Neutral Citation Number: [2009] EWHC 954 (Ch)

Case No: HC08C02172

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8th May 2009

Before :

MR STEPHEN SMITH QC

- -

Between :

PORT OF LONDON AUTHORITY **Claimant**

- and -

RUPERT GERALD ASHMORE **Defendant**

- -

Charles Harpum (instructed by Port of London Authority) for the Claimant
The Defendant appeared in person

Hearing date: 10th February 2009

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APPROVED JUDGMENT

Stephen Smith QC sitting as a Deputy Judge of the Chancery Division:

Introduction

1. This is a claim by the Port of London Authority ("the Authority") against Rupert Gerald Ashmore, the owner of the sailing barge "Atrato". The Authority was represented before me by Charles Harpum of counsel, for whose scholarly research I am most grateful; Mr. Ashmore appeared in person.

2. Atrato is a flat bottomed boat which in her heyday in the early part of the 20th century was able to access wharves and jetties in and off the Thames River which larger sailing vessels could not reach; she is 84.4 feet long. In 1945 she had an engine installed.

3. Mr. Ashmore purchased Atrato in 1980. In 1983 Mr. Ashmore sailed Atrato to Albion Wharf (now known as Albion Riverside) in the Thames, close by Battersea Bridge; he dropped anchor, tethered her to the bank fore and aft via the mooring rings set into the wall (which represents the bank of the river at that point), and she has been there ever since, save for a short period of 2 months, 5 years ago, when she was moved to dry dock in Brentford for an overhaul.

4. Mr. Ashmore had no permission from the Authority to do what he did: the Authority claims that he has been a trespasser on their property since 1983. Nor did he have any express permission to use the mooring rings, though that is not a concern of the Authority because the Authority is not the riparian owner. Mr. Ashmore has at all times lived on Atrato, sometimes alone, sometimes with others, and in those 26 years he has paid nothing to anyone in respect of his residence (his only outgoings in that respect being the premium on Atrato's insurance policy and her registration fees). Mr. Ashmore currently works in the theatre industry in London.

5. The Authority now wishes to register title to the bed of the Thames. Mr. Ashmore objects to the application in so far as it concerns the area of the bed upon which Atrato comes to rest twice a day at low tide. Mr. Ashmore claims "squatters' rights" to that part of the bed of the river, in other words that he has acquired title to that part of the bed by adverse possession. The Authority disputes Mr. Ashmore's claim, because, so it contends, Mr. Ashmore has not been in sufficient factual possession of the relevant area of the bed of the river; and because, so it also contends, the acts of possession relied upon do not unequivocally demonstrate an intention to possess that area. In its Part 7 claim form the

Authority seeks possession of the part of the river bed or foreshore which is occupied by Atrato (together with the space above the bed through which the river flows, and the air column above that); the Authority also seeks an injunction to restrain further trespasses by Mr. Ashmore and declaratory relief. There is no express claim for mesne profits.

6. On 3.11.08 Master Teverson ordered (by consent) that the following issue be tried as a preliminary issue:

"Whether it is possible for the owner of a vessel that is moored in a particular place on a tidal river or other area of tidal water to acquire title by adverse possession to the sea or river bed or the foreshore for the footprint of that vessel where:

(a) the title to the sea or river bed or the foreshore has not been registered; and
(b) the vessel rests on the bed or the foreshore at low tide."

7. Master Teverson also directed that the parties should endeavour to agree a statement of assumed facts on the basis of which the preliminary issue was to be determined. I do respectfully question the wisdom of such a direction in a case where a litigant is in person, because litigants in person will not necessarily appreciate what facts are relevant to their case on the legal issues which are raised.

8. An agreed statement of assumed facts was produced for the purposes of the trial before me only (and without prejudice to the parties' respective pleaded cases). As that statement is not lengthy I shall set it out in full:

"1. The Claimant is a statutory body which, under the terms of the Port of London Act 1968 ("the 1968 Act"), is charged with responsibility for the conservancy of that part of the River Thames that is tidal, as defined more precisely by section 2(1) and Schedule 1 of the 1968 Act.
2. Except where the ownership of the fee simple of the foreshore and bed of the tidal part of the River Thames is vested in some third person, it is vested in the Claimant. It was first vested in the Claimant's predecessor in title, the Thames Conservators, pursuant to the Thames Conservancy Act 1857. The Claimant succeeded to the rights and property of the Conservators pursuant to the Port of London Act 1908.
3. The part of the River Thames which is tidal is necessarily subject to the common law public right of navigation.
4. The Atrato, which is owned by the Defendant, is a sailing barge, believed to have been built in 1898 and rebuilt in 1945. It is approximately 84.4 feet long, 18.6 at the beam and has an internal depth of 6 feet. It is a vessel of some 63 tons or thereabouts.
5. Since at least June 1983, Atrato has been moored in the River Thames at or off Albion Riverside, Hester Road, Battersea, London SW11, adjacent to the part of Albion Riverside

that was formerly Albion Wharf. For the purposes of the Preliminary Issue it is assumed that Atrato has been moored in the same place for an unbroken period in excess of 12 years. The vessel's position at its mooring (and therefore its footprint) will not have remained static but will necessarily have moved by reason of wind and tide.
6. The part of the River Thames where Atrato is moored is tidal and is within the limits set out in section 2(1) and Schedule 1 of the 1968 Act. Accordingly, unless the Defendant has acquired title to the fee simple of the bed of the River Thames by adverse possession, that title is vested in the Claimant. The title to this part of the bed and foreshore of the River Thames has not yet been registered at the Land Registry.
7. The depth of the River Thames immediately adjacent to the place where Atrato is moored is shown on the chart annexed to the Particulars of Claim and it indicates the depth of the water to be between 3 and 3.2 metres above the chart datum. The chart datum in this part of the River Thames is 2.29 metres below Ordnance Datum (Newlyn) which is approximately the level of the Lowest Astronomical Tide, which is the lowest low water that can be expected in normal circumstances. Accordingly, although the place where Atrato is moored is always under water at high tide, and there is clearance under that vessel at that and other times, it rests on the exposed foreshore at low tide."

9. In his skeleton argument Mr. Harpum made two important concessions of law which it is also appropriate to record at this juncture.

10. First, Mr. Harpum accepts in principle that title to the bed of a tidal river can be acquired by adverse possession, in the light in particular of the decision of Lindsay J in ***Roberts v. Swangrove Estates Ltd*** *[2007] 2 P&CR 326.*

11. Secondly, Mr. Harpum concedes that whilst it is accepted that the River Thames where Atrato is moored is subject to the public right of navigation, that of itself would not prevent Mr. Ashmore from acquiring title by adverse possession.

Relevant principles of law

12. The ability to acquire title to unregistered land by adverse possession (more accurately, to bar the title of the paper title owner) derives from the provisions currently found in the Limitation Act 1980. Section 15(1) of that Act provides:

"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, if it first accrued to some other person through whom he claims, to that person."

Schedule 1 paragraph 11(1) substitutes 60 years for any action by the Crown to recover foreshore in any tidal waters, but that provision has no application in this case because the relevant part of the bed of the River Thames has long since ceased to be in the ownership of the Crown. It is accepted by the Authority that the applicable limitation period in this case is 12 years.

13. Section 17 of the 1980 Act, which applies to land where (as here) title is not yet registered (different rules now apply to registered land), provides that at the expiration of the period prescribed by the Act for any person to bring an action to recover land, "the title of that person to the land shall be extinguished".

14. The modern starting-point for a consideration of the law on adverse possession is the speech of Lord Browne-Wilkinson in ***J A Pye (Oxford) Ltd v. Graham*** *[2003] 1 AC 419*, which itself relies heavily on the judgment of Slade J in ***Powell v. McFarlane*** *(1977) 38 P&CR 452,* the judgment of the same judge in the Court of Appeal in ***Buckinghamshire County Council v. Moran*** *[1990] Ch 623* and the judgment of the first instance judge in the ***Moran*** case (Hoffmann J, who had been one of the successful advocates in the ***Powell*** case).

15. In ***Pye*** the House of Lords allowed the squatters' appeal from the decision of the Court of Appeal, and restored the decision of the first instance judge that the squatters had demonstrated sufficient factual possession of the land at issue in that case (viz. four fields totalling 25 hectares). In paragraph 40 of his speech, Lord Browne-Wilkinson said that there are two elements to a claim of legal possession which a squatter needs to establish (the burden falling upon the squatter), viz.:

"(1) A sufficient degree of physical custody and control ("factual possession"); (2) an intention to exercise such custody and control on one's own behalf and for one's own benefit ("intention to possess"). What is crucial is to understand that, without the requisite intention, in law there can be no possession."

16. Lord Browne-Wilkinson referred to doubts expressed in an earlier decision in the Court of Appeal about whether it was necessary to show both an intention to possess and factual possession, but dismissed them in this way:

"... there has always, both in Roman law and in common law, been a requirement to show an intention to possess in addition to objective acts of physical possession. Such intention may be, and frequently is, deduced from the physical acts themselves. But there is no doubt in my judgment that there are two separate elements in legal possession. So far as English law is concerned intention as a separate element is obviously necessary. Suppose a case where A is found to be in occupation of a locked house. He may be there as a squatter, as an overnight trespasser, or as a friend looking after the house of the paper owner during his absence on holiday. The acts done by A in any given period do not tell you whether there is legal possession. If A is there as a squatter he intends to stay as long as he can for his own benefit: his intention is to possess. But if he only intends to trespass for the night or has expressly agreed to look after the house for his friend, he does not have possession. It is not the nature of the acts which A does but the intention with which he does them which determines whether or not he is in possession."

17. Lord Browne-Wilkinson then addressed each element in turn. As regards factual possession, he agreed with the statement of the law contained in the judgment of Slade J in the ***Powell*** case at pp. 470-471:

"The question 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."

18. As regards the intention to possess, Lord Browne-Wilkinson agreed with Hoffmann J in the ***Moran*** case that what is required,

"is not an intention to own or even an intention to acquire ownership but an intention to possess."

And in para. 43 he accepted the reformulation of the test by Slade J in ***Powell***, as one that requires an intention:

"in one's own name and on one's own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow."

19. In his speech in ***Pye*** Lord Hutton drew attention to the close connection between the two elements of a claim to possession, at paras 75 and 76:

"75. ...[the squatters] did everything which an owner of the land would have done and when an experienced chartered surveyor, called on behalf of the plaintiffs, was asked in cross-examination what an occupying owner of the disputed land might have done over and above what was done by [the squatters] between 1984 and 1997, he was unable to think of anything.

76. I consider that such use of land by a person who is occupying it will normally make it clear that he has the requisite intention to possess and that such conduct should be viewed by a court as establishing that intention, unless the claimant with the paper title can adduce other evidence which points to a contrary conclusion."

Analysis

20. Mr. Harpum's first submission was that Mr. Ashmore did not have exclusive possession of the bed of the river. Whilst Atrato rested on the bed every day at low tide, at other times there was clearance under it. There was, he submitted, "*no continuous, unbroken possession of the bed.*" Nor did Atrato occupy a defined portion of space in the water/air column above the bed because *Atrato* went up and down with the tide. Atrato's lateral position also changed somewhat with the wind and the tide, in other words when it came to rest on the river bed it would not always occupy exactly the same 'footprint' (though Mr. Harpum conceded that, given Atrato's attachment fore and aft to the mooring rings on the bank, any difference was to be measured in feet only).

21. Mr. Harpum quite properly referred me to an observation made by A T Lawrence J in his judgment at first instance (which was not commented upon in the Court of Appeal) in the case of ***Denaby and Cadeby Main Collieries Limited v. Anson*** *[1911] 1 KB 171*. That case concerned the public right of navigation and whether the mooring of a coal hulk in Portland Harbour for the purpose of supplying coal to merchant vessels entering the harbour was a valid exercise of the public right. The case did not involve a claim to adverse possession, but at p. 176 the judge said:

> "*Except for the public right of navigation and the Crown rights in the soil ... I see no reason, if the plaintiffs' contention be correct, why they should not in twelve years acquire the fee simple in the soil of the area they occupy under the Real Property Limitation Act.*"

Mr. Harpum submitted (correctly) that the Judge's observation was an obiter dictum. He also submitted that it was wrong and that I should not follow that guidance in this case.

22. I reject the notion inherent in Mr. Harpum's submissions that for a squatter to be able to establish sufficient possession for a claim of adverse possession, he must prove some physical contact with the relevant land at all times. As Slade J pointed out in the passage of his judgment in the ***Powell*** case to which I have already referred, the question of what acts constitute a sufficient degree of exclusive possession depends in particular on "*the nature of the land and the manner in which land of that nature is commonly used or enjoyed*". In my judgment, when that land is part of the bed of a tidal river which is flooded twice a day, the fact that the squatter's boat rises and falls with the flowing and ebbing of the tide does not mean that the squatter has relinquished physical possession of

the land upon which the boat rests at low tide. True it may be, as Mr. Harpum submitted, that at high tide a frogman could have gained access to the bed of the river underneath Atrato, but even if that were not to be regarded as a legitimate use of the public right of navigation, the agreed statement of assumed facts contains no reference to frogmen having swum underneath Atrato (whether employed by the Authority or otherwise), and the point is therefore in this case an academic one.

23. In any event, there was a part of Atrato which rested at all times on (perhaps in) the bed of the river, even at high tide, viz. its anchor, and if, contrary to my view, some continuous physical contact were necessary, I do not see why that contact could not be established through the anchor.

24. If I were to ask myself the question which Lord Hutton referred to in the ***Pye*** case, viz. what an occupying owner of the disputed part of the bed might have done over and above what was done by Mr. Ashmore for 26 years, I cannot think of a sensible answer short of the construction of a structure built into the river bed itself. But it is plainly not necessary for a squatter to build upon the disputed land before a sufficient degree of possession may be established.

25. In ***Red House Farms (Thorndon) Ltd v. Catchpole*** *[1977] 2 EGLR 125*, the Court of Appeal found that the only purpose for which the land in question in that case (marshland) could be used, was for shooting (wild pigeons it seems from the report, but possibly other quarry as well). The use of that land for shooting was held to be a sufficient act of possession. I note in passing that it was not considered necessary in that case in order to establish possession of the whole of the marsh, that those out shooting stalked every corner of it and patrolled the whole of the riverbank. Nor does it seem to have crossed anyone's mind that possession could not be established because shooting would inevitably not have taken place for 24 hours each day.

26. In my judgment, ***Jourdan, Adverse Posession,*** *(2003)* accurately and succinctly sets out the relevant principle at para. 8-09, citing ***Bligh v. Martin*** *[1968] 1 WLR 804 at p. 811*, viz. *"A squatter can be in continuous possession even if he does not use the land continually"*.

27. Turning to the particular circumstance of the foreshore, the fact that, short of building on it, a squatter cannot be present physically on the foreshore every minute of the day, has never been regarded as a bar to a claim to adverse possession of it. Schedule 1 Part II para. 11 expressly contemplates the

possibility of adverse possession claims to the foreshore. ***Jourdan*** *(loc cit)* at para. 12-27 has a helpful catalogue of actions which have been held to qualify as acts of ownership in respect of land covered by water. The actions of Mr. Ashmore in this case in my judgment demonstrate a case of possession to at least as high a degree as many of the acts of possession which were found to have been sufficient in those cases.

28. In the ***Roberts v. Swangrove Estates*** case (loc cit), when addressing a related point, Lindsay J posed the question (at para. 54):

"Does a squatter, to succeed, have to prove that the acts of possession on which he relies have blanketed the whole of the area he claims?"

The Judge answered that question in the negative and made the following observations, with which I respectfully agree:

"63. There is thus ample authority for the proposition that acts on one part of an area may be treated as constituting possession of the whole area provided that there is "such a common character of locality as would raise a reasonable inference" that, if a person were possessed of one part of it as owner then he would so possess the whole of it. Plainly, the principle has been applied to rivers and there is nothing about an area being frequently entirely covered with water and not having visibly marked-out boundaries where it adjoins other waters that denies its application.

64. ... Quarrying, opencast mining and dredging come to mind as examples where it may only be on limited parts and over a period of years that the squatter can conduct operations on the land he possesses. Unless a practical view is taken of possession of part representing possession of the whole there would be many cases in which acquisition of the whole by actual possession would be impossible."

29. In that case Lindsay J found that acts which included shooting, fishing and dredging over the relevant area were sufficient acts to establish possession. The dredging took place with a greater degree of regularity than the other acts, but was certainly not continual. The other acts constituted (para. 185),

"a series of acts, often, I accept, with a large elapse of time between them, but which relate to widely spread parts [of the disputed area] and, whilst none alone would have been at all conclusive, together they are such as to have a cumulative force as all of them tend towards the same conclusion, namely that there has been unchallenged and at least spasmodic control and possession [of the disputed land by the squatter]."

30. In this case, Mr. Ashmore has without doubt enjoyed unchallenged control and possession of the relevant part of the bed of the Thames. That control and possession was much greater than spasmodic: it was for all practical purposes complete.

31. It follows that in my judgment Mr. Ashmore has established a sufficient degree of possession of the relevant part of the bed of the River Thames to claim title to it (I return to the extent of the relevant part below). I therefore reach the same conclusion as A T Lawrence expressed in the ***Denaby and Cadeby Main Collieries*** case: that in principle it is possible to acquire title to part of the bed of a tidal river or to the foreshore through the occupation of a vessel which, at least for some of the time, floats above that part and does not always rest on it.

32. I now turn to the second question, viz. has Mr. Ashmore demonstrated a sufficient intention to possess the relevant part of the river bed.

33. In his address to me Mr. Ashmore said that he had begun his search for a spot where he could establish title by adverse possession with Atrato several years before 1983. He initially moored elsewhere on the Thames in London, but after 3 years or so he was asked to move on by the riparian owner. He discovered Albion Wharf, considered it a promising spot, and before he moved Atrato there he installed some primitive construction on the bed of the river for the times when Atrato would rest on it ("preparing the berth" to use his own words). However, none of this information forms part of the assumed statement of facts, nor was it said in the witness box and therefore subject to cross examination. I shall, therefore, ignore it for the purposes of my decision. This is not as unsatisfactory a position as one might at first think, because it has been observed in many authorities that in order to avoid self-serving declarations, in the words of Sachs LJ in ***Tecbild Ltd v. Chamberlain*** *(1969) 20 P.& C.R. 633*:

"In general, intent has to be inferred from the acts themselves."

34. I refer again to the guidance given by Lords Browne-Wilkinson and Hutton in their speeches in the ***Pye*** case which I cited above. Lord Browne-Wilkinson said that the requisite intention is an intention to exclude the world at large so far as is reasonably practicable; Lord Hutton said that if a squatter does everything which an owner of the relevant land might be expected to do, that use will normally make clear that the squatter had the necessary intention to possess, and that evidence of such should normally be viewed as establishing

that intention, unless the claimant with paper title can adduce evidence pointing to a contrary conclusion.

35. Mr. Harpum submitted that Mr. Ashmore had not demonstrated a sufficient intention to possess the relevant part of the river bed because the mooring of a vessel is an equivocal act. It could be attributed to any one of:

(a) an exercise of the public right of navigation;
(b) an exercise of riparian rights by a riparian owner;
(c) a licence, which might or might not be coupled with a lease of the moorings themselves;
(d) an easement for the benefit of the land on the shore or bank.

36. I agree with Mr. Harpum that a disinterested third party coming across for the first time a boat moored in a tidal river would not automatically assume that the owner of the boat was a trespasser intent on excluding the world at large from possession. But that is not the correct test. The test is what the possession by this occupier would say to someone with the knowledge of the paper owner *"if he took the trouble to be aware of what was happening to his land"* (***Jourdan*** *(loc cit) at para. 8-12).*

37. Equipped with that knowledge in this case one can readily discount each of the alternatives suggested by Mr. Harpum. Mr. Ashmore was not exercising a public right of navigation: if one ignores as de minimis the period when Atrato was in dry dock (which if it were necessary to do so, I would), for 26 years Mr. Ashmore has not navigated anywhere. Mr. Ashmore was not the riparian owner nor the owner of any other land in the vicinity for which he needed to enjoy an easement, and nobody has suggested that the Authority at any time believed that he might be. And Mr. Ashmore never had a licence or a lease relating to the river bed, as the Authority would at all times have known.

38. I therefore find that Mr. Ashmore has established that he had a sufficient intention to possess the relevant part of the river bed throughout the material times.

39. For all these reasons my answer to the question posed as a preliminary issue in the Order of Master Teverson, is yes, it is possible for the owner of a vessel that is moored in a particular place on a tidal river to acquire title by adverse possession to a part of the river bed where the title to the river bed has not yet been registered and the vessel rests on the bed at low tide. Indeed, since I have

heard full argument on the point I would go further and find that in this case Mr. Ashmore has established the necessary fact of possession and intention to possess, to have acquired title to the relevant part of the bed of the Thames adjacent to Albion Riverside.

40. As regards the extent of the bed of the river to which Mr. Ashmore has acquired title, the preliminary issue speaks only of the "footprint" of the vessel. It is in my judgment right that the total area between the extreme points where Atrato has had contact with the river bed over the years (including through her anchor) will be included in the area to which Mr. Ashmore has acquired title (together with the space above the bed through which water flows and the air column to a reasonable height above that).

41. The question of whether any further part of the river bed beneath the outline of Atrato's deck (which Mr. Harpum referred to as "the envelope") could also be said to have been in Mr. Ashmore's possession is not raised as such by the preliminary issue, but in principle I would have thought that it should be included, even though Atrato only rested over that part of the river bed and not directly upon it (especially as Mr. Harpum suggested in his skeleton argument that the extent of Atrato's protrusion over the river bed represents a trespass). Indeed, it seems to me to be at least very strongly arguable that much the same could be said for that part of the river bed between the outline (or envelope) and the bank of the river: the position of Atrato and the presence of its mooring ropes will have precluded anyone else from occupying those relatively few square feet of the bed.

42. Finally, I should make clear what I have not decided. My decision relates to the facts of this case, which involve a vessel moored adjacent to the bank of a tidal river. Whether, and if so how, my decision translates to a case of a vessel continuously moored for the necessary period away from the riverbank, or in a non-tidal river (Mr. Harpum suggested that the most that could be acquired in such a case would be a form of flying freehold), or at sea, are questions for others to ponder: it would not be right for me to venture a view since that view would necessarily amount to obiter dicta, expressed in a case where only one party has had the benefit of legal representation.

43. I have also not explored the consequence of the area occupied by Atrato being subject to the public right of navigation, because, as I recorded at the outset, Mr. Harpum conceded that the existence of that right would not prevent Mr. Ashmore from acquiring title by adverse possession. I have of course not heard

argument from those charged with protecting the public right against obstruction, and it would not have been appropriate for me to have investigated the position in those circumstances. Whether that means that Mr. Ashmore's victory before me will turn out to have been a pyrrhic one, time will doubtless tell.

44. I should also record that I have not heard any argument about the rights of the riparian owner, whoever that may be. Whether that person is entitled to bar Mr. Ashmore's access to Atrato from the riverbank, or his use of mooring rings in the bank, are further matters upon which I am in no position to express a view in this case.