

Adverse Possession Update

Claims based on adverse possession are still regularly arising notwithstanding the introduction in the Land Registration Act 2002 of the new regime regarding adverse possession and registered land contained in Schedule 6. 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 the title is unregistered or if the title has been 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 if registered prior to 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. From the point of view of both the squatter and the paper title owner this has important consequences.

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 recently 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 13th 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 LRA receipt of rent and profits does not constitute being in actual occupation.

(c) Notice – pursuant to section 11(4)(c) 2002 LRA 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 notice 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 feature 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. Illegality – the Court of Appeal in R (oao Best and Chief Land Registrar) v Secretary of State for Justice [2015] EWCA Civ 17 has addressed the issue as to whether a claim for adverse possession is valid if for part of the period of adverse possession the occupation of a house constituted the commission of a criminal offence. This issue was avoided by the Court of Appeal in R (Smith) v Land Registry [2010] EWCA Civ 200 when affirming the decision of HHJ Pelling QC on the ground that it is not possible to acquire title to a public highway by adverse possession. The learned judge had also rejected the claim at first instance on the ground that the occupation of the lay by claimed constituted a criminal offence under the Highway Act 1980 but the Court of Appeal left that issue open. The Best case raised this issue as it was the only ground on which the adverse possession claim could fail. Part of the period of adverse possession was after 1st September 2012 which was when section 144 Legal Aid Sentencing and Punishment of Offenders Act 2012 came into force. This provision introduced a new offence when a trespasser enters a residential building and that person knew or ought to have known that he or she is a trespasser and the trespasser is either living in the residential building or intending to do so. Whilst in the residential building the trespasser is committing an offence. That ceases when the trespasser leaves the building.

Mr. Best applied under para. 1 Schedule 6 LRA 2002 to be registered as the proprietor on the basis of ten years adverse possession of a house which had been the home of the registered proprietor but who had died some time ago. He came across the house in 1997 and carried out building works and cleared the garden. He began to live at the house in 2001 and so had ten years of adverse possession but for the fact that there has to be ten years adverse possession ending with the application to the Land Registry and for

the last part from 1st September 2012 Mr Best was committing a criminal offence whenever he was in the house.

The Court of Appeal emphatically disregarded the commission of the offence and allowed the claim. Although not closing the door altogether to arguments against adverse possession claims barred by the commission of criminal offences it was made clear that an offence under section 144 will not bar a successful adverse possession claim and nor will the commission of most other criminal offences.

The majority view (Sales LJ and McCombe LJ) was that the issue was whether priority should be given to the public interest in the active use and marketability of land and this should outweigh a person not being able to benefit from their own wrongdoing. In deciding that it did a number of factors influenced the Court of Appeal. These included

- (i) the scope of the criminal offence which is limited to a residential building so that similar acts in relation to commercial buildings would not be affected;
- (ii) acts restricted to the garden or drive of the residential building do not constitute an offence;
- (iii) the offence is only committed whilst the trespasser is in the residential building and not when he or she has left it;
- (iv) there was no provision dealing with adverse possession in section 144 and in particular no amendment of Schedule 6 of the LRA 2002;
- (v) if successful it would mean that there would be no certainty with the registered title;
- (vi) the impact of a short period of criminal occupation would be disproportionate and arbitrary particularly if there has been a long history of non-criminal adverse possession;
- (vii) adverse possession of the curtilage could be treated separately from that of the house which could throw up an extraordinary result.

Lady Justice Arden adopted what she described as a “conventional statutory interpretation”. She did so on the basis that the general principle concerning illegality applied unless a contrary intention appeared. For a number of reasons she considered that there was a contrary intention. Amongst them she considered that Schedule 6 LRA 2002 contained the “totality of the paper title owner’s rights”.

As regards the application of the House of Lords decision in *Bakewell Management Limited v Brandwood* there was the same split in the Court of Appeal as with the approach to be adopted. The majority considered that it applies to adverse possession just as it does to prescriptive rights and was powerful support for their decision. In contrast Arden LJ considered that there was a difference between the two doctrines.

The decision strongly emphasises the importance attached to the ability to acquire title by adverse possession and the justification for such ability in order to avoid unmarketable titles.

3. 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).

4. 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).

5. 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).

6. 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).

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