**The Supreme Court: 15 Years of Shaping ‘Property’**

**Part Two: The Power and Role of the Court and Policy (and Other) Reasoning Themes**

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# INTRODUCTION

The Supreme Court of the United Kingdom[[2]](#footnote-3) turns 15 in 2024. This milestone provides the ideal opportunity to consider how the Supreme Court has shaped the concept of ‘property’ through its judgments. As the Court’s own materials tell us, ‘[t]he impact of Supreme Court decisions extend far beyond the parties involved in any given case, shaping our society, and directly affecting our everyday lives.’[[3]](#footnote-4) This paper, which is the second produced from this project, continues to elucidate some of the ‘themes’ that arise from a consideration of Supreme Court decisions relating to ‘property’ and gives a doctrinal and descriptive overview of the ‘property’ decisions handed down by the Court as a foundation for future exploration. Our project makes two key contributions. First, we give the decisions a fresh review within thematic groupings. Secondly, we contrast how specific themes are dealt with across decisions and analyse their internal consistency.

Section II explains this paper's methodological approach and section III explores the eight remaining themes that are the focus of this paper. Within section III, we consider how each theme arises and has been developed in the case-law.

# METHODOLOGY

To explore how the Supreme Court has shaped the concept of ‘property’, we surveyed all decisions handed down by the Supreme Court since its establishment in 2009 to identify any that had a ‘property’ dimension. ‘Property’ was initially given a generous and broad interpretation, the aim being to be over-inclusive at the outset. As the research developed, some areas were sidelined[[4]](#footnote-5) to allow for a focus on cases more strictly relevant to ‘core’ property rights and law.[[5]](#footnote-6)

The research, which was supported by a research assistant, used thematic analysis as a method to identify, analyse and report patterns (themes) within the data (the judgments of the Supreme Court).[[6]](#footnote-7) This involved identifying and reading all the cases which had a ‘property element’ and adopting an inductive/bottom-up coding approach.[[7]](#footnote-8) Here, the authors summarised the decisions and pulled out quotations from the cases, while jotting down any keyworks/terms/themes. At the end of this process, all the keywords were collated to identify broader themes which were then refined.[[8]](#footnote-9) These themes were also grouped into larger categories for ease of discussion. As this was a relatively small data set, manual coding was employed.[[9]](#footnote-10)

The themes and categories raised are presented in the table below (Figure 1). The initial papers arising from this research project explore the core and reoccurring themes that emerged through this process: the ‘keyness’ of a theme is not necessarily dependent on quantifiable measures, as discussed by Braun and Clarke, ‘but rather on whether it captures something important in relation to the overall research question.’[[10]](#footnote-11) Within each theme, we focus on analysing and comparing the cases that emerged as the strongest illustrations of their particular theme. For most themes, this was an exhaustive list: however, for space reasons, where there was overlap with other parts of the two papers, cases were omitted. This paper, as the second instalment of our broader project, focuses on the last eight themes that fall within the ‘Power and Role of the Court’ themes and ‘The Influence of Policy (or other Reasoning)’ themes, which are bolded in the table below.

**Figure 1: Table of Themes and Categories identified through Thematic Analysis**

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| Category  | Individual Themes |
| ‘Defining Property’ Themes | 1. Understanding the Essential Characteristics of Property Rights
2. The Boundaries of Property
3. Defining Key Terms in Relation to Land and Property
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| ‘Socio-Legal’ Themes | 1. Balancing the Rights of Property Holders Against Those that are Less-Propertied or Relatively Less Possessed
2. Rights of Property Holder as Balanced against Community at Large
3. Homelessness and the Concept of Home
4. Gender
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| **‘The Power and Role of the Court’ Themes** | 1. **The Relationship Between the Legislature and the Court**
2. **The Power of the Courts over the Property of Others**
3. **The Influence of Previous Decisions**
4. **The Relevance of the Intentions of the Parties (and Interpreting Them)**
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| **‘The Influence of Policy (or Other Reasoning)’ Themes** | 1. **Human Rights and Civil Liberties Influence**
2. **Public Policy Influence**
3. **The Balance Struck in Cases where One Party was a Bank/Commercial Lender**
4. **Modernising the Law**
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# THEMES

## ‘The Power and Role of the Court’ Themes

### The Relationship Between the Legislature and the Court

In this section, we look at the Court’s dialogue with Parliament and, in asking whether it has shaped property, we find two trends: (i) innovating where Parliament ought to have done so, and (ii) finding novel solutions using core property concepts developed at common law.

#### (i) Reminders to Parliament of its proper role

The Court’s deference is tested when it has to *remind* Parliament of the latter’s redistributive and policy-making role. To fulfil its duty to make a decision in cases where legislation is needed (or better legislation is needed), it can go so far as to legislate itself. In *Jones v Kernott*,[[11]](#footnote-12) a couple had cohabited for many years before splitting up, and they sought to establish their respective shares in the home. They had not formalised how they wanted to divide up their shares; for unmarried cohabiting couples, there is a legislative lacuna, so the issue must be determined using principles of property law. Not long before *Jones*, the House of Lords in *Stack v Dowden*[[12]](#footnote-13) had devised a scheme allowing factors (akin to those found in the Matrimonial Causes Act 1973) to creep in such as how the parties arranged their finances, whether they had any children, etc., in determining their respective shares in the family home.[[13]](#footnote-14) This led to much litigation[[14]](#footnote-15) but no movement from Parliament. By the time of *Jones v Kernott*, we find Lord Walker and Lady Hale, also on the bench in *Stack*,almost telling Parliament off for its lack of action in the interim period. Noting that the Law Commission[[15]](#footnote-16) had made recommendations for legislation to give the court specific redistributive power, and highlighting that ‘there are no plans to implement them in the near future,[[16]](#footnote-17) the majority was not pleased. The Court outlined a fuller quasi-legislative procedure than it had in *Stack.* It seemed to feel almost obliged to take these steps, noting that:

[i]n the meantime there will continue to be many difficult cases in which the court has to reach a conclusion on sparse and conflicting evidence. It is the court’s duty to reach a decision on even the most difficult case. As the deputy judge (Mr Nicholas Strauss QC) said in his admirable judgment...[[17]](#footnote-18) (in the context of a discussion of fairness) “that is what courts are for.”[[18]](#footnote-19)

In *Ilott v The Blue Cross*,[[19]](#footnote-20) the Court found itself indicating that the applicable legislation gave inadequate guidance in controlling courts’ discretion. Here, an estranged daughter applied for provision out of her deceased mother’s estate under the Inheritance (Provision for Family and Dependents) Act (IPFDA) 1975. The legislation directs courts to consider a range of factors in deciding whether the deceased made reasonable financial provision and, if not, whether and how to exercise courts’ discretionary power to *make* reasonable financial provision.[[20]](#footnote-21) In considering whether the Court of Appeal was right to overturn the judge’s decision and award a higher amount, Lady Hale noted that there would be a ‘wide range of opinion’ as to what ought to be done, a range which ‘may very well be shared by members of the judiciary who have to decide these claims.’[[21]](#footnote-22) She went on to say that ‘[t]he problem with the present law is that it gives us virtually no help in deciding how to evaluate these or balance them with other claims on the estate.’[[22]](#footnote-23)

Both cases can be read as pleas for Parliament to do necessary work in the field of inter-family disputes. It is notable, however, that no such plea was echoed in the no less family-dispute-related decision in *Guest v Guest*,[[23]](#footnote-24) with a differently-constituted Court.

#### (ii) The development of novel solutions at common law

What about when the Court is faced with pure property law issues? The Court displayed an innovative approach in *Bank of Cyprus v Menelaou*.[[24]](#footnote-25) Here, it awarded subrogation to a bank which lost its charge owing to a fraudulent registration in the name, not of the purchasers and chargeors, but their daughter. The Court creatively reasoned that the bank should be put in the position of the vendor of the property that was now without a charge: the bank was subrogated to its now-extinguished ‘vendor’s lien’. What was novel here was the manipulation of chronology: this was not a straightforward case whereby A’s money is used to pay B’s charge, so A takes B’s role as chargee. Instead, the bank released its charge on the purchasers’ *previous* property (in the expectation, of course, of securing a charge on their *new* one), *after* the contracts for the new property had been exchanged and the vendor’s lien raised. Nevertheless, the Court seemed to think that, *in substance*,this was an ‘A to B’ type of case.

The majority of the Court was similarly willing to overlook chronology, and look at the substance of the transaction, in *Scott v Southern Pacific Mortgages*.[[25]](#footnote-26) It was held that the (vulnerable) vendor, in making the sale of the property to the (predatory) purchaser, had not retained an equitable interest in the property which she could have then combined with actual occupation to take priority over the bank’s registered charge. The majority rejected the vendor’s argument that the contract of sale gave her an equitable interest, which she could use to bind the bank. Lord Wilson held that the contract of sale formed an indivisible part of the same transaction as the conveyance and the mortgage, and, hence, even if it were possible to carve out rights from the contract, they would be postponed to the bank’s acquisition mortgage. The vendor gave away all her rights in the property, so the clock started again when the purchaser obtained freehold title and was able to carve rights out of it for the vendor. *Scott* belongs in a similar category to *Menelaou* in two ways: first, the Court is deploying pure property law principles developed at common-law and considering whether to adopt new ways of looking at it, and, secondly, it is reaching its conclusion in a way that favours the lender, a theme that will be explored in more detail below.

The Court has overall not stayed on-message in its dialogue with the legislature. It maintains a primarily deferential policy, though occasionally reminding Parliament of its failure to legislate. The Court flourishes when it can innovate in ‘territory’ not claimed by Parliament: here, deference is rendered instead to lending institutions (a theme explored more fully below). What about, more fundamentally, when the Court confronts the question of whether it ought to redistribute property at all?

### The Power of the Courts over the Property of Others

Is it for courts to redistribute property in the absence of clear statutory provisions permitting it to do so? In grappling with this question, the Supreme Court has not always given a consistent answer. While every decision ends up being redistributive in *some* sense, the question of *whose* role it is to redistribute seems starker in some cases.

In *Bailey v Angove’s Pty*,[[26]](#footnote-27)Lord Sumption remarked that ‘English law is generally averse to the discretionary adjustment of property rights.’[[27]](#footnote-28) This seems too general a statement, given the specific discretionary powers discussed above. His Lordship’s concern seemed to be rather with *judicial* discretionary adjustment. He appeared to confirm this suspicion of the Court’s role in citing Roy Goode: ‘[i]t is when [scholars] seek to … argue for a proprietary right when there is no proprietary base that the line is crossed between what is fair and what is not, for it is the defendant’s unsecured creditors who are then at risk...’[[28]](#footnote-29) Giving a proprietary right where there is no proprietary base, in this case, would have involved recognising a remedial constructive trust, which is not apparently possible in England.[[29]](#footnote-30) He denied the existence of a trust over monies held beneficially by an agent and owed to its principal, in circumstances in which one such debt accrued shortly before the agent’s insolvency. Thus, there were neither factors authorising the recognition of a trust, nor jurisdiction to fashion one ad-hoc. Doing the latter would have involved disrupting the statutory insolvency scheme, although courts nevertheless can find themselves doing precisely this if they recognise an intended or institutional trust on flimsy facts.

The decision in *Bailey* makes for an interesting contrast with *FHR European Ventures v Cedar Capital*.[[30]](#footnote-31) Here, the court was faced with a choice between two inconsistent lines of roughly equal authority on the question of whether a fiduciary, having received a bribe related to the scope of his duty of loyalty to its principal, would hold that bribe on constructive trust for the principal, or would merely owe its value as a personal liability to the principal via an equitable account. It appears that the proprietary remedy question was a live one in this case, not because of any insolvency, but because the claimant wished to access equitable following and tracing rules.[[31]](#footnote-32) In a unanimous judgment, Lord Neuberger held that a constructive trust was the correct remedy, overruling himself in *Sinclair v Versailles*[[32]](#footnote-33) three years earlier. In his view, the balance of ‘legal principle, decided cases, policy considerations, and practicalities’ favoured the trust approach.[[33]](#footnote-34)

Fashioning new rules for the recognition of a trust can be perceived either as legislating by the Court, or as merely correcting the course of the law in exercising its declaratory function. The decision to choose one line of authority *is* essentially a redistributive one.[[34]](#footnote-35) Would the Court have been over-stepping its role if it had come to a different result in *Bailey,* and had found that authority, and general principles of conscience, favoured recognising an institutional trust where one takes on a debt having grounds to believe one risks insolvency? Both *Bailey* and *FHR* involved a choice between valid outcomes. Had *FHR* involved an insolvency situation, one can speculate that the decision might have been quite different.

Another example is *Guest v Guest*,[[35]](#footnote-36) where the issue was the correct remedial approach in proprietary estoppel claims. The debate here reflects different responses to a problem of property redistribution. Both Lord Briggs’ choices of remedy (a life interest for the parents with a remainder share for the claimant, or alternatively a lump sum, presumably to be secured by a charge on the land), and Lord Leggatt’s preference for a (smaller) lump sum, indicate that the Court tolerates property redistribution to some extent. By contrast with *Jones*, here there is no ‘telling off’ of the legislature; instead, a willingness to use equity’s creative potential to arrive at novel solutions.

The Court has therefore not been on-message consistently with whether it is empowered to redistribute property. The decision in *FHR* encourages confidence in the integrity of those one is transacting with, while the opposite is true of *Bailey’s.* Then *Guest* involves confidence in a less-formal, familial, farming context, although views of such cases as involving vulnerable individuals are overstated given that they involve *both* a familial *and* a business relationship. Nevertheless, where parents and their adult children attempt a business venture together but end up falling out, while this damages their emotional ties, we still *perceive* some bond as enduring or some parental duty persisting. Some of the Court’s decisions can thus be read in almost a moralistic, paternalistic way, suggesting that justice requires a drastic readjustment of wealth. As with other themes, though, this is not a consistently sustained principle.

### The Influence of Previous Decisions

Another theme that arose explores the different degrees to which previous decisions have influenced the Supreme Court’s decision-making. All cases *could* fall within this category – as there is always *some* previous authority(!) – but we consider three distinct groupings: (i) cases which build on and develop previous decisions, (ii) cases that overrule previous decisions, or (iii) cases where the Court feels bound, because of previous decisions, not to develop or change the law. We contend that these decisions tell us something about how the Court sees its role and limitations. This comes through most strongly in the consideration of the last category.

#### (i) Cases which seek to build on and develop previous decisions

The Supreme Court, as an apex court, has an important role (and responsibility) in developing the law and overruling previous decisions where necessary. This can be seen in both this grouping of cases and the following one; this grouping considers some examples of where the Court builds on and develops the law based on previous authority.

One example is *Jones v Kernott,* discussed above, where the Court took the opportunity to clarify and develop the House of Lords’ decision a few years earlier in *Stack v Dowden.* In doing so, it reaffirmed the principles underlying a common intention constructive trust and further developed the concept by confirming that intentions could be imputed and that the constructive trust was ambulatory.[[36]](#footnote-37) Similarly, in *Tomlinson v Birmingham City Council,* [[37]](#footnote-38)it built on the decision of the House of Lords in *Runa Begum v Tower Hamlets London Borough Council.*[[38]](#footnote-39) One issue in *Tomlinson* was whether ‘civil rights’ were engaged for the purposes of Article 6 of the ECHR when a party allegedly refused a suitable offer of accommodation and the local authority as a result discharged their duty to house them by sending a letter. While the House of Lords had declined to express a concluded view one way or the other on this issue, the Supreme Court made clear that the inclusion of benefits in kind within Article 6 was not a step it was willing to take, drawing a clearer boundary. Likewise, in *Powell,*[[39]](#footnote-40) the Court extended the reasoning developed in *Manchester City Council v* *Pinnock*[[40]](#footnote-41)applicable to Article 8 of the European Convention on Human Rights to introductory tenancies and cases where a local authority seeks possession in respect of a property that constitutes a person’s home.

#### (ii) Cases which overrule previous decisions

The Supreme Court has the ability to overrule previous decisions, and there are examples of the Court using this power. One example is *Secretary of State for Environment, Food and Rural Affairs v Meier,*[[41]](#footnote-42) where the Secretary of State had claimed orders for possession over land not yet currently occupied (but feared to be occupied in the future) by members of the travelling community. The Court ultimately refused to grant these orders of possession, and in doing so held that the decision of the Court of Appeal in *Drury v Secretary of State,*[[42]](#footnote-43) upholding the grant of such awards, was wrong and should not be followed in future.[[43]](#footnote-44) Lord Neuberger suggested that it was simply not possible to make the sort of enlarged order for possession that the Court of Appeal sought to make.[[44]](#footnote-45) Another example is *Bailey,*[[45]](#footnote-46)discussed above, in which Lord Sumption firmly rejected the approach of the High Court in *Neste Oy*[[46]](#footnote-47) (and in a cited treatise[[47]](#footnote-48)). Lord Sumption noted counsel’s argument that *Neste Oy* could be distinguished (there, the agent had no contractual right to the payment which was the subject-matter of the trust) but went even further and said that the payment fundamentally could not be impressed with the claimed constructive trust. Since English law does not recognise a remedial constructive trust, more would be needed than the fact that ‘good conscience requires it.’[[48]](#footnote-49) The trend seems to be in favour of using strong terms when the Court feels able to overrule previous authority.

#### (iii) Cases where the Court feels bound, because of previous decisions, not to develop the law

 Occasionally, the Court feels bound by previous decisions *despite* its ability to develop the law. One such example is *Austin v Mayor and Burgesses of the London Borough of Southwark*,[[49]](#footnote-50) on whether a brother could inherit a secured tenancy. The local authority had already obtained a possession order against the deceased, but never sought to enforce it. Lord Hope said:

‘[T]he fact remains that the law was regarded as having been settled by *Thompson* and the effects of reversing that decision now are incalculable… it has been assumed to be right and has been acted upon in many tens of thousands of cases. The area of greatest concern is the effect that a retrospective reversal would have on social landlords who for so long have assumed that those who had failed to comply with the conditions in a suspended possession order were no longer tenants with a right to enforce the implementation of repairing covenants’.[[50]](#footnote-51)

The Court used creative techniques to allow a remedy for this claimant. The same can be said for *Berrisford v Mexfield Housing Co-operative Ltd**,*[[51]](#footnote-52) where the Court critiqued the requirement that leases have a certain term but felt bound by its predecessor’s decision in *Prudential Assurance Co Ltd v London Residuary Body*,**[[52]](#footnote-53)** which had affirmed the relevance of the test. Again, it noted the impact that any change would have on hundreds of tenancies.[[53]](#footnote-54) But as above, a creative solution was found for the specific ‘tenant’ by finding that that section 149(6) Law of Property Act 1925 turned a lease for an uncertain term into a lease for 90 years, therefore not breaching the rule it felt bound to uphold.

Both cases suggest that the Court is reluctant to develop the law when it anticipates a potential negative impact on landlords and long-standing tenancies. One interesting point is whether the fact that both examples relate to leases is a coincidence, or rather represents a trend where the Court is reluctant to undermine the status quo in this area. The latter, we posit, is likely true. Another is whether the fact that the Court found different solutions for the tenants also played a part in the Court’s reluctance to overrule previous authority. If there was no way around in these cases other than by overruling previous authority, the result might have been different. This suggests that the Court, despite having the ability to overrule cases, uses this power sparingly if alternative solutions exist. The case law also suggests that, when the Court *is* willing to overrule previous authority, it generally coalesces with policy trends discussed further below. This, in turn, says something about how it sees its role and the factors influencing that perception.

### The Relevance of the Intentions of the Parties (and Interpreting Them)

One theme that arose was the importance of interpreting the intention of the parties based on the (written) documentation involved in the transaction, be that a lease, a trust deed, or some other contract. A trend that emerges within these cases is the need for the interpretation of the intention to make business or commercial sense.

In *In Re Sigma Finance Corporation,*[[54]](#footnote-55) the Court made clear that the interpretation of the documentation, in this case the security trust deed, should be an iterative process which involved ‘checking each of the rival meanings against other provisions of the document and investigating its commercial consequences.’[[55]](#footnote-56) Because of this a court cannot (and should not) give too much weight to the natural meaning of the words in some clauses in isolation, as even the most skilled draftsmen make errors and sometimes fail to see the wood for the trees.[[56]](#footnote-57) The importance of commercially-sensible interpretations also emerged in *Multi-Link Leisure Developments Limited v North Lanarkshire Council (Scotland)*.[[57]](#footnote-58) This concerned an option to purchase and whether ‘full market value’ needed to be based only on use of land as agricultural land, or whether the likelihood of obtaining planning permission could be factored in. The Court favoured the latter approach and, in doing so, emphasised giving an interpretation that made commercial sense,[[58]](#footnote-59) finding an agreement that was based on what ‘reasonable commercial men would have agreed to when the lease was entered into, if they had applied their minds to the benefits that would accrue to the tenants if they were to exercise the option to purchase.’[[59]](#footnote-60) The same trend is identified in *Aberdeen City Council v Stewart Milne Group Limited* *(Scotland)*,[[60]](#footnote-61) in relation to the interpretation of an uplift provision. A ‘commercially minded interpretation’ required the implication of a second term into the agreement, stating that, if the sale which triggered the uplift was not at arm's length in the open market, an open market figure should be used instead.[[61]](#footnote-62) Similar reasoning was applied in *Duval v 11-13 Randolph Crescent Ltd*,[[62]](#footnote-63) where the Court avoided an interpretation of clauses in a lease that would be ‘uncommercial and incoherent‘ by starting with the idea that the terms should be construed in a way that a reasonable person – having all the background knowledge which would reasonably have been available to the parties to each lease – would have interpreted it.[[63]](#footnote-64)

The thread holding these cases together is interpreting the agreements in line with business common sense, and a consistent approach can be said to arise in these different contexts. In coming to the final decision, weight was often placed on what the parties must have intended based on the wording of these documents as interpreted or construed in a way that a reasonable party with the same background knowledge would have done. There is some commonality here with the cases discussed in the ‘Power of the Court’ theme, where it was seen as important that the law made business sense and was as the public would expect it to be.

## ‘Policy or the Influence of Other Reasoning’ Themes

1. *Human Rights and Civil Liberties Influence*

In the first of our themes exploring the influence of wider desirable (or not) policy goals on ‘property’, we zone in on human rights. The Human Rights Act (HRA) 1998 overlapped with the latter years of the House of Lords, while during the Supreme Court’s existence we have seen a political atmosphere tending towards increasing isolation from the influence of laws perceived as emanating from the European continent. In this time, the Court has developed interesting trends around the property-related ECHR rights. The cases show some willingness to use human rights to protect the less-propertied, especially when combined with anti-discrimination rights. Overall, the Court has not gone as far as it might have in developing its Convention-based jurisprudence, and this may (at least, on occasion) be explained by a view that domestic law does, or can potentially, do enough to protect the rights sought.

1. Article 1 of the First Protocol

Article 1 of the First Protocol (A1P1) protects every natural and legal person’s entitlement ‘to the peaceful enjoyment of his possessions’, restricting deprivation of them except in the public interest and as provided for by law, and allowing a state to enforce laws which control the use of property in the general interest. It has been relied on in many contexts, with the ‘possessions’ in question ranging from a house (and entry into it), to money received as state benefits, to fish![[64]](#footnote-65) We will see that A1P1 can in theory favour the more-propertied such as landlords, but interestingly this is not consistently the case.

A1P1[[65]](#footnote-66) draws a ‘material’[[66]](#footnote-67) distinction between deprivation, which is only permitted on the occurrence of certain conditions and which requires compensation, and control of use, which is generally something the state is entitled to do in meeting its public interest duties and which does not usually require compensation.[[67]](#footnote-68) *R (Mott) v Environmental Agency[[68]](#footnote-69)*involved judicial review of the Environmental Agency’s decision to restrict the number of fish the claimant could catch from a fishery in which he held a leasehold interest. Lord Carnwath considered that the state’s actions would not be classified as deprivation or expropriation ‘merely because of the extreme effects on particular individuals or their businesses’.[[69]](#footnote-70) As such, he treated what had occurred in this case as ‘control’, but the Court still found thatthe claimant’s rights had been infringed, and awarded compensation – even though A1P1 gives no general expectation of compensation here – because of the extreme impact on the applicant’s livelihood.[[70]](#footnote-71) Thus, here, the invocation of Convention rights was successful and helped safeguard the property of the ‘man on the street’.

Meanwhile, in *Cusack v London Borough of Harrow,[[71]](#footnote-72)* a case relating to the erection of bollards that prevented vehicular access onto a footway which the claimant solicitor used to access his office, Lord Neuberger appears to draw a limit, suggesting there was *no* general rule that, ‘where the state seeks to control the use of property, and could do so under different provisions, which have different consequences in terms of compensation, it is obliged to invoke the provision which carries some (or greater) compensation.’[[72]](#footnote-73) Thus, invocations of A1P1 can fail to assist the comparatively propertied, perhaps particularly when mere control is in issue.

Nevertheless, A1P1 is potentially a robust defence for landlords otherwise restricted from ending a tenancy and recovering their property. Indeed, in *McDonald*,[[73]](#footnote-74) as we will see, one problem noted by Lord Neuberger with raising a proportionality argument against eviction by a private landlord would be that the latter could avail of an A1P1 defence. In *Salvesen v Riddell (Scotland)*,[[74]](#footnote-75) theCourt went so far as to hold a statutory provision incompatible with A1P1 owing to the excessive burden it placed on landlords in controlling the use of their property. The relevant legislation[[75]](#footnote-76) had allowed agricultural tenants to apply for retrospective security of tenure, in circumstances which allowed landlords to circumvent this only if they had served notice within a narrow timeframe. Lord Hope held that the provision was ‘discriminatory in a respect that affects the landlords’ right to the enjoyment of their property’, in a way that seemed to be ‘entirely arbitrary’.[[76]](#footnote-77)

As much as A1P1 might help landlords, the right of a social tenant can equally be a ‘possession’ and so the protection offered is not one-sided. In *Sims v Dacorum Borough Council*,[[77]](#footnote-78) the issue was whether the decision of the House of Lords in *Hammersmith & Fulham Borough Council v Monk*[[78]](#footnote-79) (that service of notice to quit by one joint tenant will end the tenancy) had survived the HRA. The appellant relied on A1P1, as well as Article 8 (A8), to argue that the joint tenancy persisted even after his wife served notice to quit (in light of domestic violence claims against him). However, Lord Neuberger dismissed the A1P1 argument on the basis that the appellant ‘was deprived of his property in circumstances, and in a way, which was specifically provided for in the agreement which created it’:[[79]](#footnote-80) indeed, as counsel had argued, as a ‘result of a bargain that he himself made.’[[80]](#footnote-81)

Do Convention rights, then, protect the propertied more than they do the less-propertied? *Salvesen* can obviously be distinguished from *Sims* on the basis that the former involved a drastic change of position imposed by the legislature in a way that made arbitrary distinctions, while the latter involved a last-ditch argument against the full implications of a contractual agreement.[[81]](#footnote-82) It is interesting to note, though, that there was a power imbalance in *Sims* between the more vulnerable appellant (regardless of his alleged actions) with his wife on the one hand, and the local authority with power to allocate housing and shelter on the other.

The protection of A1P1 for the less-propertied is occasionally potent when combined with Article 14 (A14) prohibiting discrimination. This emerged in a series of cases during the ‘austerity’ era, in response to Conservative government cuts to state benefits. In *R (SG) v Secretary of State for Work and Pensions*,[[82]](#footnote-83) the respondent accepted that A1P1 was engaged where Parliament had capped state benefits. The appellants claimed that the cap discriminated against them on the basis of gender as it impacted mostly on single-parent households, most of which are headed by single mothers, such that there was an interference contrary to A14 with their A1P1 rights. Lord Reed had no doubt that the Regulations establishing the cap pursued a legitimate aim.[[83]](#footnote-84) While it was true that ‘women head most of the households at which those aims are directed’,[[84]](#footnote-85) given that no means were suggested of achieving the legitimate aims in a way that impacted equally on women and men, the measure was justified. While the tactic thus failed here (notwithstanding dissents by Lady Hale and Lord Kerr), the fact that A1P1 was engaged, together with the use of A14 to bolster property-related Convention rights, marked a turning-point.

In *R (Carmichael) v Secretary of State for Work and Pensions*,[[85]](#footnote-86) the appellants in a series of conjoined appeals relied on both A1P1 and article 8 to seek to invalidate a limit on state benefits where the recipients had spare rooms in their properties (known as the ’bedroom tax’). Most of the appeals concerned the need for extra bedrooms to accommodate the disability of one of the occupants: all but one were dismissed. Two of the claimants, though, succeeded on the basis that the measures were discriminatory in relation to their A8 (but, interestingly, not A1P1, as it ‘adds nothing’[[86]](#footnote-87)) rights, because the measures contained an exception for children who could not share bedrooms for disability reasons but not for adults with the same requirement. This development did, then, suggest a role for property-related Convention rights in supporting those left behind by government policy.

Lady Hale dissented in relation to another of the conjoined appeals, which concerned not disability, but gender: the claimant was a female victim of gender-based violence who had been accommodated in a three-bedroom flat under the sanctuary scheme. There was no particular need for the third bedroom: the issue was rather the prospect of the claimant having to move to a smaller property losing the community and safety around her.[[87]](#footnote-88) Lady Hale’s dissent[[88]](#footnote-89) viewed the measure as discriminating against women victims of gender-based violence in breach of A14 taken with A8. She viewed states as having ‘positive obligation to provide effective protection for vulnerable people against ill-treatment or abuse’ from the state or from private persons, an obligation she said was generally recognised at national and international levels.[[89]](#footnote-90) *Carmichael* was used to further support protection for the more vulnerable in *RR v Secretary of State for Work and Pensions*,[[90]](#footnote-91) where the appellant lived with his severely disabled partner in a two-bedroom flat in respect of which the ‘bedroom tax’ had been applied to reduce the applicant’s housing benefit.

In line with this approach, an interestingly less-traditional view of cohabitation was given in *Re Denise Brewster*[[91]](#footnote-92)in finding gender-based discrimination in relation to pension entitlements. It was accepted here that denial of a surviving spouse’s pension (to a cohabitee) was engaged by A1P1. The Court found the decision incompatible with the appellant’s rights, with Lord Kerr remarking that the need for the applicant to have been married to the deceased was not explained, given that ‘[t]he essence of entitlement is that the relevant parties have lived together for a sufficiently long period and that one is financially dependent on the other or that they are financially interdependent.’[[92]](#footnote-93) Nevertheless, inherent limitations within anti-discrimination legislation mean that it cannot always be deployed to protect rights to remain in property.[[93]](#footnote-94)

From what we have seen, the Court has interpreted A1P1 expansively and found it to be applicable in a variety of contexts. It has used A1P1 to help the less-propertied (in *Mott*) and conversely it has not always used it to help the comparatively more-propertied (*Cusack*). Meanwhile, A14 has been used to bolster rights to receive state benefits relating to housing. We will see that A8 is not necessarily the key to helping the less-propertied or more vulnerable. In that light, A14 has emerged as comparatively a stronger source of support for the less-propertied. We can note here the remark of Lord Kerr in *Denise Brewster*, contrasting A14 with A8: A14 requires states to ‘secure’ one’s entitlement to equal treatment, and so ‘[t]he obligation to secure rights must require a greater level of vigilance on the part of the state authorities than is animated by a duty to have respect for a particular species of right. The duty to secure rights calls for a more proactive role than the requirement to respect rights.’[[94]](#footnote-95) A14 is, as we have seen, not a universal salvo, while Lady Hale and Lord Kerr seem to have been more pro-active in using A14 with the property-related Convention rights to support a more modern social agenda than Parliament or Ministers have perhaps anticipated. Is discrimination becoming central to court’s understanding of the bounds/protection of property?

1. Article 8

Article 8 (A8) recognises everyone’s ‘right to respect for his private and family life, his home and his correspondence’, and prohibits a ‘public authority’ from interfering with this right except for such interference ‘as is in accordance with the law and is necessary in a democratic society’, specifying an exhaustive (but widely-drawn) list of permitted state interests. A8 has been invoked in a series of cases involving losing one’s home. The Supreme Court inherited what has been politely called a ‘dialogue’, but could be described as a ‘battle’, concerning what A8 requires of public authorities, with the House of Lords adopting a narrow approach in *London Borough of Harrow v Qazi*.[[95]](#footnote-96) The Supreme Court had to retrench somewhat from this position, but it has still been able to interpret A8 narrowly. It has had to make a balancing act between the obligations imposed by Strasbourg jurisprudence, and the resource strain faced by housing authorities.

A8 has some potential to develop case-law which affords protection to the more vulnerable and marginalised. But we will see that A8 has been invoked numerous times without success. Interestingly, it has *equally* been invoked without success (indeed, it was dismissed very briefly) by privileged inhabitants of a riverside development in London. We shall see that the Justices consider domestic law can go far enough. Is there a reluctance to develop Convention rights further, seeing instead what domestic law can do?

The Court’s cautious approach to A8 emerges in *Pinnock*, [[96]](#footnote-97) whichhas been referred to as ‘the resolution of a protracted inter-judicial dialogue between the House of Lords and the Strasbourg court.’[[97]](#footnote-98) Lord Neuberger held that it would suffice for a court to be able to hear a proportionality defence in eviction proceedings by a public body[[98]](#footnote-99) in order to achieve compatibility with A8 for the purposes of section 6 HRA.[[99]](#footnote-100) He noted thatonly in exceptional cases will there be a successful proportionality defence where the applicant has no right to remain in the property.[[100]](#footnote-101)

The shortcomings we identified in the linked paper (that the Court is not always consistent in deciding what counts as a ‘home’) are not cured by a broad human right to respect for the home. In *R (ZH and CN) v Newham LBC & Lewisham LBC*,[[101]](#footnote-102) the appellants failed in their claim that section 3 of the Protection from Eviction Act (PEA) 1977 required a local authority to obtain a court order to recover property that had been licensed to them as temporary accommodation, on the basis that such property was not being occupied by them as a ‘dwelling’. They argued, in the alternative, that the authorities were required to bring court proceedings anyway, so that the appellants could then raise a proportionality defence. It had been conceded that A8 was applicable,[[102]](#footnote-103) so the matter turned on compatibility.

While sections 3 and 6 were not explicitly cited in solving the matter, it was ultimately concluded that the statutory scheme as it related to these appeals did safeguard A8 rights. Lord Hodge remarked that ‘premises may not be “let as a dwelling” under PEA 1977 and yet be a home for the purposes of A8 of the ECHR’,[[103]](#footnote-104) which initially suggests the hope that the ECHR and the HRA can bolster the protections offered by domestic law. Nevertheless, he held that the procedures and available safeguards were in accordance with the law and in pursuit of a legitimate aim.[[104]](#footnote-105) As for proportionality, the county court can consider this on an appeal of the review decision, under section 204.[[105]](#footnote-106) Thus, while the domestic law protections turned on the majority’s narrow definition of ‘dwelling’, A8 defines the ‘home’ more widely in according it protection – and yet it made no difference.

In *Sims*, discussed earlier, Lord Neuberger noted that the service of notice by the appellant’s wife, ending their tenancy, ‘put at risk [his] enjoyment of his home’, and that ‘different considerations’ may apply where the appellant risked ‘losing what has been his family home for many years.’[[106]](#footnote-107) Nevertheless, dismissing the appellant’s argument in *Sims* in a way similar to the A1P1 point, he held that ‘full respect’ was given, inter alia, by the fact that the tenancy was terminated ‘in accordance with its contractual terms to which he had agreed’, and that PEA would require a court order in his case.[[107]](#footnote-108)

While Lord Neuberger and Lady Hale’s dissents in *ZH* gave wider readings of ‘dwelling’ that made the A8 point redundant, interestingly, in *McDonald* a year later, they revisited PEA 1977 in a joint judgment, and viewed it among other legislation as *sufficient* to ‘properly balance the competing rights’ in the private sector.[[108]](#footnote-109) The case turned on whether courts, in proceedings between a private landlord and their tenant, were required to consider proportionality in order to comply with section 6 HRA 1998. It was held that A8 could not ‘justify a different order from that which is mandated by the contractual relationship between the parties, at least where, as here, there are legislative provisions which the democratically elected legislature has decided properly balance the competing interests of private sector landlords and residential tenants.’[[109]](#footnote-110) It was also difficult to see how, on the facts, if a judge were to conduct a proportionality exercise, the applicant’s needs would outweigh the lender’s need to be repaid.[[110]](#footnote-111) While Lord Neuberger in *Pinnock* had been careful to highlight that the judgment was to have no bearing on cases where a private landlord was seeking the order for possession, explaining that domestic and Strasbourg authorities were not conclusive,[[111]](#footnote-112) he and Lady Hale in *McDonald* seemed to place importance on the fact that it was *not* a public body seeking possession. They seem to have held[[112]](#footnote-113) that A8 was applicable (ie engaged) but that there was no incompatibility. Their reasoning in relation to the balance having been struck by statute therefore seems *not* to rule out A8’s applicability,[[113]](#footnote-114) but it does make incompatibility a very high hurdle indeed. We can perhaps speculate that the Court may have anticipated a Strasbourg challenge in taking its non-interventionist stance: the appellant did indeed pursue the matter in the European Court of Human Rights in *FJM v United Kingdom*,[[114]](#footnote-115) unsuccessfully, with the Court offering reasoning that underexplored its own jurisprudence.[[115]](#footnote-116)

While the result in *McDonald* is disappointing, Lord Neuberger and Lady Hale’s generous view (already expressed in their dissenting judgments in *ZH*) of what PEA *does* and the extent to which it protects accommodation at the extreme end of insecure perhaps explains why they found in *McDonald* that the legislature had already struck a proper balance. It is not clear to what extent this view was the determining factor in *McDonald*: it seems rather that this was the emphasis on the fact that Strasbourg jurisprudence simply did not extend A8 applicability to evictions by private landlords. It is a separate question whether the view that A8 does not apply in such situations is *correct*, and the Court is perhaps not clear on what view it is taking.

In a very different context, Lord Leggatt dismissed the claimants’ attempt to rely on A8 (specifically, the private life aspect) in *Fearn v Tate Gallery*.[[116]](#footnote-117) Describing the argument ‘as an unnecessary complication and distraction,’ he added that ‘the common law has already developed tried and tested principles which determine when liability arises for the type of legal wrong of which the claimants complain.’[[117]](#footnote-118) This was enabled by his extensive view of what was protected by the common law of nuisance: ‘[a]n important aspect of the amenity value of real property is the freedom to conduct your life in your own home without being constantly watched and photographed by strangers.’[[118]](#footnote-119) While Lord Leggatt’s reasoning here is brief, he does not seem to be explicitly ruling out A8’s *applicability* in this context in those terms. Instead, he seems to be saying that the common law goes far enough to protect the interest at hand so that recourse to A8 is not needed. Is this the same thing as ruling out applicability? Lord Leggatt’s judgment, with respect, could have expanded on the relationship between the privacy element of A8 and the privacy element of the property tort concerned in this case. A pattern seems to have emerged where discussions of the potential applicability of human rights provisions are overshadowed by strong, if not always fully developed and articulated, views on how far domestic law goes to protect the human right concerned. Or, in the case of the dissenting judgments in *ZH*, how far domestic law *ought to go* in protecting it.

Is A8, then, an increasingly redundant backstop to the flourishing development of private property law? A note of caution ought to be sounded, as the minority in *ZH* seem to want PEA to do more heavy lifting than it ought (and the majority certainly dismissed their generous view of PEA). It seems to be assumed that domestic law has done enough that we go no further. This may be the case *even where the human rights provision is applicable in principle*. The Court’s engagement with A8 therefore reveals uneven ideas about what human rights protections are actually for.

1. Summary

Overall, the ECHR and HRA have certainly shaped property, albeit in different ways. The risk is that this detached approach to Convention rights, elucidated above in the discussion of the case law, might slow down the potential for interesting development of those rights in relation to property: that is, not just as a *fallback* or tactic when legislation or regulations end up having arbitrary and discriminatory effects on specific categories of individuals (as in the A14 cases), but as an end in itself. This disengagement speaks volumes about the Court’s self-perception of its role.

1. *Public Policy Influence*

If human rights have impacted property law to some extent, ‘public policy’ or ‘public interest’ ideas have not quite had the same effect. While public policy can be difficult to define, we have noted two broad categories of case in which the Court has called upon public policy to make its decision. First, we note the extent to which public policy can itself be a determining factor in whether the claimant has made out a claim in the first place. A small number of cases engage this proposition, leading us to conclude that the idea remains undeveloped. Secondly, we consider the illegality defence to private law claims generally, which we only briefly mention because of its general importance.

As to substantive public policy or morality influences seeping into the shaping of doctrine, *FHR* offers the strongest example. As we saw, Lord Neuberger partly based his decision on considerations of ‘policy’, and the decision even offers hints of a punitive rationale. These are rather more tempered than the decision’s predecessor in the Privy Council, *Attorney General for Hong Kong v Reid*,[[119]](#footnote-120) perhaps as the latter concerned a bribe (characterised by Lord Templeman as ‘evil’ in a fragment cited by Lord Neuberger[[120]](#footnote-121)) and the former concerned a secret commission. While Lord Neuberger briefly touched on general concerns about bribery and secret commissions, his decision focused more on principle and authority, and attempted to balance the prejudice to unsecured creditors caused by the recognition of a trust against giving an effective remedy to the principal through tracing.[[121]](#footnote-122) *Bailey*, discussed above as a counter-point to *FHR*, involved Lord Sumption decrying fairness or justice from seeping into answering the question whether an agent received money on constructive trust for the principal. While *FHR* seems like a contrasting decision – particularly as ‘policy’ is expressly cited as part of the rationale – we think that it is significant that extensive sections of Lord Neuberger’s judgment are devoted to justifying his decision on the basis of the strength of the authority for it, and the weakness of the authority against it (which includes his own judgment three years previously in *Sinclair v Versailles*).[[122]](#footnote-123) And, while *Bailey* can be read as based on a policy choice, even overturning doctrine as expressed in an Equity treatise, Lord Sumption was also able to rely on the apparently settled idea that English law does not recognise a remedial constructive trust (which can be doubted, for instance on the basis of *Jones v Kernott*). There are therefore, we think, consistent hints that using abstract ideas of policy or fairness (which obviously might not always be overlapping) is dangerous, and that recourse to settled principle is safer. While this point may seem obvious, we think that it is interesting that different Justices at different stages are doing the same thing in slightly different ways.

Interestingly, two cases involving restrictive covenants on land, in a later era of the Court, provide development of the idea of public policy as an aspect of a legal test. In *Alexander Devine* *Children’s Cancer Trust v Housing Solutions Ltd*,[[123]](#footnote-124) the Court considered section 84 of the Law of Property Act 1925 for the first time. Under that section, public interest considerations are a statutory ground for jurisdiction to discharge or modify a restrictive covenant, and the Court indicated that these can include the provision of affordable housing.[[124]](#footnote-125) In *Peninsula Securities Ltd v Dunnes Stores (Bangor) Ltd*,[[125]](#footnote-126) meanwhile, a leasehold covenant restricting trade was argued to be unlawful, in a context in which the anchor tenant essentially benefitting from it, the Irish chain Dunnes Stores, was seen as a major boost to the shopping centre. Rejecting the claim, the Court re-examined the doctrine of restraint of trade, which Lord Wilson remarked had at its foundation public policy.[[126]](#footnote-127) By having regard to public policy, the Court held that the ‘pre-existing freedom’ test ought not to be followed as it did not engage public policy and could have arbitrary results;[[127]](#footnote-128) it preferred the ‘trading society’ test which would uphold a restraint on trade if it is normally accepted in contractual relations in that context.[[128]](#footnote-129) A consistent approach is evident: *Devine* looks at what courts can permissibly consider as part of broadly-drawn statutory grounds for jurisdiction and discretion, while *Peninsula* (as with *FHR*) makes a choice between apparently valid lines of authority, albeit perhaps more expressly basing this decision on policy reasoning. It is also possible to see the decision in *Peninsula* as part of the Court’s consistent recourse to what commerce needs in order to function.

We then turn to the illegality principle. This was one of the specific points which most consistently troubled the Supreme Court in its 15 years until *Patel v Mirza*[[129]](#footnote-130) laid down the current test for the application of the principle. We only explore some aspects of this principle, as it applies across private law generally and has been written about extensively elsewhere. Essentially, the illegality principle bars a claim where that the claim is based on, or furthers, some conduct proscribed by the law: a simple example is a claim for damages for breach of a contract to kill someone. While the principle itself is clear, English courts have had quite a lot of difficulty laying down a test. Indeed, unhappiness with the ‘reliance’ test laid down by the House of Lords in *Tinsley v Milligan*[[130]](#footnote-131) preceded three decisions by the Supreme Court revisiting the principle and making refinements where it could. An approach based on weighing up competing policy factors had been developing, for example in the decision of three of the Justices in *Hounga v Allen*.[[131]](#footnote-132) Finally, in *Patel v Mirza*,[[132]](#footnote-133) the opportunity came to confirm a test based on weighing up policy factors. Lord Toulson stated that courts were now to consider the underlying purpose of the prohibition and whether it would be enhanced by denying the claim, then consider any other relevant public policy that might be impacted by denying the claim, and finally consider whether denial would be proportionate.[[133]](#footnote-134) A similar public policy analysis had been conducted the year before by the Court of Appeal in *R (Best) v Chief Land Registrar*[[134]](#footnote-135) in deciding that the illegality defence did *not* apply specifically in respect of an application to become registered proprietor under Schedule 6 of the Land Registration Act (LRA) 2002, following a period of adverse possession.[[135]](#footnote-136) The test, now confirmed by the Supreme Court, therefore provides space for interesting development of property in balancing competing policy from tort or the criminal law.

The Court has since already had an opportunity to apply the test in a property context, in *Stoffel v Grondona*.[[136]](#footnote-137) Here, a vendor and purchaser of a leasehold flat were cooperating in arranging a mortgage fraud, with the purchaser executing a charge for around £76,000. The solicitors negligently failed to register the purchaser as the proprietor. She eventually defaulted on the mortgage, and she sought damages from the solicitors, who raised the illegality defence. In allowing the claim and disapplying the defence, Lord Lloyd-Jones for the majority emphasised that the first two parts of the test involve assessing whether allowing the claim would damage the integrity of the legal system, without getting into evaluations of the policies themselves – and that, in some cases, the decision not to allow the claim would be sufficiently clear at this stage that the proportionality aspect would not need to be considered.[[137]](#footnote-138) As we will see below, the Court seemingly emphasised the need for protection of commercial interests.

Overall, the small sample of cases interacting with wider policy considerations belies the depth of meaning involved, especially when we make links with other themes identified in this project. First, the Court draws on policy considerations but prefers to safely base its decisions on settled principle and, when it is available, precedent. Nevertheless, choices between conflicting lines of authority have been resolved by recourse to policy. Secondly, the open-textured illegality test which explicitly *requires* consideration of policy factors is yet to be tested at the highest level in difficult cases involving squatting and homelessness: while *Stoffel* suggests a relatively light-touch approach, the very point of the test is to recognise that each case will be very different, and it is perhaps fair to say that, as we have seen in this and the linked paper, various iterations of the Court have been conflicted about what social policy it ought to pursue around housing and homelessness. Thirdly, the need to boost commerce has been a feature of several of these cases: while we posited at the beginning of this section that public policy can be difficult to define, we suggest that one prong of it is at least the ‘good’ of pursuing wealth through commercial activity. This point is looked at in more depth next.

### The Balance Struck in Cases where One Party was a Bank/Commercial Lender

This theme explores how the Court has confronted the balance to be struck between two parties where one was a bank/commercial lender –specifically, we look at whether the bank was prioritised in these decisions. The trend emerging is that banks were generally though not always prioritised.

An example prioritising banks can be seen in *Scott v Southern Pacific Mortgages Ltd*, where the Court held that the mortgage and the purchase, in a predatory sale and rent-back transaction, were one indivisible transaction, so that occupiers' rights were not proprietary and therefore incapable of being overriding interests at the time the mortgage was granted. Seeing the mortgage and purchase as one indivisible transaction is an important aspect of prioritising the bank's interest, or at least of not diluting the protection and prioritisation of the bank at the expense of the claimant (who was, however, taken advantage of). Nevertheless, there was some reluctance in accepting the result of the decision, especially from Lady Hale, who expressed ‘uneasiness’ about the result. She questions whether, post-*Abbey National v Cann*, the balance always had to be struck to the benefit of the lender:

Should there not come a point when the claims of lenders who have failed to heed the obvious warning signs that would have told them that this borrower was not a good risk are postponed to those of vendors who have been made promises that the borrowers cannot keep? Innocence is a comparative concept. There ought to be some middle way between the “all or nothing” approach of the present law[[138]](#footnote-139)

The interests of the bank were similarly prioritised in *Bank of Cyprus UK Ltd v Menelaou*, discussed in detail above, where the court allowed subrogation, even though, under established principles, subrogation requires money coming from the claimant being used to pay off the creditor directly, which was not found here. This extended the situations in which subrogation is available, and the Court overlooked the strict chronology of a series of transactions in order to allow the bank a proprietary remedy that coalesced with what was promised. A similar prioritisation of the bank's interest can be seen in *Southern Pacific Securities 05-2 Plc v Walker*[[139]](#footnote-140) which concerned the interpretation of ‘credit’ in an agreement. Here the Court refused to accept the mortgagor's contention that the discrepancy in the meaning of ‘credit’ meant the agreement was improperly executed and that, therefore, the Court had discretion not to enforce it. Instead, the Court implied that it would not allow a mortgagor to wage any argument to rid themselves of a mortgage, suggesting that, however the credit was defined in the agreement, the claimants would have made this same claim.

Finally, we can expressly see attention paid to the banks interest in the case of *Stoffel & Co v Grondona*, where the Court recognised that one factor weighing on the decision was the interest of the mortgagee, which *also* needed the registration of those documents.[[140]](#footnote-141) In fact, ‘[as] matters turned out, the failure to register the transfer to the respondent meant that the property was not available to meet any part of the respondent’s liability on the discharge of the mortgage.’[[141]](#footnote-142) The Court went on to say that denying the claim against the solicitors on the basis of illegality at the very least, ‘would not enhance the protection afforded by the law to mortgagees.’[[142]](#footnote-143) This shows once again that the interests of the mortgagee are often at the forefront of the Court's mind.

Banks are, however, not always favoured, and there are decisions where the Court is not generous in their interpretations of rules and legislation. Indeed, it can be critical of the bank's behaviour. One such case is *Royal Bank of Scotland plc v Wilson (Scotland),*[[143]](#footnote-144) This was a Scottish case concerning a lender’s failure to serve a formal requisition under section 5 of the Heritable Securities (Scotland) Act 1894 before attempting to take possession of a family home (which was security for the husband’s business business) on default. In the case, despite the wives being personally liable because of the security, the bank never alerted the wives of the situation nor demanded payment of them before seeking to gain possession. The Court upheld the strict need for a formal requisition, as it would be wrong to water down the precondition imposed by Parliament for using that summary procedure. By this time, it was clear that both parties knew perfectly well what they had been asked to pay, and they had had ample opportunity to either put forward their defence or pay. Nevertheless, this did not matter: a formal requisition was required, a key indication that the bank was not prioritised in the decision.

The last case notwithstanding, there is a clear trend of preference towards protecting and prioritising the interest of banks in the Court’s decisions – a somewhat not-unexpected trend in light of the policy and economic implications of not doing so. This trend, along with others presented earlier, such as the Court not overruling leasehold cases where it could negatively impact settled tenancies, might tell us something about the parties often prioritised by the courts. It is at least a recognition that some *types of parties* need to be respected for transactions and dealings with property to flourish. The Court is mindful of this even while the Court, or some of its members, might be reluctant to take this step and would seek to help the more vulnerable, as in *Scott* above, and as in the cases relating to overruling tenancies – though, at least here, the Court was able to find alternative solutions.

### Modernising the Law

A final theme that emerged under this umbrella grouping was that the Court took opportunities to modernise the law or bring it ‘up to date’ to reflect current thinking. We highlight only a few examples here as illustrations of the Court’s reasoning. Examples include the modernisation of the definition of ‘domestic violence’ in *Yemshaw v London Borough of Hounslow.*[[144]](#footnote-145) This case considered whether a person was homeless (giving the local authority responsibility to rehome her) when she left home with her children due to her husband's verbal abuse and controlling behaviour. One condition for homelessness is that it is not reasonable to continue to occupy current accommodation: under the previous version of section 177(1) Housing Act 1996, one ground for this is that it is ‘probable that [staying in their current occupation] will lead to domestic violence or other violence.’ The local authority had interpreted ‘probable...domestic violence’narrowly as only including physical harm or a threat of it. The Court was critical of this interpretation, highlighting that domestic violence did not just include physical violence, but also verbal abuse and controlling behaviour. As such, the Court found that the wife was homeless, and required support from housing officers. This change ensures the protection of more victims in the future and reflects the recognition that abuse need not only be physical. This change has now been reflected in the legislation with an amendment to section 177(1) in 2021 which replaced the terms ‘domestic violence or other violence’ with ‘violence or domestic abuse’.

In a somewhat similar vein, in *Fearn* the Court modernised the law by allowing privacy to be protected through the tort of private nuisance. The question for the Court was whether visual intrusion or intrusion of privacy caused by visitors peering into their flats and taking videos and photos fell within private nuisance. In contrast to the Court of Appeal, the Supreme Court held unanimously that invasions of privacy could be a nuisance, and by majority (3:2), that in this case it was, in fact, a private nuisance. The implication is that protection from visual intrusion is now an aspect of property rights or ownership that can be protected by the law. This is particularly interesting as, before the decision was handed down, commentators had questioned the Court of Appeal’s conclusion that visual intrusion was not capable of being nuisance, with Emma Lees suggesting that the ‘conclusion that one's ownership rights do not encompass the ability to provide oneself with a safe and private space is problematic.’[[145]](#footnote-146) The Supreme Court’s decision has now made it so that ownership does include this kind of protection, reflecting a developing and, indeed, modern idea of property ownership.

*Jones v Kernott* also reflects a modern outlook on how property should be divided on breakups. There are many other cases which seek to improve the position for those that are cohabiting but choose not to marry, such as *Re an application by Denise Brewster for JR,*[[146]](#footnote-147)and *Re an app by Siobhan McLaughlin for JR*,[[147]](#footnote-148) dealing respectively with the refusal of pension payments to non-married cohabitees in respect of their A1P1 rights, and the entitlement of cohabitees to widowed parents' allowance. In *McLaughlin*, Lady Hale pointed out that the allowance was in place to protect the children in the home, and their situation would be the same whether or not their parents were married, so they ‘should not suffer this disadvantage because their parents chose not to marry.’[[148]](#footnote-149)

All of these decisions are concerned with ensuring that the law surrounding and interacting with property is up to date with the twenty-first century. The Supreme Court, therefore, not only shapes property, but does so in a way that tries to reflect currently-held views of what is important about property.

# CONCLUSION

This paper has explored how the Supreme Court has shaped property through its decisions, in exploring the remaining eight themes which arose from our thematic analysis. The identification of the themes is, in itself, one of the paper’s core contributions. A further key contribution is that, by grouping and theming the decisions in this way, the research has allowed for new reflections on cases to emerge, showing some cases in a new light and allowing for comparisons between cases not previously linked. One example is the willingness of some Justices to adopt an expansive view of what domestic property-related law can protect (through PEA, when looking at the *ZH* dissents and the *McDonald* majority together, and through property torts, when looking at *Fearn*), which in turn seems to obviate the need to develop Convention property-related rights. While this trend across different cases seems to be consistent, we can ask whether it is going in the right direction. Meanwhile, A1P1 and A8 arguments have been more likely to succeed when combined with A14 arguments, with cases that recognised, for instance, equal pension entitlements for unmarried partners. The increasing willingness to offer spouse-*like* protection for such relationships is reflected in *Jones*, where a message was sent to the legislature to do better - effectively to *modernise* the law. Perhaps because of the limits it sees on its role, the Court sometimes innovates through the back door, as we saw in *Austin* and *Berrisford*. These links between human rights, modernisation, and the court’s role suggest that the Supreme Court, within its (self-imposed?) limits, has been allowing itself to pursue a social agenda, even if, as in *Carmichael*, it is not in internal agreement about what that agenda should be.

Our research shows that this *general* reluctance to ‘rock the boat’ and enact excessive change is consistent over the years. One cannot ignore the economic difficulties that have overshadowed these 15 years: the very first line in the Court’s first decided case even refers to ‘victims of the current financial crisis.’[[149]](#footnote-150) Lenders have often been favoured in disputes, to the extent that we highlighted this as a theme in itself. A similar preference exists for landlords, which comes through most strongly in cases where the Court appeared reluctant to overrule previous decisions because of the impact this could have on landlords. This idea is supported even further by the emphasis on decisions aligning with ‘business sense’, which came through across the themes which dealt with the power of the court, public policy and interpretation. The Court has been developing its role (as it perceives it to be) and using its awareness of broader economic and political factors to shape property law. Indeed, we can say that, in shaping property, the Court has ended up shaping its own role.

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2. Hereafter referred to as the Supreme Court or the Court. [↑](#footnote-ref-3)
3. ‘Significance of the Supreme Court’ <https://www.supremecourt.uk/about/significance-to-the-uk.html> accessed 1st July 2024. [↑](#footnote-ref-4)
4. This included those that focused purely (or primarily) on intellectual property rights, criminal law and the Proceeds of Crime legislation, or cases which could be considered part of family law, tax decisions, etc. [↑](#footnote-ref-5)
5. We kept cases related to land law (e.g. proprietary estoppel, leases, covenants, easements, co-ownership etc.), other property law cases (e.g. those relating to chattels, anything relating to the property torts e.g. trespass (to land and goods) and private nuisance), and equity and trusts cases (e.g. those relating to wills, trusts, and insolvency). This is what we consider the ‘core’ of ‘property’. Judgment calls were made in this process. [↑](#footnote-ref-6)
6. Virginia Braun and Victoria Clarke, ‘Using Thematic Analysis in Psychology’ (2006) 3 *Qualitative Research in Psychology* 77, 79. Inspiration of how this can work as a method within property law was gained through consideration of Emily Walsh, ‘Security of Tenure in the Private Rented Sector in England: Balancing the Competing Property Rights of Landlords and Tenants’ in Ben McFarlane and Sinead Agnew (eds) *Modern Studies in Property Law* (Volume 10, Hart 2019). [↑](#footnote-ref-7)
7. ibid 83. [↑](#footnote-ref-8)
8. ibid 79 for the process adopted. This process was used by Walsh (n 5). [↑](#footnote-ref-9)
9. As opposed to using a qualitative data analysis software package (NVivo). [↑](#footnote-ref-10)
10. Braun and Clarke (n 5) 82. [↑](#footnote-ref-11)
11. [2011] UKSC 53. [↑](#footnote-ref-12)
12. [2007] 2 AC 432. [↑](#footnote-ref-13)
13. ibid [69]. [↑](#footnote-ref-14)
14. For instance, see Brian Sloan, ‘Keeping up with the Jones Case: Establishing Constructive Trusts in ‘Sole Legal Owner’ Scenarios’ (2015) 35 Legal Studies 226 on the extent to which Stack influenced those post-*Stack* decisions which involved sole-name cases. [↑](#footnote-ref-15)
15. Law Com No 307, *Cohabitation: The Financial Consequences of Relationship Breakdown* (2007). [↑](#footnote-ref-16)
16. *Jones* (n 10) [35]. [↑](#footnote-ref-17)
17. citation omitted. [↑](#footnote-ref-18)
18. *Jones* (n 10) [36]. [↑](#footnote-ref-19)
19. [2017] UKSC 17. [↑](#footnote-ref-20)
20. Sections 1-3. [↑](#footnote-ref-21)
21. *Ilott* (n 18) [58]. [↑](#footnote-ref-22)
22. ibid. [↑](#footnote-ref-23)
23. [2022] UKSC 27. [↑](#footnote-ref-24)
24. [2015] UKSC 66. [↑](#footnote-ref-25)
25. [2014] UKSC 52. [↑](#footnote-ref-26)
26. [2016] UKSC 47. [↑](#footnote-ref-27)
27. ibid [27]. [↑](#footnote-ref-28)
28. ibid [26], citing Goode, ‘Ownership and Obligation in Commercial Transactions’ (1987) 103 LQR 433, 444. [↑](#footnote-ref-29)
29. See *Re Polly Peck International plc (No 2)* [1998] 3 All ER 812 (CA). See also criticism by Webb, ‘The myth of the remedial constructive trust’ (2016) 69 CLP 353. [↑](#footnote-ref-30)
30. [2014] UKSC 45. [↑](#footnote-ref-31)
31. [2013] EWCA Civ 17 [14] (Lewison LJ). [↑](#footnote-ref-32)
32. [2011] EWCA Civ 347. [↑](#footnote-ref-33)
33. *FHR* (SC) (n 29) [12]. [↑](#footnote-ref-34)
34. See discussion in Webb (n 28) 359. [↑](#footnote-ref-35)
35. [2022] UKSC 27. [↑](#footnote-ref-36)
36. *Jones* (n 10) [51]. [↑](#footnote-ref-37)
37. [2010] UKSC 8. [↑](#footnote-ref-38)
38. [2003] 2 AC 430. [↑](#footnote-ref-39)
39. [2011] UKSC 8. [↑](#footnote-ref-40)
40. [2010] UKSC45. [↑](#footnote-ref-41)
41. [2009] UKSC 11. [↑](#footnote-ref-42)
42. [2004] 1 WLR 1906. [↑](#footnote-ref-43)
43. *Meier* (n 40)[5], [20], [40]. [↑](#footnote-ref-44)
44. ibid [59]. [↑](#footnote-ref-45)
45. [2016] UKSC 47. [↑](#footnote-ref-46)
46. [1983] 2 Lloyd’s Rep 658 (Ch). [↑](#footnote-ref-47)
47. *Story’s Commentaries on Equity Jurisprudence* (2nd edn, 1892) [1255]. [↑](#footnote-ref-48)
48. *Bailey* (n 25) [28]. [↑](#footnote-ref-49)
49. [2010] UKSC 28. [↑](#footnote-ref-50)
50. ibid [28]. [↑](#footnote-ref-51)
51. [2011] UKSC 52. [↑](#footnote-ref-52)
52. [1992] 2 AC 386 (HL). [↑](#footnote-ref-53)
53. *Berrisford* (n 50) [37]. [↑](#footnote-ref-54)
54. [2009] UKSC 2. [↑](#footnote-ref-55)
55. ibid [12], [98]. [↑](#footnote-ref-56)
56. ibid [12]. [↑](#footnote-ref-57)
57. [2010] UKSC 47. [↑](#footnote-ref-58)
58. ibid [16]. [↑](#footnote-ref-59)
59. ibid [23]. [↑](#footnote-ref-60)
60. [2011] UKSC 56. [↑](#footnote-ref-61)
61. ibid [23]. [↑](#footnote-ref-62)
62. [2020] UKSC 18. [↑](#footnote-ref-63)
63. ibid [25]. [↑](#footnote-ref-64)
64. Or, at least, the ‘right to fish’: *R (Mott) v Environmental Agency* [2018] UKSC 10 [17]. [↑](#footnote-ref-65)
65. ECHR jurisprudence separates A1P1 into three ‘rules’: the enunciation of the principle, the rule on deprivation of possessions, and the right of the state to control use of property in accordance with the public interest: *Sporrong and Loennroth v Sweden* (1982) 5 EHRR 35, *Back v Finland* (2004) 40 EHRR 48 (summarised in *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 46 [107]-[108] (Lord Reed)), *Depalle v France* (2010) 54 EHRR 535. [↑](#footnote-ref-66)
66. *Mott* (n 63) [35]: but the distinction is not ‘clear-cut’ [32]. [↑](#footnote-ref-67)
67. As highlighted by Neuberger LJ, as he then was, in *R (Trailer and Marina (Leven) Ltd) v Secretary of State for the Environment, Food and Rural Affairs* [2005] 1 WLR 1267, cited in *Mott* (n 63) at [20]. [↑](#footnote-ref-68)
68. *Mott* (n 63). [↑](#footnote-ref-69)
69. ibid [32]. [↑](#footnote-ref-70)
70. ibid [36]-[37]. [↑](#footnote-ref-71)
71. [2013] UKSC 40. [↑](#footnote-ref-72)
72. ibid [69]. [↑](#footnote-ref-73)
73. [2017] UKSC 52. [↑](#footnote-ref-74)
74. [2013] UKSC 22. [↑](#footnote-ref-75)
75. Ss 72-73 of the Agricultural Holdings (Scotland) Act 2003. [↑](#footnote-ref-76)
76. *Salvesen* (n 73)[42]. [↑](#footnote-ref-77)
77. [2014] UKSC 63. [↑](#footnote-ref-78)
78. [1992] 1 AC 478. [↑](#footnote-ref-79)
79. *Sims* (n 76) [15]. [↑](#footnote-ref-80)
80. Quoted at ibid [15]. [↑](#footnote-ref-81)
81. This reflects how the HRA operates, with greater scrutiny of the actions of the legislature. [↑](#footnote-ref-82)
82. [2014] UKSC 16. [↑](#footnote-ref-83)
83. ibid [66]. [↑](#footnote-ref-84)
84. ibid [76]. [↑](#footnote-ref-85)
85. [2016] UKSC 58. [↑](#footnote-ref-86)
86. ibid [49]. [↑](#footnote-ref-87)
87. ibid [56]. [↑](#footnote-ref-88)
88. In contrast, Lord Toulson viewed the issue as more appropriately dealt with through the discretionary housing payment scheme: ibid [63]. [↑](#footnote-ref-89)
89. ibid [73]. [↑](#footnote-ref-90)
90. [2019] UKSC 52. [↑](#footnote-ref-91)
91. [2017] UKSC 8. [↑](#footnote-ref-92)
92. ibid [41]. [↑](#footnote-ref-93)
93. This can be seen in *Akerman-Livingstone v Aster Communities Ltd* [2015] UKSC 15. [↑](#footnote-ref-94)
94. *Denise Brewster* (n 90)[48]. [↑](#footnote-ref-95)
95. [2003] UKHL 43. [↑](#footnote-ref-96)
96. [2010] UKSC 45. [↑](#footnote-ref-97)
97. *McDonald* (n 72) [34]. [↑](#footnote-ref-98)
98. *Pinnock* (n 95) See [4] and [50], expressly stating that the judgment was not intended to have any bearing where the person seeking an order for possession was a private landlord. [↑](#footnote-ref-99)
99. Having read the statutory provision, section 143D(2) HA 1996, compatibly with A8 under section 3 HRA: see ibid [70] and [79]-[88]. [↑](#footnote-ref-100)
100. ibid [54]. See also *R (ZH and CN) v London Borough of Newham and London Borough of Lewisham*[2014] UKSC 62 [65]. [↑](#footnote-ref-101)
101. *ZH* (n 99). [↑](#footnote-ref-102)
102. ibid [60]. [↑](#footnote-ref-103)
103. ibid [61]. [↑](#footnote-ref-104)
104. ibid [64]. [↑](#footnote-ref-105)
105. ibid [71]. [↑](#footnote-ref-106)
106. *Sims* (n 76)[23]. [↑](#footnote-ref-107)
107. ibid. [↑](#footnote-ref-108)
108. *McDonald* (n 72) [40]. [↑](#footnote-ref-109)
109. ibid. [↑](#footnote-ref-110)
110. ibid [74]. [↑](#footnote-ref-111)
111. *Pinnock* (n 95) [50]. [↑](#footnote-ref-112)
112. As pointed out by Boddy and Graham, ‘FJM v United Kingdom: the taming of article 8?’ [2019] Conv 166, 167, borrowing the applicability/compatibility language from Goymour, ‘Property and Housing’ in Hoffmann (ed), *The Impact of the UK Human Rights Act on Private Law* (CUP 2011) 251. [↑](#footnote-ref-113)
113. ibid. [↑](#footnote-ref-114)
114. (2019) 68 EHRR SE5. [↑](#footnote-ref-115)
115. Boddy and Graham (n 111) 170-171. [↑](#footnote-ref-116)
116. [2023] UKSC 4. [↑](#footnote-ref-117)
117. ibid [113]. [↑](#footnote-ref-118)
118. ibid [112]. [↑](#footnote-ref-119)
119. [1994] 1 AC 324 (PC). [↑](#footnote-ref-120)
120. ibid [330] (Lord Templeman), cited in *FHR* (n 29)[42] (Lord Neuberger). [↑](#footnote-ref-121)
121. *FHR* (n 29)[44]. [↑](#footnote-ref-122)
122. [2011] 3 WLR 1153 (CA). [↑](#footnote-ref-123)
123. [2020] UKSC 45. [↑](#footnote-ref-124)
124. ibid [59]. [↑](#footnote-ref-125)
125. [2020] UKSC 36. [↑](#footnote-ref-126)
126. ibid [44]. [↑](#footnote-ref-127)
127. ibid. [↑](#footnote-ref-128)
128. ibid [46]. [↑](#footnote-ref-129)
129. [2016] UKSC 42. [↑](#footnote-ref-130)
130. [1994] 1 AC 340. [↑](#footnote-ref-131)
131. [2014] UKSC 47. [↑](#footnote-ref-132)
132. [2016] UKSC 42. [↑](#footnote-ref-133)
133. [2016] QB 23. [↑](#footnote-ref-134)
134. [2020] UKSC 42. [↑](#footnote-ref-135)
135. [2016] QB 23 [76]. [↑](#footnote-ref-136)
136. [2020] UKSC 42. [↑](#footnote-ref-137)
137. ibid [26]. [↑](#footnote-ref-138)
138. *Scott* (n 24) [122]. [↑](#footnote-ref-139)
139. [2010] UKSC 32. [↑](#footnote-ref-140)
140. *Stoffel* (n 135) [31]. [↑](#footnote-ref-141)
141. ibid. [↑](#footnote-ref-142)
142. Ibid. [↑](#footnote-ref-143)
143. [2010] UKSC 50. [↑](#footnote-ref-144)
144. [2011] UKSC 3. [↑](#footnote-ref-145)
145. *Fearn* (n 115) 54. [↑](#footnote-ref-146)
146. [2017] UKSC 8. [↑](#footnote-ref-147)
147. [2018] UKSC 48. [↑](#footnote-ref-148)
148. ibid [42]. [↑](#footnote-ref-149)
149. *In Re Sigma Finance Corporation* [2009] UKSC 2 [1]. [↑](#footnote-ref-150)