

"because of the uncertainty, time and cost of an application, it was quicker and cheaper to obtain defective title insurance"; "it is not uncommon for our clients to decide after advice not to apply for registration due to the possibility of a counter-notice"; "in our experience, more common to let lie rather than apply".

It was also clear from these responses that only a relatively small number of applications (30 per cent) had met with success relying on the three exceptional grounds listed in Sch.6 para.5. Most of these successful applications (73 per cent) were based on para.5(3), namely, that the client was the owner of adjacent property and had been in adverse possession of the subject land under the mistaken, but reasonable belief, that he was its owner.⁷³

Interestingly also, 63 per cent of solicitors who responded to the writers' questionnaire indicated that they had been instructed on the sale or gift of a possessory title involving either registered or unregistered land. Of those who had, 85 per cent stated that, where the land was unregistered, the transaction was the subject of first registration at the HM Land Registry.⁷⁴ The questionnaire also asked: "have you ever acted for a client applying for registration of a possessory title based on successive periods of adverse possession (i.e. relying on a chain of different possessors) in order to establish a full possessory title?" Overwhelmingly, the answer was "yes" (70 per cent) with the majority indicating a reliance on at least two (and, sometimes, three or even four) successive periods of adverse possession. Most of these were the subject of a sale (53 per cent) or based on successive physical occupation of the subject land (31 per cent). The rest involved either a transmission by gift (10 per cent) or a devolution on death by will or intestacy amongst family members (6 per cent). The responses also suggested a combination of the above (26 per cent).

Imposing a time limit on the squatter's application to be registered as proprietor

These findings (although admittedly based on a small snapshot sample) would seem to support the notion that there is in existence a dark market in possessory titles outside the registered land system. If that is correct, then it must be asked whether such a market in possessory rights runs contrary to the overall aim of the 2002 Act which is to strengthen system of title by registration by ensuring that the basis of title is the register.⁷⁵ In the joint Law Commission/HM Land Registry Consultative Document published in 1998,⁷⁶ there are passages dealing with the principle of relativity of title and the protection of possession in the context of land where the title is unregistered. In particular, it is recognised that the squatter's possessory fee simple estate will ripen into full ownership when the rights of the

⁷³ Only 27% of successful applications were expressed to have been based on the unconscionability of the registered proprietor (Land Registration Act 2002 Sch.6 para.5(1)). The responses revealed no successful applications based on the adverse possessor being otherwise entitled to the land (Land Registration Act 2002 Sch.6 para.5(2)).

⁷⁴ In several cases where the transaction was not made the subject of first registration, the client was advised that title to the possessory estate would be held by the transferor on bare trust for him with the effect of conferring on him a beneficial interest in his possessory estate.

⁷⁵ See, Law Commission/HM Land Registry, "Land Registration for the Twenty-First Century" (1998) No.254 para.10.43.

⁷⁶ Law Commission/HM Land Registry, "Land Registration for the Twenty-First Century" (1998) No.254 paras 10.21–10.24. See also, Law Commission/HM Land Registry Report, "Land Registration for the Twenty-First Century: A Conveyancing Revolution (2001) Law Com.No.271 paras 14.20–14.22.

paper
posse
speci
the in
regist

Wh
be reg
is no
elapse
to be
oppor
length
applic
strong
in par
the 20
such t
as the
estate
succe
poten
indefi

If t
"off t
for ev
it is s
requir
stated
to ma
autorr
so tha
opera
which
posse
the sq
estate
Act 1
regist
woulc
poten

⁷⁷ Law
See also
Convey
propriet
succeed
are not l

⁷⁸ Law
⁷⁹ See
at 543.

paper owner are automatically extinguished after the land has been adversely possessed for a period of 12 years under the Limitation Act 1980. But despite these specific references in the context of unregistered land, there is no discussion of the impact of such possessory estates in relation to land already subject to the land registration system.

What the 2002 Act does, as we have seen, is to allow the squatter to apply to be registered as proprietor after ten years' adverse possession. Significantly, there is no obligation on him to apply for registration after the ten-year period has elapsed—indeed, The Law Commission recognised that “if a squatter did not apply to be registered for (say) 20 or 30 years, the proprietor would still have an opportunity to object to the squatter's application even after that (or any other) length of time”.⁷⁷ No doubt, the squatter will have every incentive to pursue his application to be registered as proprietor where he has been advised that he has a strong chance of establishing one or more of the three exceptional grounds listed in para.5 to Sch.6. But, if he has little or no chance of success, there is nothing in the 2002 Act to prevent his possessory estate from continuing indefinitely until such time (if at all) as the paper owner claims possession of the land. Moreover, as the writers' survey indicates, there is also the strong likelihood of the possessory estate devolving to another adverse possessor, in particular, either by sale or mere successive possession. It is this open-endedness, it is submitted, which has the potential for creating an ever-increasing dark market in possessory titles existing indefinitely outside the register.

If the policy underlying the 2002 Act is to limit dealings with registered land “off the register”,⁷⁸ then this suggests that such possessory estates should not endure for ever but be subject to some form of limitation period. This could be achieved, it is submitted, by a relatively simple amendment to the 2002 Act which would require the squatter to bring his application to be registered as proprietor during a stated period following his adverse possession of the land for ten years. A failure to make the application within this extended period would have the effect of automatically extinguishing the squatter's possessory title in respect of the land so that it would cease to exist for all purposes. Such a default rule, therefore, would operate in much the same way as the current limitation period in unregistered land which automatically extinguishes the paper owner's title if he fails to claim possession of the land within 12 years. One obvious difference, however, is that the squatter's fee simple ripens into absolute ownership (in effect, a wholly new estate)⁷⁹ when the rights of the paper owner have been barred under the Limitation Act 1980. In the case of a squatter who had failed to make his application for registration in time, on the other hand, the consequence of failing to apply in time would be to automatically destroy his possessory estate so as to preclude the potential for its indefinite duration under the current law. Moreover, any attempted

⁷⁷ Law Commission/HM Land Registry, “Land Registration for the Twenty-First Century” (1998) No.254 para.10.49. See also, Law Commission/HM Land Registry Report, “Land Registration for the Twenty-First Century: A Conveyancing Revolution” (2001) Law Com.No.271 para.14.83: “The general rule is, therefore, that if the registered proprietor ... brings proceedings for the recovery of the land in the possession of a squatter, those proceedings will succeed, regardless of how long the squatter has been in adverse possession ... the rights of the registered proprietor are not barred by lapse of time”.

⁷⁸ Law Commission/HM Land Registry, “Land Registration for the Twenty-First Century” (1998) No.254 para.10.7.
⁷⁹ See, *St Marylebone Property Co Ltd v Fairweather* [1962] 1 Q.B. 498 at 533; and on appeal, [1963] A.C. 510 at 543.

alienation of the land would no longer have any effect in the absence of a fee simple possessory estate. He would now simply remain in occupation as a bare trespasser entitling the registered proprietor at any time to take proceedings against him to recover possession of the land. In particular, the ten years of adverse possession would no longer (of itself) afford a defence to the proprietor's claim, nor would the squatter be entitled to raise any of the three grounds listed in para.5 to Sch.6.

Under this scheme, however, the principle of relativity of title would not be affected. Thus, if another trespasser (T1) were to take possession of the land from T, the first-in-time principle would still give T priority over T1 simply because prior possession gives rise to an older and, therefore, better right. If, however, T has been dispossessed, T1 may then seek to rely on his own adverse occupation in order to defeat the paper owner's title. In other words, T1 would now be able to rely on his own adverse possession (but no longer any time barred by limitation that had already accrued during T's occupation) for a period of ten years in order to apply to be registered as proprietor in place of the current proprietor. But here again, his right to apply would be barred after a period of limitation following his ten-year period of adverse possession. As with T, his possessory estate would be automatically extinguished leaving him only a bare trespasser of the land.

The writer's questionnaire specifically addressed the feasibility of such a scheme. It asked: "would you favour an amendment to the 2002 Act which would require the squatter to bring his application to be registered as proprietor during a strict time period following his adverse possession of the land for the requisite 10 years?" Interestingly, this received a mixed response. A significant number of responses (37 per cent) were in favour of the amendment suggesting (typically) either a 12 month or two-year limitation period.⁸⁰ The majority that were against the scheme (63 per cent) raised concerns that legitimate claims would potentially be time-barred due to "an ignorance of the law" if a strict time-limit was introduced under the Act. The questionnaire, however, also asked whether:

"you would favour a limitation period being introduced into the 2002 Act if:
(a) there was a requirement that the squatter must apply for registration within a limited period *after becoming aware* of his rights; and/or (b) the registered proprietor was given the right (as an alternative to bringing proceedings to recover possession of the land) to serve a written notice on the squatter that would trigger the start of the limitation period for applying to register and a failure to do so would automatically extinguish his possessory rights."

Interestingly, proposal (a) was favoured by less than half of all responses, although those who were against made the point that knowledge of rights would be difficult to prove, and as one respondent indicated: "if anything, the current law for registered land was already heavily weighted in favour of the absent landowner". There was considerably more support, however, for proposal (b) with 60 per cent of respondents indicating that this struck a fairer balance between the competing interests of the adverse possessor and registered proprietor.

⁸⁰ Several responses suggested a six-month period. One reply indicated that a 5-year limitation period would be appropriate.

Conclusion

The Law Commission has repeatedly emphasised that the scheme of adverse possession introduced by the 2002 Act reflects the notion that title to registered land is based on registration and not simply on possession. In its 1998 Joint Report,⁸¹ it stated that “where title is registered, the basis of title is primarily the fact of registration rather than possession”. If this is correct, then it must be questioned whether the existence of a dark market in possessory estates is desirable given that such estates may pass through a succession of possessors and endure indefinitely off the register in the absence of any compulsion on the part of the possessor to apply for registration as proprietor in place of the registered proprietor of the land.

The writers’ proposal to amend the 2002 Act, so as to incorporate a limitation period under which the squatter would be required to bring his application either during a strict time-period following his adverse possession for ten years or, alternatively, within a limited period of his becoming aware of his rights or following written notice from the registered proprietor, seeks to address this situation. Indeed, such a proposal would have a dual effect. First, it would compel the applicant, who has a legitimate basis for a claim, to bring his application promptly and convert his possessory estate into a registered title. Secondly, in the case of a squatter who has no likelihood of successfully registering his title within the grounds listed in Sch.6, the limitation period would have the consequence of extinguishing his possessory estate so that it would cease to exist for all purposes. The overall effect, it is submitted, would be to bring more titles onto the register in line with the underlying rationale of the 2002 Act. At the same time, it would significantly reduce the number of possessory estates existing outside the system and curtail the emergence of a dark side to land registration.

⁸¹ Law Commission/HM Land Registry, “Land Registration for the Twenty-First Century” (1998) No.254 para.10.11.