It's an Easement, Not a Detriment. The Ouster Principle: A Further Complexity to the Law of Easements

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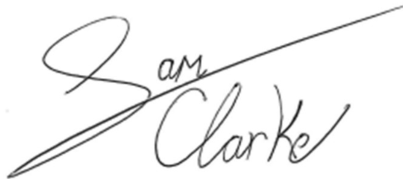

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ABSTRACT

For a right to qualify as an easement, it is necessary that the right claimed satisfies all the essential characteristics of an easement. Included in this analysis, is the consideration of whether the right sought is compatible with the proprietorship or possession of the servient tenement. To reach this determination, the Courts evolved the perplexed ouster principle — a doctrine which asserts that a right sought cannot be so burdensome as to oust the servient owner from the practical possession or the beneficial enjoyment of their own land.

Since easements are rights of one party over the land of another, there is a necessity to balance the rights of the dominant owner with the residual rights of the servient owner. Otherwise, the existence of broadly construed easements would become detrimental to the ownership of property — due to the value in the ownership of the servient tenement becoming obsolete. In the absence of such restrictions, the law would experience a rumpus of claims resulting in an avalanche of rights which would have the capacity to supersede the rights of the landowner himself. Therefore, the law has deemed it necessary to set a limit on the scope of rights which can lawfully exist as easements.

Although the ouster principle endeavours to prevent landowners form being ousted from the reasonable enjoyment or the practical possession of their own land, the application of this doctrine has proved difficult, as the absence of a defined position adopted by the Courts has resulted in much confusion within this area of law.

For the purpose of this dissertation, I hope to bring clarity to the parameters of the ouster principle and wish to outline a coherent structure that should be readily embraced by the Courts. As the ouster principle awaits a detailed consideration in Ireland[i], my critical analysis of various case law hopes to determine that an easement claimed cannot be so burdensome as to become detrimental to the ownership of land. Therefore — as it is submitted — the ouster principle is good law and ought to be formally adopted by the Irish Courts.

[i] Peter Bland, *Easements* (3rd edn, Thomson Round Hall, 2015) Ch 1-38.

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1-00 Introduction

It is no secret that the law of easements is an extremely complex area of law. Riddled with an abundance of historic precedent, the antiquity of the ever-ending appraisal to rationalise indefinite rights annexed to land has been the cause of much headache for practitioners and jurists alike. With a multitude of cases seeming certain to result in the favour of one side, the abrupt resurgence of eminent legal application had allowed the revival for even those who had seemed destined to fail. With the law of easements diluting the exclusiveness of land ownership, a very relevant question persists, what if the rights sought exceed the rights of the landowner himself? Considering the fact that easements are subordinate interests annexed to land, "if the servient owner [cannot] reasonably make any significantly valuable practical use of [his] land *without* substantially interfering with the exercise of the dominant owner's rights over the servient tenement, those rights are too extensive to amount to an easement."[1]

What has become known as 'the ouster principle', the common law has recognised that an easement cannot be so extensive as to be inconsistent with the proprietorship or possession of the servient tenement.[2] This is because — as noted by Lord Shaw — a dominant owner who asserts the right to exercise an easement, "admits that [the easement] asserted is the right over the property of [another]."[3] Therefore, the law has deemed it necessary to ensure that there is a balance as to the rights of the dominant owner with the residual rights of the servient owner.

To determine whether rights sought amount to an ouster, the Courts have partitioned the ouster principle into two categories; whether the right sought amounts to a possessory interest in the burdened land, or whether the right sought deprives the landowner from enjoying reasonable beneficial use over the servient tenement.[4]

In application of the former, an easement claimed cannot amount to a possessory interest in the servient tenement. In the most incontestable example, it has been recognised that an easement can never amount to exclusive and unrestricted possession over any part of the servient tenement.[5] However, the "ill-defined line between rights in the nature of an easement and rights

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[1] Dr Gareth Spark, "Easements of parking and storage: are easements non-possessory interests in land?" (2012) Vol: 76 (1) *Conveyancer and Property Lawyer Journal* pp. 6-18, at 10 (emphasis added).
[2] As established in *Re Ellenborough Park* [1956] Ch 131, at 164, 176.
[3] *AG of Southern Nigeria v John Holt & Co (Liverpool) Ltd* [1915] AC 599, at 618.
[4] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57, at [61].
[5] *Reilly v Booth* (1890) 44 Ch D 12, at 26.

in the nature of an exclusive right to possess or use"[6] has yet to be conclusively clarified by the Courts.

To examine the latter, the Courts have adopted the 'reasonable use test'[7] — a test which examines if the existence of an alleged easement would deprive the servient owner from enjoying reasonable use over the burdened land. Although this appears sound at first sight, the complexity in deciding what variety of uses retained by the landowner are considered 'reasonable' enough to impede the test's application has resulted in the reasonable use test becoming one of land law's most contentious doctrines. To much defiance though, calls to abolish the discussed principle failed to materialise[8] and in more recent times, its verbal exoneration of being "good law"[9] has confirmed that its application remains effective.

This dissertation aims to compose a comprehensive analyse of the ouster principle and hopes to achieve clarity in the extent of its application. Although the doctrine has been muddled and was subject to the risk of diminution, it will be my position that the ouster principle is a vital component to the jurisprudence of easements and land law as a whole. Therefore — as it is submitted — the application of the ouster principle should be vindicated to its fullest extent, with the reasonable use test being readily exercised by the Courts. To achieve this objective, it will first be necessary to differentiate the circumstances in which an alleged easement can come into existence; as the attitudes exercised by the Courts as to the residual uses retained by the landowner are dependent on the mode of acquisition. Thereafter, a full understanding of the historic precedent is required, alongside the appreciation of the nature of an easement, with its compatibility to the disposition of land law as a whole.

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[6] *Hair v Gillman* (2000) 80 P & CR 108, at 112 (Chadwick LJ).
[7] As outlined in *London & Blenheim Ltd v Ladbroke Parks Ltd* [1992] 1 WLR 1278, at 1288. This test was formally ratified in England & Wales in: *Batchelor v Marlow* [2001] EWCA Civ 1051.
[8] The Law Reform Commission of England & Wales proposed the abolishment of the ouster principle as known (or perhaps more precisely, the reasonable use test). It was suggested that "an easement that stops short of exclusive possession, even if it deprives the owner of much of the use of his land, or indeed of all reasonable use of it, [should be] valid." See: England & Wales Law Commission, *Making Land Work: Easements, Covenants and Profits à Prendre* (Law Com No.327, 2011), at para [3.208]. In the House of Lords, Lord Scott was critical of the ouster principle and proposed that the reasonable use test be substituted. It is important to note though, no precedent was created. See Lord Scott's comments on the ouster principle at: *Moncrieff v Jamieson* [2007] 1 WLR 2620, at [54] – [61].
[9] As per Judge Ewan Paton in: *Bewley v Russell* [2026] UKFTT 18 (PC), at [24].

2-00 Common Law Easement

An easement at law falls within the subject of Incorporeal Hereditaments. Incorporeal Hereditaments can be described as intangible interests annexed to land which are capable of passing through succession. From the outset, attempting to rationalise property rights which have no tangible presence can only be bound to difficulty. The fact that such right are everlasting does not help to alleviate the intricacy.[10] In *Hamilton v Musgrove,*[11] Monaghan CJ. provides a helpful summary of an easement which can be defined as follows:

> "An easement is an incorporeal right which may be defined to be a privilege... which the owner of one tenement has over the neighbouring tenement, by which the owner of the servient tenement is obliged to suffer something to be done, or to refrain from doing something, on his own land for the advantage-of the dominant tenement."

The fact that easements are rights enjoyed by one landowner over the land of another, such rights are acquired not for the personal benefit of the owner of the dominant tenement, but for the benefit of the dominant land itself.[12] As such, easements cannot exist *in gross*.[13]

The exalted case of *Re, Ellenborough Park*[14] provided a much-welcomed set of essential characteristics that must be satisfied in order for an alleged right to qualify as an easement. As summarised by Bland, the essential characteristics of an easement can be categorised as follows:

i. There must be a dominant and servient tenement;
ii. The easement must accommodate the dominant tenement;
iii. The dominant and servient tenement must be different persons;
iv. A right over land cannot amount to an easement, unless it is capable of forming the subject matter of the grant.[15]

At first sight, the wording of the fourth essential characteristic can serve more to confuse that to explain. Thankfully, the Jurists of *Re, Ellenborough Park* further elaborated on what is meant

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[10] Except in the circumstances that extinguishment of the right occurs.
[11] (1870) IR 6 CL 129.
[12] Dr Andrew Lyall, *Land Law in Ireland* (3rd edn, Round Hall, 2010) 801.
[13] In essence, easements cannot exist independently of land which is benefited by it. See: Prof JCW Wylie, *Irish Land Law* (6th edn, Bloomsbury Professional, 2020) Ch [7.04].
[14] [1956] Ch 131 (EWCA). These core attributes have also been adopted into Ireland in: *Redfont Ltd v Custom House Dock Management Ltd* (unreported, High Court, 31/03/1998).
[15] Peter Bland, *Easements* (3rd edn, Thomson Round Hall, 2015) Ch 1-04.

by the formation of the subject matter of a grant. Rights which are incapable of forming the subject matter of a grant cannot exist as an easement. Therefore, the test applied for the fourth essential characteristic can be categorised as follows:

i. The rights sought cannot be too wide or too vague in character;
ii. The rights sought, when exercised, cannot amount to rights of joint occupation or rights which would substantially deprive the landowner of the proprietorship or legal possession of the servient tenement;
iii. The rights sought cannot be rights of recreation, possessing no quality of utility or benefit.[16]

As observed by Prof. Gray & Ms. Gray, "[i]n the absence of restrictive rules governing the creation of proprietary entitlements, there is a long-standing fear that land may be encumbered by useless rights of dubious enforceability."[17] It is acknowledged, therefore, that there is a necessity to restrain the scope of rights which can lawfully exist as easements. This is imperative to prevent the sterilisation of land which is caused by the existence of not only useless rights, but also rights without limitations. This is because, land law is generally concerned with enabling land to be profitable, which in consequence, is in the best interests of society. Rights which burden land to such an extent that inhibits its ability to enter into the market ultimately results in ownership becoming redundant and sterile. Realistically, land which is not disposable is undesirable. Therefore, as the absence of rules governing the creation of easements would bombard land with excessive burdens, "the imposition [for] severely limiting [the] criteria has thus been necessary to prevent the proliferation of undesirable long-term burdens which would sterilise land by *rendering it unmarketable*."[18]

Compatible with this doctrine, it has been recognised that no man can have a right to a view,[19] or a right to merely wander over someone else's land.[20] As confirmed by *Re, Ellenborough Park,* the scope of these limitations has also been deemed necessary to prevent easements being so extensive as to be inconsistent with the proprietorship or possession of the servient tenement.[21] As such, rights that are argued as ousting the servient owner from the practical

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[16] *Re Ellenborough Park* [1956] Ch 131, at 164.
[17] Prof Kevin Gray & Susan Gray, *Elements of Land Law* (5th edn, Oxford University Press, 2008) Ch 5.1.3.
[18] Prof Kevin Gray & Susan Gray, 'The Idea of Property in Land' at Ch 1 in: Bright & Dewar (eds) *Land Law: Themes and Perspectives* (Oxford University Press, 1998) 33 (emphasis added).
[19] *William Aldred's Case* (1610) 77 ER 816.
[20] Often referred to as *Jus Spatiandi,* rights of mere recreation have difficulty in qualifying as an easement. See generally: Peter Bland, *Easements* (3rd edn, Thomson Round Hall, 2015) Ch 1-48 to 1-49.
[21] *Re Ellenborough Park* [1956] Ch 131, at 164, 176.

possession or the valuable enjoyment of the servient tenement are often pleaded as falling foul of the fourth essential characteristic established by *Re, Ellenborough Park.*

3-00 The Ouster Principle

Bland provides a brief synopsis of the rationale behind the ouster principle. Bland notes, that as a general proposition, "a right cannot rank as an easement if it is repugnant to the proprietorship or possession of the servient tenement."[22] This is because, rights inflicted — which are of such an extensive nature — are seen as ousting the owner of the servient tenement from their own land. As such, these rights would go far beyond for what is appropriate for an easement, resulting in such rights — when recognised — being detrimental to the ownership of land.

In *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd,*[23] the UK Supreme Court clarified that the ouster principle comprises of two categories:

i. Whether the easement claimed would deprive the servient owner from enjoying reasonable beneficial use over the servient tenement.
ii. Whether the easement claimed deprives the servient owner of lawful possession and control of their land.[24]

Considering the fact that easements are subordinate interests annexed to land, the premise that easements must be compatible with the possession of the servient tenement endeavours to ensure that the servient owner is not excluded from their own land. The ouster principle also ensures that easements claimed do not deprive the servient owner of valuable beneficial use of the burdened land. Otherwise, the *value* in the ownership of the servient tenement would be rendered illusory.[25]

There is a level of importance in safeguarding the rights of landowners from the threat of over inflicting burdens. The concept of a right easing the level of proprietorship which a man enjoys over his own land is one thing, the concept of a right completely eliminating it is another. A person does not own land simply to have their name recorded on a land registry folio. Neither do people own land to solely facilitate the convenience of others. People own land to extract some form of beneficial utility that is worthwhile. Therefore, an easement is considered too

[22] Peter Bland, *Easements* (3rd edn, Thomson Round Hall, 2015) Ch 1-38.
[23] [2018] UKSC 57.
[24] Ibid, at [61].
[25] *Batchelor v Marlow* [2001] EWCA Civ 1051.

severe if its existence interferers too greatly with the servient owner's rights over the servient tenement.[26] As such, rights sought which would inhibit the servient tenement's utility *to an unacceptable degree*, cannot exist as an easement.[27]

To successfully plead the ouster principle, the owner of the servient tenement engages in the task of proving a negative, which is, proving what the servient owner cannot now do with the burdened land.[28] In the Australian case of *Towers v Stolyar,*[29] Darke J. provides a helpful summary of what the Courts should analyse when considering if an alleged easements falls foul of the ouster principle;

> "In determining the question of the validity of the easement, it is necessary to consider the *extent of interference* with the servient owner's rights of ownership on that part of the servient tenement actually affected by the easement, and on the servient tenement as a whole. Included in that analysis is a consideration of whether the servient owner *retains reasonable use* of the servient tenement in its entirety."[30]

The issue at present though, is that the precise extent of the ouster principle has yet to be clarified by the Courts. As noted by Mr. Hill Smith, "[t]he difficulty comes in drawing the line as to when the claimed rights are so extensive to attract the ouster principle."[31] With the possession aspect being described as "ill-defined",[32] the precise extent of which an easement can deprive a landowner from various uses also remains unknown. This somewhat elusive concept requires clarification, as the parameters of 'reasonable use' have been described as "hewn"[33] and are dependent on several contextual circumstances. In Lord Scott's criticism of the reasonable use test, his Lordship enquiries into "what yardstick is it to be decided whether the residual uses of the servient land available to its owner are 'reasonable'?"[34] Lord Scott went

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[26] *Niata Enterprises Ltd et al v Snowcat Property Holdings Limited* [2023] MBCA 48, at [18].
[27] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57, at [59] - [60].
[28] Prof Michael Haley, "Parking rights and conceptual wrongs: the ouster principle revisited" (2022) Vol: 86 (1) *Conveyancer and Property Lawyer Journal* pp. 9-29, at 10.
[29] [2017] NSWSC 526.
[30] Ibid, at [49] (emphasis added).
[31] Alexander Hill-Smith, "Rights of parking and the ouster principle after *Batchelor v Marlow"* (2007) *Conveyancer and Property Lawyer Journal* pp. 223-234, at 233.
[32] As per Chadwick LJ in: *Hair v Gillman* (2000) 80 P & CR 108, at 112. This would be the second category of the ouster principle as outlined above.
[33] Prof Michael Haley, "Parking rights and conceptual wrongs: the ouster principle revisited" (2022) Vol: 86 (1) *Conveyancer and Property Lawyer Journal* pp. 9-29, at 10.
[34] *Moncrieff v Jamieson* [2007] 1 WLR 2620, at [59].

further to suggest that "it is not the uncertainty of the test that is the main problem. It is the test itself."[35]

It could be argued that the reasonable use test has been eroded. In this proposition, it could be argued that the Courts have widened the goalposts, allowing a more lenient view as to the extensiveness of rights which can exist as easements. As such, the value attributed to the residual uses retained by the servient owner have become "circumscribed."[36] In result, the Courts would adopt a broader scope of retained uses, uses which would now be considered reasonable, which may not have been considered reasonable before. With this perspective in mind, suggested uses retained by the servient owner can never be "far-fetched."[37]

With the UK Supreme Court having shown reluctance to address the issue,[38] the reasonable use test remains binding on the authorities of England and Wales.[39] As such, practitioners who wish to invoke the reasonable use test, have no choice but to ransack the multitude of legal authorities in hopes of being able to find some form of likeness that can be shoehorned in their favour. Although this is not a desired situation, Johnson J. provides a helpful description of the ouster principle to date. As articulated, the ouster principle can be summarised as, "a fact sensitive question, which falls to be answered on the evidence in any particular case, applying the guidance to be found in the relevant case law."[40]

It will be my argument that the reasonable use test is not being (nor should it be) eroded, but rather that its parameters can be clarified. To achieve this, close analyse of the relevant case law is required, with each case being carefully distinguished on its own facts and circumstances. Before I analyse the historic development of the ouster principle, it is first important to discuss the ways in which an easement can be established. Thereafter, it is important to discuss how these factual backgrounds impact the attitudes of such rights by the Courts.

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[35] *Moncrieff v Jamieson* [2007] 1 WLR 2620, at [59].

[36] Prof Michael Haley, "Parking rights and conceptual wrongs: the ouster principle revisited" (2022) Vol: 86 (1) *Conveyancer and Property Lawyer Journal* pp. 9-29, at 29.

[37] *Central Midlands Estates Ltd v Leicester Dyers Ltd* [2003] 2 P & C R DG1, at [33]

[38] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57, at [61]. Here, Lord Briggs noted that "the precise extent of the ouster principle is a matter of some controversy." Further, Lord Briggs went on to say that it was "unnecessary to resolve [the issue] on this occasion." The Supreme Court of New Zealand also declined to address the issue. See: *Douglas Craig Schmuck v Opua Coastal Preservation Incorporated* [2019] NZSC 118, at [89] - [90].

[39] As established in the UK Court of Appeal in: *Batchelor v Marlow* [2001] EWCA Civ 1051. Post *Moncrieff,* the criticisms of the reasonable use test were confirmed not to have abolished or substituted the ouster principle. See: *Virdi v Chana* [2008] EWHC 2901, at [16]. This position was more recently confirmed in: *Stenner v Teignbridge District Council* [2025] UKUT 204, at [64].

[40] *Stenner v Teignbridge District Council* [2025] UKUT 204, at [149].

4-00 Acquisition of an Easement.

An easement may be acquired either through express grant or reservation, implication of law, through prescription by long user, or by some statutory power being exercised. When examining the development of the ouster principle, it is important to differentiate the circumstance in which an easement has been acquired. As it has been acknowledged, a prescriptive claim based on long user will have more difficulty satisfying the ouster principle as opposed to an easement acquired through express grant.[41] This is because — as noted by Latham LJ — with regard to easements granted expressly, "the Court will undoubtedly lean in favour of the creation of an easement if the intention of the parties was clearly to that end."[42] This is a remarkable contrast with easements arising through long use — as a "heavy onus [is] placed upon a litigant seeking to establish a prescriptive easement."[43] As observed by Bland, among the disputes involving prescription, the Courts have historically stepped in and have protected landowners who were "dilatory" in protecting themselves.[44] This mentality can be distinguished with regard to easements acquired by express grant — as the prohibition that a man must not derogate from his grant, is a maxim that is "[not as old] as the hills, but as old as the year books, and a good deal older."[45]

4-01 Acquisition by Express Grant or Reservation

When it is the intention of two or more parties to create an easement, it is necessary that the express grant or reservation be by deed.[46] The creation of a deed ensures certainty as to what is being established and allows all parties to refer to this instrument in the event that discourse occurs. The circumstances in which an easement by deed arises is through the open and honest negotiation of all relevant parties. Given that deeds are complex legal documents, all parties are usually represented by licensed professionals, allowing each party to have an expert opinion in aid of their best interest. Easements by deed are usually created by two parties of equal

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[41] Jonathan Gaunt & Paul Morgan, *Gael on Easements* (22nd edn, Sweet & Maxwell, 2025) Ch 1-79.
[42] *Jackson v Mulvaney* [2002] EWCA Civ 1078, at [26].
[43] *Niata Enterprises Ltd et al v Snowcat Property Holdings Limited* [2023] MBCA 48, at [54] (Steel JA).
[44] Peter Bland, *Easements* (3rd edn, Thomson Round Hall, 2015) Ch 1-38. Acquisition through express grant occurs when one party purchases an easement over another party's land. Acquisition through reservation occurs when a dominant owner sells a portion of their land, while reserving an easement over the sold land. Since both arise through deed, there is no necessity to partition the two for the purposes of this paragraph.
[45] *Birmingham, Dudley & District Banking Co v Ross* (1888) 38 Ch D 295, at 312 (Bowen J).
[46] Peter Bland, *Easements* (3rd edn, Thomson Round Hall, 2015) Ch 4-01.

bargaining power, so in the event that one party feels that they are being hard done by, such party can simply abandon the negotiation without incurring any legal implications.

Considering the fact that easements by deed are established through a known transaction, any sufferance conceded by the landowner is usually compensated by a monetary sum. This point is of utmost relevance to the ouster principle. In the event that a man wishes to subject his land to an easement, even if such a right would curtail the land's utility, the landowner should be more than entitled to do so.[47] This is because, in these set of circumstances, a landowner would generally receive an equitable sum in exchange. There can be an indefinite number of reasons why a landowner may not be able to utilise his land to its fullest extent, and in any event, it might be more financially prudent to simply discharge an easement.

The Courts are generally reluctant to overreach and impede on a man's ability to enjoy his own land as he pleases.[48] The Courts will also be reluctant to interfere with the affairs of two parties of equal barraging power.[49] However, rights conveyed by deed which do not meet the essential characteristics as established by *Re, Ellenborough Park* will not be recognised as easements. In the context of the ouster principle, if a right discharged go far beyond for what is acceptable for an easement, for example, rights conferred that are wholly exclusive in nature, the Courts will step in and strike down that right. Although the Courts will have a much-relaxed view as to rights created by deed, rights asserted must always adhere to the nature of an easement, even if it was the intention of both parties to come to a desired outcome.[50]

4-02 Acquisition through Prescription

Easements established through prescription do not arise from a known transaction but rather through long use exercised by the dominant owner. The issue with prescription is that it has the potential to conflict with the immemorial maxim which professes that "all easements must lie in grant."[51] To counter this, the law will presume that a man who has conducted himself 'as of right' for a continuous period of twenty years, had previously acquired an ancient grant to do so — which presumably — became lost through the passage of time.[52] Known as the

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[47] Although in some instances, it may be more prudent for the landowner to transfer ownership.
[48] Provided that the enjoyment is within the constraints of the law.
[49] *Sheehan v Breccia* [2018] IECA 286, at [22]. It must be noted that this case concerned a contract, which is distinct and different from a deed. However, I see no reason why such a mentality would not extend to the law of deeds — save in exceptional circumstances.
[50] For example, even if it is the intention of both parties to protect a much-desired view, no remedy can exist within the law of easement. Although there may be an avenue via restrictive covenants.
[51] Prof JCW Wylie, *Irish Land Law* (6th edn, Bloomsbury Professional, 2020) Ch [7.09].
[52] Peter Bland, *Easements* (3rd edn, Thomson Round Hall, 2015) Ch 6-01.

doctrine of 'lost modern grant', the law will presume a legal origin which granted the exercise of such conduct, although "neither the judge nor jury, nor anyone else, had the shadow of a belief that any such instrument had ever really existed."[53] Described as "one of the most fundamental and far reaching of legal principles,"[54] a man who wishes to plead the doctrine of lost modern grant, must successfully satisfy all the "hopeless jumble of rules" that come with it.[55]

The necessity that enjoyment be 'as of right' allows the Courts presume that the man who exercised such enjoyment, actually had the right to do so. For enjoyment to be considered 'as of right' the enjoyment must be; *nec per vim, nec per clam* and *nec precario*.[56] Enjoyment exercised must be continuous and not intermittent,[57] and must also be capable of being prevented.[58] Most importantly, enjoyment exercised must also conform to the nature of an easement in order for prescription to be successfully pleaded.

The issue with lost modern grant in the context of the ouster principle is that the Courts will face difficulty presuming that a landowner would have subjected himself to a grant — which consequently — would sterilise the use of his own land. Since claims of long user involve the process where somebody "get(s) something for nothing,"[59] it would be even more far-fetched to presume that a man would have sterilised the use of his own land — without receiving a single penny in exchange. Not only does excessive enjoyment have difficulty satisfying the fourth essential characteristic of *Re*, *Ellenborough Park*, such a factual matrix will also have difficulty conforming with the natural order of humanity. As it has long been recognised, a plea of long user will not succeed in the circumstances that it is unreasonable to presume a legal origin.[60]

4-03 Easements arising through Implication

With easements acquired by express grant and easements acquired through prescription being at opposite ends of a very large stick, attitudes to ouster arguments in relation to easements arising through implication lies somewhere between the two. If a particular conveyance fails

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[53] *Bryant v Foot* (1867) LR 2 QB 161, at 181.
[54] *Cullen v Dublin Corporation* (unreported, Supreme Court, 22/07/1960), at 10.
[55] Prof JCW Wylie, *Irish Land Law in the Next Century* (Trinity College Dublin, 1981) 9.
[56] These Latin phases can be translated as: without force, without secrecy and without permission.
[57] Prof JCW Wylie, *Irish Land Law* (6th edn, Bloomsbury Professional, 2020) Ch [7.63].
[58] *Sturges v Bridgman* (1879) 11 Ch D 852, at 863.
[59] England & Wales Law Reform Committee, *Acquisition of Easements and Profits by Prescription* (Report No. 14, 1966) p. 11.
[60] *Alfred F Beckett Ltd v Lyons* [1967] Ch 449 (EWCA).

to outline the creation of a certain easement, the Courts may establish a right by implication on a true construction of the deed.[61] Disputes revolving implication are generally the cause of poor conveyancing, as issues arise because practitioners omitted certain statements within the deed, which ought to have been included. This legal remedy exists to allow the Courts to carry out the common intentions of the parties inferred from the circumstances at the time of the grant.[62] For example, a conveyance which severed a commercial premises may include an implied right to park commercial vehicles on the servient tenement for the purposes of loading and unloading goods.[63]

As provided for by Statute,[64] where the owner of land disposes of part of it or all of it in parts, the disposition creates by way of implication for the benefit of such part or parts any easement over the part retained, or other part or parts simultaneously disposed of, which —

> (*a*) is necessary to the reasonable enjoyment of the part disposed of, and
>
> (*b*) was reasonable for the parties, or would have been if they had adverted to the matter, to assume at the date the disposition took effect as being included in it.

As such, deeds granted must allow for the reasonable enjoyment of the subject matter, otherwise, the rights of the dominant owner inadvertently become futile. Therefore — like many areas of land law — "the test is one of utility."[65]

Bland notes that this requirement can be justified on the public policy grounds which "on the one hand, [prevents the dominant tenement from] becoming sterile due to the inadvertence, and on the other, [prevents] claims of implied rights which are of limited benefit or overly burdensome."[66] It is also important to note, paragraph (*b*) establishes an objective test — which

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[61] Prof JCW Wylie, *Irish Land Law* (6th edn, Bloomsbury Professional, 2020) Ch [7.38].
[62] Peter Bland, *Easements* (3rd edn, Thomson Round Hall, 2015) Ch 5-01.
[63] This is a good example of how an observation of the situation from the ground is required in these cases. If there are no adequate parking facilities within the vicinity, then it becomes necessary to park on the servient tenement to facilitate the enjoyment of the right of way. However, if there is a loading bay close by or suitable parking facilities on the dominant tenement, then it would become less likely that the deed included a right to park on the servient tenement.
[64] Pursuant to section 40 (2) of the Land and Conveyancing Law Reform Act 2009. Interestingly, section 40 of this act was the only section to survive the cursed attempt to reform the law of easements pursuant to the Land and Conveyancing Law Reform Act 2009. All the other sections within chapter one of the act were repealed pursuant to the Land and Conveyancing Law Reform Act 2021.
[65] Dr Neil Maddox, *The Land and Conveyancing Law Reform Acts: A Commentary* (2nd edn, Thomson Round Hall, 2021) Ch 8-29.
[66] Peter Bland, *Easements* (3rd edn, Thomson Round Hall, 2015) Ch 5-34.

is — that the Courts must be satisfied that it was reasonable for the parties to assume that the alleged right arose by implication.[67]

In regard to the ouster principle, the Courts may find difficulty in being satisfied that a grantor would have subjected his land to such an extensive burden in the absence of such express terms. However, close examination of the circumstances in which the main deed was disposed of is required. If the servient owner received a valuable sum in relation to the deed expressly granted, this receipt may point to evidence that a landowner would have reasonably assumed that the implied right was included in this transaction. Also, the necessity that the right alleged must provide for the reasonably enjoyment of the disposed deed may point to the obvious assumption that a grantor would have discharged of the implied right.

In any event, to determine if a right through implication is consistent with the possession and proprietorship of the servient tenement, it is necessary to assume what a landowner would have reasonably subjected his land to and whether this is consistent with the transaction. If there is no evidence to lead to the reasonable assumption that a landowner would have subjected his land to an extensive burden, then such an implied right will not be recognised.

4-04 Acquisition through a Statutory Power being Exercised

An easement can be created or acquired through the exercise of a statutory provision invoked by a statutory body.[68] There appears to be no limit as to the types of common law easements that can be acquired through the exercise of statutory powers, provided that the right conforms with the essential characteristics of an easement. For example, a local authority can compulsorily acquire a right of way over adjoining land to facilitate the residential development of council land.[69] Another example would be the powers vested towards the Industrial Development Authority to compulsorily acquire a right of way over adjoining land to facilitate the industrial development of State-owned land.[70]

With consideration to common law easements acquired by statute,[71] the Courts will undoubtedly lean in favour of the State who wish to exonerate a common good. Further, the

[67] Prof JCW Wylie, *Irish Land Law* (6th edn, Bloomsbury Professional, 2020) Ch [7.47].
[68] Peter Bland, *Easements* (3rd edn, Thomson Round Hall, 2015) Ch 3-09.
[69] Planning and Development Act 2000, s 213 (2)(a)(ii).
[70] Industrial Development Act 1986, s 16 (1)(b).
[71] A common law easement can be distinguished from a statutory easement (also known as a wayleave). The infamous wayleave has its origins in contract law as utility providers (such as electricity providers) entered into agreements with landowners to carry out essential works such as laying electricity wires

process of compulsory acquisition involves the State purchasing out an interest over the servient tenement. Like an easement acquired through express grant, the impact caused by the existence of such a right may be mitigated through the exchange of an equitable sum.

It is important to note, statutory powers that provide for the compulsory acquisition of easements also provides for the power to compulsory purchase land.[72] Therefore, if a statutory body was to run into issues regarding the extensiveness of rights sought, it would be more advisable for the statutory body to acquire the fee simple of the land in question. For example, if a local authority required a large right of way over a very small piece of land, it would be more prudent to simply acquire the fee simple of the land in question through a compulsory purchase order. Here, the predicament of grappling with rights which may violate the ouster principle is eliminated, as the State would now own the lands in question.

over land. These contractual licences were determined for a fixed term and were not binding on successors in title. As time progressed, statutory powers were introduced to allow utility providers to compulsory purchase out these rights in instances where agreements with landowners could not be met. Thereafter, the statutory easement came into existence, with these rights being created generally in respect of electricity, gas, telephone services, water and sewerage. It is important to note, the main distinction between a statutory easement and a common law easement is that a statutory easement lacks one of the essential characteristics of a common law easement — a dominant tenement. There is also no legal requirement that a statutory easement be consistent with the proprietorship or possession of the servient tenement. See generally: Chapters 3-09 to 3-53 in Peter Bland, *Easements* (3rd edn, Thomson Round Hall, 2015). See also: Peter Bland, *Easements* (3rd edn, Thomson Round Hall, 2015) Ch 16-02, "Statutory easements… do not have to comply with the common law requirements of an easement."

[72] For example, the powers vested towards local authorities to compulsory acquire easements pursuant to section 213 (2)(a) of the Planning and Development Act 2000 also provides powers to compulsory purchase land. See: Section 213 (2)(a)(i).

5-00 Historical Development of The Ouster Principle

Although the reasonable use test was only formally ratified in England & Wales in 2001,[73] the weight of the historic precedent required to reach this point was only a true reflection on the doctrine's complexity. It has always been recognised that there must be a limit as to the extensiveness of rights which can exist as easements. Inconveniently though, throughout the entirety of the common law, not one ruling has definitively marked out this line. Tuckey LJ's conclusion that an easement can never be so burdensome as to render the ownership of the burdened land illusory appears attractive at first sight. However, the criticisms this judgement faced in years subsequent threw the doctrine's attitudes in another direction. Despite this, the ouster principle was never abolished, which leaves us at the point where we are today — a bewildered and confused state which appears to be distant from formal clarification. Therefore, it is important to fully understand how we have reached this point and then acquire a true understanding of the law to prevent any further misunderstandings and inconsistencies. This can only be achieved through the complete analysis of the relevant case law; exercising careful distinguishment between the facts and circumstances of each case. Only then can we appreciate a stronger knowledge for the doctrine, allowing for a more appropriate application without causing any further anguish.

5-01 The Lead Up to Batchelor and the Importance of Copeland v Greenhalf

The legal premise that an easement cannot be so burdensome as to preclude a landowner from the ordinary benefits of ownership — is a principle that is ancient in days. The earliest recognition of this thesis can be traced back to the House of Lords case of *Dyce v Hay.*[74] In this case, a prescriptive right for the people of Aberdeen to use the whole of the servient tenement for recreational purposes was denied. The applicants in this case were residents of Old Aberdeen; who claimed a right to wander, exercise and relax over the entirety of the servient tenement. Understanding the immenseness of what was being pleaded, such a right — when recognised — "would leave the proprietors [with] no use of their property, either for cultivation or pasture."[75] Lord St Leonards C. concluded that, "what is insisted upon is a right of an extensive nature.... I conceive that this is a claim so large as to be entirely inconsistent with the right of property."[76]

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[73] Pursuant to the ruling of *Batchelor v Marlow* [2001] EWCA Civ 1051.
[74] (1852) 1 Macq 305, (1852) 15 D (HL) 14.
[75] Ibid, (1852) 15 D (HL) 14, at 15.
[76] Ibid, (1852) 1 Macq 305, at 309.

A side note in the report also asserts that "there can be no prescriptive right in the nature of a servitude or easement so large as to *preclude the ordinary uses of property* by the owner of the lands affected."[77]

In *Moncrieff v Jamieson,*[78] Lord Scott was critical of *Dyce v Hay's* relevance to the ouster principle. In his reasonings, Lord Scott argued that "*Dyce v Hay* was a case about public rights, not about private law servitudes. [Therefore], the proposition as stated in the side note tells us nothing about the essential nature of servitudes."[79] However, Lord St Leonards C. recognised that the case before him was not the same as public rights which had sustained dedication.[80] Throughout the case, Lord St Leonards C. referred to the alleged rights as "servitudes" and ultimately ruled that "there was no such servitude recognised by the law."[81] In any event, Lord St Leonards C. recognised that any right annexed to land cannot be so burdensome as to be inconsistent with property ownership, irrespective if the right alleged is a public right or an easement.

In *AG of Southern Nigeria v John Holt & Co (Liverpool) Ltd,*[82] the Privy Council considered various easements — namely easements of storage and jetties — and whether such rights could be acquired by prescription. The facts of this case were extremely novel, resulting in the complex consideration of legal application. Situate on the Island of Lagos, within the Colony of Southern Nigeria, the alleged dominant owners — who were the respondents in this case — had sought rights over foreshore land and land that had been reclaimed by means of accretion.[83] The respondents were respected African merchants, who had been occupying lands adjoining the foreshore as early as the 1860s. In the 1860s, the alleged dominant owners built a wharf and two piers along the foreshore, and as time progressed, additional land later became reclaimed through accretion. The respondents had been in "exclusive possession" of these

[77] *Dyce v Hay* (1852) 1 Macq 305 (emphasis added).
[78] [2007] 1 WLR 2620.
[79] Ibid, at [54].
[80] *Dyce v Hay* (1852) 15 D (HL) 14, at 15. In Scotland, a public right — like a private right in Ireland — may be created by prescription alone. Dedication by the landowner towards the public is not necessary. See: *Walsh v Sligo County Council* [2013] IESC 48, at [5]. Perhaps, Lord St Leonards C may have been more inclined to approve of such a burdensome right if the landowner had dedicated her lands towards the public. This should explain why the distinction was vocalised.
[81] *Dyce v Hay* (1852) 15 D (HL) 14, at 15.
[82] [1915] AC 599.
[83] A major issue in this case was whether the reclaimed lands were vested towards public or private ownership, subject to the mode of accretion. If natural accretion occurred, the additional land would be conjoined with the property abutting the foreshore, i.e. the respondent's land. However, if artificial accretion was carried out, the reclaimed land would rightfully belong to the State.

reclaimed lands for a period of thirty to fifty years.[84] Making good use of this land, the respondents constructed sheds on the reclaimed land, while also storing goods. They had also used the land in connection to purposes related to their trade.

This case emerged after the local authority constructed a road along the foreshore in 1907, thus partitioning the respondents' lands from the original piers and the newly reclaimed lands. Soon after, the Attorney General filed claims that the UK were entitled to ownership of the foreshore and the reclaimed lands by means of *res publicae*.[85] It was eventually concluded that the State were rightful owners of the land in question. Although the respondents were in exclusive possession of reclaimed lands for such a substantial period, they fell short of the necessary length of time to establish a claim of adverse possession against the State — namely sixty years.[86] The question then persisted, what rights did the respondents have over the lands in question?

The lower Court concluded that the respondents had acquired through prescription, easements in respect of two jetties on the one part, and the right to store goods on the reclaimed lands for the second part. This decision was later overruled by the Privy Council. As argued by the Attorney General, "the respondents were in exclusive possession of the servient land and could not therefore acquire an easement over it by prescription."[87] Pressing further, the Attorney General argued that "the easement [claimed] is too wide since it was not confined to the respondents' own goods and might extend to the occupation of the whole servient land."[88] As such, there is "no authority to support an easement of this character."[89]

In response, the respondents argued that the easements claimed do not "entitle [them] to occupy the whole land or to leave goods upon it permanently."[90] The rights claimed were related to the respondents' enterprise. As argued, any goods stored on the land would only be temporary; only what is consistent with the ordinary course of their business.[91]

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[84] *AG of Southern Nigeria v John Holt & Co (Liverpool) Ltd* [1915] AC 599, at 601.
[85] This Latin phrase refers to property that is owned by the State.
[86] As pursuant to the Crown Suits Act 1769, 9 Geo 3 c 16.
[87] *AG of Southern Nigeria v John Holt & Co (Liverpool) Ltd* [1915] AC 599, at 603 (Lawerence KC). Citing: *Lyell v Lord Hothfield* [1914] 2 K B 911.
[88] *AG of Southern Nigeria v John Holt & Co (Liverpool) Ltd* [1915] AC 599, at 603.
[89] Ibid.
[90] Ibid.
[91] The Attorney General argued that there had been no easement known to law in relation to the storage of goods. Rejecting this argument, Lord Shaw expressed the opinion that a right to store goods on the land of another could be created as an easement. As outlined, "the law must adapt itself to the conditions of

Rejecting this claim, the Privy Council concluded that;

> "[The use to] which the land was put by the respondents and their predecessors in title could not be the foundation of any easement, as it was not a right assumed to be taken or asserted over the land of another; the possession founded upon was possession of the land as owner thereof."[92]

To put simply, the use exercised by the respondents was not use that was compatible with an easement over somebody else's land, it was use that was compatible with land ownership itself.[93] Therefore, the use exercised was far beyond what was acceptable for an easement and was, therefore, more appropriate with a claim of adverse possession. As such, the use exercised was far too extensive for a claim in prescription to succeed, as the respondents conducted themselves as if they had *owned* the lands in question.

In *Wright v Macadam,*[94] the Court of Appeal of England & Wales considered whether two tenants, by virtue of Section 62 of the Law of Property Act 1925, had acquired an easement to store coal in a coal shed owned by their landlord. Mrs and Miss Wright occupied a flat that was rented out by their landlord, Mr. Macadam. Situate close to the flat, Mr. Macadam also owned a coal shed that was situated in his garden. Prior to the principal lease, Mrs Wright had occupied the flat for three years and had used the shed to store coal with the permission of Mr. Macadam. In 1943, the landlord granted a new lease to Mrs. Wright and Miss Wright however, there was no mention of the coal shed in this instrument. Despite this, the Wrights continued to use the coal shed for four years, until the landlord began demanding payments for the use of this shed.

The question before the Court was whether the tenants had acquired an easement to use the coal shed upon the creation of the new tenancy. It is important to note that the ouster arguments were not raised in this case. Despite this case being discussed in subsequent cases concerning the ouster principle,[95] *Wright v Macadam* mainly concerned whether a right of storage could

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modern society and trade, and there is nothing in the purposes for which the easement is claimed inconsistent in principle with a right of easement as such." (See page 617).

[92] *AG of Southern Nigeria v John Holt & Co (Liverpool) Ltd* [1915] AC 599, at 617.

[93] As observed by Lord Shaw, "It seems to be undoubtedly true that what was done by the respondents was done by them as in their opinion upon their own lands." (at 617) Lord Shaw later affirmed that the essential nature of an easement involves a right by one landowner, asserting that right *over the property of another*. By virtue, rights by way of easement are subordinate to the rights of property ownership. Therefore, rights asserted cannot be so extensive as to be akin to landownership itself.

[94] [1949] 2 KB 744.

[95] *Wright v Macadam* was not cited in the latter case of *Copeland v Greenhalf*. It had been argued that there had been some inconsistency between the two judgements. However, through close analysis of both cases, the facts can be clarified and distinguished from each other.

be known to law and whether such a right had passed by implication of the new tenancy. As observed by Mr. Ball, the report of *Wright v Macadam* does not provide any particulars of the way in which the Wrights had made use of the shed for the storage of coal.[96] There is no evidence to suggest that the use exercised by the Wrights were of such an extensive nature as to oust Mr. Macadam from his own shed. It is very possible the Wrights only occupied a minimal percentage of the shed when storing their own coal.[97] It can also be observed that the ordinary and reasonable use of a coal shed is to store coal. As such, there was nothing in the nature as to the right claimed as being inconsistent with the ownership of the property itself. However, if the tenants had locked the shed and barred Mr. Macadam from making any use of the coal shed, such use exercised by the tenants would then be inconsistent with the ownership of property.[98] This would result in the easement failing.

In *Copeland v Greenhalf,*[99] a prescriptive easement to store a multitude of vehicles over a small strip of land was denied. Due to the magnitude of what was being pleaded, this case has been understood as the "principle authority for the test of inconsistency with the possession of the servient [tenement]."[100] Upjohn J's consideration of the impact the alleged would have on the servient tenement allowed him to reach a conclusion on the scope of rights which can be acquired. As such, *Copeland v Greenhalf* continues to be cited among a variety of cases which consider the ouster principle.

Mrs. Copeland — the alleged servient owner — had owned a strip of land that ran between a public street and an orchard which was owned by herself. The strip was about 150ft in length and varied in width from 15ft in the least to 35ft at most.[101] Mr. Greenhalf was a wheelwright who operated a workshop adjacent to the strip. Mr. Greenhalf argued that himself and his father had stored vehicles along the strip for purposes connected to their business for a period of 50

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[96] As per Mr Stephen Ball, counsel for the alleged servient owner in: *Stenner v Teignbridge District Council* [2025] UKUT 204. See paragraph 49.

[97] To clarify, the Wrights were in occupation of a flat, which naturally, would not have been as resource exhaustive as a large house. The amount of coal the Wrights would have been in possession of at any one time was likely minimal. Therefore, the coal that was owned by the Wrights could have simply been left in the corner of the shed, allowing Mr Macadam to enjoy the majority of the structure. In any event, the report lacks detail as to the peculiars of the enjoyment so assumptions should be exercised with caution. However, the absence of an ouster argument made by Mr Macadam allows for the inference that the enjoyment exercised was probably not that extensive.

[98] This was Lord Scott's observation of *Wright v Macadam*. See: *Moncrieff v Jamieson* [2007] 1 WLR 2620, at [55].

[99] [1952] Ch 488.

[100] Peter Bland, *Easements* (3rd edn, Thomson Round Hall, 2015) Ch 1-40.

[101] *Copeland v Greenhalf* [1952] Ch 488, at 489.

years. In pleadings, Mr. Greenhalf asserted the right to place, deposit and store vehicles, and if necessary, carry out motor repairs on the said strip, subject to an 8ft wide clearance to allow passage to and from the orchard.[102]

As argued by Counsel for the alleged servient owner, the rights asserted were "quite unreasonable" and would ultimately oust Mrs. Copeland from the "beneficial enjoyment of her own land."[103] Counsel further argued that rights which are so extensive as to interfere with the "ordinary proprietary rights" of the servient owner — cannot be acquired through prescription.[104] There was great concern as to the extent of the rights being asserted, as the rights claimed would result in vehicles being left on the strip for an indefinite time which could amount to years if necessary.[105] Additionally, the vehicles could be left in a vague and undefined manner on the strip, leaving an ill-defined gangway for egress and regress to the orchard.[106]

Refusing to uphold the easement, Upjohn J. concluded that the rights asserted go outside "any normal idea of an easement."[107] Explaining his reasonings, Upjohn J. outlined that Mr. Greenhalf is practically;

> "Claiming the whole beneficial user of the strip of land... [H]e can leave as many or as few lorries there as he likes for as long as he likes; he may enter on it by himself, his servants and agents to do repair work thereon. In my judgment, that is not a claim which can be established as an easement. It is virtually a claim to possession of the servient tenement, if necessary to the exclusion of the owner; or, at any rate, to a joint user, and no authority has been cited to me which would justify the conclusion that a right of this wide and undefined nature can be the proper subject-matter of an easement."[108]

Upjohn J. further clarified that if Mr. Greenhalf wished to succeed in his claim, such a claim "must amount to a successful claim of possession, by reason of long adverse possession."[109]

The rights sought by Mr. Greenhalf were far beyond what was appropriate for an easement. As a result, the use Mr. Greenhalf wished to exercise over the strip of land was far too extensive

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[102] *Copeland v Greenhalf* [1952] Ch 488, at 490.
[103] Ibid, at 491.
[104] Ibid, at 491-92.
[105] Ibid, at 497.
[106] Ibid.
[107] Ibid, at 498.
[108] Ibid.
[109] Ibid.

for a claim in prescription to succeed. As acknowledged by Upjohn J, the use exercised by Mr. Greenhalf was more akin as to possession of the servient tenement, not an easement over somebody else's land. For someone to exercise such extensive rights over a piece of land, such a person would have to have a beneficial ownership in that land (such as a tenants in common). Otherwise, such a recognition would have been a complete detraction from the law of easements as known.

From the ordinary layman's perspective, it would have appeared that Mr. Greenland was the owner of the strip of land, subject to a right of way in favour of Mrs. Copeland. Mrs. Copeland's retained uses were so curtailed that such uses were not compatible with land ownership itself, but rather with having and easement over somebody else's land. For an easement to effectively invert the factual matrix, such an easement is too extensive to be known by law. Thus, the focus was not only on the extensiveness of the rights sought, but also on the limitations of the rights retained by the landowner.

5-02 Batchelor v Marlow and The Reasonable Use Test

London & Blenheim Ltd v Ladbroke Parks Ltd[110] can be credited for the creation of the reasonable use test as we know it. Deciding whether London & Blenheim Ltd had obtained an easement by implication to park cars over retained land, this case established that when the Courts consider the extensiveness of the rights sought — and contrast it with the scope of uses retained by the landowner — the question before the Courts "must be one of degree."[111] This consideration involves close analysis of the contextual circumstance, and evaluating the degree of interference that the rights sought would have on the enjoyment of the servient tenement. As such, Judge Paul Baker declared that; "[a right] granted in relation to the area over which is to be exercisable is such that it would leave the servient owner *without any reasonable use of his land*... [then such a right] cannot be an easement."[112]

Affirming the above principle, the Court of Appeal in *Batchelor v Marlow*[113] considered the level of extensiveness of a right sought and whether such a right would deprive the servient

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[110] [1992] 1 WLR 1278.

[111] Ibid, at 1286. In this case, the rights sought were to park a few cars over a "substantial car park" (Page. 1281). The Court concluded that the rights sought were nowhere near the extensiveness that was required to disqualify an easement. Interestingly, the easement failed on a separate technicality. Attempts to appeal the decision on this technicality were also dismissed. See: *London & Blenheim Ltd v Ladbroke Parks Ltd* [1994] 1 WLR 31 (CA).

[112] *London & Blenheim Ltd v Ladbroke Parks Ltd* [1992] 1 WLR 1278, at 1288 (emphasis added).

[113] [2001] EWCA Civ 1051.

owner of reasonable use of his own land. What can be considered the pinnacle of the reasonable use test, the Court of Appeal denied a prescriptive easement to park six cars on a small strip of land for ten hours a day, five days a week. In this case, Mr. Marlow — the alleged dominant owner — was a mechanic, who ran a nearby garage and claimed a prescriptive easement to park six cars on the land from 08:30 to 18:00, five days a week.[114] Mr. Batchelor was the owner of the 'L' shaped strip, with the parcel of land being exponentially small in size. The lands in question were only capable of accommodating six cars in total.[115] Therefore, the questions before the Court could be summarised as; "does an exclusive right to park six cars for nine-and-a-half hours every day of the working week leave [Mr. Batchelor] without any reasonable use of his land, whether for parking or anything else?"[116]

Considered in this analysis, the Court determined what uses Mr. Batchelor retained if such a right was upheld and how beneficial such uses would be to his ownership. Although the dominant owner would only occupy the land for 28% of the week, the existence of such an easement would have had a detrimental impact on the ownership of the servient tenement. The various uses retained by the landowner were extremely curtailed in utility, with each conjured residual use being rejected by the Court. Mr. West — counsel for the alleged dominant owner — suggested that Mr. Batchelor retained a variety of uses which could be put to the land in question. Namely, Mr. Batchelor could sell the land to Mr. Marlow or charge Mr. Marlow for using the land outside of business hours. Outside of the business hours, Mr. Marlow could park on the land himself or charge others for doing so. Mr. Marlow would also be able to concrete over the surface of the land without interfering with the exercise of the alleged right.[117]

Being of the view that these suggestions were preposterous, the Court concluded that although Mr. Batchelor could of course park vehicles on the land at night or on the weekends, "[Mr. Batchelor] has no use [of the land] at all during the whole of the time that parking space is likely to be needed."[118] It was also recognised that the commercial scope for getting others to pay for parking outside the easement hours was "very limited indeed."[119] The suggestion of selling the land to Mr. Marlow ultimately worked against Mr. West's favour as, "[s]ale to the

[114] *Batchelor v Marlow* [2001] EWCA Civ 1051, at [2].
[115] Ibid, at [3].
[116] Ibid, at [15].
[117] Ibid, at [16].
[118] Ibid, at [18].
[119] Ibid, at [17].

respondents would amount to a recognition that the rights they asserted had given them *in practice* a beneficial interest and no doubt the price would reflect this fact."[120]

Concluding that Mr. Batchelor was deprived of the practical ability to park cars on his own land, the question of whether Mr. Batchelor retained *any reasonable use* of the land, for any other purpose, was even more compelling. As contended by Tuckey LJ, "[Mr. Batchelor's] right to use his land is curtailed altogether for intermittent periods throughout the week. Such a restriction would, I think, make his ownership of the land *illusory*."[121] The extensiveness of the rights sought were so comprehensive that the sterilisation caused by the existence of such a right resulted in Mr. Batchelor's ownership of the land becoming an illusion. Compatible with the facts of *Copeland v Greenhalf,* in no way shape or form could it appear that Mr. Batchelor had any beneficial interest in the lands in question. The degree of the rights asserted had by far exceeded the rights of the landowner himself. As such, the test for determining whether a right had crossed the boundary of limitations was not a question of whether the servient owner retained *any use of his land,* it was a question of whether he retained *reasonable use of his land.*

This mentality was also echoed by Judge Robert Englehart in *Central Midlands Estates Ltd v Leicester Dyers Ltd.*[122] This case considered whether Leicester Dyers Ltd had acquired a prescriptive easement to park over a small piece of wasteland that was roughly 3774ft squared. The primary pleadings of Leicester Dyers Ltd were whether they had acquired title of the wasteland by means of adverse possession. It was argued that Leicester Dyers Ltd had been in exclusive occupation of the land by virtue of continuously parking on the land in question for a substantial period of time. Alongside their plea for title, the respondents also pleaded a prescriptive right to park over the land by virtue of their continuous use.

The claim of adverse possession ultimately failed as Leister Dyers Ltd had not satisfied the factual possession or the *animus possidendi* that was necessary to succeed.[123] The claim of prescription was also unsuccessful as the respondents failed to meet the requisite requirement of 20 years continuous use.[124] Included in this rejection, the High Court considered whether the rights asserted amounted to an ouster. Judge Robert Englehart pressed counsel for the

[120] *Batchelor v Marlow* [2001] EWCA Civ 1051, at [17] (emphasis added).
[121] Ibid, at [18] (emphasis added).
[122] [2003] 2 P & C R DG1.
[123] Ibid, at [25].
[124] Ibid, at [30]. Any use exercised by Leicester Dyers Ltd did not exceed the period of 20 years. Moreover, the use exercised by Leicester Dyers Ltd was not continuous but intermittent.

alleged dominant owner on what uses the landowner would retain if such a right was upheld. Unconvinced by the conjured uses suggested by counsel, the ability to make use of the space below or above the parked cars was considered "rather far-fetched."[125]

In the context of the above scenario, a good consideration was put forth by Dr. Lu Xu where he outlined that, "if litigants attempt to state their case widely by claiming adverse possession, or an easement of parking in the alternative, they may find that that they only succeed in undermining both claims from the outset."[126] The reasons being, if someone pleads a claim of adverse possession, they profess that their use exercised was wholly exclusive to the entire world — which ultimately — is far too extensive in the nature of an easement. Alternatively, a plea of long user inadvertently admits that the use exercised fell short of the exclusiveness required for a claim in adverse possession to succeed. In this scenario, it would be entirely possible that the use exercised by a claimant would fall within the parameters of use that was not extensive enough to suffice adverse possession, but at the same time, too extensive for a claim in prescription to succeed. In this scenario, the claimant would leave the Court empty-handed, much to the delight of the landowner.

5-03 Moncrieff v Jamieson: The Death Knell for The Ouster Principle?

In *Moncrieff v Jamieson,*[127] the House of Lords expressed the harshest criticism of the ouster principle to date. It is interesting to observe though, that the decision reached in this case wasn't based on whether the rights sought amounted to an ouster. What proved to be another highly fact sensitive case, the House considered whether a right of way which was expressly granted, included an ancillary right to park on the servient tenement. Although ouster arguments were raised, such arguments were relatively trivial to the outcome reached, as the Court was primarily concerned with whether the ancillary right sought would enhance the convenient and comfortable enjoyment of the right that was expressly granted. As acknowledged by Lord Neuberger, it would have been "dangerous to try and identify degree of ouster [which] is required to disqualify a right from constituting an easement."[128] This is because, the ouster principle was limited in its applicability to the disputed easement and therefore, such a question required a more appropriate case. Nevertheless, two of the five Jurists expressed their harsh

[125] *Central Midlands Estates Ltd v Leicester Dyers Ltd* [2003] 2 P & C R DG1, at [33].
[126] Dr Lu Xu, "Easement of car parking: the ouster principle is out but problems may aggravate" (2012) Vol: 76 (4) *Conveyancer and Property Lawyer Journal* pp. 291-306, at 303-04. Citing: Kam Ubhi & Mark Baumohl, "No parking" (2003) Vol: 147 (14) *Solicitors Journal* pp. 408-409, at 408.
[127] [2007] 1 WLR 2620.
[128] Ibid, at [143].

critic of the ouster principle, which undoubtedly, has had a substantial impact on the attitudes towards the doctrine.

It was perhaps the "unusual circumstances" of this particular case that resulted in the House of Lords upholding the right that was being asserted.[129] As acknowledged by Lord Scott, the geography surrounding the dominant and servient tenement in this case was "all important."[130] For these reasons, it was deemed necessary to uphold the right in order to enhance the *comfortable use* and *enjoyment* of the right of way that was expressly granted.[131] However, two of the five Jurists — namely Lord Scott and Lord Nuremburg — expressed their criticisms of the ouster principle within their judgements.

In this case, the servient owner argued that the right asserted would have substantially occupied the servient area and therefore, deprive them of reasonable use of that land.[132] Remarkably, this was an incorrect application of the reasonable use test as the doctrine examines whether the existence of an easement deprives the servient owner from enjoying reasonable use over the *servient tenement*, not the *servient area*. Although the extent of interference on the servient owner's rights over the servient area is a relevant consideration as to the ouster principle, it is not a question of whether the servient owner retains reasonable use over the servient area.

Rejecting this ouster argument, Lord Nuremburg correctly recognised that at the time of the grant, the servient tenement was "open land" and "significantly larger" than the area that would

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[129] This is the opinion of Mr Brian H Inkster, solicitor for the dominant owner in *Moncrieff v Jamieson*. Mr Inkster delivered various lectures titled: "*Moncrieff v Jamieson*: An insight from the coal face (or perhaps more accurately the cliff edge)" These lectures were delivered to; The University of Aberdeen, The University of Edinburgh and The University of Strathclyde. A PDF copy of these lectures can be located on Mr Inkster's website: <http://inksters.com>.
[130] *Moncrieff v Jamieson* [2007] 1 WLR 2620, at [48].
[131] This case kicked off when the Moncrieffs (the dominant owners), discovered that on one day, "out of the blue" (As per Sheriff Colin Scott Mackenzie) the Jamisons began constructing a wall which encroached on their parking area and enlarged the Jamison's garden. The Moncreiffs had been parking on this area for several years prior, without the objection of the Jamisons. Due to the surrounding topography, there was nowhere to park on the dominant tenement. If there was no right to park on the servient tenement, the closest place to park would be a considerable distance away, down a steep descent in "open and exposed country." These factors were of paramount importance to the Court.
[132] *Moncrieff v Jamieson* [2007] 1 WLR 2620, at [54]. The servient area in this case was referred to as "the pink land." For clarity on "the pink land" see: Bardell Plan 2 in: Mr Brian H Inkster, "*Moncrieff v Jamieson*: An insight from the coal face (or perhaps more accurately the cliff edge)" (Lecture delivered to The Conveyance Class at The University of Strathclyde, 02/03/2010). Found at: <http://inksters.com>. It was also argued that there was scope for excessive enjoyment of the right asserted which would result in servient area being continuously and substantially occupied. This argument was rejected on basis of the principle of *civiliter*, a Scottish law principle which regulates the manner in which a servitude may be exercised. See paragraphs 37 to 40.

be occupied by two or three parked cars.[133] At the time when the grant was created, the servient tenement was also being used for agricultural purposes. Therefore, "it [did] not appear that there would have been any difficulty, or any significant harm to the interests of the servient owner, in the dominant owner parking two or three vehicles [on the servient tenement]."[134]

Lord Scott, however, was very critical of the ouster principle and outlined his disapproval of the doctrine on the assumption that the test examines if an alleged easement deprives the servient owner from enjoying reasonable use over the servient area.[135] It is submitted that Lord Scott erred in his understanding of the ouster principle and failed to differentiate the doctrine's applicability towards the servient area and the servient tenement. It is for these reasons — I believe — that led Lord Scott into delivering a harsh critic of the doctrine.

During Lord Scott's comments on the ouster principle, Lord Scott gives a brief discussion on the historical development of the doctrine. By the time Lord Scott reaches *Copeland v Greenhalf,* Lord Scott argues that the examination of the "possible inconsistency" between *Copeland v Greenhalf* & *Wright v Macadam* — and attempting to reconcile between the two authorities — would be the result of addressing the wrong point.[136] This is because — in Lord Scott's opinion — the attitudes to the servient land have been misunderstood. Lord Scott outlines that, "the servient land in relation to an easement is surely the land over which the easement is enjoyed, not the totality of the surrounding land of which the servient owner happens to be the owner."[137] Lord Scott then proceeds to give the example of a right of way over a 100-yard roadway on a 1,000-acre estate. Lord Scott contends that, "it would be fairly meaningless in relation to [the] easement to speak of the whole estate as the servient land." In conclusion, Lord Scott suggests that "[the] servient land was never the whole estate but was the land over which the roadway ran..."[138]

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[133] *Moncrieff v Jamieson* [2007] 1 WLR 2620, at [145]. This was a significant consideration. Since easements through implication arise from a true construction of the deed, it is necessary to examine the factual circumstances that were observable *at the time* the deed was created. Regarding the above dispute, it was necessary to consider if the implied right would have amounted to an ouster *at the time* the deed was created. Through Lord Nuremburg's observation, it is evident that this was not the case.
[134] *Moncrieff v Jamieson* [2007] 1 WLR 2620, at [145].
[135] Ibid, at [60].
[136] Ibid, at [57]. I have argued that there was no inconsistency between the two authorities. See beginning page 17 above.
[137] Ibid.
[138] Ibid. Lord Scott's example of a 100-yard roadway over a 1,000-acre estate is rather extreme. To identify the servient tenement, one must examine the facts which are observable from the ground. If this 100-yard roadway way was traversing over an 8-acre field within the 1,000-acre estate, it would be more appropriate to consider the 8-acre field as the servient tenement.

In my humble opinion, I believe that Lord Scott has erred in his understanding of the servient tenement and the servient area.[139] Lord Scott's use of the word "servient land" is rather confusing and inherently ambiguous, as the servient land includes both the servient tenement and the servient area. During his judgement, Lord Scott's focus was on the "pink land" which in this case, was the servient area. Consequently, Lord Scott surrounds his opinion on the ouster principle on whether the disputed easement to park would deprive the servient owner from enjoying reasonable use over the servient area.[140] As discussed, this was the incorrect focal point, as Lord Scott's focus (regarding the reasonable use test) should have been on whether a landowner retains reasonable use over the servient tenement in its entirety.[141] To clarify matters, I will differentiate between the servient tenement and the servient area with reference to the illustration below.

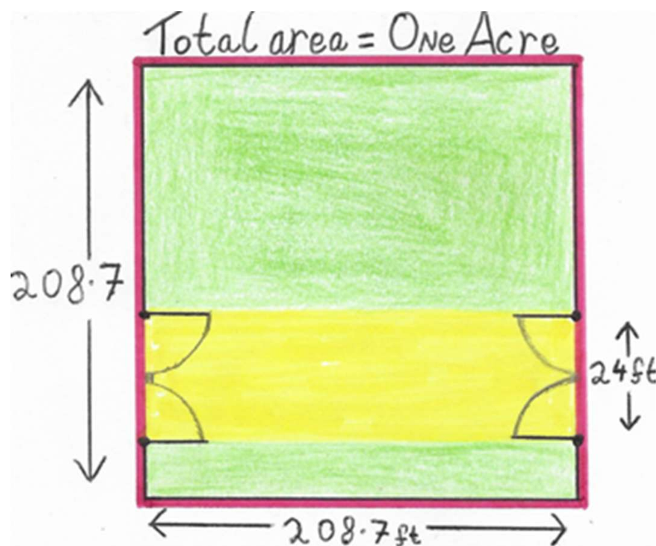

FIGURE ONE: The above graphic illustrates a 24ft wide right of way traversing over a one-acre field. The entirety of the one-acre field, enclosed in red, is considered the Servient Tenement or the Burdened Land. This is the *land* which is burdened by the existence of the easement. The area highlighted yellow is considered the Servient Area. This is the *area* over which the easement is exercised.

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[139] Another example of such confusion would be Lord Scott's criticism of the dicta in *Dyce v Hay* (See paragraph 54). The dicta of *Dyce v Hay* outlines that an easement cannot prelude a landowner from the ordinary uses of the servient tenement. In Lord Scott's criticism of this dictum, his Lordship outlines that a right of way would prevent a landowner from growing cabbages on the land over which the right of way passes. This is an incorrect focal point. Here, Lord Scott is professing that an easement may preclude a landowner from reasonable enjoyment over the servient area — not the servient tenement.

[140] *Moncrieff v Jamieson* [2007] 1 WLR 2620, at [60].

[141] Lord Nuremberg appears to have a better understanding of the servient tenement. See page 24 above.

The ouster principle was never concentrated on whether the servient owner retained valuable use over the servient area. The ouster principle is concerned with whether the servient owner retains reasonable valuable use over the servient tenement in its entirety.[142] All easements deprive the servient owner from exercising various uses over the servient area.[143] With reference to the above graphic, the servient owner is prohibited from building a shed over the right of way or ploughing up the right of way for the cultivation of crops. The existence of such an easement, however, does not prohibit the landowner from building a shed or cultivating crops on the remainder of the one-acre field. In essence, the existence of the easement does not deprive the servient owner from enjoying reasonable use *over the servient tenement.*

This distinction is of very much importance to *Moncrieff v Jamieson.* This case erupted after the servient owner wished to square off his garden with a stone wall. As such, the wall would have bordered the garden from the right of way, encroaching over the servient area and thereby leaving no room for the Moncrieffs to park. The existence of the right to park did not deprive the Jamisons of any reasonable use of their land; it only deprived them of a slightly bigger garden. In my opinion, I believe Lord Scott erred in placing so much focus in whether the servient owner retained reasonable use *over the servient area*. Instead, Lord Scott should have placed his focus on whether the servient owner retained reasonable use *over the servient tenement.*

Further in his criticism of the ouster principle, Lord Scott went on to suggest that the test applied in *Batchelor v Marlow* (whether an easement claimed deprives the servient owner from enjoying reasonable use over the servient tenement), needed some qualification.[144] Lord Scott proceeds to outline that;

> "It is impossible to assert that there would be *no use* that could be made by an owner of land over which he had granted parking rights. He could, for example, build above

[142] *Towers v Stolyar* [2017] NSWSC 526, at [49]. See also: *Registrar-General of New South Wales v JEA Holdings (Aust) Pty Ltd* [2015] NSWCA 74, at [64]. 'In a given case, it may be decisive to consider if the servient owner retains reasonable use of the servient tenement in its entirety.' (paraphrased)

[143] The extent of interference over the servient area is still a relevant consideration as to the ouster principle. For example (with reference to the above graphic), if the dominant owner wished to assert a right to fence off the 24ft wide way, to the exclusion of the servient owner and any anybody else, such a right could not be an easement. This is because, the dominant owner would then have exclusive possession of the way. If the dominant owner was to carry out this practice for 12 years, the dominant owner would acquire the fee simple of the way through adverse possession. Easements cannot be enjoyed to acquire *de facto* ownership of any part of the servient tenement. See: *Reilly v Booth* (1890) 44 Ch D 12.

[144] *Moncrieff v Jamieson* [2007] 1 WLR 2620, at [59].

> or under the parking area. He could place advertising hoardings on the walls. Other possible uses can be conjured up."[145]

In this hypothetical, a servient owner is subject to an extensive easement to parking that occupies the vast majority of his land.[146] It is important to note that in this hypothetical, Lord Scott outlines *any uses whatsoever* that may be retained by the servient owner. This is not a consideration of whether the landowner retains *reasonable use* over his land. Of course, the servient owner will retain some use of his land, however, the ouster principle is concerned with whether the landowner retains reasonable use over his land. The ability to make use of the space below or above the parked cars has already been considered far-fetched.[147] The ability to place advertisement hording on the walls would be of absolutely no utility in an isolated rural setting — although this may be a reasonable use in the heart of a city centre.[148] In any event, the uses retained should be tantamount with landownership, not with having an easement over somebody else's land. In this scenario, it would be more appropriate to sign over the fee simple towards the beneficiary, while reserving an easement to place advertisement hoardings on the wall.[149]

Lord Scott was also criticises as to the certainty of the reasonable use test by stipulating; "by what yardstick is it to be decided whether the residual uses of the servient land available to its owner are 'reasonable' or sufficient to save his ownership from being 'illusory'?"[150] It is for this reason Lord Scott believes that "[i]t is not the uncertainty of the test that, in my opinion, is the main problem. It is the test itself."[151] I will award some credit as to this critique of the ouster principle, as the word 'reasonable' can have a broad interpretation. It is for this reason that the line between what is acceptable and what is not can be hard to identify. This, however, can be achieved through the formulation of several requisite considerations which I will outline later.[152]

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[145] *Moncrieff v Jamieson* [2007] 1 WLR 2620, at [59] (emphasis added).

[146] So, to say, in a servient tenement that is only capable of facilitating 9 parked cars, the easement here is to park 9 cars on the servient tenement.

[147] *Central Midlands Estates Ltd v Leicester Dyers Ltd* [2003] 2 P & C R DG1, at [33].

[148] This is a perfect example of how blanket suggestion should be avoided. For particular uses to be considered reasonable, analysing the contextual circumstance and the surrounding area is required. Considering that all cases concerning easements are extremely unique and circumstantial, retained uses which are considered reasonable in one case, may well not be considered reasonable in the other.

[149] The right to display an advertisement on another man's wall has been recognised as an easement. See: *Moody v Steggles* (1879) 12 Ch D 261.

[150] *Moncrieff v Jamieson* [2007] 1 WLR 2620, at [59].

[151] Ibid.

[152] See generally at page 34 below.

In conclusion, Lord Scott rejects the reasonable use test and proposes that the test should be substituted for a test which asks if the servient owner retains "possession and control" of the servient land.[153] If this is the test that should be applied, the focus will now concentrate on if the easement allows the servient owner to retain possession and control of the servient tenement, even if the easement deprives the servient owner of all reasonable use of their land. Therefore, the scope of extensiveness will now be extended to rights that stop just short of exclusive possession.

5-04 The Ouster Principle post Moncrieff v Jamieson

Despite the harsh criticisms that were expressed in *Moncrieff v Jamieson,* the ouster principle was not overruled.[154] Neither did *Moncrieff v Jamieson* alter or qualify the question that must be asked in the application of the ouster principle.[155] As such, the reasonable use test that was ratified in *Batchelor v Marlow* remains authoritative and binding.[156] The issue with the opinions within these two cases though, is that they are impossible to reconcile with and offer two very conflicting approaches to addressing the same issue. If Lord Scott's test is right, then the reasonable use test is wrong. Despite *Batchelor v Marlow* remaining authoritative, the criticisms of Lord Scott have had a substantial influence on the attitudes towards the reasonable use test. Therefore — for a period of time — the Courts began to follow the lead of Lord Scott, with some considering the *Batchelor* position as being "weakened."[157] In more recent times however, the reasonable use test has received appreciation for its pivotal existence,[158] with its application being described as "good law."[159]

In *Virdi v Chana,*[160] a prescriptive right to park a car over almost all of the land in question was upheld. Another highly fact sensitive case, what was interesting about this predicament was that the lands owned by the servient owner, Ms. Virdi, were exponentially small in size. Here, Ms. Virdi's land was so small that its dimension in length was the size of half a car. Adjacent to Ms. Virdi's land was an area of unregistered land which would have facilitated the remainder

[153] *Moncrieff v Jamieson* [2007] 1 WLR 2620, at [59].
[154] *Virdi v Chana* [2008] EWHC 2901, at [16]; *Kettel v Bloomfold Ltd* [2012] EWHC 1422, at [12].
[155] *Stenner v Teignbridge District Council* [2025] UKUT 204, at [64].
[156] At least for the judiciary in England and Wales.
[157] This was the opinion of Ann McAllister, adjudicator for the Land Registry in Virdi v Chana (lower case sitting). See: *Virdi v Chana* [2008] EWHC 2901, at [22].
[158] As per Lord Biggs, who understood the importance of the common public policy to not have land perpetually sterilised due to the existence of unrestricted rights. See: *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57, at [59]-[60].
[159] As per Judge Ewan Paton in: *Viscido v Raimondo* (2025) FTT, REF/2023/0497 & 0498, at [129].
[160] [2008] EWHC 2901.

of the parked car. Therefore, the right sought was to park half the car on Ms. Virdi's land and the other half on the remaining unregistered land.

Ms. Virdi argued that the right sought would be so extensive as to deprive her of the ability to park a car on her own land.[161] Judge Purle QC delivered a very prudent response to this argument. Considering the fact that Ms. Virdi's land was so small, if Ms. Virdi wished to park a car over her own land, she would be committing an act of trespass by parking the remainder of the car over the unregistered land. Since Ms. Virdi had no right to park over the unregistered land, Ms. Virdi could not legally park a car over her own land.

Judge Purle QC concluded that the servient owner retained a variety of uses which saved her ownership from becoming illusory. Even when the right was being exercised, Ms. Virdi could enter onto her land to carry out repairs to her fence.[162] Ms. Virdi could also plant shrubs and trees on the land in question without interfering with the dominant owner's rights.[163] Distinguishing from the factual circumstances of *Batchelor v Marlow,* Judge Purle QC found it beneficial for Ms. Virdi to have the ability to resurface the servient area for "aesthetic reasons."[164] Unlike *Batchelor v Marlow,* the land in *Virdi v Chana* was located directly adjacent to the servient owner's home. Having the surrounding area aesthetically appealing would been of value to Ms. Virdi.

In Dr. Lu Xu's opinion, the foundations of the reasonable use test have been "shaken" by *Moncrieff v Jamieson,* and since then, "it only takes the possibility of re-painting the surface, placing flower pots, or the hypothetical use above or below the surface to make the ownership of land not illusory."[165] This proposition — which suggests that even the most minimal of uses retained by the servient owner are now enough to strike down the application of the ouster principle — requires clarification. The facts of *Virdi v Chana* are extremely unique and require close examination of the observable surroundings. The land owned by Ms. Virdi was so futile that it was incapable of producing any real, practical value. Even without the presence of the easement, the reasonable use to which the land could be put was extremely curtailed in utility. The land was so small and so nugatory that the most use any reasonable person could ever put to it would be to plant scrubs and make it aesthetically pleasing. In this case, the enjoyment of

[161] *Virdi v Chana* [2008] EWHC 2901, at [19].
[162] Ibid, at [21].
[163] Ibid, at [20].
[164] Ibid, at [25].
[165] Dr Lu Xu, "Easement of car parking: the ouster principle is out but problems may aggravate" (2012) Vol: 76 (4) *Conveyancer and Property Lawyer Journal* pp. 291-306, at 296.

the claimed easement did not prevent this. Perhaps — if the land owned by Ms. Virdi was large enough to park a full car, maybe then the Court would have come to a different conclusion. However, as it should always be observed, it can be the narrowest of margins that make or break any claim which involves prescription.

As acknowledged, there is a danger in applying blanket suggestions of retained uses without examining to facts that are observable from the ground. Just because a variety of retained uses are considered reasonable in one case, this does not mean that such uses would be considered reasonable in the next. The ability to plant aesthetic scrubs in a residential setting will have no weight whatsoever in the core of vast bogland.

The most recent case of high authority to consider the ouster principle can be ascribed to the doctrine's slight revival. In the UK Supreme Court case of *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd,*[166] the application of the ouster principle was discussed. During this discussion, the doctrine's stature was vocalised, with the Jurists understanding the importance in limiting the extent of rights which can impact the enjoyment of land. Nevertheless, its application proved trivial, as the disputed easement primarily concerned the legitimacy of recreational easements and the potential obligations of the servient owner to keep the servient tenement in good upkeep and repair. Although Lord Biggs acknowledged that "[t]he precise extent of the ouster principle is a matter of some controversy," he inevitably concluded that it was "unnecessary to resolve [the matter] on this occasion."[167]

In this case, Diamond Resorts (Europe) Ltd — the servient owners — were freeholders of a country club and a leisure complex. In 1981, Regency Villas became owners of land that was adjacent to the leisure complex and thereafter, constructed 26 timeshare apartments. The 1981 Transfer included the grant of rights which became the subject of the dispute. Regency Villas were granted the right to use;

> "…the swimming pool, golf course, squash courts, tennis courts, the ground and basement floor of Broome Park Mansion House, gardens and any other sporting or

[166] [2018] UKSC 57.

[167] Ibid, at [61]. Mr Ying Keat argues that it was "unfortunate" that Lord Biggs did not resolve the ouster controversy. In my opinion though, such a question requires a more appropriate case. See Mr Ying Keat comments at: Edwin Teong Ying Keat, "Easing the law onto unchartered terrain: *Regency Park Villas Title Ltd and others v Diamond Resorts (Europe) Ltd and others* [2018] UKSC 57" (2019) *Singapore Comparative Law Review* pp. 210-213, at 212.

> recreational facilities (hereafter called 'the facilities') on the Transferor's adjoining estate."[168]

The upkeep of the various facilities later fell into disuse. Sometime later, hostilities between the parties emerged after there were disagreements regarding the contributions put towards the upkeep of the several facilities. The dominant owners later denied Regency Villas from having any right to use the facilities and began demanding payments for such use. Regency Villas then sought declarations that they were entitled to use the various facilities.

Considering that the various right sought were rights over recreational facilities, such rights could only be enjoyed if the facilities were kept in good condition. For example, the dominant owner could only enjoy his right to use the golf course if the playing grounds were maintained and not overgrown. Therefore, the dominant owner would incur step in rights to carry out essential repairs and maintenance to ensure that his rights could be enjoyed. It was at this point that ouster arguments were raised, as the servient owner argued that if the dominant owner stepped in to carry out maintenance over the golf course, such conduct would — as argued — amount to excessive occupation and therefore be inconsistent with the possession of the servient tenement.[169]

This argument was rejected by the Supreme Court. Lord Biggs ruled that it is not necessary to examine the extensiveness of what a dominant owner *may do* to facilitate the enjoyment of what was expressly granted, especially in the circumstances that the servient owner ceased to carry out the necessary management and maintenance of the servient tenement — in the circumstances that the servient owner had undertook such responsibilities.[170] This is because, the Courts should examine "the ordinary expectations of the parties, at the time of the grant, as to who, between dominant and servient owners, was expected to undertake the management, control and maintenance of the servient tenement."[171] Secondly, the Supreme Court understood that step-in rights are, by definition, "rights to reasonable access for maintenance of the servient tenement, sufficient, but no more than sufficient, to enable the rights granted to be used."[172] Since such step in rights could only be used in a reasonable manner to facilitate the enjoyment

[168] *Regency Park Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57, at [8].
[169] As acknowledged in the judgement, the ouster arguments put forth by the servient owners were whether such rights were consistent with the possession of the servient tenement. *Not* whether such rights deprived the servient owner of reasonable use of the servient tenement. See paragraph 62.
[170] Ibid, at [64].
[171] Ibid.
[172] Ibid, at [65].

of the rights that were expressly granted, such step in rights could never amount to a substantial occupation of the servient tenement.

It was concluded by the Court that the servient owners had undertook the responsibility for the general upkeep of the various recreational facilities. As such, these step in rights would only be exercised in the event that the servient owner failed to carry out their obligations. Since such rights were dependent of the general upkeep of the servient tenement, such rights could not be enjoyable if the servient tenement fell into disrepair. Therefore, it was considered necessary that the dominant owners enjoyed the right to enter onto the servient tenement to exercise whatever was necessary to enable the enjoyment of the rights granted. As noted by Dr. Pratt, "even if the dominant owners did step in, the test for the ouster principle would not be met."[173]

Unlike the Supreme Jurists of *Moncrieff v Jamieson,* Lord Biggs of the UK Supreme Court spoke positively of the ouster principle. Acknowledging the proposals of the law reform commission to abolish the ouster principle — in addition to the criticisms of Lord Scott — Lord Biggs appreciated the value of the ouster principle and outlined that;

> "These requirements [that an alleged easement should not be so extensive or invasive as to oust the servient owner from the enjoyment or control of the servient tenement] serves a common public policy purpose, namely, to prevent freehold land being permanently encumbered by proprietary restrictions and obligations which inhibit its utility to an unacceptable degree."[174]

Here, Lord Biggs understood the importance of preventing the endorsement of rights which would encumber the ability to extract valuable use from land. As acknowledged, there is a common public policy in preventing land from becoming futile as it is in the best interest of society that land is constantly being utilised. This is consistent with the view articulated by Prof. Gray & Ms. Gray, in which the "delimitation of easements more effectively recognises that easements are designed *not to sterilise land*, but to facilitate the purposeful, profitable and collaborative exploitation of land resources."[175]

[173] Dr Natalie Pratt, "Recreation easements after Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd" (2019) Vol: 7 *Journal of Planning & Environment Law* pp. 638-643, at 641.
[174] *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57, at [60].
[175] Prof Kevin Gray & Susan Gray, *Elements of Land Law* (5th edn, Oxford University Press, 2008) Ch 5.1.65 (emphasis added).

6-00 The Application of The Ouster Principle & Relevant Considerations

Those wishing to invoke the ouster principle must outline the extensiveness of the right sought and evaluate whether such a right conforms with the nature of easement; and whether such a right is appropriate to the land it subjects. To reach this determination, it is first necessary to establish the manner in which the right has arisen. As acknowledged by Bland, "the mode of acquisition of an easement has influenced decisions as to the nature of the right itself."[176]

Since the ouster principle concerns the residual rights of the servient owner, such retained rights will be scrutinised with consideration to the circumstance in which the dominant right was established. In practice, it would be difficult for a servient owner to argue that an easement disposed of through express grant amounts to an ouster. This is a contrast with easements acquired through prescription as extensive rights can only be consistent with the proprietorship and possession of the servient tenement if that is what the landowner wished to subject his land to. The absence of such expressed approval is where implications arise.

After the mode of acquisition is established, the attention then shifts towards how appropriate the claimed right is. As acknowledged, it is important to understand that the ouster principle includes two categories. These are; whether the easement claimed would be inconsistent with the possession of the servient tenement, and whether the easement claimed would be inconsistent with the proprietorship of the servient tenement.

To evaluate the former, the Courts must examine whether the right sought amounts to a possessory interest in the servient tenement. Any easement claimed can never amount to an exclusive possession over any part of the servient tenement. This is because, the "exclusive or unrestricted use of a piece of land,....beyond all questions passes the property or ownership in that land, and there is no easement known to law which gives exclusive and unrestricted use of a piece of land."[177] In cases that fall short of exclusive possession, the Courts must examine if the right asserted amounts to an unjustifiable possession of the servient tenement. This can be achieved by examining the extensiveness of the servient area and determining whether the facilitation of the proper exercise of the right claimed would substantially occupy the servient

[176] Peter Bland, *Easements* (3rd edn, Thomson Round Hall, 2015) Ch 1-38.
[177] *Reilly v Booth* (1890) 44 Ch D 12 (CA), at 26 (Lopes LJ).

tenement.[178] This test effectively examines how much a claimed right would exclude the servient owner from their own land.

The second category of the ouster principle considers whether the right claimed is consistent with the proprietorship of the servient tenement. To make this determination, the Courts must examine whether the existence of the easement will leave the servient owner without any reasonable *beneficial* use which can be enjoyed over the servient tenement. Since this test endeavourers to preserve the value in landownership, the law prevents the existence of over inflicting burdens which vanish the level of proprietorship over land. After all, what value is there in owning land if a man can't enjoy reasonable use over it?

The complexity with this test is that it can be difficult to codify which variety of uses are considered reasonable uses to which the land in question should be put. As such, judicial discretion remains the cornerstone of the Courts ability to strike down claims that appear to be incongruous with rights that should be recognised. Since this test is highly circumstantial, each case of its kind will rest upon its own particular facts. In any event, there are a number of considerations the Court should take into account when concluding what decision is most appropriate for their case.

6-01 Occupation of the Servient Tenement

When considering the impact of rights sought and evaluating whether such rights unduly preclude the landowner from reasonable enjoyment over his land, it is a good start to contrast the physical parameters of the exercise of such an easement, in proportion to the burdened land as a whole. In this assessment, the Courts must examine the magnitude of the servient area and analyse to what extent the servient area occupies the servient tenement. In reality, the greater the space that is taken up to facilitate the proper exercise of the right — in relation to the whole of the burdened land — then the more likely it is that the right unduly hinders the servient owner's enjoyment of the servient tenement. To put simply, if the servient area occupies a substantial portion of the servient tenement, it becomes less likely that the landowner is capable of exercising reasonable use over his own land.

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[178] Although the precise degree of occupation required to disqualify an easement remains unknown. It would be welcomed if the Courts would conclusively clarify the extent of occupation that is required to disqualify an easement. For example, an easement with a servient area that exceeds 80% of the servient tenement is automatically disqualified. This is because, such a servient area (whatever percentage) would amount to a possessory interest in the lands in question.

Although this assessment is a good foundation, it is not absolute. In the Australian case of *Petrie v Dickson,*[179] Parker J. was of the opinion that;

> "There is no authority which requires the servient area to exceed 50% (or any other percentage) of the burdened land as a whole. I see no reason in principle why there should be. The public policy behind the ouster principle would not justify any such restriction. [The Ouster Principle] is concerned with maximising the use and value of land generally."[180]

This is a very pragmatic approach adopted by Parker J. In this assessment, the Courts should examine the overall impact such an easement would have on the reasonable enjoyment of the servient tenement — not just the easement's geographical presence. So, to say, even if the alleged right would only occupy a minority of the servient tenement — but its existence would have a detrimental impact to the ownership of the burdened land — then such a right should fail to qualify as an easement. For example, if a prescriptive right to deposit soil over a prospective residential site was claimed — and such a right would inhibit the development of the burdened land for residential purposes[181] — then such a right cannot qualify as an easement. Even though the space occupied at any one time during the proper exercise of the right would not amount to a majority of the servient tenement, its mere existence as an easement would have a catastrophic impact to the enjoyment of the burdened land.

Both of these tests coincide together without prejudice to the other. If an alleged easement was to swallow the vast majority of the servient tenement, then there would be no necessity to examine the scope of uses retained by the servient owner. This is because, the right is already disqualified before the Courts even reach this consideration. However, even if the Courts were to conclude that the servient area does not amount to a possessory interest over the servient tenement, the Courts can still disqualify the easement due to its detrimental existence. These two approaches can be considered an objective test for the former, and a subjective test with the latter. As the former test draws a line on the scope of extensiveness that is permissible for the servient area,[182] while the latter test is more open to judicial opinion.

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[179] [2024] NSWSC 972.
[180] Ibid, at [313].
[181] Thus, rendering the land futile.
[182] As acknowledged, the boundary of limitation between an area occupied which is permissible as an easement, and an area occupied which amounts to some other right which is larger than an easement, remains unknown. See footnote 156.

6-02 Market Value of the Servient Tenement

For a right to qualify as an easement, it is essential that the right sought accommodates the dominant tenement.[183] One of the most convenient methods for establishing this criterion is evaluating if the alleged easement increases the market value of the dominant tenement. Therefore, when assessing if an alleged right is so burdensome as to deprive the landowner of reasonable beneficial use of their land, it is important to consider how the existence of such an easement would have on the market value of the servient tenement. As observed by Prof. Gray & Ms. Gray, "a significant reduction in the monetary value of the alleged servient land may point to a sterilisation of ownership."[184] One of the advantages of addressing the market value is that its assessment is certain and conclusive. Therefore, less weight is attached to judicial opinion, as more focus is emphasised on concrete fact.

There can be no prescriptive easement known to law which would incinerate the market value of the servient tenement. The rational for this premise can be traced back to the compelling assertions made by Lord McNaughten in the House of Lords case of *Gardner v Hodgson's Kingston Brewery Co.*[185] In this case, the alleged dominant owner had passed and repassed by horse and cart over the yard of The Red Lion Inn for a continuous period of forty years. What proved to be pivotal, the alleged dominant owner had paid the owner of the Inn an annual fee comprising of fifteen shillings.[186] However, the purpose of this annual fee remained unknown as the origins of this payment became lost overtime. Therefore, the question before the House was whether this fee was an annual licence to traverse over the yard of the Red Lion Inn, or a payment attached to some original grant that vested the creation of a right of way.[187]

When considering if there was substance related to the argument of a lost grant which vested the disputed easement, Lord McNaughten outlined that, "[t]he suggestion of a lost grant burdening the [servient tenement] with a servitude which would *so greatly diminish its value*,... is, I think, out of the question."[188] The idea of a grant vesting a perpetual burden which would

[183] Peter Bland, *Easements* (3rd edn, Thomson Round Hall, 2015) Ch 1-04.
[184] Prof Kevin Gray & Susan Gray, *Elements of Land Law* (5th edn, Oxford University Press, 2008) Ch 5.1.64 (Footnote 7).
[185] [1903] AC 229.
[186] The House of Lords ruled that the annual payment made by the dominant owner allowed the inference to be made that a licence was being exercised. Therefore, such use was not *nec precario* and could not amount to a prescriptive right.
[187] It was argued that the annual fee was related to the expense of the necessary upkeep of the yard.
[188] *Gardner v Hodgson's Kingston Brewery Co* [1903] AC 229, at 235 (emphasis added).

plummet the value of the Inn was a conception that was far too inordinate. Therefore, it was in no way reasonable to presume a legal origin vesting towards the creation of the alleged right.

The renowned case of *Batchelor v Marlow* also had consideration for the market value of the alleged servient tenement. It is important to note that in this case, land adjacent to the servient tenement (which was owned by a separate 3rd party), had sought planning permission to develop their lands. Included in the planning permission, a turning circle was designated over Mr. Batchelor's land to facilitate these developments.[189] Although it was not mentioned within the judgment, it was likely that the 3rd party would have purchased out an interest over Mr. Batchelor's land to enable these developments. The only impediment to this arrangement was the prescriptive easement that was being claimed.

Considering the fact that the servient tenement was so small in size, its ability to produce any practical, valuable use was curtailed to much capacity. Since the turning circle was of such importance to facilitate the proposed developments, Mr. Batchelor would have received a valuable sum in relation to his lands. Needless to say, any person in their right mind would have engaged in negotiations with the 3rd party. However, all of this was put to a halt due to the easement that was in dispute. As such, Mr. Batchelor would have been deprived of this lucrative opportunity had the disputed easement been upheld.

Lord Justice Tuckey recognised that if the easement was upheld, the value of the servient tenement would have been reflected by the fact that the lands could now only be sold to the dominant owner.[190] The existence of such an easement would have sterilised the use of the land to such an extent that the land was no longer readily marketable. In reality, no person would want to purchase land which is subject to such an invasive burden. Therefore, any contenders for the land could only be the dominant owners who would undoubtedly take advantage of the existence of such the easement as leverage to purchase out the land for a cheaper prince. In effect, Mr. Batchelor's ownership of the land would have been rendered illusory, as there would have been no valuable benefit in owning the land had the easement been recognised. This mentality is uniformly recognised by Prof. Gray and Ms. Gray. As acknowledged, the necessity for limiting the extensiveness of rights which can be recognised as easements "plays a valuable

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[189] *Batchelor v Marlow* [2001] EWCA Civ 1051, at [3]. As outlined in the judgement, had the disputed easement been upheld, the developments would not have materialised.
[190] Ibid, at [17].

role in delimiting the kinds of rights which have the capacity to affect *future purchasers of land*."[191]

In the Australian case of *Harada v Registrar of Titles,*[192] King J. ruled that a statutory notice to acquire an easement to run electricity lines over the servient tenement was invalid as, among other things, would deprive the servient owner of the opportunity to construct buildings on her own land. Ms. Harada — the alleged servient owner — had purchased industrial land without the knowledge that the said land was subject to a notice to acquire an easement by the State Electricity Commission. After acquiring ownership of the land, Ms. Harada made efforts to sell the land to a 3rd party, with the 3rd party showing inclination to carry out the purchase. However, after the 3rd party made enquiries with the State Electricity Commission, they discovered that the land would become "less buildable" due to the existence of the notice to acquire the easement.[193] As a result, negotiations were abandoned, and Ms. Harada suffered a reduction in the market value of her land due to the existence of the notice.

Understanding the effects an easement to run electricity lines would have on the enjoyment of the servient tenement, King J. outlined that the rights sought would leave the servient owner with;

> "[V]ery few rights over her own property and could do little more with [the servient tenement] other than move over it and park cars on it. I think the rights sought go far beyond for what is appropriate for an easement, and for this reason, the rights sought... do not fall within the category of a common law easement."[194]

Here, King J. understood the impact electricity lines would have had on the *potential* of Ms. Harada's land. With the servient tenement being industrial land suitable for industrial developments, the presence of electricity lines would have sterilised the land by preventing the erection of any buildings. As such, auspicious land would have been rendered futile — which undoubtedly — would have had a destructive impact on the market value of the servient tenement.

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[191] Prof Kevin Gray & Susan Gray, *Elements of Land Law* (5th edn, Oxford University Press, 2008) Ch 5.1.49 (emphasis added).
[192] [1981] VR 743.
[193] Ibid, at 747.
[194] Ibid, at 753.

6-03 Ordinary and Inherent Use to Which the Land Should be Put

When evaluating if an easement deprives a landowner from reasonable enjoyment over his own land, it would be beneficial to examine the ordinary and inherent use to which that land should be put. Drawing from the dicta of the sidenote in *Dyce v Hay*,[195] "there can be no prescriptive right in the nature of [an] easement so large as to preclude the *ordinary uses* of property...." Included in this analysis, is the close examination of the facts observable from the ground and reaching a reasoned conclusion as to what use should be made of the land absent of the disputed easement. Since the ouster principle attempts to strike a balance between the rights of the dominant owner with the residual rights of the servient owner, there should be an observation of whether the rights sought are overarching to the nature of the land itself. So — for example — a 12t wide agricultural right of way traversing over an eight-acre field would not be inconsistent with the nature of the burdened land.

In the Australian case of *Clos Farming Estates v Easton,*[196] the suggestion that the servient owner would retain the ability to engage in recreational activities over their own land was rejected. This is because, such a suggestion was of no utility when "the predominant and accepted *use* and *value* of the land derives from it being rural land suitable for agricultural purposes."[197]

An example of this test can also be observed in *Harada v Registrar of Titles.*[198] As discussed, the servient tenement in this case was industrial land suitable for industrial developments. The practical and reasonable use which any man would have put to the land would have been prevented by the existence of the disputed easement. This can be compared with *Wright v Macadam,*[199] as the approved easement was not inconsistent with the nature of the property. As acknowledged, the ordinary and inherent use of a coal shed is to store coal. Provided that the amount of coal the Wrights stored was not excessive, there was nothing in their use which was inconsistent with Mr. Macadam's rights over the property.

When the Courts examine the reasonableness of any potential use to which the land should be put, Dr. Spark makes the suggestion that the Courts must account for the servient owner's

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[195] (1852) 1 Macq 305. It has also been said that rights which are so extensive as to interfere with the *ordinary* proprietary rights of the servient owner cannot be prescribed for. See: *Copeland v Greenhalf* [1952] Ch 488, at 491-92.
[196] [2002] NSWCA 389.
[197] Ibid, at [38] (emphasis added).
[198] [1981] VR 743.
[199] [1949] 2 KB 744.

"*actual* use of the land."[200] Included in this analysis, is the examination of whether the disputed easement would have an impact on what the servient owner is currently doing with the land. Although this is a good foundation — as this consideration examines the impact the alleged easement would have on the servient owner's day to day living — this test does not account for the inherent use to which the land *should* be put. As such, Dr. Spark's test would be a subjective test as opposed to an objective one; as Dr. Spark's test is dependent on the servient owner's current conduct as opposed to what a reasonable person would do with the land.

There could be several reasons why a landowner did not utilise his lands to its fullest extent.[201] This is of particular importance to prescription as it only takes a mere 20 years to perpetually bind a burden to land. For example, take the instance where there was once a house on a site which then became derelict through the lapse of time. Then — during the 20 years where the house was vacant — a neighbour establishes an easement against the land resulting in the suppression of the site from ever being reverted to its original condition. In consequence, the once fruitful enjoyment of a piece of property is now perpetually extinguished due to the sequence of events which occurred during a finite period. This prompts the genuine question: Should land forever be encumbered until Armageddon due to a man's negligence (or inability) to make good use of his own land?

In conclusion, it is submitted that when the Courts examine the reasonableness of any uses retained by the servient owner, the Courts should adopt an objective test which examines what use a reasonable person would make of the land absent of the disputed easement. Thereafter, the Courts should examine whether the existence of the disputed easement would deprive the servient owner of this established use.

6-04 Balancing the Utility – A Vital Consideration

As articulated by Prof. Gray & Ms. Gray, "[a]ny rational scheme of real property is inevitably concerned to promote the most efficient utilisation of land resources."[202] The very reason why easements exist is to ensure that land is utilised to its fullest extent. One could only ponder on how much land would be sitting idle without the existence of such salient rights. It can be

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[200] Dr Gareth Spark, "Easements of parking and storage: are easements non-possessory interests in land?" (2012) Vol: 76 (1) *Conveyancer and Property Lawyer Journal* pp. 6-18, at 17 (original emphasis).
[201] For example, a landowner may have been limited in his finances which prevented him from maximising the use of his lands. Or a landowner may have been suffering from an illness which may have impacted his ability to prioritise the enjoyment of his lands.
[202] Prof Kevin Gray & Susan Gray, *Elements of Land Law* (5th edn, Oxford University Press, 2008) Ch 5.1.1

established, then, that the law of easements concerns itself with the societal interest of ensuring that property is capable of valuable exploitation.[203] However, a question lingers; what if an easement claimed is disproportional in the utility achieved as to the utility lost?

It is submitted that a failure on behalf of the Courts to evaluate the societal impact caused by rights sought would fly right in the face of any jurisprudence surrounding land law as a whole. The Constitution itself understands the importance of regulating the laws of property to adhere to the "principles of social justice" and to exonerate "the common good."[204] It would be uncontroversial to state that it serves the best interest of society to warrant the valuable exploitation of land and its resources.[205] Although easements may reduce the level of proprietorship that can be extracted over the servient tenement, this is usually justified by the enhanced practicality of the dominant tenement. It is important, therefore, to balance the overall utility and ensure that from an objective perspective, land — overall — is not worse off due to the existence of an easement. Otherwise, the law of easements would forsake its very own *raison d'être* — which is — ensuring that land overall is capable of real, valuable utilisation.

Prescription, which has its origins in Roman Law, was ultimately concerned with property falling towards the individual who will make the best use of it — which consequently — was in the best interest to society at large.[206] This mentality was carried over into the common law where in the prestigious case of *Dalton v Angus*,[207] the House of Lords recognised that the concept of prescription was "founded upon utility more than upon equity."[208] Although there can be moral arguments made against prescription as the process can "reward the greedy and punish the indulgent,"[209] behaviour which enhances the overall practicality of land is generally encouraged by the law. Throughout time, one of the primary reasons why the doctrine continued to operate was that prescription was perceived as *not* being "antithetical to economic development."[210] However, if a procedure of law endeavours to magnify the exploitation of

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[203] Prof Kevin Gray & Susan Gray, *Elements of Land Law* (5th edn, Oxford University Press, 2008) Ch 5.1.3.
[204] Article 43.2.1° & 2°.
[205] It is a recognised public policy that land should not be "rendered useless". See: *Hirtle v Ernst* (1991) 110 NSR (2d) 216 (TD), at [50] (Nathanson J).
[206] Kauzo Hatoyama, "The Civil Code of Japan Compared with the French Civil Code" (1902) Vol: 11 (7) *The Yale Law Journal* pp. 354-370, at 359.
[207] (1881) 6 App Cas 740.
[208] Ibid, at 818.
[209] Peter Bland, "A 'Hopeless Jumble': The Cursed Reform of Prescription" (2011) Vol: 16 (3) *Conveyancing and Property Law Journal* pp. 54-60, at 54.
[210] Dr Fiona Burns, "The Future of Prescriptive Easements in Australia and England" (2007) Vol: 31 *Melbourne University Law Review* pp. 3-46, at 19.

land resources, then it would be completely paradoxical to invoke this process — which inadvertently — reduces the valuable practicability of land overall.

In practice, the Courts have historically prevented certain easements from being upheld to ensure that land is utilised to its fullest extent. In *Attorney General v Doughty,*[211] Lord Hardwick anticipated that the recognition of a right to a view would "prevent the development of great towns."[212] The constant reluctance to adopt new negative easements has also been understood to "avoid hampering legitimate development."[213] In regard to the ouster principle, easements claimed should not sterilise valuable land only to vindicate an easement of limited utility. For example, a prescriptive right of way for all purposes traversing over waste land will have less difficulty qualifying as an easement, as opposed to a prescriptive right of way for agricultural purposes which would inhibit the residential development of the servient tenement.[214] Evidence of this test can be observed in *Batchelor v Marlow,* as the Court of Appeal vindicated the societal interest of promoting property development against the sake of parking a few cars.

To conclude, it is submitted that the Courts should have an active regard to the public policy of substantiating the valuable exploitation of land. This is of particular importance when the Courts are posed with claims in prescription. In such cases, the Courts should contemplate whether there is a lot more to be lost than there is to be gained. With these factors in mind, no claim — should ever — shock the conscience of the Court.

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[211] (1752) 2 Ves Sen 453.
[212] Ibid.
[213] Peter Bland, *Easements* (3rd edn, Thomson Round Hall, 2015) Ch 1-34.
[214] As with many rights of ways arising through prescription, such routes are often established as subsidiary access points to the dominant tenement. This is because, the dominant owner already has a primary point of access to their lands. Since prescriptive rights are "*for ever limited* to the *category* and *quantum* of user which prevailed during the relevant user period" (Gray & Gray, *Elements of Land Law* 2008: Ch 5.1.84. *emphasis added*), it can be difficult for a landowner to establish a right of way for all purposes — or a right that is of significant value. In the context of this paragraph, it would be wholly unconscionable to sterilise valuable land only to facilitate a right that is capable of producing little utility. One conclusive procedure for achieving a proportional balance would be to compare the reduction of the market value of the servient tenement in recognition of the disputed easement, with the increase in the market value of the dominant tenement if the disputed easement is upheld. If a prescriptive right would perish the market value of the servient tenement, but only slightly increase the market value of the dominant tenement, then such a right should fail to qualify as an easement.

7-00 The Ouster Principle and Parking

Since the decision of Shanley J. in *Redfont Ltd v Custom House Dock Management Ltd*,[215] there is authority in Ireland to the effect that easements of parking can be acquired in this jurisdiction. However, the issue at present is that these rights can be difficult to establish as they must comply with the ouster principle. Although the Courts have felt "no hesitation in holding that a right for a landowner to park a car anywhere in a defined area as existing as an easement,"[216] certain English judges have approved of a right to park within an area of the servient tenement, but have "baulked" at a claim to park a single car in a single parking bay.[217] This is because, the inherent extensiveness of the exercise of parking may amount to a substantial occupation and possession over a part of the servient tenement. Therefore, a right to park "may be regarded as too exclusive in nature to be capable of existing merely as an easement."[218]

As observed by Bland, "a clear line of authority is yet to develop" between rights which are compatible with easements, and rights which amount to possessory claims.[219] In practice, "[n]owhere is this uncertainty more pronounced than with parking rights."[220] The most conspicuous manifestation of this headache can be observed through the seeking of a right to unconditionally park a single car in a single parking bay. This is because, such a right would amount to exclusive possession over that piece of land for an indefinite amount of time. This would indisputably conflict with the renowned maxim that there can be "no easement known to law which gives exclusive or unrestricted use of a piece of land."[221]

Further implications would arise as to the practicality of such an extensive right. If the dominant owner was to exercise this right for a continuous period of twelve years, the dominant owner would then acquire the fee simple of the parking bay. This would pose great dangers to the law of easements as we know it because in no event could the proper enjoyment of an easement be used by the dominant owner to upgrade his interest in that particular property.

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[215] (unreported, High Court, 31/03/1998). In this case, Shanley J adopted the four essential characteristics as outlined by *Re Ellenborough Park* into Ireland.
[216] *Newman v Jones* (unreported, High Court, 22/03/1982).
[217] Peter Bland, *Easements* (3rd edn, Thomson Round Hall, 2015) Ch 11-16.
[218] As per Judge Ewan Paton in: *Viscido v Raimondo* (2025) FTT, REF/2023/0497 & 0498, at [31].
[219] Peter Bland, *Easements* (3rd edn, Thomson Round Hall, 2015) Ch 11-16.
[220] Prof Michael Haley, "Parking rights and conceptual wrongs: the ouster principle revisited" (2022) Vol: 86 (1) *Conveyancer and Property Lawyer Journal* pp. 9-29, at 9.
[221] *Reilly v Booth* (1890) 44 Ch D 12, at 26.

The most recent and influential cases to address the ouster principle all dealt with rights of parking.[222] Since the act of parking can satisfy the requisite criteria to achieve a claim in adverse possession,[223] the Courts must be cautious when upholding such rights. In practice, rights of parking not only reason with the residual uses retained by the servient owner but also examine if such a right can actually be consistent with the possession of the servient tenement. As such, any claim of parking must be met with questions of "fact, degree and judicial reasoning."[224] As discussed, the right to park a few cars over a substantial carpark did not attract the ouster principle,[225] but a right to park multiple cars over a small strip for prolonged periods amounted to an ouster.[226] Therefore, there can be some difficulty in identifying when a right to park amounts to an unacceptable possession of any part of the servient tenement.

With reference to a right to park a single car in a single parking bay, it can be argued that with any right of parking, the servient owner can always park in that space when the dominant owner is not exercising their rights. Although this appears sound in theory, practical implications arise. The parking space must at all times be available to the dominant owner. Although the servient owner can park in the space when it's idle, the landowner must vacant the space immediately whenever the dominant owner wishes to exercise his rights. This can naturally cause complications because if the servient owner isn't always available to move their vehicle, they infringe on the rights of the dominant owner and therefore commit nuisance. Therefore, it inadvertently becomes more convenient for the servient owner to leave the space unoccupied at all times. In effect, the dominant owner acquires *de facto* ownership of the parking bay.

As acknowledged, the threat posed by an unconditional right to park a single car in a single parking bay is that the dominant owner can acquire the fee simple of the parking bay through the proper exercise of his right. Although it has been argued that it is "inherent in the concept of a right to park that vehicles will be moved and will not be stored on the land,"[227] through what passage of time does parking become storage? In any event, the dominant owner can simply move their car and park it back again without the servient owner having the opportunity to reclaim possession over the parking bay.

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[222] *London & Blenheim Ltd v Ladbroke Parks Ltd* [1992] 1 WLR 1278, *Batchelor v Marlow* [2001] EWCA Civ 1051 and *Moncrieff v Jamieson* [2007] 1 WLR 2620 all delt with rights of parking.
[223] *Burns v Anthony* (1997) 74 P & CR D41.
[224] Prof Michael Haley, "Parking rights and conceptual wrongs: the ouster principle revisited" (2022) Vol: 86 (1) *Conveyancer and Property Lawyer Journal* pp. 9-29, at 10.
[225] *London & Blenheim Ltd v Ladbroke Parks Ltd* [1992] 1 WLR 1278.
[226] *Batchelor v Marlow* [2001] EWCA Civ 1051.
[227] *Virdi v Chana* [2008] EWHC 2901, at [23].

To defeat the predicament of an adverse possession claim, drafters of an easement can attach conditions to the enjoyment of the parking right. For example, the drafters of an easement could construct the deed to convey a right to park a car only during a limited timeframe.[228] Therefore, the servient owner will be given the opportunity to reclaim possession of his land without infringing on the enjoyment of the dominant owner's right. Here, the issue of an adverse possession claim is eliminated.

If a landowner wishes to subject a right to park a single car over his own land, the drafters of an easement should select a servient area that is notably larger than the size of a single car.[229] This would prevent the sole occupation of a piece of the servient tenement as "there is no specific place where the vehicle is to be parked, so that there is no specific area from which the servient owner can be said to be excluded."[230] In this scenario, the dominant owner may occupy the north of the servient area on one day and then the south of the servient area on another. Therefore, there is no constant occupation of a specific area to the exclusion of the servient owner.

In the context of parking, both Lord Scott and Lord Neuberger were critical of the logic behind the ouster principle. This was specifically directed towards the scenario where a landowner wishes to select a precise area over which the right to park should be exercised — with this specific area only being large enough to accommodate the quantum of the right which is expressly granted.

In his criticism of the ouster principle, Lord Scott hypothesises that;

> "I do not see why a landowner should not grant rights of a servitudal character over his land to any extent that he wishes.... I can think of no reason why, if an area of land can accommodate 9 cars, the owner of the land should not grant an easement to park 9 cars on the land."[231]

Further, Lord Neuberger expresses his views that;

> "If the right to park a vehicle in an area that can hold twenty vehicles is capable of being a servitude or an easement, then it would logically follow that the same conclusion

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[228] For example, a right to park in the parking bay during business hours only.
[229] In *Bewley v Russell* [2026] UKFTT (PC) 18, a right to park a single car in a servient area that was capable of facilitating three parked cars was ruled as *not* offending the ouster principle.
[230] *Moncrieff v Jamieson* [2007] 1 WLR 2620, at [137].
[231] Ibid, [59].

> should apply to an area that can hold two vehicles. On that basis, it can be said to be somewhat contrary to common sense that the arrangement is debarred from being a servitude or an easement simply because the parties have chosen to identify a precise space in the area, over which the right is to be exercised, and the space is just big enough to hold the vehicle."[232]

This is pragmatic foundation as a landowner should have the liberty to dispose of his own land in any way he pleases. However — in the above scenario — both Jurists commit a grave obsession with the supposed right being an easement. Considering that this scenario has outlined a right which is so extensive in nature, there is no necessity in the above right being an easement. Since such a right would inherently be exclusive to a defined area of land — while also being perpetual by binding successors in title — it would be more prudent to simply sign over the fee simple towards the beneficiary. If the landowner wished to retain any of the residual uses that are in existence (if there even are any), they can do so by way of easement through reservation. If the landowner does not wish to vest title, the lands could be demised to the beneficiary by way of leasehold (or a lease). The landowner could also grant a licence to park on the lands in favour of the beneficiary. Furthermore, the landowner could also enter into a restrictive covenant, preventing the landowner from exercising any conduct which would impede the beneficiary's ability to park.

With there being a multitude of legal avenues for achieving such a sporadic setting, there is no good reason to deform the nature of an easement when all these alternatives exist. As in the opinion of Prof. Healy, the legal position is clear, "whatever [such a right] might be, it cannot be an easement."[233]

It is submitted that it would be regretful for the Courts to recognise an unconditional right to park vehicles in an area that is only large enough to accommodate the quantum matter of the right sought. By doing so, the ouster principle would have to be abolished, thus eliminating an important doctrine which preserves the value of landownership. Such an abolition for this reason would be wholly unjustified, as the drafters of an instrument can achieve the desired outcome through various legal avenues. One argument against my submission is that

[232] *Moncrieff v Jamieson* [2007] 1 WLR 2620, at [139].

[233] Prof Michael Haley, "Parking rights and conceptual wrongs: the ouster principle revisited" (2022) Vol: 86 (1) *Conveyancer and Property Lawyer Journal* pp. 9-29, at 29.

prescriptive claims will be adversely affected.[234] In response, it is further submitted that claims based on long user will just have to endure the consequences — as there is no good reason why a person who wishes to acquire an easement over another person's land "should not adopt the straightforward course of asking for it."[235]

[234] This is because, it would be impossible to acquire such a right through prescription. For example, if one party — through long use — sought an unconditional right to park a single car in a single parking bay, then such a pleading would have to be a claim in adverse possession or nothing.
[235] England & Wales Law Reform Committee, *Acquisition of Easements and Profits by Prescription* (Report No. 14, 1966) p. 11.

8-00 Conclusion

It is with no surprise that the Courts have shown reluctance to address the ouster principle. Its inescapable complexity has continued to be incessant as each new case posed with novel circumstances has caused unpredictable considerations for the Courts. Undoubtedly, it would be more convenient for the Courts to simply abolish the ouster principle. By doing so, the judiciary would save itself from the prolonged toil which I have attempted to rationalise throughout this fifty-page dissertation. Instead, the Courts could simply recognise easements without any consideration for the rights of the landowner himself. However — as submitted — there would be great danger in doing so, as hundreds of years of legal jurisprudence would be abandoned only for the purpose of avoiding difficulty. In effect, the law of the land will be turned on its head, which eventually, will entangle itself with complications in times to come.

As with any area of law, any consideration of a specific doctrine requires an appropriate case. Otherwise, the Courts can run into misconceptions about the law due to the absence of fundamental arguments being outlined before them.[236] It was for this reason, that the UK Supreme Court understood that it was not appropriate to resolve the ouster controversy in 2018.[237] It is essential, therefore, that any precedent established by the Courts must be on foot of a suitable dispute.

Although it is hoped that the Courts will one day come to a conclusion, the prospect of this desire faces many hurdles. With over 90% of easement disputes being settled outside of Court, alongside the reality that the value of the subject matter is greatly exceeded by the costs of litigation, it becomes less likely that such a complex issue will ever receive the attention of the high authorities that it requires. Given that the law of easements is inherently complex in its own form, if a case is likely to succeed in ouster arguments, it is foreseeable that the Courts will circumvent the issue by disqualifying the right on other grounds.

Until a ruling is reached in the awaited landmark case, there are pivotal points which can be concluded within the meantime. The common law has applied a limit to the extensiveness of rights which can exist as easements. This is done to protect not only the landowner, but to also

[236] This is why Lord Nuremburg was weary in attempting to clarify the parameters of the ouster principle. As vocalised by his Lordship, "I consider that it would be dangerous to try and identify the degree of ouster that is required to disqualify a right from constituting a servitude or easement, given the very limited argument your Lordships have received on the topic." *Moncrieff v Jamieson* [2007] 1 WLR 2620, at [143].

[237] As per Lord Biggs, *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57, at [61].

substantiate the public policy of preventing land from being perpetually encumbered with over inflicting burdens. In the most incontestable example, any easement claimed cannot amount to the perpetual occupation of a piece of land to the exclusion of the landowner himself. In the consideration of alleged rights which fall short of exclusive possession, the ouster principle does not only analyse the extensiveness of the right sought but also evaluates what the servient owner cannot now do with their own land. Attempting to determine whether the residual uses retained by the servient owner are appropriate to the ownership of land is where the difficulty arises. Although there are several attributes to aid a judge in their decision, judicial opinion remains the forefront as to the application of the ouster principle. With that said, no right should ever be unconscionable to the circumstances of the case. Although the judiciary undertakes the task of working with a line that can be difficult to draw, each new case would most likely be decided on "its own facts in light of common sense."[238] Therefore, the ouster principle persists its siege, as the doctrine continues to be an argument that is worth invoking.

[238] Jonathan Gaunt & Paul Morgan, *Gael on Easements* (22nd edn, Sweet & Maxwell, 2025) Ch 1-68.

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