

1

What Property Is and Why It Matters

PART I INTRODUCTION

1.1 What Property Is

Property is about the rights we have in things – all kinds of tangible and intangible things, from land and cars to poems and broadcast frequencies. More specifically, property is about the rights we have in things which we can enforce against other people and against the state.

There is, of course, much more to be said about it than that. What do we mean by ‘rights’ in this context? Who has them in which things and how do they get them? And why would a society adopt a system which gives people enforceable rights in things anyway – what is the point of property? Even if we as a society decide we do want a system of property rights, on what basis do we decide who is to have those rights, and what are the implications of giving rights in some things to some people and not to others?

We explore these questions in this chapter and the following chapters. In this chapter we make a start in Part II *The Classic Analysis of Property* by looking at the traditional common law analysis of what property is and why it matters. This classic analysis takes property to mean private ownership held by autonomous individuals (which matches what many non-lawyers take it to mean) and it focusses on the benefits that this kind of property provides for the private individual. We outline these benefits at the end of Part II.

However, as we argue in Part III *Broadening the Analysis*, the property world presented by this classic analysis forms only part of a broader property picture. It is certainly true that our legal system does recognise simple private ownership of the kind assumed in the classic analysis, and that most of us do indeed have this kind of ownership of some things. However, our legal system, like most others, also recognises and enforces other types of property interest as well. These arise out of a broad range of other more complex relationships that people have amongst themselves with respect to things, not only in their capacities as individuals, but also as families, communities and members of the public. If we look more closely at these complex relationships that we and others have, and at the wide diversity of tangible and intangible things to which they relate, we see that property law covers a much broader field than that suggested by the traditional classic analysis. In the real world,

simple private ownership lies along a spectrum of different kinds of property interest which the law recognises, each of which comprises a different set of reciprocal rights, freedoms, powers, duties and liabilities relating to the thing in question. Also, unsurprisingly given the many different forms that ‘things’ take, the kinds of property interest that may be appropriate for one kind of thing (houses, perhaps) may not be appropriate for another (perhaps human body parts or databases). In particular, some kinds of thing (land is the best example) are capable of being used by different people at the same time in different ways, and it is commonplace to have multiple property interest holders, each holding different property interests in such a thing at the same time. And, as we see below, it would be a mistake to assume that property is just about autonomous individuals and their private resources. It is also about the rights and interests that people have in what they think of as family or group resources, and rights and interests held by communities and the public, and also rights and interests held by commercial non-human legal entities such as companies. We need to take this wider range of stakeholders into account when we consider what property is, why we need it and the benefits that property can bring.

Our objective in Part III of this chapter is to map out this broader picture, laying the framework for the following chapters where we look at all these questions in detail. To help make sense of what follows in the rest of the book, we end this chapter with Part IV *Distinctions, Relationships and Definitions* which aims to clarify some of the ideas and the terminology we come across in later chapters. In Part IV we look at the different ways in which the term ‘property’ is used,¹ and we introduce the distinctions W. N. Hohfeld draws between different kinds of entitlements and obligations and their opposites and correlatives.² These distinctions help to clarify the distinctions we make in this and later chapters between different kinds of property interest. We also consider the different ways in which property can be said to involve relationships between people in respect of things,³ and consider what distinguishes a property right or interest in a thing from other rights and interests in things.⁴ Our last terminological clarification is to point out that whereas some property commentators argue or assume that ‘property’ exists independently of ‘property law’, others take property to have no independent existence but to be simply the product of law. We consider this distinction and the implications of it in para. 1.27, and then in para. 1.28 we end this chapter with a working definition of property to take us through the rest of the book.

PART II THE CLASSIC ANALYSIS OF PROPERTY

1.2 Property and Exclusion

The classic view of property is that it is all about rights to exclude others. If a house is my property, neither you nor anyone else can prevent me using it, or put obstacles in

¹ Paras. 1.19–1.22. ² Para. 1.23. ³ Para. 1.25. ⁴ Para. 1.26.

3 1.3 Why We Need Property

the way of me using it, or enter it or damage it without my permission. ‘Anyone else’ here includes not just other private individuals but also the state. If the house is my property, even the state cannot invade or interfere with it or with my use of it unless the law permits it to do so in the specific circumstances.

Of course, if the house next door to my house is your house, our positions are reversed in relation to your house. You will be the person who has the right to exclude me and everyone else from your house, and I will be one of the people who is forbidden from entering it or interfering with it or with your use of it. In other words, property creates reciprocal relationships between people in respect of things. The protection that property confers on the property holder necessarily involves restricting the rights of everyone else.

If, as this classic account has it, this is what property is, why do we need it? What are the benefits of this kind of exclusionary property?

1.3 Why We Need Property

Assume we live in a society like ours, where individuals live in houses with their families. Assume also that we have a legal system which is very like the one we actually have in this country now, except that we have a rule that no-one can have property rights in houses (or in anything else). In other words, in this system, no-one has rights in houses which are enforceable against other people. If no-one has any rights enforceable against anyone else in respect of any house, it follows that I am free to live in any house I want: if neither you nor anyone else has a right to stop me or to object to me living in the house I select, it must be the case that I can live there or not as I choose. The snag is that whilst I am free to live in that house, so too are you, and so too is everyone else. And because I have no *right* in respect of that house I cannot object if, after I move into the house, you then decide you want to live there and throw me out (assuming you can do that without infringing any of the non-property rights I *do* have – for example, my right not to be physically assaulted). Similarly, since I have no rights in any house, I am not entitled to stop you wantonly destroying all the houses, leaving me and everyone else homeless. My freedom consists only in being free from any legal constraints which might prevent me from living in any house that happens to be there and that I happen to choose.

The inconveniences of this non-property arrangement are obvious. If there are more than enough houses to go round and we are peaceable co-operative people who know our neighbours, we might sort out between ourselves who lives in which house without coming to blows about it. We could agree between ourselves who should be allocated which house, and also agree that none of us will interfere with anyone else’s occupation of their allocated house. However, various factors might make it difficult to maintain the consensus. Outsiders may come in who do not know or care about our arrangement, and they may ignore it, taking over whichever house they want. Even if there is no attack or disruption from outsiders, circumstances may change so that the present allocation of houses is not so convenient for some of us, forcing us to renegotiate the deal or face the breakdown of our co-operative arrangement. Meanwhile, since none of us individually has secure

rights in any one house, but we all have a collective self-interest in ensuring that the houses are properly maintained and repaired, we will have to come to some agreement about how these matters are to be arranged, and at whose cost.

All this so far assumes no scarcity. If, however, there is a shortage of houses – fewer houses than people who want to live in them – these problems will become more acute. It will be more difficult for us to arrange between ourselves how to share the houses out. Any arrangement will either leave some of us worse off than others (some of us may end up with no house) or result in equal misery for all (perhaps we could ration the time anyone is allowed to live in a house, so that we each have to accept homelessness for three months a year). Faced with these alternatives, and given the inherent difficulties in getting everyone to agree to anything anyway, it seems more likely that we will fail to reach agreement, and perhaps not even try. The strongest will take what they want and can defend, leaving the weakest with nowhere to live. Those in houses will be obliged to spend time, money and effort defending them, and their lives will be disrupted whenever someone else attempts to evict them. They will also find it difficult to sell their houses, because they have nothing of value that they can give to a buyer: even after the buyer has paid over the money, anyone – even the seller – is free to evict the buyer at any time and take the house for herself. And, of course, it is very doubtful that houses would exist at all in any significant numbers if we did not recognise property in houses. Why would you want to build a house in the first place if it could be snatched away from you at any time?

1.4 The Benefits Property Brings

Many property theorists would accept this narrative, and would argue that, if we want a peaceful, just and prosperous society which respects the freedom and dignity of all individuals, we must be able to call on the legal system to defend things like the houses we live in against arbitrary state interference and against interference from other citizens. In other words, we must have a property law system. The security that this will provide, so the classic argument goes, will provide us with many benefits. It will encourage us to spend time and ingenuity in improving our things and making them more productive, and in inventing or creating new things. Once the state guarantees protection of all rights in things, whoever holds them, the rights themselves will acquire an independent value. We will be able to find people prepared to buy our rights and we will feel sufficiently confident to buy other people's rights for ourselves. This enables us to develop a market economy which generates capital, and also steers the rights into the hands of those best able to exploit them, so ensuring that things are put to their most efficient use.

This immediate prosperity and efficiency is not the only benefit we will gain from a property law system, so this argument goes. If we recognise property rights in things it will provide us with even more significant benefits on a human level. It will guarantee us a secure private sphere in which we can flourish, safe from interference by the government and by outsiders. This guarantees our freedom and independence as autonomous individuals. It will also ensure respect and protection for the way in

which our lives become bound up with the things we use and value. And it will enable us to secure the prosperity of our family because it gives us rights in things which we can pass on to future generations, and this in turn will encourage us to take a long-term view of the value of things, and will strengthen family ties.

PART III BROADENING THE ANALYSIS

1.5 Questioning the Classic Analysis

However, this classic analysis of what property is, why we need it and how it benefits us, requires closer scrutiny. It assumes that property means absolute private ownership held by a single private autonomous individual for her own benefit, whereas in most legal systems, as we see in para. 1.10, there are many different kinds of property interest, and they may be held not only by private individuals (human and corporate) but also by groups of individuals, by communities, by the public and by the state. What is more, each of these groups may hold their property interests in a variety of different capacities. In addition, the classic analysis assumes a very particular kind of thing – a house. Are the effects of property, and the benefits it brings, the same for all kinds of property interest, and whatever the nature of the thing, or is property (in whatever form) suitable only for some kinds of thing? We look more closely at these and other questions in the rest of this part of the chapter.

1.6 What Kind of Things?

We have already noted that every legal system recognises property rights in some things but not in others, and in Chapter 6 *New Property Interests and the Numerus Clausus* and Chapter 7 *Objects of Property Interests* we see how this works out in our jurisdiction. At this stage, however, it is worth taking a preliminary look at the factors which influence decisions about whether or not to make a particular thing the subject of property rights, and thinking about how far this matches up with the classic analysis of why we need property.

(a) Natural Things and Products of Human Endeavour

Houses are products of human endeavour, and there are obvious arguments for saying that we need to have exclusionary private property rights in them, on the lines suggested in the classic analysis. There is the practical argument that this kind of property provides an incentive for people to build houses, and also the moral argument that those who have invested their labour in creating something ought to acquire rights in it. However, it is not so obvious that the incentive or reward should take the form of outright private ownership, as opposed to more limited property interests, nor is it obvious that the property interest should always go to an individual. If, for example, the thing in question was the product of communal endeavour (perhaps a house built by all the adult members of a family, or a local meeting house built by members of the community) the relevant group or

community would seem to have a stronger practical and moral claim than any one of its individual members.

Similar considerations arise if the individual human endeavour involves improving natural things or utilising materials, expertise or experience of others. Again, there may be a case for giving the individual *some* property interest in the end product, but perpetual absolute ownership seems too much if all we are aiming to do is incentivise her and give her a just return for her endeavours. We look at all of this in more detail in Chapter 2 *Conceptions and Justifications*.

In any event, none of these arguments are of much relevance when we think about propertising wholly natural things, for example oceans, wild animals, oil and other mineral resources whilst still underground, undeveloped land, or human bodies. As we see in Chapter 7 *Objects of Property Interests*, some of these can be privately owned in some legal systems, some are state owned in some legal systems, and some are regarded as incapable of being owned. Also, many legal systems recognise property interests short of ownership in some of these things. In particular, they might recognise private, communal or public property rights to exploit (as opposed to own) natural resources, for example rights to hunt wild animals or catch fish, or abstract oil or water from natural sources. The reasons why a legal system might choose one of these options rather than another are going to differ depending on the nature of the natural thing (consider the differences between owning an ocean or exploiting oil, for example, and owning or exploiting a human body or a human body part). Choices will also be influenced by local cultural, political and economic considerations, and these may change over time. Some cultures have moral or religious objections to ownership of things like human bodies or land. Some states regard natural resources as part of their national heritage, to be kept under the control of the state so that they can be preserved for the nation and for future generations. Others see them as resources in which the public or local communities have inalienable rights. Yet others regard them as valuable assets which ought to be commercially exploited so as to increase the overall wealth of the nation.

(b) Intangible Things

Houses are tangible things, and the idea of exclusionary ownership makes some sense when applied to bounded tangible things. But what about intangible things? Some intangible things, like songs or internet domain names or credit balances in bank accounts or rights to catch a quota of cod in the North Sea, are created by humans; others, for example broadcasting frequencies or the flow of water in a river, arise naturally but can be utilised by humans. Do we need property for all these things as well, and if so is it the same kind of property as the kind of property the classic account advocates for houses, and is it necessary or desirable for the same kinds of reasons? Again, it is instructive that different legal systems come to different conclusions about this. So, for example, common law property systems like ours generally have no difficulty in recognising rights in intangible things, and categorising some of these rights as property rights, although they will not necessarily all choose to propertise the same intangible things. However, the position is different in

some civil law systems. Their systems might recognise very similar legally enforceable rights in some intangible things (most systems now, for example, recognise legally enforceable rights in broadcast frequencies), but they would categorise them as personal rights only. In these systems, rights in intangible things cannot be property rights.

(c) Scarcity, Rivalrousness and Excludability

In addition to the distinctions between natural things and products of human endeavour, and between tangible and intangible things, there are other distinctions between things that make a difference. We have already noted the question of scarcity: is it true that the need for property arises if and only if a thing is scarce? Most people would now accept that the reality is more complex. Even if houses are plentiful, I might still want the law to give me secure rights in the particular house I have chosen – perhaps I have spent time and money improving it, or I particularly like the view, or I have become emotionally attached to it, or I want to avoid the disruption of being evicted from this house and having to move into another house. So, a case can be made for property in non-scarce things as well as scarce things, although as we noted in para. 1.3 additional reasons come into play when the things becomes scarce.

In addition, we probably need to take into account *rivalrousness* and *excludability* as well as scarcity. Houses are both rivalrous and excludable. Things are rivalrous if use by one person diminishes the total supply of such things available for others. Houses are rivalrous in that if I have the exclusive right to live in a particular house, and the supply of houses is finite, that is one less house available for you to live in. Songs, on the other hand, and television reception and the internet, are non-rivalrous: your freedom and opportunity to sing a particular song or pick up a television signal, or look something up on the internet are in no way diminished or affected by the fact that someone next door did the same thing yesterday, or is doing the same thing at the same time as you. On the classic analysis property is necessary for rivalrous things, because use of rivalrous things is competitive. However, the same does not apply to non-rivalrous things: they are inexhaustible. So, if we are to propertise them (and as we see later, we often do), we will need some other kind of justification. We come back to this point in Chapter 2 *Conceptions and Justifications*.

Excludability is more straightforward. Houses are excludable things in that it is relatively easy to exclude outsiders from them. We describe a thing as non-excludable if it is impossible, or disproportionately difficult or expensive, to exclude outsiders. Light from lighthouses (when lighthouses were used in order to provide such a thing) and national security provided by national armed forces are non-excludable: if you provide them at all, it is difficult to see how you can do so without making the same benefit available to everyone who happens to be within reach of them. Because of this, private ownership is not appropriate for non-excludable things according to the classic analysis. The argument is that it is not in the rational self-interest of anyone to own a thing from which others can take a benefit without having to pay for it. But again, this may be simplistic. Not all private owners are self-

interested individuals who act only for their own personal benefit. In the real world, some private owners are philanthropic, either because they want to be or because they are required to be. So, for example, it would be entirely appropriate for a private institution to own its own lighthouses if it was a charitable institution whose purpose was to provide lighthouses in the public interest. Similarly, it may be in the collective interests of a group of self-interested individuals that they should own a non-excludable thing: to take the lighthouse example again, a group of ship owners might want to club together to build and run lighthouses for their own benefit, and may not mind too much that others will also incidentally take advantage of the light. And we know that whilst some commercial providers of internet resources choose to use pay-walls in order to make their resources excludable, others find it commercially viable to sacrifice excludability and provide their resources free to the user.

We look at all these questions in more detail in Chapter 2 *Conceptions and Justifications* (where we come back to the lighthouse and internet examples) and in Chapter 7 *Objects of Property Interests* where we look more closely at the things we do propertise in this jurisdiction and at our categorisations of propertised things.

1.7 Bundling Things

There is another complicating factor to take into account when we are considering which things are propertised and why. This is that different property law systems ‘bundle’ things in different ways. Again, land provides the best example. In most western legal systems, including ours, ownership of ‘land’ means ownership of the surface of the land and the three dimensional space above and below the surface, and of everything directly and indirectly attached to the ground (including buildings, trees, growing crops and some sub-surface minerals).⁵ Other legal systems disaggregate what we think of as ‘land’ and recognise separate ownership of different elements of it.

(a) Land and Buildings

The most significant difference between legal systems in this respect is that some recognise separate ownership of buildings whereas others (including ours) do not. In our system, if you own land then you are taken to own the structures built on it as well. It is technically possible to separate the ownership of land from the ownership of the structures attached to the land but there are formidable legal obstacles and in practice it is rarely done. This means that when we talk about owning a house, what we really mean is ownership of the land on which the house is built. In other words, in our system a house is never a ‘thing’ which is capable of ownership in its own

⁵ This is subject to some qualifications in most systems. In ours, as we see in Chapter 7 *Objects of Property Interests*, the position is a bit more complicated in two respects. The first is that technological changes have forced us to re-think how far up into the sky and down into the earth property interests can realistically go. The second is that some things on or under the surface of the land, such as water, are unowned in most circumstances, and others, such as oil, gas and minerals, may be separately owned.

right (or at least not whilst it is attached to the land), and the ‘thing’ that is land necessarily includes any house built on it, as long as it remains attached to the land.

(b) Dividing up the Three Dimensional Space

However, we can and do split up ownership of the three dimensional space which constitutes land in our system, making each spatial section into a separate ‘thing’ for property purposes. We have separate ownership of horizontal slices of sub-surface land quite often, for example when the land is a highway. We can do the same with horizontal slices of the airspace above the surface of land, although in practice (for reasons we consider in Chapter 13 *Non-Possessory Land Use Rights*) we are more likely to keep the whole of the surface and air space in the ownership of a single owner, who then grants long leases of the horizontal spatial sections to separate lessees. This sounds more mysterious than it is. This is the property interests structure we use routinely for blocks of flats, or commercial buildings split up into units for separate occupation as offices or shops. There will be a single owner of the land on which the building is built, who (for the reasons already explained) will also own the building itself. That single owner will then grant a lease of each flat or commercial unit to a separate person. As we see in Chapter 17 *Leases*, the leases will be very long in the case of residential flats (99 and 999 year leases are common), but usually much shorter for commercial units (anything between two and 25 years is quite common). What each lessee actually gets is a lease of the airspace occupied by her unit and of the physical structure of the unit, with ancillary rights over the rest of the building. This means that if the building collapses before the end of the lease, each lessee still has her lease of what is now an empty slice of airspace (worth having, if the owner now wants to build into that space).

We look at all this in detail in Chapter 7 *Objects of Property Interests*, but for present purposes the point is that, when we talk about property, we need to be careful that we identify correctly the ‘thing’ in which we can and do have property rights.

1.8 What Kind of Benefits Can We Expect from Property?

When we outlined in para. 1.4 the beneficial effects of a property law system, our focus was on benefits to individual humans. Do we need to look more broadly than that?

(a) Environmental Benefits

It should be obvious that if we propertise things, we generally give the holders of property interests in them rights, freedoms and powers to use them in ways which can have an effect on our physical environment. It makes sense, then, to take these potential environmental effects into account when we decide whether and how to propertise anything. We said in para. 1.4 that property – there meaning private ownership – provides us with incentives to improve things and make them more productive: what about when we want to conserve them, or to regulate their use so as

to reverse climate change or reduce carbon emissions, for example? This question comes up again at various points in later chapters, particularly in Chapter 9 *Multiple Property Rights Systems*, where we look at the property rights systems evolved by indigenous peoples in Australia and Canada. As we see there, one of the many interesting differences between their property rights systems and the colonial property rights systems which were introduced into their countries is that the indigenous systems were less good at producing personal wealth for their peoples, but were generally more successful in conserving their natural resources and using them sustainably. The comparison can therefore give us useful insights into the environmental effects of different property rights systems.

(b) Benefits to Humans

In para. 1.4 we also took a rather narrow view of what constitutes a benefit to humans. In the classic property analysis the human benefits emphasised are those most relevant to humans as autonomous individuals. But what about benefits to humans as social beings? Does property in its various forms promote (or undermine) other values, such as sociability, co-operation, community cohesiveness, civic responsibility, community, ethnic or national identity, or the development or preservation of cultural heritage? We follow these questions up in Chapter 2 *Conceptions and Justifications*.

(c) Property and Commodification

The development of a market economy was another thing we listed in para. 1.4 as a benefit which would accrue from propertising things. Does that mean that property is appropriate only for societies which want to have western-style market economies, or that we should only propertise things that we want to buy and sell? Are there other kinds of property systems which do not require or even allow property rights to be bought and sold? And are there some kinds of things that, even in a predominantly market economy, should be treated as property but not commodified? If we are talking about property in houses in this country and at this time, few people doubt that we ought to recognise property in houses; nevertheless it is controversial how far we should rely solely on markets to distribute and maintain the standard of our scarce housing resources. In the case of other things, for example human body parts, the consensus against commodification is much stronger – few people want to see kidneys taken from live donors being sold to the highest bidder. But, as we see in Chapter 7 *Objects of Property Interests*, property does not necessarily mean commodification, and there are compelling reasons for recognising some kind of property interest in at least some kinds of body part in at least some circumstances.

1.9 Allocation and Distribution

It will be noted that the classic account of the benefits of property we set out in para. 1.4 does not even attempt to solve the basic scarcity problem. According to that