

The Role of Adverse Possession in Modern Land Law

Yui Nga Natalie Tsang*

Dear Editor,

The law of adverse possession has now seemingly been prevented from serving a relevant and useful function in modern society, largely due to legislative reforms made by the Land Registration Act 2002 ('LRA'). Developed from ancient Roman origins, the concept of adverse possession now struggles to justify how a possessor of land can completely oust a registered landowner in a civilised and organised society. Parliament has clearly conveyed this message through the LRA, as Schedule 6 now ensures that landowners are notified of adverse possession claims and are further given 65 business days to challenge any applications.¹ This has made it notoriously difficult for adverse possessors to successfully acquire title to land, as it can only be achieved if the owner fails to evict the possessor after defeating their claim within two years,² or if the landowners are prevented from challenging the application under the exceptions found in Paragraph 5 of Schedule 6 LRA.³ Therefore, whilst these reforms provide a statutory footing for adverse possession, the statutory framework fails to protect the lenient attitude historically shown towards adverse possessors.⁴

Schedule 6 permits exceptions from this reformed process under the LRA, which prevent landowners from automatically defeating the possessor's claims immediately after being notified by the Land Registry. These exceptions remain paramount, as they ensure adverse possession claims still receive a fair review and remain relevant in modern law. The first exception⁵ prevents landowners from challenging an adverse possession claim if it is 'unconscionable'⁶

¹ Land Registration Act 2002, Sch 6 para 2.

² *Ibid*, para 6(6).

³ *Ibid*, para 5.

⁴ *JA Pye (Oxford) Ltd v Graham* [2003] UKHL 30, [2002] 3 WLR 22; adverse possessors acquired property reputedly worth £10 million.

⁵ Land Registration Act 2002, Sch 6, para 5(1).

⁶ *Ibid* para 5(2).

to do so. This exception appears to provide an equitable defence to possessors and has, in recent cases such as *King*⁷ and *Best*,⁸ been upheld fairly in practice. However, without specific guidance on what comprises ‘conscionability’, the statutory wording remains subject to a broad range of interpretations. Therefore, whilst a protective interpretation was upheld in these recent cases, a continuing acceptance of this interpretation is dependent on judicial attitudes which remain subject to change over time. I therefore do not view this exception as a reliable means of guaranteeing the survival of adverse possession in modern law.

The second exception⁹ allows possessors to acquire title if they are entitled to the land. Although this exception clearly includes scenarios such as receiving land through inheritance, it still appears vague and is only likely to apply in rare circumstances.

The final exception protects possessors who have used land adjacent to their own property, believing that such property belongs to them due to physical barriers being erected in the incorrect location along the boundary line.¹⁰ This exception appears to be the most applicable, as detailed and specific guidance is given as to when this exception will be engaged. This stringent approach explains why the courts in both *Zarb v Parry*¹¹ and *LAM Group v Chowdry*,¹² two cases concerning this exception, were able to reach a fair conclusion.

Yet, I do not believe that these exceptions alone provide adequate protection for possessors. I wholly concur with the traditional view, associated with John Locke, that adverse possessors must be protected so that they can continue to effectively carry out a practical function.¹³ Adverse possession prioritises “the useful labourer to the sluggard”¹⁴ which, in turn, effectively discourages landowners from neglecting their property. Both Auchmuty¹⁵ and

⁷ *King v Suffolk CC* [2015] UKFTT 0867 (PC), [2017] PLSCS 19.

⁸ *Best v Curtis* [2015] UKFTT 0130 (PC), [2017] PLSCS 41.

⁹ Land Registration Act 2002 Sch 6 para 5(3).

¹⁰ *Ibid*, para 5(4).

¹¹ *Zarb v Parry* [2011] EWCA Civ 1306, [2012] 1 WLR 1240.

¹² *LAM Group v Chowdry* [2012] EWCA Civ 505.

¹³ John Locke, *Second Treatise on Government* (1st Edn, Oxford: Blackwell, 1966) 47.

¹⁴ *Ibid* 336.

¹⁵ Rosemary Auchmuty, *Not just a Good Children’s Story: A Tribute to Adverse Possession* [2004] Conv 293, 296.

Netter¹⁶ accurately encapsulate the practical benefits of ensuring land is not neglected, arguing that adverse possession maintains economic efficiency, is justified by moral utilitarianism, and fulfils a genuine housing need for individuals and families. Therefore, even in a modern world where the majority of land across the UK is registered and maintained in theory, adverse possession still ensures that such land is not neglected in practice.

However, the recent decision in *Baxter v Mannion*¹⁷ has threatened the survival of adverse possession, as it has confirmed that lenient statutory protection is no longer to be afforded to possessors. In this judgement, the residual statutory protection safeguarding possessors was creatively ‘subverted’,¹⁸ as although the landowner, Mr Mannion, failed to challenge the adverse possession claim within the statutory 65-day time limit, he was able to maintain ownership of his land. In reaching this decision, the Court of Appeal held that the Schedule 6 rules protecting possessors are not absolute, as, after the title was acquired by the possessor, it was quickly ‘rectified’ on the register and returned to Mr Mannion. The Court justified this radical circumvention of the statutory protection by concluding that Parliament could not have possibly intended for landowners to lose their property due to the late submission of a form. This decision consequently demonstrates that not only does Schedule 6 make it difficult for possessors to acquire title, but that it also does not even guarantee effective protection for newly-established titles following a successful adverse possession application.

Therefore, the law of adverse possession in its current form requires stringent clarification and reform, though it remains difficult to determine which direction the law should now proceed in. I would argue – in line with Dixon – that it remains best to view adverse possession as a concept of ‘incontrovertible logic’.¹⁹ It serves a practical and important function in reducing land neglect, an issue that is not resolved by increasing the incidence of land registration. However, to ensure that adverse possession remains both relevant and practically applicable in modern law, the provisions under Schedule 6 regarding the

¹⁶ Jeffrey Netter, *An Economic Analysis of Adverse Possession Statutes* (1986) 6 Int'l Rev L & Econ 217, 220.

¹⁷ *Baxter v Mannion* [2010] EWCA Civ 120, [2011] 1 WLR 1594.

¹⁸ Neil Cobb and Lorna Fox, *Living outside the system? The (im)morality of urban squatting after the Land Registration Act 2002* (2007) 27(2) LS 256.

¹⁹ Martin Dixon, *Adverse Possession and Human Rights* [2005] Conv 345, 347.

application process and exceptions from this procedure must be upheld more rigidly.

I am aware that other academics, such as Gray and Gray,²⁰ consider it ‘increasingly strange’ that adverse possession still has relevance in a modern society.²¹ I am further conscious that this viewpoint, essentially advocating an abolishment of adverse possession, appears to have been bolstered by parliament following the introduction of section 144(7) LASPO Act, which makes squatting whilst trespassing a criminal offence.²² This confuses the law regarding adverse possession, since most possessors initially enter as trespassers. However, the recent decision in *Best*²³ has demonstrated that section 144(7) did not impliedly repeal or circumvent the law on adverse possession. This comes as a relief, as a decision to the contrary decision could have resulted in adverse possession being abolished indirectly.

Overall, it remains clear that the LRA reforms have severely limited the statutory protection afforded to adverse possession, making it a vulnerable concept within modern land law. Therefore, both adverse possession as a concept and adverse possessors as individuals require stronger statutory protection, to ensure that the doctrine can continue to serve a practical and useful function. If legislators were to focus more attention on improving and utilising the law of adverse possession, as opposed to diminishing or abolishing it, a more effective law could soon be established.

Yours faithfully,

Yui Nga Natalie Tsang

²⁰ Kevin Gray & Susan Francis Gray, *Elements of Land Law* (5th Edn, Oxford University Press, 2008) 24.

²¹ *Ibid* 377.

²² Legal Aid, Sentencing and Punishment of Offenders Act 2012, s144(7).

²³ *R (Best) v Chief Land Registrar* [2015] EWCA Civ 17, [2016] QB 23.