

Chancery Division

B e t w e e n :

Beaulane Properties Limited

Claimant

-and-

Terence Charles Palmer

Defendant

Judgment

Mr. Peter Knox, instructed by Messrs Vyman, appeared for the claimant;
Mr. Steven Woolf, instructed by Messrs Seakens, appeared for the defendant.

Introduction

1. In this case, the claimant (“Beaulane”) has since 6th October 1992 been the registered owner of a field in Harlington, near Heathrow Airport, which is registered under title no. NGL339357. It is in the Green Belt and it has not so far been possible to obtain planning permission for residential or industrial development. Beaulane claims an order restraining the defendant (“Mr. Palmer”) from entering or using the field. Mr. Palmer’s case is that he acquired adverse title to the land by enclosing it and by allowing his own cattle and horses, and subsequently horses belonging to other people whom he charged £10 per week, to graze on it for in excess of 12 years, ending in October 1998.

2. There is a factual issue as to whether Mr. Palmer’s use of the land was sufficient to found a claim for adverse possession. Mr. Palmer’s case is that he had exclusive possession and control of the disputed field at all times after 1st October

1986, prior to which he was a licensee. Beaulane's case, based on the evidence of several of its witnesses who say that they went past the field, or on it to play cricket, for picnics or for other recreational purposes, is that Mr. Palmer made no substantial use of the land for grazing horses until about the beginning of the year 2003.

3. Beaulane also contends in the alternative that, for a variety of reasons, even if Mr. Palmer had exclusive possession of the land from October 1986, time did not begin to run until the end of June 1991. If that is the position, the 12 year period ended in June 2003 and Beaulane seeks to take advantage of the provisions of the Human Rights Act 1998, which came into force on 2nd October 2000.

4. In J.A. Pye (Oxford) Ltd v. Graham [2000] Ch. 676, Neuberger J. concluded his judgment, which was subsequently affirmed in the House of Lords, dismissing the claim by the registered owner of a field on which the defendant had grazed his horses for over 12 years, ending before October 2000, as follows:

“A frequent justification for limitation periods generally is that people should not be able to sit on their rights indefinitely, and that is a proposition to which at least in general nobody could take exception. However, 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. Illogical because the only reason that the owner can be said to have sat on his rights is because of the existence of the 12 year limitation period in the first place; if no limitation period existed he would be entitled to claim possession whenever he actually wanted the land. Of course one can well see the justification for saying that the owner should not be entitled to recover damages for trespass going back more than six years; that involves rather different considerations. I believe that the result is disproportionate because, particularly in a climate of increasing

awareness of human rights including the right to enjoy one's own property, it does seem draconian to the owner and a windfall for the squatter that, just because the owner has taken no steps to evict a squatter for 12 years, the owner should lose 25 hectares of land to the squatter with no compensation whatsoever.”

5. The new provisions relating to the acquisition of title by adverse possession, which follow the recommendations of the Law Commission, are set out in sections 96-8 of, and Schedule 6 to, the Land Registration Act 2002. However, they were not brought into effect until 13th October 2003. If on the facts of this case Mr. Palmer completed 12 years uninterrupted adverse possession at the end of June 2003, this raises directly the issues as to whether English law relating to adverse possession, as it stood before 13th October 2003, was compatible with the European Convention of Human Rights and, if not, whether the relevant statutory provisions can now be read and given effect to, in accordance with section 3 of the Human Rights Act, in such a way as to make them compatible.

The evidence

6. The disputed land is a field of 2.356 acres situated in an area between High Street and Cranford Lane, Harlington, which is to the north of Heathrow Airport. Its northern boundary runs along Cranford Lane. On the western boundary, there is a residential development in a cul-de-sac called Shortlands. On the eastern boundary is 100, Cranford Lane and its garden. To the south lies another field, referred to by Mr. Palmer as “Slark’s field”, which he first occupied under licence in 1975 and then bought from Mrs. Thelma Slark in 1984. To the south of that field is a property called The Elms, which Mr. Palmer bought in 1976. Most of

his income is derived from letting out converted agricultural buildings on this property to a variety of businesses.

7. The first registered owner of the disputed field was Rekstar Limited, which acquired it in 1978. Before then, planning applications for residential development had been made in 1954, 1963 and 1971. All had been refused. In 1971 there was an appeal, which was rejected, on the ground that it would be inconsistent with the Green Belt policy to permit encroachment on the open area between Harlington and Cranford. A further application was made in 1979, which was also refused; an appeal against that decision was lodged but was subsequently withdrawn.

8. Mr. Palmer has been involved in agriculture since he left school. He first worked for a farmer called Ebenezer Hayward, who had a farm in this area, and it was always his ambition to own land. In 1975, both Slark's field and the disputed field were occupied by Mr. Freddie Jones, who used them to keep pigs and also to carry on a car-breaking business. Mrs. Slark terminated his licence to use Slark's field, and offered it to Mr. Palmer for £3,000, but he could not afford it. On 30th November 1975, she granted him a licence to use it for grazing horses for £4 per week. In 1980, this was increased to £6 per week. In fact, Mr. Palmer used the field for grazing cattle, but Mrs. Slark does not seem to have had any objection to this. The licence required Mr. Palmer to fence the land in a manner approved by Mrs. Slark, which he did. The fence which he put up on its northern boundary, adjacent to the disputed field, carried on the line of the rear gardens of Cranford Lane to the east, and included a gate.

9. Not very long after Mr. Palmer was first granted a licence over Slark's field, Freddie Jones ceased to occupy the disputed field and Mr. Palmer decided to

use it for grazing purposes, leaving the gate open so that his cattle could wander between the two fields. The fence on the western boundary, adjoining Shortlands, was not in a good condition, and he renewed it with a secure fence made up with posts with three strands of barbed wire, of sufficient strength to withstand, as he put it, half a ton of cow wanting a scratch. His evidence is that he regularly maintained this fence until it was replaced in the year 2000; the maintenance consisted largely of replacing strands of barbed wire which had deteriorated through rust. The fence on the Cranford Lane boundary was also in poor condition, although not as bad as the Shortlands boundary, and Mr. Palmer had to do some work to that as well.

10. On 11th February 1983, Mr. M. Tuely of Cluttons, acting for Rekstar, wrote to Mr. Palmer. He referred to his “illegal” grazing, but continued:

“However, the owners have told me that they do not object to this use provided no tenancy is created and I am therefore writing to you let you know that they can continue grazing the land until further notice and that no rent will be charged so that there is no danger of a tenancy being created.”

He asked Mr. Palmer to sign a statement at the foot of a copy of the letter and return it to him.

11. Mr. Palmer went to see another surveyor, Mr. Cole, who wrote to Mr. Tuely to ask whether Mr. Palmer might buy the land. This was not possible, and on 21st February 1983 Mr. Palmer signed the original letter containing the statement:

“I agree that I may use the grazing on the land coloured red on the plan as a tenant at will until further notice, with no rent being paid by me to the owners.”

12. In 1984, Mrs. Slark sold her field to Mr. Palmer, who became the registered owner on 29th March 1984. Mr. Palmer thus became the owner of the two succeeding plots immediately to the south of the disputed field, that is the Elms and Slark's field. In January 1986 outline permission was granted for the use of the disputed field for the provision of six open air tennis courts and a pavilion together with parking spaces for 22 cars. But no development took place and later that year Rekstar agreed to sell the disputed field to CTN plc for £80,000. In anticipation of the sale, Mr. Tuely wrote to Mr. Palmer on 23rd July 1986, referring to the earlier correspondence and asking him to vacate the land by 31st August. Mr. Cole replied on 30th July, stating that Mr. Palmer was prepared to vacate the land at the required time but asking whether, in view of the possible hazards of fly tippers and squatters on apparently unoccupied land, he might leave his present fences on the land until such time as it was re-occupied, rather than when it was sold. Mr. Tuely replied on 20th August to say that there was no objection to Mr. Palmer staying until contracts were exchanged. He then wrote to Mr. Palmer on 1st October 1986, stating that completion was due to take place three weeks later, and asking him to make arrangements for the vacant possession immediately. The transfer from Rekstar to CTN is dated 24th November 1986 and CTN became the registered owner on 3rd December 1986.

13. CTN owned and operated some 50 convenience stores. Its chairman and managing director, Mr. Haresh Patel, gave evidence, and said that CTN had bought the disputed field as a speculation, hoping to get permission for something more substantial than outdoor recreational facilities. He had been to see the field before buying it. At that time, the fences were in reasonable condition, and he did not notice any gaps. He saw 4 or 5 horses grazing in the field. He understood that

there was an arrangement with Mr. Palmer, under which he could use the field for grazing purposes in return for maintaining the fences and hedges. However, he had not spoken to Mr. Palmer himself; his managers had mentioned the arrangement to him, but he could not say whether they had spoken to Mr. Palmer or how they had obtained their information.

14. Mr. Palmer said that he was expecting a visit after October 1986, but none materialised, so he just continued to use the land as before. Nobody disturbed him. It was suggested to him that he made some arrangement with CTN, but he said that he did not and that is consistent with Mr. Haresh Patel's evidence that he "saw no reason to interfere" with the arrangement which he believed had been made with the previous owners and still existed.

15. Mr. Palmer's evidence was that after the correspondence with Mr. Tuely in 1983 his cattle continued to graze in both fields for some time. Subsequently, with no appreciable gap in time, horses replaced the cows, at first three horses of his own and then after a year or two horses belonging to other people, whom he charged £10 per week for each horse. The horses were stabled and fed in Slark's field, but the gate between the two fields was always open and they were free to graze in both fields and did so. This has continued without interruption until today, with usually between 4 and 6 horses at any one time. Thus according to his evidence he has used the disputed field continuously for grazing purposes since Freddie Jones left some time in the 1970s.

16. Mr. Palmer said that he had always maintained the fences surrounding the disputed field in good repair, and had always kept the gate on the corner of Cranford Lane and Shortlands padlocked; the owners of the horses which grazed

on the field were given keys. Otherwise they entered through the Elms and Slark's field. The only other possible means of access to the disputed field, according to his evidence, was by getting through the strands of barbed wire on the Shortlands side, or over the fence on the Cranford Lane side.

17. Mr. Palmer also said that in 1988 he put up a fence on the eastern boundary, effectively reducing the width of the field in the area adjacent to 100, Cranford Lane so that its then owner, who had multiple sclerosis, could lay a path with access to his back door. Previously, the side of the house at 100, Cranford Lane had been the boundary.

18. Mr. Palmer's evidence was supported by a considerable body of other evidence:-

(a) Mr. Robert O'Donnell gave evidence that he and his partner, Pat McKivett, had stabled their horses Owen and Jubbs with Mr. Palmer for the past 15 years, paying £10 per week per horse and that they had always been free to use both fields as the gate was left open. Mr. O'Donnell went there every evening after work to feed the horses, and he and Ms. McKivett spent a lot of time there at weekends. During the whole of the 15 year period, there were other horses stabled there; the total number of horses varied over the period between 4 and 8. The gate on the corner of Cranford Lane and Shortlands was always padlocked; he had a key which he used when he took the horses to Cranford Park. He frequently walked round the fields, and the fences were secured; he had never seen a gap in the fences in the whole of the 15 years. The only access to the disputed field was through Mr. Palmer's other field. Mr. O'Donnell was sceptical about the claim that

the field was used for recreational activities or picnicking; he had never seen this happening, and the field was very rough and covered in horse manure.

(b) Mr. Ronald Wallace lives at Manse Close, which adjoins Shortlands, and he gave similar evidence. He and his wife had paid Mr. Palmer £10 per week for their horse for the last 13 years; there were also other horses, with the owners of which they were friendly. Mr. Wallace said that he or his wife went to the fields twice a day, in the morning to let the horse out and put it into the fields, and in the evening to feed it, put it away and muck out the stables. During the day, the horses wandered from field to field. He confirmed that the gate to Cranford Lane had always been kept padlocked and that the fields were properly fenced. This applied, in particular, to the fence adjoining Shortlands, which he was frequently very close to, when he filled a large bucket of water containing 25-30 gallons for the horses. The only gaps were between the strands of barbed wire. He had never seen anyone apart from the owners of the horses in the field and in particular he had never seen it being used for cricket or picnics, for which it was unsuitable.

(c) Mr. Frank Sherwood has lived at 18, Shortlands for 37 years, and can see three-quarters of the disputed field from his front window. In his witness statement, he said that it had been “almost continually” used for grazing, at first by cows and later by horses, in the time he has lived there. He explained in his oral evidence that he had said “almost continually” because he did not always see horses and cows in the disputed field, as they

were sometimes in the other field, which he cannot see from his house. He said that the changeover from horses to cows took place a very long time ago, possibly as much as 25 years, although he could not be sure that it was quite so long ago. Since then there had been horses, usually between 4 and 6. He was quite adamant that the fence alongside Shortlands had always been in good repair with no gaps. Since he parked his car there, he saw it several times a day; he was a therapist and returned home during the day between visits. Had there been any gap in the fence, he and other residents would have been concerned that horses might escape on to Shortlands and on to the main road. Mr. Sherwood also said that he had never seen anybody in the field other than Mr. Palmer, his son and the horse owners, and he thought that the uneven surface of the field would make cricket impossible. He also confirmed that the gate to Cranford Lane was always kept padlocked.

- (d) His brother, Mr. Philip Sherwood, also gave evidence. He does not know Mr. Palmer except as a local resident. He is a past chairman of the Planning Sub-committee of Harlington Village Association and the author of several books on the history of Harlington. He also represented the Association and the Campaign for the Protection of Rural England on a number of planning applications, including one of the applications in the 1970s on the disputed field. In his witness statement, he said that the disputed field had since at least the mid-1970s always been used on and off for grazing cattle and horses. In his oral evidence he said that, on average, he visited his brother a couple of times a month. Sometimes this would be several days running, sometimes not for a month on end. On these occasions, he would walk to

his brother's house. He also often drove along Cranford Lane. He said that the disputed field had been used for cows and horses ever since Freddie Jones left. He could not say that this was always so, but his impression was that it had been so for most of the time. He could not recall any period of time when there were no animals, but he could not say for sure that there was no such period of time. He said that the fence along Shortlands might not have been very attractive, but it was in sound condition so that the animals could not get out. He had no recollection of any gap in the fence (other than the gaps between the strands of barbed wire); if there was any gap it must have been a very narrow one indeed. He too thought it most unlikely that the field would ever be used for recreational purposes such as cricket and picnics.

- (e) Mr. Paul Daniels has lived at 108, Cranford Lane, four doors away from the disputed field since 1992, and frequently passed it for many years before that, when taking his parents' dogs for exercise in Cranford Park, or when training for competitive athletics or, between 1981 and 1984, on the way to work. He does not know Mr. Palmer personally. His evidence was that he regularly saw horses in one field or the other. As far back as he could remember, that is since about 1981, there had always been some sort of animals, at first cows and later horses, in the field. The field had always been well fenced because of the animals and the gate was always secured. He had never seen anyone using the field for picnics or other recreation. He knew the field as "Terry's field".

- (f) Mr. Syal, who has since September 2003 owned 100, Cranford Lane, which directly adjoins the disputed field also gave evidence. He does not know Mr. Palmer beyond saying hello to him. Of more relevance than his present residence is the fact that, from 1985, he lived with his parents further down Cranford Lane. Since about 1988 or 1989, he had routinely walked down Cranford Lane past the field. For the last 6 or 7 years, he had often taken his small children to see the horses at weekends. His evidence was again that the disputed field had been in almost constant use on a daily basis for grazing since 1985. Although he had not examined the fences, the field appeared to be securely fenced. He could not say whether the gate was padlocked, but it was secured. He had never seen anybody other than Mr. Palmer and a lady horse owner on the field, and he had never seen it being used for any recreational purpose.
- (g) In addition, there were witness statements from two witnesses who were unable to attend court. Mrs. Gladys Whitbread, who is 88 years old, and does not know Mr. Palmer, says in her witness statement that she has lived at 112, Cranford Lane - six doors down from the disputed field - since 1978 and that there have always been animals in the field, first cows and later horses. She also says that the field has always been well fenced because of the animals, and the gate secured. She has never seen anyone using the field for picnics or games. Mr. John Page has lived at 102, Cranford Lane, two doors away from the disputed field, since 1959. He does know Mr. Palmer. He, too, says that the field has always been used for the grazing of animals. As a Neighbourhood Watch co-ordinator, he is aware of any

unusual activity in the area, and he has never seen anybody using the field for picnics or games.

19. CTN owned the field for about 2 years until late 1988 or early 1989. Mr. Haresh Patel said that in that time he sometimes visited it with friends and family for recreational purposes, entering by the gate, including the occasional game of cricket in summer, but that he ceased doing so because the land became overgrown and untidy. In his witness statement he said that he never saw any animals in the field, nor any evidence of Mr. Palmer having maintained the hedges or fences. However, in cross-examination he contradicted this. He said that he did see horses in field and that the fences were in reasonable condition.

20. Mr. Dilip Patel, who is a friend of Mr. Haresh Patel, said that he had participated in the recreational excursions to the field in this period, and that he had not seen any animals grazing on it. He said that they had got in through a gap in the fence on the Shortlands side, not through the gate. According to him, it was later, as the years went by, that the land became overgrown. His brothers, Mr. Naresh Patel and Mr. Shalish Patel also say in their witness statements that they participated in recreational excursions to the field in this period.

21. In about late 1988, CTN went into receivership and its assets were bought by Cavendish & Castle for about £2.5 million. Although there was some due diligence, the transaction was completed within about 10 days, and Cavendish & Castle made no enquiries about the field before completing the purchase. No separate consideration was agreed for the field, but when the field was transferred to Cavendish & Castle, which for some reason was not until 1st March 1991, £5,000 of the purchase price was attributed to it. Cavendish and Castle became the

registered owner at some time between then and September 1992. The field was sold without mineral rights and these were sold separately to another company in April 1989. They were valuable because of possible substantial gravel deposits.

22. The chairman of the board of directors of Cavendish & Castle was Mr. Naresh Patel. A family owned company was a major shareholder. The other major shareholder was his brother-in-law, Mr. Nilesh Patel. Naresh Patel is the oldest of three brothers, including Dilip and Shalish who have been mentioned above. He is also a director of Beaulane, which acquired the disputed field from Cavendish & Castle for £2,000 in late 1992, after it had gone into receivership. He clearly regards the family's ownership of over 2 acres near a major international airport as a matter of prestige as well as great potential profit if one day planning policy changes - even if, as he said, this only happens in his grandchildren's time. I have no doubt that these sentiments were genuine and that he would regard the loss of the disputed land as a serious and undeserved setback.

23. Mr. Allan Taylor, then a director of Cavendish & Castle, obtained advice from a firm of surveyors called G.L. Hearn & Partners in June 1989 as to the prospects of obtaining planning permission for recreational development of the site. They advised that the prospects of obtaining planning permission for indoor sports facilities were poor, as there were no special circumstances to justify an exception to the Green Belt policy.

24. In his witness statement, Mr. Taylor said that in the course of the negotiations with CTN it came to light that Mr. Palmer had some kind of arrangement with CTN, by which he was entitled to use the land for grazing in return for looking after the fences. He had advised the other directors that there

was no harm in renewing the arrangement and it had been renewed. However, in his oral evidence he was very vague as to what the arrangement was and with whom it had been made, and said that he did not know if it had been renewed. He also said in his witness statement that he had been on the field several times between 1988 and 1994, that much of the fencing was broken and missing and that he had never seen any grazing animals. In his oral evidence, however, he said that it was possible that there were horses when he was there, and that he had no recollection of gaps in the fence sufficiently wide for horses to escape through.

25. In March 1991, Michael Placks & Co, a firm of investment and property consultants who had acted for Naresh Patel for many years, instructed another firm of surveyors, the Warner Partnership, to consider the G.L. Hearn report. They advised that the most likely proposition for the use of the land was outdoor recreational facilities or perhaps a garden centre.

26. By this time, Cavendish & Castle was in severe financial difficulties and two other directors, Mr. Alan Bowen and Mr. Lyndon Boyne, went to look at the field to assess whether it had any realisable value. While there, they were surprised to see horses on the field and were told that they belonged to Mr. Palmer and directed to his house. There was a conversation on the doorstep lasting a few minutes, about which there is no dispute. Mr. Palmer understood that he was being asked to justify the presence of his horses on the field. He said that there was an arrangement with the previous owners and implied that it was written by saying that he would look out a copy of the agreement and send it to them so that they could consider it. He also said that he would take legal advice. He did not make it clear that the previous arrangement had not been with the immediately previous

owners, or that it had been terminated so that he had been trespassing for some 4 years. Mr. Bowen and Mr. Boyne said that they would look at the agreement and consider whether to enter into a similar one on behalf of Cavendish & Castle.

27. There is a long passage in Mr. Bowen's witness statement to the effect that he was aware of an arrangement with Mr. Palmer for the use of the land for grazing at the time of its acquisition, and of Mr. Taylor's advice that it should be renewed. His evidence that he was "rather shocked" to see horses on the field is of course quite inconsistent with this, and he said that his witness statement was wrong. He also resiled from three other passages in it emphasising that an agreement was concluded in or after June 1991 between Cavendish & Castle and Mr. Palmer.

28. On 18th April 1991 Mr. Boyne wrote to Mr. Palmer in the following terms:-

"I write following our meeting at your home last week when we were visiting to inspect the field recently purchased by this Company.

I understand from our conversation that you had an arrangement with the previous owners of this field that you would maintain fences and gates in return for being allowed to graze animals in the field. It would be most helpful if you would give me full details of this arrangement so that I can judge whether it would be appropriate for us to make a similar arrangement with you in future ..."

Both Mr. Palmer and Mr. Bowen said in effect that this reflected what had been said in the conversation between them.

29. Not having heard from Mr. Palmer, Cavendish & Castle wrote again on 5th June, referring to his previous letter and continuing as follows:-

“As yet I do not appear to have received a response and I should be obliged if you would let me have the details of the arrangements you had with the previous owner of this field. We would then be able to consider a similar agreement with ourselves for maintaining the fences and gates in return for being allowed to graze your animals in the field ...”

30. Having received no reply, on 20th June they wrote asking Mr. Palmer to remove the horses within 7 days.

31. On 27th June 1991, Messrs. Piper Smith & Basham, solicitors, wrote to Mr. Boyne on behalf of Mr. Palmer in the following terms:-

“We would advise you that (Mr. Palmer) has been in possession of this land and in control of it for a period in excess of 12 years. Mr. Palmer therefore has adverse possession of land which extinguishes any previous owner’s title. He will therefore not be removing the livestock”.

32. Mr. Palmer’s evidence, which I accept, is that Mr. Cole had introduced him to Piper Smith & Basham after he received the letter of 20th June, that they had advised him that he had acquired title by 12 years adverse possession, and that he believed that this was the position until he was advised by other solicitors shortly before October 2003, when he applied to the Land Registry for registration of a title acquired by adverse possession. They told him that the advice he had been given in 1991 had been wrong, because between 1983 and 1986 he had used the land with the owners’ consent.

33. Cavendish & Castle did nothing in response to the letter of 27th June 1991. Neither Mr. Naresh Patel nor Mr. Bowen had any recollection of seeing the letter or any explanation for not replying to it. According to Mr. Bowen, Mr. Boyne has no recollection of it either. It is possible that the letter was lost in the post

(Cavendish & Castle's files are no longer available), but the more likely explanation is that, with Cavendish & Castle's increasing financial difficulties, the matter was overlooked. Mr. Naresh Patel's evidence, which I also accept, is that he understood that the matter was being taken care of, and that there was some kind of arrangement with Mr. Palmer. This would account for his inaction.

34. Cavendish & Castle went into receivership early in 1992, and Beaulane bought the field from the receiver for £2,000 in September 1992. Mr. Naresh Patel did not know that it was necessary to do anything about the field, and thought that the arrangement which he believed was in existence would just continue. In April 1993 and again in June 1994, Michael Placks & Co wrote to firms which might be interested in purchasing the field with information about it, saying on each occasion that it was presently used for grazing purposes.

35. On 28th September 2000, a firm called Land Use Consultants, which was employed by the Green Corridor Partnership on the Harlington Project Landscape Management Plan, wrote to Mr. Palmer as the proprietor of the field, as they believed, to propose that landscape improvement consisting of planting and new fencing works. The Green Corridor Partnership was a public sector project which sought to improve the environment in areas adjacent to the A4/M4. Mr. Palmer agreed and the work was completed by the end of May 2001. New hedges were planted, a new and higher fence was erected along part of the Shortlands boundary and the fencing was improved in other areas.

36. On 11th February 2003, Mr. Placks wrote another letter seeking to interest a firm called Galliard Homes in a possible purchase of the land. Again, he said the land was presently used for grazing purposes and on this occasion added that

“there is a squatter on the land at the present which the vendor is about to deal with”. Mr. Placks confirmed in the course of his evidence that he was referring to the person who was using the land for grazing purposes and said that he had this information from Mr. Naresh Patel or Mr. Taylor. Mr. Naresh Patel denied that he was aware at this time that Mr. Palmer was a squatter. Mr. Taylor was not asked about this. It seems likely that, by this stage, someone at Beaulane regarded Mr. Palmer as a trespasser.

37. On 6th October 2003, Mr. Palmer applied to the Land Registry for first registration of title by adverse possession. This led to the present proceedings being brought by Beaulane on 15th January 2004. The proceedings before the Land Registry have been adjourned.

38. As stated above, Mr. Palmer’s case is that throughout the period after 1st October 1986, when Cluttons terminated his licence, he simply continued to use the field and treated it as his own, enclosing it with fences and dealing with the owner of 110 Cranford Lane as he saw fit.

39. Beaulane’s case is that Mr. Palmer made no or no significant use of the land, from 1988, or at least from 1991, onwards. It was only after Land Use Consultants’ renovation of the fences in 2000-1 that the field was again fit to be used to keep horses in and horses were only kept in it from early 2003. I have already referred to the evidence of Naresh Patel and Dilip Patel relating to the period of CTN’s ownership. There was further evidence relating to the period between late 1988, when Cavendish & Castle acquired the field, and 2000, to which I now refer.

40. Mr. Naresh Patel said in his witness statement that, from 1988, he drove past the field at least 5 times a year on his way from his firm to his office in Colnbrook, and that on at least another 5 occasions each year he would go out of his way to visit and enter the field with members of his family or business acquaintances. On these occasions, he never saw any animals grazing on the field and the fencing along the Shortlands boundary was in a very poor state and large parts of it missing, so that residents of Shortlands could easily walk onto the field. There was a gap of 5-6 feet on the Shortlands boundary. Further down on that side, the fencing was virtually non-existent, so that the owners of the adjoining houses had free access to the land. There was a lot of litter strewn across it and on occasions he saw evidence of rubbish being dumped on it. Then, in about 2000, he saw that hedges were being planted and new fencing constructed and from about the beginning of 2003 he noticed that small ponies were regularly in the field. In cross-examination, he said that in the earlier period he had seen horses grazing on the other side of the fence between the field and Mr. Palmer's field, and had not noticed whether the gate was open. He did not accept the suggestion that the fences round the field were reasonably well maintained and were sufficient to keep the horses in. Asked why he did not do anything about the unsatisfactory state of the fences, since as he believed Mr. Palmer was supposed to be maintaining them, he said that he never thought about it.

41. Mr. Taylor said in his witness statement that he visited the field with Naresh Patel on approximately 4 or 5 occasions between 1998 and 1994, spending about half an hour walking on it and around the borders with a view to a possible sale or development. On those occasions, he saw no evidence of animals grazing on the land and noticed that much of the fencing was broken and missing allowing

free access. In cross-examination his evidence altered slightly on the question of the horses; he said that it was not impossible that there were animals in the field when he was there. He also significantly altered his evidence about the fencing, saying that he had no recollection of gaps in the fence which would be sufficient to enable horses to escape. I have already referred to this evidence at para. 24 above.

42. Mr. Plack's evidence, both in his witness statement and in cross-examination, was to the effect that he – like Naresh Patel – believed that some kind of licence arrangement existed. On the first occasion when he went to the field, in about March or April 1991, he saw horses grazing and this, together with what he had been told, was the basis for the statement in his letters to possible purchasers that the field was used for grazing purposes. However, on the subsequent occasions when he went to look at the land - two or three in all after 1994 – he saw no animals on it, and it had become overgrown and unkempt.

43. I have already referred to Dilip Patel's evidence relating to the period of CTN's ownership. He also says in his witness statement that after this he had been asked from time to time to keep an eye on the land and that he passed it on average once a month on his way to Colnbrook and in addition made specific visits with one of his brothers or his brother-in-law Nilesh Patel. He never saw any animals grazing on it, and as the years went by the field became overgrown, the hedges and fences were in a poor state and the land was littered. He noticed new fencing around the year 2000, and a few ponies roaming on the land from early 2003 onwards. In cross-examination he said that he had been there to play cricket or have a picnic on a couple of occasions in the 1990s: there were animals in the field

to the south but not on Beaulane's field. The fences were broken and had fallen apart: there was free access to the field.

44. His brother, Mr. Shaleesh Patel, gave very similar evidence of occasions when he passed by the field, and other occasions when he went on to it with another member of the family, walking around it for half an hour or so. Again, his evidence is to the effect that there were no animals grazing on it until early in 2003, and that the fences were "very dilapidated and had many open gaps". In cross-examination, he said that the gaps on the Shortlands side were sufficient for two people side by side to walk through, or even for a car to drive through.

45. Mr. Nilesh Patel is a 50% shareholder in Beaulane and is Naresh Patel's brother-in-law. He lives in Kenya, but visits this country regularly as his wife and children live here. He too gave evidence that on his visit, to the field, once or twice a year, there was no evidence of animals grazing and the fences on one side were dilapidated and missing in parts, giving free access to the field. He could not envisage animals safely grazing on the field, as they could easily have strayed onto the road. The field had only been maintained in the last two or three years. Small horses had been there more recently than that, and in his view had been placed there deliberately in order to try to demonstrate use of the land for grazing purposes for the last 12 years. Broadly, he confirmed his evidence in cross-examination, although he was somewhat vague as to the size of the gaps in the fence, saying at different times in his evidence that he did not notice a gap of sufficient size to enable a horse to get through, that there was a gap of two or three feet and that there was a gap which was sufficient for two people to walk onto the field side by side.

46. Finally, Mr. Bahrat Patel, a friend and business partner of Naresh Patel, said that he went to the field at least 5 or 6 times between 1993 and 2000, with Naresh or Nilesh Patel or others. In his witness statement, he said that the field became overgrown, with the grass reaching his knees, and the fencing was in disrepair. In cross-examination, he said that it was easy to walk straight onto the field through gaps in the fence.

Adverse possession

47. It is not necessary for me to deal with the law relating to adverse possession in any detail, because it is not in issue; the dispute between the parties on this issue is one of fact. The law is clearly stated by the House of Lords in Pye [2003] 1 A.C. 419, in which the earlier decisions of Slade J. in Powell v. MacFarlane [1977] 38 P. & C.R. 452 and of the Court of Appeal in Buckinghamshire County Council v. Moran [1990] Ch. 623 were upheld. Put shortly, in order to establish a possessory title, the trespasser must show (a) that, without the consent of the registered owner, he had sole and exclusive possession and had carried out such acts as demonstrated that, in the circumstances and having regard in particular to the nature of the land and the way it was commonly used, he had dealt with it as an occupying owner might normally be expected to do, and that no other person had done so, and (b) that he had the requisite intention, that is to possess the land on his own behalf and in his own name and to exclude everybody else, including the registered owner, so far as was reasonably possible.

48. It is common ground that, if Mr. Palmer's evidence is accepted in its entirety, he has had exclusive possession of the disputed field since he became a

trespasser in October 1986 as a result of providing secure fencing, padlocking the only entrance to the field other than the one from his own property, allowing horses to graze on it daily, agreeing to the work proposed by Land Use Consultants and in effect giving away a small portion of the land to the neighbour. Clearly, if his evidence is correct, Mr. Palmer also had the requisite intention. Indeed, it is accepted that, as a result of mistaken legal advice, he believed from 1991 onwards that he was the owner. However, Mr. Knox submits that Mr. Palmer's evidence is substantially untrue, that prior to Land Use Consultants' work the fences were not secure and that at the latest shortly after July 1991 horses ceased to graze on the field and did not do so again until about early 2003. If that is so, Mr. Palmer's belief that he owned the land could not by itself establish adverse possession.

49. Thus on this issue there is a stark conflict of evidence. I accept the evidence of Mr. Palmer and his witnesses summarised at para. 18 above. As Mr. Woolf submitted, it is overwhelming. For example, Mr. O'Donnell and Mr. Wallace were clearly honest witnesses and they can hardly have been mistaken when they said that they had paid for their horses to graze in both fields for some 15 and 13 years respectively. The same is true of all Mr. Palmer's other witnesses. I also consider it to be inherently improbable that Mr. Palmer, who was undoubtedly grazing cattle or horses on the disputed field between 1983 and 1986 and again in 1991 would have ceased to do so between 1986 and 1991 or after 1991 as would be so on Beaulane's case. His income was derived from letting out different parts of his property to a variety of people and after 1991, as a result of his solicitors' mistaken advice, he believed that the disputed field was his

property. Both these facts make it highly likely that he continued to use the field throughout.

50. I accept that Beaulane's witnesses may on occasions have seen the disputed field empty, because the horses were in the other field. But beyond that I do not accept their evidence either as to the absence of horses or as to the defective fencing. In my judgment Beaulane, having no present use for the land, was content to allow the vague arrangement, which Mr. Naresh Patel believed was in existence, to continue.

51. Mr. Knox submits that Mr. Palmer's evidence should not be believed, because he has produced accounting records showing receipt of rent for grazing only for the year 2000 onwards. In fact, even this evidence is inconsistent with Beaulane's case, which is that there were no horses grazing on the field until about 18 months before the witness statements i.e. in early 2003: see for example Naresh Patel para. 21 and Dilip Patel para. 7. Mr. Palmer said, and I accept, that the records for earlier years had been kept in small notebooks which were destroyed after the accountants had prepared the figures. I do not find this surprising: this income (about £2,000 or £3,000 per annum) was not large. Mr. Knox also submitted that Mr. Palmer's overall turnover reduced considerably during the 1990s, and that this was consistent with income from grazing ceasing after 1991. Asked about this in cross examination, Mr. Palmer was unable to give detailed explanation, but I am not persuaded that this point casts any doubt on his evidence as to the continuing receipt of income from grazing. The drop in income was far larger than the income from grazing, and there must on any view have been other factors in play.

52. Accordingly, I find that, subject to the issues relating to the interruption of adverse possession between April and June 1991, to which I now turn, Mr. Palmer has established his case that he has had exclusive possession of the disputed field since October 1986.

Interruption in April-June 1991

53. Mr. Knox submits that Mr. Palmer cannot rely on any of his acts of trespass before the end of June 1991, when the 7 days notice given in the letter of 20th June 1991 expired. He puts his case in 5 separate ways.

54. He submits first that what Mr. Palmer told Mr. Bowen and Mr. Boyne in early April 1991 was true. He had in fact made an arrangement with the previous owners – meaning the immediate previous owners, CTN – by which he was permitted to graze the horses in return for maintaining the fences. This, it was submitted, created an overriding interest binding on Cavendish & Castle, which continued it until 27th June 1991.

55. Mr. Knox relied on Mr. Palmer's evidence that he vaguely recollected having a conversation which took place on the field with somebody representing the owners, and submitted that it is to this that Mr. Palmer must have been referring in the discussion in April 1991. Further, he cannot have been referring to the arrangement which ended in October 1986, because the letter of 18th April 1991 refers to a bilateral arrangement, under which Mr. Palmer was allowed to graze animals in return for maintaining the fences; this had not been a condition of the arrangement with Rekstar.

56. However, Mr. Palmer was adamant that nobody had contacted him after October 1986 and that the conversation which he recollected had taken place earlier than this. I accept his evidence. The only direct evidence to support the existence of any arrangement with CTN was that of Mr. Naresh Patel, to which I have referred at para. 33 above. Not only was this very vague, on any view, Mr. Naresh Patel did not deal with the matter himself. I am sure that Mr. Palmer did refer to maintaining the fences “in return”, but I think that he was referring to what he in fact did in return, rather than to this having been part of what had been agreed with Cluttons on behalf of Rekstar.

57. Secondly, Mr. Knox submits that Mr. Palmer is estopped from denying that he had an arrangement with CTN. I accept that Mr. Palmer represented that he had such an arrangement, but on the balance of probabilities I do not consider that Cavendish & Castle would - as Mr. Bowen and Mr. Naresh Patel said - have taken legal advice on the situation if they had been told the true position. Cavendish & Castle did nothing in response to Piper, Smith and Bashan’s letter, probably because of other more pressing problems, although that letter clearly should have led to it consulting solicitors; it seems to me unlikely that Mr. Palmer’s silence, or an admission that he had been a trespasser since 1986, would have made any difference. So Beaulane is unable to establish that Cavendish & Castle acted to its detriment in reliance on the representation and is therefore unable to establish an estoppel case.

58. Thirdly, Mr. Knox submits that, if there was no such arrangement, what Mr. Palmer told Mr Bowen and Mr. Boyne amounted to the deliberate concealment of his trespass. I agree with this submission. Section 32(1)(b) of the

1980 Act provides that the limitation period does not begin to run where the defendant has deliberately concealed a fact relevant to the right of action against him. Mr. Palmer said in the course of his evidence that since October 1986 he had expected to be asked to vacate the field and I find that he deliberately told Cavendish & Castle's representatives when they came that he had an arrangement with the previous owner, in order to give the impression that he had stayed on after the land was sold to the present owner, when the truth as he knew was that permission to stay had been given by the last owners but one, and that it had been revoked. I do not think that Mr. Palmer was acting dishonestly; the visit came out of the blue, and he was reacting by trying to buy time so as to be able to get legal advice. Nevertheless, I do not accept Mr. Woolf's submission that this was a case of non-disclosure of facts which there was no duty to disclose, or "lying low" (cf. Topplann Estates Ltd. v. Townley [2003] EWCA (Civ.) 1369 at para. 85) as opposed to active concealment. Mr. Palmer deliberately gave Cavendish & Castle's representatives the wrong impression that he had not trespassed, when he knew that he had: this amounts to the concealment of the act which gives rise to the cause of action and is squarely within section 32(1)(b).

59. I have considered a point which occurred to me on this that, if the arrangement with CTN, even if it had existed, would not have bound Cavendish & Castle, then the effect of what Mr. Palmer said was to conceal the fact that he was a trespasser during CTN's ownership of the field, but to admit that he was a trespasser after that. However, I accept Mr. Knox's submission that, since CTN remained the legal owner of the disputed field throughout the relevant period, the licence would have continued to have effect had it existed, so that Mr. Palmer would not have been a trespasser. I also accept his alternative submission that the

trespass, even if limited to the period up to early 1989, would have been a fact relevant to the right of action. The impression which Mr. Palmer was seeking to convey was that he had an arrangement, permitting him to graze his horses, with the immediately preceding owner.

60. The effect of deliberate concealment is that time does not run until the withheld fact became known, or would if reasonable diligence had been used have become known. The truth did not become known, nor could it have become known, until the evidence in this action was heard. But Mr. Knox concedes that Mr. Palmer's trespass after he received the letter of 20th June 1991 giving him 7 days' notice was not concealed, so that if I accept the evidence of Mr. Palmer and his witnesses (as I do) 12 years adverse possession was completed at or about the end of June 2003. Even if all that had been concealed was trespass up to early 1989, adverse possession would have been completed in early 2001 i.e. still after the Human Rights Act came into force.

61. Fourthly, Mr. Knox submits that the effect of the conversation on the doorstep, and/or of the letters of 18th April and 5th June 1991, was that Mr. Palmer was in possession of the field with Beaulane's permission until 27th June 1991. Mr. Woolf submits that the effect of this conversation was that Cavendish & Castle merely reserved its position; in the meantime Mr. Palmer was neither a licensee or a trespasser. I agree with Mr. Knox on this. In the context of having been told that there was a prior arrangement with the previous owners, the effect of what was said was in my view that Beaulane was prepared to consider carrying on the same arrangement once they saw what it was, and that in the meantime Mr. Palmer could continue to graze his horses. In my judgment, the correct test is, as

he submits, whether Beaulane could have sued Mr. Palmer for damages for trespass in the period between early April and the end of June 1991, and I do not think that it could.

62. Finally, Mr. Knox submits that the letter of 27th June 1991, quoted at para. 33 above, acknowledges Beaulane's title. I reject this submission. The letter refers to "any previous owner's title". This is not an acknowledgment of Beaulane's title. However, since I think that his third and fourth points are right, this makes no difference.

Conclusion

63. For the reasons set out above, I find that, on the basis of section 75 of the Land Registration Act 1925 as normally interpreted, Beaulane became trustee of the disputed field for Mr. Palmer on or about 27th June 2003, as a result of Mr. Palmer's having had exclusive possession of it for the previous 12 years with the requisite intention to exclude everybody else including the registered owner.

Human Rights Act issues

Introduction

64. Having found that, as a matter of English law as normally interpreted, the beneficial ownership in the field was transferred from Beaulane to Mr. Palmer by operation of law in June 2003, after the Human Rights Act came into force, it is necessary to consider the issues raised in relation to this by Beaulane.

65. In essence, Beaulane contends that the effect of section 75 of the Land Registration Act 1925, read together with the relevant provisions of the Limitation

Act 1980, is to deprive it of its property without compensation, in circumstances in which its failure to take action against Mr. Palmer was due to a misunderstanding and inadvertent. Beaulane further contends that where there is a registered title there is no uncertainty as to ownership, and therefore no justification for such provisions, and that they are contrary to article 1 of the First Protocol; the court is therefore obliged by section 3 of the Human Rights Act to read and give effect to the statutory provisions in such a way as to render them compatible with the Convention if it is possible to do so.

66. The first of these issues is likely to be decided by the European Court of Human Rights in an application brought by the Pye companies against the United Kingdom, in which I understand that judgment is expected in about 3 months' time. Unfortunately, this was not appreciated by the parties or by me until after the hearing and the point was very fully argued. When I discovered it, I suggested to the parties that it might be sensible for me not to give judgment on the human rights issues until after the decision of the ECHR was known. Mr. Woolf was content with this, but Mr. Knox submitted that I ought to give judgment for a number of reasons. First, the issues have been fully argued (albeit in ignorance of the impending decision of the ECHR) and the parties are entitled to a judgment in the usual way: there is force in this. Secondly, a judgment of the local court in England might be of assistance to the ECHR. I doubt this, but it is true that there are points of interest which have emerged in the argument before me which, so far as I can see, were not argued before the ECHR. Thirdly, the ECHR's decision will not inevitably be determinative of the issues in this case: this is unlikely but possible since the UK government has made certain points on the facts, to the effect that the Pye companies were to blame for what happened, which are not

exactly the same as those which are made in the present case. In addition, the section 3 point, which arises if the law is incompatible with the Convention, is not an issue before the ECHR.

67. I have decided on balance that to proceed with my judgment is the lesser evil. It may produce a situation in which it is, or may be, inconsistent with a decision of the ECHR, in which event there may have to be an appeal. On the other hand, there is a possibility that the ECHR's decision will not be decisive of the present case. Even if it is, if its decision is that English law is incompatible, a further delay would be caused by my then having to decide the section 3 point. Accordingly, I propose to decide the issues which have been argued before me. I have seen and taken account of the arguments in the ECHR, and have given the parties an opportunity to comment on them.

Limitation and registered land

68. It is necessary to start with a regrettably lengthy discussion of the history of the law of limitation in relation to land, in order to see the process by which, from the passing of the Land Registration Act 1925 until the Land Registration Act 2002 came into force in October 2003, the statutory provisions barring the owner's rights and remedies after 12 years adverse possession have been applied in all circumstances to registered as well as unregistered land. This is relevant, first to an issue as to whether there has been a deprivation of Beaulane's 'possessions' so as to engage article 1 and if so, secondly, to an issue as to whether such deprivation is potentially justifiable as being in the public interest. I have been greatly assisted by a detailed summary provided by Mr. Knox, the accuracy of which has not been challenged by Mr. Woolf.

69. The following points in particular have a bearing on the issues in this case:
- (a) There was a radical change in the law in 1833. Before then, lapse of time barred the owner's remedies, but did not transfer title. By section 34 of the Real Property Limitation Act 1833, the owner's rights were extinguished and the trespasser acquired title to the land.
 - (b) The reason for the change in the law, and other later changes, was that it was for the public good. It did away with burdensome enquiries and difficulties which were encountered in conveyancing transactions generally (not only those in which there was an issue about a possible possessory title), and made conveyancing less expensive.
 - (c) The nature of title to registered and unregistered land differs fundamentally. Title to unregistered land is based on possession, whereas title to registered land is based on the fact of registration. The system of registration was introduced precisely to avoid the uncertainties of the earlier possession-based system.
 - (d) The law relating to adverse possession did not apply to land which was registered under the registration system introduced by the 1862 legislation as amended in 1875.
 - (e) The law relating to adverse possession was however applied in some circumstances under the Land Transfer Act 1897 and in all circumstances to land registered under the new system introduced by the Land Registration Act 1925.

- (f) However, both in 1897 and in 1925, the law relating to adverse possession was very different in its effect from the present law. It would have been highly unlikely, in the then state of the law, for an owner to lose title inadvertently, as has happened in Pye and in this case: see paras. 87-92 below.
- (g) The main reason why the law relating to adverse possession was applied to registered land was to cover cases of disputed boundaries, which are not precisely shown on the register: see paras. 95-101 below.
- (h) This means that (i) the pre-2003 state of the law, by which the registered owner of land can lose it inadvertently and even without fault, was not the result of any deliberate public policy, but rather of an accidental combination of a different public policy in 1925 and later case law and (ii) the main objection to the operation of the law, as explained by Neuberger J. in Pye, and by Lord Bingham of Cornhill in the House of Lords in that case, did not exist as the law stood in 1925.
- (i) In my view, these last points are of some significance in relation to article 1 of the First Protocol, since an expropriation of property without compensation as between private persons can only be justified if it is in the public interest: see James v. U.K., referred to further at paras. 155-6 below.

70. Leaving aside some very early statutory provisions, one can start with the Limitation Act of 1623, which barred the right of entry and so imposed a limitation period of 20 years, on the expiry of which the owner could no longer bring an action to recover the land. But he did not lose his title: see Jourdan on Adverse Possession page 23:-

“Under the Limitation Act 1623, the expiry of the limitation period barred an action to recover the land, but did not affect the true owner’s title. There was no divesting of estate. The remedy was barred, but not the right to the estate”.

71. Since the Act barred the right of entry, it probably had more than a procedural effect: see Holdsworth, History of English Law, vol. 7, pp. 20, 51-2, 69, 80. It is not necessary to explore this further, as the 1833 Act is clear: see paras. 77-9 below.

72. Between 1623 and 1833, the doctrine of ‘adverse possession’ was developed by the common law courts. This was explained by Lord Upjohn in Paradise Beach & Transportation Co. Limited v. Price Robinson [1968] A.C. 1072 at 1082-3 as follows:-

“Onto the Statute of James (the Limitation Act 1623) the common law engrafted the doctrine of “non-adverse” possession, that is to say, that the title of the true owner was not endangered until there was a possession clearly inconsistent with its due recognition, namely, “adverse possession”; so that there had to be something in the nature of ouster. But in practice it was very difficult to discover what was sufficient to constitute adverse possession...”.

73. The First Report of the Real Property Commissioners in 1829 found that

“...the modes by which estates and interests in Real Property are created, transferred and secured, are exceedingly defective, and require many important alterations”. (p.7 of the report).

74. A substantial part of the problem arose from the difficulty which a vendor, whose title depended on possession, had in establishing his title:

“Many titles, notwithstanding long enjoyment, are found unmarketable; and if, after tedious delays, a transaction is completed, the law expenses inevitably incurred sometimes amount to no inconsiderable proportion of the value of the property.” (p.41 of the report).

75. As Mr. Martin Dockray explains in an article in [1985] *The Conveyancer* 272, the reason for this was that to prove title it was not sufficient merely to show 20 years enjoyment of possession. The possibility of adverse claims as the Report stated “render(ed) all titles questionable to the extreme limits ever allowed” and this gave rise to the need to examine titles strictly for up to a century back.

76. The Commissioners’ proposals, which led to the 1833 Act, were intended to facilitate conveyancing and to reduce the expense and uncertainty involved in it:-

“The Commissioners proposed to deal with these difficulties by making the Statute act as a kind of guarantee of security of title. This would be achieved by making the law simple and consistent; there would only be one remedy and one relatively short limitation period which would have a uniform and certain effect. The result would be to diminish litigation, but more important, it would save “vexation and expense” on alienation of land. In a nutshell, shortening and making uniform the period of limitation would shorten abstracts and investigations of title by guaranteeing that outstanding claims were time barred”.

77. For present purposes, it is sufficient to note two important changes. First, by section 2, the right of action was barred 20 years after “the right...to bring such action shall have first accrued”, which was deemed to be “at the time of (the) dispossession or discontinuance of dispossession”. This in effect abolished the

doctrine of non-adverse possession: see per Lord Denman C.J. in Culley v. Doe v. Taylerson (1840) 11 Ad. and E. 1008 at 1015:-

“The effect of (section 2) is to put an end to all questions and discussions, whether the possession of lands, etc, be adverse or not; and if one party has been in actual possession for twenty years, whether adversely or not, the claimant, whose original right of entry accrued after twenty years before bringing the ejectment, is barred by this section.”

See also per Lord Denman C.J. in Nepean v. Doe d. Knight (1837) 894, 911. Nevertheless I will continue for convenience to use the term “adverse possession”.

78. Secondly, not only was the remedy barred, the owner’s right and title was extinguished, by sections 2 and 3 which prohibited not only the bringing of an action, but also the making of an entry or distress with reference back to the time of dispossession or discontinuance of possession, and by section 34 which explicitly provided that at the determination of the period the owner’s right and title to any land or rent for which an entry, distress, action or suit might have been made within the period “shall be extinguished”.

79. The effect of this was not only to prevent the owner or his successors from recovering the land, whether by legal proceedings or by any other means. He also lost his right to claim not only rent but also damages for trespass at any time during the expired period: see Re Jolly [1900] 2 Ch. 616, which was followed in a case governed by the Limitation Act 1980, Mount Carmel Investments Limited v. Peter Thurlow Limited [1988] 1W.L.R. 1078: see further at paras. 167-9 and 217-24 below.

80. The 1833 Act appears to have had the desired effect. By the mid-19th century, the conventional period for proof of title was significantly reduced. The Real Property Limitation Act 1874 reduced the limitation period to twelve years and simultaneously the Vendor and Purchaser Act 1874 reduced the minimum period for proof of title to forty years which, according to Mr. Dockray, coincided with what had already become common practice.

81. In the meantime, the first Land Registry Act of 1862 was enacted. Its purpose was stated in the preamble to be:

“...to give Certainty to the Title to Real Estates and to facilitate the Proof thereof, and also to render the dealing with Land more simple and economical”.

It established the Land Registry, and set up the first scheme for land registration, which was voluntary.

82. What is relevant for present purposes is that, whilst there is no express provision as to whether a registered title under the 1862 Act could be defeated by another person having possession for twenty years, it is implicit in sections 20, 25.5 and 25.6 that the 1833 Act should not operate since as from the date of registration the registered owner was “absolutely and indefeasibly possessed of and entitled to” the estates, rights powers and interests registered in his name “... free from all rights, interests, claims, and demands whatsoever...”.

83. This was consistent with the introduction in South Australia 1858 in the Torrens system, named after Sir Robert Torrens, by which it was not possible to acquire rights over registered land by adverse possession. This system was later

introduced in other parts of the Commonwealth and in some states in the United States: see Law Commission Working Paper No. 37, 1971, p. 29.

84. The Royal Commission of 1870 reported on the 1862 Act, and concluded that it had failed because of the delay, expense and vexation caused by the main principles of the Act, which required the owner to show marketable title, precisely defined boundaries and register partial interests.

85. The Commission further concluded that a new system should be established which avoided these pitfalls by the following means:-

- (a) registering only absolute ownership and leases of more than twenty one years;
- (b) keeping all other partial interests off the register and protecting them only by notices on the register or by the usual enquiries made by a purchaser;
- (c) doing away with the need to register a “technically marketable” title; and
- (d) not attempting to fix boundaries, but leaving the purchaser to ascertain the identity of the land registered in the usual way.

86. Such a system was established by the Land Transfer Act 1875. The details do not matter, but two provisions should be noted. First, section 21 provides that no title to land adverse to or in derogation of the title of the registered proprietor is to be acquired by any length of possession. This explicitly excludes the operation of the Real Property Limitation Acts from land registered under this Act. Secondly, section 83(5) provides that registered land should be described in such manner as the Registrar thinks best calculated to secure accuracy, but such

description is not to be conclusive as to the boundaries or extent of the registered land. So the effect of the Act was to exclude the operation of the Real Property Limitation Acts, even in relation to undefined boundaries. So, if due to an innocent error a hedge was planted 2 feet inside the registered owner's boundary, he did not lose the land inside the hedge for however long the mistake remained undiscovered.

87. In 1879, the Court of Appeal decided the case of Leigh v. Jack (1879) Ex. D. 264, which in effect reinstated, or came very near to reinstating, the doctrine of adverse possession which had been abolished by the 1833 Act. It was held that a use of land by a trespasser, which did not interfere with the purpose to which the owner intended to devote it, did not amount to a dispossession. Bramwell L.J. said at 273:-

“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”.

88. This was followed in later cases, for example Littledale v. Liverpool Corporation [1900] 1 Ch. 19 at 23-4, and in the 1st edition of Halsbury's Laws of England vol. XIX at para. 203, the position was summarised as follows:-

“The true test whether a rightful owner has been dispossessed or not is whether ejectment will lie at his suit against some other person. The rightful owner is not dispossessed, so long as he has all the enjoyment of the property that is possible; and where land is not capable of use and enjoyment, there can be no dispossession by mere absence of use and enjoyment. To constitute dispossession acts must have been done inconsistent with the enjoyment of the soil by the person entitled for the purposes for which he had a right to use it.” (my emphasis).

89. The courts also developed a kind of legal fiction that an owner who did not object to the use of his land was deemed to have implicitly authorised it, so as to prevent any inference of dispossession. This was described in Wallace Cayton Bay Holiday Camp Ltd. v. Shell-Mex [1975] Q.B. 94, in which the Court of Appeal upheld previous authorities in which it had been held that a squatter's occupation which was not inconsistent with the owner's enjoyment of the land was deemed to be with his implied permission. Lord Denning M.R. said at 103:-

“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 continued year after year for twelve years, or more: see *Leigh v. Jack...* The reason is not because the user does not amount to actual possession The reason behind the decisions is because it does not lie in that other'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 license or permission of the true owner by using the land, knowing that it does not belong to him, he impliedly assumes that he never will permit it; and the owner, by not turning him off, implicitly gives permission.”

90. It was not until Powell v. MacFarlane, to which I have referred above, was decided in 1977 that Slade J. expressed a different view, and he was concerned whether, because of decisions in the Court of Appeal binding on him, he could properly follow his own view. As was said by Lord Brown-Wilkinson in Pye at para. 32:-

“Decisions (for example *Wallace's Cayton Bay Holiday Camp...*) appeared to hold that use of the land by a squatter which would have been sufficient to constitute possession in the ordinary sense of the

word was not enough: it was said that such use by the squatter did not constitute “adverse possession” which was required for the purposes of limitation unless the squatter’s use conflicted with the intentions of the paper title owner as to his present or future use of the disputed land. In those cases it was held that the use by the squatter was, as a matter of law, to be treated as enjoyed with the implied consent of the paper owner”. (my emphasis)

91. The implied permission fiction upheld in Wallace’s Cayton Bay was abolished by section 4 of the Limitation Amendment Act, 1980, now the Limitation Act 1980 Sch.1, para. 8(4). Then in 1990 the Leigh v. Jack line of authorities was virtually distinguished out of existence by the Court of Appeal in Buckinghamshire C.C. v. Moran (referred to at para. 47 above) and in 2002 it was emphatically rejected by the House of Lords in Pye. Lord Brown-Wilkinson said as follows:

“35. From 1833 onwards, therefore, old notions of adverse possession, disseisin or ouster from possession should not have formed part of judicial decisions. From 1833 onwards the only question was whether the squatter had been in possession in the ordinary sense of the word. That is still the law, as Slade J. rightly said. After 1833 the phrase “adverse possession” did not appear in the statutes until, to my mind unfortunately, it was reintroduced by the Limitation Act 1939, section 10 of which is in virtually the same words as para 8(1) of Schedule 1 to the 1980 Act. In my judgment the references to “adverse possession” in the 1939 and 1980 Acts did not reintroduce by a side wind after over 100 years the old notions of adverse possession in force before 1833. Paragraph 8(1) of Schedule 1 to the 1980 Act defines what is meant by adverse possession in that paragraph as being the case where land is in the possession of a person in whose favour time “can run”. It is directed not to the nature of the possession but to the capacity of the squatter. Thus a trustee who is unable to acquire a title by lapse of time against the trust estate (see section 21) is not in adverse possession for the purposes of paragraph 8. Although

it is convenient to refer to possession by a squatter without the consent of the true owner as being “adverse possession” the convenience of this must now be allowed to reintroduce by the back door that which for so long has not formed part of the law.

36. Many of the difficulties with these sections which I have to consider are due to a conscious or subconscious feeling that in order for a squatter to gain title by lapse of time he has to act adversely to the paper title owner. It is said that he has to “oust” the true owner in order to dispossess him; that he has to intend to exclude the whole world including the true owner; that the squatter’s use of the land has to be inconsistent with any present or future use by the true owner. In my judgment much confusion and confusion would be avoided if reference to adverse possession were to be avoided so far as possible and effect given to the clear words of the Acts. The question is simply whether the defendant squatter has dispossessed the paper owner by going into ordinary possession of the land for the requisite period without the consent of the owner.

37. It is clearly established that the taking or continuation of possession by a squatter with the actual consent of the paper title owner does not constitute dispossession or possession by the squatter for the purposes of the Act. Beyond that, as Slade J. said, the words possess and dispossesses are to be given their ordinary meaning.

38. It is sometimes said that ouster by the squatter is necessary to constitute dispossession: see for example Rains v. Buxton (1880) 14 Ch. D. 537, 539 per Fry J. The word “ouster” is derived from the old law of adverse possession and has overtones of confrontational, knowing removal of the true owner from possession. Such an approach is quite incorrect. There will be a “dispossession” of the paper owner in any case where (there being no discontinuance of possession by the paper owner) a squatter assumes possession in the ordinary sense of the word. Except in the case of joint possessors, possession is single and exclusive. Therefore if the squatter is in possession the paper owner cannot be. If the paper owner was at one stage in possession of the land but the squatter’s subsequent occupation of it in law constitutes possession the squatter must have “dispossessed the true owner for the purposes of

Schedule 1, paragraph 1: see *Treloar v. Nute* [1976] 1 WLR 1295, 1300; Professor Dockray [1982] Conveyancer 256. Therefore in the present case the relevant question can be narrowed down to asking whether the Grahams were in possession of the disputed land, without the consent of Pye, before 30th April 1986. If they were, they will have “dispossessed” Pye within the meaning of paragraph 1 of Schedule 1 to the 1980 Act.”

92. What is important for present purposes is to keep in mind that, between 1879 and at the earliest 1977 (and perhaps as late as 1990), the doctrine of adverse possession as explained above held sway despite its apparent abolition in 1833. Consequently when, as will shortly be seen, the Real Property Limitation Acts of 1833 and 1874 were applied to registered land in some circumstances in 1897, and generally in 1925, this was against a background in which according to the then prevailing orthodoxy it would be virtually impossible for an owner of land who had not forgotten about it or abandoned it to lose title inadvertently, in the way which later occurred in Pye, and in this and other cases.

93. Returning to the chronological account, after the decision in Leigh v. Jack the 1875 Act was amended by the Land Transfer Act 1897, read together with the Land Transfer Rules. The only relevant provision to which I must refer is section 21, which repeats the general rule excluding the operation of the Real Property Limitation Acts, but permits a person who would, but for these provisions, have obtained the title by possession to registered land, to apply for rectification of register, subject to any estates or rights acquired by registration for valuable consideration under the Land Transfer Acts.

94. Thus, under the 1875 Act, the position was that, once title was registered, it could not be defeated by a person who took possession of the land, for however

long. Under the 1897 Act this was modified provided that there had been no transactions for value.

95. Mr. Knox has referred me to Cherry and Marigold's work on the Land Transfer Act 1897 (Cherry was later the draftsman of the 1925 legislation). In their commentary on section 12, they criticise the operation of the section, in that a person who would, in relation to unregistered land, have gained a possessory title would not be able to register a title, if there had been a transfer for value, until 12 years had elapsed from that transfer. In their view it was

“... not the proper function of a register to show possession, but only to show title. The two things are essentially distinct.”

Therefore, they considered, the limitation provisions should be given their full effects as regards registered as well as unregistered land, and the purchaser of registered land should therefore be obliged to make enquiries as to whether he will get possession of the land as well as legal title.

96. There is force in Mr. Knox's submission that this disregards the purpose of the Land Transfer Acts, and indeed the whole trend of the legislation since 1833, which was to facilitate conveyancing by reducing the scope of the enquiries which a prudent purchaser would have to make before acquiring land. Further, whilst it is not the function of the registration to show possession, the whole object of the registration system was to do away with the uncertainties of the previous possession-based system.

97. It is clear from the examples given by Cherry and Marigold at pp. 191-3 of the general result of what they proposed, namely the application of the limitation

statutes to unregistered land, that they did not contemplate anything like that title could be lost in the kind of circumstances which arose in Pye or this case. Given the decision in Leigh v. Jack, this is hardly surprising. The examples they give are mainly concerned with inaccurate boundary disputes and other conveyancing errors, or cases where the true owner of the land cannot be found.

98. In its Second and Final Report (1911) Command 5483, para. 81, the Royal Commission on the Land Transfer Acts reached the same conclusion as Cherry and Marigold, and recommended at para. 81 that the statutes of limitation

“... should operate with regard to registered land in the same manner as with regard to unregistered land; so that when the title of the registered proprietor has become extinguished by virtue of those statutes, the person who has acquired a title against him should be entitled to an order for the rectification of the register by the substitution of his name as registered proprietor ... the effect of rectification should not be limited in the manner provided by section 12 of the Act of 1897, so as to not affect estate’s rights acquired by registration for valuable consideration, as it appears to us that this limitation deprives the party who has acquired a title under the Statutes of the benefit which these Statutes are designed to give him.”

99. Mr. Cherry had given evidence to the Commission, and what appears still to have been uppermost in his mind was the question of disputed boundaries:

“The statutes of limitation have worked well as regards unregistered land, and my submission is that section 12 ought to be repealed and a provision inserted enabling any person who has acquired a title under the statutes of limitation, or any person claiming under him to obtain an order for rectification if he applies to the Court within 6 months from the time when his title is disputed or received a notice from the Registrar requiring him to confirm his title ... this section seems to be unobjectionable in the case of disputed boundaries, fall, if the statutes do not

apply, enquiries as to the possession would have to be carried back before the date of first registration. If the proprietor of a registered charge obtains a title by possession, the matter might perhaps be dealt with by the Registrar instead of the Court.” (Minutes of evidence p.213 Q 7271).

100. Mr. Cherry gave no other reason as to why the change was desirable, and very similar and more detailed reasons relating to hedges, ditches and boundaries were given by Sir H. Elphinstone (minutes of evidence, pp. 51-2, Q. 4469-4474). As the Law Commission put it in its 1998 Consultative Document, Command 4027, para, 10.20:

“Neither Cherry nor the Commission considered whether there was the same justification for adverse possession in each system.”

101. The Royal Commission’s recommendation was approved in the Fourth Report of the Acquisition Valuation of Land Committee on the Transfer of Land in England and Wales (1919) Command 224, para. 32, and was put into effect by the legislation passed between 1922 and 1925.

102. Section 173 of the Law of Property Act 1922 repealed section 12 of the Land Transfer Act 1897, and substituted provisions which were almost identical to section 75 of the Land Registration Act 1925. This provides as follows:-

“(1) The Limitation Act shall apply to registered land in the same manner and to the same extent as those Acts apply to land not registered, except that where, if the land were not registered, the estate of the person registered as proprietor would be extinguished, such estate shall not be extinguished but shall be deemed to be held by the proprietor for the time being in trust for the person who, by virtue of the same Acts, has acquired title against any proprietor, but without prejudice to the estates and

interests of any person interested in the land whose estate or interest is not extinguished by those Acts.

(2) Any person claiming to have acquired a title under the Limitation Acts to a registered estate in the land may apply to be registered as proprietor thereof.

(3) The registrar shall, on being satisfied as to the Applicant's title, enter the Applicant as proprietor either with absolute, good leasehold, qualified or possessory title, as the case may require, but without prejudice to any estate or interest protected by any entry on the register which may not have been extinguished under the Limitation Acts, and such registration shall, subject as aforesaid, have the same effect as the registration of a first proprietor

(4) If in the opinion of the Registrar, any purchaser or person deriving title under him whose title, being registered or protected on the register, is prejudicially protected by the entry under this section, ought in the special circumstances of the case, to be compensated, the Registrar may award to him indemnity in such amount as he may consider just, in like manner as if such purchaser or person had suffered loss by the rectification of the register:

(5) Provided that no sums shall be payable for indemnity under this section, unless that sum can be paid out of the indemnity fund without recourse to the Consolidated Fund ...”

103. Although this in effect applied the 1833 and 1874 Acts to registered land, it was technically impossible for the registered owner's title to the land to be automatically extinguished without an alteration in the register; the trust imposed on the registered owner in the meantime was intended to achieve the same effect. See the Law Commission's Consultative Document para. 10.17 and the discussion in Central London Commercial Estates v. Kato Ltd [1998] 4 All E.R. 948.

104. Section 75(4) gives no right to the registered owner who has been dispossessed, and appears to be of limited value even to a purchaser, in view of the

decision in Re Cholwood's Registered Land [1933] Ch. 574 that, since the purchasers had bought land which was already subject to the rights of the party which had been in possession of it for 12 years, acquired under the Real Property Limitation Acts, no further loss was caused by the rectification of the register in favour of that party. Therefore, no compensation under section 75(4) was payable to the purchaser. Section 75(4) was in any event repealed by the Land Registration and Land Charges Act 1971 section 15(1)(b) as a provision which was "obsolete or otherwise unnecessary". It is not clear from the provisions of the 1971 Act whether an indemnity is still available out of funds provided by Parliament, in circumstances in which compensation could have been paid under section 75(4), but in any event that section could not provide any compensation for the registered owner for the loss of his land resulting from 12 years adverse possession by another.

105. Under the Law of Property Act 1925, proof of title required under a contract expressing no contrary intention was 30 years; this was reduced by the Law of Property Act 1969 to 15 years.

106. The relevant provisions of the 1833 and 1874 Acts were replaced by the Limitation Act 1939, which provided:-

"4 ...

(3) No action shall be brought by any other 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 ...

5(1) Where the person bringing an action to recover land, or some person through whom he claims, has been in possession thereof, and has while entitled thereto been disappointed or discontinued his

possession the right of action shall be deemed to have accrued on the date of the dispossession or discontinuance. ...

16. Subject to the provisions of section seven of this Act and of section seventy-five of the Land Registration Act 1925, at the expiration of the period prescribed by this Act for any person to bring an action to recover land ... the title of that person to the land or advowson shall be extinguished.

17. No action shall be brought, or distress made, to recover arrears of rent or dower, or damages in respect thereof, after the expiration of six years after the arrears became due.”

107. Thus, the legislation no longer expressly barred the owner’s right of entry but no legal proceedings could be brought to recover the land and title was effectively extinguished, by section 16 in the case of unregistered land together with section 75 of the Land Registration Act in the case of registered land. If the owner sought to enter so as to assert his right of beneficial ownership, he would be a trespasser or, in the case of registered land, in breach of the statutory trust.

108. Sections 15(1) and 17(1) of, and Sch. 1 to, the Limitation Act 1980 replaced the provisions of the 1939 Act, with no change in their effect.

109. I have already referred to the two landmark cases after 1980, Buckinghamshire C.C. v. Moran and Pye. In effect, what Lord Denman C.J. said in 1837 and 1840 (see para. 77 above) again became an accurate statement of the law. Dispossession can occur as a result of actions on the land which are not inconsistent with anything the registered owner wishes to do and which will not be readily apparent to him unless he exercises constant vigilance, or sometimes even if he does.

110. This means, as the Law Commission said in its Consultative Document at paras. 10.4 and 10.6, that the registered owner of land can, according to English law, lose it inadvertently and without being to blame in any way, and that to a person who has no deserving claim to it. The issue is whether that is compatible with the Convention.

Discussion of the Convention issues in Pye

111. I have already set out the views of the judge at first instance, Neuberger J., at para. 4 above. However, the issue was not before him, since the trial of the action took place before the Human Rights Act 1998 came into force on 2nd October 2000.

112. The Court of Appeal allowed Pye's appeal, holding that on the facts Mr. Graham had not established the necessary intention to possess the land, with the result that Pye had not been dispossessed and time had not started to run against it: see EWCA Civ. 217, [2001] Ch. 804.

113. By the time the matter came before the Court of Appeal, in December 2000, the Act had come into force. On the human rights issue, the Court of Appeal took the view (later shown by Wilson v. First County Trust Ltd [2003] UKHL 40, [2004] 1 A.C. 816, to be wrong) that section 3 of the Act imposed a clear obligation on it in respect of the interpretation of the legislation, whenever the activities which formed the subject matter of the appeal may have taken place: see paras. 43(1), 48 and 49. It appears to have been conceded on behalf of the Pye companies that, if they lost the title to registered land in accordance with the principles relating to adverse possession as set out in Buckinghamshire C.C. v. Moran there was no breach of the Convention. As Keene L.J. said at para. 48:-

“The appellant’s eventual position on this aspect of the case was simply that the court should require strict compliance with *Buckinghamshire County Council* ... and the criteria for adverse possession as set out in the case. To my mind, that means that the arguments based on the Human Rights Act add very little, if anything, to the submissions which relate to the pre-Human Rights Act law ... “

114. Nevertheless, at para. 43 Mummery L.J. expressed the view, obiter, that Article 1 of the First Protocol was not engaged and that, even if it was, it was not breached:-

“The only Convention right relied on (the protection of property in article 1 of the First Protocol) does not impinge on the relevant provisions of the 1980 Act. Those provisions do not deprive a person of his possessions or interfere with his peaceful enjoyment of them. They deprive a person of his right of access to the courts for the purpose of recovering property if he has delayed the institution of his legal proceedings for 12 years or more after he has been dispossessed of his land by another person who has been in adverse possession of it for at least that period. The extinction of the title of the claimant in those circumstances is not a deprivation of possessions or a confiscatory measure for which the payment of compensation would be appropriate: it is simply a logical and pragmatic consequence of the barring of his right to bring an action after the expiration of the limitation period.

Even if, contrary to my view, that Convention right potentially impinges on the relevant provisions of the 1980 Act, those provisions are conditions provided for by law and are “in the public interest” within the meaning of article 1. Such conditions are reasonably required to avoid the real risk of injustice in the adjudication of stale claims, to ensure certainty of title and to promote social stability by the protection of the established and peaceable possession of property from the resurrection of old claims. The conditions provided in the 1980 Act are not disproportionate; the period allowed for the bringing of proceedings is reasonable; the conditions are not discriminatory; and they are not impossible or so

excessively difficult to comply with as to render ineffective the exercise of the legal right of a person who is entitled to the peaceful enjoyment of his possessions to recover them from another person who is alleged to have wrongfully deprived him of them. I agree with the judgment of Keene LJ, which I have read in draft.” (my emphasis)

115. Keene L.J. said at para. 46:-

“The starting point for present purposes must be the fact that limitation periods on bringing legal proceedings are in principle not incompatible with the European Convention. The European Court of Human Rights itself has acknowledged that: *Stubbings v United Kingdom* (1996) 23 EHRR 213. That is hardly surprising, since time limits on the starting of legal proceedings are expressly recognised by the Convention itself. Thus article 35(1) requires any application to the European Court of Human Rights to be submitted within six months from the date when domestic remedies have been exhausted. So the process whereby a person will be barred from enforcing rights because of the passage of time is clearly acknowledged by the Convention. This position obtains even though limitation periods both limit the right of access to the courts and in some circumstances have the effect of depriving persons of property rights, whether real or personal, or of damages. Even the latter may in some circumstances be regarded as constituting a “possession”: see *Pressos Cia Naviera SA v Belgium* (1995) 21 EHRR 301. There is therefore nothing inherently incompatible as between the Limitation Act 1980 and article 1 in Part II of Schedule 1 to the Convention.” (my emphasis).

116. The House of Lords reversed the decision of the Court of Appeal on the intention to possess point and reinstated the judgment of Neuberger J: [2002] UKHL 30 [2003] 1 A.C. 419. By this stage, the Pye companies had conceded that the 1998 Act did not have retrospective effect, so that the question of reinterpreting the legislation in accordance with section 3 did not arise. Further, the common law principle of interpretation, that legislation should be construed in

conformity with the Convention did not apply, since the language of the Limitation Act 1980 was not ambiguous: see per Lord Browne-Wilkinson at para. 74.

117. The case is nevertheless important in the present context because of what was said by Lord Bingham of Cornhill at paras. 1-2:-

“... I would echo the misgivings expressed by the judge in the closing paragraph of his judgment: [2000] Ch 676, 709-710.

The Grahams have acted honourably throughout. They sought rights to graze or cut grass on the land after the summer of 1984, and were quite prepared to pay. When Pye failed to respond they did what any other farmer in their position would have done: they continued to farm the land. They were not at fault. But the result of Pye’s inaction was that they enjoyed the full use of the land without payment for 12 years. As if that were not gain enough, they are then rewarded by obtaining title to this considerable area of valuable land without any obligation to compensate the former owner in any way at all. In the case of unregistered land, and in the days before registration became the norm, such a result could no doubt be justified as avoiding protracted uncertainty where the title to land lay. But 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. It is reassurance to learn that the Land Registration Act 2002 has addressed the risk that a registered owner may lose his title through inadvertence. But the main provisions of that Act have not yet been brought into effect, and even if they had it would not assist Pye, whose title had been lost before the passing of the Act. While I am satisfied that the appeal must be allowed for the reasons given by my noble and learned friend, this is a conclusion which I (like the judge ...) “arrive at which no enthusiasm”.”

118. Lord Hope of Craighead expressed similar misgivings at para. 73:-

“The question whether this result is incompatible with the Pye’s rights under article 1 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms was answered by the Court of Appeal in the negative ... It was not pursued before your Lordships. This is a civil and not a criminal case: see my observations in *R v. Kansal (No. 2)* [2002] 2 A.C. 69, 110D-G. Nevertheless it was conceded that section 22(4) of the Human Rights Act 1998 did not apply as this was an appeal against a decision of a court or tribunal which was made before 2 October 2000. The question itself however is not an easy one, as one might have expected the law - in the context of a statutory regime where compensation is not available - to lean in favour of the protection of a registered proprietor against the actions of persons who cannot show a competing title on the register. Fortunately, as my noble and learned friend, Lord Bingham of Cornhill has pointed out, a much more rigorous regime has now been enacted in Schedule 6 to the Land Registration Act 2002. Its effect will be to make it much harder for a squatter who is in possession of registered land to obtain a title to it against the wishes of the proprietor. The unfairness in the old regime which this case has demonstrated lies not in the absence of compensation, although that is an important factor, but in the lack of safeguards against oversight or inadvertence on the part of the registered proprietor.”

The human rights issues

119. I must first consider whether article 1 of Protocol 1 is engaged and if so whether it has been breached. The correct approach can be seen from the decision of the House of Lords in Wilson. Consideration of article 1 proceeds as follows:-

- (a) Did the party seeking to establish the Convention right have sufficient possession of property to bring him within the ambit of the article? This is not an issue in the present case.
- (b) Has there been a “deprivation” of his property?

- (c) Is there any other remedy, such as a restitutionary remedy?
- (d) Was there a legitimate policy justification for the provision?
- (e) Were the means employed by the statute appropriate to the policy objective and not disproportionate in their adverse effect?

120. If there is a breach of article 1, it is then necessary to consider whether English law can be reinterpreted in accordance with section 3 of the Act so as to become compatible with the Convention.

Article 1 of the First Protocol

121. Article 1 of the First Protocol of the Convention provides:

“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.”

122. In Bäck v. Finland, 20th July 2004, which included the adjustment of a debt in accordance with legal provisions protecting debtors, the ECHR set out the general principles at paras. 52-5:-

“52. The Court reiterates that Article 1 of Protocol No. 1 comprises 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 peaceful enjoyment of property. The second rule, contained in the second sentence of the same paragraph, covers deprivation of possessions and

makes it subject to certain conditions. The third rule, stated in the second paragraph, recognises that Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest. The three rules are not “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 defined must comply with the principle of lawfulness and pursue a legitimate aim by means reasonable proportionate to the aim sought to be realised (e.g. Jokela v. Finland no. 28856/95, 44 and 48, ECHR 2002-IV).

53. The notion of “public interest” is necessarily extensive. In particular, the decision to enact property laws will commonly involve consideration of political, economic and social issues. The taking of property in pursuance of legitimate social, economic or other policies may be in the public interest even if the community at large has no direct use or enjoyment of the property. The national authorities are in principle better placed than the international judge to appreciate what is “in the public interest”. The Court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature’s judgment as to what is “in the public interest” unless that judgment is manifestly without reasonable foundation ...

54. The possible existence of alternative solutions does not in itself render the contested legislation unjustified. Provided that the legislature remains within the bounds of its margin of appreciation, it is not for the Court to say whether the legislation represented the best solution for dealing with the problem or whether the legislative discretion should have been exercised in another way (see *James and Others*, cited above, p. 35, 51).

55. An interference with peaceful enjoyment of possession must nevertheless strike a “fair balance” between the demands of the public or general interest of the community and the requirements of the protection of the individual’s fundamental rights. The concern to achieve this balance is reflected in the structure of Article 1 as a whole which is to be read in

the light of the general principle enunciated in the first sentence. In particular, there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised by any measure depriving a person of his possessions or controlling their use. Compensation terms under the relevant legislation are material to the assessment of whether the contested measure respects the requisite fair balance, and notably, whether it does not impose a disproportionate burden on the applicant ...”

123. The third rule, entitling a State to control the use of property, is not an absolute rule. This is demonstrated by Sporrong and Lönnroth v. Sweden (1982) 5 E.H.R.R. 35, in which it was held that expropriation permits and prohibitions on construction, issued for town planning purposes and maintained in force for many years, but not followed by any actual expropriation, did not amount to a deprivation of property within the second rule. Nevertheless, the first rule of article 1, protecting the peaceful enjoyment of property, was infringed because they did not strike a fair balance between the private and the public interest and imposed an excessive burden on the owner of the property.

124. Commenting on this case, in R. (on the application of Trailer and Marina (Levin) Ltd.) v. Secretary of State for the Environment 2004 EWCA Civ. 1480 at paras. 50-1, Neuberger L.J. said in relation to the third rule:-

“50. Where there is no actual or de facto expropriation, the proper approach of the court to a complaint that there has been an infringement of Article 1P1 was spelled out in Jacobsson -v- Sweden (1989) 12 EHRR 56. The ECHR, after explaining why Sporrong was distinguishable, said this at paragraph 55:

“Under the second paragraph of Article 1 of Protocol No 1, the Contracting States are entitled, among other things, to control the use of property in accordance with the general interest by enforcing such laws as they deem necessary for the purpose. However, as

this provision is to be construed in the light of the general principle enunciated in the first sentence of the first paragraph, there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised ... In striking the fair balance thereby required between the general interests of the community and the requirements of the protection of the individual's fundamental rights, the authorities enjoy a wide margin of appreciation."

51. In this connection, it is worth mentioning what, in the context of the Convention, is the exceptional nature of the second paragraph of Article 1P1. It expressly excludes from the ambit of the right granted by the first paragraph any interference which is "deem[ed] necessary" by the state "in accordance with the general interest" (or to secure payment of taxes). This subjective approach to necessity is in marked contrast to the objective requirement of necessity in the second paragraph of Article 8, 9, 10 and 11."

Has Beaulane been deprived of its possessions?

125. On the face of it, it seems obvious that Beaulane has been deprived of the land and that Mr. Palmer has acquired it and that the issue is whether such deprivation breaches its Convention rights. But there are 5 separate arguments to the effect that there has been no deprivation in the Convention sense, and that the second rule in article 1 is not engaged.

(a) Dicta in Pye

126. Mr. Woolf naturally relied on the dicta in the Court of Appeal in Pye, to the effect that the extinction of the owner's title is no more than the logical and pragmatic consequence of the barring of his right and that article 1 is therefore not engaged. He submitted that this case involves limitation provisions, of a kind which are to be found in all or most systems of law, and gives effect to the

legitimate policy of the law, which is to bar the right of a person who has permitted the open use of his land by another for 12 years. The period is reasonable and, to the extent that access to the court is barred, this does not breach article 6(1) of the Convention, since the provisions are proportionate to this legitimate aim: see Stubblings v. United Kingdom (1996) 23 E.H.R.R. 213 at paras. 48-9, 53-4.

127. Mr. Knox points out that what was said on this point in Pye is obiter (as is explicitly stated by Mummery L.J. at para. 37), and that it was against the background of a very different argument. This is so; the Pye companies made concessions in the Court of Appeal which do not appear to be reflected in their argument before the ECHR.

128. Whilst I must attach great weight to the dicta in the Court of Appeal, the matter was seen very differently by Neuberger J. and also by Lord Bingham and Lord Hope; both stated that what was in issue was the obtaining of title by the trespasser at the expense of the registered owner, which is not merely a matter of barring access to the courts. It appears from the arguments that the difference between applying the law relating to adverse possession to registered land in cases of disputed boundaries and applying it to registered land in all cases was not pointed out to the Court of Appeal (see [2001] Ch. at 808), but was to the House of Lords (see [2003] 1 A.C. at 426B). See also the doubt expressed by Arden L.J. in a later case, set out at para. 145 below.

129. In my view, to regard the extinction of title as merely an extension of the limitation provisions, or as merely preventing access to the courts, is not consistent

with the language of the statutory provisions or the context in which they came into existence, or – perhaps more conclusively – with their practical consequences.

130. The background to the statutory provisions is, of course, that possession of unregistered land was always of the essence of title. As the matter is put in the Law Commission’s Consultative Document at para. 10.9 “title to *unregistered* land is relative and depends ultimately upon possession”. Therefore, when the 1833 Act provided for the first time that title to land should be extinguished, this was very much a matter which went to the substance of the right, and not merely to actionability. The object and effect of the Act was to prevent the former owner from asserting his rights in any way, whether in court proceedings or by retaking possession, and also to do away with the need for parties to subsequent conveyancing transactions to have regard to those rights. Again, when the law was extended to registered land in 1925, it was done by imposing a substantive trust obligation on the registered owner in favour of the squatter, with similar consequences not limited to preventing access to the courts.

131. In Fairweather v. Marylebone Property Co. Ltd. [1963] A.C. 510 at 541-2, Lord Radcliffe said:

“Briefly, section 75(1) appears to set out with the purpose of applying the Limitations Acts and, therefore, the statutory consequences of adverse possession to registered land but then goes on to provide that where the estate of a person registered as proprietor would be extinguished, “such estate shall not be extinguished but shall be deemed to be held by the proprietor for the time being in trust for the person who ... has acquired title against any proprietor.” It therefore succeeds in making a provision at the end of the subsection which is wholly inconsistent with the conceptions of the Limitation Acts as previously understood and achieves just that “Parliamentary conveyance” (through the medium of

trustee and cestui que trust) which was denied by the decision in *Tichborne v. Weir* 67 L.T. 735.”

This led the Law Commission to say at para. 10.6 of its Consultative Document that “adverse possession did not merely bar claims, its effect is positive”, and that it could only be justified by “factors over and above those which explain the law of limitation”. Clearly, it did not regard the provisions as merely limitation rules of the usual kind.

132. The decision of the House of Lords in Wilson establishes that whether a statutory provision is to be characterised as depriving a person of his property or as barring his access to the courts to recover does not depend on its wording but on its substantive effect. The issue was whether section 127(1) of the Consumer Credit Act 1974, which rendered unenforceable a loan agreement if the amount of the credit was not correctly stated, was compatible with the Convention. The House decided unanimously that the effect of the provision was to restrict the substantive rights of the creditor by rendering the agreement unenforceable, not to bar access to the court to determine whether or not it was enforceable: therefore article 1 of the First Protocol, but not article 6 of the Convention, was engaged.

Lord Nicholls said at paras. 35-6:-

“35. The distinction between the substantive content of a right and an unacceptable procedural bar to its enforcement by a court can give rise to difficulty in distinguishing the one from the other in a particular case. As a matter of drafting, a restriction on the scope of a right may be framed in several different ways. But the drafting technique chosen by the draftsman cannot be determinative of this issue. Human Rights conventions are concerned with substance, not form, with practicalities and realities, not linguistic niceties. The crucial question in the present context is whether, as a matter of substance, the relevant provision of national law has the effect of

preventing an issue which ought to be decided by a court from being so decided. The touchstone in this regard is the proper role of courts in a democratic society. A right of access to a court is one of the checks on the danger of arbitrary power. In *Matthews v Ministry of Defence* [2003] 1 AC 1163, 1207-1208, para 142, Lord Walker of Gestingthorpe noted that article 6 is in principle concerned with the procedural fairness and integrity of a state's judicial system. Lord Hoffmann observed, at p 447, para. 29, that it should not matter how the law is framed, provided one holds onto the underlying principle, which is to maintain the rule of law and the separation of powers.

36. In the present case the essence of the complaint is that section 127(3) of the Consumer Credit Act has the effect that a regulated agreement is not enforceable unless a document containing all the prescribed terms is signed by the debtor. In my view, thus framed, the complaint does not bring article 6(1) into play. In terms of labels, that is a restriction on the scope of the rights a creditor acquires under a regulated agreement. It does not bar access to court to decide whether the case is caught by the restriction. It does bar a court from exercising any discretion over whether to make an enforcement order. But in taking that power away from a court the legislature was not encroaching on territory which ought properly to be the province of the courts in a democratic society.”

133. When one considers the practical effect of section 17 of the Limitation Act 1980 and section 75 of the Land Registration Act in this case, it seems quite clear that they affect the substantive rights of the landowner. As Mr. Knox submits, if the statutory provisions were restricted to barring access to the courts, Beulane could simply have repossessed the land. If only section 15 of the Limitation Act had existed, since (unlike the 1623 and 1833 legislation) it does not bar the right of entry, Beulane would have had no need to bring this action at all. Its representatives could simply have gone on to the land, shooed any horses on it into Slark's field and shut and barred the gate between the fields. That would have

been that. Any subsequent entry on to the land by Mr. Palmer would have been a fresh trespass.

134. Accordingly, section 17 of the Limitation Act 1980 is not merely a pragmatic extension of section 15. In a case such as the present, where physical repossession would be straightforward, section 15 has little practical significance. At most, it prevents an alternative, and more expensive, route to recovery. Section 17 is the important provision.

135. I also agree with Mr. Knox's submission that, even if this was not a case in which the land could be peacefully repossessed, so that section 15 was the operative section, article 1 would be engaged. The procedural fairness and integrity of the judicial system is not in doubt. At issue is not the reasonableness of the 12 year limitation period but whether there should be a limitation period at all. As this case demonstrates, the parties have access to the court to (as Lord Nicholls puts it) "decide whether the case is caught by the restriction". The issue is not about access to the court to resolve a the owner's claim, but whether he should have to bring a claim at all, when his claim is established on the register.

136. The effect of the legislation as a whole is to deprive the owner of the land of all his rights to it and of any means, whether by taking direct action or by going to the law, of recovering possession of it, and thus to transfer the right to possession and title to the trespasser. Therefore, in my view (subject to the points discussed below), this is properly to be characterised as a deprivation of possession within the second rule of article 1, not as a bar to access to the court within article 6 of the Convention.

137. However, even if article 6 was engaged, there would still be a very similar issue, namely whether the restriction was proportionate to legitimate public policy objectives. The case of Stubbings v. U.K. concerned limitation provisions relating to claims for sexual abuse in childhood. In that context, the Court said:-

“48. The Court recalls that Article 6(1) embodies the “right to a court”, of which the right of access, that is, the right to institute proceedings before a court in civil matters, constitutes one aspect.

However, this right is not absolute, but may be subject to limitations; there are permitted by implication since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention’s requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6(1) if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.

49. It is noteworthy that limitations periods in personal injury cases are a common feature of the domestic legal systems of the Contracting States. They serve several important purposes, namely to ensure legal certainty and finality, to protect potential defendants from stale claims which might be difficult to counter, and to prevent the injustice which might arise if courts were required to decide upon events which took place in the distant past on the basis of evidence which might have become unreliable and incomplete because of the passage of time ...

53. The Contracting States properly enjoy a margin of appreciation in deciding how the right of access to court should be circumscribed. It is clear that the United Kingdom legislature has devoted a substantial amount of time and study to the consideration of these questions. ...

However, since the very essence of the applicants' right of access was not impaired and the restrictions in question pursued a legitimate aim and were proportionate, it is not for the Court to substitute its own view for that of the State authorities as to what would be the most appropriate policy in this regard.

55. Accordingly, taking into account in particular the legitimate aims served by the rules of limitation in question and the margin of appreciation afforded to States in regulating the right of access to a court, the Court finds that there has been no violation of Article 6(1) of the Convention taken alone.” (my emphasis)

138. It does not follow from the decision in Stubbings that all limitation provisions serve a legitimate aim. Even if article 6 was engaged, there would still be issues as to whether the statutory provisions in question, which have the effect of expropriating the registered owner of land because he has not taken steps to stop someone from grazing horses on it, and of giving it to that other person, serve a legitimate public interest and meet the proportionality test.

(b) Delimitation or deprivation?

139. Next it is necessary to consider the argument that article 1 is not engaged, because the statutory provisions delimit Beaulane's right, but do not deprive it of its property. When it acquired the land, it was subject to the existing law, according to which its rights were defeasible in the event of 12 years adverse possession by a trespasser. Accordingly, it is submitted, to apply article 1 would enlarge its rights, rather than protect it in respect of any existing right.

140. This argument would have some force in relation to unregistered land, where, as the Law Commission states at para. 10.9 of the Consultative Document:-

“... Title to *unregistered* land is relative and depends ultimately upon possession. The person best entitled

to the land is the person with the best right to possession of it.”

But it is a more doubtful argument in relation to registered land, where the document states at para. 10.3: “the basis of registered title is the fact of registration” i.e. the person with the registered title does not, or at least should not need to, maintain its title by possession; it is established on the register for all the world to see.

141. The question whether legislation is to be regarded as depriving a person of property or as delimiting his right to it, where it exists at the time the property is acquired but takes effect only because of later events, has been considered in two leading English cases. The first is Wilson, in which, the effect of section 127(3) of the Consumer Credit Act was that the lender’s rights were unenforceable from the beginning. On this issue:-

- (a) Lord Nicholls (at para. 40-4) was not prepared to accept the submission that a person who acquires property subject to limitations under national law which subsequently bite according to their tenor cannot invoke article 1, which he regarded as too wide and too loose to be acceptable. If correct, the Convention right guaranteeing rights of property could not apply, however arbitrary or discriminatory the legislation might be, if it existed when the property was acquired. In his view, the exercise of statutory powers to make orders depriving a person of property, such as powers relating to compulsory acquisition or property adjustment orders on divorce, prima facie engage article 1 whenever the property affected by the order was acquired. Section 127(3) the Consumer Credit Act for which the State was responsible, extinguished the lender’s rights and was therefore -

“... more readily and appropriately characterised as a statutory deprivation of the lender’s rights of property in the broadest sense of that expression than as a mere delimitation of the extent of the rights granted by a transaction.” (see paras. 40-44)

- (b) Lord Hope of Craighead held at paras 106-7 that the lenders never had an absolute and unqualified right to enforce the agreement, or the rights arising from the delivery of the motor car, and that neither article 1 of the First Protocol nor article 6 of the Convention could be used to confer absolute and unqualified rights which “having regard to the terms of the statute by which agreements of this kind are regulated” it had never had under the improperly executed loan agreement. However, where the law, although in force when the right was acquired, does not qualify it at that moment but only later, article 1 is engaged. He too thought laws providing for divorce settlements had the potential to engage section 1. The reason why there was a delimitation of rights and not a deprivation was that, on the facts, the legislation did not “bite” subsequently but at the moment the transaction took effect. Therefore, the lender never had a right of which he could be deprived. On this view, Wilson is plainly distinguishable in the present case, since Beaulane plainly acquired a right to the land in 1992, which it later lost.
- (c) Lord Hobhouse of Woodborough held at paras. 136-7 that, if the lenders were seeking to enforce a pledge, section 65(1) of the act amounted to a deprivation engaging article 1, but if they were merely seeking to enforce a claim contractual right, article 1 would not be.

(d) Lord Scott of Foscote's view was the same as that of Lord Hope: the effect of the section was that the lender never had any right to enforce repayment of the loan of which he could not be deprived: see para. 168. However unlike Lord Hope, he did not express a view on what the position is where the relevant provision of law exists at the time of acquisition, but applies to the property only as a result of later events.

(e) Lord Rodger of Earlsferry did not express a view on this point.

142. Accordingly, there is nothing in Wilson to support the argument that Article 1 is not engaged in this case, because the relevant provisions existed when Beaulane bought the disputed field, and the relevant passages in the speeches of Lord Nicholls and Lord Hope explicitly support the view that it is engaged. So, implicitly, does the speech of Lord Hobhouse, as he regards the loss of the pledge as engaging article 1 even though the relevant law was in existence before the transaction.

143. In Pennycook v. Shaws (EAL) Limited [2004] EWCI Civ. 1000, [2004] Ch. 296, the issue before the Court of Appeal was whether provisions of the Landlord and Tenant Act 1954, which precluded an application for a new tenancy unless the tenant had served a counter-notice in answer to the landlord's termination notice in due time, engaged article 1. The Court of Appeal held that article 1 was engaged, but that in the circumstances it was not breached.

144. Arden L.J., with whom Thorpe L.J. and Sir Martin Nourse agreed, said at para. 34 that the speech of Lord Nicholls in Wilson contained the most detailed guidance as to the proper analysis and at para. 35 that:-

“On this analysis the court must look at the substance of the claimed right to see whether the bar in this case to the exercise of the tenant’s right is a delimitation of the right or whether it represents a deprivation of the right. The relevant circumstances is that the bar is rigid, arbitrary or discriminatory. Lord Nicholls referred in terms to contractual rights, but a statutory right of the kind in issue in this case cannot be distinguished from the contractual rights for Article 1 purposes: the statutory right is an asset of the tenant in just the same way as a contractual right would be.”

She then set out the relevant passage from the speech of Lord Hope and said at para. 37:-

“Accordingly Lord Hope reached the opposite conclusion to that of Lord Nicholls on the question whether Article 1 was ever engaged on the footing that the agreement in the instant case had from the outset been an agreement which was improperly executed section 127(3) of the Consumer Credit Act 1974 did not deprive him of anything to which he had ever been entitled.” (my emphasis)

145. Accordingly, she concluded at para. 38 that the relevant provisions of the Landlord and Tenant Act were “more accurately analysed as a deprivation of a right rather than a delimitation of a right”.

146. I am bound by Pennycook. Article 1 is engaged where a property right is acquired which is subject to a law with the potential for depriving the owner of it, if and when this subsequently happens. Otherwise the Convention would only apply where a law came into effect after the particular acquisition of the property in question. It would apply to the law in some cases, where the acquisition predated it, but not in others where it did not. This would hardly be a sensible way to give effect to a Convention right.

147. The point also arose in R. (on the application of Whitmey) v. Commons Commissioners [2004] EWCA Civ. 951, a case concerning land required to be registered as a village green under section 13 of the Commons Registration Act 1965, where Arden L.J. said at paragraph 36:-

“Mr. Karas further submits that art. 1 is also not engaged because prescription is inherent in a property right and is a matter of private law. In my judgment, as this point has not been fully argued, the court should assume in Mr. Whitmey’s favour that this argument too cannot succeed on the basis that, even by allowing prescription, the state is providing for a limitation on the property right, and that it should make this assumption notwithstanding J.A. Pye v. Graham [2001] EWCA Civ. 117, [2001] Ch. 804 ... as the contrary views there expressed were obiter.”

See also the detailed analysis of Neuberger J. in P.W. & Co. v. Milton Gate Investments Ltd. [2004] Ch. 142 paras. 104-134.

148. I have not been referred to any decisions of the ECHR which are inconsistent with the English authorities on this point. The decision in Marckx v. Belgium [1979] 2 EHRR 330 it para. 50 was merely that article 1 applies to existing possessions as opposed to “the right to acquire possessions whether on intestacy or some other voluntary disposition”. In the recent case of Stretch v. U.K. [2004] 38 EHRR 196, the applicant complained about the unenforceability of an option to renew a lease which was ultra vires the local council which had granted it. The ECHR held that the lessee’s “legitimate expectation” was a possession and that his article 1 rights were breached. The U.K. government’s contention that article 1 was not involved because the lessee never had a valid property right in the first place was rejected: see para. 36.

(c) Family Housing Association v. Donnellan

149. Mr. Woolf relied on the decision of Park J. in Family Housing Association v. Donnellan [2002] 1 P. & C.R. 449, which was decided in July 2001, after the decision of the Court of Appeal in Pye but before the decision of the House of Lords. The issue before Park J. was whether certain amendments should be permitted to raise the issue as to whether the extinction of title as a result of adverse possession infringed the Convention. He allowed an appeal against the decision of the county court judge to give permission to amend to raise these issues.

150. Park J. held in essence that article 1 was directed against expropriations by the State or authorised by the State for public purposes, and that the operation of the private law of adverse possession was not within these categories. He relied principally on three authorities. The first was the decision of the ECHR in Bramelid v. Sweden (1982) 5 EHRR 249, which involved a provision entitling somebody who had acquired the majority of the shares in the company to compulsorily acquire the remainder at a fair price, and in which it was held that article 1 was not engaged because:-

“The Swedish legislation of which the applicants complain is of an altogether different kind. It is, in fact, the expression and the application of a general policy with regard to the regulation of commercial companies and concerns above all the relations of shareholders inter se. It goes without saying that in enacting legislation of this type, the legislature is pursuing the general aim of reaching a system of regulation favourable to those interests which it regards as most worthy of protection, something which, however, have nothing to do with the notion of ‘the public interests’ as commonly understood in the field of expropriation. The Commission, therefore, is of the opinion that the second sentence of the first paragraph of article 1 Protocol 1 does not apply to the applicants’ present appeal.”

Park J. said:-

“In my view, that case decides that the part of Article 1 which is about deprivation is directed against expropriations by the State or authorised by the State for public purposes. It is not directed against matters which are essentially ones of private law.”

151. Secondly, he referred to the decision of the Commission in James v. United Kingdom (1984) 6 EHRR 455, which related to compulsory acquisition under the Leasehold Reform Act 1967 by long leaseholders of the freehold interest, in which it concluded that the Act did effect a deprivation within Article 1 because the Act was “essentially a matter of social reform”, and therefore “for public purposes”.

152. Thirdly, he relied on the dicta of the Court of Appeal in Pye and thought it most unlikely that a first instance judge, or another composition of the Court of Appeal, would depart from what was said in Pye. Park J. did not think it right to permit the amendment on the off-chance that the issue might be got before the House of Lords.

153. Subsequently, the Court of Appeal gave permission to appeal, but dismissed the appeal without hearing argument, on the basis that this was the quickest way to enable an application for permission to appeal to be made to the House of Lords, in view of the impending appeal in Pye. Mr. Woolf rightly concedes that this does not constitute a binding decision of the Court of Appeal on the merits of the appeal. The House of Lords did give permission to appeal, but the matter then appears to have been settled.

154. In my view, the decision in Family Housing Association is inconsistent with authority to which Park J. was not referred and with later authority.

155. As to James, Park. J. does not appear to have been referred to the subsequent decision of the ECHR (1986) 8 E.H.R.R. 123 where the Court discussed the meaning of “public interest” in the second sentence of Article 1 and held that:-

“40. The Court agrees with the applicants that a deprivation of property effected for no reason other than to confer a private benefit on a private party cannot be “in the public interest”. Nonetheless, the compulsory transfer of property from one individual to another may, depending upon the circumstances, constitute a legitimate means for promoting the public interest. In this connection, even where the text is in force employ expressions like “for the public use”, no common principle can be identified in the constitutions, legislation and case-law of the Contracting States that would warrant understanding the notion of public interest as outlawing compulsory transfer between private parties ...

41. Neither can be read into the English expression “in the public interest” that the transferred property should be put into use for the general public or the community generally, or even a substantial proportion of it, should directly benefit from the taking. The taking of property in pursuance of a policy calculated to enhance social justice within the community can properly be described as being “in the public interest”. In particular, the fairness of the system of law governing the contractual or property rights of private parties is a matter of public concern and therefore legislative measures intended to bring about such fairness are capable of being “in the public interest”, even if they involve the compulsory transfer of property from one individual to another”. (my emphasis)

156. This, in my view, shows that the existence or otherwise of a public interest is relevant, not to whether article 1 is engaged, but to whether a deprivation of

property is potentially justifiable. This is consistent with its language: “No one shall be deprived of his possessions except in the public interest ...”. What it decides is that, if the deprivation is not in the public interest, it is not justifiable, but that the public interest in the context may include ensuring fairness in private dealings.

157. As already appears from the earlier part of this judgment, Mr. Knox accepts that the statutory provisions relating to limitation and extinction of title as regards land are not merely a matter of regulating the private rights of the parties, but are enacted by the State for public purposes. Limitation provisions, in general, are enacted for public purposes. Their purpose is to achieve certainty and to prevent the courts from having to adjudicate upon stale claims. Further, in relation to land, it is clear that the purpose of extinguishing title was to eradicate the evil of burdensome and expensive conveyancing and in some cases lost transactions: see paras. 73-6 above. It was not merely to regulate the private interests of owner and trespasser in individual cases. Therefore, the provisions are potentially justifiable, if they are appropriate to the policy objectives and proportionate.

158. As to Bramelid, this was a case in which the relevant provisions might be said to have had no real public purpose, but merely to have regulated the relations between shareholders; despite the passage referred to above, the Commission recognised (p. 256 of the report) that article 1 would be breached, if the legislature, in making rules as to the effects on property of legal relations between individuals created

“... an imbalance between them which would result in one person arbitrarily and unjustly being deprived of his goods for the benefit of another.”

Thus, the decision that there was no breach of article 1 in the end depended on

“... the fact that the price of the applicants’ shares was fixed by qualified arbitrators in a carefully reasoned decision and following criteria which ... did not appear either arbitrary or unreasonable.”

159. I agree with Mr. Knox’s submission that the decision in Family Housing Association is inconsistent with the later decision of the House of Lords in Wilson (which had only been decided at Court of Appeal level at the time of Park J.’s decision). On the basis of Pennycook, the right approach is set out in the speech of Lord Nicholls, and it is quite clear that he considered that laws affecting purely private transactions, such as property adjustment orders on divorce, engage article 1. Clearly, whilst regulating the private interests of individuals, they also share a wider social purpose, as do the statutory provisions relating to adverse possession. At para. 43, Lord Nicholls expressly relied on the passages in Bramelid set out above. See also at para. 68: “the fairness of a system of law governing the contractual or property rights of private persons is a matter of public concern.”

160. The recent decision of the ECHR in Stretch v. U.K., to which I have already referred, is also relevant in this context, in that what was there an issue was again a purely private transaction between the local authority and the purchaser of property, although again it might be said that the purpose of the ultra vires rule in relation to a local authority was the control of public finance.

(d) Does the law merely control the use of property?

161. The second rule in article 1 is only engaged if there is a ‘deprivation’ of property, as opposed to a control of its use by the State. In the Sporrong case, the

Court recognised at para. 63 that there might be cases in which, even in the absence of a formal expropriation, involving a transfer of ownership, it would be necessary to “look behind the appearances and investigate the realities of the situation complained of”, so as to ascertain whether the situation amounted to a de facto expropriation, although there was no such expropriation on the facts of the case. However, in the present case, there is an actual transfer of ownership, and therefore the second rule clearly applies, and the third rule does not.

162. The difference may not be great, because under the second rule it is still necessary to determine whether the deprivation is in the public interest in the sense that there was a legitimate policy justification for the deprivation, and that the means employed were appropriate to the policy objective and not disproportionate in their adverse affect on the owner of the property. See Bäck (cited at para. 122 above) at para. 55. But the subjective element referred to by Neuberger L.J. at para. 51 of the Trailers case does not arise in the context of the second rule.

(e) The Holy Monasteries Case

163. Finally, Mr. Woolf referred to Holy Monasteries v. Greece (1995) 20 E.H.R.R. where the ECHR held that a Greek law invalidating title to ancient relics unless supported by documents was held to breach article 1, on the ground that a possessory title was property protected by the Convention. So, he submitted, was Mr. Palmer’s possessory title. This is a fair point, but I think that, as between the two titles, it is the consideration of whether the loss of Beaulane’s prior title is incompatible with the Convention that must prevail. If so, it follows that Mr. Palmer’s title was only acquired as a result of a breach of Beaulane’s Convention rights.

Conclusion

164. For these reasons, I consider that the second rule in article 1 of the First Protocol is engaged, and that all the arguments to the contrary fail. As a matter of substance the relevant statutory provisions affect Beaulane's property rights. Their effect amounts to a deprivation, not merely to a control over the use of property. The case is not outside the ambit of article 1 on the ground that the relevant provisions have no public purpose, but merely regulate private transactions.

Is there any other remedy?

165. If one started with a blank sheet of paper, one might think that, since the trespasser remains a trespasser for the whole of the 12 year period, the original owner ought to be able to claim damages against him, on the basis that trespass at the end of the period foreseeably caused loss, namely the loss of the property. The effect of this is that the owner would receive proper compensation in the form of damages equivalent to the market value of the property.

166. Mr. Woolf submits that this would make a nonsense of the limitation provisions. The effect would be that the law would, at one and the same time, deprive the owner of his property in favour of the trespasser, and make the trespasser liable for damages. He submits that the loss to the owner is caused, not by the trespasser, but by his own inaction and the effect according to the law of limitation of that inaction.

167. Whatever the merits of the rival arguments, that this is not the legal position is demonstrated by the fact that no such claim has ever been made, and by the decision in the Mount Carmel case (see para. 79 above) that the former owner

cannot claim mesne profits, which are a form of damages for trespass: see Clerk and Lindsell 18th ed. paras. 18-65ff. and 18-78.

168. As was said by Potter L.J. in Cox Homes v. Ideal Homes Midlands Ltd C.A. 10th Feb 1998:-

“(Mount Carmel) decided that, once 12 years adverse possession has passed, the former owner loses his right to claim damages for trespass, even in respect of that period that falls within six years of the issue of the writ.”

169. The decision in Mount Carmel is criticised in McGhee on Limitation, 4th ed. para. 13 - 06, which refers to it as ‘unsatisfactory’, but it seems clear that the expropriation of the registered owner’s land in favour of the trespasser extends to any financial claim which may have existed before the expropriation and, a fortiori, can hardly give rise to a new claim for the value of the land.

Do the statutory provisions support legitimate policy aims?

(a) General

170. Mummery L.J. set out the justification for the relevant statutory provisions [2001] Ch. at para. 43 quoted earlier:-

“Such conditions are reasonably required to avoid the real risk of injustice in the adjudication of stale claims, to ensure certainty of title and to promote social stability by the protection of established and peaceable possession of property from the resurrection of old claims”.

171. These are the classic reasons for limitation provisions and Jordan, pages 47-55, identifies a number of broadly similar policies in the legislation, namely the

loss of evidence over time; reliance by the adverse possessor; the quieting of possession; the encouragement of the use of land and the need to prove title to land. Martin Dockray, in the article referred to above, also refers to the need to avoid hardship to the adverse possessor.

172. These are undoubtedly legitimate policy aims, but it is questionable how far they are advanced by the statutory provisions in relation to registered, as opposed to unregistered, land.

173. Mr. Woolf submits that it cannot be concluded from the fact that the law has been changed by the Land Registration Act 2002 that the previous law was incompatible with article 1. The State has a wide margin of appreciation in relation to how it promotes legitimate policy aims, and it is natural for the law to evolve over time. This submission is undoubtedly correct: see Bäck at paras.53-4. However, the force of the point is lessened by two considerations in this case.

174. First, as is shown at paras. 81-6 and 95 ff. above, it is clear that the law relating to adverse possession did not apply to land registered under the original scheme, and that this only changed after the decision in Leigh v. Jack in 1879. The significance of this is that, as Lord Hope says in Pye, the unfairness of the 1925 Act lies in “the lack of safeguards against oversight or inadvertence on the part of the registered proprietor”. There would have been little or no risk of such unfairness until the law began to change after Powell v. MacFarlane in 1977. At the time of the Land Transfer Act 1897, and of the Land Registration Act 1925, it would have been virtually impossible for a registered owner to lose title by inadvertence or oversight. This would happen only if the land was used in a manner which was inconsistent with his own use, which would be obvious, or by

abandonment. It seems clear that, in the deliberations which led up to the Land Registration Act 1925, the most influential consideration was the need to protect the person who had had long possession of land in reliance on inaccurately placed fences or other boundaries, something which would not be disclosed on the register. So it is, to put it at its lowest, very doubtful whether the law relating to “adverse” possession would have been extended generally and in all circumstances to registered land, if the concept had been as set out by the House of Lords in Pye, i.e. possession of any kind, whether or not adverse.

175. Secondly, what was said by the judge at first instance and by two members of the House of Lords in Pye (see para. 117 above), and what was said by the Law Commission in its Consultative Document, show that this is not really a case in which the Land Registration Act 2002 represents no more than a natural evolution in the law. The pre-October 2003 law is roundly condemned as unjustifiable and unfair. In its Commentary on the Land Registration Bill, Law Com. No. 271, HC114, at paras. 14.1-14.2, the Law Commission set out the passage from Neuberger J’s judgment set out at para. 4 above and says that it “encapsulates” the concerns which had led it to propose a wholly new system of adverse possession for registered land.

176. In its Consultative Document, the Law Commission said that “while the present law can be justified as regards unregistered land, it cannot in relation to registered title” (para. 10.2), that this was “because unregistered title is possession-based whereas the basis of registered title is the fact of registration” (para. 10.3), that the law transfers title to the trespasser and is at least in some cases “tantamount to sanctioning a theft of land”, which requires strong justification by

facts “over and above those which explain the law on limitation” (paras. 10.5 and 10.6), and that the acts amounting to adverse possession (e.g. regularly shooting wild fowl on the land) may not be apparent to anybody inspecting the land, and “readily detectable”, so that title may be lost inadvertently, or even where the owner is “quite blameless” (paras. 10.4 and 10.6).

177. The Law Commission concluded in its Consultative Document at paras. 10.11 to 10.16 and 10.47 that, where title is registered, the basis of title is primarily the fact of registration rather than possession. Registration confers title and the ownership of the land is apparent from the register. The main weakness of the law was that the principles determining whether the registered proprietor would lose title by adverse possession were developed for a possession-based system of title and not one founded on registration. An effective registered title system required that “those who registered their titles should be able to rely upon the fact of registration to protect their ownership except where there are compelling reasons to the contrary”. There were only four circumstances in which there was justification for registration being overridden by possession:-

- (a) Where the registered proprietor has disappeared and cannot be traced i.e. abandonment.
- (b) Where there have been dealings “off the register” which for some reason have not been registered.
- (c) Where the register is not conclusive i.e. in relation to boundaries and short leases.

- (d) Entry into possession and under a reasonable mistake as to rights; this again could arise from unclear boundaries, or because entry is made under a transaction which is invalid.

178. The Land Registration of 2002 broadly gives effect to these conclusions. It establishes a system under which a trespasser who wishes to acquire title may, after 10 years, apply for it and seek to establish his claim that the case falls within one of the four categories. Notice is given to the registered owner. If he does not oppose the claim, he will effectively be treated as having abandoned the land and the application will succeed. If he does oppose the claim, it will only succeed if it falls within one of the other 3 specified categories.

(b) Prevention of stale claims

179. This is the first of the standard objectives of limitation provisions referred to by Mummery L.J. It seems to me wrong in this context to refer to “stale claims”. It is appropriate to do so where, for example, what is in issue is a debt for work done and the court might be faced with an investigation, long after the event, into whether it was properly done. In the case of registered land, the owner’s claim is established by the fact of registration. What comes under investigation is the trespasser’s claim to have supplanted the owner i.e. his claim, based on his current acts of trespass, which may be at least partly quite recent. In this case, what has been investigated are Mr. Palmer’s actions between 1986 and 2003.

180. With the exception of cases involving matters not shown on the register, such as uncertain boundaries or short leases, it is difficult to see how the prevention of stale claims can be a legitimate objective. The owner’s claim is established by the fact of registration. As to preventing the owner from sleeping on

his rights, as the Law Commission said at para. 2.71 of its Commentary on the Bill:-

“The reasons why there is a doctrine of adverse possession are well known and often stated, but they need to be tested. For example, it is frequently said that the doctrine is an embodiment of the policy that defendants should be protected from stale claims and that claimants should not sleep on their rights. However, it is possible for a squatter to acquire title by adverse possession without the owner realising it. This may be because the adverse possession is either clandestine or not readily apparent. It may be because the owner has more land than he or she can realistically police. Many public bodies fall into this category. A local authority, for example, cannot in practice keep an eye on every single piece of land that it owns to ensure that no one is encroaching on it. But the owner may not even realise that a person is encroaching on his or her land. He or she may think that someone is there with permission and it may take an expensive journey to the Court of Appeal to discover whether or not this is so. In none of these examples is a person in any true sense sleeping on his or her rights. Furthermore, even if a landowner does realise that someone – typically a neighbour – is encroaching on his or her land, he or she may be reluctant to take issue over the incursion, particularly if it is comparatively slight. He or she may not wish to sour relations with the neighbour and is, perhaps, afraid of the consequences of so doing. It may not only affect relations with the neighbour but may also bring opprobrium upon him or her in the neighbourhood. In any event, even if the policy against allowing stale claims is sound, the consequences of it under the present law – the loss for ever of a person’s land - can be extremely harsh and have been judicially described as disproportionate.”

181. I therefore agree with Mr. Knox’s submission that section 15

“.. replaces the certainty and simplicity of the register with an uncertain inquiry that requires the court to conduct a factual investigation into the distant past which is often highly contentious and difficult to resolve. In short, far from furthering the general purposes of certainty, justice and finality in litigation

(cf. Stubbings at para. 51) in the context of registered land, care in boundary disputes, subverts each of them.”

(c) Promotion of ‘social stability’ by preventing the ‘resurrection of old claims’

182. This is the other standard objective of limitation provisions referred to by Mummery L.J. For the same reasons, I do not think that a claim by a registered owner can fairly be described as the resurrection of an old claim. Nor do I think that the law can be said to promote social stability (save where there are matters not shown on the register) again for the reasons advanced by Mr. Knox:-

“The trespasser will normally know all along that the land is not his and further, he can find out the identity of the true owner by making a search of the land register. If he chooses to make use of the land without asking for a lease or licence he does so at his own risk, and there is no hardship to him in the court requiring him to leave once the true owner wants to remove him, if necessary giving him a reasonable time to vacate. By contrast, the true owner will usually feel an understandable sense of injustice. He will feel that although he has used the mechanism provided by the state for protecting his title and making it known to the world, he has lost it by a quirk of the law to someone who has no moral claim to the land whatsoever.”

(d) Facilitation of conveyancing

183. Paras. 10.9 and 10.10 of the Consultative Document describe the facilitation of conveyancing as “the principal reason for having limitation statutes in relation to real property” and as “undoubtedly the strongest justification for adverse possession”. However, it concludes that

“...it can normally have no application to registered land. Where title is registered, adverse possession

facilitates deduction of title only in relation to those matters on which the registry is not conclusive”

(i.e. boundaries and short leases as described at para. 10.15).

184. So, except in relation to these matters, the pre-October 2003 law relating to adverse possession did not advance its principal policy aim in relation to registered land. As the Law Commission further stated at para. 2.73 of its Commentary on the Bill:-

“In relation to land with unregistered title, there are cogent legal reasons for the doctrine. The principles of adverse possession do in fact presuppose unregistered title and make sense in relation to it. This is because the basis of title to unregistered land is ultimately possession. The person best entitled to the land is the person with the best right to possession of it. As we explain below, the investigation of title to unregistered land is facilitated (and therefore costs less) because earlier rights to possess can be extinguished by adverse possession. However, where title is registered, the basis of title is primarily the fact of registration rather than possession. It is the fact of registration that vests the legal title in the registered proprietor. This is so, even if the transfer to the proprietor was a nullity as, for example, where it was a forgery. The ownership of land is therefore apparent from the register and only a change in the register can take that title away.”

(e) Promoting certainty of title

185. This is very similar to the previous objective, and again is not advanced by applying the law of adverse possession to registered land, except in relation to matters which do not appear on the register. Otherwise, applying the law of adverse possession is counterproductive, because it undermines the reliance which can be placed on the register and can lead to prolonged disputes, such as the one in Pye and this one, as to ownership. The purpose of registration is subverted.

(f) Avoidance of hardship to the adverse possessor

186. This is again a legitimate aim in relation to cases where the register does not disclose the position, such as incorrect boundaries or where someone is in possession in reliance on private dealings off the register. In such cases, it is reasonable that no issue should be raised once 12 years have elapsed. However, no hardship arises otherwise, as the trespasser knows quite well that he is not the registered owner. On the other hand, the pre-2003 law causes hardship to the registered owner, and gives rise to unwarranted windfalls in favour of undeserving land thieves (although I should make clear it would be wrong so to describe Mr. Palmer).

(g) Discouraging the waste of land as a resource

187. Mr. Woolf relies strongly on this, and it is certainly a legitimate objective. Where land has been abandoned, it is in the public interest that it should be acquired by someone else who wants it and who will use it. However, it is certainly not in the public interest to expropriate an owner who wishes to hold the land and use it in the future, e.g. when he can get suitable planning permission, except by a proper process of compulsory acquisition for fair compensation. Further, the pre-2003 law may be said to have discouraged the use of land in some circumstances, by penalizing the owner who, having no current use for the land, tolerates its use for the time being by someone else without taking the necessary legal measures to protect himself.

Were the statutory provisions an appropriate means of promoting the public interest and proportionate in their adverse effect on the registered owner?

188. The correct approach to this question is set out in James, where it was held that the legislation must strike a fair balance between the competing public and private interests. The Court held at paras. 54-5:-

“The first question that arises is whether the availability and amount of compensation are material considerations under the second sentence of the first paragraph of Article 1 (P1-1), the text of the provision being silent on the point. The Commission, with whom both the Government and the applicants agreed, read Article 1 (P1-1) as in general impliedly requiring the payment of compensation as a necessary condition for the taking of property of anyone within the jurisdiction of a Contracting State.

Like the Commission, the Court observed that under the legal systems of the Contracting States, the taking of property in the public interest without payment of compensation is treated as justifiable only in exceptional circumstances not relevant for present purposes. As far as Article 1 (P1-1) is concerned, the protection of the right of property it affords would be largely illusory and ineffective in the absence of any equivalent principle. Clearly, compensation terms are material to the assessment whether the contested legislation respects a fair balance between the various interests at stake and, notably, whether it does not impose a disproportionate burden on the applicants (see the above-mentioned Sporrong and Lönnroth judgment, Series A no. 52, pp. 26 and 28, paras. 69 and 73).

The Court further accepts the Commission’s conclusion as to the standard of compensation: the taking of property without payment of an amount reasonably related to its value would normally constitute a disproportionate interference which could not be considered justifiable under Article 1 (P1-1). Article 1 (P1-1) does not, however, guarantee a right to full compensation in all circumstances. Legitimate objectives of “public interest”, such as pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than

reimbursement of the full market value. Furthermore, the Court's power of review is limited to ascertaining whether the choice of compensation term falls outside the State's wide margin of appreciation in this domain ...” (My emphasis.)

189. The emphasised passage applies with even more force in a case in which property is taken without any compensation at all. Similarly and more succinctly, as set out at para. 158 above, the State must not make “rules affecting legal relations between individuals which result on one person arbitrarily or unjustly being deprived of his property for the benefit of another: Bramelid at 256.

190. Wilson was a case which (unlike James and Bramelid) did involve the loss of the lender's entire rights without any compensation, where the policy aim was to ensure fair treatment in private transactions between financial institutions and often needy individuals. This was held to be compatible with the Convention. Lord Nicholls accepted that the operation of the legislation could be harsh, since it applied to the technical and inadvertent slip just as much as to deliberate wrongdoers. Nevertheless he said:-

“74. Despite this criticism I have no difficulty in accepting that in suitable instances it is open to Parliament, when Parliament considers the public interest so requires, to decide that compliance with certain formalities is an essential prerequisite to enforcement of certain types of agreements. This course is open to Parliament even though this will sometimes yield a seemingly unreasonable result in a particular case. Considered overall, this course may well be a proportionate response in practice to a perceived social problem. Parliament may consider the response should be a uniform solution across the board. A tailor-made response, fitting the facts of each case as decided in an application to the court, may not be appropriate. This may be considered an insufficient incentive and insufficient deterrent. And it may fail to protect consumers adequately. Persons most in need of protection are perhaps the least likely

to participate in court proceedings. They may well let proceedings go by default: see, in relation to money lending agreements, the Crowther report, p.236, para. 6.1.19.

75. Nor do I have any difficulty in accepting that money lending transactions as a class give rise to significant social problems. Bargaining power lies with the lender, and the social evils flowing from this are notorious. The activities of some lenders have long given the business of money lending a bad reputation. Nor, becoming more specific, do I have any difficulty in accepting, in principle, that Parliament may properly make compliance with the formalities required by the Consumer Credit Act regarding “prescribed terms” an essential prerequisite to enforcement. In principle that course must be open to Parliament. It must be open to Parliament to decide that, severe though this sanction may be, it is an appropriate way of protecting consumers as a matter of social policy. In making its decision in the present case Parliament had the benefit of experience gained over many years in the working of the Moneylenders Act 1927 and the hire purchase legislation, and also the views of the Crowther committee. Further, it must be open to Parliament so to decide even though the lender’s inability to enforce an agreement will not assist a borrower who consents to the enforcement of the agreement in ignorance of the true legal position.”

191. In the present case, the starting point is what the court said in James, namely that the taking of property without payment of an amount reasonably related to its value is normally a disproportionate interference which is unjustifiable under article 1. A fortiori, this must apply to a system of law by which the owner of land can lose title to it without compensation. As the Law Commission said at para. 10.5 of its Consultation document:-

“It is, of course, remarkable that the law is prepared to legitimise such “possession of wrong” which, at least in some cases, is tantamount to sanctioning a theft of land so sweeping a doctrine requires strong justification”

192. Secondly, if an expropriation without compensation is to be justified, it must be by reference to “the public interest” or (if contrary to my view this is a control of use of property case within the third rule) by what the State deems to be necessary in “the general interest”: see the passages from Bäck and James cited at paras. 122 and 155 above.

193. In the present case, I do not think that there is, in any real sense, a public or general interest. The present position does not arise from any careful consideration by the legislature of public policy in this area, such as is to be found in James and Wilson:-

- (a) The policy in 1925, when the law in question came into force, was that the registered owner of land would lose it if he permitted 12 years adverse possession *in the sense in which that term was understood according to the then existing case law*, that is if a trespasser did acts which were not consistent with the purposes for which the owner intended to use it.
- (b) It was not the policy in 1925 that the owner of land would lose it inadvertently by permitting – at a time when he had no immediate use for the land but was holding it in the hope that he would one day be allowed to develop it – some harmless use of the land which in no way affected his future plans.
- (c) This became the position, definitively, as a result of the decision of the House of Lords in Pye. This was an accurate restatement of the meaning of ‘possession’ in the 1833 Act and therefore of the policy of the law as regards unregistered land between 1833 and 1879. But it was in no sense an expression of considered public policy as regards registered land either

now or at any time, as one can see from the deep unease expressed by 2 members of the House.

- (d) That this has become the legal position was the accidental result of our case law-based system; it was never a matter of deliberate public policy, nobody has ever seen it as being in the public interest and, now that it is apparent it is seen as being unfair and disproportionate.

For these reasons, I think that in carrying out the required balancing exercise between the public and private interests in this case, the public interest, and the margin of appreciation allowed the States in framing social, economical or other policy, are of little weight.

194. Wilson is distinguishable on this point. In that case, there were express positive obligations on the lenders to incorporate all relevant terms in the contract. The purpose of imposing those obligations was to meet a known social evil arising from people being persuaded to take out loans on exorbitant terms which they did not fully understand. The merits of the legislation were primarily a matter for parliament, as Lord Nicholls said at para. 70. Parliament had given careful consideration to the necessary legislation, and had concluded that drastic action was required. Furthermore, the statutory provisions applied only up to a financial limit of £25,000, so that the burden on the lenders was not excessive: they could not in the course of what would normally be a substantial business lose a great deal of money in any one case.+

195. None of this applies in the present case. There is no social evil. There has been no careful consideration of the matter in parliament. The registered owner does not lose his title as a result of failing to carry out any express provision of

law to protect his property. He might be forgiven for thinking that he had a clearly established registered title which required no protection. There is no limit on the loss which he may suffer, and the law applies in any event to individuals or companies which do not carry on a property business; even if the land is of not great value, it may be of great financial importance to the individual company involved.

196. In my opinion, the expropriation of registered land without compensation in circumstances such as exist in this case does not advance any of the legitimate aims of the statutory provisions and is disproportionate. Nor is it justified (as in Wilson) by the need to have a uniform rule applicable across the board. In essence, the registered owner loses his land because he has failed to take steps to get rid of a trespasser within a 12 year period. But as the present case, Pye and other cases show, the acts of trespass may not be obvious, or may be trivial and entirely harmless. Further, the owner may not know the law, and may not realise that the failure to take steps to put an end to a situation which is doing him no harm may be prejudicing his position. There is little or no fault involved. On the other side, the trespasser will usually know that he is trespassing, will already have benefited from the acts of trespass, and will have done nothing whatsoever to deserve the windfall of being given the property in return for having illegitimately used it for a long time. There is no justification for what is essentially a transfer of property without compensation from the deserving to the undeserving, except in the four categories of case identified by the Law Commission. These broadly correspond to the categories of case which would have been envisaged in 1925 as falling within the concept of adverse possession, and which are now covered by the Land Registration Act 2002.

197. Mr. Woolf submits correctly that, even under the 2002 Act, Mr. Palmer might have applied for, and might have been awarded, a registered title to the land, and indeed that he could have applied after 10 years: see Schedule 6 para. 1(1).

198. However, there is a major difference. What the 2002 Act does is to place the burden where it lies, on the party seeking to override a registered title. This reflects the Law Commission's view that there is no need for an owner who has established his claim by registering it to make a further claim. It is for the trespasser to establish his claim, if he has good grounds to do so.

199. What happens under the new provisions is that notice is given to the registered owner of the application, so that – as the Law Commission says at paras. 10.45 and 10.47 of the Consultation document, the registered owner would have “ample opportunity to evict the squatter”. The squatter would not normally be awarded a title to the land, unless the registered owner did not oppose the application. If he did, the application would succeed only in the limited classes of cases envisaged by the Law Commission and provided for in Schedule 6.

200. Thus, the objectionable feature of the pre-2003 law, which as Lord Hope said in Pye is the inadvertent loss of land, sometimes without any fault, and sometimes in favour of the deliberate land grabber, is avoided. Save in the exceptional cases, the title to the land can only be lost by 10 years adverse possession, followed by a failure to respond to notification of the application, in which case it is legitimate for the law to infer abandonment.

201. Mr. Woolf also submitted that Beaulane was at fault, by its lack of vigilance, and referred to a dictum of Neuberger L.J. in Purbrick v. Hackney L.B.C. [2004] 1 P. & C. R. 445 at 560:-

“... it is to some extent implicit in the present law of adverse possession, that an owner of property who makes no use of it, whatever, should be expected to keep an eye on the property to ensure that adverse possession rights are not being clocked up. A period of 12 years is a long period during which to neglect a property completely.”

202. On the facts of the case, there is a slight element of fault, on the part of Cavendish and Castle, in that at the beginning of the period Mr. Bowen and Mr Boyne did not follow up the letter of 20th June 1991 and left Mr. Naresh Patel with the impression that there was an arrangement of some kind with Mr. Palmer. It would also be unfair to regard Mr. Palmer as the equivalent of a deliberate land grabber. He was advised in 1991 that he had unintentionally become the owner of the land, and believed until 2003 that this was the position.

203. This is therefore not the most extreme case of unfairness which could be imagined. Nevertheless, I think that the adverse consequences which the law has imposed on Beulane are clearly disproportionate. Beulane’s lack of vigilance, if that is what it is, does not merit the loss of the land and nothing Mr. Palmer has done justifies his acquisition of it for nothing. In return for the work he has done on the fences, he has had a steady income for many years.

Conclusion

204. For these reasons, I hold that Beulane’s loss of the disputed land in accordance with section 25 of the Land Registration Act 1925 is incompatible with article 1 of the First Protocol.

Section 3 of the Human Rights Act

205. Section 3 of the Human Rights Act provides that, so far as it is possible to do so, legislation “must be read and given effect in a way which is compatible with the Convention rights”. This applies to primary and subordinate legislation “whenever enacted”.

206. This means that section 3 may have the effect of changing the interpretation and effect of legislation already in force. As was said by Lord Hobhouse in Wilson at para. 128:-

“Section 3 ... does change the law. It does change the parties’ rights and obligations. Before the 1998 Act came into force, legislation had to be construed applying the ordinary cannons of construction: the legislation therefore had legal effect ‘x’. After the 1998 Act came into force, the same legislation may, because of (section 3) have legal effect ‘y’. Conduct that was lawful before may become unlawful and unlawful conduct may become lawful ...”

207. Thus, for example, in Ghaidan v. Godin Mendoza [2004] UKHL 30, [2004] 2 A.C. 557, it was held (contrary to earlier authority) that the surviving partner in a homosexual relationship was, under the new Convention-compliant interpretation of the relevant statute, entitled to succeed to a statutory tenancy. Lord Nicholls said at para. 30:-

“Section 3 may require a court to depart from the unambiguous meaning the legislation would otherwise bear. In the ordinary course of the interpretation of legislation involved seeking the intention reasonably to be attributed to Parliament using the language in question. Section may require the court to depart from the legislative intention, that is, department from the intention of the parliament which enacted the legislation.”

208. What the Act does is, in effect, to require a court to assume that, in enacting the legislation, whenever it was enacted, Parliament had the Convention in the forefront of its mind. As Arden L.J. said in Pennycook at para. 29, the court's duty under section 3 is "to construe legislation whenever enacted compatibly with Convention rights so far as it is practicable to do so".

209. The extent to which the application of section 3 is bounded by the language of statutory provisions was discussed in some detail in Ghaidan. Several important propositions were formulated in very similar terms by the members of the House:-

- (a) The section 3 duty is not dependent upon ambiguity in the legislation being interpreted: Lord Nicholls at para. 29, Lord Steyn at para. 44, Lord Millett at para. 67.
- (b) The application of section 3 should not depend critically upon "the particular words adopted by the parliamentary draftsman in the statutory provision under consideration": Lord Nicholls at para. 31. There should not be "an excessive concentration on linguistic features of the particular statute": Lord Steyn at para. 41.
- (c) The mere fact that the language under consideration is inconsistent with a convention-compliant meaning does not make a Convention-compliant meaning under section 3 impossible: Lord Nicholls at para. 32. The section 3 duty is the "principal remedial measure" and a making of a declaration of incompatibility is a "measure of last resort": Lord Steyn, at para. 39. There is a "strong rebuttable presumption" in favour of an interpretation consistent with convention rights: Lord Steyn at para. 50. The statute must be given a meaning "which, however unnatural or unreasonable, is

intellectually defensible ... it can do considerable violence to the language and stretch it almost (but not quite) to breaking point”: Lord Millett at para. 67. ‘Judicial vandalism’ is to be gauged by reference to the change in the substance of the obligation imposed by the provision, not by reference to any “mere matter of linguistic form”: Lord Rodger at paras. 110-1.

- (d) However, the section 3 interpretation must be compatible with the “underlying thrust” of the legislation being construed: Lord Nicholls at para. 33. It is not concerned with obligations which, properly interpreted, impose an “unavoidable obligation to act in a particular way”: Lord Rodger at para. 108. Any implication of words must “go with the grain of the legislation”; the insertion of words which contradict the essential principles and scope of the legislation being interpreted is impermissible: Lord Rodger at paras. 121-2.
- (e) The Court should not embark on considering matters calling for legislative deliberation: Lord Nicholls at para. 33. It could not create a “wholly different scheme”: Lord Rodger at para. 148.

210. Mr. Knox submits first that the legislation should be construed as being inapplicable to registered land. This invites me to commit judicial vandalism. Section 75 of the Land Registration Act deliberately applied the law relating to adverse possession to registered land by imposing a statutory trust. That is its plain meaning. As to the submission that section 3(xii) of the 1925 Act is to be treated as applicable only to the Limitation Acts then in force, the definition includes “any Acts amending those Acts” and the Limitation Act 1939 and now the Limitation Act 1980 are clearly within that definition. The preamble to the 1980 Act states

that it is an “Act to consolidate the Limitation Acts 1939 to 1980” and the 1939 Act repeals and replaces the previous Real Property Limitation Acts: see section 34 of the 1939 Act and the schedule thereto.

211. Mr. Knox’s alternative submission is that (a) section 75 of the Land Registration Act 1925 should be read as being applicable only when the same was consistent with a good conscience, and/or (b) that a person is not “a person in whose favour the period of limitation can run” is within the meaning of schedule 1 to the Limitation Act 1980 para. 8(1), unless he reasonably believes that when in possession the land belongs to him, and/or (c) the registered owner of land has not been dispossessed and has not discontinued his possession within the meaning of para. 1 of the schedule, when the person occupying his land does not interfere with such use (if any) as he then makes of it.

212. I do not think that it is open to me to read a requirement of consistency with equity and good conscience into the legislation. This would create a “wholly different scheme” (cf. per Lord Rodger at para. 148), which is consistent neither with the old provisions, which were never based on considerations of fault or equitable considerations (that is part of the objection to them), or with the new scheme which has replaced them, which is far more precise than that. Nor do I think that it is open to me to re-interpret para. 8(1) to exclude from the definition of persons in whose favour the period of limitation can run all except the trespasser who reasonably believes that the land belongs to him. This again would create a fault-based system, which is inconsistent with the old provisions and with the new scheme which can, in some circumstances, operate in favour of the person who has no reasonable belief e.g. if registration of title is unopposed.

213. However, I do in substance accept the last part of Mr. Knox's submissions. In my view, there is a simpler solution, namely to interpret section 75 of the Land Registration Act as being applicable to those cases in which the trespasser establishes "possession" in accordance with the case law in existence at the time of its enactment. Thus "adverse possession" in the Schedule to the Limitation Act 1980 is given the meaning it had under the post-1879 case law. Since Mr. Palmer's action is not inconsistent with any use or intended use of the land by Beaulane, his possession of it was not "adverse". This may be a novel application of section 3, but I think it is justifiable in circumstances in which it is the duty of the court to avoid a declaration of incompatibility "unless it is plainly impossible to do so" such as where there is a clear limitation on Convention rights stated in terms: per Lord Steyn in R. v. A. (No. 2) [2001] UKHL 25, [2002] 1 A.C. 45 para. 44. Indeed, such an interpretation has the possibly unique and certainly unusual merit that it accords as nearly as possible with what is likely to have been the actual intention of the statutory draftsman and of Parliament at the time.

214. It is true that Lord Browne-Wilkinson said in Pye at para. 35 that the phrase "adverse possession" in section 10 of the Limitation Act 1939 and para. 8(1) of Schedule 1 to the 1980 Act did not reintroduce the old pre-1833 notions of adverse possession, and that the use of the term "must not be allowed to reintroduce by the back door that which for so long has not formed part of the law", but I do not think that he had the possible need to reinterpret in accordance with section 3 in mind when he said this. In any event, in view of the Land Registration Act 2002, the need to apply section 3 in this area is only likely to arise in relation to the acquisition of title by a trespasser between October 2000

and October 2003, so this may well be the last reappearance of the ghost of the old law of adverse possession. Certainly, it is unlikely that there will be many more.

215. Finally, in case the matter goes further, I have considered whether, as an alternative, it would be possible to re-interpret the relevant statutory provisions in accordance with section 3 in such a way as to give Beaulane a right to compensation for the expropriation of its property, which would or might then not be objectionable in Convention terms. As I have indicated above, this is clearly not possible under the existing law, because of the decision in the Mount Carmel case see paras. 165-9 above. Reinterpretation under section 3 would be possible only if that case were decided on the basis of a statutory provision which can be reinterpreted.

216. In re Jolly, referred to at para. 79 above, the testatrix's title to the estate had been extinguished, by one son who had been in adverse possession for 12 years through the non-payment of rent, which the estate claimed. The Court of Appeal held that, since all rights were extinguished under the statute, the unpaid rent was no longer due. The reasoning is not entirely easy to follow. Lord Alverstone M.R. held at 617 that the claim was inconsistent with the "absolute title acquired under the Act" by the trespasser. Rigby L.J. held at 618 that, on the expiry of the limitation period, the possessor was no longer a tenant, but was holding under an adverse title, inconsistent with any right to recover rent. Collins L.J. reached a similar conclusion. It seems to me that the decision is most simply to be explained - as Rigby L.J. indicates at the outset of his judgment - by reference to the provisions of the 1833 Act: section 34 expressly prevents the recovery of any rent due on the expired period of limitation.

217. In Mount Carmel, the Court of Appeal held at 1089 that the same applied to a claim for damages of trespass for two reasons:-

“First, having regard to authority. If, as *In re Jolly* decided, extinguishment of title extinguishes also the right to claim rent which was payable in respect of land during the period of adverse possession, so also it must extinguish any claim to damages ... we can see no sound basis for distinguishing between the two claims -

Secondly, having regard to principle. When title to land is extinguished by the statute, the rights which that title carried must also be extinguished. Here, the plaintiff’s claim to mesne profits is dependent upon it showing that as between it and the defendant, it was entitled to possession of the property. By virtue of the statute the plaintiff was unable to do that ...” (my emphasis)

218. As to the first point, it seems to me that there was a basis for distinguishing between rent and damages for trespass, namely that the relevant provisions of the 1833 Act expressly precluded any claim for rent in the expired period, but did not in terms preclude a claim for damages for trespass. However, the second point is more difficult. It is trite law that a person must have possession of land in order to claim damages for trespass: Clerk and Lindsell para. 18-10. In general, possession is a fact and refers to occupation or physical control of the land: paras. 18-11. However, a registered owner with a right of entry is, upon entry, deemed to have been in possession from when the right accrued, and bringing a claim for possession is deemed to be an entry: paras. 18-26 and 18-27 together with footnote 37.

219. Under all the pre-1925 statutes, going back to the Act of 1623, expiry of the period bars any right of entry, and under section 34 of the 1833 Act this is specifically made retrospective. Therefore the decision in Mount Carmel would be

readily understandable if the 1833 Act still applied. But the relevant provisions of the 1939 and 1980 Acts did not contain equivalent provisions explicitly barring the right of entry or, for that matter, the recovery of rent due in the expired limitation period (as to which see section 17 of the 1939 Act, now section 19 of the 1980 Act, set out at para. 106 above). The Court of Appeal did not discuss these differences between the provisions in force at the time of re Jolly and the current legislation, but it must be implicit in its decision that the current provisions are to be construed as having the same effect as the previous provisions. Certainly, it seems clear from the emphasised words that the decision was based on the statute, which must mean the 1980 Act.

220. It seems to me that, applying section 3 of the Human Rights Act, it would be possible to reconsider this and hold that, since the current statutory provisions do not expressly provide for the retrospective barring of the right of entry, any claim for damages for trespass survived: the owner could rely on the right of entry which he had during the period, up to and including the last moment. The position as to rent might also well be different, having regard to the different terms of section 19 of the 1980 Act, but this does not arise.

221. That leaves Mr. Woolf's submission summarized at para. 166 above, that the loss of the value of the land is to be regarded as having been caused by the owner's inaction and that it would be absurd for the law simultaneously to misappropriate the land in favour of the trespasser, but give the owner claim for damages for trespass. It seems to me that it is logically impossible to say, as a matter of causative potency, that the trespass has not caused, and foreseeably caused, the loss to the owner. Any decision that it did not cause loss would have to

be a policy decision, to avoid the suggested absurdity. I see the force of the absurdity argument, but it may be said on the other hand that there is no good reason why the trespasser should acquire the property without paying for it.

222. Accordingly, I conclude that it might well be possible to reinterpret the provisions of the Limitation Act 1980 so as to hold that, on their proper construction, they do not have the effect of retrospectively barring the owner's right to possession during the expired period, and leave intact any claim for rent or damages for trespass which is not barred by the ordinary 6 year limitation period.

223. However, I do not need to reach any conclusion on this, because I consider that to construe section 75 of the Land Registration Act 1925 as applying to cases in which adverse possession was established in accordance with the then existing case law is a more natural and preferable method of applying section 3 of the Human Rights Act. It more closely reflects the actual intention of the legislature, remedies the essential breach of article 1, which is the expropriation, and does not leave the parties in a position which, it may well be, is not satisfactory for either of them.

Overall conclusion

224. For the reasons set out above, I hold that, as a result of a reinterpretation of the relevant legislation in accordance with section 3 of the Human Rights Act 1998, Mr. Palmer's claim to have acquired the disputed land fails and Beaulane remains the owner of it. I will make a declaration to that effect.

225. There is no need for counsel to attend if an order reflecting the consequences of the judgment can be agreed. On costs, it will clearly be

appropriate to have regard to the outcome on the factual issues as well as to the overall result. It may be sensible to adjourn any application for permission to appeal.

226. I should like to conclude by thanking both counsel, and also Mr. Knox's pupil, Mr. James Hawkins, for their assistance. This is more than a conventional expression of gratitude: this case has involved more work than can have been foreseen at the outset and I greatly appreciate all the help I have been given by both sides.

N. Strauss Q.C.
Deputy Judge
Chancery Division