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Adverse Possession – boundaries, highways, waterways and mistakes: a 2010 update

There have been a number of recent important cases about adverse possession. In this briefing we highlight the differences between the old and new systems for claiming adverse possession, and look at what the reported cases have to say about the relationship between this difficult area and other aspects of property law.

The law in relation to the right for a 'squatter' to be able to claim adverse possession of land was changed in 2003 where the land is registered (which most land is these days). A new system of being able to claim adverse possession which better reflected the realities of modern registered conveyancing came into force in October of that year. The new system is generally recognised as fairer than the old system, but in some cases it has created new problems.

Adverse possession – the old law

Until October 2003, there was one set of rules in relation to the ability to make a claim for adverse possession. The principle was relatively simple: a squatter simply had to treat the squatted land as his own continuously for 12 years, to be able to claim it by way of adverse possession. What amounted to the necessary acts which would demonstrate that a squatter had treated the land as his own was the subject of numerous cases, but it was the landmark case of *Pye v Graham* in 2003, and the legislative changes brought in by the Land Registration Act 2002 which also took effect in that year, which finally saw a move away from the old system. The House of Lords in Pye v Graham had criticised the law surrounding adverse possession, noting that it did not take into account the fact that most land in England and Wales is registered with the Land Registry. Registration on the Land Register should do two things which do not sit easily with the old law of adverse possession: firstly, it is relatively easy to find out who is the official paper owner of any piece of registered land because the Land Register is a publicly available document. Secondly, one of the aims of land registration is to protect landowners by creating a definitive guide to ownership of land, an aim which was being undermined by the right to claim adverse possession.

Adverse possession – the new law

After October 2003 the system of claiming adverse possession was changed as follows: for anyone who is claiming adverse possession based upon occupation of land which began after October 1991, there is a new 'two stage' process. Firstly, after a period of no less than ten years occupation, the squatter can apply to the Land Registry to be registered as owning the relevant land. The Land Registry will then notify the registered 'paper' owner, and, except in limited circumstances (for example relating to boundary land between two

properties), if the paper owner promptly objects to the squatter being registered, the squatter's claim will be defeated. The paper owner then has a period of two years to begin possession proceedings against the squatter to remove him. If no proceedings are brought within that time then the squatter can re-apply to the Land Registry and this (second) time, will be registered.

The old law continues to apply if either (a) the land is unregistered or (b) the squatter's claim begins with occupation that began before October 1991.

Recent cases – Adverse possession of highways

The case of R (on the Application of Smith) v Land Registry was a Court of Appeal case, and looked at whether someone could claim adverse possession of a public highway. Mr Smith had parked his caravan on an unregistered, unsurfaced minor road for over 12 years and had erected other structures, and maintained the verges and hedges. He had not obstructed the highway.

The Court of Appeal could find no case law which supported the old legal adage 'once a highway, always a highway', but nevertheless was unwilling to dispense with it. Mr Smith's claim was therefore rejected on legal and public policy grounds. It is clear that any claim to adversely possess a public highway is unlikely to succeed in the near future.

Recent cases – adverse possession of flats

In July 2010, in the case of *Ramroop v Ishmael and Another* the Privy Council rejected a claim for adverse possession of a floor in a building, on the basis that it was not satisfied that the appellant had clearly established that it had had exclusive possession of that (or any) part of the subject building for the required period. The Council confirmed the position that it is possible in principle to claim adverse possession of a horizontal layer of land (such as a flat).

Recent cases – adverse possession and mistakes

As noted above, the new procedure of registration of title by way of adverse possession involves two stages: the squatter must make an application evidencing 10 years occupation and if the registered owner objects (as one assumes they would do), then the squatter must wait a further two years to see if possession proceedings are brought against him.

But what happens if the registered paper owner does not object when the squatter makes his 10 year application? On the face of the legislation it would appear that the squatter is entitled to be registered as owning the relevant land and the paper owner has lost his rights. However, in the case of *Baxter v Mannion* (March 2010) the High Court identified a very important qualification to the right for a squatter to be registered.

Mr Mannion bought a field in Ely, Cambridgeshire, in 1996, intending to develop it in the future. In 2005 Mr Baxter applied to the Land Registry to be registered as owner of that land by way of adverse possession. Notice of Mr Baxter's application was served on Mr Mannion by the Land Registry but he failed to reply and Mr Baxter was therefore registered as owner.

The Land Registration Act gives the right to a land owner to apply to Land Registry for the Register to be corrected where there has been a 'mistake'. Mr Mannion did make such an application stating that there was a mistake in the sense that Mr Baxter did not in fact have

the required 10 years of occupation in order to be registered as owning the field. Mr Baxter opposed the application arguing that mistake in this context meant only a procedural mistake, not a mistake as to the parties' legal rights.

The High Court rejected Mr Baxter's argument. It held that both on its own terms, and in order to be consistent with the Human Rights Act 1998, mistake should be interpreted to have a wide meaning, including where the Land Registry had been mistaken as to the validity of the squatters claim. As Mr Baxter did not have the necessary 10 years occupation when he made his application to be registered, the fact that he was registered thereafter would be treated as a mistake, and that registration would be corrected to reinstate Mr Mannion as owner of the land.

Recent cases – Adverse possession of waterways

Finally, the case of *Port of London Authority v Ashmore* attracted a degree of publicity in 2009 and 2010. It looked at the question of the extent to which the owner of a boat which was moored on a tidal river (in this case, the Thames at Battersea) could claim adverse possession of part of the river bed. Although there has not been a final decision yet the hearings to date have considered some of the issues involved in adverse possession claims.

Mr Ashmore owned a boat which had been moored in the same place for more than 12 years and which rose and fell with the tide: twice a day, at low tide, it rested on the foreshore, and at other times it floated above.

The parties initially asked the High Court whether it is possible *in principle* to acquire adverse possession of part of a river (and its bed). Neither party appeared to be satisfied with the answer given by the High Court (which was, broadly, 'yes'). On appeal, the Court of Appeal held that it was questionable whether it was a helpful exercise even to ask the Court such a hypothetical question, as well as concluding that the Judge in the High Court's written decision did not reflect his considered opinion. The Court of Appeal therefore passed the matter back to the High Court and expressed the view that as most adverse possession cases depend upon their own facts the issue was in reality better left for a full trial.

Summary

Adverse possession cases, both under the old law and the new law, continue to arise, and be reported, at a surprising rate. Whilst the landowner in the case of *Mannion v Baxter* had a lucky escape because the squatter had made a mistake, it is still vitally important for a landowner to ensure that its contact details at the Land Registry are up to date, and that it responds to Land Registry notices promptly. Looking forward, we expect to see shortly a number of adverse possession cases relating to neighbouring boundary land.

For further information please contact:

Paul Greatholder
Partner
020 7440 4824
Paul.Greatholder@russell-cooke.co.uk

Ed Cracknell
Solicitor
020 7440 4818
Ed.Cracknell@russell-cooke.co.uk

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