

RIGHTS: PRESCRIPTIVE OR HUMAN – CAN PYE BE SQUARED?

This discussion concerns *J.A. Pye (Oxford) Ltd v Graham*; found at [2000] Ch. 676 as reported at first instance, later, in the Court of Appeal, [2001] Ch . 804, and, finally in this country, [2002] UKHL 30. It was then exported to Strasbourg as *J.A. Pye (Oxford Ltd) and J.A. Pye (Oxford) Land Ltd v The United Kingdom* Application No 44302/02 and is reported as EHCR/2007/700 The see-saw ride for the law which this case has offered is now at an end. The Grand Chamber of the European Court of Human Rights, on appeal from the earlier decision of the Court, decided that the loss of registered title to land by the combined effect of the section 15 of the Limitation Act 1980 and section 75 of the Land Registration Act 1925 (“LRA 1925”) was not a violation of Article 1 Protocol 1 (“A1P1”) to the Convention. It found that adverse possession was a justified control of use under Rule 3 of A1P1, falling within the margin of appreciation. In doing so it reversed the Chamber. Previously, at home, the House of Lords had reversed the Court of Appeal which had itself reversed the reluctant first instance decision of Neuberger J. It is worth commenting on both because it has not been widely reported here, outside the very specialist press and because, between the two European decision, it has properly and inevitably influenced the advice which many have given and which now has to be revisited. Relevant parts of the Limitation Act and of the European Convention, with a short explanation of the latter are set out on the last page of these notes.

FACTS

The facts can be summarised very easily. The late Mr Graham and his wife farmed near to the disputed land and had a grazing agreement in respect of it.

On 30 December 1983 a chartered surveyor acting for Pye wrote to the Grahams noting that the grazing agreement was about to expire and requiring them to vacate the land. In January 1984, Pye refused a request for a further grazing agreement for 1984 because they expected to be seeking planning permission for the development of all or part of the land and considered that continued grazing

might damage the prospects of obtaining such permission. Notwithstanding the requirement to vacate the land at the expiry of the 1983 agreement, the Grahams remained in occupation at all times, continuing to use it for grazing. No request to vacate the land or to pay for the grazing which was taking place was made. If it had been, the evidence was that the Grahams would happily have paid. In June 1984 an agreement was reached whereby Pye agreed to sell to the Grahams the standing crop of grass on the land for £1,100. The cut was completed by 31 August 1984. In December 1984 the Grahams asked if they could take another cut of hay or be granted a further grazing agreement. No reply to this letter or to subsequent letters sent in May 1985 was received from Pye and thereafter the Grahams made no further attempt to contact them. From September 1984 onwards until 1999 the Grahams continued to use the whole of the disputed land for farming without their permission and remained in possession.

PROCEEDINGS IN ENGLAND

In the domestic courts, the issue centred on the question of whether Mr Graham had the relevant intention to possess, given that he had previously been a licensee and had appeared willing to accept a further licence thereafter. The House of Lords, reversing the Court of Appeal, found that he had the requisite intention. The Human Rights Act had not been in force as part of English law at times material to this case, although, of course, it had bound the Government as a Convention signatory. At the periphery of the domestic litigation were A1P1 issues. Neuberger J (as he then was, [2000] Ch 676, at p. 710) started the debate at first instance. He expressed the view that *“if as in the present case the owner of land has no immediate use for it and is content to let another person trespass on the land for the time being, it is hard to see what principle of justice entitles the trespasser to acquire the land for nothing from the owner simply because he has been permitted to remain there for 12 years. To say that in such circumstances the owner who has sat on his rights should therefore be deprived of his land appears to me to be illogical and disproportionate”*. The Court of Appeal simply noted that limitation periods were unexceptionable from a

Convention point of view [2001] Ch 804, at pp. 821-822; 823. In the House of Lords, Pye conceded that the Human Rights Act 1998 was not retrospective in effect, and that therefore it was not open to it to argue the A1P1 point. Lord Bingham expressed the view, *obiter*, that “*where land is registered it is difficult to see any justification for a legal rule which compels such an apparently unjust result, and even harder to see why the party gaining title should not be required to pay some compensation at least to the party losing it*”

STRASBOURG: SEESAW UP FOR PYE

Pye took the case to Strasbourg, obviously against the Gouvernement, looking for compensation for land which it valued at £10,000,000.00 and won before the first instance Chamber. The Court found that the operation of adverse possession, in relation to land registered under the LRA 1925, amounted to a deprivation of possessions, and was therefore within the scope of the Rule Two of A1P1. The Court went on to find that adverse possession was quite disproportionate in its effect on registered title. There was no compensation payable to the deprived registered owner (in which case it followed under the Rule Two that only exceptional circumstances could justify deprivation) and there was no notification of the registered owner that his property was at risk. The loss of registered title was only rendered possible because statute – in particular the now-repealed section 75 of the LRA 1925 - allowed it. Finally, the Law Commission papers, Law Com 254, “*Land Registration for the 21st Century*“ and Law Com 271, “*Land Registration for the 21st Century: A Conveyancing Revolution*“ lent some support for the view that adverse possession produced undesirable results in the context of land registered under the LRA 1925. The Commission had identified shortcomings in the regime under the LRA 1925, and proposed changes which were implemented under the Land Registration Act 2002 (‘LRA 2002’).

STRASBOURG: SEESAW DOWN FOR PYE

The Government appealed to the Grand Chamber which, by 10 to 7, reversed the decision of the Court. Holding A1P1 applicable, the judgment of both the majority and most of the dissenting judges proceeded on the (perhaps surprising) basis that adverse possession did not amount to a “deprivation” within Rule Two of A1P1, but rather to a “control of use” within Rule 3. There seemed to be two reasons for this. The first was that there were cases, relevant in the Grand Chamber’s view, under the Convention where there had been what seemed to be a deprivation, but which was in fact only a control of use (see paragraph 64). The material cases cited were *AGOSI v United Kingdom* (1986) 9 E.H.R.R. 1 (concerning confiscation of smuggled gold coins) and *Air Canada v United Kingdom* (1995) 20 E.H.R.R. 150 (concerning confiscation of an aeroplane adapted to smuggle cannabis and contraband). These had previously been regarded as cases of regulatory control of property by forfeiture laws (such as customs legislation), which are more obviously within the scope and justifications of Rule Three. Adverse possession, on the other hand, would seem to fit less readily into a rule permitting control of the use of property in accordance with the general interest. Pushing it into Rule Three seems further to blur the already very difficult distinctions between A1P1’s three famously distinct but not unconnected rules. It might be thought, as the English Courts and the Strasbourg Court the first time around did, that *Pye* was a deprivation case and seemed to have more in common with such cases as *James v United Kingdom* (1986) 8 E.H.R.R. 123 (in relation to the Leasehold Reform Act 1967) and *Holy Monasteries v Greece* (1994) 20 E.H.R.R. 1 (not mentioned in the majority judgment).

Essentially, the Grand Chamber, most of the dissentients (somewhat grudgingly) agreeing with the majority on this point, appeared to characterise adverse possession as a logical consequence of the acceptable operation of limitation rules affecting land, rather than as a mechanism for the deprivation of ownership. On this understanding, the then consequential loss of title merely regulated the

paper position to mirror what had happened as a matter of limitation of actions.

The point emerges at paragraph 66 of the majority judgment:

The statutory provisions which resulted in the applicant companies' loss of beneficial ownership were thus not intended to deprive paper owners of their ownership, but rather to regulate questions of title in a system in which, historically, 12 years' adverse possession was sufficient to extinguish the former owner's right to re-enter or to recover possession, and the new title depended on the principle that unchallenged lengthy possession gave a title. The provisions of the 1925 and 1980 Acts which were applied to the applicant companies were part of the general land law, and were concerned to regulate, amongst other things, limitation periods in the context of the use and ownership of land as between individuals. The applicant companies were therefore affected, not by a "deprivation of possessions" within the meaning of the second sentence of the first paragraph of Article 1, but rather by a "control of use" of land within the meaning of the second paragraph of the provision.

The extinction of title therefore was a product of, and hence shared the same legitimate aim as, the limitation rule. The Grand Chamber then said, in relation to whether a fair balance had been struck, as follows (paragraph 76):

Even though the general position in English law is that the expiry of a limitation period bars the remedy but not the right, the Court accepts that where an action for recovery of land is statute-barred, termination of the title of the paper owner does little more than regularise the respective positions, namely to confirm that the person who has acquired title by 12 years' adverse possession is the owner. Moreover, the law reflected the aim of the land registration legislation, which was to replicate the pre-registration law so far as practicable.

The Grand Chamber felt constrained to find that adverse possession "merely" fell within Rule Three, and not Rule Two. The most obvious reason is that the dispossessed registered proprietor is not compensated when the squatter takes his land. Under Rule Three absence of compensation was merely one of a number of factors (see paragraph 79) to be weighed up; Under Rule Two absence of compensation would render a violation justifiable only in exceptional circumstances. The latter course would virtually compel a finding that there had been a violation in the case of *Pye*, and mean that an ancient part of the substantive private law of a contracting state would require revision in light of the Convention – not a conclusion which is politically desirable. Given that most other countries had some similar provision that could have caused widespread

problems. Insofar as adverse possession barred not just the remedies (possession and damages) but also the title of the owner, and went on effectively to confer a fresh and practically indefeasible title on the squatter, the Grand Chamber prayed in aid the margin of appreciation and observed that this was a “long standing and complex” area of private law regulating the rights as between private individuals (paragraph 71; see also at paragraph 81). It drew attention to the divergence of approaches in other legal systems. Confusingly, the majority also found, apparently in error (see Schedule 13 to the LRA 2002; the error also being a feature of the dissenting judgments), that the LRA 2002 “did not abolish” section 75 of the LRA 1925, and took this as evidence that “Parliament confirmed the domestic view that the traditional general interest remained valid” (at paragraph 73), without particularising further. Whether this laconic conclusion is accurate in light of the scheme of the LRA 2002 and the Law Commission reports is highly doubtful. Finally, in considering the question of the fair balance, it made clear that a further factor in assessing whether adverse possession struck a fair balance was that the limitation period was a lengthy one, and that possession actions to stop the clock running, were a relatively straightforward procedural step. It was also clear that the rules of adverse possession were sufficiently well established to be a known risk to land owners in England.

CONCLUSION

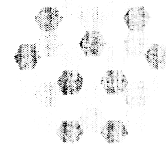
The outcome in *Pye* leaves English law as it was. Nonetheless the classification of adverse possession as a mere control of use seems surprising, especially when it is recalled that section 75 LRA 1925 has been described as giving effect to a “*parliamentary conveyance*” from the paper owner in favour of the squatter: *Central London Commercial Estates Limited v Kato Kagaku Ltd* [1998] 4 All E.R. 948. Further, it is not entirely clear that the majority gave full consideration to the changes – and the reasons for them – contained in the LRA 2002. Amendments of legislation by a State are not necessarily admissions of prior breaches of the Convention. However in this case, exceptionally, the Grand Chamber had in before it, in the form of Law Commission reports and judgments

of domestic judges, a clearly expressed, and critical, view of the operation of the law. The old feudal approach that possession is the root of title had, save in this area and the associated one of trespass, long ago given way to more formal paper roots. The social policies which had justified adverse possession – encouraging landowners to use their land rather than leave it idle – had largely been replaced by the much more prevalent attitude that land is an investment. Land as an easily transferable investment is at the heart of the proposed electronic conveyancing scheme under the LRA 2002, may be said to be evident in the introduction of the default power for trustees of land to buy additional land as an investment under the Trusts of Land and Appointment of Trustees Act 1996, as extended by section 8 of the Trustee Act 2000. Such a view of land requires enhanced security of title, especially where, as so often the case, land is bought to let it ripen for future development (so called “land banks”). It was very clear, and was one of the main prompts for the Law Commission proposals, that adverse possession threatened this goal in registered land. The dissenting Judges took the view that the absence of notification and compensation, and the undesirable disharmony between a system of registered title to land and a parallel system of title by long possession, meant that there was a breach of Rule Three. The majority ignored these factors.

Although *Pye* is no more, English Courts will have to deal with its legacy. Even before the first Strasbourg decision in *Pye*, *Beaulane Properties Ltd v Palmer* [2006] Ch 7 had recognised that the law was vulnerable to challenge and had bent to the wind there perceived as blowing. In effect, the High Court there resurrected the rule in *Leigh v Jack* [1879] 5 Ex D 264, that a squatter’s use had to be both adverse to the owner’s title and *inconsistent* with the proposed use to which the land was to be put by the paper owner. Lord Browne-Wilkinson had, of course, dubbed this a “heretical and wrong” in *Pye* [2003] 1 AC 419, at pp. 437 – 438. The effect of the Grand Chamber decision is to leave *Beaulane* hanging in a jurisprudential vacuum. Its status is uncertain: it might be thought as some commentators have done that it will be formally reversed or simply not followed in future. However it is clear from the Land Registry’s Note to LR

Practice Guide 5, set out below, as to its practice, that *Beaulane* is still to be followed in preference to *Pye*: is it a case of having a *Pye* and eating it?

Land Registry Additional practice affecting Practice Guide 5



Adverse possession of unregistered land and transitional provisions for registered land in the Land Registration Act 2002

Where an application is made under paragraph 18 of Schedule 12 to the Land Registration Act 2002 and the necessary period of adverse possession started after 2 October 1988, the applicant must show an arguable case for the possession being inconsistent with the use or intended use of the land by the registered proprietor, and not merely that the possession was without the registered proprietor's consent.

This is as a result of the decision in *Beaulane Properties v Palmer* [2006] EWHC 1071 (Ch).

In Land Registry's view, the subsequent decision of the European Court of Human Rights, sitting as a Grand Chamber, in *J.A. Pye (Oxford) Ltd and J.A. Pye (Oxford) Land Ltd v The United Kingdom* (Application no. 44302/02) does not affect current domestic case law. It does not, therefore, remove the

requirement to show inconsistent use where an application is made of the particular kind referred to above. *Pye* concerned section 75(1) of the Land Registration Act 1925 and the Limitation Act 1980. The European Court of Human Rights found that the operation of these provisions did not violate Article 1 of Protocol 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms.

At the relevant time, Section 15 of the Limitation Act 1980 provided:

“(1) No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person...

(6) Part I of Schedule 1 to this Act contains provisions for determining the date of accrual of rights of action to recover land in the cases there mentioned.”

Paragraph 1 of Schedule 1 provided:

“Where the person bringing an action to recover land, or some person through whom he claims, has been in possession of the land, and has while entitled to the land been dispossessed or discontinued his possession, the right of action shall be treated as having accrued on the date of the dispossession or discontinuance.”

Article. Article 1 of Protocol No. 1 provides as follows:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

Article 1 of Protocol No. 1, which guarantees the right to the protection of property, contains three distinct rules: the first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property; the second rule, contained in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain conditions; the third rule, stated in the second paragraph, recognises that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest.

The three rules are not, however, 'distinct' in the sense of being unconnected. The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule (see, as a recent authority with further references, *Anheuser-Busch Inc. v. Portugal* [GC], no. 73049/01, § 62, ECHR 2007).

In order to be compatible with the general rule an interference with the right to the peaceful enjoyment of possessions must strike a “fair balance” between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights (see *Beyeler v. Italy* [GC], no. 33202/96, § 107, ECHR 2000 I).

A taking of property under the second sentence of the first paragraph of Article 1 without payment of an amount reasonably related to its value will normally constitute a disproportionate interference that cannot be justified under Article 1. The provision does not, however, guarantee a right to full compensation in all circumstances, since legitimate objectives of “public interest” may call for less than reimbursement of the full market value (see *Papachelas v. Greece* [GC], no. 31423/96, § 48, ECHR 1999 II, again with further references).

In respect of interferences which fall under the second paragraph of Article 1 of Protocol No. 1, with its specific reference to “the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest ...”, there must also exist a reasonable relationship of proportionality between the means employed and the aim sought to be realised. In this respect, States enjoy a wide margin of appreciation with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question (*AGOSI v. the United Kingdom*, judgment of 24 October 1986, Series A no. 108, § 52).

Historical note

By the Limitation Act 1623 after the expiry of twenty years possession by another, the true owner's right of entry was lost and so he could no longer bring an action for possession. He did not, however, lose his title. Thus if the squatter departed, even after more than twenty years, the true owner could re-enter what was still his land.

In the centuries following 1623 the common law courts developed the doctrine of non adverse possession. By that was meant possession which did not endanger the true owner's title. Possession would only become adverse when it was clearly inconsistent with due recognition of the true owner's title, which meant that there had to be something in the nature of ouster. It was however very difficult to identify in practice when possession became adverse. Only when adverse possession in that sense had occurred was the true owner's remedy barred under the 1623 Act. All that was (or should have been) changed by the Real Property Limitation Act 1833 by which the limitation period of twenty years began to run as soon as there was dispossession or discontinuance of possession. This meant that the question of whether possession was "adverse" or not no longer arose: the question was simply whether the squatter had been in actual possession for twenty years (reduced to twelve years in 1874). The 1833 Act introduced another important change however: if the limitation period ran its course the true owner lost not only his remedy but also his title which, together with any right to recover rent or damages was as the Act uncompromisingly put it "extinguished".

Meanwhile, Parliamentary reform on other fronts began. The Land Registry Act 1862 created the first scheme of land registration. By it, the registered owner of land was entitled to it free from all rights and claims whatsoever. By implication, this meant that the title of a registered owner could not be defeated by adverse possession and so the 1833 Act did not apply to registered land. The 1862 Act was however a failure because it required the owner to show a marketable title including precisely defined boundaries. The complexity of so doing defeated the advantages of registration. In 1870 a Royal Commission recommended the creation of a new system, still recognisable as the ancestor of the present one, in which, amongst other things, boundaries of land comprised in a registered title would not be precisely fixed. That was established by the Land Transfer Act 1875 which expressly provided that the Real Property Limitation Acts should

have no application to registered land.

In the Courts, during the same period, judicial hostility to the idea of losing title through the running of a limitation period was emasculating the 1833 Act. In Leigh v Jack in 1879 the Court of Appeal effectively reinstated the idea of non adverse possession by holding that the use of land by a trespasser which did not interfere with the purposes to which the true owner intended to put the land was not adverse. From this grew a further doctrine that if the squatter's occupation of land was not inconsistent with the true owner's purposes for the land, his use of it was deemed to be with the true owner's consent and thus not adverse. The high water mark of this doctrine was the decision of Lord Denning in Wallis's Cayton Bay Holiday Camp v Shell-Mex and B P Limited in 1975.

The effect of this was that use which amounted to possession of land in the ordinary sense of the word would not be adverse. It was therefore very difficult for the true owner to lose his title through inadvertence or ignorance. Whilst in hard cases this enabled the courts to reach desirable outcomes, it flew in the face of the plain meaning of the statutes of limitation. In 1977 Slade J in Powell v MacFarlane suggested that what had become the generally held view of the effect of the limitation acts in relation to adverse possession might be wrong. This school of thought rapidly gained acceptance and in 1980 the Limitation Amendment Act repealed the Cayton Bay fiction of implied consent. In 1990 the decision of Buckinghamshire County Council v Moran effectively reversed Leigh v Jack and in 2002 the House of Lords in Pye overruled it.

Thus from 1879 (Leigh v Jack) to at least 1977 (Powell v MacFarlane) the law of adverse possession took a course which was wrong and which ignored the effect of the 1833 Act. It was against that background, in which it was very difficult for a true owner to lose his land through inadvertence or ignorance, that the doctrine of adverse possession crept into the arena of registered land. The first inroad was made by the Land Transfer Act 1897 under which a person who, but for the 1875 Act, would have acquired title to registered land by adverse possession, could apply to have the register rectified in his favour, provided that no other person had taken a transfer for value in the interim.

In 1911 the Royal Commission on the Land Transfer Acts recommended that the statutes of limitation should apply equally to registered as to unregistered land. The rationale for this view was to deal with the problems of registered owners

who could not be traced and that of disputed boundaries for, under the law as it then stood, in order for a registered proprietor to prove title to a disputed boundary, he had to go back before the date of first registration and prove his title as though it had not been registered.

These recommendations were put in to effect by the Law of Property Act 1922, re-enacted in the Land Registration Act 1925. These applied the Real Property Limitation Acts to registered land and, by Section 75, provided that on the expiry of the limitation period the registered proprietor held the land on trust for the adverse possessor. The statutes of limitation were consolidated in 1939 and again in 1980.

The effect of Moran and Pye was to return the law to that which Parliament had enacted in 1833, whereby a true owner could be dispossessed by actions which were not inconsistent with his intended purposes for the land so that as was said in Beaulane, he may “lose it inadvertently and without being to blame in any way, and that to a person who has no deserving claim to it”.