were to be a permanent or lasting improvement to the building. This is not a case where the intent to effect a permanent improvement in the building by installing these machines so that they became part of the realty was incontrovertible, as the judge's doubts illustrated.

The Court of Appeal's decision in *Botham v TSB Bank* is useful not only because it shows how the fixtures test can be applied in practice, but also because it underlines that the test is *not* based on reasonable expectations or common practice as to what B, a party buying or renting land from A, would expect to find when moving in. It might be unusual, as noted by the first instance judge, for A to remove gas fires previously connected to pipes, or an oven fitted and installed into a particular slot in the kitchen. Nonetheless, this does not mean that such items necessarily count as part of the land. If B wants to ensure that, as well as acquiring a property right in the land, she also acquires the right to have or use those items, she needs to ensure that A makes a contractual promise to give B such rights.

2.2.2 Things found on, or in, the land

We have seen that if a party (B) has a property right in land, he also has a right to control of: (i) (within limits) the area above and below the surface of the land; (ii) anything that is part and parcel of the land (such as a house); and (iii) anything that is sufficiently attached to the land (such as a towel rail attached to the central heating system). Of course, this does not mean that B's property right in the land gives him a right to control of *everything* that may be in or on his land. That point is clear from the following extract.

Hannah v Peel
[1945] 1 KB 509

Facts: In 1938, Major Peel bought Gwernhaylod House, Overton-on-Dee, Shropshire, and thereby acquired a property right in that land: a freehold. He did not move in immediately and the house remained empty, apart from periods during which it was requisitioned by the government and used by the armed forces. In August 1940, during one of those periods of requisition, Mr Hannah, a lance corporal stationed at the house, dislodged a brooch that had been in a crevice by a window frame. He later handed it to the police. No one came forward to claim the brooch and it was given by the police to Major Peel. He offered Mr Hannah a reward for having found the brooch, but Mr Hannah refused to accept the reward: he claimed that, because he found the brooch, he had a property right to it and that Major Peel was under a duty not to interfere with that property right. Major Peel, however, kept and then sold the brooch. Mr Hannah claimed that Major Peel thereby committed a tort: he had interfered with Mr Hannah's property right and so should pay damages as a result. Major Peel claimed that he was, in fact, entitled to the brooch because it had been found on his land. Birkett J found in favour of Mr Hannah.

Birkett J

At 513–15

As to the issue in law, the rival claims of the parties can be stated in this way: [Mr Hannah] says: "I claim the brooch as its finder and I have a good title against all the world, save only

the true owner." [Major Peel] says: "My claim is superior to yours inasmuch as I am the freeholder. The brooch was found on my property, although I was never in occupation, and my title, therefore, ousts yours and in the absence of the true owner I am entitled to the brooch or its value." Unhappily the law on this issue is in a very uncertain state and there is need of an authoritative decision of a higher court [. . .].

In the famous case of *Armory v. Delamirie*,[48] the plaintiff, who was a chimney sweeper's boy, found a jewel and carried it to the defendant's shop, who was a goldsmith, in order to know what it was, and he delivered it into the hands of the apprentice in the goldsmith's shop, who made a pretence of weighing it and took out the stones and called to the master to let him know that it came to three-halfpence. The master offered the boy the money who refused to take it and insisted on having the jewel again. Whereupon the apprentice handed him back the socket of the jewel without the stones, and an action was brought in trover against the master [i.e. the boy claimed that the master committed a tort by interfering with the boy's property right in the jewel], and it was ruled "that the finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner, and consequently may maintain trover [i.e. sue in tort]." The case of *Bridges v. Hawkesworth*[49] is in process of becoming almost equally as famous because of the disputation which has raged around it. The headnote in the Jurist is as follows: "The place in which a lost article is found does not constitute any exception to the general rule of law, that the finder is entitled to it as against all persons except the owner."

The case was in fact an appeal against a decision of the county court judge at Westminster. The facts appear to have been that in the year 1847 the plaintiff, who was a commercial traveller, called on a firm named Byfield & Hawkesworth on business, as he was in the habit of doing, and as he was leaving the shop he picked up a small parcel which was lying on the floor. He immediately showed it to the shopman, and opened it in his presence, when it was found to consist of a quantity of Bank of England notes, to the amount of £65. The defendant, who was a partner in the firm of Byfield & Hawkesworth, was then called, and the plaintiff told him he had found the notes, and asked the defendant to keep them until the owner appeared to claim them. Then various advertisements were put in the papers asking for the owner, but the true owner was never found. No person having appeared to claim them, and three years having elapsed since they were found, the plaintiff applied to the defendant to have the notes returned to him, and offered to pay the expenses of the advertisements, and to give an indemnity. The defendant refused to deliver them up to the plaintiff, and an action was brought in the county court of Westminster in consequence of that refusal. The county court judge decided that the defendant, the shopkeeper, was entitled to the custody of the notes as against the plaintiff, and gave judgment for the defendant. Thereupon the appeal was brought which came before the court composed of Patteson J. and Wightman J. Patteson J. said:

> "The notes which are the subject of this action were incidentally dropped, by mere accident, in the shop of the defendant, by the owner of them. The facts do not warrant the supposition that they had been deposited there intentionally, nor has the case been put at all upon that ground. The plaintiff found them on the floor, they being manifestly lost by someone. The general right of the finder to any article which has been lost, as against all the world, except the true owner, was established in the case of *Armory v. Delamirie* which has never been disputed. This right would clearly have accrued to the plaintiff had the notes been picked up by him outside the shop of the defendant and if he once had the right, the case finds that he did not intend, by delivering the

[48] (1722) 5 Stra 505. [49] (1821) 21 LJ (QB) 75.

> notes to the defendant, to waive the title (if any) which he had to them, but they were handed to the defendant merely for the purpose of delivering them to the owner should he appear."

Then a little later:

> "The case, therefore, resolves itself into the single point on which it appears that the learned judge decided it, namely, whether the circumstance of the notes being found inside the defendant's shop gives him, the defendant, the right to have them as against the plaintiff, who found them."

After discussing the cases, and the argument, the learned judge said:

> "If the discovery had never been communicated to the defendant, could the real owner have had any cause of action against him because they were found in his house? Certainly not. The notes never were in the custody of the defendant, nor within the protection of his house, before they were found, as they would have been had they been intentionally deposited there; and the defendant has come under no responsibility, except from the communication made to him by the plaintiff, the finder, and the steps taken by way of advertisement. [. . .] We find, therefore, no circumstances in this case to take it out of the general rule of law, that the finder of a lost article is entitled to it as against all persons except the real owner, and we think that that rule must prevail, and that the learned judge was mistaken in holding that the place in which they were found makes any legal difference. Our judgment, therefore, is that the plaintiff is entitled to these notes as against the defendant."

It is to be observed that in *Bridges v. Hawkesworth* which has been the subject of immense disputation, neither counsel put forward any argument on the fact that the notes were found in a shop. Counsel for the appellant assumed throughout that the position was the same as if the parcel had been found in a private house, and the learned judge spoke of "the protection of his (the shopkeeper's) house." The case for the appellant was that the shopkeeper never knew of the notes. Again, what is curious is that there was no suggestion that the place where the notes were found was in any way material; indeed, the judge in giving the judgment of the court expressly repudiates this and said in terms "The learned judge was mistaken in holding that the place in which they were found makes any legal difference." [. . .]

At 521

There is no doubt that in this case the brooch was lost in the ordinary meaning of that term, and I should imagine it had been lost for a very considerable time. Indeed, from this correspondence it appears that at one time the predecessors in title of the defendant were considering making some claim. But the moment the plaintiff discovered that the brooch might be of some value, he took the advice of his commanding officer and handed it to the police. His conduct was commendable and meritorious. The defendant was never physically in possession of these premises at any time. It is clear that the brooch was never his, in the ordinary acceptation of the term, in that he had the prior possession. He had no knowledge of it, until it was brought to his notice by the finder. A discussion of the merits does not seem to help, but it is clear on the facts that the brooch was "lost" in the ordinary meaning of that word; that it was "found" by the plaintiff in the ordinary meaning of that word, that its true owner has never been found, that the defendant was the owner of the premises and had his notice drawn to this matter by the plaintiff, who found the brooch. In those circumstances I propose to follow the decision in *Bridges v. Hawkesworth*, and to give judgment in this case for [Mr Hannah] for £66.

The first point to take from this decision is the important general principle that if a party takes physical control of an object (e.g. by finding it), he acquires a property right in that object. This is a fundamental principle of property law. Indeed, even a thief can use it: even though he has dishonestly taken physical control of an object, he still acquires a property right in it.[50] Of course, this does not mean that the finder or thief has the *best* property right: the party who lost the thing, or from whom it was stolen, also has a property right. And the general rule is that he or she can assert that property right against the finder or thief, because his or her property right arose *before* that of the finder or thief. As we will see in Chapter 12, section 2, timing is absolutely crucial when considering the priority of conflicting property rights: the general rule is that the party with the *earliest* property right will win.

So, in *Hannah v Peel*, Mr Hannah clearly had a property right in the brooch: he acquired that right simply by taking physical control of the brooch, just as the chimney sweep's boy in *Armory v Delamrie* acquired a property right by taking physical control of the jewel. Equally clearly, the party who lost the brooch had an earlier property right in the brooch: so, *if* that party were to have come forward, she would have been able to bring a claim against Mr Hannah. But that party did *not* come forward: the dispute was between Mr Hannah (who clearly had a property right in the brooch) and Major Peel. So, Major Peel had to show that: (i) he, too, had a property right in the brooch; *and* (ii) he acquired that property right *before* Mr Hannah found the brooch.

How could Major Peel show that he had such a property right? In theory, he could try to claim that his property right in the land also covered the brooch. But, as we saw in section 2.2.1 above, he could only make that argument if the brooch, when lost, had become part and parcel of his land, or was sufficiently attached to his land. Given that the brooch was easily dislodged from the crevice, it clearly was not part and parcel of, or sufficiently attached to, Major Peel's land. Further, if that argument were accepted, then the party who lost the brooch, even were she to come forward, would not be able to claim the brooch: her property right would have disappeared when the brooch became part of Major Peel's land.

So, Major Peel tried a different argument, proposing that he automatically acquired a property right in *anything* found on his land. Birkett J rejected that argument. As shown by the earlier decision in *Bridges v Hawkesworth*, the mere fact that something was lost or found on a party's land does not give that party a property right in the thing. After all, as was the case in *Hannah v Peel*, the party with the property right in the land may not even know that the thing is on his land.

It may therefore seem that the position is fairly simple: a party with a property right in land has no special rights in relation to anything lost or found on his land. The following extract, however, is from a case that (perhaps unnecessarily) introduced some complications.

Parker v British Airways Board
[1982] QB 1004, CA

Facts: In November 1978, Mr Parker was waiting for a flight in an executive lounge at Heathrow Terminal One. He spotted a gold bracelet on the floor that had been dropped by an unknown passenger. He handed the bracelet to British Airways staff in case that unknown passenger should come forward to claim it; he also gave the staff his contact details and said that the bracelet should be returned to him if no one came

[50] See *Costello v Chief Constable of Derbyshire* [2001] EWCA Civ 381, [2001] 3 All ER 150.

forward to claim it. By June 1979, no one had come forward. Although Mr Parker had requested that it be sent to him, British Airways sold the bracelet for £850. Mr Parker claimed that, by finding and taking control of the bracelet, he had a property right in the bracelet and that, by refusing to give it to him, British Airways had committed the tort of conversion. The first instance judge accepted Mr Parker's arguments and ordered British Airways to pay him £850 plus interest. The Court of Appeal dismissed British Airways' appeal.

Donaldson LJ

On November 15, 1978, the plaintiff, Alan George Parker, had a date with fate—and perhaps with legal immortality. He found himself in the international executive lounge at terminal one, Heathrow Airport. And that was not all that he found. He also found a gold bracelet lying on the floor.

We know very little about the plaintiff, and it would be nice to know more. He was lawfully in the lounge and, as events showed, he was an honest man. Clearly he had not forgotten the schoolboy maxim 'Finders keepers.' But, equally clearly, he was well aware of the adult qualification 'unless the true owner claims the article.' He had had to clear customs and security to reach the lounge. He was almost certainly an outgoing passenger because the defendants, British Airways Board, as lessees of the lounge from the British Airports Authority and its occupiers, limit its use to passengers who hold first class tickets or boarding passes or who are members of their Executive Club which is a passengers' 'club.' Perhaps the plaintiff's flight had just been called and he was pressed for time. Perhaps the only officials in sight were employees of the defendants. Whatever the reason, he gave the bracelet to an anonymous official of the defendants instead of to the police. He also gave the official a note of his name and address and asked for the bracelet to be returned to him if it was not claimed by the owner. The official handed the bracelet to the lost property department of the defendants. Although the owner never claimed the bracelet, the defendants did not return it to the plaintiff. Instead they sold it and kept the proceeds which amounted to £850. The plaintiff discovered what had happened and was more than a little annoyed. I can understand his annoyance. He sued the defendants in the Brentford County Court and was awarded £850 as damages and £50 as interest. The defendants now appeal.

It is astonishing that there should be any doubt as to who is right. But there is. Indeed, it seems that the academics have been debating this problem for years. In 1971 the Law Reform Committee reported that it was by no means clear who had the better claim to lost property when the protagonists were the finder and the occupier of the premises where the property was found. Whatever else may be in doubt, the committee was abundantly right in this conclusion. The committee recommended legislative action but, as is not uncommon, nothing has been done. The rights of the parties thus depend upon the common law.

As a matter of legal theory, the common law has a ready made solution for every problem and it is only for the judges, as legal technicians, to find it. The reality is somewhat different. Take the present case. The conflicting rights of finder and occupier have indeed been considered by various courts in the past. But under the rules of English jurisprudence, none of their decisions binds this court. We therefore have both the right and the duty to extend and adapt the common law in the light of established principles and the current needs of the community. This is not to say that we start with a clean sheet. In doing so, we should draw from the experience of the past as revealed by the previous decisions of the courts.

Neither the plaintiff nor the defendants lay any claim to the bracelet either as owner of it or as one who derives title from that owner. The plaintiff's claim is founded upon the ancient common law rule that the act of finding a chattel which has been lost and taking control of

it gives the finder rights with respect to that chattel. The defendants' claim has a different basis. They cannot and do not claim to have found the bracelet when it was handed to them by the plaintiff. At that stage it was no longer lost and they received and accepted the bracelet from the plaintiff on terms that it would be returned to him if the owner could not be found. They must and do claim on the basis that they had rights in relation to the bracelet immediately *before* the plaintiff found it and that these rights are superior to the plaintiff's. The defendants' claim is based upon the proposition that at common law an occupier of land has such rights over all lost chattels which are on that land, whether or not the occupier knows of their existence.

The common law right asserted by the plaintiff has been recognised for centuries. [Donaldson LJ here referred to *Armory v Delamrie*,[51] which is considered in the extract above from *Hannah v Peel*[...] Some qualification has also to be made in the case of the trespassing finder. The person vis à vis whom he is a trespasser has a better title. The fundamental basis of this is clearly public policy. Wrongdoers should not benefit from their wrongdoing. This requirement would be met if the trespassing finder acquired no rights. That would, however, produce [a] free-for-all situation [...], in that anyone could take the article from the trespassing finder. Accordingly, the common law has been obliged to give rights to someone else, the owner *ex hypothesi* being unknown. The obvious candidate is the occupier of the property upon which the finder was trespassing.

Curiously enough, it is difficult to find any case in which the rule is stated in this simple form, but I have no doubt that this is the law [...] One might have expected there to be decisions clearly qualifying the general rule where the circumstances are that someone finds a chattel and thereupon forms the dishonest intention of keeping it regardless of the rights of the true owner or of anyone else. But that is not the case [...]

[Donaldson LJ then surveyed previous cases and set out the following five propositions as to the rights and duties of a finder:]

1. The finder of a chattel acquires no rights over it unless (a) it has been abandoned or lost and (b) he takes it into his care and control.
2. The finder of a chattel acquires very limited rights over it if he takes it into his care and control with dishonest intent or in the course of trespassing.
3. Subject to the foregoing and to point 4 below, a finder of a chattel, whilst not acquiring any absolute property or ownership in the chattel, acquires a right to keep it against all but the true owner or those in a position to claim through the true owner or one who can assert a prior right to keep the chattel which was subsisting at the time when the finder took the chattel into his care and control.
4. Unless otherwise agreed, any servant or agent who finds a chattel in the course of his employment or agency and not wholly incidentally or collaterally thereto and who takes it into his care and control does so on behalf of his employer or principal who acquires a finder's rights to the exclusion of those of the actual finder.
5. A person having a finder's rights has an obligation to take such measures as in all the circumstances are reasonable to acquaint the true owner of the finding and present whereabouts of the chattel and to care for it meanwhile.

[Donaldson LJ also set out the following four propositions as to the rights and duties of an occupier of land on which a thing is found:]

1. An occupier of land has rights superior to those of a finder over chattels in or attached to that land and an occupier of a building has similar rights in respect of chattels attached

[51] (1722) 2 Stra 505.

to that building, whether in either case the occupier is aware of the presence of the chattel.

2. An occupier of a building has rights superior to those of a finder over chattels upon or in, but not attached to, that building if, but only if, before the chattel is found, he has manifested an intention to exercise control over the building and the things which may be upon it or in it.
3. An occupier who manifests an intention to exercise control over a building and the things which may be upon or in it so as to acquire rights superior to those of a finder is under an obligation to take such measures as in all the circumstances are reasonable to ensure that lost chattels are found and, upon their being found, whether by him or by a third party, to acquaint the true owner of the finding and to care for the chattels meanwhile. The manifestation of intention may be express or implied from the circumstances including, in particular, the circumstance that the occupier manifestly accepts or is obliged by law to accept liability for chattels lost upon his "premises," e.g. an innkeeper or carrier's liability.
4. An 'occupier' of a chattel, e.g. a ship, motor car, caravan or aircraft, is to be treated as if he were the occupier of a building for the purposes of the foregoing rules [. . .]

The plaintiff was not a trespasser in the executive lounge and, in taking the bracelet into his care and control, he was acting with obvious honesty. Prima facie, therefore, he had a full finder's rights and obligations. He in fact discharged those obligations by handing the bracelet to an official of the defendants' although he could equally have done so by handing the bracelet to the police or in other ways such as informing the police of the find and himself caring for the bracelet.

The plaintiff's prima facie entitlement to a finder's rights was not displaced in favour of an employer or principal. There is no evidence that he was in the executive lounge in the course of any employment or agency and, if he was, the finding of the bracelet was quite clearly collateral thereto. The position would have been otherwise in the case of most or perhaps all the defendants' employees.

The defendants, for their part, cannot assert any title to the bracelet based upon the rights of an occupier over chattels attached to a building. The bracelet was lying loose on the floor. Their claim must, on my view of the law, be based upon a manifest intention to exercise control over the lounge and all things which might be in it. The evidence is that they claimed the right to decide who should and who should not be permitted to enter and use the lounge, but their control was in general exercised upon the basis of classes or categories of user and the availability of the lounge in the light of the need to clean and maintain it. I do not doubt that they also claimed the right to exclude individual undesirables, such as drunks, and specific types of chattels such as guns and bombs. But this control has no real relevance to a manifest intention to assert custody and control over lost articles. There was no evidence that they searched for such articles regularly or at all.

On the evidence available, there was no sufficient manifestation of any intention to exercise control over lost property before it was found such as would give the defendants a right superior to that of the plaintiff or indeed any right over the bracelet. As the true owner has never come forward, it is a case of 'finders keepers.'

On the one hand, the *result* in *Parker v British Airways Board* is consistent with the simple position adopted in *Hannah v Peel*: British Airways did not acquire a property right in the bracelet simply because it was lost and found on its land. On the other, the *reasoning* of Donaldson LJ introduces a complication: it means that a party with a property right in land

can acquire a property right in a thing lost and found on its land *if* it can show a '*manifest intention to exercise control over the* [land] *and all things which might be in it*'. It is not immediately obvious why a landowner's *intention* to control such things should give it a property right: why change the general rule that, to acquire a property right in relation to a lost or found thing, a party needs to take actual physical control of the thing?

Despite this problem, the reasoning of Donaldson LJ was relied on by the Court of Appeal in the following case.

Waverley Borough Council v Fletcher
[1996] QB 334, CA

Facts: Waverley Borough Council had a property right (a freehold) in Farnham Park, Farnham, Surrey. The park was open to the public for recreational use. In August 1992, Mr Fletcher visited the park with a metal detector and, after some digging, uncovered a medieval gold brooch about nine inches below the surface of the ground. Mr Fletcher thus took physical control of the brooch. Under the terms of the Treasure Act 1996, the Crown acquires a property right to any 'treasure' as soon as it is found. It was determined, however, that the brooch did not count as treasure and that the Crown consequently had no claim to it. The Council, however, claimed that, because it had been lost and found on its land, it had a prior property right in the brooch. The first instance judge found in favour of Mr Fletcher; the Court of Appeal allowed the Council's appeal.

Auld LJ

At 341–2

[Auld LJ, adding his own emphasis, referred to the following passage from Pollock and Wright, *Possession in the Common Law* (1888) at p 41, dealing with objects attached to or in land]:

> 'The possession of land carries with it in general, by our law, possession of everything which is *attached to or under* that land, and, in the absence of a better title elsewhere, the right to possess it also. And it makes no difference that the possessor is not aware of the thing's existence. So it was lately held concerning a prehistoric boat imbedded in the soil. It is free to any one who requires a specific intention as part of de facto possession to treat this as a positive rule of law. But it seems preferable to say that the legal possession rests on a real de facto possession, constituted by the occupier's general power and intent to exclude unauthorized interference.'

[. . .] The test of possession, in its most abstract form, may have a constant meaning whether applied to objects in or unattached and on land. But it is clear from Pollock and Wright's statement [. . .] that they regarded its application to objects in land to be free from the uncertainties inherent in disputes about entitlement to unattached objects found on land. Their proposition was that in practice possession of land should generally be taken as carrying with it an intent to possession of objects in or attached to it [. . .]

At 345–6

[Counsel for Mr Fletcher] argued that it is against commonsense that it should make all the difference whether an object is just under or on the surface. That was also the view of the [first instance] judge. He said that he could see no reason in common sense why the better possessory claim should depend upon whether an object was found on or in ground.

[Counsel for Mr Fletcher] gave as one of a number of examples in support of his argument, a lost watch on a muddy path which might within a day or two become covered by a thin coating of mud. Why, he asked, should the landowner's claim be different and stronger when the watch finally, but only just, disappears from sight?

In my view, the authorities reveal a number of sound and practical reasons for the distinction.

First, as Donaldson L.J. said in *Parker v. British Airways Board*,[52] an object in land "is to be treated as an integral part of the realty as against all but the true owner" or that the finder in detaching the object would, in the absence of licence to do so, become a trespasser. [Counsel for Mr Fletcher] suggested that this is wrong because if an object is treated as part of the realty the true owner cannot have priority. However, the English law of ownership and possession, unlike that of Roman Law, is not a system of identifying absolute entitlement but of priority of entitlement, and Donaldson L.J.'s rationale is consistent with that [. . .]

Second, removal of an object in or attached to land would normally involve interference with the land and may damage it [. . .]

Third, putting aside the borderline case of a recently lost article which has worked its way just under the surface, in the case of an object in the ground its original owner is unlikely in most cases to be there to claim it. The law, therefore, looks for a substitute owner, the owner or possessor of the land in which it is lodged. Whereas in the case of an unattached object on the surface, it is likely in most cases to have been recently lost, and the true owner may well claim it. In the meantime, there is no compelling reason why it should pass into the possession of the landowner as against a finder unless he, the landowner, has manifested an intention to possess it. As to borderline cases of the sort mentioned by [counsel for Mr Fletcher], potential absurdities can always be found at the margins in the application of any sound principle. It is for the trial judge to determine as a matter of fact and degree on which side of the line, on or in the land, an object is found [. . .]

In my view, the two main principles established by the authorities, and for good practical reasons, are as stated by Donaldson L.J. in *Parker v. British Airways Board*. I venture to restate them with particular reference to objects found on or in land, for he was concerned primarily with an object found in a building. (1) Where an article is found in or attached to land, as between the owner or lawful possessor of the land and the finder of the article, the owner or lawful possessor of the land has the better title. (2) Where an article is found unattached on land, as between the two, the owner or lawful possessor of the land has a better title only if he exercised such manifest control over the land as to indicate an intention to control the land and anything that might be found on it [. . .]

At 350

Accordingly, I can see no basis for not applying the general rule that an owner or lawful possessor of land has a better title to an object found in or attached to his land than the finder, or for modifying it in some way to produce a different result in the circumstances of this case. Mr. Fletcher did not derive a superior right to the brooch simply because he was entitled as a member of the public to engage in recreational pursuits in the park. Metal detecting was not a recreation of the sort permitted under the terms under which the council held the land on behalf of the general public. In any event, digging and removal of property in the land were not such a permitted use, and were acts of trespass. And the council was entitled to exercise its civil remedy for protection of its property regardless of the absence of any applicable byelaw.

[52] [1982] QB 1004, 1010.

According to the reasoning of Auld LJ, the crucial point in *Waverley BC v Fletcher*, which distinguishes that case from *Hannah v Peel*, is that the brooch was found *in* the land rather than *on* the land. As the following extract suggests, however, there are some problems with that reasoning.

McFarlane, *The Structure of Property Law* (2008, pp 157–8)

The Court of Appeal's reasoning in *Waverley BC* is flawed. First, it was said that once the brooch was submerged, it became part and parcel of [the Council's] land, so that [the Council], as an owner of the land, also had Ownership of the brooch. It is true that if one thing loses its physical identity and becomes subsumed into another thing, the first thing ceases to have an independent existence [. . .] However, if this had occurred in *Waverley BC* then *all*—pre-existing property rights in the brooch would have ceased to exist. On that view, the person who originally lost the brooch (A) would lose his Ownership of the brooch and so would be unable to assert a right against either [Mr Fletcher] or [the Council]. However, the Court of Appeal's view was that A *retained* Ownership and so, if he came forward, could assert his right against each of [Mr Fletcher] and [the Council].[53] But a court cannot have it both ways: *either* (i) the brooch lost its identity and became part of the land, so that A's pre-existing property right is destroyed; *or* (ii) the brooch did not lose its identity and A still has a property right he can assert against each of of [Mr Fletcher] and [the Council]. On that second view, the brooch does not count as part of [the Council's] land: so [the Council's] position as an owner of the land does *not* give [it] Ownership of the brooch.

The puzzling statement of Donaldson LJ in *Parker v British Airways Board*,[54] relied on in *Waverley BC*, that a thing can become an "integral part of the realty [i.e. the land] as against all but the true owner" must be rejected. Either the brooch lost its identity and became part of the land or it did not. The better view must be that it did not. The brooch did not become part of [the Council's] land simply by being submerged by the top soil. The brooch remained a distinct physical object: after all, once he found the brooch, [Mr Fletcher] was easily able to remove it from [the Council's] land.

QUESTIONS

1. In *Entick v Carrington*, what rights did Mr Entick assert against the King's messengers?
2. What does it mean if we say that 25 Mountfield Gardens is 'B's property'?
3. '*To whomsoever the soil belongs, he owns also to the sky and to the depths.*' Is that an accurate statement of English law?
4. Why might it matter whether or not a particular thing counts as part of a plot of land?
5. Whilst on B's land, A finds a gold ring. What factors are relevant to deciding which of A or B has a better claim to the ring?

[53] See *per* Auld LJ at 345.

[54] [1984] QB 1004, 1010.

FURTHER READING

Goodhart, 'Three Cases on Possession' [1929] CLJ 195

Gray, 'Property in Thin Air' [1991] CLJ 252

Gray and Gray, *Elements of Land Law* (5th edn, Oxford: OUP, 2009, Part 1.5)

Hickey, *Property and the Law of Finders* (Oxford: Hart, 2010, Chapter 2)

Howell, 'Subterranean Land Law: Rights Below the Surface of Land' (2002) 53 NILQ 268

3

HUMAN RIGHTS AND LAND

CENTRAL ISSUES

1. The Human Rights Act 1998 (HRA 1998) prospectively incorporates the European Convention on Human Rights (ECHR) into domestic law. Article 1 of the First Protocol and Art 8 have particular relevance to land law.
2. The HRA 1998 has vertical effect: under s 6, public authorities must act in accordance with the ECHR, while s 2 requires the courts to take account of the decisions of the European Court of Human Rights in Strasbourg (the Strasbourg Court).
3. The HRA 1998 may also have horizontal effect (i.e. between private individuals) as a consequence of s 3, which requires legislation to be interpreted in accordance with the ECHR, and s 6, which requires the courts (as public authorities) to act in accordance with the ECHR.
4. The Articles of the ECHR confer qualified protections. Infringements may be justified in the wider public interest. The government enjoys a wide margin of appreciation in identifying and implementing a legitimate purpose, but nevertheless must act proportionately.
5. Article 1 of the First Protocol guarantees the peaceful enjoyment of possessions. It provides that a person is not to be deprived of, or subject to controls over, their possessions except in the public or general interest.
6. Article 8 guarantees respect for the home, the enjoyment of which may only be infringed in proscribed circumstances: for example, in the national economic interest or to protect the rights of others.
7. Article 6 ensures the right to a fair trial in the determination of property rights, and Art 14 provides that individuals should not be discriminated against in the exercise of their ECHR rights.
8. The effect of the HRA 1998 on property rights is still uncertain, but two views have been advanced. The first is that the Act will have little impact, because English law is already founded on the fundamental principles that it espouses. The second suggests that the HRA 1998 will have a wider effect by providing an alternative measure against which conflicting rights may be balanced, and by the possibility that it founds a free-standing property protection.

1 INTRODUCTION

The Human Rights Act 1998 (HRA 1998) incorporates the European Convention on Human Rights (ECHR) into the domestic law of England and Wales. As such, it is said to bring human rights home by permitting an infringement of the ECHR to be raised and considered in the domestic courts.[1] Previously, a claimant had to bring his or her case before the European Court of Human Rights in Strasbourg (the Strasbourg Court) once he or she had exhausted any redress under English law in the domestic courts.[2]

The ECHR is a product of post-war Europe. In the face of the cold war, its object was to set out the freedoms that are considered central to human life in a civilized and democratic society. The majority of these rights were agreed and incorporated into the original form of the ECHR, to which the United Kingdom became a signatory in 1951, but the right to property proved more controversial and was not agreed until 1954. It is thus contained in a separate Protocol.

Although the ECHR was only incorporated into domestic law by the HRA 1998, the rights that it espouses are not a radical departure from the traditional principles upon which property law has been founded for centuries. The principle that no one should be arbitrarily deprived of their property found in Art 1 of the First Protocol has been a hallmark of democratic government, whilst the sanctity of the home that forms the basis of Art 8 reflects the sentiments of the time-honoured phrase that 'an Englishman's home is his castle'.

Gray, 'Land Law and Human Rights' in *Land Law Issues, Debates, Policy* (ed Tee, 2002, p 216)

> The safeguards provided by the Convention are, in their way, mirrored across the expanse of European history during the past millennium. The human right to protection from arbitrary dispossession by the state is born of a deep impulse which views lawless seizure of property as a particularly violating kind of molestation—a form of proprietary rape. An instinct against arbitrary dissessin of freehold is at least as old as the Magna Carta and went on to animate the great eighteenth century declarations of social and civil liberties. For Blackstone, writing in 1765, it was inconceivable that 'sacred and inviolable rights to private property' should be postponed to 'public necessity' without 'a full indemnification and equivalent for the injury thereby sustained'. As Blackstone explained in strikingly modern parlance, the state cannot act 'even for the general good of the community [. . .] by simply stripping the subject of his property in an arbitrary manner'. Blackstone's premise was adopted, quickly and in virtually identical terms, in the French Declaration of the Rights of Man and of the Citizen and has since inspired a vast range of national and international prohibitions on the taking of property by the state except for justifiable purposes and on payment of a fair value.

It is becoming increasingly apparent, however, that the HRA 1998 may have a more far reaching impact upon our property law by providing a new form of property protection based upon the human rights enshrined in the ECHR.

[1] *Rights Brought Home* CM 3782.

[2] In 1966, the UK adopted the optional clauses that enabled an individual claimant to bring a case before the Strasbourg Court. See Harpum, 'Property Law: The Human Rights Dimension—Part 1' [2000] L&T Rev 4, for details of the pre-HRA effect of the ECHR.

In this chapter, we will look firstly at the mechanics of how the HRA 1998 brings human rights home; we will then go on to examine the two principal Articles of the ECHR that are of direct importance to property lawyers—namely, Art 1 of the First Protocol (protection of possessions) and Art 8 (respect for the home). Art 14 (protection from discrimination) and Art 6 (right to a fair trial) will also be considered, but only in outline.[3] The chapter will conclude with an assessment of the impact of the HRA 1998 on property law to date and in particular the emergence of a new human rights based protection of property.

2 THE MECHANICS OF THE HUMAN RIGHTS ACT 1998

We need to examine how the HRA 1998 incorporates the ECHR into domestic law, because it is only then that we can begin to appreciate its impact on land law. Unfortunately, the answer to this question is uncertain because the interpretation and impact of the HRA 1998 is the source of much debate amongst public lawyers. Land lawyers cannot remain immune to these debates, given the potential for human rights to affect the relations between private individuals. However, we will confine our attention to outlining the essential framework and highlighting the central issues.

2.1 THE COURTS AND THE HRA 1998

2.1.1 Section 2 and the duty to 'take into account' of Strasbourg jurisprudence

2.—Interpretation of Convention rights.

(1) A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any—

(a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights,

(b) opinion of the Commission given in a report adopted under Article 31 of the Convention,

(c) decision of the Commission in connection with Article 26 or 27(2) of the Convention, or

(d) decision of the Committee of Ministers taken under Article 46 of the Convention,

whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.

Section 2, dictates that courts 'must take into account' the decisions of the Strasbourg Court, which has built up a considerable body of jurisprudence on the interpretation of the ECHR. Lord Bingham explained the meaning of this phrase in the conjoined appeals in the following cases.

[3] Gray and Gray question whether Arts 10 and 11—the right to freedom of speech, and to assembly and association—raise the possibility of uncontested access to private land: see Gray and Gray, *Elements of Land Law* (5th edn, 2009, [1.68]).

Kay v Lambeth LBC; Leeds CC v Price
[2006] 2 AC 465

Lord Bingham

At [28]

The mandatory duty imposed on domestic courts by section 2 of the 1998 Act is to take account of any judgment of the Strasbourg court and any opinion of the commission. Thus they are not strictly required to follow Strasbourg rulings, as they are bound by section 3(1) of the European Communities Act 1972 and as they are bound by the rulings of superior courts in the domestic curial hierarchy. But by section 6 of the 1998 Act it is unlawful for domestic courts, as public authorities, to act in a way which is incompatible with a Convention right such as a right arising under article 8. There are isolated occasions [. . .] when a domestic court may challenge the application by the Strasbourg Court of the principles it has expounded to the detailed facts of a particular class of case peculiarly within the knowledge of national authorities. The 1998 Act gives it scope to do so. But it is ordinarily the clear duty of our domestic courts, save where and so far as constrained by the primary domestic legislation, to give practical recognition to the principles laid down by the Strasbourg court as governing the Convention rights specified in s 1(1) of the 1998 Act. That court is the highest judicial authority on the interpretation of those rights, and the effectiveness of the Convention as an international instrument depends on the loyal acceptance by member states of the principles it lays down.

Thus s 2 does not reflect a strict approach to precedent but rather that Strasbourg decisions should exert a predominate influence which allows judges only a limited measure of discretion with any departure justified only when particular domestic circumstances dictate. This limited discretion is also constrained by ss 3 and 6 of the HRA 1998 as well as by a traditional hesitation to embark on judicial activism. There was an expectation that Strasbourg jurisprudence would operate as a floor below which domestic law would not fall, but in fact judges have shown reluctance in building upon the foundations laid by Strasbourg. Thus, Strasbourg Court decisions have tended to operate as a ceiling on the development of our domestic human rights.[4]

On occasions the courts have struggled to accept the opinions of the Strasbourg Court. For instance, we will see when examining Art 8 that our highest courts were initially reluctant to accept the unequivocal message from the Strasbourg Court regarding the compatibility of mandatory rights to possession exercised by public authorities.[5] In *R v Hardcastle* it was suggested that the Supreme Court should enjoy a degree of latitude where they believe that the Strasbourg Court does not appreciate the domestic situation. A dissatisfied victim may then appeal to the Strasbourg Court resulting in a dialogue, through the judgments of the two courts, to hopefully resolve any misunderstanding.

[4] Masterman, 'Aspiration or Foundation? The Status of Strasbourg Jurisprudence and "Convention Rights" under Domestic Law' in *Judicial reasoning under the Human Rights Act* (eds Fenwick, Phillipson, Masterman, Cambridge, CUP: 2007 Ch 3) and Lewis, *The European ceiling on human rights* [2007] PL 720.

[5] See section 4.2.2 below.

R v Hardcastle
[2009] UKSC 14

Lord Phillips

At [11]

The requirement to "take into account" the Strasbourg jurisprudence will normally result in this Court applying principles that are clearly established by the Strasbourg Court. There will, however, be rare occasions where this court has concerns as to whether a decision of the Strasbourg Court sufficiently appreciates or accommodates particular aspects of our domestic process. In such circumstances it is open to this court to decline to follow the Strasbourg decision, giving reasons for adopting this course. This is likely to give the Strasbourg Court the opportunity to reconsider the particular aspect of the decision that is in issue, so that there takes place what may prove to be a valuable dialogue between this court and the Strasbourg Court.

Nevertheless, no such dialogue is appropriate where there is a clear and consistent line of authority from the Strasbourg Court.[6]

The advent of a new source of authority has raised the question of the precedent status of Strasbourg Court decisions upon the lower courts, which the House of Lords considered in *Kay; Price*.[7] Our highest domestic court is free to depart from its own decisions and will need to do so if that decision is subsequently found to take inadequate account of the views of the Strasbourg Court.[8] But the Lords in *Kay* decided that their decisions would continue to bind the lower courts: it is for their Lordships alone to consider the consistency, or otherwise, of their decisions with the Strasbourg jurisprudence.

2.1.2 Section 3 and the interpretation of legislation

Human Rights Act 1998, s 3

Interpretation of legislation

(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

(2) This section—

(a) applies to primary legislation and subordinate legislation whenever enacted;

(b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and

(c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.

6 *Manchester CC v Pinnock* [2010] UKSC 45, [48], *per* Lord Neuberger.

7 [2006] 2 AC 465.

8 The Court of Appeal is also free to depart from its own incompatible decisions see *R v Secretary of State for Work and Pensions* [2008] UKHL 63, [65]–[67].

Section 3 requires all bodies, including the courts, to give effect to legislation, whether enacted before or after the coming into force of the HRA 1998, in a manner that is compatible with the ECHR. Where a court finds that it cannot do so, it may issue a declaration of incompatibility under s 4, whereupon the government may amend the offending legislation using the fast-track procedure set out in s 10.[9] In this manner, parliamentary sovereignty is respected, whilst ensuring that Parliament itself does not infringe the ECHR.

The width of the court's power of statutory interpretation under s 3 has proved controversial. This question was considered by the House of Lords in the leading case of *Ghaidan v Godin-Mendoza*. Their Lordship decided that the phrased "So far as it is possible to do so" conferred upon the courts extensive powers of interpretation which went beyond resolving ambiguities in legislation and could depart from the stated intention of the Parliament that had enacted the legislation. Thus, a court could modify the meaning of legislation to achieve compatibility, for instance by reading in words. However, the courts could not encroach upon Parliamentary sovereignty by adopting a meaning that was inconsistent with the fundamental thrust of the legislation.

Ghaidan v Godin-Mendoza
[2004] UKHL 30, [2004] 2 AC 557

Facts: Mr Wallwyn-James died and his landlord sought possession against his homosexual partner, Mr Godin-Mendoza, who claimed to be entitled to succeed to the tenancy under the terms of Schedule 1, paragraph 2(1) and (2) of the Rent Act 1977. These provisions provided that a spouse or person living with the tenant 'as his or her wife or husband' can take over the tenancy.

Lord Nicholls

At 27–33

Section 3 is open to more than one interpretation. The difficulty lies in the word "possible". Section 3(1), read in conjunction with section 3(2) and section 4, makes one matter clear: Parliament expressly envisaged that not all legislation would be capable of being made Convention-compliant by application of section 3. Sometimes it would be possible, sometimes not. What is not clear is the test to be applied in separating the sheep from the goats. What is the standard, or the criterion, by which "possibility" is to be judged? A comprehensive answer to this question is proving elusive[...] It is now generally accepted that the application of section 3 does not depend upon the presence of ambiguity in the legislation being interpreted. Even if, construed according to the ordinary principles of interpretation, the meaning of the legislation admits of no doubt, section 3 may none the less require the legislation to be given a different meaning [...] it follows that the interpretative obligation decreed by section 3 is of an unusual and far-reaching character. Section 3 may require a court to depart from the unambiguous meaning the legislation would otherwise bear. In the ordinary course the interpretation of legislation involves seeking the intention reasonably to be attributed to

[9] The county court cannot issue a declaration of incompatibility and, thus, proceedings will have to be adjourned to enable the higher courts to deal with the matter of incompatibility: see s 4(5), HRA, and *Kay v Lambeth LBC* [2006] UKHL 10, [2006] 2 AC 465, *per* Lord Hope at [110].

> Parliament in using the language in question. Section 3 may require the court to depart from this legislative intention, that is, depart from the intention of the Parliament which enacted the legislation. The question of difficulty is how far, and in what circumstances, section 3 requires a court to depart from the intention of the enacting Parliament. The answer to this question depends upon the intention reasonably to be attributed to Parliament in enacting section 3.
>
> On this the first point to be considered is how far, when enacting section 3, Parliament intended that the actual language of a statute, as distinct from the concept expressed in that language, should be determinative [...] From this the conclusion which seems inescapable is that the mere fact the language under consideration is inconsistent with a Convention-compliant meaning does not of itself make a Convention-compliant interpretation under section 3 impossible. Section 3 enables language to be interpreted restrictively or expansively. But section 3 goes further than this. It is also apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it Convention-compliant. In other words, the intention of Parliament in enacting section 3 was that, to an extent bounded only by what is "possible", a court can modify the meaning, and hence the effect, of primary and secondary legislation.
>
> Parliament, however, cannot have intended that in the discharge of this extended interpretative function the courts should adopt a meaning inconsistent with a fundamental feature of legislation. That would be to cross the constitutional boundary section 3 seeks to demarcate and preserve. Parliament has retained the right to enact legislation in terms which are not Convention-compliant. The meaning imported by application of section 3 must be compatible with the underlying thrust of the legislation being construed. Words implied must, in the phrase of my noble and learned friend, Lord Rodger of Earlsferry, "go with the grain of the legislation". Nor can Parliament have intended that section 3 should require courts to make decisions for which they are not equipped. There may be several ways of making a provision Convention-compliant, and the choice may involve issues calling for legislative deliberation.

We will see examples of the court's powers under s 3 when considering the compatibility with Art 8 of mandatory grounds for possession in 4.2.2 below.

2.1.3 The court as a public authority

Section 6(3) of the HRA 1998 extracted at 2.2 below, defines a court as a public authority. All public authorities are by s 6 required to act in a manner that is compliant with the ECHR. For instance, courts should have human rights firmly in mind when exercising any discretion they enjoy.

We have already noted that s 3 requires courts to interpret legislation in a human rights compliant manner. Although property law is increasingly regulated by legislation, much is still reliant upon common law and equitable principles: do the courts in their development of the common law and equitable principles also have to comply with the ECHR? An affirmative argument is put forward based upon the operation of s 6. The courts, as public bodies, are required to act, and thus decide cases before them, in a manner that is compliant with the ECHR regardless of whether those cases concern the interpretation of a statute, and/or the application of the common law and equitable principles. Howell has also pointed out that it is arbitrary to draw a distinction.

Howell, 'The Human Rights Act 1998: Land, Private Citizens, and the Common Law' (2007) 123 LQR 618, 627

It must also follow that if the court is itself a public authority sufficient under s.6, there is a strong argument that the courts must equally interpret the common law in a way compatible with the Convention. Although s.3 refers only to statute law not to common law, under its obligation as a public body under s.6 the court has to act in a way which is compatible with the Convention. The fact that the HRA does not refer to the common law is understandable if it is the actions of public authorities as emanations of the State (as in *Qazi* and *Kay*) which are being scrutinised. Public bodies owe their existence and obtain their legitimacy solely through legislation, although they are, of course, also bound by any relevant common law principles. But once the HRA is applied to actions between private parties, then not only is all legislation potentially open to scrutiny under s.3 but also by the same reasoning all common law. Not to apply the Convention to the common law would itself lead to arbitrary distinctions.

Whether a particular area of property law is covered by legislation is largely a matter of chance. Much of the law relating to landlord and tenant is subject to statutory regulation as various Governments have sought to give protection first to the tenant and then to the landlord as political expediency and social trends dictated. On the other hand much of the law relating to real property is still left to the common law with occasional statutory regulation (which may itself be largely a codification of the common law). For example, at present the rules governing the acquisition of a beneficial interest under a constructive or resulting trust are governed by the common law, but may in the future be put into statutory form.

The House of Lords in the following case (in the context of a local authority's possession proceedings of a travellers' site) noted the difficulty of separating common law and statute when legislation is inevitably drawn against the landscape of the common law to produce a framework of rights and duties.[10]

Birmingham City Council v Doherty
[2008] 3 WLR 636, HL

Lord Walker

At [100]

At common law, a landlord is entitled to possession of the demised premises if the tenant's lease or tenancy has expired or been validly terminated, and similarly a fortiori if there was only a licence. To that extent [. . .] the City Council was, in seeking possession, relying on a common law right. That is part of the picture, but it is far from the whole picture, and in my opinion, it would be unrealistic, and productive of error, not to look at the whole picture. The fact is that the City Council's common law right was surrounded on all sides by statutory infrastructure, like a patch of grass in the middle of a motorway junction [. . .]

At [104]

The paramount consideration, I think, will be whether the composite legal scheme in general, and the offending provision in particular (offending that is against someone's Convention

[10] See also Lord Mance at [155].

right) clearly represents the considered intention of Parliament [. . .] By contrast the fact that Parliament has made some limited statutory modification to the common law [his Lordship referred to defamation as an example] could not, I think be treated as a general parliamentary endorsement of those extensive areas which have been left unmodified. Within these two extremes there may be some difficult problems to be determined on a case-by-case basis.

We will return to consider the court's duties under ss 3 and 6 when examining the extent of the horizontal effect of the HRA 1998.

2.2 VERTICAL EFFECT

The HRA 1998 not only affects the work of the court but also places a direct duty upon all public authorities to act in a manner that is compatible with the EHCR.

Human Rights Act 1998, s 6

Acts of public authorities

(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

(2) [. . . see section 2.2.3 below]

(3) In this section "public authority" includes—

(a) a court or tribunal, and

(b) any person certain of whose functions are functions of a public nature,

but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.

(4) In subsection (3) "Parliament" does not include the House of Lords in its judicial capacity.

(5) In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private.

(6) "An act" includes a failure to act but does not include a failure to—

(a) introduce in, or lay before, Parliament a proposal for legislation; or

(b) make any primary legislation or remedial order.

This duty is known as the vertical effect of the HRA 1998 because s 7 of the HRA 1998 confers upon a victim of an infringement of his or her human rights by a public authority a direct cause of action so that he or she may bring proceedings against, or defend proceedings brought by, that authority. A 'victim' is a person who is directly affected by the act or omission of the public authority.[11] Where the court finds that a public authority has failed to act as required by s 6, the court may grant such remedy as it deems to be 'just and appropriate', including the award of damages.[12]

[11] Section 7(7), HRA 1998, and Art 34 of the ECHR.

[12] Section 8.

2.2.1 Public authorities

Central to vertical effect is what we mean by a 'public authority'. A distinction must be drawn between *core* public authorities, the entire functions of which fall to be considered under s 6, and *hybrid* public authorities, which may not appear to be public in nature, but which may nevertheless carry out some public functions. In the performance of these public functions, hybrid bodies are subject to s 6.[13] The House of Lords made this functional distinction in *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank*,[14] when rejecting the suggestion that a parochial church council was a public authority.

A core public authority is required to comply with the ECHR in the performance of all of its functions because it is a public authority 'through and through'.[15] The identification of a core public authority should be relatively straightforward: for example, a local authority is a public authority and thus must observe the ECHR when exercising all of its functions, including when acting as a landlord of local authority housing.

A hybrid public authority is only required to comply with the ECHR when exercising those functions that are of a public nature. It is not so constrained when performing a private function.

Whether or not a particular body is subject to s 6 thus requires 'a two-fold assessment':[16] firstly, a consideration of whether some of its functions have a public character, so that it qualifies as a hybrid public authority; and secondly, whether the particular function in question was a public function and thus subject to scrutiny. The tests are not always easy to divine[17] and Howell has complained that '*unfortunately the cases reveal at best a lack of consistency and, at worst an apparent lack of awareness of the importance of the question, or at least a disinclination to deal with it directly*'.[18]

Whether or not a registered provider of social housing, although not a core public authority, is a hybrid public authority which is acting in a public or private capacity are significant questions for housing lawyers. The Court of Appeal has provided guidance in *London Quadrant Housing Trust v Weaver*.[19] Registered providers of social housing (previously known as Registered Social landlords and referred to as RSL in the extract below) provide accommodation to those in need with the assistance of government funded grants and are subject to statutory regulation in the management of their housing stock. As a registered provider and an independent legal entity with charitable status, London Quadrant entered into private tenancy agreements directly with its tenants although some of those tenants were allocated by local authorities to meet their housing responsibilities to those unable to secure accommodation on the open market. Mrs Weaver was one such tenant who fell into rental arrears and was evicted by London Quadrant. The issue that fell to be determined was whether in terminating Mrs Weaver's tenancy London Quadrant was subject to s 6 of the HRA 1998 because it was a hybrid public authority which was acting in a public, rather

[13] See s 6(3). [14] [2003] UKHL 37, [2004] 1 AC 546. [15] *Per* Lord Hope at [35].

[16] See *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 AC 546, *per* Lord Hobhouse at [85].

[17] The House of Lords was divided in *Aston Cantlow*, with Lord Scott deciding that the parochial church council, whilst not a core public authority, was exercising a public function as a hybrid public authority. See, also, *YL v Birmingham CC* [2007] UKHL 27, [2008] 1 AC 95. The restricted scope of the definition has been criticized: see Clayton, 'The Human Rights Act Six Years On: Where Are We Now?' [2007] EHRLR 11.

[18] 'The Human Rights Act 1998: Land, Private Citizens, and the Common Law' (2007) 123 LQR 618.

[19] [2009] EWCA Civ 587, [2010] 1 WLR 363. See also the previous decision in *Poplar Housing and Regeneration Community Association v Donoghue* [2001] EWCA Civ 595, [2002] QB 48.

than a private, capacity. London Quadrant conceded that it was a hybrid public authority but maintained that in terminating Mrs Weaver's tenancy they were acting as a private landlord. The majority of the Court of Appeal disagreed.

Elias LJ

At 66–81

The essential question is whether the act of terminating the tenancy is a private act. When considering how to characterise the nature of the act, it is in my view important to focus on the context in which the act occurs; the act cannot be considered in isolation simply asking whether it involves the exercise of a private law power or not. As Lord Mance observed in YL, both the source and nature of the activities need to be considered when deciding whether a function is public or not, and in my view the same approach is required when determining whether an act is a private act or not within the meaning of section 6(5). Indeed, the difficulty of distinguishing between acts and functions reinforces that conclusion.

In this case there are a number of features which in my judgment bring the act of terminating a social tenancy within the purview of the Human Rights Act.

A useful starting point is to analyse the Trust's function of allocating and managing housing with respect to the four criteria identified by Lord Nicholls in paragraph 12 in the Aston Cantlow case [. . .] First, there is a significant reliance on public finance; there is a substantial public subsidy which enables the Trust to achieve its objectives. This does not involve, as in YL, the payment of money by reference to specific services provided but significant capital payments designed to enable the Trust to meet its publicly desirable objectives.

Second, although not directly taking the place of local government, the Trust in its allocation of social housing operates in very close harmony with it, assisting it to achieve the authority's statutory duties and objectives. In this context the allocation agreements play a particularly important role and in practice severely circumscribe the freedom of the Trust to allocate properties. This is not simply the exercise of choice by the RSL but is the result of a statutory duty to co-operate. That link is reinforced by the extent to which there has been a voluntary transfer of housing stock from local authorities to RSLs.

Third, the provision of subsidised housing, as opposed to the provision of housing itself, is, in my opinion a function which can properly be described as governmental. Almost by definition it is the antithesis of a private commercial activity. The provision of subsidy to meet the needs of the poorer section of the community is typically, although not necessarily, a function which government provides. The Trust, as one of the larger RSLs, makes a valuable contribution to achieving the government's objectives of providing subsidised housing. For similar reasons it seems to me that it can properly be described as providing a public service of a nature described in the Lord Nicholls' fourth factor.

Furthermore, these factors, which point in favour of treating its housing functions as public functions, are reinforced by the following considerations. First, the Trust is acting in the public interest and has charitable objectives. I agree with the Divisional Court that this at least places it outside the traditional area of private commercial activity. Second, the regulation to which it is subjected is not designed simply to render its activities more transparent, or to ensure proper standards of performance in the public interest. Rather the regulations over such matters as rent and eviction are designed, at least in part, to ensure that the objectives of government policy with respect to this vulnerable group in society are achieved and that low cost housing is effectively provided to those in need of it. Moreover, it is intrusive regulation on various aspects of allocation and management, and even restricts the power to dispose of land and property.

None of these factors taken in isolation would suffice to make the functions of the provision of housing public functions, but I am satisfied that when considered cumulatively, they establish sufficient public flavour to bring the provision of social housing by this particular RSL within that concept. That is particularly so given that their Lordships have emphasised the need to give a broad and generous construction to the concept of a hybrid authority.

Is termination of a tenancy a private act?

That still leaves the central question whether the act of termination itself can nonetheless be treated as a private act. Can it be said that since it involves the exercise of a contractual power, it is therefore to be characterised solely as a private act? [. . . .]

In my judgment, the act of termination is so bound up with the provision of social housing that once the latter is seen, in the context of this particular body, as the exercise of a public function, then acts which are necessarily involved in the regulation of the function must also be public acts. The grant of a tenancy and its subsequent termination are part and parcel of determining who should be allowed to take advantage of this public benefit. This is not an act which is purely incidental or supplementary to the principal function, such as contracting out the cleaning of the windows of the Trust's properties. That could readily be seen as a private function of a kind carried on by both public and private bodies. No doubt the termination of such a contract would be a private act (unless the body were a core public authority.)

In my opinion, if an act were necessarily a private act because it involved the exercise of rights conferred by private law, that would significantly undermine the protection which Parliament intended to afford to potential victims of hybrid authorities. Public bodies necessarily fulfil their functions by entering into contractual arrangements. It would severely limit the significance of identifying certain bodies as hybrid authorities if the fact that the act under consideration was a contractual act meant that it was a private act falling within section 6(5)[. . .]

It follows that in my view the act of terminating the tenancy of Mrs Weaver did not constitute an act of a private nature, and was in principle subject to human rights considerations [. . .]

Rix LJ, however, delivered a dissenting judgment. He was strongly of the view that in terminating a tenancy a social landlord was exercising a private right conferred by a private tenancy agreement.[20] An appeal to the Supreme Court was refused in *Weaver,* although given the importance of the issue, it may well be that another case will be the subject of an appeal.[21]

A further distinction between a core and hybrid public authority should also be noted.[22] A core hybrid authority cannot be a victim of a breach of its human rights; by contrast, a hybrid public authority, when acting in a private capacity, may be a victim. This distinction may be relevant in determining whether or not a body is a core or hybrid public authority.

[20] At [147]–[159]. He furthermore expressed doubts about the concession made by London Quadrant that it was a hybrid public authority at [160].

[21] See also *Eastland Homes Partnership Ltd v Whyte* [2010] EWHC 695 where Eastland accepted they were bound by *Weaver* but reserved their position in the event of an appeal.

[22] *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 AC 546, [9] and [11].

2.2.2 Section 6(2): defences

The duty imposed by s 6(1) upon public authorities to act in a manner that is compliant with the ECHR is subject to the defences set out in s 6(2).

Human Rights Act 1998, s 6(2)

(2) Subsection (1) does not apply to an act if—

(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or

(b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.

The courts as public authorities cannot change the law so that it complies with the ECHR; they can only try to interpret the law to comply with the ECHR, in pursuance of their duty under s 3, or, if that is not possible, issue a declaration of incompatibility under s 4 to instigate a change in the law by Parliament. Until an incompatible law is brought into line with the ECHR, public authorities must still go about their work, which may involve applying an incompatible law. Section 6(2) provides a defence to public authorities if they find themselves in this unenviable position.

Section 6(2)(a) provides a defence where a public authority is under a duty to apply an incompatible provision because it 'could not have acted differently'; s 6(2)(b) provides a defence where a public authority has a power, which it may or may not exercise, conferred by an incompatible, but still current, statute. It should be noted that the s 6(2) defences have no application where a public authority is acting under a statutory power which can be interpreted compatibly with the ECHR pursuant to s 3 of the HRA 1998.[23]

The operation of s 6(2)(b) raises several difficult questions. The fundamental issue is whether the sub-section enables a public authority to exercise a power or discretion in a way that infringes Convention rights when it could have acted differently. The answer is not yet clear. In *R (Hooper) v Secretary of State for Work and Pensions*.[24] Lords Hoffmann and Hope appeared to accept the possibility. However, Lord Mance in *Doherty*, in the context of a decision to take possession proceedings pursuant to a statutory scheme, came to a different conclusion[25] with which Lord Neuberger in *Pinnock* expressed agreement.[26] Their Lordships were of the opinion that in taking the decision to take possession proceedings the public authority was not acting 'to give effect to' incompatible primary legislation. It was deciding whether or not to rely on its statutory right to possession and that decision was not dictated by the legislation in question. The authority was, thus, still under a s 6 duty to act in accordance with Convention values.

The key point is, therefore, to determine when a public authority 'was acting to give effect to' primary legislation. Lord Hope, in *Doherty*, identified three possibilities. It is the third

[23] *Manchester CC v Pinnock* [2010] UKSC 45 *per* Lord Neuberger, [93]–[103].

[24] [2005] 1 WLR 1681, HL. See also *R (Wilkinson) v Inland Revenue Commissioners* [2005] 1 WLR 1718.

[25] [2008] 2 WLR 636 [153]–[159]. Lord Walker in *Birmingham City Council v Doherty* [2008] 3 WLR 636 also expressed reservations at [113].

[26] *Manchester CC v Pinnock* [2010] UKSC 45, [93]–[103].

situation where the statutory scheme lays down general powers, for instance of housing management, that marks these divergent views.

Birmingham City Council v Doherty
[2008] 3 WLR 636, HL

Lord Hope

At [39]

The cases in which the effect of section 6(2)(b) of the 1998 Act has been considered so far demonstrate that three distinct situations may arise. The first is where a decision to exercise or not to exercise a power that is given by primary legislation would inevitably give rise to an incompatibility [. . .] The second, which lies at the opposite end of the spectrum, is where the act or omission of the public authority which is incompatible with a Convention right is not touched by one or more provisions of primary legislation in any way at all. As the matter is not to any extent the product of primary legislation, the sovereignty of Parliament is not engaged. The act or omission will be unlawful under section 6(1) because section 6(2)(b) does not apply to it. The third situation lies in the middle. This is where the act or omission takes place within the context of a scheme which primary legislation has laid down that gives general powers, such as powers of management, to a public authority. That is the situation in this case. The answer to the question whether or not section 6(2)(b) applies will depend on the extent to which the act or omission can be said to be giving effect to any of the provisions of the scheme that is to be found in the statutes.

At [40]

The important point [. . .] is that section 6(2)(b) assumes that the public authority could have acted differently but excludes liability if it was giving effect to a statutory provision which could not be read in a way that was compatible with the Convention rights. It protects a decision to exercise or not to exercise a discretion that is available to it under the statute [. . .] Public authorities which make use of the common law in the exercise of their statutory powers of management are in no less favourable a position under that section 6(2)(b) than they would have been had their powers been derived entirely from statute.

Yet a further gloss lies in determining the scope of powers arising under non-compliant primary legislation. As we have noted, statute and the common law are often entwined. From the last extract we can see that Lord Hope was prepared to accept that a s 6(2) defence could encompass common law rules, which operate within a statutory framework. However, Lord Mance in *Doherty*, disagreed.[27] If deciding to take possession pursuant to a statutory scheme was not within s 6(2)(b), relying on a common law right clearly also was not.

2.2.3 The interface with judicial review

As we have noted, s 7 of the HRA 1998 provides a direct cause of action where a public authority has breached its s 6 duty to act in a Convention compliant manner. A public authority's administrative decisions can also be questioned through the public law route of judicial review. At common law a public authority's administrative decision may be overturned

[27] [2008] 3 WLR 636, [153]–[159].

where it fails either to meet the requisite procedural standards, for instance, because relevant facts are not considered, or where the decision does not satisfy the well known *Wednesbury* reasonableness standard, because it is so unreasonable that no authority acting reasonably could have reached that decision.[28] The enactment of the HRA 1998 has raised two fundamental issues. First, what is the appropriate standard to be applied where judicial review is founded upon a public authority's failure to comply with human rights standards and secondly what is the interface between a s 7 direct human rights cause of action and a public law action by judicial review?

The Strasbourg Court in *Kay v UK*[29] rejected judicial review, confined to conventional *Wednesbury* reasonableness, as an adequate process that satisfied the demands of proportionality but, "welcome[d] the increasing tendency of the domestic courts to develop and expand conventional judicial review grounds."[30] The House of Lords in *Doherty* struggled to articulate the width of judicial review where an Art 8 challenge was mounted against a local authority's decision to repossess an occupier's home. However, in a series of cases in other areas their Lordships have formulated a clearer picture of the appropriate approach.[31]

It is not necessarily a question of developing a common law super *Wednesbury* standard to encompass human rights but of recognizing that the court is engaged in a different role in assessing the human rights compatibility of the public authority's conduct. Hickman has described these distinct roles as standards of review and standards of legality.[32] The *Wednesbury* standard of review empowers the courts to intervene to question a public authority's decision but no overt duty is placed upon the public authority itself. Whereas standards of legality, whether derived from the rules of natural justice or the HRA 1998, impose duties upon public authorities that the courts, as adjudicators, decide whether or not have been met. Standards of legality, thus, look to *what* the public authority is lawfully able to do and standards of review can question *how* they do so. Where a court is asked to adjudicate upon whether a public authority's decision has satisfied the human rights' standards of legality, they should look to the distinct human rights concept of proportionality that we will consider at 2.5 below.

Given this emerging wider basis of judicial review, it has been suggested that there is little difference between a direct s 7 HRA 1998 challenge and a challenge brought by way of judicial review. For instance, in *Taylor v Central Bedfordshire Council*[33] Walker LJ stated:

> … although there is a distinction between a defence raising Article 8 directly for decision by the court [i.e. via s 7] and the question [i.e. via judicial review] whether the council as a public authority has made a lawful decision in the light of the occupier's Article 8 rights, the distinction has, very largely become academic.

The 'academic' distinction to which Walker LJ refers is summarized by Nield in the following extract:

[28] *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223.

[29] [2011] HLR 2. [30] Ibid, [73].

[31] *R (on the application of Daly) v SS for the Home Department* [2001] UKHL 26, *R (on the application of Begum) v Denbigh High School Governors* [2006] UKHL 15, *Huang v SS for the Home Department* [2007] UKHL 11, *Belfast CC v Miss Behavin' Ltd* [2007] UKHL 19, *Re (A Child)* [2008] UKHL 66 and *R (on the application of Nasseri) v SS for the Home Department* [2009] UKHL 23.

[32] T Hickman, *Public law after the HRA* (Oxford, Hart 2010) Ch 4. See also I Leigh (2002) PL 265.

[33] [2009] EWCA Civ 613, [38].

Nield, 'Article 8 Again—the continuing dialogue!' [2010] Conv 498

> . . . the question before the court is different. In judicial review the court is called upon to examine the decision of the public authority to pursue possession proceedings. The focus is upon the conduct of the public authority which it is for the occupier to establish did not meet the required standard. Whereas, where an Article 8 defence is directly in issue, the court is weighing the proportionality of the claim for possession in its effect upon the occupier's right to respect for their home. Though it is to be presumed that the law governing possession is compatible and the occupier must raise the challenge that it is not in his or her circumstances, it is for the public authority to demonstrate that possession is justified. The remedial response may also differ. Section 8 of the Human Rights Act 1998 offers the possibility of damages to a victim of an unjustified interference whilst the judicial review just attacks the validity of the impugned decision.
>
> Judicial review also suffers from a number of draw backs as an adequate process. Most obviously it can only examine the decision of a public authority and thus will be of no assistance should Article 8 be applied horizontally to affect the relations of private parties. Judicial review is also not designed to resolve dispute facts, yet a consideration of an occupier's personal circumstances might well lead to factual discrepancies. This may not be an insurmountable obstacle with Lord Scott and Lord Mance in *Doherty* suggesting that only a modest adjustment to judicial review procedure could overcome this deficiency.

2.3 HORIZONTAL EFFECT

The question of whether or not human rights can operate in a dispute between private individuals is a much-debated one. Rather surprisingly, the courts have to date failed to address the question directly. In *Kay; Price*, Lords Bingham, Nicholls, and Hope did advert to the possibility of Art 8 being engaged by a private landlord's possession proceedings, but only Lord Hope was prepared to admit the likelihood.[34] Subsequently, their Lordships have studiously avoided the issue. For instance, in *Pinnock* Lord Neuberger was keen to underline that the Supreme Court was making no comment on horizontal effect.[35]

A case for horizontal application of the ECHR can be made based upon ss 3 and 6 of the HRA 1998. It should be noted at the outset that neither of these sections confers a cause of action between individual litigants: an individual cannot thus directly claim that his or her human rights have been infringed by another individual. He or she can only claim a breach of human rights in the context of other proceedings, for instance, by questioning the human rights compatibility of the law governing the dispute rather than the compatibility of the opposing party's actions (or inaction). It is, thus, generally accepted that the HRA 1998 does not have direct horizontal effect[36] but that it does have

[34] [2006] UKHL 10, [2006] 2 AC 465, [64]. Lords Bingham, [28], and Nicholls, [61], declined to express an opinion. See also *Birmingham City Council v Doherty* [2008] 3 WLR 636, [23].

[35] [2010] UKSC 45 [50]. The House of Lords in *Doherty* [2008] UKHL 57, [2008] 3 WLR 636 also avoided the issue, *per* Lord Walker [99].

[36] Professor Wade has argued for direct horizontal effect see 'Horizons of Horizontality' (2000) 116 LQR 217. His views have some support see Morgan 'Questioning the True Effect of the HRA' (2002) 2 LS 259, Beyleveld and Pattison 'Horizontal Application and Horizontal Effect' (2002) 118 LQR 623 and Bennett, 'Horizontality's new horizons—re-examining horizontal effect:privacy defamation and the Human Rights Act' (2010) 21 Ent LR 96 and 145.

a measure of indirect horizontal effect, although differences of opinion are expressed over its extent.[37]

2.3.1 Section 3 Statutory interpretation and horizontal effect

The obligation of the courts to interpret legislation in a human rights compatible manner has been applied to disputes between private individuals. Indeed the leading case of *Ghaidan v Godin-Mendoza* (extract at 2.2.1 above) involved a dispute between private individuals.

Likewise, we shall see in Chapter 8 that courts have been prepared to consider the human rights compatibility of the law on adverse possession, even though the protagonists are private individuals, because the law is statute-based.[38]

2.3.2 Section 6, the common law and horizontal effect

But where does this leave the development of the common law and equitable principles? We have already seen that it is somewhat anomalous to draw a distinction between legislation and legal rules that have been articulated and developed by the courts. It has been suggested that the courts as public authorities are required, pursuant to s 6, to have note of human rights when performing this role. Advocates of horizontal effect point to the development of the tort of misuse of private information as evidence of the influence of s 6 upon the common law.[39] The difference in views concerns whether or not the court are under an actually duty to apply and develop the common law in accordance with the ECHR (known as the strong indirect effect) or are merely obliged to give weight to Convention values depending on the context of the case (known as weak indirect effect).[40] Phillipson argues that, whilst the courts have accepted the impact of s 3 upon statutory interpretation with alacrity, they are reluctant to accept strong indirect horizontal effect upon the common law. He suggests that this explains their Lordships' reluctance to resolve this vital issue.

[37] See for a summary of the debate Phillipson, 'Clarity Postponed: horizontal effect after Campbell' in *Judicial Reasoning under the Human Rights Act* (eds Fenwick, Phillipson, and Masterman, Cambridge, CUP: 2007) 215 and Bennett ibid.

[38] *Ofulue v Bossert* [2008] EWCA Civ 7. In *JA Pye (Oxford) Ltd v Graham* [2001] EWCA Civ 117, the Court of Appeal considered briefly the application of the HRA 1998. The House of Lords ([2002] UKHL 30) decided that the HRA 1998 was not applicable, because it did not have retrospective effect, not because it did not have horizontal application.

[39] Phillipson, 'The common law, privacy and the Convention' in *Judicial Reasoning under the Human Rights Act* (eds Fenwick, Phillipson & Masterman, Cambridge, CUP: 2007), 9 and Bennett, 'Horizontality's New Horizon's—re-examining horizontal effect: privacy defamation and the Human Rights Act' (2010) 21 Ent LR 96.

[40] The case for a strong indirect effect is made by Hunt, 'The Horizontal Effect of the Human Rights Act' [1998] PL 423, Lester and Pannick 'The Impact of the Human Rights Act on Private Law: The Knights Move' (2000) 116 LQR 380 and Beatson and Grosz, 'Horizontality: A footnote' (2000) 116 LQR 385. Whilst others argue for a weak indirect effect, see Phillipson, 'The Human Rights Act, "Horizontal Effect" and the Common Law: A Bang or a Whimper' (1999) 62 MLR 824.

Phillipson, 'Clarity Postponed:Horizontal Effect after Campbell' in *Judicial Reasoning under the Human Rights Act* (eds Fenwick, Phillipson and Masterman, 2007, pp 143 and 173)

> [. . .] to allow what was hitherto an international treaty to penetrate deep into the common law was something about which the judiciary was always likely to feel ambivalent. It is one thing when Parliament simply replaces an area of common law with a statutory code [. . .] But for Parliament to enact a statute that had the capacity to colonise whole swathes of the common law with general Convention principles was quite another matter: it threatened the whole traditional common law style of reasoning and the judiciary's autonomy in developing it. If Parliament chooses to enact in one statute—the HRA—a provision that clearly instructs the judges how to interpret other statutes, that is one thing Parliament is merely modifying the rules of interpretation applying to the laws that Parliament itself produces.
>
> This outcome [a lack of resolution] at present allows the Convention rights to play a greater or lesser part in judicial reasoning, depending, presumably, upon the judge's overall view of the case and where he or she wants the law to go. In other words there is an additional source of principle to draw upon in common law reasoning, but judges have so far avoided the possibility of the Convention displacing, in a thorough going way, the broad consideration of a wide range of factors traditionally used in common law reasoning.

2.3.3 A State's positive duties and s 2

At the higher level of States' Convention duties, it is accepted that under the ECHR States are subject to both negative duties not to breach the Convention and certain positive duties to 'protect individual persons from threats to their Convention rights or to assist them to achieve full enjoyment of those rights.'[41] The domestic courts need to pay heed to these positive duties through their responsibility to take account of Strasbourg jurisprudence under s 2 of the HRA 1998.

Although the extent of such positive duties is unclear, it is becoming increasingly evident that the Strasbourg Court is prepared to consider the compatibility of legal rules governing the relations of private individuals. Their traditional approach is exemplified in *Di Palma v UK*[42] where an attempt to claim that the forfeiture of a lease by a private landlord for non-payment of service charges was a breach of Art 8 was robustly rejected as 'manifestly ill founded'.[43] A distinctly different attitude is evident from the more recent case of *Khurshid Mustafa v Sweden*[44] where the Strasbourg Court held that a repossession based upon the breach of a covenant not to erect a satellite dish on the exterior of a block of flats was admissible and indeed a breach of Art 10 (freedom of expression).[45] The satellite dish was erected so that the foreign residents could receive foreign television programmes in their own language. The court stated:

[41] See for instance P Kenna, 'Housing Rights: positive duties and enforceable rights at the European Court of Human Rights' (2008) 2 EHRLR 193, 199.

[42] (1996) 10 EHRR 149. [43] At [2]. [44] App No 23883/06.

[45] A breach of Art 8 was also alleged but, in view of the breach of Art 10, the court did not go on to consider this alleged violation of Convention rights.

At [33]

Admittedly, the Court is not in theory required to settle disputes of a purely private nature. That being said, in exercising the European supervision incumbent on it, it cannot remain passive where a national court's interpretation of a legal act, be it a testamentary disposition, a private contract, a public document, a statutory provision or an administrative practice appears unreasonable, arbitrary, discriminatory or, more broadly, inconsistent with the principles underlying the Convention.

This more interventionist change of approach is evident in environmental cases where States' liability has been considered in the control of nuisance, including pollution[46] and anti-social behaviour,[47] by private individuals or entities. It also underlies the demand for adequate procedural safeguards to protect Convention rights; an imperative that has been applied equally to disputes between private individuals.[48]

The need for protective positive duties is particularly significant where a victim is perceived as vulnerable.[49] The important following case illustrates the strength of States' positive duties to protect vulnerable victims even where important property based consideration such as the enforcement of payment obligations, certainty and the protection of bona fide purchasers are at stake.

Zehentner v Austria
[2011] 52 EHRR 22

Facts: Ms Zehentner had repairs carried out to her flat but unfortunately suffered from mental illness and had left her flat to receive treatment before she could pay for the repairs. Her workmen obtained judgment for the cost of these repairs which they enforced by obtaining the Austrian equivalent of a charging order. The flat was subsequently sold when the strict time limits for payment of the now secured judgment debt had expired. Because of her illness Ms Zehentner was unaware of the enforcement proceedings and the sale of her flat. However, when she recovered sufficiently to learn of what had happened she successfully claimed that she had been unjustifiably deprived of her possessions under Art 1 Protocol 1 and the right to respect for her home under Art 8 had been violated.

At [61]–[65]

The Court notes at the outset that the judicial sale of the applicant's apartment was authorised on the basis of a payment order which had been issued in summary proceedings. While this may be in the interest of efficient enforcement proceedings, the Court has doubts as

[46] *Lopez Ostra v Spain* (1995) 20 EHRR 277, *Hatton v UK* App No 36022/97 and *Khatun v UK* (1998) 26 EHRR CD 212.

[47] *Mileva v Bulgaria* App Nos 43449/02 and 21475/04, *Moreno Gomez v Spain* App No 4143/02; *Oluic v Croatia* App No 61260/08.

[48] *Zehentner v Austria* (2011) 52 EHRR 22; *Pye v UK* (2006) 43 EHRR 3 (Chamber) and (2008) 46 EHRR 45 (Grand Chamber) *Belchikova v Russia* App No 2408/06.

[49] For instance gypsies eg *Moldovan v Romania* (2007) 44 EHRR 16 and *Connors v UK* (2005) 40 EHRR 9 and the physically disabled e.g. *Botta v Italy* (1998) 26 EHRR 241 and *Marzari v Italy* (2000) 30 EHRR CD218.

to whether the debtor's interests are adequately taken into account where such a payment order, moreover for a comparatively minor sum, can be the basis for the judicial sale of a debtor's "home" within the meaning of Article 8. While the Court does not have to examine this system in the abstract, it notes that in the circumstances of the present case it was particularly detrimental to the applicant. It appears from the expert opinion provided in the guardianship proceedings that by the time the judicial sale of her apartment took place she had lacked legal capacity for years. As a result she had not been in a position either to object to the payment order underlying the decision authorising the judicial sale or to make use of the remedies available to the debtor under the Enforcement Act.

It is true, as the Government pointed out, that the courts were not and could not have been aware of the applicant's lack of legal capacity when conducting the proceedings at issue. However, the Court attaches weight to the fact that once the applicant's lack of legal capacity had been established and a guardian had been appointed for her, she was left without any means of obtaining a review of her case due to the absolute nature of the time-limit for appealing against a judicial sale laid down in section 187 § 1 of the Enforcement Act.

The Court notes the Supreme Court's and the Government's arguments that the said time-limit served to protect the *bona fide* purchaser and the general interests of an efficient administration of justice and of preserving legal certainty. Nevertheless, persons who lack legal capacity are particularly vulnerable and States may thus have a positive obligation under Article 8 to provide them with specific protection by the law (see, *mutatis mutandis*, *Connors*). While generally there may be good reasons for having an absolute time-limit for lodging an appeal against a judicial sale of real estate, specific justification would be required where a person lacking legal capacity is concerned. The Court notes that the Supreme Court has not given any such justification and has not carried out any weighing of the conflicting interests at stake, namely the interests of the *bona fide* purchaser on the one hand and the debtor lacking legal capacity on the other hand [...]

In the present case, neither the protection of the *bona fide* purchaser nor the general interest of preserving legal certainty are sufficient to outweigh the consideration that the applicant, who lacked legal capacity, was dispossessed of her home without being able to participate effectively in the proceedings and without having any possibility to have the proportionality of the measure determined by the courts. It follows that, because of the lack of procedural safeguards, there has been a violation of Article 8 of the Convention in the instant case.

At 73–78

The Court does not overlook the fact that the present case concerned proceedings between private parties, namely the applicant and her creditors on the one hand and the applicant and the purchaser of the apartment on the other hand. However, even in cases involving private litigation the State is under an obligation to afford the parties to the dispute judicial procedures which offer the necessary procedural guarantees and therefore enable the domestic courts and tribunals to adjudicate effectively and fairly in the light of the applicable law (see [...] *J.A. Pye*).

The horizontal application of the ECHR to property law, whilst beguiling, is problematic.

Perhaps the most significant problem of applying human rights between private individuals is the possibility that the assertion of one party's human rights may lead to the infringement of another's human rights. For instance, in possession proceedings the issue would be where the balance should come to rest between the occupier's Art 8 right to respect for their home and the Art 1 Protocol 1 rights of the owner asserting the right to possession. The issue

of competing human rights is hotly debated in the context of press freedom and privacy where the balance must be struck between the competing rights to respect for family life under Art 8 and the freedom of expression under Art 10.[50] The issue is not confined to competing rights under different Articles but is also important to competing rights under the same Article, for instance, the conflict might be between individuals both claiming interference with their Art 8 rights.

2.4 ABSOLUTE AND QUALIFIED RIGHTS

The nature of the Articles contained in the ECHR differs. Some provide an absolute protection: for example, no circumstances can justify a departure from the absolute prohibition against torture contained in Art 3.[51] The two Articles with which we are primarily concerned are clearly qualified by the terms of the Articles which provide that an interference with the protections that they enshrine may be justified in prescribed circumstances. A human rights challenge is thus frequently focused upon whether or not an infringement is justified by the relevant qualifications.

2.5 THE JUSTIFICATION FORMULA

In considering whether or not an interference is justified, the Strasbourg Court has developed a tried-and-tested formula: the interference must be in *accordance with the law* and be in pursuit of a *legitimate aim* within the qualifications set out in the appropriate Article. States enjoy a wide *margin of appreciation* in identifying a legitimate aim and the means to achieve that aim—although there must be *proportionality* between those means and the interference with the individual's human rights.

We need to examine each of these elements.

2.5.1 In accordance with the law

The interference must be in accordance with the law of the particular State.[52] Although it is for States to articulate that law, the Strasbourg Court indicated, in the following repossession case, that laws must meet a minimum qualitative threshold in terms of clarity and rationale application.

Kryvitska and Kryvitskyy v Ukraine
App No 30856/03

At [43]–[44]

The expression "in accordance with the law" does not merely require that the impugned measure should have a basis in domestic law but also refers to the quality of the law in question. In particular, the law must be sufficiently clear in its terms and afford a measure of legal protection against arbitrary application [. . .] The function of clarification and interpretation of

[50] Fenwick, 'Judicial reasoning in clashing rights cases' in *Judicial Reasoning under the Human Rights Act* (eds Fenwick, Phillipson, and Masterman, Cambridge, CUP: 2007, p 255).

[51] See *Chahal v UK* (1997) 23 EHRR 413, *Saadi v Italy* [2009] 49 EHRR 30.

[52] *Prokopovich v Russia* App No 58255/00.

the provisions of domestic law belongs primarily to domestic judicial authorities [. . .] While the Court is not in a position to substitute its own judgment for that of the national courts and its power to review compliance with domestic law is limited [. . .], it is the Court's function to review the reasoning adduced by domestic judicial authorities from the point of view of the Convention [. . .] To protect a person against arbitrariness it is not sufficient to provide a formal possibility of bringing adversarial proceedings to contest the application of a legal provision to his or her case. Where a resulting judicial decision lacks reasoning or an evidentiary basis, ensuing interference with a Convention right may become unforeseeable and consequently fall short of the lawfulness requirement.

[. . .] Lack of reasoning in a judicial decision as to the grounds of application of a statute may, even where the formal requirements have been complied with, be taken into account among other factors in determining whether the measure complained of struck a fair balance.

2.5.2 Legitimate aim

An interference must made for a legitimate purpose that serves the appropriate qualification. Thus, for example, an interference with Art 1 of the First Protocol must be in the public or general interest; an interference with Art 8 must be necessary in a democratic society, because, for example, it is for the economic well-being of the country, or because it protects the rights and freedoms of others.

2.5.3 Margin of appreciation

A State is afforded a margin of appreciation, or discretion, in determining the legitimate aim and the means of achieving that aim, because a State is generally in a better position to assess the society's needs and the best means of achieving those needs within its own country. The Strasbourg Court explained the concept in the context of a challenge to the compatibility with Art 1 of the First Protocol of legislation entitling a tenant to purchase his landlord's reversion.

James v UK
(1986) 8 EHRR 123

Facts: The Duke of Westminster, whose estate comprised a significant number of houses in London let on long leases, unsuccessfully questioned the compatibility with Art 1 of the First Protocol of the Leasehold Reform Act 1967. The Act entitled the tenants of the houses to require him to transfer the freehold reversion to them for sums (as defined by the legislation) that were less than their market value.

At [46]

Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is "in the public interest." Under the system of protection established by the Convention, it is thus for the national authorities to make the initial assessment both of the existence of the problem of public concern warranting measures of deprivation of property and of the remedial action to be taken [. . .] Here as in other fields to which the safeguards of the Convention extend, the national authorities accordingly enjoy a certain margin of appreciation.

> Furthermore, the notion of "public interest" is necessarily extensive, in particular, as the Commission noted, the decision to enact laws expropriating property will commonly involve consideration of political, economic and social issues on which opinions within a democratic society may reasonably differ widely. The Court finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature judgment as to what is "in the public interest" unless that judgement be manifestly without reasonable foundation [. . .]

Thus, a State's actions taken in the public interest under Art 1 Protocol will be respected unless they are 'manifestly without reasonable foundation', in the sense that no reasonable government would have come to a similar decision in the circumstances.[53] It should be noted that in pursuance of their obligations under s 2 of the HRA 1998, the domestic courts will accept, save in exceptional circumstances, the compatibility of a law which the Strasbourg Court has held to be within the United Kingdom's margin of appreciation.[54]

A State's margin of appreciation, however, will depend on, and may vary according to, the Article and context in which it is exercised.

Connors v UK
(2005) 40 EHRR 9

Facts: The Connors were gypsies. The family occupied the same local authority site under a licence for over thirteen years, but, after their daughter married and their sons grew up, it was alleged that their pitch was a 'magnet for trouble'. As a result, the local authority terminated their licence to occupy and summarily evicted them from the site, but without citing any reasons. The local authority chose not to rely upon the Connors' alleged 'antisocial' behaviour. The Connor family successfully claimed that their summary eviction breached their rights to respect for their home and way of life as gypsies under Art 8.

> At [82]
> In this regard, a margin of appreciation must, inevitably, be left to the national authorities, who by reason of their direct and continuous contact with the vital forces of their countries are in principle better placed than an international court to evaluate local needs and conditions. This margin will vary according to the nature of the Convention right in issue, its importance for the individual and the nature of the activities restricted, as well as the nature of the aim pursued by the restrictions. The margin will tend to be narrower where the right at stake is crucial to the individual's effective enjoyment of intimate or key rights. [. . .] On the other hand, in spheres involving the application of social or economic policies, there is authority that the margin of appreciation is wide, as in the planning context where the Court has found that: "[i]n so far as the exercise of discretion involving a multitude of local factors is inherent in the choice and implementation of planning policies, the national authorities in principle enjoy a wide margin of appreciation". *Buckley v United Kingdom* (1997) 23 E.H.R.R. 101 at [75].

[53] See, also, *Lithgow v UK* (1986) 8 EHRR 329, which concerned the compensation to be paid for nationalization of certain areas of the ship and aircraft-building business.

[54] See in the context of adverse possession *Ofulue v Bossert* [2009] Ch 1, CA, [37] and [52].

> The Court has also stated that in spheres such as housing, which play a central role in the welfare and economic policies of modern societies, it will respect the legislature's judgment as to what is in the general interest unless that judgment is manifestly without reasonable foundation. See *Mellacher v Austria* (A/169): (1990) 12 E.H.R.R. 391 at [45]; *Immobiliare Saffi v Italy*: (2000) 30 E.H.R.R.756 at [49]. It may be noted however that this was in the context of Art.1 of Protocol No.1, not Art.8 which concerns rights of central importance to the individual's identity, self-determination, physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community. See, *Gillow v United Kingdom* at [55]; *Pretty v United Kingdom*: (2002) 35 E.C.H.R. 1; *Christine Goodwin v United Kingdom*: (2002) 35 E.H.R.R. 18 at [90]. Where general social and economic policy considerations have arisen in the context of Art.8 itself, the scope of the margin of appreciation depends on the context of the case, with particular significance attaching to the extent of the intrusion into the personal sphere of the applicant. *Hatton v United Kingdom*: (2002) 34 E.H.R.R. 1 at [103] and [123].

The justification of public interest found in Art 1 Protocol 1 is generally taken to be a wider test than the narrower demands of necessity to meet a pressing social need which defines the justification under Art 8. The margin of appreciation may, thus, be narrower under Art 8, particularly where the nature of the interference is severe.

The existence and adequacy of procedural safeguards, that enable the court to assess the proportionality of the interference, are crucial in determining whether or not a State has remained within its margin of appreciation.[55] In the following case, concerning mandatory rights to possession, the court underlined the need for adequate procedural safeguards, particularly where the interference with the Convention right is severe.

Kay v UK
[2011] HLR 2

> At 67–68
> The procedural safeguards available to the individual will be especially material in determining whether the respondent State has, when fixing the regulatory framework, remained within its margin of appreciation. In particular, the Court must examine whether the decision-making process leading to measures of interference was fair and such as to afford due respect to the interests safeguarded to the individual by Article 8 (see *Connors* and *Buckley v UK, Chapman v UK,* and *Connors v UK*).
>
> As the Court emphasised in *McCann* the loss of one's home is the most extreme form of interference with the right to respect for the home. Any person at risk of an interference of this magnitude should in principle be able to have the proportionality of the measure determined by an independent tribunal in light of the relevant principles under Art 8 of the Convention notwithstanding that, under domestic law, his right to occupation has come to an end.

The interaction between the substantive law, which gives effect to a given social or economic policy, and the procedural safeguards, which attend the implementation of that policy, are difficult to separate as Nield observes in the following extract.

[55] See T Hickman, *Public Law after the Human Rights Act* (Oxford: Hart, 2010) pp 118–19.

Neild, 'Clash of the Titan: Article 8, Occupiers and Respect for their Home' in *Modern Studies in Property Law* (ed S Bright, Oxford, Hart 2011)

It would be tempting to conclude that whilst on matters of the substantive content of the law implementing a particular social or economic policy, where a party is granted a right to possession against another, the State's margin of appreciation remains wide; but as a matter of the procedural operation of that policy, where the consequences dictate repossession of an individual's home, the margin is narrow. But this distinction is too simplistic. The two issues are intimately entwined because the substantive law will define the circumstances when the occupier may be heard before the court [. . .] As Loveland has succinctly put the issue [referring to *McCann v UK*]; 'it is not what the council had done but what the court could not do'.

2.5.4 Proportionality or fair balance

Although States enjoy a wide margin of appreciation, there must nevertheless be a fair balance struck, or proportionality, between the means employed to address the legitimate aim and the interference with an individual's human rights that results. The principle is that no single individual should be expected to bear an excessive burden in meeting the particular community or social object of the legitimate aim. If it is possible to achieve that aim without interfering unduly with an individual's rights, then that route should be adopted in preference to other solutions that do so trespass.

Proportionality operates at two levels of intensity.[56] First, there is the fair balance that must be struck between individual Convention rights and the general interest of the public or society; here it is the law itself that is under scrutiny and the balance it strikes between the legitimate aim and the severity of the infringement resulting from the means employed. Here proportionality operates at a macro-level. Secondly, the nature of the Convention right may dictate proportionality in the impact of that law upon the individual victim, which necessitates a consideration of the victim's individual circumstances. Thus, there must be an adequate process to determine proportionality at this micro-level. Although there may be macro-proportionality between the legitimate aim and the interference, there may still be a breach of the relevant Article where the victim is afforded no, or an inadequate, opportunity to question its impact upon their particular rights. It was the lack of procedural safeguards that constituted the breach of Art 8 in the following repossession case, even though the claimant's case may not seem at all meritorious.

McCann v UK
(2008) 47 EHRR 40

Facts: The McCanns were joint tenants of a local authority house under a secure tenancy. Mr McCann was abusive to his wife and their marriage broke down, with Mrs McCann obtaining a non-molestation order against her husband. Mr McCann moved out of the house, as required by the order, but he broke back in using a crowbar and assaulted his wife. Mrs McCann fled with the children and was rehoused by the local authority. Mr McCann moved back into the house. When the local authority

[56] The approach of Lord Neuberger to his judgement in *Manchester CC v Pinnock* [2010] UKSC 45 demonstrates these two levels.

discovered that Mr McCann was living in the house, it approached Mrs McCann and asked her to sign a notice terminating the tenancy, which had the effect of bringing the tenancy to an end, not only in respect of her interest, but also her husband's, although the local authority did not explain these consequences fully. The local authority brought possession proceedings to evict Mr McCann as a trespasser. Mr McCann successfully alleged that his right to respect for his home had been infringed under Art 8, because his right to occupy the house had been brought to an end without recourse to court proceedings, but by his wife's notice.

At [48]–[52]

The court considers that this interference was in accordance with the law and pursued a legitimate aim of protecting the right and freedom of others in two respects. First, it protected the local authority's right to regain possession of the property against an individual who had no contractual or other right to be there [. . .] the interference also pursued the aim of ensuring that the statutory scheme for housing provision was properly applied. The "others" in such a case are the intended beneficiaries of the complex arrangements set up by, amongst others, the Housing Acts. The Court accepts that it is only by limiting the protection of the Acts to the categories to which it applies that the policy underlying the Acts can sensibly be implemented.

The central question in this case is, therefore whether the interference was proportionate to the aim pursued and thus "necessary in a democratic society". It must be recalled that this requirement under para 2 of art 8 raises a question of procedure as well as one of substance [. . .]

The Court is unable to accept the Government's argument that the reasoning in *Connors v UK* [2004] ECHR 66746/01 was to be largely confined only to cases involving the eviction of gypsies or cases where the applicant sought to challenge the law itself rather than its application in his particular case. The loss of one's home is a most extreme form of interference with the right to respect for the home. Any person at risk of an interference of this magnitude should in principle be able to have the proportionality of the measure determined by an independent tribunal in the light of the relevant principles under art 8 of the Convention, notwithstanding that, under domestic law, his right to occupation has come to an end.

[. . .] Had the local authority sought to evict the applicant in accordance with this statutory scheme, it would have been open to the applicant to have asked the court to examine, for example, whether his wife had really left the family home because of domestic violence and whether in his personal circumstances, including his need to provide accommodation for his children during overnight visits several times a week, it was reasonable to grant the possession order.

In the present case, however the local authority chose to bypass the statutory scheme by requesting Mrs McCann to sign a common law notice to quit, the effect of which was immediately to terminate the applicant's right to remain in the house. It does not appear that the authority, in the course of this procedure, gave any consideration to the applicant's right to respect for his home. Moreover in domestic law [. . .] in summary proceedings such as those brought against the applicant it was not open to the county court to consider any issue concerning proportionality of the possession order, save in exceptional cases [. . .] No such exceptional circumstances applied in the present case.

The Strasbourg Court has continued to emphasize the importance of procedural safeguards in subsequent cases. Indeed it has become a constant refrain in the context of repossession

proceedings by public authorities, which infringe the respect for the home due to the occupiers under Art 8.[57] However, it should be noted that the need for procedural safeguards is of general significance and applies equally to Art 1 Protocol 1[58] and, furthermore, may apply horizontally to disputes between private parties as part of a State's positive duties to provide adequate legal protection to Convention rights.[59]

We will return to consider the operation of proportionality and adequate procedural safeguards in the context of particular Convention rights.

2.5.5 The domestic context and 'deference'

The concept of a State's margin of appreciation does not really fit the domestic context when the courts are called upon to consider the compatibility of a public authority's actions pursuant to s 6 or the compatibility of the law in accordance with their duties under ss 3 and 6. Lord Nicholls described the court's new role under s 3 in the following case. In so doing he refers to the familiar concepts of legitimate aim and proportionality but not the margin of appreciation.

Wilson v First County Trust Ltd (No 2)
[2004] 1 AC 816, HL

Facts: Mrs Wilson entered into a consumer credit agreement with First County in January 1999. The agreement was unenforceable, because it breached the Consumer Credit Act 1974 by failing to state accurately the total amount of credit.[60] First County argued that the statutory provision was incompatible with Arts 1 and 6, but the House of Lords declined to determine the questions, because the HRA 1998 did not have retrospective effect.

Lord Nicholls

At [61]–[63]

The Human Rights Act 1998 requires the court to exercise a new role in respect of primary legislation. This new role is fundamentally different from interpreting and applying legislation. The courts are now required to evaluate the effect of primary legislation in terms of Convention rights and, where appropriate, make a formal declaration of incompatibility. In carrying out this evaluation the court has to compare the effect of the legislation with the Convention right. If the legislation impinges upon a Convention right the court must then compare the policy objective of the legislation with the policy objective which under the Convention may justify a prima facie infringement of the Convention right. When making these two comparisons the court will look primarily at the legislation, but not exclusively so. Convention rights are concerned with practicalities. When identifying the practical effect of an impugned statutory provision the court may need to look outside the statute in order to see the complete picture [. . .] As to the objective of the statute, at one level this will be

[57] See also *Cosic v Croatia* App No 28261/06, *Zehentner v Austria* (2011) 52 EHRR 22, *Kay v UK* [2011] HLR 2, *Kryvitska & Kryvitskyy v Ukraine* App No 30856/03.

[58] See *Zehentner v Austria* and *Hutten-Czapska v Poland* (2007) 45 EHRR 4.

[59] Ibid and *Belchikova v Russia* App No 2408/06.

[60] See s 127(3), which has since been amended by the Consumer Credit Act 2006, s 15.

coincident with its effect [...] But that is not the relevant level for Convention purposes. What is relevant is the underlying social purpose sought to be achieved by the statutory provision. Frequently that purpose will be self-evident, but this will not always be so.

The legislation must not only have a legitimate policy objective. It must also satisfy a "proportionality" test. The court must decide whether the means employed by the statute to achieve the policy objective is appropriate and not disproportionate in its adverse effect. This involves a "value judgment" by the court, made by reference to the circumstances prevailing when the issue has to be decided. It is the current effect and impact of the legislation which matter, not the position when the legislation was enacted or came into force [...]

Nevertheless, a similar concept to the margin of appreciation is evident in the domestic context. Here the appropriate consideration is the proper constitutional balance between Parliament, the administration, and the courts given the courts' new role under the HRA 1998 as adjudicators of Convention compatibility. Unsurprisingly, the fundamental question of the extent to which the courts should pay heed to the policy choices of Parliament or the administrative decisions of public authorities has attracted considerable academic attention.[61] Commentators have described this domestic concept as deference. However, in *Huang v Secretray of State for the Home Department*[62] Lord Nicholls disapproved of this label. Instead he acknowledged that the court in reaching its decision on human rights compatibility will afford due respect to the opinion of those who are in a better position to make an evaluation.

Lord Nicholls

At [16]

The giving of weight ... is not, in our opinion, aptly described as deference: it is performance of the ordinary judicial task of weighing up the competing considerations on each side and according appropriate weight to the judgment of a person with responsibility for a given subject matter and access to special sources of knowledge and advice. That is how any rational judicial decision-maker is likely to proceed.

In areas of socio-economic policy, particularly where public resources are in issue, the courts have shown themselves unlikely to upset the legislative design of Parliament. In *Kay v Lambeth LBC*[63] the House of Lords was not prepared to question social housing policy expressed through a complex web of legislation and common law rules, which they felt had been the subject of continuous and extensive Parliamentary scrutiny. The courts may be more questioning where the law has not been so carefully considered by Parliament.

Baroness Hale

At [185]–[187]

My Lords, we are all agreed that it must be possible for the defendant in a possession action to claim that the balance between respect for his home and the property rights of the owner,

[61] See for example Jowell, 'Judicial deference' [2003] PL 592, Allan, 'Human Rights and Judicial Review: A Critique of Due Deference' (2006) 65 CLJ 671, King, 'Institutional Approaches to Judicial Restraint' (2008) 28 OJLS 409 and Kavanagh, 'Defending deference in public law and constitutional theory' (2010) 126 LQR 222.

[62] [2007] UKHL 11, [2007] 2 AC 167, [16].

[63] [2006] UKHL 10, [2006] 2 AC 465.

struck by the general law in the type of case of which his is an example, does not comply with the Convention. We also agree that the cases in which such a claim will have a real prospect of success are rare. This is an area of the law much trampled over by the legislature as it has tried to respond to shifting and conflicting social and economic pressures. If there were enough suitable and affordable housing to share amongst those who needed it there would be no problem. But there is not, so priorities have to be established, either by Parliament or by the public sector landlord, who has to allocate this scarce resource in accordance with the priorities set by Parliament.

The balance has changed over time in accordance with what were perceived to be the needs of the time. Once upon a time, it was thought necessary to control the freedom of private landlords to let for such terms and on such rents as the market allowed. Public sector landlords, on the other hand, could be left to manage the public housing stock in a responsible manner. Then things changed. Controls over private landlords were progressively relaxed, although never abandoned, with a view to expanding the supply of privately rented homes. Controls over public sector landlords, on the other hand, were increased and public sector tenants were given the security which previously only private sector tenants had enjoyed. This and other measures reduced the supply of public sector rented homes. These were all intensely political judgments. The extent to which, and the terms on which, public authorities should be engaged in providing housing for those who for whatever reason cannot or will not buy it on the private market was one of the most politically controversial issues of the 20th century.

To the extent that a court insists that a public authority does not rely upon its right to evict an occupier, it is obliging that public authority to continue to supply that person with a home in circumstances where Parliament has not obliged (and may not even have empowered) it to do so. In this politically contentious area of social and economic policy, any court should think long and hard before intervening in the balance currently struck by the elected legislature. There may be more scope for argument in a case not covered by statute, but the most obvious example of that is a trespasser who has never had any right to occupy the premises in question.

Although substantial deference is to be expected in many areas of property law, the courts would be failing in their role under the HRA 1998 if they assumed that existing rules are compatible.

Nield, 'Clash of the Titans: Occupiers Article 8 and their Home' in *Modern Studies in Property Law* Vol 6 (ed S Bright, Oxford, Hart, 2011, Ch 5)

In assessing the proper extent of judicial deference, context is everything. Qazi demonstrates an extreme degree of deference in which proprietary rights to possession are not to be questioned at all—they were in fact nonjusticiable! In Kay the House of Lords has shown, in both the views of the majority and minority, that in relation to the regulation of housing they will show exceptional deference to the policy choices of Parliament. This is not surprising given both the degree of Parliamentary scrutiny of housing policy and the public funding underpinning that policy. Similar substantial deference is to be expected in relation to proprietary rules governing possession where certainty and due balancing of the rights of third parties is necessary. However, it should not mean that the ECHR compatibility of proprietary rules should be non-justiciable or even that substantial deference should be automatic. Judicial deference should be assessed on a case-by-case (or rule-by-rule) basis.

2.6 RETROSPECTIVE APPLICATION

The HRA 1998 came into force on 2 October 2000, but, of course, property disputes may have a much longer history. It is, thus, important to consider to what extent (if any) the Act has retrospective application. The question is procedural, in the sense that its importance is directed to whether an individual can bring a human rights issue before the domestic courts. An individual will still be able to bring proceedings before the Strasbourg Court where the cause of action arose before 2 October 2000. For example, in *JA Pye (Oxford) Ltd v Graham*,[64] the House of Lords declined to consider the question of whether adverse possession was incompatible with Art 1 of the First Protocol because the relevant events had taken place before 2 October 2000, but Pye then pursued its claim before both the Chamber[65] and, on appeal, the Grand Chamber the Strasbourg Court.[66]

The HRA 1998 follows the general presumption that legislation does not have retrospective effect.[67] Thus, the court, in performance of its obligations under s 3, does not have to consider the ECHR where the right of action accrued before the Act came into force, even though the hearing may take place after that date. However, retrospective application will differ according to which Articles are being considered. For instance, where procedure is in issue—for example, because of an alleged breach of Art 6—the Act will have immediate effect upon any proceedings conducted after 20 October 2000.[68]

There is one instance in which the HRA 1998 does make express provision for retrospective application and that is contained in s 22(4), which provides that the Act is to have retrospective application in proceedings '*brought by or at the instigation of a public authority whenever the act in question took place*'. It may thus be used defensively against public authorities that have acted in breach of their obligations under s 6. An argument that this provision may operate retrospectively to effect the decisions of the courts (as public authorities) made prior to 20 October 2000 and in accordance with the law then in force has, however, been rejected.[69]

The fact that the HRA 1998 does not have retrospective effect does not mean that the interpretation of a particular provision may not change as a result of the duties it imposes. It has long been accepted that the parties' respective rights and obligations may be altered as a result of legislation.

3 ARTICLE 1 OF THE FIRST PROTOCOL TO THE ECHR

European Convention on Human Rights, First Protocol, Art 1

Protection of property

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

64 [2002] UKHL 30, [2003] 1 AC 419. 65 (2006) 43 EHRR 3. 66 (2008) 46 EHRR 45.
67 *Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816. 68 Ibid, *per* Lord Rogers [209].
69 *R v Kansal (No 2)* [2001] UKHL 62; *R v Rezvi* [2002] UKHL 1; *R v Benjafield* [2002] UKHL 2; *R v Lyons (No 3)* [2002] UKHL 44. See also *Wainwright v Home Office* [2002] QB 1334. Approved in *Wilson v First County Council Trust Ltd* [2003] UKHL 40, [2004] 1 AC 816, and *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2004] 1 AC 546.

> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Article 1 provides a right *of* property and not *to* property. Its object is thus to protect existing property that a person holds by both positively guaranteeing that a person is entitled to the peaceful enjoyment of his or her property, and by providing supporting negative prohibitions upon a person being deprived of his or her possession or being subject to controls over his or her enjoyment of those possessions.

The Strasbourg Court, in the following case, analysed Art 1 as comprising three distinct rules.

Sporrong and Lonnroth v Sweden
(1983) 5 EHRR 35

At [61]
The first rule, which is of a general nature, announces the principle of peaceful enjoyment of property; it is set out in the first sentence of the first paragraph. The second rule covers deprivation of possessions and subjects it to certain conditions; it appears in the second sentence of the same paragraph. The third rule recognizes that the States are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose; it is contained in the second paragraph.

The rules may be distinct, but it is clear that they are also interrelated, as the Strasbourg Court stated in the following case.

James v UK
[1986] 8 EHRR 123

At [37]
The three rules are not however "distinct" in the sense of being unconnected. The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule.

Thus, the second and third rules need to be considered in the light of the overarching nature of the first rule. An interference that is justified under these rules by their limiting conditions will also satisfy the first rule. This point was also made in *James*.

James v UK
[1986] 8 EHRR 123

At [71]
The rule (in the second sentence) subjects deprivation of possessions to certain conditions concerns a particular category, indeed of the most radical kind, of interference with the right to peaceful enjoyment of property [...]; the second sentence supplements and qualifies

> the general principle enunciated in the first sentence. This being so, it is inconceivable that application of the general principle to the present case should lead to any conclusion different from that already arrived at by the court in the application of the second sentence.

The courts will look to see whether the last two rules are applicable before considering whether the first rule has been infringed.[70] This analysis and approach has been adopted in subsequent cases.

3.1 WHEN IS ARTICLE 1 ENGAGED?

The first step to consider is whether Art 1 has been engaged, because there has been an interference with possessions under one of the three elements of the Article. This will depend on what we mean by 'possessions' as well as what may constitute an interference.

3.1.1 The meaning of 'possessions'

'Possessions' bears what is known as an autonomous meaning in Strasbourg jurisprudence.[71] This means that the Strasbourg Court develops its own interpretation of a term. In so doing, it will look to, but will not be bound by, the meaning of the term within the appropriate domestic jurisdiction.[72] In fact, the Strasbourg Court has adopted a wide interpretation of 'possessions', and there is no doubt that our established notions of estates and interests in land fall within its meaning. The term also covers other accepted categories of property rights that fall outside the scope of this book, such as personal and intellectual property, as well as rights that may arise from contractual relations or a tortious claim. But an expectation that you may receive property in the future—for example, by inheritance—is not a possession for the purposes of Art 1.[73] This raises the question of whether an inchoate equity—for example, arising by estoppel (see Chapter 10)—constitutes a possession for the purpose of Art 1. Unfortunately, we do not yet have guidance of the courts, although there is some support for the proposition.[74] The Strasbourg Court, in *Stretch v UK*,[75] has accepted that a legitimate expectation of entitlement upon which the claimant had acted constitutes a possession for the purposes of Art 1.[76]

Land may have the benefit of certain rights: for example, an easement (see Chapter 25), or the benefit of a covenant (see Chapter 26), or, in the case of a leasehold reversion, a right to receive rent and to re-enter for breach of the tenant's covenants (see Chapter 24). These benefits do not constitute separate possessions for the purposes of Art 1; rather, they are

[70] See *Sporrong and Lonnroth v Sweden* (1983) 5 EHRR 35, [61].

[71] Allen, 'The Autonomous Meaning of "Possessions" under the European Convention on Human Rights' in *Modern Studies in Property Law: Vol 2* (ed Cooke, 2003, p 58).

[72] See *Matos E Silva Lda v Portugal* (1997) 24 EHRR 573.

[73] *Marckx v Belgium* (1979) 2 EHRR 330.

[74] Howell is not optimistic: see 'Land and Human Rights' [1999] Conv 287.

[75] (2004) 38 EHRR 12. See also *Pine Valley Developments Ltd v Ireland* (1992) 14 EHRR 319. The principle has been applied by the domestic courts in *Rowland v Environment Agency* [2003] EWCA Civ 1885. See Elliott, 'Legitimate Expectations and Unlawful Representations' (2004) 63 CLJ 261.

[76] The legitimate expectation arose from an ultra vires representation by a local authority, that the claimant was entitled to an option to renew his lease, which both the claimant and the local authority assumed was valid during the 22-year term of the original lease. In fact, the local authority had no power to grant the option.

encompassed within the property to which they are attached.[77] Likewise, land may be subject to an encumbrance in favour of a third person: for example, an easement or restrictive covenant in favour of a neighbouring owner. The possession that is vested in the landowner is the appropriate estate in the land, as burdened by the encumbrance. In other words, if you acquire land that is already subject to a burden, the burden does not engage Art 1.

The House of Lords confirmed this approach in the following case. The encumbrance in question was a liability to pay for chancel repairs to the local church: an unusual liability that can be difficult to discover, but which Lord Hope described as follows.

Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank
[2004] 1 AC 546, HL

Lord Hope

At [71]

[. . .] just like any other burden which runs with the land which is, and has been at all times within the scope of the property right which [was] acquired and among other factors to be taken into account in determining its value [. . .] The enforcement of the liability under the general law is an incident of the property right which is now vested jointly in Mr and Mrs Wallbank. It is not [. . .] an outside intervention by way of a form of tax.

The creation of a new encumbrance or burden may, however, engage Art 1. In most cases, the owner will have consensually created that encumbrance and so can hardly complain that his or her rights have been infringed. It is where that encumbrance has arisen, or is deemed to have arisen, by operation of external legal rules that Art 1 may be engaged.[78]

A further difficult question is whether or not a contract that is void under the terms of a statute is capable of comprising a possession within the terms of the Article. The House of Lords considered this issue in *Wilson v First County Trust Ltd*,[79] although they did not speak with one voice. In *Wilson*, the credit agreement was void for failing to comply with the statutory requirements of the Consumer Credit Act 1974 (CCA 1974).[80] Lords Hope and Scott decided that no agreement had been created in the first place, and thus there was no possession of which First County could be deprived.

Lord Nicholls disagreed. He believed that a statutory provision that robbed an agreement of its force should not escape review under the HRA 1998, otherwise '[a] *Convention right guaranteeing a right to property would have nothing to say*'.

Lord Hobhouse was more equivocal. He felt that the question turned upon whether or not an agreement had been created.[81]

A similar, although slightly different, question is whether a possession is also inherently limited by the operation of the legal rules to which it is subject and therefore cannot be infringed by the operation of those rules. Here, the law regulates the possession, rather than

[77] *Antoniades v UK* (App No 15434/89) and *Scott v UK* (App No 10741/84).

[78] For example, an easement may arise by prescription: see, further, Chapter 25.

[79] [2003] UKHL 40, [2004] 1 AC 816, although their comments are dicta.

[80] The offending s 127 has been amended by the Consumer Credit Act 2006, s 15. However, similar concerns may arise with a contract for the sale of land that is void under s 2(1), Law of Property (Miscellaneous Provisions) Act 1989.

[81] His approach draws some support from *Beyeler v Italy* (2001) 33 EHRR 52, (2003) 36 EHRR 5.

dictates its creation. The answer to this question is clear: the operation of such rules may engage Art 1.[82] Goymour explains why.

Goymour, 'Proprietary Claims and Human Rights: A "Reservoir of Entitlement"?' (2006, 65 CLJ 696, p 711)

At 711

However this argument, whilst technically compelling, would largely strip Article 1 of any sensible meaning. Indeed, one type of conduct which Article 1 Protocol 1 typically regulates is arbitrary compulsory acquisition of private property by the State. If one were to say that all property is inherently liable to compulsory acquisition, Article 1 Protocol 1 would rarely, if ever, bite. The Convention is supposed to guard against interference with property rights. To say Article 1, Protocol 1 fails to be engaged because property rights are inherently vulnerable is logical but circular.

3.1.2 Deprivation of possessions: the second limb

The second limb of Art 1 is concerned with the deprivation of possessions. A 'deprivation' is generally defined by a transfer or shift in ownership: examples include the compulsory purchase of land,[83] or the nationalization of a business by the government.[84] The transfer need not be to the government, or other public authority; it may be to another private individual, where the State has sanctioned that transfer by legislation. For example, the Leasehold Reform Act 1967 confers a right of enfranchisement upon certain tenants which entitles them to acquire their landlord's freehold reversion. The deprivation thus involves the transfer of a possession from landlord to tenant.[85] By contrast, the determination of a lease (whether by the expiry of the term, by a notice to quit, or by a right of forfeiture) does not deprive the tenant of his or her possessions, because the lease is defined by these means of termination from the outset. These modes of termination are part and parcel of the lease itself.

3.1.3 Controls over possessions: the third limb

A government may enact laws that control the use of land, the most obvious examples being the planning controls that prevent development of land without the consent of the local planning authority.[86] More unusual examples include controls over fishing,[87] and hunting rights over land,[88] or controls over who can actually use the land.[89]

3.1.4 Deprivation or control?

Whether or not an interference constitutes a deprivation or control of property is not always as clear-cut as the above examples. The distinction is significant when it comes to considering

[82] *JA Pye (Oxford) Ltd v UK* (2008) 46 EHRR 45. See also (2006) 43 EHRR 3.
[83] *Howard v UK* (1987) 9 EHRR CD116.
[84] *Lithgow v UK* (1986) 8 EHRR 329.
[85] *James v UK* (1986) 8 EHRR 123.
[86] *Pine Valley Development Ltd v Ireland* (1992) 14 EHRR 319.
[87] *Baner v Sweden* (App No 11763/85).
[88] *Chassagnou v France* (App Nos 25088/94, 28331/95, and 28443/95).
[89] *Gillow v UK* (1989) 11 EHRR 335.

whether or not the interference is proportionate. As we will see, there is an expectation that a deprivation of property under the second limb will be balanced by the payment of compensation whereas there is not necessarily the same expectation where there is a control over property under the third limb.

It might initially be thought that the extinction of the paper owner's title by the operation of adverse possession is a clear example of a deprivation of property.[90] The Grand Chamber of the Strasbourg Court decided, however, that the effect of the limitation periods for the recovery of possession of land and the consequent effect of their expiry on the paper owner's title was a control of property. In effect, the Court viewed the extinction of the paper owner's title more as an administrative step that brought the legal evidence of ownership into line with the de facto position when the squatter could no longer be evicted from the land.

JA Pye (Oxford) Ltd v UK
(2008) 46 EHRR 45, Grand Chamber

Facts: Pye owned land that it intended to develop. In the meantime, it licensed the land to a neighbouring farmer, Mr Graham. When the licence expired, Mr Graham continued in adverse possession of the land for a period in excess of the limitation period of twelve years. When Pye eventually tried to evict Mr Graham, the House of Lords dismissed its claim and held that Mr Graham was entitled to be registered as the owner. Pye unsuccessfully claimed that it had been deprived of its ownership in breach of Art 1 of the First Protocol.

At [65]

The applicant companies did not lose their land because of a legislative provision which permitted the State to transfer ownership in particular circumstances (as in the cases of *AGOSI*, *Air Canada*, *Gasus*), or because of a social policy of transfer of ownership (as in the case of *James*), but rather as the result of the operation of the generally applicable rules on limitation periods for actions for recovery of land.

At [66]

The statutory provisions which resulted in the applicant companies' loss of beneficial ownership were thus not intended to deprive paper owners of their ownership, but rather to regulate questions of title in a system in which, historically, 12 years' adverse possession was sufficient to extinguish the former owner's right to re-enter or to recover possession, and the new title depended on the principle that unchallenged lengthy possession gave a title. The provisions of the 1925 and 1980 Acts which were applied to the applicant companies were part of the general land law, and were concerned to regulate, amongst other things, limitation periods in the context of the use and ownership of land as between individuals. The applicant companies were therefore affected, not by a "deprivation of possessions" within the meaning of the second sentence of the first paragraph of Article 1, but rather by a "control of use" of land within the meaning of the second paragraph of the provision.

[90] See Limitation Act 1980, ss 15 and 17, Land Registration Act 1925, s 75, and Chapter 10.

There are other areas of uncertainty: for example, does overreaching lead to a deprivation of property, or is it a control of property? We will consider this question in the context of the sale by a trustee in Chapter 19 and by a mortgagee in Chapter 30.

3.1.5 Peaceful enjoyment: the first limb

An interference that does not fall within the second or third limb may nevertheless be an interference with the peaceful enjoyment of possession under the residual category provided by the first limb. *Sporrong and Lonnroth v Sweden*[91] provides an example. The complainants owed land in Stockholm that was earmarked for development and the authorities issued expropriation notices.[92] Although the notices were never implemented, the complainants' ability to deal with their land was blighted. The Court found that there was no deprivation or control under the second and third limbs, but did find that there was an infringement of the first rule.

3.2 WHEN IS AN INTERFERENCE JUSTIFIED?

Here, we must apply the justification formula at which we looked in section 2.5 above. Under Art 1 of the First Protocol, a deprivation of possession may be justified if it is '*in the public interest and subject to the conditions provided for by law and by the general principles of international law*', whilst a control of possessions may be justified if it is made pursuant to '*laws as* [the State] *deems necessary* [...] *in accordance with the general interest or to secure the payment of taxes or other contributions or penalties*'.

3.2.1 Subject to the law

The interference must be in accordance with domestic law. Furthermore, that domestic law must satisfy the fundamental requirements of the rule of law. It must not operate arbitrarily, it must be certain and accessible, and it must provide adequate procedural safeguards.[93]

3.2.2 The public and general interest

It is not thought that there is a distinction between the public and general interest, nor that these expressions necessarily call for the deprivation to accrue directly to, or the control be exercised by, the government.[94] The expressions 'general' and 'public' interest define the legitimate interest in respect of which a deprivation or control may be justified. States enjoy a wide margin of appreciation in both identifying what is in the public interest and in formulating the appropriate measures to address that interest. The width of a State's margin of appreciation is evident from *James v UK*.

[91] (1983) 5 EHRR 35.

[92] Prohibition notices prohibiting building were also issued, but these had lapsed.

[93] In *Lithgow v UK* (1986) 8 EHRR 329, and *James v UK* (1986) 8 EHRR 329, claims that the assessment of compensation was arbitrary were rejected, but in *Hentrich v France* (1994) 18 EHRR 440, the Court found that the domestic law failed to satisfy the rule of law. It operated arbitrarily and did not provide adequate procedural safeguards.

[94] See *James v UK*, ibid.

James v UK
(1986) 8 EHRR 123

At [43]
In the Court's opinion, even if there could be a difference between the concepts of "public interest" and "general interest" in Article 1 (P-1), on the point under consideration no fundamental distinction of the kind contended for by the applicants can be drawn between them [. . .]

At [47]
The aim of the 1967 Act as spelt out in the 1966 White Paper, was to right the injustice which was felt to be caused to occupying tenants by the operation of the long leasehold system of tenure (see para 18 above). The Act was designed to reform the existing law, said to be inequitable to the leaseholder," and to give effect to what was described as the occupying tenant's "moral entitlement" to the ownership of the house.

Eliminating what are judged to be social injustices is an example of the functions of a democratic legislature. More especially, modern societies consider housing of the population to be a prime social need, the regulation of which cannot entirely be left to the play of market forces. The margin of appreciation is wide enough to cover legislation aimed at securing greater social justice in the sphere of people's homes, even where such legislation interferes with the existing contractual relations between private parties and confers no direct benefit on the State or the community at large. In principle therefore the aim pursued by the leasehold reform legislation is a legitimate one.

The real focus of the courts' review is thus on the proportionality of the interference in meeting the public interest. In assessing proportionality, the courts will need to determine whether a fair balance has been struck between the public interest to be addressed and the individual's right to the protection of his or her possessions. A number of factors may need to be considered, depending on the circumstances of the particular case, but two factors are particularly prominent in this enquiry: firstly, the availability of compensation; and secondly, the adequacy of the process to challenge the interference.

3.2.3 Compensation

Many constitutional guarantees of property rights include an express right to compensation upon the compulsory acquisition of property by the State. Article 1 does not expressly do so,[95] but the Strasbourg Court has made clear that where the second limb of the Article is engaged (i.e. where there is a deprivation of property), compensation is to be expected, although that compensation may be less than market value.[96]

[95] Allen explains that this omission was because the right to compensation was controversial in, 'Liberalism, social democracy and the value of property under the European Convention on Human Rights' (2010) 59 ICLQ 1055.

[96] See also *Holy Monasteries v Greece* (1995) 20 EHRR 51 and *The Former King of Greece v Greece* (App No 25701/94). Allen questions Strasbourg's approach to the calculation of compensation.

James v UK
(1986) 8 EHRR 123

At [54]
The taking of property in the public interest without payment of compensation is treated as justifiable only in exceptional circumstances [. . .] As far as Article 1 (P1–1) is concerned, the protection of the right to property it affords would be largely illusory and ineffective in the absence of any equivalent principle. Clearly compensation terms are material to the assessment whether the contested legislation respects a fair balance between the various interests at stake and, notably, it does not impose a disproportionate burden on the applicants [. . .]

The Court further accepts the Commission's conclusion as to the standard of compensation: the taking of property without payment of an amount reasonably related to the value would normally constitute a disproportionate interference which could not be considered justifiable under Article 1 (P1–1). Article 1 (P1–1) does not, however guarantee a right to full compensation in all circumstances. Legitimate objectives of "public interest" such as pursued in measures of economic reform or measures designed to achieve greater social justice may call for less than reimbursement of the full market value. Furthermore, the Court's power of review is limited to ascertaining whether the choice of compensation terms falls outside the State's wide margin of appreciation in this domain.

The requirement for compensation is not so strong where the interference is a control over property under the third limb.[97] For example, the Grand Chamber in *Pye*, having decided that the interference was a control rather than a deprivation of possession, went on to hold that a lack of compensation to the paper owner whose title is extinguished could be justified.

JA Pye (Oxford) Ltd v UK
(2008) 46 EHRR 45

At [79]
The Chamber and the applicant companies emphasised the absence of compensation for what they both perceived as a deprivation of the applicant's companies' possessions. The Court has found the interference with the applicant's companies' possession was a control of use, rather than a deprivation of possession, such that the case-law on compensation for deprivations is not directly applicable. Further, in the cases in which a situation was analysed as a control of use even though the application lost possessions (*AGOSI*, and *Air Canada* [. . .]), no mention was made of a right to compensation. The Court would note, in agreement with the Government, that a requirement of compensation for the situation brought about by a party failing to observe a limitation period would sit uneasily alongside the very concept of limitation periods, whose aim is to further legal certainty by preventing a party from pursuing action after a certain date. The Court would also add that, even under the provisions of the Land Registration Act 2002, which the applicant companies use as confirmation that the provisions of earlier legislation were not compatible with the Convention, no compensation is payable by a person who is ultimately registered as a new owner of registered land on expiry of the limitation period.

[97] *Baner v Sweden* (1989) 60 DR 128; *Chassagnou v France* (2000) 29 EHRR 615.

The question of whether or not compensation is required is thus likely to call for a closer examination of the legitimate aim, as well as the financial impact of the control or disturbance upon the complainant. The minority in *Pye* also drew a connection between the need for compensation and the procedural safeguards available:[98] '[...] *the fact that the landowner received no compensation made the loss of beneficial ownership the more serious and required, in our view, particularly strong measures of protection of the registered owner's property rights if a fair balance was to be preserved*'.

3.2.4 Procedural safeguards

The process by which a person is deprived of their possessions, or by which controls are imposed upon their possessions, is an important aspect of proportionality. The fair balance may be upset if the individual has no opportunity to question the interference.[99] The importance of procedural safeguards under Art 1 Protocol 1 is illustrated by the case of *Zehentner v Austria,* which we first looked at in 2.3.3 above. The Strasbourg Court held that both Art 8 and Art 1 Protocol 1 had been infringed. In respect of Art 1 Protocol 1 the court sanctioned sale of the victim's property was a disproportionate interference with the victim's property, given the relatively small debts involved, and because the process took no account of the victim's incapacity. Furthermore, the procedural possibility of challenging the debts themselves on the grounds of the victim's lack of capacity did not constitute a viable alternative.

Zehentner v Austria Application
(2011) 52 EHRR 22

At 73–78

The present case raises an issue regarding the applicant's procedural protection in the proceedings at issue.

In that respect, the Court [...] has doubts as to whether the debtor's interests are adequately taken into account where a payment order for a comparatively minor sum issued in summary proceedings can serve as a basis for the judicial sale of real estate of considerable value [...]

However, under Article 1 of Protocol No. 1 the Court is examining the judicial sale of the applicant's apartment not from the point of view that it was the applicant's "home" but from the point of view of property rights. In that context the Government's argument that the applicant had alternative means to protect her pecuniary interests needs to be examined. The Government pointed out that the applicant, represented by her guardian, had obtained a finding that the payment orders underlying the judicial sale were not enforceable due to her lack of legal capacity. Subsequently, she would be able to obtain a review of the proceedings on the merits and, if they resulted in her creditor's claims being dismissed, she could claim reimbursement of the amounts which had been paid to them from the proceeds of the judicial sale.

[98] At [16].

[99] *Hentrich v France* (1994) 18 EHRR 440. See also the Scottish decisions of *Karl Construction Ltd v Palisade Properties Ltd* [2002] SLT 312; *AG for Scotland v Taylor* [2003] SLT 1340; *Maguire v Itoh* [2004] SLT (Sheriff Ct) 120.

> However, the Court is not convinced that this procedural mechanism, which requires conducting a number of consecutive sets of proceedings against each of the applicant's creditors, offers adequate protection to a person lacking legal capacity. It therefore refers to its above considerations dismissing the Government's argument that the strict time-limit for appealing against a judicial sale was justified in the interests of protecting the *bona fide* purchaser and in the general interests of an efficient administration of justice and of preserving legal certainty. In sum the Court does not find any reasons to come to a different conclusion under Article 1 of Protocol No. 1.

The Chamber's decision in *Pye*[100] was also largely premised on the lack of procedural safeguards afforded to the paper owner, whose registered title was automatically extinguished (without notification) on the expiration of the twelve-year limitation period.[101] On appeal, the majority of the Grand Chamber, however, was satisfied that adequate procedural safeguards did exist.[102] The paper owners were entitled to take proceedings for possession at any time before expiry of the limitation period and, furthermore, they could challenge proof of the squatter's adverse possession. The LRA 2002 now provides extensive procedural safeguards to protect a registered owner's title against the risk of adverse possession.[103]

4 ARTICLE 8: THE RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE AND THE HOME

European Convention on Human Rights, Art 8

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The inspiration for Art 8 is drawn from rights to privacy enshrined in other international human rights instruments,[104] although it does not refer explicitly to a right to privacy, but rather to a right to respect. Feldman has noted the implications of this shift in emphasis.

[100] (2006) 43 EHRR 3.

[101] See ss 15 and 17, Limitation Act 1980, and s 75 of the Land Registration Act 1925. The same lack of notification also affects unregistered land.

[102] (2008) 46 EHRR 45. [103] See Chapter 8.

[104] For example, Art 17 of the International Covenant on Civil and Political Rights provides that: '*No one shall be subjected to arbitrary or unlawful interference with his privacy, family and home or correspondence, not to unlawful attacks on his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.*' Art 12 of the Universal Declaration of Human Rights is identical, but is contained in a single paragraph.

Feldman, *Civil Liberties and Human Rights in England and Wales*
(2nd edn, 2002, pp 524–5)

> This movement from a right to freedom from interference with privacy to a right to respect for it might seem to weaken the right, as there may be circumstances in which it could be argued that interfering with a person's privacy would not indicate a lack of respect. [. . .]
>
> This potential limitation on the negative (freedom from interference) aspects of the right to privacy should not blind us to the considerable extension of the right which the notion of respect may entail, and which has been influential in the case law of the Court on Article 8. [. . .] Furthermore, a right to respect is capable of imposing positive duties on public authorities, because it can be interpreted as requiring them to take active measures to enable people to have a private and family life, going beyond providing remedies for interference.

Our discussion of Art 8 will concentrate on the respect that it affords to the home. At the outset, it should be noted that the Article does not confer a right to a home, nor does it place upon the government an obligation to meet an individual's housing needs.[105] The focus is upon the protection afforded to an individual's existing home. In this context, there are clear interactions between the home and a person's private and family life.

4.1 WHEN IS ARTICLE 8(1) ENGAGED?

4.1.1 Meaning of 'home'

'Home' has an autonomous meaning, being a place of residence with which the individual has '*sufficient and continuing links*', and is not dependent upon that person having a legal right of occupation. This test was developed by the Strasbourg Court in the case of *Gillow v UK*,[106] and has been consistently applied in subsequent cases by the Strasbourg Court, the House of Lords, and the Supreme Court.

Harrow LBC v Qazi
[2004] 1 AC 983, HL

Facts: Mr Qazi was a tenant, with his wife, of a house owned by the local housing authority. When his wife left him, she terminated their tenancy of the house—a step which she was entitled to take without her husband's knowledge or agreement. Mr Qazi sought a tenancy of the house in his own right, but the housing authority refused, on the grounds that the house was too large for his needs. When Mr Qazi refused to move out, the housing authority successfully took possession proceedings.

Lord Bingham

At [8]–[10]

> Not surprisingly, the need for some protection of the home was recognised in the Convention, since few things are more central to the enjoyment of human life than having somewhere

[105] *Chapman v UK* (2001) 33 EHRR 318, [99].

[106] (1989) 11 EHRR 335.

to live. On a straightforward reading of the Convention, its use of the expression "home" appears to invite a down-to-earth and pragmatic consideration whether [...] the place in question is that where a person "lives and to which he returns and which forms the centre of his existence", since "home" is not a legal term of art and article 8 is not directed to the protection of property interests or contractual rights.

[...] this has been the approach of the Strasbourg institutions also. In *Gillow v United Kingdom* (1986) 11 EHRR 335, para 46, the court held that the house in question was the applicants' home because although they had been absent from Guernsey for many years they had not established any other home elsewhere in the United Kingdom and had retained "sufficient continuing links" with the house for it to be considered their home for the purposes of article 8. This test was repeated and elaborated by the commission in *Buckley v United Kingdom* (1996) 23 EHRR 101, 115, para 63:

> " 'Home' is an autonomous concept which does not depend on classification under domestic law. Whether or not a particular habitation constitutes a 'home' which attracts the protection of article 8(1) will depend on the factual circumstances, namely, the existence of sufficient and continuous links. The factor of 'unlawfulness' is relevant rather to considerations under paragraph 2 of that provision of 'in accordance with law' and to the balancing exercise undertaken between the interests of the community and those of the individual in assessing the necessity of any interference."

[....]

The general approach of the Strasbourg institutions has however been to apply a simple, factual and untechnical test, taking full account of the factual circumstances but very little of legal niceties.

Although the test of 'sufficient and continuing links' is well established, the nature of these links is not easy to pin down.[107] It is clear that the links are not forged by property interests. Thus, even though an occupier's legal right to remain in possession may have ceased, or indeed never arisen, their residence may still qualify as their home for the purposes of Art 8(1). The legality of their occupation is relevant only to the justification balance under Art 8(2). Looking beyond property rights raises the possibility that Art 8 may offer a new measure of human rights based protection of the home—see section 7.

Physical occupation of the property as a residence for a period will be the norm, although in *Gillow v UK*, the lack of occupation was no bar where the Gillows had worked abroad for many years, but still regarded the house they owned in Jersey as their only home. The necessary links thus look particularly to the emotional connection that a person forms with their home and neighbourhood. In the following extract, Nield explains these aspects of home referring to the contribution of academic commentators.

Nield, 'Clash of the Titans: Article 8, Occupiers and Their Home' in *Modern Studies in Property Law* Vol 6 (ed S Bright, Oxford, Hart 2011)

[A] dwelling may be a person's home although they have no current legal right to occupy that dwelling. This interpretation may come as a surprise to property lawyers whose normal area of enquiry is concerned with identifying and then reconciling competing property rights [...]

[107] Busye, 'Strings Attached: the concept of home in the case law of the ECHR' (2006) 3 EHRLR 294.

However, this wider meaning of home is fundamental to claims that Article 8 provides a 'new form of proprietary entitlement.' It opens up the respect due to the home under Article 8 to possibilities beyond the traditional boundaries of property law and forces property lawyers to look at the concept of home in a much wider context.

The autonomous meaning of home in Strasbourg jurisprudence is defined by the 'sufficient and continuing links' that the claimant has with a dwelling. These links owe more to the social and psychological attachment or bond that develops with a particular dwelling and neighbourhood rather than proprietary rights. The concern is not just with the use of a dwelling as a mere shelter but also with abstract, but nevertheless powerful, ties to a particular place and locality. The concept of home is thus used in symbolic terms, rather than restricted by functionality, and as such dovetails with the similar Article 8 demands for respect for a person's 'private and family life.' A home is thus '*not just a place where one lives but also the place where one feels one belongs*' [see Buyse *Strings Attached: the concept of home in the case law of the ECHR* (2006) EHRLR 294 at 296]. It is concerned with '*identity, self determination, physical and mental integrity, . . . and a settled and secure home and place in community.*' [see *Connors v UK* at [82]] [. . .] Fox in her book *Conceptualising Home: Theories, Law and Policy* [Oxford, Hart:2007] explores the meaning of home beyond its physical structure to the concept of home as 'territory', home as 'identity', home as 'social and cultural unit' as well as home as 'a financial investment.' It is these intangible values of home which capture the essence of 'sufficient and continuing links' beyond a dwelling's tangible bricks and mortar. Yet lawyers and judges seem to find these home meanings challenging to accommodate for it is this wider concept of home which underpins the conflict between domestically recognised proprietary rights and the respect due to the home under Article 8.

Although the meaning of home is not easy to pin down, the home test of 'sufficient and continuing links' has generally not been difficult for a victim to pass unless their temporal connection with their home has been brief.[108] For instance, in *Leeds CC v Price*[109] occupation of a traveller's site for just a few days was insufficient.[110]

4.1.2 The implications of respect

As Feldman notes, respect has both negative and positive connotations that can encompass a wide variety of actions. Negative protection of the home encompasses protection from government interference, from (for example) police powers of entry and search,[111] or the regulation of land use through compulsory purchase,[112] and planning or residency controls.[113] Positive obligations are also placed upon governments to frame the law in such a way that individuals are at liberty to enjoy their homes and to exercise their chosen way of life.[114]

[108] *Hounslow LBC v Powell* [2011] UKSC 8, [33].
[109] [2006] 2 AC 465.
[110] See also *O'Rourke v UK* App No 39022/97 where occupation of a hotel room for less than a month was inadequate.
[111] *Mcleod v UK* (1999) 27 EHRR 493 and *Keegan v UK* (2007) 44 EHRR 33.
[112] *Howard v UK* (1987) 9 EHRR CD116.
[113] *Gillow v UK* (1989) 11 EHRR 335 and *Buckley v United Kingdom* (1997) 23 EHRR 101.
[114] *Marckx v Belgium* (1979) 2 EHRR 330. A positive duty may also arise to protect a particularly vulnerable group: see *Connors v UK* (2005) 40 EHRR 9.

An example of this positive duty is evident from cases that have challenged anti social behaviour[115] and environmental pollution.[116] For example, in *Lopez Ostra v Spain*,[117] the siting of a waste treatment plant and its operation without the requisite licence presented a health risk and nuisance to the applicant that breached Art 8. The Spanish government was responsible, because it had authorized and facilitated the construction of the plant close to the applicant's home,[118] and had failed to take steps to ensure that it was operated without causing a nuisance to neighbouring occupiers. Similar challenges to environmental pollution, caused by Heathrow and Gatwick Airports,[119] and road construction in the East End of London,[120] have also constituted an interference with the respect that Art 8(1) affords the home—although, in each case, that interference has been justified under Art 8(2).

These cases also demonstrate that governments' responsibilities may extend to the activities of private bodies, where there is a direct and immediate link between a government's duties under Art 8 and the interference.[121] Article 8(2) suggests that the interference must be by a public authority, but a public authority will be taken to have engaged Art 8(1) where it is responsible for the conditions that allow a private body to disturb an individual's enjoyment of his or her home.

4.1.3 Repossession as an interference

It is now clear that the exercise of a proprietary right to possession, for instance by a landlord or a creditor, is the most serious interference with the respect due to the home under Art 8(1) even though sanctioned by domestic law. The majority of the House of Lords in *Harrow LBC v Qazi*[122] had questioned this proposition but, following unequivocal judgments from the Strasbourg Court,[123] it is now accepted that domestic rights to possession are an interference with respect for the home, which must thus be justified as legitimate and proportionate under Art 8(2).[124]

4.2 WHEN IS AN INTERFERENCE JUSTIFIED UNDER ARTICLE 8(2)?

Article 8(2) sets out the grounds upon which an interference with the home may be justified. These grounds, in effect, set out the legitimate aims. They are comprehensive and, in many instances, an interference will be justified under one or more grounds. The most common grounds for our purposes are measures that are designed to promote the economic well-being of the country, to protect public safety, or to protect the rights and freedom of others.

[115] *Mileva v Bulgaria* App Nos 43449/02 and 21475/04; *Moreno Gomez v Spain* App No 4143/02; *Oluic v Croatia* App N 61260/08.

[116] *Arrondelle v UK* (1983) 5 EHRR 118; *Hatton v UK* (2003) 37 EHRR 28; *Powell and Ryaner v UK* (1990) 12 EHRR 355; *Khatun v UK* (1998) 26 EHRR CD 212; *Lopez Ostra v Spain* (1995) 20 EHRR 277; *Guerra v Italy* (1998) 26 EHRR 357. A positive duty may also arise to protect a particularly vulnerable group: see *Connors v UK* (2005) 40 EHRR 9.

[117] Ibid. [118] It was only 12 metres from the applicant's home.

[119] *Hatton v UK* (2003) 37 EHRR 28 and *Powell and Ryaner v UK* (1990) 12 EHRR 355.

[120] *Khatun v UK* (1998) 26 EHRR CD 212. [121] *X and Y v Netherlands* (1986) 8 ECRR 235.

[122] [2004] 1 AC 983.

[123] See *Connors v UK* (2005) 40 EHRR 9 and *Blecic v Croatia* (2005) 41 EHRR 13, which has been reiterated time and again see in particular *McCann v UK* (2008) 47 EHRR 40 and *Kay v UK* [2011] HLR 2.

[124] *Manchester CC v Pinnock* [2010] UKSC 45, [2010] 3 WLR 1441 and *Hounslow LBC v Powell* [2011] UKSC 8, [2011] 2 WLR 287.

For example, planning controls and powers of compulsory purchase will often be justified on all three grounds,[125] whilst environmental pollution may be justified to attain national economic goals.[126]

4.2.1 Necessary in a democratic society

The measures taken to achieve one or more of the legitimate aims identified in Art 8(2) must be necessary in a democratic society in order to address a pressing social need. Furthermore, they must be a proportionate response to that need, which strikes a fair balance between the respect due to an individual's home and the necessary social objective. In formulating these needs and the measures to achieve them, the government enjoys a wide margin of appreciation (see 2.5.3 above). As we have noted, it is thought that the margin of appreciate in the context of defining the necessity of a social need under Art 8 is somewhat narrower than the test of public or general interest under Art 1 Protocol 1. Nevertheless, it is not 'strict necessity' and, thus, a degree of latitude is envisaged depending on the context of the interference and the associated justification.[127] Furthermore, we have also noted in the domestic context that the courts are likely to show considerable deference to the policy choices of Parliament in socio-economic matters of which much of our land law forms part, particularly where that law has been subject to recent Parliamentary scrutiny (see 2.5.5 above).

4.2.2 Justification and social housing possession proceedings

A pressing social need is, without doubt, the provision of adequate housing, in which social landlords play a vital and prominent role. It is thus not surprising that possession proceedings by these social landlords have come under scrutiny in recent years on human rights grounds. The result has been 'a dialogue' between the Strasbourg Court and our highest court that has seen the Supreme Court eventually bow to the clear dictates of Strasbourg jurisprudence.[128]

We have already noted that repossession of the home is a serious interference with respect for the home under Art 8(1). The focus is thus upon the justification for this interference in the vindication of social landlords' property rights and their role in the provision of social housing as well as the process by which repossession operates. In most cases, a social landlord will seek possession of secure tenancies on statutory grounds, when it must satisfy the court that the requisite grounds for possession exist and, furthermore, that it is reasonable to make a possession order and/or that suitable alternative accommodation is available.[129] These cases are not thought to raise human rights difficulties. It is those occasions when a social landlord is exercising a mandatory ground for repossession that have been the subject of scrutiny. Here the victim will have no defence to the claim for possession and the court no, or very limited, discretion to refuse or delay an order for possession.

Mandatory grounds for possession fall into a number of groups. There are demoted and introductory tenancies, which were introduced to try and address anti social behaviour.

125 See *Buckley v United Kingdom* (1997) 23 EHRR 101.

126 See *Hatton v UK* (2003) 37 EHRR 28; *Powell and Rayner v UK* (1990) 12 EHRR 355; *Khatun v UK* (1998) 26 EHRR CD 212.

127 See T Hickman, *Public Law After the Human Rights Act* (Oxford: Hart, 2010 pp 118–19).

128 For details of this dialogue see Nield, 'Clash of the Titans: Article 8, Occupiers and their Home' in *Modern Studies in Property Law* Vol 6 (ed S Bright, Oxford, Hart, 2011, ch 5).

129 See Housing Act 1985, s 84.

Both create non-secure tenancies that entitle the social landlord to repossession via a process that prescribes the width of the court's discretion. Introductory tenancies are granted to new social tenants who are, in effect, put on probation for an initial period to prove that they are responsible tenants before their tenancy moves to a secure basis. Existing secure tenants, who have been guilty of anti social behaviour, may have their tenancies demoted to unsecure tenancies for a period. They are, essentially, given a second chance to amend their behaviour. The second group look to provision of non-secure accommodation to certain categories of occupier including the grant of temporary accommodation to those who would otherwise be homeless and the licensing of mobile home sites to gypsies and travellers. Lastly there are the cases that look to the means by which a tenancy is terminated on mandatory grounds. These grounds include the termination of a joint tenancy by one joint tenant without the consent of the other joint tenant under the Rule in *Hammersmith and Fulham LBC v Monk*[130] and the statutory Ground 8 where a court must order repossession on the basis of rent arrears.

When focusing upon a human rights challenge to justification under Art 8(2), we need to remember that it is not just the compatibility of the legal rules that govern rights to possession (macro-compatibility) but also their impact upon the respect due to the home occupier (micro-compatibility). There is thus a need for both an adequate process and adequate judicial discretion within that process to apply that right to possession and assess their impact on the individual occupier. In addition, where possession proceedings are brought by a public authority landlord, there is the interface with a public law challenge via judicial review of the administrative decision(s) to terminate the tenant or licensee's legal right to possession and to subsequently pursue and enforce repossession proceedings.

A brief outline of 'the dialogue' between Strasbourg and our domestic courts is necessary to appreciate the full import of the justification balance that has been achieved.[131] A prelude to this dialogue is the initial position of our domestic courts in *Harrow LBC v Qazi*.[132] The majority of the House of Lords decided that the exercise of an established proprietary right to possession is necessarily compliant with Art 8 because it automatically provides the necessary justification under Art 8(2).[133] An influential minority, however, called for landowners' rights to possession to undergo justification as a proportionate interference with respect for the home, although they acknowledged that only in exceptional circumstances was it likely that an established right to possession would be found incompatible.[134] The Strasbourg Court refused an appeal in *Qazi* but they did announce their position in *Connors v UK*[135] (extract at 2.5.3 above). They held that the termination of a licence for gypsies to occupy a local authority mobile home site, without an opportunity to consider the proportionality of the termination, was an unjustified interference with the respect due to the Connors' home who, as members of a vulnerable cultural group, i.e. gypsies, were entitled to positive protection to facilitate their way of life.

A seven member House of Lords responded to *Connors* in *Kay v Lambeth LBC*,[136] which concerned the termination of a licence of housing provided to homeless individuals. The majority moved only marginal from *Qazi* in deciding that the proprietary rules governing possession might exceptionally be unjustified as a disproportionate interference with

130 [1992] 1 AC 478; see Chapter 22

131 For a fuller examination of this 'dialogue' see Nield, 'Clash of the Titans: Article 8, Occupiers and Their Homes' in *Modern Studies in Property Law* Vol 6 (ed S Bright, Oxford, Hart, 2011 Ch 5).

132 [2004] 1 AC 983. 133 Lords Scott, Hope and Millett. 134 Lords Steyn and Bingham.

135 (2005) 40 EHRR 9. See also *Blecic v Croatia* (2005) 41 EHRR 13.

136 [2006] UKHL 10, [2006] 2 AC 465.

respect for the home under Art 8(2).[137] In contrast to the minority, however, the majority refused to accept that the application of those rules to the personal circumstances of the individual occupier also needed to be justified as proportionate. The majority held that in this respect *Connors* was confined to the particular circumstances of gypsies as a vulnerable group to whom positive duties were owed. The process concerns expressed by Strasbourg in *Connors*, the House of Lords believed, could be met by the public law redress via judicial review of the public authority's decision to repossess, which they confined to traditional *Wednesbury* grounds.[138] The Strasbourg Court was unimpressed. They repeated their position in ever clearer tones in *McCann v UK*, (extracted at 2.5.4 above) and in a number of other appeals on the compatibility of repossession proceedings from other jurisdictions.[139] In *McCann* the Strasbourg Court also expressed doubt that judicial review on traditional *Wednesbury* grounds could provide an adequate process and expressed their preference for the view of the minority in *Kay v Lambeth LBC*.

A five member House of Lords in *Doherty v Birmingham CC*,[140] another gypsy eviction case in which judgment was handed down shortly after *McCann*, virtually ignored the message from Strasbourg. The House felt constrained by their previous decision in *Kay* although they did try to address the process issue by suggesting, unfortunately with muffled and inconsistent voices, that the grounds of judicial review of a public authority's decision to repossess were wider than common law irrationality. They hinted that this alternative wider judicial review route could encompass human rights based concerns by taking into account the impact of the repossession upon the personal circumstances of the victim.

A successful appeal by Kay to Strasbourg in *Kay v UK* (extracted at 2.5.3 above) finally brought the Strasbourg message home. The exercise of a right to possession by a public authority is a serious interference with respect for the home that will be justified only if it is lawful and serves a legitimate aim by meeting a pressing social need that lies within a State's margin of appreciation, but which is also proportionate in striking a fair balance in its impact upon the individual victim. The proportionality of the interference necessitates an assessment by an independent tribunal of the impact of the interference upon the personal circumstances of the victim. Judicial review, confined to traditional *Wednesbury* irrationality, is an inadequate process given its shortcomings in reconciling disputed facts. Strasbourg in *Kay v UK* did not rule out the possibility that judicial review might be adapted to provide a compatible process and welcomed the developments to judicial review that were hinted at in *Doherty*.

The Supreme Court has bowed to the inevitable in their decisions in *Manchester CC v Pinnock*,[141] on the compatibility of the termination of demoted tenancies, and in the conjoined appeals in *Hounslow LBC v Powell*, *Leeds CC v Hall*, *Birmingham CC v Frisby*,[142] concerning the termination of introductory tenancies and unsecure tenancies to those qualifying as homeless. Before turning to look at the final conclusion reached by these decisions, it is worth noting the concerns of our domestic courts in their reluctance to heed the message from Strasbourg.

First, there is a concern not to upset the social housing regime articulated through detailed statutory schemes emanating from Parliament. Here we have an example of judicial deference to Parliament in a key area of socio-economic policy that attracts significant state funding. The judiciary is keen to acknowledge the democratic mandate of the

[137] Known as Gateway (a). [138] Known as Gateway (b).

[139] *Cosic v Croatia* (2011) 52 EHRR 39, *Paulic v Croatia* App No 3572/06, *Zehentner v Austria* (2011) 52 EHRR 22, *Kryvitska & Kryvitskyy v Ukraine* App No 30856/03.

[140] [2008] UKHL 57, [2009] 1 AC 367. [141] [2010] UKSC 45, [2010] 3 WLR 1441.

[142] [2011] UKSC 8, [2011] 2 WLR 287.

legislature in determining housing policy and the expertise of those responsible for the articulation and administration of those policy choices (see 2.5.5 above). In *Powell*, Lord Hope repeated their Lordships' views on the proper constitutional balance in the regulation of social housing.

Hounslow LBC v Powell
[2011] UKSC 8

Lord Hope

At [10]

The legislature has excluded these types of tenancy [i.e. introductory tenancies and homeless accommodation] from the statutory scheme which applies to secure tenancies for very good reason, which are firmly rooted in social policy. In seeking democratic solutions to the problems inherent in the allocation of social housing, parliament has sought to strike a balance between the rights of the occupier and the property rights and public responsibilities of the public authority. The regimes that apply to introductory and demoted tenancies have been designed to address the problem of irresponsible and disruptive tenants whose presence in social housing schemes can render the life for their neighbours in their homes intolerable. The homeless regime provides the local housing authority with the flexibility in the management of its housing stock that it needs if it is to respond quickly and responsibly to the demands that this pressing social problem gives rise to. Measure which would have the effect of widening the protections given to occupiers by the statutes must be carefully tested against Parliament's choice as to who should, and should not, have security of tenure and when it should be given to them, if at all. Social housing law draws a clear distinction between cases where security of tenure has been given, and those there it has not. There are clear policy reasons why Parliament has denied security to certain classes of occupier.

Secondly, there is, as dictated by Strasbourg jurisprudence, the importance attached to procedural safeguards that has produced tensions both with the regulation of social housing, which, as Lord Hope explains, on occasions denies security of tenure for sound policy reasons. There is also perhaps a more fundamental tension between the common law's acceptance of non-judicial controls of possession and the civilian preference for judicial control over the assertion of ownership rights. The need for procedural safeguards demonstrates the underlying demands of respect for the home. That respect dictates a judicial process within which there is an adequate opportunity to measure the proportionality of the repossession both in terms of the legal rules that sanction possession and in their impact upon the individual victim (see 2.5.3 and 2.5.4 above).

This search for adequate procedural safeguards has demonstrated the interface between a freestanding cause of action on human rights grounds emanating from s 7 of the HRA 1998 and the traditional administrative law route by which public authorities have been held to account through judicial review. Judicial review itself is undergoing somewhat of a reformation in the light of public authorities' duties under s 6 of the HRA 1998 to act in a human rights compatible manner, which looks to proportionality rather than irrationality, as the appropriate test (see 2.2.3 above).

Lastly, the decisions highlight the Supreme Court's concern with the practicalities of possession proceedings which occupy much of the business of our County Courts. The higher

courts may revel in the niceties of human rights adjudication but it is the County Courts which must apply those rules fairly yet efficiently.

The Supreme Court's decision in *Pinnock* acknowledges that a tenant from a social landlord may challenge the proportionality of his or her eviction in the proceedings for possession.

Manchester CC v Pinnock
[2010] UKSC 45

Lord Neuberger

At [45] and [49]

[. . .] it is clear that the following propositions are now well established in the jurisprudence of the European court: (a) Any person at risk of being dispossessed of his home at the suit of a local authority should in principle have the right to raise the question of the proportionality of the measure, and to have it determined by an independent tribunal in the light of article 8, even if his right of occupation under domestic law has come to an end: McCann v United Kingdom 47 EHRR 913, para 50; Ćosić v Croatia given 15 January 2009, para 22; Zehentner v Austria given 16 July 2009, para 59; Paulic v Croatia given 22 October 2009, para 43; and Kay v United Kingdom given 21 September 2010, paras 73–74. (b) A judicial procedure which is limited to addressing the proportionality of the measure through the medium of traditional judicial review (i e, one which does not permit the court to make its own assessment of the facts in an appropriate case) is inadequate as it is not appropriate for resolving sensitive factual issues: Connors v United Kingdom 40 EHRR 189, para 92; McCann v United Kingdom 47 EHRR 913, para 53; Kay v United Kingdom, paras 72–73. (c) Where the measure includes proceedings involving more than one stage, it is the proceedings as a whole which must be considered in order to see if article 8 has been complied with: Zehentner v Austria, para 54. (d) If the court concludes that it would be disproportionate to evict a person from his home notwithstanding the fact that he has no domestic right to remain there, it would be unlawful to evict him so long as the conclusion obtains—for example, for a specified period, or until a specified event occurs, or a particular condition is satisfied. Although it cannot be described as a point of principle, it seems that the European court has also franked the view that it will only be in exceptional cases that article 8 proportionality would even arguably give a right to continued possession where the applicant has no right under domestic law to remain: McCann v United Kingdom 47 EHRR 913, para 54; Kay v United Kingdom, para 73.

We have referred in a little detail to the European court jurisprudence. This is because it is important for the court to emphasise what is now the unambiguous and consistent approach of the European court, when we have to consider whether it is appropriate for this court to depart from the three decisions of the House of Lords. . . .

In the present case there is no question of the jurisprudence of the European court failing to take into account some principle or cutting across our domestic substantive or procedural law in some fundamental way. That is clear from the minority opinions in Harrow London Borough Council v Qazi [2004] 1 AC 983 and Kay v Lambeth London Borough Council [2006] 2 AC 465, and also from the fact that our domestic law was already moving in the direction of the European jurisprudence in Doherty v Birmingham City Council [2009] AC 367. Even before the decision in Kay v United Kingdom The Times, 18 October 2010, we would, in any event, have been of the opinion that this court should now accept and apply the minority view of the House of Lords in those cases. In the light of Kay v United Kingdom that is clearly the right conclusion. Therefore, if our law is to be compatible with article 8, where a court is

asked to make an order for possession of a person's home at the suit of a local authority, the court must have the power to assess the proportionality of making the order, and, in making that assessment, to resolve any relevant dispute of fact.

Lord Neuberger went onto to observe that these dictates present no problem to the existing possession proceedings against secure tenants where the court has a statutory discretion to assess the reasonableness of the order for possession, but that mandatory grounds for possession were more problematic. Before holding that the regime for the termination of demoted tenancies was compliant, and that its application to Mr Pinnock was proportionate, he made the following general observations.

Lord Neuberger

At [60]–[64]

Nevertheless, certain general points can be made, even at this stage.

First, it is only where a person's "home" is under threat that article 8 comes into play, and there may be cases where it is open to argument whether the premises involved are the defendant's home (eg where very short-term accommodation has been provided). Secondly, as a general rule, article 8 need only be considered by the court if it is raised in the proceedings by or on behalf of the residential occupier. Thirdly, if an article 8 point is raised, the court should initially consider it summarily, and if, as will no doubt often be the case, the court is satisfied that, even if the facts relied on are made out, the point would not succeed, it should be dismissed. Only if the court is satisfied that it could affect the order that the court might make should the point be further entertained.

Fourthly, if domestic law justifies an outright order for possession, the effect of article 8 may, albeit in exceptional cases, justify (in ascending order of effect) granting an extended period for possession, suspending the order for possession on the happening of an event, or even refusing an order altogether.

Fifthly, the conclusion that the court must have the ability to assess the article 8 proportionality of making a possession order in respect of a person's home may require certain statutory and procedural provisions to be revisited [. . .] we say no more on the point, since these aspects were not canvassed on the present appeal to any significant extent, save in relation to the legislation on demoted tenancies which we are about to discuss under the third issue.

Sixthly, the suggestions put forward on behalf of the Equality and Human Rights Commission, that proportionality is more likely to be a relevant issue "in respect of occupants who are vulnerable as a result of mental illness, physical or learning disability, poor health or frailty", and that "the issue may also require the local authority to explain why they are not securing alternative accommodation in such cases" seem to us well made.

Evident in these observations is a concern with the practicalities of possession proceedings, which should not be hampered by a human rights based defence unless the occupier raises the issue, i.e. compliance should be presumed unless questioned. Also evident is the message that a successful human rights challenge to the social housing legislation enacted by Parliament will be rare and likely only to arise where its impact upon an individual occupier is disproportionate because of the occupier's particular vulnerability. His message is repeated by Lord Hope in *Powell*.[143]

143 [2011] UKSC 8, [2011] 2 WLR 287, [34].

In previous decisions the word 'exceptional' had been used to describe the likelihood of a disproportionate result. Lord Neuberger, in *Pinnock*, criticized the use of the word 'exceptional' and tried to articulate a more useful guide. In so doing he suggests that vindication of a social landlord's property rights and their duties of housing management in almost all cases will provide the necessary pressing social need to demonstrate proportionality.

Lord Neuberger

At [51]–[54]

It is necessary to address the proposition that it will only be in "very highly exceptional cases" that it will be appropriate for the court to consider a proportionality argument. Such a proposition undoubtedly derives support from the views expressed by Lord Bingham, and has been referred to with apparent approval by the European court in more than one case. Nevertheless, it seems to us to be both unsafe and unhelpful to invoke exceptionality as a guide. It is unhelpful because, as Baroness Hale of Richmond JSC pointed out in argument, exceptionality is an outcome and not a guide. It is unsafe because, as Lord Walker observed in Doherty v Birmingham City Council [2009] AC 367, para 122, there may be more cases than the European court or Lord Bingham supposed where article 8 could reasonably be invoked by a residential tenant.

We would prefer to express the position slightly differently. The question is always whether the eviction is a proportionate means of achieving a legitimate aim. Where a person has no right in domestic law to remain in occupation of his home, the proportionality of making an order for possession at the suit of the local authority will be supported not merely by the fact that it would serve to vindicate the authority's ownership rights. It will also, at least normally, be supported by the fact that it would enable the authority to comply with its duties in relation to the distribution and management of its housing stock, including, for example, the fair allocation of its housing, the redevelopment of the site, the refurbishing of sub-standard accommodation, the need to move people who are in accommodation that now exceeds their needs, and the need to move vulnerable people into sheltered or warden-assisted housing. Furthermore, in many cases (such as this appeal) other cogent reasons, such as the need to remove a source of nuisance to neighbours, may support the proportionality of dispossessing the occupiers.

In this connection, it is right to refer to a point raised by the Secretary of State. He submitted that a local authority's aim in wanting possession should be a "given", which does not have to be explained or justified in court, so that the court will only be concerned with the occupiers' personal circumstances. In our view, there is indeed force in the point, which finds support in Lord Bingham's comment in Kay v Lambeth London Borough Council [2006] 2 AC 465, 491, para 29, that to require the local authority routinely, from the outset, to plead and prove that the possession order sought is justified would, in the overwhelming majority of cases, be burdensome and futile. In other words, the fact that the authority is entitled to possession and should, in the absence of cogent evidence to the contrary, be assumed to be acting in accordance with its duties, will be a strong factor in support of the proportionality of making an order for possession. But, in a particular case, the authority may have what it believes to be particularly strong or unusual reasons for wanting possession—for example, that the property is the only occupied part of a site intended for immediate development for community housing. The authority could rely on that factor, but would have to plead it and adduce evidence to support it.

Unencumbered property rights, even where they are enjoyed by a public body such as a local authority, are of real weight when it comes to proportionality. So, too, is the right—indeed the obligation—of a local authority to decide who should occupy its residential

property. As Lord Bingham said in Harrow London Borough Council v Qazi [2004] 1 AC 983, 997, para 25: "the administration of public housing under various statutory schemes is entrusted to local housing authorities. It is not for the court to second-guess allocation decisions. The Strasbourg authorities have adopted a very pragmatic and realistic approach to the issue of justification."

Therefore, in virtually every case where a residential occupier has no contractual or statutory protection, and the local authority is entitled to possession as a matter of domestic law, there will be a very strong case for saying that making an order for possession would be proportionate. However, in some cases there may be factors which would tell the other way.

Again Lord Neuberger's views regarding the legitimate aim of the interference presented by possession proceedings were repeated in *Powell*, where Lord Hope emphasized that in the case of social landlords the vindication of their property rights was by itself insufficient.[144] Lord Hope went on to reject the need for a more structured approach to proportionality, which would look to the particular policy of the ground for possession under scrutiny.

Lord Hope

At [41]

A structured approach of the kind that Mr Luba was suggesting may be appropriate, and indeed desirable, in some contexts such as that of immigration control which was the issue under discussion in Huang v Secretary of State for the Home Department [2007] 2 AC 167. But in the context of a statutory regime that has been deliberately designed by Parliament, for sound reasons of social policy, so as not to provide the occupier with a secure tenancy it would be wholly inappropriate. I agree with Mr Stilitz for the Secretary of State that to require the local authority to plead its case in this way would largely collapse the distinction between secured and non-secure tenancies. It would give rise to the risk of prolonged and expensive litigation, which would divert funds from the uses to which they should be put to promote social housing in the area. In the ordinary case the relevant facts will be encapsulated entirely in the two legitimate aims that were identified in Pinnock [2010] 3 WLR 1441, para 52. It is against those aims, which should always be taken for granted, that the court must weigh up any factual objections that may be raised by the defendant and what she has to say about her personal circumstances. It is only if a defence has been put forward that is seriously arguable that it will be necessary for the judge to adjourn the case for further consideration of the issues of lawfulness or proportionality. If this test is not met, the order for possession should be granted. This is all that is needed to satisfy the procedural imperative that has been laid down by the Strasbourg court.

The difficulty is in identifying those very few cases where repossession may be disproportionate. Lord Neuberger, in *Pinnock*, acknowledged that the particular vulnerability of the individual occupier may tip the balance. Lord Bingham in *Kay v Lambeth LBC*[145] was of the view that County Court judges should be able to spot those rare cases.

[144] [2011] UKSC 8, [2011] 2 WLR 287, [35]–[37].

[145] [2006] UKHL 10, [2006] 2 AC 465.

Lord Bingham

At [38]

I do not think it possible or desirable to attempt to define what facts or circumstances might rank as highly exceptional. The practical experience of county court judges is likely to prove the surest guide, provided always that the stringency of the test is borne in mind. They are well used to exercising their judgment under existing statutory schemes and will recognise a highly exceptional case when they see it. I do not, however, consider that problems and afflictions of a personal nature should avail the occupier where there are public services available to address and alleviate those problems, and if under the relevant social legislation the occupier is specifically disentitled from eligibility for relief it will be necessary to consider the democratic judgment reflected in that provision. Nor can article 8 avail a tenant, otherwise perhaps than for a very brief period, if he can be appropriately accommodated elsewhere (whether publicly or privately). Where, as notably in the case of gipsies, scarcity of land adversely affects many members of the class, an article 8(2) defence could only, I think, succeed if advanced by a member of the class who had grounds for complaint substantially stronger than members of the class in general.

Lord Phillips, in *Powell*,[146] also pointed out that it is 'fundamentally unfair' for an occupier not to be informed at an early stage of the reasons for the possession proceedings against him or her. Early notification is important so that an occupier can consider the possibility of raising a defence.

The Supreme Court, in *Pinnock*, held the demoted tenancy regime compatible by a resourceful use of their power of statutory interpretation under s 3. A secure tenancy can be demoted for one year where the court is satisfied that the tenant has committed anti social behaviour.[147] Within that year the social landlord is entitled to recover possession provided they follow the prescribed procedure, which provides for an internal review by the social landlord of a decision to repossess.[148] If the internal review confirms repossession the court's discretion appears limited—the court 'must make an order for possession unless it thinks that the [prescribed] procedure has not been followed'.[149] However, Lord Neuberger held that this literal wording did not prevent the court assessing the proportionality of the repossession upon the individual. He did so by the novel, if somewhat circular, argument that the statutory procedure must be read to require a lawful process. To be lawful that process must comply with the ECHR, thus, the section, despite its apparent restrictive wording, must entitle the court to assess the proportionality of the order for possession.

Lord Neuberger

At [75]

As we have pointed out [...] the purpose of [s143D] appears to be to ensure that the court makes an order for possession in all cases except where it thinks that the procedure under sections 143E and 143F has not been followed. In other words, the purpose is to ensure that the court does nothing more than check whether the procedure has been followed. It could therefore be argued that holding that the court could assess the proportionality of the local

[146] [2011] UKSC 8, [2011] 2 WLR 287, [115]–[117].
[147] Housing Act 1996, s 82A.
[148] Housing Act 1996, s 143E–143F.
[149] Housing Act 1996, s 143D.

authority's decision to bring and to continue the possession proceedings would go against the whole import of the section and would amount to amending rather than interpreting it.

We have come to the conclusion that we should reject that argument.

In our view, if the procedure laid down in section 143E or 143F has not been lawfully complied with, either because the express requirements of that section have not been observed or because the rules of natural justice have been infringed, the tenant should be able to raise that as a defence to a possession claim under section 143D(2). After all, the tenant's argument in such circumstances would be within the scope of the ambit of section 143D(2), namely that "the procedure under sections 143E and 143F has not been [lawfully] followed", since lawfulness must be an inherent requirement of the procedure. It must equally be open to the court to consider whether the procedure has been lawfully followed, having regard to the defendant's article 8 Convention rights and section 6 of the 1998 Act.

A similar interpretative approach was taken in *Powell*. The Supreme Court again exercised their duty under s 3 of the HRA 1998, by reading into the statutory framework for the termination of introductory tenancies and tenancies granted to the homeless a discretion for the court to conduct a proportionality assessment and, thus, meet human rights' procedural demands.[150]

Lord Neuberger, in *Pinnock*, also briefly addressed the availability of a public law challenge by way of judicial review of a public authority's decision to bring a tenancy to an end and their subsequent decision(s) to recover possession through the bringing of proceedings and the execution of the possession order obtained. In so doing he noted both the expanded human rights basis upon which a public landlord's decision could be questioned and recognized that the judicial review process needed to accommodate the resolution of disputed facts.

Lord Neuberger

At [72]–[74] and [81]

Rightly, in our view, it is common ground that a court has jurisdiction, under normal judicial review principles, to satisfy itself that the local authority and panel have indeed acted reasonably and have investigated the relevant facts fairly, when deciding to bring possession proceedings. From this it must follow that any decision by the local authority to continue possession proceedings is similarly susceptible to judicial review. At the same time, it is right to emphasise that it would almost always require a marked change of circumstances following a panel's decision to approve the proceedings, before an attempt could properly be made to judicially review the continuance of proceedings which were initially justified.

In our judgment, once it is accepted that it is open to a demoted tenant to seek judicial review of a landlord's decision to bring and continue possession proceedings, then it inevitably follows that, as a generality, it is open to a tenant to challenge that decision on the ground that it would be disproportionate and therefore contrary to article 8.

Further, as we saw at paras 31 to 43 above, the European court jurisprudence requires the court considering such a challenge to have the power to make its own assessment of any relevant facts which are in dispute. We have already pointed out, at para 28 above, that Lord Scott and Lord Mance, in particular, reached this conclusion in Doherty v Birmingham City Council [2009] AC 367, paras 68 and 138. The European court acknowledged this development in

150 [2011] UKSC 8, [2011] 2 WLR 287, [55]–[56].

Kay v United Kingdom The Times, 18 October 2010, para 73. In these circumstances we are satisfied that, wherever possible, the traditional review powers of the court should be expanded so as to permit it to carry out that exercise.

In summary: where it is required in order to give effect to an occupier's article 8 Convention rights, the court's powers of review can, in an appropriate case, extend to reconsidering for itself the facts found by a local authority, or indeed to considering facts which have arisen since the issue of proceedings, by hearing evidence and forming its own view.

As we can see from both *Pinnock* and *Powell*, adequate procedural safeguards call for a consideration of the proportionality of the infringement upon the victim's individual respect for their home. There must, thus, be juridical process which provides adequate judicial discretion to balance the proportionality of the interference upon the individual's personal circumstances. The Strasbourg Court has indicated that those proceedings should be substantive, when the court has jurisdiction to consider the relevant issues, and not merely in enforcement proceedings, where the courts' examination of the circumstances may be constrained.

Paulic v Croatia
Application No 3572/06

Facts: Mr Paulic's tenancy of the home he occupied with his wife and son was brought to an end in accordance with domestic law. The enforcement of the repossession order was adjourned pending the hearing of an appeal against the repossession order and in the light of the ill health of Mr Paulic's son.

At 44

While it is true that the applicant's eviction has been temporarily adjourned owing to the illness of his son in the course of enforcement proceedings, this in itself does not satisfy the requirement that the reasonableness and the proportionality of the eviction order as such has to be assessed by an independent tribunal. The Court notes that enforcement proceedings—which by their nature are non-contentious and whose primary purpose is to secure the effective execution of the judgment debts—are unlike regular civil proceedings, neither designated nor properly equipped with procedural tools and safeguards for the thorough and adversarial examination of such complex legal issues. Therefore the competence for carrying out the test of proportionality lies with a court conducting regular civil proceedings in which the civil claim lodged by the State and seeking the applicant's eviction is determined.

Whilst Lord Neuberger, in *Pinnock*, was inventive in finding the demoted tenancy procedure compliant, he warned that other measures that constrained the court discretion might not be compliant. He mentioned s 89 of the Housing Act 1980 as a possible non-compliant candidate.[151] This section limits the ability of the court's common law discretion to delay the enforcement of a possession order for such period as it thinks fit. It does so by stipulating that the court cannot delay the enforcement of a possession order for longer than 14 days, unless there are exceptional circumstances, and in any event for no longer than six weeks.

[151] [2020] UKSC 35, [2010] 3 WLR 1441, [63].

There are exceptions to this statutory rule including possession orders made in favour of mortgagees exercising a right to possession,[152] a landlord exercising a right of forfeiture,[153] and non-secure tenancies. The section was not directly in issue in either *Pinnock* or *Powell* but Lord Hope, in *Powell*, did make the following comments where we find reference to the margin of appreciation, deference, and limits on the court's powers of interpretation under s 3 HRA 1998.[154]

Lord Hope

At [62]–[64]

In the face of such strong statutory language, any reading down of the section to enable the court to postpone the execution of an order for possession of a dwelling house which was not let on a secure tenancy for a longer period than the statutory maximum would go well beyond what section 3(1) of the 1998 Act permits. As Lord Nicholls of Birkenhead said in Ghaidan v Godin-Mendoza [2004] 2 AC 557, para 33, for the courts to adopt a meaning inconsistent with a fundamental feature of legislation would be to cross the constitutional boundary that section 3 of the 1998 Act seeks to demarcate and preserve.

Section 89 of the 1980 Act does not, of course, take away from the court its ordinary powers of case management. It would be perfectly proper for it, for example, to defer making the order for possession pending an appeal or to enable proceedings to be brought in the administrative court which might result in a finding that it was not lawful for a possession order to be made, as was contemplated by the judge in the case of Mr Frisby but is now no longer necessary. An adjournment would also be a permissible exercise of the court's discretion if more information was needed to enable it to decide what order it should make. But what the court cannot do, if it decides to proceed to make the order, is play for more time by suspending or staying its effect so as to extend the time limit beyond the statutory maximum.

The question then is whether the court should make a declaration of incompatibility under section 4 of the 1998 Act. This would be appropriate if there was good reason to believe that the time limit that the section sets is likely in practice to be incompatible with the article 8 Convention right of the person against whom the order for possession is made. Mr Arden's comment in *Current Law Statutes* indicates that at the time when section 89 of the 1980 Act was enacted postponements of orders for possession for periods of four to six weeks was normal. No evidence has been put before the court to show that in practice the maximum period of six weeks is insufficient to meet the needs of cases of exceptional hardship. Furthermore, this is an area of law where the judgment of Parliament as to what was necessary to achieve its policy of restricting the discretion of the court in the case of non-secure tenancies should be respected, unless it was manifestly without reasonable foundation: Blecic v Croatia (2004) 41 EHRR 185, para 65. In these circumstances, as no obvious need for the section to be revisited has been demonstrated, I would decline to make a declaration of incompatibility.

The basic principles of how Art 8 impacts upon possession proceedings brought by social landlords may now be established but there is still much to be worked out. There are the practical procedural ramifications and further clarity of those elusive 'exceptional circumstances' when repossession will be disproportionate. There is little guidance from the Supreme Court for those at the coal face who will have to deal with these questions on a daily basis.[155]

[152] See Chapter 30. [153] See Chapter 24. [154] See sections 2.1.2, 2.5.3, and 2.5.5.
[155] See Eady J's attempts in *Holmes v Westminster CC* [2011] EWHC 2857.

Arden, Whose rights? Whose reasons? [2011] JHL 47, 49

> What is most notable about both *Pinnock* and *Powell* is the paucity of theory, the absence of reasoned, precedent based (or distinguishing) approach for which our highest court—in its present and previous incarnations—has been world renowned. What the decisions say is no more than that the time has come to accept the conclusion of the European Court of Human Rights that an independent proportionality hearing is invariably required on an eviction from the home.

More fundamentally, there are also the wider implications for possession proceedings of the home by private parties.

5 ARTICLE 14: FREEDOM FROM DISCRIMINATION

European Convention on Human Rights, Art 14

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property birth or other status.

The target of Art 14 is discrimination, but the Article does not provide a free-standing protection against discrimination.[156] Its operation is directed against discrimination in the enjoyment of the other rights protected by the ECHR. It is said to be parasitic in nature. It is thus necessary for another Article (the 'host Article') to be engaged before Art 14 can be considered. If the breach of the host Article is proved, the court will often not progress to consider whether or not Art 14 has been infringed.[157] But if there is no breach of the host Article, the court may go on to consider whether or not there has been a breach of Art 14: for example, because the justification for engagement of the host Article operates in a discriminatory fashion. In this sense, Art 14 is said to be autonomous and can provide an effective weapon that belies its parasitic nature.

Baroness Hale, in the following case, outlined the issues to be established under Art 14.

Ghaidan v Godin-Mendoza
[2004] 2 AC 557, HL

Baroness Hale

At [133] and [134]

> It is common ground that five questions arise in an article 14 inquiry [...] The original four questions were: (i) Do the facts fall within the ambit of one or more of the Convention rights?

[156] The Twelfth Protocol of the ECHR includes a free-standing right against discrimination, but the Protocol has not been signed or ratified by the United Kingdom.

[157] See *Connors v UK* (2005) 40 EHRR 9, although the House of Lords in *Doherty* noted the discriminatory treatment of occupiers evicted from local authority and privately owned travellers' sites—a distinction that has now been removed from the legislation.

(ii) Was there a difference in treatment in respect of that right between the complainant and others put forward for comparison? (iii) Were those others in an analogous situation? (iv) Was the difference in treatment objectively justifiable? i.e, did it have a legitimate aim and bear a reasonable relationship of proportionality to that aim?

The additional question is whether the difference in treatment is based on one or more of the grounds proscribed—whether expressly or by inference—in article 14. The appellant argued that that question should be asked after question (iv), the respondent that it should be asked after question (ii). In my view, the [...] questions are a useful tool of analysis but there is a considerable overlap between them: in particular between whether the situations to be compared were truly analogous, whether the difference in treatment was based on a proscribed ground and whether it had an objective justification. If the situations were not truly analogous it may be easier to conclude that the difference was based on something other than a proscribed ground. The reasons why their situations are analogous but their treatment different will be relevant to whether the treatment is objectively justified. A rigidly formulaic approach is to be avoided.

The victim must thus establish that he or she was treated differently from another person who is in an analogous position. For example, Mr Godin-Mendoza was able to prove that he would be treated differently from a heterosexual partner. The victim must then prove that his or her discriminatory treatment was not reasonably and objectively justifiable: not only must the discrimination be based upon unacceptable grounds, of which the Article provides a non-exhaustive list, but it must also be unjustified, following the process that we have already examined. For example, in *James v UK*,[158] the enfranchisement legislation under review applied only to certain landlords, but was not discriminatory under Art 14 because it met a pressing social need and, in so doing, provided a proportionate response.

6 ARTICLE 6(1): THE RIGHT TO A FAIR TRIAL

European Convention on Human Rights, Art 6(1)

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society where the interests of juveniles or the protection of private life of the parties so require, or to the extent strictly necessary in the opinion of the court in the special circumstances where publicity would prejudice the interests of justice.

Article 6(1) demands due process in the determination of civil rights and obligations, including proprietary rights and duties. That process requires a timely, fair, and public hearing before an independent and impartial tribunal. We have already seen a concern for proper procedural guarantees inherent in the assessment of whether or not a fair balance has been

[158] See also *Chassagnou v France* (2000) 29 EHRR 615.

struck to justify an infringement of either Art 1 of the First Protocol or Art 8. Article 6(1) provides a further procedural guarantee, but, this time, where there is a dispute in which a person's civil rights and obligations are determined.

6.1 CIVIL RIGHTS AND OBLIGATIONS

A 'civil right' is an autonomous concept, which is defined by the Strasbourg jurisprudence rather than domestic law. A civil right equates to a right defined by private, rather than public, law: it thus includes, for example, property rights in land and personal rights to use land.[159] There must, however, be a right recognized by the domestic law in the first place, because Art 6(1) relates to proceedings that determine substantive rights. For example, in the following case, the void credit agreement never conferred a right upon First County in the first place, so Art 6 had no role to play.[160]

Wilson v First County Trust Ltd
[2004] 1 AC 816, HL

Lord Nicholls

At [33]

For present purposes it is sufficient to note that the established case law of the European Court of Human Rights is to the effect that article 6(1) does not itself guarantee any particular content for civil rights and obligations. [Article] 6(1) applies only to disputes over what, at least arguably, are recognised under domestic law to be "rights and obligations" see *Z v UK* [2001] 2 FLR 612, 634 at para 87. Article 6(1) may not be used as a means of creating a substantive civil right having no basis in national law. The content of the substantive national law may call for scrutiny under other articles of the Convention or its Protocols, but that is not a target of article 6(1).

The distinction between public and private rights, although fundamental to Art 6(1), is not always easy to draw. For example, a private individual's interaction with a public authority will not necessarily be regarded as a matter of public law and thus will be outside the scope of Art 6(1). It is necessary to look to the character of the particular right. A measure within the administrative control of a public authority may nevertheless affect the exercise of private rights. For example, planning controls will determine whether or not an owner is able to exercise his or her private rights of ownership by building on the land. It is thus said to be 'decisive' of private law rights and subject to Art 6(1).[161] The expropriation of land by a public authority, and any compensation payable as a result, are also clearly matters that are decisive of private law rights, and thus fall to be determined in a manner required by Art 6(1).[162]

159 The scope of Art 6(1) is, of course, much wider.

160 See also *Powell and Rayner v UK* (1990) 12 EHRR 355, in which the applicants were deprived by statute of any claim in nuisance against the Civil Aviation Authority by s 76(1) of Civil Aviation Act 1982. They thus had no right to be determined.

161 *Bryan v UK* (1996) 21 EHRR 342; *Regina (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295.

162 *Sporrong and Lonnroth v Sweden* (1983) 5 EHRR 35 and *Holy Monasteries v Greece* (1995) 20 EHRR 1.

6.2 A FAIR HEARING

Article 6(1) requires proprietary rights to be determined by a hearing before an independent and impartial tribunal at which the parties have an opportunity to state their case, having access to all relevant information. That hearing must be held within a reasonable time and it is anticipated that it will take place, and the judgment be given, in public, unless the exceptions set out in the Article are satisfied. These requirements will be met where the proceedings take place before a court, but a number of self-help remedies will fall short of these requirements. For example, a landlord's exercise of a right of re-entry, or right to seize the tenant's possessions by way of distress for unpaid rent, will not do so where the landlord is able to exercise these rights without seeking the assistance of the court.[163]

The entire course of proceedings, including any right of appeal, will be considered when assessing compliance with the above requirements.[164] Thus, the fact that a body that is neither independent nor impartial initially decides a matter will not necessarily be fatal where there is an adequate right of appeal to a court that is independent and impartial. That right of appeal may be sufficient even though it is limited (for example, to points of law), provided that, taken as a whole, the proceedings satisfy the requirements of fairness.[165] Where the administrative decision of a public authority is the subject of scrutiny, the availability of judicial review may be sufficient even though the court is unable to consider the merits of the case, but is merely able to consider the legality and reasonableness of the administrative decision.[166]

7 THE IMPACT OF HUMAN RIGHTS

The crucial question is to what extent the HRA 1998 will impact on proprietary rights. The House of Lords, and now the Supreme Court, has been tussling with these issues for almost a decade and is cautiously inching its way forward but the way is not yet clear.

Allen has suggested two possibilities: either there will be little change, because human rights values are already embedded in our fundamental proprietary principles, or there will be a greater impact through the influence of an alternative process of balancing competing proprietary interests, and, possibly, also a further basis on which to claim rights affecting property.

Allen, *Property and The Human Rights Act 1998* (2005, p 250)

> This leaves the central question open: what are the values that may affect the development of substantive principles of the private law of property? In the discussion on the applicability of P1(1) [Art 1 of the First Protocol] and other Convention rights, it was said that human autonomy and dignity are values in both human rights law and private law, Similarly, both human rights and private law often require a balance to be struck between competing interests. However, if the values only take effect at a very high level of generality, alongside other private law values such as certainty, fairness and the like, the effect of human rights law is

163 See Chapter 24. 164 *Manchester CC v Pinnock* [2010] UKSC 35, [2010] 3 WLR 1441.
165 *IKSCON v UK* (App No 20490/92) and *Bryan v UK* (1996) 21 EHRR 342.
166 *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295.

unlikely to be significant. It may add a new rhetorical dimension to the reasoning in private law cases, but without changing the outcome. But once values are identified at a high level of generality, it should be possible to move to two more specific aspects relating to the development of private law doctrines where human rights law may prove significant (and is already proving significant). The first relates to the nature of the balancing process, and the second to the interest which private law seeks to protect.

The alternative balancing process to which Allen refers is found in the elements that we have examined in the justification formula and, in particular, the fair balance upon which proportionality depends. Fox has described the human rights framework as offering 'a useful lens',[167] whilst Gray and Gray have offered the analogy of a 'prism'[168] through which compliant legislation must pass. We have seen that the courts have identified that, when assessing the compatibility of legislation, they are engaged in a 'new role',[169] which calls upon them to consider policy to greater extent than has previously been required. Although the ECHR is a product of traditional property values, it does seek to articulate those values in a manner that affords greater clarity and legitimacy to the balancing process. Nevertheless, we have seen, through the cases on the mandatory repossession proceedings by public authorities, that the courts are unlikely to question the social and economic policy ramifications of housing policy. The same reluctance is also likely to be displayed in considering the compatibility of rules affecting the property rights of individuals particularly where these rules have been the subject of recent legislative reform.

The implementation of policy through the law reform process is, however, not always logical and seamless. Anomalies and lacunae do occur—particularly in land law, in which, throughout its long history, prospective and piecemeal evolution predominates. It is in these circumstances that the new balancing process may have most to contribute and we will, in the remainder of this book, try to identify those areas in which we think that a human rights challenge might make a difference.

Allen notes that Art 1 of the First Protocol '*is a very conservative element in the protection of human rights*'.[170] By contrast, Art 8 has attracted attention as a possible foundation for a new human rights based protection of the home.[171] Article 8 has already provided a platform from which claimants can seek environmental protection; there is also the possibility that claimants, with no recognized proprietary rights or for whom the existing property rules provide no redress, might be able to look to Art 8 for protection. This protection springs instead from their particular status, for instance those suffering from a disability, or way of life, for instance gypsies, which the government under Art 8 is under a positive duty to protect. In addition it is now accepted that the proportionality balance under Art 8 looks both to the fair balance of the substantive law governing the interference and to the impact of that interference upon the personal circumstances of the particular victim. In order to address this latter demand of proportionality there must be a process by which an independent tribunal can make that assessment which demands both adequate legal proceedings and adequate judicial discretion within those proceedings. These imperatives lie at the heart of

167 Fox, *Conceptualising Home: Theories, Law, and Policies* (2007, p 512).

168 Gray and Gray, *Land Law* (5th edn, 2009, [1.6.17]).

169 *Per* Lord Nicholls in *Wilson v First County Trust (No 2)* [2003] UKHL 40, [2004] 1 AC 816, [61] (see 2.5.5 above).

170 Allen, 'The Autonomous Meaning of "Possessions" under the European Convention of Human Rights' in *Modern Studies in Property Law: Vol 2* (ed Cooke, 2003, p 57).

171 Gray and Gray, *Land Law* (5th edn, 2009 at [1.6.7]).

the recent string of cases that have occupied the House of Lords, the Supreme Court, and the Strasbourg Court.

These developments mark radical shifts in the traditional emphasis of land law. First, there is a shift from repossession as a positive vindication of property rights towards the characterization of repossession as a violation of human rights, namely the respect due to the home under Art 8. Secondly, there is a shift from the primacy of a certain and limited list of property rights towards an acknowledgement that, in the context of the home, the assertion of a right to possession may need to accommodate the personal circumstances of the victim. This refocusing of attention signifies a step away from the objective application of rules towards a subjective evaluation of their impact, which, as Gray and Gray point out, could operate '*to modify or even override*'[172] the existing proprietary rights of others. Thirdly, the demand for procedural safeguards by which proportionality can be measured reinforces moves away from the common law's sympathy for the extra judicial assertion of superior rights and, more significantly, underlines the need for adequate judicial discretion in place of the bald application of possessory rights. Given the intertwined relationship between substance and process, the presence of discretion within the process by which a property right finds expression will inevitably colour the nature of the right itself. There is an obvious distinction between a mandatory right to possession, the exercise of which the court merely regulates in terms of its timing and mode of execution, and a right to possession that is inherently dependent upon positive court vindication.

The implication of this more radical agenda could prove particularly potent should the HRA 1998 have horizontal effect, and thus extend to relations between private individuals, as well as those between public authorities and individuals. The danger is that the Act could prove a precipitous rollercoaster ride and commentators have warned against upsetting the traditional balance.[173]

Howell, 'The Human Rights Act 1998: Land, Private Citizens, and the Common Law' (2007) 123 LQR 618

At 632

On one view, the HRA is to be welcomed: land law has never acted in a vacuum. Legislation and judgments are already driven by social, economic and to an extent, moral, considerations, whose weight and content change over time. Land Law is already going through a period of unprecedented but largely unremarked change. The HRA is simply one more factor to be absorbed and given its value [. . .] But the problem [. . .] is that what is driving the change is a human rights rather than a property law agenda. Replacing established rules with individual decisions based upon human rights principles may seem attractive but will lead to uncertainty [. . .]

At 634

But the seductive effects of the HRA should be resisted. Land law must, it is suggested, keep to the narrow and stony path. Land law is essentially pragmatic and practical and, most importantly, has consequences for third parties: certainty is almost always justice. Already the uncertainty over the circumstances in which the courts will find that a beneficial interest

172 Ibid.

173 See also Goymour, 'Proprietary Claims and Human Rights: A "Reservoir of Entitlement"?' (2006) 65 CLJ 696, 706.

has arisen under a constructive trust or through estoppel is making life difficult for practitioners. The introduction of human rights values is a wild card which is wholly unpredictable in effect. Parties will not enter into agreements over land if they cannot be sure of their effect, and practitioners will not be able to advise them. The Convention is a "living instrument", but it will be unfortunate indeed if this principle were to be applied to agreements relating to land.

QUESTIONS

1. To what extent does the European Convention on Human Rights affect relations between private landowners?
2. How does Art 1 of the First Protocol operate to protect rights of property?
3. What is the role of compensation in determining whether or not an Act that affects property rights is compliant with the ECHR?
4. Article 8 provides that respect is to be afforded to an individual's home. What does 'respect' mean in this context?
5. Is there such a concept as a human property right?
6. Article 14 has been described as 'parasitic'. How may the Article assist in a challenge based upon the Human Rights Act 1998?
7. To what extent is it appropriate for the courts to consider government policy in determining the compliance of property rules with the ECHR?
8. How useful is the human rights 'prism' through which the law governing property rights must now pass?

FURTHER READING

Allen, *Property and The Human Rights Act 1998* (Oxford: Hart, 2005)

Fenwick, Phillipson, and Masterman (eds) *Judicial Reasoning Under the Human Rights Act* (Cambridge: CUP, 2007)

Fox, *Conceptualising Home: Theories, Law and Policies* (Oxford: Hart, 2007)

Gray, 'Land Law and Human Rights' in *Land Law: Issues, Debates, Policy* (ed Tee: Devon: Willan, 2002, ch 7)

Hickman, Public Law After the Human Rights Act (Oxford, Hart: 2010)

Howell, 'The Human Rights Act 1998: Land, Private Citizens, and the Common Law' (2007) 123 LQR 618

Nield, 'Clash of the Titans: Article 8 Occupiers and Their Homes' in *Modern Studies in Property Law* Vol 6 (ed Bright, Oxford: Hart, 2011)

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PART B

THE CONTENT QUESTION

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4

LEGAL ESTATES AND LEGAL INTERESTS

CENTRAL ISSUES

1. In Chapter 3, we considered how human rights may be relevant to the use of land. In the next three chapters, we will look at other forms of right that are relevant to the use of land.
2. In this chapter, we will look at one of the key building blocks of land law: legal property rights in land. As we noted in Chapter 1, section 3, it is useful to ask three questions when looking at property rights in land: the *content* question; the *acquisition* question; and the *defences* question.
3. In this chapter, we will look at the content of legal property rights in land. Our question is a simple one: what types of right can count as a legal property right in land? In Chapters 7 and 8, we will look in detail at how legal property rights in land are acquired; and in Chapters 12–15, we will look at the defences that may be available against such rights. Before we can examine those questions, however, we need to know what rights count as legal property rights in land.
4. We will see that, when considering the content question, the *numerus clausus* (or 'closed list') principle is of crucial importance. It ensures that there is a limited list of legal property rights in land. It means that individual parties, such as A and B, cannot simply decide that a right given to B is to count as a legal property right in land: the right can only have that effect if its content matches that of one of the rights on the list. The list of legal property rights in land is a statutory one: it is provided by s 1 of the Law of Property Act 1925.
5. The Law of Property Act 1925 makes a distinction between two classes of legal property rights in land: legal estates and legal interests. We will see that the content of a legal estate can be defined by reference to the concept of ownership: if B has a legal estate in land, he has a right to exclusive possession of that land, and so can be said to be its owner, either forever or for a limited period. In contrast, legal interests in land are those property rights in land with a limited content: a party with a legal interest does not have any ownership of the land.
6. Whilst there are, thus, differences between legal estates and legal interests, each is a form of legal property right in land. As a result, each has the crucial feature of imposing a *prima facie* duty on the rest of the world. So, even if B acquires a legal property right from A, B's right is capable of binding not only A but also anyone else who may attempt

to use or interfere with the land. In this way, a legal property right in land is more powerful than a personal right against A, as such a personal right can be asserted only against A.

7. It is important to bear in mind that even if B cannot show he has a legal estate or legal interest in land, it may still be possible for B to show that he has an *equitable* interest in land. If B's right is not on the list of legal estates and legal interests, it may nonetheless count as an equitable interest. The content of equitable interests, therefore, differs from the content of legal estates and legal interests. We will examine the content of equitable interests in Chapter 5. One important point to bear in mind is that certain equitable interests may be related to certain legal property rights. For example, an easement can count as a legal property right in land, but it is also possible for B to have an *equitable* easement. In Chapter 5, we will consider how the effect of such an equitable property right may differ from the effect of a legal property right.

1 THE CONCEPT OF A PROPERTY RIGHT

In Chapter 2, we saw that land is a form of private property. To understand the law relating to private property, it is crucial to understand the concept of a 'property right'. A number of different terms can be used to describe such a right: for example, a property right can also be referred to as a 'right *in rem*' (from the Latin, this literally means a right against a thing), or, on the same basis, as 'a real right'. As we saw in Chapter 2, land is sometimes referred to as 'real property', but, as the following extract notes, it is important to realize that property rights can exist not only in relation to land, but also in relation to other things, such as books.

Lawson and Rudden, *The Law of Property* (3rd edn, 2002, p 14)

Real, or property rights. At this juncture, however, a further complication of terminology needs to be explained. '*Real property*' means land. But the expression '*real right*' can be used with regard to *any* type of property (movable or immovable). It is used to describe those interests which, broadly speaking, (a) can be alienated; (b) die when their object perishes or is lost without trace; (c) until then can be asserted against an indefinite number of people; (d) if the holder of the thing itself is bankrupt, enable the holder of the real right to take out of the bankruptcy the interest protected by the real right.

This apparently complicated statement can be illustrated quite simply. If you own this book you have a real right. As to point (a), you can give away or sell both the book and ownership of the book. As to point (b) if the book is destroyed in a fire, it is no longer yours and you bear the loss. As to (c) if you lend the book to a friend, of course you can claim it (or its value) back from him or her. But if your friend lends it to someone else you can claim it from them; indeed, in English law, you can claim it from someone to whom your friend sells it—your right is enforceable against an indefinite number of persons. Finally, as to (d), if your friend goes

bankrupt while reading the book, you do not have to prove as a creditor in the bankruptcy proceedings. The book does not vest in the trustee in bankruptcy, since your friend cannot pay off his or her creditors with your book.

Other ways of referring to these features of a 'real right' are to speak of 'a *property* right' or '*proprietary* right'.

The term 'property right' is often used to distinguish a particular right from a 'personal right'. Again, the term 'personal right' is often referred to using Latin, as a 'right *in personam*' (i.e. a right against a person). To understand the concept of a property right, it can therefore be useful to see how it differs from a personal right. And because the distinction flows from Roman law, it is helpful to consider the following extract.

Nicholas, *An Introduction to Roman Law* (1962, pp 99–100)

Property and obligations—actions and rights in rem and in personam. A man's assets are either property or obligations. The difference between the two is the difference between owning and being owed something. Thus a man's assets may be his house and his furniture, which he owns, his bank balance which, however much one may speak of 'having money in the bank', is a debt owed by the bank, and his right to his unpaid salary, which is likewise a debt. His assets will often, of course, be more complicated than this, but they will still fall into one of the two categories. For example, if he is a shopkeeper he will own, we may suppose, his shop and his stock-in-trade; he may have ordered, but not received, further supplies from a wholesaler, and these will, from the Roman point of view, be still owned by the wholesalers but will be owed to him (and if he has not yet paid for them he will correspondingly owe the price); he will have supplied goods on credit to his customers, and here again there is obviously a debt. He may have acquired the goodwill of the business of a former competitor, and this constitutes once more a debt—the debtor's duty being not, as in the previous cases, to pay a sum of money or to supply goods, but to refrain from soliciting his former customers.

This difference between owning and being owed is expressed by the Roman lawyer in the distinction between actions *in rem* and actions *in personam*. Any claim is either *in rem* or *in personam*, and there is an unbridgeable division between them. An action *in rem* asserts a relationship between a person and a thing, an action *in personam* a relationship between persons [. . .] The Romans think in terms of actions not of rights, but in substance one action asserts a right over a thing, the other a right against a person, and hence comes the modern dichotomy between rights *in rem* and rights *in personam*. Obviously there cannot be a dispute between a person and a thing, and therefore even in an action *in rem* there must be a defendant, but he is there not because he is alleged to be under a duty to the plaintiff but because by some act he is denying the alleged right of the plaintiff.

Of course, it may be thought that, in the modern world, this distinction between 'owning' (property rights) and 'owing' (personal rights) is too simplistic. Certainly, there is no obvious reason why a distinction derived from Roman law should help us to classify concepts such as intellectual property rights. Indeed, as we will see in Chapter 5, it is not obvious that the Roman distinction can be applied to equitable property rights. But modern-day land law still retains the key distinction between a personal right (which can be asserted only against a specific person) and a legal property right (a right relating to land that is capable of binding the whole world). That distinction was particularly important in the following case.

Hill v Tupper
(1863) 2 H & C 122, Exchequer Chamber

Facts: The Company of Proprietors of the Basingstoke Canal Navigation owned the Basingstoke Canal. It made a contractual promise to Mr Hill that he would have the exclusive right to put pleasure boats on the canal and to hire out those boats to paying customers. Mr Tupper was the landlord of an inn at Aldershot, which adjoined the canal. He also started to hire out pleasure boats on the canal. Mr Hill objected, claiming that Mr Tupper was interfering with Mr Hill's exclusive right and was thus committing a tort against Mr Hill. The Exchequer Chamber rejected Mr Hill's claim.

Pollock CB

At 127–8

After the very full argument which has taken place, I do not think it necessary to assign any other reason for our decision, than that the case of *Ackroyd v Smith*[1] expressly decided that it is not competent to create rights unconnected with the use and enjoyment of land, and annex them to it so as to constitute a property in the grantee.[2] This grant merely operates as a licence or covenant on the part of the grantors, and is binding on them as between themselves and [Mr Hill], but gives [Mr Hill] no right of action in his own name for any infringement of the supposed exclusive right. It is argued that, as the owner of an estate may grant a right to cut turves, or to fish or hunt,[3] there is no reason why he may not grant such a right as is now claimed by [Mr Hill]. The answer is, that the law will not allow it. So the law will not permit the owner of an estate to grant it alternately to his heirs male and heirs female. A new species of incorporeal hereditament[4] cannot be created at the will and pleasure of the owner of property, but he must be content to accept the estate and the right to dispose of it subject to the law as settled by decisions or controlled by acts of parliament. A grantor may bind himself by covenant to allow any right he pleases over his property, but he cannot annex it to a new incident, so as to enable the grantee to sue in his own name for an infringement of such a limited right as that now claimed.

Martin B

At 128

I am of the same opinion. This grant is perfectly valid as between [Mr Hill] and the canal Company, but in order to support this action, [Mr Hill] must establish that such an estate or interest vested in him that the act of [Mr Tupper] amounted to an eviction. None of the cases cited are at all analogous to this, and some authority must be produced before we can hold

[1] (1850) 10 CB 164.

[2] [On the fact of *Hill v Tupper*, the canal company is the *grantor* (because it gave Mr Hill a right) and Mr Hill is the *grantee* (because he was given a right by the canal company).]

[3] [Such rights are example of profits, a recognized legal property right in land: see section 6 below. A right to cut turves is a right to remove turf or peat from another's land to use as fuel: it is more commonly called a 'right of turbary'.]

[4] [As used in this particular context, that term is synonymous with 'a legal property right'. Technically, a 'hereditament' is a right that can count as 'real property' and so, for example, will be included in the scope of a term in a will '*leaving all my real property to X*'. Land (including fixtures) can be seen as a 'corporeal hereditament', because it has a physical form; an easement (a right capable of counting as a legal property right in land, e.g. a right of way over another's land) is an 'incorporeal hereditament', because it has no physical form.]

that such a right can be created. To admit the right would lead to the creation of an infinite variety of interests in land, and an indefinite increase of possible estates. The only consequence is that, as between [Mr Hill] and the canal Company, he has a perfect right to enjoy the advantage of the covenant or contract; and, if he has been disturbed in the enjoyment of it, he must obtain the permission of the canal Company to sue in their name.

Hill v Tupper is an important case for a number of reasons. One reason, which we will examine in section 6 below, concerns the approach of the Exchequer Chamber in deciding whether Mr Hill's right counted as a legal property right in land. For our present purposes, the case is significant because it is a very good example of a key difference between a legal property right in land and a personal right. The Exchequer Chamber found that the canal company's contractual promise to Mr Hill gave him only a personal right against the company. So, if a third party, such as Mr Tupper, also puts out boats on the canal, Mr Hill's only option is to assert his right against the company. He can ask for an injunction, forcing the company, as owner of the canal, to take action against Mr Tupper; he can also ask for an order that the company pay him damages, to compensate him for any loss that he has suffered as a result of Mr Tupper's action. Mr Hill's only recourse, however, is against the canal company: he has no claim against Mr Tupper. If his contract with the company had instead given Mr Hill a *legal property right*, things would be very different. Mr Hill's exclusive right to put boats on the canal would then be capable of binding not only the party who granted that right (in this case, the canal company), but also *any other party* who interferes with that right (such as Mr Tupper).

In the following extract, Birks explains both this fundamental difference between a personal right and a property right, and also its importance to land law.[5]

Birks, 'Five Keys to Land Law' in *Land Law: Themes and Perspectives*
(eds Bright and Dewar, 1998, pp 472–3)

Real rights and personal rights

We move now to the kind of 'reality' or 'thing-relatedness' which matters in the modern law. The key proposition is that land law is, centrally, the law of real rights in land [. . .] 'Real' and 'personal' here anglicize the Latin labels *in rem* and *in personam*. Many people prefer to use the Latin labels. The Latin tells us that a right *in rem* is a right in or against a thing, while a right *in personam* is a right in or against a person.

One can change to different language. A right *in personam* can be called an obligation. A right *in personam* and an obligation are one and the same thing, but looked at from different ends. I have an overdraft. I owe my bank £1,000. The bank has a right *in personam*, the person here being me. I have an obligation to pay. The relationship can be named from either end, and in practice we usually name it from the liability end. Here we very frequently speak, not of the law of personal rights or of rights *in personam*, but of obligations. As for rights *in*

[5] The usefulness of the distinction between personal rights and property rights has been challenged (see, e.g. Worthington, 'The Disappearing Divide between Property and Obligation: The Impact of Aligning Legal Analysis and Commercial Expectation' in *Equity in Commercial Law* (eds Degeling and Edelman, 2005)). Such challenges have, however, tended to focus on the application of the distinction to commercial dealings with intangible wealth, rather than on its usefulness in land law.

rem, if we drop both the Latin and the latinate English, they usually become 'property rights' or 'proprietary rights'.

We sometimes use 'property' loosely to mean 'wealth'. In that loose sense 'property' wobbles. Sometimes 'my property' evokes and is intended to evoke more specific things, such as cars and clothes and cottages. Sometimes, and rather more technically, 'my property' denoted mere rights vested in me, such as a fee simple, a lease, ownership, or the obligations of my debtors. Whichever the focus, the loose notion of property as wealth is too broad to be useful in analysis. To think clearly the law has to draw a bright line between two classes of right, both of which can fall within the loose notion of wealth.

The bright line distinguishes between property and obligations. When that line is drawn, property clearly has a narrower and much more technical sense. Within wealth, taken as including all assets, the law of obligations is the law of rights *in personam* and the law of property is the law of rights *in rem*. Hence a 'property right' or 'proprietary right' is a real right, is a right *in rem*. The law of property is the law of all known real rights, and land law is the law of real rights in land.

What is the difference? The practical difference bears on this question. Against whom can the right be demanded? 'Demandability' is intelligible but not really English. But another word for 'to demand' is 'to exact', which gives us 'exigible' and 'exigibility'. A right *in rem* is a right the exigibility of which is defined by the location of a thing. The exigibility of a right *in personam* is defined by the location of the person. Where I have a right *in personam* the notional chain in my hand is tied round that person's neck. Where I have a right *in rem*, the notional chain in my hand is tied around a thing. Between me and the car which I own there is such a chain.

So, if B has a personal right against A, it is only possible for him to assert that right against A. If B has a property right in a piece of land, then B's right is *capable* of binding the rest of the world. The word 'capable' is important: as we will see in Chapter 12, it is possible for a particular third party to have a *defence* to B's property right. But this does not undermine the importance of the distinction between personal rights and property rights. For example, the distinction was crucial in *National Provincial Bank v Ainsworth*,[6] a case we examined in Chapter 1. The House of Lords decided that Mrs Ainsworth's 'deserted wife's equity' was only a personal right against her husband and, as a result, she could not assert it against the bank, who wished to remove her from the land.[7]

2 THE CONCEPT OF A LEGAL ESTATE IN LAND

The extracts in section 1 all use ownership as the core example of a property right; indeed, Nicholas portrays the distinction between a property right and a personal right as the difference between owning and being owed. In Chapter 2, we saw how it is possible to identify a particular person (B) as an owner of land. Technically speaking, however, it is true to say that, in English law, no one owns land. Even if you buy a house and think of yourself as owning that land, you technically have an estate in that land: either a freehold or a lease. This raises an important question: is the concept of ownership irrelevant to English land law?

[6] [1965] AC 1175.

[7] See the extract from the speech of Lord Wilberforce, set out in Chapter 1, section 5.4.

In the following extract, Harris: (i) outlines the historical reasons why English law has a doctrine of estates in land; (ii) notes the argument that, as a result, ownership is irrelevant to English land law; but (iii) argues that ownership *is* nonetheless crucial to understanding English land law, because it enables us to understand the very concept of an estate in land.

Harris, *Property and Justice* (1996, pp 68–9)

The significance of ownership interests as an every-day organizing idea is commonly obscured for lawyers in common law systems, and for theorists who seek to build upon the insights of the common law, by the doctrine of estates in land. Land-transfer transactions in common law systems convey or create estates, freehold or leasehold, never *dominium* or ownership. This is a consequence of the feudal origins of English real property law.

In Early English feudal law, that interest which was to develop into the fee simple estate was a grant of seisin by a superior lord to be held by the grantee and his heirs subject to one or other variant of free tenure. It seems that the consent of both the lord and the heir were necessary before the grantee could alienate his land. Free alienability *inter vivos* of this estate evolved at common law, and free testamentary disposition of it was conferred by statute in the sixteenth century. There were as well lesser estates of freehold: estates for life; estates *pur autre vie*;[8] and the estate tail which emerged as the result of judicial interpretation of the Statute *de donis conditionalibus* of 1285.[9] There were also a variety of copyhold estates, the outcome of the progressive emancipation of land held on non-free tenure.

The leasehold estate was unknown to feudal law, but evolved from the end of the Middle Ages as common law actions were adapted to confer trespassory protection on a leaseholder, eventually, against all-comers to the land. Like the fee simple, the leasehold estate became freely transmissible *inter vivos* or on death. A covenant in a lease may prohibit assignment of the estate. Its effect is not, technically, to make the estate inalienable but to give rise to a ground for forfeiture should the estate be assigned in breach of covenant.

The terminology and conceptual structures elaborated in works on English real property law have reflected the technical concerns of conveyancers. Since what is conveyed is always an estate in the land, it has been widely assumed that 'ownership' of land, as such, is not a conception internal to English land law. A. D. Hargreaves gave robust expression to this view:

> 'English land law has made no contribution to the legal theory of ownership more striking, more brilliant and of more permanent value than the separation of the land from the estate in the land [. . .]. By distinguishing the land from the estate, English land law has shown conclusively that even within a society as individualistic and as legalistic as England in the nineteenth century, ownership is not a necessary legal concept. The problem of ownership remains, but it is not a legal problem; it is the concern of the politician, the economist, the sociologist, the moralist, the psychologist—of any and every specialist who can contribute his grain to the common heap. Ultimately the philosopher will try to unify this shifting mass into a coherent whole.'[10]

The story of the evolution of the doctrine of estates is one of complex elaboration based on the writ system, ancient statutes, and the conveyancing cunning of legal practitioners.

[8] [For the life of another: e.g. A could give B a right to land for the duration of X's life.]

[9] [*De donis conditionalibus* means 'relating to conditional gifts'. So, if A leaves land in his will to B1 for B1's life, then to B2 provided that B2 is married, B2's right to the land is conditional on both his marriage and the death of B1.]

[10] Hargreaves, 'Modern Real Property' (1956) 19 MLR 14, 17.

If asked what was the content of the interests which came thus to be freely disposable by their holders, the traditional real property lawyer will answer that it consisted of a right to seisin or possession of the land. But if a man was the beneficiary of seisin or possession, what use-privileges over the land did that entail, and what powers to control uses by others? No general answer to that question is usually to be found in land law textbooks, although the case law on nuisance summarized in works on tort is replete with partial answers to it.

The answer to the general question about the normative content of a right to seisin or a right to possession is glaringly obvious. Perhaps it is so manifest as to be trite, and so beneath the notice of a technical lawyer who seeks to expound only that which is obscure and arcane. The truth is that ownership interests in land, of varying magnitudes, are and always have been incidents of legal estates in land. The jurist of the early medieval period took it for granted that the tenant who holds land in demesne is as much *dominus rei* as is the owner of a chattel.[11] As Pollock and Maitland point out, Bracton and contemporaries (rightly in their view) 'ascribed to the tenant in demesne ownership and nothing less than ownership'.[12] [. . .]

This truth, however trite, makes claims such as those contained in the above citation from Hargreaves patently absurd. Ownership of land is not a conveyancer's problem, but it is a conception—or rather a battery of conceptions—internal to the law. An indefinitely large set of use-privileges and control-powers over the land follow from the fact that, as an incident to the estate, a person has an ownership interest over the land itself.

Harris' argument may seem complicated, but it can be summed up quite shortly. Although it is *technically* true to say that B can never own land itself, it is also true to say that, if B has an estate in land, he has ownership rights over that land. So, if we want to know what, in practice, the holder of a freehold can do with his land, we need to consider, as we did in Chapter 2, what 'ownership' means. If this is right, we may well wonder why English law developed the doctrine of estates: it seems strange to have a system in which, whilst B cannot own the land itself, he can hold an estate that gives him ownership rights.

The following extract tackles this point.

Birks, 'Five Keys to Land Law' in *Land Law: Themes and Perspectives*
(eds Bright and Dewar, 1998, pp 462–3)

Although bits do occasionally wash away or slip into the sea, land is in general permanent. For most human purposes we have to regard it as lasting for ever. There is a powerful urge to deal in slices of time. It is not confined to land. The institution of the trust makes it relatively easy to turn all kinds of wealth into an enduring fund, and that facility in turn excites and to a degree gratifies the urge to deal in slices of time. However, it is the natural permanence of land which makes slices of time a dominant feature of land law.

Two motivations

Why do people want to deal in slices of time? It is an urge which has been fed from at least two sources. One is essentially commercial, the other not.

[11] [Demesne is pronounced 'demean'. A tenant holding in demesne acquired rights in relation to the land under a grant from a feudal lord.]

[12] Pollock and Maitland, *History of English Law* (1911), pp ii, 2–6.

The commercial motivation

Commercial motivation means, in plain words, the desire to get money out of land. There are all sorts of ways of getting money out of land. For instance, one can farm the land and sell the produce. The most extreme method of all is to sell one's whole interest in the land. This means selling the whole slice of time over which one has control. The largest interest in land—the greatest slice of time—is "for ever". In everyday conversation I tend to say 'my house' or 'the house I own'. In all probability, what I actually have is my house 'for ever', a slice of time measured by the length of time the land will last. There is no harm in calling that ownership. That is in effect what it is. But in the technical language of the law that huge slice of time measured by the life of the land itself is called a fee simple. The fee simple in the land on which my house stands is worth about £200,000. I could mortgage it or sell it. But there is another possibility. I could keep 'for ever' and deal instead in a shorter slice of time.

The commercial motivation for dealing in lesser slices of time is to realize in money some of the value of the land without giving up one's whole interest. The lease is the proprietary interest which most obviously facilitates this. I might let my land for a fixed number of years, say for ten years. If I go for that option, I have further choices. I could take a single capital sum, or I might prefer a flow of income in the form of an annual rent, or a mixture of both, say £20,000 now and £5,000 per annum by way of rent. Whichever I choose, the fee simple remains mine, though occluded by the lease. When the ten years have passed, the shadow occluding my interest will vanish, and my fee simple will once again be unencumbered. The reversion has value even during the ten years during which I am out of possession. If I choose to, I can sell it even while the ten years are running.

The family motivation

The primary non-commercial motivation for dealing in slices of time is concern for one's family. In obsolescent aristocratic terms this might be restated as a dynastic motivation. The idea of benefiting the different generations of one's family is perfectly natural. The desire to keep land permanently in the family or part of the family has been a routine temptation.

As Birks notes, it is useful to see an estate in land as a 'slice of time'. We noted in Chapter 1, section 4, that permanence is one of the distinctive features of land. This means that, where land is concerned, it is very useful for an owner of land to be able to divide up his ownership over time. The doctrine of estates allows this to happen. As Birks notes, an owner of a thing other than land (e.g. a painting) can divide up the benefit of that thing by setting up a trust: for example, if A owns a painting, he can transfer it to T to hold on trust for B1 for ten years, then for B2. B2 can thus acquire an equitable property right. It is impossible, however, for A to give B1 a *legal* property right amounting to ownership of the painting for ten years. A special feature of land, then, is that, by creating a lease, an owner of land can give B ownership rights over that land *for a limited period*.

3 LEGAL ESTATES IN LAND: THE *CONTENT* QUESTION

When examining if B has a legal estate in land, the first question to ask is the *content* question: does the right claimed by B count as a legal estate in land? As a result of s 1 of the Law of Property Act 1925 (LPA 1925), that question is relatively easy: there are now only two permissible legal estates in land.

Law of Property Act 1925, s 1

(1) The only estates in land which are capable of subsisting or of being conveyed or created at law are—

(a) An estate in fee simple absolute in possession;

(b) A term of years absolute.

'*An estate in fee simple absolute in possession*' is more commonly referred to as a 'fee simple'[13] or, as we will call it in this book, a *freehold*. And '*a term of years absolute*' is more commonly referred to as a 'leasehold' or, as we will call it in this book, a *lease*. So, for example, if you are buying a house, you are, in fact, buying either a freehold or a lease. In this section, we will examine the content of a freehold and of a lease, before asking the important question of *why* the LPA 1925 imposed this limit on the types of permissible legal estate in land.

3.1 THE CONTENT OF A LEGAL FREEHOLD

A freehold can be described as 'ownership of land for an unlimited period' as, if B has a freehold, he has a right to exclusive possession forever of a piece of land. In practice, there is usually very little doubt as to whether B's right counts as a freehold: in particular, if A has a freehold of land and simply transfers that right to B, it is clear that B now has a freehold. There are, however, some contexts in which we do have to test to see if B really does have a freehold. The following extract provides an example.

Miles v Bull
[1969] 1 QB 258

Facts: Mr Bull and his brother had a freehold of a farmhouse and adjacent land. Mr Bull occupied the land with his wife until 1965, when he left the home. Under the Matrimonial Homes Act 1967, Mrs Bull had a statutory right to remain in occupation of the home.[14] As a result, Mr Bull and his brother could not remove her from the land. In 1968, Mr Bull and his brother sold their freehold to Mr Miles for £10,000. Mr Miles wished to remove Mrs Bull from the land. Mrs Bull could not assert her statutory right to remain in occupation against Mr Miles, because she had not properly registered that right. Mr Miles therefore applied for summary judgment in his favour. Mrs Bull claimed, however, that she deserved to have the chance to argue her case at a full trial because: (i) the supposed transfer of the freehold to Mr Miles was, in fact, a sham; so (ii) the freehold was still held by Mr Bull and his brother; and therefore (iii) Mr Miles had no right to remove her from the land. In considering that argument, Megarry J had to consider the decision of Jones J in *Ferris v Weaven*,[15] in which it had been held that a purported transfer of a freehold was, in fact, a sham.

[13] As in the extract by Birks given in section 2 above.

[14] As discussed in Chapter 1, section 5.6, this statutory right of occupation was introduced in response to the House of Lords' decision in *NPB v Ainsworth* [1965] AC 1175.

[15] [1952] 2 All ER 233.

Megarry J

At 262–5

Accordingly, it seems to me that there is a strong preponderance of high authority for the view that the decision in *Ferris v. Weaven* can be supported on the basis that the transaction there was a sham, and that although a genuine purchaser will take free from the rights of a deserted wife, a sham purchaser will not. It is therefore necessary to examine the facts of *Ferris v. Weaven* with some care [. . .]

In that case the husband deserted his wife in 1941, leaving her in occupation of his house; he continued to pay the building society instalments and the rates on it. He wrote to her telling her that he would "carry on paying on the house providing you do not annoy me." This state of affairs continued for some 10 years. Then:

> 'In June, 1951, wishing to obtain possession of the house so that he could dispose of it, the husband sold it for £30 to his brother-in-law, Herbert James Ferris, the plaintiff. The £30 was not, in fact, paid to the husband, the plaintiff entering into the transaction only to oblige the husband and enable him to obtain possession of the house from the wife. He did not exercise any act of ownership in respect of it, and the husband continued to pay the rates and the mortgage instalments, the amount of which due at the time of the sale was £1,600.'[16]

[. . .] In his judgment, dismissing the plaintiff's claim for possession against the wife, Jones J. said of the plaintiff:

> 'I find that he bought the house by agreement with the husband, not because he wanted to buy it, but simply to enable the husband to defeat a right which the husband believed the wife possessed as a result of the arrangement which the husband had made with her in 1941.'[17]

[. . .] The essential features of the so-called sale in that case were thus that the price was £30; that the purchaser neither paid it nor exercised any act of ownership over the house, even though it was conveyed to him; that the husband continued paying the rates and mortgage instalments as he had done before entering into the transaction; and that the object of both the husband and the purchaser was to obtain possession of the house for the husband so that he could dispose of it. The purchaser (who was the husband's brother-in-law) entered into the transaction with the object of obliging the husband. I can readily see how such a transaction could properly be described as a 'sham' for; although in outward show the ownership was vested in the purchaser, in substance and reality it was still vested in the husband. The documents lied; they made false representations, concealing what was and asserting what was not. The purchaser could not evict the wife, for the ownership of the property upon which he based his claim to possession was a mere pretence.

On the other hand, a transaction is no sham merely because it is carried out with a particular purpose or object. If what is done is genuinely done, it does not remain undone merely because there was an ulterior purpose in doing it. If in *Ferris v. Weaven* the purchaser had sought to exercise acts of ownership, and the husband had ceased to do them, and there had been no common objective of enabling the husband (as distinct from the purchaser) to dispose of the property, it would, in my judgment, be very difficult to contend that the low price and the failure to pay it made the transaction a sham. After all, some genuine transactions within the family are carried out at low prices; and some genuine purchasers fail to discharge their obligation to pay the full purchase price, if the vendor is incautious enough to make this possible. Mere circumstances of suspicion do not by themselves establish a transaction as a

[16] [1952] 2 All ER 233, 234. [17] Ibid, 237.

sham; it must be shown that the outward and visible form does not coincide with the inward and substantial truth.

In the end, Megarry J decided that summary judgment in Mr Miles' favour should *not* be given: Mrs Bull's argument that there had, in fact, been no transfer of the freehold deserved to be evaluated at a full trial.

For our purposes, the important point about Megarry J's analysis is his use of the concept of ownership. On his Lordship's analysis, the simple fact that the supposed transfer in *Ferris v Weaven* was carried out with the motive of removing Mrs Weaven did not make that transfer a sham. Instead, it was a sham because the documents lied. They said that Mr Ferris had a freehold, but '*although in outward show the ownership was vested in the purchaser, in substance and reality it was still vested in the husband*'. This confirms the analysis given by Harris (see the extract in section 2 above): the concept of ownership is vital to understanding the content of a freehold.[18]

3.2 THE CONTENT OF A LEGAL LEASE

We will examine the content of a lease in detail in Chapter 22. Three general points are, however, worth noting here. Firstly, as Harris has argued, the content of a lease, like the content of a freehold, can be understood by using the concept of ownership. In fact, in a seminal case on the content of a lease, *Street v Mountford*,[19] Lord Templeman referred to a tenant (a party holding a lease) as someone '*able to exercise the rights of an owner of land which is in the real sense his land, albeit temporarily and subject to certain restrictions*'.

Secondly, as Lord Templeman's statement makes clear, the difference between a freehold and a lease is that the latter consists of ownership *for a limited period*. This is why s 1 of the LPA 1925 describes the lease as a '*term of years absolute*'. 'Term', here, comes from the same root as 'terminal' or 'terminus', and means that a lease must come to an end—that is, that it must be for a limited period (see Chapter 22, section 2.7).

Thirdly, as we will see in Chapter 5, it is possible for B to have an *equitable lease*. In such a case, B does not have a legal property right in land, nor, according to the terminology of the LPA 1925, does he have an estate in land; instead, B has an equitable interest in land. In Chapter 5, we will consider how the effect of an equitable interest may differ from that of a legal estate or interest; in Chapter 22, section 4.2, we will specifically see why it may be better for B to show that he has a legal lease rather than an equitable lease.

3.3 WHY ONLY TWO LEGAL ESTATES IN LAND?

It may seem puzzling that the LPA 1925 imposes a limit on the types of legal estate. After all, in the final extract given in section 2 above, Birks set out some of the advantages, to an owner of land, of being able to divide his ownership into slices of time and then distribute those slices to others. An owner may well want to give another a legal estate that is neither a freehold nor a lease: for example, he may want to give his eldest child ownership of the land for her life, then give ownership for the future, taking effect on the eldest child's death, to his eldest grandchild, and so on. So why has English law limited an owner's ability to create those different sorts of legal estate in land?

[18] Harris, therefore, refers to *Miles v Bull* to support his analysis: see *Property and Justice*, p 71.
[19] [1985] AC 809, 816. See further Chapter 22, section 1.1.

Birks, 'Five Keys to Land Law' in *Land Law: Themes and Perspectives*
(eds Bright and Dewar, 1998, p 464)

Carried to extremes, the dynastic temptation might have led to an infinite series of life estates: to A, my eldest son, for life, then to A's eldest son for life, then to the eldest son of A's eldest son, and so on. The effect would have been to give each successive son only the slice of time measured by the thread of his life. He could deal in that slice, but no buyer would ever get, or pay for, more than an estate *pur autre vie*.[20] [Some of the bad effects of such an arrangement are instantly appreciable. Nobody would ever have a marketable slice of time. No money could be raised to invest in the land. It is in nobody's interest to produce an impoverished class of landowners. If such arrangements prevailed, the value of land would be locked up and sterilized.

At p 463

[...] The law now does everything it can to ensure that land is freely alienable and that any future interests granted to descendants are detached from the land and transferred to the fund represented by the money for which it is sold. Since the great reforms of 1925, anyone wanting to deal in slices of time other than leases, and less than for ever, has had to do it in equity, behind the curtain of a trust. In other words, in front of the curtain there are now only two slices of time known to the law, 'for ever' and the lease for whatever time is agreed. All other slices of time once recognized directly by the common law have been abolished.

As Birks notes, it is no longer possible for A to give B1 a *legal* property right consisting of ownership of land for his life, or to give B2 a *legal* property right consisting of ownership from the time of B1's death. The closest that A can come to dividing up his ownership in that way is to set up a trust, under which B1 and B2 each acquire an *equitable* property right. We will consider those types of trust in Chapter 20, but two basic points can be noted now. Firstly, A's ability to set up such a trust is not limited to land and so does not depend on the doctrine of estates: for example, A can set up an identical trust in relation to his ownership of a painting. Secondly, under such a trust, it is very important that B1 and B2 each have an *equitable*, and not a *legal*, property right. In particular, as we will see in Chapters 12 and 19, it means that there may well be situations in which B1 and B2 cannot assert that right against a later purchaser of the land. This may be bad news for B1 and B2, but, by protecting the purchaser, it promotes the goal of allowing land to be 'freely alienable'—that is, to be transferred free from pre-existing rights of parties such as B1 and B2.

4 LEGAL ESTATES IN LAND: THE *ACQUISITION* QUESTION

To show that he has a legal estate in land, B needs to show not only that his claimed right counts as a freehold or lease, but also that he has, in fact, acquired that right. The obvious way for B to acquire a freehold or lease is through a *dependent acquisition*—that is, by showing that A, an owner of the land, has given B that legal estate. So, if B claims that A has transferred his freehold to B, or that A has granted him a lease, B relies on a dependent acquisition. We will examine the rules applying to a dependent acquisition of a legal estate in Chapter 7.

[20] That is, an estate terminating on the death of another.

It is also possible for B to acquire a legal freehold by means of an *independent acquisition*.[21] In such a case, B does not claim that A has given him a legal estate; instead, B acquires that right through his own, unilateral conduct. For example, if B simply goes onto A's land and takes physical control of it, B acquires a legal freehold of that land, even if he acts without A's permission.[22] We will examine this point in detail in Chapter 8.

5 THE CONCEPT OF A LEGAL INTEREST IN LAND

A legal interest in land is a legal property right in land that does not give its holder a right to exclusive possession, and so does not confer ownership of that land. In the following extract, Lawson and Rudden discuss one example of a legal interest in land: a legal easement.

Lawson and Rudden, *The Law of Property* (3rd edn, 2002, pp 14–15)

We have used the simple example of ownership, but as we shall see later there is a limited number of other interests which can be described as 'real' or 'proprietary'. This can be illustrated by considering your right to leave your car in next door's yard. Probably at the moment you have no such right. If your neighbour lets you, you can park but you have no right to stay. If you pay for parking, say by the month, you have a contractual right to leave your car, enforceable by an action for damages and possibly an injunction, but enforceable against your neighbour only.[23] If, however, you have an easement—a recognized real right—your claim to park will prevail against whoever owns next door. But before the common law will recognize it as a property interest, the right to park must comply with certain requirements both of substance and form; you must own the freehold or leasehold of your house; the parking must not be a claim to possession of your neighbour's entire yard; it must be intended to add to the value of the house and not just to confer a personal benefit on you; and it must be created by deed and entered on the Land Register, or else have been acquired by over twenty years open user.

The key *positive* feature of a legal interest in land, such as an easement, is thus that it counts as a legal property right in land. As a result, it is capable of binding not only A (the party giving B the right), but also the rest of the world (including, for example, any later owners of A's land). For example, in *Hill v Tupper*,[24] which we examined in section 1 above, Mr Hill was unable to show that the right he acquired from the canal company counted as an easement, or as any other form of legal interest in land. As a result, Mr Hill could not assert that right against Mr Tupper. In contrast, if Mr Hill *had* been able to show that he had a legal interest in land, that right would have been prima facie binding not only on the canal company, but also on the rest of the world—including, of course, Mr Tupper.

The key *negative* feature of a legal interest in land, such as an easement, is that it does *not* give its holder ownership, as it does not consist of a right to exclusive possession of land. As we will see in Chapter 25, section 2.4.4, that point can be important when considering B's

[21] As to whether a legal lease can be acquired independently, see Chapter 22, section 3.1.

[22] It has been suggested that, in such a case, B acquires only an *equitable* freehold. That view is, however, difficult to support: see Chapter 10, section 3.

[23] [Such a right is an example of a *contractual licence*, which is a type of right that we will examine in Chapter 21, section 3.]

[24] (1863) 2 H & C 122.

claim to an easement. B's right cannot count as an easement if it amounts to a claim of ownership of a particular piece of land.[25] If B wants to claim such a right, he must show that he has an estate in land—that is, a freehold or a lease.

It is worth noting that the concept of a property right that does not involve ownership may well be unique to land law. Certainly, it is impossible, for example, to have an easement over property other than land. It seems that the special features of land that we examined in Chapter 1, section 4 (in particular, its capacity for multiple, simultaneous use) may justify the recognition of special forms of property right that can exist only in relation to land.

6 LEGAL INTERESTS IN LAND: THE *CONTENT* QUESTION

In *Hill v Tupper*,[26] which we examined in section 1 above, Mr Hill tried to argue that his exclusive right to put boats on the canal should be regarded by the court as a new form of legal interest in land. The Exchequer Chamber made very clear, however, that individuals, such as Mr Hill and the canal company, cannot simply choose to create new forms of legal interest in land. That important point is confirmed by the following extract.

Keppell v Bailey
(1834) 2 My & K 517

Facts: Edward and John Kendall were the proprietors of an ironworks in Monmouthshire. They set up a joint stock company, along with a number of other parties, to build the Trevill railroad. The Kendalls made a binding promise to the other stockholders that the limestone used in their ironworks would come only from the Trevill quarry (and so would be carried on the Trevill railroad, thus earning money for the joint stock company). Following the deaths of the Kendalls, the ironworks was passed on, and was eventually bought by Joseph and Crayshaw Bailey. The Baileys planned to use limestone from a different quarry and to build a new railroad to carry that limestone to the ironworks. Stockholders in the joint stock company (including Mr Keppell) applied for an injunction preventing the Baileys from using any limestone not taken from the Trevill quarry. They argued: (i) that the promise made by the Kendalls bound not only themselves, but also any later owners of the ironworks, such as the Baileys; and, alternatively, that (ii) even if the promise made by the Kendalls did not create a property right, it should bind the Baileys, because they acquired the ironworks knowing of that earlier promise. The High Court of Chancery rejected both of those arguments.

We will examine that second argument in Chapter 6, section 2.6; our focus here is on the first argument.

Lord Brougham LC

At 535

There are certain known incidents to property and its enjoyment; among others, certain burdens wherewith it may be affected, or rights which may be created and may be enjoyed

[25] See *per* Lord Scott in *Moncrieff v Jamieson* [2007] 1 WLR 2620, HL, [55].

[26] Ibid.

> over it by parties other than the owner; all which incidents are recognised by the law [. . .] All these kinds of property, however, all these holdings, are well known to the law and familiarly dealt with by its principles. But it must not therefore be supposed that incidents of a novel kind can be devised and attached to property at the fancy or caprice of any owner. It is clearly inconvenient both to the science of the law and to the public weal that such a latitude should be given. There can be no harm in allowing the fullest latitude to men in binding themselves and their representatives, that is, their assets real and personal, to answer in damages for breach of their obligations. This tends to no mischief, and is a reasonable liberty to bestow; but great detriment would arise and much confusion of rights if parties were allowed to invent new modes of holding and enjoying real property, and to impress upon their lands and tenements a peculiar character, which should follow them into all hands, however remote. Every close, every messuage,[27] might thus be held in a several fashion; and it would hardly be possible to know what rights the acquisition of any parcel conferred, or what obligations it imposed. The right of way or of common is of a public as well as of a simple nature, and no one who sees the premises can be ignorant of what the vicinage[28] knows. But if one man may bind his messuage and land to take lime from a particular kiln, another may bind his to take coals from a certain pit, while a third may load his property with further obligations to employ one blacksmith's forge, or the members of one corporate body, in various operations upon the premises, besides many other restraints as infinite in variety as the imagination can make them; for there can be no reason whatever to support the covenant in question, which would not extend to every covenant that can be devised.

Lord Brougham LC thus set out some of the dangers that would come from allowing individuals to create new legal interests in land. The central point is that a third party, such as someone later acquiring a right in that land, would then find it very difficult to know what burdens he may have to bear. We can also make the separate point that if new types of burden are imposed on land, the value of that land may be severely reduced. These fears have resulted in the adoption of the *numerus clausus* ('closed list') principle: there is a set list of legal property rights in relation to land and if B's right is not on that list, it simply cannot count as a legal property right in land.

Doubts have been expressed about the true usefulness of the principle. For example, whilst noting that the principle seems to exist in all non-feudal legal systems, Rudden[29] also argues that it may not be efficient: if A and B are unable to create a desired property right, they may well resort to complicated legal mechanisms in an effort to achieve, as far as possible, the same effect. As Rudden puts it:

> all that the law of many countries does is to prevent an owner from simply and cheaply creating fancy property interests; he can almost always achieve his aims at some cost by the use of devices [. . .] which, when one stands back and contemplates them calmly, appear largely mumbo-jumbo.

As we will see in Chapter 26, section 2.4, when examining the law relating to positive covenants, there is some truth in that observation.

27 [That is, every piece of land; 'messuage' means a piece of land on which a house stands.]

28 ['Vicinage' here means the neighbourhood or, more specifically, other neighbours who are entitled to exercise rights of common over a piece of land.]

29 'Economic Theory v Property Law' in *Oxford Essays in Jurisprudence* (3rd series, eds Eekelaar and Bell, 1987).

It can also be argued that the *numerus clausus* principle allows judges to evade their responsibility to explain precisely why particular rights count as legal interests in land, whilst others do not. Gray and Gray have made this criticism forcefully.[30]

Gray and Gray, *Elements of Land Law* (5th edn, 2009, pp 96–7)

Nowhere, perhaps, is the imperfect logic of English land law more clearly apparent than in its attempt to demarcate proprietary rights from merely personal rights in land. The outcome is a philosophical shambles, but English law has never been overly concerned with philosophical propriety. Although the way in which the law identifies the categories of proprietary right is deeply unsatisfactory, the difficulties (albeit irksome) should not be over-estimated. Somehow English law blunders its way towards roughly the correct conclusions and there is usually little doubt, except perhaps at the perimeters of the field, as to whether a particular entitlement is or is not proprietary in the relevant conveyancing sense [. . .]

The difficulty with this orthodox understanding of proprietary quality is, of course, that it is riddled with circularity: the definition of proprietary character becomes entirely self-fulfilling. If naively we ask which entitlements are 'proprietary', we are told that they are those rights which are assignable to and enforceable against third parties. When we then ask which rights these may be, we are told that they comprise, of course, the entitlements which are traditionally identified as 'proprietary'. It is radical and obscurantist nonsense to formulate a test of proprietary quality in this way.

Nonetheless, as the following extract shows, the *numerus clausus* principle, as far as legal interests in land is concerned, has been given statutory confirmation.

Law of Property Act 1925, s 1(2) and (3)

(2) The only interests or charges in or over land which are capable of subsisting or of being conveyed or created at law are—

(a) An easement, right or privilege in or over land for an interest equivalent to an estate in fee simple absolute in possession or a term of years absolute;

(b) A rentcharge in possession issuing out of or charged on land being either perpetual or for a term of years absolute;

(c) A charge by way of legal mortgage;

(d) Any other similar charge on land which is not created by an instrument;

(e) Rights of entry exercisable over or in respect of a legal term of years absolute, or annexed, for any purpose, to a legal rentcharge.

(3) All other estates, interests, and charges in or over land take effect as equitable interests.

So, just as s 1(1) of the LPA 1925 limits the number of possible legal estates in land, s 1(2) of the same Act limits the numbers of possible legal interests in land. Essentially, there are five types of permissible legal interest: an easement; a profit; a charge; a rentcharge; and a right

[30] See, also, Gray and Gray, 'The Rhetoric of Realty' in *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* (ed Getzler, 2003).

of entry. If B's right does not match the content of one of those five rights, it cannot count as a legal interest in land.

In Chapter 25, we will examine the content of the easement in detail; we will do the same for the charge in Chapter 28. Profits, rentcharges, and rights of entry are of less practical importance, and will not be examined in detail. A profit is a right to take something from A's land (e.g. turf, timber, fish, or wild animals);[31] a rentcharge is a right to receive money from a freehold owner of land.[32] A right of entry may arise as part of a lease, where a landlord reserves a right to enter the land if, for example, the tenant fails to pay rent as agreed; it may also arise as part of a rentcharge to allow the party holding the rentcharge to enter the freeholder's land if that charge is not paid.

The list imposed by s 1(2) of the 1925 Act is not necessarily fixed forever. For example, as we will see in Chapter 26, the Law Commission has recently suggested an addition: the 'land obligation'. It does mean, however, that any change to the list can be made only by Parliament, and by amending s 1(2).

7 LEGAL INTERESTS IN LAND: THE *ACQUISITION* QUESTION

The obvious way for B to acquire a legal interest in land is through a *dependent acquisition*—that is, by showing that A has given B that right. In Chapter 7, we will look at the general rules applying to the dependent acquisition of a legal interest in land. In Chapter 25, section 3, and Chapter 28, section 4, we will examine the specific rules applying to a dependent acquisition of, respectively, a legal easement and a legal charge.

As for independent acquisition, we will see in Chapter 25, section 3.3, that it is also possible for B to acquire an easement simply by exercising a right over a long period. In such a case, B's easement is said to arise 'through prescription' and there is no need for B to show that he has registered that right, or that A used a deed (or even any writing) to give B that right. Where B relies on prescription to acquire an easement, it may well seem that he is relying on an independent acquisition—that is, he is claiming a right as a result of his own, unilateral conduct, just as occurs where B acquires a freehold by taking physical control of land. As we will see in Chapter 25, section 3.3, however, the courts have not adopted this view.

8 CONCLUSION

The facts of *Hill v Tupper*[33] (see section 1 above) and *Keppell v Bailey*[34] (see section 6 above) provide particular examples of a more general question that land law has to tackle: if A owns land and B then acquires a right that relates to A's land, can B also assert that right against C, a third party? To answer that question, we need to be aware of the crucial distinction

[31] For more detail, see Law Commission Consultation Paper No 186 (2008, Part 6).

[32] For more detail, see Rentcharges Act 1977; Gray and Gray, *Elements of Land Law* (5th edn, 2009, Part 6.6).

[33] (1863) 2 H & C 122.

[34] (1834) 2 My & K 517.

between: (i) a legal property right in land; and (ii) a personal right. If, as in both *Hill* and *Keppell*, B's right is simply a personal right against A, then it is impossible for B to assert that right against C. But if B can instead show that his right is a legal property right in land, that right is capable of binding the rest of the world, including C.

Legal property rights in land can be divided into two types: legal estates and legal interests. The difference is that the former category, unlike the latter, give their holder ownership rights over a piece of land. The LPA 1925 carefully restricts the number of legal estates and legal interests in land: there are only two permissible legal estates (freehold and lease), and, for our purposes, there are only two significant legal interests (easement and charge). If B claims to have a legal estate or legal interest, he must pass both the *content* test and the *acquisition* test. To pass the *content* test, B needs to show that the right he claims counts as a legal estate or legal interest. To pass the *acquisition* test, B needs to show that he has, in fact, acquired that right: as we will see in Chapter 7, it is generally the case that, to do so, B needs to show that he is registered as holding that right and/or that A has used a particular form (such as a deed) to give him that right.

Clearly, legal estates and interests form a crucial part of land law. But to avoid overstating their importance, we need to bear four points in mind. Firstly, even if B has no legal or equitable property right in land, there may be some cases in which B can nonetheless rely on a *human right* as protection against both A and C. We discussed the impact of human rights on land law in Chapter 3.

Secondly, if B fails to show that he has a legal property right in land, this does not necessarily mean that B has only a personal right against A. Instead, as we will see in Chapter 5, it is still possible for B to have an *equitable* property right. And such a right may give B precisely the protection that he needs: not only against A, but also against a third party later acquiring a right in A's land.

Thirdly, even if B *does* have a legal property right in land, there may, in theory, be circumstances in which he cannot assert that right against a particular third party: as we will see in Chapter 12, it may be possible for C to have a *defence* against B's legal property right.

Finally, if B wants protection simply against a specific third party (rather than any third party later acquiring a right in A's land), it is not always necessary for B to show that he has either a legal or equitable property right. Instead, B may be protected by showing he has a *direct right* against that particular third party. We will examine such direct rights in Chapter 6.

QUESTIONS

1. What is the difference between a 'personal' right and a 'property' right?
2. How might the result in *Hill v Tupper* have been different if Mr Hill's right had counted as a property right?
3. What role, if any, does the concept of ownership play in English land law?
4. Why did the Law of Property Act 1925 limit the number of possible legal estates in land?
5. What is the difference between dependent and independent acquisition?
6. What is the *numerus clausus* principle? Is it an unjustified limit on the ability of an owner of land to create new property rights in that land?

FURTHER READING

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

Bright, 'Of Estates and Interests: A Tale of Ownership and Property Rights' in Land *Law: Themes and Perspectives* (eds Bright and Dewar, Oxford: OUP, 1998)

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

Merrill and Smith, 'Optimal Standardization in the Law of Property: The Numerus *Clausus Principle*' (2000) 110 Yale LJ 1

Rudden, 'Economic Theory v Property Law' in *Oxford Essays in Jurisprudence* (3rd series, eds Eekelaar and Bell, Oxford: OUP, 1987)

5

EQUITABLE INTERESTS

CENTRAL ISSUES

1. It is generally said that there are two sorts of property right in land: legal property rights and equitable property right. We examined the content of legal property rights in Chapter 4; we will examine the content of equitable property rights in this chapter.
2. We saw in Chapter 4 that legal property rights in land can be split into two groups: legal estates and legal interests. In contrast, under the scheme of the Law of Property Act 1925, there is no such thing as an equitable estate in land. All equitable property rights in land are equitable *interests*. Equitable interests in land can usefully be split into two groups: equitable interests arising under a trust; and other equitable interests.
3. As we also saw in Chapter 4, there is a limited number of legal estates and legal interests in land. The list of possible equitable interests in land is also limited, but is longer than the list of legal interests. In particular, a right under a trust counts as an equitable interest—and rights under a trust can have very varied content. This means that whilst the content of B's right may prevent it from being a legal interest in land, it may still count as an equitable interest in land.
4. Equitable interests in land share a key feature of legal estates and legal interests: they are capable of being asserted against third parties. For example, consider a case where A has a legal estate in land and B, through his dealings with A, acquires an equitable interest in A's land. B's right will then be prima facie binding on C, a party who later acquires a right from A. In this way, equitable interests in land have a power lacked by personal rights.
5. It is clear that the *content* and *acquisition* questions are answered differently depending on whether B claims a legal or equitable property right. In section 7 of this chapter, we will consider whether these differences can be justified. One important point is that if B has an equitable property right rather than a legal property right, it will generally be easier for a third party to show that he has a defence to B's right. We will focus on the *defences* question in Chapter 12. It may also be the case that equitable interests are conceptually, as well as historically, distinct from legal property rights.

1 THE CONCEPT OF AN EQUITABLE PROPERTY RIGHT

In land law, as in many other areas of law, it is possible to distinguish between common law rules and equitable rules. Historically, the distinction is a simple one: common law rules were developed by the common law courts, equitable rules were developed by courts of equity. As a result of procedural reform in the late nineteenth-century, there are no longer separate common law courts and equitable courts; rather, all courts must consider any relevant common law rules and equitable rules.

In land law, one of the lasting contributions of those equitable rules is the concept of an *equitable property right*. In Chapter 4, section 1, we considered the fundamental distinction between a personal right and a property right: whereas a personal right can be asserted only against a specific person, a property right has a wider range of application. An equitable property right shares a very important feature with a legal property right: it does more than simply bind a specific person. For example, if A has a freehold or lease of land and then gives B an equitable property right, B has a right that is capable of binding not only A, *but also C*, a party who later acquires A's land.

In the following extract, Lionel Smith discusses the development of equitable property rights. He makes the important point that these rights, unlike the legal property rights that we examined in Chapter 4, are necessarily based on A's being under a *duty* to B.

Smith, 'Fusion and Tradition' in *Equity in Commercial Law* (eds Degeling and Edelman, 2005, pp 32–3)

I would argue that there are at least two examples of norms that are enforced routinely by Equity, but only sporadically by the common law, and that it is here that the true distinctiveness of Equity may lie. In other words, leaving aside the mass of detailed doctrine in both traditions, these are examples of situations in which Equity enforces a norm or value which the common law generally does not.

Respect for other people's obligations

This section can be introduced with a simple normative problem. Imagine that John owns a boat. He lends it to Mary, promising her that she can keep it for one month. After one week, Eleanor offers to buy the boat from John. John accepts her offer and Eleanor becomes the owner of the boat. Is she required to allow Mary to retain possession during the rest of the one-month period? Reasonable people could differ. Many people would say that it depends upon whether Eleanor was aware of the arrangements between John and Mary, and some might think it was relevant whether Mary had paid for her one month of use, or whether it was in the nature of a gift.

In the Romanist tradition, the most fundamental distinction in private law is the one between obligations and property rights. A right of ownership binds everyone. Obligations bind only the parties to the obligation: the debtor is bound to the creditor. The common law, in the narrow sense that excludes Equity, basically follows this line. Both modern civil law and the common law in the narrow sense admit the possibility that someone can commit a wrongful act by interfering with the fulfilment of another person's obligation.[1] But short of that fault-based wrong, obligations do not have effects except on the debtor and the creditor. Equity takes a different view. Some obligations systematically have third-party effects,

[1] [We will examine those wrongs in Chapter 6, section 2.4.]

without recourse to the law of wrongs. These are obligations that relate to the benefit of particular property, or an interest therein.

This approach is seen in a crucial technique of legal reasoning that underlies much of the original jurisdiction of Equity. At the risk of leaving out much doctrinal detail, it can be stated in this way. If a person is under an obligation, and the obligation relates to the benefit of particular property or an interest therein, then another person who comes into possession or control of that particular property—even though he does so without any personal culpability—is not allowed to get in the way of the fulfilment of the obligation. The defendant can free himself of this constraint only by affirmative proof that he gave value in good faith without notice of the obligation, and that the interest he acquired was a common law interest and not an Equitable one only [. . .] The representative of creditors is also caught, although he represents persons who are in good faith and who, for the most part, gave value.

This principle is not totally alien to the common law. First, as we have noted, the common law recognises that one person should not deliberately interfere in another person's performance of his obligations. But in this tort context, it looks for a level of cognition on the part of the defendant that allows us to understand the defendant as having committed a genuinely wrongful act. In that setting, of course, it is irrelevant whether the obligation relates to specific property or not. More interestingly, in one crucial context, the common law did exactly what Equity does routinely: it said that if the obligation does relate to specific property, then a recipient of that property must allow the obligation to be performed, even though the recipient does not owe the obligation, and without any finding that the recipient acted wrongfully. That context is the lease of land. The lessee's rights were enforceable against a transferee from the lessor, and later against all the world, first in damages only, but later by specific recovery.

In Equity, however, this principle is ubiquitous, and routinely turns an obligation relating to a particular asset into a kind of property right, held by the beneficiary or creditor of the obligation, in the particular asset. Effectively, people are bound by other people's obligations—not bound to perform them, but bound not to interfere with them.

In the following extract, Hackney also discusses how equitable property rights developed from an initial duty of A to B. In doing so, he uses the trust as an example. As we will see in this chapter, the trust is a classic example of a situation in which B has an equitable property right. A trust arises where A (the trustee) has a right (the trust property) and is under a duty to use that right for the benefit of B (or B and others, known as the 'beneficiaries'), as well as a duty not to use that right for A's own benefit.[2] If another party has specifically set up the trust, that party is often referred to as the 'settlor'.

Hackney, *Understanding Equity and Trusts* (1987, pp 20–2)

In the course of the mid seventeenth to early nineteenth centuries, Equity[3] was turned into a systematic body of principles as refined, rigorous and ultimately unyielding as anything produced by the common law. [. . .]

[2] It is possible for there to be trusts in which A, as well as being a trustee, is also a beneficiary of the trust: see for example *Williams & Glyn's Bank v Boland* [1981] AC 813, HL, which we will discuss in section 2 of this Chapter. In such a case, A is permitted to use the trust property for his own benefit (to the extent that he is a beneficiary).

[3] [The author uses Equity with a capital E to refer to the body of specific rules developed by courts of equity and to distinguish those rules from the general concept of 'equity' with its broader sense of what is fair.]