solicitors will get sued too. A solicitor who decides the transaction is untainted will find the wife breathing down his neck protesting that he did not protect her from herself. In the unlikely event of such a wife establishing an *O'Brien* defence against the bank (thereby negating, or at least mitigating, the liability of the solicitor to the wife), the bank, although not the client of the solicitor, may sue him, as where a solicitor gives a certificate on which another party is expected to act, a "classic duty of care situation" arises: see *Allied Finance & Investment Ltd.* v. *Haddow* [1983] N.Z.L.R. 22. It is no exaggeration to say that the potential liability of solicitors acting for wives in this area is truly awesome.

C. Wives

The message of *Etridge* is clear. The *O'Brien* defence to proceedings by the bank is being closed down, probably (though in the light of recent experience one should not be over-confident) with some degree of success. Instead, wives will sue their solicitors, less satisfactory in many ways for the wives as well as the solicitors. Raising the *O'Brien* defence saves the family home, at least in the short term, and frequently brings the bank to the negotiating table with offers of time and even compensatory payments. Suing the solicitor is a lengthy and expensive process, and it will not stop the bank. And even solicitors win sometimes, as the judgment of Judge Behrens in the *Etridge* negligence action shows. The wife's solicitor had given her no advice at all, somewhat surprisingly as that was what he was instructed, and paid, to do. Despite this flagrant breach of his duty of care to his client, the solicitor was not held liable. Had the wife been given proper independent legal advice, she would have entered into the transaction anyway. The negligence had not caused her any loss.

STUART BRIDGE

SURRENDER TO THE INEVITABLE?

ADVERSE possession and registered land are unlikely bedfellows—the one originating in the common law idea that a freehold estate results from possession and the other premised upon registration validating title. Indeed, when registration of title was introduced into England and Wales in the nineteenth century, acquisition of title to registered land by adverse possession was prohibited—see section 21 of the Land Transfer Act 1875. However, a more pragmatic approach then ensued, and the Land Registration Act 1925, s. 75, expansively provided that the Limitation Acts should apply to registered land in

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the same manner and to the same extent as those Acts applied to unregistered land. But technically, of course, this was impossible, and the section detailed a special trust mechanism for registered land alone. Section 75 thus clearly illustrates the inherent difficulties in trying to retain the substantive law of unregistered land within a registered context. Tensions are inevitable, because of the very different conceptual bases of the two systems. In *Central London Commercial Estates Ltd.* v. *Kato Kagaku Ltd., The Times*, 27 July 1998, Sedley J. was directly faced with such tension, as he strove to determine the effect of section 75.

The plaintiff had acquired the freehold of part of Bush House in the Strand, subject to a long lease which was due to expire in 2028. This leasehold estate was, at all material times, registered, but, by 1996, the lessee had lost the right to possession of part of the west courtyard, where the defendant, Kato, and its predecessor had been operating a car park for over twelve years. Kato had not, however, applied to the Land Registry to regularise its position, so the lessee was still registered with title when it surrendered the lease in December 1996. The Land Registry then closed the leasehold title and re-registered the freehold title, subject only to an under-lease which was immaterial to the dispute. The question before the court was whether the plaintiff was now free to seek immediate possession of the west courtyard, or whether Kato was entitled to stay until 2028.

In unregistered land, the result would have been clear. The House of Lords had considered a similar scenario in *Fairweather* v. *St. Marylebone Property Company Ltd.* [1963] A.C. 510, and had held that a lessee who had lost his right of action against a squatter could then surrender his term to the lessor, to give the latter a right to immediate possession. In fact, one of life's little ironies is that the land in that case seems to have been registered, but registration had not been argued in the County Court, and although it had been raised in the Court of Appeal, leave had been refused to adduce evidence of the date of registration. Thus although registration had been argued before the House, it had not been treated as a central issue. Both Lord Radcliffe and Lord Denning, who spoke for the majority, had considered the effect of registration, but obiter, and, according to Sedley J., inconclusively. That being said, Lord Denning had doubted that registered land was on "a very different footing from unregistered land" (at p. 548), and had continued by remarking that the freeholder was not to be prejudiced by the fact that the leasehold was registered. It was indeed this very point that Sedley J. had to decide.

Another precedent of interest was provided by *Spectrum*

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Investment Company v. *Holmes* [1981] 1 W.L.R. 221, where a purported surrender had proved ineffective. But in that case, the squatter had already been registered as proprietor of the leasehold interest, and the former lessee's title had been closed before the attempt to surrender. Thus there was a significant difference in the circumstances.

Sedley J.'s approach was marked by a disinclination to strive to keep unregistered and registered land in step. He referred to *Williams and Glyn's Bank Ltd.* v. *Boland* [1981] A.C. 487, as evidence that the words of the Land Registration Act 1925 should not be distorted to preserve uniformity between the two systems. He also considered that the law adopted and demanded a stance of neutrality between disseisor and disseised. So fortified, he rejected the persuasive authority of *Fairweather,* and decided in favour of simplicity—*i.e.* that the trust imposed by section 75 was a trust of the whole leasehold interest. Therefore once the squatter had been in possession for the limitation period, no surrender could destroy his right to remain in possession of the land for the duration of the lease.

This case is yet another example of the difference in substantive law which has been achieved by, and is now fully recognised in, registered land. In effect, section 75 has been construed as effecting that very Parliamentary conveyance which *Tichborne* v. *Weir* (1892) 67 L.T.(N.S.) 75 eschewed. The leasehold estate is substituted for the squatter's common law freehold estate, though at what point is unclear.

The decision is disadvantageous to landlords, who may be encumbered with tenants not of their choosing—even, it would seem, if there were a covenant against assignment in the original lease—though presumably the squatter/tenant will be liable on the leasehold covenants. Unfortunately, certain areas of section 75 remain obscure. The nature of the trust which is imposed is particularly intriguing, but the full incidents of such trust did not fall for decision, and Sedley J. refrained from exploring further than was necessary.

In *Land Registration for the Twenty-First Century* (Law Com. No. 254) the Law Commission and the Land Registry recommend an entirely new regime for adverse possession in registered land—with a more restricted availability, and the abolition of the trust mechanism. The ideas would provide more coherence in a complex area, and are to be welcomed. In the meantime, one is left with the paradoxical situation that a squatter against a tenant will be in a more secure position if the land is registered. Strange bedfellows result in bizarre progeny.

LOUISE TEE

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