

Criminal Squatting and Adverse Possession: The Best Solution?

Martin Dixon*

Section 144(1) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, LASPOA 2012, created the offence of squatting in a residential building. It entered into force on 1st September 2012 and there is no exemption for persons already squatting on that date. The first person was arrested on 2nd September 2012, convicted, and sentenced to 12 weeks imprisonment.¹ Up to September 2013, in the London Metropolitan Police area, 247 people had been arrested, 112 charged, 101 convicted and 22 imprisoned.² While it is questionable whether this measure was actually necessary to enhance the protection given to home owners when faced with stubborn squatters,³ it was supported by politicians of all persuasions.⁴ Importantly, it does not criminalise *all* residential squatting and says nothing about trespass onto commercial or agricultural premises. Thus, the offence is not committed by a person who was a licensee or tenant when they entered the premises and who subsequently holds over,⁵ it applies only to trespass in a “residential building” (and not, for example, to land in the curtilage of a building); and only if the person is “living” in the building or “intends to live there for any period”.⁶ In other words, simply being on residential property does not

Queens’ College, Cambridge.

¹ The defendant pleaded guilty and the matter was reported widely: see e.g. <http://www.bbc.co.uk/news/uk-england-london-19753414>.

² http://www.met.police.uk/foi/pdfs/disclosure_2014/january_2014/2013120000844.pdf. Other forces have also disclosed figures under Freedom of Information Act request.

³ See letter, *The Guardian*, Sunday 25 September 2011 from 160 practitioners and academics.

⁴ 13 MPS voted against, after 90 minutes of debate.

⁵ LASPOA 2012, s.144(1)(a).

⁶ LASPOA 2012, s.144(1)(c).

mean an offence is committed and that simple fact cannot be taken as evidence that the squatting was “criminal”. Further, and perhaps as a reflection of the haphazard way in which the offence came to be created, LASPOA 2012 does not tell us how, if at all, the commission of this offence interacts with the law of adverse possession. If a person commits the criminal offence, does this prevent them acquiring title by adverse possession, assuming all the other elements of a possessory claim are established? This was the issue in *Best v Chief Land Registrar and Secretary of State for Justice*.⁷

Mr Best had taken possession of a rundown dwelling in 2000 and applied to be registered as proprietor in November 2012 in pursuance of the scheme in Schedule 6 to the Land Registration Act 2002. This requires ten years adverse possession by the possessor immediately prior to the application for registration, but the application triggers the provisions of the Schedule whereby the existing registered proprietor has two years to evict the possessor unless one of the three exceptions applies.⁸ There is no automatic acquisition of title now that the LRA 2002 is in force, unless the claimant had met all of the conditions for success (including completion of a full 12 years adverse possession under the Limitation Act 1980) prior to the entry into force of the 2002 Act. However, Best never made it as far as triggering Schedule 6 because the Chief Land Registrar cancelled his application on the basis that title could never be acquired by virtue of a criminal act. This was based on the Land Registry’s own assessment of the affect of LASPOA 2012 on the law of adverse possession, announced shortly after the entry into force of LASPOA 2012.⁹ The only avenue open to Best in such circumstances was judicial review of the Registrar’s decision to cancel his application and so the matter came before Ouseley J in the administrative court.

⁷ [2014] EWHC 1370 (Admin).

⁸ Land Registration Act 2002, Schedule 6 paragraph 5.

⁹ *Landnet*, No.32 October 2012.

The Registrar's decision to nail the colours to the mast by asserting that "criminal squatting" under LASPOA 2012 necessarily prevented the acquisition of title by adverse possession was a brave one. First, LASPOA 2012 is utterly silent on the point and there is no evidence at all that the matter was even considered during the relatively swift introduction of the offence. Parliament appears to have been more concerned to criminalise the behaviour of residential squatters than work out the consequences. At the very least, the Chief Land Registrar might have thought that the omission was material and thereby erred on the safe side by maintaining the status quo rather than rushing to judgment a bare month after the offence came on stream. Secondly, in similar vein, the Registrar might have considered whether the "comprehensive and carefully balanced statutory answer"¹⁰ to a claim to title based on adverse possession found in the LRA 2002 was intended to be disturbed by a side wind, especially given the legislature's silence. Thirdly, and perhaps most surprisingly, how did the Chief Land Registrar know that Best had committed a criminal offence? As noted, the offence is not committed simply by being in a residential building, and the presumption that Best must have been guilty offends against some fairly fundamental tenets of the common law. While it might, but only might, have been the case that a person convicted of "criminal squatting" could not thereafter make a claim based on adverse possession during the period of criminal activity, there is nothing in LASPOA 2012 or anywhere else that justifies the Registrar treating an applicant as if they had committed such an offence, even more so by administrative determination. In the result, Ouseley J decided robustly and as a matter of principle, that the potential commission of an offence under LASPOA 2012 did not prevent an applicant establishing title by adverse possession. Consequently, Best can now proceed under Schedule 6 LRA 2002, although given the publicity this case has generated it seems

¹⁰ *Best* at [53] per Ouseley J.

likely that there will be an objection to his registration sufficient ultimately to deny him title.

The Registrar's position was based on *R (Smith) v Land Registry*,¹¹ a decision of HHJ Judge Pelling sitting as a High Court Judge, which indicted that an unlawful act (obstruction) could not support a claim to adverse possession of a highway. Ouseley J was urged to follow this. The judge noted, however, that the decision denying Smith's claim had been upheld by the Court of Appeal on different grounds (that is, that a highway was *ipso facto* incapable of adverse possession – *R (on the application of Smith) v Land Registry*¹²) and that there was persuasive (but not binding) House of Lords authority which indicated that, in some circumstances, an unlawful act was no bar to establishing a proprietary right. So, in *Bakewell Land Management Ltd v Brandwood*,¹³ the House had decided that the offence of driving across a common under s.193(4) of the Law of Property Act 1925 did not prevent the acquisition of an easement of way by prescription where the very act complained of was the basis of the prescriptive claim. Thus, while Ouseley J recognised that he could not depart from *Smith* (at first instance) unless he had compelling reasons to do so, he was of the view that such compelling reasons existed. In essence, in the absence of any indication in LASPOA 2012 itself, or the materials which led to the enactment of s.144, it boiled down to a question of principle. There was, of course, the “general and fundamental principle of public policy that a person should not be entitled to take advantage of his own criminal acts to create rights to which a Court should then give effect”.¹⁴ But this was not “an absolute rule or principle, unyielding to any circumstance. It is the starting point and not necessarily the end

¹¹ [2009] EWHC 328 (Admin).

¹² [2010] EWCA Civ 200, [2010] 3 WLR 1223.

¹³ [2004] UKHL 14, [2004] 2 AC 519.

¹⁴ *Best* at [44].

point”.¹⁵ Indeed, in the context of adverse possession, tortious acts (trespass) were by definition capable of supporting a claim to title and many cases of adverse possession will have begun with an act apparently contrary to the criminal law (breaking and entering perhaps, as may have occurred in *Lambeth LBC v Blackburn*¹⁶). The question was, therefore, whether LAPSOA 2012 was intended to modify the common law concept of “adverse possession” so that acts which constituted the new offence now fell outside the doctrine, when tortious and other criminal acts fell within it.¹⁷ Ouseley J could not be persuaded that LAPSOA 2012 had this effect, especially because the “public interests which lie behind enabling a trespasser to acquire title by adverse possession, and, after a shorter period to apply for registration as the proprietor of registered land are clear”.¹⁸

At the doctrinal level, Ouseley J’s reasons for departing from *Smith* (at first instance) and favouring *Bakewell* appear sound. The ratio of *Smith* in the Court of Appeal is that it is impossible *per se* to acquire title to a public highway and the question of the illegality (or otherwise) of the possessor’s acts were immaterial to this outcome. At first instance HHJ Pelling did not have the benefit of the full argument presented to Ouseley J, and a different statute was in play. However, it is also clear that Ouseley J has more fundamental objections to the first instance decision in *Smith*: “[t]he issue is I think more complex than the simple application of one fundamental principle of public policy. I do not think that the simple principle that where the act of possession is an offence, no adverse possession can arise, is correct. It ignores the countervailing public interest, and misses the point of what is, to my mind, by far the strongest authority: *Bakewell*”.¹⁹ Indeed, *Bakewell* demonstrates that

¹⁵ *Best* at [45].

¹⁶ [2001] EWCA Civ 912, (2001) 82 P&CR 494.

¹⁷ For example, acts contrary to Criminal Law Act 1977 s.7.

¹⁸ *Best* at [50].

¹⁹ *Best* at [67].

criminal unlawfulness is not necessarily a bar to a proprietary claim. So, when the relevant act (squatting) is unlawful only because of the absence of the right which the relevant act is attempting to establish, it can yield to countervailing public policy considerations. Formally, Parliament “must have thought that criminalising trespass therefore would have no effect on the operation of adverse possession for registered, and indeed unregistered land”.²⁰ After all, the point of LAPS OA 2012 was to provide a quick remedy for house owners faced with stubborn squatters. It was not, *per se*, to undermine established doctrines of property law.

At the more general level, *Best* reminds us that “the application of the *ex turpi causa* maxim depends on context”²¹ something which is not new in matters of real property but worth saying nonetheless: *Bakewell and Tinsley v Milligan*.²² Further, and of considerable practical import, *Best* recognises the policy value in accepting some claims to title based on adverse possession; a value that is strong enough to require explicit Parliamentary authority before the delicate compromise found in the LRA 2002 can be unbalanced. Of course, LAPS OA 2012 could be amended to ensure that a conviction, or even the possibility of a conviction, bars a claim to adverse possession, and given that there are attempts to include commercial premises within its ambit, this possibility cannot be discounted. But as things stand, *Best* resolves an ambiguity left by LAPS OA 2012 and, no doubt, will be greeted with joy and outrage in equal measure. The reaction of the Land Registry is unknown.

Martin Dixon

Queens’ College, University of Cambridge.

²⁰ *Best* at [80].

²¹ *Best* at [33].

²² [1994] 1 AC 340.