

Land Law

Concentrate

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#1

Introduction: proprietary rights

The examination

Issues discussed in this chapter may be examined as self-contained topics, specifically those relating to the definition of land. Typical problem questions may involve:

- assessing how far a person's rights over a piece of land extend, where, for example, there has been an invasion of airspace or removal of vegetation;
- assessing whether a purchaser can insist upon the return of numerous items removed from a property between exchange of contracts and completion of sale (ie whether the items removed were fixtures or chattels);
- assessing who has superior rights over items found on land.

(Note that these issues may also form part of another question. Take guidance from your own course as to where these issues may appear in a question.)

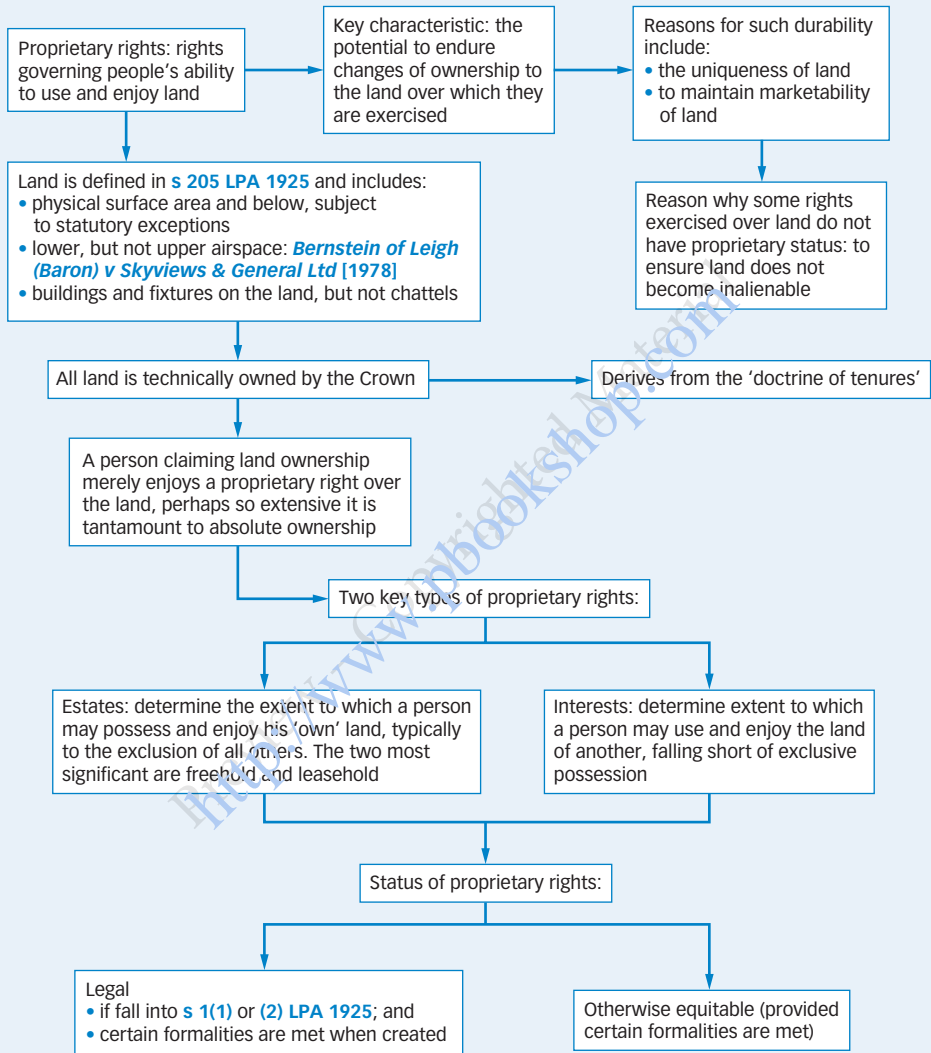
Depending upon the nature of your course, you may be required to explore the concepts of proprietary and personal rights and their distinguishing characteristics. Otherwise, much of the information contained in this chapter may be treated as foundation material: not specifically examinable by itself, but information which you must understand in order to comprehend how land law works.

Key facts

Key facts

- Proprietary rights govern your ability to use and enjoy both land you physically possess and land physically possessed by others.
- Proprietary rights are rights in the land itself which makes them capable of enduring changes of ownership to the land.
- Whilst technically all land is owned by the Crown, holding an **estate** in land, and in particular a freehold estate that gives you rights to possess, enjoy, and use the land forever, is tantamount to actual ownership.
- Holding an estate in land gives you rights to possess, enjoy, and use the land beyond just the physical surface area of that land.
- Apart from an estate in land, the other type of proprietary right that exists is an interest in land.
- Whilst an estate gives you a slice of time during which you are entitled to use and enjoy land you physically possess, an interest gives you rights to use and enjoy land physically possessed by another.
- Proprietary rights can be either legal or equitable in status.

Chapter overview



Introduction: proprietary rights

Introduction: proprietary rights

Property law concerns the regulation and management of people's enjoyment and relationships with particular things. The extent of the ability to enjoy and use property, and rights and remedies stemming from this, differ depending upon the nature of the property in question.

Where the property in question is land, rights governing people's ability to use and enjoy the land are known as **proprietary rights**.

A broad spectrum

Proprietary rights can:

- vary from being very extensive, for example the ability to use and possess land to the exclusion of everyone else (tantamount to ownership), to quite narrow, for example a right to fish;
- relate to what you can, or cannot, do over land that you physically possess, for example the ability to carry on a business on the land, or to land physically possessed by another, for example a right of way or an ability to restrict building;
- be numerous over one piece of land: a right for a person to physically possess it; a right for a person to walk over it; a right for a person to restrict building on it etc.

A distinctive nature

As seen as rights in the land itself, a proprietary right is not only enforceable against the person who originally granted it to you, but also, in certain circumstances, enforceable against any other person who may come to the land over which that right is exercised.

Why such enduring enforceability?

Land is a unique commodity: no one piece of land is the same. It's also generally expensive. A person who enjoys a right over a piece of land wants the assurance that it will not be lost when that land changes ownership. Without such assurance, land could lose its marketability, become economically stagnant and consequently lose its value.

Striking a balance

Equally, if a piece of land became overburdened by too many proprietary rights being exercised over it, such rights being capable of surviving changes of ownership to that land, it may become an unattractive investment. Consequently, some rights, although exercised in relation to land, are not given proprietary status. Licences are an example. They remain, for most, **personal rights**, enforceable only against the person who granted it to you and not against the land itself.

✓ Looking for extra marks?

A proprietary right is considered to be a right *in rem*. It is enforceable against the property itself ie the land. Where a holder of a proprietary right is denied that right, he is entitled to seek action to recover the actual land/use of the land, rather than be limited to recovering its value or damages to compensate loss of use. Personal rights are rights *in personam*. They are enforceable not against the actual property but against the person who granted the right in the first place. If revoked, even if wrongly so, the holder of the personal right may be entitled to damages but cannot insist upon recovering possession or use of the property itself. It is this fundamental difference which explains potential durability of proprietary rights which personal rights do not enjoy.

Revision tip

Some licences have been found to be enforceable against third parties and thus appear to have proprietary status. This is considered in more detail in chapter 11. Be prepared to make this link if required to examine the characteristics of proprietary, as opposed to, personal rights.

'Ownership' of 'land'

- Technically, all land is owned by the Crown (see 'The history behind land ownership: the doctrine of tenures' as to how this came about).
- The most you could have over a piece of land is a proprietary right to physically possess, use, enjoy, and deal with the land to the exclusion of anyone else, known as an estate.
- There are two key types of estate: the freehold and the leasehold (see 'Estates or interests' and chapters 5 and 6).
- The broadest is the freehold (the reasons for which are outlined later in this section). A person holding a freehold estate is, in practical terms, seen as the owner of the land. Their rights and relationship to the land that they physically possess are indistinguishable from that of an absolute owner.
- Where someone holds a freehold estate, giving them rights to possess and enjoy the land tantamount to absolute ownership, the extent of those rights depends upon how land is defined.
- A statutory definition has been given to 'land' in **Law of Property Act 1925, s 205(1)(ix)**. This is further clarified in case law.

In summary, where a person has a right to possess and enjoy a piece of land by virtue of holding a freehold estate, tantamount to making him the owner of the land, his rights extend to:

- the physical surface area of the land;
- the lower airspace above the physical surface area necessary for his ordinary use and enjoyment of that land. Any invasion of this lower airspace is *prima facie*

'Ownership' of 'land'

actionable as a trespass: *Anchor Brewhouse Developments v Berkley House (Docklands Developments) Ltd* (1987), with a remedy of an injunction where damages would not be adequate. This is qualified by statute, for example the **Civil Aviation Act 1982**, which allows for aircraft to pass over land at a reasonable height, without amounting to an actionable trespass. A landowner has no claim to trespass where there is interference with his *upper* airspace, ie that airspace not necessary for his ordinary use and enjoyment of the land: *Bernstein of Leigh (Baron) v Skyviews & General Ltd* [1978]. To allow otherwise would create absurdities and stifle the ability of the general public to take advantage of developments in science regarding airspace (for example satellites);

- the ground below the surface area, including mines and minerals, although this is qualified by various statutes, for example the **Coal Industry Act 1994** which vests ownership of coal in the Coal Authority;
- buildings or parts of buildings found on the land, whether the division is vertical or horizontal;
- wild plants growing on the land. Commercially grown plants are not considered part of the land and belong to those who planted them;
- dead wild animals killed on the land, irrespective of who killed them. Living wild animals do not belong to anyone, although a landowner has a right to kill them whilst they are on his land, subject to any statutory protection they might enjoy;
- the soil over which water flows. Where two plots of land are separated by a river, each plot owner owns the soil up to the middle of the river. As regards any fish that may be found in these waters, where the water is non-tidal the owner of the land has exclusive fishing rights, subject to him having granted this right to others. Where the water is tidal, the public has the right to fish up to the point of ebb and flow of the tide;
- some items found on the land. Whether the landowner's rights extend to such items depends upon the answer to a series of questions, as outlined in Figure 1.1;
- **incorporeal hereditaments**. These are those intangible rights that benefit the land in question, for example a right of way or an ability to restrict the neighbouring landowner from building on his land;
- **fixtures** found on the land. Where a **chattel** has become attached to the land, or a building on it, it can become part of the land itself changing from being a mere chattel to a fixture. Whether this is the case will depend upon the *degree of annexation* the object has to the land, or building on it, and the *purpose of its annexation*: *Holland v Hodgson* (1872). The label that parties give to the object is not conclusive of its status: *Melluish v BMI (No 3) Ltd* [1996].
 - The degree of annexation test: the greater the degree of annexation, the more likely the object is a fixture. Absence of any annexation at all would generally

be decisive in making the object a chattel, unless the object is one that, by reason of its own weight, does not require any annexation: *Elitestone Ltd v Morris* [1997]. However, this test must now be used in conjunction with the *purpose of annexation* test, which today is the dominant test out of the two: *Hamp v Bygrave* (1983).

- The purpose of annexation test: consider the purpose for which the object has been annexed to the land. If annexation is merely to enjoy the object as a chattel, it will remain a chattel: *Leigh v Taylor* [1902]. If it is to make an improvement to the property itself, the chattel will become a fixture: *D'Eyncourt v Gregory* (1866). The purpose of annexation must be judged objectively (*Dean v Andrews* [1986]), although subjective intentions of the person who annexed the object may be persuasive.

✓ Looking for extra marks?

In the case of *Botham v TSB Bank plc* [1997] it became clear that in making a decision as to whether an object is a fixture, and thus part of the land, a court takes into account a number of factors in addition to the degree and purpose of annexation tests, including:

- whether the object is part of the overall design of the building;
- the moveability of the object: where moved regularly, more likely a chattel;
- the lifespan of the object: where limited, more likely a chattel;
- the damage caused to the land, or building, when moved: where great, more likely a fixture;
- the type of person who installed/attached the object to the land: where a builder, more likely a fixture; where a contractor, more likely a chattel.

The significance of determining the status of an object often arises upon the sale of land where fixtures are deemed to convey with the land: s 62 LPA 1925. A purchaser is entitled to receive anything that is a fixture at 'exchange of contracts' (or perhaps earlier where land is inspected: *Taylor v Hamer* [2003]), subject to any contrary agreement.

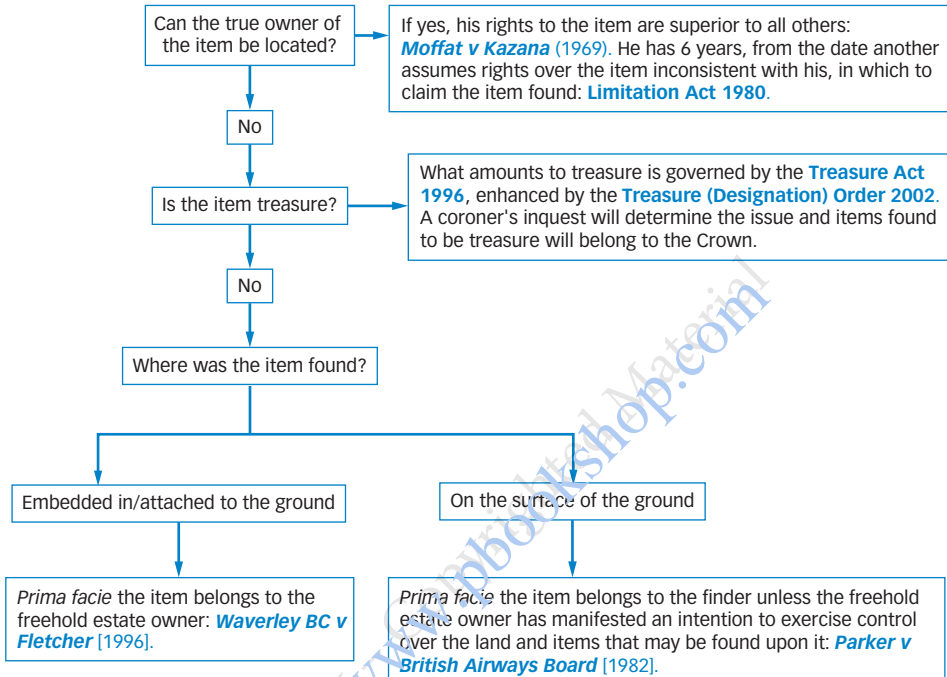
Revision tip

An examiner would want to see good use of case law to enhance your arguments as to whether an item is a fixture or a chattel. Draw appropriate comparisons and use the legal reasoning to demonstrate you understand the factors that influence a court.

The history behind land ownership: the doctrine of tenures

Ownership of items found on the land

Figure 1.1 The ownership of items found on the land



The history behind land ownership: the doctrine of tenures

The fact that, technically, all land is owned by the Crown stems from the Norman Conquest in 1066 when the King, William the Conqueror, declared himself as owner of all the land in England. A system of landholding developed whereby the King would allow people to use and occupy his land in return for the performance of certain services. Ownership of the land was never actually transferred to such persons. Such holders of the land were known as tenants and they in turn would allow others to use and occupy their land in return for services to them. This was known as *subinfeudation*. A feudal system of land ownership thus arose. The nature of the services provided by the tenant to his immediate lord differed depending upon the nature of the **tenure** in question: see Table 1.1.

Table 1.1 The doctrine of tenures

Free tenure	Unfree tenure
Characteristic – services provided to the immediate lord were fixed and certain	Characteristic – services provided to the immediate lord were not fixed as to their nature and duration
Types <ul style="list-style-type: none"> • Chivalry • Socage • Spiritual 	Types <ul style="list-style-type: none"> • Villeinage • Customary

Since 1926, there has been only one form of tenure: *free and common socage or freehold* as it is now known. The tenure exists in name only. The freehold tenant need not provide an immediate lord with services. Indeed, almost all freehold tenants hold the land directly from the Crown, the feudal pyramid of landholding having disappeared. The Crown still technically owns the land. Someone who claims ownership of land through having a freehold actually merely enjoys a proprietary right over the land that is so extensive it is tantamount to actual ownership.

Proprietary rights under the microscope

There are two key ways in which proprietary rights may be classified:

Estates or interests

An estate is a more extensive proprietary right than an interest. The freehold estate and the leasehold estate are the two most important. Whilst discussed further in their relevant chapters (chapters 5 and 6 respectively), the following key points about estates can be made here:

- holding an estate in a piece of land gives you a ‘slice of time’ during which you are entitled to possess and enjoy that land.
- the ‘slice of time’ given to you is determined by the type of estate that you hold:
 - with a freehold estate (known technically as the fee simple absolute in possession), the slice of time is perpetual. It will only come to an end if the estate holder dies with no heirs (when the estate reverts to the Crown *bona vacantia*. This is the most obvious indication today that land is still owned by the Crown). This is why someone who holds a legal freehold estate sees themselves as tantamount to the actual owner of the land.
 - With a leasehold estate (known technically as term of years absolute), the slice of time is fixed and the estate will come to an end when the time expires. It is therefore

Proprietary rights under the microscope

the smaller of the two estates. (It is further inferior to a freehold estate since the leasehold estate holder will be subject to more restrictions as to what he can and cannot do over the land than a freehold estate holder.)

The system of holding land by virtue of an estate can create a hierarchy of estates over one piece of land. For example, one piece of land could be subject to a freehold estate and one or more leasehold estates. By dealing with land in these ‘slices of time’ it is possible for people to use land to make money; carving estates out of their own and selling them to others to raise capital. (The precise status of an estate, where others exist in the same piece of land, is dealt with in detail in chapter 5.)

Whilst an estate determines the extent to which you can possess and enjoy your ‘own’ land, an **interest** concerns rights you have over the land of another. Although interests may take on a possessory character, possession will be restricted so that the estate holder of the land can still use and enjoy the land for himself. It is for this reason that interests are more limited in what they allow the holder to do than estates. However, they are no less important in the role they play in governing people’s relationship to land.

Legal or equitable

All proprietary rights will have either legal or equitable status. The types of proprietary right that can be legal, where certain formalities have been met, are found in a closed list in **s 1 LPA 1925**. Where such formalities are not met, the right may only exist in equity, but this again will be dependent upon satisfaction of certain formalities, all of which is discussed in more detail in chapter 2. (An example of a right that can have legal or equitable status is an easement. The conditions that determine its status are explained in chapter 12.)

Despite being limited to those found in the **s 1 LPA 1925** list, legal rights are not insignificant. Those that are listed commonly arise over land and they include the most extensive of the two types of proprietary rights: freehold and leasehold estates.

Other types of proprietary rights can only ever exist in equity, since their recognition as proprietary rights stemmed from equity’s intervention in resolving the inadequacies of common law when dealing with disputes over land. A classic example, and one discussed in more detail in chapter 13, is the restrictive covenant.

Revision tip

The status of a proprietary right as either legal or equitable is discussed in more detail in chapter 2 and again in relation to specific rights in the relevant chapters. Be sure you understand how status is determined.



Case	Facts	Principle
<i>Bernstein of Leigh (Baron) v Skyviews & General Ltd</i> [1978] QB 479	Flying a plane over land in order to take aerial photographs did not amount to a trespass of that land.	An owner of an estate in land has rights that extend only as far as the <i>lower</i> airspace above the physical surface area of the land necessary for the ordinary use and enjoyment of that land.
<i>Botham v TSB Bank plc</i> [1997] 73 P&CRD 1	The plaintiff owned a flat which was mortgaged. When he fell into arrears with the mortgage repayments, the bank sought possession and sold the property. A question arose as to whether some of the contents of the flat were fixtures, and thus part of the security for the debt.	In deciding the issue of whether an item is a fixture or chattel, look beyond the two key tests of degree and purpose of annexation (as discussed in 'Ownership' of 'land').
<i>D'Eyncourt v Gregory</i> (1866) LR 3 Eq 382	Despite being free-standing, marble statues of lions, garden seats, and ornaments were held to be fixtures, and thus part of the land.	Where evidence is produced that objects have been positioned so as to improve the overall architectural design of a property, those objects may become fixtures, even where there is no degree of annexation.
<i>Elitestone Ltd v Morris</i> [1997] 1 WLR 687	Wooden bungalows, not themselves attached to the land, rested on concrete pillars that were attached. The bungalows were deemed to be fixtures.	Even where there is no physical attachment to the land, an object could be a fixture where it is deemed to be used <i>in situ</i> and could not be removed without physical destruction.
<i>Leigh v Taylor</i> [1902] AC 157	Tapestries attached to a wall of a building were held to be chattels.	Although physical attachment of an object to the land might suggest that object has become a fixture, this may not be the case where such attachment is purely so that the object can be enjoyed.
<i>Parker v British Airways Board</i> [1982] QB 1004	The plaintiff, a passenger at Heathrow airport, found a gold bracelet on the floor of the executive lounge. He handed it in to an employee of the defendant requesting it be returned to him should no-one claim the item. No-one claimed the bracelet but the defendant sold it and retained the proceeds. It was held that the plaintiff was entitled to damages.	The rights of the finder of an object found on the surface of the ground can only be displaced by the owner of the land where the object was found if the latter manifested an intention to control the land and items found on it.

Exam questions

Case	Facts	Principle
<i>Waverley BC v Fletcher</i> [1996] QB 334	The defendant, lawfully in a public park, unlawfully used a metal detector to detect a gold brooch buried in the ground. It was held that the council's rights to the brooch were superior to the finder's.	Where an object is found in or attached to land, the owner of that land has better title to that object than the finder.

? Exam questions

Problem question

Tim purchased the freehold estate of a property known as Nector House two weeks ago. Upon moving into the property he noticed that a water fountain had been removed from the garden and a stained glass window had been removed from the dining room and replaced with normal glass. Two days ago, a postman picked up a valuable emerald necklace from under a bush as he walked up the garden path to the door of Nector House. The true owner of the necklace cannot be found and the postman has told Tim he is keeping it for himself. Tim has also discovered that branches from his neighbour's willow tree hang over his land.

Advise Tim whether:

1. he can insist upon the return of the water fountain and the stained glass window;
2. he can require the postman to return the emerald necklace to him; and
3. he can cut off the overhanging branches from his neighbour's willow tree and use them to make a basket.

See the Outline Answers section in the end matter for help with this question.

Essay question

'Cuius est solum eius est usque ad coelum et ad inferos': he who owns land owns everything up to the sky and down to the centre of the earth.

To what extent is this Latin phrase misleading today?



Online Resource Centre

To see an outline answer to this question log onto www.oxfordtextbooks.co.uk/orc/concentrate/