1 Adverse possession of unregistered land

1.1 Introduction

This section relates to applications based on adverse possession of **unregistered** land **only**.

For applications based on adverse possession of registered land, see Topic – Adverse Possession of Registered Land.

Adverse possession means possession inconsistent with the rights of the true owner.

An RCU2 holder should deal initially with adverse possession applications, preparing them for detailed consideration by a TT2 or TT3 holder.

1.2 Processing a case

1.2.1 Preliminary inspection

Adverse Possession applications should be auto-captured by Virtual Post Room (VPR) if they are lodged on a form FR1 and all forms and documents lodged should be scanned and attached to this application. If the application is based solely on a claim of Adverse Possession then, unlike Standard First Registrations, the customer is instructed to lodge certified copies of all documents (including statutory declarations) and application forms. Any originals lodged will be destroyed in line with the document handling policy. On receipt of an application an RCU2 holder should refer to a TT2 or TT3 holder for consideration.

Depending on when VPR FRs are auto-captured, and then LRPG, indexed PPI etc, it may not always be possible to refer cases on Day 1.

The RCU2 holder should confirm that the land is unregistered and provide details of any previously cancelled adverse possession applications.

This Case Referral Form (or local equivalent) may be used but is not compulsory. If used, the form must be sent for scanning on completion of the case.

The TT2 or TT3 holder will give instructions whether to return it as defective under r.16(3), LRR 2003.

It should be rejected if:

- the wrong type of application is lodged e.g. where an ADV1 has been used, or
- it is clear from the information lodged that the application has no prospect of success, such as where the evidence of possession is not sufficient or there has been

insufficient period of possession.

Where the statutory declaration or statement of truth does not exhibit a plan allowing the land to be identified, contact the customer by phone and inform them that we will hold the application for up to five working days to allow for a plan to be lodged which sufficiently identifies the land affected (see Topic - Rejection of substantive applications – Action for any points that will not lead to immediate rejection). In this situation you should inform the customer that the plan is to enable us to assess whether the application can proceed and that there may be a follow up requisition asking for the statutory declaration/statement of truth to be replaced or re-sworn so as to incorporate the plan.

A statement of truth may be in form ST1, which is specifically intended for adverse possession applications. Its use is not compulsory and an alternative form of statement of truth (or a statutory declaration) may be used instead. A statement of truth must meet the requirements of r.215A. See Topic – Statements of truth – Requirements.

1.2.2 Fees

See Topic – Fees – First Registrations. The fees for adverse possession of unregistered land are the same as for any other first registration. The application is entitled to a reduced scale 1 fee if it is a voluntary registration (which it is anticipated most will be).

If an inspection is required see Topic – Fees – Inspections. If the application is for any reason cancelled the registration fee should be refunded but the inspection fee should be retained.

1.3 Standard inspections

1.3.1 Standard inspection required in most cases

Often, statements of truth or statutory declarations, whilst not untrue, do not give a complete picture. For example, the declarant may have forgotten to mention a gate in a feature shown on the OS map that could indicate possible access from adjoining land.

Therefore, in almost every case a standard inspection will be required for which a separate fee is payable, see Topic – Fees – Inspections.

If a survey is not considered necessary, see Dispensing with an inspection.

1.3.2 Dispensing with an inspection

Exceptionally, TT2/TT3 holders can exercise discretion to dispense with an inspection where they believe there is enough information to make a decision without one. This may be the case if, for example:

- the statements or declarations are supported by clear photographic information; **or**
- The land is fully enclosed by, and obviously forms an integral part of, other property the applicant owns.

In such cases the TT2/TT3 holder must give instructions for the refund of any inspection fee already paid and record on the PAS the grounds for not raising an inspection.

1.3.3 Notification of inspection

Where the inspection fee has already been paid send notification of the inspection simultaneously to:

- the applicant using stock letter Survey 003; and

- the applicant's solicitor using stock letter Survey 001.

It is essential that the appropriate letters are sent. If using Royal Mail please ensure that these are sent first class.

Where the inspection fee has not already been paid, send the applicant's solicitor stock letter Survey 002, which in addition to informing them of the inspection also requests the fee. Note you must manually add the cancellation date. See Requisition Ready Reckoner in Ready Reckoners - Current.

Do not raise the inspection nor send the applicant stock letter Survey 003 until you have received the fee.

In correspondence with applicants and their conveyancers always use the term inspection rather than survey.

1.3.4 Consideration of inspection results

On completion of the inspection the TT2/TT3 holder will consider the results and give further instructions, for example:

- Where the application is being completed and the inspection reveals the applicant is not in actual possession of all the land in the statement of truth or statutory declaration, to:
- exclude such land from the registration; and
- issue with the TID free format stock letter 053/A and an illustrative plan accounting for the exclusion.
- Serve notice - see Notices.
- Where the application is not being completed, cancel the application if the inspection does not support the statements made in the statement of truth or statutory declaration. See Topic – Cancellations – What you need to do.

In the event of cancellation the TT2/TT3 holder may choose to issue a letter to the applicant explaining the reasons for cancellation and may choose to include a copy of the inspection. **A copy of the inspection must not be issued routinely - it is solely at the decision of the TT2/TT3 holder.**

1.4 General principles of adverse possession

In order for the application to proceed, **all** the points raised in this section must have been true of the applicant and any predecessors **for at least 12 years** prior to the date of the application.

1.4.1 Factual possession

Before proceeding any further with the application the TT2/TT3 holder must believe it to be more likely than not, from the evidence he or she has seen, that the squatter has factual possession.

The squatter will need to show that he or she, and any predecessors through whom he or she claims, has enjoyed single and exclusive possession of the land. This will depend on the acts of user relied upon. Where the land is open, fencing is strong evidence, but it is neither indispensable nor conclusive. In Powell v McFarlane (1979) 38 P & CR 452 Slade J said:

"The question of what acts constitute a sufficient degree of exclusive physical control must

depend on the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed...Everything must depend on the particular circumstances, but broadly, I think what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no one else has done so."

In J A Pye (Oxford) Ltd v Graham [2002] UKHL 30 ("Pye v Graham") the House of Lords adopted the above statement of the law.

1.4.2 Intention to possess

Some of the cases call this intention the *"animus possidendi"*. The applicant needs to have shown an intention to possess the land and to exclude the world at large, including the owner with the paper title, so far as reasonably practicable. It needs to be an intention to **possess**, not necessarily an intention to own.

Where the squatter has been able to establish factual possession, the intention to possess will frequently be deduced from the acts making up that factual possession. But this deduction will not always be made, as Slade J explained in Powell v McFarlane (1979) 38 P & CR 452 (in a statement approved in Pye v Graham):

"In my judgement 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 or she has dispossessed the owner, should be required to adduce compelling evidence that he or she had the requisite animus possidendi in any case where his or her use of the land was equivocal, in the sense that it did not necessarily, by itself, betoken an intention on his or her part to claim the land as his or her own and exclude the true owner".

Use of land for access purposes is an example of an "equivocal" act. Such use over time might give rise to a prescriptive easement but it is not, by itself, sufficient to establish an intention to possess the land.

The fact that the squatter admits that he or she would have vacated the land, or offered to pay for using it, if the owner of the paper title had asked him or her, does not prevent him or her from having the necessary intention to possess (Pye v. Graham).

1.4.3 Possession is without owner's consent

As well as factual possession and the intention to possess, the applicant must show that the possession was "adverse" within the meaning of the Limitation Act 1980 (LA 1980). In Buckinghamshire County Council v Moran [1990] Ch 623, Slade LJ explained:

"Possession is never 'adverse' within the meaning of the 1980 Act if it is enjoyed under a lawful title. If, therefore, a person occupies or uses land by licence of the owner with the paper title ... and his licence has not been duly determined, he or she cannot be treated as having been in 'adverse possession' as against the owner of the paper title."

1.5 Limitation period

1.5.1 The normal period

S.15(1), Limitation Act 1980 (LA 1980) states:

"No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or her or, if it first accrued to some person through whom he or she claims, to that person".

You should **only** consider granting title where the applicant has shown at least 12 years

adverse possession.

1.5.2 Extended periods

1.5.2.1 30 years

The time limit of 12 years is extended to 30 years where:

- The owner is the Crown (see Topic – Crown Land) (see below also) ; or
- The owner is a company that has been dissolved. The property of such a company vests in the Crown or one of the Royal Duchies as bona vacantia (see Topic – Companies – Insolvent – Property of a dissolved company). However where the squatter has already accrued 12 years possession before the company is dissolved, then he or she has acquired title and the title does not vest in the Crown; or
- The owner is a spiritual corporation sole - bishops, vicars and certain other office holders in the Church of England - see Topic – Church of England Property. The 12-year period applies, however, to corporations aggregate, such as the Church Commissioners (see Topic – – Form of statement of truth or statutory declarations) or one of the Oxford or Cambridge Colleges (see Topic – Universities and Colleges Estates Act 1925).

Crown Land includes land owned by Government Departments (Limitation Act 1980, s.37 (3)); see Adverse Possession by Jourdan and Radley-Gardner (2nd edition), paras. 14-05 and 14-06.

1.5.2.2 60 years

The time limit of 12 years is extended to 60 years where the land is foreshore owned by the Crown. However the normal 12-year period applies to foreshore owned by parties other than the Crown. Because of the difficulty of establishing that the applicant has been in possession you should treat with particular care any claim to have acquired title to foreshore in this way. (See Topic – Foreshore and land adjoining foreshore).

1.5.2.3 Other reason for an extended period

The normal limitation period may also be prolonged by:

- disability of the person entitled to recover the land;
- fraud or deliberate concealment of a cause of action; or
- mistake.
- Mediation period in certain cross border disputes (see Schedule 6,paragraph 16, LR Act 2002 and Schedule 8, paragraph 13, LR Rules 2003. This means that if the limitation period expires while mediation is ongoing, the effect of its expiry (that a person loses the right to litigate) is delayed until a certain specified time after the mediation ends).

You must disregard the factors listed in the bulleted points directly above unless you have positive reasons to believe that they apply. S.38(2), LA 1980 Act provides that a person is to be treated as under a disability while an infant (i.e. under the age of 18), or of unsound mind. "Mistake" in this context has a limited meaning. If, for example, the owner of a piece of land allowed someone to take adverse possession of it under the mistaken belief that he or she did not have title to it, this would not prevent time running. Ignorance of a fact or the law does not stop time running.

Where the land is held upon trust, the estate of the trustees continues, even after the expiry of the limitation period against them, until time has run against all the beneficiaries. Where there is some indication that the trustees hold the land on trust for beneficiaries other than themselves you are unlikely to be able to approve anything better than a qualified title unless the applicant can establish details of the trust and can prove that the rights of action of all the beneficiaries have been defeated.

Arguably, the fact that the estate of the trustees continues in this way means that an application cannot be made where:

- the limitation period relied on starts to run (i) after the death of the owner and whilst their estate is being administered, (ii) after the bankruptcy of the owner and whilst their property is being administered by the trustee in bankruptcy, or (iii) being a company, whilst the owner is being wound up and
- The period after the subsequent vesting in possession of the beneficial ownership in the property is less than the requisite limitation period.

In each of these cases, the owner is subject to a form of trust during this period of administration: (Ayerst v C & K (Construction) Ltd [1976] A.C. 167). Where we receive such an application, write to the applicant along the following lines:

It appears that the period of claimed adverse possession relied on starts to run [after the death of the owner at the time and whilst their estate was being administered] [after the bankruptcy of the owner at the time and whilst their estate was being administered] [whilst the owner was a company which was being wound up]. Case law such as Ayerst v C & K (Construction) Ltd [1976] A.C. 167 indicates that whilst the owner's estate is being administered, the [personal representatives] [trustee in bankruptcy] [liquidator] hold/holds the legal estate on a form of trust. It would seem arguable, therefore, that section 18 of the Limitation Act 1980 applies so as to prevent the limitation period from starting to run until the subsequent vesting in possession of the beneficial ownership in the property. We propose, as a result, not to proceed further unless you confirm that you wish us to do so. If you do provide this confirmation in writing, we shall include with any notice of your application that we serve on the owner and others a copy of this letter and your confirmation that you wish us to proceed.

URN S055/C has been created for this.

If the applicant confirms that they wish to proceed with their application you must ensure that anyone served with notice is made aware of this point.

The applicant's confirmation must be in writing but does not have to be by statement of truth or statutory declaration.

1.5.2.4 Adverse possession following death of intestate owner where no grant of administration taken out

Where the adverse possession claimed starts to run after the death of an intestate owner and no grant of administration has been taken out, refer the application to a TT3, who should consider the following.

The Court of Appeal in Earnshaw v Hartley [2000] Ch 155 treated each of the relatives etc entitled to a share in an intestate's estate as having an interest under a trust for the purposes of limitation, with the effect that paragraph 9 of Schedule 1 to the Limitation Act 1980 operated and prevented the limitation period from running in favour of one of them who had taken possession. The TT3 should refer to CSG Issue 417-12 for more information.

Where the applicant is a third party rather than one of the people entitled to a share in the

estate, the Court might similarly hold that, for the purposes of limitation, the Public Trustee has been holding the intestate's estate on trust. However, we do not think that this is likely. It can be left to be raised as an objection; it need not be mentioned in the notice served on the Public Trustee or anyone else. The TT3 should refer to CSG Issue 407-12 for more information.

1.6 What stops time running?

1.6.1 Acknowledgement of owner's title

An effective acknowledgement by the squatter of the owner's title before the limitation period expires, stops time running.

In order to be effective, an acknowledgement must be in writing and signed by the person making it (s.29, LA 1980). A written acknowledgement by the agent of the squatter is as effective as one signed personally by the squatter (s.30(2), LA 1980).

- A written offer by the squatter to purchase the land from the owner **is** treated as an acknowledgement – see Edginton v Clark [1963] 3 All ER 468.
- An oral offer is not an acknowledgement within the meaning of s.29, LA 1980.
- A mere demand for possession from the owner does not stop time running – see Mount Carmel Investments Ltd v Peter Thurlow Ltd [1988] 3 All ER 129.

Because of the importance of acknowledgements you should be interested in any contact there may have been between the squatter and the owner (or their respective conveyancers). If the evidence discloses such contact ask for details of it, including copies of all correspondence exchanged between the parties.

1.6.2 Time may start running again after acknowledgement

If the squatter remains in possession after the acknowledgement then time may start running again. But if the acknowledgement results in a change in the relationship between the squatter and the owner (for example, the grant of a lease or a licence) then the possession may no longer be adverse so that time will not run.

1.6.3 Recovery of possession

Time will also stop running if the owner recovers possession from the squatter. But the mere issue of proceedings which are later dismissed does not have this effect – see Markfield Investments Limited v Evans [2001] 1 WLR 1321.

1.7 Successive squatters

The squatter can pass on his or her interest in the land to a purchaser or under a will or intestacy. This can be done informally and there is no need in such a case to seek a formal transfer or assignment. If the successor immediately follows the original squatter into possession and holds for the remainder of the 12 years, title will be established.

If a second squatter dispossesses the first, the second acquires the benefit of any time that had already run against the owner. However, the first squatter will retain the right to recover possession from the second, until the full limitation period has run from the date when he or she was dispossessed.

So if B dispossesses A in 1986 and is then dispossessed by C in 1994, A loses the right to recover possession from C in 1998 but B could still bring possession proceedings against C until 2006.

Time stops running if a squatter abandons the land before the limitation period has expired. If a second squatter later takes possession time starts running afresh against the owner.

1.8 Human rights

In Pye v UK, the Grand Chamber of the European Court held that s.75 LRA 1925 in combination with the Limitation Act 1980 engaged but did not violate Article 1 of Protocol 1 to the European Convention on Human Rights. See Topic – Human Rights Act 1998 – Protocol 1 Article 1 Protection of property] The reasoning of the Court applies *a fortiori* where the land involved is unregistered because in this case (as was acknowledged by the European Court) the law serves the important purpose of preventing uncertainty about ownership, which is not the case where the land is registered.

1.9 Evidence required

The evidence will usually consist of one or more statutory declarations or (on or after 10 November 2008) statements of truth, which may be in form ST1.

These should be factual and, ideally, will be in the words of the person making them rather than in language that their conveyancers have copied from precedent books. They should expressly state how the facts are known, if this is not implicit.

Think about the weight that you should give to the declaration(s) or statement(s) in reaching your decision. Inevitably information from third parties, who have observed the position on the ground but may have no knowledge of the squatter's intentions or of his or her dealings with the owner, will usually carry less weight than the squatter's own claims.

For more information see Practice Guide 5 – Adverse possession of (1) unregistered land (2) registered land where a right to be registered was acquired before 13 October 2003 – 4.3 supporting evidence.

- The application should also include a land charge search against the applicant. However if no search has been lodged an internal search against the applicant(s) for their period of possession should be made. If the documentary title owner can be identified land charge searches should also be carried out against them.
- A Land Charge Search is required against the applicant as there are potential charges that may affect either the validity of the application or reveal an interest that should be protected, e.g.:
- if someone had been squatting in an unregistered property and prior to an application for first registration their spouse had obtained a Class F land charge
- The applicant may have become bankrupt (and is therefore potentially not entitled to apply if the property has vested in his trustee).

1.10 Using case law

Examine each application on its own merits.

Bear in mind the case law on adverse possession but remember that the court will have heard evidence and arguments on both sides. Often you will only see the applicant's version of events and the facts in your case, although superficially similar to others, are unlikely to be identical.

The reported cases are only illustrations of how the law works. Treat them with care, particularly those where the courts have accepted relatively slight acts of adverse possession (e.g. Red House Farms (Thorndon) Ltd v Catchpole (1977) 244 EG 295).

1.11 Requisitions

Do **not** requisition for additional evidence if you would be prepared to approve a possessory title on the basis of the statutory declarations or statements of truth lodged and the result of any inspection.

If the declaration or statement and results of inspection leave room for doubt as to the adverse possession, send a C90 to the applicant, using free format URN **F049/A**. Explain why you are not satisfied and offer to review your decision if the applicant wishes to produce further evidence in support of the application.

1.12 Notices

Always serve notice **B149** on any person who, from the information available or from your local knowledge, may have an interest in the land. The applicant may be able to supply the name and address of the documentary title owner (see -<-<Requisitions->-<-). This includes the relevant authorities and/or companies where the land abuts a highway, railway, dock, harbour canal or waterway: **do not use a B16 notice** on adverse possession cases. If issuing a B149 to the Government Legal Department or the Duchy of Cornwall or Lancaster where a proprietor is a dissolved company (see Topic – Notices – Notices served on the Treasury Solicitor concerning dissolved companies) replace the first paragraph to the B149 notice with:

"I am writing to you as we have received an application to register the land referred to above and it appears that [Company name and registered number] may be the documentary title owner of the land. The company is a dissolved company. (If the company has been restored to the register kept by the registrar of companies, or there has been an application for such restoration, or title to the registered estate has been disclaimed, please let me know.)"

Where the land may be agricultural land in England (including common land or shared grazing), contact the Rural Payments Agency (RPA). Land Registry has entered into a data sharing agreement with the RPA. The RPA will provide us with contact details of third parties in receipt of payments in respect of such land. Send an email to centralops@rpa.gsi.gov.uk providing as much information as possible to enable the RPA to identify the land. This may include the address and post code, OS co-ordinates and a plan showing the location of the land. Where contact details are received from the RPA, serve notice on the person concerned. If you have not heard back from the RPA after 7 working days, send an email to John Gray in RLSG and proceed with the application.

This arrangement does not extend to land in Wales.

The TT2/TT3 holder must give instructions for the service of notice. If it is decided not to serve notice on a person who may possibly have an interest in the land the reasons must be recorded in the PAS or the Adverse Possession Case Referral Form.

The purpose of serving notice is to give an opportunity for objection in a case where you have decided that you will approve registration if there is no reply to the notice.

The service of notice is not a means of drawing out further evidence to support a weak or doubtful application. Do **not**, therefore, serve any notice until you are satisfied that it would be right to approve a title in the absence of an objection.

Where a charge affects the land, see also Serving notice on the chargee.

1.13 Class of title

Generally, you should only register the squatter with an absolute title or good leasehold title

where you are satisfied that his or her adverse possession has barred the owner's title.

The reasons why the particular class of title has been given must be recorded in the PAS or the Adverse Possession Case Referral Form 1.

In any other case you should approve no more than a possessory title.

In cases of real doubt do not grant even a possessory title. In part this is because if the applicant remains in possession for 12 years, we will be required to convert a possessory title to absolute - see s.62(4), LRA 2002. We should also bear in mind the owner's rights, in particular, the inconvenience to them of making a rectification application if the evidence does not reach the minimum standard see General principles of adverse possession .

Where the application is being completed with a lesser class of title than applied for send stock letter F117/B on completion. The following is a suggested wording for the infill:

"the applicant has been entered as proprietor based upon a claim of adverse possession. We will generally only register the squatter with an absolute title if we are satisfied that their adverse possession has barred the owner's title. Usually this will only be so where we know what that title is and we are satisfied that the owner has consented to, or could have no valid grounds for objecting to, the squatter being registered as proprietor of the land. This is not the case in this particular application."

1.14Protective and other entries

1.14.1 Protective entry

A squatter, not being a purchaser for value, is bound by all subsisting legal and equitable rights, including restrictive covenants and rentcharges – Re Nisbet and Potts' Contract (1906) 1 Ch 386.

Where the owner's title has not been deduced, you should usually make a protective entry in respect of restrictive covenants, and, in areas where they are common, rentcharges.

If, on a reasonable assessment, of risk (which will include taking into account of information from adjoining registered titles), it is considered that the protective entry needs to refer to equitable easements or other matters (for example, equitable charges), then this may be done. However, it must not be done routinely.

A protective entry should not refer to legal easements. Any legal easement will be an overriding interest on first registration, so there is no need for a protective entry. And we take the view that, should a legal easement exist, the failure to make a protective entry will not be a mistake in the register (because of the easement being an overriding interest on first registration), and will not give rise to a breach of the registrar's duty under r.35, LRR 2003 (there having been only the possibility of such an interest existing).

Use CRE CR720.

1.14.2 Where a protective entry is not required

You need not make a protective entry if you are satisfied, on the evidence available, that there is only a minimal risk that undisclosed interests affect the land (ignoring legal easements: see -<-<Protective entry).

In making such a decision, take account of information from adjoining registered titles.

1.14.3 -<-<Appurtenant easements over the land being registered

Where adjoining registered titles have the benefit of appurtenant easements over the land being registered, enter notice of those easements in the C Register of the squatter's title.

1.15Charges

1.15.1 Adverse possession started before date of charge

The squatter's title will not as a rule be subject to a charge by the owner if the adverse possession started **before** the date of the charge. The estate now being registered is the one that arose at the start of the adverse possession: at that point there was no charge so it cannot affect the squatter's estate and he or she is entitled to be registered free from it.

1.15.2 Adverse possession started after date of charge

In contrast, if the adverse possession started **after** the date of the charge, time may have started to run against the chargee at the same time as it started to run against the owner. **But this is only so if the mortgage repayments ceased with the adverse possession**. Time will not start to run where there is a later mortgage repayment by the owner or squatter during the adverse possession (s.29(3), LA 1980).

Additionally, where the adverse possession is of only part of the land charged – perhaps of a piece of the garden to a house – it is likely that the owner will have continued to make the repayments. The squatter's title will then be subject to the charge. (There is no apportionment of the mortgage debt. To secure the release of the land from the charge, the squatter will have to pay the full amount outstanding: Carroll v. Manek (1999) 79 P & CR 173.)

1.15.3 Serving notice on the chargee

Where a charge affects the land, serve notice on any chargee who can be identified.

If the application is expressly for registration subject to the charge, then proceed as set out in Where registration is to be subject to the charge.

In all other cases, ask yourself whether the evidence produced is such that it would be justifiable to register free from the charge in the absence of a reply from the chargee. The evidence is only likely to meet this standard if it is obvious that the squatter's occupation began before the charge was entered into or the occupation has been of all the land that was the subject of the charge.

If you are satisfied that the evidence produced does meet this standard, treat the application as one for registration free from the charge, whether or not this has been made clear in the application. See Where registration is to be free from the charge.

If the evidence produced does not come up to this standard, write to the conveyancers to say that the evidence they have produced suggests any estate acquired by adverse possession will be subject to the charge and that we are, therefore, going to treat the application as one for registration subject to the charge unless we hear from them informing us that they wish to withdraw the application. Give them two weeks in which to respond.

1.15.4 Where registration is to be subject to the charge

Serve notice **B161** on the chargee, enclosing a copy of the statutory declaration or statement of truth and any other relevant supporting documentation.

Instead of simply consenting to the application, a chargee might be prepared to agree to registration free from its charge. This could happen where there is sufficient equity to repay the mortgage in other land that is charged but not being occupied by the squatter.

1.15.5 Where registration is to be free from the charge

Serve notice **B150** on the chargee, enclosing a copy of the statutory declaration or statement of truth and any other relevant supporting documentation.

1.16 Adverse possession of unregistered leasehold land

As soon as the squatter takes possession of land that is leased, time runs **against the tenant**.

However, there is no "parliamentary conveyance", so the squatter does not acquire the tenant's title. The tenant, although no longer able to recover possession of the land, can still surrender the leasehold estate to the landlord. In Fairweather v St Marylebone Property Co Ltd [1962] 2 All ER 288 a house and garden containing a shed were leased by A to B for 99 years. A neighbour, C, occupied the shed for more than 12 years. Before the lease expired B surrendered it to the freeholder, A. The House of Lords ruled that A could recover possession of the shed from C.

The consequence of the Fairweather decision, so far as unregistered leasehold land is concerned, is that Land Registry will refuse an application for first registration by a squatter during the term of the lease. This is the case whatever interest the squatter may or may not have in adjoining land –

so if the squatter is tenant of adjoining land (whether the landlord is the same one or different), it is unnecessary to consider Encroachments onto unregistered land from leasehold land.

Time does not run **against the landlord** until the lease expires – unless the adverse possession started before the lease, in which case time will continue to run against the landlord during the term of the lease.

Non-payment of rent before the lease expires is irrelevant. However, if a stranger wrongfully continues to receive the rent of leasehold land for 12 years, and provided that the lease is in writing and not granted by the Crown and the rent is £10 a year or more, the landlord's title becomes statute-barred: Schedule 1, Part 1, paragraph 6, LA 1980.

1.17 Encroachments onto unregistered land from leasehold land

A tenant who encroaches on other land belonging to a third party is presumed to have done so for the benefit of the landlord and the land forms an accretion to the lease. If the tenant occupies other land belonging to the landlord, the presumption is again that the land forms an accretion to the lease. It follows that in either case, where the presumption operates, the tenant must surrender this additional land to the landlord when the tenancy ends. This presumption is normally referred to as the presumption in Smirk v Lyndale Developments Ltd [1975] 1 Ch 317 and was considered recently by the Court of Appeal in Tower Hamlets v Barrett [2005] EWCA Civ 923.

1.17.1 Where the application is to register a freehold estate

Unless already dealt with in the application, requisition for evidence to rebut the presumption in Smirk v Lyndale.

In the requisition explain that:

- unless such evidence is produced, we will process the application on the basis that the title sought to be registered is title to a leasehold estate by way of an accretion to the tenant squatter's existing lease; and
- If this evidence is produced and the application proceeds, we will serve notice of the application on the tenant squatter's landlord and the notice will refer to the presumption.

- In the requisition you should also ask for:
- the landlord to be identified, if necessary, and warn that if the landlord cannot be identified and rebuttal evidence is produced, we will only consider a qualified title, as the rebuttal evidence cannot be tested; and
- Deduction of the tenant squatter's leasehold title, if that title is not registered. This is so that we can satisfy ourselves that the accretion is registrable, being an accretion to a lease that itself is capable of registration.
- If, as a result of the requisition, the applicant accepts that the presumption applies – see Where the application is to register a leasehold estate.

1.17.2 If the applicant produces evidence to rebut the presumption

If the adverse possession is against land that appears to be owned by the **tenant squatter's own landlord**, amend the notice served on the latter so that it also:

- refers to the presumption in Smirk v Lyndale;
- provides details as to why the tenant considers that the presumption does not apply;
- asks whether the landlord accepts that the presumption does not apply and, if not, that he or she gives his or her reasons; and
- Points out that if we proceed on the basis that the presumption does not apply, the registrar will need to consider any other objections.

If the adverse possession is against land that appears to be **owned by a third party** first serve an objection notice on the landlord. Include in the notice the matters in the first three bullet points in the notice referred to above. Additionally:

- Point out that if this issue is resolved on the basis that the presumption does not apply, notice will be served on the owner of the freehold (and others, if applicable) who may object to the application.
- Depending on the outcome of the notice served on the landlord, amend the notice served on the documentary title holder to refer to the fact that notice has been served on the landlord and that the landlord has either consented or not objected.
- The documentary title holder may, in some circumstances, insist that notice is served on him or her **before** notice is served on the landlord. This might be the case if the documentary title holder wishes to dispose of the application by objecting so that he or she can sell the land. If so, consider serving notice on the documentary title holder **before** serving notice on the landlord, but in that notice make it clear that the application is subject to the presumption point.

1.17.3 If the evidence lodged to rebut the presumption cannot be tested

If you cannot test the evidence lodged to rebut the presumption because the tenant squatter's landlord is unknown, you must only register the land with a qualified title as we cannot be satisfied that the presumption does not apply.

The qualification should be in the following terms:

"The enforcement of any estate, right or interest adverse to, or in derogation of, the title of the proprietor's title subsisting at the time of registration or then capable of arising is excepted from the effect of registration."

1.17.4 Where the application is to register a leasehold estate

If, possibly after the requisition referred to in Where the application is to register a freehold estate, the applicant accepts that the presumption in Smirk v Lyndale does apply and is thus applying to register title to a leasehold estate:

- Amend any notice served to make it clear that the applicant is seeking to register title to the land on the basis that, having encroached for the relevant period under the LA 1980, the land is now included in the holding comprised in the lease (and supply details of the lease).
- Do not serve notice on the landlord unless the adverse possession affects land also owned by the landlord.
- Register the tenant squatter as proprietor of the land encroached upon as though the land were included in the tenant's documentary lease, and for the term of that lease, but add the following note (adapted to fit the circumstances) to the H schedule:
- NOTE: The land in this title is not part of the land originally demised by the lease of which short particulars are set out above but is registered as an accretion to that lease, having been acquired by encroachment from the land originally demised.
- Additionally, if the lease set out in the H schedule contains subjective easements, entry **CF101** should be made unless it is clear that the additional land cannot be affected by the easements. For example, if the only easement expressly reserved was a right of way over a path running though the original demised extent, then no CF101 entry should be made in the register for the additional land. But a reserved right of light affecting the whole of the original demised extent may be capable of also affecting the additional land and so should give rise to a CF101 entry. 'May' is emphasised, as there does not appear to be any authority on the point.

1.18 Dealing with objections and third party information

Refer **any** objection to an application to a TT3 holder after an ANO has been captured, who will decide whether the objection is groundless or not. If the TT3 holder is satisfied that the objection is not groundless there will be a dispute.

1.18.1 Dealing with dispute

The TT3 holder will deal with any resultant dispute under s.73, LRA 2002 (see Topic – Objections – Action by the TT3).

If it is not possible to dispose of the objection by agreement then the TT3 holder may refer the matter to the Land Registration division of the Property Chamber, First-tier Tribunal (see Indemnity & Litigation Group Guidance Notes).

1.18.2 Where initial objection is not taken forward as a dispute

Anybody can object to an application: an objector no longer has to show that he or she is the owner, or claim an interest in the land involved in order to be able to object.

The TT3 holder will decide whether the objection is groundless. In cases where the objection is not groundless, the objector will be provided with information about the procedure that will follow as a result of the objection having been made, and the applicant will be provided with details of the objection and asked whether he or she wishes to continue with the application.

There may be occasions when an adjoining landowner, or another third party, initially

objects, but is subsequently deterred from pursuing their objection when they realise the formalities involved, and the cost of doing so, particularly if a referral to the Land Registration division of the Property Chamber, First-tier Tribunal is involved, and there is a possibility of the objector having to pay the applicant's costs if they were to lose. However even though they do not wish to pursue their original objection, and there is therefore no dispute, they may nevertheless have provided information which casts doubt on the applicant's claims, for instance they may be an adjoining landowner who says that the applicant did not occupy the land as he or she claims.

In such circumstances the registrar has discretion to make further enquiries in order to satisfy himself as to the applicant's title, including seeking comments or clarification from the applicant, and can and should consider the information the third party has supplied and any response from the applicant before reaching a decision on the application.

1.18.3 Communications and documents marked 'Confidential' or to similar effect

Practice Guide 37 and note 2 of the explanatory notes for objection notices clearly state that any communications or supporting documents supplied may also be disclosed to the other parties even if marked 'confidential' or to similar effect. However, it is possible that a 'confidential' document may have been supplied in ignorance e.g. not in response to a notice.

Where a confidential document has been supplied, **then unless it is reasonable to assume that the sender is aware of the policy regarding confidential documents**, the document must be returned and re-lodgement invited on a non-confidential basis.

Explain that Land Registry cannot enter into confidential discussions and that each party should be aware of all the other parties' arguments and evidence. It is important that the applicant is given the opportunity to respond to the third party information and that, as relevant information, it ought to be disclosed.

1.19 Review of decision to cancel

It may be that, after you have cancelled an application, the applicant expresses dissatisfaction with your decision.

If so, you should, after clearing up any misunderstandings and explaining any policy issues (for example, the requirement to show at least 12 years possession) offer the possibility of a review by the Land Registrar.

1.20 Adverse possession and highways

Halsbury's Laws defines a highway as "a way over which there exists a public right of passage".

Where you have reason to believe that the land includes some form of highway, proceed as follows.

If no information is available, assume that the highway is maintainable at public expense. Do not raise any requisition on this point.

The CPD support notes at http://intranet/lawyers/Archive.asp contain additional background information.

CPD support notes on adverse possession – see http://intranet/lawyers/Archive.asp.

1.20.1 Highway is maintainable at public expense

The highway authority will have acquired a legal freehold estate (albeit a determinable fee

simple) in the surface of the highway by virtue of s.263, Highways Act 1980: *Tithe Redemption Commission v Runcorn UDC [1954] 1 Ch 383; Wiltshire CC v Fraser (1984) 47 P & CR 69*. The highway authority's title to the surface cannot be lost by adverse possession. This is because the authority retains its title for as long as the public right of way continues and this right of way is unaffected by the adverse possession: *R (on the application of Wayne Smith) v The Land Registry (Peterborough Office) [2010] EWCA Civ 200*. If the squatter's possession of the surface does not allow them to acquire a registrable title to the surface, then it is unlikely that they can acquire such a title to land beneath the surface or airspace above it. The result, therefore, is that we cannot complete an application for first registration by a squatter in so far as the application is based on occupation of highway maintainable at the public expense.

Send the applicant (or their conveyancer) stock letter **S137/M**, allowing the normal period for responding to a requisition. If there are any other requisitions that need to be raised, send the C90 at the same time as the letter and make the expiry date in the stock letter the same as the C90. In the C90, cross-refer to the requisition in the stock letter so that it is not overlooked. If the applicant or their conveyancer does not respond to the letter, cancel the application or complete the registration to exclude the highway land, as appropriate.

If, in response to the stock letter, the applicant or their conveyancer can satisfy us that it is more likely than not that the land is not highway maintainable at the public expense, serve a **B242** notice on the local highway authority (the county council, the metropolitan district council or the unitary authority outside London; and Transport for London, the London Borough Council or the Common Council of the City of London within London or for trunk roads, A roads and motorways Highways England or, in Wales the Welsh Government).

The B242 notice must be served before any B149 notices, which must be amended to include reference to, and a copy of, the B242 notice and any objection.

1.20.2 Highway is not maintainable at public expense

If the land in the application is highway which is not maintainable at the public expense, consider whether the factual possession relied on substantially prevented access over all or part of the highway.

If it did, and if a TT3 takes the view that there appears to have been criminal obstruction, cancel the application if all the land is highway; if only part of the land is highway, proceed only in so far as the rest of the land is concerned (if the applicant wants to proceed). The authority for this is the High Court decision in R(Smith) v Land Registry [2009] EWHC 328 (Admin), for which there is now support from the Court of Appeal decision in R(Best) v The Chief Land Registrar [2015] EWCA Civ 17.

If there does not appear to have been any criminal obstruction involved, consider the application in the same way as any other adverse possession application. If the application is proceeding, notice of the application should be sent to the highway authority in addition to any other notices that are required.