New light on the licensee's equity – an examination of Williams v. Staite

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In this article Helen Bowie considers developments in the law concerning the relationship between licensees in real property and assignees of the licensor's interest. The author discusses the present form of, and trends in, the law with particular reference to the decision of the English Court of Appeal in Williams v. Staite.

I. INTRODUCTION

Equity's intervention in the field of property law over the past thirty-five years has been marked by displays of its flexibility in catering for the needs of persons whose occupation of land is based on an arrangement of an essentially personal character. The peculiar problem for equity in this area of property law has been that the justice of the case often required that the remedy be the continued occupation of the land in question. Damages would often have been a token substitute in a legal and social system traditionally based on the relationship of a man and his land. The difficulty was to forge some sort of propriety interest from what were essentially 'personal' rights. In the course of this process equity was often driven beyond the bounds of the natural extension of precedent to produce some seemingly anomalous results.

The competing concepts of 'logic' and 'experience', to use the words of Holmes, have led the law of licences to remain in occupation of land, (perhaps an outdated phrase to describe modern concepts) to a stage characterised by uncertainty in the definition of interests and rights in land.

The intervention of equity to elevate a personal right (a 'mere equity') to an equitable interest in land (the higher form of 'equity') is not a new idea. *Tulk* v. *Moxhay*[1] is a nineteenth century example of equity's intrusion. In that case it was established that the burden of a restrictive covenant is binding on a third party who purchases the land with notice of the covenant which effects it. The

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1 (1848) 2 Ph. 774.

policy behind this doctrine has not been questioned. There was an obvious need for subsequent purchasers to be bound by restrictive covenants if the covenants were to have their desired effect, and equity was able to respond. However, the law did not automatically accept this new equitable interest. Sixty years of refinement took place before the courts had established the requirements for its operation, (ending in *London County Council* v. *Allen*[2], although it is doubtful now whether this case provides the final word[3].) It is submitted that the law of licences is at present undergoing a similar refinement process to that which followed the initiation of the restrictive covenant as an interest in land. The problem for the courts in this area is to delineate the factual basis which gives rise to each different class of licence and to establish the legal consequences of each interest or right in such a way as to cater for the needs of the licensee in occupation, while not disregarding the guiding principles of property law.

In establishing the legal consequences which arise from a licence to occupy land, two main questions must be answered. Firstly, is the interest or right revocable, and, if so, when? Secondly — the question which establishes the proprietary nature of an interest — does the interest bind third parties with notice, who purchase the land affected by it? Equities arising from estoppel and the rights of contractual licensees in particular, continue to pose difficulties in both these areas of enquiry.

A new case in the law of licences, such as *Williams* v. *Staite*,[4] is useful in a number of ways. Firstly, it is helpful in defining the present law regarding the different classes of licences. Secondly, the court's application of the facts of the case to the law may be indicative of present trends in this area. Thirdly, the specific problem of the case, in this instance the novel point of whether misconduct by a licensee can result in the forfeiture of his equity, itself raises an interesting discussion.

The initial discussion in this paper will trace the development of the law of interests in and rights to remain on land. This basis is fundamental to the ensuing discussion relating to *Williams* v. *Staite*.

II. DEVELOPMENT OF THE LAW OF LICENCES TO OCCUPY LAND

Traditionally, at Common Law, a licence to go onto another's land was a permission to do what would otherwise be trespass.[5] This permission, which gave rise to the idea of a 'generosity factor'[6] in the licence, did not impose any obligations on the licensor. It could be revoked at any time and could not be assigned by the licensee. Nor was it binding on the purchaser of the licensor's estate. The 'bare' licence just described can be contrasted with the licence coupled with a grant of interest. If a grant was validly made (for example the right to hunt game on another's land and take it away), the licence that was

2 [1914] 3 K.B. 642.
3 *Esso Petroleum* v. *Harper's Garage Stowport Ltd.* [1968] A.C. 269.
4 [1979] 1 Ch. 291.
5 *Thomas* v. *Sorrell* (1673) Vaugh. 330.
6 J.W. Harris "Licenses and Tenancies — The Generosity Factor" (1969) 32 M.L.R. 92.

attached to it (the right to enter and be on the land), could not be extinguished so as to render the grant useless. The licence was irrecoverable as long as the interest to which it was attached remained in existence.[7] It is now probable that a licence coupled with a grant would be more readily construed as a contractual licence.[8]

The willingness of equity to intervene in the law of licences can be seen in the recent creation of a right which has been labelled as a "possible new equitable interest in land."[9] In *Re Potter*,[10] the father's will devised a house to his daughter "for her own use and benefit absolutely provided that my said son . . . may reside in the said house as long as he desires." The son was held not to have a life estate, but rather an interest to reside at the house for as long as he wished, terminable on his abandonment of the property and binding on subsequent purchasers with notice of his interest.

A. Equitable Interests Arising out of Contractual Licences

The courts may be willing to create an equitable interest for a beneficiary from the terms of a trust for personal residence. However, their willingness to hold that an equitable interest can arise from other sources, for example contracts, has been checked by the House of Lords' decision in *National Provincial Bank* v. *Ainsworth*.[11]

At Common Law, a licensee's remedy for a wrongful breach of a contract conferring a licence to remain on land was never more than damages. The first indication, after the fusion of law and equity, that equity would modify the existing strictures of the Common Law was given in *Hurst* v. *Picture Theatres Ltd.*[12]

Buckley L.J.'s reasoning in that case portended the eventual shape of equity's intervention in situations where a licence had been revoked in breach of contract. He noted:[13]

> If there be a license with an agreement not to revoke the licence, that, if given for value, is an enforceable right. If the facts here are . . . that the licence was a licence to enter the building and see the spectacle from its commencement until its termination, then there was included in that contract a contract not to revoke the licence until the play had run to its termination.

This reasoning was taken up in *Winter Garden Theatre (London) Ltd.* v. *Millenium Properties Ltd.*[14] where it was held that the point of determination of the licence would depend in each case on the construction of the contract,[15] the intention of the parties being a paramount consideration. If the terms of the

7 *Wood* v. *Leadbitter* (1845) 13 M. & W. 838 at 844-5.
8 *Re Vicker's Lease* [1947] Ch. 420.
9 P.B.A. Sim "Trusts for Personal Residence: A New Interest in Land?" [1971] N.Z.L.J. 108.
10 [1970] V.R. 352.
11 [1965] A.C. 1175.
12 [1915] 1 K.B. 1.
13 Ibid. 10.
14 [1948] A.C. 173, 189.
15 See also *Australian Blue Metal Ltd.* v. *Hughes* [1963] A.C. 74.

contract were breached the equitable remedy was an injunction against the licensor.

Once equity had shown its colours by preventing wrongful revocation of the contractual licence, it took only a progressive judgment to extend equity's intervention and render the contractual licence binding on third parties with notice. The opportunity to confer this proprietary character on contractual licences arose in *Errington* v. *Errington and Woods*[16] (which was to be followed soon after in *Bendall* v. *McWhirter.*[17]) In both cases Lord Denning presided.

In *Errington* v. *Errington*, the husband had devised a house to his wife and she claimed possession of it from her daughter-in-law. The late father-in-law had bought the house for his son and daughter-in-law through a building society, paid the deposit and taken conveyance of it in his own name. He said to the young couple that if they paid the instalments and the rates, the house would be theirs. The building society book was entrusted to the daughter-in-law. Nine years passed until the father's death. During that time all the instalments had been paid and were continued to be paid by the daughter-in-law even after the husband's departure.

It may have been possible to decide *Errington* v. *Errington* in favour of the daughter-in-law on the ground that there was a contract of sale between the young couple and the building society, followed by part performance by the son and daughter-in-law after they went into possession. This possible interpretation of the transaction was rejected by the Court of Appeal on the ground that there was no evidence of an undertaking by the young couple to pay the instalments. Instead, the finding of the Court of Appeal was that the daughter-in-law and her husband were contractual licensees. They had a right to remain in possession of the house for as long as they paid the instalments and an equitable right to call for the fee simple as soon as the last instalment was paid. The Court of Appeal was breaking new ground. Their decision implied that the licencees had an equitable interest binding on third parties, which was not dissimilar to the purchaser's equity under the contract of sale and purchase. This result challenged several precedents both at common law and equity, which refuted any suggestion that a proprietary interest could follow from the terms of a contract conferring a licence.

At a common law it was well establshed that a man could burden his estate with a contract, but could not pass the burden to the subsequent owner of the land.[18] In *Hill* v. *Tupper*,[19] Martin B. made the point that to admit the right to burden land with contracts "would lead to the creation of an infinite variety of interests in land and an indefinite increase of possible estates."

The House of Lords decision of *King* v. *David Allen and Sons Billposting Ltd.*[20] also clearly provided an obstacle to the *Errington* v. *Errington* reasoning. There,

16 [1952] 1 K.B. 290.
17 [1952] 2 Q.B. 466.
18 *Hill* v. *Tupper* (1863) 2 H. & C. 121, 127. (per Pollock CB).
19 Ibid. 128.
20 [1916] 2 A.C. 54.

a licensor agreed to entitle the plaintiffs to display advertising posters on the wall of a picture theatre. The licensor subsequently leased the theatre for a period of forty years to the company who was building it. The company refused to honour the advertising contract, and the licensee brought an action for damages against the original licensor on the grounds that in granting the lease the licensor had put it beyond his power to perform the contract. The licensee succeeded. The contract for a licence, which created nothing more than a personal obligation, was held not to be binding on the third party.

If *King* v. *Allen* could perhaps be distinguished from *Errington* v. *Errington* on the grounds that it involved an executory and not an executed licence, or that it involved a licence which did not involve a true right of occupation,[21] the Court of Appeal decision of *Clore* v. *Theatrical Properties Ltd.*[22] would seem to present an insuperable obstacle. In that case, a third party (an assignee of a 'lessor's' rights) successfully argued that terms of a lease for the exclusive use of refreshment facilities in a theatre were not binding on him. The court interpreted the lease as being a licence and held that the assignee of the benefit of the licence had no rights under it. The licensee's contention that equity would not disregard the fact that the assignee of the licensors had notice of the rights of the licensees, did not avail the latter insisting upon their rights. This contention had relied on two cases[23] involving ships' charter-parties which the court disposed of as special cases irrelevant to the law of licences relating to the use of land.

Lord Denning's judgment in *Errington* v. *Errington* (which was supported by Lord Somervell, Lord Hodson's judgment being only briefly stated) extended the intervention of equity which had been manifest in the *Winter Garden* case. Because *Clore's* case was decided before the *Winter Garden* case, Lord Denning reasoned (in his judgment delivered in *Bendall* v. *McWhirter*) that the court in *Clore* could not have had regard to the new equitable principles that had now emerged, and accordingly *Clore* would have to be reconsidered. The learned judge however seemed to overlook the fact that at the time of the *Clore* decision, the court must have been aware of the protection equity offered for licensees. *Hurst's* case (which was aproved in *Winter Garden*) had indicated the availability of equitable remedies.

Bendall v. *McWhirter*, which followed on the heels of *Errington* v. *Errington*, concerned another form of licence, the deserted wife's equity,[24] which was usually called into question in a situation where a trustee in bankruptcy claimed possession of a home in which a wife remained after her husband's departure. In the most detailed and controversial judgment of the three in the Court of Appeal, Lord

21 See *Bendall* v. *McWhirter* [1952] 2 Q.B. 466, 482-3; *National Provincial Bank Ltd.* v. *Hastings Car Market* [1964] Ch. 655, 688; Chesire "A New Equitable Interest in Land" (1953) 16 M.L.R. 1, 12.

22 [1936] 3 All E.R. 483.

23 *De Mattos* v. *Gibson* (1858) 4 De G. & J. 276; *Strathcoma Steamship Co.* v. *Dominion Coal Co.* [1926] A.C. 108.

24 This specific equity has less relevance in New Zealand after the Matrimonial Property Act 1976, but its significant role in the development of licences to remain on land cannot be disregarded.

Denning equated the position of the deserted wife to that of the contractual licensee, who now had a valid interest against a successor in title. He supported his decision by comparing the 'negative covenant' of the contractual licensor to a restrictive covenant. This negative covenant was, he said, "binding on successors in title in the same way as a restrictive covenant."[25] However, the validity of this comparison can be questioned. Firstly, the restrictive covenant requires a covenantor to refrain from doing certain things on his own land so that the covenantee is benefited, while the licence requires the covenantor to allow the covenantee to make certain use of the coventor's land. Secondly, where the restrictive covenant is enforced against a successor in title, the covenantee must have some interest in the neighbouring land for the benefit of which the covenant has been entered into.[26] But in the case of contractual licences, the licensee has no interest in the land which is subject to the licence.

Quite apart from the problems of the conceptual accuracy of the extension of equitable remedies to meet the situation of third parties and contractual licenses, there is the question of whether the justice of the case warrants that extension, as it did for example, in the case of restrictive covenants. In *National Provincial Bank* v. *Ainsworth,* Lord Wilberforce focused on that problem in regard to deserted wives. "The ultimate question," he said, "must be whether such persons can be given the protection which social considerations of humanity evidently dictate without injustice to third parties and a radical departure from the sound principles of real property law."[27] Lord Wilberforce agreed with the rest of the House of Lords in *Ainsworth* that the price of 'justice' was in this instance too high.[28] The House of Lords held that the status of the deserted wife gave her only a personal right in the property. Lord Upjohn specifically rejected that mere exclusive occupation, or notice to a purchaser that a wife was in occupation, was sufficient to create a right which would clog the title of the new owner. In the Court of Appeal, Russell L.J. had also rejected the proposition that the mere fact that a licensor was restrained from revoking his permission could convert a personal right into an equitable interest binding on third parties.

Although the *Ainsworth* case strictly involved the deserted wife's equity, the related matter of contractual licensee inevitably arose. Lord Upjohn[29] and Lord Wilberforce[30] expressly left open for future consideration the question of whether a contractual licensee must bind all successors to the land other than a purchaser for value without notice. However the reasoning of the House of Lords concerning the general principles applicable to the deserted wife's equity, and subsequent caselaw,[31] has left *Errington* v. *Errington* in a state of grave doubt.

25 [1952] 2 Q.B. 466, 480.
26 *London County Council* v. *Allen* [1914] 3 K.B. 642.
27 [1965] A.C. 1175, 1242.
28 Statutory intervention has now given limited recognition to the deserted wife's equity. See Matrimonial Homes Act 1967 (U.K.)
29 [1965] A.C. 1175, 1239.
30 Ibid. 1251-2.
31 See *Howie* v. *New South Wales Lawn Tennis Ground Ltd.* (1956) 95 C.L.R. 132, 156-7; *In re Solomon, a Bankrupt, Ex Parte the Trustee of the Bankrupt* v. *Solomon* [1967] Ch. 573, 582-583.

B. Licences Arising from an Estoppel of the Licensor

All may not be lost for the contractual licensee however. In recent years the courts have seen the emergence of a new device — the constructive trust — to protect the contractual licensee against third parties taking with notice, when certain circumstances arise. In Lord Denning's words in *Binions* v. *Evans*[32]

> Whenever the owner sells the land to a purchaser, and at the same time stipulates that he shall take it "subject to" a contractual licensee, I think it plain that a court of equity will impose on the purchaser a constructive trust in favour of the beneficiary.

Side by side with the contractual licence are licences arising from an estoppel of the licensor. There are two main categories of the later type of licence.

1. Estoppel by representation was imported into the Common Law from equity in Lord Mansfield's time. This estoppel arises where a person has made a representation relating to a deed, (for example a representation about the position of a boundary line)[33] which is acted on by another person.[34] The representor is estoppel from taking action which is inconsistent with his original representation. The representee's equity is binding on the purchaser with constructive notice of the representation as to title.

2. A licence arising from "estoppel by encouragement of acquiescence" or "proprietary estoppel" as it is sometimes called was demonstrated in *Inwards* v. *Baker*.[35] There, a father encouraged his son to build on the former's land. The son expended money on a building on his father's estate, and developed a reasonable expectation that he would be permitted to remain on the land. The father died some years later without making any arrangements about the son's occupation of the property. In his will he devised the property to persons other than the son. The Court of Appeal held that the son had an equity and, following *Plimmer* v. *Wellington Corporation*,[36] they looked at the circumstances of the case to decide in what way the equity could be satisfied. Their decision was that the son had an irrevocable right to remain on the property for as long as he desired. Lord Denning indicated that the equity was not only effective inter partes but would also bind third party purchasers with notice of the licensee's rights.

With respect to the Master of the Rolls, it is submitted that the authority for this last proposition was open to question. It is well establshed that third parties are bound where the equity has been satisfied by the conveyance of an estate or interest in land.[37] In that instance, the ordinary principles of legal and equitable estates and interests apply. But where the courts have granted an irrevocable right to the party seeking to defend his position, a right which does not conform to the conventional interests in land, the position of the licensee has been less clear. Much of the argument on this point has centred on the interpretation of *Plimmer*

32 [1972] Ch. 359, 368. Megaw and Stevenson LJJ were reluctant to pursue the topic of contractual licences further in the case.
33 *Hopgood* v. *Brown* [1955] 1 W.L.R. 213.
34 See also *Armstrong* v. *Sheppard and Sons Ltd.* [1959] 2 Q.B. 384.
35 [1965] 2 Q.B. 29.
36 (1884) 9 App. Cas. 699 (P.C.)
37 *Dillwyn* v. *Llewelyn* (1862) 4 De G.F. & J. 517.

v. *Wellington Corporation*. It is submitted that *Plimmer's* case cannot provide authority for the proposition that an irrevocable right arising from an estoppel (as opposed to a 'conventional' interest in land) binds a successor in title. That case involved encouragement by the government of the province in the building of a jetty which allegedly later came into the hands of a third party. However, it was the opinion of their Lordships that the jetty had been continuously vested in the government for public purposes and so the effect of a third party was beyond the decision of the court.[38] This interpretation of the case has been rejected by the learned authors of one text[39] on the subject, and, indeed, on the ground of policy their view may be more appropriate. To restrict the operation of the equity so that it might have no effect against third parties is to substantially defeat the underlying idea of proprietary estoppel.

Much of the doubt regarding third parties and irrevocable rights was set aside in *E.R. Ives Investments Ltd.* v. *High*.[40] There, the Court of Appeal held that the defendant's rights arising from estoppel by acquiescence were binding on successors in title. The nature of the rights which arose from the estoppel in *Ives* are difficult to define. But, it would seem to be arguable that the defendants were not conveyed a conventional equitable or legal interest. Rather they were granted a right to pass over the plaintiff's land, terminable only on the removal of the plaintiff's building which encroached on the defendant's land.[41]

If any doubt remains, it is submitted that *Williams* v. *Staite* provides a definitive statement that where the courts have granted irrevocable rights of a personal nature to the licensees to satisfy the estoppel, those rights are binding on purchasers with notice.

C. Promissory Estoppel

As Lord Denning noted in *Crabb* v. *Arun District Council*,[42] proprietary estoppel which was expounded in *Central London Property Trust Ltd.* v. *High Trees House Ltd.*[43] Promissory estoppel arises where, in the course of dealings between parties, one person makes a promise to waive, suspend, or vary his strict legal rights, intends the other to act on the promise and the promise is in fact relied and acted on to the detriment of the promisee. The remedy for the promisee is an estoppel against the promissor, who cannot take action inconsistent with his declared intention.

38 See F.R. Crane "Licences and Successors in Title of the Land" (1952) 16 Conv. 323, 329.

39 Spencer Bower and Turner *The Law Relating to Estoppel by Representation* (3 ed., Butterworths, London, 1977) 123.

40 [1967] 2 Q.B. 379.

41 Cf. the view in Hinde McMorland and Sim *Land Law* (Butterworths, Wellington, 1979) Volume 2, 740, where it is doubted that interests in land which are irrevocable inter partes bind third parties with notice.

42 [1976] 1 Ch. 179, 188 (per Lord Denning).

43 [1947] K.B. 130.

It is not difficult to envisage an application of the promissory estoppel doctrine to the licensee/licensor situation. The facts of *Foster* v. *Robinson*[44] provide one potential example. There, in the course of letting a cottage to his employee, the employer made a promise to allow the employee to remain in the cottage rent-free for the period of the latter's retirement. In such circumstances, under promissory estoppel principles, the employer would be prevented from revoking the arrangement when he (as promisor) sought to invoke his strict legal rights. The remedy available under the doctrine of promissory estoppel stands in distinct contrast with the remedy available under the proprietary estoppel doctrine. Under the former, the estoppel acts only as a defence, whereas under the latter, the estoppel can be used both as a 'sword' and as a 'shield', suggesting, in line with our previous analysis relating to third parties, that proprietary estoppel in all circumstances gives rise to some sort of interest or right in the land.

III. WILLIAMS v. STAITE

It is against this background of the law of licences that *Williams* v. *Staite* was decided. The following discussion covers two main questions arising from the case. Firstly, was the court's classification of the defendant's licence valid and what are the implications of that classification? Secondly, can the decision relating to the forfeiture of the defendant's equity be supported as a matter of law and in terms of policy?

A. Classification of the Order

Initially the facts of *Williams* v. *Staite* must be outlined. The case arose from a family arrangement made seventeen years before. Two cottages were owned by the defendant's mother Mrs. Moore. When the defendant Mrs. Staite married, she and her husband (the co-defendant) gave up the chance of a cottage a mile or two away which went with his job and moved into one of the cottages. The mother had said that the daughter and her husband could live in and have the cottage as a wedding present and they could live there as long as they wished. The mother was not young at the time and she wanted them next door so that the daughter could look after the parents in their old age.

A year or so later the father and mother died. Their son stayed on in his late parent's cottage. The daughter remained in the other. For eleven years the situation remained unchanged until the mother's executors decided to sell the property. Up until this time the Staites had done some work on the property — they had spent £100. The first purchaser bought the cottages, garden and paddock. He knew the Staites were still in one of the cottages and so he paid a reduced price for the property. But as soon as the transfer was made, he was not slow to give the Staites notice, and upon their refusal to move, he brought an action for possession. Judge Bulger,[45] relying on *Inwards* v. *Baker,* decided that the

44 [1951] 1 K.B. 149.

45 Note: Judge Bulger decided this issue in an earlier 1972 County Court action between Williams and Staite. However the appeal decision under discussion relates to a second County Court hearing before Judge Hopkin Morgan.

Staites had a right to remain. The equity which the Staites were granted was a right to occupy the cottage and garden for as long as they desired on the condition that they paid the rates and maintained the property.

The first purchaser was not happy with this outcome and so he sold the property to the present plaintiff, Mr. Williams. Mr. Williams also knew of the Staites' presence and the rights they had to stay in the cottage for as long as they wished. Upon his moving in he claimed the use of the paddock which adjoined the cottages. The Staites disapproved. They had used the paddock for sixteen years and had a pony grazing on it. There were various incidents of misconduct on the Staites' part. For example, as soon as they had learned that the plaintiff had purchased the property, they had threatened him and had blocked an entrance way rendering it impossible for him to move his furniture in. The Staites also began to do various work on the paddock. They erected a small stable and culverted the stream. Mr. Williams objected and gave the Staites notice of his disapproval. Finally he brought an action in the County Court claiming inter alia possession of the cottage and a declaration of the determination of the defendants' licence. His case relied on evidence of the Staites' misconduct which was described by Judge Hopkin Morgan[46] as

(a) bringing improper and unjustifiable pressure to bear on the plaintiff in an attempt to persuade him, quite deliberately falsely, that they, the defendants, were entitled to do whatever they wished as regards No. 2, its garden and the paddock without reference to or permission of the owner, whereas in fact, their licence was only to occupy the cottage and its garden and no more;

(b) acting in deliberate, even though minor breach of their solemn promises to [the judge] on August 16, 1974; and

(c) giving false evidence in an attempt to deceive the court as to the extent of their licence.

In the Court of Appeal, the decision of Judge Bulger in the County Court that the Staites had an equity of the *Inwards* v. *Baker* type was not disputed. Several observations can be made about this categorisation of the defendant's licence to stay on the property.

Firstly, it is submitted that the decision is indicative of a movement by the courts away from the troublesome area of contractual licences where third parties are involved.

The similarity of the facts of *Errington* v. *Errington* and the facts of the present case cannot the ignored. The decision in *Errington* v. *Errington* that a contract existed between the parties does pose difficulties. Indeed it can be argued that the father was the only party with an outstanding obligation and that the transaction in the case is best described as a unilateral contract. However, the difficulty of fitting the facts of *Errington* v. *Errington* to the contractual licence situation does not alter the court's finding that such a licence did exist. Further, of *Errington* v.

46 [1979] 1 Ch. 291, 297.

Errington can fall within the contractual licence regime, there does not appear to be any reason why *Williams* v. *Staite* should not be categorised in the same way. Both cases involved a family arrangement, and a promise by a parent to allow a young married couple to reside in their property. Arguably, in *Williams* v. *Staite* there was an equitable consideration on the defendants' part. They were there so that they could look after the elderly parents. Indeed, it seems reasonable to assume that if, in their parent's lifetime, the young couple refused to offer any assistance to them, the parents could validly terminate the implied contract under the principles of *Winter Garden Theatre (London) Ltd.* v. *Millenium Properties Ltd.* Further, over and above this, it is possible to argue that adequate consideration for the licence can be found solely in the fact that the husband had forgone the possibility of a tied cottage to take up the in-laws' offer of the adjoining cottage. An analogous, though possibly stronger consideration of this sort was found in *Tanner* v. *Tanner.*[47]

Hardwick v. *Johnson*[48] and *Chandler* v. *Kerley*[49] are further examples of cases where a contractual licence has been found in the absence of a clear agreement. In the latter case, the intention to create legal relations between the parties was sufficient to establish a binding contract conferring a licence. In *Hardwick* v. *Johnson* there was another family arrangement. The plaintiff allowed her son and daughter-in-law to live in a house which she had purchased. Initially rental payments were made by the couple and there may have been an expectation that they would inherit the house before the last payments were made. But after the period of a year the payments were not insisted upon by the mother. A few years later the mother brought an action for possession against the daughter-in-law, the son having since left her. Two of the three judges in the Court of Appeal, Roskill and Browne L.JJ. held that the daughter-in-law had a contractual licence. It would seem that their Lordships were not restricted to that conclusion. As with the facts of *Williams* v. *Staite*, the facts of *Hardwick* v. *Johnson* could give rise to either a contractual licence or an estoppel interest in land. Why then, is one licence preferred by the courts to another? It is submitted that in categorising the licence in each fact situation, the courts are influenced largely by the possible involvement of third parties in the particular case. In *Hardwick, Chandler* and *Tanner,* all cases where third parties were not involved, the Courts were not strictly concerned with the proprietary nature of the licences, and the more traditional concepts of contractual licences were used in the task of delineating the terms of the inter partes relationship. But in *Williams* v. *Staite*, the problem of interpreting the Staites' licence as contractual was that the original licensors were not involved in the action for possession brought against the licensees. Justice for the Staites, could only be achieved if their rights were found to be binding on third parties with notice of the licence. As our earlier discussion has indicated, there was authority for the view that an equity arising from estoppel could provide the required protection, even where the equity only conferred irre-

47 [1975] 1 W.L.R. 1346; cf. *Horrocks* v. *Forray* [1976] 1 W.L.R. 230, 238 (per Megaw L.J.).
48 [1978] 1 W.L.R. 683.
49 [1978] 2 All E.R. 942., [1978] 1 W.L.R. 693.

vocable rights. But the rights arising from a contractual licence probably could not bind third parties.

This analysis shows the scope which courts have in this area, enabling them to achieve a result which is just for the individual circumstances of each case. If the hard and fast principles of real property cannot be bent, there is certainly room for them to be circumvented.

The identification of the *Williams* v. *Staite* licence as one of the *Inwards* v. *Baker* type not only indicates a certain flexibility in the categorisation process of licenses. It also suggests that the definition of each category of licence is not confined within strict limits.

A case of estoppel by acquiescence, for example *Inwards* v. *Baker*, typically involves

1) the inducement or encouragement by the owner of the land to another person to expend money on the owner's property,
2) the expenditure of a considerable amount of money on the property by that person,
3) a reasonable expectation on the licensee's part that the property or rights in it will become his, and
4) acquiescence by the owner while the occupier incurs the expenditure.

In *Denny* v. *Jensen*[50] the last requirement was referred to as "conscious silence", implying some degree of fraud on the owner's part.

This type of estoppel is said to exist in *Williams* v. *Staite*, but it would seem that some of the above-mentioned characteristics do not feature in the facts of the case. In *Williams* v. *Staite*, the mother made a simple promise to the young couple that they could live in the cottage for as long as they wanted it. There was no inducement for them to expend money on the property. However, there may have been some inducement on the parents' part which is relevant to the estoppel. The parents' efforts to persuade the Staites that they should move into the cottage in preference to the house which went with the husband's job, may be construed as giving rise to some detriment to the Staites in so far as they altered their position.

The Staites had acted on the promise by moving in and forfeiting the chance of another house. They also spent money on the property. Arguably, however, something more was needed to establish a proprietary estoppel. The Staites' expenditure over a period of eleven years amounted to only £100. Much of that amount could have been spent simply on repairs for natural wear and tear over that time which presumably cannot give grounds for a claim to an equity. However, no evidence of how the money was spent is given in the report. In short, the amount of detriment suffered by the licensees in *Williams* v. *Staite* was not substantial in comparison to the other cases. *Inwards* v. *Baker* and *Dillwyn*

50 [1977] 1 N.Z.L.R. 635.

v. *Llewelyn*[51] (to take two examples) involved the outlay by the occupiers of large amounts for the improvement of the properties.

There is no evidence in *Williams* v. *Staite* that the defendants had an expectation that they could remain there after the death of the parents and the subsequent sale of the property. However, it may be that such an expectation was formed. The reasonableness of it is another matter.

Finally, there is the question of unconscionable behaviour on the licensor's part. *Inwards* v. *Baker* was clearly a case involving 'conscious silence'. In his will, old Mr. Baker had left the property to the plaintiff defeating the expectation which the son had established as a result of his father's actions. But in *Williams* v. *Staite,* the situation would appear to be different. Although the parents did not devise the cottage to the Staites, it eventually being sold, it would seem that the will did not confirm any fraud or unconscionable behaviour on the parents' part. The terms of the will are not detailed in the report, but it is not unreasonable to assume that this was a case where a not substantial amount of property had to be divided many ways, necessitating the event of the sale of family assets. In such circumstances, it does not seem appropriate that the parents' acts from the commencement of the Staites' occupancy, can be branded as unconscionable.

The categorisation of the *Williams* v. *Staite* licence as one of an *Inwards* v. *Baker* character suggests a widening of the availability of an equity arising from estoppel by acquiescence. This conclusion is consistent with Lord Denning's aproach in *Crabb* v. *Arun District Council*,[52] where the Master of the Rolls suggested that detriment may not be a necessary element of a proprietary estoppel. It would follow that all that is required is a belief by the claimant which is induced by the promise, encouragement or acquiescence, and which is acted on by the claimant. With respect, it would appear that Lord Denning's aproach here tilts the balance too far in favour of the licensee, whilst increasing the likelihood of an injustice befalling an unwitting licensor.

Two further points remain in regard to the classification of the *Williams* v. *Staite* licence. The first relates to the doctrine of promissory estoppel. The application of this doctrine to *Williams* v. *Staite* circumstances prima facie seems appropriate. In *Williams* v. *Staite* there is a promise, intended to be acted on, and acted on to the detriment of the promisees. However, the promise by the parents was not made in the course of legal dealings between the parties to the licence, so the application of the doctrine must fail.

On the other hand, it is submitted that *Williams* v. *Staite* provides a perfect set of circumstances for the application of the doctrine of constructive trusts as expounded by Lord Denning in *Binions* v. *Evans*.[53] The absence of a reference to that doctrine in *Williams* v. *Staite* can be attributed to the availability of other means to achieve the required result in the case. Further, the doctrine, which is allegedly outside the accepted area of application of constructive trusts in English

51 (1862) 4 De G.F. & J. 517.
52 [1976] 1 Ch. 179, 188.
53 Supra n. 32.

and American law,[54] has received a not altogether receptive response. It may be reasonable to assume that the courts will not attempt to invoke its assistance unless a real necessity arises.

In conclusion, the classification of the *Williams* v. *Staite* equity is indicative of a degree of pragmatism in the courts approach. While inconsistency remains among the legal consequences of different licences, it is submitted that this pragmatic aproach will continue to foster a substantial degree of flexibility in the categorisation process.

B. Revocation by Misconduct

The second point to be dealt with in regard to *Williams* v. *Staite* is the specific issue which gave rise to the decision in the case — that is whether an equitable licence pronounced in a previous action could be revoked by the subsequent conduct of the licensees?

Before discussing the court's decision, some observations may be made. Firstly, since the Staites' equity was binding on third parties and hence was of a proprietary character, consistency in the decision would seem to require that the revocation of the equity should not arise in some random fashion (for example by forfeiture on some uncertain criterion of misconduct.) As one commentator puts it:[55]

> Since it is commonly thought that an estoppel creates a property interest . . . it seems to make no more sense to talk of its revocation than to imagine a trustee being able, in the absence of power, to deprive a beneficiary of his interest on the ground that the beneficiary had been unpleasant to him.

The Court of Appeal had before them a difficult problem. On the one hand they had the task of identifying the point of revocation of the equitable interest established by a previous court, while keeping within the conceptual framework of the law. On the other hand, they had two licencees whose conduct had been reprehensible, but who wished to retain their licence. The maxims of equity did not support the licensees' cause, and a victory for the licensees would not provide a deterrent for any other licensees who might decide to make life difficult for the owners of the properties which they occupied.[56]

The Court of Appeal reversed the County Court decision in holding that the defendant's subsequent misconduct could not determine their equitable licence to occupy the cottage. Different reasoning was applied by each of the learned judges in arriving at that conclusion.

Lord Denning based his judgment on the fact that the Staites' misconduct did not warrant the termination of their equity. But he added that if a licensee were to make life for the licensor 'intolerable', there would be grounds for revocation. This test appears to give the court a considerable degree of flexibility. Indeed it is apparent that justice was very much in Lord Denning's mind. He

54 Hinde, McMorland and Sim *Land Law* (Butterworths, Wellington 1979) Volume 2, 742.

55 S. Anderson "Of Licences and Similar Mysteries" (1979) 42 M.L.R. 203.

56 Although damages are always available as a remedy for actions of trespass and nuisance.

noted that the Staites' conduct "would have to be bad in the extreme before they could be turned out of their home. They had nowhere else to go."[57]

It is evident that Lord Denning based his decision on the premise that the licensee's equity was not irrevocable. This view is difficult to reconcile with Goff L.J.'s approach to the problem.

Goff L.J. commenced his judgment by considering the normal situation of a person coming before the courts to set up an equity. In most cases, he noted, these persons had done nothing wrong except that they had acted without securing their legal position. Their equity was established by the court having regard to all the circumstances. The present case was different. The Staites had been guilty of 'very grave misconduct' and it was argued that in seeking to restrain the legal rights of the owner they did not come to equity with clean hands and therefore, they were not entitled to equitable relief. The learned Judge agreed with this proposition, and indicated that if he had to decide the point, the defendant's misconduct would probably deprive them of relief. But there were two complete answers to the plaintiff's case. Both answers arose from the fact that an equity had already been establshed for the defendants in the County Court when the first purchaser had brought an action for possession. Now, instead of the defendants being required to set up an equity in their favour as against the plaintiffs, a different question arose. The plaintiff's case was pleaded on the basis that the defendants had an equity, but that it had now been forfeited. On those pleadings the plaintiff's action was not maintainable in the court.

In the opinion of Goff L.J.:[58]

> Excessive user or bad behaviour towards the legal owner cannot bring the equity to an end or forfeit it. It may give rise to an action for trespass or nuisance or to injunctions to restrain such behaviour but I see no ground on which the equity, once established can be forfeited.

The judgment of Goff L.J. implies that an equity once defined by the court is crytallised at its point of inception as a proprietary interest in land and cannot be affected except where there is a breach of the terms which the court expressed as being conditional to the operation of the equity. But it may be that this approach is too wide. Firstly, of course, it is an inherent feature of every equity that a bona fide purchaser for value of the legal estate without notice of the equity, will extinguish any rights which the equitable owner has.

Secondly, the judgment also indicates that an equity can be terminated not on the ground of forfeiture, but in the event of the defendants having to re-establish their rights against the legal owner. So, as Cumming-Bruce L.J. puts it:[58a]

> if the case had been pleaded as a case in which the legal owner had been deprived of the possibility of the enjoyment of No. 1 Brook Cottages by the deliberate behaviour of the defendants, and that had been found as a fact, the court would have had power to look at the circumstances as they existed at the time of the hearing in order to decide whether it was right to allow the defendants to claim equitable relief.

57 [1979] 1 Ch. 291, 298.
58 Ibid. 300.
58a Idem.

This proposition suggests that the court's establishment of an 'estoppel interest in land' is an on-going procedure. Indeed this was the opinion of Cumming-Bruce L.J. who noted, "I do not think that in a proper case the rights in equity of the defendants necessarily crystallise forever at the time when the equitable rights come into existence."[58b] That idea does not appear to be wholly consistent with the concept of proprietary interests which by their very nature command a degree of continuity and certainty. Equity's intervention as an on-going defence against the actions of a promisor has been discussed as a separate category of equitable relief which emerged with the *High Trees* case. As we have seen, the facts of *Williams* v. *Staite* would not fit within the criterion of the *High Trees* estoppel. Rather the court's finding was that the facts of the case gave rise to an equity of the *Inwards* v. *Baker* type — a proprietary interest in land.

It is submitted that in conceptual terms, Goff L.J. comes closer to understanding the true nature of the equity with his comments regarding the incapacity of grave misconduct to bring about a forfeiture of the interest.

However, in terms of policy, the idea which is most clearly expounded by Cumming-Bruce L.J. — that the equity is not crystallised at the point of its inception — may be an attractive one. There will be uncertainty for the 'licensee' who has an equity which is always capable of being revoked in an action by the owner if the court finds certain undefined circumstances. But this disadvantage may be off-set by the fact that the licensor is placed in a fairer position. Indeed, where a licensor, as in the present case, has through his generosity allowed a licensee to occupy land, it does not seem to accord with justice that the licensee should be entitled to stay after he has conducted himself so as to interfere with the licensor's enjoyment of his own adjoining land. It seems right that in such circumstances the court should intervene. However, where the licensor has lost his legal rights because of unconscionable behaviour (the true *Inwards* v. *Baker* situation) there will be less cause for arguing that the licensor should be restored to his original position. In these circumstances, it might be argued that an interest which is crystallised at its inception produces a fairer result. This discussion demonstrates the conflicts which arise when an essentially personal right, arising from a simple promise, is promoted to a proprietary interest. The attributes of the 'personal' right justify certain results which become difficult to reconcile with the terms of the proprietary interest.

The final point to be made on this analysis of the termination of the Staites' licence, is to consider what might have been the result of the case if the court had found the licence to be contractual. As we have seen, in deciding upon termination of the contractual licence, the court has view to the terms of the contract and the intention of the parties who entered into the contractual arrangement.[59] The result in this case would depend upon whether the court could find an implied term which reflected the intention of the parties to terminate the licence upon misconduct by the licensees.

58b Idem.
59 *Winter Garden Theatre London Ltd.* v. *Millenium Properties Ltd.* [1948] A.C. 173.

It is apparent that this analysis does not greatly differ from the type of analysis which the Court of Appeal conducted in determining the extent of the equity arising from estoppel. As Goff L.J. pointed out, the terms of the equity (that is, the conditions imposed by the court in defining the extent of the equity) would, if breached, bring the interest to an end, while Lord Denning suggested that in situations of extreme misconduct, it was possible to 'justify' the revocation of the licence.

This comparison provides a further indication of the similarities that now seem to exist between contractual licences and estoppel interests in land.

CONCLUSION

In Snell's *Principles of Equity*,[60] the doctrine of proprietary estoppel is described as showing "equity at its most flexible". Perhaps this is an apt description for equity in the whole field of licences to occupy land. Not only is the just and equitable approach available to the courts in determining how an equity arising from estoppel is to be satisfied, but there is also a degree of flexibility which allows the courts to match the required legal consequences to the facts of a given case where the facts invite two or more possible interpretations.

This latter process has resulted from an extension in the application of different categories of licences. The prerequisites for proprietary estoppel would seem to be reduced[61] while contracts conferring licences can be forced from circumstances where no express agreement has taken place.[62]

In addition, a development from the traditional doctrine of constructive trusts may provide another direction for equity in the field of contractual licences where previous attempts to bind third parties have failed.[63]

These developments have, at the expense of certainty in the law, made it possible for personal rights to bind third parties, elevating them supposedly to the status of proprietary interests in land. This has been exemplified in *Williams* v. *Staite*. However *Williams* v. *Staite* also shows that the law is still in a state of disarray when it comes to delineating the exact nature of the so-called proprietary interest. Where does the interest become irrevocable, if at all? The case leaves that question open. In so doing the court's reasoning raises a number of other queries. Does the licensee possess rights which he or she may assign to third parties? And perhaps more importantly in the New Zealand context, what is the position of the licensee with an estoppel interest in land, in a jurisdiction where the Torrens System of land transfer operates? By s. 182 of the Land Transfer Act 1952, the purchaser from a registered proprietor of land will not be affected by an unregistered interest in the land, except in the case of fraud on the purchaser's part. Mere knowledge of the unregistered interest will not

60 Snell *Principles of Equity* (27 ed. Sweet and Maxwell, London, 1973) 568.
61 *Crabb* v. *Arun District Council* [1976] 1 Ch. 179, and *Williams* v. *Staite*.
62 *Tanner* v. *Tanner* [1975] 1 W.L.R. 1346; *Hardwick* v. *Johnson* [1978] 1 W.L.R. 683; *Chandler* v. *Kerley* [1978] 2 All E.R. 942; (1978) 1 W.L.R. 693.
63 *Binions* v. *Evans* [1972] Ch. 359.

of itself be imputed as fraud.[64] However, there would seem to be support for the view that an interest arising from estoppel can override the effects of these provisions. In *Shakespeare* v. *Atkinson*,[65] the deserted wife's equity (as it was before *National Provincial Bank* v. *Ainsworth*) was held to defeat the interest of a *bona fide* purchaser of the matrimonial home taking with notice of the wife's occupancy.[66] Arguably the equity arising from estoppel has the same effect. However, to avoid any doubt on the matter, perhaps the licence, having achieved the status of an equitable interest in land should now, like the restrictive covenant, be registered under the Land Transfer System? Solutions to this and other questions await the intervention of the legislature and/or the next chapter in this line of case law, which is showing equity to be at an extraordinary level of innovation.

64 *Efstration* v. *Glantschnig* [1972] N.Z.L.R. 594.
65 [1955] N.Z.L.R. 1011.
66 See also *Murtagh* v. *Murtagh* [1960] N.Z.L.R. 890, where it was held that a third party purchasing without fraud did not have an indefeasible title where the property had been sold to defeat a spouse's claim to matrimonial property.