

## Chapter 2

### Question 1: In *Entick v Carrington*, what rights did Mr Entick assert against the King's messengers?

Mr Entick's complaint was that the messengers, by breaking into his home and taking away his papers, had interfered with his property rights to that land and those papers. The messengers' action was, on the face of it, a legal wrong: a trespass. As noted by Lord Camden, the Lord Chief Justice, *any* entrance onto another's land, without the permission of the land owner, constitutes a *prima* trespass. The messengers argued that their action was authorized, as it had been carried out pursuant to a warrant, made out by the Earl of Halifax (one of the King's Secretaries of State) in the name of the King. The court held, however, that the Earl of Halifax had no legal authority to issue such a warrant.

The messengers had thus committed a legal wrong – a trespass – by interfering with Mr Entick's land and papers without his permission. It is important to note that Mr Entick was not claiming any special right (such as a constitutional right to privacy) that binds only the King or the state; he simply relied on his property rights in his land and his papers.

### Question 2: What does it mean if we say that 25 Mountfield Gardens is 'B's property'?

In the extract set out in section 2.1, Gray and Gray make a number of important points about how the term 'property' is used (and, indeed, abused) both in everyday speech and by lawyers. They argue that, if we say a thing is B's property, our focus is not only on the thing itself, but, more importantly, on the relationship between B and the thing. So, if we say that 25 Mountfield Gardens is 'B's property', we suggest that there is a 'power relationship' between B and that plot of land: a relationship that allows B to 'assert a significant degree of control' over that thing. We are also suggesting, in some way at least, that B *should* have some control over that thing and, perhaps, that others should be excluded from it.

Gray and Gray's discussion can be compared to some of the points made about the scope of land law in Chapter 1. In particular, the notion of property as a 'power relationship' can be linked to a focus not on things, but on *rights* to, or relating to, things. So, one way of understanding the claim that 25 Mountfield Gardens is 'B's property' is to see it as a claim that B has a property right in that plot of land. On that view, to understand more fully what the claim means, we need to know more about the nature and content of B's property right: for example, is it a freehold or a lease? We will examine this question in more detail in section 5.3.

### Question 3: '*To whomsoever the soil belongs, he owns also to the sky and to the depths.*' Is that an accurate statement of English law?

Whilst *Edwards v Lee's Administrator* is a case from Kentucky, one of the basic points it makes is also true of English law: if B owns land, B has rights in relation not just to the surface of the land and any buildings on it, but also in relation to the space below the surface of the land. To that extent, the statement '*To whomsoever the soil belongs, he owns also to the sky and to the depths*' has some truth – although it is important to note that there may of course be restrictions on the extent of B's right to control the use of the space beneath the surface of the land. Those restrictions can come, for example, from planning law, or from public control of particular resources, as noted in Chapter 1.

The case of *Star Energy Weald Basin Ltd and another v Bocardo SA* illustrates that a landowner has rights to the earth below the surface. The Supreme Court held that B had the right to the strata to be found between 800 and 2,800 feet below the surface of his land, and so the defendant's operations did involve a trespass to B's land. It is worth noting that B's rights were not limited by what was necessary for B's use and enjoyment. Equally, it is worth noting that a statute ensured that B did not have the right to all the oil beneath his land, so there clearly are some limits on the extent of B's subterranean rights.

The Court of Appeal recently applied the landowner's right to the sky and to the depths in *LM Homes Ltd v Queens Court Freehold Co Ltd*. The Leasehold Reform, Housing and Urban Development Act 1993 gave the tenants of a block of flats a right (of collective enfranchisement: see section 24.2.2) to acquire the freehold of the "premises". The Court held that this included the airspace above the block of flats and the sub-soil underneath the block.

The case of *Bernstein v Skyviews* also shows how B's supposed right to ownership of the sky above his or her land is limited. There are not only public controls, such as those expressed in the Civil Aviation Act 1949; there are also inherent limits on B's right. Those limits were explored by Griffiths J in finding that, by flying over Lord Bernstein's land for the purpose of taking photographs, Skyviews had not interfered with any property right of Lord Bernstein.

Furthermore, if B is a leaseholder and B's lease is created by contract with A, the precise nature of B's right to ownership of the space above and below his land will depend on the interpretation of that contract. In *Gorst v Knight*, for example, it was held that B's long lease of a maisonette comprising the ground floor of a house did not give B rights in relation to the sub-soil under the house, as those rights were retained by A, who had the freehold of the house. It was significant that terms of B's lease referred to the area under the leased premises which, as noted by HHJ Paul Matthews at [33], "indicates that there is a lower limit to the demised premises".

#### **Question 4: Why might it matter whether or not a particular thing counts as part of a plot of land?**

There are many different reasons for which it may be important to know whether a particular thing counts as part of a plot of land. In *Elitestone Ltd v Morris*, Mr Morris wished to claim that a particular statute, the Rent Act 1977, protected his occupancy of the wooden bungalow he lived in as his home. If the Act did not apply, Elitestone, which owned the plot on which the bungalow was located, would be able to remove Mr Morris from his home. If the Act did apply, however, Mr Morris would be protected (see Chapter 20 for more detail on the general operation of such statutory protection). To show that the Act did apply, Mr Morris had to show he had a lease: a property right in land. Elitestone argued that Mr Morris's only right was to the bungalow, and the bungalow was not part of the land: it just rested on it. The House of Lords found in favour of Mr Morris. As a result, Elitestone was not able to remove Mr Morris from his home.

In *Botham v TSB Bank*, Mr Botham had borrowed money from the bank. In return, he gave the bank a charge by way of legal mortgage – this meant the bank had power, if Mr Botham defaulted on his loan repayments, to sell off Mr Botham's land and use the money to meet his debt to the bank. When Mr Botham defaulted, a dispute arose as to whether the bank had the power to sell certain items: if those items were seen as part of Mr Botham's land, the bank could sell them off and use the money to meet the debt owed by Mr Botham; if not, the bank had no special rights to use those items. In resolving the dispute, the Court of Appeal classified the items into groups: its conclusions are summarised in Table 1 in the extract available online on the book's companion website.

In *Waverley BC v Fletcher*, Auld LJ seems to have decided that a brooch found by Mr Fletcher, when metal detecting in the council's park, had become part of the council's land. That finding was used to support the conclusion that the council had a better right to the brooch than Mr Fletcher. It seems incorrect, however, to say that the brooch had become part of the council's land, as this suggests that the council had a better right to the brooch than the unfortunate party who initially lost it.

#### **Question 5: Whilst on B's land, A finds a gold ring. What factors are relevant to deciding which of A or B has a better claim to the ring?**

In certain circumstances, defined by the Treasure Act 1996, the Crown acquires a property right to any 'treasure' as soon as it is found. Assuming the ring does not count as treasure under the Act, the cases discussed in section 2.2 set out the relevant factors to resolving a dispute between A and B. *Hannah v Peel* sets out the starting point, established in cases such as *Armory v Delamirie* and *Bridges v Hawkesworth*. That starting point is

that, if A takes possession of the ring before B, A has a better claim to the ring. Of course, if it was B, himself or herself, who lost the ring on his or her land, then B will have had possession of the ring before A and so will have the better claim. At this point, however, the fact that the ring was found on B's land is, by itself, irrelevant.

The reasoning of the Court of Appeal in *Parker v British Airways Board*, however, suggests that, in some circumstances at least, the starting point has to be modified. Lord Donaldson MR suggested that, if the ring is found in or attached to B's land (or a building on B's land) then, at least if B occupies the land or building, B has a better claim to the ring than A. The decision of the Court of Appeal in *Waverley BC v Fletcher* can be seen as an example of such a case: the brooch there was found under the surface of the council's land and so can be seen as found in the land. The reasoning in *Waverley BC* can be questioned, however, as it seems to suggest that, where the ring is found in B's land, B's claim is stronger even than that of the party who initially lost the ring.

In *Parker v British Airways* Lord Donaldson MR also suggested that, if B occupies a building and has manifested an intention to exercise control over that building and anything in it, then B will have a better claim to the ring than A, even if the ring was not in or attached to B's land when it was found. That suggestion can also be questioned: if B has not taken possession of the ring, why should B's intention to control things found on the land be relevant? It may well be that an important factor underlying the analysis in *Parker* and the decision in *Waverley* is a desire to ensure that, if A is trespassing on B's land when he finds the ring, then A should not benefit by acquiring a better right to the ring than B. Of course, that desire will often conflict with the basic starting point that the time at which a party acquired possession is the key test.