



The King's Student Law Review

Title: Property Law: The Unsung Hero of North Sea Oil and Gas

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Source: *The King's Student Law Review*, Vol. 5, No. 2 (Winter 2014), pp. 52-66

Published by: [King's College London](#) on behalf of [The King's Student Law Review](#)

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PROPERTY LAW: THE UNSUNG HERO OF NORTH SEA OIL AND GAS

*Demetris Hadjiosif and Constantinos Yiallourides**

The present paper examines the key property law-related issues pertaining to the development of subsea mineral resources on the United Kingdom Continental Shelf: from their initial 'capture' (acquisition of ownership) to their transportation to downstream facilities via onshore pipelines. Additionally, the authors discuss the future property law implications of carbon storage in depleted oil reservoirs, with a particular focus on the potential effects of the recent Carbon Capture and Storage (CCS) leases. The paper concludes that the practical property law implications of the development of offshore carbon storage could be detrimental to the government and ultimately the taxpayer; thus, more consideration should be afforded to it during the planning stage of projects and policy decision-making.

INTRODUCTION

The energy industry is a multidisciplinary industry; drawing together knowledge from a variety of fields such as physics, chemistry, engineering, geology, economics and law to facilitate the exploitation of hydrocarbons. However, unlike other industries in the UK, the initial drive for the establishment of the industry came from the private sector. Standards and rules were gradually developed by the industry rather than established by the state under a legal framework. As demonstrated in the early days of the industry, this approach was flawed¹ and because of it, several issues arose as the result of friction between the legal regulatory regime of hydrocarbon activities and general principles of property law.

The reality is that discussions within and around the Oil and Gas (O&G) industry are focused primarily on the technical/scientific aspect of things. To an extent it is expected that geology and engineering will be at the centre of an extractive industry, but, even where the law is contemplated, the discussion focuses on a number of other legal areas such as environmental law, delict (tort) law, employment law, competition law, contract and commercial law; not so much around the law of property. It follows that it is no surprise that an industry

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¹ Consider the lack of a sufficient Health and Safety regime which was highlighted by the high number of incidents during the early days of the industry and peaked with the Piper Alpha disaster. A different example is found in early licenses. They were granted for extended periods without relinquishment provisions leading to acreage being licensed but not developed and ultimately the establishment of the fallow blocks initiative.

that has science at its core, and largely developed its own standards and rules in its early days would in part overlook the relevance of property law.

Unfairly, property law is not given the recognition and consideration that it deserves. As Professor Roderick Paisley puts it, '*the potential effect of the rules of land law is far reaching and cannot be ignored*'.² It is this area of law that makes it feasible for the O&G companies to extract and acquire ownership of hydrocarbons at the first instance and subsequently facilitate hydrocarbon transportation from upstream to downstream operations. This article will explore and highlight the importance of Scots property law in the effective operation of the O&G industry. To begin with, the authors will review the sovereign right held by the state under International Law. Subsequently, a discussion of the UK licensing regime from a property law perspective, including the acquisition of the ownership of hydrocarbons by O&G companies via the doctrine of capture (*occupatio*), will follow. Moreover, the authors will analyse the predicaments arising out of the operation of encroachment law and the law of fixtures (*accessio*) with respect to the transportation of hydrocarbons. Finally, the "solution" utilised to resolve these issues by the current legal regime in Scotland³, namely the servitude⁴ of pipelines, will be explained and critically analysed. The authors close the article with a few thoughts on the future implications of property law on the UK Continental Shelf (UKCS); specifically we consider the effect, from a property law perspective, of the new Carbon Capture and Storage (CCS) leases.

1. OWNERSHIP

A. Sovereign Rights - A far Cry from Ownership

The sovereign rights of all nations over their oil and gas resources are recognised in international law. An example is found in the United Nations General Assembly Resolutions 1803 and 3281⁵, which stipulate as to 'the inalienable right of all states freely to dispose of their natural wealth and resources in accordance with their national interests'. Most importantly, they refer to every state's right to 'exercise full permanent sovereignty, including possession use and disposal, over its wealth, natural resources and economic activity'.⁶ Moreover, both at an international treaty level⁷ and in European legislation⁸, the

² Roderick Paisley, 'Aspects of Land Law Relative to the Transportation of Oil and Gas in Scotland' in Gordon, Paterson and Usenmez (eds), *Oil and Gas Law: Current Practice and Emerging Trends* (2nd Edn, Dundee University Press, 2011) para 17.32.

³ As much as for the sake of space as for the Scots Law's particular advantages for oil and gas lawyers, the analysis of the relevant issues will be confined to the Scots property law, from the land law perspective. While by no means perfect, Scots law (as a mixed jurisdiction) has a lot to offer to lawyers from other jurisdictions wishing to develop their land law rules to facilitate the use of pipelines for the oil industry.

⁴ Servitudes are known as easements under English law.

⁵ UNGA Res 1803 (1962) 1194th Plenary Meeting; UNGA Res 3281(1974) 29th Session, <http://www.un.org/en/ga/> [accessed 07 March 2014].

⁶ *Ibid.*

⁷ Article 18 of the Energy Charter Treaty (signed: 17 December 1994) OJL 380/24.

states' "sovereignty and sovereign right over [their] hydrocarbon resources" is protected.

Hence, regardless of the regulatory vehicle⁹ a state may utilise to develop its indigenous offshore hydrocarbon resources, one thing is certain: the underlying ownership in, or more accurately the exclusive right over, such valuable natural resources is reserved in the state's favour. The very history of the law of the sea reveals that just as the discovery of natural resources and minerals lying beneath the ocean seabed 'in quantities beyond anyone's imagination'¹⁰ was made (due to the radical developments in marine technology after the conclusion of the second world war)¹¹, the first assertions of control and jurisdiction over such resources started to occur. The first and most famous amongst these claims was made by the US President Harry S. Truman in September 1945 when declaring that:

*The United States regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control.*¹²

The 'Truman Proclamation' not only triggered a series of unilateral governmental declarations¹³ claiming coastal sovereignty and/or resource jurisdiction over large maritime areas but also led to the emergence, and codification some 13 years later, of a new 'resource-focused' legal concept; that of the continental shelf.

It was not long before the major economic incentive of offshore non-living natural resources, given the scarcity of land-based natural resources, led to a flurry of offshore activity and created the need for a set of uniform conventional rules to govern the use of the oceans and the seas for commercial purposes.¹⁴ Indeed, within a period of less than twenty five years, following the 1945 Truman Proclamation, two very important multilateral international conventions

⁸ Directive 94/22/EC (30 May 1994) on the conditions for granting and using authorizations for the prospection, exploration and production of hydrocarbons [Hydrocarbon Directive] 1994 *Official Journal L* 164.

⁹ There are mainly three choices for state regulation being exclusive licenses, production sharing contracts or risk service contracts.

¹⁰ R.P. Anand, *Origin and Development of the Law of the Sea* (Martinus Nijhoff Publishers 1983) 161-163.

¹¹ *Ibid.*

¹² Presidential Proclamation No.2667 concerning the 'Policy of the United States with respect to the Natural Resources of the Subsoil and Seabed of the Continental Shelf High Seas' 28 Sept. 1945 [hereafter, Truman Proclamation], cited in A.L. Hollick, 'US Oceans Policy: The Truman Proclamation' (1996) 17 *VJIL*.

¹³ Such as *inter alia* Mexico (1945), Argentina (1946), Panama (1946), Nicaragua and Chile (1947), Costa Rica (1948), El Salvador (1950), Honduras (1951); see: D.J. Attard, *The Exclusive Economic Zone in International Law* (Clarendon Press 1987) 3-6.

¹⁴ D. Johnston, *Theory and History of Ocean Boundary-Making* (QUP 1988) 40-46.

were adopted, the 1958 Convention on the Continental Shelf¹⁵ and the 1982 Convention on the Law of the Sea¹⁶.

Article 2 (1) of the 1958 Convention provided that '[t]he coastal state exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources'.¹⁷ In addition, those sovereign rights were 'exclusive' in the sense that no one would be entitled to undertake exploration or production activities into a state's continental shelf, without the express consent of the coastal state.¹⁸ However, the establishment of exclusive sovereign rights over the continental shelf areas was not without its limitations. Besides the fact that such sovereign rights could only be exercised for the purpose of exploring and exploiting the seabed of the continental shelf, they were also accompanied by various obligations such as the obligation to remove entirely unused offshore installations¹⁹ as well as not to impede the laying or maintenance of submarine cables or pipelines on the continental shelf (by other states)²⁰. As Professor Hammerson observes, these obligations are stringent restrictions "which would not be acceptable to states who believed that they had existing sovereignty over a particular area, rather than being newly created sovereign rights granted by international law".²¹

It follows that any assertion of absolute ownership by states over continental shelf areas would be at the very least an exaggeration. Indeed, whereas ownership grants the beholder the unequivocal right to use, fruits and abuse of the property in question, in the case of the continental shelf, states are only allowed limited use, for the exploration and exploitation of natural resources. The fact that states are not allowed unlimited freedom, or considerable freedom coupled with certain limitations imposed for the public good (i.e. onshore ownership of land gives one essentially unlimited *usufruct* despite certain limitations such as the maximum height of any erected building), makes it clear that the sovereign right bestowed under the United Nations Convention on the Law of the Sea (UNCLOS) is in fact a right pertaining to the natural resources *in situ* and not an absolute right of ownership. This position is reinforced by the fact that the full array of legislation enacted by states only extends to the border of territorial waters. Only certain aspects of the law, such as immigration and taxation *inter alia*, are applicable beyond the limit of the territorial sea. This distinction clearly highlights that the continental shelf does not enjoy the same status as the territorial sea, which is considered as part of the state, subject to the

¹⁵ Convention on the Continental Shelf (done at Geneva on April 29, 1958) UNTS, Vol. 499 (entered into force on June 10 1964)

¹⁶ United Nations Convention on the Law of the Sea (concluded at Montego Bay on December 10, 1982), 1833 UNTS 3, 21 IML 1261 (entered into force on November 16, 1994) - hereafter referred to as UNCLOS III.

¹⁷ With the term "natural resources" being determined as "mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species"; see: Art. 2 (4) of the 1958 Convention.

¹⁸ Article 2 (2) of the 1958 Convention.

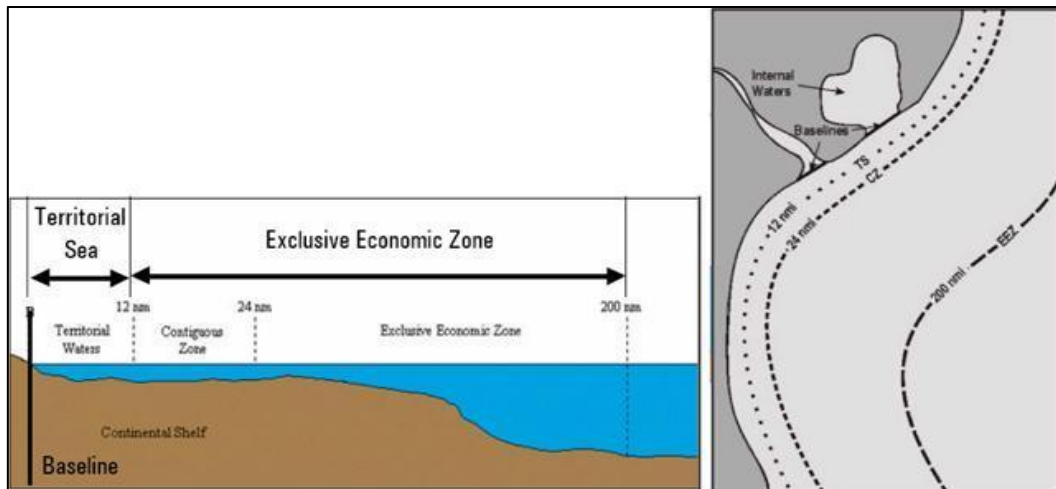
¹⁹ Article 5 (5) of the 1958 Convention.

²⁰ Article 4 of the 1958 Convention.

²¹ Hammerson (n35) 42.

full force and jurisdiction of the legal system, and under the absolute sovereignty of the state.

The 1982 Convention, which replaced²² the 1958 Continental Shelf Convention retained most of the latter's provisions concerning the continental shelf. Indeed, article 77 of UNCLOS reads identical to article 2 of the 1958 Convention. Although the stringent obligation to remove entirely unused offshore installations was replaced by more elastic terms stating that '[installations] *shall be removed to ensure safety of navigation, taking into account any generally accepted international standards*'²³, the concept of 'sovereign rights' limited to exploration and exploitation of natural resources remained untouched. A comparison between the provisions of UNCLOS in regards to the continental shelf with the corresponding ones regarding the territorial sea is perhaps the most obvious indicator of the difference between the full sovereignty a coastal state enjoys with respect to its territorial sea as opposed to the 'limited' sovereign rights it may exercise with respect to its continental shelf. For example, in contrast to article 77, article 2 of UNCLOS III - concerning the legal status of the territorial sea - refers explicitly to '*sovereignty over the territorial sea areas*' without imposing any specific limitations or qualifications with respect to the purpose of such sovereignty (e.g. 'for exploring and exploiting its natural resources') or further restrictions, such as the obligation to remove all abandoned installations and not impeding the laying of pipelines.²⁴



Source: LINZ, *Maritime Boundary Definitions*,
<http://www.linz.govt.nz/hydro/nautical-info/maritime-boundaries/definitions>
 [accessed 7 March 2014]

Taking the aforementioned into account, it can be concluded with certainty that coastal states do not enjoy full sovereignty over their continental shelves but only exclusive rights limited to the exploration and exploitation of the mineral

²² Article 311(1) UNCLOS 1982.

²³ Articles 80, 60(3) UNCLOS 1982.

²⁴ Art.60(3) UNCLOS 1982 (for the EEZ) and art.80 mutandis-mutandis for the Continental Shelf.

resources falling within such areas; unlike their territorial lands and seas.²⁵ Any such rights must always be reviewed in light of the limitations and obligations imposed by the international law of the sea and the associated international treaties.²⁶ It follows that any claim of outright ownership (*dominium*) over either the continental shelf or the natural resources contained within would also be, from a legal perspective, erroneous.²⁷

B. The UK Licensing Regime

As has already been seen, rather than declaring full sovereignty over the continental shelf in favour of the coastal state, the conventions cited above created exclusive rights over the continental shelf for the exploitation of natural resources. This is clearly reflected in the United Kingdom's domestic legislation as well: the 1964 Continental Shelf Act²⁸, which was enacted just as the huge offshore hydrocarbon potentials of the North Sea had been recognised and the 1998 Petroleum Production Act²⁹, which governs petroleum exploration and production activities to date.

In contrast to its preceding legislation³⁰ which explicitly vested property in petroleum in the Crown for onshore natural resources, the 1964 Continental Shelf Act provides that '[a]ny rights exercisable by the United Kingdom outside territorial waters with respect to the sea bed and subsoil and their natural resources...are hereby vested in Her Majesty'.³¹ It can thus be suggested that in light of the international legal developments described above, the absolute 'expropriating language' of the former 1934 Act was replaced in 1964 by the apparently weaker term: 'rights exercisable [by the UK on its continental shelf]'. As a consequence, the continental shelf regime cannot possibly be equated to the state's territorial land regime, in which the latter enjoys full sovereignty.

Indeed, given that the actual rights conveyed to states under international law over their continental shelves were not synonymous to 'the normal (legal) sub-

²⁵ Subject only to the provisions of UNCLOS 1982 concerning *inter alia* the right of innocent passage for ships of foreign states.

²⁶ Such as the 'Convention For The Protection Of The Marine Environment Of The North-East Atlantic (OSPAR)' (done in Paris on 22 September 1992) (entered into force on 25 March 1998) (as amended on 24 July 1998, updated 9 May 2002, 7 February 2005 and 18 May 2000)

²⁷ It should be noted that in practise whether a state has absolute or limited sovereignty over the continental shelf and the natural resources within does not have a significant impact due to the fact that no other entity (natural or legal) or a state is likely to have a stronger claim to the continental shelf or the natural resources. This is evident by the fact that companies are willing to invest millions in such a high risk activity (offshore hydrocarbon exploitation). If there was any potential for a predicament arising out of the lack of ownership of the continental shelf they would not be willing to take the risk. However, as we will demonstrate further down, the introduction of CCS leases by the UK government highlights the distinction between absolute and limited ownership and brings to the forefront issues that have been ignored thus far.

²⁸ Continental Shelf Act 1964, c.4.

²⁹ Petroleum (Production) Act 1998 c.17, Part 1.

³⁰ That is the Petroleum (Production) Act 1934.

³¹ Continental Shelf Act 1964, s.1.

divisions of territorial sovereignty into ‘dominium’ (ownership of territory),³² a coastal state could not be regarded as the owner of the shelf, or the resources lying therein for that matter, but only as the exclusive holder of the right to the resources of the shelf. The drafting history of the 1964 Act showcases that the UK Government itself was of the opinion that the ‘sovereign rights’ in the 1958 Convention did not confer rights of ownership of the petroleum in the ground (*in situ*).³³

The transposition of section 1 of the 1964 Act to actual petroleum development activities was achieved by Section 3 of the 1998 Petroleum (Production) Act which provides that, ‘[t]he Secretary of State, on behalf of Her Majesty, may grant to such persons as he thinks fit licences to search and bore for and get petroleum...with respect to which rights vested in Her Majesty by section 1(1) of the Continental Shelf Act 1964...are exercisable’.³⁴ Again, the wording of the said provision does not - either explicitly or implicitly - suggest the transferring of ownership of petroleum reserves lying within a given licensing area from the state to the licensee. It simply reiterates the rights of the Crown over the petroleum ‘in Great Britain or beneath the territorial sea adjacent to the United Kingdom’ and without making any additional proprietary claims allows the Crown to grant licences in search for and production of petroleum. As a matter of fact, any such transfer at the time of granting a license (i.e. while hydrocarbon reserves are still in the ground - *in situ*) could be deemed as invalid, on the basis of the *nemo dat quod non habet* rule. The state is not the owner of the hydrocarbon deposits located within its continental shelf, but it merely holds an exclusive sovereign right to them, which is why licenses are granted to ‘get petroleum’. This generic word was used -and still is- to account for the uncertain legal relationship between the state and the natural resources *in situ*. If ownership of the hydrocarbons is not passed to oil companies via the provisions of the license it begs the question, ‘how and when do oil companies acquire ownership of extracted natural resources/hydrocarbons?’.

C. The Doctrine of ‘Occupatio’

Since ‘the rights of the licensee can be no more extensive than the rights of the Crown, from which the license is held’³⁵ the state cannot purport to pass such title to its licensees.³⁶ Indeed, as the leading text-book on UK oil and gas law observes, a seaward petroleum production license authorises the undertaking of ‘activities for searching and boring for, and **getting** whatever petroleum may be present there for the time being’³⁷ rather than conveying any property rights on

³² P. D. Cameron, *Property Rights and Sovereign Rights : the Case of North Sea Oil* (Academic Press 1983) 46,47.

³³ For a thorough review of the preparatory works and discussions that led to the drafting of the Continental Shelf Act 1964 see: G. Marston, *The Incorporation of Continental Shelf Rights into United Kingdom Law* (1996) 45 (1) ICLQ 13-51.

³⁴ Petroleum (Production) Act 1998, s.2.

³⁵ Hammerson, *Upstream Oil and Gas* (Globe Business Publishing 2011) 26- *nemo dat quod non habet* rule.

³⁶ N. McLeod ‘Unitization’ in G. Gordon, J. Paterson, E. Üşenmez (eds) *Oil and Gas Law: Current Practice and Emerging Trends* (2nd edn, Dundee University Press 2007) para. 13.10.

³⁷ T. Daintith, G. Willoughby and A. Hill, *United Kingdom Oil and Gas Law* (3rd edn, Sweet & Maxwell 2000) para. 1-347.

the volume of petroleum lying beneath the licensed area at the moment of its award.³⁸ It is true to observe that none of the licensing provisions offer an answer to the aforementioned question, at least not expressly. In fact the Department has gone to great lengths to emphasise that '*proprietary rights do not exist in unextracted hydrocarbons under the UKCS and ownership of hydrocarbons arises only once they have been extracted under appropriate regulatory consent*'.³⁹ Considering that the Department is unwilling to offer clarifications through its guidelines, the only path that remains is to seek the answer to the aforementioned question within the general operation of the law of property.

The obtainment of ownership in minerals upon their extraction, as suggested by the DECC, could be deemed as a typical example of original acquisition of ownership via the doctrine of '*occupatio*'.⁴⁰ Indeed, in contrast to derivative acquisition of ownership⁴¹, original acquisition of ownership through occupation occurs in cases where a corporeal movable has never had a previous owner, in other words; it has never been subject to the right of ownership before.⁴² It is only reasonable that a title over such thing may be acquired simply by appropriating it or more preferably...capturing it.⁴³ As a consequence, assuming that petroleum *in situ* is open to acquisition – in not being subject to the right of ownership as DECC has emphasised – the oil company extracting it, the 'acquirer', obtains the ownership and creates accordingly, the first (original) link in the chain of title to the thing in question.⁴⁴

Some commentators have viewed the issues pertaining to ownership over petroleum reserves (whether lying in the ground or extracted by the licensee) as purely academic.⁴⁵ The financial implications that title-related issues give rise to, both in the present and future, illustrate that the above views might be misleading. Merely to touch the surface on such issues we offer one of many scenarios: it is a fact that a petroleum production license in the UK does not convey property rights over the petroleum reserves that might lie beneath the licensed area at the moment of its granting. It follows that the licensee cannot claim an underlying ownership interest until such mineral reserves are extracted and 'captured'.⁴⁶ As a consequence, the licensee cannot offer lenders security over petroleum until exploration is complete and physical products (over which security may be granted) have been produced. Consequently, petroleum reserves lying in a given area, even where there are highly accurate estimated volumetrics and considerable investment in producing hydrocarbons, cannot be regarded as an asset over which security can be granted. It is often emphasised in economic circles that investors avoid uncertainty, thus the following questions could be

³⁸ Ibid.

³⁹ DECC, Offshore Field Development Guide 2010 para.2.5.1.

⁴⁰ Known as occupancy or occupation under English law.

⁴¹ Where ownership derives from the title of the previous owner.

⁴² Known as *res nullius*.

⁴³ W.M. Gordon, 'Corporeal Movable Property' in K Reid (ed) *The Law of Property in Scotland* (1996) para.539.

⁴⁴ Hammerson, (n35) para. 3.2.2.

⁴⁵ Cameron (n) 48, 49; Hammerson (n35) para 1.1.8.

⁴⁶ C. Golvala, *Production Payment Financing under English Law* (2002) 1 IELTR 15.

posed: could there be a greater uncertainty than not knowing exactly who holds the title to hydrocarbons *in situ* and when exactly one would acquire ownership of the extracted resources? Often the fact that the North Sea has been operating and producing for over four decades without such ‘academic legal issues’ being resolved is offered as a conversation killer on the topic. The *status quo* of the North Sea is undeniably changing as the province matures⁴⁷ and the decommissioning stage looms larger with every day that goes by. Who owns what and what responsibilities come along with that will become critical questions.

2. TRANSPORTATION

A. Encroachment

Turning to the property law related issues during transportation of hydrocarbons via pipelines we are to begin by examining the law of encroachment. Under Scots Law landowners hold the right to exclude another from one’s private property; it is a privilege that is attached to the right of ownership (*dominium*).⁴⁸ In particular, a land owner can prevent others from building on his land, even if it is in the national interest to do so.

Encroachment refers to the usage of another’s land without consent or justification.⁴⁹ It is a physical intrusion of a permanent character, ranging from a sign or branch protruding over neighbouring land to constructing a building or pipeline on another’s property.⁵⁰ Encroachment constitutes an infringement of the aforementioned landowner’s right of exclusive use and occupation of his land.⁵¹ A landowner may enforce his exclusive right by seeking an interdict to prevent encroachment or claim damages where interdict is not available. Remarkably though, an interdict can be obtained even in circumstances where building works are in progress. In fact landowners can seek an order to demolish the partially completed structure and restore the land. Technically, proprietors are always allowed to have the encroachment removed however according to the *Jack v Begg*⁵², in appropriate cases the Court is empowered to withhold this remedy and award damages instead.⁵³ In order to prevent such legal action the consent of the landowner, as well as any other third party that may hold a derivative real right to occupy the property in question (i.e. tenant), ought to be

⁴⁷ Oil and Gas UK, *Economic Report 2014*, p.15 available at: <<https://publ.com/N6D1Taa#15/z>> accessed 27 February 2014.

⁴⁸ Roderick Paisley, ‘Aspects of Land Law Relative to the Transportation of Oil and Gas in Scotland’ in Gordon, Paterson and Usenmez (eds), *Oil and Gas Law: Current Practice and Emerging Trends* (2nd Edn, Dundee University Press, 2011) para 17.3.

⁴⁹ Kenneth Reid, *The Law of Property in Scotland* (Butterworths, Edinburgh 1996), para. 175.

⁵⁰ *Halkerston v Wedderburn* (1781) Mor 10495 - branch protruding over property line; *Macnair v Cathcart* (1802) Mor 12832 - erection of wall on another’s land.

⁵¹ *The Laws of Scotland: Stair Memorial Encyclopaedia* Nuisance Reissue, para 27.

⁵² *Andrew Jack v Dr James Begg and Others* (1875) 3 R. 35.

⁵³ *Strathclyde Regional Council v Persimmon Homes (Scotland) Ltd* 1996 SLT 176 is another example of Courts awarding damages and not an order of removal. - A Court will usually allow for the removal of an encroachment unless it is satisfied that the encroachment was performed in good faith, there is minimal inconvenience/damage to the proprietor and the cost of removal is disproportionate to the remedy.

sought before the construction of any structure, including pipelines, on another's land.⁵⁴

Although obtaining consent and entering into a contract with the landowner would avoid the issue of encroachment coming into play with existing holders of rights in the property, there is still the question of encroachment being raised by successors of those right holders.⁵⁵ Therefore it is prudent for parties that seek to construct on another's lands to acquire a real right to the land, which is enforceable against the world, thereby ensuring protection against both present and future claims of encroachment instead of relying on a mere consent or contractual obligation. Moreover failure to acquire a real right might result to bringing into contemplation another issue that is of paramount importance when considering pipeline transportation of hydrocarbons: the operation of the law of fixtures (*accessio*).

B. The Law of Fixtures

Accessio is another principle for the acquisition of original ownership that derives from Roman law. According to Professor Reid, *accessio* occurs whenever two pieces of property become joined together in such a way that one (the 'accessory') is considered to have become subsumed in the other (the 'principal').⁵⁶ Accession extinguishes the title of ownership to the accessory item, as the general rule applicable is *accessorium principale sequitur*; the accessory becomes part of the principal item and ceases to have a separate existence.⁵⁷ Notably it is not necessary for the two pieces to be inseparable for *accessio* to take place.⁵⁸ The three requirements for accession under Scots law are physical attachment, functional subordination of the accessory item to the principal item⁵⁹ and permanence or quasi-permanence.⁶⁰ Although under English law the intention of the parties at the time of attachment is also considered, Scots law takes an entirely different approach excluding subjective elements from judicial consideration.⁶¹ It should be highlighted that even if the two items were subsequently separated, ownership of the accessory item would not revert back to the original owner but remain with the owner of the principal item.⁶²

Erskine, the Scottish institutional writer, provides authority that where a heritable item is involved, such as land, it will always be the principal item.⁶³ It

⁵⁴ Roderick Paisley, *Land Law*, (W.Green/Sweet & Maxwell, 2000) para 4.30.

⁵⁵ *Labinski Limited v (First) BP Oil Development Company and others* (24 January 2003; unreported).

⁵⁶ Kenneth Reid, *The Law of Property in Scotland*, (The Law Society of Scotland/Butterworths, 1996) para 570.

⁵⁷ *Brand's Trs v Brand's Trs* (1876) 3R. (H.L.) 16 - The accessory follows the principal.

⁵⁸ *Christie v Smith's Executrix* 1949 SC 572 - authority that it is sufficient that the accessory is attached to the principal by virtue of its weight alone.

⁵⁹ *Dowall v Miln* - functional subordination is discounted in the cases of large pieces of machinery and other substantial structure (i.e. pipelines).

⁶⁰ Kenneth Reid, *The Law of Property in Scotland*, (The Law Society of Scotland/Butterworths, 1996) para 574.

⁶¹ *ibid* para 572.

⁶² *Scottish Discount Co v Blin* 1985 SC 216.

⁶³ Erskine, *Institute*, II, 2,2,4.

follows that pipelines, being moveable property attached to land, can be fixtures that accede to the land, and hence pass under the ownership of the landowner.⁶⁴ Accession is perhaps the most prominent example of the impact of property law on the transportation of hydrocarbons. Especially considering that according to *Shetland Islands Council v BP Petroleum Development Ltd* parties cannot contract out of the law fixtures, meaning that accession cannot be excluded via a contractual term.⁶⁵

As energy security was and remains a top priority for governments, discovering a legal solution to facilitate the development of pipelines while circumventing accessio was of critical importance. It is even more so in jurisdictions such as Scotland, where the courts held that a unitary approach will be followed in the law of fixtures.⁶⁶ As aforementioned, due to the right of landowner's to exclude others from their land and the law of encroachment, it is imperative for oil companies to obtain a real right in the land. It is not unheard of to utilise leaseholds to hold land for pipelines, especially ones of small size. A tenancy agreement would provide a solution to the issue of *accessio* but it would create a range of other problems, such as risk allocation between landlord and tenant, indemnification, decommissioning and restoration of land *inter alia*, all of which would have to be addressed within the contract, thus rendering this option a quite complex one. Note however that a right of severance may be granted under the contract to the tenant where such an option is opted for, thus allowing for the reversal of accession at the end of the tenancy.⁶⁷

Acquiring ownership of the land upon which the pipeline is laid would be another possibility, albeit a very costly one. Not to mention that in Scotland, ownership of land is perpetual, hence the company will be left with a narrow strip of land long after the pipeline has been decommissioned.⁶⁸ In conclusion the acquisition of a limited, derivative real right, which would enable the transportation of hydrocarbons, would be more practical and feasible.

C. Servitude of Pipeline

The main real right employed for laying pipeline and transporting hydrocarbons across private land in Scots law is the praedial servitude.⁶⁹ Servitudes are a class of rights originating from Roman law and stem from the right of ownership. They burden a piece of land 'servient tenement' for the benefit of an adjacent or

⁶⁴ Kenneth Reid, *The Law of Property in Scotland*, (The Law Society of Scotland/Butterworths, 1996).

⁶⁵ *Shetlands Island Council v BP Petroleum Development Ltd* 1990 SLT 82 at 94 per Lord Cullen.

⁶⁶ *Brand's Trs v Brand's Trs* (1876) 3 R (HL) 16.

⁶⁷ Kenneth Reid, *The Law of Property in Scotland*, (The Law Society of Scotland/Butterworths, 1996) para 586.

⁶⁸ Roderick Paisley, 'Aspects of Land Law relative to the transportation of Oil and Gas in Scotland' in Gordon, Paterson and Usenmez (eds), *Oil and Gas Law: Current Practice and Emerging Trends* (2nd Edn, Dundee University Press, 2011) para 17.11 – railway companies found themselves in the same position.

⁶⁹ Known in common law jurisdictions as 'easement'.

close-by piece of land 'dominant tenement'.⁷⁰ The general rule of servitudes is that the owner of the dominant tenement is entitled to use the servitude for the benefit of the dominant tenement alone.⁷¹ This requirement can be discharged by the running of a business on the dominant tenement, thus transportation of hydrocarbons for commercial purposes would qualify. However, there is a *caveat*: the servitude cannot become overly burdensome to the servient tenement proprietor.⁷²

The Title Conditions (Scotland) Act 2003 s.75 enables the establishment of a servitude of pipelines by allowing the creation of servitudes via registration of a deed.⁷³ In fact s.77 expressly provides the retrospective recognition of a servitude of overland pipelines in Scots law.⁷⁴ A servitude of pipeline enables the laying of pipeline by the owner of the dominant tenement and the use thereof to transport oil and gas for commercial purposes. There can be special limitations imposed on the servitude, such as limitations on chemical composition and pipeline pressure. In fact a deed of servitude will encompass an array of ancillary provisions ranging from access rights to precluding the removal of lateral support for the pipeline. From all of the above the conclusion can be reached that hydrocarbon transportation in Scotland involves quite complex deeds of servitude and by extension, that property law plays a catalytic role in making the transportation of hydrocarbons possible.

Despite the benefit of servitudes circumventing the effects of encroachment and *accessio*, the fact that they cannot exist in their own right is a notable disadvantage. The O&G company has to own adjacent or nearby land to be able to enjoy a servitude right.⁷⁵ The structures at each end of the pipeline such as, pumping stations and refineries could possibly fulfil this role.⁷⁶ In addition patches of ground located along the pipeline used for safety equipment, monitoring and pumping stations are owned by the O&G companies and are designated as dominant tenements.⁷⁷ They are utilised to discharge the *vicinitas* and *utilitas* requirements that pertain to servitudes. Professor Paisley argues that these land parchments exist to provide utility to the pipeline and not the other way round, thus raising questions as to the requirement of both *vicinitas* and

⁷⁰ Roderick Paisley, *Land Law*, (W.Green/Sweet & Maxwell 2000) para 8.1.

⁷¹ Roderick Paisley, 'Aspects of Land Law relative to the transportation of Oil and Gas in Scotland' in Gordon, Paterson and Usenmez (eds), *Oil and Gas Law: Current Practice and Emerging Trends* (2nd Edn, Dundee University Press 2011) para 27 - requirement of *utilitas*.

⁷² Roderick Paisley, *Land Law*, (W.Green/Sweet & Maxwell 2000) para 8.22 - servitudes must be exercised *civilie r-* servitude cannot be inconsistent with the servient tenement proprietor's ownership right and must be exercised only in such a manner as is least burdensome to the servient tenement and its owner.

⁷³ Title Conditions (Scotland) Act 2003 s.77.

⁷⁴ Title Conditions (Scotland) Act 2003 s.77.

⁷⁵ Erksine, *Institute*, 2.9.33 – Requirement of *vicinitas*.

⁷⁶ The dominant and servient tenement have to be sufficiently close for a praedial interest to exist. In the case of pipelines the dominant tenement proprietor may be capable of demonstrating a praedial interest even with hundreds of miles between the two tenements.

⁷⁷ Roderick Paisley, 'Aspects of Land Law relative to the transportation of Oil and Gas in Scotland' in Gordon, Paterson and Usenmez (eds), *Oil and Gas Law: Current Practice and Emerging Trends* (2nd Edn, Dundee University Press, 2011) para 17.24.

utilitas being met under current arrangements for the laying of pipelines.⁷⁸ Another practical difficulty with servitudes is that they are attached to land, thus they cannot be retained where ownership of the land is transferred. By the same token though, where ownership of the servient tenement is transferred the praedial servitude remains enforceable as it is passed along with ownership to the successor of the title and being a real right it is enforceable against the world.⁷⁹ All of the above are consequences of the industry developing a legal framework that was convenient and enabled hydrocarbon production without proper consideration of the surrounding law during the early days of the industry. There may be a functioning oil and gas industry in the North Sea but from a legal standpoint, especially through a property law perspective, hydrocarbon operations are in compliance with the law. Finally it should be mentioned that any deed of servitude in Scotland can be overtaken by events and become unreasonable in light of new circumstances. The servient tenement proprietor or any other against whom the servitude is enforceable can apply to the Lands Tribunal to have the servitude varied or discharged.⁸⁰ The application is allowed where the variation or discharge would be 'reasonable'.⁸¹ Although such a finding is unlikely in the case of large existing pipelines, it serves to further illustrate how property law issues intertwine with the transport of hydrocarbons.

3. STORAGE & THE FUTURE: The 'Im-Property' Law of CCS projects

A variety of land law rules were developed under Scots Law to facilitate the use of pipelines for the benefit of the O&G industry. For example and contrary to other jurisdictions there is no requirement that the same real right be held along the entire length of a pipeline.⁸² The government has relatively recently proceeded to the granting leases for the establishment of carbon capture and storage (CCS) projects.⁸³ Although CCS is considered to be at a pre-commercial demonstration phase, this is yet another a case of distorting and sacrificing principles of property law for the accommodation of the energy industry.

In the rather lengthy introduction to this article we've elaborated on the details of UNCLOS provisions in excruciating detail, precisely to broach upon this concern. According to the '*nemo dat quod non habet*' rule one cannot transfer a

⁷⁸ Roderick Paisley, 'Aspects of Land Law relative to the transportation of Oil and Gas in Scotland' in Gordon, Paterson and Usenmez (eds), *Oil and Gas Law: Current Practice and Emerging Trends* (2nd Edn, Dundee University Press, 2011) para 17.27 - requirement of utility of the servitude tenement to the dominant tenement.

⁷⁹ Issues of succession will be considered in the next section of the essay.

⁸⁰ Title Conditions (Scotland) Act 2003, pt.9.

⁸¹ Title Conditions (Scotland) Act 2003, s.98.

⁸² cf with other jurisdictions, such as Sri Lanka.

⁸³ The Crown Estate, 'Carbon Capture and Storage' <<http://www.thecrownestate.co.uk/energy-infrastructure/carbon-capture-and-storage/>> accessed 18 February 2014 - Lease agreement between Crown Estate and CCS tenant is available for download. ; The Herald, 'Peterhead Confirmed for Carbon Capture Site...but it's not a bribe', says Ed Davey' <<http://www.heraldscotland.com/politics/referendum-news/peterhead-confirmed-for-carbon-capture-sitebut-its-not-a-bribe-says-ed-dave.1393232825>> accessed 01 March 2014.

greater right than what one already possesses. It follows that where the state purports to grant a lease over an asset or property it holds the right of ownership to that asset or property. However as demonstrated earlier and, as is stipulated by UNCLOS III, states only hold a sovereign right to explore and exploit natural resources beneath the seabed of their continental shelves subject to certain limitations.⁸⁴ The legal basis for the granting of CO₂ storage licenses and CCS project leases was the s.1 Energy Act 2008. The right to designate “Gas Importation and Storage Zones” was originally vested in Her Majesty.⁸⁵ The legal standing for doing so was the concept of the EEZ, as established under Part V of UNLOSS III.⁸⁶ However UNCLOS III once again does not extend an ownership right but a ‘sovereign right[s] for the purpose of exploring and exploiting ... and with regard to other activities for the economic exploitation and exploration of the zone [EEZ]...’⁸⁷ The only logical conclusion that can be reached is that the granting of such leases is done in violation of property law principles.

As aforementioned the O&G industry may have been operating for years in violation of property law principles with no practical implications, hence the question beckons: why would this case be any more concerning? Being in violation of general legal principles leaves one with no legal protection in times of need. Within the aforementioned Crown Estate leases lies an implicit claim or assumption of an ownership right to the continental shelf. It follows that if the continental shelf is owned, oil platforms can be perceived as movable fixtures that accede to the seabed, thus pass under the ownership of the land owner - in this case the state. It is not inconceivable, that as the North Sea becomes increasingly regarded as a mature province and as barriers to entry are lowered in order to encourage smaller companies to get in, legal disputes may erupt during the decommissioning phase of infrastructure and such arguments may be utilised.

The point made in this section of the article is a simple one: it is dangerous to disregard established legal principles. They have been put in place to afford certain protections for specified reasons and we should not be so hard pressed to brush them aside for the sake of commercial expediency. Moreover the CCS example demonstrates that property law will most likely than not be relevant to any energy project in the future, as it was the case in the past. Therefore, it is time that more consideration should be afforded to it during the planning state of projects and policy decision-making. The future of the North Sea awaits and property law issues are bound to be of critical importance regardless of the ultimate path chosen.

⁸⁴ United Nations Convention on the Law of the Sea (concluded at Montego Bay on December 10, 1982), 1833 UNTS 3, 21 IML 1261 (entered into force on November 16, 1994) Art.77.

⁸⁵ Energy Act 2008 s.1(5) - The Marine and Coastal Access Act 2009 Sch.4 Pt.1 amended s.1(5) and designated areas were set under the Act, however Her Majesty retains the right to designate areas as well.

⁸⁶ United Nations Convention on the Law of the Sea (concluded at Montego Bay on December 10, 1982), 1833 UNTS 3, 21 IML 1261 (entered into force on November 16, 1994) Art.55.

⁸⁷ United Nations Convention on the Law of the Sea (concluded at Montego Bay on December 10, 1982), 1833 UNTS 3, 21 IML 1261 (entered into force on November 16, 1994) Art.56.

CONCLUSIONS

The present paper has demonstrated how property law operates and is relevant during all the stages of hydrocarbon production: from extraction and transportation to the storage of CO₂ produced by the generation of energy in depleted reservoirs. The state and the industry tried to use their ingenuity to circumvent the operation of certain property law doctrines, such as ‘accessio’ and encroachment, rather than developing an appropriate legal framework that would facilitate the operation of a UK Oil and Gas industry. Four decades later we are forced to continue building on this ‘house of cards’ to facilitate the operations of the industry. The CCS scenario offered above is only one of possible scenarios that may give birth to property law questions that neither the government nor the industry appear to have the answers to. Sooner or later there will be developments that will reveal the incompatibility of the hydrocarbon regime and the general principles of property law bringing this house of cards tumbling down. Our only goal through this work is to highlight the importance of property law both in ongoing and future energy industry operations and perhaps stimulate academic discussion in this area.