

The Dynamics of Enduring Property Relationships in Land

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Abstract

This article proposes a new way of looking at property relationships that will enrich our understanding of how they operate. It focuses on property rights in land which are consensual in origin, although this approach could usefully be applied both to non-consensual property relationships and to other property types. Recognising both the temporal and spatial dimensions of land, the dynamics approach reflects the fact that most property relationships are lived relationships, affected by changing patterns and understandings of spatial use, relationship needs, economic realities, opportunities, technical innovations, and so on. Although evolving responsively to accommodate changing uses and new rights-holders, these relationships are nevertheless sustained and enduring. The dynamics lens acknowledges the diverse range of legal, regulatory, social and commercial norms that shape property relations. Our approach also explores how far the enduring, yet dynamic, nature of property relations is taken into account by a range of decision-makers.

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Introduction

In this article we promote a new way of looking at property relationships that explores the heart of property: the dynamics of enduring property relationships. These dynamics are foundational to property relations and an appreciation of them enriches our understanding of the nature and meaning of property. Although this article focuses on property relationships in land, this schema could be usefully applied to other types of property, for example, intellectual or environmental property. In outline, our approach acknowledges the broad range of legal, regulatory, social and commercial norms¹ that touch on property relationships and recognises that they are not rigid but evolve responsively to the spatial, temporal and lived dimensions of property in land. This sense of change over time, of ebb and flow, reflects the enduring nature of property relationships. The dynamics approach recognises that property relationships are lived relationships that are sustained by their evolution over time to accommodate changing patterns and understandings of spatial use, new rights-holders, relationship needs, economic realities, opportunities, technical innovations, and so on.

It may be helpful at this stage to provide a practical illustration. In a block of flats, there will be a large number of persons who possess property rights: the building owner, the individual unit-owners, renters, mortgagees, and so on. The title deeds, buttressed by property law, explain the various rights and responsibilities as between right-holders, rights that are anchored by that documentation for the duration of a particular property right. The picture on the ground will, however, be more complex. The dynamics approach involves examining the relationships between these persons, which means going beyond traditional property law

¹ The term 'norm' is commonly used in two different senses: the first, meaning values or higher principles, is the sense in which most property law scholars use the term; the second, meaning practices or customs, is the sense in which the term is used by social scientists. In this article 'norm' is used in both these accepted senses, but we hope that the context will make clear which meaning is intended. When referring to everyday practices, we generally use the term 'self-generated norm'.

approaches. There may, for example, be no direct legal relationship between the occupiers of different flats and yet in practice they may develop understandings about how communal spaces in the block can be used. These understandings may be at odds with the wording in title deeds, and yet the occupiers regard them as binding, in some manner, on them and even on later occupiers. The occupiers may also recognise that rather than pursuing the self-interested individualism generally generated by the title deeds, it is necessary to develop a more collective and co-operative way of living to make the building 'work'. Further, these understandings may change over time. Our schema draws attention to this variety and fluidity, and in particular draws out the relational, that is the contextual and 'between persons' relations, recognizing that these property relationships are in part socially constructed.

The temporal focus of the dynamics approach is on property relationships across time rather than those existing at a unique point in time. Property law has of course always incorporated a temporal element: a lease is a time-limited property right; trusts make provision for future interests. However, the focus here is not on how time defines and separates doctrinal interests in land but instead on how, within the context of a given property relationship, the nature of that relationship may be shaped and re-shaped and yet sustained over time. To adapt an observation made about the idea underlying relational contract theory (RCT), we are looking not at 'one-night stands' but at marriages,² and then not at the ceremony itself but at the shared lives that follow.

In terms of methodology, our analysis is from the perspective of legal realism rather than legal formalism, that is, one that provides a realistic account about what parties and decision-

² R. Gordon, 'Macaulay, Macneil and the Discovery of Solidarity and Power in Contract Law' [1985] Wis. L. Rev. 565, 569.

makers do and how they behave. In doing so, we draw on elements of doctrinal, empirical, socio-legal and realist methods.

The article begins with an overview of the dynamics approach to enduring property relationships and how it can aid an understanding of property rights in land which originate in contract or consent.³ The following section then positions this in the context of current scholarship on contract and property law. We have been influenced by RCT literature,⁴ and the work of associated empirical scholars,⁵ and apply to property relationships the key idea from RCT that parties to contracts are ‘embedded in complex relations’.⁶ The article also engages with contemporary debates in property theory, intending (unlike much theoretical work) to provide a richer descriptive (rather than normative) account of property relationships. We next explore the dynamics approach in greater depth by identifying three key themes: the diverse network of sources influencing rights and responsibilities in enduring property relations; the temporal element of property; and discretionary spaces in decision-making. These themes are illustrated by examples taken mainly from our respective areas of research in English land law: residential leasehold, the use of ‘green’ leases in commercial property, and residential mortgages.⁷ Given that most property relations are not ‘one-off’ but

³ A similar approach could be applied to non-consensual rights in land.

⁴ For example, I. R Macneil, ‘Relational Contract Theory: Unanswered Questions’ (2000) 94 NWULR 877.

⁵ See for example L. Bernstein, ‘Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry’ (1992) 21 *The Journal of Legal Studies* 115; S. Macaulay, ‘Non-Contractual Relations in Business. A Preliminary Study’ (1963) 28 *American Sociological Review* 55.

⁶ n 4 above, at 881, footnotes omitted.

⁷ These sectors form a sizeable part of property interests and the economy: in 2013 there were 4.1 million residential leasehold properties in England, see Department for Communities and Local Government *Residential Leasehold in England* (2014) at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/342628/Residential_Leasehold_dwellings_in_England.pdf, and in 2015 leaseholds accounted for 43 per cent of all new build registrations with the Land Registry compared with 22 per cent in 1996, see <http://www.telegraph.co.uk/finance/personalfinance/borrowing/mortgages/12099723/Why-a-boom-in-leasehold-flats-for-young-and-old-is-causing-concern.html>; more than half of commercial properties are rented, see Property Industry Alliance *PIA Property Data Report 2015* at <http://www.ipf.org.uk/resourceLibrary/pia-property-data-report-2015.html>; in 2015 there were 11 million homes in the UK mortgaged to secure £1.3 trillion of debt, see Council of Mortgage Lenders, *Key UK Mortgage Facts* at <https://www.cml.org.uk/industry-data/key-uk-mortgage-facts/>.

are dynamic, enduring and context-specific, we offer some conclusions on the use and usefulness of this approach to understanding these relationships.

An overview of the dynamics approach

The dynamics approach is concerned with ‘enduring’ relationships, not those with a limited shelf life, such as between the seller and buyer of a property right which is: ‘... a scenario of executed obligation: the ‘deal’ has been ‘done’; priorities have crystallised. The interface has been isolated, short-term, private, bilateral, and impersonal.’⁸ The term ‘enduring’ is intended, instead, to convey a sense of long-lasting or on-going relationships in property and the dynamics approach enables us to pay particular attention to the role of time in property law. The continuing nature of the relationship is an important feature, affecting the way in which the governing norms are articulated at the outset, and accommodating the possibility that these may need to evolve and be adjusted over time to reflect any change in the relationships between rights-holders in that land and thus the dynamics of the relationship. Recognition of the impact of the passage of time on property relationships responds to recent calls for a ‘temporal turn’ in property law analysis, giving attention to issues of time as well as space in considering the foundations of property.⁹ Woven within the idea of ‘enduring’, therefore, is recognition that as the relationship is sustained through time there may be a degree of ‘give and take’ to accommodate changes in the use of land, in the identity of the rights holders, in external regulatory and economic forces, as well as the parties’ preferences for rigidity or flux.

⁸ K. Gray and S.F. Gray, ‘The Rhetoric of Realty’ in J. Getzler (ed), *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* (London: Butterworths, 2003), 241. Note that Gray and Gray include the mortgage in this category, whereas we see it as an enduring property relationship.

⁹ M. Valverde, *Chronotypes of Law: Jurisdiction, Scale and Governance* (London: Routledge, 2014).

The multi-dimensional perspective on property relationships looks beyond the legal rules framed by written instruments, common law and legislation. Layered across these doctrinal rules of contract and property law is a wide range of regulatory measures. In addition, there may be a rich ambit of wider norms and conventions that impact and shape these property relationships. As well as analysing the paper record or instrument that creates a particular property right, it is therefore also important to look at the external regulation of such relationships, the available methods of dispute avoidance and resolution, and to examine the *de facto* understandings or expectations between those individuals who are connected by virtue of their shared use of property. These *de facto* ‘self-generated norms’ may be specific to particular sites or relationships, or arise from developed practices of one or both of the parties, or within the community in which the relationship is nested. They form part of the dynamics framework, reflecting social constructionist theories that illuminate how property constructs relationships between people, and how people construct and adjust property rules through everyday life.¹⁰ Collectively, these norms, conventions or social practices may have a powerful influence upon the parties’ behaviour and their relationship.

This article’s focus on relationships in *land* reflects the fact that land is a very particular type of property as it provides the ‘physical sub-stratum for all human activity’ and thus justifies particularly sensitive treatment of the property relations it encompasses.¹¹ Indeed, a key debate within property law is the extent to which it should treat ‘the object as unique; it is this house we own and live in’.¹² Radin’s work on property and personhood¹³ shows that in many contexts land is strongly related to identity and self-fulfilment, giving it unique features additional to its spatial dimensions. This helps to explain why property rights-holders often

¹⁰ R. Cotterell, *Law, Culture and Society: Legal Ideas in the Mirror of Society* (Aldershot: Ashgate, 2006).

¹¹ K. Gray and S. Gray, *Elements of Land Law* (Oxford: 5th ed Oxford University Press, 2009) [1.1.1].

¹² B. Rudden, ‘Things as Things and Things as Wealth’ (1994) 14 OJLS 81, 83.

¹³ M. Radin, ‘Property and Personhood’ (1982) 34 Stan. L. Rev 957.

have a strong desire for the endurance and sustenance of their relationship with a particular piece of land, thus intensifying the risk and consequences of exiting from property relations in land. Writing extra-judicially, Mr Justice Norris recognises the origins of property law in the ‘intense distillation of the relationships of humans to particular places’ and notes that an ‘emotional engagement with the particular place is ... part of the landscape in which real property law has to operate’.¹⁴ This is reflected in English law which has for centuries allowed ‘real actions’ for the recovery of land in recognition of ‘the especial thing-relatedness of such assets’,¹⁵ rather than confining claimants to personal remedies in money.

If the land in question is a home, the psychological attachment may be especially strong, as acknowledged through the jurisprudence on Article 8 of the European Convention on Human Right and Fundamental Freedoms (ECHR).¹⁶ Fox identifies the ‘X-factor values’ of home as identity, territory and as a reflection of social and cultural values.¹⁷ The differences between the use value of property lived in as a home, and its exchange value as a commodity, can play into judicial decision-making. So, for example, in a recent decision reference was made to the fact that ‘a non-resident owner of multiple flats would not have the same direct interest in the affairs of the [resident management] company as a resident owner of a single flat’.¹⁸

The spatial dimension of land also means that property relationships may require flexibility and endurance to accommodate the lived use of land. Where there is a dispute over shared

¹⁴ Sir Alastair Norris, ‘The Poetry of Property: Its Commoditisation and Commercialisation’ Annual Property Law Lecture of The Liverpool Law School and the Chancery & Commercial Practice Group, Atlantic Chambers, held at the University of Liverpool, 4 November 2015 (paper on file with authors); at [8] and [11].

¹⁵ P. Birks, ‘Five Keys to Land Law’ in S. Bright and J. Dewar (eds), *Land Law: Themes and Perspectives* (Oxford: Oxford University Press, 1998) 471.

¹⁶ See *Gillow v UK* (1989) 11 EHRR 335, *Connors v UK* (2005) 40 EHRR 9 and A. Buyse, ‘Strings Attached: the concept of home in the case law of the ECHR’ (2006) 3 EHRLR 294.

¹⁷ She also identified the qualities of home as shelter and investment; see L. Fox, *Conceptualising Home: Theories, Laws and Policies* (London: Bloomsbury Publishing 2006).

¹⁸ *Sugarman v CJS Investments LLP* [2014] EWCA Civ 1239 at [157].

space, for instance in the enjoyment of individual rights to use common facilities, it may be necessary to resolve not only the disputed property relationship but also the personal relationship between the parties. If the personal relationship cannot be maintained the property relationship may also falter. Legal geography theorists emphasise that ‘spaces matter. They are constituted and constitutive of social life, practice and experience, and shot through with power and possibility’.¹⁹ This understanding highlights the impossibility of separating a place, the law that governs and applies to it, and the parties who use it and hold property rights in it: ‘aspects of the social that are analytically identified as either legal or spatial are conjoined and co-constituted’.²⁰

A focus on time and the dynamics of property relations requires consideration of how the different sources (conventional legal rules, regulatory principles, self-generated norms etc) are likely to come to the fore at various points in a given property relationship. Our analytical framework helps to identify that these informal norms may sometimes come to be taken into account by the law (perhaps even being formally recognised in law and in equity through time or by way of waiver of consensually agreed rights), and may sometimes ‘behave like property’ in that they are transmitted to subsequent holders of property rights. Further, during the day-to-day lived relationships, the law itself will often lie largely hidden or unknown in the background and yet at other times it is the formal legal rights that are privileged, perhaps particularly when the relationship is in crisis. Parties who have been previously unaware of the precise legal details, or content to agree to ignore them, may turn to the law at such moments.

¹⁹ N. Blomley, ‘Property Law and Space’ in S. Bright and S. Blandy (eds) *Researching Property Law* (London: Palgrave, 2016) 135. The importance of power in property relations cannot be ignored, but we are unable to address it here for reasons of space.

²⁰ I. Braverman, N. Blomley, D. Delaney, and A. Kedar, ‘Expanding the Spaces of Law’ in I. Braverman, N. Blomley, D. Delaney, and A. Kedar (eds) *The Expanding Spaces of Law: A Timely Legal Geography* (Stanford, CA: Stanford Law Books, 2014) 1.

This approach also takes note of the variety of ways that decisions can be made when there are disputes about property relationships. Sometimes judicial decisions may pay attention to the dynamic and enduring nature of property relations (as we illustrate below), sometimes they adopt the traditional ‘winner takes all’ approach.²¹ Further, we note that although judges will usually privilege the contractual document, the parties’ unwritten understandings may be factored into the interpretation of the factual matrix.²² The courts now encourage alternative dispute resolution, so we also consider dispute resolution beyond the courts by regulators and mediators, and in some instances the parties themselves,²³ and how these processes may open up discretionary spaces in decision-making to accommodate the dynamics of the property relationship.

The theoretical frame: beyond RCT and property law scholarship

This section of the paper positions our schema within existing scholarship. The dynamics approach does not start from the individual property owner, but attempts to capture the complexity of property relations, as other scholars, notably Dagan²⁴ and Page²⁵, have also done. Although our approach, which is essentially descriptive, and our focus, which is on property relationships in land, differ from the other theoretical work discussed below this section highlights how those analyses have informed our own, as well as where our work differs.

²¹ R. Dyal-Chand, ‘Sharing the Cathedral’ (2013) 46 Conn. L. Rev 647.

²² *Investors Compensation Scheme Ltd. v West Bromwich Building Society* [1998] 1 WLR 896.

²³ For example, the collective decisions of enfranchised leaseholders.

²⁴ H. Dagan, *Property, Values and Institutions* (Oxford: Oxford University Press, 2011). Dagan’s thesis is that there are multiple institutions of property, reflecting and promoting different societal values, so the search for one core explanation of property and its values is unproductive and undesirable.

²⁵ J. Page, *Property Diversity and its Implications* (Abingdon: Routledge, 2017). Page argues against the centrality of the private ownership property as it produces undesirable normative outcomes.

Reading across from Relational Contract Theory

The core RCT idea that contracts are ‘embedded in complex relations’²⁶ suggests that to understand enduring property relationships it may likewise be necessary to take account of implicit understandings which inform or lie beyond the stated contractual terms and the adaptations made over the life of the contract. Macneil’s imagery of a ‘spectrum of contractual behaviour and norms’ suggests a continuum from ‘as-if-discrete transactions’²⁷ (which conform to classical contract theory) to relational (or ‘intertwined’)²⁸ contracts in which the parties’ mutual trust and reciprocity are more important than their legal relationship. For discrete contracts, Macneil’s neologism ‘presentation’ conveys the idea that that there is complete contract planning at the time of contract formation (that is, the contract includes in the present moment provision for all, including future, aspects of the parties’ relationship). We might expect enduring property relationships to reflect the norms associated by RCT scholars with strongly relational long-term contracts: solidarity, reciprocity, flexibility and role integrity.²⁹ After all, although initial consent frames the property relationship at the outset there is a strong temporal element, as Gerhart comments:

the idea of consent as the source of relationships also illuminates ideas about relationships over time. ... Either circumstances change, or people in the relationship change their values and interests, or the identity of the people in the relationship change.³⁰

Indeed, we have already referred to the *de facto* self-generated norms that arise from and inform property relationships, echoing Kimel’s characterisation of relational contracts as

²⁶ n 4 above, at 881, footnotes omitted.

²⁷ n 4 above, at 895.

²⁸ I. R Macneil, ‘Relational Contract Theory as Sociology: A Reply to Professors Lindenberg and de Vos’ (1987) 143 J. Inst. & Theoretical Econ. 272, 276.

²⁹ n 4 above, at 897.

³⁰ Personal communication with the authors.

having ‘the propensity to generate norms, define or inform parties’ expectations, provide sources of reassurance, facilitate co-operation, create interdependence’, beyond the express contractual terms.³¹ Not infrequently, however, enduring property relationships are also highly presentiated, thus reflecting characteristics associated with discrete contracts, and we explore below the interrelationship between presentiation and the implicit relational understandings when it comes to dispute resolution. Further, whatever the legal documentation says, empirical research into relational contracts shows that the parties may in practice understand the relationship differently and/or pay little attention to the contract. Macaulay and Bernstein therefore argue that it is necessary to look beyond the ‘paper deal’ to the ‘real deal’ and, in particular, to reflect upon and identify when the paper deal is ‘non-used’, and when non-contractual norms are preferred.³² This insight is also very useful in understanding property relationships.

Our focus on relational property, rather than contract more generally, requires us to reflect on how the spatial and functional dimensions of property in land affect the relational behaviour and norms.

Exclusionary and other rights in property

Although the starting point for many inquiries into the nature of property has become what is referred to as the ‘bundle of rights’ view (the bundle representing the ‘collection of the individual rights people have as against one another with respect to owned resources’³³), Penner has argued that it is important to preserve the idea that property is a ‘right to a

³¹ D. Kimel, ‘The Choice of Paradigm for Theory of Contract: Reflections on the Relational Model’ (2007) 27 OJLS 233, 236.

³² S. Macaulay, ‘The Real Deal and the Paper Deal: Empirical Pictures of Relationships, Complexity and the Urge for Transparent Simple Rules’ (2003) 66 MLR 44; L. Bernstein, ‘Merchant Law in a Merchant Court: Rethinking the Code’s Search for Immanent Business Norms’ (1996) 144 U. Pa. L. Rev. 1765.

³³ G. S. Alexander and E. M. Peñalver, *An Introduction to Property Theory* (New York: Cambridge University Press, 2012) 2.

thing’.³⁴ As Heller observes, while the bundle of rights metaphor ‘reflects well the possibility of complex relational fragmentation, it gives only a weak sense of the “thingness” of private property’.³⁵ As discussed above, we agree that when the property is land it is both inherently relational and to do with a thing, because the physicality of the land is also centrally important in forming and reforming these relationships.

A current and lively debate, particularly amongst North American property scholars, is focussed on the ‘means by which property organizes human behavior and social life’, framing the debate in terms of whether there is a specific stick in the bundle that is uniquely important, that is, ‘whether the right to exclude is fundamental to what it means to have a property right.’³⁶ According to Baron, information theorists³⁷ focus on how property law works ‘through exclusion rights with respect to things’; they maintain that property should provide clear signals enabling efficient transactions, and so ‘bundles of rights are not and should not be infinitely customizable’.³⁸ Information theorists suggest that there is, and should be, a clear, streamlined and stable system of property to facilitate transactions and ensure that property rights are clearly communicated; property rules should be ‘crystalline’ rather than ‘muddy’.³⁹ Therefore, the right to exclude others is the paramount property right. In contrast, the bundle of rights property theorists emphasise that property ‘isn’t about controlling the “thing” so much as it is about my relationship with you, and with everybody

³⁴ J. E. Penner, *The Idea of Property in Law* (New York: Oxford University Press, 1997) 2; J. E. Penner, ‘The “Bundle of Rights” Picture of Property’ (1995-1996) 43 UCLA L.Rev. 711. See the classic statement of the bundle of rights view in C.B. Macpherson, ‘Introduction’ in C. B. MacPherson (ed), *Property: Mainstream and Critical Positions* (Toronto: University of Toronto Press, 1999). For the opposing ‘property as thing’ thesis, see also, for example; H. E. Smith, ‘Property as the Law of Things’ (2012) 125 Harv. L. Rev. 169.

³⁵ M.A. Heller, ‘The Boundaries of Private Property’ (1999) 108 Yale L. J. 1163, 1193.

³⁶ J. E. Baron, ‘The Contested Commitments of Property’ (2010) 61 Hastings L. J. 917, 918 and 919.

³⁷ See, for example, T. W. Merrill and H. E. Smith, ‘Optimal Standardization in the Law of Property: The *Numerus Clausus* Principle’ (2000), 110 Yale L. J. 1; H. E. Smith, ‘Property and Property Rules’ (2004) 79 N. Y. U. L. Rev 1719.

³⁸ n 36 above, 940.

³⁹ C. M. Rose, ‘Crystals and Mud in Property Law’ (1987-88) 40 Stan. L. Rev. 577.

else in the world'.⁴⁰ That approach to understanding property is now closely associated with the progressive property theorists, who argue that property law should be concerned with 'the inevitable impacts of one person's property rights on others'.⁴¹ Their focus is not 'on function, but on ends', meaning that a considerable level of complexity in property law and potential for change can be expected and tolerated.⁴²

We agree with this view. Indeed, it is exactly this complexity that the dynamics perspective is designed to illuminate, so there are clear affinities between the progressive understanding of property relations, and the views advocated here. However, progressive property theory remains centred on the property rights-holder and their relationship with the world, and with the state. This is a major difference from our perspective. Another difference is that both the progressive and information approaches to property are normative. The information theorists' claim is that 'to coordinate social behaviour effectively, property should be (on the whole) simple', while progressive theorists are concerned with whether 'property rules are serving the proper values and creating appropriate relationships'.⁴³ In contrast, our goal is to understand how property relationships work, rather than to advocate that property relationships should be governed by any particular normative values, for example, fairness, efficiency or sustainability.

In the UK much property law scholarship is doctrinal, focussing on legal rules rather than normative principles.⁴⁴ The Grays' enquiry into 'the various forms of reasoning displayed in our law of land' is therefore an exception.⁴⁵ They find that 'large normative propositions lurk

⁴⁰ C. M. Rose, 'Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory' (1990) 2 Yale J.L. & Human. 37, 40.

⁴¹ G. S. Alexander, E.M. Penalver, J. W. Singer and L.S. Underkuffler, 'A Statement of Progressive Property' (2009) 94 Cornell L. Rev. 743, 743.

⁴² n 36 above, 939.

⁴³ *ibid* 950 and 951.

⁴⁴ S. Blandy and S. Bright, 'Property Law Research Now and into the Future' in S. Bright and S. Blandy (eds), *Researching Property Law* (London, Palgrave, 2016) 183.

⁴⁵ n 8 above, 278.

quietly – in true Anglo-Saxon understatement – between the inscrutable lines of statutory or judicial prose’.⁴⁶ These are termed ‘meta-principles’, embodying fundamental ethical or systemic values which reflect the constantly evolving social economic and physical contexts of land law. The Grays argue persuasively that there are three current normative meta-principles applied to differing spheres of property relationships. In one-off transactions between strangers, the relevant meta-principle that the law seeks to promote and reward is rationality, whereas in ‘those large public issues which relate to the environmental quality of the life we enjoy, inevitably in common, with our fellow citizens’ it is reciprocity.⁴⁷ Between neighbours, the Grays suggest that the meta-principle that frames court decisions is ‘the maximisation of social co-operation’.⁴⁸ Whereas their analysis is argued from the starting point of legislation and case law, our approach starts from the land and the relationship between holders of property rights in it, revealing the complex dynamics of enduring property relationships rather than normative meta-principles.

Governance property

In contexts where land is used in common with other rights-holders, some arrangements for its governance must be put in place. The bundle of rights metaphor has been said to be useful for ‘teasing out the different facets of ownership ... in complex governance arrangements such as common interest communities or residential owners associations’.⁴⁹ Confusingly though, the term governance has been used in different ways. Smith, for example, differentiates ‘property’ (which he associates with exclusionary rights) from ‘governance’, by which he means a wide range of sources ‘from contractual provisions, to norms of proper use,

⁴⁶ *ibid* 236.

⁴⁷ *ibid* 265.

⁴⁸ *ibid* 206.

⁴⁹ J.B. Baron, ‘Rescuing the Bundle-of-Rights Metaphor in Property Law’ (2014) 82 U. Cin. L. Rev. 57, 80.

to nuisance law and public environmental regulation'.⁵⁰ By contrast, Alexander's definition of 'governance property' encompasses both the external relations of property and internal governance norms in multiple-ownership property,⁵¹ for example marriage or domestic partnerships, the home or household, common interest communities, leasehold, business partnerships and commercial trusts.

As Dagan notes, the concept of governance property accounts for, or at least does not overlook, property relationships other than fee simple ownership,⁵² so it seems to map well onto the type of property relationships that are our focus. Dagan suggests that formal and hierarchical governance arrangements which foreground the legal rules are appropriate for predominantly economic property institutions, whereas law acts 'in softer ways' to facilitate the 'informal and participatory' governance arrangements for predominantly social property institutions'.⁵³ This observation assists our approach to understanding the range of different enduring property relations.

Like ours, Alexander's enquiry is shifted away from the 'external life' of property towards the '*internal* relationships among property stakeholders',⁵⁴ asserting that a concentration upon the external life of property and particularly on the right to exclude, gives 'a distorted and misleading view of property'.⁵⁵ Our approach also centres on the use of land and the enduring relationships between those with property rights in the same land, taking into account the influence of broader external forces on these relationships. We agree with Alexander that use of land is the key, as exclusion inevitably centres on disputes, but our perspective is distinct from his. Alexander's concept of governance property is too broad for

⁵⁰ H.E. Smith, 'Exclusion versus Governance: Two Strategies for Delineating Property Rights' (2002) 31(S2) J. Legis. S453, at S455.

⁵¹ G. S. Alexander, 'Governance Property' (2012) 160 U. Pa. L. Rev. 1853.

⁵² H. Dagan, 'Inside Property' (2013) 63 *University of Toronto Law Journal* 1.

⁵³ *ibid* 6.

⁵⁴ n 51 above, 1854-1855, italics in the original.

⁵⁵ *ibid* 1855.

our purposes; although his work includes some of the relationships that we are exploring, for instance leaseholds, it is more expansive as it also includes wider co-ownership structures, including domestic partnership, trust property and business organisations. Whilst the dynamics approach would seem particularly pertinent in the context of the family home, the dominant dynamics of the *family* relationship are likely to drown out the influence of the essential spatial and temporal dimensions of land that we wish to explore.

A further distinction is that Alexander's purpose is normative; he argues that governance property contributes to the development of certain virtues that promote human flourishing, primarily community, cooperation, trust and honesty.⁵⁶ Dagan also suggests that governance property promotes co-operation rather than competition.⁵⁷ We accept that norms promoting human flourishing may constitute an aspect of particular property relations, but do not consider that this is an essential element, or even usual, in all governance property relationships. The structure of a typical commercial lease, for example, creates a division between the financial interests of the landlord and tenant that is often said to contribute to an adversarial relationship between the parties; indeed, that relationship is sometimes referred to as a battleground.⁵⁸

In the following section we turn to consideration of the inevitable, but often unrecognised, complexity in property relations due to their inherent dynamics: time elapses, parties to the relationship change, and the parties' use and understanding of the rules and norms that apply to the property.

Explaining the dynamics of enduring property relationships

⁵⁶ *ibid* 1859.

⁵⁷ n 52 above.

⁵⁸ S Bright, 'Carbon Reduction and Commercial Leases in the UK' (2010) 2 IJLBE 218, 227; J Patrick and S. Bright, 'WICKED insights into the role of green leases' (2016) *Conv.* 264, 272.

The dynamics approach offers multiple ways of looking at these inherently complex property relationships so that we can appreciate their differing features. For convenience we group these perspectives into three inter-related categories: the diverse network of sources, property's temporal element, and discretionary spaces in decision-making.

Our starting point is property relationships which are built around property rights recognised by the legal system. In land law terms, this means rights within the *numerus clausus*, such as the fee simple, leasehold, mortgages, easements and so on. But rather than focus our attention exclusively on these rights, we are interested in using a broad dynamics lens to explore the relationships between the persons who each possess one of these property rights in relation to the same land (such as mortgagee and mortgagor). At times this may be broadened out yet further to explore the relationships amongst rights-holders who are spatially connected but may not have direct contract-based property rights with each other (as with the occupiers of flats).

The diverse network of relationship sources

Even though we start from property-rights narrowly defined, in explaining the various influences that shape these relationships we adopt a more expansive approach that looks beyond legal instruments, to include self-generated norms and what Singer refers to as 'social custom'.⁵⁹ This broader approach is akin to the wider recognition within RCT scholarship that an analysis of contractual relationships requires 'understanding, recognition and consideration of all essential elements of its enveloping relations'.⁶⁰ Although reasons of space prevent us from discussing here other factors which may, in certain contexts, have an impact on particular property relations, such as the law of trespass, the tort of nuisance (from

⁵⁹ J.W. Singer, 'Democratic Estates: Property Law in a Free and Democratic Society' (2009) 94 Cornell L. Rev. 1009, 1053.

⁶⁰ n 4 above, at 881, footnotes omitted.

tree roots to noise), restrictive covenants, rights of reasonable access to another's land,⁶¹ and 'public environmental regulation',⁶² all of these potentially fall within the ambit of the dynamics approach.

The core elements of consensual property rights include, but are not confined to, the background common law and statutory rules of property and contract law, such as rules that dictate the definitional content of *de jure* property interests: for example, the requirement that a tenant has exclusive possession. They also include default rules that apply unless excluded or varied, for example, that a legal charge by way of mortgage confers upon the chargee an implied power of sale and to appoint a receiver.⁶³ For many doctrinal scholars it is these kinds of rules, as developed and applied through the common law and equity, that are the exclusive focus of attention. Yet even within this legal frame there are other essential elements that are central to understanding any property relationship. Prominent are the specific terms that have been agreed on by the parties. Indeed, the starting point for much legal advice and decision-making is to learn what the parties have set out in the contract. In turn, these express provisions are also subject to the canons of construction and contractual interpretation,⁶⁴ and may further be subject to various measures intended to rebalance the inequality of bargaining power between the parties, to breathe some reality into the consensual foundation of the parties' relationship. Such measures include equity's concern to guard against oppressive and unconscionable terms,⁶⁵ terms implied by common law and

⁶¹ All these examples are taken from Gray and Gray, n 8 above.

⁶² n 50 above, S455.

⁶³ Law of Property Act 1925, s101. Other examples from English land law include Law of Property Act 1925, ss 78 and 79, essentially intended as word-saving devices to assist in the transmissibility of restrictive covenants.

⁶⁴ See, for example, *Arnold v Britton* [2015] AC 1619, discussed further below.

⁶⁵ See, for example, in relation to mortgages: *Knightsbridge Estates Trust Ltd v Byrne* [1939] Ch 441; *G&K Kreglinger v New Patagonia Meat and Cold Storage Co Ltd* [1914] AC 26, and *Multiservice Bookbinding Ltd v Marden* [1979] Ch 84.

statute,⁶⁶ and legislative measures that require contractual terms to meet statutory standards of fairness⁶⁷ or risk being struck down or altered upon enforcement.⁶⁸ Regulation may also provide routes to promote flexibility within the parties' relationship by providing opportunities for that relationship to be re-negotiated or otherwise adjusted.⁶⁹

Further, the interface between contract and property rules will frequently create its own tension. For instance, terms that clog the equity of redemption in mortgage law may be satisfactory through a contractual lens but void under property law,⁷⁰ and a lease of uncertain duration may be valid as a matter of contract but fall foul of the requirement for certainty of term demanded by property law.⁷¹

The temporal nature of enduring property relationships means that these *de jure* rights may, over time, be lived differently or acquire new legal meaning. Some legal doctrines specifically recognise this. A useful illustration is provided by *Bradley v Heslin*, a neighbour dispute involving easements.⁷² The history of this case started in 1977 when the owner of a large house (number '40') built a smaller house (number '40A') in the back garden, sold the large house and the front garden, and retained ownership of 40A and a driveway leading from it to the road. The buyer of 40 was granted a right of way over this driveway but as part of subsequent work to his own property he also rebuilt the driveway (even though it belonged to

⁶⁶ See, for example, *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2016] AC 742, and Landlord and Tenant Act 1985, s 11.

⁶⁷ Consumer Rights Act 2015, Part 2.

⁶⁸ *ibid* and, in relation to certain consumer mortgages, Consumer Credit Act 1974, s140A-C. As an example see the finding that non-negotiable terms in leases issued by developers McCarthy and Stone breached the standards now found in the Consumer Rights Act 2015, Part 2: *OFT investigation into retirement home transfer fee terms* (London, Office of Fair Trading, 2013).

⁶⁹ For example, the Leasehold Reform Act 1967 gives leaseholders of houses the right to buy the freehold. Qualifying leaseholders of flats can collectively enfranchise: Leasehold Reform Housing and Urban Development Act 1993 (as amended by the Commonhold and Leasehold Reform Act 2002). See also Law of Property 1925 s84 which provides for the modification or extinction of restrictive covenants, which the Law Commission has recommended should be extended to easements (see Law Com 327 (2011) Part 7).

⁷⁰ *Jones v Morgan* [2001] EWCA Civ 995.

⁷¹ *Prudential Assurance Ltd v London Residuary Body* [1992] 2 AC 386 and *Berrisford v Mexfield Housing Co-operative Ltd* [2012] 1 AC 955.

⁷² *Bradley v Heslin* [2014] EWHC 3267.

40A), changing the dimensions of the driveway to include some of 40's land and installing a pair of iron gates where the driveway met the road. Over the next 30 years both properties changed hands more than once. At times the gates were generally closed and locked, to keep in an aggressive dog, or to prevent young children from wandering out into the road. During other periods the gates were mostly open, except when there were worries about rowdy youngsters trespassing, or outbreaks of burglary in the area. But in 2011 the then owners could not agree whether the gates should be kept open or closed when not in use. Their formal legal rights, recorded in the grant of the easement, no longer reflected how the land was laid out, or the practices about usage that had developed over time.

After a three day hearing in the High Court, and a site visit, Norris J found the understandings and conduct of the neighbours had led to an adjustment of ownership boundaries of the drive through either adverse possession or proprietary estoppel. The current owner of 40 also enjoyed an equitable easement founded in estoppel (not part of the original grant) consisting of 'a right to close and open the gates for all purposes connected with the reasonable use and enjoyment of their property', subject to the proviso that the exercise of this right must not 'substantially interfere with the reasonable enjoyment of the small house.'⁷³ Although the judge handed the problem back to the parties to resolve, he did indicate how the declared rights 'might be applied on the ground in daily life', suggesting reasonable hours for the gates to be shut until 'adequate opening arrangements' could be achieved through installing electric gates.⁷⁴

Norris J's approach in this case reflects several dimensions of the dynamics approach, and is used as an illustration throughout this article. The decision in *Bradley* was reached by looking

⁷³ *ibid* at [82].

⁷⁴ *ibid* at [85]. The case was appealed but settled at the door of the Court of Appeal; personal email communication from Lawrence McDonald, junior barrister for the Bradleys.

not only to the formal legal instruments, but also at the facts on the ground, and after careful consideration of the interrelationship between legal rights and agreements, understandings and ‘simple acts of neighbourliness’.⁷⁵ The outcome – with the adjustment of ownership boundaries and recognition of an equitable estoppel - demonstrates also how the formal property rights themselves may change over time. Further examples are given below when we discuss Blandy’s research on residential leasehold sites.

The life of the property relationship is, in any event, often inattentive to these formal legal frames. Patrick and Bright’s research on the use of ‘green’ (environmental) clauses in leases of commercial property found that for many landlords and tenants the lease seemed largely irrelevant for day to day issues: the parties talked about the idea of the ‘lease in a cupboard’, locked away and never looked at.⁷⁶ Similar attitudes to formal law are common in residential leasehold and mortgage relationships; many leaseholders or mortgagors are not only unaware of what the lease or mortgage says, but also do not know where to find the document itself.⁷⁷ The fact that parties to an enduring property relationship may not know or be concerned to check the legal frame of their relationship echoes the difference between the ‘paper deal’ and the ‘real deal’ observed in RCT scholarship.⁷⁸

Regulatory measures play several, often interconnecting, roles that affect property relationships, additional to the ways in which the contractual rights may be adjusted. The scope of regulation has proved notoriously difficult to pin down; Black suggests a definition of any ‘intentional activity of attempting to control, order, or influence the behaviour of others’.⁷⁹ There may be ‘top-down’ regulation taking the form of command and control rules

⁷⁵ Ibid at [51].

⁷⁶ J Patrick and S. Bright, ‘WICKED insights into the role of green leases’ (2016) *Conveyancer* 264, 277.

⁷⁷ See *National Leasehold Survey 2016*, available at: <http://www.lease-advice.org/files/2016/07/Brady-Solicitors-in-partnership-with-LEASE-Leaseholder-Survey-June-16.pdf>

⁷⁸ n 32 above.

⁷⁹ J. Black, ‘Decentering Regulation: Understanding the Role of Regulation and Self Regulation in a "Post-Regulatory" World’ (2001) 54 *Current Legal Problems* 103, 142.

externally imposed by government or regulatory bodies.⁸⁰ But regulatory theory has identified a wide range of influences, actors and networks beyond government that also set, monitor and require compliance with behavioural standards, often employing softer and more subtle techniques.⁸¹ An extreme illustration of a softer regulatory technique is the landlord leaving flowers for an in-coming tenant, which Cowan observes is more effective than the contract in establishing a good working relationship.⁸² The general move towards de-centred and softer regulation recognises and utilises these subtle influences and complex networks. Thus ‘top-down’ forms of regulation may be supplemented, or even kept at bay, by the influence of ‘middle-out’ – or sideways - regulatory pressures.⁸³ Prominent amongst such pressures are consensus tools which rely on persuasion and co-operation to modify behaviour and are encapsulated within ideas of responsive regulation which seeks to harness the regulated’s own decision-making and management structures, to achieve compliance with broad based behavioural objectives.⁸⁴ Such approaches are evident, for example, in the indirect, or steering, influence of regulatory measures which set minimum energy efficiency standards⁸⁵ and are driving the adoption of particular ‘green’ clauses in some segments of the commercial property market. In this context, non-state ‘middle actors’ – in particular property industry groups – exert ‘sideways’ influence⁸⁶ by promoting ‘toolkits’ offering a menu of

⁸⁰ For example the licensing requirements applicable to houses in multiple occupation under the Housing Act 2004, Part 2, which prescribe detailed housing standards for licensed properties.

⁸¹ I. Ayres & J. Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (New York: Oxford University Press, 1992).

⁸² D. Cowan, *Housing Law and Policy* (Cambridge: Cambridge University Press, 2011) 11.

⁸³ Y. Parag and K. B. Janda, ‘More than Filler: Middle Actors and Socio-Technical Change in the Energy System from the Middle-Out’ (2014) 3 *Energy Research and Social Science* 102.

⁸⁴ L. Salamon (ed), *The Tools of Government: A Guide to the New Governance* (New York: Oxford University Press, 2002).

⁸⁵ See the Energy Efficiency (Private Rented Property) (England and Wales) Regulations 2015, which make it unlawful to let properties that fail to achieve a prescribed minimum energy efficiency standard.

⁸⁶ K. B. Janda, S. Bright, J. Patrick, S. Wilkinson & T. J. Dixon (2016) ‘The evolution of green leases: towards inter-organizational environmental governance’, 44 *Building Research & Information* 660, 667.

‘green’ clauses that parties can elect to include in leases,⁸⁷ and, in turn, landlords are also sideways actors as they roll out ‘green’ leases across their property portfolio.

Alongside the various legal and regulatory influences are the ways in which the parties to the property relationships themselves generate norms that guide behaviour. Even if the parties acknowledge the contract as a reference point, the express terms may be ambiguous or silent on the issue upon which the parties need an answer. Practices thus emerge and are developed to address gaps, to agree the meaning of stated obligations, to find ways around inconsistencies, or simply an agreement to ignore unwanted terms.

Residential mortgages provide examples of how the lived property relationship is affected by understandings and practices developed by the parties, as well as by the wider interplay of other sources including the mortgage contract terms, statute, and market regulatory measures (both hard and soft). The key crisis point in the mortgage relationship arises on default when the mortgagee seeks possession as a prelude to sale. As a property right the residential mortgage creates a peculiar fictional relationship between mortgagee and mortgagor: by nature a legal charge, but a charge that creates a property relationship as if there were a lease of 3,000 years granted by the mortgagor.⁸⁸ In law, the mortgagee (as lessee) thus has an immediate right to possession that is not dependent on default but arises ‘before the ink is dry on the mortgage.’⁸⁹ This bizarre relationship is neither desired nor often appreciated by the parties and in practice the parties will contractually agree that the mortgagee should only be entitled to possession on default. Equity also discourages repossession by imposing strict fiduciary duties on the mortgagee⁹⁰ and ensuring that possession is only granted to recover

⁸⁷ Ibid 665.

⁸⁸ Law of Property Act 1925, s 87(1).

⁸⁹ *Four-Maids Ltd v Dudley Marshall (Properties) Ltd* [1957] Ch 317, 320 [Harman J].

⁹⁰ Eg to account for what the mortgagee ought to have received, see *White v City of London Brewery* (1889) 42 Ch D 237.

the debt.⁹¹ More significantly in relational terms, statutory and regulatory measures call for the sustainability of the enduring relationship between the parties to be supported whenever possible through forbearance by the mortgagee.

The mortgagee's conduct is influenced by regulatory norms prescribed by the Financial and Services Market Act 2000 (FSMA 2000). The Financial Conduct Authority (FCA) has established as an overarching principle that residential mortgagees must 'pay due regard to the interests of its customers and treat them fairly.'⁹² In attempting to clothe this aspirational, yet abstract, standard with more bite, the FCA has articulated a set of distinct regulatory outcomes⁹³ but it is the Mortgage Conduct of Business Rules (MCOB)⁹⁴ that sets out in greater detail 'fair' conduct: for instance, on default mortgagees are required to explore forbearance and only to seek enforcement as a last resort.⁹⁵ The courts also require the sustainability of the mortgage relationship through forbearance to be explored before litigation,⁹⁶ and are empowered to delay repossession where satisfied that the mortgagor can repay arrears within a reasonable time.⁹⁷ These regulatory requirements are supplemented by practices and attitudes developed across the mortgage industry, and which may be crystallised in practice guidance by trade bodies, such as the Council of Mortgage Lenders (now part of Finance UK).⁹⁸ Individual mortgagees will also develop their own internal forbearance policies, which may change over the life of the mortgage relationship.

⁹¹ *Quennell v Maltby* [1979] 1 WLR 318.

⁹² Financial Conduct Authority, *Handbook*, The Principles para. 2.1.6, at <https://www.handbook.fca.org.uk/handbook/PRIN/Sch/6/6.html>. This handbook was first published by the FCA in 2003, in consultation with industry and consumer groups, pursuant to the FMSA 2000.

⁹³ See <https://www.fca.org.uk/firms/fair-treatment-customers> viewed 9 April 2017.

⁹⁴ Financial Conduct Authority, *Handbook*, MCOB, at <https://www.handbook.fca.org.uk/handbook/MCOB/13/?view=chapter>.

⁹⁵ *ibid* para. 13.3.2A (6).

⁹⁶ See *Pre-action Protocol on Possession Actions based upon Mortgage or Home Purchase Plan Arrears in Respect of Residential Property*, at http://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_mha.

⁹⁷ Administration of Justice Act 1970, s 36; *Cheltenham & Gloucester BS v Norgan* [1996] 1 WLR 343.

⁹⁸ For example see CML, *Guidance to Members – the Role of LPA Receivers* (2014).

Nevertheless, research has demonstrated the variable and intimidating experience that mortgagors can face when seeking to navigate this forbearance process that can seem opaque rather than ‘fair.’⁹⁹ Furthermore, a mismatch between these diverse influences on the mortgagee’s conduct in the event of default reveals the significance of their interface. A failure to comply with the MCOB rules requiring forbearance may lead to regulatory censure but will not affect the parties’ underlying property rights and obligations.¹⁰⁰

The complexity of enduring property relations can also be seen in residential leasehold, which is similarly heavily-regulated.¹⁰¹ Each unit-owner will have a long lease of their unit as well as property rights over common parts, such as parking areas, grounds, entrance lobbies and lifts. The leaseholders will be granted formal rights of use and access to these common parts, but as the typical lease is silent on how leaseholders’ easements over the common parts are to take effect the parties have to develop their own understandings and practices that will govern their day to day relationships. Over time these *de facto* rules become established and may be treated as binding by new owners. Further, even where the lease sets out in detail the rights and responsibilities of the parties, one respondent in Blandy’s empirical research explained that the occupiers had collectively chosen ‘*not to enforce some things* [that are set out in the lease] – *like no barbecues, or hanging out washing - because after a while we discovered what as a group we want to do*’.¹⁰² In many residential leasehold sites, individual *de jure* property rights have been changed over time by *de facto* understandings. To take an

⁹⁹ A. Wallace, ‘Feeling like I’m doing it on my own: Examining the Synchronicity between Policy Responses and the Circumstances and Experiences of Mortgage Borrowers in Arrears’ (2012) 11 Social Policy and Society 117 and S. Bright & L. Whitehouse, *Information, Advice and Representation in Housing Possession Cases* (Universities of Oxford & Hull 2014). Even the FCA acknowledges this variable experience see FCA, Mortgage lenders’ arrears management and forbearance TR14/3 (2014).

¹⁰⁰ *Thakker v Northern Rock (Asset Management) Plc* [2014] EWHC 2107.

¹⁰¹ S. Blandy and D. Robinson, ‘Reforming Leasehold: Discursive Events and Outcomes, 1984-2000’ (2001) 28 JLS 384.

¹⁰² S. Blandy ‘Collective Property: Owning and Managing Residential Space’ in N. Hopkins (ed) *Modern Studies in Property Law* vol. 7 (Oxford: Hart, 2013).

extreme example, at one site the property boundary was changed informally and had become recognized by other owners: *'I mean, legally it was my garden, and she wanted to have that bit of land close to one of her windows. In the end a solution was reached ... she paid some money to me and I passed that on to someone else, and I got another bit of garden'*.¹⁰³

These empirical findings go beyond Alexander's concept of governance property. They chime with Ostrom's work on common pool resource governance which provides a helpful framework for analysing how property is constituted through the everyday practices which contribute to the social ordering of sites.¹⁰⁴ Ostrom defines 'working rules' as those which are actually used, monitored and enforced by those directly involved, and which are known about by most of the people affected by them. The rules which the parties themselves agree are part of the lived realities of enduring relations, as also illustrated by the 30 'harmonious years' enjoyed by successive neighbours in *Bradley v Heslin*.¹⁰⁵

Evaluating the role of these understandings and self-generated norms presents a real challenge. Their elements and scope are difficult both to identify and unpick. In *Neilson v Poole* Megarry J noted approvingly that informal 'agreements and understandings are by their nature acts of peace, quieting strife and avoiding litigation, and are to be favoured in the law, however informal they might be'.¹⁰⁶ In *Bradley*, Norris J referred to this dictum but nonetheless urged caution that 'simple acts of neighbourliness should not ripen into legal rights vested in the beneficiary of the actor's kindness'.¹⁰⁷ Self-generated norms are

¹⁰³ *ibid* 164. Likewise, in *Bradley v Heslin* (n 72 above), Norris J noted that the driveway had been moved with the probable knowledge and consent of the driveway's owner, in disregard of the boundaries in the formal grant.

¹⁰⁴ See, primarily, E. Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (Princeton: Princeton University Press, 1990); E. Ostrom, *Understanding Institutional Diversity* (Oxford: Oxford University Press, 2005); L. A. Fennell, 'Ostrom's Law: Property Rights in the Commons' (2011) 5 *International Journal of the Commons* 9.

¹⁰⁵ n 72.

¹⁰⁶ (1960) 20 P & CR 909, at 919.

¹⁰⁷ n 72 at [51].

particularly prominent in self-managed property relations, for example residential leasehold sites in which leaseholders own, manage and use the site collectively.

In thinking about how self-generated norms should be taken into account in the dynamic and enduring property relations with which this article is concerned, two inter-related issues arise. The first is how, and if so at what stage, these norms may become accepted as binding upon the parties and their successors; the second is an empirical issue of how such norms arise and evolve in the particular context of property relations attached to a specific place. The first issue requires consideration of the relationship between law and norms. The legal centralist stance (that law can only emanate from the state) has become less dominant in recent years, largely due to the influential empirical research of Ellickson.¹⁰⁸ He reached the broad conclusion that some groups, in Ellickson's case cattle ranchers in Montana, ignore the law in favour of applying their own social norms.¹⁰⁹ However, Ellickson has been critiqued for his failure to see that these apparently informal and extra-legal rules are based on the ranchers' legal status as landowners, so they are creating their own rules in the shadow of the law, which they know they can fall back on if informality does not work.¹¹⁰ We agree that the connections between formal law and self-generated norms are strong, making it important to explore how self-generated norms may influence the dynamics of parties' enduring property relations.

Addressing the second issue identified above (how norms arise and evolve) may necessitate empirical research into the lived and iterative experiences of property relations so as to understand the expectations that evolve from the relationship itself. These self-generated norms (or Ostrom's working rules), were suggested by the eminent legal anthropologist Falk Moore

¹⁰⁸ G. Alexander & H. Dagan, *Properties of Property* (Kluwer: New York, 2011) 168.

¹⁰⁹ R. C. Ellickson, *Order Without Law: How Neighbors Settle Disputes* (Cambridge MA: Harvard University Press, 1994).

¹¹⁰ A. Sarat and T.R. Kearns, 'Beyond the Great Divide: Forms of Legal Scholarship in Everyday Life' in A. Sarat and T.R. Kearns (eds), *Law in Everyday Life* (Ann Arbor, Michigan: University of Michigan Press, 1993).

as the starting point for researching a ‘semi-autonomous social field’ that generates its own rules and decisions and means of enforcement, but which is also penetrated by the external legal system.¹¹¹ Many instances of the type of property relationships focused on in this article would fit the description of a semi-autonomous social field.

Property’s temporal element

The duration of a property relationship may be indefinite (the fee simple), fixed for a long notional duration (for example 99 or 999 years), for a shorter duration but with a possibility that the relationship will be renewed (for example short commercial leases), or defined by reference to an obligation (as in the case of mortgages). Sometimes the combination of law with time may result in something the parties never anticipated, as with the statutory conversion of leases for life or until marriage into leases for ninety years,¹¹² and the conversion of perpetually renewable leases into leases for two thousand years.¹¹³ Even where a property relationship is expressed to be time-limited there are often routes by which that duration can be changed either by being extended or brought to an earlier end. Rights to extend or to terminate early may be granted or exercised by agreement of the parties (for example, through the forfeiture or surrender of a lease); or may arise as a result of a policy choice effected through legislation, for instance a right to a renew a business lease¹¹⁴ or to call for an extended term or enfranchisement in the case of certain residential long leases.¹¹⁵

The on-going nature of property relationships opens up the possibility that both *de facto* and *de jure* obligations may evolve over time. As noted earlier, certain *de facto* rights and

¹¹¹ S. F. Moore, ‘Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study’ (1973) 7 Law & Soc’y Rev. 719.

¹¹² Law of Property Act 1925, s149(6). See, for example, *Berrisford v Mexfield Housing Co-operative Ltd* [2012] 1 AC 955.

¹¹³ Law of Property Act 1922, s145.

¹¹⁴ Landlord & Tenant Act 1954, Part II.

¹¹⁵ Leasehold Reform, Housing and Urban Development Act 1993.

obligations may even become recognised *in law*. Property law scholars have addressed the question of time, but usually at a macro scale. For example, the work of van der Walt illustrates how once-marginal property interests may join the ‘mainstream rights paradigm’ as a result of wider societal changes or legal and political developments.¹¹⁶ Referring to the fact that property institutions are never ‘frozen’, Dagan also considers that property is ‘inherently dynamic’.¹¹⁷ Davidson and Dyal-Chand identify ‘property moments’ when ‘property law - and the larger culture of property - have witnessed moments of deep contestation, times of crisis that call foundational concepts into question.’¹¹⁸

This article looks at the micro-scale and how the parties, courts and other decision-makers address the complexities associated with enduring property relationships and the way in which individual property relationships respond to change over time.

The parties may build responsiveness into the contractual documentation. As noted above, in RCT scholarship Macneil associates the norms of solidarity, reciprocity, flexibility and role integrity with long-term contracts at the relational end of the discrete/relational spectrum.¹¹⁹

Here a divergence between relational contracts and many property relationships in land becomes apparent. Although some property relations do reflect these relational norms, others appear to be founded on norms more commonly associated with ‘as if discrete’ contracts.

This can be illustrated by considering commercial leases. Although lease lengths vary

¹¹⁶ A. van der Walt, *Property in the Margins* (Oxford: Hart, 2009).

¹¹⁷ H. Dagan, ‘Private Law Pluralism and the Rule of Law’ in L.M. Austin and D. Klimchuk (eds), *Private Law and the Rule of Law* (Oxford: Oxford University Press, 2013) 165.

¹¹⁸ N. M. Davidson and R. Dyal-Chand, ‘Property in Crisis’ (2010) 78 *Fordham L. Rev.* 1607, 1612. They refer to the financial crash of 2008 and the change to US court practices in mortgage foreclosures. In UK the financial crisis also resulted in a shift in emphasis towards forbearance, but effected through regulatory pressure rather than judicial activism see S. Nield, ‘Mortgage market review: “hard-wired common sense?”’ (2015) 38 *Journal of Consumer Policy* 139.

¹¹⁹ n 4 above, at 897.

considerably almost 30% are between ten and fourteen years.¹²⁰ The longevity of commercial leases would be suggestive of the norms associated with relational contracts that are intended to preserve the relationship. For instance, we might anticipate flexibility to mean something like, ‘the lease itself provides accommodation on terms that do not constrain the occupier’s ability to respond to its changing business circumstances’.¹²¹ However, as the property is essentially an investment vehicle for many landlords, particularly of prime properties, the value of the landlord’s reversion is critical and may be threatened by flexibility in lease wording. Empirical evidence shows that commercial leases in the UK are seldom flexible, but instead show high levels of ‘presentiation’,¹²² behaving in many respects like ‘as if discrete’ contracts. Far from the norms of solidarity and role integrity, commercial landlord and tenant relationships are typically adversarial, with tenants complaining of poor communication (both between landlord and tenant, and between tenants in multi-tenanted buildings), confrontational stances, and slow response times to problems.¹²³

The consequences of high levels of presentiation in leases are evident from case law. If flexibility *is* built into the terms of the lease, it is done in a structured and controlled manner. Anticipating the need for adjustment over time, commercial leases typically include carefully drafted and detailed upward-only rent review clauses. Break clauses may allow for early termination, but are applied strictly by the courts in view of the fact that leases are carefully presentiated. In *Marks and Spencer plc v BNP Paribas*,¹²⁴ the Supreme Court declined to

¹²⁰ Strutt and Parker, *UK Commercial Property Lease Lengths Continue to Increase* (2016), at <https://perma.cc/PXJ9-R9U7>. The average length of new leases is seven years.

¹²¹ Department for the Environment, Transport and the Regions, *Monitoring the Code of Practice for Commercial Leases, Interim Report* (2004), ii.

¹²² N. Crosby, V. Gibson, S. Murdoch, ‘UK Commercial Property Lease Structures: Landlord and Tenant Mismatch’ (2003) 40 *Urban Studies* 1487; Office of the Deputy Prime Minister, *Monitoring the 2002 Code of Practice for Commercial Leases* (2005). It may be that in some sub-sectors, or in other countries, things are otherwise: see the characterisation of Australian retail leases as relational in L. Villiers and E. Webb, ‘Using relational contract principles to construe the landlord-tenant relationship: Some preliminary observations’ (2011) 1 *Property Law Review* 21.

¹²³ A. Langley and E. S. Stevenson, *Incorporating Environmental Best Practice into Commercial Tenant Lease Agreements: Good Practice Guide, Parts 1 and 2* (Cardiff: Welsh School of Architecture, 2007).

¹²⁴ n 66 above.

supplement this relationship by refusing to imply a term to permit the partial recovery of rent paid in advance of exercising a break clause. Lord Neuberger referred to the fact that to imply a term would ‘lie somewhat uneasily’ with the fact that the lease was a ‘very full and carefully considered contract’.¹²⁵

In the residential leasehold sector, similarly detailed forward-planning provisions are often found in relation to service charges. These can sometimes have an unanticipated impact, as shown in *Arnold v Britton*.¹²⁶ Between 1977 and 1991 a number of 999 year leases were granted of chalets in a caravan park. The initial annual service charge was £90 but the wording of the contract seemed to commit the leaseholders to a 10 percent compound increase each year, which by 2072 would result in service charges of over half a million pounds annually! Applying the principles of contractual interpretation, the Supreme Court was unable to interfere with this patently absurd result although there was both reluctance and a strong dissenting voice.¹²⁷ The majority could only suggest Parliamentary intervention, or future negotiations between the parties to vary the service charge provision - in which the landlord would clearly hold the stronger hand.¹²⁸

These two Supreme Court cases show that where there are high levels of presentation in property relationships the courts – at the crisis moment – must ‘ascertain the objective meaning of the language which the parties have chosen to express their agreement’¹²⁹ to decide the outcome. Parties may therefore prefer to deal with issues differently so their property relationship can be responsive over time. Research into the use of ‘green’ leases shows the adoption of a number of strategies that support greater flexibility.¹³⁰ For instance,

¹²⁵ *ibid* [49].

¹²⁶ n 64 above.

¹²⁷ Lord Carnwath, discussed further below.

¹²⁸ Lord Neuberger, at 1637.

¹²⁹ *Wood v Capita Insurance Services Limited* [2017] UKSC 24. Lord Hodge at [10].

¹³⁰ n 76 above.

‘green’ clauses in leases are sometimes expressed in general terms and/or stated to be non-binding, and sometimes consigned to Memoranda of Understanding (outside the formal lease) so as to be easier to change over time. Interviewees in Patrick and Brights’ research considered the non-binding nature of these obligations was desirable, because legally binding clauses could inhibit cooperation and joint initiatives. Indeed one lawyer stated, *‘the lease is very static, it’s very difficult to put these sorts of provisions in because they will naturally evolve over time’*.¹³¹

The high degree of planning that goes into long leases is somewhat ironic, given that many property rights-holders pay little or no attention to the documentation. However, although this may be true of the day-to-day, crisis moments may hit a property relationship,¹³² which could result in termination, resolution or a pivotal turn in those relations. It is at this time that the parties are likely to take the lease or mortgage out of the cupboard to see how their rights and obligations are formally defined.

Another feature that flows from the enduring nature of property relationships is the expectation of, or at least potential for, transmissibility. The fact that the property right endures through different owners shapes the general principles of property law, the negotiated content of property rights, and the way in which property relationships are regulated. For example, leasehold covenants can be enforced by and against the persons who are in the property relationship of landlord and tenant for the time being, even though they are not in a contractual relationship.¹³³ Likewise, leaseholders of different units within a development, although not in a direct contractual relationship, may be able to enforce

¹³¹ *ibid* 276.

¹³² n 118 above, 1612.

¹³³ A result initially achieved through a combination of common law and statute (*Spencer’s Case* (1583) 5 Co Rep 16a; Law of Property Act 1925, ss 141 and 142) and now by the Landlord and Tenant (Covenants) Act 1995 – which was driven in large part by the need to *remove* the enduring nature of contractual liability.

covenants between themselves where they can establish a building scheme based upon the imposition of common covenants.¹³⁴

Transmissibility is not necessarily clear-cut, even though the rules of property law purport to be. There appears to be a ‘spectrum of enforceability’ in the transmissibility of the internal dynamics of a property relationship, reflecting the relative strengths of the express and implicit understandings relating to the exercise of both the *de jure* rights and the *de facto* use of land. At one end of this spectrum there are, for example, the leasehold covenants that, as we have seen, bind successors. At the other end of the spectrum are ‘understandings’ developed by A and B regulating their use of communal space, which may be adopted by their successors, A2 and B2. It is not that these bind A2 and B2 as a matter of law, but the fact that A2 and B2 regard themselves as bound indicates that these norms can behave in a ‘property-like’ manner. In Blandy’s research one residential leaseholder explained how informal obligations (in this case, sweeping the passageway outside the front door of her flat) were passed on to new residents: ‘*I just know that that’s supposed to be a rule, right. I follow on accordingly*’.¹³⁵

This challenges boundaries between mere understandings, contract and property. Property rules, for example, on leasehold covenants, provide a classic example of a ‘crystal rule’, perfectly designed for regulating one-off transactions between strangers.¹³⁶ However, an appreciation of the dynamics of enduring property relationships dictates an exploration of the spectrum of enforceability that underlies the rights and understandings within a given relationship.

¹³⁴ *Williams v Kiley* [2002] EWCA Civ 1645.

¹³⁵ Interview carried out for research project *The Role Of Legality In Multi-Occupied Residential Settings: A Legal Consciousness Approach*, funded by the British Academy.

¹³⁶ n 39 above.

Discretionary spaces in decision-making

Enforceability is fore grounded when disputes arise. We now explore the scope for discretion in decision-making and how far the enduring nature of property relations is acknowledged in a range of decision-making scenarios, from informal dispute-resolution¹³⁷ and regulatory intervention,¹³⁸ to property tribunals and courts. The manner in which disputes are resolved between the parties inevitably impinges upon their relationship, and timing is important; different forms of decision-making seem appropriate at different stages in the relationship. This recalls the RCT vocabulary of the ‘relationship-preserving norms’ employed in successful contractual relationships, and the contrasting ‘end-game norms’ which are prioritised when bringing the contract to an end.¹³⁹ In many enduring property relations, informal decision-making (enforcement by the parties’ actions alone) is ‘braided’¹⁴⁰ with the formal (taking the dispute to an external decision-maker, to assist performance and provide remedies). At those residential leasehold sites which successfully rely on close relations and trust between residents to ensure that rules are followed, social sanctions are often effective to ensure compliance with *de facto* rights and duties.¹⁴¹ Residents in this type of self-managed governance property may also develop surprisingly formal internal mechanisms for conflict resolution, thus avoiding recourse to external adjudicators.¹⁴²

Courts, tribunals, ombudsman, regulators and mediators - as potential external ‘agents of settlement’¹⁴³ - may be able to recognise and build flexibility into enduring property relations

¹³⁷ For instance, informal mediation or the resolution of disputes by the Financial Ombudsman Service.

¹³⁸ For example the FCA who can issue directions or guidance to financial service providers. An instance is found in the resolution of payment protection insurance miss-selling; see <https://www.fca.org.uk/news/statements/financial-conduct-authority%E2%80%99s-statement-payment-protection-insurance-ppi>.

¹³⁹ L. Bernstein, ‘Merchant Law in a Merchant Court: Rethinking the Code’s Search for Immanent Business Norms’ (1996) 144 U. Pa. L. Rev. 1765, 1796.

¹⁴⁰ R. J Gilson, C.F Sabel and R.E Scott, ‘Braiding: the interaction of formal and informal contracting in theory, practice and doctrine’ (2010) 110 Colum. L. Rev. 1377.

¹⁴¹ n 102 above.

¹⁴² *ibid*.

¹⁴³ n 32 above, 45.

but their capacity to do so is variable. It is clearly possible where an agent of settlement has executive powers to set, monitor and enforce norms of behaviour (for instance, the FCA as regulator) or where they are not constrained by formal legal rules (for example, mediators). Even some formal remedial powers are couched in the language of discretion in a manner that is designed to enable courts, when appropriate, to ensure the preservation of enduring property relations. For example, leases can be ‘saved’ when relief against forfeiture is ordered,¹⁴⁴ and the mortgagee’s right to possession may be delayed by the forbearance measures already explained.

Our perspective pays attention to Rose’s insight that judges, who have to examine facts *post hoc*, tend to lean towards ‘mud’ rules – applicable to individual circumstances and/or not obvious until litigated - when asked to adjudicate on property rights which have been readjusted by social understandings or where the power imbalance between the parties is inequitable.¹⁴⁵ More recent US property scholarship has also, at least partially, recognised this with Gerhart considering judicial decisions through the lens of socially constructed property obligations owed to others.¹⁴⁶ At first instance there is frequently more scope for discretion,¹⁴⁷ with many illustrations of decision-makers acknowledging the mud-like reality of lived and enduring property relationships. Analysis of judicial decisions in ‘neighbour law’ cases has shown that in common law jurisdictions, there is evidence of a move to take into account the parties’ conduct and understandings in addition to their strictly legal entitlements.¹⁴⁸ For example, in establishing physical boundaries the courts can take account of ‘the subsequent conduct of the parties’.¹⁴⁹ Nevertheless, rules of construction can

¹⁴⁴ A jurisdiction originally founded equity but now contained in Law of Property Act 1925, s 146(1).

¹⁴⁵ n 39 above.

¹⁴⁶ P. Gerhart, *Property Law and Social Morality* (New York: Cambridge University Press, 2013).

¹⁴⁷ J. Dickinson, *Analysis of inter-resident disputes in private residential developments* (unpublished, 2013), paper on file with [author].

¹⁴⁸ n 8 above.

¹⁴⁹ *Norman v Sparling* [2014] EWCA Civ 1152 at [12].

constrain judges in recognising lived experiences. In contrast to boundary agreements, an easement is construed according to its wording and meaning at the time of its grant, despite its enduring nature, so if the right was precisely defined there is often little latitude to take account of changes in use or subsequent conduct when interpreting the grant itself. As *Bradley* demonstrates, the court will then have to look to other tools.

‘Muddy’ decisions raise the question of reliance and expectation. Davidson reworks the presumption that settled expectations should have priority, to assert the importance of flexibility in the law, if and when required:

property rights are dynamic not only in reacting after the fact as the world changes but also, crucially, in making clear that people can have some confidence from the start that when problems emerge, the system they are contemplating entering will not grind its inexorable way forward unmindful of change.¹⁵⁰

In other words, responsiveness in certain circumstances is as important as crystal rules and may contribute to stability within a dynamic relationship. For example, in the field of European employment law, the concept of ‘Flexicurity’ has been developed, in recognition that contractual arrangements which are both flexible and reliable can enhance stability and security.¹⁵¹

Disputes over property claims which are at least partly founded in self-generated norms and expectations may pose particular problems as these understandings and practices, developed by parties over time, are likely to undermine the clarity of property.¹⁵² They can behave like

¹⁵⁰ N. M. Davidson, ‘Property’s Morale’ (2011) 110 Mich. L. Rev. 437, 488.

¹⁵¹ Employment, Social Affairs and Inclusion (European Commission), *Flexicurity*, at <http://ec.europa.eu/social/main.jsp?catId=102>.

¹⁵² n 39 above.

property, and once settled or adjudicated, solutions moulded from ‘mud’ may be transformed into ‘crystallised’ rights. Self-generated norms then acquire proprietary effect.

The development of various (muddy) equitable doctrines has allowed a range of relationship-specific factors to ‘soften and mollify the extremity of the law’.¹⁵³ For example, the equitable doctrine of estoppel by convention has been employed to justify deviation from the strict terms governing service charges in a lease, because either both parties had assumed (wrongly) that the charges should be calculated on a different basis, or one party had done so and the other had acquiesced.¹⁵⁴ Likewise, although Norris J noted in *Bradley* that the ‘court cannot write a rulebook for what may or may not be done in every eventuality’¹⁵⁵ a property solution to that dispute was found by drawing on proprietary estoppel. Proprietary estoppel enables the court to examine a range of contextual factors, including self-generated norms, in order to ‘decide’ (or discover¹⁵⁶) the parties’ rights, and in so doing may recognise that ‘between neighbours there must be give as well as take’.¹⁵⁷ *Bradley* was an expensive decision, however, both in terms of time and the parties’ costs. In the majority of lived relationships the parties simply cannot afford such expense - so it is the muddy rights that endure in uncrystallised form.

The need to work within established legal doctrine sets constraints, at least in relation to court-based dispute resolution. Within the court system, the higher courts are primarily

¹⁵³ *Earl of Oxford’s Case* (1615) 1 Ch Rep 1, Lord Ellesmere LC.

¹⁵⁴ *Tingdene Holiday Parks Ltd v Cox* [2011] UKUT 310; *Clacy v Saunders* [2015] UKUT 387, and *Admiralty Park Management Ltd v Ojo* [2016] UKUT, relying on *Republic of India v India Steam Ship Co Ltd* [1998] AC 878. This doctrine is apparently increasingly being used at First-tier Property tribunal level: see H Bowers, H. Carr and C. Hunter, ‘All in it together? Improving dispute resolution in collectively managed and collectively enfranchised long leasehold properties’, paper presented at the Comparative Social Sustainability symposium, RMIT University Europe, Barcelona, 21-22 November 2016.

¹⁵⁵ n 72 above, at [84].

¹⁵⁶ Scholars differ as to whether the courts are simply declaring rights that are already established; see for example, B. McFarlane, ‘Proprietary estoppel and third parties after the Land Registration Act 2002’ (2003) 62 CLJ 661 (commenting on proprietary estoppel), or whether it is the court that effectively crystallises the right; see, for example A. Doyle and J. Brown, ‘*Jones v Kernott*: which road to Rome?’ (2012) 26 *Trusts Law International* 96, (discussing the Common Intention Constructive Trust).

¹⁵⁷ *Costagliola v English* (1969) 210 EG 1425, 1431.

concerned with points of law in determining the correctness of a lower court's decision.

Information theorists note approvingly that, unlike the relative freedom allowed to parties to a contract, 'with respect to the legal dimensions of property, the law generally insists on strict standardization of interests'.¹⁵⁸ Dyal-Chand, however, highlights the often inappropriate 'all or nothing' outcomes to property disputes which result from a focus on individual ownership and title, arguing that property sharing should be promoted as an outcome and that property rights, wherever they may be situated on the spectrum between exclusive ownership and commons property, should be recognised by the courts.¹⁵⁹ On occasions courts have expressed regret that they feel their hands are tied. In *Arnold v Britton*¹⁶⁰ Lord Hodge upheld the 'paper deal' but commented that although 'the court does not have power to remedy these long term contracts so as to preserve the essential nature of the service charge in changed economic circumstances [this] does not mean that the lessees' predicament is acceptable.'¹⁶¹ Lord Carnworth's dissent recognised that '[l]ong residential leases are an exceptional species of contract'¹⁶² due to their enduring nature. The 'paper deal' in this case did not meet the expectation that such leases would be drafted to ensure a fair distribution of the financial obligations 'in the interests of good management and harmony within the development for both lessor and lessees'.¹⁶³

Any resort to the courts by parties to an enduring property relationship represents a failure. The process is adversarial, costly and emotionally draining, and may well spell the end of the parties' relationship. The transition from relationship-preserving to endgame norms is seen clearly in *Bradley*: from the previously 'consensual, co-operative and neighbourly approach'

¹⁵⁸ T. W. Merrill & H. E. Smith, 'Optimal Standardization in the Law of Property: The *Numerus Clausus* Principle', (2000), 110 Yale L. J. 1, 3.

¹⁵⁹ n 21 above.

¹⁶⁰ n 64 above.

¹⁶¹ *ibid*, at [79].

¹⁶² *ibid*, at [116].

¹⁶³ *ibid*, at [119].

to the parties ‘now resort[ing] to their legal rights’, and ‘ultimately legal rights (if insisted upon) must be determined’.¹⁶⁴ As Tan has shown, there will always be ‘a multiplicity of narratives involved’ in adversarial proceedings, which the judge must craft and rationalise into a final narrative that accounts for ‘the rational motivation of both parties *in this particular context*’ and is persuasively explanatory of the final decision in the case.¹⁶⁵ Whilst exclusionary disputes are about a moment in time, disputes about continued use of land must take into account the enduring nature of the parties’ relationship. In such cases, the judicial decision can be seen as a pivot in time around which the parties’ continuing relations will turn. The decision of the court, and the way that the judgment reflects the opposing narratives, may enable the warring parties’ relationship to continue.¹⁶⁶

An alternative solution would be for the parties to attend mediation and come to their own resolution, as ultimately the parties in *Bradley* did at the door of the Court of Appeal. Property Tribunal judges will often in effect act as mediators in leasehold disputes, offering advice on how to advance the issue or about how the parties could build bridges and move on, or finding a ‘middle ground’ between the parties.¹⁶⁷ Judges also commonly make pleas for mediation in neighbour dispute cases, which ‘arouse deep passions and entrenched positions’.¹⁶⁸ For instance Mummery LJ has suggested that:

An attempt at mediation should be made right at the beginning of the dispute and certainly well before things turn nasty and become expensive.

By the time neighbours get to court it is often too late for court-based ADR and mediation schemes to have much impact. [...] Almost by its

¹⁶⁴ n 72 above, at [1].

¹⁶⁵ Z. X. Tan, ‘Beyond the Real and the Paper Deal: The Quest for Contextual Coherence in Contractual Interpretation’ (2016) 79 MLR 623, 638 (*italics in the original*).

¹⁶⁶ *ibid.*

¹⁶⁷ n 147 above.

¹⁶⁸ *Oliver & Anor v Symons & Anor* [2012] EWCA Civ 267 at [53]. See also Lord Carnworth n 69 at 1661.

own momentum the case that cried out for compromise moves onwards and upwards to a conclusion that is disastrous for one of the parties, possibly for both.¹⁶⁹

These calls have not gone unheeded. Mediation and arbitration are becoming increasingly significant in the dispute resolution process and even those who can afford litigation are advised to consider some form of Alternative Dispute Resolution (ADR), or risk being penalised in an order for costs.¹⁷⁰ Indeed, in certain contexts ADR is required as a preliminary step. For example, regulated mortgage providers must have an internal complaints handling process and once this process is exhausted the mortgagor is entitled to refer his or her dispute to the Financial Ombudsman Service.¹⁷¹ The Ombudsman is empowered to look past the contract to resolve the dispute in a manner that it considers fair and reasonable on a case-by-case basis. The decision is binding on the mortgagee although the mortgagor can decline to accept the result and continue to pursue their case before the courts.¹⁷² The Ombudsman also plays a wider role in influencing regulatory norms of ‘fair’ conduct expected of mortgagees: issuing guidance on how common disputes are approached, with recommendations as to fair practice;¹⁷³ producing regular newsletters detailing its resolution of complaints; and publishing its foremost decisions.¹⁷⁴ Being at the sharp end of consumer complaints, the Ombudsman can also prompt the FCA to take regulatory action to resolve market malpractice.¹⁷⁵

¹⁶⁹ *Bradford v James* [2008] EWCA Civ 837 at [1].

¹⁷⁰ *Practice Direction - Pre-action Conduct and Protocols*, Civil Procedure Rules, at https://www.justice.gov.uk/courts/procedure-rules/civil/rules/pd_pre-action_conduct.

¹⁷¹ See <http://www.financial-ombudsman.org.uk>.

¹⁷² Financial Services and Markets Act 2000, s 229.

¹⁷³ See http://www.financial-ombudsman.org.uk/publications/technical_notes/mortgage-arrears-and-charges.html.

¹⁷⁴ Financial Services and Markets Act 2000, s230A.

¹⁷⁵ See the *Memorandum of Understanding between the Financial Conduct Authority (the FCA) and the scheme operator, the Financial Ombudsman Service Limited* (2015) at <https://www.fca.org.uk/publication/mou/mou-fos.pdf>.

The different scope and styles of reaching a resolution between the parties, in the court system and through ADR, suggest that the latter may be more appropriate for dealing with disputes over enduring property relationships. Litigation focuses on legal rights and trims evidence with that in mind, thus reducing scope for discretionary decision-making, whereas ADR looks beyond the law to give effect to the wider sources of the relationship rights and obligations. Mediators encourage parties to talk around the issue, thus opening up solutions and giving space for the relationship to endure.

But the weaknesses of ADR also need to be recognized. ADR is often seen as a mere procedural step. If the resolution is the grant of a new property interest, the necessary formalities and registration will need to be observed if the outcome is to have proprietary effect as well as bind third parties. Embedding the agreed outcome of ADR in the parties' enduring property relationship can then be reflected in new *de jure* rights.

Conclusion

This article argues that it is necessary to explore the dynamic and enduring nature of property relations to understand property fully. The terms and understandings upon which property relations depend are derived from a variety of sources. Each particular relationship differs according to its type, its rationale, its particular location and context, and the course of its evolution. Nevertheless there are commonalities which we have sought to capture in the three broad themes identified here, namely: the diverse network of sources (including, but extending beyond, legal rules) which are multifaceted in their interactions, property's temporal dimensions and the discretionary spaces within decision-making. The significance of these themes has been illustrated through examples drawn principally from research into commercial leases, the use of communal space within residential leasehold sites and

residential mortgages, reflecting the article's focus on property relationships in land with a contractual or consensual basis.

This demonstrates the value of the dynamics perspective. For commercial leases, the tension between the formal and the informal is revealed. The apparent certainty of presentation in a 'discrete' lease may be attractive, but parties recognize that it may not be desirable, or even possible, for the 'real deal' to be committed to legally binding terms. Mortgage law as a property institution has a long history; although some of the foundational legal rules remain largely unchanged, regulatory rules and practices have evolved in response to the changing social and economic landscape and the contemporary importance of the residential mortgage to delivery of home ownership and financial market stability. The temporal element in property relationships and the importance of self-generated norms appear particularly relevant in residential leasehold contexts, as the (self-) regulation of communal space must attempt to reconcile diverse needs, attitudes and values as they change over time.

This article has also suggested that forms of decision-making and dispute resolution which reflect flexibility, informality, and compromise are more likely to be effective in resolving disputes and promoting successful enduring property relationships. Crystalline legal rights encapsulated at a moment in time often seem poorly designed for dynamic and enduring property relationships. The alternative is for property law 'to enable workable informal arrangements between neighbours to survive changes in ownership without requiring unilateral action [i.e. recourse to the courts] by one neighbour in relation to the title of another, which may itself be productive of dispute and discord'.¹⁷⁶

¹⁷⁶ n 14 above, at [12] and [33].

As Singer notes, ‘we will better understand the function of property law in our economic and legal system if we ... include the entire social and legal structure that defines the property-rights system.’¹⁷⁷ This entails moving beyond the picture of property as a black and white photograph capturing a moment in time. Instead we want to see property in three dimensions, and in colour, to accurately represent the right holders’ relationship located in time and space and in lived experiences. This captures not only the clarity of the legal rules that bind the parties but also the wider frameworks in which their property relationship is embedded and the soft-focused self-generated norms which may develop. Both representations are important and have their place, but to promote one without the other runs the risk of distorting and devaluing the conception of property to one dominated by exclusionary rights.

The themes explored in this article, and their interaction, provide a starting point to more fully appreciate the dynamics of enduring property relations in all their various forms. We encourage those interested in property to join us in our exploration of property as dynamic and enduring, not as an alternative to established legal rules and doctrines but as a richer and more challenging appreciation of property within lived relationships.

¹⁷⁷ n 59 above, 1053.