

legal update

Your digest of recent chancery and commercial cases

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legal update is edited by

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Human rights and adverse possession

J A Pye (Oxford) Ltd v The United Kingdom

James Thom QC



Robert Levy

In two recent cases the law of England and Wales relating to the barring of title to registered land, as it was before the commencement of the relevant provisions of the *Land Registration Act 2002* (13 October 2003), has been held not to comply with the European Convention on Human Rights. However, because the cases fell on different sides of the date of commencement of the *Human Rights Act 1998* (2 October 2000), the consequences were radically different.

■ Background

In *J A Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 (HL) the Claimant property developer ("Pye") lost its claim for possession of 25 hectares of agricultural land, which was registered land, against the Defendant farmers ("the Grahams"). Pye had allowed the Grahams to occupy the land under a grazing agreement, but when Pye refused to extend the agreement the Grahams carried on using and occupying the land. It was held that the Grahams had been in possession of the land for 12 years before the action was brought. As a result, Pye's title to the land was extinguished (*section 17, Limitation Act 1980*) and the land was held on trust for the Grahams, who were entitled to have themselves registered as proprietors (*section 75, Land Registration Act 1925*).

The Court of Appeal ([2001] Ch 804) had decided that the Grahams were not in adverse possession, because they hoped to obtain Pye's agreement to their occupation. The House of Lords apparently put an end to a heresy, contained in a number of Court of Appeal decisions following *Leigh v Jack* (1879) 5 Ex D 264, to the effect that the squatter's occupation of the land was not sufficient unless it conflicted with the use or intentions

of the paper owner: the issue was simply whether the squatter had physical possession and the intention to possess; the requisite intention was not an intention to own or acquire ownership, but an intention to possess and to exclude the world at large, including the paper title owner, so far as possible; it was not, therefore, inconsistent with possession by a squatter that he was willing, if asked, to pay the paper owner for his occupation.

It was plain from the speeches of Lords Bingham, Browne-Wilkinson and Hope that the members of the Judicial Committee felt driven to reach a result which they thought was unjust; they noted that the law had been altered to protect landowners against inadvertent loss of title to squatters by the *Land Registration Act 2002* (see *sections 96 to 98 and Schedule 6*), but that this did not apply at the relevant time. They also noted that Pye conceded that the *Human Rights Act 1998* (which was not in force at the time of the trial) did not have retrospective effect, with the result that the construction of the 1980 Act could only be affected by the Convention if there was ambiguity, and there was none.

■ Pye - The ECtHR Application

Pye then made an application to the European Court of Human Rights, alleging that the rules of law by which they had lost their land operated in violation of Article 1 of Protocol Number 1 to the European Convention.

This reads 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.

■ Land Registration Act 2002

Sections 96 to 98 and Schedule 6 came into force on 13 October 2003. The new law excludes the existing limitation periods and provides that after 10 years a squatter can apply to be registered as proprietor. Notice of the application is given to the paper owner, and if the paper owner objects, the application will be dismissed unless one of the specified exceptions applies. However, if the paper owner thereafter allows two years to go by without claiming possession the squatter will be able to acquire title. Thus a paper owner can still lose his land; but, outside the exceptions, this will only happen through inaction after notice has been given.

■ Beaulane Properties v Palmer

While Pye's application was pending before the ECtHR *Beaulane Properties v Palmer* [2006] Ch 79 came for trial before Mr Nicholas Strauss QC, sitting as a Deputy High Court Judge. In that case the squatter had completed 12 years of adverse possession after the *Human Rights Act 1998* had come into force, but before the commencement of *Land Registration Act 2002*. The Deputy Judge held that the combined effect of the 1925 and 1980 Acts was to deprive the paper owner of his property without compensation, and that this would be a breach of Article 1. He was unable to read the legislation as conferring a right to compensation.

Accordingly, it was his duty to construe the legislation as far as possible as compatible with the Convention. The solution which he adopted was to construe the phrase "adverse possession", as it had been at the time when the *Limitation Act 1980* was passed, that is to say in accordance with the authorities disapproved in the

Pye case, so that the possession of the squatter had to be inconsistent with the use or intended use of the land by the paper owner. On this basis the squatter had not acquired title.

Thus, in effect, the heresy which the House of Lords had put an end to in *Pye* was reinstated as a means of making the statutory regime compliant with the *Human Rights Act 1998*. This decision was made after an extremely thorough analysis of the statutory history and the authorities, and on that ground alone may well be followed in the High Court.

In view of the ECtHR decision (discussed below), the Deputy Judge's decision that the legislation was not compliant seems unassailable at any level.

■ Pye - The ECtHR Decision

On 15 November 2005 the ECtHR, by a majority of 4 to 3, held that there had been a violation: see *JA Pye (Oxford) Limited v United Kingdom (Application no. 44202/02)*. Pye claimed over £10 million in compensation, including costs of the English proceedings, while the UK Government put the figure much lower. The question of compensation was reserved

The European Court of Human Rights pointed out (at paragraphs 42 to 48) that Article 1 contains 3 related rules: (1) the general principle of peaceful enjoyment of property; (2) the rule covering deprivation of possessions and the conditions which must apply; and (3) the recognition that Contracting States are entitled to regulate the use of land in the general interest. The first rule governs the remaining two, so that both deprivation and limitation of use can only be justified in pursuit of a legitimate aim by proportionate means. In addition, a person should not normally be deprived of property without compensation (paragraph 47).

The UK Government argued that the possibility of loss of title to a squatter was simply an inherent feature of all freehold land, and so the loss did not fall within Article 1. This argument was rejected, because Pye had unqualified ownership until the time when the *Grahams* completed 12 years' adverse possession (paragraphs 49 to 52).

At paragraphs 52 to 57 the court

rejected the Government's submission that Article 1 was not engaged because (a) the 1980 Act prevented access to the court and did not deprive the claimants of property, and (b) the property was lost by the defendants' actions and not those of the State. The court held that (a) section 75 of the *Land Registration Act 1925* did not just prevent access to the court but had the effect of depriving Pye of the land and (b) that it was the legislation which had this effect, and so the State was responsible.

At paragraphs 58 to 62 the court rejected the submission of the United Kingdom that the *Land Registration Act 1925* and the *Limitation Act 1980* merely regulated use, because the Applicants had been wholly deprived of their ownership of land. At paragraph 63 the court recognised that limitation periods are not incompatible with Convention rights, but held that the effect of transferring title required special justification, especially in relation to registered land, where the owner of land is readily identifiable.

In paragraphs 68 to 75 the court considered proportionality. The UK Government argued that the length of the period – 12 years – and the fact that it was easy to stop time running, by granting a licence, suggested that the legislation struck a fair balance. The court accepted the relevance of these factors, but held that they were outweighed by the total loss of property without any compensation, especially in circumstances where the proprietor was easily identifiable and there was no procedure for the landowner to be warned that he was at risk.

In judging proportionality the court took into account the views of the Law Commission and the Land Registry that the former law was unjust, and the fact that Parliament had enacted the 2002 Act to remedy the injustices. The court also took into account the decision of Deputy Judge Strauss QC in *Beaulane* that the legislation was not compatible with Article 1.

The minority considered that the claimants were at fault in that they were property developers and should have been aware of the risks; and it was not an unreasonable burden to expect them to start possession proceedings with 12 years (paragraph 2).

Human rights and adverse possession ~ continued

They also questioned the legitimacy of having regard to subsequent changes in the law (paragraph 3).

■ Further considerations

The decision itself is clear, but a number of further points and questions arise:

- (1) The *Pye* decision of the ECtHR applies in terms to registered land. Does it apply to unregistered land as well? There are strong arguments that a different approach applies to unregistered land: the proprietor is not necessarily identifiable at all, and in addition because title to unregistered land is inherently less certain than title to registered land the public interest in settling the position by imposition of a twelve year limitation period is inherently greater.
- (2) It follows from *Beaulane* that there are three possible statutory

regimes which could apply to any squatters' case involving registered land:

- (a) before 2 October 2000, the *Land Registration Act 1925* and *Limitation Act 1980*, as explained by the House of Lord in *Pye*;
 - (b) between 2 October 2000 and 13 October 2003, those provisions "read down" under the *Human Rights Act 1998*, as laid down in *Beaulane* or any subsequent authority considering the matter; and
 - (c) after 13 October 2003 (and subject to transitional provisions) the *Land Registration Act 2002*.
- (3) Paper owners who lost their title under the law as stated in *Pye* who did not apply to the ECtHR within six months of exhausting their domestic remedies would be

out of time for applying (Article 35(1)). It therefore seems unlikely that there will be a flood of applications for compensation.

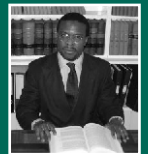
- (4) However, if the advisers of any such paper owner did not at least point out to their clients that there might be an HRA point, it would seem probable that they were negligent.
- (5) If there are still any practitioners who believe that it is possible to ignore the possibility of a human rights dimension to a property case, the *Pye* case is a clear warning that this is not so.

LATEST NEWS... On 24th April 2006, the European Court of Human Rights acceded to the UK's request to have *Pye* referred to the Grand Chamber. The result of this referral is that, in accordance with articles 42 and 44 of the Convention, *Pye* is not to be regarded as a final decision.

Getting at the court record ~ access by all and sundry ?

Dian AO v Davis Frankel & Mead [2005] 1 WLR 2951

Gary Pryce



The offices of the High Court at the Royal Courts of Justice keep registers of claims that have been issued. If a person pays the prescribed fee they may inspect the register during court office hours. Also held by the court are a host of other documents, such as claim forms, statements of case, witness statements and communications between the court and parties to the case or other third parties. This note analyses the extent to which these documents can be obtained by entities which were not party to the proceedings for which these documents were created ('non-parties') for use in subsequent proceedings.

The position regarding "any other person" - a non-party - wishing to obtain copies of documents filed by a party to proceedings from the court records is governed by CPR Part 5 (Court Documents), in particular rule

5.4(5) and paragraphs 4.1 to 4.4 of the Practice Direction supplementing Part 5.

In summary, the material parts of rule 5.4 provide that, unless the court orders otherwise, any other person may obtain from the court records copies of a claim form, a judgment or order made in public. A non-party may obtain from the court records "a copy of any other document filed by a party, or communication between the court and a party or another person" if the court gives permission. It is this discretion to allow a non-party to inspect and copy documents on the court record which has been the subject of a recent judicial consideration.

What requirements and factors are relevant to the court's consideration as to whether and when to grant permission to any other person to see other court documents, such as other

statements of case, witness statements and affidavits?

In *Dian AO v Davis Frankel & Mead* [2004] EWHC 2662 (Comm), [2005] 1 WLR 2951, Moore-Bick J was asked determine an application by a non-party to inspect the court record in proceedings between the above-named parties and to copy any documents it considered relevant.

The proceedings between the above-named parties began in September 1994. The matter was stayed in March 1996 pursuant to a Tomlin order. The non-party's application was made without notice in September 2004. The non-party wished to inspect and copy documents on the court record as it was believed that they would assist it in the conduct of heavy commercial litigation then proceeding in the British Virgin Islands.

Getting at the court record ~ access by all and sundry ?

~ continued

The application began as a broad request to inspect the entire court file in order to identify documents the non-party wished to copy.

However, after court staff erroneously disclosed pleadings to the non-party in the absence of permission from the court, the application was apparently refined and was pursued in a narrower form, with reference to identified documents that the non-party wished to inspect and copy.

Ultimately, Moore-Bick J allowed the application. The non-party could inspect and copy particular affidavits sworn in connection with applications which came before the court and also the statements of case.

The reasoning in *Dian* is of assistance in that it refers to propositions derived from earlier authorities as well as setting out some important guidance which has been considered in subsequent applications under CPR rule 5.4.

The points to note are:

- Under the CPR there is no unfettered right given to the general public to inspect the court record. The court record is not a publicly available register. The primary reason for the maintenance of the court record is to ensure the proper administration of justice. Court records are not open to “all and sundry as a right”.
- Any application made by a non-party for permission to copy documents from the court records should identify with reasonable precision the particular documents or class of documents that the non-party wishes to copy. References to certain classes of documents can be reasonably precise for these purposes if the documents are all likely to be of a similar character, e.g. statements of case. However, reference to for example, “witness statements” as a class of documents to be inspected may not be sufficiently precise

because the character of the documents in that class can vary so widely, so that different considerations may apply or at least those considerations may have different weight as regards inspection of some witness statements but not others.

- The principle of “open justice” as often endorsed by the courts is of the highest importance and the operation of CPR rule 5.4 must be considered against that background. The decision-making process must be open in order to ensure justice is administered properly. The principle allows access to the court record by the general public primarily to monitor the decision-making process during the process of deciding a dispute.
- A non-party has a “legitimate interest” in seeking to inspect documents on the court record if it can demonstrate that those documents may assist it in existing litigation in which it is itself involved. Thus, it need not always be the case that the non-party applicant seeking copy documents from the court record has a direct interest in the decision-making process of the particular claim. The court will consider all the circumstances before determining whether an order for inspection and the provision of copy documents should be made. This includes allowing copy documents to be provided after a claim has been stayed or finally determined.
- Where evidence has been referred to in court or read by the judge as part of the decision-making process, this was an important factor which tended strongly to support granting reasonable access to documents from the court record. However, this access should only be afforded to a non-party who can show a

legitimate interest in inspecting the document on the court record. Hence, the informal presumption created by the fact that a document has been read out or referred to could be outweighed by other relevant factors in appropriate cases.

- If a respondent to a rule 5.4(5) application can show that granting permission to inspect the court file will enable the disclosure of commercially sensitive information to a third party, that will be a relevant factor.
- As regards copy affidavits, statements and documents not read in court or by the judge as part of his preparation for a hearing, the principle of open justice does not apply. Those documents have not formed part of the material on which the judge decides to conduct the hearing or determines the merits of the arguments advanced by the parties. Accordingly, such other documents should not be disclosed routinely but only where “strong grounds” demonstrate it is “necessary” in the interests of justice for inspection to be allowed.
- The principle of open justice would apply to other documents read or referred to in proceedings in chambers, as the mere fact that a hearing takes place in chambers does not necessarily mean that it takes place in private.

The courts are, therefore, inclined to allow applications made under CPR rule 5.4(5), at least where the applicant can show a real and legitimate interest in obtaining a copy of a particular document.

Stephen Smith QC and Robert Levy, both of New Square Chambers, appeared for the non-party in *Dian*.



Nicholas Le Poidevin

From time to time the trustees of family trusts are asked to make a payment to a charity – not where charity is expressed itself to be a beneficiary of the trust but where the trustees have a power of appointment or advancement to benefit a given beneficiary and it is said that a gift to a charity will be for the benefit of that beneficiary.

A century ago, the young squire with a position to keep up was expected to be open-handed to local causes and it was held proper for his trustees to fund such payments as being for his benefit (*Re Walker* [1901] 1 Ch 879 at 887). In the 1960s, the son of the tycoon Charles Clore asked trustees to exercise a power of advancement by paying over a much more significant sum, one-seventh of his prospective interest in capital, to his father's charity; that too was held to be proper (*Re Clore's Settlement Trusts* [1966] 1 WLR 955).

A similar decision was given in 1980 (*Re Leigh's Settlement Trusts* (1980) 19 Tru LI 109, reported only in 2005). There matters rested, so far as reported authority is concerned, until the decision last November of Hart J in *X v A* [2006] 1 WLR 741.

The proposal there was proportionately on a larger scale than in the *Clore* case. There was a life tenant, the settlor's wife, and the trustees also had a power to appoint capital "to or for the benefit of" the wife. Subject to her interest, the fund went on discretionary trusts for the benefit of her children and other issue. The life tenant asked the trustees to appoint the bulk of the fund, about three-quarters of it, to a charity which she and the settlor were keen to support. The settlor was an Anglican priest and they devoted much of what they had to charity. The trustees applied to the court asking whether they could give effect to the proposal. The answer was no.

Clore had established that:

- When exercising a power for the benefit of a beneficiary, the "material situation" of the beneficiary had to be improved; but the requisite benefit was not confined to his

direct financial advantage. It could include satisfying a moral or social obligation.

- If the beneficiary could reasonably regard himself as being under a moral obligation to give to charity, benefiting the beneficiary could include making a donation to discharge that obligation.
- That was not limited to a case in which the beneficiary would come under such pressure that it would be detrimental to his position if the donation were not made.
- But it was essential that the beneficiary himself recognised the moral obligation, so the trustees could not pay away capital over his head.
- The precise amount which could be transferred to charity depended on the circumstances; the whole interest could not have been transferred but the proposed one-seventh was on the right side of the line.

X v A followed *Clore* on those points. It was accepted in *X v A* that "benefit" was a word of wide meaning. But Hart J held that it was not enough (i) that the wife could reasonably regard herself as under a moral obligation to make the proposed donation and (ii) that she did in fact recognise it.

Before the power to make the donation arose, there had to be some sense in which the material situation of the beneficiary was improved. Nothing suggested that the wife would in fact regard her moral obligation as having been discharged if the proposed donation were made: she was anxious to support the charity to the fullest extent within her power.

Since some improvement in the beneficiary's material situation is a limiting factor on the trustees' power, how far can they go? Hart J said that the answer was to be found in "the concrete examples provided by the decided cases and the reliance placed in them on generally accepted norms applicable in the context of dealings

with settled wealth" (*ibid*, para 43).

It will be a bold trustee who can identify those norms and translate them into a figure on a cheque. Indeed, so it seems, the wider the obligation felt by the beneficiary, the less the trustees will be able to give effect to it, since the obligation will not have been discharged. Trustees thinking of a substantial donation to charity will need the protection of a court order.

If they do go to court, they will need to think exactly what they are asking the court to do. The court's rôle when trustees seek a ruling was also the subject of comment from Hart J. It is now pretty well established that there is more than one way in which the court can act (*Public Trustee v Cooper* [2001] WTLR 901 at 922ff.).

One option for trustees who have a discretionary power is to surrender their discretion to the court. The court need not accept the surrender but if it does it then takes the decision as if it were the trustee.

The other option for the trustees is to identify what they want to do and then ask the court to give its blessing. The court's function is limited to ensuring that the proposed exercise is lawful and within the power; that it does not infringe the trustees' duty to act as reasonable and prudent trustees might act; and that the trustees can properly form the view that the proposed exercise is for the benefit of beneficiaries or the trust fund. But then, said Hart J, the court will be cautious: those beneficiaries adversely affected are likely to be at a disadvantage because they will not have had the full disclosure or the cross-examination which they would have had if they were attacking the decision after the event. Doubts about the evidence will be resolved against the proposal.

So *X v A* does not provide definite guidance on quantum in similar cases. It does sound a note of caution on a matter which has not engaged the attention of the courts for quarter of a century.

Nicholas Le Poidevin and Mark Hubbard, both of New Square Chambers, appeared in *X v A*.

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