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Adverse possession and informal purchasers

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In England and Wales the enactment of the Land Registration Act 2002 dramatically reduced the scope of the doctrine of adverse possession in relation to registered land. The new adverse possession regime was justified in the report preceding the 2002 Act on the basis that it was more compatible with principles of title registration and struck a more appropriate balance between the landowner and squatter. Although the 2002 Act confers the registered owner of land with a power to veto most adverse possession applications, an application by a squatter who satisfies one of the three conditions set out in Schedule 6, paragraph 5, will succeed in spite of an objection by the registered owner. The Law Commission felt that in these situations, the balance of fairness lay with the squatter. Two of the conditions were designed to preserve the traditional effect of the doctrine for applicants who went into possession pursuant to an informal transfer. The Law Commission noted that when a dealing takes place "off the register", the applicant does not represent a "land thief" and it would be unjust to allow the registered owner to veto the applicant's registration.⁴

The Law Commission neglected to indicate whether informal transactions in relation to registered land were a widespread phenomenon in England and Wales or if the adverse possession procedure was frequently relied on in such circumstances to update the register. Such information would have helped to contextualise the recognition of this exception to the veto system introduced by the 2002 Act. The purpose of this article is not, however, to second-guess the policy reasons behind the preferential treatment afforded to informal purchasers under the new adverse possession regime. Instead, it examines from a doctrinal perspective whether the possession of the informal purchasers envisaged by Schedule 6, paragraph 5, amounts to adverse possession. It illustrates that the point at which a right of

¹ See Land Registration for the Twenty-First Century: A conveyancing revolution, Law Comm No 271 (2001), at para. 14.4.

² Ibid., at para 14.36.

³ The third condition set out in Sch 6, para. 5(4), of the Land Registration Act 2002 facilitates the adjustment of boundaries between neighbours where one neighbour adversely possessed the other's land reasonably believing it to be his or her own throughout the limitation period.

⁴ See Land Registration for the Twenty-First Century: A consultative document, Law Comm No 254 (1998), at para. 10.14.

⁵ Note that a culture of informal land transactions and a high incidence of abandoned land forced New Zealand and certain Australian territories to re-introduce adverse possession for registered land, see M M Park, The Effect of Adverse Possession on Part of a Registered Title Land Parcel (PhD thesis, University of Melbourne, 2003), ch. 6 (available at http://eprints.unimelb.edu.au/).

action accrues against a purchaser in possession pursuant to an oral or a written contract for sale is far from clear. A convincing argument could be made that such purchasers are not in adverse possession. While informal purchasers may be entitled to rely on the doctrine of proprietary estoppel⁶ or specific performance to have themselves registered as owners, the conditions set out in Schedule 6, paragraph 5, of the 2002 Act were designed to offer them the more expedient remedy of an adverse possession application. For this option to be of benefit, however, it is essential to eliminate any doubts about whether such informal purchasers are in adverse possession. The article concludes by recommending the introduction of certain legislative amendments which would clarify when such purchasers become entitled to avail of this more expedient remedy.

Schedule 6, paragraph 5(2), of the 2002 Act sets out the first exception to the new veto regime governing adverse possession of registered land. It provides that an applicant is entitled to be registered as the new owner of the estate if it would be unconscionable because of an equity by estoppel for the registered owner to seek to dispossess the applicant and the circumstances are such that the applicant ought to be registered as the owner. In the discussions of this condition in the report which preceded the enactment of the 2002 Act, the Law Commission gave an example of a purchaser who went into possession of land pursuant to an oral contract for sale which failed to comply with requirements set out in section 2 of the Law of Property (Miscellaneous Provisions) Act 1989.⁷ The second exception is set out in paragraph 5(3) of Schedule 6 which requires the applicant to prove an entitlement to be registered as owner "for some other reason". This condition was designed by the Law Commission to cater for a purchaser who went into possession pursuant to an enforceable contract for sale.8 The informal purchasers envisaged by the Law Commission had paid the entire purchase price but were never registered as owners as the necessary steps to complete the transaction had not been taken. The purchaser envisaged by the first condition may be entitled to an equity by estoppel, while the purchaser envisaged by the second condition holds an equitable interest in the land. The Law Commission clearly assumed that the possession of such purchasers amounts to adverse possession which, if maintained for 10 years, extinguishes the title of the registered owner.

However, the informal transactions just described fracture the ownership of land so that legal and equitable interests or equities become distinctly identifiable. Although adverse possession of land subject to fractional interests, such as the interests of co-owners or future owners, has always raised complications, the Law Commission did not discuss, in any detail, the controversy which has arisen over whether the possession of such purchasers can truly be described as adverse to the vendor or the implications of such an approach. This article begins with a discussion of the status of a purchaser in possession pursuant to an enforceable contract for sale who can, therefore, be described as the equitable owner. The position of a purchaser in possession pursuant to an oral contract for sale who possesses an equity by estoppel is examined in the second part of the article.

⁶ Although, as will be demonstrated in Part 2 of this article, informal purchasers may face considerable difficulty in proving that the circumstances give rise to an estoppel in the aftermath of the House of Lords' decision in Yeoman's Row Management Ltd v Cobbe [2008] UKHL 55.

⁷ Law Comm No 271, n. 1 above, at para 14.42.

⁸ Ibid., at para. 14.43. The Law Commission also gave an example of a claimant who is entitled to the land under the will or intestacy of the deceased registered owner.

Part 1 – Adverse possession by a purchaser entitled to equitable ownership

The Law Commission reiterates the wisdom accepted by many modern land law textbooks that while the squatter—buyer who has paid the purchase price is a beneficiary under a bare trust and can be in adverse possession, a buyer who has not paid the whole of the purchase price will not be in adverse possession as his or her possession is attributable to the contract. The authorities typically cited for this proposition are *Bridges* v *Mees* and *Hyde* v *Pearce*. The difficulties with such an approach stem from the absence of any provision in the Limitation Act 1980 which explicitly sets out that the limitation period may run in favour of a purchaser and against a vendor who holds the property on constructive trust. The state of the property of

A few rules can be deduced from the provisions of the 1980 Act which deal with adverse possession in the context of trust property. Although adverse possession by a stranger against a beneficiary is permitted, ¹³ adverse possession by a trustee ¹⁴ or by another beneficiary ¹⁵ in possession of the trust property against a beneficiary is prohibited. The courts have been forced to extrapolate from these provisions when deciding whether a purchaser can be in adverse possession against a vendor who holds the property on constructive trust. One other rule has influenced the reasoning of the courts on this issue and, although it no longer appears in the 1980 Act or the Limitation (Northern Ireland) Order 1989, it has been retained in the Irish Statute of Limitations 1957. It was originally set out in section 7 of the Real Property Limitation Act 1833 which provided that where a person was in possession of land as a tenant at will, the right of the owner to bring an action to recover such land would be deemed to have accrued at the determination of such tenancy or the expiration of one year after the commencement of the tenancy. Section 7 included a proviso which set out that a beneficiary would not be deemed to be a tenant at will to his trustee within the meaning of that section.

It is important to understand the reasons for the inclusion of section 7 in the 1833 Act. Before the enactment of the 1833 Act, the Limitation Act 1623 governed the limitation of actions and the courts supplemented it by developing technical rules to determine whether possession was adverse. These rules frequently made it difficult to identify when a right of action had accrued. For example, there had to be something in the nature of an "ouster" which would put the true owner on notice that time was running against him. Another rule treated the possession of a person with the consent of the owner as under a tenancy at will and incapable of amounting to adverse possession. In addition, once possession commenced lawfully it could never become adverse. *The First Report of Commissioners on Real Property* published in 1829 criticised some of these common law rules, ¹⁶ in particular the

⁹ Law Comm No. 271, n. 1 above, at para. 14.43. See C Harpum, S Bridge and M Dixon (eds), Megarry and Wade: The Law of Real Property 6th edn (London: Thomson Sweet & Maxwell 2000), at para. 21.040; K Gray and S F Gray, Elements of Land Law 4th edn (Oxford: OUP 2005), at para. 6.63.

^{10 [1957]} Ch 475.

^{11 [1982] 1} WLR 560.

¹² The same is true of the Limitation (Northern Ireland) Order 1989 and the Irish Statute of Limitations 1957.

¹³ S. 18(1) of the 1980 Act provides, subject to s. 21, the provisions of the Act shall apply to equitable interests in the land as they apply to legal estates.

¹⁴ S. 21(1) of the 1980 Act provides that no period of limitation shall apply to an action by a beneficiary under a trust to recover trust property from the trustee.

¹⁵ Sch. 1, para. 9, of the 1980 Act provides that where any land subject to a trust is in the possession of a person entitled to a beneficial interest in the land (not being a person solely or absolutely entitled to the land), no right of action shall be treated as accruing during that possession to the trustee or any other beneficiary.

¹⁶ They commented that certain rules were of questionable expediency and greatly impaired the healing tendency of the Statutes of Limitation, at p. 47.

rule which prevented possession which began rightfully from maturing into adverse possession. It concluded that a finding of adverse possession should be possible once the rightful estate of the party had been determined.¹⁷ However, in the case of a tenancy, at will it was frequently difficult to determine whether or when the tenancy had been determined by the owner. Section 7 of the 1833 Act provided clarity on this issue by deeming the right of action to accrue one year after the tenancy commenced, unless it had already been determined. In Ramnarace v Lutchman¹⁸ Lord Millet explained the rationale behind the introduction of section 7:

It was the deliberate policy of the legislature that the title of owners who allowed others to remain in possession of their land for many years with their consent but without paying rent or acknowledging their title should eventually be extinguished.¹⁹

This policy was also reflected in section 8 of the 1833 Act which provided that where land is subject to an oral periodic tenancy, the right of action of the owner shall be deemed to have accrued at the expiry of the first period or, if rent was subsequently received, on the date rent was last received. A clear distinction was drawn between the possession of tenants under such informal arrangements and that of a tenant in possession pursuant to a lease for a fixed term. Section 3 of the 1833 Act provided that time only ran against the landlord entitled to the fee simple reversion when he became entitled to his estate in possession.²⁰

The proviso to section 7 was deemed necessary as the tenancy at will played an important role in classifying possession which was not authorised by the legal ownership at a time when the common law and equity were administered by separate courts. At common law, a trustee was entitled to possession, but the possession of a beneficiary was frequently authorised by the trust deed or the trustee. Such possession was classified by the common law as being held pursuant to a tenancy at will. The proviso clarified that time did not begin to run against a trustee one year after the commencement of the beneficiary's possession. Some of the conflict in the caselaw revolves around whether the proviso only applied to express trusts, so that time would start to run against a vendor who held the property on constructive trust one year after the purchaser went into possession. The proviso was omitted from the corresponding section in the Limitation Act 1939²¹ and in the 1980 Act the entire provision dealing with tenancies at will was repealed. The repercussions of these reforms for a purchaser—beneficiary in possession have yet to be fully teased out.

THE EARLY CASELAW

One of the chief difficulties with the Law Commission's endorsement of the approach taken in *Bridges* v *Mees* is that it directly contradicts earlier caselaw on this issue, in particular *Drummond* v *Scant*²² and *Warren* v *Murray*.²³ In Drummond, four brothers had entered into an agreement for a building lease for 99 years in relation to a plot of land next to the Thames. An Act of Parliament was passed to reclaim land from the Thames and vested it in the owners of the land on its banks in accordance with their respective interests. The case concerned the reclaimed land which the court was satisfied became vested in the owners

¹⁷ The First Report of Commissioners on Real Property (1829).

^{18 [2001] 1} WLR 1651.

¹⁹ Ibid., at para. 12.

²⁰ Time could only run against the landlord during the currency of the lease if the rent was paid to the wrong landlord or if the landlord was also entitled to the lessee's interest in the property.

²¹ S. 9(1) of the Limitation Act 1939.

^{22 (1871)} LR 6 QB 763.

^{23 [1894] 2} QB 648, CA.

subject to the equitable interest of the brothers pursuant to the Act. While leases were executed in favour of the brothers over the houses that were built, no lease was ever demanded in respect of the reclaimed land. After the 99 years had expired the owners claimed possession from the defendants who were the brothers' successors in title and argued that the owners' title had been extinguished by adverse possession.

The court noted that before the 1833 Act was passed there was no possibility that the possession of the brothers during the term could be considered adverse. Time could not begin to run against a fee simple reversioner during an equitable term anymore than it could during a legal term. The defendants argued that the 1833 Act did away with the doctrine of non-adverse possession and consequently, after the transitional period of five years, the title of the owners was barred. This argument presumably depended on the brothers being classified as tenants at will with the result that their possession became adverse one year after the tenancy commenced. The court rejected this argument stating that the legislature could not have intended time to run against the owners during the 99-year term when they could not have interfered with the possession of the defendants without risking an injunction or an order for damages for a breach of trust.²⁴ The court noted that it was bound by the decision in Garrand v Tuck²⁵ where it was held that although a beneficiary in possession is deemed to be a tenant at will to his trustee, the proviso to section 7 means that the trustee's estate is not destroyed by the mere lapse of time.²⁶ The final argument made by the defendants was that the proviso at the end of section 7 applied only to express trusts and had no application to the constructive trust which arises between a vendor and a purchaser. The defendants relied on *Doe d. Stanway* v Rock²⁷ in support of this point. The court was of the opinion that the Stanway case did not involve adverse possession by a contracting purchaser against a vendor, rather it involved a squatter in adverse possession against a contracting purchaser and a vendor and so it could not be cited as an authority on whether the proviso only applies to express trusts. However, the court reached the peculiar conclusion that, even if the proviso was limited in such a manner, the agreement between the brothers and the owners of the fee simple constituted an "actual direct trust", a term which it seems to use interchangeably for an express trust.²⁸

The decision in *Warren* v *Murray*²⁹ includes a more detailed discussion of the law and therefore sheds slightly more light on the area. This dispute also involved an agreement for a building lease for 99 years. The builders went into possession and, although the covenant to build two houses was complied with, no lease was ever asked for or granted. The interest of the builders under the agreement was assigned to the plaintiff's father and he and the plaintiff maintained possession until the term expired and the defendants took possession of the houses. The plaintiff, who contended that the defendants' title had been extinguished

^{24 (1871)} LR 6 QB 763, at p. 767.

^{25 (1849) 8} CB 231. A mortgage had been redeemed but not cancelled which results in the legal title being held by the mortgagee on trust for the mortgagor. This case involved a claim by a mortgagor in possession that time ran against the mortgagee in respect of the satisfied term.

²⁶ The probable rationale behind the exception, as explained by the court in *Garrand* v *Tuck*, was to avoid the need for a trustee to take active steps to preserve his estate from being destroyed.

^{27 (1842)} Car & M 549. The facts of this case are a little confusing – following an agreement to purchase, the purchaser was left into possession and subsequently agreed to assign his equitable interest to a sub-purchaser who paid the original vendor. The original purchaser remained in possession until he died when his widow and subsequently one of her children, the defendant, took over possession. The plaintiff acquired the legal interest of the vendor and the equitable interest of the sub-purchaser and the court ruled that his interest had been extinguished by the possession of the original purchaser who held as a tenant at will. As the proviso only applied to express trusts, time ran from the anniversary of the commencement of the tenancy.

^{28 (1871)} LR 6 QB 763, at pp. 768-9.

^{29 [1894] 2} QB 648.

by virtue of the statute of limitations by the time they took possession, lost his case. Lord Esher MR applied *Drummond* v *Scant* and concluded that if the defendants were unable to recover the land in question during the term of the lease, the Statute of Limitations had not run against them. He explained:

Looking at the agreement, it seems to me clear that although at common law they might say that the tenants were mere tenants at will, yet according to the law as a whole, including the equity doctrines applicable to this case, they (the trustees) could not exercise their will and re-enter, because, if the tenants had performed their obligations under the agreement, a court of equity would at once interfere by injunction to prevent their being dispossessed and would compel specific performance of the agreement.³⁰

He was of the opinion that section 7 of the 1833 Act applied to "tenancies at will pure and simple, where there was no clog or difficulty such as arises out of an agreement like that in question here". Kay LJ added that the circumstances of the plaintiff were in any case covered by the proviso to section 7. He noted that, where a purchaser enters into an agreement for sale, a constructive trust arises regardless of whether the agreement is to purchase a fee simple or a leasehold term. He was of the opinion that the proviso encompassed such trusts which meant that a right of action did not automatically accrue to the vendor one year after the purchaser went into possession.³¹

In both *Warren* and *Drummond* the court seemed to assume that, if adverse possession could be proved, the purchaser would have extinguished the title of the fee simple owner. However, in both situations the purchaser was entitled to an equitable lease, which cannot exist without an equitable fee simple reversion. A right of action could not have accrued against a legal fee simple reversioner during the currency of the lease and if, as the 1833 Act sets out, its provisions apply to equitable interests as they apply to legal estates,³² time could not run against the equitable fee simple reversioner until the determination of the equitable lease. The court in *Drummond* only referred to this point in passing³³ and it would seem that it was not argued at all in the *Warren* case. It is submitted that if adverse possession can take place in such circumstances it must operate solely to bar the legal title to the lease which remains vested in the vendor pursuant to the contract for sale. Time cannot run in relation to the fee simple estate until the legal or equitable lease has expired.

Warren and Drummond were discussed in two New Zealand cases reported at the beginning of the twentieth century.³⁴ The English cases were distinguished by the court in Glenny v Rathbone which was satisfied that a sub-purchaser was in adverse possession against the original vendor but, in Ormond v Portas, they were followed and the court ruled that the defendant, who was in possession pursuant to an agreement for a lease, was not in adverse possession against the owner. The judgments delivered in both New Zealand cases grappled with the distinction between the position of a vendor who has agreed to sell the fee simple and the vendor who has only agreed to the grant of a lease in relation to the property. In Glenny v Rathbone, Williams J stated that if this had been a case of a straightforward agreement to purchase a fee simple, section 7 would apply as the purchaser would be deemed to be a tenant at will of the vendor. However, he felt that the vendor would not have been a trustee within the meaning of the proviso to that section. The meaning of the term "trustee" in the context of the proviso should, he said, be limited to cases where the terms of the trust

³⁰ Warren v Murray [1894] 2 QB 648, at pp. 652-3.

³¹ Ibid., at p. 658.

³² S. 24.

^{33 (1871)} LR 6 QB 763, at p. 767.

³⁴ Glenny v Rathbone (1900) 20 NZLR 1; Ormond v Portas [1922] NZLR 570.

contemplate the retention of the legal fee simple by the trustee during the suggested period of limitation. He noted that where a lessee enters into possession under an agreement for a lease for 99 years, he or she has an equitable lease for that period. The owner of the legal fee simple holds that land on trust to grant such a lease to the intending lessee throughout the agreed term. The lessee's possession is entirely consistent with the right of the lessor to retain the legal fee simple during the whole proposed term. He felt that Drummond and Warren could be explained on the basis that it was necessary for the trustee to retain the legal fee simple in order to carry out the trust. Therefore, the proviso applied to prevent time running under section 7. However, where an agreement to purchase the fee simple is involved and the purchaser has paid the purchase money and been let into possession, the continued retention by the vendor of the legal fee simple is directly antagonistic to the possession of the purchaser and so time can run in favour of the purchaser. 35 Williams I also discussed the dicta in Warren and Drummond which suggests that time cannot run against the owner if the owner would have been prevented from recovering possession of the land by the existence of some equitable remedy. He felt that these comments could not be taken in their widest sense as a true exposition of the law and were certainly not necessary upon the facts of those cases to arrive at the decision made.³⁶ In Ormond v Portas, the court noted that Glenny v Rathbone did not weaken the effect of the judgment in Warren as applied to the case of a lessee in possession under an agreement for lease.³⁷

These New Zealand cases imply that although a purchaser in possession under a contract for a sale of the fee simple may bar the legal estate of the vendor, a purchaser under an agreement for a lease may not do so. As already mentioned, the Law Commission of England and Wales is of the opinion that a purchaser who is in possession who has not paid the entirety of the price will not be in adverse possession as such possession is attributable to the contract and not his or her absolute equitable interest. The Law Commission noted that, were it otherwise, the validity of agreements for leases as a substitute for legal leases would be undermined.³⁸ It is difficult to follow the reasoning of the Law Commission in this regard; perhaps it viewed the payment of rent over the term of the lease as making up the purchase price under the contract. However, such an approach would prevent an adverse possession application by a purchaser who had paid the purchase price and gone into possession pursuant to an agreement to purchase a registered leasehold estate. It is difficult to see why such an applicant should not benefit from Schedule 6, paragraph 5(3) of the 2002 Act, regardless of whether rent was paid during the term. The landlord has remedies for the non-payment of rent which he or she may avail of both before and after the statutory transfer of title from the registered lessee to the purchaser-squatter on proof of 10 years' adverse possession. However, where a registered freehold or leasehold owner enters into an agreement for a lease or a sub-lease, paragraph 5(3) does not apply as the lease has not as yet been granted or registered. Therefore, the old

³⁵ Glenny v Rathbone (1900) 20 NZLR 1, at pp. 28–9. Williams J ruled that the plaintiff–sub-purchaser was not a tenant at will to the original vendor. There was no evidence that the original vendor knew that he had purchased the property or had given any recognition of his possession which could give rise to the inference that it was the intention of both parties to create such a tenancy. Therefore, s. 7 of the 1833 Act was inapplicable and it was necessary for the plaintiff to show that a right of action had accrued within the meaning of s. 2 (at pp. 30–1). He was satisfied that a right of action had accrued at law and the existence of some equitable remedy did not preclude a finding of adverse possession.

³⁶ Ibid., at pp. 31–3. Even if the possessor did have a remedy in equity, Williams J noted that the owner had a hostile right at law. The object of the 1833 Act was to get rid of hostile rights. If an entire right can be barred (where there is no entitlement to an equitable remedy) why not a part of that right which is hostile to the rights of the person in possession?

^{37 [1922]} NZLR 570, at p. 580.

³⁸ See Law Comm No 271, n. 1 above, at para 14.43, n. 155.

rules which govern adverse possession of unregistered leasehold land set out in Fairweather v St Marylebone Property Ltd³⁹ will apply. It was held in that case that the squatter does not acquire the title of the lessee on the expiry of the limitation period. The original lessee remains liable on the covenants in the lease and, although he may no longer eject the squatter he may surrender the lease to the landlord who will become entitled to immediate possession. If the owner holds the land on a constructive trust to grant a lease to the purchaser and the legal title to the lease is extinguished, the possible ramifications of the Fairweather decision for the vendor and the purchaser become ridiculously complicated. The vendor clearly retains an equitable fee simple reversion and time cannot run in respect of this estate until the expiry of the term of the equitable lease. However, the extinguishment of the legal title to the lease must surely go hand in hand with the extinguishment of any rights which the vendor had pursuant to the contract. It is arguable that adverse possession in such circumstances operates to deprive the vendor of the right to enforce the covenants which the parties had agreed to include in the lease. In contrast, possession for the limitation period may confer the best of both worlds on the person who had agreed to purchase the lease: that person could claim the benefit of certain covenants under his or her equitable lease when it suited and retain the option of relying on the title acquired through adverse possession which seems to be free of such covenants.

An approach which precludes the running of time against a vendor who holds under a constructive trust to grant a lease is to be preferred, regardless of whether the purchaser has paid the entire purchase price. Unlike an agreement to purchase a fee simple or take an assignment of an existing lease, which only gives rise to a bare trust, an agreement to grant a lease gives rise to a constructive trust which envisages an active role being played by the vendor—landlord during the currency of the equitable lease. Such an approach accords well with the provisions of the legislation which prevent the extinguishment of a trustee's estate if a right of action of any person entitled to a beneficial interest in the land either has not accrued or has not been barred. The equitable fee simple reversion implicit in an agreement to grant a lease should be viewed as preventing time running against the vendor during the term of the equitable lease. Such a purchaser who wishes to regularise his or her occupation should be forced to rely on the remedy of specific performance which will ensure that the vendor is guaranteed the protection of the covenants the parties agreed to include in the lease.

MORE RECENT CASELAW

As already mentioned, *Bridges* v *Mees*⁴¹ is the authority typically cited in support of the proposition that a purchaser under an incomplete contract for sale can extinguish the title of the vendor through adverse possession. The plaintiff and the defendant owned neighbouring houses and the plaintiff had entered into an oral contract to purchase a small piece of land at the rear of both houses from a company. The purchaser went into possession after paying the deposit and by 1937 he had paid the entire purchase price. In 1955 the defendant purchased the same piece of land from the liquidator of the company and proceeded to register his ownership in the Land Registry. The plaintiff sought a declaration that he was the beneficial owner of the land and a rectification of the register to reflect his overriding interests which arose due to his adverse possession and his actual occupation of the land.

^{39 [1963]} AC 510.

⁴⁰ See s. 18(3) of the 1980 Act, previously s. 7(3) of the 1833 Act.

^{41 [1957] 1} Ch 475.

Harman J was satisfied that the purchaser initially went into possession of the property with the vendor's permission and pursuant to a licence. However, when the vendor's lien on the property for the unpaid purchase monies disappeared, the character of the purchaser's possession changed. At that point, the vendor became a bare trustee and the purchaser became the sole beneficial owner. The vendor, as trustee, was prima facie entitled to resume possession and as he did not exercise that right for 12 years the plaintiff argued that it was extinguished and he was required to hold the legal estate on trust for the plaintiff.⁴²

In discussing whether a purchaser was a person in whose favour the period of limitation could run, Harmon J referred to section 7(3) of the Limitation Act 1939, which provided:

Where any land is held upon a trust . . . and the period prescribed by this Act has expired for bringing an action to recover the land by the trustees, the estate of the trustees shall not be extinguished if and so long as the right of action of any person entitled to a beneficial interest in the land . . . has not accrued or been barred by this Act, but if and when every such right of action has been so barred, the estate of the trustees shall be extinguished.

As no one other than the purchaser had a beneficial interest from 1937 onwards, Harmon I concluded that time could and did run in his favour and therefore by 1949 the trustee's title would have been extinguished (but for section 75 of the Land Registration Act 1925).⁴³ Harmon J examined the argument which had swayed the court in *Drummond* and Warren, that the vendor could never have brought an effective action to recover the land because he would have been met by the plea that the whole beneficial interest was vested in the purchaser. Harmon I ruled that the question cannot turn on whether the action would have succeeded or not. He cited Re Cussons Ltd⁴⁴ in support of this approach even though counsel for the plaintiff had acknowledged that this case had been criticised because of the court's failure to refer to the proviso in section 7 of the 1833 Act. 45 Harmon I noted that since the proviso was omitted from section 9 of the 1939 Act, time can now run in favour of a beneficiary. He quoted Underhill on Trusts who stated that a trustee, including a constructive trustee, can be divested of a legal estate by possession of a person entitled in equity in exactly the same way as if the beneficiary were a stranger. 46 He acknowledged that no precise authority was given by Underhill but he felt that this proposition was implicit in section 7(3) (outlined above) and section 7(5) which provided:

Where any settled land or any land held on a trust for sale is in the possession of a person entitled to a beneficial interest in the land . . . not being a person solely and absolutely entitled thereto, no right of action shall be deemed . . . to accrue during such possession to any person in whom the land is vested as trustee, or to any other person entitled to a beneficial interest in the land . . .

Basically, Harmon J felt that it was implicit in both subsections that a person solely and absolutely entitled to the beneficial ownership could be in adverse possession against his or her trustee.

⁴² Bridges v Mees [1957] 1 Ch 475, at pp. 484-5.

⁴³ Ibid

^{44 (1904) 73} LJ Ch 296. In this case, partners who had incorporated neglected to transfer the disputed property into the name of the company. The court was satisfied that the partners held the property on a bare trust for the company and that it was possible that such trustees without duties may lose their trust estate at the end of 12 years if they allowed the beneficiary to remain in possession and did not interfere.

^{45 [1957] 1} Ch 475, at p. 482.

⁴⁶ Ibid., at p. 486.

Harmon J noted that even if he was wrong about his interpretation of section 7(3) and (5), the plaintiff had another string to his bow. A plaintiff was entitled to a rectification of the register on the basis that his or her interest under the contract coupled with the plaintiff's actual occupation of the property rendered it an overriding interest which bound the defendant on registration. The is submitted that the second reason which Harmon J gave for his decision is less open to challenge, particularly since the introduction of the Limitation Act 1980. In its 1977 Report, the Law Commission noted that time only ran against a licensor on the determination of the licence and agreed with those who had commented on this issue that the divergent treatment of tenancies at will and licences was artificial and unduly harsh on those categorised as lessors. The Law Commission was convinced that the distinction between a tenancy at will and a gratuitous licence is, at best, tenuous. Accordingly, under the 1980 Act, time does not begin to run in favour of the occupier until the tenancy has actually been determined. Therefore, if the occupation of a purchaser continues to be classified as that of a tenant at will, the determination of the tenancy would seem to be a prerequisite to establishing adverse possession.

Jourdan describes Harmon J's decision in *Bridges* v *Mees* on the adverse possession point as questionable,⁴⁹ but continues:

The question whether the decision was correct is, however, now largely academic. The decision was based on section 9(1) of the Limitation Act which provided that time ran against a landlord of a tenant at will from the first anniversary of the grant of the tenancy. That subsection was repealed with effect from 1 August 1980. Accordingly, if the same case fell to be decided now, a different result would be reached.⁵⁰

The status of a purchaser in possession was considered more recently by the Court of Appeal in *Hyde* v *Pearce*.⁵¹ This decision is frequently cited to support the proposition that a purchaser who has not paid the entire purchase price cannot be in adverse possession. The purchaser went into possession after making a successful bid at an auction and paying the deposit. The completion of the sale was delayed as a dispute arose over the level of the abatement in the purchase price which the purchaser was entitled to because a small portion of the property which he had contracted to buy had already been sold. The court concluded that although his initial possession was with the licence of the vendor, that licence was determined by a letter sent in 1958 which demanded that that the purchaser return the keys.⁵² The court was satisfied that a right of action had accrued to the vendor at that time. However, Templeman LJ continued:

. . . in the peculiar circumstances of this case, it seems to me that it is not sufficient to show that a right of action had accrued. Mr Hyde must show some further quality, namely adverse possession.⁵³

This was an unusual approach as section 10 of the Limitation Act 1939 specifically provided that no right of action to recover land shall be treated as accruing unless someone was in adverse possession.⁵⁴ It is not clear why the court decided to determine these issues

⁴⁷ Bridges v Mees [1957] 1 Ch 475, at pp. 486-7.

⁴⁸ Law Reform Committee, *Twenty-First Report* (Final Report on Limitation of Actions) (September 1977), at para. 3.55.

⁴⁹ S Jourdan, Adverse Possession (London: Butterworths Lexis Nexis 2003), at para. 28.29.

⁵⁰ Ibid., at para. 28.30.

^{51 [1982] 1} WLR 560.

⁵² Ibid., at p. 569.

⁵³ Ibid., at p. 570.

⁵⁴ See also M Dockray, "What is adverse possession: Hyde and seek" (1983) 46 MLR 89, at p. 92.

separately. The court pointed to a number of factors which illustrated that the purchaser was not in adverse possession. It noted that Mr Hyde was not a squatter without a shadow of a claim of right – he was the equitable owner pursuant to the contract, subject to the vendor's lien for the price. Also, his possession was attributable to a subsisting contract for sale. He had never changed his status as a purchaser in possession pending completion by doing something which showed that he repudiated the contract. The court also argued that litigation by the vendors may not have resulted in the vendors obtaining possession. Finally, the court referred to the final letter which had been sent by the vendor's solicitor to Mr Hyde proposing that the dispute over the purchase price be referred for arbitration. The court argued that this letter was equivocal and did not make it clear whether the vendors were still requiring possession to be handed over to them.⁵⁵

It is submitted that these were all issues that should have been considered in assessing whether a cause of action had accrued to the vendor. Either the purchaser was in possession pursuant to a licence, in which case no cause of action had accrued, or his licence had determined, in which case a cause of action had accrued. If you apply the reasoning in Bridges v Mees, the purchaser's licence would have automatically terminated if the entire purchase price had been paid. The repudiation of the contract would also have ended the licence and, in this particular case, the parties had agreed that the licence could be determined by a demand for the keys. If the letter demanding the keys terminated the licence, a right of action would have accrued to the vendor at that point and time must have run against him regardless of whether the contract continued to subsist or not. On balance, it seems that Mr Hyde should have succeeded in his adverse possession claim and his rights should, therefore, have bound Mr Pearce as an overriding interest when he bought the property from the vendors. Even if the court had ruled that Mr Hyde was not in adverse possession, he should have succeeded on the basis that his interest under the contract coupled with his actual occupation of the property amounted to an overriding interest. The court ruled that Mr Pearce was not bound by the contract as it had not been registered as an estate contract but these rules only apply to unregistered land.⁵⁶ It is submitted that Hyde v Pearce should not be interpreted to mean that time can only run against the vendor if the entire purchase price has been paid. A purchaser can also be in adverse possession if his or her licence to occupy the premises is validly terminated and, in such circumstances, his or her status as a purchaser under an incomplete contract is irrelevant.

McLean v McErlean⁵⁷ provides a useful illustration of the attitude of the Northern Irish courts to this issue although the removal of the tenancy at will provision in the Limitation (Northern Ireland) Order 1989 may cast doubt on its continuing relevance. The purchasers in this case were sand merchants who had entered into a contract to purchase land from the defendant's father with the sole purpose of extracting and selling sand for use in building work. They went into possession with the consent of the vendor and, by 1958, they had paid the entire purchase price. They extracted sand on the land until it ran out sometime in 1964 or 1965 and afterwards they occasionally used the land for washing sand. After the purchasers had contracted to buy the land, the vendor continued to use it for grazing and used a small amount of it for cropping. Neither of these activities interfered with the purchasers' use of the land. After the vendor died, his executor commenced an action in trespass and the purchasers applied for an order that they were entitled to be registered as owners of the land by virtue of their adverse possession. The court had to decide whether the purchasers had barred the legal title of the vendor, or the vendor had barred the

^{55 [1982] 1} WLR 560, at pp. 569-70.

⁵⁶ Dockray has also commented on this in "What is adverse possession?", n. 54 above.

^{57 [1983]} NI 258.

beneficial title of the purchasers. The Court of Appeal found in favour of the purchasers and Gibson J noted two differences between the Northern Irish Statute of Limitations 1958 and the English Limitation Act 1939. Firstly, the Northern Irish version of the tenancy at will provision included a proviso that a beneficiary shall not be deemed to be a tenant at will to his or her trustee for the purposes of that subsection.⁵⁸ However, this proviso was not included in the 1939 English version of the tenancy at will provision.⁵⁹ The second distinction is replicated in current legislation.⁶⁰ The definition of a "trustee" provided in the Northern Irish version is limited to an express trustee and does not include a person whose fiduciary relationship arises merely by construction or implication of the law.⁶¹ In contrast, all references to trusts in the English version include constructive or implied trusts.⁶² The Irish Statute of Limitations 1957 is identical to the Northern Irish legislation in these respects.⁶³ Gibson I concluded that, where the trust in question is constructive, a person entitled to the beneficial estate would begin to run a title after the first year. He stated that it was obvious why an express trustee should not have to take active steps to preserve his estate but noted that these considerations do not apply where the trust in question is constructive, for example where a purchaser has been let into possession and has paid the purchase price. The vendor is a bare trustee and his only duty is to convey and therefore there is no need to preserve his estate in order to allow him to perform the trust. The purchaser could and did in such circumstances commence to run a statutory title against the vendor. He also referred to section 29(4) of the 1958 Act (which corresponds to section 7 (5) of the Limitation Act 1939) to support his decision and implies that a right of action may accrue to a trustee if the beneficiary is solely and absolutely entitled.

Finally, it is worth mentioning briefly the recent Irish High Court decision in *Moley* v Fee⁶⁴ which concerned an agreement to sell two sites for mobile homes. The transaction was never completed and Laffoy J noted that, if the purchasers had paid the full purchase price, the vendor would be deemed by law to be a bare constructive trustee. In such circumstances, if the vendor had remained in possession of the land he would have barred the beneficial interest of the purchasers and if, on the other hand, the purchasers had gone into possession, the outstanding legal estate of the vendor would have been barred. On the facts, Laffoy J was satisfied that the vendor had never received the purchase price from the purchasers. She also noted that although the vendor had continued to exercise acts of ownership over the disputed plot during the period which followed the negotiation of the deal, the purchasers had not engaged in acts of possession sufficient to prove adverse possession during the same period.

⁵⁸ S. 21 of the Statute of Limitations 1958.

⁵⁹ S. 9 of the Limitation Act 1939.

⁶⁰ See s. 2(3) of the Limitation (Northern Ireland) Order 1989 and s. 38 of the Limitation Act 1980.

⁶¹ S. 74(2) of the 1958 Act.

⁶² S. 31 of the Limitation Act 1939.

⁶³ See s. 2(2)(a) of the Statute of Limitations 1957.

^{64 [2007]} IEHC 143.

IS A PURCHASER IN POSSESSION OR AN OCCUPANT NEGOTIATING A PURCHASE, A LICENSEE OR A TENANT AT WILL?

As has already been mentioned, in England and Northern Ireland since the enactment of the 1980s legislation dealing with the limitation of actions, a right of action will only accrue on the determination of a licence or a tenancy at will. The distinction between licences and tenancies at will as regards the accrual of a right of action continues to be maintained by the Irish Statute of Limitation 1957. Therefore, in Ireland the success of the purchaser's adverse possession claim may be dependent on whether the purchaser is classified as a tenant at will. In *Bridges* v *Mees* and *McLean* v *McErlean*, the purchaser was classified as a tenant at will, ⁶⁵ while, in *Hyde* v *Pearce*, he was classified as a licensee.

Traditionally, exclusive possession was treated as the sole distinguishing feature of a tenancy at will. However, for the last 50 years the courts have been prepared to recognise an arrangement that confers exclusive possession on the occupant as a licence if satisfied that this was the intention of the parties. The courts will more readily infer a licence if, in the words of Denning LJ in *Facchini* v *Bryson* "there has been something in the circumstances, such as a family arrangement, and act of friendship or generosity . . . to negative any intention to create a tenancy". For example, in *Heslop* v *Burns*, the court described the arrangement between Mr and Mrs Burns, who had occupied a house for 16 years without paying rent, and Mr Timms, its owner, as akin to a family arrangement. He was a good friend of the Burns, visited them frequently, had become a godfather for one of their daughters and paid for her education. There was no evidence to infer a tenancy at will and, therefore, while the licence continued, a right of action did not accrue to the owner. Scarman LJ noted that the courts will be less and less inclined to infer a tenancy at will from an exclusive occupation of indefinite duration due to the emergence of the licence to occupy into prominence as a possible mode of land-holding. He added:

It may be that the tenancy at will can now serve only one legal purpose and that is to protect the interests of an occupier during a period of transition. If one looks to the classic cases in which tenancies at will continue to be inferred,

⁶⁵ In Glenny v Rathbone (1900) 20 NZLR 1 and Ormond v Portas [1922] NZLR 570, the court also classified a purchaser under a contract for sale or an agreement for the grant of a lease as a tenant at will, although it was satisfied the proviso to s. 7 of the 1833 Act would prevent time running against the vendor where the agreement was for the grant of a lease.

^{66 [1952] 1} TLR 1386, at pp. 1389-90.

^{67 [1974] 3} ALL ER 406.

⁶⁸ A similar approach had been taken in *Cobb* v *Lane* [1952] 1 All ER 1199 and in *Hughes* v *Griffin* [1969] 1 WLR 23.

⁶⁹ Much of the caselaw which discusses the distinction between a tenancy at will and a licence involves claims by occupiers that they were entitled to certain statutory protections available to tenants. Frequently, the occupier went into possession pending the negotiation of a lease or a sale or held over possession pending the negotiation of a renewal of a lease. A tenant at will does not qualify for the security of tenure afforded to business tenants pursuant to the Landlord and Tenant Act 1954, see Wheeler v Mercer [1973] 1 All ER 829. However, it is dangerously easy for such an arrangement to become a periodic tenancy on the payment of rent and such a finding would bring the tenancy within the protection of the 1954 Act. A residential tenancy at will may come within the Rent Restrictions Acts provided that the payments made by the occupant do indeed represent rent and not the payment of the purchase price by instalments: see Dunthorne and Shore v Wiggins and Another [1943] 1 All ER 577; Francis Jackson Developments Ltd v Stamp [1943] 2 ALL ER 601. There is an increasing tendency on the parts of the courts to classify occupation pending the negotiation of a formal agreement, particularly those in occupation for commercial purposes, as being pursuant to a licence: see Baikie v Fullerton-Smith and Another [1961] NZLR 901; Isaac v Hotel De Paris Ltd [1960] 1 All ER 348. This classification will have no impact on the rights of a business occupier as neither a licensee or a tenant at will is entitled to protection pursuant to the 1954 Act, and, since the enactment of the Housing Act 1988, residential tenants are unlikely to benefit from a reduced rent or increased security of tenure.

namely, the case of someone who goes into possession prior to a contract of purchase, or of someone who, with the consent of the landlord, holds over after the expiry of his lease, one sees that in each there is a transitional period during which negotiations are being conducted touching the estate or interest in the land that has to be protected, and the tenancy at will is an apt legal mechanism to protect the occupier during such a period of transition; he is there and can keep out trespassers; he is there with the consent of the landlord and can keep out the landlord as long as that consent is maintained.⁷⁰

Ramnarace v Lutchman, 71 which involved an appeal from Trinidad and Tobago, shows the implications of classifying such transitional occupation as a tenancy at will. The appellant had entered into possession of the land with the consent of its owners, her uncle and aunt in 1974. They had told her she could live on the land until she could afford to buy it and she built a house and lived there with her family without paying any rent. Her uncle died in 1977 and her aunt died in 1988 and the respondent had periodically challenged her right to live on the land. She claimed to have acquired a possessory title by virtue of section 8 of the Real Property Limitation Ordinance 1940 which provided that time began to run against a tenant at will one year after the commencement of the tenancy. The Court of Appeal found that she was in possession pursuant to a licence which had terminated either in 1985 by the service of a notice to quit or in 1988 on the death of her aunt and therefore she had not succeeded in extinguishing the respondent's title. The Privy Council disagreed with this classification and noted that although the appellant was allowed into occupation as part of a family arrangement and at least in part as an act of generosity, the intention was that she would purchase the land when she could afford it - this was one of the classic circumstances in which a tenancy at will arose. She therefore succeeded in her claim for adverse possession.

In Bellew v Bellew, 72 the Irish Supreme Court demonstrated a willingness to regard even the occupation of a person in negotiations with the owner as being pursuant to a licence. However, in the circumstances, the classification did not prevent time running as the court was satisfied that the licence had ended. The plaintiff held a life estate in the farmlands surrounding Barmeath Castle, where he lived with his father, his wife and his children. He began an affair and moved to England to live with the woman, neglecting to make any provision for the maintenance of his wife and family. The plaintiff permitted the father to continue farming the land while negotiations were taking place in relation to an agreement for a lease and the provision to be made for plaintiff's family. These negotiations broke down in 1963 and the father remained in occupation and farmed the land as if it was his own. In 1978 the plaintiff sought a declaration that the lands were vested in him as tenant for life but the Supreme Court held that this estate had been extinguished by the father's adverse possession. Griffin J, with whom Hederman J agreed, was of the opinion that the father originally went into possession pursuant to a licence but that the licence terminated when the negotiations broke down and from that point onwards he was in adverse possession. O'Higgins CJ preferred to classify his occupation as a tenancy at will as he went into occupation pending negotiations for a long-term lease. Therefore, a right of action accrued one year after he commenced occupation and the title of the plaintiff would have been extinguished by 1974. He noted that the intricacies of running a large farm with a danger of trespass and the possibility of agistment and other contracts required that the person running such a farm would have some legal interest therein.

^{70 [1974] 3} All ER 406, at p. 416.

^{71 [2001] 1} WLR 1651.

^{72 [1982]} IR 447.

It is difficult to see what the tenancy at will can achieve in such circumstances that a licence cannot. Previously, when exclusive possession was the sole determinant of whether an occupant held under a tenancy or a licence, an action in trespass could only be maintained by a tenant. Nowadays, a licensee may maintain such an action. A licensee may also be entitled to contractual notice or reasonable notice to vacate the premises and, therefore, the licensee may even have more security of tenure than a tenant at will. In addition, it is difficult to see how an agistment contract made by a tenant at will would be more secure than one made by a licensee.

It would appear that the tenancy at will no longer plays a distinctive role in property law and these arrangements could easily be absorbed by the licence. It is increasingly difficult to justify the distinction between such tenancies and licences as regards the accrual of a right of action and it is submitted that Ireland should follow the lead of England and Northern Ireland and delete the tenancy at will provision from the Statute of Limitations 1957. This appears even more pressing in light of recent recommendations for the abolition of the tenancy at will.⁷³

However, the abolition of the tenancy at will provision does not alleviate the confusion over whether a purchaser under an incomplete contract for sale can be in adverse possession. It is important to bear in mind the consequences of recognising adverse possession in such circumstances. If the vendor's title is extinguished, presumably he or she no longer has any rights pursuant to the contract and so will no longer be entitled to the benefit of easements which were to be reserved or restrictive covenants which were to be imposed on the purchaser in the deed. By neglecting to formalise the transfer, he or she will have lost the rights that would have been conferred by it. The remaining difficulty is identifying the point at which the purchaser's possession becomes adverse. This issue could be cleared up by inserting a "deeming provision" - where a purchaser is allowed into possession before the completion of the transaction, a right of action shall be deemed to accrue to the vendor on the determination of the licence to occupy or the payment of the entire purchase price, whichever occurs earlier. However, the definition of a "purchaser" for the purposes of benefiting from the deeming provision should exclude a purchaser under an enforceable agreement for the grant of a lease. As mentioned earlier, such a purchaser should be forced to rely on the remedy of specific performance so that the landlord is not deprived of the benefit of the agreed covenants.

Part 2 – Adverse possession by a purchaser entitled to an equity by estoppel

The Land Registration Act 2002 provides that where it would be unconscionable because of an equity by estoppel for the registered owner to seek to dispossess the applicant and that applicant is entitled to be registered as owner, an application for registration on the basis of adverse possession will succeed in spite of an objection by the registered owner. The adjudicator has jurisdiction to consider the elements of the proprietary estoppel claim and is expressly authorised to award a lesser remedy if it would be unconscionable for the registered owner to seek to dispossess the applicant but the circumstances are not such that the applicant ought to be registered as owner.

Since the enactment of section 2 of the Law of Property (Miscellaneous Provisions) Act 1989, contracts for the sale of land must be made in writing and incorporate all the

⁷³ See Law Reform Commission, Consultation Paper on General Law of Landlord and Tenant Law (LRC CP28-2003), at para. 1.24. A "tenancy" is defined as not including a tenancy at will in s. 3 of the draft Landlord and Tenant Bill included in the Report on the Law of Landlord and Tenant (LRC 85-2007).

⁷⁴ Sch. 6, para. 5(2).

⁷⁵ S. 110(4) of the 2002 Act.

terms expressly agreed in one document which has been signed by both parties. Although the doctrine of part performance was not specifically abolished, the fact that an oral contract is no longer valid renders the doctrine defunct as there is no contractual obligation which can be partly performed. The Law Commission, when recommending the reforms introduced by section 2, noted that the present law provided sufficient alternative remedies to deal with the hard cases which may arise where one party unconscionably seeks to take advantage of a failure to comply with the statutory formalities.⁷⁶ In particular, the Law Commission envisaged that the doctrine of proprietary estoppel would step into the breach and provide a remedy for certain purchasers who had entered into informal contracts for sale.⁷⁷ This doctrine applies where a person represented to the claimant that he or she had rights in the land and the claimant acted to his or her detriment in reliance on this representation in circumstances where it would be unconscionable to allow the representor to insist on the strict legal position. Until such an equity has been established to the satisfaction of the court, the claimant has only an inchoate right; once it has been established the court has a broad discretion as to how to satisfy the equity. It may order the landowner to convey the freehold or some other right to the claimant, 78 it may order the payment of compensation,⁷⁹ or simply make an order restraining the owner from enforcing his or her strict legal rights.⁸⁰

The application of this doctrine to invalid contracts for sale has proved very controversial and points up a failure on the part of the Law Commission and Parliament, when proposing and enacting section 2 of the 1989 Act, "to consider either adequately or in sufficient detail which potentially hard cases can be effectively dealt with by existing doctrines".81 The main sticking point is whether reliance on the doctrine permits a claimant to bypass the formalities set out in section 2 of the 1989 Act. Some of the caselaw⁸² requires the claimant to prove what Dixon refers to as a "double assurance", 83 for example, a representation by the defendant that he is a man of his word or that the agreement is binding in honour. This approach enables the court to describe the doctrine in terms of remedying the unconscionability caused by this assurance rather than facilitating the enforcement of an invalid contract.⁸⁴ Another development is the increasing tendency on the part of the courts to restrict the remedy of proprietary estoppel in cases involving invalid contracts to situations which also give rise to a constructive trust.85 This limitation is seen as necessary to square the enforcement of the contract with the failure to comply with the formalities imposed by section 2 of the 1989 Act, as section 2(5) provides that nothing in this section affects the creation or operation of resulting, implied or constructive trusts. Some have criticised this approach as unnecessary, as a remedy based on the doctrine of proprietary estoppel is an independent cause of action which does not seek to enforce

⁷⁶ Formalities for Contracts for Sale etc of Land, Law Comm No 164 (1987), at para. 4.13.

⁷⁷ Ibid., at part 5.

⁷⁸ See Pascoe v Turner [1979] 1 WLR 431; Crabb v Arun DC [1976] Ch 179.

⁷⁹ See Dodsworth v Dodsworth (1973) 228 EG 1115.80

⁸⁰ See Maharaj v Chand [1986] AC 898.

⁸¹ C Davis, "Estoppel: an adequate substitute for part performance?" (1993) 13 OJLS 99.

⁸² See Lloyd v Dugdale [2002] 2 P & CR 13 and Etherton J's decision in Cobbe v Yeoman's Row Management Ltd [2005] EWHC 266.

⁸³ M Dixon, "Proprietary estoppel and formalities in land law and the Land Registration Act 2002: a theory of unconscionability" in E Cooke (ed.), Modern Studies in Property Law vol. 3 (Oxford: Hart Publishing 2003); M Dixon, "Invalid contracts, estoppel and constructive trusts" (2005) Conv 247.

⁸⁴ See Cobbe v Yeoman's Row Management Ltd [2005] EWHC 266, at p. 165.

⁸⁵ See Yaxley v Gotts [2002] Ch 162; Kinane v Kackie-Conteh [2005] EWCA Civ 45.

the invalid contract but rather seeks to satisfy the equity. Row Management Ltd v Cobbe, Row Management Ltd v Cobbe, Row Management Ltd v Cobbe, Row Management Ltd v Limit approach to the establishment of a constructive trust. Row Management Ltd v

The recent House of Lords' decision in Yeoman's Row Management Ltd v Cobbe⁸⁹ creates the most serious impediments for informal purchasers seeking a remedy under the rubric of propriety estoppel. An oral agreement in principle had been reached that the defendant would sell the claimant a property and, in return, the claimant undertook to obtain planning permission and invested considerable time and money in doing so. When planning permission had been obtained, the defendant sought to withdraw from the agreement relying on non-compliance with section 2 of the 1989 Act. Although Etherton J and the Court of Appeal awarded a remedy pursuant to the doctrine of proprietary estoppel, the House of Lords felt that they had stretched the boundaries of the doctrine too far⁹⁰ and chose instead to provide a remedy in restitution. The House of Lords ruled that, where an essential element of the doctrine of proprietary estoppel could not be proved by the claimant, a finding of unconscionable behaviour on the part of the defendant was not sufficient to warrant reliance on the doctrine.⁹¹ If proof of the essential elements of the doctrine were not required, Lord Scott claimed "proprietary estoppel will lose contact with its roots and risk becoming unprincipled and therefore unpredictable". 92 The crucial difficulty for the claimant was that the oral agreement was incomplete which meant that he could not prove "an expectation of a certain interest in land". 93 According to Lord Scott, the claimant's expectation, which was encouraged by the defendant, was that upon the grant of planning permission there would be a successful negotiation of the outstanding terms of the contract for the sale of the property to him. At that point, a formal contract, which would include the already agreed core terms as well as additional new terms, would be prepared and entered into. He concluded that an expectation dependent upon the conclusion of a successful negotiation is not an expectation of a sufficiently certain interest in land.⁹⁴

Even if a complete agreement for the acquisition of an interest in land had been reached, Lord Scott stated *obiter* that the doctrine cannot be relied on to render enforceable an agreement that statute has declared to be void. 95 Unlike constructive trusts, proprietary estoppel is not expressly exempted from the provisions of section 2.96 Lord Scott's *obiter* comments make the doctrine's future role in the world of informal agreements highly precarious, as two recent decisions of the Chancery Division of the High Court

⁸⁶ M Dixon, "Invalid contracts, estoppel and constructive trusts" (2005) Conv 247, at pp. 252–5; B McFarlane, "Proprietary estoppel and failed contractual negotiations" (2005) Conv 501, at pp. 516–21.

^{87 [2008]} UKHL 55.

⁸⁸ See McFarlane, "Proprietary estoppel", n. 86 above.

^{89 [2008]} UKHL 55.

⁹⁰ Ibid., at para. 85 (per Lord Walker).

⁹¹ Ibid., at paras 17 and 28.

⁹² Ibid., at para. 28.

⁹³ Ibid., at para. 18–19. Lord Scott referred to the *dicta* of Oliver J in *Taylors Fashions Ltd* v *Liverpool Victoria Trustees Co Ltd* [1982] QB 133, at p. 144, and Lord Kingsdown in *Ramsden* v *Dyson* (1866) LR 1 HL 129, at p. 170, setting out this requirement.

⁹⁴ Ibid., at para. 18.

⁹⁵ Lord Walker did not think it necessary or appropriate to comment on this issue. See ibid., at para. 93.

⁹⁶ He was satisfied that the circumstances did not give rise to a constructive trust, as, unlike other joint venture cases where a constructive trust was imposed, the defendant owned the property in question before they embarked on the joint venture. See ibid., at paras 30–6.

demonstrate. In Herbert v Doyle,⁹⁷ the court distinguished the Cobbe case on the basis that the terms of the agreement being considered were complete. It ruled that, where all the other requirements of the doctrine of proprietary estoppel are satisfied, a claim will not fail because it consists of an agreement which falls foul of section 2. The proper means of giving effect to the estoppel is to recognise or impose a constructive trust so that the remedy falls within the exception set out in section 2(5).⁹⁸ In contrast, the court in Hutchinson v B and DF Limited⁹⁹ endorsed Lord Scott's obiter view and rejected a proprietary estoppel claim where a complete oral agreement for the grant of a lease had been reached.

In the Cobbe case, Lord Scott felt that it was unacceptable to excuse parties to an oral contract in relation to land from the statutory formalities for such contracts, which they must have been aware of. On the other hand, Lord Walker's exposition of the law in the Cobbe case indicates tolerance of the highest levels of naivety amongst claimants who are on the receiving end of gifts or testamentary dispositions which fail to comply with the relevant statutory formalities. 100 It is submitted that a remedy pursuant to the doctrine of proprietary estoppel should be available to informal purchasers, as well as informal donees or successors, and although the commercial nature of the transaction may be an appropriate factor to take into account in considering whether the elements of the doctrine have been satisfied, it is an inadequate basis for the decision to grant or withhold such a remedy. McFarlane, in his 2005 article, described how "the law recognises the practical reality that expectations can be generated in the absence of finalised bargains and responds to the consequent need to provide redress to those who rely on such expectations". 101 In the aftermath of the Cobbe case, the potential withdrawal of this remedy from all informal purchasers gives cause for grave concern and highlights the need to insert an express exception for proprietary estoppel in section 2 of the 1989 Act.

The Law Commission, in its deliberations of when an adverse possession application should succeed in spite of an objection by the registered owner, assumes that a purchaser who paid the purchase price and went into possession pursuant to an oral contract for sale or a lease would succeed in obtaining a remedy under the doctrine of proprietary estoppel. ¹⁰² Recent caselaw highlights the danger of such an assumption and how easily the preferential treatment afforded by the Land Registration Act 2002 to such an informal purchaser who can also prove adverse possession for 10 years could become meaningless. Such an informal purchaser could be left in a legal limbo, unable to regularise his or her position through proprietary estoppel or adverse possession and in constant danger of being evicted.

Even if it is assumed that a purchaser under an invalid contract for sale would be entitled to be registered as owner on the basis of his or her equity by estoppel, the Law Commission also neglected to discuss, in any detail, the difficulties which such a purchaser may encounter in proving adverse possession. However, it briefly acknowledged that in many cases where an equity arises by proprietary estoppel, the possession of the party

^{97 [2008]} EWHC 1950 (Ch).

⁹⁸ Ibid., at paras 12-15.

^{99 [2008]} EWHC 2286 (Ch), at paras 64-70.

¹⁰⁰ See [2008] UKHL 55, at para. 68.

¹⁰¹ See McFarlane, "Proprietary estoppel", n. 86 above, at p. 515.

¹⁰² In Ireland and Northern Ireland this purchaser would be able to seek an order for specific performance of his or her contract for sale as the doctrine of part performance, which renders an oral contract enforceable, is still in force. However, if a concluded contract for sale had not been reached, the Irish courts may award a remedy on the basis of proprietary estoppel, see *An Cumann Peile Boitheimeach Teorenta* v *Albion Properties Ltd & Others* [2008] IEHC 447.

asserting it will not have been adverse, because he or she will have been in possession of the land with the consent of the registered proprietor. Where the vendor represents to the purchaser that the purchaser may go into possession in spite of the absence of formalities, it may be difficult for the purchaser to argue subsequently that his or her possession was adverse. He Law Commission envisaged that the condition set out in Schedule 6, paragraph 5(2), of the 2002 Act would cater for a purchaser who had paid the purchase price, gone into possession and treated the property as their own. Such actions may easily be construed as detrimental reliance, thus rendering the recovery of possession by the vendor improbable. The payment of the purchase price easily marks the moment at which the purchaser's possession becomes attributable to his or her equity and not the owner's permission. However, the Limitation Act 1980 fails to provide any guidance on whether time can run in favour of a person with an equity by estoppel. As was the case with a purchaser under an enforceable contract for sale, it is difficult to ascertain whether a right of action has accrued to the vendor and, if so, when that right accrued.

Cullen v Cullen¹⁰⁵ is the main authority for the proposition that a person, entitled to an equity by estoppel on the basis of a representation made by the owner, may in time extinguish the title of that owner through adverse possession. In that case, a son placed a portable house on his father's land on the basis of an assurance given by his father to his mother that he did not mind. When the father tried to eject the son, Kenny J ruled that he could not go back on his assurance. Kenny J made his decision on the basis of the doctrine of promissory estoppel as he was of the opinion that the doctrine of proprietary estoppel only applied in the case of a mistaken belief about the ownership of the land. 106 As a result, Kenny I thought that he did not have jurisdiction to order the father to transfer the site to the son, as promissory estoppel can only be used as a shield, not a sword. He noted, however, that once 12 years had passed, the son would be able to bring a successful adverse possession application to the Land Registry. It is submitted that undue reliance may have been attached to Kenny J's obiter comment. Kenny J clearly wished to make a positive order which would confer rights on the son in relation to the site but he was not sufficiently comfortable with the principles of proprietary estoppel to avail of the extended jurisdiction which it permits. He must have felt compelled to suggest a method by which the title could be regularised in the future. Although he stated that time began to run when the son commenced building, he failed to clarify whether this was the point at which his possession ceased to be consensual and became attributable to his inchoate equity.

According to Walstead:

Until the representor attempts to resile from the assumption engendered by him, the representee has merely a permissive licence and will be unable to claim to be in adverse possession . . . Once the representor retracts the permissive licence a

¹⁰³ Law Comm No 254, n. 4 above, at para. 10.50, n. 162.

¹⁰⁴ A claimant who can establish an estoppel pursuant to the mistake limb of the doctrine of proprietary estoppel will find it much easier to prove adverse possession as the circumstances are not complicated by a representation which could be construed as permission by the owner. The estoppel exception to the veto system introduced by the 2002 Act may allow an applicant who made an initial mistake in relation to the position of his or her boundaries but cannot prove good faith over the 10 years required by Sch 6, para. 5(4), to be registered as owner. The applicant must, however, be in a position to prove that his or her neighbour acquiesced in the mistake. In contrast, an applicant who believed he or she was the owner of the boundary land throughout the 10-year period need not prove acquiescence on the part of a neighbour.

^{105 [1962]} IR 268.

¹⁰⁶ Ibid., at pp. 291–2. J Mee discusses the development of the doctrine of proprietary estoppel in Ireland in "Lost in the big house: where stands Irish law on equitable estoppel" (1998) 23 Irish Jurist (ns) 187.

right of action may accrue to him. At that time the representee may be said to be in adverse possession as his licence has been replaced by an inchoate equity. 107

Where the owner of registered freehold or leasehold land enters into an oral contract to sell that estate and the purchaser enters into possession in reliance on a representation made by the owner, it seems fair to assume that the purchaser's licence would be implicitly terminated once the entire purchase price was paid. At that point, the purchaser should also be in a position to demonstrate the *animus possidendi* essential in proving adverse possession. In such circumstances, the adjudicator would probably view the purchaser as entitled to be registered as the owner of the freehold or leasehold estate. However, if the registered owner entered into an agreement to grant a lease or a sublease of the land, clearly the circumstances would preclude the registration of the purchaser as the proprietor of the entire registered estate. The complications, discussed earlier, engendered by a finding of adverse possession against a purchaser who holds pursuant to an enforceable agreement for a lease are avoided if the contract is unenforceable and the circumstances give rise to an equity by estoppel. This is because the adjudicator is specifically endowed with the discretion to order an appropriate remedy, which would clearly be an order for the grant of the agreed lease.

Conclusion

It is clear that the reforms to the law on adverse possession introduced by the 2002 Act leave the informal purchaser in possession, who was intended to receive preferential treatment, in a precarious position. It is far from clear whether such a purchaser will be able to prove that his or her possession was adverse. It is submitted that the reforms should have been accompanied by legislative clarification on when time begins to run against the vendor. Earlier, it was argued that a right of action should be deemed to accrue on the determination of the vendor's licence or the payment of the purchase price, whichever occurs earlier. It was also pointed out that the definition of a "purchaser" for the purposes of such a deeming provision should exclude a person who has entered into an enforceable agreement for the grant of a lease. It would not be necessary to distinguish between contracts which comply with section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 and those which do not in deeming when a right of action accrues. However, a purchaser in possession pursuant to an oral contract for sale who wishes to make an adverse possession application faces the additional hurdle of establishing the elements required by the doctrine of proprietary estoppel. In the aftermath of the Cobbe case, such a purchaser looks increasingly unlikely to succeed. To restore this remedy to purchasers it would be necessary to insert a statutory exception for proprietary estoppel into section 2 of the 1989 Act. To conclude, although the Law Commission's intention was to make the remedy of adverse possession available to informal purchasers, this intention is likely to be frustrated without the introduction of the legislative clarifications outlined in this article.