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chapter 1

INTRODUCTION

1.1 Introduction

Land is central to everyone's lives. We all have to live somewhere, even if it is not a permanent home. Land law is the study of the relationship between land and the owner of that land. However, when we speak of owners of land we include not only the owner in law, who has the right to buy and sell the land, but also others who have lesser rights, such as the right to walk on the land. So, many different people can be said to be owners of rights in respect of the same piece of land. These rights may also extend to having rights of control over your neighbour's land: if they try to develop their garden and build another house or build an extension, you may be able to stop them. It is the way all these rights overlap that causes some of the problems in land law.

> 'The name "land law" suggests a simple contextual category: all the law about land . . . Every business needs premises, every factory needs a site. For most of us as private individuals our home is the centre of our lives. Functionally, this core of land law has the task of providing the structure within which people and businesses can safely acquire and exploit land for daily use, to live and to work. To discharge that function, it has to have its own conceptual apparatus. . . . There is a recurrent problem. Property rights in land have roots a millennium deep in a pre-commercial society in which land and wealth were virtually synonymous. The structuring of land and the power that went with it was then land law's principal mission . . .'

P Birks, 'Before We Begin: Five Keys to Land Law' in S Bright and J Dewar (eds), *Land Law: Themes and Perspectives* (Clarendon Press, 1998).

1.2 The definition of 'land'

The definition of 'land' has long troubled lawyers. We can start by looking at the statutory definition. 'Land' is defined in the Law of Property Act 1925 at s 205(1)(ix):

> S 's 205(1)(ix) Land includes land of any tenure, and mines and minerals, whether or not held apart from the surface, buildings or parts of buildings (whether the division is horizontal, vertical or made in any other way) and other corporeal hereditaments also a manor, an advowson, a rent and other incorporeal hereditaments; and an easement, right, privilege, or benefit in, over or derived from land . . . And mines and minerals include any strata or seam of minerals or substances in or under any land, and power of working and getting the same'.

It is a long and complex definition and shows that land can include many different aspects and rights.

1.2.1 Corporeal and incorporeal hereditaments

Within the definition in s 205, two types of rights are identified: corporeal and incorporeal hereditaments.

1. **Corporeal hereditaments**: these are rights that have some real or tangible quality. They would include anything growing on the land, such as shrubs and trees or anything which is found under the ground, such as minerals. These will be as much part of the land as the physical plot of land itself.
2. **Incorporeal hereditaments**: these are rights in land that are intangible. They cannot be physically seen but their effect can be felt. An example would be the right to use your neighbour's garden as a short cut. This will affect your neighbour's enjoyment of his land. These rights, which also include mortgages and leases, will also affect the exact nature of your neighbour's rights over his plot of land.

ACTIVITY

Consider the following rights over land: are they corporeal or incorporeal hereditaments?

1. You have agreed with your neighbour that he will not use his land for business purposes.
2. You plant several rose bushes in your garden.
3. You allow your friend to rent your garage.
4. You find some gold in the stream which runs through you garden.
5. The property that you agree to buy has a large stable block.

Land also has a three-dimensional quality – a surface area, the airspace above it and the ground below – and also a possible fourth dimension which is made up of rights and interests in the land and, more importantly, the length of time that you can enjoy the land. We shall start by looking at the way these rights and interests have developed over hundreds of years to leave us with the system that we know today.

1.3 Tenures and estates in land

1.3.1 Tenure

After 1066 all land was held to be owned by the king, and his subjects were then granted rights in that land. The rights that they held were really as tenants of the King. In return for the land the tenants agreed to carry out certain duties for the King. This was called **tenure**. It was a bit like paying rent but instead of paying money the tenants agreed to do something that the king wanted to be done. Tenure took several different forms – spiritual, military or agricultural.

Examples of tenure: agreement by the tenant to pray for the soul of the grantor (frankalmoign); provision of armed horsemen for battle (knight service); and performance of agricultural services (socage).

1.3.2 Estates

An estate was a right of possession. Historically, it was referred to as a right of **seisin**. When we speak of 'estates' we are talking about how long a person is allowed to enjoy the plot of land.

> J
>
> 'The land itself is one thing, and the estate in the land is another thing, for an estate in the land is a time in the land, or land for a time, and there are diversities of estates, which are no more than diversities of time.'
>
> *Walsingham's Case* (1573) 75 ER 80

The law would protect the tenant's right to the land against anyone unless they could prove that they had a better right to the land than the tenant.

Today there are only **two ways** that you can be said to own land in law:

1. either you have a **freehold estate** which is regarded as absolute ownership

2. or you can have a **leasehold estate** which is absolute ownership but only for a defined period of time, for example you could rent a flat for two years.

1.3.3 Legal estates in land before 1925

The position was very different in 1066. There were several legal estates in land which were regarded as absolute ownership.

1. Fee simple: this could last as long as the original grantee or his heirs survived. In practical terms this meant that it could last indefinitely. Until the fourteenth century the land had to pass through the family and could not be sold to someone out of the family. This rule was changed gradually until eventually it could be sold in your lifetime or left by will.

2. Fee tail: this is not recognised as a legal estate today. It was a grant of land that could only pass to a certain class of descendant, usually the descendants of the original grantee. It could last for as long as the original grantee or his descendants survived. Eventually, when the line of direct descendants ran out, the Crown could claim the land and sit passed out of the family.

3. Life estate: this was recognised as a freehold estate although it was limited in length. It would come to an end on the death of the holder of the life estate. It could be transferred to someone else but only during the original owner's lifetime and they knew it would end when the original owner died.

APPLYING THE LAW

Jim is granted Greenacres absolutely for his lifetime. Greenacres is in Cornwall and Jim wants to live in London. He transfers Greenacres to his friend Johnny for £50,000. Johnny could now live there for as long as Jim remains alive. On Jim's death, Johnny's rights cease. He has to take a risk on the length of Jim's life.

Now a few useful legal definitions:

- **grantor** means the person who owns the land but is passing it to someone else. This would have been the person who had received it from the king. He became grantor of the land when he passed it on to someone else
- **grantee** means the person who receives the land from the grantor.

Today, only the first of the three legal estates in land is recognised. The others will be less than a legal estate. They take effect **in equity**, which means rights in the land where the owner has only limited control over decision-making over the land itself, for example he has no right to sell the legal estate.

1.3.4 Estates in land from and after 1925

After 1925 the number of legal estates in land was reduced to two:

1. an estate in fee simple absolute in possession (the freehold estate)

2. an estate for a term of years absolute (the leasehold estate).

So the freehold estate in land is also called a **fee simple absolute in possession**. This can be broken down into three different parts:

1. fee simple: meaning freehold ownership giving absolute rights over the property during someone's lifetime but also the chance to leave it to anyone you wish on your death. (If you remember from above, the life estate was a legal estate but the property would revert back to the grantor when the grantee died.)

2. absolute: meaning no limits on ownership, for example to Y until he leaves school, would not give Y absolute ownership and control over the property.

3. in possession: meaning immediate occupation and enjoyment of the land. There would be no question of anyone else having a prior claim.

1.3.5 Limitations on ownership

What if there are potential limits on ownership?

There may be terms imposed on ownership which will affect the nature of ownership. These generally take one of two forms:

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1. a conditional fee simple

2. a determinable fee simple.

A conditional fee simple

Property may be given to someone but a condition may be attached which imposes conditions on the enjoyment of the land, eg to X provided that he does not become a lawyer. This does not prevent the gift from taking effect in law. If the condition is carried out then the gift does not automatically return to the grantor but he has the choice whether or not to reclaim it. The grantor could ignore the condition and it will remain with the grantee. Some conditions are void because they are seen to be contrary to public policy. A condition which is uncertain or a condition which encourages divorce or separation would be void on these grounds. The grantee would then be able to take the land free from the condition.

CASE EXAMPLE

***Blathwayt v Baron Cawley* [1976] AC 397**

A testator drew up his will leaving his estate to a number of persons in succession, but under Clause 6 it was held that the interest of any person entitled would determine if he became a Roman Catholic. Sometime after the testator died the life tenant became a Roman Catholic and the interest determined and passed to the next person entitled. The court considered whether the clause was void for uncertainty.

J

'On the question whether the forfeiture clause, in so far as it relates to being or becoming a Roman Catholic is void for uncertainty. I am clearly of the opinion that it is not. Clauses relating in one way or another to the Roman Catholic Church, or faith have been known and recognised for too many years both in acts of Parliament … and in wills and settlements for it now to be possible to avoid them on this ground.'

Lord Wilberforce

CASE EXAMPLE

***Re Moore* (1888) 39 Ch D 116**

Money was to be paid to the testator's sister 'while so living apart from her husband'. This was held to be void as it was contrary to public policy. It appeared to encourage separation of the parties.

A determinable fee simple

In some cases the gift may give rise to a determinable fee simple in which case the grantee does not receive a legal estate with all the consequences of ownership but instead receives an estate in equity. These rights will last until the determining event occurs.

Consider the following examples:

1. 'to A until he marries'

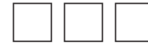
2. 'to B provided that he remains a barrister'.

In **1**. A has a determinable estate which will not take effect in law and if A marries the land will revert to the grantor automatically.

In **2**. B has a conditional fee simple which takes effect as a legal estate unless B leaves the Bar, in which case the grantor can reclaim the land.

The difference between the two rests largely on the words used. Words such as 'unless', 'on condition that', 'if' and 'provided that' suggest a conditional fee simple, but words such as 'until', 'so long as', 'whilst' or 'during' suggest a determinable fee simple.

ACTIVITY



Look at the following examples and decide whether they suggest a determinable or conditional fee simple and what the consequence will be if the condition is held to be void:

1. 'to Robert until he becomes a judge'

2. 'to Susie during her years at university'

3. 'to my children unless they start smoking'

4. 'to Flora unless she marries someone not of Jewish parentage'

5. 'to David provided that he has no more contact with his ex-wife Davina'.

1.4 Ownership of the surface of the land: boundaries

> 'Whoever owns the soil owns everything up to the heavens and down to the depth of the Earth.'

Attributed to Accursius of Bologna in *Glossa Ordinaria* on *Corpus Iuris* (13th C.)

Any landowner wants to be quite clear about the extent of rights that he may have over the plot of land that he has purchased. He will start by finding out where the boundaries are. This will depend on the site of the land; in particular, does it border the sea or a river?

1.4.1 Land bordering the coast or a river

Land is often seen as permanent and unchanging but the processes of coastal erosion and deposition challenge this. Over a period of time, where land borders a river or the sea, soil may be removed by erosion and it appears to cease to belong to the owner and will transfer to the land of another. The effect of this is that one person's land will increase at the expense of the other. The law has to deal with this.

1.4.2 The doctrines of accretion and diluvion

The doctrines of **accretion** and **diluvion** are the legal mechanisms employed to resolve disputes arising through changes in land bordering water.

1. The doctrine of **accretion** says that any naturally occurring additions of soil to the waterside land becomes the property of the owner of the land which is increased.
2. The doctrine of **diluvion** is the reduction in an area of land by naturally occurring movements of soil.

According to Lord Wilberforce in *Southern Centre of Theosophy Inc v State of South Australia* [1982] 1 All ER 283 the changes must take place very slowly, gradually and by imperceptible movements. He added: 'In the lottery of life the land owner may lose as well as gain from changes in the water boundary or level'.

This case concerned an inland lake in Australia which was reduced in size by 20 acres through deposits of sand over 60 years. The lake was owned by the Crown but it was held that it lost title to the 20 acres. This was added to the title held by the owners of the area gaining the land.

If there are any sudden changes as a result of flooding then the rules do not apply and the boundaries remain the same. For example, X and Y both own land on either side of a river. Suppose there is a storm which results in X's land losing considerable amounts of soil and so Y's land is considerably increased. Y cannot then claim the change in boundary under the doctrine of accretion and X's boundary will be changed to adapt to the sudden change.

Compare the situation where X is convinced that his land is receding. He measures the boundary and after five years there is a change of one third of a metre – the doctrine will probably apply and X cannot do anything about the loss to his land.

When will the doctrine be applied?

The modern law stops short of applying the doctrine of accretion to all cases. It has to be decided whether the interest in land which is the subject of **accretion** is fixed or moveable and this is only made clear by looking at the wording of the conveyance. So if you know that the boundaries are subject to change and the conveyance refers to this then the landowner with an increased area of land cannot claim that for himself.

Case law shows that you can exclude the operation of the doctrine of accretion by clear words in the conveyance. The Land Registration Act 2002, s 61 expressly states that a registered estate in land as shown in the register as having a particular boundary does not affect the operation of **accretion** and **diluvion**.

The doctrine of accretion shows us that not only does land extend upwards and downwards, it can grow or shrink in surface area.

1.4.3 Other boundaries

Even where boundaries do not border the sea and inland waterways, there may be uncertainty. The Land Registration Rules accept that maps and plans are imprecise and a filed plan or general map relevant to any registered title is normally 'deemed to indicate the general boundaries only' and the exact line of the boundary is left undetermined. This general principle has been preserved in the Land Registration Act 2002. There is provision under s 60 for rules to make provision for boundaries to be fixed exactly.

S

's 60(3) Rules may make provision enabling or requiring the exact line of the boundary of a registered estate to be determined and may, in particular, make provision about –

(a) the circumstances in which the exact line of a boundary may or must be determined;

(b) how the exact line of a boundary may be determined;

(c) procedure in relation to applications for determination.'

Unless such an application is made then older, more general, rules will apply.

These are some of the presumptions which can be used to decide the issue.

The 'hedge and ditch' rule

Wibberley (Alan) Building Ltd v Insley [1999] 1 WLR 894 applied this rule which suggests that where land is bounded by a hedge and ditch then the boundary lies along the edge of the ditch on the far side of the hedge. This assumes that the ditch builder deposited the earth on his own land rather than the land of his neighbour.

The '*ad medium filum*' rule

This applies to land which abuts a highway or non-tidal river. The rule says that the boundary between properties on opposite sides of the road is a line drawn down the middle of the road. The owners of land adjoining the highway are presumed to own the sub-soil as far as the middle of the road and the airspace above the soil. The owner cannot use the sub-soil so as to interfere with the use of the highway, for example if the sub-soil contained a mineral such as fuller's earth, you could not extract it in such a way as to cause subsidence to the road.

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1.4.4 Natural rights of support for the land

Landowners have certain rights which are incidental to ownership and could give rise to an action in tort if they are interfered with. It is accepted that every land owner has the right to enjoy his land in its natural state and this means it must not be put at risk by a neighbour who undermines the foundations.

APPLYING THE LAW

A landowner may be able to sue if his neighbour starts extensive mining operations and as a result his house is affected by subsidence. In order to be successful he would have to prove that his land has been affected. No case would succeed in court if the owner merely had proof that mining operations were going on and could affect his house.

It is important to note that the right only affects the land itself and not the buildings on the land. This can be criticised. It should extend to buildings. A landowner could not expect to be compensated if the buildings on his land were undermined by the activities of his neighbour. However, the landowner may have a remedy because the right of support for buildings may be recognised as an easement. The problem is that the claimant must satisfy the rules relevant to easements rather than have the chance of claiming the right automatically.

CASE EXAMPLE

***Dalton v Henry Angus & Co* (1861) 6 App Cas 740**

The court upheld an easement of support to be enjoyed by one landowner as against another. There was disagreement in court as to whether this was a negative or positive easement. The House of Lords held it to be a positive easement.

1.5 Ownership of the surface of the land: items found in or on the surface of the land, including minerals

1.5.1 Fixtures and fittings

Section 205 of the Law of Property Act 1925 specifically mentions buildings and parts of buildings as forming part of the land. This is further developed because any item affixed to the land becomes

land itself. There is an old maxim '*quicquid plantatur solo, solo cedit*' which, translated, means whatever is attached to the soil becomes part of it. The word 'fixture' means anything that has become so attached to the land that it forms part of the land.

If the item has not become a fixture then it will be a mere chattel and so will not pass with the property to the purchaser and the seller can legally take it as his own on the sale of the property, for example the clothes of the seller will always remain chattels and will not pass to the purchaser, but what of the fitted wardrobe that they are in? Some fitted wardrobes are attached to the wall but some can be free-standing. The law has to resolve the question of whether the purchaser can claim the fitted wardrobe and any other item that is not clearly a fixture or a chattel.

The law applies two tests:

1. the degree of annexation

2. the purpose of annexation.

In *Holland v Hodgson* (1872) LR 7 CP 328 Blackburn J highlighted the importance of the method of annexation of the object to the land. He suggested that even if an object is very heavy, if it never becomes fixed to the land then it remains a chattel, whereas an item that is firmly fixed will become a fixture.

J

'There is no doubt that the general maxim of the law is, that what is annexed to the land becomes part of the land; but it is very difficult, if not impossible to say with precision what constitutes annexation sufficient for this purpose. It is a question which must depend on the circumstances of each case, and mainly on two circumstances, as indicating the intention viz. the degree of annexation and the object of the annexation. When the article in question is no further attached to the land, than by its own weight it is generally to be considered a mere chattel . . . but even in such a case, if the intention is apparent to make the articles part of the land, they do become part of the land . . . Thus blocks of stone placed one on top of another without any mortar or cement for the purpose of forming a dry stone wall would become part of the land, though the same stones, if deposited in a builder's yard and for convenience sake stacked on the top of each other in the form of a wall, would remain chattels'.

Blackburn J

Blackburn J went on to introduce the idea that what matters is the intention when the item is fixed. This becomes more significant than the practical question of how the item was attached to the ground.

> J
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> 'On the other hand, an article may be very firmly fixed to the land, and yet the circumstances may be such as to shew that it was never intended to be part of the land, and then it does not become part of the land . . . Perhaps the true rule is, that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such that they were intended to be part of the land, the onus of showing that they were so intended lying on those who assert that they have ceased to be chattels, and that, on the contrary, an article which is affixed to the land even slightly is to be considered as part of the land, unless the circumstances are such as to shew that it was intended all along to continue a chattel, the onus lying on those who contend that it is a chattel'.

The degree of annexation

This depends on whether the item is resting on the land by its own weight or whether it has been fixed. Traditionally if an object rested on the ground by its own weight it was regarded as a chattel. So a Dutch barn resting on timber on the ground would be a chattel and could be removed by the seller.

CASE EXAMPLE

Hamp v Bygrave **(1983) 266 EG 720**

A number of items were removed by the seller and the purchasers argued that they were fixtures and should remain at the property. The items included patio lights fixed to the wall with screws, six urns resting on their own weight, a stone Chinese ornament resting on its own weight, several statues and their plinths and a lead trough.

> J
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> 'The first question is, therefore, were the items or any of them, fixtures? It is accepted that the answer to that question depends upon the application of two tests. First what was the degree of annexation? There is no doubt that none of the items was fixed or attached to the land or to any structure which was itself attached to the land. Each rested by its own weight either on the land itself or on some sort of plinth, and only in the case of the Chinese figure was the plinth fixed or attached to the land. Judged by this test therefore they were all prima facie chattels'.
>
> Boreham J

However, it is clear that the way the item is fixed is not conclusive, particularly today when technological advances have allowed items to be removed easily, even after semi-permanent fixing.

In *Holland v Hodgson* (1872) it was held that there were two questions to ask:

1. whether the annexation was intended to increase the value or enjoyment of the property

2. was it for the better enjoyment of the item?

What happens if there is no annexation at all? This may be because the item is very heavy and so rests on its own weight.

CASE EXAMPLE

***Eliteson Ltd v Morris* [1997] 1 WLR 687**

A wooden bungalow rested on its own weight on concrete pillars. As pointed out in the judgment the materials used to construct the building, such as the chipboard ceilings, had all started life as chattels.

J

'A house which is constructed in such a way so as to be removable, whether as a unit, or in sections, may well remain a chattel, even though it is connected temporarily to mains services such as water and electricity. But a house which is constructed in such a way that it cannot be removed at all, save by destruction, cannot have been intended to remain as a chattel. It must have been intended to form part of the realty . . . Applying the dry stone wall analogy to the present case, I do not doubt that when Mr Morris's bungalow was built, and as each of the timber frame walls were placed in position, they all became part of the structure, which was itself part and parcel of the land'.

Lloyd LJ

The issue in this case was whether the occupiers of the bungalow occupied as tenants, which depended on the property being found to be a fixture. If it was a chattel then they would have been mere licensees and would have been unprotected when the owner of the land tried to evict them. The court found that the bungalow was a fixture.

In *D'Eyncourt v Gregory* (1866) LR 3 Eq 382 a number of tapestries were fixed to the walls and the purchaser argued that they were therefore fixtures and should be left with the property. The court looked to the second test (the purpose of annexation) and concluded that the tapestries were intended to become an integral part of the property and so could not be removed by the sellers. You could say that they were not just fixed to the walls: they had become the walls.

Compare this decision with the later case of *Leigh v Taylor* [1902] AC 157 where a different result was achieved. The owner of a large house had hung tapestries on the walls in the main drawing room. They were attached by tacking them to strips of wood which were then fixed to the wall. The House of Lords held that, unlike in *D'Eyncourt v Gregory* (1866), the tapestries had never been intended to become part of the property. The degree of annexation was all that was necessary to display the tapestries and for the owner to enjoy them. It was commented by Lord Halsbury that fashions had now changed and that attitudes to ornamentation had also changed.

Lord Scarman pointed out in *Berkeley v Poulett* (1976) 241 EG, a later case, that a degree of annexation which in earlier times the law could have treated as conclusive may now prove nothing. So the degree of annexation is less important today although it will show where the burden of proof lies if an item is **securely** fixed. In these cases the burden shifts to those arguing that it is not a fixture. In other words, the burden of proof will shift to the seller as he will want to prove that the items are chattels, so enabling them to take items away after sale. For example, if a wardrobe has been fastened to the wall then the burden will shift to the seller to argue that this was for convenience only and that the wardrobe remained a chattel even after annexation.

The purpose of annexation

This test is far more decisive in deciding whether an item is a fixture. This is principally because the technical skills of affixing and removing objects to land or buildings have improved significantly over the years.

Even where items have been attached to the land, making them appear to be part of that land, the question of whether they are fixtures or not will depend on whether they were put there for the better enjoyment of the property or for the better enjoyment of the item.

Consider these cases: in *Re Whaley* [1908] 1 Ch 615 tapestries and portraits had all been fixed to the wall to form an Elizabethan room. They were held to be part of the general architectural design and were held to be fixtures. In *Berkeley v Poulett* (1976) the seller had taken a number of items from the premises including statues, a sundial and some pictures fixed into recesses in the walls of the property. The purchaser claimed that they were fixtures. The Court of Appeal held that none of the items could be fixtures; they were all chattels.

Scarman J looked at each in turn:

1. He found that the statue and the sundial had never been fixed to the property. They had not become fixtures because they had never formed part of an architectural design. The plinth was a fixture but the owner of the property had changed the item which went on it from time to time. This meant that the actual location of the plinth was important but the items which were fixed to it were not part of some grand design for the garden.

2. The pictures were in recesses in a panelled room. However, they were not considered to be a part of a composite design. In other words, it was a matter of choice which particular pictures were put there.

1.5.2 Everyday objects in a house

When property is sold, certain items which are found in most people's homes are presumed to be fixtures and certain items will be presumed to be chattels.

CASE EXAMPLE

TSB v Botham **[1996] EGCS 149**

Mr Botham had failed to keep up with mortgage repayments and the bank sold his flat. Any fixtures would pass to the purchaser but chattels would have to be passed back to Mr Botham. The case concerned such items as fitted cupboards in the kitchen, 'white goods' consisting of the main electrical appliances in the kitchen, light fittings throughout the house, fitted carpets and also curtains.

The judge at first instance held most of the items to be fixtures.

The Court of Appeal held:

1. The bathroom fittings and kitchen units, work surfaces and the fitted sink were all fixtures. The court thought it was misleading to apply the same tests to domestic dwellings as were applied to ornamental items and machinery in factories.
2. The light fittings were chattels, except those that had been specially fitted in recesses.
3. The carpets, curtains and blinds could all be removed because, although they had been cut to fit the rooms and the windows, they were attached to the building in an insubstantial way. 'The methods of keeping fitted carpets in place and keeping curtains hung are no more than is required for enjoyment of those items as curtains and carpets' (Roch LJ).
4. The white goods, ie the washing machine, dishwasher and refrigerator, were all chattels. Roch LJ distinguished the reasoning of the judge at first instance who had held these items to be fixtures. He based his judgment on the fact that the items probably remained in position by their own weight and not by virtue of the links between them and the building. He found that they were designed to last for a limited period of years. The degree of annexation was slight and they could be removed without damage to the fabric of the building and normally without difficulty.

1.5.3 Items bought under hire purchase

The court in *TSB v Botham* (1996) also looked at items being purchased under a hire purchase agreement and which so continued to be owned by the hire purchase company. The existence of the agreement will not prevent the item from becoming a fixture. In *Botham* some of the items had been purchased under hire purchase but the court held that this did not influence the decision as to whether they were fixtures or fittings. However, the owner under the agreement may have a right to enter and remove the item even when it has become a fixture.

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The right of the former owner to enter and take the item away is a form of equitable interest giving the right to enter the premises and sever and remove chattels under the hire purchase agreement which have become fixtures.

1.5.4 Intention of the parties

The intention of the parties is only relevant to the extent that it can be part of the tests which look at the degree and object of the annexation. The subjective intention of the parties cannot affect the question whether the chattel has in law become part of the freehold.

CASE EXAMPLE

***Melluish (Inspector of Taxes) v BMI (No. 3) Ltd* [1996] 1 AC 454**

A number of items including central heating installed in council flats, lifts in car parks and the filtration system in swimming pools were recorded as remaining in the ownership of the suppliers. However, the court held that simply to include a provision in the contract that these items remained in the ownership of the suppliers did not prevent them from taking effect as fixtures.

If the seller says 'I thought the fitted wardrobes were always chattels' then the court will look at how they were fixed to the wall and the purpose of fixing them. This is similar to the approach the courts might take in other areas of law, such as contract, where a condition of a contract cannot become a warranty merely because the parties call it a warranty. A lease of land will not become a licence in land just because the agreement says it is a licence.

J

'The terms expressly or implicitly agreed between the fixer of the chattel and the owner of the land cannot affect the determination of the question whether, in law, the chattel has become a fixture and therefore in law belongs to the owner of the soil . . . such an agreement cannot prevent the chattel, once fixed, becoming in law part of the land and as such owned by the owner of the land so long as it remains fixed'.

Melluish (Inspector of Taxes) v BMI (No. 3) Ltd [1996] (Lord Browne-Wilkinson LJ).

The issue will always depend on the two tests laid down in *Holland v Hodgson* (1872):

1. degree of annexation and

2. purpose of annexation.

ACTIVITY

Consider the following items and decide whether they are fixtures or chattels and can be removed by the seller:

1. Long velvet curtains and pelmets.
2. A fitted stair carpet.
3. A fridge in the kitchen.
4. Pine kitchen cupboards which have been designed for the kitchen by a local builder.
5. Four recessed lights which have been attached to the dining room ceiling.
6. A greenhouse and a garden shed. The garden shed was put up two years ago by the seller but the greenhouse was there when he arrived.
7. A statue of Persephone which is firmly attached to a concrete pillar which is placed in the middle of the garden.
8. A car bought a year ago which has not passed its MOT and is sitting in the garage.
9. A gas fire in the living room in regular use in the winter.
10. A freezer which is in the utility room.

KEY FACTS

Annexation		Fixture or chattel	Case
Degree of annexation.	Resting on its own weight.	Fixture	*Eliteson v Morris* (1997)
How firmly was the object fixed?	Insubstantially fixed.	Chattel	*Leigh v Taylor* (1902)
	Substantially fixed.	Fixture	*TSB v Botham* (1996) (fixed kitchen)
Purpose of annexation.	For the improvement of the land.	Fixture	*D'Eyncourt v Gregory* (1866)
	For the use and enjoyment of the item.	Chattel	*Berkeley v Poulett* (1976)
	Part of an architectural design.	Fixture	*Re Whaley* (1908)

1.5.5 The tenant's right to remove fixtures

The general rule was that the tenant had to leave any fixture that he had affixed to the premises during the tenancy. However, there are several exceptions:

Trade fixtures

A tenant has always been able to remove trade fixtures that he has installed during the term of his lease. He must show that they were necessary for his trade or business.

CASE EXAMPLE

***Mancetter Developments v Garmanson Ltd* [1986] QB 1212**

Tenants who ran a chemical business were allowed to remove an extractor fan from the wall of their premises after their lease had expired.

Even where, under the ordinary rules, items have become fixtures, the law will allow tenants of business premises to remove them.

CASE EXAMPLE

***Young v Dalgety plc* [1987] 1 EGLR 116**

Tenants were allowed to remove light fittings and a carpet which they had fitted during their tenancy. This right carries over to a new tenancy.

Ornamental and domestic fixtures

Any item added to the premises purely for ornamental or domestic purposes can always be removed by the tenant. It will depend on the way that it has been attached. If an item can be removed without substantial damage to the structure of the building then it will be seen as a chattel.

CASE EXAMPLE

***Spyer v Phillipson* [1929] 2 Ch 183**

A tenant of domestic premises had installed valuable antique wood panelling and other ornamental items. It was held that these were domestic or ornamental fixtures and he was entitled to remove them. They did not belong to the landlord.

Agricultural fixtures

The general law prevented the agricultural tenant from removing articles from premises that he had rented. However, under the Agricultural Holdings Act 1986, some items can be removed by an agricultural tenant if certain conditions apply:

1. the tenant must give one month's notice to the landlord
2. all rent due must have been paid and
3. there must be no damage to the premises when the item is removed, unless this is unavoidable. If the landlord offers to buy the items and the price is fair then he is entitled to keep them.

Under all these exceptions the tenant must normally remove the items **during the tenancy** but he continues to have the right even after it has ended if either:

1. he has the right to remain in possession; or
2. if he did not have time to remove these items (in which case he must be given a reasonable time to remove them).

The tenant must make good any damage which occurs when he removes the items from the property. In *Mancetter v Garmanson* (1986) the large hole left by the extractor fan had to be filled in by the tenant.

1.5.6 The loss of the right to remove fixtures

The seller and the buyer

Where items are expressly referred to in the contract then the rules concerning fixtures and fittings are displaced. So, if the seller tells the purchaser that the items are going to be removed, even if they are firmly fixed to the property the purchaser cannot challenge their removal.

Any other fixture is assumed to pass with the land, even if the contract does not mention an item, and the purchaser can challenge their removal.

CASE EXAMPLE

***Taylor v Hamer* [2002] EWCA Civ 1130**

A seller removed a large quantity of old stone flagstones and took them from a property in Worcestershire to the Isle of Wight. The particulars of sale had not mentioned them. The Court of Appeal held that they must be returned. The buyer relied on two clauses in the conditions of sale which said:

1. the buyer accepts the property in the physical state as it is in at the date of the contract
2. the seller will transfer the property in the same physical state in the same condition as it was at the date of contract.

The important issue here was: what was 'the property'? The court held that it meant 'what a reasonable person who knows what the parties know when they contracted would have taken it to mean'. In this case the facts indicated that they would have meant a garden with flagstones unless it was specifically mentioned that they were going to be removed.

The mortgagor and the mortgagee

Since fixtures are assumed to be part of the land then they will become part of the property subject to the mortgage. In *TSB v Botham* (1996) the mortgagee argued that many expensive items had become part of the land and so would pass with the land when it was repossessed.

1.6 Chattels found in or on the surface of the land

If an object is found in or attached to the ground then the owner of the land has the best claim to it after the true owner of the object. The position will be different where the object is resting on the ground because the finder of the object then has a good claim. Everyone is familiar with the saying 'finders keepers'. It has some truth in land law, but only in some cases.

For example, if you are out walking and you find a gold ring resting on the ground then you may have a claim as the finder, but if the ring is buried in the soil and you have to dig it up then the claim will be between the owner of the land and the owner of the ring.

CASE EXAMPLE

***Armory v Delamirie* (1722) 1 Strange 505**

A jewel was found by a chimney sweeper's boy who claimed ownership as finder of the item. A dishonest employee of a jeweller took the jewel and the finder claimed ownership: 'the finder of a jewel, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the true rightful owner'.

In these cases there are several different people who may have a good claim:

1. the true owner of the object

2. the finder of the object

3. the owner of the land

4. an employee of the owner of the land.

The claim to ownership depends on where the object was found and the extent to which the object was attached to the ground.

1.6.1 Objects found in the ground

At common law, where an item is found in the ground, the landowner in possession of the land is entitled to it if the true owner cannot be found.

CASE EXAMPLE

Elwes v Brigg Gas Company **(1886) 33 Ch D 562**

A long leaseholder could claim possession of a pre-historic boat found partially buried in the ground of his property. The finder of the item could not claim it for himself. It was held to belong to the landowner.

J

'he was in possession of the ground, not merely of the surface, but of everything that lay beneath the surface down to the centre of the Earth, and consequently in possession of the boat . . . The plaintiff then, being thus in possession of the chattel, it follows that the property in the chattel was vested in him. Obviously the right of the original owner could not be established.'

Chitty J

CASE EXAMPLE

South Staffordshire Water Co v Sharman **[1896] 2 QB 44**

It was held that employees of the landowner could not keep rings found in the mud of an old pond. They were the property of the landowner. The finders were employed by the landowner to remove the mud and they had a clear right to direct how the mud and anything in it should be dealt with.

1.6.2 Minerals found in the ground

Minerals found in the ground are part of the land and as a general principle belong to the landowner. Over the years many exceptions have developed. Ownership of all coal and natural gas is vested exclusively in various privatised corporations under statute, for example the Coal Industry Act 1994 and the Gas Act 1986. The Petroleum Act 1998 gives to the Crown the exclusive right of 'searching and boring for' and getting petroleum. 'Petroleum' is defined as 'any mineral oil or

relative hydrocarbon and natural gas existing in its natural condition'. The Crown has had a prerogative right to gold and silver for centuries.

CASE EXAMPLE

***The Case of Mines* (1567) 1 Plowd 310**

It was stated that any mine, whether of gold, silver or other metals containing in them gold or silver of even the smallest of quantities, was a Royal mine.

The ownership of mines under land can be severed from the ownership of the surface. The presumption that the landowner of the surface owns the land beneath can be rebutted by proof of long and continuous use of the mine or land beneath. In this way, land really does become three-dimensional.

1.6.3. Objects found on the surface of the ground

In *Elwes v Brigg Gas Company* (1886) if the item had been found resting on the ground then the finder may have had a good claim. However, the owner of the land may also have a good claim if he could prove that he intended to exercise manifest control over the land and anything found on it.

CASE EXAMPLE

***Parker v British Airways Board* [1982] QB 1004**

A passenger found a gold bracelet on the floor of an executive airport lounge at Heathrow airport. He handed it to the owners of the land (British Airways Board) in order for them to attempt to find the true owner. He challenged their claim to keep the bracelet for themselves. The court upheld the finder's claim.

J

'The plaintiff's claim is founded on the ancient common law rule that the act of finding a chattel which has been lost and taking control of it gives the finder rights with respect to that chattel . . . The common law right asserted by the plaintiff has been recognised for centuries . . . Some qualification has to be made in the case of finder who is trespassing. The person vis à vis whom he is a trespasser has a better title. The fundamental basis of this is clearly public policy. Wrongdoers should not benefit from their wrongdoing.'

Donaldson LJ

Donaldson LJ laid down the following rules on the rights and obligations of the finder:

1. The finder of a chattel acquires no rights unless (a) it has been abandoned or lost and (b) he takes it into his care.
2. If the finder is trespassing or acting with dishonest intent then he acquires very few rights.
3. The finder of a chattel acquires ownership against all but the true owner if he was on the land lawfully.
4. An employee working in the course of his employment who finds an item finds that item on behalf of his employer.
5. The finder is under an obligation to take measures to find the owner of the object.

Donaldson LJ then discussed the rights of the occupier, which he said depended on whether the occupier had manifested a desire to control the property.

Several questions must be addressed:

Where was the object found? Was it in a public or private place?

If the object is in a **public place** then the finder has a good claim.

CASE EXAMPLE

Bridges v Hawkesworth **(1851) 21 LJQB 75**

A commercial traveller found a parcel which contained some bank notes when he was in the defendant's shop. He claimed them for himself. It was held that if he had found them in the street he could have claimed them. Since the shop was open to the public and they were invited to come there then the reasoning was that the notes, being dropped in the public part of the shop, were never in the custody of the shopkeeper.

Did the owner of the land manifest control over the land?

The general principle is that where a person has possession of a house or land he must show that he intends to control it if he is to claim any lost items found on the land. If it can be proved that he does control the land in this way then there is a presumption that anything found either by an employee of the owner or a stranger will be the property of the landowner.

So the issue all depends on what the law views as 'control'.

What constitutes 'control'?

Donaldson LJ held in *Parker v British Airways Board* (1982) that a bank would exercise sufficient control over a bank vault if an item was found there. This would be because it would be closed to

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the general public and only limited people would have access. He contrasted areas such as a park where the public has unlimited access during the day. Between these two extremes he highlighted those areas where the public have limited rights of access, such as a petrol filling station forecourt.

In *Parker*, British Airways exercised some control over the airport lounge by checking tickets and allowing only certain people to enter but it was held that this was not sufficient to allow them to argue that they had superior rights to items found there.

What if the finder was trespassing?

CASE EXAMPLE

***Waverley BC v Fletcher* [1996] QB 334**

The defendant used a metal detector in a public park owned by the claimants, Waverley Borough Council. He found a mediaeval brooch nine inches below the surface. It was held that the Council had a better claim than the finder. The object was beneath the surface and the finder became a trespasser when he began to dig the ground. He had permission to walk in the public park but he did not have permission to use a metal detector and dig in the ground.

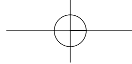
Rights of the true owner

If the finder or the landowner claims the object then he is under a duty to take reasonable steps to trace the true owner. He will still own the goods but will have a duty to advertise the find and follow up any advertisements about lost items. It is only when the owner cannot be found that the finder can exert their rights.

CASE EXAMPLE

***Moffat v Kazana* [1969] 2 QB 152**

A now-deceased man (Mr Russell) had hidden a biscuit tin containing cash in the roof of his house. The house was sold to the defendant, who discovered the tin three years later. The deceased had simply forgotten about the money. It was held that although it is implied that the true owner of a chattel found on the land has a title superior to that of anybody else, it would not affect items that had been abandoned.



J

'If Mr Russell never got rid of the notes, that is to say, never got rid of the ownership of the notes, he continued to be owner of them and, if he continued to be the owner of them, he had a title to those notes which nobody else, whether the owner of the land in which they were found, or the finders, or anybody else would have.'

Wrangham J

KEY FACTS

1. Objects found in or on the ground *prima facie* belong to the true owner of the object.
2. If the true owner cannot be found then ownership lies with the owner of the land if the object is found buried in the land (*Elwes v Brigg Gas Company* (1886)).
3. If the true owner cannot be found and the object is resting on the surface, the object is the property of either the finder or the landowner.
4. Ownership then depends on whether the landowner has shown that he intends to exercise a sufficient degree of control over the land (*Parker v British Airways* (1982)).
5. If the landowner has sufficient control over the land then he can claim any objects found.
6. If the finder is trespassing then objects found belong to the landowner (*Waverley Borough Council v Fletcher* (1996)).
7. The finder can be trespassing either because he has no right to be on the land or because he is using the land in a way not permitted by the landowner (*Waverley BC v Fletcher*).

ACTIVITY

Mrs Turner enjoyed visiting National Trust houses. One hot summer's day, she went to see a famous garden. She took her lunch and ate it in the garden. She was interested in the plants and when no one was looking she used the spoon that she had been using for her lunch and dug up one of the plants. She then noticed something in the ground, shining brightly. She put it into her pocket and looked at it when she got home. It was a gold bracelet.

Mrs Turner would like to keep the bracelet but she does not know what to do about it. Advise her whether or not she can keep it for herself.

Would it make any difference if the bracelet was resting on the ground when she found it?

1.7 Treasure

If an item is found that comes within the definition of 'treasure' then it will be the property of the Crown. The definition of what 'treasure' is can be found in the Treasure Act 1996. This Act was passed to replace the common law of treasure trove which had a number of difficulties, not least a very narrow definition of what treasure could be. The old law excluded many ancient items which had little or no gold or silver content but were often far more valuable. The new Act allows antiquities without a high metal content to come within the definition and so be preserved for the national heritage. There is provision for rewards to be paid to anyone who finds an object that comes within the definition of 'treasure'. It is now a criminal offence to fail to report a relevant find to the coroner within 14 days.

1.7.1 The Treasure Act 1996

'Meaning of "treasure"

s 6(1) "treasure" is:

(a) Any object at least 300 years old when found which –

(i) is not a coin but has metallic content of which at least 10 per cent by weight is precious metal;

(ii) when found, is one of at least two coins in the same find which are at least 300 years old at that time and have that percentage of precious metal; or

(iii) when found, is one of at least ten coins in the same find which are at least 300 years old at that time;

(b) Any object at least 200 years old when found which belongs to a class designated under section 2(1);

(c) Any object which would have been treasure trove if found before the commencement of section 4;

(d) Any object which when found, is part of the same find as –

(i) An object within paragraph (a) (b) or (c) found at the same time or earlier; or

(ii) An object found earlier which would be within paragraph (a) or (b) if it had been found at the same time.

(2) Treasure does not include objects which are –

(a) unworked natural objects, or

(b) minerals as extracted from a natural deposit, or which belong to a class designated under section 2(2).

. . .

s 2. The Secretary of State may by order, for the purposes of section 1(1)(b) designate any class of object which he considers to be of outstanding historical, archaeological or cultural importance.

. . .

s 3(3) "Precious metal" means gold or silver.

. . .

s 8(1) A person who finds an object which he believes or has reasonable grounds for believing is treasure must notify the Coroner for the district in which the object was found before the end of the notice period . . .

(3) Any person who fails to comply with subsection (1) is guilty of an offence.'

A Code of Practice accompanied the Treasure Act, giving guidelines for the payment of rewards (Treasure Act 1996: Code of Practice) which depends on whether the finder is deliberately searching for artefacts.

If the finder is **deliberately** searching for artefacts then a reward will be payable where:

1. he has valid permission from the occupier to be on the premises and

2. he has complied with the obligation to report a find to the Coroner and

3. there has been no damage to the premises.

If an artefact is found **by chance** then a reward is payable where:

1. the finder has permission to be on the premises and

2. the finder has reported his find to the Coroner.

He will generally receive half of whatever reward is paid by the Coroner and the landowner will receive the other half. Even if he did not have permission to be on the premises then the guidelines allow for a possible reward to be divided between the occupier, the landowner and the finder.

> 'Of course, objects of recent vintage may be treasure by virtue of having been found in circumstances which clearly associate them with objects which are otherwise treasure within section 1. Always assuming that the true owner cannot be ascertained, suppose a hoard of 18th century coins contains say, two or more gold coins which are at least 300 years old. The two or more gold coins aged 300 years or more will be treasure (section 1(1)(a)(ii)). Section 1(1)(d) of the Act will operate so as to engage the balance of coins, and their container together with any other contents such as books or papers, and transform them into treasure irrespective of the proof of an *animus recuperandi* or their precious metal content, if any. The point may well be of practical significance, not only for the purposes of the grant of a reward, but also because, were the coins or other objects not to be treasure then the ordinary law of "finders keepers" would fall to be applied.'

J Marston and L Ross, 'Treasure and Portable Antiquities in the 1990s still chained to the Ghosts Of Past: The Treasure Act 1996' [1997] 61 Conv 273.

ACTIVITY

Your friend Terence is walking one summer's afternoon with his dog Fedora and she starts digging furiously in the ground. Fedora uncovers what looks to Terence like a number of coins and a pottery vase which looks very old and valuable to him. He takes them home and shows them to his wife who is a history teacher and she recognises that the coins are Roman. He wants to keep them in his own coin collection but is unsure whether he can do so. He would like to give the vase to his mother as a present.

Terence comes to you for your advice.

1.8 Ownership of airspace above the land

> 'He who owns the land owns everything reaching up to the very heavens and down to the depth of the Earth'.

Attributed to Accursius of Bologna in *Glossa Ordinaria* on *Corpus Iuris* (13th C.)

Land must include part of the airspace above the ground, otherwise building above ground level would be a trespass. However, it cannot be an unlimited part of that airspace; it cannot be 'to the heavens above' as otherwise every time an aircraft flew over a house it would be trespassing.

The law has tried to define how much of the airspace is owned by a landowner. Airspace has been split into two levels: the higher stratum and the lower stratum.

1.8.1 The higher stratum

Until the advent of air travel, no one could pass through the higher part of the atmosphere so ownership was never an issue. It was assumed that the landowner had ownership of the airspace. Air travel transformed the idea of ownership of the higher stratum of airspace. Planes now regularly fly through that part of the airspace above people's houses and gardens. However, the courts are unwilling to allow ownership in the higher stratum.

CASE EXAMPLE

Re the Queen in Right of Manitoba and Air Canada **(1978) 86 DLR (3d) 631**

Attempts by Manitoba to argue that sales of goods on board aircraft flying over the province could be taxed failed, on the basis that no one could claim ownership of that part of the airspace.

CASE EXAMPLE

Bernstein v Skyviews and General Ltd **(1978) QB 479**

The claimant claimed trespass because the defendant flew over his land without permission and took aerial photographs. The claim was unsuccessful.

J

'The [claimant] claims that as owner of the land he is also owner of the airspace above the land, or at least has the right to exclude any entry into the air space above his land. . . . That an owner has certain rights in the air space above his land is well established by authority. He has the right to lop the branches of trees that may overhang his boundary, although this right seems to be founded in nuisance rather than trespass . . . In *Wandsworth Board of Works v United Telephone Company* (1884) 13 QBD 904 the Court of Appeal did not doubt that the owner of land would have the right to cut a wire placed over his land . . . I can find no support in authority for the view that a landowner's rights in the air space above his property extend to an unlimited height. In the same case Bowen LJ described the maxim, *usque ad coelum*, as a fanciful phrase, to which I would add that if applied literally it is a fanciful notion leading tso the absurdity of a trespass at common law being committed by a satellite every time it passes over a suburban garden . . . The problem is to balance the rights of an owner to enjoy the use of his land against the rights of the general public to take advantage of all

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> that best struck in our present society by restricting the rights of an owner in the air space above his land to such a height as is necessary for the ordinary use and enjoyment of his land and the structures upon it, and declaring that above that height he has no greater rights in the air space than any other member of the public.'
>
> Griffiths J

The main principles to consider from this judgment are:

1. the owner has rights in airspace above his property.

2. the owner does not own unlimited rights over airspace, otherwise there would be a trespass every time a satellite flew over someone's garden.

3. the owner owns as much of the airspace as he needs for the ordinary use and enjoyment of his land.

This area of law is now largely governed by legislation such as the Civil Aviation Act 1982.

's 76(1) No action shall lie in respect of trespass or in respect of nuisance, by reason only of the flight of an aircraft over any property at a height above the ground which, having regard to wind, weather and all circumstances of the case is reasonable . . .'

So this Act prevents actions in nuisance or trespass against aircraft flying over houses unless the aircraft fails to comply with any relevant regulations.

1.8.2 The lower stratum

The law accepts that the landowner has rights over the airspace immediately above his property. 'You own as much as is necessary for the reasonable enjoyment of your property' (Griffiths J in *Bernstein v Skyviews and General Ltd* (1978)). So this will vary according to the type of property that you own. However it probably stops short of the altitude over which aircraft can legally fly. Under the Rules of Air Regulations 1996 it is held to be no lower than 200 metres above roof level. There are a number of exceptions to this, including where an aircraft is taking off and landing and also where it is necessary to fly lower in order to save life.

One of the first cases on this issue was *Pickering v Rudd* (1815) Camp 219 where the judge, Lord Ellenborough, did not think that there would an invasion of airspace by a balloon passing over one's property and no action for trespass could be taken.

This view was criticised and overturned in a number of following cases including *Gifford v Dent* [1926] WN 336 where an overhead sign which was erected on the wall above the ground-floor premises which had been bought by the claimant was held to constitute a trespass.

In *Wandsworth District Board of Works v United Telephone Co Ltd* (1884) 13 QBD 904 a telephone line running across a street could constitute a trespass, although not on the particular facts of that case.

In *Kelsen v Imperial Tobacco* [1957] 2 QB 334 the claimant was seeking an injunction to stop the defendants from using an advertising sign. The sign projected into the airspace immediately above the claimant's shop. However, although it projected over the land it did not interfere with his enjoyment of the airspace so an action in nuisance would not be successful. If he hit his head every time he left his premises then an action in nuisance would succeed. For an action in trespass to succeed the owner must show that he owned that portion of airspace. The judge found that the sign did amount to a trespass to the airspace above the land and awarded damages to the claimant.

Several cases have been brought where property developers have used cranes which have swung through the airspace above adjoining buildings. If you apply the principles from *Bernstein v Skyviews and General Ltd* (1978) that a landowner is entitled to as much airspace as is necessary for the ordinary use and enjoyment of his land and the structures upon it, then the owner of a high-rise block may be able to claim a much more extensive ownership of airspace than someone who lives in a bungalow or low-rise building. So an injunction was granted against the use of a crane which swung over the claimant's land in *Woollerton and Wilson Ltd v Richard Costain Ltd* [1970] 1 WLR 411 (although the defendant offered substantial sums in compensation which led to the suspension of the injunction) and again later in *Anchor Brewhouse Developments Ltd v Berkeley House (Docklands Developments) Ltd* [1987] 38 BLR 82.

KEY FACTS

Rights over airspace

1. Airspace is split between the upper stratum and the lower stratum.
2. There can never be ownership of the upper stratum (Civil Aviation Act 1949 and *Bernstein v Skyviews and General Ltd* (1978)).
3. Ownership of the lower stratum depends on what can be said is reasonable for the use and enjoyment of the property (*Kelsen v Imperial Tobacco Co* (1957)).
4. 'Reasonable for use and enjoyment of the property' will vary according to the height and type of the building.

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Additional reading

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