ADVERSE POSSESSION BY DIVERTING RENT: THE MOST UNFAIR NONSENSE

Gary Cowen QC considers a recent decision of the First Tier Tribunal (Land Registration) on adverse possession claims to unregistered land based on the collection of rent for a period of twelve years

We are all familiar with the idea of adverse possession of unregistered land, are we not? Take possession of the land, dispossess the paper title owner, put up some fencing, take a deep breath and hold it for twelve long years. If you're still on the land when the twelve years is up, you can make an application for first registration and find yourself owning the land.

But there's another route to acquiring land which is less familiar and which was the subject of a recent decision of the First Tier Tribunal (Land Registration) which sought to clarify the law in this area. Paragraphs 6(1) and 8(3)(b) of Schedule 1 to the Limitation Act 1980 make provision for adverse possession of unregistered land to be claimed even though the squatter does not occupy the land claimed provided that for a period of twelve years the squatter unlawfully diverts the rent payable under a lease of that land from the true owner.

The facts in National Westminster Bank plc v Fox-Davies and others (Ref 2018/0006) in which the decision was handed down on 23 March 2020 are not straightforward and I will try to keep them as simple as possible.

The case concerned an old theatre building in Moulsham Street, Chelmsford, since converted into a bar and nightclub, and a courtyard at the rear of the building. That property was unregistered land and more pertinently, nobody knew the identity of the freehold owner.

What was known was that in 1916, the owner of the theatre, Thomas Mason, had granted a lease of the theatre and courtyard for a term of 99 years. Mr Mason's tenant had granted an underlease of the courtyard in 1917.

At some point around the time of the Second World War, the title deeds relating to the freehold interest in the theatre and courtyard went missing and rent stopped being collected under the 1916 lease from, it was thought, around the 1950's. Nonetheless, the 1916 lease was assigned on a number of occasions and in 1996, was assigned to L Ltd.

In 2004, in a scheme devised to acquire the freehold of the building by adverse possession, Mr FD granted a lease of the theatre and courtyard to ECI Ltd, a company owned and controlled by himself. The 2004 lease was said to be granted subject to the 1916 lease. The 2004 lease was registered with good leasehold title. Both L Ltd and A Ltd, its successor in title following further assignments of the 1916 lease in 2007 and 2010, paid rent under the 1916 lease to ECI Ltd.

In 2011, ECI Ltd granted an underlease of the theatre and courtyard to A Ltd which was said to be subject to the 1916 lease. It was agreed between ECI Ltd and A Ltd that the 1916 lease would merge into the 2011 underlease and be determined. The lessee under the 1917 lease continued

to occupy the courtyard and was entitled to security of tenure pursuant to the Landlord and Tenant Act 1954.

Following the grant of the 2011 lease, A Ltd paid rent to ECI Ltd pursuant to that lease.

Nat West Bank as executor of the late Edith Beatrice Mason made an application for first registration of the freehold title to the theatre and courtyard. The Tribunal cancelled that application which turns on its facts.

However, both Mr FD and ECI Ltd made applications for first registration of the freehold title to the theatre and courtyard. These were based on Paragraph 6(1) and 8(3)(b) of Schedule 1 to the Limitation Act 1980. Paragraph 6(1) provides that

"*Where—*

(a) any person is in possession of land by virtue of a lease in writing by which a rent of not less than ten pounds a year is reserved; and

(b) the rent is received by some person wrongfully claiming to be entitled to the land in reversion immediately expectant on the determination of the lease; and

(c) no rent is subsequently received by the person rightfully so entitled;

the right of action to recover the land of the person rightfully so entitled shall be treated as having accrued on the date when the rent was first received by the person wrongfully claiming to be so entitled and not on the date of the determination of the lease".

Paragraph 8(3)(b) must be looked at in the context of the whole of Paragraph 8 of Schedule 1 to the 1980 Act which provides as follows:

"(*1) No right of action to recover land shall be treated as accruing unless the land is in the possession of some person in whose favour the period of limitation can run (referred to below in this paragraph as "adverse possession"); and where under the preceding provisions of this Schedule any such right of action is treated as accruing on a certain date and no person is in adverse possession on that date, the right of action shall not be treated as accruing unless and until adverse possession is taken of the land.*

(2) Where a right of action to recover land has accrued and after its accrual, before the right is barred, the land ceases to be in adverse possession, the right of action shall no longer be treated as having accrued and no fresh right of action shall be treated as accruing unless and until the land is again taken into adverse possession.

(3) For the purposes of this paragraph—

(a) possession of any land subject to a rentcharge by a person (other than the person entitled to the rentcharge) who does not pay the rent shall be treated as adverse possession of the rentcharge; and

(b) *receipt of rent under a lease by a person wrongfully claiming to be entitled to the land in reversion immediately expectant on the determination of the lease shall be treated as adverse possession of the land*"

Mr FD and ECI Ltd contended that Paragraphs 6(1) and 8(3)(b) contained separate free-standing means by which adverse possession could be obtained. Mr FD argued that by virtue of his receipt of rent under the 2004 lease which he granted, he was in adverse possession pursuant to Paragraph 8(3)(b) of Schedule 1 to the 1980 Act.

ECI Ltd argued in the alternative that the 2004 lease was a lease immediately in reversion to the 1916 lease and that ECI Ltd received rent under the 1916 lease. It did not matter, ECI Ltd contended, that the reversionary interest under which it claimed the rent was not the freehold interest. Paragraph 6(1) merely required the claimant wrongfully to claim the land in reversion immediately in expectation on the lease. Alternatively, ECI Ltd contended to be entitled to adverse possession under Paragraph 8(3)(b) on the grounds that it was in receipt of rent under the 1916 lease and, subsequently, the 2011 underlease.

In Bligh v Martin [1968] 1 WLR 804, the plaintiff granted a tenancy of the land to the unknowing true paper title owner who occupied the land. The court held that the plaintiff was entitled to the land by adverse possession pursuant to s.10(3)(b) of the Limitation Act 1939, the predecessor of Paragraph 6(1) of Schedule 1 to the 1980 Act notwithstanding that the tenant in that case was actually in occupation of the property.

That decision seems to have been the catalyst for Rix J in Sturminster Holdings v James (Unreported) 20 May 1997, Rix J to hold that it would be "the most unfair nonsense" if a person could secretly grant a tenancy of land belonging to a third party, collect the rent under that tenancy for 12 years and then claim adverse possession of the land. He went on to say that the collection of rent must be "open" for the 1980 Act to apply. This gloss on the words of the statute appear to have been prompted by a misreading of the Bligh case where, in fact, the squatter's tenant was in physical occupation of the land and would, in the usual course, be taken to be in occupation on behalf of the squatter.

The Tribunal Judge in the present case held that

(i) Paragraphs 6(1) and 8(3)(b) of Schedule 1 to the Limitation Act 1980 did not amount to two free-standing methods for acquiring land by adverse possession. They should be read together;

(ii) On the true construction of those paragraphs, the right applied only to a lease validly granted by a person who had the legal ability to grant it; it did not apply to a lease granted by the squatter himself;

(iii) The lease which had been validly granted was the 1916 lease. But Mr FD never diverted rent payable under that lease to himself. He only ever collected rent under the 2004 lease granted to ECI Ltd;

(iv) ECI Ltd's claim failed because it did not purport to be collecting rent as freehold owner. Because Mr FD did not have a freehold interest in the land when he granted the 2004 lease, the 2004 lease was not a lease of the reversion of the 1916 lease and ECI Ltd's claim was not a claim to be entitled to the land in reversion immediately expectant on the 1916 lease;

(v) In any event, ECI Ltd had only collected rent under the 1916 lease until 2011. After 2011, ECI Ltd collected rent under the 2011 lease which it had granted;

(vi) On that analysis of the case, the question of whether rent was collected openly was irrelevant and need not be considered.

The circumstances in which Paragraphs 6(1) and 8(3)(b) of Schedule 1 to the 1980 Act will be engaged must be relatively rare. Rent from an existing validly granted lease must be diverted from the paper title owner and attempts to circumnavigate this requirement by the purported grant of a leasehold interest in reversion will not succeed.

Gary Cowen QC acted for the successful Fourth Respondent in National Westminster Bank plc v Fox-Davies and others (Ref: 2008/0006)