LAWSURE INSURANCE

NEWSLETTER

July 2015 conveyancing round-up

1. Introduction

This month we will be looking at two completely different areas of law which conveyancers have to deal with on a regular basis – adverse possession and leasehold flats. Both bring their own problems; both involve complex principles of law; both ought to be charged for extra, over and above the basic conveyancing quote. And adverse possession, at least, is often going to be an area where an indemnity policy is going to be necessary – again at an extra fee for arranging such a policy, one hopes!

Adverse Possession – a Few Reminders

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 (piece of) 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;
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> 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 refer the matter to our valuer so that an assessment can be made of the proposed security. 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.

Often, of course, the sensible way of dealing with all these issues is to take out a policy – but do ensure that the policy does meet your client's needs and check carefully that you and your client have complied/will comply with the underwriting conditions.

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:

1. *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.*

2 *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.*

3. *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.*

4. *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.*

5. *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.*

6. *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.*

7. *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.*

8. *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:

9. *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.*

10. *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.*

11. *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.*

12. *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. Now what does that mean, I wonder?

Leasehold Flats

Introduction

It appears that we are becoming a nation of flat owners – certainly it sometimes seems that way with the number of new clients who are buying flats. And for a conveyancer a flat purchase means a lot of extra work – all the work usually associated with a freehold purchase plus having to wade through a long, often poorly drafted lease, obtain and study management company enquiries, deal with pointless restrictions on the register, deeds of covenant with the management company, and giving notice of the transfer to all and sundry – all of course at an exorbitant fee. And then having to explain all this to the client – and also justify the small extra fee that we charge for doing all this extra work. There must be twice the work as in a freehold purchase, so any sensible business would charge twice the fee, but of course nobody does! Often the cost of the leasehold enquiries and the notice fees exceed the conveyancer's charges for handling the whole purchase. One flat purchased in Liverpool had notice fees of £150-£600 for each notice and notice of both assignment and mortgage had to be given to both landlord and management company.

Anyway, apologies for the rant, a quick update on flat matters.

Land Registry Changes

All of us will have come across the situation where a management company is responsible for the repair etc. of the block of flats and there is a requirement in the lease for each in-coming flat owner to enter into a deed of covenant with the management company to pay the service charge. And to ensure that this requirement is complied with there is a restriction on the Register to the effect that no disposition will be registered unless there is a certificate from the named management company that this requirement has been complied with.

This is all well and good – well it isn't, as a deed of covenant is not legally necessary to make the buyer bound by the covenants in the lease – see section 12 of the Landlord & Tenant (Covenants) Act 1995 which makes covenants with management companies enforceable either same way as covenants between landlord and tenant - but what happens when the management company or named managing agents change? No one thinks to change the restriction – or indeed the terms of the lease – so a covenant is still required with the old company and consent is also still required from the old company. And the old company is often understandably not in a great hurry to give such consent.

But worse still is when the named management company no longer exists, where it has become insolvent or more likely just struck off the register of companies for not filing its annual returns. No consent at all can then be obtained – indeed the

property is probably unmortgageable as there is no legally enforceable system in place for the repair etc of the block as is required by the CML Handbook (see Paragraphs 5.14 and 5.15).

In October last year Land Registry decided to try and help out and changed their practice in such situations. They had long allowed restrictions to be 'disapplied' in such situations i.e. they would allow registration without compliance with the restriction, but it would still remain on the Register and remain a problem for when the client came to sell. The following press release summarises the changes:

Land Registry changes practice for restrictions and leasehold registered titles

From 20 October 2014, Land Registry will be implementing practice changes to help prevent restrictions on leasehold registered titles creating problems, where the restriction calls for the consent of a particular named lessor or managing agent, and that lessor or managing agent has changed or been dissolved.

New Land Registry guidance will encourage lessors to consider relevant matters in deciding on the form of restriction to apply for. This should help lessors apply for a form of restriction that won't create difficulties if the lessor changes.

The process for applying for cancellation of a restriction will also be clarified:

If a named lessor or management company has changed

Land Registry will now permit application in form RX3 to cancel a restriction relating to the covenants in a lease if either the lessor or the management company has changed.

The application may be made either by the new lessor to whom the reversionary interest has been transferred, or by the proprietor of the leasehold title.

The new lessor and the proprietor of the leasehold title can agree a new form of restriction and apply for the registration of the same in form RX1.

If a named lessor or management company has been dissolved

The proper course will generally be to apply either for the restoration of the company or for the restriction to be dis-applied in relation to a specified disposition.

However, Land Registry will consider applications to cancel restrictions on leasehold titles that relate to the covenants in the lease where the lessor or management company named in the restriction has been dissolved.

If the lessor or management company is restored to the register after the restriction in their favour has been cancelled on the basis of the company's dissolution, then application may be made at that point in time by the restored company for the restriction to be entered.

The above practice will apply only to restrictions on registered leasehold titles that relate to the covenants in the lease.

The point about a form of restriction that won't create difficulties if the lessor changes is that instead of a certificate signed by the company certifying compliance, the draftsperson of the lease should simply require certification by 'a conveyancer'. This would mean that the buyer's conveyancer could give the certificate – much better! Much better still is the statement in the Guide: 'Restrictions in favour of management companies are rarely appropriate'. Would that developer's conveyancers would take heed of that!

For full details of all the changes see Land Registry Practice Guide 19A, but note that the changes only apply to restrictions on leasehold titles, not similar ones affecting freehold land.

Sometimes a Right to Manage (RTM) company has taken over the running of the block – but the restrictions still remain on the Register in favour of the previous maintenance regime. In that case the RTM company itself has the right to give consent etc under sections 98 and 99 of the Commonhold & Leasehold Reform Act 2002 – see also Land Registry Practice Guide 27 as to this. When there is a RTM company managing the block it takes over all the landlord's duties with regard to giving consents for alterations etc.

Right to Manage

Talking of the Right to Manage, this seems to be becoming increasingly popular. Flat owners often seem to think that they can run the block more cheaply and provide better services than professional management companies or managing agents. Clients often seem to have the same misguided view about legal services as well. Sadly, some of the worst maintained blocks of flats I have come across have been run by the tenants themselves.... Be that as it may, the Right to Manage is available in basically the same circumstances as collective enfranchisement i.e. there must be:

- At least two flats held by qualifying tenants; (Qualifying tenants are those with leases over 21 years in length)
- The total number of flats held by qualifying tenants must be not less than two-thirds of the flats in the block;
- Not more than 25% of the floor area of the 'premises' must be occupied for non-residential purposes;
- If there are only 2 qualifying tenants, both must be members of the company.
- In any other case the membership must include a number of qualifying tenants, which is not less than half the total number of flats in the block.
- It is NOT available where a local housing authority is the immediate landlord. But note that it IS available where the landlord is a registered social landlord.

The procedure seems quite straight forward, but must be followed carefully for a successful application – there have been numerous applications heard before the Tribunal where the validity of a claim to manage has been in dispute.

The first step is to set up an RTM company. This is a private limited company, limited by guarantee, with articles and memorandum in the prescribed form. The RTM company must then serve a participation notice on any qualifying tenants who are not members of the company, inviting them to become members. Do make sure that all are served and that the prescribed form of notice is used.

A 'claim notice' must then be served on the landlord, qualifying tenants, any other party to any lease of any part of the premises and any manager appointed under Part II of the LTA 1987. It cannot be served until at least 14 days have passed since the service of the notice of invitation to participate. Again care needed here to make sure that all the necessary details of all the participating tenants etc is included in the claim notice. With all such time limits it is wise to always allow a few extra days after what you thought was the correct date – just in case!

The claim notice must include a date not earlier than one month after service by which the persons served may serve a counter notice and a further date at least three months after that on which the RTM intends to take over the management.

And here we can mention a recent case. In **Windermere Court Kenley RTM Co Ltd v Sinclair Gardens Investments (Kensington) Ltd [2014] UKUT 420 (LC)** a question arose as to what was meant by these date provisions. The RTM company gave a claim notice to the respondent specifying that it respond by giving a counter-notice by 30th September 2013, and that it intended to acquire the right to manage on 31st December 2013. Was this latter date at least three months after the September date? The respondent argued that as

30th September was the last day of the month, 3 months' from that date was the last day of December i.e. the 31st. As the Act required the second date to be 'after' the three months date i.e. after 31st December, it was argued that the correct date should have been 1st January. The First Tier Tribunal agreed with the landlord, so the claim notice was invalid. The RTM company appealed.

The Upper Tribunal allowed the appeal. Using the corresponding date rule, 3 months from 30th September was 30th December. So the 31st was 'after' that date and so the notice was valid. But think of all the expense and worry for those concerned and their advisers.

Next, the Court of Appeal had another conundrum to sort out in **Ninety Broomfield Road RTM Co Ltd v Triplerose Ltd [2015] EWCA Civ 282.** What about the situation where two free-standing blocks of flats are situated in shared grounds? Can one RTM company take over the management of both blocks or does there have to be two separate companies, one for each block? The Court held that the references in the Act to "premises" were to a single self-contained building or part of a building, and so it was not open to an RTM company to acquire the right to manage more than one self-contained building or part of a building.

So it might all look straightforward, but do take care! If in doubt over dates always give a few extra days, just to make sure. Better that than risk getting it one day wrong – even if you are eventually proved correct.

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The author of our July newsletter is Paul Butt, a Solicitor who has over 25 years' experience lecturing to property lawyers. He was formerly an Associate Professor at the College of Law and Senior Lecturer at the University of Chester. He is the author (inter alia) of the Legal Practice Course textbooks on Conveyancing and on Commercial Property and is Editor of Aldridge's Leasehold Law.

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