

Adverse Possession Update

Christopher Cant

The subject of adverse possession has been transformed by the changes in the Land Registration Act 2006. Before considering how these operate it is worth being reminded by two recent decisions that being an adverse possessor (a trespasser) can have painful consequences.

1. Financial risks – the owner may look to a trespasser to recoup loss caused or to make a payment based on profits. The rental value of the property may be used even if the owner could not have let the property. In some cases the award may be extremely complicated as in *Ramzan v Brookwide Limited*.

1.1 Ramzan v Brookwide Limited [2012] EWCA Civ 985 – the facts are unusual but illustrate the dangers of trespassing. A restaurant had a store room on the first floor which provided access to the fire escape from a function room. The store room was a flying freehold. The Defendant, the adjoining owner, sent builders in who knocked down the wall between the store room and the Defendant's property and blocked up the door to the rest of the restaurant. The store room was incorporated into a flat let out by the Defendant. There was no immediate application for an injunction because the restaurant was being run by a bankrupt. Subsequently it was transferred to the son who commenced proceedings. An injunction was refused presumably due to delay. However, a substantial damages award was made which was then the subject of appeal. The heads of damage awarded were

1.1 Capital loss - £55,000 loss of capital value due to loss of store and fire escape;

1.2 Loss of profit - £225,073 loss of profit from function room which could not use as it did not have a fire escape. This was calculated by use of previous profits (around £24,000 pa) with a 25% reduction to allow for error. On appeal this was reduced by six months profit because the claim was made by a successor. With such claims Court has to do the best it can. At the trial the Defendant was handicapped by the absence of an expert's report which it was barred from adducing. Playing tactical games can rebound on a party.

1.3 Mesne profits - £23,000 odd mesne profits arising from loss of use of store room until order pay capital sum. This is compensation for loss of use of the land. It was ordered that the breach of trust damages were to be deducted from these mesne profits. On appeal this was reduced as it involved double recovery for loss of the fire escape. In consequence the store room needed to be valued without the benefit of the fire escape. The value of the store room without the fire escape was agreed to be £2,500. This reduced this award to around £1,000. But then it was held that it should not be awarded at all as the store room could never have been let and so damages for loss of profits was sufficient.

1.4 Cost of restoring fire escape - £72,570 was the figure put on the restoration of the fire escape. On appeal this was set aside as that was already covered by the diminution in capital value claim.

1.5 Breach of trust - £19,741 breach of trust representing profit accruing to defendant from wrongdoing from rent of flat. On appeal this was set aside as the Claimant had to elect between trespass and breach of trust. There had been a single wrong which was the misappropriation of the store. It was held that the Claimant had to choose between claiming for loss of function room or the Defendant's profits from letting the flat.

1.6 Exemplary damages - £60,000 exemplary damages was awarded at first instance. Wrong was a deliberate act of trespass by Defendant to make profit. Judge wanted to mark that totally unacceptable way of resolving ownership of property and to deter such misconduct elsewhere. Judge took into account that no contrition shown. Reduced to £20,000 on appeal as Claimant successor, therefore, wrongdoing did not immediately impact him.

Taking adverse possession triggered a complicated and expensive process which involved trial and appeal. Resulted in a number of complicated arguments on law applicable to damages. It was noted in the Court of Appeal that had the claim been made by the original owner of restaurant there might have been a successful claim for aggravated damages as well.

1.2 London Borough of Enfield v Outdoor Plus Limited and J C Decaux [2012] EWCA Civ 608 – this decision concerned what is becoming a popular source of disputes which is when the erection of advertising hoardings in such a way that the supports trespass on, or the hoarding oversails, adjoining land. In this case three steel stanchions encroached on the Claimants by about two feet. The test for damages was accepted as that stated by Vos J. in Stadium Capital Holdings Limited v St. Marylebone Property Co. Plc [2011] EWHC 2856 to be “hypothetical negotiation damages” – the price that would be reasonably agreed between willing parties for the act which is the trespass. The trial judge had accepted the argument that as it would have been possible to site the hoarding and its supports wholly on the correct land only nominal damages should be awarded. On appeal this was set aside. The existence of an alternative to the trespass was a factor to be taken into account in any negotiations but not a reason for not awarding substantial damages. The proper damages were held in that case to be one half of the rental for the hoarding to allow for the straddling of two properties.

Both cases are a warning to those in adverse possession as it can be a costly exercise. If the Court believe that it is deliberate with the intention of making a profit exemplary or aggravated damages can be awarded.

2. Adverse possession – most claims nowadays will relate to registered land and since 13th October 2003 that has been subject to a wholly new regime. Notwithstanding the substantial alteration the concept of adverse possession remains common to both registered and unregistered land. The House of Lords decision in Pye v Graham [2002] UKHL 30 clarified the understanding of this concept and settled the issue as to whether the occupation of the adverse possessor had to conflict with the intentions of the paper title owner. In consequence the law is simpler. Lord Browne-Wilkinson stated that the “question is simply whether the

defendant squatter has dispossessed the paper owner by going into ordinary possession of the land for the requisite period without the consent of the owner.” (para. 36). In that case a farmer carried on tending four fields after the expiry of a grazing agreement but was willing to take on a new agreement or pay rent if the owner had responded. This was sufficient to pass title under the old law in 25 hectares of farm land.

2.1 Elements of adverse possession – a person claiming title by adverse possession must prove (i), (ii) and (iii) below and (iv) must not apply:-

(i) true owner discontinued possession or dispossessed – there can only be a single possession of land so that if the true owner remains in possession there cannot be someone else in adverse possession. It must be shown that the true owner has either abandoned the land or been displaced. Continuing inspection of the land by representatives of the true owner are, therefore, significant in the context of such claims (*Williams Brothers Direct Supply Limited v Raftery* [1958] 1 QB 159).

(ii) factual possession of the land – it must be shown that the occupant has sufficient degree of control and custody of the land. What this involves will depend on the particular circumstances. It must be shown that “the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it” (Lord Browne-Wilkinson in *Pye v Graham*). In that case it was accepted in cross-examination that there was nothing more that the Graham family would have done with regard to the land if the paper title owners.

This actual possession must be unequivocal and manifested to the true owner and, therefore, be obvious on an inspection. This follows from the acquisition of title being dependent on the accrual of a cause of action in favour of the true owner against the adverse possessor. The failure to enforce the cause of action over a period of twelve results in the transfer of title. It must be possible for the true owner to be aware of the facts in order to know that there is a need to sue.

(iii) the requisite intent – a common myth was that the occupant had to have an intent to exclude the true owner. That is not so. There must be an intent to exclude everyone including the true owner as best the adverse possessor can (*Lambeth LBC v Blackburn* [2001] EWCA Civ 912). As regards the true owner the adverse possessor must merely intend to exclude the true owner as far as is reasonably practicable and so far as the processes of the law allow (Clarke LJ at para. 53). The fact that if asked the adverse possessor would be willing to pay for the occupation or to acquire the title does not automatically mean that the requisite intent is absent.

What is required is that there is an intent to occupy and use the land exclusively on the occupant’s own behalf. In *Pye v Graham* the paper title owner was excluded because of the hedges and the key to the padlock on the single gate being held by Mrs Graham. These were facts which really spoke for themselves. There must be an intent to exclude the whole world so that if others have access then the requisite intent is not established (*Battersea*

Freehold & Leasehold Co Limited v Wandsworth LBC (2001) 82 P & CR 137). It is not enough to have the intent to keep out only those who should not be there.

(iv) no permission from paper title owner – any consent from the true owner to be there will preclude adverse possession whether it is in the form of a tenancy or licence.

2.2 Facts based – adverse possession more than many other legal issues is very fact based. The outcome will depend on the individual circumstances of the particular case. Nourse LJ in *Boosey v Davis* (1987) 55 P & CR 83 stated that the principal factors were (i) condition of the land; (ii) intention of the person in adverse possession; and (iii) the quality and quantity of the acts relied on as constituting adverse possession.

2.3 Fencing - Fencing as an act of adverse possession is an example as to how outcomes can vary dependent on the individual circumstances. To enclose the land of another will normally be regarded as adverse possession. In *Hounslow LBC v Minchinton* (1997) 74 P&CR 221 fencing was put up to keep dogs in and had the effect of incorporating a strip at the rear of the property into that property's garden. The Court of Appeal held that title was acquired by adverse possession as the intent to keep the dogs in also had the effect of keeping the world out because the defendants "wanted to keep their dogs within the boundaries of their own land". In contrast in *Inglewood v Baker* [2003] 2 P & CR 319 putting a fence around a coppice was held not to have that effect. The fence was to keep sheep in but did not keep other people out which continued to be used for other activities by locals. In consequence the requisite intent was not established. The same need to investigate the facts applies to repair and replacement of an existing fence (*Chambers v Havering LBC* [2011] EWCA Civ 1576).

There is an issue as to whether the decision in *Hounslow LBC v Minchinton* supra should represent the law now after *Pye v Graham* and decisions such as *Inglewood v Baker* supra should be regarded as now being wrong particularly as the former case was not mentioned in the latter (Lewison LJ at para 65 in *Chambers v Havering LBC* supra). This is not the basis that the motive for erecting fencing is not relevant. The alternative view is that they are not inconsistent because in each case it is necessary to consider the facts to ascertain the intention in that case (para. 40 *Etherton LJ*). The third member of the Court of Appeal noted the difference but did not voice a view (para. 73).

2.4 Permission – if the person is in occupation with the consent of the true owner then the occupation will not constitute adverse possession. Express consent such as a written tenancy or licence will be clear. However, it is not only express consents which are possible. In some circumstances an implied licence may arise. Mere inaction or silent acquiescence in the use of the land on the part of the true owner is not enough (Lord Bingham in *Beresford v City of Sunderland* [2003] UKHL 60 at para. 6 – in relation to an issue as to a village green). Lord Walker of Gestingthorpe at para. 75 suggested that a charge for entry carried with it an implied licence as could other circumstances which did not involve words of permission. He stated that in "each instance there is a communication by some overt act which is intended to be understood, and is understood, as permission to do something which would otherwise be an act of trespass".

2.5 What not needed – there is no need to prove

(i) an intent to own - it is enough that the occupant has an intent to possess.

(ii) that the occupation is contrary to the paper owner's intentions. *Pye v Graham* supra rejected the rule that if the owner had no immediate use for the land it would be difficult to prove adverse possession. This has been part of the law pre-1833 and it was held that it should not be reintroduced by concepts such as implied consent. There is no need for the occupation to be inconsistent with the enjoyment of the land by the true owner for the purposes for which that owner intends.

(iii) The occupation does not have to be aggressive, hostile, by way of subterfuge or adverse to the paper title owner. A willingness to pay for the occupation if asked does not prevent the occupant being in possession for these purposes.

(iv) an ouster of the paper title owner. All that needs to be established is that possession of the land has been taken because if it has been then the paper title owner can not any longer have possession;

(v) continuous user – possession is not the same as continuous user. The state of the land will determine the extent of the user needed to establish adverse possession (*Lewison LJ in Chambers v Havering LBC* [2011] EWCA Civ 1576 at para. 57).

(vi) the intent of the paper title owner

2.6 Public highway – the adverse possessor cannot acquire a better title than the person whose title is being displaced (see *Elias LJ in R v Land Registry (Cambridgeshire CC)* [2010] EWCA Civ 200). The estate and rights of the person displaced are extinguished but the rights of a third party continue. For example, if there is a public or private right of way the adverse possessor's new title will be subject to such rights. In *Pye v Graham* supra there was a public footpath running across the fields and the *Grahams* took subject to that right.

However, when the land claimed is all public highway it is not possible to acquire title by adverse possession. The old maxim "once a highway always a highway" applies. In *R v Land Registry* supra a window cleaner had lived for over twelve years in a caravan on a part of an unmetalled bridleway keeping the verges and hedges in good trim. The Court of Appeal upheld the rejection of his application to the Land registry to be registered as proprietor of that part.

2.7 Wall – it is possible to acquire title to a wall dividing adjoining properties by adverse possession (*Palfrey v Wilson* [2007] EWCA Civ 94) by one land owner doing "everything which could be expected of him to assert exclusivity and ownership" (Lord Tuckey at para 10(11)). This included repairing the wall when it was damaged.

2.8 Criminal offence –

2.8.1 R v Land Registry supra - Interestingly at first instance in the *R v Land Registry* case one reason for rejecting the claim was that the occupation of the caravan on the public

bridleway was an obstruction and so a criminal offence within section 137 Highways Act 1980. Judge Pelling QC held that reliance could not be placed on occupation which was a criminal offence. He accepted the submission that there is a general principle that public policy prevents a party acquiring a legal right as the result of illegal activity. The occupation was in itself the criminal offence as opposed to the use to which occupation was put or the means by which entry was gained. It is similar to the issue as to whether a right of way could be acquired by prescription or the doctrine of lost modern grant over common land and village waste. In the House of Lords it was held in *Blakewell Management Limited v Brandwood* [2000] UKHL 14 that a presumed grant would not have been unlawful and so such a presumed grant would remove the criminality of the act. In consequence vehicular access over common land could be achieved by long user. In contrast the Highway Authority could not lawfully grant a licence to occupy the bridleway and so the judge held that this prevented the acquisition of title by adverse possession. The Court of Appeal skirted this minefield by saying that they did not want argument on it.

2.8.2 Residential buildings – Breaking into a flat or house and occupying for twelve years could form the basis under the common law and the Limitation Act for a claim to have acquired title by adverse possession. The act of burglary to gain entry does not preclude the claim (*Lambeth LBC v Blackburn* supra). Now that trespass in a residence has become an offence (section 144 Legal Aid Sentencing and Punishment of Offences Act 2012 which took effect 1st May 2012) this could be an important issue. It is now not just the entry into the building which may be criminal but the continuing occupation of the residence.

The elements of the offence are

- (i) the person is a trespasser in a residential building having entered as trespasser. Holding over after the end of a lease or licence takes the person outside the offence even if the person has left and then re-enters;
- (ii) the trespasser knows or ought to know that he or she is trespassing;
- (iii) the trespasser is living or intends to live in the building for any period – so it is not enough that a person excludes an owner from a residence. To be an offence it must be with the intent to live there.

Importantly it is not relevant whether the entry to the building was before or after the commencement of the section. Continuing trespass which started before 12th May 2012 will be offence after that date.

This raises the interesting question whether reliance on the general principle upheld by Judge Pelling QC can now prevent the acquisition of title to residential buildings if the occupation is a criminal offence? Such a case is distinguishable from the claim to title in *R v Land Registry* supra in that it is arguable that the owner could have lawfully granted licence to occupy the building. However, the *Blakewell Management* case was concerned with the acquisition of an easement and the application of the doctrine of lost modern grant. The presumed grant causes the user relied on to be made retrospectively lawful. Can adverse

possession operate in the same way? The expiry of the twelve year period will extinguish all rights vested in the paper title owner including claims for mesne profits and rent in relation to the past. The acquisition of the new title is from the expiry of the relevant period and not from the commencement of the adverse possession albeit that possession dates from the earlier dates. If retrospective effect is given to the adverse possession to avoid the criminality then does that undo the adverse possession? Will what has been a criminal offence retrospectively cease to be criminal or at the very least cease to be an offence for the future. It is an extremely interesting point which will have to be decided by the Courts at some stage.

3. Registered land – following on the decision in *Pye v Graham* and *Pye v UK* a new regime was introduced as regards adverse possession and registered land. For this regime to apply the title to the land does not have to be registered throughout the period of adverse possession. It is enough that the title is registered when an application is made. The old law regarding adverse possession still continues to apply to land which is not registered.

3.1 Statutory regime –

3.1.1 Limitation Act 1980 – this no longer applies to registered land but continues as regards unregistered land (s.96 LRA 2006). However, adverse possession has the same meaning even though the rules regarding adverse possession are entirely different (para. 11 Sch. 6).

3.1.2 Twelve year period – this has gone and is replaced by a ten year period.

3.1.3 First application – a person may apply to be registered as proprietor if

(1) that person has been in adverse possession for at least ten years ending with the application (para. 1(1) Sch. 6); or

(2) that person has been evicted not more than six months before the application and immediately prior to eviction could have applied on the basis of ten year's adverse possession provided that the eviction was not due to a judgment for possession (para. 1(2) Sch. 6).

Provided that no application may be made if proceedings for possession have been started against the occupant or a judgment for possession of the land was made within the last two year (para.1(3) Sch. 6).

3.1.4 Notice – once an application has been made then the registrar must give notice to the registered proprietor, any person with a superior registered title, any registered charge and anyone who is registered as a person to be notified (para. 2 Sch. 6). . The notice will give warning that a counter-notice must be given within 65 working days from the date of the notice. There is no power to extend this period.

3.1.5 Proprietor's notice - If there is no counter-notice within the prescribed 65 working days then the applicant is entitled to be registered as the new proprietor (para. 4 Sch. 6). This registration is not final because an application for rectification can be made by the removed proprietor (see *Baxter v Mannion* [2011] EWCA Civ 120 – section 3.3.2 below). If a

counter-notice is given requiring that the application be dealt with pursuant to para. 5 Schedule 6 then the provisions in that paragraph will operate.

3.1.6 Paragraph 5 – a counter-notice requiring the operation of paragraph 5 will prevent the applicant being registered as proprietor unless one of three conditions applies. These conditions are

(1) **First Condition** - it is unconscionable to dispossess the applicant because of an estoppel and the circumstances are such that the applicant ought to be registered (para. 5(2) Sch. 6). For example, a father tells his son that he can build a home on the father's land and live there with his family and the son builds the home in the expectation that it is his.

(2) **Second Condition** - the applicant is for some other reason entitled to be registered as proprietor (para.5(3) Sch. 6).

(3) **Third Condition** - adjoining land (para. 5(4) Sch. 6) – this condition is the one which will be relied on the most in litigation. It did not take effect until 13th October 2004 one year later than the commencement of the new regime. There have been a couple of decisions on it (see 3.2 below). For the third condition to apply the following requirements must be satisfied:-

(i) the applicant owns land next to the land which is the subject of the application. There is no limitation as regards size so that it can be a small strip along part of a boundary or a larger area.

(ii) there has been no determination of the line of the boundary between the two under rule 60;

(iii) for at least ten years of the period of adverse possession ending with the application the applicant or any predecessor in title has reasonably believed that the land to which the application relates belonged to him. This belief includes a belief that the applicant owned a possessory title (*Crosdil v Hodder* REF/2009/1177). The belief has to be held for at least ten years but there is no requirement that the belief should persist up to the date of application (*Davies v John Wood Property plc* REF 2008/0528).

(iv) the estate to which the application relates was registered more than one year ago.

Unless within one of the three conditions the applicant will not be registered but will have the opportunity to make another application after the expiry of a further two years from the rejection of the first application (para. 6 Sch. 6). The intention is that the registered proprietor has two years in which to commence proceedings for possession. If it does not then the applicant can be registered as the new proprietor on the second application (para. 7 Sch. 6).

3.1.7 Paragraph 6 – an applicant who has had an application to be registered rejected under paragraph 5 may make a further application on the expiry of two years from the date of that rejection if that applicant has continued in adverse possession for the two years. It would

seem that giving up adverse possession after the expiry of the two years would not prevent the applicant being registered. Such a further application cannot be made if

(a) the applicant is a defendant to proceedings in which a right to possession is being asserted;

(b) judgment for possession of the land has been given against the defendant in the last two years;

(c) the applicant has been evicted from the land pursuant to a judgment for possession.

The first application is intended to be a “wake up” call to the registered proprietor who must then take steps to recover possession of the property within two years or lose the property if the applicant then makes a further application. It is not enough that the registered proprietor obtains an order for possession. This is not sufficient protection.

After two years an order for possession ceases to be enforceable against a person who is entitled to make a first application under paragraph 1 Schedule 1 at the time that the judgment was given or a further application under paragraph 6 at the expiry of the period of two years from the judgment (s98(2) and (4)). In the latter case a court is required to order the registrar to register the defendant as the new proprietor (s.98(5)).

This means that having started possession proceedings within two years of the rejection of an application under paragraph 5 and then having obtained a judgment for possession the registered proprietor must then carry on and within two years of the judgment execute the judgment and obtain possession. If the registered proprietor fails to take that last step then the occupant could make the further application under paragraph 6 once two years have expired from the making of the judgment for possession and in consequence be registered as the new proprietor.

I have had this concern with a site purchased for development which had a tenant of part who had expanded occupation to whole site. The tenant had made application under paragraph 1 and proceedings had resulted in an order for possession by consent. Then subsequently there was a request that could the Claimant extend the time for giving up possession to the registered proprietor. This raised a serious concern that in doing so the registered proprietor did not give the occupant an opportunity to prolong period of occupation so that the occupant could make a second application to the Land Registry which could not be defeated by the registered proprietor because more than two years had passed from the making of the possession order. It has to be appreciated that it is no longer the case that the obtaining of the order for possession is the end of the matter.

3.1.8 Registered proprietor with mental disability – no application can be made if the registered proprietor suffers from a mental disability or is unable to communicate decisions (para 8(2) Sch. 6).

3.1.9 Priority - Registration of an applicant under this regime will not affect the priority of any interest affecting the estate save that it will be free of any registered charge affecting the estate immediately before the applicant's registration unless the registration is because the applicant satisfied one of the three conditions in paragraph 5 when the prior registered charges will continue to bind the land (para. 9 Sch. 6).

3.1.10 Possession claims – as well as any other defences to a claim a defendant will be entitled to defend a claim if

(i) immediately prior to the commencement of the claim the defendant would have been entitled to make an application under paragraph 1 and to be registered as the new proprietor under paragraph 5.4 (adjoining land) (s98(2)); or

(ii) immediately prior to the commencement of the claim the defendant would have been entitled to be registered as the new proprietor under paragraph 6 (s.98(3)).

In the event that a defendant is entitled to such a defence or if a judgment for possession has ceased to be enforceable because two years running from judgment have expired and the defendant has remained in adverse possession then the court must order the registrar to register the defendant as the new proprietor (s.98(5)).

3.1.11 Transition – a person who had with any predecessors in title been in adverse possession of registered land for twelve years prior to the introduction of the new regime on 13th October 2003 so that the registered estate is held on trust for that person remains entitled to be registered as proprietor (para. 18 Sch.12). Such an entitlement was an overriding interest for three years after the commencement of the new Act (para. 7 Sch. 12). It may continue as an overriding interest for so long as the person continues in actual occupation (para. 2 Sch. 3).

3.2 Adjoining land condition – if the four requirements specified in para. 5.4 Sch. 6 (see section 3.1.6 (3) above) are satisfied then an applicant under paragraph 1 is entitled to be registered as the new proprietor and the applicant cannot be rejected. As mentioned this is the condition which is most likely to lead to litigation. The requirement which will be the most contentious is the requirement that the applicant reasonably believes that he is the owner of the disputed land. Two such disputes have just been to the Court of Appeal.

3.2.1 IAM Group plc v Chowdrey [2011] EWCA Civ 1306 – two properties were divided by a Deed in 1928 but the provision relating to the blocking up of an opening from one to the other was not carried out. In consequence when the Respondent bought one property in 1993 it still provided the only means of access to two floors of the other property. Proceedings were commenced in 2010. The Respondent could not claim title under the old law as he had not been in adverse possession for twelve years prior to the introduction of the new regime. However he had been in adverse possession for ten years and so could have made an application under paragraph 1 immediately prior to the commencement of the proceedings. The two floors were adjoining his registered land and so the issue was whether he reasonably believed that he owned those two floors. The argument on appeal was that any reasonably

competent solicitor looking at the title deeds would realise that he did not and such knowledge should be imputed to him. This was rejected by the Court of Appeal. Etherton LJ stated that the test was not what a reasonably competent solicitor would believe but whether it was reasonable for the applicant to believe that he was the owner. This may involve an enquiry as to what he should have asked his solicitor but in this case the Respondent had been in unchallenged occupation for 18 years with nothing to put him on notice. In consequence the first instance decision was upheld that the requirements of para. 5.4 satisfied.

The circumstances of the case illustrate that this condition is not exclusively concerned with small areas of strips of land running along boundaries but can apply to much larger areas including floors of buildings.

3.2.2 Zarb v Parry [2011] EWCA Civ 1306 - this is an illustration of the type of adverse possession case which is also an extremely hostile boundary dispute. Part of a garden was sold in 1992 to the Defendant's predecessor. There was a plan but the parties to the sale were very relaxed about the boundaries. No fence was erected along the boundary in the manner provided. Instead a hedge standing back from the actual boundary was treated as the boundary and the additional land was incorporated in the garden of the Defendant's predecessor. In 2000 the Claimants purchased from the vendor and in 2002 the Defendants purchased from the purchaser. Without warning in July 2007 the Defendants' returned from a shopping trip to find that the Claimants were in their garden measuring a boundary using a tape having taken down a post and wire fence, cut down an elder and were starting to erect a new fence. They retreated when the Defendants returned. A few months later the Claimants' solicitor wrote claiming that the boundary was as set out in the original plan and not as the gardens were laid out. A surveyor was jointly instructed and in August 2008 he produced a plan showing the boundary running through the hedge. This was not accepted by the Claimants who commenced proceedings in June 2009 seeking a declaration that the boundary was as shown on the original plan. The Defendants defence relied on para 5.4 (adjoining land) and succeeded. Three points were taken on appeal:-

(i) Permission – there was no adverse possession because the Defendants and their predecessors occupied the land with permission due to the erection of a stock proof fence. This was rejected because there could have been a number of explanations as to why the fence was erected. The act relied on had to be probative of permission and not just consistent.

(ii) Interruption – there has to be a continuous ten year period and if possession is interrupted then the period has to start again. This aspect caused the Court of Appeal a considerable headache. Little is needed for the true owner to recover possession from a trespasser. The judges came down on the acts in 2007 being preparatory to taking possession rather than excluding the Defendants from possession. As Neuberger LJ said if the shopping trip had been a little longer then the defendants could have lost possession. It means that if the papers owners have a settled intent to recover possession and set about it in the correct manner it will be extremely difficult to prevent a successful interruption. It is not necessary that the interruption is for a particular length of time.

(iii) reasonable belief – it was argued that the events in 2007 and the solicitor’s letter meant that even if there was a reasonable belief in ownership originally this changed and the belief was no longer reasonable. The argument failed because the jointly instructed surveyor had supported the Defendants so it was reasonable for them to continue to hold the belief. The moral for Arden LJ was that once a person in adverse possession is challenged and the requirements of para. 5.4 have arguably been satisfied then that person should make application to the Land Registry as soon as possible to be registered.

3.3 Rectification – the power to rectify a registered title will have particular significance in the context of adverse possession. There is no power to extend the notice period in relation to an application by an adverse possessor to be registered under paragraph 1 of Schedule 6.

3.3.1 Statutory power of rectification – Schedule 4 LRA 2002 confers power to alter the register on both the Courts and the Registrar. The power is exercisable for the purpose of

- (i) correcting an error;
- (ii) bringing the register up to date;
- (iii) giving effect to any estate, right or interest excepted from the effect of registration.

Any alteration which involves the correction of a mistake and prejudicially affects the title of a registered proprietor then no order will be made if the proprietor is in possession of the land without the proprietor’s consent unless

- (a) the proprietor has by fraud or lack of proper care caused or substantially contributed to the mistake; or
- (b) it would for any other reason be unjust for the alteration not to be made.

3.3.2 Failure to give counter-notice - It has been argued that if following the giving of notice of an application under para. 1 Sch 6 no counter-notice has been made within the prescribed period then the registration of the new owner is final and the displaced owner has lost the land for ever. This argument was rejected by the Court of Appeal in *Baxter v Mannion* [2011] EWCA Civ 120. The Defendant was registered as the proprietor of a field in 1996. In 2005 the Claimant applied on the basis of adverse possession to be registered as the new proprietor. He had kept horses in the field albeit not continuously or extensively. The Defendant failed to respond to the notice due to personal problems and the Claimant was registered. Subsequently the Defendant applied for the title to be rectified by reinstating him as the proprietor. This application was successful before a Deputy Adjudicator on the ground that the Claimant had not had exclusive possession and so should not have been registered as the proprietor. The Claimant argued that there had been no mistake because the Land Registry had acted properly on the basis of the material provided. It was held that failure to comply with a statutory pre-condition was a mistake which could be rectified and that “mistake” should not be limited to an official error. It was accepted that the Claimant had taken possession of the field and so either (a) or (b) above needed to be satisfied. An

unjustified attempt to be registered was held to trigger (b) as it would be unjust not to replace the Defendant as proprietor. In consequence in all such cases the title will be altered and the statutory restriction when the proprietor is in possession will usually have no effect.

3.4 Succession – under the general law it is possible to add together periods of adverse possession by different persons in adverse possession provided that there is not gap between the periods. In consequence if A owns land but B goes in adverse possession from 1990 and is replaced by C in 1998 who remains in adverse possession for another four years then C will acquire title against A although oddly B could seek to recover possession from C. A recent successful example is *Site Developments (Ferndown) Limited v Cuthbury Limited* [2010] EWHC (10 Ch) in which Vos J allowed a number of periods of adverse possession to be added together. He held that it was not possible to rely on section 62 LPA 1925 to pass the rights of an adverse possessor when selling an adjoining property (para. 165).

With regard to registered land this is no longer the case. To add together periods of adverse possession by different occupiers it is necessary to satisfy one or other of the requirements of para. 11(2) Sch. 6 LRA 2002. These requirements are either

(i) the earlier adverse possession is by a predecessor in title of the applicant. To be a successor in title it presumably intends that the same estate claimed by the first adverse possessor has been acquired by the second. Alternatively,

(ii) the applicant's adverse possession has been before and after adverse possession by another and adverse possession has been continuous during the whole of the aggregate period of adverse possession.

This means that in the example given above with regard to unregistered land no title by adverse possession could be acquired after 13th October 2003 with regard to registered land if the facts had occurred two or more years later. However, if B then displaces C and recovers to adverse possession of the land then B can acquire title.

4. Acknowledgement – under the old law it was provided that an acknowledgement of the paper title by the adverse possessor would cause time to start again and so wipe the period prior to the acknowledgement. To have this effect the acknowledgement had to be in writing and signed by or on behalf of such person (section 29 and 30 Limitation Act 1980). This covers matters such as requests to the true owner for permission to make use of the land or requesting funds to refurbish the true owner's property (*Archangel v Lambeth LBC* 1st December 2000). In *Ofulue v Bossert* [2009] UKHL 16 the House of Lords had to consider two issues regarding acknowledgment.

(i) Admission in pleadings – the first issue was whether a Defence in possession proceedings which admitted the Claimant's title was a continuing acknowledgement. It has to be borne in mind that merely issuing possession proceedings only stops time running other for the purposes of those proceedings. If for whatever reason there is a second set of possession proceedings the commencement of the first will not prevent time running if there has been adverse possession during the course of the first set of proceedings (*Markfield*

Investments Limited v Evans [2001] 1 WLR 1321). Under the new regime the commencement of proceedings is irrelevant as regards the continuation of adverse possession (para. 11(3)(a) Sch. 6). An admission is an acknowledgement contrary to the decision in the Court of Appeal which limited acknowledgements to those relating to the right to immediate possession. The argument was that it continued to be effective until the end of the proceedings. The House of Lords rejected that and limited its effect to the date of the pleading unless it was later amended or possibly re-served.

(ii) Without prejudice correspondence – the second issue concerned a without prejudice offer to purchase the Claimant's title. Was this an acknowledgement so that only the period of occupation after the making of the offer could be taken into account? The House of Lords did not accept that without prejudice offers could be taken into account for this purpose.

5. Estoppel – an alternative defence to an acknowledgement is estoppel which will be available not just under the Limitation Act 1980 but also under the new regime applicable to registered land. To establish this defence it will be necessary to show

(i) that unambiguous representations have been made by the adverse possessor that either the true owner is in possession or that reliance is not being placed on adverse possession;

(ii) the representations are intended to be relied on by the true owner;

(iii) the true owner has relied on them to the detriment of the true owner or the benefit of the adverse possessor.

It is not often that it will arise but it did in case involving claim to land based on adverse possession near Colchester which ended with a fifteen day trial (Colchester BC v Smith [1991] 1 Ch. 448). In that case the representations were contained in an agreement.

6. Land Registry

6.1 Adjudication Procedure – with the creation of the Adjudicator and the implementation of the new adjudication system there is a constant stream of news. To start with there is a new set of decisions by the Adjudicator and Deputy Adjudicators now being reported. There has been a marked shift in cases from the Courts to the Adjudicator including those involving adverse possession claims. It is a subject for a separate seminar.

6.2 Reinstatement of applications – one recent Court of Appeal decision which must be borne in mind is Franks v Chief Land Registrar (2011) EWCA Civ 772. In that case an application for alteration of a registered title based on adverse possession was cancelled due to procedural failures. On appeal to the High Court the application was reinstated but it was nearly eighteen months before the Land Registry was informed of the order for reinstatement. During that period two charges were registered. Briggs J. held that notwithstanding the two charges the application should be reinstated as at the date of the original application. The Court of Appeal upheld his jurisdiction to make such an order. At the time that the charges were taken and registered there would have been no indication on the registered title that

there was such a claim being made. There would only have been an overriding interest if the claimants had been in actual occupation and in this case they had given undertakings that they would not be. How can a third party be protected against the possibility that the title relied on may be lost due to the subsequent reinstatement of such an application. The only possible ways are to investigate all past applications which have been removed or to insure.

6.3 Registration – the Land Registry may register a successful applicant with absolute or possessory title. In most cases if the displaced owner was registered with absolute title then that is the title the applicant will achieve. Registration with possessory title on an application for first registration was challenged in R (on the app of Diep) v Land Registry [2010] EWHC 3315 (Admin). The successful applicant had used the land at the rear of his property for storage and was registered with possessory title. He challenged this on the ground that it was unreasonable and irrational. This was rejected. There was a balancing exercise which has to take into account the public purse and the possibility that if an absolute title is conferred and there are interests or rights which bound the title of the displaced owner then a payment may have to be made by way of indemnity. It is different if the title to the land is already registered as then the claimant may be registered with the same title as the person who has lost ownership.

6.4 Charges – the person acquiring title by adverse possession will take subject to existing incumbrances binding the person who has lost ownership save for any prior charges (para. 9(2) Sch. 6). The rationale for this is that the charges will have had an opportunity to dispute the application by the adverse possessor in the same way as the person with paper title. It means that it is important for any person entitled to a charge over land subject to a claim by an adverse possessor not just to participate in any such application but to take steps to ensure at an earlier stage that there is no-one in adverse possession of the charged property.

7. Agreement contrary to terms of Limitation Act – the 1980 Act does not provide that the statutory provision will override any agreement to the contrary as for example section 38 Landlord and Tenant Act 1954 does with security of tenure for a business tenant. It is, therefore, possible to settle dispute without the person in adverse possession obtaining title (Trustees of Morden College v Mayrick [2007] EWCA Civ 4).

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Contact details

Websites: 9stonebuildings.com or christophercant.com

E-mail address: ccant@9stonebuildings.com

Telephone: 02074045055

Fax: 02074051551