

ATLANTIC  CHAMBERS

CHANCERY & COMMERCIAL GROUP

NEWSLETTER

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1. **Nick Riddle: Two plus nine equals twelve**¹

The 12 year limitation period for actions for the recovery of land no longer applies to registered land: **s.96 Land Registration Act 2002**. However, on the face of things, it seems to maintain a shadowy existence in the new procedure prescribed by Schedule 6 to the Act: 10 years is long enough to give a squatter the right to apply for registration, under para. 1(1), and if the application fails a further two years may be sufficient to perfect the squatter's title under para. 6(1). However, a recent case that I had before the Adjudicator to H.M. Land Registry gave rise to some doubt as to how this procedure operates.

The Applicants made their application in July 2006, on the basis that they had been in adverse possession since about 1987. Notice of the application was given to the registered proprietor under para. 2(1), and the proprietor duly gave notice under para. 3 requiring the application to be dealt with under para. 5. It was therefore necessary for the Applicants to satisfy one of the three conditions specified in para. 5² if their application was to succeed. They claimed to satisfy two of them, but the Adjudicator found against them in relation to both conditions. If that had been the only finding the position would have been straightforward: their application would have been rejected under para. 5(1), but a further two years adverse possession would have given them an indefeasible right to be registered, under paras. 6 and 7. However, the Adjudicator also found that they had not achieved 10 years adverse possession: they fell short of 10 years by a matter of months. The question therefore arises of whether, if their possession is left undisturbed, paras. 6 and 7 will save them in two years time.

¹ I am indebted to Craig Walker of Hill Dickinson LLP for drawing my attention to the question considered below.

² (1) estoppel, (2) other right to be registered, (3) reasonable belief in ownership.

Para. 6 applies "[w]here a person's application under paragraph 1 is rejected". On a literal construction the Applicants fall squarely within those words. But can it be right that a person who never had the right to apply under para. 1 can be saved by para. 6? The shortfall in this case was only a matter of months, but in other cases it could easily be years, if the application under para. 1 was made in the genuine though mistaken belief that 10 years could be established. The Law Commission in the Reports that led to the 2002 Act did not envisage that such a person could rely on para. 6: paras. 10.58 and 10.59 of their consultation Report **Land Registration for the Twenty-first Century** (No. 254, 1998) referred specifically to the squatter's failure to satisfy any of the three conditions, although this was not repeated in their recommendation in para.10.66(7); and a similar reference to failure to satisfy the conditions appeared in para. 14.53 of their final Report (2001). However, para. 6 of Schedule 6 to the draft Bill appended to the final Report was in the form in which it now appears in the Act, and the commentary at para. 704 does not refer to failure to satisfy the conditions. Thus the problem arose.



What the Law Commission intended and what the legislature enacted are not necessarily the same. The text book writers take the view that para. 6 of Schedule 6 means exactly what it says.

Ruoff & Roper's Registered Conveyancing at para. 33.050, simply paraphrases para. 6. **Wolstenholme & Cherry's Annotated Land Registration Act 2002** at para. 30-199, p.170, goes further: "... if an applicant's application is rejected *for whatever reason* he may renew his application" [emphasis supplied].

Reports of the Law Commission are admissible as a guide to the construction of statutes (*R. v. Secretary of State for the Environment, Transport and the Regions, ex p. Spath Holme Ltd.* [2001] 2 A.C. 349 at p.397C-D, per Lord Nicholls of Birkenhead), but such external aids are to be resorted to with caution, particularly where the words of the statute are clear and unambiguous and not productive of absurdity (*ibid.*, at p.398C-D). It may be that a court could be persuaded to apply para. 6(1) as if it began "Where a person's application is rejected under paragraph 5(1)...". However, there must be some uncertainty as to this, and until the point is actually decided the advice to paper title owners who have successfully resisted an application under para. 1 on the ground of inadequate length of adverse possession must be that they should take steps to assert their title well before the expiry of the two year period.

2. Tax and Insolvency

In *Arnold v Williams & HMRC* [2008] EWHC 218 (Ch), HHJ Purle Q.C. was called upon to decide how revenue debts are properly ascertained in a bankruptcy. In recent years a practice has developed under which HMRC serve post-bankruptcy tax assessments upon the trustee in bankruptcy of the taxpayer (rather than the taxpayer); HHJ Purle Q.C. was required to consider whether this practice has a sound footing in law.

The trustee in bankruptcy was appointed at the request of HMRC (which considered that the bankrupt had concealed income and assets). After the trustee's appointment, and a further tax investigation, tax assessments were raised and sent to the trustee – but not to the bankrupt. HMRC then lodged a proof of debt in the bankruptcy.

The bankrupt sought to appeal the tax assessments, but HMRC took the view that he could not do this, the right to do so (in its view) being the trustee's. HMRC served a further set of tax assessments on the trustee.

It was held that:-

- (a) under the **Taxes Management Act 1970 s.30A(3),(4)**, no assessment is final unless properly served. The first set of assessments had not been served on the bankrupt. The later assessments were expressed to be raised against the trustee, but the tax liability was that of the bankrupt, so no assessment could properly be raised against the trustee. In any event, the later assessments were not served on the bankrupt either;
- (b) any right of appeal against the assessments lay with the bankrupt, not the trustee. Any assessment on a discharged bankrupt can only be appealed by him;
- (c) the assessments had not become final and could be appealed, once served. The bankruptcy proceedings were stayed pending the determination of any appeal to the tax appeal commissioners.

Graham Sellers appeared for the bankrupt.

3. *Ofulue v Bossert: Adverse Possession and Human Rights*

In *Beaulane Properties Limited v Palmer* [2005] EWHC 817 (Ch) Nicholas Strauss Q.C., sitting as a Deputy Judge of the High Court, found the operation of the law on adverse possession pre-**Land Registration Act 2002** to be in conflict with **Protocol 1, Art.1, European Convention on Human Rights** (protection of property rights).

In *J.A. Pye (Oxford) Ltd. v U.K.* (44302/02) 23 BHRC 405 ECHR (Grand Chamber) the old law on adverse possession was however held to be Convention compliant.

Recently the Court of Appeal revisited this area in (1) *Emmanuel Ofulue (2) Agnes Ofulue v Erica Bossert* [2008] EWCA Civ. 7. The Ofulues ("O") became registered owners of the property in 1976, then went to live in Nigeria. In 1981 Bossert ("B") was let into

possession by a former tenant. In 1983 O visited, told B of his ownership and asked B to leave. In 1987 O visited again, and asked B to leave, issuing possession proceedings in 1989. B counterclaimed, asserting the grant of a tenancy. In 1992, B offered to purchase the property in a without prejudice letter. The first possession proceedings were not pursued. In 2000 and 2003 O served notice to quit on B, then issued possession proceedings again. B asserted ownership by adverse possession.

At trial, the judge held that B had been in adverse possession for 12 years before 13th October 2003 (indeed before October 2000) such that O's title was extinguished.

Of most interest (amongst O's other unsuccessful points of appeal) was O's attempt to distinguish the ECHR Grand Chamber decision in *Pye*, on the basis that in *Pye* the owner did not assert title until after the limitation period had expired: in the instant case, O asserted title in 1983 and 1987 and issued proceedings in 1989. O argued that the 'fair balance' required to be struck under *Protocol 1, Art.1* may have been struck on the facts of *Pye*, but was not in this case.



The Court of Appeal held that "...this Court would have to have very good reasons for departing from Strasbourg jurisprudence." (Arden L.J., para.32), and that the determination of the Grand Chamber in *Pye* "...applies to all decisions on adverse possession and it is not open to this court not to follow that determination because the case is distinguishable on its facts ... For the doctrine

of the margin of appreciation to be inapplicable, the results would have to be so anomalous as to render the legislation unacceptable ... and in my judgment that has not been demonstrated in this case..." (Arden L.J., para.52). The Court of Appeal has sent a strong message to the effect that the ECHR Grand Chamber decision in *Pye* applies across the board: any attempt to argue that the pre-**Land Registration Act 2002** law on adverse possession conflicts with Convention rights would now have to be treated with extreme caution.

4. *The Pirates of Penzance*

A short distance from Penzance stands Newlyn, where the firm of W. Stevenson & Sons carried on the business of selling fish by auction. The firm's misadventures, recorded in *W. Stevenson & Sons (A Partnership) and Bick v R [2008] EWCA Crim. 273*, led to an interesting analysis of the legal nature of a partnership and the status of a firm in relation to criminal law.

The firm had been prosecuted for offences under the **Sea Fishing (Enforcement of Community Control Measures) Order 2000**. That Order makes no express provision for the prosecution of a partnership, but Article 11(2) refers to the commission of an offence by a partnership and prescribes the circumstances in which individual partners are to be liable for that offence. The firm was convicted on a number of counts and, having launched an appeal, gave notice withdrawing its appeal. Subsequently, when it appeared that confiscation proceedings might be taken against individual partners under **s.71 Criminal Justice Act 1988**, and application was made in the name of the firm and of the eight individual partners for leave to bring a further appeal.

The proposed grounds of appeal embodied what the well known barrister³ W.S. Gilbert, in different circumstances but a similar geographical location, described as "a most ingenious paradox". Among other things it was said, on the one hand, that if the prosecution had been intended to be brought against the individual partners the indictment and arraignment were nullities because the partners were not named as defendants and did not enter pleas and, on the other, that if the partnership was intended

³and occasional librettist

as the defendant the proceedings were a nullity because a partnership is not an entity having any legal status. The paradox was compounded by the fact that if the partnership has been intended to be the defendant the individual partners had no standing to appeal the conviction, even though the partnership had no separate legal existence independently of them.

The Court of Appeal (Criminal Division) accepted that a partnership is not a legal entity. At para.23 of the single judgment the Court, after setting out the relevant provisions of the **Partnership Act 1890**, offered the following definition of partnership: "partnership is a relationship that enables transactions to take place under a single firm name on behalf of a group of persons who are jointly liable in respect of those transactions and jointly and severally liable for loss or injury caused or penalty imposed for which the firm has become liable."

In support of its argument that a partnership could be prosecuted for a criminal offence the prosecution relied on the suggestion in a leading textbook⁴ that the definition of "person" in the **Interpretation Acts 1889 and 1978** had effected a kind of statutory incorporation of partnerships for the purpose of any statute that refers to a "person". This argument was rejected, although it was accepted that the use of the word in any particular statute could, on the true construction of that statute, require a partnership to be treated as a legal entity. However, it was not necessary to rely on the Interpretation Acts in that case, because Article 11(2) of the Order under which the prosecution had been brought clearly envisaged, and thereby enabled, the bringing of a prosecution against a partnership as if it were a legal entity.

With the robustness that characterises decisions of the Court of Appeal (Criminal Division) the Court rejected the argument that the manifest intention of the Order could not be given effect because of its failure to make express provision for the prosecution of a partnership in the firm name. It followed that because the partnership had been correctly prosecuted the individual partners had not, and they therefore had no standing to appeal against conviction.



Although the case arose in the context of the criminal law, the exposition of the nature of partnership may well be of relevance in a wider context, as may the views of the Court as to the operation of the **Interpretation Acts** in relation to firms.

⁴Smith & Hogan, ed. Ormerod

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