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Editor's Notebook

The Best Approach to Adverse Possession, and the Decline of Factual Possession

☞ keywords to be inserted by the indexer

The case *R. (on the application of Best) v The Chief Land Registrar*¹ and the subsequent appeal² exploring the role of Legal Aid, Sentencing and Punishment of Offenders Act 2012 s.144 was perhaps, unsurprisingly one that identified a clear distinction between those attempting to acquire title to land after a period of adverse possession and those attempting to gain unlawful control of land in the short term. From a recent re-reading of the case, one significantly overlooked area is the amount of control that Mr Best had over the property, the article proposes two potential reasons for this and intends to explore them in depth. First, HM Land Registry wanted a test case to consider the role of s.144. Secondly, that a potential shift has occurred to re-balance some aspects of adverse possession by the introduction of the stewardship of land and a general lowering of standard for factual possession. Both lines of reasoning need to be considered and evaluated as this could underline a potential shift in the future approach to adverse possession claims.

The test cases approach

In HM Land Registry rejecting Mr Best's application under the LRA 2002 Sch.6 they did this, not as a result of Mr Best failing to meet the criteria for an adverse possession claim, but on the basis of their interpretation of LASPO s.144. In October 2012, in their in-house publication *Landnet* they had summarised that:

“This is [s.144] relevant to land registration because, in line with the High Court decision in *Smith v Land Registry* [2009] EWHC 328 (Admin), we will not proceed with an application based on adverse possession unless, from the evidence we have seen, we are satisfied on the balance of probability that, among other things, the factual possession relied on did not constitute a criminal offence.”³

As was later demonstrated in the High Court and Court of Appeal, this interpretation of the s.144 was proved incorrect.

¹ *R. (on the application of Best) v The Chief Land Registrar* [2014] EWHC 1370.

² *R. (on the application of Best) v The Secretary of State for Justice* [2015] EWCA Civ 17.

³ *Landnet* publication No.32 October 2012 p.5.

“I consider that the true inference is that in enacting section 144 Parliament did not intend to produce any collateral effect upon the settled law of adverse possession in respect of either registered or unregistered land.”⁴

As was fully explored by the courts such an understanding based on *R. (on the application of Smith) v Land Registry*⁵ and *Bakewell Land Management v Brandwood*⁶ was incorrect with clear distinctions being made between the legal argument in these cases and *Best*. This interpretation from the courts was in direct contrast to those arguments proclaimed by HM Land Registry prior to the case in their own publication.⁷ This asks the question as to why did HM Land Registry come to such a different conclusion to the courts. It would appear that this overly cautious approach was driven from a desire to ensure that the register was correct and to avoid later alteration and indemnity:

“Completion of such an application, if the *Smith* case applied to s.144 LASPOA 2012, could have created a mistake in the register which could be the subject of an application for alteration and indemnity perhaps years later, for instance by the estate of a deceased registered proprietor.”⁸

This is a reasonable position to take in an age of government controls on spending and the risk of future potential compensation. This case, on inspection of the facts, would be an ideal opportunity to act as a test case of s.144 and how that fitted into the adverse possession system. The residential property appeared to meet the factual criteria for a successful claim and it was only s.144 application which prevented HM Land Registry from accepting. However, the argument will be made that this was far from the ideal test case, as the factual possession claim for the property was weak.

A weak claim for factual possession?

A close examination of the facts of the *Best* case indicate that there are sufficient questions regarding the factual possession of the house for the time period claimed by Mr Best. This adds to a further question as to why HM Land Registry did not refuse the application on this additional ground, or at least highlighted as a second ground for refusal, albeit even if all applications are judged on their own merits without a uniform approach. The argument that, by not challenging the application on the basis of factual possession of the land, has if not opened the door, has at least shown the way for stewardship of land within the adverse possession framework.

In the case there is a fairly weak argument to the factual possession of the house. Mr Best started making repairs to the house from 1997 but his claim is only from 2001 onwards. In the period from 2001 until January 2012, Mr Best admits he was not in occupation as a resident of the property until January 2012⁹ but continued to undertake repairs and improvements to the property.¹⁰ It was only in

⁴ *R. (on the application of Best) v The Secretary of State for Justice* [2015] EWCA Civ 17 at [75].

⁵ *R. (on the application of Smith) v Land Registry* [2009] EWHC 328 (Admin).

⁶ *Bakewell Land Management v Brandwood* [2004] UKHL 14.

⁷ *Landnet* Publication No.32 October 2012 p.5.

⁸ *Landnet* Publication No.46 February 2015 p.10.

⁹ *R. (on the application of Best) v The Chief Land Registrar* [2014] EWHC 1370 at [3].

¹⁰ *R. (on the application of Best) v The Secretary of State for Justice* [2015] EWCA Civ 17at [13].

January 2012, that Mr Best physically moved into the property as a residence. Land Registry accepted this as meeting the criteria for factual possession of the property, as the work was done “with a view to making the house his permanent residence”.¹¹ Making repairs and renovations to “replace ceilings, skirting boards, electric and heating fittings, doors, and windows. He plastered and painted walls he maintained the boundary fences.”¹² This indicates care of land, but not necessarily outright control of the land.

Certainly Mr Best was undertaking work to the property, yet by undertaking repair work and home improvements including waterproofing, clearing the garden, replacing fittings and decoration,¹³ should these acts give an individual sufficient factual possession. The physical possession of the land seen within *Best*, is an extension and of the idea expressed by Lord Browne-Wilkinson in *Pye v Graham*, when he stated that:

“The question is simply whether the defendant squatter has dispossessed the paper owner by going into ordinary possession of the land for the requisite period without the consent of the owner.”¹⁴

In *Best* this is a stretch that ordinary possession in keeping a house in good repair, but not taking up residence in the house until much later, would be sufficient to gain possession of the house. Not many people would consider undertaking work to a property but not wish to immediately benefit from such work. Further, if the house was seen as a DIY project prior to taking up residence it certainly was a project that took many years, with perhaps days going past without a physical presence in the house. This, of course, could be linked to the standard of actual occupation¹⁵ seen within *Link Lending Ltd*¹⁶ and *Thompson v Foy*¹⁷ in which actual occupation was allowed even though physically absent from the property.

A quick review of the most significant case law in this area highlights a trend towards a gradual lowering of the threshold for factual possession, in *Tecbild Ltd v Chamberlain*,¹⁸ children playing and exercising ponies were considered “trivial acts of trespass” and insufficient for factual possession. In contrast *Roberts v Swangrove Estates Ltd*,¹⁹ whereby title was acquired to part of a tidal river bed even though twice a day water covered the land preventing direct control, and notwithstanding the public right of navigation. One of the most notable changes in the standard can be demonstrated within *Pilford and Pilford v Greenmanor Ltd*²⁰ and *Buckinghamshire CC v Moran*.²¹ In *Pilford*, the judgment noted that an unlocked gate wasn’t fatal to a claim, and that “their acts were sufficient to amount to physical custody and control bearing in mind the nature of the land”.²² In contrast in *Moran*, the locked gated was seen as central to establishing physical custody of the land.

¹¹ *R. (on the application of Best) v The Secretary of State for Justice* [2015] EWCA Civ 17at [12].

¹² *R. (on the application of Best) v The Secretary of State for Justice* [2015] EWCA Civ 17at [12].

¹³ *R. (on the application of Best) v The Secretary of State for Justice* [2015] EWCA Civ 17at [12].

¹⁴ *J A Pye (Oxford) Ltd v Graham* [2002] UKHL 30 at [36].

¹⁵ Land Registration Act 2002 Sch.3 para.2.

¹⁶ *Link Lending v Hussein* [2010] EWCA Civ 424.

¹⁷ *Thompson v Foy* [2009] EWHC 1076 (Ch).

¹⁸ *Tecbild Ltd v Chamberlain* (1969) 20 P. & C.R. 633.

¹⁹ *Roberts v Swangrove Estates Ltd* [2007] EWCH 513 (Ch).

²⁰ *Pilford and Pilford v Greenmanor Ltd* [2012] EWCA Civ 756.

²¹ *Buckinghamshire CC v Moran* [1990] Ch 623.

²² *Pilford and Pilford v Greenmanor Ltd* [2012] EWCA Civ 756 at [27].

A small and rather insignificant step between a locked and unlocked gate, but significant in the movement towards factual possession being demonstrated.

This trend can also be identified in within *Dyer v Terry*,²³ in which a sharp distinction was drawn in relation to “possession” and “mere use”.²⁴ The judgment also makes striking difference in determining factual possession in different areas, most notably for the area known as “area 4 south” in which directly outside the front of the house a discussion as to the type of planting that would give different outcomes as to factual possession.²⁵ The difference between the planting of daffodils and roses is considered, certainly daffodils that are planted would indicate less likelihood of possession as opposed to roses which require attention.²⁶ This distinction seems unimportant, yet it defines factual possession to have control of the land by actively doing something which benefits the land. This activity will demonstrate physical control, and will be more than a single activity in the sense of not just a single night trespasser as indicated by *Pye*.²⁷

This idea of benefitting the land in order to gain factual possession is underlined by the ongoing rejection of parking as being sufficient. This has been reaffirmed in *Nata Lee Ltd v Abid*²⁸ in which parking and the painting of a black line was not sufficient to take factual control of the land.²⁹ Compared against *Blackall v Moledina* which, while unable to prove who fenced off the land to a satisfactory degree (the conclusion reached by the court that the council had undertaken the work³⁰), was able to demonstrate control and care for the land once the fencing had erected by whatever means.

The approach taken by HM Land Registry in rejecting the application of Mr Best on the grounds of s.144 instead of on the basis of the criteria for factual possession based around a desire to find a suitable test case in order to better understand how s.144 and LRA 2002 interact? If that was the intended outcome, in choosing Mr Best’s application they may have chosen an application that potentially should have been rejected on failing to meet the criteria of factual possession. However, when taken in conjunction with other recent adverse possession case what can be demonstrated is a general lowering of the criteria for factual possession, with the test moving towards a demonstration of care for the land. This instead raises the questions of stewardship of land being central to factual possession.

Stewardship via the backdoor

The direction of travel for factual possession towards care and control of land is one that can be intrinsically linked to stewardship of land balanced against the strong levels of protection offered to paper owners under the LRA 2002. Schedule 6 para.5 provides the paper owner the means of serving a counter-notice to prevent losing title, making it almost impossible for the diligent land owner to lose title.

²³ *Dyer v Terry* [2013] EWHC 4829 (Ch).

²⁴ *Dyer v Terry* [2013] EWHC 4829 (Ch).

²⁵ *Dyer v Terry* [2013] EWHC 4829 (Ch) at [24].

²⁶ *Dyer v Terry* [2013] EWHC 4829 (Ch) at [24].

²⁷ *J A Pye (Oxford) Ltd v Graham* [2002] UKHL 30 at [40]–[41].

²⁸ *Nata Lee Ltd v Abid* [2014] EWCA Civ 1652.

²⁹ *Nata Lee Ltd v Abid* [2014] EWCA Civ 1652 at [38].

³⁰ *Blackall v Moledina* [2015] UKFTT 152 at [42].

Therefore, in some respect it matters little that the criteria for factual possession has been lowered to encourage anyone who has natured land to be allowed to make a claim since if the paper owner really wishes to maintain ownership the claim can be easily defeated using the statutory provision within the LRA.

One of the strongest arguments for allowing adverse possession even when it appeared to be in direct contradiction to the will of parliament under s.144 was as identified by *LandNet* as part of their analysis of the *Best* judgment:

“The court was heavily influenced by the strong public policy reasons for the existence of an adverse possession regime, in particular the certainty it provides and the fact that it prevents land from becoming sterile and unusable where no owner can be found.”³¹

The acceptance of Mr Best’s application of adverse possession, especially considering this new lower threshold for factual possession would indicate the acceptance of a shift by Land Registry into accepting stewardship of land. The application of Mr Best for adverse possession was certainly based around his concern for the land rather than occupation of the property. In maintaining the property and undertaking works, his desire to begin with can’t have been for his own immediate possession, as the obvious question is why not take possession much sooner? Mr Best was clearly looking after and managing the land in order to prevent disrepair as stated in 1997. This desire to look after the land and preserve the property is a clear connection to good land management.

This would also be seen from the courts that seem to be pushing for a public policy of adverse possession, despite the LRA 2002 making this much more difficult in comparison to the previous system. In recent years, the courts seem to take a much more liberal approach to allowing claims when the land is put to use. This desire for a more balanced system from the courts seems to reflect the need for land to be used positively and the ability of landowners to maintain title. The LRA 2002 made adverse possession much harder, it appears that the courts are moving towards a position of stewardship of land in order to rebalance and reward those willing to put work into land to ensure it doesn’t become stilted and unused. With this approach being taken by the courts it re-balances the difficulties of taking title under Sch.6. What then can be seen is a transition from the traditional approach and high bar of establishing factual possession required under the old system in order to prevent dubious claims for land and the new system whereby using the traditional criteria is less important in preventing claims.

Certainly, cases where factual possession has been found (*Dyer*, *Best*, and *Blackall*) all indicate care and concern for land. This tends to feed into the narrative of parking being insufficient as parking on land is neither caring for it, nor truly controlling it. Even the demonstration of the painting of a line to indicate that the space is yours is not truly caring for the improvement or protection of the land in and of itself. The narrative of stewardship is again seen within the *Dyer v Terry* judgment, this is outlined with the distinction of planting roses and daffodils, the planting of roses which require care and attention compared to daffodils which require very little care after planting. As a parallel, the painting of a white line for

³¹ *Landnet* Publication No.46 February 2015 p.10.

parking can also be seen as the planting of daffodils that it is a single action with no further consideration required.

The *Best* judgment is the start of a new phase of rebalanced adverse possession whereby those that have contributed to the maintenance or improvement of land are given an opportunity to gain title. This would be a significant step forward to a society which would encourage properties that have been abandoned to be repaired, therefore improving neighbourhoods and contributing in a small way to tackling the ongoing housing issue within the United Kingdom. As such, a better balance is struck between the tough framework of Sch.6 and the criteria developed through common law for a claim of adverse possession. This rebalanced approach still maintains enough security for the title holder, who can still use the two-year window to reclaim possession of the land.³² This has the effect that under this approach, those individuals who have stewarded the land, by putting time and money into it could still lose out to a title owner who has neglected the land for many years. Therefore, the lowering of the bar for factual possession is perhaps a false hope for true stewardship of land whereby those individuals who had committed time and resources to the improvement of land being rewarded with title. Instead, this is a small step in the direction of stewardship that should help promote the regeneration of abandoned buildings.

The approach of the courts to allow lower criteria for adverse possession, but maintain the strictness of the system under the LRA 2002 is a start to address some of the concerns highlighted by many academic works on the subject. For instance the moral concerns highlighted by Cowan, O'Mahony and Cobb in *Great Debates in Property law*³³ in which they argue that stewardship of land had been replaced by a moral agenda against adverse possession.³⁴ This concerns over the morality of the LRA are also seen within the earlier paper by Cobb and Fox *Living Outside the System?*³⁵ which outlined an academic response to the adverse possession framework under the LRA 2002 highlighting how the law was influenced by high profile cases in the media of undeserving individuals gaining title to expensive property.³⁶ They also interestingly indicated that a binary ethical distinction between "good faith" and "bad faith" squatters.³⁷ This point is reinforced by the *Best* decision, clearly someone who has worked and cared for a property is a "good faith" squatter. This binary decision is perhaps important for the social realities the court operates in being that those who care for land should be rewarded with title. The newspaper reaction to the decision was certainly not supportive of the decision within the respect of this binary decision, and the view dominated within them is that adverse possession has no place within the legal system.³⁸

³² Land Registration Act 2002 Sch.6 para.5.

³³ Cowan, O'Mahony and Cobb, *Great Debates in Property law* (Basingstoke: Palgrave Macmillan, 2012).

³⁴ Cowan, O'Mahony and Cobb, *Great Debates in Property law* (Basingstoke: Palgrave Macmillan, 2012) p.119.

³⁵ Neil Cobb and Lorna Fox, "Living outside the system? The (im)morality of urban squatting after the Land Registration Act 2002" [June 2007] *Legal Studies* Vol.27.

³⁶ Neil Cobb and Lorna Fox, "Living outside the system? The (im)morality of urban squatting after the Land Registration Act 2002" [June 2007] *Legal Studies* Vol.27, 239–240.

³⁷ Neil Cobb and Lorna Fox, "Living outside the system? The (im)morality of urban squatting after the Land Registration Act 2002" [June 2007] *Legal Studies* Vol.27, 239–240.

³⁸ e.g. see <http://www.telegraph.co.uk/news/uknews/law-and-order/10813937/Builder-wins-landmark-victory-for-squatters-rights.html> [Accessed 16 September 2016] and <http://www.dailymail.co.uk/news/article-2622995/Squatter-400-000-three-bedroom-house-owned-elderly-woman-WINS-right-ownership-10-years-claiming-squatters-rights.html> [Accessed 16 September 2016] and <http://www.standard.co.uk/news/squatter-granted-400000-house-mugged-the-system-say-neighbours-9336776.html> [Accessed 16 September 2016].

Academic works have highlighted an ethical duty of effective stewardship which with this re-balance the courts are now exploring. The current position in making it easier for individuals to claim adverse possession by a lower of the requirement of factual position is a start towards a stewardship based adverse possession regime, which was within the English common law doctrines governing land in feudal structures and especially pre-1925.³⁹ Within the present case being discussed is the flip side of stewardship, where the paper owner has a moral responsibility to maintain and look after the property, if they do not undertake such action then there is justification for them to lose title. The courts should be bold in accepting that the true criteria for factual possession is one that demonstrates a level of care and control for land, an evolution which embraces stewardship.

Conclusion

The attempted interference of criminal law in the delicate workings of the LRA 2002 Sch.6, was rejected by the courts on the basis that Parliament intended for this section to work independently of the adverse possession framework. However, in the HM Land Registry's attempt to find a suitable test case, the unintended consequence has been to re-enforce that stewardship of a property has been established within the adverse possession framework. Clearly, only future applications will determine if this approach is here to stay. With the tough regime for adverse possession, this is the ideal moment to continue to link the criteria for adverse possession to that of stewardship. This would create a more balanced system that any claim that demonstrated care and control of land would be allowed within the safety net of the LRA preventing abuse. It would also further create a system which would reward those willing to spend time maintaining or restoring houses that have fallen into disrepair thus, in a small way, helping to address the shortage of houses. Further instances of abandoned houses being able to be taken into possession in this manner would be very small.

However, this rebalance is perhaps not enough against the tough regime of the LRA 2002, with title holders being able to reclaim land within the two-year window regardless of how a claimant has cared for the land. Therefore, while the courts have increasingly lowered the threshold for making a claim the statutory instrument maintains a system that is still weighted too much in favour of the paper owner. While the *Best* case was originally intended to settle the potential conflict created by Parliament, the on-going effect could be much more significant in terms of changing how a claim of adverse possession is judged. This decision in favour of a public policy for adverse possession in relation to the facts of the *Best* case has perhaps opened the door a crack to stewardship of land.

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³⁹ Cowan, O'Mahony and Cobb, *Great Debates in Property law* (Basingstoke: Palgrave Macmillan, 2012), p.121.
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