Chapter 1

Question 1: In what ways does land differ from other physical things? What consequences do those differences have for land law?

Chapter 1, as a whole, introduces a key question: what's special about land? As we will see throughout this book, many special rules have been developed to deal with the very difficult questions of *who* is entitled to use land and *how* they are entitled to use land. In Chapter 1, we have a chance to stand back and ask why we need special rules to answer those questions.

It is clear that land is a special type of resource. As Birks notes, land may no longer be the key asset of the mega-rich, many of whom prefer to have access to the value of intangible assets, such as shares, often held in off-shore trusts. Nonetheless, land still offers unique opportunities, such as the chance to set up a home or business, and to establish a place within a community. As Birks puts it: "Every business needs premises, every factory needs a site. For most of us as private individuals our home is the centre of our lives." McFarlane identifies five special features of land, which depend on its unchanging physical features, rather than its changing economic role: its permanence; uniqueness; capacity for multiple simultaneous use; social importance; and limited availability. Of course, it may be said that other forms of resource share, to some degree, some of those features: for example, gold is permanent and of limited availability; and clean water is of great social importance. Yet it is difficult to think of another resource that possesses those five special features *in combination* and *to the same degree*.

In the rest of the book, we will explore the significance of those special features to land law. For example, the list of property rights that can be held in relation to land is longer than the list of such rights that can exist in relation to other resources: this can be linked to the permanence of land; its capacity for multiple simultaneous use; and its social importance. One key consequence can be seen in the analysis of the *Ainsworth* case, discussed in section 1.5. It is that disputes about the use of land can be particularly fierce, and difficult to resolve: two innocent parties may have conflicting, but persuasive, claims to make a particular use of land. It is no wonder that the law has had to develop special rules to meet the special challenge of deciding who gets to use land, and how they get to use it.

Question 2: What is land law? Does it involve all legal rules related to the use of land?

Land law obviously consists of legal rules relating to land; but it does not include *all* such rules. For example, imagine that your neighbour plans to sell her land to a company that wants to set up a factory there. You object to this and want to ensure that no factory is built. The law may protect you in a variety of ways: for example, planning rules will place limits on the use of the land, as well as setting out a procedure that must be followed if the use of land is to be changed. Any public official or body making a planning decision will also be subject to various duties, such as the duty to adopt a fair procedure and to exclude all irrelevant considerations when making a decision. In addition, as a private individual, you have certain rights that correspond to duties owed by your neighbours: even if given planning permission, the company is under a duty to take reasonable care not to cause you injury by, for example, poisoning the air.

All the rules discussed above relate to the use of the neighbouring land; but none of them traditionally falls within the scope of land law. Planning rules are seen as forming their own special subject; the duties on the decision-makers are considered to be part of public law; and the law of tort imposes the duty to take reasonable care. As noted by Birks, land law is only *part* of the legal rules relating to the use of land. Clearly, any subject that attempted to cover *all* such rules would be both enormous and incoherent. According to Birks (pp.5-6), land law focuses on a more specific set of closely linked issues. The key underlying question is whether a particular party has a *property right* in relation to a particular piece of land. So, in our example, imagine that the factory is

given planning permission, and its activities do not cause you any physical injury. However, the noise of trucks going to and from the factory keeps you awake at night. You may claim that the factory owners are thereby committing a tort: the tort of nuisance. However, the House of Lords have ruled (see *Hunter and ors v Canary Wharf Ltd* [1997] AC 665, discussed in section 19.1.1.2) that, to sue in nuisance, you need to show you have a property right in land affected by the conduct of the defendant. Land law then takes over: by asking the *content* question, the court can test if the right you have to your home counts as a property right; by asking the *acquisition* question, the court can test if you do indeed have the right that you claim.

Question 3: Harris suggests that the 'utility model' and the 'doctrinal model' may be useful in understanding particular approaches to land law. What are the differences between the two models?

Harris' analysis makes use of general models of legal rationality developed by Weber. One way to look at those models is as ways of understanding how legal rules and decisions are made. For example, someone who knows very little about the law may, understandably, assume that legal rules and decisions are designed so as to ensure the best outcome in any particular case: to promote utility. It is certainly the case that Parliament, when considering legislation, will weigh up the general pros and cons of the possible rules it might enact. However, anyone who has studied law knows that, when deciding cases, judges are constrained not just by those general pros and cons but also by existing legal doctrines and concepts (indeed, those doctrines and concepts may also assert a hold on Parliament: even though they are free to do so, legislators may think twice about opting for a radical departure from the existing legal rules).

It is therefore possible to draw a broad contrast between two different approaches that may be adopted to designing legal rules and making legal decisions. On the 'utility model', the question is: "Which rule or result will have the best overall effect in practice?". On the 'doctrine (or doctrinal) model', the question is: "Which rule or result best accords with the existing legal doctrines?". Land law is notorious for involving the sort of technical, "lawyers' law" associated with the doctrinal model. However, as shown by the discussion of *Ainsworth* in section 1.5, the social importance of land means that the 'utility model' can also be influential: for example, if the price paid for consistency with legal doctrine is that an innocent party has to lose his or her home, we might hope that a judge will think twice before deciding if that price is worth paying.

Question 4: Why did the Court of Appeal and House of Lords reach differing results in *National Provincial Bank v Ainsworth*? In your view, what should the result be in such a case?

The key difference between the decisions was that the House of Lords decided Mrs Ainsworth did not have an interest in land. Mr Ainsworth, having left the matrimonial home, was under a duty to provide support to his wife; but the House of Lords ruled that this gave Mrs Ainsworth only a *personal right*: a right against Mr Ainsworth and no-one else. That right could not assist Mrs Ainsworth in her dispute with the bank.

From the doctrinal point of view, then, whether or not you agree with the result in *Boland* depends on whether you agree with the rules about when an occupier does, and does not, acquire an equitable property right in the family home. This is a very difficult area which we will examine in detail in Chapter 12. From the utility perspective, however, your view of the cases will depend on the direct question of how you weigh the needs of the bank (a lender that wants to get the money it is owed) and the needs of the occupier (a party who wishes to remain in her home, even though the home is legally owned by a partner who has given the bank a power to sell the home). In section 1.5.7, you can see the view that Parliament took about the result in *Ainsworth*, and the balance it tried to strike between the needs of the bank and the occupier.

Question 5: Land law has a reputation as a subject full of technical rules. Even if that reputation is true, is it necessarily a bad thing?

Land law is a difficult subject; but it has to answer difficult questions. As shown by *Ainsworth*, there is often no easy solution to the questions of who is entitled to use land, and how they are entitled to use it. To some extent, then, the complexity of land law comes from the need to find a sensitive means of balancing competing, but persuasive, claims to use land. However, it may also be the case that land law is *deliberately* technical. A judge considering a case such as *Ainsworth* purely from the utility perspective will face an impossible and controversial problem: how to weigh up the bank's commercial interests with the occupier's attachment to her home? The technical rules of land law cannot eliminate that essential conflict; but they can increase the chances that the result of a particular case will depend not on the views of a particular judge on an impossible and controversial issue but, instead, on the application of a set of general rules that can be applied by any judge. So having doctrinal rules, even if they are technical, may increase the chances of consistent treatment, a key aspect of the rule of law. However, there is of course a cost: conformity to the rule of law can equally be undermined if the rules are so technical that they cannot be understood by parties or properly applied by judges. On balance, we think that the rules of land law, whilst quite technical, *can* be understood; but whether or not you agree with that is a question best left to the end of the book!