SQUATTERS AND NON-PAYMENT OF RENT – A REPRISE

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Introduction

In recent times, squatters have enjoyed some notorious success in the Courts, ranging from the formerly unlawful (but now landed) inhabitants of Lambeth's ignored housing stock[1], to the successful appellants (and now owners of valuable development land in Oxfordshire), rewarded for their perseverance by the House of Lords in JA Pye (Oxford) Limited v Graham [2003] 1 AC 419. Such squatters have acquired title by virtue of 12 years' adverse possession, pursuant to section 15 and paragraphs 1 and 8 of Schedule 1 to the Limitation Act 1980 – provisions which must be written in bold font in Chapter 1 of every well equipped squatter's guide to how to get rich (relatively) quick.

Schedule 1 to the 1980 Act also contains a less well known provision, although one used to equally devastating effect. Paragraph 5[2] allows title to be acquired where a tenant under an oral periodic tenancy stops paying rent, and 12 years pass with the tenant remaining in possession. At the expiry of that 12 year period, the tenant not merely escapes all liability for the previous 6 years rent (the first 6 years being barred in any event by section 19 of the 1980 Act), but, to add grave injury to slight injury, also becomes entitled to his landlord's title to the land in question.

Rent Act Protected Tenants

Where the occupant in question is protected by the Rent Acts, it may be thought that this melancholy result would not ensue, not least because the remedies of the landlord are constrained by the Rent Act legislation. But this

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[1] See Lambeth LBC v Blackburn (2001) 82 P. & C.R. 494.

[2] The full text of which is:

"(1) Subject to sub-paragraph (2) below, a tenancy from year to year or other period, without a lease in writing, shall for the purposes of this Act be treated as being determined at the expiration of the first year or other period; and accordingly the right of action of the person entitled to the land subject to the tenancy shall be treated as having accrued at the date on which in accordance with this sub-paragraph the tenancy is determined.

(2) Where any rent has subsequently been received in respect of the tenancy, the right of action shall be treated as having accrued on the date of the last receipt of rent."

is not so. In a number of cases decided by the Court of Appeal[3] it has been held that the fact that a statute such as the Rent Act confers security of tenure on the occupier of land does not prevent that occupier acquiring title under the Limitation Acts (in those decisions, the closely similarly provisions of the Limitation Act 1939) in the same way as any other occupier would.

In the leading authority, Moses v Lovegrove, the Plaintiff owned a dwelling-house of which the Defendant was tenant under an oral weekly tenancy. The Defendant made his last payment of rent to the Plaintiff in 1938. In 1939, the premises were brought within the provisions of the Rent Restriction Acts. In 1952, the Plaintiff sought to recover possession of the premises. The Defendant claimed that the Plaintiff's title had been extinguished by the Limitation Act 1939. The Plaintiff contended that the Defendant's adverse possession ceased with the commencement of the Rent Restriction legislation, because the Plaintiff then had no right to recover possession.

The Court of Appeal held that the Defendant had been in adverse possession for the whole period, and that there was nothing in the provisions of the Rent Restriction Acts that altered or qualified the character of the Defendant's possession. In the words of Romer LJ:

> "By reason of the [Rent Act 1939] the Plaintiff could not eject [the squatter] without an order of the County Court, but that is merely a barrier in the way of the Plaintiff's right of action for possession, and it conferred no title on the Defendant so as to convert what was formerly deemed to be adverse possession into permissive possession or possession as of right.
> …
> In my opinion, if one looks to the position of the occupier and finds that his occupation, his right to occupation, is derived from the owner in the form of permission or agreement or grant, it is not adverse, but if it is not so derived, then it is adverse, *even if the owner is, by legislation, prevented from bringing ejectment proceedings*" [emphasis supplied].

[3] See Moses v Lovegrove [1952] 2 QB 533; Hayward v Chaloner [1968] 1 QB 107; and Jessamine Investment Co Ltd v Schwartz [1978] QB 264.

1954 Act Protected Tenants

It might be thought that the same result would apply in the case of a business tenant – i.e. a tenant occupying premises for the purposes of his business, or for those and other purposes, pursuant to Part II of the Landlord and Tenant Act 1954. Indeed, that is the view taken by the authors of at least one recent respected text book on adverse possession. Moreover, the same view was expressed by James Munby QC (as he then was) in Long v Tower Hamlets London Borough Council [1998] Ch 197. In that case, the Plaintiff occupied shop premises under an oral quarterly periodic tenancy to which the 1954 Act applied. The Plaintiff alleged that he had not paid rent for a period exceeding 12 years and commenced proceedings seeking a declaration that he was beneficially entitled to the premises, on the basis of acquisition of title by adverse possession. The Defendant successfully applied to strike out the Plaintiff's claim, but the Plaintiff succeeded on appeal. The Defendant's principal argument upon appeal was that the Plaintiff had a "lease in writing". It was also argued, however, that the reasoning in Moses did not apply to a business tenancy. The Deputy Judge did not find it necessary to express a concluded view on the latter subject, but did comment:

> "I doubt that the distinction which [Counsel for the Defendant] draws really bears upon the reasoning which underlay the decision of the Court of Appeal in Moses v Lovegrove or that it is sufficient, for the purposes of the proper application of the 1980 Act, to justify distinguishing the two types of case in the way she suggests".

By contrast, in Onyx (UK) Limited v Beard [1996] NPC 47, Michael Hart QC (again, as he then was) voiced a rather different view (but, again, without having to decide the point). He said:

> "… the Plaintiff accepted that, if a periodic tenancy had been created, the consequence would have been … that time would have started to run one year after its commencement. I question, however, whether that is necessarily so. There seems to me, arguably, a tension in the case of a business tenancy between the effect of section 9(2) of the Limitation Act 1939 and the effect of section 24(1) of the Landlord and Tenant Act 1954. I heard no argument on this point".

It might be thought that the problem of oral periodic business tenants remaining in occupation for 12 years without payment of rent is one that could not arise in practice. After all, business is business: having a business tenant without a written agreement must be rare enough; having a business

tenant without a written agreement who does not pay rent for 12 years must be so rare as to be fanciful, surely?

Well, apparently not so, as the experience of the landowners in the two cases referred to above suggests. Further, there must be many small pockets of England and Wales where unproductive bits of land are subject to informal agreements at rents that are so low (in view of the nature of the land) that their eventual non-payment provokes little or no reaction.

This was the state of affairs in Perry v New Islington & Hackney Housing Association. Mr Perry's father, a scrap dealer, had taken over approximately an acre of land in the London Borough of Hackney in the 1950s, at a rent of 10 shillings a week. The land was then in a less than salubrious area, and although various proposals were made over the years for an alternative use, latterly for a car park, nothing became of them. In the meantime, Mr Perry Senior continued in occupation as a business tenant. In 1982, the London Borough of Hackney (which had by then acquired the reversion) decided to progress alternative use proposals for the site, and served a section 25 notice on Mr Perry Senior, terminating his tenancy. At the same time, Hackney decided that it should no longer accept rent from its tenant. An application to Court for the grant of a new tenancy was duly made, and that was opposed by Hackney on the grounds set out in paragraph (f) of section 30(1) (redevelopment). The proceedings were then adjourned, to allow for negotiations, which came to nothing. The last step in the proceedings was taken in about 1986.

Some years later, the site was sold to the Defendant, a Housing Association which planned to develop the site for much needed low cost social housing. By this time, the site was worth a great deal of money, and Mr Perry had awoken to the possibility that he had acquired title by adverse possession, in view of the longstanding non-payment of rent. To simplify some rather complex procedural steps, Mr. Perry ultimately took proceedings for a declaration, and battle was joined between the parties.

The proceedings were heard by His Honour Judge Cowell in Central London Civil Justice Centre in January 2004. The facts were largely agreed. In particular, it was common ground between the parties that Mr Perry and his father had been in possession of the whole of the site; that the possession had commenced with an oral periodic tenancy; that the rent payable under that tenancy had not been paid for a period exceeding 12 years prior to the commencement of proceedings; and that the tenancy in question had at all material times been one to which Part II of the 1954 Act applied.

Mr Perry argued that the Rent Act cases applied with equal force to a business tenancy protected by Part II of the Landlord and Tenant Act 1954, and that it would be illogical for an oral periodic tenancy of a dwelling house to be treated any differently to such a tenancy of business premises. NIHHA responded that, although both statutes conferred security of tenure upon tenants, they operated in ways that were critically different for the purposes of Schedule 1 to the 1980 Act. In particular, NIHHA contended that Part II of the 1954 Act prevents the right of action to recover land from accruing[4], with the result that the limitation period cannot begin to run in cases to which it applies. To put it another way, it is implicit that paragraph 5 of Schedule 1 only applies to periodic tenancies which (in the ordinary way) are terminable by notice to quit. The combined effect of Section 24(1) and Section 64 of the 1954 Act is that a landlord cannot determine a business tenancy by simply serving an ordinary notice to quit.

The Judge accepted NIHHA's arguments:

> "It seems to me that it is indeed implicit in both s15 and s17 and also in paragraph 5(1) [of Schedule 1 to the 1980 Act] that there should be a "*right of action to recover land*" (s15(1)) and a period during which a person may "*bring an action to recover land*" (s17) and, more particularly, a "*right of action*" on the part of "*a person entitled to the land subject to the tenancy*". It follows, in my judgment, that for paragraph 5(1) to apply there must be not only, as here, a tenancy from year to year or other period (in this case a weekly period) without a lease in writing, but there must also be no impediment precluding the determination of the tenancy, that being an essential feature without which the right of action to recover the land cannot arise. In short, the paragraph presupposes that the tenancy is one determinable by notice to quit. In 1939 there may well have been or were no such periodic tenancies without a lease in writing which were not determinable by notice to quit; at any rate the usual tenancy was so determinable. …."

The Judge distinguished Moses in this way:

> "The point in this case is that the continuation of the tenancy in this case was not a mere qualification on the right to possession (for in that case a notice to quit would have ended the estate of the tenant); in this case it was and is a

[4] The relevant provisions are s. 24(1), which provides that "a tenancy to which this Part of this Act applies shall not come to an end unless terminated in accordance with the provisions of this Part of this Act"; and s. 64, which provides for the date specified in the section 25 notice to be substituted by a later date, being 3 months after the date of final disposal of the tenant's application to Court for the grant of a new tenancy "and not at any other time".

> complete and insurmountable barrier to the right of entry which no ordinary notice to quit could remove… The distinction is that the right of action to recover the land did clearly arise in ***Moses v Lovegrove*** under the equivalent of paragraph 5(1) when notice to quit would, if then served, have resulted upon its expiry in a clear right of action to recover the land (and the unavailing argument was that the subsequent advent of the Rent Act caused the adverse possession to cease). No such right of action arose in this case. Indeed the Claimant through his predecessor at all times when occasion required asserted facts establishing the existence and continuation of the tenancy as other than one terminable by notice to quit."

The Judge therefore dismissed Mr Perry's claim, and refused permission to appeal (notwithstanding the conflicting dicta emanating from the decisions of the two Deputy High Court Judges noted above). An application to the Court of Appeal for permission to appeal was subsequently compromised and there the matter rests.

Given the enactment of the Land Registration Act 2002, and in particular those provisions affecting and restricting what may colloquially be called "squatter's rights", it might be thought that this decision will achieve little more status than a footnote in the history section of the texts on adverse possession. But it should provide some encouragement to those landowners who are currently beset by problems similar to those faced by NIHHA in this case. We suspect that there may be many such who ought to take heart from this decision.

The authors acted for NIHHA.