

Adverse Possession and the Transmissibility of Possessory Rights – The Dark Side of Land Registration?

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It is trite law that, if unregistered land is adversely possessed for a period of 12 years, the title of the paper owner is automatically barred under s.15 of the Limitation Act 1980. Where the land is registered, however, there is no automatic barring of title by adverse possession¹ – instead, after being in adverse possession for a minimum of 10 years,² the adverse possessor can apply to be registered as the proprietor in place of the registered proprietor of the land.³

Upon receipt of such an application, the Land Registry is obliged to notify various persons interested in the land, including the registered proprietor.⁴ Those persons then have 65 business days⁵ within which to object to the registration⁶ and, in the absence of any objection, the adverse possessor is entitled to be registered as the new proprietor of the land.⁷ In these circumstances, the registered proprietor is assumed to have abandoned the land. If, on the other hand, there is an objection, the possessor will not be registered as the proprietor unless he falls within one of the three exceptional grounds listed in paragraph 5, Schedule 6 to the Land Registration Act 2002, where: (1) it would be unconscionable for the registered proprietor to object to the application; (2) the adverse possessor is otherwise entitled to the land; or (3) if the possessor is the owner of adjacent property and has been in adverse possession of the subject land under the mistaken, but reasonable belief, that he is its owner. If none of these grounds apply, the adverse possessor will not be registered as the proprietor. The only saving is that, if his application for registration is rejected as a result of an objection and none of the three exceptions in paragraph 5, above, apply, he will be entitled to apply once again to be registered

¹ See, s.96 of the Land Registration Act 2002.

² The period is 60 years for Crown foreshore.

³ See, paragraph 1, Schedule 6, Land Registration Act 2002.

⁴ See, paragraph 2, Schedule 6, Land Registration Act 2002.

⁵ Although there is no provision to extend the time limit, there is power to order the rectification of the register for the purpose of correcting a mistake where, for example, adverse possession is not, in fact made out: *Baxter v Mannion* [2011] 1 W.L.R. 1594, (c.A.).

⁶ The objection is made by giving counter notice to the registrar requiring him to deal with the application under Schedule 6, paragraph 5 of the Land Registration Act 2002.

⁷ If the application relates to the whole of an existing registered title, the Land Registry will register the applicant as proprietor of that title. If, on the other hand, the application relates to part of an existing registered title, then the Land Registry will remove that part from the existing title and register the applicant as proprietor of that part under a new title number.

provided he remains in adverse possession for a further two years, and this time he will be registered as proprietor⁸ whether or not anyone opposes the application.⁹

Given, however, the very limited grounds under which an adverse possessor may be registered as proprietor in the event of an objection, is he not more likely to avoid the risk of applying for registration altogether if this would alert the registered proprietor of his existence and prompt opposition to the application? With an abandoned piece of land,¹⁰ perhaps the risk of an objection would be lower, but where the disputed land forms part of an occupied property,¹¹ the risk would surely be much higher, so much so as to discourage the adverse possessor from ever making an application to register after the requisite 10 years of adverse possession.¹²

Indeed, the incentive to “stay quiet” is made even more attractive given the principle of relativity of title in English property law and the possibility of the transmission of possessory rights between possessors creating, in effect, a “dark market” in possessory rights falling outside the registered land system. Although statistics are only available for the financial years 2008/09, 2009/10 and 2010/11, these show that the number of successful applications for adverse possession of land to the Land Registry in these years (where the land has already been registered and the application is to register the squatter as the new registered proprietor)¹³ were 1,111, 1,059 and 868, respectively.¹⁴ The Law Commission Consultation Paper, *Updating the Land Registration Act 2002*, (2016), No. 227, provides more recent statistics from the Land Registry.¹⁵ These indicate that, in the financial year 2014/15, only 749 applications for adverse possession were made under the new scheme introduced by the 2002 Act. In the period 1 April 2015 to 31 January 2016, the Land Registry received just 598 such applications under that scheme. This suggests a steady drop in the number of such applications brought under the 2002 Act over the last eight years.

⁸ The entitlement to be registered is subject to three exceptions where: (1) the applicant is a defendant in possession proceedings; (2) there has been judgment for possession given against him in the last two years; and (3) he has been evicted pursuant to a judgment for possession: see, paragraph 6, Schedule 6, Land Registration Act 2002.

⁹ See, paragraphs 6 and 7, Schedule 6, Land Registration Act 2002.

¹⁰ One can also envisage circumstances where it would be unlikely that the notification of the application would reach the registered proprietor – for example, where the proprietor was a company which had changed its registered office without informing the Land Registry of its new address for service.

¹¹ Although squatting in residential buildings is now outlawed under s.144 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, the offence only relates to a “building” and not its curtilage, so outbuildings, gardens, fields, etc., are not caught by the Act. But see also, *R (on the application of Best) v Chief Land Registrar* [2015] EWCA Civ 17, the Court of Appeal held that the criminality of trespass does not preclude a claim to adverse possession: see, M. Pawlowski, “Criminal Squatting and Adverse Possession: A Case of Interpretative Logic”, (2015) 24 Nott. L.J., 129.

¹² The Land Registry itself acknowledges that the 2002 Act “makes it more likely that a registered proprietor will be able to prevent application for adverse possession of their land being completed”: see, Practice Guide 4, *Adverse Possession of Registered Land*, updated 26 April 2016, para. 1.1,

¹³ There are no figures where the land concerned is unregistered and the application is to register the squatter as the first registered proprietor. One of the main reasons for this is that it is not unusual for these first registration applications to be made on more than one basis. Such applications, therefore, may not be recorded as being an adverse possession application.

¹⁴ See, Hansard, HC Deb, 12 September 2011, c1032W.

¹⁵ See, para. 17.7.

Relativity of title

One of the fundamental principles of English land law is that possession by itself is capable of giving a good title against the rest of the world except someone having a better legal right to possession.¹⁶ Thus, if a squatter's possession is disturbed by trespass or nuisance, he can sue on the strength of his own possession and does not have to prove his title.¹⁷

The principle that title to land is dependent on the better right to possession is embodied in our common law and, in particular, by the early decision of the Court of Queen's Bench in *Asher v Whitlock*.¹⁸ In that case, a Thomas Williamson had enclosed a piece of manorial waste and later built a cottage on it. He occupied the land until his death in 1860. By his will, he left the whole property, describing it as "a cottage and garden, in Keysoe Row, in which I now dwell" to his wife for life or until remarriage, remainder to his daughter in fee simple. After his death, the widow remained in possession with her daughter and, a year later, married the defendant. All three then lived at the property until the daughter's death in February 1863. On her death, the widow and defendant continued to reside on the premises until the widow's death in May 1863. The daughter's heir subsequently brought an action seeking to evict the defendant. The Court held that he was entitled to recover the whole property. As between these two rival claimants, the land belonged to the heir who could lay claim to the earlier and, therefore, better right to possession.

The notion that title is not absolute but relative has important consequences where a claim to adverse possession is founded on successive adverse possessors who may each be claiming title based on their own occupation of the land. Thus, if a trespasser (T) takes possession of a plot of land belonging to the paper owner (O), then as between O and T, the former can recover the land bringing an action for possession. But also, as between T and the rest of the world (except O and any persons claiming through him), T is the owner for he is in possession of the land and, therefore, has the better right to possession than anyone else who may seek to occupy it. Suppose then another trespasser (T1) takes possession of the land from T. The so-called "first-in-time" principle gives T priority over T1 simply because prior possession gives rise to an older and, therefore, better right. Moreover, T1 cannot argue that the land belongs to O, so as to defeat T's claim to possession. If, however, T has been dispossessed by T1, the latter may now seek to rely on his own adverse occupation (together with any time that had already run during T's occupation) in order to defeat O's title.¹⁹ In each case, therefore, successive possession generates its own form of common law legal title which is capable of barring an earlier title in time.²⁰ But to what extent is such possessory title capable of transmission from

¹⁶ See, *Rosenberg v Cook* (1881) 8 Q.B.D. 162, at 165, *per* Jessel M.R.: "Now the title of the disseisor is in this country a freehold title, and therefore, although the vendor had a very bad title, and a title liable to be defeated, he had still a title good against all the world, except against those who might be proved to have a better one."

¹⁷For a modern example of an exclusive licensee suing a squatter successfully in trespass, see *Manchester Airport plc v Dutton* [2000] Q.B. 233, (C.A.). Trespass to land is seen essentially as "a wrong against possession, not against ownership": *Simpson v Fergus* (2000) 79 P. & C.R. 398, at 401, *per* Robert Walker L.J. There is also no doubt that a mere possessor may sue in nuisance: *Hunter v Canary Wharf Ltd* [1997] A.C. 655, (H.L.). See also generally, *Harrow London Borough Council v Quazi* [2004] A.C. 983, (H.L.).

¹⁸ (1865) L.R. 1 Q.B. 1.

¹⁹ See generally, Megarry & Wade, *The Law of Real Property*, (8th ed., 2012,), pp. 86-91.

²⁰ A useful example is provided by the Land Registry Practice Guide 5, *Adverse Possession of (1) Unregistered and (2) Registered Land where a Right to be Registered was Acquired Before 13 October 2003*, updated 16

one possessor to another? Can the possessor transfer his possessory right on death, or by sale or gift during his lifetime?

Transmission of possessory title by will or on intestacy

Apart from highlighting the principle that possession is good against all but the true owner, the decision in *Asher*, above, demonstrates that a possessory title is capable of transmission on death either by will or on an intestacy. In the words of Cockburn C.J.:²¹

“There can be no doubt that a man has a right to devise that estate, which the law gives him against all the world but the true owner. Here the widow was a prior devisee, but *durante viduitate* [during widowhood] only, and as soon as the testator died, the estate became vested in the widow; and immediately on the widow’s marriage the daughter had a right to possession; the defendant however anticipates her, and with the widow takes possession. But just as he had no right to interfere with the testator, so he had no right against the daughter, and had she lived she could have brought ejectment; although she dies without asserting her right, the same right belongs to her heir.”

It is interesting to note that, in this case, there were two stages of devolution. First, the possessory right passed to the widow under the testator’s will and, secondly, it passed to the daughter’s heir upon an intestacy. Because adverse possession, as we have seen, gives all the rights and powers of ownership, the possessor acquires, to all intents and purposes, a legal estate²² in fee simple absolute in possession²³ subject only to the true owner’s paramount right to recover the land until such time as his title is extinguished by limitation.²⁴ The logical upshot

September 2015, at para. 3.4: “If a second squatter dispossesses the first, the second acquires the benefit of any time that had already run against the owner. However, the first squatter will retain the right to recover possession from the second, until the full limitation period has run from the date when they were dispossessed. So if B dispossesses A (the owner) in 1986 and is then dispossessed by C in 1994, A loses the right to recover possession from C in 1998, but B could still bring possession proceedings against C until 2006.”

²¹ *Ibid*, at 6. See also, the judgment of Mellor J, at 6-7: “Here the first possessor is connected in title with the plaintiffs; for there can be no doubt that the testator’s interest was devisable.” The decision was applied, in preference to the earlier case of *Doe v Barnard* 13 Q.B. 945, by the Privy Council in *Perry v Clissold* [1907] A.C. 73, (P.C.). See also, *Calder v Alexander* (1900) 16 T.L.R. 294.

²² There has been some controversy over whether the adverse possessor’s fee simple arising from possession is legal or equitable: see, E. Cooke, “Adverse Possession – Problems of Title in Registered Land”, (1994) L.S. 1, at pp. 4-5. It has been argued that the possessor’s estate is legal because s.7 of the Law of Property Act 1925 states that “a fee simple subject to a legal or equitable right of entry or re-entry if for the purposes of this Act a fee simple absolute”: see, B. Rudden, “The Terminology of Title”, [1964] 84 L.Q.R. 63, at 69. The Law Commission has sought to resolve this controversy by suggesting that no fee simple in unregistered land can be regarded as “absolute” in the sense that it is indefeasible. It is always subject to a risk of extinction by an adverse possessor. But both the respective estates of the squatter and paper owner are absolute because they may endure in perpetuity. The notion, therefore, that “there can only be one legal fee simple at any given time rests on a fallacy: it confuses the weakness of a person’s title with the potential duration of that person’s estate in land”: see, Law Commission/HM Land Registry, *Land Registration for the Twenty-First Century: A Consultative Document*, (1998), Law Com. No. 254, at para. 10.23.

²³ See, *Leach v Jay* (1878) 9 Ch. D. 42, at 44-45; *Rosenberg v Cook* (1881) 8 Q.B.D. 162, at 165; *Re Atkinson and Horsell’s Contract* [1912] 2 Ch. 1, at 9 and *Central London Commercial Estates Ltd v Kato Kagaku Ltd* [1998] 4 All E.R. 948, at 951. See also generally, Cheshire and Burn, *Modern Law of Real Property*, (18th ed., 2011), at pp. 50-51 and Ruoff and Roper, *Registered Conveyancing*, Loose-leaf, December 2014, at para. 33.003.

²⁴ On this reasoning, the superior title of the lord of the manor in *Asher*, who was not a party to the litigation, was presumably not barred.

of this is to recognise the existence of two estates – one held by the paper owner and the other by the squatter – each qualified by reference to the other and, therefore, not in conflict.²⁵

There is also judicial recognition in both the English and Commonwealth cases that the squatter's possessory title is capable of giving rise to property rights under statute. In *Perry v Clissold*,²⁶ for example, the Privy Council held that an adverse possessor was entitled to compensation when the land became subject to compulsory purchase. Significantly, his possessory right was characterised as an “estate or interest” in the land within the meaning of the Lands for Public Purposes Acquisition Act 1880. In the course of his judgment, Lord Macnaghten stated:²⁷

“It cannot be disputed that a person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against all the world but the rightful owner.”

In the Australian case of *Wheeler v Baldwin*,²⁸ the respondent sought to lodge a caveat in relation to certain lands on the basis that she was “an owner in fee simple” relying on her (and her predecessor in title's) adverse possession for over 20 years. In order to lodge the caveat, she had to show that she had an estate or interest in the land within the meaning of the Real Property Act 1900 of New South Wales. The High Court of Australia, relying on the above-cited extract from Lord Macnaghten's judgment in *Perry*, held that a person in possession of land claiming inconsistently with the title of the owner of the first estate in possession had a sufficient interest to lodge a caveat under the 1900 Act. In reaching this conclusion, Dixon J. acknowledged that an adverse possessory right in land is akin to an estate in fee simple capable of inheritance by heirs.²⁹

There are also other Commonwealth cases expressing the same principle. In *Allen v Roughley*,³⁰ for example, Dixon C.J. observed that “there can be no doubt that a person who is in possession of land without a good documentary title has, whilst he continues in possession, a devisable interest in the property.”³¹ Similarly, Taylor J. stated that “the inchoate interest [resulting from possession of the land] . . . was an interest which might have been assigned or, as actually occurred, devised by the testator.”³²

Transmission of possessory title by sale or gift

²⁵ See, “Informally Created Interests in Land”, in S. Bright and J. Dewar (ed.), *Land Law: Themes and Perspectives*, (1998), 487, at 490.

²⁶ [1907] A.C. 73, (P.C.)

²⁷ *Ibid*, at 79.

²⁸ (1934) 52 C.L.R. 609, (High Court of Australia).

²⁹ Reliance was placed primarily on the statements of Joshua Williams in his lectures on the “Seisin of the Freehold”, (1878), at p. 7, and Maitland's essay on “The Mystery of Seisin”, *Collected Papers*, (1911), Vol. 1, at p. 370.

³⁰ (1955) 94 C.L.R. 98, (High Court of Australia).

³¹ *Ibid*, at 130-131.

³² *Ibid*, at 145.

Apart from devolution by will or intestacy, it is apparent that an adverse possessory right in land can be sold or gifted.³³ In *Mount Carmel Investments Ltd v Peter Thurlow Ltd*,³⁴ a Mr Renwick gained entry and began to use a garage for the storage of vintage motor cars. He later caused to be registered at the Land Registry a purported lease of the property and an assignment of the lease to a company called Keithshire Properties Ltd. The registered proprietor of the garage had never granted any such lease. Subsequently, Mr Renwick, purporting to act on behalf of this company (of which he was director), permitted the first defendant (Peter Thurlow Ltd) to go into exclusive occupation. The second defendant and another director of the first defendant went into actual occupation. The forgery of the lease (and assignment) eventually came to light and the entries relating to these transactions were struck off the register. In the course of his judgment, Nicholls L.J. stated:³⁵

“If squatter A is dispossessed by squatter B, squatter A can recover possession from squatter B and he has 12 years to do so, time running from his dispossession. But squatter A may permit squatter B to take over the land in circumstances which, on ordinary principles of law, would preclude A from subsequently ousting B. For example, if A sells or gives his interest in the property, insecure as it may be, to B.”

In the instant case, it was apparent that Mr Renwick had abandoned any rights to possession of the property when the police became involved over the forged documents and he fled the country. Accordingly, despite the defendant’s occupation being initially consensual as assignee of the lease, Mr Renwick’s subsequent actions debarred him from recovering the property. This, of course, accords with the principle that a transfer of rights (by sale or gift) prevents any subsequent claim to possession by the transferor against the transferee – in effect, the latter now acquires good title against the former who no longer has any entitlement to the land. Moreover, although the paper owner’s title is not affected directly, the transferee may now count his predecessor’s period of possession towards the period which must elapse before he becomes entitled to a full possessory title.³⁶ In order to do this, however, the transferee needs immediately to follow the transferor into possession and occupy for the remainder of the limitation period.

In *Buckinghamshire County Council v Moran*,³⁷ a plot of land owned by the council had been occupied for some four years (since 1967) by a Mr and Mrs Wall, who owned a neighbouring house, for their own purposes. The house was then conveyed to the defendant by a conveyance which was expressed to include not only the land comprised in the paper title but also “all such rights estate title and interests as the vendors may have in or over” the plot of land. Because the defendant was aware of the possibility that the Mr and Mrs Wall had acquired, or were in the course of acquiring, a possessory title to the plot, he arranged for the making of a statutory

³³ See generally, Cheshire and Burn, *Modern Law of Real Property*, (18th ed., 2011), at pp. 1133-1134 and Ruoff and Roper, *Registered Conveyancing*, Loose-leaf, December 2014, at para. 33.018. See also, *Simpson v The Council of the North West County District* (1978) 4 B.P.R. 97,267, (Supreme Court of New South Wales).

³⁴ [1988] 1 W.L.R. 1078, (C.A.).

³⁵ *Ibid*, at 1086.

³⁶ It should be noted, however, that whilst the possessor who makes the claim can rely on the adverse possession of an earlier possessor, he can also be defeated by the knowledge of a prior possessor if the latter did not have a “reasonable belief” that the land belonged to him: see, paragraph 5(4)(c), Schedule 6, Land Registration Act 2002.

³⁷ [1990] Ch. 623, (C.A.).

declaration by the vendors setting out their use and occupation of the plot since 1967. Although the defendant was able to establish that the council had been dispossessed of the plot for more than 12 years before it instituted proceedings for possession by relying on his own exclusive physical control of the plot since 1973, the case illustrates the possibility of a sale of possessory rights taking place informally between successive possessors under the auspices of a formal transfer of property. Indeed, a chain of possessory title was the basis for a successful claim to adverse possession in *Treloar v Nute*,³⁸ where the defendant was able to rely on his father's earlier use of the disputed land which had also been conveyed to him by his father by way of gift to make up the 12-year statutory period of limitation.

Mere possessory successors

It is apparent that periods of adverse possession may be added together to make up a full possessory title. This is possible in relation to both registered and unregistered land. Thus, Schedule 6, paragraph 11(2)(a), to the Land Registration Act 2002 states:

“A person is also to be regarded . . . as having been in adverse possession of an estate in land –

(a) Where he is the successor in title to an estate in land, during any period of adverse possession by a predecessor in title to that estate”

The wording clearly recognises that a possessory right is transmissible from one adverse possessor to another. In the same way, a possessory title of 12 years can be built up in unregistered land. This was recognised under the common law in *Willis v Earl of Howe*,³⁹ where Kay L.J. stated⁴⁰ that “a continuous adverse possession for the statutory period, though by a succession of persons not claiming under one another, does, in my opinion, bar the true owner.”⁴¹ Indeed, a modern illustration of this principle can be found in *Ellis v Lambeth London Borough Council*,⁴² where the claimant went to live in the house in 1985 when it was already occupied by a number of other squatters. In due course, they left and various other people moved in with the claimant controlling who would be allowed to do so. From 1995, however, the property was occupied by the claimant and one other person only. The recorder, at first instance, held that one or more of the earlier squatters (who had enjoyed possession of the property) had allowed the claimant to join them and that their possessory rights could, therefore, be transmitted to him. On this basis, the claimant was able to successfully show a

³⁸ [1976] 1 W.L.R. 1295, (C.A.).

³⁹ [1893] 2 Ch. 545. The case was applied in the Australian case of *Salter v Clarke* (1904) 4 S.R. (NSW) 280, at 288, (High Court of New South Wales).

⁴⁰ *Ibid*, at 553.

⁴¹ But if the first adverse possessor ceases occupation and abandons possession back to the paper owner, time runs only from when a second adverse possessor takes possession: see, paragraph 8(1), Schedule 1 to the Limitation Act 1980: “where . . . any such right of action is treated as accruing on a certain date and no person is in adverse possession on that date, the right of action shall not be treated as accruing unless and until adverse possession is taken of the land.” In other words, time stops running if a squatter abandons the land before the limitation period has expired. If a second squatter later takes possession, time starts to run afresh against the paper owner. See also, s.15(6), Schedule 1, para. 8(2) to the 1980 Act, which makes clear that, after abandonment of possession by the squatter, the paper owner is in the same position as if he had never been deprived of possession.

⁴² (2000) 32 H.L.R. 596, (C.A.).

continuous adverse possession of the property so as to defeat the local authority's claim to possession. Although this aspect of the case was not argued on appeal, the judgment of Wilson J (with whom Swinton Thomas L.J. agreed) appears to accept the principle that, so long as the period of adverse possession is continuous,⁴³ the adverse possession of successive trespassers may be lumped together to defeat the paper title to the property.⁴⁴

A similar claim to adverse possession arose in *Lambeth London Borough Council v Bigden*,⁴⁵ where the subject property, Oval Mansions, comprised 60 flats in a total of eight blocks. From 1983 onwards, various squatters began to occupy the blocks of flats. It was not, however, until 1997 that the local authority brought an action claiming possession which was defended on the ground that the defendants had acquired title to each block through a form of joint adverse possession relying on their own and their predecessors' occupation. The Court of Appeal, however, rejected the claim holding that there was no exercise of effective joint or communal control over the individual flats and no joint adverse possession of the common parts such as the hallways and staircases. Moreover, there was no evidence of joint occupation of other common parts of the blocks, such as the outer walls, foundations and the roof, which would have been relevant to the acquisition of a freehold title to a block of flats by adverse possession. Although some doubt was cast by Simon Brown L.J.⁴⁶ on the correctness of the recorder's decision in the earlier case of *Ellis*, above, the case again acknowledges the possibility of some form of notional transmission of possessory rights from one trespasser to another which does not require any formality complying with s.52(1) of the Law of Property Act 1925. Indeed, s.55(c) of the 1925 Act seems to make this clear by stating that nothing in s.53 (conveyances to be by deed) and s.54 (creation of interests in land by parol) shall "affect the right to acquire an interest in land by virtue of taking possession".

Does a transfer of a possessory title trigger first registration?

Although, the Land Registry will not register a squatter's title to unregistered land unless there is evidence of adverse possession for at least 12 years,⁴⁷ a transfer of possessory rights (whether by gift or sale) to a successor in title will (it seems) trigger an application for first registration. In this connection, the Land Registry Practice Guide 5: *Adverse Possession of (1) Unregistered*

⁴³ See generally, Cheshire and Burn, *Modern Law of Real Property*, (18th ed., 2011), at pp. 1133-1134.

⁴⁴ This has also been recognised by the Court of Appeal in Northern Ireland in *Brown v Faulkner* [2003] NICA 5(2), at [41], *per* Higgins J.: "A person in possession without title, but before the statutory period has elapsed, has a transmissible interest in the land (good against all the world except the paper owner). If he leaves the land and is followed by another claimant without title, the period when the paper owner is without possession, due to the first claimant's possession, may inure to the benefit of the second claimant. The merger of the two (or more) periods of possession may defeat the paper owner." The Australian case law is to the same effect: see, for example, *Mulcahy v Curramore Property Ltd* [1974] 2 N.S.W.L.R. 464, at 476-477, where the Court of Appeal of New South Wales held that, as long as there was no break in possession by successive trespassers, the cumulative time during which they adversely possessed the land could extinguish the paper title to the benefit of the last trespasser. See also, *Public Trustee v Bellotti* (1986) 4 B.P.R. 97, 255, (Supreme Court of New South Wales): "There can . . . be a series of trespassers on the land and, so long as there is no abandonment by any of them, the time during which each of those trespassers is in adverse possession will be added to the time of his successors so that, if there is no break in the possession, the total time of a series of trespassers will run against the owner of the land".

⁴⁵ (2001) 33 H.L.R. 43, (C.A.).

⁴⁶ *Ibid*, at [57].

⁴⁷ See, s.75(2), Land Registration Act 1925, for periods of limitation completed before 13 October 2003.

and (2) Registered land where a Right to be Registered was acquired before 13 October 2003⁴⁸ states⁴⁹ that, if the successor does not apply for first registration within two months of the transfer of the possessory estate, the title to this estate will revert to the transferor, who will then hold it on a bare trust for the successor.⁵⁰ The effect of this is that the successor will have a beneficial interest in this freehold possessory estate and, therefore, is able to lodge a caution against first registration against anyone else claiming title to the land.⁵¹ Her again, however, there may be good reason why the squatter would not wish to apply for first registration as this would have the potential of alerting the registered proprietor of the existence of the squatter and prompt a claim to recover possession of the land. Indeed, this has been recognised most recently in the Law Commission's Consultation Paper, *Updating the Land Registration Act 2002*, No. 227, (2016), where it is stated⁵² that "there may be little incentive for an adverse possessor to register a . . . title [because] [d]oing so may draw attention to his or her claim to the land and, therefore, prompt the registered proprietor to commence proceedings to bring the adverse possession to an end."

In the case of registered land, the possibility of registering a transfer of a possessory estate as between successive squatters does not arise.⁵³ If a first possessor had, say five years' adverse possession and then transferred such rights as he had in the land to a second possessor, the latter could not, at that point, apply for registration, as a minimum of 10 years' possession, as we have seen, is required under the Land Registration Act 2002.⁵⁴

Other alienation rights

⁴⁸ Updated 16 September 2015.

⁴⁹ See, Section 8, "Protection Prior to Registration of the Squatter".

⁵⁰ See, ss.6 and 7, Land Registration Act 2002. Presumably also, an adverse possessor can validly declare an express trust of his possessory title thereby creating an equitable interest carved out of his own common law possessory title. Such equitable interest would also then enable the beneficial owner to lodge a caution against first registration.

⁵¹ The application to lodge a caution is made on the basis that the applicant is entitled to an *interest* affecting a freehold legal estate as opposed to being the owner of such an estate: see, s.15(1)(b) of the Land Registration Act 2002. The freehold estate involved is the possessory estate which is the subject of the transfer by the earlier squatter.

⁵² See, at para. 17.66.

⁵³ The Law Commission has recently proposed that an adverse possessor of land should not be able to apply for registration with possessory title until either title has been extinguished under the Limitation Act 1980 (unregistered land) or except through the procedure in Schedule 6 of the Land Registration Act 2002 (registered land): Law Commission Consultation Paper, *Updating the Land Registration Act 2002*, No. 227, (2016), at paras. 17.63-17.71.

⁵⁴ Any adverse possessor of registered land who is already a beneficiary under a trust within s.75(1) of the 1925 Act has the right to be registered as proprietor: see, paragraph 18(1), Schedule 12, Land Registration Act 2002. This qualifies as a proprietary right and so is capable of being an overriding interest. It is unclear, however, whether there must be actual occupation for the right to be classified as an overriding interest: see, *Thomson v Foy* [2009] EWHC 1076. Where the possessor has not yet accrued 10 years' adverse possession, it seems that a successor in title to the registered proprietor will take subject to the period of adverse possession which the possessor has already accrued. According to Ruoff and Roper, *Registered Conveyancing*, Loose-leaf, July 2014, at para. 33.023, "this would follow from the wording of the general principle under Schedule 6, para. 1, which defines the necessary period of adverse possession and provides that the squatter may apply once 'he has been in adverse possession of the estate for the period of ten years ending on the date of the application'". According to the authors, "it should therefore make no difference that there has been a change of proprietor of the estate in the meantime."

Apart from the transmission of a possessory title by sale or gift, or on death, there is the possibility that the adverse possessor may grant a form of possessory leasehold estate over the land. In this connection, although the adverse possessor has, as we have seen, the equivalent of a fee simple estate in possession, this cannot, it is submitted, clothe him with the necessary power to create a legal lease binding against the whole world. The principle of relativity of title dictates that the possessor is capable of giving a good title against the rest of the world but not someone having a better legal right to possession. This means that any grant of a tenancy over the land by the possessor will confer exclusive possession (and give rights against all who wrongfully interfere with possession) but will not bind the superior paper owner.⁵⁵ To this extent, the tenancy will have somewhat similar characteristics to a *Bruton*⁵⁶ tenancy which confers a form of exclusive possession/occupation but only as against the grantor and not persons with a superior title.⁵⁷ Unlike the *Bruton* tenancy, however, whose rights of occupation resemble those of a contractual licensee,⁵⁸ a possessory leaseholder would presumably be able to assign his leasehold term to a third party, as well as create a legal sub-tenancy out of his own possessory leasehold estate. Indeed, there is no reason why the possessory leaseholder should not have similar rights of alienation as enjoyed by the adverse possessor who holds the fee simple estate in the land. It has also been suggested by one commentator⁵⁹ that a leasehold estate derived from a common law fee simple estate qualifies as a “leasehold estate in land” (if granted for a term not exceeding seven years) for the purposes of paragraph 1 of Schedule 3 to the Land Registration Act 2002 and, given that the possessory tenant is also in actual occupation, then it should also be capable of overriding under paragraph 2 of Schedule 3.

As between the adverse possessor and his tenant, it is well-established that a tenant cannot, during the term of his tenancy, claim adverse possession against his landlord. This is because the tenant’s possession is by consent and, therefore, cannot be adverse.⁶⁰ Moreover, every tenant is estopped from denying his landlord’s title. During the currency of the landlord and tenant relationship, therefore, the landlord will continue to be characterised as being in adverse possession of the land. Only at the end of the tenancy may the tenant be in a position to assert his own adverse possession against his landlord and (in time) claim adverse possession (seeking a freehold title) against the paper owner.

The limited grounds under which the possessor may be registered following objection

⁵⁵ It would be surprising, however, if a *mere* trespasser (who did not have the necessary degree of physical possession and intention to possess), could grant a possessory lease. For example, T enters onto X’s field and grants Y a weekly tenancy of the land – a valid possessory leasehold estate will not arise in these circumstances as T does not have possession in the sense of a legal fee simple estate.

⁵⁶ See, *Bruton v London & Quadrant Housing Trust* [2000] 1 A.C. 405, (H.L.). The same may be true of an easement, that if expressly granted by the adverse possessor, it would not bind the paper owner. However, presumably, an easement by prescription would be acquired against the paper owner regardless whether he was in possession or not. It is necessary to show acquiescence of the quasi-servient owner, which requires “a power to stop the acts or sue in respect of them” (see, *Dalton v Angus & Co* [1881] App. Cas. 740), but the paper owner has that power unless and until the adverse possessor gains an indefeasible title.

⁵⁷ See, *Kay v Lambeth London Borough Council* [2004] EWCA Civ 926, and on appeal: [2006] UKHL 10; and *Islington London Borough Council v Green and O’Shea* [2004] EWCA Civ 56.

⁵⁸ See, M. Pawlowski, “The Bruton Tenancy – Clarity of More Confusion?”, [2005] Conv. 262.

⁵⁹ See, N. Roberts, “The Bruton Tenancy: A Matter of Relativity”, [2012] Conv. 87, at 95.

⁶⁰ *Hayward v Chaloner* [1968] 1 Q.B. 107, at 122, per Russell L.J.

As mentioned earlier, if an objection to the possessor's application for registration is received in time, he will not be registered unless the case falls within one of the three exceptional grounds listed in paragraph 5, Schedule 6 to the 2002 Act. This accords with one of the underlying objectives of the 2002 Act, namely, that the basis of title should be the register and that "the title that registration confers should be capable of being overridden by adverse possession only where it is essential to ensure the marketability of land or to prevent unfairness."⁶¹

The first ground⁶² is that it would be unconscionable because of an equity of estoppel for the registered proprietor to seek to dispossess the applicant and the circumstances are such that the applicant ought to be registered as the proprietor. The obvious difficulty here is that a possessor who occupies land under circumstances giving rise to a proprietary estoppel is unlikely to be in adverse possession. If the registered proprietor encourages the possessor to occupy the land, then presumably this would suggest that the possessor is occupying with the former's consent. It would seem, therefore, that this ground may be confined to cases where the paper owner has stood by while the possessor mistakenly builds on the disputed land, or in which there is an informal purchase and sale and the purchaser goes into possession without taking any steps to perfect his title.⁶³ Quite apart from the very limited circumstances under which this ground is likely to operate, it is important to bear in mind that the Land Registry retains a discretion whether or not to register the applicant as proprietor even if a proprietary estoppel is made out. This important discretion, reserved in practice now for the First-tier Tribunal (in place of the Adjudicator), may result in the satisfaction of the applicant's estoppel equity by some means other than his registration as proprietor of the disputed land such as an award of monetary compensation.⁶⁴

The second ground⁶⁵ is that the applicant is for some other reason entitled to be registered as the proprietor of the land. Although expressed in broad terms, the ground appears to be limited to cases where, for example, the possessor is entitled to the land as a beneficiary under a will or on intestacy of the previous registered proprietor, or where a purchaser has gone into possession after paying the purchase price but without a formal transfer of the title.⁶⁶ According to the Land Registry, this second ground is rarely successfully used in practice.⁶⁷

The third ground⁶⁸ is that (1) the land to which the application relates is adjacent to land belonging to the applicant; (2) the exact line of the boundary between the two has not been determined; (3) for at least 10 years of the period of adverse possession ending on the date of the application, the applicant (or any predecessor in title) reasonably believed that the land to which the application relates belonged to him; and (4) the estate to which the application relates was registered more than one year prior to the date of the application. Significantly, the ground

⁶¹ See, Law Commission/H.M. Land Registry, *Land Registration for the Twenty-First Century: Consultative Document*, (1998), No. 254, at para.10.43.

⁶² See, para. 5(2).

⁶³ These examples are derived from the joint Law Commission/H.M. Land Registry Report, *Land Registration for the Twenty-First Century: A Conveyancing Revolution*, (2001), Law Com. No. 271, at paras. 14.36-14.52.

⁶⁴ See, s.110(4), Land Registration Act 2002.

⁶⁵ See, para. 5(3).

⁶⁶ These examples are derived from the joint Law Commission/H.M. Land Registry Report, *Land Registration for the Twenty-First Century: A Conveyancing Revolution*, (2001), Law Com. No. 271, at paras. 14.36-14.52. See also, *Bridges v Mees* [1957] Ch. 475.

⁶⁷ See, Law Commission Consultation Paper, *Updating the Land Registration Act 2002*, No. 227, (2016), at para. 17.30.

⁶⁸ See, para. 5(4).

is intended to apply only to genuine cases in which the boundary between two pieces of land is not fixed under the Land Registration Rules 2003⁶⁹ and the boundary line has been in its present position for at least the last 10 years. The ground will not, therefore, apply where the applicant has moved the boundary deliberately (hoping to acquire more land from a neighbour) because the applicant must show that he “reasonably believed” that the land in question belonged to him or her. Moreover, it is clear that the burden of proof as to reasonable belief falls on the applicant and, although he may at all times *honestly* believed that the disputed land belonged to him, this is not enough to satisfy the condition – the test is whether the applicant was *reasonable* in holding the belief that he did in all the circumstances. That, in turn, may involve the question as to whether the applicant should have made enquiries of his solicitors (or elsewhere) as to whether the disputed land was, in fact, comprised within his paper title.⁷⁰

The point to make here is that, even in cases where 10 years of adverse possession has accrued, the success of the application to be registered as proprietor will depend on whether the squatter is able to bring his situation within one of the three limited grounds listed in paragraph 5 of Schedule 6.⁷¹ The overall impression is that, in the majority of cases, this will be a difficult obstacle to overcome discouraging the bringing of many applications of this kind.

The writers’ study

The temptation to “stay quiet” and not make an application to be registered as proprietor is borne out by the writers’ recent study based on a questionnaire sent out to 200 conveyancing solicitors (specialising in real estate) throughout England and Wales in December 2016/January 2017.

The writers’ findings were compiled from replies to the questionnaire (comprising 16 separate questions) with the sample being selected randomly from senior practitioners (taken from the Law Society website) grouped evenly amongst five different regions, namely, London, the South East, the South West, the Midlands, the North and Wales. The sample frame was given three weeks within which to return a response. The questionnaire itself was structured so as to allow for a choice of answers to a particular question (so as to avoid leading a response) or, alternatively, to provide an opportunity for more detailed comment to deliberately open-ended questions. A response rate of 30 per cent (representing 60 substantive replies) was achieved from the solicitors contacted.⁷²

Not surprisingly, perhaps, as many as 67 per cent of solicitors who responded indicated that they had advised clients who had been in adverse possession of land not to apply for registration

⁶⁹ See, S.I. 2003/1417, Part 10.

⁷⁰ See, *IAM Group plc v Chowdrey* [2012] EWCA Civ 505, (C.A.), at [27], *per* Etherton L.J. In *Zarb v Parry* [2011] EWCA Civ 1306, (C.A.), on the other hand, the applicant was able to satisfy the requirement of reasonable belief even though the paper owner had challenged the assertion of ownership of the disputed land during the last couple of years of possession.

⁷¹ Interestingly, the Law Commission has sought views as to whether the first two grounds in para. 5 of Schedule 6 should be removed: see, Law Commission Consultation Paper, *Updating the Land Registration Act 2002*, No. 227, (2016), at paras. 17.25-17.35. It is, of course, only the third ground in which the claim to the land succeeds through adverse possession.

⁷² A good geographical spread of responses was received, albeit a number were returned anonymously, including: London, Canterbury, Watford, St. Albans, Cheltenham, Southampton, Colchester, Bradford, Bath, Bury St. Edmunds, Cardiff, Kent, Manchester, Buckinghamshire, Guildford and Lincolnshire. The majority of replies were received from partners or senior associates.

because of the risk of alerting the registered proprietor to the adverse possession and prompting opposition to the application. A variety of reasons were put forward: (1) that possession was not long enough to qualify (17 per cent); (2) there was a lack of factual possession (33 per cent); (3) there was no intention to dispossess (13 per cent); (4) possession was with the owner's consent or licence (7 per cent); and (5) the application was likely to be rejected because the three exceptional grounds listed in Schedule 6, para. 5, to the 2002 Act were unlikely to be met (30 per cent). The last figure is particularly interesting as it shows that a significant number of potential applications are not pursued because of the difficulty envisaged in complying with the 2002 Act requirements. Typical responses included: "it would alert the owner of the paper title who might object"; "the client was not able to possess against the Crown so he decided to stay quiet"; "because of the uncertainty, time and cost of an application, it was quicker and cheaper to obtain defective title insurance"; "it is not uncommon for our clients to decide after advice not to apply for registration due to the possibility of a counter-notice"; "in our experience, more common to let lie rather than apply".

It was also clear from these responses that only a relatively small number of applications (30 per cent) had met with success relying on the three exceptional grounds listed in Schedule 6, para. 5. Most of these successful applications (73 per cent) were based on para.5(3), namely, that the client was the owner of adjacent property and had been in adverse possession of the subject land under the mistaken, but reasonable belief, that he was its owner.⁷³

Interestingly also, 63 per cent of solicitors who responded to the writers' questionnaire indicated that they had been instructed on the sale or gift of a possessory title involving both registered or unregistered land. Of those who had, 85 per cent stated that, where the land was unregistered, the transaction was the subject of first registration at the H.M. Land Registry⁷⁴ The questionnaire also asked: "have you ever acted for a client applying for registration of a possessory title based on successive periods of adverse possession (i.e., relying on a chain of different possessors) in order to establish a full possessory title?" Overwhelmingly, the answer was "yes" (70 per cent) with the majority indicating a reliance on at least two (and, sometimes, three or even four) successive periods of adverse possession. Most of these were the subject of a sale (53 per cent) or based on successive physical occupation of the subject land (31 per cent). The rest involved either a transmission by gift (10 per cent) or a devolution on death by will or intestacy amongst family members (6 per cent). The responses also suggested a combination of the above (26 per cent).

Imposing a time limit on the squatter's application to be registered as proprietor

These findings (although admittedly based on a small snapshot sample) would seem to support the notion that there is in existence a dark market in possessory titles outside the registered land system. If that is correct, then it must be asked whether such a market in possessory rights runs contrary to the overall aim of the 2002 Act which is to strengthen system of title by registration by ensuring that the basis of title is the register.⁷⁵ In the joint Law Commission/HM Land

⁷³ Only 27 per cent of successful applications were expressed to have been based on the unconscionability of the registered proprietor (para. 5 (1)). The responses revealed no successful applications based on the adverse possessor being otherwise entitled to the land (para. 5 (2)).

⁷⁴ In several cases where the transaction was not made the subject of first registration, the client was advised that title to the possessory estate would be held by the transferor on bare trust for him with the effect of conferring on him a beneficial interest in his possessory estate.

⁷⁵ See, Law Commission/H.M. Land Registry, *Land Registration for the Twenty-First Century*, (1998), No. 254, at para. 10.43.

Registry Consultative Document published in 1998,⁷⁶ there are passages dealing with the principle of relativity of title and the protection of possession in the context of land where the title is unregistered. In particular, it is recognised that the squatter's possessory fee simple estate will ripen into full ownership when the rights of the paper owner are automatically extinguished after the land has been adversely possessed for a period of 12 years under the Limitation Act 1980. But despite these specific references in the context of unregistered land, there is no discussion of the impact of such possessory estates in relation to land already subject to the land registration system.

What the 2002 Act does, as we have seen, is to allow the squatter to apply to be registered as proprietor after 10 years' adverse possession. Significantly, there is no obligation on him to apply for registration after the 10-year period has elapsed – indeed, The Law Commission recognised that “if a squatter did not apply to be registered for (say) 20 or 30 years, the proprietor would still have an opportunity to object to the squatter's application even after that (or any other) length of time.”⁷⁷ No doubt, the squatter will have every incentive to pursue his application to be registered as proprietor where he has been advised that he has a strong chance of establishing one or more of the three exceptional grounds listed in paragraph 5 to Schedule 6. But, if he has little or no chance of success, there is nothing in the 2002 Act to prevent his possessory estate from continuing indefinitely until such time (if at all) as the paper owner claims possession of the land. Moreover, as the writers' survey indicates, there is also the strong likelihood of the possessory estate devolving to another adverse possessor, in particular, either by sale or mere successive possession. It is this open-endedness, it is submitted, which has the potential for creating an ever-increasing dark market in possessory titles existing indefinitely outside the register.

If the policy underlying the 2002 Act is to limit dealings with registered land “off the register,”⁷⁸ then this suggests that such possessory estates should not endure for ever but be subject to some form of limitation period. This could be achieved, it is submitted, by a relatively simple amendment to the 2002 Act which would require the squatter to bring his application to be registered as proprietor during a stated period following his adverse possession of the land for 10 years. A failure to make the application within this extended period would have the effect of automatically extinguishing the squatter's possessory title in respect of the land so that it would cease to exist for all purposes. Such a default rule, therefore, would operate in much the same way as the current limitation period in unregistered land which automatically extinguishes the paper owner's title if he fails to claim possession of the land within 12 years. One obvious difference, however, is that the squatter's fee simple ripens into absolute ownership (in effect, a wholly new estate)⁷⁹ when the rights of the paper owner have been barred under the Limitation Act 1980. In the case of a squatter who had failed to make his application for registration in time, on the other hand, the consequence of failing to apply in

⁷⁶ Ibid, at paras. 10.21-10.24. See also, Law Commission/H.M. Land Registry Report, *Land Registration for the Twenty-First Century: A Conveyancing Revolution*, (2001), Law Com. No. 271, at paras. 14.20-14.22.

⁷⁷ Ibid, at para. 10.49. See also, Law Commission/H.M. Land Registry Report, *Land Registration for the Twenty-First Century: A Conveyancing Revolution*, (2001), Law Com. No. 271, at para. 14.83: “The general rule is, therefore, that if the registered proprietor . . . brings proceedings for the recovery of the land in the possession of a squatter, those proceedings will succeed, regardless of how long the squatter has been in adverse possession . . . the rights of the registered proprietor are not barred by laps of time.”

⁷⁸ Ibid, at para. 10.7.

⁷⁹ See, *St Marylebone Property Co Ltd v Fairweather* [1962] 1 Q.B. 498, 533; and on appeal, [1963] A.C. 510, 543.

time would be to automatically destroy his possessory estate so as to preclude the potential for its indefinite duration under the current law. Moreover, any attempted alienation of the land would no longer have any effect in the absence of a fee simple possessory estate. He would now simply remain in occupation as a bare trespasser entitling the registered proprietor at any time to take proceedings against him to recover possession of the land. In particular, the 10 years of adverse possession would no longer (of itself) afford a defence to the proprietor's claim, nor would the squatter be entitled to raise any of the three grounds listed in paragraph 5 to Schedule 6.

Under this scheme, however, the principle of relativity of title would not be affected. Thus, if another trespasser (T1) were to take possession of the land from T, the first-in-time principle would still give T priority over T1 simply because prior possession gives rise to an older and, therefore, better right. If, however, T has been dispossessed, T1 may then seek to rely on his own adverse occupation in order to defeat the paper owner's title. In other words, T1 would now be able to rely on his own adverse possession (but not any time that had already accrued during T's occupation) for a period of 10 years in order to apply to be registered as proprietor in place of the current proprietor. But here again, his right to apply would be barred after a period of limitation following his 10-year period of adverse possession. As with T, his possessory estate would be automatically extinguished leaving him only a bare trespasser of the land.

The writer's questionnaire specifically addressed the feasibility of such a scheme. It asked: "would you favour an amendment to the 2002 Act which would require the squatter to bring his application to be registered as proprietor during a strict time period following his adverse possession of the land for the requisite 10 years?" Interestingly, this received a mixed response. A significant number of responses (37 per cent) were in favour of the amendment suggesting (typically) either a 12 month or two-year limitation period.⁸⁰ The majority that were against the scheme (63 per cent) raised concerns that legitimate claims would potentially be time-barred due to "an ignorance of the law" if a strict time-limit was introduced under the Act.

The questionnaire, however, also asked whether "you would favour a limitation period being introduced into the 2002 Act if: (a) there was a requirement that the squatter must apply for registration within a limited period *after becoming aware* of his rights; and/or (b) the registered proprietor was given the right (as an alternative to bringing proceedings to recover possession of the land) to serve a written notice on the squatter that would trigger the start of the limitation period for applying to register and a failure to do so would automatically extinguish his possessory rights." Interestingly, proposal (a) was favoured by less than half of all responses, although those who were against made the point that knowledge of rights would be difficult to prove, and as one respondent indicated: "if anything, the current law for registered land was already heavily weighted in favour of the absent landowner". There was considerably more support, however, for proposal (b) with 60 per cent of respondents indicating that this struck a fairer balance between the competing interests of the adverse possessor and registered proprietor.

⁸⁰ Several responses suggested a six-month period. One reply indicated that a five-year limitation period would be appropriate.

Conclusion

The Law Commission has repeatedly emphasised that the scheme of adverse possession introduced by the 2002 Act reflects the notion that title to registered land is based on registration and not simply on possession. In its 1998 joint Report,⁸¹ it stated that “where title is registered, the basis of title is primarily the fact of registration rather than possession”. If this is correct, then it must be questioned whether the existence of a dark market in possessory estates is desirable given that such estates may pass through a succession of possessors and endure indefinitely off the register in the absence of any compulsion on the part of the possessor to apply for registration as proprietor in place of the registered proprietor of the land.

The writers’ proposal to amend the 2002 Act, so as to incorporate a limitation period under which the squatter would be required to bring his application either during a strict time-period following his adverse possession for 10 years or, alternatively, within a limited period of his becoming aware of his rights or following written notice from the registered proprietor, seeks to address this situation. Indeed, such a proposal would have a dual effect. First, it would compel the applicant, who has a legitimate basis for a claim, to bring his application promptly and convert his possessory estate into a registered title. Secondly, in the case of a squatter who has no likelihood of successfully registering his title within the grounds listed in Schedule 6, the limitation period would have the consequence of extinguishing his possessory estate so that it would cease to exist for all purposes. The overall effect, it is submitted, would be to bring more titles onto the register in line with the underlying rationale of the 2002 Act. At the same time, it would significantly reduce the number of possessory estates existing outside the system and curtail the emergence of a dark side to land registration.

⁸¹ Law Commission/H.M. Land Registry, *Land Registration for the Twenty-First Century*, (1998), No. 254, at para. 10.11.