

PART A

INTRODUCTION



1

WHAT'S SPECIAL ABOUT LAND?

CENTRAL ISSUES

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

1 THE IMPORTANCE OF LAND

No one needs to be told that land is important. In fact, in the United Kingdom, land is something of a national obsession. We would not necessarily think it odd if a friend were to spend the morning on some do-it-yourself jobs in her house, stop to look in the windows of a local estate agency whilst out for lunch, come back to do some gardening in the afternoon, and then spend the evening watching a television programme about the property market, and playing a board game based on buying land and renting out houses in London. And that is only at the weekend, when she is not out at work earning money to make her mortgage payments. And, of course, land can be even more important for those who are not fortunate enough to own a home: a tenant may worry that his landlord will fail to make the necessary repairs to his roof or is about to raise his rent, while someone with nowhere at all to live will face the more urgent task of finding shelter for the night.

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

2 THE SCOPE OF THIS BOOK

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

Similarly, we will not examine the various tort claims that may arise against an occupier of land: if you are injured at a friend's house and claim damages from her, you claim a right to be paid money, not a right to use her land. Nor will we look at the special crimes that may apply where land is concerned: to be seen as criminal, a party's conduct must be deserving of public sanction; it is not enough for that conduct simply to interfere with another party's rights. And we will not look directly at the special statutory responsibilities placed on local authorities: those duties do not necessarily respond to any individual's private right.

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

Equally, we will not examine the special public limits that may be placed on private rights. For example, if you own a house, you may wish to convert it into a block of flats: to do so, you will need planning permission, because your private rights, as an owner of the land, are limited by the need for the approval of a public body.

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

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

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

The socio-historical context

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

The managed fund

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

The fragility of the environment

The notion of land as scarce and fragile is relatively new. The Industrial Revolution created a few black spots. Blake's dark, satanic mills were terrible to behold, but local. It is only relatively recently that we have realized that our transport systems, our power stations, our

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

industrial processes, and our intensive agricultural methods have the potential utterly to destroy this green and pleasant land. The private law of nuisance, the historic role of which was to control annoying activities as between one neighbour and another, cannot sufficiently express the social interest in the safety of this scarce resource. Protection of the environment means more social control of land use. There will have to be more planning control, more conservation legislation, more anti-pollution legislation [...]

Public-sector housing

Local government is nowadays a powerful force in the provision of housing, adding a public law dimension new to land law as it been historically determined. During the Thatcher era the public sector experienced an upheaval, partly from shortage of money, partly from being opened to the private market through the right-to-buy legislation³ [...] The public sector ultimately rests on concepts identical to those of the private sector, overlaid by principles of public law and a mass of highly technical legislation. It is in every way a part of land law, but, because of the mass of detail, it has become a specialism. As a lawyer you have at some stage to decide whether to make yourself an expert in that field. The same is largely true of the statutory regime controlling the relations of landlord and tenant in the private sector.

The core of land law

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

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

The word 'interests' is slightly evasive. The law recognizes different kinds of rights, among them property rights. By 'interest' we mean 'property right'. The category of all property rights (or, in other words and more simply, 'the law of property') is a legal-conceptual category. It differs from, say, the law of dogs in that its subject is a legal concept, the concept of a proprietary right. The core of land law is the subset formed when the conceptual category of 'property right' is confined to one context: the law relating to property rights in land. To

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

focus on that core is neither to downgrade the importance of the units in the next circles nor to forget that in real life all the units which we have identified, and others, cohere together.

3 THREE UNDERLYING QUESTIONS

As Birks suggests, the focus of land law, and hence of this book, is on private *property rights* to use land. We will examine the concept of a property right in Chapters 3 and 4. Birks suggests that land law examines the '*nature, creation and protection*' of property rights relating to land. Certainly, at a very general level, the questions that we will examine in this book can be organized into three broad groups: firstly, there are questions about the *content* of rights to use land; secondly, there are questions about the *acquisition* of rights to use land; thirdly, there are questions about the *defences* available to one party where another party has a right to use land.

For example, imagine that you are interested in buying a house advertised in the window of a local estate agency. It is important to know whether the house is advertised as 'freehold' or 'leasehold'. The point is that the vendor is not simply selling a house: she is selling her *right to use the land*. If you go ahead and buy her house, you will acquire a particular private right to use land. As Birks suggests, land law deals with the nature of her right. In particular, it is vital for you to know the *content* of that right: if you acquire the right, how will you be able to use the land? As we will see in Chapter 3, a freehold will give you ownership of the land for an unlimited period; a leasehold also gives you ownership, but only for a limited period.

Let us say that you have established that the vendor is selling a freehold, and that you have decided to go ahead and make an offer. Your focus will then shift to the *acquisition* question: what has to be done in order for you to acquire the vendor's freehold? In Birks' terms, land law deals with the creation of your right to use the land. There will generally be two stages to the process, often known as 'contract' and 'conveyance'. At the first stage, you need to know (or, at least, your solicitor or conveyancer needs to know) what has to be done in order to reach a legally binding agreement with the vendor. As noted above, there are special rules that regulate contracts to transfer a right such as a freehold. We will examine those rules in this book (see Chapter 9), because they are crucial in defining how a party can acquire a private right to use land.

At the second stage, you need to know (or, at least, your solicitor or conveyancer needs to know) what has to be done in order for you actually to acquire the vendor's freehold: we will also examine those rules in Chapter 9. As we will see, *registration* forms a crucial part of the process: even if you pay the vendor and even if you move into her house, you do not actually acquire her freehold unless and until you are recorded on the central register as holding that right.

If all goes well and you are now registered as holding a freehold, it might seem that you are home and dry. But let us say that one of your new neighbours, when walking to his house from the road, regularly takes a short cut across your new front garden. You (very politely) object to this and he (equally politely) claims that a former owner of your land granted him a right of way over your land. This is the first that you have heard of such a right: in fact, when acquiring your freehold, you checked on the central register and there was no mention of the land being subject to a right of way. In such a case, as we will see in Chapter 6, the *defences* question is crucial. Even if your neighbour can show that he was given a right of way over your land, it may well be that you have a defence to his right and so do not need to let him

walk across your land. In our example, that defence may come from the facts that: (i) you paid for, and registered, your freehold; and (ii) your neighbour failed to have his right of way noted on the register. This is just one example of how land law, to use Birks' words, deals with the protection of rights: it may be that your neighbour should have protected his right by having it noted on the register.

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

4 THE SPECIAL FEATURES OF LAND

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

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

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

Permanence

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

Uniqueness

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

Recovery of the thing itself from X or C?

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

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

Forcing A to transfer the thing itself to B?

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

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

Capacity for multiple simultaneous use

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

1. A buys No.32 Acacia Gardens from A0.
2. A0 owns a local shop and makes A promise, when buying No.32, that neither A nor future owners of No.32 will use it as a shop.
3. A acquires No.32 with a "mortgage" loan: in return for a loan from C Bank, A gives C Bank a security right. C Bank thus has a right, if A fails to pay back the loan, to: (i) remove A and other occupiers from the land; (ii) sell the land; and (iii) use the proceeds to pay off A's debt.
4. In return for payment from E, a neighbour, A gives E a right to reach E's house by using a path crossing the garden of No.32.

5. A then moves away. He decides to keep the land and use it as an investment by renting it to B. So, in return for paying money to A, B is permitted to occupy the land. B uses the land as his home and allows his lover, D, to live with him.

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

Social importance

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

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

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

Limited availability

It is impossible to make more land. This special feature of land has a number of consequences. First, coupled with the many valuable uses to which land can be put, it ensures that land is an *expensive commodity*. For most, acquiring ownership of land is impossible unless a lender, such as C Bank, is willing to provide a substantial loan. In return, C Bank will demand a security right over the land. Second, the limited availability of land intensifies the need for

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

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

the stock of land to be *freely marketable*. As a result, it is particularly undesirable for an owner to remove land from the market by placing permanent restrictions on its use.

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

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

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

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

One of the most distinctive features of land law is that certain types of right to use land (known as 'property rights') can exist *only* in relation to land. This means that, where land is concerned, the *content* of property rights can be more varied than the content of property rights relating to, say, chairs. Many of the property rights that we will examine in later chapters can exist *only* in relation to land: this is the case, for example, with the lease (see Chapters 23 and 24), easement (see Chapter 26), and restrictive covenant (see Chapter 27). Due to the social importance of land, there may be special means by which a party can *acquire* a right to use land. For example, if you set up home with your partner, then, even if your partner is registered as the sole owner of the home, you may nonetheless be able to rely on special rules, developed by the courts, to show that you have acquired a property right: we will examine those rules in detail in Chapter 18. In contrast, the limited availability of land may make it easier for you to lose a property right relating to land: there may be special *defences* that someone can use against your right to use the land. For example, the extract above refers to the doctrine of adverse possession: if you own land, but fail, over a long

period, to assert your right to that land, a squatter may then gain a defence to your property right. We will examine adverse possession in detail in Chapter 10.

5 LAND LAW IN PRACTICE: OCCUPIERS V BANKS

There is no doubt that land law is a difficult subject. In defining and regulating private rights to use land, land law has some very tough choices to make. The best way to see this is by considering some examples. In this section, we will consider the facts and results of two important land law cases, each of which involved a dispute between an occupier of land and a bank. We will return to these cases in later chapters, when we will examine the relevant principles in greater detail. Our purpose here is simply to use these two cases, focusing on one specific aspect of land law, to highlight some of the difficult questions faced by land law and the different ways in which those questions can be approached.

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

5.1 THE CASES AND THE DILEMMA

In *National Provincial Bank v Ainsworth*,⁶ Mr and Mrs Ainsworth lived together in Milward Road, Hastings, Sussex. Mr Ainsworth was registered as owner of the home. In 1957, Mr Ainsworth moved out. In 1958, he borrowed £1,000 from the National Provincial Bank. The money was borrowed as part of a mortgage deal: to secure his duty to repay that sum, plus interest, Mr Ainsworth gave the bank a particular right (a charge) over his home. This meant that, if Mr Ainsworth were to fall behind in his repayments, the bank would have a power to sell the land and use the proceeds to meet his debt. By 1962, Mr Ainsworth had fallen behind on his repayments to the bank. The bank wished to sell the land. To get a good price, the bank knew that it had to sell the home with vacant possession. Because Mrs Ainsworth refused to leave, the bank applied for an order for possession of the home.

The Court of Appeal found that Mrs Ainsworth had a right to occupy the land that bound the bank. On that basis, the bank's claim for possession would fail. But the House of Lords reversed the finding of the Court of Appeal: Mrs Ainsworth had to leave the land. As we will see in Chapter 4, section 5.4, the House of Lords' decision depended on the *content* question: in contrast to the Court of Appeal, it found that Mrs Ainsworth's right did *not* count as a property right and so was not capable of binding the bank.

In *Williams & Glyn's Bank v Boland*,⁷ Mr and Mrs Boland lived together in Ridge Park, Beddington, Surrey. Mr Boland was registered as owner of the home; Mrs Boland also made a substantial financial contribution to the costs of acquiring the home. Mr Boland and his brother were directors of Epsom Contractors Ltd, a building company. To support

⁶ [1965] AC 1175, HL.

⁷ [1981] AC 487, HL.

the business, Mr Boland borrowed money from the Williams & Glyn's Bank. The money was borrowed as part of a mortgage deal: to secure his duty to repay that sum, plus interest, Mr Boland gave the bank a particular right (a charge) over his home. This meant that, if Mr Boland were to fall behind in his repayments, the bank would have a power to sell the land and use the proceeds to meet his debt. Mr Boland had fallen behind on his repayments to the bank. The bank wished to sell the land. To get a good price, the bank knew that it had to sell the home with vacant possession. Because Mrs Boland refused to leave, the bank applied for an order for possession of the home.

The Court of Appeal found that Mrs Boland had a right to occupy the land that bound the bank. On that basis, the bank's claim for possession would fail. The House of Lords upheld the finding of the Court of Appeal: the bank's action for possession therefore failed. The crucial questions were the *content* and *defences* questions: the House of Lords, rejecting the bank's arguments, found that Mrs Boland's right counted as a property right *and* that the bank had no defence to that right. (We will examine the aspect of the *defences* question discussed in *Boland* in Chapter 6, section 3.2.2.)

In both cases, the court had a tough choice to make. As the following extract shows, the special features of land sharpen the court's dilemma. To translate the passage to these two cases, Mr Ainsworth and Mr Boland equate to the party referred to in the passage as 'A'; Mrs Ainsworth and Mrs Boland to 'B'; and the banks take the role of 'C Bank'.

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

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

However, C Bank can make a powerful counter-argument. It may well have made a substantial loan to A: the limited availability of land, along with its social importance, ensures that land has a high value. So, if C Bank is unable to sell the land, it is likely to be left substantially out of pocket. It is also important to think about the wider consequences of finding in favour of B. First, whilst it is easy to have sympathy with B rather than with a faceless bank, it should be remembered that if banks have systematic problems in recovering loans, this can have repercussions not just for the bank's customers but for the wider economy.⁸ Second, if C Bank is unable to sell the land, we need to consider the effect of such a decision on lenders' future practice. Will lenders have to carry out extensive and expensive checks to ensure that there are no other users of the home who may later thwart a lender's attempt to sell the land? After all, as land is capable of multiple, simultaneous use, there may be many potential rights that a lender will need to watch out for. The costs incurred by lenders would then be passed on to borrowers. As land is already very expensive, this will make it harder still for would-be homeowners to enter the market. And, given its limited availability, it would be unfortunate

⁸ The importance to the wider economy of such banks has been dramatically emphasized by the UK government's [nationalization of] Northern Rock plc using powers under the Banking (Special Provisions) Act 2008. The problems faced by that bank, a major 'mortgage' lender, were *not* caused by difficulties faced by the bank in recovering loans, but the highly unusual steps taken by the government nonetheless demonstrate the importance of such banks to the wider economy.

if land became very difficult to trade in. Given we can't produce new land, we should be particularly careful to make sure the land we do have does not become permanently burdened and thus difficult to buy or sell.

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

5.2 TWO POSSIBLE APPROACHES

On the face of it, the facts of *Ainsworth* and *Boland* seem to be very similar—yet the results of the cases differ. Before we examine the specific reasons for that difference, it is worth asking how a court should approach the dispute between the occupier and the bank. In the following extract, Harris contrasts two broad types of possible approach. He opens with a quotation from Max Weber, the influential political economist and sociologist.

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

'The expectations of the parties are oriented towards the economic and utilitarian meaning of a legal proposition. However, from the point of view of legal logic, this meaning is an 'irrational one' [...] a 'lawyers' law' has never been and never will be brought into conformity with lay expectation unless it totally renounce that formal character which is immanent in it. This is just as true of the English law which we glorify so much to-day, as it has been of the ancient Roman jurists or of the methods of modern continental legal thought.'⁹

So wrote Max Weber some seventy years ago. It constitutes one of his leading conclusions about the nature of lawyers' law. It points to a contrast between formal-doctrinal (and hence circumscribed) reasoning which, he claimed, was intrinsic to professional legal thinking, and open-ended consequentialist controversy over the interpretation of legal propositions. If there are rival views as to the meaning of a legal rule, the layman expects the choice to be made according to which version will have the best outcome, all things considered. The professional lawyer, however, will settle the issue by reference to doctrinal arguments based upon existing legal materials.

I propose to examine this alleged contrast in the context of current issues concerning interests in land in English law. I shall argue that the dichotomy exists, but not in the stark Weberian form. Consequentialist interpretation is not, from the point of view of legal logic, 'irrational'. On the contrary, it constitutes the basis of one professionally accepted style of reasoning—what I call the 'utility model of rationality'. However, the 'doctrine model of rationality'—along with two other models—also plays a crucial role in the development of the law. To the extent

⁹ Weber, *Law in Economy and Society* (ed Rheinstein, 1954, pp 307–8).

that 'policy' can never totally displace doctrine, so long as our legal institutions retain anything like their present character, Weber was correct [...] if we want to ditch doctrine, we need to invent new institutions, new lawyers, and a new conception of 'law' itself.

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

Was either of those models important in the House of Lords' decisions in either *Ainsworth* or *Boland*? To test this, we can examine an extract from each decision.

5.3 THE APPROACH IN AINSWORTH

In the following passage, Lord Wilberforce considers the nature of Mrs Ainsworth's right to occupy her home; that right, arising when her husband left her, was known as a 'deserted wife's equity'. The Court of Appeal, led by Lord Denning MR, had held that the 'deserted wife's equity' was capable of binding a third party, such as a bank later acquiring a charge over the land. The House of Lords, however, rejected that analysis.

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

Lord Wilberforce

At 1241–3

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

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

The issue is thus a narrow one, affecting a small proportion only of those deserted wives who are left in occupation of their husband's house. Nevertheless as to them, as to [Mrs Ainsworth], issues of importance, and probably of hardship, are involved. The ultimate

question must be whether such persons can be given the protection which social considerations of humanity evidently indicate without injustice to third parties and a radical departure from sound principles of real property law [...]

The appeal raises two questions, one of general, the other of more limited scope.¹⁰ The general question is whether the respondent Mrs. Ainsworth as the deserted wife of her husband, the owner of the house, has any interest in or right over it which is capable of binding the bank as the proprietor of a legal interest in the land. This is a general question of real property law [...]

I turn to the first and more general question: what is the nature of the deserted wife's interest, or right? In the cases which have evolved from 1952 onwards it is variously described: it is called an "equity," a "clog," a "licence," a "status of irremovability." The description is shifting and evolutionary as different situations appear. I shall have to refer to some of these cases in some detail. But before doing so I think it useful to look at the wife's situation more generally, as it stands under well-established principles of law. After all, married women and deserted wives are familiar enough in our legal system and there cannot be much doubt what their rights are [...]

At 1247–8

[Having analysed the duties imposed on Mr Ainsworth by the deserted wife's equity, Lord Wilberforce continued thus:]

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

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

On any division, then, which is to be made between property rights on the one hand, and personal rights on the other hand, however broad or penumbral the separating band between these two kinds of rights may be, there can be little doubt where the wife's rights fall. Before a right or an interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by

¹⁰ [The second question was whether, even if Mrs Ainsworth's right counted as a property right, the bank had a defence to that right. We will consider the particular defence raised by the bank in Chapter 6, section 3.2.2. In the end, because the House of Lords decided that Mrs Ainsworth did not have a property right, there was no need for the bank to rely on that defence.]

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.

A key passage from that extract may help to reveal Lord Wilberforce's approach to the case:

The ultimate question must be whether [Mrs Ainsworth] can be given the protection which social considerations of humanity evidently indicate without injustice to third parties and a radical departure from sound principles of real property law.

The sentence contains two suggestions. Firstly, whilst there may be good reasons for allowing Mrs Ainsworth the chance to remain in her home, there may also be good reasons for protecting a lender, such as the National Provincial Bank. That point alone is consistent with the 'utility model'—that is, of weighing up the practical advantages and disadvantages of favouring either the occupier or the bank. Secondly, and much more important, is the need to avoid a '*radical departure from sound principles of real property law*'. As noted by Harris,¹¹ that part of the statement gives prominence to the 'doctrinal model'—that is, a decision in favour of Mrs Ainsworth can be made only if it can be reconciled with the doctrinal, technical rules of land law. And, according to Lord Wilberforce, those rules meant that Mrs Ainsworth's right could count as a property right (a right capable of binding the bank) only if it was '*definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability*'. Because Mrs Ainsworth's right did not have those features, the *content* question was decided against her and the bank was therefore free to remove her from her home.

5.4 THE APPROACH IN *BOLAND*

Before looking at an extract from the House of Lords' decision in *Boland*, it is useful to look at the Court of Appeal's decision in that case and, in particular, parts of Lord Denning MR's judgment.

***Williams & Glyn's Bank v Boland* [1979] 2 WLR 550, CA**

Facts: There was a clear difference between the facts of *Ainsworth* and those of *Boland*. Unlike Mrs Ainsworth, Mrs Boland had made a significant financial contribution to the cost of the land owned by her husband. As a result, Mrs Boland's right differed from the 'deserted wife's equity' of Mrs Ainsworth. Instead, Mrs Boland had a right under a trust of the land (see further Chapters 4, 18, and 19). Nonetheless, the bank argued that, like the 'deserted wife's equity', that right failed the *content* test: it did not count as a property right that could bind a third party, such as the bank, later acquiring a right in the land. This argument was based on a land law technicality: the doctrine of 'conversion', which we will examine in Chapter 19, section 5.3. According to the bank, it meant that Mrs Boland's right under the trust did not give her a right enabling her to use the land: it only gave her a right to a share of any money made by her husband from the land.

¹¹ See Harris, 'Legal Doctrine and Interests in Land' in *Oxford Essays in Jurisprudence* (3rd series, eds Eekelaar and Bell, 1987, n 60), in which that part of Lord Wilberforce's statement is highlighted.

The bank also made a second argument: even if Mrs Boland did have a property right that was capable of binding the bank, the bank had a *defence* to that right. The particular defence relied on by the bank was provided by a land registration statute and was based on the fact that, when the bank acquired its charge, Mrs Boland's right was not noted on the entry in the register relating to her home. As we will see in Chapter 6, that 'lack of registration defence' does *not* apply if the party with the unregistered property right is in 'actual occupation' of the land. In such a case, the property right held by the party in occupation is known as an 'overriding interest'—that is, a right that is immune from the lack of registration defence (see further Chapter 6, section 3.2.2, and Chapter 16). Because Mrs Boland had lived in the home throughout, it seemed clear that she was in actual occupation and therefore that the bank could *not* use the lack of registration defence. But the bank had another technical argument: it contended that, where a wife occupies alongside her husband, the wife does not count as a person in 'actual occupation'. This argument is based on the idea that, if the bank were to investigate the land before making its loan to the husband, the presence of the wife there would *not* alert the bank to the risk that she had a property right in the land. After all, even if the wife were to have no property right, it would be no surprise to see her sharing occupation with her husband.

Each of the bank's two technical arguments was rejected by the Court of Appeal and the House of Lords. The *content* and *defences* questions were thus decided in Mrs Boland's favour: her right under the trust counted as a property right in land and, due to her actual occupation, the lack of registration of that right did not give the bank a defence to it.

Lord Denning MR

At 556–7

To clear the air, I would put on one side the cases from 1949 onwards about deserted wives. In those cases the wife had no share whatever in the matrimonial home. She was a "bare" wife [...] In this court we gave her the protection which she rightly deserved. But the House of Lords stripped her of it. They held that she had no protection against a lender who took security on the matrimonial home: see *National Provincial Bank Ltd. v. Ainsworth*¹² [...]

Alongside the deserted wife's equity, there was another development of even greater significance. It was the concept of the 'wife's share' in the matrimonial home. In former times the house was usually conveyed into the name of the husband alone. He was the one who went out to work, earned the money, paid the deposit and the mortgage instalments. But when the wife went out to work, things changed. Her earnings came in very useful. They went into the family pool. Out of it the outgoings were paid including the deposit and the mortgage instalments. The conveyancers in the old days would have held that the wife gained no interest whatever in the house by reason of her contributions. She got no share in the house itself. Nor, if it was sold, did she have any share in the proceeds of sale. For the simple reason that she could show no contract, no legal right whatever to support any claim [...] But by a remarkable series of decisions—I do not hesitate, looking back, to call them remarkable—it was held that when a wife contributed in money or money's worth to the purchase of the house, she acquired a share in it [...]

But the decisions were justified in the next year by the House of Lords on a very new—and very acceptable—ground. It was in *Gissing v. Gissing*¹³ when the House held that, in these

¹² [Lord Denning MR referred to the House of Lords' decision as *National Provincial Bank Ltd v Hastings Car Mart Ltd*: that is an alternative name for the same case.]

¹³ [1971] AC 886.

cases of the matrimonial home, a wife, who contributes in money or money's worth, does obtain a proprietary interest. It is done by way of a trust imposed on the husband [...]

What is the nature of this trust? It was suggested to us that it was not a trust of the house itself, but only a trust in the proceeds of sale. That cannot be right. When a married man and his wife buy a house, they do it so as to live in it—so that it should be home for them both and their children—for the foreseeable future. They do not intend to sell it—at any rate not for many years hence. In determining what the nature of the trust is, the court must give effect to the intention of the parties—to be inferred from their words and conduct... In nearly all these cases the inexorable inference is that the husband is to hold the legal estate in the house in trust for them both—for both to live in for the foreseeable future. The couple do not have in mind a sale—nor a division of the proceeds of sale—except in the far distance.

The wife clearly has rights. The only question is whether she is herself a person “in actual occupation of the land”. [...] In *Caunce v. Caunce*¹⁴ Stamp J. seems to have held that, when a wife was living in the matrimonial home with her husband, it was the husband alone who was in actual occupation of it. The wife was not. Stamp J. said that she:

“[...] was not in apparent occupation or possession. She was there, ostensibly, because she was the wife, and her presence there was wholly consistent with the title offered by the husband to the bank”¹⁵ [...]

[At first instance in *Boland*, Templeman J accepted that Mrs Boland was not in actual occupation] when he said:

“actual occupation for the purposes of [the relevant registration statute] does not include the position of the wife of the legal owner who is in occupation.”

Any other view, he said, would lead to chaos.

I profoundly disagree. Such statements would have been true a hundred years ago when the law regarded husband and wife as one: and the husband as that one. But they are not true today.

I do not think those statements can stand with the decision of this court in *Hodgson v. Marks*:¹⁶ nor with the standing of women in our society today. Most wives now are joint owners of the matrimonial home—in law or in equity—with their husbands. They go out to work just as their husbands do. Their earnings go to build up the home just as much as their husband's earnings. Visit the home and you will find that she is in personal occupation of it just as much as he is. She eats there and sleeps there just as he does. She is in control of all that goes on there—just as much as he. In no respect whatever does the nature of her occupation differ from his. If he is a sailor away for months at a time, she is in actual occupation. If he deserts her, she is in actual occupation. These instances all show that “actual occupation” is matter of fact, not matter of law. It need not be single. Two partners in a business can be in actual occupation. It does not depend on title. A squatter is often in actual occupation. Taking it simply as matter of fact, I would conclude that in the cases before us the wife is in actual occupation [...]

Once it is found that a wife is in actual occupation, then it is clear that in the case of registered land, a purchaser or lender would be well advised to make inquiry of the wife. If she then discloses her rights, he takes subject to them. If she does not disclose them, he takes

¹⁴ [1969] 1 WLR 286.

¹⁵ [1986] 1 WLR 286, 293.

¹⁶ [1971] Ch 892. [We will examine that decision in Chapter 4, section 4, and Chapter 6, section 3.2.2. As we will see, it did not involve the actual occupation of a wife and so, technically, is not incompatible with the views expressed by Stamp J and Templeman J.]

free of them. I see no reason why this should cause any difficulty to conveyancers. Nor should it impair the proper conduct of businesses. Anyone who lends money on the security of a matrimonial home nowadays ought to realise that the wife may have a share in it. He ought to make sure that the wife agrees to it, or to go to the house and make inquiries of her. It seems to me utterly wrong that a lender should turn a blind eye to the wife's interest or the possibility of it—and afterwards seek to turn her and the family out—on the plea that he did not know she was in actual occupation. If a bank is to do its duty, in the society in which we live, it should recognise the integrity of the matrimonial home. It should not destroy it by disregarding the wife's interest in it—simply to ensure that it is paid the husband's debt in full—with the high interest rate now prevailing. We should not give monied might priority over social justice. We should protect the position of a wife who has a share—just as years ago we protected the deserted wife. In the hope that the House of Lords will not reverse us now as it did then [...]

In my opinion [Mrs Boland] is entitled to be protected in her occupation of the matrimonial home. The bank is not entitled to throw [her] out into the street—simply to get the last penny of the husband's debt.

***Williams & Glyn's Bank v Boland* [1981] AC 487, HL**

Lord Denning MR was clearly concerned that, as had occurred in *Ainsworth* over fifteen years earlier, the House of Lords would reverse the decision of the Court of Appeal and favour the bank rather than the occupier. His Lordship's fears were, however, unjustified.

Lord Wilberforce

At 502–9

My Lords, these appeals [...] raise for decision the same question: whether a husband or a wife, (in each actual case a wife) who has a beneficial interest in the matrimonial home, by virtue of having contributed to its purchase price, but whose spouse is the legal and registered owner, has an 'overriding interest' binding on a mortgagee who claims possession of the matrimonial home under a mortgage granted by that spouse alone. Although this statement of the issue uses the words 'spouse,' 'husband and wife,' 'matrimonial home,' the appeals do not, in my understanding, involve any question of matrimonial law, or of the rights of married women or of women as such. Exactly the same issue could arise if the roles of husband and wife were reversed, or if the persons interested in the house were not married to each other. The solution must be derived from a consideration in the light of current social conditions of the Land Registration Act 1925 and other property statutes [...]

I now deal with the first question. Were the wives here in 'actual occupation'? These words are ordinary words of plain English, and should, in my opinion, be interpreted as such [...]. Given occupation, i.e., presence on the land, I do not think that the word 'actual' was intended to introduce any additional qualification, certainly not to suggest that possession must be 'adverse': it merely emphasises that what is required is physical presence, not some entitlement in law. So even if it were necessary to look behind these plain words into history, I would find no reason for denying them their plain meaning.

Then, were the wives in actual occupation? I ask: why not? There was physical presence, with all the rights that occupiers have, including the right to exclude all others except those having similar rights. The house was a matrimonial home, intended to be occupied, and in fact occupied by both spouses, both of whom have an interest in it: it would require some

special doctrine of law to avoid the result that each is in occupation. Three arguments were used for a contrary conclusion. First, it was said that if the vendor (I use this word to include a mortgagor) is in occupation, that is enough to prevent the application of the paragraph. This seems to be a proposition of general application, not limited to the case of husbands, and no doubt, if correct, would be very convenient for purchasers and intending mortgagees. But the presence of the vendor, with occupation, does not exclude the possibility of occupation of others. There are observations which suggest the contrary in the unregistered land case of *Caunce v. Caunce*, but I agree with the disapproval of these, and with the assertion of the proposition I have just stated by Russell L.J. in *Hodgson v. Marks*.¹⁷ Then it was suggested that the wife's occupation was nothing but the shadow of the husband's—a version I suppose of the doctrine of unity of husband and wife. This expression and the argument flowing from it was used by Templeman J. in *Bird v. Syme-Thomson*,¹⁸ a decision preceding and which he followed in the present case. The argument was also inherent in the judgment in *Caunce v. Caunce* which influenced the decisions of Templeman J. It somewhat faded from the arguments in the present case and appears to me to be heavily obsolete. The [bank's] main and final position became in the end this: that, to come within the paragraph, the occupation in question must be apparently inconsistent with the title of the vendor. This, it was suggested, would exclude the wife of a husband-vendor because her apparent occupation would be satisfactorily accounted for by his. But, apart from the rewriting of the paragraph which this would involve, the suggestion is unacceptable. Consistency, or inconsistency, involves the absence, or presence, of an independent right to occupy, though I must observe that 'inconsistency' in this context is an inappropriate word. But how can either quality be predicated of a wife, simply qua wife? A wife may, and everyone knows this, have rights of her own, particularly, many wives have a share in a matrimonial home. How can it be said that the presence of a wife in the house, as occupier, is consistent or inconsistent with the husband's rights until one knows what rights she has? And if she has rights, why, just because she is a wife (or in the converse case, just because an occupier is the husband), should these rights be denied protection under the paragraph? If one looks beyond the case of husband and wife, the difficulty of all these arguments stands out if one considers the case of a man living with a mistress, or of a man and a woman—or for that matter two persons of the same sex—living in a house in separate or partially shared rooms. Are these cases of apparently consistent occupation, so that the rights of the other person (other than the vendor) can be disregarded? The only solution which is consistent with the Act [i.e. the land registration statute] and with common sense is to read the paragraph for what it says. Occupation, existing as a fact, may protect rights if the person in occupation has rights. On this part of the case I have no difficulty in concluding that a spouse, living in a house, has an actual occupation capable of conferring protection, as an overriding interest, upon rights of that spouse [...]

This brings me to the second question, which is whether such rights as a spouse has under a trust for sale are capable of recognition as overriding interests—a question to my mind of some difficulty [...]

As Lord Denning M.R. points out, to describe the interests of spouses in a house jointly bought to be lived in as a matrimonial home as merely an interest in proceeds of sale, or rents and profits until sale, is just a little unreal [...]

I would only add, in conclusion, on the appeal as it concerns the wives a brief observation on the conveyancing consequences of dismissing the appeal. These were alarming to Templeman J., and I can agree with him to the extent that whereas the object of a land registration system is to reduce the risks to purchasers from anything not on the register, to

¹⁷ [1971] Ch 892, 934.

¹⁸ [1979] 1 WLR 440, 444.

extend (if it be an extension) the area of risk so as to include possible interests of spouses, and indeed, in theory, of other members of the family or even outside it, may add to the burdens of purchasers, and involve them in enquiries which in some cases may be troublesome.

But conceded, as it must be, that the Act, following established practice, gives protection to occupation, the extension of the risk area follows necessarily from the extension, beyond the paterfamilias, of rights of ownership, itself following from the diffusion of property and earning capacity. What is involved is a departure from an easy-going practice of dispensing with enquiries as to occupation beyond that of the vendor and accepting the risks of doing so. To substitute for this a practice of more careful enquiry as to the fact of occupation, and if necessary, as to the rights of occupiers can not, in my view of the matter, be considered as unacceptable except at the price of overlooking the widespread development of shared interests of ownership.

5.5 COMPARING THE APPROACHES IN *AINSWORTH* AND *BOLAND*

Clearly, the House of Lords reached different results in *Ainsworth* and *Boland*. In the former case, the bank's claim for possession was successful; in the latter, that claim was denied and the occupying wife won out. From a doctrinal point of view, that difference can be simply explained: it depends on the different *content* of the right held by each occupier. Mrs Ainsworth's right, a 'deserted wife's equity', was not seen as capable of binding the bank; Mrs Boland's right, arising under a trust of the land, was capable of doing so. Harris argues, however, that there is also a difference in the underlying approach adopted by the House of Lords in each case.

Harris, 'Legal Doctrine and Interests in Land' in *Oxford Essays in Jurisprudence* (3rd series, eds Eekelaar and Bell, 1987, pp 183–4)

In the *Ainsworth* case, the principal substantive objections to admitting that a deserted wife's right could bind her husband's successors [including the bank] were these: first, such successors, not being acquainted with the details of intramarital relations, could not be expected to know whether the right had arisen; and, second, the right had an evanescent quality, since it could always be terminated by the court in the exercise of its discretion. If these objections had been fed into a consequentialist calculation, they might have been outweighed by the injustice-consequences to wives of not recognizing the right's proprietary status. In *Boland*, precisely comparable objections were so outweighed. An equitable co-owner's interest [i.e. a right such as that held by Mrs Boland] may arise through an implied trust whose existence depends on private dealings beyond the ken of purchasers and mortgagees [such as the bank]... The two considerations acquired special force in *Ainsworth* because, in contrast with *Boland*, the doctrine model, rather the utility model, structured the reasoning. Their Lordships asked themselves, not whether a ruling one way or the other would have best consequences, but whether the right under review had the characteristics we expect to find in an interest in land. It did not. It was obviously not transmissible by the wife; and it was lacking in clarity and permanence.

Harris's analysis emphasizes the fact that, *at a general level*, each of *Ainsworth* and *Boland* raised the same question: should the pre-existing right of an occupier, even if it was not created by the bank nor was necessarily easy for the bank to discover, bind the bank? In *Ainsworth*, the facts that the occupier's right was uncertain and hard to discover led the court, adopting a technical, doctrinal approach, to find that her right could not bind the bank, because it did not count as a property right. In *Boland*, those same facts did not stand in the occupier's way. Harris suggests this is because, in *Boland*, the House of Lords: (i) prioritized the need to reach what it regarded as a just result; and (ii) decided that it was just to require banks, before lending money to an owner of land, to check whether any other occupier of that land claimed a right in relation to that land, and, if so, to get the consent of that occupier to any right that the owner might give the bank.

Nonetheless, it would be oversimplistic to say that, in *Ainsworth*, the court preferred doctrine and ignored the practical effects of its decision, whilst, in *Boland*, the opposite was true. Indeed, Harris goes on to point out that, in land law as in other areas, judges never entirely jettison doctrinal reasoning.¹⁹ For example, Harris notes that, in *Boland*, the House of Lords did not state, and *could not* have said, that: “*Wives, but only wives, ought to be protected against banks, but only banks.*” [...] *Parliament may enact such distinctions, but it is unthinkable that an English court would.*”²⁰ The point is that, in *Boland*, the House of Lords' decision depended on its assessment of the nature of Mrs Boland's right: a right under a trust. As a result, its decision must necessarily apply to anyone who has such a right and is in occupation of land; doctrinally, it cannot be limited to wives.

Further, Conaglen has persuasively argued that, despite the emotive rhetoric of Lord Denning MR in the Court of Appeal (*W[e] should not give monied might priority over social justice*), the House of Lords in *Boland* simply adopted a ‘commonsense application’ of the land registration statute and *‘the result was driven by the statutory regime far more than it was by social justice concerns to protect wives over money lenders.’*²¹ Certainly, any reader of either the Court of Appeal or House of Lords decisions in *Boland* will be struck by the careful, technical analysis carried out by each court.

5.6 LESSONS FROM AINSWORTH AND BOLAND?

Although *Ainsworth* and *Boland* each focus on one particular corner of land law, they can provide us with a number of general lessons. Firstly, as we noted in section 1 above, land law is clearly very important in practice: the decisions in each case had significant practical consequences not only for Mrs Ainsworth, Mrs Boland, and the respective banks, but also for thousands of other occupiers and mortgage lenders sharing their positions.

Secondly, the cases focused on whether the occupier had a *private right* to use land that she could assert against the bank: the key question was whether the occupier had an interest in land (i.e. a property right) that could bind the bank. As we noted in section 2, other cases at the core of land law also focus on that key question.

Thirdly, in analysing the decisions in *Ainsworth* and *Boland*, it is useful to focus on the *content*, *acquisition*, and *defences* questions. As suggested in section 3 above, those questions

¹⁹ At pp 196–7, Harris notes that *‘even where consequentialism dominates the elucidation of some interest made dispositive by a legal rule, as in the Boland case, the range of possible interpretations is limited by the immanent necessity to give the concept some definite meaning’.*

²⁰ Harris, at p 177.

²¹ Conaglen, ‘Mortgagee Powers Rhetoric’ (2006) 69 MLR 583, 587.

are a useful way in which to break down the key question of whether one party can assert a property right against another.

Further, as Harris's analysis shows, cases such as *Ainsworth* and *Boland* also raise a broader question about the approach that a court should adopt when deciding a dispute about private rights to use land. The 'utility model' focuses on finding an outcome with the best practical consequences. As suggested in section 5.1 above, however, *Ainsworth* and *Boland* also demonstrate that the special features of land, discussed in section 4 above, can make that model particularly difficult to apply. Indeed, McFarlane's analysis, quoted in section 5.1 above, suggests that it may be impossible to resolve such disputes simply by weighing up the factors favouring each party. As a result, the 'doctrinal model', which aims for a result consistent with the existing, technical rules, is pervasive in land law. Certainly, according to Harris, the doctrinal approach is dominant in *Ainsworth* and is also present, even if outweighed by the 'utility model', in *Boland*.

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

This should not be taken to mean that the 'utility model' is irrelevant or that there is no need to consider the practical merits or wider justice of the doctrinal rules of land law. On the contrary, the social importance of land law means that it is vital not only to understand land law rules, but also to evaluate them. After all, land law, like other areas of law, necessarily changes over time; those changes must be based on a view that the previous legal rules were, in some way, deficient. We can see this by briefly considering developments occurring after *Ainsworth*.

5.7 AINSWORTH: LATER DEVELOPMENTS AND FURTHER LESSONS

We have seen that Harris viewed the approach of the House of Lords in *Ainsworth* as based on the 'doctrinal model'. Harris also considered some of the benefits of that approach.

Harris, 'Legal Doctrine and Interests in Land' in *Oxford Essays in Jurisprudence* (3rd series, eds Eekelaar and Bell, 1987, pp 170–1)

[In many instances] to be found in land-law books, courts invoke doctrine to settle disputed questions about the present law. Should they do so? Weber purports to offer explanations, not justifications, of different kinds of professional legal reasoning. Yet he accepts uncritically one of the common rationales for doctrine as against policy, namely, that it augments the certainty and predictability of the law:

'Juridical formalism enables the legal system to operate like a technically rational machine. Thus it guarantees to individuals and groups within the system a relative maximum of freedom

and greatly increases for them the possibility of predicting the legal consequences of their actions.'²²

Two other justifications for doctrinal reasoning (not mentioned by Weber) lie close to the surface of the present-day legal culture. They concern 'separation of powers' and the 'rule of law'. If judges resolve an uncertain question about the present law by an assessment and balancing of social consequences, are they not trespassing on the functions of the legislature?

This analysis suggests that, in developing and reforming land law, there are some options open to Parliament that are not available to judges. For example, as noted above, Harris argued that it would be 'unthinkable' for a judge to come up with a rule that, in a dispute between an occupier and a party later acquiring a right in land, the former will win whenever she is a wife and the later party is a bank. In contrast, Parliament has the sovereign authority needed to make such doctrinally unjustified distinctions, and it can do so if it believes such a rule will have beneficial consequences.

We can see this by considering the Matrimonial Homes Act 1967—that is, Parliament's response to the House of Lords' decision in *Ainsworth*. That Act established: (i) that a spouse has a (qualified) statutory right to occupy a home owned by his or her partner; and (ii) that the statutory right to occupy, if protected by registration, was capable of binding a third party, such as a bank, later acquiring a right in relation to the matrimonial home. Parliament thus reformed the law by coming up with a specific, tailored solution that it believed formed the best compromise between the need to protect an occupying spouse and the need to protect a third party such as a bank.²³ That compromise, now found in the Family Law Act 1996 (FLA 1996), ss 30–33, avoids the doctrinal question of whether the right to occupy counts as a property right; instead, the right is allowed to bind a third party, such as a bank, *only* if it is registered. Actual occupation cannot protect the statutory right to occupy: if it is not registered, it cannot bind a third party. And, even if the right is registered, a court still has the discretion to allow a third party to remove the occupying spouse.²⁴

The contrast between the approach adopted in *Ainsworth* and the solution implemented by the Matrimonial Homes Act 1967 reflects a wider tension in land law—that is, between judicial and legislative reform. At a number of points in this book, we will come across land law rules that are subject to disapproval. At such points, it is important to consider not only *if* the rules should be changed, but also *how* they should be changed. As we will see in Chapter 18, a topical example of this problem concerns the acquisition of rights under a trust of a family home. For example, we have seen that the key difference between *Ainsworth* and *Boland* is that, in the latter case, Mrs Boland had a right capable of binding a third party: a right under a trust. Mrs Boland acquired such a right as a result of making a financial contribution to Mr Boland's purchase of the home. According to Lord Denning MR in the Court of Appeal in *Boland*, the courts' willingness to recognize such rights stems from a 'remarkable series of decisions'²⁵ confirmed by the House of Lords in 1970 in *Gissing v Gissing*.²⁶

²² Weber, *Law in Economy and Society* (ed Rheinstein, 1954, pp 226–7).

²³ That solution has been extended so that it now applies to parties in a civil partnership as well as to spouses: see Civil Partnership Act 2004, s 82 and Sch 9, para 1, amending Pt 4 of the Family Law Act 1996.

²⁴ See Family Law Act 1996, s 33: *Kaur v Gill* [1988] Fam 110 provides an example of the court exercising that discretion in favour of a third party.

²⁵ [1979] 2 WLR 550, 557.

²⁶ [1971] AC 886.

It has often been said, however, that the courts have not gone far enough in recognizing such rights: for example, it has been argued that it ought to be easier for a partner to acquire a right even where he or she has *not* made a financial contribution to the purchase of his or her partner's land. If those arguments are correct, the question then is *how* the law should be changed: by Parliament or by the courts? In particular, is it legitimate for judges to change the law in order to reflect changes in society—or is that exclusively the province of an elected legislature?

The topical debate around when a partner can acquire a right under a trust of a family home also raises a further general issue that underlies Parliament's response to the House of Lords' decision in *Ainsworth*. The question here is not whether the land law rules should be reformed by Parliament or by the courts; it is the logically prior question of whether the necessary changes can be made *without reforming land law at all*. A good example of this is provided by the Law Commission's recent work on the family home, which we will examine in detail in Chapter 18, section 4. Initially, that work attempted to respond directly to the criticism that the land law rules make it too difficult for a partner to acquire a right under a trust of a family home.²⁷ The Commission concluded, however, that it was impossible to come up with a satisfactory legislative scheme setting out precisely when a partner should acquire such a property right.²⁸ Its focus therefore shifted away from a core land law question (when a party can acquire a property right in relation to land) to a different question: if the relationship of cohabiting, but unmarried,²⁹ partners ends (whether due to the parties splitting up or to death), are there circumstances in which one of the parties should be under a duty to provide some financial support to the other partner? The Commission concluded that Parliament should enact such a scheme.³⁰

One way of analysing the Law Commission's approach is to say that it has moved from a 'land law' solution to a 'family law' solution. Certainly, its focus is no longer on private rights to use land; rather, it has shifted to the question of whether a partner should be able to receive financial support. In Chapter 18, section 4, we will consider the specific advantages and disadvantages of such a shift. For present purposes, the key point is that, whilst our focus in this book will remain on private rights to use land and, in particular, on property rights relating to land, it is also important to bear in mind that the best solution to particular problems may lie not in reforming land law, but in developing other areas of the law.

6 CONCLUSION

As a result of the special physical features of land, special legal rules apply to land. The subject of land law does not consider all of those legal rules; instead, it focuses on private rights to use land and, at its core, considers property rights to use land. In very general terms, the

²⁷ See Law Commission Report No 23, *Sixth Programme of Law Reform* (1995, item 8).

²⁸ See Law Commission Report No 278, *Sharing Homes: A Discussion Paper* (2005, esp Pt VI and [15] of the Executive Summary).

²⁹ Married partners, like those in a civil partnership, are already covered by legislation permitting a court to adjust the parties' property rights and/or to impose payment obligations if the parties' relationship breaks down: see Matrimonial Causes Act 1973. Such partners are also in a stronger position if the relationship ends by death: see Inheritance (Provision for Family and Dependants) Act 1975.

³⁰ See Law Commission Report No 307, *Cohabitation: The Financial Consequences of Relationship Breakdown* (2007).

core of land law deals with three key questions. The *content* question considers the nature of a party's right and, in particular, asks if that right counts as a property right. The *acquisition* question concerns the means by which a party can acquire a private right to use land and, in particular, how a property right can be acquired. The *defences* question asks whether a party later acquiring a private right to use land may have a defence to a pre-existing property right held by another party.

By organizing land law in this way, we can begin to understand the legal rules that make up the subject. But no ordering of the rules can disguise the various tensions that run throughout land law. At a simple factual level, there is often a tension between two parties who each claim competing rights to use the land. For example, in each of *National Provincial Bank v Ainsworth* and *Williams & Glyn's Bank v Boland*, there is a tension between protecting an occupier who wishes to stay in her home and protecting the bank that has lent money on the security of that home.

At a more abstract level, there may be a tension between the different approaches that a court can take to such a dispute. For example, as noted in section 5.2 above, Harris has contrasted a 'utility model' (in which a court should make the decision with what it regards as the best practical consequences) with a 'doctrinal model' (in which a court should make the decision that best accords with the existing legal rules).

Further, if it is felt that the existing land law rules need to be changed, there is a tension between judicial and legislative reform: can judges develop the law in the appropriate direction, or should they hold back and wait for parliamentary intervention?

Finally, there is the wider question of whether the best response to a particular problem necessarily consists in changing the land law rules: it may be, as the Law Commission has suggested in the context of disputes over the family home, that we have to look beyond land law for a solution.

Of course, not all of these tensions are unique to land law. For example, Harris's 'utility model' and 'doctrinal model' are developed from Weber's general analysis of the law, and the tension between judicial and legislative reform runs throughout the law. But the special physical features of land mean that the way in which land law responds to these tensions is of great practical importance, as Mrs Ainsworth and Mrs Boland might testify.

QUESTIONS

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

FURTHER READING

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

Conaglen, 'Mortgages Powers Rhetoric' (2006) 69 MLR 583

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

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

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