

## TOPIC 3: Adverse Possession

### 1 Property in land

- **Proprietary title:** documentary proof of title
- **Possessory title:** factual possession
  - Possession of land is sufficient to create an interest enforceable against the world except another who can show a superior right to possession: ***Perry v Clissold [1907]***
  - Prior possessory title will defeat subsequent possessory title: ***Asher v Whitlock (1865)***
    - A possessory title holder of land which is compulsorily acquired is entitled to obtain compensation: ***Perry v Clissold [1907]***
  - **Establishing possession of land: *Buckinghamshire County Council***
    - Possession of land consists of both a physical and mental element
    - Where no paper title to possession, must be show:
      - Factual possession; and
      - Intention to possess.

### 2 Title hierarchy

1. Common law estate
  - Highest and most enforceable form of land title. *In rem* proprietary title: enforceable against the rest of the world. Owner of estate is deemed to be in possession
2. Adverse possession
  - Absolute defence enforceable against paper title owner.
  - Only available against title holder “vested” in possession.
3. Bare possessory title holder
  - In possession but not adversely i.e. within limitation period
4. Casual acts of trespass
  - Without consent, no possession

### 3 Adverse possession

- When adverse possession is proven, the adverse possessor acquires an absolute defence against the paper title holder that allows the possessor to subsequently acquire title by registration or transfer

### **Rationale underlying adverse possession:**

- A paper title owner not checking who might be in occupation of their land and/or not enforcing fundamental ownership rights (use, enjoyment, exclusion) over their land for a significant period of time has been found to be sufficient to justify the consequences of adverse possession: *Marquis Cholmondeley v Lord Clinton (1820)*
- Title by adverse possession reduces the risks associated with conveyancing because defects are cured with time
  - Encourage effective management of land
  - Protect legitimate expectations of possessors
  - Preventing endless litigation
  - Recognising importance of possessory title
- Squatter's title?
  - 15 years mitigates the concept of unfairness or 'squatter's title'

### **Adverse possession against the Crown:**

- Adverse possession cannot be claimed against the Crown: **s 7, LAA**
  - This is because it is difficult for Crown representatives to fully manage and regulate large tracts of Crown land
- Includes Crown agencies: *Roads Corporation v Pearse [2012]* (Victorian Roads Corporation was an agent of the Crown, and therefore protected by the legislative immunity)

### **Against which owner?**

- Adverse possession **only available against the paper title owner** who is **vested in possession**
  - **Vested:** immediate right to possession or interest
- Limitation period does not begin to run against a **future interest holder** until possession vests and the interest becomes a full estate (right of action accrues upon vesting):
  - **Future interest** vest in possession when the holder of the life estate dies
    - If a future interest is **subject to a contingency**, it must be satisfied before title and possession can vest and any adverse period can commence

- **Leasehold:** Landlord's reversionary interest will vest in possession when the lease expires and the title is re-vested in possession in the landlord (next class)
- Adverse possession against **trust** property in land may be raised against the trustee and not beneficiary (does not carry vested right in possession)
  - Trustee cannot adversely possess the beneficial interest of beneficiary because trustee is in possession and subject to fiduciary duties
- **Rationale:** non-enforcement of AP against future interest holder reflects the fact that AP is a defence and that it only penalises paper title holders who actually hold a possessory entitlement

### Elements:

#### 1. Possession for 15 years (Vic)

- **S 8 Limitations of Actions Act 1958 (LAA)**
- Limitation period commences when –
  - Paper title holder is physically dispossessed (of house or portion of land); **or**
  - Paper title holder has discontinued possession and the occupier has assumed possession which is 'adverse' in nature
    - Don't have to prove paper title holder was ousted
    - Possession **without consent: JA Pye (Oxford) Ltd v Graham [2003]**
- **S 9 LLA** – Accrual of right of action in case of present interests of land
  - (1) (**on date of dispossession or discontinuance**) 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 his possession –

the right of action shall be deemed to have accrued on the date of the dispossession or discontinuance.
  - (2) (**on date of death**) Where –
    - (a) any person brings an action to recover any land of a deceased person, whether under a will or on intestacy; and
    - (b) the deceased person was on the date of his death in possession of the land, or, in the case of a rentcharge created by will or taking effect upon his death, in possession of the land charged, and was the last person entitled to the land to be in possession thereof –

the right of action shall be deemed to have accrued on the date of his death.

- (3) (**on date of assurance**) Where –
  - (a) any person brings an action to recover land, being an estate or interest in possession assured otherwise than by will to him or to some person through whom he claims by a person who at the date when the assurance took effect was in possession of the land or, in the case of a rentcharge created by the assurance, in possession of the land charged; and
  - (b) no person has been in possession of the land by virtue of the assurance –

the right of action shall be deemed to have accrued on the date when the assurance took effect.

- **S 14 LLA** – Right of action not to accrue or continue unless there is adverse possession
- **Exception: Future Interest Title Holders**
  - **Expediting adverse possession period against future title holder:**
    - **LAA, s 10 – Accrual of right of action in case of future interests**
      - AP in possession for **15 years** from when time starts running against preceding interest holder; **OR**
      - **6 years** from the date when possession vests with the future interest holder
      - Does **not** apply to leases

## 2. Factual possession

- Onus on possessor to prove
- The AP has been dealing with the land in question as an occupying owner might have been expected to deal with it: ***JA Pye (Oxford) Ltd v Graham [2003]***
  - Depends on circumstances: ***JA Pye***
  - Look at nature of the land and the manner in which land of that nature is commonly used or enjoyed: ***JA Pye***
- Over entire claimed area
  - However, it is not necessary for an owner to show that physical use has been made of every section – acts of possession done on parts of a parcel of land may be evidence of possession of the land as a whole: ***Higgs v Nassauvian [1975]***
- Distinguish possession from use: ***KY Enterprises v Darby [2013]***

- **Mere use** of the land which falls short of possession will be insufficient: ***Whittlesea City Council v Abbatangelo (2009)***
- The person in actual possession is in charge of the land
- Permission to use is not AP
- **a) The possession must be, 'open, not secret, peaceful, not by force and adverse, not by consent of the true owner': *Mulcahy v Curramore Pty Ltd [1974]***
  - Depends on individual facts of the case: ***Murnane v Findlay [1926]***
  - Where not committing mere acts of casual trespass, but has a deliberate purpose to exercise possession and dominion over the land (see intention to possess below): ***Bank of Victoria v Forbes (1887)***
  - **Significant factors:**
    - **Pays rates and taxes: *Bank of Victoria v Forbes (1887)***
    - **Warning people off land is treated as an act of possession: *Shaw v Garbutt (1996)***
- **'Open and peaceful':**
  - The construction of permanent fencing of the land will generally satisfy this requirement: ***Petkov v Lucerne Nominees (1992)***
  - Possession must have occurred without violence
- ***Whittlesea City Council v Abbatangelo (2009)***
  - Sufficient degree of exclusive physical control
  - Depends on the circumstances
    - Nature of the land and the manner in which land of that nature is commonly used or enjoyed
    - Uses the land as an occupying owner might be expected to
- **b) Without consent of the paper title holder: *Bridges v Bridges [2010]***
  - If paper title holder has consented to the possession, it can no longer be classified as adverse in nature and it may revert to a licence or possibly a lease: ***Bridges***
  - No AP if consent is actual or implied: ***Phillips v Marrickville Municipal Council [2002]***
  - **Initial consent** does not prevent a continuation of possession without ongoing consent, from being AP: ***JA Pye (Oxford) Ltd v Graham [2003]***

- Time will stop if:
  - Issue a service of a summons
  - Going to the land and peacefully ejecting adverse possessor
  - Get an admission of title from adverse possessor
  - Adverse possessor abandons land

### 3. Intention to possess (*animus possidendi*)

- Intention to **exclude** the world at large, including the paper title owner: *JA Pye (Oxford) Ltd v Graham* [2003]
  - i.e. to exercise exclusive control: *Ocean Estates v Pinder* [1969] (does not require **conscious** intention to exclude true owner: *JA Pye*)
  - Whether intention exists will depend upon a holistic examination of the circumstances. Needs an intention to exercise exclusive possession in a manner akin to the true owner: *JA Pye v Graham* [2003]
  - Does **not** need an **intention to own** or acquire ownership, just to possess: *Moran* (1988)
  - **Willingness to pay** if asked or **willingness to enter into future agreement** should the paper title holder ask is still AP if not inconsistent with them intending to possess the land in the meantime as demonstrated by their acts of exclusive possession: *JA Pye v Graham* [2003]
  - Subjective statements by AP must be treated with caution, as they may be self-serving, however they may be of use in conjunction with other circumstances: *Whittlesea City Council v Abbatangelo* (2009)
- Made this intention clear to the world: *Whittlesea City Council v Abbatangelo* (2009)
- Intention generally established where **acts** of exclusive control of the land can be proven: *Seddon v Smith* (1877)
  - **Enclosure** prima facie indicates intention to possess: *George Wimpey & Co Ltd v Sohn* [1967]
  - Not necessary for all visitors to be excluded, but must not prevent the possession from being exercised exclusively: *Petkov* (1992)
  - No **locks/prohibition** of access to area may not be exclusive possession: *Riley v Pentilla* [1974]

*JA Pye v Graham* [2003]

Facts –

- The Grahams took possession of valuable grazing land under a grazing licence which came to an end in 1983
- They unsuccessfully tried to negotiate a new licence
- They were requested to vacate the land
- Continued to possess for entire limitation period
- Did not pay rent
- Also carried out other acts not permitted under the previous grazing licence

**Issue –**

- Did the possession of the Grahams amount to adverse possession?

**Held – Successful AP**

- Grahams used the land as their own for the relevant period between 1984 and 1997 and during that time the appellant did nothing on the land
- Grahams did whatever they wanted to do without regard to the previous grazing licence and treated the land in a way that they thought best
- They remained on the land expressly **knowing** the licence was not renewed. Demonstrates clear intention to occupy land in manner of paper title owner
- Grahams, therefore, met the requirements of adverse possession