

Chapter 5

Question 1: What is the difference between a 'personal' right and a 'property' right?

This important distinction is discussed in section 5.1. Birks states that the distinction depends on the question of '[a]gainst whom can the right be demanded?' – in other words, 'who can you sue?'. If B has a personal right against A, this simply means that A is under a duty to B: so B can only assert that right against A. In contrast, if B has a property right, that right is capable of binding *anyone* – it is not simply personal, as it is not linked to a specific person.

Question 2: How might the result in *Hill v Tupper* have been different if Mr Hill's right had counted as a property right?

The decision in *Hill v Tupper* shows the importance of the distinction between personal rights and property rights. Mr Hill acquired an exclusive right, from the Basingstoke Canal company, to put out boats on the canal. Mr Hill wished to assert that right against Mr Tupper, who had also started to hire out boats on the canal. However, the Exchequer Chamber held that Mr Hill's right was only a personal right against the Canal company. As a result, Mr Hill could not assert that right against Mr Tupper.

If the court had instead held that Mr Hill's right counted as a legal property right, Mr Hill would have had a chance of asserting that right against Mr Tupper. Mr Hill's right would have been *prima facie* binding on Mr Tupper – so, if Mr Tupper could not show that he had a defence to Mr Hill's right, Mr Tupper's action in hiring out boats on the canal would have constituted a wrong against Mr Hill. As a result, the court would almost certainly have ordered Mr Tupper to stop putting boats on the canal.

Question 3: What role, if any, does the concept of ownership play in English land law?

As noted by Harris, some commentators (such as Hargreaves) have argued that ownership is of no relevance in English land law. As Harris notes, it is technically correct to say that, in English law, a purchaser of land does not acquire 'ownership' of land; instead, she acquires a legal estate in land: a freehold or a lease. So, whilst a purchaser may think of herself as an 'owner of land', she technically holds a particular estate in land.

However, this does not mean that ownership is of no relevance in English law. Harris points out that the concept of ownership can have a different impact: it can be crucial in defining the content of a legal estate in land. For example, in *Miles v Bull*, Megarry J refers to the decision in *Ferris v Weaven*. In *Ferris v Weaven*, an apparent transfer of a legal estate was held to be a sham, so that the purported purchaser never acquired that legal estate. Megarry J analysed that result as depending on the fact that the purported purchaser had not 'sought to exercise acts of ownership'. Similarly, Lord Templeman, in *Street v Mountford*, described a party with a lease as 'able to exercise the rights of an owner of land which is in the real sense his land, albeit temporarily and subject to certain restrictions.' This supports Harris's suggestion that the concept of ownership does have a role to play in defining what it means to have a freehold or lease.

Question 4: Why did the Law of Property Act 1925 limit the number of possible legal estates in land?

Birks describes an estate in land as a 'slice of time'. For example, if B has a 99 year lease of land, B has ownership of that land for that particular slice of time. If A has a freehold (ownership of land for ever), A may wish to parcel out his or her ownership of the land. A may wish to give his eldest child ownership of the land for her life, with ownership then going to his eldest grandchild for his life, and so on.

Birks notes that, if A were completely free to deal with his or her land in that way, problems could be caused for C, a party later wishing to acquire rights in the land. If C wanted to acquire ownership of the land forever, she would have to deal with a number of different people (A's child; A's grandchild, etc), some of whom might not

yet be born! By limiting the number of possible legal estates in land, the Law of Property Act 1925 assists C – it limits the legal burdens that may be imposed on a piece of land.

As we will see in Chapter 6 (and also in the online chapter on successive ownership), if A wishes to give rights to his or her eldest child, then to his or her eldest grandchild and so on, it is possible for A to set up a trust. In this case, the child and grandchild acquire *equitable* property rights in the land. One important consequence is that C, a party later wishing to acquire the land, may be able to do so without obtaining the consent of all those with equitable property rights in the land: this is due to the doctrine of overreaching (which we will examine in Chapter 17).

Question 5: What is the difference between dependent and independent acquisition?

This distinction deals with the ways in which a party, B, may claim to have acquired a property right in land. If B relies on a dependent acquisition, he claims that another party, such as A, has exercised a power to give B a right. B's claim is dependent, as it depends on the fact that A had such a power to give B a right. This is the most common way in which B can claim a legal property right in land. For example, the overwhelming majority of freehold owners of land acquire that freehold by means of a transfer from a previous owner.

However, it is also possible, in rare cases, for B to claim a legal property right without needing to show that anyone has exercised a power to give B that right. In such a case, B's claim is independent, in the sense that it does not depend on anyone else having a power to give B that right. For example, if B simply takes physical control of A's land, without A's permission, B acquires a legal freehold of that land. We will examine this form of independent acquisition in detail in Chapter 9.

Question 6: What is the *numerus clausus* principle? Is it an unjustified limit on the ability of an owner of land to create new property rights in that land?

The *numerus clausus* ('closed list') principle governs how we determine whether a particular type of right is a personal right or a property right. As noted in section 5.6.1, it should not be thought that the *numerus clausus* principle, or its reflection in section 1 of the Law of Property Act 1925, means that the content of legal estates and interests in land is fixed forever in its current state. Instead, the point is that the content of property rights is limited: only certain types of right can count as property rights. So, if A, a freehold owner of land, gives B a particular right, that right can count as a legal property right only if it is on the set list of recognised legal property rights in land. This is true even if A and B both want B's right to count as a legal property right. For example, in *Hill v Tupper*, it may have been the case that both Mr Hill and the Basingstoke Canal company intended that Mr Hill's exclusive right to put boats out on the canal should have been a property right. However, as that type of right is not on the list of recognised legal property rights in land, it could not count as a legal property right. As far as legal property rights in land are concerned, the *numerus clausus* principle received statutory confirmation in section 1 LPA 1925, which sets out a closed list of legal estates and interests in land.

It is thus clear that the closed list principle is a limit on the ability of A, a freehold owner of land, to create new property rights in that land. However, there may be important justifications for that limit. For example, the key feature of a property right is that, even if it is given to B by A, it can bind not only A but also third parties. The closed list principle provides such third parties with some protection – that protection is important as, when dealing with each other, A and B may have no reason to consider the interests of future users of the land. There is also a debate as to whether the closed list principle promotes efficiency. Rudden has argued that the principle may simply encourage A and B to find complicated ways around it – we will see some examples of this in section 23.2.4.

In contrast, Merrill and Smith (see the article noted in the Further Reading list at the end of the chapter) have argued that, by standardising the list of property rights, the principle may make dealings between A and B more efficient, as well as making it easier for third parties to discover what burdens may affect the land. Relatedly, in 'The Architecture of Property' in Dagan and Zipursky (eds) *Research Handbook on Private Law Theory* (Elgar,

2020), Merrill and Smith contend that the *numerus clausus* principle, in one form or another, is a crucial aspect of any system of property law, and thus a fundamental component of the “architecture of property”.