

# **Dynamics of Enduring Property Relationships in Land**

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## **Introduction**

The title of our paper is designed to express the essence of our enquiry, and to distinguish it from the focus of most theoretical property scholarship. We are not looking at property rights captured at a unique moment in time, but instead are investigating the on-going and dynamic relationships that exist between those who possess property rights. We contend that these dynamics are foundational to property relations and that without an understanding of them, the nature and meaning of property and how property relationships operate in the real world cannot be fully appreciated. This reconfigured schema of property relationships is explained and explored here in relation to property in land, but could be applied to other forms of property.

Our approach responds to recent calls for a 'temporal turn' in property law analysis, giving attention to issues of time as well as space in considering the foundations of property.<sup>1</sup> Current property law scholarship has largely ignored these temporal and spatial dimensions yet the legal, regulatory, social and commercial norms that inform property relationships may adapt and evolve over time to reflect the fact that they are lived relationships with changing patterns and understandings of spatial use, relationship needs, economic realities, opportunities, technical innovations, and so on. We use this approach to examine internal relationships between people who each hold rights in relation to the same piece of land, rather than looking at the external relationship between a right-holder and the 'rest of the world' or the state.

Through the dynamics lens we establish a framework that can be used to explore and describe enduring property relationships; in effect we provide a canvas and brushes that can be used to paint a multi-dimensional perspective on property relationships. The point of this perspective is to help those who wish to understand property

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<sup>1</sup> M. Valverde, *Chronotypes of Law: Jurisdiction, Scale and Governance* (London, Routledge, 2014).

relationships to see beyond the legal rules framed by written instruments and to discover the rich variety of sources that shape these relationships. This dynamic perspective differs from the doctrinal approach to scholarship dominant in the UK, which tends to focus only on legal norms.<sup>2</sup> It also differs from the taxonomical concerns of that branch of doctrinal scholarship which aims to tightly define categories and scope.<sup>3</sup> Instead our approach combines elements of doctrinal, empirical, socio-legal and realist methods. We are presently concentrating upon exploring the ‘is’ rather than ‘the ought’ of how property relationships operate and evolve. At this point our goal is not normative in the sense of advocating that property relationships should be governed by any particular normative values – for example, fairness, efficiency or sustainability. Therefore, although we draw on the work of US property scholars, and wish to engage with them, our approach is different from that of the Progressive Property theorists.<sup>4</sup> We believe that normative assertions cannot usefully be drawn without a clear appreciation of how property relationships operate. Thus our current interest lies in understanding how property relationships are formed and evolve through shaping by both external and internal influences on the relationship. As such our work is conceptual and analytical, not normative.

In Part 1 of this paper we put some flesh on our framework, and in Part 2 we explain why we have chosen to explore it in the context of property in land. Part 3 then sets out the key themes or ways of looking at enduring property relationships. These themes – the variety of sources, regulation, property’s temporal element, the transmissibility of property rights, flexibility, and discretionary spaces in decision making – provide the key tools to develop an understanding of the dynamics of enduring property relationships. In Part 4 we apply this perspective to three different areas of land law: a neighbour dispute; residential leaseholds and mortgages. These and other examples are mainly drawn from English land law. This final section demonstrates the value of our schema; it shows the ‘dynamics’ of property relationships, the variety of influences that shape the behaviour of the parties, the

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<sup>2</sup> S. Blandy and S. Bright, ‘Property Law Research Now and into the Future’ in S. Bright and S. Blandy (eds), *Researching Property Law* (London, Palgrave, 2016).

<sup>3</sup> P Birks “Definition and Division: A Meditation on *Institutes* 3.13” in P Birks (ed) *The Classification of Obligations* (OUP, Oxford, 1997).

<sup>4</sup> Gregory S. Alexander, Eduardo M. Penalver, J. W. Singer and L.S. Underkuffler, A Statement of Progressive Property, 94 *Cornell Law Review* 743 (2009).

ways in which these may change over time, and how these dynamics are accommodated by the parties themselves, and by others, in decision making.

### **Part 1: Multi-dimensional property relationships**

Here we set out the key components of our schema.

#### **Property relationships**

Our focus differs from those strands of contemporary theoretical scholarship that concentrate attention upon relations between owners and non-owners, or between owners and the state. As with Alexander's work on what he terms 'governance property'<sup>5</sup> we shift the focus of enquiry away from the 'external life' of property to the 'internal relationships among property stakeholders.'<sup>6</sup> We agree with Alexander's assertion that a concentration upon the external life of property gives 'a distorted and misleading view of property'<sup>7</sup> and we want to correct this distortion by looking at 'what happens within the [property] box',<sup>8</sup> that is, between those with property rights in the same land.

Looking inside the property box explains what we mean by property relationships. We are not exploring the many and various ways in which people may have rights in relation to things. Our starting point is to look at those rights that are recognised within the legal system as being property rights - in land law terms this would mean the fee simple, leasehold and those rights that come within the *numerus clausus* – and then to explore the relationships between those who each possess a property right in relation to the same thing. To provide one illustration, again from land law, in a block of flats there will typically be a number of people with property rights including a freeholder, long leaseholders, and possibly their mortgagees and rental tenants. Our approach involves examining the various relationships between these persons.

Although, like Alexander, we are looking 'inside the box', our perspective is very different to his. Alexander's concept of governance property is too broad for our purposes; although his work includes some of the relationships that we are exploring,

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<sup>5</sup> Gregory S. Alexander, 'Governance Property' (2012) 160 University of Pennsylvania Law Review 1853. We discuss this further below, and explain how our model differs from Alexander's work.

<sup>6</sup> 'Governance Property' (2012) 160 University of Pennsylvania LR 1853.

<sup>7</sup> Ibid at 1855.

<sup>8</sup> Ibid.

for instance leaseholds, it is more expansive as it also includes wider co-ownership structures, including domestic partnership, trust property and business organisations. Alexander's purpose is also different. He makes the normative claim that ownership of governance property contributes to the development of certain virtues that promote human flourishing, including community, cooperation, trust and honesty.<sup>9</sup> We accept that norms promoting human flourishing may constitute an aspect of particular property relations, but we do not consider that it is a requirement or even usual in all property relationships. The structure of a typical commercial lease, for example, creates a division between the financial interests of the landlord and tenant that is often said to contribute to a commonly encountered adversarial relationship between the parties.<sup>10</sup>

### **Dynamics**

Our perspective provides a nuanced understanding of enduring property relations through looking not only at legal rules derived from general principles of contract and property law, but also by looking at the rich ambit of wider norms and conventions that impact upon and shape these property relationships, and by taking into account how relationships develop over time. The tendency within doctrinal scholarship to focus solely on legal norms seems myopic. To fully understand property relationships it is necessary also to look at the paper record or instrument that creates the property right, the external regulation of such relationship, the available methods of dispute avoidance and resolution, and to examine the *de facto* understandings or expectations between those individuals who are connected by virtue of their shared use of property. Our approach may necessitate empirical research into lived and iterative experiences of property relations so as to understand the expectations that evolve from the relationship itself. These 'self-generated norms' may be specific to particular sites or relationships, or arise from developed practices of one or both of the parties or within the community in which the relationship is nested.

Our broader inquiry encompasses a spectrum of influences to reflect more closely the parties' relations and enables us to explore how the parties to a property relationship

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<sup>9</sup> Ibid at 1859.

<sup>10</sup> S Bright, Carbon Reduction and Commercial Leases in the UK, (2010) 2 IJLBE 218, 227.

develop that relationship over time. This may involve a history of the parties successfully articulating their respective rights and responsibilities to promote their common interests and reconcile tension in their divergent needs and aspirations, or of a dispute taken to court, with parties sticking rigidly to their legal rights.

Relational contract theory (RCT)<sup>11</sup> and the work of associated empirical scholars<sup>12</sup> have informed our perspective. Without attempting to summarise this very rich and complex literature, its key idea for our purposes is that property relationships are, as Macneil observes in relation to contracts, 'embedded in complex relations'.<sup>13</sup> In particular it is helpful to draw on Macneil's imagery of a 'spectrum of contractual behaviour and norms' with 'as-if-discrete transactions'<sup>14</sup> (which conform to classical contract theory) at one pole and at the other relational (or 'intertwined')<sup>15</sup> contracts in which the parties' mutual trust and reciprocity are more important than their legal relationship, and over the life of the contract adaptations are made to the terms by agreement.

## **Enduring**

We use the term 'enduring' in the sense of long-lasting or on-going, relationships in property, and we are particularly interested in the role of time in property law.

We have identified the continuing nature of the relationship as an important feature; it affects the way in which the governing norms are articulated at the outset, and mean that they may need to evolve and adjust over time to reflect any change in the lived relationships. We are thus not concerned with relationships that have a limited shelf life, such as the relationship between the seller and buyer of an interest in land which is concluded once the contract is executed upon completion. Such a relationship is likely to be short and explicitly articulated by the terms of the contract that relate to

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<sup>11</sup> Ian R Macneil, 'Relational Contract Theory: Unanswered Questions A Symposium in Honor of Ian R Macneil: Relational Contract Theory: Challenges and Queries' (2000) 94 NWULR 877

<sup>12</sup> See e.g. L Bernstein, 'Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry' (1992) 21 *The Journal of Legal Studies*, 115; S Macaulay, 'Non-Contractual Relations in Business. A Preliminary Study' (1963) 28 *American Sociological Review* 55

<sup>13</sup> Ian R Macneil, (2000) 94 NWULR 877, 881 (footnotes omitted).

<sup>14</sup> Ian R Macneil, (2000) 94 NWULR 877, 895.

<sup>15</sup> Ian R Macneil, (1987) 'Relational Contract Theory as Sociology: A Reply to Professors Lindenberg and de Vos', 143 *J. Inst. & Theoretical Econ.* 272, 276.

the passing of ownership and the payment of money rather than the use of the land itself. Instead we wish to understand how the range of norms evolve responsively to the spatial, temporal and lived dimensions of property.

In recognizing that property rights may change over time we align ourselves with certain features of the work of the Progressive Property scholars.<sup>16</sup> The other main approach to theoretical enquiry into the nature of property in the North American literature is that of the 'information theorists'.<sup>17</sup> Jane Baron helpfully frames this key debate in terms of the 'means by which property organizes human behavior and social life'.<sup>18</sup> Information theorists focus on *how* property law 'works, which is through exclusion rights with respect to things' and maintain that in order that property provides clear signals enabling efficient transactions 'bundles of rights are not and should not be infinitely customizable'.<sup>19</sup> By contrast, progressive theorists focus not 'on function, but on *ends*'.<sup>20</sup> They argue that property law should be concerned with 'the inevitable impacts of one person's property rights on others', meaning that a considerable level of complexity in property law and potential for change should therefore be tolerated.<sup>21</sup> Both approaches are normative: the information theorists' claim is that 'to coordinate social behaviour effectively, property *should be* (on the whole) simple'; progressive theorists value consideration of whether 'property rules are serving the proper values and creating appropriate relationships'.<sup>22</sup>

Although our approach is not normative, we do wish to understand *how* property relationships work. Unlike the information theorists we do not see these relationships as static and necessarily or desirably stable. In common with progressive property theorists, we agree that property relationships are complex and changing. It is this

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<sup>16</sup> Gregory S. Alexander, Eduardo M. Penalver, J. W. Singer and L.S. Underkuffler, A Statement of Progressive Property, 94 Cornell Law Review 743 (2009); L. Underkuffler, 'A Theoretical Approach: The Lens of Progressive Property', in S. Bright and S. Blandy (eds), *Researching Property Law* (London: Palgrave, 2016).

<sup>17</sup> See, for example, Thomas W. Merrill & Henry E. Smith, 'Optimal Standardization in the Law of Property: The *Numerus Clausus* Principle', (2000), 110 Yale Law Journal, 1; Henry E. Smith, 'Property and Property Rules', (2004) 79 New York University Law Review, 1719.

<sup>18</sup> J. E. Baron 'The Contested Commitments of Property', (2010) 61 Hastings Law Journal 917.

<sup>19</sup> J. E. Baron 'The Contested Commitments of Property', (2010) 61 Hastings Law Journal 917, 940.

<sup>20</sup> J. E. Baron 'The Contested Commitments of Property', (2010) 61 Hastings Law Journal 917, 940.

<sup>21</sup> Gregory S. Alexander, Eduardo M. Penalver, J. W. Singer and L.S. Underkuffler, A Statement of Progressive Property, 94 Cornell Law Review 743 (2009).

<sup>22</sup> J. E. Baron 'The Contested Commitments of Property', (2010) 61 Hastings Law Journal 917, 950. And 951

complexity that our project is designed to explore. We seek to analyse how *de facto* and *de jure* obligations regulating property relationships evolve over time, and to explore why certain *de facto* rights and obligations may become recognised in law, both in the context of a specific property relationship but also in a more general sense. *De facto* rights may come to be recognised in law through time, for example, as prescriptive rights in relation to specific land. More broadly, the work of van der Walt illustrates how once-marginal property interests may join the ‘mainstream rights paradigm’ as a result of wider societal changes or legal and political developments,<sup>23</sup> and contemporary developments in human rights law in this jurisdiction have echoes of this.

In summary, and to adapt an observation made about the idea underlying relational contract theory, we are looking not at ‘one-night stands’ but at marriages,<sup>24</sup> and then not at the ceremony itself but at the shared lives that follow.

## **Part 2: Land: the context in which we have developed our ideas**

For this paper, we focus upon property relationships that are enduring and dynamic, and which share two further common characteristics, namely, they relate solely to land and they are initially constructed from a consensual base. In part these are pragmatic boundaries that both keep the enquiry manageable but they also reflect our particular interests (and expertise). However, they also have foundations in principle.

### *Why Land?*

There is a lively debate, particularly amongst North American property scholars, as to whether property is, conceptually, to do with ‘rights, not things’, or whether it is ‘rights to things’.<sup>25</sup> As researchers with long careers exploring rights that relate to land, we are interested in both angles of this debate. The fact is that when the property

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<sup>23</sup> André van der Walt, *Property in the Margins* (Oxford, Hart, 2009).

<sup>24</sup> R. Gordon, ‘Macaulay, Macneil and the Discovery of Solidarity and Power in Contract Law’ [1985] Wisconsin LR 565 at 569.

<sup>25</sup> CB Macpherson provided a classic statement of the bundle of rights view in his Introduction, in CB MacPherson, ed, *Property: Mainstream and Critical Positions* (Toronto: University of Toronto Press). For the opposing ‘property as thing’ thesis, see J E Penner. *The Idea of Property in Law* (New York, Oxford University Press, 1997); Henry E Smith ‘Property as the Law of Things’ (2012) 125 Harvard Law Review, 169.

is land it is *both* inherently relational *and* to do with a thing. The 'rights' focus of property emphasizes:

'property as a way of defining our relationships with other people. On such versions, my right to this thing or that isn't about controlling the "thing" so much as it is about my relationship with you, and with everybody else in the world'<sup>26</sup>

Where these relationships relate to use of land, we believe that the physicality of the land itself as 'a thing' is also important in forming and reforming these relationships. The spatial dimensions of land demand a more particular understanding of property relationships than can be captured around a broader picture of property. Whilst other property may be also physical, land has unique characteristics.<sup>27</sup> For centuries, English law has allowed 'real actions' for the recovery of land rather than claimants being confined to personal remedies in money. The subject matter of these real actions became "real property" or "realty", the especial thing-relatedness of such assets being their specific recoverability'.<sup>28</sup>

In both its immovability and its geography land is different. Land connects people and communities. As we are interested in the way that the physical spaces connect the communities of rights-holders, the property relationships that we are interested in take a variety of forms. They may be bilateral between people who have a direct legal nexus - for example landlord and tenant, mortgagor and mortgagee, dominant and servient owner. They may also be multipartite between people who each have a property right in relation to the same piece of land but without a direct legal nexus between them – for example the tenants of a block of flats who share communal space, a head landlord and sub-tenant, or the holders of rights of access over common land. Some of the relationships we examine can be described as 'vertical', for example between leaseholder and freeholder; some are 'asymmetrical', for example between mortgagor and mortgagee; while others are 'horizontal', for example the

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<sup>26</sup> Carol M. Rose, 'Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory', (1990) 2 Yale Journal of Law and the Humanities, 37, at 40.

<sup>27</sup> See for instance B. McFarlane, *The Structure of Property Law* (Hart, Oxford 2008) at 7-11.

<sup>28</sup> P Birks, Five Keys to Land Law, in S Bright and J Dewar (eds), *Land Law: Themes and Perspectives* (Oxford, Oxford University Press, 1998), at p 471.

relationships between people sharing a common right of access over land owned by another.

A piece of land, and the relationships that exist within that space, cannot be separated from its environment. It forms part of a larger whole, which inevitably impacts upon the relations operating within and across its boundaries. Though immovable the permanent physicality of land can alter over time as the human inter-action changes. Buildings come and go, use alters, and the relations upon that land do not remain static – they arise, evolve and may eventually cease, to be replaced by new relationships. Land also accommodates a multiplicity of interactions in terms of the relations that can exist within a given piece of land. As Gray and Gray have noted, land is the ‘physical strata on which all human inter-action takes place.’<sup>29</sup> The central socio-economic importance of land, in providing the location for residential shelter and a site for economic activity, justifies particularly sensitive treatment of the property relations it encompasses. It is for these reasons that we take land as our property subject.

### *Contract based*

We also confine our examination to relationships that emanate from a consensual base either directly or indirectly. There are, of course, many enduring property relationships that arise from other sources. For example, relationships based upon the wrong of trespass within adverse possession or prescription as well as relationships developed from customary use. However we wish to start from a clear, if pragmatic, point of demarcation to keep our enquiry within bounds. Relational contract theory provided an initial focus, as well the work of contract focussed empiricists and in particular Macaulay's pithy distinction between the ‘paper deal’ and the ‘real deal’.<sup>30</sup> As with other contractual relationships, property relationships that are directly derived from a contractual base need to take account of implicit understandings which inform or lie beyond the stated contractual terms.

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<sup>29</sup> K. Gray and S. Gray, *Elements of Land Law* (5<sup>th</sup> edn OUP 2009) [1.1.1]

<sup>30</sup> S Macaulay, ‘The Real Deal and the Paper Deal: Empirical Pictures of Relationships, Complexity and the Urge for Transparent Simple Rules’ (2003) 66 MLR 44.

For now, we focus on consensual relationships which are (or were once) negotiated at arm's length or which are commercially based. This means putting to one side trusts of the family home. The 'dynamics' approach is particularly pertinent in that context, but the dominant dynamics of the *family* relationship are likely to drown out the influence of the essential spatial and temporal dimensions of land that we wish to explore.

### **Part 3: Key themes**

We have identified six different themes which can be used as frames, or perspectives, from which to view and better understand enduring property relations: The Complex Network of Sources; Regulation; Property's Temporal Element: Flexibility and Transmissibility; and Discretionary Spaces in Decision Making. These themes are all subject to the overarching idea that property relationships are both dynamic and long-lasting. They are inter-related and some ideas could, perhaps, be slotted under different headings. We present them here separately for the sake of clarity

#### **The Complex Network of Sources**

Drawing inspiration from relational contract theorists, it is clear that in order to understand the dynamics of the relationships between land users it is necessary to look beyond the explicit terms governing the relationship. As with Macneil's insight about relational contracts, we consider that analysis of property law requires 'understanding, recognition and consideration of all essential elements of its enveloping relations'.<sup>31</sup>

It is important also to consider the combined effect on the one hand of the dictates imposed, and the subtle influences exerted, by external sources and on the other hand the implicit understandings developed between land users. This is a complex task.

In addition to the general principles of property and contract law, there are the terms negotiated between the parties (which are often overlooked by scholars focussing on generalities), self-generated norms, and external sources of regulation which are considered below as a separate theme. These are not hard and fast divisions between different sources. They have interconnecting boundaries and lie along a spectrum

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<sup>31</sup> Ian R Macneil, (2000) 94 NWULR 877, 881 (footnotes omitted).

reflecting their potency in affecting a relationship between the land users from time to time.

Doctrinal scholars tend to focus upon legal rules. In the context of land these will be mainly property rules, including the rules that dictate the definitional content of *de jure* property interests. For example, rules that easements must conform to the characteristics described in *Re Ellenborough Park*,<sup>32</sup> that a tenant must have exclusive possession<sup>33</sup> that a charge must sufficiently appropriate property to the repayment of a debt<sup>34</sup> or that a mortgage (properly so called) transfers a proprietary right as security for the repayment of a debt and accordingly creates an equity of redemption.<sup>35</sup> In addition, there are default rules that apply, unless excluded or varied, to certain types of property generally by statutory implication which often reflects long standing practice. For example, a legal charge by way of mortgage confers upon the chargee, a right to possession of the mortgaged property ‘before the ink is dry on the paper’<sup>36</sup> and an implied power of sale and to appoint a receiver.<sup>37</sup>

Even this is insufficient, however. Many property rights are governed by contracts; that define their parameters – the contractual terms set out the on-going rights and responsibilities of the parties and they may alter default property rules that would otherwise apply. To understand the property relationship created it is therefore necessary to look beyond property law and to see what the contract provides and how contractual principles affect the relationship. Additional to the express terms of the contract there may be terms implied by common law, equity and statute. Express terms are subject to the canons of construction and contractual interpretation,<sup>38</sup> and may also be subject to the controls imposed by equity against oppressive and

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<sup>32</sup> [1956] Ch 131.

<sup>33</sup> *Street v Mountford* [1985] AC 809.

<sup>34</sup> *Re Cosslet Contractors* [1998] Ch 495 at 508

<sup>35</sup> *Swiss Bank Group v Lloyds Bank Ltd* [1982] AC 584 at 594.

<sup>36</sup> Law of Property Act 1925 s87(1) and *Four-Maids Ltd v Dudley Marshall (Properties) Ltd* [1957] Ch 317.

<sup>37</sup> Law of Property Act 1925 s101. Other examples from English land law include sections 78 and 79 of the Law of Property Act 1925, essentially intended as word-saving devices to assist in the transmissibility of restrictive covenants.

<sup>38</sup> See for example *Arnold v Britton* [2015] AC 1619 and *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] 3 WLR 1843.

unconscionable terms<sup>39</sup> or penalties<sup>40</sup> and the statutory standards of fairness to which consumer contracts must conform.<sup>41</sup>

To understand fully how a particular property relationship operates we need also to appreciate the role of its contract. Yet property academics tend to stop short by limiting their attention to the generality of legal principles and so side-line the impact of both standard and relationship specific contractual terms in constructing the property relationship. For example, a mortgagee may expressly define the events that constitute a mortgagor's default under the mortgage and qualify their right to immediate possession until such default.

It is also important to appreciate the interface between contract and property rules, and in particular the outcome when these conflict: for example terms that clog the equity of redemption may be satisfactory through a contractual lens but void under property law,<sup>42</sup> or a lease of uncertain duration may be valid as a matter of contract but fall foul of the requirement for certainty of term demanded by property law.<sup>43</sup>

We also include *de facto* self-generated norms in our enquiry, based on social constructionist theories which illuminate how property constructs relationships between people, and how people construct and adjust property rules through everyday life.<sup>44</sup> If we look at the on-going relationships rather than the one-off moments, we cannot understand the lived realities without taking into account the diverse norms that are developed by the parties. By reason of their individual entitlements to land or over communal space, parties frequently develop norms and conventions of customary behaviour to facilitate their shared use. The parties may not know or be concerned to check the legal frame of their relationship – the lease or mortgage simply 'stays in the cupboard'.<sup>45</sup> Even if checked, the express terms may be

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<sup>39</sup> See for example *Knightsbridge Estates Trust Ltd v Byrne* [1939] Ch 441.

<sup>40</sup> *Madessi v Cavendish Square Holdings BV* [2015] 3 WLR 1373.

<sup>41</sup> Consumer Rights Act 2015 and s140A-C Consumer Credit Act 1974.

<sup>42</sup> For example options to purchase which bar the equity of redemption in a mortgage relationship see *Jones v Morgan* [2001] EWCA Civ 995.

<sup>43</sup> *Prudential Assurance Ltd v London Residuary Body* [1992] 2 AC 386 and *Berrisford v Mexfield Housing Co-operative Ltd* [2011] UKSC 52.

<sup>44</sup> Roger Cotterell, *Law, Culture and Society: Legal Ideas in the Mirror of Society* (Aldershot, Ashgate 2006).

<sup>45</sup> S J Bright, J Patrick, Kathryn B. Janda, and Ben Thomas, '[The evolution of greener leasing practices in Australia and England](http://www.energy.ox.ac.uk/wordpress/wp-content/uploads/2014/11/The-Evolution-of-Greener-Leasing-Practices-in-Australia-and-England.pdf)', paper presented at RICS COBRA AUBEA 2015 available at: <http://www.energy.ox.ac.uk/wordpress/wp-content/uploads/2014/11/The-Evolution-of-Greener-Leasing-Practices-in-Australia-and-England.pdf>

ambiguous or silent on the issue upon which the parties need an answer. Practices thus emerge and are developed to address gaps, to agree the meaning of stated obligations, to find ways around inconsistencies or unwanted terms may be simply ignored. These norms, conventions or social practices may have a powerful influence upon the parties' behaviour and their relationship.

*De jure* rights may be lived differently or acquire new legal meaning as relations between property users change, as recognised within a specific property relationship through the doctrines of waiver or estoppel and more prosaically in constructing the relations between neighbours, as we will show later when discussing *Bradley v Heslin*<sup>46</sup>. Yet these understandings and norms developed by parties over time are likely to undermine the clarity of property. Carol Rose has shown that judges, who have to examine facts post hoc, tend to lean towards 'mud' rules – applicable to individual circumstances and/or not obvious until litigated - when asked to adjudicate on property rights which have been readjusted by social understandings or where the power imbalance between the parties is inequitable.<sup>47</sup> Information theorists unsurprisingly favour the clear message and limited transaction costs associated with 'crystal' rules. Merrill and Smith point out approvingly that, unlike the relative freedom allowed to parties to a contract, 'with respect to the legal dimensions of property, the law generally insists on strict standardization' of interests.<sup>48</sup> We feel that this is too simplistic an analysis. There are many illustrations of decision-makers acknowledging the messy mud-like reality of lived property relationships.<sup>49</sup>

We recognise that evaluating the role of these understandings and self-generated norms presents a very real challenge. Their elements and boundaries are difficult to first identify and then unpick. They are perhaps particularly relevant to self-managed property relations, for example residential long leasehold in the English context, in which owners own, manage and use the site collectively. Property theorists have used the term 'governance' when analysing this type of property relationship, although in different ways. For example, Smith differentiates 'property' which he associates with

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<sup>46</sup> [2014] EWHC 3267 (Ch)

<sup>47</sup> C.M. Rose, 'Crystals and Mud in Property Law' (1987-88) 40 *Stan. L. Rev.* 577.

<sup>48</sup> Thomas W. Merrill & Henry E. Smith, 'Optimal Standardization in the Law of Property: The *Numerus Clausus* Principle', (2000), 110 *Yale Law Journal*, 1, at 3.

<sup>49</sup> See for instance our illustrations in Part 4 below.

exclusionary rights) from 'governance', giving governance a wide meaning that includes sources ranging 'from contractual provisions, to norms of proper use, to nuisance law and public environmental regulation'.<sup>50</sup> More recently, Smith has looked at the role of custom in property law through the lens of information theory and transactional costs; he argues that adopting custom as law may be effective with a small audience that shares common knowledge, but property law cannot accommodate custom with an extensive non-homogenous audience.<sup>51</sup> By contrast, Alexander defines 'governance property' as including both the external relations of property and internal governance norms in multiple-ownership property.<sup>52</sup>

We are drawn to Alexander's approach which bundles together self-generated norms and legal instruments as 'property', although recognising the difficulties that this definition creates (see later discussions on Transmissibility and Decision Making). Here we find Jane Baron's re-evaluation of the bundle of rights analysis of property very helpful; this approach would enhance clarity about whether to 'propertise' rights which are currently difficult to categorise but which fall within our broad scope of enquiry.<sup>53</sup> At present we have many questions to explore. Why and how do such understandings evolve? Once sufficiently embedded into a particular relationship, what is their force and effect? How do they 'sit' within the frame of formally articulated legal rules, with which indeed they may conflict? In pushing our understanding of the reality of the internal dynamics of enduring property relationships we wish to try and find the answers to these questions.

## **Regulation**

A wide range of regulatory measures that impact on enduring property relations is layered across the doctrinal rules of contract and property law. This plurality of regulations and regulators is mirrored in the plural definitions of regulation itself.<sup>54</sup>

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<sup>50</sup> HE Smith, 'Exclusion versus Governance: Two Strategies for Delineating Property Rights' (2002) 31(S2) *Journal of Legal Studies* S453, at S455.

<sup>51</sup> Henry E Smith 'Community and Custom in Property' (2009) 10:5 *Theoretical Inquiries in Law*, 6.

<sup>52</sup> Gregory S. Alexander, 'Governance Property' (2012) 160 *University of Pennsylvania Law Review* 1853.

<sup>53</sup> J.E. Baron, 'Rescuing the Bundle-of-Rights Metaphor in Property Law' (2014) 82 *University of Cincinnati Law Review* 57.

<sup>54</sup> Christine Parker, 'The Pluralization of Regulation' (2008) 9 *Theoretical Inquiries in Law*, 349.

We would include the various forms of regulation and/or 'soft law',<sup>55</sup> as an important source of property law. Failing to take account of the influence of regulation means failing to understand the true nature of property relationships.

These regulatory measures can play several, often interconnecting, key roles. They may rebalance the inequality of bargaining power between the parties to breathe some reality into the consensual foundation of the parties' relationship. Thus statutory rules may effectively insert rights or obligations into the property relationship or control the content or exercise of apparently 'agreed' obligations. For instance, the terms of a consumer credit relationship must meet statutory standards of fairness<sup>56</sup> and in some instances may be struck down or altered or upon enforcement.<sup>57</sup>

More fundamentally the property rules may construct a relationship which fails, without regulatory adjustment, to implement the parties' intentions. The structure of the legal charge as a security device provides a clear example which we explore more fully below. The time-limited ownership created by a residential long lease may also not fully reflect the parties' purposes, but leasehold has been adopted as a useful legal device to overcome obstacles to the transmissibility of the positive obligations necessary to regulate communal spaces and facilities.<sup>58</sup> Certain lessees have a right to alter their relationship with their landlord through statutory rights to extend or renew their lease,<sup>59</sup> to query service charges<sup>60</sup> or alter their management relationship<sup>61</sup> and to end the leasehold relationship through enfranchisement.<sup>62</sup>

Regulation may also provide routes to promote flexibility within the parties' relationship by providing opportunities for that relationship to be re-negotiated or

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<sup>55</sup> Filippo M. Zerilli 'The rule of soft law: An introduction' *Focaal – Journal of Global and Historical Anthropology* 56 (2010) 3; Anna Di Robillant 'Genealogies of soft law' *American Journal of Comparative law* 54 (2006) 499.

<sup>56</sup> Consumer Rights Act 2015.

<sup>57</sup> For example in the case a regulated consumer credit agreement by s140A-C Consumer Credit Act 1974.

<sup>58</sup> In contrast to distinct communal ownership structures found in condominium and strata titles in other common law jurisdictions and commonhold in this jurisdiction.

<sup>59</sup> Landlord and Tenant Act 1954 and the Leasehold Reform and Housing and Urban Development Act 1993 (as amended).

<sup>60</sup> s19 Landlord and Tenant Act 1985

<sup>61</sup> Commonhold and Leasehold Reform Act 2002.

<sup>62</sup> Leasehold Reform and Housing and Urban Development Act 1993 (as amended).

otherwise adjusted. For instance, restrictive covenants may be modified or extinguished under section 84 Law of Property Act 1925.

Regulation may take the form of command and control rules that stem from ‘top-down’ regulatory measures externally imposed, usually by government or regulatory bodies, but other regulatory norms may display a softer influence through measures that steer, rather than dictate, particular responses in property relationships. For example, the forthcoming introduction of minimum energy efficiency standards making it unlawful to let properties that fail to achieve a prescribed minimum energy efficiency standard, is driving the adoption of particular ‘green lease’ clauses in some segments of the commercial property market.<sup>63</sup>

Regulatory control may also be focussed upon the conduct of one of the parties who is called upon to observe certain standards of behaviour. Those standards may be tightly framed by the traditional ‘do’s and don’ts’ of command and control rules or may be more open textured as evidenced in principled regulation which leaves the regulated to determine the way in which they comply with a set of overarching behavioural norms. For instance, regulated mortgage providers<sup>64</sup> are required to treat their customers fairly, and to embed that standard in all aspects of their business.<sup>65</sup> An external regulator, in this instance the Financial Conduct Authority, is responsible for monitoring and achieving compliance, if necessary by resort to disciplinary sanctions, but more routinely through subtle pressure. In addition when looking at a particular aspect of a regulated mortgage provider’s relationship with their borrower, for instance upon the borrower’s default, regulatory rules outline how the mortgagee should act.<sup>66</sup>

Regulatory theory has identified a wide range of influences, actors and networks beyond government in setting, monitoring and seeking compliance with behavioural standards within the governance of a variety of relationships, as highlighted by the

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<sup>63</sup> K B Janda, S Bright, J Patrick, S Wilkinson, T Dixon, ‘Green Leases as Tools for Inter-Organisational Governance’, *BRI* (forthcoming)

<sup>64</sup> As defined by Financial Services and Markets Act 2000 (Regulated Services) Order Art 61 & 61A S12001/544.

<sup>65</sup> Financial Services and Markets Act 2000 & FCA Handbook PRIN 6.

<sup>66</sup> See MCOB 13.

work of Ayres and Braithwaite<sup>67</sup> and explored, within financial markets, by Black.<sup>68</sup> Thus ‘top-down’ forms of regulation, may be supplemented, or even kept at bay, by the influence of ‘middle-out’ – or sideways - regulatory pressures,<sup>69</sup> from, for example, property professionals such as lawyers and industry groups. This can be seen, for example, in the way that the Better Buildings Partnerships in both London and Sydney have promoted ‘toolkits’ providing a menu of ‘green clauses’ that parties can elect to include in leases and that provide a framework ‘for sustainable operations and collaboration throughout the life of commercial leases right from the on-set’.<sup>70</sup> The Council of Mortgage Lenders have also staved off legislative reform, following disquiet resulting from the decision in *Horsham Properties Group Ltd v Clark*,<sup>71</sup> by providing ‘guidance’ to their members on when it is appropriate to appoint a receiver or seek a court order for possession.<sup>72</sup>

### **Property's temporal element**

We use ‘enduring’, in the sense of long-lasting or on-going, relationships in property; we are particularly interested in the role of time in property law theory. Property law has of course always incorporated a temporal element: easements and rights of adverse possession may be acquired through practice over time; a lease is a time-limited property right; trusts make provision for future interests. The duration of a property relationship may be indefinite (the fee simple), fixed for a long notional duration (e.g. 99 or 999 years), for a shorter duration but with a possibility that the relationship will be renewed (e.g. short commercial leases) or defined by reference to an obligation (as in the case of mortgages).

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<sup>67</sup> I. Ayres & J. Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (USA, OUP, 1992).

<sup>68</sup> See, for example, J Black, ‘Enrolling Actors in Regulatory Processes: Examples from UK Financial Services Regulation’ [2003] Public Law 62; J Black ‘The Emergence of Risk Based Regulation and the New Public Management in the UK’ [2005] Public Law 512; J. Black, M. Hopper and C. Band ‘Making a Success of Principles Based Regulation’ (2007) *Law and Financial Markets Review* 191.

<sup>69</sup> Y Parag and KB Janda, ‘More than Filler: Middle Actors and Socio-Technical Change in the Energy System from the Middle-Out’ (2014) 3 *Energy Research and Social Science* 102.

<sup>70</sup> K B Janda, S Bright, J Patrick, S Wilkinson, T Dixon, ‘Green Leases as Tools for Inter-Organisational Governance’, *BRI* (forthcoming)

<sup>71</sup> [2009] 1 WLR 1255.

<sup>72</sup> CML, Guidance for members – the role of LPA receivers (CML 2011).

Our property law schema goes beyond these doctrinal rules to look at the adaptive approach over time by the parties to the property relationship, and their successors. We are therefore interested in how the ideas discussed by relational contract theorists and in empirical contract scholarship might provide insight into enduring property relationships, and a vocabulary to aid exploration of long-term property rights. In the section on Flexibility, we consider whether commercial and residential leases can be categorised as discrete or relational contracts. Also linked to the temporal element, there are particular features of enduring property relationships that relate to the transmissibility of property obligations, that is, their impact on third parties, whether by the volition of the holder or as appurtenant to the estate to which it is attached. Transmissibility issues are considered in the section that follows.

### **a) Flexibility**

Although the idea of ‘enduring’ property relations would appear to resonate strongly with relational contracts we are intrigued by the fact that whereas some property relations do reflect the norms of solidarity, reciprocity, flexibility and role integrity that Macneil associates with long-term contracts at the relational end of the discrete/relational spectrum,<sup>73</sup> others appear to be founded on norms more commonly associated with ‘as if discrete’ contracts. Again, leases provide useful illustrations. The longevity of leases suggests that they would display the norms associated with relational contracts, such as ‘flexibility’ and contractual solidarity and trust in order to preserve the relationship. Villiers and Webb characterise Australian retail leases as relational on the basis of the mutuality of economic benefit, incompleteness (lightness of landlord obligations) and the ongoing conversations (for example, in relation to rent review and alienation).<sup>74</sup> Yet, commercial leases do in fact behave in many respects like ‘as if discrete’ contracts. Commercial landlord and tenant relationships are typically adversarial, with commercial tenants often complaining of poor communication (both between landlord and tenant, and between tenants in multi-tenanted buildings), adversarial stances, and slow response times to problems.<sup>75</sup>

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<sup>73</sup> Ian R Macneil, (2000) 94 NWULR 877, 897.

<sup>74</sup> L. Villiers and E. Webb, ‘Using relational contract principles to construe the landlord-tenant relationship: Some preliminary observations’ (2011) 1 Property Law Review 21.

<sup>75</sup> Langley, A. and V. Stevenson. Incorporating Environmental Best Practice into Commercial Tenant Lease Agreements: Good Practice Guide- Part 1. 2007. Welsh School of Architecture, Cardiff (ISBN 978-1-899895-37-3) [www.greenleases-uk.com](http://www.greenleases-uk.com); Langley, A and V. Stevenson. 2007. Incorporating

We might also expect there to be much open-endedness and flexibility with commercial leases, given their enduring nature, rather than what Macneil refers to as ‘presentation’. This term was invented by Macneil to cover the idea of taking a decision in the present moment about all, including future, aspects of the contract. That is, there will be presentation if there is complete contract planning at the time of contract formation, something we would expect with ‘as if discrete’ contracts but not with strongly relational contracts. Translated into the commercial lease context we might anticipate flexibility to mean something like, “the lease itself provides accommodation on terms that do not constrain the occupier's ability to respond to its changing business circumstances.”<sup>76</sup> However, empirical evidence shows that commercial leases are seldom flexible.<sup>77</sup> They provide for high levels of presentation. For example, anticipating the need for adjustment over time, commercial leases typically include carefully drafted and detailed upward-only rent review clauses. Recently, in *Marks and Spencer plc v BNP Paribas*, the Supreme Court declined to imply a term into a commercial lease that would enable the tenant to recover that portion of the ‘quarter’s’ rent paid in advance that would reflect the fact that the lease ended within that quarter following the exercise of the break clause. Lord Neuberger referred to the fact that to imply a term would ‘lie somewhat uneasily’ with the fact that the lease was a ‘very full and carefully considered contract’,<sup>78</sup> that is, in RCT terminology, the lease displayed detailed presentation.

In the residential leasehold sector, similar provisions are often found in relation to future service charges. These can have an unanticipated impact. A recent English Supreme Court decision relating to the computation of services charges in residential leases, *Arnold v Britton*,<sup>79</sup> illustrates the trap of presentation. Between 1977 and 1991 a number of leases of chalets in a caravan park had been granted for 99 year terms. The initial annual service charge was £90 and the leases provided for this charge to increase each year to keep broadly in line with inflation. The problem was that

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Environmental Best Practice into Commercial Tenant Lease Agreements: Good Practice Guide- Part 2. 2007. Welsh School of Architecture, Cardiff (ISBN 978-1-899895-39-7). [www.greenleases-uk.com](http://www.greenleases-uk.com).

<sup>76</sup> DETR, *Monitoring the Code of Practice for Commercial Leases, Interim Report* (April 2004), p.ii.

<sup>77</sup> N. Crosby, V. Gibson, S. Murdoch, “UK Commercial Property Lease Structures: Landlord and Tenant Mismatch” 40 *Urban Studies* 1487; Reading University, *Monitoring the 2002 Code of Practice for Commercial Leases*, ODPM, March 2005.

<sup>78</sup> *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd and another* [2015] UKSC 72 [49].

<sup>79</sup> [2015] AC 1619.

changed economic conditions meant that the particular wording used would result by 2072 in service charges of over half a million pounds annually! The parties had provided contractually for future price changes but the ravages of time mean that the particular impact had not been imagined. The Supreme Court, in applying the principles of contractual interpretation, was unable to interfere with this patently absurd result although they did so reluctantly and with a strong dissenting voice. The majority could only suggest Parliamentary intervention or future negotiations between the parties to vary the service charge provision, in which the landlord would clearly hold the stronger hand.<sup>80</sup>

We agree with Macaulay and Bernstein that to understand, in our case, property relationships, it is necessary to look beyond the ‘paper deal’ to the ‘real deal’ and, in particular, to reflect upon and identify when the paper deal is ‘non-used’ (as when the lease stays ‘in the cupboard’), and when non-contractual norms are preferred (as when non-binding Memorandum of Understanding are used in preference to the insertion of binding clauses into leases).<sup>81</sup> Concepts drawn from RCT scholarship can, thus, help to articulate what we see happening within property relationships. RCT scholars talk of ‘relationship-preserving’ norms, applicable when parties seek to resolve problems themselves, and ‘end-game norms’, such as resorting to courts, that are used when the enduring relationship based on trust is over. The concept of ‘braiding’,<sup>82</sup> that is, the intertwining of the formal (enlisting the judicial system to assist performance and provide remedies if there is breach) and the informal (informal enforcement by the parties’ actions alone without court intervention) within contractual relations, may also be broadened to property relations. This flexibility between parties is often essential to the maintenance of long-term property relationships.

The role of courts, tribunals and mediators as potential ‘agents of settlement’<sup>83</sup> may enable them to build flexibility into enduring property relations, as demonstrated in the judgement of Norris J in *Bradley v Heslin* or in the discretionary power of the

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<sup>80</sup> Per Lord Neuberger at [60]-[65].

<sup>81</sup> Jackman, Sarah (2010). A War of Attrition – Roundtable. June 2010. *Estates Gazette*, 102-103, <http://www.betterbuildingspartnership.co.uk/download/bbp-green-lease-round-table.pdf> .

<sup>82</sup> Ronald J Gilson, Charles F Sabel and Robert E Scott, ‘Braiding: the interaction of formal and informal contracting in theory, practice and doctrine’ (2010) 110 *Columbia Law Review*, 1377.

<sup>83</sup> S Macaulay, ‘The Real and the Paper Deal: Empirical Pictures of Relationships, Complexity and the Urge for Transparent Simple Rules’ (2003) 66 *Modern Law Review*, 44.

courts to control a mortgagee's right to possession (both of which we use later as worked illustrations). However, the need to work within established legal doctrine sets constraints, at least in relation to court-based dispute resolution. This has implications for discretionary spaces of decision making, as seen in the outcome of *Arnold v Britton*. In that case Lord Hodge commented regretfully that the fact 'that the court does not have power to remedy these long term contracts so as to preserve the essential nature of the service charge in changed economic circumstances does not mean that the lessees' predicament is acceptable.'<sup>84</sup>

### **b) The Transmissibility of Property Rights and Obligations**

As property rights are likely to outlast the current right holders, the potential for transmissibility shapes the general principles of property law, the negotiated content of property rights, and the way in which property relationships are regulated. Thus, the enduring nature of property relations is taken into account. Long leases, for example, will usually contain clauses that have been expressly negotiated between the parties to regulate what happens when the lease is to be sold to a new owner, and these alienation provisions are supplemented by statutory provisions designed to prevent exploitation 'by unscrupulous landlords for their own devices'.<sup>85</sup>

Although it is not a defining feature of a property right that the benefit and the burden must have the potential to be passed to third parties,<sup>86</sup> it is the case that 'transmissibility is often an important incident of proprietary entitlement'.<sup>87</sup> This is not surprising given the longevity of property rights, coupled with their economic, social and commercial significance. Contractual terms may achieve an enduring, and transmissible, quality because they become attached to the property relationship. This is true, for example, of terms falling within the mutual benefit and burden principle<sup>88</sup>, which provides an ingenious solution to the problem (in English law) that positive covenants are unenforceable against freehold successors in title. Leasehold covenants can be also enforced by and against the persons who are in the property relationship

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<sup>84</sup> At [79].

<sup>85</sup> *Design Progression Ltd, v Thurloe Properties Ltd* [2004] EWHC 324 (Ch)[1]. For statutory control, see Landlord and Tenant Act 1927, s 19; Landlord and Tenant Act 1988.

<sup>86</sup> P Birks, Five Keys to Land Law, in S Bright and J Dewar (eds), *Land Law: Themes and Perspectives* (Oxford, Oxford University Press, 1998), at p 474; K. Gray and S. Gray, *Elements of Land Law* (5<sup>th</sup> edn OUP 2009) [1.5.26]

<sup>87</sup> K. Gray and S. Gray, *Elements of Land Law* (5<sup>th</sup> edn OUP 2009) [1.5.26].

<sup>88</sup> *Halsall v Brizell* [1957] Ch 169.

of landlord and tenant for the time being, even though they are not in a contractual relationship, .<sup>89</sup> [Interestingly, the Act was driven in large part by the need to remove the enduring nature of contractual liability; that is, to release former landlords and former tenants from the otherwise continuing contractual liability, and instead recognising liability as appropriately belonging only to the property relationship].<sup>90</sup> .

Other contractual obligations or self-generated norms although not formally attached to property may have an effect upon others who are in, or enter, the web of property relations within an area of land through less formal mechanisms, for instance through implied novation, estoppel or waiver. We also need to look beyond doctrine to other means by which compliance is required or encouraged, for instance when there is a mingling of legal rules and self-generated norms in dispute resolution or through social and commercial pressure.

We want to pursue the idea of a ‘spectrum of enforceability’ in the transmissibility of the internal dynamics of a property relationship, incorporating the relative strengths of the express and implicit understandings relating to the exercise of both the *de jure* rights and the *de facto* use of land. This idea of a spectrum seeks to capture the differing influence of these terms or understandings. For instance, at one end of this spectrum we have noted formal mechanisms that govern the enforceability of legally appurtenant terms, particularly leasehold covenants, but at the other end of the spectrum is the extent to which understandings developed by A and B regulating their use of communal space affect, or get adopted by, A2 and B2 to whom either A or B transfer their entitlement to that communal space. Here we are on the challenging boundaries between mere understandings, contract and property. It is difficult to bring informal, self-generated norms within the definition of a property right set out in *National Provincial Bank v Ainsworth* [1965] 3 WLR 1:

‘before a right or an interest can be admitted into a category of property, or a right affecting property it must be definable, identified by third parties,

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<sup>89</sup> A result initially achieved through a combination of common law and statute (*Spencer’s Case* (1583) 5 Co Rep 16a; Law of Property Act 1925 ss 141 and 142) and now by the Landlord and Tenant (Covenants) Act 1995.

<sup>90</sup> Reflecting the principle that they should ‘not continue to enjoy rights nor be under any obligations from a lease once...[they] have parted with all interest in the property’: Law Commission, ‘Landlord and Tenant: Privity of Contract and Estate’ (Law Com No 174, 1988) para 4.1.

capable in its nature of assumption by third parties, and have some degree of permanence and stability.’<sup>91</sup>

This is a classic example of a 'crystal rule', perfectly designed for regulating one-off transactions between strangers.<sup>92</sup> However, an appreciation of the dynamics of enduring property relationships dictates an exploration of this spectrum of enforceability that underlies the rights and understandings within a given relationship.

### **Discretionary Spaces in Decision Making**

Here we address the issues of how enduring property relations are, could be, or should be, acknowledged in a range of decision-making scenarios from informal dispute-resolution between parties, mediation, regulation, to courts and property tribunals. Since it is clear that the manner in which disputes can be and are resolved between the parties inevitably impinges upon their relationship.

Formal remedial powers to intervene in property relations are given to the courts, often couched in the exercise of discretion, to ensure the preservation of enduring property relations. For example, leases can be ‘saved’ when relief is ordered,<sup>93</sup> the mortgagee’s right to possession delayed when the court has discretion to regulate enforcement<sup>94</sup> or the proprietary status of restrictive covenants ‘downgraded’ where a court, in the exercise of its discretion, refuses an injunction.<sup>95</sup> However, in such cases the property rights are not in doubt.

Disputes over property claims which are at least partly founded in social norms and expectations pose a particular problem for decision-makers. Yet, once settled or adjudicated, we are intrigued by the way in which solutions moulded from ‘mud’ may be transformed into ‘crystallised’ rights. A strong example is provided by claims based on estoppel, which require the courts to examine a range of contextual factors, including self-generated norms, in order to ‘decide’ (or discover<sup>96</sup>) the parties' rights.

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<sup>91</sup> [1965] AC 1175 at 1247-8.

<sup>92</sup> C.M. Rose, ‘Crystals and Mud in Property Law’ (1988) 40 Stan. L. Rev. 577.

<sup>93</sup> A jurisdiction originally founded equity but now contained in s146(1) Law of Property Act 1925.

<sup>94</sup> S36 Administration of Justice Act 1970.

<sup>95</sup> *Jaggard v Sawyer* [1995] 1 WLR 269, *Coventry t/a RDC Promotions v Lawrence* [2014] AC 822.

<sup>96</sup> Scholars differ as to whether the courts are simply declaring rights that are already established (eg Ben, CLJ 2003, commenting on proprietary estoppel) or whether it is the court that effectively crystallises the right (see eg Doyle and Brown, ‘*Jones v Kernott*: which road to Rome’ 2012 Trust Law International 96 at 104, discussing the CICT)

Until the court's determination the position is 'inchoate', yet even these muddy rights may be binding upon new owners of the land. What factors persuade a judge, in reconciling a dispute between either the original parties or their successors, to recognise their import? Once there is a court judgement the rights will crystallise and become clear; but, of course, in the vast majority of lived relationships it is the muddy rights that endure as the cost of dispute resolution is prohibitive for the many.

Our perspective pays attention to this insight, drawing on recent US property scholarship which has at least partially addressed this issue. Gerhart analyses judicial decisions through the lens of socially constructed property obligations owed to others.<sup>97</sup> Dyal-Chand highlights the often inappropriate 'all or nothing' outcomes to property disputes which result from a focus on individual ownership and title, arguing that property sharing should be promoted as an outcome and that property rights, wherever they may be situated on the spectrum between exclusive ownership and commons property, should be recognised by the courts.<sup>98</sup>

A form of commons property is recognised through the Commons Registration Act 2006, which permits registration of a village green where a significant number of local inhabitants have 'indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years'.<sup>99</sup> This is a collective property interest based on use over time which matures into an established right. As for how the collective right might be exercised, in the *Redcar and Cleveland* case Lord Walker expressed the view that:

conflicts over competing uses (whether as between the owner and the local residents, or between different interest groups among the local residents) are capable of resolution by the "constant refrain in the law of easements that 'between neighbours there must be give as well as take'" (Gray and Gray, *Elements of Land Law*, 5<sup>th</sup> ed. 2009) para 5.2.72, citing Megarry J in *Costagliola v English* (1969) 210 EG 1425, 1431).<sup>100</sup>

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<sup>97</sup> P. Gerhart, *Property Law and Social Morality* (Cambridge University Press, 2013)

<sup>98</sup> R. Dyal-Chand 'Sharing the Cathedral' (2013) 46 Connecticut Law Review 647

<sup>99</sup> Section 15 (2)(a).

<sup>100</sup> *R (on the application of Lewis) v Redcar and Cleveland BC* [2010] UKSC 11, at [48].

However, courts may be unable to enforce 'give and take' as a solution to some property disputes. As Norris J noted in *Bradley v Heslin*, the 'court cannot write a rulebook for what may or may not be done in every eventuality', although in that case he was able to find a property solution to the dispute.<sup>101</sup> An alternative solution would be for the parties to attend mediation and come to their own resolution. Judges commonly make pleas for mediation in neighbour dispute cases, demonstrating their understanding of the enduring and dynamic nature of property relations, as in these examples:

An attempt at mediation should be made right at the beginning of the dispute and certainly well before things turn nasty and become expensive. By the time neighbours get to court it is often too late for court-based ADR and mediation schemes to have much impact. [...]. Almost by its own momentum the case that cried out for compromise moves onwards and upwards to a conclusion that is disastrous for one of the parties, possibly for both.<sup>102</sup>

All disputes between neighbours arouse deep passions and entrenched positions are taken as the parties stand upon their rights seemingly blissfully unaware or unconcerned that that they are committing themselves to unremitting litigation which will leave them bruised by the experience and very much the poorer, win or lose. It depresses me that solicitors cannot at the very first interview persuade their clients to put their faith in the hands of an experienced mediator, a dispassionate third party, to guide them to a fair and sensible compromise of an unseemly battle which will otherwise blight their lives for months and months to come.<sup>103</sup>

Forms of mediation and arbitration are becoming increasingly significant in the dispute resolution process as litigation becomes beyond the economic and practical

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<sup>101</sup> [2014] EWHC 3267 (Ch), at [84].

<sup>102</sup> *Bradford v James* [2008] EWCA Civ 837; Mummery LJ at [1].

<sup>103</sup> *Oliver & Anor v Symons & Anor* [2012] EWCA Civ 267; Ward LJ at [53].

reach of many property owners.<sup>104</sup> And even those who can afford litigation would be well advised to consider alternatives, such as negotiation or some form of ADR, or risk being penalised in an order for costs.<sup>105</sup>

Indeed in certain contexts ADR is formalised and required at least as a preliminary step. For example regulated mortgage providers must have an internal complaints handling process and once this process is exhausted the mortgagor is entitled to refer his or her dispute to the Financial Ombudsman Service for resolution.<sup>106</sup> The Ombudsman is empowered to throw away the ‘agreed’ contractual handbook to resolve the dispute in a manner that it considers fair and reasonable on a case by case basis. It is evident that the Ombudsman plays a valuable role not just in resolving individual disputes but in influencing regulatory standards of ‘fair’ conduct expected of regulated mortgage providers and in precipitating regulatory action by the Financial Conduct Authority to resolve market wide malpractice. A recent example being the industry-wide agreed compensation package for the miss-selling of payment protection insurance.<sup>107</sup>

To illustrate this complex pattern of dynamics we provide some illustrations from our work to date.

#### **Part 4: Some Examples**

We offer three examples of property relationship dynamics which demonstrate the issues with which we are concerned. The first, which deals with easements, we owe to Professor Alison Clarke. The second example comes from the work of Sarah Nield and Nicholas Hopkins on mortgages and the last is from Sarah Blandy’s research into residential leasehold.

##### **Easements and *Bradley v Heslin*<sup>108</sup>**

*Bradley v Heslin* has no particular doctrinal value but is interesting for our project. It originated in an express grant of a property right, so on the face of it there are clear

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<sup>104</sup> For instance see the comments of Norris J in our example of *Bradley v Heslin* [2014] EWHC 3267 at [22]-[24].

<sup>105</sup> Practice Direction - Pre-action Conduct and Protocols, Civil Procedure Rules.

<sup>106</sup> See <http://financial-ombudsman.org.uk/>.

<sup>107</sup> FCA, Thematic Review Redress for Payment Protection Insurance Mis-sales TR14/14 (August 2014).

<sup>108</sup> [2014] EWHC 3276.

contractual and property terms governing the relationship. However, these terms failed to resolve conflicts within the parties' relationship.

In 1977 the owner of a large house with a big garden downsized by building a smaller house (No 40A) in the back garden and selling off the large house and the front garden (No 40). He retained ownership of the small house and a strip of land leading from the road to the small house at the back. In the conveyance of the large house the buyer was granted a right of way over the strip of land; thus there was a shared driveway.

The buyer of the large house, No 40, was a builder, and he spent the next year or so refurbishing it, and as part of that work he laid, landscaped and tarmacked the whole of the driveway (which belonged to No 40A), changing the dimensions somewhat so that the driveway now also included some of No 40's land. He also built a pair of iron gates across the driveway where it met the road, and the operation of these gates – opening and closing - was the trigger for the litigation.

Over the next 30 harmonious years the two houses each changed hands twice. For some periods during that time the gates were kept closed and locked most of the time - these were periods when the then owner of No 40 had an aggressive dog, or young children liable to wander out into the road. At other times the gates were left open most of the time, closed only for short periods when there were worries about outbreaks of burglary in the area, or rowdy youngsters wandering in.

Then in 2012, the 'consensual, co-operative and neighbourly approach' about the driveway usage and, in particular, the gates came to an end and the present owners of the two properties fell out. As Norris J put it: both parties 'now resort to their legal rights'. The owners of No 40A (the Heslins) insisted that the gates must be kept open all the time, and eventually padlocked them open. The owners of No 40 (the Bradleys) insisted that they should be kept closed all the time, and brought proceedings for the padlock to be removed and for a declaration that they were entitled to keep the gates closed at all times.

After a three day hearing in the High Court, the judge essentially called a draw. It was held that the owners of No 40 had acquired an easement by estoppel, consisting of "a right to close and open the gates for all purposes connected with the reasonable use

and enjoyment of their property” but that the exercise of their right was subject to the proviso that it must not “substantially interfere with the reasonable enjoyment of the small house.” Although the judge handed the problem back to the neighbours to detail what was ‘reasonable’ in the circumstances (hopefully through mediation), he did give them quite detailed indications of what he would have thought would be reasonable if they did not have the good sense to buy an electronic gate.

The judgment illustrates many of the dynamics of property relationships that we are interested in. The ‘paper deal’, the formally granted easement, no longer reflected how the land was laid out or the understandings that had developed. The judge’s carving out of a flexibly understood easement bounded in the reasonableness expected by law of neighbours illustrates discretionary spaces in decision making. In the course of his judgement, Norris J grapples with the interrelationship between legal rights and agreements, understandings and ‘simple acts of neighbourliness’. Some of these, accompanied by certain actions, can be translated into legal rights (flexibility and regulation). Thus, for example, Norris suggests that the dealings ‘bore the hallmarks of an informal boundary agreement of the type considered in *Neilson v Pool* (1960) 20 P & CR 909’ and refers to Megarry J’s reference in that case that ‘such agreements and understandings are by their nature acts of peace, quieting strife and avoiding litigation, and are to be favoured in the law, however informal they might be’ (self-generated norms). Yet, there must be caution that these simple acts of neighbourliness do ‘not ripen into legal rights vested in the beneficiary of the actor’s kindness’. Further, ‘when looking at usage over a period of time’ the usage may indicate agreement, or modification of an established right, or itself establishing a right, by way of adverse possession or prescription (property’s temporal element).

When the judge considered how the neighbours had behaved throughout the harmonious 30 years he took account of the self-generated norms about when the gates were kept open and when they were kept closed, and the changes over time. He then examined these self-generated norms to make some sort of assessment of how far those rules were influenced by external factors (the physical nature of the locality, outbreaks of burglaries or anti-social behaviour by outsiders) and how far they arose out of subjective behaviour of the respective owners for the time being. He used these factors to come to some kind of assessment of what it would be reasonable for them to agree today if they were acting reasonably, disregarding their own idiosyncrasies.

Norris J pointed out that it was the grantee of the right of way (No 40) who actually built the gates and improved the driveway with the knowledge and probable consent of the owner of the driveway - largely disregarding the boundaries and terms laid out in the formal conveyance. So, whatever rights the grantee has they are clearly wider and different from those expressed in the original grant. Norris J found the understandings and conduct had led to an adjustment of ownership boundaries through either adverse possession or proprietary estoppel, and that the opening and closing the gates was covered by an equitable easement founded in estoppel.

This is the kind of analysis of the dynamics of a property relationship that we are interested in, which looks at the realities of the relationship governing the sharing of physical space. We are not necessarily saying, or only saying, that this is the kind of approach judges ought to adopt. We argue that the utility of this approach goes beyond arriving at a just settlement of property disputes to understand the true dynamics of the parties' property relationship which is enduring, evolving and may be transmissible to third parties and thus be truly proprietary in character. One of the avenues we explore is how legally recognized 'adjustments' of 'paper property rights' – through such tools as adverse possession, prescription, estoppel, and waiver - have evolved to reflect commonly encountered living stories of land use. Further, in so far as adjudication – formal and informal - resolves a dispute between parties, we are interested in how any compromises reached may affect future owners.

### **Residential Mortgages**

Mortgages differ somewhat from some of the other relationships with which we are concerned. They do not regulate shared space so much as shared value in the same property which comes to the fore on default when the mortgagee wishes take possession and exclude the mortgagor as a prelude to sale. The transmissibility of the mortgage relationship is also not so much of a central concern. The identity of the lender (as the person entitled to the contractual debt) may change through securitisation but it is not contemplated that the borrower/mortgagor will change although the property might when the lender agrees that the borrower may 'port' his or her mortgage. What is significant about the property relationship between the parties is first the impact it has upon their entitlement to and control over possession

and secondly, the authority it confers upon the mortgagee to sell and transfer ownership to a purchaser free of the mortgagor's proprietary interest.<sup>109</sup> These issues become inter-related in the event of default, however that may be defined by the loan contract, when the mortgagee looks to their security and the parties' property relationship comes to the fore.

In addressing these questions the mortgage relationship is derived from a complex web of sources. Whitehouse has noted that the legal structure of the mortgage has changed little from 1925 when the Law of Property Act introduced the concept of a legal charge by way of mortgage.<sup>110</sup> Yet the function of mortgage finance has changed dramatically in the intervening years as the primary source of funding for home ownership, and other consumer spending, as well as to provide finance for small and medium size enterprises. Major legal reform has been kept at bay by the growth of softer edged regulation, primarily of the conduct of mortgage providers, by the Financial Conduct Authority through their regulatory responsibilities under the Financial Services and Markets Act 2000.

The property relationship created by the legal charge by way of mortgage continues a fiction derived from the historical evolution of the mortgage as a property relationship.<sup>111</sup> This fiction is that the mortgagee enjoys an immediate right to possession by virtue of their deemed status as a tenant for 3,000 years. This right accrues regardless of default.<sup>112</sup> The inherent property relationship is thus far from reflecting the reality of the mortgage as a security interest and, what is more, is ambiguous in failing to articulate the rights to possession of the mortgagor.<sup>113</sup> As the holder of the legal estate one would expect the mortgagor to be entitled to possession and indeed the mortgagee as a matter of agreement, practice, convention (or what you will) at the most agrees, or in any event, allows the mortgagor to be in possession.

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<sup>109</sup> As against the rest of the world, as opposed to the mortgagor and mortgagee, the priority the mortgage affords is clearly of primary significance.

<sup>110</sup> 'A Longitudinal Analysis of the Mortgage repossession process 1995-2010: Stability, Regulation and Reform' in *Modern Studies in Property Law Vol 6* (ed Bright, Hart, Oxford 2011).

<sup>111</sup> Law of Property Act 1925 s87(1).

<sup>112</sup> *Four Maids Ltd v Dudley Marshall (Properties) Ltd* and regardless of any counterclaim by the borrower/mortgagor *Mobil Oil Co Ltd v Rawlinson* (1982) 43 P&CR 221, *Citibank Trust v Aviyor* [1987] 1 WLR 1157, *National Westminster Bank Plc v Skelton* [1993] 1 WLR 72, *Ashley Guarantee v Zacaria* [1993] 1 WLR 62.

<sup>113</sup> *Figgins Holdings Pty Ltd v SEAA Enterprises Ltd* (1999) 196 CLR 245.

Upon default by the mortgagor, the property relationship may now more closely accord with reality but there is now the danger of abuse by the mortgagee in asserting their right to possession in a relationship that is inherently one-sided; particularly in consumer mortgages where there is minimal negotiation but wide experiential differences. A degree of reality is achieved by a layering of law, regulation and self-generated norms.

Although equity cannot regulate the timing of the mortgagee's right to take possession,<sup>114</sup> equity does discourage its exercise by insisting that mortgagee only goes into possession for the purpose of recovering their debt<sup>115</sup> and by imposing strict duties to account upon a mortgagee in possession.<sup>116</sup> The criminal law also has its say in encouraging formal possession proceedings of residential premises.<sup>117</sup>

Regulation through a mix of hard and soft law supports forbearance rather than 'pay or possession' and expects mortgagees to explore the sustainability of the continued loan relationship and 'not repossess the property unless all other reasonable attempts to resolve the position [of default] have failed.'<sup>118</sup> A Pre-action Protocol on Possession Actions based upon Mortgage Arrears<sup>119</sup> reinforces this forbearance message with s36 of the Administration of Justice Act 1970 providing the final and independent assessment by the court of the loan relationships sustainability.

Underpinning the rebalancing of these 'controls' over the mortgagee's right to possession are a number of influences of the mortgage relationship which have fairness at their core. Loan terms should comply with the consumer standards of fairness now enshrined within the Consumer Rights Act 2015, there is a regulatory expectation that mortgage providers should treat their customers fairly which finds more detailed expression in the Conduct of Business Rules issued by the Financial Conduct Authority<sup>120</sup> and the Financial Ombudsman's Service provides a forum for disputes to be settled upon a fair and reasonable basis.

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<sup>114</sup> *Birmingham Citizens Permanent BS v Caunt* [1962] Ch 883.

<sup>115</sup> *Quennell v Maltby* [1979] 1 WLR 318.

<sup>116</sup> *White v City of London Brewery* (1889) 42 Ch D 237.

<sup>117</sup> s6 Criminal Law Act 1977, s1(3) Protection from Eviction Act 1977 but see *Ropaigealach v Barclays Bank* [2000] QB 263, *Horsham Properties Group Ltd v Clark* [2009] 1 WLR 1255.

<sup>118</sup> MCOB 13.3.2A (6).

<sup>119</sup> Available at [http://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot\\_mha](http://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_mha), viewed 31 august 2015.

<sup>120</sup> See in particular the Mortgage Conduct of Business Handbook (MCOB).

However, to breathe life into this complex web of controls, the mortgagee and the various regulatory and adjudicative bodies must formulate norms and conventions to guide how they will act or exercise their discretion. For instance, mortgagees formulate their own forbearance policies, the Financial Conduct Authority have a plethora of guidance on how they expect borrowers to be treated fairly,<sup>121</sup> the Council of Mortgage Lenders have issued guidance on when their members should seek a court order for possession,<sup>122</sup> the Financial Ombudsman's Service issues technical guidance indicating how they resolve common mortgage disputes<sup>123</sup> and the County Court judges must develop 'a feel' as to how to exercise their discretion.<sup>124</sup> Even so how these norms and conventions impact upon individual relationships is difficult to fathom. Empirical evidence from a number of sources suggests that their import is variable and highly dependent on both parties' awareness, ability and will to engage with their formulation and application.<sup>125</sup>

What is evident is that there is the space and opportunity within the regulatory and adjudicatory responsibilities outlined for discretion to operate within broad and varying parameters to both set behavioural norms and to try and seek compliance with those norms which affords the potential flexibility to take account of changing circumstances both within the mortgage market and a particular mortgage relationship. For example, the financial crisis of the last decade initiated a widespread review of the mortgage market, including the lending and enforcement practices of mortgagees, which has resulted in more stringent lending standards and some pressure upon mortgagees to alter their enforcement practices to demonstrate greater flexibility.<sup>126</sup> These regulatory influences will undoubtedly continue to change as the

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<sup>121</sup> See for instance FSA, *Treating Customers Fairly - Towards a Fair Outcome for Consumers* (FSA, 2006), FSA, *Treating Customers Fairly - Culture* (FSA, 2007)

<sup>122</sup> CML, Guidance for members – the role of LPA receivers (CML 2011).

<sup>123</sup> FOS, Guidance on Mortgage Arrears and Hardship and instances of their redress in FOS, Ombudsman News Issue 126 (2015).

<sup>124</sup> *Cheltenham & Gloucester Building Society v Norgan* [1996] 1 WLR 343.

<sup>125</sup> See FCA, Thematic Review of Mortgage lenders arrears management and arrears TR14/3 (FCA 2014), Bright & Whitehouse, 'Information, Advice and representation in Housing Possession Cases' (Universities of Oxford and Hull 2014); Wallace & Ford, 'Limiting Possessions? Managing Mortgage Arrears in a New Era' [2010] IJHP 133, Wallace, 'Feels like I am doing it on my own: Examining the Synchronicity between Policy Responses and the Circumstances and Experiences of Borrowers in Arrears' (2012) 11 Social Policy and Society 117.

<sup>126</sup> S Nield, Mortgage Market Review: Hard-wired Common Sense? (2015) 38J Consumer Policy 139.

expectations of the mortgage relationship alter or abuses of that relationships emerge in new and differing forms.

### **Residential leasehold**

An increasingly common form of tenure, the residential leasehold relationship is heavily regulated, as noted above. Most leasehold purchasers are unaware of the complexity of the legal relationships they are entering, and usually have no opportunity to negotiate over terms in the lease. The aspect of leasehold which is our focus here is that it raises interesting questions about property rights over common parts in old and new developments such as apartment blocks, large houses converted into flats, and gated communities. The freeholder may be a completely separate individual or corporate entity, or may be a company made up of some or all of the leaseholders. The horizontal relationships between the leaseholders revolve around the obligation to pay service charges and the right of use and access to the common parts, including the grounds, car parking and leisure facilities. However, the typical lease is silent on how these shared rights over the common parts are to take effect. It is only when there are disputes that the law can take notice, and court decisions are reported. Successful relations between leaseholders, or between their tenants if they are not resident themselves, only come to light through empirical research.

The findings from this research suggest that in many residential leasehold sites, *de jure* property rights have been changed over time by *de facto* understandings.<sup>127</sup> To take an extreme example, at one site the location of property boundaries was changed for practical reasons, and had become recognized by other owners as the accepted boundary. Similarly, the provisions of the lease, such as a covenant against having barbecues outside, may be ignored when convenient by mutual agreement. These findings seem to go further than Alexander's concept of governance property; they have more in common with Elinor Ostrom's work on common pool resource analysis,<sup>128</sup> which starts from a detailed examination of how self-governing communities produce collective norms and rules.

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<sup>127</sup> S. Blandy, *Collective Property: Owning and Managing Residential Space*, in N. Hopkins, N. *Modern Studies in Property Law* vol. 7 (Oxford, Hart, 2013) 151-172.

<sup>128</sup> See, primarily, Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (Princeton, Princeton University Press, 1990); Elinor Ostrom, *Understanding*

At residential leasehold sites which successfully rely on close relations and trust between residents to ensure that rules are followed, social sanctions are effective (mirroring Macaulay's findings in the case of relational contracts) to ensure compliance with *de facto* rights and duties.<sup>129</sup> Residents may also develop surprisingly formal mechanisms for conflict resolution, thus avoiding recourse to external dispute resolution. It is notable that when leasehold disputes do reach the first tier Property Tribunal, the judges will often in effect act as mediators, offering advice on how to advance the issue or about how the parties could build bridges and move on, and attempting to find a 'middle ground' between the parties.<sup>130</sup> The judiciary at this level is clearly aware both of the enduring nature of the leasehold property relationship, and the fact that the parties will have to continue living 'cheek by jowl' after the determination of the dispute, and is prepared to use discretion and persuasion to make the parties negotiate. Tracking some of the same disputes through to the Court of Appeal, it is obvious that property rules are more formally applied.<sup>131</sup>

The enduring nature of leasehold relationships requires give and take and a less formal approach to resolving differences. The lack of appreciation of these factors by the parties to some property disputes can be a source of irritation to the courts. The case of *Arnold v Britton*<sup>132</sup> turned on interpretation of the lease, as outlined earlier. For the majority in the Supreme Court, the 'paper deal' prevailed, despite a clear recognition that its effect became increasingly bizarre as time elapsed. Dissenting, Lord Carnwath appealed to an understanding of collective property interests and moral obligations. He also, like first tier Property Tribunal judges, felt that mediation was the preferred course of action.

Whatever the strict legal position, the other lessees may perhaps be persuaded that they have a common interest in the good management of the estate, and at least a moral obligation to contribute their fair

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*Institutional Diversity* (Oxford, Oxford University Press, 2005); Lee Anne Fennell, 'Ostrom's Law: Property Rights in the Commons' (2011) 5 *International Journal of the Commons* 9.

<sup>129</sup> S. Blandy, *Collective Property: Owning and Managing Residential Space*, in N. Hopkins, N. *Modern Studies in Property Law* vol. 7 (Oxford, Hart, 2013) 151-172.

<sup>130</sup> J. Dickinson, *Analysis of inter-resident disputes in private residential developments* (unpublished, 2013), paper on file with S.Blandy, University of Sheffield.

<sup>131</sup> J. Dickinson, *Analysis of inter-resident disputes in private residential developments* (unpublished, 2013), paper on file with S.Blandy, University of Sheffield.

<sup>132</sup> [2015] UKSC 36.

share of its costs. A long-running dispute of this kind can hardly be conducive to the atmosphere appropriate to a holiday location, even for those not directly involved. It is to be hoped that some way can be found of bringing them into the discussions. On any view, the case seems to cry out for expert mediation, if it has not been attempted before, preferably not confined to the present parties.<sup>133</sup>

Residential leasehold exemplifies the dynamics of enduring property relationships in a range of ways; these relationships go beyond individual property, develop over time, braid the formal with the informal, and disputes are often best dealt with by 'agents of settlement' such as tribunal judges steering away from a 'winner takes all' outcome, and the encouragement of common sense 'give and take' and, failing that, mediation.

### **The Way Forward**

We recognise that an examination of the dynamics of property relationships is a complex task. The terms and understandings upon which they depend are derived from a variety of sources which are diverse and multifaceted in their interactions. The mix of sources differs with each type of relationship depending on the nature of the relationship, its rationale and the course of its evolution. Nevertheless, there are similarities, brought out through the themes discussed in this paper and in our examples, which give rise to common issues deserving of closer attention and comparison.

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<sup>133</sup> At [157]