Chapter 3

Interpretation, policy and human rights

Interpretation

3–01 The Limitation Act 1980 is a consolidation statute.[1] It is thus permissible to look at the previous law in interpreting it, but only where necessary to solve a real difficulty or ambiguity which cannot otherwise be resolved. The House of Lords has said that care should be taken before looking behind the plain words of a consolidating Act. 'Recourse to the antecedents of a consolidation statute should only be had when there is a real difficulty or ambiguity incapable of being resolved by classical methods of construction.'[2]

3–02 There have been different, and contradictory statements as to the proper approach to construing statutes of limitation. Some judges have said that they are of great benefit, and therefore ought to receive a liberal or beneficial construction[3] and that therefore the exceptions to the statutes should not be extended further than necessary.[4] In *China v Harrow UDC*,[5] Lord Goddard CJ said: 'Limitation of actions is imposed by positive law and courts can only refuse to enforce claims on the ground of lapse of time if there is an appropriate provision to be found in the Act, but I see no good reason for unduly limiting words which can apply to a particular case as courts always lean against stale claims.' In *Cave v Robinson Jarvis and Rolf*,[6] Lord Millett[7] said:

> 'The limitation of actions is entirely statutory. The first statute was the Limitation Act 1623 (21 Jac 1, c 16). For almost four centuries, therefore, it has been the policy of the legislature that legal proceedings should be brought, if at all, within a prescribed period from the accrual of the cause of action. The statutes of limitation

1 See para 2–68 above.
2 *Sheldon v RHM Outhwaite (Underwriting Agencies) Ltd* [1996] AC 102 at 140, per Lord Keith of Kinkel, quoting from *Farrell v Alexander* [1977] AC 59 at 73, per Lord Wilberforce; see also *Lowsley v Forbes (t/a L E Design Services)* [1998] 3 All ER 897 at 899–890, per Lord Lloyd of Berwick.
3 See *King v Walker* (1760) 1 W B 287; *Tolson v Kaye* (1822) 3 Brod & Bing 217; *Lafond v Ruddock* (1853) 13 CB 820.
4 *Perry v Jackson* (1792) 4 TR 519.
5 [1954] 1 QB 178 at 185.
6 [2002] UKHL 18, [2002] 2 All ER 641.
7 With whom Lords Mackay of Clashfern and Hobhouse of Woodborough agreed.

> have been described as "statutes of peace". They are regarded as beneficial enactments and are construed liberally.'

3–03 Other judges have said the opposite. In *Re Baker*,[8] Cotton LJ said that there might be circumstances that rendered it morally wrong to plead the statute of limitations, and that 'a defence under the statute is never looked upon with any great favour'. In *Stamford, Spalding and Boston Banking Co v Smith*,[9] Lindley LJ spoke of the case before the court as 'one of the few cases in which the Statute of Limitations comes in aid of an honest defence'. In *Roddam v Morley*,[10] Lord Cranworth LC said:

> 'I should be very unwilling to give encouragement to the notion that there is of necessity anything morally wrong in a defendant relying on a Statute of Limitation. It may often be a very righteous defence. But it must be borne in mind that it is a defence the creature of positive law, and therefore not to be extended to cases which are not strictly within the enactment'.

And in *Edmunds v Waugh*,[11] Sir R T Kindersley V-C said of a claim by a mortgagor to recover surplus money: 'Moreover, it does not appear to me to come within the spirit of the Act, which, it must be remembered, is an Act taking away existing rights, and which must be construed with reasonable strictness.'

3–04 In *Central London Commercial Estates Ltd v Kato Kagaku Ltd*,[12] Sedley J advocated a neutral approach to interpretation (but without adverting to the above statements). He said:

> 'The law seems to me to adopt and in turn to demand a stance of neutrality as between disseisor and disseised. Parliament has prescribed the effects of a sufficient period of adverse possession without reference to circumstances, and enough examples have been canvassed in the course of the submissions to demonstrate that the deserving and the undeserving alike may be caught or spared by the operation of the Limitation Acts. The law, correspondingly, leans neither towards nor against the extinction of titles by prescription: for policy reasons it simply provides for it to happen in certain situations.'

3–05 It is suggested that an understanding of the policy behind the law of adverse possession is required in order to resolve doubtful points of interpretation. Only in cases where no clear policy can be discerned should the courts adopt the neutral position advocated by Sedley J in *Central London Commercial Estates Ltd v Kato Kagaku Ltd*.[13] The courts will

8 (1890) 44 Ch D 262 at 270.
9 [1892] 1 QB 765 at 770.
10 (1857) 1 De G & J 1 at 23.
11 (1866) LR 1 Eq 418 at 421.
12 [1998] 4 All ER 948 at 958C–E.
13 [1998] 4 All ER 948 at 958C–E.

attempt to construe statutes of limitation in a way consistent with their underlying policy.

3–06 An example of such an approach is *Adnam v Earl of Sandwich*.[14] In that case, Field J, delivering the judgment of the Divisional Court, said:[15]

> 'The legitimate object of all Statutes of Limitation is no doubt to quiet long continued possession, but they all rest upon the broad and intelligible principle that persons, who have at some anterior time been rightfully entitled to land or other property or money, have, by default and neglect on their part to assert their rights, slept upon them for so long a time as to render it inequitable that they should be entitled to disturb a lengthened enjoyment or immunity to which they have in some sense been tacit parties; and as the effect of the [Real Property Limitation Act 1833] which is now relied upon by the plaintiff, is to divest the estate of the rightful owner, and convey it to a wrongdoer without compensation to the former, to hold that such a transfer takes place, in cases where the rightful owner has been guilty of no neglect or default, would work such an injustice to him as to induce us to resort to any reasonable construction of the statute which should avoid so unjust a result.'

3–07 Accordingly, an examination of the policy underlying the law of adverse possession should assist in deciding difficult points of construction of the Limitation Act 1980.

The policy of adverse possession

3–08 There have been a number of judicial and academic pronouncements on the policy of limitation periods, both generally and specifically in the context of possession of land. In the context of adverse possession claims, they may be summarised as follows.

Loss of evidence

3–09 The long lapse of time may have caused the defendant to alter his position so that he is unable to meet the claim. In particular, evidence which might have been used to resist the claim may no longer be available. If a person with a claim failed to pursue it for a long period, it is reasonable to infer that there was some good reason for the claim not having been met, even if that reason cannot now be found.

3–10 In *Cholmondeley v Clinton*,[16] Plumer MR said:

14 (1877) 2 QBD 485.
15 (1877) 2 QBD 485 at 489.
16 (1821) 2 Jac & W 1 at 140.

> 'The public have a great interest in having a known limit fixed by law to litigation, for the quiet of the community, and that there may be a certain fixed period, after which the possessor may know that his title and right cannot be called in question. It is better that the negligent owner, who has omitted to assert his right within the prescribed period, should lose his right, than that an opening should be given to interminable litigation, exposing parties to be harassed by stale demands, after the witnesses of fact are dead, and the evidence of the title lost.'

3–11 In *Trustees of Dundee Harbour v Dougall*,[17] Lord St Leonards said: 'All statutes of limitation have for their object the prevention of the rearing up of claims at great distances of time when evidences are lost'. In *Cave v Robinson Jarvis and Rolf*[18] Lord Millett[19] said that the policy of statutes of limitation was:

> '... that a defendant should be spared the injustice of having to face a stale claim, that is to say one with which he never expected to have to deal: see *Donovan v Gwentoys Ltd* [1990] 1 WLR 472, 479A per Lord Griffiths. As Best CJ observed nearly 200 years ago, long dormant claims have often more of cruelty than of justice in them: see *A'Court v Cross* (1825) 3 Bing 329, 332–333. With the passage of time cases become more difficult to try and the evidence which might have enabled the defendant to rebut the claim may no longer be available. It is in the public interest that a person with a good cause of action should pursue it within a reasonable period.'

3–12 It can be argued that this justification for adverse possession cannot apply to registered land. There is no danger of entries on the register of title being lost. This is not necessarily the case, however. Even with registered land, there can be an informal disposition of land, intended to be effective and acted on. Although this may give rise to a claim to an equitable interest arising by virtue of proprietary estoppel,[20] with the passage of time evidence to support the claim may be lost.

Acquiescence, reliance and the quieting of possession

3–13 The failure by the true owner to enforce his rights, by neglect or default, amounts to tacit acquiescence in the possession of the squatter. The squatter will probably have regulated his affairs in the belief that his possession would not be disturbed. He will have developed a sense of security in his enjoyment of the land and have acted on that. It is desirable

17 (1852) 1 Macq HL 321.
18 [2002] UKHL 18, [2002] 2 All ER 641.
19 With whom Lords Mackay of Clashfern and Hobhouse of Woodborough agreed.
20 See para 19–34 below.

that a person who has been in possession for a long time should not have his possession disturbed. In *Cholmondeley v Clinton*,[21] Plumer MR said:

> 'The individual hardship will, upon the whole, be less, by withholding from one who has slept upon his right, and never yet possessed it, than to take away from the other what he has long been allowed to consider as his own, and on the faith which the plans in life, habits and expenses of himself and his family may have been unalterably formed and established.'

3–14 This justification for limiting an owner's right to recover his property has been adverted to in a number of subsequent cases. In *Trustees of Dundee Harbour v Dougall*,[22] Lord St Leonards said: 'In all well-regulated countries the quieting of possession is held an important point of policy.' In *Sutton v Sutton*,[23] Jessel MR, dealing with the effect of a mortgagee's failure to claim payment under a mortgage for a long time, said: 'The principle on which the law has always been based is either actual satisfaction or presumed satisfaction, or such delay on the part of the creditor as entitles the debtor to believe that he will not be called upon to pay'. In *Manby v Bewicke*,[24] Sir W Page Wood said:

> 'The Legislature has, in this as in every civilised country that has ever existed, thought fit to prescribe certain limitations of time after which persons may suppose themselves to be in peaceable possession of their property and capable of transmitting the estates of which they are in possession, without any apprehension of the title being impugned by litigation in respect of transactions which occurred at a distant period, when evidence in support of their own title may be most difficult to obtain.'

3–15 In *JA Pye (Oxford) Ltd v Graham*,[25] Mummery LJ said that the provisions of the Limitation Act 1980 were required: '... to avoid the real risk of injustice in the adjudication of stale claims; to ensure certainty of title; and to promote social stability by the protection of the established and peaceable possession of property from the resurrection of old claims.' That was said in the context of a dispute concerning registered land, and this justification for adverse possession applies just as much to registered land as to unregistered.[26]

21 (1821) 2 Jac & W 1 at 140. See also *Gray & Gray: Elements of Land Law* (5th edn) para 9.1.7, explaining the psychological consequences of long term possession, and quoting Oliver Wendell Holmes in *The Path of the Law* (1897) 10 Harv L Rev 457 at 477: '[a] thing which you have enjoyed and used as your own for a long time ... takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it'.

22 (1852) 1 Macq HL 321.

23 (1882) 22 Ch D 511 at 517.

24 (1857) 3 K & J 342 at 352.

25 [2001] Ch 804 at para 52.

26 The subsequent reversal of the Court of Appeal's decision by the House of Lords, [2003] 1 AC 419, on other grounds does not affect this point.

3–16 This justification for adverse possession has been criticised on the grounds that owners are not always aware of the adverse possession of their land. Public bodies in particular often have more land than they can realistically police. Even if an owner is aware of adverse possession, he may not wish to engage in hostile litigation. To deprive an owner of his title simply because he has delayed in claiming possession is disproportionate.[27]

Encouragement of use of land

3–17 Land is an important national resource. Limiting the time for the true owner to recover possession encourages owners to make use of their land. If they do not, the limitation rules encourage others to do so, knowing that if they make uninterrupted use of the land for a substantial period, they will acquire title to it.[28] It has been said in the United States that the underlying philosophy of the doctrine of adverse possession is 'basically that land use has historically been favored over disuse, and therefore he who uses land is preferred in the law to he who does not, even though the latter is the rightful owner'.[29]

3–18 In their *21st Report on the Limitation of Actions*,[30] the Law Commission recommended the repeal of the provision that allowed time to run in favour of oral periodic tenants. The government rejected that recommendation for reasons explained by Lord Hailsham when moving the second reading of the Limitation Amendment Bill 1980.[31] He said that the retention of the rule governing oral periodic tenancies: '... would be more in the general interest than its repeal. If a periodical tenant could never prescribe against his landlord when the latter vanished, he would be disinclined to improve or maintain the property and would have difficulty in making title for the purposes of a mortgage for improvements, and so on.' So the policy behind the retention of that rule was to encourage the efficient use of land.

3–19 The United Nations Centre for Human Settlements (Habitat) *Guidelines for the Improvement of Land-Registration and Land-Information in Developing Countries*[32] states:[33]

> 'Occupation of land is not easily converted into a sound title through adverse possession and the workings of the statute of limitations. While the interests of absentee land-owners may need to be

27 *Land Registration for the Twenty-First Century: A Conveyancing Revolution* (Law Com no 271, 2001) para 2.71.

28 For an account of the residential squatting movement, containing a powerful defence of the utility of squatting in making abandoned houses available as residential accommodation, see Wates and Wolmar *Squatting: The Real Story*.

29 *Warsaw v Chicago Metalic Ceilings Inc* 35 Cal 3d (1985) 564 at 575.

30 Cmnd 6923 (1977).

31 400 HL Official Report (5th series) col 1232.

32 UNCHS, Nairobi, 1990.

33 At paras 2.5(h) and 5.2.8.

protected, there should be more effective mechanisms to ensure that land is used to its full potential ... The use of the statute of limitations should be reviewed in the context of the acquisition of rights by adverse possession and the regulation of unregistered dealings so that what is on the register can reflect what is on the ground. The introduction of limited title, for instance, a qualified or possessory title or even a right to occupancy, should be considered as a means to secure the short-term benefits of registration. There should however be an option to upgrade these to a full title within a finite period of time.'

3–20 Again, this justification for adverse possession applies as much to registered as to unregistered land. In the report that led to the Land Registration Act 2002,[34] it was recognised that:

'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.'

One of the aims of the Act was therefore that a squatter should be able to acquire title if the owner and other interested persons did not oppose an application to be registered, or failed to take steps to regularise the position after the rejection of an initial application, so that the land would remain in commerce.[35]

Titles may depend on limitation

3–21 Titles may be dependent on limitation, because the proper formalities for transferring title may not be observed. In *O'Connor v Foley*,[36] Holmes LJ said that in Ireland the titles of small occupiers of leasehold land were generally dependent on the Real Property Limitation Act 1833, since they did not take out administration to their predecessors, and even where the holding was transferred *inter vivos* there was often no writing.

3–22 It is clear from the *First Report of the Real Property Commissioners* in 1829[37] that one of the principal reasons for the reform of the law of limitation recommended by them, and carried out by the Real Property Limitation Act 1833, was to facilitate the deduction of title to land. That is also clear from the speech of Lord Lyndhurst, introducing the Real

34 Law Com no 271, fn 27 above, para 2.72.
35 See para 14.75 of the Report and Chapter 22 below.
36 [1906] 1 IR 20 at 39.
37 See para 2–16 above.

Property Limitation Bill to the House of Lords.[38] Lord Lyndhurst said that the Bill:

'... was founded on a principle that had long been recognised by the law of England, which was, the long period of adverse possession should give an indefeasible right to the property. That principle itself owed its origin to the necessity, or at least the convenience, of quieting titles to property. The rule of law was *"leges vigilantibus non dormientibus subvenient,"* and that rule arose from the circumstance that the evidence of title to property, however good that title was, might be lost; that the witnesses required to prove it might die; and other events happen, which but for the intervention of this rule might leave a lawful possessor at the mercy of a fraudulent claimant ... '

3–23 He said that the object of the Bill was to provide:

'... that after a certain time the party holding adversely should thereby have an indefeasible title to the property. They were several advantages in adopting such a rule. The first was, that it would quiet the title to lands; the next was — which was not an immaterial consideration — that it would give security in possession, and, consequently, ease in letting, and facility in conveying, property.'

3–24 It has also been suggested that there was a link between the reduction in the length of the limitation period to 12 years by the Real Property Limitation Act 1874 and the reduction in the minimum period ordinarily required for deducing title from 60 to 40 years by the Vendor and Purchaser Act 1874.[39] It is true that the two pieces of legislation were introduced at the same time, together also with the bill which became the Land Transfer Act 1875. But, in introducing the three Bills, Lord St Leonards, the Lord Chancellor, did not suggest any direct link between them. He gave the following reason for the reduction in the limitation period:[40]

'It has been for some time felt as a crying evil that these periods[41] should be so long. They are felt to be unnecessarily long; but it is very hard to say what should be the periods of limitation. I propose to take the periods which have been adopted in recent legislation in regard to India, to shorten the period of 20 years in the [Real Property Limitation Act 1833] to 12 years ...'[42]

3–25 The further reduction to a period of 30 years for deducing title effected by of the Law of Property Act 1925, s 44(1) does not seem to have been influenced by limitation considerations. But it is clear that the

38 Hansard Official Report (3rd series) cols 790–94, 14 June 1833.
39 See Dockray 'Why do we need Adverse Possession' [1985] Conv 272 at 280–84.
40 Hansard Official Report (3rd series) col 328, 26 March 1874.
41 The periods provided for by the Real Property Limitation Act 1833.
42 However the effect of shortening the limitation period in simplifying titles was undoubtedly appreciated at the time: see Charley *Real Property Acts 1874–77* p 2.

further reduction in the minimum period ordinarily required for deducing title to 15 years effected by the Law of Property Act 1969 was expressly based on a consideration of the effect of the 12-year limitation period for actions to recover land.[43]

3–26 The link between adverse possession and proof of title to unregistered land was emphasised in the consultative report that ultimately led to the Land Registration Act 2002:[44]

> 'Title to unregistered land is relative and depends ultimately upon possession. The person best entitled to land is the person with the best right to possession of it. The fact that adverse possession can extinguish earlier rights to possess facilitates and cheapens the investigation of title to unregistered land. The length of title that a vendor is required to deduce is and always has been closely linked to the limitation period. Indeed, the principal reason for having limitation statutes in relation to real property appears to have been to facilitate conveyancing.'

3–27 This point was also made in Parliament during the passage of the Land Registration Bill 2002:[45]

> 'Limitation is absolutely fundamental to the operation of unregistered conveyancing. This is because it depends on proving title by an historical investigation of a chain of ownership, going back to a point, known as a 'good root of title', where the right to ownership of the land cannot be brought into question. The present requirement is for a good root of title of at least 15 years. This period has been revised from time to time, but, because title to unregistered land is ultimately based upon possession, it has always borne a close relation to the limitation period applicable to actions for recovery of land.'[46]

3–28 This justification for adverse possession has no application to registered land.[47] There is a fundamental distinction between unregistered title, which depends on possession, and registered title, which depends on registration. Pollock explained the difference between registered and unregistered title as follows:[48]

> 'Title in the sense of English conveyancers means only evidence of right to possession, or rather that sum of such evidence which is deemed practically safe for prudent men to act upon. But a registered title under a system of State registration is more than

43 See the Law Commission's *Report on Transfer of Land: Interim Report on Root of Title to Freehold Land* (Law Com no 9, 1967).
44 *Land Registration for the Twenty-First Century* (Law Com no 254, 1998) para 10.9; see also Law Com no 271, fn 27 above, para 14.2.
45 Baroness Scotland of Asthall, Hansard HL Official Report (5th series) col 1377, 30 October 2001.
46 See also Lightwood *Possession of Land* (1894) p 295.
47 Law Com no 254, fn 44 above, para 10.10; Law Com no 271, fn 27 above, para 14.3.
48 Pollock and Wright *Possession in the Common Law*, p 84.

> evidence; it constitutes, and is the only measure of, the right itself (though not necessarily an absolute right) which is guaranteed by the State.'

Dishonest claims

3–29 The English law of adverse possession makes no distinction between honest and dishonest claims to land. It applies to cases where a squatter takes possession innocently, believing himself entitled to possession of the land. This may be because of a mistake about the boundary between two properties. Or because of the mistaken inclusion of land in a conveyance. Or an error as to who is entitled to land under a settlement, or a will. Or where a failure to observe the correct formalities means that title is not vested in an intended donee of land. In most such cases the true owner of the land will share the mistake of the squatter. In this type of case, the law of adverse possession, after the lapse of the limitation period (normally 12 years) gives the person in possession the title he believes he already has.

3–30 The law of adverse possession also applies, however, to cases where a squatter knows perfectly well that he has no right whatsoever to occupy the land. The position has been different in the case of chattels since 1 August 1980.[49] Since then, the ordinary limitation period of six years for claims in tort for conversion of goods[50] has not applied in the case of theft, and there has been no limitation period for recovering stolen goods. The failure of the Limitation Act 1980 to distinguish between honest and dishonest claims to title by adverse possession in the case of land is difficult to defend. In Canada, the courts have adopted a different approach to cases where a squatter acts in good faith, believing himself to be the owner, to those where the squatter is an opportunist who knows he is not entitled to possession. In the latter type of case, the courts have construed the Statutes of Limitation in the very strictest manner.[51] There is much to be said for making such a distinction.

3–31 Under the Land Registration Act 2002, such a distinction exists in the case of boundary disputes. Under that Act, a person who has been in adverse possession of land along a boundary with registered land for at least ten years can become entitled to apply to be registered as proprietor if (for at least ten years of the period of adverse possession ending on the date of the application to be registered) he (or any predecessor in title) reasonably believed that the land in question belonged to him.[52] The Land Registration Act 2002 therefore makes a distinction between honest

49 When the Limitation Amendment Act 1980, s 2 introduced the Limitation Act 1939, s 3A; see now the Limitation Act 1980, s 4.
50 Under the Limitation Act 1980, s 2.
51 See *Hamson v Jones* (1989) 52 DLR (4th) 143 at 154–155, reviewing earlier authorities .
52 See Land Registration Act 2002, Sch 6, para 5(4)(c); and Chapter 22 below.

and reasonable adverse possessors, and those who are dishonest or unreasonable.

The impact of the Human Rights Act 1998

3–32 The Human Rights Act 1988 came into force on 2 October 2000. It gave direct effect to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). Under the Human Rights Act 1998, s 3, as far as possible, domestic legislation is to be interpreted and given effect in a way which is compatible with Convention rights. Where that cannot be done, the court may make a declaration of incompatibility under the Human Rights Act 1998, s 4, which may lead to amending legislation by statutory instrument under the Human Rights Act 1998, s 10.

3–33 One of the rights protected by the Convention is the protection of property under the ECHR, Article 1 of the First Protocol. This article provides:

> 'Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.'

3–34 Article 1 of the First Protocol, referred to below as 'A1P1', incorporates three separate but connected rules:[53]

1 Rule 1: Every natural or legal person is entitled to the peaceful enjoyment of his possessions.
2 Rule 2: No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
3 Rule 3: The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

3–35 Furthermore, Article 8 provides:

1 Everyone has the right to respect for his private and family life, his home and his correspondence.
2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national

53 *Sporrong and Lönnroth v Sweden* (1983) 5 EHRR 35; see generally T Allen *Property and the Human Rights Act 1998* Chapter 4.

security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

3–36 Article 8 may be engaged where the property which is the subject of a claim to adverse possession is the home of the squatter. However, a discussion of the operation and effect of Article 8 in relation to possession proceedings is outside the scope of this book.

Adverse Possession and A1P1 in relation to the Land Registration Act 1925

3–37 Since the coming into force of the Human Rights Act 1998, the Courts have considered, from time to time, whether or not adverse possession, in relation to land registered under the Land Registration Act 1925, breached one of the Rules under A1P1. The Courts reached a variety of conclusions for a variety of reasons, which are briefly outlined below. However the question was finally resolved by the decision of the Grand Chamber of the European Court of Human Rights in *Pye v United Kingdom*[54] in which it was held that no part of A1P1 was violated by the law of adverse possession in relation to land registered under the Land Registration Act 1925.

3–38 It is considered that the effect of this decision is also to render unarguable any suggestion that the operation of adverse possession in relation to unregistered land (where the justification for adverse possession is stronger than for registered land), or under the Land Registration Act 2002 (where the regime has been substantially altered in favour of the registered proprietor, as explained in Chapter 22 below) breaches A1P1.

A1P1 in the domestic courts up to the first decision in Pye v UK

3–39 The question of whether the law of adverse possession in its application to registered land might breach A1P1 was first raised by Neuberger J at first instance in *JA Pye (Oxford) Ltd v Graham*.[55] In the Court of Appeal,[56] Mummery and Keene LLJ considered that adverse possession did not infringe the ECHR. The matter was not further considered in the House of Lords, as the events giving rise to the claim pre-dated the coming into force of the Human Rights Act 1998, which had no retrospective effect.

3–40 In *Family Housing Association v Donnellan*,[57] an argument based on Rule 2 of A1P1 was also rejected by Park J, though on the ground that this rule governed only deprivations by the state itself, or for public

54 (2008) 46 EHRR 1083.
55 [2000] Ch 676.
56 [2001] Ch 804.
57 [2002] 1 P & CR 449, Park J.

purposes authorised by the state, and as such had no application to the doctrine of adverse possession. It considered that this reasoning was unsound, as it is clear that acts of State permitting one private individual to deprive another of property do engage A1P1.[58]

3–41 The decision in *Donnellan* was subsequently expressly disapproved in *Beaulane Properties Ltd v Palmer*[59] in which Nicholas Strauss QC (sitting as a deputy High Court Judge) found that adverse possession in relation to land registered under the Land Registration Act 1925 did infringe Rule 2 of A1P1. He considered that compatibility could only be achieved by reading back into adverse possession in relation to registered land under the 1925 legislation a requirement that there be possession inconsistent with the true owner's rights, that is, a return to the law as it stood in *Leigh v Jack*.[60]

Pye v United Kingdom

3–42 The question of whether the law of adverse possession in relation to registered land infringed A1P1 first came before the European Court of Human Rights in *Pye v United Kingdom*.[61] The Court held (by four to three) that adverse possession, so far as land registered under the Land Registration Act 1925 was concerned, did violate Rule 2 of A1P1. This was because registration as proprietor under the 1925 Act conferred an absolute title which was not in any way inherently qualified, restricted or limited. However, section 15 of the Limitation Act 1980, together with section 75 of the 1925 Act, operated to bring to an end that title, which amounted to a deprivation within Rule 2 of A1P1, and was not merely a control of use within Rule 3. Therefore the deprivation was attributable to the action of the State. Further, this deprivation was unjustifiable, was disproportionate and upset the fair balance. The Court noted that adverse possession operated to deprive an owner of his possessions without the payment of compensation, and that, in those circumstances, a deprivation could only be justified in exceptional circumstances under Rule 2. There were no such circumstances. The dissenting Judges took the view that Pye had lost its property through foreseeable means, and could have taken minimal steps to protect its position which it did not do. This meant that adverse possession was compatible with A1P1, even absent compensation.

3–43 The matter was then referred to the Grand Chamber of the European Court of Human Rights, which reversed the earlier decision (by ten to seven), finding that there has been no violation of A1P1 in *Pye v United Kingdom*.[62] The Grand Chamber proceeded on the basis that adverse possession was not a Rule 2 deprivation, but rather a control of

58 See, for example, *James v United Kingdom* (1986) 8 EHRR 123.
59 [2006] Ch 79 at paras 64–204.
60 (1879) 5 Ex D 264.
61 [2005] 3 EGLR 1.
62 (2008) 46 EHRR 1083.

use under Rule 3, as it was part of the law of limitation of actions. The Grand Chamber found that the operation of the doctrine of adverse possession, and the determination made by the legislature that title by lengthy possession was to be given more weight than title by formal registration, and that possession could extinguish the latter when land had become irrecoverable, was not without foundation and fell within the margin of appreciation. The Grand Chamber noted that provision for compensation would sit oddly with the certainty function of limitation periods, and further observed that a dispossessed owner could easily protect himself against losing ownership of the land in question.

3–44 It is, therefore, the case that there are no further human rights arguments under A1P1 in relation to cases where the true owner has been dispossessed of land by operation of the Land Registration Act 1925, s 75 in conjunction with the Limitation Act 1980, s 15. A subsequent application to the European Court on Human Rights was held to be inadmissible.[63]

A1P1 and the domestic Courts after Pye in the Grand Chamber

3–45 Following the decision of the Grand Chamber in *Pye*,[64] there was some uncertainty as to the status of, in particular, cases such as *Beaulane Properties Ltd v Palmer*.[65] In particular, the Land Registry issued guidance stating that *Beaulane* should still be followed until overruled.[66]

3–46 The Court of Appeal put the matter beyond doubt in *Ofulue v Bossert*[67] in which it held that, in light of *R (Ullah) v Special Adjudicator*,[68] the Court of Appeal was bound to keep pace with the jurisprudence of the European Court of Human Rights, and that therefore it should follow the Grand Chamber's decision in *Pye*. It follows that it is no longer arguable as a matter of domestic law that adverse possession is contrary to A1P1.

Adverse possession and the Land Registration Act 2002

3–47 For the reasons stated above, it is not considered that a challenge to the operation of adverse possession under the Land Registration Act 2002 is arguable. However A1P1 may not be wholly irrelevant to the interpretation of the 2002 Act.

3–48 In *Baxter v Mannion*,[69] Henderson J decided that one of the reasons why it must be a rectifiable mistake to register a squatter who had

63 *Topplan v UK* (Application no 15642/05).
64 (2008) 46 EHRR 1083.
65 [2006] Ch 79.
66 *Additional practice affecting Practice Guide 5*, which has since been withdrawn.
67 [2009] Ch 1. See also what was said in the House of Lords in that case at [2009] AC 990, paras 66–70; and in *Strachey v Ramage* [2008] 2 P & CR 154, at para 27.
68 [2004] 2 AC 323.
69 [2010] EWHC 573 (Ch) at para 44.

land. Cairns LJ, who gave the leading judgment, held that joint user was irrelevant because the parties were different.[59]

Not where change in use of disputed land

8–38 Where there has been a change in the nature of the use of the disputed land during the limitation period, later conduct cannot be used to interpret earlier actions. In *Powell v McFarlane*,[60] the relevant period ran from 1956, when the squatter began using the disputed land, to November 1973, when possession proceedings were commenced. The issue was therefore whether the true owner's right to recover the land accrued before November 1961, 12 years before the issue of the writ. Slade J held that the squatter's use of the land had changed over time, and that by 1962 he might well have taken possession, but he had not done so before the start of the limitation period.

59 [1977] 2 EGLR 125 at 127G.
60 (1977) 38 P & CR 452.

Chapter 9

The mental element of possession — the intention to possess

The requirement of an intention to possess

9–01 The intention to exercise effective and exclusive custody of and control over property on one's own behalf is an essential element of actual possession. This intention is often referred to in the authorities by a Latin phrase, the '*animus possidendi*'. There are two aspects to it:

1 There must be an actual, subjective intention to possess.
2 The intention must be manifested by unequivocal actions.

9–02 The requirement for both the subjective and objective aspects of the intention to possess was emphasised by Peter Gibson LJ in *Prudential Assurance Co Ltd v Waterloo Real Estate Inc.*[1] He said:

> 'It would plainly be unjust for the paper owner to be deprived of his land where the claimant had not by his conduct made clear to the world including the paper owner, if present at the land, for the requisite period that he was intending to possess the land. The claimant must of course be shown to have the subjective intention to possess the land but he must also show by his outward conduct that that was his intention.'

9–03 To the like effect, in *Smith v Waterman*,[2] Blackburne J said of the intention to possess:

> 'There are two elements to this:
>
> (1) a subjective intention to possess (which involves showing that the trespasser actually had the requisite intention to possess) and
> (2) some outward manifestation of the trespasser's subjective intention which makes clear that intention to the world at large.'

9–04 In *Site Developments (Ferndown) Ltd v Cuthbury Ltd*,[3] Vos J said, without referring to authority: 'The intention required must be objectively manifested, and need not be shown to have been a subjective

1 [1999] 2 EGLR 85 at 87. See para 12–37 below for the facts of the case.
2 [2003] EWHC 1266 (Ch) at para 19.
3 [2010] EWHC 10 (Ch) at para 155

belief.' As phrased, this is incorrect. As explained below, the court will ordinarily infer the subjective intention from the squatter's conduct, but, if it is apparent from the evidence that, despite the squatter's conduct, he did not actually have the intention to posses, he will not be treated as having been in possession.

9–05 In *JA Pye (Oxford) Ltd v Graham*,[4] it was argued that there should be no need to demonstrate an intention to possess in order to establish actual possession. That argument was roundly rejected. Lord Browne-Wilkinson said:[5]

> 'What is crucial is to understand that, without the requisite intention, in law there can be no possession. Remarks made by Clarke LJ in *Lambeth London Borough Council v Blackburn* (2001) 82 P & CR 494, 499 ("it is not perhaps immediately obvious why the authorities have required a trespasser to establish an intention to possess as well as actual possession in order to prove the relevant adverse possession") provided the starting point for a submission by Mr Lewison QC for the Grahams that there was no need, in order to show possession in law, to show separately an intention to possess. I do not think that Clarke LJ was under any misapprehension. But in any event there has always, both in Roman law and in common law, been a requirement to show an intention to possess in addition to objective acts of physical possession. Such intention may be, and frequently is, deduced from the physical acts themselves. But there is no doubt in my judgment that there are two separate elements in legal possession. So far as English law is concerned intention as a separate element is obviously necessary.'

9–06 This chapter considers the following aspects of the *animus possidendi:*

1 What intention is necessary.
2 The relevance of pre-existing rights the squatter may have to use the land.
3 The position where the squatter's use of the disputed land could be pursuant to an easement or *profit à prendre*.
4 The position of a squatter who acts in accordance with the owner's requests.
5 The position of a squatter who asks the owner to do work to the disputed land.
6 The position of a squatter who offers to buy the disputed land or pay rent for it.
7 The effect of an oral acknowledgment of the owner's title.
8 Proving the necessary intention.
9 The relevance of the squatter's subjective intention.
10 The relevance of the true owner's intention.
11 The position where the squatter's use of the disputed land is consistent with the true owner's future plans for it.

4 [2003] 1 AC 419.
5 [2003] 1 AC 419 at para 40.

9–07 The squatter's intention must be to possess in his own right, and not on behalf of another. This aspect of the law is considered at para 7–103 ff above.

What intention is necessary?

Judicial definitions of the animus possidendi

9–08 The essence of the *animus possidendi* is the manifested intention to exercise control over the land for the time being, excluding all others from such control, including the true owner (unless the possessor believes himself to be the owner), as far as possible. In the leading case of *Powell v McFarlane*,[6] Slade J[7] defined the *animus possidendi*, as follows:

> 'What is really meant, in my judgment, is that the animus possidendi involves the intention, in one's own name and 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.'

9–09 That formulation was approved by the House of Lords in *JA Pye (Oxford) Ltd v Graham*.[8] In the same case, Lord Browne-Wilkinson defined the *animus possidendi* as:[9] 'an intention to exercise such custody and control on one's own behalf and for one's own benefit'.

No requirement of a conscious intention to exclude true owner

9–10 What is required is the intention to exclude the whole world from control of the land, not from use of the land. There are a number of cases where the true owner made some, limited, use of the disputed land, yet the squatter was held to be in possession. Those cases are considered at para 7–51 ff above. If the squatter has and manifests the intention to exercise exclusive control of the disputed land, and in pursuance of that control permits the owner to make limited use of the land, he will have the *animus possidendi.*

9–11 The squatter must, however, intend to exercise exclusive control of the land. That raises the issue of whether the squatter must

6 (1977) 38 P & CR 452. See para 9–88 below.
7 (1977) 38 P & CR 452 at 471–72.
8 [2002] UKHL 30, [2002] 3 WLR 221 at para 43. See also *Buckinghamshire County Council v Moran* [1990] Ch 623 at 643E; and *Murphy v Murphy* [1980] IR 183 at 202, where Kenny J said: adverse possession means possession of land which is inconsistent with the title of the true owner: this inconsistency necessarily involves an intention to exclude the true owner, and all other persons, from enjoyment of the estate or interest which is being acquired.
9 [2002] UKHL 30, [2002] 3 WLR 221 at para 40.

consciously intend to exclude the true owner. At an early stage in the development of the law, this was said to be required. However, it is now clear that no such conscious intention is required. The squatter must intend to exercise exclusive control for his own benefit, but he need not have a conscious intention to exclude the owner. The required intention is to possess, and not to dispossess.

9–12 In the context of adverse possession, the first attempt to formulate what intention to possess was required[10] was by Lindley LJ in *Littledale v Liverpool College*:[11]

> 'They [the true owners] could not be dispossessed unless the plaintiffs [the squatters] obtained possession themselves; and possession by the plaintiffs involves an animus possidendi — i.e., occupation with the intention of excluding the owner as well as other people.'

9–13 In *Powell v McFarlane*,[12] Slade LJ commented on that statement as follows:

> 'This concept is to some extent an artificial one, because in the ordinary case the squatter on property such as agricultural land will realise that, at least until he acquires a statutory title by long possession and thus can invoke the processes of the law to exclude the owner with the paper title, he will not for practical purposes be in a position to exclude him. What is really meant, in my judgment, is that 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.'

9–14 In *Lambeth London Borough Council v Blackburn*,[13] Clarke LJ quoted that passage from *Powell v McFarlane*[14] and said:

> '[17] That is an important passage in the context of the present case because it emphasizes the fact that trespassers are likely to be aware that they will in practice be unable to exclude the owner if he takes steps to recover possession of his property. It thus shows that in order to have the necessary intention the trespasser does not have to regard himself as entitled to exclude the lawful owner from the premises. It is to my mind sufficient if he intends to keep the true owner out for the time being and until he is evicted.'

10 See Radley-Gardner *Civilized Squatting* (2005) 25(4) Oxford Journal of Legal Studies p 727.
11 [1900] 1 Ch 19 at 23.
12 (1977) 38 P & CR 452 at 471–72.
13 (2001) 82 P & CR 494 at para 17.
14 (1977) 38 P & CR 452.

9–15 In *JA Pye (Oxford) Ltd v Graham*,[15] Lord Browne-Wilkinson, having referred to the 'heresy' that a squatter needs to have the intention to own the land, rather than simply to possess it, described Lindley LJ's formulation of the intention to possess as also being a heresy. He said:[16]

> 'A similar manifestation of the same heresy is the statement by Lindley MR in *Littledale v Liverpool College* [1900] 1 Ch 19, 23 that the paper owners "could not be dispossessed unless the plaintiffs obtained possession themselves; and possession by the plaintiffs involves an animus possidendi — i.e., occupation with the intention of excluding the owner as well as other people". This requirement of an intention to exclude the owner as well as everybody else has been repeated in subsequent cases. In *Powell*'s case 38 P & CR 452, 471 Slade J found difficulty in understanding what was meant by this dictum since a squatter will normally know that until the full time has run, the paper owner can recover the land from him. Slade J reformulated the requirement (to my mind correctly) as requiring an "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".'

9–16 Lord Hope of Craighead also addressed the subject[17] as follows:

> 'The important point for present purposes is that it is not necessary to show that there was a deliberate intention to exclude the paper owner or the registered proprietor. The word "adverse" in the context of section 15(1) of the Limitation Act 1980 does not carry this implication. The only intention which has to be demonstrated is an intention to occupy and use the land as one's own. This is a concept which Rankine, The Law of Land-Ownership in Scotland (4th ed, 1909), p 4, captured in his use of the Latin phrase *cum animo rem sibi habendi* (see his reference in footnote 1 to Savigny, Das Recht des Besitzes, translated by Perry (1848), paras 1–11). It is similar to that which was introduced into the law of Scotland by the Prescription Act 1617, c 12 relating to the acquisition of an interest in land by positive prescription. The possession that is required for that purpose is possession "openly, peaceably and without any judicial interruption" on a competing title for the requisite period: Prescription and Limitation (Scotland) Act 1973, section 1(1)(a). So I would hold that, if the evidence shows that the person was using the land in the way one would expect him to use if it he were the true owner, that is enough.'

9–17 Lord Hutton discussed the subject in the following passage:

15 [2003] 1 AC 419.
16 [2003] 1 AC 419 at para 43.
17 *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 at para 71.

'[74] I wish only to make some brief observations in relation to the proof of intention to possess which is referred to by Slade J in his classic judgment in *Powell v Macfarlane* (1977) 38 P & CR 452 , 470: "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')."

[75] In the present case from August 1984 onwards the Grahams made full use of the disputed land as if they were the owners they did everything which an owner of the land would have done and when an experienced chartered surveyor, called on behalf of the plaintiffs, was asked in cross examination what an occupying owner of the disputed land might have done over and above what was done by the Grahams between 1984 and 1997, he was unable to think of anything.

[76] I consider that such use of land by a person who is occupying it will normally make it clear that he has the requisite intention to possess and that such conduct should be viewed by a court as establishing that intention, unless the claimant with the paper title can adduce other evidence which points to a contrary conclusion. Where the evidence establishes that the person claiming title under the Limitation Act 1980 has occupied the land and made full use of it in the way in which an owner would, I consider that in the normal case he will not have to adduce additional evidence to establish that he had the intention to possess. It is in cases where the acts in relation to the land of a person claiming title by adverse possession are equivocal and are open to more than one interpretation that those acts will be insufficient to establish the intention to possess. But it is different if the actions of the occupier make it clear that he is using the land in the way in which a full owner would and in such a way that the owner is excluded.

[77] The conclusion to be drawn from such acts by an occupier is recognised by Slade J in *Powell v Macfarlane*, at p 472: "If his acts are open to more than one interpretation and he has not made it perfectly plain to the world at large by his actions or words that he has intended to exclude the owner as best he can, the courts will treat him as not having had the requisite *animus possidendi* and consequently as not having dispossessed the owner." And, at page 476: "In my judgment it is consistent with principle as well as authority that a person who originally entered another's land as a trespasser, but later seeks to show that he has dispossessed the owner, should be required to adduce compelling evidence that he had the requisite *animus possidendi* in any case where his use of the land was equivocal, in the sense that it did not necessarily, by itself, betoken an intention on his part to claim the land as his own and exclude the true owner." In another passage of his judgment at pp.471–472 Slade J explains what is meant by "an intention on his part to … exclude the true owner": "What is really meant, in my

judgment, is that 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."

[78] It is clear that the fact that the Grahams would have given up occupation to the plaintiffs or would have made payment for their occupation to the plaintiffs, if requested to do so, does not prevent the existence of the intention to possess: see the judgment of the Privy Council delivered by Lord Diplock in *Ocean Estates Ltd v Pinder* [1969] 2 AC 19 , 24.

[79] Therefore I consider that Clarke LJ was right to state in *Lambeth London Borough Council v Blackburn* (2001) 82 P & CR 494 , 504: "I would not for my part think it appropriate to strain to hold that a trespasser who had established factual possession of the property for the necessary 12 years did not have the animus possidendi identified in the cases. I express that view for two reasons. The first is that the requirement that there be a sufficient manifestation of the intention provides protection for landowners and the second is that once it is held that the trespasser has factual possession it will very often be the case that he can establish the manifested intention. Indeed it is difficult to find a case in which there has been a clear finding of factual possession in which the claim to adverse possession has failed for lack of intention." '

9–18 There is a substantial difficulty with the formulation of the *animus possidendi* in *Powell v McFarlane*[18] approved in *JA Pye (Oxford) Ltd v Graham*,[19] if it is read as requiring a conscious intention to exclude the owner. The problem is that a squatter who is aware that he is not the lawful owner cannot sensibly intend to exclude the owner 'so far the processes of the law will allow'. The processes of the law do not permit a squatter to exclude the owner until the limitation period has expired.[20] Lord Hope of Craighead's discussion of the necessary intention is, therefore, illuminating, as it makes it clear that the necessary intention is not one directed at the owner. As he said, no conscious intention to exclude is needed. All that is required is the actual and manifested 'intention to occupy and use the land as one's own'.

9–19 In subsequent cases, the Courts have seen no inconsistency between the speeches of Lords Browne-Wilkinson and Hope in *Pye*. Rather, Lord Hope's discussion has been treated as supplementing and illuminating that of Lord Browne-Wilkinson. It is now clearly established that what is required is an intention to possess, and not an intention to dispossess.

---

18 (1977) 38 P & CR 452.
19 [2003] 1 AC 419.
20 This problem is discussed by Dockray in 'Adverse Possession and Intention I' [1982] Conv 256 at 262–63.

9–20 In *Topplan Estates Ltd v Townley*,[21] Jonathan Parker LJ summarised the law to be derived from *Pye* as follows:

> '[73] ... an intention to possess must be distinguished from an intention to own: it is only the former which is relevant in the context of adverse possession (per Lord Browne-Wilkinson at para 42: see para 44 above). An intention to possess may be, and frequently is, deduced from the objective acts of physical possession (per Lord Browne-Wilkinson at para 40 (see para 38 above) per Lord Hope of Craighead at para 70 (see para 40 above) and per Lord Hutton at para 76 (see para 41 above)). However, where the acts relied on as objective acts of physical possession are equivocal, further evidence of intention may be required (see, e.g., per Lord Hutton ibid.) An intention to possess means, in this context, "an intention to occupy and use the land as one's own" (per Lord Hope of Craighead at para 71: see para 40 above). It is not necessary for the squatter to establish that he had a deliberate intention to exclude the true owner (ibid.): it is enough that he intends to exclude the owner "as best he can" (per Slade J in *Powell* at p.472: see para 42 above); or, to put it another way (as Slade J did in *Powell* at pp.471–472: see para 43 above), "to exclude the world at large, including the owner with the paper title if he be not the possessor, so far as is reasonably practicable and so far as the processes of the law will allow". The intention to possess must be manifested to the true owner, but where the objective acts of physical possession are clear and unequivocal, those acts themselves will generally constitute a sufficient manifestation of the intention to possess (per Lord Hope of Craighead at para 71 (see para 41 above) and per Lord Hutton at para 76 (see para 41 above)).'

9–21 To the same effect, in *Wretham v Ross*,[22] David Richards J said:

> '[25] The requisite intention to possess the property is an "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 the possessor, so far as is reasonably practicable and so far as the process of the law will allow" (per Slade J in *Powell v McFarlane*). There need not however be "a deliberate intention to exclude the paper owner or the registered proprietor ... The only intention which has to be demonstrated is an intention to occupy and use the land as one's own" (per Lord Hope in *Pye v Graham*). The requisite intention is present if "the actions of the occupier make it clear that he is using the land in the way in which a full owner would and in such a way that the owner is excluded". Possession must be exclusive and the intention is therefore to occupy the land as one's own and thereby exclude everyone else.'

21 [2005] 1 EGLR 89 at para 73.
22 [2005] All ER (D) 07 (Jul) at paras 25 and 29.

9–22 He held that the decision of the Deputy Solicitor under appeal had been wrong, because he focused on whether there was clear 'evidence of an intention to exclude the paper title owner'. David Richards J said of that approach:

> '[26] The problem with the deputy solicitor's formulation of "evidence of an intention to exclude the paper title owner" is that it does not focus on the squatter's intention to be in possession of the property and to exclude the world at large, to be deduced in general from his acts, but instead focuses on an intention specifically directed at the exclusion of the paper owner'.

9–23 It is considered that the position was accurately summarised in two Australian cases. In *Whittlesea City Council v Abbatangelo*,[23] the Court of Appeal of Victoria said:

> 'When the law speaks of an intention to exclude the world at large, including the true owner, it does not mean that there must be a conscious intention to exclude the true owner. What is required is an intention to exercise exclusive control.'

9–24 Similarly, in *Petkov v Lucerne Nominees Pty Ltd*,[24] Murray J said:

> 'The mental element in the requisite intention to possess will also be of great importance, but must be understood. When the law speaks of an intention to exclude the world at large, including the true owner, it does not mean that there must be a conscious intention to exclude the true owner. What is required is an intention to exercise exclusive control ... an intention to control the land, the adverse possessor actually believing himself or herself to be the true owner, is quite sufficient.'

Intention to own the land unnecessary

9–25 The *animus possidendi* is the intention to possess the land, to exercise exclusive control of it, not the intention to own it. In *Buckinghamshire County Council v Moran*,[25] Mr Moran took possession of a plot of land, believing that he was entitled to use it until it was needed by the council for building a road. The Court of Appeal held that he had the necessary *animus possidendi*. Slade LJ said:[26]

> '... although there are some dicta in the authorities which might be read as suggesting that an intention to own the land is required, the true position is that what is required for this purpose is not an intention to own or even an intention to acquire ownership but an intention to possess, that is to say an intention for the time being to

23 [2009] VSCA 188 at para 5.
24 (1992) 7 WAR 163 at 168.
25 [1990] Ch 623.
26 [1990] Ch 623 at 643E.

possess the land to the exclusion of all other persons, including the owner with the paper title.'

9–26 In *JA Pye (Oxford) Ltd v Graham*,[27] Lord Browne-Wilkinson[28] described the idea that a squatter must intend to own the land in order to be in possession as a 'heresy'.[29] He said:[30]

> 'Once it is accepted that in the Limitation Acts, the word "possession" has its ordinary meaning (being the same as in the law of trespass or conversion) it is clear that, at any given moment, the only relevant question is whether the person in factual possession also has an intention to possess: if a stranger enters on to land occupied by a squatter, the entry is a trespass against the possession of the squatter whether or not the squatter has any long term intention to acquire a title.'

9–27 Thus the fact that a squatter believes he is liable to be evicted at any time, and a consequent failure by him to carry out improvements to the property of the kind which an owner would do, is consistent with him from having the intention to possess: see *Purbrick v London Borough of Hackney*.[31]

9–28 It follows that an absence of claims to ownership by the squatter, rather than exclusive control, is not relevant in deciding if the squatter has the *animus possidendi*. In *Carroll v Manek*,[32] HH Judge Hicks QC said of a document relied on as showing the absence of the *animus possidendi*:

> 'As to the light which it casts on the situation during the currency of the twelve years it must be remembered that until the expiration of that period [the squatter] was not on any view the owner of the land, so the presence or absence of claims to ownership then would not be of great significance. Moreover the intention required during that period is simply to exclude all others as of right; it need not include an intention to acquire ownership.'

9–29 To the same effect, in the Australian case of *Bree v Scott*,[33] Maddem CJ[34] said that the absence of a claim to title by a squatter was of no significance:

27 [2003] 1 AC 419.
28 [2003] 1 AC 419 at paras 42–43; and see too *Williams v Jones* [2002] 3 EGLR 69 at para 32.
29 And condemned references to an intention to own in *Littledale v Liverpool College* [1900] 1 Ch 19 at 24; *George Wimpey & Co Ltd v Sohn* [1967] Ch 487 at 510; and even in *Powell v McFarlane* (1977) 38 P & CR 452 at 476 and 478.
30 [2003] 1 AC 419 at para 42.
31 [2004] 1 P & CR 34 at paras 11 and 23–24.
32 (1999) 79 P & CR 173 at para 71.
33 (1904) 29 VLR 692 at 701.
34 Whose decision was upheld on appeal.

> 'The last thing you would expect of a person under these circumstances would be defiance to the person who could turn her out next day. She would diplomatize, and hold on to her possession by every means she could. Therefore the absence of any protest on her part cannot be used as an argument against her.'

Duration of intention

9–30 The squatter need not intend to possess the land indefinitely. The required intention is to control the land for the time being. In *Buckinghamshire County Council v Moran*,[35] counsel for the true owner argued that the squatter had to have the intention to exclude the true owner in all future circumstances.[36] This argument was rejected. Slade LJ said[37] that the requisite intention was: '… an intention *for the time being* to possess the land to the exclusion of all other persons, including the owner with the paper title' (emphasis added). Similarly, in *Ocean Estates Ltd v Pinder*,[38] the squatter's state of mind was reported as being: 'If somebody had come along I would either have taken a lease or got off the land'. That did not prevent him having the intention to possess.

9–31 In *Lambeth London Borough Council v Blackburn*,[39] Clarke LJ said:

> '[27] Mr Arden submits that it is not sufficient for an adverse possessor to intend to possess the property only temporarily. He does not go so far as to say that he must intend to possess the property for twelve years or more but submits that at least he must intend to possess it indefinitely and not temporarily. However, for my part, I would not accept that submission. It seems to me to be inconsistent with both principle and authority. In *Moran*[40] it was submitted that the defendant's claim should fail because he did not intend to exclude the council in all future circumstances. Thus, he did not intend to exclude the owner when and if the land was required for a by-pass. This court held that it was not necessary to intend to exclude the paper owner in all future circumstances.'

9–32 After referring further to *Moran*, he said:[41]

35 [1990] Ch 623.
36 See [1990] Ch 623 at 642G–H.
37 [1990] Ch 623 at 643E.
38 [1969] 2 AC 19 at 24.
39 (2001) 82 P & CR 494 at para 27; followed in *Smith v Waterman* [2003] EWHC 1266 (Ch) at para 21, though in *Smith*, the squatter failed to establish the relevant intention for the entire period, but only for part of the period, and therefore failed. Similarly, in *Beaulane Properties Ltd v Palmer* [2006] Ch 79 at para 58, the squatter successfully established adverse possession despite accepting in evidence that 'he had expected to be asked to vacate the field'.
40 *Buckinghamshire County Council v Moran* [1990] Ch 623.
41 (2001) 82 P & CR 494 at para 29.

'[29] It is in my judgment plain from that decision and the principles to which I have referred that in order to be an adverse possessor a trespasser must have actual possession of the property throughout the twelve year period before the commencement of the proceedings and that throughout that period he must have a present manifested intention to possess the property to the exclusion of all others including the paper owner. As Slade LJ put it in the passage just quoted, he must have that intention "for the time being". The fact that at any particular moment he expects or intends to leave the property in the near future does not prevent his having that intention, but in order to defeat the paper owner's claim for possession he must in fact remain in possession for the full twelve years and he must have a present intention to remain in possession throughout that period.'

9–33 Later in his judgment he returned to this subject:[42]

'[49] … In fact the appellant said in evidence that he did not expect to be there longer than six months or a year.

[50] Mr Arden relies upon that evidence and those findings as contradicting the necessary intention to possess because they show that the appellant only expected to be in the flat for a short period and that his intention to possess was a temporary one and not being exercised against the paper owner. However, I do not accept that submission. It seems to me to run counter to the approach in the cases. The appellant said that he had no intention of leaving until he was evicted, although he expected to be evicted at any time. As I see it, he thus satisfied the test propounded by Slade J in *Powell*[43] … namely by showing an intention to exclude the world at large including the paper owner "so far as is reasonably practicable and so far as the processes of the law will allow" or "as best he can". He intended to keep the true owner out for the time being and until he was evicted, which was in my judgment sufficient …'

9–34 Judge LJ described the state of mind of the successful squatter in that case as follows:

'[59] … in his own mind he wisely accepted throughout the period of his trespass that if the true "owner" came along, rather than assert any title or right to possession which he knew perfectly well he did not have, he would defer to him, either by negotiating a rent, or leaving the premises.'

9–35 However, if the intention is only to use the land for a very short period, then that is unlikely to suffice. In *JA Pye (Oxford) Ltd v Graham*,[44] Lord Browne-Wilkinson gave the following illustrations of the *animus possidendi:*

42 (2001) 82 P & CR 494 at paras 49–50.
43 *Powell v McFarlane* (1977) 38 P & CR 452.
44 [2003] 1 AC 419 at para 40.

'Suppose a case where A is found to be in occupation of a locked house. He may be there as a squatter, as an overnight trespasser, or as a friend looking after the house of the paper owner during his absence on holiday. The acts done by A in any given period do not tell you whether there is legal possession. If A is there as a squatter he intends to stay as long as he can for his own benefit: his intention is an intention to possess. But if he only intends to trespass for the night or has expressly agreed to look after the house for his friend he does not have possession. It is not the nature of the acts which A does but the intention with which he does them which determines whether or not he is in possession.'

9–36 The second of those illustrations was discussed in *J Alston & Sons Ltd v BOCM Chemicals Ltd*,[45] where HHJ Marshall QC said:

'[62] At Paragraph 40, dealing with the constituents of "possession" in its ordinary sense, he approved Slade J's first two propositions quoted above, noting that a certain mental element of intention was required in order, in effect, to lift mere occupation to the status of legal "possession". He illustrated this distinction by reference to a person in occupation of a locked house, who might be a squatter, an overnight trespasser, or a friend taking care of the house whilst the owner was absent. The squatter, intending to be on the premises for as long as he can for his own benefit, has the necessary intention to possess. But the party *who only intends to trespass for a night* or who is looking after the house temporarily, does not.

[63] I have emphasised the second illustration, because I have some difficulty with it. In the third illustration, the occupier is plainly not intending to assert occupation of the house on his own account and for his own benefit, but for his friend, such that it is easy to see that his occupation nonetheless represents his friend's possession. In the second case, the trespasser is intending to occupy the house on his own account and for his own benefit for the night, and the only distinction from the first case is the intention that that occupation should only be temporary. However, if he changed his mind the following morning and decided to stay another night before he moved on, and this intention became more prolonged and turned into an intention to be a fully fledged squatter, then it is difficult to see why time should not run against the paper owner from the start of his occupation. What I therefore take Lord Browne Wilkinson to have had in mind is that the intention of the overnight trespasser is not so much an intention to " occupy" the house, as merely an intention to "make use of" it, not really rising to the level of occupation, much in the same way as the child in Powell was held by Slade J to have had the intention to do no more than make use of the relevant field as a trespasser, when grazing the family animals on it in the early years (see foot of page 480), and therefore not to have been

45 [2009] 1 EGLR 93 at para 63.

Chapter 23

Easements, profits and other rights

Issues that can arise

23–01 Apart from leases, considered in Chapter 24 below, and mortgages and charges, considered in Chapter 26 below, there are a number of other third-party rights which can affect land, including easements, *profits à prendre*, public rights, customary rights, manorial rights,[1] franchises, restrictive covenants, positive covenants, estate contracts (including options and rights of pre-emption), obligations to contribute to chancel repairs, rentcharges and rights of entry.

23–02 Where a squatter claims to have acquired title by adverse possession, the squatter may already have a right to use the disputed land by virtue of an existing right. That may be relevant to the question of whether he had the *animus possidendi* and so to his claim to have taken possession of the land: see para 9–65 ff above. This chapter considers five other issues which can arise in relation to rights affecting or benefiting land which is the subject of adverse possession:

1 The effect of adverse possession on existing third-party rights over the land which is the subject of the adverse possession.
2 The grant of rights by the paper title owner after time starts to run.
3 Whether a squatter takes the benefit of existing rights benefiting that land.
4 Whether adverse possession can lead to the creation of new easements or profits affecting or benefiting the land.
5 Whether it is possible for a squatter to put his claim in the alternative as a claim to adverse possession or a claim to lesser right.

Existing third-party rights over the disputed land

Unregistered land — legal interests

23–03 A legal interest in unregistered land binds the whole world, including a squatter, both during the limitation period and after its expiry. So if there are legal interests, such as easements, profits, public rights,

1 Insofar as preserved by the Law of Property Act 1922: see Megarry and Wade *Law of Real Property* (7th edn), para 2–029.

customary rights, manorial rights, franchises, obligations to contribute to chancel repairs or rentcharges, affecting the disputed land at the date that time starts to run against the true owner, the squatter takes subject to and is bound by them.[2]

23–04 Where, however, a right has not been created at the date that the owner's title is extinguished, then it will not bind the squatter. Thus where the owner of land intended to be used as public highways dedicated the land for that purpose, and a squatter took adverse possession and held it for the limitation period without the intended roads ever being used as such, no public right of way came into existence over the intended roads. A public right of way requires both dedication by the owner and use by the public, and no use was made of the intended roads by the public during the limitation period.[3]

Equitable interests in unregistered land

23–05 Equitable interests in unregistered land bind the whole world, other than 'equity's darling' i.e. a bona fide purchaser of a legal estate for value without notice.[4] As a squatter does not qualify as 'equity's darling', he takes the land subject to any equitable interests affecting it. This was decided in *Re Nisbet and Potts' Contract*.[5] In that case, the land in issue had been sold to the true owner, K, in 1872, with the conveyance containing restrictive covenants with the owners of the adjoining land restricting building on the land. After K died, H, the original squatter, took possession of the land and held it for more than 12 years. H's title was purchased by N, who thus acquired what he described as a 'squatting title'. N was unaware of the original conveyance to K. However, if he had required a 40-year title,[6] he would have been aware of it. N then contracted to sell the land to P. After the contract had been entered into, P learned of the restrictive covenants, by independent information, and raised a requisition on the title offered. The Court of Appeal held the requisition was good, because N's title was subject to the restrictive covenants. A restrictive covenant is in the nature of a negative easement, creating a paramount right in the person entitled to it over the land which it relates to. It is imposed on the land so as to be binding upon any person other than a bona fide purchaser of the legal estate without notice. The only rights extinguished for the benefit of the squatter after the expiry of the limitation period were those of persons who might, during the limitation period, have brought, but did not in fact bring, an action to recover possession of the land.

2 See *R (Smith) v Land Registry* [2010] EWCA Civ 200, considered in para 7–136 above.
3 See *Mackett v Herne Bay Comrs* (1876) 35 LT 202. The decision was affirmed by the Court of Appeal at (1877) 37 LT 812, but in the Court of Appeal it was conceded that the squatter had a possessory title: see (1877) 37 LT 812 at 816, CA.
4 Megarry and Wade, fn 1 above, para 5–011.
5 [1906] 1 Ch 386, CA.
6 As was then normal, pursuant to the Vendor and Purchaser Act 1874.

23–06 However, where a squatter sells his title to a third party, the third party will take free of any equitable interest of which he does not have notice. For most equitable interests in unregistered land, including estate contracts and restrictive covenants entered into after 1925, registration under the Land Charges Act 1972 is the only form of notice which is effective. Such registration constitutes actual notice to all persons and for all purposes.[7] Any other form of notice is irrelevant as against a purchaser. That is because, under the Land Charges Act 1972, where there is a registrable interest which has not been registered, it is void against a purchaser of a legal estate for money or money's worth and, in some cases, also against a purchaser for value of any interest in the land.[8] It follows that *Re Nisbet and Potts' Contract*[9] would be decided differently today if the restrictive covenants had been entered into after 1925 and had not been registered. P would have been a purchaser of a legal estate for money, and so would have taken free of the restrictive covenants entered into by K.

Contractual rights

23–07 Rights which affect the owner of a land which are enforceable as a matter of contract only will not bind the squatter. Thus if the freehold owner land enters into a positive covenant to maintain a roof, that creates no interest in land and is not enforceable against anyone other than the covenantor.[10] The squatter will not be subject to the covenant.

23–08 The position may be different where the contractual right allows the third party to use the disputed land, and it is so used throughout the limitation period. For example, if the owner of land grants a fire-escape licence in favour of a neighbouring owner which does not constitute an easement,[11] the squatter, not being a party to the licence, will not be bound by the contractual obligations imposed on the owner by it, either during or after the expiry of the limitation period. However, if the neighbouring owner makes use of the rights under the licence during the limitation period, it may be that the squatter's title will be treated as subject to an easement in favour of the neighbouring owner equivalent to the rights enjoyed by him under the licence.[12]

Registered land under the Land Registration Act 1925

23–09 Under the Land Registration Act 1925, during the limitation period, the squatter's possessory title to registered land took effect as an overriding interest under s 70(1)(f). At the expiry of the limitation period,

7 See the Law of Property Act 1925, s 198.
8 See the Land Charges Act 1972, s 4; Megarry and Wade, fn 1 above, para 8–091ff.
9 [1906] 1 Ch 386, CA.
10 *Rhone v Stephens* [1994] 2 AC 310.
11 As in *IDC Group v Clark* [1992] 2 EGLR 184.
12 See para 23–25 ff below.

a trust was imposed on the registered proprietor in favour of the squatter under the Land Registration Act 1925, s 75(1). The squatter could then apply to be registered as proprietor of the estate under the Land Registration Act 1925, s 75(2) and (3).[13] While time was running in favour of the squatter, he was in the same position as in relation to unregistered land. At the expiry of the limitation period, when the statutory trust arose, it is thought that the position was the same. When a squatter was registered as proprietor under s 75(2) and (3), he was the successor in title to the registered land.[14] He therefore took the land subject to all rights protected by an entry on the register and to any overriding interests[15] and to any unregistered minor interests which bound the previous registered proprietor.[16]

Registered land under the Land Registration Act 2002

23–10 The position is the same under the Land Registration Act 2002.[17] During the period prior to a squatter successfully applying to be registered as proprietor under the Land Registration Act, Sch 4, Sch 6, paras 1 or 6, or Sch 12, para 18, the squatter holds an unregistered estate in the land and is in the same position, so far as third-party rights are concerned, as if the land were unregistered. If a squatter's application to be registered as proprietor succeeds, he will be registered as the successor in title to the previous registered proprietor.[18] He will, therefore, generally be bound by all existing third-party proprietary rights. However, if he is registered pursuant to an application under Sch 6, then in some circumstances he will take free of registered charges, and if he is registered under Sch 4, because the original registration of the proprietor was a mistake, it is possible that third party rights created by the proprietor would not be enforceable against the squatter.[19]

23–11 Under the Land Registration Act 2002, s 29(1), if a registrable disposition of a registered estate is made for valuable consideration,[20] completion of the disposition by registration has the effect of postponing to the interest under the disposition any interest affecting the estate immediately before the disposition whose priority is not protected at the time of registration. However, a squatter who successfully applies to be registered as proprietor does not acquire the estate as the result of a registrable disposition made for valuable consideration. He will,

13 See Chapter 21 above.
14 See *Central London Commercial Estates Ltd v Kato Kagaku Ltd* [1998] 4 All ER 948 considered at para 21–11 above.
15 Land Registration Act 1925, ss 20(1)–(3), 23(1)–(4) and 70(1).
16 Land Registration Act 1925, ss 20(4) and 23(5); the disposition of a registered title pursuant to s 75 is not for valuable consideration.
17 See generally Chapters 21 and 22 above.
18 See para 22–66 above.
19 See Chapter 21 above.
20 Defined in the Land Registration Act 1925, s 132(1).

therefore, be bound by all proprietary interests affecting the land.[21] When the squatter comes to make a disposition for valuable consideration, however, the disponee will only take subject to those matters protected by registration or which are listed in the Land Registration Act 1925, Sch 3.[22]

Rights created by true owner after time starts to run

23–12 So far we have considered rights in existence when time started to run against the true owner. If the true owner of unregistered land grants rights to a third party over the disputed land after time starts to run, such rights will bind the squatter during the limitation period. But once the limitation period has expired, those rights will fall, together with the title from which they are derived.

23–13 The Limitation Act 1980, s 15(4) provides that:

> 'no person "shall bring an action to recover any estate or 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" unless the action is brought within the period during which the person by whom the assurance was made could have brought such an action.'

'Recover' in that subsection means 'assert title to'.[23] Under s 15(4), once time has started to run, no estate or interest created or transferred by the true owner can survive longer than the limitation period which would have applied against the true owner.[24]

23–14 The position might be different if the squatter had himself allowed an easement or profit created by the true owner to be exercised during the limitation period. If the squatter did this at the request of the true owner, that might show that the squatter did not have the *animus possidendi*.[25] If the squatter acted at the request of the person exercising the easement or profit, or simply acquiesced in the exercise of the relevant right, that would not shed any light on the squatter's *animus*. However, it may be that it would have the same effect as the exercise of limited rights over the disputed land by the true owner.[26] The title acquired by the squatter would then be subject to the rights exercised over the disputed land during the limitation period.

23–15 The same should be true if an easement or profit is claimed by prescription. In such a case, the person claiming the prescriptive right will allege that the right was exercised from time immemorial, or for 20 or 40

21 See Law Com No 271 (2001) para 5.5.
22 Land Registration Act 2002, s 29.
23 See para 1–14 ff above.
24 See para 15–06 ff above and para 26–53 below.
25 See para 9–92 ff above.
26 See para 23–22 below.

years.[27] The fact that the squatter may have been in adverse possession of the disputed land for part of that period should not affect the claim to have acquired the right by prescription.

23–16 The position discussed above would apply equally to registered titles where the limitation period expired before 13 October 2003.[28] Where the limitation period had not expired before that date, and the squatter makes a successful application under Sch 6, the squatter will succeed to the title of the previous registered proprietor. It is thought that he will, therefore, be bound by all third party proprietary rights created by that proprietor during the period of adverse possession, other than, in some cases, registered charges.[29]

Existing rights benefiting the disputed land

Registered land

23–17 Once a squatter is registered as proprietor of registered land, whether under the Land Registration Act 1925, s 75(2) and (3), or the Land Registration Act 2002, Sch 4, Sch 6 or Sch 12, para 18, he will be the successor in title to the registered land, and entitled to all the rights benefiting that land accordingly: see Chapters 21 and 22 above. The position in relation to unregistered land, and to registered land in respect of the period until the squatter is registered as proprietor, is considered below.

Legal rights appurtenant to the land

23–18 There is no authority on whether a squatter who acquires a possessory title to land becomes entitled to the benefit of existing rights appurtenant or appendant to that land. It is considered on general principles that any such rights appurtenant or appendant to the land would benefit a squatter in possession, both during and after the expiry of the limitation period.[30]

Restrictive covenants

23–19 A restrictive covenant is normally annexed by making it clear that the benefit of the covenant is to be enjoyed by the covenantee and his successors in title and the persons deriving title under him or them. This

27 See generally Megarry and Wade, fn 1 above, para 28–032 ff.
28 See Chapter 21 above.
29 See Chapter 22 above.
30 An easement is appurtenant to each and every part of the dominant tenement: see *Newcomen v Coulson* (1877) 5 Ch D 133; Gray and Gray *Elements of Land Law* (3rd edn) p 531; and *Gallagher v Rainbow* (1994) 179 CLR 624.

is the effect of the Law of Property Act 1925, s 78 for covenants made after 1925.[31] Section 78(1) provides:

> 'A covenant relating to any land of the covenantee shall be deemed to be made with the covenantee and his successors in title and the persons deriving title under him or them.
>
> For the purposes of this subsection in connexion with covenants restrictive of the user of land, "successors in title" shall be deemed to include the owners and occupiers for the time being of the land of the covenantee intended to be benefited.'

23–20 It therefore seems clear that a squatter can enforce a restrictive covenant annexed to the disputed land by virtue of the Law of Property Act 1925, s 78 both during and after the expiry of the limitation period.[32] A restrictive covenant enforceable by reason of a building scheme ought also to be enforceable by a squatter, as such schemes create a 'local law' providing for mutually enforceable covenants in a defined estate. Where there is a building scheme, it gives rise to an 'equity created by circumstances which is independent of contractual obligation'.[33] Whether a restrictive covenant entered into before 1926 will be annexed so that a squatter can take advantage of it may depend on the wording of the covenant and the question of how far the annexation extends.

Rights in the course of acquisition

23–21 There is no authority on the position where easements or profits are in the course of acquisition by prescription when the squatter takes adverse possession. If the true owner uses a road serving the disputed land for ten years, and the squatter then takes possession and uses it for a further ten years, can the squatter add together the two periods of ten years and claim a prescriptive right of way? The foundation of prescription is acquiescence by the owner of the servient land in its use by the owner of the dominant land.[34] It would appear to follow that there should be no difference between the case where the true owner conveys or lets his land and that where a squatter takes adverse possession. In either case, if there is continuous exercise of an easement or profit for 20 or more years for the benefit of the dominant land, with the acquiescence of the owner of the servient land, a prescriptive right should be acquired by the dominant land.[35] If the squatter is in adverse possession for 20 or

31 *Federated Homes Ltd v Mill Lodge Properties Ltd* [1980] 1 WLR 594.
32 See Megarry and Wade, fn 1 above, para 32–063, fn 282.
33 Per Megarry J in *Brunner v Greenslade* [1971] Ch 993.
34 See *Dalton v Angus & Co* (1881) 6 App Cas 740 at 773, per Fry J; *Oakley v Boston* [1976] QB 270.
35 In *Chung v Law* [1997] HKLRD 1022, the Hong Kong Court of Appeal held that it was arguable that a squatter in adverse possession had acquired an easement by prescription.

more years, and throughout that period exercises a right over the adjacent land of the true owner, or a third party, he will acquire a prescriptive easement on ordinary principles.[36]

New easements or profits

New easements or profits in favour of squatter

23–22 On a conveyance of land, new easements are sometimes created by implication, or under the Law of Property Act 1925, s 62, which operates in relation to conveyances of land. Because a squatter does not acquire title to land by conveyance, it has been held that no new easements are created in his favour. In *Wilkes v Greenway*,[37] the defendant had acquired, by adverse possession, two gardens of which the plaintiff had been the owner. The plaintiff still owned the private road which was the only means of approach to the gardens, and which had always been used by the defendant. The plaintiff claimed an injunction to prevent the user of the road. He admitted that the defendant had acquired title to the gardens by 12 years' possession. But as he had not used the road for 20 years, he had not acquired a prescriptive right of way over it. Vaughan Williams J refused to grant the plaintiff an injunction.[38] He held that it would be:

> '... inconsistent with public policy and public interest that, while the title of the disseized owner is extinguished, yet no one should be in a position to enjoy the property ... I see no reason why, where a defined way is absolutely necessary to the enjoyment of the property, the law should not presume that somehow or other by legal means, by grant or otherwise, that right of approach must have been created without which that possession could not have been taken, and that seisin enjoyed which the law recognizes.'

23–23 The Court of Appeal reversed that decision. Lord Esher MR[39] complained that the case had come before the court without adequate factual material. He then said:

> 'On the hypotheses, however, so presented to us, and without further knowledge of the facts, we can only say that there is nothing in the Statute of Limitations to create ways of necessity. The statute does not expressly convey any title to the possessor. Its provisions are negative only. We cannot import into such negative provisions doctrines of implication that would naturally arise where title is created either by express grant or by statutory enactment. The

36 Seee.g. *Walker v Russell* (1966) 53 DLR (2d) 509 at 527.
37 (1890) 6 TLR 449.
38 See (1890) 6 TLR 290.
39 Giving the judgment of the court at (1890) 6 TLR 449.

> doctrine of a way of necessity is only applied to a title by grant,[40] personal or Parliamentary.'[41]

23–24 That decision was followed in relation to registered land in *Palace Court Garages (Hampstead) Ltd v Steiner*.[42] Dankwerts J is reported as saying, in relation to the registration of the squatter as proprietor: 'I do not think that amounts to any kind of Parliamentary grant and it seems to me that it is just a recognition of the position created by the Limitation Act [1939] which applies to registered land in a similar manner and is purely machinery for putting the title right.' *Wilkes v Greenway*[43] was also followed in Canada in *Iredale v Loudon*,[44] a case where the squatter was an oral periodic tenant of an upper room who stopped paying rent, so that he was in deemed adverse possession. Time ran against the owners and the squatter acquired title to the room and the staircase leading to it. However, it was held that the squatter did not have the right to support for his room from the building beneath, so that the owners could pull down the building and so destroy the room. That decision is very unsatisfactory. The squatter undoubtedly had a right of support as an implied right while he was a tenant, and it is unsatisfactory that the extinguishing of his landlord's title should destroy that right of support, leaving him worse off than when he was a tenant.

New easements or profits in favour of true owner

23–25 Where the true owner makes use of the disputed land during the limitation period, but the use is not such as to prevent the squatter from being in possession,[45] the title acquired by the squatter will be subject to rights in favour of the true owner to enable him to continue such use.

23–26 The leading case on this point in England and Wales is *Williams v Usherwood*.[46] In that case, the disputed land was part of a drive separating two houses, nos 31 and 33 Rosedale Road. The first owner of no 31 erected a fence which enclosed the disputed land, belonging to no 33. Number 33 had eaves projecting 18 inches over the disputed land, four windows that opened outwards over it, and three drainpipes running down the side of the house and disappearing into the disputed land where they joined drains and sewers enjoyed in common with the owners of no 31. There were manholes or drain covers on the disputed land near the drainpipes. The footings of no 33 projected a few inches below the surface of the disputed land. Thereafter, the owners of no 33 only used

40 As to which, see *Nickerson v Barraclough* [1981] Ch 426, [1981] 2 All ER 369.
41 See para 23–24 and 23–27 below for a suggestion that *Wilkes v Greenway* (1890) 6 TLR 449 was wrongly decided and that the later decision in *Williams v Usherwood* (1983) 45 P & CR 235 is to be preferred.
42 (1958) 108 LJ 274, a short and inadequate report.
43 (1890) 6 TLR 449.
44 (1908) 40 SCR 313.
45 See para 7–51 ff above.
46 (1983) 45 P & CR 235.

the disputed land for the purpose of maintenance of the side of no 33 and the pipes and drains there. The owners of no 33 assumed they had a right to go on to the drive for those purposes. Such permission as was sought was a matter of neighbourly politeness. The Court of Appeal held that the owners of no 31 had acquired title to the disputed land, but subject to rights in favour of no 33. The true owners of no 33 argued that if the squatters, the owners of no 31, had acquired title by adverse possession, the true owners could not exercise any rights on the side of their house. That argument was rejected. Cumming-Bruce LJ, giving the judgment of the court, said[47] that the law has recognised the existence of different rights in segments of land, distinguishing a right to the surface from the right to layers of land below the surface, for example, in the context of mining. The cases referred to[48] established that:

> '... where a squatter establishes exclusive possession of the surface, he may acquire a possessory title subject to the rights of the paper owner, which have the practical characteristics of easements although they do not logically satisfy the conditions necessary to prove a legal or equitable easement or a quasi-easement. They are, in our opinion, consistent with the undoubted existence of the exceptions to the second rule propounded by Thesiger LJ in *Wheeldon v Burrows*.[49] These exceptions are founded on necessity. If it is necessary, the law will imply in favour of a grantor such rights as are necessary to the enjoyment of the grantor's own house, even if he makes no reservation in his grant ... If a squatter obtains a possessory title to one of two semi-detached houses, each of which has enjoyed a right of support of the other, by what duty, if any, is the squatter under an obligation to continue the duty of support of the neighbouring house? ... The answer lies in the power of the law to imply obligations in the case of necessity. The duty arises as a matter of law, independent of grant.'

23–27 The result in *Williams v Usherwood*[50] was undoubtedly correct, and the same result has been reached in Canada.[51] However, the reasoning in *Williams v Usherwood* is, it is submitted, wholly inconsistent with *Wilkes v Greenway*[52] and *Nickerson v Barraclough*.[53] Those are decisions of the Court of Appeal which make it clear that there is no power for the law to imply easements in case of necessity; easements of necessity arise by virtue of implications into a grant, and a squatter's title

47 (1983) 45 P & CR 235 at 253–254.
48 *Midland Rly Co v Wright* [1901] 1 Ch 738; *Marshall v Taylor* [1895] 1 Ch 641; and *Rains v Buxton* (1880) 14 Ch D 537.
49 (1879) 12 Ch D 34, CA.
50 (1983) 45 P & CR 235.
51 See *Rooney v Petry* (1910) 22 OLR 101; and *De Vault v Robinson* (1920) 54 DLR 591.
52 (1890) 6 TLR 449 at para 23.22 below.
53 [1981] Ch 426, [1981] 2 All ER 369.

does not derive from a grant. Neither of those cases appears to have been cited in *Williams v Usherwood*.[54]

23–28 In the case of unregistered title, it is clear that the squatter's title does not derive from a grant: see Chapter 20 above. In the case of registered title, there is a parliamentary conveyance of the registered title to the squatter: see Chapters 21 and 22 above. In that case, it is perhaps arguable that there is a statutory transfer of title, into which an easement can be implied. However, in *Sovmots Investments Ltd v Secretary of State for the Environment*[55] it was held that no easements were implied where a conveyance was made pursuant to a compulsory purchase order, because: '... there is no common intention between an acquiring authority and the party whose property is compulsorily taken from him, and the very basis of implied grants of easements is accordingly absent.' It seems likely that the same is true in the case of the statutory transfer of a registered title to a squatter.

23–29 As the reasoning in *Wilkes v Greenway*[56] and *Williams v Usherwood*[57] are inconsistent, it is open to any court to decide which to follow. It is submitted that the approach taken by Vaughan Williams J at first instance in *Wilkes v Greenway* is to be preferred. In *Chung v Law*,[58] Mortimer JA said of *Wilkes v Greenway*: 'In many respects, this authority is unsatisfactory.'[59] This criticism is justified. The nature of the title acquired by adverse possession is to be deduced from the acts of possession themselves.[60] If the title created and evidenced by the possession of the squatter involves the exercise of rights by the squatter for the benefit of the disputed land, or the exercise of rights by the owner or a third party over the disputed land, then the title acquired should benefit from and be subject to those rights. In *Stanley v White*,[61] Bayley J said that 'Acts of ownership will be evidence of a grant or reservation formerly made, though now lost, conformably to the manner in which the rights of the parties continued to be exercised'. The possessory title of a squatter should be treated as having the benefit of, and being subject to, the rights actually exercised during the limitation period over land belonging to the paper title owner.

54 Indeed, *Nickerson v Barraclough* [1981] Ch 426 could hardly have been cited, as both cases were argued in the same week, and *Nickerson* had not been reported when judgment in *Williams v Usherwood* (1983) 45 P & CR 235 was delivered.
55 [1979] AC 144 at 175, per Lord Edmund-Davies.
56 (1890) 6 TLR 449.
57 (1983) 45 P & CR 235.
58 [1997] HKLRD 1022 at 1029B–C.
59 For further criticism see Omotola 'The Nature of Interest Acquired by Adverse Possession of Land under the Limitation Act 1939' (1973) 37 Conv (NS) 85 at 102.
60 See para 20–22 ff above.
61 (1811) 14 East 332 at 339.

Claim to easement or profit as alternative to adverse possession

23–30 Where a person and his predecessors have made use of another's land for more than 20 years, they may wish to claim that they have acquired title by adverse possession or, in the alternative, that they have acquired an easement or profit by prescription. There are two serious difficulties with such a course.

23–31 The first is that a claim to an easement or profit, even in the alternative, is likely to undermine the squatter's claim to have had the *animus possidendi*. The squatter's actions and communications with the true owner, if any, must make it unequivocally clear that the squatter intends to possess the disputed land — to control it exclusively.[62] A claim in the alternative that the use of the disputed land fell short of possession may make it harder to persuade the court that the squatter had the necessary intention to possess the land.

23–32 The second is that the courts have held that a person who exercises a right over land which he believes to be his cannot, if it turns out he does not own that land, claim an easement or profit over that land by prescription: see *Lyell v Lord Hothfield*[63] and *Attorney-General of Southern Nigeria v John Holt & Co (Liverpool) Ltd.*[64] It is not clear, however, whether those cases have survived the decision of the House of Lords in *R v Oxfordshire County Council, ex p Sunningwell Parish Council.*[65] There, the House of Lords held that enjoyment 'as of right' does not require a subjective belief on the part of the person exercising the right that he is entitled to it. Until the law has been clarified, there is a risk that, by claiming he was in possession of the disputed land, the squatter will disqualify himself from claiming an easement or profit should his claim to possession fail.

62 See Chapter 9 above.
63 [1914] 3 KB 911.
64 [1915] AC 599 at 617–618, PC.
65 [2000] 1 AC 335.

Chapter 24
Leases

24–01 The law of adverse possession in relation to leases is considered in this chapter under the following headings:

1 Limitation of claims between landlord and tenant for rent and breach of covenant.
2 Limitation of a landlord's claim to forfeiture.
3 Non-payment of rent by an oral periodic tenant.
4 Adverse possession where the disputed land is subject to a lease.
5 Receipt of rent by person other than landlord.

24–02 For discussion of the effect of the grant of lease by a squatter, as giving rise to an estoppel, see Chapter 19 above. The effect of encroachments by a tenant, where a tenant under a lease takes possession of land not forming part of the demised premises is considered in Chapter 25 below.

Claims for rent and breach of covenant

24–03 The rules limiting claims against a tenant for rent and by and against a tenant for damages for breach of covenant are not part of the law of adverse possession. However, it is convenient briefly to explain those rules here. They are straightforward, and they frequently come into play in the context of an adverse possession claim involving a lease.

Arrears of rent

24–04 There is a six-year limitation period for the recovery of arrears of rent. The Limitation Act 1980, s 19 provides:

> 'No action shall be brought, or distress made, to recover arrears of rent, or damages in respect of arrears of rent, after the expiration of six years from the date on which the arrears became due.'

Damages for breach of covenant

24–05 The limitation period for bringing an action for damages for breach of a tenant's or landlord's obligation under a lease depends on whether the lease was made by deed or not. If the lease was made by deed,

then it is a 'specialty', and the Limitation Act 1980, s 8 imposes a limitation period of 12 years for an action upon a specialty. This does not, however, affect the shorter period of six years imposed by the Limitation Act 1980, s 19 in cases of arrears of rent. But if the lease was not made by a deed, then the relevant limitation period is six years under the Limitation Act 1980, s 5, as the claim will then be treated as an action founded on simple contract.

Forfeiture

24–06 Most leases contain a proviso entitling the landlord to re-enter the demised premises and forfeit the lease if the rent is not paid for a stated period, if there is a breach of covenant by the tenant or if the tenant becomes insolvent.[1] Such provisos give the landlord an option to determine the lease, and take back possession of the demised premises, which the landlord may or may not choose to take advantage of. Subject to statutory restrictions,[2] a landlord may enforce his right of forfeiture by physical re-entry, or by serving proceedings claiming possession. Under the Law of Property Act 1925, s 146, the landlord normally has to give the tenant written notice of a breach of covenant (other than the covenant to pay rent) and to allow a reasonable time to elapse before re-entering. In some circumstances, the right to forfeit can be waived.

The expiry of the limitation period bars all forms of forfeiture

24–07 In relation to cases where the Limitation Act 1980 applies,[3] the right to forfeit will be barred once the limitation period has expired after the right of forfeiture first accrued, under the Limitation Act 1980, s 15.

24–08 Section 15 applies both to forfeiture by action, and to forfeiture by physical re-entry, because the Limitation Act 1980, s 38(7) provides:

> 'References in this Act to a right of action to recover land shall include references to a right to enter into possession of the land ... and references to the bringing of such an action shall include references to the making of such an entry ...'

24–09 It is unclear whether s 15 applies to claims to forfeit leases, the title to which is registered. The Final Report referred to in Chapter 22 above expressed the view that it would do so,[4] even though s 96(1) of the

1 See generally *Woodfall on Landlord and Tenant* (Looseleaf edn) para 17.057 ff.
2 See *Woodfall*, fn 1 above, para 17.089.
3 That is, in relation to unregistered titles, registered titles where the limitation period expired before 13 October 2003, and chargees of registered titles, but not registered titles where the limitation period had not expired before 13 October 2003: see para 1–06 and Chapters 21 and 22.
4 See Final Report, para 436.

2002 Act provides: 'No period of limitation under section 15 of the Limitation Act 1980 (time limits in relation to recovery of land) shall run against any person, other than a chargee, in relation to an estate in land or rentcharge the title to which is registered'.

Statutory provisions

24–10 The Limitation Act 1980, Sch 1, para 7 provides:

> '(1) Subject to sub-paragraph (2) below, 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.
>
> (2) If any such right has accrued to a person entitled to an estate or 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 estate or interest fell into possession, as if no such forfeiture or breach of condition had occurred.'[5]

Failure to forfeit does not affect subsequent claims

24–11 If the landlord has the right to forfeit in respect of a breach of covenant, the limitation period for enforcing that right in respect of that breach runs from the date when the right accrued. However, the expiry of the limitation period in respect of the right to forfeit does not affect the landlord's title, and does not prevent him from forfeiting in respect of subsequent breaches.

24–12 In *Barratt v Richardson and Cresswell*,[6] a lease for 99 years was granted to Richardson in 1909 at a rent payable quarterly and with a covenant to pay the rent. In 1924, the lease was assigned to Cresswell. No rent was paid from 1914 onwards. Cresswell had offered to pay and had paid into court six years' rent. The landlord claimed to forfeit the lease for non-payment of rent. Cresswell argued that the right to forfeit had been lost under the Real Property Limitation Act 1874, s 1.[7] Wright J rejected that argument. He held that a fresh right of re-entry arose every time a gale of rent remained unpaid for 21 days or more. The loss of the right to re-enter in respect of the earliest gales of rent did not affect the landlord's right to forfeit in respect of the later instalments. The decision to the

5 The Limitation Act 1980, Sch 1, para 7(1) derives from the fifth clause of the Real Property Limitation Act 1833, s 3, and para 7(2) from the Real Property Limitation Act 1833, s 4. The effect of those provisions was then re-enacted as the Limitation Act 1939, s 8. See Chapter 2 above.
6 [1930] 1 KB 686.
7 Which imposed a limitation period of 12 years on actions to recover land: see Chapter 2 above.

contrary by the Irish Court of Common Pleas in *Doe d Mannion v Bingham*[8] was wrong.

When time runs from

24–13 It seems probable that, where the landlord cannot forfeit in respect of a breach of covenant until he has complied with a statutory requirement, time runs from the date of the breach, and not from the later date on which the statutory requirement is complied with. For example, before a landlord can forfeit, he must serve a notice under the Law of Property Act 1925, s 146 specifying the breach of covenant and requiring it to be remedied, and requiring compensation in money for the breach if he wants such compensation. He cannot then forfeit until a reasonable time has elapsed. The question therefore arises as to whether the limitation period for forfeiting the lease starts to run from the date of the breach of covenant, or from the expiry of a reasonable time after service of a s 146 notice.

24–14 The Limitation Act 1980, Sch 1, para 7(1) provides that, subject to the special provisions applying to interests in reversion or remainder in sub-para (2), 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. In modern usage, forfeiture would normally be used as the appropriate expression in the case of landlord and tenant. Breach of condition would, however, be the more natural expression to use in the case of a right to recover an estate imposed on the assignment of the estate, such as a right reserved to the assignor of a lease to recover the lease on breach of covenant.[9] Historically, forfeiture was also the term used to describe the right of the Crown to seize and keep the lands of any person attainted of high treason, and the statutory right of a feudal lord to forfeit an estate if the feudal services were in arrear.[10] In many cases, however, the right to bring an action to terminate an estate and take possession could be described equally as arising by 'virtue of a forfeiture' or 'by virtue of breach of condition'.[11]

24–15 It would make little sense if there were different dates for the accrual of the cause of action depending on the precise characterisation of the right. It could be argued that a forfeiture is only 'incurred' when the landlord has the right to forfeit, when all statutory requirements have been satisfied. But that is not the natural meaning of 'incurred', and it would mean that there would be a different date for the accrual of the cause of action depending on whether it was treated as arising by virtue of

8 (1841) 3 ILR 456.
9 As in *Shiloh Spinners Ltd v Harding* [1973] AC 691.
10 See Megarry and Wade *Law of Real Property* (6th edn) para 2–015 (the passage is not replicated in the 7th edition).
11 See *Woodfall*, fn 1 above, para 17.058; and *Fairweather v St Marylebone Property Co Ltd* [1963] AC 510 at 537, HL, per Lord Radcliffe.

forfeiture or by virtue of breach of condition. In other branches of the law of limitation, time runs against a claimant even though some procedural step needs to be taken before he can sue: see para 6–12 above. Accordingly, it is thought that time runs from the date of the breach.[12]

Transfer of land with right of re-entry

24–16 Land can be conveyed, transferred or assigned subject to a right of re-entry. For example, a lessee may assign a lease but reserve the right to re-enter if the assignee fails to comply with certain stipulations: see *Shiloh Spinners Ltd v Harding*.[13] The Limitation Act 1980, Sch 1, para 7 will also apply to such rights of re-entry, with the effect that the right of action to recover the land is treated as accruing on the date on which the right to re-enter accrues.

Non-payment of rent by periodic tenant

Non-payment of rent — the general rule

24–17 Non-payment of rent by a tenant does not ordinarily cause time to run against the landlord. In *Doe d Davy v Oxenham*,[14] a tenant under a 99-year lease failed to pay the rent for more than 20 years. The court held this had no effect on the landlord's title. The landlord's right to possession only accrued when the lease came to an end. So, however long the rent remains unpaid for, the landlord can start collecting it again. The Limitation Act 1980, s 19[15] will prevent him from recovering more than six years of arrears, but the Limitation Act 1980 will not affect his title to those arrears or to future payments.[16]

Oral periodic tenants subject to special statutory rule

24–18 By virtue of the Limitation Act 1980, Sch 1, para 5, the position is different, in relation to cases where the Limitation Act 1980 applies,[17] where the tenant is an oral periodic tenant. The Limitation Act 1980, Sch 1, para 5 provides:

> '(1) Subject to sub-paragraph (2) below, a tenancy from year to year or other period, without a lease in writing, shall for the

12 That was also the view expressed in Preston and Newsom *Limitation of Actions* (3rd edn) p 122. The current, 4th edn, expresses no view.
13 [1973] AC 691.
14 (1840) 7 M & W 131.
15 See para 24–04 above.
16 See *Archbold v Scully* (1861) 9 HLC 360.
17 That is, in relation to unregistered titles, registered titles where the limitation period expired before 13 October 2003, and chargees of registered titles, but not registered titles where the limitation period had not expired before 13 October 2003: see para 1–06 and Chapters 21 and 22.

purposes of this Act 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 sub-paragraph the tenancy is determined.

(2) 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.'

24–19 That provision derives from the Real Property Limitation Act 1833, s 8, which was re-enacted as the Limitation Act 1939, s 9(2). The Law Reform Committee's *21st Report on the Limitation of Actions*[18] considered that provision.[19] They considered that, like the parallel rule for tenancies at will, in the Limitation Act 1939, s 9(1),[20] it should be changed, so that time ran against the landlord only when a periodical tenancy was actually determined. That recommendation was not, however, implemented, although the recommendation in relation to tenancies at will was. In introducing what became the Limitation Amendment Act 1980, s 3 to the House of Lords, Lord Hailsham said that the retention of the rule governing oral periodic tenancies:

> '... would be more in the general interest than its repeal. If a periodical tenant could never prescribe against his landlord when the latter vanished, he would be disinclined to improve or maintain the property and would have difficulty in making title for the purposes of a mortgage for improvements, and so on.'[21]

24–20 It is submitted that the Law Reform Committee's recommendation should have been put into effect. The provision can cause substantial injustice: see, for example, *Hayward v Chaloner*;[22] where the plaintiffs, staunch supporters of the local church, purchased land forming part of the garden of the glebe cottages, which was let to the rector at ten shillings a year. They never asked for any rent. After more than 12 years had passed, the rector claimed to have acquired title by adverse possession, and his claim succeeded.

'Lease in writing'

24–21 In order to be a 'lease in writing' for the purposes of the Limitation Act 1980, Sch 1, para 5(1), the document must create a leasehold estate. It is not sufficient if it merely evidences the existence and terms of a lease; it must actually create the lease. In *Doe d Landsell v*

18 Cmnd 6923 (1977).
19 Cmnd 6923 (1977) paras 3.56, 46.
20 See Chapter 35 below.
21 Hansard HL Official Report (5th series) col 1232, 25 June 1979.
22 [1968] 1 QB 107.

Gower;[23] an entry in a vestry book, signed by the tenant and by one, but not by all, of the parish officers, was held not to be a 'lease in writing' within the meaning of the Real Property Limitation Act 1833, s 8,[24] because only one of the parish officers had signed the vestry book and he had not professed to sign on behalf of all. In *Moses v Lovegrove*,[25] the Court of Appeal held that a rent book which evidenced the terms on which the tenant held was not a 'lease in writing' within the meaning of the Limitation Act 1939, s 9(2).[26]

24–22 In *Long v Tower Hamlets London Borough Council*,[27] James Munby QC, sitting as a deputy High Court judge, held that a letter setting out the terms of a proposed tenancy and signed by the tenant was not a 'lease in writing' within the meaning of para 5(1). The letter was dated 4 September 1975, was counter-signed by the tenant on 8 September 1975, and proposed a tenancy to commence on 29 September 1975. As it conferred no immediate right to possession, it could not take effect at law unless it was a deed, because under the Law of Property Act 1925, s 54(2), only leases taking effect in possession are exempt from the requirement that a lease must be created by a deed. It followed that the letter had not created a legal estate in land, and there was no 'lease in writing'. Although the letter created an equitable lease, because it created a specifically enforceable agreement for the grant of the tenancy, that was not sufficient to make it a 'lease in writing' as only a legal lease sufficed.

'Rent has subsequently been received'

24–23 'Rent' includes a service by which the land is held.[28] It probably also includes service charges or other periodical payments payable by way of additional rent,[29] but not service charges which are not payable by way of rent.[30]

24–24 In order for the receipt of rent to stop time running, it must be paid within the limitation period: see *Nicholson v England*.[31] In that case, it was held that once time has run in favour of a tenant and the title of the landlord has been extinguished accordingly, a payment of rent does not

23 (1851) 17 QB 589, 117 ER 1406.
24 The section from which the Limitation Act 1980, Sch 1, para 5(1) derives.
25 [1952] 2 QB 533.
26 The immediate statutory predecessor to the Limitation Act 1980, Sch 1, para 5(1).
27 [1998] Ch 197.
28 See *Doe d Edney v Benham* (1845) 7 QB 976; *Doe d Edney v Billett* (1845) 7 QB 976; *Williams v Jones* [2002] 3 EGLR 69 at paras 12–13 (refusing to set aside the finding of the trial judge on this point).
29 See *Escalus Properties v Robinson* [1996] QB 231, CA.
30 *Khar v Delbounty* (1996) 75 P & CR 232.
31 [1926] 2 KB 93. This point was not considered in the case of *Mortgage Credit Ltd v Kalli* [2007] EWCA Civ 1156, in which the tendering of cheques — some of which were not honoured — were treated as an acknowledgment of the tenancy, and hence not adverse possession.

revive the tenancy. The decision of Jessel MR to the contrary in *Bunting v Sargent*[32] was wrongly decided.

24–25 The payment must be in respect of rent if it is to be effective. In *A-G v Stephens*,[33] Lord Cranworth LC said:

> 'Where the tenancy is, as in this case, disputed, the circumstances connected with the annual payments are evidently most important; for if the person paying made the payment expressly or impliedly on account of something else than rent of land of which he was the tenant, this would not be a payment of rent within the meaning of the clause.'[34]

24–26 The decision in *Neall v Beadle*[35] is not inconsistent with that proposition. In that case, there was a lease for eight years reserving a rent of £150 per annum and obliging the tenant to reimburse the landlord in respect of a tithe rentcharge. The tenant held over after the expiry of the eight years for a further period of nearly 13 years. The tenant never paid the rent, but always paid the tithe rentcharge. In fact, the agreement obliging him to pay the rentcharge was void.[36] Eve J held that the payment of the rentcharge after the expiry of the lease justified the inference that a fresh yearly tenancy had been entered into. Accordingly, time had not run against the landlord until the anniversary of the grant of that new yearly tenancy, and had not expired when the action was commenced. So Eve J did not treat the payment of the rentcharge as payment of rent, delaying the start of the limitation period. Rather he inferred from the payment that a new yearly tenancy had been created on the expiry of the eight-year lease, rather than a tenancy at will.

Evidence of payment of rent

24–27 Although an acknowledgment of title must be in writing for the purposes of the Limitation Act 1980, s 29, evidence of the payment of rent can be oral.[37]

Possession of oral periodic tenant is adverse

24–28 In *Hayward v Chaloner*,[38] it was argued that the possession of a tenant under an oral yearly tenancy was not adverse, so that even though rent was not paid, time did not run against the landlord. The majority of the Court of Appeal[39] rejected that argument. Russell LJ said:[40]

32 (1879) 13 Ch D 330.
33 (1855) 6 De M & G 111 at 146.
34 He decided the case on a different point, so that observation was an *obiter dictum*.
35 (1912) 107 LT 646.
36 By reason of the Tithe Act 1891.
37 See *Doe d Earl Spencer v Beckett* (1843) 4 QB 601.
38 [1968] 1 QB 107.
39 Russell and Davies LJJ, Lord Denning MR dissenting.
40 [1968] 1 QB 107 at 122.

> 'I have no doubt that for this purpose the possession of a tenant is to be considered adverse once the period covered by the last payment of rent has expired.'

Once time has expired, possession is deemed always to have been adverse

24–29 Once the limitation period has expired, the tenancy is treated for all purposes as if it had really determined when it is deemed to have ended. So once the landlord's title against the tenant is extinguished, the landlord cannot recover any rent from the tenant.

24–30 In *Re Jolly*[41] AJ left her property to her four children, and directed that all moneys owing at her death by any child for rent or otherwise should be brought into hotchpot in ascertaining the share of each child. An issue arose as to whether the executors should deduct from one son's share arrears of rent due under a tenancy of a farm occupied by him. He had taken a tenancy of the farm in 1868, and had paid the rent up to 1881, but after that had paid nothing. AJ died in 1893, by which time the limitation period had expired. The Court of Appeal held that the rent should not be taken into account. Lord Alverstone MR said:

> 'In the year 1893 RT Jolly obtained, by virtue of the Real Property Limitation Act, 1874 s. 1, an absolute title to the property. It is, I think, inconsistent with his right so acquired that the rent which he ought to have paid should be deemed to be still owing. The effect of the Limitation Acts of 1833 and 1874 is, in my opinion, that, after the expiration of the statutory period of twenty and twelve years respectively, all rights which the reversioner would have had in respect of the land have come to an end.'

Rigby LJ said:

> 'The assumption is that on the day after the twelve years have elapsed the tenant is to be taken to be no longer tenant. He is holding the land under a title which, according to the older cases, would have been an adverse title. That is absolutely inconsistent with an agreement to pay rent; and so it was held that the tenant was no longer in possession as a tenant from year to year, or as a tenant at all.'

Collins LJ said:

> 'I think the crucial point was that put by Mr. Poyser — namely, that the effect of the statute of William IV was to do away with non-adverse possession, and to make all possession adverse. At the end of the twelve years the possession of a tenant who has paid no rent becomes adverse during the whole time the adverse possession is validated by the statute, and it is not competent for the landlord to

41 [1900] 2 Ch 616.

say that he still retains the right to recover rent which was not payable to him. I think that is emphasised by the position of a tenant under a lease for years as compared with that of a tenant under a lease from year to year. In the former case the non-payment of rent does not render the possession of the tenant adverse unless he pays rent to some person other than the lessor. But in the latter case the Legislature has treated the mere non-payment of rent by a tenant from year to year as a payment to some person other than the landlord. On these grounds I think the son must be regarded as having been in possession during the twelve years, not as tenant to the testatrix, but in a right in respect of which he was under no obligation to pay rent.'

Tenant's possession presumed to continue

24–31 Where Sch 1, para 5 applies, the tenant's possession is presumed to continue: see *Williams v Jones*,[42] where Buxton LJ said that, where para 5 applies:

'... the possession held by the tenant moves from being possession with the landlord's consent to being possession held without his consent, and thus for limitation purposes adverse ... I agree that this analysis does not exclude the possibility that a tenant might have so feeble a connection with the land (the example given in argument was of a man who has gone off to Australia leaving the front door of the demised premises open) that on the determination of the tenancy he could not be said to be in possession at all. But that in my view would be an extreme case ... It follows from my analysis that [the paper title owner] was in my judgment wrong in his argument that on the determination of the tenancy the matter ought to be looked at afresh, by straightforward application of the approach in *Powell v McFarlane*, without regard to the fact that the tenant was a tenant holding over.'

Year or other period

24–32 Where the tenancy is a yearly one, then Sch 1, para 5 provides that it is treated as being determined at the expiration of the first year. Where the tenancy is a weekly one, time runs from the end of the first week of the tenancy: *Jessamine Investment Co v Schwartz*.[43] If the tenancy was monthly, then time would run from the end of the first month of the tenancy.

42 [2002] 3 EGLR 69 at paras 19–21.
43 [1978] QB 264.

New tenancy or licence

24–33 If, while the limitation period is running, the tenancy is surrendered and followed by the grant of a new tenancy or a licence, that will stop time from running.[44] If an oral periodic tenancy is actually determined and replaced by a new oral periodic tenancy, time starts to run afresh from the end of the first period of the new tenancy or, if later, the last payment of rent under it.[45] However, a statement by the owner of the property that the tenant can have the property outright will not suffice to surrender the tenancy and grant the tenant a licence.[46]

Effect of statutory protection

24–34 The oral periodic tenant may have statutory protection, making it difficult or impossible for the true owner to recover possession. Where the Limitation Act 1980[47] provides that time is to run in favour of such a tenant, it has been held that the fact that the tenant may have statutory protection against a possession action will not prevent his possession from being adverse.

The Rent Acts

24–35 In *Moses v Lovegrove*,[48] the plaintiff purchased a property in 1934 of which the defendant was tenant, holding under an oral tenancy but with a rent book. In 1935, the plaintiff obtained a declaration under the Rent Acts that the property was free from control.[49] There then arose a dispute about the amount of rent payable and, from 28 May 1938 on, the tenant paid no rent. As a result of legislation,[50] as from 2 September 1939 the property was brought within the ambit of the Rent Acts, so that the landlord could not have obtained possession without persuading a county court judge that it was reasonable to make an order for possession. More than 12 years after the last payment of rent, the plaintiff sued for possession. The defendant successfully claimed to have acquired title by adverse possession. The Court of Appeal held that the fact that statutory limitations were put on the plaintiff's right to recover possession after it accrued did not prevent the defendant's possession from being adverse. It

44 A tenancy is surrendered by operation of law when the tenant is granted and accepts a new right to occupy the land inconsistent with the continued existence of the tenancy — see *Foster v Robinson* [1951] 1 KB 149 — provided that the new interest is valid and enforceable: *Barclays Bank v Stasek* [1957] Ch 28.
45 See *Doe d Bennett v Turner* (1840) 7 M & W 226, approved in *Turner v Doe d Bennett* (1842) 9 M & W 643, Ex Ch; see also *Neall v Beadle* (1913) 107 LT 646.
46 See *Palfrey v Palfrey* (1974) 229 Estates Gazette 1593.
47 And its predecessors.
48 [1952] 2 QB 533.
49 That is, was not protected by the Rent Acts.
50 The Rent and Mortgage Restrictions Act 1939.