A postscript to *Pye*

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The long-awaited decision of the Grand Chamber in *J A Pye (Oxford) Ltd and J A Pye (Oxford) Land Ltd v UK*¹ was handed down on 30 August 2007. It was held, by a majority, that the applicant's human rights had not been violated when it lost title to registered land as a result of the limitation of actions following adverse possession.

In a sense this paper could end here. The law is back where it was before the Pye companies ("Pye") took their case against the UK Government to the European Court of Human Rights (ECtHR). The provisions of the Land Registration Act 1925 in respect of adverse possession are perfectly safe; and so, therefore, are those of the Land Registration Act (NI) 1970 and of the Registration of Title Act 1964 (Ireland). But it has been very clear throughout the *Pye* litigation² that the interaction of human rights with the law of property in general, and specifically in the context of adverse possession, is extremely controversial. It must still be useful to discuss this strange journey taken by the law, and to consider where it may still lead us.

The *Pye* litigation prior to Grand Chamber's decision

This is now well-known and can be summarised briefly. Mr Graham had a grazing licence over 25 hectares of land near Newbury, in Berkshire, for 1983 from its owner, Pye.³ When it expired he asked for another one, and was refused because Pye was intending to develop the land. He was not asked to leave, and so he kept his cattle there and in 1984 he bought the hay crop. After that, he asked again for a renewed grazing licence but received no response and, thereafter, continued to graze his cattle on the land and also to maintain it by harrowing and fertilising it and repairing fences. In 1997 Graham registered a caution

* This paper was written for a meeting of the Judicial Studies Board of Northern Ireland, on 16 October 2007. It is therefore a sequel to an address given to the JSB on 26 January 2006; see E Cooke, "Adverse possession after *J A Pye (Oxford) Ltd v the United Kingdom*" (2006) 57 NILQ 429. I am grateful to Laura Edwards and to Laura Graham for research assistance; to Una Woods of the University of Limerick for the insights I have gained from her paper at the conference of the Society of Legal Scholars in September 2007, and to Amy Goymour of Cambridge University for discussing this paper with me and providing many helpful thoughts. The remaining errors are my own.

1 Application no. 44302/02.

2 Hereafter the whole litigation saga, heard in five courts altogether and between two different sets of parties, is referred to simply as *Pye*.

3 Martin Dixon, "Adverse possession in three jurisdictions" (2006) *The Conveyancer and Property Lawyer* 179, points out that the figure of 23 hectares given by the ECtHR seems to be a typographical error.

against Pye's registered title. Pye took action a year later to have the caution cancelled, and in 1999 commenced a further action to recover possession of the land. But their action failed because of the limitation of actions. So held Neuberger J in the High Court.⁴ The Court of Appeal found in favour of Pye on the basis that Graham did not have the requisite possession, since the quality of his occupation was unchanged from that of a grazing licensee, and that he had not had the requisite intention to possess the land;⁵ but Graham succeeded in the House of Lords.⁶ The value of the land has been in dispute, but one valuation put it at £2.5 m in 2002.⁷

The legal background to these events was the Limitation Act 1980 and the Land Registration Act 1925; the parallel enactments in Northern Ireland are of course the Land Registration Act (NI) 1970 and the Limitation (NI) Order 1989. The combined effect of these statutes is that title to land is lost 12 years after possession of it is taken by another. The limitation of actions to recover land works just as well in registered land as in unregistered land, and the adverse possessor's title is protected against purchasers even before he becomes the registered proprietor, although the technical means by which this is achieved differs very slightly between the two Acts.⁸

Pye lost its title before the Human Rights Act 1998 came into force, but was free to apply to the ECtHR on the pre-Human Rights Act basis. It did so, the respondent being now not Graham but the UK Government, on the basis that the legislation that led to the loss of its land contravened Article 1 of the First Protocol to the European Convention on Human Rights and Fundamental Freedoms. Pye succeeded, leaving the UK Government with a huge bill for compensation for the loss of that valuable development land.

Meanwhile, of course, the Land Registration Act 1925 was repealed by the Land Registration Act 2002 ("the 2002 Act"). That Act made radical changes, so that there is now no limitation period for the recovery of possession of registered land;⁹ it is possible for an adverse possessor to take over the dispossessed proprietor's registered title, but if the dispossessed proprietor objects to his application for registration the circumstances in which the squatter can be registered are very limited indeed. It should be stressed that these changes were not motivated by the *Pye* saga, having been proposed by the Law Commission before Pye had been heard of;¹⁰ but the first instance decision added weight to the Law Commission's views.¹¹ Rather, they arose from two quite different concerns. One was the view that to allow loss of title by adverse possession was inconsistent with the certainty of title that registration is supposed to confer; the other was the wish to induce large organisations to register their title voluntarily, by making registered title attractive (because it is now "squatter-proof").

Despite that change in the law, the decision of the ECtHR in *Pye* raised serious concerns. There must be titles acquired by adverse possession against registered proprietors under the 1925 statute and still unregistered; to the compensation payable to Pye may be

4 (2000) 81 P&CR 177.

5 [2001] EWCA Civ 117, [2001] Ch 804, paras 41 and 43.

6 [2002] UKHL 30.

7 According to the UK Government; Grand Chamber decision *J A Pye (Oxford) Ltd and J A Pye (Oxford) Land Ltd v UK* (application no. 44302/02), para. 23.

8 See E Cooke, "Adverse possession after *J A Pye (Oxford) Ltd v the United Kingdom*" (2006) 57 NILQ 429, p. 431.

9 S. 96.

10 In Law Commission, *Land Registration for the Twenty-First Century: A consultative document* (Law Com no. 254, 1998), Part X.

11 *Law Commission, Land Registration for the Twenty-First Century: A conveyancing revolution* (Law Com no. 271, 2001); Neuberger J's conclusion is quoted at length at para. 14.1.

added claims for compensation in the future, to an incalculable extent. Moreover, the decision raised open-ended problems for Northern Ireland and the Republic, both of whose registration statutes appeared to violate human rights following the court's decision. The decision even raised fears about the Land Registration Act 2002, which might be seen to have weak points even in its much attenuated provisions for adverse possession. The new Act makes it possible for a squatter to supplant a registered proprietor who fails to respond to the registrar's notice of the squatter's application, yet the majority in the European Court of Human Rights took the view that the fact that a proprietor had "slept on his rights" should make no difference to the fact of violation.¹²

It was therefore unsurprising that the UK Government appealed to the Grand Chamber of the ECtHR,¹³ and the Irish Government made a third-party submission in the case.¹⁴

A digression . . .

Here we have to digress and note two developments that took place parallel with the *Pye* litigation and in response to it.

One is the English decision in *Beaulane Properties Ltd v Palmer*.¹⁵ This was another case arising from the grazing of livestock, where the limitation period for the recovery of land had expired well before the coming into force of the Land Registration Act 2002. It was heard after the House of Lords' ruling in *Pye* and after the coming into force of the Human Rights Act 1998, but before the judgment in *Pye* in the ECtHR. Nicholas Strauss QC, sitting as a Deputy Judge of the High Court, was able to find in favour of the dispossessed registered proprietor despite the fact that on a conventional understanding of the legislation he would have lost his title. The judge was persuaded by the registered proprietor's argument that there a violation of Article 1 of the First Protocol and, rather than making a declaration of incompatibility in respect of the legislation, reinterpreted the requirements for adverse possession itself. He decided the case as if a nineteenth-century Court of Appeal decision, *Leigh v Jack*¹⁶ remained authoritative, so that the squatter had to be doing something obviously incompatible with the proprietor's current use of the land. That was not the case here; and so the registered proprietor's action succeeded.¹⁷

The other is the proposal to reform the law in the Irish Republic with a view to making the law of adverse possession in registered land human rights compatible. The Law Reform Commission's draft Bill, in 2005, contained clauses (129 and 130) restricting significantly the rights of a squatter, requiring him or her to make an application to court before he or she could be registered, cutting down the circumstances in which he or she could be registered and empowering the court to order the squatter to pay compensation. However, the circumstances in which the squatter could be registered, under these proposed provisions, were nowhere near so narrow as those under the Land Registration Act 2002 for England

12 For further comment on the decision of the ECtHR, see Cooke "Adverse possession" (n. 8 above); Dixon, "Adverse possession" (n. 3 above); A Goymour, "Proprietary claims and human rights – a 'reservoir of entitlement?'" (2006) 65(3) *Cambridge Law Journal* 696–720.

13 Leave is given for this only in exceptional cases, i.e. those raising a serious question about the interpretation or application of the Convention, or a serious issue of general importance: Art. 43(3) of the Convention. See H Fenwick, *Civil Liberties and Human Rights* (London: Cavendish, 2002), p. 24.

14 Grand Chamber judgment, para. 8.

15 [2005] EWHC 1071 (Ch). See J Howell, "The Human Rights Act 1998: land, private citizens, and the common law" (2006) 123 *LQR* 618.

16 (1879) 5 Ex D 264, CA.

17 Again, for further discussion, see Cooke, "Adverse possession" (n. 8 above).

and Wales. They were essentially the circumstances in which adverse possession is normally successful in Ireland, namely:

1. whether from the lack of response to notices, inquiries, searches, or advertisements displayed, served, made or placed, from statutory declarations or other evidence furnished, it is reasonable to assume that the owner has abandoned the land or is unlikely to be found;
2. owing to a mistaken assumption as to the position of the boundary between the applicant's land and the owner's land, the applicant has throughout the period encroached upon part of the owner's land reasonably believing it to be part of the applicant's land;
3. where the application relates to land comprised in a deceased person's estate, it is reasonable to assume that an order in favour of the applicant would accord with the deceased's wishes; or
4. in any other case, in the interest of settling the title to land in the fairest manner, it is appropriate to make the order.¹⁸

Point 3 is especially significant because adverse possession has been widely used both in the Republic and in Northern Ireland to resolve disputes arising on intestacy, in a context where families have been scattered by migration and where farming has often simply been carried on by the next generation without those involved feeling it necessary to extract a grant of probate.

However, the Land and Conveyancing Law Reform Bill presented to the Seanad on 16 June 2006 did not include those clauses. It was felt (in response to representations made to the Irish Government by the Law Society of Ireland's Conveyancing Committee) more appropriate to await the decision of the Grand Chamber and, indeed, as we have noted, for the Irish Government to intervene in those proceedings.

The decision of the Grand Chamber

Article 1 of the First Protocol reads as follows:

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

It is trite law that there are three things here: a general principle, a provision about the deprivation of possessions, and, in the second paragraph, a third provision, about the control of use of property. It is also well-established that the second and third provisions are instances of the first.¹⁹

The Grand Chamber gave a majority decision in favour of the UK Government; two different minority opinions were also handed down.

18 Law Reform Commission, *Report on Reform and Modernisation of Land Law and Conveyancing Law* (LRC 74-2005), Appendix B, Land and Conveyancing Bill 2005, cl. 130(2)(b).

19 Grand Chamber decision, para. 52.

THE MAJORITY DECISION

The majority reasoned as follows. First, they disagreed with the UK Government's submission that the case should be heard with reference solely to Art. 6, since it was not a case where the Government was trying to confiscate possessions or otherwise carry out any direct deprivation (so that Art. 1 of the First Protocol was not relevant). The court found "nothing in principle to preclude the examination of a claim under Article 1".²⁰ But that feature of the legislation was relevant in another respect; because this was not legislation which permitted the state to transfer ownership from one person to another, nor a manifestation of a social policy of transferring ownership. Rather, it was a provision for the limitation of actions. Accordingly, the statutory provisions were not intended to deprive anyone of their ownership, but to "regulate questions of title". Accordingly, the court found that the operation of the statutory provisions in question was a control of use of the land, not a deprivation of possessions.

That finding of itself led the court to its conclusion. It seems to have regarded it as beyond dispute that the limitation of actions serves a legitimate aim. Reference was made to *Stubbings and Others v UK*,²¹ which concerned the limitation of an action for personal injury. As to the extinguishment of the registered proprietor's title, the court regarded this as being within the margin of appreciation accorded to states as to what is in the public interest, unless the provision is manifestly without reasonable foundation; and the court held that this provision was not.²²

Even so, could it be said that the application of the law in this case did not strike a fair balance between the public interest and the individual? Again, the strength of the public interest in the limitation of actions seemed to draw the court to its conclusion; it took the view that the termination of the title of the paper owner merely regularises the positions of the parties once the cause of action to recover land is barred. And while the Chamber had laid much weight upon the absence of compensation, the Grand Chamber noted that the issue of compensation was not generally engaged in connection with a control of use, and that no other country had compensation provisions as part of its adverse possession regime.²³ It agreed with the UK Government that "a requirement of compensation would sit uneasily alongside the very concept of limitation periods".²⁴ And the court was unimpressed with the idea that the legislation did not incorporate sufficient procedural safeguards for the registered proprietor, in view of the fact that the limitation period was relatively long, at 12 years; that very little action would have been needed to stop time running; and that Pye had ready access to the courts throughout the 12 years. What of Pye's contention that their loss was so great, and Graham's gain such a windfall (on top of the free use of land for so many years) that the fair balance required by Art. 1 was upset? Again, the court was unimpressed. Their reasoning focuses on the legislation itself, rather than on the legislation's application to the facts of this case, because of their view about the importance of the limitation of actions: "limitation periods, if they are to fulfil their

20 Grand Chamber decision, para. 60.

21 [1996] ECHR 22083/93.

22 Grand Chamber decision, paras 71 and 74; reference was made to *Jahn and Others v Germany* nos 46720/99 and 72552/01, ECHR 2005-VI.

23 Both parties submitted comparative evidence; on behalf of the UK Government the British Institute of International and Comparative Law submitted a detailed report of adverse possession regimes in a number of jurisdictions. The court found, at para. 78, that it could not derive any general principle from this material, save to say that periods of limitation differed from one regime to another, as did the relevance of the good faith or otherwise of the squatter.

24 Grand Chamber decision, para. 79.

purpose . . . must apply regardless of the size of the claim. The value of the land cannot therefore be of any consequence to the outcome of the present case.”²⁵

THE DISSENTS

There were two minority opinions. One (“the first dissent”) was given by Judges Rozakis, Bratza, Tstatsa-Nikolovska, Gyulumyan and Sikuta, and the other (“the second dissent”) by Loucaides and Kovler.

The first dissent is, with respect, the more powerful. The dissenters agreed with the majority that this was a control of use of land; and they agreed that the statute served a legitimate aim in the public interest and that the extinguishment of the registered proprietor’s title was not “manifestly without reasonable foundation”. Where they parted company was on the question of fair balance. They went into rather more detail than had the majority of the Grand Chamber on the purposes of the law of adverse possession, looking not simply at the limitation of actions but at matters much more closely linked with land law itself – in particular, the justifications raised by the Law Commission for England and Wales,²⁶ and also the Government’s additional argument raised before the Grand Chamber, namely the public interest in ensuring that land, as a finite resource, should be used and maintained. They noted that some of the general reasons for the limitation of actions for the recovery of land are unnecessary where title is registered – in particular there is no need to use limitation to ensure certainty of title, since the register provides this. And they took the view that the public interest in keeping land in use does not require the landowner to be deprived of his title without compensation. Nor were they attracted to the idea of giving the adverse possessor a windfall, taking the view that his moral entitlement was quite different from that of the tenants in *James and Others v UK*,²⁷ where it could be said that the tenants’ investment in the property over the years justified their being able to enfranchise their leases. The impact on the landowner was, they said, “exceptionally serious”. Significantly, the minority agreed that compensation provisions simply do not fit with the idea of limitation of actions; but they went on to say that this only made the loss of beneficial ownership all the more serious. They laid more stress on the extent of the changes in the 2002 Act – thus emphasising the contrast, as had the Chamber, and the new safeguards in the legislation, which might be said to make the lack of safeguards in the older statute all the more conspicuous.

Thus they could not agree that a fair balance had been struck, quoting words used to describe Pye’s loss in the national courts: “draconian”, “unjust”, “illogical”, “disproportionate”.

The second dissent was rather shorter. Judges Loucaides and Kovler could not agree that the legislation in question served a legitimate aim in the general interest. They took the view that the provisions amounted to a deprivation, rather than a control of use. Insofar as there might be an interest in keeping land in use, that could be achieved by “taxation or the creation of incentives”; and the system complained of showed, they said, disrespect for the owner’s legitimate rights and encouraged illegal possession of property and the growth of squatting. The fact that Judges Loucaides and Kovler thought that this was a deprivation may have influenced their finding of a violation, owing to the general rule that compensation should be payable where there is a deprivation of possessions.²⁸

25 Grand Chamber decision, para. 84.

26 Law Com no. 254 (n. 10 above), 10.6–10.

27 [1986] ECHR 8793/79.

28 I am indebted to Amy Goymour for this point.

COMMENT

There is much to reflect on here, and we are still in the early days of evaluating the decision. One of the striking factors, already highlighted in the account given above, is the extent to which the majority was swayed by the fundamental importance of the limitation of actions across the board. It made little or no use of specific justifications for the limitation of actions *to recover land*, although in its discussion of relevant domestic law and practice it did rehearse the Law Commission's thinking about the justifications for the law on adverse possession.²⁹ The majority did not really carry out much of an examination of the justification for extinguishing title, regarding that as simply a logical consequence of the limitation of the action for possession. And, of course, that latter point is right – the public interest could not possibly be served by a situation in which a registered proprietor remained the “owner” of land but could not access it, use it or sell it, while the squatter had *de facto* ownership which he could not then register (so that the squatter could not sell the land either). But is the former point correct: is there anything more to be said about the justification of the limitation of actions to recover possession of land? If not, we might now pause to worry about why we have virtually abolished that limitation in England and Wales for registered titles. Have we gone too far? We look at this again in the final section of this note.

One curious feature of the Chamber's decision was its very European, civil law view of the ownership of land. It will be recalled that the civilians are uncomfortable with the idea that property rights can be fragmented (seen pre-eminently in the common law concepts of the trust and of relativity of title); and so were particularly uncomfortable with the idea that an owner might be penalised for sleeping on his rights. But this is rather a theoretical position; in practice, land throughout Europe is subject to restrictions upon its use and management, and may be subject to compulsory purchase; land ownership carries obligations as well as privileges. The Grand Chamber's decision may be seen as a more realistic view of the nature of ownership itself than was that held by the Chamber.³⁰

The second dissent is curious; it is hard to see any justification for a view that certainty of title is the *only* justification for the law of adverse possession, so that it has *no* justification in registered land. But the first dissent is much stronger. The dissenters part company with the majority only on the final question as to fair balance, whether the circumstances of an individual case can ever be subject to examination so as to provide a possible challenge to a squatter's title. The majority's view is quite simply that for the limitation of actions to work *at all* there can be no exceptions; the minority disagrees. Neither has a knock-down argument as a matter of logic.

The authority of the Grand Chamber decision

This is perhaps the most crucial issue for the courts in Northern Ireland, England and Wales, and the Irish Republic. For these courts are not bound by decisions of the ECtHR; they are obliged only to have regard to its jurisprudence (s. 2 of the Human Rights Act 1998). And it has to be acknowledged that there is force in the minority's view in the Grand Chamber decision in *Pye*. It is difficult not to imagine circumstances in which the Limitation

29 Grand Chamber decision, para. 30.

30 The Grand Chamber did not explore, perhaps because it was not invited to do so, the question of the squatter's own rights under Art. 1 of the First Protocol. Could not the grazing land be said, after so many years, to be among Graham's possessions? The point might sound rather a weak one but for decisions of the ECtHR granting a measure of protection to illegal occupiers in some (perhaps rather extreme) circumstances: see H Ploeger and D Groetelaers, “Informal settlements and fundamental rights” at www.fig.net/pub/fig2006/papers/ts27/ts27_01_ploeger_groetelaers_0436.pdf.

Acts could operate in a manner perceived to be unjust, despite the Grand Chamber's reassurance that the statutory machinery here is human rights compliant and, indeed, its view that the nature of the legislation precludes the examination of individual circumstances. We might or might not think that Pye deserved its fate; but it is easy to construct stories of registered proprietors deprived of their land through no fault of their own, in circumstances where, perhaps through infirmity, they were unable to look after it. That land might be all a person had. Is it not still open to the domestic courts to hold that in some extreme circumstances the operation of the Limitation Acts is disproportionate to the end sought to be attained – as, indeed, was the view of the first dissent in the Grand Chamber in *Pye*? The majority of the Grand Chamber would seem to say not only that there was no violation of Art. 1 in *Pye* itself, but that there could be no violation in any other circumstances, even extreme ones.

Again, no knock-down arguments come to hand. But three factors would seem to point in the direction of the courts' not examining the issue of fair balance in individual cases.

One is the authority of the Grand Chamber's judgment. It is not binding precedent. But it is very persuasive indeed. To quote Lord Bingham from *Leeds City Council v Price and Others; Kay and Others v London Borough of Lambeth* ("*Kay;Price*"): ³¹

... it is ordinarily the clear duty of our domestic courts, save where and so far as constrained by primary domestic legislation, to give practical recognition to the principles laid down by the Strasbourg court as governing the Convention rights specified in s 1(1) of the 1998 Act. That court is the highest judicial authority on the interpretation of those rights, and the effectiveness of the Convention as an international instrument depends on the loyal acceptance by member states of the principles it lays down.

Lord Bingham also referred to the courts' liberty, under s. 2 of the 1998 Act, to depart from the Strasbourg court on "isolated occasions" in a class of case "peculiarly within the knowledge of the domestic authorities". But note that he speaks of a "class of case", not of the circumstances of a particular individual;³² and note that the Grand Chamber has denied the relevance of individual circumstances in cases concerning the limitation of actions.

Another powerful persuasion must be the majority's central argument, which is that there is no room for consideration of the size of the claim (and therefore of the loss or of the "windfall" gain) in the context of the limitation of actions. We do not, for example, decide to override the limitation periods in actions in contract, or arising out of personal injury. Limitation is, to a considerable extent, about drawing bright lines.

Third is the House of Lords' decision in *Kay;Price*. These conjoined cases were both possession proceedings, taken in one case against tenants whose lease had come to an end, and in the other against gypsies. The occupiers' defence, in both cases, was that possession proceedings violated their rights under Art. 8 of the Convention: their right to respect for their home. As is well known, the cases reached the House of Lords and the occupiers' appeals failed. Their lordships' decision was reached in the light of the ECtHR's decision in *Connors v UK*,³³ which also involved the actions taken by a local authority to get rid of gypsies. In that case, it was held that the gypsies' procedural rights had been violated; and

31 [2006] UKHL 10, para. 28. The decision in *Kay;Price* is helpfully expounded by Carnwath LJ in *Doherty and Others v Birmingham CC* [2006] EWCA Civ 1739.

32 Bear in mind that the *Kay;Price* case was decided partly in response to the ECtHR's decision in *Connors v UK* (2004) 40 EHRR 189, which was precisely about the special considerations relevant to a *class* of cases (gypsies), not to a particular individual.

33 See n. 32 above.

legislation was passed in response to ensure that gypsies in the future would have the opportunity to have possession proceedings adjourned for up to 12 months.³⁴

Against this background the House of Lords had the opportunity to decide the status of a challenge pursuant to Art. 8 in the face of possession proceedings based on indisputable property rights. By a majority they made a far-reaching decision. They held that an Art. 8 defence to possession proceedings can *only* be mounted on the basis that the legislation concerned is incompatible with the Convention – and not on the basis of hardship in an individual case. They reasoned that parliamentary scrutiny of legislation will already have carried out the necessary balancing procedure, and that therefore there is no need for the courts to address that issue afresh. There can be a challenge based on Art. 8 only where it can be said that the legislation as a whole is not human rights compliant – as it was not in the *Connors* case because the unusual needs of a particular community had been overlooked. And of course in that event a challenge would (in the appropriate court) lead to a declaration of incompatibility (if the legislation could not be interpreted pursuant to s. 3 of the Human Rights Act 1998) which would, of course, make no difference to the outcome for the individual suffering hardship.

The majority in the House of Lords was motivated in particular by their concern not to flood standard county court possession proceedings with human rights arguments, of which 99.99 per cent or more must be doomed to failure.

Can the ratio of that case (that is, that domestic property legislation can only be challenged as a whole, rather than its effect examined in individual cases) be stretched just a little wider and construed to encompass not only defences to possession proceedings on the basis of Art. 8, but also any human rights challenge to a clearly established property right? Is it always the case that the Convention looks to property law itself, rather than to its application to specific facts? Lord Hope, at para. 81, referred to the applicant local authorities' "right to vindicate their right, as owners of the land, to exclusive occupation of the properties". That is what a squatter is doing in applying for registration, or in resisting possession proceedings brought by the former owner whose title has been extinguished – for in adverse possession cases of this kind, it is the *squatter* who is owner, by virtue of the legislation.

The House of Lords' decision in *Kay; Price* related explicitly only to Art. 8: it cannot be regarded as binding authority to the effect that in *any* human rights challenge to property rights the question of balance and of hardship to the individual cannot be examined. Nevertheless it must be regarded as highly persuasive, or at the very least indicative of the view their lordships would take were an adverse possession case involving an Art. 1/Protocol 1 challenge ever to reach them. They would surely hold that the legislation is, according to the Grand Chamber, human rights compliant, that the balancing exercise has already been done in the legislative process, and that the courts may not re-open it in individual cases.

The case for reform

The somewhat negative conclusions of the last paragraph should not blind us to the extent to which the *Pye* saga must be a catalyst for reform. The gift that the *Pye* litigation has given is an opportunity to re-evaluate adverse possession. There seems to be little scope, if any, for the courts to inquire whether the legislation strikes a fair balance in a particular case. But the legislature for Northern Ireland and for the Irish Republic can still address the prior

34 Amendments to the Caravan Sites Act 1968.

question: does the legislation serve a legitimate aim, and does it do so in a proportionate manner? England and Wales has very recent legislation, but even this should not escape scrutiny in the light of the issues thrown up by *Pye*.

The litigation forced the courts to look closely at the requirements for adverse possession. These have been fluid, to say the least, over the years. The physical aspects of possession are now relatively clear;³⁵ but the confusion inherent in the requirements that the squatter does not have to intend to own, only to possess, but must intend to exclude the world at large “including, so far as practicable, the paper owner” came to a head in the Court of Appeal decision in *Pye* that Graham did not have sufficient intention to possess. The contrast between that finding and those of the High Court and Court of Appeal is striking. One of the trends in adverse possession law over the years has been the courts’ wish, from time to time, to raise the barrier that the squatter must surmount; we find it difficult to forgive those who trespass against us, the courts no less than the rest of us. Every now and then the barrier is pushed a bit too high, so as to frustrate the purpose of the legislation, and the House of Lords’ analysis restores order in this respect.³⁶

That of course was what had happened in *Leigh v Jack*,³⁷ and again in *Wallis’ Cayton Bay Holiday Camp Ltd v Shell-Mex and BP Ltd*.³⁸ The implied licence idea introduced in the latter case was expressly overruled by the Limitation Act 1980;³⁹ the more subtle curb upon the squatter in *Leigh v Jack* survived, strictly speaking, until *Buckinghamshire CC v Moran*.⁴⁰ The attempt to revive that rule, in *Beaulane Properties Ltd v Palmer*⁴¹ must now be regarded as *per incuriam*. The Grand Chamber’s decision in *Pye* removes any reason for reinterpreting the legislation and makes clear that *Beaulane* was founded on an erroneous application of human rights law. Instead, the law as to the requirements for adverse possession stands as it stood immediately after the House of Lords’ decision in *Pye*.⁴²

In England and Wales we have moved on from there. So far as registered land is concerned the law is now as stated in the 2002 Act, except where the limitation period expired before the coming into force of that Act.⁴³ That reform was undertaken in the light of proposals made by the Law Commission for England and Wales, in a joint project with the Land Registry.⁴⁴ The Commission identified⁴⁵ four reasons often given for the law on adverse possession:

35 *Buckinghamshire CC v Moran* [1990] Ch 623 is now the leading authority.

36 [2003] AC 419 at 435–43.

37 See above n. 16.

38 [1975] QB 94.

39 Sch. 1, para. 8(4).

40 [1990] Ch 623, *per* Slade LJ at 639 and Nourse LJ at 645F. The Republic’s courts have followed this decision: J C W Wylie, *Irish Land Law* 3rd edn (Dublin: Butterworths, 1997), p. 1089.

41 See n. 15 above.

42 For a profound analysis of the requirements for adverse possession: see O Radley-Gardner “Civilized squatting” (2005) 25 *Oxford Journal of Legal Studies* 727–47.

43 Subject to the transitional provisions contained in Sch. 12. It is noteworthy that s. 11(4)(c) provides that on first registration after the coming into force of the new statute, the registered proprietor will hold his or her newly registered title subject, *inter alia*, to rights acquired under the Limitation Act 1980 (c. 58) *of which he or she has notice*. Thus, the owner of unregistered land who does not know that he or she lost a field to a squatter 20 years ago and registers the title now can regain that field (provided, one supposes, that the squatter has not first registered his or her own title to the field). This seems a perfectly straightforward deprivation of the title of the squatter and it is hard to think of a justification of it apart from academic tidiness. The point has been made before – E Cooke, “The Land Registration Bill 2001” (2002) *The Conveyancer* 11 – but has not yet been raised by real people.

44 Law Com no. 271 (n. 11 above).

45 See n. 26 above.

- (i) because it is part of the limitation of actions, and encourages owners not to sleep on their rights;
- (ii) because if ownership and use of land are out of kilter, the land may become unmarketable;
- (iii) because an innocent squatter who was simply mistaken about ownership, may have spent money on the land; and
- (iv) to facilitate investigation of title to land – the requisite age of a good root of title to unregistered land need only be a few years longer than the limitation period.⁴⁶

The commission rightly noted that point (iv) has no application when title is registered. With that justification disposed of, they took the view that the other points were of minor importance. Point (i), too, fades into insignificance when registration provides certainty to the world and is supposed to guarantee security of title to the owner. Point (ii) was considered to be of minor importance and covered by the provisions relating to overriding interests; and point (iii) can often be picked up by other principles, such as proprietary estoppel.

So the Law Commission, and the legislature, felt it reasonable virtually to eliminate the possibility of acquiring title to land by adverse possession. The circumstances in which a squatter can be registered as proprietor are restricted to instances where the registered proprietor has no objection; where the squatter has an equity by estoppel; where the squatter has some other entitlement, for example, under a will or intestacy; or where the squatter has made an innocent and reasonable mistake about boundaries.

Earlier commentary has focused on the fact that this reform may go too far in favour of the registered proprietor. Other legislatures, for example, the Australian states, have not all abolished the limitation of actions to recover registered land.⁴⁷ At the very least, it may be said that adverse possession plays a vital role in registration systems which do not operate a system of fixed, surveyed boundaries.⁴⁸

On the other hand, it was observed after the Chamber decision in *Pye*, when the Grand Chamber decision was awaited, that alongside those concerns that the new law went too far in suppressing the squatter there must also be concerns that the new law went too far in the squatter's favour, by giving the registered proprietor insufficient protection. Was it enough to give the squatter 65 business days to respond to the registrar's notice of the squatter's application?

The Grand Chamber's view is that it is; and I have argued that the decision in *Kay; Price* means that the courts of England and Wales, and of Northern Ireland, should not go behind the legislation in an individual case. Nevertheless there are reasons why the legislature might at some stage review the very radical change made in the 2002 Act and ask if it goes too far in either direction and if it might therefore be tweaked. It might well be influenced

46 This is Martin Dockray's point, in his renowned article "Why do we need adverse possession" (1985) *The Conveyancer* 272; in the writer's view this point was the major driver of the 2002 reform to adverse possession. Dockray's point was simple and persuasive: the major reason for the law on adverse possession was intimately linked with the deduction of title in unregistered land; therefore it is (almost) unnecessary where title is registered.

47 The reference to Australia is deliberate; true, a number of European jurisdictions also allow for title to be acquired by possession, but European registration systems are conceptually different from the English and Commonwealth systems. These two are rather stronger systems, in which registered title is supposed to prevail over unregistered, and there is little or no possibility of a "true owner" off register. So the point to be made is that acquisition of title by adverse possession cannot be said to be fundamentally incompatible even with registration systems akin to ours.

48 Commonwealth systems typically do; the English and Irish systems do not.

by its own argument in the Grand Chamber: that without the possibility of acquiring title by adverse possession, land may be left unused. This is slightly different from the Law Commission's point (ii), above, where the concern was unmarketability. It may be that insufficient weight was given to that point by the Law Commission; and the Government's point may also have to be thought through. We currently have legislation allowing local authorities to use, but not to acquire, unoccupied properties for housing;⁴⁹ but these provisions may be ineffective because of the heavy duties placed upon the authorities to maintain the property in the interests of the owner. It may be that, in a jurisdiction where land is scarce and housing a problem, the ability to acquire title by adverse possession is truly needed. And that takes us to the pressing social concerns highlighted by Lorna Fox and Neil Cobb in their article "Living outside the system? The (im)morality of urban squatting after the Land Registration Act 2002".⁵⁰ They raise the problems of the homeless, who have in recent years been able to have recourse to adverse possession, and who may actually be rather more deserving than the landowners whose neglected properties they occupy. They suggest that morality does not always run in one direction – in contrast to the view taken by the Law Commission, which seemed to view squatting as immoral and, also, as it turns out, to the view taken by the second dissent in the Grand Chamber decision in *Pye*.

So, I suggest that the legislative story of adverse possession in England and Wales is not yet over.

These issues are even more live in Northern Ireland and the Republic, where the steps taken by the English legislature in the 2002 Act have not been taken. It seems unlikely now that the precise terms suggested by the Irish Law Reform Commission will find their way into the new Irish legislation; but there are strong arguments that some provision might perhaps be made for the protection of owners who are in danger of losing their land inadvertently.⁵¹ Reform cannot now be said to be required under the European Convention, but if reform is ever considered for Northern Ireland then that is one of the factors that should be considered. Alongside it will doubtless be the considerations that swayed the English Law Commission; and, in the other direction, the public interest in keeping land in use and in not allowing land ownership to fall out of kilter with use. An important consideration must also be the traditional use made of adverse possession in Northern Ireland and in the Republic in sorting out disputes on intestacy; a matter of which the judiciary might not, perhaps, be able to take judicial notice but which must be an important consideration for government.

So *Pye* is over. The issues surrounding the usefulness of the law relating to adverse possession remain live. But it is suggested that those are matters for the various legislatures of the United Kingdom and Ireland and not for the courts; which may be a matter either for relief or for regret to today's audience.

49 Housing Act 2004, ch. 2.

50 (2007) 27(2) *Legal Studies* 236.

51 Una Woods, paper delivered at the conference of the Society of Legal Scholars, 2007.