§ Law in Context

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Property Law

Commentary and Materials

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Personal and proprietary interests

5.1. Characteristics of proprietary interests

In this chapter, we outline the distinctive features of property interests and how they differ from non-proprietary interests in things. Most of these points come up again in other chapters (some of them in more detail): the object of this chapter is to draw together some recurrent themes.

5.1.1. General enforceability

We saw in Chapter 2 that the essential characteristic that distinguishes proprietary interests in things from non-proprietary interests is their range of enforceability. A non-proprietary interest is essentially bilateral: generally only one other person is under a duty correlative to the right held by the right holder. A proprietary interest, on the other hand, is generally enforceable: if I hold a property right, everyone in the world (or, in the case of some types of right, everyone in the world except a privileged class) has a correlative duty. The classic illustration of the general enforceability principle is provided by the decision in *Hill* v. *Tupper*, extracted below, where the court held that, where a canal company which had (among its other rights in the canal) an exclusive right to put pleasure boats for hire on the canal, transferred that right to Hill, Hill became entitled to prevent the canal company from also putting boats on the canal for hire, but was not entitled to prevent Tupper, a stranger, from doing so. One of the ingredients of the canal company's proprietary interest in the canal was a proprietary right to put pleasure boats for hire on the canal, but it could not break that right off from its proprietary bundle in such a way that the right remained proprietary when transferred to Hill. As against the canal company, Hill had the exclusive right to put pleasure boats on the canal (so, for example, he could require the canal company to prevent anyone else doing so) but it was enforceable only against the canal company, not against Tupper. It was a personal right, not a property right.

The principle that a proprietary interest is generally enforceable is as near absolute as any principle in English property law. Its obverse – that non-property interests in things are enforceable only bilaterally – requires some qualification, however. First, contract and constructive trust rules may allow a non-proprietary

interest to become enforceable against third persons: see, for example, the Contracts (Rights of Third Parties) Act 1999, and *Ashburn Anstalt* v. *Arnold* [1989] Ch 1 for an analysis of the circumstances in which a non-proprietary interest might become binding via a constructive trust. Secondly, economic torts can be said to put everyone in the world under a duty not to interfere with the performance of a particular contract. If I enter into a contract with a hotel that they will provide me with a particular room for ten days, I can sue in tort anyone who induces the hotel to break that contract (assuming I can establish the other necessary elements of the tort). In that sense, therefore, I can be said to have a right to the hotel room for those ten days enforceable against the whole world. However, this does not mean that I have a property right – I have a right *to* the hotel room, not a right *in* it.

General enforceability is therefore a necessary but not so obviously a sufficient condition for an interest to be a property interest.

5.1.2. Identifiability of subject-matter

5.1.2.1. The basic principle

It follows from the principle of general enforceability that, if my right in a thing is to be a property right, it must be possible to identify the thing in question. Because a property right in a thing is enforceable against everyone who comes into contact with the thing, it must be possible to identify whether or not any particular thing has become burdened in this way. There are two aspects of this. The marketability of things is hindered if it is difficult or impossible for potential buyers to find out whether or not the thing they are proposing to buy is burdened by a property interest held by a third person. This is essentially a labelling problem, and we look at it in Chapters 14 and 15. The other aspect is that a property right cannot attach to a thing in any meaningful way until the thing has been identified. If I own 100 sheep in a field and I sell you five of them but we never separate off your sheep from my sheep, what are we to do if one of the sheep dies, or gives birth to a lamb? We need to know whether it was one of my sheep or one of yours. Similarly, if your university provides you with a room in a hall of residence for you to live in for a year, but on the basis that it can move you from room to room whenever it wants, you may have a personal right as against the university to be provided with *a* room in the hall, but it is difficult to see how you can have a property right in any particular room, because we cannot identify which room it is. We look at these identification problems again in Chapter 12.

5.1.2.2. Fluctuating assets

There is, however, one important qualification to the identifiability principle to be noted here. It is possible for a fluctuating body of assets to be viewed as a whole, as an abstract thing which continues to exist in an identifiable form even though the component assets making up the whole may change over time. The property

interest then attaches to the abstract whole, rather than to the fluctuating component assets. We see in Chapter 2 that this is essentially what a trust fund is. Trustees hold a portfolio of assets for the benefit of beneficiaries, but with the power and the duty to sell any of the assets at any time and replace them with others as and when necessary to maintain or increase the value of the fund as a whole. In such circumstances, it is useful to regard the abstract thing – the fund – as a thing in its own right, and to treat the beneficiaries as having a property interest in the fund rather than in any of the individual assets making up the fund at any one time.

There are other examples of property interests that can exist in an abstract thing which consists of a fluctuating body of assets. Commercially, the most important is the floating charge, which we look at in Chapter 18. By using a floating charge, a business can give a charge to a lender over all its assets of a particular type, rather than over the specific assets it happens to own at any one time. So, for example, a car manufacturer can grant to its lender a floating charge over all its stock of completed cars, without giving a lender a specific charge over any one of the cars. A specific charge (usually called a fixed charge to distinguish it from a floating charge) over a car is a property interest in the car, potentially enforceable against anyone who buys the car. So, if the lender was to have a fixed charge over each of the company's completed cars, this could be highly inconvenient: every time the company wanted to sell a car to a buyer, it would have to ask the lender to give up its charge over that car (and prove to the buyer that it had done so). The advantage of a floating charge over *the stock of cars* is that it does not give the lender a property interest in any specific car, so the company is free to carry on its business of making and selling cars without having to ask the lender every time it wants to sell one. The charge floats over the body of assets, without attaching to any particular one at any particular time. Admittedly, this is not of itself very much use to the lender. The reason a lender takes a charge over a car is so that, if the company fails to repay the loan that the charge secures, the lender has a property interest in the car that enables it to sell the car for itself and take the proceeds of sale to pay off the debt. If it has a floating charge over a stock of cars it has no sufficient property interest in any specific car to enable it do this. However, this problem is avoided by the device of 'crystallisation': on the happening of a specified event (for example, the business goes into liquidation, or fails to make a loan repayment to the lender) the floating charge over the fluctuating stock of cars crystallises and is transformed automatically into a fixed charge over each car then owned by the business at that point in time. The lender can then go ahead and sell each car as chargee if it wants, or exercise any of the remedies available to a chargee.

5.1.3. Significance of alienability

A right or interest is alienable if it is capable of being transferred from its current holder to someone else, so that the transferee steps into the shoes of the transferor. In this sense, then, an alienable right or interest is not personal to the holder. Alienation might take the form of deliberate transfer, or transfer by operation of

law, or the automatic passing of the property interest on the death of the holder. Economists and others who regard the creation of a free market in resources as the central rationale for the existence of property rights, regard alienability as the central feature of an efficient property system, as we saw in Chapters 2 and 3.

Indeed, it is often said that alienability is an essential characteristic of a property interest (see, for example, Lord Wilberforce in *National Provincial Bank* v. *Ainsworth* [1965] AC 1175, discussed in Chapter 9, and Blackburn J in *Milirrpum* v. *Nabalco Pty Ltd* (1971) 17 FLR 141 below). However, this is inaccurate in a number of respects.

5.1.3.1. Inalienability of communal property

First, some communal property rights and interests are not alienable. If the community consists of a fluctuating body of individuals, no one individual can alienate her own interest, and generally the community as a whole cannot alienate its communal interest either. We look at this point again in section 5.2 below.

5.1.3.2. Status rights

Secondly, inalienable private property rights can be, and frequently have been, created by legislation. These are all essentially status rights – i.e. rights that the holder holds personally, by virtue of a unique status he has, and which cannot be transmitted to anyone else because the status is personal to him. For example, under various statutes some types of residential, business or agricultural tenant remain in possession as tenant after the end of their tenancies either under new statutory tenancies or under their old tenancies, which the statute extends. Such statutory tenancies are undeniably property interests – the tenant is in possession, with an interest enforceable against the whole world – but they are inherently inalienable: the tenant holds the statutory tenancy only by virtue of his status as the former tenant.

5.1.3.3. Appurtenant rights

Thirdly, some property interests can only be held as appurtenant to other property interests: they cannot be transferred separately from the property interests to which they are appurtenant. This mostly applies only to land interests. For example, an easement, which is a right to make a particular use of land owned by someone else, such as a right to use a path crossing someone else's land, can only be held by someone who also owns neighbouring land which benefits from the easement. Suppose, for example, it would be convenient for me to take a shortcut across your land to get to the University library from my office in the Law Faculty. You can grant me a right of way over your land for this purpose, but it cannot be a property right, because it does not benefit (is not appurtenant to) any land I own. Similarly, if you have granted me a right of way over a path crossing your land to get from my house to the road, this is a property right, but it is appurtenant to the ownership of my house. I cannot sell it to a neighbour unless I also sell the neighbour my house,

and, if I do sell my house to anyone, I cannot retain the right of way – if it is not transferred to the person who buys my house, it will simply cease to exist.

Subject to these qualifications, however, alienability is an inherent characteristic of *private* property interests, so firmly embedded that the holder of an alienable property cannot shed the power to alienate her interest. As we saw in Chapter 2 where we looked at this point more closely, even a contractually binding agreement *not* to alienate the interest is ineffective. If, having entered into such an agreement, the right holder nevertheless goes ahead and transfers her interest to a transferee, the transfer is fully effective to move the interest from transferor to transferee. The transferor will, however, be in breach of contract, and the remedies available to the other party to the contract will include damages and even (in the case of some property interests and in some circumstances) the right to terminate the property interests by the process of forfeiture (see below).

5.1.4. Requirement for certainty

We have already said that the subject-matter of a property interest must be certain in the sense that it must be identifiable. The same applies – and for the same reasons – to the identity of the interest holder, to the duration of the interest (if it is of a limited duration, such as a lease, rather than of perpetual duration, such as ownership), and to the precise time when it begins and when it ends. It must be possible to say at any point in time whether or not *at that time* that particular interest is attached to that particular thing, and who it is who holds it. This dictates the degree of certainty required. Leaving aside an anomalously stringent certainty requirement applicable to the duration of leases (which we look at in Chapter 17), it is not necessary that the identity of the interest holder, or the duration of the interest or the beginning and end date should be ascertainable in advance. All that is required is that we can identify the start date when it happens, and that we can identify the interest holder by the start date, and that we can identify the end date when it happens. So, for example, if I die leaving a will in which I leave 'the residue of my estate to my eldest living relative for his or her lifetime, and then to be divided equally between my children then alive', then the certainty requirements are satisfied. The precise content and extent of the subject-matter ('the residue of my estate') will not be known immediately, but it will be known by the time the executors have to vest the interest in the eldest relative, and while no one knows in advance precisely when that will be, everyone will be able to recognise the event when it happens. Similarly, by that date the identity of my eldest living relative will be known, and while at that time no one will know how long he or she will live, or which of my children will still be alive by then, all of these things will be ascertainable at the relevant time.

5.1.5. The *numerus clausus* of property interests

There is an almost infinite variety of non-property rights that can be created in relation to a thing, bounded only by human ingenuity. This is not true of property

rights. Only a small range of types of property interest is known to the law. It would be possible to list them all, and it would be a short list. If you own a bicycle, you can give me whatever personal rights in it or to it that you want (a right to ride it every third Wednesday, or scrape paint off the handlebars, or anything else you can think of) and, provided I give consideration so that you become contractually bound by what you promised, I will be able to enforce these rights against you fully as personal rights. However, the *only* property rights you can give me in the bicycle are full ownership of it (you can sell or give it to me), or a mortgage or charge over it (as security for you repaying money you owe me), or a beneficial interest under a trust (you can declare you hold the bicycle on trust for me, so that you hold the legal ownership on trust for me as beneficiary), or you can bail it to me (bailment is a grant of possession of goods for a limited duration and sometimes a limited purpose – and even bailment's place on the property list is controversial, as we see in Chapter 17). Different types of property interest are recognisable in relation to different types of thing – for example, the list of property interests in land is quite different from (and considerably longer than) the list applicable to bicycles and other goods.

This characteristic of property interests seems to apply in most jurisdictions (which perhaps explains why it is still generally referred to by the Latin term *numerus clausus*, meaning literally finite in number), and in this jurisdiction at least it makes the courts extremely reluctant to recognise new types of property interest, as we see in *Hill* v. *Tupper* below. We consider why this should be the case in Chapter 9, where we look at this point in more detail.

5.1.6. Vindication of property rights

It is sometimes said that what distinguishes a property right from a personal right is the availability of specific performance: the courts will order specific performance of an enforceable promise to transfer or grant a property interest in a thing but not a personal right in the thing. Again, this is only partially true. It is more true in the case of land than it is in the case of goods or intangible things. Each piece of land is regarded as unique, and so the court will generally order specific performance of a contractually binding promise to transfer or grant a property interest in land. They would do the same in the case of a property interest in any other unique thing, where damages would not be an adequate remedy, but not many things other than land are regarded as unique in this way.

The converse is more generally true. The courts are very unlikely to order specific performance of a promise to transfer or grant a *personal* right in a thing, even if the personal right relates to land. This remains an important consequence of a decision to categorise a right to occupy land as a lease (a property interest) or a licence (a purely personal right), as we see in Chapter 7. However, even here there are exceptions. For example, in *Verrall* v. *Great Yarmouth Borough Council* [1980] 1 All ER 839 (extracted at www.cambridge.org/propertylaw/), the Court of Appeal granted the National Front specific performance of a two-day licence of a hall that

the Conservative-controlled council had granted to them for their annual conference, and which the now Labour-controlled council wanted to revoke. The court rejected an argument that specific performance of a licence can never be ordered, and it is clear from the reasons they gave for ordering it in this case that the courts will take each case on its own merits, and grant specific performance where, for one reason or another, damages would not be an appropriate remedy, whether the interest in question is personal or proprietary.

5.1.7. Termination

We see in Chapter 8 that some property interests continue indefinitely whereas others are limited in duration, to continue either until a particular date or until the happening of a particular event. Those of a limited duration automatically continue for that duration. It is possible to limit a property interest to last only during a person's life-time, and of course this would necessarily be the maximum duration of a status right of the kind we noted above. Subject to this, however, a property interest is not personal to its holder and so nothing happens to the interest when its holder dies or ceases to exist: the property interest simply passes on to the next person entitled.

There are, however, three ways in which property interests can end prematurely.

5.1.7.1. Abandonment

The first, *abandonment*, applies to all types of property interest. It is, however, surprisingly difficult to abandon a property interest: non-use, for example, is not sufficient of itself. We see this in section 5.2 below in relation to communal property interests, and the same is true of private property (for fuller consideration, see Hudson, 'Abandonment', particularly in relation to shipwrecks, which is explored in further detail in Dromgoole and Gaskell, 'Interests in Wrecks').

5.1.7.2. Disclaimer

Any type of property interest can also be given up by a formal procedure known as *disclaimer*, but this is available only to a company in liquidation or a bankrupt individual's trustee in bankruptcy, or to a person who has become entitled to a property interest on the intestacy or under the will of someone else who has died. It is not wholly clear what actually happens to a disclaimed property interest: difficult and complex issues can arise, particularly where the disclaimed interest is a derivative interest like a lease of land (what, for example, is to happen to the landlord's interest, and to any subleases that had been granted: for an exploration, if not a resolution, of these difficulties, see *Hindcastle Ltd* v. *Barbara Attenborough Associates Ltd* [1997] AC 70).

5.1.7.3. Forfeiture

The third way of ending a property interest prematurely if by *forfeiture*. Forfeiture can be described in general terms as a right reserved by the grantor of a property

interest to take the property interest back from the grantee on breach by the grantee of one of the terms of the grant. In principle, any property interest may be made forfeitable by the reservation or grant of such a right. In practice nowadays, a right of forfeiture is most likely to be made exercisable over a lease of land, or (less often) over a fee simple interest in land, or over a possessory interests in goods or (increasingly) over intellectual property rights. When the forfeitable interest is a lease of land or a possessory interest in goods (i.e. a bailment), the right to forfeit is exercised by the right holder either physically re-entering/retaking possession of the land or goods, or applying to the court for an order that will have the effect of terminating the forfeitable interest and/or ordering its return to the right holder. In other cases, for example the forfeiture of intellectual property rights, the holder of the right to forfeit will usually have to apply to the court for an order of specific performance of the contractual term requiring the forfeitable interest to be transferred back.

There are two important features of forfeiture to be noted here. The first is that the right to forfeit another property interest is itself a property interest (usually called a right of re-entry). This is incontrovertible where the right is to forfeit an interest in land, but probably also true in other cases (see *Shiloh Spinners Ltd* v. *Harding* [1973] AC 691 for a judicial analysis of the nature of the right of re-entry). Like most other private property rights, a right of re-entry is inherently assignable. When it is exercisable over a lease of land, the right of re-entry is appurtenant to the landlord's interest in the land (i.e. only the landlord for the time being under the lease can forfeit it and the right of re-entry cannot be traded separately from the landlord's interest: see section 5.1.3.3 above). Other types of right of re-entry are usually not appurtenant to any other property interest.

The second distinctive feature of forfeiture is its potentially Draconian effect. Rights of re-entry are usually exercisable only where the holder of the forfeitable interest has committed some breach, and the holder of the right of re-entry will usually exercise it only where the breach has caused or is likely to cause her harm. However, there is no necessary connection between that harm and the gain that will accrue to her by forfeiting the other person's interest, nor between that harm and the loss the other person will suffer if his interest is forfeited. In practice, it is very likely that forfeiture will over-compensate the forfeiter and penalise the interest holder too severely. Take the example of a lease of office premises granted for twenty-five years at a rent of £12,000 a year, which contains a right for the landlord to forfeit the lease if the tenant misses a monthly payment of rent. If after ten years of the lease the tenant fails to pay a month's rent, the landlord can either just sue for recovery of the rent or forfeit the lease. If by that time the rent of £12,000 a year is higher than the market rent for that kind of premises, the landlord will just sue for recovery of the rent: there will be no point in ending the lease and taking the premises back because she is not likely to be able to let them to anyone else at the same rent. If, on the other hand, the £12,000 a year rent is now lower than the market rent, the landlord has every incentive to forfeit the lease at the

earliest and most minor breach: she will gain, and the tenant will lose, much more by forfeiting the lease than the £1,000 unpaid rent (which will anyway still be recoverable as due for the period up until forfeiture).

The potential for unfairness is intensified in the case of forfeiture of possessory interests in land and goods by the fact that traditionally the holder of the right to forfeit can choose to exercise it by self-help instead of by judicial process.

For these two reasons, both equity and statute have long intervened in the exercise of rights of re-entry. There is a long-established general equitable jurisdiction to grant relief against forfeiture, now supplemented by specific statutory provisions applicable to different types of property interest, and there is also now some (but by no means complete) statutory regulation of the use of forfeiture without judicial process. In general, relief against forfeiture will almost always be granted if the holder of the forfeitable interest remedies the breach (for example, by paying up all arrears of rent), and, even if that is not possible, relief is still likely to be granted if the gain to one party and/or the loss to the other is disproportionate to the harm caused by the breach.

Just as the right of re-entry is a property interest in its own right, so too is the right to apply to court for relief against forfeiture, at least where the forfeited interest is an interest in land. This is a consequence of the rule in *Walsh* v. *Lonsdale* which we look at in Chapter 12.

5.1.8. Property rights and insolvency

Probably the most important difference in practice between proprietary rights and non-proprietary rights is the difference in the way they are treated on insolvency. When an individual goes bankrupt or a company goes into insolvent liquidation (the process equivalent to bankruptcy for a company), all their property is taken from them (subject to a few exceptions for individuals not relevant here). This property is then sold, and the proceeds of sale are divided between the creditors of the bankrupt or liquidated company, proportionately to the amount of the creditor's claims. Since a debtor who has gone bankrupt or gone into insolvent liquidation is, by definition, insolvent, the total amount of claims against the debtor will exceed the total proceeds of sale of all the assets of the debtor. Consequently, each person who has only a personal claim against the debtor will inevitably receive less than full repayment of their claims on insolvency (see further Chapter 8).

If, however, a creditor has a proprietary right or claim enforceable against the debtor, the position is dramatically different. If a creditor can show that he has a property interest in any asset apparently held by the insolvent debtor, that property interest never forms part of the debtor's property in the first place, so it is never made available to be distributed between the debtor's general creditors. The effect is that the creditor with a proprietary claim is always paid in full. Suppose, for example, that the debtor owns her business premises, worth £1 m, but has granted her bank a mortgage over the premises to secure repayment of a loan of £900,000.

The property of the debtor available to her general creditors will include her property interest in the business premises, which is worth £100,000 (the value of her ownership subject to the bank's mortgage). This can be realised only by selling the premises to a third person subject to the mortgage (in which case the bank will obtain full repayment of the loan from the buyer, who will have to pay that amount to the bank to clear the mortgage off the title) or by paying the bank its full £900,000 to discharge the mortgage, so that ownership of the premises can be sold at its full value. Either way, the bank is repaid in full, and only £100,000 (less the costs of all this) is available to be distributed between the creditors with other claims.

A different example illustrates another difference between proprietary and non-proprietary interests. Consider what your position would be if you took a lease of a house for ten years at a rent of £5,000 a year, or instead took a licence to occupy the same house for the same period at the same price, £5,000 a year. Assume your landlord/licensor goes bankrupt after the first year. If you have a lease, a property interest, the landlord's property interest in the house consists only of his landlord's interest, i.e. his ownership subject to your lease. This is all that can be sold to satisfy his creditors. So the only effect on you of his bankruptcy is that his interest in the house will be sold to an outside person, and you will have a new landlord. If, on the other hand, you had only a licence, this is only a personal interest enforceable against the landlord but not against anyone else. His ownership interest in the house can therefore be sold free from your licence, and the buyer will be entitled to evict you. The proceeds of sale will be paid over to be divided between all creditors with personal claims against your licensor. This will include you: you will have a personal claim against the licensor for breach of the licence, and this will entitle you to damages (consider what damages you will get). However, like all the other creditors with personal claims, in practice you will get only a small proportion of the value of your claim. So, if you have a property interest in the house, you are not affected at all by your landlord's bankruptcy, whereas if you have only the equivalent personal right to occupy the house you will lose your right, and will not be adequately compensated.

Extract 5.1 ***Hill* v. *Tupper* (1863) 2 H&C 121; 159 ER 51**

[An incorporated canal company granted to the plaintiff the sole and exclusive right or liberty of putting or using pleasure boats for hire on their canal. Held, that the grant did not create such an estate or interest in the plaintiff as to enable him to maintain an action in his own name against a person who disturbed his right by putting and using pleasure boats for hire on the canal.]

The Company of Proprietors of the Basingstoke Canal Navigation were incorporated ... for the purpose of making and maintaining a navigable canal from the town of Basingstoke, in the county of Southampton, to communicate with the River Wey in the parish of Chertsey, in the county of Surrey. The lands purchased by the company of proprietors, under their parliamentary powers, were by the Act vested in

the company. The defendant was the landlord of an inn at Aldershot adjoining the canal, and his premises abutted on the canal bank. The plaintiff, who was a boat proprietor, also occupied premises at Aldershot on the bank of the canal, which he held under a lease from the company of proprietors, and by virtue of the lease claimed the exclusive right of letting out pleasure boats for hire upon the canal, which was the right the defendant was alleged to have disturbed.

The lease under which the plaintiff claimed this right was dated 29 December 1860, and by it ... the said company of proprietors demised to the plaintiff ... for the term of seven years from 24 June 1860, at the yearly rent of £25:

> All that piece or parcel of land containing 19 poles or thereabouts, adjoining Aldershot wharf, situate in the parish of Aldershot aforesaid, and the wooden cottage or tenement, boathouse, and all other erections now or hereinafter being or standing thereon [describing the premises by boundaries, and by reference to a plan], together with the appurtenances to the same premises belonging; and also the sole and exclusive right or liberty to put or use boats on the said canal, and let the same for hire for the purpose of pleasure only.

The lease contained various covenants framed with the object of preventing any interference by the plaintiff's pleasure boats with the navigation of the canal ...

The plaintiff says that, while he was so entitled ... the defendant, well knowing the premises, wrongfully and unjustly disturbed the plaintiff in the possession, use and enjoyment of his said right or liberty, by wrongfully and unjustly putting and using ... boats on the canal for the purposes of pleasure, and by letting boats on the said canal for hire, and otherwise for the purposes of pleasure. By means of which said premises the plaintiff was not only greatly disturbed in the use, enjoyment and possession of his said right and liberty, but has also lost great gains and profits which he ought and otherwise would have acquired from the sole and exclusive possession, use and enjoyment of his said right or liberty, and was otherwise greatly aggrieved and prejudiced. The evidence of the defendant was at variance with that adduced on behalf of the plaintiff upon the question whether the defendant had ever let out boats upon the canal for hire, in the sense of a direct money payment. The defendant did not deny that he kept pleasure boats, and used them upon the canal, but stated that he kept them for the use of his family; he admitted, however, that gentlemen had come from time to time to his inn and used these boats for fishing and bathing. But the defendant also pleaded that ... the plaintiff was not entitled to ... the sole and exclusive right or liberty to put or use boats on the said canal for the purposes of pleasure, nor to let the said boats for hire on the said canal for the purposes of pleasure as alleged.

[Counsel for the plaintiff argued that] [t]he plaintiff's right having been infringed, an action lies for the infringement. The action is not without analogy. The grantee or lessee of a several fishery, or of a right of turbary, or other profit à prendre [an established form of property right] may sue for a disturbance of his right. Here, too, the right claimed is a profit à prendre ...

[Martin B interjected:] The plaintiff is setting up a right of a perfectly novel character. In *Keppell* v. *Bailey* (2 Myl & K 535) Lord Brougham said:

> There are certain known incidents to property and its enjoyment; among others certain burthens wherewith it may be affected, or rights which may be created and enjoyed over it by parties other than the owner; all which incidents are recognized by the law ... But it must not, therefore, be supposed that incidents of a novel kind can be devised and attached to property at the fancy or caprice of any owner ... [G]reat detriment would arise, and much confusion of rights, if parties were allowed to invent new modes of holding and enjoying real property, and to impress upon their lands and tenements a peculiar character.

... [Pollock CB interjected:] If the plaintiff's contention were correct, the number and variety of rights which might thus be created over land for a particular purpose would be infinite. The whole question depends on whether a new species of property can be created, or whether the alleged right merely exists in covenant ...

The Court gave judgment for the defendant:

POLLOCK CB: We are all of opinion that the rule must be absolute to enter the verdict for the defendant on the second plea. After the very full argument which has taken place, I do not think it necessary to assign any other reason for our decision, than that the case of *Ackroyd* v. *Smith* (10 CB 164) expressly decided that it is not competent to create rights unconnected with the use and enjoyment of land, and annex them to it so as to constitute a property in the grantee. This grant merely operates as a licence or covenant on the part of the grantors, and is binding on them as between themselves and the grantee, but gives him no right of action in his own name for any infringement of the supposed exclusive right. It is argued that, as the owner of an estate may grant a right to cut turves, or to fish or hunt, there is no reason why he may not grant such a right as that now claimed by the plaintiff. The answer is, that the law will not allow it. So the law will not permit the owner of an estate to grant it alternately to his heirs male and heirs female. A new species of incorporeal hereditament cannot be created at the will and pleasure of the owner of property; but he must be content to accept the estate and the right to dispose of it subject to the law as settled by decisions or controlled by act of parliament. A grantor may bind himself by covenant to allow any right he pleases over his property, but he cannot annex to it a new incident, so as to enable the grantee to sue in his own name for an infringement of such a limited right as that now claimed.

MARTIN B: I am of the same opinion. This grant is perfectly valid as between the plaintiff and the canal company – but in order to support this action, the plaintiff must establish that such an estate or interest vested in him that the act of the defendant amounted to an eviction. None of the cases cited are at all analogous to this, and some authority must be produced before we can hold that such a right can be created. To admit the right would lead to the creation of an infinite variety of interests in land, and an indefinite increase of possible estates. The only consequence is that, as between the plaintiff and the canal company, he has a perfect right to enjoy the advantage of the covenant or contract; and, if he has been disturbed in the enjoyment of it, he must obtain the permission of the canal company to sue in their name ...

BRAMWELL B: I am of the same opinion.

5.2. Special features of communal property rights

5.2.1. Present scope of communal property

Communal property rights share most of the characteristics of private property rights, but there are some important differences.

In this country, limited access communal property rights generally exist only in relation to land and other natural resources, and they are now all particular use rights. English law does not recognise communal *ownership*, whether of land or of any other resource, nor does it provide mechanisms for communities to hold fee simple estates in land (the equivalent of land ownership in this country, as we see in Chapters 6 and 8). This means that, whenever communal property rights are exercisable over a particular piece of land, there will either be a private fee simple owner of the land or the underlying ownership will be vested in the state (usually the Crown or a local authority). Approximately 1.5 million acres of land in England and Wales are subject to limited access communal property rights, as Lord Nicholls noted in *Bettison* v. *Langton*, extracted at www.cambridge.org/propertylaw/.

5.2.1.1. Rights of common

There are essentially two different types of limited access communal property right surviving in this country. In the first type, sometimes referred to as 'rights of common', the community entitled to make communal use of the resource (perhaps grazing land, or game birds bred or breeding wild in a particular area) consists of ascertainable individuals who hold the right either by virtue of their ownership of adjoining land, or (if the right has become severed from the benefited land, as can sometimes happen) by transfer from someone who owned adjoining land or who could trace their title back to such an owner. This type of communal property is very like the model Hardin had in mind in 'The Tragedy of the Commons', discussed in Chapters 3 and 6, and its present nature and function was recently reviewed by the House of Lords in *Bettison* v. *Langton* [2001] UKHL 24, extracted at www.cambridge.org/propertylaw/.

This type of communal property most closely resembles private property. For present purposes, the important feature of rights of common is that the members of the right-holding community can always be identified at any particular time, and each of them has a distinct right which he can deal with without reference to the others. Some rights of common are appurtenant to the ownership of other land: grazing rights over a particular pasture, for example, will usually be held by the owners of adjoining farms. If the right is appurtenant to other land in this way and is not severable from it, the right cannot be dealt with separately from the land to which it is appurtenant, so in this sense the right is not alienable. It can, however, be surrendered back to the owner of the land over which the right is exercisable, and if this happens the right is extinguished. If the right is not appurtenant to other

land (the technical term is 'in gross') or if it is appurtenant but severable, it can be freely alienated in much the same way as a private property right.

Rights of common are therefore communal property only in the sense that they involve communal use of a resource. Regulation of the communal use to avoid Hardin's tragedy of the commons is relatively straightforward. Typically, use will be regulated either by the underlying owner of the land over which the rights are exercisable, or by the users themselves. Self-regulation by the users themselves is made easier by the fact that they are all readily ascertainable at any one time. If the rights are all appurtenant to local neighbouring landholdings this is likely to make self-regulation even more effective, because the right holders will then tend to be bound by social pressures and common interest, with clear lines of communication with each other. They will form a close-knit social group of the kind that Epstein describes in Chapter 4 as capable of developing and maintaining effective self-regulation. The majority decision of the House of Lords in *Bettison* v. *Langton* that all appurtenant grazing rights of common are now severable is therefore likely to have significant effects on self-regulated grazing commons, as we see below (see Notes and Questions 5.1 below).

5.2.1.2. Customary rights

The other type of limited access communal property found in this country consists of what are usually referred to as customary property rights. They are called this because, as we see in Chapter 13, they can be acquired only by long use or custom: they cannot be expressly granted. This is because the community in this type of communal property right consists of a fluctuating body of individuals (defined by reference to a general characteristic, usually residence in a particular locality), and English common law has no mechanism for granting rights to fluctuating bodies of individuals.

The fact that the community consists of a fluctuating body of individuals defined by status has other implications. First, as already noted, neither the rights of the individuals nor the rights of the community as a whole can be alienated. An individual member of the community has no power to transfer his share because he has no power to transfer the status to someone who does not have it. If the community consists of inhabitants of Lambeth, the status of Lambeth-inhabiting can be acquired only by moving there, not by transfer, and once you have moved there you acquire the communal property right automatically and have no need for a transfer from a fellow-inhabitant.

The fact that the community itself *prima facie* cannot alienate its interest is of more practical significance. The problem is that the present members of the community have no power to extinguish the rights of future members of the community. This means that, once customary property rights have come into existence there is no way in which they can be terminated or varied. Unless the law provides some mechanism for freeing the resource from the use, for example by adopting a rule that the rights can be lost by abandonment, or extinguished by a surrender or transfer

agreed by the majority of present members, the resource will be perpetually tied to its present use. If conservation of the resource in its present state is an overriding objective, this form of communal property therefore has distinct advantages. As we see in *Milirrpum* v. *Nabalco Pty Ltd* in section 5.3 below, the present members of the Gove Peninsula Aboriginal tribes did not consider themselves to have a collective right to alienate or alter their tribe's pattern of land use, and this has almost certainly been a major factor in the conservation of scarce resources in those areas.

We noted in Chapter 4 that this aspect of Australian native title was changed by the Native Title Act 1993. It is now possible for native title to be extinguished by abandonment, and the present members of a community can extinguish the community's rights for ever by surrendering them to the state in exchange for money or private property rights, or anything else they choose.

This can be contrasted with the present position in relation to English customary rights. As both Lord Denning in *New Windsor Corp*. v. *Mellor* and Lord Hoffmann in *R*. v. *Oxfordshire County Council, ex parte Sunningwell Parish Council* point out, customary rights cannot be extinguished by abandonment, and there is no suggestion in either case that present inhabitants have any power to vary the rights or extinguish them, for example by freeing some of the land affected by the rights in consideration of a payment of money to finance improvement or conservation of the remainder. As noted in both decisions, the Commons Registration Act 1965 makes provision for registering all rights of common and all customary rights, and allows for new customary rights to arise by twenty years' user, but it contains no provisions equivalent to those in the Australian Native Title Act for abandoning, varying, transferring or surrendering customary rights, whether pre-existing or newly arising.

The final point to make about rights held by a fluctuating body of individuals is that there is no mechanism for capping the numbers of those entitled to use the resource. If the number of users can increase without limit, this increases the danger that the resource will be exhausted. This is why customary rights that allow users to take finite resources from the land (for example, to pasture animals or take away timber or dredge for oysters) are rare. Such rights to take resources from other people's land (technically still referred to by the law-French term 'profits a prendre', or just profits) are much more likely to exist as private property rights, or as rights of common, where the number of communal users is fixed. Indeed, English law maintains a general rule that profits *cannot* be held by a fluctuating body of individuals, but it has developed devices to circumvent the rule in order to legitimise long-established customary uses. This has been done by attributing the customary use to a presumed (i.e. fictitious) ancient Crown grant to a corporation, either a real corporation such as a local authority which is then deemed to hold the profit on trust for the benefit of the local users, or to a fictitious corporation comprising the local users. It was on this basis that, for example, local inhabitants were held entitled to continue their long-established custom of dredging for oysters in the River Tamar during a specified period in each year in *Goodman*

v. *Saltash Corp*. (1881–2) LR 7 App Cas 633 (for further reference, see Burn, *Cheshire and Burn's Modern Law of Real Property*, pp. 628–33).

Notes and Questions 5.1

1 Read *Bettison* v. *Langton* [2001] UKHL 24, *New Windsor Corp*. v. *Mellor* [1975] 1 Ch 380, CA, and *R*. v. *Oxfordshire County Council, ex parte Sunningwell Parish Council* [2000] 1 AC 335; [1999] 3 WLR 160; [1999] 3 All ER 385, either in full or as extracted at www.cambridge.org/propertylaw/, and consider the following:

2 Examine the following arguments for and against making profits severable from the land they were originally intended to benefit:
   (a) Robert Walker LJ in the Court of Appeal in *Bettison* v. *Langton* said that, once profits were freely alienable, this would prevent them falling into disuse. This, he said, is because, if they remained tied to the farm, and the farm then became something other than a livestock farm, those rights would not be exercisable by anyone. In other words, profits will not survive unless they are freely marketable, because it is only through exchanges in the open market that profits will end up being held by the person who values them most. This is the classic economic argument in favour of alienability.
   (b) He also said that, once the extent of the profit is limited by some objective fact (such as a specific number of animals) rather than by the nature of the benefiting land, it makes no difference to the burden on the burdened land who owns the right, so there is no need to keep the right tied to a specific piece of land.
   (c) Lord Nicholls in the minority in the House of Lords in *Bettison* v. *Langton* answered (b) by saying 'But in the 1950s the Royal Commission was concerned with wider issues than the position of the owner of the common' (paragraph 19), referring here to what he said was the overriding conclusion of the Royal Commission, i.e. that common land ought to be preserved in the public interest (not in the interests of the rights holders).
   (d) Lord Nicholls also said it would make it more difficult for the various profit holders to co-operate in managing the resource if they were not the neighbouring farm-owners. What was Robert Walker LJ's response to this?
   (e) Lord Nicholls also pointed out that the Department of the Environment, Transport and the Regions, *Good Practice Guide on Managing the Use of Common Land* (June 1998) had expressed the view that 'severance of grazing rights from the associated holdings off the common can reduce the long-term viability of these holdings'. Consider why this should be the case.

   Who is right, on each of these arguments?

3 In *Bettison* v. *Langton*, both Lord Nicholls and Lord Scott agreed that neither the Royal Commission nor Parliament had intended to make all grazing rights severable, and that indeed the policy behind the Royal Commission's report had been to keep the class of severable rights as small as possible. What justification

does Lord Scott give for nevertheless concluding that this is the effect that section 15 of the Commons Registration Act 1965 has had? How do you view this approach to statutory interpretation?

4 If Lord Nicholls' minority view in *Bettison* v. *Langton* was accepted, it would mean that grazing rights which had always consisted of a right to graze a fixed number of animals would be severable and could be freely traded, whereas those that were originally limited by reference to *levancy* and *couchancy* but were converted by the 1965 Act into rights to graze a fixed number of animals were not severable, and could only be sold with the appurtenant land. This would mean treating rights that are now identical but had different historical origins in different ways. Would this be satisfactory? Is this an argument for leaving the issue for Parliament to resolve, so that it can be decided as a matter of policy whether profits ought to be severable, and then make them all or none of them so?

5 If the Royal Commission did not want grazing rights to be severable from the benefited land, why then did it recommend that grazing rights limited by *levancy* and *couchancy* (i.e. which gave such a close and principled link between the extent of the right and the nature of the appurtenant land) should be converted into rights to graze a specific number of animals? This number was not arrived at by looking at the optimum number of animals the burdened land could take while still preserving the public amenity value of the burdened land: it was done by accepting the number claimed by each rights holder, subject to objections made by other commoners and the holder of the burdened land. However, Lord Nicholls seems to have accepted that there was a pre-existing over-grazing problem before 1965: 'it was small wonder if each commoner shifted for himself and crowded as many sheep as he dared on the upland sheepwalk. As a result, the sward was becoming increasingly impoverished through overgrazing.' If that was the problem, was it a good solution to translate the inexact quantifier into a permanently fixed specific number of animals? What other solutions could you suggest?

6 Are there any restrictions on the nature and type of user that will give rise to customary rights? Should there be?

7 Section 22 of the 1965 Act, discussed in *Sunningwell*, was subsequently amended by section 98 of the Countryside and Rights of Way Act 2000 to make it clearer that the 'inhabitants of a locality' for the purposes of class (c) need not be definable with any great precision: these words are now replaced by 'a significant number of the inhabitants of any locality, or of any neighbourhood within a locality'. Consider the effect this will have.

8 In *Mabo (No. 2)*, it was held that Australian native title could be extinguished by Parliament, not only by express legislation but also by inference, by providing

for the grant of inconsistent rights to others or to itself (this was subsequently changed for the future by the Native Title Act 1993). Can English customary rights be extinguished in this way?

9 What are the justifications for treating these recreational customary rights as property rights, and giving them this high level of protection? Compare the justifications given in Chapter 4 for the recognition of Aboriginal native title: which of these apply to these English customary rights?

10 In the light of the conclusion you reach on the previous question, consider the justification for the English rule, confirmed by these cases, that customary rights cannot be lost by non-user.

11 In general, private property rights cannot be lost by non-user either. However, they are subject to the principle of limitation of actions, as we see in Chapter 11. In other words, if I have a private property right or interest, such as fee simple ownership of a plot of land, or a right of way over a path across your adjoining plot of land, the enforceability of my rights is not affected if I never set foot on my land or (with some exceptions) your path. If, however, you do something which is an actionable interference with my interests, such as encroaching on to my plot of land or building a fence across your path, I will lose my right to object (and hence lose the interest itself) if I do not take action to stop you within twelve years (under the Limitation Act 1980 as it stands at present, shortly to be changed to ten years). It appears that limitation of actions does not apply to English customary rights: consider why.

12 The provisions requiring registration of 'new' customary rights under Class c in the 1965 Act are complex and possibly not comprehensive (see Lightman J in *Oxfordshire County Council* v. *Oxford City Council* [2005] EWHC 175 although arguably no longer tenable following the decision of the Court of Appeal in the same case: [2005] EWCA Civ. 175). If this is the case, it is possible for a 'new' Class c right not to appear on the register at all. Consider what practical problems this might cause, bearing in mind the rule that such rights cannot be extinguished by non-user or limitation of action rules.

13 Land can be a town or village green even if it not in a town or a village – it might be a beach forming part of the foreshore, or a river bank, or a patch of land in an urban area, such as a landscaped area left open by a developer. Also, it is clear from Lord Hoffmann's judgment in *Sunningwell* that a broad range of activities is covered by Class c (would it include, for example, picnicking or skateboarding?). Is this likely to discourage owners from keeping such areas open to the public? See further Chapter 13, where we look more closely at how rights can be acquired by long use.

14 At the end of his judgment in *New Windsor*, Lord Denning points out that the 1965 Act provides no mechanism for varying or extinguishing customary rights. Consider what problems this does or could cause.

5.3. Aboriginal land rights

5.3.1. Nature of native title

In Chapter 4, we looked at the justifications for recognising that Aboriginal land use gave rise to rights enforceable against a colonising state and against subsequent settlers, and at how in Australia this proposition was finally accepted by the courts in *Mabo (No. 2)* and then confirmed by the Australian Parliament in the Native Title Act 1993. Similar developments have taken place in the United States (much earlier than in Australia), in Canada, in New Zealand and in other former British colonies. The precise nature and extent of the rights recognised, and the form recognition has taken, has varied from country to country. Here we concentrate on Australia and look more closely at the nature of the rights now recognised there, and how they differ from English property rights.

The term used in Australian law to describe traditional Aboriginal land rights is 'native title'. This term encompasses the very different resource uses of different tribes with differing customs and traditions, occupying a wide variety of geographic environments. In *Mabo (No. 2)*, Brennan J had this to say about the content of native title (at paragraph 64):

> Native title has its origins in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs.

As we saw in Chapter 4, the statutory definition given in the Native Title Act 1993 closely follows this formulation.

This means that the term 'native title' tells us nothing about the substance and content of the rights that any particular tribe might have in any particular territory, it only tells us how we can find out what they are. However, in the following paragraphs (see paragraphs 65–72 of his judgment extracted at www.cambridge.org/propertylaw/), Brennan J went on to give general propositions that he said followed from his definition of native title, and, again, these have been largely confirmed by the Native Title Act 1993.

5.3.2. Alienability

First, Brennan J said that only inhabitants indigenous at the time of colonisation and their descendants can hold native title, and the only form of native title they can hold is that which reflects the connection they have with the land under their particular laws and customs. In other words, each tribe has its own form of native title, the substance

and content of which is dictated by the laws and customs by which they consider themselves to be bound, and there can be no question of transfer of any of those rights outside the tribe, either to a member of another tribe or to anyone else. Native title is, therefore, wholly inalienable. The only form of alienation that he envisaged was surrender to the Crown, which would result in the extinguishment of the title.

5.3.3. Abandonment

Secondly, he said, if native title is defined by reference to the connection which a community has with a territory under the laws and customs by which it feels itself to be bound, it must follow that it will be lost if the community loses that connection to their territory. It will have lost that connection, in his view, if the community has ceased to acknowledge the relevant laws and (except in so far as impracticable) ceased to observe the relevant customs. Equally, the connection will be lost if the community itself has ceased to exist because the last of the members has died. Although Deane J and Gaudron J expressed reservations about this principle that native title is necessarily lost when the community's traditional way of life is lost, it represents the majority view of the court in *Mabo (No. 2)* and again it has been confirmed by the Native Title Act 1993.

We have seen that this principle does not exist in English common law. English customary rights cannot be lost by non-user, nor (on the whole) can private property rights. It has proved to be controversial in Australia. First, there is the political problem of how to view a disintegration of a community, or an abandonment of its traditional way of life and its connection with its territory, where this was forced on it by the settlers. In the United States native title is not considered to be abandoned if the abandonment resulted from failure to resist white encroachment or from being forced onto a reservation (see Bartlett, 'Humpies Not Houses', p. 27). Secondly, there is an evidential problem. In Australia (unlike in Canada and in the United States, as Bartlett notes in the same article) the onus is put on claimants to *prove* that there has been no abandonment. This can be done only by proving continuity of the community and of its traditional way of life, and continued observance of its laws and customs. This perhaps explains the length and complexity of the proceedings now reaching the courts in Australia.

5.3.4. Variation

However, it seems that, in some respects at least, native title is more flexible than English customary rights. Brennan J envisages that it might change in content if the community adapts its way of life to meet changing conditions, although he appears to have in mind gradual evolutionary change rather than radical change: see paragraph 68 of his judgment. However, even this does not appear to be possible for English customary rights, as we saw in section 5.2 above. Probably of more practical significance is the confirmation in the Native Title Act 1993 that native title can be surrendered to the state in exchange for other rights, even private

property rights. Again, there is no such mechanism in English law for exchanging customary rights for rights more appropriate to changed circumstances.

5.3.5. Extent of native title

This is an issue that was left unresolved in *Mabo (No. 2)* and has proved to be contentious in later cases. Once a tribe has established native title over an area, does this automatically mean that it has general use rights over that area, akin to ownership? If so, the tribe will be treated as having control of that area and entitled to resist all incursions, not just those infringing specific rights, and it will also become entitled to all resources found there (such as oil and minerals) just as a private common law owner would. However, it might also mean that any past government grant of property rights in that geographic area would be treated as inconsistent with the native title and therefore as having extinguished it. If, on the other hand, a successful claim to native title merely confirms the right to use the territory in the way it has always been used, the claimant gets no rights of control over the area or rights to natural resources unless it can prove that it has always had them. It does, however, open up greater possibilities for the co-existence of native title and private property rights. This was the significant step forward made in *Wik Peoples* v. *Queensland* (1996) 187 CLR 1 referred to in Chapter 4, where it was established that both pastoral leases and the native title claimed by the tribes in that case conferred only specific use rights rather than general use rights, so that, to the extent that they were not specifically incompatible, the one would not have extinguished the other. While the consequences of this decision have been largely reversed by the Native Title Amendment Act 1998, this 'bundle of rights' approach has been followed in subsequent cases, and severely criticised by commentators who see it as an unjustifiable limitation on the scope of native title (see, for example, the articles by Bartlett, 'Humpies Not Houses' and Tehan, 'A Hope Disillusioned').

As we can see from *Delgamuukw* v. *British Columbia* [1997] 3 SCR 1010 (extracted at www.cambridge.org/propertylaw/), the Supreme Court of Canada has drawn clearer distinctions between ownership-type rights and specific use rights, and has developed a more sophisticated approach under which land held under aboriginal title can be used in any way, not just in ways it has always been used, but subject to the limitation that it 'cannot be used in any manner that is irreconcilable with the nature of the claimants' attachment to the land' (paragraph 125). Further, it recognises that there is a distinction between this general aboriginal title and aboriginal *rights*, which are essentially specific use rights (paragraphs 137–42).

5.3.6. Is native title proprietary?

5.3.6.1. Blackburn J's view in *Milirrpum*

For Blackburn J in *Milirrpum* v. *Nabalco Pty Ltd*, this was an important question. The issues he was asked to decide were argued on the basis that, even if colonisation had not extinguished *all* rights of the indigenous population, the only rights that

could have survived were those that were recognisable as proprietary rights by the common law. As we saw in Chapter 4, his firm conclusion was that, whatever the nature of the aboriginal relationship with the lands they inhabited, it was not proprietary.

However, it is important to appreciate that he rejected most of the arguments that the government put forward in support of its contention that the claimants' relationship with their land could not be categorised as proprietary. He refused to accept the government's argument that there was nothing in the aboriginal world that was recognisable as law at all because there was no discernible law-maker or law-enforcer. He rejected this Austinian assumption of what it takes to have a legal system, preferring the more inclusive view that law is no more than 'a system of rules of conduct which is felt as obligatory upon them by the members of a definable group of people' (p. 266). This amounts to an acknowledgment that, whenever people live in a definable community, they can be taken to have a recognisable system of law, and indeed he suggested that any conclusions reached in the past that particular indigenous groups in colonial territories had 'no ordered manner of community life' so as to give rise to a system of law, were based on inadequate anthropological knowledge.

He also rejected the government's argument that the claimants did not form a definable community. It was not necessary, he said, for the community to be defined with any great precision or specificity. It was sufficient to say that there *was* a system of laws recognised as obligatory upon them by those 'who made ritual and economic use of the subject land' (p. 267) – a somewhat circular definition which removes considerable potential obstacles to the recognition of communal property rights.

Finally, he rejected a contention that there was insufficient certainty about which clans were entitled to use precisely which areas. The government argued that the physical boundaries of their use were not sufficiently precise for there to be certainty as to the subject-matter of their rights, nor was there sufficient certainty as to the identity of the holders of the rights in any particular area. We noted above in section 5.1.4 that it is generally necessary that the subject-matter of a right and the identity of the right holder should be certain if the right is to be categorised as a property right. Blackburn J did not disagree with this, but he did not accept that the same degree of precision was required for native title as might be required for common law private property rights. As far as physical boundaries were concerned, he considered that it was sufficient if they were defined 'with ... such precision as the users of the land require for the uses to which the land is put even though this might be less precisely definable than those to which we are accustomed' (p. 271). As to certainty of the right holder, he rejected the contention that 'if there is property in land, there must be either a written or pictorial means of discovering who is the owner of any particular piece of land ... or if that is not possible among primitive people, there must be a sufficient number of witnesses who can produce a register of title out of their memories ... In my opinion, the fallacy in this

argument is the assumption that there cannot be rights of property without records or registers of title' (p. 272).

So, he was willing to accept that the Aboriginal peoples inhabited their lands under a system of laws, and that a sufficiently defined community made ritual and economic use of sufficiently defined areas of land. Why then was he not prepared to accept that they had rights to use the land in the way that they did?

In his view, there were three characteristics that property rights tended to have: they involved a right 'to use and enjoy' the subject-matter, a right to exclude others from it, and a right to alienate the rights. These were not present in the relationship the claimants had with their land, he said, and therefore it could not be a proprietary relationship.

It is not clear why any of these three should be thought to be necessary criteria for proprietary status, and in the case of the first two it is equally unclear as to why the claimants in this case could be said to fail to meet the criteria, even if they were necessary. To take the last one first, we have already seen that alienability is not a characteristic of communal property rights (or even of private property rights) where the right holders are defined by reference to a status. Similarly, the right to exclude others is admittedly characteristic of limited access communal property but it does not arise in the case of open access communal property. What marks property off from non-property is the right not to be excluded, not the right to exclude. Here, as far as one can gather from the evidence given in the judgment, the aboriginal population of the territory regarded particular clans as having the right to exclude others from religious sites, and the population as a whole regarded themselves as having a right not to be excluded from the resources whose use they shared, and certainly regarded the proposed activities of Nabalco as an invasion of those rights.

The question of the right to use and enjoy is more complex. It is quite wrong to say that *all* property rights in things give the right holder the right to use and enjoy the thing. Your landlord has a property interest in the house you rent from him, as does your neighbour who has the benefit of a restrictive covenant over it, but this does not give either of them the right to use and enjoy it. The right to use and enjoy is a characteristic incident of *ownership*, not a necessary incident of all property interests. But, even if the right to use and enjoy the land was a necessary ingredient of the kind of interest the Aboriginals claimed to have, it is difficult to see why Blackburn J thought they had failed to establish it.

The problem as he saw it was that the definable communities – the clans – had only a spiritual relationship with the land: they regarded themselves as under a duty to care for the land as a whole, with specific clans having particular responsibility towards specific sites, which they 'used' only in the sense that they performed religious ceremonies there. He accepted that the Aboriginals did of course make economic use of the land – they lived there and were entirely dependent on its natural resources. However, they did so in transient *ad hoc* food-gathering and communal-living groupings – the bands – which appeared to have no particular

connection with any particular tribe. Membership of a band was not restricted to any particular tribe, nor did any band feel itself bound to confine its activities to territory associated with one tribe rather than another, and there appeared to be no other defining characteristic that could allow bands to be viewed as right-holding communities. So, he concluded, the only potential right holders were the clans, but they did not appear to regard themselves as having any 'rights' to use and enjoy the land, only duties towards it.

This is a surprisingly narrow conception of ownership to adopt, given the very different cultural context, even if we were to accept that what the claimants had to establish was something resembling ownership. It is not difficult to conceive of a community that regards itself as 'owning' a site while simultaneously regarding itself as bound not to enter it, or bound not to use it for any purpose other than religious observances. European religious organisations own churches and have sacred objects too. It is true that their position might best be described as having a legal right to use and enjoy in any way they choose (perhaps subject to obtaining planning permission) but a moral or spiritual obligation to use for religious purposes only, but who is to say that the same is not true of Aboriginal Australian sacred sites? And, even a legal ban on use and enjoyment is not inconceivable. The common law would have no difficulty with the concept of ownership of an area of land which no one, not even the owner, was entitled to enter or use in any way – perhaps a nature reserve, or an area of contaminated land.

So, the reasons that Blackburn J gave for concluding that native title – if it existed at all, which he doubted – was not proprietary are hardly convincing.

5.3.6.2. The view of the High Court in *Mabo (No. 2)*

In a sense, the question of whether native title is or is not proprietary has become a side issue after the decision of the High Court in *Mabo (No. 2)*. Once it has become established that, whatever native title is, it has survived annexation and has to be recognised by the state, it becomes less significant whether this is because it is proprietary or for some other reason.

In fact, only a minority of the judges in the High Court were prepared to accept that native title is proprietary. Brennan J (with whom Mason CJ and McHugh J agreed) expressed the firm view that it is (paragraph 53 of his judgment), but Deane J and Gaudron J disagreed. In their view, the indigenous peoples had personal but not proprietary rights, and it was for this reason that their rights were effectively extinguished by the government granting inconsistent property rights to others (paragraphs 23–4, 29–30 and 60 of their judgment): if they had had property rights they could not have been extinguished in this way. Neither of the other two judges expressed a concluded view. Dawson J, in the minority, said that, if there was such a thing as native title that survived annexation – which he rejected – it was 'probably not' proprietary in nature but it was unnecessary for him to decide the question (paragraph 80 of his judgment).

5.3.6.3. The Canadian view

The process of recognition of aboriginal land rights began earlier in Canada and developed along different lines, as can be seen from *Delgamuukw* v. *British Columbia* [1997] 3 SCR 1010, extracted at www.cambridge.org/propertylaw/. In particular, the legislative background is different, and, as the Supreme Court of Canada decision in *Delgamuukw* demonstrates, Canadian law is happier with the notion of aboriginal title and aboriginal rights being regarded as proprietary, although again it is not viewed as a determinative factor. Once it is accepted that these are rights that are enforceable against the state and against all others, it makes little sense to argue whether they can in any other sense be called proprietary. However, it is notable that Canadian jurisprudence demonstrates a more sophisticated approach in distinguishing aboriginal title (the right to the land itself) from other aboriginal rights, and recognising that the rights the law recognises – essentially as proprietary – 'fall along a spectrum with regard to their degree of connection with the land' (see paragraph 138), all of which receive constitutional protection.

Notes and Questions 5.2

1 Read *Delgamuukw* v. *British Columbia* [1997] 3 SCR 1010, either in full or as extracted at www.cambridge.org/propertylaw/.

2 According to Lamer CJ in *Delgamuukw*, what is 'aboriginal title'? (See paragraphs 111–32 of his judgment.) How does it differ from Honoré's conception of ownership? How does it differ from 'native title' as defined in section 223(1) and (2) of the Australian Native Title Act 1993, read in the light of section 225(a) and (b) of that Act (see Chapter 4 above)?

3 What does Lamer CJ mean when he says that 'lands subject to aboriginal title cannot be put to such uses as may be irreconcilable with the nature of the occupation of that land and the relationship that the particular group has had with the land which together have given rise to aboriginal title in the first place' (paragraph 128)? Give examples. What reasons does he give for these restrictions? Compare these reasons with the reasons given by Brennan J in *Mabo (No. 2)* for concluding that the uses to which land held by native title may be put must be restricted. Are the Australian restrictions the same as the Canadian ones? Is there any significance in the differences?

4 According to Lamer CJ, what are 'aboriginal rights'? How do aboriginal rights differ from 'aboriginal title'? (See paragraphs 137–41 of his judgment.) What does he mean by a 'site-specific right to engage in a particular activity'? Give examples.