chapter

1 Introduction to Land Law

study points

After reading this chapter, you will be able to understand:

- what is treated as land in the law of England and Wales
- the distinction between a fixture and a chattel
- what rights are recognised as being rights in the land
- the distinction between legal estates and interests and equitable interests in land
- the distinction between proprietary and personal rights
- how land can be subject to complementary and competing rights
- how human rights protection applies in the context of land.

1.1 Introduction

It is hard to overstate the importance of land to us. The Royal Institution of Chartered Surveyors (RICS) estimates that up to 70% of the world's wealth is bound up in land and real estate (RICS, April 2017). It is home to the world's estimated 7.9 billion citizens and the basis of mega cities and infrastructure, as well as to rural life and food production. It is both a scarce resource requiring careful management, at risk from the climate emergency and its implications such as flooding, and a wealth-producing asset with a global investor base. For many years, land has been favoured by sovereign wealth funds (the largest being the Norway Government Pension Fund (also known as the oil fund) which has a $49 billion exposure to real estate globally), and this status is likely to continue despite actual and predicted changes to the use of property due to technology and the Covid-19 pandemic.

Land therefore has 'a 'functional and financial dimension' that other asset classes such as equities and bonds do not (RICS, *Safeguarding growth and stability in real estate and beyond*, April 2016). Thus, property serves two masters: the end user and the investor. The report argues that the dominance of the investor has led to a commercial property industry designed to meet investor rather than operational objectives and which must adapt to meet wider social, environmental and political needs, by using data to serve people better and by addressing sustainability issues. This is reflected even in the language used of 'landlords' and 'tenants' rather than 'owners' and 'occupiers' and requires 'a conceptual shift from a feudal mindset of lord and subject to a customer-centric model' (RICS, *The Age of Unreal Estate*,

October 2020). In the housing sector, the role of the investor can be seen too; witness the growth in private renting at the expense of the owner-occupier or social housing sector. In 2019–20, 19% of England's 23.8 million households were renting from private landlords compared to 65% owner-occupiers and 17% renting from social landlords. Compare this to 2003, the highpoint for owner-occupation, at 71% of households, with social housing at 18% and, in contrast, private renters comprising only 11%.

Events since the first edition of this book have further highlighted the vulnerabilities involved in certain individuals' and groups' relationships with land and the mixed response by policy makers to this. The devastating Grenfell Tower fire on 14 June 2017, in which at least 72 people lost their lives, and the ongoing battle by leaseholders for safer buildings highlight the powerlessness of leaseholders, tenants and occupiers in relation to the safety of the buildings in which they live and the slowness and paucity of an official response to tackle this.

In contrast, the Covid-19 pandemic led to protective measures for residential tenants and mortgage-holding owner-occupiers, as well as businesses, which were implemented swiftly when national lockdowns were imposed. These and similar measures in other nations have the approval of the International Monetary Fund, whose Managing Director, Kristalina Georgieva, stated, 'it is essential to sustain support to businesses and workers … there must be no premature (policy) withdrawal.' The Covid-19 pandemic has highlighted not just national but global inequalities. World Bank statistics suggest that the pandemic has plunged between 88 and 115 million more people into extreme poverty, a number that will probably rise further over the course of 2021. In response to this, the RICS believes that 'more austerity is not the answer' and that a new approach, targeting infrastructure investment 'focused on sustainability and lessening inequality, is urgently needed', including connecting underserved populations to goods and services and undertaking social housing construction and renovation (Simon Rubinsohn, Chief Economist, RICS, 5 March 2021).

It is unsurprising that this dual dimension – functional and financial – of land is recognised by our legal system in England and Wales, as in others, by the development of a body of rules that apply specifically to land, our transactions with land and our relationship with other people in relation to land.

Many transactions relating to land are based in contract (although many are not) but land law goes further and deeper than this. Contract law is concerned about rights against an individual or individuals who have voluntarily entered into binding commitments; land law is concerned with rights considered to be so important that the law recognises them as rights in the land itself, potentially binding all future persons who come to the land, whether they wish it or not and irrespective that they are not parties to the original contract. The transmissibility of the benefit and burden of proprietary rights in land to future owners and occupiers of the land affected by the rights means that they are rights 'against the

world' as well as merely rights against a particular individual. (The Latin phrase '*in rem*', meaning a right 'in the thing itself', is used to describe a property right – which has the potential to be upheld against *anyone* – in comparison to a right '*in personam*' or against a *particular* person.)

The importance and permanence of land rights means that the law must regulate what rights will be considered proprietary, impose clear rules on when and how proprietary rights in land are created and disposed of, and develop mechanisms to resolve conflicts between competing rights and determine which existing land rights will bind a person who acquires an interest in land.

We consider it important that the law balances the rights of people who hold interests in land, and may have done so over many years, whilst enabling purchasers to buy land quickly, securely and without undue transaction cost. Our system relies on land registration to achieve this. 'Land registration ultimately aims to reduce or eliminate complexity and uncertainty in conveyancing' and provide a more efficient system (Law Commission, *Updating the Land Registration Act 2002: A Consultation Paper* (Law Com No 227, March 2016), [2.7]). Ultimately this will be fully electronic or digital although there are currently practical barriers to the simultaneous completion of transactions and their registration.

However, our law also recognises the validity of undocumented arrangements. In some cases this is a pragmatic response to arrangements that have operated over long periods of time (see **2.2** on adverse possession and **13.4.3** on prescription). Others are based on the conscience of the affected landowner; even before the late 1700s, it was clear that equity would step in, in certain circumstances in which it would be unconscionable to allow a landowner to insist on their strict legal rights (see **2.7.3**).

New issues are thrown up by modern transactions such as equity release schemes in *Re North East Property Buyers Litigation* [2014] UKSC 52. (Equity release covers a variety of mechanisms by which property owners can raise funds now by 'releasing' the equity or ownership rights in their home.) Striking a balance between undocumented or unregistered rights and an efficient system of land registration is potentially devastating to individuals involved, such as former homeowners who were evicted when the equity release schemes collapsed, in some cases fraudulently. The need to respond to changes in consumer behaviour or market practice is not unique to land law; the consumer detriment in equity release schemes led to them becoming added to the list of regulated activities under s 19 of the Financial Services and Markets Act 2000, supervised by the Financial Conduct Authority. The 'functional and financial dimension' of land that we have already referred to, as well as its uniqueness and the strong emotional pull of an individual's home, mean that addressing these issues in relation to land can cause particular hardship.

We will begin by looking at the study points set out at the opening of this chapter.

1.2 What is 'land'?

The statutory definition of 'land' is set out in s 205(1)(ix) of the Law of Property Act (LPA) 1925:

> 'Land' includes land of any tenure, and mines and minerals, whether or not held apart from the surface, buildings or parts of buildings (whether the division is horizontal, vertical or made in any other way) and other corporeal hereditaments; also a manor, an advowson, and a rent and other incorporeal hereditaments, and an easement, right, privilege, or benefit in, over, or derived from land; … and 'mines and minerals' include any strata or seam of minerals or substances in or under any land, and powers of working and getting the same …; and 'manor' includes a lordship, and reputed manor or lordship; and 'hereditament' means any real property which on an intestacy occurring before the commencement of this Act might have devolved upon an heir;

Some of the items included in this definition of land seem quite archaic to us; for example an 'advowson' is the right to nominate a person to become minister of a church. In other cases, the concept remains relevant but the language is difficult: 'corporeal hereditaments' include physical features of the land such as buildings, plants or growing trees, whereas 'incorporeal hereditaments' include rights which have no physical form, such as a right of way over a neighbour's land or a right to take water from a spring.

The legal definition of land includes the physical land itself. This includes the subsoil beneath the land, including mines and minerals within the land, and the airspace above; the maxim was said to be that the owner of the soil also owns everything up to the sky and down to the centre of the earth (quoted in *Corbett v Hill* (1869–70) LR 9 Eq 671). Thus the invasion of a leaseholder's airspace by a sign which projected only 8 inches over the property let to him was held to be a trespass and he could obtain an injunction ordering the sign to be removed (*Kelsen v Imperial Tobacco Co (of Great Britain and Ireland) Ltd* [1957] 2 QB 334).

1.2.1 Airspace

In practice, due to the need to balance landowners' rights to use their land against the needs of the general public, rights in respect of the airspace have been limited to 'such height as is necessary for the ordinary use and enjoyment of his land and the structures upon it' (*Bernstein v Skyviews & General Ltd* [1978] QB 479 at 488, per Griffiths J). Above that height, the landowner has no greater rights than any other member of the public (*Star Energy v Bocardo* [2010] UKSC 35). A landowner cannot, therefore, prevent flights passing over their land at reasonable height. This also has a statutory basis in s 76(1) of the Civil Aviation Act 1982.

1.2.2 Below the ground

The owner of land owns the subsoil and strata below it. Interference by a third party will be an actionable trespass. The leading case of *Star Energy v Bocardo*

[2010] UKSC 35 concerned horizontal drilling and confirmed that interference is not restricted to interfering with the owner's use and enjoyment of the land; the mere fact of boring into someone else's land, even at substantial depths, is trespass. The Supreme Court was not willing to apply the same principle as applies to airspace (namely that the surface owner would have rights over the subsoil only to such depth necessary for the ordinary use and enjoyment of the land and the structures upon it). Lord Hope stated (at [26]) that:

> It overlooks the point that, at least so far as corporeal elements such as land and the strata beneath it are concerned, the question is essentially one about ownership. As a general rule anything that can be touched or worked must be taken to belong to someone.

He accepted that there would be obviously be some practical stopping point, but noted that this would change with technological advances.

The owner of land also owns the minerals to be found within that land, subject to a number of qualifications:

(a) By statute and common law, certain valuable mines and minerals are reserved to the Crown. Examples include petroleum (Petroleum Act 1988, s 2). Statutory rights have been granted to enable organisations holding a licence from the Crown to extract those minerals. A topical and controversial example relates to 'fracking' or the extraction of shale gas (see below).

(b) In many cases, rights to mines and minerals have been alienated by private conveyance. It was common when selling off parts of larger estates for the seller to retain ownership of mines and minerals, together with rights to extract them.

Fracking

The Government decided in late 2019 to pause all fracking in the UK following a 2.9 magnitude seismic tremor at Preston New Road fracking site in Lancashire in August 2019, which led to the suspension of operations at the site. An Oil and Gas Authority (OGA) review concluded that the possibility of larger events could not be excluded and these could cause damage and disturbance unacceptable under current policy guidance. The methods for predicting event maximum and magnitude need further testing and cannot be viewed as reliable. The Government held open the prospect of fracking re-starting if new evidence or scientific methods indicated that this could be done safely. However, in June 2020, the then UK Energy Minister, Kwasi Kwarteng, suggested that the Government's focus had moved away from fracking to more sustainable energy sources, reflecting an increasing awareness of the urgency of climate change. Despite this broader (and welcomed) context, the scheme for fracking still has something to tell us about how property rights in England and Wales work.

Fracking is the controversial method of extracting subterranean shale gas or oil. Shale gas is included in the definition of petroleum contained in s 2 of the Petroleum Gas 1988 and is therefore owned by the Crown. The Crown has the power to grant licences to extract shale gas in the UK, but the licensee still had to reach agreement with all landowners concerned to drill under their land. Drilling without such consent would be trespass and could be prevented by an injunction (as in the *Kelsen* case above).

The Infrastructure Act 2015 grants a statutory right of access to drill under people's land without the need for permission from the landowner. Section 43(1) gives a right to use 'deep-level land' for the purposes of exploiting petroleum or deep geothermal energy without the landowner's permission. Deep-level land is any land at a depth of at least 300 metres below surface level (s 43(4)). The right to use may be exercised for drilling, boring, fracturing or otherwise altering the deep-level land, installing infrastructure and removing any substances.

Although landowner permission is unnecessary, landowners must be informed in advance and there will be a scheme for payments by the industry.

The Act does not give a right to use land for surface drilling sites, so fracking companies will still need to negotiate these with landowners, but they can rely on the new statutory right for bore holes passing under other land.

The Infrastructure Act 2015 remains in force, but, as explained above, at present the Government is no longer issuing licences for fracking and has indicated that it is unlikely to resume.

1.2.3 Buildings

Ownership rights in land are not limited to the surface, and they include buildings or parts of buildings on the land. Physical structures like these are known as corporeal hereditaments (this roughly translates as physical real property that is capable of being inherited by an heir of the owner).

1.2.4 Intangible rights

As well as the physical land and structures on it, the legal definition of land encompasses various rights which are connected to the land. For example, there may be a right to walk or drive over a neighbour's property in order to get access to your land. This right is known as an easement and is included within the definition of land. Intangible rights like these are described as 'incorporeal hereditaments' in the definition of land contained in s 205(1)(ix) of the LPA 1925 that you have just read.

They can be important in order to get full use or value from the land, and their status in law reflects this importance. They are considered so important that not only are they considered to be 'proprietary rights' in the land itself (rather than merely personal rights against an individual), but they are treated as if they are land in their own right. We will come to look at these in greater detail in **Chapters 13** and **14**.

1.2.5 Fixtures

When items or chattels are attached to land, they may take on the status of a fixture and become regarded in law as part of the land.

Whether an item has become a fixture depends on the intention of the original owner as ascertained from the degree of annexation and the purpose of the annexation. Of these two tests, the purpose of the annexation is the more decisive, as illustrated by Blackburn J, giving judgment in *Holland v Hodgson* (1872) LR 7 CP 328. He compared a dry stone wall which is fixed to the ground merely by its own weight, and which is part of the land. However the same stones, stored in a builder's yard and for convenience stacked in much the same way, would remain chattels. Conversely, a ship's anchor is firmly attached to the ground but only for the purpose of preventing the ship (a chattel) from drifting and is therefore a chattel itself.

The question of whether a chattel has become part of the land is important when land is sold or if a mortgagee takes possession of the land. Title to a fixture passes with the title to the land under s 62 of the LPA 1925 and therefore passes to the buyer or mortgagee in possession (unless expressly excluded in the transfer or mortgage deed). The *Holland v Hodgson* case concerned over 400 looms which were fixed to the floor of a mill to keep them steady. Following a conveyance of the mill, who had the right to them? It was found that the looms were attached to the land for the purpose of improving the land, rather than for any temporary purpose, and had become part of the land. Title to them had passed with the conveyance.

It is also important between a landlord and tenant, where a tenant attaches chattels to a property. There are special rules relating to a tenant's fixtures, allowing a tenant to remove such items at the end of the lease term, provided any damage to the property is made good (*Climie v Wood* (1868–69) LR 4 Ex 328).

In the case of *Elitestone Ltd v Morris* [1997] 1 WLR 687, Lord Lloyd approved a three-fold classification for objects brought on to land, which may be:

(a) a chattel;
(b) a fixture; or
(c) part and parcel of the land itself.

The question was whether a bungalow which rested by its own weight on concrete pillars fixed into the ground had become part of the land or remained a chattel. The House of Lords held that even though the bungalow was not fixed to the pillars, and therefore not attached to the ground other than by gravity, a house built in such a way that it could only be removed by destruction must have been intended to have become part of the land.

1.2.6 Items found in or on land

The owner of land is generally also entitled to lost items of property that are found buried in (rather than merely on) the land (*South Staffordshire Water Co v Sharman* [1896] 1 QB 44), unless they are treasure trove, in which case they belong to the Crown. The modern rules relating to treasure trove are found in the Treasure Act 1996. In his judgment in *South Staffordshire v Sharman*, Lord Russell of Killowen cited with approval at [46]–[47] Pollock and Wright, *An Essay on Possession in the Common Law* (1 January 1888):

> 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 … It is free to anyone who requires a specific intention as part of a 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 de facto possession, constituted by the occupier's general power and intent to exclude unauthorised interference.

The rationale for this is given by Donaldson J in *Parker v British Airways Board* [1982] 1 QB 1004:

> … let me know turn to another situation in respect of which the law is reasonably clear. This is that of chattels which are attached to realty (land or buildings) when they are found. If the finder is not a wrongdoer, he may have some rights, but the occupier of the land or building will have a better title. The rational of this rule is probably either that the chattel is to be treated as an integral part of the realty as against all but the true owner and so incapable of being lost or that the 'finder' has to do something to the realty in order to get at or detach the chattel and, if he is not thereby to become a trespasser, will have to justify his actions by reference to some form of licence from the occupier. In all likely circumstances that licence will give the occupier a superior right to that of the finder.

However, chattels that are merely found *on* land (for example a lost bracelet) will not belong to the landowner or occupier unless the finder is a trespasser or the owner exercises such control over land that he has shown intention to control anything found on it (*Parker v British Airways Board*). Evidence of intention to exercise control can be express (for example putting up signs on the land requiring lost property to be handed in) or it may be implied from the circumstances (for example if the occupier accepts or is required by law to accept liability for chattels that are lost on their premises).

Donaldson J confirmed (at 1018) that the owner of a chattel (eg a ship, car or aircraft) would be treated as if they were the occupier of a building for the purposes of these rules.

1.3 What rights can exist in land?

1.3.1 Legal 'ownership' of land

In English law, we see the idea that it is not possible to 'own' land itself but instead an estate in the land. An estate in the land was described in 1573 in *Walsingham's Case* (1575) 2 Plow 547 at 555 as follows:

> An estate in the land is a time in the land, or land for a time, and there are diversities of estates which are no more than diversities of time …

The two estates which are recognised at law under modern English law are the fee simple absolute in possession (or freehold) and the term of years absolute (or leasehold). Commonhold (see **1.3.1.3** below) is a form of freehold estate.

1.3.1.1 The fee simple absolute in possession

This gives an indefinite right to own the land and is commonly known as the 'freehold'. It is regarded as the closest that English law gets to absolute ownership, but in theory remains an estate or a 'time in the land' even though an indefinite one. This is reflected in the fact that if the owner dies intestate without relatives then ownership will revert back to the Crown as bona vacantia or vacant goods. The Treasury Solicitor may dispose of the land, with proceeds going to the Crown.

The components of the phrase are explained as follows:

(a) a 'fee' is an estate that lasts for an indefinite period of time and is capable of being inherited (as opposed, for example, to a life interest that expires on the holder's death);
(b) 'simple' refers to a lack of restrictions as to which heirs can inherit;
(c) 'absolute' means that it is not conditional or determinable (for example, an estate granted to Nelson if he marries is conditional; an estate to which Charlie is entitled until he marries is determinable); and
(d) an estate 'in possession' allows the holder to exercise ownership rights now, rather than in the future.

1.3.1.2 The term of years absolute

This estate gives ownership for a defined period of time, which could be long or short, for example as little as a week or as long as 999 years. It is commonly known as a leasehold or as a lease or tenancy.

Under s 1(1) of the LPA 1925, the freehold and leasehold are the only two estates which are recognised as legal estates under English law:

> 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; and
> (b) A term of years absolute.

1.3.1.3 Commonhold

Commonhold was created as a method of 'ownership' by the Commonhold and Leasehold Reform Act 2002. The new form of tenure was designed to be an alternative to leasehold tenure, appropriate for use for buildings with multiple occupiers, such as blocks of flats or a commercial office block or shopping centre. A freehold estate is registered to a commonhold association as a freehold estate in commonhold land. Individual units, such as a flat or an office unit, are disposed of as a freehold estate in the unit. The owner of each unit holds a freehold estate in the unit, and the commonhold association holds the freehold estate in the common parts (for example the common hallways or parking areas within the property). The advantage of the scheme is that the convenience of leasehold estates, in allowing positive covenants to be enforced, is retained but without the vulnerability that comes from a time limited estate. The best features of each estate are obtained: the commonhold association can require the unit holders to pay for upkeep of the common parts, and in return the unit holders can require the association to carry out maintenance works, similarly to a leasehold estate. However, the unit holder gets the benefit of an indefinite right to the unit under a freehold title, rather than one limited to a term of years (eg 99 years) as a leasehold interest would be, and removal of some of the risks of a leasehold title. The freehold titles of the commonhold association and the unit holders are each a fee simple absolute in possession within s 1(1)(a) of the LPA 1925.

Despite the advantages of commonhold and its popularity in other jurisdictions, it has not proved popular with property developers and, by early 2008, only 14 commonholds had been registered according to figures supplied by the Land Registry (Law Commission, *Easements, Covenants and Profits à Prendre* (Consultation Paper No 186), [11.4]).

The Law Commission published proposals in July 2020 seeking to 'reinvigorate' commonhold as an alternative to leasehold ownership as part of a wider review into leasehold home ownership. Its proposals seek to make commonhold the preferred alternative to leasehold ownership. Ahead of a full response, the Government is to establish a Commonhold Council, with members from industry, leaseholders and government, to prepare for a wider take up of commonhold (<lawcom.gov.uk/project/commonhold>).

1.3.2 Legal third party rights in land

As well as freehold and leasehold estates in land, English law also recognises rights or interests in land. These can be thought of as third party rights in or over land that belong to another person. Section 1(2) of the LPA 1925 states that only certain interests in land are capable of existing at law:

> 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) … and 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.

The most important of these rights are easements (such as the right to cross a neighbour's land to get access to your property) and mortgages. A mortgage is a device used to secure repayment of a loan. If the money is not paid back, the lender is entitled to take possession of the property and sell it, taking the money owed to it out of the sale proceeds
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example

Dipak wants to build a new garage at the back of his house. In order to get to the garage from the public highway, he persuades his neighbour to grant him a right of way, with or without vehicles, over his neighbour's land. This is known as an easement. If the easement is granted for an indefinite period or for a fixed term (eg 10 years) then it is capable of being a legal easement. We know this from applying the rule set out in s 1(2)(a) of the LPA 1925 above.

Any rights in land that do not fall within s 1(1) and 1(2) of the LPA 1925 can only take effect as equitable interests in land.

1.3.3 Equitable interests in land

Equity also recognises certain interests in land which were not recognised by the common law or, now, by s 1(1) and 1(2) of the LPA 1925.

If a right in land does not fall within s 1(1) or 1(2) of the LPA 1925 then it cannot take effect as a legal estate or interest and will only take effect in equity.

Section 1(3) of the LPA 1925 states:

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

The estates and interests set out in s 1(1) and 1(2) of the LPA 1925 may also be created in equity. Sometimes this may occur because the interest has not been created in the way that the law requires.

For example, s 52(1) of the LPA 1925 requires that a deed is used to create or transfer a legal estate or interest in land. If this formality has not been observed then equity might intervene in some circumstances. In *Walsh v Lonsdale* (1882) 21

Ch D 9, an agreement to create a lease had never been completed by deed by the parties. A lease had not been created at law. However, the contract to enter into the lease was specifically enforceable and sufficient to create an equitable lease on the same terms as the contract.

'Specific performance' means that a court will require that a contract is actually performed, rather than requiring the common law remedy of payment of damages to compensate for breach. Specific performance is an equitable remedy that is normally available in relation to land contracts as, due to the unique nature of land, damages are considered 'wholly inadequate and unjust' (*Sudbrook Trading Estate Ltd v Eggleton* [1983] 1 AC 444 at 478, per Lord Diplock).

example

If Oliver enters into a contract to sell his land to Alice and then refuses to complete the sale, Alice may be able to obtain an order of specific performance which compels the transfer of the land, rather than simply requiring Oliver to pay damages for loss that Alice incurs as a result of his refusal to honour the contract.

The equitable lease that was created in *Walsh v Lonsdale* could have existed as a legal lease if the parties had entered into a lease by deed, as they had originally intended when they entered into the contract to do so. However, equity will also recognise transactions that create equitable interests in land that have *never* been recognised by the common law or, following s 1 of the LPA 1925, are *no longer* recognised as creating legal estates or interests in land. All such rights are now categorised as 'equitable interests' in land under s 1(3) of the LPA 1925.

1.3.4 Equitable 'ownership' of land

It is possible to create rights in land that look like 'ownership' that only take effect in equity. So, for example, it is possible to own an equitable life interest which gives the right to enjoy land for the lifetime of the person holding the interest. On his or her death, the lifetime title in the property comes to an end. This is not an estate in fee simple absolute in possession as its existence is conditional on the continued life of the holder. Neither is it an estate for a term of years absolute as it is not for a fixed term (unlike, for example, a 10-year lease). As it does not fall within either of the categories above set out in s 1(1) of the LPA 1925, it cannot take effect at law but can only take effect in equity. And unlike an 'ownership' right that exists at law, it is not known as an 'estate' in land, but only as an equitable 'interest'.

As we have seen, s 1(3) of the LPA 1925 states:

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

example

John, a retired widower with one child, Max, is the freehold owner of Beech House. He marries Judy, a divorcee with two children of her own. In his will, John wants to provide that Max will inherit his house, but that if Judy outlives John, she will have the right to live in Beech House for the rest of her life. This will take place using a trust: on John's death, the legal title to the property will pass to Max, but Judy will be granted an equitable life interest in Beech House. The legal title gives formal ownership of the property, but Judy's equitable interest gives her the right to use and occupy the property. During the period in which Judy survives John, Max's equitable interest is described as being 'in remainder'. On Judy's death, the trust comes to an end, and Max will be entitled to the full equitable interest in the property as well as to the legal title that he already holds.

1.3.5 Equitable third party rights in land

Equity also recognises certain rights in land that we would characterise as third party rights; they are rights over land that we would regard as 'belonging to' another person.

Sometimes this was because the interest was not one that the common law recognised as being an interest in land at all. The important case of *Tulk v Moxhay* [1848] 2 Ph 774 concerned restrictive covenants affecting land.

***Tulk v Moxhay* [1848] 2 Ph 774**

- A landowner named Elms promised by deed (a covenant) with his neighbour not to develop part of his land but to keep it as a garden.
- The land was later sold to a purchaser who knew of the covenant but who wished to develop the garden.
- The neighbour was able to obtain an injunction to prevent the development, even though the purchaser was not a party to the original contract.
- The Court accepted that at law the burden of a covenant did not 'run with the land' and so would not bind the purchaser.
- However, it would be 'inequitable or contrary to good conscience' for a person (Elms) who takes property at a lesser price because it is subject to a restriction to obtain full value from a third party (the purchaser) who would hold it 'unfettered' by the restriction under which it was granted. The conscience of Elms was affected and he could not hand over the property with a better title as between himself and his neighbour than he himself possessed. (Elms himself had died before any sale of the property and therefore was not at fault personally, but the principle applied to the sale by his successors.)
- The purchaser had taken the land with knowledge of the covenant and therefore had knowledge of the 'equity'. A purchaser would be bound by the covenant unless he could show that he purchased the land without notice of it.

1.3.6 No right in land at all?

Some transactions may not give rise to any right in the land at all, although they may create personal rights between two individuals. The right may be enforceable against the individual in question but will become worthless if the individual dies, becomes bankrupt or sells the property concerned. It can be very valuable to establish the existence of a proprietary right in the land that can survive these events.

King v David Allen and Sons, Billposting, Ltd **[1916] 2 AC 54**

King, who owned a cinema, granted a right to the claimant company to display adverts on the walls of the cinema. He then granted a lease of the cinema to a third party, who refused to allow the posters to be displayed. The House of Lords confirmed that the contract granted a licence that was enforceable between King and the company only. It did not create any proprietary right in the land in favour of the company. The company was entitled to damages from King for breach of the contract but could not enforce the contract against the new tenant of the property.

1.3.6.1 'Orthodox' approach

This is the 'orthodox approach' that a contractual licence does not bind third parties. However, there are circumstances in which the courts will find that a personal arrangement like this can become binding on a new estate owner in equity. The 'conscience of the estate holder' is said to be affected so that it would be inequitable for him to refuse to honour the arrangement, creating a constructive trust.

1.3.6.2 Constructive trust

When will the conscience of the estate holder be affected? It is not enough simply for the new estate owner to buy their interest with notice of the personal arrangement, as it is common conveyancing practice for property to be sold 'subject to' past documents that may or may not be binding. This is to protect a seller against ongoing personal liability, rather than to impose new proprietary obligations on the purchaser and their successors where none previously existed. If the right is non-proprietary like a licence, the circumstances must also show that a *new arrangement* has arisen between the licence-holder and the new estate owner. Evidence of the new arrangement must be more than 'slender' (*Ashburn Anstalt v Arnold* [1989] Ch 1, approved and followed in a case concerning proprietary estoppel, *Lloyd v Dugdale* [2002] 2 P&CR 13). Evidence can be indirect, for example if the price is reduced to reflect the continued liability.

1.4 Law and equity

In the discussions above, we have identified a distinction between law and equity which we must now explain: what is the difference between rights that exist at law and those that exist only in equity?

Historically, equity developed to address defects in the common law. The common law was administered by the King's courts. In some cases where the common law gave no or an inadequate remedy but where 'conscience' or justice was thought to demand one, a party could bring their case to the King's Chancellor. Over time, this formalised into the equitable jurisdiction of the Courts of Chancery and two systems developed: common law rights were recognised and enforced by the common law courts and equitable rights by the Chancery Courts. To enforce common law or equitable rights, one had to apply to different courts, which led to conflict between the two court systems. The Judicature Acts of 1873–75 resolved this by providing that all courts could administer the law and equity.

Equity is underpinned by maxims or general principles, which are set out below.

equitable maxims

Equity will not suffer a wrong to be without a remedy

Equity follows the law

He who seeks equity must do equity

He who comes to equity must come with clean hands

Where the equities are equal the law prevails

Where the equities are equal the first in time prevails

Equity imputes an intention to fulfil an obligation

Equity regards as done that which ought to be done

Equity is equality

Equity looks to the intent rather than the form

Delay defeats equities

Equity acts in personam

Under our precedent-based system, these maxims developed into rules that may be applied as rigorously as the common law.

Although the two systems have merged, English law continues to make a distinction between law and equity. One practical effect of this is that legal and equitable rights can co-exist in the same piece of property. One meaning of the maxim that 'equity follows the law' is that property rights recognised by the common law can also exist in equity. For example, as well as legal easements, there can be equitable easements. However, equity also accepts, as rights in land, matters that are not recognised by the common law as being rights in land, such as restrictive covenants (which the common law views as essentially contractual agreements between the original contracting parties), or at all, such as rights of beneficiaries under a trust of land.

1.5 Trusts of land

Under a trust of land, the trustee holds the legal title to land on trust for a beneficiary or beneficiaries.

example

In our example above, after John's death, Max holds the legal title to the house on trust for Judy (during her lifetime) and for himself as 'remainderman'. On Judy's death, the trust comes to an end and Max holds the full equitable interest in the property as well as the legal estate.

The trustee or trustees are the legal owner(s) of the land and, if the land is registered, the registered proprietor(s). It is the trustees who have the power to sell, charge or lease the property (Trusts of Land and Appointment of Trustees Act 1996, s 6(1)). However, it is the beneficiaries who have the benefit of the use and enjoyment of the land. Trustees must act for the benefit of the beneficiaries and are under strict obligations (known as fiduciary duties) to do so. The trustees must utilise any benefit from the land (eg rent paid to the trustees under an occupational lease) for the benefit of the beneficiaries. Depending on the nature of the trust, the beneficiaries then have a right to occupy the property (Trusts of Land and Appointment of Trustees Act 1996, s 12), not the trustees.

Trusts may be created expressly but may also arise by operation of law. The law always imposes a trust of land when property is jointly owned by two or more people (LPA 1925, s 34(2)). As a result, trusts of land are very common, particularly in relation to the family home. Where land is transferred into joint names (for example a husband and wife), confusingly, the trustees and beneficiaries are the same people, who may be unaware of the legal categorisation of their relationship with the land into legal and beneficial interests under a trust. However, a trust can also arise where property is transferred into the sole name of one person but another person contributes to the purchase price or the mortgage, or where there is a common intention that the property is to be shared. In the case of *Williams & Glyn's Bank v Boland* [1981] AC 487, the family home was registered in the sole name of Mr Boland but he held it on trust for himself and his wife, as she had contributed to the purchase price.

A trust is not the only kind of equitable right, though it is an important one. Other rights like leases, easements and covenants can also exist in equity.

1.6 Proprietary rights vs personal rights

We talked at the beginning of this chapter about the difference between a proprietary right, which is a right in the land itself, and a personal right, which is a right against an individual. Many transactions give rise to both personal and proprietary rights. For example, if I enter into a contract to buy a house, I have both a personal contractual right against the seller with whom I have entered into

the contract, and an equitable proprietary right in the house. This distinction can be crucial; if the seller breaches the contract by selling the land to another person, my contractual right gives me a right to seek financial compensation or damages from the seller, but my proprietary right may give me the right to have the property transferred to me in specific performance of the contract.

However, other rights may be purely personal. If the landowner breaches them, the only remedy may be against the landowner personally. That may be of little benefit if the landowner dies or has sold the land or is bankrupt.

So, how do we know whether a right is a right in land at all? A starting point could be to look at s 1(2) of the LPA 1925, which sets out legal interests in land. A right included in this list, such as an easement or mortgage, is capable not only of being a right in land but one recognised at law. However, this only gets us so far. Section 1(3) states: 'All other estates, interests, and charges in or over land take effect as equitable interests.' So clearly there are other rights that are interests or rights in land that are not listed in subsection (2). How do we identify those?

1.6.1 National Provincial Bank v Ainsworth

This question was addressed by the House of Lords in *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175. The case concerned a claim by a wife who had been deserted by her husband to have a proprietary right in the matrimonial home. The question for the court was whether rights to cohabitation and support that existed between a husband and wife were merely personal rights between the husband and wife or also gave a proprietary right in the property. The rights existed by virtue of marriage, and were recognised in equity and enforceable against the husband by procedures contained in s 17 of the Married Women's Property Act 1882 (which Act is now largely repealed). A husband could be ordered to provide a suitable dwelling house and maintenance for his wife. Mrs Ainsworth continued to live in the matrimonial home and argued that her rights as a deserted wife were not merely personal rights against her husband but proprietary rights in the marital home that took priority over a third party bank, which had lent money to her husband and held a registered charge in the property. Lord Wilberforce, dismissing her appeal, stated (at 1248):

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

The rights were merely personal rights against the husband. They did not attach to any particular property, and the husband could satisfy his obligations by supporting her in a suitable home. The nature of a proprietary right is that it gives rights in a specific property, and Mrs Ainsworth could not establish that her rights existed in the actual matrimonial home in which she continued to live. It was

possible that Mr Ainsworth might not be subject to any obligations to Mrs Ainsworth at all. The rights were also

> personal in the sense that a decision can only be reached on the basis of considerations essentially dependent on the mutual claims of husband and wife as spouses and as the result of a broad weighing of circumstances and merit. Moreover these rights are at no time definitive, they are provisional and subject to review at any time according as changes take place in the material circumstances and conduct of the parties. (per Lord Wilberforce at 1247)

1.6.2 Criticism of the test

The test has been criticised as being 'riddled with circularity' (Gray and Gray, *Elements of Land Law*, 5th edn (OUP, 2008)) for identifying proprietary rights as those rights which are capable of being enforced by third parties and that have some degree of permanence or stability. It has been said that these are descriptions of the *effect* of proprietary status rather than a reason why that status should be given. Whilst these requirements make sense in the context of this case (in which Mrs Ainsworth's claimed rights arose out of the personal nature of the marriage relationship and were not fixed to any particular house), they may be too loose to be of practical help to categorise other situations. The requirement for the status of property to be limited to rights that are definable and identifiable may be more useful. However, the test is frequently cited, most recently in the bitcoin case discussed below.

1.6.3 The end of the story?

The decision in *Ainsworth* led to the Matrimonial Homes Act 1967, now contained in Part IV of the Family Law Act 1996, which extends to married couples and civil partners. A spouse or civil partner who is not a legal owner of the family home has a statutory right to occupy it, not to be excluded or evicted and, if not in occupation, the right with the leave of the court to enter and occupy the family home.

The rights are capable of binding third parties if protected by a notice on the register (in the case of registered land) (Family Law Act 1996, s 31(10)(a); Land Registration Act 2002, s 29(2)(a)(i)) or by registration of a Class F land charge (in the case of unregistered land) (Land Charges Act 1972, ss 2(7) and 4(8)). They cannot be an overriding interest (Family Law Act 1996, s 31(10)(b)) (see **5.6.2** for the overriding nature of interests of persons in actual occupation of registered land).

1.6.4 The nature of the right determines if it is proprietary

The nature of the right granted is vital. If, whether the parties intended to or not, parties create a right that is accepted as a proprietary right in the land then it will

(at least in the correct conditions) create one, even if the parties are not aware that this has occurred. As Lord Hoffmann said in *Bruton v London & Quadrant Housing Trust* [2000] 1 AC 406:

> … it is the fact that the agreement is a lease which creates the proprietary interest. It is putting the cart before the horse to say that whether the agreement is a lease depends upon whether it creates a proprietary interest.

So far as the student of land law is concerned, perhaps the best answer to the question 'how do we know whether a right is a right in land at all?' is that they must become familiar through practice with the established categories of estates and rights in land – and then learn the rules that set out whether a right or purported right falls within any of those categories.

Bitcoin – as property

This test is not limited to land but also applies to other kinds of property. The case of *AA v Persons Unknown* [2019] EWHC 3556 (Comm) followed the earlier decision of *Vorotyntseva v Money-4 Ltd (t/a Nebeus.com)* [2018] EWHC 2598 (Ch) in deciding that bitcoin is property under English law and gave reasons for doing so. A Canadian company was hacked and malware installed on its IT system that encrypted all its data, rendering it unusable. The hackers required a ransom in bitcoin for a decryption tool, which the company paid. Bitcoin was chosen because it is difficult to trace, but some of the bitcoin paid was tracked to the defendant's account. The claimant, the company's insurer, sought a proprietary injunction for return of the bitcoin, and one of the first questions that the court had to answer was whether the bitcoin was property at all. It held that crypto-assets such as bitcoin were property: they were definable, identifiable by third parties and capable of assumption by third parties, and they had some degree of permanence (*National Provincial Bank Ltd v Ainsworth* [1965] AC 1175, applied) (paras 55-61).

1.7 How are rights created or transferred?

1.7.1 Formalities

Because of the potential impact of proprietary rights and the need for their existence to be certain and capable of being discovered by a purchaser, there are usually formalities required for their creation and transfer. For example, the general rule is that the creation or transfer of a legal interest in land must be by deed, under s 52(1) of the LPA 1925. This means that it must be made by a document that makes it clear on its face that it is intended to be and is validly executed as a deed. For an individual, that requires it to be signed in the presence of a witness and delivered as a deed. Different formality rules apply to the creation or disposition of equitable interests (LPA 1925, s 53(1)).

1.7.2 Registration

In *Tulk v Moxhay*, it was critical that the purchaser of the garden land was aware of – to use the legal term, 'had notice of' – the restrictive covenant before he

purchased title to the property. In the modern law, the covenant is likely to require registration on a public register in order to bind a purchaser:

(a) If the servient (burdened) land is registered, the restrictive covenant will be protected if it is the subject of a notice in the register (Land Registration Act 2002, ss 29(2)(a)(i) and 32(3)).

(b) If the servient land remains unregistered:

  (i) any new restrictive covenant will be void against a purchaser unless registered as a land charge under Class D(ii) (Land Charges Act 1972, s 2(5)(ii) and 4(6));

  (ii) only pre-1926 restrictive covenants affecting unregistered land continue to rely on mere notice for protection (Land Charges Act 1972, s 4(6)).

From the point of view of the person who wishes to take the benefit of an interest in land, it is very important therefore that they check that all necessary steps to ensure that the interest is properly created and protected have been taken. We will look at this in greater detail in **Chapters 3** and **5**.

1.7.3 Informal acquisition

Although the general policy in land law is to require compliance with formalities and registration requirements, there are exceptions where rights can be transferred or created informally or by operation of law (such as short leases (LPA 1925, s 54) and trusts created in certain circumstances (LPA 1925, s 53(2)). We examine both the policy and the exceptions in more detail in **Chapter 2**. Similarly, those and other rights may be binding on a purchaser even though unregistered (Land Registration Act 2002, s 29(2)(a)(ii) and Sch 3), and this is covered in **Chapter 5**.

1.8 In what circumstances will rights be binding on a purchaser of land?

A person who is buying or lending money on land wants to know whether they will be bound by or can take advantage of rights and liabilities affecting the land. Looking again at the example of a property to which access is gained by walking or driving over the land of a neighbour, any buyer or mortgagee of the land needs to know whether they can rely on the ability to gain access to the property in this way, even if the neighbouring land is sold. In other words, has an easement been created or merely a personal licence? If it is capable of binding in this way, it is regarded as a proprietary right.

As noted above, whether a proprietary right *actually* binds in each particular case will depend on whether it has been created properly – as a general rule this means compliance with formalities – and whether mechanisms designed to communicate the right to a purchaser – as a general rule this means registration – have been satisfied. Both these general rules are subject to exceptions.

1.9 Complementary and competing interests in land

This leads on to another concept which is of paramount importance in land law. The existence of proprietary rights means that many people can have rights in one piece of land.

In many cases these are complementary because property rights can be multi-layered. It may help a student getting to grips with land law to think in terms of layers or levels of interests.

example

Eve is the freehold owner of a house (to put this in technical language she holds the fee simple absolute in possession (LPA 1925, s 1(1)(a)). Her mother Alison has contributed to the purchase price; it is not a loan or a gift, so under equitable principles (*Dyer v Dyer* (1788) 2 Cox 92) Alison has an equitable interest in the house. Eve holds the house on trust for herself and her mother, most likely in the proportions in which they have contributed. It can be helpful for students to think of both of these interests in the 'freehold ownership layer' of the property:

LEGAL ESTATE	Eve
BENEFICIAL INTERESTS	Eve and Alison

Eve's name appears on the property deeds and, if title is registered, in the proprietorship register of the title. She is the formal owner, but both Eve and Alison are entitled to the benefits of property ownership, for example, the right to live in the property (Trusts of Land and Appointment of Trustees Act 1996, s 12(1)).

Eve, as legal owner, grants a six-month assured shorthold tenancy or lease to Adam, who lives in the house. This creates a new legal estate, a term of years absolute (LPA 1925, s 1(1)(b)), which is a new layer carved out of the 'freehold ownership layer'. This new layer is a hybrid because it is both a new 'ownership layer', in this case 'ownership' of the lease, but also a third party right affecting the freehold. If the lease were longer, it would have its own registered title (leases of more than seven years on grant or transfer are registrable under s 4(1)(c)(i) and s 4(1)(a)(i) of the Land Registration Act 2002) and would also appear as a notice in the charges register of Eve's registered title (leases of three years or more can be noted on the affected title (Land Registration Act 2002, s 32 and s 33(b))).

Eve remains in possession of the freehold estate, which she continues to hold on trust for herself and Alison. Eve and Alison have now given up the right to live in the property to Adam, temporarily, for the duration of his lease. It is no longer available to the beneficiaries of the trust of land for occupation (Trusts of Land and Appointment of Trustees Act 1996, s 12(2)). However, Adam will pay rent to Eve as the legal freeholder, which Eve receives as trustee for herself and Alison, and they enjoy the right to share the rent.

We could add further layers to this; for example, part of the purchase price could have been made up of a mortgage taken out with First Bank by Eve to finance the acquisition. The property may be subject to an easement in favour of the next-door neighbour, Max, to park on the drive of the property, and it may be subject to a restrictive covenant in favour of the neighbour on the other side, Nathan, that the property may only be used for residential purposes.

These rights are capable of existing in a complementary way. In the example above, the mortgagee's consent should have been obtained (either specifically or generally in the wording of the loan agreement) to the grant of the lease to Adam. Similarly, Adam, in taking the lease, will have to observe and respect the easement and restrictive covenant rights.

However, rights can conflict. If the mortgage is unpaid and the mortgagee seeks possession, or Alison as beneficiary under the trust of land and Adam as tenant both want to occupy the property, then the law needs mechanisms to assess who has the right to do so and what rights, if any, the other people are left with. So another issue which land law has to deal with is how a person who wishes to take the benefit of a proprietary right in land can protect it, and how the law will assess the competing priorities of several people with rights in the same land.

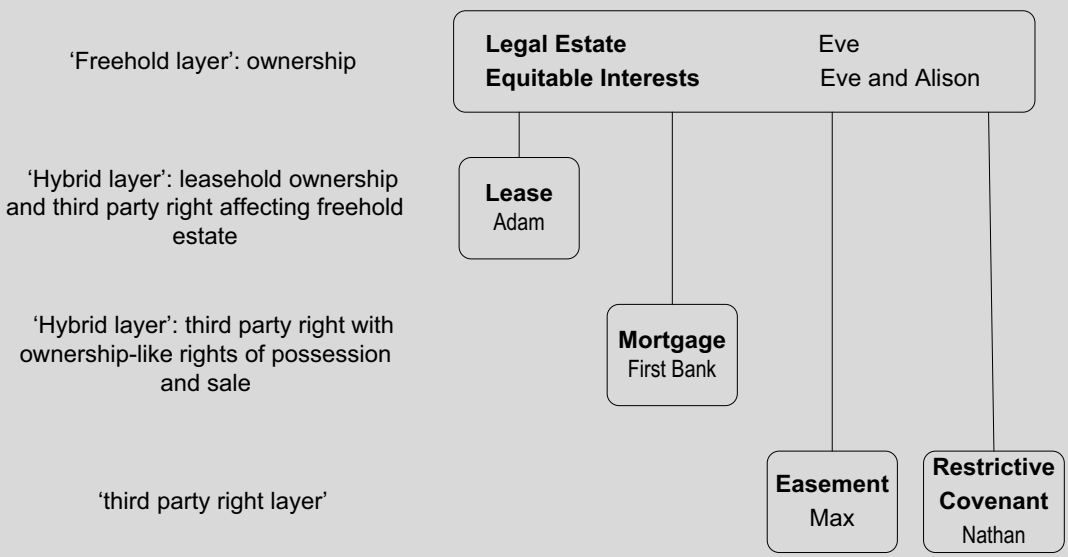

Figure 1.1 Layers of interests

We deal with this in **Chapters 3** and **5**.

1.10 Human rights

Much of this discussion has concerned rights, whether in land and therefore 'against the world' or personal rights against individuals. It is worth putting these in the context of modern understandings of rights contained in the European Convention on Human Rights, incorporated into UK law by the Human Rights Act 1998. Given that property rights can be held by any entity that is recognised in England and Wales as having legal personality, we should explain at the outset that certain articles, such as Article 1 of Protocol No 1, grant rights to natural or legal persons. And Article 34 allows Convention rights to be exercised by any person, non-governmental organisation or group of individuals. In the leading case on Article 1 of Protocol No 1, *JA Pye (Oxford) Ltd v United Kingdom* (2008) 46 EHRR 45, Application No 44302/02, the applicant was a limited company.

The two provisions that relate most closely to property rights are Article 1 of Protocol No 1 and Article 8.

1.10.1 Article 1 of Protocol No 1

Article 1 of Protocol No 1 to the European Convention on Human Rights, incorporated into UK law by the Human Rights Act 1998, provides:

> 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.
>
> 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.

The case of *JA Pye (Oxford) Ltd v United Kingdom* concerned adverse possession, which is a method of acquiring title informally by long usage of land without force, permission of the legal owner or stealth. The common law position is that if a squatter or trespasser on land is in possession of it for a minimum of 12 years, then the legal owner is barred from bringing an action to recover its land (Limitation Act 1980, s 15(1)). Pye was a landowner in such a situation who claimed that the loss of its land to a squatter (the Grahams) breached its rights under Article 1 of Protocol No 1. It was unsuccessful, as the Court held that the limitation period amounted to a control of the use of property, rather than a deprivation of property, and the UK Parliament's view of what was in the public interest would be respected unless manifestly without foundation. A limitation period of 12 years for actions for recovery of land pursued a legitimate aim in the public interest. (Note that in the case of registered land, different limitation provisions now apply; see **2.2.5**.)

The Court stated that:

> Finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one [the Court] will respect the legislature's judgment as to what is 'in the public interest' unless that judgment is manifestly without reasonable foundation.

The rules as to adverse possession were widely known and had been in force for many years (indeed were in force prior to the acquisition of the land by Pye), and therefore Pye was expected to be aware of them when acquiring its title to the land. Pye could have taken relatively small procedural steps to defeat the Grahams' claim; for example, if before the Grahams' claim crystallised on 12 years' adverse possession, Pye had demanded rent from the Grahams and, if refused, brought an action for recovery of the land, this would have been sufficient to defeat the Grahams' claim. The fact that very little action was needed by Pye to stop time

running indicated that the provisions in the Limitation Act 1980 were proportionate between the means employed and the aims pursued.

Although the land was valuable, the value of the land could not affect the application of the principles, and the Court found that the 'fair balance' required by Article 1 of Protocol No 1 had not been breached.

1.10.2 Article 8

Article 8 of the European Convention on Human Rights, incorporated into UK law by the Human Rights Act 1998, provides:

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.

And s 6 of the Human Rights Act 1998 states:

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

(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.

(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.

1.10.2.1 'Home'

The expression 'home'

> … appears to invite a down-to-earth and pragmatic consideration whether (as Lord Millett put it in *Uratemp Ventures Ltd v Collins* [2001] UKHL 43, [2002] 1 AC 301, paragraph 31) 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 (per Lord Bingham in *London Borough of Harrow v Qazi* [2003] UKHL 43 at [8]).

Whether a place is a person's home does not depend on ownership, as the European Commission on Human Rights held that

> '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. (*Buckley v United Kingdom* (1997) 23 EHRR 101, at 115, para 63)

The focus of Article 8 is very different to the focus of much of our property law, in which parties seek to assert property interests or contractual rights. Article 8 is not concerned with property rights to own or occupy property but with freedom from interference by public authorities.

1.10.2.2 'Interference'

Interference with that right must be:

(a) in accordance with the law; and
(b) necessary to satisfy some competing public interest (see the list in Article 8(2) above).

The competing public interests include protections of the rights and freedoms of others; therefore in a case where a public authority (or other public authority within the meaning of s 6 of the Human Rights Act 1998) is exercising contractual or proprietary rights to possession, it is in principle open to the occupier to raise the question whether it is proportionate to make an order for possession against them, and, if it is, to invite the court to take that into account when deciding what order to make (*Manchester City Council v Pinnock* [2011] 2 AC 104 and *Hounslow London Borough Council v Powell* [2011] 2 AC 186).

1.10.3 Where the landlord is a public authority

The *Pinnock* case represented, in Lord Neuberger's words, the 'resolution of a protracted inter-judicial dialogue between the House of Lords and the Strasbourg court …'. In *Pinnock* (at [49]), the Supreme Court concluded that, in the light of the ECtHR's clear and constant jurisprudence,

> 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.

However, the Supreme Court also made it clear at [51] and [54] that it would 'only be in "very highly exceptional cases" that it will be appropriate for the court to consider a proportionality argument' and that 'where … 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'.

Lord Neuberger continued (at [52]):

> 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.

He went on to refer to a point raised by the Secretary of State, which was 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 other words, the local authority need not prove that possession is justified, but that there may be particular cases where 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:

> 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. (per Lord Neuberger)

The Supreme Court's conclusion in *Pinnock* was that proportionality should, if raised, be addressed (albeit that in the great majority of cases it could and should be summarily rejected) in every possession action against a residential occupier by a local authority or other public authority. This is because s 6(1) of the 1998 Act only applies to 'a public authority', given that the Convention is intended to protect individual rights against infringement by the State or its emanations.

1.10.4 Private landlords

In the *Pinnock* case, the Supreme Court made it clear (at [50]) that 'nothing' said in the judgment in that case was 'intended to bear on cases where the person seeking the order for possession is a private landowner', and added that it was 'preferable for this court to express no view on the issue until it arises and has to be determined'. A court is, of course, a public authority for the purposes of s 6 of the Human Rights Act 1998.

In *McDonald v McDonald* [2016] UKSC 28, the Supreme Court held that although Article 8 may be engaged when a private individual is seeking a court order for possession, it cannot be used to justify altering the private relationship between the parties. Thus, Article 8 cannot be used to seek a different outcome in a case involving the no-fault eviction of a tenant under s 21 of the Housing Act 1988. Therefore a court is not entitled to consider the proportionality of the actions under Article 8/s 6 of the Human Rights Act 1998. In *Qazi*, Lord Millett commented (obiter) (at [108]) that in a case for possession between two private individuals, the court is 'merely the forum for the determination of the civil right in dispute between the parties'.

In *McDonald*, the Court also pointed to the danger of inconsistency between judicial and non-judicial possession, as landlords have rights to exercise the self-help remedy of peaceable possession where they simply change the locks on a vacant property. In this situation, there is no recourse to court and therefore Article 8 would not be engaged (see also **11.3.3.1**).

Section 21 permits a landlord to serve two months' notice on a tenant to terminate their assured shorthold tenancy on or after the expiry of the initial term without showing fault on the part of the tenant. This period was extended to three and then six months' notice as a protective measure during the Covid-19 pandemic. It reduced to four months from 1 June 2021 and will return to two months from 1 October 2021.

In 2019, the UK Government announced its intention to abolish 'no fault' by removing s 21 of the Housing Act 1988, and a Bill was included in the Queen's Speech on 19 December 2019. In the Queen's Speech on 11 May 2021, the Government announced its intention to publish a White Paper (a policy document setting out proposals for future legislation) in autumn 2021 on the proposed renters' reforms and to consult further before producing a Bill.

1.10.5 Equality Act 2010

An individual may also enjoy protection under the Equality Act 2010 if they possess one or more of the protected characteristics specified in s 4 of the Act. These are: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religious belief, sex and sexual orientation. The 2010 Act is designed to prevent unlawful discrimination: under s 35(1) various

protections are given, including, at s 35(1)(b), that a person (A) who manages premises must not discriminate against a person (B) who occupies premises by evicting, or taking steps to evict, B from those premises.

Like the Human Rights Act 1998, the 2010 Act can be raised as a defence where the individual has no other right to remain in the property in question. The rights granted under the 2010 Act therefore go beyond establishing the existence of property rights, as stated at [55] in *Akerman-Livingstone v Aster Communities Ltd (formerly Flourish Homes Ltd)* [2015] UKSC 15:

> Section 35(1)(b) provides a particular degree of protection to a limited class of occupiers of property, who are considered by Parliament to deserve special protection. The protection concerned is founded on a desire to avoid a specific wrong in a number of fields, not just in relation to occupation of property, namely discrimination against disabled persons. (per Lord Neuberger)

The *Akerman-Livingstone* case concerned an individual with disabilities who was provided with temporary accommodation by the defendant housing association, in accordance with the local authority's homelessness duties under s 193(2) of the Housing Act 1996. Mr Akerman-Livingstone refused all offers of permanent accommodation, due to his mental ill health. This led to his provision of temporary accommodation being terminated by the local authority, and the housing association sought possession.

The 2010 Act contains specific provisions relating to disability at s 15(1): a person (A) discriminates against a person (B) if A treats B unfavourably because of something arising in consequence of B's disability, and A cannot show that the treatment is a proportionate means of achieving a legitimate aim (unless A did not know and could not reasonably have been expected to know that B had the disability).

The question in *Akerman-Livingstone* was whether the court could take a similar approach to proportionality as that taken under Article 8 ECHR, namely that whilst the question should be addressed, it would be likely that a landlord entitled to possession would be acting proportionately.

Lord Neuberger continued (at [56]) that where the occupier is disabled, the approach in *Pinnock* allowing summary judgment would not normally be appropriate as it is both:

(a) 'significantly less unlikely than in the normal run of cases that an article 8 defence might succeed'; and
(b) in relation to a claim under the 2010 Act, there are likely to be disputed facts or assessments, for example as to whether the individual suffers from a disability, whether the disability has led to the possession claim, and whether

> the landlord can demonstrate that eviction is a proportionate means of achieving a legitimate aim.

As stated, Mr Akerman-Livingstone was an individual with disabilities, but s 35(1) of the 2010 Act also applies to the other protected characteristics set out above.

In addition, unlike the Human Rights Act 1998, the 2010 Act applies to public and private sector landlords alike. Thus:

> … no landlord, public or private can adopt a discriminatory policy towards eviction, for example, by evicting a black person where they would not evict a white. Thus also no landlord, public or private, can evict a disabled tenant 'because of something arising in consequence of [his] disability' unless the landlord can show that this is a proportionate means of achieving a legitimate aim. (per Lady Hale at [24])

Thus the protection given by the Equality Act 2010 is a stronger protection than that given by Article 8 ECHR, and a court should consider proportionality separately in relation to it.

1.11 Further reading

P Birks, 'Before We Begin: Five Keys to Land Law' in s Bright and J Dewar (eds), *Land Law: Themes and Perspectives* (Oxford University Press, 1998), pp 457–86.

AM Honoré, 'Ownership' in AG Guest (ed), *Oxford Essays in Jurisprudence (First Series)* (Oxford: Clarendon Press, 1961), pp 107–47 (<http://nw18.american.edu/~dfagel/OwnershipSmaller.pdf>).

K Gray, 'Property in Thin Air' (1991) 50 CLJ 252.

S Roberts, 'More Lost than Found' (1982) 45 MLR 683.

DC Hoath, 'Some Conveyancing Implications of Finding Disputes' (1990) 54 Conv 248.

S Nield and E Laurie, 'The private-public divide and horizontality in the English rental sector' (2019) Public Law 724–74.

The legal definition of land is contained in s 205(1)(ix) of the Law of Property Act (LPA) 1925. It encompasses not merely the physical land itself but also a wide range of rights associated with it. These include rights above and below the land and intangible rights such as easements.

In English law it is not possible to 'own' the land but instead an 'estate' in the land. The two estates that exist at law are the fee simple absolute in possession (freehold) and term of years absolute (leasehold) (LPA 1925, s 1(1)).

Legal estates and interests are set out in s 1(1) and (2) of the LPA 1925. Section 1(3) provides that all other interests in land take effect in equity.

The distinction between law and equity also refers to the two systems recognised in our land law. Although the two systems have been merged since the Judicature Acts of 1873–75, equity continues to provide a remedy where the 'conscience' of a party is affected and where the common law may not do so.

Proprietary rights are rights in a particular asset, such as land, but may also include rights in personal property, such as jewellery. Subject to certain conditions, they are capable of being exercised 'against the world', no matter into whose hands the asset may come. Personal rights are rights against an individual, rather than against a particular asset. They may be inadequate if the individual in question is bankrupt, cannot be traced or no longer has the asset in their possession.

The unique and permanent nature of land means that it can be subject to multiple rights which may be complementary but which may also compete or conflict. This is reflected in the definition of land referred to above. We will look at how land law resolves these conflicts in later chapters.

Human rights protection applies in the context of land. However, it should be recognised that measures to protect the 'public interest' may be proportionate even though they affect individual rights.

1 Why are rights over land (such as a right to walk or drive over adjoining land) capable of being treated by the law as being as much a part of the land as the ground itself or buildings upon it?

2 Why does the law recognise a distinction between fixtures and chattels?

3 Why should legal systems recognise a distinction between land and other forms of property, such as shares or jewellery?

4 Why is contract law insufficient to deal with rights in land? Why does the law recognise certain rights as being 'proprietary' and capable of binding third parties?

5 What defects in the common law gave rise to equity?

6 What does equity contribute to the modern law? Why is a distinction still recognised between legal and equitable rights in land?

reflection

What is 'ownership'?

In this chapter, we have used words like 'ownership' and 'rights' as ordinary words of the English language. Some theorists have described ownership as a 'bundle of rights' or, more accurately, as rights and duties in relation to an asset that the State selects to be enforceable (see the article by Anthony Honoré in Further Reading). These would be expected to include rights to possess and use, alter or destroy property, rights to prevent others from interfering with those rights and the right to transfer this group of rights to others. The 'bundle of rights' would usually be limited by a duty not to use it for a use that is harmful to others and made subject to 'liability to execution', which means that the interest can be taken away from the owner to settle their debts.

What does being an estate owner mean in English law?

In *Star Energy v Bocardo* [2010] UKSC 35, the Supreme Court confirmed that an owner's right to prevent others interfering with his land was inherent in his right of ownership. Therefore horizontal drilling at substantial depths was an actionable trespass for interference with Bocardo's land regardless of whether it impacted upon the owner's use and enjoyment of the land, and it was irrelevant that he was not making any use of the land at that depth. A focus on use and enjoyment was missing the point that the question was 'essentially one about ownership. As a general rule, anything that can be touched or worked upon must belong to someone' (per Lord Hope at [26]).

What rights are granted by interests in land?

Holding an interest or third party rights in land gives specific rights which are limited by the nature of the right and any terms contained in a document granting it.

For example, the owner of dominant land benefitting from a vehicular right of way over servient land has a right of access onto the servient land both to exercise the easement and to carry out repair works that enable them to exercise the easement. However, they have no right to exclusive possession or to exclude others from the land, and, as we shall see in **Chapter 13**, a purported easement to park may be objected to if the right is so extensive that it deprives the landowner of almost all use of the land (*London & Blenheim Ltd v Ladbroke Retail Parks Ltd* [1992] 1 WLR 1278).