

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

RESPONDENT’S WRITTEN CASE

Introduction

1. The central issue in this case is the scope and/or validity of what has become known as the “ouster principle”. In broad terms, this is the principle that a right cannot exist as an easement if it is more akin to some larger grant. The controversy arises in determining, as a matter of principle, where the line is crossed.

Development of the ouster principle

2. The genesis of the ouster principle is regarded¹ as lying in *Dyce v Hay* (1852) 1 Macq 305 where it was said in side note:

“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. Semble, that where a claim in the nature of a servitude or easement is incapable of judicial control and restriction it cannot be sustained by prescription. It does not follow that rights sustainable by grant are necessarily sustainable by prescription. The law of Scotland agrees with the law of England in holding that the right to village greens and playgrounds stands upon a principle of original dedication to the use of the public. Where new inventions come into use they may have the benefit of servitudes and easements, the law accommodating its practical operation to the varying circumstances of mankind.”

3. The jurisprudence has since developed and, it is submitted, is rather more qualified.
4. In *Copeland v Greenhalf* [1952] CH 488 Upjohn J said at 498

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,

¹ See, eg Law Commission at 3.196,

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”

The modern statement of the principle

5. The current state of the law is to be found in Batchelor v Marlow [2001] EWCA Civ 1051 which upheld the dicta in London & Blenheim Estates Ltd v Ladbroke Retail Parks Ltd [1992] 1 WLR 1278 at 1288C which says:
 - a. *“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.”*
6. London & Blenheim would seem to have moved the principle further from Copeland and introduced this concept of depriving the servient owner of any reasonable use of his land.
7. Indeed, the Court of Appeal in Batchelor v Marlow asked itself *“Does an exclusive right to park cars for nine and a half hours every day of the working week leave the appellant without any reasonable use of his land, whether for parking or anything else?”* [at 15].
8. This is however not the complete analysis. The Court of Appeal when it answered the question found [at 18] *“His right to use his land is curtailed altogether for intermittent periods during the week. Such a restriction would, I think, make his ownership of the land illusory.”*
9. It appears uncontroversial that a right cannot be an easement if it confers exclusive possession of land. An easement cannot be *“inconsistent with the proprietorship or possession of the alleged servient owners”*.²

² Per Lord Evershed MR in Re Ellenborough Park [1956] Ch 131 at 176

10. Joint occupation would also seem to engage the principle. Lord Evershed MR said in Re Ellenborough park:

"the right conferred no more amounts to 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 a joint occupation of that garden with London County Council, or involve an inconsistency with the possession or proprietorship of the council as lessees. It is conceded 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."

11. This focus on occupation must be squared with the Court of Appeal decision in Wright v Macadam [1949] 2 KB permitting use of a small coal shed by a tenant, for the storage of coal.

Conceptual difficulties

12. A series of issues flow from this. There is some gap between a right which excludes reasonable use and one which confers exclusive possession. The operation of the ouster principle at first blush admits the possibility that some use is too extravagant to exist as an easement but insufficient to make out a claim for possession.
13. Secondly, what is the extent of the servient tenement when applying the test? Is it merely the land subject to the use or is it the wider parcel of which the subject land forms part?
14. Exclusive possession is surely a hallmark of any estate in land and a distinguishing feature as to other proprietary interests. The ouster principle would therefore seem offended by Wright. In London & Blenheim this conflict was reconciled thus:

“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”

15. This is not uncontroversial. The Law Commission point out that difficulties cannot be resolved in this way, because such a solution would enable the grant of an easement to build a house and live in it if the servient owner has a large estate, but not if she has a small one. Similar criticism was made, respectfully rightly, in Moncrieff v Jamieson [2007] UKHL 42 at [57].
16. Further, the distinction between exclusivity and exclusion is immediately cast into relief. It is one thing to grant a right to one person exclusively, such that they are the sole user or have the right solely to the use. It is quite another to grant the ability to exclude the true owner. The latter of course is more akin to possession.
17. On any analysis, the scope of the ouster principle is undefined. There are conflicting authorities and it has been extensively criticised.
18. The Respondent however submits that whilst some qualification to the ouster principle might be helpful, the wholesale reform called for by the Appellant is unnecessary.
19. Lord Scott indeed suggests in Moncrieff that the “reasonable use” test “*needs some qualification*” and he expounds a test whereby the threshold is the retention of possession and control, even if the servient owner is effectively excluded.
20. Lord Neuberger rightly identifies at [144] that there are serious risks associated with determining unconditionally that exclusion of the servient owner from occupation is not enough to prevent an easement being created. The logical conclusion that flows from that is that any occupational licence constitutes, or is capable of constituting an interest in land. That is to convert rights *in personam* into valuable rights *in rem* binding on the world. That alone attracts careful consideration of whether or not there is some difference in those matters forming the subject of grant and those forming the subject of prescription.

21. Whilst the degree of ouster required might benefit from further clarification, the wholesale abolition of the principle is unnecessary.
22. It is clear from *Re Ellenborough Park* [at 176 quoted above] that the Court is prepared to accept that even relatively remote possible uses would suffice to prevent the ouster principle from blocking creation of an easement.
23. The “reasonable use” test of course is “any reasonable use”. This is plainly a low threshold. The Court in its application of the test found the threshold met where ownership was rendered “illusory”. It is surely operative of injustice to say that ownership can be rendered illusory but still be regarded as ownership. Indeed, it cannot reasonably be said that where ownership is illusory there is any meaningful retention of control.

Possession

24. The words in the test contended for by the Appellant are “possession and control” or “exclusive possession” or “legal possession”.
25. With respect, this does not represent a solution. Whether or not someone is in possession of property may be decided as a question of law or indeed as a matter of fact. Different branches of jurisprudence employ the concept of possession in different ways. Interpretation of it therefore attaches, or is illuminated by, the purpose of the rules or jurisprudence engaged. Normative judgment is thus called for.
26. The focus across the various branches of jurisprudence shifts across intention (in the context of adverse possession), exclusivity (in identifying the creation of a leasehold estate), exclusion (in vindicating rights and relativity of title), and focus on the land (see for example *Thorpe v Frank* [2019] EWCA Civ 150) or the actions of self interested actors (for example the distinction between equivocal and unequivocal acts of possession in establishing a claim to adverse possession).
27. A claimant in adverse possession need not demonstrate an intention to own but instead an intention to possess.
28. Surely actual control is an essential element of possession.

29. Questions of exclusivity thus engage. If the dominant owner is in occupation for practical purposes, or if he shares possession with the servient owner, can it be said that the servient owner retains possession for the purposes of determining whether an easement has been created?
30. The answer is surely that it cannot. The rendering of ownership as illusory is indivisible from the rendering of possession as illusory – the latter entails the former.
31. If possession is legally significant, at least so as to be consistent with property rights, or clothed with proprietary protection, then it must carry with it the right to exclude others and to deal with the property concerned.
32. This speaks directly to the point. Possession and ownership are central incidents of property. Occupation is not. That an owner, or someone in possession is absent from their land is nothing to the point. An owner might grant exclusive rights but which are limited in time. An owner might grant rights that severely restrict his use of land in perpetuity. It is consistent with his possession, control and ownership that he does so.
33. The distinction nonetheless is profound. Ownership does not require actual control. Possession does. Ownership entails the ability to determine who will be the possessor.
34. In this context, the test of “possession and control” is too high. It requires both to be affected. In fact, the reasonable use test, when coupled with the rendering of ownership as illusory is the correct test. There is neither policy nor doctrinal need for an owner to be ousted of possession before the law is offended.
35. The Respondent further contends that the test contended for is unworkable. If the dominant owner enjoys *de facto* exclusive occupation, as a necessary and inevitable consequence of the impugned use as distinct from inconsequential absence of the owner, then the servient owner cannot be said to retain possession or control. The argument will always be inherently circular.
36. That by itself is a challenge to Lord Neubger’s view that an easement should not be prevented from creation “simply because the right granted would involve the servient owner being effectively excluded [...]” (emphasis added). With respect, His Lordship’s

observation is sound. There should not be a binary outcome. The cases are fact sensitive and should be the subject of careful analysis. Effective exclusion from the land does not necessarily deprive the owner of any reasonable use. Indeed, lack of possession does not by itself deprive the owner of any reasonable use. Possession might indeed be joint.

37. If the test contended for is adopted, then the uncertainty or mischiefs associated with the ouster principle are not cured.
38. For example, Lords Scott and Neuberger discuss in *Moncrieff* the fact that a right of drainage or water is perfectly capable of existing as an easement but necessarily excludes the servient owner from the whole of the servient tenement.
39. That is of course absolutely correct. It immediately vindicates the test as presently formulated. The assessment of any residual reasonable user admits analysis of the nature and character of the land in issue. With respect, that must be right. We are concerned with the creation of proprietary rights enforceable against the owner of the servient tenement and a scheme that permits that to operate so as to exclude them from their land. It must be right that such questions are questions of degree and the individual circumstances and characteristics are taken in to account before significant rights *in rem* are created and, more particularly, significant rights *in rem* are interfered with – *de facto* even if not *de jure*.
40. The test is expressed as “any reasonable use”. This is a low threshold to meet. There need not be every reasonable use, nor more than one reasonable use. There need simply be one reasonable use. The importation of the word “reasonable” connotes an objective test. It is perfectly in order that the Court should consider the character of the land and the possibility of alternative uses.
41. It is not necessary that any such uses are attractive to the servient owner.
42. The afore cited dicta of Upjohn J in *Copeland* at 498 is worthy of repetition:-

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

43. Lord Scott in Moncrieff expressly agreed with this proposition where he says at [56]

“There may be arguments as to whether the facts of the case justified those remarks but, for my part, I would accept that if they did Upjohn J was right to reject the easement claim and to require the defendant, if he was to succeed in resisting the plaintiff’s claim to remove from the land, to establish a title by adverse possession.”

44. Copeland was determined on the basis that either a joint user or a claim **virtually** of possession was made. It did not entail, although it did admit, the exclusion of the owner.

45. To import a test requiring loss of “possession” drives a coach and horses through even the criticisms of the ouster principle and leads to unintended consequences. If joint possession offends the concept of an easement then that is surely a lower threshold than contended for by the Appellant.

46. It is therefore consistent with authority to say that a claim which falls short of possession might still be too extravagant as to use to give rise to a recognised easement.

Right to park generally

47. It is not necessary to conclude that a right to park cannot exist as an easement or that every claim to a right to park will offend the ouster principle. Indeed, that has not been the effect of Batchelor v Marlow. In Viridi v Chana [2008] EWHC 2901 (Ch) a claim to a prescriptive right to park was upheld, because some albeit limited use of the servient tenement remained.

48. It is trite and in any event obvious to say that many easements are capable of having the effect of excluding any reasonable use of land from time to time. It is, though, surely only pragmatic and sensible that the point at which this engages the ouster principle is fact specific. The point is well illustrated in Miller v Emcer products Ltd

[1956] Ch 304, where the Court considered whether a right to use a lavatory could take effect as an easement, by virtue of the ouster principle.

49. The Court concluded *“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 upheld by Upjohn J to be incompatible with a legal easement in the case.”*

50. That surely is an indication of the common sense approach that is admitted by the test as presently formulated.

51. Even if *Batchelor v Marlow* was wrongly decided, the test developed in *Copeland* and in *London & Blenheim* is the correct test and does not go so far as the test contended for by the Appellant.

Prescription

52. It is accepted that the Appellant disputes the relevance of prescription.

53. The Respondent contends that it is of relevance to this particular question.

54. The Respondent accepts that it is well established that a right capable of creation by grant is similarly capable of creation by prescription.

55. Nevertheless, it is right to say that the law should adapt to changes in modern society. There remain practical, if not conceptual, differences between those easements which are expressly granted and those which arise by prescription.

56. If and to the extent possession is relevant, then the intention of parties forms an integral part of the assessment.

57. Indeed, the Court of Appeal has considered this very point in *Jackson v Mulvaney* [2003] 1 WLR 360, where Latham LJ said at [23]:-

“However there is no doubt that there is a real difference between a case in which the easement claimed is said to have been the subject matter of an express grant, and one which is said to arise by reason of prescription or under s62 of the Law of Property act 1925. In the former case, the issue is simply one of construction of the grant. And the court will undoubtedly lean in favour of the creation of an easement if the intention of the parties was clearly to that end. In the latter case, the court has the more difficult task of assessing the evidence as to alleged use in order to determine whether the claimed right has been established.

But if it is clear from that evidence that use has been made of the land for the requisite period which is capable of amounting to an easement, it seems to me that a court should not be deflected from declaring the existence of an easement which can sensibly be formulated by the fact that, of necessity, its parameters may not be so clearly defined as they could be in a deed.”

58. Indeed in Copeland the court entertained a more lenient view being taken of expressly granted easements.
59. The point is simply this. Where a right is claimed in prescription rather than expressly, its genesis likely lies in a legal fiction. That must be relevant to concepts of control, particularly if the test proposed by the Appellant were correct.

Application in this case

60. Even if, which is denied, the test contended for by the Appellant is the correct test, the Appellant’s claim still interferes with the possession and control of the Respondent.
61. The reference period is the period of time during which the area is in use.
62. The area is filled more or less completely by boats which are rarely moved.
63. The reference is not the extent to which the Appellant is utilising his possession, the issue is whether the Respondent remains in possession or control.
64. The Respondent does not. The Respondent cannot meaningfully access the land. The Respondent could not undertake works on or to the land, including under the land or over the land precisely because it cannot access the land.
65. The respondent cannot be said to be in control of the land. The Respondent can decline to permit alternative uses of the land by Appellant, in principle, but the Respondent

cannot make any other use of the land, or permit any other use of the land by any other party because it would necessarily interfere with the occupation of the whole tenement by the Appellant. That is not to have control it is to be the subject of control.

66. There is distinction to be drawn between that which is factually unlikely and that which is possible in the abstract only.
67. Possession and control must be considered by reference to the character and nature of the land (see, *Thorpe v Frank* for example). The land is a car park. The storage of boats which are not moved for months at a time operates to dispossess the Respondent. That is a matter of fact. That the Appellant cannot develop or deal in the land, for example, goes to the extent of their possession and not the extent of the dispossession of the Respondent. The Respondent has no control over the land beyond requiring the Appellant not to go any further than the right he claims. Property entails obligations as well as rights. Neighbouring land owners can compel cessation of trespass or nuisance and enforce covenants restricting use and development. That does not give rise to control in any meaningful way. The Respondent has even less control if the Appellant has the rights contended for.

Ground 2

68. The Appellant further attacks the judgment on the ground that:
- (a) To answer the question of residual reasonable use only by reference to the period during which the rights are exercisable is wrong;
 - (b) To discount potential alternative uses of the land by the servient owner because there is no present evidence of such use being made is wrong;
 - (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 is wrong.

69. As to (a), the Respondent contends that the Upper Tribunal was entirely correct to apply this test. It is consistent with principle. If the test for reasonable use is by reference to the land in use rather than the wider tenement, then it must be correct that the time when the use is being made is similarly applied. This is particularly so when the use is exclusive and sustained, as is the case here.
70. Furthermore, the use contended for is temporally fixed to certain months in the year. If that is so, then the assessment of the right must be by reference to its exercise – particularly in the case of an easement claimed in prescription. (See Jackson v Mulvany). For the period that the right is engaged there is no reasonable user remaining. If the boats were stored only during working hours, for example, during the period of months when the right is engaged, then there might be reasonable use available to the Respondent.
71. The user by the Appellant is not merely regular when the impugned easement is engaged, it is constant. That is necessarily excessive.
72. Even if that were wrong, that the Respondent only has any use of the land during certain months of the year is akin to sharing possession or joint occupation, which offends well settled principles discussed above.
73. As to (b), the Respondent against contends that the Upper Tribunal is correct in its analysis. The Tribunal was not shown any evidence of utilities running under the land. The point is surely that there is no potential to install said utilities on the facts of the case. The Respondent could not now do so without interfering with the Appellant's claimed right.
74. Further, there is nothing in the authorities that invites the Court to undertake a speculative exercise without evidence. The court would be required to find as a matter of fact that there were reasonable alternative uses. The Court cannot make factual findings in the absence of evidence. The evidence need not be that there was an actual use intended that was or was not prevented, but there must still be evidence given and considered of reasonable use. Absent that, the Court would have made a finding of fact

that the Respondent had not been given an opportunity to speak to which would have been irregular and vulnerable to challenge.

75. As to (c), again the Respondent contends for the views expressed by the Upper Tribunal. The question of “reasonable use” is necessarily an objective one. That must involve consideration of the surrounding facts and circumstances, the nature of the land and the like. It cannot be the case that such characteristics are relevant only to an assessment of the claimed right, it must also be relevant to what reasonable use might be made of the land. It would be wholly artificial, for example, to say that an agricultural field could be built over so as to create a multi storey car park. That might be theoretically possible but it is not an objectively reasonable proposition.

76. The physical characteristics of the servient land (as distinct from the adjacent land) must be taken in to account and accordingly the likelihood of land of a specific type being put to a particular use is relevant.

Concluding remarks

77. The ouster principle as presently formulated is well settled, is not operative of injustice, is consistent with the law in relation to easements generally, and admits sufficient analysis of the facts to enable just decisions.

78. Even if that is wrong, then slight clarification and qualification of the principle is all that is required.

79. To impose the question as whether an owner retains exclusive possession of the servient land is artificial, unworkable and will be operative of injustice. It overlooks the proposition that a right claimed might exceed that of an easement but not be sufficient to make out a claim for adverse possession. To alter the test as suggested is to create a binary outcome which is operative of injustice as to the servient tenement.

80. Even if the test should be changed as the Appellant contends, there is no meaningful way in which it can be said the Respondent retains exclusive possession or control so as to amount to exclusive possession.

81. If the Respondent is correct and the test as formulated should apply, then the decision of the Upper Tribunal is entirely correct.

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