Topic 4: Fragmentation by Reference to Space and Time – The Doctrines of Tenure and Estates

DOCTRINES OF TENURE – FRAGMENTATION IN REFERENCE TO SERVICE/SPACE

Types of Tenure

Under the Doctrine of Tenure, the Crown was the absolute owner of the land, and was able to grant land holdings to any person he/she wished. When making grants, the Crown *did not transfer absolute ownership*, but instead set up feudal ties pursuant to which land was granted subject to the grantee performing and fulfilling certain duties and conditions. Tenure could be *free tenure* or *non-free tenure*. Free tenure included two types of tenure, each with their own sub-divisions. These included:

(1) Lay Tenures – for (a) *Knights Service* – which was dependant on military service; (b) *Grant Sergeanty* – which required the performance of some honourable service to the king, such as being his butler, carrying his banner, being his chamberlain etc; and (c) *Socage* – these were for the performance of fixed services, primarily agricultural or via payment of rent monies.

(2) Spiritual Tenures - for (a) *Frankalmoign* – which required the tenant to perform spiritual services for the donor, such as the saying of mass or prayers.

Statute of *Quia Emptores, 1290*

The tenure system became increasingly complex, and gradually, many services became difficult to enforce. The first attempt to simplify the system and to prevent even more complex feudal ties was made in 1290, with the *Statute of Quia Emptores*. Under this statute:

(a) A person could alienate their interest in land without the consent of the lord, provided the alienation was absolute and all rights and duties were relinquished to the new owner.

(b) Subinfeudination, wherein a person holding land directly from the king (*tenant-in-chief*) who granted part of their land to another who, in return, promised to fulfil certain conditions, was prohibited.

Statute of Tenures, 1660

The simplification of tenures was aided further by the disappearance of many services associated with tenure. Labour services, arising from *Socage Tenure,* were gradually converted into money rents. With the proliferation of money as a feature in society, the value of money fell, making the fixed payment of rents an insignificant amount barely worth collecting. Thus, many parts of the tenure system fell into disuse. The *Tenures Abolition Act 1660* then came into force, abolishing military and religious service tenants owed to the Crown, converting them into Socage Tenure. Most value in Socage Tenure was also abolished.

Doctrine of Tenure in Australia

Despite feudal tenure withering away in England, it was assumed that upon settlement of Australia, the doctrine of tenure operated. Australia was considered *uninhabited land*, thus allowing the Crown to claim absolute sovereignty upon Settlement. Nowadays, however, the doctrine of tenure operates so that:

All land ultimately belongs to the Crown, who in turn grants it to the people. Thus, there is no absolute ownership, as all people are tenants of the Crown. This is the concept of **fragmentation of space**.

Indeed, the Crown is able to acquire any land it wishes subject to its 'Just Terms' head of power in s. 51(31) of the Cth Constitution. However, it must pay just terms when it seeks to do so.

Tenure and Native Title

It was not until 1992 that the HC in *Mabo* rejected the long-held view that upon Settlement, all land vested in the Crown and any interests could only be held as a consequence of direct grant from the Crown. The HC confirmed that, upon Settlement, the Crown acquired sovereignty over the territory and radical title – not full beneficial ownership - over the land. Through the doctrine of tenure, this radical title enabled the Crown to grant interests in land and hold absolute beneficial ownership over un-alienated land. However, the Court found there was no full beneficial ownership because the territory *was not terra nullius*, and the radical title acquired upon settlement did not confer on the Crown absolute beneficial ownership of land occupied by indigenous inhabitants:

Brennan J (Mason CJ and McHugh J agreeing): If a community is in exclusive possession, community native title will survive the Crown's assertion of sovereignty. However, native title can be extinguished, expire, or land can be surrendered.

Gaudron and Deane J: The Crown acquired *radical title* on acquisition of sovereignty, and this held with respect to existing native title rights. Native title rights are personal, but legally enforceable. However, native title rights can be extinguished.

Toohey J: The Crown obtained radical title upon Settlement. However, traditional title survived annexation. 'Title' rights did not correspond or confer ownership, but they did prevent the Crown from acquiring full rights over occupied land. However, native title can be extinguished.

DOCTRINE OF ESTATES – FRAGMENTATION IN REFERENCE TO TIME

The doctrine of **tenure** demonstrated that *several persons could hold interests in one piece of land*. The doctrine of **estates**, on the other hand, created the notion that, due to the permanent nature of land, it was possible to have *successive interests* land. The idea was that it should be possible for a person to have an interest in the land giving a *present* right to possession, while other persons would have interests which would give them rights to possession *in the future*. Thus, although the holder of a future interest had no present right to possession, the interest was still a present and full one, capable of alienation.

Thus, **the doctrine of estates divides up interests in land according to their duration.** Estates create the fullest set of rights; both a right to possession and enjoyment. However, estates are distinguishable from *interests*, which are lesser rights. A possessory interest is also greater than any other kind of interest. For example:

- A mortgage is a security interest, but does not denote possession;
- An easement is an interest for the use and enjoyment of land, but does not denote possession of that land.

There are two types of estates:

FREEHOLD ESTATES: Where the length of the duration of the estate is *uncertain* and could last into perpetuity, with no date of extinguishment set. These include:

Fee Simple: The closest interest to absolute ownership. It is only the doctrine of tenure – which theoretically means the Crown is the owner of the land – which prevents the owner from being regarded as an absolute owner.

'Fee' = Capable of being inherited.

'Simple' = No restrictions on the classes of persons who are capable of inheriting the estate; the estate can pass to heirs generally.

In modern law, fee simple continues *whether or not there are heirs*. The holder may dispose of the estate during his/her lifetime. If the holder dies intestate, the estate passes to his or her next of kin; where a person dies intestate and without next of kin, the Crown takes the property.

Fee Tail: An estate of inheritance limited to a particular person and his/her specified descendants, the idea being to keep the estate within a particular branch of the family. The estate could descend to lineal heirs of any type, or be restricted further so as to descend only to a specified class of lineal descendants eg. Only female/male heirs. The estate would revert back to the grantor when the grantee and specified descendants died.

The holder of fee tail enjoyed the same rights of enjoyment, apart from the right of alienation, as the holder of a fee simple estate.

In Victoria, fee tails can no longer be created; pursuant to the Property Law Act, s. 249, any attempt to create a fee tail estate results in the creation of a fee simple estate.

Life Estate: The life estate is an estate the duration of which is limited to the life of the person, ending on the death of the tenant. There are 2 forms of life estate:

Life estate pur sa vie: An estate for the life of the grantee eg. "To A for the term of their natural life.

Life estate pur autre vie: An estate for the life of a person other than the grantee eg. "To A for the life of B". This creates an interest in A which lasts, not for the length of their lifetime, but for the length of B's life (eg. the Queen).

Problems used to arise in ***life estates pur autre vie*** where the holder (A) would die before B. As the estate was not one of inheritance, A could not devise the interest in his will nor would it pass to his next of kin upon intestacy. The *doctrine of occupancy* was invented to solve the problem, wherein the first person to enter the land after A's death would be considered a *'general occupant'*, or if to A's heir, as *'special occupant'* – both free of A's debts.

The doctrine of occupancy is no longer part of the law; statute now ensures the holder of an estate *per autre vie* (A) may leave the interest by will. If A dies intestate, the interest forms part of their estate.

LEASEHOLD ESTATES: Where the duration of the estate is certain or capable of being rendered certain. These include:

Fixed-Term Lease: A lease for any fixed period of time which comes to an end automatically at the expiration of the period. The maximum period of duration must be certain and the fact a lease may come to an end before then does not invalidate it.

Periodic Lease: A tenancy which continues from period to period until determined by a proper notice. These tenancies may be created by reference to a period of time, the most common being yearly, monthly and weekly. The notice required to terminate the tenancy is usually equal to the length of the period, but a *yearly tenancy is terminated by 6 months notice.* If the tenancy is not determined at the end of a period, it is considered to continue for another term.

Tenancy at Will: When a tenant occupies land on the basis that *either party may terminate the tenancy at any time*. There is no agreement to duration and usually none to payment of rent; for example, where a person takes possession of property rent free for an indefinite period.
If the tenant subsequently pays rent periodically, and the rent is accepted, it becomes a periodic tenancy.
The tenancy at will determines automatically if the tenant purports to alienate their interest or if he/she dies.

Tenancy at Sufferance: Arises when the tenant holds over at the expiration of a lease without the consent of the landlord. The landlord may bring an action for recovery of possession against the tenant, but cannot sue for trespass as the original entry was lawful.
It is not strictly a leasehold estate as there is no agreement or tenure between the parties. Nevertheless, it often arises where such a relationship has formerly existed between the parties.

THE DOCTRINE OF WASTE: Because of the general doctrine that persons can only dispose of the interests they have, owners of estates *less than freehold* (leasehold; future) cannot as a rule deal with the whole interest in the land. However, the owner of a lesser estate will at some point be entitled to possession. When a person is in possession, their use of the land can significantly affect its long term value, thereby causing injury to the interests of the holders of future interests. To protect their interests, the common law developed the **doctrine of waste**, whereby the holders of limited interests are limited in their use of the land. There have traditionally been 4 categories of waste:

Voluntary Waste: The commission of acts harming the property (i.e. positive actions).

As per the ***PLA, s. 132A(1)***, voluntary waste is prohibited, for which the estate holder will be liable:
"A tenant shall not commit voluntary waste".

However, voluntary waste may be contracted out of, as per **s. 132A(2):** *"Nothing in subsection (1) shall affect any license or other right to commit waste".*

But if voluntary waste is not contracted out of, the estate can be liable in damages to the remainderman or reversioner, as per **s. 132A(3):** *"A tenant who infringes subsection (1) shall be liable in damages to his remainderman or reversioner"*

Equitable Waste: A subspecies of voluntary waste, equitable waste occurs when *intentional and serious harm* is done to the property (eg. stripping a building of lead, iron, glass, doors and boards, the removal of trees providing ornament or shelter or the destruction of vegetation).

The estate holder is liable even if the instrument *generally* excludes, unless the instrument *explicitly excludes,* as per ***PLA, s. 133:*** *"An estate without impeachment of waste shall not confer upon the tenant any right to commit waste known as equitable waste,* ***unless an intention to confer such right expressly appears by the instrument creating such estate****".*

Permissive Waste: Where harm is allowed to occur because of a failure to take action or allowing the property to fall into disrepair.

The estate holder is liable only if instrument imposes liability to repair - ***PLA, s. 132A(5):*** *"No tenant shall be liable in damages for permissive waste for which he would not have been liable if this section had not been enacted"*

Ameliorating Waste: An alteration to the land which constitutes an improvement to the land. In these circumstances, the remainderman or reversioner would receive land which is no longer the same as that which was granted.

There has been some doubt whether ameliorating waste amounts to waste at all. As Jessell MR stated: *"The erection of buildings on land which improve the value of the land is not waste. In order to prove waste you must prove an* ***injury to the inheritance****".* However, the more traditional view is that any alteration to the nature of the land constitutes waste, even if the alteration benefits the land.

However, such waste does not give an automatic rise to remedy by way of injunction or damages. Remedies are up to the court's discretion: no decrease in value = nominal; substantial injury = court intervenes.

FUTURE INTERESTS: The doctrine of estates endorsed the concept of the creation of *successive interests in land*, thereby recognising that **future interests** in land could exist. Thus, a future interest is one that grants a *right to possession at some future time*. Future interests are an estate and can therefore be transferred (i.e. alienated). There are two types of future interests:

Reversions: Where the interest goes back to the original owner (i.e. the grantor). When they alienate their interest in possession, the grantor obtains a future interest in their property. The future interest is maintained and eventually comes back to the grantor.

Thus, the reversion comprises the *residual* of the grantor's estate; he/she has *granted a lesser portion of the interest to another person.*

For example, if X, the **fee simple owner**, grants a **life estate to Y**, ***X has a reversion*** – a present right to future enjoyment and possession of the property – ***upon Y's death***. During her life, **Y has an estate in possession** – a *life estate*.

Remainders: Where the possessory interest goes to someone else and stays with that other person. It is the grant of a future interest in land to a person not previously entitled to an interest.

For example, if X grants his **fee simple estate** to **Y for life** and **then** to **Z and her heirs**, Y has a *life estate in possession* and Z has a *fee simple in remainder*. Z, or her estate if she is dead, will be entitled to possession of the property upon Y's death. Thus, Z's is a *present right to future enjoyment*. Her interest is a future one only in the sense that the right to **possession** *will arise in the future*; her right is *vested* in **interest** immediately.

There are 2 types of remainders:

Vested – "To A for life, remainder to B": Vested interests are *unconditional* and *automatically apply*. For a vested interest to exist, 2 criteria must be met: (1) the identity of the person to whom the interest is grated must be known; (2) there must *not be any condition precedent to possession taking effect.*

Vested interests may be '**vested in interest**' or '**vested in possession**': if an interest is *vested in possession* – such as life estate of Y (above) – the interest is not a future one; a present right to possession of the property is given. If the interest is *vested in interest*, but not in possession – such as the reversion of X and the remainder of Z – the interest is a future one as the right to possession will arise in the future; the interest currently exists, eventhough the right to possession is postponed.

Contingent – "To A for life then to B in fee simple when B attains 18 years of age": The contingent interest gives no right to the recipient *until the occurrence of some particular future event.* It is a *conditional* interest which does not automatically apply because it may theoretically never come into existence.

For example, if **X** grants land to **Y for life** and *remainder* to **Z in fee simple *once Z has attained the age of 21 years at Y's death***, Z has a contingent remainder; Z has only the *possibility* of an estate. The right is *neither vested in possession nor in interest*, and Z would not gain any estate if, at Y's death, Z was not 21+ years old. Effectively, there is a **condition precedent** to Z's right becoming a vested interest. But if Z attains 21 years before Y's death, Z's *contingent remainder is converted into a vested remainder*.

Where the condition is not fulfilled, the law deals with contingent interests in the following ways:
Common Law – the contingent interest is invalidated and ceases to exist;
Legislation – s. 192 of the *PLA* operates to save the assignment.

Topic 5: Fragmentation by Reference to the Nature of Title – Possession; Relativity Titles; Adverse Possession

Possession

The doctrine of tenure effectively abolished the concept of *absolute ownership*. Because of this, the common law had to protect something other than ownership. Thus, the law developed so as to protect **'seisin'**, the *person in possession of a freehold estate in land*. The possessor of land had an interest in it, enforceable against the whole world, *except against someone with a superior right of possession*.

This gave way to the doctrine of **relativity of titles**; that is, that title to property is relative to that of other title holders. Under this doctrine, *more than one person may have a legal estate in land at the same time*. For example, a person with **documentary title** generally has a legal fee simple (i.e. is the holder of the freehold estate and has *seisen*), which is good against the whole world, unless someone can show a better right. Simultaneously, a person could have **possessory title**, which gave them a lesser interest than someone with documentary title (not *seisen*), but an enforceable right nevertheless. A tenant under a lease is such an example: in possession, but without *seisen*.

NOTE: A ***possessory title holder*** has a different interest to a person ***under a lease***. A leasehold has been set up and granted by the freeholder, so the agreement is *subject to the freeholder's seisen*. Thus, not all forms of possession are competing; some possessory interests are set by those with seisen.

Significance of Possession: The general principle is that the possession of land creates an interest in the possessor that is enforceable against the whole world, except against someone with a better right to possession. Therefore, a person in possession of land, even as a wrongdoer, is entitled to take action against anyone interfering with his or her possession, *unless the person interfering is able to demonstrate a super right to possession,* such as **documentary title** or **prior possession**. Documentary title will always have the better interest unless that interest has been extinguished through the effluxion of time.

Possessory Title – Principles

LAND: A person in possession of land, exercising the ordinary rights of ownership, has a perfectly good title against the whole world *but for the rightful owner*. However, if the rightful owner does not come forward and assert his title by law within the period prescribed by the *Limitations of Actions Act*, his right is extinguished and the possessory owner acquires title – even if the initial acquisition was unlawful. Adverse possession is an exception to indefeasibility **(TLA, s. 42(2)(b)). NOTE:** A documentary title holder cannot assert the ***jus tertii defence*** in relation to land. The existence of a third party with superior rights has no effect on the ability of a party with only a possessory title to bring actions against the dispossessor **(*Perry v Clissold*).**

GOODS: A person in possession of goods has a good title against the whole world. One who takes those goods from him, having no title in himself, is a wrongdoer, and cannot defend himself by claiming there was some title in a third party (i.e. *jus tertii defence does not apply in these circumstances*). Therefore, someone in possession, even in wrongful possession, has a requisite level of protection to rely on. Only a person with a superior right, or agents acting on behalf of a principle with a superior right, can justifiably assume possession **(*Jeffries v The Great Western Railway Company*).**

Unlawful Possession

A person unlawfully dispossessed of land has a right to bring an action against the wrongdoer to recover possession of the land. However, this is subject to a *limitation period*, a finite amount of time in which an action may instituted. In Victoria, this is 15 years (before ***adverse possession*** takes effect).

However, where 15 years have not yet passed, **remedies** are available to rightful owner. These include:

(1) **Injunctions to stop the trespass** – where it is not impossible or hugely onerous to award such; and

(2) **Equitable damages for trespass in addition to, or in substitution for, an injunction** – if an injunction cannot be awarded.

Remedies to Unlawful Possession

The court undertakes 4 considerations in determining whether an injunction, or damages in lieu of, is appropriate:

(1) **Is the injury to the plaintiff's rights small?**

(2) **Is the injury to the plaintiff capable of being estimated in monetary form?**

(3) **Is the injury capable of being compensated for by a small monetary payment?**

(4) **Would it be oppressive to the defendant to grant an injunction?**

If the answer to these questions is 'yes', damages would be appropriate; if 'no', an injunction may be awarded **(*Jaggard v Sawyer*).**

'Oppressiveness to the defendant' must be assessed in proportion to the damage that would be suffered by the plaintiff if an injunction was refused. If an injunction would be out of all proportion to the injury suffered, damages are likely to be awarded in lieu **(*Break Fast Investments v PCH*).**

Limitations on Possession – Restricts on the Rights of Recovery

Limitation of actions legislation bars the right of a documentary title holder to bring an action to recover land or goods after a specified period of time. Limitations on the rights of recovery apply to both land and chattels:

Chattels – *Limitation of Actions Act, s. 5*: **6 years**.

Land – *Limitation of Actions Act, s. 8:* **15 years** – "No action shall be brought by any person to recover any land after the expiration of **15 years** from the date on which the right of action accrued to him"

The effect of a limitation period is an extinguishment of title – *Limitation of Actions Act, s. 18*: "... at the expiration of the period prescribed by this Act for any person to bring an action to recover land... the title of that person to the land shall be extinguished". Thus, under s. 18, the true owner is statute barred from seeking recovery of possession. The only way to re-enliven title is to buy it back from the adverse possessor.

NOTE: As per s. 7 of the *LAA*, land owned by the **Crown** cannot be adversely possessed*: ***Limitation of Actions Act, s. 7 – No title by adverse possession against the Crown:*** "Notwithstanding any law or enactment now or heretofore in force in Victoria, the right title or interest of the Crown to or in any land shall not be and shall be deemed not to have been in any affected by reason of any possession of such land ***adverse to the Crown***, whether such possession has or has not exceeded sixty years".

*This was not always the case; Crown land used to be able to be dispossessed after 60 years.

Policy reasons:

I. It is too onerous a requirement for the Crown to regularly manage and oversee their vast tracts of land.

II. The Crown owns land for the community, on the people's behalf. For private individuals to be able to take away land reserved for common benefit is undesirable.

NOTE: Land can change from Crown land to private land through a grant. If people are already on land provided for by a grant, the concepts of adverse possession no longer apply; adverse possession only applies from the time the grant is given. If these people are not removed within 15 years, adverse possession trumps documentary title and thereby applies. Beforehand, people can be removed.

Other sections to which the concept of adverse possession does not apply include:

s. 7A: PTC or Victorian Rail Track – "The right, title or interest of Victorian Rail Track... is not, and must be taken never to have been, affected by reason only of any possession of that land adverse to Victorian Rail Track, irrespective of the period of that possession"

s. 7AB: Water authorities – "The right, title or interest of an Authority, within the meaning of the *Water Act 1989*... is not affected by any possession of that land adverse to the Authority irrespective of the period of that possession".

s. 7B: Councils – (1) "The title of a Council to council land is not affected by reason only of any possession of that land adverse to Council, irrespective of the period of that possession; (2) This section does not apply if – (a) an application for title to council land based on adverse possession is made before or within 12 months of commencement; and (b) that adverse possession is for more than 15 years".

s. 7C: Common Property – "The right, title and interest of an owners corporation, or an owner of a lot affected by the owners corporation, in land which is common property is not affected by reason only of any possession of that land adverse to the owners corporation or the lot owner by another owner of a lot affected by the owners corp..."

Adverse Possession

Establishing Adverse Possession

In establishing adverse possession, three things need to be assessed:

(1) **Commencement:** *When did possession commence?*

(2) **Calculation:** *How is time calculated?*

(3) **Stoppage:** *When did time stop?*

Commencing Time: The limitation period commences from the time the cause of action first accrues. The relevant provisions provide that a person's right to bring an action accrues when –

(1) **The person entitled to possession has discontinued possession/been dispossessed** – *LAA*, s. 9(1): "Where the person bringing an action to recover land or some person through whom he claims (a) has been in possession thereof; and (b) has while entitled thereto been dispossessed or discontinued possession, the right of action shall be deemed to have accrued on the date of the dispossession or discontinuance"; AND

(2) **Adverse possession has been taken by some other person** – *LAA*, s. 14(1): "No right of action to recover land shall be deemed to accrue unless the land is in the possession of some person in whose favour the period of limitation can run (hereafter... referred to as "adverse possession").

Thus, a right to action cannot accrue unless the documentary title holder is out of possession and the land is in possession of someone else *without the consent of the owner to possess*. **Time only starts to run against the true owner when another person has taken adverse possession of the land. The adverse possessor must be able to show that he/she has taken possession and that the true owner no longer enjoys possession.**

Aggregating Time: A person's right to bring an action to recover land will not be barred unless it is proved that the adverse possession of the land has *continued unbroken* for the length of the limitation period. There must be a *continuous, uninterrupted period of adverse possession* for the whole of the limitation period before the owner's right to recover is lost. For various reasons, the original adverse possession may not complete the full period of possession himself/herself:

(1) Alienate the property – where the original adverse possessor disposes of their interest to another person, either by selling, giving or devising their interest. The recipient of the interest must have the same interest as the adverse possessor; that is, must assume adverse possession.

(2) Successive adverse possessors – if the original adverse possessor is dispossessed by another, the second adverse possessor can add the first period of adverse possession to his or her own period for the purpose of barring the true owner's right of action. The only proviso is that there must be continuous, uninterrupted adverse possession for the duration of the relevant limitation period.

(3) Abandonment – an adverse possessor loses any interest in the land if they abandon it before the full limitation period has run. Thus, when the land is taken into adverse possession again after abandonment, the 2 separate periods of adverse possession cannot be added together **(LAA, s. 14(2)).** What constitutes abandonment is a question of fact, determined by deciding whether the adverse possessor is still in 'possession' of the land. Whether the adverse possessor has retained possession will depend on (1) the nature and character of the land, (2) the usual and natural mode of using the land, and (c) the *animus possidendi*. However, if an adverse possessor remains in possession for the length of the limitation period and subsequently abandons possession, the rights of the adverse possessor are not lost; once the period has expired, the possessor attains a title in fee simple good against the whole world, including the true owner. The true owner's title is extinguished **(LAA, s. 18)** (***Mulcahy v Curramore***).

Stopping Time: Time stops running if either (a) the owner *effectively asserts* their title or (b) if the adverse possessor *admits the title holder's superior title* –

(1) Title Holder effectively asserting their title – either by instituting proceedings to recover the land or by making a peaceable but effective entry on to the land.

A mere formal entry is insufficient **(LAA, s. 16)** – eg. Putting up a sign on the front door purporting a notice to vacate); entry must amount to a resumption of possession.

An *effective entry* can be asserted by changing the locks, calling the police to remove the occupier. The owner must assume **control** by removing or restricting the other in such a way to break their occupancy.

(2) Adverse possessor acknowledging the Title Holder's superior title – the acknowledgment needs to be in writing and signed by the adverse possessor **(LAA, ss. 25, 26).** A statement made in pleadings or other court documents can constitute an acknowledgment. *Because animus may change, formal evidence shows a lack of animus in the adverse possessor.*

Adverse Possession and Future Interests: In the case of interests in reversion or remainder or any other future interest, the *date the action accrued is deemed to be the date on which the estate or interest* ***became an estate or interest in possession***. The limitation period is 15 years from the date of adverse possession, or 6 years from the interest vesting in possession, whichever period expires later **(LAA, s. 10(2)).**

EXAMPLE: *In 1996, X grants an interest 'to A for life and then B in fee simple'.*

(1) In 2004, C dispossesses A. A dies in 2007 – interest in possession for B will not vest until A dies. If C dispossesses A in 2004, B would have until 2019 to reassert title, or 6 years from when B vests in possession i.e. 2013. 15 gives more time, so it is used.

(2) In 1997, C dispossesses A. A dies in 2007 – applying 15 years, B has until 2012. Applying 6 years, B has until 2013. B will use 2013.

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Adverse Possession and Leases:

(1) **Fixed Term (LAA, s. 10(1))** – adverse possession first accrues on the day the lease ends. If the tenant stays in possession, the consent within the lease is withdrawn, and adverse possession starts to run. This adverse possession must continue for 15 years.

(2) **Periodic Leases (LAA, s. 13(2)) –** the right will accrue either on the last day of the first period, or if more than one period has run, from the date the last rent was paid. If rent is not paid again, adverse possession starts to run. As soon as rent is paid, a new period is created, and adverse possession stops.

(3) **Tenancy at Will (LAA, s. 13(1))** – a person has a year after a tenancy at will is created. After this year has expired, adverse possession starts to run. Tenancies at will are deemed to have consent withdrawn after 1 year.

(4) **Tenancy at Sufference** – because there is no consent or rent, time starts to run immediately.

Policy behind Adverse Possession: (1) It encourages a more efficient use of land, thus maintaining the value of surrounding land; (2) It discourages land hoarding; (3) It encourages investment in/improvement of land by occupiers; (4) It offers resolution of boundary disputes; (5) It addresses problems of proof where considerable time has elapsed; (6) It allows for the extinguishment of stale claims.

Elements of Possession

Two elements need to be proved for evidence of possession ***generally***:

(1) **Physical/Factual Possession** – shown by actual, physical control. This is more than simply using or being in a space.

(2) **Mental Possession/*Animus Possidendi*** – an intention to possess. This is not an intention to own. An intention can be limited to a certain period of time (i.e. does not have to be forever). Intention must manifest itself in such a way so as to exclude others from possession, *including the true owner.*

Elements of Adverse Possession: Possession in the documentary title holder is presumed. To prove adverse possession: (a) *15 years must have elapsed*; (b) *ss. 9(1) & 14(1) have been established*; and **(c) *Factual Possession and Animus Possidendi must be established*** -

Element 1: Factual Possession – to demonstrate factual possession, possession must be (***Mulcahy v Curramore***):

"Open, not secret" – this means the user must be unconcealed and such that it would be noticed by a documentary title holder reasonably careful of his/her interests.

"Peaceful, not by force" – if someone takes land forcefully to the extent that the documentary title holder is frightened to enforce their rights, it will not be peaceful possession.

"Without the consent of the owner" – possession cannot be adverse if the occupier is on the premises under a lawful title, such as by lease or license. However, if a license is terminated, the formerly consensual possession may be come adverse possession **(*JA Pye v Graham*).** Factual possession requires an appropriate degree of physical control of the land; mere use of the land will not be enough to demonstrate control **(*Buckinghamshire CC v Moran*).** What the 'appropriate degree' is depends on the facts of the case, but it must be shown that the alleged possessor was dealing with the land **as an occupying owner might have been expected to deal with it (*JA Pye (Oxford) v Graham*).** Regard must be had to (a) the *character and value of the property*, (b) *the suitable and natural mode of using it* and (c) *the course of conduct which the owner might reasonably be expected to follow with regard to his/her own interests.*

NOTE: (1) Possession is single and exclusive; an owner and alleged possessor cannot both be in possession at the same time; (2) Legal possession comprises factual possession and *animus*. It is irrelevant if the possessor uses the land for a purpose inconsistent with that of the true owner; (3) **Part-Parcel Claims:** Where the land comprises a large area, acts of possession performed on one part may provide evidence of possession of the whole. Further, where land is farmed on a rotational basis, adverse possession of the whole may be claimed. This is ***constructive possession***.

Element 2: *Animus Possidendi* (Intention) – the person taking adverse possession of the land must have the intention to possess the land for their *own behalf and benefit* ***to the exclusion of others.*** Intention must be clear to the world.

This is simply an intention to possess, not own. An intention to possess does not need to be for forever. Intention is not a subjective measure. Where there was originally a license to use the land in some way, intention to possess adversely must be where the license is no longer in force and the use of the land has changed **(*JA Pye v Graham*).** But intention to possess is not subjective; there needs to be an **objective demonstration**. Acts generally agreed upon to demonstrate an intention to possess include:

(I) **Fencing the land/changing locks on doors** – enclosure is said to be the strongest possible evidence of adverse possession. But this must be considered in light of the circumstances of the case.

(II) **Payment of Rates** – the payment of rates by an adverse possessor may be significant in demonstrating that the possessor has an intention to create title in himself and do whatever necessary to effect that purpose.

None of these factors are definitive; **the intention must be considered in light of the facts of the case.** However, an intention possess is different to an intention to simply *use or enjoy*. Enjoyment may entail allowing others on to the land for benefit. This is not indicative of an intention to possess to the exclusion of others.