

# LAWS4104 PROPERTY LAW

## I Adverse Possession

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Possession gives rights to land

- Possession of land gives rise to a proprietary interest
- Possessory title good against all the world except the person with superior title (*Asher v Whitlock*)
- Possessory title can be inherited, devised or conveyed (*Asher v Whitlock*)
- Defendant can't defeat possessor's right by setting up a 'jus tertii' defence (*Asher v Whitlock*; confirmed in Australia in *Perry v Clissold*)

### Elements of adverse possession

#### STEP 1 – Rights of the True Owner

- True owner of land has superior right against all the world (*Asher v Whitlock*) subject to doctrines of abandonment and adverse possession
- Presumption that person with title has possession until otherwise proven (*Powell v McFarlane – Slade J*). Right to possession usually follows whoever has title to the land (*Clement v Jones*)
- However, true owner's title is extinguished if they abandon the property.
  - Abandonment entails: (*Re Jigrose*)
    - Factual possession – lose physical control; AND
    - Intention to abandon
  - Onus is on the party seeking to prove there has been abandonment
- If not abandoned, title can also be extinguished if there has been adverse possession.

#### STEP 2 – What is Adverse Possession?

*Limitation Act 2005*

- Commenced 15 November 2005
  - Where causes of action accrued before this date, the limitation periods contained in 1935 Act continue to apply (s4)
- Adverse possession limits a landowner's ability to assert a possessory right and is administered by a combination of common law and statute (*Limitation Act 2005*)
- Limitation Act s75:
  - A person's title is extinguished if
    - (a) they do not commence action to recover land before expiry of limitation period or
    - (b) after the court extends time no action to recover land occurs

*What are the elements of adverse possession?*

- 1) True owner discontinues possession (s66)
- 2) Adverse possessor has taken up possession (s3(6), s65)
- 3) Possession continues for 12 years (s19)

If these elements are proved, the true owner's rights are extinguished (s75)

#### STEP 3 – Dispossession of True Owner

There is a presumption that the person with title has possession until proved otherwise (*Powell v McFarlane – Slade J*)

*Has the true owner been dispossessed or discontinued possession (s66)?*

- *Buckinghamshire CC v Moran*:
  - Dispossessed → where owner has been driven out of possession by others
  - Discontinue possession → where owner leaves and others move in (comprises two acts)
- Apply and conclude whether there appears to have been a dispossession or discontinuance of possession.

#### STEP 4 – Establish Adverse Possession

*Following dispossession/discontinuance of possession, has adverse possession been taken up by some other person not entitled to possession (the ‘adverse possessor’)? (s3(6) and s65)*

- Must prove factual possession and intention to possess (*Powell*)
  - Onus is on adverse possessor to prove this (*Clements*)
- Actual possession by AP must continue for 12 years (s19)

#### STEP 5 – Establish Adverse Possession: FACTUAL Possession

*Is there factual possession?*

- Requires an appropriate degree of physical control (*Powell*)
  - Depends on:
    - Nature of the land
    - Manner in which land is commonly used or enjoyed
  - Possessor must be dealing with the land as an occupying owner may be expected to
    - True owners can get sick, go on holidays, etc. (*Mulcahy v Curramore*)
    - Maintaining land in away no one else has been
- Must be ‘open, not secret; peaceful, not by force; and adverse not by consent of true owner.’ (*Mulcahy*)
  - Open, not secret → cannot conceal adverse possession; it should be able to be noticed by a careful and reasonable title holder
  - Peaceful, not by force → a question of degree
  - Cannot be with consent of owner → e.g. lease
- Must be ‘single and conclusive possession’ (*Powell*)
  - Cannot AP if owner is still in possession
  - *Clement v Jones* (HCA)
    - Could not establish single and conclusive possession as true owner kept visiting often and exercised control
    - Grazing cattle on land was not an unequivocal act of possession as it did not illustrate exclusive possession
- \*Note that possession of a part of land deemed to extend to entire piece of land

#### *Examples of factual possession*

- *Buckinghamshire CC v Moran*
  - M (AP) used plot of land to grow plants, mow lawn, maintain hedges, and placed a lock on gate which only M had the key to.
    - Fence and lock → exclusive access and control of land; factual possession.
- *Cf. Powell v McFarlane*
  - P lived on farm and M owned adjacent land. M moved overseas and P used land for grazing cows. Actions did not amount to factual possession.
- *Whittlesea City Council v Abbatangelo*
  - Erected fence to enclose plot along with her land
  - Land used to keep animals, maintain trees and vegetation, mowed grass, removed weeds, and held social functions.

#### STEP 6 – Establish Adverse Possession: Intention to Possess (Animus Possidendi)

*Was there an intention to possess?*

- Clear intention to 'exclude the world at large, including the owner ... so far as it is reasonably practicable and so far as the processes of the law will allow.' (*Powell*)
  - Objectively infer intention from acts obvious to the world at large (*Powell*)
  - In own name and on own's behalf (*Powell*)
- Not an intention to exclude true owner but an intention to exercise exclusive control (*Petkov v Lucerne* – WA authority)
  - Adverse possessor's belief that they are the true owner is sufficient (*Wallis' Clayton Holiday Camp*)
  - Intention to occupy it as if it were their own (*JA Pye*)
- Intention not to own land but to possess it for the time being (*Buckinghamshire CC*)
- Acknowledgment of not owning land is not detrimental given there is an intention to exclusively possess (*Whittlesea v Abbatangelo*)

#### *Sufficient acts to infer intention*

- Exercising control over who can enter the property
  - Enclosure is the strongest possible evidence of the intention to possess (however not a universal principle) (*Seddon v Smith*)
    - Erecting fences and gates
      - Shows intention to possess land and exclude owner
      - But where enclosed land is owned by more than one person, it is not necessarily unequivocal (*Clement*)
    - Changing locks and holding one key (*Buckinghamshire CC*)
  - Acting in a manner that prevents true owner from exercising rights
    - Paying taxes and rates
    - Collecting profits from land
  - Leaving rights to the land in a will (*Asher v Whitlock*)

#### *Examples of intention to possess*

- *Buckinghamshire CC v Moran* (Slade J)
  - Lock on gate → unequivocal in showing intention to exclude world at large
- *JA Pye v Graham*
  - Lock on the gate → intention to exclude; not inconsistent that the possessor wanted to pay the owner for a lease
- *Whittlesea City Council v Abbatangelo*
  - Abbatangelo acknowledged land was untitle → no intention to own the land required, only an intention to possess and exclude
  - Kept animals on land, maintained trees and vegetation, mowed grass, removed weeds, held social functions

### STEP 7 – Has the Limitation Period run for the necessary length?

#### *Has the adverse possession gone on for 12 years? (s19)*

- S65 Limitation Act
  - Cause of action to recover the land cannot accrue unless the land is in adverse possession
- S19 Limitation Act
  - If 12 years pass since the cause of action accrues, the owner's right to sue for trespass/ejection is extinguished. By operation of s19 their title is lost.
- The 12 years must be 'continuous and uninterrupted' (*Mulcahy*)
  - If the AP abandons, the true owner's title will restore to its true force.
    - Abandoning possession before the LP expires leaves no clout on the TO's title:
      - Time resets
      - Mere non-use of the land is not evidence in itself of abandonment

#### *Has there been a series of adverse possessors?*

- Where there are a series of APs where none of whom have been in possession for 12 years, they may cumulate their years and extinguish the title of true owner. Two ways:
  - (1) Where adverse possessors 'claim through' each other (*Asher v Whitlock*)
    - Subsequent possessor can add earlier time to their own
    - Subsequent possessor has best case as previous possessors abandoned claims
    - As long as there is intention to possess and take possession in time that is reasonable in the circumstances ('continuous and uninterrupted')
  - (2) Where adverse possessors are 'independent trespassers' (*Mulcahy*)
    - Series of APs who do not derive title from each other, however cumulatively have been in AP longer than the limitation period
    - Statute will operate to extinguish TO's title, as long as possession is continuous and uninterrupted and there is no GAP (or gap is not too long).
      - Gap – depends on nature of the land
      - If there is a gap it would restore TO's rights
    - s65, ss2-3 → cause of action of subsequent independent trespassers accrues when first person's accrued as long as it does not cease to be in adverse possession.
- Summary:
  - Prior possessor has superior title against all the world except true owner provided:
    - They do not abandon
    - They don't convey or devise possessory title
    - Prior adverse possessor has not been adversely possessed himself

## STEP 8 – Has time stopped or been extended?

### *Has time been extended or suspended?*

#### *Minor/infancy* [suspension]

s32 Suspension of time while person under 18 is without guardian

- Limitation period suspended for any period of time during which an infant landowner is without a guardian (s32(1))

s41 If they have a guardian, a plaintiff who was under 18 years of age when a cause of action accrued may apply to a court for leave to commence an action even though the limitation period has expired.

#### *Mental disability/impairment* [suspension]

s35(1) Suspension of time while person with a mental disability for a period they are without a guardian

- Action cannot be commenced if 12 years has elapsed (s35(2))
- If they have a guardian, they must apply for court leave to commence an action if the limitation period has expired (s41)

#### *Fraud* [extension]

s38 In cases of fraud/improper conduct, may apply to court for extension to limitation period even if:

- (1) Limitation period has expired.
- (2) Court can extend up to 3 years from when action ought reasonably have commenced if satisfied that the failure to commence was attributable to fraud/improper conduct.

S36 Defendant in close relationship with person under 18 when cause of action accrues

- (1) If –
  - (a) A person (person A) is suffering a mental disability at any time after a cause of action accrues to person A; and
  - (b) During the time in which person A is suffering the mental disability a defendant is a person in a close relationship with person A, an action on that cause of action cannot be commenced if three years have elapsed since the relationship ceased.