**(In)flexibility of Enduring Property Relations: The Easement Story**

**Introduction**

Much of property law, and indeed property scholarship, addresses certainty and stability. For example, numerus clausus restricts those relationships which warrant proprietary effect and rules governing the disposal of property interests, from requirements for writing to registration regimes, seek to facilitate land dealings by providing a record of the land, its owner(s) and those proprietary interests to which a purchaser will be bound. But we live in an ever-changing world – uses evolve, technical innovation brings different demands and the physical nature of the land may change too. Thus, it is also important to appreciate when and how property, and particularly long-term property relations, can change and develop to show a flexible face.[[1]](#footnote-1) This article thus shifts the perspective away from certainty and stability to examine how successfully property law accommodates change in land use and property relations.

In doing so, it takes easements as its laboratory as an illustrative example of the wider tensions evident in property relations between stability and flexibility as well as transactional certainty and the reality of lived uses of space.[[2]](#footnote-2) Easements almost self-selected for study. Generally, they offer the relative clarity of a property dynamic between two, rather than a multiplicity of, owners. More significantly, change is in the DNA of easements. It is accepted that the class of rights that can qualify as an easement is not closed but may admit new ways of using land. For example, in *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd[[3]](#footnote-3)* a right to use recreational facilities attached to time share apartments was recognised as an easement. A conclusion that reflected the view that “*the common law should as far as possible accommodate itself to new types of property ownership and new ways of enjoying the use of land*.” [[4]](#footnote-4)

This enquiry, however, is not primarily concerned with change in the tenets of property law that arise as a result of judicial development or legislative change that look to the macro picture.[[5]](#footnote-5) These are of course important, but they are conducted through well versed and transparent processes. Instead, attention is concentrated on how change is accommodated in individual property relations between dominant and servient owners – the micro. Others have demonstrated that the way in which property is used, shared and understood does not always accord with the formal legal rights and responsibilities contained in documentation.[[6]](#footnote-6) This divergence may be gradual through the evolution of practices and understandings between neighbours. Alternatively, unilaterally practices may be tolerated and accepted over time. Such arrangements may continue harmoniously for years but disputes can occur and when they do, they may well be acrimonious. Neighbours can fall out or one or both properties be sold and a purchaser object to circumstances about which they may or may not have known but, when faced with reality, they find unacceptable.

A review of recent reported decisions reveals both the dilemmas faced by judges and the techniques they employ to resolve the dispute.[[7]](#footnote-7) It demonstrates that property’s tools to accommodate and recognise change are limited. Judges bridge the gap by inventive use of their interpretative jurisdiction and in utilising those proprietary doctrines that facilitate flexibility – for example adverse possession, prescription and proprietary estoppel. At times, somewhat muddy reasoning emerges which can strain property doctrine.[[8]](#footnote-8) It is also clear that the Land Registration Act 2002 (LRA 2002) has shifted the sensitive balance between transactional certainty and flexibility to prioritise certainty but consequently can jeopardise the evolution of an enduring property relationship.

Throughout, illustrative examples from this case law are employed to bring to life the difficulties faced by the parties and the courts in negotiating change. Unashamedly, the emphasis is on the facts and dispute before the court rather than property doctrine. Indeed, most cases were not primarily concerned with challenging points of law and in doctrinal terms, they are relatively mundane. Thus, this article is also not primarily concerned with the finer legal issues. Its looks rather to how courts resolve the situation on the ground. Many cases were first instance decisions focussed on disputed facts on the ground, the veracity of testimony and/or competing interpretations of the grant. That said, there are a clutch of Court of Appeal decisions that do break new ground, particularly on estoppel.

This article first examines how courts have facilitated change through interpreting the grant of existing easements concentrating on rights of way. It then explores how the increased use of estoppel can afford legal recognition to past changes in a property relationship through the creation of a new easement or the extinction of an old right. This enquiry provides an opportunity to consider the critical interaction between certainty and flexibility by assessing the enduring effect of estoppel when land changes hands. The article finally considers the limited role of ex post tools of the modification and extinguishment of easements proposed by the Law Commission before concluding observations are made.

**Existing Easements: Interpreting the Grant**

Disputes involving change in the context of an existing grant commonly centre upon the interpretation of that grant. As a consensual right, the interpretation of easements follows the principles of contractual interpretation reiterated by the Supreme Court in *Arnold v Britton*.*[[9]](#footnote-9)* The court’s task is to construe what the parties intended at the time of the grant from the language employed by grant. The focus is on the registered grant as the primary source of information.[[10]](#footnote-10) Guidance that could be gleaned from pre-contractual negotiations or other associated document is excluded. [[11]](#footnote-11) The test is objective being how a reasonable person would view the meaning of the words in the light of the background knowledge of the parties at the time of the grant encompassing, for example, the purpose and provisions of the grant in the light of the surrounding facts and circumstances.

Viewing intention at the time of the grant, presents an immediate timing impediment but there are techniques that can mitigate the risk that a right becomes frozen in time. First, conveyancers often will anticipate change within the express terms of the grant. An example is found in *Dickinson v Cassillas.[[12]](#footnote-12)* This is a dispute which caused considerable acrimony and cost. The Dickinsons and Ms Cassillas were neighbours with the side wall of Ms Casillas house forming the boundary. Her utility meters had been installed into this wall and so the only way they could be read was to go onto the Dickinson’s drive. The Dickinsons objected in extreme terms, they erected spiked gates to prevent entry, Ms Cassillas was allegedly racial abused and another neighbour, who tried to intervene, was stabbed. The animosity was compounded by a new porch that Ms Cassillas built with gutters that overhung the Dickinson’s drive. The court resolved the overhanging gutters by looking at the ambulatory words used –the right was to ‘*erect and maintain the … gutters …. [etc] on buildings for the time being erected on the property transferred*’ which were ‘*intended to encompass a changing state of affairs*’[[13]](#footnote-13) including Ms Cassillas’ alterations. The meters were more difficult to address but the court resorted to the business efficacy test to imply an appropriate term.

Secondly, the stated purpose of the grant may be drafted in wide terms, for instance ‘for all purposes’ or for all ‘reasonable and usual purposes.’ Any change in purpose, even if leading to an increased user, is thus permitted provide it still accommodates the dominant land. However, this carte blanche is balanced against the possible excessive user of the servient land which unreasonable interferes with the rights of others.[[14]](#footnote-14) *Rosling v Pinnegar[[15]](#footnote-15)* provides an illustration of this balance. A conveyance of 1923 granted a right of way ‘*at all times by day or by night and for all purposes*’ over a narrow winding lane giving access to Hammerwood Park, a 19th century mansion. Mr Pinnegar bought Hammerwood Park in 1982 and, after extensive restoration, opened it to the public including for the staging of cultural events. [[16]](#footnote-16) Unfortunately, his neighbours, who also enjoyed rights of access along the lane, objected to the increased traffic and applied for an injunction to regulate its use. It was clear that the right of way was sufficiently wide to allow public access to Hammerwood Park, but the court was persuaded that the user was excessive given the unreasonably interference caused to the other dominant owners’ rights of way. [[17]](#footnote-17) In coming to that conclusion, they took into account the width of the lane, the growth over time of vehicle size and the frequency of use by all the dominant owners.

Thirdly, a degree of foresight may be read into the parties’ objective intention at the time of the grant. In *Regency Villas* the Supreme Court looked at the right to use the various recreational facilities at the resort as a whole and recognised that these facilities ‘*would be bound to be subjected to significant alterations and changes during its business life*.’[[18]](#footnote-18). Indeed, some of the facilities at the resort had changed.[[19]](#footnote-19)

In *Beverland v Williams[[20]](#footnote-20)* the owner of one of the oldest fish farms in the British Isles wished to expand his enterprise to remain economically viable. The farm enjoyed a right to take water from the river with a right to install, repair, maintain (including to renew) the water pipe. A larger water pipe was required to facilitate the business expansion which the court held fell within the terms of the grant. The intention underlying the grant was for the operation of a financially viable fish farm which inevitably would change over time in the light of economic conditions and technical innovation. [[21]](#footnote-21)

Future foresight also is found in *Risegold v Escala Ltd.*[[22]](#footnote-22) The dominant land was an industrial workshop ripe for redevelopment in Shoreditch. It enjoyed a right to enter over adjoining land ‘*for the purpose of carrying out maintenance, repair, rebuilding or renewal of the Property*.’ Risegold, needed to rely on this right to substantial redevelop the site with commercial units and flats but, at first instance, the court found that a literal reading of the right to facilitate ‘rebuilding or renewal’ did not extend to such a substantial redevelopment. Reversing this decision on appeal, the Court of Appeal held that a literal reading of the clause was ‘*not sensible and unlikely to have been within the reasonable contemplation of the parties*.’[[23]](#footnote-23) They observed that:

‘*it must have been contemplated that the situation of the existing land and buildings would not remain the same for ever, that there would be possible changes in the character of the area and the buildings that might be put on the Property*.’[[24]](#footnote-24)

They adopted a fluid meaning to the word ‘*Property*’ which was not limited to the existing buildings and included the land itself. [[25]](#footnote-25) ‘*Rebuilding*’ was also capable of bearing *‘a broader and more flexible meaning*’ to encompass redevelopment with different buildings to those they replaced.[[26]](#footnote-26)

Nevertheless, such foresight will be constrained where the grant expressly limits the permitted use or purpose. In *Mills v Partridge[[27]](#footnote-27)* the diversification of a plant nursery to include a tearoom, retail space and the occasional event – not unusual attractions nowadays - was held to lie beyond the parameters of a right of way to access ‘*agricultural land only*’. Although the court accepted that agriculture developed over time, what had occurred was a ‘*diversification into non-agricultural activity*’[[28]](#footnote-28) which could not be described as incidental or ancillary.

A right may also be expressly limited by a specified mode of user, for instance, a right of way may be limited to pedestrian passage or be more widely expressed to include for example motor vehicles. Modes of transport change - horse and carriages have been replaced by cars and carts by lorries. The courts have recognised these developments so for instance in *Kain v Norfolk[[29]](#footnote-29)* the use of a right of way by carts granted in 1919 was sufficient to encompass lorries and in *AG v Hodgson[[30]](#footnote-30)* a right to drive carriages granted in conveyances made between 1853 and 1861 was held to include a motor car as a form of carriage with an engine rather than a horse.

The physical nature of the servient and dominant land is key, and the cases are replete with detailed descriptions of the physical nature of the land often reinforced by visits to the site. Such details remind us that easements are not simply recorded on paper and in Land Registry entries but are user rights physically exercised on the ground.[[31]](#footnote-31) For example, there are a stream of cases looking to the physical width of a right of way to determine the scope of the right where the situation on the ground is central to the court’s decision. [[32]](#footnote-32) Thus a narrow road or track will exclude sizeable vehicles.[[33]](#footnote-33)

*Dybedal v Maskell[[34]](#footnote-34)* illustrates the importance of the situation on the ground. Mr Dybedal spent £140,000 unsuccessfully trying to remove his neighbour’s shed from beside the lane running behind his house. The argument hinged on the width of the right of way over the lane that had been granted to benefit Mr Dybedal’s house (at No 6A) when this plot had been carved out of No 6 where the Maskells now lived. A conveyance in 1929 showed that the lane was 16 feet wide but before the sale of No 6A, a previous owner of No 6 had built a raised stone flower bed which narrowed that part of the lane to 10 feet. The question thus was whether No 6A’s right of way was over a 16 or 10 foot wide lane. Considering the stone flower bed, the court decided that it was 10 feet and thus the shed could remain.

The interpretation of an implied or presumed easement requires a different approach.[[35]](#footnote-35) The scope of the right will be determined by the extent of the user established as the time of the presumed or implied grant.[[36]](#footnote-36) Accordingly, any additional or new user of the dominant land will generally not be permitted. A line is drawn between an increase in the permitted user and a change in the use of the dominant land. [[37]](#footnote-37) Only the former is acceptable although constrained by possible excessive user.[[38]](#footnote-38) In *McAdams Homes Ltd v Robinson[[39]](#footnote-39)* a bakery, which enjoyed an implied right of drainage, was redeveloped into two sizeable houses. A dispute arose over whether the houses could continue to use the drain. The Court of Appeal decided they could not. This critical line between increase in a permitted user and radical change will depend on scrutiny of the facts on the ground and may depend on fine judgments of degree.[[40]](#footnote-40) In *McAdam*,the change from commercial to residential use and the likelihood of an increased in the use of the drain proved decisive.

These cases demonstrate the limited tools conveyancers and the courts have to accommodate change where there is an existing grant. They highlight the dead hand of intention embedded at the time of the grant and the balance to be struck between the flexibility of accommodating change on the one hand and risks to certainty and overburdening the servient land on the other. The creation of new rights, or removal of old easements, raise different issues to which we now turn.

**The Contribution of Estoppel**

The law acknowledges that easements justify a more relaxed approach to written formalities. Past practices and anticipated uses may lead to presumed or implied easements through prescription, easements of necessity and intention, the *Rule in Wheeldon v Burrows* and by the effect of section 62 of the LPA 1925. These doctrines are important but they each have their limitations. Prescription requires ‘user as of right’ for a minimum period of 20 years and the circumstances when the remaining doctrines can be employed are fact specific. These rules and their intricacies have been the subject of important work and thus it is not intended to dwell on their role. Instead, this article concentrates on the use of estoppel to facilitate the birth of new, and the death of old, easements.[[41]](#footnote-41)

***The Flexibility of Estoppel***

Estoppel recognises that property rights lie in their relational context within the ‘*ill-defined and chaotic circumstances of everyday life*’ [[42]](#footnote-42) that often beset the relations between neighbours over shared facilities. The flexibility of the doctrine offers courts the doctrinal elasticity as well as the evidential spaces and remedial discretion to weave a way though the conundrums thrown up by the ‘*more nebulous and confused aspects of lay persons’ informal arrangements*.’[[43]](#footnote-43) Proof of the expectation required to establish an estoppel, from express assurances through to silent acquiescence, can reflect the way in which neighbours communicate.[[44]](#footnote-44) Where the parties’ relationship is conducted at arms-length, qualitatively strong express assurances are common. However, parties who are known to each other often keep their interchanges in more muted tones. The assurance may equally lie in passive acquiescence to changed circumstances the quantitative strength of which builds over time. Meanwhile, detrimental reliance can be found in changed uses or expenditure on building or alterations on the dominant land. Thus, estoppel can provide a route by which de facto uses over time can be afforded de jure recognition.

***Estoppel’s Various Forms***

There are several well-known cases in which verbal assurances upon which a claimant had relied and acted to their detriment have recognised the parties’ past conduct to give birth to a right of way by proprietary estoppel.[[45]](#footnote-45)More novel rights have also been recognised. For example, in *Bradley v Heslin[[46]](#footnote-46)* a protracted argument over the use of gates over a shared driveway was resolved in part by finding an easement by proprietary estoppel to open and close the offending gates.

Proprietary estoppel has also been employed in other ways to resolve changed circumstances. Extinguishing an easement by abandonment is notoriously difficult to prove[[47]](#footnote-47) but estoppel by acquiescence has been used.[[48]](#footnote-48) In *Lester v Woodgate[[49]](#footnote-49)* a right of way on foot and with a wheelbarrow had been granted in favour of property, now owned by Mr Lester, over a pathway situated on adjoining property, now owned by the Woodgates. The pathway was obstructed when the Woodgates’ predecessor in title constructed a parking space over it. When Mr Lester objected the Court of Appeal held that acquiescence by his own predecessor in title in standing by whilst the parking space was constructed estopped him from asserting the right of way. McFarlane has noted the Court’s rather relaxed approach to meeting the evidential requirements of estoppel by acquiescence.[[50]](#footnote-50) For example, the servient owner was not mistaken as to his rights, he knew the land was subject to a right of way, and his detrimental reliance was scant being the risk associated with the failure to inform the Woodgates of possible legal action.[[51]](#footnote-51) The court excused this lax reasoning on ‘*the need to take a flexible and very fact-specific approach to each case in which an estoppel by acquiescence was relied upon*.’[[52]](#footnote-52)

Proprietary estoppel is not the only form of estoppel utilised to overcome disagreements over shared use. Estoppel by convention was the Court of Appeal’s preferred tool to resolve a dispute triggered by changed development plans in *Valentine v Allen.[[53]](#footnote-53)* Mr Valentine and five others agreed to purchase houses off-plan. As the development progressed it became clear that access to certain plots required the grant of rights of way over other plots. Agreement was reached but the plans on the requisite transfers and deeds of grant were inconsistent and ineffective to create the necessary easements. Nevertheless, the Court of Appeal held that, as the parties had all entered into the conveyancing documents on the assumption that the plans were consistent, they (and their successors in title) would be estopped by convention from asserting otherwise.

Estoppel by representation was raised as a possibility in the case of *Shortland v Hill.*[[54]](#footnote-54)This was another instance of an alleged abandonment. Shortland had the benefit of a right of way over a driveway owned by the Hills. The right was expressed to be for the sole purpose of gaining access to a garage that had since been demolished. The Hills obstructed the access in various ways and a four-year feud ensued. When the case came to court the Hills argued that the right had been abandoned but Matthews J rejected their plea by looking to the terms of the grant which, despite the demolition of the garage, was expressed to be for the benefit of the whole of Mr Shortland’s property. However, as obiter dicta, he considered estoppel by representation as a possible solution. The Hills’ predecessor in title had represented to Mr Shortland that the right of way was not extinguished by the garage’s demolition upon which Mr Shortland had relied when purchasing the property.

**The Certainty and Flexibility Interface: Priority Dilemmas**

Estoppel is of limited enduring utility if it operates only against the person estopped or can be raised only by the person to whom the assurance is made. Here is the interface and tension between the flexibility afforded by estoppel in giving effect to the way in which neighbours have behaved and the certainty of formal documentation and priority rules embodied in registration requirements. In addressing that tension, judges must try to reconcile statutory provisions with the situation on the ground. It is evident that opportunities to do so have reduced as registration regimes have evolved to favour transactional certainty. The solutions adopted by the courts have proved controversial for sidestepping legislative intent. It is not intended to revisit these doctrinal dilemmas – others have successfully done so[[55]](#footnote-55) – but to demonstrate how judges have tried to strike a balance between certainty and flexibility.

Under both the Land Charges Act 1972 and the Land Registration Act 1925 (LRA 1925) the courts upheld unprotected easements by estoppel despite statutory provisions which appeared to condemn them to defeat against a purchaser. In *ER Ives v High*,*[[56]](#footnote-56)*an unregistered land case governed by the Land Charges Act 1972, the Court of Appeal avoided a ‘*monstrous and inequitable*’[[57]](#footnote-57) result perpetrating *‘the grossest injustice*’[[58]](#footnote-58) to find Mr Eves’ estoppel easement binding upon Ives. They did so by excluding estoppel easements from registration through a somewhat imaginative approach to the definition of equitable easements which required registration as a Class D(iii) land charge. Priority was thus governed by the doctrine of notice and it was clear that Ives had actual notice of Mr High’s right since they had expressly agreed in their purchase contract to take subject to it.

Under the LRA 1925 section 70(1)(a) equitable easements were not categorised as overriding interests. Thus, it was somewhat of a surprise when Scott J held, in *Celsteel Ltd v Alton House Holdings Ltd*,[[59]](#footnote-59)that equitable easements that were openly used and enjoyed could qualified as overriding interests within Rule 258 of the Land Registration Rules 1925.[[60]](#footnote-60) The Court of Appeal followed Scott’s lead to protect estoppel easements in the bitter neighbour disputes in both *Thatcher v Douglas*,[[61]](#footnote-61) and *Sweet v Sommer.*[[62]](#footnote-62) In both decisions there is a sense of judicial relief that the court was able to resort to Rule 258 to uphold the priority of an estoppel easement. In *Thatcher v Douglas* Mr Thatcher’s almost 20year use of a slipway was based upon his agreement to tolerate encroachment of part of the slipway on his land. The slipway had passed through several owners before the Douglas, for some unrelated reason, objected. In *Sweet v Sommer* a conveyancing error left the Sweets with no legal access to their home which they had built relying on assurances from Ms Sommers’ predecessor in title that they had a right of way over a yard forming the servient property. Some years after she bought the property knowing of the Sweet’s right of way, Ms Sommer objected – the first instance report indicates she found the yard ‘*most unsightly and would prefer it to have more of the characteristics of a garden and less of those of a motorway*.’[[63]](#footnote-63)

The LRA 2002 swings the balance firmly in favour of transactional certainty. It was the avowed aim of its architects ‘*to ensure that it is possible to investigate title to the land almost entirely on-line with the minimum of additional enquiries’*[[64]](#footnote-64) Section 116 of the LRA 2002 may have resolved the debate surrounding the proprietary credentials of rights created by estoppel but estoppel easements now face dual difficulties which effectively neutralise this status unless protected on the register. First, estoppel easements, as equitable rights, do not qualify as overriding interests within Schedule 3 Paragraph 3 and the escape route provided by Rule 258 has been closed. Secondly, *Chaudhary v Yavuz[[65]](#footnote-65)* demonstrates that an easement is unlikely to qualify as an interest protected by reasonably discoverable occupation under Schedule 3 paragraph 2. Mr Chaudhary’s son had agreed with the neighbouring owner (at No 35) that his father (at No 37) could build an external staircase, that encroached on No 35, to provide safe access to the upper floors of both No 35 and No 37 via a connecting balcony. When Chaudhary’s son heard of plans to sell No 35, he tried unsuccessfully to get his neighbour to formalise the arrangement. Yavuz bought No 35 and removed the balcony with the connection to No 37 leaving no means of accessing the upper floor of No 37. The Court of Appeal, whilst acknowledging Mr Chaudhary’s easement by estoppel, reversed the decision at first instance, to hold that this right was unenforceable against Mr Yavuz. Mr Chaudhary, or rather his tenant’s use of the stairs and balcony, did not qualify as occupation.

This interpretation of the LRA 2002 may be difficult to fault.[[66]](#footnote-66) But does the result strike a workable balance between certainty and flexibility? Mr Yavuz was able to ignore a reasonably discoverable right of access whilst retaining the benefit of a safer access to his own land that he did not pay for.[[67]](#footnote-67) Mr Chaudhary was left out of pocket and without access to the first floor of his property. He paid a heavy price for failing to protect his rights on the register.[[68]](#footnote-68)

This result is to be contrasted with the rules governing other undocumented easements namely those arising by prescription or implied grant. These easements are protected if exercised within one year of the disposition or if they are within the actual knowledge of the purchaser or would be obvious on a reasonably careful inspection of the servient land.[[69]](#footnote-69) This balance, looking to performance, knowledge and discoverability, is combined with the Law Commissioner’s hope that standard enquiries before contract will encourage dominant owners to disclose their rights to the purchaser and thus trigger appropriate registration. Not only is this resort to off the register information at odds with the essence of land registration, but it does not address the fact that conflict is more likely on the sale of the servient land when a seller has less incentive to disclose adverse informal arrangements. More to the point is why should an easement created by implication or by estoppel be treated differently? The legal status of the former and the equitable status of the latter does not affect their discoverability. It is the circumstances surrounding their creation that differ yet all spring from informality and an absence of registered documentation.

*Chaudhary* is a decision in which priority under the LRA 2002 was faced head on but there are several cases that involved third parties where priority was not raised as an issue.[[70]](#footnote-70) It seems, on occasions, because of the third-party involvement in encouraging the claimant’s expectations. [[71]](#footnote-71)

Other routes to liability have been explored. In *ER Ives v High* the Court of Appeal, as an alternative ground, applied the mutual benefit and burden doctrine.[[72]](#footnote-72) If Ives or other purchasers of the servient land wished to take the benefit of their encroachment onto Mr High’s land, they had to accept the burden of his right of way.[[73]](#footnote-73) A similar argument could have been made in *Thatcher v Douglas*. In *Chaudhary*,several unsuccessfully arguments were canvassed. For instance, it was argued that a direct right by way of constructive trust should be imposed upon Mr Yavuz because the standard terms of the contract gave notice of Mr Chaudhary’s right. Direct rights do not arise easily. They require evidence that the purchaser’s conscious is affected for example because not only did they know of a prior interest but crucially have benefited for instance because they paid a lower price.[[74]](#footnote-74) It was also unsuccessfully argued that the staircase and balcony were Mr Chaudhary’s chattels.

Evidentiary, rather than proprietary, based estoppel may help. The estoppel by representation considered in *Shortland v Hill*[[75]](#footnote-75)is a rule of evidence that as such falls outside the LRA 2002 but, being legal in nature, can also estop successors in title from denying the represented facts. Thus, Matthews J suggested that the Hills could be estopped from denying the representation made by their predecessor title. Estoppel by convention, being also an evidentiary rule, could bind third parties in a similar way.

With the parties before them and their relationship dispute laid bare, the courts have tried to find a way through registration legislation that risks wiping out long exercised uses into proprietary oblivion.[[76]](#footnote-76) They have been inventive and stretched statutes in directions that they were not intended to go. The LRA 2002 has put an end to this moulding of priority rules but it leaves the question of whether the resulting balance is appropriate and practical particularly when implied easements are treated differently yet spring from similar imperatives. A strict priority rule may promote transactional certainty, but the situation of the ground remains unresolved. To reconcile the two simply encourages resort to other less obvious and doctrinally questionable routes. The result can be murky, unresolved and simply unsatisfactory.

**Ex-Post Flexibility**

Remedial judicial discretion in refusing an injunction to restrain a trespass or nuisance may afford some tolerance of unauthorised use of communal space but it is to a statutory jurisdiction to modify or discharge an easement that is the primary focus of ex post possibilities. Such jurisdiction is confined to facilitating change in the use or non-use of an existing easement. It does not help in recognising new rights.

The Law Commission has recommended that statutory provision be made for the modification and discharge of existing easements by the Upper Tribunal. [[77]](#footnote-77) A separate recommendation provides for a rebuttable presumption of abandonment following 20 years non-user.[[78]](#footnote-78) These ex-post controls has been mooted for some years [[79]](#footnote-79) and reflect similar provisions in other common law jurisdictions for example New Zealand,[[80]](#footnote-80)States in Australia[[81]](#footnote-81) and Canada[[82]](#footnote-82) as well as the United States.[[83]](#footnote-83)

The grounds for modification or discharge are essentially three-fold and build on the jurisdiction to modify and discharge restrictive covenants found in section 84 of the LPA 1925. [[84]](#footnote-84) They encompass obsolescence, express or implied agreement or where some reasonable use is impeded.[[85]](#footnote-85) They thus pay some attention to changed circumstances whether on the ground or by reason of the parties’ past understandings. The existing section 84 experience also suggests that the jurisdiction should promote the settlement of neighbour disputes by offering a distinct forum in which de jure change can be achieved. [[86]](#footnote-86) Nevertheless, the primary motivation for introducing ex-post controls seems to lie more with facilitating the economic development of land than resolving the troublesome disputes between neighbours illustrated above.[[87]](#footnote-87) Dixon observes that ‘*the proposal seems to prioritise value over use in a way that is at odds with the fundamental basis of our land law*’ and ‘*is out of step with the organic nature of land law as a system which seeks to balance the rights of neighbours and not artificially enhance one at the expense of the other*’.[[88]](#footnote-88) Thus what at first sight appears a useful additional tool to promote flexibility may have more questionable undertones.

**CONCLUSION**

Property rules must walk a fine line between stability and flexibility. Stability promotes certainty and efficient property transactions, but flexibility is required to cater for changing circumstances in enduring property relations. Both are necessary but property discourse is often dominated by stability and certainty.

Unless law demonstrates a capacity for flexibility in people’s experience of land, the law is in danger of becoming disconnected from people’s experience and relationships with respect to land. Davidson has argued that ‘*peoples’ expectations of property encompass not just certainty and stability but also an expectation for ‘responsiveness, fair adjustment, and inclusion*.’ [[89]](#footnote-89) People need reassurance that property can respond to external forces, changed circumstances and altered aspirations. Thus, to concentrate solely on the stability of property overlooks whether property rules are sufficiently flexible to successfully accommodate change.

This imperative is graphically illustrated by the very regrettable consequences in many of the cases considered - reports of which found their way into the press.[[90]](#footnote-90) Relations had broken down to such an extent that neighbours could not resolved their differences through dialogue. Involvement of the police, even occasional violence and other unsavoury conduct resulted. Substantial costs were incurred that sometimes forced the losing party to think about selling their home. These instances demonstrate that property was not just about value but also the deep psychological connections with a particular place.[[91]](#footnote-91) The adversarial proceedings often exacerbate the divide with strong emotions obscuring rationality and compromise. In this fraught environment, there is a clear sense of the law’s failure with judicial despair evident in extortions for the parties to resolve their difficulties outside the court.[[92]](#footnote-92)

The risk of this failure remains despite valiant efforts to accommodate flexibility within express grants found in the drafting techniques adopted by conveyancers. Judges have also pressed the limits of their discretion (for example in determining the relevant facts and in divining the parties’ intention) and can utilise their legal tools, from interpretation and implication of terms, to reconciling rights over shared space through excessive user. The proposed legislation to introduce ex-post measures to modify and extinguish easements will provide an additional but only limited tool. However, neither interpretative tools or legislative measures will assist where there is no grant, but change is evident through unilateral use or informal understandings. This is largely the province of prescription and estoppel. Prescription is significant but legal rights are slow to mature and can depend on technical and fine distinctions. Meanwhile estoppel does provide some opportunity to give effect to the way in which neighbours often behave.

Of particular concern is the difficulty in establishing when such neighbourly understandings cross the line from the personal to the proprietary. This highlights the crucial but difficult balance between stability and certainty demanded by transactional efficiency on the one hand and flexibility required to accommodate lived experiences on the other. In striking that balance judges were sympathetic in their interpretation of previous registration legislation but the LRA 2002 has made that task significantly more difficult. It firmly shifts the balance towards certainty in pursuit of the yet to be attained holy grail of electronic conveyancing which demands a move away from the reality of the situation on the ground to see land as a mere electronic entry transferred by the convenience of a click of a mouse.

There are risks associated with this apparent simplicity. Yes, certainty and clarity in property transaction is important but attention needs also to be paid to how land is used, how those uses evolve and how land users, particularly neighbours, behave. In short that flexibility as well as certainty is a necessary ingredient for a successful system of property rules. Yet the LRA 2002 pays little attention to flexibility. Within strict confines, prescriptive and implied easements can be protected as overriding interests but equitable easements, including those created by estoppel, are left out in the cold even if within the knowledge or discoverable by the purchaser. This different treatment of undocumented easements is unjustified and invites resort to novel solutions which can dangerously stretch doctrinal clarity.

1. \*The author would like to thank Professors Sue Bright, Sarah Blandy and Alison Clarke as well as Mark Jordan for their valuable insights on an earlier draft of this article. Gratitude is also due to Holly Southey, whom, as a research assistant, carried out much of the initial case law research.

   Bland, Bright and Nield, in ‘The Dynamics of Enduring Property Relationships in Land (2018) 81 MLR 85 highlight this need for flexibility. [↑](#footnote-ref-1)
2. For example, long leases whose covenants often anticipate change through rents reviews and service charges provisions or covenants, whether qualified or absolute, against alterations or changes of use see by way of illustration the recent decision in [*Duval v 11-13 Randolph Crescent Ltd*](https://eur03.safelinks.protection.outlook.com/?url=https%3A%2F%2Fnearlylegal.co.uk%2F%3Fmailpoet_router%26endpoint%3Dtrack%26action%3Dclick%26data%3DWyI0ODMyIiwiZTZmMmYxIiwiNTY1OSIsIjlkNDAwOTNkYTI1ZCIsZmFsc2Vd&data=01%7C01%7Cs.a.nield%40soton.ac.uk%7Cf25e6a09f5d048e18acc08d7f54f0f59%7C4a5378f929f44d3ebe89669d03ada9d8%7C0&sdata=nBQ5aazQ4I4Py55VWhUEt9hL6aOLQck2flFuR%2BgEkFI%3D&reserved=0) (2020) UKSC 18. Statutory processes also can accommodate change through lease variation see Landlord & Tenant Act 1987 Part IV and S Bright, ‘Variation long residential leases: when, why and reform [2019] Conv 332. [↑](#footnote-ref-2)
3. [2018] UKSC 57. [↑](#footnote-ref-3)
4. Per Lord Briggs at [76]. [↑](#footnote-ref-4)
5. Which Davidson and Dyal Chand have called ‘property moments’ see N Davidson & R Dyal Chand, ‘Property in Crisis’ (2010) 78 Fordham Law Review 101. [↑](#footnote-ref-5)
6. See for example S Blandy, ‘Collective Property: Owning and Managing Residential Space’ in N Hopkins (ed), *Modern Studies in Property law Vol 7* (Oxford, Hart, 2013) and J Patrick & S Bright, ‘WICKED insights into the role of green leases’ (2016) Conv 264. [↑](#footnote-ref-6)
7. This review was conducted with the invaluable help of a research assistance, Ms Holly Southey. [↑](#footnote-ref-7)
8. Adopting the analogy of Carol Rose see C Rose, ’Crystals and Mud in Property Law’ (1987-1988) 40 Stanford Law Review 577. [↑](#footnote-ref-8)
9. [2015] AC 1619. [↑](#footnote-ref-9)
10. *Cherry Tree Investment Ltd v Landman* [2012] EWCA Civ 736, [2013] Ch 305 – a clause in an associated facilities agreement could not be read into a registered charge. [↑](#footnote-ref-10)
11. *Prenn v Simmonds* [1971] 1 WLR 1381; *Brook v Young* [2008] EWCA Civ 816; *Platt v Crouch* [2004] 1 P&CR 18 but note *Partridge v Lawrence* [2003] EWCA Civ 1121. [↑](#footnote-ref-11)
12. [2017] EWCA Civ 1254. [↑](#footnote-ref-12)
13. At [27] quoting Lord Nicholls in [*Department for Environment, Food and Rural Affairs v Asda Stores Ltd* [2003] UKHL 71](https://uk.westlaw.com/Document/I96936331E42711DA8FC2A0F0355337E9/View/FullText.html?originationContext=document&transitionType=DocumentItem&contextData=%28sc.Search%29&comp=wluk)at [18] . [↑](#footnote-ref-13)
14. *White v Grand Hotel, Eastbourne, Ltd* [1913] 1 Ch 13; *South Eastern Rly v Cooper* [1924] Ch 211*; British Railway Board v Glass* [1963] Ch 538; *Robinson v Bailey* [1948] 2 All ER 791; *Jelbert v Davis* [1968] 1 WLR 589; *Jalnarne Ltd v Ridewood* (1991) 61 P&CR 142; *Davill v Pull* [2009] EWCA Civ 1309. [↑](#footnote-ref-14)
15. (1987) 54 P&CR 124. See also *Bee v Thompson* [2010] Ch 412. [↑](#footnote-ref-15)
16. See <https://www.hammerwoodpark.co.uk/> accessed 18th April 2021. [↑](#footnote-ref-16)
17. *Jelbert v Davis* [1968] 1 WLR 589. Lord Denning’s leading judgment suggests a wider ground ie that the user would not have been within the reasonable contemplation of the parties at the time of the grant. [↑](#footnote-ref-17)
18. At [46] reversing the Court of Appeal that had considered each facility. [↑](#footnote-ref-18)
19. For example, an outdoor pool had been replaced by an indoor swimming pool. [↑](#footnote-ref-19)
20. [2017] NICh 23. See also *Cooping (UK) Ltd v Walton Commercial Group* [1989] 1 EGLT 241. [↑](#footnote-ref-20)
21. At [37]. [↑](#footnote-ref-21)
22. [2008] EWCA Civ 1180. [↑](#footnote-ref-22)
23. At [19]. [↑](#footnote-ref-23)
24. At [16]. [↑](#footnote-ref-24)
25. At [17]. [↑](#footnote-ref-25)
26. At [22]. [↑](#footnote-ref-26)
27. [2020] EWHC 2171. See also *Wilkins v Lewis* [2005] EWHC 1710. [↑](#footnote-ref-27)
28. At [71]. [↑](#footnote-ref-28)
29. [1949] Ch 163. [↑](#footnote-ref-29)
30. [1922] 2 Ch 429 on the interpretation of a local authority bye law [↑](#footnote-ref-30)
31. See Blandy, Bright & Nield, ‘Property on the Ground: the Law of people and place’, in Dagan and Zipursky, *Research Handbook on Private Law Theory* (Elgar, Cheltenham & Northampton, 2020) Ch 14. [↑](#footnote-ref-31)
32. See for instance *White v Richards* (1993) 68 P&CR 105*Mills v Blackwell*  (1999) 78 P&CR D43, *West v Sharp* [(2000) 79 P. & C.R. 327](http://uk.westlaw.com/Link/Document/FullText?findType=Y&serNum=1999161762&pubNum=4807&originatingDoc=I5955F3F00C1211E8949BE7D862F1C18A&refType=UC&originationContext=document&vr=3.0&rs=PLUK1.0&transitionType=CommentaryUKLink&contextData=(sc.Category)); *Wilkinson v Farmer* [2010] EWCA Civ 1148; *Carpenter v Calico Quays Ltd* {2011] EWHC 96, *Oliver v Symons* [2012] EWCA Civ 267, *Emmet v Sisson* [2014] EWCA Civ 64; *Higson v Guenault* [2014] EWCA Civ 703, *Lea v Ward* [2017] EWHC 2231, *Mills v Partridge* [2020] EWHC 2171, *McGill v Stewart* [2020] EWHC 3387. [↑](#footnote-ref-32)
33. Ibid, *Bulstrode v Lambert* [1953] 1 WLR 1064, *White v Richards* (1993) 68 P&CR 105 but see *Keefe v Amor* [1965] 1 QB 334. [↑](#footnote-ref-33)
34. [2017] EWCA 2399. [↑](#footnote-ref-34)
35. The approach to implied easements under *Wheeldon v Burrows* is similar to prescription see *McAdams Homes Ltd v Robinson* [2004] EWCA Civ 214 at [22] & [79] but easements acquired under section 62 LPA 1925 may be treated as an express grant see *Wood v Waddington* [2015] 2 P&CR 11. [↑](#footnote-ref-35)
36. *Cowling v Higginson* (1838) 3 M&W 245; *Wimbledon & Putney Commons Conservators v Dixon* (1875) 1 Ch D 362; *Mills v Silver* [1991] Ch 271, *Loder v Gaden* (199) 78 P&CR 223 *Dewan v Lewis* [2010] EWCA Civ 1382. [↑](#footnote-ref-36)
37. *William v James* (1867) LR 2 CP 577; *Wimbledon & Putney Common Conservators v Dixon* ibid, *RPC Holdings Ltd v Rogers* 1953] 1 ALL ER 1029.But see *Attwood v Bovis Homes Ltd* [2001] Ch 379 where the change was radical but did not increase the burden on the servient land given mitigation measures. [↑](#footnote-ref-37)
38. *British Railway Board v Glass* [1965] Ch 538, *Giles v County Building Constructors (Hertford) Ltd* (1971) 22 P&CR 978; *Cargill v Gotts* [1981] 1 WLR 441; *Wood v Waddington* [2015] 2 P&CR 11.  [↑](#footnote-ref-38)
39. [2004] EWCA Civ 214. [↑](#footnote-ref-39)
40. See comments of Neuberger LJ at [54]-[55]. [↑](#footnote-ref-40)
41. Several of cases already considered raised a plea based upon estoppel see for example *Beverland v Williams* [2017] NICh 23. [↑](#footnote-ref-41)
42. K. Gray & S. Gray *Elements of Land Law* 5th ed (OUP, Oxford, 2009) 9.2.4. [↑](#footnote-ref-42)
43. Ibid. [↑](#footnote-ref-43)
44. See S Nield, ‘Estoppel and reliance’ in E Cooke (ed) *Modern Studies in Property Law Volume 1* (Hart, Oxford 2001). [↑](#footnote-ref-44)
45. *Crabb v Arun District Council* [1976] Ch 179; *ER Ives Investment Ltd v High* [1967] 2 QB 379; *Joyce v Epsom and Ewell BC* [2012] EWCA Civ 1398; *Hoyl Group Ltd v Cromer Town Council* [2015] EWCA Civ 783. [↑](#footnote-ref-45)
46. [2014] EWHC 3267. The case is further discussed by the author (with co-authors) in ‘The Dynamics of Enduring Property Relationships in Land’ (2018) 81 MLR 85. [↑](#footnote-ref-46)
47. *Tehidy Minerals Ltd v Norman* [1971] 2 QB 528, *Benn v Hardinge* (1993) 66 P&CR 246, *Odey v Barber* [2006] EWHC 3109, *Jones v Cleanthi* [2006] EWCA Civ 1712, *Williams v Sandy Lane (Chester) Ltd* [2006] EWCA Civ 1738, *Dwyer v Westminster CC* [2014] EWCA Civ 153, *Annetts v Adeleye* [2018] EWCA Civ 555. [↑](#footnote-ref-47)
48. McFarlane suggest that estoppel provides a better foundation for the extinguishment of an easement see B. McFarlane, *The Structure of Property Law* (Hart, Oxford, 2008) p873. [↑](#footnote-ref-48)
49. [2010] EWCA Civ 199. [↑](#footnote-ref-49)
50. McFarlane, *The Structure of Property Law* (Hart, Oxford, 2008) p873 looking to the 5 probanda set out in *Wilmott v Barber* (1880) 15 Ch. D. 96.  [↑](#footnote-ref-50)
51. The alterations here pre-dated the acquiescence and thus could not constitute detrimental reliance. [↑](#footnote-ref-51)
52. At [39] per Patten LJ giving the leading judgment. In *Watts v Dignan* [2017] EWCA Civ 1390 a claim for abandonment by estoppel failed on the facts. [↑](#footnote-ref-52)
53. [2003] EWCA Civ 915 at [63] See also the use of estoppel by convention to address de facto variations from the documented basis for determination of service charges *Jetha v Basildon Court Residents Co Ltd* [2017] UKUT 58, *Tingdene Holiday parks Ltd v Cox* [2011] UKUT 310, *Clacy v Sanchez* [2015] UKUT 421 and *Admiralty Oak Management Ltd v Ojo* [2016] UKUT 421. [↑](#footnote-ref-53)
54. [2018] 1 P&CR 16. [↑](#footnote-ref-54)
55. See for example G Battersby, ‘Informal transactions in land, estoppel and registration’ (1995) 58 MLR 637, J Greed, ‘Equitable easements and the pitiless purchaser’ [1999] Conv 11; Editor, ‘Land registration, easements and overriding interests’ [2005] Conv 545; B Macfarlane, ‘Eastenders, Neighbours and Upstairs, Downstairs [2013] Conv 74. [↑](#footnote-ref-55)
56. [1967] 2 QB 379. [↑](#footnote-ref-56)
57. Per Danckwerts LJ at 399F. [↑](#footnote-ref-57)
58. Per Lord Denning at 396B. [↑](#footnote-ref-58)
59. [1985] 1 WLR 204. For a detailed critique see J Greed, ‘Equitable easements and the pitiless purchaser’ [1999] Conv 11 [↑](#footnote-ref-59)
60. Rule 258 encompassed ‘Rights, privileges, and appurtenances appertaining or reputed to appertain to land or demised, occupied, or enjoyed therewith or reputed or known as part or parcel of or appurtenant thereto, which adversely affect registered land.’ [↑](#footnote-ref-60)
61. [1995] N.P.C. 206. [↑](#footnote-ref-61)
62. [2005] EWCA Civ 227. [↑](#footnote-ref-62)
63. [2004] EWHC 1504 at [12]. [↑](#footnote-ref-63)
64. Law Comm 271 [8.66]. [↑](#footnote-ref-64)
65. [2011] EWCA Civ 1314. See also *Pezaro v Bourne* [2019] EWHC 1964. [↑](#footnote-ref-65)
66. See B McFarlane, ‘Eastenders, Neighbours and Upstairs, Downstairs’ [2013] Conv 74. [↑](#footnote-ref-66)
67. In evidence Mr Yavuz claimed he did not know of the access. [↑](#footnote-ref-67)
68. By filing a unilateral notice. [↑](#footnote-ref-68)
69. See Schedule 3 Paragraph 3. Concern has been expressed that these provisions will result in some easements vanishing see P. H. Kenny, Vanishing easements in registered land [2003] Conv 304; G Battersby, ‘More thoughts on easements under the Land Registration Act 2002 [2005] Conv 195. [↑](#footnote-ref-69)
70. See for instance *Bradley v Heslin* [2014] EWHC 3267*, Shortland v Hill* [2018] 1 P. & C.R. 16; *Lester v Woodgate* [2010] EWCA Civ 199; *Joyce v Epsom & Ewell DC* [↑](#footnote-ref-70)
71. For example, *Bradley v Heslin* ibid; *Lester v Woodgate* ibid. [↑](#footnote-ref-71)
72. See *Halsall v Brizell* [1957] Ch 169. [↑](#footnote-ref-72)
73. Battersby suggests that the doctrine provides a more convincing doctrinal foundation see ‘More thoughts on easements under the Land Registration Act 2002 [2005] Conv 195 . [↑](#footnote-ref-73)
74. See *Binions v Evans* [1972] Ch 359*; Lyus v Prowsa Developments Ltd* [1982] 1 WLR 1044; *Ashburn Ansalt v WJ Arnold Co* [1989] Ch1. [↑](#footnote-ref-74)
75. [2018] 1 P. & C.R. 16 but see critique by J Roche, ‘Estoppel, registration, and the perils of obiter [2017] Conv 463. [↑](#footnote-ref-75)
76. Similar judicial efforts are found in the case law reconciling the meaning of ‘occupation’ in the LRA 2002 Schedule 3 para 2 with those right holders who are absent from their property see for example *Link Lending Ltd v Bustard* [2010] EWCA Civ 424. [↑](#footnote-ref-76)
77. Most recently in Law Commission, ‘Making Land Work: Easements Covenants and Profits a Prendre’ Law Comm 327 at [7.35]. See Clause 30 of the proposed Bill in Appendix A to Law Comm 327. Supplemental provisions provide for the imposition of conditions and payment of compensation see Clause 32. [↑](#footnote-ref-77)
78. Law Comm 327 at [3.320]. [↑](#footnote-ref-78)
79. The government announced its intention to implement the report in the Queen’s Speech of 18th May 2016, but the Bill was lost to other Parliamentary business. [↑](#footnote-ref-79)
80. Property Law Act 1952 (NZ) s127. [↑](#footnote-ref-80)
81. For example, Conveyancing Act 1919 (New South Wales) s89(1). [↑](#footnote-ref-81)
82. For example, Canada (Property Law Act 1996 (British Columbia) s35. [↑](#footnote-ref-82)
83. In the Third and now Fourth Restatement of Property: Servitudes largely the work of Professor French who pursued a reforming agenda see S. French, Toward a Modern Law of Servitudes: Reweaving Ancient Strands (1982) 55 So Cal L Rev 1261 and Highlights of the New Restatement (Third) of Property: Servitudes, (2000) 35 Real Property Probate and Trusts Journal 225. These ex post controls sparked debate between those accepting flexibility see U Reichman, Toward a Unified Concept of Servitudes (1982) 55 So Cal L Rev 1177and S Sterk, Foresight and the Law of Servitudes (1988) 73 Cornell L Rev 956 and those concerned at this assault on the inviolability of property rights C.M.Rose, Servitudes, Security and Assent: Some Comments on Professors French and Reichman (1982) So Cal L Rev 1403, R Epstein, Notice Freedom of Contract in the Law of Servitudes (1982) 55 So Cal L Rev 1353. [↑](#footnote-ref-83)
84. The modification of a covenant may lead to a consequent modification of a related easement see *Hotchkin v McDonald* [2004] EWCA Civ 519. [↑](#footnote-ref-84)
85. The latter is to be determine by considering whether the easement secures any practical benefit of substantial value to the dominant land, whether the dominant owner suffers any other injury or the use is generally contrary to the public interest. [↑](#footnote-ref-85)
86. See the Law Commission’s analysis in Appendix B to its Consultation Paper No 186 ‘Easements, Covenants and Profits A Prendre’. [↑](#footnote-ref-86)
87. The growth in s84 applications evident from the Law Commission’s analysis was attributed to increased residential development. [↑](#footnote-ref-87)
88. ‘The Organic Nature of the Law of Real Property: Reforming Modern Land Law in H Conway & R Hickey (ed) *Modern Studies in Property Law Vol 9* Ch 1 at 14-15. The latter part of the quote is directed at reform of rights to light but it is submitted has wider application. [↑](#footnote-ref-88)
89. N Davidson, ‘Property’s Morale’ (2011) 110 Mich L Rev 437 at 441-443. [↑](#footnote-ref-89)
90. See for example *Bradley v Heslin* [2014] EWHC 3267 <https://www.dailymail.co.uk/news/article-2788649/the-middle-class-neighbours-racked-100-000-legal-bill-row-driving-gates-open-shut.html> and <https://decksandfencesdaily.com/merseyside-authorized-row-over-driveway-gates-lastly-resolved/> ; *Dickinson v Cassallis* [2017] EWCA Civ 1254 <https://www.thesun.co.uk/news/4101199/spiteful-pensioner-76-who-stabbed-one-neighbour-and-built-metal-spiked-gates-to-stop-another-getting-access-to-her-own-gas-meter-faces-losing-her-own-home-over-200000-feud/> *Shortland v Hill* [2018] 1 P. & C.R. 16 <https://www.dailymail.co.uk/news/article-5015999/Couple-moved-pot-plants-neighbour-couldn-t-park-car.html>; <https://www.mirror.co.uk/news/uk-news/britains-most-expensive-garden-shed-10181493>; *Dybedal v Maskell* [2017] EWCA 2399 <https://www.dailymail.co.uk/news/article-4390106/Lawyer-loses-140k-appeal-garden-shed.html>; *Rosling v Pinnegar* [*https://www.independent.co.uk/news/uk/crime/barrister-disbarred-for-eavesdropping-on-solicitor-621963.html*](https://www.independent.co.uk/news/uk/crime/barrister-disbarred-for-eavesdropping-on-solicitor-621963.html); *Thatcher v Douglas*[1995] N.P.C. 206 [*https://www.independent.co.uk/news/people/unsubstantiated-bias-allegation-should-not-be-made-1324237.html*](https://www.independent.co.uk/news/people/unsubstantiated-bias-allegation-should-not-be-made-1324237.html) *Lester v Woodgate* [2010] EWCA Civ 199[*https://www.telegraph.co.uk/news/uknews/7406293/Couple-face-legal-bill-over-shortcut-row.html*](https://www.telegraph.co.uk/news/uknews/7406293/Couple-face-legal-bill-over-shortcut-row.html)all accessed 21 April 2021 [↑](#footnote-ref-90)
91. For example the X-factor values explored by L. Fox in *Conceptualising Home: Theories, Law and Policies* (Hart, Oxford, 2006) and Radin’s work on property and personhood see M.J.Radin, ‘Property and Personhood’ (1982) 34 Stanford Law R 957. [↑](#footnote-ref-91)
92. For example, *Bradley v Heslin* [2014] EWHC 3267; *Sweet v Sommer* [2005] EWCA Civ 227. [↑](#footnote-ref-92)