

CHAPTER SIX

Adverse Possession

The Origins of Adverse Possession

[6:01] Adverse possession allows a person who has been in possession of land for a specified period of time, who has no interest in land, to adversely take the interest in the land if they fit within a number of limitations. The Statute of Limitations 1957 governs the law of adverse possession. The concept of adverse possession came about for a variety of reasons. One such reason is what was known as ‘the quieting men’s titles’. This is the idea that where a squatter was allowed to take an interest in land, this would prevent the back log of claims in the land which may be decades or even centuries old, where evidence of such claims has been lost. Also it was felt that an owner has to take reasonable responsibility to protect their title in land and the law provides numerous avenues through which title can be protected. If after a reasonable period of time, a landowner has not protected their interest, it should not be the State who offers a continuous and everlasting protection. The Grand Chamber of the European Court on Human Rights had to consider whether the doctrine of adverse possession infringed the European Convention on Human Rights¹. The argument was that adverse possession involved a deprivation of possession which wasn’t adequately safeguarded by procedural measures. The Grand Chamber found that the correct balance existed between the ‘peaceful enjoyment’ of possessions and the demands of the public interest.

The Statute of Limitations

[6:02] Section 13(2) of the Statute of Limitations 1957 requires that a squatter must be in adverse possession of land for 12 years before they attain rights in the property. If the squatter is on land owned by the State the limitation period is 30 years. If the land is foreshore the limitation period is 60 years. The general rule is that the limitation time begins to run from the date that the squatter enters into possession of the land.

Knowledge of the dispossessed or squatter

[6:03] Adverse possession can occur without the knowledge of the landowner. In fact it can occur without the knowledge of the squatter. In **Murphy v Murphy**² two sons and a wife were left land in a three parts. It was not realised that the wife was left any interest in the land. One of the sons bought the other out and took possession of the entire land as he was acting under the belief that he now held the interest in the entire land. The wife/mother died and left her entire estate to the brother who had sold his interest in land. Upon realising that this meant he gained the mothers interest in the aforementioned land he sought to take this land into his possession. However the other brother argued that he held the land in adverse possession. It was decided that it was not relevant that the brother who had been in possession of the land did not know he was in adverse possession. It was also held that even though the mother/landowner did not know about her rights in the land, time still began to run. Under section 14(1) if the

¹ *JA Pye (Oxford) Ltd v United Kingdom* (2007) 46 EHRR 1083

² *Murphy v Murphy* [1980] IR 183

Statute of Limitations, the limitation period begins to run the moment the landowner has been dispossessed of the land.

Disability

[6:04] If a landowner is acting under some form of a disability, then the running of the limitation period will not start to run, or will be postponed until they are no longer acting under that disability.

Fraud

Section 71 (1) of the Statute of Limitations 1957 states as follows:

'Where, in the case of an action for which a period of limitation is fixed by this Act, either –

(a) the action is based on the fraud of the defendant or his agent or of any person through whom he claims or his agent or

(b) the right of action is concealed by the fraud of any such person

the period of limitation shall not begin to run until the plaintiff has discovered the fraud or could with reasonable diligence have discovered it.

Mistake

[6:05] A mistake will not generally stop time from running under the Statute of Limitations, but section 72(1) creates exceptions to this stating that time will not begin to run (a) until the plaintiff has discovered the mistake or (b) if they could with reasonable diligence have discovered the mistake. The *Murphy* decision above is authority for the fact that this provision will not apply where a land owner is not aware of her rights over property.

The Requirement of Adverse Possession/Meaning of Possession and Animus Possidendi

For the doctrine of adverse possession to be recognised by a court certain elements must be present: (i) Possession; (ii) adverse (iii) animus possidendi or discontinuance; and (iv) successive adverse possessors.

(i) Possession

[6:06] Section 18(1) of the Statute of Limitations, 1957 provides that 'no right of action to recover land shall be deemed to accrue unless the land is in the possession (in this section referred to as adverse possession) of some person in whose favour the period of limitation can run.' So a squatter who is claiming they satisfy the limitation period will have to have possession of the land. The Irish High Court in *Dunne v Iarnrod Eireann*³ cited with approval the following statement or suggestion of what 'possession' is.

³ *Dunne v Iarnrod Eireann* [2007] IEHC 314, unreported, High Court, Clarke J., September 7 2007

[6:07] Factual possession signifies an appropriate degree of physical control. It must be a single and conclusive possession, though there can be a single possession exercised by several persons jointly. Thus an owner of land and a person intruding on that same land cannot both be in possession of the land at the same time. The question of 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.⁴

If the permission of the landowner is sought by the squatter or possessor then this will result in the possession no longer being adverse and so the doctrine will not apply.⁵

(ii) Adverse

[6:08] The possession that a squatter takes over land must be adverse to the landowner. If the squatter gets permission to be on the land or has acknowledged the landowner's title then that possession will not be adverse. If a squatter asks a landowner if they own land and the landowner is ambivalent as to whether they are the owner or not, this may give rise to adverse possession. In *Battelle v Pinemeadow Ltd*⁶ the plaintiff owned a plot of land and had enquired with the owner of neighbouring land whether a piece of overrun land at the boundary of the two properties was owned by the neighbour. The neighbour said he didn't know if he owned it, but that they weren't interested in the piece of land anyway. The plaintiff took possession of the land, cleared it up and used it for over 20 years. The defendant then bought the neighbour's plot of land and on realisation that their predecessors in title, in fact, had ownership of the former overrun land at the boundary of the two properties, they tried to take possession of it. The plaintiff argued that he had a right to the land through adverse possession while the defendant argued that adverse possession didn't occur as the plaintiff had been using the land with the permission of their predecessor in title and permission would negate the idea that the land had been held adversely. The court decided in favour of the plaintiff and held that an owner saying that they doesn't know if he owns land, and doesn't care anyway cannot amount to permission to use land.

(iii) *Animus Possidendi* or Discontinuance

[6:09] If a squatter is claiming adverse possession, they must prove that they intended to possess the land to the exclusion of all others; otherwise known as *animus possidendi*. This means that the squatter must discontinue or dispossess the landowner's use, before the limitation time will begin to run. The squatter does not have to have knowledge of the title which they are dispossessing; they could be mistakenly occupying the land under the presumption that they have a right to possess it as arose in *Murphy v Murphy*⁷ above. In the course of that decision Kenny J gave a description of adverse possession:

Adverse possession means possession of the land which is inconsistent with the title of the true owner: this inconsistency necessarily involves an intention to exclude the true owner, and all other persons, from enjoyment of the estate or interest which is being acquired.

Retention for future use

[6:10] There is some conflict as to whether land which has been purchased by a landowner for some future use, but has not yet been used for that purpose, could be taken into adverse

⁴ *Powell v McFarlane* (1977) 38 P. & C.R. 452

⁵ *Doyle v Neill* [1995] IEHC 4

⁶ *Battelle v Pinemeadow Ltd* [2002] IEHC 120

⁷ *Murphy v Murphy* [1980] IR 183

possession if the use of the squatter/occupier of the land is not inconsistent with that intended future use.

*Leigh v Jack*⁸

[6:11] This case sets out the principle that if a landowner held land and intended using it for a future purpose that a squatter on that land would have to hold the land in possession in a manner which was inconsistent with that future intended purpose. Leigh sold his interest in a plot of land to Jack and Jack built a factory on this plot of land. Leigh owned the adjoining land and had the future intention of building a road on a piece of land close to Jack's plot. Jack began to use this adjoining land and even fenced off parts of it, he continued to be in possession of this part of land for almost 20 years. Leigh attempted to regain possession of the land, and Jack argued that he had acquired the land through adverse possession. The Court stated that Jack had not dispossessed Leigh as his acts of possession on the land had not interfered with Leigh's future intended use of the property nor were they inconsistent with it: therefore he lacked *animis possidendi*.

This test laid down in *Leigh v Jack* has been applied in this jurisdiction in *Cork Corporation v Lynch*⁹

In England & Wales the House of Lords abandoned the decision of *Leigh v Jack* in *J.A. Pye (Oxford) Ltd v Graham*¹⁰ where Browne-Wilkinson LJ stated at page 438:

The suggestion that the sufficiency of the possession can depend on the intention not of the squatter but of the true owner is heretical and wrong. It reflects an attempt to revive the pre-1833 concept of adverse possession requiring inconsistent user.

...

[6:12] The highest it can be put is that, if the squatter is aware of a special purpose for which the paper owner uses or intends to use the land and the use made by the squatter does not conflict with that use, that may provide some support for a finding as a question of fact that the squatter had no intention to possess the land in the ordinary sense but only an intention to occupy it until needed by the paper owner. For myself I think there will be few occasions in which such inference could be properly drawn in cases where the true owner has been physically excluded from the land. But it remains a possible, if improbable, inference in some cases.

This overruling of the *Leigh* decision raises doubts about the persuasiveness of Irish cases that followed it. This doubt is confirmed in the case discussed below.

*Seamus Durack Manufacturing Ltd v Considine*¹¹

[6:13] Barron J in this case somewhat limits the decision of *Leigh v Jack* in Ireland. Similar facts were present in this case. The defendant gained the right to use a shed on the plaintiffs land for the life of someone else. He not only used the shed, but also used the surrounding land and placed a cattle trough on it and he was in possession of the land for more than 12 years. The plaintiff then tried to remove the defendant from the land arguing that he had a future intended

⁸ *Leigh v Jack* (1879) 5 Ex D 264

⁹ *Cork Corporation v Lynch* [1995] 2 ILRM 598

¹⁰ *J.A. Pye(Oxford) Ltd v Graham* [2003] 1 A.C. 419

¹¹ *Durack v Considine* [1987] I.R. 183; also for a more detailed discussion on the ramification of Pye see Lyall 'Land law in Ireland' 3rd edition, page 977–978

use for the land which had not been interfered with and appealed to the court to apply the case of *Leigh v Jack*.

[6:14] Barron J held that what is relevant in these adverse possession cases is the intention of the defendant/squatter and not, as suggested by *Leigh*, the intention for the future use of the land of the Plaintiff. Considine, the defendant, just had to show *animus possidendi* (i.e. that he intended to possess the land to the exclusion of all others). The intended future use of the land had never played a part in constructing that. Proving that a squatter has acted on the land in a manner that has not interfered with or was inconsistent with the owner's future use is not, on its own, sufficient to display *animus possidendi*. Barron J did hold that *knowledge* that the plaintiff had no current use for the land, but had a future use for it may lead to an inference that there was no intention present on behalf of the defendant to possess the land absolutely.

[6:15] It cannot be said that *Durack* is entirely accepted as the position in Ireland with regard to future used of land. *Leigh v Jack* was applied in *Dundalk UDC v John Conway*¹² and cited in *Fehan v Leamy*¹³. While in *Dunne v Iarnrod Eireann*¹⁴ Clarke J applied *Durack*. For this reason in approaching a problem question on this topic, both judgments should be considered.

The Law Reform Commission recommended the enactment of a statutory provision defining that adverse possession is possession inconsistent with the title of the true owner, not inconsistent with the true owner's intention.¹⁵ This statutory definition never came to fruition, but is a good definition to help understand the concept of possession.

Discontinuance

[6:16] A squatter can show that he discontinued the landowners use and enjoyment in property in order to claim adverse possession. *Dundalk UDC v Conway*¹⁶ is authority for the fact that if land is unable to be 'used or enjoyed' then it will not be possible to discontinue the use and enjoyment of land.

(iv) Successive adverse possessors

Section 18 of the Statute of Limitations stipulates that the land be adversely possessed for the limitation periods set out above; it does not demand that the same person be in possession of the property for the whole period. However if one party abandons possession, even if the next enters onto the land immediately afterward, the second possessor will not be able to make use of the time built up by the first.

Dispossessed landowner regaining interest

If the limitation period of 12 years, or 30 years in the case of land owned by the State, has not yet been met and the dispossessed landowner commences proceedings against the squatter or retakes possession of the land then the time limit will be reset.

[6:17] It has been accepted that a landowner can retake possession in the following ways:

¹² *Dundalk UDC v John Conway* Unreported, High Court, 15 December 1987

¹³ *Fehan v Leamy* [2000] IEHC 118

¹⁴ *Dunne v Iarnrod Eireann* [2007] IEHC 314, unreported, High Court, Clarke J., September 7 2007

¹⁵ Report on Land Law and Conveyancing Law: (1) General Proposals (LRC 30-1989), para 52-53

¹⁶ *Dundalk UDC v Conway* [1987] IEHC 3

- Visiting the land on a regular basis and ask for an item, such as cattle, to be removed from land¹⁷.
- Grazing horses on land or erecting some structures¹⁸

The following have been deemed to not be sufficient on their own to be considered retaking possession of land:

- A caretaker entering land a few times¹⁹
- Writing letters asserting title²⁰

[6:18] Before the limitation period has been reached, if a squatter makes some form of acknowledgement that the dispossessed landowner has better title than them, or if payment or part payment is made to the landowner then the limitation time will be reset and begins to run afresh. Section 58 of the Statute of Limitations requires that the acknowledgement be in writing.

The Effect on Title and the Concept of Parliamentary Conveyance

[6:19] Since 1833 if an owner has his land dispossessed in adverse possession his or her title is extinguished and they have no right of action to regain title or take possession of the land. If they do take possession of the land they will be deemed to be trespassing. The only way the squatter's rights may be dispossessed is by the doctrine of *jus tertii*, which is where a third party has some form of superior title.

Parliamentary Conveyance

Since the Real Property Limitation Act 1833 the judicial opinion on title of adversely possessed land was:

*The effect of the Act is to make a parliamentary conveyance of the land to the persons in possession after that period of twenty years [the old limitation period] has elapsed*²¹

[6:20] Originally the position was the squatter would receive the interest in the land by the parliamentary conveyance. The position now is that if land is successfully adversely possessed that the interest the squatter acquires is the fee simple subject to any superior interests. Referring to the title received by a squatter the Law Reform Commission puts forward the proposition that "there is no doubt that, whatever may be the effect of the Limitation Acts, the squatter acquires a title which is as good as a conveyance of the freehold."²²

Adverse Possession of Leasehold Property

[6:21] Section 15(1) of the Statute of Limitations 1957 provides that where land is the subject of a lease, the doctrine of adverse possession can't be used by a squatter as a landlord until the termination of the lease. Time, for the purpose of the limitation period, will start to run against the landlord when the tenant's lease expires.

¹⁷ *Mulhern v Brady* [2001] IEHC 23

¹⁸ *Dunne v Iarnrod Eireann* [2007] IEHC 314, unreported, High Court, Clarke J., September 7 2007

¹⁹ *Ibid.*

²⁰ *Mahon v O'Reilly* [2010] IEHC 103; *Mt Carmel Ltd v Peter Thurlow Ltd* [1988] 1 WLR 1078

²¹ *Doe d Jukes v Sumner* (1845) 14 M & W 39

²² LRC, *Report on the Acquisition of Title by Adverse Possession*, (2002) p.10

In relation to leasehold lands, when a squatter displaces a tenant's interest in land, that interest in the land is not conveyed to the adverse possessor.

[6:22] In the English Court of Appeal decision of **Tichborne v Weir**²³ the court held that the dispossessed interest holder's title was destroyed by adverse possession but it was not conveyed to the dispossessing tenant. The reason the interest wasn't conveyed is because the English courts have distinguished between adverse possession of leasehold and freehold property providing that a parliamentary conveyance of any interest in the land is not possible in relation to leasehold property. In England, when a tenant's land was dispossessed they could surrender the lease which allowed the landlord to take possession of the land rather than having to wait until the lease ended. A landlord can enforce the covenants in the land against the adverse possessor and forfeit the land for non compliance²⁴. A landlord does not have to allow an adverse possessor to stay on land under the terms of the original lease. It doesn't matter if the squatter is prepared to commit to the covenants of the leasehold agreement, or pay the rents, they can still be removed by forfeiture. Therefore adverse possession of leasehold lands can quite easily be displaced in England.

[6:23] However in Ireland this conclusion was rejected in *Perry v Woodfarm Homes Ltd*²⁵ where it was held that a dispossessed tenant could not terminate a lease through surrender or merger as the adverse possession had extinguished their interest in the land. The court accepted that a landlord could remove a squatter by forfeiture if they had not complied with the lease. In *Perry* Griffin J considered the different English and Irish authorities. Firstly on the issue of parliamentary conveyance he accepted the distinction which had arisen in England between leasehold and freehold land²⁶. In relation to adverse possession of leasehold land he stated:

... though there is no statutory transfer or conveyance to the squatter, what the squatter... has gained is the right to possession of the premises in dispute against the fee simple owner ... for the unexpired portion of the term, subject to the risk and the possibility of a forfeiture. During the currency of the term limited by a lease, the lessor has no right to possession of the demised property unless the lessee has incurred a forfeiture for the breach of one or more of the covenants in the lease... The ousted lessee continues to be contractually liable to the lessor upon the conveyance of the lease'

If no forfeiture occurs, the squatter remains protected until the expiration of the lease.

[6:24] The above discussed problem will not arise in relation to registered land as s. 49(4) of the Registration of Title Act 1964 allows a squatter, who holds land in adverse possession to be registered as the owner of registered land after 12 years of adverse possession. So on dispossession of a tenant an adverse possessor can have their interest in the land registered.

Past Paper Questions

MARCH 2011 QUESTION FIVE

In the Irish case of *Dunne v Irish Rail and Anor* [2007] IEHC 314, Clarke J stated that '...the nature of the possession which must be established is one which must be objectively viewed by reference to the lands concerned and the type of use which one might reasonably expect a typical owner to put those lands to'.

²³ *Tichborne v Weir* (1892) 67 LT 735

²⁴ *Fairweather v St Marylebone Property Co Ltd* [1963] A.C. 510

²⁵ *Perry v Woodfarm Homes Ltd* [1975] I.R. 104

²⁶ *Tichborne v Weir* (1892) 67 LT 735

Critically analyse this statement with reference to relevant case law.

OCTOBER 2010 QUESTION TWO

'In determining whether the possession of land is adverse for the purposes of the Statute of Limitations, the intentions of the legal owner are irrelevant – the only intention which matters is that of the squatter.'

Critically analyse this statement, supporting your answer with relevant legal authority.

OCTOBER 2009 QUESTION SIX

- (a) Explain the role that the Statute of Limitations 1957 (sections 13 and 24 in particular) has in regulating the law on the adverse possession of land.

OCTOBER 2007 QUESTION THREE

In 1993, Vincent, a farmer, sold one of his fields to Mount Tara Developments Ltd. The field lay adjacent to a single carriageway road, which the local authorities had signalled would soon be upgraded to motorway status. Mount Tara Developments bought the land with the intention of building a motorway service station on the site. On the day of purchase, Mount Tara Developments wrote to Vincent asking him to remove his cattle from the field. They also asked him to place one of their advertising notices on the gate nearest to the roadway. Vincent never got round to those tasks. In fact, as the motorway development continued to encounter delays related to environmental and heritage concerns, Vincent continued to graze his cattle on the field.

In 1999, Vincent decided to leave farming. He sold his cattle and retired to Spain. At his farewell night in the local pub, Vincent agreed to lease the field adjacent to the roadway to his neighbour, and local businessman, Billy. Billy, who had always fancied himself as a farmer, decided to use the field to grow-and later sell-strawberries. Billy built a number of polythene sheds on the land in order to facilitate this commercial enterprise.

In 2003, the chief executive of Mount Tara Developments happened to be driving by the strawberry beds. He stopped his car and looked in over the fence but as he attempted to open the gate, one of Billy's employee's ran towards him and in an aggressive tone told him to 'clear off'. A week later, Mount Tara Development's solicitors wrote to Billy requesting that he leave the field immediately. In reply, Billy suggested that he 'probably would leave' if the road was upgraded because, he wrote, 'the noise and pollution emanating from the motorway would destroy my crops'.

Earlier this year, work finally began to upgrade the road but Billy has had a change of heart, and wants to remain on the land.

Advise Mount Tara Developments Ltd.

MARCH 2007 QUESTION THREE

- (b) Discuss the basis and operation of the doctrine of adverse possession in Irish law.

OCTOBER 2006 QUESTION FOUR

QUESTION FOUR

In July 1992, Peter, an animal lover, bought the freehold to a cottage just outside of Limerick city. In August 1992, Peter bought some sheep and goats and kept them in an adjacent field that appeared unfarmed. Peter's neighbour, Danielle, owned the field. Danielle is a business executive and, at the time, was away three weeks in every month. When next home, in September 1992, she noticed the sheep and goats because they had broken into her property through a fence in the field. She decided to visit Peter to find out what was going on. Peter explained his

needs and Danielle agreed orally that Peter could leave his animals to graze on the field for an initial six-month period. On completion of the six months, Peter wrote to Danielle asking whether 'the present arrangement could continue'. Danielle refused the request because, she claimed, she had begun the process of seeking planning permission to build upon the land. Danielle never actually got around to applying for planning permission. Peter continued to use the field, upon which his sheep and goats roamed free among the weeds, though he did make an effort to repair the boundary fences. In 1994, Peter realised that there was money to be made from the sheep and goats. In the winter of that year, he fully repaired the boundary fences, installed a new gate and erected a shed on the field for the shelter of the sheep and goats. To this day, the regularly sells lambs and goat's milk at local markets.

Danielle has recently married a property developer who has told her that the site adjacent to her property is valuable. In June 2006, Danielle wrote to Peter in a letter entitled 'notice to quit' informing him that she was applying for planning permission but that he could continue to use the land for the time being. Peter replied in writing to Danielle telling her bluntly, 'I will not be evicted from my land. You never had a problem with me before and I often saw you buying my goat's milk products at the local organic farm market'.

Advise Danielle.

See also

- MARCH 2009 QUESTION FIVE
- OCTOBER 2008 QUESTION FIVE
- MARCH 2008 QUESTION THREE

MARCH 2013 QUESTION SEVEN