**Chapter 12**

**Question 1: Are there good reasons for thinking that certainty is a particularly important concern in land law?**

Certainty is of course an important value in all areas of law, and particularly in those that involve parties planning for the future and transacting with each other (see **12.11**). For example, for many people, buying a property will be the most significant financial transaction of their lives, and they need to know how to acquire the property, and how to avoid, if possible, being bound by any pre-existing rights in the property. In *McDonald v McDonald* (2016), for example, the Supreme Court emphasized the importance, recognized by Parliament in the Housing Act 1988, of certainty to landlords who have let out their land and need to know in what circumstances they will be able to regain possession of that land (see **12.35**). Property rights of course play a key role in land law and, as discussed at **12.20**, certainty is particularly important in relation to such rights, as it increases the chances for third parties to discover them. As noted at **12.49**, the special features of land as a permanent but finite resource also mean that certainty is of particular importance in land law.

**Question 2: What might be the disadvantages of a judicial approach that focuses entirely on applying the relevant legal concepts and pays no heed to the particular context of a dispute?**

Chapter 12 as a whole explores the tension between concepts and contexts in land law, and it is pointed out at **12.10-12.16** that we would not expect any judge to consider only one of the two. The importance of context was recognized (albeit in overstated terms) by Lady Hale in *Stack v Dowden* (2007) when stating that ‘In law, “context is everything”.’ (see **12.5**). So, in a family home case such as *Stack*, for example, a court has to recognize that we should not expect a cohabiting couple to express their intentions in formal, precise ways – similarly, in *Thorner v Major* (2009), for example (see **5.94**), the House of Lords took the context of the dealings between Peter and David Thorner into account when finding that, despite the lack of any specific express promise, Peter had made sufficient assurances to David that David would inherit Peter’s farm. Conversely, in the commercial context of a case such as *Cobbe v Yeoman’s Row Management Ltd* (2008) (see **5.102**), the House of Lords was sensibly more reluctant to find that an assurance had been made. Note though that, in each case, the same legal question was asked (ie had A made the required assurance to B?) and so the context was relevant to the application of the test, rather than to the content of the test itself.

**Question 3: Do you think it is possible to classify the approaches of individual judges according to their place on a spectrum with a focus on concepts at one end, and a focus on contexts at the other?**

As noted at **12.16** (and see the guidance to Question 2 above) it is very unlikely that any judge would focus on only one of either concepts or contexts to the exclusion of the other. Locating individual judgments on a spectrum may be possible, and can allow for a contrast between eg the approaches of Lord Denning MR in the Court of Appeal, and Lord Wilberforce in the House of Lords, in *National Provincial Bank v Ainsworth* (1965) (see **12.13-12.15**). It is less likely that we would find a consistent pattern for a particular judge, even if looking only at one area of law, although it may well be that a judge may have a general preference for one of the ‘doctrinal’ or ‘utility’ models of rationality discussed at **12.15**. Certainly, for example, Lord Wilberforce’s approach in *Ainsworth* is consistent with the former, whilst Lord Denning MR’s accords with the latter.

**Question 4: What are the disadvantages of judicial reform of land law? What are the disadvantages of legislative reform of land law?**

The problems of judicial reform are discussed at **12.23-12.26** and can be summarised as: (i) legitimacy – in some areas in particular (eg those related to issues on which there are strong and opposing social or political views), it might be felt that change should come from the legislature, not the courts; (ii) delay – reform requires an appropriate case to come before a court at a suitable level in the hierarchy, and that depends on accidents of litigation; (iii) retrospectivity – in English law, judges cannot change the law only for the future: any change has retrospective effect, and this can interfere with the bases on which parties have entered into transactions. As discussed at **12.26**,this is a particular concern in land law, where those past transactions (eg the purchase of land) are often very significant. In addition, as noted at **12.20**, Parliament can come up with a specific, tailored solution to a particular problem, making a number of linked changes at the same time.

One concern with legislative reform is, simply, that it may not happen. As discussed at **12.22**, for example, even if the Law Commission recommends particular reform, the government may decide not to act. As discussed at **12.27-12.32**, a further difficulty is that judges applying the legislation may develop it unexpected ways. It is impossible for legislation to deal with all possible situations which may arise in the future, and this gives space for such judicial interpretation.

**Question 5: Which area or areas of land law do you think are most in need of reform? How should such reform take place?**

This is of course a big question! Throughout the book we have focused on setting out clearly the current rules applying in particular areas of land law and have also discussed some of the arguments for reform of those rules. It is also important to think about *how* reforms should occur. We have seen areas where there have been important judicial reforms (eg in relation to the common intention constructive trust, and also proprietary estoppel, in Chapter 5, and in relation to the content requirements for leases in Chapter 7 and for easements in Chapter 9) and also important legislative reforms (eg the Human Rights Act 1998 in Chapter 2, the Land Registration Act 2002 in Chapters 4 and 11, and the Landlord and Tenant (Covenants) Act 1995 in Chapter 7). It is also worth keeping an eye on the completed and ongoing projects of the Law Commission in relation to land law (see [www.lawcom.gov.uk](http://www.lawcom.gov.uk)) as these indicate areas in which reform is planned, such as updating the Land Registration Act 2002. We noted at **1.48** that, when introducing part of what was to become the great 1925 property legislation, Lord Birkenhead recalled how, as a law student, he had been appalled at the complexity of the rules on estates and had resolved to reform them (see <https://bit.ly/2R82xtt>). Perhaps there is part of modern land law that similarly motivates you?