

Week 13 – Lecture 1 – An Introduction: Understanding Property Law**The Course**

- ▶ What is property?
 - What are its characteristics?
 - What distinguishes it from Obligations?
 - Is there something distinct about public as opposed to private property?
 - How do we balance reasonable access to property by non-owners with the owner's right to exclude and exploit?
- ▶ Introducing the rules...
 - Property law rules are not natural or God given – we make them up
 - People from different common law jurisdictions come out with different solutions to the same problem
 - They are technical rules
 - They reflect political power
 - Powerful people make up rules
 - They carry moral weight
- ▶ Rules are designed in a way to make sure what society thinks is the right outcome happens. We may have a different view about the appropriate use of power is there in those rules or the appropriate moral outcome
- ▶ Thinking about the trust
 - How does it change our understanding of ownership
 - Who are the powerful people within the trust document?
- ▶ Tying it all together
 - The Infrastructure Act 2015
 - Puts in some important provisions on fracking and property
 - Puts in some interesting provisions on weed species in private property

'Property' and 'Law'

- ▶ What is it that property law regulates
 - Is it regulating **property** or is it regulating **people**?
 - Property lawyers will say that property law, in contemporary democratic capitalist societies, is probably the most important subject you study
 - Property law regulates people: regulating people's relationships with each other via property, regulating how owners of property interrelate, and regulating how owners and non-owners of property interrelate – has an important societal function especially in a society where property = rich.
- ▶ **(My) property: private, exclusion and 'right to benefit' from use and sale.**
 - Ownership not about the relationship between people and things but about the relationship between people (owners and non-owners) a relationship mediated by things.

Gray and Gray... 'The Idea of Property in Land'

'The common lawyer's understanding of land still hovers between a purely material conception of the **physical** stuff of land and a more cerebral image of land as comprising a coordinated set of **abstract** entitlements. This **underlying tension between the physical and the conceptual has imparted a multi-dimensional complexity to the term...**'

- Stuff and relations to stuff – the tensions between the two leads to complexity of property
- Common law's ambiguity about property is what makes property law very rich

Exclusion and Inclusion

- ▶ Key part of property law and key part of a property owner is the ability to exclude all others from their property – though this is the ideal of property, reality is more difficult because there are people who have conflicting interest i.e. entering land to park car
- ▶ The meta-principles of land law... comprise a number of overarching consensus values that reflect the aggregated wisdom of the land lawyers of any particular era Gray and Gray 71
 - It is the land lawyers who decide who is included and who is excluded
 - If you want to make money in law, property litigation is the way forward.

- Bylaws are local laws that give particular permissions or control permissions to do various things
- If bylaws do that, there is going to be an implied license.
- The interrelationship of the statutory law relating to village greens and other duties imposed by statute.
 - There are other duties imposed by NPP in relation to the use of the land

The question of access to the beach left unresolved

Extent the company can stop people from using the beach or whether oysters found belongs to the company rather than the person who found it.

- NPP succeeds on 2nd point
 - Once one concludes that there is “**an implied revocable permission**” for an activity, it follows that there is a license, which renders the activity in question being carried on “by right” not “as of right”. The fact that permission can be subsequently withdrawn by an action on the part of the authority, such as fencing off, merely means that, when and if that occurs, the permission is withdrawn, so that any subsequent continuation of the activity concerned becomes a trespass and would therefore normally be “as of right”.
 - An implied revocable permission – if a landowner says that they allow access on certain circumstances and reserve the right to change their mind, it is a license. As soon as there is a license, any activity is ‘by right’ and not ‘as of right’.
 - After permission is withdrawn, any subsequent continuation of activity is a trespass and therefore amount to ‘as of right’.
 - Clear incompatibility between NPP’s statutory functions in relation to the Harbor, which it continues to operate as a working harbor, and the registration of the Beach as a town or village green.
 - The two things cannot run side by side. There is statutory incompatibility. Despite the fact that people has been using the land for 80 years, no ‘as of right’
 - There has been no user as of right by the public of the Beach that has interfered with the harbor activities. If there had been such an assertion of right it would not avail the public, because the 2006 Act cannot operate in respect of the Beach by reason of statutory incompatibility.

Conclusion...

- The poet Ovid spoke of time as “the devourer of things” (“tempus edax rerum”. *Metamorphoses* 15.234). In the English law of prescription, user as of right can over time eat into a landowner’s freedom to use land. So too can the 2006 Act.
 - Prescription: use as of right eating into the landowner’s rights
 - But here in this case, it hasn’t happened.
- In this case, however, we conclude that, assuming that there is no general common law right for the public to use the foreshore for bathing and associated recreational activities, the user was by permission in the light of the Byelaws, and that in any event the 2006 Act cannot operate by reason of incompatibility with the statutory basis on which NPP’s predecessors acquired the land, and the statutory purposes for which they held, and now NPP holds, that land.
 - Any use of the beach was by permission by bylaws
 - The act cannot operate where there is statutory incompatibility with NPP’s functions
- **HELD:** Judges said that the village green could interfere with the French’s company operating the port.

2013 Legislative amendments

- Controversial because the legislation stops developers from developing land
- Registrations of town and village greens considered to be interfering with the planning system
 - Government decided that village green legislation interferes with planning.
 - The Government places great importance on the planning system to support efficiency, effectiveness and growth.
- Via an Infrastructure Act, they introduced landowner statements and registers
 - Not stopping use of land but no ‘as of right’ use
- **Time restriction:** Reduced the time limit for applications from 2 years to 1 year following cessation of at least 20 years recreational use

Week 16 – Lecture 7 – Using land – Possession, Title and Land Registration

- Talk about Land Registration in a more conceptual way this week. Next week will be much more technical.

About

- Land Registration Act 2002 –
 - Key piece of legislation we are concerned with
 - There was a Land registration Act 1925 but this is a major update
- **Following the introduction...**
 - Private property
 - Ownership and exclusion
 - Exclusive possession, a real characteristic of property, that is the ability to exclude all others including the landlord
 - Other: extending / contracting
 - Rights in land can extend over somebody else's' land by rights of way, communal use of land for recreation
 - At the same time, somebody's land ownership may be contracted/constrained by those rights
 - Fact / **right** / responsibility
 - G&G's triple approach to property land law about facts, about rights and interest, and about owning land and having responsibilities
 - 'Abstract entitlement' that comes from **right**
 - When we talk about rights, we are talking about abstract entitlements
 - Adding...
 - Land registration is about the state's role in recording ownership of land and everybody's property interest relating to that land
 - The land register have to capture the complexities which will lead to compromises and things being out

When we talk about rights, we are talking about abstract entitlements

State recording land and rights

- Maps and registers – ways of recording ownership, borders and boundaries
- **G&G's observation that property is always about the value invested in that property**
 - They are statements of power / politics / values
 - Military – imperial expansions)
 - Cultural – where things are and what tells us about our culture
 - Taxation – maps are also about raising revenue. Maps are a way of extracting value from the population

G&G's observation that property is always about the value invested in that property**State recording land and rights**

- Maps and registers – what type of rights are out there?
- From looking at the maps, we can see the land available to the public for its use.
- If you are a private owner, you would want to know how your ownership is constrained by the public rights
 - Public rights to land
 - Commons
 - Commons Act 2006
 - GIA 2013
 - PRoW (public rights to way)
 - Highways Act 1980
 - GIA 2015
 - Access land
 - Countryside Rights of Way Act 2000

The Ellenborough Park formula *and its problems*

- **Hunter v Canary Wharf (1997)**
 - The right to television reception was not pleaded as an easement, but the House of Lords nonetheless considered the issue, concluding that such a right **should not be recognised**, as it would place a burden on a wide and indeterminate area. (Lord Hoffmann)
 - But... this may interfere with the people's right to live
- **Miller v Emcer Products (1956)**
 - The right to use lavatories on neighbouring premises belonging to another was upheld as an easement
 - May seem like a case of extensive interference with somebody's land. Thus, it is not easy to predict when the courts will say that an easement goes to far or is acceptable
- **Dowty Boulton Paul v Wolverhampton Corp (No.2) [1976]**
 - The right to use neighbouring land as an airfield was upheld as an easement.

b) Are the rights mere recreation? (Limitation on fourth requirement)

- **Re Ellenborough Park (1956)**: "the full enjoyment ... at all times hereafter in common with the other persons to whom such easements *may be granted of the pleasure ground*".
 - The courts interpreted the right to use the communal garden as something more recreation but it is clear
- But compare it with **International Tea Stores Company v Hobbs (1903) 2 Ch 165 [pure recreational use= no easement]**
 - But it is clear that pure recreation use doesn't give an easement – you need to demonstrate more

The Ellenborough Park formula *and its problems*

- The **judicial animus against recreational easements** has undoubtedly receded in recent times. It may be an index of a hedonistic [...] age that it no longer seems inappropriate to acknowledge the easement character of certain recreational facilities annexed to dominant land. **This is particularly the case where the claim of easement refers to a defined area over which a recreational enjoyment has been given not to the public but to a limited number of lot holders**" Gray & Gray, *Elements of Land Law*, OUP, 2009, 612.
 - They are suggesting that there can be an easement for recreation rights to recreation but probably limited to the defined areas where the access is not public but to a limited number of holders

Very recently...

- **Regency Villas Title Ltd and others v Diamond Resorts (Europe) Ltd and another [2015] EWHC 3564 (Ch); [2015] WLR (D) 506**
- 'There was no legal impediment to a right of recreation taking effect as an easement, provided that the intention to grant an easement, as opposed to a merely personal right, was evident on the proper construction of the grant construed in the light of the material surrounding circumstances.'
 - Interestingly, they are saying that if the parties intended to grant an easement of recreation, there is nothing to stop that from going into effect.
 - Maybe a new level of clarity on recreation of easements?

The Ellenborough Park formula *and its problems*

- **Problem: Exclusive use**
 - For example, this issue is important parking your car on neighboring land, as it would deprive the servient owner of the use of their land
- A right over land capable of forming the subject matter of a grant
- **Easements and Exclusive Use**
- In **Moncrieff v Jamieson (2007)** the House of Lords held that *a right to park* can be an easement, so long as the servient owner remains in possession of his land
- "It is possible to have an easement to park in a parking space provided that the servient owner **has reasonable use of the rest of the tenement**" *Virdi v Chana [2008] EWHC 2901 (Ch)*

- Mental capacity to make a decision
- Have to be a freeholder or leaseholder
- If you are a leaseholder the easement cannot exceed the lease
- The grantee must be capable of receiving a grant
- ii) The right must be sufficiently definite
 - It mustn't be too wide or vague – it must be clear enough what you are allowed to do and what you are not allowed to do
- iii) The right must be in the general nature of rights recognised as easements
- iv) Cannot impose positive burden on servient owner
 - The servient owner should not be required to invest in time and money
- v) Must not deprive the servient owner of all beneficial ownership
 - *Copeland v Greenhalf*
 - The servient owner must still be the owner of the land, in fact not just in name

Can there be an easement of recreational and amusement?

It is also used for the purposes such as domestic purposes, etc. and not only recreational and amusement reasons. Therefore, whether there is an easement for recreational and amusement does not matter. But later, it was discussed that

183-184 in Ellenborough Park

3. How are easements created or acquired in law? In equity?

Mode of creation:

Easements are created expressly, impliedly, or by prescription. *In grant in deed*.

1. Express easements must be i) created by deed and ii) completed by registration LEA 2002 s27 (entry made by the land registry)

If not by deed...

2. Implied easements are legal easements because impliedly incorporated into transfer. Constitute overriding interests. Rationale: a grantor cannot derogate from his grant

i) Easement of necessity (the easement is necessary to get to the plot of land – there is no other way)

ii) Common intention: Case of *Wong* – Wong opened a restaurant on the ground floor. Contained within the grant he would abide by public health elements and get rid of obnoxious smells – the only way to get rid of the smells, he would need to build a vent through the upstairs. He had an easement to build the vent through the upstairs building since the grant consisted an agreement to rid of the smells

iii) Quasi-easement - one can consider the rule in *Wheeldon v Burrows* which gives rise to quasi-easement. Right to light can be granted impliedly if i) it is necessary for reasonable enjoyment in the part of land, ii) it have been or is in use at the time of disposition, and iii) right of light is continuous and apparent.

iv) Under the Law of Property Act 1925, section 62

3. Prescribed easements – law of property tends to legitimise uses of land, which have continued de facto over long periods of time. Acquiring an easement by prescription requires: i) user in fee simple (leaseholders cannot acquire easements by prescription, only freeholders can), ii) continuous user (at least 20 years), iii) user as of right (*nec vi, nec clam, nec precario*)

4. Easements can be created by statutes

Duration

Legal estate of the land – freeholder or leaseholder

Express grant is only created by registration

Easements that do not apply have to be equitable in that case

4. Can a legal easement be acquired without formalities?

Yes, if without deed or registration, legal easements can be created by statute, implied grant, and prescription

5. When do easements have to be registered?

the court would have to decide what was fair based on the whole course of dealing between the parties in relation to the property.

- Aimed to clarify the decision in **Stack v Dowden**. The Court will decide what was fair based on the whole course of dealing. “Exceptional and unusual” becomes the “whole course of dealing” on parties in relation to the property.
 - This comes to play when we consider resulting and constructing trust.
 - Take away: you need to be **precise in your declaration of express trust**.

Co-ownership

- Joint tenants and tenants in common
- Ownership in which two or more persons are simultaneously entitled to possession to an interest or interests in the same property
- Governed by Trusts of Land and Appointment of Trustees Act (TOLATA) 1996
- **Legal title must be held by joint tenants who hold it on trust**
- **Tenants in common can only hold beneficial interest**
 - Beneficial interest can be held by both joint tenants and tenants in common
 - Legal title can only be held by joint tenants

Joint tenancy

- Each joint tenant is said to be wholly entitled to the whole of the estate or interest which is the subject of co-ownership
 - Say that your parents own a family home as joint tenants, each of them own the whole of it simultaneously – cannot identify which bit whom own.
- Can subsist in either a legal or an equitable estate – or both
 - Nb co-ownership of a legal estate in land must take the form of a joint tenancy - LPA 1925 s.1(6)
- **Important:** Joint tenants enjoy as between themselves a **right of survivorship**
 - Jus accrescendi – right of survivorship – **distinguishing feature of a joint tenancy**
 - Means that if one of them dies, other becomes automatically entitled to the whole so it is **not by their will**. If my joint partner dies, I will become the beneficiary owner of that house.
 - Most of the time it is a good thing, but what if the relation turns bad?
- Joint tenancy presupposes the **presence of the four unities** – and where all four unities are present in a multiple holding of land there is joint tenancy
 - All four unities are present in joint tenancy

The four unities

Joint tenancy makes it seem like you own it as one person

- Unity of possession
 - Each joint tenant is as much entitled to possession of every part of the co-owned land as the other joint tenant or tenants
 - You cannot identify which bit of the property one person owns – there is a unity of possession
- Unity of interest
 - The interest held by each joint tenant is necessarily the same in extent nature and duration
- Unity of title
 - Each joint tenant must derive his title to the land from the same act or document
- Unity of time
 - The interest of each joint tenant must normally vest at the same time

Tenants in common

- **Note:** You can't hold legal title but you can own beneficial interest
- The co-owners hold distinct shares
 - There is still unity of possession, but you can have different shares: not 50/50 but 60/40 or etc.
- No right of survivorship
 - What you have is concrete so interest passes via will
- **Only unity of possession is required**
- Equitable ownership only

Property as right.

- Land comprises various assortments of artificially defined jural right.
- Property here is abstract rather than physical.
- Epitomized by doctrine of estates.
- The ingenious compromise of the doctrine of estates has facilitated almost endless disaggregation of title through grants of series of differentially graded estates in land.
- Preserved in the 1925 legislation.
- This confirms the existence of a range of other interests and charges such as easements, mortgages, rights of entry, interests under trust) which can be held at law, or in equity or either.
- The legislation seeks to maintain consistently the dogma that landownership and use are mediated by the distribution, not of land as such, but of intangible jural entitlements interposed between persons and land.

Notes: The more dominant way of thinking now may be the property right. The land comprises of selections of jural rights, legal rights. This idea of property is more abstract than a physical one, and it is epitomised by the doctrines of estates: only two legal estates can exist in land (s 1 LPA 1925). But estates is now almost irrelevant the way we operate other than s 1 LPA 1925, but it is the notion of estates that gave rise to the idea of property as a bundle of rights. There are rights of other interests and charges on land: easements, mortgages, and rights of entry, interests under a trust. This is all about how property is a bundle of things/rights – much more abstract view. Neither perspective totally dominates – the abstract and the material are fused. This license distinction gives us a lot there.

But note...

- Neither perspective prevails - The abstract and the material are fused.
 - **Note:** Neither perspective totally dominates – the abstract and the material are fused. This license distinction gives us a lot there.
- The emphasis on the intangible in property means a premium is placed on strict definitional boundaries.
 - **Note:** G&G also points out that this emphasis of jural rights means that law becomes obsessed with definitional boundaries.
- 'Property' must come in neat, discrete, pre-packaged conceptual compartments, immune from capricious tampering or even well intentioned amplification.
 - **Note:** Property for the lawyer (who comes from the rights perspective), property has to become in neat, discrete, pre-packaged conceptual compartments. We are always defining it.
- We can see this in **leases**.
 - Certainty of terms.
 - **Note:** You can only be leased when there is certainty of terms. The difficulty of certainty of term is that it doesn't necessarily work but it has been insisted on in recent cases.
- And **easements**.
 - No right to an easement can be asserted if it is too vague.
 - **Note:** We insist on definitional clarity.

Why is the rule on easements so strict?

- Conventional explanation is that it prevents the proliferation of undesirable long-term burdens or clogs upon title, which sterilize land.
- However it is far from clear that the restrictive definition of servitudes has any particularly beneficial effect: the admission of broader categories of utility and prohibition with the definition of allowable servitudes might well enhance the enjoyment of land in a crowded environment.
- For G and G what is at stake is the permissible boundary of entrepreneurial imitative in the exploitation and development of land resources.
- Discreteness of definition may well have a critical interface with large issues relating to environmental protection and the quality of urban life.

Note: G&G going to a bit of an aside: why is the rule on easement so strict? However, they say that let's think about it differently – G&G suggest that easements may enhance our enjoyment of land. What they say that is in stake here is the permissible boundary of entrepreneurial initiative in the exploitation and development of land resources. Might that be useful in thinking what is at stake