Problems with Adverse Possession

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Introduction

It is not unusual in a conveyancing context to find that a seller has ‘incorporated’ an extra piece of land into his or her property. This is normally only discovered when the buyer is asked to compare the title plan with the actual property being bought. The question then arises whether the seller can claim adverse possession to this land. Please do not forget, however, that although 12 years adverse possession of unregistered land gives title to the squatter, the position is very different now in registered land. Unless the squatter can prove adverse possession for 12 years prior to the Land Registration Act 2002 coming into force i.e. prior to October 13th 2003, then the new rules introduced by that Act will apply. And under the 2002 Act, although an application to be registered based on adverse possession can be made after 10 years adverse possession, if the registered proprietor objects, then the squatter can only be registered if he or she can prove one of the three additional circumstances set out in Paragraph 5 of Schedule 6 to the Act.

The 3 circumstances are as follows:

(a) Equity of Estoppel

It would be unconscionable because of an equity by estoppel for the registered proprietor to dispossess the applicant; and

the circumstances are such that the applicant ought to be registered.

This condition is intended to embody the equitable principles of proprietary estoppel as these have developed. The squatter will have to establish that an equity has arisen in their favour. Thus they will need to show that:

- in some way the registered proprietor encouraged or allowed the squatter to believe that they owned the land in question
- in this belief, the squatter acted to their detriment to the knowledge of the proprietor, and
- it would be unconscionable for the proprietor to deny the squatter the rights which they believed they had.

Examples where this condition might apply are:
where the squatter has built on the registered proprietor's land in the mistaken belief that they were the owner of it and the proprietor has knowingly acquiesced in their mistake, and

where neighbours have entered into an informal sale agreement for valuable consideration by which one agrees to sell the land to the other. The ‘buyer’ pays the price, takes possession of the land and treats it as their own. No steps are taken to perfect their title and there is no binding contract.

(b) The Applicant is entitled to be registered for some other reason.

Examples where this condition might apply are:

- where the squatter is entitled to the land under the will or intestacy of the deceased proprietor, and

- where the squatter contracted to buy the land and paid the purchase price, but the legal estate was never transferred to them.

(c) Reasonable mistake as to the boundary

the land in question is adjacent to land belonging to the applicant; and
the exact boundary has not been determined under Land Registry rules i.e. r118 LRR 2003; and

for at least the last 10 years of the adverse possession prior to the application, the applicant (or any predecessor in title) reasonably believed that the land belonged to him; and
the estate in the land in question was registered more than 12 months prior to the date of the application.

It will be seen that none of these will cover the situation discussed above where the seller has just seen a piece of unused adjoining land and incorporated it into his or her own property. So do manage your client’s expectations as to whether they will become the owner of this ‘extra’ land.

However, the good news is that these three circumstances are only relevant if the registered proprietor objects; if he or she does not object, then the squatter will become registered after only 10 years adverse possession. But why would the proprietor not object? Well, if this is land they have forgotten about and left unused, they may well have also forgotten to update their address for service on the Register. But note that if an application is made under the 2002 rules, the registered proprietor will have 65 business days in which to make any objection, so no chance in the context of the time scale of a normal conveyancing transaction for the seller to get himself/herself registered before the sale proceeds.

And one final thought before we move on; don’t forget to check your lender client’s instructions with regard to adverse possession. CML Handbook (Part 1) states:
5.6.3 A title based on adverse possession or possessory title will be acceptable if the seller is or on completion the borrower will be registered at the Land Registry as registered proprietor of a possessory title. In the case of lost title deeds, the statutory declaration must explain the loss satisfactorily;

5.6.4 We will also require indemnity insurance where there are buildings on the part in question or where the land is essential for access or services;

5.6.5 We may not need indemnity insurance in cases where such title affects land on which no buildings are erected or which is not essential for access or services. In such cases, you must send a plan of the whole of the land to be mortgaged to us identifying the area of land having possessory title. We will then notify you of any additional requirements or if a revised mortgage offer is to be made.

Note the requirement for registration, which may well not be possible! But of course, if you do get registered as proprietor of registered land after proving adverse possession, you will be granted an ABSOLUTE title, not a possessory one. Presumably in that case, it does not need reporting, nor will a policy be required. And remember also that each individual lender has its own Part 2 which may deviate from these basic rules.

**R. (on the application of Best) v The Chief Land Registrar [2015] EWCA Civ 17**

It was this case that brought us to thinking about adverse possession. Adverse possession is based on the premise that by committing the tort of trespass, a squatter can acquire the legal ownership of land. But what if the squatter was committing a criminal offence – would that still result in the acquisition of the legal ownership? Or would it be contrary to public policy for someone to be able to acquire ownership through criminal activity – after all a thief does not acquire such ownership. That was the question to be answered by the Court of Appeal in this case.

The starting point is the enactment of section 144 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPOA"). This provides as follows:

(1) A person commits an offence if—
(a) the person is in a residential building as a trespasser having entered it as a trespasser,
(b) the person knows or ought to know that he or she is a trespasser, and
(c) the person is living in the building or intends to live there for any period.

Sales LJ set out the facts of the case:

9. The case relates to a house at 35 Church Road, Newbury Park ("the house"). It is a "residential building", within the meaning of section 144 of LASPOA. The freehold title is registered at HM Land Registry. The registered proprietor is Doris May Curtis. Mrs Curtis died some time ago. We were told that her son has recently been appointed as her personal representative.
11. On 27 November 2012, the First Respondent ("Mr Best") made an application to the Registrar to be entered on the Register as the registered proprietor of the house. This was on the basis that he had been in adverse possession of it for the period of ten years ending on the date of the application, as required by paragraph 1 of Schedule 6 to the LRA. …

12. The application was accompanied by a statutory declaration by Mr Best, in which he explained the basis of his claim to have himself entered on the register as the owner of the house. Mr Best stated that in 1997 he had been working on a nearby property when he noticed the then empty and vandalised house at 35 Church Road. The owner of the property on which he was working told him that the owner, Mrs Curtis, had died and that her son had not been seen since 1996.

12. Mr Best entered the house and did work to it. He repaired the roof in 2000. He has taken other steps to make the house weatherproof and has cleared the garden. As time went on, he replaced ceilings, skirting boards, electric and heating fitments, doors and windows. He plastered and painted walls. He maintained the boundary fences. He did all this with a view to making the house his permanent residence.

13. Mr Best said that he had treated the house as his own since 2001. Although it is not entirely clear what position Mr Best was adopting in relation to the period between 1997 and 2001 (and it does not matter for present purposes), as I read his statutory declaration, his claim to have been in adverse possession of the house, asserting his right of possession against the world, dates from 2001. He had occupied the house without anyone's consent, as a trespasser (although Mr Best did not use that term). There had been no disputes relating to his possession of the house. The period in which he claimed to have been in adverse possession of the house exceeded the ten years required under paragraph 1 of Schedule 6 to the LRA.

14. It was only at the end of January 2012 that Mr Best eventually moved into the house, to live in it as his home. On the Registrar's case, this was an unfortunate thing for him to have done, since it was by virtue of his trespassory occupation of the house to live in it that, as from 1 September 2012, he committed criminal offences under section 144 of LASPOA in such a way as to prevent his possession of the house from qualifying as adverse possession for the purposes of his claim to acquire title under the LRA.

16. The Registrar says that from 1 September 2012, for the last part of the period before Mr Best made his application on 27 November 2012, he had committed offences contrary to section 144 of LASPOA. …

17. The Registrar considered Mr Best's application, but decided that it should be rejected, by reason of the contravention of section 144 by Mr
Best. In a letter dated 10 December 2012, the Registrar stated, "It is not possible to rely on an act which is itself a criminal offence … as evidence of adverse possession"…

After a lengthy discussion, Sales LJ decided:

67. Although the public policy concerns underlying acquisition of title by adverse possession are very strong, especially in relation to unregistered land, I have some doubt whether Parliament can be taken to have intended the illegality principle to be wholly excluded from having any potential impact whatever in relation to the operation of paragraph 1 of Schedule 6 to the LRA. …..For example, I would wish to reserve my opinion regarding a case in which a trespasser in occupation of a residential building bribed a police officer not to expel him in reliance on section 144 of LASPOA, thus procuring or participating in an offence of corruption in a public office to gain the benefit of being registered as the proprietor with the title to the land; or a case in which a trespasser murdered the true owner in order to prevent him from claiming possession of the property.

68. Adoption of the approach in line with Mr Rainey's narrower submission appears to me to be in accordance with an appropriate general principle which it is reasonable to infer Parliament intended should apply by implication in the operation of the LRA. This approach allows for a properly modulated and focused weighing of the competing public policies which might come into play, whether considering legislation passed prior to the LRA or enacted after it.

69. Following this approach, I accept Mr Rainey's submission that the relevant balance of public policy considerations shows clearly that the fact that a relevant period of adverse possession for the purposes of the LRA included times during which the possessor's actions constituted a criminal offence under section 144 of LASPOA does not prevent his conduct throughout from qualifying as relevant adverse possession for the purposes of the LRA.

70. ….. Addressing that focused issue, I consider that it is clear that in enacting section 144 of LASPOA, Parliament did not intend that it should have any impact on the law of adverse possession set out in the LRA. The mischief which section 144 was intended to address and the objective it was intended to achieve had nothing to do with the operation of the law of adverse possession….

Arden and McCombe LJJ agreed with Sales LJ.

Conclusion

So there we are, you can acquire property rights by committing a criminal offence. To be fair, this ruling will only have limited impact. It is not at all common for a person to claim adverse possession of a house; the claims are more commonly in relation to
open land and taking possession of non-residential property has not been criminalised. But it does show that adverse possession is not quite as straightforward as we might hope.

And only part of Mr Best’s occupation was criminal – most of his period of occupation was before the 2012 Act was enacted. Would it make any difference if the whole of the occupation was tainted with criminality? Sales LJ did say that he did not think that Parliament could have intended that the illegality principle was to be wholly excluded from having effect in relation to adverse possession.