

## ADVERSE POSSESSION

Adverse possession is the extinguishment of a documentary titleholder's interest, and the acquisition of a fee simple title by a person in adverse possession (*Whittlesea*).

### Concepts & Principles

A person in possession of land and exercising the ordinary rights of ownership has a good title against all the world but the rightful owner (*Perry v Clissold*)

A person in possession acquires a fee simple estate (fullest estate known to law) until a lesser state is proved (*Mabo v Qld No. 2*)

The same principles that apply to land, apply to goods (*Jeffries v Great Western Railway*)

### STEP 1: WHAT TYPE OF LAND IS IT?

The following pieces of land can't be adversely possessed;

- + Crown Land [LAA s7]
- + Public Transport Corporation / Victorian Rail Track [LAA s7A]
- + Water Authority [LAA s7AB]
- + Council Land [LAA s7B]
- + Common Property [LAA s7C]

If the land is under a current lease;

**+ A landlord's right to recover possession from the tenant or stranger accrues at the end of the term of lease**

#### Tenancy at Will

After 1 year from the commencement [LAA s13(1)]

#### Periodic Tenancy

At the expiration of the first period [LAA s13(2)]

**+ A tenant's right to recover possession from a stranger accrues once dispossessed**

If the land is a 'part parcel' of an entire property, the adverse possessor only obtains possessory rights to the parcel in which they have made their claim

## STEP 2: HAS TIME BEGUN TO RUN? [LAA s9(1)]

This occurs if;

- + The person entitled to possession has discontinued their possession

OR

- + The person entitled to possession has been dispossessed by another

## STEP 3: FACTUAL POSSESSION & ANIMUS POSSIDENDI [LAA s14(1)]

### FACTUAL POSSESSION

Requires an appropriate degree of physical control over the land (*Buckinghamshire*)

The possession must be; (*Mulcahy v Curramore*)

- + **Open, not secret**

Unconcealed in a manner that allows it to be noticed by a documentary owner had they been reasonably careful of his/her interest

- + **Peaceful, not by force**

Uninterrupted, Exclusive, Continuous

- + **Without permission of the true owner**

Consideration should be given to; (*Mulcahy v Curramore*)

- + Character and Value of the property

- + Suitable and Natural Mode of Use

- + Conduct expected of a proprietor

*“Broadly what must be shown as constituting FP 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”* (*Whittlesea*)

### ANIMUS POSSIDENDI

Requires an intention to possess the land in exclusion of the world at large (*Buckinghamshire*)

- + An intention to own the land is not required (*Pye; Whittlesea*)

## STEP 6: HOW TO STOP ADVERSE POSSESSION

The individual with the better title can assert their superiority by;

- + Instituting court proceedings
- + Making a peaceful but effective entry onto the land, that is enough to constitute retaking possession [LAA s16]

The adverse possessor can acknowledge the existence of a superior title [LAA s24(1)]

- + Must be in writing and signed by the individual making the acknowledgement [LAA s25(1)]

### Part Parcel Claims

An individual can apply for an injunction to stop the adverse possessor

HOWEVER

There are times when the court will award equitable damages instead [SCA s38]

*(Shelfer v City of London Electric Lighting Co; Jaggard v Sawyer)*

- + Injury to plaintiff's legal right is small
- + Injury is capable of being estimated in money
- + Injury is capable of being adequately compensated by a small monetary payment
- + Injunction would be oppressive to the defendant

## PRINCIPLES OF ADVERSE POSSESSION

### PERRY v CLISSOLD [1907]

C took possession of land in 1881 by fencing it off. C remained in possession, conducting his business by letting the land to different tenants and paid all relevant council taxes. In 1891, notice was given to C that the land was being compulsorily acquired to build a school but nothing was done and C died shortly after. In 1902, C's estate claimed compensation for the land as at the time of the acquisition notice, C was in possession. P argued that C was a trespasser.

**Issue:** Was C the possessor of the land and therefore entitled to compensation?

**Held:**

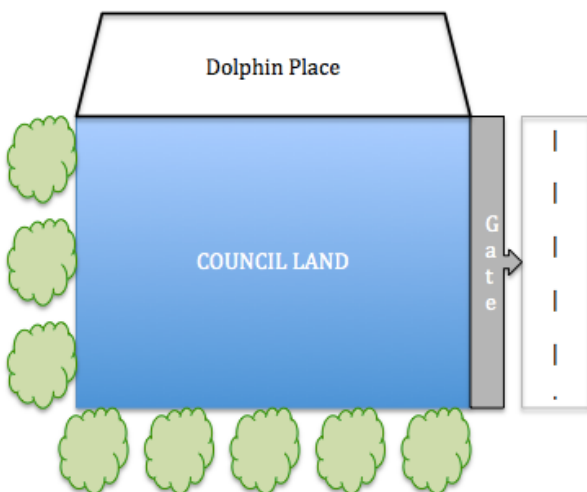
Court ruled in favour of Clissold

+ A person in possession of land as its owner and exercising peaceably the ordinary rights of ownership (an adverse possessor) has a perfectly good title against all the world but the rightful owner.

+ If the rightful owner does not come forward and assert his title by process of law within the period prescribed by the provisions of the *Statute of Limitations* (Imp) applicable to the case, his right is forever extinguished, and the possessory owner acquires an absolute title.

+ P is unable to raise 'jus tertii' (unable to establish the title of a third party not privy to the action in order to defeat C's claim to possession)

### BUCKINGHAMSHIRE COUNTY COUNCIL v MORAN [1989]



**1955:** B acquired documentary title to a plot of land where the only access was through the eastern boundary road, or Dolphin Place (no fence between council land).

**1970:** M purchased DP from W who had maintained B's land (4 years) by treating as the garden to DP. M locked the eastern fence, restricting access.

**1975:** M said W had informed him that B had given W the right to use the land, which B rebutted.

**1985:** B issues a writ claiming possession