functions (e.g. ensuring the debtor's proper accounting practices), the doctrine of anticipatory breach has the sole effect of protecting that one creditor who is entitled to invoke the claim from the point of "breach". The doctrine thus enables that creditor to "leap over" other creditors to enforce his "debt" in the event of the debtor's financial distress. Contracting parties, especially the debtor, should consider their options seriously before embarking on a course of conduct that will trigger the doctrine of anticipatory breach in this situation.

YIHAN GOH AND MAN YIP

School of Law, Singapore Management University, Singapore 178899. Email: yihangoh@smu.edu.sg; manyip@smu.edu.sg

ESTOPPEL AND THE LAND REGISTRATION ACT 2002

WISHART v Credit and Mercantile Plc [2015] EWCA Civ 655 is an unusual priorities case. At its heart is an informal business partnership between two close friends: S and W. Together, the pair undertook a series of property developments. In all their ventures, S took the lead on financial matters. With the approaching sale of a particularly lucrative development, S and W considered how to spend their gains. W indicated that he would like to purchase a residential property for himself and his family, and entrusted the arrangements for the acquisition to S. W removed himself entirely from the process, failing even to look at the contract of sale. As such, he did not realise that S had inserted himself as the purchaser of the property. Upon sale, W and his family moved into the property, oblivious to the subterfuge. S then secured a loan of £500,000 on the property by way of a legal mortgage in favour of C&M. The sum was promptly gambled away, and S, now declared bankrupt, disappeared. C&M obtained possession of the property and sold it for £1.1 million, using just under £700,000 of the proceeds to recoup their loan and expenses. It was at this point that W re-entered the narrative, appearing before the court to argue that, by virtue of an overriding interest, he was entitled to the proceeds of the sale over C&M.

W's bid for priority failed due the court's adherence to a little-used nineteenth-century principle laid down in *Brocklesby v Temperance Permanent Building Society* [1895] A.C. 173. Although this is not an authority that has featured prominently in recent years, it was explicitly relied upon in *Thompson v Foy* [2009] EWHC 1076 (Ch), at [142], and rests behind the Court of Appeal's decision in *Abbey National Building Society v Cann* [1989] 2 F.L.R. 265, though the point was left untouched by the House of Lords. The effect of this principle is a simple estoppel: when

invoked, it prohibits a beneficial owner from asserting the priority of their right over that of another. Under the decision in *Wishart*, it is of no significance whether the priority of the beneficial owner would have been safeguarded under the priority rules enshrined in ss. 28–29 of the Land Registration Act 2002.

The rationale behind the *Brocklesby* principle is straightforward: the beneficial owner has unknowingly facilitated a fraud on an innocent purchaser or lender. As between these two parties (assuming, as ever, that the fraudster himself is bankrupt or beyond the reach of the law), it is only proper that the person who made the fraud possible bears the risk of that fraud. Nevertheless, a doctrine capable of disregarding the legislative framework for determining the priority of rights in land ought to be viewed with caution. Moreover, it is a poor fit with the approach to priorities adopted in the Land Registration Act 2002, which rarely engages with questions of fault. As such, it is vital that the parameters of the estoppel be carefully defined, so that its precise interaction with the legislative priorities regime can be controlled.

At [52], Sales L.J. provided the factors behind the invocation of the *Brocklesby* estoppel: (1) the owner of an asset gives actual authority to a person authorised to deal with it in some way on his behalf; (2) the owner furnishes the agent with the means of holding himself out to another as the owner of the asset; and (3) the owner omits to bring to the attention of the misled party any limitations on the agent's authority. As W gave S free rein to make arrangements for the purchase of the property, and made no effort to oversee the acquisition, W was estopped from asserting priority over C&M. It was considered irrelevant that S fraudulently exceeded the terms of his authority in procuring a mortgage – something W had expressly prohibited (at [57]) – as W had failed to bring that limitation to C&M's notice.

There are two sets of concerns raised by this decision. The first centres on the appropriateness of adding yet another arrow to the mortgagees' quiver at the expense of individuals in actual occupation. How does this decision affect the archetypal priorities case that the facts of *Williams & Glyn's Bank v Boland* [1981] A.C. 487 have come to represent? Suppose one spouse entrusts another with all financial matters relating to their home, which is registered solely in the name of the spouse so authorised. The sole legal owner charges the property and absconds with the money. Is the remaining spouse now estopped from claiming the priority over the lender that would otherwise be available by virtue of Sch. 3, para. 2 of the Land Registration Act 2002? The answer under *Wishart* appears to be "yes". The three criteria laid down by Sales L.J. – authorisation, facilitation, and omission – have all been satisfied.

The Court of Appeal neglected to consider the consequences of its decision on the *Boland* fact pattern. If *Boland* is to be left intact, it is imperative

that the two cases be distinguished. The most straightforward way to do this is by implementing the familiar distinction between domestic and commercial scenarios. In this case, W might not have had any reason to doubt S's friendship but, within a commercial relationship, it was foolhardy to place blind faith without oversight in a business partner's trustworthiness. By contrast, in the domestic context, it is less appropriate to expect cohabitants to act as financial watchdogs, overseeing every move made by their partner. If this is how *Boland* and *Wishart* are to be distinguished, it is the relationship between the parties rather than the properties that needs to be categorised as commercial or domestic. After all, W authorised S to find a property for W to live in with his partner.

Secondly, the case touches upon a topic that has received much attention in recent years: the degree to which the Land Registration Act 2002 operates within or outside of general property law. There can be little doubt that under the statutory rules W's interest was prior to C&M's charge, since it was an overriding interest protected by actual occupation: Land Registration Act 2002, Sch. 3, para. 2. W and his partner were in actual occupation, and their occupation was discoverable on a reasonably careful inspection of the land. The Court of Appeal's recourse to a relatively obscure nineteenth-century precedent is a testament to their desire to circumvent this outcome.

Similar methods of circumvention have been employed by the courts in relation to the meaning of "mistake" when ordering alteration of the register under Sch. 4 to the Land Registration Act 2002, particularly in cases where the original owner, A, loses his title to a fraudster, B, who alienates to a *bona fide* purchaser, C. A literal reading of the Act, and in particular the combined effects of ss. 58 and 23, leads to the conclusion that C has unimpeachable title. Nevertheless, the courts have gone to considerable lengths to interpret C's registration as a mistake or the consequence of a mistake so as to justify an order of alteration against him. In so doing, the courts look to be manipulating the Act to give the answer that would have been reached under general property principles. The efforts of the courts in this context have been largely welcomed.

Taken together, are we to encourage the courts to interpret the Land Registration Act 2002 creatively, so as to replicate the outcomes that would have been produced before its enactment? Or should the Act be seen as a distinct and self-contained regime? In this case, it is possible to have one's cake and eat it too. The judicial activity concerning the meaning of "mistake" in relation to alteration is forced by legislative silence. That one word acts as the gateway to rectification and, consequently, indemnification, but is left undefined by the statute. Presented with this silence, the courts have found a means of ensuring that A and C – two innocent parties – both receive a remedy. The Court of Appeal's decision in *Wishart* is another beast entirely. There was no ambiguity in the Act's

priority rules to be ameliorated, nor a basis within the Act for the imposition of an estoppel on W. In the absence of any such silence or ambiguity, the circumvention of the legislative framework for determining priority by an appeal to earlier common law principles is little more than judicial legislation.

As a whole, the decision in *Wishart* ought to be viewed with caution. Motivated by a clear desire to favour the misled lender over the oblivious business partner, the Court of Appeal has endangered one of the few enduring protections afforded to occupiers of residential properties, and has done so through means of doubtful legitimacy. It is a decision best confined to its relatively unusual facts.

JOE SAMPSON

Selwyn College, Cambridge, CB3 9DQ, UK: jws43@cam.ac.uk

THE RIGHT TO VOTE AS AN EU FUNDAMENTAL RIGHT AND THE EXPANDING SCOPE OF APPLICATION OF THE EU CHARTER OF FUNDAMENTAL RIGHTS

IS the right to vote in European Parliament elections a matter for EU law? Until recently, the answer to this query seemed to be a clear "no". Indeed, while Article 223(1) of the TFEU does confer on the European Union the competence to lay down a uniform procedure for the election of Members of the European Parliament ("MEPs"), this competence has not been exercised so far. Consequently, Article 8 of the Act concerning the election of the MEPs by direct universal suffrage, annexed to Council Decision 76/787/ECSC, EEC, Euratom (OJ 1976 L 278 p. 1, henceforth "the 1976 Act"), provides that the "electoral procedure shall be governed in each Member State by its national provisions". Apart from the general principles of "direct universal suffrage in a free and secret ballot" and of non-discrimination on the ground of nationality, enshrined respectively in Article 14(3) of the TEU, Article 1(3) of the 1976 Act, and Article 20(2)(b) of the TFEU, there is nothing in EU law that governs specifically the eligibility to vote in EP elections.

The EU Court of Justice thus found, in 2006, that EU law contains "no rule defining expressly and precisely who are to be entitled to the right to vote" and that, consequently, "in the current state of Community law, the definition of the persons entitled to vote [in EP elections] falls within the competence of each Member State in compliance with Community law" (Cases C-145/04, *Spain v United Kingdom* EU:C:2006:543, at [65], [78], and C-300/04, *Eman and Sevinger* EU:C:2006:545, at [40], [43], [45]). Similarly, Lord Mance of the UK Supreme Court argued that "eligibility