

## Adverse Possession Update

Claims based on adverse possession still regularly arise notwithstanding the introduction in the Land Registration Act 2002 of the new regime regarding adverse possession and registered land. In the last year there have been a number of decisions providing useful reminders of material points in the context of adverse possession claims.

1. Adverse possession and first registration – often the first aspect to consider when dealing with an adverse possession claim in relation to registered land is whether there has been a period of adverse possession whilst unregistered or if registered before the new regime came into force and if there has been such a period then for how long. Twelve years adverse possession prior to registration or the coming into force of the new regime can give rise to ownership under the Limitation Act 1980 which avoids the need to become involved with the operation of the new regime.

Instead of the land having a registered title throughout the relevant period it may be that title to the land did not become registered until sometime after the coming into force of the 2002 LRA. Such a set of circumstances has been considered in *Blackall v Moledina* [2015] UKFTT 0152 (PC) by Judge McAllister and in a careful judgment the judge usefully highlighted the differences between a first registration under the 1925 legislation and the 2002 Act. This case concerned the traditional adverse possession set of facts of an area of land at the rear of a property which had been fenced off with access only from the property and a service road. The following practical and legal points come out of the judgment

(i) fencing – the enclosure of the disputed area was crucial to the claim but it appeared that it may have been carried out by the Council rather than the claimants. This did not matter. What was important was that the land was enclosed and the only access from other private properties was from the claimant's property.

(ii) tenant – the decision in *Tower Hamlets LBC v Barrett* [2005] EWCA Civ 923 was applied. An encroachment by a tenant of land close to the demised premises and occupied by the tenant together with the demised premises accrues to the benefit of the landlord.

(iii) overriding first registration – when the paper owner is registered as the proprietor on first registration there are three routes by which the person who has acquired title by adverse possession can override the registration assuming that a caution against first registration has not been entered. These are:-

(a) Transitional provision – para. 7 Sch. 12 LRA 2002 gives effect to any entitlement under the 1980 Act without qualification for three years from 13<sup>th</sup> October 2003. In consequence this will only help if the application for first registration is made within that three year period. In the *Blackall* case it did not because the application was in 2009.

(b) Actual occupation – if the person with title under the 1980 Act is in actual occupation of the disputed land then the interest will override registration. Unlike section 70(1)(g) LRA 1925 this does not cover cases where the person with the interest is not in actual

occupation but has let the land and receives rent. Under the 2002 Act receipt of rent and profits does not constitute being in actual occupation.

(c) Notice – pursuant to section 11(4)(c) 2002 Act an entitlement under the 1980 Act will bind the registered proprietor if that person had notice of the 1980 entitlement. Under the 1925 LRA the proprietor would have been bound whether or not the person entitled was in occupation or the interest could be discovered. In the absence of a statutory definition the judge treated it as including constructive as well as actual notice reflecting the position under section 199(1)(ii)(a) LPA 1925 (para. 58). The judge considered that the effect was that the interest of a person entitled under the 1980 Act is demoted from a legal estate “to an equitable interest dependent on notice.” (para. 53).

Accordingly, failure to carry out a proper enquiry which would have revealed the entitlement will constitute notice. In the Blackall case the claimants were held to have notice because of the appearance of the disputed land including the fencing, the use of the land and a claimed licence to the claimants’ predecessor in title. Each indicated that enquiries were needed. In para. 53 the judge stated that the “more restrictive provisions in the 2002 Act are consistent with the desire to strike a fairer balance between the landowner and squatter by shifting the balance in favour of the registered owner.”

2. Cut through – whilst land is used as a cut through it will not be in the exclusive possession of anyone (*Sexton v Gill* ref/2013/0472/0473 Judge Owen Rhys at para. 44.1).

3. Possessory title – possessory title can only be granted by the Land Registry if the applicant is in actual possession of the land or in receipt of rents and profits in accordance with section 9(5) 2002 Act and not in any other circumstances (*Sexton v Gill* supra at para. 23).

4. Parking – the difficulty of establishing adverse possession by parking without enclosure has been reaffirmed again by the Court of Appeal in *Nata Lee Limited v Abid* [2014] EWCA Civ 1652 (Briggs LJ at para. 38).

5. Landscaping – in *Kirkby v Heaney* (First Tier Tribunal Property Chamber ref/2012/0608) using an unfenced and unkempt verge first as an area for depositing building materials and equipment and then landscaping it to produce a parking space and flower beds constituted adverse possession because this dealt with the land as an owner would act. This was so even though the land was not fenced save for a limited period (paras 55 to 57). Judge Abbey made the point that to be adverse possession there had to be a sufficient degree of physical custody and control and what is sufficient depends on the circumstances (para. 58).