STONE BUILDINGS NEWS

Lincoln's Inn

Adverse possession: where are we now?

Over the past few years the courts have been giving further consideration to the circumstances in which a "squatter" may adversely possess land against the paper title owner. While the Land Registration Act 2002 brings in new requirements and procedures for "new" adverse possession claims, these recent cases are of the utmost importance for all the transitional claims brought pursuant to the provisions of schedule 12 to the LRA 2002.

The starting point for any consideration of a case where adverse possession is claimed is the restatement of the law in the speech of Lord Browne-Wilkinson in ***JA Pye (Oxford) Limited v Graham*** [2003] 1 AC 419, approved by the other Lords. In order to succeed in an application for adverse possession (so long as it is challenged and not allowed to succeed by default), the possessor will need to establish that he had adversely possessed the land for a period of 12 years. In ***Pye***, the House of Lords approved, in large part, the judgement of Slade J in ***Powell v McFarlene*** (1977) 38 P & CR. Lord Browne-Wilkinson cited with approval a passage from Slade J's judgement where he said: *"I would for my part have regarded the word "possession"... as bearing the traditional sense of that degree of occupation or physical control, coupled with the requisite intention commonly referred to as animus possidendi, that would entitle a person to maintain an action of trespass in relation to the relevant land; likewise I would have regarded the word "dispossession" in the Act as denoting simply the taking of possession in such sense from another without the other's licence or consent".*

Possession therefore involves two elements: a sufficient degree of physical custody and control ("factual possession) coupled with an intention to exercise such custody and control on one's own behalf and for one's own benefit ("an intention to possess") as referred to by David Richards J in ***Wretham v Ross & Shaw*** [2005] EWHC 1259: *"Factual possession signifies an appropriate degree of physical control. It must be a single and [exclusive] possession, though there can be a single possession exercised by or on behalf of several persons jointly... The question what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed... Everything must depend on the particular circumstances, but broadly, I think what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no-one else has done so." As to intention to possession, what is required to be shown is "an intention, in one's own name and on one's own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow."*

If an applicant is able to establish both factual possession and the intention to possess then, by virtue of the provisions of section 75 of the LRA 1925 and section 15 of the Limitation Act 1980, the paper owner holds the land on trust for the possessor and, by virtue of the provisions of section 70(1)(f) of the LRA 1925 and (possibly) section 70(1)(g), the possessor's rights are protected against the new purchaser as overriding interests.

An issue raised in ***Pye*** was the effect of the Human Rights Act 1998 upon claims for possession brought by the "squatter". In ***Pye*** it was made clear by concession on the part of the respondents, that the Human Rights Act 1998 does not have retrospective effect. This point was confirmed, again by agreement between the parties, in the ***Wretham v Ross & Shaw*** where it was held that as the alleged adverse ▸▸

possession took place long before the Act came into force, it did not apply. However, Nicholas Strauss QC in ***Beaulane Properties Limited v Palmer*** [2005] EWHC 817, held that as the paper owner was being deprived of its property without compensation it was contrary to the European Convention of Human Rights 1950 Protocol 1 Article 1 and that the provisions were incompatible. In ***Beaulane Properties*** the use of the land, sufficient to found a claim for adverse possession, did not start to run until June 1991 and the paper owner became trustee of the land for the adverse possessor until June 2003 (pursuant to the provisions of section 75 of the LRA 1925), after the relevant provisions of the Human Rights Act 1998 came into force in October 2000. Plainly, as time goes on, the Human Rights Act will play a more significant role in claims that land has been adversely possessed.

Karen Walden-Smith

Partnerships replace trusts

One of the purposes of the standard family settlement was to prevent youthful beneficiaries from dissipating the family fortune. Since 2006, many such trusts have severe tax disadvantages. Some of us are now using family partnerships to achieve the same end, but without the tax disadvantage. Either ordinary partnerships or limited partnerships can be used.

The simplest arrangement is this. The family partnership is established for the purpose of managing investments or other wealth, with senior friends of the family as managing partners, receiving a profit share. A child on attaining 18 is invited to join. If he agrees, wealth can be put into the partnership as his capital. (This will be a Potentially Exempt Transfer; the donors should have no interest in the partnership, lest there be a retention of benefit). The terms of the partnership agreement will provide that he may not withdraw his capital for (say) 12 years. In the meantime, he will have an active say in the management, but no ability to do any damage.

Care is taken that there is an active partnership business (so that the partnership is genuine) and that the independent partners do not become so dominant that they could be called trustees. The arrangement should have no trust element, but should be purely contractual.

The 3rd edition of the author's book *Partnership* will be published this autumn.

Mark Blackett-Ord

Speaking Events Seminars

03-08 SEPTEMBER 07 – JESUS COLLEGE, OXFORD
Shân Warnock-Smith QC
Oxford Offshore Symposium

21 SEPTEMBER 07 – EDINBURGH
Chris Whitehouse
Emma Chamberlain
STEP Autumn Conference
(tel: 020 7838 4890 for bookings)

25 SEPTEMBER 07 – LONDON
Chris Whitehouse
Emma Chamberlain
Capital Taxes and Pre-Owned Assets Income Tax Conference
Organised by IIR/IBC
(contact Helen Sanders 020 7017 7246 for bookings)

28 SEPTEMBER 07 – LONDON
Penelope Reed
"Winding up Estates"
Organised by CLT
(tel: 0121 355 0900 for bookings)

28 SEPTEMBER 07 – BRISTOL
Chris Whitehouse
Emma Chamberlain
STEP Autumn Conference
(tel: 020 7838 4890 for bookings)

05 OCTOBER 07 – LONDON
Chris Whitehouse
Emma Chamberlain
STEP Autumn Conference
(tel: 020 7838 4890 for bookings)

Behind the sensationalism of the forged will: the judgment in *Supple v Pender*

The case of *Supple v Pender* in which I acted earlier this year attracted national press coverage as well as professional interest. Allegations of forgery in relation to wills are rare, and actual findings against an allegedly forged will even rarer.

In ***Supple*** the deceased Leonard Supple's son, Stephen, succeeded in challenging an alleged will propounded by his illegitimate half-sister, Lynda, under which virtually all of the estate passed to her. The most significant asset of the estate was a farm on the outskirts of Maidstone which had been the home of Leonard Supple and his daughter since the 1960s. The farm had a speculative possibility of development value, which fuelled the headline figure of £18M for the value of the estate. The alleged will appointed Lynda Supple and a man who had been a slight acquaintance of Leonard Supple and his daughter as executors, and had been witnessed by a local pharmacist and one of his colleagues who described himself as an IT consultant. The alleged will had been prepared, apparently without any professional supervision, using a homemade wills package on a word processor and there was no evidence from anyone as to how and when it had come into existence, or of any drafts or notes about its contents. It was produced in a solicitor's office by the executor acquaintance about a month after Leonard Supple's death. His story was that Leonard Supple had left a document case in his safe-keeping and that the will had been amongst the documents in the case. Stephen Supple disputed the will as soon as it was produced, claiming that his father's signature on it was not genuine, and that its dispositions were not such as his father would have made. There was no evidence that Leonard Supple had ever made or attempted to make any previous will, although he was well aware of the difficulties in administering his estate which might follow after his death, with two half-sibling adult children whose relationship was not close; his daughter had always occupied the farm as her home and could be expected to resist its being sold to realise its development value.

The deputy judge (Peter Leaver QC) found against the will, essentially because he did not believe the account of its execution and attestation given by the pharmacist witness. The other attesting witness did not give evidence. The judge also doubted the general credibility of Lynda Supple and the other executor. However, he neither speculated nor made findings as to who in fact had forged the will or when and how. Although in a way it is surprising that such a serious allegation can be proved without any sustained attempt to investigate or reconcile the unknown and improbable facts which must, by virtue of the finding of forgery, be true, this is an accepted approach to the evidence in civil cases involving will forgery allegations. The court has to balance the findings of fact that it can make on the evidence against the inherent improbability of the allegation being true. In a number of other modern reported cases the balance has been struck the other way, with inherent improbability outweighing some questionable or inconsistent evidence given by witnesses. Another momentarily surprising feature of the decision – and of earlier decisions – is that contrary to popular impression, expert evidence given by a forensic document examiner is not necessarily determinative. In ***Fuller v Strum*** [2001] WTLR 677, in which I also acted, it was argued that the judge was not entitled to reject such expert evidence at all, but must accept its conclusions irrespective of the weight of evidence of fact. This, as the judge in that case held, is clearly wrong – document and handwriting analysis is not an exact science but uses a degree of impressionism and a qualitative scale of measurement to form opinions in many cases, and such opinions cannot usurp findings of fact based on the testimony of those involved in the creation of the document and others with personal knowledge of the testator. In ***Supple*** the judge made it clear that he was satisfied that the will was a forgery on the basis of the witnesses of fact alone, and that his finding did not depend on the opinion of the well-known expert Dr Audrey Giles that it was a forgery. The relative weight of evidence of fact and of expert evidence in determining the outcome in forgery cases is worth bearing in mind when attempting to evaluate the risks of litigation, or in negotiating a compromise of such allegations.

Barbara Rich

11-12 OCTOBER 07 – SINGAPORE
Shân Warnock-Smith
STEP Asia Conference
(tel: 020 7838 4890 for bookings)

19 OCTOBER 07 – LONDON
Penelope Reed
"Trusts and Probate Litigation"
Organised by CLT
(tel: 0121 355 0900 for bookings)

23 OCTOBER 07 – STAPLE INN HALL, LONDON
Denzil Lush – Senior Judge Designate of the Court of Protection (Conference Chair)
David Rees
Barbara Rich
Penelope Reed
"The Mental Capacity Act 2005 and the New Court of Protection"
Organised by 5 Stone Buildings
(tel: 020 7421 7870 for bookings)

2 NOVEMBER 07 – MANCHESTER
Chris Whitehouse
Emma Chamberlain
STEP Autumn Conference
(tel: 020 7838 4890 for bookings)

7 NOVEMBER 07 – BRISTOL
David Rees
"The New Court of Protection"
Organised by ACTAPS
(tel: 01225 4257231 for bookings)

Members' News

Henry Harrod, head of chambers, and Chris Whitehouse and Mark Herbert QC have been busy on trust and tax matters. Shân Warnock-Smith QC has been acting in trust litigation in London, Guernsey, Bermuda and the Cayman Islands and has been advising trustees and beneficiaries on matrimonial claims post-*Charman*. With Emma Chamberlain, she is the only barrister mentioned in the Citywealth Top 100 of wealth advisers. Mark Blackett-Ord has been preparing an arbitration relating to a London solicitor's firm and acting in relation to farming disputes in Yorkshire, and has noticed that members of these chambers appeared in 50% of all partnership cases reported in the Law Reports and Weeklies in the last six years. Martin Farber has been locked in heavy costs litigation. Andrew Simmonds QC has been engaged in the first application for the Pensions Regulator to issue a Financial Support Direction under the Pensions Act 2004, acting for the target, Sea Containers Limited, a Bermudan company in Chapter 11 bankruptcy proceedings in the US. Penelope Reed appeared in Court of Appeal in the undue influence case *Goodchild v Bradbury*. Christopher Tidmarsh QC has been litigating about pension schemes (including acting for the pension regulator), tax (winning two appeals), trust, estates and partnerships. Michael O'Sullivan has been litigating in the Court of Protection, before the Land Registry Adjudicator and in the High Court and is about to do a Variation of Trusts Act application in a large estate worth £5 million. Emma Chamberlain continues to work as Chair of the Succession Taxes Committee at the Chartered Institute of Taxation, working on further correspondence with HMRC on s71D trusts and transitional serial interests. She has been speaking regularly at conferences with Chris Whitehouse. Patrick Rolfe and Barbara Rich have both been busy. Karen Walden-Smith has been in the courts dealing with, amongst other issues, beneficial interests in land and rectification of title. In addition to representing clients in litigation in the High Court and court of Appeal and attending half a dozen mediations, Tracey Angus has organised a seminar on Mental Capacity for the Chancery Bar Association. Henry Legge has been dealing with a substantial fraud case in Jersey and a number of cases relating to offshore trusts and assisting in the preparation of the rules for the new court. David Rees has been lecturing on the new Court of Protection, and has been assisting in the preparation of the rules for the new court. Anna Clarke is representing parties in the High Court, the County Court and at a mediation in various actions including a claim for revocation of a settlement on grounds of mistake, a disputed will, an Inheritance (Provision for Family and Dependants) Act application by an unmarried partner and a proprietary estoppel claim. Leon Sartin has been busy with several trust and estate disputes and tax negligence claims whilst Sarah Haren has recently been involved in a three day county court trial of a sale of goods dispute. Thomas Entwistle has also been busy. Joseph Goldsmith, in addition to advising on various non-contentious trusts and estates matters and appearing in several trials, has been providing assistance to the private client department of a firm of solicitors covering a partner's maternity leave. We are looking forward to Caroline Kenny and Mark Baxter joining the Chambers after completing their pupillages with us in October.

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