De Lege Ferenda (2022) Vol V, Issue i, 54–65

The End of the Road? Equitable Easements as Overriding Interests under Schedule 3 Paragraph 2 of the Land Registration Act 2002

FRED HALBHUBER*

ABSTRACT

This past November marked the 10th anniversary of *Chaudhary v Yavuz*, the landmark Court of Appeal decision in which Lloyd LJ declined to hold that the exercise of a purported equitable right of way over a stairway amounted to actual occupation of the land under Schedule 3 Paragraph 2 of the Land Registration Act 2002. *Chaudhary* is often cited in support of the proposition that enjoyment of an easement does not generally amount to actual occupation. However, this conclusion begs two further questions. First, can the enjoyment of an easement ever have the effect of placing the owner of the dominant tenement in actual occupation of the servient tenement? Second, and if so, in what circumstances can the enjoyment of an easement have this effect? This article addresses these two related questions. By considering the reasoning in *Chaudhary* and subsequent case law it will be demonstrated that the exercise of an easement can amount to actual occupation. Pre- and post-LRA 2002 case law will then be used to identify several indicia of actual occupation to assist courts in determining whether the exercise of an easement crosses the threshold from "use" to "occupation" of land. The relevant indicia are: (a) the proportion of the burdened land being used in the enjoyment of the easement; (b) the frequency of use of the land; and (c) the permanence of presence on the land. Finally, the practical implications of this analysis will be explored by applying these indicia to different types of easements. The easements that will be considered are (a) rights of way; (b) rights to use land for recreational purposes; (c) rights to park; and (d) rights of storage. It is hoped that this exercise will assist courts and practitioners applying *Chaudhary*.

* BA in Law (Cantab), JD (Yale) (Candidate). I am grateful to the anonymous reviewers for their comments on earlier drafts. Any errors that remain are my own.

Keywords: easements; *Land Registration Act 2002*; *equitable proprietary interests*; *actual occupation*; *overriding interest*

I. INTRODUCTION

The Land Registration Act 2002 is a powerful weapon in a purchaser's back pocket. Under section 29(1), all pre-existing unregistered interests in land are postponed to an interest acquired by a disponee for valuable consideration unless these are "protected" at the time of registration. The priority of an easement can be protected in three ways. First, a notice may be entered in the register of the servient estate and, if the dominant estate is registered, in the register of the dominant estate.[1] Second, if the easement is legal, its priority may be protected under Schedule 3 Paragraph 3 if it was used in the past year[2] or was known or discoverable upon a reasonable inspection of the land.[3] Finally, the priority of the easement may be protected under Schedule 3 Paragraph 2 if the dominant owner is in actual, discoverable occupation of the transferred land.[4]

This article is concerned with the third of these methods. Unlike Schedule 3 Paragraph 3, Paragraph 2 applies to both legal and equitable easements. In practice, however, the owner of the dominant tenement will only rarely need to raise Paragraph 2 in order to safeguard the priority of an unregistered legal easement. In most cases, Paragraph 3 will provide comprehensive protection. The analysis in this article is therefore primarily directed at equitable easements and related equitable interests that are excluded from the scope of Paragraph 3. An equitable easement may arise upon the express grant of an easement by specifically enforceable contract or deed.[5] If a purchaser acquires the servient tenement for valuable consideration before registration of the easement, the priority of this equitable easement is postponed to the interest of the purchaser. Perhaps more common, however, is the case where a proprietary equity by estoppel[6] arises as a result of a representation made by one party to another. To satisfy this equity, the court may use its "wide judgmental discretion"[7] to require the grant of an easement.[8] In both of these cases, the absence of a legal interest leaves the owner of the equitable easement or equity by estoppel without the protection of Paragraph

1 LRA 2002, Schedule 2 Paragraph 7.
2 LRA 2002, Schedule 3 Paragraph 3(2).
3 LRA 2002, Schedule 3 Paragraph 3(1).
4 LRA 2002, Schedule 3 Paragraph 2.
5 Equity deems to be done what ought to have been done: *Walsh v Lonsdale* (1882) 21 Ch D 9.
6 LRA 2002, section 116(a).
7 *Jennings v Rice* [2002] EWCA Civ 159 [51].
8 See, for example, *Chaudhary v Yavuz* [2011] EWCA Civ 1314 (discussed below) and *Hoyl Group Ltd v Cromer Town Council* [2015] EWCA Civ 782.

3.[9] To safeguard their equitable interest against postponement, the interest-holder must therefore rely on the protection by actual occupation under Paragraph 2.

This article will first discuss the orthodox position that exercising an easement does not amount to actual occupation and evaluate the reasoning underpinning this position. It will be demonstrated that this orthodox position is not the "end of the road": judicial reasoning does not preclude the possibility that the enjoyment of an easement might constitute actual occupation. Next, this article will consider the limits of the orthodox position by drawing from case law analysing actual occupation under the LRA 2002 and the LRA 1925. A number of factors will be gleaned from these authorities to help delimit the orthodox position going forward. Finally, these factors will be applied to four common and contentious easements in order to assess whether the exercise of these easements might amount to actual occupation.

II. The Orthodox Position And Its Justifications

Chaudhary v Yavuz stands for the orthodox proposition that the mere exercise of an easement does not amount to actual occupation.[10] Yavuz's predecessor in title had promised Chaudhary, the owner of a neighbouring property, that Chaudhary could replace an external stairway and use it to access the upper floors of Chaudhary's property. Chaudhary claimed that this promise gave rise to a proprietary equity by estoppel under section 116(a) LRA 2002. However, no notice of this promise was placed on the register. When Yavuz purchased the property, he sought to sever the connection between the staircase and his property. The question for the court was therefore whether Yavuz was bound by Chaudhary's pre-existing equitable interest (and therefore precluded from severing the connection).[11] Since Yavuz was a disponee acquiring for valuable consideration, his registration as freehold proprietor of the neighbouring property triggered the postponement rule in section 29. Chaudhary would therefore only be able to exercise his right if it had been protected against postponement. Since Chaudhary's interest was merely equitable, Chaudhary relied on Schedule 3 Paragraph 2 to argue that his equity by estoppel was protected by actual occupation. Departing from the first instance decision of Judge Cowell, Lloyd LJ held that the "correct view" was that Chaudhary's interest

---

9 Even if the equity by estoppel would subsequently be satisfied through the grant of an easement by deed which may be registered so as to become legal, Schedule 3 Paragraph 3 refers to a legal easement which has certain characteristics "at the time of the disposition"; a potential future legal easement is therefore not covered.

10 *Chaudhary* (n 8).

11 Since the court found that the equity by estoppel may have arisen in Chaudhary's favour based on his discussions with Yavuz's predecessor in title: *Chaudhary* (n 8) [26].

had not been so protected: "the enjoyment of a right such [as] an easement over burdened land does not amount to actual occupation of the land for this purpose".[12]

In support of this conclusion, Lloyd LJ drew a distinction between "use" and "occupation"—adopting the position taken by Ruoff & Roper on Registered Conveyancing.[13] In other words, while the owner of the dominant tenement will invariably "use" the servient tenement when exercising the easement, this use does not necessarily establish "occupation" of the servient tenement. Lloyd LJ also made the important observation that, since "not every piece of land is occupied by someone", Chaudhary was not in occupation merely because no one else had any better claim to occupation.[14]

The distinction between "use" and "occupation" offers a logically sound justification for the general approach taken in *Chaudhary*. As Lord Oliver observed in *Abbey National Building Society v Cann*,[15] occupation "involve[s] some degree of permanence and continuity".[16] The "mere fleeting presence" of a dominant tenement owner on the servient land will generally not suffice to establish actual occupation.[17] It is important to appreciate, however, that this reasoning does not necessitate the conclusion that the enjoyment of an easement is incapable of amounting to actual occupation under Paragraph 2. Rather, Lloyd LJ merely recognised that, owing to the nature of easements as limited property rights, exercising an easement will *typically* fail to cross the threshold from "use" to "occupation". On the facts of *Chaudhary*, this general approach was surely applicable. The stairway was used for little more than "to get to and from [the] flats on the upper floors"[18]—hardly use which points towards "permanence and continuity of presence".[19] However, a departure from the general position may be justified where the specific facts demand it. Indeed, Lloyd LJ implicitly acknowledged that his reasoning may not apply in all cases by reserving opinion as to whether "the use of the servient land in the case of an easement such as a right to park, where the dominant owner may place a large object on the relevant land" might be treated differently.[20]

---

12 ibid [27].

13 *Chaudhary* (n 8) [28]. See T.B.F. Ruoff and R.B. Roper, The Law and Practice of Registered Conveyancing (Sweet & Maxwell, 2021) [36.005].

14 ibid [31].

15 *Abbey National Building Society v Cann* [1991] 1 AC 56.

16 ibid 93.

17 ibid.

18 ibid [31].

19 *Link Lending Ltd v Bustard* [2010] EWCA Civ 424, [27] (Mummery LJ).

20 Lloyd LJ sought to support his view as a matter of precedent by distinguishing some pre-LRA 2002 authorities and citing another in support of his view. A more detailed analysis of the relevant pre-LRA 2002 authorities is carried out below.

Approval of Lloyd LJ's reasoning in *Chaudhary* can be found in the academic literature[21] as well as in subsequent case law. In *Cornerstone Telecommunications Infrastructure Limited v Compton Beauchamp Estates Limited*[22] Lewison LJ identified the reasoning at the core of *Chaudhary* when he noted that in certain contexts, including the exercise of an easement, the "cases draw a distinction between occupation of land and use of land".[23] *Chaudhary* was also explicitly referenced in *Pezaro v Bourne*.[24] Here the facts of *Chaudhary* were reversed: the servient owners were asserting occupation of the right of way. Important for present purposes is that the court again applied Lloyd LJ's reasoning that exercising the easement "did not amount to actual occupation of the land for that purpose as opposed to actual use".[25] The orthodox position articulated in *Chaudhary* therefore continues to accurately reflect the law ten years on.

However, since the reasoning underpinning Lloyd LJ's judgement is not inherently tied to easements, the decision in *Chaudhary* does not preclude the possibility that exceptions might develop to this general rule. This article now considers what factors may drive the court to depart from the position in *Chaudhary*.

III. Indicia of Actual Occupation

Three factors can be gleaned from pre- and post-LRA 2002 case law to assist courts in applying Schedule 3 Paragraph 2 to the exercise of an easement. This article does not suggest that these are the only potentially relevant factors. In fact, these factors certainly do not constitute an exhaustive list. Nor does this article suggest that the factors identified herein are always free-standing and mutually independent. Instead, these factors act as a useful starting point when considering actual occupation of the servient tenement through the exercise of an easement.

A. Proportion of the Burdened Land Used

It is not a requirement of actual occupation that there remains no reasonable use for the land. Indeed, it may well be that two or more people are in actual occupation of the same plot of land at the same time. Nevertheless, the greater the share of the burdened land that is "used" by the exercise of the easement, the more the easement's enjoyment resembles the "physical

---

21 Megarry & Wade: The Law of Real Property (9th Ed) [6–096]; Ruoff and Roper (n 12) [17.027]; Gale on the Law of Easements (21st Ed) [5–21].

22 *Cornerstone Telecommunications Infrastructure Limited v Compton Beauchamp Estates Limited* [2019] EWCA Civ 1755.

23 ibid [47].

24 *Pezaro v Bourne* [2019] EWHC 1964 (Ch).

25 ibid [53] (Master Teverson).

presence" required for actual occupation.[26] As a result, the issue whether the enjoyment of an easement amounts to actual occupation is closely connected to the size of the land purportedly occupied. For example, parking one car in a ten-car garage is much further removed from actual occupation of the garage than is parking the same car in a single-car garage. Importantly, the size of the plot of land should have no impact on whether the spot in which the car is parked is under actual occupation within the meaning of Schedule 3 Paragraph 2. Since occupation of part no longer amounts to occupation of the whole,[27] it may well be that long-term, consistent parking on the same part of the land will protect the right to park on that one part but not the right to park on the land as a whole.[28]

B. Frequency of use

The frequency with which an easement is exercised also contributes to the success of an actual occupation argument by increasing the "degree of permanence" required for occupation.[29] Although "[r]egular and repeated absence" can be consistent with "actual occupation",[30] prolonged absence may suggest that the requisite "permeance and continuity" of presence is not satisfied. The relevance of frequency of use is demonstrated by the Schedule 3 Paragraph 2 dispute in *Thomas v Clydesdale Bank*.[31] Although the relevant property was not being used as a permanent residence, Ramsey J held that the fact that "Ms Thomas was present at the property on a regular, almost daily basis" demonstrated that she was in actual occupation.[32]

C. Permanence of presence

Ramsey J in *Thomas* also attached importance to the "permanence and continuity of the presence of the person concerned".[33] As a consequence, physical structures on the land which can establish a continuous or permanent presence on the land are powerful evidence of actual

---

26 *Williams & Glyn's Bank Ltd v Boland* 1981 AC 487, 505 (Lord Wilberforce); see also, Law Com No 271 para 8.22: "A person is only to be regarded as being in actual occupation of land if he or she, or his or her agent or employee, is physically present there".

27 As it did under section 70(1)(g) of the LRA 1925: *Wallcite Ltd v Ferrishurst Ltd* [1999] Ch 355.

28 Under Schedule 3 Paragraph 2(1), an interest is overriding so far as it "relat[es] to land … in actual occupation". For a discussion of the meaning of "relating to" in this context, see Fred Halbhuber, 'The Forgotten Question: Clarifying the Extent of the Protection Afforded by Actual Occupation under the Land Registration Act 2002', The Cambridge Journal of Law, Politics, and Art, Issue 2, Summer 2022 (forthcoming).

29 *Abbey National* (n 15) 93.

30 *Kingsnorth Finance v Tizard* [1986] 1 WLR 783, 788.

31 *Bernice Thomas v Clydesdale Bank Plc* [2010] EWHC 2755 (QB).

32 ibid [32].

33 *Thomas* (n 31) [38].

occupation. It is well-established in the case law that the presence of belongings on a plot of land might evidence actual occupation. In the context of section 1 of the Matrimonial Homes Act 1967, Sir David Cairns in *Hoggett v Hoggett*[34] found that "the presence of … furniture provides the 'corpus' of occupation",[35] something which has been echoed in subsequent judicial interpretation of "actual occupation" in section 70(1)(g) of the LRA 1925.[36]

Therefore, where the enjoyment of an easement requires some form of physical presence on the land that persists even while the dominant owner is not personally on the land (such as the parking of a car in a garage) the claimant will have a far easier time establishing actual occupation. This is well illustrated by the pre-LRA 2002 case of *Kling v Keston Properties*,[37] where Vinelott J accepted that parking a car in the garage amounted to actual occupation of the garage so as to protect the claimant's right of pre-emption under section 70(1)(g) of the LRA 1925.[38]

The importance of a permanent presence was also raised in *Chaudhary* itself. Here, counsel for Chaudhary argued that since the presence of chattel can contribute to actual occupation, Chaudhary's erection of a more invasive structure must do the same. This was rightly rejected by Lloyd LJ. Under ordinary property law principles, the structure in *Chaudhary* ceded to the land and "thus became part of what could be used or occupied" rather than the thing "doing the occupying".[39] There existed no point in time where the structure on the servient tenement could be said to evidence occupation on Chaudhary's behalf as his property. The extent to which the structure would have evidenced actual occupation if it had not ceded to the land is likewise immaterial. Importantly, however, Lloyd LJ did not doubt the suggestion that, had the structure not acceded to the land, it would have assisted in establishing actual occupation.

---

34 *Hoggett* (1979) 39 P & CR 121.

35 ibid 128.

36 See, for example, *Chhokar v Chhokar* [1984] FLR 313.

37 *Kling v Keston Properties Ltd* (1985) 49 P & CR 212.

38 ibid 219. Lloyd LJ distinguished *Kling* in *Chaudhary* on the basis that the use of the garage in *Kling* was founded on a right under licence rather than an easement. However, as has been argued elsewhere (see Ben McFarlane, 'Eastenders, Neighbours and Upstairs Downstairs: Chaudhary v Yavuz', Conv. 2013, 1, 74–82), this point of distinction is unconvincing. As will be recalled, Lloyd LJ's central argument against recognising the exercise of purported right in *Chaudhary* as overriding—the distinction between use and occupation—is not inherently connected to the status of the purported right as an easement. Therefore, the fact that the claimant in *Kling* was occupying under a license rather than an easement is immaterial. The relevant question—whether the exercise of the right amounts to occupation—is one of fact and is unaffected by any legal entitlement. Indeed, this is made explicitly clear by the inclusion of the word "actual" to modify "occupation" in Schedule 3 Paragraph 2 of the LRA 2002. As Lord Wilberforce noted when interpreting the identical wording in section 70(1)(g) LRA 1925, "what is required is *physical presence*, not some entitlement at law": *Boland* (n 26) 505. Therefore, the analysis should be the same regardless of the right under which the claimant permitted to park in the garage.

39 *Chaudhary* (n 8) [32].

The relevance of establishing a permanent presence was specifically approved in *Cornerstone Telecommunications Infrastructure v Compton Beauchamp Estates*.[40] Here, Lewison LJ held that, in the context of the exercise of an easement, "the mere presence of physical structures on land will not amount to occupation, especially where those structures have become part of the land".[41] The first part of this comment—that the presence of physical structures belonging to the dominant owner on the servient land will not of itself suffice for actual occupation—is surely correct in the vast majority of cases.[42] It may be going too far to say that the presence of physical structures "will not" ever suffice in and of itself to constitute actual occupation; although *Chaudhary* is cited in support of this statement, Lloyd LJ made no such sweeping statement in his judgement. More importantly, Lewison LJ's statement does not doubt the utility of such physical structures as further evidence of actual occupation in addition to the claimant's own personal (even if more sporadic) presence on the land. Therefore, the enjoyment of an easement which necessitates the frequent placing or keeping of chattel on the servient land is, all else equal, more likely amount to actual occupation under Schedule 3 Paragraph 2 than an easement which does not.

IV. The Indicia in Practice

Having identified three indicia to guide the application of Schedule 3 Paragraph 2, this section now considers how these indicia might be applied in practice. This piece confines itself to four common and controversial easements: rights of way, rights of recreation, rights to park and rights to storage. It is also important to note at the outset that the application of Schedule 3 Paragraph 2 always requires a case-specific analysis. The analysis below will therefore only discuss general characteristics of these easements without suggesting that the same conclusion will be reached in every case.

A. Right of way

A claimant asserting the overriding status of a right of way faces an uphill battle. The stretch of land over which a right of way is typically exercised is rarely a small *locus in quo* and, although a right of way might be frequently used, enjoyment rarely involves using more than a small fraction of the relevant land. Moreover, exercising a right of way does not

---

40 *Cornerstone Telecommunications* (n 22).

41 ibid [47].

42 For example, in *Strand Securities v Caswell* [1965] Ch 958, the Court of Appeal held that the presence of the defendant's belongings was not sufficient to render the defendant in actual occupation of the property: 983.

generally result in any permanent presence on the land. Therefore, even if the owner of Plot A enjoys his right to walk over a path on Plot B every day, the owner of Plot A only exercises any factual control over the land for a very short period of time each day. The decision in *Chaudhary* is therefore entirely defensible in light of the indicia identified in this piece.

This is further evidenced by judicial hesitance—beyond the decision in *Chaudhary*—to recognise the use of a right of way as amounting to actual occupation. In the landmark *Re Ellenborough Park*[43] decision, Sir Raymond Evershed MR was tasked with deciding whether a right to "the full enjoyment at all times hereafter in common pleasure" of a communal garden adjoining a number of properties could take effect as an easement. In concluding that the right did not raise any issues under the ouster principle, Sir Raymond Evershed MR noted that

> the right conferred no more amounts to a *joint occupation* of the park with its owners, no more excludes the proprietorship or possession of the latter, *than a right of way granted through a passage*.[44]

Sir Raymond Evershed MR therefore rejected the idea that the exercise of a "right of way…through a passage" would amount to "occupation" of the passage. This comment aligns with the indicia considered above and suggests that the exercise of a right of way will only rarely, if ever, fall within Schedule 3 Paragraph 2.

B. RIGHT TO USE LAND FOR RECREATIONAL PURPOSES

The question whether English law recognises a right to use land for recreational purposes (*jus spatiandi*) as an easement has long been disputed, with the key questions being whether recreational rights accommodate the dominant tenement and whether they are sufficiently definite. However, in the recent *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd*[45] decision, the Supreme Court accepted that the right to use purely recreational facilities at the Broome Park estate and surrounding lands was capable of constituting an easement.[46]

---

43 *Re Ellenborough Park* [1956] Ch 131.

44 ibid 176 (emphasis added).

45 *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2018] UKSC 57.

46 For a more detailed analysis of the impact of the *Regency Villas* (n 45) decision, see Chris Bevan, 'Opening Pandora's box? Recreation pure and simple: easements in the Supreme Court Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd [2018] UKSC 57; [2018] 3 W.L.R. 1603', Conv. 2019, 1, 55–70.

Owing to the broad nature of this category of easements,[47] it is difficult to generalise as to whether the exercise of a right to recreational purposes will constitute actual occupation. However, it seems that much of the same reasoning applied to easements conferring a right of way would also be relevant to easements conferring a right to use a particular recreational facility.[48] The *locus in quo* is typically quite large, only a small share of the land is used at any particular time, and, even if the land is used frequently, typically no permanent or continuous presence is established on the land. Exercising a right to use land for recreational purposes is therefore highly unlikely to amount to actual occupation of the land.

C. RIGHT TO PARK

As with rights of recreation, whether a right to park is capable of constituting an easement has long been debated. Although the right has historically raised significant concerns under the ouster principle,[49] recent authorities have been more willing to accept that a right to park amounts to an easement.[50]

The extent to which a right to park aligns with the indicia identified will vary significantly from case to case. Where the easement is granted over a designated parking spot, such as a garage[51] or other designated parking space, the *locus in quo* will be quite small and clearly defined. Exercising the easement by parking a vehicle in the spot would use the vast majority of the relevant servient land and therefore weigh in favour of actual occupation. The same would not be true of an easement granting a right to park on a large plot of land without any designated parking spot. The exercise of a right to park which is connected to a home[52] or a place or work, and is therefore frequently used, is also more likely to give rise to actual occupation. This is further strengthened where a car does not leave the servient tenement for an extended period of time, as in the pre-LRA 2002 *Kling* decision. When explaining his conclusion that Kling was in actual occupation of the garage, Vinelott J discussed at length the fact that there was "a considerable period" during which a car was "confined in the garage because the garage door was blocked."[53] Although Vinelott J notes that the same result would

---

47 The rights in Broome Park alone included, among others, rights to use the swimming pools, golf courses, TV room, billiards, saunas.

48 See, for example, the quote of Sir Raymond Evershed MR above that the right to full enjoyment "no more amount[ed] to a joint occupation" than a right of way: *Re Ellenborough Park* (n 44) 176.

49 See, for example, *Moncrieff v Jamieson* [2007] UKHL 42.

50 See, for example, *Virdi v Chana* [2008] EWHC 2901 (Ch) and *Kettel v Bloomfold Ltd* [2012] EWHC 1422 (Ch).

51 Such as the licence in *Kling* (n 37).

52 As in the pre-LRA 2002 authority of *Saeed v Plustrade Ltd* [2001] EWCA Civ 2011.

53 *Kling* (n 37) 219.

probably have been reached even if the car had not been trapped, the fact that the car physically could not have left (and was therefore continuously present in the garage) certainly strengthened Vinelott J's decision on the facts.[54]

Therefore, while the exercise of a right of way and right of recreation is unlikely in practice ever cross to the threshold from use to occupation, it seems that the exercise of a right to park has that potential. While clearly not every (or even most) parking rights will be protected under Schedule 3 Paragraph 2, those cases where the right to park is granted over a single parking spot and where the car is parked for extended periods of time are most likely to constitute actual occupation.

D. RIGHT OF STORAGE

Many parallels can be drawn between an easement conferring a right of storage and an easement conferring a right to park.[55] The *locus in quo* over which the easement is exercised is typically quite small, exercise of the easement often requires much of the relevant land to be used and this use is typically frequent if not continuous by virtue of the storage of items on the land.

Some judicial support for the proposition that exercise of a right of storage might amount to actual occupation can also be found in the pre-LRA 2002 case of *Malory Enterprises v Cheshire Homes*.[56] Although the suggestion in *Malory* that only equitable, not legal, title passes when a disposition is forged has been held *per incuriam*,[57] the Court of Appeal's decision with respect to actual occupation under section 70(1)(g) LRA 1925 has not been questioned. Important for present purposes is that Arden LJ, in concluding that Malory Enterprises was in actual occupation, held that "using the land for storage" was a relevant factor pointing towards actual occupation.[58] Therefore, although the specific facts of each case will ultimately be

---

54 ibid. At 219, Vinelott J comments more generally that "the plaintiff should be treated as being in continuous occupation of the garage while he was using it in the ordinary course for the purpose for which the licence was granted, that is, for garaging a car as and when it was convenient for him to do so". Importantly, however, this is not an affirmation that using a right as intended necessarily suffices for actual occupation. Such a rule would be significantly overinclusive and finds no support in the case law. Instead, this statement reaffirms the relevance of the parked car to establishing actual occupation, since it is only when "garaging a car" that the plaintiff could be "treated as being in continuous occupation".

55 Indeed, parking has been described as "a form of storage": *Wilcox v Richardson* (1997) 8 BPR 15, 491 (Handley JA).

56 *Malory Enterprises Ltd v Cheshire Homes (UK) Ltd* [2002] EWCA Civ 151.

57 *Swift 1st Ltd v Chief Land Registrar* [2015] EWCA Civ 330.

58 *Malory* (n 56) [82]. It was also relevant that the land included "derelict buildings" which did not allow for other forms of occupation and the land was fenced and locked.

determinative, both principle and precedent suggest that the exercise of a right to storage may—much like the exercise of a right to park—situationally amount to actual occupation of the land.

V. Conclusion

This article has considered the question whether—and, if so, when—the owner of an unregistered equitable easement may rely on Schedule 3 Paragraph 2 of the LRA 2002 to safeguard her interest against postponement. The orthodox position advanced in *Chaudhary*—that the dominant owner is not in actual occupation of the servient tenement merely by exercising an easement—remains authoritative in the majority of cases. However, Lloyd LJ's core distinction between "actual use" and "actual occupation" merely reflects the fact that exercising an easement does not typically exhibit characteristics which the courts have found to be determinative of actual occupation. Exceptional cases may arise where the dominant owner's enjoyment of his easement does cross the threshold from use to occupation. This article identified three guiding factors which, although certainly not conclusive, may help courts and practitioners to identify these exceptional cases. The relevant indicia are: (i) the proportion of the land used, (ii) the frequency of the use, and (iii) the permanence of the presence on the land. To illustrate the utility of these indicia, this article has considered their application to four different types of easements. The exercise of rights of way and rights of recreation are, in practice, unlikely ever to amount to actual occupation of the servient estate. By contrast, exercising a right to park and a right to storage may situationally constitute actual occupation of the land.