

SHORTER ARTICLES

ADVERSE POSSESSION OF LAND UNDER THE LAND TITLES ACT¹

The Land Titles Act permits limited application of the law of acquiring title by adverse possession to registered land. This article examines the provisions of the Act and recent cases on the interpretation of these provisions. The Land Titles Bill 1992² proposes to abolish acquisition of title by adverse possession altogether in regard to registered land. The proposed amendment and the transitional provisions are also considered.

UNDER general law title to land may be acquired by adverse possession through the operation of the Limitation Act.³ The basis is the barring of the documentary owner from suing the trespasser after the lapse of twelve years from the time the right of action accrued.⁴ Time runs against the documentary owner and in favour of the adverse possessor either from the date of dispossession or discontinuance of possession.⁵ Where it is a case of discontinuance of possession then there must also be someone in adverse possession before time can begin to run. It is also provided that after the lapse of twelve years the title of the documentary owner is extinguished.⁶ The title acquired by the adverse possessor is based on the strength of his own adverse possession. He does not get the title of the person he successfully dispossessed. He has a fee simple or whatever is the greatest interest that can be held in respect of that piece of land.⁷ The justification for this method of acquisition of title rests on the public policy that he who sleeps on his rights should not be assisted by the courts in the recovery of his property.⁸

The concept of acquiring title by adverse possession is not compatible with the regime of registration of title under the Land Titles Act⁹ (hereafter LTA) which requires all interests in land to be registered before the interest

¹ Cap. 157, 1985 Ed.

² Bill No. 36 of 1992. See note 16 *infra*.

³ Cap. 163, 1985 Ed.

⁴ *Ibid.*, s. 9.

⁵ *Ibid.*, s. 10(1).

⁶ *Ibid.*, s. 18; *Fong Chong Cheng v. The Public Trustee* [1967] 2 M.L.J. 262.

⁷ *Perry v. Clissold* [1907] A.C. 76. Where the person dispossessed has a leasehold interest the adverse possessor will also have to dispossess the reversioner to acquire the freehold.

⁸ *R.B. Policies at Lloyds's v. Butler* [1950] 1 K.B. 76 at 81.

⁹ *Supra*, note 1.

in land passes¹⁰ and which confers indefeasibility on the registered title.¹¹ Acquisition of title by adverse possession on the other hand rests on factual acts of possession with the requisite intention and when done successfully the title of the documentary owner is extinguished. Thus the essence of acquisition of title by adverse possession offends the two basic tenets of the system of registration of title.¹²

Torrens statutes applicable in the different jurisdictions vary in their approach to acquisition by adverse possession. The Canadian statutes for the most part permit land acquired by adverse possession to be brought under the system but after the land becomes registered land no acquisition by adverse possession is allowed.¹³ In Australia the Torrens legislation in some States (Tasmania, Victoria and Western Australia) allow acquisition by adverse possession even for land already under the system while in other States (Northern Territories and Australian Capital Territory) acquisition by adverse possession is not tolerated after the land has been brought under the system. The remaining States (New South Wales, South Australia and Queensland) take a position in between.¹⁴ The National Land Code of Malaysia does not permit acquisition by adverse possession.¹⁵

The LTA accepts the principle of adverse possession but adjusts its operation to suit the context of the land register.¹⁶ It is an attempt to effect a compromise between the principle of indefeasibility of title and the policy that documentary owners who sleep on their rights should not be protected by the law as against persons who have established long possession.¹⁷ Acquisition of title to registered land by adverse possession is permitted only as provided in Division II of the LTA.¹⁸

¹⁰ *Ibid.*, s. 37.

¹¹ *Ibid.*, s. 38.

¹² See *Wong Kok Chin v. Joseph Mah Ten Kui* [1992] 2 S.L.R. 161.

¹³ See generally Di Castri, *Registration of Title to Land* (1987).

¹⁴ See generally Whalan, *The Torrens System in Australia* (1982) at pp. 325-328.

¹⁵ S. 341, National Land Code, Act No. 56 of 1965.

¹⁶ Since this article was written, the Land Titles Bill, Bill No. 36 of 1992, was read for the first time in Parliament on 16 November 1992. Clause 50 of the Bill provides that except as provided in clause 172(8) and (9) of the Bill there shall be no acquisition of title to land under the LTA by way of adverse possession and the provisions of the Limitation Act for the extinguishment of title shall be not applicable to land under the LTA. Clauses 172(8) and (9) provide for the preservation of the right to acquire title by adverse possession under the current LTA where either an application for adverse possession has already been made or where a person is entitled to make an application he may still do so provided he applies within three months of the date of the commencement of the Bill as an Act. See *infra*.

¹⁷ See *Hajjah Tampoi binte Haji Matusin v. Haji Matusin bin Pengarah Rahman* [1984] 2 M.L.J. 185 (Privy Council on appeal from Brunei). Also *Wong Kok Chin v. Joseph Mah Ten Kui*, *supra*, note 12.

¹⁸ S. 42(2), LTA, *supra*, note 1.

(i) *Adverse possession of unregistered land – primary application under section 13 LTA*¹⁹

Where a person has completed adverse possession of unregistered land for the required period he may apply for the land to be brought under the LTA under section 13²⁰ as a person “claiming to be the owner of land”.

(ii) *Adverse possession commenced and completed before land brought under LTA*

Where the adverse possessor has completed the requisite twelve years adverse possession when the land was first brought under the LTA the adverse possessor’s interest would still subsist where the title is a qualified one.²¹ This was confirmed in *Tan Eng Kiam v. Ultra Realty Pie. Ltd.*²² In that case the facts were that the plaintiff, the person claiming adverse possession, had completed twelve years of adverse possession (thirty years prior to the action he had built a wall which encroached on the defendant’s land) when the land was brought under the LTA with the issuance of a qualified title in favour of the documentary owner in 1988. After the issuance of the qualified title a mortgage in favour of a bank was registered in May 1989. In September 1990 the proprietor also registered a reassertion of ownership. The adverse possessor lodged a caveat in respect of his claim in January 1991 and brought the action staking his claim. The documentary owner sought to have the cause of action struck out stating that the land was now registered and no claim of adverse possession could be made in the circumstances. Selvam J.C. gave judgment for the adverse possessor stating that the adverse possessor’s claim was an arguable one since while the documentary owner’s title was a qualified one the provisions of the LTA preserved the rights and interests of the adverse possessor.²³

Where the twelve years adverse possession has been completed before the land was brought under the LTA the rights of the documentary owner would already have been extinguished under general law before the conversion

¹⁹ This is not really acquisition of title to registered land by adverse possession but is included for the sake of completeness.

²⁰ This is unaffected by the amendments of the Land Titles Bill 1992, *supra*, note 2. See clause 19 of the Bill.

²¹ Clause 19(1) preserves interests affecting the land before it was brought under the LTA for so long as the caution remains on the folio. Although clause 25(1) of the Bill is *in pari materia* with section 19(1) LTA it may be argued that the wording of clause 50 of the Bill has curtailed the ambit of clause 25(1) of the Bill in this regard. See *infra*.

²² [1991] 3 M.L.J. 244.

²³ The facts of a more recent case *Lee Wee Kit v. Tan Soon Aun*, OS 924/91, judgment delivered 23 December 1991, are essentially the same; but there judgment was given for the adverse possessor on a different ground. See discussion below.

to registration of title. It is therefore not a case of acquiring title by adverse possession after the land is brought under the LTA.²⁴ The adverse possessor has a subsisting interest within section 19(1). Therefore for so long as the title is a qualified one the adverse possessor's rights are protected. But unless he lodges a caveat under section 20(2) which the Registrar then notifies on the register, he will lose his interest when the title becomes an unqualified one either within five years of the issue of the qualified title in favour of a purchaser or on the application of the documentary owner himself.²⁵ Needless to say the most advisable step for him to take would be to apply to court for the appropriate declaration regarding the title to the land possessed and for the consequential rectification of the register under section 143.

(iii) *Adverse possession of land already under the LTA*

Section 42 (1) LTA provides that a person who would have satisfied the general law that he has acquired land by adverse possession if that land were not under the LTA can apply for a certificate of title to that land provided that twelve years have elapsed from the time the land has been under the Land Titles Act or from the most recent memorial of registration or notification of an instrument. In the case of such land time runs against the documentary owner from the last activity on the register. So where an adverse possessor of registered land has completed five years of adverse possession, and the documentary owner transacts a registered dealing, *e.g.*, mortgage or lease or merely has a reassertion of ownership notified on the register, the adverse possessor's earlier five years possession would be wiped out and time would begin to run afresh from the last registration or notification of an instrument on the register. Where the documentary owner is not minded to transfer, lease, mortgage or charge the land he may keep his vigilance against would be adverse possessors by lodging a reassertion of his ownership of his interest with the Registrar who shall notify this on the land register.²⁶ In other words only the documentary owner who is totally uninterested in his land and who is not exercising his rights as owner in any way would be adversely affected.²⁷ But instead of having to be vigilant in regard to the actual use and occupation of the land itself the need for vigilance is transferred to the register.

(a) *Running of time*

The twelve-year period runs from the date when the land was brought

²⁴ Hence s. 42, LTA, *supra*, note 1, is not applicable.

²⁵ S. 19(2), (3) & (5), LTA, *supra*, note 1.

²⁶ S. 44, LTA, *supra*, note 1.

²⁷ See *Wong Kok Chin v. Joseph Mah Ten Kui*, *supra*, note 12.

under the LTA “or” from the time of the most recent entry of a memorial of a registration or notification of an instrument on the land register. It was clarified in *Baalman* that “or” in that context cannot have been intended to be used in a disjunctive sense for that would render the latter contingency meaningless. It is to be read as to give the adverse possessor two alternative periods whichever is the later.²⁸ This was approved of by the Court of Appeal in *Wong Kok Chin v. Joseph Mah Ten Kui*.²⁹

The principle behind section 42(1) is that the documentary owner who has not been dormant in regard to his ownership of the interest should not lose his interest. Therefore where the entry on the register is not due to an activity on his part, *e.g.*, the notification of a statutory obligation then such an entry will not affect the running of time. Obviously the registration of any dealing would be effective to cause time to run afresh. Section 42(1) also includes “a notification of an instrument” affecting the land. A reassertion of ownership which is provided in section 44 is such a notification but the term would also include notifications of other instruments *e.g.*, a caveat.

In *Lee Wee Kit v. Tan Soon Aun*³⁰ the boundary wall of a parcel of land was so built that it encroached on the neighbouring parcel of land. But at that time in 1955 the two parcels of land were in common ownership. The plaintiff, the adverse possessor became the owner of one of the parcels in 1970 and so the running of time dates from 1970. The land encroached on belonged to the defendant and was brought under the LTA with the issuance of a qualified title in 1974. In 1982 the documentary owner effected an equitable mortgage over the land and the equitable mortgagee lodged a caveat in respect of the mortgage. In April 1991 the adverse possessor lodged a caveat and in May 1991 the documentary owner lodged a reassertion of ownership. Goh Joon Seng J. found for the adverse possessor on the ground that the notification of the caveat in respect of the mortgage did not interfere with the accrual of time under section 42(1).³¹ Accordingly as the twelve-year period was completed before the notification of the reassertion of ownership in May 1991, the notification served no purpose. With respect it is submitted that Goh J. is wrong in denying the notification of the mortgagee’s caveat the effect of interrupting the accrual of time of the adverse possessor.

Apart from a memorial of registration section 42(1) also includes a “notification of an instrument”. There is no reason in principle why this

²⁸ *Baalman, The Singapore Torrens System* (1959) at p. 98.

²⁹ *Supra*, note 12 at p. 168.

³⁰ *Supra*, note 23.

³¹ Since the land was in adverse possession before the land was brought under the LTA with the issuance of a qualified title the applicable provision should be section 42(3). However Goh J. took the view that section 42(3) was inapplicable on the facts as the adverse possessor had not lodged a caveat at the relevant time. So the operative provision was section 42(1).

term should receive a narrow construction and be confined to a reassertion of ownership under section 44 when the policy is only to deny the documentary owner his rights when he is dormant *apropos* his ownership rights. Where he deals with his land albeit not by a registrable dealing, but in a manner which is capable of recognition through the caveat, can he be said to be sleeping on his rights? In any event had the intention of the legislature been to confine the notification to that of a reassertion of ownership then it could have stated so rather than use a wider term.

(b) *Acts of adverse possession*

The general law regarding what actions amount to adverse possession remains applicable under the LTA.³²

(c) *Effect of completion of requisite period of adverse possession*

Under the general law once the adverse possessor has completed the requisite period of possession the title of the documentary owner is extinguished and the adverse possessor then becomes the new owner on the strength of his adverse possession. A straight transfer of this to the LTA regime of registration of title would be incompatible with the principles of the LTA. For a start under the LTA only the registered proprietor has an interest in land recognised by the LTA. Furthermore the registered proprietor has an indefeasible title save for stated exceptions. Consequently it is necessary for the person who has successfully completed the requisite period of adverse possession to get himself on the register as owner of the land.

Section 42(1) permits a person who has adversely possessed registered land for twelve years from the relevant date to apply to the Registrar for a certificate of title to that land. An application for possessory title shall be made in the prescribed form. Where the Registrar is satisfied of his claim on the evidence supplied he shall issue a certificate of title to the applicant freed from all such encumbrances and interests as may have been extinguished by adverse possession.³³ When a certificate of title has been issued under this provision the Registrar shall also cancel the existing folio of the land register.³⁴ A person who becomes a proprietor under this provision is deemed to be a purchaser and so will have the benefit of indefeasibility.³⁵

³² S. 42(1) & (3), LTA, *supra*, note 1. Baalman, *op.cit. supra*, note 28 at pp. 101-2. See generally Megarry, *The Law of Real Property* (5th ed., 1984), Ch. 18.

³³ S. 43(1), (2) & (3), LTA, *supra*, note 1.

³⁴ S. 43(4), LTA, *supra*, note 1. Unless this is done there will be conflicting entries on the register.

³⁵ S. 38(3) and 43(6) LTA, *supra*, note 1. *Cf.* position at general law.

To discourage frivolous claims section 45 provides for the payment of compensation by a frivolous applicant to any person who may have suffered damage or incurred costs as a result of the application.

It is Baalman's view that the adverse possessor who has completed the requisite period of adverse possession but who does not apply for a possessory title has whatever interest the general law recognises in him. He may deal with it in any manner that is allowed by general law.³⁶ But since the land register still has the documentary owner as the proprietor of the land his must be the effective title under the LTA. His title cannot be simply extinguished since there is nothing on the register which reflects this effect.

Under the Torrens system of land registration, title is acquired by registration. It follows that to lose the title there must be something on the register to this effect. For example where the adverse possessor has completed the twelve years adverse possession but does not apply for a possessory title he will not be able to deal with his interest under the LTA as he is not the registered proprietor. His rights are at general law outside the LTA but he may apply for a possessory title. On the other hand it should be possible for the documentary owner to deal with his interest since he is still the registered proprietor and he remains so until someone else is registered as owner.³⁷ If one takes the view that the title of the registered proprietor can be extinguished without the necessary entries in the register the principle of indefeasibility of title will be adversely affected. This is not provided for in section 38 (the indefeasibility section). Moreover section 42(2) states categorically that "[e]xcept as in this Division provided, no title to land adverse to ... the title of a proprietor shall be acquired ... by virtue of the Limitation Act ... nor shall the title of any proprietor be extinguished by the operation of that Act." This would indicate that the intention is not to make unnecessary inroads into the system of registration of title but is rather to permit the general law regarding acquisition of title by adverse possession to apply only in the manner explicitly articulated.³⁸

Where a person is claiming land by adverse possession there is no equity in his favour save that the law will give him assistance if he were vigilant and actively using the land as against the dormant owner who is sleeping on his rights. But where the adverse possessor does not help himself by applying for a possessory title as is provided then under the scheme of

³⁶ Baalman, *op.cit.*, *supra*, note 28 at p. 98.

³⁷ The Court of Appeal in *Wong Kok Chin's* case, *supra*, note 12, at p. 173 seems to be of the view that the title of the documentary owner is extinguished but only partially, *i.e.*, it is extinguished as between the adverse possessor and himself but not as between the adverse possessor and a purchaser from the documentary owner.

³⁸ *Cf. Wong Kok Chin*, *supra*, note 12. My emphasis.

the LTA there should be no room for granting him indulgence. Therefore the submitted view is that the title of the registered proprietor cannot be extinguished until the adverse possessor obtains a possessory title and the existing folio of the register cancelled or amended – to this extent the Limitation Act must give way to the LTA.

(iv) *Adverse possession commenced but not completed before land brought under LTA*

Where an unqualified title is issued in respect of land which is in the possession of an adverse possessor who has not yet completed the requisite twelve-year period of adverse possession the unqualified title is indefeasible. Accordingly the adverse possessor loses all his rights. In order then to acquire title by adverse possession he would have to satisfy section 42(1), viz., to be in adverse possession for twelve years from the time the land was brought under the LTA or from the entry on the register of the most recent memorial of registration or notification of an instrument affecting the land.

Where the title issued to the documentary owner is a qualified one are the rights of the adverse possessor preserved? If he were to complete his adverse possession for the remainder of the twelve-year period could he acquire title by adverse possession? In *Tan Eng Kiam v. Ultra Realty Pte. Ltd.*, Selvam J.C. seems to take the view that the adverse possessor may complete his possession while the title is a qualified one if he lodges a caveat within the five-year period of the caution.³⁹ Baalman takes a similar view.⁴⁰

Under general law even before he has completed the requisite period of adverse possession the adverse possessor has rights superior to all except the true owner. This has been recognised as an interest in land albeit an inchoate interest.⁴¹ Accordingly this interest is capable of protection by a caveat under section 104.⁴² But being an interest at general law before the land was brought under the LTA the adverse possessor's rights are protected by section 19(1) whether or not he lodges a caveat.

In the situation at hand the adverse possessor's interest will only be complete after the land has been brought under the LTA. Unlike the position where the period of adverse possession was completed when the land was converted in this instance the title of the owner was not extinguished before

³⁹ *Supra*, note 22 at p. 236.

⁴⁰ Baalman, *op.cit.*, *supra*, note 28 at p. 99.

⁴¹ *Perry v. Clissold*, *supra*, note 7.

⁴² S. 104, LTA, *supra*, note 1, provides that a person claiming an interest in land may lodge a caveat. Section 4 defines an "interest" in land as an interest recognised as such by law. In any event section 42(3) assumes that this interest is capable of being protected by a caveat.

the land was converted. If he is to acquire title to the land which is now registered land he has to bring himself within section 42(1) or (3) and then apply for a possessory title under section 43. It follows then that if the adverse possessor wishes to add the pre-conversion period of adverse possession to the post-conversion period he must comply with section 42(3) and lodge a caveat. Otherwise he must comply with section 42(1).⁴³ The lodging of a caveat in this case is to bring himself within section 42(3). It will of course also bring him within the protection of section 3S.⁴⁴

However the Court of Appeal in *Wong Kok Chin v. Joseph Mah Ten Kur*⁴⁵ is of the view that the adverse possessor in such a situation need not lodge a caveat in order to add the post-conversion period of adverse possession if the title is a qualified one. He needs to lodge a caveat only as against the purchaser from the documentary owner but not as against the documentary owner himself. In short the adverse possessor need not bring himself within section 42(3). The facts of this case are as follows. Since 1969 a wall built on Mah's land encroached on Wong's land. In 1974 Wong's land was brought under the LTA with the issuance of a qualified title. In June 1988 Wong discovered the encroachment and tore down the wall. On 23 June 1988 he lodged a reassertion of ownership and on 27 June 1988 Mah lodged a caveat. The title was still a qualified one. If Mah was permitted to accumulate the periods of adverse possession by adding the pre-conversion period to the post-conversion period he would have successfully completed the requisite period in 1981.⁴⁶ The case for the documentary owner was that as the adverse possessor did not lodge a caveat till after the reassertion of ownership on his part time ran from the time of reassertion of ownership. The Court of Appeal gave judgment for the adverse possessor. The reasons for the decision may be summed up thus: The adverse possessor had an inchoate interest in the land when it was issued with a qualified title. This therefore continued to affect the title so long as it remained a qualified one. The right to add the remaining years of adverse possession after the conversion remained available to the adverse possessor although he had not lodged a caveat. This was because the LTA recognises the operation of the Limitation Act and only when the latter is incompatible with the LTA is it abrogated. This being the case the title of the documentary owner was already extinguished by the time he lodged

⁴³ See Baalman, *op. cit.*, *supra*, note 28 at pp. 99-100.

⁴⁴ See s. 20(5), LTA, *supra*, note 1.

⁴⁵ *Supra*, note 12.

⁴⁶ But in any event even if time ran from 1974 when the land was brought under the LTA the period would have been completed by 1986 well before the lodgment of reassertion of ownership. The question is would even this have effectively extinguished the documentary owner's registered title? See above.

a reassertion of ownership in June 1988.⁴⁷ A reassertion of ownership cannot resurrect an extinguished title so the reassertion of ownership in this case had no effect at all.

On the facts the decision of the Court of Appeal may well be correct. The title in the documentary owner was still a qualified one. The adverse possessor did lodge a caveat. Accordingly he is within section 42(3) and so he can add the post-conversion period to the pre-conversion period. In this circumstance the reassertion of ownership has no effect.

However the reasoning of the Court of Appeal that the adverse possessor may retain his rights under general law apart from section 42(3) and that the title of the documentary owner is effectively extinguished before the adverse possessor has been given a possessory title is difficult to defend. It would seem to ignore the provisions of the statute itself. It is also incompatible with the basic tenets of the LTA, *viz.*, (i) title is only obtained on registration and (ii) a registered title is indefeasible save as provided in section 38.

As stated above although the twelve-year period has not been completed the adverse possessor has an interest in the land based on his actual possession.⁴⁸ His right to possession is superior to all persons except the true owner and in this instance the interest is an inchoate one until the twelve-year period has been completed. The right of the adverse possessor to complete his twelve-year adverse possession even after the land has been brought under the LTA is recognised by the LTA in section 42(3). However in order to avail himself of section 42(3) it would seem from the wording of the subsection that the adverse possessor is required to lodge a caveat.

Aside from section 42(3) are the adverse possessor's rights under the general law preserved? Being an existing albeit inchoate interest the right of the adverse possessor comes within the ambit of section 19(1) as an interest in the land and will be preserved so long as the caution remains. However if he does not lodge a caveat and the caution has lapsed in favour of a purchaser after the expiration of five years of the issuance of the qualified title, then the purchaser's registered title is indefeasible by the adverse possessor. Because of this possibility it would be advisable for the adverse possessor to lodge a caveat while the title is a qualified one.⁴⁹ This is probably

⁴⁷ The true question is whether the documentary owner's title was extinguished simply by operation of the Limitation Act so that the subsequent reassertion of ownership cannot revive it?

⁴⁸ *Perry v. Clissold*, *supra*, note 7; *Wong Kok Chin v. Joseph Mah Ten Kui*, *supra*, note 12; *Megarry, op.cit.*, *supra*, note 32 at pp. 102-107.

⁴⁹ It is easy to understand why the adverse possessor in such a position would not want to lodge a caveat as this would alert the documentary owner who would then take steps to eject him.

the reason for the Court of Appeal saying that the lodging of the caveat is necessary only *vis-a-vis* the purchaser from the proprietor.

However the question is whether the adverse possessor's rights under the general law apply outside of section 42(3)? Section 42(2) states: "*Except as in this Division provided, no title to land adverse to ... the title of a proprietor shall be acquired ... by virtue of the Limitation Act or otherwise, nor shall the title of any proprietor be extinguished by the operation of that Act.*" [My emphasis.] The relevant sections within "this Division" are section 42(1) and (3), section 43 relating to application for the possessory title pursuant to satisfying section 42 and section 44 relating to the reassertion of ownership. This provision seems to be unambiguous and a plain construction of it would restrict the manner of acquisition of title by adverse possession of land governed by the LTA to only those covered by section 42(1) and (3).⁵⁰

It would seem that the Court of Appeal in *Wong Kok Chin's* case does not take this view. The judgment in favour of the adverse possessor in that case is based on the premise that the adverse possessor is able to add the period of adverse possession after the land was issued with a qualified title without the adverse possessor being required to lodge a caveat so long as the title has not become unqualified in favour of a purchaser.⁵¹ The Court stated that the reassertion of ownership lodged by the documentary owner after the twelve-year period so accumulated was ineffective as the documentary owner's title was already extinguished. It is submitted that this begs the question whether the title has been effectively extinguished.⁵² Chan J. delivering the judgment of the Court of Appeal said:

Now, in this case, the respondent did not lodge his caveat to protect his interest until the appellant had lodged his reassertion of ownership. His inchoate interest had crystallized into an indefeasible right against the appellant by December 1981. The question therefore is whether the lodgement of a reassertion of ownership has destroyed the interest that the respondent had obtained by adverse possession. Having regard to the policy of the LTA in continuing to apply the Limitation Act to registered land, subject only to Div. 2 of the Act, the short answer must be that unless Div. 2 expressly provides to the contrary, the appellant's title was extinguished long before he lodged his reassertion of ownership. In our view, the lodgement of re-ownership could not

⁵⁰ This interpretation of section 42(2) cuts down the operation of section 19(1) *vis-a-vis* existing interests of adverse possessors.

⁵¹ As noted above the adverse possessor did not need to add the pre-conversion period in order to complete the requisite period of adverse possession. But the question remains: was the title of the registered proprietor effectively extinguished under the LTA?

⁵² See above.

have the effect of reviving a title which had been extinguished by limitation as there is no provision in Div. 2 which so provides.⁵³

Chan J. must be correct when he says that the reassertion of ownership cannot revive a title that has been extinguished. But the nub of the problem is whether the title of the documentary owner has been extinguished. The difficulty with the judgment in *Wong Kok Chin's* case is not with the actual decision itself which on the facts it is submitted is correct. However by holding that the documentary owner's title is extinguished without complying with section 42(3) and by permitting the adverse possessor to add the pre-conversion period of adverse possession to the *post-conversion* period it ignores the clear words of section 42(2). Further by recognising that the title of the documentary owner can be extinguished without any amendment or notification to the register the decision also ignores the basic tenets of the system of registration of title. Moreover it indulges the adverse possessor who does not avail himself of the means of protection given to him under the LTA, which provides for the lodging of a caveat by anyone claiming an interest which existed before the conversion of the land to the LTA. If therefore such a person does not avail himself of the facility⁵⁴ surely the person who is otherwise a trespasser does not deserve the assistance of the courts.

Post-Wong Kok Chin, the moral for the documentary owner with a qualified title who does not wish his land to be whisked from him by an adverse possessor is, that notwithstanding that the land is under the LTA, he should be vigilant to take steps to eject any trespasser. Alternatively he should deal in favour of a purchaser who would then have the benefit of the five-year maximum caution period. Any such dealing should be a registered dealing in favour of a purchaser since transacting non-registrable dealings or registered dealings not in favour of a purchaser will not bring into operation section 19(2).

Result of successful completion of period of adverse possession

The person in adverse possession who completes the twelve years of adverse possession where the title issued is a qualified one may apply for a possessory title under section 43 provided he complies with section 42(3) or section 42(1). If he does not apply for such a title his interest will still bind the registered proprietor as a notification under section 38(1) LTA

⁵³ *Supra*, note 12 at p. 172.

⁵⁴ Whether through laziness, negligence or intended stealth. If he lodges a caveat and the documentary owner still does not take steps to eject him then the documentary owner is truly dormant and deserves to lose his land.

provided he lodges a caveat.⁵⁵ On the basis of the Court of Appeal's judgment in *Wong Kok Chin* if the adverse possessor has not lodged a caveat he may nevertheless have successfully acquired a title by adverse possession. In which case assuming that he is not within section 42(1), and not having lodged a caveat, he is not within section 42(3); accordingly he may not apply for a possessory title under section 43. Under what authority and provision then is he to apply for a title? In the circumstance the answer must be under the general law and the limited protection given by section 19(1).

(v) *Provisions of the Land Titles Bill 1992 affecting acquisition of title by adverse possession*

Clause 50 of the Land Titles Bill (hereafter Bill)⁵⁶ changes the attitude of the land titles legislation to acquisition of title by adverse possession. It accepts that the operation of acquisition of title in this way is incompatible with the philosophy of the indefeasible title of the land register.⁵⁷ It provides that title to registered land may not be acquired by adverse possession and the provisions of the Limitation Act shall not be applicable to registered land.⁵⁸ This is straightforward enough and perhaps is an acknowledgment that the experiment to permit the partial application of the Limitation Act to registered land has not worked well and is not worth retaining. However questions may be raised as to the effect of clause 50 on the position of persons who have either completed the twelve years of adverse possession or who are in the course of completing the twelve years when the proprietor of the land is issued with a qualified title.

Pre-conversion issue

As set out above section 19(1) of the current LTA allows for the preservation of existing rights to affect the qualified title. Further section 20(2) provides for the protection of these existing interests by lodgment of a caveat. Consequently the adverse possessor who has either completed or has commenced his period of adverse possession before the land was brought under the LTA with the issuance of a qualified title has his rights preserved. This ties in with section 42(3) of the current LTA. Clauses

⁵⁵ S. 20(2), LTA, *supra*, note 1.

⁵⁶ *Supra*, note 2.

⁵⁷ The increasing litigation in this area in recent years may well have prompted the rethink.

⁵⁸ Clause 50 reads: "Except as provided in section 172(8) and (9), no title adverse to or in derogation of the title of the proprietor of registered land shall be acquired by any length of possession by virtue of the Limitation Act or otherwise, nor shall the title of any proprietor of registered land be extinguished by the operation of that Act."

25(1) and 27(2) of the Bill are similar to sections 19(1) and 20(2) of the current LTA. Consequently it is arguable that land may still be acquired by adverse possession where the title issued is a qualified one. However the words used in clause 50 of the Bill proscribe acquisition of title by adverse possession of "registered land" subject only to the transitional provisions of clauses 172(8) and (9). Land issued with a qualified title is "registered land". It is therefore arguable that this affects the operation of clauses 20(1) and 27(2) of the Bill relating to pre-conversion rights of the adverse possessor. Should this be the case and is there any need to proscribe pre-conversion adverse possession? It may be fair to consider the two situations of pre-conversion adverse possession separately.

First in respect of the situation where the adverse possessor had completed the twelve years of adverse possession before the land was brought under the LTA with the issuance of a qualified title, the title of the registered proprietor to that portion of the land was already extinguished when the land was brought under the system. Hence it may be argued that this situation is or should be outside the scope of clause 50. However on the assumption that clause 50 applies even to this situation all that this means for the adverse possessor of land not yet brought under the LTA is that he must take the necessary steps under the general law to declare that the relevant land is his by way of adverse possession. In short, in view of the declared intention of the Bill to expedite conversion of land to the LTA⁵⁹ all persons who are in adverse possession of land should have their position regularised under the general law as soon as possible. If they do not then their rights may be extinguished.

In respect of the adverse possessor who still has not completed the twelve-year period of adverse possession when the land was brought under the LTA, it is very arguable that clause 50 operates (and should so operate) to make it impossible for him to acquire by adverse possession. Although at general law the adverse possessor in this position has an interest in land and so is within clause 20(1) of the Bill, yet his interest being at the time of the conversion of the land an inchoate one, it cannot be brought to fruition because of clause 50. In any event if such an adverse possessor were to lodge a caveat under clause 27(2) of the Bill the registered proprietor would challenge it. There is much to recommend in a clear legislative policy of aborting these inchoate claims.⁶⁰

⁵⁹ See the Explanatory Statement to the Bill, *supra*, note 2.

⁶⁰ Thus there will be no more cases like *Wong Kok Chin*, *supra*, note 12. It may well be asked if the philosophy of recognising the acquisition of title by adverse possession is suitable to an urban milieu.

(vi) *Transitional provisions*

Clause 172(8) which protects applications already made under section 42 of the current LTA is straightforward and does not need discussion. Subclause (9) of clause 172 however seeks to give a grace period of 3 months for any person who could have made an application under section 42 of the current LTA to make such an application. This is eminently fair.⁶¹ Subclause (9) provides that any person who “before the commencement of this Act was in adverse possession of registered land and was entitled to lodge an application for a possessory title under the provisions of the repealed Act” may do so within a three-month grace period. This provision would cover situations of adverse possession under section 42 as well as section 43 (pre-conversion adverse possession). However in regard to pre-conversion section 43 acquisitions, only those persons who have completed the requisite twelve-year period just before the expiration of the grace period may take advantage of this provision. It is just simply unfortunate for those who have not completed the requisite twelve years by this time.

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⁶¹ One cannot resist noting that this is an uncommon instance of the Legislature enacting provisions that do not apply retrospectively.

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