Falcon Chambers

SOME ISSUES IN THE LAW OF ADVERSE POSSESSION:

THE PROBLEM OF MULTIPLE SQUATTERS

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Swarms of Squatters

1. Exclusive possession, we are told, is single and indivisible. The mere fact of possession (as opposed to a vested right to possess in the form of a fee simple or a lease3) generates a title in English law generates a form of title which can be vindicated in the English courts against anyone with a relatively weaker title: *Asher v Whitlock (1865)* L.R. 1 Q.B. 1, which has in recent times (somewhat controversially) been extended to licensees whose interests amount to something less than an estate in land but whose cumulative rights look like possession: *Manchester Airport v Dutton* [2000] 1 Q.B. 133.

2. Whilst it is possible for multiple people to share occupation (that is, the factual use) of land, the indivisible nature of possession means that it is not possible for there to be multiple entities in "concurrent" possession at the same time. For a multiplicity of concurrent squatters to succeed they therefore need to show that they are in joint, and not several, possession. Those in true joint possession are, in law, one possessor (see below, para 13).

A Few Work-Arounds

3. To date the Courts have identified categories, some more controversial than others, where concurrent acts of possession by different persons have been allowed to be aggregated into a single unified possession.

Vicarious Possession

4. One way around the problem might present itself if the concurrent use by putative squatter A and B can in fact be attributed to (or credited to) the actual squatter C.

5. An obvious example is if A and B are agents or employees of C. If the use of the adversely possessed land is within the scope of their employment or agency so as to clearly by for and on behalf of C, then that will be attributable to C.

6. It is established that C can possess vicariously - *Bligh v Martin* [1968] 1 W.L.R. 804. This avoids the indivisibility of possession problem, because it can be shown that A and B are in fact a facet of C's unitary and sole possession. This even works where C delegates possession to A entirely, for instance by granting a lease. This is a strong indicator of possession: see e.g. *Bristow v Cormican* (1878) 3 App Cas 641. Licences granted and exercised also show an assertion of dominion by the licensor: see *Moore v Doberty* (1843)5 Ir LR 449.

"Representative" Possession

7. In other cases, it may be possible to craft a case based on the fact that one or more of the squatters can be treated as the "figurehead" squatters who are to be taken as the persons who are acquiring title. This depends on the facts.

8. The best example is *Mitchell v Watkinson & Anor* [2014] EWCA Civ 1472, in which case X granted his son, Y, the fee simple of cricket pitch, but then (without title) entered into a written tenancy with the three trustees of a cricket club. Subsequently the trustees were directed to pay rent to Y, which they did, and then stopped doing. The Court of Appeal held that there was no written tenancy agreement between Y and the trustees. This allowed time to run under Schedule 1 para 5 to the Limitation Act 1980 as against Y. As the tenancy agreement fixed who the persons who thought they had possession were, and as the club was then operated by members licensed by them, it

was possible for the Court of Appeal to uphold the decision at first instance that the trustees had vested in them the possessory title by adverse possession.[1]

Unincorporated Associations?

9. It was held by the Deputy Adjudicator to the Land Registry in *Holland v Neville Estate Company Ltd* (6th October 2006, unreported) that a group acting jointly for an unincorporated association could be held to be in adverse possession. This conflicts with certain observations of a different adjudicator in *Openshaw v P&F Properties Ltd* REF/2013/0222, who found that an unincorporated association with fluctuating members could never adversely possess. However, that seems contrary to the principles we shall go on to discuss below. The problem is discussed in some detail by Dr A Dowling in "Adverse Possession and Unincorporated Associations" 54.3 (2003) NILQ 272.[2] What seems likely is that where the unincorporated association has provisions as to ownership structure (such as a trustee system for existing beneficiaries), then the land adversely possessed will be held on that structure, with the beneficiaries from time to time being licensees vicariously feeding the trustees' possession, and, depending on the terms of membership, relinquishing their interests on departure from the membership (see e.g. *Neville v Madden* [1962] Ch 832).

Family Arrangements

10. The above examples all tend to suggest that a formal relationship of contract (employment, agency, unincorporated association) or trust might be needed as the bedrock to allowing possession by multitudes of squatters to be concentrated into the hands of a defined group.

11. The law reports are full of cases where successful squatting has been a "family affair".

[1] The position of a trustee asserting rights by adverse possession on their own account for property held on trust is a different situation covered by section 21 of the Limitation Act 1980, which we don't address here.
[2] Open access available here: https://nilq.qub.ac.uk/index.php/nilq/article/view/744/582

12. That said, in two cases, *Morris v Pincher* (1969) 212 EG 1141 and *Brazil v Brazil* [2005] All E.R. (D) 311, the Court seemed to think that concurrent use by a family would not be enough where the claim was brought just by fewer than all of the family members.

13. It may be that *Morris* and *Brazil* were argued in a particular way. However, it seems at least arguable that the joint possession of family members should result in a joint tenancy being vested in them. This is in line with the observation that "joint tenants count as one person": *Pye v Graham* [[2003] 1 A.C. 419, para [70]; *Roberts v Swangrove Estates Ltd & Anor* [2007] EWHC 513 (Ch), at [77].

Concurrent Use by Others That Can Be Ignored

14. Finally, in certain cases (which are by their nature fact-sensitive) concurrent use by other parties can simply be ignored.

15. If the other is the true owner, it depends on what the effect of their use is:
    a. If the true owner has been using the land concurrently with the squatter throughout the requisite limitation period, then of course the squatter will not have excluded the owner so far as reasonably practicable. The squatter would, in such a case, not be able to establish the corpus or animus of possession. However it does depend on the nature of the acts done. In *Tower Hamlets v Barrett* [2006] 1 P&CR, the fact that the paper title owner had wooden props on the land being squatted, supporting its adjacent building, was not enough of a toe-hold to retain possession of the squatted land.
    b. If the squatter has taken possession of the land, and the owner subsequently does something that is less than a resumption of possession, then that will not do. This is a "mere entry", and does not stop time running: see *SS Global v Sava* [2008] EWCA Civ, esp at para 74. The principle is illustrated by *Bligh v Martin* [1968] 1 W.L.R. 804. The squatter was in possession of farmland from 1949. The paper owner, ignorant of his title, took various licences but also turned heifers onto the land in the winter months for his own benefit, but also for the

benefit of the paper owner's agents. The Court held that these acts did not dispossess the squatter.

16. Concurrent unauthorised use by third parties is similarly fact-sensitive. The squatter is of course not obliged to enter into a confrontation with anyone they see. But extensive use might justify a finding that there was no possession by the squatter in the first place. Again, once possession has been found to have been taken, then it would appear that use by third parties not undertaken by them with an intention to possess will be innocuous: see *Fowley Marine (Emsworth) Ltd v Gafford* [1968] 2 Q.B. 618, 637-638.

A Unifying Principle?

17. So, what is the test for telling whether one is confronted with a collection of individuals doing things on their own account, concurrently, over land (which is not possession), and a collection of individuals doing things collectively (which could be possession)?

18. It is established in English law that members of a Parish with no other connecting characteristic cannot claim adverse possession as an unincorporated collective: *Norwich Corporation v Brown* (1883) 48 L.T. 898, where Chitty J stated at 900 that "*to gain an adverse title under the Statue of Limitations the possession must not be in one man one day, and in another, another*".

19. The problem has arisen in a number of Commonwealth jurisdictions, where concepts of English common law have proven hard to reconcile with customary (and sometimes indigenous) modes of established land use. One response has been the development (but not, as yet, judicial recognition) of a special form of property ownership called "generation property" to deal with land disposed to groups of individuals to be treated

as collective property for the original members of that group, but also (as the name suggests) for their future generations.[3]

20. Another response has been to take a more flexible view of what level of understanding between squatters is needed to make their actions count as joint and collective possession. A good example of this is the Canadian case of *Afton Band of Indians v Attorney General of Nova Scotia* (1978) 85 DLR (3d) 454.

21. This was a quieting of titles application. In general terms, some Commonwealth jurisdictions have Quieting of Titles Acts, under which a person concerned to establish their title to land may petition the Court for a certificate to that effect. The judicial process is a form of judicial enquiry under which title is deduced in a manner similar to the way it is deduced in old-fashioned registered conveyancing. Title may be paper, or based on adverse possession, or be sufficiently proved by establishing an equitable entitlement sufficient to allow the holder of that interest to claim under *Saunders v Vautier.* As the application is in the form of a judicial enquiry, it is inquisitorial, to the extent that the Court can direct notification of the application to invite adverse claimants to participate. The effect of a certificate issued under this jurisdiction is to (i) bar anyone in future who could have participated in the proceeding to claim the land but who did not, and (ii) to produce a title good against the world.

22. In *Afton*, the Afton Band applied for such a certificate. It was not a claim based on any Aboriginal rights. The land in question was relatively well demarcated, and contained a chapel and a graveyard in which members of the Band had been interred since the late nineteenth century. Members of the Band were recorded as having lived there since 1935. Boats were stored on the land in the Summer for fishing, and wood was cut there and berries gathered.

23. As a matter of Canadian law, a band had no corporate legal personality of its own, and it was not possible for it to make a claim for a certificate as it was not, itself, a "person".

[3] http://m.nicobethel.net/nico-at-home/essays/genprop.html gives an overview of what the concept means in the context of the Bahamas.

This problem was circumvented by identifying the claimants as representatives of a larger group with a common interest, following *Smith v Cardiff Corporation* [1953] 2 All E.R. 1373.

24. The Court observed that, on the face of it, there was a good claim for collective adverse possession here rendering the Band tenants in common of the lands in question:

> "It was clear from the evidence that while individual members of the band used and occupied the land they did so on behalf of and with the consent of the band. This is the practice which they follow with regard to general reserve lands."

25. The problem for the Band in *Afton* was that it was impossible for the Court to say with evidential certainty that it had before it a complete list of those people how had collectively possessed so as to vest the legal tenancy in common in them.[4] Accordingly, the claim failed for that reasons.

26. What therefore appears to be required, is a consensual element to the collective use. That is a reason why the claim failed in *Lambeth v Bigden & Ors* [2000] EWCA Civ 302. In that case the question was whether entire blocks of flats around the Oval had been adversely possessed by the occupiers (who were squatters) of the flats within them. That rested purely on evidence that the occupiers of blocks had keys affording access to those blocks. The Court of Appeal explained:

> *"The judge was entitled to find as facts that there was no consensual arrangement affecting the basis of occupation of the individual flats within the blocks (the allocation arrangements being scant or non-existent); that there was no exercise of effective joint or communal control over the individual flats themselves; and that there was no physical occupation or joint adverse possession of the common parts i.e. the hall ways and staircases about which he heard evidence. The judge heard no evidence of joint occupation of other*

[4] Following the Law of Property Act 1925, the answer in England & Wales would be that they are legal joint tenants holding on trust for the members of the Band as equitable tenants in common (section 36). That may not be a way around the problem, however. Although there is a statutory rule that in a conveyance to more than four grantees is to the first four, that does not apply to possessory titles. It therefore seems likely that shifting populations, or evidence that some of the squatters are unknown, could still be problematic.

common parts of the blocks, such as the outer walls, foundations and the roof, which would also be relevant to the acquisition of a freehold title to a block of flats by adverse possession."

27. So, the evidence did not make out a claim to adverse possession of the common parts, but in addition, there was no suggestion that the possession was done under any form of "consensual" arrangement.

28. So far the cases tell us that, for collective possession to get off the ground as adverse possession, we need (a) an evidentially certain list of squatters entitled to the possessory title as at the date of trial, and (b) some element of consensual conduct that allows us to say that the use is joint, not several – or to put it another way, that each squatter is contributing to a collective act of possession rather than doing their own thing.

29. The law has since been reviewed by the Privy Council in *Bannerman Town, Millars and John Millars Eleuthera Association v Eleuthera Properties Ltd (Bahamas)* [2018] UKPC 27. In that case, upon the abolition of slavery, some land on the island of Eleuthera in the Commonwealth of the Bahamas had been gifted to the freed slaves who used it for accommodation and subsistence farming. After a number of generations had used the land, an application for the quieting of title (on the basis of adverse possession) was made by those descendants, in response to a petition for a certificate of title by a development company which claimed paper title.

30. One issue that required consideration was whether there were sufficient acts of user (which the Privy Council found there were not). The other issue was whether the company had good paper title (which it also found it did not). For our purposes, it is interesting to note that the Privy Council expressed its opinion on what was needed to be shown if collective possession was to be relied upon. It said (at [52] – [52]) that:

"*Where a number of persons are proved to have occupation and use of land together, and the question arises whether they had joint possession of the whole of the land, this will usually turn upon the agreement, arrangement or shared common intention (if any) between them: see eg Bigden v London Borough of*

Lambeth (2001) 33 HLR 43; Brown v Faulkner [2003] NICA 5(2); Churcher v Martin (1889) 42 ChD 312 and (in Canada) Afton Band of Indians v Attorney General of Nova Scotia (1978) 85 DLR (3d) 454.

There is an element of uncertainty in those authorities whether the requisite mutual meeting of minds must amount to an agreement or to an arrangement, or to a common intention shared between them. It is not necessary that there should be a formal contract. But the mere aggregate of the separate intention of each occupier, which is neither communicated to nor shared with any of the others, will be insufficient. The requirement is for a shared common understanding, sufficient to render multiple occupants of land joint possessors of it. It is quite separate from the general requirement of an intention to possess. Rather, it forms part of the analysis of possession in fact."

31. So there are no categories of relationship that need to be shown in order to establish collective adverse possession. What is required is a shared meeting of the minds, whether in a formal contract, articles of an unincorporated association, or other document, or by leading evidence of a shared informal understanding that this is what all of the squatters intended. Although the Privy Council was not prepared to say so in terms, generation property may become relevant in cases such as this, not exactly as a new form of land ownership, but rather as furnishing a factual basis for establishing that all squatters were acting in a common cause, namely to preserve their ancestral land for themselves and future generations.

Chains of Squatters

32. What about successive, rather than concurrent, squatters?

33. A distinction needs to be drawn between successive squatters where the change takes place during the limitation period, and successive squatters where the change takes place after the completion of the limitation period.

During The Limitation Period

34. Assume S1 is in adverse possession of land, and then S2 takes over. Two questions arise:
    a. Can S2 aggregate S1's period of adverse possession to their own?
    b. Does S1 have a remedy as against S2?

35. We also need to distinguish between (a) unregistered land and title acquired before the coming into force of the Land Registration Act 2002, and (b) adverse possession under the Land Registration Act 2002

Unregistered Land/Pre-2002

36. The answer to the first question depends on the manner in which S2 came to the land:
    a. If S1 abandoned possession before limitation ran its course, and S2 took over the vacant field, then S2 cannot claim to have continued S1's period of adverse possession. S2 can only rely on their own period of adverse possession: see *Swangrove* at [81] and Schedule 1, para 8(2) of the Limitation Act 1980. There will have been no continuity of adverse possession.
    b. If S1 transmitted, by will or intestate succession or conveyance, their possessory title within the limitation period, then S2 is entitled to aggregate: see *Mount Carmel Investments v Thurlow* [1988] 1 W.L.R. 1078.
    c. If S1 voluntarily ceded possession to S2 without a formal transfer, then that will also do: see *Barrett*, above para 15a, at [36]. This is because the limitation period expires after a period of continuous dispossession of the paper title owner. It does not matter who is doing the dispossessing, just that it is seamless.
    d. If S1 is in turn dispossessed by S2, then (a) it appears likely that S2 can aggregate the possession of S1 in light of *Barrett*, but (b) on *Asher* principes S1 may have a claim for possession against S2 unless and until S2 has also barred S1's prior possessory title. That is the position in Canada (see *Afton*, above, at p.463). The position also appears to have been endorsed, at least by Kay LJ, in

the English case of *Willis v Howe* [1893] 2 Ch 545, but there is still some scope for doubt in this jurisdiction.

Post-2002

37. Under the 2002 Act, the ability to aggregate is more limited. Schedule 6 paragraph 11(2) of the 2002 Act says:

> *"(2)A person is […] to be regarded for those purposes as having been in adverse possession of an estate in land—*
>
> *(a) where he is the successor in title to an estate in the land, during any period of adverse possession by a predecessor in title to that estate, or*
>
> *(b) during any period of adverse possession by another person which comes between, and is continuous with, periods of adverse possession of his own."*

38. The first example narrows the scope for adverse possession in a number of ways. First, aggregation depends on S1 having an "estate in land", and then contemplates that S2 has become his "successor". As we are in the world of registered land, that appears to contemplate that S2 has acquired S1's title by transfer and registration. Secondly, we are in the world of registered land, so adverse possession only stands a chance if one of the three conditions applies in Schedule 6 paragraph 4, which can be summarised as (a) estoppel, (b) "some other reason" (like a defective transfer not passing legal title) or (c) a reasonable mistake as to the boundary.

39. By far the most common application of adverse possession these days is (c), reasonable mistake as to boundary. It would appear that the first kind of permitted aggregation will most naturally apply where S1 owned a registered estate but also squatted on neighbouring land in circumstances within the boundary exception, and S1 then conveyed their registered title to S2 who continued that adverse possession under the same mistake. Presumably the idea here is that the conveyance of the registered title is also meant to transfer to S2 the mistaken sliver of boundary land which S1 has been squatting on (though there may be interesting questions about that

in light of what is said about section 62, below, and in light of the fact that the 2002 Act has explained that mere successive possession will no longer do to transfer accruing limitation rights from S1 to S2).

40. It is harder to see how aggregation under conditions (a) and (b) could arise, and one might expect that to be a rare event:

    a. One situation in which it might most naturally occur is where adverse possession can be used to "feed" a mistaken (or even fraudulent) registration, as the Court of Appeal have now clarified. It had been thought at one point that the fact of registration conferred a lawful title meant that a registered proprietor could never feed its defective registered title with adverse possession: see *Parshall v Hackney* [2013] Ch 568. A later and differently-constituted Court of Appeal in *Rashid v Nasrullah* [2020] Ch 37 however has since said that was wrong, and entailed a failure to apply *Pye* properly. The only relevant question was whether or not possession was with the permission of the true owner. One can see that in the admittedly rare case where the successive squatters are the registered proprietor by reason of some event or transaction falling within conditions (a) and (b), there will have been formal transmission of the possessory title so that paragraph 11(2)(a) of Schedule 2 is engaged. It is to be noted that *Rashid* was a case in which adverse possession was completed before the 2002 Act came into force, and the registered proprietor had benefited from a fraud perpetrated by his father which resulted in the son's registration. That is obviously not a promising fact pattern for either condition (a) or (b). However, one can think of more innocent fact patterns where (a) or (b) might be engaged in support of a defective registration.
    b. Apart from that, there is the likely even rarer case where the squatter is on the land but is not the registered proprietor. Perhaps they are there because of an informal agreement leading them to think they are the owner, or because they believe they have inherited the land (but have taken no steps to protect that

by registration that could alert them to any such misconception). It is just about conceivable that in those (vanishingly rare) cases S2, having formally acquired S1's accruing possessory title, could aggregate as it might be that, even though no squatter thought to register, they might still have enough awareness of the law to convey their possessory titles to bring them withing paragraph 11(2)(a).

41. The right to accrue is available only to successors in title to the self-same estate that S1 had. So, if S1 granted a lease to S2, for example, S2 could not aggregate as is interest is derivative and not successive – see Harpum and Bignell, Registered Land, para 30.6, and most recently *Vodafone Ltd v Potting Shed Bar and Gardens Ltd & Anor* [2023] EWCA Civ 825.

42. The second example only applies where S1 starts the adverse possession, S2 is interposed for a period, and S1 is then back in adverse possession and makes the application to be registered. It was a deliberate policy choice that S2, if they dispossessed S1, could not accrue S1's period to their own: Law Com 271, 14.21. The 2002 Act is silent as to whether the example covers only cases where S2's interposition is consensual (i.e. by formal transfer), or whether it also covers competitive dispossession by S2 with dispossession back by S1. The omission of references to title in this second example are notable. It leaves open the possibility that S1 could, for example, lease to S2 for a period before resuming possession.

Once Time Has Run

43. In relation to the Land Registration Act 2002, time has <u>never "run"</u> so as to create a shift in the legal position from an inchoate, accruing right based on possession to a fully crystallised right. The squatter will always require the intervention of the First Tier Tribunal (or, if raised as a defence to a possession claim, the Court), to crystallise their rights.

44. That is not so in relation to unregistered land or land that was registered under the 1925 Act and in relation to which a 12 year period accrued before the 2002 Act came into force. In the former case, 12 years automatically extinguishes the title of the unregistered paper owner and leaves the squatter with an unanswerable possessory title. In the latter case, the squatter became the beneficiary of a statutory trust under section 75 of the Land Registration Act 1925. The trust entitled the squatter to be registered instead of the dispossessed proprietor: section 75(2) and *Central London Commercial Estates Ltd v Kato Kagaku Co Ltd* [1998] 4 All ER 948, 958-959. This is catered for by the transitional provisions under the 2002 Act in Schedule 12, paragraph 18.

45. What happens in those circumstances was discussed in two principal cases, *Site Developments (Ferndown) Ltd v Cuthbury Ltd* [2011] Ch. 226, and most recently *Hanndrikman v Heslam* [2021] UKUT 56 (LC).

46. In *Site Development,* Vos J had to deal with an argument by the paper title owner to the effect that once a 12 year period had elapsed (in relation to land registered under the 1925 Act), it was no longer possible to transmit title simply by altering who was in possession of the land being squatted on. Instead, it was argued, what had arisen was a true beneficial interest under a bare trust, and that had to be transmitted formally so as to comply with section 53 of the Law of Property Act 1925. He held (at paragraph [175]) that because what mattered was that 12 years had elapsed, as the squatter could rely on any period. The creation of the section 75 trust made no difference to that. He accepted that the position might be different if there was no current successive squatter, and the claimant had been an entity claiming land on the basis of a past 12 year period.

47. A second point to note is that Vos J made helpful comments about the operation of section 62 of the Law of Property Act 1925. Assume A owns Whiteacre as registered proprietor. Assume B has also acquired adjacent Blackacre by adverse possession. Assume Whiteacre and Blackacre had been used together. What happens if A sells

Whiteacre only? Vos J has held that the adverse possession rights over Blackacre are not "liberties … rights, and advantages … appertaining … to" or "occupied, or enjoyed with" Whiteacre, so the accrued rights over Blackacre did not pass automatically upon the sale of Whiteacre.

48. However, as there was continuing possession which the buyer was able to aggregate under the pre-2002 law simply by change of possession, that wasn't a problem. In light of paragraph 11(2)(a) of Schedule 6 to the 2002 Act (requiring a formal transfer of possession), it very much is now however.

49. Section 62 will only assist the buyer of Blackacre to pass to Whiteacre along with it if, on the facts, there is conveyed with Blackacre a structure which is partially on Blackacre and partially on Whiteacre, an exception identified in *Fairweather v St Marylebone Property Co Ltd* [1963] AC 510.

50. Quite why the law of adverse possession has to be so complicated is probably something to be discussed separately.

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