

## TOPIC 6: ADVERSE POSSESSION

Definition: factual possession and an intention to possess create a presumption and precarious fee simple in the possessor (even if wrongful), against the whole world except for someone with a better right to possession (*Great Western Railways*, Toohey J in *Mabo*)

### Concept of Possessory Title

- Significant example of original acquisition
- Title in land is relative, and will be assessed according to others; multiple people can have a legal estate in land at one time
- Under CL, 'possession of land gives rise to a title which is good against all the world except a person with a better claim' (*Toohey J, Mabo*)
- Person in possession is presumed to be there lawfully i.e. to have title (fee simple) until this is disproved (*Toohey J, Mabo*)
- The title of a possessor is enforceable against the world, but is weaker than the title of specific people:
  - Documentary title holder
  - Earlier possessors
- A later possessor doesn't have the defence of *jus tertii* *Perry v Clissold*
  - *Jus tertii*: if a third party to the proceedings has a better right to the land than either the plaintiff or the defendant, the plaintiff cannot succeed even if he or she has a better possessory interest than the defendant
  - (formerly used as a defence)

### Adverse Possession

- Actual possession of land without licence of true owner
- Must show that she has taken possession and that the owner no longer has true possession
- Adverse possessor does not have title until they make a claim
- Related to human rights > person must not be deprived of their property
- Allows for the efficient use of land

General Statement: where a person, who has possession of a piece of land, holds that land in possession for a sufficiently long period of time, the rights of the true owner to bring a real action and recover the land may be extinguished.

### Intro

1. Identify who has the best title *prima facie*
2. Define: if a possessor has possessed someone's land for 15 years adverse to the owner, then the dispossessor will adversely possess that land (or part of the land) and the owner will not be able to recover the land, extinguishing the title of the documentary title ss 8, 18 LAA
  - For goods/chattels, the limitation period is 6 years s 5 LAA
3. If there is a new person to the contract regarding the property, then per s 42(2)(b) TLA they will be subject to adverse possession

### Step 1: When Can an Adverse Possessor Make a Claim?

#### 1. Owner needs to be out of possession

s 9(1) LAA - Right to bring an action to recover land has accrued when the true owner or person in possession is dispossessed or has discontinued possession

**Dispossession** = true owner, or a person with possessory interest has been driven out of possession by another

**Discontinuance** = true owner, or a person with possessory interest has abandoned possession

#### 2. Squatter must be in adverse possession s 14(1) LAA

- If it is proved that a person is in possession of land without licence of the owner, that possession is adverse.
  - I.e. possession cannot be adverse if it is done with lawful title or under a licence. C.f. if a licence has been terminated *Pye*

Possession is exclusive (*Buckinghamshire*; *Pye*). Owner and possessor cannot both be in possession at the same time.

- In cases where neither can demonstrate a “single and exclusive possession”, the owner will be held to have possession.

## Step 2: Is the land capable of being subject to an adverse possession claim?

### Limitations of Actions Act 1958 (Vic)

No title of adverse possession against:

The Crown	s 7	Council	s 7B
Vic Rail Track	s 7A	Owner's Corporation	s 7C
Water Authority	s 7AB		

## Step 3: Is there factual possession?

A person claiming title to land by adverse possession must prove factual possession for the relevant period of time *Pye*

### 1. FACTUAL POSSESSION

- Documentary titleholder is deemed to be in possession until there is evidence to the contrary (onus on proving possession is on the APor)
- Acts of possession must show that the adverse possessor has an appropriate degree of exclusive control over the land to the exclusion of all others
- AP and the owner cannot both be in possession at the same time
- Possession must be “Open not secret; peaceful, not by force; and adverse, not by consent of the true owner”  
Brown CJ in *Mulcahy*
  - Open: user must be unconcealed, such that possession would be noticed by a documentary titleholder reasonably careful of his/her interests.
  - Peaceable possession: uninterrupted, exclusive and continuous possession. Owner shouldn't be frightened to enforce their rights (e.g. because of the threat of force).
- Look at the nature of the land itself and how it is commonly used
  - Dealing with the land as an occupying owner would deal with it *Abbatangelo, Perry*
  - The acts necessary to constitute possession will differ, depending on the nature of the property. Courts ask: has the possessor been using the land the way an owner would? *Pye*
  - Possession over part of land may in circumstances be possession of all land (very fact dependent) *Abbatangelo*
  - Still need to show control of whole parcel of land
  - Does not matter if the use does not change the appearance of the land *Abbatangelo*
- There must a continuous adverse possession - a question of fact s 14(2) LAA
- Examples:
  - Paying rates, building/structural work, physical control *Perry, Buckinghamshire*
  - Fencing or enclosing land, gardening and general maintenance - especially without financial contribution *Abbatangelo*
  - Grazing cattle and holding keys to the gate *Pye*
  - Having key while owner could not access/exclusive control *Pye*
  - Bathtub as trough, installed fence, grazed land, play equipment *Abbatangelo*
  - Fence *Moran*

## Step 4: Is there intention to possess?

A person claiming title to land by adverse possession must prove intention to possess, clear and unequivocal acts regarding intention to possess to the exclusion of others *Pye*

## 2. INTENTION TO POSSESS

- Assessed objectively
- Must intend to exclude the whole world, including the true owner *Abbatangelo*
- An intention to own land is not required *Pye, Abbatangelo, Buckinghamshire*
- Enclosure of land is prima facie evidence of intention to possess eg. new lock *Buckingham*
- Unequivocal acts (unambiguous) eg. fencing, paying rates
- Owner's intended use of the land is irrelevant *Pye*
- If the person enters as a trespasser, need compelling evidence of intention to possess *Abbatangelo*
- AP's statements of intention are self-serving and should be treated with caution, but can be relevant when taken with other evidence (not enough on their own) *Abbatangelo*

### Step 5: Has there been 15 years of adverse possession?

#### Limitation Period for Recovery of Possession of Land

##### *Limitation of Actions Act*

**s 8 and s 14(1)** Action to recover land: No action can be brought to recover land 15 years from the date on which the right of action accrued to owner, statute is barred

**S 9** Right of action starts at the date of dispossession or discontinuance

**s 14(2)** If there is a gap in possession, time will cease running. The right of action shall no longer be deemed to have accrued and no fresh right of action be deemed to accrue until the land is again taken into adverse possession

**s 18** At the expiration of [15 years] the title of the true owner/person wanting to recover land is extinguished.

##### *Mulcahy v Curramore*

- The true owner's title can be distinguished when there is a series of adverse possessors not deriving title from each other and who have been in adverse possession for a continuous period
- Permissible to aggregate successive periods of adverse possession
- Adverse possession must be "open not secret; peaceful not by force; and adverse, not by the consent of the true owner."
- Time does not stop running with successive possessors but it needs to be proved that there was no gap in ownership

#### > Aggregation of Time

1. If there is a gap, time will stop running - discontinuity **s 14(2) LAA**
2. Alienation by adverse possessor: if the recipient immediately goes into possession they may add the two periods together *Mulcahy*
  - But previous dispossession will have better rights than new one
  - Do not always assume if there is a new person, the previous dispossession has been adversely possessed - consider if previous person has actually maintained possession despite being away *Abbatangelo*
3. Successive adverse possessors: if the adverse possessor is dispossessed by another, the second adverse possessor can add the first period of adverse possession to her/his own - even if there is a gap between dispossession's possession and new person's possession, still continuance *Mulcahy*

#### > When Does Time Stop Running?

1. When there is a break in possession
  - **s 14(2)**: when adverse possession is discontinued, not fresh right of action will accrue until the adverse possessor is again in possession
  - However, leaving property for a while does not always break continuity - decide on facts *Abbatangelo*
2. Assertion of superior title by true owner

- Self-help: peaceable but effective entry onto land and resumption of possession with the intention to do so - mere formal is not enough
- Documentary claims and mere formal entry is insufficient s 16 LAA
- 3. Admission of superior title by adverse possessor
  - Must be in writing, oral admission is not enough *Buckinghamshire; Pye*
  - Signed by squatter or their agent s 25 LAA
  - Acknowledgement after the expiration of limitation period has no effect
  - Acknowledgment effect binds all other adverse possessor - their time also resets s 26 LAA
- 4. Abandonment of possession by adverse possessor
- 5. Part payment of a debt
  - Must be in writing

## Step 6: Extra Things to Consider

### Part Parcel Claims

- In Vic, AP claims may be made with respect to whole parcels or part parcels
- Part parcel claims are more common, and often result from encroachment by neighbours
- Clear acts of possession just over the boundary line can create AP (after 15 years) of a small section of land
- Courts will consider the following when deciding whether to exercise their discretion in granting an injunction (*Jaggard; Break Fast Investments*):
  1. If the injury to the P's legal rights is small, and
  2. Is capable of being assessed in money, and
  3. This is a small money payment, and
  4. It would be oppressive to the defendant to grant an injunction [look at whether D is acting honestly or not].
    - Oppression is assessed at the time the court is asked to grant an injunction
    - Relevant that P could have sought injunction earlier *Jaggard*
    - Relevant if D had acted in blatant and calculated disregard of P's rights *Jaggard*

### Action to recover land when possessor dies s 9(2)

- Deceased person was in possession on the date of his/her death
- Date of death is when time stops

### Future interests s 10(2)

- The general rule is that the right of action of the holder of a future interest accrues on the date on which the estate becomes a present interest.
- For holder of future interests where the previous interest was not of fixed duration
  - If life tenant is dispossessed or discontinues possession and AP comes in, time starts to run against life tenant
- When life tenant dies, holder of reversion or remainder gets the longer of two options to bring their action:
  - 15 years from when right accrued to life tenant (the adverse possessor took possession), or
  - 6 years from when interest came into possession

### Leases

- If land is leased, LAA treats the landlord as having a future right to the property
- 1. Fixed term lease s 10(1) LAA
  - Time starts to run against the landlord at the end of the fixed-term lease, when the landlord is entitled to possession
  - If during the fixed-term there is a squatter on the land, they are only adversely possessing the tenancy
- 2. Tenancy at will s 13(1) LAA
  - Time starts 1 year after the date of determination of tenancy = 16 years
- 3. Periodic tenancy s 13(2) LAA
  - Time starts at the end of the last rent period or payment received
- 4. Tenancy at sufferance

- If between sub-tenant and tenant, runs against tenant immediately
  - If between tenant and landlord when lease expires
5. Rent to 3rd Party s 13(3) LAA
- Rent is not paid to the landlord but to a third party
  - Time starts to accrue on the date of the first receipt of rent to the wrongful “landlord”
  - No rent is received by the rightful landlord
- Where a stranger dispossesses a tenant of land, the right to bring an action to recover land accrues to the tenant.
  - No right of action accrues to the landlord until the lease expires.
    - Landlord has the full limitation period from when his or her own cause of action arose in which to bring the action.

### Step 7: Conclusion

- If time has lapsed, right of owner to recover land is barred and title extinguishes ss 8, 18 LAA
  - Or s 10 if future interest, or s 13 is lessees adverse possessing lessor
- Disposessor’s precarious fee simple becomes real, full one
- Adverse possession does not distinguish rights over the land of third parties however
- Disposessor can apply to be registered as owners ss 60-62 TLA
- If adverse possession does not succeed, then consider whether owner can sue (injunction or damages)
  1. Past damages for trespass and injunction to prevent further trespass
  2. S 38 Supreme Court Act : courts can award damages in addition/in lieu of an injunction when entertaining a claim for specific performance