BRIEFING

GARDEN SQUARES IN THE ROYAL BOROUGH OF KENSINGTON & CHELSEA

Registration of Title

SHOULD TITLE BE REGISTERED AT THE LAND REGISTRY?

A number of the Garden Squares in the Royal Borough of Kensington and Chelsea, which operate under either the Kensington Improvement Act 1851 or the Town Gardens Protection Act 1863, do not have any ownership registered at HM Land Registry. The reason for this is generally because the ownership of the freehold of the garden is uncertain or unknown. While it is possible that there is someone who could come forward and produce documentary evidence of the ownership of the freehold, that is now extremely unlikely given that since 1899 the transmission of the title (in most cases) would have triggered compulsory first registration of title. Therefore, it is almost certainly true to say that those squares which do not now have a registered title simply do not have a known freehold owner.

The reason for this is likely to be because somewhere down the line the ownership was simply forgotten or ignored. Generally, squares were laid out by the developers of the estates and arrangements were often then made for committees to be formed by the residents of the properties surrounding the squares and for them to be granted some form of right to manage the square and to collect contributions for its maintenance from its residents.

The majority of these schemes were associated with leasehold ownership of the properties. However, towards the latter half of the nineteenth century and the earlier part of the twentieth century, the initial leasehold schemes often came to an end, and at that point the residents generally bought the freehold of their properties. Consequently, the developers and their successors and families lost interest in the ownership of the squares, which by then had no practical purpose and little value, and simply left them to the residents to run, either under the schemes originally set up or pursuant to the provisions of the 1851 or 1863 Acts.

Over the years, a number of garden committees have tried to trace the owners of the freehold of their garden without success. While some estate owners such as the Gunter Estate and Phillimore Estates retained an interest and updated the freehold ownership of their gardens, others (such as the original owners of the Ladbroke Estate) simply disappeared from view. For those Garden Committees for whom the title to their garden is not registered the question then arises as to whether this actually matters and what, if anything, they should do about it. The purpose of this note is to suggest that it does matter and now is the time to do something about it.

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LAND REGISTRY POLICY

In Kensington and Chelsea land registration was first introduced in 1899 but became more widespread nationally with the passing of the Land Registration Act 1925. From the earliest introduction of registration up to the present the Land Registry has sought to extend registration so that by September 2019, 87% of all land in England and Wales was registered. The stated intention of the Land Registry is to register the remaining 13% of land by 2030. This goal does, of course, require co-operation and active participation by land owners, but it creates a climate where the Land Registry are perhaps more inclined to assist in approving applications for first registration of land than might have been the case in the past. Of course, that does not mean that the Land Registry will not still strictly apply the rules set out for registration in the Land Registration Acts and Regulations, but they may be more willing to assist, particularly where only possessory title is sought.

It is relatively easy to go onto the Land Registry website to check the registered titles of all land in England and Wales. Inspection of the plan for Kensington and Chelsea quickly reveals that there are various pieces of land which do not yet have a registered title. While some of these relate to properties held by religious and other institutions, the vast majority, at least by area, relate to garden squares, making it easy to identify those squares without a registered title.

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THE REGISTRATION PROCESS

For garden squares it is unlikely that registration would proceed in the usual way which would be by producing documentary evidence of ownership of the square. In the absence of this, the only alternative is to seek registration through adverse possession. This is the process by which a person or organisation which is in possession and control of land may claim ownership, and by doing so may dispossess the person otherwise entitled to that ownership.

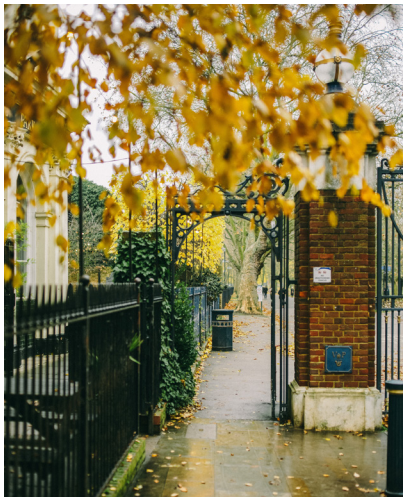
In the normal sense it is 'adverse' in that the original owner may not consent and the land may forcibly be transferred from him to the person in possession. In the context of garden squares the word 'adverse' is a bit misleading because the whole point is that there is no one who is going to be dispossessed by the process, since that person is not known, and probably does not exist at all.

In order to establish a claim, the person seeking adverse possession must be able to show that they have occupied the land for a minimum period of 12 years without the permission of the owner and have done this quite openly. It is normally necessary that the land claimed is fenced off and the person claiming title has controlled access to it without objection from the legal owner.

In the context of garden squares, it is the committees that operate them that have for many years, and in some cases perhaps for even 100 years or more, exercised control over the garden, and have acted in the same way that they would have done had they been the freeholder.

There are potential complications in respect of gardens operating under either the 1851 or 1863 Act in relation to consent, because the garden committees generally exercise their rights over the garden by virtue of the provisions of the Acts. Technically, this is not consent from the land owner, but rather consent from Parliament, and, we would argue, such consent should not prevent a claim for adverse possession being successful. This does, however, remain to be tested with the Land Registry.

The process of applying for first registration by way of adverse possession is a little complicated and may be time consuming and will certainly incur some expense, but it is something that only has to be done once. If an application for adverse possession is successful, the Land Registry will award possessory title. This class of title is not as good as the normal absolute title but can be upgraded after a further period if no one comes forward to claim or to challenge the title. The process of upgrading the title to absolute should in itself be relatively straight forward.



BRIEFING

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THE ADVANTAGES OF REGISTRATION

The principal advantage is certainty. Registration will demonstrate that the garden committee (or rather the nominated trustees who are the holders of the land) control the garden, and that no-one can subsequently come forward and claim that they own it. Although that is unlikely, it always remains a possibility.

Registration will determine precisely the boundaries of the garden and help to protect the garden from encroachment by others. With an unregistered title, it is always possible that a neighbouring property could seek to register title to part of the garden through adverse possession and, since the Land Registry will have no record of anyone claiming ownership of the garden, the committee might not even know about it. Adverse possession is much harder to establish against a registered proprietor than against an unregistered owner. This is because registration means that the Land Registry (and ultimately the government) guarantee the title so the registered owner can only be disposed under strict rules.

It also helps to prevent any fraudulent dealing with the land and lets anyone enquiring know how to contact the owners of the garden.

While the Land Registry has stated that it is its aim to register all land by 2030, it is not clear what will happen to land that is still unregistered when that date is reached. Whilst it is unlikely that the Government would take any steps to seek to confiscate land from people who have not registered it, it is not impossible that land that is used for a common purpose (such as a communal garden) will be assigned to some organisation. It is possible to imagine that the gardens in Kensington and Chelsea might be registered in the name of the Local Authority, and if that were to happen it would then be subject to the whims of the politicians who run the authority. Or even worse, they might be assigned to the control of the Mayor of London. That is, of course, highly speculative but even if there were a remote chance of such an outcome it would be better for garden committees to avoid such a risk.

DISADVANTAGES OF REGISTRATION

There are not really many. One is that anyone would then be able to establish who owns the garden, and in particular the names of the trustees who hold it on behalf of the garden committee and the garden residents. Potentially, it would open those people up to dealing with unwanted contact from members of the public, and potentially means that they become liable for the garden, and could potentially be the subject of a claim brought by a third party. However, the garden committee and its members, as controllers of the garden, are already liable for the garden, the only difference being it is more difficult to establish who they might be. In practice, any such liability will be covered by the insurance.

If the title is registered, it does have to be maintained. Normally, there will be up to four trustees nominated by a garden committee, who might be long term residents of the garden. People move on, either by moving away from the garden or, in the event of death, the title does need to be updated, and a new trustee would need to be appointed. This may involve the completion of a deed of retirement and/or appointment of a new trustee, and a transfer of the legal title and the payment of a relatively small fee to the Land Registry. There is therefore some expense involved, and for that reason it is important to try and avoid changing trustees too often.

However, we would suggest that the disadvantages are far outweighed by the advantages.

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