OXFORD

LAND LAW

TEXT, CASES, AND MATERIALS

SECOND EDITION

BEN MCFARLANE,
NICHOLAS HOPKINS, SARAH NIELD

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Ben McFarlane, Nicholas Hopkins,
and Sarah Nield

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PREFACE

We wrote the preface to the first edition of this book in March 2009. The three years since then have brought a volume of new cases, legislation, reform proposals and academic commentary that thoroughly refutes any lingering idea that land law is a musty or static subject. Indeed, on one day alone (9 November 2011), the Supreme Court delivered judgments in two potentially seminal land law cases: *Jones v Kernott* and *Berrisford (FC) v Mexfield Housing Co-operative Limited*.

These and other developments have naturally left their mark on this second edition. Chapters 16 and 23 have been extensively revised to incorporate the judgments in *Jones* and *Berrisford*; Chapter 10 has been re-written to take account of a House of Lords decision of 2009 (*Thorner v Major*); and a Supreme Court case of 2010 (*Star Energy Weald Basin Limited v Bocardo SA*) features prominently in a re-worked Chapter 2. To give just one further example, the pivotal decision of a nine-member Supreme Court in *Manchester City Council v Pinnock* (2010) has led to a thorough revision of our human rights chapter. It has also caused us to re-structure our introductory chapters so that our second edition, like the Supreme Court's decision itself, affirms the importance of human rights in land law.

We have also incorporated the impact of new legislation, such as the Perpetuities and Accumulations Act 2009, the Equality Act 2010, and the Localism Act 2011. Despite all this activity, the scent of further reform is in the air, and Chapters 25 and 26 have been updated to consider the Law Commission's 2011 report on easements, covenants and profits *à prendre*. As our first edition made clear, we are also keen to give readers access to the best academic writing on land law, and this edition includes extracts from and references to new articles and books on a wide range of topics, from land registration to constructive trusts.

We have taken the opportunity of a new edition not only to update the content of the chapters, but also to revise their structure. The first chapter, and the whole of Part A, has been streamlined, to give a more focused introduction to land law. Readers of the first edition found its three-step approach to be very helpful in understanding the operation of interests in land, and therefore Parts B, C and D have been modified so as to correspond to the content, acquisition and defences questions. We have also altered the contents and positioning of the licences chapter, so as to make the most of the instructive comparison between licences and leases. Despite the large number of developments since 2009, we have, by careful pruning, ensured that the overall length of the book has barely increased.

We wrote in the preface to the first edition that the Text, Cases and Materials format is ideally suited to land law. The key advantage of such a book is that it can both show *and* tell. In this edition, as well as providing direct access to the most important and useful cases and materials, we have again made sure to guide readers, by devoting more than half of the book to our author commentary. While there are some areas in which we can all claim a level of expertise, our individual interests meant that the division of labour was perhaps more readily determined than might have been the case. Ben is responsible for Chapters 1–2, 4–6, 10, 12, 15 and 21–23; Nick for Chapters 7–9, 11, 13–14 and 16–19; Sarah for Chapters 3 and 24–30; and Nick and Sarah jointly wrote Chapter 20. Each of us has read and commented on chapters written by the others.

Our thanks are wholeheartedly extended to colleagues, friends and to staff at OUP who have helped us in writing each of the first and second editions. Professor John Mee and a

number of anonymous referees took on the unenviable task of reading and commenting on the first edition. Likewise, a number of people commented on individual chapters in that first edition: we are particularly indebted to Amy Goymour, Professor David Clarke and Peter Smith. Their generosity in giving of their time and their own insights into the subject is gratefully acknowledged and has undoubtedly improved the finished text. Rupert Seal and Ruth Hudson played a significant role in the development of the Online Resource Centre. Ben is grateful to Stephen Du and Christopher Knowles for their comments on the first edition and research assistance on the second edition. The enthusiasm and commitment of OUP have helped make the process of writing an enjoyable one. Particular thanks are due to Kate Whetter, our commissioning editor for the second edition, to copy-editor Francesca White, and to Stella White for her management of the marketing.

Ben McFarlane
Nicholas Hopkins
Sarah Nield
March 2012

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LIST OF ABBREVIATIONS

AALR	Anglo-American Law Review
APR	annual percentage rate
BERR	Department of Business Enterprise and Regulatory Reform
CBLJ	Canadian Business Law Journal
CCA 1974	Consumer Credit Act 1974
CCA 2006	Consumer Credit Act 1006
CLJ	Cambridge Law Journal
ECHR	European Convention on Human Rights
FLA 1996	Family Law Act 1996
FSA	Financial Services Authority
FSMA 2000	Financial Services and Markets Act 2000
FSO	Financial Services Ombudsman
HRA 1998	Human Rights Act 1998
LCA 1925	Land Charges Act 1925
LCA 1972	Land Charges Act 1972
LPA 1925	Law of Property Act 1925
LPA 1969	Law of Property Act 1969
LP(MP)A 1989	Law of Property (Miscellaneous Provisions) Act 1989
LQR	Law Quarterly Review
LRA 1925	Land Registration Act 1925
LRA 2002	Land Registration Act 2002
LS	Legal Studies
MCOB	Mortgage Conduct of Business Sourcebook
MLR	Modern Law Review
OFT	Office of Fair Trading
TOLATA 1996	Trusts of Land and Appointment of Trustees Act 1996

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PART A

INTRODUCTION

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1

WHAT'S SPECIAL ABOUT LAND?

CENTRAL ISSUES

1. This introductory chapter aims to show the importance of land, and hence of land law. It focuses on the features that make land special and the distinctive legal rules produced by those features. By considering a specific example, it also shows how and why land law can give rise to very difficult questions of both doctrine and policy.
2. This chapter thus helps to answer an important question: why is it worth studying land law? Firstly, the special features of land mean that rules regulating the use of land are very important *in practice*. Secondly, those special features mean that the rules are *analytically* interesting: they try to perform the very difficult job of balancing the interests of a number of deserving parties. Thirdly, although many land law rules are rooted in tradition, the practical importance of land law means that the rules must change in response to new social and economic conditions. This means that land law can be a *topical* and *lively* subject.
3. In this chapter, our focus is on what makes land (and thus land law) special. As we will see, however, land law is part of the broader subject of property law. This gives us a further important reason for studying land law: it is a very useful way in which to learn about core concepts that apply not only where land is concerned, but in many other situations as well.
4. In this chapter, we will look at a particular situation that shows the sharp debates and difficult questions that can arise in land law. In later chapters, we will return to that situation in more detail and closely examine the relevant legal rules. Our purpose here, however, is to see what can be discerned about the special concerns of land law.

1 THE IMPORTANCE OF LAND

No one needs to be told that land is important. In fact, in the United Kingdom, land is something of a national obsession. We would not necessarily think it odd if a friend were to spend the morning on some do-it-yourself jobs in her house, stop to look in the windows of

a local estate agency whilst out for lunch, come back to do some gardening in the afternoon, and then spend the evening watching a television programme about the property market, and playing a board game based on buying land and renting out houses in London. And that is only at the weekend, when she is not out at work earning money to make her mortgage payments. And, of course, land can be even more important for those who are not fortunate enough to own a home: a tenant may worry that his landlord will fail to make the necessary repairs to his roof or is about to raise his rent, while someone with nowhere at all to live will face the more urgent task of finding shelter for the night.

So, whilst we may sometimes take it for granted, land is always there: under our noses, beneath our feet, and perhaps even in our souls. As a result, land looms large in much of the law. For example, in the law of torts, occupiers' liability forms a discrete area due to the special responsibilities placed on those with control of land. Conversely, the criminal law gives special protection to a residential occupier of land: if another party uses force or the threat of force to come onto land despite the objections of the occupier, that party can be guilty of a special criminal offence.[1] In the law of contract, special rules regulate agreements relating to land: the importance of land is recognized by the requirement that contracts to sell land must be made in writing, signed by both vendor and purchaser. In administrative and public law, special responsibilities are placed on local authorities, in certain circumstances, to provide accommodation to those with nowhere to live.

2 THE SCOPE OF THIS BOOK

This book cannot focus on all of the varied areas of law in which land is important. Its focus instead is on the special rules that govern *private rights to use land*. By 'private' rights, we mean the rights that, in theory, *any* of us might acquire. For example, the government or a local authority may have a statutory power to acquire land for particular purposes: for example, the London Development Agency, by means of compulsory purchase orders approved by the Secretary of State for Trade and Industry in 2005, was permitted to buy land needed for use in connection with the 2012 Olympics, even if the current owners of that land did not agree to sell. Such special powers to use land are *not* considered in this book.

Similarly, we will not examine the various tort claims that may arise against an occupier of land: if you are injured at a friend's house and claim damages from her, you claim a right to be paid money, not a right to use her land. Nor will we look at the special crimes that may apply where land is concerned: to be seen as criminal, a party's conduct must be deserving of public sanction; it is not enough for that conduct simply to interfere with another party's rights. And we will not look directly at the special statutory responsibilities placed on local authorities: those duties do not necessarily respond to any individual's private right. Equally, we will not examine the special public limits that may be placed on private rights. For example, if you own a house, you may wish to convert it into a block of flats: to do so, you will need planning permission, because your private rights, as an owner of the land, are limited by the need for the approval of a public body.

[1] See Criminal Law Act 1977, s 6. To commit the crime, the party must know of the occupier's presence on the land and of his objection to that party's entry. The crime is not committed if the party entering is a 'displaced residential occupier'—i.e. someone who was himself earlier removed from the land. See also the Protection from Eviction Act 1977, s 1, for a further example of a crime protecting the use of land.

This is not to suggest that the areas not covered by this book are unimportant, or lacking in interest. In fact, to have a full picture of how the law regulates the use of land, it is vital to be aware of the relevant parts of the law of torts or of public law. But no book can sensibly examine *all* of the legal rules that can regulate the use of land; rather, this book focuses on a set of rules that are joined together not only by the *context* in which they apply, but also by the *concepts* that underlie them. In this way, the book fits with the meaning of 'land law', as set out in the following extract.[2]

Birks, 'Before We Begin: Five Keys to Land Law' in *Land Law: Themes and Perspectives* (eds Bright and Dewar, 1998, pp 457–60)

The name 'land law' suggests a simple contextual category: all the law about land. The law does use many such categories, ordered only by the alphabet: all the law about aviation, banks, commerce, dogs, education and so on. They take as their subject some aspect of life, just as a non-lawyer would identify it. But in this case things are not quite so straightforward. By the end of this section we will have formulated a more complex proposition: land law, as generally understood, is a contextual subset of a legal-conceptual category.

The socio-historical context

It will help to start with some background. The role of land, and hence of land law, has changed dramatically since the Industrial Revolution and the rise of the limited liability company. The paragraphs which follow sketch in that change and two others.

The managed fund

For institutions and individuals with serious wealth, land has lost its central role. The managed fund has displaced the rolling acres. Land used to be the pre-eminent form of wealth. Landed property was the focus of dynastic ambition. Land opened the door to high social status and political power. A landed family had by that fact alone a stake in governmental power. Keeping land in the family mattered. That has changed. Land, important as it is, has lost its pride of place. For the mega-wealthy, land has become just one species of investment, just as agriculture has become just one more industry. Pension funds and wealthy institutions hold mixed portfolios. They hold some land, some works of art, and many shares in many companies. Rich individuals do the same. The dynastic urge has been translated, with one eye constantly on the tax man, into trust funds and private companies [. . .]

The fragility of the environment

The notion of land as scarce and fragile is relatively new. The Industrial Revolution created a few black spots. Blake's dark, satanic mills were terrible to behold, but local. It is only relatively recently that we have realized that our transport systems, our power stations, our industrial processes, and our intensive agricultural methods have the potential utterly to destroy this green and pleasant land. The private law of nuisance, the historic role of which was to control annoying activities as between one neighbour and another, cannot sufficiently express the social interest in the safety of this scarce resource. Protection of the environment

[2] As is the case with all such extracts in this book, footnotes, numbering, and cross-references have been omitted unless essential to understanding the extract.

means more social control of land use. There will have to be more planning control, more conservation legislation, more anti-pollution legislation [. . .]

Public-sector housing

Local government is nowadays a powerful force in the provision of housing, adding a public law dimension new to land law as it been historically determined. During the Thatcher era the public sector experienced an upheaval, partly from shortage of money, partly from being opened to the private market through the right-to-buy legislation[3] [. . .] The public sector ultimately rests on concepts identical to those of the private sector, overlaid by principles of public law and a mass of highly technical legislation. It is in every way a part of land law, but, because of the mass of detail, it has become a specialism. As a lawyer you have at some stage to decide whether to make yourself an expert in that field. The same is largely true of the statutory regime controlling the relations of landlord and tenant in the private sector.

The core of land law

A target has a centre. Taking land law as a simple contextual category, we can identify at least five topics, all of which have already figured in the discussion. Four of these must on reflection be located in the second or third circles, just outside the bull's-eye at which we are aiming. They matter, but they do not relieve us of the intellectual necessity of mastering the core. Two belong largely in public law. One of these comprises the social control essential if the environment is to be protected. The other is the housing law which applies to local government tenancies. Within private law, a third unit lies in the law of civil wrongs and deals with the duties imposed by the law for regulating the behaviours of neighbours towards each other, especially through the torts of nuisance and trespass to land. Fourthly, there is the structuring of mega-wealth, the mission of the old Lincoln's Inn conveyancers. That is breaking away, not specifically land law any longer but wealth management. Its principal vehicle is the trust, often enough off-shore, in which land becomes just one kind of asset in a rolling fund. Fifthly and last of all, there is the unit at the very centre of the target. When lawyers speak of land law, it is usually to this core that they refer.

Every business needs premises, every factory needs a site. For most of us as private individuals our home is the centre of our lives. Functionally, this core of land law has the task of providing the structure within which people and businesses can safely acquire and exploit land for daily use, to live and to work. To discharge that function, it has to have its own conceptual apparatus. The proper content of this fifth unit thus becomes the nature, creation and protection of interests in land. Those interests and their implications are the conceptual apparatus of our land law.

The word 'interests' is slightly evasive. The law recognizes different kinds of rights, among them property rights. By 'interest' we mean 'property right'. The category of all property rights (or, in other words and more simply, 'the law of property') is a legal-conceptual category. It differs from, say, the law of dogs in that its subject is a legal concept, the concept of a proprietary right. The core of land law is the subset formed when the conceptual category of 'property right' is confined to one context: the law relating to property rights in land. To focus on that core is neither to downgrade the importance of the units in the next circles nor to forget that in real life all the units which we have identified, and others, cohere together.

[3] Housing Act 1980, followed by the Housing Act 1985.

3 THREE UNDERLYING QUESTIONS

As Birks suggests, the focus of land law, and hence of this book, is on private *property rights* to use land. We will examine the concept of a property right in Chapters 4 and 5. Birks suggests that land law examines the '*nature, creation and protection*' of property rights relating to land. Certainly, at a very general level, the questions that we will examine in this book can be organized into three broad groups: firstly, there are questions about the *content* of rights to use land; secondly, there are questions about the *acquisition* of rights to use land; thirdly, there are questions about the *defences* available to one party where another party has a right to use land. In Part B of this book, we will look in detail at the different content of particular rights to use land. In Part C, we will look at how a person can acquire such rights. And in Part D, when considering how the law establishes the priority of competing rights to use land, we will look at the defences that may be available to a person against another's right to use land. In the remaining parts of the book, Parts E-H, we will look in more detail at specific contexts in which these questions about content, acquisition and defences may arise.

To take a simple example, imagine that you are interested in buying a house advertised in the window of a local estate agency. It is important to know whether the house is advertised as 'freehold' or 'leasehold'. The point is that the vendor is not simply selling a house: she is selling her *right to use the land*. If you go ahead and buy her house, you will acquire a particular private right to use land. As Birks suggests, land law deals with the nature of that right. In particular, it is vital for you to know the *content* of the right: if you acquire the right, how will you be able to use the land? As we will see in Chapter 4, a freehold will give you ownership of the land for an unlimited period; a leasehold also gives you ownership, but only for a limited period.

Let us say that you have established that the vendor is selling a freehold, and that you have decided to go ahead and make an offer. Your focus will then shift to the *acquisition* question: what has to be done in order for you to acquire the vendor's freehold? In Birks' terms, land law deals with the creation of your right to use the land. There will generally be two stages to the process, often known as 'contract' and 'conveyance'. At the first stage, you need to know (or, at least, your solicitor or conveyancer needs to know) what has to be done in order to reach a legally binding agreement with the vendor. As noted above, there are special rules that regulate contracts to transfer a right such as a freehold. We will examine those rules in this book (see Chapter 7, section 3), because they are crucial in defining how a party can acquire a private right to use land.

At the second stage, you need to know (or, at least, your solicitor or conveyancer needs to know) what has to be done in order for you actually to acquire the vendor's freehold: we will also examine those rules in Chapter 7. As we will see, *registration* forms a crucial part of the process: even if you pay the vendor and even if you move into her house, you do not actually acquire her freehold unless and until you are recorded on the central register as holding that right.

If all goes well and you are now registered as holding a freehold, it might seem that you are home and dry. But let us say that one of your new neighbours, when walking to his house from the road, regularly takes a short cut across your new front garden. You (very politely) object to this and he (equally politely) claims that a former owner of your land granted him a right of way over your land. This is the first that you have heard of such a right: in fact, when acquiring your freehold, you checked on the central register and there

was no mention of the land being subject to a right of way. If your neighbour was indeed given a right of way over your land, it will be necessary to establish which of the two competing rights (your freehold on the one hand and his right of way on the other) is to be given priority. At this point, as we will see in Chapter 12, the *defences* question is crucial. Even if your neighbour can show that he was given a right of way over your land, it may well be that you have a defence to his right and so do not need to let him walk across your land. In our example, that defence may come from the facts that: (i) you paid for, and registered, your freehold; and (ii) your neighbour failed to have his right of way noted on the register. This is just one example of how land law, to use Birks' words, deals with the protection of rights: it may be that your neighbour should have protected his right by having it noted on the register.

What if your neighbour instead claims that there is a *public* right of way, such as a public footpath, running over your land? If that is the case, then any member of the public will be able to walk over your front garden. We will not examine such public rights in this book, because our focus is on *private* rights: rights that can be held by an individual as an individual, not as a member of the public.

4 THE SPECIAL FEATURES OF LAND

Birks suggests that land law is a 'contextual subset' of property law. This raises the question of why we should gather together the legal rules relating to private rights to use land. We could equally, for example, study private rights to use chairs. Yet, whilst there are lots of books and courses dealing with 'land law', very few deal with 'chair law'. One reason, of course, is the practical importance of land—but then chairs are pretty useful too. A linked, but better, reason is that land has certain features that make it a unique resource, fundamentally different from other types of physical thing. The legal rules relating to rights to use chairs are essentially identical to those relating to rights to use tables, bikes, or cauliflowers. So, these rules can be found in books or courses dealing with 'personal property law'. In fact, personal property law deals with private rights to use just about any physical thing *other* than land. Land is separated out for special treatment because, due to its fundamentally different physical characteristics, rights to use land are regulated by fundamentally different legal rules.

The following extract discusses those special features and the special legal rules to which they give rise.

McFarlane, *The Structure of Property Law* (2008, pp 7–11)

Permanence

Subject to the rarest of exceptions, land is permanent. Whereas other objects that can be physically located (e.g. bikes) wear out, the usefulness of land endures. This special feature of land is reflected by a special feature of the land law system: ownership of land can be split up over time. For example, A, an owner of land, can give B a Lease: B then has ownership of that land for a limited period. In contrast, if A is an owner of a bike, A *cannot* give B ownership of that bike for a limited period.

Uniqueness

"Location, location, location": a crucial feature of any piece of land is its physical location. That physical location can never be shared by another piece of land. In this significant sense, all pieces of land are unique. This special feature of land explains two special rules of land law.

Recovery of the thing itself from X or C?

First, let us say that: (i) B owns a thing, such as a bike; and (ii) X takes physical control of that thing without B's consent or other lawful authority. B can assert his right, as an owner of the thing, against X: by interfering with B's right, X commits a wrong against B. However, there is no guarantee that a court will order X to return the bike to B: rather than getting his thing back, B may well have to settle for receiving money from X [. . .]

In contrast, if: (i) B has ownership of some land; and (ii) X takes physical control of that land without B's consent or other lawful authority; then (iii) a court *will* make an order (a "possession order") allowing B to remove X and to take physical control of the land. This difference between land and other things thus relates to the remedies question: the question of how a court will protect B's right. It explains why land is sometimes known as "real property". "Real" comes from the Latin for "thing" (*res*); when used in the phrase "real property" it indicates that B can recover the *thing itself* if wrongfully deprived of it by X or C.

Forcing A to transfer the thing itself to B?

Second, let's say A owns a bike and makes a contractual promise to transfer his ownership to B. A then changes his mind and refuses to go ahead with the transfer. B can assert his right against A: by breaching his contractual duty to B, A commits a wrong against B. However, it is unlikely that the court will order A to transfer the bike itself to B; B will, almost always, have to settle for receiving money from A. The aim of remedies for breach of contract is to put B in the position he would have been in had A kept his promise: B's right is adequately protected if A gives B any money necessary to allow B to buy a similar bike elsewhere.

However, where A promises to transfer a *unique thing* to B, the position is different. To put B in the position he would have been had A kept his promise, A must give B the *thing itself*. So, in the rare case where A promises to transfer a unique bike to B, A may be ordered to keep his promise. In contrast, if A promises to transfer land to B, the standard position is that a court will order A to keep his promise and to transfer his right to the land to B: after all, each piece of land is unique. Again, this difference between land and other things relates to the remedies question: the question of how a court will protect B's right. Where B's contractual right is to acquire a right to land, it is, in general, specifically protected; where B's contractual right is to acquire a right to a thing other than land, B usually has to settle for receiving money.

Capacity for multiple simultaneous use

The same piece of land can be used in many different ways, by many different people, at the same time. For example, let's say:

1. A buys No.32 Acacia Gardens from A0.
2. A0 owns a local shop and makes A promise, when buying No.32, that neither A nor future owners of No.32 will use it as a shop.

3. A acquires No.32 with a "mortgage" loan: in return for a loan from C Bank, A gives C Bank a security right. C Bank thus has a right, if A fails to pay back the loan, to: (i) remove A and other occupiers from the land; (ii) sell the land; and (iii) use the proceeds to pay off A's debt.
4. In return for payment from E, a neighbour, A gives E a right to reach E's house by using a path crossing the garden of No.32.
5. A then moves away. He decides to keep the land and use it as an investment by renting it to B. So, in return for paying money to A, B is permitted to occupy the land. B uses the land as his home and allows his lover, D, to live with him.

Each of A0, A, B, C, D and E has a right to make some use (or at least to prevent a particular use) of the land. Things other than land are also capable of multiple, simultaneous use. If A owns a bike, A can: (i) give B permission to ride the bike; and (ii) offer his bike as security for a loan from C. The difference between land and other things is therefore one of *degree*. However, the difference remains important as it poses a significant question for the land law system: can it reconcile the competing desires of all those who simultaneously want to use the same piece of land? It certainly helps to explain another special feature of the land law system: the longer list of property rights in land.

Social importance

Land is uniquely capable of meeting important social needs. B can only acquire the sense of security and identity that comes with establishing a home *if* he has some sort of right in relation to land. Similarly, it is very difficult to establish business premises without a right to use land. As a result, an interference with B's use of land can have dramatic consequences. For example, eviction from a settled home can cause great stress and disruption; eviction from business premises can cause grave commercial harm.

This special feature of land is reflected in a number of special rules. For example, if: (i) B occupies land as his home; and (ii) C unlawfully prevents B occupying that land *or* with the intention of causing B to leave the land, interferes with the "peace or comfort" of B or members of B's household, then (iii) C commits a criminal offence.[4] Further, if B has ownership of some land, the rest of the world is under a *prima facie* duty not to unreasonably interfere with B's use and enjoyment of that land. So, if C's pig farm, next to B's land, produces nauseating smells, C breaches that duty and thus commits the wrong of nuisance against B. However, C commits no such wrong if he interferes, in a similar way, with B's enjoyment of a thing other than land.[5] Further, in some circumstances, A and B's private agreement can be regulated by mandatory rules protecting B's use of land. So, if A gives B a Lease of land for one year, B may have a statutory right to remain even after the year has expired.

This special feature of land also means that certain human rights may be of particular relevance in land law. For example, Article 8 of the European Convention of Human Rights states that: "Everyone has the right to respect for his private and family life, his home and his correspondence." [. . .] [T]his right is of course subject to qualifications; but the social importance of land means that the right *may* have a role in shaping the rules of the land law system.

4 [Under the Protection from Eviction Act 1977, s 1.]

5 [To bring a claim in nuisance, B must have a property right in land: see *Hunter v Canary Wharf* [1997] AC 655.]

Limited availability

It is impossible to make more land. This special feature of land has a number of consequences. First, coupled with the many valuable uses to which land can be put, it ensures that land is an *expensive commodity*. For most, acquiring ownership of land is impossible unless a lender, such as C Bank, is willing to provide a substantial loan. In return, C Bank will demand a security right over the land. Second, the limited availability of land intensifies the need for the stock of land to be *freely marketable*. As a result, it is particularly undesirable for an owner to remove land from the market by placing permanent restrictions on its use.

The limited availability of land, coupled with its importance and uniqueness, can lead to special limits being placed on an owner of land. For example, the need to promote the marketability of land has led the land law system to give protection to certain parties [e.g. C] who acquire rights relating to land. As we will see, registration rules, particularly prominent in land law, are one means of giving C such protection. Equally, the rules of the land law system have long tried to promote marketability by preventing an owner from limiting the use of land after his death. Further, legislation commonly allows public bodies compulsory purchase powers: powers to acquire land from an owner in order to use it for a specific purpose, such as the building of a motorway.

More startling is the doctrine of *adverse possession*: a means by which an owner of land can lose his right without receiving any compensation. Due to changes in the registered land system, the doctrine of adverse possession now has much less of an impact. However, where it applies, its effect is dramatic. If: (i) X occupies B's land without B's consent; and (ii) B fails, over a long period, to take steps to remove X; then (iii) B's right to the land can be extinguished. The doctrine only applies if X has been acting as an owner of the land: it protects X's claimed ownership, exercised over the long period, by extinguishing B's prior ownership. It can protect X even if X is fully aware that the land initially belongs to B. In this way, the doctrine recognises X's claim (established by his long use) and removes the right of B, who has failed to make use of his land.

The doctrine of adverse possession applies only to land. If: (i) X takes physical control of B's bike without B's consent or other authority; and (ii) B fails, over a long period, to assert his ownership against X; then (iii) there is *no* general rule that the passage of time, by itself, can lead to B losing his ownership of the bike. The limited availability of land supports the idea that land is too scarce a commodity to remain under the ownership of a party who fails, over a long period, to assert his right. As seen above, it also heightens the need for land to be freely marketable. The doctrine of adverse possession certainly promotes that goal: the extinction of B's right not only protects X, but also anyone later acquiring a right from X.

As demonstrated by the extract, the special *physical* features of land lead to special *legal* rules that regulate private rights to use land. Those rules can be organized into three general groups by looking at: the *content* of those rights; the means by which they can be *acquired*; and the *defences* that may be used against them.

One of the most distinctive features of land law is that the *content* of property rights can be more varied than the content of property rights relating to, say, chairs. This is because many of the property rights that we will examine in later chapters can exist *only* in relation to land: this is the case, for example, with the lease (see Chapters 22 and 23), easement (see Chapter 25), and restrictive covenant (see Chapter 26). Due to the social importance of land, there may also be special means by which a party can *acquire* a right to use land. For example, if you set up home with your partner, then, even if your partner is registered as the sole owner of the home, you may nonetheless be able to rely on special rules, developed by

the courts, to show that you have acquired a property right: we will examine those rules in detail in Chapter 16. In contrast, the limited availability of land may make it easier for you to lose a property right relating to land: there may be special *defences* that someone can use against your right to use the land. For example, the extract above refers to the doctrine of adverse possession: if you own land, but fail, over a long period, to assert your right to that land, a squatter may then gain a defence to your property right. We will examine adverse possession in detail in Chapter 8.

5 LAND LAW IN PRACTICE: OCCUPIERS *V* BANKS

There is no doubt that land law is a difficult subject. In defining and regulating private rights to use land, land law has some very tough choices to make. The best way to see this is by considering an example. In this section, we will consider the facts and result of an important land law case involving a dispute between an occupier of land and a bank. We will return to the case in later chapters, when we will examine the relevant principles in greater detail.[6] Our purpose here is simply to use the case, focusing on one specific aspect of land law, to highlight some of the difficult questions raised by the subject as well as some of the different approaches to tackling those questions.

When examining the case, as well as the other cases included in this book, we will necessarily look at how the rules of land law are used to solve disputes about the use of land. It is important, however, to bear in mind that those rules, as well as solving disputes, affect parties' future conduct. In particular, the rules form the background against which an owner of land can arrange his affairs. It is therefore important to remember that land law is not only about resolving disputes; it also aims to create a settled legal background against which parties can plan their future use of land.

5.1 THE FACTS OF THE CASE AND THE DILEMMA

In *National Provincial Bank v Ainsworth*,[7] Mr and Mrs Ainsworth lived together in Milward Road, Hastings, Sussex. Mr Ainsworth was registered as owner of the home. In 1957, Mr Ainsworth moved out. In 1958, he borrowed £1,000 from the National Provincial Bank.[8] The money was borrowed as part of a mortgage deal: to secure his duty to repay that sum, plus interest, Mr Ainsworth gave the bank a particular right (a charge) over his home.[9] This meant that, if Mr Ainsworth were to fall behind in his repayments, the bank would have a power to sell the land and use the proceeds to meet his debt. By 1962, Mr Ainsworth had fallen behind on his repayments to the bank. The bank wished to sell the land. To get

[6] See Chapter 5, sections 2 and 5.4; Chapter 6, section 2.6; Chapter 21, sections 2.2 and 2.3.2.

[7] [1965] AC 1175, HL.

[8] Formerly one of the largest banks in England and Wales, the National Provincial Bank became part of the National Westminster Bank in 1970.

[9] In fact, before borrowing the money and giving the bank the charge, Mr Ainsworth had transferred his title to the home to a company: that company then granted the bank its charge. In separate proceedings against her husband, however, Mrs Ainsworth succeeded in having the transfer to the company set aside, so the later litigation between the bank and Mrs Ainsworth proceeded on the basis that the company had not been involved, and that Mr Ainsworth had retained title to the home, and given the bank its charge directly.

a good price, the bank knew that it had to sell the home with vacant possession. Because Mrs Ainsworth refused to leave, the bank applied for an order for possession of the home.

The majority of the Court of Appeal, led by Lord Denning MR, found that Mrs Ainsworth had a right to occupy the land that bound the bank. On that basis, the bank's claim for possession would fail. But the House of Lords reversed the finding of the Court of Appeal: Mrs Ainsworth had to leave the land. As we will see in Chapter 5, section 5.4, the House of Lords' decision depended in part on the *content* question: in contrast to the Court of Appeal, it found that Mrs Ainsworth's right did *not* count as a property right and so was not capable of binding the bank. As we will see in Chapter 6, section 2.6, the House of Lords also found that Mrs Ainsworth had no direct right against the bank: there was nothing in the bank's conduct that placed it under a duty to allow Mrs Ainsworth to remain in her home.

The House of Lords, like the Court of Appeal, had a tough choice to make. Mrs Ainsworth and the bank can each be seen as victims, in different ways, of Mr Ainsworth—he gave the bank a charge over the home without telling his wife; equally, her claim came as a surprise to the bank, as Mr Ainsworth, when giving the bank that charge, had not informed the bank that he had deserted his wife. The court was thus forced to choose between two parties who can each be seen as 'innocent'.

This type of dilemma is common in property law. For example, consider a case in which the claimant owns property and sells that property to a fraudster, who then fails to pay for the goods. Before the fraud is discovered, the rogue sells the goods on to the defendant, who pays the usual market price for them. Of course, each of the claimant and the defendant has a good claim against the fraudster; in practice, however, such a claim is likely to be rendered useless by the fraudster's disappearance or hopeless insolvency. A crucial question, then, is who has the better right to the goods: the claimant or the defendant? If it is the claimant, then the innocent defendant will lose out, as he or she will have to pay the value of the goods to the claimant. If the defendant has the better right, in contrast, the innocent claimant will lose out, as he or she will have parted with their goods without receiving any payment in return.

As the following extract shows, when the dilemma arises in relation to land rather than goods, the special features of land sharpen the court's dilemma. To translate the passage to the case, Mr Ainsworth equates to the party referred to as 'A'; Mrs Ainsworth to 'B'; and the bank takes the role of 'C Bank'.

McFarlane, *The Structure of Property Law* (2008, pp 11–12)

On the one hand, B can point to the social importance of land: [she] is currently using the land as a home and uprooting that home will cause severe disruption. B can also point to the uniqueness of land: even if B is able to find a home elsewhere, it will be in a different location and so B may be forced to change many aspects of [her] life. So it might seem that the social importance and uniqueness of land should cause the rules of the land law system to lean in favour of someone, such as B, who is currently occupying or otherwise making use of land.

However, C Bank can make a powerful counter-argument. It may well have made a substantial loan to A: the limited availability of land, along with its social importance, ensures that land has a high value. So, if C Bank is unable to sell the land, it is likely to be left substantially out of pocket. It is also important to think about the wider consequences of finding in favour of B. First, whilst it is easy to have sympathy with B rather than with a faceless bank, it should be remembered that if banks have systematic problems in recovering loans, this can have

repercussions not just for the bank's customers but for the wider economy.[10] Second, if C Bank is unable to sell the land, we need to consider the effect of such a decision on lenders' future practice. Will lenders have to carry out extensive and expensive checks to ensure that there are no other users of the home who may later thwart a lender's attempt to sell the land? After all, as land is capable of multiple, simultaneous use, there may be many potential rights that a lender will need to watch out for. The costs incurred by lenders would then be passed on to borrowers. As land is already very expensive, this will make it harder still for would-be homeowners to enter the market. And, given its limited availability, it would be unfortunate if land became very difficult to trade in. Given we can't produce new land, we should be particularly careful to make sure the land we do have does not become permanently burdened and thus difficult to buy or sell.

[...T]he dispute between B and C Bank could be characterised as part of a wider clash between commerce and market forces on the one hand and the need for social protection and the maintenance of a home on the other. The fact that the dispute involves land, a special kind of thing, does *not* help us resolve this conflict; instead, it *heightens the tension*. The dispute between market forces and social protection thus draws out the ambivalent nature of land itself. On the one hand, it is of limited availability and constitutes an important financial investment: we therefore do not want the process of buying land to be unduly difficult. Yet on the other hand, it is unique and socially important: we therefore do not want to give insufficient protection to those who use and, in particular, occupy land.

5.2 TWO POSSIBLE APPROACHES

Before we examine the reasoning of the courts in *National Provincial Bank v Ainsworth*, it is worth asking how a court *should* approach the dispute between the occupier and the bank. In the following extract, Harris contrasts two broad types of possible approach. He opens with a quotation from Max Weber, the political economist and sociologist.

Harris, 'Legal Doctrine and Interests in Land' in *Oxford Essays in Jurisprudence*
(3rd series, eds Eekelaar and Bell, 1987, pp 168–9)

> 'The expectations of the parties are oriented towards the economic and utilitarian meaning of a legal proposition. However, from the point of view of legal logic, this meaning is an "irrational one" [...] a "lawyers' law" has never been and never will be brought into conformity with lay expectation unless it totally renounce that formal character which is immanent in it. This is just as true of the English law which we glorify so much to-day, as it has been of the ancient Roman jurists or of the methods of modern continental legal thought.'[11]

So wrote Max Weber some seventy years ago. It constitutes one of his leading conclusions about the nature of lawyers' law. It points to a contrast between formal-doctrinal (and hence circumscribed) reasoning which, he claimed, was intrinsic to professional legal thinking, and open-ended consequentialist controversy over the interpretation of legal propositions.

[10] The importance to the wider economy of such banks was dramatically emphasized by the UK government's nationalization of Northern Rock plc using powers under the Banking (Special Provisions) Act 2008. The problems faced by that bank, a major 'mortgage' lender, were *not* caused by difficulties faced by the bank in recovering loans, but the highly unusual steps taken by the government nonetheless demonstrate the importance of such banks to the wider economy.

[11] Weber, *Law in Economy and Society* (ed Rheinstein, 1954), pp 307–8.

If there are rival views as to the meaning of a legal rule, the layman expects the choice to be made according to which version will have the best outcome, all things considered. The professional lawyer, however, will settle the issue by reference to doctrinal arguments based upon existing legal materials.

I propose to examine this alleged contrast in the context of current issues concerning interests in land in English law. I shall argue that the dichotomy exists, but not in the stark Weberian form. Consequentialist interpretation is not, from the point of view of legal logic, 'irrational'. On the contrary, it constitutes the basis of one professionally accepted style of reasoning—what I call the 'utility model of rationality'. However, the 'doctrine model of rationality'—along with two other models—also plays a crucial role in the development of the law. To the extent that 'policy' can never totally displace doctrine, so long as our legal institutions retain anything like their present character, Weber was correct [. . .] if we want to ditch doctrine, we need to invent new institutions, new lawyers, and a new conception of 'law' itself.

Harris thus identifies two prominent, but contrasting, models that may inform a court's approach when dealing with cases such as *Ainsworth*. The 'utility model of rationality' is based on what Weber sees as a non-specialist's expectation of how the dispute should be decided: it essentially consists of weighing up, on one side, the practical advantages of favouring the occupier and, on the other, the practical advantages of finding for the bank. The 'doctrinal model of rationality' is based on what Weber calls 'lawyers' law': the dispute is resolved by the application of specific legal rules, not by a general weighing of the consequences of finding in favour of the occupier or the bank.

Was either of those models important in the decisions in *Ainsworth*? To test this, we can examine an extract from each of the Court of Appeal and House of Lords decisions.

5.3 THE COURT OF APPEAL'S APPROACH IN *AINSWORTH*

Although Russell LJ dissented, the majority of the Court of Appeal (Lord Denning MR and Donovan LJ) found in favour of Mrs Ainsworth. The case was the culmination of a series of decisions in which the Court of Appeal, under Lord Denning's direction, had first created and then developed a right that protected a party such as Mrs Ainsworth: the 'deserted wife's equity'. In the extract below, Lord Denning relies on those decisions to find that Mrs Ainsworth's 'deserted wife's equity' protected her not only against her husband, but also against the bank.

***National Provincial Bank v Ainsworth* (sub nom *National Provincial Bank v Hastings Car Mart and ors*)**
[1964] Ch 665 (CA)

Lord Denning MR

At 679–85

On August 17, 1957, the husband deserted his wife and children. He left the matrimonial home at 124, Milward Road, and has never returned. The wife has remained there with the children ever since. The husband went off with another woman and committed adultery with her. The bank did not know of these domestic happenings. They did not know that he had deserted his wife. [. . .]

On January 27, 1959, the wife filed a petition for judicial separation, not for divorce. The reason for judicial separation was because she wanted to remain in the house. She was advised that if she divorced her husband, she would have no security of tenure. But that, so long as she remained married to him, her position with regard to the house was reasonably secure. She did not, therefore, seek a divorce. But she petitioned for a judicial separation. She based it on her husband's adultery. (She did not base it on his desertion because the necessary three years had not elapsed.) The husband wanted a divorce, not a judicial separation. A good deal of pressure was brought on the wife to induce her to change her prayer from one of judicial separation to one of divorce. But she refused. And her main reason was because of the house. She wanted to stay there because she had no other place for herself and the children.

[Lord Denning then described the loan made by the bank and the charge it received in return over 124, Milward Road, noting that it was 'important' that, when taking the charge, the bank 'made no inquiries as to who was living in the house or on what terms.']

The wife knew nothing of these transactions with the property. She proceeded with her petition for judicial separation. It came on for hearing in March, 1961. It lasted for four days. She won completely. She was granted a judicial separation on the ground of her husband's adultery, and his cross-prayer was dismissed. On May 2, 1961, the wife obtained an order for permanent alimony against her husband on these terms: she was to be at liberty to live with the children in the house, 124, Milward Road, rent free; and in addition he was to pay her £4 6*s*. 6*d*. a week for herself, and £1 18*s*. 5*d*. a week for each child. She has lived since that time in the house, rent free, with her children; but the husband has not made the money payments due under the order. He is seriously in arrears. We were told that he has been made bankrupt. And she has had to resort to national assistance [i.e. state benefits] for herself and the children.

In February, 1962, the bank wrote to the wife demanding possession of the house. They said that they required to enforce their charge on the property and, in order to do so, required the property to be vacated. She went to solicitors, who pointed out that her husband had deserted her and the children and she had no place to go to. But the bank determined to press on with the claim [. . .] And they now seek to get possession of No. 124, Milward Road, so as to sell it with vacant possession. If they do so, it is probable (so we were told) that, at the high prices now prevailing, they may more than recoup themselves all that they have lost with interest, and there may be a balance over to go to somebody—but not to the wife, not even for the arrears of alimony. The husband, we are told, is bankrupt. Arrears of alimony are not provable in bankruptcy. [. . .]

Since the war there have been many cases in this court which have established that a wife, who has been deserted by her husband, has a right to remain in occupation of the matrimonial home unless and until the court orders her to go. The development can be easily traced. Prior to the war it was recognised that, where the husband owns the matrimonial home and is living there himself, he cannot turn his wife out. He cannot treat her as a stranger. He cannot exclude her from the house without good cause.[12] Now suppose he deserts his wife and goes off, leaving her in the matrimonial home with the children. Is he to be in any better position because he has deserted her? Can he turn her out as if she was a stranger? Clearly not. He cannot take advantage of his own wrong—of his own desertion—and use it as a ground for ejecting her. The reason is simply this: it is the husband's duty to provide the wife with a roof over her head; and, by providing the matrimonial home, he gives her an authority to be there. It is an authority which he cannot revoke, so long as it remains the matrimonial home. He certainly cannot revoke it on his desertion. Just as in olden days a deserted wife

[12] See *Shipman v Shipman* [1924] 2 Ch 140, 146, *per* Atkin LJ.

had an irrevocable authority to pledge his credit for necessaries, so in these days she has an irrevocable authority to remain in the matrimonial home. [. . .]

But the question here is: what is the position of successors in title? Suppose the husband, after deserting his wife, sells the house over her head, or mortgages it without her knowledge. Can the purchaser or mortgagee turn her out? The courts have already given some consideration to the problem. Take first the case where the husband becomes bankrupt and the property becomes vested in his trustee in bankruptcy. Can the trustee turn her out and sell the house for the benefit of the creditors? This court has held that the trustee stands in no better position than the husband and cannot turn her out: see *Bendall v. McWhirter*.[13] Take then the case where the husband sells the house to his new mistress for an agreed price. Can the mistress turn her out? It would be surprising if she could. Lynskey J. held that the new mistress cannot turn out the wife: see *Street v. Denham*.[14] Take next the case where the husband conveys the house to a purchaser, by a genuine conveyance and no sham, but intending that the purchaser should sue the wife for possession. In one case he conveyed it to his brother-in-law; in another to a speculator. Can such a purchaser turn out the wife? The judges have held that he cannot do so: see *Ferris v. Weaven*;[15] *Savage v. Hubble*.[16] Take finally this case, where the husband conveys the house to a company, which is entirely under his control, in return for fully paid shares. Can the company turn out the wife? Cross J. thought it inconceivable. 'I cannot think, however,' he said, 'that any court would allow the company to turn Mrs. Ainsworth out of the house without providing her with another home.'[17]

Such being the decided cases, what is the principle underlying them? It is the way of English law to decide particular cases and then seek for the principle. It has been suggested that those cases turned on the fact that there was a collusive arrangement between husband and purchaser. But what does this mean? Collusion is not unlawful if it is designed to achieve a lawful end by lawful means. In all these cases, if the wife has no right to remain there, the husband is fully entitled to sell the house to a purchaser or to give it away, even though the design of both is that the purchaser or donee should evict her for their own benefit. It is only because she has a right to remain that it is unlawful to enter into an arrangement designed to turn her out. Take this simple instance: suppose the husband says to a prospective purchaser: 'I cannot myself turn out my wife because I have deserted her; but if you buy from me, there is nothing to stop you getting her out, and then you can sell with vacant possession.' If such a transaction were permitted, the husband would benefit greatly because he would get a high price at his wife's expense. There is nothing wrong with such a transaction if the wife has no right to remain. But there is everything wrong with it if she has a right. It seems to me that, if the cases I have mentioned were correctly decided, as I believe them to be, it can only be on the footing that the wife *has a right* to remain in the matrimonial home—and a right which is enforceable against the successors of the husband—save, of course, a purchaser for value without notice [. . .]

At 690–91

It is said that this will put an undue burden on purchasers and mortgagees, but I do not see this. If the husband, on deserting his wife, had granted the wife a tenancy (as he might well have done) they would be bound by it if they made no inquiry of her. So, in order to be safe, they should make inquiry at the house. I do not see why it should be in the least embarrassing. All they need say is: 'As we are buying (or lending money on) the house, we wish to verify the occupation of it.' She may say: 'I live here with my husband,' or 'I am a tenant,' or 'My

[13] [1952] 2 QB 466 (CA). [14] [1954] 1 WLR 624. See also *Churcher v Street* [1959] Ch 251.
[15] [1952] 2 All ER 233. [16] [1953] CPL 416. [17] [1963] 2 WLR 1015, 1021.

husband has left me.' The husband may deny it, but his denial would not affect her right, if she was a tenant. Nor should it, if she has been deserted.

Then it is said that the wife should look after herself and should apply to the court for an injunction to stop her husband selling the house over her head[18] and register the suit as a pending action under the Land Charges Act, 1925. But what wife, I ask, on being deserted, has the knowledge or foresight to do this? More often than not she carries on in the house, hoping that her husband will return. She does not go straight off to a lawyer; and, if she does, it is not every lawyer who advises action at once. The lawyer here did not do so. Surely she can rest on the fact that she is in actual occupation of the house. The burden should not rest on her to take action, but on the purchaser to make inquiries.

The question remains: what order should be made? When should the wife go? It is a matter for the discretion of the court. On the one hand there is the bank who desire to recoup themselves all that is owing to them. On the other hand there is the wife with four children, receiving nothing from her husband, and on National Assistance. Of all the creditors of the husband, she has the most crying claim of all. It is a case where I would fain temper justice with mercy. Justice to the bank, with mercy to the wife.

[Further evidence was then filed, as to the sums owing to the bank and to the value of the house. After hearing that evidence, Lord Denning MR formulated the court's order]

At 702–3

This is clearly a case where the bank are owed a sum in the region of £2,000 and meanwhile interest is running upon it. Equally, on the other hand, the wife is living in the house with four children. Her husband only pays her £5 a week instead of the £12 which he has been ordered to pay. She receives £1 8*s.* a week by way of family allowance and £3 8*s.* 6*d.* from the National Assistance Board.

It is a matter, as the majority of this court have held, for the discretion of this court as to what order should he made for possession. We think that the bank should be protected in this way: that the interest which is payable to them on their outstanding advance should be paid and also that there should be a sum paid sufficient to enable any necessary repairs to be carried out. It seems, as far as we can judge, that the sum of £3 a week should cover these current expenses. We understand that the value of the house may be somewhere in the region of £2,500 or £2,600. That means that the principal owing to the bank is covered. So the bank should be fully covered in every respect. In these circumstances we think, exercising our discretion, that it would be quite reasonable for the wife to be able to stay in the house for a period, which we fix now at twelve months. At the end of one month she ought to start paying the sum of £3 a week and pay £3 a week thereafter. We hope that will give her an opportunity during the month to obtain assistance from the National Assistance Board, which it appears likely she will be able to get, so as to be able to pay that sum. The bank should keep an account relative to the £3 a week, remembering that the greater portion of it is interest paid by her and they can deal with any tax position arising out of it, and they will also no doubt, for the sake of their security, deal with any question of repairs. In addition to that period of twelve months, which we fix, we also think it right to give liberty to apply, for instance, to the bank if the payments are not made so that they can ask for possession, but liberty also to the wife to apply. It is contemplated that there may be an appeal to the House of Lords in this case, and if the payments are made, it would seem reasonable that she should remain in possession at least until the House of Lords have given their decision. But, at all events, what we fix is an order for possession at the end of a period of twelve months: but

[18] See *Lee v Lee* [1952] 2 QB 489.

as from one month from today, £3 a week is to be paid by the wife to the bank, liberty to both parties, to apply in case of need.

In analysing Lord Denning's approach, we can use both of the models of legal reasoning identified by Harris: the 'utility model' and the 'doctrinal model'. In one way, Lord Denning appeals to the doctrinal model: he argues that protecting a deserted wife against a bank involves only a logical, incremental extension of the existing case-law. In another, more significant way, however, his Lordship's approach is motivated by the utility model: by the desire to find what Harris calls the 'best outcome, all things considered'. Firstly, consider Lord Denning's analysis of the facts of the case: he emphasizes the vulnerability of Mrs Ainsworth and her children and contrasts their innocence not only with the adultery of Mr Ainsworth but also with the laxity of the bank, who failed to make its own inspection of the house before acquiring a charge over the land. Secondly, and most importantly, Lord Denning's conclusion ensures that the court has a very wide discretion to reach whatever result it considers just. To find that Mrs Ainsworth's deserted wife's equity binds the bank does *not* mean that the bank are necessarily denied a possession order. For the effect of that equity can only be determined by a court, considering all the facts (including the parties' respective financial positions) and combining '[j]ustice to the bank, with mercy to the wife'. On this approach, then, the ultimate resolution of the case depends entirely on the judges' view of what is 'the best outcome, all things considered'. As we will see in the next extract, however, the House of Lords decisively rejected this view.

To understand Lord Denning's approach, it is important to be aware of the social and economic context in which the courts developed the concept of the 'deserted wife's equity'. This context is discussed in the following extract.

Dunn, '*National Provincial Bank v Ainsworth* (1965)' in *Landmark Cases in Equity* (eds Mitchell and Mitchell, 2012)

In a decade leading up to legislative reform on equal pay and sex discrimination, concern with the economic vulnerability of women had become a worldwide concern. The legal, social and fiscal vulnerability of the abandoned spouse will be evident in any age, but for the wife was particularly acute in the 1950s and 1960s. In an age which saw the beginnings of an erosion of traditionalist values and attitudes towards the family, rising divorce rates and ultimately a liberalisation of divorce laws, this was a period in which wives tended not to be in circumstances which would allow them to establish financial independence or housing security. Whilst there was a rise in numbers of women going out to work and earning a separate income, wage rates in this period were insufficient to afford independent housing. The post-war housing shortage also meant that there was a dearth of affordable housing, and for a deserted wife (and her children) the possibility of homelessness was a real one. Against this background, wives' vulnerability was addressed directly by Lord Denning within the case law as a process of welfare-based discretionary justice to prevent a husband from 'taking advantage of his own wrong'.[19]

[19] *National Provincial Bank v Ainsworth* (sub nom *National Provincial Bank v Hastings Car Mart* [1964] Ch 665 (CA) 683 (Lord Denning MR). Also accepted was the emotional cruelty which could occur in permitting a husband to sell the matrimonial home to his new partner over the head of his wife, as occurred for example in *Street v Denham* [1954] 1 WLR 624.

5.4 THE HOUSE OF LORDS' APPROACH IN *AINSWORTH*

A unanimous House of Lords differed from the majority of the Court of Appeal as to the answer to be given to the crucial *content* question: did Mrs Ainsworth's 'deserted wife's equity' count as a property right, capable of binding not only Mr Ainsworth but also a third party such as the bank? The House of Lords thus rejected Lord Denning's analysis, not only allowing the bank's appeal but also overruling the previous Court of Appeal and first instance decisions, relied on by Lord Denning, that had allowed a 'deserted wife's equity' to bind a party other than the relevant husband.[20]

National Provincial Bank v Ainsworth
[1965] AC 1175, HL

Lord Upjohn

At 1233–4

In this case your Lordships are dealing with essentially conveyancing matters. It has been the policy of the law for over a hundred years to simplify and facilitate transactions in real property. It is of great importance that persons should be able freely and easily to raise money on the security of their property. [Lord Upjohn then considered what would happen if, before making such a secured loan, the bank were to check the husband's property and ask the deserted wife what rights she had in that land] The answer 'I am a deserted wife' (if given) only gives notice of a right so imprecise, so incapable of definition, so impossible of measurement in legal phraseology or terms of money that if [it] is to be safe the [bank] will refuse to do business and much unnecessary harm will be done [. . .] It does not seem to me that an inquiry as to the marital status of a woman in occupation of property is one which the law can reasonably require to be made; it is not reasonable for a third party to be compelled by law to make inquiries into the delicate and possibly uncertain and fluctuating state of affairs between a couple whose marriage is going wrong. Still less can it be reasonable to make an inquiry if the answer to be expected will probably lead to no conclusion which can inform the inquirer with any certainty as to the rights of the occupant. These considerations give strong support to the opinion I have already expressed that the rights of the wife must be regarded as purely personal between herself and her husband.

Lord Wilberforce

At 1241–3

My Lords, the doctrine of the 'deserted wife's equity' has been evolved by the courts during the past 13 years in an attempt to mitigate some effects of the housing shortage which has persisted since the 1939–45 war. To a woman, whose husband has left her, especially if she has children, it is of little use to receive periodical payments for her maintenance (even if these are in fact punctually made) if she is left without a home. Once possession of a house has been lost, the process of acquiring another place to live in may be painful and prolonged. So, even though, as is normally the case, the home is in law the property of the husband, the

[20] See the House of Lords decision: [1965] AC 1175 at 1252, *per* Lord Wilberforce. The decisions in *Bendal v McWhirter* [1952] 2 QB 466 and *Street v Denham* [1954] 1 WLR 624 were overruled, and the decision in *Ferris v Weaven* [1952] 2 All ER 233 was explained on a different basis—for that explanation, see Chapter 4, section 3.1.

courts have intervened to prevent him from using his right of property to remove his deserted wife from it and they have correspondingly recognised that she has a right, or "equity" as it has come to be called, which the law will protect, to remain there.

This case relates to one aspect, and one aspect only, of [the deserted wife's equity]. No question arises here as to any claim which a deserted wife may have against her husband: all that we are concerned with is the right of a deserted wife to remain in possession as against a third party, claiming, in good faith, under the husband. And the issue is even narrower than that: it relates only to the position of a third party whose title arises subsequently to the desertion [. . .]

The issue is thus a narrow one, affecting a small proportion only of those deserted wives who are left in occupation of their husband's house. Nevertheless as to them, as to [Mrs Ainsworth], issues of importance, and probably of hardship, are involved. The ultimate question must be whether such persons can be given the protection which social considerations of humanity evidently indicate without injustice to third parties and a radical departure from sound principles of real property law [. . .]

The appeal raises two questions, one of general, the other of more limited scope.[21] The general question is whether the respondent Mrs. Ainsworth as the deserted wife of her husband, the owner of the house, has any interest in or right over it which is capable of binding the bank as the proprietor of a legal interest in the land. This is a general question of real property law [. . .]

I turn to the first and more general question: what is the nature of the deserted wife's interest, or right? [Lord Wilberforce then analysed the duties imposed on Mr Ainsworth by the deserted wife's equity: his conclusion is set out below]

At 1247–8

The position then, at the present time, is this. The wife has no specific right against her husband to be provided with any particular house, nor to remain in any particular house. She has a right to cohabitation and support. But, in considering whether the husband should be given possession of property of his, the court will have regard to the duty of the spouses to each other, and the decision it reaches will be based on a consideration of what may be called the matrimonial circumstances. These include such matters as whether the husband can provide alternative accommodation and if so whether such accommodation is suitable having regard to the estate and condition of the spouses; whether the husband's conduct amounts to desertion, whether the conduct of the wife has been such as to deprive her of any of her rights against the husband. And the order to be made must be fashioned accordingly: it may be that the wife should leave immediately or after a certain period: it may be subject to revision on a change of circumstances.

The conclusion emerges to my mind very clearly from this that the wife's rights, as regards the occupation of her husband's property, are essentially of a personal kind: personal in the sense that a decision can only be reached on the basis of considerations essentially dependent on the mutual claims of husband and wife as spouses and as the result of a broad weighing of circumstances and merit. Moreover, these rights are at no time definitive, they are provisional and subject to review at any time according as changes take place in the material circumstances and conduct of the parties.

On any division, then, which is to be made between property rights on the one hand, and personal rights on the other hand, however broad or penumbral the separating band between

[21] [The second question was the *defences* question: even if Mrs Ainsworth's right counted as a property right and was thus capable of binding a third party, did the bank have a defence to that right? We will consider the particular defence raised by the bank in Chapter 12, section 3.2.]

these two kinds of rights may be, there can be little doubt where the wife's rights fall. Before a right or an interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability. The wife's right has none of these qualities, it is characterised by the reverse of them.

5.5 COMPARING THE APPROACHES OF THE COURT OF APPEAL AND THE HOUSE OF LORDS

It would be over-simplistic to say that the difference in the results reached by the Court of Appeal and the House of Lords depended entirely on the former's adoption of the 'utility model' of reasoning, whereas the latter favoured the 'doctrinal model'. Firstly, as noted above, Lord Denning did at least pay lip-service to the doctrinal model, by claiming that the Court of Appeal's decision was a logical extension of the pre-existing case-law as to the effect of a deserted wife's equity. Secondly, we can see the influence of the utility model in the extract, set out above, from Lord Upjohn's speech. The divergence from Lord Denning's approach is that Lord Upjohn attaches greater significance to the practical disadvantages of making it harder for banks to take an unencumbered security over land. Thirdly, in the first paragraph of the extract set out above, Lord Wilberforce acknowledges the social and economic factors that may well have motivated the Court of Appeal's decision.

It thus seems that the approaches of each of Lord Denning, Lord Upjohn and Lord Wilberforce can be seen as combining, in different proportions, elements of each of the utility model and the doctrinal model. This should be no surprise; we should not expect any judge deciding a difficult case wholly to ignore either the wider policy questions or the technical legal rules. It does seem, nonetheless, that in Lord Wilberforce's speech, the doctrinal model is more prominent: in particular, there is a concern to avoid '*a radical departure from sound principles of real property law.*'[22] In other words, a decision in favour of Mrs Ainsworth can be made only if it can be reconciled with the doctrinal, technical rules of land law. And, according to Lord Wilberforce, those rules meant that Mrs Ainsworth's right could count as a property right (a right capable of binding the bank) only if it was '*definable, identifiable by third parties, capable in its nature of assumption by third parties, and ha[d] some degree of permanence or stability*'.[23] Because Mrs Ainsworth's right did not have those features, the *content* question was decided against her and the bank was therefore free to remove her from her home.

It should be noted that, whilst the House of Lords was unanimous in its decision, each of Lord Cohen[24] and Lord Upjohn[25] called upon Parliament to consider legislative reform of the law, to improve the protection afforded to a deserted wife against third parties. In contrast, Lord Denning clearly felt that such protection could be developed by judicial means. This demonstrates an important point: a judge's view as to the constitutional limits on judges' freedom to create and develop the law may have an important influence on his or her approach. If, for example, a judge takes a fairly strict view as to

[22] This point is noted by Harris: see 'Legal Doctrine and Interests in Land' in *Oxford Essays in Jurisprudence* (3rd series, eds Eekelaar and Bell, 1987, n 60).

[23] [1965] AC 1175, 1248. [24] Ibid, 1228 [25] [1965] AC 1175, 1241.

those limits, the doctrinal model may be more appealing. As Harris noted, concerns about the 'separation of powers' and the 'rule of law' may be used to limit reliance on the utility model: '*If judges resolve an uncertain question about the present law by an assessment and balancing of social consequences, are they not trespassing on the functions of the legislature?*'.[26]

Certainly, at a number of points in this book, we will come across land law rules that are subject to disapproval, not only by commentators but also by the judges themselves. At such points, it is important to consider not only *if* the rules should be changed, but also *how* they should be changed. For example, in Chapter 16, section 2.3.2, we will examine a recent Supreme Court decision concerning the application of the acquisition question to interests in the family home; and in Chapter 22, section 2.7, we will examine a recent Supreme Court decision concerning the application of the content question to leases. Each case raised the question of whether it would be better to reform existing land law rules through judicial intervention or, instead, by legislation.

5.6 DEVELOPMENTS AFTER *AINSWORTH*: RIGHTS OF OCCUPATION

Parliament did not ignore Lord Cohen and Lord Upjohn's call for legislation to protect a party such as Mrs Ainsworth. The Matrimonial Homes Act 1967 established: (i) that a spouse has a (qualified) statutory right to occupy a home owned by his or her partner; and (ii) that the statutory right to occupy is capable of binding a third party, such as a bank, *if* and *only if* the spouse registers the right of occupation before the third party acquires its right. The 'spouse's right to occupy' thus replaces the 'deserted wife's equity': the statutory right is extended to husbands, and is not limited to spouses who have been deserted. Indeed the statutory right to occupy, now found in the Family Law Act 1996,[27] was extended to civil partners by the Civil Partnership Act 2004.[28]

Parliament thus reformed the law by coming up with a specific, tailored solution that it believed formed the best compromise between the need to protect an occupying spouse and the need to protect a third party such as a bank.[29] That compromise could not have been reached by purely judicial reform, as it avoids the doctrinal question of whether the right to occupy counts as a property right; instead, the right is allowed to bind a third party, such as a bank, *only* if it is registered. This is a way of addressing Lord Upjohn's concern, expressed in the extract above, that a bank should not have to undertake exhaustive or delicate enquiries: instead, the bank need only check the relevant register. If the spouse's right is not registered, then, even if the spouse is in occupation of the home when the bank acquires its right, the bank will not be bound. And, even if the right is registered, a court still has the discretion to allow a third party to remove the occupying spouse.[30]

[26] Harris, 'Legal Doctrine and Interests in Land' in *Oxford Essays in Jurisprudence* (3rd series, eds Eekelaar and Bell, Oxford: OUP, 1987), p 171.

[27] Family Law Act 1996, ss 30–33.

[28] Civil Partnership Act 2004, s 82, Sch 9.

[29] Lord Denning, it is interesting to note, regarded Parliament's reforms as a 'good result': see Denning, *The Due Process of Law* (London: Butterworths, 1980), p 222.

[30] See Family Law Act 1996, s 33: *Kaur v Gill* [1988] Fam 110 provides an example of the court exercising that discretion in favour of a third party.

5.7 DEVELOPMENTS AFTER *AINSWORTH*: PROPERTY RIGHTS IN THE FAMILY HOME

Whilst the Matrimonial Homes Act 1967 eventually settled the specific dilemma arising in *National Provincial Bank v Ainsworth*, the wider issues raised by that case have certainly not gone away. First, the issue of women's rights in relation to family homes remains prominent, and the courts continue to be confronted by the question of whether the existing land law rules respond adequately to changing social and economic factors. Indeed, as we will see in Chapter 16, the question now relates not just to the rights of wives, but also to those of unmarried partners, and the focus has now shifted from the content question to the acquisition question. In other words, the question is not whether a 'deserted wife's equity', based on a wife's right to maintenance from her husband, can count as a property right and so bind a third party. Rather, the question now is how can a partner (married or unmarried) acquire a recognized property right: a share of ownership of the family home? Indeed, as the following extract indicates, this question was already an important one, even at the time of the *Ainsworth* litigation.

Kahn-Freund, 'Recent Legislation on Matrimonial Property' (1970) 33 MLR 601

At 606–7

The acquisition for family use of durable assets, immovable [i.e. land] and movable, is one of the dominant features of economic life in the Western world [. . .] Very often such acquisition is made possible through much improved facilities for married women to participate in gainful employment, owing to the state of the labour market, owing to family planning, and also owing to that mechanisation of the household which is in its turn the result of the ability of the family to use part of its current income towards the acquisition of durable assets [. . .] Mrs X may, by her thrift as a housewife, contribute as much to the acquisition of the matrimonial home or of the family car or the television set as her neighbour Mrs Y does by working in a factory or in an office. The maintenance obligation which the law imposes on the husband used to be considered as an answer to the question raised by the economic dependence of wives upon husbands which results from the arrangements of nature rather than those of society. As a housewife and as a mother the wife was 'rewarded' in this way. This approach to the problem had a certain plausibility as long as the large majority of married couples were compelled to spend their income on current needs of food, clothing and shelter for themselves and their children. The link between the law of matrimonial property and the law of matrimonial maintenance is as close today as ever it was, but how can one seriously assert that supply by the husband of the means to cover these elementary needs can be an equivalent to the wife's economic contribution (in whatever form) where a large part of the contribution is destined for the acquisition of durable goods, and especially of a home for the family?

[. . .] Today the problem of sharing between the spouses and of the protection of the non-earning housewife (which is part of it) can no longer be solved through the law of maintenance. It must comprise her share in what has been called 'household property' or 'family assets'. Much the most important of these is the family home, whether it be freehold or rented property.

Kahn-Freund's analysis must now, of course, be extended to unmarried cohabiting partners. His central point is that, even by the middle of the 1960's, the 'deserted wife's equity' was

an anachronism. The equity was an elaboration of a husband's historic duty to maintain his wife: Lord Denning drew an explicit link between the equity and the wife's power 'in olden days' to pay for necessaries (such as food) by using her husband's credit.[31] This raises a real difficulty for Lord Denning's idea that the equity could bind a third party such as the bank—if the wife's right is ultimately based on a husband's duty to maintain his wife, how can the right also bind a third party, such as a bank? After all, the bank has no such duty to maintain Mrs Ainsworth. This difficulty, of course, was exposed when the case reached the House of Lords.

As Kahn-Freund suggests, a focus on maintenance is outdated: the real issue is as to the ownership of property acquired by cohabiting partners. And land, chiefly the home in which the partners live, is by far the most valuable and significant piece of such property. It may be, for example, that formal ownership of that land is vested in only one of the partners; but, as Kahn-Freund suggests, there may be strong arguments that the other partner should nonetheless have a share of the benefit of the property. It is therefore no surprise that, as we will see in Chapter 16, the modern focus of the law is on whether a partner has *acquired* a recognized property right in the family home. As we will see, however, the general issues raised by the *Ainsworth* litigation remain important. The dilemma faced by judges and Parliament is as acute as ever, and the tension between the utility model and the doctrinal model remains unresolved.

6 CONCLUSION

Although the *Ainsworth* litigation focussed on one particular corner of land law, it teaches us a number of general lessons. Firstly, as we noted in section 1 above, land law is clearly very important in practice: the outcome of the litigation had significant practical consequences not only for Mrs Ainsworth and the National Provincial Bank, but also for thousands of other occupiers and mortgage lenders sharing their positions.

Secondly, the case focused on whether the occupier had a *private right* to use land that she could assert against the bank: did Mrs Ainsworth have an interest in land (i.e. a property right) that could bind the bank? That question can usefully be broken down into three further questions: the *content*, *acquisition*, and *defences* questions. The *content* question considers the nature of a party's right and, in particular, asks if that right counts as a property right. The *acquisition* question concerns the means by which a party can acquire a private right to use land and, in particular, how a property right can be acquired. The *defences* question asks whether a party later acquiring a private right to use land may have a defence to a pre-existing property right held by another party. The *Ainsworth* litigation concerned the first of those questions; as suggested in section 5.7 above, its modern day equivalents, to be examined in Chapter 16, focus on the second of those questions.

The simple facts of *Ainsworth* demonstrate a tension that runs throughout land law: the tension between two parties who each claim competing rights to use the land. At a more abstract level, the judges' differing approaches to the case show a further tension: between a 'utility model' (in which a court should make the decision having what it regards as the best practical consequences) and a 'doctrinal model' (in which a court should make the decision that best accords with the existing legal rules).

[31] *National Provincial Bank v Ainsworth* (sub nom *National Provincial Bank v Hastings Car Mart* [1964] Ch 665 (CA) 683.

This leads us to perhaps the most important lesson of *Ainsworth*. Imagine that you are employed to act as a lawyer for one of the parties in the case. If acting for Mrs Ainsworth, you may want to emphasize the social importance of land and the need to allow her and her children to continue living in their home. If you are instead acting for the bank, you may want to focus on the need to keep the cost of mortgages down by ensuring that banks do not need to make time-consuming enquiries before making a mortgage loan. Either way, however, it will not be enough simply to go to court and make those general points. If you want to do the best job for your client, it is vital to understand, and to be confident in using, the doctrinal rules that make up land law.

This should not be taken to mean that the 'utility model' is irrelevant or that there is no need to consider the practical merits or wider justice of the doctrinal rules of land law. On the contrary, the social importance of land law means that it is vital not only to understand land law rules, but also to evaluate them. After all, as we noted in sections 5.6 and 5.7 above, and as we will see throughout this book, land law, like other areas of law, necessarily changes over time; the crucial question is whether those changes are for the better.

QUESTIONS

1. In what ways does land differ from other physical things? What consequences do those differences have for land law?
2. What is 'land law'? Does it involve all legal rules related to the use of land?
3. Harris suggests that the 'utility model' and the 'doctrinal model' may be useful in understanding particular approaches to land law. What are the differences between the two models?
4. Why did the Court of Appeal and House of Lords reach differing results in *National Provincial Bank v Ainsworth*? In your view, what should the result be in such a case?
5. Land law has a reputation as a subject that is full of technical rules. Even if that reputation is true, is it necessarily a bad thing?

FURTHER READING

Birks, 'Five Keys to Land Law' in *Land Law: Themes and Perspectives* (eds Bright and Dewar, Oxford: OUP, 1998)

Dunn, '*National Provincial Bank v Ainsworth* (1965)' in *Landmark Cases in Equity* (eds Mitchell and Mitchell, Oxford: Hart, 2012)

Harris, 'Legal Doctrine and Interests in Land' in *Oxford Essays in Jurisprudence* (3rd series, eds Eekelaar and Bell, Oxford: OUP, 1987)

Kahn-Freund, 'Recent Legislation on Matrimonial Property' (1970) 33 MLR 601

Law Commission Report No 307, *Cohabitation: The Financial Consequences of Relationship Breakdown* (2007, Pts I and II)

McFarlane, *The Structure of Property Law* (Oxford: Hart, 2008, Pt A)

2

WHAT IS LAND?

CENTRAL ISSUES

1. In Chapter 1, we looked at the special features of land and saw that land law is a special part of property law. In this chapter, we will look more closely at the legal meaning of land.
2. Firstly, in section 1 of this Chapter, we will look at the fundamental question of what it means to say that land is a form of property. We will see that it is important to focus not on the land itself, but rather on the relationship between a person and the land. That relationship can take the form of a right: so, if a party claims that he or she owns particular land this is a claim that he or she has a property right in that land.
3. Secondly, in section 2 of this Chapter, we will look in more detail at what it means to say that someone owns 'land'. We will see that an 'owner' of land has a particular type of property right in that land: a freehold or a lease. The rights of such an owner of land are not limited to the physical surface of the land: they extend both downwards and upwards from that surface. We will also consider the extent to which an owner's right to exclusive control of land entails a right to exclusive control of objects attached to that land, or found in or on that land.
4. We noted in Chapter 1 that the focus of land law, as a distinct subject, is on property rights to use land. In this Chapter, we will begin to see some of the questions with which the courts have to deal in deciding on the nature and extent of parties' property rights. We will look at these questions in more detail in Chapters 4 and 5.

1 LAND AS A FORM OF PRIVATE PROPERTY

In Chapter 1, section 1, we noted that rules relating to land can be seen throughout the law, not only in land law. The following extract, taken from a seminal constitutional law case, provides an example of this. It is important to note that the case does not only concern the protection of land; the claimant also complained of the theft of some of his papers. Those two aspects of the case are not separated out by the court: as we will see, the case depends not on the special features of land, but rather on the protection given to *any* property right.

Entick v Carrington
(1765) 2 Wils KB 274, Common Pleas

Facts: Carrington and three others (messengers to the King) entered the house of Entick without his consent, searched it, and removed various papers. They were acting under a warrant issued by the Earl of Halifax, one of the King's Secretaries of State. The warrant authorized them to search for papers at the house of Entick, because he was '*the author of, or one concerned in the writing of, several weekly very seditious papers, entitled* The Monitor *or* British Freeholder *containing gross and scandalous reflections and invectives upon His Majesty's Government, and upon both Houses of Parliament*'.

Lord Camden, Lord Chief Justice, considered whether the warrant could authorize the actions of Carrington and the other messengers.

Lord Camden, LCJ

At 291–2

The warrant in our case was an execution in the first instance, without any previous summons, examination, hearing, or proof that he [Entick] was author of the supposed libels; a power claimed by no other magistrate whatsoever; [. . .] it was left to the discretion of these defendants to execute the warrant in the absence or presence of [Entick], when he might have no witness present to see what they did; for they were to seize all papers, bank bills, or any other valuable papers they might take away if they were so disposed; there might be nobody to detect them.

[W]e were told by one of these messengers that he was obliged by his oath to sweep away all papers whatsoever; if this is law it would be found in our books, but no such law ever existed in this country; our law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without leave; if he does he is a trespasser, though he does no damage at all; if he will tread upon his neighbour's ground he must justify it by law.

The defendants have no right to avail themselves of the usage of these warrants since the Revolution [. . .] we can safely say there is no law in this country to justify the defendants in what they have done; if there was, it would destroy all the comforts of society; for papers are often the dearest property a man can have [. . .]

We shall now consider the usage of these warrants since the Revolution; if it began then, it is too modern to be law; the common law did not begin with the Revolution; the ancient constitution which had almost been overthrown and destroyed was then repaired and revived; the Revolution added a new buttress to the ancient venerable edifice: the Kings Bench lately said that no objection had ever been taken to general warrants, they have passed *sub silentio*:[1] this is the first instance of an attempt to prove a modern practice of a private office to make and execute warrants to enter a man's house, search for and take way all his books and papers in the first instance, to be law, which is not to be found in our books. It must have been the guilt or poverty of those upon whom such warrants have been executed, that deterred or hindered them from contending against the power of the Secretary of State, or such warrants could never have passed for lawful till this time [. . .]

Our law is wise and merciful, and supposes every man accused to be innocent before he is tried by his peers: upon the whole, we are all of opinion that this warrant is wholly illegal and void. One word more for ourselves; we are no advocates for libels, all Governments must set their faces against them, and whenever they come before us and a jury we shall

[1] [Under silence; without comment.]

> set our faces against them; and if juries do not prevent them they may prove fatal to liberty, destroy Government and introduce anarchy; but tyranny is better than anarchy, and the worst Government better than none at all.

When analysing *Entick v Carrington*, it is useful to bear in mind the Fourth Amendment to the Constitution of the United States:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

That constitutional guarantee was passed, in large part, to prevent an abuse of governmental power that had occurred in the 1760s, when tax collectors had been given a very wide power to enter and search private homes. It is worth noting that, in *Entick*, the reasoning of Lord Camden was not based on a *special* limit on governmental power, such as that later established by the Fourth Amendment, but rather on the *general* rules of property law. More precisely, because Entick had a property right in relation to both his house and papers, *no one* could interfere with those things without showing some lawful authority to do so. So, even without an explicit constitutional guarantee, Entick's land, like his papers, could be seen as private property, safe from unjustified interference.

In a case such as *Entick*, it is tempting to say that the land and papers were each 'Entick's property'. As the following extract shows, however, that general description may not, in fact, be an accurate picture of the legal position.

Gray and Gray, *Elements of Land Law* (5th edn, 2009, pp 86–8)

> Few concepts are quite so fragile, so elusive and so frequently misused as the notion of property. There is a pervasive element of shared deception in our normal property talk: property is not theft, but *fraud*. We commonly speak of property as if its meaning were entirely clear and logical, but property is a conceptual mirage which slips tantalisingly from view just when it seems most solidly attainable. Amongst the misperceptions which dominate the conventional analysis of both lay persons and lawyers is the lazy myth that property is a 'monolithic notion of standard content and invariable intensity'.[2] Our daily references to property therefore tend to comprise a mutual conspiracy of unsophisticated sematic allusions and confusions, which we tolerate—frequently, indeed, do not notice—largely because our linguistic shorthand commands a certain low-level communicative efficiency [...]
>
> It remains painfully true that most of our everyday references to property are unreflective, naïve and relatively meaningless. In our crude way we are seldom concerned to look behind the immediately practical or functional sense in which we employ the term 'property' in relation to land. What does it really mean to say that Julian Bishop 'owns' 25 Mountfield Gardens or that these premises are his 'property'? [...]

[2] See *Yanner v Eaton* (1999) 201 CLR 351 (High Court of Australia) at [19], *per* Gleeson CJ, and Gaudron, Kirby, and Hayne JJ.

The mistaken reification of property[3]

As the High Court of Australia acknowledged in *Yanner v Eaton*,[4] much of our false thinking about property 'stems from the residual perception that "property" is itself a thing or resource rather than a legally endorsed concentration of power over things and resources.' The root of the difficulty lies in the fact that non-lawyers (and often lawyers) tend to speak rather loosely of 'property' as the *thing* which is owned (eg 'that book/car/house is my property'). Whilst this reification of property is harmless enough in casual conversation, it has the effect of obscuring important features of property as a legal and social institution.

Property is not a thing but a power relationship

Deep at the heart of the phenomenon of property is the semantic reality that 'property' is not a thing, but rather the condition of being 'proper' to a particular person (eg 'That book/car/house is *proper* to me'). For serious students of property, the beginning of truth is the recognition that property is not a thing but a *power relationship*—a relationship of social and legal legitimacy existing between a person and a valued resource (whether tangible or intangible). To claim 'property' in a resource is, in effect, to assert a significant degree of control over that resource. Moreover, as Karl Renner once said, '[p]ower over matter begets personal power'.[5] 'Property' ultimately articulates a political relationship between persons. Land—the physical substratum of all human interaction—becomes a vital component of all social and economic engineering.

All property talk is value-laden

All property references are, at some level, a statement about the social legitimacy attaching to the claim in question. The etymological links between terms such as 'property', 'proper', 'appropriate', and 'propriety' underscore the value-laden complexity of inter-relating nuances of property talk. Genuine property discourse thinly conceals a subtext of social propriety. The law of property incorporates a series of critical value judgments, reflecting the cultural norms, the social ethics and the political economy prevalent in any given community. It is inevitable that property law should serve in this way as a vehicle for ideology, for 'property' has commonly been the epithet used to identify that which people most greatly value. The terminology of 'property' also points more subtly to relationships of dependence, for dependence is the inescapable outcome of unequal distributions of that which is valued. The terms 'property' and 'dependence' are merely positive and negative descriptions of existing distributions of control over socially valued resources.

Gray and Gray make a number of important points: some of them can assist us to understand, internally, how land law works; others can help us to stand outside land law and evaluate the system. The first crucial point is that, to understand property as it is used in legal contexts, we cannot equate it with physical things: so, in *Entick v Carrington*, it is not enough simply to say that the land or papers were Mr Entick's property; instead, we need to make clear that there is something *in between* Mr Entick and those physical things. Gray and Gray

[3] [Reification means 'turning into a thing'—the argument here is that it is a mistake to equate 'property' as a concept or organizing idea with physical things, such as land or cars.]

[4] [(1999) 201 CLR 351 at [18], *per* Gleeson CJ, and Gaudron, Kirby and Hayne JJ.]

[5] *The Institutions of Private Law and Their Social Functions* (ed O Kahn-Freund, 1949), p 107.

develop this point by focusing on property as a 'power relationship' between, say, Mr Entick and his land or papers. A different way of developing the point (linking it into our discussion of the scope of land law in Chapter 1, section 2) is to say that what stands between Mr Entick and his land or papers is a *right*. In defining the *content* of that right, we can build on Gray and Gray's definition of the content of the 'power relationship': it is a right to a '*significant degree of control over that resource*'.

So, the first vital lesson to take from Gray and Gray's analysis is that we cannot always equate 'property' with 'things'. If we say that the house broken into by Mr Carrington was Mr Entick's property, what we really mean is that Mr Entick had a particular type of *right* in relation to that land—a right that gave him a significant degree of control over that land. We can describe Mr Entick's right as a *property right* in relation to that land. We can therefore say that land (like papers) counts as a form of private property in the sense that land is a resource in relation to which a private individual (such as Mr Entick) can have a property right. This means that, in thinking about the notion of property in land law, we really need to focus on the concept of a *property right*. We will examine the nature of a property right in land in more detail in Chapters 4 and 5. A key feature of such a right is that imposes a prima facie duty on the rest of the world. In *Entick*, the King's messengers, along with everyone else in the world, were thus under a duty to Mr Entick, and that duty arose because Mr Entick had a property right in relation to both the land and papers.

In the extract above, Gray and Gray also point out the assumptions that we may make when saying, for example, that the land and papers are Mr Entick's property. That formulation implies that the land and papers are *proper to* Mr Entick—that is, they are due to, or appropriate to, him. That point is made clearer if, instead of describing the land and papers as his property, we say that Mr Entick has a property right in relation to them. The terminology of 'rights' is also, to use Gray and Gray's term, 'value-laden' because it implies something about the legitimacy of Mr Entick's claim.

At this point, it is very useful to distinguish between two different kinds of legitimacy. In *Entick* itself, Mr Entick was not concerned to show that, for moral, social, or economic reasons, it was appropriate for him to have a significant degree of control over the land or papers; his only concern was to show that his claim to that control was *legally* legitimate—that is, to show that he had a right that the courts were prepared to protect and enforce. His focus was therefore on showing that the rules of property law gave him a property right in relation to both the land and the papers. When considering his claim from that internal perspective, we can therefore limit ourselves to looking at the land law rules and seeing if they do, indeed, give him a property right in relation to the land in question. We can, however, say that Mr Entick does have such a property right and still consider whether, for moral, social, or economic (or other) reasons, Mr Entick *should* have that degree of control over the land or papers. It is at this point that the '*critical value judgements*' referred to by Gray and Gray play a very important role.

Of course, it would be naive to think that these two kinds of legitimacy can, or should, be kept firmly separate. After all, as judges or legislators develop the law, they have to keep in mind the wider (moral, social, economic, etc.) effects of the legal rules. In fact, the contrast between two kinds of legitimacy links in to the contrast between the two approaches that we examined in Chapter 1, section 5.2—that is, what Harris called the 'doctrinal model' and the 'utility model'. The first question in *Entick* is whether Mr Entick's claim to a property right in the land and papers is legally legitimate: does it accord with the doctrinal rules of property law? The second question, is whether, taking into account a broad range of considerations (e.g. moral, social, economic, etc.), it would be better or worse to recognize that Mr Entick

has such a right: does recognizing such a right have better consequences than not recognizing it? And, as we saw in the previous chapter, the 'utility model' can play a role not only when Parliament decides how to reform the law for the future, but also when judges decide on the current state of the law.

2 THE MEANING OF 'LAND'

2.1 THE PHYSICAL REACH OF LAND

In the extract set out above, Gray and Gray raise a fundamental question: '*What does it really mean to say that Julian Bishop "owns" 25 Mountfield Gardens or that these premises are his "property"?*' As we have seen, the first step is to understand that statement as simply a shorthand for the more accurate analysis: Julian Bishop has a property right in relation to that land. After all, as we noted in Chapter 1, section 3, if Julian Bishop puts 25 Mountfield Gardens up for sale and you decide to put a bid in, then you are not bidding for the land as such; instead, you are bidding for his property right in that land—either a freehold or a lease. Gray and Gray's question therefore boils down to a question about the *content* of a freehold or a lease: if you acquire such a right, what rights to use the land will you get? We will examine that question in Chapter 4, section 3, when we focus on the nature of the freehold and the lease.

There is also a more practical side to the content of your freehold or lease. It will give you rights to use the land—but what do we mean by 'the land'? You might think of yourself as buying 'a house', but, clearly, if you get Julian Bishop's freehold or lease, you get more than the house. After all, if the house were to burn down, you would still have your freehold or lease. Indeed, the decision of McNair J in *Kelsen v Imperial Tobacco Co*[6] shows that a party with a property right in land also has rights in relation to the sky.

Mr Kelsen had a lease of a tobacconist's shop in City Road, Islington, London. The Imperial Tobacco Co maintained a large advertising sign that projected into the air above that shop. Initially, Mr Kelsen made no complaint, but he later demanded that the sign be removed. The company refused, arguing that, because its sign did not substantially interfere with Mr Kelsen's enjoyment of his land, the tort of nuisance was not made out. McNair J, however, ordered the sign to be removed: Mr Kelsen's lease gave him a right to exclusive control not only of the shop itself, but also of the air above it. As a result, the tobacco company, like the rest of the world, had a prima facie duty not to encroach on that space without Mr Kelsen's consent. An injunction could therefore be granted to prevent the company's ongoing act of trespass.

Whilst the *Kelsen* decision deals with a land owner's rights above the ground, an American case, *Edwards v Lee's Administrator*,[7] provides a memorable example of a land owner's rights below the ground. Mr and Mrs Edwards owned land in Kentucky, near the famous Mammoth Cave. They discovered a spectacular cave under their own land: they dubbed it the 'Great Onyx Cave', charged tourists for entry, and built a hotel on their land. The only entrance to the cave was on the Edwards' land, but a third of the cave was in fact situated beneath the land of Lee, one of the Edwards' neighbours. As Lee had not given permission for visitors to enter the part of the cave below his land, he claimed that the Edwards had committed the tort of trespass and should be made to pay him a share of their profits.

[6] [1957] 2 QB 334.

[7] 96 SW 2d 1028 (1936, Court of Appeals of Kentucky).

The Kentucky Court of Appeals upheld an order that the tort of trespass had been committed and that the Edwards should pay Lee a third of their net profits. In doing so, the court found that Lee's rights extended below the surface of his land, and it referred to an important maxim, or brocard: *cujus est solum, ejus est usque ad cœlum et ad infernos* (to whomsoever the soil belongs, he owns also to the sky and to the depths). Like most maxims, however—particularly those in Latin—the expression *cujus est solum, ejus est usque ad cœlum et ad infernos* can be misleading, as the next extract shows.

Bernstein of Leigh (Baron) v Skyviews & General Ltd
[1978] QB 479

Facts: Skyviews took aerial photographs of houses and then offered to sell copies of the photographs to residents of the houses. On receiving an offer to buy such a photograph of his country house in Leigh, Kent, Lord Bernstein took exception, not only turning down the offer, but also complaining of an invasion of his privacy and requesting the destruction of any negatives or prints of his house. Unfortunately, his letter of complaint was answered by an 18-year-old who had just joined Skyviews. She replied by offering to sell Lord Bernstein the negative of his house. This led to another letter of complaint, in the absence of an answer to which, Lord Bernstein began legal proceedings. The chief part of his claim was that Skyviews had committed the wrong of trespass by flying over his land without permission. Griffiths J, however, dismissed the claim, finding that Skyviews had not interfered with Lord Bernstein's property right.

Griffiths J

At 485–8

I therefore find that on August 3, 1974, [Skyviews] flew over [Lord Bernstein's] land for the purpose of photographing his house and did so without his permission.

I turn now to the law. [Lord Bernstein] claims that as owner of the land he is also owner of the air space above the land, or at least has the right to exclude any entry into the air space above his land. He relies upon the old Latin maxim, *cujus est solum ejus est usque ad coelum et ad inferos*, a colourful phrase often upon the lips of lawyers since it was first coined by Accursius in Bologna in the 13th century.[8] There are a number of cases in which the maxim has been used by English judges, but an examination of those cases shows that they have all been concerned with structures attached to the adjoining land, such as overhanging buildings, signs or telegraph wires, and for their solution it has not been necessary for the judge to cast his eyes towards the heavens; he has been concerned with the rights of the owner in the air space immediately adjacent to the surface of the land.

That an owner has certain rights in the air space above his land is well established by authority. He has the right to lop the branches of trees that may overhang his boundary, although this right seems to be founded in nuisance rather than trespass: see *Lemmon v. Webb*.[9] In *Wandsworth Board of Works v. United Telephone Co. Ltd.*,[10] the Court of Appeal did not doubt that the owner of land would have the right to cut a wire placed over his land [. . .]

[8] [Franciscus Accursius was a professor of law at the University of Bologna. By compiling the 'Great Gloss' of the Roman law under Justinian, he played a pivotal role in the spread of Roman law thinking in the European medieval world and beyond.]

[9] [1894] 3 Ch 1.

[10] (1884) 13 QBD 904.

> It may be a sound and practical rule to regard any incursion into the air space at a height which may interfere with the ordinary user of the land as a trespass rather than a nuisance. Adjoining owners then know where they stand; they have no right to erect structures overhanging or passing over their neighbours' land and there is no room for argument whether they are thereby causing damage or annoyance to their neighbours about which there may be much room for argument and uncertainty. But wholly different considerations arise when considering the passage of aircraft at a height which in no way affects the user of the land.
>
> There is no direct authority on this question, but as long ago as 1815 Lord Ellenborough in *Pickering v. Rudd*[11] expressed the view that it would not be a trespass to pass over a man's land in a balloon [. . .]
>
> I can find no support in authority for the view that a landowner's rights in the air space above his property extend to an unlimited height. In *Wandsworth Board of Works v. United Telephone Co. Ltd.*,[12] Bowen L.J. described the maxim, *usque ad coelum*, as a fanciful phrase, to which I would add that if applied literally it is a fanciful notion leading to the absurdity of a trespass at common law being committed by a satellite every time it passes over a suburban garden. The academic writers speak with one voice in rejecting the uncritical and literal application of the maxim [. . .]
>
> The problem is to balance the rights of an owner to enjoy the use of his land against the rights of the general public to take advantage of all that science now offers in the use of air space. This balance is in my judgment best struck in our present society by restricting the rights of an owner in the air space above his land to such height as is necessary for the ordinary use and enjoyment of his land and the structures upon it, and declaring that above that height he has no greater rights in the air space than any other member of the public.
>
> Applying this test to the facts of this case, I find that [Skyviews'] aircraft did not infringe any rights in [Lord Bernstein's] air space, and thus no trespass was committed. It was on any view of the evidence flying many hundreds of feet above the ground and it is not suggested that by its mere presence in the air space it caused any interference with any use to which [Lord Bernstein] put or might wish to put his land. [Lord Bernstein's] complaint is not that the aircraft interfered with the use of his land but that a photograph was taken from it. There is, however, no law against taking a photograph, and the mere taking of a photograph cannot turn an act which is not a trespass into the plaintiff's air space into one that is a trespass.

Section 40 of the Civil Aviation Act 1949 makes clear that simply flying at a reasonable height above another's land does not constitute a wrong against that landowner. Griffiths J decided that, in any case, there is an inherent limit on a landowner's property right. So, whilst a property right unquestionably allows its holder to assert a significant degree of control over a resource, that control must be limited—in some circumstances, at least—in order to take account of the needs of others.

In the next extract, the Supreme Court considered the usefulness of the *cujus est solum, ejus est usque ad coelum et ad infernos* brocard to establishing the reach of a land owner's rights below the surface of the land.

Star Energy Weald Basin Ltd and another v Bocardo SA
[2010] UKSC 35, [2010] 3 WLR 654

Facts: The case concerned an oil field in the unlikely location of Surrey. The apex of the Palmers Wood Oil Field, located near Caterham, lies beneath a plot of land, the

[11] (1815) 4 Camp 219. [12] (1884) 13 QBD 904.

freehold of which was held by Bocardo, the claimant. The defendant, Star Energy, had drilled diagonally from the surface of neighbouring land in order to extract oil from the apex of the field. When, in 2006, Bocardo discovered this, it sought damages from Star Energy.

Bocardo did not claim that it owned the oil beneath its land, or even that it had a right to search or drill for such oil. By statute (formerly the Petroleum Production Act 1934, now the Petroleum Act 1998), those rights were vested in the relevant licence holder: in this case, Star Energy. Bocardo did, however, claim that, by extracting oil from beneath the surface of its land without its permission, Star Energy had committed a trespass to Bocardo's land.

At first instance, Peter Smith J found in favour of Bocardo. This finding was upheld by the Court of Appeal and Star Energy appealed to the Supreme Court. The Supreme Court unanimously held that a trespass had occurred. There was also a cross-appeal by Bocardo as to the extent of the damages awarded to it. The question of damages in such a case is regulated by the Mines (Working Facilities and Support) Act 1966. The view of the Court of Appeal, upheld by a majority of the Supreme Court, was that, in light of the 1966 Act, Bocardo's damages were limited to £1,000.

Lord Hope

At paras 5–31

(a) Trespass

[. . .] The question which this issue raises is whether an oil company which has been granted a licence to search, bore for and get petroleum in the licensed area which is beneath land belonging to another, and drills wells at depth beneath that land in order to recover petroleum from within the licensed area without obtaining the landholder's agreement or an ancillary right under the Mines (Working Facilities and Support) Act 1966 to do so, is committing a trespass [. . .]

It is common ground that a trespass occurs when there is an unjustified intrusion by one party upon land which is in the possession of another. It is common ground too that Bocardo did not, and does not, own any of the petroleum in the reservoir that is situated beneath its land. Nor does it possess, or have the right to possess, any of that petroleum. Those rights belonged to the holder of the licence granted by the Secretary of State under section 2 of the Petroleum (Production) Act 1934, Conoco (UK) Ltd. They now belong to [Star Energy] as the original holder's assignees. By virtue of section 1 of the 1934 Act, which vested the property in petroleum existing in its natural condition in strata in Great Britain in the Crown, at no time did Bocardo have any right to search, bore for or get that petroleum from the reservoir beneath its land. Only the Crown or its licensee had the right to do so.

The question whether the drilling of the three wells under Bocardo's land, and the continued presence of the well casing and tubing within them, was an actionable trespass raises the following issues: (1) whether Bocardo's title to the land extends down to the strata below the surface through which the three wells and their casing and tubing pass; (2) whether possession or a right to possession is a pre-condition for bringing a claim for trespass and, if so, whether Bocardo has or is entitled to possession of the subsurface strata through which these facilities pass; (3) whether [Star Energy] have a right under the 1934 Act (and subsequently the 1998 Act) to drill and use the three wells and their casing and tubing to extract petroleum from beneath Bocardo's land which gives them a defence to a claim in trespass.

Ownership: how far below the surface?

There is, of course, nothing new in one person carrying out works under land whose surface is in the ownership or the possession of another. Operations of that kind have been familiar since at least Roman times. They ranged from great public works such as catacombs on the one hand to modest cellars for the storage of wine or other commodities on the other. What is new is the depth at which the operations that are said to constitute a trespass in this case have been carried out. The advance of modern technology has led to the discovery of things below the surface, and the desire to obtain access to and remove them, that were unimaginable when the depths to which people could go were limited by what manual labour could achieve.

Bocardo's case is that it is trite law that a conveyance of land includes the surface and everything below it, unless there have been exceptions from the grant such as commonly occurs in the case of minerals. [Star Energy] do not dispute this proposition as a general rule that applies where the rights of the surface owner are interfered with. But they maintain that it does not extend to the depth at which the operations were and are being carried out in this case. The minimum depth was 800 feet, while for the most part the depths were greatly in excess of this. [Counsel for Star Energy] said that he accepted that in law the surface owner owned the substrata to some depth, but not that far. He submitted that the wells and their tubes and casing did not interfere with or enter upon "land" in any meaningful way at all. Moreover the right to search, bore for and get the petroleum was vested in the Crown. Bocardo did not own, and had no right to possess, the petroleum.

It has often been said that prima facie the owner of the surface is entitled to the surface itself and everything below it down to the centre of the earth . . . The proposition that prima facie everything below the surface belongs to the surface owner is often linked to the proposition that everything above it belongs to him too: "everything up to the sky", as Sir William James VC put it in *Corbett v Hill*,[13] or "everything under the sky" in the words of Bowen LJ in *Pountney v* Clayton.[14] In *Mitchell v Mosley* Cozens Hardy MR said that the grant of the land includes the surface and all that is supra—houses, trees and the like—and everything that is infra—mines, earth and clay, etc.[15] Agreeing with him, Swinfen Eady and Phillimore LJJ said that this was a recognised rule of law. Plainly, the source for these remarks was the well-known Latin brocard *cuius est solum, eius est usque ad coelum et ad inferos*[. . .]

In the Court of Appeal Aikens LJ, referring to Lord Wilberforce's remarks in *Commissioner for Railways v Valuer-General*,[16] said that he had no doubt that Accursius's maxim or brocard was not part of English law.[17] Asking himself what the general rule is at common law about the ownership of the substrata below the surface of land, he said that he found it in *Mitchell v Mosley*,[18] but shorn of its references to Accursius's maxim. In short, he said, the registered freehold proprietor of the surface will also be the owner of the strata beneath the surface of his land, including the whole minerals, unless there has been some express or implied alienation of the whole or a particular part of the strata to another. In his view,[19] Bocardo's title certainly extended to the strata (other than the petroleum) to be found at the depth of the wells up to 2,800 feet below the surface of the Oxted Estate. Precisely how much further into the earth's crust that ownership might go was a question that he did not need to decide. But if it carried to the centre of the earth landowners, he said, all have a lot of neighbours.

13 (1870) LR 9 R 671, 673. 14 (1883) 11 QBD 820. 15 [1914] 1 Ch 438, 450.
16 [1974] AC 325. 17 [2009] 3 WLR 1010, [2010] Ch 100, [59]. 18 [1914] 1 Ch 438.
19 [2009] 3 WLR 1010, [2010] Ch 100, [60].

I think, with respect, that Aikens LJ was perhaps a little too hasty in asserting that the brocard is not part of English law. It is true that Lord Wilberforce appears to have had little enthusiasm for it. He regarded it as an excuse for dispensing with analysis. But those remarks were made in a case where the question was what was meant by the word "land" in the statute. He seems to have been prepared to accept it as having some relevance as a statement, imprecise though it is, of the rights, prima facie, of owners of land: see his reference to Bowen LJ's observation in *Pountney v Clayton*.[20] Furthermore, although Aikens LJ adopted what Cozens Hardy MR said in *Mitchell v Mosley*[21] as an accurate statement of the law if shorn of his references to Accursius's maxim, it must be acknowledged that it was by reference to that maxim that Cozens Hardy MR said what he did. As Lord Wilberforce pointed out, the maxim only has authority at common law in so far as it has been adopted by decisions, or equivalent authority. I am inclined to think that the observations by the Court of Appeal in *Mitchell v Mosley*, seen against the background of various dicta in the 19th Century cases including *Pountney v Clayton*, measure up to that requirement. In the present context, therefore, I believe that the brocard does have something to offer us.

The particular relevance of the brocard to the dispute in this case is that, taken literally, it answers [counsel for Star Energy's] point that the wells in question were too deep for the landowner's interest in his land to be affected. If the brocard is accepted as a sound guide to what the law is, there is no stopping point. This makes it unnecessary to speculate as to how it can be applied in practice as one gets close to the earth's centre. The depths to which the wells in question were drilled in this case do not get anywhere near to approaching the point of absurdity. The fact that there were substances at that depth which can be reached and got by human activity is sufficient to raise the question as to who, if anybody, is the owner of the strata where they are to be found. The Crown has asserted ownership of the petroleum, but it does not assert ownership of the strata that surround it. The only plausible candidate is the registered owner of the land above, which is exactly what the brocard itself indicates. [Counsel for Star Energy] was unable to point to any contrary authority.

It is perhaps worth looking more closely at the words used by the glossator. The earliest source that we have for them is the *Glossa Ordinaria* which was compiled by Accursius, a professor at the University of Bologna, in the 13th century. He set for himself the task of collecting and arranging a vast number of annotations to the *Digest* that had been made by his predecessors in one great work. He supplemented these with annotations of his own. For the most part at least, the authors of these annotations are not identified. The gloss that led to the brocard with which we are all familiar is not attributed to anybody. We have no means of knowing when it was first written down. Francis Lyall[22] observed that the history of its development is obscure. It may have been one of Accursius's own annotations, but it seems just as likely that it was much older. All we can say with confidence is that it was not part of Roman law but that it had been recognised by 1250 when the *Glossa Ordinaria* was completed [. . .]

I think that it is significant that the glossator took as his starting point the rule that applied to the underlying strata and then applied it to what took place above the surface. The context for the annotation was the proposition that, while the owner may erect structures as high as he likes on the solum of land in his ownership, his freedom to do so is restricted by the praedial servitude *non altius tollendi* which protects his neighbour's right to light and prospect. The owner of the dominant tenement is entitled to insist that there should be no interference with

[20] (1883) 11 QBD 820, 838. [21] [1914] 1 Ch 438, 450.
[22] 'The Maxim *cuius est solum* in Scots Law' [1978] JR 147, 148.

the sky over his land. The assumption appears to have been that it was generally understood that the ownership of land carried with it the right to everything that lay below the surface. The point that the glossator was making, as an explanation for the praedial servitude, was that the existing rule as to what lay below (*cuius est solum*) should be (*debet esse*) applied to the air-space above it. The rule that applied to the underlying strata appears to have been of greater antiquity.

The problems that a rule in these terms might give rise to as man's understanding of the earth's structure improved, airspace began to be used for the passage of aircraft and means were developed to penetrate deep below the surface were not, of course, obvious in the 13th century. But the simple notion that each landowner is the proprietor of a column or cylinder of land that stretches down to the centre of the earth and upwards indefinitely into outer space is plainly no longer tenable. The earth is not flat, as the glossator may have supposed. A greater understanding of geology has taught us that most of the earth's interior, due to extremes of pressure and temperature, is a complex and inhospitable structure that is beyond man's capacity to enter or make use of. It has been observed that anything that is drilled below a depth of about 8.7 miles or 14 kilometres would be crushed by the earth's pressure of 50,000 pounds per square inch and vaporised by a temperature of 1,000 degrees Fahrenheit.[23] [P]roductive human activity is possible only within the shallowest portion of the earth's crust, and humans have never penetrated below it.[24] As for that portion of it, the development of heat mining and carbon capture, storage and sequestration technologies to reduce greenhouse gas emissions[25] would be difficult to achieve if the subsurface within which it is sought to carry out these activities in the public interest were to be broken up into columns of rock owned by the surface owners.

As for the position above the surface, the development of powered flight has made it impossible to apply the brocard *usque ad coelum* literally. In *Bernstein of Leigh (Baron) v Skyviews & General Ltd*[26] Baron Bernstein failed in his claim that the defendants, who had flown over his land to take an aerial photograph of his property which they then offered to sell to him, were guilty of trespass. Griffiths J noted[27] that the proposition that an owner has certain rights in the air space above his land was well established by authority. In *Kelsen v Imperial Tobacco Co (of Great Britain and Northern Ireland) Ltd*,[28] for example, a mandatory injunction was granted ordering the defendants to remove a sign which projected 8 inches over the plaintiff's property on the ground that, applying the brocard, this was a trespass. Griffiths J was willing to accept, as a sound and practical rule, that any incursion into air space at a height which may interfere with the ordinary user of land was a trespass. But he said that wholly different considerations arise when considering the passage of aircraft at a height which in no way affects the user of the land. In his judgment,[29] the balance was best struck by restricting the rights of the owner to such height as necessary for the ordinary use and enjoyment of his land and the structures upon it, and declaring that above that height he has no greater rights in the air space than any other member of the public.

[Star Energy] say that this analysis should be applied to subsurface ownership too. They submit that a sensible and pragmatic solution would be for each surface owner to own directly down beneath the boundaries of his land as far down as is necessary for the use and enjoyment of the surface, the buildings on the surface and any minerals which have not been excluded from his ownership by conveyance, common law or statute which lie beneath

[23] John G Sprankling, 'Owning the Center of the Earth' (2008) 55 UCLA L Rev 979, 993, fn 84.
[24] Ibid, 994. [25] Ibid, 1030–2, [26] [1978] QB 479. [27] Ibid, 485.
[28] [1957] 2 QB 334. [29] [1978] QB 479, 488.

it. [Counsel for Star Energy] was unable to point to any English authority that provided direct support for this approach to the position beneath the surface. But there is some support for it in the United States…

Sprankling[30] points out however that most modern US legal texts continue to endorse the centre of the earth theory and that almost all modern cases continue to embrace it too […] Addressing himself to the question, how far below the earth's surface do property rights extend, he asserts that the surface owner should certainly hold property rights to a portion of the subsurface.[31] After exploring four alternative models—ownership of the entire crust, ownership based on first-in-time exploitative use, ownership for reasonable and foreseeable uses and ownership to a specified depth—he comes down in favour of a specified depth such as 1000 feet, but he acknowledges that reasonable minds may differ as to the appropriate extent […]

Coming closer to home, Dr Jean Howell[32] acknowledges that it might be argued that the same test as that which Griffiths J applied in *Bernstein of Leigh (Baron) v Skyviews & General Ltd* should be used for land below the surface. But, as she also notes, it was implicit in that case that even above the notional height at which the land owner's usable rights stop, there is not a free for all in the airspace above. To characterise the surface owner's rights as following technological advances as to the depth at which land can be exploited, she says, would offend against all notions of "property" whose defining quality in land is certainty. She concludes[33] that any intrusion into land which is not sanctioned by some countervailing property right will be a trespass and that, although the surface owner will not usually wish to or be able to utilise the ground below the surface, he has rights in the land which could be valuable.

In my opinion the brocard still has value in English law as encapsulating, in simple language, a proposition of law which has commanded general acceptance. It is an imperfect guide, as it has ceased to apply to the use of airspace above a height which may interfere with the ordinary user of land: *Bernstein of Leigh (Baron) v Skyviews & General Ltd* […] But I think that the reasons for holding that the brocard has no place in the modern world as regards what goes on below the surface, even in England, are not by any means as compelling as they are in relation to the use of airspace. In *US v Causby*[34] the US Supreme Court regarded the airspace as a public highway to which only the public had a just claim. The same cannot be said of the strata below the surface. As Aikens LJ said in the Court of Appeal, it is not helpful to try to make analogies between the rights of an owner of land with regard to the airspace above it and his rights with regard to the strata beneath the surface.[35] Although modern technology has found new ways of making use of it in the public interest, there is no question of it having become a public highway […]

The better view, as the Court of Appeal recognised[36] is to hold that the owner of the surface is the owner of the strata beneath it, including the minerals that are to be found there, unless there has been an alienation of them by a conveyance, at common law or by statute to someone else. That was the view which the Court of Appeal took in *Mitchell v Mosley*.[37] Much has happened since then, as the use of technology has penetrated deeper and deeper into the earth's surface. But I see no reason why its view should not still be regarded as good law. There must obviously be some stopping point, as one reaches the point at which

[30] Owning the Center of the Earth (2008) 55 UCLA L Rev 979, 991–2.
[31] Ibid, 1033.
[32] 'Subterranean Land Law: Rights below the Surface of Land' (2002) 53 Northern Ireland Legal Quarterly 268, 270.
[33] Ibid, 285. [34] 328 US 256 (1946). [35] [2009] 3 WLR 1010, [2010] Ch 100, [61].
[36] [2009] 3 WLR 1010, [2010] Ch 100, [59]. [37] [1914] 1 Ch 438.

> physical features such as pressure and temperature render the concept of the strata belonging to anybody so absurd as to be not worth arguing about. But the wells that are at issue in this case, extending from about 800 feet to 2,800 feet below the surface, are far from being so deep as to reach the point of absurdity. Indeed the fact that the strata can be worked upon at those depths points to the opposite conclusion.
>
> I would hold therefore that [Bocardo's] title extends down to the strata through which the three wells and their casing and tubing pass.

Lord Hope went on to find that, if possession was required for a trespass claim, Bocardo could be said to be in possession of the strata used by Star Energy, as it had registered title to the land, and no other party claimed to be in actual possession of the strata. It was further held that the relevant legislation gave Star Energy no defence to a trespass claim.

For our purposes, the importance of *Star Energy v Bocardo* lies in the Supreme Court's refusal to extend the reasoning in *Bernstein v Skyviews* to the question of how far *below* ground the rights of a freehold owner extend. As a result, a freehold owner's rights are better protected below ground than above it. In Lord Hope's view, this reflects the historical development of the *cujus est solum* maxim: that an owner's right to the strata beneath his or her land was recognized first, and only then extended by analogy to the area above his land. After all, a balance must be struck between protecting the position of an owner of land and preserving the freedom of those who do not own the land; in Roman times as today, the activities of such non-owners are more likely to take place above the land than below it.

2.2 WHAT OBJECTS DOES THE LAND INCLUDE?

2.2.1 Things attached to, or part and parcel of, the land

On 23 May 2002, the BBC News website reported on a decision from the Colchester county court. Mr Bennis had a property right in a large detached house. He sold that right to Mr and Mrs McMahon. When the McMahons moved in, they were disappointed to find that Mr Bennis had removed a number of items from the house (including a towel rail attached to the central heating system, and signs with the name and number of the house), as well as taking paving stones from the garden. Mr Bennis believed that he was entitled to remove those things: it seems that the contract between him and the McMahons did not specifically list those items as part of the sale. Nonetheless, the county court found in favour of the McMahons and Mr Bennis was ordered to pay them £1,166. The point is that Mr Bennis had clearly agreed to transfer his property right in the land—and that property right includes not only the house and the surface of the land, but also any items that are viewed as part of that land.

How, then, can we tell if a particular object is included within the scope of a property right in land? The relevant principles are considered in the following extract.

Elitestone Ltd v Morris
[1997] 1 WLR 687, HL

Facts: Elitestone Ltd had a property right in land in Murton, Swansea. Mr Morris (along with Ms Sked) lived in a wooden bungalow on that land and paid an annual fee

to Elitestone Ltd. Elitestone Ltd wished to redevelop the land and brought proceedings to remove Mr Morris from the land. Mr Morris claimed that, under the provisions of the Rent Act 1977, he had a protected tenancy. If that claim were correct, the grounds on which Elitestone Ltd could apply for possession of the land were limited by statute and none of those grounds was available to them. Both sides accepted that, to have a protected tenancy, Mr Morris had to show that he had a property right in land (a lease). Elitestone Ltd argued that Mr Morris could not have a property right in land because, instead, he simply owned a wooden bungalow—that is, a separate object not forming part of any land. The Court of Appeal accepted that argument and Mr Morris appealed to the House of Lords, which allowed his appeal.

Lord Lloyd

At 689–93

The assistant recorder held, correctly, at the end of what was necessarily a very lengthy judgment that the question in Mr. Morris's case turned on whether or not the bungalow formed part of the realty.[38] [. . .]

Having visited the site, the assistant recorder had this to say:

> 'While the house rested on the concrete pillars which were themselves attached to the ground, it seems to me clear that at least by 1985 and probably before, it would have been clear to anybody that this was a structure that was not meant to be enjoyed as a chattel to be picked up and moved in due course but that it should be a long-term feature of the realty albeit that, because of its construction, it would plainly need more regular maintenance.'

The Court of Appeal disagreed[39] [. . .] Aldous L.J., who gave the leading judgment, was much influenced by the fact that the bungalow was resting by its own weight on concrete pillars, without any attachment. He was also influenced by the uncertainty of Mr. Morris's tenure. Although Mr. Morris had been in occupation since 1971, he was required to obtain an annual "licence." At first the licence fee was £3 a year. It rose to £10 in 1984, then to £52 in 1985, and finally to £85 in 1989. In 1990 the plaintiffs required a licence fee of £1,000: but Mr. Morris, and the other occupiers declined to pay.

On these facts Aldous L.J. inferred that it was the common intention of the parties that the occupiers should acquire the ownership of their bungalows, but the ownership of the sites should remain in [Elitestone Ltd]. On that footing Mr. Morris's bungalow was to be regarded as a chattel. It was never annexed to the soil, so it never became part of the realty. It followed that the tenancy did not include the bungalow, and Mr. Morris was not a protected tenant.

Unlike the judge, the Court of Appeal did not have the advantage of having seen the bungalow. Nor were they shown any of the photographs, some of which were put before your Lordships. These photographs were taken only very recently. Like all photographs they can be deceptive. But if the Court of Appeal had seen the photographs, it is at least possible that they would have taken a different view. For the photographs show very clearly what the bungalow is, and especially what it is not. It is *not* like a Portakabin, or mobile home. The nature of the structure is such that it could not be taken down and re-erected elsewhere. It could only be removed by a process of demolition. This, as will appear later, is a factor of great importance in the present case. If a structure can only be enjoyed *in situ*, and is such that it cannot be removed in whole or in sections to another site, there is at least a strong inference

[38] ['[T]he realty' here refers to the land in relation to which Elitestone Ltd had a property right.]
[39] Court of Appeal (Civil Division) Transcript No. 1025 of 1995 (unreported, 28 July 1995).

that the purpose of placing the structure on the original site was that it should form part of the realty at that site, and therefore cease to be a chattel [. . .]

It will be noticed that in framing the issue for decision I have avoided the use of the word 'fixture.' There are two reasons for this. The first is that 'fixture,' though a hallowed term in this branch of the law, does not always bear the same meaning in law as it does in everyday life. In ordinary language one thinks of a fixture as being something fixed to a building. One would not ordinarily think of the building itself as a fixture [. . .] There is another reason. The term fixture is apt to be a source of misunderstanding owing to the existence of the category of so called 'tenants' fixtures' (a term used to cover both trade fixtures and ornamental fixtures), which are fixtures in the full sense of the word (and therefore part of the realty) but which may nevertheless be removed by the tenant in the course of or at the end of his tenancy. Such fixtures are sometimes confused with chattels which have never become fixtures at all. Indeed the confusion arose in this very case [. . .]

For my part I find it better in the present case to avoid the traditional twofold distinction between chattels and fixtures, and to adopt the three-fold classification set out in *Woodfall, Landlord and Tenant*:

> 'An object which is brought onto land may be classified under one of three broad heads. It may be (a) a chattel; (b) a fixture; or (c) part and parcel of the land itself. Objects in categories (b) and (c) are treated as being part of the land.'

So the question in the present appeal is whether, when the bungalow was built, it became part and parcel of the land itself. The materials out of which the bungalow was constructed, that is to say, the timber frame walls, the feather boarding, the suspended timber floors, the chipboard ceilings, and so on, were all, of course, chattels when they were brought onto the site. Did they cease to be chattels when they were built into the composite structure? The answer to the question, as Blackburn J. pointed out in *Holland v. Hodgson*,[40] depends on the circumstances of each case, but mainly on two factors, the degree of annexation to the land, and the object of the annexation.

Degree of annexation

The importance of the degree of annexation will vary from object to object. In the case of a large object, such as a house, the question does not often arise. Annexation goes without saying [. . .]

Purpose of annexation

Many different tests have been suggested, such as whether the object which has been fixed to the property has been so fixed for the better enjoyment of the object as a chattel, or whether it has been fixed with a view to effecting a permanent improvement of the freehold. This and similar tests are useful when one is considering an object such as a tapestry, which may or may not be fixed to a house so as to become part of the freehold: see *Leigh v. Taylor*.[41] These tests are less useful when one is considering the house itself. In the case of the house the answer is as much a matter of common sense as precise analysis. A house which is constructed in such a way so as to be removable, whether as a unit, or in sections, may well remain a chattel, even though it is connected temporarily to mains services such as water and electricity. But a house which is constructed in such a way that it cannot be removed at

[40] (1872) LR 7 CP 328. [41] [1902] AC 157.

all, save by destruction, cannot have been intended to remain as a chattel. It must have been intended to form part of the realty. I know of no better analogy than the example given by Blackburn J. in *Holland v. Hodgson*:[42]

> "Thus blocks of stone placed one on the top of another without any mortar or cement for the purpose of forming a dry stone wall would become part of the land, though the same stones, if deposited in a builder's yard and for convenience sake stacked on the top of each other in the form of a wall, would remain chattels."

Applying that analogy to the present case, I do not doubt that when Mr. Morris's bungalow was built, and as each of the timber frame walls were placed in position, they all became part of the structure, which was itself part and parcel of the land. The object of bringing the individual bits of wood onto the site seems to be so clear that the absence of any attachment to the soil (save by gravity) becomes an irrelevance.

Lord Clyde also gave a reasoned speech, and the other members of the House of Lords agreed with both Lord Clyde and Lord Lloyd. Mr Morris's bungalow was therefore regarded as part of the land in relation to which Elitestone Ltd had a property right. As a result, Mr Morris had a lease (another property right in relation to that same land) and the resulting statutory protection that allowed him to resist Elitestone Ltd's claim for possession.

The decision of the Court of Appeal in *Mew v Tristmire Ltd*[43] provides a useful contrast. The occupiers lived in houseboats on the claimant's land.[44] The occupiers wished to show they had an assured tenancy, which attracts statutory protection: as in *Elitestone v Morris*, this turned on whether or not the houseboats could be seen as part of the land. The houseboats, like the bungalow in *Elitestone*, were not attached to the land but rather rested on supports. The Court of Appeal affirmed the judge's finding that, in contrast to the bungalow in *Elitestone*, the houseboats were *not* part of the land. Two key differences were that the houseboats were, initially at least, '*structures which could have been removed without being dismantled or destroyed in the process*'; they also '*fall into a category of items such as caravans which, as designed, are moveable*.'[45] In contrast, the bungalow in *Elitestone* had always been '*intended to be a permanent feature of the site*' and '*was constructed on site from components brought in for that purpose*'.[46]

Lord Lloyd's reasoning in the extract set out above is important because it shows the potentially confusing nature of the term 'fixture'. For example, it used to be said that an object (such as the towel rail and paving stones in the McMahon's case, or the bungalow in Mr Morris's case) had to be *either* a chattel (something independent of the land and so not covered by a property right in that land) *or* a fixture (something attached to the land and so covered by a property right in that land). As Lord Lloyd points out, however, it would be odd to think of a building, such as a house, as merely attached to land: it is covered by a property right in the land not because of its attachment, but rather because it is part and parcel of the land itself.

[42] (1872) LR 7 CP 328, 335. [43] [2011] EWCA Civ 912.

[44] The status of a houseboat was also considered by the Court of Appeal in *Chelsea Yacht & Boat Co Ltd v Pope* [2001] 2 All ER 309, but it was reasonably clear there that the boat was not part of any land as it remained floating alongside the Thames embankment and could easily have been detached from its mooring: see *per* Patten LJ in *Mew v Tristmire Ltd* [2011] EWCA Civ 912 at [32].

[45] Ibid, [42], *per* Patten LJ. [46] Ibid, [41], *per* Patten LJ.

Lord Lloyd's second reason for treating the word 'fixture' with care is that it has a special meaning when used to refer to 'tenant's fixtures' or 'landlord's fixtures'. Those terms are used to solve a related, but different problem. Imagine that an owner of land gives you a lease of business premises. When the lease ends, you can clearly take your office furniture with you; equally clearly, you cannot rip out the toilets and take those with you. But what if you have installed a special shed in which to store your stock? That shed may have become attached to, or be part and parcel of, the land, because you may have attached it with iron straps to a concrete floor. But, as the Court of Appeal confirmed in *Webb v Frank Bevis Ltd*,[47] you may nonetheless be allowed to remove the shed at the end of the lease. The term 'tenant's fixtures' is used to refer to objects attached to the land or forming part and parcel of the land that the tenant is allowed to remove at the end of the lease (such as the shed); the term 'landlord's fixtures' is used to refer to such objects (such as the toilets) that the tenant cannot remove.

Once any confusion over the concept of 'fixtures' is dealt with, we are left with the position that a property right in land covers: (i) the surface of the land itself; (ii) anything that is part and parcel of that land (e.g. a house built on the land); and (iii) anything that is sufficiently attached to that land (e.g. a towel rail connected to the central heating system). Of course, in practice, it may not be obvious whether a particular object falls into either of (ii) or (iii); in such cases, as shown by Lord Lloyd's approach in *Elitestone Ltd v Morris*, a court has to look at both the degree of attachment to the land and the purpose of such attachment.

The following extract provides a useful practical example of the results that a court may reach.

Botham and ors v TSB Bank plc
[1996] EWCA Civ 549, CA

Facts: Mr Botham owned a luxury flat at 90 Cheyne Walk, Chelsea, London. He borrowed money from TSB Bank and, in return, granted TSB a mortgage over his flat. TSB thus acquired a property right (technically, a charge by way of legal mortgage—see Chapter 28, section 4.2) in the land. Mr Botham failed to repay TSB as agreed; TSB therefore acquired a power to sell the flat and use the proceeds towards meeting Mr Botham's debt. A dispute arose as to the scope of TSB's property right in the land: did it give TSB a power to sell (and use the proceeds) of particular objects within the flat, such as the fitted carpets, light fittings, the dishwasher in the fitted kitchen, etc.? Mr Botham claimed that such items were *not* covered by TSB's property right, because they were not fixtures and therefore not part of the land.

The first instance judge split the various objects in dispute into nine groups. Table 1 sets out the groups, along with the related decision of the first instance judge and then of the Court of Appeal.

The first instance judge, by examining the degree and purpose of annexation, thus found that almost all of the disputed objects (including the kitchen sink) were fixtures, and therefore that TSB did have the power to sell those objects and use the proceeds of sale towards meeting Mr Botham's debt.

The Court of Appeal applied the same basic test, but reached different conclusions.

[47] [1940] 1 All ER 247.

Table 1 Items considered in *Botham and ors v TSB Bank plc*

	First instance judge	Court of Appeal
1. Fitted carpets	Fixtures: part of the land	*Not fixtures*
2. Light fittings fixed to a wall or ceiling	Fixtures: part of the land	*Not fixtures*[1]
3. Four decorative gas flame-effect fires of the mock coal type	Fixtures: part of the land	*Not fixtures*
4. Curtains and blinds	Fixtures: part of the land	*Not fixtures*
5. Bathroom fittings A (towel rails, soap dishes, and lavatory roll holders)	Fixtures: part of the land	Fixtures: part of the land
6. Bathroom fittings B (fittings on baths and basins—namely, the taps, plugs, and shower heads)	Fixtures: part of the land	Fixtures: part of the land
7. Bathroom fittings C (mirrors and marble panels on the walls)	Conceded by Mr Botham as fixtures: part of the land	Conceded by Mr Botham as fixtures: part of the land
8. Kitchen units and work surfaces (including a fitted sink)	Fixtures: part of the land	Fixtures: part of the land
9. White goods in the kitchen (the oven, the dishwasher, the extractor, the hob, the fridge, and the freezer)	Fixtures: part of the land	*Not fixtures*

[1] Subject to two exceptions, conceded by Mr Botham to be fixtures.

Lord Justice Roch

The tests, in the case of an item which has been attached to the building in some way other than simply by its own weight, seem to be the purpose of the item and the purpose of the link between the item and the building. If the item viewed objectively is intended to be permanent and to afford a lasting improvement to the building, the thing will have become a fixture. If the attachment is temporary and is no more than is necessary for the item to be used and enjoyed, then it will remain a chattel. Some indicators can be identified. For example, if the item is ornamental and the attachment is simply to enable the item to be displayed and enjoyed as an adornment that will often indicate that this item is a chattel. Obvious examples are pictures. But this will not be the result in every case; for example ornamental tiles on the walls of kitchens and bathrooms. The ability to remove an item or its attachment from the building without damaging the fabric of the building is another indicator. The same item may in some areas be a chattel and in others a fixture. For example a cooker will, if free standing and connected to the building only by an electric flex, be a chattel. But it may be otherwise if the cooker is a split level cooker with the hob set into a work surface and the oven forming part of one of the cabinets in the kitchen. It must be remembered that in many cases the item being considered may be one that has been bought by the mortgagor on hire purchase, where the ownership of the item remains in the supplier until the instalments have been paid. Holding such items to be fixtures simply because they are housed in a fitted cupboard and linked to the building by an electric cable, and, in cases of washing machines, by the

necessary plumbing would cause difficulties and such findings should only be made where the intent to effect a permanent improvement in the building is incontrovertible. The type of person who instals or attaches the item to the land can be a further indicator. Thus items installed by a builder, eg the wall tiles will probably be fixtures, whereas items installed by eg a carpet contractor or curtain supplier or by the occupier of the building himself or herself may well not be [. . .]

I have no hesitation in agreeing with the judge that Groups 5 and 6, the bathroom fittings namely the taps, plugs and showerhead together with the towel rails, soap dishes and lavatory roll holders which are all the items listed under the heading "Ironmongery" in the schedule of disputed items helpfully prepared by Mr Chapman, the Bank's counsel for the purpose of this appeal, are fixtures.

Those items are attached to the building in such a way as to demonstrate a significant connection with the building, and are of a type consistent with the bathroom fittings such as the basins, baths, bidets and lavatories, as to demonstrate an intention to effect a permanent improvement to the flat. They are items necessary for a room which is used as a bathroom. They are not there, on the evidence which was before the judge and which is before us, to be enjoyed for themselves, but they are there as accessories which enable the room to be used and enjoyed as a bathroom. Viewed objectively, they were intended to be permanent and to afford a lasting improvement to the property.

The third group about which I have no doubt is Group 8, the kitchen units, including the sink [. . .]. Again in my judgment the degree of annexation, the fact that between the working surfaces and the underside of the wall cupboards of the wall units there is tiling, demonstrates both a degree of annexation and an intention to effect a permanent improvement to the kitchen of the flat so as to make those units fixtures. Further, as a matter of common sense, those units could not be removed without damaging the fabric of the flat, even if the damage is no more that the leaving of a pattern of tiling which is unlikely to be of use if different units had to be installed.

The seventh group of items, the marble panels and mirrors in the principal bathroom were conceded by Mr Botham's counsel before the judge to be fixtures and [counsel for Mr Botham] in this appeal, accepts that that concession was rightly made [. . .]

I would allow the appeal with regard to the fitted carpets and the curtains and blinds i.e., Groups 1 and 4. These items, although made or cut to fit the particular floor or window concerned, are attached to the building in an insubstantial manner. Carpets can easily be lifted off gripper rods and removed and can be used again elsewhere. In my judgment neither the degree of annexation nor the surrounding circumstances indicate an intention to effect a permanent improvement in the building. Although many people take with them their curtains and carpets when they move, it is true that others leave curtains and carpets for the incoming occupier, but normally only where the incoming occupier has bought those items separately from the purchase of the property itself. Curtains are attached merely by being hung from curtain rails. The removal of carpets and curtains has no effect damaging or otherwise on the fabric of the building. In my opinion, the method of keeping fitted carpets in place and keeping curtains hung are no more than is required for enjoyment of those items as curtains and carpets. Such items are not considered to be or to have become part of the building. They are not installed, in the case of new buildings, by the builders when the building is constructed, but by the occupier himself or herself or by specialist contractors who supply and install such items. The same is true of curtains. Both will be changed from time to time as the occupier decides to change the decoration of one or more rooms in his or her house or flat. There may be cases where carpeting or carpet squares are stuck to a concrete screed in such a way as to make them part of the floor and thus fixtures. In this case, there was no evidence, in my opinion, to justify the judge's finding that the carpets in this flat were fixtures.

With regard to Group 2, the light fittings, [counsel for Mr Botham] conceded that two of the light fittings recessed into the ceilings shown in photographs 129 and 138 were fixtures. I would hold that [TSB Bank] on the admissible evidence have failed to show that the other lighting items were fixtures. There is no admissible evidence as to the method of attachment of these items to the walls and ceilings other than that the photographs show that they must be attached in some manner. [Counsel for Mr Botham] submitted that their removal cannot be too difficult because in many cases the fitting would have to be removed in order to replace a bulb or connection that had failed. In my judgment, these light fittings, in the absence of evidence other than the photographs of them, remain chattels as would lamp shades or ornamental light fittings or chandeliers suspended from a ceiling rose.

Group 3 were the gas fires. In their case the only connection between them and the building was a gas pipe. In the gas pipes, shortly before the pipes enter these gas fires, gas taps are to be seen in the photographs. Apart from that link, which essential if they are to be used as gas fires, nothing secures the gas fires, on the evidence, other than their own weight. [Counsel for Mr Botham] argues that their function was purely ornamental, the flat actually being heated by water filled radiators. I would not accept that submission. These fires have two purposes: one decorative, the mock coal fire aspect, and one functional, the gas fire aspect. Nevertheless I am of the view that electric fires and heaters which are simply plugged into the electricity supply of a house are not fixtures and I do not see any sensible distinction between such electric fires and these four gas fires on the evidence which was available to the judge and is available to us. [. . .]

Many of [the items in Groups 8 & 9] were made by a single manufacturer, Neff. The judge said that whilst the kitchen units and sink were manifestly fixtures, the white goods he had found to be the most difficult items he had had to decide. He found that they were manufactured to standard sizes, they were fitted into standard sized holes and that they were removable. They were very probably expensive items, although he had no direct evidence of their value. He held them to be fixtures because:

> 'They were there as part of the overall kitchen. If one were taking a flat on a lease one would expect them to be there. They were put in to be part of the kitchen as it stood. They were all physically fixed in, not only resting on their own weight, but being plumbed in, wired in and in most cases aligned with and perhaps to some extent abutted to, so that they could not be too easily removed, the remaining parts of the fitted kitchen. A fitted kitchen is a whole.'

I differ from the judge on this group of items on the slender facts in this case. What one might expect to be in a flat if one were taking a flat, would depend on the type of letting one was seeking. That is not, in my view, a test of whether an item is or is not a fixture. Clearly all of these items are items one would not be surprised to find in a kitchen, but then so is an electric kettle, a food mixer and a microwave oven, which are all normally 'plugged in'. No one, I venture to suggest would look on these as fixtures. Here the judge should have reminded himself that the degree of annexation was slight: no more than that which was needed for these items to be used for their normal purposes. In fact these items remain in position by their own weight and not by virtue of the links between them and the building. All these items can be bought separately, and are often acquired on an instalment payment basis, when ownership does not pass to the householder immediately. Many of these items are designed to last for a limited period of time and will require replacing after a relatively short number of years. The degree of annexation is therefore slight. Disconnection can be done without damage to the fabric of the building and normally without difficulty. The purpose of such links as there were to the building was to enable these machines to be used to wash clothes or dishes or preserve or cook food. Absent any evidence other than the photographs, it was not open to the judge, in my opinion, to infer that these items were installed with the intention that they