

Adverse possession versus the criminal law.

Criminalisation of trespass to residential buildings raises interesting questions regarding its interplay with the acquisition of title by adverse possession. With limited exceptions, squatting has hitherto been a civil matter, and property owners generally needed to enforce a possession order from a civil court to remove squatters from their property. However, section 144 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 provides that an offence is committed if (a) the person is in a residential building having entered it as a trespasser, (b) the person knows or ought to know that he is a trespasser and (c) the person is living in the building.

Section 144 empowers the police to arrest such squatters. It came into force on 1 September 2012 with no transitional provisions. CPS figures indicate that 69 people were charged in the first year: the majority of convictions resulted in fines of around £100, although one person received 90 days imprisonment.

The intended targets of section 144 were plainly squatters who had taken over residential buildings that were not abandoned, but section 144 was not limited in that way.

Difficulties in the new law were quickly apparent. Irene Gardiner had lived with her children unchallenged for 11 years in an abandoned Welsh hillside cottage. Although there was no suggestion of a disgruntled ousted homeowner, the new law seemingly left her exposed to prosecution for living in what was now her home. Mrs. Gardiner's legal challenge seeking an assurance that she would not be prosecuted was resolved out of court.

A further problem arose because after 1 September 2012 the Land Registry changed its policy on processing applications by squatters for registration of title under Schedule 6 of the Land Registration Act 2002.

The LRA 2002 was itself a landmark change to the law made after lengthy consultation. Schedule 6 restricts the right to claim title to land by adverse possession. To apply for "squatter's title" to registered land a person must have been in adverse possession for the period of ten years ending on the date of the application (Paragraph 1(1) of Schedule 6). The application requires details of those acts which demonstrate adverse possession, such as fencing in land, securing buildings, etc. What if the applicant relies on an act of adverse possession which discloses the offence under s.144 of "living in" a residential building? The Land Registry considered that an evidential rule, *ex turpi causa non oritur actio*, 'no right of action arises from a shameful cause' came into play. The Land Registry began applying this maxim by rejecting applications for registration on the basis that periods where a prohibited act under s.144 ("living in") was relied upon must be ignored. The applicant was then invariably unable to show the requisite period of ten years adverse possession up to the date of their application. As each month passed after 1 September 2012, so more applications were cancelled under this policy.

The Land Registry relied upon the decision of HHJ Pelling QC in *R (Smith) v Land Registry* [2009] EWHC 328(Admin) where the court considered an unusual claim by a person for adverse possession of a public highway. The public had an obvious interest in the public highway remaining as such, and obstructing the highway was not only illegal but no permission could have been granted by the landowner to do so and it would have been illegal for the

landowner itself to have obstructed the highway. In *Smith* the Judge did not hesitate to apply the *ex turpi* maxim and the claim failed.

*Smith* was taken to the Court of Appeal. The appeal failed, but on different grounds. A number of commentators therefore questioned both the Judge's application of the *ex turpi* maxim in *Smith*, and its application to the squatter seeking registration of residential property.

The recent judicial review in *R (Best) v Land Registry* [2014] EWHC 1370 (Admin) required the Court to consider whether the Land Registry's position was correct. The Court determined that this part of *Smith* was wrong in law, as was the Land Registry's practice.

In *Best* the Court had particular regard to the House of Lords decision in *Bakewell Management Limited v Brandwood* [2004] UKHL 13. In *Bakewell*, the relevant criminal prohibition was against driving on common land without authority from the landowner. The appellant homeowners wished to rely on their repeated commission of that offence in support of a claim to a right of way to their houses by prescription, which the courts below had rejected. Lord Walker considered that the evidential rule "*must be applied as an instrument of public policy, and not in circumstances where it does not serve any public interest*", and went on to note "*...a statutory prohibition in respect of which a private citizen has an unfettered dispensing power, exercisable if he thinks fit for his own private purposes, cannot easily be described as enacted in the public interest*". The offence in *Bakewell* would not have been committed if the landowner had given permission for the doing of the prohibited act. The same can be said of section 144 trespass.

Ultimately, the Court in *Best* resolved the issue in its finding that adverse possession can be based on conduct which discloses a criminal offence. The Court determined that the LRA 2002 did not seek to define "adverse possession", and therefore imported its common law meaning. Whether the conduct relied upon was criminal under s.144, or some other enactment, was not relevant and the Land Registry was required to consider that conduct as part of the adverse possession in the period of ten years ending on the date of the application.

The decision in *Best* has created significant press interest (much of it inaccurate), and has paved the way for countless Schedule 6 applications which had been previously rejected or not pursued. Permission to appeal has been granted, but in the interim the Land Registry must observe the Court's finding in progressing both Mr. Best's, and other squatters', applications.