

Adverse possession: the different statutory regimes and requirements

John Sharples, Barrister, St John's Chambers

Published on 8 April 2018

In disputes between neighbours relating to ownership of land, adverse possession and boundaries often go “hand in hand”. An adverse possession claim is often bolted on to a claim to paper title.

Adverse possession is the process by which one person (the squatter) may claim legal title to land owned by another (the owner) through possession of the land without the owner’s permission for a particular period of time.

The different regimes and common factors

There are 3 mutually-exclusive schemes which apply to adverse possession claims, depending on whether (and when) title to the land is registered and when the squatter first went into adverse possession. They are:

- unregistered land
- registered land where a full period of adverse possession was enjoyed before October 2003
- registered land where the period did not start/was not completed until after then

Under all three, the squatter must show:

1. he has in fact been in exclusive possession of the land
2. he did so with the intention to possess
3. he did so without the owner’s consent
4. he had possession continuously for the required period. Depending on the relevant statutory regime and the nature of the owner this can be: 10 years (registered land after October 2003) 12 years (registered land before then and unregistered land) 30 years (Crown land, including bona vacantia) or 60 years (Crown foreshore). Statutory rules may prevent time running in the squatter’s favour e.g. if the owner is under a disability (s.29 LA 1980) or on grounds of fraud/deliberate concealment/mistake (s.32 LA 1980). Or they may re-set the “clock” back to zero e.g. a written acknowledgement of the owner’s title by the squatter (ss.29-30 LA 1980).

Under the first 2 regimes these are the only requirements the squatter must meet. Under the 3rd:

- there are extra requirements which the squatter may have to meet; and
- his title must be protected by occupation or notice if it is to bind a purchaser for value.

1. Unregistered land

(a) general

It was estimated that by mid-2015 about 86% of land in England and Wales had been registered: Land Registry Annual Reports and Accounts 2014/5 (July 2015) p.9. So the rules for unregistered land are now on the way to becoming a 'dead letter' in practice. It is now largely confined to some established estates and smallish areas of "spare" land (some lanes, verges, etc.) to which the paper title is lost/untraceable, if it ever existed, or uncertain.

For unregistered land, adverse possession is governed by the Limitation Act 1980. Under it, and subject to certain exceptions:

- the owner's right to recover possession is barred once the squatter has been in adverse possession for 12 years: s.15 LA 1980
- his title is also extinguished: s.17 LA 1980
- the squatter acquires an independent possessory title, enforceable against the whole world.

Until 12 years have passed the squatter (1) is at risk of an action by the owner to recover his land and (2) must rely on his continuing factual possession as conferring title to sue any third party trespasser (but not the owner or someone who derives title from him) who interferes with it.

(b) first registration by squatter

The squatter who has barred the owner's title can apply for first registration in Form FR1: r 23 Land Registration Rules 2003. He should first carry out:

- a search of the index map, to see if the land is registered
- a land charge search against his and, if known, the owner's and any previous owner's name(s)

- any other relevant searches (e.g. a commons registration search if the land may be a TVG or, if the owner is a company, a companies search).

HMLR will give notice of the application to anyone it considers may have an interest in the land. If successful:

- the squatter will normally be granted possessory title only, since he will usually only be able to prove that he has acquired a fee simple and not that he has extinguished the owner's title: R (Diep) v Chief Land Registrar [2010] EWHC 3315 (Admin). This is a possessory estate, separate from the paper owner's title, and so subject to existing legal and equitable interests.
- he will only be registered with absolute title if HMLR is satisfied that he has barred the owner's title. That is, if (a) it knows what that title is and (b) is satisfied that the owner consents or could have no valid grounds for objecting to the squatter's application.

If a squatter with registered possessory title remains in possession for a further 12 years he may then apply to convert it into an absolute one: s 62(4) LRA 2002.

(c) squatter cannot generally register a caution

A squatter cannot – with one possible exception below – lodge a caution against 1st registration. That is because he will be claiming to be the owner of a legal estate arising out of possession and a caution cannot be lodged by virtue of ownership of a freehold estate in land: s 15(1)(a), (3)(a)(i) LRA 2002. Turner v Chief Land Registrar [2013] 2 P&CR 12.

Similarly HMLR takes the view that a squatter cannot claim to be entitled to an interest affecting a qualifying estate (the owner's) under s 15(1)(b) LRA 2002. It does so on the basis his right is not an "adverse right affecting the title to the estate" within s 132(3) LRA 2002: HMLR Practice Guide 5 Section 8.

The one possible exception is where the squatter is a successor in title to an earlier squatter and has taken a transfer of his possessory estate. If he does not apply to register it within 2 months of the transfer, legal title re-vests in the original squatter who holds it on a bare trust for him: s 6-7 LRA 2002. It seems he can lodge a caution against first registration, as he has a beneficial interest

affecting a legal freehold estate i.e. his transferor's possessory estate (s 15(1)(b) LRA 2002) as opposed to being the owner of that estate.

(d) first registration by owner

First registration post-2003 after 12 years adverse possession by the squatter:

What happens if the owner, unaware that his title is now extinguished, later voluntarily first registers the land? That will be a "mistake" for the purposes of Sch 4 LRA 2002 and so the squatter can apply, using AP1, to alter the registered title under Sch 4 para 5.

If the squatter is in actual occupation or the owner has notice of his estate, the owner's registered estate is subject to the squatter's estate: s 11(4)(b)-(c) LRA 2002. Alteration here does not amount to "rectification" within Sch 4 so he is not entitled to an indemnity if his title is closed: Sch 8 para 1(1)(a), 11(2)(b) LRA 2002.

First registration before the 12 year period has elapsed but time is running:

If first registration takes place before the owner's title is barred, then the registration is not a "mistake" for Sch 4 purposes. It seems (see below) time continues to run in the squatter's favour and after 10 years he can apply to be the registered proprietor of that estate under Sch 6 LRA 2002.

2. Registered land where the squatter has been in possession for 12/+ years by October 2003

(a) general rules

Before the LRA 2002 came into force (in October 2003) adverse possession in registered land under the LRA 1925 operated in an analogous manner to its application to unregistered land. The same rules apply to decide whether the squatter has been in adverse possession.

(b) effect of acquiring possessory title

The main difference was the effect of the 12 year limitation period passing. In registered land, the owner's title was not extinguished, since for as long as he remained the registered proprietor the legal estate remained vested in him.

So to reconcile this with adverse possession, s.75 LPA 1925 said that after the squatter has been in adverse possession for 12 years:

- (1) he could apply to become the registered proprietor in place of the owner (s.75(2) LRA 1925)
When that happened, the owner's legal title was transferred to the squatter unlike in unregistered land where (to repeat) the legal title is extinguished and the squatter acquires an independent legal title.
- (2) in the meantime, the owner held the legal title on trust for him as bare trustee (s.75(1)).

(c) later sales by the registered owner

Up to October 2003 (when the LRA 2002 came into force) the position was governed by the LRA 1925. Under it the squatter's title (or accruing title) took effect as an overriding interest, even if he was no longer in actual occupation: s.70(1)(f) LRA 1925. So it bound even purchasers for value from the original registered owner.

The effect of sales after 2003 on the squatter's (accruing) title are governed by the LRA 2002 (see 3(d) below)

(d) accrued rights under the LRA 1925 are preserved by the LRA 2002

Let's assume:

- the land is registered
- the squatter had been in adverse possession for at least 12 years before October 2003 (when the LRA 2002 came into force)
- but did he not apply before then to become the registered proprietor in place of the owner.

There is no equivalent to s.75(2) LRA 1925 in the LRA 2002. But the transitional provisions in Sch 12 para 18(1) LRA 2002 apply. So the trust created in the squatter's favour under s.75 LRA 1925 continues to exist. The squatter can still apply to be registered in the owner's place. The correct form is AP1: r 13 LRR 2003.

But since (a) this is a bare trust and (b) there is no equivalent to s.70(1)(f) LRA 1925 under the LRA 2002 automatically making the squatter's interest an overriding one, it is liable to be defeated by a registrable disposition for value unless protected – see Section 3(d) p.17 below for the details.

(e) where there has not been a full 12 years adverse possession before October 2003

Let's assume the squatter only went into possession in/after November 1991, less than 12 years before the LRA 2002 came into force. By then he had not barred the owner's title, so he cannot rely on s.75 LRA 1925. Time continues to run in his favour, but now he is subject to LRA 2002. Since this regime is less favourable to him, it can be critical to know precisely when he first took up adverse possession.

3. Registered land where there is not a full 12 years adverse possession before October 2003

The LRA 2002 – which came into force in October 2003 – introduced a new, more rigorous regime in relation to registered land for squatters who had not been in adverse possession for 12 years by then.

(a) the new regime

Under the LRA 2002, no limitation period applies the land is registered. Instead:

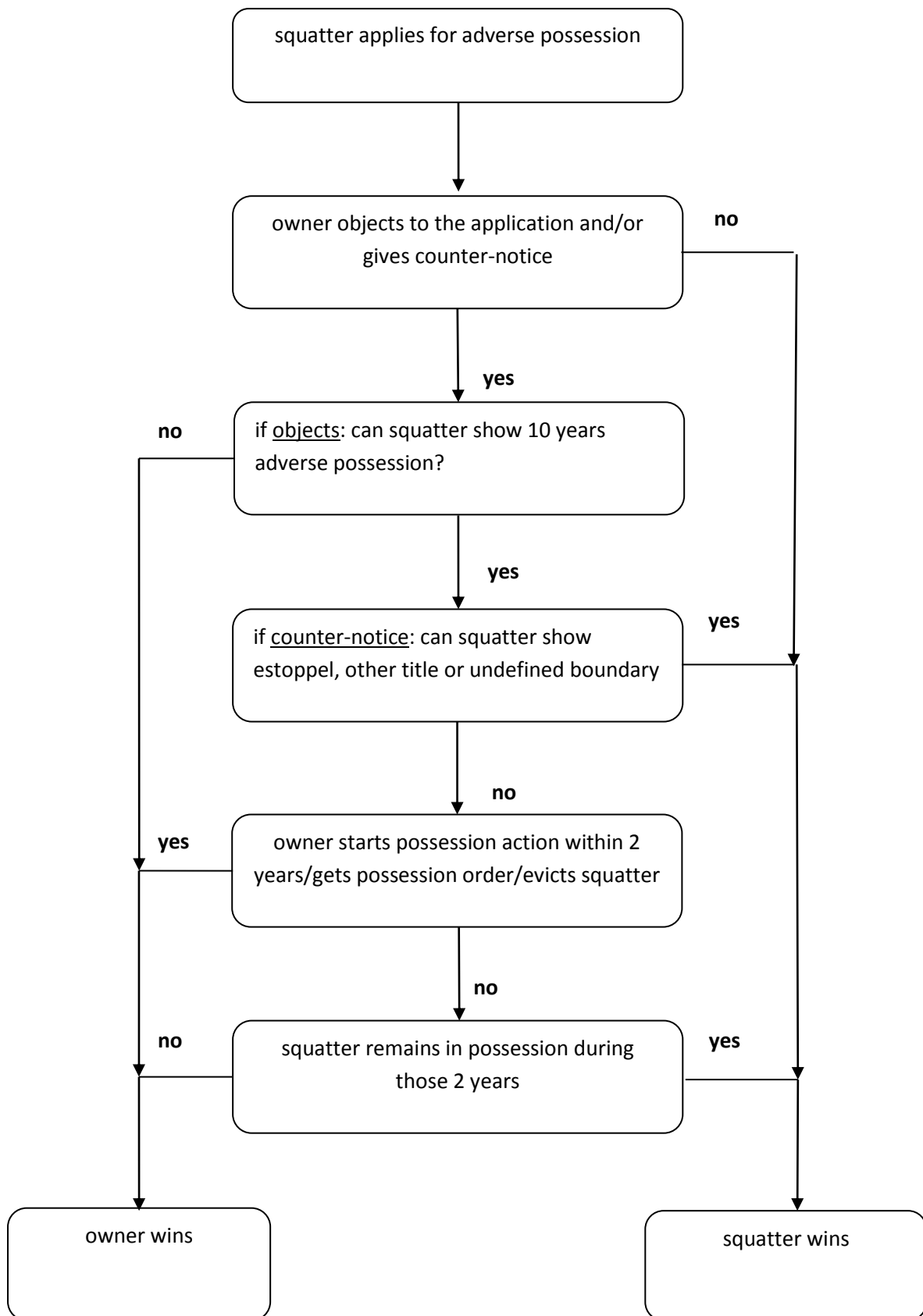
1. the squatter can apply to become the registered proprietor if he has been in 10 years adverse possession under Sch 6 LRA 2002 unless (1) he is presently a defendant to possession proceedings or (2) a possession order was made against him in the last 2 years.
- The 10 year period is measured from the date of the application. So if the squatter loses possession before then he cannot apply, unless (a) the eviction occurred less than 6 months before the application (b) it was not pursuant to a possession order and (c) he had already enjoyed 10 years adverse possession. Sch 6 para 1(3)(b) LRA 2002.
- The correct form is ADV1. It must be accompanied by a statement of truth/stat. dec. complying with r.188 LRR 2003. For details of the procedure see HMLR's Practice Guide 4.

2. the owner has the right to give notice that he opposes the application. He must do so within 65 business days after notification by HMLR: r.189 LRR 2003.
But if the squatter is occupying all the land within the registered title then since the notification will usually be sent there, the owner is unlikely to receive it.
3. specifically the owner can:
 - (1) object that the squatter was not in adverse possession for 10 years (s 73(1) LRA 2002); +/-or
 - (2) counter-notice requiring the application to be dealt with under Sch 6 para 5 (see 6. below).
This is in form NAP.
4. if the owner fails to oppose the application, then the squatter's application will be granted and he will become the registered proprietor in place of the owner. But all is not lost because if he was not in fact in adverse possession the (now former) owner can apply to rectify the register back to what it was on the basis that the squatter's application was granted in error. Baxter v Mannion [2011] 1 WLR 1594.
5. if the owner objects, it must be determined whether the squatter (a) was in factual possession (b) with the intention to possess (c) without the owner's consent (d) for at least 10 years. If he cannot prove that then of course the application fails. If he can, then unless the owner also relies on para 5 (below) his application succeeds. Sch 6 para 4.
6. if the owner gives counter-notice (instead of/as well as objecting) the squatter's application will fail unless he can bring himself within one of three grounds in para 5:
 - (1) he is entitled to be registered as proprietor on the basis of proprietary estoppel. E.g. if the true owner led him to believe that he owned the land and he detrimentally relied on that.
 - (2) he is entitled to be registered by virtue of some other interest in the land. E.g. if
 - he is entitled to the land under a will, but no assent has been made.
 - (possibly) he has occupied the land under an uncompleted contract to buy it; or
 - (3) where (a) the parties own adjoining land (b) the boundary between them is a 'general boundary' under s.60 LRA 2002 (c) for at least the last 10 years before the application the squatter reasonably believed the land belonged to him and (d) the owner's title has been registered for more than 1 year.

7. Note:
 - that (1) and (2) are cases where the squatter is entitled to legal title to the land on some basis other than adverse possession. He need not rely on the para 6 procedure at all but could apply instead relying on his inchoate equity or other interest
 - so it is only (3) where his application succeeds because of adverse possession. This is limited to cases of bona fide trespass between neighbours.
8. If the squatter can establish any of the para 5 criteria, he is entitled as of right to be registered as proprietor in place of the owner. This is a statutory conveyance of the owner's registered title to him. If the application relates to part of the registered title, it is removed from the existing one and registered separately with the squatter as the proprietor.
9. As a general principle, the registration of the squatter does not affect the priority of any existing interest affecting the estate. Sch 6 para 9(2) LRA 2002. So he takes subject to the same estates, rights and interests as bound the previous owner. The rules are slightly different in relation to registered charges.
10. If the squatter cannot make out the para 5 criteria, then the application is dismissed. In that case the owner then has a further 2 years to bring possession proceedings against the squatter. Sch 6 para 6. If he does, then he is entitled to possession as of right.
11. If he does not and the squatter stays in adverse possession for that 2 year period, at the end of it he can re-apply (as of right) to be the registered proprietor. Sch 6 para 7. That is unless
 - he is already the defendant to possession proceedings brought by the owner;
 - a judgment for possession has been made against him in the last 2 years; or
 - he has been evicted pursuant to a possession order
12. The owner can only object to the squatter's 2nd application under 11. above on the basis
 - the squatter did not stay in adverse possession for the 2 years
 - one/other of the three exceptions in 11. above applies

So, in diagram form:

Schematic of Schedule 6 Land Registration Act 2002



Court proceedings

Existing court proceedings preclude a Sch 6 application:

As stated above, the squatter cannot make the Sch 6 application if he is already a defendant to possession proceedings by the owner. But if he is, he can rely on the grounds under para 5 as a defence to that action. Specifically:

- the first two (estoppel, independent ground to be registered as proprietor) are substantive defences to the action, quite apart from Sch 6
- the third (general boundary between adjoining parcels of land) is, by statute, a defence to a possession action: s 98 LRA 2002.

Court proceedings more than 2 years after an unsuccessful Sch 6 application

Let's assume a squatter's application fails because he can't make out any of the para 5 criteria, but the owner fails to apply for possession within the 2 years following and the squatter remains in adverse possession. At that point:

- the squatter (as we have noted) can now apply to become the registered owner as of right
- but if before he does so the owner starts possession proceedings, that right also gives him a defence to the owner's action: s 98(3) LRA 2002.

Special rules

There are special rules regarding the running of time in relation to:

- leases (Ruoff & Roper's Registered Conveyancing @ 33.024).
- land subject to successive interests under a trust (ibid @ 33.027)
- mortgages (ibid. @ 33.028.01)
- rentcharges (ibid. @33.063)
- commonhold land (ibid. @ 33.066)

(b) problems/issues with the LRA 2002

Despite the new regime a number of doubts arise:

- i. out of the Sched.6 procedure itself; and

i. concerning how that procedure relates to the general law of adverse possession

i. problems/issues with the statutory scheme

(1) squatter's claim fails: fresh application or 2 year time period?

The squatter's application can fail for a number of reasons:

- (a) the trivial/procedural. For example, he fails to pay the application fee or provide the required evidence in support. Then HMLR will simply reject the application without requiring the owner to respond, after giving the squatter the chance to correct the error/omission.
- (b) ground (1): the squatter was not in adverse possession for 10 years before applying. This may
 - (i) be obvious on the face of the application, in which case HMLR will similarly reject it peremptorily (unless the squatter makes good the defect) or
 - (ii) only emerge after a contested hearing. For example the parties may be at odds as to whether the squatter can show 10 years possession or whether this with the owner's consent.
- (c) ground (2): the squatter failed to meet the para 5 criteria.

Sch 6 unfortunately does not make entirely clear what the consequences are of each and whether they are the same. This gives rise to a number of issues:

- when can the squatter simply re-apply, relying on his existing 10 years adverse possession?
- when does the 2 year period run?

The position seems to be:

- if (a) (formal invalidity) applies, the squatter can simply re-apply and start the process afresh, relying on the same evidential basis as his first, rejected application. Of course if he fails to correct the errors/omissions it will also be peremptorily dismissed.
- if (b)(i) applies (application defective on its face), the same seems to be true. Law Commission Consultation Paper 227 Updating the Land Registration Act 2002 @ 17.21-17.23. So:

- if it failed because the evidence showed the squatter was not in adverse possession at all (no factual possession, no intention to possess, owner under a disability or owner consented to his possession) time has not started to run against the owner. But if the squatter later acquires adverse possession, time will start to run
 - if it failed only because the squatter was not in possession for 10 years when he applied, the “clock” is not re-set to zero. Time continues to run in his favour and he can re-apply when 10 years have passed unless the owner has started possession proceedings in the meantime.
- the uncertainty really arises in relation to (b)(ii) (application only found to be defective after contested determination). The position is that:
- the 2 year period certainly does not apply
 - but if the squatter remains in possession then it seems likely the position is the same as (b)(i) above. The proceedings before HMLR do not stop time running/re-set the clock. Pye v Graham [2000] Ch 676 @ 699-703, not considered on appeal [2002] UKHL 30.
- if (c) applies (the para 5 criteria are not made out) then obviously the 2 year period for the owner to bring possession proceedings applies. A second application would mean the 2-year period starts afresh, which cannot be right.

(2) problems with the first two criteria in para 5: estoppel and independent basis to be registered as proprietor

As we have noted, a squatter who can show that he has (1) an equity arising by proprietary estoppel or (2) some other basis to be registered as proprietor can succeed under Sched 6 para 5, even if the owner opposes the application.

That gives rise to a few issues:

- (a) First, why would he ever make that application, since he could apply simply on the basis of his estoppel/other right to be registered?

Then he would avoid his application being dismissed on the basis that even though he could make out a para 5 ground he had not in fact been in adverse possession for 10 years before he applied.

- (b) Second, it is not entirely certain that a person who has (a) an estoppel (b) some independent ground to be registered is in “adverse” possession for these purposes, since one/other arguably gives him a right to possess the land and so his possession may be referable to that instead.
- (c) Third, an estoppel gives rise to an inchoate equity which the court has a discretion as to how it satisfies. It need not grant a proprietary interest in the land. That remains the case under the Sch 6 para 5 procedure. So if the FTT decides that the appropriate remedy is something less than registration as proprietor, it will not allow the Sch 6 application but must decide how to satisfy the equity or refer that to the High Court: s 110(4) LRA 2002. Thus it seems the squatter with an equity gains no benefit from using the Sch 6 procedure.
- (3) where the squatter relies on the third ground in para 5 what does the “reasonable” belief requirement entail?

The third ground means that after 2003 only genuinely mistaken squatters can acquire adverse possession. Sch 6 is designed to prevent the cynical expropriation of land by adverse possession.

Let’s assume the squatter relies on this third ground (general boundary + reasonable belief that he was the owner) and the owner asserts that the squatter’s belief was not “reasonable”. That can give rise to two issues:

- (a) First what is the evidential threshold for finding that his belief was not reasonable?
 - presumably that must be based on what the parties actually knew, as distinct from what they could have known.
 - presumably also the owner must do more than merely assert his title, but how clear/convincing must his evidence be to make the squatter’s contrary belief “unreasonable”? And how should that evidence be weighed against any contrary evidence which the squatter may rely on?

- is a “reasonable suspicion/doubt” sufficient? Or must it appear to be “more likely than not” that the squatter does not have title? Or is there some other standard?

(b) Second, timing. There are three possible interpretations ([2012] Conveyancer 343):

- the reasonable belief must be held for at least 10 years and persist at the date of the squatter’s application.
- it must be held for at least 10 years at any time before the application whether/not it persists when the application is made
- it must be held for at least 10 years and cannot end more than a short time before the application is made

The first two are based on the wording of para 5. The third is based on Zarb v Parry [2012] 1 WLR 1240. For a debate on the issue see Law Commission Consultation Paper 227 @17.39 – 17.44 which considers the 3rd preferable.

But that then begs three further questions:

- what is a “short time”. The Law Commission Consultation Paper @ 17.44 declines to say what that is, as it will vary from case to case. Whilst the logic is impeccable, it does not really help the practitioner. It has suggested (17.46) that a 6-month period should be allowed, by analogy with the exception to the need for the squatter to be in adverse possession when he applies under Sch 6 (p 6 above).
- it may be, for example, that he learns information over time. Then it can often be difficult to judge at what precise point either (1) he ceases in fact to “believe” or (2) his continuing belief became unreasonable.
- if time start to run against the squatter, what if he later learns of information which bolsters his belief so it becomes reasonable (again). Is time reset- suspended or does it continue to run?

The lesson for the squatter is clear: once the owner raises his title, he must apply under Sch 6 as soon as reasonably practical, otherwise he runs the risk of his application failing.

ii. the relationship between the Sch 6 procedure and the general law of adverse possession

(1) first registration of an extinguished title

A 1st registered proprietor takes the land subject to interests acquired under the LA 1980 (i.e. when the land was unregistered) of which he has notice: s 11(4)(c) LRA 2002. Alternatively the squatter – if he remains in possession – can rely on the fact he has an overriding interest under Sch 1 para 2 LRA 2002.

But neither may apply e.g. the squatter may have completed his 12 years and then left the land unoccupied for some time before 1st registration. The Law Commission originally said that in such cases the owner would take free of the squatter's interest: Law Commission Report No.271 @ 3.47. But it now takes the view that in such case the registration appears to be a "mistake". The squatter has already extinguished the owner's title so he need not remain in possession and a title that has been extinguished can't be revived. Law Commission Consultation Paper 227 @17.58.

It is also uncertain whether in such cases this is "rectification" or merely "alteration" for the purpose of determining whether the owner is entitled to

- the protection accorded to proprietors in possession: Sch 4 para 3(2), 6(2) LRA 2002
- an indemnity if the register is corrected: Sch 8 para 11(2)(b) LRA 2002

See the debate in the Consultation Paper @ 17.59 – 17.61.

(2) registration of possessory title by squatter

At common law, a squatter is considered to have a freehold – seemingly legal – title from the moment he goes into adverse possession (albeit one liable to be defeated by a superior title until the relevant period has passed). This is distinct from the owner's title.

The question then is whether that is registrable under s 9(5) LRA 2002. That would seem to be contrary to the policy that adverse possession claims should be determined under Sch 6 and it would allow the squatter to circumvent the limitations in para 5. It might also mean the squatter ceases to be in adverse possession for the future, applying (by analogy) the rule in Parshall v Hackney [2013] Ch 568, that a person cannot be in adverse possession of land of which he is (erroneously) the registered proprietor, so if that mistake is later corrected:

- he cannot rely on his possession during the period he was the registered proprietor, so as to claim to have acquired possessory title
- he must show that he was in possession for the full period required before he became the registered proprietor.

The Law Commission's view is that the squatter should not be able to apply for registration with possessory title until the relevant period has expired: Law Commission Consultation Paper @ 17.63-17.68.

(3) can time continue to run if an adverse possessor is registered with possessory title before the prior title has been extinguished

If the squatter obtains 1st registration with only possessory title, not title absolute – as is usual (see sect 1(b) p 3 above) – it remains unresolved whether time continues to run in his favour should it transpire that he has not in fact extinguished the owner's title. Two contradictory decisions – remarkably – by the same adjudicator (Owen Rhys J) show the confusion:

- Moore v Buxton [2009] EWLandRA 2007_1216: time can't continue to run in his favour
- Sexton & Kember v Gill [2015] EWLandRA 2013_0472_0473: time can continue to run under the LA 1980

The Law Commission's Consultation Paper @ 17.72-17.79 agree with Sexton and proposes that where the squatter is registered in the reasonable but wrong belief that the owner's title is extinguished the period continues to run even for the period that the possessory title remains open.

(c) the squatter who is erroneously entered as the registered proprietor

Sometimes a person (1) may not have paper title to the land (2) but is erroneously registered as the proprietor with title absolute and (3) has in fact been in "adverse" possession of it for the required period.

If/when the true owner applies under Sch 4 LRA 2002 to rectify the register to show him as the registered proprietor on the basis of his paper title, the squatter:

- will be able to rely on the limitation in Sch 4 para 3(2), 6(2) LRA 2002. So the owner must show that (a) the squatter has by fraud or lack of proper care caused or substantially contributed to the mistake, or (b) it would for any other reason be unjust not to rectify. These are difficult burdens to meet.
- will not however be able to assert that he has acquired possessory title to the land under the rule in Parshall v Hackney (p 15 above).

(d) effect of sale by the registered owner before the squatter implements the Sch.6 procedure

As stated above, before October 2003 a squatter's (accruing) title bound a purchaser as an overriding interest under s.70(1)(f) LRA 1925. That also remained the case until October 2006 under the transitional provisions: LRA 2002 Sch.12 para 11.

After October 2006, the LRA 2002 rules apply and so a squatter who acquired possession before the land was registered or under the LRA 1925 will be protected against a sale of the registered land (only) if either

- (1) he remains in actual occupation and his occupation is reasonably apparent to the purchaser.
In that case he has an interest that overrides: LRA 2002 Sch 3 para 2; or
- (2) he protects his title with a notice.

The position of a squatter who has 10 years adverse possession after 2003 but has not yet applied under Sch 6 is less clear. Either

- the new buyer takes subject to whatever period of adverse possession already exists i.e. time continues to run and the sale makes no difference or
- the squatter's possessory estate is an interest affecting the registered estate and so capable of binding the buyer, in which case it must be protected either by notice or as an interest that overrides

Ruoff & Roper's Registered Conveyancing @ 33.023.

John Sharples
St. John's Chambers

8 April 2018