Fairweather or Foul—Can a Squatter Acquire Title to Leasehold Property?

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In Fairweather v St Marylebone Property Co Ltd *[1963] A.C. 510, the House of Lords upset the academic community with its decision that a tenant who has lost possession to a squatter can nevertheless surrender his lease to the landlord. Despite continuing criticism, the case remains good law for leases that do not need to be registered at the Land Registry.*

Background to the case

If a tenant loses possession of demised premises (or part of the premises) to a squatter, can he still surrender the lease (or part) to the landlord? This was the difficult question that the House of Lords had to consider in *Fairweather v St Marylebone Property Company Ltd* [1963] A.C. 510.

The case is interesting for a number of reasons. First, it raises an intriguing question in itself. Secondly, it highlights Lord Denning's imaginative manner of writing—and the thought processes that lead him to his conclusions. Thirdly, it demonstrates that sometimes it is not easy to obtain unanimity among judges. And fourthly, the case has been widely criticised, yet never overturned.

The problem that writers encounter when summarising a case in which Lord Denning is one of the judges is that Lord Denning's explanation of the facts is always so much more colourful than anything the author could pen. So I will adopt Lord Denning's introductory paragraph:

> "At the back of a leasehold house in Hampstead there is a shed. In the year 1920 [it is now 1962] the next door neighbour, Mr Millwood, saw it was unused and out of repair. He went in and repaired it and has treated it as his own ever since. Now a property company has bought the freehold of the property on which the shed stands and wants to recover possession of the shed. Can it do so, or is it barred by the statutes of limitation?"

Lord Denning went on to explain that there are three "important persons" to consider: the freeholder, the leaseholder and the squatter. The *freeholder* let the premises on which the shed stood in 1893 on a 99 year lease. The lease was not due to expire until 1992. The *leaseholder* had taken no steps to recover possession of the shed that formed part of the property demised to him. His right of action first accrued in 1920. So the 12 year period expired in 1932 (it is now 1962, remember). The *squatter* had been in possession of the shed since 1920, either personally or through his tenant (interestingly, Lord Denning uses the word "sub-tenant", which is begging the question). In a masterstroke worthy of Agatha Christie, Lord Denning waits until this point before revealing the legal problem that the court has to resolve:

> "And there is one important event to consider:

The surrender in 1959 by the leaseholder to the freeholder of the rest [I think he means 'residue'] of the term of 99 years. Whereupon the freeholder claims that he is entitled to possession of the shed. But the squatter says he is entitled to stay in it until 1992."

Four possible solutions

Lord Denning then tests out various possibilities of the parties' positions. He finds four possible solutions, and analyses each in turn.

1. The leaseholder's title is extinguished not only against the squatter but also against the freeholder. This would mean that the freeholder would have been entitled to possession against the squatter in 1932, from when time would have run against him. In 1944 the squatter would have acquired a good title against the freeholder. This would have been the case even where (as in this case) the freeholder did not even realise that the squatter was on the premises in the first place. Lord Denning dismissed this possibility.
2. The leaseholder's title has been extinguished and the leasehold title itself vests in the squatter. This would mean that the squatter would effectively be a statutory assignee of the lease. This suggestion too was rejected, on the basis that "the operation of the statutes of limitation is merely negative. It destroys the leaseholder's title to the land but does not vest it in the squatter".
3. The leaseholder's title is extinguished, but his estate in the land is not. For Lord Denning, this was too fine a distinction—and he observed that Parliament used the words interchangeably.
4. The title of the leaseholder is extinguished as against the squatter, but remains good as against the freeholder. Lord Denning pronounced this "the only acceptable solution". It had several advantages over the other suggestions:
    - Time would not run against the freeholder until the lease was determined (or came to an end by effluxion of time).
    - The freeholder can enforce against the leaseholder the covenants in the lease, and the forfeiture provision.
    - The leaseholder could return the property to the freeholder at the end of the lease, if he were able to regain possession from the squatter before the end of the lease.

Lord Denning's solution to the problem, however, relied upon the effect of a surrender being to end a lease, rather than transfer it to the freeholder. If the effect of the surrender was that the lease was then vested in the freeholder, the freeholder could not evict the squatter even after regaining control of the freehold, because he would be "claiming through" the leaseholder—and the leaseholder's title had already been barred by the statutes of limitation.

Fortunately for the freeholder in this case, Lord Denning concluded that a surrender terminates a lease, not assigns it. The position is different where there is an underlease. In that case, the tenant under the underlease is unaffected by the surrender and the freeholder takes subject to the underlease (by reason of ss.139 and 150 Law of Property Act 1925). However, this rule does not apply to trespassers. An undertenant is protected because otherwise the surrender of the lease by the mesne tenant would constitute a derogation from grant in respect of the underlease: *Mellor v Watkins* (1873–74) L.R. 9 Q.B. 400). But the same analysis would not apply to a trespasser.

Lord Denning observed that, as a result of this rule, it would be possible for the freeholder and the leaseholder to destroy the squatter's title by acting together, by the freeholder taking a surrender of the lease and then granting a new lease to the leaseholder. The squatter is not in a position to complain about this, however, as the freeholder can achieve the same effect without the co-operation of the leaseholder, by forfeiting the lease. That too would bring to an end the squatter's title. (Similar reasoning was used in the House of Lords case of *Barrett v Morgan* [2000] 2 A.C. 264 to conclude that an agricultural mesne tenant could effectively end a sub-tenant's interest by failing to serve a counter-notice in response to the superior landlord's notice to quit, the effect being that the headlease and also the sub-lease would come to an end.)

Other members of the court

It would be wrong not to mention the views of the other members of the court. This was a court of only four judges. Lord Radcliffe, with whom Lord Cross agreed, considered the question in a more academic manner than Lord Denning, but reached the same conclusion. He observed:

> "It is plain that the case on each side involves several deductive steps which are claimed to follow by irrefutable logic from their respective premises. After some hesitation between two inviting paths, I have come to the conclusion that the Appellant's arguments [ie those of the squatter] are vitiated by the fact that their reasoning contains an engaging but considerable fallacy. It seeks to revive in an elegant new form the rejected proposition that a squatter becomes in some way the successor to the title of the dispossessed owner."

This was the same argument that Lord Denning dismissed in the second of his four possible solutions. The fourth member of the court, Lord Morris, disagreed with his three colleagues, saying:

> "If the lessees were not entitled to possession of one part of No 315 (that is, the part on which the shed stood) how could they yield up possession of that part to the plaintiffs?"

In his view, the squatter succeeded in his argument. But to no avail, as he was a lone voice.

Application to registered land

There seems to be no doubt that, unless the decision is overturned by the Supreme Court, the majority view advanced by the House of Lords in this case represents the last word on the subject—in the case of a lease that does not need to be registered at the Land Registry.

The Law Lords were unable to come to a conclusion on the effect of s.75 of the Land Registration Act 1925. This was principally because it was unclear whether the squatter's name had ever appeared on the register relating to the lease and, if so, whether this had occurred before or after the Land Registration Act 1925 had come into force (on January 1, 1926).

This is seriously unsatisfactory, for the manner in which s.75 of the LRA 1925 operated (until its repeal in 2003) was to create a trust in favour of the squatter of the land that had been adversely possessed. In the context of the facts of this case, it is arguable that this would be effecting a statutory assignment of the lease from the tenant to the squatter—exactly what Lord Denning (for one) was denying had taken place.

Lord Denning sidestepped this problem in an unconvincing way, stating that he doubted that the 1925 Act would put registered land on a very different footing from unregistered land, and saying that "the freeholder has no notice of the trust in favour of the squatter and his interests are not to be prejudiced by the fact that the leasehold is registered". That appears to be

overlooking the likelihood that the squatter's rights constituted an overriding interest under s.70(1)(g) of the 1925 Act (rights of a person in actual occupation), in which case they would have bound the freeholder.

Fortunately, since the advent of the Land Registration Act 2002, the decision is not relevant to registered land, since adverse possession of a registered estate has no effect as such upon the title of the registered proprietor, however long that period of adverse possession may have been.

Criticism of the case

This case has been much criticised. In *Chung Ping Kwan v Lam Island Development Co Ltd* [1997] A.C. 38, a decision about squatters in Hong Kong, Lord Nicholls (giving the judgment of the court) said:

> "It is unnecessary for their Lordships to express a view on the controversial decision in *St Marylebone Property Co Ltd v Fairweather*: see the powerful critique by Professor HWR Wade in "Landlord, Tenant and Squatter" (1962) 78 LQR 541. The actual decision in that case turned on the effect of the surrender of a lease by a lessee whose title has been barred by a trespasser's adverse possession. The answer to that conundrum throws no light on the problem arising in the present appeal."

Similarly (and, perhaps, unsurprisingly), the current edition of Megarry and Wade, *The Law of Real Property*, 8th edn (London: Sweet & Maxwell, 2012) says of the decision:

> "[The reasoning in the case] seems unsound, since it ignores the fact that T has lost all power to eject S and cannot therefore confer any such power upon L. As against S, T's lease is no longer a good title, whether pleaded by T or by L, and to allow it to be so pleaded violates the fundamental principle that no one can confer a better title than he has himself (*nemo dat quod non habet*) … The House of Lords' decision gravely impairs the squatter's statutory title, by putting it into the power of the person barred (T) to enable a third party (L) to eject the squatter. The operation of the Limitation Act 1980 in respect of leaseholds is thus substantially curtailed. It is otherwise in the case of registered land …"

Conclusion

It is difficult to criticise a case decided by a majority of 3-1 in the House of Lords, and yet the decision, as Megarry and Wade states, leaves the operation of the statutes of limitation in an unsatisfactory state.

The courts have since held, in *Spectrum Investment Co v Holmes* [1981] 1 W.L.R. 221 and *Central London Commercial Estates Ltd v Kato Kagaku Ltd* [1998] 4 All E.R. 948, that the *Fairweather* decision did not apply to registered land under the Land Registration Act 1925, as a result of the express terms of s.75. Equally, the case is not relevant to registered land under the Land Registration Act 2002, for the concept of adverse possession no longer has any meaning in relation to registered land.

However, the case remains relevant to leases that are too short to require registration. There will always be large numbers of such leases: indeed, one of the reasons for retaining overriding interests under the 2002 Act was the great number of short leases that would otherwise require registration at the Land Registry.

The law is stated as at June 20, 2014.