IN THE SUPREME COURT OF THE UNITED KINGDOM. UKSC/2025/0164

ON APPEAL FROM THE UPPER TRIBUNAL (LANDS CHAMBER)

BETWEEN

PETER NIGEL JOSEPH STENNER Appellant

and

TEIGNBRIDGE DISTRICT COUNCIL Respondent

APPELLANT'S WRITTEN CASE

Numbers in square brackets in bold refer to page numbers of the main hearing bundle

Introduction

1. This appeal concerns what is known as the "ouster principle" in the context of easements. To use the words of Lord Neuberger in Moncrieff v Jamieson [2007] 1 WLR 2620 at ¶143, the issue is the "*degree of ouster … required to disqualify a right from constituting a[n] … easement*" [**769**]. We will hereafter refer to this as "**the ouster principle**".
2. It is an appeal from the judgment of the President of the Upper Tribunal (Lands Chamber), Edwin Johnson J ("**the Judge**") at [2025] UKUT 204 [**65**] (**the judgment**). In the judgment, the Judge dismissed an appeal from the judgment and order of the First-tier Tribunal ("**FTT**") dated 30th October 2024 ("**the first-tier judgment**") [**105**].
3. The Appellant, who runs a boat hire business from three beach huts which he owns, claims a prescriptive easement to store, and carry out maintenance work on, up to six of his boats over a small area (referred to in the judgment and hereafter as "**the Triangle**" [**16**]) of an adjacent car park owned by the Respondent (referred to as "**the Car Park**") during the period between 1st October and 31st May each year ("**the Disputed Easement**").

4. Both the FTT and Judge held that the Disputed Easement could not be an easement for the sole reason that it offended against the "ouster principle" (see paragraph 155 of the judgment [**95**]).
5. In paragraphs 65-7 [**80**] and 75-6 [**82**] of the judgment, the Judge identified what he called "the Ouster Question" as being whether a supposed easement "would leave the servient owner without any reasonable use of his land". This test was derived from the judgment of HHJ Paul Baker QC in the case of London & Blenheim Estates Ltd v Ladbroke Retail [1992] 1 WLR 1278 [**638**] as applied by the Court of Appeal in Batchelor v Marlow [2003] 1 WLR 764 [**420**]. Both the FTT and the Judge applied that test. At ¶64 [**79**] and ¶149 [**94**] of the judgment and in his Reasons for Granting the Appellant a certificate pursuant to section 14A of the Tribunals Courts and Enforcement Act 2007 ("**The Reasons**") [**98**] the Judge held that he was bound by Batchelor v Marlow so to do (see further below).
6. The point of law of general public importance in this case (as correctly identified by the Judge himself in The Reasons) is whether the "Ouster Question" as formulated by the Judge is the correct test to apply. Put another way: is the test for the ouster principle as stated by HHJ Paul Baker QC in the London & Blenheim Estates case and subsequently applied by the Court of Appeal in Batchelor v Marlow, which asks whether a putative easement "would leave the servient owner without any reasonable use of his land", correct?
7. The Appellant submits, and will ask the Supreme Court to hold, that it is not. The test as applied by the FTT and the Judge crucially confuses use and occupation, on the one hand, with possession, on the other. The correct test is, rather, that suggested by Lord Scott in Moncrieff v Jamieson [2007] 1 WLR 2620 (at (¶59) [**747**]) and by The Law Commission ("**LC**"), in Chapter 3 of its 2011 paper Making Land Work: Easements, Covenants and Profits à Prendre (Law Com No. 327) [**1268**] (**The LC Report**"). Although slightly differently expressed, these are the same test: whether the servient owner retains possession of the servient land.
8. Had the Tribunals below applied this test then they would have held that the Disputed Easement was and is an easement known to the law.

<u>Grounds of Appeal</u>

Ground 1: The Correct test

9. The Judge was wrong to conclude that the "Ouster Question", as he formulated it, was the correct question because the proper formulation of the test as to whether the Ouster Principle is engaged is to ask "*whether the servient owner retains possession and, subject to the reasonable exercise of the right in question, control of the servient land*" (per Lord Scott in <u>Moncrieff v Jamieson</u> [**747**]) or whether, as suggested by LC in Chapter 3 of the LC Report, simply whether the servient owner retains exclusive possession. Had the Judge (and the FTT before it) applied the correct test, then he would, and should, have held that the right claimed by the Appellant was an easement recognised by law.
10. The Appellant submits that the tests propounded by Lord Scott in <u>Moncrieff v Jamieson</u>) and that suggested by the LC are two formulations of the same question, namely whether, given the putative easement, the servient owner retains legal possession of the land. Possession encompasses both control (subject to the reasonable exercise of the right) and the ability to exclude others from the land.

The origin and development of the ouster principle

11. In <u>Regency Villas v Diamond Resorts Ltd</u> [2019] AC 553 [**854**] Lord Briggs JSC summarised the four requirements for the recognition of a right as an easement as follows:

> *Before addressing the Ellenborough Park case directly, it is convenient first to summarise what, by the 1950s, were the well-established conditions for the recognition of a right as an easement. Writing in 1954, Dr Cheshire described the four essential characteristics as follows: (i) there must be a dominant and a servient tenement; (ii) the easement must accommodate the dominant tenement; (iii) the dominant and servient owners must be different persons; (iv) a right over land cannot amount to an easement, unless it is capable of forming the subject matter of a grant*. (¶35 [**872**])

12. The ouster principle sits within the fourth condition, described by Lord Briggs as a "*repository for a series of miscellaneous requirements which have been held to*

be essential characteristics of an easement ... [including] ... *that the right is not so extensive or invasive as to oust the servient owner from the enjoyment or control of the servient tenement*" (para 58 [**877**]). In the LC Report, the LC describes the present test as being "*that an easement must not leave the servient owner without any reasonable use of his or her land*" (para 3.196 [**1276**]).

13. The ouster principle has been traced to the Scottish House of Lords case of Dyce v Hay (1852) 1 Macq 305 [**529**] in which a prescriptive right for the public at large to use a strip of land for the purpose of recreation was claimed. The right claimed was described as being of *"an extensive nature...the Pursuer claims as an inhabitant, but, in fact, on behalf of all the Queen's subjects, the right to go at all times upon the enclosed soil of a portion of the Appellants property near the mansion house for the purposes of recreation just as they think proper...It is in effect a demand on the part of the public at large to resort to this spot for recreation exercise, strolling and lying down particularly..."* [**533**]. What was claimed appears to have been a private right which was to be contrasted with *"...the right of village greens and village play-grounds, the enjoyment of which has been dedicated to the public"* [**535**]. These latter were to *"remain untouched, and are unassailable, be the fate of this case what it may"* [**535**].

14. Lord St Leonards LC said that the right claimed was one that "*cannot be maintained*" and "*ought not to be maintained*" [**539**] as it was "*so large as to be entirely inconsistent with the right of property; for no man can be considered to have a right of property worth holding in a soil over which the whole world has the privilege to walk and disport itself at pleasure*" [**533**]. The sidenote to the report (described by Lord Scott in Moncrieff as "unhelpful") records that "*There can be no prescriptive right in the nature of a servitude or easement so large as to preclude the ordinary uses of property by the owner of the lands affected*" [**529**].

15. That case was a Scottish case (as made clear by the Lord Chancellor in the last paragraph of his judgment). The sidenote is not a quote from the judgment. Insofar as the case decides that one cannot have an easement of recreation in favour of a dominant tenement over a defined servient tenement, then of course it does not now reflect the law of England (see Re Ellenborough Park [1956] Ch 131 [**894**] and Regency Villas). Insofar as the case holds that there cannot be a private right (as

opposed to a Town or Village Green right) in favour of the general public over private property, then it is uncontroversial. Whichever it is, the case is an insubstantial foundation for the ouster principle.

16. In Reilly v Booth (1890) 44 ChD 12 [**837**], the Court of Appeal had to construe a conveyance which conveyed a parcel of land together with "the exclusive use of" what was described as a "gateway into Oxford Street" which the court construed as a passage from the street into land at the rear. It was argued that this was the grant of an easement. The Court of Appeal thought it was not. Lopes LJ said (at pages 26-7):

    I think ownership passed. The exclusive use of the said gateway was given. The exclusive or unrestricted use of a piece of land, I take it, beyond all question passes the property or ownership in that land, and there is no easement known to law which gives exclusive and unrestricted use of a piece of land. It is not an easement in such a case, it is property that passes. [**851**]

17. In Copeland v Greenhalf [1952] Ch 488 [**508**], a prescriptive easement to use a strip of land by the side of a private roadway for depositing vehicles and for other purposes connected with a wheelwright's business was claimed. Both Dyce v Hay and A-G of Southern Nigeria v Holt [1915] AC 599 [**396**] (see below) were cited to the court although Wright v Macadam [1949] 2 KB 744 [**1087**] (see below) famously was not. Counsel for the freeholder argued, relying on Dyce v Hay, that *"The right claimed…amounts to an ouster of the plaintiff for the beneficial enjoyment of her land"* [**511**]. He also argued that the right claimed was too uncertain.
18. Upjohn J having cited a passage from the Holt case said (at page 495 [**515**]):

    I read that sentence as meaning this: There is no reason why there should not be a valid easement for the purpose of storing on the land coopers' stores, casks, trade goods and produce.

    However, having then cited from Dyce v Hay, he said this (at 498 [**518**]):

    but I must return to the point of uncertainty.

    I think that the right claimed goes wholly outside any normal idea of an easement, that is, the right of the owner or the occupier of a dominant tenement over a servient tenement. This claim (to which no closely related authority has been referred to me) really amounts to a claim to a joint user of the land by the defendant. Practically, ***the defendant is claiming the***

> ***whole beneficial user of the strip of land*** *on the south-east side of the track there; he can leave as many or as few lorries there as he likes for as long as he likes; he may enter on it by himself, his servants and agents to do repair work thereon. In my judgment, that is not a claim which can be established as an easement****. 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, and no authority has been cited to me which would justify the conclusion that a right of this wide and undefined nature can be the proper subject-matter of an easement. It seems to me that to succeed,* ***this claim must amount to a successful claim of possession by reason of long adverse possession****. I say nothing, of course, as to the creation of such rights by deeds or by covenant; I am dealing solely with the question of a right arising by prescription.*

(emphasis added)

19. Thus, although Upjohn J speaks of "joint user", he **does** talk about the right being, "virtually a claim to possession…if necessary to the exclusion of the owner" and of amounting in effect to a claim to ownership by adverse possession. Whilst there is no specific attempt made by the Judge to distinguish the <u>Holt</u> case, his recognition that the <u>Holt</u> case held that *"[t]here is no reason why there should not be a valid easement for the purpose of storing… "* [**515**] would tend to indicate that he decided the case on the basis that, on the facts, the right claimed would have deprived the freeholder of possession. Thus, Upjohn J appears to have applied a test different to that subsequently expounded in the <u>London & Blenheim</u> and <u>Batchelor v Marlow</u> cases.

20. In <u>Miller v Emcer</u> [1956] Ch 304 [**706**] the Court of Appeal held that a right to use a lavatory could be an easement, Romer LJ stating (at page 316 [**718**]):

> *In my judgment the right had all the requisite characteristics of an easement. There is no doubt as to what were intended to be the dominant and servient tenements respectively, and the right was appurtenant to the former and calculated to enhance its beneficial use and enjoyment. It is true that during the times when the dominant owner exercised the right, the owner of the servient tenement would be excluded, but this in greater or less degree is a common feature of many easements (for example, rights of way) and does not amount to such* ***an ouster of the servient owner's rights*** *as was held by Upjohn J. to be incompatible with a legal easement in Copeland v. Greenhalf*

(emphasis added). The phrase in bold is compatible with a test that asks whether the right deprives the servient owner of possession and control.

21. In Re Ellenborough Park [1956] Ch 131, Lord Evershed MR said this (at page 164 [**927**] in relation to "Dr Cheshires fourth condition"):

> *the cognate questions involved under this condition are: whether the rights purported to be given are expressed in terms of too wide and vague a character; whether, if and so far as effective, **such rights would amount to rights of joint occupation or would substantially deprive the park owners of proprietorship or legal possession**; whether, if and so far as effective, such rights constitute mere rights of recreation, possessing no quality of utility or benefit; and on such grounds cannot quality as easements.*

He continued (at 175-6 [**938**]):

> *We turn next to Dr. Cheshire's fourth condition for an easement - that the right must be capable of forming the subject-matter of a grant. As we have earlier stated, satisfaction of the condition in the present case depends on a consideration of the questions whether the right conferred is too wide and vague, **whether it is inconsistent with the proprietorship or possession of the alleged servient owners**, and whether it is a mere right of recreation without utility or benefit.*

He held (at 176 [**939**]) that the right claimed:

> *no more amounts to a joint occupation of the park with its owners, no more excludes the proprietorship or possession of the latter, than a right of way granted through a passage, or than the use by the public of the gardens of Lincoln's Inn Fields (to take one of our former examples) amount to joint occupation of that garden with the London County Council, or involve an inconsistency with the possession or proprietorship of the council as lessees*

(emphasis added)

Again the test is stated in terms of deprivation of "proprietorship or legal possession" and not in terms of deprivation of reasonable use and/or occupation.

22. In Thomas Ward v Alexander Bruce [1959] 2 Lloyds Rep 472 [**996**], the Court of Appeal were prepared (albeit obiter) to hold that a right to scuttle or break up ships in a dock belonging to another could be an easement, but an ancillary right "to maintain the silt over the area to which the right was alleged to extend at a height chosen by the appellant as convenient to themselves" could not be an easement as:

> *it involves an almost complete exclusion of the alleged servient owner and involves also the result that, over the last 30 years, the appellants have been entitled to all the area over which the right is said to extend, altering its nature*

by tipping material on it and curtailing its height, and thereby altering its extent and character. [**1001**]

23. In Ward v Kirkland [1967] Ch 194 [**1034**], Ungoed-Thomas J held that a right to enter a neighbour's land to repair a wall could be an easement. It was argued, relying on Copeland v Greenhalf that "*A right which excludes the owner from exclusive possession of his land cannot be an easement*" (see page 209 [**1049**]). The judge said (at page 222 [**1062**]):

> *The objection which is taken to such a right as this constituting an easement is that, so it is said, it would amount to an exclusion of the servient owner from possession of his land…*

Having cited from Copeland v Greenhalf, the judge stated [**1063**]:

> *It was submitted, however, that such a right would in effect exclude the defendant from the use of part of the farmyard next to the cottage, or interfere substantially with such use. It is quite clear, of course, that the farmyard could be used right up to the cottage wall, but the user could not be such as to destroy the right or any easement to maintain which might exist. Similar considerations arise even in cases of rights of way, because the owner of the servient tenement cannot exercise his property rights in such a way as to defeat the easement which exists over it. I for my part find no difficulty in coming to the conclusion* ***that such a right as is claimed here is not a right that would be defeated upon the ground that it would amount to the possession or joint possession of part of the defendant's property****, being that part over which the plaintiff would be exercising his right to maintain his wall*
>
> (emphasis added)

24. Thus, he derived from the Copeland case a test which asked whether the servient owner would be deprived of possession, and not one which assessed the nature of the servient owner's subsequent use of the land.

25. In Grigsby v Melville [1972] 1 WLR 1355 [**553**] Brightman J held (albeit obiter) that an "easement of unlimited storage within a confined or defined space" was not capable of existing as an easement at law. He said (at page 1364 [**562**]):

> *In the case before me, it is, I think, clear that the defendant's claim to an easement would give, to all practical intents and purposes,* ***an exclusive right of user over the whole of the confined space representing the servient tenement****. I think I would be at liberty, if necessary, to follow Copeland v.*

Greenhalf [1952] Ch. 488. I doubt, however, whether I need express any concluded view on this aspect of the case (emphasis added)

26. In the London & Blenheim Estates case the issue was whether a right to park cars on "retained land" granted in a transfer of land was exercisable over additional or "other land" as defined. There were effectively two issues: (i) whether the "other land" could benefit from the right granted in the transfer; (ii) whether a right to park can exist as a valid easement. The claim was dismissed on the first ground. HHJ Paul Baker QC accepted the argument advanced on behalf of the Defendant as follows (at page 1281 [**641**]):

    It is common ground that clause 11 did not amount to an immediate grant of easements for the benefit of the newly acquired leaseholds. For such easements to exist and bind the successors in title of the retained land there has to be a dominant tenement, which would not occur until all three conditions listed in the clause had been satisfied. By the time they were satisfied the potential servient tenement had already been transferred to and registered in the name of a third party. Accordingly, says Mr. Lightman for the defendants, at the time of the transfer to Wortley Developments Ltd. there was no interest in land which could be enforced against them.

    He then held (at page 1284 [**644**]):

    in the case before me there was no dominant tenement at the date of the grant or at the date of the disposal of the potentially servient land. An estate or interest cannot subsist in a non-existent hereditament. That, in my judgment, as I said, is fatal to the plaintiffs' case.

    This part of his judgment was upheld by the Court of Appeal ([1994] 1 WLR 1278).

27. Although that disposed of the case, HHJ Paul Baker QC said that he should go on to consider the remaining issues "which have been extensively argued before me" (see page 1285 [**645**]). These included "whether the right to park conferred by clause 7 can exist as a valid easement". The judge considered a number of authorities, including the Holt case and Wright v Macadam. In respect of the latter he concluded (at page 1285 [**645**]):

    This shows that a valid easement can subsist which involves the exclusive occupation of a shed or other piece of the servient tenement

Having noted that Wright v Macadam was not cited in Copeland v Greenhalf he said that:

> *it probably would not have made any difference. The matter must be one of degree. 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. Hence I do not accept the submission that Copeland v Greenhalf [1952] Ch. 488 was wrongly decided.* [**646**]

This reconciliation was (rightly it is submitted) criticised by Lord Scott in Moncrieff v Jamieson (at ¶57 [**746**]). In relation to the case of Bilkus v LB Redbridge (1968) 207 EG 803 [**426**], he concluded (at 1287 [**647**]):

> *That is a clear authority that in some circumstances the right to park cars can amount to an easement.*

28. He thus recognised that a right to park could be an easement. He then described the test for the ouster principle as follows [**648**]:

> *The essential question is one of degree.* ***If the right granted in relation to the area over which it is to be exercisable is such that it would leave the servient owner without any reasonable use of his land, whether for parking or anything else, it could not be an easement*** *though it might be some larger or different grant The rights sought in the present case do not appear to approach anywhere near that degree of invasion of the servient land. If that is so — and I emphasise that I have not gone into the facts — I would regard the right claimed as a valid easement.* (emphasis added)

29. This is the first articulation of the test for the ouster principle as has subsequently been adopted. Of course, along with the entire discussion as to whether, and to what extent, a right to park could be an easement, the statement was obiter. Further it was "obiter on obiter" in that, had he not dismissed the case on another point, HHJ Baker QC would have held that the right to park in that case **was** a valid easement (and thus did not fall foul of the test for the ouster principle he had articulated).

30. The Appellant also submits that the test articulated by HHJ Paul Baker QC is not the same as that applied in Copeland v Greenhalf and the other decisions which pre-dated London & Blenheim Estates referred to above. A test which asks whether the right claimed is such that it leaves the servient owner "without any reasonable use of his land" is not the same as a test which asks whether the claim

"amount[s] to a successful claim of possession" or "is virtually a claim to possession of the servient tenement, if necessary to the exclusion of the owner".

31. The test stated in London & Blenheim was the test also applied in Batchelor v Marlow in which the Court of Appeal held that an exclusive right to park six cars for 9½ hours every day of the working week could not, on the application of that test, be an easement. However, it is submitted that in Batchelor v Marlow the Court of Appeal simply applied that test because it had been agreed by both parties to be applicable.

32. At ¶8 and ¶9 [**423**] Tuckey LJ said this (referring to the first instance judgment in that case):

> *Earlier in his judgment he referred to the authorities and accepted that the question he had to answer was one of degree. This followed the approach adopted by Judge Paul Baker QC in London and Blenheim Estates Ltd v Ladbroke Retail Parks Ltd [1992] 1 WLR 1278 , 1288 who, after reviewing the earlier authorities on car parking, said:*
>
> > *"The essential question is one of degree. If the right granted in relation to the area over which it is to be exercisable is such that it would leave the servient owner without any reasonable use of his land, whether for parking or anything else, it could not be an easement though it might be some larger or different grant."*
>
> ***It was common ground before us that that was the essential question in this case** and that there was no authority which provided the answer to it.* (emphasis added)

Having mentioned both Dyce v Hay and Copeland v Greenhalf (about which he said the court had heard "considerable argument"), he continued (at ¶13 [**423**]):

> ***In view of the fact that the parties are agreed what the right question is and that the answer to it depends upon the facts of each case, I see no need to grapple with these arguments**, other than to say that I think it is clear from his judgment that Upjohn J rejected the claim because the rights asserted were both uncertain and too extravagant*. (emphasis added)

Having briefly cited the London & Blenheim and Bilkus cases, Tuckey LJ continued (at ¶15 [**424**]):

> *After that short diversion I return to the question which has to be answered in this case. Does an exclusive right to park six cars for 9½ hours every day of the working week leave the plaintiff without any reasonable use of his land, whether for parking or anything else*

He concluded (at ¶18 [**424**]):

If one asks the simple question: "Would the plaintiff have any reasonable use of the land for parking?" the answer, I think, must be "No". He has no use at all during the whole of the time that parking space is likely to be needed. But if one asks the question whether the plaintiff has any reasonable use of the land for any other purpose, the answer is even clearer. His right to use his land is curtailed altogether for intermittent periods throughout the week. Such a restriction would, I think, make his ownership of the land illusory.

33. It is submitted that, however Batchelor v Marlow has been treated in subsequent cases, it is not authority for anything. It was simply the application to the facts of that case of the London & Blenheim test which had been agreed by the parties as applicable. There is no critical examination by the Court of Appeal of whether or not it is the correct test and no ruling that it is. There was no need for it. Whilst the Judge here (at ¶64-65 of the judgment [**79**]–[**80**] and ¶5-6 of the Reasons [**100**]–[**101**]) held that he was "bound" by Batchelor v Marlow which "had not been overruled" by Moncrieff v Jamieson, it submitted that this is not technically correct. In any event, even if it **is** binding authority, it is not an intellectually rigorous examination and endorsement of the test for the ouster principle as formulated in London & Blenheim.
34. Despite this, the Appellant accepts that (as held by the Judge here) Batchelor v Marlow has been treated in subsequent decisions (with varying degrees of enthusiasm) as binding authority for the application of the test for the ouster principle as there set out, see: Jackson v Mulvaney [2003] 1 WLR 360 (at ¶16-22 [**571 - 572**); Platt v Crouch [2004] 1 P&CR 18 (at ¶43-46); Virdi v Chana [2008] EWHC 2901 (Ch) (at ¶15-16 [**1031**] and ¶24 [**1033**]); Polo Woods Foundation v Shelton-Agar [2010] 1 P&CR 12 (at ¶121-124); Kettel v Bloomfold [2012] L&TR 30 (at ¶10-13); Begley v Taylor [2014] EWHC 1180 (Ch) (at ¶81-83); De Le Cuona v Big Apple Marketing [2018] L&TR 27 (at ¶13-15 [**524**] and ¶22-23 [**527**]). See also the summary in two recent FTT decisions: Viscido v Raimondo [2025] UKFTT 00926 (PC) and Bewley v Russell [2026] UKFTT 0018 (PC).
35. However, the test for the ouster principle as formulated in London & Blenheim, with its emphasis on whether the servient owner is left without any reasonable user of his land, has not been applied in cases involving the right to store goods.

36. Most significantly, in both A-G of Southern Nigeria v Holt [1915] AC 599 [**396**] and Wright v Macadam [1949] 2 KB 744 [**1087**] both the Privy Council and the Court of Appeal were prepared to recognise storage rights as an easement: a right to store coopers stores casks trade goods and produce (in the former) and a right to store coal in a coal shed (in the latter). The latter case was famously not cited in Copeland v Greenhalf.

37. In the former case the Crown (over whose land the easement had been held to exist) argued *"that such an easement is unknown to the law"*. The Privy Council said (at 617 [**414**]):

> *Their Lordships see no reason why upon the first point a right of easement should be exclusive of the storage claim. The law must adapt itself to the conditions of modern society and trade, and there is nothing in the purposes for which the easement is claimed inconsistent in principle with a right of easement as such. This principle is of general application, and was so treated in the House of Lords in Dyce v. Hay by Lord St. Leonards L.C., who observed:*
>
> > *"The category of servitudes and easements must alter and expand with the changes that take place in the circumstances of mankind."*

38. In Wright v Macadam the question was whether a formal right to use a garden shed for the storage of coal had passed to a tenant under section 62 of the Law of Property Act 1925. The Court of Appeal held that it had. Jenkins LJ said this (at 750-1 [**1093-4**]):

> *The next proposition deducible from the cases is the one laid down in Burrows v. Lang, which has been referred to in some of the passages I have already read. It is that the right in question must be a right known to the law... . For the purposes of s. 62, it is only necessary that the right should be one capable of being granted at law, or, in other words, a right known to the law. If it is a right of that description it matters not, as the International Tea Stores case shows, that it has been in fact enjoyed by permission only.*

He continued (at 752 [**1095**]):

> *the right was, as I understand it, a right to use the coal shed in question for the purpose of storing such coal as might be required for the domestic purposes of the flat. In my judgment that is a right or easement which the law will clearly recognize, and it is a right or easement of a kind which could readily be included in a lease or conveyance by the insertion of appropriate words in the parcels.*

He also noted that:

Nor is it a case in which it can be said to have been in the contemplation of the parties that the enjoyment of the right should be purely temporary. No limit was set as to the time during which the coal shed could continue to be used.

39. These are both appellate authorities in which a right to store goods or articles within a defined area on another's land without a time limit has been recognised as an easement. The passage from the Holt case is obiter, that from the Wright case is not. Whilst there is no specific discussion in either judgment of the ouster principle and there is little detail as to the exact nature of the storage, these cases cannot be ignored, particularly when the modern origin of the current test for the ouster principle derives from two cases at first instance. Certainly in the Holt case, the Privy Council was well aware of Dyce v Hay.

Criticism of the test for the ouster principle

40. The test for the ouster principle as applied in Batchelor v Marlow has been subject to criticism.
41. In Moncrieff v Jamieson, Lord Scott said this (at ¶47 [**741**]):

> *I must later examine the so-called "ouster" principle, the principle which, it is said, prevents the creation of a servitude if the servitude contended for would prevent any reasonable use being made of the servient land, and some of the authorities relating to that principle. To the extent, however, that the "ouster" principle is asserting that a servitude must not be inconsistent with the continued beneficial ownership of the servient land by the servient owner, I would unreservedly accept it. If, for example, the nature of the purported servitude were to place the dominant owner in such occupation of the servient land as to bar the servient owner from possession or control of the land I would find it very difficult to accept that the right could constitute a servitude. An express grant of such a right might be construed as a grant of the fee simple (see per Lopes LJ in Reilly v Booth (1890) 44 Ch D 12 , 26) or might be construed as the grant of a contractual licence, but I do not as at present advised see how it could be the grant of a servitude.*

He distinguished Dyce v Hay as "a case about public rights not about private law servitudes". At ¶55 [**745**], in considering Wright v Macadam he said this:

> *It has been suggested that the case may have turned on whether the claimant had sole use of the coal shed, but it is difficult to see any*

difference in principle between a case in which the dominant owner has sole use of a patch of ground for storage purposes, e g a coal shed, and a case in which the dominant owner is the only user of a strip of road for access purposes or of a viaduct for the passage of water. ***Sole user, as a concept, is quite different from, and fundamentally inferior to, exclusive possession****. Sole use of a coal shed for the storage of coal does not prevent the servient owner from using the shed for any purposes of his own that do not interfere with the dominant owner's reasonable use for the storage of coal. The dominant owner entitled to a servitude of way or for the passage of water along a viaduct does not have possession of the land over which the road or the viaduct passes. If the coal shed door had been locked with only the dominant owner possessing a key and entry by the servient owner barred, so that the dominant owner would have been in possession and control of the shed, I would have regarded it as arguable that the right granted was inconsistent with the servient owner's ownership and inconsistent with the nature of a servitude or an easement. But 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.* (emphasis added)

He criticised (at ¶57 [**746**]) the way in which HHJ Paul Baker QC had, in the London & Blenheim case, sought to distinguish Wright v Macadam.

42. When he then came to examine the test for the ouster principle he said this (at ¶59-60 [**747**]):

In my respectful opinion the test formulated in the London & Blenheim Estates case [1992] 1 WLR 1278 and applied by the Court of Appeal in Batchelor v Marlow [2003] 1 WLR 764, a test that would reject the claim to an easement if its exercise would leave the servient owner with no "reasonable use" to which he could put the servient land, needs some qualification. 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. He could, for example, build above or under the parking area. He could place advertising hoardings on the walls. Other possible uses can be conjured up. And by what yardstick is it to be decided whether the residual uses of the servient land available to its owner are "reasonable" or sufficient to save his ownership from being "illusory"? It is not the uncertainty of the test that, in my opinion, is the main problem. It is the test itself. I do not see why a landowner should not grant rights of a servitudal character over his land to any extent that he wishes. The claim in Batchelor v Marlow for an easement to park cars was a prescriptive claim based on over 20 years of that use of the strip of land. There is no difference between the characteristics of an easement that can be acquired by grant and the characteristics of an easement that can be acquired by prescription. If an easement can be created by grant it can be acquired by prescription and I can think of no reason why, if an area of land can accommodate nine cars, *the owner of the land should not grant an easement to park nine cars on the land. The servient owner would remain the owner of the land and in possession and control of it. The dominant owner would have the right to station up to nine cars there and, of course, to have access to his nine cars. How could it be said that the law would recognise an easement allowing the dominant owner to park five cars or six or seven or eight but not nine?* ***I would, for my part, reject the test that asks whether the servient owner is left with any reasonable use of his land, and substitute for it a test which asks whether the servient owner retains possession and, subject to the reasonable exercise of the right in question, control of the servient land.*** (emphasis added)

He continued that he regarded as "doubtful" whether Batchelor v Marlow was correctly decided.

43. At ¶143 [**769**] Lord Neuberger said that he saw "considerable force in the views expressed by Lord Scott" and (at ¶140 [**768**]) he said:

> *At least as at present advised, I am not satisfied that a right is prevented from being a servitude or an easement simply because the right granted would involve the servient owner being effectively excluded from the property.*

44. At ¶76 [**752**] Lord Rodger said this:

> *Of course, a servitude of parking would involve a car being placed on the neighbour's land and this would prevent the neighbour using that part of his land when the car was stationed there. But that cannot, in itself, be a conclusive objection to the existence of such a servitude since many well known servitudes involve structures being erected or objects being placed on the servient land. The most obvious example, perhaps, is the servitude of aquaehaustus and aquaeductus, where the dominant owner may construct a permanent dam on the servient land at the source and then lead the water from there through pipes permanently laid over the servient tenement. Another example is the right to erect a hut or bothy on land over which there is a servitude of pasturage. Yet another possible example is the right of bleaching, referred to by the Lord Chancellor in Dyce v Hay, by virtue of which the cloth would be laid out on the servient land from time to time: Cusine & Paisley, Servitudes and Rights of Way , para 3.12.*

At ¶24 [**733**] Lord Hope concluded that:

> *These examples tend to show, as in the case of aqueduct or drainage and the decision of Maecianus to which Lord Rodger of Earlsferry refers (post, para 75), that the fact that the servient proprietor is excluded from part of his property is not necessarily inimical to the existence of a servitude. I am not aware of any authority in Scotland which indicates the contrary. In principle therefore there seems to me to be no fundamental objection to*

the right which the pursuers seek to establish. I am fortified in this view by Lord Neuberger's valuable analysis of the English authorities.

45. In the LC Report, it recommended the abolition of the ouster principle (at ¶3.208 [**1278**]) on the grounds that: (i) it is unclear; (ii) that lack of clarity puts "valuable parking rights at risk"; (iii) future litigation has the potential to invalidate those rights and (iv) it causes difficulty for the Land Registry. At ¶3-191 [**1274**] it stated:

    The difficulty is this: an easement or profit is an interest in land, not an estate. If what the dominant owner can do on the servient land actually amounts to an ownership right – regardless of the words used – then it cannot be an easement. That much is clear. What is more difficult is to delineate precisely the point at which the dominant owner's right can be said to be "too much" to be merely an interest in land

    The LC Report continues (at ¶3-198 [**1276**]):

    The extent of the ouster principle is unclear, and that gives rise to problems in the context of any purported easement that confers a right to make extensive use of the land, even if not actually to exclude the servient owner

    It concluded as follows (at ¶3-206 and ¶3-208 [**1278**]):

    ***The law should remain that if the dominant owner is granted exclusive possession of land then, while it may be a grant of a lease or a freehold, it cannot be an easement**...*
    We conclude therefore that while an easement must not grant exclusive possession, the ouster principle should be abolished. 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. The effect of this would be to reverse, for the future, the decision in Bachelor v Marlow, for example, and therefore to validate a potentially wide range of parking easements. In particular easements that confer an "exclusive right to park" would clearly be valid, provided that the servient owner can access the land (to however limited an extent). (emphasis added)

    Section 24 of LC Draft Bill read as follows [**1282**]:

    Use of land is not prevented from being of a kind which may be the subject of an easement by reason only of the fact that it prevents the person in possession of the land from making any reasonable use of it.

46. In Gale on Easements (22nd edition at ¶1-72 [**1290**]) the learned editors state that "*the law is not clear as to the precise boundary between a right which can be an easement and a right which is too invasive of the rights of the owner of the land to be an easement*".

47. In the Regency Villas case (at ¶61 [**878**]) Lord Briggs said this:

The precise extent of the ouster principle is a matter of some controversy, which it is unnecessary to resolve on this occasion. The view of the Law Commission, in its 2011 paper Making Land Work: Easements, Covenants and Profits à Prendre at paras 3.207–3.211, is that the scope for litigation created by its uncertainties sufficiently outweighs its utility that it should be abolished. The controversy usually causes difficulty in the context of parking rights, and its extent is sufficiently summarised (for present purposes) in the speech of Lord Scott of Foscote in Moncrieff v Jamieson [2007] 1 WLR 2620 , paras 54–61 (in which he treated the Scottish law of servitudes as for all relevant purposes the same as the English law of easements). Leaving aside cases where the grant confers exclusive possession, which cannot by definition be an easement, 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

48. However, he continued (at ¶64-5 [**878**]):

In my view it is wrong in principle to test the issue whether a grant of rights amounts to an ouster of the servient owner by reference to what the dominant owner may do by way of step-in rights if the servient owner ceases to carry out the necessary management and maintenance of the servient tenement. This is for two reasons. The first is that the ouster question should be addressed by reference to what may be supposed to have been the ordinary expectations of the parties, at the time of the grant, as to who, as between dominant and servient owners, was expected to undertake the management, control and maintenance of the servient tenement... The second reason is that step-in rights are, by definition, rights to reasonable access for maintenance of the servient tenement, sufficient, but no more than sufficient, to enable the rights granted to be used: see Gale on Easements , 20th ed, para 1-93 and Carter v Cole [2006] EWCA Civ 398; [2006] NPC 46 , per Longmore LJ. The dominant owner's right is "to enter the servient owner's land for the purpose but only to do necessary work in a reasonable manner ...": para 8(6). Provided that, as the courts below have held, the recreational and sporting facilities in the park could be used by the RVOC timeshare owners without taking control of the park, then no question of ouster arises

Commonwealth authorities

49. It appears that, in Australia, a test akin to that proposed by Lord Scott prevails. There was a recent survey of the law by the Court of Appeal of New South Wales

in the case of Theunissen v Barter [2025] NSWCA 50 [1099]. Following a lengthy citation of Australian and English authorities, Kirk JA said this (at ¶140 [**1148**]):

> *Drawing these various statements of principle together, the following may be said. Every easement prevents some ordinary use of the servient tenement, perhaps to a very significant extent. The question is whether a putative easement substantially deprives the servient owner of proprietorship or legal possession to such an extent as to be inconsistent with ownership. That assessment is a matter of fact and degree. That assessment involves considering the physical area affected by the putative easement by reference to the servient tenement as a whole. The greater the proportionate area affected, the more likely that the restriction cannot be characterised as an easement. The assessment also involves considering the effect of the easement on the rights of the servient owner with respect to the burdened land. Those rights are positive: what the servient owner may do on and with the land. They are also negative: what the servient owner may require the dominant owner not to do on the easement area; or, put conversely, the extent of the positive rights held by the dominant owner. If there is a complete transfer of the servient owner's rights, as in Bursill Enterprises, the instrument cannot be an easement. Anything less than that is a question of degree. That the instrument grants a sole right to the dominant owner to use the subject area for some particular purpose (as opposed to having exclusive possession for all purposes) does not of itself establish that the easement is invalid.*

50. The position in New Zealand appears to be similar to that in England and Wales. In the recent New Zealand case of Schmuck v Opua Coastal Preservation [2019] NZSC 118 [**1154**], the Supreme Court of New Zealand (at ¶56 [**1172**]) (citing the Regency Villas case and the Australian case of Registrar-General of NSW v Jea Holdings [2015] NSWCA 74) stated the relevant test as follows:

> *(c) The right claimed must be capable of being the subject matter of the grant of an easement. This incorporates a number of requirements: that the easement be in sufficiently clear terms; that it is not so precarious that it is liable to be taken away by the servient owner; that it is not so extensive or invasive as to oust the servient owner from the enjoyment and control of the servient tenement; and that it does not impose on the servient owner an obligation to spend money or do anything beyond mere passivity*

Referring to Copeland v Greenhalf the court held (at ¶87 [**1181**]) (citing Moncrieff v Jamieson and the LC Report):

> *We consider Copeland is of doubtful authority now. It is, as just noted, a case about a claim based on prescription not grant. It has been criticised and doubted.*

At ¶88 to ¶90 [**1182**] they continued (omitting footnotes):

> *The test for whether an easement amounts to joint occupation is usually formulated as whether the proposed easement would leave the servient owner without reasonable use of their land. This is commonly termed the ouster principle. But in Moncrieff v Jamieson, Lord Scott doubted the correctness of the ouster principle. He observed that every easement will bar some use of the servient land and that sole use for a limited purpose was not inconsistent with the servient owner's retention of possession and control. While "reasonable use" is traditionally assessed by reference to the servient tenement as a whole, Lord Scott considered the relevant inquiry is the impact upon the land subject to the easement. In Lord Scott's view, the correct test is "whether the servient owner retains possession and, subject to the reasonable exercise of the right in question, control of the servient land".*
>
> *More recently, in Regency Villas, Lord Briggs JSC noted that the extent of the ouster principle was a matter of some controversy, which he did not find necessary to resolve. He later added:*
>
> > *...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.*
>
> *For reasons we will come to, we do not think it is necessary to resolve this controversy either.*

They held (at ¶93 [**1184**]) that on the construction of the relevant easement which they preferred it did not deprive the dominant owner of reasonable use of the servient tenement.

51. In Canada the law appears to be similar to that in England and Wales. The test applied is whether the putative easement is "*at variance with the proprietary rights of the servient owner*" being the point at which "*the right in question detracts so substantially from the rights of the servient owner that it must be something other than an easement*" (Husky Oil Operations Ltd. v Shelf Holdings Ltd. (1989) ABCA 30 at ¶34 [**1211**]; Robinson v Pipito (2014) BCCA 200 at ¶19 [**1220**]; ¶22; ¶47 [**1229**]; Romspen v Chemainus Quay and Marina Complex Limited (2011) BCSC 768 at ¶57 [**1246**]; ¶65 [**1250**]).
52. In applying that test the authorities suggest that the deprivation of the exclusive "use of the surface" of the servient tenement will be sufficient to negative the

presence of an easement (Husky Oil Operations Ltd. v Shelf Holdings Ltd. at ¶40 [**1212**]; ¶44 [**1213**]).

53. The Honourable Mr Justice Willock sitting in the Court of Appeal for British Columbia in Robinson v Pipito explained as follows (at ¶21-22 [**1220**]):

> *In their discussion of the essential characteristics of an easement, the authors of Gale on Easements ((17th ed.), London: Sweet & Maxwell, 2002) note that the grant of a right amounting to joint or exclusive occupation is not in the nature of an easement, but "the line is difficult to draw, and each new case would probably be decided on its own facts in the light of common sense."*
>
> *The parties, here and below, have not sought to challenge the well-settled law that an easement cannot give exclusive possession or unrestricted use of a parcel of land. The appellants have not sought to advance the argument accepted in Australia in Mercantile General Life Reassurance Co. v. Permanent Trustee Australia Ltd. (1988), 4 B.P.R. 97279 (Sup. Ct. N.S.W.), and Wilcox v. Richardson, [1997] NSWSC 281, and considered by the House of Lords in Moncrieff v. Jamieson, [2007] UKHL 42, to the effect that a right can be an easement notwithstanding that the dominant owner effectively enjoys exclusive occupation so long as the servient owner in some sense retains possession and control of the property. We are, therefore, in the position described by Lord Neuberger in Moncrieff: it would be dangerous to reconsider this well-settled principle, the displacement of which could result in unexpected consequences, in the absence of extensive argument."*

Why the current test for the ouster principle should be overruled or altered

54. The test for the ouster principle, which is a test of "fact and degree" is, as recognised in the LC Report, vague and involves the court in making value judgments as to what is, or is not, "reasonable use" by the servient owner. For example, in ¶109 of the judgment [**88**], the Judge was driven to consider the "utility" to the servient owner of the pedestrian access which could be had across the Triangle when the Appellant's boats were stored there.

55. The Appellant submits that the criticisms of the current test for the ouster principle which are set out in the LC Report and made by Lord Scott and Lord Neuberger in Moncrieff v Jamieson are well founded.

56. The test as suggested by Lord Scott in Moncrieff v Jamieson and by the LC in the LC Report, which focuses on whether the alleged right deprives the servient owner of possession, is correct. It, in fact, reflects the test applied by the Court of Appeal

in Reilly v Booth, by Upjohn J in Copeland v Greenhalf and indeed in the authorities prior to the London & Blenheim case. It also fits with the distinction between an estate in land and an interest in land which is set out in s. 1(1) and (2) of the LPA 1925 [**374**]. Thus the fact that the servient owner might be excluded to a large extent or indeed completely from **occupation** of the servient land does not prevent a right from being an easement.

57. Hence, for example, a right to run a pipe, drain or artificial watercourse through or under the land of another can be a valid easement (see Gale at ¶6-45-6-46 [**1304-1306**] and ¶6-86-6-101 [**1310 - 1316**] and Moncrieff v Jamieson at ¶24, 54, 55, 76, 81 and 142) because:

> *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...*
> *I am not satisfied that a right is prevented from being a servitude or an easement simply because the right granted would involve the servient owner being effectively excluded from the property.*

The meaning of Possession

58. There is a clear legal distinction between occupation and possession that is well-recognised in a number of different contexts.

59. In Akici v Butlin [2006] 1 WLR 201 [**377**] the Court of Appeal was concerned with a covenant in a lease which prohibited parting with or sharing possession of the demised premises. The court held that the covenant was not broken by a tenant who shared occupation of the demised premises. Neuberger LJ said this (at ¶18-26 [**382 - 383**]):

> *The judge held that Mr Akici could not have broken the covenant against parting with possession by his arrangement with the company, unless the arrangement had "wholly oust[ed] him from legal possession" of the premises and that "nothing short of a complete exclusion of [Mr Akici] from the legal possession for all purposes amounts to a parting of possession". In this connection he was purporting to apply the reasoning in a number of cases culminating with, and considered and applied by, the decision of the Privy Council in Lam Kee Ying Sdn Bhd v Lam Shes Tong [1975] AC 247, 255f-256c. As was stated by the Privy Council in that case at p 256b: "A covenant which forbids a parting with possession is not broken by a lessee*

who in law retains the possession even though he allows another to use and occupy the premises....
The difference between possession and occupation is rather technical and, even to those experienced in property law, often rather elusive and hard to grasp. None the less, it is very well established and is particularly important, and indeed well known, in the field of landlord and tenant law, especially in relation to the question of whether an agreement creates a tenancy or a licence, and in relation to alienation covenants such as clause 4.18.
...I would hold that the covenant against parting with possession of the whole or part of the premises in the present case should be given its normal, and technically legally correct, meaning unless there is any good reason to construe it in some other way.

60. In the landlord and tenant context, it was said in Street v Mountford [1985] AC 809 [**977**], that the badge of a tenancy, as opposed to a licence of land, was the grant of exclusive possession of land for a term at a rent and that:

> *The tenant possessing exclusive possession is able to exercise the rights of an owner of land, which is in the real sense his land albeit temporarily and subject to certain restrictions. A tenant armed with exclusive possession can keep out strangers and keep out the landlord unless the landlord is exercising limited rights reserved to him by the tenancy agreement to enter and view and repair.*

(per Lord Templeman at page 816 [**984**])

61. Pye v Graham [2003] 1 AC 419 [**807**] was technically concerned with the construction of section 15 and Schedule 1 of the Limitation Act 1980. However, in his speech, Lord Browne-Wilkinson approved the following passage from the judgment of Slade J in Powell v McFarlane (1977) 38 P&CR 452 [771] (at 469 [**788**]):

> *Possession of land, however, is a concept which has long been familiar and of importance to English lawyers, because (inter alia) it entitles the person in possession, whether rightfully or wrongfully, to maintain an action of trespass against any other person who enters the land without his consent, unless such other person has himself a better right to possession. In the absence of authority, therefore, I would for my own part have regarded the word 'possession' in the 1939 Act as bearing the traditional sense of that degree of occupation or physical control, coupled with the requisite intention commonly referred to as animus possidendi, that would entitle a person to maintain an action of trespass in relation to the relevant land; likewise I would have regarded the word 'dispossession' in the Act as denoting simply the taking of possession in such sense from another without the other's licence or consent; likewise I would have regarded a person who has 'dispossessed' another in the sense just stated as being in 'adverse possession' for the purposes of the Act.*

Hence in order to be in "adverse possession" a party must have both factual possession and the requisite intention to possess, the latter being [**790**]:

> *...an "intention, in one's own name and on one's own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow".*

62. As Ward LJ said in Clarence House v NatWest bank [2010] 1 WLR 1216 (at ¶32 [**501**]):

> *...as Chadwick LJ said in Manchester Airport plc v Dutton [2000] QB 133 , 142: "possession is synonymous ... with exclusive occupation-that is to say occupation (or a right to occupy) to the exclusion of all others, including the owner or other person with superior title ..." The hallmark of the right to possession* ***is the right to exclude all others from the property in question****. That is the ordinary and normal sense of the word and that is the meaning which it should be given in this covenant.* (emphasis added)

63. In his monograph "Possession of Land" (2006) [**1321**] Mark Wonnacott distinguishes between three ways in which the word "possession" has been used in English law. He states (at page 13 [**1337**]) as follows:

> *To summarise, 'possession' may have one of three meanings: it may be describing a relationship between a person and a fee simple, a lease or a profit a prendre (the person presently using and enjoying it is 'in' possession of it; the person who has a present right to use and enjoy it has a 'right' to possess it); or it may simply mean occupation of the physical land itself; or it may be referring to an old legal fiction, whereby someone was deemed to have been using and enjoying an estate in land, when (in fact) that person was not.*
> *Because the word 'possession' has three different and inconsistent meanings, the truth of any statement made about the law of possession depends upon the context in which it is made. The rights and obligations of a person in possession of an estate are rarely the same as those of a person in occupation, and the position of a person in constructive possession may be different to both.*

The key here is to ascertain whether the relevant right grants the first or second "type" of possession.

64. Thus possession, as opposed to occupation, involves the exercise of ownership rights. Whilst the question of whether or not a particular arrangement gives rise to exclusive possession is not always clear cut, nevertheless it is one which courts

are well used to answering. No vague value judgment is involved in deciding the issue. The test is whether the arrangement gives the right to exclude others, involving both factual control and the legal ability to exclude others (per the LC Report at ¶3-193 [**1275**]). Possession in this sense automatically involves control.

65. The present test for the ouster principle therefore wrongly fails to distinguish between use and occupation (which may or may not be exclusive), on the one hand, and exclusive possession, on the other. The latter is an attribute of freehold and leasehold ownership (i.e. those interests described in section 1(1) of the LPA 1925 [**374**]). A freehold or leasehold owner with exclusive possession can (subject to any rights granted or acquired) exclude third parties from their land. The holder of an easement (which is an interest described in section 1(2) of the LPA 1925) cannot evict anyone from the servient land: all they can do is to take steps to prevent interference with their rights over that land (which, to be actionable, must be "substantial"). The servient owner still retains control over the land in that, at the very least, they can: (i) prevent the dominant owner using the land in a way that is not permitted by the easement and (ii) if they so choose, permit the dominant owner to use the servient land in ways not permitted by the easement. In addition, the servient land ownership extends above and below the surface (see Bocardo SA v Star Energy [2011] 1 AC 380 [**430**]) and (depending on the nature of the easement) the servient owner retains possession and control over everything above and beneath the surface.

66. Thus, the distinguishing feature of freehold and leasehold ownership when compared to the rights of an easement holder, is that the former is an estate in land and involves exclusive possession and control of the land. The fact that the right of the easement holder may involve exclusive use and occupation of the servient land for a limited purpose and/or a limited time ought not to render that right incapable of being an easement.

Easements acquired by prescription

67. For the avoidance of doubt, it is submitted that there is no difference in the application of the ouster principle (whatever its content) to easements which are

acquired by prescription, on the one hand, compared with those which are subject to express or implied grant, on the other. This is because "*all prescription presupposes a grant*"-see Gardner v Hodgson's Kingston Brewery [1903] AC 229 (at page 239 [**551**]). See also R v Oxfordshire CC (Ex parte Sunningwell PC) [2000] 1 AC 335 (at pages 349-351 [**965**]). Courts have thus repeatedly held that if an easement can be acquired by grant it can equally be acquired by prescription-see Moncrieff (at ¶54, 59), Lawrence v Fen Tigers [2014] AC 822 (at ¶29-32 [**588**]) and McAdams Homes v Robinson [2005] 1 P&CR 30 (at ¶22 [**688**] and ¶79 [**702**]). See also Odey v Barber [2006] EWHC 3109 (Ch) (at ¶77-84 [**669**]).

Application of the "correct" test to the facts of this case

68. Once the correct test is applied, the Appellant submits that the right he claims is clearly an easement recognised by the law. Even if, during the winter months, his boats occupy the majority of the surface area of the Triangle, at no stage does the right he claims deprive the Respondent of possession and/or control of it. Whilst he can prevent activities or uses which substantially interfere with his right to store and maintain boats and equipment, he cannot, for example: (i) prevent pedestrians (or anyone else) from crossing the Triangle in the gaps between the boats; (ii) use the Triangle for anything other than boat and equipment storage or maintenance (he could not, for example, park a car or station a cabin on the land without the Respondent's consent); or (iii) prevent the Respondent installing pipes or cables underneath the surface of the Triangle or electricity lines above it.
69. Whilst these scenarios might seem factually unlikely, that is or should be irrelevant. As Lord Scott asked in Moncrieff v Jamieson [**747**]:

> *by what yardstick is it to be decided whether the residual uses of the servient land available to its owner are "reasonable" or sufficient to save his ownership from being "illusory"?*

It is rather the fact that, as a matter of law, the Respondent retains possession and thus control of the Triangle which renders the right claimed by the Appellant an easement.

Ground 2 –if the test for the ouster principle is as described by the Judge, then the decision was nevertheless wrong.

70. Even if the test for the ouster principle as formulated by the Judge is to be regarded as the right test, then the Appellant submits that the Judge was wrong, when identifying whether the servient owner would be left without a reasonable use of his land:
    a. To answer that question only by reference to the period during which the rights in the easement are exercisable.
    b. To discount potential alternative uses of the land by the servient owner because there is no present evidence of such use being made.
    c. To discount potential alternative uses of the land by the servient owner on the grounds that they are not likely to eventuate given the specific features on the ground.

Sub-issue (a): Over what period is the reasonable user to be gauged?

71. The Judge held in the judgment that, in determining whether the Respondent was left with any reasonable user of the Triangle given the Disputed Easement, no account was to be taken of the period June to September during which time the Respondent had unfettered use and occupation of the Triangle (see the discussion in the judgment at ¶91 – 102 [**84 –87**]). The reason given by the Judge is that it would involve "*treating the servient land as if it was subject to the relevant easement, at a time when, because of the temporal nature of the easement, it is not in fact subject to the relevant easement*" ¶99 [**86**].
72. The Appellant submits that the Judge was wrong to discount the periods during which the rights pursuant to the Disputed Easement were not engaged when evaluating whether the Respondent was left with reasonable user of the Triangle. Not only is there no warrant in any caselaw to that effect but looking only at the period of actual user by the dominant owner results in an elevated test which is difficult, if not impossible, to satisfy for a party asserting a prescriptive easement which: (i) involves occupying the surface of land and (ii) is operative only for certain, regular, temporal periods. Given that most easements involve a periodic deprivation of use (i.e. when exercising a right of way the dominant owner is

occupying the surface of the servient land) the elevated test proposed by the Judge appears irrationally to penalise a wide range of potential easements which happen to involve regular user at defined times.

73. Moreover, the only criteria in the test in London & Blenheim Estates of whether the servient owner is left with reasonable use of his land is a spatial one not a temporal one. Further, as noted by the Judge in the judgment at ¶100 [**86**] in Batchelor v Marlow the Court of Appeal took into account the periods during which the rights of parking were not excisable in answering the test. The Judge's basis for distinguishing Batchelor v Marlow on that point; namely that the right of parking claimed in that case was "*not intermittent in the sense that, for a certain period of the year, it did not apply at all. The right of parking, as claimed, operated on a continuous basis, but was restricted to working hours on weekday*s" is both arbitrary and artificial.

74. The facts of this appeal illustrate the illogical consequences of the Judge's decision on this point. It follows that had the Appellant stored his boats on the Triangle in an intermittent manner throughout the year rather than simply constantly during October – May but to the same level of intensity (in other words having 4 boats on the Triangle for 12 months rather than 6 boats for 7 months) then the Respondent may well have been held to have retained reasonable use of the Triangle. It is hard to see a coherent and reasoned basis as to why the test applied to the Appellant's claim should be different because his user was restricted to only part of the year.

75. Indeed, taken to its logical extremity on this point, the test for whether the servient owner was left with reasonable user would be harder (if not impossible) for a dominant owner who used the land in question for, say, storing and selling Christmas trees constantly for 2 weeks a year to satisfy than it would be had that same owner stored and sold Christmas trees for 2 days a week throughout the year. That cannot be right in circumstances where the former user is plainly less of an imposition on the servient land than the latter.

76. On the facts on this appeal, had the Judge determined that the period from June to September was relevant to the question of whether the Respondent was left with any reasonable use of the Triangle given the Disputed Easement, it is

submitted that the answer to that question would have been "yes" given that, aside from the potential uses available to the Respondent during the months of October – May (details of which are set out below), during the period June - September (being the height of the summer) the Respondent had unrestricted occupation of the Triangle to do whatever it wished including charging for car parking or the storage of gigs.

Sub-issue (b): What qualifies as "reasonable use"?

77. The Judge held, in respect of the provision of utilities as a potential use of the Triangle by the Respondent, that it was to be discounted because "*he was not shown any evidence that utilities* [ran] *under the Triangle*" ¶118 [**89**]. In so doing the Judge fell into error in that he discounted potential alternative uses of the land by the servient owner on the basis that there is no present evidence of that use.

78. The Judge's approach is inconsistent with the comments of Lord Scott in <u>Moncrieff v Jamieson</u> at ¶59 [**747**] in which he stated, with reference to an easement of parking and the reasonable use the servient owner might nevertheless retain:

    > *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. He could, for example, build above or under the parking area. He could place advertising hoardings on the walls. Other possible uses can be conjured up*.

    In <u>Re Ellenborough Park</u> (at page 176 [**939**]) Lord Evershed said that:

    > ...*in any event, the plaintiff owners of the park are entitled to cut the timber growing on the park and to retain its proceeds. We have said that in our judgement, under the deed, the flowers and shrubs in the garden are equally the park owner's property*.

    Hence the ouster principle was not offended by the right claimed.

79. The quotes from Lords Scott and Evershed above show that the question of the reasonable user is to be answered not by reference to actual alternative reasonable user but, rather, by potential alternative user. The error into which the Judge fell is shown by considering this: it follows from the judgment that had it been proved that the Respondent actually intended to lay utility cables under the Triangle, then it would have been left with reasonable use of the Triangle. It is hard

to see why the actual intention of the servient owner at the time the putative easement is called into question should be relevant to the question of reasonable user.

80. On the facts of this appeal, had the Judge considered the alternative reasonable user in question available to the Respondent (at any time of year) including pedestrian access, lighting, and the provision of utilities under or over the surface, it is submitted that he would have concluded that the Respondent was left with reasonable use of the Triangle.

Sub-issue (c): Use not likely to eventuate given the features of the land

81. The Judge held in the judgment that the FTT was entitled to: (i) "*consider what need there was for pedestrians to cross the Triangle and what value there was in the Triangle being available for such access*"; (ii) take account of the location of the Triangle in the context of surrounding land; and (iii) conclude "*there is no utility in … pedestrian access*" across the Triangle ¶109 [**88**]. The Appellant submits that the Judge fell into error here. Specifically, he fell into error in condoning the FTT's approach of evaluating the likelihood of a reasonable user eventuating on the facts.

82. As above, there is no warrant in the caselaw for determining the question of whether the servient owner is left with any reasonable use of his land by reference to the likelihood of the reasonable user in question materialising. All that is required by the test formulated in London & Blenheim Estates is an evaluation of whether the servient owner is left with any reasonable use of the land in question. That is, of necessity, a theoretical examination. To enter, as the FTT did, into an examination of whether a potential reasonable user is likely to materialise on the facts is to descend into a speculative exercise which will be a function of the subjective intention of the servient owner from time to time in light of the features of the surrounding land. This is illegitimate.

83. Moreover, on the facts of this case, had the physical geography of the site been different such that, for example, pedestrians could not have passed over the surrounding land but, rather, only through the gaps between the boats on the Triangle then, counterintuitively, there would have been a residual use of the

Triangle notwithstanding the presence of the boats and the Appellant's claim would have succeeded. The very process of determining whether the servient owner is likely to use the servient land for the user suggested imports into the test a consideration of the features of the adjacent land – something which the Judge correctly determined was impermissible in the judgment at ¶108 [**88**].

84. Thus, given that the FTT had concluded that motorists who parked their cars in the car park surrounding the Triangle **could** walk through the gaps between the boats stored thereon for the purposes of getting to and from their cars, the Judge should have held that the FTT was wrong to discount that potential reasonable user on the basis that it was "*not required as it is open land and other access is available to the Car Park on foot*" (per the first-tier judgment at ¶65 [**123**]). Had the Judge done so then, it is submitted, he would have concluded that the Respondent was left with reasonable user of that land despite the presence of the boats on the Triangle because pedestrians could, as the FTT held, "*use the spaces between boats to cross the Boat Storage Area to get to and from their cars*" (per the first-tier judgment at ¶65 [**123**]).

Conclusion and summary of reasons

85. In conclusion the Appellant's case on this appeal is that:

    a. The test for the ouster principle articulated in <u>London & Blenheim Estates Ltd v Ladbroke Retail</u> and <u>Batchelor v Marlow</u> is wrong and should be substituted by one which asks whether the servient owner retains exclusive possession of the servient land.

    b. On the facts of this appeal, there is no question that the Respondent retained exclusive possession of the Triangle (it is not clear if the Respondent contends otherwise) and, accordingly, the burden and benefit of the Disputed Easement should be registered in the parties' titles.

    c. Alternatively, insofar as the test is that described in the cases above, then the Appellant submits that the Judge was wrong, in applying that test, to: (i) answer it only by reference to the period during which the rights in the Disputed Easement were exercisable; (ii) discount potential alternative uses for which there is no present evidence and (iii) discount any use which is not likely to eventuate given the specific features on the ground.

d. Had the Judge not fallen into any or all of the errors above, he would have concluded that the Disputed Easement left the Respondent with reasonable use of the Triangle and, accordingly, allowed the appeal against the first-tier judgment.

David Holland KC	Rupert Cohen
Lead Counsel for the Appellant	Junior Counsel for the Appellant

Landmark Chambers

180 Fleet Street

London EC4A 2HG

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