

THE LIFE OF PYE

Where has adverse possession got to?

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by

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Recent published comments include:

Jonathan Gaunt QC has "a powerful intellect" and is "very client-focused", Gaunt provides "clear and succinct advice in guiding a clear path through the forest of litigation". Chambers and Partners Guide 2006 (Real Estate Section).

"Intellectual ability is Jonathan Gaunt QC's great strength. He is praised for being "calm but very thorough, with excellent attention to detail". Legal 500 2005 (Property Litigation Section).

1. **Two crucial dates**

1st October 1988

13th October 1991

2. **Four different regimes?**

- (1) Unregistered land – governed by sections 15-18 and Schedule 1 of Limitation Act 1980;
- (2) Registered land where the limitation period expired before the commencement of the Human Rights Act 1998 (1st October 2000);
- (3) Registered land where the limitation period expired before the commencement of the Land Registration Act 2002 (13th October 2003);
- (4) Registered land where the limitation period expired after that.

3. **The Limitation Act 1980**

3.1 No action can be brought by any person to recover land after the expiration of 12 years from the date on which the cause of action accrued to him or to some persons through whom he claims.

3.2 Once the right of action is barred, the owner's title is extinguished, save that, in the case of registered land, it is not extinguished but held on trust for the squatter.¹

3.3 A right of action is deemed to accrue at the date a person in possession is dispossessed by a person in whose favour the period of limitation can run – the possession of such a person is called in the Act “adverse possession”.

3.4 The definition of land in the Limitation Act, section 38, does not include incorporeal hereditaments and so the Act does not apply to actions to establish

¹ LRA 1925, S.75

or prevent interference with easements, nor does it operate to extinguish easements or restrictive covenants.

3.5 An application to HMLR or the Court to have cautions registered by a squatter vacated is not an action to recover land and does *not* stop time running².

3.6 Changes in ownership of the paper title do not stop time running.

3.7 “Adverse possession” means possession by somebody who never had a right to possession **or** who had such a right which has come to an end **or** who has a right to be in possession but is treated by the Act as if he did not have one, e.g. an oral periodic tenant who has stopped paying his rent.

3.8 The notion of “adverseness” does not imply that the squatter drove out the true owner or that his possession must necessarily be inconsistent with or opposed to the true owner’s plans. The concept remains fundamental to the new regime introduced by the LRA 2002.

4. **The case of Leigh v. Jack (1879) 5 Ex.Div. 264.**

4.1 The law on limitation has see-sawed throughout its history as a result of a tension between the literal constructionists and Judges whose distaste for “legalised land theft” has caused them to construe the statutes in the landowner’s favour. This latter tendency can first be seen in Leigh v. Jack.

4.2 The Defendant became owner of land on either side of an intended street; in 1854 he placed factory materials on it; in 1865 he enclosed part of it and in 1872 he fenced the ends; in 1876 the owner sued for possession. The

² Pye v. Graham [2000] Ch. 276, Neuberger J.

Court drew a distinction between acts of *user* and acts of *possession*. Per Bramwell LJ:

“In order to defeat a title by dispossessing the former owner, acts must be done that are inconsistent with his enjoyment of the soil for the purposes for which he intended to use it.”

4.3 In 1975 Lord Denning developed this principle by holding that, where the true owner has no immediate use for the land, he is deemed to have impliedly given the squatter permission to use it, so that his possession will not be adverse³:

“When the true owner of land intends to use it for a particular purpose in the future, but meanwhile has no immediate use for it, and so leaves it unoccupied, he does not lose his title to it simply because some other person enters on it and uses it for some temporary purpose, like stacking materials; or for some seasonal purpose, like growing vegetables. Not even if this temporary or seasonal purpose continues year after year for 12 years or more: see Leigh v. Jack ... The reason is not because the user does not amount to actual possession. The line between acts of user and acts of possession is too fine for words. The reason behind the decisions is because it does not lie in that other person’s mouth to assert that he used the land of his own wrong as a trespasser. Rather his user is to be ascribed to the licence or permission of the true owner. By using the land, knowing that it does not belong to him, he impliedly assumes that the owner will permit it: and the owner, by not turning him off, impliedly gives him permission.”

4.4 This was not the rationale behind the previous decisions at all and was so off the wall that it had to be reversed by statute:

“For the purpose of determining whether a person occupying any land is in adverse possession of the land, it shall not be assumed by implication of law that his occupation is by permission of the person entitled to the land merely by virtue of the fact that his

³ Wallis’s Cayton Bay Holiday Camp Limited v. Shellmex and BP Limited [1975] QB 94.

*occupation is not inconsistent with the latter's present or future enjoyment of the land."*⁴

5. The case of Littledale v. Liverpool College [1900] 1 Ch. 19.

5.1 In the meantime, another Judge had invented another sophistication which was to cause much trouble. In Littledale Sir Nathaniel Lindley MR introduced into the law the requirement that the squatter should not merely be in actual possession but that he must also demonstrate an intention to possess or *animus possidendi*.

5.2 That case concerned land adjacent to the now celebrated Penny Lane in Liverpool. The Plaintiffs had a right of way from Penny Lane over a strip of land to their own field. They had 12 years before erected locked gates at each end of the strip. The Court of Appeal held that they had not acquired title; the gates had been put up to protect the right of way and not to exclude the owner:

*"When possession has to be inferred from equivocal acts, the intention with which they are done is all important."*⁵

5.3 Littledale was followed in George Wimpey v. Sohn [1967] Ch. 487, where a hotel had a right to use an adjacent garden and had fenced it off from the road. The Court of Appeal held that this was an equivocal act explicable in terms of the desire to keep the public from straying from the road into the garden.

5.4 It can be seen that between them Leigh v. Jack and Littledale introduced into the law the potential for some very nice distinctions:

- that between acts of user and acts of possession;
- that between excluding the public and excluding the owner;

⁴ Limitation Act 1980, Schedule 1, para. 8(4).

⁵ In a recent article, Oliver Radley-Gardner has demonstrated that the concept of *animus possidendi* was imported into English jurisprudence from the German jurists of the late 19th Century and is not found in earlier English cases – "Civilised Squatting" (2005) 25(4) Oxford Journal of Legal Studies, page 727.

- how you can demonstrate an intention to exclude the owner when you know you can't;
- the question as to what state of mind is inconsistent with an intention to possess (e.g. a willingness to pay if asked or to leave if asked or to accept directions from the owner);
- the difference between intention and motive.

6. **The case of Powell v. Macfarlane (1979) 38 P&CR 452.**

6.1 In 1977 Slade J. tried to make sense of the law in a much admired judgment. In 1952 a civil servant had bought a field and had it planted with Christmas trees. He was then posted abroad and did not come back for over 11 years. In 1956 a 14 year old boy decided to use the field to graze the family cow called Kashla:

“From 1947 onwards Mr. Bishop, who had sold the rest of his herd, retained a cow called Kashla. It seems to have been a remarkable cow; it lived on until 1968 and provided the family with milk until about 1966. The Plaintiff, from about the age of 8 onwards, did everything for it. He put it out to grass in the morning; he milked it during the day and bedded it at night; it was known by his family and friends as “Ted’s cow”.”

6.2 The case turned on *animus possidendi* Slade J. held that the Plaintiff's acts were not necessarily referable to an intention to dispossess the owner, but were acts done with a view to taking various profits from the land, in particular grass and hay for the cow and occasional game.

6.3 Slade J. defined *animus possidendi* as:

“the intention, in one’s own name and on one’s own behalf, to exclude the world at large, including the owner with the paper title, so far as was reasonably practicable and so far as the processes of the law would allow.”

He also held that the Courts would require clear and affirmative evidence that the intruder not only had the requisite *animus possidendi* but made such intention clear to the world.

7. The case of Pye v. Graham [2003] 1 AC 419

7.1 Mr Graham had enjoyed a series of grazing licences of 58 acres in Berkshire which adjoined his own farm. When the last licence expired at the end of 1983, he asked for a renewal but it was at first refused. He continued to use the land and was permitted to take a cut of hay in 1984. He then asked for further renewals; his letters were not answered but he continued to farm the land. In June 1997 he registered cautions. In January 1999 the owner brought proceedings for possession.

7.2 Neuberger J held that he had been in adverse possession since September 1984; the Court of Appeal held that he had not shown the necessary intention to possess; the House of Lords held:

- (1) To establish factual possession the squatter has to show the absence of the paper owner's consent and such acts as demonstrated that he had dealt with the land as any occupying owner of that kind of land might normally be expected to do and that no other person had done so;
- (2) That the requisite intention was not to acquire ownership but to possess and on one's own behalf to exclude the world at large, including the paper owner, as far as was reasonably possible;
- (3) That *animus* can normally be inferred from the acts of possession and is not disproved by evidence that the squatter would have paid or signed a licence, if asked.

7.3 The House of Lords held that the suggestion by Bramwell LJ (see above) that the sufficiency of the possession can depend on the intention not of the squatter but of the true owner was "heretical and wrong". They also stated that

Sir Nathaniel Lindley's statement in Littledale, insofar as it suggested that the relevant intention was an intention to own, was also a "heresy".

7.4 Note that in Pye time had started to run in September 1984 and so the limitation period expired in September 1996. By the time the case reached the Court of Appeal, the Human Rights Act 1998 was in force and it was argued that it applied. The Court of Appeal rejected that argument and subsequent House of Lords authority established that the 1998 Act was not to be applied retrospectively, so the point that section 3 of the 1998 Act applied was not run in the House of Lords. It was however argued that there was a similar common law principle of construction. Lord Browne-Wilkinson brushed this aside tersely by observing:

"Any such old principle of construction only applied where there was an ambiguity in the language of the statute. No such ambiguity in the 1980 Act was demonstrated to Your Lordships."

It is apparent from the judgments of Lord Bingham and Lord Hope that they regarded the existing regime as it applied to registered land as demonstrably unfair and as having produced an unjust result.

8. **The case of Beaulane Properties v. Palmer [2005] 3 WLR 554**

8.1 Mr Palmer had been grazing horses in a field for many years, initially under licence. The Judge held that time started to run against the Claimant in June 1991 and had expired in June 2003, after the commencement of the 1998 Act but before the commencement of the 2002 Act. The question of the impact of the 1998 Act on the interpretation and application of the meaning and application of the 1980 Act was therefore squarely raised.

8.2 The Judge (Nicholas Strauss QC) held:

- (i) That Article 1 of the First Protocol was “engaged” because the practical effect of LRA 1925, section 75 and LA 1980, section 17 was to deprive the owner of his land;
- (ii) That a system of law under which the owner could be deprived of his land without compensation as a result of mere inadvertence was disproportionate interference which could not be justified by reference to any public interest;
- (iii) That the loss of B’s land was therefore incompatible with the Article;
- (iv) That the effect of HRA 1998, section 3 was to require the statutes to be read and given effect to in a way which was compatible with the Article;
- (v) That the statutes were to be read as applying only to those cases in which the trespasser established “possession” in accordance with the case law in 1925; but since the defendant’s use of the land had not been inconsistent with B’s intentions for it, his possession had not been adverse (applying Leigh v. Jack);
- (vi) Alternatively, it might be possible to reinterpret the Acts as *not* precluding the owner from suing in trespass for damages for (a) 12 years’ occupation and (b) the loss of his land!

8.3 Can this be right? Accepting that there is an incompatibility, how can “adverse possession” be re-interpreted so as to revive Bramwell LJ’s approach in Leigh v. Jack which (a) has been said by the HL to have been “wrong and heretical” and (b) has been reversed by statute, and so as to also to revive the pre-1833 law as to “adverseness”, which the 1833 Act was designed to simplify.

8.4 Secondly, this approach will lead to “adverse possession” having a different meaning in the LRA 2002 (which is not incompatible with the Article) and in unregistered conveyancing (where there is also no incompatibility) to that which it has in cases of registered land where the limitation period expired between 1st Oct 2000 and 13th Oct 2003.

8.5 Thirdly, this interpretation only protects the human rights of landowners who have future plans for the property with which the squatter's use is not inconsistent. But what if:

- (a) The squatter's use is inconsistent; or
- (b) The owner has no future plans; or
- (c) The squatter does not know of the owner's plans.

In those cases, the Strauss interpretation does not resolve the incompatibility.

9. **The case of Pye v. UK [2005] 3 EGLR 1**

9.1 Having lost in HL, Mr Pye applied to the European Court of Human Rights alleging that the UK law violated Article 1 of the First Protocol.

9.2 In December 2005 the ECHR held by four to three:

- (i) That the effect of the 1925 and 1980 Acts was to deprive Pye of its beneficial interest and so the Article was engaged;
- (ii) In the absence of any provision for compensation, the provisions imposed on Pye an excessive burden and upset the fair balance between the demands of the public interest and Pye's right to the undisturbed enjoyment of their possessions;
- (iii) The assessment of compensation was reserved.⁶

9.3 The UK Government have applied to have the case heard by the Grand Chamber.

9.4 The dissenting judgment stresses how easily Pye could have stopped time running – by granting a licence or suing for possession – but this would seem to miss the point that Pye had simply not realised that time was running.

⁶ Pye's claim is for £10m land value and £1m costs.

10. **Adverse possession and the LRA 2002 (simplified)**

10.1 The relevant provisions are sections 96 to 98 (Part 9) and Schedule 6 (paras 1 to 15). See also Jourdan, Chapter 22 and Harpum and Bignell, Part 6, Chapters 29 to 33.

Part A – The warning shot

10.2 Section 96 disapplies the 1980 Act by providing that time shall not run against a person in relation to an estate the title to which is registered and, accordingly, his title will not be extinguished.

10.3 Instead, a person may apply to be registered as proprietor of a registered estate if he has been in *adverse possession* for 10 years ending on the date of the application. The application form needs to be accompanied by a statutory declaration evidencing the required period of adverse possession and containing the information required by LRR 2003, rule 188.⁷

10.4 “Adverse possession” has the same meaning (subject to a couple of exceptions) as under the 1980 Act. So all the law about what that means still applies. Express provision is made for successive squatters.

10.5 A person may not make a para 1 application if he is the defendant in possession proceedings or if a judgment for possession of the land has been given against him in the last 2 years.

10.6 On receipt of a para 1 application, the Land Registry must serve notice of it on the registered proprietor, the proprietor of any registered charge, the proprietor of any superior registered estate and any other person registered as a person entitled to be notified.

⁷ See also Land Registry Practice Guide, pg.4.

10.7 Note that HMLR will give notice to the *address on the register*. In view of the serious consequences of not giving a counter-notice, it is vital that landowners notify HMLR of changes of address. **They should be advised to this effect as a matter of course.**

10.8 The LR notice tells the recipient of the application, that the recipient has 65 business days (3 months) to serve a counter-notice and that, if nobody serves a counter-notice, the registrar *must* enter the applicant as the new proprietor of the registered estate.

10.9 If no counter-notice is served in time, HMLR will register the applicant as proprietor of the estate. The effect is that he will become the successor in title of the previous registered proprietor, who will lose any right to sue the squatter for damages for trespass. If the estate is leasehold, the squatter will become liable on the covenants of the lease. He takes subject to all interests affecting the estate except a registered charge.

10.10 The recipient of the LR notice may do two things:

He may object to the application on the ground that applicant has not been in adverse possession for 10 years; and/or
He may serve a counter-notice requiring HMLR to deal with the matter under para 5.

10.11 If a counter-notice is served, the registrar *must reject* the application unless the squatter can establish that he can meet one of the following conditions:

- (i) That it would be unconscionable because of an equity by estoppel for the owner to seek to dispossess the applicant and the circumstances are such that the applicant ought to be registered as proprietor;⁸

⁸ e.g. long acquiescence in the construction of a trespassing building.

- (ii) That for some other reason the applicant is entitled to be registered as proprietor;
- (iii) That the land is adjacent to land belonging to the squatter, the exact boundary has not been fixed, for at least 10 years of the period of adverse possession ending on the date of the application the applicant reasonably believed that the land belonged to him and the estate was registered more than one year before.

10.12 Any dispute as to whether these conditions are met will fall to be determined by the Adjudicator. Note that the Adjudicator is empowered to award a lesser remedy than registration of the squatter to satisfy any proprietary estoppel equity.

10.13 It is a defence to a possession action to prove that you are entitled to make a para 1 application and that, had you done so, the third condition (reasonable mistake as to boundary) would have been satisfied.

Part B – The second bite at the cherry

10.14 Where the squatter's para 1 application is rejected he may make a further application (under para 6) provided that he has remained in adverse possession from the date of the application until the end of 2 years from the date of its rejection.⁹

10.15 In the absence of any sound objection, the applicant is entitled to be registered as proprietor unless:

- (i) He is defendant to possession proceedings started within 2 years of the rejection; or
- (ii) Judgment for possession has been given against him in the last 2 years; or

⁹ For the supporting statutory declaration, see LRR 2003 rule 188(3). The registrar will give notice to the usual suspects (see above), who have 15 days to object.

- (iii) He has been evicted pursuant to a judgment; or
- (iv) The registered proprietor is under a disability.

10.16 To protect his position, therefore, the proprietor who has rebuffed a para 1 application *must sue for possession* **or** legitimate the squatter's occupation by licence or tenancy, within the 2 year period. Note that any proceedings must be prosecuted. If they are struck out or discontinued and the 2 year period expires, the owner loses his land.

10.17 A judgment for possession ceases to be enforceable after 2 years if, at the end of that period, the Defendant is entitled to make a para 6 application. So it is a defence to the possession claim to prove:

- (a) That possession proceedings were not brought within 2 years from the rejection of the para 1 application; or
- (b) That a judgment obtained in such proceedings has not been enforced for 2 years.

In either case the Court *must* order the registrar to register the squatter as proprietor.

Part C – Squatter's rights and third parties

10.18 On first registration, the registered proprietor will take subject to:

- (a) The rights of any squatter who has been in possession for the requisite period, provided that he is in actual occupation;
- (b) The rights of squatters not in occupation of which he has notice.

10.19 The disponee of a registered estate will be bound by the squatter's right to apply to be registered under Schedule 6 only if:

- (d) The squatter is in actual occupation; **and**
- (e) Either he knew of the squatter's occupation or the squatter's occupation would have been obvious on a reasonably careful inspection.

Part D – Transitional

10.20 Where a registered estate in land was held in trust by virtue of LRA 1925, section 75 immediately before 13th October 2003, the squatter is entitled to be registered as proprietor. He also has a defence to a claim for possession. Any Court which determines that he is entitled to that defence must order the registrar to register him.¹⁰ This right to be registered replaces the statutory trust imposed by section 75, which has been repealed.

¹⁰ LRA 2002, Schedule 12, para 18.