Adverse Possession and Leasehold Titles

As we have seen in Section 3 of this chapter, from the moment a claimant (C) moves into adverse possession he or she obtains a freehold title. This is so even if the land is leased at the time at which C commences adverse possession. In that case, it is the party who holds the lease who has a right to exclusive possession of the land, and so it is that party (and not the holder of the freehold title) who has the right to remove C from the land. The limitation period, therefore, begins to run against the party with the lease, and not against the landlord. At the expiry of the term of the lease, (even if it is many years after C first came on to the land), the landlord can assert his or her freehold title against the adverse possessor. To defeat the landlord's title, a fresh claim to adverse possession is required.

The additional complexity of adverse possession in the leasehold context has given rise to a number of questions regarding the nature of the right acquired by the adverse possessor, the extent to which an estate is extinguished by the operation of limitation rules, and the relationship between the adverse possessor and the freeholder. The specific context in which these questions have arisen is the surrender of a lease by a tenant who has lost his or her title by adverse possession: is such a surrender (i.e. a voluntary early termination of the lease by the party with the lease: see Chapter 19, section 3.3) effective to enable the landlord immediately to assert its freehold title against the adverse possessor, without the need to wait for the expiration of the term of the lease? Different answers to this question have been given in unregistered land, and under each of the LRA 1925 and the LRA 2002.

1. Unregistered Land

In unregistered land, the possibility of surrender of a lease is met with the immediate objection that the leasehold title has been extinguished by adverse possession. It therefore appears illogical to suggest that the lease can be surrendered. Despite this apparent difficulty, the House of Lords has held that surrender was effective.

Fairweather v St Marylebone Property Co Ltd
[1963] AC 510, HL
Facts: The freeholder of adjoining plots of land built a shed across the boundary of the two plots. The entrance to the shed was on No 311, but 75 per cent of the shed was on No 315. Long leases were granted of both plots. It was accepted that the owner of No 311 had obtained title to the land on No 315 occupied by the shed through adverse possession. The tenant of No 315 surrendered the lease and the freeholder sought to assert its title against the adverse possessor.

Lord Radcliffe
At 538–40
On one view, which seems not an implausible one having regard to the structure of the respective sections, the right or title extinguished is coterminous with the right of action the barring of which is the occasion of the extinguishment. This would mean that, when a squatter dispossesses a lessee for the statutory period, it is the lessee's right and title as against the squatter that is finally destroyed but not his right or title as against persons who are not or do not take through the adverse possessor. On the other view, that upon which the appellant's case depends, the lessee's right and title to the premises becomes extinguished for all purposes and in all relations, so that as between himself and the lessor, for instance, he has thereafter no estate or interest in the land demised. [. . .]

I think, therefore, that it is a false approach to the provisions of the Limitation Acts to regard the "extinguishment of title" as extinguishing more than the title of the dispossessed against the dispossessor. Where the person dispossessed is a lessee, I do not think it right to try to build legal conclusions on the assumption that the nexus between him and his lessor has been destroyed; or, consequently, that, once adverse possession has been completed, he ceases to hold the term of years and estate in it granted to him by his lessor. [. . .]

I conclude, therefore, that the effect of the "extinguishment" sections of the Limitation Acts is not to destroy the lessee's estate as between himself and the lessor; and that it would be incorrect to say that if he offers a surrender to the lessor he has nothing to surrender to him in respect of the land in the possession of the squatter. *Nemo dat quod non habet*, and I daresay that he does not, but, as Pearson L.J. indicated in the Court of Appeal, the question here is not whether there are any exceptions from that general principle but whether, as a principle, it is relevant to the situation that we have here. In my opinion it is not.

Hence, the extinguishment of title operated only as regards the relationship between the tenant and the adverse possessor. Because the lease continued in existence between the tenant and landlord, the surrender of the lease was effective to enable the landlord immediately to assert the freehold title against the adverse possessor.

2. The LRA 1925

As for registered land, we noted in Section 5.2 that, under s 75 of the LRA 1925, title was not extinguished by adverse possession, but instead was held on trust. By s 75(2), the adverse possessor was then entitled to apply to be 'registered as proprietor thereof'. A question arose as to what estate the adverse possessor should be registered with: the freehold title acquired by the inception of adverse possession, or the leasehold estate held on trust by s 75(2)? This, in turn, appeared to affect the issue of the effectiveness of a surrender of the lease.

In the following case, Mrs David was the registered proprietor of a long lease granted by Spectrum Investment. The defendant had been in adverse possession against Mrs David and, following the expiration of the limitation period, applied for registration. The Registrar closed Mrs David's title and registered the defendant as proprietor of a new leasehold estate. In these circumstances, a surrender by Mrs David was considered to be ineffective. Browne-Wilkinson J held that, because the surrender of a lease is a registered disposition, it was clear that, once Mrs David's title had been closed, she lacked the ability to execute a surrender. Browne-Wilkinson J was satisfied that the registration of the defendant with a lease had been correct.

Spectrum Investment Co v Holmes
[1981] 1 WLR 221, HC

Browne-Wilkinson J
At 230

To my mind the words are clear and unequivocal: the squatter claims to have acquired a title to "a registered estate in the land" (i.e. the leasehold interest) and applies to be registered as a proprietor "*thereof*" (my emphasis). Therefore under section 75 (2), references to the squatter having acquired title to a registered estate must include the rights which under the Limitation Act 1939 the squatter acquires in relation to leasehold interests. Section 75 (2) then refers to the squatter applying to be registered as proprietor "thereof." This word can, in my judgment, only refer back to the registered estate in the land against which the squatter has acquired title under the Act of 1939, i.e. the leasehold interest. The clear words of the Act therefore seem to require that, once the 12 years have run, the squatter is entitled to be registered as proprietor of the lease itself, and is bound to be so registered if he applies for registration. It follows that in my judgment the defendant (as the squatter) is correctly registered as proprietor of the lease itself in accordance with the clear requirements of section 75. If that is right, Mrs. David cannot be entitled to rectification of the register as against the defendant, and she can therefore never get into a position in which she is competent to surrender the lease to the plaintiff.

Cooke identified difficulties with this result.

Cooke, 'Adverse Possession: Problems of Title in Registered Land' (1994) 14 LS 1, 9

The decision in Spectrum is unsatisfactory, while being correct on its facts, and has generated much academic

distress. So glaring an inconsistency with unregistered land is unfortunate in itself; from a practical point of view, it imposes on the parties a relationship of landlord and tenant which neither has chosen. It raises technical queries. What has happened, for example, to [the squatter's] independent fee simple, arising from his adverse possession of the land? He becomes the registered proprietor of the estate which the dispossessed owner held on trust for him; his fee simple has disappeared without trace.

Cooke argued that while *Spectrum Investment* was the correct decision on the facts, the registration of the adverse possessor with a leasehold title should not take place. She argued that the adverse possessor should be registered with a freehold title, to reflect the title acquired by possession. This prevented the relationship of landlord and tenant being forced upon the freeholder and adverse possessor.

In *St Marylebone*, Lord Radcliffe had also expressed doubt that the adverse possessor would be registered with the leasehold title.

Fairweather v St Marylebone Property Co Ltd
[1963] AC 510, HL

Lord Radcliffe
At 543
[. . .] the trust of the dispossessed owner's title under subsection (1) must somehow be reconciled with the provision under subsection (2) for the squatter to apply to register his own title, which would presumably be his independent possessory title acquired by the adverse possession.

If the adverse possessor is registered with freehold title, then, as in unregistered land, the leasehold title continues to exist as between the landlord and dispossessed tenant, enabling the effective surrender of the lease.

But Browne-Wilkinson J's analysis of s 75 of the LRA 1925 was supported in a subsequent decision.

Central London Commercial Estates Ltd v Kato Kagaku Co Ltd
[1998] EWHC 314

Sedley J
At [36]
To split the leasehold interest after 12 years' adverse possession into an element related entirely to the freehold and another related solely to the squatter, as is now known to happen with unregistered land, does not seem to me to marry up with either the purpose or the operation of section 75(1). The squatter, unlike an underlessee, has no legal relationship at all with the leaseholder during the 12 initial years of trespass (except in the negative sense that the leaseholder may at any time evict him and claim damages); and at the end of the 12 years, by operation of law, the leaseholder's right and title to do even this are extinguished wherever the Limitation Acts apply. At law the squatter is then in a position to make a good title, independent of the lease, although always subject to the freeholder's eventual reversion. In relation to a registered leasehold, however, section 75 lifts the extinguishing effect of the Limitation Act 1980 and substitutes a trust of the leasehold interest, benefits and burdens alike, from the moment of extinction of the leasehold title. The squatter becomes entitled, without regard to merits, to be placed in the same relationship with the freeholder as had previously been enjoyed by the leaseholder. The trust preserves not the squatter's common law title but a new statutory right to be substituted by registration for the leaseholder—carrying with it, as Mr Nugee accepts, an obligation to indemnify the leaseholder against outgoings. This is to all appearances a statutory conveyance of the entire leasehold interest.

In that case, the question that arose was whether a tenant in registered land who had lost its title by adverse possession could surrender the lease prior to the adverse possessor becoming registered and, therefore, while the s 75 trust remained in existence. This possibility had not arisen on the facts of *Spectrum Investment*,

although Browne-Wilkinson J had noted the possibility that the tenant may remain free to deal with the title during this period. In *Kato Kagaku*, the answer followed logically from the court's refusal to 'split' the estate. A surrender of the lease passed the leasehold title back to the freeholder, but subject to the adverse possessor's beneficial interest.

3. The LRA 2002

As regards claims to adverse possession under the 2002 Act, the position is placed beyond doubt. Title remains vested in the tenant unless and until the adverse possessor (C) successfully applies for registration under Sch 6. A successful application will result in C being registered as proprietor of the lease,[1] thus again removing the possibility of a surrender.

If C had completed 12 years of adverse possession before the coming into force of the LRA 2002, then whilst the s 75 trust no longer operates, C's position is protected. The transitional provision in Sch 12, para 18, confers on C an entitlement to be registered as the proprietor of 'the estate'. This appears to confirm the approach adopted in *Spectrum Investment* and *Kato Kagaku* in so far as C is entitled to be registered with the lease. Once registered, the factual position mirrors that in *Spectrum Investment* and therefore the possibility of a surrender by the dispossessed tenant is removed. Doubt may arise, however, as regards the position prior to registration. In the absence of a trust, there may be nothing to prevent the dispossessed proprietor executing a surrender of the lease.

1 Land Registration Act 2002, Sch 6, paras 4 and 7, both provide for a successful application to result in registration as proprietor of 'the estate'.