Adverse possession: how long must the "reasonable belief" last?

Stephanie Tozer and Kester Lees comment

Introduction

The Land Registration Act 2002 introduced a new regime for adverse possession - mere possession is no longer enough. Claimants must now also, if required to do so by the owner, prove one of the statutory conditions set out in paragraph 5 of the Sixth Schedule. This article focuses on the third condition in paragraph 5(4).

The condition

The third condition appears to have been intended to apply where there was a boundary dispute. However, it is not limited to boundary disputes in terms, and it is being relied on much more widely – in any case where the claimed land is adjacent to other land owned by the claimant and the boundary between the two has not been determined. A claimant must establish that:

"*For at least 10 years of the period of adverse possession ending on the date of the application, the applicant (or any predecessor in title) reasonably believed that the land to which the application relates belonged to him*"

This new reasonable belief requirement raises a number of questions,in particular the *period* during which the reasonable belief must subsist.

Zarb v Parry

The only appellate consideration of this question is in *Zarb v Parry [2012] 1 WLR 1240*, where the Court of Appeal indicated that the belief had to subsist, and be reasonable, throughout the *last* 10 years of the period of adverse possession. Arden LJ indicated (at [17]; [55]) that a claimant had to act "promptly", and apply for registration "as soon as" he learns that he is not the paper owner. It was also implicit in Lord Neuberger's comments (at [79]) that it would not be good enough to establish a reasonable belief for *any* 10 years out of the period of adverse possession.

It appears that the statute requires such an interpretation: if the reasonable belief does not need to last until the application is made, what is the purpose of the words "ending on the date of the application"? Those words are entirely redundant if the reasonable belief may exist for *any* 10 year period.

Later Developments

However, some advocates and judges rely on the obiter nature of the comments to ignore the Court of Appeal's guidance altogether.

In *McLeod v Brown and Jones, First Tier Tribunal (Property Chamber)(Land Registration) REF/2013/0833, 26 June 2013* Judge Green held:

" although the belief must have been had during the period of adverse possession, and must have been held for at least ten years, it does not have to be established as continuing up to the date of the application. If that were the case few, if any, applications under Schedule 6 in which the third condition was in issue could ever succeed. By the time the application is made, and for a period beforehand, the applicant knows that the title to the land in question is registered in the name of another person, hence the application. Once they have such knowledge, necessarily: the applicant cannot believe that he or she owns the land, or such a belief cannot be reasonable… The words "ending on the date of the application" qualify the period of adverse possession, and do not apply to the period of at least ten years during which the reasonable belief as to ownership is required"

In October 2014, Lewison LJ gave permission to appeal to the Court of Appeal in a case raising this point (which has subsequently settled), commenting: "*the Zarb v Parry point is one of importance and the argument advanced has real prospects of success*".

Analysis

In the authors' view, Judge Green's concerns can be readily answered. Parliament must be taken to have intended that the principle of *de minimis non curat lex* (which applies to all statutes unless a contrary intention appears - Bennion on Statutory Interpretation at 343) would be imported into the 2002 Act, and paragraph 5(4)(c) in particular. So, any short gap between the reasonable belief ending and the date the application was made, which was *de minimis* in the circumstances, would be ignored.

Furthermore, the statutory conditions are exceptions to the general principle that possession for a 10 year period would not entitle the squatter to claim land in face of an objection by the owner, and as such should be interpreted restrictively. This is all the more powerful an argument when one appreciates that:

(a) the purpose of the reforms to the adverse possession doctrine introduced by the 2002 Act was to narrow the scope of the adverse possession, so that the register was more likely to be an accurate reflection of the ownership of land; and

(b) Parliament must have intended to give appropriate weight to the paper owner's right (under article 1 of the First Protocol to the European Convention on Human Rights) not to be deprived of his property except in the public interest.

In the authors' view, these arguments outweigh those to the contrary, and the *Zarb v Parry* detractors should not prevail.

But, of course, that leaves the question of what period should be considered "*de minimis"?* The following thoughts are offered:

(1) The period will vary from case to case. Factors include:
   - the length of the period of possession;
   - the amount of work needed to prepare the application; and
   - whether the claimant had alerted the paper owner of his claim prior to making the application (and if so, whether the parties had negotiated).

(2) That said, generally the period is likely to be measured in weeks rather than months or years. In *Homes and Communities Agency v Missing, Southend County Court, 18 August 2014, unrep*, the Judge indicated that seven months' delay would be too long.

(3) The key, in a run of the mill case, is to identify the time period that a reasonable person acting promptly would need in order to get the application prepared. Assuming that he identifies and consults a solicitor and witness statements in support of the application then need to be prepared, it seems unlikely that a period of less than 28 days would suffice. However, 2 months might well be too long, absent any special factors.

The Law Commission may examine this as part of their current project on land registration. But, unless and until there is a statutory amendment or further judicial clarification, the prudent course is to issue the application as soon as possible after discovering that the land is not registered to the claimant.

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