Parking Rights and Conceptual Wrongs: The Ouster Principle Revisited

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Introduction

Easements offer the right of one landowner to use the land of another in a prescribed fashion or, much less commonly, to restrict the use made of the burdened land.[1] These incorporeal rights exist, therefore, to enhance the enjoyment of the dominant land at the expense of the servient land.[2] The elemental feature is that an easement does not mark a deprivation of the servient owner's rights, but rather entails a mere diminution of those rights.[3] As Lord Shaw observed, "In substance the owner of the dominant tenement throughout admits that the property is in another, and the right being built up or asserted is the right over the property of that other".[4] As an easement is a third-party interest in the servient land, it is necessary to distinguish it from claims that are possessory in nature such as leasehold and freehold estates. This distinction is crucial as, "easements and possessory interests in land must be mutually exclusive".[5]

Unfortunately, any clear demarcation of these classificatory borders is severely hampered by, "the somewhat confused state of the authorities"[6] and the resultant, "ill-defined line between rights in the nature of an easement and rights in the nature of an exclusive right to possess or use".[7] Nowhere is this uncertainty more pronounced than with parking rights,[8] which due to the high degree of use by the dominant owner inherent in the exercise of these rights, lie on the cusp between possessory and non-possessory claims.[9] As Colton J noted in *McAteer v Keeley*,

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[1] See *Churston Golf Club v Haddock* [2018] EWHC 347 (Ch); [2018] 2 P. & C.R. 3 (fencing easement).

[2] They represent, "a shift in the equilibrium of natural rights incident to their ownership, a diminution in the natural rights of one accompanied by an artificial addition to the natural rights of the other …" (J. Gaunt and P. Morgan, *Gale on Easements*, 16th edn (Sweet and Maxwell, 1997), p.4).

[3] See generally, M. Haley and L. McMurtry, "Identifying an easement: exclusive use, de facto control and judicial constraints" (2007) N.I.L.Q. 490.

[4] *AG of Southern Nigeria v John Holt & Co (Liverpool) Ltd* [1915] A.C. 599 at 618.

[5] Law Commission Consultation Paper, *Easements, Covenants and Profits à Prendre* (2008) Law Com. No.186, [3.34]. The Commission added [3.35] that, "It is clear that where a person has exclusive possession of land, he or she is likely to be a tenant of the land. It is also clear that such a person cannot have an easement over the land being exclusively possessed".

[6] per Neuberger LJ in *McAdams Homes Ltd v Robinson* [2004] EWCA Civ 214 at [1]; [2005] 1 P. & C.R. 30.

[7] per Chadwick LJ in *Hair v Gillman* (2000) 80 P. & C.R. 108 at 112; [2000] 3 E.G.L.R. 74.

[8] K. Gray and S. Gray, *Elements of Land Law*, 4th edn (Oxford: OUP, 2005), p.647 describe the right to park as the "most valuable asset of the modern urban dweller …".

[9] Similar difficulties have been encountered with storage rights: *Grigsby v Melville* [1972] 1 W.L.R. 1355; [1973] 1 All E.R. 385.

"An easement to park vehicles is not a traditionally recognised easement and it is only in recent years that the courts have recognised such a concept".[10]

Although it is undeniable that a right to park now has the potential to exist as an easement,[11] whether it will be so classified currently involves questions of fact, degree and nuanced judicial reasoning.[12] While it is essential that the right claimed, "must have the character and quality of an easement as understood by, and known to, our law", excluded from consideration are claims that, "amount to rights of joint occupation or would substantially deprive the … [servient] owners of proprietorship or legal possession".[13] As demonstrated in *Mulvaney v Gough*, this involves the task of proving a negative, that is, what the servient owner cannot now do with the burdened land.[14] The investigation is into whether a right otherwise capable of existing as an easement (there the right to use and maintain a communal garden at the back of a row of houses) is disqualified due to the extensive possessory use attendant on its exercise.[15] In *Mulvaney*, the easement was upheld because the maintenance of the garden by the dominant owner did not prevent the servient owner from entering on the land and, subject to the easement, doing whatever he wished thereon.[16]

In relation to parking rights, this process of impact assessment is particularly troublesome because, as the Law Commission noted, "A parking space may be transferred as part of a freehold, or demised as part of a lease; alternatively a right to park may be conferred alongside an estate (usually along with a lease), and that is where particular pitfalls may lie".[17] The right itself might amount to exclusive use of the servient tenement[18] and, thereby, be in the nature of a possessory claim.[19] The same outcome arises when the exercise of the right claimed (albeit not exclusive) is so exclusionary in effect that it deprives the servient owner of any reasonable use of the burdened land.[20] In order to gauge the degree of the servient owner's residual use, the courts have innovated the highly fact sensitive, but roughly hewn and oft maligned, "ouster" test.[21] While the Law Commission believes that

[10] *McAteer v Keeley* [2021] NICh 15 at [87].

[11] *De Le Cuona v Big Apple Marketing Ltd* [2017] EWHC 3783 (Ch); [2018] L. & T.R. 27; see also the obiter statement of Lord Scott in *Moncrieff v Jamieson* [2007] UKHL 42; [2007] 1 W.L.R. 2620 at [2635], [2636].

[12] See *Kettel v Bloomfold Ltd* [2012] EWHC 1422 (Ch); [2012] L. & T.R. 30.

[13] per Lord Evershed MR in *Re Ellenborough Park* [1956] Ch. 131 at 160, 164; [1955] 3 W.L.R. 892.

[14] *Mulvaney v Gough* [2002] EWCA Civ 1078; [2003] 1 W.L.R. 360.

[15] In *P&S Platt Ltd v Crouch* [2003] EWCA Civ 1110; [2004] 1 P. & C.R. 18, Peter Gibson LJ underscored this distinction between a detraction of the servient owner's rights and the deprivation of any reasonable user by the servient owner.

[16] By way of contrast, in the Australian case of *Clos Farming Estates Pty Ltd (Receivers & Managers Appointed) v Eastern* [2001] NSWSC 525, the right to operate a vineyard on the servient land went far beyond the notion of a communal garden and, according to Bryson J (at [41]) entailed that the servient owner's rights were, "no more than a shadow of ownership and possession of a freehold and do not have any reality beyond the opportunity to experience a sense of proprietorship …".

[17] *Making Land Work: Easements, Covenants and Profits à Prendre* (2011) Law Com. No.327, [3.199].

[18] *Making Land Work: Easements, Covenants and Profits à Prendre* (2011) Law Com. No.327, [3.200] provides the example of a right to park in a lockable garage on terms that the dominant owner will have sole access.

[19] *Making Land Work: Easements, Covenants and Profits à Prendre* (2011) Law Com. No.327, [3.200] explained, "A grant that gives the right wholly to exclude the owner of the land, all the time, is not an easement".

[20] In *Batchelor v Marlow* [2001] EWCA Civ 1051; [2003] 1 W.L.R. 764, the exclusive right to park in several parking spaces during working hours on working days was held by the Court of Appeal to be too invasive to be an easement.

[21] Although the origins of the ouster principle are usually traced back to the Scottish case of *Dyce v Hay* (1852) 1 Macq. 305 (see A. Hill-Smith, "Rights of parking and the ouster principle after Batchelor v Marlow" [2007] Conv. 223), Lord Scott expressed his doubts in *Moncrieff v Jamieson* [2007] UKHL 42; [2007] 1 W.L.R. 2620 at 2640, "*Dyce v Hay* was a case about public rights, not about private law servitudes … [and] tells us nothing about the essential nature of servitudes".

the present law lacks coherence and clarity and calls for reform,[22] the ouster principle remains the yardstick employed in exclusionary use cases to distinguish an easement from a possessory claim.[23]

This article will examine the extant law concerning exclusive and exclusionary use, with a focus on the problems and academic debate associated with parking easements. This will involve an appraisal of the origins, workings and deficiencies of the ouster principle, a critique of the proposals for reform, an engagement with case law both new and old and an evaluation of the alternative "possession and control" test as propounded by Lord Scott in *Moncrieff v Jamieson*.[24]

Contextual framework

The most significant exercise in profiling the nature of an easement was that undertaken by Lord Evershed MR in *Re Ellenborough Park*, where he adopted the four-stage test that continues to pervade modern judicial thinking.[25] Although it was hoped that his analysis would draw an intelligible line of demarcation between easements and other rights, as an exposition of principle it lacks detail.[26] These indicators of an easement have proved to be, "elastic and imprecise in their application to the wide variety of rights which human ingenuity has evolved".[27] It is with the fourth of Lord Evershed MR's qualifying conditions, which requires that the right has the potential to lie in grant, that most difficulty emerges and with which this article is concerned.[28]

Although the fourth head has become, "a repository for a series of miscellaneous requirements which have been held to be essential characteristics of an easement",[29] on a pragmatic level, the fourth condition captures the common-sense notion that a right cannot be so indefinite or vague as to be unenforceable by the courts. Hence, there can be no easement to protect privacy,[30] to preserve a view[31] or to offer protection from the weather.[32] It explains also why a recreational right to wander over land (as opposed to the private use of a communal garden) cannot be an easement[33] nor can a right to park as many vehicles as the dominant owner likes on the servient land.[34] Similarly, and because neither can be said to lie in grant,

[22] *Making Land Work: Easements, Covenants and Profits à Prendre* (2011) Law Com. No.327; see also the Law Commission Consultation Paper, *Easements, Covenants and Profits à Prendre* (2008) Law Com. No.186.

[23] See *De Le Cuona v Big Apple Marketing Ltd* [2017] EWHC 3783 (Ch); *Kettel v Bloomfold Ltd* [2012] EWHC 1422 (Ch); [2012] L. & T.R. 30.

[24] *Moncrieff v Jamieson* [2007] UKHL 42; [2007] 1 W.L.R. 2620; see M. Haley, "Easements, exclusionary use and elusive principles—the right to park" [2008] Conv. 244.

[25] *Re Ellenborough Park* [1956] Ch. 131. These are that there must be a dominant and servient tenement, those tenements must be owned or occupied by different entities, the right must accommodate the dominant tenement and the right must lie in grant.

[26] Nevertheless, as Lord Briggs appreciated in *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57 at [1]; [2019] A.C. 553, the criteria continue to represent, "the necessary limitations upon the scope of easements in English law".

[27] R. E. Megarry [1956] 72 L.Q.R. 172, 173.

[28] Lord Evershed MR in *Re Ellenborough Park* [1956] Ch. 131 at 164 admitted that "The exact significance of this … last condition is, at first sight, perhaps, not entirely clear".

[29] per Lord Briggs in *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57 at [58].

[30] *Browne v Flower* [1911] 1 Ch. 219; [1908-10] All E.R. Rep. 547.

[31] *Harris v De Pinna* (1886) 33 Ch. D 238.

[32] *Re Ellenborough Park* [1956] Ch. 131.

[33] See *International Tea Stores Co v Hobbs* [1903] 2 Ch. 165. Defined recreational rights can, however, be easements provided that they accommodate the dominant land: *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57.

[34] *Copeland v Greenhalf* [1952] Ch. 488; [1952] 1 All E.R. 809.

the condition excludes both temporary rights[35] and so-called "natural rights".[36] On a more abstract jurisprudential footing, this fourth characteristic echoes the sentiment expressed by Lopes LJ that, "there is no easement known to the law which gives exclusive or unrestricted use of a piece of land".[37] Although the Law Commission expressed doubt as to, "whether the important word was 'exclusive' or 'unrestricted'",[38] this is seemingly an unnecessary inquiry. The allusion to "unrestricted" was surely to recognise only that the right claimed must be capable of definition.[39]

The cardinal logic remains, however, that an easement is a right over land and is not a right to the land itself.[40] Hence, if the claim is tantamount to exclusive use of the servient land, the conventional wisdom is that it cannot be an incorporeal right.[41] It will, instead, be regarded as the assertion of a claim to a corporeal hereditament or, by default, a mere permission.[42] With exclusionary use cases, however, the point of departure between a right to use the land and a claim to possession of the land is notoriously difficult to determine. This is, undoubtedly, a matter of some consequence as a finding of inconsistency with the proprietorship or possession of the servient owner is fatal to the assertion of an easement.[43] This explains why the courts have, albeit in an unmethodical manner, formulated the ouster principle.[44] It offers a rudimentary, forensic tool by which the physical exercise of the right granted is evaluated and is the indicator as to whether it is so extensive that the servient owner is divested of any reasonable and practical use of the servient land.[45] As Lord Briggs explained:

> "the ouster principle rejects as an easement the grant of rights which, on one view, deprive the servient owner of reasonable beneficial use of the servient tenement or, on the other view, deprive the servient owner of lawful possession and control of it."[46]

Nonetheless, as the Law Commission readily admitted, "the precise effect of this limitation is uncertain".[47] Unsurprisingly, therefore, this unrefined inquiry has promoted considerable academic and judicial discussion as well as a high degree of unpredictability for litigants.

[35] There can be no such thing as a precarious easement: *Burrows v Lang* [1901] 2 Ch. 502.
[36] *Palmer v Bowman* [2000] 1 W.L.R. 842; [2000] 1 All E.R. 22.
[37] *Reilly v Booth* (1890) L.R. 44 Ch. D. 12 at 26.
[38] *Making Land Work: Easements, Covenants and Profits à Prendre* (2011) Law Com. No.327, [3.193].
[39] As Peter Gibson LJ put it in in *London & Blenheim Estates Ltd v Ladbroke Retail Parks Ltd* [1994] 1 W.L.R. 31 at 37; [1993] 4 All E.R. 157, "Land could not be allowed to become burdened to an uncertain extent". This is particularly so with prescriptive rights: see *McAteer v Keeley* [2021] NICh 15.
[40] K. Gray and S. Gray, *Elements of Land Law*, 4th edn (Oxford: OUP, 2005), p.645 emphasise that, "easements are designed not to sterilise land, but to facilitate the purposeful, profitable and collaborative exploitation of land resources".
[41] See *Wilkinson v Proud* 152 E.R. 704; (1843) 11 M. & W. 33 where a claim to a substratum of coal was viewed as a claim to the land and not a profit.
[42] A contractual licence and not an easement was upheld by the county court in *Starham Ltd v Greene King Pubs Ltd* [2017] 9 WLUK 422.
[43] See Lord Evershed MR in *Re Ellenborough Park* [1956] Ch. 131 at 176.
[44] Sometimes described as the "substantial interference test": see B. Ziff and M. Litman, "Easements and Possession: An Elusive Limitation" [1989] Conv. 296; P. Luther, "Easements and Exclusive Possession" (1996) 16 *Legal Studies* 51.
[45] It interrogates what A. Goymour, "Easements, servitudes and the right to park" (2008) 67 C.L.J. 20, 21 describes as the "spatial and temporal limitations on the type of usage which can qualify as an easement …".
[46] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57 at [61].
[47] *Easements, Covenants and Profits à Prendre* (2008) Law Com. No.186, [3.36].

Exclusive use

At its extremes, the debarment promoted within the fourth limb of *Re Ellenborough Park* embodies a well-worn sentiment, which is that, "A grant that gives the right wholly to exclude the owner of the land, all the time, is not an easement".[48] Hence, in *Reilly v Booth* a claim to the exclusive use of a gateway amounted to an assertion of ownership and did not amount to an incorporeal right.[49] In *Metropolitan Railway Co v Fowler*, a right to tunnel under land could not amount to an easement.[50] Similarly, in *Thomas Ward Ltd v Alexander Bruce (Grays) Ltd*,[51] there could be no easement to maintain a silt bed at a height chosen by the dominant owner as that amounted to a permanent and exclusive user. In a like vein, in *Hanina v Morland*,[52] a claim to the exclusive occupation (for leisure and storage purposes) of an adjacent flat roof could not lie in grant. The scope of the rights afforded in the foregoing cases clearly amounted to a claim to legal possession of the servient tenement and thus fully contradicted the servient owner's proprietorship rights. The common thread is that each case concerned exclusive occupation of the servient tenement on a positive, permanent and substantial basis.[53] Exclusive use cases, therefore, emphasise the nature of the right granted to the dominant owner over the servient tenement, which is for these purposes the precise area over which the right is to be exercised.[54] This entails that, if the easement is to park in a locked garage, the dominant owner has no rights to the airspace or the sub-surface. As will become clear, this is in striking contrast with the concept of exclusionary use, which addresses the servient owner's potential, residual use of the land subject to the easement.

A different dynamic arises when the right affords exclusive and permanent user, but it is merely passive and insubstantial in nature. In this type of case, the courts have adopted a de minimis style approach, which tolerates permanent exclusive use which is deemed to be inconsequential. Accordingly, in *Chelsea Waterworks Co v Bowley*,[55] the space occupied exclusively by a permanent underground pipe was found to be negligible and did not amount to an exclusive use sufficient to prevent an easement of drainage from arising. Similarly, a right to run telephone wires in the airspace of the servient land was upheld as an easement in *Lancashire Telephone Co v Manchester Overseers*.[56] The right to affix a sign to the wall of a neighbouring house was classified as an easement in *Moody v Steggles*.[57] In *Philpot v Bath*,[58] the placing of rocks on a small part of foreshore to protect the dominant tenement from the ravages of the sea was admitted as an easement because it involved no significant interference with the servient owner's use of the land. More

[48] Law Commission, *Making Land Work: Easements, Covenants and Profits à Prendre*, (2011) Law Com. No.327, [3.200].
[49] *Reilly v Booth* (1890) 44 Ch. D 12.
[50] *Metropolitan Railway Co v Fowler* [1893] A.C. 416. As Lord Ashbourne said at 428, "they took an interest in land—taking a practically perpetual right of exclusive possession in the tunnel".
[51] *Thomas Ward Ltd v Alexander Bruce (Grays) Ltd* [1959] 2 Lloyd's Rep. 472.
[52] *Hanina v Morland* (2000) 97(47) L.S.G. 41.
[53] In the Australian case of *Evanel Pty Ltd v Nelson* (1995) 39 NSWLR 209, a "right of footway" did not amount to exclusive use because the servient owner could access the burdened land one day each year. Accordingly, it was not permanent in nature.
[54] See Starham Ltd v Greene King Pubs Ltd [2017] 9 WLUK 422.
[55] *Chelsea Waterworks Co v Bowley* 117 E.R. 1316; (1851) 17 Q.B. 358.
[56] *Lancashire Telephone Co v Manchester Overseers* (1884) 14 Q.B.D 267.
[57] *Moody v Steggles* (1879) 12 Ch. D 261.
[58] *Philpot v Bath* [1905] W.N. 114.

recently, in *P&S Platt Ltd v Crouch*,[59] the installation of mooring posts and various signs was regarded as amounting only to minimally invasive, exclusive use.

Although the Law Commission claim that these cases form an exception to the exclusive use principle,[60] it is instead possible to view them as defining the principle itself.[61] They are properly to be appraised as being on all fours with the continuance of the rights of the servient owner, albeit now in a slightly reduced form. Accordingly, it is not the right per se that is treated differently, but the minimal invasiveness of its existence. This is best illustrated by the Australian case of *Harada v Registrar of Titles*,[62] where the right to run overhead power cables over the servient land was held not to be an easement. As the right prevented the servient owner from building or planting trees under the wires, King J reasoned that, "the plaintiff would be left with very few rights over her property and could do little more with it than move over it and park cars on it".[63]

The judicial approach to cases where there is permanent and exclusive use of the burdened land by the dominant tenement owner is, seemingly, settled. Matters become more complex when, although there is no exclusive user attendant to the actual grant, the physical exercise of the right excludes the servient owner from any practical and reasonable enjoyment of the burdened land.[64] This tension was demonstrated in *De Le Cuona v Big Apple Marketing*,[65] which concerned two parking spaces in a car park that had the capacity for about 16 vehicles. The right conferred was to park in the two parking spaces as "shall from time to time be designated" by the servient owner. The deed of grant was described as a "lease of parking rights" and claimed to offer "exclusive full right and liberty" for 114 years. The grant was, moreover, redolent with the language of a lease. As to whether it created an estate or an easement, Newey J toed the traditional line and explained that "what matters is substance rather than mere form …".[66] He determined that the deed did not grant exclusive possession[67] and that the legal arrangement instead gave rise to an incorporeal hereditament.[68] The use of the parking spaces was held to be true to the nature of an easement as the servient owner was not ousted from any reasonable enjoyment of the servient land.[69] This case serves to emphasise that, while exclusive possession focuses upon the claimant's legal rights, the existence of an easement turns upon the degree of use and control retained by the servient owner. Despite the undoubtedly extensive right granted to the dominant owner, it was neither exclusive nor exclusionary in nature.

[59] *P&S Platt Ltd v Crouch* [2003] EWCA Civ 1110.

[60] Law Commission, *Making Land Work: Easements, Covenants and Profits à Prendre* (2011) Law Com. No.327, [3.211].

[61] This avoids having to define the servient tenement in an artificially narrow manner in accordance with the exact size of the land where, say, the cable lies: see the Law Commission, *Easements, Covenants and Profits à Prendre* (2008) Law Com. No.186, [3.41].

[62] *Harada v Registrar of Titles* [1981] V.R. 743.

[63] *Harada v Registrar of Titles* [1981] V.R. 743 at 753.

[64] As the Law Commission, *Making Land Work: Easements, Covenants and Profits à Prendre* (2011) Law Com. No.327, [3.201] recognised, "the cases do not give consistent answers".

[65] *De Le Cuona v Big Apple Marketing Ltd* [2017] EWHC 3783 (Ch).

[66] *De Le Cuona v Big Apple Marketing Ltd* [2017] EWHC 3783 (Ch) at [11].

[67] The claimant merely had sole right to use the space for parking a car or motorbike; see also *Kettel v Bloomfold Ltd* [2012] EWHC 1422 (Ch).

[68] It was common ground that, if it was held to be a lease, it would be void against Ms De Le Cuona for non-registration. She would then have obtained an unmerited windfall.

[69] The servient owner retained the right of "access to the allocated spaces on previous notice to the tenant whenever practicable" for a range of specified purposes and could walk and drive a car across the spaces when they were not in use.

Exclusionary use

In the absence of a permanent and unrestricted exclusive use by the dominant owner, the court is required to balance the factual extent of the third-party claim with legal notions of proprietorship and its physical manifestation. The task is to determine whether the right, as Sara explains, "involves not just an incident, but actual occupation of the servient tenement …".[70] In order to reach this determination, the court should proceed according to common sense, principle and analogy. Unfortunately, this process has been hindered by the pronounced tendency of the courts to blur the boundaries between exclusive use (which as shown is better associated with a claim to ownership) and exclusionary use (de facto control exerted during the physical exercise of the claimed right). Some scope for conceptual confusion stems from the reality that most easements necessarily entail a trace of intermittent, individual occupation.[71] As Romer LJ explained in the context of an easement to use two communal lavatories, "It is true that during the time when the dominant owner exercised the right, the owner of the servient tenement would be excluded, but this in greater or lesser degree is a common feature of many easements …".[72] The theme was again pursued in *Ward v Kirkland*,[73] where a right to enter on land in order to maintain a wall was upheld as an easement because it involved only a minor, non-permanent element of sole use by the dominant owner. At most, the exercise of the right would involve no more than a monthly visit to the servient land. Such occasional rights as, for example, to use a clothes line,[74] to use a church pew[75] and to enter and mix manure[76] can be explained on this basis without any need whatsoever to consider issues of exclusive and exclusionary user.[77] These claims are clearly of a non-possessory nature and most certainly do not amount to a substantial exclusion of the servient owner. Nevertheless, and because some "fairly forlorn submissions" have been made on this principle,[78] the courts have felt obliged to engage in this classificatory dialogue when it would otherwise have been unnecessary. In an extra-judicial capacity, Megarry warned that, "the boundary marks between licences and easements are … in danger of erosion".[79]

The judicial tendency in authentic exclusionary use cases is to employ such descriptive terminology as "joint user",[80] "joint ownership"[81] or "joint occupation".[82] Unfortunately, these expressions are unhelpful, misleading and confusing. Whichever epithet is employed, however, the commonality is that they refer to the

[70] C. Sara, *Boundaries and Easements*, 2nd edn (Sweet and Maxwell, 1996), p.190.

[71] As Lord Davey noted in *Holywell Union & Halkyn Parish v Halkyn Drainage Co* [1895] A.C. 117 at 131, "the easement may be of such a character as requires the occupation of land for its exercise".

[72] *Miller v Emcer Products Ltd* [1956] Ch. 304 at 316; [1956] 2 W.L.R. 267. As a comparator, Romer LJ relied upon the case of *Heywood v Mallalieu* (1883) 25 Ch. D 357 where an easement to undertake washing in a neighbour's kitchen was upheld.

[73] *Ward v Kirkland* [1967] Ch. 194; [1966] 1 W.L.R. 601.

[74] *Drewell v Towler* 110 E.R. 268; (1832) 3 B. & Ad 735.

[75] *Mainwaring v Giles* 106 E.R. 1221; (1822) 5 B. & Ald. 356.

[76] *Pye v Mumford* 116 E.R. 623; (1848) 11 Q.B. 666.

[77] As Judge Purle QC observed in *Virdi v Chana* [2008] EWHC 2901 (Ch) at [20], "Some limitation on the servient owner's user is a common feature of easements generally, and applies (for example) to all rights of way".

[78] C. Sara, *Boundaries and Easements*, 2nd edn (Sweet and Maxwell, 1996), p.190.

[79] R. E. Megarry, [1956] 72 L.Q.R. 172, 173.

[80] See Upjohn J in *Copeland v Greenhalf* [1952] Ch. 488 at 498; [1952] 1 All E.R. 809.

[81] See Danckwerts J in the High Court in *Re Ellenborough Park* [1955] 3 W.L.R. 91 at 156.

[82] See Lord Evershed MR in the Court of Appeal in *Re Ellenborough Park* [1956] Ch. 131 at 164.

impact of the exercise of the right on the burdened land[83] and the consequential reduction of the occupational rights of the servient owner.[84] Hence, if the physical exercise of the asserted right substantially divests the servient owner of the reasonable use of the burdened land then under the current law the right should not be regarded as an easement. As Danckwerts J made clear in *Re Ellenborough Park*, "it is repugnant to the conception of an easement that the rights of the owner of the dominant tenement should reduce the right of the servient owner to, in effect, no rights at all".[85]

Admittedly, not all rights are so easily categorised and this is a difficulty evident with parking rights. In such closely contested territory, the ouster principle lies at the core of this interrogative analysis.[86] It offers no more than a purely fact led and imprecise process, which serves only as an indicator of when exclusionary use might disqualify a right that may otherwise properly be classified as an easement.[87] Gray & Gray, moreover, suggest that the courts have used the ouster test, "as a smokescreen for judicial discretion" to strike down unmeritorious claims while suppressing the requirement when it is thought that a remedy should be available.[88] In relation to parking rights, this element of bias is evident from the significant distinction drawn between the commercial and the domestic contexts.[89]

On a survey of the authorities, it becomes clear that the origins of the ouster principle are founded upon a dubious and distinctly unstable foundation. It has been extrapolated from a trinity of decisions of which two were wholly unconcerned with the notion of ouster and the remaining one offered no more than speculative obiter as to how the other two could be reconciled. The alleged highpoint of the disqualification for exclusionary use is usually thought to be the decision of the High Court in *Copeland v Greenhalf*.[90] This concerned a claim by a wheelwright to store and park as many agricultural vehicles as he liked and for as long as he wished on a 150 feet long narrow strip of land. The servient tenement owner brought an action seeking to restrain this activity and the defendant countered unsuccessfully that he had acquired an easement under the Prescription Act 1832. Although there was no authority cited to him that was directly on point, Upjohn J was emphatic that, "the right claimed goes outside any normal idea of an easement".[91] He felt that the exercise of the right asserted was so extensive and indefinite that, "It is virtually a claim to possession of the servient tenement, if necessary to the exclusion of the owner; or, at any rate, to a joint user …".[92] Accordingly, the right claimed could not be the subject-matter of a valid easement

[83] See *Dyce v Hay* (1852) 1 Macq. 305. This represents, as the Law Commission, *Making Land Work: Easements, Covenants and Profits à Prendre* (2011) Law Com. No.327, [3.196], acknowledged, "a shift in focus from the dominant owner to the servient".

[84] See Judge Paul Baker in *London & Blenheim Estates Ltd v Ladbroke Retail Parks Ltd* [1992] 1 W.L.R. 1278 at 1288.

[85] *Re Ellenborough Park* [1955] 3 W.L.R. 91 at 155.

[86] See *De Le Cuona v Big Apple Marketing* [2017] EWHC 3783 (Ch).

[87] As A. Hill-Smith, "Rights of parking and the ouster principle after Batchelor v Marlow" [2007] Conv. 223, 233 acknowledges, it offers no positive guidance as to, "what sort of hypothetical reasonable use by the servient owner will defeat the ouster principle".

[88] K. Gray and S. Gray, *Elements of Land Law*, 4th edn (Oxford: OUP, 2005), p.643.

[89] This distinction being articulated in cases such as *Begley v Turner* [2014] EWHC 1180 (Ch) and *Virdi v Chana* [2008] EWHC 2901 (Ch).

[90] *Copeland v Greenhalf* [1952] Ch. 488.

[91] *Copeland v Greenhalf* [1952] Ch. 488 at 498.

[92] *Copeland v Greenhalf* [1952] Ch. 488 at 498.

and that, "to succeed, this claim must amount to a successful claim of possession by reason of long adverse possession".[93]

Although much is made of the *Copeland* case as fathering the ouster principle, the decision is not as authoritative as it might at first appear.[94] Upjohn J did not contemplate the operation of a substantial interference approach. Instead, his decision was based upon the pragmatic finding that the right claimed was too vague and uncertain to be acquired by prescription. This is tellingly reinforced by his refusal to discount the possibility that the same right might form the basis of an express grant.[95] It is clear, therefore, that Upjohn J was preoccupied with the evidential difficulties underlying the prescriptive claim and, most certainly, did not intend to issue any authoritative statement of principle. He was also seemingly unaware of the earlier Court of Appeal decision in *Wright v Macadam*.[96] There the appellate court had no difficulty in upholding the right to use a garden shed for the storage of coal as an easement.[97] It may have been that, had this higher authority been cited, the comments of Upjohn J as to the compatibility of the right claimed with the concept of an easement might have been tempered. Nevertheless, the eventual outcome in the *Copeland* case would it seems have been unaffected.[98] The open-ended and imprecise nature of the right claimed necessarily defeated the prescriptive claim.

Ironically, the obiter comments of Upjohn J were to become the cornerstone of the ouster principle. Those that adopt this interpretation focus not on the uncertainty of the right claimed, but on its impact on the servient owner's use of the limited dimensions of the burdened land. This then suggests the logical conclusion that, the greater the servient tenement, the less ready Upjohn J would have been to conclude that the right amounted to an intolerable ouster. Although the nature of the right remains the same, the exercise of it would then have less impact upon the servient owner's rights to possession. This, of course, is precisely what Upjohn J could not have held because there can be no easement of, as the Law Commission explained, "a right to do pretty much anything that the dominant owner liked, or a right that was too uncertain in its extent …".[99]

Wright v Macadam concerned the status of a tenant's right to use a garden shed on the landlord's land for the storage of coal as might be required for the domestic purposes. No limit was set as to the time during which the coal shed could be used and there was no precise evidence as to the mode in which the right was to be enjoyed. Mr Macadam had merely given his permission, which was acted on and continued until the grant of the new tenancy. On taking a new lease of the flat, the tenant asserted that the former licence to use the shed was elevated to a legal easement under the Law of Property Act 1925 s.62 and, as the landlord had subsequently demolished the shed, she maintained a claim for damages.

[93] *Copeland v Greenhalf* [1952] Ch. 488.

[94] P. Luther comments that this decision, "has been distinguished much more frequently than it has been followed" ("Easements and Exclusive Possession" (1996) 16 *Legal Studies* 51, 51).

[95] This point is amplified by P. Luther, "Easements and Exclusive Possession" (1996) 16 *Legal Studies* 51, 58.

[96] *Wright v Macadam* [1949] 2 K.B. 744; [1949] 2 All E.R. 565. Hence it has been argued that *Copeland v Greenhalf* [1952] Ch. 488 is a decision per incuriam: see J. R. Spencer, [1973] C.L.J. 30.

[97] An express easement to store goods on reclaimed land had previously been acknowledged by the Privy Council in AG of *Southern Nigeria v John Holt & Co (Liverpool) Ltd* [1915] A.C. 599.

[98] See Deputy Judge Paul Baker QC in*London & Blenheim Estates Ltd v Ladbroke Retail Parks Ltd* [1992] 1 W.L.R. 1278 at 1286.

[99] *Making Land Work: Easements, Covenants and Profits à Prendre* (2011) Law Com. No.327, [3.192].

The decision of the Court of Appeal is thought to mark the nadir of the ouster disqualification and is appraised as an illustration of an easement being recognised in circumstances where there is exclusive use.[100] As there is not a scintilla of evidence as to the actual use and control of the shed, and as no consideration was devoted by the appellate court to the exclusivity of this user, this gloss appears highly unjustified. Instead, the appellate court was preoccupied with whether the right claimed was too precarious to pass as an easement under s.62. Such was appreciated by Chadwick LJ in *Hair v Gillman* where he said that the importance of the decision, "is not that it decides what is the nature of a right that can be enjoyed as an easement. Its importance lies in the affirmation that a right which has been exercised by permission only, and is in that sense precarious, can pass under a conveyance …".[101] Accordingly, neither *Copeland v Greenhalf* nor *Wright v Macadam* amount to anything resembling authority on the issue of possessory claims.

Both decisions were subsequently revisited in *Grigsby v Melville*.[102] This case concerned freehold owners of adjoining properties that had formerly been in common ownership and occupation. Under the plaintiff's property was a cellar accessible only by stairs leading down from inside the defendant's property. The plaintiff sought injunctive relief restraining the defendant from trespassing on her property and specifically from entering the cellar and storing goods there. The defendant claimed unsuccessfully that she enjoyed an easement of storage. The problem was that she was asserting a claim to unlimited storage rights in the cellar. Hence, it was an authentic exclusive user decision and could not at law amount to an easement. As previously demonstrated, this outcome is in accordance with established principle.

The interesting aspect of the *Grigsby v Melville* litigation, however, is the analysis of Brightman J in the High Court.[103] There, and purely by way of obiter, Brightman J approved the decision in *Copeland*. He reasoned that, "the right asserted amounted in effect to a claim to the whole beneficial user of the servient tenement and for that reason could not exist as a mere easement".[104] Seemingly, he viewed *Copeland* as being an exclusive use type of case rather than being of the shared use variety. Turning his sights upon the decision in *Wright*, and without a shred of evidence disclosed upon which his conclusion was founded, Brightman J suggested vaguely that the outcome there probably turned upon the extent of exclusive user. He commented weakly that, "To some extent a problem of this sort may be one of degree".[105] No such approach is, however, evident from the *Copeland* or *Wright* decisions or, indeed, in the deliberations of the Court of Appeal in *Grigsby* itself. As the full factual narrative of *Wright v Macadam* remains hidden from discovery, such ex post facto rationalisation is merely speculative and

[100] See *London & Blenheim Estates Ltd v Ladbroke Retail Parks Ltd* [1992] 1 W.L.R. 1278 at 1285.
[101] *Hair v Gillman* (2000) 80 P. & C.R. 108 at [28].
[102] *Grigsby v Melville* [1972] 1 W.L.R. 1355; [1973] 1 All E.R. 385.
[103] *Grigsby v Melville* [1972] 1 W.L.R. 1355.
[104] *Grigsby v Melville* [1972] 1 W.L.R. 1355 at 1364. This, however, ignores the recognition by Upjohn J of the possibility of a more certain right comprising the subject matter of an express easement.
[105] *Grigsby v Melville* [1972] 1 W.L.R. 1355.

unhelpful.[106] It hardly offers a sound base upon which to build the ouster principle.[107] The absence of telling and consistent authority, coupled with a judicial narrative that is blurred by imprecision of language and interpretation, inspire scant confidence in the ouster test.

Parking problems: Space, time and context?

The Law Commission adopted the pragmatic stance that, "it should be clear in what circumstances a right to park a vehicle or to store goods may take effect as an easement and in what circumstances it may not".[108] Although few would disagree with this ideal, the judiciary has approached its role with marked caution and uncertainty.[109] By analogy with the long established right to moor barges,[110] it might be thought that the courts would have experienced little difficulty upholding an independent easement to park a motor vehicle or, at the least, charting the parameters in which such a proprietary right could exist. This is, however, not the case and there remains much hesitancy in recognising parking rights as a third party right over the servient land.[111] As Lord Briggs acknowledged, "the question whether a particular grant of, or claim to, rights is capable of having the enduring proprietary quality of an easement is usually … fact intensive …".[112] The key factors that are brought into play concern how the servient tenement is to be defined, the effect of restrictions placed on the exercise of the right, whether the right is exercised over residential or commercial property and how the right claimed has been acquired.

The problem is exacerbated, as the Law Commission acknowledged, by commonly found and unfortunate drafting references which spotlight the alleged exclusivity of the parking use.[113] Admittedly, however, such difficulties are often alleviated by the preparedness of counsel to concede, perhaps at times too hastily, that such an easement may exist.[114] The judicial hesitancy arises also from a blurring of the boundaries between exclusive use and exclusionary use and the associated failure to appreciate the differences and distinctions in both approach and principle.[115] This is discernible in the obiter of Chadwick LJ in *Montrose Court Holdings Ltd v Shamash*.[116] There the issue focused upon a regulated, communal right to park on a rear service road, which did not have enough space to accommodate all tenants and householders and was subject to the temporal

[106] Latham LJ in *Mulvaney v Gough* [2002] EWCA Civ 1078; [2003] 1 W.L.R. 360 at [17] regarded *Wright v Macadam* [1949] 2 K.B. 744 as being, "The only case in which what apparently amounted to exclusive use of premises was claimed as an easement …".

[107] This did not, however, prevent Judge Paul Baker QC in *London & Blenheim Estates Ltd v Ladbroke Retail Parks Ltd* [1992] 1 W.L.R. 1278 from espousing this interpretation of the case law.

[108] *Easements, Covenants and Profits à Prendre* (2008) Law Com. No.186, [3.44].

[109] See, e.g. Sir Christopher Slade in *Saeed v Plustrade Ltd* [2001] EWCA Civ 2011 at [22]; [2002] 2 P. & C.R. 19.

[110] See *Capel v Buszard* 130 E.R. 1237; (1829) 6 Bing. 150 where the right to attach vessels to a wharf was not a lease, but was instead an implied easement.

[111] Law Commission, *Easements, Covenants and Profits à Prendre* (2008) Law Com. No.186, [3.42] agree that "there remains doubt as to the parameters within which such rights can subsist".

[112] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57 at [2].

[113] *Making Land Work: Easements, Covenants and Profits à Prendre* (2011) Law Com. No.327, [3.204].

[114] See, e.g. *Graham v Philcox* [1984] Q.B. 747; [1984] 3 W.L.R. 150; *Patel v WH Smith (Eziot) Ltd* [1987] 1 W.L.R. 853; [1987] 2 All E.R. 569; *Bye v Marshall* [1993] 4 WLUK 166.

[115] A conclusion shared also by G. Spark, "Easements of parking and storage: are easements non-possessory interests in land?" [2012] Conv. 6, 7.

[116] *Montrose Court Holdings Ltd v Shamash* [2006] EWCA Civ 251.

limitation of three days parking at any one time. Chadwick LJ was unpersuaded that, "a right to park can subsist as an easement if part of the serviced land is to be occupied for a continuous period of 72 hours to the exclusion of the freeholder and of all others having a like right".[117] There, however, the right to park was neither exclusive nor unrestricted and could be said to represent the antithesis of a claim to estate ownership of the servient land. As Cumming-Bruce LJ observed in *Williams v Usherwood*, "Parking cars on a strip of waste land may have no evidential value whatsoever in relation to possession of land".[118] While much will turn on the facts before the court, there should be little force in an argument that the exercise of a right to park anywhere on the burdened land in conjunction with others and for a maximum period of three days should be regarded as a substantial ouster of the servient owner.

The demarcation between exclusive and exclusionary use remains crucial as it is only with the latter that the ouster principle assumes importance. Where it operates, moreover, it relies heavily on the physical dimensions and capacity of the servient tenement.[119] As the Law Commission conceded, "Application of the ouster principle requires the court to decide first what constitutes the servient land".[120] Hence, in *Newman v Jones*,[121] Megarry VC expressed the firm, albeit obiter, belief that a right to park anywhere on a generally defined servient tenement could constitute an easement. In such circumstances, the right does not involve any permanent and unrestricted exclusive use and is consistent with the servient owner's estate in the burdened land.[122] This common-sense approach has much to commend it and it should matter nought whether the dominant owner chooses to park in the same spot each day.[123] In stark contrast, the unregulated right to park in a designated bay or a garage does give rise to potential problems as, "it cannot be authoritatively said that, on the current state of the law, a right to park a vehicle in a particular space is capable of being an easement".[124] The traditional wisdom is that this should not be classified as an easement for the simple reason that it clearly embodies a high degree of exclusionary use of the servient land (i.e. the space only within which the right can be lawfully exercised). Hence, it prevents any reasonable use by the servient owner.[125] Of course, this argument loses its bite when the servient owner can also use the space for parking purposes.[126] Although some might argue that the use of a single space should be classified as exclusive

[117] *Montrose Court Holdings Ltd v Shamash* [2006] EWCA Civ 251 at [30].

[118] *Williams v Usherwood* (1983) 45 P. & C.R. 235 at 251; see also *Pavledes v Ryesbridge Properties Ltd* (1989) 58 P. & C.R. 459 where the parking on wasteland on an intermittent basis could not fuel a claim for adverse possession.

[119] As G. Spark, "Easements of parking and storage: are easements non-possessory interests in land?" [2012] Conv. 6, 15 agrees, "The greater the space that can be taken up at any one time by a proper exercise of the right, in relation to the whole of the land over which the right can be exercised, the more likely it is that the right unduly restricts the servient owner's use of the land".

[120] *Easements, Covenants and Profits à Prendre* (2008) Law Com. No.186, [3.39].

[121] *Newman v Jones* [2021] UKFTT 80 (TC).

[122] As the Law Commission [3.40] explained, "Where a right is granted to park anywhere on a large plot of land, such as a car park, then it cannot be sensibly argued that the servient owner is left without any reasonable use of his or her land".

[123] See *Bilkus v Redbridge LBC* (1968) 207 E.G. 803.

[124] Law Commission, *Easements, Covenants and Profits à Prendre* (2008) Law Com. No.186, [3.42].

[125] See D. Hayton, [1973] 37 Conv. 60.

[126] See *P&S Platt Ltd v Crouch* [2003] EWCA Civ 1110 (mooring of boats on the servient tenement).

use,[127] this cannot be sustained as the use is neither permanent nor truly excusive in nature.

It is to be admitted, however, that not all judges have agreed with this strict definitional interpretation of the servient tenement. Judge Paul Baker, for example, stated that, "A small coal shed in a large property is one thing. The exclusive use of a large part of the alleged servient tenement is another".[128] The problem with this elaboration is that it fails to differentiate between the servient tenement as the land over which the right is claimed and other land of the servient owner over which no right is claimed.[129] It is also out of kilter with judicial thinking both past and contemporary. As Lord Scott explained, "The servient land in relation to a servitude or easement is surely the land over which the servitude or easement is enjoyed, not the totality of the surrounding land of which the servient owner happens to be the owner".[130] Accordingly, in *Wright v Macadam*,[131] the easement was narrowly restricted to the garden shed. Simplicity, logic and practicality are surely to be welcomed in this area.[132]

It follows that, in *Hair v Gillman*, a right to park anywhere on a forecourt some 20 feet in depth that could accommodate three or four cars was upheld as an easement.[133] The rationale is that the servient tenement is the entire forecourt so that, when the vehicle was parked, the other three spaces remained available for use by the servient owner. The right to park up to two vehicles anywhere and at any time on a private cu-de-sac was similarly classified as an easement in *Begley v Taylor*.[134] In reaching her decision, the Deputy Judge emphasised that this case did not concern designated spaces and the parking was not for business purposes. A prescriptive right to park a motor vehicle on a gravelled area of land was, moreover, upheld in *Virdi v Chana*.[135] Judge Purle QC applied the ouster principle again in a domestic context and concluded that, "It cannot, in my judgment, be said that depriving the Appellant of the ability to park on the gravelled area amounts to denying her a reasonable use of the servient land".[136]

The right, moreover, does not have to be exclusive to the grantee and an easement can exist in circumstances where there are insufficient spaces for all dominant owners to park simultaneously.[137] It is also to be appreciated that, where there are communal rights to park on the servient land, there cannot be any unrestricted and permanent use by any individual dominant owner.[138] In addition, even though the

[127] In *Gilpin v Legg* [2017] EWHC 3220 (Ch) at 64; [2018] L. & T.R. 6, Judge Paul Matthews equated an easement to park a car in a specified parking space with the grant of exclusive possession.

[128] *London & Blenheim Estates Ltd v Ladbroke Retail Parks Ltd* [1992] 1 W.L.R. 1278 at 1286.

[129] K. Gray and S Gray, *Elements of Land Law*, 4th edn (Oxford: OUP, 2005), p.647 noted further that where there is the allocation of a designated bay, "The delimitation of such space merely underscores the fact that the user does not substantially interfere with the remainder of the servient owner's land".

[130] *Moncrieff v Jamieson* [2007] UKHL 42; [2007] 1 W.L.R. 2620 at 2641.

[131] *Wright v Macadam* [1949] 2 K.B. 744.

[132] The distinction may have much resonance in relation to prescriptive easements where the servient tenement must be ascertained from the geographical parameters within which the long user has been established and which might give rise to evidential problems.

[133] *Wright v Macadam* (2000) 80 P. & C.R. 108. Chadwick LJ observed at [18] that, "although the line may be ill-defined, there is no doubt as to the side on which this case falls".

[134] *Begley v Taylor* [2014] EWHC 1180 (Ch); see also *Poste Hotels Ltd v Cousins* [2020] EWHC 582 (Ch); [2020] R.T.R. 31.

[135] *Virdi v Chana* [2008] EWHC 2901 (Ch).

[136] *Virdi v Chana* [2008] EWHC 2901 (Ch) at [15]. He added at [18] that, "The only sensible use of the Disputed Land of which the servient owner is deprived in this case is the right to park a car on the gravelled area".

[137] See *Montrose Court Holdings Ltd v Shamash* [2006] EWCA Civ 251.

[138] *Saeed v Plustrade Ltd* [2001] EWCA Civ 2011.

communal exercise of parking rights may amount to a substantial interference with the physical use retained by the servient owner, it should not fail the ouster test because that exclusion is not caused by a particular dominant owner, but instead by disparate dominant owners in legal isolation from each other.[139]

Restrictions attached to the exercise of the right can also assume much significance.[140] If the right to park is subject to time restraints, for example, this might influence the court towards the recognition of an easement.[141] The claim in *Batchelor v Marlow*[142] concerned the prescriptive right to park and store six vehicles on an unadopted dirt road (which could only accommodate a maximum of six vehicles). The right could be exercised only between the hours of 8.30am and 6.00pm on Monday to Friday. In the Court of Appeal, Tuckey LJ admitted that the ouster principle was determinative of the claim and that, whether the exclusionary use was too extensive, was a matter of degree. He concluded that the exercise of the right, even in this delimited form, amounted to a substantial interference with the servient owner's use of the non-domestic, burdened land.[143] Tuckey LJ explained that "His right to use the land is curtailed altogether for intermittent periods throughout the week. Such a restriction would, I think, make his ownership of the land illusory".[144] It is to be appreciated also that, on the facts of *Batchelor*, if the easement had been upheld it would have sterilised the development of adjacent land owned by a third party.

In *Central Midlands Estates Ltd v Leicester Dyers Ltd*,[145] the claim to a prescriptive easement was run as an alternative to a primary claim of adverse possession. It concerned the right to park an unlimited number of vehicles upon a small piece of wasteland on an industrial estate. The right was subject only to the limitation of there being available space. The parked cars belonged to employees of an adjacent factory. Although the High Court held that the claimant was unable to establish a sufficient long user, the Deputy Judge went on by way of obiter to regard the case before him as indistinguishable from *Batchelor v Marlow*.[146] Hence, he concluded that the right was incapable of being an easement because its exercise would render the residual ownership of the servient land illusory. He dismissed any suggested uses retained by the servient owner as being, "rather far fetched".[147]

Although *Batchelor v Marlow* has not been overruled and remains binding, it has not prevented rights to park being upheld in more recent case law. The modern tendency has been to distinguish *Batchelor v Marlow* whenever convenient.[148] In

[139] See *Mulvaney v Gough* [2002] EWCA Civ 1078; [2003] 1 W.L.R. 360.

[140] In *Polo Woods Foundation v Shelton-Agar* [2009] EWHC 1361 (Ch); [2010] 1 All E.R. 539, a profit to graze a limited number of ponies for a period of eight months each year, severely curtailed the servient owner's use of the burdened land. Nevertheless, as there remained residual uses that could be made of that land the ouster principle did not operate.

[141] As G. Spark, "Easements of parking and storage: are easements non-possessory interests in land?" [2012] Conv. 6, 15 observes, "The longer the period of time for which a vehicle can be parked, or other property stored, the more likely it is, all else being equal, that the right is excessive …".

[142] *Batchelor v Marlow* [2003] 1 W.L.R. 764.

[143] Lu Xu, "Easement of car parking: the ouster principle is out but problems may aggravate" [2012] Conv. 291, 291 describes this case as, "perhaps the high watermark of the impact of the ouster principle in this context".

[144] *Batchelor v Marlow* [2003] 1 W.L.R. 764 at 768.

[145] *Central Midlands Estates Ltd v Leicester Dyers Ltd* (2003) 100(11) L.S.G. 33; [2003] 2 P. & C.R. DG1.

[146] *Leicester Dyers and Starham Ltd v Greene King Pubs Ltd* [2017] 9 WLUK 422 appear to be the only authorities that have followed *Batchelor v Marlow* [2003] 1 W.L.R. 764 without attempting to distinguish it on the facts.

[147] *Leicester Dyers and Starham Ltd v Greene King Pubs Ltd* [2017] 9 WLUK 422 at [33]. Those suggestions included, e.g. the ability to make use of space above or below the parked cars.

[148] Lu Xu, "Easement of car parking: the ouster principle is out but problems may aggravate" [2012] Conv. 291, 295 comments that, "It is difficult to miss the artificialness in the efforts to distinguish *Batchelor*".

R Square Properties Ltd v Nissan Motors (GB) Ltd, the High Court identified a residual use for the servient owner that was not illusory and upheld the easement.[149] This was in circumstances where the dominant owner had the exclusive right to use 80 parking spaces on an industrial estate in Watford. The servient owner's expressly retained use was an unfettered right to enter the car parking area and to lay cables and/or to deal with the supply of utilities beneath the servient land. The lack of similarity between the servient tenements in both these cases was a driving factor as also was the express reservation of rights in favour of the servient owner. By way of contrast, the servient tenement in *Batchelor* was a small piece of roadside, commercial wasteland with scant opportunity for other uses. In addition, *Batchelor* was a claim founded on prescription, which requires close consideration of the nature, extent and purpose of the user which establishes the right. Although as Lord Scott stated in *Moncrieff v Jamieson*, "If an easement can be created by grant it can be acquired by prescription",[150] a prescriptive right can be no more burdensome to the servient tenement than the nature extent and purpose of the usage.[151] *R Square Properties* was not based on prescription and concerned a servient tenement that clearly was open for a variety of other uses, whether expressly reserved or otherwise. Similarly, *Kettel v Bloomfold Ltd*[152] was concerned with the terms of an express grant in a residential setting. Judge David Cooke emphasised that, "This being a right expressly granted, it is necessary to examine the terms of the right itself in some detail to see if they … are so extensive as to deprive the defendant of any reasonable use of the land, in the context of this particular development".[153] The judge acknowledged that *Batchelor* did not decide that the right to park a car on a piece of land which is only big enough to accommodate one car necessarily amounts to exclusive possession.[154] Instead, it determined only that the prescriptive right claimed was so extensive that, on the facts, it could not subsist as an easement. The judge reiterated that it remains a question of fact as to whether the right is such that it makes the freeholder's ownership illusory. He admitted that, if it did, *Batchelor* would prevail so there could not be an easement. Judge David Cooke, however, had no hesitation in concluding on the facts before him that the servient owner retained a reasonable use of the burdened land. This trend is demonstrated also in *Virdi v Chana*[155] where the High Court felt able to distinguish *Batchelor* on the basis that, despite the exercise of the parking right, the servient owner still retained a reasonable use of the property. It was also emphasised that the residual use in a domestic setting may more readily be found than when the servient tenement is commercial land.[156] The carrying out of acts such as maintaining the land and fencing round it, altering the surface or planting climbing plants adjacent to the fence could not be dismissed as insignificant or illusory in the case of residential property. In a commercial context, however, such residual and aesthetic rights might still be regarded as illusory.[157]

[149] *R Square Properties Ltd v Nissan Motors (GB) Ltd* [2014] EWHC 1218 (Ch). Permission to appeal was later refused by Patten LJ ([2014] EWCA Civ 1769).
[150] *Moncrieff v Jamieson* [2007] UKHL 42; [2007] 1 W.L.R. 2620 at 2642.
[151] *PropertyPoint Ltd v Kirri* [2009] EWHC 2958 (Ch); [2009] 47 E.G. 133 (C.S.).
[152] *Kettel v Bloomfold Ltd* [2012] EWHC 1422 (Ch).
[153] *Kettel v Bloomfold Ltd* [2012] EWHC 1422 (Ch) at [13].
[154] See also *De Le Cuona v Big Apple Marketing Ltd* [2017] EWHC 3783 (Ch).
[155] *Virdi v Chana* [2008] EWHC 2901 (Ch).
[156] *Virdi v Chana* [2008] EWHC 2901 (Ch) at [25].
[157] See *Central Midlands Estates Ltd v Leicester Dyers Ltd* (2003) 100(11) L.S.G. 33; [2003] 2 P. & C.R. DG1.

Moncrieff, the Law Commission and contemporary thinking

Although the Scottish House of Lords' decision in *Moncrieff v Jamieson* is not binding on English courts,[158] it has undoubtedly exerted influence as to when parking rights will be upheld as easements. The facts concerned an express right of way that made no reference to parking rights. Although the House of Lords was required to decide whether such rights should be implied as being ancillary to that grant, the most interesting aspect of the decision was the obiter discussion by Lords Scott and Neuberger of the ouster principle and the resultant criticism of *Batchelor v Marlow*.[159]

The traditional distinction between a right to park anywhere on the servient tenement (which, as shown, is thought to be consistent with an easement claim) and a right to park in an allocated space (which, as discussed, potentially undermines an easement claim) was considered. Unsurprisingly, Lord Neuberger accepted that a right to park anywhere on the servient tenement must be capable of being an easement because, "there is no specific place where the vehicle is to be parked, so that there is no specific area from which the servient owner can be said to be excluded".[160] He then deduced that, as a general right to park in an area that can hold 20 vehicles is capable of being an easement, the same conclusion should be reached when the area can hold two vehicles. This is, however, an uncontentious proposition. Lord Neuberger then indicated a departure from orthodoxy by believing it to be, "contrary to commonsense that the arrangement is debarred from being a servitude or an easement simply because the parties have chosen to identify a precise space in the area, over which the right is to be exercised, and the space is just big enough to hold the vehicle".[161] Although he saw considerable force in the view that a right can be an easement provided the servient owner retains possession and control, Lord Neuberger drew back from the brink and did not decide that it was so.[162] He feared that the "possession and control test" as propounded by Lord Scott (see below) could lead to unexpected difficulties which had not been fully explored by the House. He foretold of dire consequences such that, "it may be hard to justify an effectively exclusive right to store any material not being an easement, which could be said to lead to the logical conclusion that an occupational licence should constitute an interest in land".[163]

Lord Scott shared no such reserve. He believed that the central issue should be, "whether the servient owner retains possession and, subject to the reasonable exercise of the right in question, control of the servient land".[164] Lord Scott roundly denied the validity of the ouster test, commenting that, "It is not the uncertainty

[158] *Moncrieff v Jamieson* [2007] UKHL 42; [2007] 1 W.L.R. 2620. *Batchelor v Marlow* [2003] 1 W.L.R. 764, however, is binding and remains the only Court of Appeal authority on the ouster principle.

[159] As a result, Patten LJ in *R Square Properties Ltd v Nissan Motors (GB) Ltd* [2014] EWCA Civ 1769 at [7] concluded that, "It therefore seems reasonably probable that, were this point to reach the Supreme Court, the decision of this court in *Batchelor v Marlow* is unlikely to survive in its current form".

[160] *Moncrieff v Jamieson* [2007] UKHL 42; [2007] 1 W.L.R. 2620 at 2663.

[161] *Moncrieff v Jamieson* [2007] UKHL 42; [2007] 1 W.L.R. 2620 at 2663. He added the gloss that, "such a right would indeed be capable of being an easement if the servient owner had the right to change the location of the precise space within the area from time to time".

[162] He did, however, admit doubt as to whether *Batchelor v Marlow* [2003] 1 W.L.R. 764 was correctly decided.

[163] *Moncrieff v Jamieson* [2007] UKHL 42; [2007] 1 W.L.R. 2620 at 2664.

[164] *Moncrieff v Jamieson* [2007] UKHL 42; [2007] 1 W.L.R. 2620 at 2643. He concluded at 2641 that, "sole use for a limited purpose is not, in my opinion, inconsistent with the servient owner's retention of possession and control or inconsistent with the nature of an easement".

of the test that, in my opinion, is the main problem. It is the test itself".[165] Instead, he promoted the alternative possession and control test, which looks to whether the servient owner can still demonstrate ownership rights in a meaningful way.[166] From this perspective, Lord Scott could see no objection to an easement to park in an allocated bay because the servient owner could demonstrate sufficient control by, for example, building above or excavating below the parking area and placing advertising hoardings on the adjacent walls.[167] Accordingly, Lord Scott doubted the legitimacy of the decision in *Batchelor v Marlow*, arguing that, "It is impossible to assert that there would be no use that could be made by an owner of land over which he had granted parking rights".[168]

Casting an eye over *Wright v Macadam*,[169] Lord Scott reasoned that the sole use of a coal shed for the storage of coal did not prevent the servient owner from using the shed for any purposes of his own that were consistent with the exercise of the right. He did, however, acknowledge that, if the shed was locked and only the dominant owner had the key, the right might arguably be inconsistent with the servient owner's possession and control. This is a notion subsequently adopted by the Law Commission.[170] Barring entry to the servient owner, therefore, enjoys potential significance, but neither Lord Scott nor the Commission explained exactly why. The only justification is that the claim would then properly fall to be categorised as exclusive use rather than use that is merely exclusionary in nature. Arguably, if the lock and key were acquired after the easement was granted, this could not alter the status of the original right. This interpretation also appears to be on all fours with Lord Scott's appraisal of *Copeland v Greenhalf*.[171] In approving the no easement outcome, he paid no heed to the possibility that the servient owner might still have demonstrated his possession and control rights by tunneling under or building over the land or erecting new fencing around the compound. Lord Scott clearly viewed *Copeland* as being an exclusive use case and, thereby, beyond the range of easements. As mentioned, having expressed his dissatisfaction with the present law, Lord Neuberger felt unable to adopt the possession and control test advocated by Lord Scott. The Law Commission has also summarily rejected Lord Scott's alternative test as not being, "particularly helpful" and expressed doubt as to, "how it is possible to determine whether a servient owner has retained 'control' of the servient land over which the right is being exercised".[172]

In its Consultation Paper, the Law Commission felt that the solution to these parking problems was to consider the scope and extent of the right that is created and to investigate whether the grant purported to confer a right with the essential characteristics of an easement. The Commission elaborated that, "The question should be 'What can the dominant owner do?', rather than 'What can the servient

[165] *Moncrieff v Jamieson* [2007] UKHL 42; [2007] 1 W.L.R. 2620 at 2642.

[166] A test which A. Goymour, "Easements, servitudes and the right to park" (2008) C.L.J. 67 20, 20 believes, "should be welcomed into English law".

[167] *Moncrieff v Jamieson* [2007] UKHL 42; [2007] 1 W.L.R. 2620 at 2642. How such possessory activity might manifest itself with the motor vehicle in situ and without interfering with the exercise of the right was not addressed.

[168] *Moncrieff v Jamieson* [2007] UKHL 42; [2007] 1 W.L.R. 2620.

[169] *Wright v Macadam* [1949] 2 K.B. 744.

[170] *Making Land Work: Easements, Covenants and Profits à Prendre* (2011) Law Com. No.327, [3.200], "A right to park in a lockable garage on terms that the dominant owner (that is, the person benefiting from the easement) will have sole access to the only key will not pass the test". cf. the different stance adopted in the Consultation Paper, *Easements, Covenants and Profits à Prendre* (2008) Law Com. No.186, [3.52].

[171] *Copeland v Greenhalf* [1952] Ch. 488.

[172] *Easements, Covenants and Profits à Prendre* (2008) Law Com. No.186, [3.47].

owner not do?'".[173] It concluded that, although exclusive possession should no longer act as a bar to an easement,[174] a right of a wide and undefined nature should not be so classified. This does not, however, advance the understanding of exactly when the claim becomes too extensive and unrestricted to become a right in rem.[175] Nevertheless, the Commission felt assured that its approach would enable the parties, as far as possible, to decide for themselves what they should be entitled to create by way of an easement and added that, "Parties who have taken it upon themselves to set out clearly the area over which the right can be exercised should not be penalised unnecessarily by legal rules which do not have any satisfactory basis in policy".[176] Unsurprisingly, this approach was jettisoned in the Commission's subsequent Report.[177] The earlier recommendation had involved a total re-evaluation of what rights could exist as an easement, emphasised form over substance, blurred the distinction between a lease and an easement and contradicted established legal theory.[178]

The lapse of three years, and the appointment of a new lead Law Commissioner, produced a very different response. By the time of its Report, the Commission was influenced by developments in the law of landlord and tenant and, particularly, the long term impact of *Street v Mountford* and the ritualistic invocation of exclusive possession as the primary indicator of a tenancy.[179] As exclusive possession is the legal right to keep all others (including the landlord) out of the premises, the Commission felt that, as a result, "it becomes inadequate to define an easement merely by reference to the range of activities it permits, because a right to do only one thing may nevertheless confer exclusive possession".[180] Accordingly, if exclusive possession is present, "while it may be a grant of a lease or a freehold, it cannot be an easement".[181] It is to be appreciated, moreover, that the absence of a rent is not fatal to the finding of a lease[182] and monetary payment is not anathema to the existence of an easement.[183] This aspect of the Commission's reasoning is unobjectionable and mirrors the well-established rule that substantial exclusive use is alien to the nature of an easement.[184] It reflects a more restrained approach

[173] *Easements, Covenants and Profits à Prendre* (2008) Law Com. No.186, [3.49]. It believed [3.51] that this approach would justify the recognition of parking easements, "even though the effect of exercise of the right is seriously to restrict the use to which the servient land could be put".

[174] A heresy firmly denounced by the Supreme Court in *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57 at [61].

[175] *Easements, Covenants and Profits à Prendre* (2008) Law Com. No.186, [3.50] added that, "The 'exclusive possession' question should not arise, save and in so far as it can be contended that the interest arising is a lease rather than an easement".

[176] *Easements, Covenants and Profits à Prendre* (2008) Law Com. No.186, [3.54].

[177] *Making Land Work: Easements, Covenants and Profits à Prendre*, (2011) Law Com. No.327, [3.205], where the conclusion was drawn that, "reform of the law that made it impossible to discern whether a particular right was a lease (or fee simple) or an easement would be unsustainable".

[178] cf. P. Odell, "Parking is such sweet sorrow too" (2009) J.B.L. 488, 493 who felt that the Commission's approach was, "both logical and defensible".

[179] *Street v Mountford* [1985] A.C. 809; [1985] 2 W.L.R. 877. The Commission's own invocation of exclusive possession in its Report was solely by way of a retort to its earlier Consultation Paper.

[180] *Making Land Work: Easements, Covenants and Profits à Prendre*, (2011) Law Com. No.327, [3.193]. As the Commission added, "That dilemma did not arise in the earlier cases, at a time when the defining characteristic of an ownership right had not been formulated in this way".

[181] *Easements, Covenants and Profits à Prendre* (2008) Law Com. No.186, [3.206].

[182] *AG Securities v Vaughan* [1990] 1 A.C. 417; [1988] 3 W.L.R. 1205.

[183] *De Le Cuona v Big Apple Marketing Ltd* [2017] EWHC 3783 (Ch).

[184] In relation to an express grant, the court will usually consider whether what was granted is a lease (*De Le Cuona v Big Apple Marketing* [2017] EWHC 3783 (Ch)). Similarly, as to exclusive use claims based upon long user, the court can look beyond the parameters of prescription and consider the claim as being one of adverse possession (see *Central Midlands Estates Ltd v Leicester Dyers Ltd* (2003) 100(11) L.S.G. 33; [2003] 2 P. & C.R. DG1).

than that promoted in its Consultation Paper, which advocated that, in accord with the intentions of the parties, an easement could exist even if exclusive possession was granted.[185]

The Commission recommended, however, that the ouster principle be abandoned, which if implemented will ensure that, "An easement that stops short of exclusive possession, even if it deprives the owner of much of the use of his land, or indeed of all reasonable use of it, is valid".[186] It is with this conclusion, and the resultant extension of easements to park, that conceptual and practical problems lie.[187] The reference to "much of the use" or "all reasonable use" engages obvious uncertainty and arguably leaves open the traditional stance that overly invasive rights (e.g. exclusive use cases) cannot be easements. Any suggestion that, if there is no exclusive possession, a right which offers exclusive use can be an easement is thoroughly unconvincing and departs from long established wisdom.[188] It is also counterintuitive in that it clearly undermines the overarching policy against the creation of new property rights. As the Grays confirm, "the imposition of severely limiting criteria has been rationalised as necessary to prevent the proliferation of undesirable long-term burdens which inhibit the marketability of land …".[189] The shift of emphasis may also, as Lord Neuberger feared in *Moncrieff*, have more far-reaching consequences than considered in the Report. As Lu Xu concludes, the reform would be tantamount, "to completely rewriting the book on freehold ownership, leases and easements …".[190] It is ironic that this is similar to the criticism levied in the Report against the recommendations contained in its own Consultation Paper.

The Commission's reliance on *Street v Mountford*[191] as a justification for its radical approach is somewhat curious. The emphasis on exclusive possession in the lease or licence distinction is far from novel[192] and, as Lord Templeman readily acknowledged, the finding of exclusive possession offers no guarantee that a tenancy has been created.[193] Exclusive possession is, moreover, geared to the territorial control and legal rights afforded to the occupier whereas the ouster principle focuses upon the deprivation of the servient owner's rights and use. The Commission's recommendation also generates an uneasy outcome that a dominant owner without exclusive possession can have an easement even (seemingly) if there is exclusive occupation of the servient land whereas, in contrast, a contractual licensee with exclusive possession cannot.[194] A similar outcome will arise where the landlord lawfully denies exclusive possession. The existence or not of an

[185] *Easements, Covenants and Profits à Prendre* (2008) Law Com. No.186, [3.55].

[186] *Making Land Work: Easements, Covenants and Profits à Prendre*, (2011) Law Com. No.327, [3.208].

[187] See generally Lu Xu, "Easement of car parking: the ouster principle is out but problems may aggravate" [2012] Conv 291.

[188] Lu Xu "Easement of car parking: the ouster principle is out but problems may aggravate" [2012] Conv 291, 292 describes this abandonment of the ouster principle as being, "unnecessary, disproportionate and unprincipled".

[189] K. Gray and S. Gray, *Elements of Land Law*, 4th edn (Oxford: OUP, 2005), p.616; see also Lord Briggs in *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57 at [60].

[190] Lu Xu, "Easement of car parking: the ouster principle is out but problems may aggravate" [2012] Conv 291, 303.

[191] *Street v Mountford* [1985] A.C. 809 at 818.

[192] See *Lynes v Snaith* [1899] 1 Q.B. 487; *Glenwood Lumber Co v Phillips* [1904] A.C. 405.

[193] A possibility seemingly sidestepped by the Law Commission, *Making Land Work: Easements, Covenants and Profits à Prendre*, (2011) Law Com. No.327, [3.195] when it concluded that, "A grant that confers exclusive possession for a defined term must be a lease …".

[194] As Lord Scott noted in *Moncrieff v Jamieson* [2007] UKHL 42; [2007] 1 W.L.R. 2620 at 2640, "sole user, as a concept, is quite different from, and fundamentally inferior to, exclusive possession".

easement should surely not turn upon the legal niceties involved in the lease or licence distinction.[195] Exclusive possession is, therefore, a yardstick that is ill suited to the question of what can constitute an easement to park. It conflates legal entitlement with physical use.

The Commission's rationale was simply to reverse the decision in *Batchelor v Marlow* and it did not expressly consider the abolition of the exclusive use rule beyond equating it mistakenly with exclusive possession. Accordingly, any abolition of the ouster test should have no effect whatsoever on authentic exclusive use cases. Whether intentional or otherwise, the Report has attempted to recast the nature of an easement and fails fully to examine the implications where, absent a lease, the servient owner has no use whatsoever of the burdened land. The Report remains on the political backburner and the implementation of its proposals for reform are not an imminent prospect.

On a more positive front, the judiciary have in the post-*Moncrieff* era adopted a much more liberal attitude to what might now constitute a valid easement.[196] As regards the ouster test, and despite the undeniably binding nature of *Batchelor v Marlow*, the courts have followed the lead of the House of Lords in *Moncrieff*.[197] In exclusionary use cases, therefore, the modern authorities take a more holistic view of what comprises the servient tenement and have at last addressed what the Grays called, "the almost universal failure to define with any three-dimensional precision the servient tenement in relation to which the exercise of the alleged easement may or may not be adjudged …".[198] Such is evident from *Kettel v Bloomfold*[199] where there was no ouster of the servient owner because he had retained a broad spectrum of potential uses. For example, he could walk or drive across the space freely if there was no vehicle parked; he could choose, change and repair the surface and remove obstructions; he retained the ability to lay pipes or other service media under the land, and might in principle build above it or provide overhead projections such as wires.[200] This is an approach highly reminiscent of Lord Scott's "possession and control" test. The theme was pursued also in *De Le Cuona v Big Apple Marketing*[201] where again it was held that the parking rights granted were not such as to leave the grantor without any reasonable use of the servient land. The servient owner was still allowed to make use of the designated parking spaces. For example, when no car was in a space it remained possible for the grantor to walk across it or for a car to be backed into it when seeking to come out of another parking space. In principle, the grantor could, renew or change the surfacing and erect an advertising hoarding on the surrounding

[195] This is a practice still prevalent in the commercial rented sector: see M. Haley, "Licences of Business Premises: Contract, Context and the Reach of Street v Mountford" (2013) 64(4) N.I.L.Q. 425, 441.

[196] See *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57, where the majority of the Supreme Court held that purely recreational and sporting rights could exist as easements.

[197] As admitted by Patten LJ in *R Square Properties Ltd v Nissan Motors (GB) Ltd* [2014] EWCA Civ 1769 at [6], "in the case of rights of car parking, which are now recognised as a species of easement, the courts have adopted a rather more flexible approach to that question".

[198] K. Gray and S. Gray, *Elements of Land Law*, 4th ed (Oxford: OUP, 2005), p.643. As mentioned, this liberality cannot extend to exclusive use cases where the servient tenement must necessarily be strictly defined.

[199] *Kettel v Bloomfold* [2012] EWHC 1422 (Ch).

[200] See also *European Urban St Pancras 2 Ltd v Glyn* [2013] P.L.S.C.S. 67.

[201] *De Le Cuona v Big Apple Marketing Ltd* [2017] EWHC 3783 (Ch).

fence.[202] As Newey J observed, "Provided that what he is doing does not interfere with the grantee's ability to park in the two spaces, the grantor can do as he wishes with them".[203]

Conclusion

Although it is now a hackneyed sentiment that the categories of easement are never closed,[204] the court is understandably chary of acknowledging new forms of burden that confer more than mere contractual rights.[205] The traditional and still prevailing wisdom[206] is that deregulation would compromise the integrity of existing property rights and entail that land would become overly burdened by a profusion of third party claims.[207] Hence, policy considerations apply a brake on the type of right that may be classified as an easement.[208] Nevertheless, in the context of admitting parking rights the law of easements has long been arcane, contrived and outmoded.

In relation to substantial and permanent exclusive use, the legal position is clear, that is, whatever it might be it cannot be an easement. The position with exclusionary use is, however, traditionally more obscure. The courts have long taken an unduly restricted view of what comprises the servient tenement, essentially confining it to the surface area of the burdened land. Similarly, the value attributed to the residual rights of the servient owner have been severely circumscribed. This landscape, has, however, changed markedly in recent times. Since Lord Scott's speech in *Moncrieff*, the courts have been prepared to reconfigure the parameters of the burdened land to acknowledge, where appropriate, its airspace and subterranean dimensions. This explains why the potential for building and excavation work now assumes a significance that it never previously enjoyed.

A more realistic appreciation of the form that this residual use can adopt is also evident. In relation to a parking bay, and although the servient owner might be deprived of the ability to park, that owner can still engage in activities such as, for example, painting, maintaining and erecting an advertisement hoarding. Whereas prior to *Moncrieff* such retained use would have been disregarded, this is clearly no longer the case, particularly so in the residential setting where the potential to make aesthetic improvements is not so readily disregarded as illusory. Each case must still turn on its facts and what might be illusory in the context of, say, parking on a strip of commercial wasteland situated by the public highway is not necessarily as far-fetched in the curtilage of a dwelling house. The ouster test, therefore, lives on, but thankfully in a more refined and rational form.

[202] See also *Virdi v Chana* [2008] EWHC 2901 (Ch) where the servient owner retained the ability to alter the surface of the land and maintain her fence and plantage. This residual use of the servient land, as Judge Purle QC concluded at [25], "cannot be dismissed as wholly insignificant or illusory".

[203] *De Le Cuona v Big Apple Marketing Ltd* [2017] EWHC 3783 (Ch) at [55].

[204] As Lord St Leonards LC put it in *Dyce v Hay* (1852) 1 Macq. 305 at 312, "easements must alter and expand with the changes that take place in the circumstances of mankind".

[205] See Peter Gibson LJ in *London & Blenheim Estates Ltd v Ladbroke Retail Parks Ltd* [1994] 1 W.L.R. 31 at 37.

[206] See Lord Briggs in *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57 at [60].

[207] See Martin B in *Hill v Tupper* 159 E.R. 51; (1863) 2 Hurl. & C. 121 at 128.

[208] See Lord Brougham LC in *Keppell v Bailey* 39 E.R. 1042; (1834) 2 My. & K. 517 at 535, 536.