

1 Systems of Landholding/Adverse Possession

1.1 What Is "Title"? Documentary or other indicia of ownership. Systems of land rights. Four types of title in NSW.

1.1.1 Crown Land Form of land owned/managed by C. Distinct from land owned by gov. by (Crown Lands Act 1989 (NSW)).

1.1.2 Native Title Collectively held, generally exists over Crown land. Extinguished by grant of land in freehold.

1.1.3 Old System Title Transferred by a deed. Crown grants NSW made prior to 1863 Old System, unless converted to Torrens.

Old System Title Depended on Establishing a Chain of Title - Each transfer must be valid for you to receive valid title to the land.

Good root of title: *Gateway Developments Pty Ltd v Grech (1970) (NSW)*: "instrument of disposition dealing with/proving on face of it the ownership of the whole legal & equitable estate in the property sold, containing a description by which property can be identified, showing nothing to cast any doubt on the title of the disposing party" *CA 1919 (NSW) s 53*: Good root of title means going back at least 30 years. Only presumption.

1.1.4 Torrens Title - Torrens system of title - *RPA 1900 (NSW)*. Administered by the Registrar-General.

Torrens Title: Indefeasibility (system by which interest in land registered, legal consequences - indefeasibility of title.)

- *Breskvar v Wall (1971)* "RPA, s 42(1): the registered proprietor shall, except in case of fraud, hold same, subject to such other estates and interests & entries, as are recorded in that folio, but absolutely free from all other estates & interests not so recorded."
 - The key exception is fraud. Registration acquired by fraud by the person registered can be invalidated. However, innocent person is protected, even if gain a title acquired by fraud. Unregistered interests can exist under Torrens, but receive very limited protection.

1.1.5 Adverse Possession Does A have a claim of possession?

Principle that permits documentary title holder's interest to be statute-barred, in favour of AP, after effluxion of specified period of time, blocking title of DO (*J.A Pye (Oxford) Pty Ltd v Graham*). DO dispossessed must bring a cause of action to recover possession, if fails to bring a cause of action before limitation period expired, action may become statute-barred. Result - possessor free of superior title of DO, can thus gain title to land.

s 170 *Crown Lands 1989 (NSW)* title Crown land cannot be asserted on basis of AP claim in certain circumstances (*Re North Sydney Council*), s also prohibits acquisition of title, by AP of certain Crown land - incl Crown land dedicated or reserved for public purpose (*Townsend v Waverley Council (2001)*). *Roberts v Swangrove Estates Ltd* - If statutory period fully run against DO Crown may bar DO from asserting his/her title.

1. When will cause of action accrue? (Limitation Act s28):

- For adverse possession to occur, the DO must have been dispossessed of the land. May occur if:
 - DO is in possession, and is then dispossessed (Limitation Act, s 28);
 - DO discontinues possession, another comes into possession (s38), abandonment by DO.
 - DO has inherited or acquired land from a DO who was in possession, but never goes into possession themselves (Limitation Act, ss 29-30). Following death property in AP, accrues on date of death.
 - If DO, dispossessed assigns interest before statutory period expired, assignee will take subject to AP's interest, as assignee cannot be in better position than assignor was in (ss27(2), 11(2)(a)).

Land subject to **interest in remainder**, action won't accrue until remainder falls into p (s31). Although possessor may hold adversely against life tenant for 12 years & defeat interest, AP can't defeat tenant in remainder until expiration of another 12 years of AP.

Tenant may bring a claim for recovery of land against AP in 12 year period after cause of action has accrued. Clock doesn't begin ticking against lessor until lease expired & lessor able to go into possession again.

If AP goes into p against a tenant, but before the 12 year period has elapsed, and landlord grants a new lease, tenant under the new lease has another 12 years from the commencement of that new lease to assert rights. (*Chung Ping Kwan v Lam Island Co Ltd (1997)*).

2. What are the criteria for adverse possession? (BOP) (Bridges v Bridges)

1. Factual Possession (requisite level of physical control)

- 'Possession in ordinary sense of the word' (*JA Pye (Oxford) Pty Ltd v Graham*). AP must demonstrate FP, not engaged in conduct which constitutes something less than/different from possession (*Kierford Ridge Pty Ltd v Ward* - accidental).
- 'Open, not secret' (*Barrel v Renehan*) - (*Rains v Buxton* - underground, no knowledge, but p/limitation period satisfied).
- Peaceful, not by force (*Mulcahy v Curramore*) - *Harnett v Green* - squatters remained in p by shotguns, warnings. If DO so intimidated by force used, unable to enforce rights, p may not be peaceable (*Barlett v Ryan (2000)*).
- Not by consent of true owner' (*Mulcahy v Curramore*). In *Richardson v Greentree*, no AP, licence to reside, 'allegation AP negated by family relationship. Sometimes, p given at outset, revoked during course of p (*Bridges v Bridges*). P must occur in manner DO reasonably careful about interest would notice it (*Re Riley and Real Property Act 1965*).
- Physical control, single and exclusive possession (*JA Pye Oxford*). Determining acts constitute a sufficient degree of exclusive physical control, consider 'nature of land, manner land commonly used or enjoyed' (*Powell v McFarlane* - neighbouring animals grazed on it. Number of straying animals must be great enough to displace the original animals).
- 'What must be shown as constituting factual possession is alleged possessor has been dealing with the land in q as an occupying owner might have been expected to deal with it, exercising 'a sufficient degree of physical custody and control (*JA Pye Oxford - G held grazing licence over Pye's land, expiry of licence, request to extend, another request, no reply, physically excluded Pye from land by hedges, lack of key to road gate, spread dung on land, harrowed, rolled it, overwintered dry cattle, yearlings in shed on land, beyond permitted in agreement - acts constituted FP*). Carrying out improvements or erecting buildings on the land would be strong evidence test satisfied (*Cooke v Dunn (1998)*)
- What amounts to possession - character/value of the property, suitable & natural mode of using it & course of conduct, which a proprietor might be expected reasonably to follow regarding his/her own interests (*Lord Advocate v Lord Lovat (1880)*). Acts amounting to evidence - building on, occupying property (*Mulcahy v Curramore Ltd*), paying rates/taxes (*Newington v Windeyer*), fencing property (*Mulcahy*), maintaining trees/gardens, blocking access to land (*Newington*), allowing cattle graze for fee on land (*Mulcahy*).

2. Intention to possess (animus possidendi)

No need for **intention to own, but to exclusively possess**, not mere deprivation of special benefit, accidental, unintentional – insufficient to meet test for est of requisite intention. Actions/words acknowledging other party's ownership, payment of rates won't preclude the est. of intention to possession by AP. (*Whittlesea City Council v Abbatangelo*)

Intention to **exclude the world at large**, including true owner, must be made clear to world (*Powell v McFarlane*). Not necessary 'to show deliberate intention to exclude paper owner or registered proprietor', but rather 'intention to occupy & use land as one's own' (*JA Pye (Oxford)*), exercise exclusive control (*Ocean Estates v Pinder*). AP actually believing to be true owner sufficient (*Bligh v Martin*). Requires '**clear and affirmative evidence**' (*Whittlesea*). Evidence required will **depend on the facts of the case** – nature of the land, use to which it is being put, acts necessary to establish possession. **Enclosure of land** – strong evidence of intention to possess: *Seddon v Smith*. Similarly, erecting a building on the land. May be demonstrated also by payment of rates/taxes (*Quach v Marrickville Municipal Council (No 2)*). Evidence may be pictures, views, building plans, observations of neighbours, payments of rates, etc.

Difficult where acts of p equivocal (*Riley v Penttila*). In those circumstances, consideration of subjective intention of AP may be relevant (*Buckinghamshire County Council v Moran*). If acts open to more than one interpretation and has not made perfectly clear to the world by actions/words intention to exclude owner, courts will treat not having the requisite intention and not having dispossessed the owner. While statement intended to p not enough to establish intention, may be relevant taken in combination with other evidence suggesting intention to p (*Whittlesea City Council*) - factors contributed to finding of **exclusive possession** included: installation of fence, gate, keeping animals on property, used by livestock for grazing & for shade, shelter, enclosure, free range poultry farm on property 3 yrs, ran cattle on l, social gatherings on l, maintained tress, vegetation on l, removed noxious weeds, expended materials, fallen branches collected for firewood, snakes, rabbits were caught & eaten – **Other factors that will demonstrate intention to possess:**

o *Seddon v Smith*, 'enclosure is the strongest possible evidence of AP' affirmed in *George Wimpey & Co Ltd v Sohn*.

o The intention to possess may be demonstrated by the payment of taxes (*Quach v Marrickville v Municipal Council*)

o However, payment of rents, taxes must be supported by other acts evincing ITP (*Whittlesea City Council v Abbatangelo*)

Time Limitations

Limitations Act 1969 (NSW) determines period of time must elapse between AP beginning and DO's loss of ability to challenge.

Crown land = 30 years. Privately owned land = 12 years.

Events Which Stop Time Running

Must start running and can't stop. Can't bring an AP claim if act doesn't run against someone.

Claimant under a legal disability ie, a minor or incapable of managing legal affairs. Fraud – DO's cause of action fraudulently (with knowledge of wrongdoing) concealed. (**takes steps to prevent DO from finding out about it, take holiday**)

Confirmation of the cause of action (Limitation Act s. 54)

- Confirmation occurs if person cause of action lies against acknowledges the right or title of person who has the cause of action. Acknowledgement must be in writing and signed.
- Confirmation also occurs if there is a payment re right/title. **If do no longer have statute barred, no longer claim AP**

Cause of Action Expired

- The cause of action must have expired (ie the time must have run out).
- Must determine when the cause of action accrued – when did time start to run? AP must have continued – (s. 38).
- If successive adverse possession, cause of action accrues with the first act, even if it is a second or later person in adverse possession who is resisting the claim.
- If person in AP gives up possession after limitation period starts to run, then new act of adverse possession required.

Bridges v Bridges [2010] NSWSC 1287 Bridges owned Old Title land in Chakola NSW, acquired in 1968. In 1969, allowed his brother Barry Bridges to reside in the property. In 1973, Rodney asked Barry and his family to leave. Barry refused to do so. Barry and his family continued to live on the property. Barry maintained the property and made some improvements, ie fences. Also paid some of the rates. Barry found to have had exclusive possession and the intention to exclude Rodney after 1973. Rodney's title was extinguished in 1986.

Old system land – a claim could be made for a part of the land.

Torrens system -- Only 'whole parcel of land' may be claimed (s45D(1) RPA)

If a person is in possession and the claim of the DO is statute barred, the person in possession can apply to the Registrar-General to be recorded as the registered owner: RPA s. 45D(1)(c)

2 Introduction to Equity and Trusts

Transferring Interest in Land at Law

- **Inter vivos – Old system** – Deed of conveyance. CA 1919(NSW) s23B.
- **Wills, in writing, signed and two witnesses - Succession Act 2006 (NSW)**
- **Torrens:** RPA s. 41(1) – no dealing is effective unless registered. No dealing, until registered in the manner provided by this Act, shall be effectual to pass any estate or interest in any land under the provisions of this Act, or to render such land liable as security for the payment of money, but upon the registration of any dealing in the manner provided by this Act, the estate or interest specified in such dealing shall pass, or as the case may be the land shall become liable as security in manner and subject to the covenants, conditions, and contingencies set forth and specified in such dealing, or by this Act declared to be implied in instruments of a like nature.

Transferring Interests in Land in Equity

- Contracts for Sale of Land

K for sale of land binding promise to convey interest some time after formation of K, usually on tender of balance of agreed purchase price. Until that time, vendor remains owner at law (*Pirrie v Saunders*), (*Harrison v Murphy*). **S54A of CA agreement,**