ARTIFICIAL INTENTIONS

ADVERSE possession is a contentious subject. The possibility of a squatter knowingly acquiring title to land "as of wrong" is one which disturbs the general public and indeed causes qualms in some members of the judiciary. Thus, at first instance, Neuberger J. felt very unhappy with the jurisprudence that caused him to find for the squatter in *J.A. Pye (Oxford) Ltd.* v. *Graham* [2000] Ch. 676. The Court of Appeal (*The Times*, 13 February 2001) has now reversed this decision, and has upheld the title of the registered proprietor to the disputed land. However, although the result may seem desirable with regard to fairness and the integrity of land registration, the judgments seem less satisfactory, and only serve to re-emphasise the difficulties in this area of the law.

The facts of the case are unexceptional. In 1977, the Pye group of companies had acquired an estate near Newbury in Berkshire with an eye to its long-term development potential, and one of its companies had been registered as proprietor at the Land Registry. Pye thereupon sold off the farmhouse with the land which it did not require. It carefully retained the four fields of pasture—amounting to some 25 hectares—which it had identified as promising, to await the glad day when planning permission for development would be granted. In the meantime, Pye, lacking agricultural ambition, had no particular use for the retained land. But the farming family which had bought the rest of the estate, the Grahams, most certainly had a use in mind. They were running a mixed livestock and arable farm, and very much wanted to use the grazing available in the four fields. And so they negotiated a grazing licence with Pye. The licence ran out in December 1983. The Grahams requested a new licence, but were refused. Pye believed that a planning application would have more chance of success if the land were "in hand"; so the most it would allow for 1984 was a single cut of hay. Thereafter, Pye refused any permission for the land to be used, and failed to respond to the Grahams' requests. Understandably in the circumstances, the Grahams grazed their cattle on the land anyway and farmed the fields as part of their farm. They harrowed, rolled and fertilised, maintained the ditches, hedges and fences, and generally displayed good husbandry with regard to the disputed land—to such an extent, indeed, that neighbours and friends believed the land was part and parcel of the farm.

Unfortunately for Pye, the desired planning permission failed to materialise as quickly as it would have liked, and so the years passed. No doubt Pye was involved in other, more fruitful ventures

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while the Grahams happily continued farming the land. Eventually, of course, the possibility of adverse possession arose and, after some preliminary skirmishes, Pye issued a writ for the recovery of the land in January 1999. The Grahams resisted the claim and the case came to court. Sadly, Michael Graham had died in 1998, but he had prepared a witness statement which was received in evidence. He had said: "my intention was to carry on using the land for grazing until I was requested not to ... I would have preferred to obtain a formal agreement but in the absence of one I continued to farm the Land ... I continued to use the Land to what I considered to be its best use ... I believed ... it was possible to obtain ownership of Land after it had been occupied for a sufficient number of years ...".

At first instance, Neuberger J. held that the Grahams enjoyed factual possession which was adverse to Pye, and had the necessary *animus possidendi* in respect of the disputed land from September 1984 onwards. He therefore concluded that the Grahams were entitled to be registered as proprietors of the disputed land at the Land Registry.

Pye appealed on two points—the issue of intention to possess and that of human rights. (The second point deserves full treatment elsewhere.) With regard to the intention to possess, readers of *The Conveyancer* will be aware that the subject is contentious. The prevailing orthodoxy, as explained in *Buckinghamshire County Council* v. *Moran* [1990] Ch. 623, is that the squatter must show a continuing intention to possess the land for the time being—but this need not amount to an intention to own or to acquire ownership of the land. Applying this rather subtle principle, Neuberger J. had found for the Grahams. Applying the selfsame principle, the Court of Appeal disagreed. Mummery L.J., who gave the only reasoned judgment on this point, considered that Neuberger J. had given insufficient weight to the statement of Michael Graham.

The way in which the Court of Appeal interpreted the evidence is surprising. It in effect held that a farmer who was carefully farming (not casually grazing, but actively farming) farm land in what he considered the most appropriate way did not *intend* to possess that land *for the time being*. In fact he possessed the land, but he lacked sufficient intention to accompany the factual possession. The crucial evidence for this unlikely result was the witness statement provided by the hapless Michael. It is doubtful that either he or his legal advisers expected his statement to be interpreted as it was.

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The trouble is that the necessary intention to support adverse possession is an artificial construct. As well as being artificial, it is challengingly subtle. An intention to "possess" but not to own, an intention to exclude everyone else, including the paper owner, but only as far as is reasonably practicable and only so far as the processes of the law will allow, is precise to an extreme. It bears little relationship to how people think in real life, nor is it expressed in language that ordinary people use to describe or explain their intentions. It seems very likely, from his actions and from his statement, that Michael Graham intended to farm the fields as part of his farm, and from day to day intended to keep the rest of the world out of the fields. But the reality gap between how people actually think and express their thoughts, and the convolutions of the judicially required intention, allowed the Court of Appeal room to manoeuvre. No doubt it wished to find for Pye. The result seems fair, but the analysis by which the result was achieved seems strained and implausible.

The Grahams are seeking leave to appeal to the House of Lords and the Appeal Committee is presently considering their petition. It is to be hoped that the House of Lords will indeed hear an appeal, so that the whole question of the necessary intention to found a claim in adverse possession can be fully considered.

LOUISE TEE

UNDUE INFLUENCE AND PARALLEL PROCEEDINGS

THE relationship between ancillary relief and undue influence was considered by the Court of Appeal in *First National Bank plc* v. *Walker* [2001] 1 F.L.R. 505. The case is a warning to practitioners that unless carefully advised, divorcing clients may be precluded as a result of ancillary relief proceedings from alleging an *O'Brien* defence of undue influence in subsequent possession proceedings. The facts of *Walker* were that husband and wife were joint tenants of the matrimonial home. Three mortgages of the house had been executed: first and third mortgages in favour of Barclays Bank and Lloyds Bank, and the disputed second charge in favour of First National Bank (FNB). This disputed mortgage, created in 1991, was to secure a loan made for the sole business purposes of Mr. Walker and his then partner. The marriage foundered, as did the husband's business. A decree absolute of divorce was granted in 1993, and in 1994 Mrs. Walker's petition for ancillary relief was heard. The court ordered that Mr. Walker transfer to his former

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