

POSSESSION

(1) Possessory title

1. **Define:** Possession creates a presumptive 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*)
 - a. No defence by wrongful possessor to plead jus tertii (*Perry*)
2. Prior possession > dispossessor's possessory title (*Mabo*)

(A) Is there factual possession?

1. An open act that is no secret, without consent, peaceful & adverse to owner (Brown CJ in *Mulcahy*)
2. **What kind of property is it?**
3. Dealing with the land as occupying owner would deal with it, and no one else has done so (*Whittlesea*; *Perry*)
 - a. **Appropriate degree of physical control** (*Buckinghamshire*)
 - b. Maintaining land (*Perry*; *Buckinghamshire*)
 - c. Maintaining fences esp. without financial contribution (*Whittlesea*)
 - d. Having key while owner could not access it; exclusive control (*JA Pye*)
 - e. Paid taxes (*Perry*)
 - f. **Even if** no change in appearance of land (*Whittlesea*)
4. Harder to show if:
 - a. Owner still occupies or visits

(B) Is there intention to possess? [Objective]

1. Per *Whittlesea*, must intend to exclude everyone else
2. Even if they acknowledge future intentions of owner, only need intention to possess at time of possession (*Buckinghamshire*)
3. Willingness to pay irrelevant (*Pye*) unless written and signed (See LAA)
4. Need not show an intention to OWN (*Pye*; *Whittlesea*)

Conclusion

1. Past damages for trespass + injunction preventing it happening again
2. **S38 SCA**: courts can award damages in addition/in lieu of an injunction when entertaining a claim for specific performance
 - a. **Bars of specific performance?**
 - b. Prima facie an injunction (*Break Fast*); OR
 - c. Damages (incl. equitable damages) if, per *Shelfer*:
 - i. Injunction would be oppressive on D (*Jaggard*)
 1. Consider financial position
 - ii. P's injury was small (*Jaggard* cf. *Break Fast*)
 - iii. Can be estimated in money (*Jaggard*)
 - iv. Money would be adequate (*Jaggard*)