THE NON-MARITAL PARTNER AS CONTRACTUAL LICENSEE

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[*The Family Law Act 1975 (Cth) contains provisions which give the Family Courts broad power in relation to property of legally married spouses. However, these provisions do not deal with the position of* de facto *spouses who therefore must rely on other principles at equity and law. In this article Dr Hardingham examines extensively the legal and equitable principles relating to the grant of a licence by the owner of a home to a non-owner de facto spouse.*]

De facto spouses cannot claim the benefit of common law doctrine and statutory provisions which are based upon the premise that the parties are lawfully married. Thus the party in whose name title to the family home is vested may, *prima facie*, exclude his or her *de facto* spouse. One *de facto* spouse is under no duty to house or render consortium to the other. It is open to one *de facto* spouse to argue, however, that the other holds the legal title to the family home on trust for one or other or both of them. The trust may be express, resulting or constructive.[1] It may be argued that, as a result of the doctrine of estoppel by acquiescence, the party in whose name legal title is *not* vested has nevertheless acquired equitable rights in the home.[2] These are issues — issues of title — which are not canvassed in this article. Here we are concerned with the rights of occupation of a *de facto* spouse or non-marital partner who has no interest, legal or equitable, in the family home. Such rights arise from the grant of a licence by the owner of the home to the non-owner *de facto* spouse.

The licence pursuant to which the non-owner claims to be entitled to occupy the home may be a bare licence. Such a licence 'only makes an action lawful, which without it had been unlawful'.[3] In other words, it merely constitutes a permission preventing the non-owner from assuming the status of trespasser. It can be revoked at any time and, when it is revoked, the non-owner will become a trespasser after the lapse of a reasonable 'packing-up period'.[4]

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[1] See, for example, *Allen v. Snyder* [1977] 2 N.S.W.L.R. 685; *Hohol v. Hohol* (1980) F.L.C. 90-824; Neave M. A., 'The Constructive Trust as a Remedial Device' (1978) 11 *M.U.L.R.* 343.

[2] See, most recently, *Pascoe v. Turner* [1979] 1 W.L.R. 431.

[3] *Thomas v. Sorrell* (1673) Vaugh. 330, 351; 124 E.R. 1098, 1109.

[4] See Hinde G. W., McMorland D. W. and Sim P. B. A., *Land Law* (1979) Vol. II, s. 7.015.

While it is clear that a licence coupled with an interest or a grant would provide more secure rights or enjoyment for the non-owner than a bare licence, in that it is irrevocable, it is most unlikely that such a licence would be of relevance in this context. A licence coupled with a grant is given to a licensee so that he may fully enjoy a separate chattel interest or interest in realty. A right to venture upon the licensor's lands in order to collect his natural produce or profits is an accepted example of a licence coupled with a grant. The licence is necessary so that the licensee may enjoy the separate interest in property that has been granted to him whether that property be real or personal, legal or equitable.[5] A contractual right to enter premises does not in and of itself give rise to the prerequisite grant of a proprietary interest.[6] As Megarry V.C. has observed:

> If for this purpose 'interest' is not confined to an interest in land or in chattels on the land, what does it extend to? . . . [If *Vaughan v. Hampson*[7] and *Hurst v. Picture Theatres Ltd*[8] be correct] it is not easy to see any fair stopping place in what amounts to an interest, short of any legitimate reason for being on the land.[9]

A contractual licence will provide the non-owner *de facto* spouse with more secure rights of occupation than those available under a bare licence. The non-owner will argue that he or she has occupation rights for a defined period of time pursuant to a binding contract entered into with the owner of the home, the other *de facto* spouse. The difficulty here, of course, is that a contract must be established with its constituent elements of offer, acceptance, consideration and intention to create legal relations. As an integral part of establishing the bargain between the parties, agreed terms must be defined. The contract may be express or implied from the circumstances but, whichever it is, it must be apparent that the parties intended to make a bargain concerning occupation rights and that that bargain should carry with it legal consequences.

In *Horrocks v. Forray*[10] Megaw L.J. made the following comment:

> Now, in order to establish a contract, whether it be express or implied by law, there has to be shown a meeting of the minds of the parties with a definition of the contractual terms reasonably clearly made out and with an intention to affect the legal relationship, that is, that the agreement that is made is one which is properly to be regarded as enforceable by the court if one or the other fails to comply with it; and it still remains a part of the law of this country, though many

[5] *Cf.* (1971) 87 *Law Quarterly Review* 311: 'One wonders whether there is any need for a separate category of licences coupled with an interest. The irrevocability of licences coupled with an interest may be regarded as an aspect of the rule that a licensee does not become a trespasser until he has had an opportunity to pack up and remove his property from the land.'

[6] *Cowell v. Rosehill Racecourse Co. Ltd* (1937) 56 C.L.R. 605, *Hounslow London Borough Council v. Twickenham Garden Developments Ltd* [1971] Ch. 233, 244, *Mayfield Holdings Ltd v. Moana Reef Ltd* [1973] 1 N.Z.L.R. 309, *Graham H. Roberts Pty Ltd v. Maurbeth Investments Pty Ltd* [1974] 1 N.S.W.L.R. 93, 104-5. See *contra Hurst v. Picture Theatres Ltd* [1915] 1 K.B. 1 and *Vaughan v. Hampson* (1875) 33 L.T. 15.

[7] (1875) 33 L.T. 15.

[8] [1915] 1 K.B. 1.

[9] *Hounslow L.B.C. v. Twickenham G.D. Ltd* [1971] Ch. 233, 244.

[10] [1976] 1 W.L.R. 230.

> people think that it is time that it was changed to some other criterion, that there must be consideration moving in order to establish a contract.[11]

Lord Denning M.R. has expressed favour for an approach which, it is conceived, would not yet find acceptance by Australian courts. In *Tanner v. Tanner*[12] His Lordship agreed that the terms of the contract embodying the licence may be express or may be capable of implication from the circumstances, but he also envisaged that they may, in appropriate circumstances, be *imposed* upon the licensor by the court. This view is consistent with Lord Denning's method of resolving family property disputes: he adopts what may be referred to as a remedial approach as opposed to an institutional approach. He notes the legal and equitable institutions and concepts at his disposal — resulting and constructive trusts, estoppel, licences, gifts, loans — and chooses that which, irrespective of any intention that the parties may have manifested, seems to satisfy the merits of the case before him. That is to say, he assesses the individual merits of the case before him, and then chooses a legal institution which he proceeds to apply as an appropriate remedy. Thus in *Hardwick v. Johnson*[13] His Lordship said:

> The court will pronounce in favour of a tenancy or a licence, a loan or a gift, or a trust, according to which of these legal relationships is most fitting in the situation which has arisen; and will find the terms of that relationship according to what reason and justice require.[14]

It is not thought that, at the present stage of its development, the common law of this country permits Australian courts to adopt Lord Denning's remedial approach. A contractual licence may not simply be imposed as a remedy to satisfy the conceived merits of a particular case. It must be established as a recognized institution. Its component parts must be made out.[15]

We will now consider some of the properties of, and problems associated with, contractual licences as between non-marital partners.

Some recent examples[16]

Let us consider four recent decisions of the Court of Appeal. Three involve the question as to whether or not a contractual licence existed between man and mistress; the other, whether or not a contractual licence arose between mother and daughter-in-law.

In *Tanner v. Tanner*[17] the defendant, a spinster, and the plaintiff, a married man, were having an affair. The defendant became pregnant and

[11] *Ibid.* 236.
[12] [1975] 1 W.L.R. 1346.
[13] [1978] 2 All E.R. 935.
[14] *Ibid.* 938.
[15] Compare the subjective approach taken by the courts in the context of constructive trusts and the family home: see Neave M. A., 'The Constructive Trust As a Remedial Device' (1978) 11 *M.U.L.R.* 343, 580.
[16] See also *Pearce v. Pearce* [1977] 1 N.S.W.L.R. 170.
[17] [1975] 1 W.L.R. 1346.

gave birth to twins. The plaintiff was the father. Early in 1970 the plaintiff and defendant decided that a house should be purchased to provide a home for the defendant and her twin daughters. In July 1970 the plaintiff purchased a home on mortgage. The defendant abandoned her rent-controlled flat and moved into the newly acquired home with the twins. In due course the plaintiff formed an association with another woman whom he eventually married after receiving a divorce from his wife. He wanted to move into the home with his new wife and, of course, he wanted the defendant and her children to leave. Monetary offers having produced no compliance from the defendant, the plaintiff sued for possession. The plaintiff relied upon his title. The defendant argued that she was entitled to the use of the home while her children were of school age, that is to say, until her children had left school. At first instance, the County Court Judge found for the plaintiff; the defendant was forced to vacate the home and was rehoused, along with her children, by the local authority.

Meanwhile, however, the defendant appealed successfully to the Court of Appeal. There it was held that the defendant was not simply a bare licensee whose rights of occupation could be determined at will. She was a contractual licensee whose contractual rights could be protected in equity, by specific performance or injunction. The consideration moving from the defendant was stated to be her action in giving up her rent-controlled flat and moving into the new home where she would take care of the children. A certain amount of difficulty was encountered in defining the terms of the contract between the parties but it was finally held that

> in all the circumstances it is to be implied that she had a licence — a contractual licence — to have accommodation in the house for herself and the children so long as they were of school age and the accommodation was reasonably required for her and her children.[18]

Browne L.J. rather enigmatically added an extra proviso to these terms:

> subject to any relevant change of circumstances, such as her remarriage.[19]

But the possession order from which the Court of Appeal dissented had been put into effect. It was thus considered that the plaintiff should be ordered to make restitution to the defendant in respect of the benefit which he had wrongly received at her expense. He was directed to pay her a sum representing the surrender value of the licence, namely, £2,000.

One may query whether the essence of the arrangement in *Tanner's* case was a bargain; whether, in leaving her rent-controlled flat, the defendant

[18] *Ibid.* 1350 *per* Lord Denning M.R.

[19] *Ibid.* 1351. Is such a contract, or a contract permitting the licensee to reside during his lifetime or for as long as he wishes, one which is not to be performed within one year from the date of its making within the writing requirements of the Statute of Frauds? No, for it could terminate, by reason of death, for example, within a year. See *Wells v. Horton* (1826) 4 Bing. 40; 130 E.R. 683, *Murphy v. O'Sullivan* (1866) 11 Ir. Jur. (N.S.) 111; *McGregor v. McGregor* (1888) 21 Q.B.D. 424. See Mercantile Law Act 1935 (Tas.), s. 6; Instruments Act 1958 (Vic.), s. 126; Statute of Frauds 1677 (N.S.W./S.A.), s. iv. If a contractual licence does fall within the Statute of Frauds, see *J.C. Williamson Ltd v. Lukey and Mulholland* (1931) 45 C.L.R. 282 on the question of the application of the doctrine of part performance.

was actually providing a *quid pro quo* for the plaintiff's undertaking to allow her to reside in his house; and, finally, whether the parties had actually agreed, expressly or impliedly, to be legally bound by the terms of the arrangement as the Court of Appeal construed them.[20] The whole process of analyzing the arrangement between the Tanners in terms of a contractual licence seems, with respect, particularly artificial. But it is clear that it *was* understood between the parties that the defendant would acquire rights of occupation in relation to the home; and it is equally clear that, with the plaintiff's knowledge and acquiescence, the defendant acted to her detriment (that is, she vacated her rent-controlled premises) on the faith of that understanding. *Tanner's* case was, therefore, a case tailor-made for the application of the much more flexible doctrine of estoppel by acquiescence.[21]

> Estoppel looks at all the facts but does not require, as contract does, that expectations should have been reduced to promises. Estoppel provides a remedy that is appropriate at the time it is granted, while a contract remedy must reflect what precisely the parties undertook.[22]

In *Horrocks v. Forray*[23] the defendant was the mistress of S and, in 1961, bore him a daughter. Thereafter S wholly maintained and supported the defendant and her daughter. He provided accommodation, clothing, holidays and expenses on a generous scale. In 1973 S bought a house. He told his solicitor that he was buying it for the defendant and her daughter, but he did not ask for it to be conveyed to her, although he installed both parties in it. He decided not to effect a transfer after learning about the fiscal charges involved. In 1974 S was killed in a car accident. In his will he left his entire estate to his wife. Neither the wife nor the plaintiffs, S's executors, had ever known of S's association with the defendant or of the purchase of the house. The plaintiffs brought an action for possession of the house alleging that the defendant's licence to occupy the home had terminated on S's death. The defendant argued that she was a contractual licensee entitled to occupy the home for her life or while her daughter was of school age or for so long as either she or her daughter needed the accommodation. The County Court Judge held that no contract existed between S and the defendant and the Court of Appeal upheld that point of view.

Before considering the Court's reasoning it should be mentioned that, in *Horrocks v. Forray*, the mistress did not seem to be favoured by the merits of the case to the same extent as the mistress in *Tanner*. S, who had been a 'marvellous husband'[24] had been at the end of his financial tether at the

[20] See *Balfour v. Balfour* [1919] 2 K.B. 571.
[21] See *Crabb v. Arun District Council* [1976] Ch. 179, especially *per* Scarman L.J. See generally Davies J. D., 'Informal Arrangements Affecting Land' (1979) 8 *Sydney Law Review* 578. See also the discussion of contractual licences and third parties *infra*.
[22] Davies *op. cit.* 586.
[23] [1976] 1 W.L.R. 230.
[24] *Ibid.* 232.

time of his death. His estate would have been insolvent if the home were not sold unoccupied. If the home were so sold the estate would be solvent, the wife would receive something under the will, and the way would be open to S's daughter to make an application for support under the Inheritance (Family Provision) Act 1938 (Eng.). The mistress had done well out of her relationship with S. Her own son, as well as S's daughter, had been living in the home. Brief references in the judgment of Megaw L.J. to the history of the defendant's relationship with S indicate that she had never regarded herself as entirely dependent upon S.

In *Tanner* the Court determined that the licensee had given some *quid pro quo* for the licence. It was able to imply terms upon which the licence was to operate and to conclude that it was the parties' intention that the licensor should be legally bound by the transaction. But in *Horrocks v. Forray* it was held that the mistress had given no consideration which would support a contractual licence:

> whatever relationship did exist between these two, it could as well be referable to the continuance of natural love and affection as to an intention to enter into an agreement which they intended to have legal effect.[25]

It was held that it would be unreal to suppose that the parties, affectionate as their relationship was, intended that their arrangements should be enforceable in the courts. *Tanner* was here distinguished on the dubious ground that, in that case, the relationship was on the point of collapse; the Tanners were making arrangements for the future at arm's length; here the relationship was warm and continuing until the unhappy and unexpected death of S.[26] Finally, it was held that the terms of a contractual licence could not be established with any certainty. Mrs Forray did not, like Mrs Tanner, put forward one construction of the agreement; she put forward several possible alternative constructions. The Court expressed dismay at the variety of terms that could be implied and suggested that, with so many choices open, 'one wonders whether these parties, in fact, entered into a legally binding agreement or intended to create legal relations upon the basis of terms sufficiently formulated to be clear and certain'.[27]

One can simply distinguish *Tanner* and *Horrocks v. Forray* on the basis that in the former case the mistress provided consideration for the licence while in the latter case she did not. Alternatively, one can argue, as did Scarman L.J., that there was an intention to create legal relations in *Tanner* — the parties were at arm's length — but there was no such intention in *Horrocks v. Forray* — the parties were enjoying a harmonious and affectionate relationship. But it would be unreal to do so. The critical distinction between the two cases lies in the fact that, in *Tanner*, the mistress could more easily be seen to have the merits of the case on her side than in *Horrocks v. Forray*. That is not to say that a contractual

[25] *Ibid.* 240 *per* Scarman L.J.
[26] *Ibid.*
[27] *Ibid.*

licence will automatically be imputed in favour of a non-marital partner who is clearly favoured by the 'justice of the case'. It simply means that, where the licensee is able to assert a strong moral claim against the legal owner of the home, the court will be more ready to find that contractual elements have been established.

In *Hardwick v. Johnson*[28] R and J became engaged in 1972. R's mother, the plaintiff, promised to buy R and J a home in which they could live upon their marriage. R and J looked for a home, found one, and the plaintiff purchased it in her own name. She said that R and J could live in it and pay her rent. After they were married R and J moved into the home on the understanding that they would pay the plaintiff £28 a month from 1st April 1973. Few payments were made. The plaintiff did not protest. It was generally understood that, on her death, R and J would inherit the home. After about a year the marriage began to founder. J was pregnant. R was having an affair with another woman. In January, 1975 the plaintiff asked for vacant possession of her home. In March, 1975 R left J. And, in June, 1975, proceedings were instituted against R and J for possession of the house. J, of course, was the active defendant.

Roskill and Browne L.JJ. held that R and J were joint contractual licensees entitled to occupy the home in return for a payment of £28 per month. Their Lordships held that the contract between the parties was not subject to a condition that the marriage should succeed and that, therefore, the daughter-in-law, J, could enforce its terms against the plaintiff. The plaintiff was not free to revoke the licence at will; and no circumstance had arisen entitling her to determine it. Their Lordships envisaged, without specifying, conduct on the part of J which might entitle the mother-in-law to determine the licence — perhaps, as Lord Denning M.R. suggested, an association with a third person in the house.

Lord Denning M.R. held that the licence was not contractual: there was no intention between the family members to contract. It was 'an equitable licence of which the court has to spell out the terms'.[29] It was a licence given to both son and daughter-in-law at £7 a week. It was not revocable at will and, in the present circumstances, was not revocable by the plaintiff while J was prepared to make the necessary payments. His Lordship envisaged that the equitable licence might become determinable in the event of the daughter-in-law not giving birth to a grandchild and associating with a third person in the house.

The Court of Appeal's reasoning in *Hardwick v. Johnson* may be criticized on several grounds. First, it appeared that the plaintiff had helped to buy a home for her son and his first wife. Title to that home had been vested in the married couple and, as a consequence, the plaintiff had faced complications over the property when the marriage broke down. It was in

[28] [1978] 2 All E.R. 935.
[29] *Ibid.* 939.

the hope of avoiding the earlier problems that she bought the house in question in the instant case in her own name. In the circumstances it would seem to be a fair inference that the contractual licence *was* intended to be conditional upon the marriage surviving. One may query whether the Court would have reached the same conclusion if the wife, J, had not been pregnant and deserted but had, by her persistent nagging, driven her husband, R, from the home. Secondly, it is difficult to see how an implied term, entitling the plaintiff to determine the licence in the event of the occurrence of certain types of activity by J,[30] would be formulated. Thirdly — and this relates to Lord Denning M.R.'s judgment only — one may ask, what is an equitable (as distinct from a contractual) licence. Lord Denning did not suggest, and, it is submitted, could not have suggested,[31] that the doctrine of estoppel was relevant. He excluded the possibility of a contractual licence. What is this new category of licence which, it is said, is non-contractual but imputable in equity? It is respectfully submitted that there is no such category of licence and that the following passage from Lord Scarman's judgment in the later case of *Chandler v. Kerley*[32] is apposite:

> If the defendant can establish a licence for life, there is neither room nor need for an equitable interest. Since the fusion of law and equity, such a legal right can be protected by injunction . . . If she cannot establish such a licence (express or implied), she cannot establish an equity; for no question of estoppel arises in this case. It is simply a case of what the parties envisaged by their arrangement. . . . In the present case the parties certainly intended that the arrangement between them should have legal consequences. If, therefore, they agreed on a right of occupation for life, there is a binding contract to that effect; if they did not so agree, there is nothing to give rise to an equity to that effect.[33]

In *Chandler v. Kerley* K and D, who were then husband and wife, had purchased a home for £11,000 in 1972. There were two children of the marriage. In 1974 the marriage broke down and K left D, although he continued paying the mortgage instalments due in respect of the house. Shortly thereafter D met P and eventually became his mistress. Early in 1975 K stopped paying the mortgage instalments. He said that he could no longer afford them. The home was put on the market at an asking price of £14,950. No buyer could be found. Ultimately it was arranged that P should buy the home at the reduced price of £10,000 on the understanding that D should be permitted to remain there with her children. It was envisaged that P would move into the house and live with D and that eventually, when they were able to do so, P and D would marry. In fact, the relationship between P and D broke down within six weeks of P's purchase of the house. The plaintiff, P, then brought an action for possession against the defendant, D. The County Court Judge held that, as

[30] Other than, perhaps, putting herself in a position in which she no longer had any need of the accommodation afforded by the home.

[31] There was no evidence that the parties had changed their position in reliance upon the plaintiff's representation that they could dwell in the house.

[32] [1978] 2 All E.R. 942, 945.

[33] *Ibid.* 945.

a result of the arrangement entered into, P held the home on a constructive trust in favour of D. Under this trust D was entitled to remain in the house for her life or for as long as she wished to reside there. He, therefore, dismissed the plaintiff's claim.

On appeal, it was held that the case involved nothing more than a contractual licence. Such a licence, Lord Scarman ruled in his leading judgment, is 'supported by equity so far, and only so far, as is necessary to give effect to the expectations of the parties when making their arrangement'.[34] In the instant case there was no need to impose a constructive trust or to invoke any other equitable doctrine. With respect, this approach is clearly correct and is preferable to that adopted by the trial judge, possibly in reliance upon the earlier Court of Appeal decision of *D.H.N. Food Distributors Ltd v. London Borough of Tower Hamlets*.[35]

Having concluded that a contractual licence was intended, the next problem was to ascertain its terms from the circumstances of the case. A licence for life could not be implied: P had invested £10,000 in the home; it would be unreal to imagine that he was assuming the burden of housing K's wife and children indefinitely and after any relationship between himself and D may have ended. D's licence was, it was decided, 'terminable on reasonable notice, and . . . the notice must be such as to give the defendant ample opportunity to rehouse herself and her children without disruption'.[36] The Court agreed on a period of twelve months.[37]

Immoral contracts[38]

In *Fender v. St. John-Mildmay*[39] Lord Wright said that

> The law will not enforce an immoral promise, such as a promise between a man and woman to live together without being married or to pay a sum of money or to give some other consideration in return for immoral association.[40]

In *Upfill v. Wright*[41] it was held, following *Pearce v. Brooks*,[42] that an agreement whereby a woman was to lease a man's premises so that she could, to the knowledge of the man, fulfil her role as a third party's mistress, was void as tending to promote immorality. How do the cases in which a contractual licence is said to bind *de facto* spouses sit with these

[34] *Ibid.* 947.
[35] [1976] 3 All E.R. 462. This case is discussed *infra*.
[36] [1978] 2 All E.R. 942, 947.
[37] In the context of contractual licences, the terminability of agreements of unspecified duration is a matter to be resolved by means of the implication of an appropriate term having regard to the circumstances of the case. See the authorities discussed above; see also Carnegie A. R., 'Terminability of Contracts of Unspecified Duration' (1969) 85 *Law Quarterly Review* 392; *Winter Garden Theatre (London) Ltd v. Millenium Productions Ltd* [1948] A.C. 173; *Re Spenborough U.D.C.'s Agreement* [1968] Ch. 139, 149-50 *per* Buckley J.
[38] Dwyer J. L., 'Immoral Contracts' (1977) 93 *Law Quarterly Review* 386.
[39] [1938] A.C. 1.
[40] *Ibid.* 42.
[41] [1911] 1 K.B. 506.
[42] (1866) L.R. 1 Ex. 213.

doctrines? In *Tanner* and *Chandler v. Kerley* the issue was simply not adverted to.[43]

The matter has, however, been adverted to in several modern cases. *Cavalier v. Cavalier*[44] was not a contractual licence case. It was a case where the Court was being asked to divide up assets as between divorced parties in such manner 'as the court considers just and equitable'.[45] Title to the matrimonial home was vested in the wife. The husband wanted a share of the home and asked the Court to take into account contributions which he had originally made towards its acquisition. The parties had first acquired the home so that they could enjoy a de facto relationship together. Both parties were, at the time, already married. They lived together for twenty years, married in 1959, and were divorced in 1967. Carmichael J. suggested to counsel that the Court ought not to take into account the husband's contributions towards the acquisition of the home because they 'were not contributions to a matrimonial life, they were contributions to enable them to continue an adulterous life together and rear illegitimate children'.[46] His Honour said:

> This is a case in which a man while still married to another woman and a woman while still married to another man lived together as if they were married to each other. For two decades they lived domestic lives contrary to their respective matrimonial duties. . . . Their conduct as to their financial arrangements designed to provide them with a home and the amenities of consortium was against the policy of the law.[47]

A promise which 'tends to produce conduct which violates the solemn obligations of married life' is void.[48] The learned Judge suggested that he should not take into account 'the financial contributions of each to this way of life which was contrary to the policy of the law'.[49] In the event, however, Carmichael J. did not rely on this line of reasoning in deciding the issue before him.

In *Cavalier* the Court seemed more concerned with the detrimental effect which de facto relationships may have on *existing* marriages than with the inherent immorality of living together other than as man and wife. But, it should be noted, no such policy consideration prevented the enforcement of contractual licences in *Tanner* and *Chandler v. Kerley*.[49a]

[43] See also *Pearce v. Pearce* [1977] 1 N.S.W.L.R. 170 and *Dale v. Haggerty* [1979] Qd. R. 83. And see, in the context of constructive trusts, *Cooke v. Head* [1972] 2 All E.R. 38; *Eves v. Eves* [1975] 3 All E.R. 768; and *Allen v. Snyder* [1977] 2 N.S.W.L.R. 685; and *Hohol v. Hohol* (1980) F.L.C. 90-824.

[44] (1972) 19 F.L.R. 199.

[45] Matrimonial Causes Act 1959 (Cth), s. 86.

[46] (1972) 19 F.L.R. 199, 207.

[47] (1972) 19 F.L.R. 199, 208.

[48] *Fender v. St. John-Mildmay* [1938] A.C. 1, 16, cited at 19 F.L.R. 199, 208. See also *Trustees of Church Property of the Diocese of Newcastle v. Ebbeck* (1960) 104 C.L.R. 394, 404, 409, 415-16.

[49] (1972) 19 F.L.R. 199, 208.

[49a] Under the *Family Law Act* 1975 (Cth), s. 79, the court has held that, in sharing assets between a divorced couple, it will take into account contributions made towards those assets by either party during an earlier period of *de facto* cohabitation: *Collins v. Collins* (1977) F.L.C. 90-286 b; *Oliver v. Oliver* (1978) F.L.C. 90-499.

In *Horrocks v. Forray*[50] Scarman L.J. was clearly concerned with the policy issue. It will be recalled that, in *Horrocks v. Forray*, S and his mistress had had a child and that S was already married. His Lordship suggested that the existence of the illegitimate child — see also *Tanner*[51] — overcame any adverse policy considerations:

> When an illegitimate child has been born, there is certainly nothing contrary to public policy in the parents coming to an agreement, which they intend to be binding in law, for the maintenance of the child and the mother. Parents of an illegitimate child have obligations towards the child. So far from its being contrary to public policy that those obligations should be regulated by contract, I would have thought it was in the public interest that they should be so.[52]

But, it will be recalled, there was no illegitimate child in *Chandler v. Kerley* and yet the licence was enforced.

It has been suggested that, in so far as an agreement purports to provide for what is to happen on the *termination* of a *de facto* relationship, it does not contravene any policy aimed at striking down bargains tending to promote immorality.[53] This suggestion is not compelling. In a vast majority of the cases the litigation before the court concerns the rights of the parties consequential upon the termination of their relationship. The whole question then is whether there exists between the parties a legal relationship which survives the breakdown of their *de facto* association. The suggestion under consideration, if accepted, enables one to ignore the policy issue in most cases, but fails to assess its present status.

The better view is that put by Dwyer,[54] and accepted by Stable J. in *Andrews v. Parker*,[55] that an arrangement between non-marital partners governing the terms upon which they will cohabit can no longer be struck down on the basis that it constitutes a bargain which promotes sexual immorality. Having regard to changed social mores it is no longer regarded as necessarily immoral that a man and a woman should live together in a *de facto* relationship. As Stable J. said:

> I am not, in my view, to be taken as changing the law if I do not accept that immoral today means precisely what it did in the days of *Pearce v. Brooks*:[56] I am, I believe, entitled to look at the world under modern social standards.[57]

His Honour conceived that an agreement which envisages the parties living together as man and wife in a *de facto* relationship involves no such immorality as would, according to modern standards, deprive a party of the right to enforce it.[58]

That is not to say, however, that an agreement or promise to undertake a sexual relationship can *per se* constitute a lawful consideration. It cannot,

[50] [1976] 1 W.L.R. 230.
[51] [1975] 1 W.L.R. 1346.
[52] [1976] 1 W.L.R. 230, 239.
[53] *Andrews v. Parker* [1973] Qd. R. 93.
[54] *Op. cit.*
[55] [1973] Qd. R. 93.
[56] (1866) L.R. 1 Ex. 213.
[57] [1973] Qd. R. 93, 102.
[58] *Ibid.* 104.

and the contrary was not argued in *Horrocks v. Forray*.[59] It simply means that an arrangement between *de facto* spouses governing the terms upon which they are to cohabit is not void on the short ground that it constitutes a bargain promoting sexual immorality.

The best discussion of these issues is contained in the Californian decision, *Marvin v. Marvin*.[60] The plaintiff and the defendant, actor Lee Marvin, had lived together in a de facto relationship for seven years before separating. In subsequent proceedings against the defendant, the plaintiff alleged that a contract between herself and the defendant should be implied from all the circumstances: that while they lived together they would combine their efforts and earnings and would share equally any and all property accumulated as a result of their efforts, whether individual or combined. The plaintiff further alleged that she had given up her career as a singer and entertainer in order to devote all her time to the defendant as a companion, homemaker, housekeeper and cook and that, in return, the defendant had agreed to provide for all her needs for the rest of her life. At first instance the plaintiff was nonsuited on the ground that her pleadings disclosed no viable cause of action. On appeal that ruling was reversed. It was held that the 'courts should enforce express contracts between nonmarital partners except to the extent that the contract is explicitly founded on the consideration of meretricious sexual services'.[61]

It was observed[62] that the fact that a man and woman live together without marriage, and engage in a sexual relationship, does not, in itself, invalidate agreements between them relating to their earnings, property or expenses. Nor is such an agreement invalid merely because the parties may have contemplated the creation or continuation of a non-marital relationship when they entered into it. Agreements between non-marital partners fail only to the extent that they rest upon a consideration of meretricious sexual services. Thus the rule asserted by the defendant that a contract fails if it is 'involved in' or made 'in contemplation of' a non-marital relationship was rejected. In sum, a court will not enforce a contract for the pooling of property and earnings if it is explicitly and inseparably based upon services as a paramour. But even if sexual services are part of the contractual consideration, any severable portion of the contract supported by independent consideration will still be enforced.

It was further held[63] that any agreement between the plaintiff and the defendant, in the terms alleged, was not invalid as an agreement to promote or encourage divorce. The contract did not, by its terms, require the defendant to divorce his wife, nor did it reward him for so doing. Moreover,

[59] A case in which the mistress was unable to establish consideration.
[60] (1976) 557 P. 2d 106.
[61] *Ibid.* 110.
[62] *Ibid.* 113.
[63] *Ibid.* 115 n. 8.

it was pointed out that this ground of invalidity is beside the point when the marriage in question is beyond redemption.

By way of summary the Court observed:

> In summary, we base our opinion on the principle that adults who voluntarily live together and engage in sexual relations are nonetheless as competent as any other persons to contract respecting their earnings and property rights. Of course, they cannot lawfully contract to pay for the performance of sexual services, for such a contract is, in essence, an agreement for prostitution and unlawful for that reason. But they may agree to pool their earnings and to hold all property acquired during the relationship in accord with the law governing community property; conversely they may agree that each partner's earnings and the property acquired from those earnings remains the separate property of the earning partner. So long as the agreement does not rest upon illicit meretricious consideration, the parties may order their economic affairs as they choose, and no policy precludes the courts from enforcing such agreements.[64]

The Court concluded with the following remark which, it is submitted, reflects not only the Californian, but also the Australian, position:

> In summary, we believe that the prevalence of nonmarital relationships in modern society and the social acceptance of them, marks this as a time when our courts should by no means apply the doctrine of the unlawfulness of the so-called meretricious relationship to the instant case. As we have explained, the nonenforceability of agreements expressly providing for meretricious conduct rested upon the fact that such conduct, as the word suggests, pertained to and encompassed prostitution. To equate the nonmarital relationship of today to such a subject matter is to do violence to an accepted and wholly different practice . . . The mores of the society have indeed changed so radically in regard to cohabitation that we cannot impose a standard based on alleged moral considerations that have apparently been so widely abandoned by so many . . . We conclude that the judicial barriers that may stand in the way of a policy based upon the fulfillment of the reasonable expectations of the parties to a nonmarital relationship should be removed.[65]

The revocation of contractual licences

At law a licensor is able to determine a contractual licence effectively, if not properly.[66] The only recourse open to the licensee is an action for damages for breach of contract.[67] The damages recoverable by the licensee will vary depending upon the circumstances of the case: if the contractual licence entitles the licensee to enter premises to view a spectacle, the damages may amount to little more than the cost incurred by the licensee in purchasing his ticket; if the contractual licence entitles the licensee to reside in premises for a period of time, the damages may be more substantial.[68] So effective will the revocation be at law that it will be open to the licensor, even although he has breached his contract in revoking the licence, to require the licensee to leave the premises. If the licensee fails to

[64] *Ibid.* 116.
[65] *Ibid.* 122.
[66] See *Thompson v. Park* [1944] K.B. 408, a case in which this distinction is emphasized. See *Sharman v. McIntosh* (1950) 68 W.N. (N.S.W.) 16, a case in which the distinction is not appreciated. Owen J. suggested that a contractual licence may be revoked, *i.e.* effectively, at law, and that therefore it will automatically come to an end on the licensor's death.
[67] *Wood v. Leadbitter* (1845) 13 M. & W. 838; 153 E.R. 351, *Kerrison v. Smith* [1897] 2 Q.B. 445.
[68] *Cf. Tanner v. Tanner* [1975] 1 W.L.R. 1346.

leave within a reasonable time, he may be treated as a trespasser and reasonable force may be used to eject him.[69]

The picture in equity is, however, considerably different. If equity is prepared to lend its remedies to the enforcement of the contract embodying the licence then the contractual licence is irrevocable, that is to say, it is not revocable at the will of the licensor. If the contract contains a negative stipulation, express or implied, denying the licensor the right to determine the licence otherwise than in compliance with its terms, injunctive relief may be available to enforce that stipulation.[70] If injunctive relief is in fact available, the licensor will not be permitted to proceed with a threatened revocation; nor will a *de facto* revocation be permitted to continue.[71] Again, if injunctive relief is available, the licensor will not be in a position to treat the licensee as a trespasser after an improper revocation of his licence. If he does so treat him, he may be liable to pay damages for assault to the licensee.[72] Although practical considerations may prevent a court of equity from giving effect antecedently to the rights with which its doctrines invest the licensee, yet *ex post facto* it will not permit the licensor to assert any right at law inconsistent with the equitable position.[73]

It is worth reiterating here Lord Greene M.R.'s comments in the *Winter Garden* case[74] concerning the role of equity in the enforcement of contractual licences. Lord Greene was speaking in the Court of Appeal but, in the House of Lords, Lord Uthwatt confessed that he found Lord Greene's propositions of law unanswerable.[75] Lord Greene M.R. said:

[69] *Wood v. Leadbitter* (1845) 13 M. & W. 838; 153 E.R. 351, *Cowell v. Rosehill Racecourse Co. Ltd* (1937) 56 C.L.R. 605. *Cf. Winter Garden Theatre (London) Ltd v. Millenium Productions Ltd* [1948] A.C. 173, 189 *per* Viscount Simon, Wade H. W. R., 'What is a Licence?' (1948) 64 *Law Quarterly Review* 57, and *Hounslow L.B.C. v. Twickenham G.D. Ltd* [1971] Ch. 233, 254 f. In the latter case Megarry J. adverted to the doctrine of a licence acted upon and referred to *Feltham v. Cartwright* (1839) 5 Bing N.C. 569; 132 E.R. 1219: [1971] Ch. 233, 255. This doctrine would appear to be at variance with the decision in *Wood v. Leadbitter supra.*

[70] *Winter Garden Theatre (London) Ltd v. Millenium Productions Ltd* [1948] A.C. 173, 194, 202-3 (H.L.); *Foster v. Robinson* [1951] 1 K.B. 149, 156; *Heidke v. Sydney City Council* (1952) 52 S.R. (N.S.W.) 143; *District Council of Snowtown v. Verran* [1952] S.A.S.R. 137, *Playgoers' Co-operative Theatres Ltd v. The Workers' Educational Association of N.S.W.* (1955) 72 W.N. (N.S.W.) 374; *McMahon v. Rowston* (1958) 75 W.N. (N.S.W.) 508; *Michelmore v. Breen* [1920] Q.S.R. 266; *Hounslow L.B.C. v. Twickenham G.D. Ltd* [1971] Ch. 233; *Mayfield Holdings v. Moana Reef Ltd* [1973] 1 N.Z.L.R. 309; *Graham H. Roberts Pty Ltd v. Maurbeth Investments Pty Ltd* [1974] 1 N.S.W.L.R. 93. See also the cases discussed under 'Recent examples' *supra.* See also *Verrall v. Great Yarmouth Borough Council* [1980] 1 All E.R. 839, where the Court of Appeal ordered the specific performance of a contractual licence.

[71] *Millenium Productions Ltd v. Winter Garden Theatre (London) Ltd* [1946] 1 All E.R. 678, 685 *per* Lord Greene M.R., *Graham H. Roberts Pty Ltd* v. *Maurbeth Investments Pty Ltd* [1974] 1 N.S.W.L.R. 93, 104. See also *Verrall v. Great Yormouth Borough Council* [1980] 1 All E.R. 839, a case in which a contractual licence was specifically enforced. The Court of Appeal held that it is immaterial that the licencee has not actually taken up the licence at the time of the proceedings.

[72] See *Cowell v. Rosehill Racecourse Co. Ltd* (1937) 56 C.L.R. 605, 634 *per* Dixon J., *semble per* McTiernan J. 653, 651- f. *per* Evatt J.; see *contra per* Starke J. 628 f. and *semble per* Latham C.J. 618.

[73] *Ibid.*

[74] [1946] 1 All E.R. 678, 680, 684 f.

[75] [1948] A.C. 173, 202.

> Counsel for the respondents put in the forefront of his argument a proposition of this nature. There is a thing called a licence, which is something which, so to speak, has a separate existence, distinct from the contract which creates it; and there is a rule of law governing that particular thing which says that a licence is determinable at will. That seems to me to be putting the matter on the wrong footing. A licence created by a contract is not an interest. It creates a contractual right to do certain things which otherwise would be a trespass. It seems to me that, in considering the nature of such a licence and the mutual rights and obligations which arise under it, the first thing to do is to construe the contract according to ordinary principles. There is the question whether or not the particular licence is revocable at all and, if so, whether by both parties or by only one. There is the question whether it is revocable immediately or only after the giving of some notice. Those are questions of construction of the contract. It seems to me quite inadmissible to say that the question whether a licence is revocable at all can be, so to speak, segregated and treated by itself, leaving only the other questions to be decided by reference to the true construction of the contract. As I understand the law, rightly or wrongly, the answers to all these questions must depend on the terms of the contract when properly construed in the light of any relevant and admissible circumstances.[76]

Later his Lordship added:

> The respondents have purported to determine the licence. If I have correctly construed the contract their doing so was a breach of contract. It may well be that, in the old days, that would only have given rise to a right to sue for damages. The licence would have stood revoked, but after the expiration of what was the appropriate period of grace the licensees would have been trespassers and could have been expelled, and their right would have been to sue for damages for breach of contract, as was said in *Kerrison v. Smith*.[77] But the matter requires to be considered further, because the power of equity to grant an injunction to restrain a breach of contract is, of course, a power exercisable in any court. The general rule is that, before equity will grant such an injunction, there must be, on the construction of the contract, a negative clause express or implied. In the present case it seems to me that the grant of an option which, if I am right, is an irrevocable option, must imply a negative undertaking by the licensor not to revoke it. That being so, in my opinion, such a contract could be enforced in equity by an injunction. Then the question would arise, at what time can equity interfere? If the licensor were threatening to revoke, equity, I apprehend, would grant an injunction to restrain him from carrying out that threat. But supposing he has in fact purported to revoke, is equity then to say: 'We are now powerless. We cannot stop you from doing anything to carry into effect your wrongful revocation?' I apprehend not. I apprehend equity would say: 'You have revoked and the licensee had no opportunity of stopping you doing so by an injunction; but what the court of equity can do is to prevent you from carrying that revocation into effect and restrain you from doing anything under it.' In the present case, nothing has been done. The appellants are still there. I can see no reason at all why, on general principles, equity should not interfere to restrain the licensors from acting upon the purported revocation, that revocation being, as I consider, a breach of contract. Looking at it in that rather simple way, one is not concerned with the difficulties which are suggested to arise from the decision of this court in *Hurst v. Picture Theatres Ltd*.[78, 79]

If the licensee cannot, for one reason or another, secure an injunction, he will be thrown back on his position at law: the licence will, in effect, be revocable, the licensee will be confined to relief by way of damages for breach of contract, and he will be obliged to leave the premises in question when requested to do so or assume the status of a trespasser.[80] But it has

[76] [1946] 1 All E.R. 678, 680.
[77] [1897] 2 Q.B. 445.
[78] [1915] 1 K.B. 1.
[79] [1946] 1 All E.R. 678, 684 f.
[80] *Cowell v. Rosehill Racecourse Co. Ltd* (1937) 56 C.L.R. 605; *Thompson v. Park* [1944] K.B. 408; *Robinson v. Kingsmill* (1954) 71 W.N. (N.S.W.) 127; *Porter v. Hannah Builders Pty Ltd* [1969] V.R. 673; *Mayfield Holdings v. Moana Reef Ltd*

been suggested that equity should not, in these circumstances, assist the licensor, who, in breach of his contract, has revoked the licence, to expel the licensee; equity ought not to grant the licensor an injunction restraining the licensee from entering the premises or remaining upon them. Even if a contractual licence is not directly enforceable in equity, the court will not, it is said, grant equitable remedies in order to procure or aid a breach of contractual licence. Equity will not assist a man to break his contract.[81] Although compelling, this appears to be a minority view for the weight of authority establishes that the licensee will not be permitted to resist the licensor's right of re-entry on this basis when he is unable to resist it by seeking equitable relief directly. The licensee is not entitled to receive equitable assistance indirectly when he is unable to obtain it directly.[82]

When will an injunction be granted to enforce a contractual licence? Injunctive relief will, as we have seen, be granted to enforce a promise, express or implied, by the licensor that he will not terminate the licence otherwise than in accordance with the terms of the contract. Any grant of a contractual licence implies, as a general rule, a negative undertaking by the licensor not to revoke it improperly. This implication will be particularly strong where the contract envisages the termination of the licence in specified circumstances none of which is instantly material.[83]

But even if a negative stipulation can be implied, injunctive relief will not be granted where its effect would be to enforce indirectly a contract which cannot be enforced directly: for the reason, for example, that it involves a substantial element of personal service.[84] So in *Heidke v. Sydney City Council*[85] Hardie A.J. commented:

> There is no doubt that in many cases, where a licence to go upon land is granted, equitable remedies are not available. In such cases, the licence is part and parcel of an agreement which courts of equity will not enforce directly or indirectly — agreements under which employees have rights to use and occupy premises of the employer; agreements under which building contractors have a right to go on land and build;[86] agreements under which sharefarmers have a right to use the land of the owner; and agreements under which boarders are entitled to use premises of the owner of the boarding establishment. In those cases, equitable remedies are not available, mainly for the reason that they are contracts which involve a substantial

[1973] 1 N.Z.L.R. 309; *Graham H. Roberts Pty Ltd v. Maurbeth Investments Pty Ltd* [1974] 1 N.S.W.L.R. 93.

[81] *Hounslow L.B.C. v. Twickenham G.D. Ltd* [1971] Ch. 233.

[82] *Mayfield Holdings v. Moana Reef Ltd* [1973] 1 N.Z.L.R. 309; *Porter v. Hannah Builders Pty Ltd* [1969] V.R. 673; *Thompson v. Park* [1944] K.B. 408.

[83] *Playgoers' Co-operative Theatres Ltd v. The Workers' Educational Association of N.S.W.* (1955) 72 W.N. (N.S.W.) 374; *Hounslow L.B.C. v. Twickenham G.D. Ltd* [1971] Ch. 233; *Graham H. Roberts Pty Ltd v. Maurbeth Investments Pty Ltd* [1974] 1 N.S.W.L.R. 93. But compare *Mayfield Holdings v. Moana Reef Ltd* [1973] 1 N.Z.L.R. 309.

[84] *Porter v. Hannah Builders Pty Ltd* [1969] V.R. 673; *Mayfield Holdings v. Moana Reef Ltd* [1973] 1 N.Z.L.R. 309; *Graham H. Roberts Pty Ltd v. Maurbeth Investments Pty Ltd* [1974] 1 N.S.W.L.R. 93.

[85] (1952) 52 S.R. (N.S.W.) 143.

[86] See n. 84; see also *Cowell v. Rosehill Racecourse Co. Ltd* (1937) 56 C.L.R. 605, 621 *per* Latham C.J. But see *Hounslow L.B.C. v. Twickenham G.D. Ltd* [1971] Ch. 233, 251 and *Binions v. Evans* [1972] Ch. 359.

element of personal service and thus are not susceptible of direct or indirect enforcement by a court of equity.[87]

Nor, it may be added, will injunctive relief be granted in Australia to enforce contractual licences to view an entertainment or spectacle.[88] Since these contracts, which are by implication, if not expressly, properly determinable upon the licensee misbehaving himself,[89] are not enforceable in equity, they may be effectively revoked. Thus Dixon J. said in *Cowell v. Rosehill Racecourse Co. Ltd*:[90]

> The rights conferred upon the plaintiff by the contract possess none of the characteristics which bring legal rights within the protection of equitable remedies, and the position of the plaintiff at law gives him no title under any recognizable equitable principle to relief against the exercise by the defendant of his legal rights. No right of a proprietary nature is given. The contract is not of a kind which courts of equity have ever enforced specifically. It is not an attempt to confer a right by parol agreement which at law might have been effectually granted by deed. There is no clear negative stipulation the breach of which would be restrained by injunction. On the other hand, there is a fugitive or ephemeral purpose of pleasure, mutual undertakings, mostly implied, affecting the behaviour of the parties, and a complete absence of material interest. The purpose is not to enjoy the amenities forming part of the land, but to witness the races and, perhaps, to use the facilities provided for adding to the pleasure and excitement of the spectacle. The implication that the licence to remain upon the course will not be revoked is subject to many conditions. If it is found necessary to suspend the proceeding owing to weather, to the disorderly conduct of a crowd, to some sudden public emergency, or to some other unforeseen event, the contractual right to remain upon the course will be brought to a premature end. If the individual racegoer behaves in a disorderly, insulting, or objectionable manner, he may be expelled notwithstanding that he has paid for his admission. The nature of such a contract takes it outside the scope of the equitable doctrines regulating the application of the remedies of specific performance or injunction . . . it is impossible to disregard the transient nature of the contractual rights out of which the alleged equity or equitable interest is said to grow. Nor can the conditions attending the licence be ignored in dealing with the claim that the contract is, except for practical difficulties, susceptible of specific performance.[91]

It would not be correct to conclude that *Cowell* supports the proposition that, in Australia, contractual licences may be revoked effectively, albeit in breach of their terms. *Cowell* was concerned with a particular type of contractual licence, one permitting entry upon land to view a spectacle, which, the Court concluded, was unenforceable in equity.[92]

[87] (1952) 52 S.R. (N.S.W.) 143, 149.

[88] *Cowell v. Rosehill Racecourse Co. Ltd* (1937) 56 C.L.R. 605 approving *Naylor v. Canterbury Park Racecourse Co. Ltd* (1935) 35 S.R. (N.S.W.) 281. In England, see *Hurst v. Picture Theatres Ltd* [1915] 1 K.B. 1 disapproved of in *Cowell's* case *supra*.

[89] *Ibid.* See also *Hurst v. Picture Theatres Ltd* [1915] 1 K.B. 1; *Cox v. Coulson* [1916] 2 K.B. 177; *Said v. Butt* [1920] 3 K.B. 497; *Duffield v. Police* [1971] N.Z.L.R. 381. *Cf. Todd v. Nicol* [1957] S.A.S.R. 72.

[90] (1937) 56 C.L.R. 605.

[91] *Ibid.* 633 f.

[92] See *Michelmore v. Breen* [1920] Q.S.R. 266; *Heidke v. Sydney C.C.* (1952) 52 S.R. (N.S.W.) 143; *District Council of Snowtown v. Verran* [1952] S.A.S.R. 137; *Playgoers' Co-operative Theatres Ltd v. The Workers' Educational Association of N.S.W.* (1955) 72 W.N. (N.S.W.) 374; *McMahon v. Rowston* (1958) 75 W.N. (N.S.W.) 508; *Graham H. Roberts Pty Ltd v. Maurbeth Investments Pty Ltd* [1974] 1 N.S.W.L.R. 93; *Pearce v. Pearce* [1977] 1 N.S.W.L.R. 170. More fundamentally it has been argued that the High Court concluded that such a contract is unenforceable in equity because it confers no proprietary interest on the licensee: Meagher R. P., Gummow W. M. C. and Lehane J. R. P., *Equity: Doctrines and Remedies* (1975) 482 citing *Cowell* 652 f. *per* McTiernan J., 633 f. *per* Dixon J., and at 614 f. *per*

In most cases, contractual licences between *de facto* spouses will make allowance for non-exclusive occupation by the licensee. The presence in the home of the licensor, the licensee's partner, is contemplated. The consideration payable by the licensee will vary from case to case. In *Tanner* the licensee had given up her rent-controlled flat. In *Pearce v. Pearce*[93] the licensee had made contributions towards the purchase price of the home. In *Chandler v. Kerley* the licensor had purchased the home from the licensee (and her husband) at a reduced price. In other cases, however, the consideration moving from the licensee may be in the form of personal services; the licensee may agree, for example, to act as a companion, homemaker, housekeeper and cook.[94]

The cases indicate that contractual licences between non-marital partners are enforceable by injunction irrespective of the fact that they envisage, not exclusive occupation by the licensee, but a shared accommodation arrangement.[95] In *Thompson v. Park*[96] the Court of Appeal denied that the licensee in that case could obtain any equitable relief in respect of his contractual licence, remarking that the 'court cannot specifically enforce an agreement for two people to live peaceably under the same roof'. But that comment was made in the context of an agreement between two schoolmasters to share, for a specified period of time, one set of buildings.[97] Such an agreement would depend for its efficacy upon the existence of a considerable amount of professional cooperation. An agreement to allow another simply to reside in one's house does not necessarily entail the same considerations of 'give and take' and active cooperation. Even so, it has

Latham C.J. The authors criticize this conclusion. But, it is submitted, nothing contained in the pages cited supports this construction of *Cowell*. McTiernan J. simply asserted that a contract to provide entertainment is not specifically enforceable and that any injunctive relief in respect of such a contract would be tantamount to an improper specific performance. Talking of equitable relief, His Honour noted at 654 that the 'foundation of such relief need not be the protection of property'. Latham C.J.'s reasoning was similar. His Honour said at 621 that equitable remedies 'would be used to protect proprietary rights, to enforce negative agreements and, in special cases only, to enforce affirmative agreements. . . . These agreements never included contracts to provide an entertainment in a particular place in return for payment'. At 634 Dixon J. talked of the need for the licence to confer an 'equitable interest' or for the contract to give rise to 'an equity against revocation of the licence'. But it is clear, at least from the earlier discussion set out on 633 of the report, that, in referring to an 'equity against revocation', Dixon J. was not speaking of a proprietary interest but simply of a right or entitlement to equitable relief in respect of the contract.

[93] [1977] 1 N.S.W.L.R. 170.

[94] *Cf. Marvin v. Marvin* (1976) 557 P. 2d 106.

[95] See *Pearce v. Pearce* [1977] 1 N.S.W.L.R. 170; *Chandler v. Kerley* [1978] 2 All E.R. 942. Presumably, in *Tanner v. Tanner* [1975] 1 W.L.R. 1346, Mr Tanner could have moved back into his house had he wanted to, provided he did not unreasonably interfere with Mrs Tanner's occupation. See also *McMahon v. Rowston* (1958) 75 W.N. (N.S.W.) 508.

[96] [1944] K.B. 408, 409. The correctness of this decision was doubted by the Court of Appeal in *Verrall v. Great Yarmouth Borough Council* [1980] 1 All E.R. 839, having regard to the subsequent House of Lords decision in the *Winter Garden Theatre* case [1948] A.C. 173.

[97] Compare share farming agreements: *Dudgeon v. Chie* (1955) 92 C.L.R. 342 approving *Moxey v. Lawrence* (1952) 69 W.N. (N.S.W.) 378.

been held that the need for a certain amount of mutual cooperation or confidence between contracting parties will not stand in the way of equitable relief.[98]

The cases further indicate that, in this context, the courts do not regard an award of damages as an adequate recompense to a contractual licensee. Injunctive relief is not to be denied on that ground alone.[99] Nor is it to be denied on the ground that the contract is to run over a considerable period of time[1] or that the licensee himself may be required to abide by certain conditions, perhaps pertaining to behaviour, during the currency of the licence.[2] In the latter case, the court may dissolve the injunction in the event of the licensee's own subsequent breach of condition and the parties will thus be restored to the relative position they occupied before the suit.[3]

Contractual licences and third parties

The question to which we must now turn concerns the extent to which a contractual licensee, such as Mrs Tanner[4] or Mrs Pearce,[5] can enforce the contractual licence against third persons to whom the land subject to the licence has been transferred.

The traditional view, and that which is accepted here, is that the licensee's contractual right does not bind third parties, even if they should take with notice of it: X is not to be bound by the terms of a contract between A and B.[6] In *King v. David Allen and Sons, Billposting Ltd*,[7] the defendant, by an agreement in writing, gave the plaintiffs permission to affix advertisements and posters to the flank walls of a picture house which was to be erected on his property by a company that was about to be formed. The agreement was to run for four years at a stipulated yearly rental. The defendant undertook not to permit other concerns to post bills on the walls during the period of the licence. The defendant subsequently leased the premises to the picture house company which took with notice of the agreement, although there was no mention of it in the lease. The picture house company refused to be bound by the terms of the licence. The

[98] *Thomas Borthwick & Sons (Australasia) Ltd v. South Otago Freezing Co. Ltd* [1978] 1 N.Z.L.R. 538 applying *Evans Marshall & Co. Ltd v. Bertola* [1973] 1 W.L.R. 349. *Cf.* Megarry J.'s comment in *Hounslow L.B.C. v. Twickenham G.D. Ltd* [1971] Ch. 233, 250 that 'If the courts sought to enforce a licence to share, a multitude of practical problems would arise which would be absent if the licence was for exclusive occupation'.

[99] *Cf. Graham H. Roberts Pty Ltd v. Maurbeth Investments Pty Ltd* [1974] 1 N.S.W.L.R. 93, 107.

[1] *Thomas Borthwick & Sons (Australasia) Ltd v. South Otago Freezing Co. Ltd* [1978] 1 N.Z.L.R. 538.

[2] *J.C. Williamson Ltd v. Lukey and Mulholland* (1931) 45 C.L.R. 282, 299 f. This was a 'contractual licence' case.

[3] *Ibid.*

[4] *Tanner v. Tanner* [1975] 1 W.L.R. 1346.

[5] *Pearce v. Pearce* [1977] 1 N.S.W.L.R. 170.

[6] *King v. David Allen & Sons, Billposting Ltd* [1916] 2 A.C. 54; *Clore v. Theatrical Properties Ltd* [1936] 3 All E.R. 483.

[7] [1916] 2 A.C. 54.

plaintiffs sued the defendant alleging that, by leasing the premises, he had put it out of his power to fulfil his contractual obligations and had effectively destroyed the plaintiffs' contractual rights. The plaintiffs' arguments were accepted by the House of Lords. It was held that the agreement did not create any interest in land, but created merely a personal obligation on the part of the licensor to allow the licensees to use the walls in the agreed manner; as the defendant had put it out of his power to fulfil his obligation under the agreement he was liable in damages for breach of contract.

In *Clore v. Theatrical Properties, Ltd, and Westby and Co. Ltd*[8] the licensee contracted for the 'front of the house' rights of a theatre. These rights comprehended 'the free and exclusive use of all the refreshment rooms . . . of the theatre . . . for the purpose only of the supply to and the accommodation of the visitors to the theatre and for no other purpose whatsoever'. An assignee of the licensor who had notice of this arrangement sought to prevent assignees of the licensee from exercising any of the rights conferred by the original agreement. The Court of Appeal ruled that, being a personal agreement only, it could only be enforced by persons between whom there was privity of contract. Thus neither the original licensee nor his assignees could assert rights under the agreement against the assignee of the licensor.[9]

The first significant departure from this orthodoxy appears in the Court of Appeal's reasoning in *Errington v. Errington and Woods*.[10] In that case a father, wishing to provide a home for his recently married son, purchased a house through a building society. He paid a lump sum and arranged that the balance should be secured by mortgage and paid by weekly instalments. He retained the conveyance in his own name and paid the rates but promised that, if his son and daughter-in-law continued in occupation, and duly paid all the instalments, he would, when the last payment had been made, transfer the property to them. He was on affectionate terms with his daughter-in-law and handed her the building society's book, directing her not to part with it. When the father died he left all his assets, including the house in question, to his widow. Up to that time the son and daughter-in-law had occupied the home together and paid the instalments, but the son then left his wife and went to live with his widowed mother. The wife remained in the home and continued to pay the instalments. The mother brought an action for possession. Denning L.J., with whom Sommervell and Hodson L.JJ. were in basic agreement, held that the young couple

[8] [1936] 3 All E.R. 483.

[9] The Court of Appeal rejected the contention that the well-known reasoning of Knight Bruce L.J. in *De Mattos v. Gibson* (1858) 4 De G. & J. 276, 282; 45 E.R. 108, 110 (approved in *Lord Strathcona Steamship Co. v. Dominion Coal Co.* [1926] A.C. 108, 117) applies in this context: *ibid.* 483, 490 f., 492 f. See also *London County Council v. Allen* [1914] 3 K.B. 642, 658; *National Provincial Bank Ltd v. Ainsworth* [1965] A.C. 1175, 1237 *per* Lord Upjohn; *Howie v. N.S.W. Lawn Tennis Ground Ltd* (1956) 95 C.L.R. 132, 156 f.

[10] [1952] 1 K.B. 290.

were contractual licensees with rights of exclusive possession binding upon the mother so long as the instalments were paid.

Denning L.J. pointed out that a contractual licensee, while having no interest in the land to which his licence applies,[11] may nevertheless have equitable rights of enforcement.[12] If he does, the licensor will be bound by them; they will also bind any purchaser taking with notice of them:

> They had a mere personal privilege to remain there, with no right to assign or sub-let. They were, however, not bare licensees. They were licensees with a contractual right to remain. As such they have no right at law to remain, but only in equity, and equitable rights now prevail. . . . This infusion of equity means that contractual licences now have a force and validity of their own and cannot be revoked in breach of contract. *Neither the licensor nor anyone who claims through him can disregard the contract except a purchaser for value without notice.*[13]

Denning L.J. made no mention of either *King v. David Allen*[14] or *Clore v. Theatrical Properties Ltd.*[15]

While *Errington* has been criticized[16] on the ground that, in neglect of principle and earlier authority, it affirms that contractual rights may be asserted against persons not party to the contract, the actual decision arrived at in the case has never been seriously doubted. It has been justified on other grounds: it has been supported on the basis of estoppel,[17] on the basis that the defendants had acquired an equitable interest under a contract of sale of the land,[18] and even on the ground that no question arose at all of rights against third parties; the mother was suing in her capacity as personal representative of the deceased father.[19]

Denning L.J. subsequently amplified his approach to contractual licences and third parties in *Bendall v. McWhirter*.[20] Once again His Lordship did not suggest that third parties are bound because the contractual licence creates in the licensee a proprietary interest in the land which is subject to it. His Lordship said:

[11] *Ibid.* 296, 298.
[12] Citing *Winter Garden Theatre (London) Ltd v. Millenium Productions Ltd* [1948] A.C. 173.
[13] [1952] 1 K.B. 290, 298 f. Emphasis supplied.
[14] [1916] 2 A.C. 54.
[15] [1936] 3 All E.R. 483.
[16] See particularly Wade H. W. R., 'Licences and Third Parties' (1952) 68 *Law Quarterly Review* 337. Contrast Cheshire G. C., 'A New Equitable Interest in Land' (1953) 16 *Modern Law Review* 1.
[17] Cheshire, *op. cit.* 12, Maudsley R. H., 'Licence to Remain on Land (Other than a Wife's Licence) (1956) 20 *The Conveyancer and Property Lawyer* (N.S.) 281.
[18] Wade, *op. cit.* 350 f., *Dudgeon v. Chie* (1954) 55 S.R. (N.S.W.) 450, 460.
[19] *National Provincial Bank Ltd v. Ainsworth* [1965] A.C. 1175, 1251 f. *per* Lord Wilberforce; Wade, *op. cit.* 350. In *Ainsworth* Lord Upjohn said (at 1239) that the spouses would have had an interest in land 'in accordance with a well-known line of authority starting with *Webb v. Paternoster* (1619) Popham 151, valid against all except a purchaser for value without notice'. It is not clear to what line of authority His Lordship is here referring: see Goff J.'s explanation in *Re Solomon* [1967] Ch. 573, 585. See also Baker P. V., 'The End of the Deserted Wife's Equity' (1965) 81 *Law Quarterly Review* 353, 355 for another explanation.
[20] [1952] 2 Q.B. 466, 480 f.

> Every contractual licence imports a negative covenant that the licensor will not interfere with the use and occupation of the licensee in breach of the contract. This negative covenant is binding on the successors in title of the licensor in the same way as is a restrictive covenant. It does not run with the land so as to give a cause of action in damages for breach of contract against the successor; but it is binding in equity on the conscience of any successor who takes with notice of it. He cannot therefore eject the licensee in disregard of it. It is an equity within the words of Lord Cottenham L.C. in *Tulk v. Moxhay* (2 Phillips 774, 778), when he said: 'If an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the person from whom he purchased.'[21]

But His Lordship added:

> the party who seeks to enforce the contract against a successor in title should have a sufficient interest to warrant the intervention of equity. . . . This does not mean that he must have a legal estate to be protected. Possession or actual occupation of the land or chattel is sufficient.[22]

Thus His Lordship purported to distinguish *King v. David Allen*:[23] the contract in that case remained executory; the bills were never posted. However, nothing was made of this point in *King v. David Allen* itself. *Clore v. Theatrical Properties Ltd* could not be so distinguished. It was distinguished on the doubtful ground that, being earlier in time than the *Winter Garden* case, the decision therein proceeded 'on the assumption that the licensee had no right which equity could enforce against the licensor. That assumption is no longer true'.[24] Subsequently, however, His Lordship distinguished *Clore* on another basis: namely that the contractual licence in that case did not permit anything like 'actual occupation'.[25]

Finally, Denning L.J. observed:

> My conclusion, therefore, is that a contractual licensee, who is in actual occupation of land by virtue of the licence, has an interest which is valid, if not at law at any rate in equity, against the successors in title of the licensor, including therein his trustee in bankruptcy. It is not a legal interest in land, like a tenancy, but a clog or fetter like a lien. It is a personal right, but it is nevertheless binding on successors of the licensor, so long as the conditions of the licence are observed.[26]

The idea that contractual licenses may bind third parties received some judicial criticism[27] before it was considered by the House of Lords in *National Provincial Bank Ltd v. Ainsworth*.[28] In that case, the reasoning upon which Lord Denning had based his view that contractual licences bind third parties taking with notice was refuted. The House of Lords unequivocally rejected the proposition that a transferee will be bound by anything short of a proprietary interest as distinct from a personal right.[29]

Lord Upjohn said:

[21] *Ibid.* 480 f.
[22] *Ibid.* 482.
[23] [1916] 2 A.C. 54. See also *National Provincial Bank Ltd v. Hastings Car Mart Ltd* [1964] Ch. 665, 688.
[24] [1952] 2 Q.B. 466, 483.
[25] *National Provincial Bank Ltd v. Hasting Car Mart Ltd* [1964] Ch. 665, 688.
[26] [1952] 2 Q.B. 466, 483.
[27] *National Provincial Bank Ltd v. Hastings Car Mart Ltd* [1964] Ch. 665, 699 *per* Russell L.J., *Howie v. N.S.W. Lawn Tennis Ground Ltd* (1956) 95 C.L.R. 132, 156 f., *Dudgeon v. Chie* (1954) 55 S.R. (N.S.W.) 450.
[28] [1965] A.C. 1175.
[29] *Ibid.* 1225 f., 1237 f., 1253 f., 1260.

> To create a right over the land of another that right must (apart from statute) create a burden on the land, i.e., an equitable estate or interest in the land. . . . So in principle, in my opinion, to create a right over the land of another that right must in contemplation of law be such that it creates a legal or equitable estate or interest in that land and notice of something though relating to land which falls short of an estate or interest is insufficient. There are no doubt many cases where judges have said the purchaser 'takes subject to all equities' but they meant 'equitable interests' . . . An equity to which a subsequent purchaser is subject must create an interest in land.[30]

His Lordship added that in order that a 'mere equity' should bind a purchaser it should be 'ancillary to or dependent upon an equitable estate or interest in the land'.[31]

Lord Wilberforce added:

> The fact that a contractual right can be specifically performed, or its breach prevented by injunction, does not mean that the right is any the less of a personal character or that a purchaser with notice is bound by it: what is relevant is the nature of the right, not the remedy which exists for its enforcement . . .[32] [It is] a fallacy that, because an obligation binds a man's conscience, it therefore becomes binding on the consciences of those who take from him with notice of the obligation.[33]

It follows from this reasoning that it is only by saying that a particular contractual licensee has an interest in the subject of the licence that a third party will be considered bound by that licence. Can it ever be said that, by virtue of his contractual licence alone,[34] a licensee has a proprietary interest in land? Does a contractual licence which, for example, concedes the licensee rights of exclusive residence for as long as he wishes to exercise them[35] also concede him an equitable interest in the land in question? These questions were left open by the House of Lords in *National Provincial Bank Ltd v. Ainsworth*.[36]

It did not take Lord Denning long to provide answers to them. His Lordship has ruled that an interest is vested in one having an irrevocable licence to reside in premises indefinitely. This interest binds purchasers taking with notice of it.[37]

In *Binions v. Evans*[38] the defendant's husband had been employed by an estate and had lived in an estate cottage, paying no rent or rates. He died in 1965 when the defendant was 73 years of age. The defendant stayed on in the cottage. On March 15, 1968, the trustees of the estate entered into an agreement with the defendant 'to provide a temporary home' for her and agreed to permit her 'to reside in and occupy' the cottage 'as tenant

[30] *Ibid.* 1237 f.
[31] *Ibid.* 1238.
[32] Compare a contract for the sale of an interest in land.
[33] [1965] A.C. 1175, 1253.
[34] Apart from the application of doctrines such as the doctrine of estoppel by acquiescence.
[35] See *Foster v. Robinson* [1951] 1 K.B. 149.
[36] [1965] A.C. 1175, 1223, 1239, 1251 f.
[37] *Binions v. Evans* [1972] Ch. 359, *D.H.N. Food Distributors Ltd v. London Borough of Tower Hamlets* [1976] 3 All E.R. 462. *Cf. Re Sharpe* [1980] 1 W.L.R. 219, a case in which it is not clear whether the third party, the licensor's trustee in bankruptcy, was held bound by a contractual licence *simpliciter* or an estoppel interest.
[38] [1972] Ch. 359.

at will of them free of rent for the remainder of her life or until determined as hereinafter provided'. Clause 2 provided that the tenancy 'may be determined at any time' by the defendant giving to the trustees not less than four weeks' notice in writing. By clause 3 the defendant undertook to keep the cottage in good condition and repair, to cultivate, keep and manage the garden, to 'personally occupy and live' in the cottage as a private residence, and not to 'assign sub-let or part with the possession of the cottage or any part thereof and . . . upon ceasing personally to live there' to give vacant possession to the trustees. By clause 5 it was agreed that 'the tenancy . . . shall unless previously determined forthwith determine on the death' of the defendant. On 5 May, 1970, the trustees agreed to sell the cottage to the plaintiffs. They gave the plaintiffs a copy of the agreement and inserted a special condition in the contract of sale, designed to protect the defendant's occupation: the property was sold 'subject to the tenancy of' the cottage in favour of the defendant. As a result of the inclusion of that provision in the contract of sale, the plaintiffs paid a reduced price. On February 11, 1971, the plaintiffs gave the defendant a notice to quit and purported to determine the tenancy on March 17, 1971. The defendant remained in possession. The plaintiffs sought a possession order in the County Court, claiming that the defendant was a trespasser, her tenancy at will having been determined.

The County Court Judge dismissed the application, holding that the plaintiffs held the cottage on trust to permit the defendant to reside there during her life or for so long as she desired. The plaintiffs appealed.

Both Megaw and Stephenson L.JJ. held that the defendant was a tenant for life within the meaning of the Settled Land Act 1925 (Eng.).[39] They were not of the opinion that she was a contractual licensee; nor that she was a tenant at will. The words 'tenant at will' in the agreement were inconsistent with the expressions 'for the remainder of her life or until determined as hereinafter provided' and 'a temporary home'. Since the plaintiffs took with express notice of the defendant's interest they were bound by it.

Megaw L.J. considered an alternative solution: if the defendant were not a tenant for life within the meaning of the Settled Land Act 1925 (Eng.), she would be a licensee having by contract an irrevocable licence to reside in the cottage.

> That irrevocable licence, that contractual right to continue in occupation, remained binding upon the trustees. They could not, and did not, free themselves from it unilaterally by selling the land to the plaintiffs. As the plaintiffs took with express notice of, and indeed expressly subject to, the agreement between the trustees and the defendant, the plaintiffs would, on ordinary principles, be guilty of the tort of interference with existing contractual rights if they were to evict the defendant. For that would be knowingly to interfere with her continuing contractual rights with a

[39] Following *Bannister v. Bannister* [1948] 2 All E.R. 133. *Cf.* Hornby J. A., 'Tenancy for Life or Licence' (1977) 93 *Law Quarterly Review* 561 and *Chandler v. Kerley* [1978] 2 All E.R. 942, 946.

> third party, the trustees. In the ordinary way, the court would intervene to prevent the plaintiffs from interfering with those rights. I should have thought that ordinary principles of equity would have operated in the same way.[40]

His Lordship expressed reservations about this approach[41] and, it is respectfully submitted, they were justified. For once the licensor has put it out of his power to meet his contractual obligation, the licence — that is, the contractual licence — is effectively determined and the licensee must accept the breach and sue for damages.[42] To suggest that the contractual licence may still exist merely begs the question. At this stage, the third party is not to be seen as interfering with the contractual rights establishing the licence for they will have to come to an end.[43]

But it is Lord Denning's judgment which, in the immediate context, is most interesting. His Lordship concluded that the defendant was a contractual licensee, having a privilege which was personal to her to reside in the house for the remainder of her life or as long as she pleased to stay.[44] The consideration provided by the defendant was, presumably, her undertaking to keep the cottage in repair and to cultivate the garden. Lord Denning assumed that as between the trustees and the defendant the contractual licence had been irrevocable. But it seems doubtful that equity would enforce such an agreement, involving as it does, a substantial element of personal service.[45]

Lord Denning M.R. adopted two alternative arguments, each leading to the same conclusion, namely, that the plaintiffs were bound to permit the defendant to stay in the cottage.

First, and more radically, His Lordship held that 'a right to occupy for life, arising by contract, gives to the occupier an equitable interest in the land'.[46] Here the question left open by Lords Upjohn and Wilberforce in

[40] [1972] Ch. 359, 371.

[41] *Ibid.*

[42] *King v. David Allen* [1916] 2 A.C. 54. But, as we shall see, the licensee may have separate rights arising under a constructive trust.

[43] It may be argued that what, in effect, His Lordship was proposing was that the views expressed by Knight Bruce L.J., in *De Mattos v. Gibson* (1858) 4 De G. & J. 276, 282; 45 E.R. 108, 110, were both accurate and applicable in the immediate context: see *Swiss Bank v. Lloyds Bank* [1979] 3 W.L.R. 201, 226. But it has been ruled, both in the Court of Appeal and in the House of Lords, that these views, in so far as they are accurate, do not apply to realty as distinct from personalty. See n. 108 *supra*. The recent judgment of Goff L.J. in *Pritchard v. Briggs* [1979] 3 W.L.R. 868 is also instructive in this context. X granted Y a right of pre-emption in respect of certain land. X subsequently granted an option to purchase the same land to Z in circumstances indicating that Z had clear notice of Y's right of pre-emption. Although Z's rights arose later in time, Goff L.J. held that, by virtue of their proprietary nature, they took priority over Y's earlier purely personal rights. Goff L.J. went on to hold that, in seeking to acquire the land ahead of Z, Y (along with X) was committing the tort of conspiracy or interference with contractual rights and was liable to pay damages (as assessed) to Z. Whether this be right or wrong, it is significant that there was no suggestion that, by entering into the option agreement, Z himself was committing tortious misconduct in relation to the earlier contract between X and Y. See also *per* Stephenson L.J. at 914.

[44] [1972] Ch. 359, 367.

[45] See the discussion of the revocation of contractual licences, *supra*.

[46] [1972] Ch. 359, 367.

National Provincial Bank Ltd v. Ainsworth[47] was answered unequivocally. Compare the earlier approach taken by Lord Denning in which he denied that a contractual licensee received anything in the nature of a proprietary interest. But there is little authority to support this conclusion and, in fact, Lord Denning cited none.[48] No indication was given of the circumstances in which a contractual licensee may claim an equitable interest: must he be entitled to occupancy for *life* or will a lesser period suffice? must the licensee be entitled to *exclusive* occupation or will a non-exclusive occupancy suffice? what is the role of the Statute of Frauds? if the licensee bargains for what amounts to an equitable interest in the land, surely the contract must be evidenced by a note or memorandum in writing signed by the licensor, as it was in the instant case.[48a]

Lord Denning's conclusion has, however, already received the approval of the Court of Appeal: see *D.H.N. Food Distributors Ltd v. London Borough of Tower Hamlets*,[49] another case concerning a licensee in exclusive occupation of premises for an indefinite period of time. The premises were compulsorily acquired and the licensee sought compensation for disturbance from the acquirer, the Borough Council. Lord Denning M.R. held that the licence was irrevocable — 'equivalent to a contract'.[50] Applying his own reasoning in *Binions v. Evans*[51] His Lordship held that

> a contractual licence (under which a person has the right to occupy premises indefinitely) gives rise to a constructive trust, under which the legal owner is not allowed to turn out the licensee. So here. This irrevocable licence gave to D.H.N. a sufficient interest in the land to qualify them for compensation for disturbance.[52]

Goff L.J. agreed with this assessment.[53] Shaw L.J. agreed with the judgments of Lord Denning M.R. and Goff L.J.

[47] [1965] A.C. 1175, 1239, 1251 f.

[48] See Smith R. J., 'Licences and Constructive Trusts — "The Law is What it Ought to Be"' (1973) 32 *Cambridge Law Journal* 123, 135.

[48a] See *Re Sharpe* [1980] 1 W.L.R. 219 (note 37) in which Browne-Wilkinson J. held that a non-exclusive licence which was to last only for so long as moneys advanced by the licensee remained unrepaid bound the licensor's trustee in bankruptcy. In a cry from the heart His Lordship said:

> 'I do not think that the principles lying behind these decisions [*i.e.* those mentioned in note 37 *supra*] have yet been fully explored and on occason it seems that such rights are found to exist simply on the ground that to hold otherwise would be a hardship to the plaintiff.' (at 223) 'I find the present state of the law very confused and difficult to fit in with established equitable principles. I express the hope that in the near future the whole question can receive full consideration in the Court of Appeal, so that, in order to do justice to the many thousands of people who never come into court at all but who wish to know with certainty what their proprietary rights are, the extent to which these irrevocable licences bind third parties may be defined with certainty. Doing justice to the litigant who actually appears in the court by the invention of new principles of law ought not to involve injustice to the other persons who are not litigants before the court but whose rights are fundamentally affected by the new principles.' (at 226)

[49] [1976] 3 All E.R. 462. Technically, this case may be distinguished as one concerning the position between licensor and licensee: what rights did the plaintiff have against the licensor which were disturbed by the defendant's acquisition?

[50] *Ibid.* 466.

[51] [1972] Ch. 359.

[52] [1976] 3 All E.R. 462, 467.

[53] *Ibid.* 468. *Cf.* his remarks in *Re Solomon* [1967] Ch. 573, 583.

It may very well be that we will see this line of argument — conceding a contractual licensee an interest in the premises the subject of the licence — develop further in England in the near future. For English judges have, in the recent past, been willing to treat people who, formerly, may have been regarded as lessees, as contractual licensees. The main reason for this appears to be a desire to avoid the application, in particular cases, of the Rent Restriction legislation.[54] As Smith has observed:

> This approach has resulted in there being a large number of people who, as licensees, are *prima facie* unprotected against purchasers. It has been a matter of getting the landlord (usually) out of the frying pan but putting the tenant into the fire. Thus there is a good reason for allowing licensees with exclusive possession, in other words those who would formerly have been tenants, to have an interest in land.[55]

In Australia, the courts may be less inclined to find that a contractual licence has been created rather than a tenancy.[56] In *Radaich v. Smith*[57] Windeyer J. held that *whenever* there is created in the occupant a right of exclusive possession for a term, for a life or lives, or from year to year, a tenancy is created.

But, irrespective of this difference, is it likely that Australian courts will follow the Master of the Rolls' reasoning in *Binions v. Evans*[58] and *D.H.N. Food Distributors Ltd v. London Borough of Tower Hamlets*?[59] Taking account of both precedent and principle, it is not thought that they will. From the point of view of principle, it is not clear why a contractual licensee who, *ex hypothesi*, is not a lessee or a life tenant,[60] but a person who has merely contracted for rights of enjoyment, should, by being conceded an equitable interest in land,[61] assume a position of superiority over third persons such as the licensor's trustee in bankruptcy. Why should the licensee be put in a better position on the licensor's bankruptcy than

[54] See Smith R. J., *op. cit.* 132 f., *Heslop v. Burns* [1974] 1 W.L.R. 1241, 1251 ff. *per* Scarman L.J. Additionally, the courts wished, in particular cases, to avoid the conclusion that an occupier was a tenant at will who had acquired title by reason of the operation of limitation of actions legislation. See *Cobb v. Lane* [1952] 1 All E.R. 1199.

[55] *Op. cit.* 133.

[56] See, for example, *Radaich v. Smith* (1959) 101 C.L.R. 209, 221 ff. *per* Windeyer J. *Cf.* Cullity M. C., 'The Possessory Licence' (1965) 29 *The Conveyancer and Property Lawyer (N.S.)* 336. On the distinction between leases and licences, see Hinde G. W., McMorland D. W. and Sim P. B. A., *Land Law* (1978) Vol. 1, ss. 5.004-5.011.

[57] *Ibid.* It is not thought that the law of landlord and tenant will often be relevant in the context of non-marital partners. Even if one non-marital partner were to give the other a right of exclusive possession of the home, an almost inconceivable circumstance, a right of exclusive possession until receipt of reasonable notice, or until children are independent, or while they are of school age, or for so long as the occupant wishes to reside in the home, is not sufficiently defined, in terms of duration, to give rise to a tenancy for a term. *Cf. Lace v. Chantler* [1944] K.B. 368. It would seem to be more appropriately described as a contractual licence.

[58] [1972] Ch. 359.

[59] [1976] 3 All E.R. 462.

[60] For the distinction between life tenants and licensees see Hinde G. W., *op. cit.* Vol. 2, s. 7.003, Hornby, *op. cit.*

[61] The problem of defining any equitable interest which a contractual licensee may acquire is dealt with below.

other persons who, without having acquired an equitable interest in his property, have contracted with him? For, by saying that the licensee has an equitable interest, one is simply saying that he may assert his rights against the world generally with the exception of *bona fide* purchasers for value without notice of the interest. It is not clear why a contractual licensee should be granted this capacity: he has not purchased an estate in the land, nor has he leased it. Without doing either of these things, he has entered into a contract concerning the land's use. Why should this contract bind people who are not party to it?[62]

Precedent in Australia indicates that contractual licensees, as such, should not be deemed to have acquired any equitable interest in the land over which they are entitled to exercise rights of enjoyment. *Dudgeon v. Chie*[63] involved an action in ejectment. It was necessary for the defendant to show that he had acquired an interest in the land in question entitling him to possession of it, whether that possession be joint or exclusive.[64] The defendant argued that, since, as a contractual licensee, he could secure the grant of an injunction to prevent the wrongful determination of his licence, he could be seen to have an interest in the land. This contention was rejected by Brereton J. at first instance. In a passage which received the approval of the High Court of Australia,[65] the Full Court[66] agreed with his Honour's reasoning.[67] It is worth setting out the relevant passages from Brereton J.'s judgment since, by implication, they received the High Court's concurrence. His Honour said:

> What must be emphasised, therefore, is that what equity does is merely to restrain the breach of a negative stipulation in a contract, whether that stipulation be express or implied, and the result of this is that the licensee secures as against the licensor immunity from interference during the currency of the contract. He achieves, at any rate as against his licensor, a right to remain, but he does not achieve anything in the nature of an interest or estate in land unless his contract gives it to him. Except for the suggestion by Denning L.J. in *Errington v. Errington*[68] that the 'right to remain' might be effective against a purchaser for value with notice of it, I see nothing in the *dicta* I have quoted[69] which goes beyond the established principle that equity will normally restrain the breach of a purely negative stipulation, unless there is some indication of an increasing

[62] It may be argued that since, in *Tulk v. Moxhay* (1848) 2 Ph. 774; 41 E.R. 1143, this question was answered in a way that led to third parties being bound by restrictive covenants, there is no reason why now it should not be answered in a way that leads to third parties being bound by contractual licences. Wade, however, convincingly rejected such an argument by 'standing it on its head'. He argued that the limitations which equity places upon the enforcement of restrictive covenants against third parties — the doctrine is confined to covenants restricting the use of one piece of land for the benefit of another — constitute 'a decisive repudiation of the notion that the mere fact that an equitable remedy was available was enough to turn a contract into an interest in land binding purchasers with notice: (1952) 68 *Law Quarterly Review* 337, 348.

[63] (1954) 55 S.R. (N.S.W.) 450; (1955) 92 C.L.R. 342.

[64] See *Hindmarsh v. Quinn* (1914) 17 C.L.R. 622.

[65] (1955) 92 C.L.R. 342, 352.

[66] Roper C.J. in Eq. expressing no view.

[67] (1954) 55 S.R. (N.S.W.) 450, 472.

[68] [1952] 1 K.B. 290.

[69] From the Court of Appeal and House of Lords decisions in the *Winter Garden case* [1946] 1 All E.R. 678, 680, 684, 685, [1948] A.C. 173, 202 f.

readiness to imply a negative stipulation in the form of a promise not to commit a breach. Denning L.J. in the passage quoted[70] does seek to go further.[71]

Later His Honour added:

> The whole result of equity's intervention is to give a licensee, either before termination of his licence or during the 'period of grace' protection against a breach of contract, where the breach is of such a kind that equity will intervene, and not to establish any estate or interest in land unless his contract purports to grant it. There is nothing peculiar to the contract of licence which of itself attracts the jurisdiction of the equity court.[72]

Further

> It seems that not a little confusion of thought has resulted from the tendency to regard a licence as something having an existence apart from the contract creating it; as a proprietary right akin to but less than an interest in land. This tendency makes it the easier to accept the view that it involves some interest in land which of itself will attract equity's protection. In fact the word 'licence' merely epitomises certain rights arising under certain types of contract whereby permission is given to do something which would otherwise be unlawful.[73]

Finally, His Honour concluded:

> Putting the matters shortly, it seems that though equity may restrain by an injunction a breach of a contract of licence, though it may even restrain the bringing of an action in ejectment against the licensee as constituting such a breach, it does not by so doing convert a licence into an interest or a licence coupled with an interest into an estate. Even if a licensee has an equity to prevent a breach of his contract this does not amount for that reason only to an equitable estate in land entitling him to possession.[74]

But let us now return to Lord Denning M.R.'s judgment in *Binions v. Evans*.[75] We have considered His Lordship's first reason for holding that the plaintiffs were bound to permit Mrs Evans, the defendant, to continue to reside in the cottage. The Master of the Rolls advanced an alternative argument which, it is suggested, is more compelling. He suggested that, in the special circumstances of the case, a constructive trust bound the plaintiffs at the time of the sale:

> In these circumstances, this court will impose on the plaintiffs a constructive trust for her benefit: for the simple reason that it would be utterly inequitable for the plaintiffs to turn the defendant out contrary to the stipulation subject to which they took the premises. . . .[76] Whenever the owner sells the land to a purchaser, and at the same time stipulates that he shall take it 'subject to' a contractual licence, I think it plain that a court of equity will impose on the purchaser a constructive trust in favour of the beneficiary. It is true that the stipulation (that the purchaser shall take it subject to the rights of the licensee) is a stipulation for the benefit of one who is not a party to the contract of sale; but, as Lord Upjohn said in *Beswick v. Beswick*,[77] that is just the very case in which equity will 'come to the aid of the common law'. It does so by imposing a constructive trust on the purchaser. It would be utterly inequitable that the purchaser should be able to turn out the beneficiary.[78]

Lord Denning distinguished *King v. David Allen* and *Clore v. Theatrical Properties Ltd* on the basis that 'there was no trace of a stipulation, express

[70] From his judgment in *Errington* [1952] 1 K.B. 290.
[71] (1954) 55 S.R. (N.S.W.) 450, 459.
[72] *Ibid.* 460 f.
[73] *Ibid.* 461.
[74] *Ibid.* 463.
[75] [1972] Ch. 359.
[76] Citing *Bannister v. Bannister* [1948] 2 All E.R. 133.
[77] [1968] A.C. 58, 98.
[78] [1972] Ch. 359, 368.

or implied, that the purchaser should take the property subject to the right of the contractual licensee'.[79]

What is the basis or foundation of the constructive trust which Lord Denning M.R. imposed upon the plaintiffs?[80] The Master of the Rolls himself did not make this clear.[81] But it is submitted that it lies in the jurisdiction of equity to prevent the perpetration of a fraud. There is a recognized jurisdiction by which a court exercising equitable jurisdiction, proceeding on the ground of fraud, converts the party who has committed it into a trustee for the party who is injured by that fraud. A most comprehensive survey of this jurisdiction is to be found in the judgment of Hope J. in *Last v. Rosenfeld.*[82] His Honour observed[83] that the fields in which the jurisdiction has been invoked include: that in which parol evidence is admissible to show that an absolute conveyance was in truth by way of security only;[84] that in which oral evidence is admitted to establish that a person has taken a transfer of property as trustee for another;[85] that in which equity gives relief upon a breach by the survivor of two persons of a contract they entered into to make mutual wills;[86] and that in which equity compels beneficiaries who have agreed to accept their interests under a will upon communicated trusts to perform those trusts.[87] In each of these cases equity imposes a trust upon the person who fraudulently denies his undertaking, in favour of the party or parties thereby injured.

The jurisdiction was summarized by Holland J. in *Ogilvie v. Ryan*[88] in the following terms:

> One category [of constructive trust] could be said to be cases where the constructive trustee obtained his legal title from the *cestui que trust*, and obtained it only by having agreed that the *cestui que trust* would have a beneficial interest in the property. *Bannister v. Bannister*[89] and *Last v. Rosenfeld*[90] would be in this category.

[79] *Ibid.* 368. This is probably fair comment to make of *King v. David Allen* [1916] 2 A.C. 54, as, although a stipulation was originally made by the defendant to the trustee of the yet to be formed theatre company, the stipulation was not actually included in the lease entered into between the defendant and the newly formed company.

[80] Bandali S. M., 'Licence as an Interest in Land' (1973) 37 *The Conveyancer and Property Lawyer (N.S.)* 402 argues alternatively that the defendant could have counter-claimed as the beneficiary of the benefit of the relevant provision in the contract between the licensors and the plaintiffs, joining the licensors as co-defendants (in the counterclaim). On the facts, an intention to create a trust of the benefit of the contractual provision should not have been difficult to prove.

[81] See Smith, *op. cit.* 142.

[82] [1972] 2 N.S.W.L.R. 923.

[83] *Ibid.* 927 f.

[84] *Ibid.* 931 f.

[85] *Rochefoucald v. Boustead* [1897] 1 Ch. 196, *Bannister v. Bannister* [1948] 2 All E.R. 133; *Last v. Rosenfeld* [1972] 2 N.S.W.L.R. 923, 928 ff.; *Timber Top Realty Pty Ltd v. Mullens* [1974] V.R. 312.

[86] *Birmingham v. Renfrew* (1937) 57 C.L.R. 666. See Hardingham I. J., Neave M. A. and Ford H. A. J., *Law of Wills* (1977) ss. 1213-18.

[87] *Blackwell v. Blackwell* [1929] A.C. 318. See Hardingham I. J., Neave M. A. and Ford H. A. J., *op. cit.* (1977) ss. 730-9.

[88] [1976] 2 N.S.W.L.R. 504.

[89] [1948] 2 All E.R. 133.

[90] [1972] 2 N.S.W.L.R. 923.

> *Binions v. Evans*[91] could be regarded as an extension[92] of this category to a case where the constructive trustee, whilst not obtaining his legal title from the *cestui que trust*, obtained it from the transferor to him on terms that he would recognise a beneficial interest[93] in the *cestui que trust* by which the transferor was bound. In this category the basis of the constructive trust could be the fraud in asserting the legal title to defeat the beneficial interest on the basis of which it was obtained.[94]

These principles apply despite the fact that the constructive trustee's obligation may arise under a contract[95] or favour third parties.[96]

As *Binions v. Evans* illustrates, this jurisdiction may have an application in the context of contractual licences. If, having agreed to take title to land *subject to* a contractual licence, the purchaser subsequently purports to determine the licence, he is acting fraudulently and equity will impose a constructive trust upon him requiring him to hold the land subject to the licensee's right of entry.

In *Binions v. Evans* the plaintiffs, the purchasers, not only agreed to take the cottage subject to the defendant's right of residence in it but also paid a reduced consideration as a consequence. But, in the words of Hope J. in *Last v. Rosenfeld,*

> this fact [that is the payment of a reduced consideration] seems only to have constituted an evidentiary circumstance supporting the beneficiary's claim, and not to be a necessary element for the application of the general principle.[97]

What is the nature of the obligation imposed upon the constructive trustee in the envisaged circumstances? Clearly the constructive trustee will not hold the land which he has acquired from the licensor on trust for the licensee absolutely. If the constructive trustee were so required, the licensee would be in a much stronger position after the transaction between the licensor and the trustee than before it: before he would have had personal rights of occupation, enforceable in equity; after he would have an equitable estate in the land of such magnitude that he could require a transfer of full title to himself. Such a result would not give effect to the agreement between the licensor and trustee; it would pervert it. It is therefore conceived that the trustee, that is the purchaser, will hold the land on constructive trust for himself *subject to* the licensee's defined rights of entry and occupation.

Does a licensee with rights, as described, under such a trust have an equitable interest in the trust subject-matter? It is submitted that he does not. There is no inherent reason why equity could not fashion such an interest — that is, an interest not amounting to any estate but to a right of

[91] [1972] Ch. 359.
[92] But not an extension in the sense of a novelty: see the doctrines concerning mutual wills (n. 86) and secret trusts (n. 87).
[93] There is no reason in principle why the same reasoning should not apply to equitable rights not amounting to proprietary interests.
[94] [1976] 2 N.S.W.L.R. 504, 517.
[95] *Last v. Rosenfeld* [1972] 2 N.S.W.L.R. 923, 935 f.
[96] See the doctrines concerning mutual wills (n. 86) and secret trusts (n. 87).
[97] [1972] 2 N.S.W.L.R. 923, 930, referring to *Bannister v. Bannister* [1948] 2 All E.R. 133 and *Booth v. Turle* (1873) L.R. 16 Eq. 182.

occupation, either exclusive[98] or non-exclusive,[99] binding upon all except *bona fide* purchasers for value without notice.[1] But there appears to be no need for equity to go that far in this case.

> Equity in fact calls into existence and protects equitable rights and interests in property only where their recognition has been found to be required in order to give effect to its doctrines.[2]

The licensee did not have an equitable interest, binding upon all except *bona fide* purchasers for value without notice, before the trust arose, so it is not clear why he should have any such interest thereafter. The constructive trust should protect the contractual licensee's rights, not improve them.

Thus the licensee has personal rights enforceable in equity against the constructive trustee. Just as he had purely personal rights against the contractual licensee so he has only personal rights against the trustee. These rights will not be enforceable against any alienee from the trustee, irrespective of whether the alienee takes with or without notice of them. Once again, the licensee is in the same position *vis à vis* an alienee from the trustee as he was in relation to an alienee from the contractual licensee.[3] If, however, the alienee takes *subject to* the licensee's rights, the alienee will himself become a trustee on the same basis as did the original trustee, the transferee from the licensor. Subject to the latter proposition, the licensee will be able to seek an injunction restraining the trustee from terminating his rights of entry and to sue the trustee for compensation[4] for breach of trust if, as a result of any transfer of the land, his rights of entry are defeated. The gist of this analysis is that, under the constructive trust, the licensee's rights under the original contract must, as nearly as possible, be maintained but should not be increased or improved upon.

But having held in *Binions v. Evans*[5] that a purchaser who takes land on condition that he will adhere to the terms a licence hitherto binding upon the vendor, will himself be bound by that licence, Lord Denning M.R. went further. Referring to the purchaser, he said:

> But, even if he does not take expressly 'subject to' the rights of the licensee, he may do so *impliedly*. At any rate when the licensee is in actual occupation of the land, so that the purchaser must know he is there, and of the rights which he has: see *Hodgson v. Marks*.[6] Whenever the purchaser takes the land impliedly subject to the rights of the contractual licensee, a court of equity will impose a constructive trust

[98] *Re Hoppe* [1961] V.R. 381, 402.
[99] *Re Potter* [1970] V.R. 352.
[1] See *Inwards v. Baker* [1965] 2 Q.B. 29; *Williams v. Staite* [1978] 2 All E.R. 928.
[2] *Commissioner of Stamp Duties (Qld) v. Livingston* [1965] A.C. 694, 712 *per* Viscount Radcliffe. See also *Chandler v. Kerley* [1978] 2 All E.R. 942.
[3] The constructive trustee's trustee in bankruptcy would, like any other alienee, take the land free of the licensee's rights of entry. See *Re Solomon* [1967] Ch. 573. Cf. *Re Sharpe* [1980] 1 W.L.R. 219. Section 116(2)(a) of the Bankruptcy Act 1966 (Cth) would not apply for that provision envisages that the claimant is in a position to assert an equitable interest in trust property vested in the bankrupt. The licensee's rights are, on our analysis, personal only.
[4] See Spry I., *Equitable Remedies: Injunctions and Specific Performance* (1971), Ch. 6.
[5] [1972] Ch. 359.
[6] [1971] Ch. 892.

> for the beneficiary. So I still adhere to the proposition I stated in *Errington v. Errington & Woods*;[7] and elaborated in *National Provincial Bank Ltd v. Hastings Car Mart Ltd*,[8] namely, that, when the licensee is in actual occupation, neither the licensor nor anyone who claims through him can disregard the contract except a purchaser for value without notice.[9]

It is respectfully suggested that, in this passage, the Master of the Rolls runs together two different concepts. Each produces a different result in the immediate context. They are the concept of a person taking with notice of a licence — such a person is not bound by it — and the concept of a person taking on the agreed basis that he will observe the terms of a licence — such a person is, as we have seen, bound by the licence. It will be remembered that it was on the basis of this conceptual difference that Lord Denning, earlier, distinguished *King v. David Allen* and *Clore v. Theatrical Properties Ltd.*

Let as summarize the position to this point:

(1) A contractual licence does not, of itself, give rise to, or result in the creation of, an equitable interest in the licensee.

(2) Thus if the licensor disposes of the land which is subject to the contractual licence, the licensee will be defeated; he will not be able to assert his contractual rights of entry against the disponee.

(3) The licensee may, however, sue the licensor for damages for breach of contract.

(4) If the transferee from the licensor has the land conveyed to him subject to the understanding that he will adhere to the terms of the licence, then equity will oblige him to do so. He will be declared a constructive trustee of the land, holding it on trust for himself subject to the rights of residence or occupation of the licensee.[10]

Finally, the licensee may, even if he is only a gratuitous licensee,[11] acquire a proprietary interest in the land in question with the assistance of the doctrine of estoppel by acquiescence. An interest so acquired binds third parties in the normal way[12] and, of course, is irrevocable at the will of

[7] [1952] 1 K.B. 290, 299.
[8] [1964] Ch. 665, 686 ff.
[9] *Binions v. Evans* [1972] Ch. 359, 369.
[10] Upon registration pursuant to Torrens system legislation, the transferee will not be able to claim that that legislation entitles him to disregard the licensee's rights. The 'in personam' exception to indefeasibility of title is here relevant: see *Frazer v. Walker* [1967] 1 A.C. 569, 585; see also, most relevantly, *Loke Yew v. Port Swettenham Rubber Co. Ltd* [1913] A.C. 491. For a consideration of the authorities, see Stephens L. L., 'The in personam Exceptions to the Principle of Indefeasibility' (1969) 1 *Auckland University Law Review* 29. In *Frazer v. Walker (supra)* the Privy Council referred with approval to this passage from the judgment of Skerrett C.J. in *Tataurangi Tairuakena v. Mua Carr* [1927] N.Z.L.R. 688, 702: 'The provisions of the Land Transfer Act as to indefeasibility of title have no reference either to contracts entered into by the registered proprietor himself or to obligations under trusts created by him or arising out of fiduciary relations which spring from his own acts contemporaneously with or subsequent to the registration of his interest.'
[11] See *Pascoe v. Turner* [1979] 1 W.L.R. 431, a case concerning non-marital partners.
[12] See, for example, *E.R. Ives Investment Ltd v. High* [1967] 2 Q.B. 379; *Inwards v. Baker* [1965] 2 Q.B. 29; *Williams v. Staite* [1978] 2 All E.R. 928.

the licensor.[13] Here the licensee relies for his proprietary rights, not upon his position as contractual licensee, but upon a separate equitable doctrine. The gist of this doctrine in the present context is that the licensor having held out the prospect of secure and uninterrupted occupancy to the licensee, stands by and allows the licensee to change his position in reliance upon the arrangement continuing. Having allowed the licensee to act in this way, the licensor will not be permitted to deny the licensee's expectation.[14] In this context, legal contractual and equitable estoppel notions may overlap.[15] Should they do so in a given case, the licensee will be best advised to put his faith in the equitable doctrine. It can be applied less artificially and more flexibly[16] than the competing legal doctrine and is more calculated to provide him with the security of tenure which he seeks.[17] These factors perhaps indicate that, as far as the rights of non-marital partners in the home are concerned, the 'growth area' lies with estoppel rather than the law of contract.[18]

[13] *Plimmer v. Wellington Corporation* (1884) 9 App. Cas. 699; *Inwards v. Baker* [1965] 2 Q.B. 29; *Williams v. Staite* [1978] 2 All E.R. 928.

[14] For a neat summary of the doctrine, see Davies J. D., 'Informal Arrangements Affecting Land' (1979) 8 *Sydney Law Review* 578, 584, Neave M. and Weinberg M., 'The Nature and Function of Equities' (Part 1) (1978) 6 *Tasmania Law Review* 24.

[15] See the discussion of the Court of Appeal decision in *Crabb v. Arun District Council* [1976] Ch. 179, a most significant 'estoppel' case, by Atiyah P. S., 'When is an Enforceable Agreement not a Contract? Answer: when it is an Equity' (1976) 92 *Law Quarterly Review* 174 and Millet P. J., '*Crabb v. Arun District Council* — A Riposte' (1976) 92 *Law Quarterly Review* 342. See also the comments made concerning *Tanner v. Tanner* [1975] 1 W.L.R. 1346 *supra.*

[16] *Supra* and see the discussion of *Tanner v. Tanner* [1975] 1 W.L.R. 1346; *Pascoe v. Turner* [1979] 1 W.L.R. 431. See also Neave M. A. and Weinberg M., *op. cit.*

[17] See text to nn. 216-7.

[18] See Davies (1979) 8 *Sydney Law Review* 578. See also *Re Sharpe* [1980] 1 W.L.R. 219 in which Browne-Wilkinson J. attempted to force a number of contractual licence cases within the doctrine of estoppel.