

## Determinable and Conditional fees

### Determinable

The **determinable fee simple** is an estate that might last forever, but which may be cut short by a specified but unpredictable event.

#### Cross Reference

See Chapter 2, especially Table 2.2

#### Example

Abishek may transfer his house to Biljana on the following terms: '... in fee simple until she passes her land law exam'.

#### Thinking point

If a grant is made to Biljana 'until she dies', will that also be a determinable fee?

The determining event must be unpredictable (uncertain). Although we hope Biljana will pass her land law exam, it is not certain. Unfortunately, death is a certain event for all of us, including Biljana. This grant will create a life interest, which is different to a determinable fee.

### Conditional

A **conditional fee simple** is an estate that might last forever, but which may be brought to an end on the satisfaction of a **condition subsequent**—a conditional event that may occur after the estate has been created.

### Example

Abishek transfers his house to Biljana on the following terms: '... in fee simple on condition that she does not pass an exam in land law'.

Again, the occurrence of the conditional event must be unpredictable.

### Differences between determinable and conditional fees

As you will note from the two examples, a similar result can be achieved by a determinable fee and a conditional fee, so why should we bother distinguishing between them? The answer is that the two estates actually have different legal effects. The law regards the coming to an end of the two estates differently. A determinable fee comes naturally to an end as soon as the determining event happens, but a conditional fee potentially lasts forever and is cut short only if the condition is satisfied. In practice, this is shown by the difference in wording, examples of which are shown in Table 3.1.

**Table 3.1 Differences in wording between determinable and conditional fees**

Words indicating a determinable fee	Words indicating a conditional fee
While	provided that
During	on condition that
as long as	but if
Until	if it happens that

A determinable fee comes to an end immediately and automatically when the determining event occurs.

### Example

Abishek transferred his house to Biljana 'in fee simple until she passes her land law exam'. As soon as Biljana passes her land law exam, her estate in the house will come to an end. Abishek need not take any action to end it.

Conditional fees, on the other hand, give the grantor (the person who transferred the estate to the owner of the conditional fee) the right to enter and bring the estate to an end when the event occurs.

### Example

Abishek transferred his house to Biljana 'in fee simple on condition that she does not pass an exam in land law'. When Biljana passes her land law exam, Abishek (the grantor of the estate) has a right to put an end to Biljana's estate in the land. If he does not do so, however, the estate will continue.

Because a conditional fee contains this right to **forfeiture**, the courts have construed such conditions strictly. It must be possible to say with certainty when such a condition has been breached, so vague conditions will be struck out. In addition, the courts have struck down certain conditions if they make it impossible for land to be transferred, or if they are against public policy.

In general, conditions wholly prohibiting marriage, or which encourage illegal or immoral behaviour, have been struck out. Conditions forbidding marriage to certain classes of persons, however, or forbidding a person from following certain religions, have been upheld.

## Forfeiture

The bringing to an end of an estate as the consequence of an offence or a breach of an undertaking

## Case Close-Up

### *Blathwayt v. Lord Cawley* [1975] 3 All ER 625

A condition in a settlement stated:

[I]f any person who under the trusts hereof shall become entitled ... to the possession of [the settled property] shall ... be or become a Roman Catholic ... the estate hereby limited to him shall cease and determine and be utterly void.

This condition was held not to be void as against public policy. Lord Wilberforce agreed that public policy must move with the times, but said:

Discrimination is not the same thing as choice: it operates over a larger and less personal area, and neither by express provision nor by implication has private selection yet become a matter of public policy.

It is possible that the provisions seen in *Blathwayt v. Lord Cawley* would now be incompatible with the beneficiary's human rights—in this case, the 'right to freedom of thought, conscience and religion' under the European Convention on Human Rights (ECHR), Art. 9. Lord Wilberforce was referred to the ECHR in the *Blathwayt* case, but declined to apply its standards to a will taking effect in 1936 (which was before the ECHR was drafted). Since the enactment of the Human Rights Act 1998, which incorporates the ECHR into domestic law, the courts might be inclined to take a different view.

A second legal difference between determinable fees and conditional fees is that conditional fees are capable of being legal estates, whereas determinable fees are always equitable interests only. The reason for this distinction is the Law of Property Act 1925

(LPA 1925), s. 7, which was amended for historical reasons that are not relevant today.

Most conditional fees—as long as they contain a legal or equitable **right of re-entry**, which almost all do—are treated as fees simple absolute and are therefore capable of being legal estates, rather than as equitable interests.

### Right of re-entry

A legal or equitable right to resume possession of land, here as the result of forfeiture

The situation is consequently as follows:

- the fee simple absolute can be a legal estate;
- the determinable fee simple can only ever be an equitable interest;
- the conditional fee simple can be a legal estate under LPA 1925, s. 7(1), if it is subject to a right of re-entry. Otherwise, it will be an equitable interest.

### LPA 1925 s.40 – the old law on contracts for the sale of land

Before Law of Property (Miscellaneous Provisions) Act 1989, s. 2 came into force, contracts for the sale of land were governed by LPA 1925, s. 40. This required the contract to be '*evidenced in writing*', which meant that an oral contract could be given validity by a later written memorandum. This is no longer possible. It also provided an exception for transactions of which there had been '*part performance*'—most typically, situations in which the purchaser was allowed to move into the premises before the conveyance. However, any act of part performance could make the contract enforceable, provided the act was *directly referable* to the contract. LPA 1925, s. 40, no longer applies, but it is useful to be aware of it when reading older cases.