**Chapter 1**

**Question 1: What are the special features of land? Can you explain how those special features might influence particular land law rules?**

Chapter 1, as a whole, introduces a key question: what’s special about land? As we will see throughout this book, many special rules have been developed to deal with the very difficult questions of *who* is entitled to use land and *how* they are entitled to use land. In Chapter 1, we have a chance to stand back and ask why we need special rules to answer those questions.

It is clear that land is a special type of resource (**1.8-1.12**). As Birks (1998) notes, land may no longer be the key asset of the mega-rich, many of whom prefer to have access to the value of intangible assets, such as shares, often held in off-shore trusts. Nonetheless, land still offers unique opportunities, such as the chance to set up a home or business, and to establish a place within a community. As Birks puts it: “Every business needs premises, every factory needs a site. For most of us as private individuals our home is the centre of our lives.” McFarlane (2008) identifies five special features of land, which depend on its unchanging physical features, rather than its changing economic role: its permanence; uniqueness; capacity for multiple simultaneous use; social importance; and limited availability. Of course, it may be said that other forms of resource share, to some degree, some of those features: for example, gold is permanent and of limited availability; and clean water is of great social importance. Yet it is difficult to think of another resource that possesses those five special features *in combination* and *to the same degree*.

In the rest of the book, we will explore the significance of those special features to land law. For example, the list of property rights that can be held in relation to land is longer than the list of such rights that can exist in relation to other resources: this can be linked to the permanence of land; its capacity for multiple simultaneous use; and its social importance. One key consequence can be seen in the analysis at **1.57-1.79** of the three case-law examples. It is that disputes about the use of land can be particularly fierce, and difficult to resolve: two innocent parties may have conflicting, but persuasive, claims to make a particular use of land. It is no wonder that the law has had to develop special rules to meet the special challenge of deciding who gets to use land, and how they get to use it.

**Question 2: What is the key difference between a property right and a personal right?**

As noted at **1.14**, the key difference is that if B has a personal right against A, that right, by itself, binds only A. A personal right is a right against a specific person. In contrast, a property right is not defined by reference to a specific person, as it relates instead to something independent of a specific person, such as some land.

The practical implications of this are explored throughout the book, but a good example is provided by *National Provincial Bank v Ainsworth* (1965) as discussed at **1.58-1.62**. The Court of Appeal had found that Mrs Ainsworth’s right was a property right and so was capable of binding not only Mr Ainsworth, but also the bank, who had acquired a right in the land when Mr Ainsworth granted them a charge over the land. The House of Lords reversed this finding, holding that instead Mrs Ainsworth’s right was only a personal right against her husband, and so did not bind the bank, who were then free to insist that Mrs Ainsworth leave the property.

**Question 3: How might each of the content, acquisition and defences questions be relevant when advising a party as to his or her rights in relation to land?**

As discussed at **1.13-1.36**, the three questions provide a means to structure the land law rules that decide if B has a private right to use land that is binding on C, a party who claims a later, competing right to use that land. The content question looks to the content of B’s right and asks in particular if that type of right is capable of counting as a property right, or is instead just a personal right against A. It was important, for example, in *Ainsworth* (1965): the House of Lords decided that, given its content, the right of Mrs Ainsworth (B) was just a personal right against Mr Ainsworth (A) and so could not bind the bank (C), which had later acquired a right in the land.

Even if the right claimed by B is capable in its content of counting as a property right, it is necessary to ask if B, on the facts, has acquired that right. There are, for example, formality rules that determine what must occur for B to acquire A’s title to land. The formality rules differ in relation to different types of right, and in particular apply differently to legal estates and interests on the one hand and equitable interests on the other.

Even if B can satisfy both the content and acquisition questions, and therefore show that B has a property right that is capable of binding C, the defences question must still be answered. Even if, for example, B’s property right arose before C’s property right, it may be possible for C to show a defence to B’s pre-existing property right. That was the case, for example, in *Flegg* (1988) (see **1.71-1.77**) where the overreaching defence allowed the mortgage lender (C) to acquire its charge without being bound by the pre-existing equitable interest of the Fleggs (B1 and B2).

**Question 4: The *Ainsworth* (1965) and *Boland* (1981) decisions each concerned the rights of a wife occupying her home against a bank, where the bank acquired rights in the land without the knowledge or consent of the wife. Can you briefly explain why the results in the cases were different? And can you briefly explain why the result in *Flegg* (1988) differed from that in *Boland*?**

This can be done by making use of the content, acquisition, and defences questions (see **1.13-1.36**). In *Ainsworth* (1965) (see **1.58-1.62**), the content question was crucial. The House of Lords found that Mrs Ainsworth’s right was only a personal right against her husband, and so did not bind the bank, who were then free to insist that Mrs Ainsworth leave the property. In contrast, in *Boland* (1981) (see **1.63-1.70**), Mrs Boland had a recognized equitable interest: an interest under a trust. This right was not just a personal right against Mr Boland, and so was capable of binding the bank when it later acquired a right from Mr Boland.

As discussed at **1.71-1.77**, the defences question was the crucial difference between *Boland* and *Flegg* (1988). In each case, the occupiers (B) had a pre-existing equitable interest that was capable of binding the lender (C). However, in *Flegg*, C was able to use a particular defence (the overreaching defence) to take priority over B1 and B2’s property rights. In *Boland*, that defence was not available, and nor was any other defence, so B’s pre-existing equitable interest was binding on C. Defences, including the overreaching defence, are discussed in detail in Chapter 11.

**Question 5: What problems would arise if it were indeed the case that the rights of an owner of land extended indefinitely in a column stretching both above and below the surface of the land?**

As noted at **1.83**, a balance must be struck between the claims of the owner and the freedoms of others. This can be seen, for example, from the decision in *Bernstein* (1978): clearly a single owner of land should not have the power to stop any aircraft flying at any height above his or her land, as the costs thereby imposed on others would be too great. Note though that, as shown by *Bocardo* (2010) (see **1.82**), an owner’s claim can still succeed even if the activity of the defendant, in this case under the surface of the land, does not interfere with any current use or enjoyment of the land by the owner. It is worth considering these cases within the wider context of regulation: who do we want to have control of particular activities? In relation to aircraft flights, for example, a system of legislative and regulatory control seems to make more sense than having to get permission from all owners over whose land one wishes to fly; in relation to drilling for oil, where a small number of land owners may be affected, the burden of obtaining permission is much lower.

**Question 6: Are there any convincing reasons why an owner or occupier of land should have any rights in relation to an object found on that land? Do any different reasons apply if the object is found below the surface of the land?**

The basic legal position is that the mere fact of an object’s being found on B’s land gives B no special rights to that object (see **1.91**). As discussed at **1.92-1.94**, there are then three exceptions which have been developed in the case-law, the first two of which can apply if the object is found on the land, and the third of which applies only where the object if found below the surface of the land. It is possible to criticize each of these exceptions, and it is necessary to ask whether they justify moving away from a simple rule that allocates property rights based on possession of the object itself. In *Parker* (1982) and *Waverley* (1996) some reasons are evident in the courts’ thinking: for example, promoting the aim of returning the object to its true owner (giving B a claim where B operates some sort of scheme for finding and returning lost property may give B an incentive to operate such a scheme); or discouraging trespass (giving a claim to B, rather than the finder, where the finder does not have authority to be on B’s land). Where the object is below the surface, the finder’s conduct may well be more intrusive, as in *Waverley*, and there is also an idea that the object has therefore become ‘part of’ B’s land – although, as noted at **1.94**, that would seem to deny the rights of the true owner of the lost object.

Note too there are also special rules applying under the Treasure Act 1996 where the object found counts as treasure for the purposes of the Act: these rules are not focused as such on giving rights to B, but rather on ensuring that such finds are declared and the opportunity is given to the State to acquire historically or culturally important objects for public display.