

DRAFT LAND AND CONVEYANCING BILL 2005
(LRC 74 –2005)
SECTIONS 129 AND 130

SUBMISSION FROM CONVEYANCING
COMMITTEE OF THE LAW SOCIETY
RE ADVERSE POSSESSION

Committee’s Proposals for Change to Secs. 129 and 130 of draft Bill:

1. (a) That Application should be made to the Registrar of Titles (not to the court as proposed in the draft Bill) as has been the case under Sec. 49 of the Registration of Title Act 1964, with a right (under Section 19) of reference to the Court by the Registrar or of Appeal to the Court by the claimant.

(b) That such Applications to the Registrar should not be necessary in the case of unregistered land but that the present situation should remain, allowing those in adverse possession to apply for first registration if they so wish and allowing the dispossessed owners to bring ejectment proceedings if they so wish.
2. That there should not be any provision made for the payment of compensation as envisaged in Sec. 130 of the draft Bill

Summary of Points Set Out Hereunder:

- **The proposal to have adverse possession applications decided in the first instance by the court is ill-advised and unnecessary.**
- **The Pye decision is based on circumstances which do not apply to Ireland.**
- **To base Irish legislation on the Pye decision would be a misguided and self-defeating exercise.**
- **The finding in the Pye case that compensation be paid in certain circumstances has not been shown to be relevant to the Irish situation.**
- **The distinction made (in the Pye and Beaulane cases) between registered land and unregistered land is not relevant or justified in the Irish context.**

Background

Under Sec. 52 of the Registration of Title Act 1891 (which was replaced by Sec. 49 of the Registration of Title Act 1964) applications for declarations of title based on adverse possession were made to the Circuit Court. When this Act was repealed by the 1964 Act it was decided that such applications should be made in the first instance to the Registrar of Titles who would determine the application or refer it for determination to the Circuit Court with a right of Appeal, in any case, to the Circuit Court. The reason for this change was set out in Registration of Title by McAllister (p. 95/96) as follows:

“Questions of title arising under statutes of limitation have in fact been determined for years by Examiners in the Land Registry on applications for first voluntary registration and on applications to cancel a notice of equities, subject of course to an appeal to the court. Having regard to the practice of long standing it was apparently felt by the legislature that there was no good reason why applications under section 52 of the Registration of Title Act, 1891, to the court should continue. Most of these applications were ex-parte, uncontested, and therefore suitable to be dealt with by the legal staff in the Land Registry.

In the relatively few contested cases it was apparently felt that the Registrar under his statutory powers could refer the matter to court for decision. The legislature, therefore in its wisdom, put section 49 of the Act into force.

Applications under the section have been dealt with expeditiously to date; and any contested applications or applications in which the Registrar may have doubts on questions of law or facts are referred to the court under section 19 of the Act.”

The Conveyancing Committee is not aware of any change having occurred in this assessment of the capacity of the Land Registry to deal with such applications and feels that a change in this practice as envisaged in the draft Bill would be a detrimental one. There also appears to have been general satisfaction with the decisions made by the Registrar judging by the number of cases heard by the Land Judge. In the Publication “Land Registry Centenary 1892-1992” in an article “The Land Registry and the High Court” Ms Justice Mella Carroll wrote:

“The most remarkable aspect of being the Land Judge is that there are so few applications to the High Court. In the six years that have elapsed since I was nominated, there have been less than a dozen cases...the most common form of application was under S. 19, being an appeal against an order of the Registrar. But even these were few in number which is an indication of the parties’ general satisfaction with Registrars’ decisions.”

It appears, in fact, that there has been a yearly average of about 1,400 Section 49 Applications to the Land Registry for the last 5 years. It appears that during that 5 years there have been 14 appeals against refusal to register under Sec. 49 and one appeal against a registration.

Reasons for Change as set out in the Report of the Law Reform Commission

The reason given in the Report for the proposed changes are set out in Chapter 2.

Par. 2.04 refers to the recommendations made in Chapter 12 of the Consultation Paper, which did not include the new proposals referred to above, and states that:

“Since those reports were written the operation of the doctrine has become the subject of increasing controversy. Much of this relates to the extent to which it appears to sanction a person who has no claim whatever to the land becoming the owner of it, without having to pay any compensation at all to the “paper” owner or even to obtain the sanction of a court order.”

Comment

The Conveyancing Committee is not aware of any concern having been expressed in relation to the manner in which Section 49 has operated in the past. There appears to have been universal satisfaction with the time limitation of 12 years and with the ability of a land owner to appeal to the Court. As mentioned above it is not aware of

any appreciable number of appeals having been made to the Court having regard to the number of Sec. 49 Applications which are made each year. It is believed that the majority of claims for adverse possession would arise in relation to agricultural land, through land being neglected or abandoned and being taken over either by relations of the owner or by owners of neighbouring land. The amount of claims for adverse possession in relation to unregistered land is not believed to be large and to a large extent would be in urban areas where such titles are more common and would in most cases relate to the acquisition of disused laneways or other small portions of ground. Such claims have not been the subject of a great number of applications to the court in any event.

In this context reference is made to the Ninth Progress Report of the All-Party Oireachtas Committee on the Constitution (April 2004) which dealt with Private Property. That Committee invited submissions under various headings including "Private property and the common good". Of the 140 submissions made none appears to have made any reference to the law relating to adverse possession or to the statutory periods of limitation in relation thereto. The submissions made include those from the Irish Farmers Association and the Irish Landowners' Association.

The LRC Report, at 2.04, goes on to say that:

In England considerable doubts have been expressed by some judges as to whether the doctrine is consistent with the European Convention for the Protection of Human Rights and Fundamental Freedoms.

And at 2.05 it states that:

Not only has the European Convention been given effect in Irish law by the European Convention on Human Rights Act 2003, but there is also the protection of private property rights enshrined in Articles 40 and 43 of the Constitution.

Comment

The reference to the Irish Constitution underlines the fact that there has never been a challenge to the constitutionality of Section 49 in its 40 odd years of existence (or to Secs. 13 or 24 of the Statute of Limitations) notwithstanding the readiness of Irish citizens to challenge many aspects of legislation relating to landlord and tenant law and related legislation and to the Statute of Limitations in other contexts. It was always open to landowners in Ireland to invoke the European Convention of Human Rights, as Pye did, in respect of events preceding the adoption of the Convention into Irish law. It is also worthy of note that while the UK did not have a written constitution the wording of the Irish Constitution is not so different to the wording of the European Convention as to require two separate interpretations. Article 43 of the Constitution refers to the protection of private ownership subject to "the principles of social justice" and "the exigencies of the common good". This is consistent with the requirements of the European Convention (Article 1 of the First Protocol) that "No one shall be deprived 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." If Section 49 has been constitutional to date there is no reason to think it may be held to be unconstitutional in the future by virtue of the European Convention or otherwise. It is submitted that, as a provision of an Act of the Oireachtas which is not unconstitutional on its face, it enjoys "a presumption of validity until the contrary is clearly established" (Blake v. Attorney General 1982 IR 117).

It may be argued that "in the public interest" as applied to Ireland may have a different meaning than when applied to other countries. The manner in which it is applied in Ireland

does, it is submitted, have adequate regard to “the public interest” in any case. In this context it is noted that Article 1 of the First Protocol goes on to say that:

“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.”

The recognition thereby given to the freedom of the Irish legislature to have regard to such provisions “as it deems necessary” in accordance with “the general interest” would suggest that it would be unduly hasty to change the existing legislation based on the view taken by the UK courts of the European Convention and its implications for “the general interest” of the UK or, perhaps more to the point, the view taken by the European Court of Human Rights in the Pye case (referred to below) as to the “general interest” of the UK— and whether the “general interest” of British society is identical to “the general interest” of Irish society. This, in turn, may have relevance to the question of “Proportionality” on which point the ECHR held against the UK.

Reference is made, in this regard, to the Report of the Constitution Review Group referred to in Appendix Six of the Ninth Progress Report of The All-Party Oireachtas Committee on the Constitution mentioned above. At p. 307 of the Appendix the view of the Review Group is set out:

“Following a review of the case law on the provisions of both Article 40.3.2. and Article 43 on the one hand and Article 1 of the First Protocol on the other, the Review Group is of the view that there is a great deal of overlap as far as the substance of the respective guarantees is concerned. While a detailed review of the respective case law would be unnecessary in the present context, an examination of the two leading cases arising respectively under the Constitution (Blake v. Attorney General) and the Convention (Sporrong v. Sweden (1983) 5 EHRR 325) reveals a striking similarity in terms of judicial reasoning and general approach to the issue of what constitutes an unjustified interference with property rights. Applying, therefore, the first two principles already mentioned, there is little of substance to choose between the Constitution and the Convention, as both protect the right to property and both envisage circumstances in which such rights can be restricted, qualified etc. in the public interest, provided any such interference in the right is proportionate and required on objective grounds.”

EU AND UK CASE LAW

J.A. Pye (Oxford) Ltd. V. The United Kingdom

In this case Pye, having lost its land by adverse possession, following a number of court decisions, applied for compensation to the European Court on the basis that the UK legislation was in contravention of Article 1 of Protocol 1 of the Convention of Human Rights.

The European Court took into account a number of factors including The Facts and Circumstances of the Case, Relevant Domestic Law and Practice, and the Law relating to the alleged violation of Article 1 of the Protocol.

Having considered the relevant factors the Court decided by 4 votes to 3 in favour of Pye. It may be that if there was a variation in some of these factors a different decision may have been reached.

The Court, at Par. 50, rejected the argument that as the law was in force when Pye bought its land it knew it was possible to lose it by adverse possession. It may take a different view of the argument that, in Ireland, the land is bought subject to the **Constitution**, the expressed will of the people, which limits the right of private property by “the exigencies of the common good” and that the Supreme Court interprets the common good on behalf of the people. In addition the courts have never had to deal with a challenge to the Statute of Limitations in relation to adverse possession of land and the Statute itself has never been found to be unconstitutional by the Supreme Court in relation to land or otherwise.

The Report of the Pye case refers in a number of places to comments that the law of adverse possession in relation to **registered land** should be different than for unregistered land (e.g. Pars. 15 and 65) because the ownership is more readily identifiable.

It may be submitted, in relation to Ireland in any case, that difficulties in identifying the owners of land were not of much relevance to the law of adverse possession – and that, in any case, the owners of registered land **frequently died or emigrated** and nothing was done to bring the register up to date for many years, until a Section 49 Application was finally made.

In this context see Land Law in Ireland by Andrew Lyall (Round Hall Sweet & Maxwell) 2nd edn. P. 884 in setting out some reasons for the law of Adverse Possession:

“A fourth justification is a quite specific one which applies to Ireland and which is alluded to by Griffin J in *Perry v. Woodfarm Homes*:

Until comparatively recent years, raising representation in the case of small farms was quite rare, the occupiers preferring to rely on the Statute of Limitations, and there must be very few agricultural holdings in this country in which at some time in the past 140 years a tenancy was not ‘acquired’ under the statute...”

In this context also see “The Land Registry Centenary 1892-1992” at p. 27 in an article by Tom Moylan, Deputy Registrar “An Overview of the Land Registry” dealing with the Agricultural Community:

“Moreover, a significant benefit for them is the availability of the procedure under Section 49 of the Registration of Title Act, 1964 based on the Statute of Limitations, which is an easy and cheap method of establishing title by possession and which has a particular relevance **in the context of emigration from agricultural land.**”

At Par. 27 of the Report the Law Commission Consultative Document published in the UK in 1998 is quoted to set out various reasons to justify the law of adverse possession – “to encourage defendants not to sleep on their rights, to prevent land becoming unmarketable, because the innocent but mistaken squatter may have incurred expenditure and to facilitate and cheapen investigation of land.”

A further reason, of some relevance in Ireland, appears in Property Law by Paul Coughlan (Gill and McMillan 1996) at p. 206

“Generally speaking land is a productive commodity which is in finite supply and so **it is of social benefit to prefer a squatter who has made use of it**

for a substantial period of time over the true owner who has neglected it.”

This raises the whole question of abandonment and neglect of land which is socially and economically undesirable and attracts little sympathy if it eventually leads to forfeiture through adverse possession.

It is noted that, as set out in the Law Commission’s 1998 paper, some Commonwealth jurisdictions which use the Torrens system of registration do allow for land being acquired by adverse possession.

James v. United Kingdom (ECHR 3/1984/75/119)

It may be significant that in this judgment of the European Court of Human Rights it was stated in paragraph 40 that:

“The Court agrees with the applicants that a deprivation of property effected for no reason other than to confer a private benefit on a private party cannot be “in the public interest”. Nonetheless, the compulsory transfer of property from one individual to another may, depending upon the circumstances, constitute a legitimate means for promoting the public interest.”

The words “no reason” and “depending upon the circumstances” appears to leave room for argument in specific cases as to whether or not land was transferred “in the public interest”.

Beaulane Properties Ltd. v. Palmer (2005) EWHC 817 (Ch) (23 March 2005)

The Law Reform Commission Report refers to this case at 2.04:

“...ruled that the doctrine was incompatible with the protection of peaceful enjoyment of property enshrined in Article 1 of the First Protocol to the Convention.”

The reasoning employed may not necessarily be applicable to Ireland and it remains to be seen how a comparable case might be determined in this country.

Par. 69 of this judgment sets out a summary of the law in the UK including:

- (c) “The nature of title to registered land differs fundamentally. Title to unregistered land is based on possession, whereas title to registered land is based on the fact of registration. The system of registration was introduced precisely to avoid the uncertainties of the earlier possession-based system.”

To say, in a modern context, that “*Title to unregistered land is based on possession*” would seem to lack accuracy. A person in possession does not necessarily own the land and the owner is not necessarily in possession at any particular time. The land may be in the possession of a tenant or licensee of the owner. It may be more accurate to say, in modern terms, that title to unregistered land passes on the execution and delivery of a Deed, whereas title to registered land passes on the execution, delivery and registration of a Deed.

In most cases the ownership of unregistered land can be traced through the documents registered in the Registry of Deeds and, in Ireland, at any rate it is unusual to find land the ownership of which cannot be traced one way or the other. This, however, is not an issue – as far as unregistered land is concerned the identity of the paper owner is not relevant to adverse possession. In the Land Registry the registered owner may have died many years ago and his land may have changed hands a number of times within the same family before the

register is ultimately brought up to date. The ease or difficulty in establishing the identity of the owner of land has never been considered crucial to the question of obtaining title by adverse possession in Ireland.

“The system of registration was introduced precisely to avoid the uncertainties of the earlier possession-based system” may be correct to some extent but it does not give the full story, certainly as far as Ireland is concerned. For example in “The Historical Development of Registration of Title in Ireland” by John Murphy (Land Registry Centenary 1892-1992) having stated that by 1890 a total of 21,850 properties were vested in tenant purchasers under various Acts, went on to say at Par. 4.10 that:

“By 1890 there were 3,000 new properties being vested each year. Something had to be done for these tenant purchasers. As yearly tenants or short leaseholders, they were outside the scope of the Registry of Deeds, and the estate agents books furnished them with a rough and ready register of title. However, the purchase of the freehold meant that the property was now treated as realty. The tenant purchaser became subject to the Registry of Deeds system and primogeniture.”

The implications of being brought within the Registry of Deeds system were then set out by Murphy at Par. 4.11:

“Coming within the Registry of Deeds system imposed on the tenant purchaser charges, not only relatively but absolutely, as high as those paid by the largest landholders. This meant that he would not, indeed, could not, use the Registry of Deeds effectively. Primogeniture meant that, if the tenant purchaser died intestate, his eldest son or some other person, depending on the priority of his own birth or that of his ancestor, took the intestates real property, all other relatives being excluded.”

Nor were the landowner’s interests the only ones that were considered relevant to the establishment of a Registration of Title system, as Murphy sets out at 4.12:

“There was an additional problem, and probably a telling one; large sums of money were being advanced by the Government for the purchase of lands by tenant purchasers. It was seen to be important to protect the government’s interest by giving the tenant purchasers security of title.”

In any case the memorandum to the 1891 Local Registration of Title (Ireland) Bill which ultimately emerged set out the intention of the Act (Par.1.1. of Murphy’s article):

“It is intended:

- (a) to provide a simple, inexpensive, and easily accessible Land Registry for the occupiers of land in Ireland, and in particular for those who on purchasing their holdings are compulsorily brought within the provisions of the Registry of Deeds Acts,
- (b) to substitute for the Record of Title established in Ireland in 1865 an improved system of registration, which may be made use of by any owner of land in Ireland who prefers the system of registration of title to that of registration of assurances.”

It is noteworthy also that the 1891 Act is different from the English 1925 Act in that it was introduced at the same time as descent of land to the heir-at-law on intestacy was abolished for registered land, and it favoured instead the registration of the long-time occupant as owner, a practice which was endorsed when Section 49 of the Registration of Title Act 1964 was introduced. At that stage the Oireachtas was satisfied that it was in

the public interest to effect such transfers of title, which could only be done by the Registrar of Titles acting in a quasi-judicial capacity and subject to an appeal to the Court.

The arguments in the UK case law (reflecting Law Commission Reports) as to why registered land should not be treated the same as unregistered land are not convincing in the Irish context.

It is of some relevance also that because of the history of the Irish land issue, it is title to agricultural land, even small farms, which is substantially registered, and titles in urban areas which are mainly unregistered. This is the opposite to the position in the UK where registration of title started in towns and proceeded from there.

Submission

In the absence of a decision of the European Court which might require a change in Irish legislation it should not be assumed that such a change is necessary. Any decision in the UK in relation to the case law referred to in the Report (re Pye and Beaulane respectively) should not be seen as requiring any change in Irish law.

The Report at 2.06 states that:

“However, it must be recognised that on occasion the doctrine may operate unfairly, especially where it appears to enable a person, who deliberately sets out to take advantage of it, to use it as a means of obtaining ownership of someone else’s land without paying any compensation. The same applies where it appears to exact a very severe penalty on a landowner (the loss of the land) through a mere oversight or mistake.”

It is submitted that if someone effectively abandons his property for 12 years it cannot realistically be described as “a mere oversight or mistake”. It is generally accepted that a person who occupies the land for that period so as to effectively assume ownership of it should acquire title to it and whether he “deliberately sets out to take advantage of it...” should not be considered to be of any relevance. (As to whether it is sufficiently clear that “concealment” of such occupation or user should be a bar to acquiring title by adverse possession is something which can be dealt with by statute). The question of paying compensation is not something for which there has been a public demand nor is there a feeling that someone who allows someone else to occupy his land for 12 years is deserving of compensation any more than a lessee who abandons a valuable leasehold interest is deserving of compensation when his interest is deemed by a court to have been terminated by abandonment after a period of one or two years. In the absence of a relevant decision of the European Court or of the Courts in Ireland any change in the current legislation is, it is submitted, unnecessary and inappropriate.

If, in some exceptional case, a dispossessed owner feels entitled to compensation he will be free to take a test case to Europe. In the meantime it would appear to be unduly hasty to provide for such an exceptional case by changing the entire system, which has worked so well in this country for many years. In this context reference is made to the Joint Dissenting Opinion of Judges Maruste, Garliki and Borrego Borrego in the Pye v. U.K. case:

“We note that the United Kingdom provisions on adverse possession appear never to have been challenged before the former Commission or the Court until the present case, and **we fear that the majority have been swayed by the legislative changes and judicial comments**, rather than trying to assess what would have been the position if, for example, the 2002 (Act) had not been passed.”

This refers to Par. 74 of the Judgment in which it is stated that:

“More importantly, it is clear that Parliament itself recognised the deficiencies in the procedural protection of landowners under the then current system by enacting the Act of 2002. The new Act not only puts the burden on a squatter to give formal notice of his wish to apply to be registered as the proprietor after 10 years adverse possession but requires special reasons to be adduced to entitle him to acquire the property where the legal owner opposes the application. The mere fact that a legal system is changed to improve the protection provided under the Convention to an individual does not necessarily mean that the previous system was inconsistent with the Convention. However, in judging the proportionality of the system as applied in the present case, **the Court attaches particular weight to the changes made in that system**, and to the view of the Law Commission and the Land Registry as to the lack of cogent reasons to justify the system of adverse possession as it applied in the case of registered land.

It is clear that if the Irish legislation is changed unnecessarily this will be pointed to by the European Court as evidence of the need for change. **This would be a self-defeating course of action if, in fact, the legislation is being changed only because there is a perception that the European Court requires such a change.**

It would be prudent, in any case, to have regard to the fact that passing the proposed legislation may well be seen as a tacit admission that our existing legislation, in so far as it extinguishes the title of the paper owner, offends the European Convention and that **this might well trigger claims against the State for compensation, from dispossessed landowners, not only in relation to registered land but to unregistered land.** The numbers of potential claimants would be unquantifiable, since the unregistered land cases would have been dealt with outside any register. It appears from *J.A. Pye (Oxford) Ltd. v. The United Kingdom* that **such claims would be entertained by the European Court although they pre-dated the change in legislation and the adoption of the European Convention into domestic law** (by the European Convention on Human Rights Act 2003).

It should also be borne in mind that until 3 months have elapsed from the date of the Pye Judgment on 18th November 2005 it will not be known if the matter has been referred for a decision to the Grand Chamber, particularly having regard to the split decision of 4-3. **Apart from this, certain parts of the judgment relating to compensation have been reserved for later consideration and until all aspects are dealt with no final conclusions can be drawn from the judgment.**

It is evident, in any case, that even if, for some reason, it was considered necessary to provide for the payment of compensation in some cases, that all such claims should, **in the first instance, be dealt with by the Registrar of Titles as heretofore, and**

1. That any appeal by a dispossessed owner against any decision of the Registrar could include a claim for compensation and
2. That as it may well be that the function of the Registrar might not extend to awarding compensation this could be dealt with by the Registrar referring a case considered worthy of compensation to the Court for determination both as to the entitlement to compensation and to the amount which might be appropriate.
3. An indication should be given of the specific factors which should be taken into account by the court in determining whether

compensation is payable and what factors are relevant in qualifying the amount of the compensation.

To refer all claims of adverse possession to the court in the first instance would mean clogging up the courts unnecessarily having regard to the fact that, as pointed out above, of 1,400 cases dealt with by the Registrar on average for each of the last five years only one appeal during that five years has been against a decision of the Registrar to make an order for adverse possession, while there were only fourteen appeals arising from a refusal to grant such an order during that time. The expense of so many unnecessary court applications would, no doubt, be regarded as wasteful by a consumer society which is growing more conscious of unnecessary expenditure.

December 2005
Conveyancing Committee