

Scott J. referred to the judgment of Lord Greene in *Cumberland,* where it was argued that a general condition (stating that the purchaser was deemed to buy with full notice in all respects of the actual state and condition of the property as at exchange) *could not* modify a seller's obligation to give vacant possession with respect to chattels. Lord Greene said:

> "The rubbish forms no part of the property sold and its presence upon the property sold cannot, in our opinion, be said to be covered by [the words of the general condition] 'state and condition of the property sold'. Those words refer, in our view, to the physical condition of the property sold itself, such as its state of repair, and do not extend to the case where the property sold is made in part unusable by reason of the presence upon it of *chattels* which obstruct the user. Such obstruction does not affect the 'state and condition of the property' but merely its usability which is a different matter altogether."[22]

This explained clearly that chattels were not connected to the state and condition of the property and that a general condition relating to the state and condition of the property would therefore have no relevance to left-over chattels, since they formed no part of the property sold. Whilst making this distinction between the state and condition of the property sold (including fixtures thereon) and chattels, Scott J. went on to note that such a distinction, whilst possible in cases involving the interior of buildings, was not necessarily relevant with respect to matters *outside* of the premises (such as was in issue here). In discussing Lord Greene's judgment, Scott J. remarked:

> "..that the [general] condition did not protect the vendor was based on his construction of the words 'state and condition of the property sold'. Those

[22] Above, n13, *per* Scott J. at 453. Emphasis added.

> words, [Lord Greene] said, referred to the physical condition of the property sold and did not cover the presence on the property of *chattels*. The distinction between on the one hand the property sold and on the other hand chattels on the property can be drawn with some clarity so far as the interior of buildings is concerned. But it is a distinction which becomes blurred when applied to gardens, paddocks, stable yards or other un-built on land. And the rougher and more rural in character the land, the more difficult it becomes to draw the distinction clearly."[23]

An example was given to demonstrate this:

> "Take the example of piles of rubbish. All properties with house or kitchen gardens of a fair size in rural areas are likely to have at least one and often more than one rubbish pile. On to such piles will be thrown refuse from the garden. Where refuse collection has in the past been infrequent or unreliable, piles of domestic rubbish may be found. Piles of this sort will often include bits of broken glass or bits of broken furniture. Piles of ashes may be found where the debris of years of swept out fires have been dumped. Bonfire sites may be found on which combustible or mainly combustible rubbish has been placed and at regular or irregular intervals burnt. Properties with stables are almost bound to have, nearby the stables, a place where stable manure has been placed. Where the building of outbuildings, whether stables, sheds or garages, has recently taken place, there is likely to be found, pushed into some convenient corner, builders' debris, such as broken bricks, tiles or planks. These piles of rubbish are likely in an old property to be of long standing. The debris of earlier years will have become part of the surrounding earth. More recent additions may still be distinguishable. But to describe the contents of piles of rubbish such as I have described as 'chattels' and as something distinct from the property sold would in most cases be quite unreal."[24]

Scott J. made clear that Lord Greene's statement of principle in *Cumberland*, with respect to the fixtures and chattels distinction, was not intended to deal with ordinary garden or stable rubbish which could not be distinguished from the rest of the property like everyday chattels could (such as table and chairs, for example). Ordinary garden or stable rubbish as referred to by Scott J. was seen to be part and parcel of the property sold, even though not affixed to the property in the way that fixtures are generally understood to be attached to the property itself. As such, the actual state and condition clause contained in the contract *could* potentially have relevance with respect to these 'non-chattel like' items. This led the judge to consider the effect of condition 13(3) of the contract which provided:

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[23] Above, n13, *per* Scott J. at 453. Emphasis added.
[24] Above, n13, *per* Scott J. at 453.

> "the purchaser shall be deemed to buy with full notice in all respects of the actual state and condition of the property and, save where it is to be constructed or converted by the vendor, shall take the property as it is [that is, as it was at exchange]."[25]

Scott J. considered that the condition obliged the purchaser to take the property with its existing garden and stable rubbish piles and bonfire sites (which were present on the property at exchange), because such items had merged with the actual land and become consistent with the nature of the property (even though not strictly fixtures in a traditional sense). The judge explained that condition 13(3) would be relevant to such items:

> "...in my judgment, condition 13(3) does provide an answer where, first, the rubbish complained of has merged with and become part of the surrounding soil and, secondly, where the nature and extent of the rubbish complained of is consistent with the nature and character of the property sold."[26]

As such, several of the items complained of by the plaintiff were held to be covered by general condition 13(3) (some others were chattels and therefore not in issue). The judge then went on to consider what the position would have been if this were *not* the case: that is, the items were not covered by the general condition; and applied the *Cumberland* test to determine that these items were not substantial interferences with possession in any event.

This judgment raises the issue of whether it is possible to suggest that matters pertaining to the state and condition of the property could *themselves* be a barrier to the receipt of vacant possession: that is, that rubbish or piles of debris connected to the state and condition of the property, and which *cannot* properly be classified as chattels, could cause a breach of the obligation to give vacant possession if sufficiently substantial. In this context, it is necessary to consider what effect a general condition relating to the state and condition of the property could have on such an obligation, as that would have relevance to 'non-chattel like' items. Where the contract is subject to a general condition relating to the purchaser taking the premises in the state and condition that it was in *on exchange*, then operation of the clause would have the effect of meaning that only *new*

[25] Above, n13, *per* Scott J. at 453.
[26] Above, n13, *per* Scott J. at 453. Emphasis added.

piles of debris or related items (which come onto the property *after* exchange of contracts) could be potential obstacles to the receipt of vacant possession. As the judge said:

> "The present case is not one in which the complaint made is that after the date of contract the vender defendants added *new rubbish* to existing piles or created new piles of rubbish ...Condition 13(3) would, I think, provide no answer to a complaint of that sort..."[27]

This is because those items would have entered onto the property *after* the exchange of contracts, and condition 13(3) relates to the point of exchange, and thus not to items added thereafter. The judge continued by indicating that chattels would not be relevant to condition 13(3):

> "...Nor is the case one in which the piles of out-of-doors rubbish of which complaint is made are in any way unusual or out of character for the type of property being sold [i.e. are chattels]. If that had been the case, it may be that condition 13(3) [relating to the state and condition of the property] would not apply."[28]

Presumably, condition 13(3) would not apply in that case for the reasons given by Lord Greene in *Cumberland*, namely that chattels are not part of the state and condition of the property to which condition 13(3) has application:

> "...the condition does not relate to chattels. If the rubbish forms no part of the property sold...it cannot be said to be covered by [the words of the general condition] 'state and condition of the property sold'. Those words refer, in our view, to the physical condition of the property sold itself, such as its state of repair, and do not extend to the case where the property sold is made in part unusable by reason of the presence upon it of *chattels* which obstruct the user. Such obstruction does not affect the 'state and condition of the property' but merely its usability which is a different matter altogether."[29]

[27] Above, n13, *per* Scott J. at 453. Emphasis added.
[28] Above, n13, *per* Scott J. at 453. Emphasis added.
[29] Above, n13, *per* Scott J. at 453. Emphasis added.

This indicates that the scope of the obligation to give vacant possession does not just concern chattels, as has been traditionally perceived.[30] The case suggests that potential obstacles connected to the state and condition of the property, and which are not covered by a general condition, *could* be a barrier to vacant possession if they could be described as impediments which substantially interfere with the buyer's right to possession. Accordingly, the vacant possession test must be applied in such circumstances. Indeed, the court made clear that in order to succeed with their defence:

> "the defendants must establish...that the *state of the property* as they proposed to hand it over to the [buyer] on completion was consistent with their obligation to give vacant possession."[31]

This suggested that the ability to obtain vacant possession *was* relevant to the state and condition of the property. Indeed, reinforcing this, in conclusion the judge said:

> "The state of this property of which complaint is made was, in my view, reasonably in keeping with the character of the property. There has been no suggestion that it was not reasonably consistent with the state of the property at the date of the contract. In my judgment, the plaintiff has failed in the evidence she placed before me to establish any arguable case that the *condition of the property, in the state in which the defendants proposed to hand it over on completion,* would have involved a breach by them of their obligation to give vacant possession."[32]

This again indicated that certain matters relevant to the state and condition of the property could, in principle, amount to a breach of the obligation to give vacant possession. This was despite the fact that such items would likely be regarded as part of the land or property itself, and therefore *not* chattels.

What would appear crucial to the decision in *Hynes* is the distinction that Scott J. makes between the 'inside' and 'outside' of a given premises. In *Hynes*, the 'property' that was the subject of the sale and purchase contract was the dwelling house and surrounding land. It was clear that Scott J. saw the discussion in *Cumberland* as having been directed at the interior of buildings, and judged that such comments were not similarly applicable

[30] Above, n13, *per* Scott J. at 453.
[31] Above, n13, *per* Scott J. at 453. Emphasis added.
[32] Above, n13, *per* Scott J. at 453. Emphasis added.

to determinations relating to vacant possession of external premises, land and open surroundings where potential impediments would be less easily classified as fixtures or chattels and need to be assessed differently. Indeed:

> "a distinction which becomes blurred when applied to gardens, paddocks, stable yards or other unbuilt on land. And the rougher and more rural in character the land, the more difficult it becomes to draw the distinction clearly."[33]

Scott J. identified certain items which could not be properly determined as chattels but which could, if still on the property at completion, be relevant to the determination (and application of the tests) of whether vacant possession was being given. Such items (such as rotting vegetation and pieces of timber), more akin to fixtures given their connection with the general state and condition of the external property, could therefore prevent vacant possession from being given at the relevant time.

Here, a parallel can be identified with claims for both adverse possession and actual occupation where, as discussed in chapter 7, the nature of the land has been seen as relevant to whether factual possession or actual occupation was established. In discussing factual possession, Lord Browne-Wilkinson quoted Slade J. in the case of *Powell v McFarlane*:

> "The question what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, in particular the *nature of the land and the manner in which land of that nature is commonly used or enjoyed.* Everything must depend on the particular circumstances..."[34]

The nature, or state and condition, of the land was also decisive in claims of actual occupation, where the Court of Appeal in *Lloyds' Bank v Rosset*[35] distinguished between different properties or land:

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[33] Above, n13, *per* Scott J. at 453.

[34] [1977] 38 P&CR 452 at 470. Emphasis added. The quotation from Slade J. is a paraphrase of an often cited dictum of Lord Hagan in *Lord Advocate v Lord Lovat* (1880) 5 App Cas 273, *per* Lord Hagan at 288. See also *Red House Farms (Thorndon) Ltd v Catchpole* [1977] 2 EGLR 125, *per* Cairns L.J. at 126 and the more recent case of *Port of London Authority v Ashmore* [2009] EWHC 954 (Ch).

[35] [1989] Ch 350. Reversed by House of Lords [1991] 1 AC 107, but these observations were not material to the later decision and remain valid.

> "[t]he acts which constitute actual occupation of a dwelling house, a garage or woodland cannot all be the same."[36]

As such, just as the physical nature and characteristics of the land or property will affect the prospects of, and be relevant to, claims for adverse possession and actual occupation, the nature of the land to which the obligation to give vacant possession is engaged would appear to be relevant to the application of the tests to determine whether a breach of the obligation has occurred. This further supports the analysis of the preceding chapter in respect of the context specific nature of the application of the *Cumberland* tests, and specifically the proposition that the 'objective' second limb of the *Cumberland* test must be interpreted in the particular context, taking into account the nature of the land as well as the characteristics of the party seeking to occupy at the material date and other fact specific considerations. All such factors, it can be argued, would appear to directly affect whether the given impediment prevents the right holding party from being able to occupy without difficulty or objection at completion. This also further supports the argument that the very nature of possession requires that any determination is highly fact specific, and incapable of discernment in isolation from the practical context, including the nature of the property or land.

From this analysis, it is possible to formulate a number of questions which will be of assistance to judges, academics and practitioners who need to undertake a structured reasoning process in making determinations of fact. These would include:

1. is the alleged impediment inside or outside of a building?

2. what is the nature of the land?

3. to what extent is the impediment consistent with, or distinguishable from, the surrounding land?

4. when did the impediment first appear on the property subject to the contract?[37]

[36] Ibid, *per* Mustill L.J. at 394.
[37] This is relevant to whether other conditions of the contract may affect the obligation – see below.

5. what effect does the impediment have on use?

6. to what extent is the presence of the impediment inconsistent with the transfer of possession?

The answers to these questions will be relevant to judges seeking to determine any particular dispute which comes before them, and will provide guidance as to what facts they need to consider in order to make the appropriate assessment. Indeed, as these questions are clearly relevant in determining whether there has been a breach of the obligation to give vacant possession, it is clear that not considering these questions may potentially lead to an incorrect decision being reached in any particular case. In turn, such determinations (involving a structured reasoning process) will assist parties in taking a view as to the likelihood that the alleged impediment will constitute a breach of the obligation to give vacant possession. As such, they will provide helpful illustrations to practitioners seeking to determine how clients should be advised in any given instance.

In summary, the character of the alleged or potential impediment with respect to the nature of the property or land would seem to be an essential element in the operation of the second limb of the *Cumberland* test, as to whether the impediment substantially interferes with or prevents enjoyment of a substantial part of the property. In principle, the state and condition of the property *may* constitute a barrier to the receipt of vacant possession, in a similar manner to chattels and personal items.

Since the obligation may be breached by the state and condition of a given property or piece of land, it is therefore appropriate to consider whether it can be modified by 'actual state and condition' clauses such as are commonly found in residential and commercial contracts for the sale and purchase of land. With respect to chattels and legal impediments, an obligation to give vacant possession was found to interact with general conditions such as 'subject to local authority requirement clauses' and 'no annulment, no compensation clauses'.[38] There would also appear to be an interaction between the obligation to give vacant possession and 'actual state and condition' clauses in cases where the impediment complained of relates to the nature and condition of the

land itself. This suggests that any potential impediment to the right of 'possession' (whether a fixture or a chattel) should be treated in the same terms, and moreover supports the contention that the fixtures and chattels distinction is somewhat artificial and irrelevant in respect of vacant possession. The crucial question relates to whether the obstacle (whether fixture or chattel) is a substantial impediment to possession at the relevant time.

'Actual state and condition' clauses

The discussion in chapter 3 established that whilst a vacant possession obligation can appear as an express clause in the contract, it is common for conditions to fail to cater for vacant possession expressly. Ordinarily, this will mean that vacant possession will be no more than an *implied* term of the contract. In *Cook v Taylor*[39] it was held that where a contract is silent as to vacant possession, and silent as to any tenancy to which the property is subject, there is impliedly a contract that vacant possession will be given on completion. When an obligation to give vacant possession has arisen impliedly, it is important to note that the implied obligation will be subject to specific circumstances and to the actual knowledge of the parties. For example, where one party is aware, when entering into a contract, that the interest is subject to some impediment to vacant possession, case law makes clear that if the purchaser knows that the obstacle to the receipt of vacant possession is *irremovable,* then the implied obligation to give vacant possession will *not* extend so as to include that obstacle.[39(a)] If at the time the contract was made, the purchaser knew of only a *removable* obstacle however, then the implied obligation to give vacant possession will not be deemed to exclude such an obstacle, and if the *removable* obstacle is still on the premises on completion the obligation to procure vacant possession will have been breached.[39(b)]

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[38]See chapter 3.

[39][1942] Ch. 349 at 352. In this case some importance was attached to the fact that the property was seen to be vacant on inspection, but Simons J. did say in general terms that "where a contract is silent as to vacant possession, and silent as to any tenancy to which the property is subject, there is impliedly a contract that vacant possession will be given on completion".

[39(a)] *Timmins v Moreland Street Property Co Ltd* [1958] Ch 110.

[39(b)] *Norwich Union Life Insurance Society v Preston* [1957] 1 WLR 813 establishes that a purchaser's knowledge of a removable object to vacant possession is irrelevant.

The position on removable and irremovable obstructions with respect to the implied obligation to give vacant possession, can be contrasted with the position where there is an express obligation to give vacant possession. Here the position is entirely different. It has been held that an express obligation to give vacant possession *will* prevail regardless of the nature of any known potential impediment to vacant possession (removable or irremovable). In *Sharneyford Supplies Ltd v Edge*[40] the plaintiff purchased land from the defendant by a contract which provided that the property was sold with vacant possession on completion. The plaintiff, aware that the land was occupied, had stressed from the outset that vacant possession was required and had received answers to pre-contractual enquiries from the defendant that the occupants had no right to remain in possession. The occupants refused to vacate the land on completion. The express obligation to give vacant possession meant that the defendant was in breach even though the plaintiff purchaser knew, at the time the contract was formed, of an irremovable obstruction to the delivery of vacant possession, namely the lease.[41]

The potential for the state and condition of the property (or land) to constitute a barrier to the receipt of vacant possession is apparent both in the context of physical disrepair, and also in relation to legal obstacles. In both cases the effect of an 'actual state and condition' clause may need to be considered.

Physical disrepair

Where there exists an express undertaking to give vacant possession on completion, the purchaser's knowledge of any known impediment is immaterial.[42] An actual state and condition clause would therefore logically be of no assistance and contribute nothing to modify an *express* obligation to give vacant possession.[43] Where there is an express special condition that vacant possession will be given, a seller should not be able to rely on an 'actual state and condition' clause (normally incorporated into the contract as a general condition) to qualify the vacant possession obligation, in the same terms as purported reliance on 'subject to local authority requirement clauses' and 'no annulment,

[40] [1987] Ch 305.
[41] See also *Hissett v Reading Roofing Co Ltd* [1996] 1 WLR 1757.
[42] Above, n40.
[43] *Topfell Ltd v Galley Properties Ltd* [1979] 1 W.L.R. 446, *per* Templeman J. at 450. This is also the view of Charles Harpum - see Harpum, above n19, 400.

no compensation clauses' was shown to be inappropriate in the context of an express undertaking to give vacant possession.[44] Whether the purported impediment was connected to the state and condition of the property, or otherwise, should also be irrelevant.

If a contract is silent as to vacant possession (and therefore vacant possession is only an implied term of the contract), and at the time of the contract there is some physical impediment to such possession, for example, in the form of garden rubbish which cannot be classified as a chattel but rather forms part of the state and condition of the premises, then there is nothing in case law or statute to preclude, in principle, the fabric of the premises being construed as a *removable* physical obstruction to the receipt of vacant possession. In such a case, it is possible that the seller may try to use an 'actual state and condition' clause to claim that, whilst the obligation to give vacant possession extends to that part of the fabric of the premises or land, the 'actual state and condition clause' excludes liability in respect of that impediment.[45] The seller would rely on the general 'actual state and condition' clause to claim that the purchaser is bound to take the property in the condition it was in on exchange, thereby taking the property subject to the physical impediment complained of (which, if sufficiently substantial, would otherwise constitute a breach). Logically, in such a case, the general 'actual state and condition' clause (as an expressly incorporated provision) would take precedence over the implied obligation to give vacant possession, and could therefore be relied upon by the seller. If, however, the impediment known and complained of was *irremovable*, then the implied obligation to give vacant possession would *not* extend so as to include that obstacle in the first place. In such a case, reliance on other conditions of the contract to escape liability for breach would not be necessary.

Legal impediments

The potential for the state and condition of the property to be a barrier to vacant possession is apparent in the context of not just physical disrepair, but also potential legal obstacles. Indeed, an 'actual state and condition' clause may be relevant in cases

[44] See chapter 3.
[45] This would follow the argument and reasoning in *Hynes v Vaughan.*

with facts similar to those in *Topfell Ltd v Galley Properties Ltd*[46] with respect to a legal obstacle to the receipt of vacant possession. As noted above, in *Topfell* the seller contracted to sell a property that was partly tenanted and partly vacant. The facilities provided on the premises were inadequate for the existing occupants. After contract but before completion, the local authority served a notice under the Housing Act 1985, limiting the number of persons who were permitted to occupy the premises until additional facilities were provided. As a result the vendor was unable to give vacant possession of the untenanted part of the premises.

If the contract contained an express condition that vacant possession would be given on completion, then the purchaser's knowledge of the physical state of the property at the time of the contract should be irrelevant; in such cases, the express term for vacant possession should prevail regardless of the nature of any known potential impediment to vacant possession (removable or irremovable).[47] Further, as noted earlier, an express special condition to give vacant possession will prevail over any conflicting contractual terms, whether special or general conditions.

The position is, again, less clear-cut with respect to cases where the obligation to give vacant possession is only *implied.* Where a contract is silent as to vacant possession and the contract incorporates an 'actual state and condition' clause, then this clause could prevent a buyer arguing that the state and condition of the premises is a barrier to the receipt of vacant possession. A seller would argue that a general 'actual state and condition clause' would take precedence over an implied obligation to give vacant possession, on the basis that it is not possible to imply, into a contract, a term that is inconsistent with an express term of the contract.[48] Accordingly, the seller would claim that because the 'state and condition impediment' to vacant possession was known of (or deemed to be known of) on exchange, and is *removable* (i.e. could be remedied by way of compliance with the order) the buyer cannot complain of it and must take the property with that impediment on completion. If the impediment was known of on exchange, but *irremovable* however, the implied obligation to give vacant possession

[46] Above, n43, *per* Templeman J.
[47] Above, n40.
[48] See *Rignall Developments Ltd v Halil* [1988] Ch. 190, *per* Millett J. at 200. See also *Squarey v Harris-Smith* [1981] 42 P. & C.R. 118, *per* Oliver, L.J. at 128.

would not include such an obstacle in the first place, and there would be no need to rely on a general 'actual state and condition' clause to escape liability.[49]

It would clearly be advisable for the contract to provide that any impediment to vacant possession occasioned by the state and condition of the property is the concern of the purchaser; but normally this situation arises because the contract *fails* to expressly deal with vacant possession in the first place.[50] As such, whilst there is a distinct lack of case law in this area, these examples illustrate how a physical or legal impediment, connected to the state and condition of a given property, could potentially constitute a barrier to the receipt of vacant possession. In turn, these examples further highlight how any breach of the obligation to give vacant possession on such a basis could be modified (or negated) by a seller relying on the 'actual state and condition' clause. This would likely be in cases where the obligation to give vacant possession is implied.[51]

Summary

In chapters 3 and 4, it was suggested that vacant possession, rather than being a term with a clearly defined and understood meaning, was rather a concept that currently lacked coherence and formulation. The above analysis suggests that the scope of the obligation to give vacant possession may not be limited to chattels, as has been traditionally considered by case law and property textbooks.[52] Traditional views of vacant possession as concerned only with personal items may therefore need to be reconsidered in light of the comments in *Hynes v Vaughan*.[53]

The scope of the obligation may thus encompass more than originally suggested by definitions in property textbooks and case law and also extend to items or impediments

[49] Given the wording of an 'actual state and condition' clause, it is unlikely that a purchaser would ever be able to claim that it did not know (or was not deemed to know) of the state and condition of the premises at exchange, and therefore the 'state and condition impediment' complained of.
[50] See Harpum, above n19, 400.
[51] If the vacant possession clause was only a general condition, however, with the same status as the 'actual state and condition' clause, then arguments as to which should have priority would arise in similar terms to those discussed in chapter 3.
[52] See for example, *Cumberland,* above n1, which distinguishes chattels from the state and condition of the property. Megarry, W. and Wade W., above n1, 672 state that "removeable physical impediments" are relevant to the obligation – i.e. chattels and not fixtures which are attached permanently to the land and which pass under the contract of sale.
[53] Above, n13, 452.

more akin to fixtures, or the fabric or state and condition of the premises or land. If such impediments are sufficiently substantial, they too may constitute a breach of the obligation to give vacant possession at the material time. This further suggests that any impediment which affects 'possession' will be relevant to the obligation, and reinforces how the fixtures and chattels distinction may therefore be somewhat artificial in the context of vacant possession. Further, general conditions with respect to the state and condition of the property may affect and modify an implied obligation to give vacant possession, in a similar manner to chattels and legal impediments (as demonstrated in chapter 3).

Lesser interests

The proposition that any impediment to 'possession' will be relevant to the obligation can be further developed in respect of 'lesser interests'. While the discussion above has centred on tangible/physical impediments to vacant possession, it has also touched on so-called 'legal obstacles' to vacant possession in the context of how the state and condition of a given property may contravene statutory restrictions on use, thus preventing the giving of vacant possession. Compulsory purchase orders and requisitioning notices, as the main types of 'legal impediments' to vacant possession, were discussed in detail in chapter 6. Crucially, in all such cases, the analysis undertaken was set in the context of claims, and competing restrictions, to 'possession' of the property in question. It is, however, possible to acquire or be granted less extensive rights over land which do *not* amount to 'possession'. It is relevant to consider the effect of such 'lesser interests' when interpreting the scope and extent of the obligation to give vacant possession.

There is no definition, as such, of so-called 'lesser interests' but such an expression is likely to refer to interests amounting to something short of exclusive possession. An example would be an incorporeal hereditament. Incorporeal hereditaments are burdens on an estate in land in the form of "rights which are attached to some estate, and have become part of it, so as to be enforceable by the person in possession of it",[54] but are not themselves estates in land (in their own right). One type of incorporeal hereditament

[54] Wonnacott, M. *Possession of Land* (Cambridge University Press, Cambridge 2006) 142.

that merits consideration in this context is a profit-à-prendre,[55] a non-possessory interest in land, which gives the holder the right to take natural resources such as petroleum, minerals, timber, or wild game from the land of another. Due to the necessity of allowing access to the land so that resources may be gathered, every profit contains an implied easement for the owner of the profit to enter the other party's land for the purpose of collecting the resources permitted by the profit. Whatever the type of profit (whether it be rights to graze stock, plant and harvest crops, quarry stone, sand or gravel, or take timber) in practice the exercise of that right gives the owner of it a substantial degree of control over the burdened land.[56] As such, it can be questioned whether such rights, while amounting to less than possession but still encumbering the estate being transferred in some way, would also amount to a legal obstacle to the receipt of vacant possession, if sufficiently substantial.

Imagine that a seller contracts to convey land to a purchaser. The contract provides expressly that vacant possession is to be given on completion. Between exchange and completion a third party reveals a profit against the property that will prevent development of the land by the purchaser in the manner desired. While the purchaser may have contractual remedies against the seller with respect to disclosure of third party rights, from a vacant possession perspective it can be questioned whether the seller is able to transfer the land to the purchaser on completion in compliance with the seller's obligation to give vacant possession. The third party's right is clearly an interest over the land rather than a competing claim to possession, but it prevents delivery of the property free from a claim of right over the land (i.e. the right to pass and re-pass) that is adverse to the purchaser. The purchaser may claim that the third party's right constitutes (albeit infrequent) third party occupation of the land. The purchaser could clearly argue that the adverse right was a legal impediment that prevented it from obtaining the quality of possession for which it had contracted. If a seller's obligation to procure vacant possession does not refer to transferring the estate free from all conceivable adverse legal obstacles to enjoyment, it is necessary for the law to determine which 'lesser interests' constitute obstacles to the receipt of vacant possession.

[55] From the Middle French expression meaning 'right of taking'.
[56] Ibid, 141.

The law at present does not provide a satisfactory account of how an obligation to give vacant possession is affected by intervening legal matters, such as non-possessory interests in land that act as obstacles to the procurement of vacant possession. Indeed, *Horton v Kurzke*[57] would appear to be the only case that can be seen to have relevance on this point. This case concerned the sale and purchase of land (with vacant possession) where, following exchange, the purchaser learnt of an agricultural grazing 'tenancy' purportedly affecting the land. The purchaser asked that completion be deferred until after the result of arbitration proceedings to decide the tenancy claim. The seller refused and, by notice under the contract, required completion of the contract within 28 days. On the purchaser's refusal, the seller claimed that she could forfeit the deposit and resell the property. The purchaser issued a writ for specific performance of the contract, with an abatement in price if the agricultural grazing claim should be upheld; and she later issued a summons for summary judgment. The arbitrator had meanwhile decided there was no legitimate claim for the agricultural grazing right but the purchaser did not know that until after the issue of her summons. Completion took place and the proceedings became abortive. The case therefore concerned the costs awarded against the seller given its conduct throughout the matter.

Relevant from this decision are the comments made by the court as to whether the agricultural grazing 'right' (if established) would be an issue of title, or vacant possession. Whilst the purchaser claimed that the agricultural grazing tenancy could be a barrier to the procurement of vacant possession, Goff J. was clear that this was the wrong approach:

> "The plaintiff opened her case on the footing that in the circumstances the defendant was not at any material time able to give vacant possession. I doubt whether that is an entirely correct way of approaching it. I think the real question is whether the defendant was able to prove her title. As, however, there is no sufficient evidence that the alleged claimant was in actual occupation, and the inability to give vacant possession therefore— if there were such inability— was based upon the right to possession, I think whether one looks at it as a question of vacant possession or of title, one gets back to the same position and must apply the same test."[58]

[57] [1971] 1 W.L.R. 769.
[58] Ibid, *per* Goff J. at 771.

The 'same test' can be seen to be a reference as to whether the impediment/defect could be remedied by completion, and therefore vacant possession/good title could be given by the seller in accordance with the contract.

The differences between the legal impediments previously discussed, and the potential legal impediment here, can be explained by reference to the nature of the right or interest. Unlike compulsory purchase orders and requisitioning notices, which pass the right to possession of the property in question to the acquiring authority (or another party), or in the case of statutory restrictions on user, prevent possession from being legally possible, so called 'lesser interests' do not amount to barriers to 'possession' of the property, as they are only rights over the land, rather than competing claims to possession of the land itself.

Indeed, whilst the judgment in *Horton* does not specifically discuss or explain the potential overlap between vacant possession and title, the issue with the agricultural grazing 'tenancy' would appear to centre on what the right specifically constituted. On the facts, it would seem that the grazing rights were more akin to a profit, and did not involve exclusive possession (i.e. clearly not a freehold or leasehold interest). In this context, 'tenancy' appeared to have been used to designate a contractual arrangement, but not an estate in land; indeed, the seller of the land remained the party with the right to possession which was held to have been transferred to the purchaser pursuant to the contract. This decision does not clarify, but does suggest, that so called 'lesser-interests' are not issues of vacant possession, but rather issues of title, and the case has been treated as authority for the proposition that lesser interests will only be relevant to title, and not to the delivery of vacant possession.[59] This would seem logical; the scope and extent of an obligation to give vacant possession, dealing with barriers to 'possession', should not encompass *rights* which, by their very nature, do not amount to possession.

[59] Megarry, W. and Wade W., above n1, 672. The interaction between vacant possession and title is discussed in chapter 8.

The responsibility for passing good title rests with the party asserting the title who is normally bound under the contractual documentation to provide necessary evidence, and then convey as provided for by the contract. The risk of purchasing a given property subject to some lesser interests is therefore put on, or shared by, the particular parties with respect to the disclosure of incumbrances in the contractual documentation relating to the sale. What is particularly noteworthy from the *Horton* decision is that the risk of a purchaser buying subject to an adverse lesser interest is seen by the law as being categorised as a defect in *title*; impediments which amount to *less* than possession are therefore legal issues of title. This marks such an issue out as distinct from the vacant possession obligation (which relates to competing claims to possession *itself*). Thus, legal impediments, in the form of compulsory purchase orders and requisitioning notices, can be distinguished from legal impediments such as certain profits and incorporeal hereditaments; the latter being legal rights amounting to *less* than possession of the land to which they pertain, and therefore not being relevant to the vacant possession obligation. This discussion aids a characterisation of the scope and extent of the obligation as being concerned with *all* barriers (i.e. whether fixtures, chattels or otherwise) to 'possession', but not all conceivable rights pertaining to the land which fall short of fully fledged possession. The decision in *Horton* also reflects further the need for close analysis of available case law in order to determine the scope and extent of the obligation with reference to the particular impediment in issue.

Given that the type of legal impediment (e.g. compulsory purchase order, statutory restriction on user, requisitioning notice or lesser adverse right) will determine whether a given obstacle is an issue of vacant possession or title, the distinction between vacant possession and title can be seen to be subtle and potentially capable of confusion. The similarities between giving vacant possession and giving good title, and instances in which the two become blurred, are discussed in more detail in the following chapter, in order to explain the parallels further.

Conclusion

The obligation to give vacant possession includes an inherently factual element: the ability to take possession in a practical sense at the date of completion. Certain tangible

impediments, such as chattels or persons in occupation will clearly be relevant to whether the obligation has been breached. Conversely, interests amounting to less than possession will clearly not be, given that by their very nature they amount to something less than 'possession' and cannot therefore be a barrier to the receipt of possession, which is inherent in the obligation to give vacant possession (as was explained by the model proposed in chapter 5). There is, however, some uncertainty as to whether other obstacles can be relevant in interpreting the scope and extent of the obligation. There remains little authority on whether the state and condition of a property can *itself* be a barrier to the procurement of vacant possession. This chapter has, however, developed arguments in support of the proposition that matters more akin to the state and condition (and nature) of the property or land in question, are relevant to the obligation to give vacant possession, if they amount to barriers to 'possession' of the estate in question.[60]

Indeed, the analysis in this chapter has shown the obligation to relate to *any* impediment with 'possession', but not an interest or matter that falls short of 'possession'. As such, and as explained with reference to the decision in *Hynes*, the status of items as fixtures or chattels does not matter in this context which is concerned with whether they are impediments to the enjoyment of the right to 'possession' on completion (or the operative date). Accordingly, the question is not how obstacles should be classified (or labelled), but whether they amount to a barrier to 'possession' on completion (and, if so, then how substantial they are in the particular context in question).

The analysis in this thesis therefore supports a new understanding of potential obstacles to the receipt of vacant possession. In light of the analysis undertaken, the previous classification of potential impediments as either fixtures or chattels can be understood as no more than an 'artificial' distinction that was (somewhat) wrongly assumed by property textbooks and case law to explain which items can, and cannot, be barriers to vacant possession.

In determining whether certain items constitute a breach of the obligation to give vacant possession, this chapter has also demonstrated once more that any such determination

[60] In turn, general conditions that pertain to the state and condition of the property or land in question (in cases where there is not an express special condition providing for vacant possession) will also potentially have an effect on the vacant possession obligation.

will be made with reference to the particular context in question, including the nature of the land or property. Building on the conclusions of the previous chapter, this was also shown to be comparable with the tests to determine factual possession in the context of claims for adverse possession, and actual occupation, again demonstrating the close association of 'possession-type' concepts in this regard.

On the basis that an impediment was relevant to the scope of the obligation, and constituted a breach at the operative time, the next determination for a court will be the remedy or relief that can be awarded to the successful party. As noted previously, the remedy normally awarded to an injured party for a breach of the obligation to give vacant possession will be damages, which can often be largely unsatisfactory to a purchaser who, having already paid their money before finding the property is not vacant, will be unable to occupy the property as they wish to. Chapter 9 explores the remedies available with reference to the connection and interaction between vacant possession and title, in seeking to consider whether vacant possession as a proprietary, rather than contractual, obligation would more evenly balance the issues of risk and fairness between parties.

Chapter 9

Vacant Possession and Title

On the basis that an obligation to give vacant possession has arisen and is breached by the party required to give vacant possession, it is important to consider where this leaves the party who had contracted for something more than is actually obtained at the relevant time. An enquiry into the current remedies available upon a breach of the obligation to give vacant possession reveals how, at present, they are intrinsically unsatisfactory, whether in the context of a standard sale and purchase contract, or the termination of a lease. This chapter, in concluding the detailed exploration in this thesis of the concept of vacant possession, contrasts the concept of giving vacant possession with giving good title. Given that a number of similarities are evident between the two, an analysis is undertaken of contrasting remedies for a breach of the obligation to give vacant possession and for not giving good title.

The chapter explores how the remedies for breaching the obligation to give vacant possession could be improved in the event that the vacant possession obligation were, like title, to become proprietary in nature, rather than remaining contractual. Here, whilst there would be certain advantages in terms of the additional remedies available, it is demonstrated that there is no independent justification for such a proposal and that the right to repudiate (currently available in the context of good title) could expressly be provided for as a remedy for a breach of the existing contractual obligation to give vacant possession. As such, it is concluded that vacant possession can best be interpreted as a more clearly defined and articulated contractual obligation. Based on the analysis in this and previous chapters, the final chapter of this thesis is then able to promulgate a proposed 'definition' of the concept, with appropriate justification, along with contractual provisions that may assist with the remedies available to a purchaser in the event of a seller's default.

Remedies for breaching an obligation to give Vacant Possession

In relation to vacant possession, if on the day of completion (but before completion is effected) a purchaser was to inspect the premises and see that they were not vacant, they would have the following options:

1. Apply to the court for an order for specific performance,[1] and claim damages for the impediment;

2. Serve a notice to complete on the seller[2] and after expiry of that notice (which will be determined by contractual provisions) rescind the contract, recover any deposit paid and claim damages; or

3. Choose to complete without prejudice to a right to claim damages.[3]

Commonly, however, a given property is not inspected prior to completion.[4] The first a purchaser knows about the problem with vacant possession is after completion when they arrive at the premises to find that all is not as they had expected. At this point, the contract has been completed (the seller has the sale monies in cleared funds) and the purchaser is left with the burden of having to action the claim thereafter.[5]

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[1] According to *Wroth v Tyler* [1964] Ch 30 a seller will not normally be obliged by an order for specific performance to undertake 'hazardous' litigation to obtain possession, but would still remain liable in damages. A vendor who sold with vacant possession had, if necessary, to take proceedings against any wrongful occupant but he would not usually be required to embark on difficult or uncertain litigation.

[2] This is in order to make time of the essence of the contract, and thus be able to rescind upon expiry of the notice if vacant possession is not provided before hand, thus allowing the sale to complete. As discussed, there is no right to immediately rescind the contract for a breach of the obligation to give vacant possession.

[3] The availability and amount of damages will depend on the circumstances and the nature of the losses. A purchaser's remedies may also be restricted by the express terms of the contract, as explained later in this chapter.

[4] It is stated on Lexis Nexis Butterworths Document [547] 10 Occupiers (accessible via subscriber service) that ideally "the buyer's conveyancers should check for any evidence as to rights of occupiers by either personally inspecting the property or advising the buyer client to do so...the buyer's conveyancers should raise a requisition of the seller's conveyancers requesting confirmation that vacant possession of the whole of the premises will be given on completion and that all occupiers have agreed to vacate". In practice this does not normally occur however because the mechanics of completion are such that legal completion is normally effected before the purchaser takes possession in residential property transactions. It is standard, on the day of completion, that the buyer of the subject property will be vacating their current home and will not arrive at their new property until much later in the day. As sales of residential properties take place on 'chain' (where each is selling and also buying on the same day) it would be practically cumbersome for each property to be inspected, in turn, before completion in each particular case.

[5] It is not general practice to stipulate that completion is required at a specific time on the day of completion in standard sale and purchase contracts. As such, the task of the court will be to seek to give effect to the true bargain between the parties based on a fair interpretation of the contract as a whole. The effect of this, in practice, is to allow a seller to satisfy his obligation to give vacant possession if the purchaser secures possession at *some point* during the day of completion. See *Cooper v Mysak* [1986] 54 O.R. (2d) 346 and *Re Lyne-Stephenson and Scott-Miller's Contract* [1920] 1 Ch. 472. See also the Court of Appeal decision in *Chinnock v Hocaoglu* [2008] EWCA Civ 1175. Whilst it is not the general practice to stipulate that completion is required at a specific time on the day of completion, certain contractual consequences may flow if the money is not received by a certain time. For example, completion

Non-merger

Indeed, a breach of an obligation to give vacant possession gives a purchaser the right to action the breach *after* completion. This is because the obligation to give vacant possession has been said not to merge in the conveyance or transfer but to remain actionable after completion (even in the absence of an express non-merger clause).[6]

In *Hissett v Reading Roofing Co Ltd*[7] the defendants contracted to sell to the first plaintiff property comprising offices, depot space and a flat; the property was sold subject to the special condition that vacant possession be given on completion. Condition 33 of the Law Society's Conditions of Sale 1953 stated that:

> "notwithstanding the completion of the purchase any General or Special condition or any part or parts thereof to which effect is not given by the conveyance and which is capable of taking effect after completion...shall remain in full force and effect."[8]

The contract was completed and on the direction of the first plaintiff it was transferred to the second plaintiff, a company. The plaintiff was unable to get vacant possession of the whole property because the flat was at all material times occupied by a protected tenant. The plaintiff claimed damages for breach of the sale agreement. It was held that the first plaintiff was entitled to damages for breach of contract because the defendant failed to give vacant possession in accordance with the special condition which was (in the words of condition 33) a condition 'capable of taking effect after completion'; further the condition did not merge with the conveyance which covered only part of the ground covered by the contract for sale.[9]

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can be deemed to take place the following working day with the technical requirement for 1 day's interest on the payment of completion monies becoming due to the seller – see Standard Commercial Property Conditions (Second Edition) (The Law Society, London 2003), and Standard Conditions of Sale (Fourth Edition) (The Law Society, London 2003).

[6] Seeking to action the breach post-completion by unraveling the contract (as opposed to claiming damages), however, is subject to the purchaser having not affirmed the contract. This is because the remedy of rescission is equitable in nature.

[7] [1969] 1 WLR 1757. In *Hissett* the obligation was express but the result should be the same even if the term for vacant possession was implied.

[8] The Law Society's General Conditions of Sale 1953 (The Law Society, London 1953) condition 33.

[9] Above, n7.

A party may try to action a breach of the obligation, post-completion, by seeking to unravel the contract, rather than claiming damages. In *Gunatunga v Dealwis*[10] it was noted that there was established authority for the proposition that a contractual term that vacant possession shall be given on completion did not merge in the conveyance. In that case the respondent's conduct post-completion, seeking to run the business in order to prevent its collapse and the loss of its goodwill, was not held to amount to affirmation of the contract that would bar its right to the equitable remedy of rescission. The failure by the appellants to give vacant possession on the relevant date was held to have given rise to a 'new and separate cause of action' each day.

In practice, by the time a purchaser becomes aware of the breach of vacant possession a period of time (sometimes a number of days) will have passed[11] and the purchaser may have commenced using the premises and can therefore, by conduct, be deemed to have affirmed the contract (although as noted in *Guntunga* this will normally be a question of fact and degree given the circumstances of the case). Even then, with the monies having been transferred over to the seller to effect completion, this leaves the purchaser having to embark on expensive court action (which they may not be able to fund) to seek to action the breach by way of rescission of the contract, and have the monies returned. As such the non-merger provision is unlikely to be of use to a party, who finds that they have not been given vacant possession on completion, in an attempt to unravel the contract post-completion, and a purchaser will normally action the breach only by way of damages in such a case.

At present, therefore, the current law and practicalities of completion put the seller in a much stronger position as far as a breach of a vacant possession obligation is concerned. A purchaser will often be left in the difficult position of advancing a claim for damages having suffered interruption as a consequence of not being able to immediately occupy without difficulty or objection. If the obstacle to vacant possession is a person or entity with a right to remain in occupation, the purchaser may have difficulty in removing them from the premises and may have to take the premises subject to their interest.[12]

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[10] [1996] 71 P.&C.R. 161.

[11] On residential sale and purchases the purchaser is likely to arrive at the property on the afternoon of completion or the following day; on investment purchases, this can often be a number of days afterwards.

[12] For a discussion of the doctrine of constructive notice (with respect to overriding interests and other adverse interest to which a sale may be subject, notwithstanding that a purchaser may not actually be aware of interests), see

Further, the purchaser may lose a proposed letting opportunity (and thus suffer even greater detriment) if they had already contracted to demise the premises to a tenant on the basis that a transfer to them takes place. This can result in the purchaser themselves being subject to breach of contract claims (with respect to an anticipated tenant) giving rise to consequential losses.[13] This is largely unsatisfactory for a purchaser, and highlights the flaws in the remedies currently available for a breach of the obligation and the greater element of risk that lies at the door of the purchaser. At the present time, the purchaser is unevenly exposed to, and bears, the greater risk of not receiving vacant possession from a seller on completion.

Title and remedies for breach

Title is normally seen as a comprehensive term referring to the legal basis of the ownership of property by a person. The idea of title in property law is equated with ownership, legal right or legal ownership.[14] Throughout this thesis the passing of good title has been referred to as an element of a standard sale and purchase transaction. As discussed below, the issues relevant to giving good title can be seen to be analogous to those pertinent to the procurement of vacant possession. For this reason, and as an alternative perspective, the relevance of title in the context of vacant possession is examined in this chapter. This is in order to both highlight similarities between the two that have not previously been made apparent, and also to question how close the two concepts are, and perhaps could *become*, in theoretical terms.

Title to a proprietary interest can be either absolute or relative and, in the common law tradition, titles in property law are normally understood to be relative.[15] This effectively amounts to saying that any given title is subject to a better title to the object of interest in question. The classic analysis of title demonstrates that title is the set of facts upon

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Howell, J. 'Notice: A Broad View and a Narrow View' (1996) *Conv* 34; Partington, M. 'Implied Covenants for Title in Registered Freehold Land' (1988) *Conv* 18 and Sheridan, L.A. 'Notice and Registration' (1950) *NILQ* 33.

[13] As noted earlier, in the leasehold context, the landlord (in a similar manner to the tenant in the freehold context) currently has the upper hand and can use the issue of vacant possession to seek to prevent their tenant exercising a contractual break option in a lease if the landlord would prefer the lease to continue. This is not just when vacant possession is an express condition of lawful operation of the break, but also in circumstances where the break is conditional upon material compliance with covenants which, by virtue of the yielding-up obligation, will include a requirement to give a form of vacant possession in any event.

[14] See Megarry, W. and Wade W. *The law of real property* (7th edn Sweet and Maxwell, London 2008) 86.

which a claim to some legal right, liberty, power or interest is founded.[16] Lawson and Rudden wrote that "title is a shorthand term used to denote the facts which, if proved, will enable a plaintiff to recover possession or a defendant to retain possession of a thing".[17]

Remedies for a defect in title are similar in nature to those available for a breach of the obligation to give vacant possession. A party can seek specific performance of an obligation to deduce title;[18] a notice to complete can be served as a precursor to seeking to end the contract, or a party may complete and then claim damages.[19] Of particular relevance here, however, is that a defect in title can also enable a party to repudiate a contract (without the need for a notice to complete to be served) and that statute provides that certain covenants are implied when a party purports to sell with 'full' or 'limited' title. These have a significant effect on the remedies which thus become available to the purchaser, in contrast to those available to a purchaser upon a breach of the obligation to give vacant possession.

Rescission

It is well established that a vendor is under a 'two-fold' obligation when it comes to deducing title to their property.[20] A vendor is obliged to disclose, prior to (but, in any event, by) the exchange of contracts, all latent defects in title, except those of which a purchaser is already aware.[21] Further, a vendor must, by the completion date prescribed by the contract, be able to prove he has the title which he contracted to pass to the purchaser.[22] In the event that a vendor contracts to sell property or land which he cannot prove title to, as provided for by the contract, then the purchaser is able to rescind the contract immediately:

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[15] Ibid, 90. See also Jones, J.W. 'Forms of Ownership' (1947) 22 *Tulane LR* 82. The idea of relativity of title originates from the nature of possession in law which has the effect of making ownership a relative concept as opposed to an absolute one. See also Panesar, S. *General Principles of Property Law* (Longman, Essex 2001) 141.
[16] Salmond, J.W. *Jurisprudence* (12th edn Stevens and Haynes, London 1966) 265.
[17] Lawson, F.H. and Rudden B. *The Law of Property* (2nd edn Clarendon, London, 1982) 44.
[18] Or for disclosure of certain documents prior to completion.
[19] Above, n14, 81.
[20] Ibid.
[21] Harpum, C. 'Exclusion Clauses and Contracts for the Sale of Land' (1992) 108 *LQR* 280.
[22] See *Re Haedicke and Lipski's Contract* [1901] 2 Ch 666 at 668.

> "If a vendor contracts to sell land which he does not own or to which the title is bad, the purchaser may *at once* treat the contract as repudiated and [to] sue the vendor for damages. He does not have to wait until the contractual completion date."[23]

This position was established in *Barlett v Tuchin.*[24] This right to rescind (before completion) is on the basis of the vendor being in breach of a contractual obligation which is distinct from being required to give good title on the date fixed for completion. The decision in *Stevens v Adamson*[25] suggests that a failure to disclose a defect in title would be sufficient to constitute such a breach, giving rise to the right to rescind at that point.[26] Such a breach would, however, have to involve either a substantial or irremovable defect, otherwise the right to rescind would not arise[27] and the buyer would normally seek specific performance of the contract subject to an abatement of the price in respect of the insubstantial or irremovable defect in title.[28]

As such, the obligation to give good title differs from the obligation to give vacant possession in that, in relation to the former, a breach can arise and be actioned before completion, whereas with vacant possession the obligation (and potential breach thereof) arises only on completion (or the operative date), as explained in chapter 5. Further, in respect of a breach, in relation to title this can give the purchaser a right to rescind the contract (either before or at completion) whereas, with vacant possession, a breach can only come about on completion and does not give rise to an express right to immediately rescind (a notice to complete must be served first, as a precursor to then treating the contract as discharged).[29]

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[23] Above, n14, 81. Emphasis added.

[24] (1815) 1 Marsh 586. See also, *Roper v Coombs* (1827) 9 Dowl & Ry 562; *Brewer v Broadhead* (1882) 22 CH D 105; *Lee v Soames* (1888) 36 WR 884; *Pips (Leisure Productions) Ltd v Walton* [1980] 43 P & CR 415 and *Pinekerry Ltd v Needs (Kenneth) (Contractors) Ltd* [1992] 64 P & CR 245. See also Oakley, A.J. 'The conveyancing problems of rapid re-sales' (1993) *CLJ* 22.

[25] (1818) 2 Stark 422.

[26] Ibid, and *Peyman v Lanjani* [1985] Ch 457 at 497. The breach of an obligation to give vacant possession will only become actionable on completion, as that is when the obligation is engaged – see below.

[27] *Pips*, above n24 at 424.

[28] Above, n14, 81; *Dyer v Hargreave* (1805) 10 Ves 505, at 507 and *Rutherford v Acton-Adams* [1915] AC 866 at 869, 870. No abatement of the purchase price would be appropriate if the removable defect was to be remedied before the date of contractual completion.

[29] A purchaser serving a notice to complete in such circumstances is uncommon and normally they would seek specific performance of the contract; however, in a downward market, it can be used as a way to ultimately discharge the purchaser from completing the contract (which, may for example, be attractive where the land value had dropped significantly between exchange and completion). The crucial point to note is that the purchaser cannot rescind immediately for a breach of the obligation to give vacant possession.

Implied covenants for title

Covenants for title are assurances given by the owner of a property about ownership and the owner's right to dispose of the property.[30] The law relating to title covenants was reformed by the Law of Property (Miscellaneous Provisions) Act 1994,[31] which broadly repealed aspects of the Law of Property Act 1925 relating to implied covenants for title in certain cases,[32] and introduced a new regime. The provisions of the Law of Property (Miscellaneous Provisions) Act 1994 were supplemented by the Land Registration (Implied Covenants for Title) Rules 1995, which amended the Land Registration Rules 1925 and applied the provisions of the Law of Property (Miscellaneous Provisions) Act 1994 to registered land.[33]

Under the Law of Property (Miscellaneous Provisions) Act 1994, the use of 'full title guarantee' or 'limited title guarantee' implies a set of covenants into the 'disposal instrument'[34] (for example, a transfer document).[35] The covenants implied by these two defined phrases are the same except for the covenant that relates to incumbrances (i.e. matters to which the title of the property is subject).[36] If neither of the key phrases is used, no covenants will be implied;[37] the parties are, however, at liberty to vary any

[30] Above, n14, 83.

[31] This came into force on 1 July 1995. The Law of Property (Miscellaneous Provisions) Act 1994 deals with implied covenants for title in Part 1.

[32] Prior to the Law of Property (Miscellaneous Provisions) Act 1994, title covenants were addressed under section 76 of the Law of Property Act 1925. Certain covenants as to title were implied if the entity disposing of an interest in land was expressed to do so as beneficial owner, whilst other covenants as to title were implied if the seller were expressed to be selling as settler, trustee, mortgagee, personal representative or under an order of the court. There were also certain covenants implied under section 24(1)(a) of the Land Registration Act 1925, which applied only to registered leasehold properties. These overlapped to some extent with some of the implied covenants under section 76 of the Law of Property Act 1925, but went a little further in what they covered and when they applied.

[33] The Land Registration Act 2002, which came into force on 13 October 2003, does not significantly change the regime under the Law of Property (Miscellaneous Provisions) Act 1994. The Land Registration Act 2002 does, however, repeal the Law of Property Act 1925 in its entirety, and is supported by the Land Registration Rules 2003 (as amended by the Land Registration (Amendment) Rules 2008).

[34] Rule 67(1), Land Registration Rules 2003.

[35] The set of implied covenants for title may be implied into any 'instrument effecting or purporting to effect a disposition of property' – section 1(1), Law of Property (Miscellaneous Provisions) Act 1994. A disposition of property is defined in section 205(ii) of the Law of Property Act 1925 as including a transfer or conveyance of an existing interest in property. Property is given the same definition as in section 205(xx) of the Law of Property Act 1925 and includes any thing in action and any interest in real or personal property.

[36] Full title guarantee implies that the property is free from known encumbrances, whereas selling with limited title guarantee implies that the property is free from known encumbrances since the last disposition for value - section 3, Law of Property (Miscellaneous Provisions) Act 1994.

[37] There is no actual obligation on the parties to give full or limited title guarantee, except in relation to transitional arrangements when the Act first came into force. Full or limited title guarantee is a matter for the parties to agree between themselves.

implied covenant or agree bespoke title covenants expressly under the contract or transfer.[38]

Of particular relevance here, is the obligation implied in relation to using reasonable efforts to give title.[39] The statute implies that the person disposing of the property will, at its own cost, make reasonable efforts to give to the new owner of the property the same title that it has said it will give.[40] This is an obligation that will take effect on completion and subsist thereafter. In relation to incumbrances, the implied covenants will imply either that the property is free from known incumbrances, or free from known incumbrances since the last disposition for value.[41]

It is clear therefore that, in relation to title, a seller has an implied duty to use reasonable endeavours to give good title, at and following completion. In the case of vacant possession, the obligation arises (and may be breached) on completion but, once the transaction has formally completed, thereafter the seller has no implied obligation to remedy the breach and it normally falls to the purchaser to take action and then sue for damages.[42] This is significant when one considers the uneven distribution of risk and responsibility that currently exists with regard to the procurement of vacant possession, with the purchaser more exposed in the event that vacant possession is not given. In the conveyancing process, with respect to title, the purchaser has greater redress than the seller under the implied covenants for title, which provide the purchaser with some

[38] In relation to these implied covenants, the person making the disposition is not liable for any particular matter to which the disposition is expressly made subject (section 6(1), Law of Property (Miscellaneous Provisions) Act 1994); anything which at the time of the disposition is within the actual knowledge of the person to whom the disposition is made (section 6(2)(a), Law of Property (Miscellaneous Provisions) Act 1994) or anything which at the time of the disposition is a necessary consequence of facts that are then within the actual knowledge of the person to whom the disposition is made (section 6(2)(b), Law of Property (Miscellaneous Provisions) Act 1994).

[39] Section 2(1)(b) and (2), Law of Property (Miscellaneous Provisions) Act 1994.

[40] Ibid.

[41] Section 3, Law of Property (Miscellaneous Provisions) Act 1994. The scope of the implied covenant depends on which of the key phrases has been used: 'full title guarantee' or 'limited title guarantee'. Full title guarantee implies that the disposal is free from all charges, incumbrances and all rights exercisable by third parties *except* any charges, incumbrances or rights which the person disposing of the property does not and could not reasonably be expected to know about – i.e. free from all known incumbrances. So, if a seller knows or ought reasonably to have known about an incumbrance, it should disclose that incumbrance to the buyer, whether that incumbrance was created by the seller, a previous owner or a third party, and no matter when it was created. Limited title guarantee implies that the person disposing has not and as far as it is aware no-one else has, since the last disposition of the property for value, charged or incumbered the property or granted any third party rights over it which still subsist.

[42] When the purchaser completes and then sues for damages, if the impediment is irremovable (e.g. where the property is let to a tenant), the measure of damages will be the difference between the purchase price and the market price of the property subject to the impediment, plus any consequential loss – see *Beard v Porter* [1948] 1 KB 321 (where costs arising from the purchase of another property were held to be recoverable). If the impediment is removable (for example, a substantial quantity of chattels remains on the property) then the purchaser may recover

assurance post-completion. The position of the purchaser is therefore more adequately protected in the context of title, with the comparison between vacant possession and title revealing a legal position in which risk and responsibility is more evenly distributed in the context of title (albeit still slightly more in favour of the seller), as compared to vacant possession. This justifies further enquiry into the apparent closeness of the two.

Title and Vacant Possession

Whilst there is an analogy (and indeed, overlap) between vacant possession and title, additional remedies are available in the case of title (as compared to vacant possession). Harpum, in his 1988 paper, argued that the obligation to give vacant possession is very similar to a vendor's obligation to show a good title free from encumbrances.[43] This is a view which has also been expressed by other commentators.[44] The analogy can be seen to apply both in cases where the obligation to give vacant possession, or good title, is implied or express.

Implied obligations

As noted in chapter 3, the decision in *Cook v Taylor*[45] is authority for the legal principle that vacant possession will be an implied term of a sale and purchase contract, if there is no express provision to the contrary.[46] The implication that vacant possession will be given can, however, be rebutted by conflicting conditions of sale. In chapter 4, it was noted that it has been established that the implied obligation will not arise if it would be inconsistent with an express provision of the contract.[47] Further, in addition to being capable of rebuttal by conflicting conditions of sale, an implied obligation to give

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the cost of doing so – see *Cumberland Consolidated Holdings Ltd v Ireland* [1946] KB 264 (where the costs of removing the rubbish were recoverable).

[43] Harpum, C. 'Vacant possession - chameleon or chimaera?' (1988) *Conveyancer and Property Lawyer* 324.

[44] For example, see Farrand, J.T. *Contract and conveyance* (Oyez Publications, London 1964) 175.

[45] [1942] Ch. 349.

[46] See also *Re Crosby's Contract* [1949] 1 All E.R. 830, *per* Romer J. at 834; *Midland Bank Ltd v Farmpride Hatcheries Ltd* [1981] 2 EGLR 147; *Edgewater Developments Co v Bailey* [1974] 118 Sol Jol 312 and *Farrell v Green* [1974] 232 EG 587.

[47] *Rignall Developments Ltd v Halil* [1988] Ch. 190, *per* Millett J. at 200. This was in an alternative context but the statement is of general application. See also *Reynolds v Doyle* [1919] 19 S.R. (N.S.W.) 108, *per* Harvey J. at 110 and *Squarey v Harris-Smith* [1981] 42 P. & C.R. 118, *per* Oliver L.J. at 128.

vacant possession will not arise with respect to irremovable[48] incumbrances which were either known to the purchaser[49] or were patent at the time of contracting.[50]

Harpum notes in this regard that there is "a striking parallel with the vendor's obligation under open contract to show a good title free from encumbrances which will be implied (and rebutted) in similar circumstances".[51] Indeed this was established in *Hughes v Jones*[52] where it was held that:

> "There is not on the face of the particulars any qualification of the interest in the estate purported to be offered for sale, and it was, as I conceive, the vendors' duty to qualify upon the fact of the particulars the interest which they intended to sell, if they did not intend to offer for sale an unqualified estate in fee. Under these particulars of sale, therefore, the vendors were, in my opinion, bound to prove a title to an unqualified estate in fee..."[53]

This was also confirmed in *Leominster Properties Ltd v Broadway Finance Ltd*[54] where it was clearly stated that:

> "In the absence of express stipulation to the contrary...a contract for the sale of land in fee simple obliges the vendor to make a good title to the whole legal and equitable interest in the freehold free from encumbrances." [55]

Also in *Re Ossemsley Estates Ltd,*[56] this proposition of law was held:

> "If a vendor is contracting to sell land, his obligation, of course, is to make a good title to the land free from any encumbrance. If there is an encumbrance,

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[48] The purchaser's knowledge of a removable impediment to vacant possession is irrelevant – see *Norwich Union Life Insurance Society v Preston* [1957] 1 W.L.R. 813.

[49] If the seller knew (or ought to have known) of the impediment and had failed to make full and frank disclosure of it to the purchaser, then the seller will not be able to rely on any condition of sale in general terms which excludes or modifies their obligation to give vacant possession. The implied obligation to give vacant possession will not readily be excluded or modified in such a circumstance (see *Re Crosby's Contract*, above n46). This is an application of the rule that if there is any ambiguity, a condition of sale will be construed against the vendor because it restricts the rights of the purchaser (see *Leominster Properties Ltd v Broadway Finance Ltd* [1981] 42 P. & C.R. 372, *per* Slade J. at 387).

[50] A defect will be patent if there is something on the land which necessarily leads to the conclusion that there is some adverse right – see *Yandle v Sutton* [1922] 2 Ch. 199, *per* Sargant J. at 210. See *Cook v Taylor* [1942] 2 All E.R. 85, *per* Simonds J. at 87.

[51] Above, n43.

[52] (1861) 3 De G.F. & J. 307.

[53] Ibid, *per* Turner L.J. at 313-314.

[54] [1981] 42 P & CR 372.

[55] Ibid, *per* Slade J. at 380.

[56] [1937] 3 All E.R. 774.

> his contractual obligation is, by some means or other, to get rid of it, so that the purchaser may have a clean title."[57]

Further, the obligation to give good title free from incumbrances is similarly qualified by the exception that a purchaser takes the land subject to irremovable defects in the title which were either patent or known of at the date of contract. For example, it was stated in *Timmins v Morel and Street Property Co Ltd*[58] that:

> "If no interest is mentioned, then prima facie an unencumbered freehold interest will be implied. No such implication arises, however, if the purchaser knew at the time of the contract (as the defendants knew in the present case) that some lesser interest or some incumbered interest was to be the subject of the sale."[59]

As such, both in cases of giving vacant possession and good title, the obligation will be implied (if not expressly stated) and, when implied, will be rebuttable if the seller can show that the *irremovable* impediment or incumbrance was known to the purchaser, or was patent (or was otherwise covered by a conflicting condition of sale). That is, in cases of both vacant possession and title, the obligation is impliedly created and capable of being discharged in similar terms.

This highlights the similarity between vacant possession and title when both exist as implied obligations. The analogy between vacant possession and title also applies with respect to express obligations to give vacant possession.

Express obligations

If a vendor expressly contracts to sell land free from encumbrances then such an obligation is absolute.[60] Even if the purchaser was aware of the existence of some defect in the vendor's title, or that the property was subject to some patent irremovable

[57] Ibid, *per* Greene M.R at 778.
[58] [1958] Ch 110.
[59] Ibid, *per* at 132. See also *Yandle Sons v Sutton*, above n50 at 210 in relation to patent versus latent defects and a purchaser's liability to take the property 'subject to those defects which are patent to the eye'.
[60] Above, n43.

incumbrance, this will be no defence to an action for breach of an express undertaking to give good title. It was stated in *Barnett v Wheeler* [61] that:

> "The defendant has entered into an express contract to deduce a good title to the premises by a specified day: and it affords no reason for his not performing that contract that the plaintiff, at the time of the sale, was aware of the defect of title by the breach of the covenant to repair."[62]

Similarly, as established in chapter 3, an express undertaking to give vacant possession amounts to a "guarantee by the vendor that upon completion of purchase the purchaser will be put into possession":[63]

> "...a condition of this kind is recognised as amounting to a guarantee by the vendor that upon completion of the purchase the purchaser will be put into possession."[64]

Other principles applicable to title which derive from the vendor's duty of disclosure are equally applicable to vacant possession. For example, a vendor who knows or ought to have known of a defect in his title may not rely on a general condition of sale to cover the defect unless he has made full and frank disclosure of it. This was established in *Rignall Developments Ltd v Halil*:[65]

> "It is, however, a well-established rule of equity that, if there is a defect in title or encumbrance of which the vendor is aware, the vendor cannot rely upon conditions such as those in the present case unless full and frank disclosure is made of its existence."[66]

In turn, a vendor who knew or ought to have known of an impediment which would preclude him from giving vacant possession, should not be able to rely on a general

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[61] (1841) 7 M. & W. 364. See also, *Cato v Thompson* (1882) 9 Q.B.D. 616, *per* Jessel M.R. at 620; *Re Allen and Driscoll's Contract* [1904] 2 Ch. 226, *per* Romer L.J at 231. The court will not permit parol evidence to be adduced to contradict the express undertaking to make a good title – see *Cato v Thompson* (1882) 9 Q.B.D. 616, *per* Lindley L.J. at 620 and *Re Gloag and Miller's Contract* (1883) 23 Ch.D. 320, *per* Fry J. at 327.

[62] (1841) 7 M. & W. 364, *per* Park B. at 367.

[63] *Isaacs v McGuire* (1888) 14 V.L.R. 815, *per* Higinbotham C.J. at 817-818.

[64] Ibid. See *Topfell Ltd v Galley Properties Ltd* [1979] 1 W.L.R. 446. See also *Sharneyford Supplies Ltd v Edge* [1987] Ch. 305 at 325. As discussed in chapter 5, and argued by Harpum in (1988) 'Vacant possession - chameleon or chimaera?', above n43, the overriding nature of an express obligation to give vacant possession was not appreciated in the decision of Deputy Judge Wheeler in *Sheikh v O'Connor* [1987] 2 EGLR 269.

[65] [1988] Ch. 190.

[66] Ibid, *per* Millett J. at 197. See also *Becker v Partridge* [1966] 2 Q.B. 155, C.A.

condition of sale to escape liability, unless before contract he made adequate disclosure of the matter.[67]

As such, vacant possession and title (both when express or implied) can be seen to share a number of similarities, even though the obligations in form are separate and distinct:

> "The vendor's obligation to give vacant possession on completion is a separate obligation, distinct from his duties to show a good title free from encumbrances and to take reasonable care of the property until completion."[68]

The similarities between vacant possession and title have been touched upon in previous chapters, where confusion arose as to whether the issue in question was one of vacant possession or one of title. It is useful to review these in order to highlight how the similarities between the two have led to confusion.

Confusing Vacant Possession and Title

The fact that a number of principles applicable to title are equally applicable to vacant possession may explain why there has, on occasion, been confusion as to whether the relevant issue is one of vacant possession or title. Throughout the discussion in this thesis, a number of instances have been highlighted where this has been the case and a review of such instances is appropriate in order to draw together these parts of the thesis, and to reinforce how the similarities between vacant possession and title are apparent, and can be confused. Examples in three specific respects can be drawn upon in this regard.

[67] See chapter 3, and the decisions in *Flight v Booth* (1834) 1 Bing. (N.C.) 370 in respect of mis-description and *Re Puckett and Smith's Contract* [1902] 2 Ch. 258 C.A. concerning non-disclosure. Also *Nottingham Patent Brick and Tile Co v Butler* (1885) 15 Q.B.D. 261, *per* Wills J. at 271; subsequently applied by Millett J. in *Rignall Developments Ltd. v Halil* [1988] Ch. 190 at 197-198. Harpum, C (1988) 'Vacant possession - chameleon or chimaera?', above n43, 324 also suggests that this is correct.
[68] Above, n43, 324.

Lesser interests

A discussion in chapter 8 related to the relevance of so called 'lesser interests' to vacant possession including, for example, incorporeal hereditaments such as certain profits.[69]

As noted in chapter 8, the law at present does not provide a satisfactory account of how an obligation to give vacant possession is affected by intervening legal matters, such as non-possessory interests in land that may act as obstacles to the procurement of vacant possession. In *Horton v Kurzke*[70] the court had to determine whether the agricultural grazing right (if established) would be an issue of title, or vacant possession. Whilst the purchaser claimed that the agricultural grazing tenancy could be a barrier to the procurement of vacant possession, Goff J. was clear that this was the wrong approach:

> "The plaintiff opened her case on the footing that in the circumstances the defendant was not at any material time able to give vacant possession. I doubt whether that is... entirely correct.... I think the real question is whether the defendant was able to prove her title."[71]

With that said, the judge emphasised that the same test must be applied, regardless of whether it is an issue of vacant possession or title:

> "As, however, there is no sufficient evidence that the alleged claimant was in actual occupation, and the inability to give vacant possession therefore— if there were such inability— was based upon the right to possession, I think whether one looks at it as a question of vacant possession or of title, one gets back to the same position and must apply the same test."[72]

The 'same test' can be seen to be a reference to whether the impediment or defect could be remedied by completion, and therefore vacant possession or good title could be given by the seller in accordance with the contract. This clearly showed similarities in nature and form between the two obligations. The decision in *Horton* did not clarify, but suggested, that so called 'lesser-interests' are not issues of vacant possession, but rather issues of title, and the case has been treated as an authority for the proposition that

[69] And other non-possessory interests in land.
[70] [1971] 1 W.L.R. 769.
[71] Ibid, *per* Goff J at 771.
[72] Ibid, *per* Goff J at 771.

lesser interests will only be relevant to title, and not to the delivery of vacant possession.[73] It was argued in chapter 8 that the vacant possession obligation will only relate to impediments that represent a competing claim to the right to 'possession', and thus not lesser claims or rights that do not amount to possession.

Thus, some types of legal impediments, in the form of compulsory purchase orders and requisitioning notices, can be distinguished from other legal impediments, such as certain profits and incorporeal hereditaments; the latter being legal rights amounting to less than possession of the land to which they pertain, and therefore not being relevant to the vacant possession obligation. Given that the type of legal impediment (e.g. compulsory purchase order, statutory restriction on user, requisitioning notice or lesser adverse right) will determine whether a given obstacle is an issue of vacant possession or title, the distinction between vacant possession and title can understandably sometimes be confused as specific consideration of the nature of the impediment will be required to determine whether issues of vacant possession, or title, are engaged. A broad statement that 'legal impediments' will be relevant to the obligation to give vacant possession is thus not correct or helpful.

Conditions of sale

A second example of the potential confusion between vacant possession and title, and where the two can be seen to have been conflated, was in the context of standard conditions of sale. In chapter 4 it was noted that under the first edition of the Standard Conditions of Sale in 1990[74] vacant possession was specifically dealt with as a general condition under condition 3 marked 'Tenancies'. Condition 3.3.1 stated:

> "The buyer is to be given vacant possession of all the property on completion; this does not apply to any part of it included in a lease or tenancy ("tenancy") subject to which the agreement states the property is sold."[75]

[73] For example, see Megarry, W. and Wade W., above n14, 672. The interaction between vacant possession and title is discussed in chapter 8. As explained in chapter 8, this would seem logical; the scope and extent of an obligation to give vacant possession, dealing with barriers to 'possession', should not encompass *rights* which, by their very nature, do not amount to possession. This also supports the model of vacant possession proposed in chapter 5.
[74] The Standard Conditions of Sale (First Edition) (The Law Society, London March 1990).
[75] Ibid, condition 3.3.1.

It was explained in chapter 4, in a discussion of the evolution of the standard conditions of sale, that this provision was interpreted as a general condition that vacant possession was to be given subject to any disclosed tenancies, a view supported by commentaries on the conditions and texts on the interpretation of the general conditions.[76] Of particular interest was the standard form of special conditions to the 1990 edition which did *not* specifically include a special condition where any tenancies (as barriers to vacant possession) could be explicitly listed. This differed from the pre-fusion standard conditions of sale which included a form of special condition which provided, for example:

> "G The property is sold...
>
> State whether the property is sold with vacant possession or subject to tenancies (giving particulars of them)."[77]

Or in other editions, a standard form special condition which provided:

> "The property is sold with vacant possession on completion
>
> OR
>
> The property is sold subject to the following leases or tenancies...."[78]

[76] Standard Conditions of Sale (First Edition): a guide for clients (Miscellaneous publications of the Law Society) (Law Society, Law Society Stationery Society, London 1990). See also Silverman, F. *Standard Conditions of Sale: a conveyances guide* (3rd edn Format Publishing, London 1990) 149.
[77] The National Conditions of Sale, 16th Edition, August 1953 (special conditions) (The Solicitor's Law Stationery Society Limited, London 1953).
[78] The Law Society's Contract for Sale (1980 Edition) (The Law Society, London 1980) special condition F.

As such, if the property was to be sold subject to a tenancy or lease then an additional special condition would need to be manually added in the special conditions to the 1990 edition listing the tenancies in question, as suggested by Silverman.[79] This was, however, contrary to the spirit of the standard conditions of sale which were intended to provide standard form wording for the conveyancer. For this reason, it was arguable whether a barrier to vacant possession in the form of a tenancy could be treated as a 'burden' on the property, and therefore be covered by, and listed under, special condition 2, which provided:

> "The Property is sold subject to the Burdens on the Property [as explicitly listed under the heading 'Burdens' on the standard form contract] and the Buyer will raise no requisitions on them."[80]

Indeed, it was possible to interpret the 1990 standard conditions as suggesting that barriers to vacant possession (in the form of tenancies) could, and should, be disclosed as 'burdens' pertaining to title, rather than the contractual obligation to give vacant possession in its own right (as the separate and distinct obligation). This would also potentially have had an effect on the remedies available for a breach or non-disclosure of a tenancy (as discussed in more detail below).[81] This example, in illustrating the similarity between issues of vacant possession and title, demonstrates that such similarity has in previous years led to the two being, to some extent, fused together, with impediments to vacant possession being treated alike with incumbrances on title in the context of the disclosure of incumbrances in contracts for the sale and purchase of land. This is despite vacant possession being interpreted as a separate and distinct obligation.[82]

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[79] Silverman, above n76, 149.
[80] The Standard Conditions of Sale (First Edition) (The Law Society, London March 1990) special condition 2.
[81] The internal inconsistency created appears to have been something that was known of at the time; indeed, comments from one of the authors of the first edition reflected how the new conditions had been drafted very quickly, which may explain why greater thought was not given to the form of special conditions (see Silverman, above n76, vi).
[82] Above, n43, 329.

A third example of vacant possession and title being confused with each other is found in the decision in *Sheikh v O'Connor.*[83] As discussed in chapter 5, in *Sheikh* the vendor contracted to sell a property to the plaintiff. Most of the property was tenanted but the vendor expressly contracted to sell one of the rooms with vacant possession. After completion, the purchaser complained that the room which should have been vacant was in fact occupied by one of the tenants as a trespasser. The purchaser sued the vendor for damages for his failure to give vacant possession. One of the issues was purely factual and concerned whether the tenant had taken possession of the room before, or after, the completion date. Deputy Judge Wheeler concluded that it had been *after* completion, which was sufficient to dispose of the case in the defendant's favour and have the action dismissed. However, the judge went on to consider (*obiter*) the position in the event that his finding of fact was incorrect and the trespasser had been in unlawful occupation of the premises at the material time.

The judge accepted that a vendor who had contracted to give vacant possession did not fulfill his contractual obligation if, at the date fixed for completion, there was a third party who had a *legal* claim to possession, but he considered the position to be different in relation to a trespasser. In such a case he considered that it was for the purchaser to seek his remedy in the county court against the trespasser, given that the *legal* right to possession had passed to the purchaser on completion.

As discussed in chapter 5, the problem with the judge's *obiter* comments in this decision is that, if correct, they take all substance from the vendor's contractual undertaking to give vacant possession. The *obiter* comments suggest that a vendor will not be liable, even if he expressly contracts to give vacant possession, in the event that persons with no lawful claim prevent the delivery of vacant possession on completion. This will leave a purchaser with no remedy against the seller and no legal right to sue or seek specific performance of obligations. It therefore negates the obligation being operative in the sale and purchase contract between the parties, and is contrary to established authority.[84]

[83] [1987] 2 EGLR 269.
[84] See chapter 5.

Harpum[85] provides an extensive criticism of the decision in *Sheikh* and seeks to explain why it could not be treated as reliable *obiter*. In doing so, he highlights the strands of reasoning provided by the judge for making the erroneous decision:

> "There are...two strands in this reasoning. First, a vendor's obligation to give vacant possession will *not* be broken if there happen to be persons on the property without claim of right at the date of completion. Secondly, after contract, the purchaser bears the risk of any supervening impediment (other than one of title) which prevents the vendor from giving vacant possession."[86]

With respect to the first strand, Harpum justified his criticism with reference to vacant possession case law, including the effect of an express undertaking to give vacant possession as a "guarantee by the vendor that upon completion of purchase the purchaser will be put into possession".[87] Therefore the purchaser's knowledge of the impediment (whether patent or otherwise, lawful or unlawful) should be immaterial.

With respect to the second strand, the reasoning given in the decision in *Sheikh* was that after contract the risk of squatters coming on to the premises fell upon the purchaser. Harpum compared this to principles of standard conveyancing practice to argue that such principles were (wrongly) being applied by this judge in this case to determine whether there had been a breach of the obligation to give vacant possession.

Indeed the analysis undertaken in the case is consistent with three fundamental propositions of conveyancing law, namely:

1. It is the duty of a vendor under open contract to show a good title free from encumbrances;

2. It is a vendor's duty, after contract and before completion, to use reasonable care to preserve the property in a reasonable state of preservation, and, so far as may be, as it was when the contract was made; and

[85] Above, n43, 329.
[86] Ibid. Emphasis added.
[87] *Royal Permanent Building Society v Bomash* [1887] 35 Ch.D. 390, *per* Kekewich J. at 394.

3. After contract and prior to completion, by virtue of the doctrine of conversion, the property is at the purchaser's risk in relation to all matters except supervening defects of title.[88]

Harpum suggested that the judge's decision was based on the fact that, after contract, when conversion operates,[89] the risk of defects passes to the purchaser as owner in equity of the property. The judge in *Sheikh* can therefore be seen to have confined the seller's duties to those of a trustee in possession who is required to take reasonable care of the premises. In so doing he ignored the vendor's contractual obligation to give vacant possession.[90] Harpum claimed that Deputy Judge Wheeler in *Sheikh* was:

> "beguiled into underestimating the extent of the vendor's obligation to give vacant possession, by its chameleon-like character."[91]

The judge clearly failed to appreciate the "overriding nature of an express obligation to give vacant possession",[92] and the difference between the obligation and principles of title associated with standard conveyancing. Indeed, whilst the obligation to give vacant possession is directly analogous to the vendor's duty to show a good title free from incumbrances, the vendor's obligation to give vacant possession on completion is a separate obligation which is quite distinct from showing a good title free from incumbrances and taking reasonable care of the property until completion.[93]

The decision in *Sheikh* therefore highlights the danger of confusing the obligation to give vacant possession with a requirement to give good title as part of the conveyancing process, leading to the incorrect conclusion that the presence of unlawful occupiers did not constitute a breach of the obligation to give vacant possession.

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[88] Ibid. Support for the propositions can be found in *Re Ossemsley Estates Ltd*, above n56 at 778, *per* Greene M.R.; *Clarke v Ramuz* (1891) 2 Q.B. 456 at 459-460, *per* Lord Coleridge C.J. and *Amalgamated Investment & Property Co Ltd v John Walker & Sons Ltd* [1977] 1 W.L.R. 164, *per* Lawton L.J. at 175. On the vendor's liability for supervening defects of title, see *Wroth v Tyler*, above n1.

[89] Conversion takes place at the moment when the vendor makes title, but is then retrospective to the date of the contract – see *Lysaght v Edwards* (1876) 2 Ch.D. 499, *per* Jessel M.R. at 506-507, 510, 518. See also, Oakley, A.J. *Constructive Trusts* (4th edn Sweet & Maxwell Ltd, London 2009) 164.

[90] The condition requires the purchaser to take the property as it stands on that date and cannot be invoked in respect of matters arising thereafter. It does not qualify in any way the vendor's duty as trustee in possession of the property to take reasonable care of the property pending completion: *Davron Estates Ltd v Turnshire Ltd* [1982] CAT (where a vendor was held liable for damages caused to the property by squatters who entered the premises after contract) and *Hynes v Vaughan* [1985] 50 P. & C.R. 444, *per* Scott J. at 456.

[91] Above, n43, 329.

[92] Ibid.

[93] Ibid.

A close association

The three issues identified above demonstrate the close association between vacant possession and title, and the confusion that can easily be caused by applying principles of title to vacant possession, which are not coterminous.[94]

What is most noticeable is that each of the three examples shows the confusion that is manifest by different sets of stakeholders. In the first example, lawyers wrongly argued that the issue was one of vacant possession rather than title, with the judge in *Horton* explaining that lesser interests were actually issues of title. In the second example, draftsmen on the Law Society's Conditions of Sale allowed impediments to vacant possession to be listed along with other burdens on title. The third example provides an illustration of how the courts failed to appreciate the nature, scope and extent of an obligation to give vacant possession as quite separate to the standard conveyancing process and the issues of title relevant thereto. This supports the observations made in earlier chapters (in particular chapters 3 and 4) that lawyers, judges and legal draftsmen have all had difficulty in understanding and interpreting the vacant possession obligation.

A question remains as to whether, since vacant possession is so close to title, it could more appropriately be classified in such terms. The next section considers whether vacant possession could become part of the passing of good title itself, and therefore shift from being a contractual obligation to becoming proprietary in nature.

Vacant Possession as proprietary

Given the similarity between vacant possession and title, and the confusion between the two as highlighted above, it can be questioned whether the distinction made between the two, whilst a correct statement of law, is the most appropriate formulation or strategy, and whether vacant possession would be more appropriately viewed as part of the passing of good title itself. As an alternative perspective, it is useful to consider the

[94] Ibid.

implications (both legally and practically) of allowing, or seeking to justify, vacant possession to become part of the proprietary element of passing good title.

The effect of making vacant possession part of title would be that the remedies available for a breach of the vacant possession obligation would, in line with those for not giving good title, potentially be more satisfactory to the purchaser. This could result in a more even distribution of risk and responsibility between seller and purchaser. If a purchaser could repudiate on the day fixed for completion for a breach of the obligation to give vacant possession (rather than having to serve a notice to complete and wait 10 working days) then a seller would be significantly more concerned with, and aware of, the need for the premises to be vacant. This would result in the balance of power being more evenly distributed with a greater element of risk thus lying on the seller. In line with repudiating for not giving good title, it is likely that only a substantial or irremovable defect would be appropriate to allow the repudiation, otherwise in line with the case law on title (and vacant possession) the purchaser would be able to sue for damages.[95] This would provide greater comfort to a purchaser who at present has to sue for specific performance on completion, or serve a notice to complete and ultimately wait 10 days before being able to treat the contract as discharged and recover their deposit.[96]

It has already been established that whilst a breach of the obligation to give vacant possession is actionable after completion (by way of damages or by way of seeking to unravel the contract), a purchaser is unlikely to seek to unravel the contract when the completion monies have been sent over to the seller (and instead will seek to advance a damages claim). Under the implied covenants for title, a purchaser has an implied duty to use reasonable endeavours to assist with providing good title on completion *and thereafter*; if vacant possession were to be part of title then this would apply to vacant possession in similar terms, which is currently not the case. At present, once the transaction has formally completed, the seller is under no duty as far as vacant possession is concerned.

[95] See *Pips (Leisure Productions) Ltd v Walton*, above n24 at 424, Megarry, W. and Wade W., above n14, 81; *Dyer v Hargreave*, above n28 at 507 and *Rutherford v Acton-Adams*, above n28 at 869, 870.
[96] Unlike with title, the right to repudiate could not arise *before* the date set for completion, when the obligation is operative.

While this issue has not yet been explored in the case law or in academic literature, there are a number of potential arguments that can be identified both for and against such a proposal. These arguments are set out below, where it is ultimately shown that there is no independent theoretical justification for making the obligation to give vacant possession proprietary in nature. A discussion of the arguments does, however, assist in explaining the reasons for why vacant possession is, and must remain, separate from title and, in turn, provides justification for improving the current understanding of the contractual obligation to give vacant possession (as a means of seeking to more fairly distribute risk and responsibility between seller and purchaser) as detailed in the concluding chapter of this thesis.

The case in support of vacant possession as a title issue

Whilst the so-called 'better remedies' that would flow from making vacant possession part of title are not, in and of themselves, justification for treating vacant possession in proprietary terms, it is relevant to note how the law has previously sought to assist parties who would otherwise be disadvantaged in order to ensure their remedies will either exist, or will be more appropriate to the circumstances. By analogy, such examples provide justification for the proposition that vacant possession could be made proprietary in order to improve the remedies available to a purchaser, given that, in each of the examples referred to, no independent justification (other than improving the position on remedies) can be found.

The first example relates to the right of an injured party to damages in lieu of an injunction. Commonly the breach of a covenant or right will be actionable, but not sufficiently serious to warrant the grant of an injunction, and damages (in lieu of an injunction) will be awarded at the equitable discretion of the court.[97] An award for damages arising out of a breach of covenant is normally intended to place the injured party, so far as money can, in the position that they would have been in should the

[97] Power to award damages is in lieu of an injunction, the power originating from the section 2 of the Chancery Amendment Act 1958 (known as the Lord Cairns' Act) and therefore the breach must be 'injunctable' in nature. See Bickford-Smith, S. and Shaw K. 'Seeing the light' (2006) 150 *Solicitors Journal* 45; Baker, M. and Shaw K. 'Speed of light' (2007) 151 *Solicitors Journal* 13; Shaw, K. 'Soon to see the light again?' (2007) Real Estate Matters: Issue 1 (12 April 2007) 2, Pinsent Masons LLP; Shaw, K. (2007) 'Development's dark side' Yorkshire Post: Business Supplement (22 May 2007), Romeike Ltd; Baker, M. and Shaw K. 'New lease... new rent'. (2007) 194 *Property Law Journal* 32;

covenant not have been breached; that is, the award seeks to compensate the injured party for their loss.[98] This is usually calculated with reference to the diminution in the value of the injured party's land as a result of the breach.[99] This can enhance the position of the party in breach, especially where the injured party has suffered little (or perhaps no) actual loss, and yet the offending party has benefited significantly from the interference with another's right.[100] In recent years case law has suggested that judges are increasingly willing to assess damages for breach of covenant as the greater of the damages to compensate and so-called 'buy-out' damages,[101] which refers to a sum based on what reasonable people in the position of the parties would, hypothetically, have negotiated for a release of the right (i.e. for loss of the covenant). This was established in *Wrotham Park Estate Co Ltd v Parkside Homes Ltd.*[102] Here, the offending party commenced developing land in breach of a freehold covenant. Brightman J. ordered the developers to pay damages, not by reference to the injured party's negligible loss but rather with regard to the sum that the injured party might reasonably have demanded for relaxation of the covenant (i.e. to 'buy out' the right). As was explained in the judgment, this was to achieve a fairer result for the parties:

> "The basic rule in contract is to measure damages by that sum of money which will put the plaintiff in the same position as he would have been in if the contract had not been broken. From that basis, the defendants argue that the damages are nil or purely nominal, .. In my judgment a just substitute for a mandatory injunction would be such a sum of money as might reasonably have been demanded by the plaintiffs...as a quid pro quo for relaxing the covenant."[103]

Shaw, K. 'A shadow of doubt' (2007) *Estates Gazette* 176 and Baker, M. and Shaw K. 'What sort of damages?' (2008) 213 *Property Law Journal* 2.

[98] *Livingstone v Raywards Coal Co* (1880) 5 App Cas 25, *per* Lord Blackburn at 30.

[99] See *Carr-Saunders v Dick McNeil Associates* Ltd [1986] 1 WLR 922 and *Colbeam Palmer Ltd v Stock Affiliates Pty Ltd* [1968] 122 CLR 25.

[100] See Baker, M. and Shaw K. 'Infringement could prove to be costly' (2006) 28 Oct 2006 *Estates Gazette* 170.

[101] See *Lunn Poly Ltd v Liverpool & Lancashire Properties Ltd* [2006] EWCA Civ 430. See also *A-G v Blake* [2000] All ER (D) 1074; *A-G v Guardian Newspapers (No 2)* [1990] 1 AC 109 (HL); *Bracewell v Appleby* [1975] Ch 408; *Deakins v Hookings* [1994] 14 EG 133; *Esso Petroleum Co Ltd v Naid Ltd* [2001] All ER(D) 324; *Experience Hendrix LLC v PPX Enterprises Inc and Edwards Chaplin* [2003] EWCA Civ 323; *Forsyth-Grant v Allen* [2008] All ER (D) 110 (Apr); *Livingstone v Raywards Coal Co*, above n98; *Lunn Poly Ltd v Liverpool & Lancashire Properties Ltd* [2006] All ER (D) 264 (Mar); *Marine and General Mutual Life Assurance Society v St James' Real Estate Co Ltd* [1991] 38 EG 230; *Regan v Paul Properties DPF No 1 Ltd* [2006] All ER (D) 327 (Oct); *Tamares (Vincent Square) Ltd v Fairpoint Properties (Vincent Square) Ltd* [2007] All ER (d) 103 (Feb) and *United Australia Ltd v Barclays Bank Ltd* [1940] AC 1.

[102] [1974] 2 All ER 321.

[103] Ibid, *per* Brightman J. at 339.

As such, the effect of the court making an award of buy-out damages is to give the injured party a better (and more appropriate) remedy. It also prevents infringing parties from ignoring legal rights by making them accountable for such a breach. This can be seen as an example of the courts seeking to achieve equity for a wronged party by giving the injured party a more appropriate remedy. In turn, deeming vacant possession to be proprietary in nature would have the effect of giving an injured purchaser fairer remedies in all the circumstances, which would also place them in a stronger position with respect to the other (breaching) party.

A second example, in which the court has sought to assist parties with obtaining a remedy relates to the use of a legal fiction. A legal fiction is, broadly speaking, a fact assumed or created by the courts which is then used in order to apply a legal rule which was not necessarily designed to be used in that way, or which could not be used without the fiction. Legal fictions are mostly encountered under common law systems which have placed great reliance on legal fictions historically:

> "[a] legal fiction ... is an assumption of a possible thing as a fact, which is not literally true, for the advancement of justice, and which the law will not allow to be disproved, as far as concerns the purpose for which the assumption is made."[104]

Blackstone says that "a fiction becomes understandable only when we know why it exists, and we can know that only when we know what actuated its author".[105] It is true to say that the English courts have found legal fictions "highly beneficial and useful"[106] in seeking to create a right of action that would otherwise not exist:

> "The English Courts were in the habit of pretending that a chattel, which might in fact have been taken from the plaintiff by force, had been found by the Defendant...in order to allow an action which otherwise would not have lain."[107]

[104] *Stoner v Skene* [1918] 44 OLR 609, *per* Justice Lennox at 609.
[105] Blackstone, W. *Commentaries on the Laws of England* (Clarendon Press, Oxford 1987) 43.
[106] Fuller, L. *Legal Fictions* (Stanford University Press, Stanford 1968) 4.
[107] Blackstone, above n105, 152.

Indeed, an example of this can be found in the doctrine of 'Lost Modern Grant', which was developed by the courts to help parties who could not establish a prescriptive right on the basis of common law prescription:

> "The doctrine of lost modern grant has in its origins the increasing difficulty which the courts encountered in establishing the presumption of enjoyment of an easement back to 1189. Thus, by analogy with the period of 30 years fixed by the Statute of Limitations 1623, it became possible to assert that enjoyment of an easement for 20 years, without any other lawful explanation, could be presumed to have had its origin in a grant. The grant was of course fictional."[108]

The doctrine of lost modern grant provides a legal fiction based on proof of user for at least 20 years (not necessarily the last 20 years). It will be presumed that the user is as a result of a grant made since 1189, such grant having now been lost. This doctrine may also be used if there has been an interruption of the user during the last 20 years, such as would prevent a claim under the Prescription Act 1832,[109] for which it is necessary to prove 20 years' continuous (and uninterrupted) enjoyment up to the time when legal proceedings were commenced. For example, the exercise of a right, such as an access right, for a period between 1981 and 2001 can give rise to an easement under the doctrine of lost modern grant by virtue of that user, even though such use may have ceased subsequently:[110]

> "...the courts...obviated the inconvenience which must have arisen from allowing long enjoyment to be defeated by showing that it had not had a uniform existence during the whole period required by introducing a new kind of title by presumption of a grant made and lost in modern times."[111]

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[108] Ibid, 57.

[109] The gist of the principle upon which a lost modern grant is presumed is that the state of affairs is otherwise unexplained: "When the court finds an open and uninterrupted enjoyment of property for a long period unexplained, *omnia praesumuntur rite esse acta*, and the court will, if reasonably possible, find a lawful origin for the right in question": *Att-Gen v Simpson* [1901] 2 Ch. 671, *per* Farwell J. at 698.

[110] *Simpson v Godmanchester Corp* (1897) A.C. 696. In *Tisdall v McArthur & Co (Steel and Metal) Ltd* [1951] I.R. 228, it was contended that a prescriptive right to light cannot arise under a presumption of modern lost grant, but this was not accepted. This was described as "the modern and better view" in *Marlborough v Wilks Head & Eve* [1996] NLD 138, *per* Lightman J.

[111] Bickford-Smith, S. and Francis A. *Rights of Light: The Modern Law* (Jordons, Bristol 2004) 53. The earliest reported decision to this effect is that of *Lewis v Price* [1761] 2 Wms. Saund and *Dalton v Angus* (1881) 6 App. Cas. 812, *per* Lord Blackburn at 812.

The courts have had frequent recourse to this doctrine and have repeated and applied in various ways the words of Lord Herschell in *Phillips v Halliday*:[112]

> "Where there has been long-continued possession in assertion of a right, it is a well-settled principle of English law that the right should be presumed to have had a legal origin if such a legal origin was possible, and the courts will presume that those acts were done and those circumstances existed which were necessary to the creation of a valid title."[113]

The courts have presumed a lost grant in a wide range of cases including the right to ventilate a cellar through adjoining property;[114] a grant in the nature of an agreement substituting one way for another;[115] and as to paying a quit rent.[116] As regards the Crown, the courts have presumed a grant of a lost charter.[117] They have presumed a grant from the Crown to a corporation of the right to discharge sewage into a tidal river.[118] They have also presumed the grant of a manor,[119] or of a several fishery in tidal waters.[120] As such, the effect of the legal fiction is to provide a party with the right in circumstances where it would otherwise not be possible to establish that right.

As such, the law provides the party with a cause of action that would otherwise not exist, by deeming a grant to have been made. The law invokes a legal fiction "...in order to allow an action which otherwise would not have lain."[121] In the same terms, the courts could deem vacant possession to be a title issue in order to provide a purchaser with better remedies, which stem from title, and would otherwise not be available to them, in the interests of justice.[122]

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[112] (1891) A.C. 228 at 231. Those words were repeated by Lord Halsbury in *Clippens Oil Co v Edinburgh District Water Trustees* [1904] A.C. 64; by Joyce J. in *Halbert v Dale* [1909] 2 Ch. 570; by Lord Reading in *General Estates Co v Beaver* [1914] 3 K.B. 926 and by Lord Denning M.R. in *Davis v Whitby* [1974] Ch. 186. The doctrine of lost modern grant was more recently applied, by the House of Lords, in *Bakewell Management Ltd v Brandwood* [2004] 2 A.C. 519.

[113] (1891) A.C. 228, *per* Lord Herschell at 231.

[114] *Bass v Gregory* (1890) 25 Q.B.D. 481.

[115] *Hulbert v Dale* [1909] 2 Ch. 570.

[116] *Bomford v Neville* [1904] 1 I.R. 474 and *Foley's Charity Trustees v Dudley* [1910] 1 K.B. 317.

[117] *Goodtitle v Baldwin* (1809) 11 East 490 and *Lord Rivers v Adams* (1878) 3 Ex.D. 365. As to a lost grant by the Crown, see *Att-Gen v Horner* (1885) 11 App. Cas. 66 and *Att-Gen v Horner (No. 2)* [1913] 2 Ch. 140.

[118] *Somersetshire Drainage Commissioners v Bridgwater Corp* [1904] 81 L.T. 729.

[119] *Merttens v Hill* [1901] 1 Ch. 851.

[120] *Goodman v Saltash Corp* (1882) 7 App. Cas. 633.

[121] Blackstone, above n105, 152.

[122] It is correct to suggest that the doctrine of Lost Modern Grant is more focused on evidential issues in nature.

Arguments against

There are a number of arguments against making vacant possession part of the passing of good title. The effect of making vacant possession proprietary in nature would be to make the factual element of the obligation part of the legal transfer of title itself. It has been established in legal theory that whilst contract law provides for private ordering,[123] by contrast property law recognises only a limited and standard list of mandatory interests.[124] As such, making vacant possession a part of title would not therefore be possible, unless there was a very clear policy reason for doing so.[125] This 'standardisation' is known as the *numerus clausus* and originates from the civil law concept that the "number is closed":[126]

> "A central difference between contract and property concerns the freedom to "customize" legally enforceable interests. The law of contract recognises no inherent limitations on the nature or the duration of the interests that can be the subject of a legally binding contract...The law of property is very different in this respect. Generally speaking, the law will enforce as property only those interests that conform to a limited number of standard forms."[127]

The *numerus clausus* concept has been the subject of much debate and thinking in recent years,[128] with some arguing that standardisation enhances efficiency, scales property interests appropriately for productive use, and reduces information-cost

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[123] Merrill, T.W. and Smith H.E., above n123, 4. In this regard, the numerus clausus serves a distinctly different function than standardisation in contract law which generally provides default rules where parties have not, or where it is less efficient to have, completed the terms of their agreement. See Ayres, I. and Gertner R. 'Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules' (1989) 99 *Yale La Journal* 87, 92-93 (discussing 'the sources of contractual incompleteness'). This is true at the structural level of contract law, and it is also an important part of the practical negotiation of contracts. See Ahdieh, R.B. 'The Strategy of Boilerplate' (2006) 104 *Mich Law Review* 1033, 1036-37.

[124] Above, n123.

[125] See Merrill, T.W. and Smith H.E. 'Optimal Standardization in the Law of Property: The Numerus Clausus Principle' (2000) 110 *Yale Law Journal* 1, 23 – "[T]he *numerus clausus* exerts a powerful hold on the system of property rights... [and] from the perspective of the practicing lawyer, the entire system presents the picture of a fixed menu of options from which deviations will not be permitted". The *numerus clausus* principle is embodied in contemporary property law in the palette of estates in land, servitudes, security interests in property, and in intellectual property, as well as in emerging forms of property.

[126] See Merrill, T.W. and Smith H.E., above n123. The *numerus clausus* principle has long been an explicit aspect of civil law systems. See Paisley, R. 'Real Rights: Practical Problems and Dogmatic Rigidity' (2004) 9 *Edinburgh Law Rev* 267 (discussing the *numerus clausus* principle in Scottish law, a mixed common law and civil law jurisdiction).

[127] Ibid. In Latin *numerus clausus* literally means 'closed category'.

[128] See, for example, Merryman, J.H. 'Policy, Autonomy, and the Numerus Clausus in Italian and American Property Law' (1963) 12 *Am.J.Comp.L.* 224; Rudden, B. 'Economic Theory v. Property Law: The Numerus Clausus Problem', in Eekelaar, J. and Bell J. (eds) *Oxford Essays in Jurisprudence* (3rd edition Oxford University Press, Oxford 1987) 239.

externalities.[129] Others suggest that the *numerus clausus* embodies inherent categories of meaning and reflects the normative coherence of existing social patterns, the objective well-being of interest holders, or underlying democratic values.[130] Versions of the *numerus clausus* are found in Roman law and recur throughout the history of feudal and post-feudal English common law.[131] Likewise, some form of a standard list appears in disparate modern civil law and common law systems throughout the world.[132] It was stated in *Keppell v Bailey*[133] that 'incidents of a novel kind' cannot "be devised and attached to property at the fancy or caprice of any owner."[134] As such, this is potentially an argument against allowing vacant possession to become proprietary in nature, and changing the established list of forms that currently exists.

With that said, in respect of the *content* of the existing forms, although standardisation is a stable feature of property law, the particular list of forms and their internal substance have always been understood as dynamic.[135] That is, even though they are standardised, these bundles can retain great flexibility. Davidson claims that this dynamism has three dimensions: in the list itself, in the mandatory limits imposed on each given form, and in the permissible range of variation allowed to private parties in altering the forms.[136] Davidson claims that, historically, forms have been added and removed from the universe of recognised property types and that the contemporary 'list' is a product of significant contestation.[137] This view is expressed despite scholars arguing that the universe of interests (commonly referred to as the 'list') is now closed.[138] Davidson claims that the list continues to fluctuate in modern law:

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[129] See Bell, A. and Parchomovsky G. 'Of Property and Federalism' (2005) 115 *Yale Law Journal* 72 (discussing the *numerus clausus* principle in the context of federalism); Dagan, H. 'The Craft of Property' (2003) 91 *California Law Review* 1517, 1565-70 (offering a modern Legal Realist view of the *numerus clausus* principle); Hansmann, H. and Kraakman R. 'Property, Contract, and Verification: The Numerus Clausus Problem and the Divisibility of Rights' (2002) 31 *J. Legal Studies* 373 (arguing that the *numerus clausus* principle serves to 'aid verification of the ownership of rights offered for conveyance'); Lewinsohn-Zamir, D. 'The Objectivity of Well-Being and the Objectives of Property Law' (2003) 78 *New York University Law Review* 1669, 1730-39 (discussing an objective theory of well-being as a justification for the *numerus clausus* principle); Heller, M.A. 'The Boundaries of Property' (1999) 108 *Yale Law Journal* 1163, 1176-78 (discussing the numerus clausus principle). See also Munzer, S.R. *Commons and Anticommons in the Law and Theory of Property*, in Golding, M.P and Edmundson W.A. *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Blackwell, London 2005) 148, 156-57.
[130] Davidson, N.M. 'Standardization and Pluralism in Property Law' (2008) 61 *Vanderbilt Law Review* 6, 1601.
[131] Rudden, above n128, 241-42.
[132] Ibid.
[133] *Keppell v Bailey* (1834) 39 Eng. Rep. 1042, 1049.
[134] Ibid.
[135] Davidson, above n130.
[136] Ibid.
[137] Ibid.
[138] Ibid.

> "even a cursory glance at the generative capacity of property law over the past fifty years – a period that has seen the recognition of forms such as the timeshare, significant upheaval in the law of servitudes, and the creation of the *droit de suite*, to name a few examples – belies the notion that the list has ceased developing."[139]

Crucially, even if the list is now not subject to change, the *numerus clausus* principle does not preclude dynamic interpretations in the changing internal content and meaning that the law imposes on any given form. Davidson explains that public definition of the mandatory content of the forms is an ongoing process, so that even the same nominal form can have significantly different content over time and across jurisdictions. He gives an example of the fee simple for which "the most important characteristics of the conceptual category changed by active regulatory intervention."[140] A similar transformation occurred with the tenancy:

> "...although modern law recognises a 'form' of property called the 'tenancy by the entirety', that form has a very different social and practical meaning than it did in early modernity and varies from jurisdiction to jurisdiction today."[141]

As such, Davidson emphasises the changing nature of the content of given property forms:

> "Throughout the law of property, forms persist with nominal stability at the same time that the default content of those forms changes, at times incrementally, and at times radically. Additions and eliminations from the list are an important part of the history of the *numerus clausus*, yet internal dynamism is arguably an even more central aspect of standardisation."[142]

On this basis, it can be argued that making or deeming vacant possession part of the passing of good title would not, in and of itself, be contrary to the *numerus clausus* theory. Making vacant possession part of passing good title, and therefore being proprietary in nature, could reflect the internal dynamism which Davidson claims is an even more central aspect of 'standardisation'. This would be as part of the ongoing

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[139] Ibid. One of the most recent innovations in the forms of property is arguably the chattel servitude as it is emerging in the context of digital property. See Robinson, G.O. 'Personal Property Servitudes' (2004) 71 *U. Chi. L. Rev.* 1449, 1516-21 (discussing the increasing popularity of digital rights management tools, which are self-enforcing restriction mechanisms that are hardwired into products).

[140] Davidson, above n130.

[141] Ibid, 1613.

[142] Ibid.

flexibility of the established bundles in reflecting the changing internal content and meaning that the law imposes on any given form. Indeed, notwithstanding *numerus clausus* theory, the theoretical and practical justifications of the policy (whether in the form of case law or legislation) could dictate that there was an overwhelming need to allow vacant possession to become a proprietary interest. As discussed throughout this thesis, the level of risk and responsibility which is attributable to the purchaser could be one justification for doing so, given the improved remedies that would thus become available. The shift would not be based on legal theory or doctrine in such a case, but on policy, in terms of which party to a transaction can be seen to require greater protection with respect to the procurement of vacant possession.

With that said, it must be questioned whether making vacant possession a part of passing good title is appropriate, even if one could propose a clear policy reason for the shift of the obligation from contractual to proprietary. Indeed, the model of vacant possession proposed by chapter 5 suggested that vacant possession had two dimensions (*de jure* and *de facto*) namely:

1. Vacant possession is the legal *right* to possession that follows from the transfer of a non-reversionary estate in land; but

2. Vacant possession is only given when the party with the legal right to possession (which comes with the transfer of the estate in land) can:

   (i) *actually* enjoy that right of possession in a factual and practical sense

   (ii) *immediately* on completion (or at the operative date).

Chapter 5 thus highlighted that the legal right to possession was linked with the transfer of the estate in land (i.e. the legal title) and that the right to factual possession stemmed from the legal right to possession having been acquired. Whilst this emphasised the close relationship between legal ownership and the right to possession on completion or the operative date, it also highlighted the distinction between the legal right to possession and factual possession in the sense of being in actual occupation of the estate in land. Deputy Judge Wheeler in *Sheikh* focused *only* on the legal aspect of vacant possession when he said:

> "[vacant possession] is a right, and it is a right which, in the absence of some competing *legal* claim, passes to the purchaser on completion [i.e. when the estate in land is transferred]."[143]

Chapter 5, and earlier in this chapter, explained why such an analysis failed to properly appreciate both dimensions of the vacant possession obligation. The effect of making vacant possession part of title would therefore be to make the *factual* element part of the legal transfer of title itself.

Deeming vacant possession to be part of passing good title is arguably consistent with the rights that a purchaser obtains (in law) on completion.[144] The right to possession of an estate in land runs with the estate and it is not personal to the contracting parties. If trespassers are in unlawful occupation on completion, for example, the party with the legal right to possession may commence action to remove them, even though they were not party to the contract.[145] As noted in chapter 6 and above, legal possession has been said to be enforceable in *rem* (that is, against the whole world at large), with a person having a *right* to possess an estate if they have acquired a title to it which is 'vested in possession'. As such, given that the legal right to vacant possession runs with the estate in a similar manner to the legal title to the estate and other benefits of the estate (e.g. rights which benefit the property), it could be seen as appropriate to conflate the two obligations and make vacant possession (both legal and factual) part of the proprietary element.

There is, however, theoretical opposition to such an approach. As noted earlier, the classic analysis of title demonstrates that title is the set of facts upon which a claim to some legal right, liberty, power or legal interest is founded.[146] Lawson and Rudden wrote that "title is a shorthand term used to denote the facts which, if proved, will enable a plaintiff to recover possession or a defendant to retain possession of a thing".[147] As Salmond explained:

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[143] *Sheikh*, above n64, *per* Deputy Judge Wheeler at 271.
[144] See below for further analysis of the implications of this proposition.
[145] See Tolley's *Claims to the Possession of Land* (LexisNexis Butterworths, London April 2009) A1.5.
[146] Salmond, above n16, 58.
[147] Above, n17, 44.

> "title is the de facto antecedent of which the right is the de jure consequent. If the law confers a right upon a man which it does not confer upon another, the reason is that certain facts are true of him which are not true of the other, and these facts are the title to the right."[148]

However, as Panesar explains in his commentary, the use of the word 'facts' in this context does not denote 'physical' facts (such as the fact of taking up possession in the sense of commencing occupation) but "[r]ather the inquiry is into the *legal* facts pertaining to a person's standing in relation to some object or asset".[149] Pottage confirms the view that title is about legal, and not factual, rights and that "title is an abstract quality, which depends upon an interpretation of rights rather than the identification of physical facts".[150] These suggest that making the factual element of the obligation to give vacant possession part of the passing of title would be inconsistent with the understanding that title is about evidencing ownership, which itself constitutes a collection of legal rights, powers and immunities, rather than factual manifestations.

There are also more practical arguments against making vacant possession part of title. If vacant possession was to be deemed a title issue, it is arguable that other elements of a standard sale and purchase contract should also be treated in such terms. It could be argued that a premises not delivered on completion in the state and condition they were in on exchange should also give rise to the right to repudiate, along with various other aspects of the transaction such as the agreed boundaries of a given property. Further, there is technically no need to deem vacant possession part of title when the contract could expressly provide for a repudiation to be possible in cases where vacant possession had not been given, as a contractual term. This possibility is considered in the conclusion to this thesis.

These practical observations are also relevant to potential invocation of a legal fiction, as set out in the preceding section, to justify making vacant possession proprietary in nature. As discussed above, the effect of a legal fiction is to treat some state of affairs as being different to the actual state of affairs. This is normally for convenience, where the law wishes to reach a result which is more suitable, or preferable, even though that end

[148] Salmond, above n16, 56.
[149] Panesar, above n15, 8139. Emphasis added.
[150] Pottage, A. *Evidencing Ownership* in Bright, S. and Dewar J. (eds) *Land Law Themes and Perspectives* (Oxford University Press, Oxford 1988) 131.

outcome is not doctrinally sound. However, the effect of allowing a legal fiction can also lead to potentially unfair or unsound outcomes. An example would be the doctrine of constructive notice, which was discussed earlier in chapter 5. Constructive notice[151] is a type of legal fiction which deems a party with having knowledge which they did not in fact have. This is common in cases where, for example, a third party asserts a right to property and a purchaser or charge-holder is deemed to have constructive notice of their interest, and thus be bound by that interest.[152] Given that a party is deemed to know something which they actually do not know, many have highlighted the unfair nature of the use of such a legal fiction, some going as far as to suggest the doctrine of constructive notice is 'dangerous':

> "The doctrine is a dangerous one. It's contrary to the truth. It is wholly founded on the doctrine that a man does not know the facts, and yet is said that constructively he does know them."[153]

It could be argued that seeking to make vacant possession proprietary in nature, simply as a matter of convenience and in order to provide more favourable remedies to a purchaser, is also 'dangerous'. In many respects, it could be viewed as a manipulation of the nature and form of the contractual obligation, making it into something that it is not. This consequentialist-type approach would be devoid of doctrinal support and an *ad hoc* 'quick fix' to a problem more deeply routed in the contractual sphere. There are therefore arguments against the use of legal fictions *per se*, as well as arguments as to why the use of a legal fiction would specifically not be appropriate or necessary in respect of making vacant possession proprietary in nature.

Conclusion

On the basis that an obligation to give vacant possession has arisen and is breached by the party required to give vacant possession, it must be considered where this leaves the party who had contracted for something more than is actually obtained at the relevant time. An enquiry into the current remedies available upon a breach of the obligation to

[151] See also Howell, above n12; Partington, above n12 and Sheridan, above n12.
[152] For example, see rule in *Hunt v Luck* [1901] Ch 45 which gives constructive notice to a purchaser of the equitable interest of someone in occupation of property.
[153] *Allen v Seckham* (1879) 11 Ch D 790, *per* Lord Esher at 794.

give vacant possession reveals that, at present, they are intrinsically unsatisfactory to a purchaser. This chapter contrasted the concept of giving vacant possession with giving good title and highlighted a number of similarities between the two obligations. This chapter analysed contrasting remedies for a breach of the obligation to give vacant possession and for not giving good title, and explored how the remedies for breaching the obligation to give vacant possession could be improved in the event that the vacant possession obligation were to become proprietary rather than contractual in nature.

From a discussion of the relevant considerations it is clear that, whilst there would be certain advantages in terms of the additional remedies available, there is no independent theoretical justification for deeming vacant possession to be part of title. Further, it is arguable that it is not appropriate to make the factual element of the obligation to give vacant possession part of passing title, given that title depends upon an interpretation of legal rights rather than the identification of physical facts. Moreover, any proposal to make vacant possession proprietary in nature (on the basis of a policy decision that considers it necessary in order to enhance the remedies of a purchaser, and thus provide greater protection to a purchaser) is further discredited when one considers how the right to repudiate could expressly be provided for as a remedy for a breach of the existing 'contractual' vacant possession obligation. This discredits any contention that there is a unique policy reason why a new category of property law interest, in the context of the *numerus clausus* theory, should be permitted.

It can thus be concluded that vacant possession is best interpreted as a more clearly defined and articulated contractual obligation and, in that regard, a proposed description of the concept arising out of the analysis in this and previous chapters is promulgated in the conclusion of this thesis. The legal articulation of the concept of vacant possession is shown to make reference to a number of variables that must be considered when seeking to interpret the obligation in context, and with reference to the facts of any given case. This reflects the *de jure* and *de facto* nature of the obligation, and that the obligation cannot be 'straight-jacketed' into a specific legal definition or statement. Suggested proposals to enhance the existing contractual remedies that would be available to an injured party are also made, along with (specifically in the leasehold context) a proposal to ameliorate the problems associated with the procurement of vacant possession upon the exercise of conditional break options.

Chapter 10

Conclusion

The motivation for researching this thesis was to consider in depth a previously undeveloped and generally neglected, but not the less commonly used, property law concept. A wide range of people use the expression 'vacant possession', including conveyancers, litigators, surveyors, estate agents and others, including property owners, landlords and tenants, and many more concerned with property. Yet, despite the importance and common occurrence of this term, the nature and meaning of vacant possession has previously been dealt with in property textbooks and handbooks in a very superficial way. This is unfortunate since, as this thesis has shown, vacant possession is a pervasive concept, and it raises a number of interesting and difficult issues that have generally been neglected, disregarded or unappreciated by those connected to the property industry, along with legal academics and commentators.

Whilst the concept is an everyday term that is used by many, behind the familiarity of this common expression this thesis has identified uncertainty, misunderstanding and general neglect of the development of a sound and coherent theoretical model of vacant possession. There is very little judicial guidance available, due to limited case law on the subject, and this has inhibited the development of a more satisfactory and detailed jurisprudence on the concept. In 1988, in two articles in the *Conveyancer and Property Lawyer*, Charles Harpum provided what probably remains the most insightful learned scholarship on the subject,[1] but since then the concept appears to have warranted very little scholarly or practitioner attention.

The consequence is that the concept of vacant possession has been misunderstood by a wide variety of people. The review in this thesis of case reports, journal articles, and minutes of historic law society meetings has indicated that this confusion has resulted across four broad stakeholder groups.

[1] Harpum, C. 'Vacant possession - chameleon or chimaera?' (1988) *Conveyancer and Property Lawyer* 324.

Firstly, judges have struggled to interpret the nature and effect of an obligation to give vacant possession. Chapter 3 highlighted that, until 1979, the courts had failed to recognise the precedence of a special condition for vacant possession over other conflicting contractual conditions. Further, in seeking to appreciate both the legal and factual dimensions to the obligation, chapter 6 demonstrated that some judges did not recognise that the factual element of the obligation had to be met *on completion*, instead seeing vacant possession as a legal 'right' which passed to the purchaser who was then empowered (after completion) to pursue the vacant possession for which they had contracted.

Secondly, professionals have failed to understand the meaning and significance of vacant possession. Estate agents have sought to distinguish, in their advertising particulars, between 'full vacant possession', 'immediate vacant possession' or 'complete vacant possession'; there is no real distinction as the preceding adjective in each case adds nothing to the message that they are seeking to convey to prospective purchasers, in relation to what they can expect to obtain on completion. Lawyers talk about 'giving VP on completion', but few documents ever actually define what vacant possession means with a capitalised 'V' and 'P'.[2] Professionals have for generations made use of the term somewhat loosely and without proper attention as to what they really mean by it.

Thirdly, draftsmen and commentators have struggled to understand the intricacies of vacant possession. A detailed review of the various editions and revisions to standard conditions of sale since 1904 explicated an inconsistent and confused evolution of the term 'vacant possession'. It was not used as a term in and of itself until the 1950s, whence followed a series of seemingly *ad hoc* shifts back and forth in respect of its incorporation as a general or special condition. Further, its interaction with other terms was shown to be misunderstood, with the drafting of the conditions of sale providing for various internal inconsistencies and conflicts with other terms of the standard set of conditions. Notable examples included the National Conditions of Sale 1953,[3] which provided as a special condition that the property was sold with vacant possession other

[2] Shaw, K. 'Fit to be occupied' (2007) 27 Jan 2007 *Estates Gazette* 182; Shaw, K. 'More to it than meets the eye' (2010) 1 May 2010 *Estates Gazette* 4 and Shaw, K. 'All that you can't leave behind' (2010) 256 *Property Law Journal* 6.

[3] The National Conditions of Sale, 16th Edition, August 1953 (The Solicitor's Law Stationery Society Limited, London 1953).

than with regard to any tenancies *explicitly listed*, but also contained a general condition providing that the property was sold subject to all tenancies to which the property was subject, *whether mentioned in the particulars of sale or not.*

Fourthly, lay people, the consumers of property transactions, have misunderstood what giving vacant possession actually means or involves. Particularly in the leasehold context, tenants have found (to their cost and expense) the dangers of not fully appreciating how a contractual break option in a lease may be frustrated by the requirement to give vacant possession. This is not just when vacant possession is an express pre-condition for exercise of the break, but also more generally where the break is conditional on yielding-up the property, or on compliance with all covenants at the break date (which will thereby include an express or implied requirement to yield-up the property, and therefore to give vacant possession).

These confusions can be explained by the lack of clarity that has existed with respect to the constituent elements of the obligation (both legal and factual) and how these elements of the obligation can be breached in practice. It would seem from the case law that many have confused the term 'vacant possession' with use of the same expression in so called "summary in ejectment cases" dating back to the 1800s. In this context, it was necessary for a premises to be 'completely deserted', whereas, in the modern property law context, vacant possession has been shown to have a different meaning. Analysis of case law and commentary in this thesis has clearly demarcated the 'legal' (*de jure*) and 'factual' (*de facto*) aspects of the obligation to give vacant possession. This demonstrated that vacant possession is not just concerned with the transfer of the legal right to possession (which follows from the transfer of the estate in land) but also with whether the party with the legal right to vacant possession is able to actually occupy and enjoy that right immediately on completion. The benefits of providing this formulation were illuminated when previously inconsistent case law with regard to so-called 'legal obstacles' was explained by analysing the form of obstacle to vacant possession with reference to the constituent elements of the obligation that had been identified by the model proposed.

Understanding the constituent elements of the obligation also facilitates a more scholarly inquiry into what will amount to a breach of the obligation, at the point of completion. Analysis of the tests proposed by case law to determine a breach of the obligation exemplified that any determination as to a breach of the obligation to give vacant possession would be inherently fact specific. This is true both in cases where such a determination is based on the first limb of the test, directed at the party required to give vacant possession, or the second limb, which focuses on whether the impediment represents a substantial obstacle to the receipt of possession at the point of completion. Here a comparison, by analogy, with more developed property law concepts, such as actual occupation and adverse possession, enabled a deeper understanding of the nature of 'possession-type' concepts, and why they must remain fact sensitive. The concept of 'possession' was therefore explained as a property law concept which can not be 'straight-jacketed' into a single legal definition or statement devoid of context and relevant case specific circumstances, and that no check list or formula for vacant possession, unlike other (more fixed) property law concepts, can therefore be promulgated. This highlighted the factual dynamism of this inherently *infra-jural* obligation.

A more informed understanding of the relevant tests to determine a breach of the obligation precipitated further analysis into the scope of the obligation. Whilst there remains no legal authority on whether the state and condition of a given property can be a barrier to the receipt of vacant possession, an analysis of the various likely impediments explained how any obstacle that prevented or restricted the receipt or enjoyment of the right of 'possession' could potentially amount to a breach of the obligation. As such, so-called *lesser-interests* (falling short of the fully fledged possession) were shown not to be relevant to the vacant possession obligation, even though the representations in the case of *Horton v Kurzke*[4] seemed to consider that they were. This analysis articulated a more coherent understanding of the scope of the obligation to give vacant possession in referring to any and all impediments to the 'right of possession'. This articulation improves on the artificial distinction that had previously been regarded as significant in issues of vacant possession, namely the difference between the status of items as fixtures or chattels. This thesis has shown that classifying

[4] [1971] 1 W.L.R. 769.

items in such terms is not the starting point in determining whether any given obstacle can be a barrier to the receipt of vacant possession, thus reformulating the approach taken to understanding and appreciating potential obstacles to vacant possession.

The scope of the obligation to give vacant possession also led into a more fundamental discussion of the 'form' of the obligation itself, specifically whether vacant possession would be more appropriately positioned as a proprietary right, than a contractual obligation. This discussion was based on a series of cases and circumstances where vacant possession had been treated as an issue pertaining to title. Indeed, when considering the contractual form of the obligation, it was not just the representations of counsel in the case of *Horton* (as alluded to above) which seemingly confused or merged issues of title with vacant possession. The Standard Conditions of Sale 1990[5] seemed to allow potential impediments to vacant possession to be listed along with other burdens on 'title', and reasoning in some judgements of the court sought to treat the obligation to give vacant possession in similar terms to standard conveyancing rules pertaining to passing a clean title. This thesis explained that the current contractual obligation to give vacant possession is a separate and distinct obligation, quite apart from any obligation to give good title free from incumbrances. Further, in examining whether the contractual nature of the obligation to give vacant possession is appropriate, and noting how the principles relevant to the obligation to give vacant possession have been shown to be closely analogous with a seller's duty to disclose good title, the thesis has identified the theoretical and practical reasons why the obligation must remain a contractual obligation, rather than being deemed proprietary in nature. The benefits that could be gained, in terms of the remedies available from a breach of good title, are equally as available in the contractual sphere without expanding the 'closed category' of property law interests by including vacant possession as a title issue, something for which no clear theory driven, or policy motivation, could be advanced.

Whilst the journey travelled by this thesis has identified and explained problems with understanding of the obligation in the past, and has for the first time developed a more scholarly understanding of the concept of vacant possession for the present, the story of

[5] The Standard Conditions of Sale (First Edition) 1990 (The Law Society, London 1990), known also as The National Conditions of Sale 21st Edition and the Law Society's General Conditions of Sale 1990.

vacant possession does not end here. Implicit in the current uncertainty and confusion that remains apparent are the key issues of risk and responsibility which overlay transactions involving vacant possession, where sellers and buyers and landlords and tenants are all responsible for, or exposed to, the procurement or non procurement of vacant possession, and corresponding obligations, liabilities and implications. The recent economic decline, causing parties to, more than ever before, seek to find novel (or convenient) ways to avoid payments and liabilities under contractual documents and other agreements, has only served to increase the number of contractual disputes concerning vacant possession. This is why it is necessary to go a step further than explaining the problems, and also to seek to address the issues that have been identified, to assist and facilitate future operation of the vacant possession term in practice.

Whilst this thesis has advanced an understanding of the constituent elements of the obligation, and the tests to determine a breach in various contexts, alongside a clearer understanding of the scope of the obligation, what remains lacking is a clear description of the obligation that can be used to characterise the underlying legal and factual elements that are central to it. One step forward to address the uncertainty associated with the term, given its inconsistent evolution and understanding in case law, is to provide a principled description of the obligation as a contractual term, which could be used in standard contracts for the sale and purchase of land, or leases and other agreements pertaining to land.

Whilst the concept of vacant possession cannot be straight-jacketed into a single definition or legal phrase, in practice it would assist (and be possible) to attach some agreed meaning to the term when appearing in standard form sale and purchase contracts, which currently do not define 'vacant possession' as they do virtually all other contractual terms. From the comprehensive review of the obligation undertaken in the preceding chapters, it is suggested that a so-called 'contractual definition' of vacant possession, which would be included into sale and purchase contracts, would be as follows:

"Vacant Possession" means:

The Purchaser [or party with the right to vacant possession] being able to actually enjoy their right of possession immediately on Completion without any form of Impediment which is Substantial in nature.

In this definition, "Impediment" means:

An object or issue (whether physical or legal) which prevents or interferes with the Purchaser [or party with the right to vacant possession] being able to occupy the whole or a Substantial part of the Property without Difficulty or Objection.

In this definition, what constitutes "Substantial", "Difficulty" and "Objection" are each questions of fact and degree, to be objectively assessed in the specific circumstances of the given case and taking into account (a) the nature of the premises (b) the state and condition of the premises (c) the circumstances and characteristics of the parties in question and (d) the current or (if different) intended use of the Property (at Completion).[6]

This definition reflects the fact that whilst certain parts of the vacant possession 'definition' can clearly be articulated, other elements will be fact specific determinations in each given case (thus reflecting that a single (or precise) legal definition is not possible). The definition does, however, improve on current understanding in this regard by prescribing the relevant variables that should be taken into account when interpreting the tests for vacant possession in a specific context, and therefore characterising the issues that are relevant in understanding the obligation, thus it applies the reasoning of Tay and others by showing that any purported 'definition' must make reference to factual circumstances. Providing a 'definition' as part of the standard conditions of sale in a way which reflects the *infra-jural* nature of the obligation will provide greater certainty for the parties and a better understanding of how the tests to determine vacant possession will operate in practice, and the author of this thesis is liaising with the relevant working party committee at the Law Society in that regard at the present time.

In addition to providing a clearly articulated (albeit, slightly *infra-jural*) definition of Vacant Possession, a contract for the sale and purchase of land would also benefit from

[6] Capitalised terms (such as 'Completion') would be defined in the Standard Conditions of Sale in which this 'definition' would appear.

amendment in respect of the remedies that may be available upon a breach of the obligation. As explained through the thesis, whilst issues of risk and responsibility are relevant to all parties to a given transaction, at present the seller can be seen to have the upper hand in cases where a breach of the obligation has, or is alleged to have taken place. Contractually amending the remedies could, in turn, be used to rebalance the risk and responsibility between the parties (without changing the form of the contractual obligation to give vacant possession). The work undertaken in this thesis has identified that the current remedies associated with the obligation could be improved or ameliorated in the following ways.

Firstly, in contracts where vacant possession on a particular day is *absolutely* fundamental to the contract (opposed to where it is just important), it may be appropriate to seek to make 'time of the essence' in respect of the vacant possession provision.[7] The effect of this will be to provide the parties with immediate remedies on the day of completion if vacant possession is not given (i.e. rescission immediately without the need to first make time of the essence by serving a notice to complete, and then waiting (normally) ten working days).

A seller may seek to reject such a provision, because making time of the essence for a vacant possession obligation will clearly impose on the seller greater risk, and thus a burden, of ensuring that there is no conceivable argument that vacant possession has not been given, in view of the immediate rights of the buyer from the day set for completion in the event that vacant possession is not given on that day. It would, however, have the effect of focusing the seller's attention on the procurement of vacant possession on completion, and provide the buyer with greater assurance that they are likely to receive what they have contracted for on completion (or the immediate right to discharge itself thereafter if not). If the seller is promising that 'vacant possession' will be given, then it can be argued that they should be prepared to deal with potentially harsher and more immediate consequences in the event that it is not.

Secondly, the provisions relating to 'Notice to Complete' may be capable of refinement. Under the current editions of the Standard Conditions of Sale and Standard Commercial

Property Conditions, a notice to complete must allow ten working days in order to give the party the right to thereafter rescind the contract.[8] If ten working days are not provided for by the notice, then the rescission could itself be deemed unlawful, giving rise to legal proceedings.

There is, however, nothing to stop the parties amending the relevant general condition and providing that only 5 working days need to be given on the service of a notice to complete (whether generally or specifically with regard to the issue of vacant possession). This can be useful in cases where a proposal to make time of the essence in respect of the vacant possession obligation (as suggested above) is refused by a seller. Requiring a notice to complete to only prescribe 5 days expedites the time at which the parties' remedies and actions can then take effect, thus still resulting in the seller needing to give greater attention to procuring vacant possession. This would also rebalance the risk and responsibility of the parties a little further (but not completely) in favour of the buyer.

A third proposal arising out of this work concerns damages. Whilst case law on damages explains, in principle, what can be claimed by an injured party in the event that there is a breach of the obligation to give vacant possession, if parties are aware (from the outset) of the potential losses that could be incurred by a given party then it may be worth expressly providing for certain pre-agreed damages if vacant possession is not given on completion.

Liquidated damages are a fixed or pre-determined amount which the parties can agree will contractually become payable upon a given breach of the contract. The issue with purported liquidated damages clauses, however, is that the amount stipulated must be a genuine pre-estimate of loss to be sustained in a particular circumstance. If not, the clause is likely to be seen to constitute a penalty, thus rendering it unenforceable.[9]

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[7] See, for example, *Eagle Limited v Golden Achievement Limited* [1997] CPC 16 and *British and Commonwealth Group plc v Quadrex Holdings* Inc [1989] 3 All ER 492.

[8] See Standard Conditions of Sale (Fourth Edition) (The Law Society, London 2003), condition 6.8 and Standard Commercial Property Conditions (Second Edition) (The Law Society, London 2003), condition 8.8.

[9] See, for example, *Pneumatic Tyre Company Limited v New Garage Motor Co Limited* [1915] AC 79; *Impresa Castelli SpA v Cola Holdings Ltd* [2002] EWHC 1363 and *Alfred McAlpine Projects Limited v Tilebox Limited* [2005] EWHC 281 (TCC).

If, for example, a buyer requires vacant possession of a property in order to complete on an agreement for a lease which it has entered into with a prospective tenant, which itself is conditional on the buyer (as proposed landlord under the agreement for lease) procuring vacant possession of the said property, then a liquidated damages clause could be useful. In this and similar circumstances, it would be possible to estimate the likely loss from losing the proposed tenant (on a weekly basis) and thereafter any difference in value between securing the letting that was the subject of the agreement for lease, and securing an alternative tenancy at perhaps a lower rent. In similar terms, if vacant possession of a property is required for a specific purpose or event, then again the costs of having to relocate the event or change the arrangements are likely to be capable of quantification in advance, thus making a liquidated damages clause possible.

Obviously if a seller contracts to pay specified damages in the event of not procuring vacant possession on completion, the seller is more likely to take active steps to ensure compliance with all obligations in this regard. It will, of course, depend on the wider context of the overall transaction as to whether a seller would be prepared to allow a liquidated damages clause to enter into the contract. In such cases, a seller may be well advised itself to consider insuring against the additional risk that arises from such a potentially onerous contractual provision becoming operative due to a failure to provide vacant possession.

Fourthly, and perhaps more controversially, one could draw on the 'reasonably discoverable' qualification used in the provisions of the Land Registration Act 2002 relating to 'actual occupation' to address the problem of completion almost always taking place before an inspection of the property has revealed whether the premises are vacant. One view is that, whilst the seller is responsible for ensuring that vacant possession is given, a buyer should themselves take on *some* of the responsibility for ensuring that what they have contracted for is conveyed to them on completion and before the monies are paid over.

Parties to a contract could provide that an inspection (revealing no impediment to vacant possession) is 'deemed' to have taken place before completion and that no claim for a breach of the obligation to give vacant possession can be made thereafter (in

respect of impediments that would have been reasonably discoverable from such an inspection). It is likely that tangible impediments would be those that a clause of this kind would most probably relate to, as legal impediments (e.g. a Housing Act notice) are unlikely to be discoverable on an inspection of the property (but would be from an inspection of public registers, for example).

This has particular advantages to the seller because it ensures that, once completed, the risk of non-procurement of vacant possession has passed to the buyer, with no arguments or claims thereafter being capable of being advanced by the buyer (in respect of matters that were reasonably discoverable on such an inspection). Such a clause would obviously encourage a buyer to undertake a reasonable inspection to ensure that vacant possession has been given (as far as can be determined) before completion takes effect, something which should happen but often does not. Implementation of such a contractual term in, for example, standard conditions of sale would reflect a policy shift from the current position whereby a buyer who had not inspected the property prior to completion would later be able to action a breach of the obligation to give vacant possession. Obviously, unlike in the context of actual occupation under the Land Registration Act 2002, a contractual provision of this nature could be expressly dis-applied by the parties.

In practical terms, however, especially in residential transactions where inspections at the point of completion can be impossible or impractical, inclusion of such a clause is likely to tilt the balance even more in favour of sellers who already can be seen to have the upper hand as far as vacant possession is concerned. Indeed, deeming an inspection to have taken place before completion (revealing no reasonably discoverable impediments) can be seen to amount to a contractual means of partly negating the covenant for vacant possession itself, as the buyer is thereafter partly waiving its rights to argue otherwise. With that said, it would provide contractual certainty to a seller that completion really does mean an end to its vacant possession obligations under the contract so far as reasonably discoverable impediments are concerned, and ensure that the buyer takes the trouble to check that vacant possession has been given. This further underlines the issues of risk and responsibility that are engaged in transactions that are conditional on vacant possession.

As such, there are various means by which the remedies available for a breach of the obligation to give vacant possession can be improved upon without making vacant possession proprietary in nature. This further undermines the justification for making vacant possession part of passing good title on the basis that conflating vacant possession with title is not necessary to improve the remedies available.

Whilst this thesis has been critical of the attention that has, or it has claimed, has not been paid to the obligation to give vacant possession, it is correct to say that the property industry is catching up in showing an awareness of the particular problem posed by the issue of vacant possession, specifically in the leasehold context.

The Code for Leasing Business Premises in England and Wales 2007[10] is the result of collaboration between commercial property professionals and industry bodies representing both owners (landlords) and occupiers (tenants). The Code aims to promote fairness in commercial leases, and recognises a need to increase awareness of property issues, especially among small businesses, ensuring that occupiers of business premises have the information necessary to negotiate the best deal available to them. It is commonly viewed as being shorter, easier to understand and more focused than the previous version of the Code in 2004. The Code is entirely voluntary and there is no requirement that every single part of the Code is kept to at all times. However, the working group that re-wrote the Code sought to achieve a workable document that provides a fair and level playing field between the parties. In respect of break options, the Code prescribes only three pre-conditions to the exercise of a tenant's break option:

1. The tenant should be up to date with the main rent, (the basic rent, not service charge).

2. The tenant should give up occupation. This is not the same as giving vacant possession – see below.

3. The tenant should leave behind no continuing subleases.

What is important to note about these three conditions is that they are wholly within the

[10] Code for Leasing Business Premises in England and Wales 2007, 1. Available from: www.leasingbusinesspremises.co.uk.

tenant's ability to comply with. Indeed, the code actually suggests that the obligation to give vacant possession should be avoided as a pre-condition altogether. The proposed lease conditionality focuses on the first element of the vacant possession test, looking at whether a clear intention to determine the lease has been manifested by the party required to give vacant possession or, in the terms of the lease code, to 'give up' occupation. The second part of the *John Laing* test, as to whether, pursuant to the intended determination by the tenant, the landlord could, if it wanted to, 'reoccupy the property without difficulty or objection' is not necessary under the proposed conditionality prescribed by the code This is because the requirement to 'give up' occupation does not, in line with common misunderstandings, require the party to give vacant possession. As the Code states, "any disputes about what has been left behind or removed should be settled later".[11] As such, the Code avoids some of the commonest issues relating to the provision of vacant possession which often cause a tenant compliance difficulties when seeking to exercise a break option, and takes from the landlord the ability to seek to frustrate a tenant's compliance with a pre-condition.

In terms of whether the problems of vacant possession are 'solved' by the above suggestions, the answer is clearly that they are not. It will take much more than a definition of vacant possession in contracts, some proposals for the terms of contractual break options in leases and better contractual remedies to completely eradicate the problems that are apparent. Indeed, whilst use of the obligation to give vacant possession in the leasehold context is at least on the radar of the property industry (unlike in the freehold context at this time), in practice the voluntary nature of the Code results in such proposed conditionality being rarely incorporated into leases and other documents, where freedom of contract dictates that the party with the greater bargaining strength is likely to be able to impose their proposed terms on the weaker party. This just serves to highlight how the concept of 'bargaining in the shadow of the law' is relevant to all aspects of the vacant possession obligation. A proposal not discussed in this work, but perhaps worthy of consideration in the future, is whether legislation is actually required to further improve the position on vacant possession; that is, not just to understand and explain the obligation itself, but also to prescribe the *use* for which the obligation can be made in various contexts. Here a whole host of new issues arise,

[11] Ibid.

including philosophical debate as to whether the law is entitled to interfere in the free contracting of obligations between parties to a given agreement.

Whilst further development and practical application of the obligation is clearly still necessary to bridge the gap between understanding of the theory and practical application of the term in real life scenarios, this thesis can, however, be seen to represent an important first step along the path of the eventual development of a principled, sound and coherent theoretical and applied understanding of the term by those who regularly encounter it.

Appendix

Standard Commercial Property Conditions (2nd Edition)

CONTRACT

Incorporating the Standard Commercial Property Conditions (Second Edition)

Date :

Seller :

Buyer :

Property (freehold/leasehold) :

Title Number/Root of title :

Specified incumbrances :

Completion date :

Contract rate :

Purchase price :

Deposit :

The seller will sell and the buyer will buy:

(a) the property, and

(b) any chattels which, under the special conditions, are included in the sale

for the purchase price.

WARNING

This is a formal document, designed to create legal rights and legal obligations. Take advice before using it.

Signed

Authorised to sign on behalf of Seller/Buyer

STANDARD COMMERCIAL PROPERTY CONDITIONS (SECOND EDITION)

PART 1

1. GENERAL

1.1 Definitions

1.1.1 In these conditions:

(a) "accrued interest" means:
  (i) if money has been placed on deposit or in a building society share account, the interest actually earned
  (ii) otherwise, the interest which might reasonably have been earned by depositing the money at interest on seven days' notice of withdrawal with a clearing bank
  less, in either case, any proper charges for handling the money

(b) "apportionment day" has the meaning given in condition 8.3.2

(c) "clearing bank" means a bank which is a shareholder in CHAPS Clearing Co. Limited

(d) "completion date" has the meaning given in condition 8.1.1

(e) "contract rate" is the Law Society's interest rate from time to time in force

(f) "conveyancer" means a solicitor, barrister, duly certified notary public, licensed conveyancer or recognised body under sections 9 or 23 of the Administration of Justice Act 1985

(g) "direct credit" means a direct transfer of cleared funds to an account nominated by the seller's conveyancer and maintained at a clearing bank

(h) "election to waive exemption" means an election made under paragraph 2 of Schedule 10 to the Value Added Tax Act 1994

(i) "lease" includes sub-lease, tenancy and agreement for a lease or sub-lease

(j) "notice to complete" means a notice requiring completion of the contract in accordance with condition 8

(k) "post" includes a service provided by a person licensed under the Postal Services Act 2000

(l) "public requirement" means any notice, order or proposal given or made (whether before or after the date of the contract) by a body acting on statutory authority

(m) "requisition" includes objection

(n) "transfer" includes conveyance and assignment

(o) "working day" means any day from Monday to Friday (inclusive) which is not Christmas Day, Good Friday or a statutory Bank Holiday.

1.1.2 In these conditions the terms "absolute title" and "official copies" have the special meanings given to them by the Land Registration Act 2002.

1.1.3 A party is ready, able and willing to complete:

(a) if it could be, but for the default of the other party, and

(b) in the case of the seller, even though a mortgage remains secured on the property, if the amount to be paid on completion enables the property to be transferred freed of all mortgages (except those to which the sale is expressly subject).

1.1.4 (a) The conditions in Part 1 apply except as varied or excluded by the contract.

(b) A condition in Part 2 only applies if expressly incorporated into the contract.

1.2 Joint parties

If there is more than one seller or more than one buyer, the obligations which they undertake can be enforced against them all jointly or against each individually.

1.3 Notices and documents

1.3.1 A notice required or authorised by the contract must be in writing.

1.3.2 Giving a notice or delivering a document to a party's conveyancer has the same effect as giving or delivering it to that party.

1.3.3 Where delivery of the original document is not essential, a notice or document is validly given or sent if it is sent:

(a) by fax, or

(b) by e-mail to an e-mail address for the intended recipient given in the contract.

1.3.4 Subject to conditions 1.3.5 to 1.3.7, a notice is given and a document delivered when it is received.

1.3.5 (a) A notice or document sent through the document exchange is received when it is available for collection

(b) A notice or document which is received after 4.00 p.m. on a working day, or on a day which is not a working day, is to be treated as having been received on the next working day

(c) An automated response to a notice or document sent by e-mail that the intended recipient is out of the office is to be treated as proof that the notice or document was not received.

1.3.6 Condition 1.3.7 applies unless there is proof:

(a) that a notice or document has not been received, or

(b) of when it was received.

1.3.7 Unless the actual time of receipt is proved, a notice or document sent by the following means is treated as having been received as follows:

(a) by first class post:	before 4.00 pm on the second working day after posting
(b) by second-class post:	before 4.00 pm on the third working day after posting
(c) through a document exchange:	before 4.00 pm on the first working day after the day on which it would normally be available for collection by the addressee
(d) by fax:	one hour after despatch
(e) by e-mail:	before 4.00 p.m. on the first working day after despatch.

1.3.8 In condition 1.3.7, "first class post" means a postal service which seeks to deliver posted items no later than the next working day in all or the majority of cases.

1.4 VAT

1.4.1 The seller:

(a) warrants that the sale of the property does not constitute a supply that is taxable for VAT purposes

(b) agrees that there will be no exercise of the election to waive exemption in respect of the property, and

(c) cannot require the buyer to pay any amount in respect of any liability to VAT arising in respect of the sale of the property, unless condition 1.4.2 applies.

1.4.2 If, solely as a result of a change in law made and coming into effect between the date of the contract and completion, the sale of the property will constitute a supply chargeable to VAT, the buyer is to pay to the seller on completion an additional amount equal to that VAT in exchange for a proper VAT invoice from the seller.

1.4.3 The amount payable for the chattels is exclusive of VAT and the buyer is to pay to the seller on completion an additional amount equal to any VAT charged on that supply in exchange for a proper VAT invoice from the seller.

1.5 Assignment and sub-sales

1.5.1 The buyer is not entitled to transfer the benefit of the contract.

1.5.2 The seller may not be required to transfer the property in parts or to any person other than the buyer.

2. FORMATION

2.1 Date

2.1.1 If the parties intend to make a contract by exchanging duplicate copies by post or through a document exchange, the contract is made when the last copy is posted or deposited at the document exchange.

2.1.2 If the parties' conveyancers agree to treat exchange as taking place before duplicate copies are actually exchanged, the contract is made as so agreed.

2.2 Deposit

2.2.1 The buyer is to pay a deposit of 10 per cent of the purchase price no later than the date of the contract.

2.2.2 Except on a sale by auction the deposit is to be paid by direct credit and is to be held by the seller's conveyancer as stakeholder on terms that on completion it is to be paid to the seller with accrued interest.

2.3 Auctions

2.3.1 On a sale by auction the following conditions apply to the property and, if it is sold in lots, to each lot.

2.3.2 The sale is subject to a reserve price.

2.3.3 The seller, or a person on its behalf, may bid up to the reserve price.

2.3.4 The auctioneer may refuse any bid.

2.3.5 If there is a dispute about a bid, the auctioneer may resolve the dispute or restart the auction at the last undisputed bid.

2.3.6 The auctioneer is to hold the deposit as agent for the seller.

2.3.7 If any cheque tendered in payment of all or part of the deposit is dishonoured when first presented, the seller may, within seven working days of being notified that the cheque has been dishonoured, give notice to the buyer that the contract is discharged by the buyer's breach.

3. MATTERS AFFECTING THE PROPERTY

3.1 Freedom from incumbrances

3.1.1 The seller is selling the property free from incumbrances, other than those mentioned in condition 3.1.2.

3.1.2 The incumbrances subject to which the property is sold are:

(a) those specified in the contract

(b) those discoverable by inspection of the property before the contract

(c) those the seller does not and could not reasonably know about

(d) matters, other than monetary charges or incumbrances, disclosed or which would have been disclosed by the searches and enquiries which a prudent buyer would have made before entering into the contract

(e) public requirements.

3.1.3 After the contract is made, the seller is to give the buyer written details without delay of any new public requirement and of anything in writing which he learns about concerning a matter covered by condition 3.1.2.

3.1.4 The buyer is to bear the cost of complying with any outstanding public requirement and is to indemnify the seller against any liability resulting from a public requirement.

3.2 Physical state

3.2.1 The buyer accepts the property in the physical state it is in at the date of the contract unless the seller is building or converting it.

3.2.2 A leasehold property is sold subject to any subsisting breach of a condition or tenant's obligation relating to the physical state of the property which renders the lease liable to forfeiture.

3.2.3 A sub-lease is granted subject to any subsisting breach of a condition or tenant's obligation relating to the physical state of the property which renders the seller's own lease liable to forfeiture.

3.3 Retained land

Where after the transfer the seller will be retaining land near the property:

(a) the buyer will have no right of light or air over the retained land, but

(b) in other respects the seller and the buyer will each have the rights over the land of the other which they would have had if they were two separate buyers to whom the seller had made simultaneous transfers of the property and the retained land.

The transfer is to contain appropriate express terms.

4. LEASES AFFECTING THE PROPERTY

4.1 General

4.1.1 This condition applies if any part of the property is sold subject to a lease.

4.1.2 The seller having provided the buyer with full details of each lease or copies of documents embodying the lease terms, the buyer is treated as entering into the contract knowing and fully accepting those terms.

4.1.3 The seller is not to serve a notice to end the lease nor to accept a surrender.

4.1.4 The seller is to inform the buyer without delay if the lease ends.

4.1.5 The buyer is to indemnify the seller against all claims arising from the lease after actual completion; this includes claims which are unenforceable against a buyer for want of registration.

4.1.6 If the property does not include all the land let, the seller may apportion the rent and, if the lease is a new tenancy, the buyer may require the seller to apply under section 10 of the Landlord and Tenant (Covenants) Act 1995 for the apportionment to bind the tenant.

4.2 **Property management**

4.2.1 The seller is promptly to give the buyer full particulars of:
(a) any court or arbitration proceedings in connection with the lease, and
(b) any application for a licence, consent or approval under the lease.

4.2.2 Conditions 4.2.3 to 4.2.8 do not apply to a rent review process to which condition 5 applies.

4.2.3 Subject to condition 4.2.4, the seller is to conduct any court or arbitration proceedings in accordance with written directions given by the buyer from time to time (for which the seller is to apply), unless to do so might place the seller in breach of an obligation to the tenant or a statutory duty.

4.2.4 If the seller applies for directions from the buyer in relation to a proposed step in the proceedings and the buyer does not give such directions within 10 working days, the seller may take or refrain from taking that step as it thinks fit.

4.2.5 The buyer is to indemnify the seller against all loss and expense resulting from the seller's following the buyer's directions.

4.2.6 Unless the buyer gives written consent, the seller is not to:
(a) grant or formally withhold any licence, consent or approval under the lease, or
(b) serve any notice or take any action (other than action in court or arbitration proceedings) as landlord under the lease.

4.2.7 When the seller applies for the buyer's consent under condition 4.2.6:
(a) the buyer is not to withhold its consent or attach conditions to the consent where to do so might place the seller in breach of an obligation to the tenant or a statutory duty
(b) the seller may proceed as if the buyer has consented when:
(i) in accordance with paragraph (a), the buyer is not entitled to withhold its consent, or
(ii) the buyer does not refuse its consent within 10 working days.

4.2.8 If the buyer withholds or attaches conditions to its consent, the buyer is to indemnify the seller against all loss and expense.

4.2.9 In all other respects, the seller is to manage the property in accordance with the principles of good estate management until completion.

4.3 **Continuing liability**

At the request and cost of the seller, the buyer is to support any application by the seller to be released from the landlord covenants in a lease to which the property is sold subject.

5. RENT REVIEWS

5.1 Subject to condition 5.2, this condition applies if:
(a) the rent reserved by a lease of all or part of the property is to be reviewed,
(b) the seller is either the landlord or the tenant,
(c) the rent review process starts before actual completion, and
(d) no reviewed rent has been agreed or determined at the date of the contract.

5.2 The seller is to conduct the rent review process until actual completion, after which the buyer is to conduct it.

5.3 Conditions 5.4 and 5.5 cease to apply on actual completion if the reviewed rent will only be payable in respect of a period after that date.

5.4 In the course of the rent review process, the seller and the buyer are each to:
(a) act promptly with a view to achieving the best result obtainable,
(b) consult with and have regard to the views of the other,
(c) provide the other with copies of all material correspondence and papers relating to the process,
(d) ensure that its representations take account of matters put forward by the other, and
(e) keep the other informed of the progress of the process.

5.5 Neither the seller nor the buyer is to agree a rent figure unless it has been approved in writing by the other (such approval not to be unreasonably withheld).

5.6 The seller and the buyer are each to bear their own costs of the rent review process.

5.7 Unless the rent review date precedes the apportionment day, the buyer is to pay the costs of a third party appointed to determine the rent.

5.8 Where the rent review date precedes the apportionment day, those costs are to be divided as follows:
(a) the seller is to pay the proportion that the number of days from the rent review date to the apportionment day bears to the number of days from that rent review date until either the following rent review date or, if none, the expiry of the term, and
(b) the buyer is to pay the balance.

6. TITLE AND TRANSFER

6.1 **Proof of title**

6.1.1 Without cost to the buyer, the seller is to provide the buyer with proof of the title to the property and of his ability to transfer it, or to procure its transfer.

6.1.2 Where the property has a registered title the proof is to include official copies of the items referred to in rules 134(1)(a) and (b) and 135(1)(a) of the Land Registration Rules 2003, so far as they are not to be discharged or overridden at or before completion.

6.1.3 Where the property has an unregistered title, the proof is to include:
(a) an abstract of title or an epitome of title with photocopies of the documents, and
(b) production of every document or an abstract, epitome or copy of it with an original marking by a conveyancer either against the original or an examined abstract or an examined copy.

6.2 **Requisitions**

6.2.1 The buyer may not raise requisitions:
(a) on the title shown by the seller taking the steps described in condition 6.1.1 before the contract was made
(b) in relation to the matters covered by condition 3.1.2

6.2.2 Notwithstanding condition 6.2.1, the buyer may, within six working days of a matter coming to his attention after the contract was made, raise written requisitions on that matter. In that event steps 3 and 4 in condition 6.3.1 apply.

6.2.3 On the expiry of the relevant time limit under condition 6.2.2 or condition 6.3.1, the buyer loses his right to raise requisitions or to make observations.

6.3 **Timetable**

6.3.1 Subject to condition 6.2 and to the extent that the seller did not take the steps described in condition 6.1.1 before the contract was made, the following are the steps for deducing and investigating the title to the property to be taken within the following time limits:

Step	Time limit
1. The seller is to comply with condition 6.1.1	Immediately after making the contract
2. The buyer may raise written requisitions	Six working days after either the date of the contract or the date of delivery of the seller's evidence of title on which the requisitions are raised whichever is the later
3. The seller is to reply in writing to any requisitions raised	Four working days after receiving the requisitions
4. The buyer may make written observations on the seller's replies	Three working days after receiving the replies

The time limit on the buyer's right to raise requisitions applies even where the seller supplies incomplete evidence of its title, but the buyer may, within six working days from delivery of any further evidence, raise further requisitions resulting from that evidence.

6.3.2 The parties are to take the following steps to prepare and agree the transfer of the property within the following time limits:

Step	Time limit
A. The buyer is to send the seller a draft transfer	At least twelve working days before completion date
B. The seller is to approve or revise that draft and either return it or retain it for use as the actual transfer	Four working days after delivery of the draft transfer
C. If the draft is returned the buyer is to send an engrossment to the seller	At least five working days before completion date

6.3.3 Periods of time under conditions 6.3.1 and 6.3.2 may run concurrently.

6.3.4 If the period between the date of the contract and completion date is less than 15 working days, the time limits in conditions 6.2.2, 6.3.1 and 6.3.2 are to be reduced by the same proportion as that period bears to the period of 15 working days. Fractions of a working day are to be rounded down except that the time limit to perform any step is not to be less than one working day.

6.4 **Defining the property**

6.4.1 The seller need not, further than it may be able to do from information in its possession:
(a) prove the exact boundaries of the property
(b) prove who owns fences, ditches, hedges or walls
(c) separately identify parts of the property with different titles.

6.4.2 The buyer may, if to do so is reasonable, require the seller to make or obtain, pay for and hand over a statutory declaration about facts relevant to the matters mentioned in condition 6.4.1. The form of the declaration is to be agreed by the buyer, who must not unreasonably withhold its agreement.

6.5 **Rents and rentcharges**

The fact that a rent or rentcharge, whether payable or receivable by the owner of the property, has been or will on completion be, informally apportioned is not to be regarded as a defect in title.

6.6 **Transfer**

6.6.1 The buyer does not prejudice its right to raise requisitions, or to require replies to any raised, by taking steps in relation to the preparation or agreement of the transfer.

6.6.2 Subject to condition 6.6.3, the seller is to transfer the property with full title guarantee.

6.6.3 The transfer is to have effect as if the disposition is expressly made subject to all matters covered by condition 3.1.2.

6.6.4 If after completion the seller will remain bound by any obligation affecting the property and disclosed to the buyer before the contract was made, but the law does not imply any covenant by the buyer to indemnify the seller against liability for future breaches of it:
(a) the buyer is to covenant in the transfer to indemnify the seller against liability for any future breach of the obligation and to perform it from then on, and
(b) if required by the seller, the buyer is to execute and deliver to the seller on completion a duplicate transfer prepared by the buyer.

6.6.5 The seller is to arrange at its expense that, in relation to every document of title which the buyer does not receive on completion, the buyer is to have the benefit of:
(a) a written acknowledgement of the buyer's right to its production, and
(b) a written undertaking for its safe custody (except while it is held by a mortgagee or by someone in a fiduciary capacity).

7. INSURANCE

7.1 **Responsibility for insuring**

7.1.1 Conditions 7.1.2 and 7.1.3 apply if:
(a) the contract provides that the policy effected by or for the seller and insuring the property or any part of it against loss or damage should continue in force after the exchange of contracts, or
(b) the property or any part of it is let on terms under which the seller (whether as landlord or as tenant) is obliged to insure against loss or damage.

7.1.2 The seller is to:
(a) do everything required to continue to maintain the policy, including the prompt payment of any premium which falls due
(b) increase the amount or extent of the cover as requested by the buyer, if the insurers agree and the buyer pays the additional premium

(c) permit the buyer to inspect the policy, or evidence of its terms, at any time
(d) obtain or consent to an endorsement on the policy of the buyer's interest, at the buyer's expense
(e) pay to the buyer immediately on receipt, any part of an additional premium which the buyer paid and which is returned by the insurers
(f) if before completion the property suffers loss or damage:
(i) pay to the buyer on completion the amount of policy moneys which the seller has received, so far as not applied in repairing or reinstating the property, and
(ii) if no final payment has then been received, assign to the buyer, at the buyer's expense, all rights to claim under the policy in such form as the buyer reasonably requires and pending execution of the assignment, hold any policy moneys received in trust for the buyer
(g) on completion:
(i) cancel the insurance policy
(ii) apply for a refund of the premium and pay the buyer, immediately on receipt, any amount received which relates to a part of the premium which was paid or reimbursed by a tenant or third party. The buyer is to hold the money paid subject to the rights of that tenant or third party.

7.1.3 The buyer is to pay the seller a proportionate part of the premium which the seller paid in respect of the period from the date when the contract is made to the date of actual completion, except so far as the seller is entitled to recover it from a tenant.

7.1.4 Unless condition 7.1.2 applies:
(a) the seller is under no obligation to the buyer to insure the property
(b) if payment under a policy effected by or for the buyer is reduced, because the property is covered against loss or damage by an insurance policy effected by or for the seller, the purchase price is to be abated by the amount of that reduction.

7.1.5 Section 47 of the Law of Property Act 1925 does not apply.

8. COMPLETION

8.1 Date

8.1.1 Completion date is twenty working days after the date of the contract but time is not of the essence of the contract unless a notice to complete has been served.

8.1.2 If the money due on completion is received after 2.00 p.m., completion is to be treated, for the purposes only of conditions 8.3 and 9.3, as taking place on the next working day as a result of the buyer's default.

8.1.3 Condition 8.1.2 does not apply if:
(a) the sale is with vacant possession of the property or a part of it, and
(b) the buyer is ready, willing and able to complete but does not pay the money due on completion until after 2.00 p.m. because the seller has not vacated the property or that part by that time.

8.2 Place

Completion is to take place in England and Wales, either at the seller's conveyancer's office or at some other place which the seller reasonably specifies.

8.3 Apportionments

8.3.1 Subject to condition 8.3.6 income and outgoings of the property are to be apportioned between the parties so far as the change of ownership on completion will affect entitlement to receive or liability to pay them.

8.3.2 The day from which the apportionment is to be made ('apportionment day') is:
(a) if the whole property is sold with vacant possession or the seller exercises its option in condition 9.3.4, the date of actual completion, or
(b) otherwise, completion date.

8.3.3 In apportioning any sum, it is to be assumed that the buyer owns the property from the beginning of the day on which the apportionment is to be made.

8.3.4 A sum to be apportioned is to be treated as:
(a) payable for the period which it covers, except that if it is an instalment of an annual sum the buyer is to be attributed with an amount equal to 1/365th of the annual sum for each day from and including the apportionment day to the end of the instalment period
(b) accruing—
(i) from day to day, and
(ii) at the rate applicable from time to time.

8.3.5 When a sum to be apportioned, or the rate at which it is to be treated as accruing, is not known or easily ascertainable at completion, a provisional apportionment is to be made according to the best estimate available. As soon as the amount is known, a final apportionment is to be made and notified to the other party. Subject to condition 8.3.8, any resulting balance is to be paid no more than ten working days later, and if not then paid the balance is to bear interest at the contract rate from then until payment.

8.3.6 Where a lease of the property requires the tenant to reimburse the landlord for expenditure on goods or services, on completion:
(a) the buyer is to pay the seller the amount of any expenditure already incurred by the seller but not yet due from the tenant and in respect of which the seller provides the buyer with the information and vouchers required for its recovery from the tenant, and
(b) the seller is to credit the buyer with payments already recovered from the tenant but not yet incurred by the seller.

8.3.7 Condition 8.3.8 applies if any part of the property is sold subject to a lease and either:
(a) (i) on completion any rent or other sum payable under the lease is due but not paid
(ii) the contract does not provide that the buyer is to assign to the seller the right to collect any arrears due to the seller under the terms of the contract, and
(iii) the seller is not entitled to recover any arrears from the tenant, or
(b) (i) as a result of a rent review to which condition 5 applies a reviewed rent is agreed or determined after actual completion, and
(ii) an additional sum then becomes payable in respect of a period before the apportionment day.

8.3.8 (a) The buyer is to seek to collect all sums due in the circumstances referred to in condition 8.3.7 in the ordinary course of management, but need not take legal proceedings or distrain.
(b) A payment made on account of those sums is to be apportioned between the parties in the ratio of the amounts owed to each, notwithstanding that the tenant exercises its right to appropriate the payment in some other manner.
(c) Any part of a payment on account received by one party but due to the other is to be paid no more than ten working days after the receipt of cash or cleared funds and, if not then paid, the sum is to bear interest at the contract rate until payment.

8.4 Amount payable

The amount payable by the buyer on completion is the purchase price (less any deposit already paid to the seller or its agent) adjusted to take account of:
(a) apportionments made under condition 8.3
(b) any compensation to be paid under condition 9.3
(c) any sum payable under condition 7.1.2 or 7.1.3.

8.5 Title deeds

8.5.1 As soon as the buyer has complied with all its obligations on completion the seller must hand over the documents of title.

8.5.2 Condition 8.5.1 does not apply to any documents of title relating to land being retained by the seller after completion.

8.6 Rent receipts

The buyer is to assume that whoever gave any receipt for a payment of rent which the seller produces was the person or the agent of the person then entitled to that rent.

8.7 Means of payment

The buyer is to pay the money due on completion by direct credit and, if appropriate, by an unconditional release of a deposit held by a stakeholder.

8.8 Notice to complete

8.8.1 At any time on or after completion date, a party who is ready, able and willing to complete may give the other a notice to complete.

8.8.2 The parties are to complete the contract within ten working days of giving a notice to complete, excluding the day on which the notice is given. For this purpose, time is of the essence of the contract.

9. REMEDIES

9.1 Errors and omissions

9.1.1 If any plan or statement in the contract, or in the negotiations leading to it, is or was misleading or inaccurate due to an error or omission, the remedies available are as follows.

9.1.2 When there is a material difference between the description or value of the property as represented and as it is, the buyer is entitled to damages.

9.1.3 An error or omission only entitles the buyer to rescind the contract:
(a) where the error or omission results from fraud or recklessness, or
(b) where the buyer would be obliged, to its prejudice, to accept property differing substantially (in quantity, quality or tenure) from that which the error or omission had led it to expect.

9.2 Rescission

If either party rescinds the contract:
(a) unless the rescission is a result of the buyer's breach of contract the deposit is to be repaid to the buyer with accrued interest
(b) the buyer is to return any documents received from the seller and is to cancel any registration of the contract
(c) the seller's duty to pay any returned premium under condition 7.1.2(e) (whenever received) is not affected.

9.3 Late completion

9.3.1 If the buyer defaults in performing its obligations under the contract and completion is delayed, the buyer is to pay compensation to the seller.

9.3.2 Compensation is calculated at the contract rate on the purchase price (less any deposit paid) for the period between completion date and actual completion, but ignoring any period during which the seller was in default.

9.3.3 Any claim by the seller for loss resulting from delayed completion is to be reduced by any compensation paid under this contract.

9.3.4 Where the sale is not with vacant possession of the whole property and completion is delayed, the seller may give notice to the buyer, before the date of actual completion, that it will take the net income from the property until completion as well as compensation under condition 9.3.1

9.4 After completion

Completion does not cancel liability to perform any outstanding obligation under the contract.

9.5 Buyer's failure to comply with notice to complete

9.5.1 If the buyer fails to complete in accordance with a notice to complete, the following terms apply.

9.5.2 The seller may rescind the contract, and if it does so:
(a) it may
(i) forfeit and keep any deposit and accrued interest
(ii) resell the property
(iii) claim damages
(b) the buyer is to return any documents received from the seller and is to cancel any registration of the contract.

9.5.3 The seller retains its other rights and remedies.

9.6 Seller's failure to comply with notice to complete

9.6.1 If the seller fails to complete in accordance with a notice to complete, the following terms apply:

9.6.2 The buyer may rescind the contract, and if it does so:
(a) the deposit is to be repaid to the buyer with accrued interest
(b) the buyer is to return any documents it received from the seller and is, at the seller's expense, to cancel any registration of the contract.

9.6.3 The buyer retains its other rights and remedies.

10. LEASEHOLD PROPERTY

10.1 Existing leases

10.1.1 The following provisions apply to a sale of leasehold land.

10.1.2 The seller having provided the buyer with copies of the documents embodying the lease terms, the buyer is treated as entering into the contract knowing and fully accepting those terms.
10.1.3 The seller is to comply with any lease obligations requiring the tenant to insure the property.

10.2 **New leases**
10.2.1 The following provisions apply to a contract to grant a new lease.
10.2.2 The conditions apply so that:
"seller" means the proposed landlord
"buyer" means the proposed tenant
"purchase price" means the premium to be paid on the grant of a lease.
10.2.3 The lease is to be in the form of the draft attached to the contract.
10.2.4 If the term of the new lease will exceed seven years, the seller is to deduce a title which will enable the buyer to register the lease at the Land Registry with an absolute title.
10.2.5 The seller is to engross the lease and a counterpart of it and is to send the counterpart to the buyer at least five working days before completion date.
10.2.6 The buyer is to execute the counterpart and deliver it to the seller on completion.

10.3 **Consents**
10.3.1 (a) The following provisions apply if a consent to let, assign or sub-let is required to complete the contract
(b) In this condition "consent" means consent in a form which satisfies the requirement to obtain it.
10.3.2 (a) The seller is to:
(i) apply for the consent at its expense, and to use all reasonable efforts to obtain it
(ii) give the buyer notice forthwith on obtaining the consent
(b) The buyer is to comply with all reasonable requirements, including requirements for the provision of information and references.
10.3.3 Where the consent of a reversioner (whether or not immediate) is required to an assignment or sub-letting, then so far as the reversioner lawfully imposes such a condition:
(a) the buyer is to:
(i) covenant directly with the reversioner to observe the tenant's covenants and the conditions in the seller's lease
(ii) use reasonable endeavours to provide guarantees of the performance and observance of the tenant's covenants and the conditions in the seller's lease
(iii) execute or procure the execution of the licence
(b) the seller, in the case of an assignment, is to enter into an authorised guarantee agreement.
10.3.4 Neither party may object to a reversioner's consent given subject to a condition:
(a) which under section 19A of the Landlord and Tenant Act 1927 is not regarded as unreasonable, and
(b) which is lawfully imposed under an express term of the lease.
10.3.5 If any required consent has not been obtained by the original completion date:
(a) the time for completion is to be postponed until five working days after the seller gives written notice to the buyer that the consent has been obtained or four months from the original completion date whichever is the earlier
(b) the postponed date is to be treated as the completion date.
10.3.6 At any time after four months from the original completion date, either party may rescind the contract by notice to the other, if:
(a) consent has still not been given, and
(b) no declaration has been obtained from the court that consent has been unreasonably withheld.
10.3.7 If the contract is rescinded under condition 10.3.6 the seller is to remain liable for any breach of condition 10.3.2(a) or 10.3.3(b) and the buyer is to remain liable for any breach of condition 10.3.2(b) or 10.3.3(a). In all other respects neither party is to be treated as in breach of contract and condition 9.2 applies.
10.3.8 A party in breach of its obligations under condition 10.3.2 or 10.3.3 cannot rescind under condition 10.3.6 for so long as its breach is a cause of the consent's being withheld.

11. COMMONHOLD
11.1 Terms used in this condition have the special meanings given to them in Part 1 of the Commonhold and Leasehold Reform Act 2002.
11.2 This condition applies to a disposition of commonhold land.
11.3 The seller having provided the buyer with copies of the current versions of the memorandum and articles of the commonhold association and of the commonhold community statement, the buyer is treated as entering into the contract knowing and fully accepting their terms.
11.4 If the contract is for the sale of property which is or includes part only of a commonhold unit:
(a) the seller is, at its expense, to apply for the written consent of the commonhold association and is to use all reasonable efforts to obtain it
(b) either the seller, unless it is in breach of its obligation under paragraph (a), or the buyer may rescind the contract by notice to the other party if three working days before completion date (or before a later date on which the parties have agreed to complete the contract) the consent has not been given. In that case, neither party is to be treated as in breach of contract and condition 9.2 applies.

12. CHATTELS
12.1 The following provisions apply to any chattels which are included in the contract.
12.2 The contract takes effect as a contract for the sale of goods.
12.3 The buyer takes the chattels in the physical state they are in at the date of the contract.
12.4 Ownership of the chattels passes to the buyer on actual completion but they are at the buyer's risk from the contract date.

PART 2*

A. VAT
A1. Standard rated supply
A1.1 Conditions 1.4.1 and 1.4.2 do not apply.
A1.2 The seller warrants that the sale of the property will constitute a supply chargeable to VAT at the standard rate.
A1.3 The buyer is to pay to the seller on completion an additional amount equal to the VAT in exchange for a proper VAT invoice from the seller.

A2 Transfer of a going concern
A2.1 Condition 1.4 does not apply.
A2.2 In this condition "TOGC" means a transfer of a business as a going concern treated as neither a supply of goods nor a supply of services by virtue of article 5 of the Value Added Tax (Special Provisions) Order 1995.
A2.3 The seller warrants that it is using the property for the business of letting to produce rental income.
A2.4 The buyer is to make every effort to comply with the conditions to be met by a transferee under article 5(1) and 5(2) for the sale to constitute a TOGC.
A2.5 The buyer will, on or before the earlier of:
(a) completion date, and
(b) the earliest date on which a supply of the property could be treated as made by the seller under this contract if the sale does not constitute a TOGC,
notify the seller that paragraph (2B) of article 5 of the VAT (Special Provisions) Order 1995 does not apply to the buyer.
A2.6 The parties are to treat the sale as a TOGC at completion if the buyer provides written evidence to the seller before completion that it is a taxable person and that it has made an election to waive exemption in respect of the property and has given a written notification of the making of such election in conformity with article 5(2) and has given the notification referred to in condition A2.5.
A2.7 The buyer is not to revoke its election to waive exemption in respect of the property at any time.
A2.8 If the parties treat the sale at completion as a TOGC but it is later determined that the sale was not a TOGC, then within five working days of that determination the buyer shall pay to the seller:
(a) an amount equal to the VAT chargeable in respect of the supply of the property, in exchange for a proper VAT invoice from the seller; and
(b) except where the sale is not a TOGC because of an act or omission of the seller, an amount equal to any interest or penalty for which the seller is liable to account to HM Customs and Excise in respect of or by reference to that VAT.
A2.9 If the seller obtains the consent of HM Customs and Excise to retain its VAT records relating to the property, it shall make them available to the buyer for inspection and copying at reasonable times on reasonable request during the six years following completion.

B CAPITAL ALLOWANCES
B1 To enable the buyer to make and substantiate claims under the Capital Allowances Act 2001 in respect of the property, the seller is to use its reasonable endeavours to provide, or to procure that its agents provide:
(a) copies of all relevant information in its possession or that of its agents, and
(b) such co-operation and assistance as the buyer may reasonably require.
B2.1 The buyer is only to use information provided under condition B1 for the stated purpose.
B2.2 The buyer is not to disclose, without the consent of the seller, any such information which the seller expressly provides on a confidential basis.
B3.1 On completion, the seller and the buyer are jointly to make an election under section 198 of the Capital Allowances Act 2001 which is consistent with the apportionment in the Special Conditions.
B3.2 The seller and the buyer are each to submit the amount fixed by that election to the Inland Revenue for the purposes of their respective capital allowance computations.

C REVERSIONARY INTERESTS IN FLATS
C1. No tenants' rights
C1.1 In this condition, sections refer to sections of the Landlord and Tenant Act 1987 and expressions have the special meanings given to them in that Act.
C1.2 The seller warrants that:
(a) it gave the notice required by section 5,
(b) no acceptance notice was served on the landlord or no person was nominated for the purposes of section 6 during the protected period, and
(c) that period ended less than 12 months before the date of the contract.

C2. Tenants' right of first refusal
C2.1 In this condition, sections refer to sections of the Landlord and Tenant Act 1987 and expressions have the special meanings given to them in that Act.
C2.2 The seller warrants that:
(a) it gave the notice required by section 5, and
(b) it has given the buyer a copy of:
(i) any acceptance notice served on the landlord and
(ii) any nomination of a person duly nominated for the purposes of section 6.
C2.3 If the sale is by auction:
(a) the seller warrants that it has given the buyer a copy of any notice served on the landlord electing that section 8B shall apply,
(b) condition 8.1.1. applies as if "thirty working days" were substituted for "twenty working days",
(c) the seller is to send a copy of the contract to the nominated person as required by section 8B(3), and
(d) if the nominated person serves notice under section 8B(4):
(i) the seller is to give the buyer a copy of the notice, and
(ii) condition 9.2 is to apply as if the contract had been rescinded.

*The conditions in Part 2 do not apply unless expressly incorporated. See condition 1.1.4(b).

SPECIAL CONDITIONS

1. This contract incorporates the Standard Commercial Property Conditions (Second Edition).

2. The property is sold with vacant possession.

(or) 2. The property is sold subject to the leases or tenancies set out on the attached list but otherwise with vacant possession on completion.

3. The chattels at the Property and set out on the attached list are included in the sale. [The amount of the purchase price apportioned to those chattels is £]

4. The conditions in Part 2 shown against the boxes ticked below are included in the contract:

☐ Condition A1 (VAT: standard rate)

[or] ☐ Condition A2 (VAT: transfer of a going concern)

☐ Condition B (capital allowances). The amount of the purchase price apportioned to plant and machinery at the property for the purposes of the Capital Allowances Act 2001 is £

☐ Condition C1 (flats: no tenants' rights of first refusal)

[or] ☐ Condition C2 (flats: with tenants' rights of first refusal)

Seller's Conveyancers*:

Buyer's Conveyancers*:

*Adding an e-mail address authorises service by e-mail: see condition 1.3.3(b)

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