damages is the exception rather than the rule. In the circumstances, it would be preferable not to limit severely the possibility of such awards in the first instance.

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A HARSH TWILIGHT

THE *New Shorter Oxford Dictionary* defines heresy as an opinion or doctrine contrary to the accepted doctrine of any subject. In *Pye* v. *Graham* [2002] 3 W.L.R. 221 the House of Lords robustly confirmed the orthodoxy relating to adverse possession and discounted discordant voices as heretical. There is probably general relief that no fireworks have disturbed the established law in its twilight years, but for this writer there is some regret over a wasted opportunity. Yet again in an adverse possession case, a result has been reached that caused some of the judges misgivings about the fairness of the outcome, but there was no serious attempt to try to address this by subjecting the whole area to a fresh scrutiny and considering whether there was any merit in heretical views.

The case concerned 25 hectares of agricultural land with development potential. Pye, a development company, was the registered proprietor of the land, but had no immediate use for it. So, perhaps understandably, and certainly foolishly, the company failed to react when the Grahams continued to farm the land after the expiration of their grazing agreement. The last permission granted to the Grahams expired in August 1984, but it was not until April 1998 that Pye woke up to the dangers of the situation and started proceedings for possession. By that time, of course, it was possible for the Grahams to claim that they had acquired title by adverse possession.

At first instance, Neuberger J. [2000] Ch. 676 held, "with no enthusiasm", that the Grahams had indeed established title by possession. This decision was reversed by the Court of Appeal [2001] Ch. 804, in an understandable but dubious attempt to find for Pye. Pye's relief has proved short-lived, however, because the House of Lords has now unanimously restored the judge's decision. Lord Browne-Wilkinson, who delivered the leading speech, gave a ringing endorsement to Slade J's "remarkable judgment" in *Powell* v. *McFarlane* (1977) 38 P. & C.R. 452, subsequently approved by the Court of Appeal in *Buckinghamshire County Council* v. *Moran* [1990] Ch. 623.

In particular, Lord Browne-Wilkinson cited Denman C.J. (twice) to confirm that the concept of non-adverse possession had been abolished by the Real Property Limitation Act of 1833. Since then, he asserted, possession had to be given its ordinary meaning and the only question was whether the squatter had been in possession of the land in the ordinary sense of the word. He swept aside any arguments questioning the necessity to show an intention to possess and reaffirmed what every undergraduate knows, that there are two elements necessary for legal possession, factual possession and intention to possess. His Lordship gave equally short shrift to the suggestion, apparent in some cases, that the squatter should have an intention to own the land in order to be in possession. This "heresy" was disposed of with dispatch, as was the "heresy" that the acts of the squatter must be inconsistent with the intentions of the paper owner. Lastly, he confirmed that a squatter's willingness to pay the paper owner for the use of the land, if asked, was not inconsistent with the squatter being in possession in the meantime. In view of this robust affirmation of conventional doctrine, the only plausible decision was that the Grahams had acquired title through adverse possession.

Some subtle shifts can be discovered in the speeches, but nothing dramatic. The thrust of Lord Hutton's speech was that where a squatter was in factual possession, then normally that in itself would also provide sufficient evidence of the required intention, and Lord Hope made a similar point. It is only when the actions of a squatter are equivocal that the intention may need further evidence and may become more difficult to prove. This is hardly novel, but the primacy of establishing by conduct a factual possession has possibly received fresh emphasis.

It may well be that further and more careful analysis of the principles would have yielded the same conclusions as to their validity, but it is a pity that such analysis was not forthcoming, in view of the difficulties caused by this jurisprudence in terms of judicial discomfiture. Generally, after all, there is some explanation for the attraction of a heretical belief and some of the heresies dismissed can be explained as quite reasonable judicial attempts to limit the success of claims that seemed unmeritorious. As it is, the law stays the same and anomalies will still persist. For example, the Grahams wrote asking for a renewed grazing licence in 1985; presumably that would have amounted to a written acknowledgment of title and so should have started time running anew (though this does not seem to have been argued and indeed in the time scale would not have been fatal to their claim). But why a written acknowledgment should have such an effect when an oral

acknowledgment would not even offend *in principle* against time running, and so of course would have no effect, is curious. It may be possible to explain how such juxtaposition of principles has arisen, but that does not prevent the present paradox and possible capricious distinctions from being regrettable. It is lucky for the Grahams that they were not enthusiasts for the epistolary art.

Lords Bingham and Hope were concerned about the apparent injustice of a result that rewarded the Grahams with valuable land which they always knew belonged to Pye and which Pye seems to have lost through mere inadvertence. They both found consolation, however, in the fact that the Land Registration Act 2002 will introduce a new regime. This is indeed true, and the new regime is to be warmly welcomed. Whether it will sufficiently address the issue of a proprietor's inadvertence is still to be seen. It looks as if a registered proprietor will have a three-month window of opportunity to object if a squatter makes claim to the land. Of course in an ideal world this should be more than sufficient time, but one can easily imagine scenarios where the notice does not reach the right person in time, and yet another local authority or ill-managed corporation loses the plot. The writer would prefer at least a six-month period, when so much is at stake—and when the proprietor is by definition incompetent, for otherwise the squatter would not have been there at all. And the new Act's pragmatic approach to boundary disputes also leaves room for loss through inadvertence. Here under the new regime a squatter who has reasonably believed the land to be his may succeed in a claim despite the protests of the registered proprietor.

The question that remains is the impact of the Human Rights Act 1998 on adverse possession. Of course the Land Registration Act 2002 has been drafted with human rights in mind, but the new regime does not apply to unregistered land, nor indeed present claims, and so the issue is still compelling. In the Court of Appeal, Pye had advanced arguments on the basis of human rights, and the Court of Appeal robustly defended the principle that limitation was not incompatible with human rights. This is persuasive in theory, but there was also a specious quality to Mummery L.J.'s assertion that the extinctive provisions of the Limitation Act merely barred a right to bring an action and did not amount to a deprivation of possessions. The arguments were not pursued before the House of Lords because Pye conceded that the 1998 Act was not retrospective in effect and so did not apply to the present case. A faint clue to judicial attitude is provided by Lord Hope, who adverted to the question and remarked that it was not an easy one; does this suggest a measured approach? Leave to appeal to the

House of Lords has however now been granted in *Family Housing Association* v. *Donnellan* (Ch.D., 12 July 2001), and so the whole question may well be aired in the future.

And so to conclude: the Grahams are blessed, and Pye has learnt a hard lesson. The owner of land, even when registered as proprietor at the Land Registry, has responsibilities towards that land that he ignores at his peril. The House of Lords was in no mind to develop or reinterpret the jurisprudence and instead chose to reaffirm the orthodox version. The result may seem unfair, but the House of Lords was unrepentant; it reached the only possible conclusion that it could properly have done on its chosen terms. Thank goodness that the Land Registration Act 2002 will soon come into effect and then the present unsatisfactory jurisprudence will largely fade away into a twilight zone of harsh decisions and lucky breaks.

LOUISE TEE

THE UNCERTAIN FLIGHT OF *BRITISH EAGLE*

IN a winding-up, the property of the insolvent company must be liquidated and the proceeds distributed *pari passu* amongst its unsecured creditors. This being mandatory, a company cannot by contract arrange to do things differently, and a provision purporting to do so will be void (*British Eagle International Airlines* v. *Compagnie Nationale Air France* [1975] 1 W.L.R. 758). The scope of this common law rule of public policy is, however, notoriously uncertain. Neuberger J.'s judgment in *Money Markets International Stockbrokers Ltd.* v. *London Stock Exchange Ltd.* [2002] 1 W.L.R. 1150, based on a thorough and erudite review of the authorities, suggests some helpful clarifications.

Prior to April 2000, the London Stock Exchange ("LSE") was owned and controlled exclusively by its members. The LSE's rules provided, *inter alia*, that membership would terminate were a member declared a "defaulter"—being unable to pay its debts to other members. The LSE had been incorporated as a limited company, structured to give effect to the organisation's mutual character. Only "B" shares carried voting rights. Clause 8.03 of the articles of association required new members to acquire "B" shares; conversely, a shareholder ceasing to be a member would be required to dispose of its shares. "B" shares could only be transferred to firms that were members of the LSE, and not for any consideration.