

## Adverse Possession

1. **State the Law:** Documentary title holder, remains subject to the rights of adverse possession (s 42(2)(b) *TLA*). Under s 8 and 18 of the *LAA*, after 15 years from the date on which the right of action accrued to AP, the title of the documentary owner of the land will be extinguished and they will be barred from recovering their land.
  - a. Successive periods of AP can be aggregated (*Mulcahey v Curramore*)
2. **Accrual of right**
  - a. Under s 14(1), this right does not accrue unless there is adverse possession
    - i. Requires factual possession and animus possidendi
  - b. When right accrues depends on nature of interest + when AP started
    - i. Present interest: s 9(1): accrues date of dispossession/discontinuance
    - ii. Future interest:
      1. s 10 (1): the day on which the interest is vested in possession
      2. s 10 (2): has 15 years from APs accrual of right or 6 from their own accrual of right to recover, whoever is longer
    - iii. Landlord: end of the term of lease
      1. Periodic tenancies: end of first year or other period, if revived after first period, accrues on last date of rent payment (s 13(2) )
      2. Tenancy at will: deemed to end after 1 year (s 13(1))
3. **Factual Possession:** must have had factual control, single and exclusive possession
  - a. Physical control
    - i. Presence of a fence and its purpose (*Abatangelo; Moran*)
      1. Although is not absolutely necessary (*Abatangelo*)
    - ii. Have they dealt with the land as an owner would have? Maintenance, farming, socialising etc. (*Moran; Pye; Abatangelo*)
    - iii. Who has keys (*Pye*)
    - iv. Vehicular access? (*Pye; Abatangelo*)
  - b. Open and not secret
  - c. Peaceful and not by force
  - d. Adverse and not by consent
4. **Animus Possidendi:** intention on one's own behalf to exclude the world at large so far as is reasonably practicable and so far as the law will allow. Question of fact to be decided on the circumstances of the case and with reference to the nature of the land.
  - a. Personal statements may be relevant (*Abbatangelo*)
  - b. Payment of rates: shows intention to create title in themselves
  - c. Enclosure of the land strong indicator (*Abatangelo; Moran*)
  - d. Intention to possess for the time being to the exclusion of all others (*Moran*)
  - e. Intention of true owner relevant to extent it affects the AP's intention (*Moran*)
  - f. Casual acts of trespass for special benefit or possession? (*Abatangelo*)
  - g. Willingness to pay may not be inconsistent with intention to possess (*Pye*)
5. **Discontinuance:** under s 14(2), if the AP discontinues possession the right of action does not accrue unless the land is again taken into AP. Need a lot of evidence to show (*Whittlesea*).
6. **Aggregation:** successive periods of AP by can be aggregated (*Mulcahey*)
  - a. Abandonment by initial AP followed by AP: unless there is no gap, time restarts
  - b. APs who transfer their interest: can be aggregated, last AP has only interest
  - c. APs who dispossess each other: can be aggregated if no gaps, prior possession
    - i. Prior possession = better right (*Mabo*), cannot raise jus tertii (*Perry*)

7. **Stopping Time:** formal re-entry not enough (s 16 *LAA*), need to resume possession or seek a formal declaration.
  - a. Acknowledgements of true owner's title restarts time (s 24 *LAA*)
    - i. Must be to true owner and signed by AP (s 25)
    - ii. Binds successors in title (cannot argue that time was AP) (s 26)
8. **Remedy:** if AP found not to have extinguished title, true owner entitled trespass remedy
  - a. Equitable damages will only be granted where: (*Jaggard; Break Fast Investments*)
    - i. Injury to true owner's rights are small
    - ii. Value is capable of being estimated in money
    - iii. True owner can be compensated adequately by money payment
    - iv. It would be oppressive to AP to grant an injunction
      1. Judged from date the case is heard

This is a difficult standard to meet (*Break Fast Investments*)
9. **Torrens Land:** holds rights subject to rights of AP (s 42(2)(b) *TLA*), and can register their title after limitation period expired (s 60-62 *TLA*)d

NOTE:

- s 7 *LAA*: Crown land not affected by adverse possession
  - s 8: if subsequently sold, right of action accrues when land is transferred
- s 32: Crown can gain title to land through adverse possession
- 7A: no AP against PTV, Vic Rail, 7AB: water authorities, 7B: councils

dominant tenement owned by the holder of the easement. Easements in gross can exist only under legislation.

### Scope and Construction of Express Covenants in Easements

If the characteristics of an easement are not satisfied, the parties may still have an effective contract. If an easement does exist, there may be arguments as to its scope – what the holder of the easement is permitted to do. The nature of the right may be subject to interpretation. For example, a right of way may include solely pedestrian traffic or pedestrian and vehicular traffic.

### ***Cargill v Gotts***

Facts: An easement began to be used in 1927, by P, a farmer who rented a 400 acre property. The property was used as a cattle farm, so the farmer needed access to water to care for his stock. They began to take water from a millpond (pool hived off from a river) 500 yards from southern boundary of farm. P eventually bought the farm. While he was a tenant, P and his employees took a water cart down to millpond, which held 400 gallons, and fed the cattle. However, once P bought the farm he decided to crop it, and needed water to spray and irrigate. As a result, P needed more water. By the 1950s P was using a bowser with capacity of 900 gallons. By the 1970s, P was using 4000 gallons of water per day instead of 200. In 1977, the millpond comes into ownership of D, who forcibly stopped P's employees from coming onto land and taking water. P wanted declaration that he had an easement to draw land from the millpond.

Issue: Did P have an easement which allowed him to take 4000 gallons of water per day?

### Court of Appeal

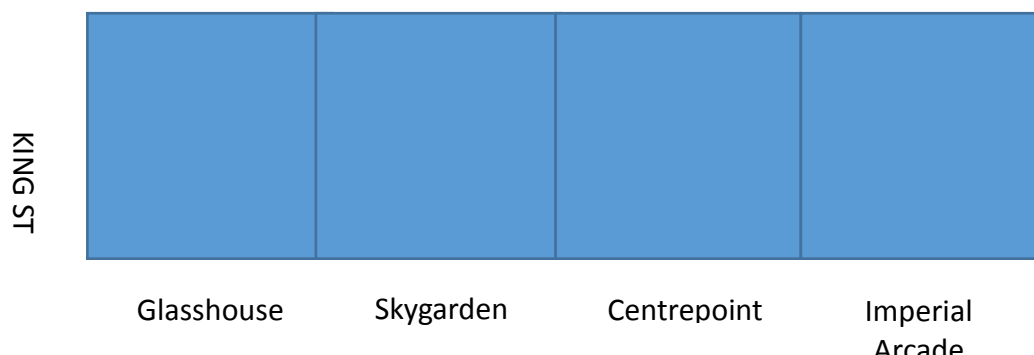
- The right which P had acquired in 1920s was to take water from the millpond for all farming purposes, and had ripened by long user into an easement
- The subsequent change in farming methods like crop spraying and increased quantity of water was not sufficient to destroy or alter the nature of the right
  - It was still an agricultural user, and the right asserted by P in the 70s was no different to the right he asserted in the 20s
- There had not been a significant change in the dominant tenement
- Water used for crop spraying is just as much used for agricultural purposes as water used for bullocks, and the fact that more water may be required for crop spraying than for watering bullocks is not sufficient to destroy or alter the nature of the right asserted or the easement acquired

Outcome: the scope of the easement allowed P to take as much water as he needed.

If the DT had been subdivided, for example if 50 apartment users instead of one family had been using the water, may have constituted too much of an interference and become a possessory right.

### ***Perpetual Trustee v Westfield Management***

Facts: The owner of GlassHouse (GH) granted the owner of SkyGarden (SG) a right of carriageway. It allowed SG to "go, pass and re-pass at all times and for all purposes to and from SkyGarden," giving them access to King St.



GH featured a vehicular ramp that went under GH, allowing access to King Street. GH was then bought by Perpetual Trustees, and SG was bought by Westfield. Westfield also acquired Centrepoint and Imperial Arcade. W intended to utilise the right of way under GH for the benefit of all three sites. It argued the easement allowed it, as the owner of SG, to allow others to gain access to King St from GH. GH argued it substantially changed nature and burden of the easement

Issue: Did the easement entitle W and others authorised by W to pass across GH to gain access to King St and back again?

High Court of Australia:

- Need to look at the wording of the easement
- The phrase “to go, pass and re-pass” means that the benefit of the easement was access to SG and from SG over GH, this does not include access to and from more remote land that could only be reached by going across sky garden
- If the original parties had intended the easement to extend to people who owned the other sites, should have used the phrase “to and from and across SG”
- The wording suggests SG was the place in which you started or terminated your access if coming in from King St
- Other factors that also suggested decision was correct one
  - Conditions and arrangement specified in the easement
    - The cost of maintaining/repairing the carriageway would be borne equally of grantor and grantee
      - If HCA found for W, allowing 3 other blocks to use it, GH would still be required to bear 50% of maintenance - this is unfair
    - No provision in insurance for loss/damage by users other than SG or GH
- W tried to argue court should admit extrinsic evidence of the factual matrix surrounding the original grant, including what the original contracting parties had in mind
  - It was known to the original parties that the owner of GH was seeking planning approval to provide access to CP and IA
  - W: this would bolster argument that it should be widely construed
- This evidence should not be accepted: the easement was registered, and anyone wanting to buy the land would chase up and read the document
  - They should not be expected to know anything extrinsic to the document
- The register should be conclusive, all the buyer should have to do is read the document
  - *If it was the original owners disputing, intentions may be relevant*

Outcome: allowing access to IA and CP was outside the scope of the easement.

*Distinguishing Easements from other Rights and Interests*

**Lease:** Distinguishing feature between an easement and lease is that no lease can exist unless the tenant is given a right of exclusive possession. An easement must not amount to exclusive possession of the servient tenement, although this may not be the case for airspace (*Berger Bros v Bursill*). This is a clear distinction in theory but can be difficult to establish on the facts.

**License:** Unlike licenses, easements must be created at common law by deed of grant (actual, implied, presumed), require a dominant tenement where licenses can exist in gross, and cannot grant a general right to occupy neighbouring land. Rights which fail as easements may be deemed to be contractual instead.

**Restrictive Covenant:** There is significant overlap between easements and restrictive covenants – certain rights can be equally protected by both laws. Restrictive covenants have been referred to as an extension of the doctrine of negative easements. They both also require a dominant and servient tenement and the right must touch and concern the land. Despite these similarities, they are distinct.

- Easements can exist in law or equity, whereas restrictive covenants are purely equitable
- easements may be acquired by prescription
- Easements are broader in scope in that they can give a right to enter the servient land
- Restrictive covenants are broader in scope in that they can be used to safeguard certain amenities (eg right to view) which cannot be protected by easements

**Natural Right:** Fee simple owners acquire natural rights: a right of support for land by neighbouring land (not including buildings), and a right to water flowing naturally in a defined channel or from higher to lower ground. For example, if a neighbour excavates and causes land to subside on your property, you have a right of action. Both of these are narrowly construed and, unlike easements, exist by operation of law and do not have to be specifically acquired.

**Profit a Prendre:** profit a prendre gives the right to come onto someone else's land and take something natural off of it, an easement does not necessarily entitle the holder to take something, which is the essence of a profit a prendre. Profit a prendre does not require a dominant tenement.

### Common Types of Easement

- Right of way
- Right of drainage over neighbouring land
- Rights to support
- Rights of light
  - These can no longer be created: *Property Law Act 1958* s 195
- Rights of air
- Fencing easements
- Parking
- Use of toilets
- Statutory easements

### Creation of Easements

Novel easements can be created, but courts are less likely to recognise negative easements, as it is more intrusive to stop the owner of a ST from doing something on their own land.

#### *1. Express creation*

Legal easements generally require a deed (general law land) or registration (Torrens system land).

Equitable easements generally require a specifically enforceable contract. This needs to be written, or if oral, part-performed. They can also arise by estoppel. Moreover, someone with an equitable fee simple is only able to create an equitable easement.

#### *a. Creation of easements by express grant*

A grant implies that something is given by the owner of the ST to the owner of the DT.