Advanced topics – Chapter 6
Implied licences and human rights

The subject of implied licences to occupy land as a reason not to allow adverse possession is an interesting one which looked as if it was going to make a surprise comeback thanks to the European Court of Human Rights. As it turned out, it was a short-lived reappearance, as the initial decision was overturned by the Grand Chamber. Therefore, we have deleted much of the previous discussion from the third and subsequent editions of our textbook. However, if you are interested in knowing more, you can find a fuller version below.

Implied licences

The doctrine of implied licence seems to have originated in *Leigh v. Jack* (1879) 5 Ex D 264, in which it was held that uses of land that do not interfere, and are consistent, with, the uses to which the paper owner wants to put the land are not acts of dispossession and do not provide evidence of discontinuance of possession by the paper owner. In other words, the squatter has an implied licence from the paper owner to do acts that do not interfere with the paper owner's plans for the land.

An example of how this doctrine worked can be seen in the case of *Wallis's Cayton Bay Holiday Camp v. Shell-Mex* [1975] QB 94, in which it was held that using land as part of the frontage to a holiday camp was by implied licence of the paper owner as it did not conflict with their future intended use of the land.

As you can appreciate, this would make it very difficult to claim adverse possession unless the squatter were to do something radical to the land, such as building on it.

This doctrine of implied licence was expressly overruled in LA 1980, Sch. 1, para. 8(4).

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

For the purpose of determining whether a person occupying any land is in adverse possession of the land it shall not be assumed by implication of law that his occupation is by permission of the person entitled to the land merely by virtue of the fact that his occupation is not inconsistent with the latter's present or future enjoyment of the land.

This provision shall not be taken as prejudicing a finding to the effect that a person's occupation of any land is by implied permission of the person entitled to the land in any case where such a finding is justified on the actual facts of the case.

This provision was passed after the Law Reform Committee decided that the law had taken a wrong turning in *Leigh v. Jack*, as interpreted by *Wallis's Cayton Bay Holiday Camp v. Shell-Mex*, and that the doctrine of implied licence should be removed from the law. It was still not entirely clear whether the intention of the paper owner was relevant at all to the question of adverse possession: one interpretation of *Leigh v. Jack* was that it did not require an implied licence to be imposed, but that possession of land in a way that was not inconsistent with the paper owner's future intentions for the land was not 'adverse' possession.

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This point was discussed in *Buckinghamshire County Council v. Moran* (see 6.5.2.2 in the text book) and the Court of Appeal held that the intentions of the future owner were irrelevant in deciding whether the squatter's possession of the land was adverse. The House of Lords further endorsed this decision in *Pye v. Graham*, in which the reasoning in *Leigh v. Jack* was expressly overruled and the future intentions of the paper owner were held to be irrelevant to adverse possession.

At this point, everything seemed very clear—but there were further developments, based on the Human Rights Act 1998, which brought this doctrine briefly back into play again, as discussed above.

Human rights

The brief revival of the doctrine of implied licence was directly due to the influence of human rights law on adverse possession. In order to understand how this happened, we will trace the history of human rights law in this area.

It is not surprising that people who lose their land to a squatter might well feel that there has been a breach of some fundamental human right—after all, the paper owner is very likely to feel that the loss of their land is a great injustice. The first case in which it was claimed by a paper owner that their dispossession was a breach of their human rights was the case of *Family Housing Association v. Donellan* (2001) 30 EG 114 (CS). In this case, it was argued that LA 1980 was incompatible with European Convention on Human Rights (ECHR), Protocol 1, Art. 1.

European Convention on Human Rights, Protocol 1, Art. 1

Every natural or legal person is entitled to the peaceful enjoyment 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.

It was held in that case that ECHR, Protocol 1, Art. 1 applied to deprivation concerning expropriation by, or on behalf of, the state for public purposes and not to issues of private law. It therefore did not apply to adverse possession.

The matter was raised again in the House of Lords in *Pye v. Graham*, but because that case was decided before the Human Rights Act 1998 (HRA 1998) came into effect (2 October 2000), the House of Lords could not consider that point. When Pye eventually lost its land to the Grahams, however, it took its case to the European Court of Human Rights (ECtHR) in Strasbourg, to try to get compensation from the UK government for its loss. (That decision is discussed below.)

In the meantime, another adverse possession case was heard in the English courts after HRA 1998 had come into force: *Beaulane Properties v. Palmer*.

Beaulane Properties v. Palmer [2005] EWHC 1071 (Ch)

In this case, the facts were in many ways similar to those of *Pye v. Graham*. The land was agricultural land owned by a property company, which intended eventually to develop the land for other uses. In the meantime, the defendant used the field, which adjoined his own land, to graze horses. It was held that the 12-year limitation period ended in June 2003, which, crucially, was after the Human Rights Act 1998 came into force, but before the Land Registration Act 2002 came into force.

Nicholas Strauss QC held that, on the facts, adverse possession was proved—but this was contrary to Protocol 1, Art. 1 of the European Convention on Human Rights.

He held that *Family Housing Association v. Donellan* was inconsistent with authority to which Park J was not referred and was therefore wrongly decided. He decided that the correct course of action was to interpret the law so as to accord with human rights, as he had the power to do under HRA 1998, s. 3. After a careful consideration of the history of adverse possession, he concluded that he should reintroduce idea of implied licence, by reading the Limitation Act 1980 as if Sch. 1, para. 8(4) had not been enacted.

Therefore, because the actions of the squatter were not inconsistent with the paper owner's intended use of the land in the future, the claim of adverse possession was not made out.

Essentially, therefore, the judge resurrected the rule in *Leigh v. Jack* for cases in which adverse possession of registered land occurred between 2 October 2000 and 12 October 2003.

This decision was immediately criticized on the grounds that the judge should not have reinterpreted the law as he did, but should instead have made a declaration of incompatibility under HRA 1998, s. 4(2), and should have followed the House of Lords' decision in *Pye v. Graham*. This is the correct procedure in all but exceptional cases—*Kay v. London Borough of Lambeth* [2006] UKHL 10.

The first decision of the ECtHR in *J. A. Pye v. United Kingdom*, however, partially vindicated the decision of Nicholas Strauss QC in *Beaulane*, because the court decided that LA 1980 and LRA 1925, s. 75, were indeed incompatible with ECHR, Protocol 1, Art. 1.

J. A. Pye v. United Kingdom (Application No. 44302/02)

The European Court of Human Rights, by a majority of four to three, found that the operation of LA 1980 and LRA 1925 ended Pye's ownership of the land in a way that was not a legitimate aim of legislation and which was disproportionate. The legislation did not strike a fair balance between the need for the title to land to reflect the actual possession of it and the need for the paper owner to be secure in his ownership.

The legislation was therefore in breach of Protocol 1, Art. 1.
It is worth noting that this was a majority decision. The minority judgment was much less sympathetic to Pye's claim, pointing out that the law on adverse possession is well known and that Pye must have been aware of it. If it had foolishly left its land unattended for long periods, Pye should have realized that it ran a risk of adverse possession. It was an investment company and should have taken more care of its property.

However, the case did not end even there: the UK government referred the case to the Grand Chamber of the ECtHR—in effect, appealing the decision of the original Chamber.

J. A. Pye v. United Kingdom (Application No. 44302/02), decision of the Grand Chamber This Grand Chamber hearing represented the fifth time that this case had been discussed by a court!

The Grand Chamber found, by a majority of ten judges to seven, that the law of adverse possession as it had applied in *Pye v. Graham* was **not** a breach of Protocol 1, Art. 1. The majority held that Pye did not lose its land because of legislation allowing the state to take it, but rather because of legislation that was part of general land law and intended to regulate limitation periods. Limitation periods have a legitimate aim in the general interest. This limitation period was relatively long, and simple actions by Pye (such as starting an action for possession) would have ended it.

Under the circumstances, the effect of the law, even though compensation was not payable, was not disproportionate and there was no breach of Protocol 1, Art. 1.

The decision of the Grand Chamber—like any decision of the ECtHR—had no direct effect in English law. You will observe that the case is *Pye v. United Kingdom*, not *Pye v. Graham*—the Grahams won in the House of Lords and the land is theirs. What Pye wanted, however, was compensation from the government on the grounds that the law had caused a breach of its human rights.

Since Pye has lost its case, it did not get any compensation and was faced by a huge bill for legal costs. More importantly for the law on adverse possession, however, the decision of the Grand Chamber could not and did not overrule the decision in *Beaulane Properties v. Palmer*. You will remember that this High Court case held that the old law as it applied to registered land was in breach of ECHR, Protocol 1, Art. 1.

Because *Beaulane Properties v. Palmer* is an English High Court decision, it was binding on lower courts—in effect, the county court. However, any such case could be appealed to the Court of Appeal, which would take into account the Grand Chamber's decision in *Pye v. United Kingdom* and would no doubt overrule *Beaulane Properties v. Palmer*.

The situation was complicated by the fact that until November 2008, the Land Registry took the approach that *Beaulane* was correct law, and required the squatter to show inconsistent use of the land if the adverse possession started after 2 October 1988 (so that the Human Rights Act 1998 applied when the 12 years was up after 1st October 2000). This approach of the Land Registry was the subject of considerable academic criticism.

However, this unsatisfactory state of affairs has now changed. In the case of *Ofulue v. Bossert* the Court of Appeal considered the cases of *Beaulane v. Palmer* and *Pye v. United Kingdom* (Grand Chamber).

***Ofulue v. Bossert* [2008] EWCA Civ 7, [2008] 3 WLR 1253**

The case concerned a house which was registered in the name of Mr Ofulue in 1976. He let the house to tenants, and moved to Nigeria. In 1981 the former tenants left and allowed the Bosserts into the property. At that time the property was in very poor condition. The Bosserts did a number of repairs and paid the rates, but did not pay any rent. There were various visits by Mr Ofulue to the property, and he seems to have made offers to grant the Bosserts a lease. However, these discussions came to nothing. In 1987, Mr Ofulue began possession proceedings, and the Bosserts counterclaimed in 1990, saying that they had been promised a lease for their repair works. In 1991 and 1992, the Bosserts made 'without prejudice' offers to buy the house, which were rejected. Mr Ofulue did not have the money to pursue the possession claim, so it was stayed by the courts in August 2000. In September 2003, further possession proceedings were started. The remaining defendant (Mr Bossert had died by then) claimed adverse possession.

The 12-year limitation period was held by the trial judge to have ended in 1999, and was therefore before the Human Rights Act 1998 came into force. However, the Court of Appeal considered whether they should follow *Pye v. United Kingdom*. Arden LJ, in the only substantive judgment, held that the court was bound to follow *Pye v. United Kingdom*. At paragraph [54], Arden LJ said:

The Strasbourg court held that the relevant provisions were for the regulation of dealings in land and were controls on the use of land within the second paragraph of art 1. The significance of this holding was that the fact that adverse possession took place without any compensation for the paper owner did not entail any violation of art 1. In my judgment . . . its conclusion on this point does not turn on the specific facts of the *Pye* case or on the fact that the land was unregistered land so that s 75 of the Land Registration Act 1925 did not apply.

On this point, the Strasbourg court differed in its conclusion from that of Mr Nicholas Strauss QC, sitting as a deputy judge of the Chancery Division in *Beaulane*. [Counsel for the defendants] has filed lengthy submissions to the effect that *Beaulane* was wrongly decided but I do not consider it is necessary to go into those submissions, nor do I propose to do so as an application has been made in that case for permission to appeal out of time.

(Note that the Court of Appeal's decision was upheld by the House of Lords at [2009] UKHL 16, after an appeal on a point not relevant to this discussion.)

The Court therefore considered that *Pye v. United Kingdom* should be followed in all cases of adverse possession by UK courts. However, *Beaulane* was not overruled, as an appeal out of time was expected (though it has not happened), and the case did not directly raise the *Beaulane* point, as the period for adverse possession ended before the coming into force of the Human Rights Act 1998. Nevertheless, it is clear that the Court of Appeal will follow *Pye v. United Kingdom*, and not *Beaulane*. It is to be expected that this will end claims that the operation of the law of adverse possession, as it applied to registered land before LRA 2002 came into force, is in breach of human rights law. This was finally accepted by the Land Registry, who changed their guidance to bring it in line with *Pye v United Kingdom*.

Therefore, human rights law ultimately does not stand in the way of adverse possession. In any case, the new law under the LRA 2002 offers far greater protection to the registered proprietor, so is most unlikely to raise the same concerns.