



## **THE CAYMAN ISLANDS LAW REFORM COMMISSION**



### **DISCUSSION PAPER ADVERSE POSSESSION 24 JULY, 2023**

**THE CAYMAN ISLANDS LAW REFORM COMMISSION**

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## CAYMAN ISLANDS LAW REFORM COMMISSION

### Public Submissions

Stakeholders and members of the general public are invited to comment on the issues identified in this Discussion Paper and, in particular, to submit their views on the recommendations presented for discussion.

The Paper may be viewed on the following website: [www.lrc.gov.ky](http://www.lrc.gov.ky) or [www.gov.ky](http://www.gov.ky) or a copy may be collected from the Offices of the Law Reform Commission.

Submissions should be forwarded no later than **27<sup>th</sup> October 2023** to the Director of the Law Reform Commission, 4<sup>th</sup> Floor Government Administration Building, Portfolio of Legal Affairs, 133 Elgin Avenue, George Town, Grand Cayman, P.O. Box 136, Grand Cayman KY1-9000 either electronically to **[cilawreform@gov.ky](mailto:cilawreform@gov.ky)**, or in writing, by post or hand delivered.

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## 1 INTRODUCTION

1.1 Adverse possession is the process by which a person can obtain title to land belonging to someone else by continuously occupying it in a way that is inconsistent with the rights of the owner. The doctrine of adverse possession is often referred to as “squatter’s rights”, a somewhat emotive term with negative connotations. The label “squatter” conjures visions of an aggressive incursion tantamount to land theft, and the notion of such a “squatter” having “rights” to the land they have invaded may be met with alarm. The concept of a person legally acquiring another’s property simply by using it without permission runs contrary to the modern understanding of property ownership.

1.2 While there are examples of the doctrine of adverse possession operating to reward an undeserving squatter, the more common scenario is more nuanced. Claims to adverse possession frequently occur in the context of encroachments on neighbouring land, many of which are the inadvertent result of mistakes as to boundary. As Lord Hope explained –

“At first sight, it might be thought that the word 'adverse' describes the nature of the possession that the squatter needs to demonstrate. It suggests that an element of aggression, hostility or subterfuge is required. But an examination of the context makes it clear that this is not so. It is used as a convenient label only, in recognition simply of the fact that the possession is adverse to the interests of the paper owner or, in the case of registered land, of the registered proprietor.”<sup>1</sup>

As such, any reform of the law relating to adverse possession must be undertaken with care to ensure that there are no unintended consequences that would unfairly disadvantage a person with a deserving claim.

1.3 This Paper will outline the history and existing law of adverse possession, assess the justifications for the doctrine (and corresponding counter-arguments) and examine the law and recent reforms in other common law jurisdictions. Finally, the Paper will propose two options for reform in the Cayman Islands.

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<sup>1</sup> *JA Pye (Oxford) Ltd v Graham* [2000] Ch 676, [69].

## 2 THE DOCTRINE OF ADVERSE POSSESSION

### 2.1 The elements of adverse possession

2.1.1 The doctrine of adverse possession consists of statutory elements and common law elements. As summarised by Butt –

“The law governing possessory title is a mixture of common law and statute. Common law determines the required nature of possession. Statute determines the required duration of possession.”<sup>2</sup>

2.1.2 The statutory elements are primarily found in statutes of limitation,<sup>3</sup> which stipulate the period after which a person’s right to recover land of which they have been dispossessed ends. The prescribed period varies between jurisdictions, and frequently varies depending on whether the land concerned is privately held or held by the Crown. The limitation period operates to bar the exercise of the prior rights of the documentary owner of the land. However, the person claiming adverse possession must meet the common law requirements of possession to gain title.<sup>4</sup>

2.1.3 In order to succeed in a claim for adverse possession, a person must establish two elements of possession –

1. Factual possession – the person must demonstrate a sufficient degree of physical control of the land in a way that is conclusive and exclusive of others.<sup>5</sup>
2. Intention to possess (*animus possidendi*) – the person must establish an intention to possess the land to the exclusion of all others, including the owner.<sup>6</sup>

These elements are explored further at 2.3 below.

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<sup>2</sup> Butt, *Land Law* (Lawbook, 6<sup>th</sup> ed, 2010), p. 896.

<sup>3</sup> Depending on the jurisdiction, there may also be statutory provisions governing the process of acquiring title to registered land by adverse possession.

<sup>4</sup> Burns, “Adverse Possession and Title-by-Registration Systems in Australia and England”, (2011) 35(3) *Melbourne University Law Review* 773, p. 781.

<sup>5</sup> *Powell v McFarlane*, [1977] 38 P & CR 452, 470.

<sup>6</sup> *Buckinghamshire County Council v Moran* [1990] Ch 623, 643.

## 2.2 The development of the doctrine of adverse possession

2.2.1 When considered in the modern context, the doctrine of adverse possession may seem to be entirely at odds with accepted notions of property ownership. However, it is important to understand how land ownership developed as a legal concept. Physical possession was fundamental to the early common law principle of seisin, or possessory title.<sup>7</sup> Gray and Gray observe –

“Much of the genius of the common law derives from a rough-and-ready grasp of the empirical realities of life. According to this perspective the identification of 'property' in land is an earthily pragmatic affair. There is a deeply anti-intellectual streak in the common law tradition which cares little for grand or abstract theories of ownership, preferring to fasten instead upon the raw organic facts of human behaviour. This perspective is preoccupied with what happens on the ground rather than with what emerges from the heaven of concepts. Accordingly, the crude empiricism of this outlook leaves the recognition of 'property' to rest upon essentially intuitive perceptions of the degree to which a claimant successfully asserts *de facto* possessory control over land. On this view 'property' in land is more about fact than about right; it derives ultimately not from "words upon parchment", but from the elemental primacy of sustained possession.”<sup>8</sup>

2.2.2 A consequence of the primacy of possession to ownership was that the possession could not be temporary or ambiguous. In order to claim seisin, a person's possession of land had to be consistent, open to the world and exclusive. In addition to physical possession, the possessor was required to demonstrate the intention to possess the land.<sup>9</sup> Importantly, an entitlement to land based on seisin did not constitute absolute ownership of property – seisin could be displaced by a claimant with an earlier and better seisin.<sup>10</sup>

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<sup>7</sup> Burns, p. 773.

<sup>8</sup> Gray & Gray, “The Idea of Property in Land” in Bright & Dewar (eds), *Land Law: Themes and Perspectives* (Oxford University Press, 1988), p. 18-19.

<sup>9</sup> Burns, p. 778.

<sup>10</sup> Burns, p. 778.

- 2.2.3 The doctrine of adverse possession developed in this context. The uncertainty and instability created by a system of relative title based on possession, in which a person's interests could be overturned at any time by an earlier possessor, was remedied by the introduction of statutory limitation periods, beginning with the *Limitations Act 1623* (UK). This quietened title when an earlier possessor had "slept" on his or her rights.<sup>11</sup>
- 2.2.4 This position was not seriously challenged until the concepts of possession and relativity of title were diminished in importance by the introduction of title by registration.<sup>12</sup> Adverse possession of registered land was not always permitted in the United Kingdom. The *Land Transfer Act 1875* (UK) did not allow it, but the position changed with the enactment of the *Land Transfer Act 1897* (UK). Under this Act, a person could obtain rectification of the register to be registered as proprietor of land under their possession after the expiry of the limitation period. However, at any time before the person obtained that rectification, their interest could be displaced by the sale of the land.<sup>13</sup> In this way, the Act differentiated between registered and unregistered land.
- 2.2.5 This position was criticised by the Royal Commission on the Land Transfer Acts in 1911, which concluded that the Statutes of Limitation should not distinguish between registered and unregistered land. However, this conclusion was reached without considering the basis for the distinction – that ownership of unregistered land is founded on possession, and ownership of registered land is founded on the register itself.<sup>14</sup>
- 2.2.6 The *Land Registration Act 1925* (UK) (the "1925 UK Act") reflected the view of the Royal Commission. The 1925 UK Act sought to apply the principles of adverse possession to registered land "in the same manner and to the same extent" as they apply to unregistered land.<sup>15</sup> However, the existence of the register presented a technical obstacle to the identical treatment of registered and unregistered land – the title of the registered proprietor cannot be extinguished without a change to the register. The 1925 UK Act attempted to overcome

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<sup>11</sup> Burns, p. 780.

<sup>12</sup> Burns, p. 780.

<sup>13</sup> *Land Transfer Act 1897* (UK), section 12.

<sup>14</sup> United Kingdom Law Commission, *Land Registration for the Twenty-First Century: A Consultative Document* (Law Com No. 254), p. 210.

<sup>15</sup> *Land Registration Act 1925* (UK), s 75.

this obstacle by stipulating that the registered proprietor's title would not be extinguished by an adverse possessor, but that the land would be held by the registered proprietor on trust for the adverse possessor.<sup>16</sup> This remains the position in the Cayman Islands.<sup>17</sup>

## 2.3 Leading adverse possession cases

2.3.1 Two leading United Kingdom decisions comprehensively outline the common law elements of adverse possession.

*Powell v McFarlane*<sup>18</sup>

2.3.2 The High Court decision in *Powell* clarified a number of important principles of the law of adverse possession. Powell lived on his grandfather's farm (which later became his). The disputed land was next to the farm. McFarlane bought the disputed land but soon afterwards moved abroad for several years. Powell, then aged 14, began to use the land to graze a cow, used the land for shooting, repaired fences and kept a goat there. These activities were spaced out over many years. Powell sought a declaration to the effect that he had been in adverse possession for more than 12 years. This claim was rejected on the grounds that the relevant actions were too trivial to constitute the requisite degree of possession.

2.3.3 Slade J summarised the elements of adverse possession as follows:

- “(1) In the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land, as being the person with the prima facie right to possession...
- (2) If the law is to attribute possession of land to a person who can establish no paper title to possession, he must be shown to have both factual possession and the requisite intention to possess (“*animus possidendi*”).
- (3) Factual possession signifies an appropriate degree of physical control. It must be single and conclusive possession...The question what acts constitute a sufficient degree of exclusive physical control must depend on

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<sup>16</sup> *Land Registration Act 1925* (UK), s 75.

<sup>17</sup> *Registered Land Act (2018 Revision)*, s 135.

<sup>18</sup> [1977] 38 P & CR 452.

the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed...It is impossible to generalise with any precision as to what acts will or will not suffice to evidence factual possession...Everything must depend on the particular circumstances, but broadly, I think what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no-one else has done so.

- (4) The *animus possidendi*...involves the intention, in one's own name and on one's own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow...[A] person seeking to dispossess an owner must, in my judgment, at least make his intentions sufficiently clear so that the owner, if present at the land, would clearly appreciate that the claimant is not merely a persistent trespasser, but is actually seeking to dispossess him."<sup>19</sup>

*JA Pye (Oxford) Ltd v Graham*<sup>20</sup>

2.3.4 The House of Lords considered the doctrine of adverse possession in the well-known case of *Pye*. The case concerned a farming family, the Grahams, who had occupied registered land owned by JA Pye (Oxford) Ltd ("Pye") under a grazing agreement. After the agreement expired in 1983, the Grahams remained in occupation despite requests to vacate, and without making further payments. Although the Grahams offered to enter into a further agreement, this did not occur, and, after 1986, Pye did little in relation to the land until 1998, when proceedings to recover the land were commenced.

2.3.5 The first instance judge held that time had begun to run against Pye when the grazing agreement expired, even though Pye had made requests for the Grahams to vacate, and the Grahams had offered to enter into a further agreement. The Court of Appeal overturned

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<sup>19</sup> [1977] 38 P & CR 452, 470-480.

<sup>20</sup> [2000] Ch 676 (Ch D); [2002] UKHL 30; [2003] 1 AC 419 (HL).

this, finding that the limitation period did not start running until 1986, after Pye had apparently abandoned attempts to recover the land.

2.3.6 The House of Lords reversed the decision of the Court of Appeal and held that the Grahams had established the required elements of actual possession and intention to possess for the required period. Lord Browne-Wilkinson confirmed that the two elements necessary for legal possession are:

1. A sufficient degree of physical custody and control ("factual possession").
2. An intention to exercise such custody and control on one's own behalf and for one's own benefit ("intention to possess").

Lord Browne-Wilkinson emphasised that what is required to satisfy the requisite intention element is not an intention to own or even an intention to acquire ownership, but simply an intention to possess.

2.3.7 The *Pye* case eventually made its way to the Grand Chamber of the European Court of Human Rights, which considered whether the statutes governing adverse possession (comprised, at the relevant time, of the *Limitation Act 1980* (UK) and the *Land Registration Act 1925* (UK)), violated the right to peaceably enjoy property under Article 1 of Protocol No. 1 to the European Convention on Human Rights. The Court held<sup>21</sup> that –

“The statutory provisions which resulted in the applicant companies' loss of beneficial ownership were...not intended to deprive paper owners of their ownership, but rather to regulate questions of title in a system in which, historically, 12 years' adverse possession was sufficient to extinguish the former owner's right to re-enter or to recover possession, and the new title depended on the principle that unchallenged lengthy possession gave a title. The provisions of the 1925 and 1980 Acts which were applied to the applicant companies were part of the general land law, and were concerned to regulate, amongst other things, limitation periods in the context of the use and ownership of land as between individuals. The applicant companies were therefore affected, not by a “deprivation of possessions” within the

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<sup>21</sup> Application No 44302/02, 30 August 2007, *J.A. Pye (Oxford) Ltd and J.A. Pye (Oxford) Land Ltd v. the United Kingdom* (2008) EHRR 45.

meaning of the second sentence of the first paragraph of Article 1, but rather by a “control of use” of land within the meaning of the second paragraph of the provision.”<sup>22</sup>

2.3.8 Notably, the Court considered and endorsed the general policy underlying statutes that allow registered land to be subject to adverse possession –

“It is a characteristic of property that different countries regulate its use and transfer in a variety of ways. The relevant rules reflect social policies against the background of the local conception of the importance and role of property. Even where title to real property is registered, it must be open to the legislature to attach more weight to lengthy, unchallenged possession than to the formal fact of registration. The Court accepts that to extinguish title where the former owner is prevented, as a consequence of the application of the law, from recovering possession of land cannot be said to be manifestly without reasonable foundation.”

2.3.9 The decision of the Grand Chamber of the European Court of Human Rights was not unanimous. The dissenting opinion emphasised the distinction between registered and unregistered land in the context of adverse possession –

“...[I]t is not in dispute that limitation periods for the recovery of land may be said to pursue a legitimate aim in the public interest. However, as was pointed out in the Consultative Document of the Law Commission, the law of adverse possession, which does not merely bar claims but has the effect of extinguishing title, can only be justified by “factors over and above those which explain the law of limitations”.

The present case concerns the law of adverse possession as it applies to registered land in which...the reasons traditionally advanced to justify the transfer of beneficial title to the adverse possessor at the end of the limitation period have much less cogency than in the case of unregistered land...[W]here land is registered, it is difficult to see any justification for a legal rule which compels such an apparently unjust result as to deprive the owner of his beneficial title in favour of an adverse possessor.

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<sup>22</sup> (2008) EHRR 45, [66].

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In the case of registered land...title depends not on possession, but on registration as the proprietor. A potential purchaser of land can ascertain the owner of the land by searching the register, and there is no need for a potential vendor to establish title by proving possession.”<sup>23</sup>

### **3 ADVERSE POSSESSION IN THE CAYMAN ISLANDS**

#### **3.1 History of land registration in the Cayman Islands**

3.1.1 A comprehensive system of land registration was introduced to the Cayman Islands with the enactment of the *Registered Land Law, 1971*, the *Land Adjudication Law, 1971*, and the *Land Surveyors’ Law, 1971*. The enactment of this package of legislation allowed for the determination of boundaries, adjudication of ownership, and registration of land.<sup>24</sup>

3.1.2 The first step in creating a land registry was to determine boundaries and ownership of existing unregistered land. Under the *Land Adjudication Law, 1971*, land was divided into adjudication areas for the purpose of determining boundaries and ownership of parcels of land within each area. Disputes as to ownership were heard and determined, and an adjudication record compiled for each parcel of land.<sup>25</sup> While most boundaries were recorded as demarcated, it was not always possible to determine the actual boundary of a parcel of land on the ground. In these cases, an undemarcated (that is, unadjudicated) boundary was recorded. The process of adjudicating land was completed by September 1977.<sup>26</sup>

3.1.3 The land adjudication process reflected the deep connection between possession and ownership in the early common law, and the common law principles applicable to adverse possession. This was expressed in the principles of adjudication set out in section 16 to the *Land Adjudication Law, 1971*, which remain in the Act today.

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<sup>23</sup> (2008) EHRR 45, [7], [11].

<sup>24</sup> Lands & Survey Department, Cayman Islands Government, *Land Registry Procedure Manual*, 2010, p. 20.

<sup>25</sup> Lands & Survey Department, p. 21.

<sup>26</sup> Lands & Survey Department, p. 22.

- 3.1.4 In preparing the adjudication record, the Records Officer was permitted to record a person's title as either absolute or provisional. To grant an absolute title to land, the Records Officer was required to be satisfied that the person claiming ownership –
- (a) had been in open and peaceful possession of the land for an uninterrupted period of 12 years or more; or
  - (b) had a good documentary title to the land that had not been disturbed by a competing claim.<sup>27</sup>
- 3.1.5 If the Records Officer was satisfied that a person was in possession of land or had a right to it, but was not satisfied that the person was entitled to an absolute title, a provisional title could be granted. In the case of provisional title, the Records Officer would record any other right or interest affecting the title, or any other qualification to the title.<sup>28</sup> A provisional title can be converted to an absolute title under section 29 of the *Registered Land Act (2018 Revision)* if the applicant satisfies the Registrar that –
- (a) the qualification to which the provisional title is subject has ceased to be of effect; or
  - (b) the holder of the provisional title has been in possession for 12 years and there is no effective qualification to which the title is subject.
- 3.1.6 The land adjudication process resulted in the registration of all land in the Cayman Islands. The statute law relating to adverse possession continues to provide a process for acquiring title to unregistered land. However, these provisions have no practical application as no unregistered land remains.

## **3.2 The current Cayman Islands scheme**

- 3.2.1 The doctrine of adverse possession is incorporated into the statute law of the Cayman Islands by way of three Acts:

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<sup>27</sup> *Land Adjudication Act (1997 Revision)*, s 16(1)(a).

<sup>28</sup> *Land Adjudication Act (1997 Revision)*, s 16(1)(d).

- (a) the *Limitation Act (1996 Revision)* provides the basis for limiting a landowner's right to recover land after specified periods of time;
- (b) the *Registered Land Act (2018 Revision)* confirms the application of the doctrine of adverse possession to registered land, and prescribes the procedure for acquiring title to registered land on this basis; and
- (c) the *Land Adjudication Act (1997 Revision)* prescribes the procedure for acquiring title to unregistered land by possession.<sup>29</sup>

3.2.2 The *Limitation Act (1996 Revision)* provides (in summary):

- (a) that a person cannot bring an action to recover land after the expiry of 12 years from the date on which the right of action accrued (section 19(1));
- (b) the person's right of action to recover land accrues on the later of:
  - (i) the date they are dispossessed of the land or discontinue possession (section 20(1)); or
  - (ii) the date another person takes adverse possession of the land (section 20(9));
- (c) in the case of Crown land, the limitation period is 30 years rather than 12 years (section 21(1)); and
- (d) in the case of unregistered land, the expiry of the limitation period before which a person must bring an action to recover land extinguishes the title of the person to the land (section 23, read with section 135 of the *Registered Land Act (2018 Revision)*).

3.2.3 The *Registered Land Act (2018 Revision)* provides (in summary):

- (a) registered land is subject to rights acquired or in the process of being acquired by virtue of any law relating to the limitation of actions, without those rights being recorded on the Land Register (section 28(f));

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<sup>29</sup> See 3.1 above.

- (b) the *Limitation Act (1996 Revision)* applies to both registered and unregistered land, but in the case of registered land, the expiry of the limitation period does not operate to extinguish the title of the registered proprietor – instead, the registered proprietor holds the land on trust for the adverse possessor (section 135);
- (c) an adverse possessor who claims to have acquired title to registered land by virtue of the expiry of the limitation period may apply to the Registrar to be registered as the proprietor of the land (section 136); and
- (d) on application by an adverse possessor for registration as proprietor of registered land:
  - (i) the Registrar must advertise the application and give notice of the application to the proprietor of the land (section 137(1) and (2));
  - (ii) if the Registrar is satisfied of the applicant’s title after 1 month has elapsed since notice of the application was given, the Registrar may register the applicant as proprietor of the land, either with absolute or provisional title (section 137(3)); and
  - (ii) either the proprietor or the applicant may apply to the court for the determination of any question arising in relation to the application.

3.2.4 As has been discussed,<sup>30</sup> the European Court of Human Rights has considered whether the UK law of adverse possession operates to violate the right to peaceably enjoy property under Article 1 of Protocol No. 1 to the European Convention on Human Rights. It should be noted that, in the Cayman Islands, a law will not violate the right to peaceful enjoyment of property contained in section 15 of the Bill of Rights<sup>31</sup> to the extent that the law makes provision for the interference with, taking of possession or acquisition of any property in consequence of a limitation of actions.<sup>32</sup>

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<sup>30</sup> See 2.4.4-2.4.6 above.

<sup>31</sup> Cayman Islands Constitution Order 2009 (S.I. 2009/1379), Schedule 2, Part 1.

<sup>32</sup> Cayman Islands Constitution Order 2009 (S.I. 2009/1379), Schedule 2, s 15(2)(a)(viii).

3.2.5 The legislative provisions summarised above are presented in their complete form in Appendix A to this Paper.

#### **4 JUSTIFICATIONS FOR THE DOCTRINE OF ADVERSE POSSESSION**

4.1 Allowing land to be acquired by way of possession may first appear to run contrary to the accepted understanding of ownership. The existence and retention of the doctrine has been justified on a number of grounds.

*To facilitate conveyancing in unregistered land*

4.2 The most straightforward justification for the doctrine of adverse possession is relevant only to unregistered land. Ownership of unregistered land is based on possession, and adverse possession can extinguish earlier rights to possess. Limitation periods in relation to real property appear to have been created in order to facilitate conveyancing in a possession-based system of land ownership.<sup>33</sup> This principle was articulated by Lord Macnaghten in *Perry v Clissold*<sup>34</sup> –

“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. And if the rightful owner does not come forward and assert his title by process of law within the period prescribed by the provisions of the Statute of Limitations applicable to the case, his right is forever extinguished, and the possessory owner acquires an absolute title.”

4.3 This justification is not relevant to a discussion of adverse possession in the Cayman Islands, since all land is registered.

*To protect against stale claims*

4.4 Another justification is aligned to the policy underlying statutes of limitation in general – to protect defendants from stale claims and encourage plaintiffs not to “sleep on their rights”. A limitation period provides certainty.<sup>35</sup> However, by allowing a person to obtain

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<sup>33</sup> Law Com No. 254, p. 204.

<sup>34</sup> [1907] AC 73, 79.

<sup>35</sup> Law Reform Commission of Hong Kong, *Report: Adverse Possession*, October 2004 (HKLRC 2014), p. 22.

title to land, the doctrine of adverse possession has a positive effect that goes much further than simply barring claims. As a result, it cannot be justified purely on the same basis as the policy of limitations.<sup>36</sup>

- 4.5 Further, the owner of the land may not know that the possession is taking place. Knowledge of the possession is not required for the limitation period to run against the owner.<sup>37</sup> Conversely, the person in possession may have full knowledge of their fault (that is, that they are not entitled to occupy the land) and this knowledge will not bar their claim. Even if the owner of the land does know that the occupation is occurring, there may be justifications for not taking action to resume their own occupation –

“[T]he acts of trespass may not be obvious, or may be trivial and entirely harmless. Further, the owner may not know the law, and may not realise that the failure to take steps to put an end to the situation which is doing him no harm may be prejudicing his position. There may be little or no fault involved. On the other side, the trespasser will usually know that he is trespassing, will already have benefited from the acts of trespass, and will have done nothing whatsoever to deserve the windfall of being given the property in return for having illegitimately used it for a long time. There is no justification for what is essentially a transfer of property without compensation from the deserving to the undeserving...”<sup>38</sup>

- 4.6 In the case of registered land, it is difficult to argue that a registered proprietor should be expected to exercise vigilance to protect their title from adverse possession – unregistered title is rooted in possession, but registered title is not.<sup>39</sup> The basis of title to registered land is the registration itself, and a change in legal ownership requires a change in the register. The integrity of a system of registered title can only be maintained if registered owners can rely on the registration to safeguard their ownership without any further action. It can be argued that the doctrine of adverse possession stands in direct conflict with the fundamental principle of indefeasibility of title that underpins the modern system of registration-based

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<sup>36</sup> Law Com No. 254, p. 204.

<sup>37</sup> Dockray, “Why do we need adverse possession?” [1985] *Conveyancer and Property Lawyer* 272, p. 274.

<sup>38</sup> *Beaulane Properties Ltd v Palmer* [2005] 4 All ER 461, at 512, per Deputy High Court Judge Strauss KC.

<sup>39</sup> Law Com No. 254, p. 204.

land ownership.<sup>40</sup> Nonetheless, several justifications for the doctrine of adverse possession in its application to registered land have been advanced.

*To prevent land becoming unmarketable*

- 4.7 One such justification is that land may become unmarketable if the ownership of the land no longer reflects the reality of the possession of the land and the person in possession has no way to acquire title. This justification has its foundation in the principle that land should not be “wasted”, and that the doctrine of adverse possession allows land that would otherwise be unmarketable to be put to productive use.<sup>41</sup> It is generally accepted that it is in the public interest to encourage the upkeep, improvement and development of land rather than allowing it to be left neglected and unused.<sup>42</sup>
- 4.8 For example, the registered proprietor of land may abandon the land and be untraceable, or die in circumstances in which no steps are taken to wind up his or her estate. In such a case, the land would be incapable of being dealt with. However, if a squatter were to obtain ownership by virtue of the doctrine of adverse possession, the land would remain “useful”, in the sense that it would remain marketable.<sup>43</sup>
- 4.9 Another example of a situation in which adverse possession can ensure that land remains marketable is where there have been unregistered dealings with the land. Unlike the previous example, in such a case there is no “theft” of the land. However, the person in possession would be unable to deal in the land unless the reality of their possession is recognised and reflected in a change to the register.<sup>44</sup>

*To prevent hardship in cases of mistake*

- 4.10 A further justification for applying the doctrine of adverse possession to registered land is that it can prevent hardship in cases of mistake. A squatter may have taken possession of land under a reasonable but mistaken belief that he or she is the true owner. This most commonly occurs if the squatter owns neighbouring land and is under a mistaken belief as

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<sup>40</sup> Law Com No. 254, p. 206.

<sup>41</sup> Law Com No. 254, p. 205.

<sup>42</sup> HKLRC 2014, p. 22.

<sup>43</sup> Law Com No. 254, p. 206.

<sup>44</sup> Law Com No. 254, p. 207.

to the correct boundary between the two parcels of land. Relying on this mistaken belief, the squatter may have made improvements to the land or otherwise incurred expenditure. If the true owner of the land knew of the squatter's mistake and did not do anything to bring the mistake to the squatter's attention, the squatter may have a claim in proprietary estoppel, but this will not always be the case.<sup>45</sup> Nonetheless, it has been argued that, in protecting the adverse possessor from hardship, the traditional doctrine of adverse possession does not sufficiently balance the hardship to a landowner who is unaware that his or her land is under the possession of another, and that the limitation period is running.<sup>46</sup>

## **5 REFORM OF ADVERSE POSSESSION IN THE UNITED KINGDOM**

### **5.1 Law Commission process**

5.1.2 On 16 September 1998, the Law Commission of England and Wales published a consultative document examining all aspects of the land registration system in the United Kingdom.<sup>47</sup> The Commission highlighted that while the basis of title to registered land is not possession, but the register itself, this fundamental principle was not reflected in the rules governing adverse possession.<sup>48</sup>

5.1.3 The Commission criticised the approach taken by the 1925 UK Act to registered land acquired under the rules of adverse possession (that is, specifying that the registered proprietor holds the land on trust for the adverse possessor). The Commission considered the trust-based system to have created unnecessary uncertainty and confusion,<sup>49</sup> and suggested that it would have been preferable to protect the adverse possessor's estate in the land as an overriding interest that binds anyone who gains a later interest in the land.<sup>50</sup>

5.1.4 The Commission did not simply object to the mechanism by which the 1925 UK Act dealt with adverse possession of registered land. They also considered the very premise of the existing law to be flawed –

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<sup>45</sup> Law Com No. 254, p. 205.

<sup>46</sup> Dockray, p. 275.

<sup>47</sup> Law Com No. 254.

<sup>48</sup> Law Com No. 254, p. 12.

<sup>49</sup> Law Com No. 254, p. 219.

<sup>50</sup> Law Com No. 254, p. 214.

“The main weakness of the present law is that the principles which determine whether a registered proprietor will lose his or her title by adverse possession were developed for a possession-based system of title and not one founded on registration. If a system of registered title is to be effective, those who register their titles should be able to rely upon the fact of registration to protect their ownership except where there are compelling reasons to the contrary. All that should be required of them is to keep the Registry informed of their address for service.”<sup>51</sup>

5.1.5 The Commission concluded that compelling grounds are required to justify overriding the fact of registration by possession, and identified four such situations –

1. Where the registered proprietor has disappeared and cannot be traced.
2. Where there have been dealings “off the register” so that the register does not reflect the reality of title.
3. Where the register is inconclusive, such as in the case of a boundary dispute.
4. Where a person has entered into possession under a reasonable mistake as to their rights.<sup>52</sup>

5.1.6 The Law Commission published its Final Report<sup>53</sup> on 6 July 2001. In it, the Commission tested the justifications for the doctrine of adverse possession, stating –

“[I]t is frequently said that the doctrine is an embodiment of the policy that defendants should be protected from stale claims and that claimants should not sleep on their rights. However, it is possible for a squatter to acquire title by adverse possession without the owner realising it. This may be because the adverse possession is either clandestine or not readily apparent. It may be because the owner has more land than he or she can realistically police. Many public bodies fall into this category....But the owner may not even realise that a person is encroaching on his or her land. He or she may think that someone is there with permission and it may take an expensive journey to the Court of Appeal to discover whether or not

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<sup>51</sup> Law Com No. 254, p. 206.

<sup>52</sup> Law Com No. 254, p. 206-207.

<sup>53</sup> Law Commission, *Land Registration for the Twenty-First Century: A Conveyancing Revolution* (Law Com No. 271).

this is so. In none of these examples is a person in any true sense sleeping on his or her rights. Furthermore, even if a landowner does realise that someone – typically a neighbour – is encroaching on his or her land, he or she may be reluctant to take issue over the incursion, particularly if it is comparatively slight. He or she may not wish to sour relations with the neighbour...In any event, even if the policy against allowing stale claims is sound, the consequences of it under the present law – the loss forever of a person’s land – can be extremely harsh and have been judicially described as disproportionate.

There are other grounds for the doctrine of adverse possession that have greater weight. Land is a precious resource and should be kept in use and in commerce. A person may be in adverse possession where the true owner has disappeared and there is no other claimant for the land. Or he or she may have acquired the land informally so that the legal ownership is not a reflection of the practical reality. A person may have innocently entered land, quite reasonably believing that he or she owned it, perhaps because of uncertainties as to the boundaries.”<sup>54</sup>

5.1.7 The Commission confirmed its earlier view<sup>55</sup> that, while adverse possession has a necessary place in relation to unregistered land, its unqualified application to registered land is not justifiable –

“The principles of adverse possession do in fact presuppose unregistered title and make sense in relation to it. This is because the basis of title to unregistered land is ultimately possession. The person best entitled to the land is the person with the best right to possession of it...[T]he investigation of title to unregistered land is facilitated (and therefore costs less) because earlier rights to possess can be extinguished by adverse possession. However, where title is registered, the basis of title is primarily the fact of registration rather than possession...[T]he doctrine of adverse possession does have benefits and we do not therefore favour outright abolition in relation to registered land. However, we consider that the balance

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<sup>54</sup> Law Com No. 271, p. 31.

<sup>55</sup> Law Com No. 254, p. 208.

between landowner and squatter needs to be adjusted to overcome some of the deficiencies outlined above, while maintaining the advantages it can offer.”<sup>56</sup>

## **5.2 Land Registration Act 2002 (UK)**

- 5.2.1 The *Land Registration Act 2002* (UK) (the “2002 UK Act”) gave effect to the Law Commission’s recommendations and made it significantly more difficult for a claim to title of registered land to succeed against the wishes of the registered proprietor. The relevant provisions relating to adverse possession commenced in stages between 13 October 2003 and 13 October 2004.
- 5.2.2 Section 96 of the 2002 UK Act disapplies the limitation periods specified in sections 15 and 16 of the *Limitation Act 1980* (UK) in relation to registered land. Section 96(3) expressly states that section 17 of that Act does not operate to extinguish the title of a person. However, this does not abolish the right to claim title to registered land by way of adverse possession entirely. The Act sets out the procedure for registration of an adverse possessor in Schedule 6.
- 5.2.3 Under the new scheme, a person in adverse possession of land for at least 10 years may apply to be registered as the proprietor of the land, but the registered proprietor must be given notice of the application and an opportunity to respond to the application.<sup>57</sup> In itself, this change to the law places registered proprietors in a much stronger position to defend their title against claims by adverse possessors.
- 5.2.4 If the registered proprietor does not respond to the notice, the applicant is entitled to be registered as proprietor of the estate without establishing anything further. However, if the registered proprietor responds to the notice by objecting to the application and the Registrar is unable to dispose of the objection by agreement between the parties, the matter must be referred to the First-tier Tribunal for determination. The adverse possessor will only succeed in their application if one of three conditions are met.<sup>58</sup>

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<sup>56</sup> Law com No. 271, p. 32.

<sup>57</sup> Land Registration Act 2002 (UK), Schedule 6, paragraphs 1, 2 and 3.

<sup>58</sup> Land Registration Act 2002 (UK), Schedule 6, paragraphs 4 and 5.

*Condition 1*

The following circumstances apply:

- (a) it would be unconscionable because of an equity by estoppel for the registered proprietor to seek to dispossess the applicant; and
- (b) the circumstances are such that the applicant ought to be registered as the proprietor.

*Condition 2*

The applicant is for some other reason entitled to be registered as the proprietor.

*Condition 3*

The following circumstances apply:

- (a) the land to which the application relates is adjacent to land belonging to the applicant;
- (b) the exact line of the boundary between the two has not been determined under rules made under the Act;
- (c) 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 them; and
- (d) the estate to which the application relates was registered more than one year prior to the date of the application.

5.2.5 An adverse possessor who fails in an application for registration may apply again after the expiry of 2 years, but only if they:

- (a) remain in possession;
- (b) are not defending an action for possession by the registered proprietor;
- (c) have not been subject to a judgment for possession against them; and

(d) have not been evicted following a judgment for possession.<sup>59</sup>

5.2.6 If the adverse possessor meets these criteria and makes a new application, they are entitled to be registered as proprietor of the estate.<sup>60</sup> This essentially puts the registered proprietor who has defeated an application for registration by an adverse possessor on notice – they must take action to obtain possession of the land within 2 years after the application was rejected, or risk a further application which will result in their title being extinguished.

5.2.7 In addition to the obvious protections the new scheme affords to registered proprietors, there are more subtle consequences that address some of the concerns raised by the Commission in relation to neighbouring land. Because the limitation period no longer applies to registered land, the registered proprietor's title will never be barred simply by the passage of time. As such, the adverse possessor is required to take the initiative to extinguish the registered proprietor's title. The Commission noted that –

“This is a significant point in a case involving neighbours. A neighbour cannot be criticised for objecting to such an application and acting upon it, where he or she might have been regarded as a trouble maker if he or she had taken steps on his or her own initiative against the encroaching neighbour.”<sup>61</sup>

### 5.3 The 2002 UK Act in practice

#### *Baxter v Mannion*<sup>62</sup>

5.3.1 This case concerned a field purchased by Mr. Mannion in 1996. Mr. Baxter, who lived nearby, applied to be registered as the proprietor of the field on the basis that he had used the field as a pasture for his horses (without payment) since 1985. Mr. Mannion failed to respond to the notice of the application, and as such Mr. Baxter was not required to establish that one of the conditions in Schedule 6, paragraph 5 of the 2002 UK Act was met. Mr. Baxter was registered as proprietor of the field. Mr. Mannion then applied under Schedule 4, paragraph 5(a) of the Act for the Registrar to alter the register to correct a

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<sup>59</sup> Land Registration Act 2002 (UK), Schedule 6, paragraph 6.

<sup>60</sup> Land Registration Act 2002 (UK), Schedule 6, paragraph 7.

<sup>61</sup> Law Com No. 271, p. 33 at note 149.

<sup>62</sup> [2010] 1 WLR 1965; [2010] All ER 173.

mistake, on the basis that Mr. Baxter had not actually been in possession of the field to the extent required to satisfy the elements of adverse possession. Mr. Mannion's application was successful and the register was altered. Mr. Baxter appealed on the basis that the register could only be altered to correct a mistake of a procedural nature, and that the application for registration based on adverse possession had been made and decided in accordance with the requirements of the Act.

5.3.2 Mr. Baxter's appeal was unsuccessful, with Henderson J taking a purposive approach rather than accepting the strict compliance with procedural requirements demonstrated by Mr. Baxter –

“42. First, the general policy of the 2002 Act was severely to limit the circumstances in which a squatter could acquire title to registered land, and to offer greater security of title for a registered proprietor than existed under the previous law...In the light of this policy, it would be very strange if a registered proprietor could, for the first time, be at risk of irrevocably losing his land to a squatter who had never in fact been in adverse possession. It would also be a wholly disproportionate penalty for failure to serve a counter notice, especially where (as in the present case) there are extenuating circumstances, which help to explain, even if they do not fully excuse, the failure.

43. Secondly, Mr Baxter's interpretation of the 2002 Act would be an invitation for fraud. It would potentially reward a dishonest applicant who succeeded in persuading the registrar that he had been in adverse possession by telling lies about the nature and extent of his use of the land...”<sup>63</sup>

5.3.3 This case highlights a possible gap in the scheme prescribed by the 2002 UK Act. If a registered proprietor fails to respond to the notice of application for registration by the adverse possessor, nothing further needs to be established in order for the possessor to gain registration. Mr. Baxter's use of the land did not satisfy the elements of factual possession and requisite intention that have long been part of the settled law of adverse possession.

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<sup>63</sup> [2010] All ER 173, [42], [43].

The goal of the 2002 UK Act was to strike a fairer balance between the rights of registered proprietors and adverse possessors – it does not achieve this if a registered proprietor can lose their title purely as a result of failing to respond to a notice. It would be preferable to require a further step to be taken – that the Registrar must assess whether or not the person claiming title has in fact met the basic requirements of possession. A registered proprietor who fails to respond to notice of the application would still be at a disadvantage, as they would be unable to present evidence to contradict the applicant’s claim. However, a situation in which the claimant is registered despite having a patently baseless claim to possession would be avoided.

*Dowse v City of Bradford*<sup>64</sup>

- 5.3.4 This case concerned a dispute over 2 acre parcel of land located between the rear gardens of a row of residential houses and a railway with adjacent allotment land. The applicants, Mr. and Mrs. Dowse, owned one of the houses and their rear garden adjoined the disputed land but was separated from it by a fence. Their boundary with the disputed land had not been determined, but comprised only a small part of the entire boundary of the disputed land, which ran all along the rear gardens of the row of houses.
- 5.3.5 Mr. and Mrs. Dowse claimed to have been in adverse possession of the disputed land since 1974. They had previously applied unsuccessfully for registration of title to the land under the pre-2002 UK Act scheme. That application was rejected on the basis that they had only used the disputed land for grazing and that it was not in their exclusive possession (in other words, they failed to establish the required factual possession and intention). The Dowses proceeded to increase their use of the land, including by parking a caravan on the land and making access to the land more difficult. They then re-applied for registration under the new 2002 UK Act, which was disputed by the Bradford Council.
- 5.3.6 The Dowses relied on the third condition contained in Schedule 6, paragraph 5(4) of the 2002 UK Act (and outlined in paragraph 5.2.4 above). They argued that they held a reasonable belief that the land belonged to them, but not as a result of a disputed boundary.

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<sup>64</sup> [2020] UKUT 202 (LC).

Rather, they believed that they owned the land in addition to their own land. The Dowses' application was dismissed by the First Tier Tribunal and they appealed unsuccessfully to the Upper Tribunal.

5.3.7 The case clarified an important issue of interpretation regarding the wording of paragraph 5(4). The provision does not expressly require the applicant to believe that the legal boundary between their land and the disputed land is in a different location to that shown on the Land Register. However, the Upper Tribunal found that this is implied, and that "the exception [in paragraph 5(4)] is to the effect that the applicant was justified in believing that the true position of the boundary was where he believed it to be".<sup>65</sup>

5.3.8 In addition, the Upper Tribunal held that paragraph 5(4)(a) required "whole (or substantially the whole)" of the disputed land to be "capable of being described as 'adjacent to' the applicant's land".<sup>66</sup> This was not the case with the land in question, where only a small part of the disputed land adjoined the applicant's land.

5.3.9 The Upper Tribunal also clarified an important issue relating to the interpretation of the paragraph 5(4) requirement that the adverse possessor reasonably believe that "the land to which the application relates belonged to him". The First Tier Tribunal held that the Dowses did not meet this requirement because they did not believe that they held paper title to the disputed land. The Upper Tribunal rejected this interpretation, finding that the words "belonged to" were deliberately used to convey a broader meaning than ownership in the sense of holding the paper title.<sup>67</sup>

## **6 ADVERSE POSSESSION IN OTHER COMMON LAW JURISDICTIONS**

### **6.1 Australia**

6.1.1 Land law in Australia is a state and territory matter. As such, the law of adverse possession varies to some degree between the eight states and territories.

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<sup>65</sup> [2020] UKUT 202 (LC), [41].

<sup>66</sup> [2020] UKUT 202 (LC), [42].

<sup>67</sup> [2020] UKUT 202 (LC), [46].

### *Unregistered Land*

6.1.2 Adverse possession is not part of the land law of the Australian Capital Territory or the Northern Territory. Section 5 of the *Limitation Act 1985* (ACT) expressly prohibits limitation periods from applying to actions to recover land, and the *Limitation Act 1981* (NT) does not provide for a limitation period in relation to such actions.

6.1.3 All the states allow for adverse possession in relation to unregistered land. In most cases, the relevant limitation period is 12 years,<sup>68</sup> while in two states it is 15 years.<sup>69</sup> In relation to Crown land, no adverse possession claim is permitted in Queensland, Victoria and Western Australia, while the limitation period in relation to Crown land is 30 years in New South Wales<sup>70</sup> and Tasmania,<sup>71</sup> and 60 years in South Australia.<sup>72</sup> The expiration of the limitation period has the effect of extinguishing the owner's title to the land.<sup>73</sup>

### *Registered land*

6.1.4 Adverse possession in relation to registered land has been retained as part of the land law of all the states, but not the two territories (as mentioned above). In South Australia, Queensland, New South Wales, Victoria and Western Australia, a successful claim to adverse possession results in the title of the registered proprietor being extinguished. This occurs after a process that differs slightly between jurisdictions but essentially takes the form of the following steps –

1. The person in possession applies to the Registrar for title to the land.
2. Notice of the application is published and given to the registered proprietor and anyone else with an interest in the land.

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<sup>68</sup> *Limitation Act 1969* (NSW), s 27(2); *Limitation of Actions Act 1974* (QLD), s 13; *Limitation Act 1974* (Tas), s 10(2); *Limitation Act 2005* (WA), s 19 & *Limitation Act 1935* (WA), s 4.

<sup>69</sup> *Limitation of Actions Act 1936* (SA), s 4; *Limitation of Actions Act 1958* (Vic), s 8.

<sup>70</sup> *Limitation Act 1969* (NSW), s 27(1), (4).

<sup>71</sup> *Limitation Act 1974* (Tas), s 10(1).

<sup>72</sup> *South Australian Co v City of Port Adelaide* [1914] SALR 161.

<sup>73</sup> *Limitation Act 1969* (NSW), s 65(1); *Limitation of Actions Act 1974* (QLD), s 24(1); *Limitation of Actions Act 1936* (SA), s 28; *Limitation Act 1974* (Tas), s 21; *Limitation of Actions Act 1958* (Vic), s 16; *Limitation Act 2005* (WA), s 75.

3. If, after the expiration of a period specified in the notice, no-one has lodged a caveat on the land, the Registrar may issue the title to the land to the applicant.
4. If a person lodges a caveat during the period specified in the notice, the Registrar must determine the entitlement of the caveator and, if not satisfied with the caveator's claim, notify the caveator that they may take proceedings in court to establish title within a specified period.
5. If the caveator fails to commence proceedings, or fails to establish title in such proceedings, the Registrar may issue title to the possessor.<sup>74</sup>

The person claiming possession is also required to demonstrate the common law requirements of actual possession and requisite intention.

6.1.5 Tasmania takes a stricter approach, under the *Land Titles Act 1980* (Tas), in the following ways:

1. The procedure established by the Act applies to both registered and unregistered land.<sup>75</sup>
2. In determining the period of possession, any period during which the owner of the land has paid local council rates is disregarded.<sup>76</sup>
3. The expiry of the limitation period does not extinguish the title of a registered proprietor, but where the title would have been extinguished had the land not been registered, the registered proprietor holds the land on trust for the adverse possessor.<sup>77</sup>

## 6.2 Canada

6.2.1 Some provinces in Canada use a deeds registration system of land conveyancing, rather than a land titles system. Only the provinces and territories that use a land titles system will be examined here.

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<sup>74</sup> *Real Property Act 1900* (NSW); *Land Title Act 1994* (Qld); *Real Property Act 1886* (SA); *Transfer of Land Act 1958* (Vic); *Transfer of Land Act 1893* (WA).

<sup>75</sup> s 138H.

<sup>76</sup> s 138U(1).

<sup>77</sup> s 138W(2).

- 6.2.2 The only land titles jurisdictions in Canada that allow adverse possession in relation to registered land are Alberta, the Northwest Territories and Nunavut.<sup>78</sup> In each case, adverse possession applies only in relation to privately owned land, and in each case the limitation period is 10 years.<sup>79</sup>
- 6.2.3 The Alberta Law Reform Institute recently undertook a lengthy project examining the law of adverse possession. The Institute concluded that there are no longer compelling policy reasons to retain adverse possession in Alberta, and recommended the inclusion of a positive statement in the *Land Titles Act*<sup>80</sup> that no title or interest in land may be acquired by adverse possession, and amendments to the *Limitations Act*<sup>81</sup> to abolish the limitation period for claims to recover possession of real property.<sup>82</sup> However, the Institute recommended a corresponding amendment to section 69 of the *Law of Property Act*,<sup>83</sup> which provides for a person who makes lasting improvements to land under the mistaken belief that the land was the person's own to receive compensation from the owner of the land. The Institute recommended removing the requirement for the improver to establish their belief that they owned the land, broadening the category of cases in which compensation would be payable under the provision.<sup>84</sup>

### 6.3 Bermuda

- 6.3.1 Section 16 of the *Limitation Act 1984* (Bermuda) provides for a limitation period of 20 years in relation to land. Section 18 provides that expiration of the limitation period results in the owner's title being extinguished. The First Schedule to the Act (clause 9) provides that the limitation period in relation to Crown land is 60 years.

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<sup>78</sup> *Land Titles Act*, RSA 2000, c L-4, s 74; *Limitation of Actions Act*, RSNWT 1988, c L-8, ss 2(1)(e), 18, 19, 43; *Limitation of Actions Act*, RSNWT 1988 (Nu), c L-8, ss 2(1)(e), 18, 19, 43 (the Northwest Territories Act applies as a law of Nunavut, having been duplicated by the *Nunavut Act*, SC 1993, c 28, s 29).

<sup>79</sup> *Limitations Act*, RSA 2000, c L-12, s 3(1)(b); *Limitation of Actions Act*, RSNWT 1988, c L-8, s 18; *Limitation of Actions Act*, RSNWT 1988 (Nu), c L-8, s 18 (the Northwest Territories Act applies as a law of Nunavut, having been duplicated by the *Nunavut Act*, SC 1993, c 28, s 29).

<sup>80</sup> RSA 2000, c L-4.

<sup>81</sup> RSA 2000, c L-12.

<sup>82</sup> Alberta Law Reform Institute, *Adverse Possession and Lasting Improvements to Wrong Land: Final Report 115*, April 2020 (ALRI FR 115), p. 103.

<sup>83</sup> RSA 2000, c L-7.

<sup>84</sup> ALRI FR 115, p. 104.

6.3.2 However, the *Land Title Registration Act 2011* (Bermuda) significantly curtails a person's ability to acquire registered land by adverse possession. Section 108(2) specifies that no right of action accrues under section 16 of the *Limitation Act 1984* in relation to registered land unless –

- (a) the land in question has an area no greater than one fifth of the area of all the land in the relevant parcel; and
- (b) the adverse possessor is the owner of an estate in other land that is adjacent to that land, or is entitled to be registered as the owner of a registered estate in other land that is adjacent to that land.

6.3.3 These restrictions reflect the adjacency requirement of the 2002 UK Act, but severely restrict the amount of registered land that can be acquired in this way to just one fifth of the total parcel. As such, this provision appears to be targeted quite precisely at rectifying situations in which prolonged possession has occurred as a result of mistaken boundaries between neighbouring parcels of land.

## **6.4 Barbados**

6.4.1 Section 25 of the *Limitation of Actions Act*, Cap. 231 (Barbados) provides for a limitation period of 10 years in relation to private land, and 30 years in relation to Crown land. Section 37 of the Act provides that, subject to the *Land Registration Act*, Cap. 229 (Barbados), the expiration of the limitation period results in the owner's title being extinguished.

6.4.2 The procedure under the *Land Registration Act*, Cap. 229 for acquiring title to registered land by adverse possession is similar to the current procedure in the Cayman Islands under the *Registered Land Act (2018 Revision)*. Notice of the application is required to be published and given to all affected persons, following which the Registrar may issue title without further steps being taken.

## **7 OPTIONS FOR REFORM AND RECOMMENDATIONS**

### **7.1 Is reform necessary?**

- 7.1.1 Many of the jurisdictions studied in this Paper have a long history of contentious adverse possession cases proceeding to the highest levels of the judicial system. Such cases gain significant publicity and prompt concern and disquiet in the community regarding the concept of adverse possession and its implications for landowners. While the courts of the Cayman Islands have not been similarly exercised, a small number of applications for registration based on adverse possession are made under section 136 of the *Registered Land Act (2018 Revision)* each year. As land values increase and vacant land becomes increasingly scarce, it is reasonable to predict an increase in such applications over time. Some of these applications will, no doubt, be contested and culminate in court proceedings. As such, a lack of contentious adverse possession cases at the present time is not a justification for inaction.
- 7.1.2 In addition, it is important to recognise that the historical basis for the doctrine of adverse possession no longer applies in the Cayman Islands. The Law Reform Commission accepts that ownership of unregistered land is rooted in possession. This is reflected in the *Land Adjudication Act (1997 Revision)*, which provided the foundation for the modern land ownership system in the Cayman Islands. The justifications for maintaining the doctrine of adverse possession as it applies to unregistered land in other jurisdictions are sound. However, they are not relevant in a jurisdiction in which all land is registered.
- 7.1.3 As has been discussed in this Paper, there are cogent policy reasons to reconsider the law of adverse possession as it applies to registered land. There is a global trend towards reform and, in some cases, abolition of the doctrine in relation to registered land. There is a fundamental conflict between the concept of indefeasibility of title and adverse possession, and its retention in its current form compromises the primacy of the Land Register as the foundation of our system of title by registration. The existing system attempts to shoehorn a historical doctrine based on a system of ownership by possession into a modern system of title by registration.

<b>RECOMMENDATION</b>
<i>The Law Reform Commission recommends reforming the law of adverse possession.</i>

## **7.2 Should the doctrine of adverse possession be abolished?**

7.2.1 While some jurisdictions have taken the step of abolishing the doctrine of adverse possession in relation to registered land entirely, there are arguments for its retention in a modified form. There are limited circumstances in which the abolition of the doctrine of adverse possession could result in land becoming unmarketable, or a person being unfairly disadvantaged, such as those identified by the Law Commission of England and Wales<sup>85</sup> –

1. Where the registered proprietor has disappeared and cannot be traced.
2. Where there have been dealings “off the register” so that the register does not reflect the reality of title.
3. Where the register is inconclusive, such as in the case of a boundary dispute.
4. Where a person has entered into possession under a reasonable mistake as to their rights.

7.2.2 The Law Reform Commission considers that much of the perceived and actual unfairness of the existing system of adverse possession can be remedied by amendments to the law to more fairly reflect the rights of registered proprietors and protect the integrity of the system of title by registration. However, the Commission also acknowledges the strong argument that the doctrine of adverse possession is fundamentally at odds with a system of title by registration, and that a person disadvantaged in the circumstances identified by the Law Commission of England and Wales has access to other remedies, such as proprietary estoppel.

## **7.3 Options for reform**

7.3.1 The Commission presents two options for reform for consideration –

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<sup>85</sup> Law Com No. 254, p. 206-207.

1. Abolish the doctrine of adverse possession entirely.
2. Amend the law to restrict the circumstances in which title to registered land can be acquired by adverse possession.

*Option 2: Proposed scheme*

7.3.2 If option 2 is pursued, the Commission proposes the following scheme, which is a modified version of the scheme introduced by the 2002 UK Act. It consists of 4 main elements –

1. Abolishing the limitation period for causes of action to recover land.
2. Strengthening the procedure to be followed when a person applies for registration based on adverse possession to more fairly balance the rights of registered proprietors.
3. Limiting the circumstances in which a person can succeed in a claim for registration based on adverse possession.
4. Requiring an applicant for registration based on adverse possession to establish their entitlement to registration even when the registered proprietor does not respond to notice of the application (but not if the registered proprietor expressly consents to the application).

7.3.3 The abolition of the limitation period would require the following amendments –

1. Section 19 of the *Limitation Act (1996 Revision)* specifies that no action can be brought for the recovery of land after the expiration of 12 years from the date on which the right of action accrues. In other words, 12 years after a person is dispossessed of their land by a squatter, they lose their right to take action to recover the land. Section 19 would be amended to specify that it does not apply to an action to recover registered land. The effect of this amendment would be that a registered proprietor would never be barred only by passage of time from recovering land from an adverse possessor.
2. Section 135 of the *Registered Land Act (2018 Revision)* provides that, in the case of registered land, the expiry of the limitation period does not extinguish the

registered proprietor's title, but the registered proprietor is deemed to hold the title on trust for the adverse possessor. This section would be repealed to reflect the disapplication of the limitation period in relation to registered land.

3. Section 23 of the *Limitation Act (1996 Revision)* provides that, subject to section 135 of the *Registered Land Act (2018 Revision)*, the expiry of the limitation period in relation to land extinguishes the title of the owner of the land. A consequential amendment would be required to reflect the repeal of section 135 of the *Registered Land Act (2018 Revision)*.

7.3.4 Sections 136 and 137 of the *Registered Land Act (2018 Revision)* would be repealed and replaced with provisions outlining the basis and procedure for an adverse possessor to acquire title to registered land. The provisions would provide as follows –

1. A person may apply to the Registrar to be registered as the proprietor of registered land if the person –
  - (a) has been in adverse possession of the land for a specified period; and
  - (b) satisfies one of the criteria for registration.
2. The required nature of possession (factual possession and requisite intention) that constitutes adverse possession would be articulated.
3. The criteria for registration would be as follows –

*Criteria 1*

The applicant is entitled to be registered as the proprietor as a result of an unregistered dealing between the applicant and the registered proprietor. This criteria would only apply in a very narrow set of circumstances, such as where the registered proprietor, after exhaustive efforts, cannot be located.

*Criteria 2*

The applicant is able to establish that all the following circumstances apply:

- (a) the land to which the application relates is adjacent to land belonging to the applicant;
  - (b) either –
    - (i) the boundary line between the two parcels of land is undemarcated; or
    - (ii) the applicant had a reasonable but mistaken belief that the boundary line was different to the demarcated boundary line;
  - (c) for the entire period of adverse possession, ending on the date of the application, the applicant reasonably but mistakenly believed that the land to which the application relates belonged to the applicant; and
  - (d) the applicant, to the knowledge or acquiescence of the registered proprietor, made lasting improvements to the land in reliance on the reasonable but mistaken belief of ownership.
4. The registered proprietor must be given notice of the application and a period of 30 days to respond to the application. If the registered proprietor fails to respond, the registered proprietor must be given the notice again and a further 30 days to respond. This ensures the registered proprietor is given sufficient opportunity to respond.
5. If the registered proprietor does not respond to the notice, the applicant must establish, to the satisfaction of the Registrar, that he or she –
- (a) has in fact been in adverse possession of the land for the required period; and
  - (b) satisfies one of the criteria for registration.
6. If the registered proprietor responds to the notice by objecting to the application and the Registrar is unable to dispose of the objection by agreement between the parties, the matter must be referred to the Grand Court for determination.

7.3.5 The Commission leaves the question of the required period of adverse possession open for discussion, but recommends a period of at least 12 years.

## **8 CONCLUSION**

8.1 The options for reform outlined in this Discussion Paper provide the basis for consultation to determine the best option for reform in the Cayman Islands. The Commission invites submissions on the issues identified in this Paper and the recommendations made in Part 7.

## APPENDIX A

### LEGISLATIVE PROVISIONS GOVERNING ADVERSE POSSESSION IN THE CAYMAN ISLANDS

#### Limitation Act (1996 Revision)

#### 19. Time limit for actions to recover land

- (1) An action shall not be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.
- (2) Subject to subsections (3) to (6), where —
  - (a) the interest claimed was an interest in reversion, remainder or any other future interest, and the right of action to recover the land accrued on the date on which the interest fell into possession by the determination of the preceding interest; and
  - (b) the person entitled to the preceding interest (not being a term of years absolute) was not in possession of the land on that date,

no action shall be brought by the person entitled to the succeeding interest after the expiration of twelve years from the date on which the right of action accrued to the person entitled to the preceding interest or six years from the date on which the right of action accrued to the person entitled to the succeeding interest, whichever period last expires.
- (3) No person shall bring an action to recover any interest in land under an assurance taking effect after the right of action to recover the land had accrued to the person by whom the assurance was made, some person through whom he claimed or some person entitled to a preceding interest, unless the action is brought within the period in which the person by whom the assurance was made could have brought such an action.
- (4) Where any person is entitled to any interest in land in possession and, while so entitled, is also entitled to any future interest in that land, and his right to recover the interest in possession is barred under this Law, no action shall be brought by that person or by any person claiming through him, in respect of the future interest, unless in the meantime possession of the land has been recovered by a person entitled to an intermediate interest.
- (5) Section 20 contains provisions for determining the date of accrual of a right of action to recover land in the cases therein mentioned.

- (6) Section 21 contains provisions modifying this section in its application to an action brought by, or by a person claiming through, the Crown.

**20. Provisions with respect to actions to recover land**

- (1) Where the person bringing an action to recover land or some person through whom he claims has been in possession of the land, and has while entitled to the land been dispossessed or discontinued his possession, the right of action shall be treated as having accrued on the date of such dispossession or discontinuance.
- (2) Where any person brings an action to recover any land of a deceased person and that deceased person was —
- (a) on the date of his death in possession of the land; and
  - (b) the last person entitled to the land to be in possession of it,
- the right of action shall be treated as having accrued on the date of his death.
- (3) Where any person brings an action to recover land, being an interest in possession assured otherwise than by will to himself or to some person through whom he claims and —
- (a) the person making the assurance was on the date when the assurance took effect in possession of the land; and
  - (b) no person has been in possession of the land by virtue of the assurance,
- the right of action shall be treated as having accrued on the date when the assurance took effect.
- (4) The right of action to recover any land shall, in any case where —
- (a) the interest claimed was an interest in reversion, remainder or any other future interest; and
  - (b) no person has taken possession of the land by virtue of the interest claimed,
- be treated as having accrued on the date on which the interest fell into possession by the determination of the preceding interest.
- (5) A tenancy from year to year or other period, without a lease in writing, shall, for the purposes of this Law, be treated as being determined at the expiration of the first year or other period; and accordingly the right of action of the person entitled to the land subject to the tenancy shall be treated as having accrued at the date on which, in accordance with this subsection, the tenancy is determined:

Provided that, where any rent has subsequently been received in respect of the tenancy, the right of action shall be treated as having accrued on the date of the last receipt of rent.

- (6) Where —
- (a) any person is in possession of land by virtue of a lease in writing (other than a lease granted by the Crown) by which a rent of not less than twenty dollars a year is reserved;
  - (b) the rent is received by some person wrongfully claiming to be entitled to the land in reversion immediately expectant on the determination of the lease; and
  - (c) no rent is subsequently received by the person rightfully so entitled,

the right of action to recover the land of the person rightfully so entitled shall be treated as having accrued on the date when the rent was first received by the person wrongfully claiming to be so entitled and not on the date of the determination of the lease.

- (7) Subject to subsection (8), a right of action to recover land by virtue of a forfeiture or breach of condition shall be treated as having accrued on the date on which the forfeiture was incurred or the condition broken.
- (8) If any right referred to in subsection (7) has accrued to a person entitled to an interest in reversion or remainder and the land was not recovered by virtue of that right, the right of action to recover the land shall not be treated as having accrued to that person until his interest fell into possession, as if no such forfeiture or breach of condition had occurred.
- (9) No right of action to recover land shall be treated as accruing unless the land is in the possession of some person in whose favour the period of limitation can run (referred to in this subsection and in subsections (10), (11) and (12) as “adverse possession”); and where under subsections (1) to (8) 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.
- (10) Where a right of action to recover land has accrued and after its accrual, before the right is barred, the land ceases to be in adverse possession, the right of action shall no longer be treated as having accrued and no fresh right of action shall be treated as accruing unless and until the land is again taken into adverse possession.
- (11) For the purpose of determining whether a person occupying any land is in adverse possession, it shall not be assumed by implication of law that his occupation is by permission of the person entitled to the land merely by virtue of the fact that his

occupation is not inconsistent with the latter's present or future enjoyment of the land:

Provided that this subsection shall not be taken as prejudicing a finding to the effect that a person's occupation of any land is by implied permission of the person entitled to the land in any case where such a finding is justified on the actual facts of the case.

- (12) For the purposes of subsections (9) and (10), receipt of rent under a lease by a person wrongfully claiming to be entitled to the land in reversion immediately expectant on the determination of the lease shall be treated as adverse possession.
- (13) Where any land to which the Settled Land Law [Cap. 156] applies or any land held on trust for sale is in the possession of a person entitled to a beneficial interest in the land or in the proceeds of sale (not being a person solely or absolutely entitled to the land or the proceeds), no right of action to recover the land shall be treated for the purposes of this Law as accruing during that possession to any person in whom the land is vested as tenant for life or trustee, or to any other person entitled to a beneficial interest in the land or the proceeds of sale.

**21. Modifications of s.19 re Crown**

- (1) Subject to subsections (2) and (3), section 19(1) applies to the bringing of an action to recover any land by the Crown as if "thirty years" were substituted for "twelve years".

**23. Extinction of title to land**

Subject to —

- (a) section 24; and
- (b) section 135 of the Registered Land Law (1995 Revision),

at the expiration of the period prescribed by this Law for any person to bring an action to recover land, including a redemption action, the title of that person to the land shall be extinguished.

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**Registered Land Act (2018 Revision)**

**28. Overriding interests**

Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register —

- (a) rights of way, rights of water and any easement or profit subsisting at the time of first registration under this Law;

- (b) natural rights of light, air, water and support;
- (c) rights of compulsory acquisition, resumption, entry, search, user or limitation of user conferred by any other law;
- (d) leases or agreements for leases for a term not exceeding two years, and periodic tenancies within the meaning of section 2;
- (e) any unpaid moneys which, without reference to registration under this Law, are expressly declared by any law to be a charge upon land;
- (f) rights acquired or in process of being acquired by virtue of any law relating to the limitation of actions or by prescription;
- (g) the rights of a person in actual occupation of land or in receipt of the rents and profits thereof save where inquiry is made of such person and the rights are not disclosed; and
- (h) electric supply lines, telephone and telegraph lines or poles, pipelines, aqueducts, canals, weirs and dams erected, constructed or laid in pursuance or by virtue of any power conferred by any law:

Provided that the Registrar may direct registration of any of the liabilities, rights and interests hereinbefore defined in such manner as he thinks fit.

**135. Acquisition of title by possession**

The Limitation Law (1996 Revision) shall apply to registered land in the same manner and to the same extent as it applies to land not registered, except that where, if the land were not registered, the estate, right or interest of the owner therein would be extinguished, such estate, right or interest shall not be extinguished but shall be deemed to be held by the proprietor for the time being in trust for the person who, by virtue of the said law, has acquired title against any proprietor, but without prejudice to the rights and interests of any other person interested in the land whose right or interest is not extinguished by the said law.

**136. Application to register title acquired by possession**

Any person claiming to have acquired a title to registered land by virtue of the Limitation Law (1996 Revision) may apply to the Registrar to be registered as proprietor thereof.

**137. Procedure on application**

- (1) On application by any person for registration as proprietor under section 135, the application shall be advertised by the Registrar at the expense of the applicant in such manner as the Registrar may direct.

- (2) The Registrar shall give notice of any such application to the proprietor of the land affected and to any other persons who may, in his opinion, be affected thereby.
- (3) After one month has elapsed from the date of giving notice under subsection (2), the Registrar, on being satisfied as to the applicant's title, may allow the application and register him as proprietor of the land claimed, either with absolute or provisional title, as the case may require, but without prejudice to any interests protected by any entry on the register which may not have been extinguished under the Limitation Law (1996 Revision).
- (4) The proprietor or the applicant or any other persons interested, may apply to the court for the determination of any question arising under this section or sections 136 and 137.

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