

## TOPIC 5: POSSESSION & ADVERSE POSSESSION

### \*\* ASK: What does X want and why?

E.g. X owns the land being possessed by Y. X wants to assert his documentary title and argue he has the best interest in the land (*Perry v Clissold*; *Mabo*). Y will seek to argue he now has the best title by virtue of AP (s 8 + 18 LAA).

**General principle** = the possession of land creates an interest in the possessor that is *enforceable against the whole world except someone with a superior right to possession* (such as documentary title or prior possession) (*Perry v Clissold*; *Mabo*).

### Jus Tertii – 3<sup>rd</sup> parties with superior rights to possession

A Defendant to an action for possession cannot defeat P's claim by pointing to a better claim by a 3<sup>rd</sup> party, unless they are privity to the action (*Perry v Clissold*). Courts are concerned with the relativity of title.

- *Clissold*: C took possession of vacant land, fenced it off + rented it out. True owner not known. Crown wanted to acquire land + C's estate sought compensation. Crown argued C not entitled as there was a superior 3<sup>rd</sup> party. Privy Council found for C as 3<sup>rd</sup> party not privity + C had relatively better title. Must rely on strength of OWN title.

**NB.** Possession confers the same rights in respect of goods (*Jeffries v GWR* per Lord Campbell).

### RELEVANT LIMITATION PERIODS:

#### Limitation Period for Recovery of Chattels

**LAA s 5:** P has six years from the date on which wrong occurred to commence an action in contract or tort.

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

**LAA s 8:** No action shall be brought by any person to recover any land after the expiration of 15 years from the date on which the right of action accrued to him or if it first accrued to some person through whom he claims, to that person.

- E.g. A is the registered owner of Blackacre. A is dispossessed by X in 2005, so A will be statute barred in 2020. A sells BlkA (which is in AP) to B in 2013. B will also be statute barred in 2020 (doesn't start fresh).

### COMMENCEMENT OF THE LIMITATION PERIOD – PRESENT INTEREST:

#### Set up the law and facts

1. \_\_\_\_\_ is the registered owner (legal title holder) and is entitled to the land, unless there are rights of adverse possession
2. As per **s 42(2)(b) TLA**, title is acquired subject to any rights of AP
3. The squatter will seek to show **15 years of continuous possession**, after which [the owner's] right to sue for recovery of land is barred + [the owner's] title will be extinguished (**s 8 + s 18 LAA**).
4. This doctrine applies to both general law and torrens system (**s 42(2)(b) TLA**) land (not Crown land).

### When does time start to run?

#### EXCEPTIONS:

##### Public Crown Land

**LAA s 7:** Cannot acquire title to public, Crown land by adverse possession, even if 60 years has passed (old law). Time does not run against the Crown – can't extinguish title, as can't be expected to monitor usage of all their land (too expensive and time consuming). Otherwise would whittle away community assets ☹

- NB. If X is adversely possessing Crown land, and Crown alienates the land into the private sector, date of AP starts when Crown alienates land to some other person (as per proviso in **s 8 LAA**).

- ❖ **LAA s 7A:** No title by adverse possession against Public Transport Corporation and Victorian Rail Track
- ❖ **LAA s 7AB:** No title by adverse possession against water authorities, e.g. catchment areas
- ❖ **LAA s 7B:** No title by adverse possession against Councils – e.g. can extend fence out into council lane way, but time won't start running and won't acquire title after 15 years.

### Common Property

**LAA s 7C:** The right, title and interest of an owners corporation or an owner of a lot affected by the owners corp, in land which is common property is not affected by adverse possession by another owner of a lot, irrespective of the period of possession. Can't extinguish owners corp's title over common property!

### **SPECIAL CASES:**

#### **(a) Future Interests**

**s 10 LAA** recognises that a reversioner/ remainderman can't do anything until the life estate holder dies as no right to possession (and no right of action to recover land accrues) until they die (**s 10(1) LAA**) – thus, gives future interest holder the greater of 2 possible time limits. Not fair otherwise!

Per **s 10(2) LAA**, time starts running either:

- 15 years from the date the right of action accrued to life estate holder (date AP took possession); or
- 6 years from the date of the death of the life estate holder,

Whichever period is **LONGER**.

#### **(b) Leases**

[CHECK – is there a lease? Exp + certainty of duration?]

#### *Is the tenant in adverse possession vis-à-vis the landlord?*

- **Fixed term lease:** Time doesn't start running until the end of the fixed term lease as that's when the LL has the *right to re-gain possession* and the CoA will accrue (**s 10(1) LAA**). LL will have 15 years.
- **Oral periodic tenancy:** CoA accrues to the LL at the end of the first period unless the tenant pays rent (**s 13(2) LAA**). Possession becomes adverse if tenant stops paying rent. Rent is sufficient acknowledgement of superiority.
- **Tenancy at will:** time starts running one year after a tenancy at will is created, unless determined earlier (**s 13(1) LAA**).
- **Tenancy at sufferance:** time starts running *immediately* because it's not really a tenancy!

#### *Where a stranger goes into adverse possession of land under a lease:*

- Tenant has current right of possession so can bring an action straight away
- LL cannot bring an action straight away as no right of possession. LL's possession is governed by **s 10(1) LAA – no right until lease is over and estate falls in possession**
  - NB. LL is not governed by s 10(2) – does not deal with leases as ...'not being a term of years absolute'
  - LLs are very well protected – have **15 years after lease expires!** Thus, **time starts to run in \_\_\_\_\_**.
- If tenant is paying rent to a 3<sup>rd</sup> party, position is different (**s 13(3) LAA**) ~ if 3<sup>rd</sup> party is wrongfully claiming entitlement to rent and LL is thus not receiving any rent, time is running against the LL (i.e. right of action accrues) from the time the \$\$ is first wrongfully received.

\*\* If it doesn't pass as a lease, may be a contractual licence > time starts running as normal!

### **COMMON SCENARIO:**

#### **Is the Land in the Adverse Possession of [Z]?**

**AP** = the extinguishment of a doc title holder's interest, and the acquisition of a fee simple title by a person in AP (**Whittlesea**).

- *Start with AP1, then move onto AP2 – analyse separately but will be overlap.*